

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

INNERCITY RECYCLING :
SERVICE LLC, et al. :
 :
v. : C.A. No. 13-648ML
 :
SMM NEW ENGLAND :
CORPORATION :

MEMORANDUM AND ORDER

Pending before me for determination (28 U.S.C. § 636(b)(1)(A)) is Plaintiffs’ Motion for Emergency Relief Preserving Evidence and Granting Expedited Discovery Regarding Spoliation of Evidence by Defendant. (Document No. 8). Defendant objects and cross moves for an award of costs and attorneys’ fees incurred in responding to Plaintiffs’ Motion which it describes as “unnecessary and a waste of both judicial and party resources.” (Document No. 12). An expedited hearing was held on October 17, 2013. For the following reasons, Plaintiffs’ Motion is denied.

Plaintiffs, a putative class of scrap metal dealers, initiated this action in Superior Court on September 20, 2013 against Defendant, a major scrap metal recycler, alleging several claims including breach of contract and fraud related to Plaintiffs’ sale of scrap metal to Defendant. Plaintiffs allege, *inter alia*, that Defendant improperly made certain manual adjustments to either the gross weight, tare weight and/or net weight of scrap metal deliveries which resulted in reduced load weights and thus reduced payments to Plaintiffs.

Shortly after Defendant removed the case to this Court, Plaintiffs filed a Motion for an Order to Preserve Evidence and a Temporary Restraining Order. (Document No. 3). The Motion was heard on an emergency basis by District Judge McConnell on September 26, 2013 who denied the

Motion. Plaintiffs did not present any conclusive proof of evidence destruction to the Court in support of the Motion and based their argument primarily on “suspicion.” (Document No. 8-1 at p. 26). While Judge McConnell observed that the “lack of information between the parties...raise[d] legitimate suspicions,” he concluded that Defendant had acknowledged its duty to preserve relevant evidence and that “there’s not enough before me to say that that’s been violated sufficient that I would issue an injunction.” Id. at pp. 34-35.

In the instant Motion, Plaintiffs contend that emergency relief is warranted because there is “conclusive evidence that [Defendant] has recently and deliberately deleted and changed the information respecting numerous subject transactions among the parties in its SIP/SAI computer database” despite Judge McConnell’s preservation admonitions at the hearing on their earlier Motion. (Document No. 8 at p. 1). After reviewing the competing Affidavits, I conclude that there is not “conclusive evidence” of spoliation. Rather, Plaintiffs have only shown evidence creating a reasonable suspicion of spoliation based on the changes in the information accessible to them when viewing it through the Supplier Information Portal (“SIP”) to the SAI database.¹ However, any inference of spoliation created by the evidence presented by Plaintiffs has been sufficiently rebutted by the credible explanation detailed in Defendant’s proffered Affidavits. In its Affidavits, Defendant posits that a “glitch” in the SIP system “caused certain weight measurements to display incorrectly when viewed.” (Document No. 12-1 at p. 2). Defendant’s software vendor, Systems Alternatives International (“SAI”), affirms that it “fixed the ‘glitch’” on October 1, 2013 and, “[i]n doing so, SAI

¹ The information presented by Plaintiffs creating a reasonable suspicion of spoliation is sufficient to deny Defendant’s cross-motion for fees and costs. See Fed. R. Civ. P. 37(a)(5)(B). Further, in hindsight, this motion practice may have been averted if Defendant had informed its counsel of the glitch and allowed counsel to communicate with Plaintiffs’ counsel about the issue before any “fixing” was done particularly since Defendant asserts that it first learned of the glitch through an inquiry made by a principal of one of the Plaintiff entities.

did not delete or modify any component of the data that [Defendant] had already input into the system...[and] merely altered the manner in which the data was displayed through [its] SIP.” Id. SAI also affirms that “all of the data input by [Defendant] into the SAI system² remains intact, and has not been deleted, modified, or destroyed in any way by SAI.” Id.

Additionally, Defendant affirms, through Affidavits of its local Office Manager and regional IT Supervisor, that the transaction information in the SAI system has not been deleted. (See Document Nos. 12-2 and 12-3). The Office Manager also affirms that Defendant creates paper tickets for each transaction which reflect the scale weights and adjustments and that “[a]ll paper tickets are preserved and maintained by [Defendant] independently of SAI, and all information entered into the SAI system is automatically saved and stored in SAI’s database.” (Document No. 12-2 at p. 2). As to the “suspicious” transactions identified by Plaintiffs, the Office Manager testifies that she “accessed the SAI system and verified that each transaction contains all the information reflected on the paper tickets and reflects a full history of manual modifications by [Defendant] [and] that no information relating to any of these transactions reflected on the SIP printouts has been deleted.” Id. at p. 3.³

This case is in its infancy, there is no pretrial scheduling order in place, and formal discovery has not yet begun by rule. See Fed. R. Civ. P. 26(d)(1). In addition to a preservation order, Plaintiffs seek other relief including immediate access to and imaging of Defendant’s database by Plaintiffs’ retained computer consultant and an order that Defendant pay for all of the consultant’s

² The SAI system “records weights and measurements, adjustments, pricing, and customer information for a specific transaction at [Defendant’s] facility.” (Document No. 12-1 at p. 1).

³ Although I find no basis for the extraordinary relief requested by Plaintiffs, I do ORDER Defendant to produce the raw data referenced in paragraph 10 of Ms. Potvin’s Affidavit (Document No. 12-2 at p. 3) to Plaintiffs within seven days that they can independently verify Ms. Potvin’s conclusions about such transactions.

work. As previously stated, Plaintiffs have simply not made a sufficient showing to warrant such extraordinary relief. While one might view a preservation order as harmless, the legal duty to take reasonable steps to preserve relevant evidence and the potential sanctions for failing to do so are well-established. The discovery rules do not specifically provide for the entry of evidence preservation orders as a matter of course, and Defendant, a subsidiary of a global company with experienced litigation counsel, has acknowledged its preservation obligations. Although this case is hotly contested, the fundamental issue of whether Plaintiffs were accurately paid for the amounts of scrap metal delivered to Defendant's facility is straight-forward. Moreover, it is clear, and the parties appear to agree, that the critical evidence relevant to resolution of this issue includes the actual recorded weights (gross, tare and net) of the delivered loads and the history of any adjustments made to such weights by Defendant. I am disinclined to enter a preservation order based solely on the existence of distrust and unsubstantiated suspicion because those elements are unfortunately present in most newly filed civil cases, and doing so would incent counsel to engage in this type of emergency pre-discovery motion practice rather than professionally communicating about the scope of relevant evidence, preserving discoverable evidence, electronic discovery issues and a general discovery plan. See Fed. R. Civ. P. 26(f).

For the foregoing reasons, Plaintiffs' Motion for Emergency Relief (Document No. 8) and Defendant's cross motion for Attorneys' Fees (Document No. 11) are DENIED.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
October 24, 2013