In re Hitachi TV *Optical Block* Cases

United States District Court for the Southern District of California

August 12, 2011, Decided; August 12, 2011, Filed

Civil No. 08cv1746 DMS (NLS)

Reporter
2011 U.S. Dist. LEXIS 90882; 2011 WL 3563781

IN ***RE HITACHI TELEVISION OPTICAL BLOCK*** CASES This document relates to all actions

Subsequent History: Related proceeding at *Colosimo v. **Hitachi*** Home Elecs. (Am.), Inc., 2011 U.S. Dist. LEXIS 109143 (E.D. Mich., Sept. 26, 2011)
Class certification denied by *In **re Hitachi*** TV ***Optical Block*** Cases, 2011 U.S. Dist. LEXIS 109995 (S.D. Cal., Sept. 27, 2011)

Prior History: *In **re Hitachi*** TV ***Optical Block*** Cases, 2011 U.S. Dist. LEXIS 135 (S.D. Cal., Jan. 3, 2011)

Core Terms

deleted, documents, files, spoliation, bad faith, sanctions, hard drive, fragments, defragmentation, declaration, carving, trace, willfulness, discovery, forensic, notice, email, destroyed, recovered, space, deposition, party's, overwritten, wiping, Reply, fault, adverse inference, Sur-Reply, destroying evidence, inherent authority

Case Summary

Overview

Plaintiffs' motion for sanctions was denied because defendants had shown that the files were not destroyed, that the retrieved fragments more likely than not were already produced documents, and that the three that were irretrievable were not relevant. Additionally, there was no evidence of intent of impede plaintiffs' access to evidence, and therefore, no evidence of bad faith.

Outcome

Plaintiffs' motion for sanctions denied.

LexisNexis® Headnotes

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN1 In order to prove spoliation, a party must show: 1) the party with control over the evidence had an obligation to preserve it at the time of destruction; (2) the evidence was destroyed with a culpable state of mind; and 3) the evidence was relevant to the party's claim or defense.

Civil Procedure > Discovery & Disclosure > Disclosure > Motions to Compel

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

Civil Procedure > ... > Discovery > Misconduct During Discovery > Motions to Compel

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

HN2 Sanctions are potentially available under Fed. R. Civ. P. 37(a)(5) for a party who successfully moves for an order compelling discovery. Fed. R. Civ. P. 37(a)(5). Rule 37(a)(5) provides for the payment of fees when a motion for an order compelling discovery is granted, but cautions: the court must not order this payment if: (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust. Fed. R. Civ. P. 37(a)(5)(A).

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

Evidence > Burdens of Proof > Burden Shifting

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN3 A court may sanction a party who has despoiled evidence based on its inherent power to respond to abusive litigation practices. Inherent powers, however, must be exercised with restraint and discretion. If spoliation is shown, the burden of proof logically shifts to the guilty party to show that no prejudice resulted from the spoliation. Prejudice is determined by looking at whether the spoliating party's actions impaired the non-spoliating party's ability to go to trial, threatened to interfere with the rightful decision of the case, or forced the non-spoiling party to rely on incomplete and spotty evidence.

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN4 A party's destruction of evidence need not be in "bad faith" to warrant the imposition of evidentiary sanctions. Sanctions may be imposed on a party that merely had notice that the destroyed evidence was potentially relevant to litigation. Motive or degree of fault in destroying the evidence, however, should be considered in choosing the appropriate sanction.

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

HN5 A district court may sanction under its inherent powers not only for bad faith, but also for willfulness or fault by the offending party.

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN6 In determining the appropriate sanction for spoliation, a court will seek a sanction that will: (1) penalize those whose conduct may be deemed to warrant such a sanction; (2) deter parties from engaging in the sanctioned conduct; (3) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (4) restore the prejudiced party to the same position it would have been in absent the wrongful destruction of evidence by the opposing party. Courts should also examine: 1) the degree of fault of the party who destroyed the evidence and whether a lesser sanction exists that would avoid substantial unfairness to the opposing party.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Evidence > Inferences & Presumptions > Inferences

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN7 The destruction of evidence need not be in bad faith to warrant the imposition of an adverse inference. California district courts have adopted the three-part adverse inference test from the United States Court of Appeals for the Second Circuit requiring: (1) the party having control over the evidence had an obligation to preserve it; (2) the records were destroyed with a culpable state of mind; and (3) the destroyed evidence was relevant to the party's claim or defense. Even if these three requirements are met, the court must exercise its discretion to determine if an adverse inference is appropriate.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

HN8 Fee shifting under the inherent authority of the court requires a finding of bad faith. Before awarding attorneys' fees, the court must make an express finding that the sanctioned party's behavior constituted or was tantamount to bad faith.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

Evidence > Inferences & Presumptions > Inferences

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN9 At first blush, a rule requiring bad faith for fee shifting, but not for evidentiary sanctions, is counterintuitive. This seeming discordance, however, disappears upon examining the two different rationales for sanctioning spoliation. An adverse inference can be given in the absence of bad faith when it is necessary to

eliminate prejudice caused by spoliation. In contrast, because fee shifting is punitive the penalty can be imposed only in exceptional cases and for dominating reasons of justice. Thus, because fee shifting is punitive in nature, and can chill advocacy, it logically requires a finding of bad faith.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

HN10 A party demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

HN11 A finding of bad faith is warranted where an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent. A party also demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN12 "Willful" spoliation requires only notice of relevance. This imprecise terminology, however, cannot stand for the proposition that all "willful" spoliation is in "bad faith." Sanctions under the inherent authority are available not only for bad faith, but also for willfulness or fault by the offending party. Thus, it would be illogical to read willful and bad faith as synonyms. Moreover, equating willfulness with bad faith would render all spoliation in bad faith.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN13 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.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN14 Given that sanctions under the inherent authority are available not only for bad faith, but also for willfulness or fault, bad faith must require more than destruction with notice of relevance. In terms of spoliation, the dishonest purpose is most logically the impediment to the other side's ability to litigate.

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

HN15 A sanction award must be just, and a determination of the correct sanction for a discovery violation is a fact-specific inquiry.

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

Evidence > Relevance > Preservation of Relevant Evidence > Spoliation

HN16 In evaluating whether sanctions are necessary to penalize those in the wrong or to deter parties from engaging in the sanctioned conduct, a party's role and behavior regarding the spoliation is important.

Civil Procedure > Discovery & Disclosure > Disclosure > Motions to Compel

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

Civil Procedure > ... > Discovery > Misconduct During Discovery > Motions to Compel

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

HN17 Fed. R. Civ. P. 37 does not require bad faith. Fed. R. Civ. P. 37(b)(2)(A) provides for sanctions for failure to comply with a discovery order. Fed. R. Civ. P. 37(d) provides for fee shifting where a party successfully moves to compel a party to appear for deposition or respond to written discovery.

Civil Procedure > Discovery & Disclosure > Disclosure > Motions to Compel

Civil Procedure > Discovery & Disclosure > Disclosure > Sanctions

Civil Procedure > ... > Discovery > Misconduct During Discovery > Motions to Compel

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

Civil Procedure > Sanctions > Misconduct & Unethical Behavior > General Overview

HN18 Fed. R. Civ. P. 37(a)(5) provides for the payment of fees when a motion for an order compelling discovery is granted, but cautions: But the court must not order this payment if: (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust. Fed. R. Civ. P. 37(a)(5)(A).

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For ***Hitachi*** Home Electronics (America), Inc., ***Hitachi*** Ltd., ***Hitachi*** America, Ltd., Defendants: Alfredo Ortega, Seth Eric Pierce, LEAD ATTORNEYS, Mitchell Silberberg & Knupp LLP, Los Angeles, CA.

Judges: Hon. Nita L. Stormes, U.S. Magistrate Judge.

Opinion by: Nita L. Stormes

Opinion

ORDER:

(1) [*2] DENYING PLAINTIFFS' MOTION FOR SANCTIONS

(2) GRANTING DEFENDANTS' MOTION TO FILE SUR-REPLY

[Doc. Nos. 175 & 194.]

I. INTRODUCTION

On August 27, 2010, Plaintiffs filed a Motion alleging spoliation of evidence and seeking forensic investigation of a hard drive from which electronic files had been deleted. [Docket No. 99 (the "Spoliation Motion").][1] The Court found Defendants ("***Hitachi***") had spoliated documents by intentionally deleting computer files following notice of this lawsuit. [Doc. No. 122, (the "Spoliation Order").] The Court reserved judgment on the appropriate sanction until the extent of any prejudice could be determined through forensic analysis of the pertinent hard drives and the deposition of ***Hitachi*** regarding the efforts made to preserve and produce electronic data. On March 16, 2011, Plaintiff filed a Motion for Sanctions as a Result of Defendants' Spoliation . [Docket No. 175, ("Mot." or "Sanctions Motions").] On April 22, 2011, ***Hitachi*** filed an Opposition [Docket No. 185 ("Opp.")]. On May 6, 2011, Plaintiffs filed a Reply [Docket No. 192 ("Reply").] On May 11, 2011, ***Hitachi*** filed a Motion to Strike or File a Sur-Reply [Docket No 194.]. Having held oral argument on May **[*3]** 13, 2011, and having read all pertinent papers and attachments thereto, the Court **GRANTS** the Motion to File a Sur-Reply, and **DENIES** the Motion for Sanctions.

II. BACKGROUND

This is a putative class action alleging a defect in the ***optical block*** of ***Hitachi***'s rear projection ***televisions***.

[1] The Opposition to the Spoliation Motion is Docket No. 106 and the Reply to the Spoliation Motion is Docket No. 107.

Plaintiffs contend that the ***Hitachi***-brand LCD Rear Projection ***Televisions*** ("LCD RPTV") failed prematurely. ***Hitachi*** assembled the LCD RPTV in Mexico through its subsidiary, ***Hitachi*** Consumer Products de Mexico, S.A. de C.V. ("HIMEX "). HIMEX and its engineers were responsible for implementing design changes and reconditioning ***televisions*** that malfunctioned. In response to a Rule 30(b)(6) request, ***Hitachi*** designated Koji Kato, the former Chief Engineer in Quality Assurance of HIMEX, as its person most knowledgeable regarding the cause of the alleged defect and any measures taken to counter it. Just before his deposition in July 2010, ***Hitachi*** "de-designated Mr. Kato" upon learning that Kato had intentionally deleted electronic files relevant to the litigation.

Plaintiffs thereafter took Kato's **[*4]** deposition in his individual capacity. Kato testified in relevant part that between July 2002 and April 2007 he was employed by ***Hitachi*** Ltd., but was "loaned out" to ***Hitachi*** Home Electronics (America), Inc. ("HHEA") and also worked at HIMEX. (Kato Tr. at 13-16; Kato Decl. ¶ 1.)[2] Kato lived in Chula Vista, California, and traveled across the border to HIMEX's factory for most of his work. (Kato Tr. at 13-15.) He took work files home on occasion and saved them on his personal computer. He then transferred the work files to a 200 GB Maxtor External Hard Drive, and eventually transferred the work files to an 80 GB Maxtor External Hard Drive. In doing so, Kato deleted the files off his home computer and the 200 GB hard drive, which no longer functions. (Kato Decl.¶ 15.) Kato copied these files in violation of ***Hitachi***'s trade secret policy, which forbids employees to copy or otherwise store company information on home computers or other storage devices. (Kato Decl. ¶ 16.). Kato does not recall telling anyone at ***Hitachi*** that he possessed a copy of these files. (*Id.*). After ***Hitachi*** designated him as a 30(b)(6) witness, and just prior to his deposition, Kato deleted the work files off the 80 **[*5]** GB hard drive and ran a defragmentation program.

"Deleting" a document does not typically eliminate information on a hard drive. (Tulo Decl. ¶¶ 22-23.)[3] When a file is deleted it becomes unallocated space, space designated as unused and available. *Id.* The deletion of the file is noted in the Master File Table ("MFT"), which is the index system that indicates where files are stored on the hard drive. (Stenhouse Decl. II ¶7)[4] The file becomes invisible to the operating system but it exists until it is overwritten with new or other **[*6]** data. (Tulo Decl. ¶¶ 22-23; Stenhouse Tr. at 85-89.) A defragmentation utility reorganizes ***blocks*** of data in order to allow the computer program to retrieve files more efficiently. (Tulo Decl. ¶ 29) A defragmentation program is not designed to, and does not, make it impossible to recover the deleted files and is not the equivalent of "wiping" the disk. (*Id.*) When a defragmentation utility moves ***blocks*** of data, it is possible that some ***blocks*** of data will be moved into the space where deleted files were stored and, when that happens, the deleted file can no longer be recovered. In contrast, a "wiping" or "file eraser" program actively fills the space where the deleted file was stored with meaningless data in order to make it impossible to

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[2] There are three Kato Declarations. This first declaration is in opposition to the Spoliation Motion, was signed on September 16, 2010, is Docket No. 106-7 and will be referred to as "Kato Decl." The second declaration was signed on the same day also in opposition to the Spoliation Motion, is Docket Number 106-9 and will be referred to as "Kato II Decl." The third declaration was in opposition to the Sanctions Motion, was signed on April 20, 2011, is Docket Number 185-2 and will be referred to as "Kato Decl. III." Plaintiff deposed Mr. Kato on July 2, 2010 and excerpts of his deposition transcript are Docket Number 194-2 and will be referred to as "Kato Tr."

[3] There are four declarations from ***Hitachi***'s expert, David Tulo. The first declaration is in opposition to the Motion for Spoliation was signed on September 16, **[*7]** 2010, appears as both Docket No. 106-15 and Docket No. 194-2 and will be referred to as "Tulo Decl." There is also a Tulo Declaration in opposition to Motion to Certify Class, which is Docket No. 173-20 and is not referenced in this Order. The third Tulo Declaration in opposition to the Motion for Sanctions was signed on April 21, 2011, is Docket No. 185-7 and shall be referred to as "Tulo Decl. III." The fourth declaration in support of the sur-reply was signed on May 10, 2011, is Docket No. 194-3, and shall be referred to as "Tulo Decl. IV."

[4] There are three declarations from Plaintiff's expert, David. P. Stenhouse. The first declaration in support of the Spoliation Motion, was signed on August 24, 2010, should be part of Docket 99, but was never e-filed and appears as Docket No. 185-11 and shall be referred to as "Stenhouse Decl." The second declaration cited above is in support of the reply to the Spoliation Motion, was signed on September 23, 2010, is Docket No. 107-1, and shall be referred to as "Stenhouse II Decl." The third declaration in support of the reply to the Motion for Sanctions was signed on May 5, 2011, is Docket No. 192-1 and shall be referred to as "Stenhouse Decl. **[*8]** III." ***Hitachi*** deposed Stenhouse on March 24, 2011, the transcript of that deposition is both Docket No. 185-10 and 194-2, and shall be referred to as "Stenhouse Tr."

recover the deleted data. (*Id.* at ¶¶ 29-30.) Plaintiff's expert, Mr. Stenhouse, concedes that the defragmenter is not designed to "wipe" and only makes recovery impossible for deleted files that happen to be overwritten in the normal course of optimizing file storage. (Stenhouse II Decl. ¶ 12.)

Upon learning of Kato's deletion of files, ***Hitachi*** notified Plaintiffs' counsel about the deletion, took possession of Kato's 80 GB drive, and hired forensic consultant Ji2 to restore as much of the 80 GB drive as could be salvaged. (Pierce Decl. ¶¶ 4-5, 9.)[5] On July 2, 2010, the date originally reserved for the 30(b)(6) deposition, ***Hitachi*** produced Kato in Japan for a deposition regarding the deletion. (Pierce Decl. ¶7.) ***Hitachi*** offered to produce an alternate 30(b)(6) witness on that same date, but Plaintiffs preferred ***Hitachi***'s alternative offer to produce (at ***Hitachi***'s cost) an alternate 30(b)(6) witness at a future date in the United States. (*Id.*).

Ji2 **[*9]** used a software program called "Encase", the industry standard and most widely recognized computer forensic software platform, to recover deleted files from the hard drive. Encase examines the space on the hard drive where the deleted files were stored, as recorded on the MFT. (Tulo Decl. ¶ 37.) The program then recovers the deleted files from the drive's unallocated space or, if the files were overwritten, it notes what was previously stored in that location. (Tulo Decl. ¶ 38.) The forensic recovery performed "looked for all deleted files in the unallocated space" of the hard drive. (Snyder Decl. ¶ 9 [Docket No. 106-13].) Plaintiffs' expert, David Stenhouse, monitored the recovery search.

As a result of the search, ***Hitachi*** claimed it had recovered 99.69% of the deleted documents and only 64 files/folders remained unrecoverable. (Mot. at 14; Reply at 3.)[6] Based on Stenhouse's expert opinion, Plaintiffs argued ***Hitachi*** could not possibly ascertain how many documents were recovered because an unknown quantity could have been deleted without a trace. (Mot. at 14.) Stenhouse's opinion was based on his theory that defragmentation likely corrupted the MFT and that Encase only looked for documents **[*10]** in the unallocated space of a hard drive based on what was listed in the MFT. (Stenhouse Tr. at 158-161.) If the MFT is incomplete due to corruption from defragmentation, the Encase program would not know to look for all deleted documents. (*Id.*) (Stenhouse Tr. at 73-75, 82.) Stenhouse advocated the use of a data carving protocol that would expand Ji2's search to the entire unallocated space, not just the portions implicated by the MFT. (Stenhouse Tr. at 116-24.) In this way, forensic recovery would capture data or files missing from the MFT. ***Hitachi*** opposed the data carving, arguing it would not recover any useful data because defragmentation does not corrupt the MFT. Accordingly, Plaintiffs filed a motion for further forensic examination, and also for a finding of spoliation, and for the production of a Rule 30(b)(6) witness to testify about company policies regarding preservation and production of electronic data. (the Spoliation Motion.)

In an Order dated October 20, 2010, the Court found ***Hitachi*** committed spoliation **[*11]** via the actions of Kato. (the Spoliation Order.) Based on the record at the time, the Court could not make an objective determination of the degree of prejudice the deletion of files may have caused. Therefore, the Court granted Plaintiffs' motion to carry out a further forensic search of Kato's hard drive, using ***Hitachi***'s consultant Ji2 but under a protocol recommended by Plaintiffs' expert Stenhouse. (Spoliation Order.) The Court also granted Plaintiffs' request for ***Hitachi*** to designate a Rule 30(b)(6) witness to testify about what ***Hitachi*** did to attempt to preserve its electronic documents. [*Id.*]

Under Stenhouse's protocol, Ji2 used a method called "data carving" to search Kato's hard drive. The data carving examined all of the unallocated space in the hard drive, as opposed to the prior effort which searched only the unallocated space in which the MFT indicated deleted files had been stored. (Tulo Decl. ¶41(b)(i)(b).) As ***Hitachi*** argued, data carving is an unsophisticated search instrument because it does not disclose when the files were deleted or whether the files were deleted automatically or by a user. (*Id.*) Thus, there is no way to determine if Kato deleted the documents or **[*12]** whether the documents were deleted after the lawsuit was filed. (Opp. at 6.) The Court ordered the data carving based upon expert Stenhouse's view that the MFT was unreliable because "the Master File Table

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[5] There are two declarations of ***Hitachi*** attorney Seth E. Pierce. The first declaration in opposition to the Spoliation Motion was signed on September 16, 2010, is Docket No. 106-1, and shall be referred to as "Pierce Decl." The second declaration in opposition to the Sanctions Motion was signed on April 21, 2011, is Docket No. 185-9, as shall be referred to as "Pierce Decl.II."

[6] The forensic analysis restored 18,619 deleted files in 1,819 folders and revealed 64 items (4 folders and 60 files) were deleted but overwritten. (Snyder Decl. ¶ 3.)

is damaged by the defragmenting process". (Stenhouse Decl. ¶18, *see also* Stenhouse II Decl. ¶ 7). As described below, Stenhouse's assertion that defragmentation damages the MFT was subsequently shown to be inaccurate.

Ji2 performed the data carving and produced 829 file fragments in addition to the 99.69% of the documents recovered initially. (May 13, 1011 Sanctions Hrg. Tr. at 5-6 [Docket No. 210.]). The issue of prejudice is now fully briefed and the Court has had an opportunity to hear oral argument from counsel.

III. MOTION TO STRIKE OR FILE SUR-REPLY

As an initial matter the Court addresses ***Hitachi***'s Motion to Strike or File a Sur-Reply. [Docket No. 194.] ***Hitachi*** claims Plaintiffs have improperly raised a new argument in their Reply brief focusing on the loss of the "64 files/folders" that were found to be unrecoverable after Ji2's initial restoration efforts. [*Id.* at 1.] ***Hitachi*** states Plaintiffs' opening brief focused on the additional 829 file fragments uncovered by the second **[*13]** forensic analysis performed by Ji2 using Stenhouse's methodology, not the 64 files. [*Id.*] At oral argument, Plaintiffs said they did reference the 64 files in the opening paragraph of their opening brief by talking in terms of 99.69 % of documents ***Hitachi*** claimed to have initially recovered. (Sanctions Hrg. Tr. at 3.) However, the suggested reference does not appear in the opening brief until page 14, at which point Plaintiffs state:

> As explained above, and as expected, full reconstruction and restoration of Kato's files has proven to be impossible–despite ***Hitachi***'s previous and unsubstantiated claim to have reproduced 99.69% of the destroyed documents–a claim initially rebutted by Stenhouse and now conclusively disproved through Ji2's data carving.

(Mot. at 14.)

Plaintiffs argued that ***Hitachi*** could not possibly say how many files were recovered or unrecovered because certain files were deleted without a trace. They punctuated this point by saying ***Hitachi*** had previously only conceded to the 64 files being unrecoverable (or recovery of 99.69% of the files) and were proved wrong by the discovery of the additional 829 file fragments. (*Id.*) Although Plaintiffs do not address the prejudice **[*14]** from the 64 files in the opening brief, it was not unreasonable for Plaintiffs to focus on the allegedly *additional* prejudice revealed by the 829 file fragments. Moreover, Plaintiffs never conceded a lack of prejudice from the 64 files. Accordingly, the Court will not strike the Reply but **GRANTS** the Motion to File a Sur-Reply.

IV. DISCUSSION

Plaintiffs seek an order from this Court imposing the following sanctions:

> 1. At trial the jury be instructed that ***Hitachi*** destroyed relevant documents in this case and to impose an adverse inference with respect to the contents of the destroyed documents;
>
> 2. The burden of proof on any dispositive or class certification motions regarding the existence of a common defect should be shifted from Plaintiffs to ***Hitachi***; and
>
> 3. Plaintiff's counsel be awarded reasonable attorneys' fees and expenses incurred in connection with Kato's spoliation as set forth in the Compendium of Plaintiffs' Counsel's Declarations Regarding Counsel Fees and Expenses.

Plaintiffs justify the sanctions by claiming ***Hitachi***'s spoliation has "forever deprived [them] of [an] unknown number of documents which can never be reconstructed" and which is forcing them to rely on "incomplete **[*15]** and spotty evidence." [Mot. at 10.]; *see* *Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 348 (9th Cir. 1995)* (prejudice found where party was forced to rely on incomplete and spotty evidence due to spoliation). Apart from documents that Plaintiffs claim have disappeared without a trace, they are specifically referring to the 829 data fragments unearthed by the latest forensic analysis and the 64 files found to be unrecoverable following ***Hitachi***'s initial recovery efforts. (Mot. at 3-5; Sur-reply at 1.) Plaintiffs state 310 of the 829 fragments are incomprehensible. (Mot. at 3-5.) They also argue that the fragments will never be capable of complete recovery or reconstitution so as to match exactly the documents that were deleted. (*Id.*)

Hitachi argues that "every one of the purportedly destroyed source files for these Document Fragments exists and was either produced by Defendants in 2009 or is non-responsive." (Opp. at 1.) ***Hitachi*** contends none of the documents were destroyed to the point of being eliminated without a trace. (*Id.*)

A. Spoliation Previously Decided

At various points in its Opposition, ***Hitachi*** contends there was no spoliation in this case. The Court will **[*16]** not revisit the issue of spoliation as this matter has already been decided in the Spoliation Order. ***HN1*** In order to prove spoliation, a party must show: 1) the party with control over the evidence had an obligation to preserve it at the time of destruction; (2) the evidence was destroyed with a "culpable state of mind"; and 3) the evidence was relevant to the party's claim or defense. *Zubulake v. UBS Warburg, LLC ("Zubulake IV"), 220 F.R.D. 212, 220 (S.D.N.Y 2003)*; *see also United States v. Kitsap Physicians Serv.,* 314 F.3d 995, 1001 (9th Cir. 2002) (willful spoliation occurs when a party destroys evidence after being given notice that documents were potentially relevant to the litigation before they were destroyed.) In the Spoliation Order the Court found the following undisputed facts established spoliation:

> (1) Kato intentionally deleted his work files from the 80 MB Maxtor External Hard Drive in June 2010 after he learned ***Hitachi*** had designated him as a Rule 30(b)(6) "person most knowledgeable" about alleged defects in the ***optical block*** of its rear projection TVs.
>
> (2) After he deleted the documents, he ran a disc optimization utility that he knew would make recovery of these files more **[*17]** difficult.
>
> (3) At the time he deleted these documents, Kato knew about the company's "litigation hold" and knew he had specific instructions to preserve them.

[*Id.* at 122.]

Accordingly, the Court will address whether Plaintiffs were prejudiced by Kato's spoliation, the degree of prejudice, and the appropriate sanction, if any.[7]

B. Legal Standards

1. Sanctions Under Rule 37 of Federal Rules of Civil Procedure

HN2 Sanctions are potentially available under Rule 37(a)(5) for a party who successfully moves for an order compelling discovery. Fed. R. Civ. P. 37(a)(5).[8] Rule 37(a)(5) provides for the payment of fees when a motion for an order compelling discovery is granted, but cautions: "the court must not order **[*18]** this payment if: . . . (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A).

2. Sanctions Under the Inherent Authority of the Court

HN3 A court may sanction a party who has despoiled evidence based on its "inherent power" to respond to abusive litigation practices. *Fjelstad v. American Honda Motor Co., Inc., 762 F.2d 1334, 1337-38 (9th Cir. 1985)*. Inherent powers, however, must be exercised with restraint and discretion. *Roadway Exp., Inc. v. Piper, 447 U.S. 752, 764, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* (citations omitted).

If spoliation is shown, "the burden of proof logically shifts to the guilty party to show that no prejudice resulted from the spoliation." *Hynix Semiconductor Inc. v. Rambus, Inc., 591 F.Supp.2d 1038, 1060 (N.D. Cal., 2006)* (internal citations omitted), *overturned on other grounds.* Prejudice is determined by looking at whether the spoliating party's actions **[*19]** impaired the non-spoliating party's ability to go to trial, threatened to interfere with the rightful decision of the case, or forced the non-spoiling party to rely on incomplete and spotty evidence. *Leon v. IDX Systems Corp., 464 F.3d 951, 959 (9th Cir. 2006)*.

HN4 A party's destruction of evidence need not be in "bad faith" to warrant the imposition of evidentiary sanctions. *Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993)*. Sanctions may be imposed on a party that merely had notice that the destroyed evidence was potentially relevant to litigation. *Id.* Motive or degree of fault in destroying the evidence, however, should be considered in choosing the appropriate sanction. *Advantacare Health Partners L.P. v. Access IV, 2004 U.S.*

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[7] ***Hitachi*** takes great pains to argue that since deletion of the files does not equal complete elimination or destruction, and the documents were eventually capable of retrieval, there was no spoliation. (Opp. at 1-2.) The alteration of the document through deletion, however, constitutes spoliation. *Infor Global Solution (Michigan), Inc. v. Saint Paul Fire and Marine,* 2009 U.S. Dist. LEXIS 125797, 2009 WL 5909255 (N.D. Cal. Oct. 21, 2009). Accordingly, ***Hitachi***'s arguments go to the evaluation of the degree of prejudice.

[8] When a court order has been violated, sanctions are also available under Rule 37(b)(2) of Federal Rules of Civil Procedure. In this case, no Court Order was violated and sanctions under Rule 37(b)(2) are not at issue.

Dist. LEXIS 16835 , 2004 WL 1837997 *4, (N.D. Cal. 2004).

Hitachi argues that bad faith is required for any sanction for spoliation. (Opp. at 19.) The Ninth Circuit has recognized that Roadway Express, Inc. v. Piper, 447 U.S. 752, 767, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980) and Chambers v. NASCO, Inc., 501 U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991) "can be read to preclude a court's inherent power to sanction a party in the absence of bad faith" but then rejected that interpretation:

> The bad-faith requirement recognized in Roadway, however, is very **[*20]** likely limited to the context of sanctions in the form of cost- and fee-shifting. *See* Chambers, 501 U.S. at 59-60, 111 S.Ct. at 2140-41 (Scalia, J., dissenting). This court has, since *Roadway,* confirmed the power of ***HN5*** the district court to sanction under its inherent powers not only for bad faith, but also for willfulness or fault by the offending party. Halaco Eng'g Co. v. Costle, 843 F.2d 376, 380 (9th Cir.1988).

Unigard Sec. Ins. Co. v. Lakewood Engineering & Mfg Co., 982 F.2d 363, 368 n.2 (9th Cir. 1992).

HN6 In determining the appropriate sanction for spoliation, a court will seek a sanction that will: (1) penalize those whose conduct may be deemed to warrant such a sanction; (2) deter parties from engaging in the sanctioned conduct; (3) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (4) restore the prejudiced party to the same position it would have been in absent the wrongful destruction of evidence by the opposing party. Advantacare, 2004 U.S. Dist. LEXIS 16835, 2004 WL 1837997 at * 3, *citing* National Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976); Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 589 (9th Cir. 1983). Courts should also examine: **[*21]** 1) the degree of fault of the party who destroyed the evidence and whether a lesser sanction exists that would avoid substantial unfairness to the opposing party. Brosnan v. Tradeline Solutions, Inc., 681 F. Supp.2d 1094, 1104 (N.D. Cal. Jan. 15, 2010), *citing* Schmid v. Milwaukee, 13 F.3d 76, 79 (3rd Cir. 1994).

C. Prejudice

The Court will address each of Plaintiffs' claims of prejudice in turn.

1. Documents lost without a trace

Plaintiffs contend they will never know exactly what was on Kato's hard drive and what was deleted without a trace. In ordering the data carving, the court relied upon Stenhouse's assertion that the MFT is damaged by the defragmentation process. (Stenhouse Dec. ¶ 18.) Evidence submitted in opposition to the Motion for Sanctions proves this statement was not accurate. Kato's 80 GB hard drive was a NTFS (New Technology File System) formatted hard drive. (Tulo Decl. III at ¶ 12.) Kato used a "Windows Optimizer"; he selected "My Computer" in Windows, right clicked on the 80 GB HDD icon, and selected Properties. He then selected "Tools" and believes he selected "Defrag." (Kato Decl. ¶ 27.) As Expert Tulo describes in his third declaration: the Microsoft defragmentation **[*22]** utility used by Kato on NTFS hard drives does not remove any entries from the MFT. (Tulo Decl. III. ¶¶ 11, 35.) The Microsoft TechNet Library states that the Disk Defragmenter verifies that the new MFT "is an exact duplicate of the original." (Tulo III Decl. at ¶ 35, *quoting* Ex. 4 - http://technet.microsoft.com/en-us/library/bb742585.aspx). Tulo examined the Microsoft TechNet Library and Support website before concluding that, even if the MFT itself were defragmented, no entries would be deleted and the MFT would remain "exactly the size" it was before the defragmentation process and that "deleted file entries in the File Table are 'not reclaimed.'" (Tulo Decl. III ¶ 42, *quoting* Ex. 5 - http://support.microsoft.com/kb/174619).

This is a critical flaw in Stenhouse's theory. Stenhouse theorized: if the MFT itself were moved and defragmented, only the active file entries would be moved and the entries related to deleted files would be relegated to unallocated space, and possibly overwritten in the defragmentation process. (Stenhouse Tr. at 73) Microsoft documentation, however, proves that this does not happen. Accordingly, there is no support for Stenhouse's theory that defragmentation **[*23]** damages the MFT and no support for his assertion that the original recovery performed by Ji2 was insufficient. Indeed Stenhouse admitted that his sole reason for believing files might have been eliminated without a trace was based on the fact that Kato defragmented the hard drive (Stenhouse Tr. at 143); and that he was not certain whether the defragmentation utility would actually fail to move the deleted file list. (Stenhouse Tr. at 73-74.)

Additionally, Stenhouse agreed (even under his theory of the damaged MFT) that it was only a *possibility* that

documents could be deleted without a trace. (Stenhouse Tr. at 144.) In this case, Stenhouse stated he had not seen any evidence that documents had been deleted without a trace. (*Id.* at 80, 150.) He further stated the chances of documents being deleted without a trace were significantly lower if the computer was taken out of service relatively immediately after deletion of files. (*Id.* at 149.) The Stenhouse "disappearing without a trace" theory would require not only a damaged MFT (which Microsoft documentation proves is not possible), but also that the original MFT was randomly overwritten and that each and every piece of the file was also **[*24]** randomly overwritten. (Tulo Decl. III at ¶¶ 43-44.) Tulo saw no evidence that such a "perfect storm" had taken place and neither did Stenhouse. (Tulo Decl. ¶ 27; Stenhouse Tr. at 141.)

Moreover, Stenhouse was not asked to provide any opinions on the actual reports provided by Ji2 following the data carving analysis. (Stenhouse Tr. at 30.) Stenhouse's opinions were based on a theory of what could happen when defragmentation takes place. In contrast, ***Hitachi***'s expert, David Tulo, examined Ji2's results and stated definitively there was no evidence that either the MFT was corrupted or that any files were deleted without trace. (Tulo Decl. ¶ 27.) Tulo states:

> ...I have seen no evidence of file storage system index damage or corruption. I have seen no evidence leading me to conclude that any files have been deleted in such a way as to leave no trace of them–let alone a "significant likelihood" of that outcome.

(*Id.* at ¶ 43(b)).

Plaintiffs have presented nothing to contradict Tulo's conclusions. Plaintiffs did submit a third Stenhouse Declaration, which states Stenhouse's disagreement with ***Hitachi***'s conclusion that no files were deleted without a trace. Stenhouse claims that ***Hitachi***'s conclusion **[*25]** is "entirely premised on its assumption that Mr. Kato ceased use of his hard drive immediately after his deletions and defragmentation." (Stenhouse Decl. III ¶ 3.) Thus, Stenhouse claims that because Kato used the drive after deletions (albeit only once) "it is impossible to conclude that portions of the Master File Table and other areas on the hard drive have not been overwritten after Mr. Kato's deletions and defragmentation of the drive, resulting in deletions without a trace as I described in my September 23, 2010 Declaration." (*Id.*) Stenhouse, however posits no explanation for how the MFT could have been overwritten. In light of Stenhouse's prior admission that his sole basis for assuming corruption of the MFT was the defragmentation, and the Microsoft documentation proving that the MFT is not corrupted by defragmentation, Stenhouse's assertion that documents could still have disappeared without a trace is unpersuasive.

Thus, the Court concludes no documents were lost without a trace.

2. Documents Identified as Deleted

During oral argument, the following exchange took place:

> THE COURT [to Mr. Lax for Plaintiffs]: So are you saying that the Defense has to prove with 100–percent certainty **[*26]** that the recovered document is the same document that was on Mr. Kato's computer?
>
> MR. LAX: What I'm saying is that ***Hitachi*** has to reproduce the documents that are on Mr. Kato's computer or be able to prove in some other way that the documents are identical.
>
> THE COURT: Well, talk to me about what the burden is. Is it a –it's a more likely than not–isn't it a probability that the document recovered is more likely than not the same document that was on Mr. Kato's computer?
>
> MR. LAX: I think that that's right, you Honor.

(Sanctions Hrg. Tr. at 75 [Docket No. 210].)

Hitachi has shown that it is more likely than not it has already produced the documents deleted by Kato.

a. The 829 Document Fragments From Data Carving

The 829 file fragments fall into three general types; email, unformatted partial repair log entries, and incomprehensible documents. (Mot. at 4.) ***Hitachi*** has painstakingly identified a "duplicate" document for each document fragment except for 6 fragments which contain gibberish. ***Hitachi*** did this by pointing to "multiple combinations of unique serial numbers and words that would not randomly appear in close proximity to each other." (Opp. at 4.) In this way ***Hitachi*** was able to link **[*27]** or match fragments to documents ***Hitachi***

previously produced to Plaintiffs in 2009. ***Hitachi*** provides three examples of how this process identified matching documents. (Opp. at 3, Appendix Illustration 1-3). ***Hitachi*** took the fragment recovered from data carving and matched it with one or more source documents that had either been produced or were not relevant. ***Hitachi*** paralegal Nicole Leon declares that she compared each document fragment and "was able to locate a source or duplicate document for each Document Fragment." (Leon Decl. ¶ 4(c) [Docket No. 185-12.][9] The full results of this investigation are found in Exhibit 1 to the Leon Declaration. [Docket No. 185-13.] The Court has not been provided with the source documents and is without sufficient information to make an independent judgment as to the accuracy of the matches. Plaintiffs, however, do have all the source documents and do not contest the accuracy of any match. Instead, Plaintiffs argue that they have still been prejudiced because the documents on Kato's computer may not have been exact duplicates. (Reply at 4.)

Plaintiffs argue that the law presumes that the documents lost were adverse to ***Hitachi***'s case. (*Id.*). This is not true for the document fragments because data carving does not provide any information as to when the deletion occurred. (Tulo Decl. IV at ¶ 1.) Thus, the fragments could be from documents deleted long before the litigation or documents automatically created and deleted. Indeed, this is likely because, if the documents had existed when Kato deleted documents in 2010, the documents would have been present in the MFT. In the absence of any evidence of destruction with notice, no presumption attaches.

Moreover, even if the fragments could not be matched up to produced documents (as they were), the data carving fragments would not be proof of documents lost through wrongful deletion. First, the fragments recovered from the data carving protocol could also be deleted copies of files that had been stored elsewhere or deleted temporary back-up files that are automatically generated **[*29]** and deleted. (Stenhouse Tr. at 128-29.) Additionally, as just discussed, the fragments could be from documents deleted long before the litigation was filed. Plaintiffs are not entitled to recovery of every document deleted prior to notice of the need to preserve documents and are not entitled to a presumption that documents deleted at a remote time were adverse to ***Hitachi***.

b. The 64 Documents from the Encase Recovery

Plaintiffs also claim prejudice from the 64 unrecoverable files identified in the initial search by Ji2. (Reply at 2.) ***Hitachi*** has demonstrated that 61 of the files are irrelevant to the litigation or a duplicate has already been produced. (Sur-reply at 2-10.)[10] For example, one file was produced in 2001, before the LCD RPTVs at issue had been designed; some of the files relate to flat panel ***televisions***, some relate to plasma ***televisions***, and some relate to CRT (Cathode Ray Tube) ***televisions***. (*Id.*) Other files concern unrelated manufacturing issues, such as environmental testing equipment and hazardous chemical use. Still other files were index files for which the underlying documents were not overwritten, so no substantive information was lost.

Plaintiffs cite the case of *Phillips Electronics North America Corp. v. BC Technical*, 773 F. Supp. 2d 1149, 2011 U.S. Dist. LEXIS 16259, 2011 WL 677462 (D.Utah, Feb. 16, 2011), for the proposition that similarity of file names and matching of fragments to other produced documents is not sufficient to rebut the assumption of prejudice because, "[n]obody knows. . . how similar or how different those documents will be." (Sanctions Hrg. Tr. at 18.) The court finds no similarity between this case and *Phillips*. In *Phillips* there was no serious argument that prejudice was lacking due to Phillips' possession of similar documents. In that case, BCT executives destroyed 17,800 documents of which more than 15,000 could not be retrieved because the executives used sophisticated wiping programs. *2011 U.S. Dist. LEXIS 16259, [WL] at *2, 46-47, 55*. In this case, Kato did not "wipe" the hard drive and only a very small number of

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[9] Leon qualifies that six of the fragments could not be matched because they did not contain any key words or any **[*28]** words at all. ***Hitachi*** theorizes that the gibberish fragments only contain formatting (Opp. at 3, n.1), and Stenhouse agreed that the gibberish could only be formatting or metadata. (Stenhouse Tr. at 126-127.)

[10] ***Hitachi*** provides a chart **[*30]** detailing, for example, which files pre-date the design or manufacture of the ***televisions*** in issue or relate to other products.

documents could not be recovered.[11] More importantly, Phillips alleged trade secret misappropriation and copyright infringement and some of the lost files had the same names as proprietary and confidential Phillips documents. The **[*31]** court found that Phillips was prejudiced by not being able to prove the extent of BCT's misappropriation of trade secrets and copyright infringement. *2011 U.S. Dist. LEXIS 16259, [WL] at *14*. In other words, the fact that Phillips had a document with the same name did not preclude prejudice because the fact that BCT had possession of those documents was relevant.

By contrast, in this case ***Hitachi*** produced thousands of documents and has persuasively connected fragments recovered through forensic examination to those documents previously produced. Where only file names remained, ***Hitachi*** has shown there is no relation between those unrecovered documents and the claims and defenses in this case.

The remaining 3 files for which ***Hitachi*** has no information are emails that went through the company server and were copied to other employees' files which would have been previously produced in discovery if responsive. (*Id.*) Additionally, **[*32]** the subject of the emails is discernable from its index file. (*Id.*) One email refers to lamp testing to learn how long the lamp would last and two refer to lamps being returned from the field. These emails do not shed light on the alleged defective component in this lawsuit because there is no allegation that the lamps failed prematurely. (Sanctions Hrg. Tr. at 54-55.) Additionally, the emails were sent to multiple mail recipients and would have gone through the main server. (*Id.* at 57.) Finally, there is no information as to when the 3 remaining files were deleted. Even after data carving, the only information available is that the emails were on the hard drive on or about April 26, 2007. (Tulo IV Decl. ¶1.) Thus, there is no proof that the files were deleted after notice of relevance.

3. Degree of prejudice

At the end of the day, there are only three email files for which ***Hitachi*** cannot account by reference to prior documents or information and the file names of these documents indicate that they are not relevant to any issue in this case. (Sur-Reply at 10.) Perhaps more importantly, these three files represent a tiny fraction of material that was deleted; 20,000 or so documents have **[*33]** otherwise been retrieved. (Tulo Decl. ¶ 43(d)). These are in addition to thousands of other documents produced by ***Hitachi***. (Pierce Decl. ¶¶ 2, 8.) The three files were randomly overwritten by the defragmentation program, meaning they were not specifically targeted as files that contained critical or unique information pertaining to the disputes in this litigation. Under these circumstances, there is no evidence that would lead the Court to conclude Kato's spoliation has impaired Plaintiffs' ability to go to trial, threatened to interfere with the rightful decision of the case, or forced Plaintiffs to rely on incomplete and spotty evidence. *Leon, 464 F.3d at 959*.

Hitachi has met its burden of proving Plaintiffs did not suffer evidentiary prejudice.

D. Evidentiary Sanctions

Plaintiffs request three types of sanctions: adverse inference on the spoliated documents; shifting of the burden of proof on the issue of common defect; and reasonable attorneys' fees and costs. ***Hitachi*** contends there is no basis for the imposition of sanctions because neither the company nor Kato acted with bad faith.

Hitachi's argument misses the mark, however, because ***HN7*** the destruction of evidence need not be in bad **[*34]** faith to warrant the imposition of an adverse inference. *Glover, 6 F.3d at 1329* ("Surely a finding of bad faith will suffice, but so will simple notice of 'potential relevance to the litigation'")(citation omitted); *see also Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 n. 2. (9th Cir. 1992)(limiting bad faith requirement to sanctions in the form of cost and fee shifting). California district courts have adopted the three-part adverse inference test from the Second Circuit requiring: "(1) the party having control over the evidence had an obligation to preserve it; (2) the records were destroyed with a culpable state of mind; and (3) the destroyed evidence was relevant to the party's claim or defense." *Lewis v. Ryan,* 261 F.R.D. 513, 521

[11] It is clear that Kato did not use a "wiping" program because if he had, every single deleted file would be unrecoverable, as opposed to only the 64 unrecoverable in this case. (Tulo Decl. ¶*36); see also* Stenhouse Tr. at 84: "Q: Is the defragmentation utility a forensic wiping program? A: No."

(S.D.Cal., 2009).[12] Even if these three requirements are met, the court must exercise its discretion to determine if an adverse inference is appropriate. *See Keithley v. Homestore.com, Inc., 2008 U.S. Dist. LEXIS 92822 , 2008 WL 4830752 at *10 (N.D. Cal. November 6, 2008)* (finding adverse inference "a harsh remedy that is disproportionate to Plaintiffs' conduct in this case" and declining to recommend inference); *see also Unigard,* 982 F.3d at 367 (court has **[*35]** "broad discretion to fashion, on a case-by-case basis, an appropriate sanction for spoliation.")

Here, Kato acted with a culpable state of mind because he purposely deleted the files from his hard drive after notice of the relevance of the documents to this litigation. ***Hitachi***, however, has shown that the files were not destroyed, that the retrieved fragments more likely than not are already produced documents, and that the three that were irretrievable were not relevant. Therefore, imposition of **[*36]** an adverse inference is not justified. For the same reasons, a burden shifting sanction regarding proof of common defect is not warranted. Moreover, because the Court has found little or no prejudice to Plaintiffs, evidentiary sanctions are not necessary to place the risk of an erroneous judgment on the party who wrongfully created the risk or to restore the prejudiced party to the same position he would have been in absent the spoliation. *See Advantacare, 2004 U.S. Dist. LEXIS 16835, 2004 WL 1837997 *4*.[13]

E. Fee Shifting as a Sanction

Plaintiffs seek $500,000 in fees in connection with the Spoliation and Sanction motions.

1. Fee Shifting Under the Inherent Authority of the Court

HN8 Fee shifting under the inherent authority of the court requires a finding of bad faith. *Chambers v. NASCO, Inc., 501 U.S. 32, 46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)*. **[*37]** In *Leon v. IDX Systems Corp., 464 F.3d 951 (9th Cir. 2006)*, the Ninth Circuit stated: "Before awarding [attorneys' fees], the court must make an express finding that the sanctioned party's behavior 'constituted or was tantamount to bad faith.' *Leon at 961*, *quoting Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 648 (9th Cir. 1997)*; *see also Otsuka v. Polo Ralph Lauren Corp., 2010 U.S. Dist. LEXIS 12867, 2010 WL 366653 at *4 (N. D. Cal. Jan. 25, 2010)* (declining to award monetary sanctions in the absence conduct tantamount to bad faith); *Peschel v. City of Missoula, 664 F.Supp.2d 1137, 1148 n.8 (D. Mont. 2009)*(same).[14]

The *Leon* court defined bad faith: ***HN10*** "A party 'demonstrates bad faith by delaying or disrupting the

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[12] In *Lewis,* this court found a culpable state of mind where the sanctioned party failed to comply with a court order requiring it produce discovery, instead responding that it was looking for documents. The court issued a second order requiring production of the discovery. After the second order, the sanctioned party claimed all documents had been destroyed. The Court specifically found that the sanctioned party pointed to no efforts to preserve relevant documents and no effort to comply with the first Court order to produce the documents. On these facts, the Court found a culpable state of mind in that the sanctioned party was "at best, reckless and grossly negligent." *Lewis,* 261 F.R.D. 521.

[13] Plaintiffs assert: "Having determined that spoliation occurred and that such spoliation has prejudiced Plaintiffs, *see* Spoliation Order at 5-6, sanctions should be imposed." (Mot. at 7.) Plaintiffs misstate the findings of the Spoliation Order, which clearly says: "Whether and to what extent Plaintiffs' ability to prove its claims has been compromised by Kato's conduct must await determination at a later date." [Spoliation Order at 5.]

[14] ***HN9*** At first blush, a rule requiring bad faith for fee shifting, but not for evidentiary sanctions, is counterintuitive. This seeming discordance, however, disappears upon examining the two different rationales for sanctioning spoliation. An adverse inference can be given in the absence of bad faith when it is necessary to eliminate prejudice caused by spoliation. In contrast, because fee shifting "is punitive . . . the penalty can be imposed only in exceptional cases and for dominating reasons of justice.'" *Dogherra v. Safeway Stores, Inc.,* 679 F.2d 1293, 1298 (9th Cir. 1982)(citation omitted.); **[*38]** *see also Primus Auto. Fin. Servs., Inc. v. Batarse,* 115 F.3d. 644, 648-49 (9th Cir. 1997)(noting, in the context of sanctions for raising frivolous arguments, that a finding of bad faith "is especially critical when the court uses its inherent powers to engage in fee-shifting). Thus, because fee shifting is punitive in nature, and can chill advocacy, it logically requires a finding of bad faith.

litigation or hampering enforcement of a court order." *Leon, 464 F.3d at 961*, *quoting* *Primus, 115 F.3d at 649*.[15] This generic definition is borrowed from a case deciding whether a frivolous argument should be sanctioned under the court's inherent authority and it is the only time the Ninth Circuit has defined "bad faith" in the specific context of sanctions under the inherent authority of the court for spoliation of evidence. The court in *Leon* found bad faith where the spoliator (Leon) knew of the litigation hold, intentionally deleted 2,200 files and then wrote a program to write-over (wipe) any files from the unallocated space of the hard drive. *Id. at 959*. The Ninth Circuit rejected Leon's assertion **[*39]** that he only intended to delete personal files, noting that the deleted pornographic "files created on his employer-issued computer were relevant to a lawsuit centering on the existence of legitimate grounds for firing Leon." *Id.*

Unfortunately, the Ninth Circuit muddied the definition of "bad faith" by concluding Leon's "deletion and 'wiping' of 2,200 files, acts that were indisputably intentional, amounted to **willful** spoliation of relevant evidence." *Leon, 464 F.3d at 959* (emphasis added). This finding is confusing because ***HN12*** "willful" spoliation requires only notice of relevance. This imprecise terminology, however, cannot stand for the proposition that all "willful" spoliation is in "bad faith." The Ninth Circuit case law makes clear that sanctions under the inherent authority are available "not only for bad faith, **[*40]** but also for willfulness or fault by the offending party." *Unigard Sec. Ins. Co,*, 982 F.2d at 368, n.2. Thus, it would be illogical to read willful and bad faith as synonyms; *see also* *Lewis v. Ryan* 261 F.R.D. 513 (S.D. Cal. 2009)(finding insufficient evidence of bad faith despite destruction after notice of relevance.) Moreover, equating willfulness with bad faith would render all spoliation in bad faith, a result not contemplated by Ninth Circuit precedent.[16]

Neither the briefs of the parties nor the court's independent research has revealed any specific definition of bad faith in the context of sanctioning spoliation under the inherent authority of the court. Accordingly, it is appropriate to look to other jurisdictions for guidance. In a recent **[*41]** case, the Federal Circuit held an intent to impede the opposition is necessary for a finding of bad faith spoliation: ***HN13*** "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.'" *Micron Tech, Inc. v. Rambus, Inc. 645 F.3d 1311, 2011 U.S. App. LEXIS 9730, 2011 WL 1815975 * 12 (Fed. Cir. May 13, 2011)*, *quoting* *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 80 (3rd Cir. 1994) (citing cases from the First, Third and Seventh Circuits). The *Rambus* court concluded: "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." *Id.;*[17] *see also* *Hamilton v. Signature Flight Support Corp., 2005 U.S. Dist. LEXIS 40088, 2005 WL 3481423 *7 (N.D. Cal. Dec. 20, 2005)* (lack of conscious disregard of obligation to preserve evidence weighs against sanction).

This advantage seeking behavior was specifically relied upon by the *Napster* court in imposing **[*42]** reasonable attorneys' fees based on "wrongful" destruction. *In **re** Napster, Inc., 462 F.Supp.2d 1060, 1073-4 and 1078 (N.D. Cal., 2006)*. The *Napster* court, specifically found that the spoliator had issued an email that was "clearly designed to instruct the recipients to delete all of their Napster-related emails going forward in order to avoid surrendering them." *Id. at 1073*. Additionally, as described above, the *Leon* court relied upon the finding that Leon intended to delete documents relevant to his employer's lawsuit against him, behavior that could satisfy the advantage-seeking bad faith standard.

Moreover, the court has found no case within the Ninth Circuit rejecting a definition of bad faith based upon

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[15] The *Primus* court held: ***HN11*** "A finding of bad faith is warranted where an attorney 'knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent.' A party also demonstrates bad faith by 'delaying or disrupting the litigation or hampering enforcement of a court order.'" *Primus,* 115 F.3d at 649 (citations omitted.)

[16] Plaintiffs assert that "this Court's finding that the documents were purposefully destroyed satisfies any definition of bad faith. *Carl Zeiss Vision Int'l GmbH v. Signet Armorlite, Inc.,* 2010 U.S. Dist. LEXIS 118186, 2010 WL 743792, 15 (S.D. Cal. 2010), *quoting* *Napster,* 462 F.Supp.2d at 1066; see also *Lewis* at 518." (Reply at 7.) *Zeiss* and *Napster,* however, merely state that bad faith is not required for sanctions and do not equate purposeful destruction with bad faith.

[17] The Third and Seventh Circuit law differs from the Ninth Circuit in that bad faith is not required for an adverse inference. The definition of bad faith is, nonetheless, instructive.

intent to deprive the other side of evidence.[18] ***HN14*** Given that sanctions under the inherent authority are available "not only for bad faith, but also for willfulness or fault" [*Halaco, 843 F.2d at 380*], bad faith must require more than destruction with notice of relevance. Black's Law Dictionary defines bad faith as "not simply bad judgment or negligence, but ... conscious doing of a wrong because of dishonest purpose or moral obliquity." *as quoted in* Theofel v. Farey-Jones, 359 F.3d 1066, 1069 (9th Cir. 2004). **[*43]** In terms of spoliation, the dishonest purpose is most logically the impediment to the other side's ability to litigate. Accordingly, this court adopts the *Rambus* definition of bad faith as intent to impede the opposition.

Plaintiffs rely upon the following language from *Advantacare:* "disobedient conduct not shown to be outside the control of **[*44]** the litigant is sufficient to demonstrate willfulness, fault **and** bad faith." *Advantacare Health Partners L.P. v. Access IV, 2004 U.S. Dist. LEXIS 16835, 2004 WL 1837997 *4, (N.D. Cal. 2004)*, *quoting Jorgensen v. Cassiday, 320 F.3d 906, 912 (9th Cir. 2003)*, *quoting* Hyde & Drath v. Baker, 24 F.3d 1162, 1167 (9th Cir.1994). (*See* Mot.at 15 n. 5.) This reliance is misplaced. First, *Advantacare*, *Jorgenson*, and *Hyde& Drath* all involved violations of court orders: the disobedient conduct. Here, there was no violation of any court order and this definition is not directly relevant to the situation presented in this case. Second, *Hyde & Drath* actually says: "Disobedient conduct not shown to be outside the control of the litigant is sufficient to demonstrate willfulness, bad faith, **or** fault."[19] (emphasis added). This little change is significant because "willfulness, "bad faith" and "fault" are all separate concepts. While all bad faith conduct is willful, not all willful acts are in bad faith. Thus, even though conduct not outside the litigant's control is sufficient to meet the standard of "willfulness, bad faith, or fault," it is not clear such conduct is sufficient to show "bad faith" as opposed to "willfulness" or "fault."

To the extent that Plaintiffs intend to rely on *Philips Electronics North America Corp. v. BC Technical,* 773 F. Supp. 2d 1149, 2011 U.S. Dist. LEXIS 16259, 2011 WL 677462 *48 (D.Utah Feb 16, 2011), such reliance is also misplaced. The Phillips court did state: "Bad faith, or culpability, 'may not mean evil intent, but may simply signify responsibility and control.'" *Id., quoting Phillip M. Adams & Associates, L.L.C. v. Dell, Inc., 621 F.Supp.2d 1173, 1193 (D.Utah 2009)*. But, there is no reason to believe that the *Philips* court intended to define bad faith as not requiring a bad intent because *Phillips* defines either "bad faith or culpability", two separate concepts. Additionally, the *Adams* case quoted is defining culpability **in contrast to** bad faith. Finally, to the extent that the *Philips* court did intend to define bad faith in **[*46]** absence of any bad intent, the court respectfully declines to adopt such a definition.

a. No Bad Faith Because No Intent to Impede Evidence

In this case, there is no evidence of intent of impede Plaintiffs' access to evidence, and therefore, no evidence of bad faith. Unlike the facts in *Leon,* Kato's reason for deleting files was truly personal, that is, to cover up a prior misrepresentation to ***Hitachi*** that he had no work files at home. (Opp. at 20; Kato Decl. ¶¶ 29-30.) This is a key distinction because Kato's violation of ***Hitachi***'s work rules is not an issue in this litigation. Additionally, before deleting the files from his hard drive, Kato copied the ones he thought were relevant to ***Hitachi***'s server. Thus, Kato exhibited a desire to preserve relevant documents. Doubtless, Kato lacked "authority to make unilateral decisions about what evidence was relevant," *Leon, at 956-957*. Nonetheless, his attempt to preserve relevant documents is important to the question of bad faith. Moreover, Kato's level of culpability does not rise to the level of Leon's because Kato did not "wipe" the drive; he came forward and admitted his misconduct, and has cooperated in

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[18] The court is aware that some District Courts within the Ninth Circuit have awarded monetary sanctions without requiring bad faith, as defined as an intent to hide evidence from the other side. *See* Padgett v. City of Monte Sereno, 2007 U.S. Dist. LEXIS 24301, 2007 WL 878575 (N.D. Cal. March 20, 2007)(awarding monetary sanctions for spoliation without any discussion of the bad faith requirement for fee shifting); *Kopitar v. Nationwide Mut. Ins. Co.,* 266 F.R.D. 493, 501 (E.D.Cal. 2010) (imposing monetary sanctions without discussion), *citing* Realnetworks, Inc. v. DVD Copy Control Ass'n, Inc., 264 F.R.D. 517, 530 (N.D. Cal.2009)(also imposing sanctions without discussion). There is no reason to believe that these cases were wrongly decided. The facts and circumstances of each case could have warranted a finding of bad faith under the court's inherent authority or under Rule 37.

[19] The **[*45]** *Advantacare* opinion mistakenly uses the "and" language. The Court has no reason to believe that Plaintiffs were aware that *Joregenson* and *Hyde & Drath* opinions used the "or" language. Additionally, there is no reason to believe the error was in any way significant in *Advantacare* as the sanctioned parties in that case had engaged in egregious conduct that met the definition of willfulness, bad faith and fault.

Hitachi's efforts to restore and **[*47]** explain the deleted files.

Another distinction between this case and *Leon* is that the spoliator here is not the litigant. There is no evidence here that suggests ***Hitachi*** knew Kato was storing his HIMEX work files at home. He specifically certified otherwise. (Opp. at 21, Kato Decl at ¶¶ 18-20). It would be odd indeed for ***Hitachi*** to have proffered Kato as a 30(b)(6) witness had it known of or been complicit in his decision-making.[20] Although ***Hitachi*** may be responsible for Kato's conduct, it did not have control over Kato's actions. The Court takes this into consideration because ***HN15*** a sanction award must be just, and "a determination of the correct sanction for a discovery violation is a fact-specific inquiry." *Phillips, 2011 U.S. Dist. LEXIS 16259, 2011 WL 677462 at * 56*. Even if Kato's actions meet the bad faith requirement, ***Hitachi***'s do not. Kato was not instructed to delete the files, he did so on his own volition. The company did not have control over Kato's personal hard drive, nor was it negligent in this regard. ***Hitachi*** reasonably believed Kato did not have any stored files at home due to the regular certifications he signed to that effect. This is contrary to the *Phillips* case cited by Plaintiffs, where several **[*48]** upper management and executive employees "covered up deletions through sophisticated wiping, shredding, or overwriting, all in direct disobedience to [the] court's orders." *Phillips, 2011 U.S. Dist. LEXIS 16259, [WL] at *55*. The BCT spoliators also engaged in a cover up attempt that included repeatedly lying under oath about the destruction of the documents. *2011 U.S. Dist. LEXIS 16259, [WL] at 2* (rejecting argument that the company is not culpable for employee actions)

b. Even If Bad Faith Existed, Monetary Sanctions Are Unwarranted

HN16 In evaluating whether sanctions are necessary to penalize those in the wrong or to deter parties from engaging in the sanctioned conduct, ***Hitachi***'s role and behavior regarding the spoliation is important. *Advantacare, 2004 U.S. Dist. LEXIS 16835, 2004 WL 1837997 * 4*. Although ***Hitachi*** does not specifically set forth all their efforts at collecting documents, it is clear that ***Hitachi*** instituted a litigation hold and informed its employees. (Pierce Decl. ¶ 2 [Docket No. 106-1.] Additionally, Kato **[*49]** states that he received document preservation instructions shortly after this suit was filed in September of 2008. (Kato Decl. 1 at ¶ 22.) Nonetheless, Plaintiffs argue that ***Hitachi*** failed in various ways to adequately preserve documents. The Court will address each alleged failure in turn.

Plaintiffs claim "***Hitachi*** wholly failed to request that Kato produce documents relevant to this litigation, and further failed to take affirmative steps to gather and preserve Kato's files. *See Spoliation Order at 4-5.*" (Mot. at 1, n.2.) The Spoliation Order, however, made no such finding, instead it specifically stated that ***Hitachi*** should have taken such steps and "[w]hether ***Hitachi*** took such steps has yet to be determined." [Spoliation Order at 5.]

Plaintiffs claim that ***Hitachi*** was on notice that Kato had brought work files home but failed to ask Kato to produce such documents. (Mot. at 8.) This assertion, however, is misleading because the documents cited by Plaintiffs as proof of notice also contain Kato's certification that he had erased all work files he found at home. (Kato Decl at ¶¶ 18, 20). ***Hitachi*** reasonably believed based on Kato's certification, that all such information had been deleted. **[*50]** Therefore, it was not reasonably necessary for ***Hitachi*** to ask Kato to produce the files it believed no longer existed. Moreover, the computer and hard drives at issue were purchased by Mr. Kato, and were not the property of ***Hitachi***. (Kato Decl. at ¶ 8, 11, 14).

Plaintiffs also claim that ***Hitachi*** negligently failed to locate Kato's work computers or email account. (Mot. at 5.) This assertion finds no support in the evidence. Rather, ***Hitachi*** lays out a detailed history of Kato's company computers which reflects that all of them were either junked, lost or reassigned prior to the filing of this lawsuit.[21] Moreover, once ***Hitachi*** became aware of Kato's spoliation, it made immediate efforts to retrieve the information. There is no basis upon which to conclude ***Hitachi*** was negligent in attempting to retrieve

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[20] The court also notes that ***Hitachi*** could have simply designated another employee for the 30(b)(6) deposition and covered up the deletion of documents. Instead, ***Hitachi*** candidly admitted the deletion and attempted to alleviate all prejudice from the deletion.

[21] Dell GX110 was junked years before case was filed; HP3250 laptop was lost 16 months before case was filed; Dell GX150 junked three months before case was filed; Dell GX280 deleted, reassigned multiple **[*51]** times in months before case was filed; and email purged 12 months before case was filed. (Opp'n at Appdx. Illustr. 4.)

Kato's work files or that any prejudice resulted from a delay on the part of ***Hitachi*** since, as it has shown, most of the information contained in the deleted documents was produced in 2009.

Similarly Kato's email account was purged over a year prior to the filing of this litigation. (Mo Decl. ¶¶34 [Docket No. 185-5.]). Any failure to preserve evidence prior to being on notice of the litigation cannot form the basis for sanctions.

Plaintiffs next claim that ***Hitachi*** negligently failed to search the email back-up server. (Mot. at 5.) As ***Hitachi*** points out, ***Hitachi*** objected to the discovery request seeking the backup data in both the responses and in meet and confer efforts, but Plaintiffs never moved to compel. (Pierce Decl. Ex. 4, ¶ 5) Thus, there is nothing sinister in ***Hitachi***'s refusal to search backup data.

Finally, Plaintiffs claim that "***Hitachi*** wholly failed to fulfill its obligation" to preserve documents, citing the deposition testimony of Koji Hirata, a ***Hitachi*** engineer. (Mot at 13.) Plaintiffs claim that Hirata testified that he was neither asked to search for, nor produce relevant documents. This claim is likewise misleading. When Hirata was promoted off the team, his papers and files were moved to the common design area where the ***optical*** engine **[*52]** team worked. (Hirata Decl. ¶ 4 [Docket No. 185-1.]) Because Hirata had been promoted and no longer worked on the LCD RPTVs, he asked two engineers (Ogura and Ikeda) who remained on the team to look for any responsive documents. (Hirata Decl. ¶ 5.) Ogura and Ikeda did so. (Ogura Decl. ¶ 5, [Docket No. 185-3.]) Additionally, another employee, Yuzo Tamura, coordinated the collection effort, including all of Hirata's electronic documents. (Tamura Decl. III, at ¶¶ 4-7 [Docket No. 185-4]) Accordingly, Hirata's failure to personally look for documents is meaningless.

When ***Hitachi*** regained control of Kato's hard drive it immediately contacted Plaintiffs with remedial offers attempting to lessen the damage voluntarily and swiftly. ***Hitachi*** voluntarily paid for the forensic recovery of the drive Kato admitted deleting, as well as the costs to produce a new 30(b)(6) witness in the United States, including the court reporter and two interpreters. (Opp. at 22; Pierce Decl. ¶8.). ***Hitachi*** never participated in any attempt to cover up the deleting and did not in any way impede the recovery of all relevant information. Considering ***Hitachi***'s lack of control over the spoliation, the objectives of punishment **[*53]** and deterrence would not be served by the imposition of sanctions.

Nonetheless, ***Hitachi*** is responsible for its employee's spoliation. To a great extent, ***Hitachi*** has met this responsibility by paying for much of the recovery effort. (Opp. pp.22-23.)[22] The Spoliation Order appropriately required Plaintiffs to bear the cost of the data carving because the data carving would not have been ordered in the absence of the erroneous opinion of their expert, Mr. Stenhouse. If there are other expenses associated with the spoliation that ***Hitachi*** did not pay, Plaintiffs ought to be reimbursed for those. However, the award of attorneys' fees is a different matter. Considering ***Hitachi***'s speedy corrective action against spoliation that it did not direct or condone, it would be unjust and a disproportionate sanction to burden ***Hitachi*** with an award of attorney's fees. Therefore, the court declines to do so.

2. Fee Shifting Under Rule 37

Plaintiffs assert that sanctions are available under ***HN17*** Rule 37, which does not require bad faith. Rule 37(b)(2)(A) provides for sanctions for failure to comply with a discovery order. ***Hitachi*** did not fail to comply with a discovery order. Rule 37(d) provides for fee shifting where a party successfully moves to compel a party to appear for deposition or respond to written discovery. ***Hitachi*** did not fail to appear for a deposition or to respond to written discovery.

HN18 Rule 37(a)(5) provides for the payment of fees when a motion for an order compelling discovery is granted, but cautions: "But the court must not order this payment if: . . . (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A). To the extent that Plaintiffs can be considered to have successfully moved for discovery, the court finds that ***Hitachi***'s failure to agree to the data carving was substantially justified. As the advisory committee's notes make clear, the purpose of this rule is to "deter the abuse implicit **[*55]** in carrying or forcing a discovery dispute to court when no genuine dispute exists." Fed. R. Civ. P. 37 Advisory committee's notes. In this case, a genuine dispute existed as to the necessity for the additional data carving. The Court

[22] Although ***Hitachi*** has not attempted to estimate all of its costs, it did estimate at the hearing on the Spoliation Motion, that it had incurred approximately $100,000 for that portion of the recovery effort, consisting primarily of translation costs and attorneys' fees to review the documents. (Oct. **[*54]** 15, 2010 Hearing Transcript at p. 38. [Docket No. 140].)

granted the Spoliation Motion (Motion for Additional Forensic Investigation) based on testimony from Plaintiff's expert, Mr. Stenhouse. As discussed above, Mr. Stenhouse's theory that it was possible for documents to disappear without a trace was, at best, overstated.[23] Accordingly, ***Hitachi***'s opposition to the Spoliation Motion and the Sanctions Motion were substantially justified and no award of fees is warranted.

Moreover, when the circumstances are viewed in their entirety, including the prompt admission of the deletion along with the **[*56]** voluntary payments to restore the data, and all the efforts ***Hitachi*** has made to preserve, collect, and produce documents, an award of fees would be unjust.

Finally, Plaintiff's made virtually no effort to meet and confer after receiving the document fragments from the data carving. ***Hitachi*** completed the fragment production in mid-December 2010 and Plaintiff's filed the instant motion for sanctions on March 8, 2011. Plaintiffs, however, failed to conduct any meet and confer efforts until March 4, 2011 and only then at ***Hitachi***'s insistence. (Pierce Decl. II ¶ 7 [Docket No. 185-9.]) If Plaintiffs had participated fully in the meet and confer process, it is possible that the costs associated with this motion could have been reduced. Plaintiffs' failure to adequately meet and confer is another reason why it would be unjust to award attorney's fees.

V. CONCLUSION

Accordingly, the Court **DENIES** Plaintiffs' request for: (1) a jury instruction that ***Hitachi*** destroyed relevant documents in this case and to impose an adverse inference with respect to the contents of the destroyed documents; (2) the burden of proof on any dispositive or class certification motions regarding the existence of a common **[*57]** defect to be shifted from Plaintiffs to ***Hitachi***; and (3) for reasonable attorneys' fees and costs incurred in litigating the issue of spoliation.

IT IS SO ORDERED.

DATED: August 12, 2011

/s/ Nita L. Stormes

Hon. Nita L. Stormes

U.S. Magistrate Judge

United States District Court

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[23] To be clear, the court is not, with the benefit of hindsight, finding that the failure to uncover substantial relevant documents renders ***Hitachi***'s opposition to the data carving substantially justified. The court is finding that the expert testimony of Mr. Stenhouse was inaccurate as to the possibility of files disappearing without a trace and that this inaccuracy renders ***Hitachi***'s opposition substantially justified.