

all indications, they contained only historical factual information otherwise discoverable as deposition testimony *See Fed R Evid 408* ("This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations ")

FN10 Rule 408 provides, in pertinent part Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount Evidence of conduct or statements made in compromise negotiations is likewise not admissible

Fed R Evid 408

In light of this, Plaintiffs reliance on *Kleen Laundry & Dry Cleaning Services, Inc v Total Waste Management Corp.*, 817 F Supp 225, 229 (D NH 1993), is misplaced, for that case involved a situation where the court disallowed an affidavit that incorporated statements made during settlement negotiations Unlike in *Kleen Laundry*, the affidavits here included statements of historical facts pertinent to this lawsuit As such, these affidavits were "otherwise discoverable" and thus were not subject to exclusion under Rule 408 The Court therefore concludes that Plaintiffs deliberately destroyed the affidavits after the obligation to preserve them arose and after Plaintiffs had clear notice of this obligation

*14 Once a court determines that a party had a duty to preserve evidence, the court must then consider (1) the degree of fault of the party who destroyed the evidence, (2) the degree of prejudice suffered by the opposing party, and (3) the appropriate sanction *See Indemnity Insur.*, 1998 WL 363834, at *3 The evidence before the Court provides a sufficient basis for finding that Plaintiffs intentionally destroyed the affidavits to prevent their use in future litigation For one thing, Plaintiffs and their counsel apparently were concerned that the contents of similar affidavits would undermine Plaintiffs' position on issues important in this case Moreover, the destruction of this evidence was not accidental or inadvertent Quite the contrary, Mr Colli, a high-ranking official of plaintiff Frendo, admitted that he purposely destroyed the affidavits sometime after June 1992, apparently after deciding that the contents of the affidavits might establish that Frendo employees engaged in illegal activities with respect to waste

disposal *See Roberts Aff ¶ 3, Ex B*, p 110 The Court rejects Plaintiffs' argument that the record does not establish that Mr Colli acted within the scope of his employment at the time that he destroyed the affidavits In this respect, Mr Colli collected the affidavits on behalf of his employer and then contacted Plaintiffs' lawyers, whom he referred to as "our lawyers," allegedly to discuss whether the affidavits suggested that Frendo employees had acted wrongfully It was after this conversation that Mr Colli apparently destroyed the evidence

Based on the foregoing, the Court finds Plaintiffs highly culpable for the destruction of this evidence The Court also finds that Defendants are significantly prejudiced by the loss of this evidence because now Defendants cannot use these prior sworn statements as admissions regarding the time period of landfill usage, nor can Defendants use the statements to impeach the new and contradictory testimony given by Messrs Pizzamiglio and Vianelli Moreover, although Defendants deposed these two gentlemen, they provided only sketchy testimony regarding the contents of the destroyed affidavits Also, Defendants have provided inferential evidence (the unsigned affidavits) as to the possible contents of the missing materials, which indicates that such materials would have been harmful to Plaintiffs' case *See Skeete v McKinsey & Co., Inc.*, No 91 Civ 8093, 1993 WL 256659, at *7 (S D N Y July 7, 1993)

Pursuant to the spoliation doctrine, Defendants ask the Court to sanction Plaintiffs by precluding them from giving testimony from Messrs Pizzamiglio and Vianelli contradictory to their two unsigned affidavits Given the record in this case, such a sanction is appropriate Mindful of the serious nature of this sanction, the Court nonetheless finds such a penalty fitting given the deliberate destruction of evidence and Plaintiffs' overall bad behavior in their pursuit of indemnification

*15 Besides the deposition testimony from these two gentlemen that dumping of small amounts of scrap material at the Orzinuovi plant occurred as late as 1986, Plaintiffs offer virtually nothing else to suggest post-inspection landfill usage Regarding this issue, Plaintiffs' environmental expert, Mr Marcoaldi, identifies other things that allegedly establish post-inspection usage, including (1) "pieces of production specific to the period '78/'79 were found during excavation," (2) accounting documents dated 1976 were found during the removal project that "in principle should be kept for ten years," (3) some worker (whom the report fails to name) remembers that excavations were made in the backyard area of the plant, and (4) "one purchase order and relevant invoice