IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

VFI ASSOCIATES, LLC, ET AL.	)	
	)	
Plaintiffs,	)	Case No. 1:08CV00014
	)	
v.	)	**OPINION AND ORDER**
	)	
LOBO MACHINERY CORP., ET AL.,	)	By: James P. Jones
	)	United States District Judge
	)	
Defendants.	)	

Thomas A. Leggette, Leggette Law Firm, PLC, Roanoke, Virginia, for Plaintiffs; Jay H. Steele, Lebanon, Virginia, for Defendants.

There is pending in this case Plaintiffs' Motion for Sanctions against Defendants Yuan, Lobo Power Tools, Inc., and Lobo Machinery Corp. (ECF No. 190), as well as Plaintiffs' Additional Motion for Sanctions against Defendants Yuan, Lobo Power Tools, Inc., and Lobo Machinery Corp. (ECF No. 202). The motions have been the subject of a hearing and are ripe for decision.

The plaintiffs, investors in a wood products business, claim that their business manager and his wife (and related entities) enlisted an unscrupulous supplier, defendant Robin Yuan, and his companies Lobo Power Tools, Inc., and Lobo Machinery Corp., who sold equipment to the business at inflated prices and then paid

kickbacks to the manager. This case has been consolidated for an upcoming trial with suits against the business manager and his wife and related entities.

The basis for the present motions is that Yuan and his companies have lied in discovery, refused a court order to produce relevant documents, and destroyed evidence.

I find from the evidence presented by the plaintiffs that the defendants have (1) knowingly refused to produce the so-called "source documents," supporting the transactions contained in their books and records, after being ordered to do so; and (2) knowingly altered data ordered to be produced from the electronic accounting software used in the business (the so-called Platinum Accounting Software) in an effort to hide relevant evidence. The plaintiffs' abundant proof in this regard is substantially uncontested by the defendants, except by Robin Yuan's bare denial of wrongdoing.

The question is the appropriate sanction to impose under these circumstances. Sanctions may be imposed under Federal Rule of Civil Procedure 37(b) for failure to comply with a discovery order or for an evasive or incomplete disclosure. In addition, sanctions are inherently available to the court where spoliation, that is, the destruction or material alteration of evidence, is involved. *Silvestri v. GMC*, 271 F.3d 583, 590 (4th Cir. 2001).

The Fourth Circuit has developed a four-part test in considering sanctions — (1) whether bad faith was involved; (2) the degree of prejudice occurring to the adversary; (3) the need for deterrence; and (4) whether less drastic sanctions are appropriate. *Anderson v. Found. for Advancement, Educ. & Emp't of Am. Indians*, 155 F.3d 500, 504 (4th Cir. 1998).

From the evidence presented, I find that bad faith was involved. The plaintiffs' expert opined without contradiction that the alterations of the accounting software were intentional and destroyed the plaintiffs' ability to obtain the correct data. Moreover, while Yuan claims that he cannot find the source documents, a clerical employee in his office has testified under oath that such documents were routinely retained and stored. I find that the plaintiffs have shown by a preponderance of the evidence that the true records were not produced in an effort to prevent a disclosure that the defendants believed would be helpful to the plaintiffs in their prosecution of this case.

The degree of prejudice to the plaintiffs is a different question. While the source documents and accurate software data may have been helpful to the plaintiffs, as Yuan likely believed, there is other probative evidence upon which the plaintiffs may rely in proving their case. Accordingly, I find that a sanction less than a default

judgment is appropriate. Moreover, because discovery is now completed, the deterrence factor is not determinative.

Accordingly, the motions are GRANTED and the following sanction is appropriate. The defendants Yuan, Lobo Power Tools, Inc., and Lobo Machinery Corp. are hereby precluded from offering any defense, evidence, or argument as to the true cost to Yuan and the companies of finishing machines, the amount of any markup by Yuan or the companies in the sale of finishing machines, and whether any changes or upgrades were made to the machines that would have justified the price paid or the value of the machines.[1]

It is so **ORDERED**.

ENTER: November 22, 2010

/s/ JAMES P. JONES
United States District Judge

[1] I will also consider an appropriate adverse inference jury instruction relating to the defendants' conduct if offered by the plaintiffs and relevant to the issues. Of course, the sanction of preclusion may make such an instruction unnecessary. *See D'Onofrio v. SFX Sports Grp., Inc.*, No. 06-687 (JDB/JMF), 2010 WL 3324964, at *7 (D.D.C. Aug. 24, 2010).