SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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PARLUX FRAGRANCES, LLC,PERFUMANIA HOLDINGS, INC.,

Plaintiff,

- v -

S. CARTER ENTERPRISES, LLC,SHAWN CARTER,

Defendant.

INDEX NO.	650403/2016
MOTION DATE	10/27/2020
MOTION SEQ. NO.	009 010

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 428, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 923, 924, 925, 926, 927, 928, 929, 930, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000, 1001, 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 1010, 1011, 1012

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 460, 461, 462, 463, 464, 465, 591, 592

were read on this motion to/for STRIKE JURY DEMAND.

Upon the foregoing documents, and for the reasons set forth on the record (10/27/2020), Parlux Fragrances, LLC (**Parlux**) and Perfumania Holdings, Inc.'s (**Perfumania**) motion (Mtn. Seq. No. 009) for an order finding that S. Carter Enterprises (**SCE**) and Shawn Carter engaged in the spoliation of evidence and imposing sanctions, and Parlux and Perfumania's motion (Mtn. Seq. No. 010) to strike SCE and Mr. Carter's jury demand pursuant to CPLR § 4102, are decided as follows:

Mtn. Seq. No. 009: Parlux and Perfumania's Motion for Spoliation Sanctions is Granted

To prevail on a motion for sanctions for spoliation of evidence, the moving party must establish: (1) the party with control over the evidence had an obligation to preserve it at the time of its destruction, (2) the party destroyed the evidence with a "culpable state of mind," and (3) the destroyed evidence was relevant to the other party's claims or defenses such that the trier of fact could find that the evidence would have supported those claims or defenses (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015]). A "culpable state of mind" includes ordinary negligence for purposes of a motion for spoliation sanctions (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]). The relevance of materials that were intentionally or willfully destroyed is presumed, as is the relevance of materials destroyed as a result of gross negligence (*Pegasus*, 26 NY3d at 547).

Trial courts may, in the exercise of discretion, impose sanctions to provide relief to the affected party, including (i) preclusion of evidence favorable to the spoliating party, (ii) awarding costs associated with obtaining replacement evidence, or (iii) employing an adverse inference instruction at trial (*id.* at 551, citing CPLR § 3126 ["If any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are just"]).

The First Department has adopted the standard set forth in *Zubulake v UBS Warburg LLC* (220 FRD 212 [SD NY 2003]), which held that, "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold'" (*VOOM*, 93 AD3d at 41, quoting *Zubulake*, 220 FRD at 218).

Here, SCE and Mr. Carter reasonably anticipated litigation at least by July 31, 2015 when they received Alfred Parliani's letter (the **Parliani July 2015 Letter**; NYSCEF No. 967) (which Parliani July 2015 Letter provided that "Parlux intends to take whatever action it deems necessary and appropriate to recover all of the losses it has sustained as a consequence of SCE and Mr. Carter's failure to comply with the terms of the License Agreement") and wrote a reservation of rights letter back (NYSCEF Doc. No. 969), approximately one month later on August 26, 2016, and potentially earlier depending on when the evidence shows that Mr. Carter anticipated litigation with respect to his counterclaim that Parlux failed to pay him royalties that were due.

Parlux's argument that SCE and Mr. Carter reasonably anticipated litigation in 2013 soon after the launch based on their description of Desiree Perez's testimony or because a business meeting was requested soon after a highly successful initial launch fails. The sum and substance of her testimony is that she came to believe that Parlux's way of doing business through Renee Garcia was to constantly threaten litigation and that as such, such threats were mere puffery (NYSCEF Doc. No. 999). Given the continuing nature of their relationship and the successful launch, the request for a business meeting also does not lead to the conclusion that litigation was reasonably anticipated at that time either. There was no written or other expression of threatened litigation from Parlux until the Parliani July 2015 Letter.

It is undisputed, however, that the Defendants did not put a litigation hold in place and that they destroyed Mr. Carter's emails in January 2016 — i.e., after they reasonably anticipated litigation and had an obligation to preserve evidence. Their conduct under the circumstances was at a

minimum grossly negligent. Indeed, according to the testimony of Michael Allen, although destruction of Mr. Carter's emails was done annually in January based on safety concerns, it was not done automatically. It was only done at times and in response to requests from SCE (NYSCEF Doc. No. 928, Allen Tr. at 118-119, lines 5-25, 1-6).

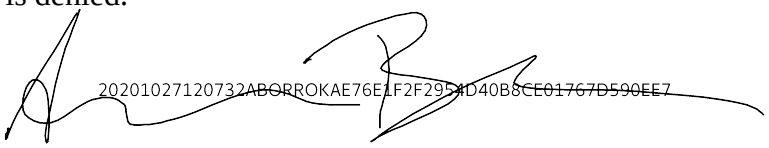
To the extent SCE and Mr. Carter argue that this destruction only involves the calendar year 2015 and that the stain of spoiliation only involves 2015 emails, their argument fails. Although emails dated from prior years may no longer have been on Mr. Carter's computer, nothing in the record supports the notion that the 2016 mass deletion did not encompass relevant non-privileged attachments from others from prior years or to others in response to any such emails that would otherwise constitute business records or admissions against interest. Under *Zubulake* (220 FRD at 218) and *Voom* (93 AD3d at 46), Parlux was entitled to the universe of information that the Defendants had an obligation to preserve. Given the foregoing, Parlux is entitled to an adverse inference at trial.

Mtn. Seq. No. 010: Parlux and Perfumania's Motion to Strike SCE and Mr. Carter's Jury Demand is Denied.

CPLR § 4101 provides that issues of fact shall be tried by a jury "in an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only" or "in any other action in which a party is entitled by the constitution or by express provision of law to a trial by jury" (CPLR § 4101 [1], [3]).

The First Department has held that "where a plaintiff brings a claim triable by jury and the defendant interposes both equitable defenses and counterclaims arising from the same transaction, the defendant waives a jury even on the main, legal, claim (*Hudson View II Assocs. v Gooden*, 222 AD2d 163, 167 [1st Dept 1996]). However, a request contained in a pleading's prayer for relief that is equitable in nature does not result in a waiver of the right to a jury trial where the character of the causes of action asserted are predominantly legal in nature (*Hebranko v Bioline Labs., Inc.*, 149 AD2d 567, 568 [2d Dept 1989] ["the right to a jury trial is to be determined by the facts alleged in the complaint and not by the prayer for relief"]; *Schlick v American Bus. Press*, 246 AD2d 450, 450 [1st Dept 1998] [holding that the plaintiff was entitled to a jury trial where equitable request for reinstatement in prayer for relief was merely incidental to the money damages sought]) and for which monetary damages alone would afford full relief (*Echostar Satellite LLC v ESPN, Inc.*, 84 AD3d 469, 470 [1st Dept 2011]).

Here, SCE and Mr. Carter assert a sole counterclaim for breach of contract against Parlux and Perfumania. The overall nature and character of SCE and Mr. Carter's counterclaim is undeniably legal in nature, not equitable, as only monetary damages would afford a full remedy (*Echostar*, 84 AD3d at 470). Their request for a declaratory judgment in the prayer for relief that, "Parlux and Perfumania must forthwith comply with all the terms of the License Agreement and Sublicense Agreement" is merely incidental to the legal breach of action counterclaim as such request goes to the calculation of damages. Accordingly, SCE and Mr. Carter have not waived their right to a jury trial and the motion is denied.



10/27/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE