

In the Matter of

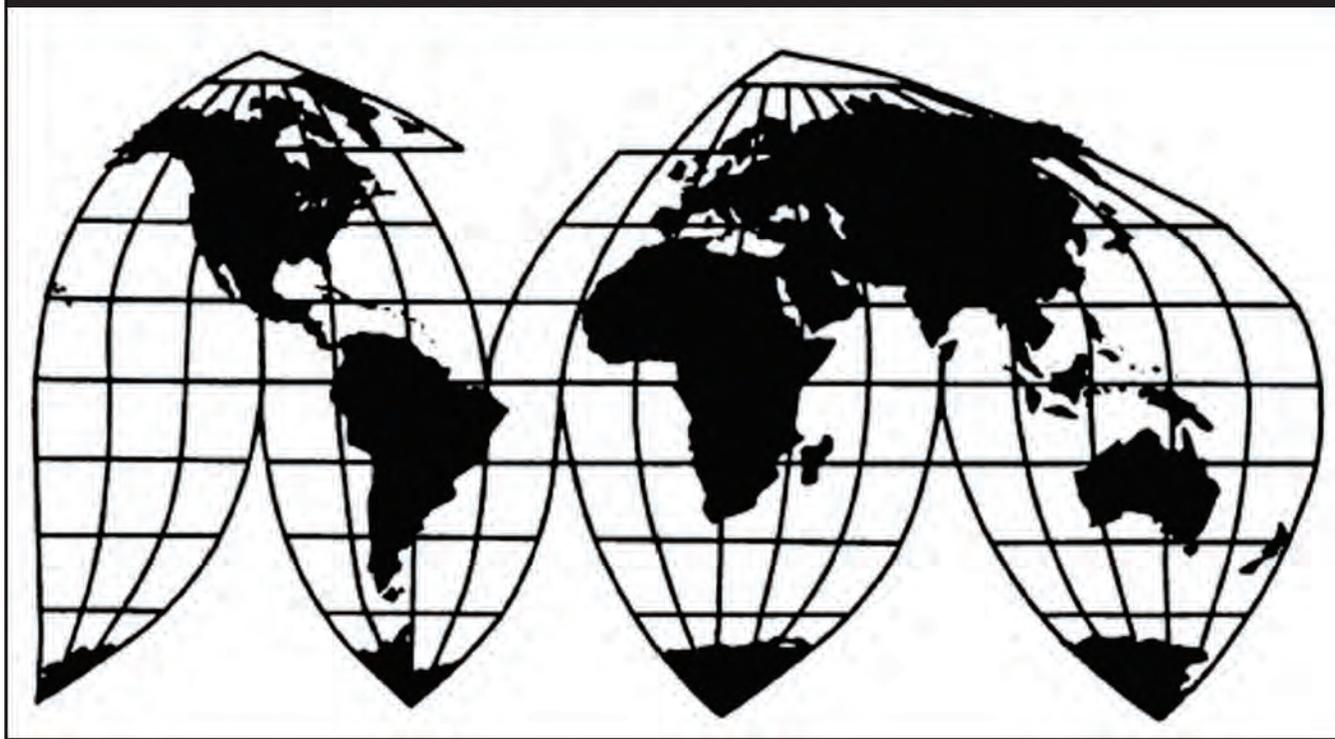
CERTAIN OPAQUE POLYMERS

Investigation No. 337-TA-883

Publication 4922

August 2019

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

COMMISSIONERS

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**Address all communications to
Secretary to the Commission
United States International Trade Commission
Washington, DC 20436**

U.S. International Trade Commission

Washington, DC 20436
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In the Matter of

CERTAIN OPAQUE POLYMERS

Investigation No. 337-TA-883



UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN OPAQUE POLYMERS

Investigation No. 337-TA-883

**NOTICE OF COMMISSION DECISION AFFIRMING GRANT OF DEFAULT
AND SANCTIONS; FINDING A VIOLATION OF SECTION 337;
ISSUANCE OF A LIMITED EXCLUSION ORDER AND
CEASE AND DESIST ORDER; TERMINATION
OF THE INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission affirmed, with modification, an initial determination ("ID") (Order No. 27) by the presiding Administrative Law Judge ("ALJ") granting a motion for default and sanctions. The Commission has found a violation of section 337 in this investigation and has issued a limited exclusion order prohibiting importation of certain opaque polymers manufactured using the Complainants' misappropriated trade secrets. The Commission has also issued a cease and desist order directed to one respondent. The Commission has affirmed the assessment and calculation of sanctions including joint and several liability as to U.S. counsel, but has reversed the ID to the extent that it imposed joint and several liability on Turkish counsel. The Commission has thereby terminated the investigation with a finding of violation of section 337.

FOR FURTHER INFORMATION CONTACT: Sidney A. Rosenzweig, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2532. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 21, 2013, based on a complaint filed by the Dow Chemical Company of Midland, Michigan, and by Rohm and Haas Company and Rohm and Haas Chemicals LLC, both of Philadelphia, Pennsylvania (collectively, “Dow”). 78 *Fed. Reg.* 37571 (June 21, 2013). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), by reason of the importation into the United States, the sale for importation, and the sale within the United States after importation of certain opaque polymers that infringe certain claims of four United States patents. The notice of investigation named five respondents, three of whom remain in this investigation: Organik Kimya San. ve Tic. A.Ş. of Istanbul, Turkey; Organik Kimya Netherlands B.V. of Rotterdam-Botlek, Netherlands; and Organik Kimya US, Inc., of Burlington, Massachusetts (collectively, “Organik Kimya”). 78 *Fed. Reg.* at 37571; Notice (Dec. 1, 2014) (termination as to two of the five originally-named respondents). The complaint and notice of investigation were amended to add allegations of misappropriation of trade secrets. 78 *Fed. Reg.* 71643 (Nov. 29, 2013). The allegations of patent infringement have been withdrawn from the investigation. See Notice (Dec. 13, 2013) (withdrawal of two asserted patents); Notice (Dec. 1, 2014) (withdrawal of the remaining two asserted patents). The only remaining issues are Dow’s claims based on trade secret misappropriation and sanctions for discovery abuse.

On May 19, 2014, Dow filed a motion for default and other sanctions against Organik Kimya for discovery abuse. On May 21, 2014, Organik Kimya filed a motion to terminate based upon a consent order stipulation. On July 8-9, 2014, the ALJ conducted a hearing on the pending motions. On October 20, 2014, the ALJ issued an ID (Order No. 27) (“the sanctions ID”) finding Organik Kimya in default, under Commission Rule 210.42(c), and ordering monetary sanctions jointly and severally against Organik Kimya and its counsel. Organik Kimya is represented by Finnegan, Henderson, Farabow, Garrett & Dunner, LLP (“Finnegan”), a law firm in Washington, D.C., and by Ömür Yarsuvat, an attorney in Istanbul, Turkey. The ALJ denied Organik Kimya’s motion to terminate the investigation based upon a consent order stipulation.

On October 28, 2014, Organik Kimya filed a petition for review of the sanctions ID. The same day, Finnegan and Yarsuvat filed separate motions before the Commission to intervene in the investigation for the purpose of contesting joint liability for the monetary sanction. Finnegan and Yarsuvat also filed provisional petitions for review of the sanctions ID. On November 10, 2014, Finnegan filed a motion for leave to file a reply in support of its motion to intervene, which Dow opposed.

On December 16, 2014, the Commission granted the motions to intervene and determined to review the sanctions ID. The Commission notice granting review solicited further briefing on two questions concerning sanctions and on remedy, the public interest, and bonding.

On December 30, 2014, the parties—Dow, Organik Kimya, Finnegan, and Yarsuvat—filed opening briefs in response to the Commission notice. (Organik Kimya filed two briefs.) On January 7, 2015, the parties filed replies. (Dow filed two replies.)

Having examined the record of this investigation, including the ALJ's sanctions ID, as well as the petitions to the Commission and their replies, and the briefs to the Commission and their replies, the Commission has determined to affirm the ID's finding of Organik Kimya in default. See 19 U.S.C. § 1337(h); 19 C.F.R. §§ 210.16-.17, 210.33. The Commission has determined that the appropriate remedy is the issuance of a limited exclusion order prohibiting, for twenty-five years, the entry of opaque polymers manufactured using any of the misappropriated trade secrets identified in Dow's Disclosure of Misappropriated Trade Secrets (Jan. 29, 2014) (listing trade secrets A-ZZ). The Commission has also determined to issue a cease and desist order prohibiting Organik Kimya U.S., Inc. from, *inter alia*, importing or selling opaque polymers manufactured using any of the aforementioned misappropriated trade secrets. The Commission has also determined that the public interest factors enumerated in section 337(d) and (f), 19 U.S.C. § 1337(d) & (f), do not preclude the issuance of the limited exclusion order or the cease and desist order. The Commission has determined that no bonding is required during the period of Presidential review, 19 U.S.C. § 1337(j).

The Commission has further determined to affirm the ALJ's assessment and calculation of attorneys' fees and costs against Organik Kimya. The Commission has determined to affirm, with modification, the ALJ's determination that Finnegan be held jointly and severally liable with Organik Kimya for those sanctions. The Commission has determined to reverse the sanctions ID to the extent that it imposed joint and several liability on Mr. Yarsuvat. The Commission's reasoning in support of these determinations is provided in an accompanying Commission opinion. The investigation is terminated.

Commissioner Schmidtlein dissents, for the reasons to be set forth in her separate opinion, as to the Commission's determination on sanctions for Organik Kimya's counsel. She otherwise joins the Commission's determination as to Organik Kimya's default, the Commission remedial orders to be issued, and the liability of Organik Kimya for fees and costs.

The Commission's limited exclusion order and opinion were delivered to the President and the United States Trade Representative on the day of their issuance.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: April 17, 2015

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION NOTICE** has been served upon the following parties as indicated, on **April 17, 2015**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

On Behalf of Complainants Rohm and Haas Co., Rohm and Haas Chemicals LLC, and The Dow Chemical Company:

Paul F. Brinkman, Esq.
QUINN EMANUEL URQUHART & SULLIVAN LLP
777 6th Street, NW, 11th Floor
Washington, DC 20001

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- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondents Organik Kimya San. ve Tic. A.S, Organik Kimya Netherlands B.V., Organik Kimya US, Inc., Turk International LLC, and Aalborz Chemical LLC d/b/a All Chem:

Eric J. Fues, Esq.
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP
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On Behalf of Respondents Intervenor Finnegan, Henderson, Farabow, Garrett & Dunner, LLP:

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On Behalf of Respondents Intervenor Omar Yarsuvat:

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**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

CERTAIN OPAQUE POLYMERS

Investigation No. 337-TA-883

LIMITED EXCLUSION ORDER

The Commission has found Respondents Organik Kimya San. ve Tic. A.Ş of Istanbul, Turkey; Organik Kimya Netherlands B.V. of Rotterdam-Botlek, Netherlands; and Organik Kimya US, Inc., of Burlington, Massachusetts (collectively, “Respondents”) in default as a sanction for discovery abuse pursuant to section 337(h) of the Tariff Act of 1930, as amended (19 U.S.C. § 1337(h)) and Commission rules 210.16 and 210.33 (19 C.F.R. §§ 210.16 & 210.33). The Commission has thereby determined that there is a violation of section 337 in the unlawful importation, sale for importation and sale after importation by Respondents of opaque polymers manufactured by or for Respondents using any of the 52 misappropriated trade secrets listed in Dow’s Disclosure of Misappropriated Trade Secrets (Jan, 29, 2014) (listing trade secrets A-ZZ) (the “Dow Trade Secrets”).

The Commission has determined that the appropriate form of relief includes a limited exclusion order prohibiting the unlicensed entry of opaque polymers manufactured using any of the Dow Trade Secrets by or on behalf of Respondents, or their affiliated companies, parents, subsidiaries, licensees, contractors or other related business entities, or their successors or assigns.

The Commission has determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude issuance of the limited exclusion order. Finally, the Commission has

determined that the bond during the period of Presidential review shall be zero.

Accordingly, the Commission hereby **ORDERS** that:

1. Opaque polymers manufactured using any of the Dow Trade Secrets by or on behalf of, or imported by or on behalf of, Respondents, or their affiliated companies, parents, subsidiaries, licensees, contractors or other related business entities, or their successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption, for a period of twenty-five (25) years from the effective date of this order, except under license of the owner of the Dow Trade Secrets, or as provided by law.

2. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to opaque polymers that are imported by and for the use of the United States, or imported for, and to be used for, the United States with authorization or consent of the Government.

3. Prior to the importation of organic polymers that may be subject to this Order, any of the persons listed in paragraph 1 of this Order must seek a ruling from the Commission to determine whether the opaque polymers sought to be imported are covered by this Order.

4. After a Commission determination of admissibility under paragraph 3 of this Order, persons seeking to import opaque polymers may certify to U.S. Customs and Border Protection (“CBP”) that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not subject to this Order based on that Commission determination. CBP may require persons who have provided the certification described in this paragraph to provide such information necessary to substantiate that claim.

5. The Commission may modify this Order in accordance with the procedures

described in Rule 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

6. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon U.S. Customs and Border Protection.

7. Notice of this Order shall be published in the *Federal Register*.

By Order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', with a stylized flourish at the end.

Lisa R. Barton
Secretary to the Commission

Issued: April 17, 2015

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION ORDER** has been served upon the following parties as indicated, on **April 17, 2015**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

On Behalf of Complainants Rohm and Haas Co., Rohm and Haas Chemicals LLC, and The Dow Chemical Company:

Paul F. Brinkman, Esq.
QUINN EMANUEL URQUHART & SULLIVAN LLP
777 6th Street, NW, 11th Floor
Washington, DC 20001

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondents Organik Kimya San. ve Tic. A.S, Organik Kimya Netherlands B.V., Organik Kimya US, Inc., Turk International LLC, and Aalborz Chemical LLC d/b/a All Chem:

Eric J. Fues, Esq.
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP
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On Behalf of Respondents Intervenor Finnegan, Henderson, Farabow, Garrett & Dunner, LLP:

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On Behalf of Respondents Intervenor Omar Yarsuvat:

James B. Altman, Esq.

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN OPAQUE POLYMERS

Investigation No. 337-TA-883

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Organik Kimya US, Inc., of 200 Wheeler Road, 2nd Floor, Burlington, Massachusetts 01803, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), soliciting United States agents or distributors, or aiding and abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of covered products in violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337.

I.

Definitions

As used in this Order:

- (A) "Commission" shall mean the United States International Trade Commission.
- (B) "Complainants" shall collectively refer to Rohm and Haas Company of 100 Independence Mall West, Philadelphia, Pennsylvania 19106; Rohm and Haas Chemicals LLC of 100 Independence Mall West, Philadelphia, Pennsylvania 19106; and The Dow Chemical Company of 2030 Dow Center, Midland, Michigan 48674.
- (C) "Respondent" shall mean Organik Kimya US, Inc., of 200 Wheeler Road, 2nd Floor, Burlington, Massachusetts 01803.

(D) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity or its majority owned or controlled subsidiaries, or their successors or assigns.

(E) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(F) The terms "import" and "importation" refer to importation for entry for consumption under the Customs laws of the United States.

(G) The term "covered products" shall mean opaque polymers manufactured by or for Respondent using any of the 52 misappropriated trade secrets listed in Dow's Disclosure of Misappropriated Trade Secrets (Jan, 29, 2014) (listing trade secrets A-ZZ) (the "Dow Trade Secrets").

II.

Applicability

The provisions of this Cease and Desist Order shall apply to the Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III.

Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. For a period of twenty-five (25) years from the date of issuance of this Order, Respondent shall not:

(A) import or sell for importation into the United States any of the covered products;

- (B) market, distribute, offer for sale, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV.

Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the Dow Trade Secrets licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V.

Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2015. This reporting requirement shall continue in force until such time as Respondent will have truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that Respondent has (i) imported and/or (ii) sold in the United States after importation during the

reporting period, and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period. A Respondent filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to Commission rule 210.4(f), 19 C.F.R. § 210.4(f). Submissions should refer to the investigation number (“Inv. No. 337-TA-883”) in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures,

http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf).

Persons with questions regarding filing should contact the Secretary (202-205-2000). A Respondent desiring to submit a document to the Commission in confidence must file the original and a public version of the original with the Office of the Secretary and serve a copy of the confidential version on Complainant’s counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. §1001.

VI.

Record Keeping and Inspection

(A) For purposes of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three

¹ Complainant must file a letter with the Secretary identifying the attorney to receive the reports or bond information. The designated attorney must be on the protective order entered in the investigation.

(3) years from the close of the fiscal year to which they pertain.

(B) For purposes of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal office during office hours, and in the presence of counsel, or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

VII.

Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in the preceding paragraph, a copy of this Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and (C) shall remain in effect for twenty-five (25) years from the date of issuance of this Order.

VIII.

Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, as amended (19 U.S.C. § 1337(f)), and any other action as the Commission may deem appropriate. In determining whether a Respondent is in violation of this Order, the Commission may infer facts adverse to a Respondent if Respondent fails to provide adequate or timely information.

X.

Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

By Order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: April 17, 2015

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached COMMISSION ORDER has been served upon the following parties as indicated, on April 17, 2015.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

On Behalf of Complainants Rohm and Haas Co., Rohm and Haas Chemicals LLC, and The Dow Chemical Company:

Paul F. Brinkman, Esq.
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- Other: _____

On Behalf of Respondents Organik Kimya San. ve Tic. A.S, Organik Kimya Netherlands B.V., Organik Kimya US, Inc., Turk International LLC, and Aalborg Chemical LLC d/b/a All Chem:

Eric J. Fues, Esq.
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP
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On Behalf of Respondents Intervenor Finnegan, Henderson, Farabow, Garrett & Dunner, LLP:

Smith R. Brittingham IV, Esq.
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Washington, DC 20001

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On Behalf of Respondents Intervenor Omar Yarsuvat:

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- Other: _____

PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

CERTAIN OPAQUE POLYMERS

Investigation No. 337-TA-883

COMMISSION OPINION

In this investigation, complainants Dow Chemical Company, Rohm and Haas Company, and Rohm and Haas Chemicals LLC (collectively, “Dow”) accused respondents Organik Kimya San. ve Tic. A.Ş; Organik Kimya Netherlands B.V.; and Organik Kimya US, Inc. (collectively, “Organik Kimya”), of violating section 337 of the Tariff Act of 1930 by, *inter alia*, selling and importing into the United States certain opaque polymers, which are paint additives, that were produced using trade secrets misappropriated from Dow. *See 78 Fed. Reg. 71643* (Nov. 29, 2013). All other respondents and claims have been terminated from the investigation, and the initial determination at issue here (Order No. 27) (“the ID” or “the sanctions ID”) is the ALJ’s final initial determination on violation. The sanctions ID found Organik Kimya in default as a result of its spoliation of evidence, and ordered Organik Kimya, jointly and severally with its counsel, to pay certain of Dow’s fees and costs incurred as a result of the spoliation. On review, the Commission has determined to uphold the ID’s finding that Organik Kimya is in default, and has issued a limited exclusion order and a cease and desist order. The Commission has determined to affirm the ID’s assessment of certain fees and costs against Organik Kimya and

PUBLIC VERSION

has determined to affirm, in part, the ID's determination that certain Organik Kimya counsel are jointly and severally liable with Organik Kimya for those fees and costs.¹

I. BACKGROUND

On May 19, 2014, Dow filed a motion for default and other sanctions against Organik Kimya for discovery abuse. On May 21, 2014, Organik Kimya filed a motion to terminate based upon a consent order. On July 8-9, 2014, the presiding administrative law judge ("ALJ") conducted a hearing on the pending motions. On October 20, 2014, the ALJ issued an initial determination ("ID") finding Organik Kimya in default under Commission Rule 210.42(c), and ordering monetary sanctions jointly and severally against Organik Kimya and its counsel. Organik Kimya's counsel are the law firm Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, of Washington, DC ("Finnegan"), and Ömür Yarsuvat ("Yarsuvat"), an attorney in Istanbul, Turkey.² The ALJ denied Organik Kimya's motion to terminate based upon a consent order.

¹ Commissioner Schmidlein joins the Commission opinion as to Organik Kimya's default, the Commission remedial orders to be issued, and the liability of Organik Kimya for certain fees and costs. She dissents, for the reasons set forth in her separate opinion, as to the joint and several liability of Organik Kimya counsel for those fees and costs.

² Commission Rule 210.33(c)(1) permits the award of reasonable expenses against a "party" or "the attorney advising that party or both." 19 C.F.R. § 210.33. It is undisputed that the Commission rule, as well as Federal Rule of Civil Procedure 37(b)(2)(C), upon which the Commission rule is patterned, *see* 19 U.S.C. § 1337(h), permits sanctions against firms or individual attorneys. *See, e.g.,* Thomas Y. Allman, *Achieving an Appropriate Balance: The Use of Counsel Sanctions in Connection with the Resolution of E-Discovery Misconduct*, 15 Rich. J.L. & Tech. 1, 37 (2009) ("Similarly, Rule 37 permits sanctions against law firms, not just individual lawyers, as authorized under Rule 26(g)." (footnote omitted)); *Hyde & Drath v. Baker*, 24 F.3d 1162, 1171 (9th Cir. 1994) (sanctioning a law firm); *Certain Hardware Logic Emulation Sys. & Components Thereof*, Inv. No. 337-TA-383, Order No. 96, 1997 WL 665012, * 33 n.47 (July 31, 1997), *adopted by the Commission in relevant part at* 1998 WL 105158, *1 (March 6, 1998); *Hardware Logic*, Comm'n Op. 29-35 (Mar. 16, 1998) (sanctioning a California-based law firm). The ID refers to the client's "counsel" but does not name any particular lawyers at the Finnegan law firm or otherwise distinguish among those lawyers or between those lawyers and the law firm. Nor have the parties briefed any potential allocation of

[Footnote continued on next page]

PUBLIC VERSION

On October 28, 2014, Organik Kimya filed a petition with the Commission for review of the sanctions ID.³ The same day, Finnegan and Yarsuvat filed separate motions before the Commission to intervene in the investigation for the purpose of disputing joint liability for the monetary sanction.⁴ Finnegan and Yarsuvat also filed provisional petitions for review of the ID, appended to their motions to intervene. On November 4, 2014, Dow filed a response to Organik Kimya's petition, as well as responses to Finnegan's and Yarsuvat's motions.⁵ On November 10, 2014, Finnegan filed a motion for leave to file a reply in support of its motion to intervene.⁶ Dow opposed that motion on November 13, 2014.⁷

On December 16, 2014, the Commission determined to review the ID, and granted counsels' motions to intervene concerning discovery abuse and sanctions, and Finnegan's motion

[Footnote continued from previous page]

responsibility between or among such individual lawyers and the law firm. As a result, the Commission has not made any determination on those questions.

³ Resp'ts' Pet. for Comm'n Review of the ALJ's Initial Determination Finding Spoliation of Evidence, Granting Default Judgment Against Resp'ts, and Requiring Resp'ts to Pay Certain of Compl'ts' Att'ys Fees and Costs (Oct. 28, 2014) ("Organik Kimya Pet.").

⁴ Finnegan, Henderson, Farabow, Garrett & Dunner, LLP's Mot. to Intervene for the Limited Purpose of Defending Its Interests in Light of the Initial Determination Holding Resp'ts and Their Counsel Jointly and Severally Liable for Certain of Compl'ts' Att'ys' Fees and Costs (Oct. 28, 2014) ("Finnegan Pet."); Motion of Mr. Ömür Yarsuvat to Intervene for the Limited Purpose of Defending His Interests in Light of the Initial Determination Holding Resp'ts and Their Counsel Jointly and Severally Liable for Certain of Compl'ts' Att'ys' Fees and Costs (Oct. 28, 2014) ("Yarsuvat Pet.").

⁵ Dow's Resp. to Organik Kimya's Pet. for Comm'n Review of the ALJ's Initial Determination (Nov. 4, 2014) ("Dow Pet. Reply"); Dow's Opp'n to Finnegan, Henderson, Farabow, Garrett & Dunner LLP's Mot. to Intervene for the Limited Purpose of Defending Its Interests in Light of the Initial Determination Holding Resp'ts and Their Counsel Jointly and Severally Liable for Certain of Compl'ts' Att'ys' Fees and Costs (Nov. 4, 2014); Dow's Opp'n to Mr. Ömür Yarsuvat's Mot. to Intervene for the Limited Purpose of Defending His Interests in Light of the Initial Determination Holding Resp'ts and Their Counsel Jointly and Severally Liable for Certain of Compl'ts' Att'ys' Fees and Costs (Nov. 4, 2014)

⁶ Finnegan, Henderson, Farabow, Garrett & Dunner, LLP's Mot. for Leave to File Reply Br. in Supp. of Its Mot. to Intervene (Nov. 10, 2014)..

⁷ Dow's Resp. to Finnegan, Henerson, Farabow, Garrett & Dunner, LLP's Mot. for Leave to File Reply Br. in Support of Its Mot. to Intervene (Nov. 13, 2014).

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for leave to file a reply.⁸ The Commission notice of review sought further briefing on the following two questions:

1. Please brief the law governing what types of notice and opportunity to present evidence and argument must be provided to counsel before imposing sanctions on the counsel based on the types of conduct cited on page 112 of the ID. Please also brief how that governing law applies to Organik Kimya's counsel in this investigation, based on the existing record in this investigation. In answering this question, please specifically address whether and when Organik Kimya's counsel was or should have been on notice that counsel might be subject to sanctions and whether they were given adequate opportunity to present evidence and argument on any issue of which they had notice.

2. Please discuss duties that counsel may have under ITC rules, ethics rules, case law, and any other relevant sources with respect to the conduct cited on page 112 of the ID, including duties relating to the implementation of a litigation hold, a duty to investigate before making a representation to the tribunal, a duty to avoid willful blindness, or a duty to preserve or take possession of evidence. In answering this question, please also address any duties that may arise when counsel has received notice of allegations that the counsel's client has intentionally spoliated evidence. Please also explain with citation to the existing record whether Organik Kimya's counsel satisfied any such duties in this investigation.

Notice at 3. The Commission explained that other "issues on review are adequately presented in the parties' existing filings," that the "parties are not to brief the sanction finding Organik Kimya in default nor Organik Kimya's liability for monetary sanctions," and that the briefing was to be based "upon the existing evidentiary record" and not "new evidence." *Id.* at 3-4. The

⁸ In considering whether to grant a motion for intervention, the Commission often looks to Federal Rule of Civil Procedure 24 for guidance. *See, e.g., Certain Electronic Devices With Imaging Processing Systems, Components Thereof, and Associated Software*, Inv. No. 337-TA-724, Comm'n Op. at 57 (Dec. 1, 2011). Based on the factors set forth in the Federal Rule, *see id.* (citing Fed. R. Civ. P. 24 and *Certain Baseband Processor Chips and Chipsets*, Inv. No. 337-TA-543, Order No. 27 (Feb. 15, 2006)), the Commission determined that the motions to intervene were timely, that there was a risk that Organik Kimya would not adequately represent its counsels' interest in view of their shared liability, and that granting intervention would not cause undue delay or prejudice. We note that the ALJ conducted a thorough proceeding, including multiple teleconferences, submissions, and a hearing on the matters raised in the counsels' petitions. However, out of an abundance of caution, counsels' provisional petitions and Finnegan's reply have been deemed of record and have been considered by the Commission, affording Organik Kimya's counsel additional opportunities to be heard.

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Commission's notice also sought submissions from the parties and the public regarding remedy, the public interest, and bonding. *Id.* at 4.

On December 30, 2014, in response to the notice of review, the Commission received one submission each from Dow, Finnegan, and Yarsuvat.⁹ The Commission also received on that same day two submissions from Organik Kimya: one on the sanctions issues under review; and another on remedy, bond, and the public interest.¹⁰ On January 7, 2015, Finnegan and Yarsuvat filed replies to Dow's opening brief.¹¹ On that same day, Organik Kimya filed a reply on remedy,¹² and Dow replied to both of Organik Kimya's opening submissions.¹³ The Commission did not receive any submissions from the public.

The issues under review fall into the following four categories: (1) Organik Kimya's default; (2) the remedial orders to issue from Organik Kimya's default; (3) Organik Kimya's liability for Dow's fees and costs; and (4) the joint and several liability of Organik Kimya's counsel for those fees and costs.

⁹ Dow's Written Submission on Certain Issues Under Review and Remedy, Public Interest and Bonding (Dec. 30, 2014) ("Dow Br."); Resp. of Finnegan, Henderson, Farabow, Garrett and Dunner, LLP to Req. for Written Submissions on Issues Under Review (Dec. 30, 2014) ("Finnegan Br."); Intervenor Ömür Yarsuvat's Written Submission in Resp. to the Comm'n's Determination to Review an Initial Determination Granting Default and Sanctions (Dec. 30, 2014) ("Yarsuvat Br.").

¹⁰ Resp'ts Organik Kimya San Ve Tic., A.ş, Organik Kimya Netherlands B.V., and Organik Kimya US, Inc's Resp. to the Comm'n's Req. for Written Submissions on Issues Under Review (Dec. 30, 2014) ("Organik Kimya Sanctions Br."); Organik Kimya's Br. on Remedy, Bond, and the Public Interest (Dec. 30, 2014) ("Organik Kimya Remedy Br.").

¹¹ Rep. of Finnegan, Henderson, Farabow, Garrett & Dunner, LLP Regarding Issues Under Review (Jan. 7, 2015) ("Finnegan Reply Br."); Intervenor Ömür Yarsuvat's Rep. to Dow's Written Submission in Resp. to the Commission's Determination to Rev. an Initial Determination Granting Default and Sanctions (Jan. 7, 2015) ("Yarsuvat Reply Br.").

¹² Organik Kimya's Rep. to Dow's Written Submission on Remedy, Public Interest and Bonding (Jan. 7, 2015) ("Organik Kimya Remedy Reply Br.").

¹³ Dow's Resp. to the Written Submissions of Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Omur Yarsuvat and Organik Kimya (Jan 7, 2015) ("Dow Sanctions Reply Br."); Dow's Reponse to Organik Kimya's Br. on Remedy, Bond, and the Public Interest (Jan. 7, 2015) ("Dow Remedy Reply Br.").

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II. THE DEFAULT SANCTION

The ID recites in detail the discovery-related misconduct in this investigation, ID at 20-99, and we affirm and adopt all of the ID's factual findings. We also affirm and adopt the ALJ's determination of default, ID at 99-101. The ID presents a detailed statement of the facts concerning spoliation of evidence carried out by Organik Kimya, as confirmed by forensic examination, in violation of orders compelling discovery and mandating preservation of evidence, as well as false representations made by Organik Kimya's counsel concerning the destruction of relevant evidence.

A. The ID's Findings

To briefly summarize, Dow sought a finding of default based on Organik Kimya's pattern of destroying documents and obstructing discovery. Organik Kimya denied the existence of a relationship with former Dow employee Dr. Dilip Nene, *see* Hr'g Tr. 153-155, 162-163 (July 8, 2014), and Organik Kimya ordered the destruction of certain documents reflecting its communications with Dr. Nene. *See* Order No. 16 at 8. Dr. Nene was deceptive in his deposition testimony about his relationship with Organik Kimya, and destroyed his own documents. *See* ID at 32-43; Order No. 15 at 5-7 (Feb. 4, 2014). Organik Kimya insisted—improbably—that documents concerning its relationship with Nene were actually about its relationship with Organik Kimya's Polymer R&D Manager, Guillermo Perez, who also used to work for Dow. Indeed, Organik Kimya went so far as to argue that internal emails referring to “Dr. X from R&H” (*i.e.*, Rohm & Haas) actually referred to Dr. Perez, even though Dr. Perez was copied on those emails. Order No. 16 at 8-9. The ID found Organik Kimya's misdirection concerning Dr. X to be “implausible.” *Id.* at 9. Dow then sought discovery from Dr. Perez and his evidence was destroyed. ID at 20-25, 43-53; *see* Order No. 16 at 5 (ordering the inspection of Dr. Perez's computer hard drives). Dow also sought discovery from Leonardo Strozzi,

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another Organik Kimya employee who used to work for Dow. More evidence was destroyed despite orders to preserve it. ID at 31, 53-59.

Some of the ID's most pertinent findings of fact are as follows:

- “[T]he analysis of the Perez laptop revealed that, in complete disregard of Order No. 16 [requiring Organik Kimya to make available Dr. Perez’s computers for forensic examination], 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.” ID at 22; *see also id.* at 23 n.8, 70-79, 86-88.
- “The evidence also shows that while Organik Kimya was overwriting the ‘unallocated’ space [on the Perez laptop] . . . , 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 forensic examination.” *Id.* at 23.
- “The evidence set forth above leads 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 [Dow’s forensic experts] at the time of the scheduled forensic examination 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 examination.” *Id.* at 80.
- “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 [to] prove its allegations of trade secret misappropriation.” *Id.*
- “Despite my admonition during the March 20 [2014] teleconference that I would be ‘mortally annoyed’ if there was any more destruction of evidence or even the suggestion of it, and despite on 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

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I issued the Preservation Order, someone deleted over 2,700 files from the Strozzi laptop.” *Id.* at 30.

- The forensic examination of Strozzi’s personal work laptop “also discovered . . . evidence of at least 20 external storage media devices being connected to his laptop after May 2013.” *Id.*
- “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.” *Id.* at 31. The explanation for this loss is “highly suspect.” *Id.* at 85.
- “Even though the [Strozzi] 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 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.” *Id.* at 31-32; *see also id.* at 93-96.
- “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. At the beginning of the inspection, counsel for Dr. Nene disclosed for the first time that Dr. Nene had replaced his hard drive in mid-2013 and that he no longer had the original hard drive.” *Id.* at 36-37 (citation omitted). “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.’ 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.* at 37 (citation omitted).
- During his second deposition, “Dr. Nene admitted that sometime between [June and July] 2013, Dr. Nene removed the hard drive from his personal laptop, took it to his garage, smashed it with a hammer and threw it in the garbage. Dr. Nene testified that he smashed the hard drive to make sure that the information on the drive could not be recovered. 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 38-39 (citation omitted).
- “During a March 20, 2014, teleconference, I ordered preservation of “the “laptop Dr. Nene received from Organik Kimya during his July 2013 visit to Rotterdam and all portable storage devices he used since issuance of the first subpoena.” *Id.* at 38. “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.” *Id.* at 38 (citation omitted).

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- “Forensic evidence shows that on September 17, 2013, less than a week after receiving his first subpoena, Dr. Nene opened and reviewed [four files pertinent to this investigation] on a Fujifilm USB drive The 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. 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.” *Id.* at 40 (citation omitted).
- “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.* (emphasis in original).
- “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 onto the new hard drive’ was false.” *Id.* at 41.
- “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 [2014], and my Order of March 26 [2014].” *Id.*; *see also id.* at 96-99.

The ID evaluated these facts, in part, as follows:

Organik Kimya’s behavior in this investigation, which resulted in the massive spoliation of evidence, is reprehensible. . . . 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 that there is a culture at Organik Kimya that finds its duty to preserve evidence an inconvenience.

Id. at 70.

The ID explained that “the evidence of Organik Kimya’s bad faith in the destruction of evidence is manifest.” *Id.* In particular, the ALJ explained Organik Kimya’s deception relating to the Perez computer. Central to that deception was an April 4, 2014, letter in which Finnegan, on behalf of Organik Kimya, represented that Organik Kimya’s tampering with the Perez computer was innocuous. The letter is quoted extensively in the ID. *Id.* at 72-73. The ALJ

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concluded that the representations in that letter were both false and implausible: “As it turns out, . . . this story is completely concocted.” *Id.* at 74; *see also id.* at 77; *id.* at 80 n.14 (“Organik Kimya’s attempt to cover up its spoliation by uttering patently false statements to the undersigned should shock the conscience any reasonable person. There can be no excuse for such conduct.”). The ALJ dissected the representations in Finnegan’s April 4, 2014, letter, as follows:

[T]he 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 borne by Dow.

ID at 112. The ID also explained: “[T]here is no affirmative evidence in the record that a litigation hold memo, or equivalent, was issued or disseminated [to Organik Kimya] in this investigation. Nor is there evidence that an active undertaking was made to preserve evidence in this investigation.”¹⁴ *Id.* at 112; *see also id.* at 82-84 & nn.15-16.

The ID concluded:

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 inexcusable conduct with regard to [the] computer it issued to Mr. Strozzi to be sufficient to independently justify the most severe sanction

Id. at 116-17.

¹⁴ For these and other reasons, *id.* at 112, the ALJ found Organik Kimya’s counsel jointly and severally liable with Organik Kimya for the compensatory fees due Dow, *id.*, of \$1,944,379.91, *id.* at 117. The imposition of joint and several liability upon counsel is discussed, *infra*, Part V.

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B. Proceedings before the ALJ

Procedurally, the effect of the spoliation and evasion in this case was an extraordinary level of motions practice, briefing, and letter writing to the ALJ by the parties, complemented by frequent teleconferences and rulings by the ALJ, which culminated in the ID under review. By way of example, prior to Dow's May 19, 2014, motion for sanctions, Dow filed at least nine letters regarding discovery disputes relating to the spoliation, including the need for forensic investigation of evidence that Organik Kimya attempted to, or actually did, destroy.¹⁵ Organik Kimya (through its counsel, Finnegan) submitted at least eight letters to the ALJ on these issues.¹⁶ Counsel for Dr. Nene and Dr. Perez submitted additional motions, responses, and letters. Prior to the sanctions motion, Organik Kimya (through Finnegan) opposed various motions pertinent to the spoliation issues on at least four occasions.¹⁷ Dow filed at least six motions or responses.¹⁸ The ALJ conducted pertinent conferences with the parties, on the record, on January 14, 2014; January 28, 2014; February 20, 2014; February 25, 2014; March 14, 2014; March 19, 2014; March 20, 2015; March 25, 2014; March 26, 2014; and April 7, 2014.¹⁹ The ALJ issued at least two directly relevant written orders prior to Dow's motion for sanctions: Order No. 15 (Feb. 4, 2014) (granting in part Dr. Nene's motion to quash, but ordering Dr. Nene

¹⁵ See Letters from Dow counsel to the ALJ dated: January 10, 2014, January 22, 2014; January 27, 2014; February 18, 2014; February 20, 2014; March 12, 2014; March 13, 2014; March 18, 2014; and April 3, 2014.

¹⁶ See Letters from Finnegan to the ALJ dated: January 13, 2014; January 23, 2014; January 24, 2014; February 21, 2014; March 13, 2014; March 14, 2014; March 25, 2015; and April 4, 2014.

¹⁷ See Finnegan Oppositions dated: February 6, 2014; April 22, 2014; April 24, 2014; and May 8, 2014.

¹⁸ See Dow Motions dated February 4, 2014; April 14, 2014; and April 29, 2014; Dow Responses dated January 10, 2014; April 23, 2014; and May 12, 2014.

¹⁹ The March 20, 2014, transcript is the Preservation Order cited in the ID, in which the ALJ ordered Organik Kimya's counsel to stop the further destruction of evidence. Oral orders fall within the scope of Commission Rule 210.33 and its counterpart, Federal Rule of Civil Procedure 37. ID at 27-28.

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to comply with certain discovery requests from Dow); Order No. 16 (Feb. 20, 2014) (granting in part Dow's motion to compel, and ordering Organik Kimya to make certain computers available for forensic inspection, copying, and analysis); *see also* Order No. 17 (Apr. 7, 2014) (confidentiality issues concerning Dr. Nene); Order No. 18 (May 6, 2014) (same); Order No. 19 (May 6, 2014) (protective order issues concerning Dr. Perez).

Following Dow's May 19, 2014, motion for sanctions, there were extensive further proceedings. Beyond the responsive briefing for Dow's motion, Organik Kimya moved to terminate the investigation by a consent order instead, which would have had the possible effect of bypassing any findings of litigation misconduct. The ALJ conducted a two-day hearing on July 8-9, 2014, on the sanctions and consent-order motions. The trial transcript is more than 500 pages long. Following the hearing, the ALJ ordered supplemental briefing from the parties on certain issues. *See* Order No. 25 (Oct. 8, 2014); Order No. 26 (Oct. 16, 2014). On October 20, 2014, the ALJ issued the sanctions ID.

C. The Commission's Determinations on Review

We affirm all of the ID's findings concerning the default sanction. Some of the arguments raised to the Commission, however, warrant additional discussion.

1. Spoliation in Connection with Dr. Perez

What is arguably the most egregious spoliation in this investigation occurred in connection with Dr. Perez. He is the co-head of research and development for Organik Kimya. He is also a former employee of Dow's affiliate Rohm and Haas. While at Rohm and Haas, Dr. Perez had access to Dow's proprietary information for making opaque polymers, the misappropriation of which is at issue in this investigation. On February 20, 2014, the ALJ ordered forensic inspection of Dr. Perez's laptop over Organik Kimya's objection. Order No. 16 at 9. Organik Kimya and its counsel admit that, subsequent to the order, Dr. Perez's computer

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was tampered with, resulting in the permanent loss of an unknown number of files.²⁰ Organik Kimya Pet. 14-15; Finnegan Pet. 29-30. We affirm the ALJ's findings of fact relating to the spoliation of evidence on Dr. Perez's computer. We also affirm that this spoliation alone is more than sufficient to justify the sanctions ordered by the ALJ. *See* ID at 116.

2. Spoliation in Connection with Mr. Strozzi

Organik Kimya has argued that sanctions should not have been granted based upon the actions of Mr. Strozzi. Organik Kimya Pet. 42-57. Mr. Strozzi is a former employee of Dow's affiliate Rohm and Haas. While at Rohm and Haas, Mr. Strozzi had access to Dow's proprietary opaque polymer information. In the spring of 2014, Mr. Strozzi was an employee of Organik Kimya. On March 20, 2014, the ALJ issued an oral order compelling the inspection of Mr. Strozzi's laptop over Organik Kimya's objection. *See* Hr'g Tr. 6:4-22; 11:17-21 (Mar. 20, 2014). In the same teleconference, the ALJ also ordered the preservation of evidence on Mr. Strozzi's laptop. *Id.* at 8:17-20. Organik Kimya and its counsel admit that the day after the ALJ's order Mr. Strozzi deleted 2,742 files from his laptop. Organik Kimya Pet. 16; Finnegan Pet. 33. Organik Kimya proffered to the ALJ that Dow "likely" has access to the deleted files. *See* ID at 95. The ALJ determined that Organik Kimya's supposition that Dow has access to the files was presented "without proof" and was not supported by the record. ID at 95-96.

In its petition to the Commission for review of the ID, Organik Kimya attempts to augment its showing that Dow, through computer forensics, has recovered all of the deleted files

²⁰ Organik Kimya seeks to excuse the spoliation of Dr. Perez's laptop by arguing that it had produced some documents and that Dr. Perez had been deposed. Organik Kimya Pet. at 15. Organik Kimya, however, cites no authority for the proposition that sanctions for the massive spoliation that occurred here is legally impermissible when the party had produced some amount of discovery. Nor does Organik Kimya cite authority to support its contention that absent corroborating evidence of Dr. Perez's involvement in trade secret misappropriation, the Commission should find that the evidence destroyed on Dr. Perez's laptop was not relevant to Dow's trade secret claim.

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on Mr. Strozzi's computer. We conclude that Organik Kimya's argument does not demonstrate error in the ID for two reasons. First, Organik Kimya's petition includes factual arguments it did not present to the ALJ, and we find those arguments waived. Second, even if Organik Kimya's argument had not been waived and there were sufficient evidence to conclude that Dow has access to all 2,742 files that Mr. Strozzi deleted, we would not disturb the ALJ's determination that default is an appropriate sanction for the extensive discovery abuse here. As noted above, the ALJ found the Perez laptop spoliation alone to be sufficient to justify the ordered sanctions. *See* ID at 116. Moreover, the intentional deletion of 2,742 files by Mr. Strozzi is at least circumstantial evidence relating to the culpable state of mind found by the ALJ. *See, e.g.*, ID at 70. The ALJ was entitled to consider this circumstantial evidence of Organik Kimya's *mens rea* when considering the Perez laptop spoliation and other spoliation by Organik Kimya. *See id.*

3. The Availability of Termination by Consent Order

Organik Kimya's petition for review argued that default was an inappropriate sanction for the spoliation in this investigation, because Organik Kimya had already agreed to a consent order of similar effect. Organik Kimya Pet. 31-35; *see* Order No. 28 (Oct. 20, 2014) (denying Organik Kimya's motion for a consent order). Organik Kimya contends that termination by consent is a lesser and more appropriate remedy. *Id.* at 31-32. As part of this argument, Organik Kimya argues that the ID purports to ascribe preclusive effect to the default determination in any future district court action. *Id.* at 33-35 (citing ID at 101 n.19 and Hr'g Tr. 380-81 (July 9, 2014)).

We reject Organik Kimya's argument that the ALJ erred. Neither the hearing transcript nor the ID demonstrates that the ALJ selected the sanction of default because of its preclusive effect in district court as Organik Kimya contends. *See* ID at 101 n.19. The relevant footnote in the ID instead describes the disadvantage Dow will have in any future litigation because Organik Kimya destroyed relevant evidence during this investigation. *See id.* In any event, the

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preclusive effect, if any, of the default determination here is to be determined by a future tribunal in which such arguments about preclusion may be made, not by the Commission or the ALJ. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2375 (2011) (“Deciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court”) (emphasis in original); *see also Midway Motor Lodge v. Innkeepers’ Telemanagement & Equip. Corp.*, 54 F.3d 406, 409 (7th Cir. 1995); 18 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 4405, at 82 (2d ed. 2002).

The record before us justifies the sanction of default without consideration of any future preclusive effect of our final determination. The Commission has always reserved the right to deny termination by consent in appropriate circumstances. 19 C.F.R. § 210.21(c); *see Certain Cigarettes & Packaging Thereof*, Inv. No. 337-TA-424, Order No. 21, 2000 WL 64081, at *3 (Jan. 6, 2000) (denying a consent order because of discovery violations);²¹ *Certain Vehicle Security Systems & Components Thereof*, Inv. No. 227-TA-355, Order No. 16, 1994 WL 930094, at *1 (Feb. 7, 1994) (denying a consent order so as to reach patent invalidity questions). The bad faith exhibited by Organik Kimya in this investigation is such an appropriate circumstance justifying denial of the consent-order motion. We find no error in the ALJ’s determination that default is more appropriate in these circumstances than granting a motion for termination by entry of a consent order. The impact on Organik Kimya’s reputation and deterrent value flowing from the factual findings of pervasive discovery abuse underlying the default sanction make the default sanction and consent order inherently unequal. Indeed, this is precisely why Organik Kimya strenuously seeks to escape, by means of a consent order, from being called out for its wrongful conduct. We agree with the ALJ’s finding that allowing Organik Kimya to exit the

²¹ In the *Cigarettes* investigation, the consent-order motion was later granted after the respondents at issue had cured their discovery misconduct.

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investigation on consent “without accepting the full measure of its responsibility for its egregious actions” would not be a sufficient deterrent. *Id.* If such termination were allowed here, future parties may decide to engage in discovery abuse with the understanding that if they are caught they can merely exit the investigation through the consent order procedures without being held accountable for their misconduct.

4. Arguments Concerning What the Spoliated Evidence Contained

Organik Kimya argues in its petition that the sanction of default is inappropriate because, *inter alia*, the spoliated evidence would not have proved every element of Dow’s trade secret misappropriation claim. Organik Kimya Pet. at 36. In support of that argument, Organik Kimya claims that *Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1479 (D.C. Cir. 1995) holds that “default judgment is only appropriate when spoliated evidence is dispositive of the case.” Organik Kimya Pet. at 36.

Organik Kimya mischaracterizes *Shepherd*. The court in *Shepherd* actually stated,

[C]ourts generally respond to document destruction or alteration with the ultimate sanction of dismissal or default in two types of cases: where the destroyed document is dispositive of the case, so that an issue-related sanction effectively disposes of the merits anyway, *see, e.g., Synanon Church*, 820 F.2d at 427–28; *State Farm Fire & Casualty Co. v. Frigidaire*, 146 F.R.D. 160, 163 (N.D.Ill.1992); and where the guilty party has engaged in such wholesale destruction of primary evidence regarding a number of issues that the district court cannot fashion an effective issue-related sanction, *see, e.g., Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 135 (S.D.Fla.1987); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1456 (C.D.Cal.1984).

Shepherd, 62 F.3d at 1479. Thus, Organik Kimya omitted the portion of the court’s explanation in which it wrote that “wholesale destruction of primary evidence regarding a number of issues” may prohibit the court from fashioning an effective issue-related sanction, even if the destroyed evidence would not necessarily dispose of the case. *Id.* Moreover, the fact that certain district courts may have exercised their discretion not to issue a default sanction under their unique facts, *see* Organik Kimya Pet. 36-38, does not prevent the Commission from exercising its discretion

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here to issue a default sanction. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (default and other discovery sanctions reviewed for abuse of discretion).

Here, the ALJ stated that Organik Kimya's destruction of evidence "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." ID at 99. The ALJ also explained why any sanction less than default would be insufficient. *Id.* at 99-101. We discern no conflict between the ALJ's determination and *Shepherd*.

Organik Kimya also claims that the spoliated evidence "relates to only one element" of Dow's trade secret misappropriation claim—whether the secrets were stolen. Organik Kimya Pet. at 37. Organik Kimya argues default is inappropriate because Dow must still prove that the information was both kept secret and has economic value. *Id.* at 36. Organik Kimya's argument is unpersuasive for several reasons.

First, as the ALJ rightly noted, Organik Kimya has made it impossible to know the exact volume and content of destroyed data. *See, e.g.*, ID at 23, 99-101. Because of Organik Kimya's bad faith actions, the ALJ properly presumed that the information destroyed was relevant to Dow's trade secret claim. *See, e.g., id.* at 15-17, 86, 88. Organik Kimya's argument ignores that justified presumption. *Id.* at 15-17 (collecting cases).

The ALJ took the additional step of noting that Dow provided "plausible, concrete suggestions" as to what the spoliated evidence might have been, which satisfies any burden Dow might have had in seeking sanctions. *See* ID at 86 (citing *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1328 (Fed. Cir. 2011)). For example, Dow argued in its sanctions motion to the ALJ that "there is every reason to believe that the unrecoverable data would also have included

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Dow's confidential materials, including documents describing certain technology as proprietary trade secrets and/or discussing how Dow protects this information." Dow Sanctions Mot. at 52. Dow also argued that "the unrecoverable data also likely would have included documents tending to show that the technology at issue is not generally known," and that "Organik Kimya treated Dow's proprietary information differently and/or refused to share it with others because it knew that the information gave it a competitive advantage." *Id.* We affirm, therefore, that Dow has provided plausible, concrete suggestions as to what the spoliated evidence might have been, and under the circumstances of this case we presume Dow's suggestions to be true. Dow therefore has met any burden it had to show that Dow keeps its trade secrets confidential and that the secrets have independent economic value.

Moreover, Organik Kimya's argument that default cannot be entered unless Dow proves every element of its claim is inconsistent with the fundamental meaning of default. Our rules provide that a party may be found in default as a sanction for failure to make or cooperate in discovery. *See* 19 C.F.R. §§ 210.16(a)(2), 210.33(b)(5). When a party is found in default, it loses any right to contest the allegations at issue in the investigation. 19 C.F.R. § 210.16(b)(4). Organik Kimya would not allow Dow the presumptions contemplated by Rule 210.16(b)(4) unless Dow has already proven the facts for which the presumptions are an intended substitute. Organik Kimya's argument would render the waiver remedy in Rule 210.16(b)(4) meaningless, and we reject it.

Finally, we note that the allegations in Dow's amended complaint, if deemed to be true, are sufficient to support a finding of violation of section 337. Regarding the two trade secret elements disputed by Organik Kimya, we note that paragraphs 64-66 allege facts that demonstrate the economic value of Dow's opaque polymer trade secrets and paragraphs 67-73 allege facts that demonstrate the secrecy of Dow's proprietary opaque polymer information and

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Dow's steps to preserve that secrecy. Under the legal standard conceded by Organik Kimya (*see* Organik Kimya Pet. at 29), Dow's allegations, when presumed true, support a finding of violation. Because Organik Kimya is in default, it no longer has a right to contest Dow's allegations. 19 C.F.R. § 210.16(b)(4). We therefore presume to be true all allegations of trade secret misappropriation in Dow's amended complaint, and we determine that Organik Kimya has violated section 337 as described in those allegations. *See* 19 U.S.C. § 1337(g).

III. REMEDY, BONDING, AND THE PUBLIC INTEREST

Dow proposed remedial orders in proceedings before the ALJ. *See* ID at 99-101 & n19. Specifically, Dow sought a limited exclusion order lasting twenty-five years. *See, e.g.*, Dow's Mot. for Default & Other Sanctions Against Organik Kimya 1-2 (May 19, 2014); Dow's Opp'n to Rep'ts' Mot. to Terminate the Investigation Based on Consent Order Stipulation and Proposed Consent Order 3 (June 2, 2014). Before the Commission, Dow reiterates the propriety of a twenty-five year exclusion order. Dow Br. 49-55. Dow also argues for a cease and desist order against Organik Kimya U.S. based upon its commercially significant inventory in the United States. *Id.* at 50; *see also* Dow Remedy Reply Br. 29. Dow does not seek a cease and desist order against the other Organik Kimya companies. Dow does not seek bond during the Presidential review period.

Organik Kimya's remedy brief argues that a number of the trade secrets are not secret; that any exclusion order should be two years or less and limited to the specific products at issue; and that there should be no bond or cease and desist order.²² Organik Kimya's challenge to the

²² These positions are at odds with Organik Kimya's preferred consent order, which contained provisions similar to Dow's default relief. *See, e.g.*, Organik Kimya's [Proposed] Reply in Supp. of Their Mot. to Terminate the Investigation Based on Consent Stipulation and Proposed Consent Order 2-3 (June 10, 2014) (stating that the proposed consent order, of indefinite length, could be for longer than twenty-five years but that if "Dow would prefer the

[Footnote continued on next page]

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scope of an exclusion order is based on whether any and all trade secrets are unknown to the public and would be difficult to design around. These issues all go the merits, which Organik Kimya has waived by default. Organik Kimya's challenge to the issuance of a cease and desist order directed to Organik Kimya U.S. is based on whether Dow demonstrated commercially significant inventory, *see* Dow Br. 50-51, an issue that Organik Kimya has now waived as well by virtue of its default. *See Certain Lens-Fitted Film Packages*, Inv. No. 337-TA-406, Comm'n Op. at 13 (June 28, 1999); *Certain Composite Wear Components and Products Containing the Same*, Inv. No. 337-TA-644, Comm'n Op. at 6 (Nov. 24, 2009); *see also* Dow Remedy Reply Br. 29-30.

Dow's proposed remedial orders relate to "Dow Trade Secrets" and Organik Kimya takes Dow to task for failing to list them all:

The scope of Dow's purported trade secrets is not a mere liability question that the Commission can ignore when fashioning an appropriate remedy. Instead, the Initial Determination should have identified Dow's trade secrets with sufficient particularity to permit Dow, Organik Kimya, and U.S. Customs and Border Protection ("CBP") to determine which products (if any) should be subject to a remedial order. Dow has not proven any of its purported trade secrets and, more importantly, the ALJ's Initial Determination did not identify any actual Dow trade secrets. Thus, which of Dow's purported trade secrets should be included in the scope of an exclusion order—and which should not—is an issue that cannot be resolved based on the record before the Commission.

Organik Kimya Remedy Reply Br. 1. But Dow did provide a list of the 52 specific trade secrets in this investigation. Dow's Disclosure of Misappropriated Trade Secrets (Jan. 29, 2014) (listing trade secrets A-ZZ). Indeed, Organik Kimya adopted Dow's list for the scope of Organik Kimya's proposed consent order. *See* Consent Order Stipulation ¶¶ 8-9, at 2-3 (May 21, 2014);

[Footnote continued from previous page]

length of exclusion under the Consent Order be for twenty-five years rather than an indefinite period, Respondents are amenable to that" so long as it is not bound after a tribunal finds the underlying right, here trade secret, invalid or unenforceable, *see* 19 C.F.R. § 210.21(c)(4)(x)).

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Proposed Consent Order ¶¶ 8-9, at 2-3 (May 21, 2014). And Organik Kimya discussed all of the trade secrets in its opening brief on remedy. Organik Kimya Remedy Br. 7-22. These are the trade secrets within the scope of the investigation, and the finding of default presumes both the validity of these trade secrets and Organik Kimya's misappropriation of them. 19 C.F.R. § 210.16(b)(4).

The Commission has determined, based on the record of this investigation, that a limited exclusion order prohibiting the importation of articles that utilize the trade secrets identified in Dow's January 29, 2014, disclosure, is appropriate. 19 U.S.C. § 1337(d)(1). The Commission has also determined, based upon Organik Kimya U.S.'s commercially significant inventory of subject opaque polymers in the United States, that a cease and desist order should issue against it. *Id.* § 1337(f)(1). Dow's evidence demonstrates that Dow had maintained the secrecy of its opaque polymers for more than thirty years, until Organik Kimya's misappropriation, and that it would have taken Organik Kimya from "22-25 years, possibly longer, to independently develop a recipe and process to manufacture a commercial opaque polymer comparable to Dow's." Dow Mot. Sanctions, Ex. 5, Cunningham Expert Report ¶ 633 (Mar. 24, 2014); *see also id.* ¶¶ 475-509, 616-632. Accordingly, the 25 years sought by Dow is an appropriate length for the remedial orders here.

In connection with the issuance of an exclusion order or cease and desist order, the Commission must consider the effect of such orders "upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers." 19 U.S.C. § 1337(d)(1), (f)(1). We find that these public interest factors do not preclude the issuance of the subject remedial orders. In particular, we reject Organik Kimya's public interest arguments. Organik Kimya argues:

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[A] limited exclusion order would be problematic because the ALJ failed to make a single finding as to which (if any) of Dow's alleged trade secrets are actually trade secrets. Therefore, any Commission exclusion order necessarily will encompass technology that is publicly known and not, in fact, deserving of protection. As a result, legitimate competition will be frustrated and Dow will enjoy an undeserved lack of competition with the resulting power to increase prices and limit choices for its opaque polymer products.

Organik Kimya Remedy Br. 49; *see also* Organik Kimya Remedy Reply Br. 15-16. This argument, which has no evidentiary support, takes issue with the existence of remedial orders in default cases, a matter to which Congress has already spoken. 19 U.S.C. § 1337(g). Congress has also provided the Commission with the authority to issue sanctions to the same degree as district courts under Federal Rule of Civil Procedure 37, *see* 19 U.S.C. § 1337(h), which, as discussed above, permits default as a sanction for violation of a discovery order, *see* Fed. R. Civ. P. 37(b)(2)(A)(vi); *see also* 19 C.F.R. § 210.33(b)(6).

Organik Kimya's other argument on the public interest is that Dow's dominance in this sector creates competitive conditions in the U.S. economy disfavoring relief, and harm to U.S. consumers who would pay more for products containing these opaque polymers. Organik Kimya Remedy Br. 49-50. The opaque polymers here are additives that can reduce the amount of titanium dioxide used in paint, thereby decreasing cost. ID at 2-3. Thus, substitutes to the products at issue already exist: paints that use Dow's opaque polymers; and paints that do not, but which use extra titanium dioxide to compensate. There is no evidence in the record that *anyone* will be deprived of an adequate paint should the Commission issue a limited exclusion order.

In sum, Organik Kimya offers no substantial argument based upon the facts of this investigation for precluding the issuance of the Commission remedial orders. Accordingly, the Commission has determined to issue an exclusion order directed to opaque polymers

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manufactured or imported by or on behalf of Organik Kimya and its affiliates, as well as a cease and desist order directed to Organik Kimya U.S.

In connection with a limited exclusion order, the parties dispute the appropriateness of a certification provision that would permit Organik Kimya's importation of opaque polymers based upon its representations to Customs and Border Protection ("CBP") that the opaque polymers are not made with Dow's misappropriated trade secrets. Organik Kimya argues that a certification provision is necessary to make the exclusion order administrable, even once the trade secrets are all identified. Organik Kimya Remedy Br. 26. Dow argues against a certification provision here for two reasons: (1) Organik Kimya does not presently make any other products that might inadvertently get excluded; and (2) given Organik Kimya's conduct in this investigation, a later assertion that it made products without the misappropriation of trade secrets should be met by CBP with "considerable skepticism." Dow Remedy Reply Br. 28. Thus, Dow argues that, before Organik Kimya is allowed to certify that its opaque polymers are not made with Dow's misappropriated trade secrets, CBP should require Organik Kimya to seek an advisory opinion from the Commission, which would "need to examine the processes used by Organik Kimya for manufacturing a new product and determine whether Dow's trade secrets (which are presumably still unlawfully in Organik Kimya's possession) were used." *Id.*

Under the extraordinary facts of this case—which include the default determination that Organik Kimya misappropriated trade secrets from Dow (including the deception of former Dow employees assisting Organik Kimya), as well as Organik Kimya's misrepresentations concerning spoliation of evidence—the Commission has determined to require Organik Kimya to obtain a ruling (via an advisory opinion or a modification proceeding) from the Commission prior to the importation of opaque polymers that may be subject to the exclusion order. *See Canadian Tarpoly Co. v. USITC*, 640 F.2d 121, 125-26 (C.C.P.A. 1981) (affirming the Commission's

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authority to require an advisory opinion); *see also* 19 C.F.R. § 210.79 (advisory opinions); 19 C.F.R. § 210.76 (modification proceedings). Should the Commission determine that particular Organik Kimya products are outside the scope of the exclusion order, Organik Kimya may certify to Customs that future shipments are identical to the products adjudicated in a post-order proceeding by the Commission.

Because Dow does not seek a bond during the Presidential review period, Dow Br. 57, we impose no such bond. *See Certain Rubber Antidegradants, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-533, Comm'n Op., at 39-40 (Public Version July 21, 2006) (complainant's burden to establish the appropriateness and amount of the bond).

IV. ATTORNEYS' FEES ASSESSED AGAINST ORGANIK KIMYA

Organik Kimya's petition for review, while challenging the default finding, did not challenge the ALJ's decision to award Dow with fees and costs related to Organik Kimya's spoliation. Instead, Organik Kimya challenges the ALJ's calculations. Organik Kimya Pet. 59-76. We have reviewed Organik Kimya's arguments, the ID's findings, and the record of this investigation. Consistent with Commission Rule 210.33(c), the ALJ's calculation of monetary sanctions were carefully calibrated to compensate Dow solely for such fees and expenses that were caused by the failure to obey the ALJ's discovery orders. ID at 105-112. We affirm and adopt both the ID's award of fees and costs and the ID's calculation of those fees and costs (\$1,944,379.91), ID at 101-116, subject to the following discussion regarding joint and several liability by Organik Kimya counsel.

V. JOINT AND SEVERAL LIABILITY OF COUNSEL

The Commission has accepted the petitions for review from Finnegan and Mr. Yarsuvat, as well as Finnegan's reply. The Commission has also received briefing from Finnegan and Mr. Yarsuvat in response to the Commission notice of review. After considering these submissions,

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as well as the rest of the record of the investigation, the Commission has determined to affirm the ALJ's determination that Finnegan shall be jointly and severally liable with Organik Kimya for the assessed monetary sanction. The Commission clarifies that Mr. Yarsuvat is not liable for the monetary sanction.²³

A. Joint and Several Liability with Respect to Finnegan

Finnegan's petition for review argues that the ALJ erred by holding it jointly and severally liable for monetary sanctions. Finnegan's arguments at the petition stage, as well as in its briefing in response to the Commission briefing, make two principal claims: (1) that Finnegan was deprived of due process in the proceedings here; and (2) that its conduct was not culpable.

1. Procedural Considerations

In its petition for review, Finnegan argued that it was not given adequate notice that it could be jointly and severally liable for monetary sanctions based on discovery abuse.²⁴ Finnegan Pet. at 20-27. Out of an abundance of caution, the Commission solicited further briefing from the parties, including Finnegan, on this issue. Finnegan contends that its due process rights were violated because it was not on notice of possible sanctions. Finnegan Br. 5-7. Had it known that it could have been exposed to sanctions, Finnegan contends that it would have undertaken a different style of advocacy, and that it is entitled to "a hearing, likely an evidentiary hearing given the size of the sanctions, to present Finnegan's defenses to whatever

²³ Commissioner Schmidlein dissents from the Commission's determinations concerning Finnegan and Mr. Yarsuvat for the reasons set forth in her separate opinion.

²⁴ Mr. Yarsuvat subscribes to Finnegan's arguments. Yarsuvat Br. 1.

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allegations were leveled against the firm.”²⁵ *Id.* We are not persuaded by any of these arguments for the reasons set forth below.

Section 337(h) provides the Commission with authority to issue sanctions “for abuse of discovery and abuse of process to the extent authorized by Rule 11 and Rule 37 of the Federal Rules of Civil Procedure.” 19 U.S.C. § 1337(h). In the exercise of that authority, the Commission promulgated Commission Rule 210.33, which provides for the issuance of monetary sanctions to the extent authorized by Federal Rule 37. 19 C.F.R. § 210.33(c) (authorizing sanctions as governed by Fed. R. Civ. P. 37(b)(2)). Because the ALJ’s assessment of fees and costs was based upon his authority under Commission Rule 210.33, the Commission looks to Federal Rule 37 and the cases interpreting it to consider the adequacy of process.²⁶

In this case, Finnegan had more than adequate notice of possible sanctions. The federal courts, in interpreting Rule 37, have found that the filing of motions similar to Dow’s provide adequate notice to attorneys that they may be liable for sanctions. *See, e.g., Devaney v. Cont’l Am. Ins. Co.*, 989 F.2d 1154, 1160 (11th Cir. 1993) (“a motion for sanctions under Rule 37, even one which names only a party, places both that party and its attorney on notice that the court may

²⁵ Finnegan has failed to explain how Organik Kimya’s establishment of an escrow account affects Finnegan’s arguments concerning due process. Organik Kimya Sanctions Br. 2 (“Organik Kimya is establishing an escrow account in the United States to eliminate any perception of risk of non-payment of the potential sanction.”); Letter from J. Robert Robertson to Hon. Lisa R. Barton (Mar. 3, 2015) (“Organik has established an escrow account with Wells Fargo Bank . . . in the full amount of the sanction recommended by the Administrative Law Judge, should any sanction be awarded by the Commission in this case.”). As will be discussed, *infra*, the Commission has found that Organik Kimya’s ability to pay is not relevant to the determination that Finnegan is liable for sanctions in this investigation.

²⁶ We are not persuaded by Finnegan’s argument that because Commission Rule 210.33(c) provides the ALJ or the Commission with the discretion not to hold counsel liable for sanctions that Dow bears a heightened burden to demonstrate the appropriateness of sanctions against Finnegan. Finnegan Br. 5 n.1. Finnegan cites no authority for the legal proposition that the grant of discretion not to impose liability imposes a heightened burden on the party seeking relief, and the Commission is aware of no such authority.

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assess sanctions against either or both unless they provide the court with a substantial justification for their conduct”); *see also Rates Technology, Inc. v. Mediatrice Telecom, Inc.*, 688 F.3d 742, 748 (Fed. Cir. 2012); *Novick v. AXA Network, LLC*, No. 07 Civ. 7767 (AKH) (KNF), 2013 WL 6388362, at *7 (Dec. 6, 2013); *Certain Hardware Logic Emulation Sys. and Components Thereof*, Inv. No. 337-TA-383, Order No. 96, 1997 WL 665012, * 33 n.47 (July 31, 1997), *adopted by the Commission in relevant part at* 1998 WL 105158, *1 (March 6, 1998); Comm’n Op. 29-35 (Mar. 16, 1998).

But Finnegan had more notice than the motion itself. It was well aware that Dow’s spoliation accusations pointed to Finnegan as well as to Organik Kimya. On February 20, 2014, the ALJ rejected Finnegan’s repeated assertions that “Dr. X” was Guillermo Perez. Order No. 16 at 8-9. On March 13, 2014, Dow explained to the ALJ that it “should not have taken a court-ordered inspection to uncover” information about Strozzi and Nene’s misappropriation of trade secrets and Nene’s spoliation, and alleged a “massive cover-up constructed by Organik Kimya and Dr. Nene.” Letter from Paul Brinkman to Hon. Thomas B. Pender 3 (Mar. 13, 2014). That same letter requested, *inter alia*, that the ALJ “order counsel for Organik Kimya to provide a sworn declaration explaining its misrepresentations to the ALJ” concerning Dr. Nene. *Id.* at 10. Several days later, a Finnegan attorney said to the ALJ at a telephonic hearing, “now that Dow has kind of taken a few swings at us, I think my firm needs to be able to respond, too.” Hr’g Tr. 15:18-15:20 (Mar. 19, 2014). Such a statement on the official record in March 2014 by a Finnegan attorney that his “firm,” *i.e.*, Finnegan, “needs to be able to respond,” is, standing alone, compelling evidence that Finnegan had notice and opportunity to respond. Dow continued to allege misrepresentations by Finnegan in another telephonic hearing a week later. Hr’g Tr. 13:8-15 (Mar. 26, 2014). Additionally, Dow’s motion for sanctions quoted Commission Rule 210.33(c), 19 C.F.R. § 210.33(c), which expressly states that attorneys may be liable for

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sanctions for discovery abuse. Dow Mot. for Default and Other Sanctions Against Organik Kimya 2 (May 19, 2014); Mem. in Supp. of Dow's Mot. for Default and Other Sanctions Against Organik Kimya 60-62 (May 19, 2014) ("Dow Sanctions Mem."). The motion also challenged the lack of any apparent litigation hold. *Id.* at 5, 76, 78. Furthermore, Dow's reply on its motion for sanctions, filed June 9, 2014, expressly stated, "Courts have also been clear that a party and its counsel are responsible for ensuring ongoing compliance with its obligation to preserve evidence." Dow Reply in Supp. of Its Mot. for Default and Other Sanctions Against Organik Kimya 14 (June 9, 2014) ("Dow Sanctions Reply Mem."). That reply discussed the caselaw regarding the obligations of counsel. *Id.* at 14-15. Thus, Dow's submissions to the ALJ regarding discovery misconduct and the sanctions papers, as well as the text of the legal authority cited therein, makes explicit reference to the responsibility and potential liability jointly shared by counsel.

Moreover, Dow's motion for sanctions expressly states that the representations in Finnegan's April 4, 2014 letter purporting to explain the Perez laptop tampering were "not credible" and appended that letter to its motion for sanctions. *See, e.g.,* Dow Sanctions Mem. 27-28 & Ex. 27; *see also* Dow Sanctions Reply Mem. 9-11. Finnegan had notice of all of the foregoing at least one month before the sanctions hearing held July 8-9, 2014. In addition, Finnegan had sufficient opportunities to respond to the motion and present evidence at the hearing and in post-hearing briefing to dispute the allegations leveled against Organik Kimya and against Finnegan. Indeed, well ahead of the hearing, the ALJ advised Finnegan to mount a defense with evidence. Hr'g Tr. 16:13-16 (Apr. 7, 2014) ("Let's put it this way. If he [Finnegan counsel] doesn't file declarations, then he's not defending. If he does file declarations, then he is defending.").

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We find no error in the exhaustive process afforded by the ALJ. Furthermore, Finnegan has been afforded additional opportunities to be heard by the Commission in its petition for review of the ID and in its briefing in response to the Commission notice of review.²⁷ For all of these reasons, the Commission concludes that Finnegan has been afforded notice and due process.

In response to the Commission's notice of review, Finnegan sets out its due process arguments at great length, and with citation to numerous authorities. Yet, the bulk of those authorities are inapposite. For example, this is not a case involving the revocation of criminal parole, *Morrissey v. Brewer*, 408 U.S. 471 (1972) (Finnegan Br. 3), or a case involving the termination of welfare benefits, *Mathews v. Eldridge*, 424 U.S. 319 (1976) (Finnegan Br. 3). It is not a case involving claimants to an *in rem* interpleader. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Instead, this is a case in which the Commission applied its procedural rule to the parties and counsel appearing before the Commission and awarded fees to compensate Dow for costs incurred due to discovery misconduct in violation of the ALJ's orders. Because the amount of process that is due varies greatly based on the procedural setting for the alleged deprivation, as well as the nature of the property right itself, Finnegan's citation of the

²⁷ Despite the ALJ's positive statements regarding the Finnegan firm, including the Finnegan attorneys who appeared before him, the ALJ, upon careful review of the evidentiary record, reasonably found that Finnegan was culpable for Organik Kimya's misconduct in this investigation. It has been suggested by Finnegan that these statements counteracted the notice provided to the firm. The Commission has carefully considered each of these remarks in the context of counsel's obligations under the rules with respect to conduct in the discovery process. Considering all the evidence and arguments presented on notice, the Commission finds that the statements made by the ALJ do not outweigh the evidence of sufficient notice to the firm that its conduct in discovery was at issue. Counsel is expected to meet the obligations set forth in Rule 210.33 throughout the course of an investigation. There is no requirement that counsel receive enhanced and particularized notice of allegations of misconduct. Finnegan's culpability will be discussed further, *infra*.

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aforementioned and many other inapposite cases provides little guidance about what process is due in the specific setting of this case.

In its brief to the Commission, Finnegan improperly conflates Federal Rule 37, and thereby Commission Rule 210.33, with other bases for sanctioning attorneys. *See, e.g.*, Finnegan Br. 3-4, 13-14. For example, sanctions under a court's inherent authority require a finding of bad faith, unlike Rule 37. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763-67 (1980) (distinguishing Rule 37 sanctions from inherent authority). Federal Rule of Civil Procedure 11 has its own requirements and limited purpose, *In re Kunstler*, 914 F.2d 505, 522-24 (4th Cir. 1990), which are different from those of Rule 37.

Finnegan also loses sight of Federal Rule 37 in its reliance upon cases in which the authority for the sanctions—such as inherent authority, Federal Rule of Civil Procedure 11, Federal Rule of Civil Procedure 37, or 28 U.S.C. § 1927—was unstated or provided inadequate support for the type of relief granted. *Roadway*, 447 U.S. at 762-63 (1980) (no attorneys' fees under 28 U.S.C. § 1927); *Loops, LLC v. Phoenix Trading, Inc.*, 2014 WL 5859156, at *5-*6 (Fed. Cir. Nov. 13, 2014) (reviewing issuance of sanctions for false deposition testimony, which fell outside of Fed. R. Civ. P. 37(b)(2)(C) for violating a court order). Commission Rule 210.33, like Federal Rule of Civil Procedure 37, expressly provides for liability of counsel for certain fees and costs caused by the failure to obey discovery orders. 19 C.F.R. § 210.33(c)(1); Fed. R. Civ. P. 37(b)(2)(C). Indeed, the ALJ was quite emphatic about Finnegan's and Organik Kimya's misconduct. ID at 112 ("The filing of this [April 4, 2014] 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."); *id.* at 80 n.14 ("Organik Kimya's attempt to cover up its spoliation by uttering patently false statements," in Finnegan's April 4, 2014, letter "to the undersigned should shock the conscience of any reasonable person. There

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can be no excuse for such conduct.”); *see also id.* at 116-17. Accordingly, Finnegan’s cited cases are inapposite.

Similarly, Finnegan improperly relies upon cases in which the presiding judge failed to explain the relationship between counsel’s conduct and the client’s conduct. *In re Yellen & Herstic*, 804 F.2d 191, 193 (2d Cir. 1986) (Finnegan Br. 7); *see also Hyde & Drath v. Baker*, 24 F.3d 1162, 1172 (9th Cir. 1994) (excusing counsel for certain sanctions for conduct in a timeframe in which the district court had found counsel blameless) (Finnegan Br. 5). As noted above, the ID in the present investigation explained counsel’s culpability. ID at 112.

Finnegan’s due process arguments also improperly rely upon cases concerning punitive, rather than compensatory, awards as are involved here. *See Satcorp Int’l Group v. China National Silk Import & Export Corp.*, 101 F.3d 3, 5-6 (2d Cir. 1996) (Finnegan Br. 6); *Hathcock v. Navistar International Transportation Corp.*, 53 F.3d 36, 39, 42 (4th Cir. 1995) (Finnegan Br. 8). This is not a punitive fine case; the standards are different for punitive and compensatory sanctions. *See Eastcott v. Hasselblad USA, Inc.*, 564 F. App’x 590, 597 (Fed. Cir. 2014) (“On remand, the district court must also reconsider any sanctions which are punitive rather than merely compensatory in nature. When imposing punitive sanctions, such as the portion of the sanction here made payable to the court, additional procedures are required.”). Indeed, attorneys’ fees are the “mildest” sanction available under Rule 37. *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066 (2d Cir. 1979); *cf. Roadway Express*, 447 U.S. at 767 n.14 (“The due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers.”).

Finnegan draws a tenuous link to some of these authorities by suggesting that the proper sanctioning authority for the Commission is Commission Rule 210.4(d), which is the

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Commission's analogue to Federal Rule of Civil Procedure 11.²⁸ Finnegan Br. 13; *see* 19 U.S.C. § 1337(h) (authorizing sanctions as authorized under Federal Rules 11 and 37). Finnegan argues that Commission Rule 210.4(d) would have provided Finnegan with additional procedural protections that Commission Rule 210.33 lacks. Finnegan Br. 13-14, 19. However, neither Federal Rule 37(b) nor Commission Rule 210.33(c) requires the hearing sought by Finnegan.²⁹

The ALJ properly exercised authority to sanction under Commission Rule 210.33, as opposed to Commission Rule 210.4(d). The ALJ expressly found, ID at 104-05, that Finnegan's submission of the April 4, 2014, letter violated the ALJ's discovery orders,³⁰ obstructed discovery, and exacerbated Dow's expenses, and that Finnegan's conduct falls squarely within the scope of Commission Rule 210.33 (*i.e.*, Federal Rule 37). We affirm the ALJ's findings. Tellingly, Finnegan offers no legal support for its proposition that Rule 11 (and thereby Commission rule 210.4) trumps Rule 37 (and thereby Rule 210.33). To the extent that the two Commission rules overlap, the ALJ had the authority to choose either. 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1336, at 625 (3d ed. 2004) ("Indeed, in many contexts, two or more of these sanctioning sources [*i.e.*, Rule 11, Rule 26(g), Rule 37, or inherent authority] overlap, and the district judge has the authority to pick among them in terms of their relative appropriateness."). In any event, a hearing was conducted by the ALJ with respect to the

²⁸ Federal Rule 11 and Commission Rule 210.4 generally do not apply to discovery disputes. Fed. R. Civ. P. 11(d); 19 C.F.R. § 210.4(e). We do not reach whether Finnegan's conduct could be sanctionable under Commission Rule 210.4.

²⁹ Federal Rule of Civil Procedure 37(a), which is not at issue here, used to include a hearing requirement, but was amended in 1993 "to make clear that the court can consider such questions on written submissions as well as on oral hearings." Advisory Committee's Notes on Fed. R. Civ. P. 37(a)(4) (1993) (now Rule 37(a)(5)).

³⁰ *See* Order No. 16 (Feb. 20, 2014); Transcript of Hearing 6-8 (Mar. 20, 2014). The other orders that Organik Kimya violated involve misconduct surrounding Dr. Nene and Mr. Strozzi. *See* Order No. 15 (Feb. 4, 2014) (regarding Dr. Nene); Transcript of Hearing 8-10 (Mar. 26, 2014) (regarding Mr. Strozzi).

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discovery misconduct here. Finnegan had the opportunity during the two day hearing to present any evidence it believed to be exculpatory. Inasmuch as the subject matter of the hearing implicated Finnegan's own conduct as well as Organik Kimya's, Finnegan's claim that a second hearing was legally mandated falls flat.

We affirm the ALJ's authority to assess joint and several liability upon the record presented to him. In addition, the Commission finds, based upon the entire record of the investigation, including the additional process afforded to Finnegan through its submissions to the Commission, that the ALJ's assessment of monetary sanctions jointly and severally to compensate Dow for costs and fees caused by the discovery abuse here is appropriate.³¹

In making this determination, we reject Finnegan's arguments that additional process should have been afforded because of Finnegan's duties of advocacy. We reject Finnegan's apparent contention that there exists a two-tiered scheme of advocacy, in which overzealousness or recklessness must be permitted until counsel is put on enhanced and particularized notice that it may share some blame with its client. With regard to Finnegan's and Organik Kimya's general failure to disclose or explain the steps that were taken to preserve evidence, *see* ID at 112; *see also id.* at 82-84 & nn.15-16., Finnegan argues as follows:

Absent such notice, counsel's sole obligation is to defend the client's interest to the best of counsel's ability, without fear that the representation will be materially limited by counsel's own interest in avoiding sanctions. *See* ABA Model R. Prof'l Resp. 1.7(a)(2). When counsel receives notice that *counsel's* property and reputation are at issue, counsel must look at all the evidence, including the litigation hold, in a different light.

³¹ *See McLaughlin v. Phelan Hallinan & Schmeig, LLP*, 756 F.3d 240, 250 (3d Cir. 2014) (finding due process to have been afforded based upon briefing after the district court's *sua sponte* imposition of sanctions under Federal Rule 37); *Porter Bridge Loan Co. v. Northrop*, 566 Fed. App'x 753, 756-57 (10th Cir. 2014) (holding that all that is required is "an opportunity to brief the issue"); *see also* 19 C.F.R. § 210.33(c) (providing the Commission, as well as the ALJ, with the authority to assess sanctions).

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Finnegan Br. 15 (emphasis in original). Finnegan misses the point: *Counsel's conduct is always potentially at issue*. Finnegan misreads the ABA model rules.³² ABA Model Rule 1.7 governs when counsel must cease representing a client due to a conflict of interest. It does not condone overzealous advocacy or excuse inadequate investigation by counsel, depending on whether, for each next step taken by the attorney, the tribunal has issued a particularized sanction warning that counsel might incur joint and several liability with the client. As Dow's reply brief correctly observes, Federal Rule 37 does not require a specific warning that would cause counsel to shift into a different gear of advocacy. Dow Sanctions Reply Br. 9. And Dow is also correct that Finnegan's reliance upon Rule 1.7 would suggest that Finnegan was obligated to withdraw its representation, and to this day Finnegan has not done so. *Id.* at 11; *see* Hr'g Tr.13-14 (Mar. 19, 2014) (alluding to a "very, very difficult conversation" between Finnegan and Organik Kimya, which the ALJ understood to regard Finnegan's representation of Organik Kimya).

2. Finnegan's Culpability

The ALJ gave four reasons for joint and several liability. *See* ID at 112. First, the ALJ found that because Organik Kimya is a Turkish company with no significant operations in the United States, a monetary fee award will be difficult to enforce against Organik Kimya. *Id.* To give Dow effective relief, the ALJ stated, Organik Kimya's counsel should be held jointly liable. *Id.* Second, the ALJ noted that a Finnegan attorney was present in Turkey to oversee the

³² Finnegan does not argue that sanctions require a predicate finding of a violation of an underlying rule of professional responsibility. *See generally* Richard G. Johnson, *Integrating Legal Ethics & Professional Responsibility with Federal Rule of Civil Procedure 11*, Loyola L.A. L. Rev. 819, 891 (2004) ("All that we know for a fact from the above review is that the litigation ethics rules have not been used as the Civil Rule 11 standard in over ninety-nine percent of the Civil Rule 11 cases."). The ethics rules serve a different purpose than a tribunal's rules, and are enforced by different entities. What matters here is whether a Commission rule has been violated—here one was in view of the breach of the ALJ's discovery orders—and not whether state ethics officials would independently sanction the attorney.

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inspection of the Perez laptop, but failed to safeguard that laptop from Organik Kimya's tampering. *Id.* Third, the ALJ criticized an April 4, 2014, letter from Finnegan to the ALJ, which defends Organik Kimya's destruction of files on the Perez laptop. *Id.* The ALJ found that the letter was submitted without conducting an adequate investigation as to whether the explanations in the letter were factually correct, and the contents of the letter were "not the slightest bit credible." *Id.* The ALJ further found the filing of the letter "exacerbated the discovery dispute . . . increasing the costs and fees born by Dow." *Id.* Finally, the ALJ noted there is no evidence that counsel gave litigation hold instructions to Organik Kimya or provided "evidence that an active undertaking was made to preserve evidence in this investigation." *Id.*

Finnegan argues against each basis for joint and several liability. The Commission has considered these arguments and affirms imposition of joint and several liability on Finnegan, but does so based only on three of the ID's bases.

As to the first of the four bases for joint and several liability—Organik Kimya's ability to pay—we vacate the statement in the ID that joint liability for counsel is appropriate because it may be difficult for Dow to collect on a judgment solely against Organik Kimya. We agree with Finnegan that this is not a cognizable factor for imposing liability on counsel.³³ As discussed below, we determine that the record supports holding Organik Kimya and Finnegan jointly and severally liable without consideration of this factor.

Finnegan argues that it was inappropriate for the ALJ to take account of Finnegan's presence in Turkey when spoliation of the Perez computer occurred. Finnegan Br. 10-11, 32-34. We affirm that the ALJ could reasonably consider this factor. The forensic imaging of the Perez laptop in Turkey in February 2014 was ordered by the ALJ over Organik Kimya's objection. *See*

³³ The Commission decision on this point is independent of Organik Kimya's establishment of the escrow account.

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Order No. 16 (Feb. 20, 2014). Finnegan does not dispute that the ALJ's order mandating the inspection imposed upon it and its client a duty to preserve all evidence on the laptop. Yet, there was no evidence presented to the ALJ that the Finnegan attorney supervising the inspection took any action to secure the Perez laptop and the data on it in advance of the inspection.³⁴ To the contrary, the record evidence is that the start time of the forensic inspection was delayed by several hours because the attorney was attending a soccer game the night before the scheduled date, and desired to avoid morning traffic. *See* ID at 22. This precise period coincides with the destruction of files and backdating of the clock on the Perez computer. *Id.* at 22-25, 80; Letter from Paul Brinkman to Hon. Thomas B. Pender 2-3 (Mar. 18, 2014); Letter from Paul Brinkman to Hon. Thomas B. Pender 5 (Apr. 3, 2014); Hr'g Tr. 348:12-22 (July 9, 2014) (Finnegan counsel explaining, with regard to the spoliation of Dr. Perez's computer, that "the company has a position, it's been made of record, there's evidence on their side that rebuts those contentions," and that "with all due respect, I prefer to leave it at that"). Those facts, without any credible facts to the contrary, support a conclusion that Finnegan did not fulfill its duty to preserve evidence. *See, e.g., Rosenthal Collins Grp., LLC v. Trading Techs. Int'l, Inc.*, No. 05-C-4088, 2011 WL 722467, at *12 (N.D. Ill. Feb. 23, 2011) ("At a minimum, RCG and its counsel had a duty to preserve the evidence, which they could have done by taking physical possession of, or

³⁴ While this matter was pending before the Commission, an attorney whose conduct is in issue initiated a brief social conversation with Commissioner Kieff during a break at a large annual conference for the bar that practices before the Commission. Commissioner Kieff did not know the attorney before the conversation and did not become aware that the attorney was involved in this pending matter until he recognized the attorney's name several minutes into the conversation. The subject of this case did not arise during the conversation, which Commissioner Kieff ended after several minutes. Commissioner Kieff has considered whether this contact with the attorney impaired the Commissioner's ability to work on this matter in an impartial and unbiased manner. Commissioner Kieff properly concluded that it did not.

Commissioner Kieff, joined by Vice Chairman Pinkert, observes that social discussion at professional gatherings between Commissioners and private individuals—which should be mindful of ethical and prudential considerations—is valuable and to be expected.

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obtaining forensic images, of the evidence.”); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (“It is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.”). Counsel must remain mindful of its own ongoing obligations to protect the integrity of the evidence and the representations provided to the Commission and opposing parties on behalf of its client and itself.

As to the ALJ’s third factor, Finnegan’s April 4, 2014, letter, Finnegan does not dispute that the explanations in that letter about the Perez laptop were false. Finnegan Pet. at 13. Moreover, Finnegan does not dispute that its filing of the April 4, 2014, letter exacerbated the discovery dispute, resulting in Dow conducting further expensive forensic investigations to prove that the letter contained false assertions. *See* ID at 112. In connection with its April 4, 2014, letter, Finnegan argues that it reasonably relied upon technical evidence presented to it by Organik Kimya. Finnegan Br. 34-40. We affirm the discussion of the ALJ rebuffing these same arguments. ID at 71, 74, 77, 80 n.14; *see also* Dow Sanctions Reply Br. 26-29. Moreover, Dow correctly observes that Finnegan did not merely serve as a passive conduit for its client’s representations, but stood behind those representations without having any basis for supporting their veracity. *Id.* at 27. In addition, while Finnegan asserts that it was pressed for time, Finnegan Br. 39, 43, that does not justify submission of false information to the ALJ. *Cf. NHL*, 427 U.S. at 641-43 (1976) (upholding a district court’s Rule 37 default sanction for failure to comply with a court order under circumstances with arguably tighter time constraints than those in the present investigation). As noted by Dow, Finnegan had more time than Finnegan contends; Dow put the firm and Organik Kimya on notice of Perez-related issues no later than March 18, 2014, when Dow counsel submitted a letter to the ALJ that provided specific details

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about the Perez-related tampering. Dow Sanctions Reply Br. 27-28. While we agree with Dow, we note that even absent those earlier communications, the ALJ could have properly found Finnegan's conduct inexcusable in view of Organik Kimya's other known or alleged instances of spoliation or obstruction of discovery, including allegations of false testimony under oath.³⁵ Dow's briefs offer a timeline that demonstrates that Finnegan's conduct with respect to Dr. Perez's laptop was not reasonable in view of Finnegan's knowledge about what Organik Kimya had destroyed or attempted to destroy earlier in the investigation.³⁶ Dow Br. 4-5, 24-25; Dow Sanctions Reply Br. 24-25. Indeed, previous acts of spoliation served as the bases for Dow's motions that certain computers be made available for forensic examination.³⁷ By March 20, 2014, the ALJ had already recognized the "playing around with hard drives [and] memory devices" and ordered the parties (an order that should not have been necessary) not "to alter,

³⁵ See, e.g., Letter from Paul Brinkman to Hon. Thomas B. Pender 1-5 (Jan. 10, 2014) (Organik Kimya's attempt to destroy documents concerning Dr. Nene); *id.* at 6 (Dr. Perez's involvement to allege that he, and not Dr. Nene is "Dr. X"); Letter from Paul Brinkman to Hon. Thomas B. Pender 1-3 (Jan. 22, 2014) (deletion of Dr. Nene's email accounts); Letter from Paul Brinkman to Hon. Thomas B. Pender 7-8 (Jan. 27, 2014) (Organik Kimya's refusal to identify the "guy" who provided Dow production data to Organik Kimya); Letter from Paul Brinkman to Hon. Thomas B. Pender 1-4 (Feb. 18, 2014) (Dr. Nene's statement at the beginning of the forensic inspection that he no longer had the hard drive that he had strenuously fought to protect from inspection); Letter from Raymond Nimrod to Hon. Thomas B. Pender 2-4 (Mar. 12, 2014) (Organik Kimya's continuation of its implausible argument that Dr. Perez is "Dr. X" and alleging that an Organik Kimya witness, through Finnegan, "provide[d] a false declaration"); Letter from Paul Brinkman to Hon. Thomas B. Pender 1-10 (Mar. 13, 2014) (accusing Dr. Nene and one of Organik Kimya's owners and directors of falsely testifying under oath, and discussing Strozzi and Nene's misappropriation, as well as Nene's spoliation); Letter from Paul Brinkman to Hon. Thomas B. Pender 1-3 (Mar. 18, 2014) (discussing Organik Kimya's tampering with Dr. Perez's computer).

³⁶ Finnegan did not meaningfully rebut Dow's submissions.

³⁷ See Compl'ts' Resp. to Non-Party Dilip Nene's Mot. to Quash Subpoena Duces Tecum Issued on Behalf of Compl'ts 1-3, 6-14 (Jan. 10, 2014) (Dr. Nene's and Organik Kimya's destruction of records); Mem. in Supp. of Compl'ts' Mot. to Compel Forensic Examination 3-6 (Feb. 4, 2014) (Organik Kimya's attempt to destroy its records of communications with Dr. Nene); see also Order No. 15 (Feb. 4, 2014); Order No. 16 (Feb. 20, 2014).

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destroy or otherwise mess with evidence in this case.” Hr’g Tr. 8:15-20 (Mar. 20, 2014); *see also* ID at 20-27.

Before the Commission, Finnegan attempts to pin the blame for Finnegan’s April 4, 2014, letter, on its forensic expert, G. Hunter Jones, who Finnegan alleges approved the content of Finnegan’s letter. Finnegan Br. 36, 39. But the evidence of record demonstrates that its expert conducted no substantive investigation into the veracity of the statements made in the letter before it was submitted to the ALJ. *See* Dow’s Mot. for Leave to File a Reply in Support of Its Motion to Submit the Supplemental Expert Rep. of Spencer C. Lynch, Ex. 4 (May 12, 2014, Jones Dep. 22:19-24:17) (Apr. 29, 2014) (stating that prior to his receipt of Dr. Perez’s laptop, Mr. Jones had not done any work on the case, and that he “did not do much at all before April 8” because he “had a major hearing in Florida for the first week of April”). In its reply brief to the Commission, Finnegan contends that because it “mentioned” a non-testifying expert (apparently Mr. Ferrara, an associate of Mr. Jones) in its petition for Commission review, Finnegan acted appropriately in submitting the false April 4, 2014, letter. Finnegan Reply Br. 37. Finnegan had numerous opportunities to introduce evidence concerning Mr. Ferrara in the course of the proceedings (including in Mr. Jones’s deposition, or at the hearing). That Finnegan once “mentioned” his name in its petition for Commission review is hardly adequate to support an inference either that Mr. Ferrara or Finnegan acted reasonably under the circumstances of this investigation.

Finnegan argues that “Dow’s standard would” improperly “require counsel to second-guess both their client and their experts.” *Id.* We disagree. The reason for this forensic inspection was the alleged—and, as it turned out, actual—attempts by Organik Kimya and Dr. Nene to destroy evidence. Mem. in Supp. of Compl’ts’ Mot. to Compel Forensic Inspection 3-6 (Feb. 4, 2014) (granted in part as Order No. 16). We affirm the ALJ’s finding that the

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explanations in the April 4, 2014, letter “are not the slightest bit credible on [their] face” and that “[a]ny diligent effort by counsel to check the veracity of the explanations in that letter before it was filed would have revealed them as false.” ID at 112. Given the basis for the forensic inspection here, the blind or almost blind deference shown by Finnegan toward Organik Kimya’s offered explanation for its tampering was, and should have been recognized by Finnegan to be, inappropriate.

Regarding the litigation hold, which was the ALJ’s fourth basis, Finnegan does not dispute that it had a duty to preserve evidence independent of Organik Kimya’s duty. *See Telecom Int’l Am. Ltd. v. AT & T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y.1999) (“the obligation to preserve evidence runs first to counsel”); *see also Zubulake*, 229 F.R.D. at 433 & n.80 (S.D.N.Y. 2004) (same). Finnegan also does not dispute that it had a duty to explain to Organik Kimya its obligations to preserve evidence. *See id.* at 433. Instead, Finnegan argues that it would have presented the ALJ with evidence of a litigation hold if Finnegan had notice that it could share liability for sanctions. Finnegan Pet. at 16; Finnegan Br. 47. The ALJ properly expressed concern at Organik Kimya’s assertion—through its counsel—of privilege concerning the facts surrounding litigation holds in this investigation.³⁸ ID at 82-83 n.16. The ALJ properly found that those facts are not privileged. *Id.* (citing *Brown v. West Corp.*, 287 F.R.D. 494, 499-500 (D. Neb. 2012)). Finnegan could have and should have presented the nonprivileged matters discussed in the ID, *id.*, to the ALJ in a timely manner, regardless of any decisions concerning

³⁸ We are not persuaded by Finnegan’s arguments, Finnegan Br. 47 n.14, that its inadequate demonstration of a litigation hold should be blamed on its Turkish witnesses’ supposed confusion about what the term “litigation hold” means. *See* ID at 83-84. A review of the overall transcript of the proceeding makes clear that the witnesses adequately understood the topic.

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waiver of any ostensibly privileged matters.³⁹ As stated above, we have determined that Finnegan had sufficient notice of litigation hold accusations and sufficient notice that Finnegan could be liable for sanctions. As we did earlier, we reject Finnegan's arguments, Finnegan Br. 47, that overzealousness or recklessness is allowed until counsel is put on enhanced and particularized notice that it may share liability with the client.

Finnegan also argues that it fulfilled its document-production obligation because "Finnegan and Organik Kimya went to great lengths to produce discoverable information to Dow." Finnegan Br. 45; *see also id.* at 44-47. Finnegan further notes that Organik Kimya produced more in discovery than Dow. *Id.* That the respondents accused of patent infringement and trade secret misappropriation possessed more discoverable information than the complainants can hardly come as a surprise. And that Organik Kimya did not destroy or suppress *all* of its own discovery cannot justify the culpable conduct in this investigation.

B. Joint and Several Liability with Respect to Mr. Yarsuvat

Organik Kimya's Turkish counsel Mr. Yarsuvat filed a petition for review requesting that the Commission clarify whether he is also jointly and severally liable for monetary sanctions. It is unclear from the ID whether the ALJ intended Mr. Yarsuvat to be held liable. Mr. Yarsuvat notes that the ALJ did not identify by name the counsel that should be held jointly and severally liable. He argues that the reasons that the ALJ relied upon for imposing joint liability relate to Finnegan exclusively. For example, because he and Organik Kimya are both located in Turkey, Mr. Yarsuvat argues that holding him jointly liable does not accomplish the ALJ's intention to

³⁹ It is not clear that the content of any litigation hold—as opposed to the ancillary facts surrounding the hold's issuance—should be protected from disclosure either. While "litigation hold letters are privileged, courts have adopted the view that when spoliation occurs those letters become discoverable." *Magnetar Techs. Corp. v. Six Flags Theme Park Inc.*, 886 F. Supp. 2d 466, 482 (D. Del. 2012), *aff'd*, 2014 WL 545440 (D. Del. Feb. 7, 2014).

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make collection of the sanction easier. Additionally, Mr. Yarsuvat points out the ALJ identified no evidence that Mr. Yarsuvat knew of or was present during the destruction of any evidence.

We determine that the record does not support holding Mr. Yarsuvat jointly and severally liable for monetary sanctions. The factors that the ALJ relied upon to impose joint liability for counsel do not appear to be directed at Mr. Yarsuvat. The ALJ's first stated basis—collectability—would not be served by making Mr. Yarsuvat jointly liable. In any event, we have vacated that basis for joint liability. Next, the ALJ's analysis of counsel's presence in Turkey for the inspection of the Perez laptop focuses on a Finnegan attorney. Additionally, the April 4, 2014, letter cited by the ALJ was from a Finnegan attorney, and no evidence in the record suggests Mr. Yarsuvat was involved in drafting or approving the letter. In view of the foregoing, we clarify that Mr. Yarsuvat is not jointly and severally liable for the fees and costs imposed, based upon the record evidence.

VI. CONCLUSION

We affirm that Organik Kimya is in default as a sanction for spoliation of evidence. We have issued a limited exclusion order to the subject opaque polymers and a cease and desist order directed to Organik Kimya U.S. We affirm that Organik Kimya and the Finnegan law firm are jointly and severally liable for \$1,944,379.91 in monetary sanctions. We determine the record is sufficient to support joint and several liability for Finnegan without consideration of Dow's ability to collect from Organik Kimya, and we vacate the statement in the ID citing potential difficulty in collection as a factor supporting joint and several liability. We clarify that Mr.

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Yarsuvat is not liable for monetary sanctions. We affirm the other findings and conclusions in the ID to the extent they are consistent with this opinion.

By Order of the Commission.

A handwritten signature in black ink, appearing to read "Lisa R. Barton".

Lisa R. Barton
Secretary to the Commission

Issued: April 30, 2015

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Dissenting Views of Commissioner Rhonda K. Schmidlein

I join my colleagues in their determination regarding both the default and monetary sanctions against Respondent Organik Kimya for evidence spoliation. Given the egregious nature of Organik Kimya's conduct, I find that the ALJ was justified in imposing these sanctions. I also agree with the Commission's determination on remedy, bonding, and the public interest. However, I do not join in their decision to hold Organik Kimya's counsel jointly and severally liable for the monetary sanctions. As explained below, I find that counsel was not provided adequate notice and opportunity to be heard prior to the imposition of sanctions. Thus, I would vacate the sanctions imposed on counsel and remand the issue of attorney sanctions to the ALJ for further proceedings.¹

I. BACKGROUND

The attorney sanctions at issue here arose out of an investigation into alleged violations of section 337 by Organik Kimya through the importation into the United States of opaque polymers. Dow's amended complaint alleged that, among other things, Organik Kimya's opaque polymers were produced using trade secrets misappropriated from Dow. As relevant here, during the investigation Dow uncovered that two of Organik Kimya's employees as well as a consultant to the company had each separately destroyed evidence that was responsive to Dow's

¹ I note that bifurcation of this case would permit such action to be taken without delaying the remedial relief sought by Dow. Bifurcation of the issue of attorney sanctions from the rest of the investigation would allow Dow to obtain the relief it deserves as a result of Organik Kimya's violation of section 337 and its appalling conduct during discovery while at the same time afford counsel procedural due process before the Commission decides whether to also sanction the lawyers. Indeed, I note that Organik Kimya has established an escrow account in the full amount of the monetary sanction imposed by the Commission. *See Organik Kimya Br. on Issues under Review at 2* ("Organik Kimya is establishing an escrow account in the United States to eliminate any perception of risk of non-payment of the potential sanction."). Thus, affording counsel procedural due process would not delay Dow actually getting paid in this case.

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discovery requests and covered by certain of the ALJ's discovery orders. Thereafter, on May 19, 2014 Dow moved for default and monetary sanctions against Organik Kimya under Commission Rule 210.33. The ALJ held a two-day oral argument on Dow's motion. The ALJ subsequently issued the Initial Determination ("ID") at issue on October 20, 2014 finding Organik Kimya in default as a sanction for evidence spoliation in violation of discovery orders and ordered Organik Kimya and its counsel under Rule 210.33(c) to pay costs and attorney fees totaling \$1,944,379.91. Organik Kimya is represented by the Finnegan law firm and attorney Mr. Yarsuvat, although the ID does not specifically identify the counsel sanctioned. Without elaboration, the ALJ articulated four reasons for his decision to impose sanctions on counsel:

1. Organik Kimya is a Turkish company with no significant U.S. operations, and a judgment for fees and costs "will be difficult to enforce directly against Organik Kimya."
2. Counsel for Organik Kimya was present in Turkey during the forensic computer inspection of Dr. Perez's laptop in Turkey when spoliation occurred.
3. Organik Kimya's April 4, 2014 letter, submitted by counsel after a forensic inspection revealed spoliation of evidence, was not "the slightest bit credible on its face" and any diligent effort by counsel to check the veracity of the explanations in the letter would have revealed them as false.
4. There was no affirmative evidence that a litigation hold memorandum, or its equivalent, was disseminated or that there was "an active undertaking" to preserve evidence in the investigation.

ID at 112.

In response to the ALJ's ID, Finnegan and Mr. Yarsuvat both moved to intervene and submitted petitions for review. Notably, Finnegan's petition argues, and Mr. Yarsuvat agrees, that counsel never received notice that sanctions were being considered against them prior to the issuance of the ID. They therefore argue the ID's imposition of sanctions against them violated their procedural due process rights. On December 16, 2014, the Commission determined to

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review the ID and granted counsel's motions to intervene. The Commission notice of review sought further briefing from the parties and intervening counsel. Importantly, however, the Commission did not permit the reopening of the record during Commission review. Notice at 3 (Dec. 16, 2014) ("No new evidence will be considered."). Counsel were therefore limited to the record that existed before the ALJ in their briefing before the Commission. As explained below, I find that counsel was not afforded the protections of procedural due process prior to the imposition of the sanctions.

II. LEGAL PRINCIPLES

The ALJ sanctioned counsel in this case under Commission Rule 210.33(c). Rule 210.33(c) permits sanctions for violations of discovery orders; it is analogous to Rule 37(b) of the Federal Rules of Civil Procedure. Rule 210.33(c) reads in relevant part as follows:

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.

19 C.F.R. § 210.33(c).

The Due Process clause states that persons shall not "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. It is settled that the Due Process clause applies to court orders imposing sanctions against counsel. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980). Consistent with the requirements of due process, the Supreme

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Court has explained that, “[l]ike other sanctions, attorney’s fees certainly should not be assessed lightly or without fair notice” and without the opportunity to be heard on the record. *Id.*

“Providing such notice . . . prevents misunderstandings between the offending party and the sanctioning judge, provides an orderly manner and calm forum in which each party has had time to prepare adequately, and certainly aids our review on appeal.” *Johnson v. Cherry*, 422 F.3d 540, 551 (7th Cir. 2005).

Specifically as to Rule 37, case law establishes that an attorney fee sanction under Rule 37(b) is punitive in nature in that the sanction penalizes for an earlier failure to obey a court order. *Hamilton v. Ford Motor Co.*, 636 F.2d 745, 747, 749 n.12 (D.C.Cir.1980) (“The principal purpose of Rule 37(b) is punitive, not compensatory.”); *United States, v. Kouri-Perez*, 187 F.3d 1, 7-8 (1st Cir. 1999). As a punitive sanction², Rule 37 requires, at a minimum, notice and the opportunity to be heard (*i.e.*, the opportunity to make arguments and present evidence) prior to imposition. *See Bowers v. Nat’l Collegiate Athletic Ass’n*, 475 F.3d 524, 544 (3d Cir. 2007) (“Whenever the district court imposes sanctions on an attorney, it must at a minimum, afford the attorney notice and opportunity to be heard.”); *Hathcock v. Navistar Int’l Trans.*, 53 F.3d 36, 42 (4th Cir. 1995) (“This court has recognized that a Rule 37 fine is effectively a criminal sanction, requiring notice and the opportunity to be heard.”).

² The Commission finds that the monetary sanction imposed on counsel is merely compensatory, not punitive. I cannot agree. Simply because counsel’s monetary liability equates to the fees and costs that Dow incurred does not make the sanction less of a penalty to counsel. *See Hamilton*, 636 F.2d at 749, n.12 (“It should be reiterated that Rule 37(b) awards are punitive, not compensatory. No matter who gets the award, defendants will have been punished.”). Indeed, if the monetary sanction is truly compensatory in nature, and nothing more, then Organik Kimya’s establishment of the escrow account in the full amount of the sanction should satisfy the compensatory purpose, leaving no reason to separately sanction counsel.

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Further, separate and apart from any financial harm, an attorney sanction carries with it the stigma of impugning counsel's professional ethics and competence. *See Kouri-Perez*, 187 F.3d at 12. "After all, trial counsel are not sanctioned for exemplary conduct." *Id.* Accordingly, "an order rising to the level of a public reprimand [under Rule 37] is a sanction." *Bowers*, 475 F.3d at 543. ("[A] public reprimand carries with it the formal censure of the court and may, in many cases, have more of an adverse effect upon an attorney than a minimal monetary sanction."). Procedural due process affords attorneys the right to notice and an opportunity to be heard before a public reprimand is imposed under Rule 37. *Id.* at 544.

III. DISCUSSION

A. Dow's Motion Sought Sanctions Against Organik Kimya and Did Not Seek, Propose or Argue for Sanctions Against Counsel

On May 19, 2014, Dow moved for sanctions of default and attorney fees and costs against Organik Kimya. Dow argued that Organik Kimya destroyed and materially altered massive amounts of evidence, which included the electronic information on Dr. Perez's laptop and Mr. Strozzi's laptop. Dow asserted that the spoliation violated several orders, including Order 16 and the ALJ's oral March 20 "Preservation Order." Dow's motion cited Rule 210.33 as the basis for imposing sanctions on Organik Kimya.

Although the Commission finds that Dow's motion provided notice to Organik Kimya's counsel, Dow's motion never indicated that it was seeking sanctions against counsel. For example, Dow's arguments in its motion included the following: "Organik Kimya destroyed and materially altered massive amounts of evidence," (Mem. at 25); "Organik Kimya overrote data" on Dr. Perez's laptop, (*id.* at 25); "Organik Kimya backdated the system clock," (*id.* at 28); "Organik Kimya installed 'WinHex'" on Dr. Perez's laptop, (*id.* at 31); "Organik Kimya used

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‘CCleaner’ to wipe the hard drive the night before the inspection,” (*id.* at 32); “Organik Kimya violated at least Order No. 15, Order No. 16, the Preservation Order, the March 26 Order and the Nene subpoenas,” (*id.* at 39); “Dow has been severely prejudiced by Organik Kimya’s spoliation,” (*id.* at 43); “Organik Kimya is responsible for the actions of its employees” (*id.* at 56).

The Commission opinion observes that Dow’s motion cites Organik Kimya’s April 4 letter to the ALJ – a letter signed by Finnegan. Dow’s motion had argued that the statements in the letter were “not credible” in support of its allegation that Organik Kimya’s acts of spoliation were conducted with bad faith. *Id.* at 27, 30, 32. Nowhere, however, does the motion assert that the letter itself violated a discovery order, a prerequisite to a sanction under Rule 210.33(c) or that outside counsel acted unreasonably or without good faith in submitting the letter. In fact, Dow’s motion included a timeline showing the alleged violations of the ALJ discovery orders. The April 4 letter is not identified as a violation. *Id.* at 41-43. Notably, with regard to whether monetary sanctions should be imposed, Dow argued that “*Organik Kimya* should be ordered to pay monetary sanctions pursuant to Commission Rule 210.33(c).” *Id.* at 75, 78 (emphasis added).

The Commission finds that Dow’s reply brief in support of its motion provided notice to counsel. In the reply brief Dow included a new theory for sanctions, one that was not included in Dow’s opening motion. Namely, Dow asserted for the first time that the lack of a litigation hold constituted a separate basis for sanctions. *See* Dow Sanctions Reply at 14-15. However, Dow’s reply brief did not argue that *outside counsel* failed to take appropriate steps to implement a litigation hold. Instead, Dow again directed its argument to Organik Kimya. Dow argued that Organik Kimya should be sanctioned for failure to issue a litigation hold to “*its* employees.” *See*

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id. (emphasis added). Nowhere does Dow argue or raise the question of whether outside counsel took appropriate steps with regard to a “litigation hold.” *Id.* at 14. Indeed, the heading to the relevant section of Dow’s reply reads, “Organik Kimya should be sanctioned for its admitted failure to issue and distribute a litigation hold.” Answering the question of whether the client failed to take sufficient steps to preserve evidence does not necessarily mean that its outside lawyer did not take appropriate action. That is a separate and different question. In my view, to hold otherwise would make outside counsel a guarantor of the client’s behavior.³

The Commission points to a single sentence in Dow’s reply brief where Dow recites the undisputed general principle that “a party and its counsel are responsible for ensuring ongoing compliance with its obligation to preserve evidence.” According to the Commission, this reference also served to put Finnegan on notice. I cannot agree. I cannot find that, despite the fact that Dow’s motion papers and arguments were explicitly and universally directed towards Organik Kimya, the inclusion in a single sentence of a general principle that references both the client and counsel is sufficient to satisfy the notice requirements of procedural due process. In any event, the statement must be considered in the context of which it was made. This single reference to counsel’s responsibility in Dow’s reply brief was made in the context of Dow’s

³ Dow asserts that it argued in its opening brief that the failure to issue a litigation hold supported its request for monetary sanctions. Dow Resp. to Finnegan’s Petition at 12. The statements about a litigation hold in the opening brief were not presented as a basis for sanctions. Moreover, the statements were again explicitly directed to Organik Kimya. *See* Dow Sanctions Mem. at 5 (“[Organik Kimya] did not even issue a preservation or litigation hold memo to its employees to ensure that electronic documents were not deleted.”), at 76 (“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 documents were not deleted.”), at 78 (“In violation of the parties’ September 6, 2013 stipulation on discovery, Organik Kimya failed to take ‘reasonable steps to preserve potentially relevant ESI . . . such as through a document hold or preservation notice to relevant custodians and personnel.’”).

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theory for the basis of the sanctions as argued in Dow's opening brief. The context was that Dow was arguing that Organik Kimya should be sanctioned.

The Commission also finds that counsel received notice simply on the basis that Dow moved for sanctions under Rule 210.33(c). As support, the Commission relies on *Devaney v. Continental American Insurance Company*, 989 F.2d 1154 (11th Cir. 1993). In *Devaney*, the court held that "a motion for sanctions under Rule 37, even one which names only a party, placed both that party and counsel on notice that the court may assess sanctions against either or both unless they provide the court with substantial justification for their conduct." *Id.* at 1160. I do not find the Commission's view compelling for a number of reasons.

To begin, the Commission is not bound by *Devaney* and, as explained below, other regional appellate courts which I find more persuasive and analogous to this case have held the opposite. Further, *Devaney* is distinguishable from the current investigation on several key points. For example, in *Devaney* the court provided multiple warnings that sanctions were being considered against counsel personally. *See, e.g.*, 989 F.2d at 1158 (stating that the district court issued "an order that included a warning to counsel that the district court would likely hold a post-trial hearing to explore the propriety of Rule 37 and Rule 11 sanctions against them"). Further, the court issued an order requesting submissions in support of or in opposition to sanctions; the order referenced the possibility that sanctions could be imposed on counsel. *See id.* Additionally, the court scheduled a hearing in which the topics of discussion specifically included attorney sanctions. *Id.* Finally, the discovery motions and relevant court orders in *Devaney* related to conduct generally that was within the control of the counsel – providing responses to interrogatories – not to client spoliation of evidence in a foreign country. Contrary to *Devaney*, in the current investigation counsel did not receive any similar notice that sanctions

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were being considered against them. As discussed *infra*, the ALJ's statements to counsel before and during the hearing conveyed just the opposite. Thus, *Devaney* does not compel the outcome the Commission adopts today.⁴

Second, other regional circuit courts have expressed a different view of due process vis-à-vis Rule 37, which I find more persuasive. For example, the Third Circuit in *Bowers v. National Collegiate Athletic Ass'n*, 475 F.3d 524 (3d Cir. 2007), held that a motion for Rule 37 sanctions against a party did not provide sufficient notice of possible sanctions against counsel. In that case, defendant Temple moved for Rule 37 sanctions against plaintiff for discovery abuse. In ruling on Temple's motion, the district court sanctioned plaintiff's counsel with a public reprimand, stating that counsel had acted in bad faith with regard to the alleged discovery abuse.

⁴ Further, neither *Rates Technology, Inc. v. Mediatix Telecom, Inc.*, 688 F.3d 742 (Fed. Cir. 2012) nor *Certain Hardware Logic Emulation Sys. and Components Thereof*, Inv. No. 337-TA-383, Order No. 96, 1997 WL 665012 (July 31, 1997) compel today's outcome. In *Rates Technology*, the Federal Circuit, applying regional circuit law, affirmed the assessment of Rule 37 attorney's fees against the plaintiff's attorney where the district court determined that the attorney and client were equally responsible for the failure to obey the discovery orders. *See* 688 F.3d at 746-49. Specifically, in that case the district court had issued *four* orders which required the attorney to respond to a contention interrogatory seeking plaintiff's theory of infringement. *See id.* at 746-47. Yet, despite these orders – which required disclosure of information *within the possession of the attorney* – the attorney was found to have “repeatedly and willfully” failed to provide adequate responses. *Id.* at 747. The Federal Circuit noted that when the district court issued its fourth order it “warned Mr. Hicks that this is indeed the last opportunity to comply with the directives of this Court and Plaintiff proceeds at its own peril.” *Id.* at 748. Under these circumstances, the Federal Circuit explained that the due process rights of the attorney were not violated when the district court, acting on defendant's motion for sanctions, assessed attorney's fees against the attorney.

In *Hardware Logic*, the ALJ assessed monetary sanctions against respondent and its counsel for discovery abuse where counsel failed to timely produce any detailed information regarding the accused device and certified “grossly inaccurate and misleading” interrogatory responses regarding the design of the accused device. In that investigation the evidentiary hearing established that counsel failed to conduct any inquiry into the accuracy of the interrogatory responses, including failing to confer with their client. Thus, counsel were shown to have failed to conduct a reasonable investigation prior to submitting the inaccurate responses.

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On appeal, the Third Circuit reversed the district court's sanction on the basis that the district court violated counsel's right to procedural due process. The court explained (in the context of Rule 37) that "[w]henver the district court imposes sanctions on an attorney, it must at a minimum, afford the attorney notice and opportunity to be heard." *Id.* at 544. The court thus determined that the filing of the motion under Rule 37 did not provide notice to counsel. *Id.* at 545; *see also Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1357 (3rd Cir. 1990) (indicating that the "mere existence" of a rule or statute concerning sanctions is insufficient to put a party on notice that sanctions are being contemplated; instead "particularized notice is required to comport with due process"); *Satcorp Int'l v. China Nat'l Silk Import & Export*, 101 F.3d 3, 6 (2nd Cir. 1996) (finding attorney's due process rights violated where attorney was not given notice and the opportunity to be heard before the imposition of Rule 37 sanctions).

Finally, although Rule 210.33(c) is analogous to Rule 37(b) of the Federal Rules of Civil Procedure, it is worded differently from Rule 37. Rule 37(b) requires that the court "must" order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses if a discovery order is violated. Conversely, Rule 210.33(c) states that the ALJ or the Commission "may" require the party failing to obey the order or the attorney advising that party or both to pay reasonable expenses. Thus, unlike Rule 37(b), Rule 210.33(c) gives the ALJ and the Commission discretion as to whether to impose monetary sanctions upon a party or an attorney or both. In my opinion, the exercise of such discretion can be meaningful and not arbitrary only if the party to be sanctioned has received notice and an opportunity to be heard as to why sanctions are not warranted.

Accordingly, I disagree with the view that the mere citation to Rule 210.33(c) in a motion seeking sanctions against a party provides notice that counsel's conduct is also at issue. Under

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such a view, nearly any motion for sanctions under Rule 210.33(c) would invite counsel to respond on their own behalf, potentially disrupting the attorney-client relationship. Instead, I find – similar to *Bowers* – that due process at a minimum requires actual notice as well as an opportunity to present evidence and argument prior to the imposition of attorney’s fees and costs under Rule 210.33(c). *See also Satcorp Int’l*, 101 F.3d at 6 (finding attorney’s due process rights violated where attorney was not given notice and the opportunity to be heard before the imposition of Rule 37 sanctions); *Johnson*, 422 F.3d at 551-552 (stating that district court was required to give attorney alleged to have made false statements notice of the specific conduct for which it was contemplating sanctions and to afford her the opportunity to show cause why sanctions were not in order). Providing such notice “prevents misunderstandings between the offending party and the sanctioning judge, provides an orderly manner and calm forum in which each party has had time to prepare adequately, and certainly aids our review on appeal.” *Johnson*, 422 F.3d at 551.

As explained below, there are many questions that I would like addressed before I would feel comfortable imposing not only a severe monetary penalty on counsel (here, almost \$2 million) but also impugning counsel’s integrity and competence as well as potentially damaging their professional standing in the legal community.

B. Contemporaneous Statements Show an Understanding that Counsel was Not Accused of Being Culpable and Therefore Not the Target of Any Possible Sanctions

Even assuming *arguendo* that Dow’s motion against Organik Kimya and/or the rule itself could be considered to have provided adequate notice, the record taken as a whole suggests that counsel’s conduct was not at issue, or, at the least, counsel would have been reasonable to

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believe that their conduct was not in question. The record is replete with statements by the ALJ to the effect that he did not consider counsel's conduct to be at issue.

For example, during a telephone conference on March 19th between counsel for both sides (as well as counsel for Dr. Nene) and the ALJ, the Finnegan attorney stated (in reference to a March 13th letter and a March 18th letter from Dow to the ALJ) that "now that Dow has kind of taken a few swings at us, I think my firm needs to be able to respond, too." Mar. 19, 2014 Conf. Tr. at 15:7-20. In response, the ALJ explicitly states that he is not of the view that counsel's conduct has been implicated. Specifically, the ALJ states:

Mr. [Finnegan attorney], I saw that in the 18th letter, and I would be flabbergasted beyond belief if your firm had anything to be worried about, as well as you too, sir. And *I'm not drawing any inferences about that, and I don't think that Mr. Brinkman wanted me to in that letter. If he did, then I didn't get it. Do you follow what I'm saying, Mr. [Finnegan attorney]?*

Id. at 15:21-16:6 (emphasis added). The Finnegan attorney answers "Yeah. Thank you very much, your Honor." *Id.* at 16:7-8.⁵ Dow's counsel did not correct or otherwise contradict the ALJ upon hearing this statement.

In light of the ALJ's statement to counsel noted above, it would have been reasonable to believe that – absent any further allegations of wrongdoing by counsel – that counsel's conduct was not at issue. As described above, no such allegations were included in Dow's subsequent motion for sanctions. Thus, after the March 19 teleconference and given that Dow's motion did not accuse counsel of wrongdoing or seek sanctions against counsel, it would have been

⁵ The Commission's opinion cites Dow's March 13th letter in which Dow requests that the ALJ order Organik Kimya's counsel to provide a sworn declaration explaining their "misrepresentations" concerning Dr. Nene as providing notice to Finnegan. However, the ALJ did not order Finnegan to submit such declarations and, as noted above, states that he is not of the view that counsel's conduct has been implicated.

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reasonable for counsel to believe that their conduct was not at issue regarding the evidence spoliation.⁶

Even if there was still a question as to whether counsel's conduct was at issue after Dow filed its motion on May 19th, which I do not believe that there was, that question seemed to have been put to rest during the July 8-9th oral argument on Dow's motion. During the course of the hearing, the ALJ assigned "the highest praise" to Finnegan's work under the circumstances, and spontaneously offers after a discussion of the spoliation of the Perez laptop that "I think that you are not responsible for three separate wipeout programs being run nine times or changing the clock." July 2014 Hr'g Tr. at 347:4-18. At the conclusion of the two day proceeding, after hearing extensively from both parties, the ALJ states that he wants to be "clear for the record" that "never for a moment, and I want it very, very, very clear, did I doubt the integrity of any of the counsel from either side" and that there was "no indication" of "anything to connect any of the attorneys to what happened here." In fact, he stated "if I'm any kind of a reader of body language, it's just the opposite." *Id.* at 519:7-25. The ALJ's full statement is as follows:

All right. You know, I guess we're done here. I just want to say that never for a moment, and I want it very, very, very clear, did I doubt the integrity of any of the counsel from either side.

That's one of the most difficult things about this case. I don't want there to be any thought that I did or that I would. I've seen Finnegan too many times in front of me, and they have always been a model of decorum and reliability.

⁶ The Commission's opinion asserts that the ALJ advised Finnegan to mount a defense with evidence and cites an April 7 conference call with counsel. That is not what the transcript of the conference shows, however. The transcript shows that the evidence being discussed were declarations Organik Kimya might submit from "persons in the IT department" pertaining to the handling of the Perez computer. April 7, 2014 Conf. Tr. at 14:18-15:8. Dow was asking the ALJ to order Organik Kimya to "provide the declarations now" so that the employees in the IT department could then be deposed. *Id.* The parties and the ALJ were not discussing Finnegan's conduct or whether it should mount a defense on its own behalf.

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And, you know, one of the law firms I like to have practice in front of me. I like to have Mr. Verhoeven's law firm, I like Quinn Emanuel too. It's always a lot of fun, you know.

So I don't see anything, and *I want it clear for the record, in case I get hit by a truck or anything else, knock on wood, I don't see anything to connect any of the attorneys to what happened here, that occurred here. There is no indication of that. In fact, if I'm any kind of a reader of body language, it's just the opposite.*

Id. at 519. (emphasis added).

In my view, the ALJ's comments at the end of the hearing reflect and further reinforce an understanding that counsel's conduct was not at issue and not the subject of Dow's motion for sanctions. There would have been no reason for counsel to believe that they should have moved to intervene as a party in order to present exculpatory evidence and argument on their own behalf.⁷

In fact, at one point during the discussion of whether Organik Kimya had procedures in place to preserve evidence, the Finnegan attorney offers to go into detail with regard to a "litigation hold," Dow's counsel objects and the ALJ precludes counsel from providing any such detail. The exchange took place as follows:

JUDGE: . . . [A]t the time this litigation was commenced at the ITC, was there a preservation standard operating procedure order or policy in place?

[FINNEGAN]: In connection with this litigation, your Honor?

⁷ The Commission suggests that counsel should have withdrawn their representation of Organik Kimya now that they had notice that their conduct was at issue. In this case, the Commission does not know what steps the attorneys from Finnegan took to advise Organik Kimya and certainly does not know the details of counsel's representation of Organik Kimya. It is possible that counsel received informed consent from Organik Kimya to continue their representation. *See* ABA Model Rule 1.7(b)(4) (permitting representation of a client where there is a conflict of interest when the client gives informed consent, confirmed in writing). Thus, without knowing the relevant facts, I cannot make presumptions about the fact that the attorneys from Finnegan have not withdrawn as counsel for Organik Kimya.

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JUDGE: Yes.

[FINNEGAN]: And the answer to that is I can go through some details about that. And as a factual matter, I think the answer is yes.

JUDGE: I'm sorry, I didn't hear the last.

[FINNEGAN]: As a factual matter, the answer is yes.

[Dow's counsel then objected and a colloquy between the ALJ and counsel for both parties followed with regard to the interpretation of certain deposition testimony from an Organik Kimya employee.]

JUDGE: What I'm going to do is take what I've heard under consideration. Let's proceed with everything other than this, okay?

[FINNEGAN]: Other than this topic, your Honor?

JUDGE: Yes

[FINNEGAN]: I would – I'll move on.

July 2014 Hr'g Tr. at 406:5-409:19.

Under these circumstances, I cannot conclude that counsel has been afforded procedural due process through adequate notice and opportunity to be heard. In addition, I find that the circumstances of this investigation as a whole, including the lack of notice and the ALJ's statements, constitute "other circumstances" that would make an award of expenses "unjust" within the meaning of Rule 210.33(c). *See* 19 C.F.R. § 210.33(c) (precludes the Commission from imposing monetary sanctions on counsel if there is a finding that "other circumstances make an award of expenses unjust"); *Loops, LLC v. Phoenix Trading, Inc.*, 2014 WL 5859156 (Fed. Cir. Nov. 13, 2014) (Rule 37 requires a determination as to whether the attorney's conduct was "substantially justified" or whether "other circumstances make an award of expenses

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unjust”).⁸ In my view, the circumstances of this investigation taken as a whole show that it would be unjust to sanction counsel without reopening the record for additional fact-finding. It would be unjust because counsel would have been reasonable to believe that their conduct was not at issue in light of statements made by the ALJ, and because the record does not show that counsel had adequate notice and opportunity before or during the two day hearing to present exculpatory evidence or argument.

C. Without Notice and the Opportunity to Present Evidence and Argument, the ALJ Erred by Holding Counsel Culpable for the Spoliation of Evidence

As previously noted, the ID provides four bases for holding counsel culpable for the spoliation of evidence: (1) collectability of the sanction; (2) counsel’s presence in Turkey when the forensic examination of Dr. Perez’s laptop took place; (3) the April 4 letter; and (4) the lack of evidence of a litigation hold. I join the Commission in determining to vacate the first basis.

⁸ The Commission’s opinion suggests that the Commission review process cured any due process infirmities that may have existed in the proceedings before the ALJ. Counsel, however, was expressly precluded from submitting evidence during Commission review. *See* Notice at 3 (Dec. 16, 2014) (“No new evidence will be considered.”). Counsel therefore had no way of presenting exculpatory evidence to the Commission. Without the ability to present argument *and* evidence to the Commission, the central issue becomes whether procedural due process was afforded in the proceedings before the ALJ. *Johnson*, 422 F.3d at 553 (“[T]he opportunity to make her case after the court has imposed sanctions is not an adequate substitute for an opportunity to be heard in full before sanctions are ever imposed.”); *Beatrice Foods Co. v. New England Printing & Lithographing Co.*, 899 F.2d 1171, 1177 (Fed. Cir.1990) (“[R]econsideration after a decision is rendered is not a substitute for a pre-decision hearing, when such hearing is otherwise required.”).

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For the three remaining bases, I find that without notice and the opportunity to be heard, it was error for the ALJ to assign culpability to counsel.⁹

Counsel's Presence in Turkey

Specifically, with regard to the second basis, counsel's presence in Turkey, the Commission finds that no evidence was presented to the ALJ that the Finnegan attorney supervising the inspection took any action to secure the Perez laptop and the data on it in advance of the inspection. That there is no evidence is not surprising given that counsel was never provided with notice that their conduct in Turkey was at issue and thus no evidence on this particular question was submitted. Before sanctioning counsel, I would like to know what actions counsel took (or failed to take) in connection with the production of the Perez laptop in Turkey, including any specific advice or requests from counsel to Organik Kimya leading up to the production of the laptop and Organik Kimya's response to counsel.¹⁰ Here, all we know is that counsel did not take physical possession of the computer before spoliation, but neither the

⁹ I find that the ALJ's findings on the three remaining bases directly implicate counsel's credibility, ethics, and competence. These are findings that may harm counsel's reputation and career. In my view, the findings constitute what is in effect a public reprimand. Notice and the opportunity to be heard must be provided prior to the imposition of a public reprimand. *See Bowers*, 475 F.3d at 544-545. Thus, to the extent Organik Kimya's establishment of an escrow account means that it agrees to pay the entire amount of the monetary sanction, counsel has still incurred a cognizable harm deserving of due process protections. *See Organik Kimya Br. on Issues under Review* at 2 ("Organik Kimya is establishing an escrow account in the United States to eliminate any perception of risk of non-payment of the potential sanction.").

¹⁰ In its petition for review, Finnegan states that "counsel from Finnegan attended the inspections with the goal of making sure that Organik Kimya complied with the inspection requirements of Order No. 16, just as he had during Dow's two-day plant inspection at Organik Kimya earlier during discovery." Finnegan Pet. at 4.

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ALJ nor the Commission cites authority¹¹ or a factual basis¹² for concluding that that was a required duty in this case. No one disputes that counsel has a duty to advise their client to

¹¹ The Commission cites *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 433 n.80 (S.D.N.Y. 2004), for the proposition that counsel *themselves* had a duty to preserve evidence – presumably by taking possession of it – independent of Organik Kimya’s duty. *Zubulake* explains counsel’s duty regarding advising clients on evidence preservation. In discussing the preservation of backup email, the court states that in certain circumstances such as “[i]n cases involving a small number of relevant backup tapes, counsel might be advised to take physical possession of the backup tapes.” *Id.* at 434. In my view, *Zubulake* does not articulate a general duty for counsel to take physical possession of all of its client’s property that is the subject of discovery. In addition, no authority has been cited indicating that a practice of counsel taking physical possession of the client’s information is the established standard for litigation at the Commission. I therefore do not find that a general duty exists at the Commission for counsel to take possession of their client’s property during discovery. *Telecom Int’l Am. Ltd. v. AT & T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y.1999), and *Rosenthal Collins Grp., LLC v. Trading Techs. Int’l, Inc.*, 2011 WL 722467, at *12 (N.D. Ill. Feb. 23, 2011), cited by the Commission, are inapposite. *Telecom* simply discusses the attorney’s “duty to advise and explain to the client its obligations to retain pertinent documents.” 189 F.R.D. at 81. And in *Rosenthal*, the court explained that plaintiff and its counsel could have satisfied their preservation duties by taking physical possession of evidence that was held by plaintiff’s agent – an agent who was known to have previously spoliated evidence leading to sanctions earlier in the case and where the agent interacted with plaintiff through counsel.

¹² The Commission finds that Finnegan’s conduct with respect to Dr. Perez’s laptop was not reasonable in view of what the Commission refers to as Finnegan’s knowledge of destruction of evidence or attempted destruction of evidence by “Organik Kimya” earlier in the investigation. The Commission does not cite to any fact-finding in the ID for support, but instead references Dow’s briefs. A review of the cited pages in Dow’s briefs shows that the earlier allegations of destruction of evidence related to Dr. Nene, who was a consultant to Organik Kimya, not an employee. To the extent that the Commission is referring to Dow’s allegations that Organik Kimya may have destroyed evidence relating to its consultations with Dr. Nene, a remand for further fact-finding would allow a determination as to whether Finnegan’s conduct in not taking physical possession of the Perez laptop was reasonable in light of those allegations. To the extent the Commission is referring to evidence spoliation by Dr. Nene, the ALJ found in the investigation that, while Organik Kimya should be faulted for failing to take steps to preserve Dr. Nene’s laptop and external storage devices, Dr. Nene’s bad behavior could *not* be imputed to Organik Kimya. ID at 85 (“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”). Given the ALJ’s finding and the fact that the Commission has precluded additional fact-finding, in my view it is not appropriate to bootstrap Dr. Nene’s conduct into a basis for concluding that Finnegan should be held liable for what happened to the laptop of an Organik Kimya employee.

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preserve evidence and an ongoing obligation to monitor their client's compliance in order to ensure that the client is taking the appropriate steps. Whether that duty includes the step of outside counsel demanding and/or taking physical possession of the client's information will depend on the facts of the case. In this case, the record was never developed because the specific question of Finnegan's conduct in connection with the production of the Perez laptop was never put at issue. It remains possible that the facts, once developed, support the conclusion that counsel should have taken possession of the Perez laptop before it was produced for a forensic inspection. Without such record, however, I believe it was an error for the ALJ to sanction counsel for Organik Kimya's conduct vis-a-vis the Perez laptop. And, in any event, I do not agree that counsel's mere presence in the same country as the production can serve as an appropriate basis for sanctions. *See* ID at 112 ("Second, counsel for Organik Kimya was present in Turkey to oversee the inspection of the Perez company-issued laptop when the spoliation occurred.").

April 4 Letter

As to the third basis, the April 4 letter, the ID states that the explanations provided therein are not the "slightest bit credible on their face" and that "[a]ny diligent effort by counsel to check the veracity of the explanations in that letter before it was filed would have revealed them as false." ID at 112. The ID does not, however, address how counsel was deficient in their efforts

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to make a reasonable inquiry.¹³ It is undisputed that the explanations contained in the letter turned out to be false. That the statements are false, however, is not a basis by itself to impose sanctions on counsel. *See Loops*, 2014 WL 5859156, at *5. The question is whether counsel conducted a reasonable inquiry before submitting the letter.

Here, the Commission affirms the ID's finding that the explanations contained in the April 4th "are not the slightest bit credible on [their] face [and that] [a]ny 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 Commission faults Finnegan for relying on a third party IT expert who, according to the majority opinion, should have but did not conduct what it calls a "substantive investigation into the veracity of the statements made in the letter"

Based on the existing record, I cannot say that Finnegan was not diligent in investigating the initial allegations regarding the Perez computer spoliation presented in Dow's March 18 letter (and by extension Dow's April 3 letter). Again, development of the record in this regard

¹³ Rule 210.33(c) pertains to sanctions for violation of discovery orders, while Rule 210.4(d), the analog to Rule 11 of the Federal Rules of Civil Procedure, pertains to sanctions based on attorney representations in written submissions. Given that the letter constitutes a written submission to the ALJ signed by an attorney and the ID does not find that the letter itself violated any discovery order, it is not clear to me that Rule 210.33 is the proper basis for any sanctions based on the letter. Indeed, Finnegan argues that Rule 210.4(d) is the applicable rule under which to consider the letter. *See Finnegan's Sub. to Issues Under Review* at 13-14. Regardless of which rule is applied, the standard for assessing attorney statements made in a written submission should be the same: whether the statements were made after an inquiry reasonable under the circumstances. *See* 19 C.F.R. § 210.4 (requires attorneys to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, or other documents); *see also* Advisory Committee Notes on Fed.R.Civ.P. 11 ("The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper.").

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may lead me to a different conclusion but, based on the existing record, I cannot agree that the inquiry conducted by Finnegan before submission of the April 4th letter warrants the imposition of sanctions.

Here is what the record shows: after receiving the March 18th letter, Organik Kimya retained Mr. Jones, an independent third-party IT forensic expert whose credentials have not been challenged. Finnegan Pet. at 9. Finnegan disclosed him to Dow on March 19. *Id.* Organik Kimya then filed Mr. Jones' Protective Order undertaking on March 21, which was a Friday. *See* EDIS Doc ID 530221. Thereafter, on Monday, March 24 Finnegan forwarded to Mr. Jones the report of Dow's expert, Mr. Lynch. Finnegan Pet. at 9. Subsequently, another of Dow's forensic experts, Stroz Friedberg, sent Mr. Jones a copy of the forensic image from the Perez laptop. Finnegan forwarded additional materials to Mr. Jones, and held a teleconference with him on March 27, and with a non-testifying expert, Mr. Ferrara, on April 1, attempting to understand the forensic computer image issues. *Id.* Mr. Jones testified that after a draft of the April 4 letter was prepared by Finnegan, he was sent a copy, asked to review and comment on it, and did not remember proposing any changes to it. *See* Dow's Response to Finnegan's Petition at 27-28 (citing Jones Tr. at 103:3-17)).¹⁴

The contents of the April 4 letter address the then asserted spoliation of Dr. Perez's computer. The letter, for example, acknowledges that Organik Kimya manipulated the computer by running "certain computer programs and copied files on Dr. Perez's computer shortly before the forensic inspection." April 4, 2014 letter at 3. The letter asserts that the manipulations were

¹⁴ Finnegan alleges that the April 4 letter "was based on input from Organik Kimya and its expert." *See* Finnegan's Sub. to Issues Under Review at 38; Finnegan Pet. at 11. The fact that Mr. Jones did not propose any edits to the letter should not be summarily taken as an indication that Finnegan did not perform a reasonable inquiry under the circumstances.

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performed to fix problems with a three-year-old computer, and not with the intent of erasing files. Finnegan asserts that Mr. Jones' preliminary review of the Perez forensic image indicated to him that the anomalies to the computer identified by Dow were consistent with troubleshooting. Finnegan's Sub. to Issues Under Review at 37-38. Finnegan asserts that it relied on this input in its letter. *Id.*; Finnegan Pet. at 13. In fact, Mr. Jones' expert report submitted 11 days after the April 4 letter is consistent with the contents of the letter. *See* Expert Report of G. Hunter Jones at ¶¶ 37-73. Further, Finnegan did qualify the statements in the April 4 letter. *E.g.*, April 4, 2014 letter at 2, 5, 9 (“Organik Kimya’s forensic expert is still in the process of finalizing his opinions”; “*We understand* that in order to test the time server, he changed the date and time randomly.”; “. . . *we understand that* the Organik Kimya IT Department installed WinHex to correct the Microsoft Outlook accessibility problems Dr. Perez was having.”) (emphasis added).¹⁵

The ID concludes that the letter is not “credible on its face.” However, in my opinion, this finding appears to be at odds with certain comments and positions taken on the record. Notably, as explained above, at the conclusion of the two day oral argument on Dow’s sanction motion where the explanations contained in the April 4th letter were discussed extensively, the ALJ opines that there was no indication that the attorneys were involved with what happened

¹⁵ The Commission opinion asserts that Mr. Jones conducted “no substantive investigation into the veracity of the statements” made in the letter before it was submitted to the ALJ. It is not clear what is meant by “substantive investigation into the veracity of the statements.” It seems to suggest that Mr. Jones should have conducted an investigation into the subjective intent behind the statements apart from an examination of whether the explanations were technically accurate. In any event, the record shows that Mr. Jones had received the image of the Perez laptop prior to the letter’s submission and, according to Finnegan, he had provided input into responding to the allegations of spoliation. *See* Finnegan’s Sub. to Issues Under Review at 37-38. I believe that the record should be developed to make a determination whether Finnegan acted reasonably in these circumstances in relying on Mr. Jones.

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here. July 2014 Hr'g Tr. at 519 (“I want it clear for the record, in case I get hit by a truck or anything else, knock on wood, I don’t see anything to connect any of the attorneys to what happened here, that occurred here. There is no indication of that. In fact, if I’m any kind of a reader of body language, it’s just the opposite.”). In my view, this statement seems wholly inconsistent with the notion that the explanations contained in the letter submitted by counsel were not credible *on their face*.

Further, the notion that the explanations in the April 4th should be recognized as not credible on their face to a non-expert is belied by the fact that it took Dow’s computer expert, Mr. Lynch, over 90 numbered paragraphs in his declaration to address the Perez computer examination. Dow itself emphasized the difficulty in understanding the Perez laptop in its motion to supplement the report of Mr. Lynch, stating that “examining a particular device for evidence of deletion, backdated timestamps and the use of anti-forensic software is much more time-consuming and complicated” than a one-step forensic examination of an electronic device. Reply in Support of Dow’s Motion for Leave at 2. Dow’s brief quoted the deposition testimony of Mr. Lynch to support the point that the forensic examination of the Perez computer was a “complicated iterative process.” *Id* at 3. In light of all this, in my view, the record does not support the conclusion that the letter can be deemed not credible on its face from the perspective of outside counsel who is not an IT forensic computer expert.

If the April 4th letter is considered credible on its face – which the contemporaneous statements of both the ALJ and Dow suggests to me that it was – then the question is why was Finnegan’s reliance on a third-party IT expert not enough. What more should Finnegan have done? Additional fact-finding would allow a decision on whether Finnegan acted reasonably in relying on its experts.

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Litigation Hold

As to the fourth basis, the ID states that “there is no affirmative evidence of record that a litigation hold memo, or equivalent, was issued or disseminated in this investigation.” ID at 112. In this case, the Commission does not know what steps counsel took to advise their client to identify and preserve evidence and monitor their compliance because the motion for sanctions was directed at Organik Kimya, not counsel. Again, before imposing what is a severe monetary sanction and public reprimand, I would like to have the question squarely presented and evidence submitted with regard to, for example, what advice did counsel provide to their client with regard to the preservation of evidence; what steps did counsel take to ensure compliance; what was the client’s response; and what was counsel’s understanding of the client’s response.¹⁶

Although the issue has not been explored in the investigation, there is nonetheless record evidence that indicates counsel did in fact advise Organik Kimya on document preservation. For example, the declaration of Murat Turaman, who is the Strategic Planning Director at Organik Kimya, shows that counsel did provide advice on the ALJ’s oral Preservation Order, which ordered Organik Kimya to preserve Mr. Strozzi’s laptop, among other things, for forensic examination. The declaration states that Organik Kimya learned of the ALJ’s preservation instructions on the afternoon of March 20, the same day the order was issued. Decl. at ¶ 3; see July 2014 Hr’g Tr. at 298:13-25. The declaration further states that on that evening Mr.

¹⁶ In its briefs to the Commission, Finnegan does assert that counsel did undertake document preservation efforts including “oral document preservation advice provided before institution of the investigation, written preservation advice provided shortly after institution (and many months before the February 27-28 inspection) about preserving paper and electronic documents throughout the proceeding, advice provided during one-on-one interviews with document custodians about suspending document destruction policies and preserving documents, and advice about compliance with the ALJ orders.” Finnegan’s Submission in Resp. to Briefing Questions at 47.

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Turaman instructed Mr. Strozzi to send the password of his email to “our counsel, as well as preserve the information in his email account and in his laptop computer.” Decl. at ¶4. Mr. Turaman’s knowledge of the ALJ’s Preservation Order could have only originated from Organik Kimya’s litigation counsel.

Further, during the hearing counsel stated that a document preservation procedure was in place when directly asked by the ALJ. As noted above, the exchange took place as follows:

JUDGE: ... [A]t the time this litigation was commenced at the ITC, was there a preservation standard operating procedure order or policy in place?

[FINNEGAN]: In connection with this litigation, your Honor?

JUDGE: Yes.

[FINNEGAN]: And the answer to that is I can go through some details about that. And as a factual matter, I think the answer is yes.

JUDGE: I’m sorry, I didn’t hear the last.

[FINNEGAN]: As a factual matter, the answer is yes.

[Dow’s counsel then objected and a colloquy between the ALJ and counsel for both parties followed with regard to the interpretation of certain deposition testimony from an Organik Kimya employee.]

JUDGE: What I’m going to do is take what I’ve heard under consideration. Let’s proceed with everything other than this, okay?

[FINNEGAN]: Other than this topic, your Honor?

JUDGE: Yes.

[FINNEGAN]: I would – I’ll move on.

July 2014 Hr’g Tr. at 406:5-409:19.

Again, without notice and the opportunity to be heard, I believe it was error for the ALJ to assign culpability to counsel based on an alleged failure to issue a litigation hold

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memorandum to the client. Indeed, it strikes me as exceedingly unfair to do so after Finnegan offered to go into detail about the preservation policy in place and the ALJ declined to hear it.

D. Sanctions with Respect to Mr. Yarsuvat

Organik Kimya is represented in this investigation by Finnegan and Mr. Yarsuvat. The ID does not indicate whether the sanctions were to be imposed on both Finnegan and Mr. Yarsuvat or just Finnegan. The Commission finds that the record does not support sanctions against Mr. Yarsuvat and that the bases relied upon for sanctioning counsel do not appear to be directed at Mr. Yarsuvat.

My view is that the record on whether attorney sanctions should be imposed has not been developed because notice was never provided. Given that the record has not been developed, and that I believe the matter of attorney sanctions should be remanded back to the ALJ, it appears premature to decide that the record does not support sanctions against Mr. Yarsuvat. The little that the record does show indicates that, like Finnegan, Mr. Yarsuvat was present in Turkey when the forensic examination of Dr. Perez's laptop took place. I would therefore remand the issue of sanctions as to Mr. Yarsuvat for additional fact-finding. In so doing I do not mean to suggest that Mr. Yarsuvat should be sanctioned. I simply cannot arbitrarily assign or not assign culpability based on the record as it currently exists.

IV. CONCLUSION

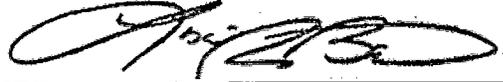
Before the Commission sanctions counsel under Rule 210.33(c)– an action that impugns counsel's integrity and which harms the reputation and potentially career – that counsel should receive notice that their conduct is at issue and the opportunity to present evidence and argument on their behalf. In this investigation, I find that Organik Kimya's counsel did not receive

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adequate notice or opportunity. I therefore would bifurcate the proceedings, vacate the sanctions imposed on counsel and remand the issue to the ALJ for additional proceedings.

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served upon the following parties as indicated, on **April 30, 2015**.



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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN OPAQUE POLYMERS

Investigation No. 337-TA-883

**NOTICE OF COMMISSION DECISION TO GRANT MOTIONS TO INTERVENE;
COMMISSION DECISION TO REVIEW AN INITIAL DETERMINATION GRANTING
DEFAULT AND SANCTIONS; REQUEST FOR WRITTEN SUBMISSIONS ON ISSUES
UNDER REVIEW, REMEDY, THE PUBLIC INTEREST, AND BONDING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has granted motions by Finnegan, Henderson, Farabow, Garrett & Dunner, LLP ("Finnegan") and Ömür Yarsuvat ("Yarsuvat") to intervene in this investigation for a limited purpose. The Commission has further determined to review an initial determination ("ID") (Order No. 27) issued by the presiding administrative law judge ("ALJ") finding respondents Organik Kimya San. ve Tic. A.Ş. of Istanbul, Turkey; Organik Kimya Netherlands B.V. of Rotterdam-Botlek, Netherlands; and Organik Kimya US, Inc., of Burlington, Massachusetts (collectively, "Organik Kimya") to be in default as a sanction for discovery abuse and ordering monetary sanctions. Accordingly, the Commission requests written submissions, under the schedule set forth below, on certain issues under review and on the issues of remedy, public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Clark S. Cheney, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2661. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 21, 2013, based on a complaint filed by the Dow Chemical Company of Midland, Michigan, and by Rohm and Haas Company and Rohm and Haas Chemicals LLC, both of Philadelphia, Pennsylvania (collectively, "Dow"). 78 *Fed. Reg.* 37571 (June 21, 2013). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), by reason of the importation into the United States, the sale for importation, and the sale within the United States after importation of certain opaque polymers that infringe certain claims of four United States patents: U.S. Patent Nos. 6,020,435; 6,252,004; 7,435,783; and 7,803,878. The notice of investigation named five respondents: the three Organik Kimya respondents noted above; Turk International LLC of Aptos, California ("Turk"); and Aalborz Chemical LLC d/b/a All Chem of Grand Rapids, Michigan ("Aalborz"). The complaint and notice of investigation were amended to add allegations of misappropriation of trade secrets. 78 *Fed. Reg.* 71643 (Nov. 29, 2013). The Office of Unfair Import Investigations is not a party to this investigation.

On December 13, 2013, the Commission determined not to review an initial determination (Order No. 11) terminating the investigation with respect to U.S. Patent Nos. 7,435,783; and 7,803,878.

On May 19, 2014, Dow filed a motion for default and other sanctions against Organik Kimya for discovery abuse. On May 21, 2014, Organik Kimya filed a motion to terminate based upon a consent order stipulation. On July 8-9, 2014, the ALJ conducted a hearing on the pending motions. On October 20, 2014, the ALJ issued an ID (Order No. 27) finding Organik Kimya in default, under Commission Rule 210.42(c), and ordering monetary sanctions jointly and severally against Organik Kimya and its counsel. Organik Kimya is represented by Finnegan, a law firm in Washington, DC, and by Yarsuvat, an attorney in Istanbul, Turkey. The ALJ denied Organik Kimya's motion to terminate the investigation based upon a consent order stipulation.

On October 28, 2014, Organik Kimya filed a petition for review of the sanctions ID. The same day, Finnegan and Yarsuvat filed separate motions before the Commission to intervene in the investigation for the purpose of contesting joint liability for the monetary sanction. Finnegan and Yarsuvat also filed provisional petitions for review of the sanctions ID. On November 10, 2014, Finnegan filed a motion for leave to file a reply in support of its motion to intervene, which Dow opposed. The Commission extended the time for determining whether to review the sanctions ID until December 16, 2014.

On October 30, 2014, Dow filed an unopposed motion to withdraw the amended complaint as to the two remaining asserted patents, U.S. Patent Nos. 6,020,435 and 6,252,004, and to withdraw all allegations against Turk and Aalborz. On November 3, 2014, the ALJ granted the motion in an ID (Order No. 29), and on December 1, 2014, the Commission determined not to review the ID. Accordingly, the only remaining respondents in the investigation are the Organik Kimya respondents. The only remaining issues are Dow's claims based on trade secret misappropriation and the sanctions ID.

The Commission has determined to grant the motion by Finnegan for leave to file a reply in support of its motion to intervene and has considered the reply. The Commission has further determined to grant the petitions by Finnegan and Yarsuvat to intervene in this investigation for the limited purpose of disputing joint and several liability for the monetary sanctions imposed in the sanctions ID. The Commission has considered the petitions for review filed by Finnegan and Yarsuvat, in addition to the petition for review filed by Organik Kimya and the oppositions thereto filed by Dow.

In light of the intervention by Finnegan and Yarsuvat, the Commission has determined to review the sanctions ID. In connection with its review, the Commission requests responses only to the following questions. The parties are to brief their positions with reference to the applicable law and citations to the existing evidentiary record. No new evidence will be considered.

1. Please brief the law governing what types of notice and opportunity to present evidence and argument must be provided to counsel before imposing sanctions on the counsel based on the types of conduct cited on page 112 of the ID. Please also brief how that governing law applies to Organik Kimya's counsel in this investigation, based on the existing record in this investigation. In answering this question, please specifically address whether and when Organik Kimya's counsel was or should have been on notice that counsel might be subject to sanctions and whether they were given adequate opportunity to present evidence and argument on any issue of which they had notice.

2. Please discuss duties that counsel may have under ITC rules, ethics rules, case law, and any other relevant sources with respect to the conduct cited on page 112 of the ID, including duties relating to the implementation of a litigation hold, a duty to investigate before making a representation to the tribunal, a duty to avoid willful blindness, or a duty to preserve or take possession of evidence. In answering this question, please also address any duties that may arise when counsel has received notice of allegations that the counsel's client has intentionally spoliated evidence. Please also explain with citation to the existing record whether Organik Kimya's counsel satisfied any such duties in this investigation.

Other issues on review are adequately presented in the parties' existing filings. The parties are not to brief the sanction finding Organik Kimya in default nor Organik Kimya's liability for monetary sanctions.

In connection with the final disposition of this investigation, the Commission may: (1) issue an order that could result in the exclusion of articles manufactured or imported by the respondents; and/or (2) issue a cease and desist order that could result in the respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either

are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 7-10 (December 1994).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors that the Commission will consider include the effect that the exclusion order and/or cease and desists orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. See Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Complainants are requested to submit proposed remedial orders for the Commission's consideration. Complainants are further requested to state the date upon which the patents expire and the HTSUS numbers under which the accused products are imported and to provide identification information for all known importers of the subject articles.

Written submissions and proposed remedial orders must be filed no later than the close of business on December 30, 2014. Reply submissions must be filed no later than the close of business on January 7, 2015. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadline stated above and submit eight true paper copies to the Office of the Secretary pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-883") in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment.

See 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted nonconfidential version of the document must also be filed simultaneously with any confidential filing. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton
Secretary to the Commission

Issued: December 16, 2014

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION NOTICE** has been served by hand upon the following parties as indicated, on **December 16, 2014**.



Lisa R. Barton, Secretary
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On Behalf of Complainants Rohm and Haas Co., Rohm and Haas Chemicals LLC, and The Dow Chemical Company:

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UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC

In the Matter of)	
)	Investigation No. 337-TA-883
CERTAIN OPAQUE POLYMERS)	

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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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. Frije, *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 (2d 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.”).

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.

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 Kullanılan 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

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:

(*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 (Kaslowski Dep.) at 145:7-12.) Contrary to both Dr. Nene's and Mr. Kaslowski's testimony, forensic analysis of Dr. Nene's laptop recovered fragments from an email stating that Dr. Nene and Mr. Kaslowski 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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Kaslowski 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

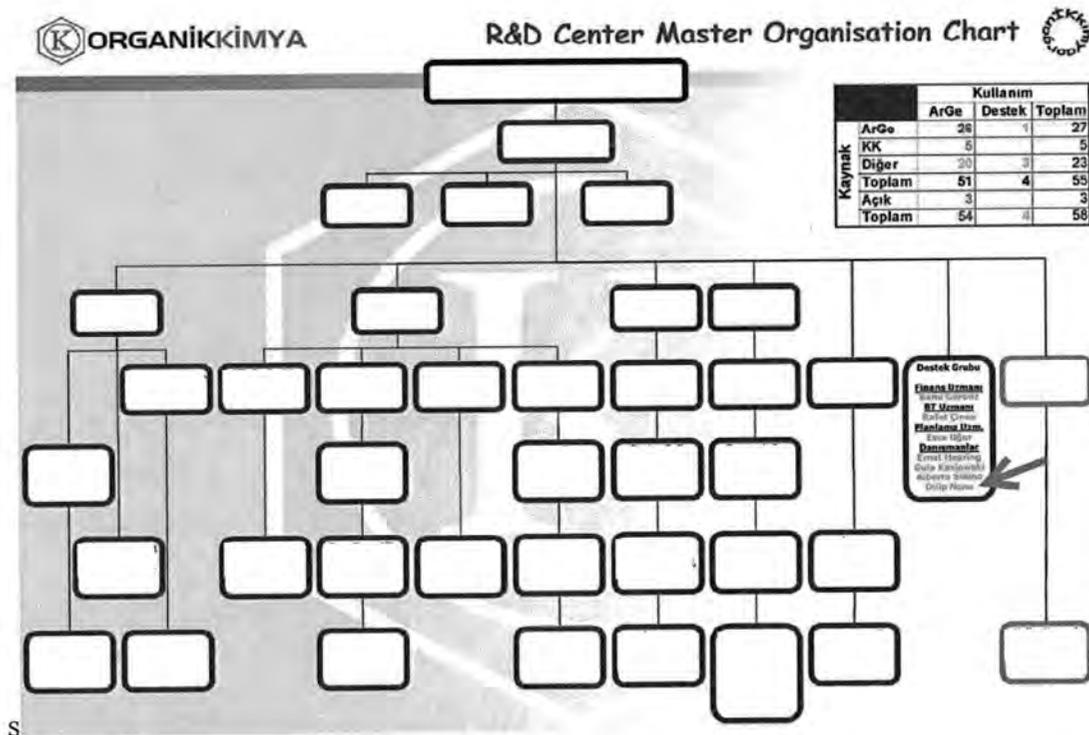
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Cir.1983); *Avis Rent a Car Sys., Inc. v. United States*, 503 F.2d 423, 429 (2d Cir.1974). The U.S. Supreme Court has held that in the absence of a statute defining the term employee, there is a presumption that traditional agency-law criteria for 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

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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 Intranet [sic] clock

Greetings Rafet,

While the Intranet [sic] clock shows 11:57, the cellphone shows 12:04 from the Internet. This difference of 7 minutes is being reflected into all meetings and work, since everyone looks at the intranet 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 synchronizing 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 synchronizing 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\P500_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_StandarAcrSeed.xls
5/25/2011 3:36:53 PM	D:\Data\Guille\OK\Excel\OKLAB\Rott\
5/12/2011 2:37:56 PM	D:\Data\Guille\OK\Excel\OKLAB\Rott\Serhan
5/12/2011 2:37:37 PM	D:\Data\Guille\OK\Excel\OKLAB\Rott\Serhan\
5/12/2011 2:37:56 PM	D:\Data\Guille\OK\Excel\OKLAB\Rott\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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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 G883ITC00152350-55 (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-worth 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

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

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.)

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 AIAE'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).

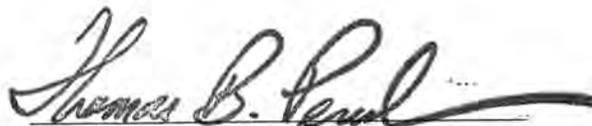
Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders, on its own motion, a review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

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER NO. 27: Initial Determination** has been served upon the following parties via first class mail and air mail where necessary on October 30, 2014.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112A
Washington, DC 20436

FOR COMPLAINANT ROHM & HAAS COMPANY, ROHM & HAAS CHEMICALS LLC & THE DOW CHEMICAL COMPANY.:

Paul F. Brinkman., Esq.
QUINN EMANUEL URQUHART & SULLIVAN, LLP
777 6th Street, N.W. 11th Floor
Washington, D.C. 20001

- () Via Hand Delivery
- Via Express Delivery
- () Via First Class Mail
- () Other: _____

FOR RESPONDENTS ORGANIK KIMYA SAN, ve TIE, A.S., ORGANIK KIMYA NETHERLANDS B.V., ORGANIK KIMYA U.S. INC., TURK INTERNATIONAL LLC & AALBORZ CHEMICAL LLC d/b/a ALL CHEM:

Eric J. Fues, Esq.
FINNEGAN, HENDERSON, FARABOW GARRETT & DUNNER, LLP
901 New York Avenue, N.W.
Washington, DC 20001

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- () Other: _____

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

In the Matter of

CERTAIN OPAQUE POLYMERS

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Investigation No. 337-TA-883

ORDER NO. 28: DENYING RESPONDENTS' MOTION TO TERMINATE THE INVESTIGATION BASED ON CONSENT ORDER STIPULATION

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

On May 20, 2014, Respondents Organik Kimya San. Ve Tic. A.S., Organik Kimya Netherlands B.V., Organik Kimya U.S., Inc., Turk International LLC, and Aalborz Chemical LLC d/b/a Aal Chem filed a motion to terminate this investigation based on consent order stipulation. (Motion Docket No. 883-020.) On June 2, 2014, Complainants' Rohm and Haas Company, Rohm and Haas Chemicals, LLC, and the Dow Chemical Company (collectively "Dow") filed an opposition to Respondents' motion to terminate. On June 10, 2014, Respondents filed a motion for leave, which is hereby Denied, to file a reply in support of its motion to terminate. (Motion Docket No. 883-021.) On June 20, 2014, Dow filed a motion for leave, which is hereby Denied, to file a sur-reply in response to Respondents' motion to terminate. (Motion Docket No. 883-022.)

Concurrently with this Order I issued Order No. 27 as an Initial Determination finding Organik Kimya in default with regard to Dow's allegations of trade secret misappropriation and Dow entitled to recover certain of its costs and fees as sanctions for the bad faith spoliation of evidence by Organik Kimya in this investigation in violation of Commission Rule 210.33(b). Accordingly, I find Respondents' motion to terminate moot and DENY it accordingly.

SO ORDERED.



Thomas B. Pender
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER NO. 28** has been served upon the following parties via first class mail and air mail where necessary on October 20, 2014.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112A
Washington, DC 20436

FOR COMPLAINANT ROHM & HAAS COMPANY, ROHM & HAAS CHEMICALS LLC & THE DOW CHEMICAL COMPANY.:

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FOR RESPONDENTS ORGANIK KIMYA SAN, ve TIE, A.S., ORGANIK KIMYA NETHERLANDS B.V., ORGANIK KIMYA U.S. INC., TURK INTERNATIONAL LLC & AALBORZ CHEMICAL LLC d/b/a ALL CHEM:

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UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC

In the Matter of

CERTAIN OPAQUE POLYMERS

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Investigation No. 337-TA-883

NOTICE

(October 20, 2014)

On October 20, 2014, I issued Order No. 27 as an Initial Determination finding that Respondents Organik Kimya San. Ve Tic. A.S., Organik Kimya Netherlands B.V., Organik Kimya U.S., Inc. (“Oranik Kimya”) spoliated evidence in this investigation in violation of Commission Rule 210.33(b). As a sanction for Organik Kimya’s bad faith spoliation of evidence I have found Organik Kimya in default with regard to Dow’s allegations of trade secret misappropriation. As an additional sanction, I have also imposed monetary sanctions against Organik Kimya and its counsel, jointly and severally.

SO ORDERED.



Thomas B. Pender
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC NOTICE** has been served upon the following parties via first class mail and air mail where necessary on October 20, 2014.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112A
Washington, DC 20436

FOR COMPLAINANT ROHM & HAAS COMPANY, ROHM & HAAS CHEMICALS LLC & THE DOW CHEMICAL COMPANY.:

Paul F. Brinkman,, Esq.
**QUINN EMANUEL URQUHART &
SULLIVAN, LLP**
777 6th Street, N.W. 11th Floor
Washington, D.C. 20001

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 Via Express Delivery
() Via First Class Mail
() Other: _____

FOR RESPONDENTS ORGANIK KIMYA SAN, ve TIE, A.S., ORGANIK KIMYA NETHERLANDS B.V., ORGANIK KIMYA U.S. INC., TURK INTERNATIONAL LLC & AALBORZ CHEMICAL LLC d/b/a ALL CHEM:

Eric J. Fues, Esq.
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() Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN OPAQUE POLYMERS

Investigation No. 337-TA-883

**NOTICE OF COMMISSION DECISION TO AFFIRM AN
ADMINISTRATIVE LAW JUDGE'S CONFIDENTIALITY
DETERMINATION UNDER COMMISSION RULE 210.5(e)**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to grant the interlocutory appeal presented to it regarding the ALJ's determination of confidentiality under Commission rule 210.5(e), and has determined to affirm the decision of the presiding Administrative Law Judge (Order Nos. 17 and 18), finding certain information not to be confidential business information.

FOR FURTHER INFORMATION CONTACT: Sidney A. Rosenzweig, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2532. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 21, 2013, based on a complaint filed by the Dow Chemical Company of Midland, Michigan, and by Rohm and Haas Company and Rohm and Haas Chemicals LLC, both of Philadelphia, Pennsylvania (collectively, "Dow"). 78 *Fed. Reg.* 37571 (June 21, 2013). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended 19 U.S.C. § 1337, by reason of the importation into the United States, the sale for importation, and the sale within the United States after importation of certain opaque polymers that infringe certain claims of four United States patents. The notice of institution named five respondents: Organik Kimya San. ve

Tic. A.Ş of Istanbul, Turkey; Organik Kimya Netherlands B.V. of Rotterdam-Botlek, Netherlands; Organik Kimya US, Inc. of Burlington, Massachusetts (collectively, “Organik Kimya”); Turk International LLC of Aptos, California; and Aalborz Chemical LLC d/b/a All Chem of Grand Rapids, Michigan. The complaint and notice of investigation have since been amended to add allegations of misappropriation of trade secrets. 78 *Fed. Reg.* 71643 (Nov. 29, 2013).

Some of Dow’s trade secret allegations are based upon the actions of a former Dow employee. Order No. 15 (Feb. 4, 2014) ordered certain discovery from the former employee, subject to certain safeguards put in place by the ALJ. In Order No. 16 (Feb. 20, 2014), the ALJ ordered certain discovery against Organik Kimya. In redactions originally proposed to the ALJ, Organik Kimya redacted the former employee’s name. Subsequently, Organik Kimya agreed that the name of the former employee could be made public in Order Nos. 15 and 16. The former employee objected to disclosure of certain information, including his name, which appears publicly elsewhere in the Commission record. In Order No. 17 (Apr. 7, 2014), the ALJ overruled that objection, and found that the former employee’s name could be released publicly in connection with Order Nos. 15 and 16, which have not yet been made public. In Order No. 18 (Apr. 29, 2014), the ALJ denied the former employee’s motion for reconsideration, but granted the former employee’s alternative request to certify Order No. 17 for interlocutory review by the Commission, pursuant to Commission Rules 210.5(e)(1) and 210.24(b)(2).

On May 4, 2014, the former employee filed his interlocutory appeal. On May 13, 2013, Dow filed an opposition. Organik Kimya did not respond.

Pursuant to Commission Rule 210.24(b)(3), “the Commission may, in its discretion, permit an appeal,” and unless “otherwise ordered by the Commission, Commission review, if permitted, shall be confined to the application for review and answer thereto, without oral arguments or further briefs.” The Commission has determined to permit the former employee’s appeal.

Section 337(n) provides in pertinent part that information properly designated as confidential pursuant to Commission rules may not be disclosed except under protective order. 19 U.S.C. § 1337(n). When the Commission or the ALJ “issues a confidential version of an order, initial determination, opinion, or other document, the Commission or the presiding [ALJ] . . . shall issue any public version of the document within 30 days, unless good cause exists to extend the deadline.” 19 C.F.R. § 210.5(f); *see* Notice of Final Rule, 78 *Fed. Reg.* 23474, 23480 (Apr. 19, 2013). That same rule provides that upon “request by the Commission” or the presiding ALJ, “parties must provide support in the record for their claim of confidentiality, pursuant to § 201.6 of this chapter and § 210.4 of this subpart for any proposed redactions that parties may submit to the Commission or the [ALJ] for the preparation of any public version.” 19 C.F.R. § 210.5(f). Similarly, the protective order in this investigation states that an “opportunity shall be provided to the supplier of such information to argue its confidentiality prior to the time of such ruling.” Order No. 1, ¶ 2(b) (June 23, 2013).

Following these procedures, the ALJ here conducted a teleconference on March 26, 2014 that included counsel for the former employee. During that teleconference, the ALJ expressed

skepticism about treating the former employee's name as confidential, and urged the parties and counsel for the former employee to come to some agreement. Tr. 24 (Mar. 26, 2014). A follow-up email on March 27, 2014 from the ALJ's law clerk to the parties and counsel for the former employee requested support for the claimed redactions in Orders 15 and 16. The former employee provided a response that reasserted confidentiality as to certain information, including his name, without supplying support for the proposition that such information is confidential business information under Commission Rule 201.6. Letter to Judge Pender (Mar. 28, 2014) (EDIS Doc. 530759). Such support could have substantiated his assertion that the designated information meets the definition of confidential business information set forth in 19 C.F.R. § 201.6(a) to warrant redaction from the public version of Orders 15 and 16.

In Order No. 17, the ALJ rejected the former employee's showing as inadequate. In response, the former employee filed an affidavit appended to a motion for reconsideration. But even if taken as timely, the affidavit offered no particular information beyond the same prior conclusory assertion of confidentiality, which the ALJ had already rejected. In Order No. 18, the ALJ found the motion provided no new evidence for the former employee's assertion that the information was properly designated as confidential business information under Rule 201.6, but that it "simply reargues that which he already argued in his letter of March 28, 2014." Order No. 18 at 2. However, the ALJ permitted the former employee to seek interlocutory review.

Accordingly, the Commission grants the motion for interlocutory appeal. Upon consideration of the submissions filed in the appeal, and the record below concerning notice and opportunities provided by the ALJ to the former employee to submit support for his request for confidential treatment and the former employee's responses thereto, the Commission affirms Order No. 17. The effect of this decision is stayed until September 3, 2014, in order to permit the former employee to seek such judicial review as may be available.

The authority for the Commission's determination is contained in sections 332(g) and 337 of the Tariff Act of 1930, as amended (19 U.S.C. §§ 1332(g) & 1337), and in Parts 201 and 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Parts 201 & 210).

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: August 13, 2014

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached NOTICE has been served by hand upon the following parties as indicated, on August 14, 2014.



Lisa R. Barton, Acting Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

On Behalf of Complainants Rohm and Haas Co., Rohm and Haas Chemicals LLC, and The Dow Chemical Company:

Paul F. Brinkman, Esq.

QUINN EMANUEL URQUHART & SULLIVAN LLP
777 6th Street, NW, 11th Floor
Washington, DC 20001

- Via Hand Delivery
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On Behalf of Respondents Organik Kimya San. ve Tic. A.S., Organik Kimya Netherlands B.V., Organik Kimya US, Inc., Turk International LLC, and Aalborz Chemical LLC d/b/a All Chem:

Eric J. Fues, Esq.

FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP
901 New York Avenue, NW
Washington, DC 20001

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN OPAQUE POLYMERS

Investigation No. 337-TA-883

NOTICE OF COMMISSION DECISION NOT TO REVIEW AN
INITIAL DETERMINATION GRANTING SUMMARY DETERMINATION
ON THE ECONOMIC PRONG OF THE DOMESTIC INDUSTRY REQUIREMENT

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's ("ALJ") initial determination ("ID") (Order No. 14) granting the complainants' unopposed motion for summary determination that they have satisfied the economic prong of the domestic industry requirement.

FOR FURTHER INFORMATION CONTACT: Sidney A. Rosenzweig, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2532. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 21, 2013, based on a complaint filed by the Dow Chemical Company of Midland, Michigan, and by Rohm and Haas Company and Rohm and Haas Chemicals LLC, both of Philadelphia, Pennsylvania. 78 *Fed. Reg.* 37571 (June 21, 2013). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended 19 U.S.C. § 1337, by reason of the importation into the United States, the sale for importation, and the sale within the United States after importation of certain opaque polymers that infringe certain claims of four United States patents. The notice of institution named five respondents: Organik Kimya San. ve Tic. A.Ş of Istanbul, Turkey; Organik Kimya Netherlands B.V. of Rotterdam-Botlek, Netherlands; Organik Kimya US, Inc. of Burlington, Massachusetts; Turk International LLC of Aptos, California; and Aalborz Chemical LLC d/b/a All Chem of Grand Rapids, Michigan. The complaint and notice of investigation have

since been amended to add allegations of misappropriation of trade secrets. *78 Fed. Reg.* 71643 (Nov. 29, 2013).

On December 16, 2013, the complainants moved for summary determination that they have satisfied the economic prong of the domestic industry requirement. On December 26, 2013, the respondents filed a response that did not substantially contest the complainants' showing. On January 23, 2014, the ALJ issued the ID granting the complainants' motion. Order No. 14.

No petitions for review of the ID were filed. The Commission has determined not to review the ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', with a stylized flourish at the end.

Lisa R. Barton
Acting Secretary to the Commission

Issued: February 24, 2014

CERTAIN OPAQUE POLYMERS

337-TA-883

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the following parties as indicated, on **February 24, 2014**.



Lisa R. Barton, Acting Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

On Behalf of Complainants Rohm and Haas Co., Rohm and Haas Chemicals LLC, and The Dow Chemical Company:

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UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of
CERTAIN OPAQUE POLYMERS

Investigation No. 337-TA-883

ORDER NO. 16: GRANTING-IN-PART DOW'S MOTION TO COMPEL

(February 20, 2014)

INTRODUCTION

On February 4, 2014, Complainants Rohm & Haas Co., Rohm & Haas Chemicals LLC, and The Dow Chemical Company ("Dow") moved to compel Respondent Organik Kimya San. Ve Tic. A.S. ("Organik") to make certain of their computers and networks available for forensic inspection, copying and analysis. (Motion Docket No. 883-012). On February 6, 2014, Organik filed a response opposing Motion No. 883-012. No other responses were received.

In particular, Dow requests that its forensic experts be permitted to:

- (1) Inspect Organik Kimya's network to determine whether the "O Drive" documents that used to reside in the deleted file path can be recovered, and, if so, copy those files;
- (2) Inspect Organik Kimya's email exchange server to determine whether Dr. Nene's deleted emails can be recovered, and, if so, copy those files;
- (3) Inspect, copy and search the hard drives of laptops and/or computers used by Organik Kimya employees Sibel Altinok, Nur Basak Ergun Ersen, Fatma Arslan, Guillermo Perez, and Bradley McPhee since November 1, 2007;
- (4) Inspect one of Organik Kimya's "dummy terminals" to determine whether files can be saved locally, and, if so, inspect, copy and search the local files from dummy terminals used by Organik Kimya employees Sibel Altinok, Nur Basak Ergun Ersen, and Fatma Arslan since November 1, 2007; and
- (5) Inspect, copy and search the "personal folders" of Organik Kimya employees Sibel Altinok, Nur Basak Ergun Ersen, and Fatma Arslan that reside on Organik Kimya's network.

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Dow argues the requested inspection is narrowly-tailored to obtain highly relevant documents relating to Dow's allegation of trade secret misappropriation. Dow argues that Organik will not be burdened by the requested inspection because it has agreed to bear the cost of the inspection, and the protocol set forth in Exhibit 1 to its motion protects Organik's privileged information.

Organik argues that Dow's motion should be denied because: (1) it is beyond the scope of Dow's discovery requests (Request Nos. 2, 4, and 5); (2) it is overly burdensome in view of the likely futility of the request (Request No. 1); (3) it seeks non-existent information (Request No. 3, in part); and (4) it is baseless and not reasonably calculated to lead to the discovery of admissible evidence (Request No. 3, in part).

STANDARDS OF LAW

"Commission Rule 210.27(b) governs the scope of discovery and says that a party may obtain discovery about any non-privileged matter that is relevant to any claim or defense it may have. It is not grounds for objection that the information sought may be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Thus the scope of discovery has been held to be broad." *Certain Electronic Devices for Capturing and Transmitting Images, and Components Thereof*, Inv. No. 337-TA-831, Order No. 22 at 2 (Aug. 23, 2012) (citations omitted); *see also Certain Products Containing Interactive Program Guide and Parental Controls Technology*, Inv. No. 337-TA-747, Order No. 8 at 3 (Mar. 30, 2011) ("Discovery is broadly permitted in Section 337 investigations."). On a motion to compel, "the burden of proving that an issue is beyond discovery rests squarely with the party resisting the request." *Certain Gel-Filled Wrist Rests and Products Containing Same*, Inv. No. 337-TA-456, Order No. 8 (Dec. 5, 2001).

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Courts have frequently entered orders requiring forensic inspections, noting that “computer records, including records that have been ‘deleted,’ are documents discoverable under Fed. R. Civ. P. 34.” *Simon Property Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000). This is especially so where trade secrets and electronic evidence are both involved (*see Balboa Threadworks, Inc. v. Stucky*, 2006 U.S. Dist. LEXIS 29265, *7 (D. Kan. Mar. 24, 2006)), and where there is evidence of “troubling discrepancies” with the responding party’s document production. *Simon Property*, 194 F.R.D. at 641. Indeed, such “discrepancies or inconsistencies in the responding party’s discovery responses may justify a party’s request to allow an expert to create and examine a mirror image of a hard drive.” *Ameriwood Indus., Inc. v. Liberman*, 2006 U.S. Dist. LEXIS 93380, *13 (E.D. Mo. Dec. 27, 2006).

Courts have been cautious, however, “in requiring imaging of computers where the request is extremely overbroad in nature and the connection between the computers and the claims in the lawsuit are unduly vague or unsubstantiated in nature.” *Balboa Threadworks*, 2006 U.S. Dist. LEXIS 29265, at *8-9. For that reason, courts often require that the imaging be narrowly-tailored and subject to specific protocols. *See, e.g., Ameriwood Indus.*, 2006 U.S. Dist. LEXIS 93380, at *16.

DISCUSSION

Commission Rules allow a party to obtain broad discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. *See* 19 C.F.R. § 210.27(b). Although the party seeking discovery must first make a threshold showing that the requested information is relevant, “once the movant has made a threshold showing of the relevance of the information sought, the burden of showing that the requested information is not relevant rests with party resisting the request.” *See, e.g., Certain Set-Top Boxes and Components Thereof*, Inv. No.

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337-TA-454, Order No. 10 at 4 (June 1, 2001); *Certain Gel-Filled Wrist Rests and Products Containing Same*, Inv. No. 337-TA-456, Order No. 8 (Dec. 5, 2001) (“the burden of proving that an issue is beyond discovery rests squarely with the party resisting the request”).

The relevancy of the discovery Dow seeks from the forensic inspection of certain of Organik’s computers and networks has been fully developed in letters filed by the parties and during a teleconferences I held with the parties on this issue. (See Dow Memo. at Exh. 2 (Dow’s letter of January 10), Exh. 3 (Organik’s responsive letter of January 13), Exh. 4 (Dow’s letter of January 22), Exh. 5 (Organik’s responsive letter of January 23); EDIS Doc ID. No. 525895 (Transcript of February 14 teleconference).) Except as specifically discussed below, I find the discovery Dow seeks from the forensic inspection of Organik’s computer and networks to be directly relevant to Dow’s claims of trade secret misappropriation or reasonably calculated to lead to the discovery of admissible evidence relevant to Dow’s claims of trade secret misappropriation.

Organik argues that Dow’s motion should be denied because: (1) it is beyond the scope of Dow’s discovery requests (Request Nos. 2, 4, and 5); (2) it is overly burdensome in view of the likely futility of the request (Request No. 1); (3) it seeks non-existent information (Request No. 3, in part); and (4) it is baseless and not reasonably calculated to lead to the discovery of admissible evidence (Request No. 3, in part). Organik also argues that the time frames provided in the forensic inspection protocol are unreasonable. Further, Organik argues that the search parameters proposed by Dow for the forensic inspection are too broad. I will address each of Organik’s arguments in turn below.

Dow's Motion to Compel is Beyond the Scope of Dow's Discovery Requests

Organik argues that Dow's motion to compel far exceeds the scope of its discovery requests or the relief sought in its letters of February 10 and 22, 2014. (Organik Opp. at 4.) In particular, Organik argues that Dow now seeks to inspect Organik's email server to search for Dr. Nene's emails (Request No. 2); dummy terminals used by Ms. Altinok, Ms. Ersen, and Ms. Arslan (Request No. 4); and personal folders used by Ms. Altinok, Ms. Ersen, and Ms. Arslan (Request No. 5). (*Id.* at 4-5, 9.) Organik argues that Dow's original requests for inspection say nothing about email servers, dummy terminals, or personal folders. (*Id.* at 9.) Organik argues that Dow failed to seek inspection of any of these items in its original discovery requests or in its letter briefs and thus Dow's motion should be denied with regard to those requests. (*Id.* at 5, 9.) I disagree.

Dow served its notice of forensic inspection on November 27, seeking, among other things, "[i]nspection, copying and forensic analysis of all computers, network drives, tape backups or other electronic media which store or have stored data at the following path on the network of Organik: [] (Dow Memo., Exh. 12 at 6). The notice also requested "[i]nspection copying and forensic analysis of the computer hard drive or network email space or any other network space, including backup media, allocated to Dilip Nene from November 1, 2007 to the present." (*Id.* at 6.) Additionally, the notice requested that Dow's forensic experts be permitted to inspect, copy and analyze the computer hard drives for any computer used by Ms. Altinok, Ms. Ersen, Dr. Nene, Ms. Fatma Arslan, Dr. Guillermo Perez, and Mr. Bradley McPhee from November 1, 2007 to the present. (*Id.* at 6-7). I find the above discovery requests constitute a sufficient foundation for Dow's present motion to compel and that the motion to compel is not beyond Dow's inspection requests.

Dow's Motion to Compel is Overly Burdensome in View of the Likely Futility

Organik argues that Dow's request to inspect Organik's network should be denied, as Dow's own forensic experts admit that this inspection is not likely to yield any results. (Organik Opp. at 10.) In particular, Organik argues that it does not have back-up images of its computer system and because its network is used by numerous individuals, the location of the O: \ file path has likely been overwritten over the last few years. (*Id.*) Further, Organik argues that any inspection of its network is burdensome and invasive because Dow's requested O: \ drive inspection is so broad that millions of pages of materials could be swept into the search. (*Id.*) Organik argues that under these circumstances the burden would be enormous while the benefit, according to Dow's own forensic experts, is likely non-existent. (*Id.*) Thus, Organik argues Dow's Request No. 1 to inspect Organik Kimya's O: \ drive should be denied. (*Id.*)

While it is true that Dow's own forensic expert admitted that a search of the O:\ drive would likely prove futile because the drive is used by numerous individuals and thus likely the information sought has been overwritten, I disagree with Organik's claim that the request is unduly burdensome and invasive. The cost of conducting the forensic inspection is being born by Dow and the time it takes to copy the drives for inspection is negligible. Thus, I do not find the process to be that burdensome. I am also not persuaded by Organik's prognostication that a search of its O:\ drive would produce millions of pages. At this point in time, this is mere conjecture. If a search of the O:\ drive were in fact to turn up an unreasonably burdensome number of documents, Organik would of course be free to seek a protective order.

Accordingly, I do not find Dow's Request No. 1 to be overly burdensome.

Dow's Motion to Compel Seeks Non-existent Information

Organik argues that Dow's request to inspect computer hard drives should be denied because these items either do not exist and/or because Dow has not provided any justification for the inspection. (Organik Opp. at 10.)

With regard to the computers of Ms. Altinok, Ms. Ersen, and Ms. Arslan, Organik argues that these people do not have computers or laptops but rather use dummy terminals to connect to Organik's research and development system. (*Id.*) Organik asserts that the dummy terminals do not have hard drives and that information is stored on a central network with no way to segregate the portions of the system used by Ms. Altinok, Ms. Ersen, and Ms. Arslan. (*Id.* at 11.) Organik argues that an inspection of the entire system would far exceed the scope of Dow's original requests and would violate the requirement that any inspection be narrowly tailored to meet specific objectives. (*Id.*) Organik further argues that to the extent Dow seeks to inspect these dummy terminals to retrieve locally saved files there are no such files. (*Id.*)

Dow does not seek to inspect the entire system, but rather "[i]nspect one of Organik Kimya's 'dummy terminals' to determine whether files can be saved locally, and, if so, inspect, copy and search the local files from dummy terminals." If, as Organik contends, files cannot be saved locally on the dummy terminals, then there is no burden to Organik if Dow inspects one of Organik's dummy terminals used by Ms. Altinok, Ms. Ersen, or Ms. Arslan to confirm that fact. Accordingly, I am going to permit Dow to inspect one of Organik's "dummy terminals."

With regard to Dr. Perez, Organik argues that Dow's request to inspect is baseless in that Dow does not accuse Dr. Perez of misappropriation or even contend that he was aware of any alleged trade secret. (*Id.* at 11-12.) Organik argues that except for Dr. Perez's previous

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involvement with Rohm & Haas, Dow has not articulated any basis for the inspection of his computer. (*Id.* at 12.) I disagree.

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

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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. Accordingly, I am going to permit Dow to forensically inspect Dr. Perez's computer(s).

With regard to Mr. McPhee's computers, Organik argues that Dow's request is off the mark. (Organik Opp. at 12.) Organik asserts that Mr. McPhee is a sales representative with no involvement in product development. (*Id.*) Organik further asserts that Mr. McPhee was not hired until 2013, years beyond the relevant time frame. (*Id.*) Thus, Organik argues the forensic inspection of Mr. McPhee's computers would be unjustified and not reasonably calculated to lead to the discovery of admissible evidence. (*Id.* at 12-13.) I agree.

Dow argues that Mr. McPhee is a former Rohm & Haas employee with significant ties to sales and marketing of Organik Kimya's products. Dow does not allege that Mr. McPhee knows any trade secrets or that he disclosed any confidential Dow information to Organik. Nor has Dow previously explained the relevancy of Mr. McPhee to these proceedings. I find the fact that Mr. McPhee is a former Rohm & Haas employee insufficient to establish that he is relevant to Dow's allegations of trade secret misappropriation or that inspection of his computer(s) would be relevant or likely to lead to the discovery of admissible evidence. Accordingly, I am denying Dow's motion to compel with respect to the forensic inspection of Mr. McPhee's computer(s).

Dow's Motion to Compel Is Baseless and Not Reasonably Calculated To Lead To The Discovery of Admissible Evidence

Organik argues that Dow's request to inspect any "personal folders" of Ms. Altinok, Ms. Ersen, and Ms. Arslan should be denied because such folders do not exist. (Organik Opp. at

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13.) Organik argues that Dow miscites the testimony of Ms. Altinok in support of its request. (*Id.*) Organik asserts that Ms. Altinok did not testify that Organik employees were permitted to save documents and emails to their own folders. (*Id.*) Rather, Organik asserts that its employees having access to the O drive via dummy terminals save documents in shared files and that these files may be used by all employees that have access to that location. (*Id.*) Organik further argues that Dow's request to search for the individual files of Ms. Altinok, Ms. Ersen, and Ms. Arslan on Organik's network would necessarily involve a company-wide search through the O drive that would be burdensome and duplicative of discovery already provided. (*Id.* at 14.)

Organik represents that its employees having access to the O drive via dummy terminals save documents in shared files and that these files may be used by all employees that have access to that location. Provided Organik can provide evidence, beyond attorney argument, that Ms. Altinok, Ms. Ersen, and Ms. Arslan do not have and cannot have created the "personal folders" Dow seeks to inspect, Dow's request is denied.

Inspection Protocol

Organik argues that the inspection protocol attached as Exhibit 1 to Dow's motion sets forth unreasonable deadlines.

Organik asserts that two days after receiving an order on its motion, Dow would require Organik Kimya employees to meet with the forensic experts to "discuss specifications and logistics" and require electronic assets to be made available within five days of any order. (Organik Opp. at 14.) Organik argues that in the event Dow's motion to compel is granted that it be provided ten days to provide access items to be inspected, and that it be required to meet with the forensic experts no less than seven days after the issuance of any such order. I hereby order that within four days of the date of this Order that Organik meet with the forensic experts to "discuss specifications

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and logistics” and that within seven days of the date of this Order that Organik provide its electronic assets be made available for inspection.

Organik argues that the time period for conducting a review for privileged materials is unreasonable. (*Id.* at 15.) Organik argues that the five days proposed by Dow is not reasonable in view of the overly broad search terms Dow seeks to use in its inspection and the fact that the results of such search will require the privilege review of numerous Turkish documents. (*Id.*) Organik requests fourteen days to conduct a privilege review. (*Id.*) I agree that considering the number of Turkish language documents that are likely going to have to be reviewed for privilege that the five days proposed by Dow is not reasonable. Accordingly, I hereby order that the time period for conducting a review for privileged materials be seven days.

Organik also objects to logging any privileged or work product information created on or after the date of the original Complaint in this investigation arguing that the parties have already agreed and stipulated that such information need not be logged by either party on a privilege log. (*Id.* at 15.) Based on the parties’ stipulation filed on August 2, 2013, I hereby order that Organik need not have to log privileged or work product information created on or after the date of the original Complaint in this investigation.

Search Parameters

Organik argues that the search protocol contains unreasonably broad terms. In particular, Organik argues that the terms [] and [Meeting Note* OR Toplantı notları*] be removed from the list of search terms. I have reviewed Dow’s proposed search protocol and find it reasonable.

CONCLUSION

As set forth, *supra*, Motion No. 883-012 is **GRANTED-IN-PART**.

To expedite service of the public version, the parties are hereby ORDERED to jointly submit no later than seven (7) days from the date of this Order: (1) a proposed public version of this EID 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 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.^{1 2}

SO ORDERED.



Thomas B. Pender
Administrative Law Judge

¹ 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.

² While the parties are required to jointly submit the proposed redactions, there is no requirement that the parties must agree on all the redactions. However, the parties' written justification for any proposed redactions should distinguish between those redactions that are agreed upon and those proposed by the individual parties.

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER NO. 16** has been served upon the following parties via first class mail and air mail where necessary on

September 24, 2014.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112A
Washington, DC 20436

FOR COMPLAINANT ROHM & HAAS COMPANY, ROHM & HAAS CHEMICALS LLC & THE DOW CHEMICAL COMPANY.:

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FOR RESPONDENTS ORGANIK KIMYA SAN, ve TIE, A.S., ORGANIK KIMYA NETHERLANDS B.V., ORGANIK KIMYA U.S. INC., TURK INTERNATIONAL LLC & AALBORZ CHEMICAL LLC d/b/a ALL CHEM:

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UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

**In the Matter of
CERTAIN OPAQUE POLYMERS**

Investigation No. 337-TA-883

**ORDER NO. 15: GRANTING-IN-PART NON-PARTY DILIP NENE'S MOTION TO
QUASH SUBPOENA *DUCES TECUM* ISSUED ON BEHALF OF
COMPLAINANTS**

(February 4, 2014)

INTRODUCTION

On January 3, 2014, non-party Dilip M. Nene moved to quash a subpoena *duces tecum* issued December 18, 2013. (Motion Docket No. 883-011). Complainants Rohm and Haas Company, Rohm and Haas Chemicals, LLC, and the Dow Chemical Company (collectively, "Dow") filed a response opposing Motion No. 883-011 on January 10, 2014 (Docket ID No. 525507), with a supplemental response filed on January 13, 2014 (Docket ID No. 525611).

On January 23, 2014, my attorney-advisor, Greg Moldafsky, held a teleconference with counsel for Dow and counsel for Dr. Nene. During the teleconference the parties were informed that it was my intent to deny Dr. Nene's motion to quash the subpoena *duces tecum* permitting the inspection of Dr. Nene's computers, but that I was sensitive to Dr. Nene's concerns regarding the protection of his confidential and privileged information on his computers. To that end, I requested, through my attorney-advisor, that the parties work out protocols that would protect Dr. Nene's confidential and privileged information and to submit the agreed-to protocols to be included in the present Order. On January 30, 2014, I received individual letters from Dow and Dr. Nene indicating that they had reached agreement on a number of protocols, but still had remaining disagreements on several issues.

No other responses were received.

PARTIES' POSITIONS

Dr. Nene

Dr. Nene alleges that the subpoena *duces tecum* ordering the production of any personal computer used by him from November 2007 through December 31, 2012 for forensic copying is unduly burdensome, and serves as a form of harassment which will not advance discovery.

(Nene Memo. at 1.) First, Dr. Nene argues that the subpoena in question must be considered in light of Dow's interaction with Dr. Nene as memorialized in his deposition. (*Id.* at 3.) Dr. Nene suggests that the scope of Dow's subpoena is unduly broad, and is intended to harass Dr. Nene and violate his "due process rights." (*Id.* at 5.)

Second, Dr. Nene argues there is no justification for the subpoena because the requested documents can be obtained directly from the Respondent, Organik Kimya. (*Id.* at 7.)

Third, Dr. Nene argues that there is insufficient evidence supporting the subpoena, *Id.* at 11, and that the subpoena provides no protections for Dr. Nene's personal and privileged communications. (*Id.* at 15.)

Dow

Dow argues that Dr. Nene cannot meet his burden to show that the subpoena should be quashed because (1) the subpoena is based on discrepancies between Organic Kimya's documents and Dr. Nene's testimony; (2) these discrepancies provide a reasonable basis to seek documents and emails from Dr. Nene himself; and (3) the proposed imaging protocol of Dr. Nene's hard drive does not present a sufficient burden to Dr. Nene. (Dow Opp. at 5-15.)

Additionally, Dow argues that emails detailing Rohm & Haas process information, inconsistencies in Dr. Nene's testimony, and invoices obtained from Organik Kimya support the inspection request. (Dow Supp. at 3-4.) Further, Dow argues that Respondents' 30(b)(6) witness,

Ms. Altinok, revealed during her deposition additional details regarding documents possessed by Dr. Nene that support the inspection request. (*Id.* at 5.)

STANDARDS OF LAW

Commission Rule 210.27(b) states that a party may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. 19 C.F.R. § 210.27(b)(1). A party may apply to an administrative law judge for a subpoena to obtain discovery from a nonparty. *See* 19 U.S.C. § 1333(a); 19 C.F.R. § 210.32(a). When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits that constitute or contain evidence relevant to the subject matter involved and that are in the possession, custody, or control of such person. 19 C.F.R. § 210.32(b).

A party seeking to have a subpoena quashed bears the burden of proving the burdensome nature of the subpoena. *Certain Magnetic Resonance Injection Systems and Components Thereof*, Inv. No. 337-TA-434, Order 12, 2000 WL 1335089 (September 14, 2000); *also see Certain Hardware Logic Emulation Systems and Components Thereof*, Inv. No. 337-TA-383, Order No. 42, 1996 WL 965375 (September 6, 1996). A nonparty resisting a subpoena has the burden to prove that the subpoena is unreasonable or oppressive.

Certain Microelectromechanical Systems (MEMS Devices) and Products Containing the Same, Inv. No. 337-TA-876, Order No. 43 at 2, 2013 WL 6155400 at 1 (Nov. 7, 2013), *citing Truswal Sys. Corp. v. Hydro-Air Eng'g. Inc.*, 813 F.2d 1207, 1210 (Fed. Cir. 1987). The burden is particularly heavy to support a motion to quash a subpoena in its entirety, as contrasted with seeking some more limited protection. *Id.* The test for determining whether a subpoena should be quashed balances: (1) the relevance of the discovery sought; (2) the need of the requesting

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party; and (3) the potential hardship to the party responding to the subpoena. *Certain EPROM, EEPROM, Flash Memory, and Flash Microcontroller Semiconductor Devices and Products Containing Same*, Inv. No. 337-TA-395, Order No. 25, 1997 WL 696285 (November 6, 1997).

“Commission rules 210.34(a) and 210.34(a)(7) provide that the administrative law judge may make ‘any order that may appear necessary and appropriate for the protection of the public interest’ and has the authority, ‘when justice requires,’ to protect a party or person from ‘annoyance, embarrassment, oppression, or undue burden or expense.’” *Certain Set-Top Boxes and Components Thereof*, Inv. No. 337-TA-454, Order No. 16 at 1-2 (July 2, 2001), *citing Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993). “[T]he fact of [the movant’s] nonparty status may [also] be considered with any motion to limit.” *Id.*; *see also Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) (“Although discovery is by definition invasive, parties to a lawsuit must accept its travails as a natural concomitant of modern civil litigation. Non-parties have a different set of expectations. Accordingly, concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs.”).

Courts have frequently entered orders requiring the mirror imaging of hard drives, noting that “computer records, including records that have been ‘deleted,’ are documents discoverable under Fed. R. Civ. P. 34.” *Simon Property Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000). This is especially so where trade secrets and electronic evidence are both involved (*see Balboa Threadworks, Inc. v. Stucky*, 2006 U.S. Dist. LEXIS 29265, *7 (D. Kan. Mar. 24, 2006)), and where there is evidence of “troubling discrepancies” with the responding party’s document production. *Simon Property*, 194 F.R.D. at 641. Indeed, such “discrepancies or inconsistencies in the responding party’s discovery responses may justify a party’s request to

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allow an expert to create and examine a mirror image of a hard drive.” *Ameriwood Indus., Inc. v. Liberman*, 2006 U.S. Dist. LEXIS 93380, *13 (E.D. Mo. Dec. 27, 2006).

Courts have been cautious, however, “in requiring imaging of computers where the request is extremely overbroad in nature and the connection between the computers and the claims in the lawsuit are unduly vague or unsubstantiated in nature.” *Balboa Threadworks*, 2006 U.S. Dist. LEXIS 29265, at *8-9. For that reason, courts often require that the imaging be narrowly-tailored and subject to specific protocols. *See, e.g., Ameriwood Indus.*, 2006 U.S. Dist. LEXIS 93380, at *16.

DISCUSSION

Although Dr. Nene argues the subpoena *duces tecum* served by Dow is unduly burdensome and unreasonable, I find for the reasons discussed in more detail below that the subpoena is narrowly tailored and that the inconsistencies in the evidence collected by Dow are sufficient to deny the present motion to quash the subpoena *duces tecum*.

Dow seeks evidence of whether Dr. Nene revealed/provided information regarding Dow’s opaque polymers and opaque polymer processes to Organik.¹ This evidence is highly relevant to both Dow’s infringement and trade secret misappropriation claims in this investigation.

Dr. Nene testified at his deposition on September 27, 2013, that he was not involved with Organik’s opaque polymer processes and that his work was limited to providing general advice on chemistry and safety protocols. (*See* Dow Opp., Ex. 3.) Dr. Nene testified that he would exchange emails with Organik regarding scheduling visits and paying invoices, but that he

¹ The evidence shows that Dr. Nene was hired by Rohm and Haas in 1980, (Dow Opp., Ex. 3 at 14), was terminated by Rohm and Haas in December, 2007 (*Id.* at 35), and formally began consulting with Organik Kimya in February, 2008. (*Id.* at 158.)

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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.”))

In contrast to Dr. Nene’s deposition testimony, documents produced by Organik from both Dr. Nene’s network and Yahoo accounts indicate that Dr. Nene did communicate over email “chemistry type” information and documents to Organik. (*See* Dow Opp., Ex. 6, Ex. 9, Ex. 10.) In fact, one document produced by Organik indicating 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.) 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 Hass process information obtained from “[t]he guy.” (*Id.*, Ex. 15.)

The evidence presented by Dow in its response and supplement, a smattering of which I have presented in the paragraph above, strongly suggests that Dr. Nene’s relationship with Organik was one of providing more than merely general advice on chemistry and safety protocols as he stated in his deposition. The evidence also suggests that Dr. Nene’s email exchanges with Organik consisted of more than discussions regarding scheduling visits and paying invoices, but also included information of a technical nature. For example, it appears that documents/emails were at some point created by Dr. Nene and communicated to Organik discussing technical process information and information regarding seed selection that have yet

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to be produced in this investigation. Moreover, Dr. Nene admits to deleting emails between him and Organik. Accordingly, I find the subpoena request for forensic inspection of Dr. Nene's computers well supported.

With regard to Dr. Nene's claims of undue hardship in complying with the subpoena, I find any hardship resulting from the subpoena minimal as the expense for the forensic inspection is being born by Dow and the time that Dr. Nene would be without access to his computers is negligible. Additionally, I find that in light of the protection protocols proposed by counsel for Dow and Dr. Nene for handling information obtained from the inspection of Dr. Nene's computers, discussed further below, that the subpoena is narrowly-tailored to ensure the protection of Dr. Nene's confidential and privileged information. Further, I find Dr. Nene has failed to show that the subpoena is unreasonably burdensome.

Dr. Nene argues that Dow's subpoena is unduly broad, and that as a result, his "due process rights" have been violated. However, as discussed above, I do not find the subpoena overly broad. Although Dr. Nene may be uncomfortable with his computer being examined that does not amount to undue hardship.

Dr. Nene also argues that there is no justification for the subpoena because the requested documents can be obtained directly from Organik Kimya. I find this argument not persuasive as Organik has in fact been unable to produce the documents requested by Dow. Moreover, even if the requested information could be obtained from Organik, where, as here, there are genuine issues regarding the timing, nature, and extent of the relationship between Dr. Nene and Organik, I would still find Dow entitled to the forensic inspection of Dr. Nene's computers for at least purposes of confirming the veracity of information already obtained.

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Dr. Nene further argues that there is insufficient evidence supporting the subpoena. However, as discussed above, I find Dow's evidence supporting the subpoena to be sufficient.

With regard to Dr. Nene's argument that the subpoena provides no protections for Dr. Nene's personal and privileged communications, as I already stated, I am sensitive to Dr. Nene's position and in that vein ordered the parties to work together to develop protocols that would protect Dr. Nene's privileged and confidential information. While the parties were able to agree on a number of protocols, several issues remain unresolved: (1) the timing for making Dr. Nene's computer(s) available; (2) the timing for logging results of any search on a privilege log; and (3) the scope of the search terms. I will address each issue in turn below.

The timing for making Dr. Nene's computer(s) available

Dow proposes that Dr. Nene make his computer(s) available for inspection within three (3) business days of this Order. Dr. Nene proposes ten (10) days.

I am ordering that Dr. Nene make his computer available for inspection within three (3) business days from the date of this Order.

The timing for logging results of any search on a privilege log

Dow proposes that any privileged materials be logged within seven (7) business days after Dr. Nene's counsel receives the results of the search. Dr. Nene proposes fourteen (14) days.

I am ordering that any privileged materials be logged within seven (7) business days after Dr. Nene's counsel receives the results of the search.

The scope of the each terms

Dow proposes thirty-nine (39) search terms. Dr. Nene contends that five (5) search terms is more appropriate. Dr. Nene argues that five search terms is more in line with the Federal Circuit E-Discovery Model Order.

I find Dr. Nene's argument on this point not persuasive. The Model Order was designed to prevent undue burden on the producing party. Here, Dr. Nene is not bearing the time or cost of conducting the searches. Notably, the Model Order provides that additional/broad search terms may be used if the requesting party bears "all reasonable costs caused by such additional discovery." Model Order ¶ 11. Further, given the evidence of missing documents, deleted emails, and inconsistent testimony provided in this investigation, I find Dow should be permitted to broadly search for any relevant information. Accordingly, I am ordering that the search be conducted using the search terms proposed by Dow and listed in Appendix A to the Electronic Inspection Protocol attached hereto.

CONCLUSION

For the reasons discussed above, I am denying Dr. Dilip Nene's request to quash subpoena *duces tecum* in its entirety. I am, however, going to limit the subpoena by imposing the Electronic Inspection Protocol attached hereto to ensure the protection of Dr. Nene's confidential and privileged information.

Motion No. 883-011 is **GRANTED-IN-PART**.

To expedite service of the public version, the parties are hereby ORDERED to jointly submit no later than seven (7) days from the date of this Order: (1) a proposed public version of this EID 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

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confidential and why disclosure of the information would be likely to 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.^{2 3}

SO ORDERED.



Thomas B. Pender
Administrative Law Judge

² 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.

³ While the parties are required to jointly submit the proposed redactions, there is no requirement that the parties must agree on all the redactions. However, the parties' written justification for any proposed redactions should distinguish between those redactions that are agreed upon and those proposed by the individual parties.

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.**

**Before the Honorable Thomas B. Pender
Administrative Law Judge**

In the Matter of

CERTAIN OPAQUE POLYMERS

Investigation No. 337-TA-883

ELECTRONIC INSPECTION PROTOCOL

WHEREAS, pursuant to the subpoena issued by the ALJ on December 18, 2013, Dr. Nene was required to produce for inspection, examination, forensic copying and other related activities any personal computer used by Dr. Nene (“Electronic Assets”);

WHEREAS, the computer forensics and electronic discovery firm Stroz Friedberg, LLC (“Stroz Friedberg”), has been retained by Complainants to conduct a forensic examination of the Electronic Assets; and

IT IS HERE BY ORDERED that the following protocol shall apply to Dr. Nene’s production and Complainants’ examination of the Electronic Assets:

1. Dr. Nene shall identify and provide to Stroz Friedberg access to the original Electronic Assets within three (3) business days from the issuance of this Order.
2. Stroz Friedberg shall create forensically-sound copies of the Electronic Assets and shall maintain that information in a secure facility at Stroz Friedberg’s offices at 32 Avenue of the Americas, New York, New York. Stroz Friedberg shall not disclose or permit any such disclosure of that information to anyone, including the parties, their attorneys or agents, directly or indirectly, to this litigation, except as provided for in this Order. Each employee or agent of Stroz Friedberg involved with the search and analysis covered by this Order shall individually

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sign an acknowledgement of this Order, thereby agreeing to be bound. Complainants' counsel shall receive a copy of each of these acknowledgements and provide promptly copies thereof to Dr. Nene's counsel and a copy of which shall also be filed with the Commission. As a party to this Order, Stroz Friedberg specifically acknowledges and agrees to be bound by the terms and conditions of this Order, for the protection of confidential documents and information during the course of this investigation.

3. Stroz Friedberg will be permitted to search and analyze any and all data or information on the Electronic Assets, including data fragments, log files and other artifacts, that it deems forensically relevant to the issues in this case. In addition, Stroz Friedberg will be permitted to search for evidence that relevant data has been deleted or attempts to delete data have been made. Stroz Friedberg will examine the materials located by such searches in order to identify documents, emails, data, fragments, and artifacts that reasonably appear to be related to this investigation. The relevant data shall be saved and stored by Stroz Friedberg in a separate form, and shall be deemed the "Presumed Relevant Materials." The searches shall be governed by parameters set forth in Appendix A and the professional judgment of Stroz Friedberg in searching for the Presumed Relevant Materials. Other than as specified in this Order, the parties shall have no control over the search process. The parties and their counsel shall not have the right to be present, and shall not be present, during such searches.

4. Prior to disclosing any files or artifacts from the Electronic Assets to Complainants, Stroz Friedberg will identify and provide such files and artifacts to Dr. Nene's counsel, so that Dr. Nene's counsel may conduct a privilege review of this data.

5. Within seven (7) business days of receiving the files and artifacts from Stroz Friedberg, Dr. Nene shall produce to Stroz Friedberg and Complainants, a privilege log which

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complies fully with the requirements of the U.S. International Trade Commission and the ALJ's Ground Rules, identifying those documents within the files and artifacts that Dr. Nene maintains are subject to claims of privilege.

6. Stroz Friedberg shall then produce to counsel for Complainants all presumptively relevant documents not designated as privileged by Dr. Nene.

7. Upon termination of this litigation, Stroz Friedberg shall erase and scrub the memory devices containing any code, fragments, artifacts, or other data retained by Stroz Friedberg and certify to Dr. Nene's counsel that all such code, fragments, artifacts and data have been irretrievably deleted therefrom, and delete and destroy all work materials associated with Dr. Nene's Electronic Assets.

APPENDIX A

Sibel
Suresh
Subramanian
(204X OR "204 X")
Seed*
OPAC*
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Rotterdam
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Account
Payment
wire
Ultra
Kaya
Kaslowski
[]
Rohm
R&H
Organik
Kimya
Opa*
Orga*
Ropaque*
Ultra
Altinok
Perez
Istanbul
Turkey
Consult*

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER NO. 15** has been served upon the following parties via first class mail and air mail where necessary on

September 24, 2014.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112A
Washington, DC 20436

FOR COMPLAINANT ROHM & HAAS COMPANY, ROHM & HAAS CHEMICALS LLC & THE DOW CHEMICAL COMPANY.:

Paul F. Brinkman,, Esq.
QUINN EMANUEL URQUHART & SULLIVAN, LLP
777 6th Street, N.W. 11th Floor
Washington, D.C. 20001

- () Via Hand Delivery
- () Via Express Delivery
- Via First Class Mail
- () Other: _____

FOR RESPONDENTS ORGANIK KIMYA SAN, ve TIE, A.S., ORGANIK KIMYA NETHERLANDS B.V., ORGANIK KIMYA U.S. INC., TURK INTERNATIONAL LLC & AALBORZ CHEMICAL LLC d/b/a ALL CHEM:

Eric J. Fues, Esq.
FINNEGAN, HENDERSON, FARABOW GARRETT & DUNNER, LLP
901 New York Avenue, N.W.
Washington, DC 20001

- () Via Hand Delivery
- () Via Express Delivery
- Via First Class Mail
- () Other: _____