

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

FILED  
JAN 17 2019  
CIRCUIT COURT  
WAUKESHA COUNTY, WI

**STORAGE BATTERY SYSTEMS, LLC,**

**Plaintiff,**

**-vs-**

**Case: 17CV1244**

**GLENN WILDER, and  
PROFESSIONAL POWER ENGINEERING, LLC.**

**Defendants.**

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**AMENDED DECISION AND ORDER**

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¶1. The issue pending before the Court is the appropriate sanction for the Defendants' violation of the Court's orders to preserve and produce evidence. The Court found that the Defendants egregiously, intentionally, and flagrantly violated this Court's orders by destroying and modifying electronic information as a conscious attempt to affect the outcome of litigation. The Court ordered additional briefing and argument on the appropriate sanctions, and took the matter of an appropriate sanction under advisement to prepare this written decision.

**FINDINGS**

¶2. The Court makes the following findings of fact based upon the credible evidence presented in this case, including the evidence offered for purposes of the requested injunctive relief and the motions to compel discovery and motions for sanctions and dismissal.

¶3. Plaintiff Storage Battery Systems, LLC ("SBS") manufactures, distributes and sells batteries for material handling equipment, stationary and portable power solutions, backup

battery systems, uninterruptible power supplies (“UPS”) and batteries, battery testing equipment, power generators, and related equipment and supplies. It sells them to distributors and customers located throughout the United States and internationally.

¶4. SBS was founded in 1915. From approximately 1970 through June 2012, it operated as Storage Battery Systems, Inc. (“SBSI”), which was owned by the Rubenzer family. In June 2012, the Rubenzer family sold the business to Supply Chain Equity Partners (“SCE”), which formed SBS and began operating on July 2, 2012.

¶5. On May 19, 2017, SCE sold the company to High Road Capital Partners, which continues to operate as SBS.

¶6. Glenn Wilder began working for SBSI in 1991. From July 2, 2012, through the termination of his employment on July 7, 2017, he worked for SBS as a sales manager in the stationary department, selling stand-alone, UPS and stationary battery systems to SBS’s customers and distributors. He also worked with SBS’s suppliers to obtain and provide that equipment in support of customer orders.

¶7. In his capacity as sales manager, Mr. Wilder had access to confidential information and knowledge about SBS’s suppliers, distributors and customers, including information about key contacts, pricing, requests for quotes, sales agreements, costs and other SBS information.

¶8. In approximately 2006, Mr. Wilder incorporated Professional Power Engineering (“PPE”) to assist in obtaining additional business for SBS. Because Mr. Wilder is African-American, PPE was able to qualify as a minority-owned business. As a minority-owned business, PPE could obtain sales from customers whom SBS may not otherwise have been able to obtain business.

¶9. Prior to forming PPE, Mr. Wilder approached then president of SBSI, Scott Rubenzer, who supported Mr. Wilder in using PPE to obtain business for SBSI. Mr. Rubenzer even assisted Mr. Wilder in forming PPE.

¶10. Starting in 2006, Mr. Wilder was able to use PPE to obtain business from state and governmental entities. Mr. Wilder obtained that business through the use of SBSI customer lists and supplier lists. The PPE business was set up to have PPE purchase UPS systems from SBSI. Mr. Wilder, on behalf of PPE, would generate invoices where SBSI was the vendor and SBSI shipped directly to the customer. Because SBSI profited from transactions, SBSI did not object and likely encouraged Mr. Wilder's use of PPE to generate sales of SBSI products.

¶11. Between 2006 and 2012, Mr. Wilder obtained business for PPE and SBSI, and some of that business is still ongoing to date because of the long-term nature and renewal of that business.

¶12. When SCE acquired SBSI, and began operating as SBS in July 2012, it extended an offer of employment to Mr. Wilder reflected in a letter of June 28, 2012—an offer Mr. Wilder accepted on July 2, 2012. The offer referenced and enclosed several additional forms and agreements, including specifically, an Employment Application, Form W-4, Employee's Withholding Allowance Certificate, Form I-9, Employment Eligibility Verification, with Instructions, Agreement of Confidentiality and Noncompetition (if applicable), and Agreement of Confidentiality.

¶13. On July 2, 2012, Mr. Wilder signed the Confidentiality and Noncompetition Agreement as a condition of his employment. In the Confidentiality and Noncompetition Agreement, Mr. Wilder agreed that during his employment and for a period of one (1) year

following the termination of his employment, he would not, within the defined territory, do any of the following:

- (a) The Employee agrees that during the Restricted Period the Employee will not, within the Territory, directly or indirectly (through partners, agents, employers, employees, distributors, or any other persons acting for, with or on behalf of the Employee), solicit or in any way contact any of the Company's Customers for the purpose of selling to any of the Company's Customers any of the Company's Products and Services, or accept any orders or business from any of the Company's Customers for any of the Company's Products and Services.
- (b) The Employee also agrees that during the Restricted Period the Employee will not, within the Territory, directly or indirectly (through partners, agents, employers, employees or any other persons acting for, with or on behalf of the Employee), solicit or in any way contact any of the Company's Distributors for the purpose of selling to any of the Company's Customers any of Company's Products and Services.
- (c) The Employee also agrees that during the Restricted Period the Employee will not, within the Territory, directly or indirectly (through partners, agents, employers, employees or any other persons acting for, with or on behalf of the Employee), solicit or in any way contact any of the Company's Suppliers for the purpose of selling to any of the Company's Customers any of the Company's Products and Services.

¶14. The Confidentiality and Noncompetition Agreement also precluded Mr. Wilder for a period of one (1) year following the termination of his employment from disclosing Confidential Information, as follows:

3. CONFIDENTIALITY AGREEMENT. The Employee agrees that, during the Restricted Period, the Employee will not directly or indirectly, unless authorized by an officer or the Company, disclose to any individual or entity of any type any Confidential Information. Upon termination of employment (regardless of whether the termination is voluntary or involuntary), the Employee agrees to promptly deliver to the Company the originals and all copies of all documents, records and property of any nature whatsoever which are the property of the Company or

which contain any Confidential Information or which relate to any Confidential Information, and which are in the Employee's possession or control at the time of the termination of employment.

The Employee understands and agrees that nothing in this Agreement limits or restricts the continuing obligations the Employee has not to disclose Trade Secrets under the Uniform Trade Secrets Act as adopted by Wisconsin and as amended from time to time and any and all other fiduciary obligations the Employee may have to the Company as an employee.

¶15. John Bondy is the President of SBS and has worked in that capacity since July 2015. Prior to July 2015, he was the Chief Operating Officer ("COO") of SBS, a position he occupied since February 2013.

¶16. When Mr. Bondy became the COO of SBS, he met with Mr. Wilder in March 2013 to discuss, among other things, roles and responsibilities, financial results, budgets and "Professional Power Engineering." Mr. Bondy testified that, as to the topic of "Professional Power Engineering," he told Mr. Wilder that he was uncomfortable with SBS selling product to PPE because he saw it as a conflict of interest. Mr. Bondy testified that Mr. Wilder told him that PPE was essentially dormant and that there was an understanding that Mr. Wilder would no longer use PPE to sell products.

¶17. Mr. Wilder testified that PPE was discussed in the March 2013 meeting, but that Mr. Bondy simply stated that he was uncomfortable with SBS selling to PPE, and that there was no specific instruction or agreement that Mr. Wilder could not continue to sell through PPE. Mr. Wilder testified that he does not recall saying that PPE was dormant, but testified that PPE's sales at that time were minimal.

¶18. From March 2013 to 2017, Mr. Wilder acknowledged at the hearing and in his affidavit opposing injunctive relief that PPE continued to sell products, though PPE stopped using SBS as its supplier. Although Mr. Wilder suggested that the amount of sales annually

were small, neither side presented any specific evidence regarding the amount of sales made by PPE during this period.

¶19. Mr. Wilder also testified that after 2013, SBS was aware that he was operating PPE and that it permitted him to continue to sell through PPE even after the Confidentiality and Noncompetition Agreement was signed. Specifically, Mr. Wilder testified about a specific transaction in or about August 2016 involving a prior SBS customer, JP Cullen/Evonik, and a request for a unit that SBS no longer had. The outdated units had been returned to SBSI as part of the original sale of the business. Because SBS could not sell them as part of the acquired inventory, the units were returned to SBSI as part of a “clawback” provision. When SBS would not agree to sell the unit to the customer, Max Mueller—Mr. Wilder’s supervisor at SBS—suggested that Mr. Wilder use PPE to acquire the unit from SBSI to sell it to the customer. Mr. Mueller, as a part owner of SBSI, believed he had authority to sell the unit to PPE, and testified that Mr. Bondy even approved the transaction. Because the unit required installation, Mr. Mueller and Mr. Wilder agreed to split the cost of having an SBS employee install the unit for the customer. The SBS employee, Bret Lewis, was instructed to take a day off to perform the installation, for which he was paid by PPE, and 50% of the installation cost was deducted from the price of the unit PPE paid to Mr. Mueller.

¶20. Mr. Bondy testified that he was unaware until February 2017 that Mr. Wilder was continuing to sell product and services through PPE.

¶21. On March 26, 2015, SBS and Mr. Wilder signed a Confidentiality Agreement. Jessica King signed on behalf of SBS. Ms. King is a staff accountant and works in human resources assisting Robert Mitchell, the SBS person responsible for human resources at SBS. Ms. King testified that she attended a human resources seminar which highlighted best practices

of updating human resource documents annually to ensure compliance with the employee handbook. She testified that she obtained copies of the different policies from the computer and unilaterally had all of the employees sign various human resource documents at the SBS annual meeting, including an electronic media policy, acknowledgement of the employee handbook, and proprietary information acknowledgement.

¶22. On further examination, however, it was clarified that Mr. Mitchell, her superior and Controller and Manager of Human Resources, was aware of what she was doing in having the employees sign these documents at the annual meeting, and in fact had approved her doing so. Ms. King testified that Mr. Mitchell himself signed the confidentiality agreement and other human resource documents at the annual meeting, and that Mr. Bondy signed the other documents, but did not sign the confidentiality agreement “because he had a separate agreement.” That is also true of Mr. Wilder’s supervisor, Max Mueller—that is, he signed the other acknowledgements, but did not sign the confidentiality agreement because “[h]e also had a separate employment agreement.”

¶23. Ms. King said she distinguished, to the extent she was aware, between people who had other agreements like the confidentiality agreement in place (*e.g.* Messrs. Bondy and Mueller) and did not have those people sign the confidentiality agreement, but attempted to have all other employees sign the confidentiality agreement.

¶24. During the hearing SBS suggested on a number of occasions that Ms. King did not have authority to sign the Confidentiality Agreement or bind the company. Thereafter, SBS conceded that Ms. King had authority and that SBS was not disavowing the effectiveness of the Confidentiality Agreement.

¶25. The terms of the Confidentiality Agreement are identical to the terms contained in the Confidentiality and Noncompetition Agreement as it relates to the confidentiality obligations imposed on Mr. Wilder. As the title of the agreement makes clear, however, the latter identifies additional agreements not to compete that are not included in the former.

¶26. In February 2017, Mr. Mueller received a complaint that Mr. Wilder had not been responsive in relation to some business inquiries. In order to address the issue, Mr. Mueller accessed Mr. Wilder's SBS emails and noticed some suspicious emails in which Mr. Wilder was sending emails to himself at a PPE email exchange. Mr. Mueller did not follow-up on the matter because of the press of other matters, specifically, the eminent sale of SBS in May 2017.

¶27. On April 21, 2017, Mr. Wilder had his attorney notify SBS that he was pursuing a claim for race and age discrimination. On April 28, 2017, Mr. Wilder filed with the Wisconsin Department of Workforce Development a discrimination complaint against SBS.

¶28. In May 2017, Mr. Mueller received a call from a sales representative in Indiana. Mr. Mueller contacted an SBS supplier called Powervar to determine if it would have a unit that matched the specifications for the request. Apparently, when Mr. Mueller spoke with Mike Chmura of Powervar, Mr. Chmura stated that he worked only with Mr. Wilder, and would not work with anyone else at SBS.

¶29. In May 2017, an SBS director, Tommy Kosek, apparently performed an exit interview for a former employee named Jason Adkins. In that conversation, apparently Mr. Adkins said he was being called by another former SBS employee, Joe Depola, who said he is working with Mr. Wilder and had been informed Mr. Depola had been let go from SBS. At the hearing, Mr. Wilder denied working with Mr. Depola outside of SBS.



¶30. In June 2017, a representative of Powervar confirmed to Mr. Mueller that it did business with PPE and that sales for the prior year approximated \$10,000.

¶31. Because of the matters discussed in preceding five paragraphs, representatives of SBS became concerned about Mr. Wilder and the potential of him competing against SBS through PPE. Mr. Mueller located PPE's website, which identified a list of other companies on it, including suppliers and competitors of SBS. Mr. Wilder testified that he put the various names on the website to draw attention to his business and the type of business he was in and could do, but said he was not doing business with most of them, and that almost all of the listed customers and suppliers had not done business with SBS for many years.

¶32. On June 27, 2017, Messrs. Bondy, Mueller and Mitchell confronted Mr. Wilder in a meeting originally scheduled as a follow up to Mr. Wilder's annual review. In that meeting, SBS confronted Mr. Wilder about diverting opportunities from SBS through the use of PPE, and requested that Mr. Wilder provide him information to assist SBS in its investigation of him and PPE. Specifically, SBS requested that Mr. Wilder provide a signed release authorizing various SBS suppliers to provide information about PPE transactions from 2014 to the present, as well as sales and income tax returns to show income associated with PPE. Finally, SBS requested that Mr. Wilder turn in his company-owned smartphone. At the meeting, Mr. Wilder refused to turn over the phone because it had sensitive personal information on it. He also admitted in his affidavit opposing injunctive relief that he used the phone for communications regarding PPE. Mr. Wilder said he would work to delete the personal information and return the phone to SBS. SBS granted him the opportunity to remove the personal information on the express condition that he not delete or otherwise destroy any other data on the phone.

¶33. On July 5, 2017, Mr. Wilder returned the phone to SBS. The phone had been reset to factory settings, and all information was deleted from the phone, as confirmed by SBS's digital forensics provider.

¶34. Mr. Wilder testified that when he was transferring information from the SBS phone to a new smartphone, "it was all or nothing," and information could not be transferred to his new phone and also remain on the old phone. After information was transferred to his new phone, Mr. Wilder testified that all texts, call histories, and voicemail messages were deleted from the SBS phone. He testified that because he no longer had access to the SBS server, the SBS emails were not transferred to the new phone, and that no texts, call histories, or voicemail messages were transferred to the new phone.

¶35. On July 6, 2017, Mr. Wilder, through his attorney, informed SBS that he was unwilling to provide SBS with any requested information about the business activities of PPE.

¶36. SBS terminated Wilder's employment on July 7, 2017, identifying as grounds for the termination Wilder's refusal to provide the requested information and his destruction of the data on his phone.

¶37. Prior to the hearing on the requested injunctive relief, the parties had not engaged in any formal discovery. SBS, however, had been reviewing Mr. Wilder's former SBS emails since his termination in July 2017. Among the emails SBS reviewed was an email chain dated April 26, 2016, relating to a Mark Travel quote. Mark Travel was a former customer of SBS and Mr. Wilder testified that a principal of Mark Travel, Gary, no longer wanted to deal with SBS. On the email chain, Mr. Wilder copied himself at the PPE email address. Mr. Wilder testified in his affidavit that PPE had been dealing with Mark Travel since 2011.

¶38. Mr. Wilder testified that he has not spoken with Gary regarding the pending litigation and related hearing for injunctive relief, and in fact had not spoken to him since prior to Mr. Wilder's termination. Nonetheless, SBS representatives, who have access to Mr. Wilder's SBS phone with the same phone number Mr. Wilder had used prior to his termination, played a voicemail from a "Gary," to Mr. Wilder, received during the hearing on the injunction. The voicemail stated:

"Hey Glenn, Gary. I'm sorry I didn't catch your call. Calling you back. If you just say you wanted a special battery that SBS couldn't supply it, that's an option, all right. Call me."

¶39. In a written Decision and Order, the Court granted in part and denied in part the Plaintiff's requested injunctive relief. The Court concluded that the merger clause in the Confidentiality Agreement clearly and unequivocally related to the same subject matter of the prior agreement and barred enforcement of the Confidentiality and Noncompetition Agreement and specifically, its noncompetition provisions. 9/18/17 Dec. and Order.

¶40. The Court did enjoin Mr. Wilder and ordered that he immediately cease and desist from using or disclosing, either directly or indirectly, any Confidential Information, as that term is defined in the Confidentiality Agreement. The Court ordered Mr. Wilder to return to SBS the original and all copies of Confidential Information, including any SBS files, information, or property within his custody or control, and enjoined him from deleting or modifying any digital information within his custody or control during the pendency of this case. *Id.*

¶41. On February 13, 2018, SBS filed a motion to compel discovery, including, among other things, electronic data from July 2012 to the present from the Defendants' QuickBooks program and other data from computers and hard drives used by Mr. Wilder in relation to PPE. The requested information related to the pending claims against the Defendants claiming that they diverted SBS business opportunities for their gain. At a status conference the next day, the

Court ordered that the Plaintiff refile the motion to comply with the Court's local rules, and the Plaintiff complied with a new filing on February 15, 2018.

¶42. The parties briefed the motion, and the Court held a hearing to decide it on February 21, 2018. The Court ordered that

1. Defendants shall produce for inspection and permit access to any QuickBooks software used to conduct business and/or store data on behalf of Professional Power Engineering, LLC ("PPE") from July 2012 to the present, including any electronic data stored therein.

2. Defendants shall produce for inspection and forensic imaging within 10 days from the date of the hearing, any personal computer, laptop, hard drive and/or electronic storage device used to conduct business and/or store data on behalf of Professional Power Engineering, LLC ("PPE") from July 2012 to the present. Appropriate measures shall be taken to prevent from disclosure any information protected by the attorney-client privilege.

3. Defendants shall identify, by bank and account number, every business and personal account that he has utilized and/or maintained from July 2, 2012 through August 31, 2017, and produce bank statements for any and all accounts used by PPE in connection with the operation of its business, including any personal or other bank accounts into which any sales, funds or revenue generated by PPE were deposited. Defendants shall produce said information forthwith. 3/6/18 Order.

¶43. After briefing and a hearing, the Court also sanctioned the Defendants \$2000.00 for the noncompliance with their discovery obligations. 4/24/18 Order.

¶44. On May 2, 2018, SBS filed a Motion for Sanctions and/or Order of Contempt, seeking an order of default, contempt, and an award of damages and other sanctions due to alleged egregious discovery violations and noncompliance with the Court's orders.

¶45. On May 24, 2018, SBS also filed a Motion for Temporary Injunction enjoining the Defendants from "expending, converting, concealing or otherwise depleting any income they have received or will receive as a result of their unlawful activity, and to immediately place those

revenues into a trust account administered by Defendants' counsel, to be held in trust to satisfy any damages the Court may award in this matter.”

¶46. After significant briefing, the Court held an evidentiary hearing on the motions on August 17, 2018, September 21, 2018, and again on October 5, 2018. On August 17, the Court heard testimony from Nathan Little—a forensic examiner for Gillware Digital Forensics—retained by SBS to conduct a forensic examination of the Defendants' hard drive, including the “clone” and original and related electronic data. He testified that his forensic analysis was hampered by the discovery of numerous attempts to destroy, modify, and impair the integrity of the data contained on the hard drive. He identified several examples of such efforts, including a decision made between February 28, 2018 and March 2, 2018, to restore the computer to the state existing on October 8, 2017, which effectively removed all new data created or modified after October 8, 2017. Mr. Little also testified that the purported explanation for the restore and lost data supplied by Mr. Wilder and the person he hired to assist him in cloning the hard drive, Marcus Gentry, did not make sense from a computer and forensic investigation standpoint. He also testified that several QuickBook files had been modified from the active file, and then ultimately deleted. The Court found Mr. Little, and his opinions, to be credible.

¶47. The Court then heard from Marcus Gentry, who was called adversely by SBS. Mr. Gentry testified that he and Mr. Wilder were long-time friends and that he occasionally assisted Mr. Wilder on computer work, including removing viruses and swapping out a motherboard. Mr. Gentry could not recall the details of when he was contacted by Mr. Wilder to assist on this matter, and what was discussed. He testified that Mr. Wilder's computer was infected with viruses which made it slow to start up and operate. He then ran a program to clean

the viruses and encountered a weird error, which he could not identify on the witness stand. Because it would not reboot after the error, he had to initiate a system restore to a prior date.

¶48. Mr. Gentry was then asked about contacting Robert Mitchell from SBS in relation to Mr. Gentry's willingness, for a price, to disclose efforts by Mr. Wilder to destroy and conceal information from his computer. Mr. Gentry denied this, but was confronted with text messages from his phone number to Mr. Mitchell, and pictures of Mr. Gentry meeting Mr. Mitchell at a McDonald's. Mr. Gentry admitted that it was him in the picture, but denied contacting Mr. Mitchell to obtain payment in exchange for disclosing fraud by Mr. Wilder.

¶49. At the close of the hearing, the Court handed Mr. Gentry a subpoena to ensure his attendance at the continued hearing on September 21, 2018. The subpoena also required Mr. Gentry to bring with him any recording of Mr. Wilder and any text messages or emails between him and Mr. Wilder.

¶50. Mr. Gentry did not appear on September 21, 2018. His testimony, coupled with the testimony of other credible witnesses, and his nonappearance at the hearing leads the Court to find Mr. Gentry not credible. In fact, the Court finds that Mr. Gentry intentionally lied under oath at the August hearing. The Court issued a warrant for Mr. Gentry's arrest.

¶51. On September 21, 2018, the Court heard testimony from Robert Mitchell, the Controller of SBS. Mr. Mitchell testified, among other things, to his comparison of various QuickBooks files obtained from Mr. Wilder. This included information deleted on the most recent "active" file, but contained on a recovered file dated September 6, 2017. In addition, information Mr. Wilder produced in discovery on paper did not contain several items that appear in the recovered QuickBooks file from September. All of the missing information relates to SBS customers that the Defendants were working with on various deals. Some of those transactions

appear to be in violation of the Court's temporary order. Deleted or modified information relates to "Diversity Consulting Fees" Mr. Wilder invoiced to an SBS vendor after apparently diverting an SBS opportunity directly to that vendor. Information such as these invoices were not produced on November 13, 2017, in Mr. Wilder's response to SBS's discovery requests, or disclosed in the QuickBook documents Mr. Wilder produced on January 9, 2018.

¶52. In addition, some information relating to alleged diverted business was not deleted, but modified by changing the PPE invoice and the decimal point, so that the invoice went from originally charging \$15,970, to \$1,597, the freight charge went from \$891 to \$89.10, and the total invoice from \$16,861 to \$1,686. This modified invoice exists, despite the fact that the PPE bank records reflect a deposit of \$16,861 on May 19, 2017, just a few weeks after the invoice was sent on April 28, 2017.

¶53. Mr. Mitchell testified to emails obtained by subpoena from an SBS vendor, in which Mr. Wilder states, "REMEMBER – NOT A WORD ABOUT THIS TO ANYONE AT SBS OR ANY SUBS YOU MIGHT IN CA, TX, OR MN." Mr. Wilder failed to produce the email in his production.

¶54. Mr. Mitchell testified that he was contacted by Marcus Gentry and told that he was asked by Mr. Wilder to delete information from his computer, but that, in exchange for \$25,000, he would provide Mr. Mitchell with the contents of the original hard drive before it had been modified, and that for an additional \$10,000, he would testify in court regarding what Mr. Wilder asked him to do and throw in a recorded conversation with Mr. Wilder.

¶55. Mr. Mitchell organized a meeting with Mr. Gentry, which took place in January 2018, at a local McDonald's. SBS took pictures of Mr. Gentry with Mr. Mitchell. In that meeting, Mr. Gentry played Mr. Mitchell a recorded conversation with Mr. Wilder wherein Mr.

Wilder asked Mr. Gentry to build a separate computer for him to turn over to SBS as part of the lawsuit. They met again in February 2018 and Mr. Gentry explained to Mr. Mitchell how he could delete information with a “date hack” by rolling the clock back on the computer, and that he had information about Mr. Wilder’s overseas accounts. Mr. Mitchell also referred to text messages he had with Mr. Gentry consistent with his testimony about Mr. Gentry’s offer. The Court finds Mr. Mitchell credible, including the review of data and information produced by Mr. Wilder at various times, as well as the true nature of the interactions with Mr. Gentry.

¶56. After Mr. Mitchell testified at the September hearing, the Court heard testimony from the Defendants’ forensic expert, Katherine Helenek, a forensic examiner at Digital Intelligence. She testified that she was retained to recover any deleted files from the Defendants’ hard drive during the period from October 2017 to March 2018. She testified that she was successful in recovering some files, but that some information may have been overwritten. As of the date of the hearing, none of the recovered information had been provided to SBS. The Court generally found Ms. Helenek to be credible regarding the efforts she was undertaking for the Defendants.

¶57. Mr. Wilder testified on October 5, 2018. Mr. Wilder testified generally that he did not intentionally delete or modify information from his computer, and that he had never asked Mr. Gentry to assist him do so. He testified that he asked Mr. Gentry to create a clone of the hard drive to comply with his discovery obligations in this case. When referring to various invoices he issued to SBS vendors, such as Omni Power and others, that discuss a Diversity Consulting Fee, Mr. Wilder stated, among other things, he did not charge or earn a consulting fee, but that payments made to him by these vendors were “gifts.” Mr. Wilder did not have any explanation for the deleted and modified documents other than “user error,” and that Mr. Gentry



may have purposely compromised the integrity of his electronic information. The Court finds Mr. Wilder and his explanations for the deleted and modified information to be incredible.

¶58. The Court found at the close of the October 2018 hearing, and further finds as part of this written decision, that Mr. Wilder intentionally violated his discovery obligations and violated this Court's orders, specifically its 9/18/17 Decision and Order ¶80 and its 3/6/18 Order ¶¶ 1 & 2, by intentionally deleting or modifying electronic information, including but not limited to QuickBook files, regarding his dealings with SBS vendors and customers. The Court finds this conduct to be egregious and flagrant, and done in a conscious attempt to affect the outcome of this litigation. The Court further finds that Mr. Wilder attempted to hide his misconduct by intentionally testifying falsely to mislead the Court and hinder its efforts to get to the truth of the discovery issues in this case.

¶59. The Court sanctioned the Defendants and ordered that they pay to SBS the reasonable legal fees incurred in litigating the discovery issues, including those expended in an effort to reconstruct the evidence and conduct a forensic analysis of the electronic information. The Court took under advisement further sanctions, including the request for a default judgment and injunction ordering Mr. Wilder to preserve assets to cover any potential judgment in this case.

¶60. After supplemental briefing, the Court held a hearing on December 10, 2018, and heard argument on the issue of sanctions against the Defendants. The Court took the issue of sanctions under advisement to issue a written decision, but ordered as a sanction the payment of \$89,091.00 by the Defendants to SBS for the violations and costs of pursuing relief, and also ordered that the Defendants post by January 9, 2019, a surety bond in the amount of \$400,000 to cover a potential recovery by SBS against the Defendants.

## DISCUSSION

¶61. A party has a duty to preserve evidence. The intentional destruction, alteration or concealment of such evidence is known as “spoliation.” In making a spoliation determination, this Court should consider whether the party responsible for the destruction of evidence knew, or should have known, at the time of the destruction, that: (1) litigation was already pending or was a distinct possibility; and (2) the destroyed material would be relevant to that litigation. *Wagner Dairy Farms, LLC v. Tri-County Dairy Supply, Inc.*, 2013 WI App 1, ¶ 13, 345 Wis.2d 396, 824 N.W.2d 927 (Wis. App. 2012) (citations omitted).

¶62. Once a court determines that a party’s actions constitute spoliation, the next step is to determine the appropriate sanction. When the spoliation involves the violation of a court order, the potential sanctions are identified in Wis. Stat. § 804.12(2). That section provides

(2) Failure to comply with order.

(a) If a party or an officer, director, or managing agent of a party or a person designated under s. 804.05 (2) (e) or 804.06 (1) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under sub. (1) or s. 804.10, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

1. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
2. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;
3. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
4. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders

except an order to submit to a physical, mental or vocational examination.

(b) In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

¶63. The sanction decision is committed to the sound discretion of the trial court.

*Morrison v. Rankin*, 2007 WI App 186, ¶ 15, 20, 305 Wis.2d 240, 738 N.W.2d 588 (Wis. App. 2007). “Just” sanctions can include dismissal (or default) upon a showing that a party has acted egregiously or in bad faith, which means a conscious attempt to affect the outcome of litigation or a flagrant, knowing disregard of the judicial process. Upon such a showing, the court may impose sanctions regardless of whether the destruction “impaired the opposing party’s ability to present a claim or defense.” *Id.* at ¶ 20 (citations omitted).

¶64. In *Morrison*, the Court of Appeals upheld the issuance of a directed verdict for the plaintiff as a sanction for the defendant’s destruction of documents that he knew, or should have known, would be evidence in the malpractice action. In finding the directed verdict appropriate, the circuit court concluded that the defendant’s action was not only intentional, but taken knowing that it would eliminate evidence favorable to the plaintiff and unfavorable to him:

I firmly believe the doctor’s destruction of his records raises a strong inference that the records destroyed would have revealed evidence that was unfavorable to[him] and favorable to the plaintiff. At this point, based solely upon Dr. Rankin’s actions, it would not be fair to require the plaintiff to defend against defendants’ challenges, engage in further, possibly lengthy discovery, including discovery related to the possibility of availability of some other records (which could not possibly be compared to or contrasted with the destroyed records), name additional experts, nor engage in any other activities which would only generate additional time and expense. In short, the innocent plaintiff should not pay for the sins of Dr. Rankin.

*Id.* at ¶¶ 21, 23, 738 N.W. at 595 (emphasis added).

¶65. Affirming the circuit court's sanction, the court appeals also addressed whether *Hudson Diesel, Inc. v. Kenall*, 194 Wis.2d 531, 535 N.W.2d 65 (Ct. App. 1995), required it to consider whether a less severe sanction was available to remedy the violation before a directed verdict could be ordered. The court rejected any such requirement, finding it limited to cases involving conduct that is not intentional or in bad faith – not those involving actions that are intentional and egregious. *Id.* at ¶ 26, 738 N.W.2d 596, 97.

¶66. In their brief, the Defendants contend that this Court must apply the five-step process or inquiry cited in *Milwaukee Constructors II v. Milwaukee Metropolitan Sewerage District*, 177 Wis. 2d 523 (Ct. App. 1993). In that case, the Court of Appeals reversed the decision of the circuit court dismissing Plaintiff's complaint against Defendant after finding that Plaintiff destroyed documents that deprived Defendants of relevant information essential to their defense. The circuit court relied on a New Jersey district court case for its analytical framework for dismissing the action. That framework included a five-step process for evaluating an allegation of document destruction:

- (i) identification, with as much specificity as possible, of the documents which were destroyed;
- (ii) the relationship of those documents to the issues in the present action;
- (iii) the extent to which such documents can now be obtained from other sources;
- (iv) whether [the party responsible for the document destruction] knew or should have known at the time it caused the destruction of the documents that litigation against [the opposing parties] ... was a distinct possibility, and
- (v) whether, in light of the circumstances disclosed by the factual inquiry, sanctions should be imposed upon [the party responsible for the document destruction] and, if so, what the sanctions should be.

*Id.* at 532.

¶67. In applying this framework, the Defendants argue that dismissal or default is not appropriate because the Plaintiff has not identified with specificity what documents existed and were destroyed, what the documents supposedly contained, and how they relate to the issues in the

case. They also contend that SBS failed to establish that the destroyed information could not be obtained from other sources. In this regard, the Defendants point to the external hard drive they recovered during the pendency of the discovery motions and the work being performed by Ms. Helenek and Digital Intelligence to recover the information.

¶68. The Plaintiff responds, however, that more recent cases clarify that the test in *Milwaukee Contractors II* applies when the violation was not purposeful, but negligent, and make clear that the party aggrieved by spoliation need not prove, and the circuit court need not find, specific prejudice before a sanction of dismissal or default is appropriate. A court is obliged to consider prejudice and less-drastic sanctions only when the noncomplying party's conduct is unintentional. *See Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis.2d 707, 730, 731, 599 N.W.2d 411 (Wis. App. 1999) ("We conclude that in the appropriate case, after finding that a party, or persons acting on the party's behalf, has destroyed evidence with a conscious attempt to affect the outcome of the litigation or a flagrant knowing disregard of the judicial process, the trial court does have the discretion to impose a sanction of dismissal even though the destruction of the evidence has not impaired the opposing party's ability to present a claim or defense.") (citations omitted, emphasis added); *Hudson Diesel, Inc. v. Kenall*, 194 Wis.2d 531, 546535 N.W.2d 65 (Wis. App. 1995) ("[A] trial court need only explore alternative remedies where the noncomplying party's conduct is unintentional.").

¶69. As noted above, the Court found that Mr. Wilder and his company PPE intentionally violated their discovery obligations and this Court's orders, specifically the Court's 9/18/17 Decision and Order ¶80 and its 3/6/18 Order ¶¶ 1 & 2, by intentionally deleting or modifying electronic information, including but not limited to QuickBook files, regarding their dealings with SBS vendors and customers. The Court finds that the information deleted or

modified was likely advantageous to the Plaintiff and disadvantageous to the Defendants on matters to be tried in the case. The Court finds this conduct to be egregious and flagrant, and done in a conscious attempt to affect the outcome of this litigation.

¶70. The Court agrees with the Plaintiff that the framework identified in *Milwaukee Contractors II* is inapplicable here, and that SBS need not identify the specific documents lost and need not rebut a claim that the documents are recoverable from another source. The Court agrees with the Plaintiff that such a requirement here would essentially result in a game of “electronic hide-and-seek,” putting the onus on an aggrieved party to identify just how effective the culprit’s egregious actions are.

¶71. The Court has considered the nature, extent, and scope of the Defendants’ violations; the fact that Mr. Wilder had likely committed spoliation with respect to his phone in the summer of 2017, and that the Court entered an order to address any future spoliation, which the Defendants ignored, further spoliating evidence in a more calculated and devious way; that the violations were repeated, deliberate, and calculated, including seeking the assistance of a knowledgeable person to shield their violations even after matters regarding discovery noncompliance were coming to light; that the Defendants violated not only one order, but two orders seeking the preservation and production of information requested by the Plaintiff; and that Mr. Wilder lied under oath regarding his actions and in so doing attempted to frustrate this Court’s ability to address the violations. The Court has considered alternative sanctions, less drastic and less punitive than a sanction of default and dismissal. It finds that those alternative sanctions are inappropriate, and their imposition would not, in the light of the aggravated nature of the violations, be just. It finds that alternative sanctions would, in this Court’s view,

depreciate the seriousness and egregiousness of the violations. Under the circumstances presented here, the only fair, just, and appropriate sanction is that of dismissal and default.

¶72. Accordingly, the Court grants the Plaintiff's Motion for Sanctions and in doing so, strikes the Defendants' Answer to Amended Complaint and Counterclaims, dismisses the Defendants' counterclaims against the Plaintiff, and grants a judgment of default in favor of the Plaintiff and against the Defendants on all of the Plaintiff's claims. The Court will hold an evidentiary hearing on the amount of damages, if any, the Plaintiff may recover on its claims against the Defendants.

Dated this 17th day of January, 2019.

BY THE COURT:

/s/ Michael J. Aprahamian

Circuit Court Judge