

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 1:16-cv-21199-CIV-ALTONAGA/O'Sullivan

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.

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

Counter-Plaintiffs,

v.

ANDREA ROSSI and LEONARDO
CORPORATION,

Counter-Defendants,

v.

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

Third-Party Defendants.

**J.M. PRODUCTS, INC.'S RESPONSE IN OPPOSITION TO 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 SPOILIATION OF EVIDENCE**

Third-Party Defendant, J.M. Products, Inc., ("J.M. Products"), by and through their

undersigned counsel, hereby files its response in opposition to 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 [ECF No. 285] ("Appeal"), and states as follows:

INTRODUCTION

J.M. Products hereby incorporates and adopts Plaintiffs' Response in Opposition to 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 [ECF No. 305] herein by reference.¹

ADDITIONAL ARGUMENT

As noted by Judge O'Sullivan, the parties did not have a duty to preserve the output pipe or heat exchanger until, at the earliest, Defendants filed their counterclaim and third-party claims on August 5, 2016. In order for there to be a duty to preserve evidence, there must be a reasonable anticipation of litigation involving the allegedly spoliated evidence. *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F.Supp.2d 1317, 1326 (S.D. Fla. 2010); *See also Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303, 1313 (N.D. Fla. 2002) (Where plaintiff did not notify defendant of plaintiff's intent to file suit or request to inspect or maintain evidence, a duty to preserve based on anticipation of litigation did not arise – "It is essentially impossible for everyone ... to hold onto every piece of potential evidence just because there is a possibility that litigation may arise sometime in the future."). Contrary to Defendants' position, the parties could not have reasonably anticipated that the output pipe or heat exchanger would be an issue in

¹ The Defendants' Appeal [ECF No. 285] and the Plaintiffs' Response [ECF No. 305] also include argument regarding communications between Rossi and Fabio Penon, which does not pertain to J.M. Products. Accordingly, JM Products adopts only those portions of Plaintiffs' Response [ECF No. 305] relating to the output pipe and heat exchanger.

future litigation. The letter on which Defendants' rely only advises J.M. Products as to Industrial Heat's belief that J.M. Products breached the Term Sheet by allegedly denying an employee access to the Plant and potentially an alleged failure to provide sufficient security for the Plant. Similarly, as noted in Plaintiffs' Response [ECF No. 305], the letters between Plaintiffs and Defendants address only breaches of the License Agreement and with respect to the guaranteed performance test, only the timing. The output pipe and the heat exchanger are not relevant to any of the issues that J.M. Products could have reasonably anticipated litigation over. Accordingly, J.M. Products did not have a duty to preserve the output pipe or heat exchanger.

Neither the output pipe nor the heat exchanger is crucial to proving or disproving any claim or defense in this matter. "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." *Wandner v. American Airlines*, 79 F.Supp.3d 1285, 1296 (S.D. Fla. 2015) (internal citations omitted) (emphasis in original). Although the output pipe and heat exchanger are relevant to Defendants' claims, such evidence is not crucial because it would be cumulative to other evidence already obtained. *See* ECF No. 305-1 at 46-47. Defendants seem to concede this point as they offer no argument that the evidence is not cumulative and instead reiterate their position that the evidence is critical to their claims and/or defenses.

Lastly, there is no evidence to support Defendants' position that J.M. Products acted in bad faith. There is no evidence that establishes that J.M. Products destroyed or removed the output pipe or the heat exchanger. Instead, Defendants cite to deposition testimony that Rossi removed the output pipe and heat exchanger. Defendants then attempt to attribute Rossi's actions to J.M. Products (and Leonardo) simply because Rossi was the technical and scientific director

of J.M. Products while it operated at the Doral facility. However, Defendants do not have any evidence that establishes whether Rossi was acting on his own or on behalf of Leonardo or J.M. Products. Simply because a person might wear several “hats” does not mean that such person is wearing all of those “hats” at once, or at all times.

Even assuming, *arguendo*, that Rossi was acting on behalf of himself, Leonardo and J.M. Products as Defendants suggest, there remains no evidence of bad faith. “[D]istrict courts in our Circuit regularly deny adverse inference requests even when there is an indisputable destruction of evidence.” *Wandner*, 79 F.Supp.3d at 1299. In this case, Defendants do not have any direct or circumstantial evidence that supports their conclusion that Plaintiffs and J.M. Products destroyed the evidence solely to interfere and seek to affect the outcome of the instant action. The evidence establishes that the materials from the output pipe and the heat exchanger were repurposed for other projects. The facts also establish that neither Plaintiffs nor J.M. Products had an obligation to preserve the evidence. Accordingly, Defendants have failed to demonstrate that the handling of the output pipe and the heat exchanger amounted to bad faith. *See Assimack v. J.C. Penney Corp.*, 2005 WL 219422 (M.D. Fla. 2005) (Holding that there was no bad faith where defendant removed the autopole that struck plaintiff and reinstalled the autopole in a different location without marking it for future identification, making it impossible to identify the specific autopole at issue); *See also Wandner*, 79 F.Supp.3d at 1300 (“When a party’s actions lead to the destruction of evidence but were not done in bad faith, then sanctions are inappropriate”)

WHEREFORE, Third-Party Defendant J.M. Products, Inc. respectfully requests that this Court enter an order affirming Judge O’Sullivan’s Order [ECF No. 266] and for such other and further relief as the Court may deem just and proper.

Dated: May 18, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 18, 2017, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. Copies of the foregoing document will be served on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

/s/ Francisco J. León de la Barra
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