IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RALPH F. DURDIN and
RICHARD J. DIOTTE,

Plaintiffs,

ORDER

06-C-0039-C

v.

KURYAKYN HOLDINGS, INC.,

Defendant.

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Before the court is plaintiffs' motion for sanctions for defendant's alleged spoliation of evidence. Dkt. #54. Plaintiffs contend that defendant's failure to preserve e-mail correspondence within the company is a wilful violation of its discovery obligations that should be punished by default judgment or by judicially noticed adverse inferences at trial. Defendant responds that it has not destroyed any e-mail and that no sanctions are warranted. For the reasons stated below, I am declining to grant default judgment against defendant. Neither am I persuaded that the court should take judicial notice of adverse inferences to be drawn from the facts. I will, however, allow examination and cross examination of witnesses on the "missing" e-mails and will instruct the jury at the close of

the case regarding possible inferences it may draw on this point.

Although the parties have been litigating their dispute in one fashion or another since July 12, 2004, defendant never has attempted to preserve any of its in-house e-mail related to the disputed products. Even after plaintiffs filed the instant lawsuit, defendant and its attorneys did not impose an e-mail preservation directive. Defendant's policy is to destroy all e-mail after thirty days and it has continued this practice during this lawsuit. Therefore, there is no way for plaintiffs to discover whether defendant's officers or employees exchanged e-mail on topics such as the similarities between the parties' products and defendant's decision three days after plaintiff filed this lawsuit to stop selling its challenged product.

Defendant responds that its employees never exchanged any e-mail on these topics, so there could not have been any destruction of e-mail relevant to this lawsuit. Defendant's basis for making this claim is the memory of its employees, who testified at their depositions merely that they "do not recall" any e-mail on the relevant topics. There is evidence that in-house e-mail actually was exchanged, but defendant is sticking with its story that none of these messages was relevant to the issues disputed in this lawsuit.

Plaintiffs rejoin that this response is incredible, and that they have lost their ability to prove what defendant's officers and employees were thinking during critical junctures in this case. This has prompted the instant motion seeking either default judgment or directives to the jury that it may infer from defendant's failure to preserve e-mail that (1)

defendant's infringement (if infringement is found) was willful; (2) defendant modified its prototype of the product because the original was too close to plaintiffs' patented product; (3) defendant stopped selling its product because defendant believed its product infringed plaintiffs' patent; and (4) defendant's employees believed that their product was substantially similar to plaintiffs'.

Absent stronger proof that defendant intended its failure to preserve e-mail to deprive plaintiff of discoverable evidence, I conclude that default is too harsh a sanction. Further, at this juncture in the case, there is no principled method by which to judge the credibility of the parties' competing claims on whether relevant e-mail existed and was destroyed, Therefore, I am reserving a final decision on plaintiffs' fallback request for relief until this issue has been explored with the witnesses at trial.

Toward this end, I conclude that the parties may explore with the witnesses at trial the question whether defendant's employees exchanged and then destroyed relevant e-mail. Also, I am leaning toward providing closing instructions regarding precatory inferences the jury may draw from defendant's failure to preserve electronically stored information while this dispute was festering. I will draft a final version of these instructions at the close of the evidence. The parties may propose their versions of these instructions in their submissions for the final pretrial conference.

ORDER

IT IS ORDERED that plaintiffs' motion for sanctions is GRANTED IN PART AND DENIED IN PART in the fashion stated above.

Entered this 7th day of November, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge