UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

ANDREA ROSSI and LEONARDO CORPORATION,

Plaintiffs,

v.

THOMAS DARDEN; JOHN T. VAUGHN, INDUSTRIAL HEAT, LLC; IPH INTERNATIONAL B.V.; and CHEROKEE INVESTMENT PARTNERS, LLC,

Defendants.

CASE NO. 1:16-cv-21199-CMA

INDUSTRIAL HEAT, LLC and IPH INTERNATIONAL B.V.,

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO CORPORATION,

Counter-Defendants,

and

J.M. PRODUCTS, INC.; HENRY JOHNSON; UNITED STATES QUANTUM LEAP, LLC; FULVIO FABIANI; and JAMES BASS

Third-Party Defendants.

DEFENDANTS' APPEAL OF MAGISTRATE JUDGE O'SULLIVAN'S DENIAL OF DEFENDANTS' MOTION FOR SANCTIONS BASED ON PLAINTIFFS' AND THIRD PARTY DEFENDANT J.M. PRODUCTS INC.'S SPOLIATION OF EVIDENCE

INTRODUCTION

Defendants Thomas Darden, John T. Vaughn, Industrial Heat, LLC ("IH"), IPH International B.V. ("IPH") and Cherokee Investment Partners, LLC hereby appeal Magistrate Judge O'Sullivan's April 20, 2017 denial of Defendants' motion for sanctions based on spoliation of evidence by Plaintiff Andrea Rossi, Plaintiff Leonardo Corporation ("Leonardo"), and Third-Party Defendants J.M. Products Inc. ("JMP") [D.E. 266].[1]

The issue presented is straightforward. It is undisputed that, as early as December of 2015, Plaintiffs and JMP reasonably anticipated this litigation. It is also undisputed that Plaintiffs filed this lawsuit against Defendants in April 2016. And it is undisputed that Plaintiffs destroyed evidence directly bearing on the lawsuit, including their breach-of-contract claim.

As shown below, there can be no legitimate question that the evidence Plaintiffs destroyed is material to determining whether Plaintiffs can meet their burden of proving their breach-of-contract claim at trial. Plaintiffs' explanation for their spoliation of evidence—that it was *Defendants'* burden to put Plaintiffs on notice that Plaintiffs should not destroy crucial evidence—is neither credible nor an accurate statement of the governing law. Under the law of the Eleventh Circuit, the elements of spoliation are firmly established here, and the Magistrate Judge erred in denying Defendants' motion for sanctions. The decision should be reversed.

BACKGROUND

I. Plaintiffs' Complaint

Plaintiffs brought this lawsuit on April 5, 2016 "to enforce the terms of the License Agreement" and to recover $89 million in damages. Compl. [D.E. 1] ¶¶ 6, 46.c. The License Agreement gave IH (among other things) a "license to use the E-Cat IP," which Plaintiffs

[1] Because counsel for Third-Party Defendants Fulvio Fabiani and United States Quantum Leap did not appear at the April 20, 2017 hearing, Defendants' motion for sanctions based on their spoliation of evidence was not addressed by the Magistrate Judge and is not ripe for appeal.

describe as "a revolutionary low energy nuclear reactor, . . . which through the use of a catalyst, generates a low energy nuclear reaction resulting in an exothermic release of energy at a cost well below more traditional sources." *Id.* ¶¶ 3, 6. Thus, according to Plaintiffs' Complaint, the E-Cat IP's value lies squarely in its purported ability to efficiently generate massive amounts of energy. Defendants obtained a license and transfer of the technology on the promise that it would produce the energy output Plaintiffs claimed.

The License Agreement conditioned Plaintiffs' receipt of payment on their successful completion of a test showing that the technology produced "revolutionary" measures of energy. Specifically, the License Agreement contained a payment schedule totaling $100.5 million over three installments, the third of which provided for an $89 million payment "after the successful completion of a three hundred fifty (350) day test period (hereafter the 'Guaranteed Performance Test')." *Id.* ¶ 46.c.

Plaintiffs allege that that they successfully completed the Guaranteed Performance Test as required by the License Agreement, and, therefore, are entitled to payment of $89 million.

II. The Spoliated Evidence

A simple reading of the Complaint makes clear that Plaintiffs were on notice that they were putting at issue their own compliance with their obligations under the License Agreement. Accordingly, they had an obligation to preserve evidence bearing on that compliance. Plaintiffs admit to having nonetheless destroyed evidence critical to proving the allegations in their Complaint, namely, whether "the E-Cat Unit had satisfied all of the performance requirements imposed by the License Agreement including, but not limited to, the requirement that the production of energy was at least six (6) times greater than the energy consumed." *Id.* ¶ 72.

Plaintiffs destroyed the following pieces of evidence that are important to meeting their burden of proof:

> (1) an **output pipe** that transported heated fluid from the one megawatt plant ("1MW Plant") operated by Leonardo at a warehouse in Doral, Florida (the "Doral Warehouse") to a walled-off container on the other side of the Doral Warehouse, which was allegedly owned by JMP but in fact controlled by Rossi;
>
> (2) a purported **heat exchanger** that operated to dissipate the heat from the massive amount of steam allegedly produced by the 1MW Plant and to convert that steam back into water, and
>
> (3) **email communications** between Rossi to Fabio Penon, the person who was to be monitoring, measuring and (ultimately) certifying the 1MW Plant's operations.

These three pieces of evidence—the output pipe, the purported heat exchanger, and the email communications—were crucial to determining the performance of the 1MW Plant.

A. Output Pipe

The 1MW Plant, which Plaintiffs purportedly operated at the Doral Warehouse from February 2015 through February 2016[2], was housed in a container on one side of the Doral Warehouse controlled by Plaintiffs, where it purportedly converted water into steam. The output pipe allegedly transported the steam into a separate, walled-off container on the other side of the Doral Warehouse, which, at the time, was said to be controlled by JMP.[3]

One of the criteria for achieving Guaranteed Performance under the License Agreement was that the 1MW Plant produce steam "consistently 100 degrees Celsius or greater." Compl. Ex. B § 5. Thus, if the output pipe carried water instead of pure steam, Plaintiffs could not have successfully completed the Guaranteed Performance Test. The 1MW Plant as originally constructed contained a steam trap/water collector on the output pipe to capture any water

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[2] Plaintiffs claim this was the "Guaranteed Performance" test under the License Agreement. As Defendants prove in their summary judgment motion, it could not be.

[3] Discovery in this litigation has revealed that the JMP side of the Doral Warehouse was actually controlled by Rossi.

flowing through it. Leonardo Dep. Ex. 9 (attached hereto as Exhibit 1). Rossi testified that during the purported Guaranteed Performance test, a concealed collector line was in fact put on the output pipe.[4] Leonardo Dep. (excerpts of which are attached hereto as Exhibit 2) at 175:6-181:7. If that collector contained water, it would mean that pure steam was not traveling though the pipe, despite the requirements of the License Agreement. On the other hand, if the collector was water-free, it would indicate that only steam was traveling through the output pipe. Dameron Dep. at 78:11-79:14; 200:6-201:6. Because Plaintiffs intentionally destroyed the output pipe, there is no way to now make that determination.

There is also testimony that Plaintiffs and JMP placed heating strips or cords on piping at the Doral Warehouse, which would have artificially heated the output pipe and distorted temperature measurements of the pipe's contents, thus rendering the purported Guaranteed Performance Test invalid. Rossi Dep. (excerpts of which are attached hereto as Exhibit 5) at 231:13-232:7; JMP Dep. (excerpts of which are attached hereto as Exhibit 6) at 245:14-246:25. Defendants have been unable to examine the output pipe to determine whether such heating strips/cords were placed on it because Plaintiffs and JMP destroyed the pipe. *See* Leonardo Dep. 272:22-273:8; JMP Dep. 81:21-82:14, 84:14-17. Defendants could not observe the heating strips while the 1MW Plant was in operation because the pipes were wrapped in insulation. *See* JMP Dep. Ex. 4 (attached hereto as Exhibit 7).

[4] Whether a water collector was in fact employed during the Guaranteed Performance Test is unclear—and unknowable—due to Plaintiffs' and JMP's spoliation of the evidence. The steam trap and water collector line installed by IH was removed. Dameron Dep. (excerpts of which are attached hereto as Exhibit 3) at 78:11-79:14; 200:6-201:6. Any new collector does not appear in any photographs of the 1MW Plant at the Doral Warehouse. Penon testified that he requested a collector line be installed on the Output Pipe and Rossi agreed, but Penon does not recall ever seeing a collector line on the Output Pipe. Penon Dep. (excerpts of which are attached hereto as Exhibit 4) at 162:5-163:6; 165:2-5.

Additionally, an inspection of the interior of the output pipe itself would have been another way to check if water or steam was flowing through the pipe because of water stain lines. However, because of Plaintiffs' and Third-Party Defendants' spoliation, such an inspection is no longer possible.

B. Heat Exchanger

According to Plaintiffs and JMP, the walled-off container controlled by JMP (and thus by Rossi) also housed a heat exchanger. Both Plaintiffs and Defendants have identified expert witnesses who agreed that, if the E-Cat technology works as Plaintiffs claim, without additional technology to manage the heat, the 1MW Plant would produce temperatures that would injure or kill people working inside the Doral Warehouse. The only difference between their opinions is that Plaintiffs' expert assumed the existence of a heat exchanger at the Doral Warehouse—even though he had never seen it, had never seen photographs of it, and had never seen any documentary evidence of it. All he could do, he explained, was take Rossi's word on it. Wong Dep. (excerpt of which are attached hereto as Exhibit 8) at 70:7-71:11; 99:1-23; 101:9-102:5. Absent this heat exchanger, Plaintiffs' expert agreed with Defendants' experts that the Doral Warehouse would have been too hot for humans to work in (and of course, any visitors would have immediately noticed the extraordinary temperature). Wong Dep. 146:20-149:19; Expert Disclosure of Joseph Murray (attached hereto as Exhibit 9) at 2.

To accomplish this critical function, the heat exchanger allegedly carried the steam from the JMP container to a second-story room on the JMP side of the Doral Warehouse. According to Plaintiffs, the second-story room contained fans that pushed the heat released from the steam out a window, allowing the steam to cool back to water, which was then returned through piping

to the walled-off container and ultimately back to the Plaintiffs' side of the Doral Warehouse.[5] Rossi Dep. 238:3-239:8. There are no photographs or records of this alleged heat exchanger.

C. Daily Emails

According to both Rossi and Penon (the individual who was to monitor and measure the 1MW Plant's operations), Rossi and Penon exchanged daily emails about the operation of the IMW Plant and the purported Guaranteed Performance Test. Penon Dep. at 108:20-109:2-17; Leonardo Dep. 16:10-17:1; 37:5-39:24. The information contained in those daily emails, the data attached to those daily emails, and whatever else was communicated in those e-mails directly bears on whether Plaintiffs met their obligation to demonstrate the 1MW Plant's performance under the License Agreement. Defendants cannot review those hundreds of e-mails because the e-mails have mysteriously and inexplicably been erased.

III. Defendants' December 2015 Letter to Plaintiffs and Plaintiffs' Subsequent Destruction of Evidence

There can be no dispute that by December 2015, Plaintiffs and JMP reasonably anticipated there would be litigation over whether Plaintiffs' operation of the 1MW Plant constituted "guaranteed performance." On December 4, 2015, IPH's counsel sent a letter to Plaintiffs' counsel advising Plaintiffs, among other things, that what they were doing at the Doral Warehouse did not satisfy Plaintiffs' Guaranteed Performance Test obligations under the License Agreement. *See* Exhibit 11 hereto. A few days later, IH requested to visit the Doral Warehouse to inspect the 1MW Plant. *See* Johnson Dep. Ex. 40 (attached hereto as Exhibit 12). The same day, JMP told IH (a) that Plaintiffs' counsel had insisted that IH *not* be permitted to access the

[5] Most of the power needed to turn water into steam comes from the last degree of Celsius. Thus, in order for the 1MW Plant to turn water into steam at 100 degrees Celsius, it would have to produce many times more energy than one that only heats water to 99 degrees Celsius. Expert Report of Rick Smith (attached hereto as Exhibit 10) at 9. The production of this single degree of energy is at the heart of Rossi's allegedly "revolutionary" invention.

Doral Warehouse, and further (b) that Plaintiffs believed IH had breached the License Agreement. *See* Johnson Dep. Ex. 41 (attached hereto as Exhibit 13). Several days later, Plaintiffs' counsel sent a letter expressly accusing "IH and/or IPH" of "anticipatory repudiation of the License Agreement." *See* Johnson Dep. Ex. 42 (attached hereto as Exhibit 14). Thus, as early as December of 2015, Plaintiffs had threatened litigation over enforcement of the License Agreement which, as their Complaint acknowledges, requires *their own compliance* with the Guarantee Performance Test requirement.

Plaintiffs claim that they completed the Guaranteed Performance Test in February 2016. In March of 2016, counsel for both parties jointly put a padlock on the 1MW Plant side of the Doral Warehouse. April 20, 2017 Hearing Tr. (attached hereto as Exhibit 15) at 8-9. Plaintiffs thus understood that the Doral Warehouse contained material evidence that had to be preserved for purposes of Plaintiffs' impending lawsuit against Defendants. At that time, Defendants were not allowed access to the walled-off container side of the Doral Warehouse, and Plaintiffs did not disclose that JMP—the supposed controller of the walled-off container side of the Doral Warehouse—was itself controlled by Rossi. Nor did Plaintiffs disclose that the area contained a so-called heat exchanger. Details about the alleged existence of the heat exchanger was only brought to Defendants' attention much later—during February 2017 deposition in this case. Rossi Dep. at 235:5-237:18. Accordingly, Defendants were in no position in March 2016 to insist that the contents of the JMP side of the Doral Warehouse also be somehow locked down and preserved for purposes of Plaintiffs' lawsuit, or to believe that Plaintiffs would destroy evidence on the JMP side of the Doral Warehouse.

Plaintiffs do not dispute that they subsequently destroyed the output pipe. Not only did they take down the output pipe, but they claim to have disassembled it (unnecessarily) and used

it for other purposes at the Doral Warehouse. Leonardo Dep. 272:22-273:8. Although Defendants were made aware in 2016 that the output pipe had been taken off the 1MW Plant, they had no reason to know or believe that Plaintiffs had taken apart the output pipe and allegedly "repurposed" the piping rather than store it in a safe place where it could be examined during discovery. The reasons for this extraordinary destruction of material evidence are indefensible; as Defendants explained at the April 20 hearing: Piping is hardly a rare commodity, and if Plaintiffs needed pipes for any reason, they could have easily bought new pipe at Home Depot without impacting material evidence in Plaintiffs' pending $89 million lawsuit.

Without the alleged heat exchanger that Plaitniffs and JMP claim once existed, the 1MW Plant could not have safely produced the unprecedented levels of energy that Plaintiffs claim. Yet it is undisputed that, despite Defendants' repeated discovery requests, Plaintiffs have produced no physical evidence demonstrating the existence of the heat exchanger—no photographs,[6] no building plans, no receipts for the labor[7] or building materials.[8]

Plaintiffs claim that they took down the heat exchanger after completion of the purported Guaranteed Performance Test. Rossi Dep. 236:10-237:18; JMP Dep. 94:1-6. If that is the case, as with the output pipe, Plaintiffs were under an obvious obligation to store the heat exchanger in anticipation of discovery in their lawsuit. Rather, they claim to have disassembled it and put all its components—including the piping, the fans, and the wood housing—to alternative uses in the Doral Warehouse. Leonardo Dep. 273:24-274:5. Again, this was obviously unnecessary since new pipe, new wood, and even new fans could be easily purchased. Plaintiffs' actions thus made

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[6] *See* Rossi Dep. 235:5-9; 238:3-240:6; Leonardo Dep. 269:18-271:21; JMP Dep. 114:14-117:12; 120:9-124:25.

[7] Leonardo Dep. 265:1-266:15; 288:21-290:6; Rossi Dep. 235:10-236:17; 291:13-19; JMP Dep. 140:10-141:14; 153:13-23; 156:20-157:21.

[8] Leonardo Dep. 266:16-267:4; JMP Dep. 142:5-143:4; 144:20-145:23; 157:22-158:2.

it impossible for Defendants' experts to examine the heat exchanger and its purported cooling properties, which are essential to Plaintiffs' ability to prove that they complied with the terms of the License Agreement.

As Rossi admitted in his Rule 30(b)(6) testimony for JMP, he was fully in charge of and running JMP at the Doral Warehouse and, as a result, entirely capable of destroying the output pipe and heat exchanger evidence. JMP Dep. 8:19-24; 17:11-16; 22:16-23:1. When Rossi destroyed the output pipe and the alleged heat exchanger, therefore, he did so on behalf of both Leonardo and JMP.

IV. The April 20, 2017 Hearing and Magistrate Judge's Ruling

As a consequence of Plaintiffs' spoliation, Defendants moved for sanctions before the Magistrate Judge, pursuant to the court's "inherent power to manage its affairs and to achieve the orderly and expeditious disposition of cases," as well as to insure the integrity of the judicial process. *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005).[9] Defendants also moved for sanctions against JMP, which was admittedly run by Rossi—although this fact was concealed from Defendants at the time of the filing of the complaint as well as the spoliation of evidence.

On April 20, 2017, the Magistrate Judge held a hearing on Defendants' spoliation motion. At the hearing, Plaintiffs' counsel conceded that the output pipe "did exist at one time." April 20, 2017 Hearing Tr. at 20. As for the heat exchanger, he stated that "we certainly claim it exists." *Id.* at 26. He also represented that "[m]y client has testified that he sent emails on a daily basis" but "[w]e don't know what happened to them." *Id.* at 32. He added that "the email

[9] To the extent required to provide them full relief, Defendants also requested that the court impose sanctions if needed pursuant to Federal Rule of Civil Procedure 37.

communications between Dr. Rossi and . . . Dr. Penon is [sic], I have to say, would be material to the case." *Id.* at 31. Yet all of this is now gone.

As for notice, Plaintiffs' counsel represented that "in December 2015, it was clear that litigation was going to ensue if they didn't pay, and that was the issue that we raised. We said this is the guaranteed performance test, you need to show us and we asked for reasonable assurances that they would pay upon the conclusion." *Id.* at 20.

Plaintiffs' counsel nonetheless suggested it was Defendants' burden to "raise[] any issue with, you know, problems with the test, or errors or manipulation of the measurements or otherwise" and that, absent such notice, Plaintiffs were under no obligation to preserve – but in fact could intentionally destroy – the output pipe, the heat exchanger, or the daily emails. *Id.* at 20. This argument was erroneous as a matter of law. However, the Magistrate Judge adopted Plaintiffs' reasoning as justification for denial of Defendants' motion: "Also find that the Plaintiffs were not aware of the allegations of manipulation of the tests until August of 2016, and that's the earliest that they would have been on notice of a duty to preserve, so the duty to preserve has not been shown prior to August of 2016." *Id.* at 46. The Magistrate Judge—without citation to authority—further concluded that the instant motion "is out of time" because "the Defendant became aware of the removal of the pipe in approximately March 2016 and didn't bring this matter to the court's attention until approximately a year later." *Id.* There is no authority for the Magistrate Judge's timeliness argument in the context of spoliation, and his decision should be reversed.

ARGUMENT

Under Fed. R. Civ. P. 72(a), a district court must modify or vacate a magistrate judge's order that "is clearly erroneous or is contrary to law." *In re O'Keeffe*, 184 F. Supp. 3d 1362,

1366 (S.D. Fla. 2016) (quoting Rule 72(a)). "An order is contrary to law when it fails to apply or misapplies . . . case law." *Id.*[10] Here, the Magistrate Judge misapplied this Circuit's law governing spoliation. Accordingly, his denial of Defendants' motion for sanctions should be reversed.

I. Plaintiffs and JMP Indisputably Violated Their Duty to Preserve Evidence

Courts generally ask four questions in cases involving possible spoliation of evidence: (a) *when* does the duty to preserve evidence attach; (b) *what* must be preserved; (c) *how* must a party preserve evidence; and (d) *who* is responsible for making sure that the obligation is met. *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, No. 09-61166-CIV, 2011 WL 1456029, at *11 (S.D. Fla. Apr. 5, 2011). By faulting *Defendants* for not putting Plaintiffs on notice that they had to preserve certain evidence under Plaintiffs' control and material to Plaintiffs' case on the merits, the Magistrate Judge got the applicable law exactly backwards.

As to the *when* question, the duty to preserve attaches once litigation was reasonably anticipated. *Managed Care Solutions., Inc. v. Essent Healthcare, Inc.*, 736 F. Supp. 2d 1317, 1324 (S.D. Fla. 2010). It is undisputed that Plaintiffs reasonably anticipated litigation regarding the parties' respective obligations under the License Agreement as early as December 2015—several months before Plaintiffs and JMP evidence material to that issue. *See* April 20, 2017 Hearing Tr. at 20. *Cf. Managed Care Solutions., Inc.*, 736 F. Supp. 2d at 1326 (S.D. Fla. 2010) (finding that litigation should have been reasonably anticipated when "counsel for the defendant sent counsel for the plaintiff a letter outlining the defendant's position with respect to some of

[10] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *In re O'Keeffe*, 184 F. Supp. 3d at 1366 (citing *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1523 (11th Cir. 1997)).

the provisions . . . which the Plaintiff claimed had been breached"); *Se. Mech. Servs., Inc. v. Brody*, No. 8:08-CV-1151T30EAJ, 2009 WL 2242395, at *3 (M.D. Fla. July 24, 2009) ("SMS undoubtedly anticipated litigation when it sent TEI a demand letter on June 3, 2008.").

As to the *what* question, courts in this Circuit have made clear that "parties are well advised to retain all relevant documents . . . in existence at the time the duty to preserve attaches." *Point Blank Solutions, Inc.*, 2011 WL 1456029, at *11 (quotation omitted). As Plaintiffs admitted, all three categories of information—the output pipe, the heat exchanger, and the daily emails—were in existence in December of 2015, or at least with respect to the emails in particular, the parties had no reason to believe they were not in existence then (and in fact additional emails were being created between Rossi and Penon after December 2015). *See* April 20, 2017 Hearing Tr. at 20, 26, 31.

As to the *how* question, "a litigation hold must be implemented—and affirmative steps must be taken to monitor compliance so that all sources of discoverable information are identified and searched." *Point Blank Solutions, Inc.*, 2011 WL 1456029, at *12 (quotation omitted). "After that, the duty to preserve persists through the discovery process and litigants must ensure that all potentially relevant evidence is retained." *Id.* (citations omitted). Plaintiffs cannot argue that complete dismemberment and alleged reuse of the output pipe and purported heat exchanger, as well as an unexplained purging of the hundreds of daily Rossi-Penon emails, are sufficient means of preserving evidence. Had Plaintiffs merely taken apart the output pipe and the components of the heat exchanger and put them into storage, Defendants' ability to fully assess the evidence might have been hampered, but they would at least have had access to the equipment in some usable form. The actions of Plaintiffs and JMP are akin to tossing it all in a

bonfire—a far cry from taking affirmative steps to preserve the evidence so that the parties can examine it during discovery.

Finally, as to the *who* question, the law is clear that *Plaintiffs* bore the obligation of retaining relevant objects, data and documents, including emails. *Managed Care Solutions., Inc.*, 736 F. Supp. 2d at 1324. Plaintiffs offered no support for their contrary claim before the Magistrate Judge that no such duty attached until *Defendants* put them on particularized notice that each of these categories of evidence should be retained for purposes of Plaintiffs' lawsuit. Indeed, such a standard would be nonsensical, as Defendants did not even know of the existence of the heat exchanger or the daily emails until February 2017 – long after Plaintiffs and JMP destroyed the evidence – and they did not know that Plaintiffs destroyed the output pipe (as opposed just to taking it down) until February 2017 as well. There is accordingly no dispute that, with respect to the output pipe, heat exchanger, and daily emails, Plaintiffs failed to meet *their* retention obligations.

II. Plaintiffs' and JMP's Failure to Meet Their Duty to Preserve Evidence Amounts to Spoliation

Spoliation is "the destruction of evidence or the significant and meaningful alteration of a document or instrument." *Point Blank Solutions, Inc.*, 2011 WL 1456029, at *8 (citing *Green Leaf Nursery v. E.O. DuPont de Nemours & Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003)). As it is beyond dispute that Plaintiffs and JMP knowingly destroyed or failed to properly retain the output pipe, heat exchanger, and daily emails, all that is before Court is whether Plaintiffs' and JMP's failure to meet their duty to preserve evidence amounts to spoliation and, if so, what is the appropriate sanction.

"Generally, spoliation is established when the party seeking sanctions proves (1) that the missing evidence existed at one time; (2) that the alleged spoliator had a duty to preserve the

evidence; and (3) that the evidence was crucial to the movant being able to prove its *prima facie* case or defense." *Floeter v. City of Orlando*, No. 6:05-cv-400-Orl-22KRS, 2007 WL 486633, at *5 (M.D. Fla. Feb. 7, 2007) (citations omitted). As explained above, according to Plaintiffs' counsel at the April 20, 2017 hearing before the Magistrate Judge, the first two factors are met in this case with respect to all three categories of destroyed or missing information.

The only question remaining regarding spoliation, therefore, is whether the destroyed evidence was crucial to the defense of Plaintiffs' breach of contract claim regarding the parties' respective obligations under the Licensing Agreement. "In meeting the requirement to demonstrate that the spoliated evidence was crucial to the movant's ability to prove its *prima facie* case or defense, it is not enough that the spoliated evidence would have been relevant to a claim or defense." *Point Blank Solutions, Inc.*, 2011 WL 1456029, at *8 (citation omitted). But in this case, the spoliated evidence goes to the very heart of Plaintiffs' claims, including their foundational breach of contract claim.

Plaintiffs prominently allege in their complaint that they fully complied with the License Agreement, including its requirement that they successfully conduct a Guaranteed Performance Test showing that the steam carried by the output pipe was consistently at least 100 degrees Celsius. *See* Compl. Ex. B. § 5, ¶¶ 46.c, 71-74. As noted above, if the output pipe carried water instead of steam, Plaintiffs did not satisfy their obligations under the License Agreement. Plaintiffs contend that the pipe carried pure steam; Defendants contend it did not. Because Plaintiffs and JMP destroyed the output pipe, it could not be examined for signs of water flowing through the pipe, and Defendants' ability to mount a defense on the merits is materially and unjustifiably hampered.

The alleged heat exchanger is also clearly critical to Plaintiffs' breach of contract claim. The parties' experts agree that without the heat exchanger, the 1MW Plant—if functioning as claimed—would produce temperatures that were too high for employees and visitors of the Doral Warehouse to sustain. In other words, without a heat exchanger, the only possible conclusion is that the 1MW Plant did not perform as Plaintiffs claim, eliminating any further financial obligations of IH or IPH under the License Agreement. One can scarcely imagine evidence that is more crucial to Plaintiffs' breach-of-contract claim.

Lastly, both Rossi and Penon testified that they had daily email communications about the operation of the 1MW Plant during the supposed Guaranteed Performance Test—the very test upon which Plaintiffs are relying to claim an entitlement to $89 million under the License Agreement. *See* Penon Dep. 190:2-17; Leonardo Dep. 37:5-39:24. What was said in all of those emails cannot be examined because Plaintiffs either destroyed or failed to properly retain the emails. Nor can Defendants ascertain what data was attached to or included in those emails, or how that data may have been changed over time. The destruction of this information is analogous to a hospital in a malpractice action destroying a patient's contemporaneous medical chart and preserving only a retained expert's report. The third element of the Eleventh Circuit's spoliation test—materiality to the Plaintiffs' claims or their defense—is thus amply met here.

III. Sanctions Are Warranted

Finally, sanctions are plainly warranted for the blatant destruction of material evidence in this case. Although one of the leading cases in the Eleventh Circuit does not include "intentional" in its definition of spoliation, *see Point Blank Solutions, Inc.*, 2011 WL 1456029, at *8 (citing *Green Leaf Nursery*, 341 F.3d at 1308), lower courts are split on the question of whether—in addition to the three-part test discussed above—there must be a showing of bad

faith on the part of the spoliator for it to be liable for sanctions, *see Managed Care Solutions, Inc.*, 736 F. Supp. 2d at 1328 n.16 (discussing disagreement). Even assuming arguendo that an additional bad faith element applies for purposes of obtaining spoliation sanctions in this Circuit, direct evidence of bad faith/malice is definitely *not* required. Rather, "[i]n order to obtain spoliation sanctions," the movant "must show, through direct *or circumstantial evidence*, that the defendant acted in bad faith." *Managed Care Solutions, Inc.*, 736 F. Supp. at 1329 (emphasis added). This inquiry turns on a number of factors, including whether:

> (1) evidence once existed that *could fairly be supposed to have been material* to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an *affirmative act* causing the evidence to be lost; (3) the spoliating party did so *while it knew or should have known of its duty to preserve* the evidence; and (4) the affirmative act causing the loss *cannot be credibly explained* as not involving bad faith by the reason proffered by the spoliator.

Id. at 1331 (emphasis added).

Factors (1), (2) and (3)—materiality to a claim or defense, an affirmative act causing evidence to be lost, and knowledge of a duty to preserve—are all satisfied with respect to the output pipe and the heat exchanger (if not the mysteriously missing daily emails, as well). Regarding the fourth factor—whether the affirmative act causing the loss cannot be credibly explained by something other than bad faith—the transcript of the April 20, 2017 hearing is telling. Plaintiffs' counsel stated that the output pipe "was removed at the time because . . . the pipe was repurposed. It was used in another project that was ongoing at the plant." April 20, 2017 Hearing Tr. at 25. This is patently frivolous since piping is readily available, so if piping was needed for another project, Plaintiffs could have bought new piping cheaply.

As for the heat exchanger, Plaintiffs' counsel literally had nothing to say as to why—if it existed at all—the heat exchanger was destroyed. Counsel instead rhetorically punted the issue on spurious grounds that Defendants must first choose whether the heat exchanger did or did not

actually exist. *Id.* at 26. Absent a definitive choice on Defendants' part, Plaintiffs' counsel argued, they are not obliged to identify a credible reason for destroying the heat exchanger. Of course, this argument makes no sense (in addition to making a mockery of the federal rules). The entire reason for the instant motion is that the spoliation of evidence by Plaintiffs and JMP rendered it *impossible* for Defendants to discover the facts regarding the heat exchanger. Moreover, if there never was a heat exchanger, then Plaintiffs and JMP each committed blatant perjury at their depositions (by claiming one did exist); if a heat exchanger did exist, Plaintiffs and JMP intentionally destroyed evidence. Either way, the most severe of sanctions against Plaintiffs and JMP is warranted.

Likewise, Plaintiffs' counsel argued that, although the emails concededly existed, they have disappeared into thin air with zero explanation whatsoever. *See id.* at 31. Since no credible explanation is *per se* an insufficient explanation, the Court should find that bad faith exists as to the output pipe, heat exchanger and the daily emails (to the extent such a showing is required at all), and impose sanctions.

In the Eleventh Circuit, sanctions for spoliation include dismissal of the case, exclusion of expert testimony, or "instructing the jury that spoliation of evidence raises a presumption against the spoliator." *Walter v. Carnival Corp.*, No. 09-20962-CIV, 2010 WL 2927962, at *2 (S.D. Fla. July 23, 2010) (citing *Flury*, 427 F.3d at 945). Dismissal is warranted where the spoliator knows the opposing party would want to examine the material evidence it destroyed. In *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944-45 (11th Cir. 2005), for example, the court found that dismissal was necessary where the plaintiff destroyed an automobile involved in an accident, reasoning that "plaintiff should have known that the vehicle . . . needed to be preserved and examined as evidence central to his case. Plaintiff's failure to preserve the vehicle resulted

in extreme prejudice to the defendant, and failure to respond to defendant's letter displayed a clear dereliction of duty." Similarly, in *Simon Prop. Grp, Inc. v. Lauria*, No. 6:11-CV-01598-ORL-31, 2012 WL 6859404 (M.D. Fla. Dec. 13, 2012), *report and recommendation adopted,* 6:11-CV-1598-ORL-31, 2013 WL 152525, at *9 (M.D. Fla. Jan. 15, 2013), the court entered a default against a party who had destroyed information on a laptop computer, finding that such actions "are at least as flagrant as those of the Plaintiff in *Flury*[,] in which the Eleventh Circuit imposed the ultimate sanction of dismissal." In light of the compound and egregious spoliation by Plaintiffs and JMP in this case, dismissal of Plaintiffs' claims, and judgment for IH and IPH on their claims, is proper.

Alternatively, numerous courts in this Circuit also have imposed the sanction of an adverse inference against a party that failed to preserve material evidence without a compelling justification. *See e.g., Austrum v. Fed. Cleaning Contractors, Inc.,* 149 F.Supp.3d 1343 (S.D. Fla. 2016); *Swofford v. Eslinger*, 671 F. Supp. 2d 1274 (M.D. Fla. 2009); *Southeastern Mechanical Servs., Inc. v. Brody*, 657 F. Supp. 2d 1293 (M.D. Fla. 2009); *St. Cyr v. Flying J Inc.*, No. 3:06-cv-13-33TEM, 2007 WL 1716365 (M.D. Fla. June 12, 2007); *Morrison v. Veale*, No. 3:15-cv-1020-TFM, 2017 WL 372980, at *8 (M.D. Ala. Jan. 25, 2017). Here too, if the Court refuses to dismiss Plaintiffs' claims and grant judgment to IH and IPH on its claims, and if this case goes to trial, the jury should be instructed that:

(a) examination of the output pipe—had it been properly preserved—would have demonstrated that the 1MW Plant was not producing steam as Plaintiffs claim;

(b) the alleged heat exchanger that Rossi, Leonardo and JMP claim existed in fact did not exist, which means the 1MW Plant could not have been producing the steam output Plaintiffs claim;

(c) Rossi's email communications with Penon would have demonstrated that Rossi and Leonardo were manipulating the claimed results of the Guaranteed Performance Test; and

(d) Rossi, Leonardo, and JMP intentionally deceived IH and IPH about the operations of the 1MW Plant at the Doral Warehouse and the Guaranteed Performance Test and obstructed IH and IPH's ability to learn the truth about those activities.

CONCLUSION

For the foregoing reasons, the Court should reverse the Magistrate Judge's April 20, 2017 Order [D.E. 266] (attached hereto as Exhibit 16).

Dated: May 4, 2017

Respectfully submitted,

/s/ Christopher R. J. Pace

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel or parties of record.

/s/ Erika S. Handelson
Erika S. Handelson