Motion Ex. 26

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 Amy J. St. Eve**
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
BP CORPORATION NORTH AMERICA INC.,	)	
	)	
Third-Party Defendant.	)	
	)	

BP AMOCO CHEMICAL COMPANY AND BP CORPORATION NORTH AMERICA INC.'S AMENDED REPLY BRIEF 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

FHR's response not only confirms its spoliation of evidence, but it also reveals that the extent and willfulness of FHR's destruction of evidence is even greater than originally thought. For starters, FHR does not dispute that its then-CEO, David Robertson, deleted relevant emails and that FHR destroyed or otherwise failed to preserve equipment at the Joliet Plant relevant to twelve of its individual claims for which it seeks damages of over $9.5 million according to its most recent Claims Chart. Now, however, Robertson has submitted an affidavit confirming that he did not retain all emails, and further confessing that he failed to retain certain relevant emails ***even after*** being told by an FHR attorney that deleting emails was not acceptable. In fact, the undisputed evidence establishes and confirms that Robertson deleted and failed to save—in either electronic or hard copy format—at least hundreds of relevant emails he sent or received after FHR issued its legal hold notice, after Robertson sent his claims notice to BP Amoco, and after Robertson personally instructed BP Amoco in writing to "hold all records (electronic and hard copy) that are relevant to this dispute." Thus, Robertson's own affidavit, which also changes his deposition testimony, confirms that he made a conscious decision to destroy emails he knew were relevant to the Joliet Plant and this litigation.

With respect to the tanks and other physical evidence discarded and destroyed by FHR at the Joliet Plant, FHR's response confirms that this occurred (i) after and in violation of its evidence and document preservation hold notice, (ii) before BP Amoco had the opportunity to inspect the equipment, (iii) after this litigation commenced, and (iv) after FHR instructed its employees to preserve this evidence. Moreover, FHR's response confirms that it selectively decided when to ask BP Amoco in advance whether evidence could be destroyed and when not to notify BP Amoco before destroying key evidence.

Unable to dispute the facts of its misconduct which have necessitated BP Amoco's motion, FHR exacerbates the egregiousness of its wrongful conduct by asserting a barrage of factually incorrect and legally irrelevant excuses for its destruction of evidence. Appropriate sanctions must be imposed to preserve the integrity of the judicial system and to remedy the prejudice to BP Amoco and BPCNA resulting from their inability to examine and use the destroyed evidence in support of their defenses. As explained below and in their opening memorandum, no sanction short of dismissal can fairly and adequately redress FHR's willful destruction of documentary and physical evidence that goes to the heart of this case.

Finally, one way to look at this motion is to ask the question: if FHR can knowingly destroy hundreds if not thousands of emails as well as physical evidence at the heart of this case and do so without sanction, then what degree of spoliation would it take to justify a sanction? In FHR's world, there is no good answer to that question; but under the law, the answer is clear—FHR did not have the right to destroy this evidence. FHR had the duty to preserve, and yet instead it made the decision to destroy. If that is not sanctionable conduct, then the negative consequences, not only in this case but for our system of justice, will be far-reaching and severe.

UNDISPUTED FACTS

In its response, FHR stridently complains about "rhetoric" as compared to the "facts" (FHR Opp. at 1), but it is FHR who takes great liberties with the record in an attempt to excuse its spoliation of evidence. Thus, we start with the following undisputed facts concerning FHR's spoliation of evidence and its subsequent attempts to conceal its misconduct:

- **May 28, 2004:** FHR assumed ownership of the Joliet Plant.
- **July 7, 2004 (at the latest):** FHR began to anticipate litigation over the "faulty plant equipment" at the Joliet Plant, as confirmed by its withholding of documents based upon the assertions of attorney work product with reference to various documents on FHR's privilege log. (*See* FHR's Privilege Log at 270, relevant pages attached as Exhibit 1)[1]
- **After July 7, 2004:** FHR's then-CEO, David Robertson, continued to delete emails relating to the sale of the Joliet Plant. (FHR Opp. 3, 13-14; FHR Opp. Ex. 3 at 2.)
- **December 17, 2004:** FHR issued a "legal hold" notice to its employees, including its then-CEO, David Robertson.[2] (*Id.*) This notice requires the retention of all relevant evidence, including emails in native format. (Mot. Ex. I at 625-26.)
- **After December 17, 2004:** Robertson contends that he began printing and saving hard copies of emails after receiving the legal hold notice (FHR Opp. Ex. 3 at 2), but in fact, Robertson saved only 2 out of at least 316 relevant emails he received or sent after this date; he

[1] The exhibits to this reply brief are designated with numbered tabs to distinguish them from the exhibits attached to BP Amoco's opening motion, which are designated with lettered tabs.

[2] Robertson is now the President, Chief Operating Officer and member of the Board of Directors of FHR's parent company, Koch Industries. *See* http://www.kochind.com/newsroom/bios.aspx.

destroyed the other at least 314. (*See* Supp. Decl. of F. Sramek, attached as Ex. 2, and Second Supp. Decl. of F. Sramek at ¶¶ 6-7, attached as Ex. 16.)

- **After December 17, 2004:** Robertson is informed by FHR's counsel that his continuing deletion of emails is not acceptable and is in violation of FHR's own policies and litigation hold for this case. (Mot. Ex. N at 25; Mot. Ex. I at 625-26; FHR Opp. Ex. 3 at 2-3.) Even after being so informed by FHR's counsel, Robertson continued to selectively delete relevant emails without printing and saving a hard copy. (FHR Opp. Ex. 3 at 3.)

- **After December 17, 2004:** FHR continued to destroy equipment at the Joliet Plant that forms the basis for its claims and anticipated litigation with BP Amoco. This destruction of relevant equipment continued in 2005 and until at least the summer of 2006—twenty months or more after this litigation began. (Mot. Ex. H.) All told, FHR destroyed or otherwise failed to preserve equipment that forms the basis of at least 12 of its individual claims against BP Amoco for which it seeks over $9.5 million in damages. (FHR 02/13/09 Claim Chart, attached as Ex. 3.)

- **December 21, 2004:** Robertson sends BP Amoco a claims notice, listing specific equipment at the Joliet Plant which FHR alleges did not meet the contractual representations. (Mot. Ex. A.) Those pieces of equipment now form the basis for the bulk of FHR's counterclaim. At least five of the specific pieces of equipment referenced by Robertson in this notice were destroyed by FHR and are the subject of this motion.

- **April 25, 2005:** Robertson sends BP Amoco another letter, instructing BP Amoco to retain "all records (electronic and hard copy) that are relevant to this dispute." (*See* Mot. Ex. B.)

- **September 30, 2005:** BP Amoco initiates this litigation by filing a declaratory judgment action in this Court.

- **January 25, 2006 (and thereafter):** BP Amoco repeatedly reminds FHR of its obligation to preserve all evidence, including physical evidence at the plant. (Mot. Ex. C.) BP Amoco requests the opportunity to inspect the equipment "before that evidence is destroyed, discarded, altered…etc." (*Id.*) On April 18, 2006, FHR represents to BP Amoco in writing that "mechanisms have been placed into effect…to preserve all relevant evidence in support of [FHR's] claims." (Mot. Ex. D.) Nevertheless, FHR continued to destroy relevant evidence after that time. (Mot. Ex. H.; FHR Opp. Ex. 3 at 3.)

- **2007:** In correspondence and briefs, BP Amoco repeatedly raised with FHR its failure to produce emails from Robertson's files. (Mot. Exs. R, S, T, and V.) FHR continued to

fail to produce any emails from Robertson's files, as well as many other documents. Instead, FHR continually told the Court and BP Amoco that it was done with its document production and on that basis urged the Court to set a prompt trial date.

- **March 28, 2008:** After BP Amoco served a notice for Robertson's deposition (Mot. Ex. U), and only weeks before his deposition, FHR produced 27 emails from Robertson's files. Of the 20 hard-copy emails produced, many have nothing to do with this case and were not requested by BP Amoco in discovery. (*See* Ex. 16 at ¶ 8.)

- **April 18, 2008:** Robertson testified that he deleted relevant emails only after printing a hard copy for his files. (Mot. Ex. N at 18-24, 266-67) Robertson said he was told by an FHR attorney that this practice was "not acceptable." (*Id.* at 23.) According to Robertson's sworn deposition testimony, "from that point forward, any documents that I received electronically I dragged into that file as opposed to printing them and putting them in a file." (*Id.*)

- **July 18, 2008:** After FHR failed to provide the facts relating to its spoliation in response to BP Amoco's interrogatories (Mot. Exs. H, P, and Q), BP Amoco took a Rule 30(b)(6) deposition of FHR on the subject of evidence preservation. FHR's witness, Richard Morris, confirmed various facts surrounding FHR's spoliation. (Mot. Ex. I.)

- **February 10, 2009:** Robertson submitted an affidavit changing his deposition testimony. Now, in his affidavit, he says that, in fact, he did not print out all emails. In fact, Robertson printed only what he believed to be "the last email in the string." (FHR Opp. Ex. 3 at 2.) Robertson's affidavit also confesses that, even after being told his practice was not acceptable, Robertson did not save other relevant emails: "I did not separately retain certain emails after December 17, 2004, containing general financial information relating to the ongoing operations of the Joliet Plant that were sent to me and several other Koch Industries managers on a regular basis in the normal course of business." (*Id.* at 3.) The financial performance of the Joliet Plant and its value is an issue in this case central to FHR's claims for damages.

* * * *

In sum, the undisputed evidence confirms that FHR has destroyed and failed to preserve the very equipment and documentary evidence at the core of the claims in this case. Given this undisputed evidence, and FHR's attempts to conceal its destruction of evidence and its ever-changing story, the only remaining question is what consequences should flow from FHR's misconduct.

REPLY ARGUMENT

As noted in BP Amoco and BPCNA's opening memorandum, 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 v. Bank One Corp.*, 2005 WL 4652509, at *10 (N.D. Ill. Aug. 18, 2005); *Danis v. USN Communications, Inc.*, 2000 WL 1694325, at *35 (N.D. Ill. Oct. 23, 2000). FHR does not dispute these factors, each of which compels sanctions here.

I. FHR'S RESPONSE CONFIRMS THAT FHR HAD A DUTY TO PRESERVE THE SPOLIATED EVIDENCE.

FHR does not dispute that 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), or that 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).

FHR suggests that it circulated a legal hold notice to its employees on December 17, 2004, "before litigation was considered likely." (FHR Opp. 2.) This suggestion is simply not credible. First, FHR's suggestion is contrary to its own privilege log. In fact, FHR's privilege log confirms that it is withholding over 900 documents dated after May 28, 2004 (the closing) and before December 17, 2004 on the basis of the attorney work product doctrine. (Ex. 1.) Of course, the attorney work product doctrine requires a document to have been created "in anticipation of litigation" in order to be withheld. Fed. R. Civ. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 508 (1947). An early entry on FHR's privilege log destroys its argument: an email dated July 7, 2004, from FHR's manager of the Joliet Plant, Tim Nicol, who is a key witness in this case. (Ex. 1 at 270.) FHR describes this email as "regarding faulty plant equipment; prepared in anticipation of litigation," and thus FHR is withholding it from production on the basis of attorney work product. (*Id.*) This email alone confirms that FHR was anticipating litigation "regarding faulty plant equipment" less than six weeks after taking

ownership of the plant.[3] And that early document is not alone—there are more than 900 similar documents dated after May 28, 2004 and before December 17, 2004 that are being withheld by FHR from production on the basis of attorney work product because FHR contends they were prepared "in anticipation of litigation" or "for the purpose of impending litigation." (Ex. 1.)

Second, and putting aside the over 900 work product entries on its privilege log between the date of closing and the initial claims notice, FHR admittedly circulated its legal hold notice on December 17, 2004. (FHR Opp. 3.) Although FHR has not produced a copy of the hold notice, it strains credulity for FHR now to suggest that it circulated a legal hold notice to its CEO and others in December 2004 but did not consider litigation likely. This is particularly true given that Robertson himself sent a claims notice to BP Amoco on December 21, 2004, only four days after the FHR hold notice, notifying BP Amoco of FHR's belief that BP Amoco had "materially breached" the parties contract, resulting in alleged damages "in the tens of millions of dollars." (Mot. Ex. A.) Also, FHR's evidence preservation legal hold notice presumably meant something. But if FHR is correct in its argument now—that it did not anticipate litigation and thus had no duty to preserve evidence as of December 17, 2004—then apparently its legal hold notice was both unnecessary and intended just to paper the record, but not to be followed. FHR's argument on this point is not credible.

Third, and regardless, Robertson's deletion of emails and FHR's destruction of equipment at the Joliet plant continued for a long time after December 17, 2004. Robertson, for example, destroyed at least 314 emails dated after December 17, 2004 and that he did not print and preserve in hard-copy format, but that were produced by other FHR employees in this litigation. (Ex. 2.) And remarkably, Robertson destroyed—without printing—at least 284 relevant emails after he sent his letter on April 25, 2005, instructing BP Amoco to preserve electronic evidence. (*Id.*) Independently, at the Joliet Plant, FHR destroyed numerous pieces of relevant equipment in 2005 and into 2006, well after the filing of this lawsuit. (Mot. Ex. H.)

FHR attempts to justify and excuse its own misconduct by *speculating* that BP Amoco

[3] FHR's assertion that these documents were prepared "in anticipation of litigation" is consistent with what BP Amoco believes the evidence will show was always FHR's plan upon closing and taking possession of the Joliet Plant. Specifically, BP Amoco believes that FHR always intended to seek further adjustments to the purchase price by suing or threatening to sue BP Amoco once FHR signed the contract and closed the transaction.

did not issue a litigation hold notice until April 2005.[4] That date is irrelevant; the relevant issue is when FHR anticipated litigation, which was at least as early as July 7, 2004 (the date of the Nicol email on the privilege log) and certainly no later than December 17 (FHR's legal hold notice) or December 21, 2004 (FHR's claims notice). Nor is it particularly helpful to FHR to wrongfully suggest that it had no duty to preserve evidence before April 2005, because as noted above FHR has admitted to destroying significant amounts of emails and physical evidence after April 2005.[5] (Mot. Ex. H; FHR Opp. Ex. 3.)

In sum, FHR had a duty to preserve evidence beginning as early as July 2004, as confirmed by its privilege log, internal hold notice and Robertson's claims notice to BP Amoco.

II. FHR'S RESPONSE CONFIRMS THAT FHR SPOLIATED EQUIPMENT AT ISSUE IN THIS CASE.

FHR concedes it failed to preserve equipment that is the subject of its claims. FHR has admitted this through the sworn testimony of its witnesses, through its answers to discovery, and through its response to this motion. (Mot. Exs. H, I, J, and K; FHR Opp. 17-22.) In fact, FHR destroyed or otherwise spoliated the equipment at issue in 12 of its now-51 claims, and equipment for which its revised Claims Chart seeks over $9.5 million in damages. (At the time BP Amoco filed this motion, FHR was seeking $13.6 million for this spoliated equipment.)

As it typically does, FHR seeks to excuse its spoliation of evidence by blaming BP Amoco for not inspecting the plant before FHR destroyed the evidence underlying these 12

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[4] FHR makes the speculative suggestion that BP Amoco knew its contractual representations were false because BP Amoco issued written record retention instructions shortly after the sale. (FHR Opp. 12.) FHR has no good faith basis to make this speculative suggestion. As BP Amoco would have informed FHR if FHR had asked, these instructions were neither unique to this transaction nor issued because BP Amoco believed litigation with FHR was "imminent." To the contrary, the BP Amoco instructions to which FHR refers were standard post-closing instructions requiring employees to retain certain records relating to a closed transaction. BP Amoco typically issues such instructions for deals in which it disposes of assets. FHR's December 2004 litigation hold, in contrast, was issued four days before Robertson sent FHR's notice of claims to BP Amoco alleging breach of the parties' contract.

[5] FHR suggests, incorrectly, that BP Amoco has failed to preserve certain emails sent in 2005 to and from one of its employees, Mike Wrenn. (FHR Opp. 12, n.5, 6.) Again, this issue is irrelevant as it does not excuse FHR's misconduct, which is the only subject of this motion. Regardless, FHR is wrong: those emails have, in fact, been preserved by BP Amoco. They were not produced because BP Amoco expressly objected to producing any documents post-dating its receipt of FHR's claims notice on December 21, 2004. (Unlike FHR, BP Amoco did not operate the Joliet Plant and continue to generate relevant documents well after the sale.) FHR did not challenge this objection.

claims. FHR provides no legal support for its excuse, because none exists. In fact, courts have rejected FHR's exact argument, holding that a party must preserve relevant physical evidence as long as necessary. *See 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 it, defendant was partly to blame for the vehicle's spoliation); *Anderson v. Mack Trucks, Inc.*, 341 Ill. App. 3d 212, 217-18, 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). Thus, any alleged delay in the inspection did not excuse FHR from its duty to preserve the evidence.

In addition to being incorrect under the law, FHR's excuse is incorrect factually. For example, FHR contends that it offered BP Amoco "unrestricted access" to the Joliet Plant after the sale. (FHR Opp. 8.) Not true. FHR objected to BP Amoco's request for multiple plant visits, contending that "BP Amoco is not entitled to make multiple visits to the Plant throughout the course of [this] litigation." (FHR Opp. Ex. 16) This became an important issue when FHR further objected—on alleged conflict of interest grounds—to BP Amoco's use of Packer Engineering to conduct the inspection and to serve as experts.[6] (Mot. Ex. G; FHR Opp. Ex. 17.)

Rather than conducting an inspection with Packer Engineering and risking the chance that FHR would later prevail on its conflict-of-interest and number-of-inspection arguments, BP Amoco brought these issues to the Court's attention in a motion filed on December 12, 2006. (Docket Nos. 93 and 94) FHR responded, asking the Court to disqualify Packer Engineering.[7] (Docket No. 105) The Court rejected FHR's disqualification request and decided the motion in

[6] FHR's opposition ignores its conflict-of-interest objection, and selectively quotes (without using ellipses) only a portion of a sentence in a letter from BP Amoco's counsel to FHR's counsel on this issue. (FHR Opp. 9, Ex. 17.) The portion of the sentence omitted by FHR confirmed FHR's continuing objection to Packer's role: "Flint Hills does not object specifically to engineers from Packer Engineering attending and conducting the inspection on behalf of BP Amoco, *but Flint Hills continues to object generally to Packer Engineering's role as a non-testifying consultant or testifying expert for BP Amoco.* (FHR Opp. Ex. 17 at 1; emphasis added.)

[7] FHR's response did not address the number of inspections that BP Amoco would be permitted because the Court ruled orally on this issue, instructing BP Amoco to conduct an initial inspection and return to the Court if additional inspections became necessary.

favor of BP Amoco on June 1, 2007, almost six months after it was filed. *See BP Amoco Chemical Co. v. Flint Hills Resources, LLC*, 500 F. Supp. 2d 957 (N.D. Ill. 2007). After a further wait due to the hospitalization of one of the key persons planning to attend the inspection and then a delay requested by FHR due to an unusually severe rainstorm that disrupted plant operations, BP Amoco conducted its inspection in early September 2007, after FHR had already spoliated much of the relevant equipment. Thus, it is disingenuous and misleading for FHR to suggest that BP Amoco "waited another eight months before requesting access to the Joliet Plant" (FHR Opp. 9), after FHR objected to Packer Engineering and required BP Amoco to file a motion so that the inspection could occur. Regardless, all of FHR's excuses are irrelevant because any alleged delay in conducting the inspection did not give FHR license to destroy equipment. *Flury*, 427 F.3d at 945; *Anderson*, 341 Ill. App. 3d at 217-18, 793 N.E.2d at 969.

FHR also argues that it was acceptable for it to destroy evidence because it told BP Amoco that it intended to do so. (FHR Opp. 23.) Merely stating this argument is sufficient to refute it. Nevertheless, to complete the record, FHR fails to acknowledge that it had assured BP Amoco that "mechanisms [had] been placed into effect consistent with FHR's legal obligations to preserve all relevant evidence in support of our claims" (Mot. Ex. D.) and that BP Amoco repeatedly requested advance notice before any relevant evidence was removed or altered (Mot. Exs. C and E).

Tellingly, FHR, in fact, did selectively provide BP Amoco with occasional advance notice seeking permission to dispose of certain items at the Joliet Plant, but none of those items are at issue or are the subject of this motion. (FHR Opp. 10-11, 23) This fact, however, does not excuse FHR's failure to provide such notice to BP Amoco before destroying the equipment at issue in 12 of its claims. Moreover, FHR did not begin making such requests until late 2007, long after it had destroyed other evidence with no notice to BP Amoco. If anything, FHR's belated notices to BP Amoco demonstrate FHR's selective and secretive spoliation of evidence, confirming its bad faith, and are yet another reason why severe sanctions are necessary as discussed further below.

III. FHR'S RESPONSE CONFIRMS THAT FHR SPOLIATED INTERNAL EMAILS RELEVANT TO THIS CASE.

In an effort to excuse his destruction of emails, Robertson has submitted an affidavit with FHR's response. Robertson's affidavit, however, changes his deposition testimony, makes his story worse, and only confirms his improper conduct and the false and shifting stories he has

concocted.

At his deposition, Robertson testified that he printed and saved a hard copy of "all" relevant emails:

> Q. Focusing now on e-mails, have you retained all e-mails that you authored or received relating to this litigation?
>
> A. Since the legal hold was filed, yes.

(Mot. Ex. N at 20; *see also id.* at 266-67.) Robertson further testified that after he was told by FHR's counsel that this practice was "not acceptable," he placed "any" relevant electronic documents into a special electronic file created for this litigation so that the document would be preserved in its native format. (*Id.* at 22-23.) Robertson was asked by BP Amoco's counsel at the end of his deposition whether his sworn testimony was true and correct, and he responded by swearing that it was. (*Id.* at 267.) Robertson was also asked by BP Amoco's counsel to read his testimony and sign it. (Robertson Dep. 277, attached as Ex. 10.) Subsequently, two months after his deposition and after having read the transcript, Robertson signed the signature page, making no changes to his testimony. (*See* Robertson Signature Page, attached as Ex. 7.)

In his affidavit, Robertson now states that if he had been asked at his deposition, he would have testified that he deleted all relevant emails before receiving the hold notice in December 17, 2004, "in accordance with [his] normal practice." (FHR Opp. Ex. 3 at 2.) As an initial matter, FHR's contention that it was acceptable for Robertson to delete all emails before December 2004 cannot be squared with FHR's invocation of the attorney work product doctrine to withhold from production hundreds of documents because it anticipated litigation over "faulty plant equipment." (*See* Ex. 1 and discussion, *supra*.) Nor does Robertson's deposition testimony address the inconvenient fact that he continued to destroy emails without retaining copies after the legal hold notice in December 2004.

FHR also relies on Robertson's affidavit to attempt to explain why it produced only 20 hard-copy emails from Robertson's files, while producing 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. FHR makes the "inference" that most of the 2,083 emails must have been sent or received before December 17, 2004. (FHR Opp. 13.) FHR apparently did not examine the documents it has produced in this case, but BP Amoco has: FHR produced 316 emails from the files of other witnesses that were sent to or received from Robertson after December 17, 2004.

(Ex. 2.) And 286 of those emails were sent to or received from Robertson after April 25, 2005, when Robertson instructed BP Amoco to preserve all electronic records. (*Id.*) Thus, Robertson's affidavit and the evidence actually produced by FHR do not exonerate his conduct. To the contrary, the affidavit confirms his intentional destruction of massive amounts of emails after receiving the legal hold notice and even after instructing BP Amoco to comply with a directive and duty he subsequently violated.

The fact that Robertson deleted and failed to print at least hundreds of emails after receiving the hold notice confirms the falsity of his deposition testimony that he saved a hard copy of "all" relevant emails after receiving the notice. Ironically, Robertson's own affidavit also conflicts with and changes his deposition testimony—but does so in a manner that makes it worse for FHR.[8] Thus, in his affidavit, Robertson does not testify, as he did in his deposition, that he saved a copy of "all" relevant emails after receiving the hold notice. Quite the opposite. In his affidavit, Robertson testifies only that he "attempted" to print relevant emails and even then, not all of them. (FHR Opp. Ex. 3 at 2-3.) For example, Robertson confesses to only printing what he believed to be the last email in a string.[9] More significantly, Robertson continued to delete emails containing financial information relating to the ongoing operations of

[8] Robertson's attempt to change his testimony does not create any genuine issue of fact here, just as a party cannot avoid summary judgment by trying to change deposition testimony with "self-serving affidavits." *See, e.g., Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1295 (7th Cir. 1993) ("Self-serving affidavits without factual support in the record will not defeat a motion for summary judgment."); *Essick v. Yellow Freight Systems, Inc.*, 965 F.2d 334, 335 (7th Cir. 1992). Regardless, even taken at face value, Robertson's changes make the facts worse for FHR, confirming that his deposition testimony was false and that his spoliation continued and was knowingly selective.

[9] There are several problems arising from Robertson's "attempted" effort to print out only the last email in a string. *First,* this practice would have required Robertson to retain what he believed at any given time to be the final email in the string and then, after waiting days or even longer to see if any further emails were sent or received, to remember to print out the final email before deleting it. *Second,* email strings often diverge in different paths, sometimes reconnecting and sometimes not, depending on whether certain individuals are copied on only selected emails in the string. Thus, before deleting any email with the expectation of later printing only the final email in the string, Robertson would have had to examine each email to make sure that he was saving a version of the string that included all emails he had sent or received by that time. *Finally,* the evidence confirms that Robertson did not, in fact, always print the last email in a given string. Compare Exs. 12 and 13, which are email strings produced by FHR from Robertson's files, with Exs. 14 and 15, which are versions of the same strings as produced by other FHR custodians and which include additional emails sent by Robertson.

the Joliet Plant. (*Id.* at 3.) This is not a minor or inconsequential case of deliberate spoliation; the financial performance of the Joliet Plant under FHR's ownership is a key issue in this case. One of BP Amoco's defenses to FHR's claim that it purchased a defective plant that required significant capital investment and could not produce sufficient amounts of chemicals is that, in fact, the plant has made money. The plant's financial performance since closing, and the overall profitability of the transaction to FHR, is a central issue in this case. (*See* Elson Rep. at 14-15, relevant portion attached as Ex. 8.) Thus, Robertson's affidavit is a confession that, contrary to his deposition testimony, he did not retain all emails after receiving the hold notice. Instead, and perhaps even worse, he selectively decided which emails to retain and which to destroy. This implicates and confirms Robertson's intent and FHR's bad faith, as discussed below.

IV. FHR'S EXCUSES AND EXPLANATIONS ARE FACTUALLY INCORRECT AND LEGALLY INSUFFICIENT TO CURE THE PREJUDICE TO BP AMOCO.

Contrary to FHR's suggestion (FHR Opp. 14), although prejudice to the non-offending party should be considered when deciding whether to impose sanctions for the spoliation of evidence, it is not required. *See Old Banc One*, 2005 WL 3372783, at *4; *see also Barnhill v. United States*, 11 F.3d 1360, 1368 (7th Cir. 1993); *Larson*, 2005 WL 4652509, at *9. Regardless, even if prejudice were required, FHR's spoliation of evidence clearly has prejudiced BP Amoco's ability to defend against FHR's counterclaims and pursue its declaratory judgment action. For FHR to suggest otherwise, after admittedly destroying massive amounts of relevant emails and the very physical evidence underlying its claims, is self-serving, contrary to the record, and defies common sense.

In its opening motion and supporting memorandum, BP Amoco explained the prejudice resulting from the inability to examine the equipment at issue in FHR's claims. (Mot. 5-10; BP Mem. 7-8) In response, FHR contends that pre-sale photographs and inspection reports are an acceptable substitute for the actual equipment. (FHR Opp. 16.) The law, however, disagrees with FHR. *See Lawrence v. Harley-Davidson Motor Co.*, 1999 WL 637172, at *3 (N.D. Ill. Aug. 12, 1999) (holding that a videotape can not take the place of an actual physical inspection of the equipment at issue); *Jones v. O'Brien Tire & Battery Serv. Ctr.*, 374 Ill. App. 3d 918, 928-29, 871 N.E.2d 98, 108-09 (Ill. App. Ct. 2007) (holding that photographs alone were not sufficient to satisfy the duty to preserve the evidence). This makes perfect sense, particularly here given that FHR's claims relate to the condition of specific pieces of equipment on a specific date: May 28, 2004. Photos and reports taken years earlier, before BP Amoco even thought

about selling the plant let alone learned of FHR's specific claims, cannot possibly substitute for seeing and inspecting the actual pieces of equipment with FHR's claims in mind.

FHR also contends that its misconduct should be excused because BP Amoco's experts have enough information to offer opinions and would not have done anything with the equipment if it were not missing, and that BP Amoco "does not dispute the actual condition of that equipment as of May 2004." (FHR Opp. 25-27.) FHR's excuses, however, are neither factually nor legally supported. Thus, for example, FHR's rank speculation as to what BP Amoco would have done with the missing equipment to support its defenses is not a relevant defense to a spoliation claim. *See Larson*, 2005 WL 4652509, at *14 (rejecting defendant's argument that plaintiff had ample data to conduct its analysis and finding that "parties must be allowed to prosecute a case based on their chosen theory in light of all relevant evidence.").

Even if FHR's speculation were relevant, the record evidence does not support FHR's arguments. To the contrary, the actual condition of the equipment as of the date of the sale is very much in dispute, and BP Amoco's experts would have benefited from having had the opportunity to inspect the equipment. For example:

- **Claim 10:** BP Amoco expert Gale Hoffnagle specifically asked FHR for the opportunity to inspect the valves at issue, but was not permitted to do so because the valves no longer exist. (Mot. Ex. X) And, despite making its incorrect "look at the photos argument," FHR neglects to inform the Court that it has no photos of these valves. (Mot. Ex. H at 5; FHR Opp. 17.)
- **Claim 19:** As noted in the report of BP Amoco expert John McKinney, the ability to have inspected this tank would have been significant in determining whether the tank could have been repaired rather than replaced. (McKinney Rep. at 15, relevant portion attached as Ex. 4.) FHR, of course, is seeking replacement costs as damages even though it admittedly scrapped the tank. (Ex. 3.)
- **Claim 48:** FHR alleges that a surge drum had "severe shell corrosion and titanium liner was bulged and cracked" at the time of the sale. In his expert report, BP Amoco expert Ric Bidwell opined to the contrary—that on the date of the sale, the original MD-801 had a leak-tight titanium shell and had been operating leak-free for years. (Bidwell Rep. at 51, relevant portion attached as Ex. 5.) BP's expert also noted that FHR's scrapping of the drum is "significant" because he is unable to evaluate whether the new, higher rated pressure vessel constituted an unnecessary upgrade. (*Id.*)
- **Claim 53:** FHR alleges that the HF-1404 tank's shell was buckled and damaged at the time of the sale. (Ex. 3.) BP Amoco's expert, however, has opined that, from his review of a 2002 video of the tank, it is not clear whether any such buckling existed at the time of the sale. (Kaczkowski Rep. at 7, relevant portion

attached as Ex. 6.) Obviously, the parties disagree as to the condition of the tank at the time of the sale, and thus an inspection is necessary to determine the facts.

- **Claim 54:** FHR alleges that the tubes of the HE-1306A heat exchanger were leaking. (Ex. 3.) BP Amoco's expert, however, has opined that it is not clear whether any of the alleged corrosion or pitting of which FHR complains existed at the time of the sale. (Ex. 5 at 59.)
- **Claim 58:** FHR alleges that the PIA dryer tubes were below minimum wall thickness at the time of the sale. (Ex. 3.) BP's expert disputes the condition as of the sale, opining that the dryer was leak-free and operating well. (Ex. 5 at 64.)
- **Claim 67:** FHR alleges that a heat exchanger had "tube corrosion" at the time of the sale and the tubes needed to be replaced at an alleged cost of $1.1 million. (Ex. 3.) BP Amoco's expert, however, has testified that there is no indication that the tubes were below minimum thickness requirements and needed to be replaced as of the date of the sale. (Bidwell Dep. at 601, attached as Ex. 11.)
- **Claims 10, 22 and 51:** FHR contends that the condition of the equipment as of the sale date is irrelevant because these claims are based upon a alleged violation of environmental laws. (FHR Opp. 17-18.) However, the alleged basis for these claims is that the condition of the equipment caused the equipment to be in violation of those laws.[10] (Ex. 3.) The importance of the condition of the equipment on the sale date is confirmed by the fact that FHR seeks the costs for the repair and modification of that equipment as alleged damages. (Ex. 3.)

Perhaps the best evidence of the prejudice to BP Amoco resulting from FHR's destruction of equipment is FHR's own conduct. After issuing a legal hold, holding internal training sessions regarding evidence preservation, and instructing BP Amoco to preserve all relevant evidence, FHR then chose to selectively destroy certain equipment surreptitiously while giving BP Amoco advance notice before it destroyed other equipment. In addition, FHR falsely, as it turns out, represented to BP Amoco in writing that it would preserve the evidence. (Mot. Ex. D.) This conduct strongly suggests, contrary to FHR's after-the-fact speculation, that the destroyed evidence would have supported BP Amoco's defenses to FHR's claims. But regardless, neither the Court nor BP Amoco should have to take FHR's word for it. BP Amoco

[10] For example, Claim No. 10 rests upon whether the spoliated valves at issue were in fact open-ended (BP Amoco claims they were not, FHR claims they were) and therefore not in compliance with environmental laws; Claim No. 22 rests upon whether the HE-1404 condenser in place at the time of the sale could achieve 95% removal efficiency of VOMs (*see* Hoffnagle Dep. 572, attached as Exhibit 9); and Claim No. 51 rests upon if and when the REECO valves needed servicing and whether those valves had been properly maintained under FHR's ownership. (Ex. 3.)

was entitled under the law to inspect the equipment. FHR knew that, represented that it would preserve the equipment, but destroyed the equipment at issue anyway.

With respect to Robertson's emails, FHR's "no prejudice" argument rests entirely on its speculation that each of the emails Robertson deleted were saved and produced by other FHR witnesses. Of course, the fact that 2,083 of Robertson's emails happen to have been produced from the files of other FHR employees does not mean that all of Robertson's destroyed emails have been retrieved and produced. We will never know if, in fact, that is true. Again, neither the Court nor BP Amoco should have to take FHR's word for it, particularly given the fact that Robertson has changed his sworn deposition story. Indeed, the court in *Nursing Home Pension Fund v. Oracle Corporation* rejected the same argument FHR is making here and sanctioned the defendant in that case after its CEO failed to preserve in his own files hundreds of emails, 1,650 of which were then discovered in the email files of other employees. 2008 WL 4093497, at *6 (N.D. Cal. Sept. 2, 2008). In its opinion, which BP Amoco cited in its opening brief but FHR simply ignores, the court explained that the prejudice to the party that did not engage in the spoliation lies in the knowledge that an email was found in the CEO's file and the possibility that other, unknown emails that were not produced by any other custodian also were deleted:

> 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).

Indeed, less than three weeks ago, another federal court rejected the types of excuses FHR is making here and dismissed the plaintiffs' claims due to the destruction of emails. In *Kvitka v. Puffin Company LLC*, 2009 WL 385582, at *5-6 (M.D. Pa. Feb. 13, 2009), one of the plaintiffs intentionally discarded her laptop computer after saving only selected "self-serving emails" to a new computer: "While Defendants have paper copies of certain emails allegedly sent by Plaintiff, they cannot verify the origin of the computer from which they were sent nor do they have access to all of the emails sent during that time, significantly reducing their ability to defend against the claims. Last, anything short of such a drastic remedy [of dismissal] would

encourage litigants to dispose of unfavorable evidence, hoping that they can overcome limiting instructions or an adverse inference by taking advantage of judges."

Similarly, in this case, BP Amoco and BPCNA have been prejudiced because substantial and unexplained gaps exist in FHR's document production—a point to which FHR has no answer. (*See* BP Mem. 9.) As just one of many examples, 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, there are gaps in the document production concerning Robertson himself, such as how he became aware of the alleged claims, what he then did, what instructions he gave to others, etc. Put simply, BP Amoco and BPCNA have been deprived of key evidence that would fill the gaps in FHR's document production. *See 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. Int'l Inc. v. Am. Fundware, Inc.*, 133 F.R.D. 166, 170 (D. Colo. 1990).

In sum, given its admitted conduct and unclean hands, FHR should not be permitted to benefit from the fact that the evidence it destroyed is now unavailable and thus BP Amoco cannot say with absolute precision what the missing evidence would have shown or exactly how it would have supported its positions. What we can say and do know, however, is that FHR was selective in its spoliation of both emails and physical evidence, choosing to save certain evidence while destroying other evidence going to the core of its claims. That fact alone is sufficient to support a finding of prejudice.

V. FHR'S BAD FAITH AND WILLFUL CONDUCT WARRANTS DISMISSAL OF ITS COUNTERCLAIMS, STRIKING OF FHR'S ANSWER, AND AN AWARD OF ATTORNEYS' FEES AND COSTS.

As FHR recognizes, sanctions are appropriate for spoliating evidence if there is evidence of willfulness, bad faith, or fault. *Maynard v. Nygren*, 332 F.3d 462, 468 (7th Cir. 2003); *Krumwiede v. Brighton Assocs. LLC*, 2006 WL 1308629, at *9 (N.D. Ill. May 8, 2006). FHR's response focuses on the "bad faith" element, which involves an intentional act or act in reckless disregard of a party's obligations, while "[f]ault does not refer to the non-complying party's subjective motivation, but rather describes the reasonableness of the conduct." *Krumwiede*, 2006 WL 1308629 at *9. Fault may be evidenced by "negligent actions or a flagrant disregard" of a party's duty to preserve evidence. *Wiginton v. Ellis*, 2003 WL 22439865, at *6-7 (N.D. Ill. Oct.

27, 2003); *see also Silvestri v. General Motors Corp.*, 271 F.3d 583, 593 (4th Cir. 2001); *Danis*, 2000 WL 1694325, at *34.

Here, FHR's conduct was intentional, deceptive, reckless, unreasonable and/or negligent, satisfying either the willfulness, bad faith or fault standard for imposing sanctions. ***First,*** it is undisputed FHR destroyed evidence at the heart of its claims, and did so (i) after it began to anticipate litigation, as confirmed by its privilege log; (ii) after it issued a legal hold notice requiring all evidence to be preserved, including emails in native format; (iii) after it sent a claims notice to BP Amoco alleging "tens of millions of dollars" in damages; (iv) after Robertson instructed BP Amoco to preserve its evidence; (v) after this litigation began; (vi) after BP Amoco reminded FHR of its obligations to preserve evidence and requested the opportunity to inspect any equipment before it was modified or removed; (vii) after Robertson was told by FHR's attorneys that his actions were "not acceptable"; (viii) after FHR employees attended meetings emphasizing the need to retain the key physical evidence that it later destroyed; and (ix) after FHR instructed its employees regarding evidence retention. Moreover, FHR destroyed evidence after assuring BP Amoco that it would not. If such conduct does not constitute bad faith, and willful intent, then it would be interesting to know FHR's definition of what would.

Second, FHR attempted during discovery to conceal its conduct from BP Amoco and the Court. It claimed its document production was finished when it was not. It told one story at Robertson's deposition, but tells another one now which reveals new facts of misconduct. It selectively asked for permission to destroy physical evidence, but not for the equipment at issue. It represented to BP Amoco in writing that it would not destroy evidence, but it did. ***Third,*** FHR had its CEO testify that although he deleted emails, he personally printed out hard copies of "all" emails before deleting them.

Last, when confronted with the undisputed facts in BP Amoco's motion, Robertson submitted an affidavit changing his story and testifying that, contrary to his deposition testimony, he did not save hard copies of "all" emails, but instead continued to delete certain emails from "strings" and deleted other emails related to the financial performance of the Joliet Plant, including at least 314 emails that were produced by other FHR employees. FHR's conduct is indistinguishable from the conduct at issue in *Kvitka*, 2009 WL 385582, at *4, where the court found that plaintiff acted in bad faith when she deleted emails and then "[W]hen confronted by defense counsel regarding her deception, she refused to answer questions, concocted an

outlandish story, and attempted to manipulate the facts of the case by substantively changing deposition testimony and an interrogatory answer [and]…gave no explanation for these changes."

The record establishes Robertson and others at FHR made a conscious decision to not retain evidence, and to destroy evidence, and also to pick and choose which evidence to destroy and which to keep. As in similar circumstances where core evidence has been spoliated, the only remedy to cure the prejudice is to dismiss all claims against the non-offending party and 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 v. General Motors Corp.*, 966 F.2d 220, 224 (7th Cir. 1992) (affirming the district court's sanction of dismissal and award of fees where plaintiff destroyed vehicle claimed to be defective); *see also* cases cited in BP Amoco's opening memorandum at 11-14.

Finally, in a last-ditch effort to avoid sanctions, FHR contends that BP Amoco waited too long and failed to consult with FHR before filing this motion. FHR's argument is based on the false premise that this is a "discovery motion." (FHR Opp. 27-29.) It is not.[11] BP Amoco's motion is a dispositive motion seeking the dismissal of FHR's counterclaims and the striking of FHR's answer to BP Amoco's declaratory judgment complaint or, in the alternative, the dismissal of certain FHR claims and an adverse inference jury instruction at trial. BP Amoco filed this motion more than eight months before trial and six months before the July 1, 2009 date

[11] Contrary to FHR's assertion, courts do not routinely treat motions for sanctions due to spoliation as Rule 37 discovery motions. Unlike here, the cases cited by FHR involved either discovery motions brought specifically pursuant to Rule 37 (because it involved a violation of a specific court order or discovery ruling) or motions to compel discovery that sought sanctions only in the alternative. *See Packman v. Chicago Tribune Co.*, 267 F.3d 628 (7th Cir. 2001) (involving motion to compel, not a sanctions motion for spoliating evidence); *Rowe v. Albertsons, Inc.*, 2004 WL 2252064, at *2 (10th Cir. Oct. 7, 2004) (sanctions motion brought specifically as a discovery motion); *Vukadinovich v. Griffith Pub. Sch.*, 2008 WL 5377720, at *1 (N.D. Ind. Dec. 18, 2008) (same); *Diersen v. Walker*, 2003 WL 21317276, at *3 (N.D. Ill. June 6, 2003) (violation of a specific court order); *Oldenkamp v. United Am. Ins. Co.*, 2008 WL 4682226, at *1 (N.D. Okla. Oct. 21, 2008) (involving a motion to compel or sanctions in the alternative); *Banks v. CBOCS West, Inc.*, 2004 WL 723767, at *1 (N.D. Ill. Apr. 1, 2004) (same); *Northwest Territory Ltd, P'ship v. Omni Properties, Inc.*, 2006 WL 3618215 (D. Colo. Dec. 11, 2006) (same); *Ferrone v. Onorato*, 2007 WL 2973684 (W.D. Pa. Oct. 9, 2007) (sanctions were requested in an opposition to a summary judgment motion where defendant would have no opportunity to respond); *Litetronics Int'l, Inc. v. Technical Consumer Prods., Inc.*, 2006 WL 2850514, at *1 (N.D. Ill. Sept. 28, 2006) (denying spoliation motion without any discussion of timeliness).

for the submission of proposed jury instructions in the final pretrial order.

Nor is this a motion "for an order compelling disclosure or discovery" under Federal Rule of Civil Procedure 37(a)—which includes the meet-and-confer requirement that also appears in Local Rule 37.2—or any other provision of Rule 37. *See* Fed. R. Civ. P. 37(a)(1); LR 37.2 (requiring consultation before filing "all motions for discovery and production of documents under Rules 26 through 37"). Because BP Amoco's motion is not based on the violation of a specific court order or discovery ruling, the Court's authority to sanction FHR under the present circumstances is inherent. *See, e.g.*, *Diersen*, 2003 WL 21317276, at *3 (a court's authority to sanction a party for the failure to preserve evidence is statutory under Rule 37 and inherent); *Old Banc One*, 2005 WL 3372783, at *2 ("A court may sanction a party pursuant to Rule 37 for discovery violations; however, these sanctions are limited to circumstances in which a party violates a court order or discovery ruling."). Thus, not surprisingly, FHR does not cite a single case (let alone one from this jurisdiction) holding that a party must meet and confer with opposing counsel before filing a motion for dismissal or for an adverse inference instruction based on the spoliation of evidence.[12]

FHR's contention that this is a "discovery motion" is ironic, as the whole point of this motion is to seek relief for FHR's destruction of evidence that can never be discovered. Unfortunately, there is no evidence to seek to compel here because FHR has destroyed it. FHR's timeliness argument is also misplaced, given that FHR attempted to conceal its misconduct from BP Amoco, and even to this day FHR continues to offer changing explanations for its actions. In fact, Robertson's affidavit—which reveals new facts regarding FHR's misconduct—was just

[12] FHR's argument that a meet-and-confer consultation is necessary before filing a dispositive motion is not only absent from the rules applicable here and unsupported by case authority, but it makes no sense. Rule 37's meet-and-confer obligation for discovery disputes, which this is not, is designed to require the parties to work out as many disputes as possible and to bring to the Court's attention only those they are unable to resolve and which thus require the Court's assistance. Here, there is no discovery dispute for the Court to resolve, nor could any meet-and-confer possibly produce a consensual resolution. Put simply, a meet-and-confer here would have been the ultimate act of unnecessary futility. BP Amoco has been prejudiced and FHR's claims should be dismissed as a sanction, as only that can protect BP Amoco's rights. FHR is never going to agree to that sanction; indeed, FHR complains that BP Amoco's motion is "reckless" and should not have been filed. Hence, the notion that FHR should be allowed to destroy evidence and get away with it because no futile and non-required meet-and-confer took place only underscores the extreme position and misconduct in which FHR has engaged.

filed; it would have been helpful to have known those facts when Robertson testified at deposition. Regardless, there is no "timeliness" bar to raising a party's spoliation of evidence, as even in cases of less severe spoliation, the issue of the destroyed evidence can and will be part of any trial and requested jury instructions. FHR's misconduct cannot be waived or excused, and FHR should not be rewarded for concealing its misconduct throughout and until the end of fact discovery. In addition, the spoliated evidence, particularly the physical evidence, relates to expert issues and expert discovery. Expert discovery just closed, on February 23, well after this motion was filed. Thus, even under FHR's novel theory, this motion is not untimely.

One final point: FHR's argument that spoliation can be waived and justified because the victim of the spoliating party's misconduct did not bring the terminating sanctions motion before the close of discovery is not only legally unsupported, it makes no sense. If a party chooses to destroy evidence, as FHR chose to do here, such misconduct will be part of the case before any trial, during any trial, and on appeal. Moreover, in any trial in this case, the issue of spoliation and the destroyed evidence will be a central part and theme of the trial, and the jury will have to consider the issue. This is not just because of the necessity for an adverse jury instruction, but also because BP Amoco and its witnesses will be entitled to bring out the facts regarding spoliation, particularly with respect to the destroyed physical evidence and the inability to have examined the condition of that evidence. In short, FHR's argument that it can spoliate and get away with it because BP Amoco did not bring a "discovery" motion is not the law and cannot immunize FHR from the consequences of its misconduct.

CONCLUSION

FHR's response and Robertson's affidavit only serve to confirm and compound the deliberate, undisputed and prejudicial nature of the spoliation facts giving rise to this motion. The intentional destruction of evidence, followed by FHR's shifting and less than honest stories, compromises the integrity of the judicial system and impairs and prejudices the rights of BP Amoco and BPCNA. As we said at the start of this brief, if FHR's spoliation conduct does not call for the requested sanctions, what spoliation conduct ever would? Because FHR's conduct taints this proceeding and any trial, BP Amoco and BPCNA respectfully request that the Court grant their motion for sanctions and award the relief requested in their motion.

Date: March 10, 2009

Respectfully submitted,

s/Marla Tun Conneely

One of the attorneys for BP Amoco Chemical Company and BPCNA

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2009, 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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