

**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., HENRY JOHNSON, AND JAMES A. BASS' RESPONSE IN
OPPOSITION TO DEFENDANTS' CONSOLIDATED MOTION IN LIMINE**

Third-Party Defendants, J.M. Products, Inc., Henry Johnson, and James A. Bass,
(collectively, "Third-Party Defendants"), by and through their undersigned counsel, hereby

respond to Defendants' Consolidated Motion in Limine [ECF No. 264] ("Motion"), and state as follows:

1. Defendants' request for spoliation sanctions is improper, lacks merit, and should be denied

Defendants claim that Plaintiffs in bad faith destroyed critical evidence in this case, including, *inter alia*, piping that transported steam from the Plant to a container operated by J.M. Products (defined in the Motion as the "Output Pipe") and a heat exchanger that dissipated heat from the steam produced by the Plant, and attempt to attribute such actions to Third-Party Defendant J.M. Products, Inc. ("J.M. Products"). Defendants request an adverse inference jury instruction against Plaintiffs and J.M. Products due to the purported spoliation of evidence. Defendants' Motion should be denied as improper and because the Motion lacks merit.

As a preliminary matter, Defendants' request for spoliation sanctions is improperly raised in a motion in limine. *See Buy-Low Save Centers, Inc. v. Glinert*, 547 So. 2d 1283 (Fla. 4th DCA 1989) ("Generally, the purpose of a motion in limine is to prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial.") Accordingly, the Motion should be denied.

In addition, Defendants previously raised their request for spoliation sanctions at a hearing before Judge O'Sullivan on April 20, 2017. After hearing argument from counsel, Judge O'Sullivan denied Defendants' Motion for Sanctions [ECF No. 266], finding that there was no duty to preserve at the time the actions took place, the evidence was not crucial, and there was no evidence of bad faith. Defendants' improperly raise the issue in their Motion in an attempt to appeal the ruling [ECF No. 266]. Accordingly, the Motion should be denied.

In order to establish spoliation, Defendants' must prove that (i) the missing evidence existed at one time, (ii) that the alleged spoliator had a duty to preserve the evidence, and (iii)

that the evidence was crucial to the movant being able to prove its prima facie case or defense. *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F.Supp.2d 1317, 1323-24 (S.D. Fla. 2010). In order to obtain spoliation sanctions, Defendants must show, through direct or circumstantial evidence, that J.M. Products acted in bad faith. *Id.* at 1328.

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. *Id.* at 1326; *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.). Contrary to Defendants’ position, the parties could not have reasonably anticipated that the Output Pipe or heat exchanger would be an issue in 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, the letters between Plaintiffs and Defendants address only breaches of the License Agreement. 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 also Managed Care Solutions*, 736 F.Supp.2d at 1327.

Lastly, there is no evidence 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 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.

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. ECF No. 264 at 11. 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 where defendant removed the pole that struck plaintiff and reinstalled the pole in a different location

without marking it for future identification, there was no bad faith); *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”)

For the foregoing reasons, Defendants’ Motion must be denied.

2. Defendants’ request to preclude Third-Party Defendants from presenting expert testimony is overbroad and should be denied.

To the extent that Defendants are attempting to preclude Third-Party Defendants from presenting Rossi, Penon, Bass or any other witness to testify about their personal knowledge simply because they were not designated as expert witnesses, such a request is improper and should be denied. Whether any particular opinion testimony is that of an expert or a lay witness is better addressed by objection on a matter-by-matter basis, if and when such issues arise. *See, e.g., AEM, Inc. v. United States, IRS (In re Mirabilis Ventures, Inc.)*, No. 6:08-bk-04327-KSJ, 2012 Bankr. LEXIS 1287 (Bankr. M.D. Fla. Mar. 21, 2012) (denying a motion in limine and holding that the court will rule on contemporaneous objections to testimony because the scope of the testimony was undetermined). Defendants’ attempt to preclude Third-Party Defendants from presenting Rossi, Penon, Bass or others to testify should be denied.

3. Conclusion

For the foregoing reasons, Third-Party Defendants J.M. Products, Henry Johnson, and James A. Bass respectfully request that this Court enter an order denying Defendants’ Combined Motion in *Limine*, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted this 2nd day of May, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 2, 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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