Motion Ex. 25

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BP AMOCO CHEMICAL COMPANY,	)	
	)	
Plaintiff/Counter-Defendant,	)	
	)	
v.	)	
	)	
FLINT HILLS RESOURCES, LLC,	)	
	)	
Defendant/Counter-Plaintiff,	)	**No. 05 C 5661**
	)	
	)	
FLINT HILLS RESOURCES, LLC.,	)	**Judge James B. Moran**
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
BP CORPORATION NORTH AMERICA INC.,	)	
	)	
Third-Party Defendant.	)	
	)	

BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC.'S MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SANCTIONS AGAINST FLINT HILLS RESOURCES, LLC FOR THE SPOLIATION AND DESTRUCTION OF MATERIAL EVIDENCE

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INTRODUCTION

A party's duty to preserve evidence is so crucial to ensuring a fair and just proceeding that a court may impose severe sanctions against a party that destroys evidence, whether the act was intentional or unintentional. *Nat'l Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640 (1976); *Silvestri v. General Motors Corp.*, 271 F.3d 583, 593-95 (4th Cir. 2001). In *Danis v. USN Communications, Inc.*, this court explained how important preserving evidence is to the integrity of our judicial system: "[The] duty of disclosure would be a dead letter if a party could avoid the duty by the simple expedient of failing to preserve documents that it does not wish to produce. Therefore, fundamental to the duty of production of information is the threshold duty to preserve documents and other information that may be relevant in a case." 2000 WL 1694325, at *1-2 (N.D. Ill. Oct. 23, 2000). There is nothing new or novel about this duty not to destroy evidence. In fact, before this litigation was filed, Flint Hills Resources, LLC ("FHR") instructed BP Amoco Chemical Company ("BP Amoco") about this duty, implying that while FHR understood its obligations, BP Amoco perhaps did not. (Mot. Ex. B)

Here, FHR has engaged in precisely the conduct that is antithetical to our judicial system and that sanctions are intended to deter. We say "deter," because once a party destroys evidence, as FHR did in this case, there is no going back. The evidence is gone; the opponents have been unfairly prejudiced while the party that destroyed the evidence, in contrast, has wrongfully been advantaged. The only question, then, is what should be done about the misconduct?

FHR is alleging that BP Amoco and BP Corporation North America Inc. ("BPCNA") defrauded FHR during the negotiations culminating in its purchase of a chemical plant and that the condition of dozens of pieces of equipment at the plant was not as represented by BP Amoco. During discovery, FHR's witnesses have admitted that FHR destroyed or otherwise spoliated the equipment at issue in at least 12 of FHR's individual 59 claims, which collectively seek over $13.6 million in alleged damages. In addition, FHR's then-President and Chief Executive Officer (David Robertson) has admitted at deposition that he deleted emails relating to FHR's purchase of the Joliet plant and its post-sale claims against BP Amoco. (*See* Mot. Ex. N at 18-24, 30.) Robertson further admits that this conduct was not acceptable according to FHR's own lawyers, and that this conduct was in violation of FHR's own policies and litigation hold for this case. (*See* Mot. Ex. N at 25; Mot. Ex. I at 625-26.)

FHR has destroyed and failed to preserve the very equipment and documentary evidence at the heart of the parties' claims and counterclaims in this case. More importantly, FHR spoliated this critical evidence after it was on notice of this litigation, and even after (in most cases) FHR had imposed a special litigation hold instructing employees to preserve this exact type of evidence. Because FHR destroyed equipment and deleted emails relating to its purchase of the plant and its post-sale claims, it is now impossible for this case to be fairly decided upon the merits. FHR's spoliation of masses of key evidence has irrevocably prejudiced BP Amoco and BPCNA because they are precluded from examining, testing, using, or relying upon the spoliated evidence to defend themselves against FHR's claims. In addition, they are prejudiced by the inability to review and use the destroyed emails.

Accordingly, BP Amoco and BPCNA respectfully request that the Court grant their motion for sanctions against FHR and provide the relief described in their motion.

LEGAL ANALYSIS AND ARGUMENT

The undisputed facts necessitating this motion are set forth in BP Amoco's and BPCNA's motion. Those facts warrant and indeed compel sanctions for the following reasons:

I. THIS COURT POSSESSES THE AUTHORITY TO SANCTION A PARTY FOR SPOLIATING EVIDENCE.

The court's authority to sanction a party for the failure to preserve evidence is statutory, under Rule 37, and inherent. *Diersen v. Walker*, 2003 WL 21317276, at *3 (N.D. Ill. June 6, 2003); *see also Silvestri*, 271 F.3d at 590. The analysis for whether a party should be sanctioned under Rule 37 or pursuant to the court's inherent powers is the same. *See Larson v. Bank One Corp.*, 2005 WL 4652509, at *8 (N.D. Ill. Aug. 18, 2005) A court's decision to impose sanctions is guided by the following: (1) whether the party had a duty to preserve the spoliated evidence; (2) whether the party breached that duty; (3) whether the culpability for breach rises to the level of willfulness, bad faith or fault; (4) whether the underlying claims suffered prejudice as a result of the breach; and (5) whether an appropriate sanction can ameliorate the prejudice from that breach. *Larson*, 2005 WL 4652509, at *10 (N.D. Ill. Aug. 18, 2005); *Danis*, 2000 WL 1694325 at *35.[1] Here, the undisputed facts satisfy all of these considerations.

[1] If Robertson deleted emails pre-suit, Illinois law, not federal law, would apply in determining whether to sanction FHR's conduct. *See Allstate Ins. Co. v. Sunbeam Corp.*, 53 F.3d 804, 806 (7th Cir.

II. FHR HAD A DUTY TO PRESERVE THE SPOLIATED EVIDENCE.

A party's duty to preserve evidence arises when the party has notice of the relevance of the documents or evidence. *In re Old Banc One S'holders Sec. Litig.*, 2005 WL 3372783 at *4 (N.D. Ill. Dec. 8, 2005). A party can be on notice from a complaint or discovery request, but the duty to preserve arises even before a complaint is filed when a party is on notice that litigation is likely. *Cohn v. Taco Bell Corp.*, 1995 WL 519968 at *5 (N.D. Ill. Aug. 30, 1995). A party is required to preserve all evidence that is relevant and which the party knew or reasonably should have known would be material to a potential legal action. *Morrocco v. General Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1992); *Large v. Mobile Tool Int'l, Inc.*, 2008 U.S. Dist. LEXIS 1297, at *9 (N.D. Ill. Jan. 7, 2008).

FHR admittedly was on notice of the likelihood of this litigation by no later than December 21, 2004, when FHR sent its written claims notice to BP Amoco. (*See* Mot. Ex. A.) At or near this time, FHR's attorneys notified FHR employees that they should "preserve all documents and records in relation to an upcoming legal matter with BP." (Mot. Ex. I at 605.) In fact, FHR knew or should have known that the spoliated equipment that is the subject of this motion would be material to this litigation, because FHR specifically identified that equipment in a schedule attached to its claims notice. (Mot. Ex. A.) FHR also knew that the emails of its then-CEO and president, David Robertson, would be material because Robertson: (1) played a key role in FHR's purchase of the Joliet plant; (2) traveled to Chicago to participate in a July 2003 plant visit; (3) attended a lengthy management presentation regarding the plant and the other assets for sale; (4) personally represented FHR in the sale negotiations; (5) regularly used email to correspond with others regarding the purchase of the plant; (6) recommended the purchase of the plant to the boards of FHR and Koch; (7) later recommended to the board of directors that FHR file its claims in this case; and (8) authored FHR's claims notice and

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1995); *Large*, 2008 U.S. Dist. LEXIS 1297 at *26 (N.D. Ill. January 7, 2008). Illinois law does not have a well-defined legal standard for sanctioning the pre-suit spoliation of evidence. *See Thomas v. Bobardier-Rotax Motorenfabrik*, 909 F. Supp. 585, 587 (N.D. Ill. 1996) (Moran, J.). This court, however, has held that the unreasonableness of the destruction and the resulting prejudice would be relevant to the inquiry. *Id.* Our motion and this memorandum set forth the unreasonableness of FHR's spoliation of key evidence and the resulting prejudice to BP Amoco and BPCNA. Therefore, regardless of whether Illinois or federal law applies, the outcome should be the same: FHR should be sanctioned for its misconduct in destroying evidence.

subsequent letters regarding FHR's claims. (Mot. Ex. N at 14, 15, 18, 21-22, 68-70, and 126.)

Accordingly, FHR had a duty to preserve the equipment at the Joliet plant and Robertson's emails, arising when it first suspected it had a claim, which at the latest was in December 2004, months before this litigation began. *See White v. Office of the Pub. Defender for the State of Maryland*, 170 F.R.D. 138, 148 (D. Md. 1997) ("[D]estructive acts occurring prior to the filing of a complaint where the potentiality of litigation is clear may also merit sanctions."); *WM. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1446 (C.D. Cal. 1984) (finding that pre-suit destruction of evidence warranted sanctions where plaintiff was on notice of the litigation and the relevance of the destroyed evidence from pre-litigation correspondence); *Stinnes Corp. v. Kerr-McGee Coal Corp.*, 722 N.E.2d 1167, 1173 (Ill. App. Ct. 2000) ("A *potential litigant* owes a duty to take reasonable measures to preserve the integrity of relevant and material evidence.") (emphasis in original).

Based on FHR's internal circulation of a legal hold notice in December 2004 and the testimony of its witnesses during discovery in this case, FHR does not dispute that it had a duty to preserve evidence. In fact, when Robertson told FHR's counsel that he had deleted his emails, he was told by FHR's attorneys that his destruction of that evidence was "not acceptable." (Mot. Ex. N at 23.) In addition, FHR's Rule 30(b)(6) corporate representative on evidence preservation issues, Rick Morris, admitted that FHR's litigation hold required electronic records to be maintained in electronic form. (Mot. Ex. I at 625.)

III. FHR SPOLIATED EQUIPMENT AT ISSUE IN THIS CASE.

"Spoliation of evidence occurs when one party destroys evidence relevant to an issue in the case." *Krumwiede v. Brighton Assocs., LLC*, 2006 WL 1308629, at *8 (N.D. Ill. May 8, 2006). There is no dispute that FHR failed to preserve equipment that is the subject of its claims. FHR has admitted as much through the sworn testimony of its witnesses and through its answers to discovery. (Mot. Exs. H, I, J, and K.) In fact, FHR destroyed or otherwise spoliated the equipment at issue in 12 of its 59 claims.

FHR contends that it has video or photographs of some, but not all, of the equipment that it destroyed and that this is sufficient to excuse its failure to preserve the actual evidence. The law, however, does not agree with FHR. In *Lawrence v. Harley-Davidson Motor Co.*, the plaintiff permanently altered the motorcycle upon which his claims were based. 1999 WL

637172, at *3 (N.D. Ill. Aug. 12, 1999). The plaintiff claimed that he had conducted his own inspection of the motorcycle before altering it, and that the inspection was videotaped. The court rejected plaintiff's argument that the videotape satisfied his obligation to preserve the motorcycle as evidence, and held that the videotape, even if it perfectly documented the inspection, could not be a substitute for the defendant's own physical inspection of the motorcycle. (*Id.*) To state the obvious, one can view a videotape, but one cannot inspect the contents of the equipment on the tape itself—which is key to determining the physical condition of the equipment at issue.

Moreover, in *Jones v. O'Brien Tire & Battery Serv. Ctr.*, the Illinois Appellate Court rejected a party's argument that it preserved the wheel at issue in the case because it took photographs of the wheel on the day of the accident. 871 N.E.2d 98, 108-09 (Ill. App. Ct. 2007). The court held that the photographs were not sufficient, and that the duty to preserve evidence had been breached. *Id.* Similarly, in this case, FHR's photographs do not satisfy its duty to preserve the equipment at issue. BP Amoco's experts cannot examine the equipment—the evidence itself. At a minimum, the experts were entitled to have the opportunity to physically inspect and test the equipment to determine the equipment's condition at the time of sale. *See also Silvestri*, 271 F.3d at 594 ("To require [defendant] to rely on the evidence collected by [plaintiff's] experts in lieu of what it could have collected would result in irreparable prejudice."). And finally, FHR did not even make videos or keep pictures of all of the equipment it destroyed and that is at issue. (*See* Mot. Ex. H at 5, 10.)

Having destroyed the equipment over which it now sues, FHR attempts to shift the blame to BP Amoco, claiming that BP Amoco's experts should have inspected the plant sooner. *First,* FHR admitted to spoliating some of the equipment in the fall of 2005, shortly after BP Amoco filed its declaratory judgment action and before discovery even had commenced. (Mot. Ex. H.) *Second,* the timing of BP Amoco's inspection was due, in large part, to the fact that FHR objected to BP Amoco's expert witnesses, claiming that Packer Engineering had a conflict. (*See* Mot. Ex. G at 1.) BP Amoco was thus forced to delay the inspection in order to file a motion asking this Court to rule that BP Amoco could use Packer as its consultant, which the Court granted. *Regardless,* any alleged delay in conducting the inspection did not give FHR a license to destroy the equipment, and cannot excuse FHR from its obligation to preserve evidence in the interim. *See Anderson v. Mack Trucks, Inc.*, 793 N.E.2d 962, 969 (Ill. App. Ct. 2003) (the duty

to preserve evidence remains as long as the party should reasonably foresee that further evidence material to a potential civil action could be derived from the physical evidence in the party's possession); *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005) (finding "clear error" where the district court determined that because defendant had months to inspect the vehicle before plaintiff sold, defendant was partly to blame for the vehicle's spoliation).

IV. FHR SPOLIATED INTERNAL EMAILS RELEVANT TO THIS CASE.

FHR's duty to preserve all discoverable evidence included electronic data, such as email. *See Wiginton v. Ellis*, 2003 WL 22439865, at *4 (N.D. Ill. Oct. 27, 2003). Despite this duty, FHR's then-CEO and president, David Robertson, has admitted to intentionally deleting his emails relevant to issues in this case. (*See* Mot. Ex. N at 18-24, 30.) Robertson has admitted to knowing there was a litigation hold in place, but claims that he deleted his emails only after first printing out and saving hard copies of the emails. (*Id.*) His testimony and story on this point are simply untrue; FHR's production of Robertson's hard-copy files confirms that Robertson's sworn testimony was false. In this regard, FHR produced only 20 hard-copy emails from Robertson's files, covering the span of several years, from 2003 through 2006. (*See* Mot. Ex. O at 1). Only two emails were produced by Robertson for the entire year of 2004, the year FHR purchased the plant and made its first post-sale claims, and only one email was produced by Robertson for all of 2003. (*Id.*) Moreover, of the 20 hard-copy e-mails, many had nothing to do with this case and had not been requested by BP Amoco during discovery.

In addition, Robertson's testimony that he printed and saved hard copies of all of his emails is contrary to the undisputed fact that FHR produced 2,083 emails from the files of other FHR witnesses who sent emails to Robertson or received emails from him, but did not destroy the emails. Specifically, Robertson was the recipient of 1,897 of these emails, the sender of 67 of these emails, and copied on 119 of these emails. (*See* Mot. Ex. O.) Of course, there is now no way for BP Amoco or the jury to know how many other emails to or from Robertson would exist today, or what those emails would say, had they been saved and produced by Robertson consistent with FHR's evidence preservation duty and the legal hold notice Robertson ignored.

While this fact pattern and the extensive destruction of emails by a senior, central officer of an opposing party is unusual, it is not unique. Less than three months ago, a federal court in California was faced with nearly identical misconduct by a party's CEO and responded by

imposing sanctions. In *Nursing Home Pension Fund v. Oracle Corp.*, the court sanctioned the defendant, Oracle Corporation, after its CEO, Lawrence Ellison, failed to preserve in his own files hundreds of emails, 1,650 of which were then discovered in the email files of other Oracle employees. 2008 WL 4093497, at *6 (N.D. Cal. Sept. 2, 2008). Similar to Robertson's production in this case, Oracle only produced 15 emails sent or received by Ellison from his own email files. Seeking to avoid sanctions, Oracle argued that the plaintiffs were not entitled to multiple copies of any document, and that it was sufficient that Ellison's emails were produced from the files of other custodians. *Id.* The court rejected this argument and sanctioned Oracle by ordering that an adverse inference instruction be given to the jury:

> It could have been helpful to plaintiffs to demonstrate that certain emails were discovered in Ellison's files; otherwise, for instance, Ellison could argue that he never actually read or received an email that was sent to him, and thus had no knowledge of its contents. Moreover, having established with certainty that numerous emails were not produced from Ellison's email files—because the emails *were* produced from other files or accounts—it is impossible to know whether additional unproduced emails were also deleted or not turned over. This uncertainty about the existence of other emails is precisely the reason all of Ellison's emails should have been preserved and produced.

Id. (emphasis added).

The facts here are more egregious than those in *Oracle*. Here, Robertson admitted that he intentionally deleted emails relevant to the issues in this case. He deleted these emails after his own lawyers had put a litigation hold in place and after sending a letter to BP Amoco about document and email preservation obligations, including the need to keep emails and backup tapes. Equally significant, Robertson was not truthful about his own conduct. Although Robertson claims he printed and saved copies of all of his emails before deleting them, that story cannot possibly be true, as FHR's production of only 20 emails from Robertson's hard-copy files and its production of 2,083 emails from others' files sent to or by Robertson precludes this after-the-fact story. Regardless, even if Robertson had printed his emails, he had a duty to preserve the evidence in its native form, electronically, which he admittedly failed to do.

V. BP AMOCO AND BPCNA HAVE BEEN PREJUDICED.

Sanctions for spoliation are especially appropriate where the destruction of the evidence has prejudiced a party. *Allstate*, 53 F.3d at 806. Although a showing of prejudice is not required for imposing sanctions, the prejudice to the non-offending party can be considered. *Old Banc*

One, 2005 WL 3372783 at *4; *see also Barnhill v. United States*, 11 F.3d 1360, 1368 (7th Cir. 1993) ("We continue to eschew grafting a requirement of prejudice onto a district court's ability to dismiss or enter judgment as a sanction under its inherent power."). "A party suffers prejudice due to spoliation of evidence when the lost evidence prevents the aggrieved party from using evidence essential to its underlying claim." *Krumwiede*, 2006 WL 1308629 at *10. Sanctions are also appropriate where spoliation of evidence interferes with a party's ability to defend itself from claims brought against it. *Lawrence*, 1999 WL 637172 at *3; *Silvestri*, 271 F.3d at 594.

The basis for FHR's counterclaims is that the equipment at the Joliet plant allegedly did not meet the conditions warranted in the sale agreement at the time of the sale. Without the opportunity to test, examine, use, or inspect the equipment as it existed at the time of the sale, BP Amoco's ability to disprove FHR's allegations is permanently impaired. For example, BP Amoco has lost the opportunity to rely upon the spoliated evidence in order to show that the equipment was, in fact, in the allegedly as-warranted condition at the time of the sale or that any damage to the equipment occurred after the sale. Given FHR's claims, there can be no question that FHR's conduct in destroying the equipment has unfairly prejudiced BP Amoco. *Krumwiede*, 2006 WL 1308629 at *10 ("A party suffers prejudice due to spoliation of evidence when the lost evidence prevents the aggrieved party from using evidence essential to its underlying claim."); *Lawrence*, 1999 WL 637172 at *4 (dismissing case after evidence relating to motorcycle's condition at the time of the accident was altered through disassembly); *China Ocean Shipping (Group) Co. v. Simone Metals Inc.*, 1999 WL 966443, at *4 (N.D. Ill. Sept. 30, 1999) (finding that where the alleged defective equipment was spoliated, no sanction short of dismissal would put the aggrieved party in its rightful position because it would be unable to properly defend the claims); *Silvestri*, 271 F.3d at 593 ("[E]ven when conduct is less culpable, dismissal may be necessary if the prejudice to the defendant is extraordinary, denying it the ability to adequately defend its case."); *Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166, 170 (D. Colo. 1990) ("Destroying the best evidence relating to the core issue in the case inflicts the ultimate prejudice upon the opposing party.").

BP Amoco and BPCNA are also forever precluded from relying upon Robertson's deleted emails in support of their defenses. Because all of Robertson's emails were not produced, there is complete uncertainty about the existence of other emails, and it is impossible

to know what other evidence or emails were also deleted and not turned over. In this regard, FHR's conduct during discovery and the continuing existence of gaps in its production confirm the prejudice that exists, particularly as the preservation of Robertson's emails could very well have filled the substantial gaps of information in FHR's document production during discovery. For example, FHR has produced no documents to reflect (i) when FHR discovered each of the alleged problems at the Joliet plant; (ii) how FHR discovered the alleged problems; (iii) who discovered the alleged problems; (iv) how the alleged problems were investigated; (v) who investigated the alleged problems; (vi) how the facts and underlying documents relating to the alleged problems were organized and maintained at the Joliet plant; or (vii) how and when Robertson was made aware of these issues and claims. Notably, Robertson sent the initial post-sale claims notice and subsequent letters claiming fraud, etc., over the condition of the assets at the time of the sale. And yet, unless one were to believe that Robertson simply drafted and sent the letters without discussing their contents with anyone, at any time, the chain of communications and evidence relating to Robertson's personal involvement and knowledge in FHR's investigation has not been produced by FHR.

In light of the fact that Robertson was closely involved with FHR's purchase of the plant and personally sent the various claims notices to BP Amoco after the sale, there is no doubt but that this and other missing evidence would have been included in emails to or from Robertson. Indeed, Robertson admits that he communicated with respect to the Joliet plant by email and those emails have now been intentionally deleted. (*See* Mot. Ex. N at 21-22.) Thus, BP Amoco and BPCNA are without key evidence that could prove that the alleged problems arose after the sale, not before, and are unable to question Robertson or others about this missing evidence. Likewise, BP Amoco and BPCNA are deprived of key evidence that would fill the gaps in FHR's document production. *See Krumwiede*, 2006 WL 1308629 at *11 (finding that plaintiff's intentional destruction of electronic files warranted a default judgment in favor of defendant's counterclaims); *Am. Cash Card Corp. v. AT&T Corp.*, 184 F.R.D. 521, 525 (S.D.N.Y. 1999) (rejecting argument that a diligent search for all responsive documents had been conducted where there remained significant gaps in the records produced); *Computer Assocs.*, 133 F.R.D. at 170 (finding that plaintiff was prejudiced by defendant's destruction of electronic evidence where that evidence could have been used to provide unknown answers).

An example of how evidentiary gaps and discovery violations can significantly affect the merits of a case was provided last year in *Qualcomm Inc. v. Broadcom Corp.*, 539 F. Supp. 2d 1214 (S.D. Cal. 2007). In that case, Qualcomm repeatedly represented to the court that it had not participated in meetings to set an industry standard that incorporated technology in Qualcomm's patents. *Id.* at 1222. After the industry standard was implemented, Qualcomm sought to enforce its patents against a competitor, Broadcom. In the last days of trial, it was revealed that certain emails may not have been produced by Qualcomm. After the jury verdict, Broadcom demanded discovery of Qualcomm's records that had previously been concealed. Qualcomm then reluctantly produced, post-trial, additional emails and correspondence, which revealed hundreds of emails demonstrating that Qualcomm had indeed participated in the meetings at issue and had not disclosed, as required, that the standard being proposed incorporated Qualcomm's patented technology. More importantly, the emails revealed that Qualcomm's witnesses had knowingly lied in depositions and at trial, and that Qualcomm's counsel had made false statements to the court. *Id.* at 1220, 1222. As a result, the court held that Qualcomm waived its rights to enforce its patents and awarded Broadcom over $8 million in fees, costs, and interest. *Qualcomm Inc. v. Broadcom Corp.*, 2007 WL 4351017, at *1 (S.D. Cal. Dec. 11, 2007); 2008 WL 5047675 (Fed. Cir. Dec. 1, 2008) *aff'd in part, rev'd in part* (limiting remedy of unenforceability to products compliant with standard at issue but affirming other rulings). If Qualcomm had simply deleted the emails it tried to conceal, like Robertson has done here, Qualcomm's dishonesty and misconduct may never have been discovered, and the merits of that case could have been different based upon false information, thus rewarding Qualcomm for its unscrupulous behavior.

As in the *Qualcomm* case, FHR delayed producing evidence revealing Robertson's destruction of evidence and was less than candid with BP Amoco and the Court regarding the status of the production of documents from Robertson and others. The history of FHR's document production and BP Amoco's efforts to obtain emails and other electronic documents from Robertson and other FHR employees located at its Wichita headquarters is described in BP Amoco's motion. (*See* Mot. at 12, n.3.) For example, throughout 2007, BP Amoco repeatedly raised FHR's failure to produce these emails. (*See* Mot. Exs. R, S, T; and V.) Instead of telling BP Amoco and the Court what Robertson had done, FHR represented to the Court at several status conferences in late 2007–when urging the Court to set a prompt trial date–that its

document production was complete. Then, months later and only after BP Amoco served a notice for Robertson's deposition and only weeks before his deposition, FHR finally produced 27 emails from Robertson's files. Of these 27 emails, three were from 2003 or 2004 and 24 were dated in 2005 or 2006, which is significant because: (i) Robertson's involvement with FHR's purchase of the plant and his post-sale claims against BP Amoco occurred in 2003 and 2004; and (ii) FHR waited several years before finally producing these emails to BP Amoco in 2008. This timeline confirms that FHR waited as long as possible to produce those emails, after incorrectly informing BP Amoco and the Court in late 2007 that its document production was complete, in the hope that Mr. Robertson's evidence destruction would never come to light.

VI. THE ONLY SANCTION TO REMEDY FHR'S DESTRUCTION OF MASSES OF EVIDENCE IS DISMISSAL OF FHR'S COUNTERCLAIMS, STRIKING FHR'S ANSWER, AND THE AWARD OF ATTORNEYS' FEES AND COSTS.

As a result of FHR's failure to preserve masses of evidence central to the issues in this litigation, BP Amoco has been severely and irrevocably prejudiced in its ability to defend against the allegations in this case. Accordingly, appropriate sanctions must be imposed to prevent FHR from having an unfair advantage as a reward for its improper behavior.

"[S]poliation of evidence can have very severe consequences, which is only proper because it strikes at the heart of our judicial system's truth-seeking function." *Cooper v. United Vaccines, Inc.*, 117 F. Supp. 2d 864, 874 (E.D. Wis. 2000) (dismissing plaintiff's claims for intentionally spoliating "evidence crucial to the defense of [the] matter"). The award of sanctions must be proportionate to the discovery violation and can include such punishments as the dismissal of claims, permitting adverse inferences, awarding reasonable attorneys' fees and expenses, and barring evidence or arguments. *Langley v. Union Elec. Co.*, 107 F.3d 510, 515 (7th Cir. 1997); *Krumwiede*, 2006 WL 1308629 at *9.

"[C]lear and convincing evidence of willfulness, bad faith, or fault" is required for the sanction of dismissal with prejudice or default judgment. *Maynard v. Nygren*, 332 F.3d 462, 468 (7th Cir. 2003); *Krumwiede*, 2006 WL 1308629 at *9. Other sanctions, such as a negative inference or jury instruction, require the lesser standard of proof by a preponderance of the evidence. *Larson*, 2005 WL 4652509 at *9. Bad faith is an intentional act or act in reckless disregard of a party's obligations, while "[f]ault . . . doesn't not speak to the non(-)complying

party's disposition at all, but rather only describes the reasonableness of the conduct—or lack thereof—which eventually culminated in the violation." *Id.* at *13. Fault may be evidenced by "negligent actions or a flagrant disregard" of a party's duty to preserve evidence. *Wiginton*, 2003 WL 22439865 at *6-7. In deciding between a default judgment and a lesser sanction, courts consider (1) prejudice to the aggrieved party, (2) prejudice to the judicial system, and (3) deterrence and punishment. *Krumwiede*, 2006 WL 1308629 at *11. In this case, FHR's actions were willful, intentional, deceptive, and prejudicial to BP Amoco and the judicial system.

In December 2004, FHR—knowing that litigation was imminent—imposed a legal hold directive on its employees. Then, after Robertson sent BP Amoco the first claims notice, Robertson instructed BP Amoco to preserve all relevant evidence. Robertson's instruction was in the broadest of terms, and included backup tapes and original electronic information in native format. Then, shortly after filing the complaint a few months later, BP Amoco sent FHR a letter reminding FHR that it had a legal duty to preserve all evidence relevant to the issues in this case. (*See* Mot. Ex. C.) BP Amoco emphasized that it be allowed to inspect the equipment "***before*** that evidence is destroyed, discarded, altered, removed, repaired, replaced, modified, etc." (*Id.*)

Incredibly, FHR denied it had a duty to preserve, but nevertheless assured BP Amoco that it was preserving the evidence. Thus, despite putting its employees on notice about the duty to preserve, despite being reminded of that duty by BP Amoco, despite assuring BP Amoco that it was preserving evidence, and despite the specific evidence-preservation instruction given to BP Amoco by FHR's own CEO, FHR not only failed to preserve masses of core evidence, but intentionally destroyed this evidence. And then, to make matters worse, FHR did not tell BP Amoco about the destruction, instead representing to the Court for months that it was done with its discovery obligations—even though that representation was inaccurate. Finally, and to underscore its bad intent, FHR then had its CEO testify that although he had destroyed the emails, he personally had printed out hard copies of each before deleting them. The undisputed facts, of course, are to the contrary, as Robertson only produced 20 hard-copy emails, while we know from other FHR custodians that he had over 2,000 relevant email communications.

In similar situations, where equipment at the center of a case has been spoliated, courts have held that the only remedy to cure the prejudice to the wronged party is to dismiss all claims against that party and, in some cases, to award attorneys' fees. *See Allstate Ins. Co. v. Sunbeam*

Corp., 53 F.3d 804 (7th Cir. 1995) (affirming sanction of dismissal where plaintiff destroyed gas grill alleged to be defective); *Morrocco*, 966 F.2d at 225 (affirming the district court's sanction of dismissal and award of fees where plaintiff destroyed vehicle claimed to be defective); *China Ocean*, 1999 WL 966443 at *4 (sanction of dismissal); *Lawrence*, 1999 WL 637172 at *3-4 (sanction of dismissal); *Flury*, 427 F.3d at 947 (finding that prejudice to defendant due to the destruction of the vehicle at the heart of plaintiff's claims warranted dismissal); *Silvestri*, 271 F.3d at 593 (dismissing claims for spoliation and recognizing that "even the inadvertent, albeit negligent, loss of evidence will justify dismissal because of the resulting unfairness").

BP Amoco and BPCNA are entitled to the same remedy and sanction imposed in these cases, because they have been forever precluded from relying upon the spoliated evidence to defend themselves. "[A] court can apply the sanction of dismissal for Rule 37 violations with a finding of willfulness, bad faith or fault, as long as it first considers and explains why lesser sanctions would be inappropriate." *Maynard*, 332 F.3d at 468. In this case, any lesser sanction than dismissal would not remedy the prejudice and would send a message that evidence can be spoliated or destroyed at a party's will with minimal consequences.[2] *See Nat'l Hockey League*, 427 U.S. at 643; *Computer Assocs.*, 133 F.R.D. at 170.

Robertson's intentional destruction of relevant emails was also unreasonable and in bad faith. Robertson was the most senior executive at FHR, serving as the company's president and CEO. (Mot. Ex. N at 5-6.) Robertson knew that he had a duty to preserve the electronic copies of his emails. (*Id.* at 18-23, 265-68.) Robertson sent a letter to BP Amoco instructing it about the responsibility to preserve electronic and hard copies of documents. He reiterated his understanding of that policy at his deposition:

> Q. Can you read [the April 25, 2005 letter] for us, please.
>
> A. "We assume that BP has preserved, and will continue to hold all records (electronic and hard copy) that are relevant to this dispute. We want to remind BP

[2] This would not be the first time that a court has sanctioned FHR or one of its affiliates for discovery violations. In *United States ex rel. Koch v. Koch Industries*, the district court sanctioned Koch for negligently destroying computer tapes. 197 F.R.D. 463 (N.D. Okla. 1998). As a result, Koch was ordered to pay plaintiffs the costs ($200,000) for creating a substitute for the spoliated data and was prohibited from using any evidence prepared by using the spoliated evidence. *Id.* at 493. This is the same type of conduct that FHR, a subsidiary of Koch Industries, has engaged in here, except that in this case, FHR's actions were intentional.

> specifically of the backup tapes being stored at Iron Mountain, and ask that those be preserved."
>
> * * * * *
>
> Q. And that's a mutual obligation to retain documents and emails, isn't it, Mr. Robertson?
>
> A. Yes, it is.

(*See* Mot. Exs. B, N at 265-66.)

Nevertheless, Robertson knowingly violated these fundamental rules of discovery. And then, to top it all off, he concocted a story to excuse his misconduct—*i.e.*, that he had made a hard copy of each email before deleting—a factual assertion that is objectively and demonstrably untrue. One more point about intent: Robertson not only wrote the letter to BP Amoco regarding document preservation, but he also knew there was a litigation hold in place. Nevertheless, he continued to delete relevant emails until he was finally told by one of FHR's lawyers that such conduct was "not acceptable." (Mot. Ex. N at 22-23.)

In similar circumstances where witnesses have purposefully deleted electronic files or documents in violation of discovery rules and orders, courts have held that the appropriate sanction is the dismissal of the party's claims. *Krumwiede*, 2006 WL 1308629 at *11 (entering default judgment on defendant's counterclaims for plaintiff's deletion of relevant electronic files); *Leon v. IDX Sys. Corp.*, 464 F.3d 951 (9th Cir. 2006) (upholding district court's reliance on its inherent power to dismiss claim where plaintiff intentionally deleted computer data); *Computer Assocs.*, 133 F.R.D. at 170 (entering a default judgment where defendant intentionally destroyed electronic evidence); *WM. T. Thompson Co.*, 593 F. Supp. at 1456 ("Default and dismissal are proper sanctions in view of [defendant's] willful destruction of documents and records that deprived [plaintiff] of the opportunity to present critical evidence on its key claims to the jury."); *White*, 170 F.R.D. at 140 (same).

The sanction in this case should be the same. As a result of Robertson's conduct, BP Amoco and BPCNA are forever precluded from using the destroyed evidence in support of their defenses. Any other sanction would encourage parties in litigation to delete relevant and perhaps incriminating emails, believing that by doing so the emails could not be used against them. *Krumwiede*, 2006 WL 1308629 at *11 (finding that "[plaintiff's] conduct shows such blatant contempt for this Court and a fundamental disregard for the judicial process that his behavior can

only be adequately sanctioned with a default judgment."); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 110 (S.D. Fla. 1987) ("[W]e have concluded that no sanction less than the entry of default judgment as to Defendant's liability can fairly and adequately redress this willful [destruction of discovery documents].")[3]

CONCLUSION

BP Amoco and BPCNA do not bring a motion such as this lightly and without careful consideration. In fact, it took a long time to figure out precisely what had transpired in this case due to FHR's discovery conduct. But the conduct of FHR described above and in the accompanying Motion is so deliberate, undisputed, and prejudicial to the ability to defend this litigation that BP Amoco and BPCNA have no reasonable choice but to bring this issue to the Court's attention and seek relief. Accordingly, BP Amoco and BPCNA respectfully request that the Court grant their motion for sanctions and award the relief described in their motion.

Date: December 19, 2008

Respectfully submitted,

s/Marla Tun Conneely

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One of the attorneys for BP Amoco Chemical Company and BPCNA

[3] FHR's claims, including its fraud claim, should also be dismissed under the unclean hands doctrine. "[B]efore a complainant can have a standing in court he must first show that not only has he a good and meritorious cause of action, but he must come into court with clean hands." *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 244 (1933); *see also Mas v. Coca-Cola Co.*, 163 F.2d 505, 507-08 (4th Cir. 1947) ("[P]laintiff must not only come into court with clean hands, but must keep his hands clean."). Generally, courts apply the doctrine "where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation." *Keystone Driller Co.*, 290 U.S. at 245. Litigation misconduct, such as concealing evidence or providing false testimony, suffices to support a finding of unclean hands. *Mas*, 163 F.2d at 507.

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2008, I caused a true and correct copy of the foregoing to be served electronically via the CM/ECF system on the following:

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