

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MOTOWN RECORD CO., LP, et al.,

Plaintiffs,

v.

THERESA DePIETRO,

Defendant.

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CIVIL NO. 04-CV-2246

ORDER

AND NOW, this 11th day of June 2007, upon consideration of Plaintiffs’ Motion for Sanctions Based on Defendant’s Spoliation of Evidence [Doc. # 60] and Defendant’s Request to Deny Plaintiffs’ Motion [Doc. # 67], and after a hearing held in this matter on May 4, 2007, it is hereby **ORDERED** that Plaintiffs’ Motion is **GRANTED IN PART** and **DENIED IN PART**, as follows:

- (1) Plaintiffs’ Motion is **GRANTED** inasmuch as it seeks sanctions for Defendant’s spoliation; and
- (2) Plaintiffs’ Motion is **DENIED** inasmuch as it seeks the entry of default judgment as the proper sanction.¹

¹ At the May 4, 2007 Hearing on Plaintiffs’ Motion, the Court found that DePietro’s “computer and cable modem were both disposed of . . . after this lawsuit was noticed.” N.T. 5/4/07 [Doc. # 81], at 34. DePietro destroyed this equipment with knowledge of her duty to conserve relevant evidence and in an attempt to protect herself from Plaintiffs’ claims. Because DePietro thereby robbed Plaintiffs of any opportunity to examine the equipment, they are substantially prejudiced. Accordingly, the Court concludes that DePietro is responsible for spoliation of evidence, and she is therefore subject to sanctions.

The act of spoliation may give rise to various types of sanctions. Some available sanctions include the suppression of evidence, an adverse-inference instruction, fines, attorneys’ fees or costs, and the ultimate of all spoliation sanctions—the entry of default judgment. See Paramount Pictures Corp. v. Davis, 234 F.R.D. 102, 110–11 (E.D. Pa. 2005). The decision of which sanction(s) to impose is within the discretion of the Court. Id. at 111. In choosing an appropriate sanction, however, the Court should “select the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim.” Id. Entering default judgment against the spoliating party should be considered only as a “‘last resort,’ to be imposed only if no alternative remedy by way of a lesser, but equally efficient sanction is available.” Baliotis v. McNeil, 870 F. Supp. 1285, 1289 (M.D. Pa. 1994).

In this case, while DePietro’s wrongful conduct certainly warrants sanctions, the Court is not convinced that the entry of default judgment is appropriate. Even without examining DePietro’s computer and modem, Plaintiffs

It is **FURTHER ORDERED** that Defendant is hereby **SANCTIONED** in the

following manner:

- (1) Defendant is precluded from offering any testimony—whether lay or expert—or making any argument that Plaintiffs would be able to sufficiently rebut only if they had the opportunity to examine the spoliated computer and modem. Specifically, Defendant **may not** offer any evidence or argument:
 - (a) that a third-party hacked into her computer and downloaded the relevant media files onto her computer;
 - (b) that the “remote desktop” feature was enabled and no passwords were defined, thereby allowing a third-party intruder to connect to her computer; or
 - (c) that a virus caused the computer to download the relevant media files.²
- (2) The Court will give an adverse-inference instruction—also known as the “spoliation inference”—in its jury instructions, informing the jurors that they may infer that the destroyed evidence, if it had been preserved, would have been unfavorable to DePietro’s position.³

have obtained and developed evidence linking her to the infringement. While this evidence may be stronger if buttressed by information that could have been obtained from the discarded equipment, it is nonetheless sufficient to proceed against DePietro at trial and to, theoretically, carry their burden of proof. This is especially true in light of the alternative sanctions that the Court will impose against DePietro. Even DePietro is entitled to her day in court; albeit a day on which her defenses will be greatly limited, and the jury will be informed that she knowingly discarded important, and likely damaging, evidence. Therefore, the Court will not enter default judgment against DePietro based on the spoliation.

² While the Court is unwilling to enter judgment against DePietro, it will exercise its sanction power in this case by precluding her from offering evidence that would be subject to rebuttal if Plaintiffs had been granted the opportunity to examine her computer and modem. DePietro’s own alleged expert confirmed that, if given the opportunity to examine the discarded equipment, he—or any other expert, including Plaintiffs’—would be able to determine the viability of the various defense theories involving an “outside attacker” who infiltrated her computer and downloaded the media files. *See, e.g.*, Magee Dep. 43:12–16, 63:9–12, May 22, 2006. Since DePietro’s conduct prevented Plaintiffs from obtaining the information necessary to conclusively refute these theories, the Court deems it appropriate to preclude DePietro from offering them to the jury through testimony or argument. Allowing otherwise would reward DePietro for her misconduct.

³ Levying the spoliation-inference sanction against a party accused of destroying evidence is appropriate when: (1) the relevant evidence was within the accused party’s control; (2) the party actually suppressed, withheld, or destroyed the evidence; (3) the evidence destroyed or withheld was relevant to the opposing party’s claims or the

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe
CYNTHIA M. RUFÉ, J.

accused party's claims; and (4) it was reasonably foreseeable that the evidence would later be discoverable by the opposing party. Davis, 234 F.R.D. at 112 (citing Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 334 (3d Cir. 1995); Mosaid Techs., Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332, 335 (D.N.J. 2004)).

In this case, the spoliation-inference sanction is appropriate because: (1) the computer and modem were within DePietro's control at all times; (2) she intentionally destroyed or suppressed both pieces of evidence—by throwing out the computer and returning the modem to her Internet provider—after learning of the pending action against her; (3) examination of the computer and modem would have provided significant, if not conclusive, evidence to Plaintiffs; and (4) considering the importance of her computer and modem to the claims of illegal downloading and distribution, it was foreseeable that her computer and modem would be discoverable by Plaintiffs. Therefore, the factfinder must be informed of the spoliation and be permitted to infer that the evidence would have yielded information adverse to DePietro's claims of innocence.