IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GN NETCOM, INC., Plaintiff, vs. PLANTRONICS, INC., Defendant.	)	C.A. No. 12-cv-1318-LPS

PLAINTIFF GN NETCOM, INC.'S BRIEF IN SUPPORT
OF ITS MOTION FOR A NEW TRIAL

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Dated: November 9, 2017

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NATURE & STAGE OF PROCEEDINGS

GN filed its Complaint in this matter on October 12, 2012. D.I. 1. A jury trial was held from October 11, 2017 to October 18, 2017,[1] after which the jury returned a verdict for Plantronics. D.I. 533.

SUMMARY OF ARGUMENT

GN moves for a new trial based on two decisions by the Court, which GN contends were errors of law that unduly and substantially prejudiced it. First, the Court ordered a permissive adverse inference rather than a dispositive sanction as a remedy for Plantronics' extensive, bad faith spoliation of evidence despite ample case law suggesting that a dispositive sanction was the only appropriate remedy. That error was compounded when the Court failed to permit GN to present key spoliation evidence at trial, without which the jury was confused by, and did not clearly understand how to apply, the permissive adverse inference. This is most obvious from the fact that the jury found GN had proven the relevant market, but did not find for GN on its substantive antitrust claims, all of which turned on GN's ability to put forth *exactly the type of evidence* that Plantronics intentionally, and in bad faith, deleted in this case. The jury's verdict makes clear that the Court's sanction of a permissive adverse inference did nothing to cure the prejudice to GN caused by Plantronics' spoliation of evidence.

Second, GN contends that the Court committed legal error when it prohibited GN from presenting evidence regarding the GSA's 2017 Proposed Debarment of Plantronics. GN submits that it is clear that Plantronics' entire defense strategy involved distracting the jury from its misconduct with a narrative of its pro-U.S. government history from the 1950's to today. GN contends that this strategy, at least by inference, was pursued to distract the jury from the merits of the case to a contest between a U.S. company, favored by the U.S. government, against a

[1] Citations to the trial transcript herein shall be "Trial Day X, at xx:xx."

foreign plaintiff. Allowing the jury to hear Plantronics' one-sided, pro-government narrative but not allowing it to hear that *earlier this year*, the federal government issued a Notice of Proposed Debarment to Plantronics, which (at least temporarily) barred it from remaining a government contractor (as a direct result of its misconduct in this case, no less) was clearly legal error. This error also severely prejudiced GN, which is evidenced by Juror No. 3 twice contacting Plantronics' witnesses—one of which was its corporate representative, who sat at counsel table every day of trial—in violation of the Court's explicit instructions. While the Court ultimately struck Juror No. 3 due to this improper conduct, it indicates that other jurors may also have held Plantronics in high regard due to its pro-government reputation.

Further, the exclusion of the GSA Proposed Debarment evidence was particularly harmful to GN when coupled with exclusion of the spoliation evidence. First, because it was not allowed to hear that the GSA had Proposed Debarment of Plantronics *as a direct result of its spoliation*, the jury could not understand the seriousness of Plantronics' misconduct. In addition, the jury never learned that Plantronics was only able to convince the GSA to drop the Proposed Debarment action in exchange for terminating Mr. Houston—or that apparently, Plantronics had no plans to terminate him otherwise despite his egregious misconduct. Not only are the GSA Proposed Debarment action and Plantronics' intentional, bad faith spoliation of documents relevant to this case and inextricably linked, but excluding this evidence was legally erroneous and caused incurable prejudice to GN. The Court should grant GN's motion for a new trial.

STATEMENT OF FACTS

The Court is familiar with the extensive facts regarding Plantronics' spoliation of evidence in this case, and indeed memorialized the same in its July 6, 2016 Memorandum Opinion (D.I. 333, hereinafter the "Spoliation Order"). To summarize, the Court concluded that

Plantronics "failed to take reasonable steps to preserve ESI which cannot be restored or replaced, [and] that it did so in bad faith with the intent to deprive GN from using the information contained in the emails[.]" Spoliation Order, at 26. Specifically, the Court found that "Plantronics [did not take] all the reasonable steps it could have taken to recover deleted emails after discovering that Mr. Houston had instructed others to delete emails," including by failing to search back-up tapes for deleted emails, deciding not to pay for Stroz Friedman to complete its statistical analysis, and unrestoring back-up tapes that it had previously paid Stroz Friedman to restore. *Id.* at 14. The Court also made the following key observations:

- "Destruction of internal emails regarding the decisions made, the discussions had, and the resulting impact would make it difficult, if not impossible, for GN to effectively and fully challenge Plantronics' one sided view of how the POD agreements and POD distributors operated in practice. In short, Plantronics attempts to set up a heads-I-win-tails-you- lose scenario by arguing that 'there is no way for GN to succeed on the merits' while Plantronics' own spoliation leaves GN with a spotty and incomplete factual picture of the marketplace with which to combat Plantronics' claims."

- "Having found that Plantronics…failed to take reasonable steps to preserve ESI which cannot be restored or replaced, that it did so in bad faith with the intent to deprive GN from using the information contained in the emails, and that GN is prejudiced by the loss of the emails, the Court must now determine the appropriate sanctions."

- "In light of all this evidence, including Plantronics' repeated obfuscation and misrepresentations related to Mr. Houston's email deletion and its investigation of it, the Court finds that Plantronics did act in bad faith, intending to impair the ability of [GN] to effectively litigate its case."[2]

To remedy the prejudice to GN, the Court imposed sanctions on Plantronics consisting of: (1) a monetary sanction in the amount of $3,000,000; and (2) "an instruction to the jury that it may—not that it must—presume that the information missing from Plantronics' production was unfavorable to Plantronics," *i.e.*, a permissive adverse inference.[3]

[2] *Id*. at 18, 26.
[3] *See id.* at 28-29.

In May of 2017, after obtaining a copy of the Court's Spoliation Order, the U.S. General Services Administration ("GSA"), the entity responsible for managing government contractors, issued a Notice of Proposed Debarment to Plantronics (hereinafter, "Proposed Debarment"), which recommended that it be debarred from serving as a government contractor due to its spoliation of evidence in this case. Months later, GN later learned that the GSA had terminated its Proposed Debarment action, and was under the impression that no further adverse action had been taken against Plantronics. However, during the October 2, 2017 Pretrial Conference, Plantronics' counsel revealed that after issuing the Proposed Debarment, the GSA had inquired of Plantronics "whether there was something that the GSA should be concerned about given Mr. Houston's continued employment at Plantronics." Oct. 2, 2017 Tr., at 22:2-4. Thus, on the eve of trial, GN and the Court learned for the first time that it was only in response to the GSA's *specific inquiry* that Plantronics had terminated Mr. Houston's employment.[4] *See id.* at 22-24.

In light of this discovery, GN argued that the Court should permit it to introduce evidence of the GSA Proposed Debarment if Plantronics opened the door to it.[5] Indeed, even as early as the Pretrial Conference, Plantronics admitted that it would reference its history as a government contractor during opening statements. *Id*. at 27:13-17. While the Court conceded that in doing

[4] *Id*. at 24:2-5 ("[MR. HAYMAN:] [T]he GSA informed Plantronics that there was no basis for them to continue with any administrative action after they were informed that Mr. Houston was no longer employed by the company.").

[5] *See id.* 23:12-18 ("[MR. PATTERSON:] If they suggest that they are a premier supplier with the government and they have a great relationship with the government, we certainly should be allowed to cross-examine them on the GSA debarment issue. And the fact that it sounds like GSA asked Mr. Houston be terminated in order for them to have the debarment be pulled back. I think there is still some probationary status."); *id.* 25:12-17 ("[Mr. PATTERSON:] But certainly if they're going to play up their government reputation as some positive, we have to be allowed to say, well, it hasn't been totally spotless. . . . If they're going to get into it, then we have to be allowed to cross-examine on the issue.").

so, Plantronics *could potentially* open the door to evidence of the GSA Proposed Debarment,[6] it chose not to rule on the issue at that time. *Id.* The Court also discussed the treatment of spoliation evidence at trial, but no final decisions were made.[7]

Subsequently, the Court issued a Memorandum Order that addressed the treatment of both the spoliation and the GSA Proposed Debarment evidence. D.I. 502. As to spoliation, the Court outlined preliminary and final instructions that would be read to the jury, along with certain "Stipulated Facts." *Id*. at 4-8.[8] Regarding the GSA Proposed Debarment evidence, the Court ruled that Plantronics would not open the door by presenting evidence as to "its purportedly positive relationship with the government, historically and currently[.]" *Id.* at 2.

The parties then proceeded to trial. Plantronics' counsel kept his word and told jurors during his opening statement that Plantronics headsets were "worn by the astronauts in both the Mercury and Apollo missions, including Neil Armstrong on his historic walk on the moon," and that "[t]he first words spoken by a human on the moon were spoken through a Plantronics headset."[9] When it was Plantronics' turn to put on its affirmative case, the pro-government narrative ventured far beyond what Plantronics had represented to the Court, and GN, prior to

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[6] *See id.* at 26:17-27:1 ("[THE COURT:] [I]t does happen in my experience that a company wants to tell the positive aspects of their history, and I have ruled before in a particular context where that opens the door to arguably negative things, even though there may be a very valid and meritorious response to those negative things, but sometimes all of that comes out in front of the jury. So I don't know which way it is going to play out, but I think that is about as far as I can get on those issues at the moment.").

[7] *See id*. at 70-77.

[8] Both parties filed letters in response, disputing and seeking to clarify certain of the "Stipulated Facts." D.I. 507, 510, 513. GN also filed a Motion to Reconsider the October 5, 2017 Order, which Plantronics opposed. D.I. 511, 514. The Court heard argument on the Motion to Reconsider on the first day of trial, D.I. 517, and made some changes to its October 5, 2017 Order (D.I. 502) but rejected others. *See* Trial Day 1, at 5-29. One of the changes that the Court made was to strike the word "Stipulated" and refer to its findings simply as "Facts."

[9] Trial Day 1, 214:9-214:19. Plantronics' counsel also introduced no less than five slides during his opening statement that referenced Plantronics' relationship with the federal government: Slides 2 (ID 2050), 5 (ID 2003), 6 (ID 2004), 7 (ID 2005), and 11 (ID 2010).

trial.[10] The *very first topic* that Mr. Erbe (Plantronics' first witness and corporate representative) testified to was Plantronics' role as a government contractor:

> Q. [A]re you familiar with the industries to which Plantronics sells these special products? . . .
>
> A. There's really four that we focus on. The first one is ***air traffic control.*** Those are, of course, the products you buy controllers for talking to pilots. The second one is ***emergency dispatch***, the products that plug into the console to allow first responders to take 911 calls and communicate over radios. The third is ***aviation***. Those are products for pilots. And fourth is ***aerospace, military.*** We lump that into one segment we can focus on.
>
> Q. And you just mentioned air traffic control. Can you tell me about that or any recent product offerings?
>
> A. Yes. Yes. So at Plantronics we've sold products for air traffic control for many, many years. ***Just last week I got a call from one of the engineering folks within the FAA and the conversation was with regard to the hurricanes in Puerto Rico and the infrastructure damage that had been sustained in the airports down there, and there's more than a dozen. So the conversation we had was with regard to, well, the FAA has emergency radio that can be deployed. We make headsets for use on those radios, so how can we better prepare for disasters like this in the future.***[11]

Mr. Erbe continued to reference Plantronics' close government relationships throughout his testimony.[12] Plantronics' counsel closed Mr. Erbe's direct examination by asking him:

> Q. There are [sic] any government entities closer to here on the East Coast for which Plantronics makes special products?
>
> A. Yes. Yes, there are. ***Just a few months ago, we received an order from New York City Police Department, and there, it was***

[10] In the parties' October 3, 2017 Joint Status Report, Plantronics represented that it intended to "explain the origins of our company in the late 50s, early 60s, when we invented the commercial lightweight headset for pilots, when we created the headset that was worn by Neil Armstrong on the moon, when we were awarded the sole provider status to the FAA, which we still have to this day." D.I. 500, at 3. Plantronics also stated that this issue would be "fleshed out for the Court in . . . briefing," but it never was. *Id*.

[11] Trial Day 3, 864:1-865:1 (emphasis added).

[12] *See, e.g., id*. at 872:11-24; *id.* at 873:22-874:19.

> ***for several hundred of these push-to-talk units that we make.*** It's a custom product for them for use in the dispatch area.[13]

In regards to Mr. Erbe's work history, he testified that he joined the Navy in 1974, and was "[d]ischarged in 1981 honorably, and a Vietnam veteran."[14] When asked what he did after leaving the Navy, he replied: "Took a couple days off and went to work for Plantronics."[15]

Prior to cross-examining Mr. Erbe, GN's counsel requested leave to question him about the GSA's Proposed Debarment, arguing that he had opened the door to it on direct given his references to "specific instances of doing business with the military in New York." *Id.* at 877:19-878:5. GN's counsel pointed out that Mr. Erbe's testimony did not fit within the Court's prior ruling on the GSA Proposed Debarment evidence, but in fact, "went further than that into saying ***in geographic proximity and in the recent times, you were just awarded this, suggesting that their recent working with the government has been all positive.***" *Id.* at 881:2-5 (emphasis added). Despite Plantronics' concession that GN had not received notice that it intended to question Mr. Erbe on "this very recent win in particular in our geographic area,"[16] and despite recognizing that the GSA Debarment evidence was relevant,[17] the Court denied GN's request to question Mr. Erbe on the GSA's Proposed Debarment of Plantronics. *Id*. at 882:1-7.

Later, during direct examination of its expert, Professor Richard Gilbert, Plantronics forged another (albeit false) association between itself and the government by displaying the

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[13] *Id*. at 876:11-17 (emphasis added).

[14] *Id*. at 865:2-10.

[15] *Id*. at 865:16-18.

[16] *Id.* at 880:14-20 ("[THE COURT:] So there was no disclosure to the plaintiff that you were going to go into this very recent win in particular in our geographic area; is that correct? MR. DEAN: Was there something that referenced NYPD? Not in any slide specifically. THE COURT: Or otherwise. MR. DEAN: Not that I'm familiar with.").

[17] *Id.* at 882:1-5 ("[THE COURT]: I understand the concern the plaintiff has about the recency. Presumably it's in a period in which the investigation may have been ongoing or at least was in the recent past, so there is some relevance to it[.]").

official seals of the DOJ and FTC on Powerpoint slides[18] during his testimony.[19] GN's counsel objected to Plantronics' use of the seals, which look exactly like the seal that is displayed in the courtroom of a federal court and, therefore, might mislead the jury into thinking that Professor Gilbert "has a seal of approval from those entities."[20] Indeed, the DOJ prohibits the use or reproduction of its seal without written permission, presumably because displaying it conveys the imprimatur of government approval.[21] Nevertheless, the Court overruled GN's objection.[22]

The true harm caused by the exclusion of the GSA Proposed Debarment evidence started to materialize the next day. On Day 5 of trial, Juror No. 3 contacted two of Plantronics' witnesses (one of which was its corporate representative), despite the Court's instruction that jurors were "essentially not to have any contact with anyone associated with the case . . . [and] not to talk to anyone about the case." Trial Day 6, at 1552:5-1552:9. First, following Professor Gilbert's testimony, "Juror No. 3 came up to [Professor Gilbert] and stuck out his hand and said 'thank you for your service.'" Trial Day 5 at 1338:10-11. At the time, GN's counsel worried that taking any sort of action in response to this improper contact "might make it worse," and therefore chose to assume that Juror No. 3 was just referencing Professor Gilbert's Navy service "and [] was not showing a bias." *See id.* at 1339:7-14. Then, later that same day, Juror No. 3 approached Mr. Erbe, Plantronics' corporate representative and witness, who sat at Plantronics' counsel table every day of trial, and thanked him for his service. *Id.* at 1533:2-3. Because this

[18] Plantronics used two slides—Slide ID 2207 contained the words "U.S. DEPARTMENT OF JUSTICE" in large text next to the DOJ's official seal. Slide ID 2208 stated "Ongoing Government Advisory Roles," and displayed the DOJ and FTC seals.

[19] Professor Gilbert testified that he served four years in the Navy and two years as Chief Economist at the DOJ's Antitrust Division. Trial Day 4 at 1099:17-1100:21.

[20] *See id.* at 913:13-17; *id.* at 919:12-14.

[21] *See* https://www.justice.gov/legalpolicies#seals (last accessed Nov. 8, 2017) ("Department of Justice seals, logos and other official insignia may not be used or reproduced without written permission."). Plantronics did not have written permission to use the seals.

[22] Trial Day 4, at 921:12-18.

was the second time the same juror had engaged in the same improper conduct, GN argued that Juror No. 3 should be dismissed.[23] The Court agreed, explaining:

> ***[T]o twice latch on to an irrelevant fact on the same side of the case in violation of the letter or at least spirit of what he was instructed does give me concern that he may, he may turn out to be biased because he may put any weight on that qualification which really has nothing to do with the issues in the case.***
>
> ***[T]he improper contact occurred not once but twice, and both times involved Juror No. 3 having contact with witnesses for the defense . . . .***
>
> ***[P]art of defendant's case, again not at all improperly, has been to point out to the jury its positive, so it says, relationship with the government in terms of developing products for government entities and selling them and supplying them to government entities, including NASA and possibly the military as well.***
>
> Given all that, ***I am concerned that Juror No. 3 may be unfairly biased in favor of defendant*** . . . .[24]

On that basis, the Court struck Juror No. 3. Trial Day 6, at 1551:11-12.

A few hours later, the remaining six jurors returned a verdict for Plantronics, after less than two hours of deliberation. D.I. 533.

ARGUMENT

Pursuant to Fed. R. Civ. P. 59(a), the Court may "grant a new trial on all or some of the issues . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court[.]" There are three grounds on which the court may order a new trial: "(1) a prejudicial error of law; (2) a verdict against the weight of the evidence; or (3) a jury's grossly excessive or inadequate award against the weight of the evidence." *Mycogen Plant Science, Inc. v. Monstanto Co*., 61 F. Supp. 2d 199, 260 (D. Del. 1999).

[23] Trial Day 6, at 1537:8-10 ("[MR. PATTERSON]: [I]t does cause us concern because it involved a corporate representative, and it included sort of an affirmation of characteristics of the corporate representative, Mr. Erbe.").

[24] *Id.* at 1540:24-1541:7; *id* at 1554:4-1554:13 (emphasis supplied).

"When the district court commits a prejudicial error of law, it has wide discretion in deciding a motion for a new trial." *Id.* (citations omitted).[25] "Although Rule 59 does not specify grounds upon which the Court may grant a new trial, significant errors of law prejudicial to the moving party involving evidence or jury instructions have been properly found as bases for a new trial." *Finch*, 941 F. Supp. at 1413 (citations omitted). In deciding a new trial motion, the Court undertakes a two-step inquiry: "(1) whether an error was in fact committed, and (2) whether that error was so prejudicial that denial of a new trial would be "inconsistent with substantial justice." *Id.* at 1414 (citations omitted). With respect to the second prong of this test, "a new trial must be granted unless it is highly probable that the erroneous ruling did not affect the objecting party's substantial rights." *Bhaya v. Westinghouse Elec. Corp.*, 709 F. Supp. 600, 601-02 (E.D. Pa. 1989) (citations, internal quotation marks, and brackets omitted).[26] "In determining whether to grant a motion for a new trial under Rule 59(a), the court need not view the evidence in the light most favorable to the verdict winner[.]" *McMillan v. Weeks Marine, Inc.*, 478 F. Supp. 2d 651, 655 (D. Del. 2007) (citations omitted); *Bullen v. Chaffinch*, 336 F. Supp. 2d 342, 347 (D. Del. 2004) (same).

I. The Court Should Grant a New Trial Because It Committed Legal Error In Regards to Its Treatment of Spoliation That Affected GN's Substantial Rights.

The Court committed legal error in this case when it found that Plantronics intentionally spoliated evidence but failed to enter a dispositive sanction. Case law from federal courts around

[25] *Accord Finch v. Hercules, Inc.*, 941 F. Supp. 1395, 1413 (D. Del. 1996); *see also Klein v. Hollings*, 992 F.2d 1285, 1289-90 (3d Cir. 1993) ("[T]he district court's latitude on a new trial motion is broad when the reason for interfering with the jury verdict is a ruling on a matter that initially rested within the discretion of the court, e.g. evidentiary rulings[.]") (citations omitted).

[26] *See also Glass v. Phila. Elec. Co.*, 34 F.3d 188, 191 (3d Cir. 1994) ("In reviewing evidentiary rulings, if we find nonconstitutional error in a civil suit, such error is harmless *only 'if it is highly probable* that the error did not affect the outcome of the case.'" (internal citations omitted) (emphasis added)); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 917 (3d Cir. 1985) (trial court's errors are harmless "*only if* it is highly probable that the errors did not affect the outcome of the case") (emphasis added).

the country makes clear that nothing less than a dispositive sanction can (1) cure the prejudice caused by such egregious spoliation, or (2) serve as a proper deterrent to those who would spoliate evidence (and opt for a more lenient sanction over exposure of the contents of the deleted documents to the judge or jury).[27] This error was compounded when the Court ordered a permissive adverse inference but prohibited GN from presenting to the jury core facts regarding Plantronics' spoliation of evidence. The Court's sanction substantially prejudiced GN because without a default or the ability to understand the context of the Facts that were read to it, the jury had no practical ability to actually consider Plantronics' spoliation of evidence or apply the permissive adverse inference. This is clear because the jury found that GN had proven the relevant market, but not its antitrust claims, the proof for which Plantronics had largely destroyed. Because the Court cannot say that it is "highly probable" that its errors in the presentation of spoliation to the jury did not affect GN's substantial rights, the Court should grant GN's motion for a new trial.

A. The Court's Decision Not to Order a Dispositive Sanction, and To Instead Order a Permissive Adverse Inference Without Allowing GN to Put On Evidence of Spoliation at Trial, Was Legal Error.

Pursuant to Fed. R. Civ. P. 37(e)(2), once the Court finds that a party has intentionally spoliated evidence, the Court can "instruct the jury that it may or must presume that the [deleted] information was unfavorable to the party; or [] dismiss the action or enter a default judgment." As set forth in GN's Brief in Support of its Motion for Sanctions (D.I. 262),[28]

[27] That is exactly the calculation that was made here, where it essentially cost Plantronics $5 million ($3 million for the spoliation sanction plus approximately $2 million in costs) to defend a potentially $212 million lawsuit. Indeed, the lesson this case teaches future defendants is that it is better to spoliate evidence than to comply with the legal obligation to preserve.

[28] GN's Brief in Support of its Motion for Sanctions (D.I. 262), the Declaration of Michael J. Farnan in Support Thereof (D.I. 263), and GN's Reply (D.I. 280) are hereby incorporated in full by reference.

where, as here, Plantronics' misconduct was particularly egregious, the proper remedy is a dispositive sanction.[29] As the Court explained in *Telectron*:

> The policy of resolving lawsuits on their merits must yield when a party has intentionally prevented the fair adjudication of the case. By deliberately destroying documents, the defendant has eliminated the plaintiffs' right to have their cases decided on the merits. Accordingly, the entry of a default is the only means of effectively sanctioning the defendant and remedying the wrong.

116 F.R.D. at 130. Indeed, in its Spoliation Order the Court acknowledged that case law and conceded that "courts have found dispositive sanctions to be appropriate in cases ***with comparable or even less egregious conduct than that proven here***[.]" Spoliation Order, at 30 (citations and footnote omitted) (emphasis added). Thus, by failing to issue a dispositive sanction in this case, the Court committed legal error.[30]

Further, once the Court decided to order a permissive adverse inference, it should have allowed the parties to put on evidence of spoliation at trial which would allow the jury to fully understand the context of the Facts and be informed in how to apply the adverse inference.[31] *See Stevenson v. Union Pacific*, 354 F.3d 739 (8th Cir. 2004) (reversing trial Court decision for not allowing both parties to present evidence related to spoliation). Aside from including certain facts that were not supported by evidence in the record, the Court's Facts also omitted specific

[29] *See, e.g., Leon v. IDX Sys. Corp*, 464 F.3d 951, 960 (9th Cir. 2006) (affirming dismissal due to spoliation of 2,200 deleted files); *U.S. ex rel. Berglund v. Boeing Co.*, 835 F. Supp. 2d 1020, 1055 (D. Or. 2011) (dismissing case due to deletion of hundreds of emails and three hard drives); *Gutman v. Klein,* 2008 WL 4682208, at *12, n.16 (E.D.N.Y. Oct. 15, 2008) (dismissing case in which the spoliator had deleted files from a single laptop); *Telectron Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 137 (S.D. Fla. 1987) (entry of default judgment in antitrust case involving similar claims).

[30] *See, e.g., Micron Technology, Inc. v. Rambus, Inc.*, 917 F. Supp. 2d 330, 326 (D. Del. 2013) (adverse jury instructions are inappropriate in cases where the spoliation is done in bad faith or where there is no record of what was deleted); *see also Leon*, 464 F.3d at 960 (negative inference ineffective as it "leave[s] [the aggrieved party] equally helpless to rebut any material that [the deleting party] might use to overcome the presumption.").

[31] GN elaborated on the various issues with the Facts in its Motion to Reconsider (D.I. 511) and at the Court's hearing on the same, all of which is incorporated herein by reference.

evidence that the jury needed for context to understand the extent of the wrongfulness of Plantronics' misconduct. For example, the Court permitted the jury to hear evidence based on metadata that was favorable to Plantronics regarding the number of emails Plantronics and Mr. Houston produced (among other things),[32] but it did not allow GN to put on metadata evidence informing the jury that it was not only Mr. Houston, but also Mr. Gonzalez, Mr. Kannappan, Mr. Meadows, and Mr. Eisner, who had targeted the terms "Jabra" and "GN" in their email inboxes and deleted the resulting emails.[33] That evidence was included in GN's expert's (Dan Gallivan's) report,[34] but the Court did not allow said evidence. The Court also told the jury how many relevant emails were collected from other individuals that were missing/deleted from Mr. Houston's account (D.I. 502, ¶ 13), but failed to put these numbers in context by allowing GN to present evidence to the jury that Plantronics' own discovery expert found that less than 5% of Mr. Houston's emails were contained in the email accounts of other employees.[35] The Court also neglected to tell the jury key information that it needed to properly apply the permissive adverse inference, such as that Plantronics' "[d]estruction of internal emails regarding the decisions made, the discussions had, and the resulting impact would make it difficult, if not impossible, for GN to effectively and fully challenge Plantronics' one sided view of how the POD agreements and POD distributors operated in practice," and that Plantronics "failed to take reasonable steps to preserve ESI which cannot be restored or replaced, that it did so in bad faith with the intent to deprive GN from using the information contained in the emails[.]"[36] These are but a handful of the examples of core evidence that the jury needed to properly understand in order to weigh the impact of spoliation on the evidentiary record. Without this core evidence,

[32] *See, e.g.,* D.I. 511, at 5 (referencing Paragraphs 11-14 of the Court's Facts).
[33] *See id.* at 4.
[34] *See id.*; *see also* D.I. 359 (Oct. 7, 2016 Affidavit of Dan Gallivan), at ¶ 14.
[35] *See* D.I. 511 (citing D.I. 263, at Ex. 24).
[36] *See id.* at 9 (quoting Spoliation Order, at 26, 18); *see also supra* at 2-3.

there was no possible way for the jury to consider and properly apply the permissive adverse inference. The Court's treatment of spoliation evidence at trial therefore constituted legal error.

B. GN's Substantial Rights Were Severely Affected By the Mishandling of Spoliation.

As the Supreme Court has recognized, in antitrust cases in particular, the "proof is largely in the hands of the [defendant]." *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976). In this case, the primary instigator of the mass document deletion was Plantronics' Senior Vice President of Sales. Critically, despite the fact that Mr. Houston was in charge of the POD program, his production did not contain a *single email* which discussed the effectiveness of the POD program, the utility of the POD program, the effect of the POD program on sales, or even the identity of current PODs. Those were exactly the type of documents that GN needed to prove its antitrust claims in this case,[37] and it is clear that Mr. Houston intentionally deleted them all (or 95% of them) in an effort to deprive GN of the evidence it needed to prove its antitrust case. One need look no further than the jury's verdict sheet to conclude that Mr. Houston and company succeeded, as the jury found that GN had proven the relevant market but did not find that it had proven its antitrust claims, likely because 95% of the evidence it needed to prove them had been intentionally destroyed by the individual in charge of the POD program. D.I. 533.

Finally, the jury heard nothing about Plantronics' complete and utter mishandling of the spoliation once it came to light. Despite the fact that Plantronics knew that individuals other than Mr. Houston had deleted relevant responsive emails (and then lied about it), it made no attempt to review back-up tapes to determine how widespread the deletions were. In fact,

[37] *Cf. Telectron*, 116 F.R.D. at 133 ("Given the nature of Telectron's claims against OHD and the scope of production sought, ***we are at a loss to conceive of a category of documents more directly relevant to Telectron's grievances than 'sales correspondence' and other sales-related materials*** contained in the files of Advance personnel.") (emphasis added).

Plantronics actually "unrestored" back-up tapes to make it more difficult and expensive for GN or the Court to even consider whether other custodians deleted responsive emails at Mr. Houston's direction. All of this was included in the Court's factual findings in its Spoliation Order,[38] yet the jury was left entirely in the dark.

In short, the Court presented a sanitized version of facts regarding Plantronics' spoliation that vastly ignored how egregious its misconduct was and how detrimental the consequences were on GN's case. Indeed, Plantronics' extensive, intentional, bad faith destruction of documents did not occur in a vacuum, but the jury was given the impression that it did due to the sanitized overview presented to it through the Facts. In its Spoliation Order, the Court recognized that in awarding the appropriate sanction for Plantronics' "bad faith" and intentional spoliation it had to take into account that "GN is prejudiced by the loss of the emails."[39] By deciding not to issue a dispositive sanction, or at least permitting GN to put on evidence of spoliation at trial to give context to the Court's watered-down facts, it is "highly probable" that GN's substantial rights were affected. *Bhaya*, 709 F. Supp. at 601-02. The Court should grant a new trial.

II. The Court Should Grant a New Trial Because It Committed Legal Error In Disallowing GN From Discussing the GSA's Proposed Debarment of Plantronics, Which Affected GN's Substantial Rights.

"A motion for a new trial is [] appropriately granted where a substantial error occurred in the admission or rejection of evidence." *McMillan*, 478 F. Supp. 2d at 655 (citing *Goodman v. Pa. Turnpike Comm'n*, 293 F.3d 655, 676 (3d Cir. 2002)); *Tristrata Tech., Inc. v. Mary Kay, Inc.*, 423 F. Supp. 2d 456, 468 (D. Del. 2006) (same). Here, the Court committed legal error when it disallowed GN from putting on evidence regarding the GSA's 2017 Proposed

[38] Spoliation Order, at 13-14.
[39] *Id*. at 26.

Debarment of Plantronics once Plantronics opened the door to the inquiry. Allowing the jury to be exposed to Plantronics' repeated one-sided references to its history as a government contractor without permitting GN to elicit the fact that the federal government had (at least temporarily) barred Plantronics from serving as a government contractor earlier this year, was clearly erroneous. This error severely prejudiced GN. Juror No. 3 exhibited a pro-government bias that favored Plantronics, and the Court cannot be satisfied that it is "highly probable" that other jurors were not similarly biased due to Plantronics' one-sided presentation of evidence.

Further, the prejudice to GN caused by the exclusion of the Proposed Debarment evidence was amplified by the exclusion of the spoliation evidence. As a result of the Court's rulings, the jury did not hear that (1) Mr. Houston's misconduct, and Plantronics' mishandling of the spoliation once it came to light, was so egregious that it caused the GSA issued a Notice of Proposed Debarment to Plantronics, (2) the only way Plantronics was able to convince the GSA to drop the Proposed Debarment was by terminating Mr. Houston, and (3) Plantronics was not planning to terminate Mr. Houston absent pressure from the GSA. Without these facts, the jury could not understand the gravity of Plantronics' misconduct, and how detrimental it was to GN, which affected GN's substantial rights. The Court should grant GN's motion for a new trial.

A. Evidence of the GSA's Proposed Debarment of Plantronics Was Relevant and Should Have Been Admitted When Plantronics Opened the Door To It.

Under the curative admissibility doctrine, the introduction of inadmissible evidence by one party "justifies or 'opens the door to' admission of otherwise inadmissible evidence," by the other party. *U.S. v. Brown*, 921 F.2d 1304, 1307 (D.C. Cir. 1990).[40] Courts have discretion to

[40] *See also U.S. v. Rosa*, 11 F.3d 315, 335 (2d Cir. 1993) ("The rule of 'opening the door,' or 'curative admissibility,' gives the trial court discretion to permit a party to introduce otherwise inadmissible evidence on an issue (a) when the opposing party has introduced inadmissible evidence on the same issue, and (b) when it is needed to rebut a false impression that may have resulted from the opposing party's evidence.") (citations omitted); *U.S. v.*

invoke the doctrine in situations where it may be needed to "neutralize or cure any prejudice" incurred from the introduction of prejudicial evidence. *Martinez*, 988 F.2d at 702.

In *Henderson v. George Washington University*, 449 F.3d 127, 140-141 (D.C. Cir. 2006), the court excluded a medical report offered by the plaintiff. At trial, the defendant questioned the plaintiff's expert on the basis of his opinion, with full knowledge that the expert would not be permitted to reference the medical report—an essential factor in his analysis. On appeal, the U.S. Court of Appeals for the District of Columbia found that the defendant's conduct amounted to "sandbagging": "They knew that the [report] was excluded . . . and opportunistically used that ruling not only to shield themselves from potentially damaging evidence, but also . . . as a sword to slice through the foundation of much of [plaintiff's] case." *Id.* at 140.

Similarly, in *Esquire Restaurant, Inc. v. Commonwealth Ins. Co. of New York*, 393 F.2d 111, 118 (7th Cir. 1968), the plaintiff touted its "long history of untroubled business dealings" with a stockholder and "person of stature in the community," Mr. Seidel. As the Seventh Circuit noted, the plaintiff's portrayal of its positive relationship with Mr. Seidel was "obviously intended to cause the jury to react favorably." *Id.* The Court found that plaintiff's representation of its positive relationship with Mr. Seidel "opened the door" to the defendant revealing on cross-examination that Mr. Seidel had once brought a lawsuit against the plaintiff, to show that "Seidel did not always regard [the plaintiff] favorably." *Id*. at 118.

For the same reasons, it is clear that Plantronics opened the door to evidence of the GSA's 2017 Proposed Debarment action. Contrary to its pre-trial representations to the Court and GN, Plantronics did not limit the evidence of its relationship with the government to "the origins of our company in the late 50s, early 60s, when we invented the commercial lightweight

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Martinez, 988 F.2d 685, 702 (7th Cir. 1993) ("[W]here a proponent introduces inadmissible evidence, a court may permit the opponent to introduce similarly inadmissible evidence in rebuttal or engage in otherwise-improper cross-examination.").

headset for pilots, when we created the headset that was worn by Neil Armstrong on the moon, when we were awarded the sole provider status to the FAA, which we still have to this day." D.I. 500, at 3. Rather, Plantronics repeatedly portrayed itself as a company that had a storied, unblemished relationship with the government, and specifically opened the door to evidence of the GSA Proposed Debarment on multiple occasions. For example, while testimony regarding Plantronics' *history* with the federal government may not have opened the door to the GSA Proposed Debarment evidence, Mr. Erbe's testimony as to Plantronics' recent government "wins" clearly did.[41] If, in fact, these "wins" were so recent as to have occurred in 2017 (which GN should have been permitted to explore on cross-examination), it is likely that they overlapped with the GSA Proposed Debarment, during which time Plantronics was prohibited from doing business with the government. Similarly, when Plantronics chose to display the seals of the DOJ and FTC during Professor Gilbert's testimony, the Court should have permitted GN to bring up the GSA's Proposed Debarment to rectify the false impression that Professor Gilbert's pro-Plantronics position was approved by the government, which had temporarily suspended Plantronics from serving as a contractor just months earlier.

By disallowing GN from raising the recent GSA Proposed Debarment of Plantronics, the Court allowed the jury to hear a fragmented, incomplete, and misleading representation of Plantronics' relationship with the government. While it may not have intended to rely so heavily on its pro-government narrative prior to trial, after learning that the Court would not admit evidence of the GSA Proposed Debarment, Plantronics took full advantage of that ruling to paint before the jury its own self-portrait as a trusted, reliable, long-standing government partner, with

[41] Of particular note are: (1) Mr. Erbe's specific references to the recent contract with the NYPD, which was close both in terms of its geographical proximity to the jury as well as its proximity in time to the GSA Proposed Debarment (*see* Trial Day 3 at 881:2-10); and (2) Mr. Erbe's specific reference to a call he received "[j]ust last week" from the FAA concerning the damage caused to airport radios by the hurricanes in Puerto Rico. *See id.* at 864:17-865:1.

the full knowledge that GN would not be able to cast even the lightest of shadows on it. Indeed, as in *Henderson*, Plantronics tactically used the exclusion of the GSA Proposed Debarment as both a shield and a sword. The Court's decision to exclude this evidence, after Plantronics undoubtedly and repeatedly opened the door to it was clear legal error.

B. The Exclusion of the GSA Proposed Debarment Evidence Affected GN's Substantial Rights.

The Court's error in excluding evidence of the GSA's 2017 Proposed Debarment of Plantronics clearly resulted in prejudice to GN. Indeed, the Court recognized that emphasizing its positive relationship with the government was part of Plantronics' case, and had conceded the prejudice that could result if the jury heard of Plantronics' relationship with the government in the absence of the GSA Proposed Debarment evidence.[42] Furthermore, a central part of the Court's decision to strike Juror No. 3 turned on the likelihood that his pro-government bias would render him biased in favor of Plantronics due to the emphasis it put on its positive relationship with the government.[43] While only Juror No. 3 actually manifested his bias towards Plantronics, the Court cannot be satisfied that other jurors did not share this bias.[44] The fact that other jurors did not similarly contact Professor Gilbert or Mr. Erbe is not evidence that they were not biased in favor of "pro-government" Plantronics; rather, the more logical explanation is that the remaining jurors merely obeyed the Court's instruction not to interact with witnesses at trial, and thus better concealed their biases.

[42] *See* October 2, 2017 Transcript, at 26:17-26:23.

[43] *See* Trial Day 6, at 1554:4-1554:13.

[44] "Because the bias of a juror will rarely be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it,' [bias] necessarily must be inferred from surrounding facts and circumstances. Therefore, for a court to determine properly whether bias exists, it must consider two questions: are there any facts in the case suggesting that bias should be conclusively presumed; and, if not, is it more probable than not that the juror was actually biased against the litigant." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 558 (1984) (Brennan, J. concurring) (citations omitted).

Additionally, the harm caused by the Court's exclusion of the GSA Proposed Debarment evidence was exacerbated in light of the Court's refusal to allow GN to put on spoliation evidence at trial. The reality is that Plantronics' widespread, intentional deletion of highly relevant evidence was so serious and so unethical that it caused the GSA to issue a Notice of Debarment to Plantronics, which underscores the seriousness of its wrongdoing. Moreover, Plantronics' counsel conceded at the Pretrial Conference that Plantronics was only able to convince the GSA to drop the Proposed Debarment in exchange for terminating Mr. Houston. That is, despite this Court's finding that he intentionally and in bad faith deleted 95% of emails pertaining to "GN" or "Jabra" and ordered more junior employees on his team to do the same, in direct violation of a legal hold order, Plantronics would not have terminated Mr. Houston but for the fact that it desperately needed the GSA Proposed Debarment action resolved so that it could continue serving as a government contractor. This Court's refusal to let the jury hear spoliation evidence or that the GSA had issued a Notice of Proposed Debarment to Plantronics this year clearly prejudiced GN by minimizing the extent of the wrongfulness of Plantronics' misconduct.

Under the Third Circuit's test, GN is entitled to a new trial *unless* it is "highly probable" that these errors *did not* prejudice GN. *See McQueeney*, 779 F.2d at 924; *see also Glass*, 34 F.3d at 191. Because the Court cannot be certain that the jury was not biased in favor of Plantronics, and had an adequate understanding of the extent of Plantronics' misconduct and the effect it had on GN's ability to prove its case, that test is not satisfied. Thus, the Court should grant GN's motion for a new trial.

CONCLUSION

For the foregoing reasons, GN respectfully requests that the Court grant its motion and order a new trial.

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Respectfully submitted,

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