



1 sanctions based on Taishan’s improper destruction of evidence after litigation reasonably should  
2 have been anticipated. The Court reserved judgment and requested further briefing on the issue  
3 of whether Taishan’s allegedly improper loss or destruction of certain graphite rollers that  
4 apparently were used in 2004 warranted sanctions. The Magistrate Judge justified the  
5 imposition of sanctions by explaining that (1) the rollers were relevant, in that they were the  
6 “most likely source of contamination,” (2) Glasforms has been prejudiced because it now lacks a  
7 key piece of evidence—in the form of the rollers—and will be forced to rely on indirect evidence  
8 of the alleged cause of the contamination, and (3) “[t]he graphite rollers used to produce the  
9 2004 fiberglass at issue were no longer identifiable by January 2006[,] . . . [which] was several  
10 months after the anticipated litigation date and just one year after being pinpointed in Taishan’s  
11 seventeen point report as the probable source of contamination.” *See* Sanctions Order, at  
12 11:18-20.<sup>2</sup>

13 Having considered the parties’ further briefing, the Court concludes that it was not  
14 clearly erroneous or contrary to law for the Magistrate Judge to conclude that some form of  
15 sanction was warranted for Taishan’s loss of the rollers. *See* Fed. R. Civ. P. 72(a). However,  
16 because the circumstances surrounding the loss, miscategorization, or destruction of the rollers  
17 make the determination of Taishan’s culpability an extremely close question, the Court will  
18 modify slightly the nature and scope of the sanction ordered by the Magistrate Judge.

## 19 II. LEGAL STANDARD

20 “[D]ecisions by the magistrate judge on nondispositive matters are essentially final  
21 decisions of the district court which may be appealed in due course with other issues.” *United*  
22 *States v. Abonce-Barrera*, 257 F.3d 959, 968 (9th Cir. 2001). However, if a party objects to a  
23 nondispositive order entered by a magistrate judge, that order may be set aside or modified if its  
24 factual findings are clearly erroneous or its conclusions are contrary to law. *See* Fed. R. Civ. P.  
25 72(a).

---

26  
27  
28 <sup>2</sup> Taishan’s reference to January 2006 appears to have corresponded to its legal argument  
that litigation could not reasonably have been anticipated before January 2006.

1 **III. DISCUSSION**

2 **A. Taishan’s obligation to preserve the rollers**

3 It is essentially undisputed that Taishan could not have known exactly which rollers were  
4 used to produce fiberglass sold to Glasforms. The rollers lack any identifying marks and are  
5 changed on and off the production line as needed. Glasforms contends, however, that Taishan  
6 *did* possess rollers identified as having been used on the production line where glass sold to  
7 Glasforms was produced, but that Taishan discarded or misplaced the rollers at some unknown  
8 time either before or after the date on which Taishan reasonably should have anticipated  
9 litigation. Glasforms draws this conclusion from two statements made by Zhang Guo, Taishan’s  
10 manager of quality assurance.

11 The first relevant statement was that Zhang had ordered that two rollers be “set aside”  
12 around the time Taishan created the internal 17-point report identifying graphite from its rollers  
13 as the likely cause of Glasforms’ product failures. It appears that the rollers were in a waste pile  
14 awaiting pickup for recycling. Zhang stated that “[a]fter [he] knew about this event  
15 [(presumably the failures of Glasforms’ rods or the alleged carbon contamination in Taishan’s  
16 plant)<sup>3</sup>], those rollers that we put in the waste storehouse, we took them out. We thought that  
17 they might be useful.” Zhang Depo. V, at 662-64. The second relevant statement is Zhang’s  
18 “admission” that a “certain portion” of rollers used in 2004 still are in use in Taishan’s plant.

19 Glasforms’ theory essentially is that Taishan should have known that *any* rollers used on  
20 production line no. 2, where glass sold to Glasforms was made, were relevant to this action.  
21 Glasforms thus appears to argue that Taishan should have kept a vigilant watch over any rollers  
22 that it “set aside,” such that the disappearance of such rollers—or the lack of an explanation as to  
23 their location—in the months surrounding the anticipated litigation date is sanctionable. There  
24 are several difficulties with this reasoning. Principally, because the Magistrate Judge concluded  
25 that it would have been unreasonable to assume an anticipated litigation earlier than September  
26

---

27 <sup>3</sup> The precise context cannot be determined from the selected pages of the Zhang  
28 deposition provided both by Defendants and Glasforms.

1 6, 2005, it is legally appropriate to assume that Taishan’s interest in the cause of the failures  
2 prior to that date was purely pragmatic. In that context, the relatively unremarkable facts are  
3 that Taishan, having commissioned an internal report suggesting that graphite was the likely  
4 cause of the failures, pulled two rollers from a waste heap, set them aside because they might be  
5 “useful,” cut a sample from one of them at the direction of CTGNA, and then at some point lost  
6 or discarded them. Given the clearly fungible nature of the rollers, it is difficult to see why  
7 Taishan should have been expected to keep careful track of particular rollers prior to  
8 anticipating litigation. As among the numerous rollers that were rotated on and off of the line in  
9 2004—none of which could be identified with any certainty as rollers used to make glass sold to  
10 Glasforms—the “set aside” rollers had no special significance prior to the anticipation of  
11 litigation. More importantly, any number of things reasonably might have happened to those  
12 rollers in the course of Taishan’s internal investigation, before litigation was anticipated—things  
13 of which Taishan’s employees would have no particular memory, and of which there would be  
14 no records since Taishan does not keep records to track the interchangeable rollers. Thus,  
15 Taishan’s lack of a clear explanation for the disappearance or miscategorization of the rollers,  
16 and its inability to say more than that the rollers “would have been recycled by January 2006”  
17 would not appear to indicate serious culpability.

18 With respect to Zhang’s purported “admission” that some 2004 rollers still are in use  
19 today, Glasforms argues that the admission makes “Taishan’s position that it could not identify  
20 the relevant rollers by the preservation date . . . simply not credible.” Yet, aside from the fact  
21 that Zhang clearly was referring to a generalized percentage of rollers, rather than to specifically  
22 identifiable rollers, Zhang’s testimony does not indicate that there was any way of tracking the  
23 rollers:

24 Mr. Christopher: You told me that this [roller (Ex. 78, a cut piece of a 2004 roller  
25 produced to Glasforms)] was, in fact, used on production line 2 in 2004. I want to  
26 know how you know that. I understand that you told me you were not sure if it  
27 was used to make glass for Glasforms.

28 Mr. Zhang: [T]his is a discarded oil coating roller, and it came from production  
line 2 as garbage. Our inference was that it came from the 2004 period. And the  
reason we made this inference was based on its service life or expected service  
life.

1 Zhang Depo., at 187:11-24. Zhang also testified that he asked Taishan’s production line  
2 employees whether they could identify a particular roller or when it was used, and that all of  
3 these employees answered in the negative. In any event, Glasforms was given an opportunity to  
4 inspect Taishan’s plant, and its focus on the continued existence of the 2004 rollers is at a  
5 minimum puzzling.

6 **B. Prejudice to Glasforms**

7 Glasforms argues that “Taishan has hoped to avoid producing the[] used rollers because  
8 producing them would have likely revealed that the rollers shed graphite and become smaller in  
9 the repair and grinding process,” but Glasforms has not explained why this is so. Zhang testified  
10 that Taishan does not grind and polish the rollers, but sends them out to a third-party to be  
11 ground and polished. *See* Zhang Depo. II, at 179:18-180:1. Zhang’s testimony indicates  
12 further—and Glasforms does not dispute—that the rollers come back smooth and polished, with  
13 various forms of build-up having been removed. Glasforms’ appears to contend that grinding  
14 and polishing of rollers makes them more susceptible to shedding graphite during use in  
15 production. But if that is so, it is unclear why Glasforms complains of having received polished  
16 or “refurbished” rollers. Glasforms surely could have tested the “refurbished” rollers to  
17 determine whether they are more prone to shedding graphite. Separately, even assuming it that  
18 ground or refurbished rollers that had been put back into production and were immersed in  
19 Taishan’s sizing would have been more helpful than rollers that had been ground or refurbished  
20 but not returned to use, Glasforms had an opportunity to inspect Taishan’s plant, where rollers  
21 from 2004 allegedly were in use, and there is no dispute that Taishan continues to use the same  
22 make and model of roller as it did in 2004. *See* Zhang Depo. II, at 188. Thus, it is somewhat  
23 difficult to conclude that Taishan’s failure to track certain rollers allegedly used in 2004 rises to  
24 the level of sanctionable conduct.

25 **C. Conclusions**

26 The Magistrate Judge’s determination with respect to the rollers appears to rest on  
27 Taishan’s inability to account for the “set aside” rollers as of the date on or after which litigation  
28 reasonably should have been anticipated. Despite its difficulty in ascribing to Taishan’s conduct

1 the same level of culpability that the Magistrate Judge clearly and properly found with respect to  
2 every other category of destroyed document, the Court holds that it was neither clearly erroneous  
3 nor contrary to law for the Magistrate Judge to conclude that Taishan’s lack of a convincing  
4 explanation for the loss, destruction, or miscategorization of the rollers warranted some kind of  
5 adverse instruction to the jury. The Magistrate Judge could have concluded—and apparently did  
6 conclude—that Taishan’s failure to provide a compelling explanation for the loss of the two  
7 complete, intact rollers—viewed in conjunction with what he found to be Taishan’s bad-faith  
8 destruction of numerous related documents—was improper and sanctionable in some measure.  
9 Furthermore, it was neither clearly erroneous nor contrary to law for the Magistrate Judge to  
10 impose sanctions despite the apparent availability of rollers from 2004 that still were in place on  
11 Taishan’s production line when Glasforms inspected Taishan’s plant. Undoubtedly, there would  
12 have been considerable added value to Glasforms in having specific, intact samples of rollers  
13 believed to have been used in 2004 on production line no. 2.

14 At the same time, however, broad adverse inference instructions of the kind appropriate  
15 for Taishan’s other identified violations would be excessive in the context of the rollers. The  
16 justification for sanctions with respect to the rollers lies entirely in Taishan’s arguably improper  
17 loss of the two “set aside” rollers—evidence that became available for some period of time  
18 because Taishan affirmatively chose to make it available, despite the lack of any  
19 contemporaneous legal obligation to do so. Any instruction therefore must be limited to the  
20 circumstances of the “set aside” rollers, not to some undefined pool of rollers that theoretically  
21 were available for Glasforms’ inspection but that were destroyed improperly. In addition, the  
22 Court does not find adequate support for an instruction requiring the jury to draw an adverse  
23 inference from the circumstances surrounding the disappearance of the rollers. The  
24 determination of Taishan’s culpability with respect to the rollers simply presents too close a  
25 question to warrant the extraordinary and drastic sanction of such an inference. Instead, the jury  
26 will be instructed that (1) it was not Taishan’s ordinary manufacturing practice to track its  
27 graphite rollers, (2) nonetheless, after learning of Glasforms’ product failures, it set aside, as  
28 useful in ascertaining the cause of the failures, certain rollers thought to have been used on the

1 production line where glass sent to Glasforms in 2004 was made, and (3) under circumstances  
2 that Taishan has not been able to explain, the rollers were lost, destroyed, or stored in a manner  
3 that prevented their identification. The jury will be instructed that it is not required to draw an  
4 inference that the rollers would have provided evidence helpful to Glasforms and harmful to  
5 Taishan, but that it may draw such an inference if it sees fit to do so.

6 **IV. ORDER**

7 Defendants' remaining objections to the Magistrate Judge's order are hereby overruled  
8 except to the extent that the Court will modify the nature and scope of the instruction ordered by  
9 the Magistrate Judge with respect to the rollers, as set forth above.

10  
11 **IT IS SO ORDERED.**

12  
13 DATED: 8/12/09

14  
15   
16 JEREMY FOGEL  
17 United States District Judge

1 This Order has been served electronically upon the following persons:

2 April E. Sellers april.sellers@bakerd.com

3 David K. Herzog david.herzog@bakerd.com

4 Eugene Ashley eashley@hopkinscarley.com, ihernandez@hopkinscarely.com,  
5 ihernandez@hopkinscarley.com, jdooley@hopkinscarley.com

6 Jennifer M. Phelps jennifer.phelps@bakerd.com, debora.schmid@bakerd.com

7 Kevin M. Toner kevin.toner@bakerd.com, judy.ferber@bakerd.com

8 Lisa J. Cummins lcummins@campbellwarburton.com

9 Noelle Dunn gcordova@hopkinscarley.com, ndunn@hopkinscarley.com

10 Robert A. Christopher rchristopher@hopkinscarley.com, ihernandez@hopkinscarley.com

11 Sophie N. Froelich sfroelich@nossaman.com, ntorpey@nossaman.com

12 Tod C. Gurney tgurney@hopkinscarley.com

13 Notice has been delivered by other means to:

14 Glasforms Inc.,  
15 William Whitcom Faulkner  
16 McManis, Faulkner & Morgan  
17 50 West San Fernando St., Suite 1000  
18 San Jose, CA 95113  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28