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**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC**

In the Matter of

CERTAIN OPAQUE POLYMERS

)
) **Investigation No. 337-TA-883**
)
)

ORDER NO. 27, INITIAL DETERMINATION:

- (1) FINDING SPOILIATION OF EVIDENCE;
- (2) GRANTING DEFAULT JUDGMENT AGAINST RESPONDENTS ON COMPLAINANTS' CLAIM OF TRADE SECRET MISAPPROPRIATION AS A SANCTION FOR SPOILIATION OF EVIDENCE; AND
- (3) IMPOSING AS AN ADDITIONAL SANCTION THAT RESPONDENTS BE REQUIRED TO PAY CERTAIN OF COMPLAINANTS' ATTORNEYS' FEES AND COSTS¹

Administrative Law Judge Thomas B. Pender
(October 20, 2014)

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¹ Commission Rule 210.33(b) states that any action taken pursuant to the rule “*may* be taken by written or oral order issued in the course of the investigation or by inclusion in the initial determination of the administrative law judge.” 19 C.F.R. § 210.33(b) (emphasis added). While Rule 210.33(b) leaves it to my discretion to issue my decision as an order or initial determination, Rule 210.17 (b)(2) makes clear that a “motion for a finding of default as a sanction for abuse of process or failure to make or cooperate in discovery shall be granted by initial determination or denied by order.” 19 C.F.R. § 210.17(b)(2). Accordingly, I am issuing my decision as an Initial Determination pursuant to Rule 210.17(b)(2). (See also § 210.42(c).)

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*Public Version***List of Abbreviations**

Memo	Complainants' Memorandum in Support of Its Motion for Default and Other Sanctions
Opposition	Respondents' Opposition to Complainant's Motion
Reply	Complainants' Reply in Further Support of Its Motion
Sur-Reply	Respondents' Sur-Reply to Complainant's Reply
Opp. Sur-Reply	Complainants' Opposition to Respondents' Sur-Reply
Supp. Brief	Complainants' Supplemental Brief On Fees and Costs
Opposition to Supp. Brief	Respondents' Opposition to Complainants' Supplemental Brief
Additional Supp. Brief	Complainants' Addition Supplemental Brief On Fees and Costs
Tr.	Transcript
Ex.	Exhibit

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Executive Summary

The evidence shows that Organik Kimya spoliated, or permitted the spoliation, of massive amounts of evidence prejudicial to Dow's allegation of trade secret misappropriation in this investigation. The evidence shows that the spoliation of evidence was undertaken intentionally and in bad faith. The evidence shows Organik Kimya flouted its obligation to preserve evidence in this investigation. In fact there is no evidence that even a litigation hold memo was issued. Further, the evidence shows Organik Kimya undertook great efforts to try and cover up the spoliation, including running specialized software and repeatedly lying to the court. Thus, for the reasons stated below, Dow's present motion is GRANTED-IN-PART.

As will be described in more detail, *infra*, I am ordering as sanctions for spoliation of evidence default judgment be entered against Organik Kimya on Dow's allegation of trade secret misappropriation and Organik Kimya, jointly and severally with its counsel, be required to pay certain of Dow's costs and attorneys' fees. No doubt imposing the dispositive sanction of default on Organik Kimya on Dow's allegation of trade secret misappropriation is the most severe sanction I can impose, but as will be made clear in the pages that follow, this is an extreme case, for Organik Kimya flouted its obligation to preserve evidence, deliberately destroyed evidence, and then actively attempted to deceive the undersigned as to what it had done. Given: (1) the grave damage Organik Kimya's deliberate conduct potentially could have on the administration of justice; (2) the need to deter such egregious conduct in the future; and (3) the certain prejudice to Dow, only the strongest remedy available is sufficient.

I. Introduction

On May 19, 2014, Complainants' Rohm and Haas Company, Rohm and Haas Chemicals, LLC, and the Dow Chemical Company (collectively "Dow") filed a motion for default and other sanctions against Respondents Organik Kimya San. Ve Tic. A.S., Organik Kimya Netherlands

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B.V., Organik Kimya U.S., Inc.(collectively “Organik Kimya”) (Motion Docket No. 883- 019.)

On May 29, 2014, Organik Kimya filed an opposition to Dow’s motion. On June 2, 2014, Organik Kimya filed an updated version of page 44 to its opposition. On June 9, 2014, Dow filed a motion for leave, which is hereby GRANTED, to file a reply in support of its motion for default and other sanctions. (Motion Docket No. 883-021.) On June 17, 2014, Organik Kimya filed an opposition to Dow’s motion for leave to file a reply or, in the alternative, leave to file a sur-reply. Organik Kimya’s motion for leave to file a sur-reply is hereby GRANTED. On June 24, 2014 Dow filed an opposition to Organik Kimya’s motion for leave to file a sur-reply.

On July 8-9, 2014, I held a hearing on Dow’s motion for default and other sanctions.

On October 8, 2014, I issued Order No. 25 requesting supplemental briefing regarding Dow’s request for fees and costs. On October 14, 2014, Dow timely filed its supplemental briefing. On October 16, Organik Kimya filed a response to Dow’s supplemental briefing. October 16, 2014, I issued Order No. 26 requesting additional supplemental briefing regarding Dow’s request for fees and costs. On October 17, 2014, Dow timely filed its additional supplemental briefing.

II. Background

One of the great problems faced by homeowners and professionals alike is how to cover existing paint with that of a new color and do it with as little paint as possible. This is a long recognized issue. The time honored way of hiding existing paint is to use paints with a high “reflectance value.” The best way to make paint with a high reflectance value is to use titanium dioxide (TiO₂) in the paint. The more TiO₂ that is used, the higher the reflectance value. However, making high reflectance value paint using TiO₂ is expensive, for titanium dioxide is expensive.

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To avoid needing to use as much TiO₂, Complainant Rohm and Haas scientists began developing (as early as 1979) opaque polymers that could achieve a high reflectance value when mixed in paint and thus could be substituted for some of the TiO₂ currently used. (Complaint at ¶¶ 30, 31.) The process the Rohm and Haas scientists developed led Rohm and Haas to introduce its first opaque polymers to the coatings market in 1982 with its ROPAQUE™ line of opaque polymers. (*Id.* at ¶ 31.) Because light is lost within the tiny air voids trapped within the polymer (which scatters light), paint manufacturers could use the Rohm and Haas manufactured hollow sphere polymers as polymeric pigments to reduce the raw material cost of their paint formulations. (*Id.*)

To date, Rohm and Haas has created four different generations of ROPAQUE™ opaque polymers. (*Id.* at ¶ 32.) Originally, the amount of voids in the polymers was around 20%, but by the late 1990's Rohm and Haas scientists were able to develop polymers with more uniform and ideal size with higher void fractions and improved hiding properties. (*Id.* at ¶ 33.) As a result, Rohm and Haas began its ROPAQUE™ Ultra line of polymers in the late 1990's, which included the Ultra, Ultra E, and Ultra EF. (*Id.* at ¶ 34.) These polymers lead the industry today. (*Id.*) According to Dow, the reason the Rohm and Haas polymer products enjoys a huge measure of success is because of their innovative process development. (*Id.* at ¶ 35.) Respondents recently began manufacturing and selling opaque polymers under the commercial names OPAC 240x and ORGAWHITE 2000. (*Id.* at ¶ 36.)

Dow alleges it owns trade secrets that contain (1) highly confidential manufacturing instruction for the ROPAQUE™ Ultra line of products and (2) highly confidential recipes for the “seed” polymer used as a starting material for ROPAQUE™ Ultra products. (*Id.* at ¶ 63.) Dow claims its ROPAQUE™ Ultra trade secrets are secret and valuable and are not readily

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ascertainable by proper means, while providing Dow with significant competitive advantages over competitors and would-be competitors. (*Id.* at ¶¶ 64-66.) As might be expected, Dow asserts it has been careful to maintain its trade secrets, including marking the opaque polymer products with anonymous identifiers after shipment and making key ingredients in countries with strong trade misappropriation laws. (*Id.* at ¶¶ 67-73.)

Dow notes that Organik Kimya has hired several former Rohm and Haas employees relevant to this Determination, including Dr. Guillermo Perez Lorenzo and Leonardo Strozzi, while consulting with Dr. Dillip Nene, a 27-year Rohm and Haas employee. (*Id.* at ¶¶ 9, 82.) Dow alleges that one or more of the former Rohm and Haas employees revealed Rohm and Haas trade secrets, which Organik Kimya misappropriated in the development and commercial marketing of its own opaque polymer products. (*Id.* at ¶¶ 83, 84.) Hence, despite its controls, Dow alleges Organik Kimya manufactures opaque polymers wherein it has misappropriated one or more Dow Trade secrets concerning the process by which Dow manufactures the ROPAQUE™ Ultra products.

III. Standards of Law

A. Spoliation

Spoliation “is the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.” *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011) (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)), *reh'g and reh'g en banc denied* (Fed. Cir. 2011); *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). “[T]he duty to preserve means what it says and ... a failure to preserve records—paper or electronic—and to search in the right places for those records, will inevitably result in the spoliation of evidence.” *Pitney Bowes Gov't Solutions, Inc. v. United States*, 94 Fed.Cl. 1, 7 (2010) (quoting *Pension*

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Comm. Of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F.Supp.2d 456, 462 (S.D.N.Y.2010), *abrogated on other grounds*, *Chin v. Port Authority of New York & New Jersey*, 685 F.3d 135, 162 (2d Cir. 2012), *cert. denied sub. nom Eng v. Port Authority of New York and New Jersey*.— U.S. —, 133 S.Ct. 1724, 185 L.Ed.2d 785 (2013)). A party, therefore, has an obligation to preserve relevant electronic records, including email correspondence and back-up media, when anticipating litigation. *See AAB Joint Venture v. United States*, 75 Fed.Cl. at 441 (citations omitted).

B. Sanctions

1. Authority to Impose Spoliation Sanctions

My authority to impose spoliation sanctions is derived from the Commission's Rules.²

Commission Rule 210.33, pursuant to which Dow filed its motion for default and other

² Article III Courts also possess the inherent power to sanction for spoliation of evidence. It is unclear whether an ALJ at the ITC has analogous authority, although I think there are good policy reasons for finding so. *See United Medical Supply Co., Inc. v. U.S.*, 77 Fed.Cl. 257, 264 (Fed.Cl. 2007) ("Although established under Article I of the Constitution, this court, no less than any Article III tribunal, possesses this form of inherent authority."); *see also* "The Use of Discovery Sanctions in Administrative Agency Adjudication", by Richard T. Frieje, *Indiana Law Journal*, Volume 59, Issue 1, Article 5 (Jan. 1, 1983); "Contempt Powers of the Administrative Law Judge" by Joyce Krutick Barlow, *Journal of the National Association of Administrative Law Judiciary*, Volume 12, Issue 1, Article 1 (March 15, 1992). To the extent an ALJ at the ITC has such authority, I do not rely on such as the basis for this Order; the authority I have under Commission Rule 210.33 is sufficient to resolve Dow's present motion for default and other sanctions.

I raise this issue, however, because it is important in reviewing the case law to be cognizant that the calculus used to determine whether to impose spoliation sanctions pursuant to a Court's inherent power differs from the calculus used to determine whether to impose spoliation sanctions pursuant to FRCP 37 and its corollary Commission Rule 210.33. For example, a court's inherent authority only may be exercised to sanction "bad-faith conduct," *Chambers v. NASCO Inc.*, 501 US 32, 50 (1991); *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 767-768 (1980) ("Similarly, the trial court did not make a specific finding as to whether counsel's conduct in this case constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers."), and "must be exercised with restraint and discretion. *Id.* at 44; *see Roadway Exp., Inc.*, 447 U.S. at 764 ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and

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sanctions, gives me the authority to impose sanctions for a party's failure to make or cooperate in discovery. *See* 19 C.F.R. § 210.33. Rule 210.33 incorporates FRCP 37(b) to the extent it permits me to issue "any other non-monetary sanction available under Rule 37(b) of the Federal Rules of Civil Procedure." Rule 210.33 reads as follows.

§210.33 Failure to make or cooperate in discovery; sanctions.

(a) Motion for order compelling discovery. A party may apply to the administrative law judge for an order compelling discovery upon reasonable notice to other parties and all persons affected thereby.

(b) Non-monetary sanctions for failure to comply with an order compelling discovery. If a party or an officer or agent of a party fails to comply with an order including, but not limited to, an order for the taking of a deposition or the production of documents, an order to answer interrogatories, an order issued pursuant to a request for admissions, or an order to comply with a subpoena, the administrative law judge, for the purpose of permitting resolution of relevant issues and disposition of the investigation without unnecessary delay despite the failure to comply, may take such action in regard thereto as is just, including, but not limited to the following:

- (1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;
- (2) Rule that for the purposes of the investigation the matter or matters concerning the order or subpoena issued be taken as established adversely to the party;
- (3) Rule that the party may not introduce into evidence or otherwise rely upon testimony by the party, officer, or agent, or documents, or other material in support of his position in the investigation;
- (4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

discretion."); *Shaffer Equip. Co.*, 11 F.3d at 461-62 (the court's inherent power "must be exercised with the greatest restraint and caution and then only to the extent necessary"); *Sampson v. City of Cambridge, Md.*, 251 F.R.D. 172, 179 (D.Md.,2008) ("The court's discretion to impose sanctions under its inherent authority is more limited than that under Rule 37.") ("citing *Pressey v. Patterson*, 898 F.2d 1018, 1021 (5th Cir.1990)).

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- (5) Rule that a motion or other submission by the party concerning the order or subpoena issued be stricken or rule by initial determination that a determination in the investigation be rendered against the party, or both; or
- (6) Order any other non-monetary sanction available under Rule 37(b) of the Federal Rules of Civil Procedure.

Any such action may be taken by written or oral order issued in the course of the investigation or by inclusion in the initial determination of the administrative law judge. It shall be the duty of the parties to seek, and that of the administrative law judge to grant, such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the lack of withheld testimony, documents, or other evidence. If, in the administrative law judge's opinion such relief would not be sufficient, the administrative law judge shall certify to the Commission a request that court enforcement of the subpoena or other discovery order be sought.

(c) Monetary sanctions for failure to make or cooperate in discovery. (1) If a party or an officer, director, or managing agent of the party or person designated to testify on behalf of a party fails to obey an order to provide or permit discovery, the administrative law judge or the Commission may make such orders in regard to the failure as are just. In lieu of or in addition to taking action listed in paragraph (b) of this section and to the extent provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, the administrative law judge or the Commission, upon motion or *sua sponte* under §210.25, may require the party failing to obey the order or the attorney advising that party or both to pay reasonable expenses, including attorney's fees, caused by the failure, unless the administrative law judge or the Commission finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Monetary sanctions shall not be imposed under this section against the United States, the Commission, or a Commission investigative attorney.

19 C.F.R. § 210.33.

2. Sanction-Worthy Spoliation

To prove sanctions are warranted for spoliation of evidence, a party must show: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed or materially altered; (2) that the records were destroyed or materially altered with a 'culpable state of mind' and (3) that the destroyed or materially altered evidence was "relevant" to the claim or defense of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable fact finder could conclude that it would support that claim or

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defense. See *Jandreau v. Nicholson*, 492 F.3d 1372, 1375 (Fed. Cir. 2007) (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002))³; *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 520-21 (D.MD. 2010); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 430 (S.D.N.Y. 2004).

a. Duty to preserve, control, breach of the duty to preserve

The Supreme Court has stated,

“[d]ocument retention policies, which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.”

Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005) (internal citation and quotation marks omitted). Thus, “a party can only be sanctioned for destroying evidence if it had a duty to preserve it.” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003). “[T]he duty to preserve means what it says and ... a failure to preserve records—paper or electronic—and to search in the right places for those records, will inevitably result in the spoliation of evidence.” See *Pitney Bowes Gov’t Solutions, Inc. v. United States*, 94 Fed.Cl. 1, 7 (Fed. Cl. 2010) (quoting *Pension Comm. Of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F.Supp.2d 456, 462 (S.D.N.Y.2010), *abrogated on other grounds*, *Chin v. Port Authority of New*

³ Although the Federal Circuit articulated these requirements as the test for determining whether a specific type of sanction—an adverse inference—could be imposed for the destruction of documents, *Jandreau v. Nicholson*, 492 F.3d 1372, 1375 (Fed. Cir. 2007), the test is of more general applicability. In fact a number of courts rely more broadly on this test to prove spoliation that warrants a sanction, including courts in the Second, Fourth, Fifth, Sixth, and Ninth Circuits, as well as the Court of Federal Claims. See, e.g., *G.W. v. Rye City School Dist.*, 554 Fed.Appx. 56, 57 (2nd Cir. 2014); *Beaven v. U.S. Dep’t of Justice*, 622 F.3d 540, 553 (6th Cir. 2010); *K-Con Bldg. Systems, Inc. v. U.S.*, 106 Fed.Cl. 652, 663-64 (Fed. Cl. 2012); *Surowiec v. Capital Title Agency*, 790 F.Supp.2d 997, 1005 (D. Ariz. 2011); *Nieman v. Hale*, 2014 WL 1577814, *3 (N.D. Tex. 2014); *Goodman v. Praxair Services, Inc.*, 632 F.Supp.2d 494, 509 (D.Md. 2009); *Emery v. Harris*, 2014 WL 710957, *6 (E.D. Cal. 2014).

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York & New Jersey, 685 F.3d 135, 162 (2d Cir.2012), *cert. denied sub. nom Eng v. Port Authority of New York and New Jersey*, — U.S. —, 133 S.Ct. 1724, 185 L.Ed.2d 785 (2013)). The duty to preserve evidence begins when litigation is “pending or reasonably foreseeable.” *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir.2001). *See also West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999) (applying the same standard). “This is an objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation.” *Micron v Rambus*, 645 F.3d 1311, 1320 (Fed. Cir. 2011.) “Thus, the proper standard for determining when the duty to preserve documents attaches is the flexible one of reasonably foreseeable litigation, without any additional gloss.” *Id.* at 1321.

“In determining whether a party bears responsibility for spoliation of evidence, the key inquiry is identifying who had control over the evidence. If a party having control over evidence allows that evidence to be discarded, then the disposal of that evidence is attributable to that party, regardless of who actually discarded the evidence.” *Chapman Law Firm, LPA v. United States*, 113 Fed.Cl. 555, 610 (Fed. Cl. 2013) (citing *K-Con Bldg. Systems, Inc. v. U.S.*, 106 Fed.Cl. 652, 664 (Fed. Cl. 2012)).

“The concept of control ... in the context of Rule 34 provides the closest analogy to control in connection with a spoliation issue.” *Goodman v. Praxair Services, Inc.*, 632 F.Supp.2d 494, 515 (D.Md. 2009). While courts agree that physical possession is not necessary for a party to have control over evidence, *see e.g., id.*, courts differ on what constitutes “control.” This is an open question for the Federal Circuit. The prevailing view, and the one I adopt here, is that “control” includes not only legal control over evidence, but also practical control over evidence. Thus, a party is said to have “control” if the party has “the right, authority, or practical

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ability” to obtain the documents from a non-party to the action. *See Mazzei v. Money Store*, 2014 WL 3610894, *3 (S.D.N.Y. 2014) (“A party has control over evidence when it has ‘the right, authority, or practical ability to obtain the documents from a non-party to the action.’”)(quoting *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007)); *Digital Vending Services Intern., Inc. v. University of Phoenix, Inc.*, 2013 WL 5533233, *5 (E.D.Va. 2013) (“The ability to control is defined by the Fourth Circuit as when that party has the right, authority, or practical ability to obtain the documents from a nonparty to the action.”) (internal quotations omitted); *Pacific Coast Marine Windshields Ltd. v. Malibu Boats, LLC*, 2012 WL 10817204, *5 (M.D.Fla. 2012) (“Control may be inferred, even when a party does not have possession or ownership of the evidence, ‘when that party has the right, authority, or practical ability to obtain [the evidence] from a non-party to the action.’”)(quoting *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D.Md. 2010)); *Coral Group, Inc. v. Shell Oil Co.*, 286 F.R.D. 426, 441 (W.D.Mo. 2012) (“[D]ocuments are considered to be under a party’s control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.”) (internal quotations omitted); *see also Bush v. Ruth's Chris Steak House, Inc.*, 286 F.R.D. 1, 5 (D.D.C. 2012) (“Control does not require that the party have legal ownership or actual physical possession of the documents at issue, but rather “the right, authority or practical ability to obtain the documents from a non-party to the action.”) (citing *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007); *United States ITC v. ASAT, Inc.*, 411 F.3d 245 (D.C.Cir. 2005)); *but see Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993) (“[T]he fact that a party could obtain a document if it tried hard enough and maybe if it didn't try hard at all does not mean that the document is in its possession, custody, or control; in fact, it means the opposite.”).

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b. Culpable state of mind

The Federal Circuit has not clarified the level of culpability required for a finding of spoliation. In *Jandreau v. Nicholson*, the Federal Circuit articulated the test for determining whether an adverse inference sanction could be imposed for the destruction of documents, but did not comment on what level of culpability was required for the imposition of an adverse inference or other sanctions. See 492 F.3d 1372 (Fed. Cir. 2007). In *Micron Tech., Inc. v. Rambus, Inc.*, the Federal Circuit opined that “[a] determination of bad faith is *normally* a prerequisite to the imposition of dispositive sanctions for spoliation....” *Micron Tech., Inc.*, 645 F.3d at 1327 (emphasis added). Thus, it generally remains an “open question in this circuit” as to what level of culpability is required to impose spoliation sanctions. *United Med. Supply Co.*, 77 Fed.Cl. at 266. As the court in *United Medical Supply Co.* remarked:

There is, in fact, a division of authority among the circuits on this issue.... On one end of [the] spectrum, actually representing a distinct minority, are courts that require a showing of bad faith before any form of sanction is applied. Other courts expect such a showing, but only for the imposition of certain more serious sanctions, such as the application of an adverse inference or the entry of a default judgment. Further relaxing the scienter requirement, some courts do not require a showing of bad faith, but do require proof of purposeful, willful or intentional conduct, at least as to certain sanctions, so as not to impose sanctions based solely upon negligent conduct. On the other side of the spectrum, we find courts that do not require a showing of purposeful conduct, at all, but instead require merely that there be a showing of fault, with the degree of fault, ranging from mere negligence to bad faith, impacting the severity of the sanction. If this continuum were not complicated enough, some circuits initially appear to have adopted universal rules, only to later shade their precedents with caveats. Other times, the difference between decisions appear to be more a matter of semantics, perhaps driven by state law, with some courts, for example, identifying as “bad faith” what others would call “recklessness” or even “gross negligence.”

Id. at 266–67 (footnotes omitted); see *Victor Stanley*, 269 F.R.D. at 529; *Jandreau v. Nicholson*, 492 F.3d 1372 (Fed. Cir. 2007) (stating that “while some circuits have held that a showing that a

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party was negligent in the destruction of records creates an adverse inference, we need not decide whether that is the correct rule ...”).⁴

I adopt here what I believe to be the more reasoned position that spoliation sanctions may be imposed as long as the destruction of evidence was “blameworthy” (*i.e.*, with fault), with the degree of culpability impacting the severity of the sanction. *See Chapman Law Firm, LPA v. United States*, 113 Fed.Cl. 555, 610-611 (Fed.Cl. 2013); *Beaven v. U.S. Dept. of Justice*, 622 F.3d 540, 554 (6th Cir. 2010) (“[T]he ‘culpable state of mind’ factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently. When appropriate, a proper spoliation sanction should serve both fairness and punitive functions, but its severity should correspond to the district court’s finding after a fact-intensive inquiry into a party’s degree of fault under the circumstances, including the recognition that a party’s degree of fault may rang[e] from innocence through the degrees of negligence to intentionality.”) (internal quotations and citations omitted); *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (“As we explicitly noted in *Byrnie*, however, the ‘culpable state of mind’ factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently.”) (internal quotations omitted); *Volcan Group, Inc. v. Omnipoint Communications, Inc.*, 552 Fed.Appx. 644, 646 (9th Cir. 2014) (“The record also supports the district court’s finding that Netlogix’s spoliation of evidence resulted from ‘willfulness, fault, or bad faith.’”); *Montoya v.*

⁴ In examining the case law it is worth taking heed that a number of cases appear to conflate willfulness with bad faith. *Victor Stanley*, 269 F.R.D. at 530 (“Nevertheless, courts often combine their analysis of willfulness and bad faith.” “Willfulness is equivalent to intentional, purposeful, or deliberate conduct.” *Id.* “[B]ad faith requires ‘destruction for the purpose of depriving the adversary of the evidence.’” *Id.* Bad faith conduct necessarily is willful conduct, however, willful conduct need not rise to the level of bad faith. *Id.* (“Conduct that is in bad faith must be willful, but conduct that is willful need not rise to bad faith actions.”)

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Orange County Sheriff's Dept., 2013 WL 6705992, *9 (C.D.Cal. 2013) ("At a minimum, the culpable state of mind includes negligence.") (citing *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993) (stating that "simple notice of potential relevance to the litigation" is sufficient to impose sanctions for spoliation); *Lewis v. Ryan*, 261 F.R.D. 513, 521 (S.D.Cal. 2009)); *Sampson v. City of Cambridge, Md.*, 251 F.R.D. 172, 179 (D.Md. 2008) ("The three possible states of mind that satisfy this requirement are bad faith destruction, gross negligence, and ordinary negligence. Although, some courts require a showing of bad faith before imposing sanctions, the Fourth Circuit requires only a showing of fault, with the degree of fault impacting the severity of sanctions.") (internal citation omitted); see also *Porche v. Oden*, 2009 WL 500622, *7 (N.D.Ill. 2009) ("The next element in determining whether sanctions are proper requires the Court to determine whether defendants were at fault for their failure to preserve evidence. Fault does not require that the failure to preserve evidence result from a party's subjective state of mind. It can also be the result of how objectively reasonable that party's conduct was in light of the circumstances. Whether it be in the form of 'extraordinarily poor judgment,' 'gross negligence,' or 'reckless disregard of a party's obligation,' all three forms of fault can justify an award of sanctions."); *Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 627-28 (C.D.Cal. 2013) ("In the Ninth Circuit, a party's destruction of evidence need not be in 'bad faith' to warrant a court's imposition of sanctions. The Ninth Circuit has instructed that district courts may impose sanctions even against a spoliating party that merely had simple notice of potential relevance to the litigation. Nevertheless, a party's motive or degree of fault in destroying evidence is relevant to what sanction, if any, is imposed. ... [M]any courts in this Circuit have adopted the reasoning of the *Zubulake IV* and *Residential Funding Corp.* courts and have similarly instructed that "[t]he 'culpable state of mind' includes negligence."). I believe this to be the more reasoned position

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for two main reasons. First, notably, neither FRCP 37(b), FRCP 37(d), Rule 210.33(b), nor Rule 210.33(c) requires a showing of bad faith as a precondition to the imposition of sanctions.

Instead, they require only that the sanctions imposed be “just.”

The omission of any *mens rea* requirement is not an oversight. Indeed, in 1970, Fed.R.Civ.P. 37(d) was modified to eliminate the requirement that the failure to comply with a discovery request be “willful,” with specific indication in the drafters’ notes that, under the modified rule, sanctions could be imposed for negligence. *See* Advisory Comm. Notes to 1970 Amendments; *see also Coane v. Ferrara Pan Candy Co.*, 898 F.2d 1030, 1032 (5th Cir.1990). Under the revised rule, willfulness instead factors only into the selection of the sanction.

See United Medical Supply Co., Inc. v. U.S., 77 Fed.Cl. 257, 267-268 (Fed.Cl. 2007). As such, it is apparent that ‘bad faith’ need not be shown in order to impose spoliation sanctions authorized by FRCP 37(b) and (d) and by extension Rule 210.33 (b) and (c). *Id.*; *Residential Funding Corp. v. Degeorge Financial Corp.*, 306 F.3d 99, 108 (2d Cir. 2002); *see also Design Strategy, Inc. v. Davis*, 469 F.3d 284, 296 (2d Cir. 2006) (reaching this same conclusion as to Fed.R.Civ.P. 37(c)); *Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596–97 (4th Cir. 2003) (same). Second, from a practical standpoint, a rule that would not permit the imposition of sanctions for grossly negligent or simple negligent spoliation of evidence would potentially undermine one of the basis for which sanctions are imposed, redress of the harm to the truth seeking process. For example,

Where intentionally egregious conduct leads to spoliation of evidence but causes no prejudice because the evidence destroyed was not relevant, or was merely cumulative to readily available evidence, or because the same evidence could be obtained from other sources, then the integrity of the judicial system has been injured far less than if simple negligence results in the total loss of evidence essential for an adversary to prosecute or defend against a claim. In the former instance, the appropriateness of a case-dispositive sanction is questionable despite the magnitude of the culpability, because the harm to the truth-finding process is slight, and lesser sanctions such as monetary ones will suffice. In contrast, a sympathetic though negligent party whose want of diligence eliminates the ability of an adversary to prove its case may warrant case-dispositive sanctions, because the damage to the truth-seeking process is absolute.

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Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 526 (D.Md. 2010).

c. Relevancy and Prejudice

“Relevance” for spoliation purposes is a two-pronged finding of relevance and prejudice because “for the court to issue sanctions, the absence of the evidence must be prejudicial to the party alleging spoliation of evidence.” *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 531 (D.Md. 2010); *see Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 627 (C.D.Cal. 2013); *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 346 (M.D.La. 2006) (noting that, in determining whether an adverse inference is warranted, the “‘relevance’ factor” involves not only relevance but also “whether the non-destroying party has suffered prejudice from the destruction of the evidence”); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp.2d 598, 616 (S.D.Tex. 2010). “In the context of spoliation, lost or destroyed evidence is ‘relevant’ if ‘a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.’” *Victor Stanley*, 269 F.R.D. at 531 (quoting *Thompson*, 219 F.R.D. at 101.) “Prejudice” requires a showing that the spoliation “materially affect(s) the substantial rights of the adverse party and is prejudicial to the presentation of his case.” *Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d at 1328; *see Victor Stanley*, 269 F.R.D. at 532 (“Spoliation of evidence causes prejudice when, as a result of the spoliation, the party claiming spoliation cannot present evidence essential to its underlying claim.”) (internal quotations omitted). “Generally, courts find prejudice where a party’s ability to present its case or to defend is compromised.” *Victor Stanley*, 269 F.R.D. at 532. Courts recognize that “[t]he burden placed on the moving party to show that the lost evidence would have been favorable to it ought not to be too onerous, lest the spoliator be permitted to profit from its destruction.” *See Rimkus*, 688 F.Supp.2d at 616 (internal citations omitted); *Yelton v. PHI, Inc.*, 279 F.R.D. 377, 393 (E.D.La.

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2011) (“[G]iven the facts and circumstances presented here, the Court finds that PHI has carried its limited burden of demonstrating that the lost documents would have been relevant.”). To show prejudice a party must only “come forward with plausible, concrete suggestions as to what [the destroyed] evidence might have been.” *Micron Tech., Inc.*, 645 F.3d at 1328 (emphasis in original).

If, however, it is shown that the spoliator acted in bad faith, the spoliator bears a “‘heavy burden’ to show a lack of prejudice to the opposing party because ‘[a] party who is guilty of ... intentionally shredding documents ... should not easily be able to excuse the misconduct by claiming that the vanished documents were of minimal import.’”⁵ *Id.* (quoting *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (1st Cir. 1988)). Likewise, “a failure to preserve documents in bad faith, such as intentional or willful conduct, alone establishes that the destroyed documents were relevant.” *Sampson v. City of Cambridge, Md.*, 251 F.R.D. 172, 179 (D.Md. 2008); see *Thompson*, 219 F.R.D. at 101; *Victor Stanley*, 269 F.R.D. at 532; *Broadspring, Inc. v. Congoo, LLC*, 2014 WL 4100615, *24 (S.D.N.Y. 2014) (“Where the destruction of evidence is found to be willful, courts presume the relevance of the destroyed evidence”); *Barrette Outdoor Living, Inc. v. Michigan Resin Representatives*, 2013 WL 3983230, *14 (E.D.Mich. 2013) (“This is because ‘[w]hen evidence is destroyed in bad faith[,] ... that fact alone is sufficient to demonstrate relevance.’”) (quoting *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 431 (S.D.N.Y. 2004)). “The reason relevance is presumed following a showing of intentional or willful conduct is because of the logical inference that, when a party acts in bad faith, he demonstrates fear that the evidence will expose relevant, unfavorable facts.” *Sampson*, 251

⁵ It should go without saying, but a finding of prejudice necessary includes a finding of relevance, because the spoliation of irrelevant evidence cannot be prejudicial.

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F.R.D. at 197 (citing *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). “That is, prejudice is presumed precisely because relevant evidence, *i.e.*, evidence presumed to be unfavorable to the spoliating party, has been intentionally destroyed and is no longer available to the innocent party.” *Sekisui American Corp. v. Hart*, 945 F.Supp.2d 494, 504 -505 (S.D.N.Y. 2013) (internal quotations and footnotes omitted). Thus, if a party acted in bad faith in failing to preserve evidence then relevance and prejudice are presumed. Notably, this presumption does not change the burden of proof (*i.e.*, burden of persuasion), which rests on the party seeking sanctions to prove each of the elements of a claim for sanctions, but rather shifts the burden of production to the spoliator to rebut the presumption by showing that the destroyed, lost, or altered evidence was not relevant or did not prejudice the party seeking sanctions. See *Micron Tech., Inc.*, 645 F.3d at 1328 (“The proper resolution of this issue turns largely on whether Rambus has the burden to show lack of prejudice or Micron has the burden to show prejudice. As discussed above, this turns on whether the district court, on remand, concludes that Rambus was a bad faith spoliator.”); *Chrysler Corp. v. U.S.*, 592 F.3d 1330, 1338 (Fed. Cir. 2010) (“The culpable destruction of relevant documents does not relax the burden of proof, although it may aid a party in meeting that burden by giving rise to an inference that the information contained in the destroyed documents would have been unfavorable to the party responsible for their destruction.”) (citing *Jandreau v. Nicholson*, 492 F.3d 1372, 1375 (Fed. Cir. 2007)). “If the spoliating party makes such a showing, the innocent party, of course, may offer evidence to counter that proof.” *Victor Stanley*, 269 F.R.D. at 532.

3. Available Sanctions

The sanctions available for imposition for a parties’ failure to make or cooperate in discovery can be found in Rule 210.33. 19 C.F.R. § 210.33. Commission Rule 210.33(b) lists non-monetary sanctions, including: (1) Infer that the admission, testimony, documents, or other

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evidence would have been adverse to the party; (2) Rule that for the purposes of the investigation the matter or matters concerning the order or subpoena issued be taken as established adversely to the party; (3) Rule that the party may not introduce into evidence or otherwise rely upon testimony by the party, officer, or agent, or documents, or other material in support of his position in the investigation; (4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown; (5) Rule that a motion or other submission by the party concerning the order or subpoena issued be stricken or rule by initial determination that a determination in the investigation be rendered against the party, or both; or (6) Order any other non-monetary sanction available under Rule 37(b) of the Federal Rules of Civil Procedure. 19 C.F.R. § 210.33(b). Federal Rule of Civil Procedure 37(b), to which Rule 210.33(b) refers, includes the following additional sanctions: striking pleadings in whole or in part; staying further proceedings until the order is obeyed; dismissing the action or proceeding in whole or in part; rendering a default judgment against the disobedient party; and treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination. Fed. R. Civ. P. 37(b). Commission Rule 210.33(c) permits the imposition of monetary sanctions, including “reasonable expenses” and “attorney's fees.” 19 C.F.R. § 210.33(c).

Sanctions for spoliation should be crafted to “vindicate the trifold aims of: (1) deterring future spoliation of evidence; (2) protecting the [complainants’] interests; and (3) remedying the prejudice [complainants] suffered as a result of [respondents] actions.” *Micron Tech., Inc.*, 645 F.3d at 1329 (citing *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 780 (2d Cir.1999)) (alterations added); *West*, 167 F.3d at 779 (“The sanction should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who

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wrongfully created the risk; and (3) restore the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.”). More expansively, sanctions for spoliation should be designed “to punish the spoliator, so as to ensure that it does not benefit from its misdeeds; to deter future misconduct; to remedy, or at least minimize, the evidentiary or financial damages caused by the spoliation; and last, but not least, to preserve the integrity of the judicial process and its truth-seeking function.” See *United Med. Supply Co. v. United States*, 77 Fed.Cl. at 264 (citations omitted); *Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1345 (Fed. Cir. 2011) (“Most relevant in this case is the point when the duty to preserve evidence begins. This determination is informed by a number of policy considerations, including “the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.”) (quoting *Silvestri*, 271 F.3d at 590.); *Schumacher Immobilien UND Beteiligungs AD v. Prova, Inc.*, 2010 WL 2867603, *5 (M.D.N.C. 2010) (“Courts have the power to impose sanctions for spoliation of evidence in order to “preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth.”). Thus, in determining an appropriate sanction, I “must take into account ‘(1) the *degree* of fault of the party who altered or destroyed the evidence; (2) the *degree* of prejudice suffered by the opposing party; and (3) *whether there is a lesser sanction* that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.’” *Micron Tech., Inc.*, 645 F.3d at 1329 (quoting *Schmid*, 13 F.3d at 79) (emphasis in original); see *Apple, Inc. v. Samsung Electronics Co., Ltd.*, 888 F.Supp.2d 976, 992 (N.D.Cal. 2012). Accordingly, although the choice of sanction is within my discretion, the sanction must be proportionate to the conduct

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being punished and the harm that the conduct caused. *Id.* at 1326, 1329; *see K-Con Bldg. Systems, Inc. v. U.S.*, 106 Fed.Cl. 652, 666 (Fed.Cl. 2012).

IV. Discussion

Dow asks me to sanction Organik Kimya for its spoliation of evidence, which “is the destruction or material alteration of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011). In this investigation I issued a series of subpoenas, an Order to preserve evidence, and Orders to compel the forensic inspection of certain evidence, all of which were violated. As discussed in more detail below, after each Order evidence was destroyed.

A. Spoliation

Dow argues that Organik Kimya is responsible for the spoliation of certain evidence that was in the possession of three people: Dr. Dilip Nene, Dr. Guillermo Perez, and Mr. Leonardo Strozzi. Thus, I will discuss in the context of these three individuals whether there was spoliation in violation of an Order issued in this investigation.

1. Perez laptop

On February 4, 2014, Dow moved to compel Organik Kimya to make certain of its computers and networks available for forensic inspection, copying and analysis. (Motion Docket No. 883-012) Among other things, Dow requested that its forensic experts be permitted to “[i]nspect, copy and search the hard drives of laptops and/or computers used by Organik Kimya employees Sibel Altiniok, Nur Basak Ergun Ersen, Fatma Arslan, *Guillermo Perez*, and Bradley McPhee since November 1, 2007.” (*Id.* (emphasis added).) Organik Kimya opposed the forensic inspection of Dr. Perez’s computer(s) arguing Dow’s request was baseless because Dow did not accuse Dr. Perez of misappropriation or even contend that he was aware of any alleged

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trade secrets. Organik argued that except for Dr. Perez's previous involvement with Rohm & Haas, Dow had not articulated any basis for the inspection of his computer. I disagreed stating:

The relevancy of Dr. Perez is explained in Dow's letter of January 10 at pages 2-5. There Dow cites to an email from Nur Basak Ergun Ersen to Sibel Altinok stating that "a file was created within the Lab concerning all meeting notes and mails on Opac 101, 103, 204x and seeds." The metadata accompanying that email included the following description: "As a result of the recent meetings held with Dilip Nene, the information obtained about 'seed' and 'opac polymers' are summarized as follows." Another email cited by Dow states that "[m]eeting notes related to Orgal Opac 204 X are indicated in the link below." The link listed in the email was to the O drive [] Thus these two emails suggest that meeting notes were created based on meetings held with Dr. Nene; that the meeting notes discuss seed and opac polymers; and that such meeting notes were stored on the O drive []

Dr. Perez becomes relevant because Organik asserts that the documents in the O drive [] do not involve Dr. Nene, but rather "involve Dr. Perez and that patent application." (Dow January 10 Letter at Exh. L) Further, in another email with Orgal Opac 204 X in the subject line, Nur Basak Ergun Ersen writes to Sibel Altinok that "[c]onfidential information related to the consultant are still recorded here, they were supposed to be erased by the IT department." Organik asserts that the "consultant" referred to in the email is not Dr. Nene, but rather Dr. Perez. (*Id.*) However, as Dow sets out in its letter, at the time of the email Dr. Perez had been employed full time for nearly six years as Organik's Polymer R&D Manager. Thus I agree with Dow that it seems implausible that Dr. Perez would be referred to as "the consultant." Organik further asserts that Dr. Perez, not Dr. Nene, is the "Dr. X from R&H" referred to in an email from a distributor trying to solve a customer's problem. However, as Dow sets out in its letter, Dr. Perez was Organik's Polymer R&D Manager and was specifically CC'd on the email. I agree with Dow that it seems implausible that Dr. Perez, who was specifically CC'd by name on the email, would then be referred to cryptically as "Dr. X from R&H" in the same email. Thus, for at least the above reasons, I find the forensic inspection of Dr. Perez's computers to be justified, relevant, and reasonably calculated to lead to the discovery of admissible evidence.

(Order No. 16 at 8-9 (Feb. 20, 2014).) Accordingly, on February 20, 2014, I issued Order No. 16, granting-in-part Dow's motion to compel and ordering, *inter alia*, the forensic inspection of "Dr. Perez's computer(s)." (*Id.* at 9.)

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On February 26, 2014, six days after I issued Order No. 16, Stroz Friedberg, Dow's forensic experts, traveled to Istanbul, Turkey to inspect and image Organik Kimya's network and computers pursuant to Order No. 16. On February 26, 2014, they met with Organik Kimya's counsel and management to discuss the logistics of the inspection that was to take place the next day on February 27, 2014. The evidence shows that Organik Kimya dictated a late 11:00 am start for the inspection because counsel for Organik Kimya was to be attending a soccer match expected to last well into the night of February 26 and because there would be morning traffic. (See CIB, Ex. 15 (Lynch Decl.) at ¶ 12-13.)

On February 27, 2014, Stroz Friedberg arrived at the appointed hour for the forensic inspection. (CIB, Ex. 16 (Lynch Dep.) at 191:11-17.) Stroz Friedberg inspected and imaged a number of computers and electronic files pursuant to Order No. 16, including the Perez laptop. (*Id.* at ¶ 14.)

As discussed in more detail below, the analysis of the Perez laptop revealed that, in complete disregard of Order No. 16, Organik Kimya essentially wiped the laptop hard drive clean by overwriting massive amounts of potentially recoverable data in the days leading up to the inspection.

The evidence shows that on February 23, 2014, three days after I issued Order No. 16, the large "unallocated" space on Perez's laptop's "C" drive⁶ was overwritten by copying the Program Files folder at least one hundred eight (108) times.⁷ (CIB, Ex. 15 at ¶¶ 36, 39-43, 56-58.) The Program File folder is the default location on a Windows computer for storing installed

⁶ The Perez laptop had a single hard drive that was partitioned into a "C" drive and a "D" drive.

⁷ "Unallocated space is an important area for forensic analysis, because it contains previously deleted files that can sometimes be recovered, at least until such time as they are overwritten by subsequently created files." (CIB, Ex. 15 at ¶ 44.)

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programs (e.g., word processing, email programs, etc.). (*Id.* at ¶ 38.) The evidence shows that the Program File folder on Perez's laptop took up approximately 1.8 gigabytes. (*Id.* at ¶ 45.) Thus, by copying the Program File folder 108 times, Organik Kimya managed to overwrite one hundred ninety (190) gigabytes worth of unallocated space on Perez's laptop's "C" drive.⁸ By doing so, Organik Kimya made it impossible to now know the exact volume and content of any previously recoverable data, as the overwritten data is irretrievable. (*Id.* at ¶ 46.) While the number of files overwritten is unquantifiable, the evidence suggests "that given the size of unallocated space filled with the program files (at least 190 GB) and the forensic evidence on the computer, *potentially hundreds of thousands of files* could have been overwritten by the copy operation." (*Id.* (emphasis added).) Hence, there is no question the overwriting of information contained in the unallocated space on Dr. Perez's hard drive resulting in the destruction of said information is spoliation.

The evidence also shows that while Organik Kimya was overwriting the "unallocated" space by repeatedly copying the Program File folder, Organik Kimya was manipulating the clock of the computer to alter the metadata on those copies to hide the fact that the copies were being made less than a week before the ordered forensic inspection. (*Id.* at ¶¶ 45, 54, 56-58.) I find the backdating of the computer clock constitutes a purposeful fabrication and material alteration of evidence. What is more, I find purposeful fabrication and material alteration to be the only plausible explanation for the changes Organik Kimya made to the clock.

⁸ Notably, when Perez's laptop was presented for inspection it had 209 gigabytes of unallocated space. (CIB, Ex. 15 at ¶ 45.) Thus, by making 108 copies of the Program Files folder Organik Kimya "substantially or completely filled the unallocated space of the hard drive" such that "[a]ny previously deleted files that were recoverable on the C drive prior to those efforts would have most likely been overwritten by those copies." (*Id.* at ¶ 45.)

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After filling the unallocated space of the “C” drive with 108 copies of the Program File folder, Organik Kimya then deleted the copies on or after February 24, 2014. (*Id.* at ¶ 47.) On February 26, 2014, the day before the ordered forensic inspection, the evidence shows Organik Kimya ran a program called CCleaner “multiple times to delete a large percentage of the C drive and all of the D drive in Dr. Perez’s laptop.”⁹ (*Id.* at ¶¶ 83-84) In fact the evidence shows CCleaner was used multiple times starting just hours after Organik Kimya representatives and counsel met with Stroz Friedberg on February 26, 2014 until it was uninstalled on February 27, 2014, a mere twenty minutes before the ordered forensic inspection. (*Id.* at ¶¶ 85-86.)

The evidence shows CCleaner was run on Dr. Perez’s laptop with the option selected to wipe unallocated space. (*Id.* at ¶ 91.) Forensic inspection uncovered over 600,000 files with names matching the naming scheme used by CCleaner to wipe unallocated space. (*Id.* at ¶ 92.) The timestamps for those files show that the files were created and then automatically deleted over the course of several hours starting around 1:45 a.m. on February 27, 2014 and concluding shortly before Stroz Friedberg arrived to image Dr. Perez’s laptop. (*Id.*) The evidence shows Organik Kimya was able to completely wipe the “D” drive and much of the “C” drive on Perez’s laptop using CCleaner. (*Id.* at ¶ 94.) Recalling that Organik Kimya’s repeated copying of the Program File folder ostensibly overwrote the entire unallocated space on the “C” drive destroying any potentially recoverable data therein, the use of CCleaner to try and wipe the “C” drive of any traces of the repeated copies of the Program File folder would not in and of itself

⁹ CCleaner is a computer software program made by Piriform that has multiple uses. Among those uses, CCleaner has the capability of targeting specific files to be overwritten and deleted. In addition, CCleaner also has the capability to overwrite unallocated space. By overwriting, or wiping, unallocated space, CCleaner will overwrite all previously deleted data, rendering it unrecoverable. (CIB, Ex. 15 at ¶ 87.)

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constitute a separate act of spoliation as the spoliation had already occurred. However, the use of CCleaner to completely wipe the “D” drive does constitute a separate act of spoliation.

2. Strozzi laptop and external storage devices

On March 13, 2014, Dow submitted a letter seeking a discovery teleconference to discuss “information uncovered through the forensic inspection of Dr. Nene’s computer, his declaration, and certain Organik Kimya depositions, and to request that Organik Kimya and Dr. Nene be ordered to provide additional materials relevant to this investigation.” (*See* Memo, Ex. 25 at 1.) Among other things, Dow asserted that the forensic inspection had revealed an email exchange between Organik Kimya employee Leo Strozzi and Dr. Nene, dated April 12-29, 2013, conducted over personal, previously-undisclosed email accounts, in which Mr. Strozzi referred to specific, proprietary Dow product codes in one of Dow’s confidential and proprietary product recipes called RHOPLEX™ Multilobe™. (*Id.* at 2.) Dow argued that Mr. Strozzi could only know the Dow product codes if he had access to the proprietary recipe. (*Id.*) Dow also asserted that in the email exchange “Mr. Strozzi asked Dr. Nene point blank to misappropriate further Dow trade secrets relating to that recipe.” (*Id.*)

In submitting its letter of March 13, 2014, Dow requested that counsel for Organik Kimya and Dr. Nene (Mr. Schwartz) not show the letter to their clients until I ruled on Dow’s requested relief for fear that dissemination of the contents of the letter would precipitate the additional destruction of evidence. Eventually, with the guidance and assistance of my attorney-advisor, agreement was reached whereby counsel for the Respondents and Mr. Schwartz agreed to maintain Dow’s letter of March 13, 2014, as outside counsel’s eyes only until either (a) Dow agreed that the letter (or parts of it) could be shared with their respective clients or (b) I authorized counsel for the Respondents and Mr. Schwartz to release the letter (or parts of it) to

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their respective clients. (See Organik Kimya Letter dated March 14, 2014, EDIS Document No. 529937.)

On March 14, 2014, Organik Kimya submitted a letter seeking a telephone conference to request the release of information in Dow's letter of March 13, 2014. (*Id.*) On March 19, 2014, I held a teleconference to discuss Organik Kimya's and Mr. Schwartz's request to release information. After hearing from the parties I concluded I needed more time to consider the issue and decided to withhold ruling until the next day, March 20, 2014.

During the March 20, 2014, teleconference I announced my decision to allow the parties to disseminate the information in Dow's letter to their clients. By permitting counsel for Organik Kimya and counsel for Dr. Nene to share the contents of Dow's March 13 letter, counsel would then be able to prepare a formal response so that I could rule on the substance of Dow's March 13 letter. I also issued a preservation order ("Preservation Order") requiring that certain evidence, including Mr. Strozzi's personal company laptop, be copied and preserved by Dow's forensic experts, Stroz Friedberg. (See EDIS Document ID No. 542385, March 20 Hr'g Tr. at 6:4-22; 11:17-21.) I explicitly stated that I would be "*mortally annoyed if anything was done to alter, destroy or otherwise mess with the evidence in this case.*" (*Id.* at 8:15-17 (emphasis added); 8:17-20 ("Let's not have any more playing around with hard drives, memory devices or anything, or there even be the suggestion of that.").)

Organik Kimya does not argue, but rather insinuates at two points in its opposition that an oral order is an insufficient basis to impose sanctions under Rule 210.33. (See Opposition at 33, 45.) Organik Kimya never actually takes a position on the issue, which I assume is a reflection of

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its belief in the merit of its insinuation.¹⁰ Organik Kimya states that “[s]ome precedent suggests that a sanctions motion under Commission Rule 210.33 must be based on a *written* order to compel to satisfy the notice requirement, ‘as the offending party must have notice of the alleged discovery misconduct and be given an opportunity to comply.’ ” (*Id.* at 33 (emphasis in original) (quoting *Genentech, Inc. v. US Int’l Trade Comm’n*, 122 F.3d 1409, 1422 (Fed. Cir. 1997).)

During the March 20 teleconference I stated:

Okay. The bottom line is, and I’ll be, I’m going to allow you to talk to your clients, that’s for certain, because I have not made a finding on spoliation. Actually, what was mentioned in that March 18th letter, excuse me, yeah, in the March 18th letter, would go beyond spoliation, I don’t even think there is a word for it that’s adequate.

But be that as it may, all right, I’m going to allow everybody to talk to their clients, obviously, but also this is an, and I’m quoting from Mr. Brinkman’s 13 March letter, if you look at No. 2, I’m going to do No.2, and I’ll read that out loud. Order Dr. Nene and Organik Kimya employees Leo Strasse [sic], Guillermo Perez and Sybil Altamont to provide a list and logging information for all personal Email accounts to Strasse, Ryburg [sic] for inspection of those accounts as well as their personal computers under existing protocol.

(March 20 Hr’g Tr. at 6:4-22; *see id.* at 11:17-21.) In addition, I explicitly warned:

I would be mortally annoyed if anything was done to alter, destroy or otherwise mess with the evidence in this case. Let’s not have any more playing around with hard drives, memory devices or anything, or there even be the suggestion of that.

(*Id.* at 8:15-20.) In light of those clear statements, Organik Kimya cannot seriously contend it was not on notice to preserve evidence, including the Strozzi laptop.

In any event, the weight of authority holds that “order” should be broadly construed and that as such an order need not be written. *See, e.g., United Medical Supply Co., Inc. v. U.S.*, 77 Fed.Cl. 257, 271 (Fed.Cl. 2007) (“As such, the court need not issue a written order compelling discovery for RCFC 37 to be triggered.”); *Avionic Co. v. General Dynamics Corp.*, 957 F.2d

¹⁰ In my opinion this is nothing more than an attempt to seed an idea in a brief that might later be seized upon in a Petition for Review.

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555, 558 (8th Cir.1992); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1415 (9th Cir.), cert. denied, 502 U.S. 994, 112 S.Ct. 617, 116 L.Ed.2d 639 (1991) (“Discovery sanctions may be imposed for failure to comply with an oral order.”); *Daval Steel Products, a Div. of Francosteel Corp. v. M/V Fakredine*, 951 F.2d 1357, 1363 (2d Cir. 1991) (“We rejected that argument, ruling that proceedings before the district court during which the judge issued an oral order requiring compliance with the subpoena provided a proper basis for the Rule 37(b)(2) sanction.”); *Quela v. Payco-Gen. Am. Creditas, Inc.*, No. 99-C-1904, 2000 WL 656681, at *6 (N.D.Ill. 2000) (“Although the language of Rule 37 requires violation of a judicial order in order to impose sanctions, a formal, written order to comply with discovery is not required. Courts can broadly interpret what constitutes an order for purposes of imposing sanctions.”) (citing *Brandt v. Vulcan, Inc.*, 30 F.3d 752, 756 n. 7 (7th Cir.1994) (“While courts have only applied Rule 37(b)(2) where parties have violated a court order, courts have broadly interpreted what constitutes an “order” for purposes of imposing sanctions.”)). In fact, “Courts have held that, for purposes of Federal Rule 37(b)(2), a party fails to obey a court ‘order’ whenever it takes conduct inconsistent with the court’s expressed views regarding how discovery should proceed.” *United Medical Supply Co., Inc. v. U.S.*, 77 Fed.Cl. 257, 271 (Fed.Cl. 2007) (citing *Brandt v. Vulcan, Inc.*, 30 F.3d 752, 756 n. 7 (7th Cir. 1994); *Daval Steel Prods., a Div. of Francosteel Corp. v. M/V Fakredine*, 951 F.2d 1357, 1363 (2d Cir. 1991)). Thus, because of the foregoing and because my Order of March 20, 2014 so clearly was directive in nature, I find my oral preservation order of March 20, 2014 to constitute an “order” within the context of Commission Rule 210.33.¹¹

¹¹ One that Organik Kimya understood it had to obey as demonstrated by its production of the Strozzi laptop to Stroz Friedberg.

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On March 25, 2014, pursuant to my Preservation Order, Stroz Friedberg imaged a number of computers, including Mr. Strozzi's personal work laptop. (Memo., Ex. 15 at ¶ 104.)

Also on March 25, 2014, Organik Kimya filed its substantive response to Dow's March 13 letter. (See EDIS Docket No. 530395.) Organik Kimya opposed Dow's request to forensically inspect Mr. Strozzi's laptop arguing that Dow had provided no justification for the forensic inspection. Organik Kimya argued that the email exchange between Dr. Nene and Mr. Strozzi was with regard to RHOPLEX™ Multilobe™, which is not an opaque polymer and thus outside the scope of this investigation. (*Id.* at 1-2.) Organik Kimya also argued that the exchange was not relevant because the email from Mr. Strozzi to Dr. Nene was from 2013, years past the development of either of the accused products, OPAC 204X or Orgawhite 2000. (*Id.* at 2.)

During the March 26, 2014 teleconference to discuss the substance of Dow's March 13 letter I stated my disagreement with Organik Kimya. Specifically, I found the email exchange to be relevant to Dow's request to forensically inspect Mr. Strozzi's laptop because it had the tendency to make a fact (*e.g.*, that Mr. Strozzi and Dr. Nene were discussing other confidential information, including information relevant to this investigation) more probable than it would be without the email. I also noted that "the thing that strikes me and I will be up front about it is it looks like very casual conversation. It suggests to me that there is a possibility that this kind of conversation has gone on before." I also stated that "while it may be true that the substance of the email between Mr. Strasse and Doctor Nene is outside the scope of this investigation as defined by the Notice of Investigation, the discovery Dow seeks based on the email is relevant to at least Dow's claim of trade secret misappropriation." Thus, based on the recovered email exchange I found good cause to grant Dow's request to compel the forensic inspection of

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Mr. Strozzi's personal company laptop. (EDIS Document No. 531844 (March 26 Hr'g) at 8:7-10:9.)

Despite my admonition during the March 20 teleconference that I would be "mortally annoyed" if there was any more destruction of evidence or even the suggestion of it, and despite of being on notice at the time of the Preservation Order of the potential massive spoliation on Dr. Perez's laptop, the forensic inspection of Mr. Strozzi's laptop revealed that on March 21, 2014, one day after I issued the Preservation Order, someone deleted over 2,700 files from the Strozzi laptop. (Memo, Ex. 15 at ¶¶ 104-108.) In particular, the forensic inspection revealed that a folder named "scale up", which was created on September 9, 2013 (after the institution of this investigation) and originally located at "C:\Users\l_strozzi\scale up" was deleted on March 21, 2014 at 1:43 p.m. (Coordinated Universal Time). (*Id.* at ¶ 107.) The evidence shows that the folder contained 2,742 user-created files and folders. (*Id.*) The evidence also shows that these files and folders were not found in the Recycle Bin, indicating that they were deleted in a manner that circumvented the Recycle Bin. (*Id.*)

The forensic analysis also revealed dozens of files and folders that had been moved to the Recycle Bin and deleted, but were still recoverable. (*Id.* at ¶ 108.) The evidence shows that included within the files and folders that had been moved to the Recycle Bin was a folder named "Aplikasyon" originally located at "C:\Users\l_strozzi\PD 027- Etiket Uygulamalarinda Kullanilan basinca hassas yapıştırıcıların iyileştirmesi\Aplikasyon". (*Id.*) Based on forensic analysis of the file "UsnJrnl", a Windows system log that records information about recent file system actions, including file deletions, the evidence shows this folder was selected to be deleted and placed in the Recycle Bin on March 21, 2014 at 8:14 a.m. (UTC). (*Id.*) The metadata from

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a file located in the folder, which was keyword responsive, shows that it too was deleted and placed in the Recycle Bin on March 21, 2014 at 8:14 a.m. (UTC). (*Id.*)

Stroz Friedberg also discovered, by examining the Windows registry files and “setupapi” log on Mr. Strozzi’s personal work laptop, evidence of at least 20 external storage media devices being connected to his laptop after May 2013. (*Id.* at ¶110.) In addition, by examining the Jump Lists on Mr. Strozzi’s laptop, Stroz Friedberg found references to additional USB devices and files on USB devices connected to the Strozzi laptop after May 2013. (*Id.* at ¶ 111.)

Before Dow learned from Stroz Friedberg of the existence of these external storage devices, the evidence shows that on March 31, 2014, Mr. Strozzi took his computer bag, with his laptop and storage devices, into a bathroom of a highway rest stop, but “accidentally” left them there. Mr. Strozzi filed a police report with Italian police, which reads as follows:

Today, after having a day off as I was feeling sick, I was on my way to my residence located in Treviglio. On my way home, approximately around 12.00 o’clock, I stopped at the autogrill of Lainate (MI), which is located on the “MILANO-COMO” highway. When I reached the Autogrill, I went to the bathroom facilities of said autogrill, carrying the computer in its bag with me. I was going to go to the bathroom and then continue to travel towards my residence. When I left the aforementioned autogrill, I realized that I had forgotten the computer inside the bathroom facility of the autogrill. I returned immediately to the autogrill and I went to the bathroom facility. When I reached the bathroom, I saw that the bag I carried my computer in was not there. I went to the manager of the Autogrill ROSSINI Pasquali and I told him what had happened. ROSSINI and I searched together for the computer but we weren’t able to find it.

Inside my computer bag, beside the laptop computer, there were also the following items: an external hard disc of 500 GB, brand Verbatin; an external hard disc of 1 TEGA, brand TOSHIBA; around six (6) USB sticks (external memory sticks) about which I am not able to provide any description; a mouse, the brand of which I am not able to provide; one power supply for computers; a laser pen used for presentations; a few personal objects.

(See Memo, Ex. 17.) Even though the laptop had already been imaged, I find the loss of the original evidence (*i.e.*, the laptop itself) is a separate act of spoliation in violation of my

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Preservation Order of March 20, 2014. Additionally, the loss of the large number of external memory devices accessed after the complaint was filed in May 2013 is spoliation in violation of my Preservation Order.

3. Nene laptop and external storage devices

On September 12, 2013, Dow served Dr. Dilip Nene with a subpoena for documents and testimony.¹² (Memo, Ex. 19.) The subpoena specifically required Dr. Nene to search for and produce documents related to his consultation with Organik Kimya. (*Id.* at 3.) In addition, it instructed him to “preserve and retain all documents, including electronic documents, and other information potentially responsive to any of these requests.” (*Id.* at 1.)

The evidence shows that after being served with the subpoena, Dr. Nene immediately called Stefano Kaslowski, the co-CEO of Organik Kimya. (Memo, Ex. 8 at 160:19-161:4.) During that conversation, Mr. Kaslowski told Dr. Nene not to worry because Organik Kimya would provide him with legal representation. (Memo, Ex. 18 at 22:2-15, 66:2-67:12.) The evidence shows that since that phone conversation, Organik Kimya has been paying Dr. Nene’s legal expenses. (*Id.*)

On September 27, 2013, counsel for Dow deposed Dr. Nene pursuant to the subpoena. (Memo, Ex. 8). During that deposition, Dr. Nene testified that he did not speak to Mr. Kaslowski until he received his subpoena on September 12, 2013. (*Id.* at 162:4-14.) He also insisted that during his four years of consultation with Organik Kimya, the only information he provided involved basic chemistry and plant safety. (*Id.* at 109:6-20, 110:18-111:1, 139:13-24, 152:17-25, 187:23-188:9, 194:23-195:9, 235:22-236:5, 269:17-23.) Dr. Nene also testified that he gave a tutorial to several Organik Kimya scientists, a basic “Chemistry 101” tutorial. (*Id.* at

¹² Dr. Nene is a former research scientist employed by Complainant Rohm and Haas who helped to develop or had knowledge of the relevant Rohm and Haas/Dow products.

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242:9-24.) Dr. Nene testified that he would exchange emails with Organik regarding scheduling visits and paying invoices, but that he deleted those exchanges. (*See Id.* at 252:6-10 (“I deleted everything.”).) Dr. Nene testified that those exchanges were never of a technical nature. (*Id.* at 249:5-9 (“A. I have no idea. But there were normally these kind of communications. There was no chemistry type of exchange. Q. Ever? A. No.”)) Counsel for Dow requested a copy of the Chemistry 101 tutorial, as well as copies of all of Dr. Nene’s invoices with Organik Kimya. (*Id.* at 243:3-246:25.) Dr. Nene testified that he would search for those materials in good faith. (*Id.*)

On November 11, 2013, counsel for Dr. Nene sent a letter to counsel for Dow indicating that Dr. Nene was unable to locate the requested materials. (Memo, Ex. 20.) With respect to the invoices, counsel for Dr. Nene stated that Dr. Nene stored his invoices on a Yahoo account that was “hacked” and could not be restored. (*Id.*).

On December 18, 2013, Dow served Dr. Nene with a second subpoena directing him to produce for inspection “computer hard drives for any Personal Computer used . . . during the period from November 2007 through December 31, 2012.” (Memo, Ex. 21.) On January 4, 2014, Dr. Nene moved to quash the subpoena.

On February 4, 2014, I denied in part Dr. Nene’s motion and issued Order No. 15 requiring him to make his computer(s) available for forensic inspection. (*See* Order No. 15 (February 4, 2014).) I denied the motion to quash because in contrast to Dr. Nene’s deposition testimony, documents produced by Organik from both Dr. Nene’s network and Yahoo accounts indicated that Dr. Nene did communicate over email “chemistry type” information and documents to Organik. (*Id.* at 6.) For example, Dr. Nene sent an email to several Organik Kimya employees forwarding three technical documents:

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From: Dilip NENE
To: Leonardo STROZZI; Emre KAYA; Eric KERVEZEE
CC: Stefano KASLOWSKI; Sibel ALTINOK
Sent: 3/14/2011 6:36:59 PM
Subject: Sops
Attachments: Blend Tanks.docx; Preparation of pre-emulsion.docx; Reactor Process Dilip.docx

Lady and Gentlemen during the shift leader training in Rotterdam I noticed that there were some minor errors in these documents.

The errors have been corrected and the documents attached herein for you to read and give me your feedback (from Rotterdam group).

If I do not get your feedback by Friday the 18th I will assume that these documents are approved.

Sibel I am copying you on this note so that you may have the copies. We could use these for training in Istanbul.

Thank you and have a good week.

Dilip

(EDIS Document No. 525507 (Dow opposition to Dr. Nene's Motion to Quash), Ex. 6.) One of the attachments to the email, "preparation of pre-emulsion.docx" clearly included technical information:

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(*Id.*, Ex.9.) So did the “Reactor Process Dilip.docx” attachment:

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(*Id.*, Ex. 10.) Moreover, one document produced by Organik contradicts Dr. Nene's deposition testimony that he did not do any opaque polymers work. That document indicated that Organik created a file "concerning all meeting notes and mails on Opac 101, 103, 204x and seeds" includes metadata that states "[a]s a result of recent meetings held with Dilip Nene, the information obtained about 'seed' and 'opac polymers' are summarized as follows." (*Id.*, Ex. 16.) Further, the evidence also shows that shortly after Dr. Nene's trip to Organik's facility in Istanbul, an Organik employee reported "good news" regarding Organik's opaque polymer Orgal Opac 204X due to revisions of its production run to incorporate detailed Rohm and Haas process information obtained from "[t]he guy", who Dow alleges is Dr. Nene. (*Id.*, Ex. 15.) Accordingly, I found the subpoena request for forensic inspection well supported and in Order No. 15 denied Dr. Nene's motion to quash the subpoena. (*See* Order No. 15 at 7.)

On February 6, 2014, pursuant to the ALJ's instruction, counsel for Dr. Nene provided Dow's forensic experts Stroz Friedberg with Dr. Nene's personal laptop. (Memo, Ex. 15 at ¶ 117). At the beginning of the inspection, counsel for Dr. Nene disclosed for the first time that

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Dr. Nene had replaced his hard drive in mid-2013 and that he no longer had the original hard drive.¹³ On February 18, 2014, Dow submitted a letter arguing that Dr. Nene had not been forthcoming with information concerning his personal laptop and requesting an order requiring him to submit a sworn affidavit explaining what happened to his old hard drive and identifying all computers, hard drives, tablets, smart phones and other memory storage devices in his possession since 2007. On February 20, 2014, I ordered the requested relief. (EDIS Document ID No. 543902, Feb. 20 Hr'g Tr. at 5:2-21, 8:7-10).

On March 7, 2014, Dr. Nene served Dow with his sworn affidavit. (*See* Memo, Ex. 22). In that document, Dr. Nene represented that he began having problems with his personal laptop in April 2013 and that he eventually removed the hard drive and “threw it into the household trash which was subsequently discarded.” (*Id.*) Dr. Nene further represented that he purchased a new hard drive four months later, on August 23, 2013, which he subsequently installed on his personal laptop without transferring anything over from his old hard drive. (*Id.*) Dr. Nene also explained that he traveled to India in May 2013, returned to the U.S. in early June 2013 and visited Organik Kimya’s facility in Rotterdam in July 2013, during which time Organik Kimya gave him a new laptop, which he brought back to the U.S. (*Id.*) Dr. Nene identified in his affidavit only a single external hard drive that he purchased on December 31, 2013. (*Id.*)

On March 11, 2014, Dow deposed Mr. Kaslowski, who, like Dr. Nene, testified that the

¹³ The second subpoena to Dr. Nene requested “computer hard drives for any Personal Computer used . . . during the period from November 2007 through December 31, 2012.” Dr. Nene moved to quash that subpoena knowing that he had already destroyed the hard drive used in his laptop during that period of time. Yet, Dr. Nene never argued in support of the motion to quash that he had no hard drives from this time period. Nor did he bother to tell counsel for Dow before its forensic experts actually traveled to Dr. Nene’s to do the forensic inspection that he had removed the hard drive from his laptop from that time period. Thus, I must conclude the motion to quash was filed only to stymie discovery and harass and waste commission and party resources.

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two men did not speak or meet in 2013 until service of Dr. Nene's first subpoena on September 12, 2013. (Memo, Ex. 23 (Kaslowksi Dep.) at 145:7-12.) Contrary to both Dr. Nene's and Mr. Kaslowksi's testimony, forensic analysis of Dr. Nene's laptop recovered fragments from an email stating that Dr. Nene and Mr. Kaslowksi had a "meeting" in Rotterdam during Dr. Nene's July 2013 trip. (Memo, Ex. 24 at NENE-221.) Forensic examination of Dr. Nene's personal laptop also uncovered that after service of his first subpoena on September 12, 2013, Dr. Nene connected to his personal laptop at least eleven different portable storage devices. (Memo, Ex. 22.) None of these devices were identified in Dr. Nene's sworn affidavit, as required by my February 20, 2014 Order.

On March 13, 2014, Dow filed a letter seeking an order requiring Dr. Nene to turn over for forensic inspection the laptop he received from Organik Kimya during his July 2013 visit to Rotterdam and all portable storage devices used since issuance of his first subpoena. (Memo, Ex. 25.) During a March 20, 2014 teleconference, I ordered preservation of these materials. (EDIS Document ID No. 542385, Mar. 20 Hr'g Tr. at 6:4-22, 11:17-21.) During a March 26, 2014 teleconference, I granted Dow's request to have these materials forensically inspected by Stroz Friedberg. (EDIS Document ID No. 531844, Mar. 26 Hr'g Tr. at 7:15-8:6, 18:17-21.) On March 27, 2014, counsel for Dr. Nene delivered the Organik Kimya issued laptop and four external storage devices to Stroz Friedberg. The four storage devices were completely empty. (Memo, Ex. 15 ¶ 125.) Dr. Nene explained that he no longer had the other seven storage devices discovered by Stroz Friedberg.

On May 3, 2014, counsel for Dow deposed Dr. Nene for a second time. Notably, during this deposition Dr. Nene admitted that sometime between returning from India in early June 2013 and traveling to Rotterdam in July 2013, Dr. Nene removed the hard drive from his

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personal laptop, took it to his garage, smashed it with a hammer and threw it in the garbage.

(Memo, Ex. 18 at 50:6-52:22, 200:13-25, 202:18-203:3.) Dr. Nene testified that he smashed the hard drive to make sure that the information on the drive could not be recovered. (*Id.*) Dr. Nene admitted that in addition to the destruction of his old hard drive, he also found and destroyed a bag full of old zip drives. (*Id.* at 42:14-47:16.) Dr. Nene also testified that he found a stash of external storage devices, in addition to the zip drives, in his basement that he had not turned over to Stroz Friedberg for inspection. (*Id.* at 358:18-361:8, 363:11-364:24.)

On May 6, 2014 counsel for Dr. Nene delivered three additional storage devices (in addition to the four provided on March 27, 2014) to Stroz Friedberg for forensic inspection. (Memo, Ex. 15 at ¶ 125.) On May 8, 2014, counsel for Dr. Nene delivered three more USB devices (in addition to the four provided on March 27 and the three provided on May 6) to Stroz Friedberg for forensic inspection. (Memo at 22.)

Although Dr. Nene originally on March 27, 2014 produced only four external storage devices, forensic evidence revealed that the following eleven removable storage devices were connected to his personal laptop.

Vendor	Product	First Known Connection
IOMEGA	ZIP 250	9/13/2013 9:57:12 AM
SanDisk	U3 Cruzer Micro	9/17/2013 10:57:11 AM
Kingston	USB Drive	9/17/2013 11:41:26 AM
Fujifilm	USB Drive	9/17/2013 11:42:51 AM
Verbatim	Store 'n' Go Pro	9/17/2013 12:04:35 PM
SanDisk	Cruzer Mini	9/17/2013 12:11:15 PM
Lexar	Jumpdrive Pro	9/17/2013 12:12:21 PM
pqi	IntelligentStick	9/27/2013 12:05:37 PM
Generic	Multi Card	12/21/2013 9:12:29 AM
Generic	Flash Disk	1/27/2014 6:37:07 PM
Mass	Storage Device	

(Memo, Ex. 15 at ¶ 119.) As the above table shows, Dr. Nene connected seven of the external storage devices to his personal laptop within a week of receiving his first subpoena on September

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12, 2013. The table also shows that he attached another device on December 21, 2013, *three days after service of his second subpoena*.

Forensic evidence shows that on September 17, 2013, less than a week after receiving his first subpoena, Dr. Nene opened and reviewed the following files on a Fujifilm USB drive:

Referenced Document Full Path	Link File Create Time	Target File Create Time	Target File Modify Time	Volume Label
D:\Chem 101.pptx	9/17/2013 11:48:23 AM	5/3/2008 5:01:39 PM	5/6/2008 3:39:30 PM	MEG NENE
D:\Chem 101.odp	9/17/2013 11:58:58 AM	9/17/2013 11:58:48 AM	9/17/2013 11:58:58 AM	MEG NENE
D:\Invoice Rotterdam	9/17/2013 12:03:03 PM	11/30/2010 7:59:00 AM	11/30/2010 7:59:02 AM	MEG NENE
D:\Invoice Rotterdam\Transportation\Rotterdam*1.jpg	9/17/2013 12:03:03 PM	11/30/2010 7:59:01 AM	11/29/2010 5:31:58 PM	MEG NENE

(*Id.* at ¶ 126). This USB drive was one of the four removable storage devices provided to Stroz Friedberg on March 27, 2014. As explained above, when Stroz Friedberg received this device, the files were no longer there, indicating that Dr. Nene deleted these files sometime between September 17, 2013 and March 27, 2014. (*Id.* at ¶ 127). These files indicate that Dr. Nene's representations in the November 11, 2013, letter sent by counsel for Dr. Nene to counsel for Dow indicating that Dr. Nene was unable to locate the requested materials was a deliberate lie. (*See* Memo, Ex. 20.) The files also contradict Dr. Nene's story that he kept his invoices on his hacked Yahoo account.

In addition to identifying the files that were accessed from the FujiFilm device, Stroz Friedberg was also able to recover deleted data from the unallocated space of the Kingston USB device. (Memo, Ex. 15 at ¶ 127.) After recovering files from the unallocated space, Stroz Friedberg applied the keyword search terms in the inspection protocol to the files and found that some were keyword responsive. (*See id.* at ¶ 127; *id.* at Ex. 15-O.)

Forensic inspection of the Nene personal laptop revealed a number of deletions that took place on December 20, 2013, *two days after service of Dr. Nene's second subpoena*. (*Id.* at ¶ 128.) For example, forensic evidence shows that file "Chem101.pptx" was present on Nene's laptop on December 20, 2013 at 8:25 a.m., but was no longer there as of 2:08 p.m. that same day.

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Thus, the file must have been deleted sometime between those two times. (*Id.* at ¶¶ 129-130.)

Stroz Friedberg also determined that files named “Preparation of pre-emulsion.docx” and “Reactor Process Dilip.docx” were deleted shortly after Dr. Nene received his second subpoena. (*Id.* at ¶¶ 130-131.)

Stroz Friedberg’s forensic analysis of Dr. Nene’s laptop also revealed that twelve “.zip” files named “Backup files,” totaling approximately two gigabytes of data, were deleted from Dr. Nene’s computer beginning on December 20, 2013, in the same time period as the files described above. (*Id.* at ¶ 132.)

Further, Stroz Friedberg’s analysis revealed that Dr. Nene’s representation in his March 7, 2014 declaration that “nothing from the discarded hard drive was transferred on to the new hard drive” was false. (*See* Memo, Ex. 22.) The evidence shows that on September 10, 2013, Dr. Nene created a folder named “NewAll Folder” on his laptop. (*Id.* at ¶ 134). That folder contained 128 subfolders, including a folder named “toshiba backup.” (*Id.*). The name “toshiba backup” and the fact that the folder only contained data modified on or before January 2011, strongly suggest that this folder was a backup of data from the old hard drive of the Toshiba Laptop provided by Dr. Nene for inspection. (*Id.*). The forensic evidence shows that on December 20, 2013, Dr. Nene deleted most of the data within the “NewAll Folder.” (*Id.* at ¶ 137).

As set forth above, Dr. Nene deleted a number of files and folders from his personal laptop and external memory devices in violation of my first subpoena to Dr. Nene, my Preservation Order of March 20, and my Order of March 26. The fact that the files or folders may have been deleted prior to issuance of my Preservation Order and the March 26 Order is of no moment as Dr. Nene was at the time of the deletion of evidence under a duty to preserve

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pursuant to my first subpoena and yet he deleted the files anyway. Thus, his wound is self-inflicted. Federal district courts have consistently held that “even though a party may have destroyed evidence prior to the issuance of a discovery order and thus may be unable to obey, sanctions are still appropriate under Rule 37(b) because this inability is self-inflicted.” *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. at 191-192 (quoting *Chan v. Triple 8 Palace, Inc.*, 2005 WL 1925579 at *4 (S.D.N.Y. Aug. 11, 2005)); *see also Beck v. Test Masters Educational Servs., Inc.*, 289 F.R.D. 374, 382 (D.D.C. 2013) (rejecting spoliator’s argument that Rule 37(b) does not apply because “all of the alleged spoliation conduct occurred *before* this Court’s June 27, 2011 order” and because “none of the information Plaintiffs claim has been spoliated was subject to any discovery order at the time it was allegedly spoliated.”); *Orbit One Comm’ns, Inc. v. Numerex Corp.*, 271 F.R.D. 429, 435 (S.D.N.Y. 2010) (“Sanctions [under Rule 37(b)] are appropriate even where a party’s spoliation occurred before the issuance of the discovery order – thus rendering compliance impossible – because the inability to comply with the order was ‘self-inflicted.’”). Additionally, Dr. Nene’s failure to timely produce all the external memory devices in his possession was a violation of my March 26 Order compelling forensic inspection of such. Dr. Nene’s spoliation at least includes: (1) The deletion of the files on the Fujifilm USB drive and Kingston USB drive after Dr. Nene was served with the first subpoena on September 12, 2013, requiring him, *inter alia*, to “preserve and retain all documents, including electronic documents, and other information potentially responsive to any of these requests” is spoliation in violation of my first subpoena to Dr. Nene, as well as my Preservation Order of March 20, 2014 and the March 26 Order; (2) The deletion of the files “Chem101.pptx,” “Preparation of pre-emulsion.docx,” and “Reactor Process Dilip.docx” is spoliation in violation of my first subpoena to Dr. Nene, my Preservation Order of March 20, 2014 and the March 26 Order; (3) The deletion

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of the twelve “.zip” files is spoliation in violation of my first subpoena to Dr. Nene, my Preservation Order of March 20, 2014, and the March 26 Order; and (4) The deletion of the “NewAll Folder”, including subfolders and files therein, is spoliation in violation of my first subpoena to Dr. Nene, my Preservation Order of March 20, 2014, and the March 26 Order.

B. Proof of Sanction-Worthy Spoliation

1. Control, duty to preserve, breach of the duty to preserve

As discussed, *supra*, to prove spoliation that warrants the imposition of sanctions Dow must show that the party having control over the evidence had an obligation to preserve it when it was destroyed or altered and that the party breached that obligation through the destruction or alteration of evidence.

It has been held that courts must consider issues of proportionality and reasonableness of the alleged spoliator’s conduct in determining whether there has been a breach of the preservation duty, neither is at issue in this investigation. Organik Kimya does not allege that it would have been an undue burden for it to preserve the information that was destroyed. Neither is this a case where a hapless party took objectively reasonable steps to preserve potentially relevant evidence, which was nevertheless destroyed, lost or altered.

a. Perez laptop

Organik Kimya does not dispute that it had control over Dr. Guillermo Perez’s laptop. Organik Kimya does not dispute that it had a duty to preserve the laptop and the evidence therein at the time the Program File folder was copied 108 times to overwrite the unallocated space on the laptop’s “C” drive or when CCleaner was run to wipe the “D” drive. Organik Kimya does not dispute that as a result potential evidence was destroyed on Perez’s laptop in contravention of Order No. 16. (See Opposition at 1, 51 (“Organik Kimya does not dispute that a portion of the hard drive of Mr. Perez’s computer was overwritten in such a way that previously deleted files

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were potentially rendered unrecoverable through forensic means. Organik Kimya understands that this is a serious issue and that the overwriting of deleted (but potentially still recoverable) files on Mr. Perez's computer may constitute a violation of Order No. 16.”.)

Dr. Guillermo Perez is co-head of R&D for Organik Kimya. Dr. Perez has been employed by Organik Kimya for six years. The laptop in question was Dr. Perez's company-issued laptop. The evidence shows that Organik Kimya took possession of Dr. Perez's company laptop before the spoliation. Thus, Organik Kimya incontrovertibly had control over the laptop at the time of the spoliation and does not argue otherwise.

The Complaint in this investigation was filed on May 20, 2013, and the Commission instituted this investigation by publication in the Federal Register on June 21, 2013. 78 FR 37571 (June 21, 2013). On November 7, 2013, I issued Order No. 8 as an initial determination granting Dow's request to amend the Complaint and Notice of Investigation (“NOI”) to add allegations of trade secret misappropriation. Thus Organik Kimya was under a duty to preserve evidence relevant to Dow's allegations of patent infringement at least as of May 20, 2013 and trade secret misappropriation at least as of November 7, 2013, if not earlier. Accordingly, there can be no debate that Organik Kimya was under a duty to preserve when the spoliation of evidence on Perez's laptop occurred between February 23-27, 2014. Likewise, there can be no debate that Organik Kimya breached that duty when Organik Kimya undertook to make 108 copies of the Program File folder to overwrite the unallocated space on the laptop's “C” drive or when CCleaner was run to wipe the “D” drive. (*See supra*, at IV.A.1.)

b. Strozzi laptop and external memory devices

The Complaint in this investigation was filed on May 20, 2013, and the Commission instituted this investigation by publication in the Federal Register on June 21, 2013. 78 FR 37571 (June 21, 2013). On November 7, 2013, I issued Order No. 8 as an initial determination

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granting Dow's request to amend the Complaint and Notice of Investigation ("NOI") to add allegations of trade secret misappropriation. Thus Organik Kimya was under a duty to preserve evidence relevant to Dow's allegations of patent infringement at least as of May 20, 2013 and trade secret misappropriation at least as of November 7, 2013, if not earlier. Accordingly, there can be no debate that Organik Kimya was under a duty to preserve when the spoliation of evidence on Mr. Strozzi's laptop occurred on March 21, 2014 and the laptop and external memory devices were lost on March 31, 2014. Likewise, there can be no debate that if I find Organik Kimya to have "control" over Strozzi's laptop or external memory devices that Organik Kimya breached its duty to preserve when more than 2700 files were deleted from the laptop and when the laptop and memory devices were subsequently lost.

As indicated above, the issue of "control" is contested.

The Parties' Positions

Organik Kimya argues that it is not responsible for the deletion of over 2700 files from Mr. Strozzi's work-issued laptop. (*See* Opposition at 45.) Organik Kimya argues that Mr. Strozzi was a "rogue employee" who made a unilateral decision to delete those files prior to delivering his computer to Organik Kimya for forensic inspection. (*Id.* at 45-46.) Organik Kimya argues Mr. Strozzi deleted the files despite receiving direct instructions not to delete any material from his computer. (*Id.* at 46.) As such, Organik Kimya argues Mr. Strozzi's decision to delete the files cannot be imputed to Organik Kimya under standard agency principles. (*Id.* at 45.) Organik Kimya argues that Dow's forensic inspection of the Strozzi laptop revealed file paths that suggest that Mr. Strozzi had accessed not only Rohm and Haas confidential information but also confidential information from Vinavil, Mr. Strozzi's former employer. (*Id.* at 46.) Organik Kimya argues that the forensic inspection also revealed that Mr. Strozzi had

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Organik Kimya confidential recipes among his files and that he had already sold at least one of those Organik Kimya recipes to a competitor. (*Id.*) Organik Kimya argues that under these unique circumstances, Mr. Strozzi's decision to delete the files on his company-issued laptop cannot be attributed to Organik Kimya because his actions were clearly not performed within the scope of his employment or for anything other than Mr. Strozzi's own personal benefit. (*Id.*)

Organik Kimya argues that for Dow to demonstrate that Organik Kimya is vicariously liable for the actions of Mr. Strozzi, Dow must prove that his act was "reasonably necessary to accomplish the purpose of [his] employment" and was done "in furtherance of [Organik Kimya's] business." (*Id.* (quoting Restatement (Second) of Agency § 220 cmt. e (1958).)

Organik Kimya argues that there is no evidence that the deletion of the "scale-up" folder on his work-issued laptop was necessary to accomplish the purpose of his employment. (*Id.* at 47.)

Moreover, Organik Kimya argues that Dow has not shown that the deletion of files off his company-issued laptop was within the scope of his employment, as interpreted by Turkish law. (*Id.*)

Dow argues that inspection of the company-issued Strozzi laptop and the loaner laptop revealed that Organik Kimya was in possession of over one hundred of Dow's proprietary recipes, including recipes for the domestic industry products in this investigation. (Reply at 16.)

Dow asserts that to avoid responsibility for this theft, Organik Kimya alleges Strozzi was a "rogue employee" and it an innocent victim. (*Id.*) Dow argues that evidence shows otherwise. (*Id.*)

Dow argues that forensic evidence shows that a user identified as "hp" used an Organik Kimya loaner laptop to access several Rohm and Haas recipes located on an external storage device in December 2007. (*Id.*) Dow asserts that Dr. Nene admitted to keeping copies of these

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very same files from his time at Rohm and Haas. (*Id.*) Dow argues that contrary to Organik Kimya's argument in its opposition, Dow does not allege that Dr. Nene accessed the recipes on the Organik Kimya loaner laptop in December 2007, but rather that Dr. Nene provided the recipes in electronic form to Organik Kimya in November 2007 and that an Organik Kimya employee, not Dr. Nene, accessed the recipes on the loaner laptop in December 2007. (*Id.* at 17.)

Dow asserts that it is Organik Kimya's position that Strozzi, acting on his own accord and not at the direction of Organik Kimya, accessed the files on the loaner laptop in December 2007. (*Id.*) Dow argues that Organik Kimya's theory has a huge problem in that Mr. Strozzi did not start working for Organik Kimya until September 2008. (*Id.*) Thus, Dow argues that an Organik Kimya employee other than Strozzi must have been the one to access the files on the Organik Kimya loaner laptop. (*Id.*) Dow argues that the fact that these same recipes show up on Strozzi's storage devices several years later only underscores the point that Mr. Strozzi is not a "rogue employee" and that someone from Organik Kimya gave him more Rohm and Haas recipes after he began working at Organik Kimya. (*Id.* at 17-18.)

Dow asserts that Organik Kimya also argues that Mr. Strozzi must have been the one who accessed the files in December 2007 because "hp" jump lists contained several files from Vinavil, Mr. Strozzi's former employer. (*Id.* at 18.) Dow argues that if Organik Kimya's theory is indeed true then it means that Strozzi must have provided Organik Kimya with both Rohm and Haas and Vinavil recipes while he was still undisputedly working for Vinavil and before starting to work for Organik Kimya. (*Id.*) Thus, if true, Dow argues that Organik Kimya was collecting recipes from its competitors in December 2007 using Strozzi's services even before he officially started as an Organik Kimya employee. (*Id.*) Dow argues that in any event whether it was Strozzi or Nene who provided the Rohm and Haas recipes to Organik Kimya, it is undeniable

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that Strozzi was not the one who accessed them using the Organik Kimya loaner laptop in December 2007. (*Id.*) Dow argues that in fact it appears that Strozzi never even used the loaner laptop. (*Id.*) According to Dow, the event logs for the loaner laptop identify over ten (10) users, but Strozzi is not one of them. (*Id.* at 18-19.) Dow argues that in addition to the “hp” storage device, the forensic evidence also shows that in 2009 a user named “a_simsek”, who is likely Alaattin Simsek, a member of Organik Kimya’s IT department, accessed many of the Rohm and Haas recipes using an Organik Kimya loaner laptop and a storage device with file paths bearing Mr. Strozzi’s name, specifically “FILES/Leo.” (*Id.* at 19.)

Thus, Dow argues that Organik Kimya’s assertion that “[n]one of this means that Mr. Strozzi’s personal files became Organik Kimya files or that anyone else at Organik Kimya ever accessed those files” is false. (*Id.*) Dow argues that the evidence shows that someone other than Strozzi accessed those files in 2007 and 2009 from an Organik Kimya laptop. (*Id.*) Accordingly, Dow argues that the evidence shows that Mr. Strozzi was not a “rogue employee” but was doing exactly what other Organik Kimya employees had been doing for years, looking at other companies’ confidential recipes, and when he got caught he did exactly what Organik Kimya did with the Perez laptop, he destroyed the evidence. (*Id.*)

Dow argues this is not a case of whether Organik Kimya is liable under a theory of respondent superior as Organik Kimya argues, but rather whether Organik Kimya is directly liable. (*Id.*) Dow argues that the Strozzi laptop was an Organik Kimya issued computer over which Organik Kimya had control. (*Id.* at 20-21.) Dow argues that when the Preservation Order issued on March 20, 2014, Organik Kimya should have taken steps to secure and preserve the Strozzi laptop. (*Id.* at 21.) In fact, Dow argues that Organik Kimya should have taken steps to secure the laptop in July-August 2013 when discovery commenced in this investigation. (*Id.*)

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Dow argues that by leaving the laptop in Mr. Strozzi's hands, Organik Kimya delegated the duty to preserve to him. (*Id.*) Thus, Dow argues the fact that one day after the Preservation Order issued Strozzi deleted the scale-up folder and all 2,742 of its files and subfolders and nine days later he lost the laptop and storage devices in the restroom of an Italian Autogrill is attributable to Organik Kimya directly. (*Id.*)

Organik Kimya argues in sur-reply that although Dow condemns its "rogue employee" arguments as just another lie the following facts cannot be ignored: the "jump lists" from the Strozzi laptop and the loaner laptops reference companies Mr. Strozzi had worked for including Dow, Vinavil, and Organik Kimya; no document referred to in any of these jump-lists was ever found on any Organik Kimya computer, network server or email system; the jump-lists found on Strozzi's computer and the file paths found on the loaner laptops have identical, or strikingly similar formats; and the jump-lists found on Strozzi's laptop and the file paths found on the loaner laptops was written in Italian, Mr. Strozzi's native language. (Sur-Reply at 9-10.)

Organik Kimya asserts that Dow's argument that Dr. Nene provided files to Organik Kimya in 2007 makes no sense. (*Id.* at 10.) Organik Kimya argues Dr. Nene would not provide files written in Italian and pertaining to Vinavil a company Dr. Nene never worked for, but Mr. Strozzi did. (*Id.*) Organik Kimya argues that Dow has provided no proof that such a transfer ever happened. (*Id.*) Organik Kimya argues that only explanation that makes sense is that the files accessed on the loaner laptop in December 2007 were Mr. Strozzi's personal files, not Dr. Nene's. (*Id.* at 10-11.)

Organik Kimya questions Dow's argument that Mr. Strozzi could not have been the person to access the files in December 2007 because he didn't start working for Organik Kimya until September 2008, asking "why not?" (*Id.* at 11.) Organik Kimya asserts that Mr. Stefano

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Kaslowksi recalls interviewing Mr. Strozzi on several occasions in late 2007/early 2008 in both Istanbul and Rotterdam. (*Id.* at 12.) Organik Kimya argues the time frame of the file access, nine months before Mr. Strozzi's start date, is consistent with Organik Kimya's hiring practices citing Dr. Nene's interview process as an example. (*Id.* at 11-12.) Organik Kimya argues that the evidence strongly suggests Mr. Strozzi was interviewing at Organik Kimya on December 14-15, 2007 when he borrowed a loaner laptop and accessed the files. (*Id.*) Organik Kimya argues that the login ID "hp" probably is a generic default user-name for a loaner laptop, rather than a specific user at Organik Kimya. (*Id.* at 13.)

Organik Kimya argues that Dow's claim that a user named "a_simsek" (likely Alaattin Simsek a member of Organik Kimya's IT department) also accessed many Rohm and Haas recipes using an Organik Kimya loaner laptop in 2009, ignores that the default user for a loaner laptop such as this is typically an employee from the IT department. (*Id.*) Thus, Organik Kimya argues the mere fact that the loaner laptop was logged into with the user name a_simsek does not mean that Alaattin Simsek was accessing Italian chemical process files. (*Id.*) Organik Kimya argues that the more likely explanation is that Mr. Strozzi logged onto the loaner laptop on February 18, 2009 using the name a_simsek to access his own personal files, stored on his own, non-company-issued storage device. (*Id.*)

Organik Kimya again argues in its sur-reply that Turkish law very likely governs the question of whether Mr. Strozzi's alleged acts of spoliation can be imputed to Organik Kimya. (*Id.* at 14.) Organik Kimya argues that Dow makes no attempt to analyze the facts under Turkish law. (*Id.*) Organik Kimya argues that Dow's refusal to even acknowledge Turkish law is fatal to its claim for spoliation sanctions based on Strozzi's deletion of the "scale up" folder. Organik Kimya argues that Dow's reliance on section 7.03 and 7.05 of the Restatement (Third) of

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Agency is misplaced as section 7 refers to the law of agency in the context of a tort based on negligence. (*Id.*) Organik Kimya argues what is relevant is standard and ordinary agency principles. (*Id.* at 15.)

Dow argues that Organik Kimya's assertion that Mr. Strozzi was the person who used the loaner laptop in December 2007 is incorrect. (Opp. Sur-Reply at 3.) Dow argues that Organik Kimya offered no proof that Mr. Strozzi interviewed on December 14-15, 2007 and no proof that he accessed confidential Rohm and Haas recipes by himself while doing so. (*Id.*) Dow argues that such information is an issue of historical fact well within Organik Kimya's corporate knowledge and yet the only evidence Organik Kimya presented in support was the declaration of Mr. Kaslowski who stated that Mr. Strozzi interviewed in the late 2007/early 2008 time period. (*Id.*)

Dow argues that Organik Kimya's assertion that "the last visited date/time" of the files accessed on December 14, 2007 shows that the files were last visited around noon during a time when Mr. Strozzi was likely on a break from interviewing and that additional Vinavil and Dow files were accessed on Friday, December 14, 2007 at around 8 pm and on Saturday, December 17, 2007 throughout the day is implausible. (*Id.* at 3-4.) Dow argues that it is entirely unreasonable to suggest that Organik Kimya would give Mr. Strozzi a company laptop during his two-day interview or that he would spend his spare time using that laptop during private breaks and in the evening by himself to access the confidential files of Rohm and Haas, Vinavil and []. (*Id.* at 4.) Dow questions why Mr. Strozzi did not bring his own laptop and why Organik Kimya would agree to provide a loaner laptop to one of its competitor's (Vinavil) employees and allow him to use it unsupervised. (*Id.*) Dow also argues that the forensic evidence shows that contrary to Organik Kimya's assertion, no one accessed Vinavil and Dow

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files on Friday, December 14, 2007 at around 8:00pm. (*Id.*) Dow asserts there is not a single entry for December 14 after 3 pm. (*Id.*) Additionally, Dow argues that Organik Kimya's assertion that confidential files were accessed on December 14 around noon when Mr. Strozzi would be taking a lunchtime break is also false. Dow asserts the time stamps from the jump lists Organik Kimya relies on in support of its assertion are in Universal Coordinated Time (UTC), which is two hours behind Istanbul time. (*Id.* at 5.) Thus, Dow argues the files were not accessed around Noon, but rather around 2:00 pm Istanbul time. (*Id.*) Dow further argues that Organik Kimya's assertion that someone accessed Rohm and Haas confidential files around lunchtime is undermined by the fact that the forensic evidence shows that the 13 Rohm and Haas files in question were accessed at least 41 times on or before December 14, 2007. (*Id.*) Dow argues that it is unreasonable to suggest that those files were accessed 41 times during the 58 minute interval during which Mr. Strozzi was supposedly having lunch. (*Id.* at 6.)

Dow argues the forensic evidence from December 15 is even more telling. (*Id.*) Dow asserts that the forensic evidence shows that someone used the loaner laptop continuously for five straight hours from 8:31 am to 1:37 pm UTC to access numerous confidential recipes of Rohm and Haas, Vinavil and [], as well as several chemical related websites. (*Id.*) Dow argues that this is inconsistent with Organik Kimya's theory that Mr. Strozzi had control of the loaner laptop and was looking at files during intermittent breaks in his interview. (*Id.*)

Dow argues that Organik Kimya's theories regarding the access to the loaner laptop by "a_simsek" in 2009 are similarly flawed. (*Id.* at 7.) Dow asserts that Organik Kimya in its sur-reply argues both that a_simsek is the default user for the loaner laptop and "hp" is the default user for the loaner laptop. (*Id.*) Dow argues that Organik Kimya cannot have it both ways. (*Id.*) Dow also argues that the forensic evidence from the loaner laptop revealed not one IT

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department “user” but more than ten users (in addition to “a_simsek”). (*Id.*) Thus, Dow argues that Organik Kimya’s assertion that a_simsek was simply a default setting is inconsistent with the forensic evidence. (*Id.*) Dow notes that this information is a matter of historical fact that Organik Kimya should have in its possession, yet Organik Kimya cites to no declaration or other evidence stating that Mr. Strozzi was ever issued a loaner laptop, let alone this particular loaner laptop in both 2007 and 2009. (*Id.*)

With regard to Organik Kimya’s argument that it should not be held responsible for the spoliation of the Strozzi laptop or external memory devices because Dow did not address Turkish law, Dow argues that the reason it did not address Turkish law is because it is completely irrelevant. (*Id.* at 11.) Dow asserts that Organik Kimya’s argument that foreign employment law and/or contract law is the lynchpin to a finding of spoliation by a foreign party involved in US litigation is without merit. Dow argues that it is aware of no cases standing for such a proposition. Dow argues that the cases simply hold that a person’s “scope of employment” should be analyzed under the law of the relevant jurisdiction. (*Id.*) Dow argues that “scope of employment” is not at issue here because no one’s job responsibilities include spoliation of evidence. (*Id.*) Instead, Dow argues the issue is one of “possession, custody, or control” which is a factual inquiry and does not require a choice of law. Dow argues that the concept of “possession, custody, or control” in federal courts is governed by FRCP 34, which has been extended to the duty to preserve. (*Id.* at 12.)

Discussion

I will address the “control” issue with regard to the Strozzi laptop separately from the external memory devices as the analysis differs.

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(i) The Strozzi laptop

For the reasons that follow, I find Organik Kimya's arguments concerning Turkish law as it relates to the spoliation of the evidence on the Strozzi laptop to be a misdirection. It does not matter what law governed the Strozzi/Organik Kimya employment relationship, because that is not the issue. Instead, the issue is whether Organik Kimya controlled or had the right to control the laptop at issue.

"Control" is a question decided based on who had control over the evidence at the time of the spoliation, not control over the party who actually destroyed or lost the evidence. *Chapman Law Firm, LPA v. United States*, 113 Fed.Cl. 555, 610 (Fed. Cl. 2013) ("If a party having control over evidence allows that evidence to be discarded, then the disposal of that evidence is attributable to that party, regardless of who actually discarded the evidence.") To find "control" possession is not necessary as long as the party has the right, authority or practical ability to obtain the evidence.

Here, the evidence shows that Organik Kimya issued Mr. Strozzi his laptop. (*See, e.g.*, Ex. 48, March 24, 2014 Email ("As we indicated previously, we understand that Mr. Strozzi does not have a personal computer. He instead uses his company-issued laptop when out of the office.")). As the laptop was his work computer, he certainly used the computer in the course of his employment and "in furtherance of the master's business." Moreover, as the legal owner of the company-issued laptop, Organik Kimya had an absolute right to obtain the laptop back from Strozzi upon request. This is evident by the fact that when Organik Kimya asked, Mr. Strozzi turned over the laptop to Organik Kimya for Stroz Friedberg to forensically inspect. Thus, there can be no doubt that Organik Kimya had "control" over the Strozzi laptop at the time of the spoliation. Therefore, I find the spoliation of the Strozzi laptop, both the deletion of files and loss of the laptop itself, is attributable to Organik Kimya.

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E.I. Du Pont de Nemours and Co. v. Kolon Indus., Inc., 803 F. Supp. 2d 469 (E.D. Va. 2011) and *Philips Electronics North America Corp. v. BC Technical*, 773 F.Supp.2d 1149, 1158 (D.Utah 2011), cases cited by Dow, also support this conclusion. For example, in *DuPont*, plaintiff sued defendant for trade secret misappropriation. Certain “key employees” of the defendant deleted relevant files from their computers after being put on notice of the litigation. The defendant tried to distance itself from its employees’ deletion of files by arguing that those employees’ acts “should not be attributed to the company because their actions were unauthorized, were outside the scope of their employment, and were not taken with intent to aid [defendant] or further its business interests.” 803 F. Supp. 2d at 506. The court rejected this argument, finding instead that the employees “deleted relevant files and email from their work computers, which they used in the course of their employment and in furtherance of [defendant’s] business.” *Id.* at 507. The court concluded that “[n]o other conclusion can be drawn from the record, and the Court will not entertain suggestions that short of a corporate policy or directive encouraging spoliation of relevant materials, the employees’ spoliation of relevant evidence should not be imputed to [defendant].” *Id.*

Likewise, in *Philips*, the defendant sought to avoid the consequences of its actions by arguing that the executives and employees who destroyed the documents “were acting individually and contrary to [defendant’s] express directives not to delete documents from their laptops.” 773 F. Supp. 2d at 1203. To address that argument, the magistrate examined the defendant’s “behavior and attitude” throughout the case towards its obligations to preserve evidence. *Id.* Among other things, the magistrate noted that no written instructions to preserve documents were sent to defendants’ employees until 17 months after the lawsuit was filed. *Id.* at 1204. Considering defendants’ disregard for its discovery obligations, it could not then escape

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responsibility by claiming that computers it owned, that were being used by its executives and employees, had information deleted because the employees were acting in violation of the company's directives. *Id.* at 1207. As the *Philips* court stated, "[t]o argue that these employees acted independently and therefore [defendant] cannot be culpable for their actions is simply not credible." *Id.* at 1156.

(ii) The external storage devices

As discussed, *supra*, the forensic inspection of the Strozzi laptop revealed evidence of at least 20 external storage media devices being connected to the laptop after May 2013. (Memo, Ex. 15 at ¶ 110.) The police report filed after the loss of the laptop shows Strozzi had in his possession at the time of the loss six external storage devices in his laptop bag with his laptop. (Memo, Ex. 17.) Organik Kimya asserts that the external storage devices are Strozzi's personal devices containing his personal files and that he never told Organik Kimya of their existence. Organik Kimya argues it cannot be sanctioned for the spoliation of evidence it didn't know existed. Dow does not appear to contest that the storage devices were Strozzi's personal devices, but nevertheless argues that Organik Kimya is responsible for the loss of the external storage devices and the files therein.

Although none of the storage devices were turned over for inspection, forensic analysis identified folders named 'R&H' on at least five of the USB devices. (Memo, Ex. 15 ¶ 112.) Forensic analysis also was able to identify some of the files contained in the folders by examining the "jump lists", Internet Explorer history records, and file access records stored in active and deleted artifacts on Mr. Strozzi's laptop. (*Id.*) The table below shows examples of some of these files. Particularly noteworthy are the files referencing [] which Dow has alleged in these proceedings to be the seed used to make its ROPAQUE™ Ultra domestic industry product.

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URL
F:\leo files privati 2\Leo Files Privati\FILES LEO PRIVATI\files 1\r&H\schede\schede-1\[]
F:\leo files privati 2\Leo Files Privati\FILES LEO PRIVATI\files 1\r&H\schede\schede-1\schede-1\[]
E:\leo files privati 2\Leo Files Privati\FILES LEO PRIVATI\files 1\r&H\schede\schede-1\[]
E:\leo files privati 2\Leo Files Privati\FILES LEO PRIVATI\files 1\r&H\schede\schede-1\[]
E:\Leo private 2 new\Leo privato 2b\LEO FILES PRIVATI\FILES LEO PRIVATI\files 1\r&H\schede\schede-1-2\[]
F:\LEO Files privati 2\Leo Files\FILES LEO PRIVATI\files 1a\r&H\schede\schede-1\[]
F:\LEO Files privati 2\Leo Files\FILES LEO PRIVATI\files 1a\r&H\schede\schede-1\[]
E:\LEO Files privati 2\Leo Files\FILES LEO PRIVATI\files 1a\r&H\schede\schede-1\Opaque ultra data\[]
E:\Leo files privati\Leo privato\Leo files privati n2\leo files\Leo files privati n3\files 1\r&H\schede\schede-1\Opaque ultra data\[]
E:\Leo files privati\Leo privato\Leo files privati n2\leo files\Leo files privati n3\files 1\r&H\schede\schede-1\[]
E:\leo files privati 2\Leo Files Privati\FILES LEO PRIVATI\files 1\r&H\schede\schede-1\[]

(Memo, Ex. 15-L) (highlighting added).

Stroz Friedberg also discovered similar file paths from two other removable storage devices plugged into one of the Organik Kimya loaner laptops that were forensically analyzed. The table below shows the files found on the two storage devices plugged into the loaner laptop.

Last Visited Date/Time	User	URL
12/14/2007 11:51:32 AM	Hp	D:/files1/r&H/metodi/[]
12/14/2007 11:44:34 AM	Hp	D:/files1/r&H/metodi/[]
12/15/2007 11:37:05 AM	Hp	D:/files1/r&H/metodi/[]
12/14/2007 12:01:03 PM	Hp	D:/files1/r&H/metodi/[]
12/14/2007 12:01:09 PM	Hp	D:/files1/r&H/metodi/[]
12/14/2007 12:38:22 PM	Hp	D:/files1/r&H/metodi/[]
12/15/2007 11:37:38 AM	Hp	D:/files1/r&H/schede/schede-1/[]
12/14/2007 12:27:49 PM	Hp	D:/files1/r&H/schede/schede-1/[]
12/14/2007 12:42:07 PM	Hp	D:/files1/r&H/schede/schede-1/[]
12/14/2007 12:04:13 PM	Hp	D:/files1/r&H/schede/schede-1/[]
12/14/2007 12:08:01 PM	Hp	D:/files1/r&H/schede/schede-1/[]
12/14/2007 12:04:50 PM	Hp	D:/files1/r&H/schede/schede-1/[]
12/15/2007 11:09:38 AM	Hp	D:/files1/r&H/schede/schede-1/[]
12/15/2007 07:34:26 AM	Hp	D:/files1/r&H/schede/schede-1/[]
12/14/2007 12:39:29 PM	Hp	D:/files1/r&H/schede/schede-1/[]

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12/14/2007 12:08:38 PM	Hp	D:/files1/r&H/schede/schede-1/[]
12/14/2007 12:11:26 PM	Hp	D:/files1/r&H/schede/schede-1/[]
12/15/2007 07:18:29 AM	Hp	D:/files1/r&H/schede/schede-1/[]
12/15/2007 07:14:55 AM	Hp	D:/files1/r&H/schede/schede-1/[]
2/18/2009 4:01:42 PM	a_simsek	E:/FILES Leo/files1/r&H/metodi-start-up/[]
2/18/2009 4:04:30 PM	a_simsek	E:/FILES Leo/files1/r&H/metodi-start-up/[]
2/18/2009 4:15:14 PM	a_simsek	E:/FILES Leo/files1/r&H/metodi-start-up/[]
2/18/2009 7:04:28 PM	a_simsek	E:/FILES Leo/files1/r&H/metodi-start-up/[]
2/18/2009 4:04:29 PM	a_simsek	E:/FILES Leo/files1/r&H/metodi-start-up/[]
2/18/2009 4:13:01 PM	a_simsek	E:/FILES Leo/files1/r&H/metodi-start-up/[]
2/18/2009 4:01:58 PM	a_simsek	E:/FILES Leo/files1/r&H/metodi-start-up/[]
2/18/2009 4:15:05 PM	a_simsek	E:/FILES Leo/files1/r&H/metodi-start-up/[]
2/18/2009 4:13:07 PM	a_simsek	E:/FILES Leo/files1/r&H/metodi-start-up/[]
2/18/2009 4:14:22 PM	a_simsek	E:/FILES Leo/files1/r&H/metodi-start-up/[]
2/18/2009 4:15:36 PM	a_simsek	E:/FILES Leo/files1/r&H/metodi-start-up/[]
2/18/2009 4:04:22 PM	a_simsek	E:/FILES Leo/files1/r&H/metodi-start-up/[]
2/18/2009 4:03:14 PM	a_simsek	E:/FILES Leo/files1/r&H/metodi-start-up/[]
2/18/2009 4:04:49 PM	a_simsek	E:/FILES Leo/files1/r&H/metodi-start-up/[]

(Memo., Ex. 15 ¶ 114).

Dow argues from this evidence that people in Organik Kimya, other than Strozzi, have accessed confidential Rohm and Haas documents (i.e., “hp” and “a_simsek”) and thus Strozzi was not acting as a rogue employee when he accessed the confidential and propriety Rohm and Haas files on his personal laptop. Dow argues “Organik Kimya was aware of Mr. Strozzi’s storage devices containing Rohm and Haas’s recipes since Organik Kimya had accessed them at least as early as 2009. Organik Kimya should have secured, preserved and produced those files at the beginning of the investigation.” (Reply at 21.)

Contrary to Dow’s argument I do not find the evidence presented sufficient to show that Organik Kimya knew, or should have known, of the Strozzi external storage devices. Even if I were to accept Dow’s argument that “hp” and “a_simsek” are not Mr. Strozzi, the evidence shows only that the documents were accessed from the loaner laptop, not that the documents

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were ever stored on the loaner laptop or on Organik Kimya's network. Based on this fact and the fact that the evidence presented shows the files were accessed infrequently (two consecutive days in 2007 and one day in 2009) I find it difficult to impute knowledge to Organik Kimya. Moreover, contrary to Dow's assertion on page 24 of its reply brief that "Organik Kimya was well aware of the Strozzi storage devices" because "a member of Organik Kimya's IT department, "a_simsek," plugged at least one of the Strozzi storage devices into an Organik Kimya loaner laptop in 2009" the evidence does not show that the storage device accessed on the loaner laptop by a_simsek was one of the undisclosed Strozzi external storage devices. The evidence from Dow's forensic expert states:

Notably, as indicated above, folder names accessed on the Second Loaner Laptop are similar to folders on USB devices identified on Mr. Strozzi's laptop. Based on this, there are two likely explanations. First, it is possible that the Second Loaner Laptop was used to access one of the undisclosed USB devices accessed using Mr. Strozzi's laptop. Second, it is possible that Organik Kimya had additional undisclosed external devices that contain potentially relevant data.

(Memo, Ex. 15 at ¶ 116.) The most this evidence shows is that it is *possible* that one of the Strozzi undisclosed external storage devices was accessed from the loaner laptop based on the *similarity* in folder names accessed on the loaner laptop. Accordingly, I find Dow has failed to show that Organik Kimya knew, or at least should have known, of the external storage devices. Thus, I cannot find that Organik Kimya had "control" over the external storage devices.

c. Nene

The Complaint in this investigation was filed on May 20, 2013, and the Commission instituted this investigation by publication in the Federal Register on June 21, 2013. 78 FR 37571 (June 21, 2013). On November 7, 2013, I issued Order No. 8 as an initial determination granting Dow's request to amend the Complaint and Notice of Investigation ("NOI") to add allegations of trade secret misappropriation. Thus Organik Kimya was under a duty to preserve

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evidence relevant to Dow's allegations of patent infringement at least as of May 20, 2013 and trade secret misappropriation at least as of November 7, 2013, if not earlier. Accordingly, there can be no debate that Organik Kimya was under a duty to preserve when the spoliation of evidence relating to Dr. Nene occurred, namely the deletion of the files on the Fujifilm USB drive, the Kingston USB drive, the deletion of the files "Chem101.pptx," "Preparation of pre-emulsion.docx," and "Reactor Process Dilip.docx" on December 20, 2013, the deletion of the twelve ".zip" files on December 20, 2013, and the deletion of the "NewAll Folder", including subfolders and files therein on December 20, 2013. Likewise, there can be no debate that if I find Organik Kimya to have "control" over Nene's personal laptop or external memory devices that Organik Kimya breached its duty to preserve when the above enumerated deletions occurred. More so, if I find Organik Kimya to have control over Nene's personal laptop then Organik Kimya would have also breached its duty to preserve when Dr. Nene smashed the original hard drive in his personal laptop around June 2013. The reason for this duty is because even though Dr. Nene cannot be held to have had a duty to preserve prior to receipt of his first subpoena in September 2013, Organik Kimya had a duty to preserve that commenced at the time when litigation began or was anticipated, which in this case is no later than when Organik Kimya was served with a copy of the complaint in May 2013.

As mentioned above, Organik Kimya contests "control."

The Parties' Positions

Dow argues that there is no dispute that Organik Kimya had legal and practical control over documents in Dr. Nene's possession. (Memo at 58.) Dow argues that pursuant to the consulting agreement between Organik Kimya and Dr. Nene, Organik Kimya retained legal ownership of all documents created by Dr. Nene during the course of his consultancy. (*Id.*)

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Dow argues that the agreement also specifically required Dr. Nene to “deliver to the Company all documents relating to the Company or any customer of the Company in whatever form, which may be held by or under the control of the Consultant, together with all copies thereof.” (*Id.*) Based on these provisions, Dow argues Organik Kimya had both legal ownership over, and the practical ability to obtain, any documents within Dr. Nene’s possession that were created during the course of his consultancy or that related to Organik Kimya. (*Id.*)

Dow argues that Organik Kimya’s argument that Dr. Nene was an independent consultant whom it did not control is a fallacy. (Reply at 35.) Dow argues that Dr. Nene was intimately involved in Organik Kimya’s business, so much so that the company treated him like a full-time employee in some respects. (*Id.*) Dow asserts that Organik Kimya gave Dr. Nene his own Organik Kimya email account. (*Id.*) Dow also asserts that Organik Kimya gave him a new laptop. Dow further asserts that Organik Kimya even included Dr. Nene on their internal organization charts. (*Id.* at 35-36)

Dow argues that Dr. Nene was not just a “safety consultant” or someone whom Organik Kimya brought over to teach its employees “chemistry 101.” (*Id.* at 36.) Rather, Dow argues Organik Kimya relied heavily on Dr. Nene in the research and development of OPAC 204X and ORGAWHITE 2000, the accused products in this investigation. (*Id.*) Dow argues contemporaneous documents show how important Dr. Nene was to Organik Kimya’s research and development efforts. (*Id.* at 37.) For example, Dow argues metadata from 2009 documents states that “[a]s a result of recent meetings with Dilip Nene, information obtained about ‘seed’ and ‘opac polymers’ are summarized as follows.” (*Id.*) Dow also argues that a 2009 email from a distributor relating to technical problems with Organik Kimya’s opaque polymers asks that the email be forwarded to “Dr. X from R&H,” a clear reference to Dr. Nene. (*Id.* at 38.) Further,

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Dow asserts that a 2010 email from Emre Kaya to Sibel Altinok states that “[t]he guy provided free monomer ratios for R&H production runs,” arguing that the “guy” is likely Dr. Nene. (*Id.*)

Dow also argues that Dr. Nene’s actions during this investigation also show that he was under the direction and control of Organik Kimya. (*Id.*) For example, Dow argues that in early June 2013, after Dow served Organik Kimya with the complaint, Mr. Kaslowski called Dr. Nene directly. (*Id.* at 38.) Dow argues that Dr. Nene testified that around the same time, he removed the hard drive from his computer, took it to his garage and smashed it with a hammer. (*Id.*) Dow argues that although Dr. Nene could not remember whether this occurred before or after his phone conversation with Mr. Kaslowski, it is highly likely that it occurred afterwards, and that Mr. Kaslowski was the one who instructed Dr. Nene to destroy his hard drive. (*Id.*) Dow argues that this is entirely consistent with the fact that Organik Kimya gave Dr. Nene a new laptop during his subsequent trip to Rotterdam in July 2013. (*Id.* at 38-39.) Dow argues that if the phone call and subsequent trip to Rotterdam in July 2013 had nothing to do with this investigation, but rather concerned a safety audit as Organik Kimya contends, then Mr. Kaslowski and Dr. Nene would not have collectively denied having this meeting at their depositions. (*Id.* at 39.) Dow notes Organik Kimya only admitted to the meeting after forensic evidence uncovered it. (*Id.*) Dow further argues that if the meeting was really for a safety audit, the co-CEO of Organik Kimya would not need to participate and Organik Kimya would have had no reason to give Dr. Nene a new computer at such a meeting. (*Id.*)

Dow also argues that Organik Kimya’s reliance on handwritten safety notes as proof of the alleged safety meeting is problematic. (*Id.*) Dow argues it is suspect that Mr. Kaslowski called Dr. Nene for a safety audit only weeks after being served with Dow’s complaint, having not consulted with Dr. Nene for the prior two years. (*Id.*) Further, Dow argues that at his recent

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deposition, Dr. Nene testified that his July 2013 Rotterdam audit was the only one where he was allowed to take notes, much less leave Organik Kimya with those notes. (*Id.*) Dow asserts that for every other trip, Organik Kimya had its own employee take notes for Dr. Nene and required him to shred any written materials he generated or received prior to returning to the U.S. (*Id.*) Dow argues that it is highly likely that Organik Kimya asked Dr. Nene to take notes during his July 2013 “safety audit” so that it could later use these notes to cover up the real purpose of his trip, as it is doing here, in opposition to Dow’s present motion. (*Id.*)

Dow further argues that Organik Kimya’s argument that it does not have control over Dr. Nene because he “has been represented by his own counsel,” “filed his own motions” and “asserted his own positions throughout this Investigation” is a fallacy. (*Id.* at 40.) Dow asserts that when Dr. Nene received his first subpoena in September 2013, the first thing he did was call Mr. Kaslowski and Organik Kimya immediately retained counsel for him. (*Id.*) Dow asserts that when Dr. Nene called Mr. Kaslowski in January-February of this year to inquire about the status of the investigation, Mr. Kaslowski conferenced in Organik Kimya’s outside counsel and the group decided to retain Dr. Nene a second attorney. (*Id.*) Dow argues that at all times, Organik Kimya has paid all of Dr. Nene’s legal fees. (*Id.*) Dow argues that these facts show that Dr. Nene had a longstanding and continuing relationship with Organik Kimya. (*Id.* at 41.)

Organik Kimya argues that Dr. Nene has never been an employee of Organik Kimya. (Opposition at 10.) Rather, Organik Kimya argues that Dr. Nene has performed consulting work periodically since 2008, for which he charged his normal consulting fee. (*Id.*) Organik Kimya argues there is no evidence that Dr. Nene’s sporadic consulting relationship is sufficient to render Organik Kimya vicariously liable for Dr. Nene’s actions under Turkish or U.S. law. (Sur-Reply at 39.) Likewise, Organik Kimya argues that Dow’s argument that Organik Kimya has

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legal and practical control over Dr. Nene must fail because Dr. Nene's employment to Organik Kimya is governed by Turkish law and Dow failed to perform any analysis under Turkish law. (*Id.* at 42-43.)

Organik Kimya argues that Dow focusses a large amount of unwarranted attention on events that occurred shortly after the investigation began. (Opposition at 20.) Organik Kimya argues that Dow has no evidence to support its assertion that the June 2013 phone call from Mr. Kaslowski to Dr. Nene was to instruct Dr. Nene to destroy his hard drive. (*Id.*) Organik Kimya argues that the more logical explanation is that Mr. Kaslowski called Dr. Nene to setup his visit. (*Id.*)

Organik Kimya argues that contrary to Dow's assertion that Organik Kimya had both legal and practical control of Dr. Nene, Dow has never treated Dr. Nene during this investigation as an employee or agent under the control of Organik Kimya. (*Id.* at 22.) Organik Kimya also argues that Dr. Nene has been represented by his own counsel throughout this investigation, he has filed his own motions, and via his own counsel, has asserted his own positions throughout this investigation. (*Id.* at 23.) Organik Kimya asserts that it even issued its own subpoena to Dr. Nene to take his deposition alongside Dow. (*Id.*)

Discussion

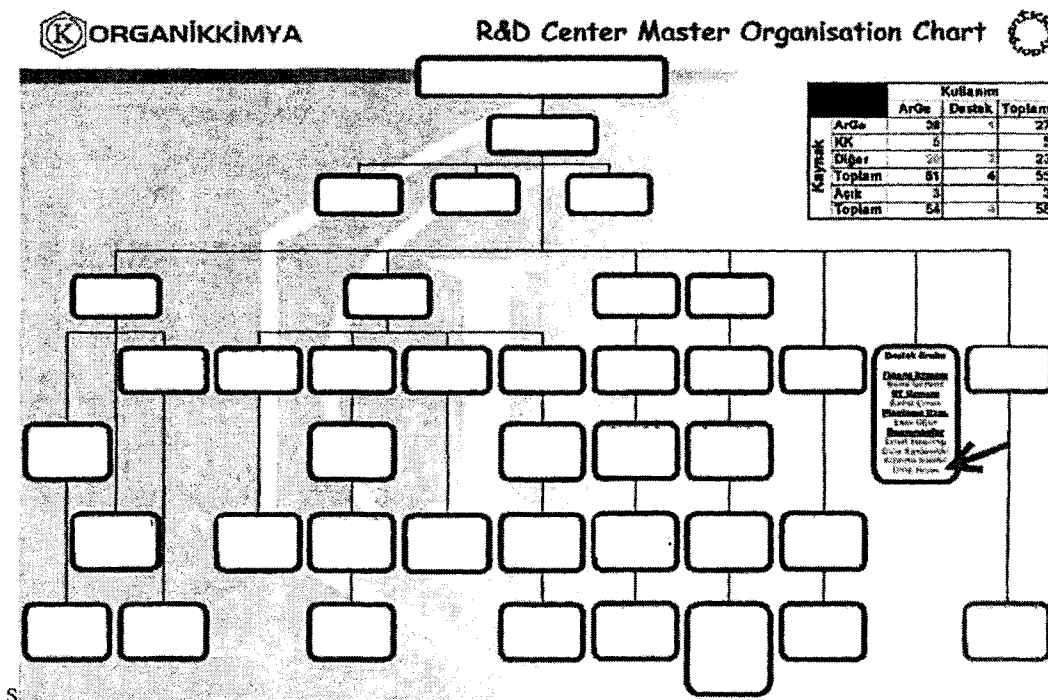
No consistent, uniform definition distinguishes an employee from an independent contractor. Courts have identified various factors relevant for determining whether an employer-employee relationship exists. *See, e.g., Bartels v. Birmingham*, 332 U.S. 126, 130, 67 S.Ct. 1547, 1549-50, 91 L.Ed. 1947 (1947); *United States v. Silk*, 331 U.S. 704, 716, 67 S.Ct. 1463, 1469-70, 91 L.Ed. 1757 (1947); *Dole v. Snell*, 875 F.2d 802, 804-05 (10th Cir.1989); *Doty v. Elias*, 733 F.2d 720, 722-23 (10th Cir.1984); *Marvel v. United States*, 719 F.2d 1507, 1514 (10th

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Cir.1983); *Avis Rent a Car Sys., Inc. v. United States*, 503 F.2d 423, 429 (2d Cir.1974). The U.S. Supreme Court has held that in the absence of a statute defining the term employee, there is a presumption that traditional agency-law criteria for identifying master-servant relationships apply. *National Mutual Insurance Co. v. Darden*, 503 U.S. 318, 112 S. Ct. 1344, 111 L. Ed. 2d 581 (1992). One comprehensive set of guidelines that takes into account agency-law criteria and numerous other factors courts have created to define independent contractor status was developed by the Internal Revenue Service (IRS), known collectively as the 20-factor test. Rev.Rul. 87-41, 1987 WL 419174. The enumerated criteria in the 20-factor test generally fall within three categories: control (whether the employer or the worker has control over the work performed), organization (whether the worker is integrated into the business), and economic realities (whether the worker directly benefits from his or her labor). *Id.* At least one circuit has officially adopted the 20-factor test. *See U.S. v. Crabbe*, 2010 WL 318399, *5 (10th Cir. 2010) (“This circuit has adopted this twenty-factor test, but we have recognized that ‘[e]ach factor may not have application to every situation ... and no one of the[] factors in isolation is dispositive; rather, it is the total situation that controls.’”).

Organik Kimya characterizes Dr. Nene’s relationship with Organik Kimya as an independent contractor, yet a number of facts tend to indicate otherwise. For example, the evidence shows that Dr. Nene has had an ongoing relationship with Organik Kimya since 2008, having performed consulting services for a total of twenty-seven days in 2008, fifty days in 2009, fifty-seven days in 2010, forty-six days in 2011, and two days in 2013. (Opposition at 10-11.) A continuing relationship between a worker and an employer, even at irregular intervals, tends to show an employer-employee relationship. Rev.Rul. 87-41, 1987 WL 419174. Additionally, the evidence shows that Organik Kimya gave Dr. Nene his own Organik Kimya

email account and also provided him with a new laptop. (Memo, Ex. 56 (Turaman Dep.) at 138:16-141:10; *id.*, Ex. 18 at 50:6-52:22, 180:3-182:15, 184:3-12, 200:13-25, 202:18-203:3.) An employer who furnishes a worker with significant tools, materials, or other equipment tends to show that the worker is an employee. Rev.Rul. 87-41, 1987 WL 419174. Further, Organik Kimya even included Dr. Nene on its internal organization chart, as shown below with a red arrow.



(Ex. 57, STROZ-0021803-36, at STROZ-0021831.) If a worker's services are integrated into business operations, this tends to show that the worker is subject to direction and control and is thus an employee. Rev.Rul. 87-41, 1987 WL 419174.

Whether a person is an employee or independent contractor is a fact intensive inquiry based on the unique circumstances of each case. Here, fortunately I need not decide whether Dr. Nene's relationship with Organik Kimya is an employer-employee relationship or employer-independent contractor relationship for legal control over Dr. Nene's laptop and external storage

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devices is not necessary to prove spoliation-worthy sanctions as long as it can be shown that Organik Kimya has practical control over them. In addition to the facts discussed above, there is ample additional evidence to support a finding of practical control.

The evidence shows that in early June 2013, after Dow served Organik Kimya with the complaint in May, Mr. Kaslowski called Dr. Nene directly and directed him to travel to Rotterdam to allegedly perform a safety audit. (Memo, Ex. 18 at 184:3-10 (“He told – he was the one who told me that he wanted me to come for an audit.”), 202:18-203:3.) Coincidentally (or suspiciously as alleged by Dow) right around this time the evidence shows that Dr. Nene removed the hard drive from his personal computer and smashed it with a hammer and threw it in the garbage. (*Id.* at 200:13-25; 202:18-203:3.) Then, Dr. Nene traveled to Rotterdam in July 2013. The evidence shows that the first person Dr. Nene met with after he arrived in Rotterdam for the “safety audit” was Mr. Kaslowski. (*Id.* at 189:14-18.) The two did not meet at Organik Kimya, rather the evidence shows Mr. Kaslowski met Dr. Nene personally at his hotel. (*Id.* (“I arrived at the hotel, and later that afternoon he came to the hotel.”).) Notably, at their depositions both Mr. Kaslowski and Dr. Nene collectively denied having this meeting. (*See* Memo, Ex. 8 at 162:4-14; Ex. 23 at 145:7-12.) Only through analysis of forensic evidence from Dr. Nene’s laptop was the secret meeting uncovered. (Memo, Ex. 24 at NENE-221.) I find this point very significant, as well as extremely troubling, as it shows not only joint purpose, but tends to establish Dr. Nene and Mr. Kaslowski recognized the obvious implication that such a meeting would have since it occurred shortly after this investigation commenced. Even though Organik Kimya still asserts that the meeting was for a “safety audit,” I agree with Dow that it seems unlikely the co-CEO of Organik Kimya would participate in a routine safety audit and meet in a hotel to discuss it and then lie about the meeting afterwards. This is a great deal of

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effort to minimize an allegedly routine event.

As evidence of the alleged “safety” meeting, Organik Kimya points to a July 17, 2013 handwritten page of notes from Dr. Nene’s notebook. Interestingly, Dr. Nene testified at his deposition that his July 2013 Rotterdam audit was the only one where he was allowed to take notes, much less leave Organik Kimya with those notes. (Memo, Ex. 61 at 164:16-178:15.) For every other trip, the evidence shows Organik Kimya had its own employee take notes for Dr. Nene and required him to shred any written materials he generated or received prior to returning to the U.S. (*Id.*) The obvious implication here is that Organik Kimya asked Dr. Nene to take notes during his July 2013 “safety audit” so that it could later rely on those notes as cover for the timing of the trip.

During Dr. Nene’s trip to Rotterdam, Organik Kimya gave Dr. Nene a new laptop. Twice during this investigation Organik Kimya represented that it never issued Dr. Nene with a company laptop. (*See* Memo, Ex. 26 (“Dilip Nene was never provided with a accompany computer.”); Organik Kimya Opposition to Dow’s Motion to Compel (Feb. 6, 2014) (“four of the individuals on Dow’s inspection list, (Ms. Altinok, Ms. Ersen, Dr. Nene, and Ms. Arslan) did not have company laptops ...”). When confronted with this information Organik Kimya asserted that the laptop was a gift from Mr. Kaslowski. During the March 26, 2014 teleconference I held with the parties, counsel for Organik Kimya argued that there was a “back story to why this computer was gifted over” relating to a 2012 hospital visit between Dr. Nene and Mr. Kaslowski while Mr. Kaslowski was having cancer surgery in New York. Specifically, counsel stated:

Dr. Nene visited Stefano Kazlowski in 2012 when Stefano Kazlowski was having cancer surgery in New York City so they had somewhat of a relationship, so there is kind of a back story to why this computer was gifted over.

(EDIS Document No. 531844, Mar. 26 Hr’g Tr. at 18:7-12.) Dr. Nene’s testimony at his most

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recent deposition in May 2014, however, calls into question that narrative. There, Dr. Nene testified that before he left Rotterdam “one of the technicians said, Dilip, I am supposed to give you this computer.” (Memo, Ex. 18 at 180:6-9.) Dr. Nene testified he did not know the technicians name, the technician never explained why he was getting a computer, and he never asked why he was getting a computer. (*Id.* at 180:10-182:7.) Under these circumstances I refuse to credit Organik Kimya’s “gift” argument.

The evidence also shows that when Dr. Nene received his first subpoena in September 2013, the first thing he did was call Mr. Kaslowski, who during the conversation agreed to provide Dr. Nene with counsel. (Memo, Ex. 18 at 22:2-12 (“Oh, yes. After I received the subpoena, I called Mr. Kaslowski and I told him about the subpoena and I wanted legal help and he said he would provide me one.”).) When Dr. Nene called Mr. Kaslowski again in January-February of this year to inquire about the status of the investigation, the evidence shows that Mr. Kaslowski conferenced in Organik Kimya’s outside counsel (Finnegan Henderson), and told Dr. Nene that they had retained a second lawyer for him because they thought he would help him. (*Id.* at 68:22-82:2). The evidence shows that at all times, Organik Kimya has paid all of Dr. Nene’s legal fees. (*Id.* at 66:2-67:12.)

Based on the evidence above, I do not find Dr. Nene to be the objective third-party whom Organik Kimya makes him out to be. The evidence establishes a level of cooperation and an interweaving of purpose between Dr. Nene and Organik Kimya such that the actions taken by Dr. Nene and Organik Kimya support the conclusion that Dr. Nene “would have complied with a timely request by [Organik Kimya] to preserve its information.” *See* 282 F.R.D. at 355. Accordingly, I find Organik Kimya had practical control over Dr. Nene’s laptop and external storage devices.

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2. Culpable state of mind

Organik Kimya's behavior in this investigation, which resulted in the massive spoliation of evidence, is reprehensible. As discussed in detail below, I have no trouble finding Organik Kimya's spoliation of evidence on Dr. Perez's laptop was done in bad faith. Likewise, I have little trouble finding that the deletion of files from the Strozzi laptop along with the laptop's subsequent loss occurred in bad faith. Finally, with regard to Dr. Nene, I find Organik Kimya's failure to exercise control over Nene to preserve his laptop or external storage devices to be at least reckless. Taken together, I can only conclude there is a culture at Organik Kimya that finds its duty to preserve evidence an inconvenience.

a. Perez laptop

The evidence of Organik Kimya's bad faith in the destruction of evidence on the Perez laptop is manifest. First, the evidence shows that when Stroz Friedberg arrived to conduct the forensic inspection of the Perez laptop neither Organik Kimya nor its counsel made any mention about any recent problems with Dr. Perez's laptop, that it had allegedly been dropped, or that Organik Kimya's IT department had done anything to the laptop or its files. (Memo, Ex. 16 (Lynch Dep.) at 191:11-17.) Yet afterwards, when confronted with Dow's allegations of spoliation, *see* EDIS Document No. 531067 (Dow Letter of April 3, 2014), Organik Kimya then admitted "that it ran certain computer programs and copied files on Dr. Perez's computer shortly before the forensic inspection." (Memo, Ex. 27 at 3.) In so admitting, Organik Kimya stated that

it rejects any suggestion of doing so with the intent to "erase relevant files." Rather, as set forth below, it did so in an attempt to fix problems that Dr. Perez had experienced with his three-year-old computer. Organik Kimya did not act with bad faith but, rather, had an entirely different motive.

(*Id.*) The story Organik Kimya told is as follows:

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Shortly before the scheduled inspection on February 27, Dr. Perez presented his work laptop to the Organik Kimya IT department. He informed them that he had recently dropped his computer and was having issues with it. Specifically, he told the IT department that he could not access certain Microsoft applications, such as Outlook, Word, and Excel. Because Dr. Perez had dropped the computer, the IT Department believed bad sectors on the hard-drive may have been the root cause of these accessibility problems. Thus, to ensure the laptop could operate during the forensic inspection, the IT Department, and specifically manager Rafet Çince, attempted to locate and isolate bad sectors.

To do this, during the afternoon and evening of Sunday, February 23, 2014, Mr. Çince repeatedly copied the computer's own program files into the unallocated clusters on Dr. Perez's hard drive. An unallocated cluster is an area on the hard-drive that is considered to be free space for storage. If a program file could not be copied onto a particular sector of the hard drive, Mr. Çince thought that he could identify and isolate this portion of the drive. (*See* Ex. A, Print-Out from Microsoft Outlook Support.) There was no ill-intent or desire to destroy evidence, rather, the true motive behind this copying procedure was simply to find the origin of Dr. Perez's computer problems and fix it prior to the inspection.

(*Id.*) As discussed in detail below, the evidence shows Organik Kimya's story to be a work of fiction. (Memo, Ex. 15 at ¶ 49 ("This explanation is implausible for a number of reasons."))

In particular, the evidence shows that making copies of files in the manner the Program Files copies were made is not an effective method for learning about the status of any area of a hard drive. (*Id.* at ¶ 51.) "When copying a file or folder, it is impossible for a user to target any specific sector on a hard drive for the copy to reside in; and, if an error occurred, the copying would not identify to IT where the bad sector was located." (*Id.*) Additionally, the evidence shows that "almost all modern hard drives, including the hard drive in Dr. Perez's laptop, have built-in technology to monitor for, test for, and handle bad sectors." (*Id.*) Further, "the Windows Operating System on Dr. Perez's laptop is designed to also monitor for corruption that could result from a bad sector, and a common program in the operating system named 'Check Disk' can be used to test for such corruption." (*Id.*) Interestingly, when Stroz Friedberg imaged the hard drive, it contained no bad sectors. (*Id.*) Moreover, contrary to Organik Kimya's

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explanation that the attempt to locate and isolate bad sectors was to ensure the laptop could operate during the forensic inspection, the evidence shows that a laptop need not be operation in order for the hard drive to be imaged and forensically inspected. (*Id.* at ¶ 50.)

Contrary to Organik Kimya's story I find no legitimate reason for Organik Kimya to have created more than 108 copies of the Program Files folder, and I find no legitimate reason for Organik Kimya to have deleted those copies within days of making them. (*Id.* at ¶¶ 38 ("A Windows computer only needs one copy of each installed program in the Program Files folder in order to run those programs, so there would be no legitimate need to copy them in the manner observed on Dr. Perez's laptop."), 48.) It is clear that copies of the Program Files folder were intentionally made to render previously deleted data permanently unrecoverable and the deletion of the files was an effort to hide that the copies had been made. (*Id.* at ¶¶ 46, 48.)

Worse still, the evidence shows that on February 23, 2014, while Organik Kimya was copying the Program File folder 108 times, the computer clock on the Perez laptop was backdated such that the metadata for those files showed them as having been created before the lawsuit was filed in 2013. (*Id.* at ¶ 54.) When confronted with allegations of backdating the clock Organik Kimya, through its counsel, decided to double-down stating:

While the image taken from Dr. Perez computer contains random time-clock stamps, there is a normal and logical explanation for this that differs markedly from Dow's allegations about "fabricating evidence." While Dr. Perez's computer was synced to Organik Kimya's time server on February 23 and continuing to the following morning, the IT Department was also troubleshooting Organik Kimya's time server to solve an ongoing problem identified a few weeks before (i.e., a global problem in Organik Kimya's corporate network—not a problem limited to the computer used by Dr. Perez). That is why some files created on the computer used by Dr. Perez on February 23 or 24 appear to have been created earlier in time.

The pre-existing, global time server problem is shown by a contemporaneous email sent by Hakan Uygur, Organik Kimya's plant manager, to Organik Kimya's IT department. (Ex. B, Jan. 30, 2014 email from H. Uygur to R.

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Çince.) Mr. Uygur noticed that the company's intranet showed a time that was 7 minutes different from mobile/internet (actual) time:

From: Hakan UYGUR
Sent: Thursday, January 30, 2014 11:59 AM
To: Rafet ÇINÇE
Cc: Tansel ÖZYÖNÜM
Subject: Difference in the Inranet [sic] clock

Greetings Rafet,

While the Inranet [sic] clock shows 11:57, the telephone shows 12:04 from the Internet. This difference of 7 minutes is being reflected into all meetings and work, since everyone looks at the Inranet clock under the computer first.

What is the reason for this difference? Can it be corrected?

Good day at work.

Hakan UYGUR

(*Id.*) This 7-minute time difference was causing numerous problems at Organik Kimya, and Mr. Uygur asked that it be fixed.

To help remedy the problem, a member of IT Staff was troubleshooting Organik Kimya's time server on February 23, 2014. We understand that in order to test the time server, he changed the date and time randomly. Consequently, when computers sync to the network time server, as did Dr. Perez's laptop, the computer updates its internal clock to the network time *automatically*. (See, e.g., Ex. C, "Synchronizing your computer clock." (accessed Apr. 3, 2014).) The IT professional set the network clock to random dates and times, including December 22, 2012, January 24, 2013, February 15, 2013, June 19, 2013, and January 17, 2013. Dr. Perez's computer, synced to the network, picked up these dates and times, and some program files created on February 23, 2014 instead bear the incorrect date of February 15, 2013. In short, there is nothing nefarious about the time-stamp anomalies identified by Dow (nor are those anomalies even specific to the computer used by Dr. Perez).

Indeed, a closer inspection of the metadata reveals that some Trend Micro files related to copies of the program files were created on the correct date, while some were created on incorrect dates like February 15, 2013. (Ex. D, Initial Expert Report of S. Lynch, Ex. 12 at 19- 21 (showing Trend Micro log files created on both Feb. 15, 2013 and Feb. 23, 2014 relating to "Program Files – Copy" file titles.)) This means that, as part of the normal troubleshooting process, Organik Kimya's IT staff member switched from February 15, 2013 back to the correct date around the same of the creation of the program files. Contrary to Dow's allegations, there was nothing nefarious about the time server change at all—it was done as part of a process to troubleshoot a problem.

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(Memo, Ex. 27 at 4-5.) As it turns out, as detailed below, this story is completely concocted.

(Memo, Ex. 15 at ¶ 66 (“Again this explanation is implausible for multiple reasons.”).)

First, Organik Kimya relies on a January 30 email from its plant manager indicating that the network time server was running approximately seven minutes behind the time recorded by the Internet. Thus, “the apparent problem was between the network time server and the Internet, not between the time server and the individual employee workstations.” (*Id.* at ¶ 67.) Contrary to Organik Kimya’s argument, “altering the times on the Organik Kimya network time server would not remedy this problem.” (*Id.*) The evidence shows that if the clock on the network time server is lagging, then either: (1) the network time server is set as an independent time source and is not keeping accurate time; or (2) the network time server is failing to accurately sync with an external source, such as the Internet. (*Id.*) For the first possibility, the evidence shows “troubleshooting would consist of manually updating the network time server” and “[f]or the second possibility, troubleshooting would consist of determining why the network time server is not properly synching with the external source.” (*Id.*) Randomly changing the time on the network time server to incorrect dates, as Organik Kimya did, does not address either possible problem. (*Id.*) Nor does it explain why Organik Kimya changed the year on the clock when only several minutes were at issue.

Second, contrary to Organik Kimya’s explanation, the backdating on Dr. Perez’s laptop was not a result of synching with the network time server. (*Id.* at ¶ 68.) The evidence shows the changes were made directly on Dr. Perez’s laptop. (*Id.*) In particular, the evidence shows that:

For a computer running Windows, such as Dr. Perez’s laptop, connected to a network such as the Organik Kimya network, the clock for the computer is configured to automatically synchronize with a server on the network so that, at any one time, all computers on the network believe it to be the same time. Rather than a constant process always assuring that the clocks are consistent, each

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computer periodically checks the clock of the server to confirm they are the same. By default, if the clocks between a computer and the server are less than 15 minutes different, the computer's system clock is slightly accelerated or decelerated so that the clocks can "catch up." If the clocks differ by more than 15 minutes, the clock on the computer is immediately changed.

Among other things, Windows Event Logs record this synchronization activity. Every time the computer checks the server, an event log is recorded, showing that the computer began the synchronization process. If the computer receives a response from the server and the clocks are either completely in sync or only slightly different, no additional entries are made. If the clocks differ by more than 15 minutes, a log entry is made indicating that the computer clock needed to be reset by more than 15 minutes. In addition to the time synchronization activity, the event logs show when the clock changes, what the original time for the clock was, and what the new time was. Finally, the event logs also record each time a computer is turned off and turned on.

(*Id.* at ¶¶ 68-69.) By analyzing the Windows Event Logs, Dow's forensic expert, Stroz Friedberg, was able to determine when the operating system shut down and started, when the computer clock synchronized with the server, and when the clock was manipulated directly on the computer. (*Id.* at ¶70.) The event log for the first set of clock changes is reproduced below.

Date and Time (UTC)	Event Log Summary
02/23/2014 12:11:48	Computer resumes from sleep
02/23/2014 12:12:05	Time Synchronization Begins
06/19/2013 12:17:11	Date changed from 02/23/2014 to 06/19/2013
01/24/2013 11:20:31	Date changed from 06/19/2013 to 01/24/2013
01/24/2013 12:26:21	Computer shutdown
01/24/2013 12:35:25	Computer starts
01/24/2013 12:35:51	Time Synchronization Begins
02/23/2014 12:36:02	Synchronization resets clock by more than 15 minutes and date changed from 01/24/2013 to 02/23/2014

(*Id.*) The evidence proves the first two clock changes on Dr. Perez's laptop occurred independently of any synchronization with the network server, and therefore, the changes must have been made locally. (*Id.* at ¶¶ 71-72.) As evinced by the third clock change setting the

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clock back to the correct time of February 23, 2014, had the first two clock changes been the result of synchronization, a log reflecting that the computer clock was changed by more than fifteen minutes would have been created. (*Id.* at ¶ 71.) Thus, the evidence shows the change of the computer clock to the inaccurate date was made locally at the computer, and not by the network server. (*Id.* at ¶ 72.) I find the only reason a user changes the computer clock in the manner observed on Dr. Perez's laptop is so that actions on the computer are recorded on the computer as if they happened on different dates. (*Id.* at ¶ 55.) Thus, I find the clock was being manipulated to cause false timestamps to be recorded by the computer and hide that the Program File copies were made days before the inspection. (*Id.*)

Worse still, on February 24, 2014, one day after the Program File copies were created and the computer clock backdated, the evidence shows that a program called WinHex was installed on Dr. Perez's laptop. (*Id.* at ¶¶ 75-78.) WinHex is marketed as "a universal hexadecimal editor, particularly helpful in the realm of computer forensics, data recovery, low-level data processing, and IT security." (*Id.* at ¶ 75.) The evidence obtained through forensic inspection of the Windows Registry on Perez's laptop shows that WinHex was run by the "Administrator" account of Dr. Perez's laptop at least 12 times. (*Id.* at 79.) When Dow confronted Organik Kimya with this information and the allegation that WinHex was used to determine if any previously deleted data was still recoverable, Organik Kimya argued:

In actual fact, checking deleted files was not the reason WinHex was installed. Rather, as part of the process of trouble-shooting Dr. Perez's computer, we understand that the Organik Kimya IT department installed WinHex to correct the Microsoft Outlook accessibility problems Dr. Perez was having. Specifically, to confirm that the NTUser.dat file (a registry file storing the settings for each user's individual account) was not corrupted, WinHex was used to edit this file. Editing a registry file obviously differs from using software, like WinHex, to check whether a deleted file still exists. WinHex was also used to look into other Outlook system files resulting in the WinHex program being run multiple times.

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Dow's and its expert's speculation about Organik Kimya's use of the WinHex program is unsupported.

(Memo, Ex. 27 at 5-6.) Unfortunately, like the rest of Organik Kimya's explanations, this explanation is also not plausible. (Memo, Ex. 15 at ¶ 81 ("This explanation is not plausible.").)

Specifically, the evidence shows that "WinHex is a complicated hexadecimal editor that would not be an effective tool to check whether the registry was corrupt, nor would it be used to edit a registry file in a normal IT troubleshooting effort." (*Id.* at ¶ 82.) "The NTUser.dat file is a complex file that requires software specifically designed to view and edit a registry." (*Id.*)

While the evidence shows that it may be possible to make minor edits to the Registry without corrupting it, the evidence also shows that it is likely that editing the Registry with WinHex would corrupt the Registry. (*Id.*) According to Dow's forensic expert, if Organik Kimya's IT personnel really wanted to edit the NTUser.dat file then instead of WinHex "a tool built into Windows, Regedit, would be used to edit the Registry." (*Id.*) Although Stroz Friedberg was unable to determine exactly for what Organik Kimya used WinHex, the implausibility of Organik Kimya's explanation coupled with Organik Kimya's other implausible stories, leads me to agree with Dow's forensic expert that "WinHex was most likely installed and used after creating the Program Files copies to review Dr. Perez's laptop to determine if any previously deleted data was still recoverable." (*Id.* at ¶ 80.)

The reason why Stroz Friedberg was unable to discern the exact purpose for which Organik Kimya used WinHex is because, astonishingly, after Organik Kimya ran WinHex 12 times, Organik Kimya deleted the WinHex program and thereafter employed a data destruction tool, CCleaner, which "was used multiple times to delete a large percentage of the C drive and all of the D drive in Dr. Perez's laptop." (*Id.* at ¶¶ 79, 83, 84.)

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CCleaner is a computer software program made by Piriform that has multiple uses. Among those uses, CCleaner has the capability of targeting specific files to be overwritten and deleted. In addition, CCleaner also has the capability to overwrite unallocated space. By overwriting, or wiping, unallocated space, CCleaner will overwrite all previously deleted data, rendering it unrecoverable. CCleaner is described on the manufacturer's website as "the number-one tool for cleaning your Windows PC. It protects your privacy online and makes your computer faster and more secure. Easy to use and a small, fast download."

(*Id.* at ¶ 87.) The evidence shows CCleaner was used just hours after Organik Kimya representatives and counsel met with Stroz Friedberg on February 26, 2014. (*Id.* at ¶¶ 85, 95, 97.) The evidence shows it was uninstalled less than 20 minutes before Stroz Friedberg arrived the next day for the scheduled forensic inspection. (*Id.* at ¶¶ 86, 96, 97.) I find there is no innocent explanation for such conduct.

When Dow confronted Organik Kimya with allegations of CCleaner's use and in particular that Organik Kimya used CCleaner to wipe the unallocated space on the Perez laptop hard drive, Organik Kimya again chose to double down arguing:

As Dow admits, Organik Kimya used CCleaner to "clean" specific files from Dr. Perez's computer. (*Id.*) But this cleaning functionality differs greatly from CCleaner's ability to wipe clean deleted materials from a hard drive. Specifically, CCleaner has a "secure delete" function that can forever eliminate files from a hard-drive, but that feature was not employed on Dr. Perez's computer. And Dow's expert does not opine otherwise.

Each file that CCleaner was directed to eliminate on the Perez computer is still present, as well as its associated metadata, in the unallocated clusters as before. Thus, Dow's contention that Organik Kimya's use of CCleaner rendered the deleted files "unrecoverable" is mistaken. (*Id.*) Moreover, a search of these files revealed that the overwhelming majority of them were simply the 61 program file copies that had been previously added. The remaining files, as we noted, are still present on Dr. Perez's computer in unallocated space. Thus, Dow's repeated insinuation that Organik Kimya permanently "wiped" 600,000 potentially relevant files from the Perez computer is wrong.

(Memo, Ex. 27 at 6.) Sadly, the evidence paints a different picture.

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The evidence shows it is possible to determine what method was used for deleting and wiping data (*i.e.*, wipe all unallocated space; wipe select files; or delete select files) based on whether artifacts remain on the computer and how those artifacts are named. (*Id.* at ¶ 88.) When “Wipe Free Space” (*i.e.*, delete and overwrite all unallocated space) is selected, folders with names beginning with the characters “3590F75ABA9E485486C100C1A9D4FF06” are created, and within them files are created using a combination of the characters “Z” and “.”. (*Id.* at ¶ 89.) When files are specifically targeted for wiping (*i.e.*, deletion and overwriting), including when files in the Recycle Bin are targeted for deletion, all characters in the file name, except the “.”, are replaced with “Z” (the “.” character is not replaced). (*Id.* at ¶ 90.) Unlike when “Wipe Free Space” is selected, no special folder is created when files are specifically targeted for wiping. (*Id.*) If CCleaner is used to simply delete data without overwriting any data, neither naming convention is employed and the files are simply deleted and the filenames remain intact. (*Id.* at ¶ 91.)

Forensic examination of the Perez laptop revealed artifacts on both the C and D drives using the CCleaner naming convention indicating CCleaner was used on the Perez laptop to wipe all unallocated space. (*Id.* at ¶¶ 89, 91 (“CCleaner must have been run on Dr. Perez’s laptop with the option selected to wipe unallocated space, otherwise the artifacts and the special folders observed on the computer would not exist.”).) Specifically, Dow’s forensic expert, Stroz Friedberg, found over 600,000 files with names matching the naming scheme used by CCleaner to wipe unallocated space. (*Id.* at ¶ 92.) Thus, contrary to Organik Kimya’s story, I find Organik Kimya used CCleaner’s “wipe unallocated space” function to delete and overwrite the entirety of the “D” drive and a large portion of the “C” drive on Dr. Perez’s laptop.

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The evidence set forth above leads me to the inescapable conclusion that Organik Kimya acted in bad faith when, in contravention of Order No. 16, Organik Kimya undertook the massive spoliation of evidence on Dr. Perez's laptop through the repeated copying of the Program File folder and the use of CCleaner. In fact, were there such a thing, I would find Organik Kimya's egregious behavior to be gross bad faith. The scheme carried out by Organik Kimya to destroy evidence and then conceal those efforts, including making 108 copies of the Program File folder, back-dating the computer clock, running WinHex, and then running CCleaner shows Organik Kimya knew what it was doing was wrong and evinces an intent to cover-up that known wrong doing. The fact that Organik Kimya did not tell Stroz Friedberg at the time of the scheduled forensic inspection that its IT personnel had tampered with the laptop is also evidence of a cover-up. Additionally, a finding of bad faith is supported by the timing of the spoliation and the thereafter attempted cover-up occurring within days after I issued Order No. 16 and continuing unabated through the morning of the scheduled forensic inspection. These actions by Organik Kimya coupled with the multitude of lies Organik Kimya knowingly and deliberately presented to the undersigned to hide or explain away its wrong-doing, leaves no doubt that Organik Kimya destroyed evidence on Perez's laptop with the intent to impair Dow's ability prove its allegations of trade secret misappropriation.¹⁴ *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311, 1326 (Fed. Cir. 2011) ("To make a determination of bad faith, the district court must find that the spoliating party 'intended to impair the ability of the potential defendant to defend itself.' ... The fundamental element of bad faith spoliation is advantage seeking behavior by the party with superior access to information necessary for the proper administration of justice.") (quoting

¹⁴ Organik Kimya's attempt to cover up its spoliation by uttering patently false statements to the undersigned should shock the conscience of any reasonable person. There can be no excuse for such conduct.

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Schmid, 13 F.3d at 80.) Organik Kimya's spoliating behavior clearly fits this requirement. Accordingly, I find the spoliation of evidence on Dr. Perez's laptop was done in bad faith.

b. Strozzi laptop and external storage devices

I have found hereinabove that Organik Kimya had "control" over the Strozzi laptop, but not the external storage devices so I will focus my discussion of "culpable state of mind" on the spoliation of evidence on the laptop and loss of the laptop itself.

Organik Kimya was under a duty to preserve evidence relevant to Dow's allegations in this investigation. The duty to preserve evidence "includes an obligation to identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation," *Apple Inc. v. Samsung Electronics Co., Ltd.*, 881 F.Supp.2d 1132, 1137 (N.D.Cal.2012). It is well-established that the duty pertains to:

[A]ny documents or tangible things (as defined by Rule 34(a)) made by individuals "likely to have discoverable information that the disclosing party may use to support its claims or defenses." The duty also includes documents prepared for those individuals, to the extent those documents can be readily identified (e.g., from the "to" field in e-mails). The duty also extends to information that is relevant to the claims or defenses of any party, or which is "relevant to the subject matter involved in the action." Thus, the duty to preserve extends to those employees likely to have relevant information-the "key players" in the case.

Id. (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y.2003)); *In re Pfizer Inc. Securities Litigation*, 288 F.R.D. 297, 313 (S.D.N.Y.2013) ("Evidence that must be preserved includes documents, electronically stored information, and physical evidence that the party knows or reasonably should know is relevant to claims or defenses in the action, is reasonably calculated to lead to the discovery of admissible evidence, or is reasonably likely to be requested during discovery."). Organik Kimya should have known that Mr. Strozzi was a "key-player" in this investigation. Mr. Strozzi began working for Organik Kimya in 2008. (Opposition at 23.) Mr. Strozzi was Organik Kimya's plant manager for the Rotterdam plant.

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(*Id.*) Mr. Strozzi was an Organik Kimya employee as of the date Organik Kimya became responsible for preserving evidence and when the evidence on the computer was subsequently destroyed. (*Id.* at 3 (“Mr. Strozzi was an employee of Organik Kimya at the time of his alleged actions”).) Moreover, Dow put Organik Kimya on actual notice of the need to preserve Strozzi’s evidence when Dow served its first set of discovery on June 25, 2013, requesting, among other things:

REQUEST NO. 4: All documents and things concerning any proposed or actual changes made or considered with respect to the **research, design and/or development of the Organik Opaque Polymers**, including, but not limited to, all memoranda, notes, meeting minutes, reports, studies, laboratory notebooks, drawings or communications concerning such changes.

REQUEST NO. 62: All documents and things concerning **Leonardo Strozzi** and Opaque Polymers.

(Memo, Ex. 43(Dow’s First Set of Requests for Production) (emphasis added).) Despite this clear notice, Organik Kimya failed to take any steps to secure and preserve the Strozzi laptop before the spoliation, a step Organik Kimya’s own forensic expert testified he would have done. (*See* Mot., Ex. 1 at 74:22-75:12 (explaining that once a court orders inspection of a computer, a company should “[t]ake it off the network, turn it off and don’t let anybody touch it.”).)

Moreover, there is no evidence of record that Organik Kimya disseminated any type of preservation memo or litigation hold memo to its employees to ensure that relevant evidence was not destroyed and relevant documents were not deleted.^{15 16} In fact, the evidence is to the

¹⁵ Organik Kimya complains in its sur-reply that it was never on notice of Dow’s litigation hold argument. (Sur-Reply at 4-6.) Nonsense. I find Dow explicitly presented or anticipated this argument in its opening brief. (*See* Memo at 5, 76, 78.)

¹⁶ Organik Kimya states in its Sur-Reply that “respondents decline Dow’s invitation to waive attorney/client privilege in order to discuss their communications with counsel.” (Sur-Reply at 6.) Yet the case law is clear that the facts surrounding litigation holds, including the fact of whether a hold was issued and distributed, whether employees received the hold instructions, etc., are not privileged. *Brown v. West Corp.*, 287 F.R.D. 494, 499-500 (D. Neb. 2012) (holding

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contrary. The evidence shows that neither Mr. Turaman (Organik Kimya's corporate witness on document retention/collection topics) nor Mr. Özyönüm (Organik Kimya's COO and head of IT) was aware of any such preservation notice being issued to Organik Kimya employees. (Memo, Ex. 44 (Turaman Dep.) at 114:2-18, Ex. 45 (Özyönüm Dep.) at 95:13-17.) Indeed both witnesses testified that Organik Kimya employees were free to save or delete documents and emails as they saw fit. (*Id.*, Ex. 44 at 113:4-7 ("Q: And you also testified that for electronic documents, it was up to each individual employee whether to save it or delete it, right? A: Yes."), Ex. 45 at 94:7-21 ("We don't have any rules for that. It depends on the employee. If they want to erase, they erase.").) Organik Kimya was obligated to secure and preserve the Strozzi laptop at the beginning of this investigation in response to Dow's interrogatories asking same. Instead, inexplicably, Organik Kimya left it "up to each individual employee whether to save [] or delete" electronic files. (Memo, Ex. 44 at 113:4-7.)

Organik Kimya argues that I should disregard the deposition testimony because it "clearly shows the witness (and both parties' interpreters) did not understand the meaning of the term "litigation hold notice," or how to translate it into Turkish." (Sur-Reply at 3-4.) Admittedly the deposition transcript does show some initial confusion by the translators as to how properly to translate "litigation hold notice" but after counsel for Dow rephrased the question there is no indication that confusion remained. I would expect that if there was still

that, although litigation hold letters are themselves privileged, "the information surrounding the letters is not," and ordering defendant to disclose (*inter alia*) the "names of individuals to whom the litigation hold was sent," "the dates on which the hold was communicated," the "specific sources that custodians were instructed to search," "[w]hen and for what specific sources preservation policies were put in place," "[w]hen and what steps were taken to preserve ESI," and "[w]hat steps were taken to ensure compliance with preservation policies ... after the litigation hold was distributed"). Thus, I find Organik Kimya's conscious decision to not provide any affirmative evidence of a legal hold memo telling.

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ongoing confusion or ambiguity that Organik Kimya's counsel, who was very actively defending the deposition, would have ensured that the matter was clarified for the record. Furthermore, if Organik Kimya had really undertaken its obligation to communicate and explain to its employees their duty to preserve than I would expect Organik Kimya's corporate witness on document retention/collection topics would have been fully aware of what a litigation hold memo was during his deposition. I would also expect Organik Kimya's corporate representative not to have testified that electronic document preservation was left up to each employee. Moreover, Organik Kimya has not offered any affirmative evidence of a litigation hold memo.¹⁷

As discussed, *supra*, the Strozzi laptop was a company-issued laptop and, unlike the external storage devices, the deleted folder and files once resided on the laptop's hard drive. The evidence shows that on March 21, 2014, one day after I issued my Preservation Order and stated that I would be "mortally annoyed if anything was done to alter, destroy or otherwise mess with the evidence in this case," 2,742 user-created files and folders were deleted from the Strozzi laptop. (Memo, Ex. 15 at ¶ 107.) The evidence shows those files were deleted in a special manner such that they were not placed in the Recycle Bin, but rather had to be recovered using forensic tools. (*Id.*) This evinces an attempt to cover-up wrong doing. What is even more shocking is that at the time I issued my Preservation Order, Organik Kimya was already on notice of the massive spoliation of evidence on Dr. Perez's laptop.

The matter is even worse when discussing the loss of the laptop itself, for Organik Kimya had the laptop in its possession for the forensic inspection and yet inexplicably returned it to Mr. Strozzi, which allowed him to "lose" it. Telling, is at the time Organik Kimya gave the laptop back to Strozzi they had already spoliated the data on the Perez laptop. Further the

¹⁷ See *supra*, n.16.

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explanation provided for the loss (*i.e.*, that Strozzi took his laptop bag with his laptop and a number of USB devices inside into a rest stop bathroom and accidentally left it there) is highly suspect. I question why one would bring their work-issued laptop and a number of USB devices likely containing massive amounts of proprietary and confidential recipes into a rest stop bathroom and I question how within the time it takes to use the tiny rest stop bathroom, one could possibly forget their laptop bag their work-issued laptop.

Accordingly, for the reasons discussed above, including, the timing of the spoliation, the breath and manner of the spoliation, the failure to issue a litigation hold notice or ensure the dissemination of such, the failure to take any steps to preserve the evidence, and the fact that Organik Kimya was on notice of the Perez spoliation, the only conclusion that can be drawn is that the spoliation of evidence on the Strozzi laptop and the spoliation of the Strozzi laptop itself was done in an effort to prevent Dow from access to evidence it might use to support its allegations in this investigation. *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311, 1326 (Fed. Cir. 2011) (“To make a determination of bad faith, the district court must find that the spoliating party ‘intended to impair the ability of the potential defendant to defend itself.’ ... The fundamental element of bad faith spoliation is advantage seeking behavior by the party with superior access to information necessary for the proper administration of justice.”) (quoting *Schmid*, 13 F.3d at 80.) Accordingly, I find the spoliation of evidence on the Strozzi laptop and the loss of the Strozzi laptop itself was in bad faith.

c. Nene laptop and external storage devices

Dow’s theory of culpable state of mind or purpose is attractive and even logical given what occurred later with the Perez and Strozzi laptops. While it is clear that Dr. Nene intentionally deleted evidence from his laptop and external storage devices, I do not find the record sufficient to support imputing that behavior to Organik Kimya. The evidence, which is

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circumstantial, fails to persuade me that Dow has met its burden to prove a design by Organik Kimya to deliberately destroy data on Dr. Nene's laptop and external storage devices.

Nevertheless, I find sufficient evidence to sustain a finding that Organik Kimya, in the person of Mr. Kaslowski, and Organik Kimya generally, had the ability to control Dr. Nene and failed to act in a responsible manner to preserve Dr. Nene's devices and data. Hence, while there is not enough evidence to sustain a finding of bad faith with regard to Dr. Nene on the part of Organik Kimya, I find Organik Kimya reckless in its disregard of its duty to preserve Dr. Nene's evidence.

3. Relevancy and Prejudice

a. Perez Laptop

Having found heretofore that the spoliation of evidence on the Perez company-issued laptop was undertaken in bad faith, prejudice and relevancy are presumed. Organik Kimya made no attempt to rebut this presumption in its response to Dow's present motion for default and other sanctions. Organik Kimya neither offered nor introduced evidence that would show that the spoliated evidence was not prejudicial or not relevant. Accordingly, I find the spoliated evidence on the Perez laptop to have been relevant to Dow's allegation of trade secret misappropriation and its destruction prejudicial to Dow's ability to prosecute same.

Even assuming arguendo that the presumption did not apply, Dow needed only to "come forward with plausible, concrete suggestions as to what [the destroyed] evidence might have been." *Micron Tech., Inc.*, 645 F.3d at 1328. Here, even in light of the proficiency in which Organik Kimya destroyed evidence, Stroz Friedberg was able to recover information that meets this standard.

With regard to Dr. Perez, Stroz Friedberg was able to compile information from the Jump Lists, Link Files, Registry, and Internet History records it forensically recovered from the Perez

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laptop and compared the lists of files that had been accessed to what was present on the hard drive when Dr. Perez's laptop was presented for inspection. (Memo, Ex. 15 at ¶ 26.) Such a comparison revealed dozens of files that had been stored and accessed on the computer (both "C" and "D" drive) that were subsequently wiped from the computer. (*Id.*) The evidence shows, however, that given the multiple destruction efforts undertaken on Dr. Perez's laptop "it is likely that there are many more deleted files that will never be identified." (*Id.*) Because Organik Kimya wiped the files from the computer, it is impossible to assess their relevance beyond reviewing the file names and folder paths forensically recovered. (*Id.*) The evidence shows the following files and folders once resided on the Perez laptop hard drive prior to Organik Kimya repeatedly copying the Program File folder and running CCleaner.

Last Record Access	File Path
11/21/2012 2:21:40 PM	C:\Documents\OldRH\
9/30/2013 1:33:43 PM	C:\Documents\OldRH\Powders
9/30/2013 1:33:43 PM	C:\Documents\OldRH\Powders\powders.ppt
7/8/2013 11:31:20 AM	C:\Users\g_perez\Desktop\G PEREZ.pst
4/23/2011 5:43:42 PM	C:\Users\g_perez\Desktop\Guille Portatil\Chemcofacturas\2011N
4/25/2011 7:17:34 AM	C:\Users\g_perez\Desktop\Guille Portatil\OK\Excel\OKLAB\Rott
4/25/2011 7:17:34 AM	C:\Users\g_perez\Desktop\Guille Portatil\OK\Excel\OKLAB\Rott\PS00_R1.xls
4/10/2011 6:36:01 PM	C:\Users\g_perez\Desktop\Guille\Documents\OK\Excel\OKLAB\StyAc\OPAC\OrgWhite 2000
4/10/2011 6:36:01 PM	C:\Users\g_perez\Desktop\Guille\Documents\OK\Excel\OKLAB\StyAc\OPAC\OrgWhite 2000\OrgWhite 2000_Pilot.xls
9/30/2013 1:36:52 PM	C:\Users\g_perez\Documents\Outlook Files
9/30/2013 1:36:51 PM	C:\Users\g_perez\Documents\Outlook Files\lostarexportmailbox.pst
9/30/2013 12:22:54 PM	C:\Users\g_perez\Documents\Outlook Files\lostarexportmailbox1.pst
9/30/2013 12:23:00 PM	C:\Users\g_perez\Documents\Outlook Files\lostarexportmailbox2.pst
9/30/2013 12:23:05 PM	C:\Users\g_perez\Documents\Outlook Files\lostarexportmailbox3.pst
9/30/2013 12:23:13 PM	C:\Users\g_perez\Documents\Outlook Files\lostarexportmailbox4.pst
9/30/2013 12:20:52 PM	C:\Users\g_perez\Documents\Outlook Files\lostarexportmailbox5.pst
3/27/2013 4:15:16 PM	C:\Users\g_perez\Documents\TDS_ORGAL OPAC 204 X.pdf

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Last Record Access	File Path
5/25/2011 3:36:54 PM	D:\Data\Guille\OK\Excel\OKLAB\StyAc\OPAC\
5/25/2011 3:37:09 PM	D:\Data\Guille\OK\Excel\OKLAB\StyAc\OPAC\OrgWhite 2000\
7/8/2013 12:17:31 PM	D:\Data\Guille\OP2\
5/12/2011 12:09:47 PM	D:\Data\Guille\OK\Excel\OKLAB\Acrylic\SAS StandarAcSeed.xls
5/25/2011 3:36:53 PM	D:\Data\Guille\OK\Excel\OKLAB\Rotf\
5/12/2011 2:37:56 PM	D:\Data\Guille\OK\Excel\OKLAB\Rotf\Serhan
5/12/2011 2:37:37 PM	D:\Data\Guille\OK\Excel\OKLAB\Rotf\Serhan\
5/12/2011 2:37:56 PM	D:\Data\Guille\OK\Excel\OKLAB\Rotf\Serhan\P-036V_R23_3lst.xls
5/12/2011 12:10:01 PM	D:\Data\Guille\OK\Excel\OKLAB\StyAc
5/25/2011 3:36:53 PM	D:\Data\Guille\OK\Excel\OKLAB\StyAc\
6/12/2011 11:57:07 AM	D:\Data\Guille\Chemcofacturas\
5/12/2011 3:28:07 PM	D:\Data\Guille\DEExcel\OldExcel\Acrylic recipes.xls
5/10/2011 7:41:35 AM	D:\Data\Guille\DEExcel\OldExcel\LAP
5/10/2011 7:41:29 AM	D:\Data\Guille\DEExcel\OldExcel\LAP\
5/10/2011 7:41:35 AM	D:\Data\Guille\DEExcel\OldExcel\LAP\Tg1.xls
5/12/2011 3:14:30 PM	D:\Data\Guille\DEExcel\OldExcel\Proyectos pinturas.xls
5/12/2011 3:23:02 PM	D:\Data\Guille\DEExcel\OldExcel\Tg1.xls
5/10/2011 7:41:29 AM	D:\Data\Guille\DEExcel\POLYMERS\

(See *id.*, Ex. 15-C.) As Director of Research for Organik Kimya, Mr. Perez should be expected to have access to all of the chemical processes developed by or used by Organik Kimya for polymers. This would be true whether Organik Kimya developed the process or formula internally or appropriated the process or formula from someone else. Further, it would be reasonable for Mr. Perez to retain these processes on his company-issued laptop so he could access them as needed to perform his job. Hence, it is reasonable for me or any factfinder to presume, as buttressed reinforced by Organik Kimya's thorough destruction of the data on his laptop, their effort to hide the destruction (*e.g.*, by the changing of the clock), and their effort to lie about all that they had done later, that Organik Kimya had evaluated the data on his laptop and knew it was relevant. In fact, any contrary conclusion strains credulity.

b. Strozzi laptop and external storage devices

The Parties' Positions

Organik Kimya contests the relevancy of the 2,700 plus files deleted from the Strozzi laptop. Organik Kimya argues Dow has been able to forensically recover the deleted "scale-up" folder, and not one single document in that folder is relevant to this Investigation. (Opposition at 27.) Organik Kimya argues that according to the forensic inspection protocol, only documents

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that contain certain search terms selected by Dow were considered to be responsive to its discovery requests. (*Id.*) Organik Kimya argues that using those criteria, only ninety-three of the 2,742 files in Mr. Strozzi's "scale-up" folder contained key word hits. Of these, Organik Kimya argues the vast majority are corporation-created technical data sheets (TDS) and material safety data sheets (MSDS), which are readily and publicly available. (*Id.*) Organik Kimya asserts that these files show up as potentially relevant only because they contain the key word "Dow." (*Id.* at 28.) Organik Kimya argues the MSDs and TDS documents have no relevance at all to this investigation. (*Id.*) Ok argues that having presumably reviewed all 2,742 files contained in Mr. Strozzi's "scale-up" folder, Dow has managed to find just three files that it considers relevant. (*Id.* at 28-29.) Ok argues that even these three files are not relevant to this Investigation. (*Id.* at 29.)

Organik Kimya asserts that Dow contends that Mr. Strozzi deleted a Rohm and Haas Standard Operating Procedure (SOP) from his work-issued laptop. (*Id.*) Organik Kimya asserts that in describing this SOP, Dow comments in a footnote that "[t]his document provides details as to how Dow makes its opaque polymer products in a specific plant." (*Id.*) Organik Kimya argues that this footnote is "incredibly misleading" because it suggests that the SOP that was deleted from Mr. Strozzi's laptop was for a Dow opaque polymer product, which it was not. (*Id.*) Organik Kimya argues that the SOP appears to relate to an adhesive product and not to opaque polymers at all. (*Id.*) Organik Kimya argues that first page of the SOP clearly identifies it as being for "Adesivo per etichette, di almeno 25 anni fa", which Organik Kimya asserts in Italian literally translates to "Adhesive labels, at least 25 years ago." (*Id.*)

Organik Kimya asserts that the second deleted document Dow flags as being relevant relates to an Organik Kimya product called Orgal M-4250. (*Id.* at 30.) Organik Kimya argues

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the product is not an opaque polymer and not an accused product in this Investigation. (*Id.*) Organik Kimya asserts that Dow contends this document is relevant to show that Dr. Nene discussed production batches with Organik Kimya , but argues that it has never denied that Dr. Nene had conversations about general polymerization concepts for products not involved in this Investigation. (*Id.*) Thus, Organik Kimya argues this document is fully consistent with what Organik Kimya has repeatedly told Dow. (*Id.*)

Organik Kimya asserts that the third deleted document that Dow alleges is relevant is a scale-up report for OPAC 103. (*Id.*) Organik Kimya argues that it is not an accused product. (*Id.*) Organik Kimya argues the scale-up report reveals nothing of relevance. (*Id.*) Specifically, Organik Kimya argues that it relates to a product not within the scope of the investigation. (*Id.* at 30-31.) Organik Kimya asserts that the document merely mentions that Mr. Strozzi and Dr. Nene may have provided general manufacturing advice and that the technique is not one that Dow has contended is a trade secret. (*Id.* at 31.)

Dow argues that Organik Kimya's claim that only three out of the 2,742 documents deleted from the scale-up folder are even arguably relevant to this investigation because Dow only cited those three examples in its opening brief blatantly misrepresent the record. (Reply at 27.) Dow argues Stroz Friedberg was not permitted to turn over, and its counsel was not allowed to review, the vast majority of the 2,742 documents in the scale-up folder because they did not hit on any of the search terms called for by the inspection protocol. (*Id.*) Dow argues that the three cited were merely meant to be exemplars. (*Id.*)

Dow argues that contrary to Organik Kimya's argument the three cites examples are relevant to this investigation. (*Id.* at 28.) With regard to the OPAC 103 document, Dow argues that although it is true that OPAC 103 is not one of the accused products in this investigation that

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does not mean it is not relevant to the investigation. (*Id.*) Dow argues that this document is a good example of the kinds of documents deleted from the scale-up folder on the Strozzi laptop. (*Id.*) Dow also argues that I have already decided that OPAC 103 is relevant to this investigation and that Organik Kimya has admitted as much. (*Id.* at 28-29.)

Dow argues that contrary to Organik Kimya's argument that the scale-up report for OPAC 103 is irrelevant to the investigation because it "merely mentions that Mr. Strozzi and Dr. Nene may have provided general manufacturing advice," the document shows that Mr. Strozzi and Dr. Nene offered specific advice about the [].

(*Id.* at 29.) Dow also argues that the document is contemporaneous with five other Organik Kimya documents with metadata explaining that "[a]s a result of recent meetings with Dilip Nene, information obtained about 'seed' and 'opac polymers' are summarized in the following way." (*Id.*) [

]

(*Id.*)

With regard to the scale-up report for ORGAL M4250, Dow argues that while ORGAL M4250 is not an accused product and not an opaque polymer, the document is indicative of the types of documents Mr. Strozzi kept on his laptop. (*Id.*) Dow argues that just because this document relates to another product does not mean it is not relevant to this investigation. (*Id.*) Dow argues that it contends Dr. Nene worked on two specific projects, OPAC 204X and ORGAWHITE 2000, and that this document shows that Dr. Nene was consulting on a specific product, ORGAL M-2450, contrary to Organik Kimya repeated assurances that Dr. Nene did not

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work on any specific products. (*Id.* at 30.)

With regard to the SOP, Dow argues that even though the SOP is not for opaque polymers it is still relevant. Dow argues the point is not that the SOP refers to any particular product, the point is that Mr. Strozzi was keeping SOPs on his laptop. (*Id.* at 31.)

Dow further argues that in addition to the three documents, the “scale-up” folder deleted from the Strozzi laptop contained several other highly relevant materials. (*Id.* at 32.) Dow argues that even a cursory review of the list of files from the deleted scale-up folder shows many other files clearly relevant to this investigation. (*Id.*) Dow argues one example is another recovered document named [

], one of the accused products in the investigation. (*Id.*)

Dow argues that although it was not provided access to most of the files because they did not hit on particular search terms, many other files deleted from the scale-up folder also specifically reference the accused products in this case (ORGAWHITE 2000 or OPAC 204X), the seed used to make those products [] and important ingredients such as []. (*Id.* at 32.)

Organik Kimya argues in sur-reply that Dow’s argument that additional documents identified as deleted from the “scale up” folder on Mr. Strozzi’s laptop are relevant to this investigation fails because: (1) Dow’s own inspection protocol did not indicate the additional documents are search-term relevant; (2) if the newly raised documents were truly relevant to this investigation, Dow should have discussed them in its opening motion; and (3) the newly raised documents are not relevant to Dow’s claims but, instead, merely confirm Organik Kimya’s commitment to safety and innovation. (Sur-Reply at 20-21.) With regard to the files that Dow

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was unable to examine from the scale-up folder, but asserts based on the file names are relevant, Organik Kimya argues one of the documents identifies OPAC 101, which is not an accused product. (*Id.* at 26.) Organik Kimya also argues that two of the documents appear to be of no relevance whatsoever, as the filenames for both identify FDA and one bears the title “Confirmation Food Contact [].” (*Id.*) With regard to the remaining files, Organik Kimya argues that “Dow likely already has the remaining files.” (*Id.*) Organik Kimya argues that these documents relate to what appears to be the scale-up of Orgawhite 2000 and its seed, Dispersant 1204. (*Id.*) Organik Kimya asserts that it produced hundreds of trials relating to its work to develop Dispersant 1204 and several production recipes, including the original Dispersant 1204 production recipe and thirteen revisions. (*Id.*) Organik Kimya argues that all of these documents have been produced to Dow. (*Id.*)

Discussion

Having found heretofore that the spoliation of evidence on the Strozzi company-issued laptop and the loss of the laptop were undertaken in bad faith, prejudice and relevancy are presumed. *See, e.g., Micron Tech., Inc.*, 645 F.3d at 1328. Thus, Organik Kimya bears a “‘heavy burden’ to show a lack of prejudice to the opposing party because ‘[a] party who is guilty of ... intentionally shredding documents ... should not easily be able to excuse the misconduct by claiming that the vanished documents were of minimal import.’” *Id.*

The spoliation of evidence on the Strozzi laptop consisted of the deletion of 2,742 user-created files from the scale-up folder. Since there is a presumption that deletion of those 2,742 files was prejudicial to Dow’s allegations in this investigation, it was up to Organik Kimya to come forward with evidence to show that they were not prejudicial. Organik Kimya could accomplish this by either showing the documents not relevant (*i.e.*, that a reasonable trier of fact

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could not conclude that the lost evidence would have supported the claims or defenses of the party that sought it) or not prejudicial (*e.g.*, showing that the documents were duplicative of documents already produced in discovery). I find Organik Kimya failed to rebut the presumption.

Contrary to Organik Kimya's argument, I find the scale-up report for OPAC 103 relevant. Notably, the report includes the following passages:

[

] (this was advised y Dilip NENE and Leo STROZZI).

...
A trial production with the original but improved recipe shall be performed under supervision of Dilip NENE, during the week of March 9.

(Memo, Ex. 14 at STROZ-0030015, STROZ-0030016.) Organik Kimya has previously all but admitted the relevancy of OPAC 103 stating in a letter to Dow:

We would, however, like to address the mischaracterization you made in your letter to Jude Pender on January 23, 2014. In that letter, you stated that "Organik Kimya again took the position that the OPAC 101/103 products were outside the scope of the investigation and stated that it had produced relevant research and development documents." We have never made such a statement. The letter that you rely on to purportedly substantiate this assertion does not say this. In fact, we specifically said that "Organik Kimya has produced the OPAC 101 and 103 production methods."

(Reply, Ex. 51 at 1.) More specifically, though, Organik Kimya has argued that development of OPAC 103 supports its defense of independent development to Dow's allegations of trade secret misappropriation. Thus, to the extent the scale up report for OPAC 103 would tend to either prove or disprove that defense it is clearly relevant and should have been produced to Dow.

Moreover, Organik Kimya focusses on only a small subset of the documents deleted on the Strozzi laptop, namely 93 documents that met certain search criteria set forth in the forensic inspection protocol. In so doing Organik Kimya ignores the remaining 2649 files that were

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deleted. As Dow asserts in its reply, some of the file names of those 2649 files specifically reference the accused products in this case (i.e., ORGAWHITE 2000 or OPAC 204X), the seed used to make those products (i.e., []) and important ingredients (i.e., []). (See Reply at 32.) The list of those files is shown in the table below.

Name	Location
[]	[]
[]	[]
[]	[]
[]	[]
[]	[]
[]	[]
[]	[]
[]	[]
[]	[]
[]	[]

(Memo, Ex. 15-K at 1, 39, 51, 56, 61.) While Organik Kimya attempts in its sur-reply to address the relevancy of some of these documents, *see* Sur-Reply at 26, Organik Kimya fails to show that the documents referencing [] and Orgawhite 2000 are not relevant or prejudicial. The best argument Organik Kimya makes in this regard is that “Dow likely already has the remaining files.” (Sur-Reply at 26.) That statement, without proof, is insufficient to overcome

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the presumption that the deleted files are prejudicial to Dow. Thus, I find Organik Kimya has failed to rebut the presumption that the evidence spoliated in bad faith from the Strozzi laptop was prejudicial to Dow's allegations in this investigation.

Accordingly, I find at least some of the documents deleted from the Strozzi laptop to be relevant and prejudicial to Dow's allegations in this investigation.¹⁸

c. Nene laptop and external storage devices

Organik Kimya argues that if it had some control over Dr. Nene's files, which it does not, such control would extend only to Dr. Nene's files created by Dr. Nene during the course of his consulting activities. (Opposition at 45.) Organik Kimya argues that it would not apply, for instance, to the alleged "massive amounts of Rohm and Haas proprietary documents" that Dr. Nene allegedly had on his personal storage devices, presumably from his days as a Rohm and Haas employee. (*Id.*) Organik Kimya argues that when the analysis is appropriately focused on the allegedly relevant documents that were created by Dr. Nene during the course of his consulting activities with Organik Kimya, and allegedly deleted by Dr. Nene after receipt of his subpoena, Dow has identified only a handful of such documents. Organik Kimya asserts those documents are: "Chem 101.pptx," "Chem 101.odp," "Invoice Rotterdam," "Invoice Rotterdam\Transportation^Rotterdam^1.jpg," "Blend Tanks.docx," "Preparation of pre-emulsion.docx," and "Reactor Process Dilip.docx." (*Id.*) Organik Kimya asserts all of these documents were either produced during discovery or recovered forensically. (*Id.*) Thus,

¹⁸ In its reply, Dow makes the argument on several occasions that although a document does not reference an accused product or opaque polymer that the document is nevertheless relevant because it indicates the type of documents that were on the Strozzi laptop. This is not the correct standard of relevance. It appears Dow confuses "relevancy" under FRCP 401 (and the corollary Commission Rule 210.27(b)) with "relevancy" in the context of spoliation. "In the context of spoliation, lost or destroyed evidence is 'relevant' if 'a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.'" *Victor Stanley*, 269 F.R.D. at 531.

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Organik Kimya argues that as to this category of documents there has been no actual loss of documents. (*Id.*)

Dow asserts that Organik Kimya's argument that there has been no spoliation because "all of these documents were either produced during discovery or recovered forensically from Dr. Nene's computer" is only half the story. (Reply at 41.) Dow argues that important point is that Dr. Nene generated the documents and then provided them to Organik Kimya, as evidenced by the fact that Organik Kimya produced copies of the documents from its own files. (*Id.* at 41-42.) Dow argues that Organik Kimya has spent this entire investigation trying to give the appearance that Dr. Nene only provided general advice on "chemistry 101" and "plant safety", but the names of the deleted files alone make clear that Dr. Nene provided information on much more than just safety and basic chemistry. (*Id.* at 42.) Dow argues that the fact that these documents have been produced or recovered by Stroz Friedberg is irrelevant to the issue of spoliation. (*Id.*) Further, Dow argues that the documents cited by Organik Kimya are not the only evidence that Dow relies upon in its opening brief to show that Dr. Nene deleted relevant files. (*Id.*) Dow asserts that it relies on an entire exhibit (Mot., Ex. 15-O) from the Lynch Declaration, as well as the direct testimony of Dr. Nene explaining that when he left Rohm and Haas, he took numerous proprietary recipes with him, including some of the same recipes that later ended up on an Organik Kimya loaner laptop. (*Id.*) Dow argues there can be no real dispute that Dr. Nene deleted relevant materials. (*Id.*)

Discussion

I have found Organik Kimya to have practical control over Dr. Nene and as such a duty to preserve Dr. Nene's evidence in this investigation, including his laptop and thumb drives. Organik Kimya breached that duty by permitting the spoliation of the Nene evidence. I have

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found herein Organik Kimya's failure to exercise practical control to preserve Dr. Nene's evidence to be reckless. Because I have not found bad faith, Dow bears the burden of showing that the spoliated evidence was prejudicial, which naturally includes a showing of relevance. *Micron Technology, Inc. v. Rambus Inc.*, 917 F.Supp.2d 300, 319 (D.Del. 2013) ("If the spoliation was not done in bad faith, then the burden lies with the non-spoliating party to show prejudice.").

Here, there does not appear to be any real argument that the recovered evidence, "Chem 101.pptx," "Chem 101.odp," "Invoice Rotterdam," "Invoice Rotterdam\Transportation^Rotterdam^1.jpg," "Blend Tanks.docx," "Preparation of pre-emulsion.docx," and "Reactor Process Dilip.docx", is not relevant to Dow's allegations in this investigation. Likewise, there is no dispute that all of these documents were either produced during discovery or recovered forensically from Dr. Nene's computer. (See Opposition, Ex. 42 at ORG883ITC00204460-75 (Chem 101); Ex. 15 at ORG883ITC00152274-275 (blend tanks); Ex. 13 at ORG883ITC00152321-31 (preparation of pre-emulsion); Ex. 14 at ORG883ITC00152350-55 (reactor process Dilip); Ex. 43 at ORG883ITC00201537-64 (collection of D. Nene invoices)) (Ex. 44, NENE-500 (Chem 101)). Thus, there can be no prejudice. Accordingly, with regard to these files, I find no sanction-worthy spoliation.

Dow argues those documents are not the only evidence it relies upon to show that Dr. Nene deleted relevant files. Dow also points to an entire exhibit (Memo, Ex. 15-O) from the Lynch Declaration, as well as portions of the deposition testimony of Dr. Nene (Memo, Ex. 18 at 433:10-443:12). However, other than citing to the exhibit and deposition transcript, Dow never develops an argument for why this evidence is relevant and its destruction prejudicial. (See Reply at 41-42.) Thus, I find Dow has failed to prove the relevancy of this evidence or why its

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destruction was prejudicial. Accordingly, with regard to these files, I find no sanction-worth spoliation.

V. Imposition of Sanctions

A. Default Judgment

Sanctions for spoliation should be crafted to “vindicate the trifold aims of: (1) deterring future spoliation of evidence; (2) protecting the [complainants’] interests; and (3) remedying the prejudice [complainants] suffered as a result of [respondents] actions.” *Micron Tech., Inc.*, 645 F.3d at 1329. Thus, in determining an appropriate sanction, I “must take into account ‘(1) the *degree* of fault of the party who altered or destroyed the evidence; (2) the *degree* of prejudice suffered by the opposing party; and (3) *whether there is a lesser sanction* that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.’” *Micron Tech., Inc.*, 645 F.3d at 1329

In this investigation Dow has urged me to impose the most severe of sanctions-- entry of default judgment against Organik Kimya on Dow’s allegation of trade secret misappropriation. On the record before me, Dow hardly can be blamed for taking such a position. Indeed, as exhaustively discussed, *supra*, Organik Kimya’s willful, bad faith misconduct has ostensibly deprived Dow of its ability to pursue its claim of trade secret misappropriation and me of my ability to oversee a prehearing process that would facilitate a fair and timely resolution of this investigation on its merits. No sanction short of default is available to return the parties to the position in which they would have been but for the deliberate destruction by Organik Kimya of evidence potentially favorable to Dow.

Organik Kimya’s bad faith conduct has precluded this action from being decided on the merits. The evidence shows potentially *hundreds of thousands* of files were wiped from the “C” and “D” drives of the Perez laptop. (Memo, Ex. 15 at ¶ 26 (“that given the size of unallocated

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space filled with the program files (at least 190 GB) and the forensic evidence on the computer, *potentially hundreds of thousands of files* could have been overwritten by the copy operation.”)

Because Organik Kimya has ensured whatever evidence was on the Perez company-issued laptop that may have been favorable to Dow will never see the light of day and I can no longer weigh conflicting evidence.

Evidentiary sanctions such as shifting the burden of proof are insufficient because Organik Kimya arrogated to itself the right to decide what evidence would be made available for hearing. Further, an adverse inference would be ineffective at this stage of the investigation and would not absolve the substantial unfairness Dow has suffered. In any event, because of the nature of Dow’s trade secret misappropriation claims finding adverse inferences against Organik Kimya on this claim would be effectively equivalent to a finding of default.

Moreover, no lesser sanction will adequately deter the repetition of this kind of easily accomplished and highly prejudicial destruction of evidence. Organik Kimya’s conduct demonstrates flagrant bad faith and a callous disregard for the judicial process, including its responsibility to preserve evidence. In fact, I find Organik Kimya’s conduct in this investigation so egregious as to amount to a forfeiture of its claim. I also find the effect of the spoliation of evidence in this investigation prejudicial to Dow and to the just resolution of this case.

Litigations are fought and won with information. Here Organik Kimya destroyed vast amounts of information found prejudicial to Dow’s allegations in this investigation. The spoliated evidence was from some of the “key players” one would naturally expect to have information relevant to Dow’s claims. Thus, Dow’s inability to access such information has

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deprived Dow of its ability to prove its trade secret misappropriation case. Accordingly, no lesser sanction than Default can make Dow whole.¹⁹

B. Attorneys' Fees and Costs

Dow seeks an award of costs and fees associated with the forensic inspection, imaging and analyses of Organik Kimya's computers and other electronic media; the preparation of expert reports and declarations related to those forensics issues; the drafting of letters and briefs (including this motion) and participating in hearings with the ALJ concerning the forensic inspections; and discovery related to the forensic inspections and evidence uncovered from such inspections. (Memo at 73.) Dow also seeks an award of fees and costs incurred since the time that Organik Kimya should have produced the documents uncovered during the forensic inspection, namely from September 2013 to the present. (*Id.*) I will address each in turn.

1. Fees and Costs Allocable to the Spoliation of Evidence

The Parties' Positions

Dow argues that it has incurred significant expense to track down evidence of Organik Kimya's trade secret misappropriation in this investigation. (Memo at 73.) Dow asserts that

¹⁹ Two days after being served with Dow's motion for default and other sanctions, Organik Kimya filed a motion to terminate this investigation based on a consent order stipulation. Organik Kimya argues that granting its motion to terminate will give Dow all the relief it is entitled to at the ITC and thus no sanctions are necessary. I disagree. Permitting Organik Kimya to unilaterally terminate at this stage in the investigation would be an affront to the judicial process. It would permit Organik Kimya to exit this investigation without accepting the full measure of its responsibility for its egregious actions and would therefore fail to deter the future spoliation of evidence. In fact, allowing Organik Kimya to exit the investigation at this stage could encourage future bad behavior. Future parties may decide to take the calculated risk of destroying relevant evidence, knowing that if the destruction is revealed they can escape default or adverse findings by consenting out. Additionally, granting the motion to terminate would not protect Dow's interests or remedy the prejudice to Dow flowing from Organik Kimya's bad faith behavior. For example, Dow would have to re-litigate the same trade secret misappropriation issues that should have been resolved in this investigation again at District Court, except now Dow will be tangibly disadvantaged because we know Organik Kimya has destroyed the evidence and the record of said destruction cannot be recreated anew.

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after learning in late October 2013 of deleted meeting notes relevant to Dr. Nene's work on the accused opaque polymers, Dow served Organik Kimya with a notice of forensic inspection. (*Id.* at 73-74.) Dow argues that Organik Kimya refused to make its network and employee laptops available for inspection, which sparked a series of letters, teleconferences, and briefs decided by Order No. 16, granting in part Dow's request to compel the forensic inspection of certain computers. (*Id.* at 74.) Dow asserts that in late February its forensic expert, Stroz Friedberg, traveled to Turkey, imaged Organik Kimya's network and Dr. Perez's laptop, and conducted forensic analysis to determine whether relevant documents and information could be recovered. (*Id.*) Dow asserts the forensic inspection revealed evidence of multiple efforts to delete relevant data. (*Id.*) Dow argues that this evidence of spoliation sparked another round of letters, teleconferences and inspections culminating with the filing of the instant motion for default and other sanctions. (*Id.*) Dow argues that it incurred significant expense for these activities and is entitled to be reimbursed. (*Id.* at 74-75.) In particular, Dow argues that Organik Kimya should be ordered to pay monetary sanctions pursuant to Commission Rule 210.33(c) for: (1) costs associated with Stroz Friedberg's inspection, imaging and analyses of Organik Kimya's computers (including Dr. Perez and Mr. Strozzi's laptops), emails and removable storage devices; (2) preparing expert reports and declarations; (3) attorneys' fees incurred in drafting letters and briefs (including this motion and Dow's motion to compel) and participating in hearings with the ALJ concerning Dow's request for forensic inspections; (4) and discovery related to the forensic inspection and evidence uncovered from such inspections. (*Id.* at 75-76.)

Organik Kimya argues that any award of fees and costs should be limited to the reasonable costs and fees incurred by Dow directly as a result of the overwriting of Dr. Perez's computer by Organik Kimya's IT Department in late February. (*Id.* at 58.) Organik Kimya

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argues that it has incurred significant litigation expenses in this investigation despite its efforts to minimize costs by carefully focusing on the substantive issues that mattered rather than fighting every battle. (*Id.*) Organik Kimya asserts that it has provided a great deal of discovery in this investigation and that [w]hile the overwriting of the Perez computer is highly regrettable, it should be kept in context.” (*Id.* at 59.) Organik Kimya argues that awarding Dow all of its requested fees and costs would be disproportionate and unjustified especially since Organik Kimya is withdrawing its product from the United States market. (*Id.*)

Organik Kimya argues that only those expenses, including fees, caused by the failure to comply may be assessed on the noncomplying party. (*Id.*) Organik Kimya argues that Dow may receive only expenses “that would not have been sustained had the opponent conducted itself properly.” (*Id.* (quoting *In re Stauffer Seeds, Inc.*, 817 F.2d 47, 50 (8th Cir. 1987)).) Organik Kimya argues that because it is not liable for the acts of Mr. Strozzi or Dr. Nene Dow may not recover from Organik Kimya any fees or costs associated with those acts. (*Id.* at 60.) Further, Organik Kimya argues that Dow may not recover for any fees or costs associated with briefing its trade secret arguments unrelated to the mishandling of the Perez computer. (*Id.*) Organik Kimya argues that if I award Dow its expenses for expert reports, letters, and briefs addressing the alleged Perez spoliation, I must determine what portion of each directly concerns the mishandling of the Perez spoliation. (*Id.*) Organik Kimya argues that Dow may not recover for any discovery, including the forensic inspection, not caused by the overwriting of the Perez computer. (*Id.*) Organik Kimya argues that Dow requested the inspection before any alleged spoliation occurred and thus, by definition, the inspection could not have been caused by an alleged wrongdoing by Organik Kimya because Dow would have inspected the Perez computer notwithstanding Organik Kimya’s alleged spoliation. (*Id.* at 61.)

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Discussion

“Less severe sanctions include costs, attorney’s fees and fines, which not only compensate the prejudiced party but also punish the offending party for its actions and deter the litigant’s conduct, sending a message that egregious conduct will not be tolerated.” *Victor Stanley*, 269 F.R.D. at 536 (internal quotations omitted). Commission Rule 210.33(c) authorizes me to impose monetary sanctions against a party, its counsel, or both, for failing to obey an order to provide or permit discovery.²⁰ 19 C.F.R. § 210.33(c). The Rule makes clear that monetary sanctions may be imposed either in lieu of or in addition to the imposition of non-monetary sanctions. *Id.* Pursuant to Rule 210.33(c) monetary sanctions include “reasonable expenses, including attorney’s fees, caused by the failure [to obey an order to provide or permit discovery], unless the administrative law judge or the Commission finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.” *Id.*

Here, I do not find any circumstances that would make an award of attorney’s fees and costs unjust. In light of Organik Kimya’s egregious behavior, Organik Kimya’s failure to obey Order No. 16, the Preservation Order and the March 26 Order cannot be considered justified, much less substantially justified. Accordingly, my imposition of sanctions shall include reasonable costs, including attorney’s fees, as indicated below.

Dow requests costs and fees associated with a number of activities, some of which that appear outside the scope of Commission Rule 210.33 (c). For example, Dow seeks reimbursement for the forensic inspection of the Perez company-issued laptop. Organik Kimya

²⁰ Notably, the analogous rule in the Federal Rules of Civil Procedure, Rule 37(b)(2)(C), *requires* the imposition of attorney’s fees and costs. F.R.C.P. 37(b)(2)(C) (“the court *must* order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.”) (emphasis added).

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argues these fees are not recoverable under the Commission Rule because they were not caused by the failure to obey an order to provide or permit discovery. Thus, at the outset, I must decide as a matter of law the scope of the fees and costs I may assess under the Commission Rule. Commission Rule 210.33(c) governs the imposition of monetary sanctions. Rule 210.33(c) states in pertinent part,

If a party ... fails to obey an order to provide or permit discovery ... the administrative law judge ... may require the party failing to obey the order or the attorney advising that party or both to pay reasonable expenses, including attorney's fees, caused by the failure [to obey the order to provide or permit discovery].

19 C.F.R. § 210.33(c). The plain language of the Rule requires that expenses and fees must be *caused by the failure to obey an order* to provide or permit discovery. With regard to the Perez laptop, Organik Kimya violated Order No. 16's mandate to provide the Perez company-issued laptop for forensic inspection by presenting the laptop for forensic inspection in a condition different (*i.e.*, with the unallocated space of the "C" drive overwritten and the "D" drive wiped clean) from the condition it was in at the time Organik Kimya's duty to preserve began. There can be no question that the failure of Organik Kimya to provide Dow with the Perez laptop in such a condition, where Dow could have potentially recovered information from the "C" drive or "D" drive, caused Dow significant expense in, for example, bringing the present motion. However, it cannot be said that the failure caused Dow to move to compel the forensic inspection of the Perez laptop in the first instance or hire Stroz Friedberg to perform the forensic inspection of the Perez laptop. Those costs would have been incurred regardless.

Dow argues that "the ALJ and the Commission have the authority to assess monetary sanctions for Organik Kimya's violation of the ALJ's orders regardless of when those violations occurred." (*See Reply at 45.*) It appears that Dow mistakenly conflates what constitutes a failure

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to obey an order to provide or permit discovery (*i.e.*, when I am permitted to impose monetary sanctions) with the amount of costs and fees I am permitted to assess under the Rule. I agree with Dow and the cases it cites that a party may be found to have failed to obey an order to provide or permit discovery even if the discovery sought by the order was destroyed before issuance of the order. The reason being is simple. The order required the party to provide certain discovery and the party failed to do so thereby failing to obey the order. The fact that the party may have an excuse or justification for not being able to provide the discovery (*i.e.*, it was destroyed pursuant to a valid document retention policy) is irrelevant to whether there was a violation of the order. The excuse or justification would militate only against the amount of the sanction to be imposed. What constitutes a violation of an Order, however, is not the same as what fees and costs may be collected for such violation under Commission Rule 210.33(c). As previously stated, I find I am limited by the unambiguous language of the rule that the fees and costs must result from the failure to obey the order to provide or permit discovery. *Certain Composite Wear Components and Products Containing Same*, Inv. No. 337-TA-644, Comm'n Op. at 6 (June 7, 2010) ("Therefore, under Commission rule 210.33(c), Magotteaux may only recover those attorney's fees incurred as a result of ALAE's failure to comply with an order to provide or permit discovery.")

Dow cites several district court cases where an award of fees and costs included fees and costs for the forensic imaging and recovery of the spoliated evidence (*i.e.*, fees and costs not resulting from a failure to obey to obey an order to permit or provide discovery). (Memo at 74-75.) Those cases are distinguishable from the present case because in those cases the court relied either entirely, or in part, on its inherent power to sanction. *See, e.g., Ameriwood Industries, Inc. v. Liberman*, 2007 WL 5110313, *4 (E.D.Mo. 2007) ("Pursuant to the Court's inherent powers and Fed.R.Civ.P. 37(b)(2) ..."). Thus, in those cases the court was not constrained by the

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language of FRCP 37(b)(2)(C). At least one court has explicitly recognized this distinction. In

U.S. ex rel. Berglund v. Boeing Co., the district court stated:

Under the circumstances of this case, the court will imposes [sic] two monetary sanctions and the sanction of dismissal. First, for violation of the court's order to produce the third hard drive for inspection, monetary sanctions are awarded under Rule 37(b)(2)(C). Berglund, personally, is ordered to pay Boeing's reasonable costs and attorney fees arising directly from his failure to produce the third hard drive as directed on March 11, 2010. See Fed. R. Civ P. 37(b)(2)(C) ("court must order the disobedient party ... to pay the reasonable expense ... caused by the failure"). In addition, under the court's inherent authority, Berglund is ordered to pay Boeing's costs directly connected with the investigation and discovery of the altered emails, including the deposition preparation for and questioning of Berglund about the altered emails.

U.S. ex rel. Berglund v. Boeing Co., 835 F.Supp.2d 1020, 1055 (D.Or. 2011). I do not rely on any inherent power as the basis for this Order. Thus, unlike the cases cited by Dow and the case I cite above, I am constrained by the language of Commission Rule 210.33(c).

For spoliation of evidence on Dr. Perez's laptop in violation of Order No. 16, I find Dow is entitled to fees and costs for: any additional discovery resulting from the forensic inspection of the Perez laptop; the preparation and briefing of the present motion for default and other sanctions, including, for example, preparation of the Lynch Declaration; and preparation for, travel to, and expenses incurred at the oral hearing on July 9-10, 2014. For spoliation of Leo Strozzi's laptop and files thereon in violation of my Preservation Order and my Order of March 26, I find Dow is entitled to fees and costs for: any additional discovery resulting from the forensic inspection of the Strozzi laptop; the preparation and briefing of the present motion for default and other sanctions, including, for example, preparation of the Lynch Declaration; and preparation for, travel to, and expenses incurred at the oral hearing on July 9-10, 2014. For spoliation of evidence on Dr. Nene's laptop and external storage devices, I find because Dow

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failed to show that the spoliation of evidence from the Nene laptop and external storage devices was prejudicial, an award of fees and costs is not appropriate.

On October 8, 2014, I issued Order No. 25 requesting supplemental briefing regarding Dow's request for fees and costs. Specifically, I sought an accounting of fees and costs regarding:

1. Any additional discovery reasonably flowing from the forensic inspection of the Perez laptop;
2. Any additional discovery reasonably flowing from the forensic inspection of the Strozzi laptop;
3. The preparation and briefing of Dow's motion for default and other sanctions, including, for example, preparation of the Lynch Declaration; and
4. The oral hearing on July 8-9, 2014, including the preparation for the hearing, travel to the hearing and costs incurred while at the hearing.

On October 14, 2014, Dow timely filed its supplemental response. On October 16, I issued Order No. 26 requesting additional supplemental briefing regarding Dow's request for fees and costs having found Dow's supplemental briefing to include fees and costs outside of the scope of Order No. 25. In particular, I found the following fees and costs to be outside the scope of the accounting requested in Order No. 25:

1. Inspection of Dr. Perez and Mr. Strozzi's laptops. (Fees and costs associated with the preservation and inspection of Dr. Perez's personal email account and USB drives, as well as the preservation and inspection of the Organik Kimya pool computers per Order of April 7 teleconference are okay); and
2. Preparation for and participation in March 19, March 20, and March 26 teleconferences.

On October 17, 2014, Dow timely filed its additional supplemental briefing providing an updated accounting of fees and costs that does not include the two categories of fees and costs identified in Order No. 26 as outside the scope of Order No. 25.

The Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) stated:

The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a

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reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services.

Id. at 433-434. The calculation is commonly referred to as the “lodestar.” As stated in *Hensley*, a proper lodestar is based on two components, a determination of a reasonable billing rate and a determination of the number of hours reasonably expended.

Dow submitted declarations from its lead counsel in this investigation, Raymond Nimrod, and partner, S. Alex Lasher, made under penalty of perjury, which detail the fees charged by Quinn Emanuel Urquhart & Sullivan, LLP (“Quinn Emanuel”) and Weil, Gotshal & Manges LLP (“Weil Gotshal”) with respect to the issues I have found herein to be recoverable (those identified in Order No. 25 and Order No. 26). (*See* Supp. Brief, Ex. 1; Additional Supp. Brief, Ex. 1.) The declarations include the relevant monthly invoices for Quinn Emanuel and Weil Gotshal and summaries of the attorneys’ fees expended. (*See* Supp. Brief, Ex. 1-A, 1-B; Additional Supp. Brief, Ex. 1-A, 1-B.)

Organik Kimya argues that Quinn Emanuel’s billing entries exceed the scope of Order No. 25, but this argument was mooted by Order No. 26 and the revised billing entries submitted by Quinn Emanuel in response thereto. (*See* Additional Supp. Brief, Ex. 1.)

Organik Kimya argues that “a 50% reduction of Quinn Emanuel’s hours is appropriate and reasonable, given the duplicative staffing on this case,” but provides no adequate support for this assertion. (*See* Opposition to Supp. Brief at 15). Organik Kimya’s conduct required extensive and careful evaluation, and Organik Kimya identifies no duplication of effort on the part of Dow’s attorneys. Organik Kimya’s claim that it “reviewed each billing entry on a line-by-line basis” is insufficient to rebut the presumption that the hours charged to Dow were reasonable or rebut the sworn statements from Mr. Nimrod and S. Alex Lasher that Dow’s attorneys reviewed the invoices and only included time spent on the activities identified in Order

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No. 25 and Order No. 26. (Supp. Brief, Ex. 1 at ¶¶ 5-7; Additional Supp. Brief, Ex. 1.)

I also find Organik Kimya failed to rebut the presumption that the hours charged to Dow by Weil Gotshal were reasonable. As Mr. Nimrod's sworn declaration explained, Dow hired Weil Gotshal to assist Quinn Emanuel with the spoliation issues because Mr. Lender is a "recognized expert, author and frequent lecturer on issues related to electronic discovery." (Supp. Brief, Ex. 1 at ¶ 12). Organik Kimya does not challenge Mr. Lender's qualifications, nor does it contend that the spoliation issues in this investigation were anything other than extraordinary. Thus, I find Dow's decision to retain Mr. Lender and his firm for consultation on the spoliation issue was reasonable.

Accordingly, for the reasons above, I find the number of hour expended by Quinn Emanuel and Weil Gotshal to be reasonable.

Having found the rates billed by Quinn Emanuel and Weil Gotshal to Dow to be reasonable and the number of hours billed to Dow by Quinn Emanuel and Weil Gotshal on the issues identified in Order No. 25 and Order No. 26 reasonable, may now calculate the lodestar. For Quinn Emanuel, multiplying the rates of each attorney by the hours he/she expended gives [] in fees. For Weil Gotshal, multiplying the rates of each attorney by the hours he/she expended gives [] in fees. Thus, I find the total amount of fees recoverable by Dow to be \$1,345,707.30.

With respect to Dow's costs, Dow argues that it incurred expenses totaling \$633,279.45. (Additional Supp. Brief at 2.) Those costs include: [] for Quinn Emanuel hearing costs; [] for Dow's forensic experts Stroz Friedberg; and [] for Dow's audio/visual technicians Resonant Legal Media, LLC ("RLM"). In support of its cost calculation, Dow provides a declaration from its lead counsel Raymond Nimrod (*See* Supp. Brief, Ex. 1) and a

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declaration from Colleen Kavanagh, Managing Director of Stroz Friedberg (*See* Supp. Brief, Ex. 2; Additional Supp. Brief, Ex. 2). These declarations detail the costs incurred by Dow. Organik Kimya argues that Quinn Emanuel's costs associated with the July 8-9, 2014 hearing are excessive because of "Quinn Emanuel's excessive overlawyering" (*see* Opposition to Supp. Brief at 16), but provides no evidence that the number of people involved in the two day hearing were in fact excessive. Organik Kimya also argues that Stroz Friedberg's costs are excessive, unjustified and unreasonable. (Opposition to Supp. Brief at 20-26.) Much of Organik Kimya's argument, however, has been mooted by Dow's Additional Supplemental Brief, which included a reduction of [] from Stroz Friedberg's original accounting of its fees and costs for costs related to activities I found in Order No. 26 to be outside the scope of costs Dow is entitled to recover for Organik Kimya's failures to obey my Orders to permit or provide discovery. (*See* Additional Supp. Brief, Ex. 2.) As for Organik Kimya's argument that Stroz Friedberg's total hours are too high, I am not persuaded. Ms. Kavanagh convincingly explained in her declaration on behalf of Stroz Friedberg that Organik Kimya's consistent efforts to obfuscate discovery required hundreds of hours of forensic analysis and investigation. (Supp. Brief, Ex. 2 at ¶¶ 15-17.) Organik Kimya provides no evidence showing that the number our hours required to analyze the spoliated evidence was excessive in view of the multiple data destruction techniques employed by Organik Kimya. Organik Kimya further argues that RLM's costs are unreasonable and excessive. (*See* Opposition to Supp. Brief at 26-28.) I agree that the costs appear excessive. The evidence shows that compared to Dow's [] in costs related to RLM's audio/visual services at the July 8-9 hearing, Organik Kimya incurred only [] for similar services at the hearing. Similarly, Dow claims fees from five different audio/visual employees in contrast to the two individuals employed by Organik Kimya with comparable results. Lacking a more

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detailed explanation of why RLM's fees are so high or why so many individuals were required to perform audio/visual services for a two-day hearing, I find a reduction to RLM's costs to the amount of [] to be appropriate. Accordingly, as adjusted, I find for the reasons above that Dow's requested costs are reasonable and as such Dow is entitled to recover costs in the amount of \$598,672.61.

The monetary sanctions, as set forth above, shall be imposed against both counsel for Organik Kimya and Organik Kimya, jointly and severally. The basis for my decision is threefold. First, Organik Kimya is a Turkish chemical company with no significant operations in the United States. Thus a judgment against Organik Kimya for fees and costs will be difficult to enforce directly against Organik Kimya. Accordingly, imposing monetary sanctions against Organik Kimya alone would likely give Dow ineffective relief vitiating a basis of my decision to impose monetary sanctions, which is the significant expense Dow actually incurred as a result of Organik Kimya's misconduct. Second, counsel for Organik Kimya was present in Turkey to oversee the inspection of the Perez company-issued laptop when the spoliation occurred. Third, as discussed in detail, *supra*, the explanations in Organik Kimya's letter of April 4, 2014, for the destruction of evidence on the Perez laptop and the behavior that occurred thereafter to try and cover up the spoliation are not the slightest bit credible on its face. Any diligent effort by counsel to check the veracity of the explanations in that letter before it was filed would have revealed them as false. The filing of this letter with the court exacerbated the discovery dispute between the parties resulting in the need for multiple filings and teleconferences, increasing the costs and fees born by Dow. Fourth, there is no affirmative evidence of record that a litigation hold memo, or equivalent, was issued or disseminated in this investigation. Nor is there evidence that an active undertaking was made to preserve evidence in this investigation.

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Accordingly, I find my decision to impose sanctions against both counsel for Organik Kimya and Organik Kimya itself, jointly and severable, well justified.

2. Fees and Costs Incurred As a Result of Organik Kimya's Failure to Comply With Its Discovery Obligations

The Parties' Positions

Dow argues that Organik Kimya should be ordered to pay monetary sanctions pursuant to Commission Rule 210.33(c) for Dow's fees and costs incurred in this Investigation since September 2013. (Memo at 78.) Dow argues that the fact that Organik Kimya's destruction of documents and failure to secure, preserve and produce documents occurred before the issuance of the ALJ's orders is immaterial. (*Id.*)

Specifically, Dow argues that it is entitled to fees and costs incurred since the time that Organik Kimya should have secured, preserved, and produced the documents uncovered during the forensic inspection. (Memo at 76.) Dow argues that Organik Kimya should have secured and preserved those documents in June 2013, and then produced them in July-August 2013 in response to Dow's document requests. (*Id.*) Dow argues that not only did Organik Kimya fail to produce the documents, it did not even issue a preservation memo, or legal hold memo, to its employees to ensure that electronic documents were not deleted. (*Id.*) Dow argues that had Organik Kimya complied with its discovery obligation, and preserved and produced the documents in question, it could have avoided most, if not all of its fees from September 2013 to the present. (*Id.*) Instead, Dow asserts it incurred significant expense in this investigation for which Organik Kimya should be held directly responsible. (*Id.*)

Dow argues that at the outset of this case, Organik Kimya had an obligation to search for and preserve all responsive documents and information. (*Id.*) Dow asserts that its document requests specifically called for the documents that have now been recovered or, worse yet, have

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now been lost or destroyed. (*Id.*) Dow argues that Organik Kimya ignored its obligation to secure, preserve and produce documents in the possession of Mr. Strozzi. Mr. Strozzi's company laptop and his electronic media with Dow's recipes should have been collected. (*Id.* at 77.) Dow argues that Organik Kimya can no longer pretend that Mr. Strozzi was not involved in the development of its opaque polymers. (*Id.*) Dow argues that Organik Kimya knew of his role and should have secured his electronic media at least in response to Dow's Request No. 62. (*Id.*)

Dow asserts that Organik Kimya hid the most damning evidence of its misappropriation and left Dow to its own devices to track it down. (*Id.*) Dow argues that there is no reasonable argument that Organik Kimya did not know where the documents and information was in this case. (*Id.*) Dow argues that Dr. Perez, Mr. Strozzi and Dr. Nene are all former Rohm and Haas employees, and asserts Organik Kimya's company management and senior personnel were well aware that Rohm and Haas' proprietary recipes and confidential documents had been used to develop Organik Kimya's opaque polymers. (*Id.*) Dow argues that the computers and storage devices of Dr. Perez, Mr. Strozzi and Dr. Nene should have been among the very first places that Organik Kimya searched for responsive documents. (*Id.*) If it had done so, Dow argues the dispositive evidence in this case would have come to the surface long ago, and this case would have been resolved by way of early motion practice or settlement. (*Id.*) Instead, Dow asserts Organik Kimya allowed Dow and the court to waste almost a year and several million dollars taking this case to the brink of trial. (*Id.* at 77-78.) Dow argues that the fact that Organik Kimya so vehemently objected to forensic inspection after being caught red-handed only made matters worse. (*Id.*)

Organik Kimya argues that Dow's request for an award of fees and costs incurred from

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September 2013 to the present is unwarranted and wholly unsupported by the facts and the law. (Opposition at 61.) Organik Kimya argues that there is no Commission precedent for such a sanction and that Dow cites none. (*Id.*) Organik Kimya asserts that Dow incorrectly contends that “[t]he fact that Organik Kimya’s [alleged] destruction of documents . . . occurred before the issuance of the ALJ’s orders is immaterial.” (*Id.*) Organik Kimya argues that directly contrary to Dow’s assertion, the timing of the alleged discovery violations is material to the requested sanctions because, as the Commission has repeatedly made clear, “[a]n order compelling discovery is a prerequisite to all sanctions under Commission Rule 210.33.” (*Id.*) Organik Kimya asserts that a “prerequisite” means a condition precedent, *i.e.*, something that must occur before sanctions can be assessed. (*Id.*) Organik Kimya argues that here, all four of the discovery orders upon which Dow’s sanctions motion is based are dated on or after February 4, 2014. (*Id.*) Thus, as a matter of law, Organik Kimya argues this is the earliest date on which sanctions can attach. (*Id.*)

Organik Kimya argues that even if the ITC had the authority to award the sanctions Dow requests, Dow has not even come close to showing that it is entitled to all of its costs and fees since September 2013. (*Id.* at 62.) Organik Kimya asserts that Dow relies exclusively on two document requests (Nos. 4 and 62), issued “at the outset of this case,” that it contends Organik Kimya failed to comply with, but fails to mention that “at the outset of this case,” the Investigation was all about patents, not trade secrets. (*Id.*) Organik Kimya asserts that Dow did not amend its complaint to add claims of trade secret misappropriation until November 2013. (*Id.*) Organik Kimya argues that Dow fails to mention that its document requests were inherently limited to the accused opaque polymers in this Investigation, *i.e.*, ORGAWHITE® 2000 and OPAC 204X. (*Id.*) Organik Kimya argues that this is important to remember because Dow’s

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complaint about the 2,700 deleted Strozzi files boils down to just three allegedly “relevant” documents, none of which relates to these accused products. (*Id.*) Likewise, Organik Kimya argues that none of the small handful of documents created by Dr. Nene during his consultancy that were allegedly deleted by him after his first subpoena actually relate to these accused products. (*Id.*)

Organik Kimya also argues that Dow’s claims that it “could have avoided most, if not all of its fees from September 2013 to the present” but for the alleged computer issues with Dr. Nene, Dr. Perez, and Mr. Strozzi is absurd. (*Id.* at 63.) Organik Kimya argues that Dow did not even amend its complaint to add trade secret claims until November 27, 2013. (*Id.*) Moreover, Organik Kimya argues that regardless of what the allegedly deleted files would have shown, Organik Kimya would have been entitled to its defenses, necessitating continued discovery, motions practice, and a hearing. (*Id.*)

Discussion

As I explained, *supra*, I am constrained by the language of Commission Rule 210.33(c). Pursuant to 210.33(c), any recoverable costs and fees must have been “*caused* by the failure to obey an order to make or permit discovery.” 19 C.F.R. § 210.33(c)(emphasis added) Accordingly, I have no authority to grant Dow its requested *fees and costs* resulting from Organik Kimya’s failures to comply with its discovery obligations that were not incurred as a result of the failure to obey an order to make or permit discovery.

VI. Conclusion

Lest it be misunderstood, I find Organik Kimya’s abhorrent conduct with regard to the laptop it issued to Dr. Perez and that it actually possessed at the time of the spoliation, to be more than sufficient to justify the Default Sanction against Organik Kimya, along with the Attorneys’ Fees Sanction. I also find Organik Kimya’s contumacious and inexplicable conduct with regard

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to computer it issued to Mr. Strozzi to be sufficient to independently justify the most severe sanction, even were I to heed Organik Kimya's lack of prejudice argument. As I mentioned, while I find Dow's arguments concerning Dr. Nene to be both attractive and logical, I do not find sufficient actual proof of bad faith imputable to Organik Kimya. Nevertheless, the entire chapter with regard to Dr. Nene, including the false statements during his first deposition and that of Mr. Kaslowski, which appear coordinated, to be more indicative of something I have no adequate sanction to address. Taken together, the facts discussed in this Determination are disheartening and leave all of those who practice before the U.S. International Trade Commission diminished by the experience.

Order 883-019 is GRANTED-IN-PART as set forth herein. As discussed more fully, *supra*, as sanctions for the bad faith spoliation of evidence in this investigation in violation of Commission Rule 210.33(b), I find Organik Kimya in default with regard to Dow's allegations of trade secret misappropriation and award Dow costs and fees as follows:

Attorney's Fees: \$1,345,707.30

Costs: \$598,672.61

TOTAL: \$1,944,379.91

In addition to Dow's allegations of trade secret misappropriation, this investigation also includes allegations of patent infringement. At the hearing on Dow's motion for default and other sanctions Dow represented that if Organik Kimya were found in default than it would move to withdraw its remaining patent infringement claims. (Tr. at 520:21-521:1 ("Your Honor, I can represent, and I have client approval to represent, that if you enter a default as to the trade secret case, that -- but we can't do it until after to protect our interests, but we will terminate the

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patent cases in this proceeding without prejudice.”.) Having found Organik Kimya in default I expect Dow will move post haste to do so, preferably no later than October 30, 2014.

Further, this investigation was instituted against five Respondents: Organik Kimya San. Ve Tic. A.S., Organik Kimya Netherlands B.V., Organik Kimya U.S., Inc., Turk International LLC, and Aalborg Chemical LLC d/b/a Aal Chem. However, Dow’s present motion for default and other sanctions is only directed against the Organik Kimya respondents. On October, 17, 2014, Dow filed a letter acknowledging this issue and stating that “Dow will immediately move to terminate the investigation as to the Distributor Respondents in the event that the Administrative Law Judge decides to order default judgment ... as requested in Dow’s Motion for Default and Other Sanctions Against Organik Kimya (Motion No. 883-019).” (EDIS Document ID No. 544517.) Having found Organik Kimya in default I expect Dow will move post haste to do so, preferably no later than October 30, 2014.

Having found Organik Kimya in default, pursuant to Commission Rule 210.17(b)(4), Organik Kimya “shall be deemed to have waived its right to appear, to be served with documents, and to contest the allegations at issue in the investigation.” 19 C.F.R. § 210.17(b)(4).

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders, on its own motion, a review of the Initial Determination or certain issues herein.

Within **3 days of the date of this order**, the parties shall jointly submit: (1) a proposed public version of this order with any proposed redactions bracketed in red; and (2) a written justification for any proposed redactions specifically explaining why the piece of information sought to be redacted is confidential and why disclosure of the information would be likely to

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cause substantial harm or likely to have the effect of impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions.²¹

SO ORDERED.



Thomas B. Pender
Administrative Law Judge

²¹ Under Commission Rules 210.5 and 201.6(a), confidential business information includes: information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information.

See 19 C.F.R. § 201.6(a). Thus, to constitute confidential business information the disclosure of the information sought to be designated confidential must ***likely have the effect of*** either: (1) impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions; or (2) ***causing substantial harm*** to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained.