IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

FIRECLEAN, LLC, Plaintiff, v. GEORGE FENNELL and STEEL SHIELD TECHNOLOGIES, INC., Defendants.	)	Civil Action No. 1:16-cv-293-TSE-JFA

OPPOSITION TO MOTION TO DISMISS

Plaintiff FireClean, LLC ("Plaintiff"), through counsel, respectfully submits this opposition (the "Opposition") to Defendant George Fennell's and Steel Shield Technologies, Inc.'s (collectively, the "Defendants") Motion to Dismiss Due to Plaintiff's Spoliation of Evidence (the "Motion"), and respectfully states as follows:

PRELIMINARY STATEMENT

While the loss of some of the FIREClean® samples is extremely unfortunate, the facts will show that the losses were inadvertent unintentional, not due to the actions of the Plaintiff or its counsel, not in bad faith, inadvertent and, in the end, not prejudicial to Defendants. The extraordinary relief sought by Defendants is totally unwarranted.

What is not clear from the Defendants moving papers is that Defendants have, and have had in their possession for weeks, numerous samples of FIREClean® that are from the same production runs as the four bottles of FIREClean® that were inadvertently not retained by

Medallion Laboratories ("Medallion"). [1] Defendants even now possess samples from the same *barrels* within the production runs as the four missing samples. Beyond that, after Plaintiffs were informed on October 11, 2016 at 4 p.m. that Medallion Labs could not locate the four missing bottles which they were requested to retain on at least three occasions, Plaintiff immediately arranged for these samples ("Replacement Samples") to be sent to Medallion Labs to be tested, and within a week, these four Replacement Samples were sent to Defendants' lab for their use. Moreover, within days of providing Defendants with the actual Replacement Samples, Defendants were also provided with the gas chromatography graphs from Medallion Labs for the Replacement Samples (on October 21, 2016). Exhibit 15. Shortly thereafter, Plaintiff's expert, Dr. Ron Davis, issued a Supplemental Report to his Initial Expert Report that concluded to a reasonable degree of scientific certainty that based on a comparison of the scientific testing of the Initial Samples (four of which were now misplaced) and the four Replacement Samples, all of the samples in both instances were all "scientifically equivalent." Exhibit 3. Accordingly, Defendants have had samples, the means and opportunity for weeks to fully challenge and scientifically contest, if possible, Dr. Davis' Expert Report that concludes from analysis of the

[1] As will be discussed in more detail herein, Plaintiff has provided over 50 bottles of FIREClean® to Defendants for their use for testing or otherwise since October 6, 2016. *See* footnotes 7 and 8, *infra.* In addition, immediately after learning that the four samples were missing on October 11, 2016, Plaintiff provided four additional samples to Medallion Labs for testing, and then expeditiously sent these Replacement Samples to Defendants lab for their own use and testing by October 18, 2016. For some unknown reason, Defendants have apparently not tested these bottles but rather have chosen to purchase additional bottles of FIREClean® on Amazon.com and obtain other bottles of FIREClean® from Mr. Fennell's acquaintances to use for their testing and Expert Reports. *See*, Exhibit 4. Interestingly, Defendants have chosen not to replicate the testing performed by Medallion Labs upon which Plaintiff's Expert, Dr. Ron Davis' opinions rely but to perform some other types of tests. The fact that Defendants' expert has elected to test bottles procured from third party sources rather than the bottles in their possession from the same production runs that Plaintiff tested, and that they chose to perform different tests than that performed by Medallion Labs, establishes that Defendants unsupported assertion that their testing of FIREClean® must be from the exact same bottle as Medallion Labs tests to determine whether or not FIREClean® is Crisco Vegetable Oil is simply without merit.

Initial Samples as well as of the Replacement Samples that FIREClean® is simply not Crisco Vegetable Oil as Defendants so prominently asserted and advertised on numerous occasions over the internet and otherwise.[2]

What is also not discussed in Defendants' moving papers is that while there was a mishap when Medallion Labs sent the one remaining FIREClean® sample from its initial testing to Defendants lab when one of the bottles of Crisco Vegetable Oil somehow broke in transit and spilled in the cardboard package, subsequent testing showed that there was absolutely no contamination of the bottled FIREClean® sample (known as F6) and the sample was returned to Defendants lab where it has remained for further testing. Exhibits 6 and 21. Defendants have not identified how they were prejudiced by the breakage of a Crisco Vegetable Oil bottle.

With respect to the pre-litigation testing of FIREClean® by PetroLube, Defendants have known about this issue since August (DKT #152 at 3) and were willing to move forward because bottles of FIREClean® from every relevant time period, if not the exact same bottle from the PetroLube testing, are readily available. That remains true to this day. Defendants have the ability to fairly test other bottles of FIREClean® samples in order to take issue with the

[2] Defendants have taken the position, throughout this litigation, that they never stated that FIREClean® is literally Crisco Vegetable Oil and that when Mr. Fennell said FIREClean® was Crisco Vegetable Oil he was referring to "vegetable oils generally." (Dkt 78 at p. 3 n.1). Plaintiff has never disputed that FIREClean® is made from vegetable oils. A simple concession by Defendants that FIREClean® is not Crisco Vegetable Oil would eliminate the instant controversy instead of perpetuating this exercise. This entire controversy over the scientific testing of FIREClean® is a red herring in the scope of this litigation. If Defendants' current position is that he was not referring to FIREClean® being Crisco Vegetable Oil but that he was referring to "vegetable oils generally", then the question for the jury would be simply, what did Defendant Fennell mean when he repeatedly said that FIREClean® was Crisco Vegetable Oil. All of this scientific testing is no longer relevant given Mr. Fennell's current position.

PetroLube results. However, should the Court disagree with this proposition, Plaintiff will simply not rely on those tests at trial. Indeed, Plaintiff has filed a Motion to Amend the Complaint in order to remove the PetroLube test results from the Complaint. (Dkt. 212, 213).

There has been no intentional, bad faith action by Plaintiff in this case and there has been no prejudice to the Defendants or to the interests of justice by these unfortunate events.

STATEMENT OF FACTS

A. Medallion Labs Gas Chromatography Testing and its Failure to Retain Four out of the Five Initial Samples Despite Plaintiff's Requests To the Lab for Preservation.

In late August and early September 2016, Plaintiff and Plaintiff's counsel sent five samples of FIREClean® to a third party vendor, Medallion Labs (a General Mills company), for gas chromatography fatty acid analysis. *See*, Exhibits 8 and 20. These samples were labeled samples No. 1 (no serial number but marked as "use within one year of purchase," indicating it was produced in late 2012 or early 2013), No. 11 (serial # D5-022-D, indicating April 2015 production run), No. 13 (serial # J5-016-B, indicating July 2015 production run), No. 14 (serial #S5-008-C, indicating September 2015 production run)[3] and one unnumbered sample (serial 55-008-B, indicating the February 2106 production run).[4] (collectively, "Initial Samples").

When these samples were sent to Medallion, this fully accredited laboratory[5] was instructed by Plaintiff's counsel to retain the remainder of the unused samples ("retained samples") pending further shipping instructions. This "retention" instruction was: (1) written on the lab's submission form in capital letters, (2) contained in counsel's cover letter, in capital

[3] These four bottles were sent together for testing on September 9, 2016. *See*, Exhibits 8 and 9.
[4] FIREClean® was produced on only four occasions between April 2015 and February 2016. These four production runs were April 2015 (producing "D5 bottles"), July 2015 (producing "J5 bottles"), September 2015 (producing "S5 bottles") and February 2016 (producing "F6 bottles"). Exhibit 11 at p. 5(c).
[5] See Exhibit 7.

letters, enclosing the samples, and (3) referenced on several occasions to a lab representative. Exhibit 5 at ¶ 5. *See*, also, Exhibits 8, 9 and 20.

Medallion Labs produced the results of its gas chromatography fatty acids analysis of the four samples on or about September 21, 2016.[6] Exhibit 5 at ¶ 4. Plaintiff's expert, Dr. Ron Davis, then analyzed these results, among others, and used them, in part, as the basis for his conclusions in his expert report. Dr. Davis' Expert Report was then timely served on Defendants on September 29, 2016. Exhibit 12. On or about October 7, Plaintiff's counsel requested Medallion to forward all retained samples to Defendants' expert. Exhibit 13.

A day earlier, on October 6, 2016, as set forth below, Plaintiff transmitted 32 additional samples of FIREClean® to Defendants for their use.[7] These bottles were from four of the five production runs as those earlier sent to Medallion Labs.[8]

[6] The gas chromatography fatty acids analysis of the F6 sample was completed earlier.

[7] These 32 samples were sample # 15 and 42--- D5 bottles; sample # 45, 46, 50, 52, 53---- S5 bottles; sample # 2, 29, 30, 31 ---- Late 2012 bottles; sample # 16, 17, 54, 55, 56 ---- F6 bottles. Exhibit 1.

[8] To be clear, between October 6 and October 20, 2016, Plaintiff has sent over 55 bottles of FIREClean® to Defendants for their use for testing or otherwise. These samples are from every production run and every barrel of the misplaced samples as well as dozens of additional samples. These are in addition to the four Replacement Samples which were tested by Medallion after the discovery of the misplaced samples and then sent to Defendants' lab as will be discussed in detail below. Additionally, on or about October 11, 2016, the laboratory that ran Plaintiff's NMR testing sent another bottle of FIREClean® to Defendants' expert: No sample #, a D5 bottle. On October 18, 2016, Plaintiff sent additional samples of FIREClean® to Defendants. Of those, sample # 66 and 67 were D5 bottles; sample # 70 was an S5 bottle. On October 20, 2016 sent to Defendant another July 2015 production run bottle: sample # 71, a J5 bottle. On October 20, 2016, PetroLube transmitted additional samples to Defendants, from testing it performed in October: sample # 3 and 4, Late 2012 bottles; sample # 10 and 41, D5 bottles; sample # 12, 43, 44, J5 bottles; sample # 47, 48, 39, 51, S5 bottles. Exhibit 1.

A chart of these numerous sample bottles of FIREClean® that have been sent to Defendants since October 6, 2016 for testing is attached in a color chart coded by production run for the Court's convenience. See Exhibit 1.

At approximately 4 p.m. on October 11, 2016, a representative of Medallion Labs contacted Plaintiff's counsel and informed counsel that the laboratory had searched for the retained samples but these particular samples could not be found and were believed to be lost. Exhibit 5 at ¶9. The laboratory representative profusely apologized and explained that this is an extremely rare occurrence. *Id.* at ¶6. The representative explained that the lab has protocols in place to prevent this but the loss was inadvertent and unexplainable. The representative agreed to continue looking for the samples. The next day, on October 12, Plaintiff's counsel and Medallion's General Manager had further conversations about this situation and Medallion agreed to provide FireClean with a Declaration pertaining to the loss, confirming that four of the five retained samples had been lost while one was still retained. Specifically, it was confirmed that Medallion failed to locate the following samples:

- Sample No. 1 (no serial #[9] but label indicating late 2012/early 2013 production run). Plaintiff shall refer to any sample from the late 2012/early 2013 production runs as a "Late 2012 bottle."

- Sample No 11 (serial # D5-022-D indicating the April 2015 production run, barrel D). Plaintiff shall refer to any sample from the April 2015 production run as a "D5 bottle."

- Sample No 13 (serial # J5-016-B, indicating the July 2015 production run, barrel B). Plaintiff shall refer to any sample from the July 2015 production run as a "J5 bottle."

- Sample No 14 (serial # S5-008-C, indicating the September 2015 production run, barrel C) Plaintiff shall refer to any sample from the September 2015 production run as an "S5 bottle."

The sample that was retained was:

- One unnumbered sample (serial 55-008-B, indicating the February 2016 production run). Plaintiff shall refer to any sample from the February 2016 production run as an "F6 bottle."

[9] Serial numbers only started being printed on FIREClean® bottles when the company moved to a commercial bottler in March 2015.

Defendants' counsel was immediately notified of the loss of the four samples and provided a copy of the Declaration obtained from Medallion. Exhibits 5 and 14. Among other things, the Medallion Declaration, attested to the fact that:

- Plaintiff's counsel, Ms. Harris, provided Medallion with clear and explicit instructions to retain the samples pending further instructions for shipping. Ms. Harris' instructions appeared on the submission form, the enclosed cover letter and also in an email to the laboratory.

- When Ms. Harris subsequently provided Medallion with forwarding instructions, the lab went to obtain the samples from the "retain" storage and did not find them. They did find, however, a Crisco Vegetable oil sample as well as one FIREClean® sample that had been sent to the lab earlier in the month.

- Medallion is now unable to locate these four FIREClean® bottles despite extensive searching efforts, before and after Ms. Harris was informed on October 11, 2016 at 4 pm.

- Medallion believes that the samples were used up in testing, inadvertently lost or destroyed.

- Medallion Labs is owned by General Mills Corporation. It processes over 500,000 samples annually and process close to 2000 samples daily. Medallion has a protocol in place for how long to keep samples as well as a protocol in place for samples to be held longer than their protocol. Medallion rarely has an issue where samples are lost or destroyed inadvertently.

- As part of Medallion's ISO certification, when an occurrence such as this happens, Medallion issues a corrective protocol which is used to understand where the potential failure occurred in the system and what steps need to be taken to ensure that this does not happen in the future.

Exhibit 5. Plaintiff's counsel then arranged with Medallion's General Manager, Lisa Povolny, to have additional samples sent to Medallion and to have gas chromatography tests run on these new FIREClean® samples on a rush basis.[10]

Accordingly, within seven days of the discovery that four of the Initial Samples had been

[10] On October 14, 2016, Plaintiff also notified the Court of the loss of the four samples and sought to put the issue of "spoliation" and a short extension of expert deadlines before the Court through a "Motion to Determine that Plaintiff's Recent Testing Data Should Not be Excluded On the Grounds Of Spoliation and In /The Alternative For Modification of The Scheduling Order to Allow Additional Time to Produce An Amended Expert Report". (Dkt 132).

lost by Medallion, Plaintiff was able to provide the Replacement Samples to Medallion, have them subjected to the same tests on a rush basis, and then immediately shipped to Defendants' expert who received them on or about October 18, 2016. Exhibits 19 and 23. Accordingly, Defendants received, for testing, samples from the same batch of FIREClean® production seven days later than they would have had the lab not inadvertently lost the samples. As noted in footnotes 7 and 8, by October 20, 2016, Defendants had received numerous other samples of FIREClean®, including duplicate bottles of every sample that had been lost by Medallion. See also Exhibit 1.

On October 21, 2016, three days after sending the Replacement Samples, Defendants were sent the Medallion Lab gas chromatography test results for the Replacement Samples immediately after Plaintiff's expert verified the results. Exhibit 15.

On that same date, October 21, 2016, Defendants filed the instant Motion to Dismiss with this Court, (Dkt. 140) without discussing the over 50 additional samples and four Replacement Samples that had been provided to them for their use and testing. Moreover, this Motion was filed despite, a week earlier, as noted in footnote 10, this same issue was brought before Magistrate Judge Anderson by Plaintiff.

While all of the Replacement Samples are from the same production runs as the lost samples, some are not from the same barrels. [11] However, this is of no consequence. First and

[11] Specifically, the Replacement Samples that were tested and sent to Defendants'lab for testing are (Exhibit 23):

- Sample No. 63 (no serial # - label indicates December 2012 production run) (**i.e. same time period as Sample No. 1 of lost sample**.)
- Sample No. 65 (serial # D5-022-C, (a D5 bottle) indicating April 2015 production run, barrel C) (i.e. **same production run as Sample No. 11 of lost sample**)
- Sample No. 68 (serial # J5-016-A (a J5 bottle), indicating July 2015 production run, barrel A) (i.e. **same production run as Sample No. 13 of lost sample**)

most importantly, ***Plaintiff has tested the Replacement Samples, and Defendants now have the remainder of these samples and can test the exact same samples by testing the Replacement Samples.*** Without conceding the necessity that the same exact sample be tested, but that is what Defendants have been seeking and now it could have been done, just a week later than anticipated. Second, in support of Plaintiff's reply brief for the Motion then before Magistrate Judge Anderson, see footnote 10, Plaintiff submitted a Supplemental Expert Report from Ron Davis, Ph.D. who had analyzed the scientific data from Medallion generated from the Initial Samples and from the Replacement Samples, from which he concluded to a reasonable degree of scientific certainty that both sets of samples are scientifically equivalent to one another. Exhibit 3.

Specifically, in his Supplemental Report, Dr. Davis compared all of the GC testing results for all FIREClean® batches tested, both the Initial Samples *and* the Replacement Samples, and concluded that *all* of these samples are "***scientifically equivalent to one another***." Exhibit 3 at 1. (emphasis added). While there is some mild variability between the Initial Samples and the Replacement Samples, Dr. Davis states in his Supplemental Report that these variabilities "are within the expected variability for a product formulated primarily from naturally-sourced triacylglycerides, and are consistent with the results obtained from the five samples previously tested that were the subject of my original report." Exhibit 3 at 1. Specifically, the average oleic (i.e. monounsaturated fat) content of the five Initial Samples tested was 72.7%. The average oleic (i.e. monounsaturated fat) content of the four Replacement Samples was 73.7%. Dr. Davis sets out that this is within the expected variability of a product made of naturally-sourced

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- Sample No. 69 (serial # S5-008-C (an S5 bottle), indicating September 2015 production run, barrel C) (i.e. **same production run and same barrel as Sample No. 14 of lost sample**).

triaclygylcerides, and also within the stated accuracy and precision ranges that Medallion Labs provides for its tests. *Id*. at 1.

Notably, Dr. Davis also concludes that "[j]ust as the previous analysis did, these newest results for FIREClean® show beyond a reasonable scientific doubt that the [triacylglycerides] composition of all tested batches of FIREClean® is consistent. They also further demonstrate that the chemical composition of all tested batches of FIREClean® is distinct from that of vegetable oil." Exhibit 3 at 2. See also Exhibit 2, (enlarged graph from Dr. Davis Supplemental Report, demonstrating fatty acid similarities among all FIRECLean® bottles and their differences from Crisco Vegetable Oil.)

Moreover, comparing the Replacement Samples to the Initial Samples, Dr. Davis states that "I can further conclude that the basic formulation for FIREClean® over all the batches tested has not been altered significantly." Exhibit 3 at 2. Finally, Dr. Davis notes that any change in additives in the FIREClean® formulation "do not affect my conclusions that all tested batches of FIREClean® are not materially different from each other, nor does it affect my conclusion that all FIREClean® samples tested are consistently and materially different from Crisco Vegetable Oil."[12] *Id*.

Because, as set forth in Dr. Davis' Supplemental Report, the FIREClean® batches do not materially differ from one another, Defendants are not prejudiced by testing the FIREClean® bottles that were previously produced to them. Notwithstanding Dr. Davis' analysis regarding all

[12] The scientific testing results are consistent with the manufacturing process of FIREClean®. As described by David and Edward Sugg, the owners and sole producers of FIREClean® in their Joint Declaration, attached as Exhibit 11, there should be no difference between the barrels in any given production run because all barrels are produced at the same time, in the same manner, and with the same materials provided from the same suppliers, received at the same time. Exhibit 11 ¶ 5(a)-(n). In essence, there is nothing that should cause material changes in the product.

of the bottles of FIREClean® Defendants already possessed, Defendants also have in their possession the exact same bottles of FIREClean® that Plaintiff tested in the form of the Replacement Samples that they can test and use in scientifically challenging or disputing, if they are able, Dr. Davis' expert conclusions.

On October 31, 2016, Defendants served their expert report of Dr. Lori Stereit. Exhibit 4. The Expert Report is notable for the fact that Defendants do not address any gas chromatography tests of the Replacement Samples that were tested by Medallion and analyzed by Dr. Davis, or any such tests on the fifty plus samples of FIREClean® previously provided by Plaintiff. In addition, Defendants' Expert Report did not address the ultimate question in this case as to whether or not FIREClean® is Crisco Vegetable Oil. See Footnote 2, *supra.* The Defendants' Expert Report claims that their expert cannot make that determination for such reasons as irregularities in FIREClean® production, lack of quality control, variability in raw materials, among other things. Exhibit 4 at 9. Ultimately, Defendants' Expert Report provided an opinion regarding the amount of variability amongst FIREClean® samples, but fails to address how those samples compare to Crisco Vegetable Oil.[13]

B. Medallion Labs' Shipment of the Remaining Sample From the Initial Medallion Testing Did Not Result in Contamination And Is Irrelevant.

The alleged contamination during shipping of the FIREClean® bottle by a broken Crisco Oil bottle is 1) wrong in that ultimately there was no contamination, and 2) immaterial in light of the Replacement Samples and the bottles from the same batches already in the Defendants' possession. The facts concerning the bottle of Crisco Oil that broke during shipment are as follows.

[13] Based upon attachments to the Defendants' Expert's Report, it appears that samples of FIREClean® and/or other samples were sent to Unified Engineering or other labs for testing on October 18th and 21st, 2016. See Exhibit 24.

Following the discovery that Medallion had inadvertently not retained four of the five FIREClean® bottles from the initial testing, Medallion shipped the remaining FIREClean® bottle (an F6 bottle), three samples of Crisco products (i.e. the "Remaining Samples") to Defendants' expert, Dr. Lori Streit. During shipment, one of the samples of Crisco broke and spilled over the Remaining Sample bottles.[14] The sample of Crisco that spilled was a duplicate of another non-broken bottle within that shipment. Exhibit 6. Moreover, the Crisco samples are, of course, all commercially available.

Thereafter, Medallion offered to re-test the remaining FIREClean® F6 sample and Crisco samples to ensure that they were not contaminated by the spillage. Plaintiff contacted Defendants and proposed that Defendants send (at Plaintiff's expense) a sample from each of the non-broken bottles back to Medallion for testing to determine whether there was any contamination, with Defendants retaining the Remaining Samples so as not to be deprived of the samples for any period of time. Defendants refused to do this. Plaintiff then requested that Defendants ship (at Plaintiff's expense) the samples in their entirety back to Medallion. Defendants refused to do this, or to do anything to assist shipping these samples back to Plaintiff's lab. Exhibit 17. Thus, the only way Plaintiff could procure the samples to test for contamination was to hire a private investigator in Chicago to travel to Dr. Streit's office, procure the samples "as is" and ship the package back to Medallion. Exhibits 6 at ¶ 7; 17 and 22.

[14] Before scientific testing began, in order to facilitate the Defendants' request to test the exact same bottle as opposed to two bottles mixed together in the same batch, Plaintiff attempted to negotiate an agreement with the Defendant that would have minimized any risk associated with the transportation of materials. Specifically, Plaintiff suggested that Plaintiff and Defendants jointly select an independent laboratory for testing for numerous reasons including in order to avoid possible risks, such as transportation risks of breaking any evidence or the loss of samples. However, Defendants refused this common-sense approach.

Once Medallion received the package with the samples "as is", it tested the FIREClean® sample bottle and the Crisco sample bottles and determined they were not contaminated by the spillage. Exhibit No. 6. Subsequently, Medallion was instructed to properly package and immediately send these samples back to Defendants' lab on October 26, 2016, which it did. Exhibits 6 at ¶ 11 and 21.

Simply put, the only material bottle that was lost was one spilled bottle of Crisco. None of the other bottles were contaminated. Moreover, the bottle involved here was the one F6 bottle from the initial testing by Medallion and is completely unrelated to the Replacement Samples. Defendants elected to not cooperate with Plaintiffs in assisting in the testing for contamination by sending either a portion or all of the unbroken FIREClean® F6 sample and the two unbroken Crisco samples for contamination testing by Medallion, as is their right. But that resistance did cause some of the delay. Regardless, the F6 FIREClean® bottle from the initial samples is now in the possession of Defendants, it is not contaminated, and it can be tested by Defendants if they so chose.

C. The November 2015 and January 2016 PetroLube Testing.

With respect to the PetroLube pre-litigation testing, the test results from the fall of 2015 were commissioned by Plaintiff's owners before Plaintiff had decided whether or not to institute litigation, and Plaintiff's owners were told that PetroLube would retain those samples. For the testing commissioned in January 2016, which was after the decision had been made to proceed with litigation, there is at least one written record of Plaintiff instructing PetroLube to retain the FIREClean® bottles used in those tests as well. Exhibit 18. Regardless, the samples were not retained by the laboratory.

For the same reasons as set forth above, Defendants can fairly test other FIREClean® samples in order to take issue with the PetroLube results. Should the court disagree with this proposition, Plaintiff will simply not rely on those tests at trial. Defendants have known about the pre-litigation issue since August, 2016 (Dkt 152 at 3) and were willing to move forward because bottles of FIREClean® from every relevant time period, if not the exact same bottle from the PetroLube testing, are readily available. That remains true to this day.

ARGUMENT

A. Legal Standards

"Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. The right to impose sanctions arises from a court's inherent power to control the judicial process and litigation but the power is limited to that necessary to redress conduct 'which abuses the judicial process.'" *Silvestri v. Gen. Motors. Corp.*, 271 F.3d 583, 590 (4th Cir. 2001) quoting *Chambers v. NASCO, Inc*., 501 U.S. 32, 45-46 (1991). "While a district court has broad discretion in choosing an appropriate sanction for spoliation, "the applicable sanction should be molded to serve the prophylactic, punitive and remedial rationales underlying the spoliation doctrine." *Id.* quoting *West V. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir 1999). In addition, a court must find some degree of fault to impose sanctions. *Id*.

"When a party's sanctionable conduct is spoliation of evidence, to justify dismissal, the district court must "conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claims." *Suntrust Mortg. Inc. v. United Guar. Residential Ins. Co.*, 508 Fed. Appx. 243, 254-5 (4th Cir. 2013) *citing Silvestri v. Gen. Motors. Corp.*, 271 F.3d 583, 593 (4th Cir. 2001).

When assessing what, if any, sanctions are appropriate, a court "'should take pains neither to use an elephant gun to slay a mouse nor wield a cardboard sword if a dragon looms;'" the proper measure of a sanction, rather, is "'whether it 'restore[s] the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'" *In Re: Ethicon Inc. Pelvic Repair System Product Liability Litigation*, 299 502 F.R.D 520, 522 (S.D. W. Va. 2014) (citing *Anderson v. Beatrice Foods Co*., 900 F.2d 388, 395 (1st Cir. 1990) and *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 618 (S.D. Tex. 2010)).

In this case, FireClean's conduct does not warrant that it forfeit its claim nor were Defendants so prejudiced that they are substantially denied their ability to defend the claims made against them. Defendants have the ability to defend this case using the Replacement Samples and the numerous other samples, and their complaints are simply diversionary tactics.

B. <u>No Unique Evidence Has Been Lost</u>

Defendants' motion is premised on the proposition that some unique piece of evidence was lost. This is not the case. To the contrary, FireClean's expert has confirmed—and Defendants' moving papers have not rebutted the notion—that the Replacement Samples are "scientifically equivalent" to the evidence Defendants' claim was lost by Medallion. Exhibit 3 at 2. Defendants argue that "each barrel is mixed individually, so unless the product comes from the same barrel in the same batch it is not identical to the ones that were lost." Memorandum at 16. (Dkt 141). The inference to be taken from this statement is that Defendants cannot accurately and fairly challenge Plaintiff's Expert's test results or analysis because no other bottles of FIREClean® would substitute for the Initial Samples. Defendants' argument is a red herring, and utterly devoid of factual support, scientific support or expert testimony, and none is

cited by Defendants in their moving papers. Because a wholly adequate substitute for the four samples lost by Medallion is available, there has been no spoliation of any unique evidence

Moreover, setting aside the existence of the Replacement Samples, which Defendants received seven days later than they would have received the Initial Samples, Defendants also have over 50 *other* samples of FIRECLean® in their possession to test and many of these samples are from the same production runs as the Initial Samples, e.g. D5, S5, F6 and Late 2012 samples. Currently, Defendants have samples from the same barrels as the Initial Samples. Defendants can test FIREClean® samples, if they choose, from the sample barrel that was tested and then analyzed by Dr. Davis in his initial Report and from that they can challenge or dispute his Report. Exhibits 1 and 16.

Thus, because there are Replacement Samples to test and because there are samples from the same production runs and same barrels as the samples that Medallion lost, the purpose of the spoliation doctrine has no application here.

C. <u>There Has Been No Bad Faith by FireClean</u>

Dismissal of a lawsuit is severe and constitutes the ultimate sanction for spoliation. It is usually justified only in circumstances of bad faith or other "like action." *Silvestri v. Gen. Motors. Corp.*, 271 F.3d 583, 593 (4th Cir. 2001) *citing Cole v. Keller Indus., Inc., 132 F.3d 1044, 1047 (4th Cir 1998).* "[W]hen a ***proponent's intentional conduct*** contributes to the loss or destruction of evidence, the trial court has discretion to pursue a wide range of responses both for the purpose of leveling the evidentiary playing field and for the purpose of sanctioning the improper conduct." *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). (emphasis added). For these purposes, bad faith spoliation may be defined as "advantage-seeking behavior by the party with superior access to information necessary for the proper

administration of justice," or even simply intentional, deliberate conduct." *Micron Tecnology, Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1326 (Fed. Cir. 2100).

Here there can be little question that the destruction or loss of the four samples of FIREClean® by Medallion Labs was not accompanied by any culpable state of mind by the lab, but more importantly for purposes of this Motion, there was clearly no culpable state of mind by Plaintiff or its counsel. Nor was the loss the result of any "advantage-seeking behavior" by anyone.

Indisputably, the non-retention of the Initial Samples by Medallion Lab occurred only after FireClean's counsel, Ms. Harris, provided Medallion with clear and explicit instructions to retain the samples that were provided to the lab for testing pending further instructions for shipping to Defendants. As attested to in Medallion Lab's General Manager's Declaration, "Ms. Harris' instructions appeared on the submission form, the enclosed cover letter and also in an email to the laboratory." Exhibit 5.

The laboratory is an accredited and reputable laboratory. Exhibit 7. It is owned by General Mills and it performs 500,000 tests per year and 2000 tests per day. Exhibit 5 at ¶ 6. The laboratory has protocols for retaining evidence under these circumstances and it is a "rare occasion" when these protocols result in the loss of evidence. *Id.* Unfortunately, four samples of FIREClean® that were tested by Medallion as part of the Initial samples are missing. Medallion takes full responsibility for that loss. *Id.*

In a case like here, what can an attorney do except choose a reputable laboratory to have scientific testing performed and to provide the lab with clear and explicit instructions to retain the samples pending further instructions for shipping. That is precisely what FireClean's counsel did in this case. There was no reason for counsel to foresee that her reasonable instructions

would not be carried out or that there would be a loss of four of the initial samples sent to Medallion.

There is no fact from which this Court could or should find or infer that FireClean or its' counsel intentionally or in bad faith participated in the loss of the four samples from the initial testing. Nor is there any fact from which this Court could or should find or infer that FireClean or its' counsel in any way tarnished or frustrated the integrity of the judicial process in regards to the loss of the initial four samples.

To the contrary, immediately upon being notified of the loss of these four samples, Plaintiff's counsel, Plaintiff's owners and the laboratory acted in the highest measures of integrity in attempting to mitigate and eliminate any prejudice whatsoever to the Defendants from this most unfortunate occurrence.

First, Plaintiff's counsel learned what the facts were, sought a Declaration attesting to what had transpired and tried to work out some solution to the problem with opposing counsel. Exhibit 5.

Second, when a solution with opposing counsel failed, Plaintiff's counsel arranged with Plaintiff's owners to expeditiously send additional samples of FIREClean® from the same production runs as the lost samples to the laboratory. Exhibit 11 at ¶ 9; Exhibit 19.

Third, simultaneously, arrangements were made with the laboratory to test these four samples on a rush basis so that they could be examined by Plaintiff's expert and then sent to Defendants for their own testing. Exhibits 3, 15 and 19. Defendants received these four Replacement Samples for testing within a week of learning that the initial four samples were lost. Exhibit 19. These samples were received by the Defendants at or about the same time the Defendants were sending their own samples of FIREClean® to their lab. Exhibit 24.

Fourth, the gas chromatography test graphs were sent three days later to Defendants for comparison to any tests that they were to perform. Exhibit 15.

Fifth, Plaintiff's filed a Motion with Magistrate Judge Anderson regarding the lost samples seeking to obtain a ruling as to the effect of the loss upon discovery and the scheduling order. (Dkt Nos. 132 and 188).

Sixth, Plaintiff ensured that additional samples of FIREClean® were sent to Defendants so that Defendants would have samples from every barrel of every production that were identical to the four lost samples well before the date Defendants' Expert Report was due.[15] Exhibit 1.

The same holds true with the purported "contamination" of the F6 FIREClean® sample. It is clear that the only participation that Plaintiff or Plaintiff's counsel had in the breaking of a bottle during transport was to instruct the lab to transmit the bottle to Defendants' lab. How or why the bottle of Crisco Oil broke is unknown. But, as soon as Plaintiff's counsel was informed of the breakage, counsel tried whatever was possible to determine as quickly as possible whether or not the remaining F6 sample from the initial testing had been contaminated by the broken Crisco Oil bottle. Exhibit 17. Without any cooperation from Defendants lab, Plaintiff's counsel hired a private investigator to retrieve the package, repackage it and transport it to Medallion where arrangements were made to have it tested for contamination. Exhibit 22. The tests were performed. Exhibit 6. The tests show that the samples were not contaminated and the F6 sample was sent back to Defendants' lab where it now is housed ready for testing. Exhibits 6 and 21.

[15] From the moment Plaintiff's counsel learned for certain that four samples were missing, counsel offered to request an extension for the Defendants' to file their Expert Report. The request was rejected.

Again, what more can be expected of counsel than to pick a reputable and accredited lab and provide explicit transmission instruction, as was done here. While the delay was unfortunate, in the end, the sample F6 bottle was not spoliated and can be tested by Defendants if they want.

While there was some delay due to the bottle breaking that was clearly not caused by Plaintiff or its counsel. In deciding any spoliation motion, a court has wide discretion and any contemplated sanction should take into account the "blameworthiness of the offending party and the prejudice suffered by the opposing party." *Potomac Elec. Power Co. v. Elec. Motor Supply, Inc.*, 192 F.R.D. 511, 515 (D. Md. 2000). In *Potomac Electric Power Co.*, for instance, there were certain unique samples that were destroyed such that the opposing party lost the ability to replicate the tests (which is not the case here). The court held that, even in that case, where there was no showing that the loss was intentional or in bad faith, dismissal would be a "drastic" measure and "plainly unwarranted." 192 F.R.D. at 514-515. The court further declined to exclude the expert's opinion based on the lost material and declined to impose any sanction. *Id.*

In sum, absent extraordinary prejudice, which there isn't here, "[s]ome quantum of blameworthiness is required before sanctions for spoliation may obtain." *Trigon Ins. Co. v. United Sates*, 204 F.R.D. 277, 287 (E.D. Va. 2001).

D. <u>Defendants Are Not Prejudiced.</u>

Defendants have not suffered prejudice, let alone the extraordinary prejudice required for dismissal, exclusion of Plaintiff's expert, or an adverse inference. Indeed, the law is clear that "to justify dismissal, the district court must conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim." *Suntrust Mortg., Inc. v. United Guar. Residential Ins. Co.*, 508 Fed.Appx. 243, 254-255

(4th Cir. 2013) (citation omitted). Moreover, the law is clear that "[w]hen a proponent cannot produce original evidence of a fact because of loss or destruction of evidence, the court may permit proof by secondary evidence." *Vodusek v. Bayliner Marine Corp.*, 71 F.3d at 156; *Stallings v. Bil-Jax, Inc.*, 243 F.R.D. 248, 253 (E.D. Va. 2007) (denying defendants summary judgment motion based upon spoliation when third defendant store lost allegedly defective scaffolding returned to store because photographs had been taken and because other examples of the same type of scaffolding existed); *Musick v. Dorel Juvenile Grp., Inc.*, No. 1:11CV00005, 2011 WL 5029802, at *3 (W.D. Va. Oct. 24, 2011) (in case involving alleged defective child safety seat, Plaintiff failed to retain the Windstar min-van that was involved in the accident. Court held that substantial prejudice did not exist because photographs of van existed and held that secondary evidence in the form of a duplicate Windstar passenger seats were available.); *PacifiCorp v. Northwest Pipeline GP*, 879 F. Supp. 2d 1171, 1195 (D. OR. 2012)(holding when laboratory samples were lost sanctions were inappropriate when opposing party had samples from the same time period.) In this case, there is no prejudice.

There is no prejudice because Defendants have had access to the Replacement Samples since October 18, 2016, which is on or about the date that they sent their other samples for their own testing. Defendants' could have tested the Replacement Samples but chose not to do so. Exhibits 19 and 24.

Additionally, Plaintiff has moved swiftly at all times to conduct testing on an expedited basis and to provide the Replacement Samples to Defendants. Medallion Labs informed Plaintiff on October 11, 2016 at approximately 4:00 p.m. that the lab had inadvertently lost or destroyed the FIREClean® samples. Exhibit 5 at ¶ 9. Thereafter, after confirming the four samples could not be found, Plaintiff's counsel informed Defendants' counsel of the matter and attempted to

negotiate a resolution of the matter. [16] At the same time, Plaintiff had the Replacement Bottles tested, examined by its expert and had the Replacement Bottles shipped to Defendants, and issued the Supplemental Expert Report. Plaintiff has been diligent at every step – including by instructing Medallion to retain the samples, by attempting to negotiate a joint independent lab, and by retesting the Replacement Bottles as soon as possible. Defendants have simply elected to ignore the Replacement Samples, the 55 prior bottles of FIREClean® produced, and testing them to determine whether or not FIREClean® is Crisco Vegetable Oil.

Finally, the failure of Defendants' own Expert Report to rely on the Replacement Samples shines a light on Defendants' position in their memo that it is critical to test the same batch, the same barrel, the same bottle, as Plaintiff. Defendants have had the four Replacement Samples since October 18, 2016, and the one surviving bottle of FIREClean® from the Initial Samples (which Defendants chose not to keep a portion of and send the remainder to Medallion to confirm non-contamination) since October 28, 2016. Defendants' Expert Report does not rely on any of these samples for its expert conclusions. Nevertheless, the Expert Report puts forth a variety of purported defenses on behalf of Defendants none of which are dependent or affected

[16]While Plaintiff informed Defendant and filed a motion before Judge Anderson as soon it became aware of the loss of some of the Initial Samples by Medallion, Plaintiff acted appropriately throughout the process. Plaintiff informed Defendants' counsel the next day. First, while the initial tests from Medallion were completed in September, Plaintiff was waiting on the bottle of Crisco Vegetable Oil from the PetroLube Labs to be delivered to Medallion so that the sample originally designated by the parties as Sample No. 18 could be used in the current testing. While Plaintiff does not believe that the exact same bottle was necessary as any bottle of Crisco Vegetable Oil could have been used, Defendants have taken the position that the testing should involve the exact same bottle. This caused a delay. Second, Plaintiff's expert needed to confirm the validity of the results of the Medallion tests to ensure that repeat testing was not necessary. Third, Plaintiff's counsel requested that the samples be transferred to Defendants' expert earlier, but it took Medallion five days to realize that it had lost the samples and to contact Plaintiff's counsel. Exhibit 13 and Exhibit 5 at ¶ 9. Ultimately, Plaintiff did not cause any undue delay, explicitly instructed the laboratory to retain the now missing samples, and at all times moved expeditiously to eliminate any possible prejudice to Defendants from this inadvertent mishap.

by the missing samples. The issue in this case is whether FIREClean® is Crisco Vegetable Oil as claimed by Defendants on numerous occasions. Plaintiff expert, Dr. Davis, has concluded to a reasonable degree of scientific certainty based on scientific testing that FIREClean® is not Crisco Vegetable Oil. Defendants have had FIREClean® samples available to them to either prove or disprove that FIREClean® is Crisco Vegetable Oil. All Defendants have to do is perform the relevant tests that can lead a reasonable scientist to determine whether or not FIREClean® is or is not Crisco Vegetable oil. The inadvertent loss of the samples in question do not hinder that testing.

Moreover, Defendants did not suffer any prejudice with respect to the Crisco Oil container that broke during shipment to Defendants. First, laboratory tests have confirmed that the F6 bottle and the remaining Crisco bottles were not contaminated. Exhibit 6. Second, Crisco Vegetable Oil is readily available in any convenience store. Third, and most importantly, the F6 bottle of FIREClean® was from the initial testing and it was not contaminated. Exhibit 6. Once again, Defendants were provided with the Replacement Samples as well as approximately 50 other bottles of FIREClean® for testing. Finally, Plaintiff did everything in its power to expedite recovery and retesting in this instance including hiring a private investigator to retrieve the package after Defendants refused to mail the package to Medallion. Exhibits 6, 17, 21 and 22. See *Medical Laboratory Management Consultants v. American Broadcasting* Companies, 306 F.3d 806 (9th Cir. 2002). Ultimately, the breakage during shipping of the remainder of the Medallion Labs sample was inadvertent and caused no harm. Dismissal of the case and exclusion of Plaintiff's expert would be excessive. If the Court deems that some relief is appropriate, Plaintiff's request that the Court extend Defendants' expert discovery deadlines and

allow Defendants to test the Replacement Samples and/or the samples from the same batches as the lost samples that they have had for weeks, if Defendants so choose.

Finally, the Petro-Lube pre-litigation testing does not substantially prejudice Defendants. Defendants have known of this issue for weeks and were prepared to go forward with testing additional samples. That holds true today. Defendants have at least 50 samples to test, as well as the Replacement Samples if they want to test the same bottles as Plaintiff. Furthermore, Plaintiff is willing to not rely upon the PetroLube tests at trial if necessary.

Ultimately, this is not a case where the only sample of a product has been lost or where the key piece of evidence, like the air-bag involved in an accident, is missing. *See, e.g., Silvestri*, 271 F.3d 583 (4th Cir. 2001). Nor is it a case where every sample of FIREClean® needs to be tested. Instead, an analysis of ***any*** sample of FIREClean® would determine that it is not Crisco Vegetable Oil, as the Defendants' falsely alleged on numerous occasions online. That analysis and testing is still possible now. To state otherwise is to create a false hurdle. While it is unfortunate that the laboratories lost some samples, as discussed above, many other bottles of FIREClean® remain available. In this case, at the furthest limits, Defendants were prejudiced by a week or so in not receiving the Replacement Samples until October 18, 2016. Exhibits 19, 24. The proper remedial measure is to permit Defendants' time to challenge Plaintiff's experts' opinion regarding whether FIREClean® is Crisco Vegetable Oil, to reflect the delay in providing of the Replacement Samples, even though Defendants had those samples and chose to conduct other testing with other samples. Accordingly, no spoliation sanction is appropriate in this case.

CONCLUSION

For the reasons set forth herein, Plaintiff respectfully requests that the Court deny the Motion in its entirety.

Dated: November 7, 2016

Respectfully submitted,
FIRECLEAN LLC

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notice of such filing to counsel of record that are registered with CM/ECF.

/s/
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