IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LIAFAIL, INC.,	)	
	)	
Plaintiff and Counterclaim Defendant	)	CONSOLIDATED
	)	
v.	)	C.A. No. 01-599 GMS and
	)	C.A. No. 01-678 GMS
LEARNING 2000, INC., JAMES RICHARD STORY, III, individually, ANTONIO SANTINI, individually, ILC, INC., SFD, INC,. and S & S ENTERPRISES,	)	
	)	
Defendants and Counterclaim Plaintiffs and Third-Party Plaintiffs,	)	
	)	
v.	)	
	)	
FRANK STUCKI,	)	
	)	
Third-Party Defendant.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On June 5, 2001, the plaintiff and counter-claim defendant, Liafail, Inc. ("Liafail") filed a complaint in the United States District Court for the Western District of Kentucky, setting forth various contractual theories of liability. The United States District Court for the Western District of Kentucky transferred this case to the United States District Court for the District of Delaware on August 29, 2001. This case became Civil Action Number 01-599-GMS.

On October 9, 2001, Learning 2000, Inc ("L2K") commenced Civil Action Number 01-678-GMS in the United States District Court for the District of Delaware. In that complaint, L2K alleges that Liafail violated, *inter alia,* Section 43 of the Lanham Act, 15 U.S.C. § 1125(a); Section 2532

of the Delaware Uniform Deceptive Trade Practices Act, and the Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d).

By stipulation of the parties, the court consolidated Civil Actions 01-599-GMS and 01-678-GMS on November 2, 2001.

Presently before the court is L2K's motion for relief from spoliation of evidence. For the following reasons, the court will grant this motion in part.

II. BACKGROUND

On October 30, 2001, pursuant to Federal Rule of Civil Procedure 26(a)(1), Liafail identified its national sales manager, Steve Sborov ("Sborov") as "likely to have discoverable information concerning the writings at issue in Liafail's complaint and/or Liafail's claims, contentions or defenses relating thereto; including, but not limited to, discoverable information concerning the day-to-day operations of Learning 2000; and Learning 2000's complaint against Liafail and its principals and/or Learning 2000's claims relating thereto."

On November 2, 2001, L2K and Liafail stipulated that "they will preserve all documents, data compilations and tangible things that are in their possession, custody or control, which are relevant or could lead to the discovery of relevant information concerning each party's claims in the above-captioned lawsuit." On November 20, 2001, L2K served requests for production of documents directed to Liafail. The requests sought, among other things:

> (1) all documents concerning Liafail's marketing, sale, or distribution of the Lifetime Library;
>
> (2) all documents concerning any marketing and sales materials provided by Liafail or representatives involved in the sale or marketing of the Lifetime Library or Learning 2000 Lifetime Library;

> (3) all documents concerning all work product produced by Liafail's representatives engaged in the marketing, sale, and distribution of the Lifetime Library; and
>
> (4) all demonstration, sales, and marketing materials for the Lifetime Library used and/or created by Liafail, its agents, employees or representatives.

The requests further asked Liafail to identify and describe "any document requested herein [that] was formerly in your possession, custody or control and has been lost or destroyed or otherwise disposed of . . . ."

In response to these requests, Sborov gave Liafail the L2K-issued laptop that he had been using while gaining knowledge of the day-to-day operations of L2K, both as its sales representative and as its national sales manager. Upon receiving the laptop, L2K alleges that Liafail's Vice-President, Keith Hanson ("Hanson") purged all the files from the computer. L2K further alleges that Liafail made no effort to preserve the Sborov files by copying them onto another hard drive, disk or other medium before their destruction.

L2K was able to reconstruct some, but not all, of the Sborov files. L2K maintains that, as far as can be ascertained, virtually all of the Sborov Files were relevant to the issues in this litigation. Indeed, L2K argues that, not only were they relevant, the documents were highly incriminating. For example, according to L2K, the documents included an e-mail received by Sborov, and forwarded to Stucki, which established that, in July 2001, Laifail sales representatives were promoting the Lifetime Library by using L2K marketing materials. L2K also points to an e-mail which it claims establishes that, two months later, Liafail sales representatives were still promoting the Lifetime Library by using a demonstration CD that had "Learning 2000 [] splashed all over" it. The e-mail also implicated Stucki's knowledge of these actions. L2K maintains that, to date, Liafail has denied

that the conduct evidenced by these e-mails occurred. Alternatively, Liafail denies that it had any notice that its sales representatives engaged in the conduct described in these e-mails.

One week before the close of discovery, L2K alleges that it discovered additional spoliation during Frank Stucki's ("Stucki") deposition. At his deposition, Stucki testified that he "trashed two laptops in the last seven months." Specifically, he testified that he dropped the first laptop when he was staying at somebody's house in Arizona. The second laptop "slipped out of [his] hands" at home. During his deposition, he maintained that the information on both laptops was destroyed.

With respect to the first laptop ("the 1700 laptop"), Stucki initially testified that "[t]here was nothing on there that - regarding this litigation . . . ." Later, he contradicted his claim of irrelevance by testifying that whatever was on that laptop was made available to litigation counsel before he disposed of it. L2K now maintains that Liafail's counsel has not confirmed that the files from the 1700 laptop were in fact searched and produced. Nor has it clarified whether (1) it made an independent judgment as to whether the documents on the 1700 laptop were responsive, or (2) whether it simply relied on Stucki's layperson's view of what he believed to be discoverable.

With respect to the second laptop ("the 1720 laptop"), Stucki was unable to confirm that everything on that laptop was made available to his counsel before it was destroyed. Liafail's counsel itself refused to confirm whether it had, in fact, searched the files on the laptop and whether responsive documents were produced or identified on a privilege log.

In response, Liafail now contends that L2K "already has in its possession the documents at issue in the instant motion." Specifically, Liafail has submitted affidavits to the effect that all of the relevant information was removed from the laptop computers, saved, and then made available to L2K.

III. DISCUSSION

A. The Disputed Files

L2K contends that, in the past, Liafail has maintained that the information L2K now seeks was inadvertently destroyed and is no longer available for production. In response to the present motion, however, Liafail has brought forth affidavits, albeit of questionable validity given its previous assurances that the information no longer exists, that the information does indeed exist and is available for production. *See* Liafail's Answer Brief at 4-5. Liafail even goes so far as to indicate, without any citations to record evidence to support its claims, that the files "where relevant and appropriate" have been produced to L2K. *See id. at* 2-4 (stating that all relevant information from the Sborov laptop had been produced and that backup files of this information exist). Liafail's current position on the whereabouts of the discovery sought indicates that Liafail may have engaged in questionable discovery tactics. Nevertheless, because on the record before the court, it is unclear what has been produced, and what must still be produced, the court will not immediately sanction Liafail. Rather, it will first afford Liafail the opportunity to correct or clarify the discovery record by producing the requested documents which it has claimed are available, or by producing the Bates Numbers of documents which it claims it has already produced.[1]

B. Sanctions

For the following reasons, should Liafail chose not to heed the court's order and produce the

[1]This order includes the production of all relevant documents within the meaning of Federal Rule of Evidence 401, including those which Liafail has conceded it did not produce due to "marginal relevance." *See* Liafail's Answer Brief at 7, n.6. The order further includes information which Liafail believes L2K already has in its possession due to its own computer file restoration efforts. *See e.g. Land Ocean Logistics, Inc. v. Aqua Gulf Corp.*, 181 F.R.D. 229, 240 (W.D.N.Y. 1998) (holding that the defendants "must produce requested documents . . . regardless of whether Plaintiff is also in possession of the documents.").

documents of which it claims to have possession, the court will order sanctions against it in the form of an adverse inference jury instruction.

Where the nature of the alleged breach of a discovery obligation is the non-production of evidence, the court has broad discretion in fashioning an appropriate sanction. *See Residential Funding Corp. v. Degeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002). In exercising its discretion, the court may impose an adverse inference instruction where: (1) the party having control over the evidence had an obligation to timely produce it; (2) the party had a "culpable state of mind;" and (3) the missing evidence is "relevant" such that a reasonable trier of fact could find that it would support the other party's claim or defense. *See id.* Liafail has not argued that the discovery at issue was, or is, out of its control, nor that it did not have an obligation to timely produce it. Thus, the court concludes that the first prong of the test has been met. It will now address the remaining two prongs.

With regard to the culpability prong, the court finds that, should Liafail disregard this order, it will have acted in bad faith. Specifically, if Liafail does not produce the requested files, it will then be in the position of having intentionally misrepresented the availability of the evidence before the court on this motion.

Further informing the court's decision on this point are the clear discrepancies in Liafail's two versions of the events, which tend to demonstrate bad faith on its part. For example, in his present affidavit, Stucki testified that attempts were made to save the contents of the 1700 laptop, and that, indeed, the contents were saved. *See* Stucki Affidavit at ¶ 4. During his earlier deposition, however, Stucki testified that the contents of the 1700 laptop were "destroyed," and that no attempts were made to retrieve the documents from that laptop. *See* Stucki Deposition at 1366.

Additionally, Stucki's affidavit claims that the entire contents of the 1720 laptop were

transferred to the old 1700 laptop and that "[t]he transfer was successful and . . . no documents or filed were omitted from the transfer and none were deleted." Stucki Affidavit at ¶ 6. Stucki further states in his affidavit that, "I have reviewed the contents of the 1700 laptop I now use and have confirmed that all potentially relevant information which was contained on it . . . has been made available to my counsel." *Id.* at ¶ 8. The court finds it difficult to reconcile this statement with Liafail's counsel's earlier representation that both laptops were discarded because they could not be repaired. *See* June 20, 2002 Letter from W. Bruce Baird to Sean K. Hornbeck (stating that the Stucki computers "were not repairable [and] they were disposed of long ago.").

Finally, the court is satisfied that the requested discovery documents are relevant, such that a "reasonable trier of fact could infer that 'the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction.'" *Residential Funding Corp.*. 306 F.3d at 109. Liafail has put Stucki's scienter at issue in this litigation by denying that he had knowledge of certain events. Accordingly, the identity of the documents he had stored on his laptops may be probabtive of what he knew or should have known.

With regard to the relevance of the Sborov files, L2K has represented that, based on the information it was able to salvage, the files were relevant to the issues in this litigation. By way of example, L2K has provided an e-mail received by Sborov, and forwarded by Stucki, which allegedly establishes that, in July 2001, Liafail sales representatives were promoting the Lifetime Library by using L2K marketing materials. *See* Liafail's Opening Brief, Ex. K.

Additionally, the court notes that a jury would be permitted to infer that Liafail's bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party. *See Residential Funding Corp.*, 306 F.3d at 109.

Accordingly, the court finds that the requisite relevance factor has been satisfied.

IV. CONCLUSION

Thus, while it would be entirely appropriate for the court to sanction Liafail immediately based on the conflicting stories Liafail has espoused in an apparent attempt to perform an end-run around both L2K's discovery requests and the current motion, the court nevertheless concludes that the more just route is to allow Liafail to correct its apparent wrongs before imposing sanctions.[2]

For the aforementioned reasons, IT IS HEREBY ORDERED that:

1. L2K's Motion for Relief from Spoliation of Evidence (D.I. 260) is GRANTED as follows:
2. Liafail shall produce any and all relevant documents, files, or the like, originating from the Sborov laptop, as well as the 1700 and 1720 laptops, within thirty (30) days of the date of this order.
3. Should Liafail not comply with this order, the court will order sanctions against it in the form of an adverse inference jury instruction.
4. L2K's requests for costs as a result of Liafail's alleged misconduct is DENIED at this time.

Dated: December 23, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

[2]In light of counsel's joint request for additional time to respond to the motions in limine, and the need to move the trial to a later date as a result of this request, the court finds this solution to be imminently fair to both parties.