

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOM, INC., d/b/a)	
CHIPCO INTERNATIONAL, LTD.,)	
)	
Plaintiff)	
)	
v.)	Civil No. 96-156-P-DMC
)	
ADELL PLASTICS, INC.,)	
)	
Defendant)	

MEMORANDUM DECISION ON DEFENDANT’S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF CHIPS NOT PRODUCED IN DISCOVERY BY PLAINTIFF

This lawsuit concerns plastic resin sold by the defendant to the plaintiff, which used the resin to manufacture gaming chips the plaintiff contends were defective because the defendant failed to comply with its legal obligations to the plaintiff. Now before the court is the defendant’s motion *in limine* (Docket No. 31) seeking to exclude testimony or other evidence concerning any gaming chips that were not produced by the plaintiff in discovery. For the reasons that follow, the motion is denied.

The plaintiff alleges that its customers began experiencing problems with its gaming chips after it began substituting the defendant’s resin for resin manufactured by General Electric (“GE”). Accordingly, when the defendant first sought production of documents and tangible items by the plaintiff, the defendant asked counsel for the plaintiff to produce

whatever chips and resin your client has related to this case including (1) any and all defective chips manufactured from either GE or Adell resins, (2) any good chips manufactured from GE or Adell resins, and (3) any and all samples of resin from GE or Adell that both met and did not meet specifications.

Letter of John M.R. Paterson, Esq. to Peter Culley, Esq. *et al.* dated August 28, 1996, Exh. A to

motion, at 1. The plaintiff did not object to this production request. Three months later, the defendant renewed this request orally in connection with its deposition of the plaintiff conducted pursuant to Fed. R. Civ. P. 30(b)(6). Counsel for the defendant sought to reduce this agreement to writing; he sent a letter to the plaintiff's counsel stating that the defendant expected to receive "[s]ix chips from each batch of chips which have been returned to JOM buy customers who allegedly were supplied with chips manufactured with Adell resins." Letter of John M.R. Paterson, Esq. to Peter Culley, Esq. dated Nov. 27, 1996, Exh. B. to motion, at 1. The defendant's counsel also stated that he expected an opportunity "to look at all chips which have been returned to Adell by any of its customers and which were manufactured with Adell resins." *Id.* The November 27 letter also referred to certain tests performed by the plaintiff on chips containing both manufacturers' resins, complaint records and any chip samples contained therein, and the plaintiff's daily production journal. *Id.* at 1-2. According to the defendant, the plaintiff produced 20 chips on February 10, 1997 that the plaintiff contended were defective, and another 50 such chips approximately a month later. The defendant also reported that on June 2, 1997 the plaintiff produced 26 allegedly defective chips and 18 that it described as not defective.

The essence of the instant motion is the defendant's contention that the plaintiff should be sanctioned for destroying relevant evidence. According to the defendant, the plaintiff has destroyed at least 635,915 such chips and possibly as many as 980,000.¹ The plaintiff does not dispute that destruction of this magnitude occurred. Rather, it asserts that gaming chips are, in effect, a form of currency to its customers and that its business practice is therefore to account for and then destroy

¹ The former figure is derived from certificates of destruction provided by the plaintiff in discovery; the latter figure is the defendant's estimate based on the testimony of John Kendall, who represented the plaintiff at its Rule 30(b)(6) deposition.

chips that are removed from service. The plaintiff states that it sought to cull representative samples of the chips before any were destroyed, but that it was not always successful because some of its customers are located overseas and their chips are destroyed at remote locations.

In determining whether any sanctions are appropriate against a plaintiff (or, presumably, any party) that destroys relevant evidence, this court has previously considered five factors:

(1) whether the defendant was prejudiced as a result of [the destruction of the evidence]; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the plaintiff was in good faith or bad faith; and (5) the potential for abuse if the evidence is not excluded.

Northern Assurance Co. v. Ware, 145 F.R.D. 281, 283 (D. Me. 1993) (citation omitted). These factors are applied with an eye toward preventing a party from

selectively determin[ing] what relevant evidence is worthy of being preserved for use in a possible suit and to destroy, without notice to a potential adversary, other evidence, knowing of its potential adverse relevance to the issues to be generated by the assertion of claims.

Id. at 284. Thus, in the *Northern Assurance* case, the court prevented the plaintiff, an insurance company charged with knowledge of litigation practices, from presenting testimony or expert conclusions concerning a burned house that the plaintiff caused to be destroyed before the defendant had received an opportunity to examine it. *Id.* The fourth factor appears to have been of particular importance. Although the court found no evidence of intentional and malicious destruction of evidence, it characterized the plaintiff as “reckless” and “palpably remiss in failing to make reasonable arrangements” to preserve the evidence in question. *Id.* at 183-84; *cf. Jackson v. Harvard Univ.*, 900 F.2d 464, 469 (1st Cir. 1990) (court may consider as “important part of the calculus of relief” the fact that “tardy production of records and the loss of evidence did not flow from defendants’ consciousness that the documents would hurt their case”).

The facts as revealed in the motion papers suggest a scenario that does not approach the egregiousness of what transpired in *Northern Assurance*. Here, although the plaintiff can be assumed to have been aware well before it filed this lawsuit that a legal dispute was brewing over gaming chips that were being destroyed, this plaintiff is not an insurance company that deals regularly with the need to inspect evidence relevant to damages claims. Moreover, at least some of the destruction in question appears not to have been in the plaintiff's direct control, and — unlike the incident of destruction in *Northern Assurance* — the chip destruction can reasonably be construed to be a routine and necessary part of the plaintiff's business.

The other *Northern Assurance* factors also militate against a wholesale exclusion of the evidence in question. The potential of prejudice is significantly attenuated here because the plaintiff has not destroyed all of the chips at issue and has, in fact, produced samples to the defendant. The defendant's failure to have brought this discovery problem to the attention of the court earlier, while not dispositive, also suggests a lack of prejudice given that the defendant was on notice at least as of the Rule 30(b)(6) deposition in November 1996 that the chips manufactured by the plaintiff are generally destroyed upon being retired from use. *See* Letter of Geraldine G. Sanchez, Esq. (Docket No. 54) and exhibit 1 thereto. Obviously, notwithstanding the language in the defendant's initial discovery request, the defendant could not have expected the plaintiff to produce nearly a million gaming chips in discovery. A sampling regime was the only reasonable solution. If the regime used by the plaintiff was inadequate to allow both sides to prepare their case, or if the defendant even had reason to be concerned that the regime would be inadequate, it is reasonable to expect the defendant to have made that fact known to the court well before the present juncture.

Having determined the wholesale granting of the defendant's motion to be inappropriate, I

stress that I do not rule out the reassertion of such an objection to specific evidence at trial. If the defendant can demonstrate that it has been denied an opportunity to rebut or consider specific evidence offered by the plaintiff — in the form of expert testimony or otherwise — because of the plaintiff's destruction of gaming chips, I would likely look with favor on an objection to the admission of such evidence into the record. I also note that the Federal Rules of Evidence permit the drawing of an adverse inference from one side's destruction of evidence. *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 446 (1st Cir. 1997) (citation omitted). In the circumstances, the most that can be said prior to trial is that *some* evidence *may* be excludable based on the factors in *Northern Assurance*.

For the foregoing reasons, the defendant's motion *in limine* to exclude evidence relating to gaming chips not produced by the plaintiffs in discovery is, on the showing made, **DENIED**.

Dated this ____ day of June, 1997.

David M. Cohen
United States Magistrate Judge