

Plaintiffs' environmental expert, for their review *See* Hackett Decl ¶¶ 3-6 Mr Hackett then swears that, on December 18, 1992, Mr Colli returned to him the unsigned affidavits that Hackett had prepared for Messrs Pizzamiglio and Vianelli and that these are the unsigned affidavits produced to Defendants during the discovery phase of this case *See id* ¶ 6

*12 Even still, a July 10, 1992 communication between Plaintiffs' lawyers (which included Mr Hackett) seems to establish their knowledge of some form of affidavit from both Messrs Pizzamiglio and Vianelli to the effect that landfill usage at the Orzinuovi plant ceased in 1982 This July 10, 1992 facsimile message, addressed to Mr Hackett, among others, states

At the meeting of July 1st, 1992, in Frankfurt (attending Mr Buttner, Mr Streit, Mr Colli and Mr Marcoaldi), Mr Buttner stressed that the wording used in the affidavits of Messrs Pizzamiglio and Vianelli should be further discussed with you *The present wording*, in fact, contains no specific indication as to the location of the waste disposals after 1982 (see my fax of July 1st, 1992) This conflicts with the audit prepared by PAR eighteen months ago (presently held by Whitman) where the location of the waste disposals after 1982 is indicated Mr Buttner is concerned that Whitman could point out the contradiction "

Defs' Exs , Tab 39 (emphasis supplied)

This message no doubt could refer to other affidavits of Messrs Pizzamiglio and Vianelli, perhaps the *signed* affidavits entrusted to Mr Colli One thing is certain, though, this fax communication highlights Plaintiffs' deep concern with avoiding "conflicts" and "contradictions "

Based on these circumstances, Defendants ask the Court to exclude any testimony from Messrs Pizzamiglio and Vianelli contradictory to the two unsigned affidavits produced during discovery Defendants rely on the spoliation of evidence theory (also referred to as "spoliation") to support their position This doctrine refers to a party's intentional or negligent destruction of evidence that impairs another party's ability to prove or defend a civil action *See West v Goodyear Tire & Rubber Co.*, 167 F 3d 776, 778 (2d Cir 1999) ("Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation ") When a party's intentional conduct causes the destruction of evidence, a district court has considerable discretion to impose a wide range of sanctions for purposes of leveling the evidentiary playing field and punishing the improper conduct *See Shamis v Ambassador Factors*

Corp., 34 F Supp 2d 879, 888 (S D N Y 1999) ("It is well settled that the Court has the power to sanction a party that destroys relevant and discoverable evidence [based on, among other things,] a court's inherent power to regulate litigation, preserve and protect the integrity of the proceedings before it, and sanction parties for abusive practices ") Such sanctions include ordering dismissal of the culpable party's suit, granting summary judgment in favor of the prejudiced party, precluding the culpable party from giving testimony regarding the destroyed evidence, or giving an adverse inference instruction to the jury against the culpable party *See Trigon Insur Co v United States*, 204 F R D 277, 285 (E D Va 2001)

*13 In considering whether to impose sanctions for spoliation of evidence, a court must initially determine whether the party against whom sanctions are sought had an obligation to preserve evidence *See Indemnity Insur Co of North Amer v Liebert Corp.*, No 96 Civ 6675, 1998 WL 363834, at *3 (S D N Y June 29, 1998) The duty to preserve evidence arises even prior to the filing of a complaint "where a party is on notice that litigation is likely to be commenced " *Id* at *3 In such a situation, the party is obligated to preserve "what it knows, or reasonably should know, will be relevant in the action " *Turner v Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S D N Y 1991), *see also Kudatzky v Galbreath Co.*, No 96 Civ 2693, 1997 WL 598586 (S D N Y Sept 23, 1997) ("The threshold question with respect to imposing sanctions for document spoliation based on the court's inherent powers is whether the party knew or should know that the destroyed evidence was relevant to pending, imminent or reasonably foreseeable litigation " (internal quotation marks omitted))

Here, Plaintiffs had notice that litigation could likely commence with respect to the waste disposal situation For example, Plaintiffs specifically obtained the affidavits in response to advice from their lawyers that information regarding the timing of the waste disposal was important to resolving claims between the parties *See Roberts Aff* ¶ 3, Ex B, pp 108-09 Moreover, Plaintiffs now argue that these affidavits are immune from allegations of spoliation based on the confidentiality of compromise negotiations under Federal Rule of Evidence 408 because they were prepared in the course of settlement discussions Rule 408 forbids the admission of statements made during settlement talks to prove liability or the lack of liability [FN10] The Rule, however, provides no support for Plaintiffs' deliberate destruction of this evidence That is so because the Court finds that the affidavits constitute otherwise discoverable evidence, explicitly made admissible by the terms of Rule 408, since, from