

No evidence suggested how these various documents could have ended up in the trash at the Buena Vista Plaza Building. There was, however, evidence suggesting how the documents, nonetheless, ended up in SSI's possession. Either Sands entered one or more of Disney's Burbank facilities and took the documents from the bins provided by Golden State for disposal of confidential documents or Sands trespassed onto Golden State's facility in Canoga Park and took the documents before Golden State had a chance to destroy them.

10. *SSI's Alteration of Disney Documents*

Disney presented circumstantial evidence that Pati Slesinger or someone else on SSI's behalf altered copies of the Restricted Items List and the Interrogatory Tables after receiving them from Sands to delete any reference to their confidentiality.

At the sanction hearing, Erich Speckin, a forensic document specialist, testified that he had examined the two copies of the Restricted Items List and of the Interrogatory Tables produced by SSI in 2002. As we have already noted, the copy of Restricted Items List from the files of SSI's attorneys contained the cover page with the declaration of confidentiality as created by Disney, and the 24-page Corporate Participants section with the footer on each page declaring: "CONFIDENTIAL – For Internal Use Only." The copy from Pati Slesinger's files, however, contained a cover page that lacked the confidentiality declaration. Also, Slesinger's copy did not contain the 24-page confidential Corporate Participants section.

Similarly, the copy of the Interrogatory Tables from the files of SSI's attorneys contained the footer created by Disney on each page declaring: "Attorney Work Product. [¶] Privileged and confidential. Created at the request of Counsel." But the copy from Slesinger's files lacked the footer.

According to Speckin, Slesinger's copies of the documents were made from the sets possessed by SSI's counsel. In other words, Slesinger or someone else had: (1) altered the cover page of the Restricted Items List to delete its confidentiality declaration in Slesinger's copy; (2) omitted the 24-page confidential Corporate Participants section from Slesinger's copy; and (3) altered each page of the Interrogatory Tables to delete its confidentiality footer in Slesinger's copy.

Pati Slesinger denied having altered the documents or having directed anyone else to do so.

11. *The FAX Legends*

Copies of several documents produced by SSI contained FAX legends tracing them to Slesinger and Lasswell's offices, as well as the offices of SSI's counsel. Among these documents was a copy of the Fuller Memorandum, which contained a FAX header indicating that in September 1993 it was sent to SSI's attorneys from Slesinger's office.

Similarly, a copy of a page from the Interrogatory Tables contained a legend showing the FAX numbers of Pati Slesinger's office in Beverly Hills and Shirley Lasswell's office in Florida. The legend indicated that in September 1993, the page was faxed from Slesinger's office to Lasswell's office. The page contained the footer stating the page to be confidential. A copy of the Kaplan memorandum produced by SSI also bore two Fax legends, one indicating it had been sent from Slesinger's office and another indicating receipt by SSI's counsel.

12. *The Trial Court's Ruling on Disney's Sanction Motion*

SSI's opposition to Disney's sanction motion raised three primary arguments: first, that Sands had taken documents only from publicly accessible dumpsters at the Buena Vista Plaza; second, that Disney had created both

sense suggests that such documents are not the type that a litigant would simply discard in publicly accessible trash dumpsters, as opposed to disposing of them in a more secure way.

Strong circumstantial evidence suggested that Pati Slesinger knew that Sands had taken documents Disney considered confidential. SSI's copies of the Fuller Memorandum and the Interrogatory Tables bore September 1993 fax transmission legends indicating they were sent from Pati Slesinger's office. Also, SSI ultimately produced two sets of the Restricted Items List and the Interrogatory Tables: one set with the confidentiality markings as originally created by Disney, and one set without them. In testimony credited by the trial court, Disney's forensic document specialist, Erich Speckin, testified that the sets without the confidential markings, which came from Slesinger's files, were made from the set that did have those markings, which came from the files of SSI's attorneys. From this testimony, the court could reasonably infer that Pati Slesinger (or someone else on SSI's behalf) had altered one set of both the Restricted Items List and the Interrogatory Tables to omit any indicia of confidentiality. Moreover, in the years before Disney's sanction motion, SSI consistently concealed Sands' activities and its possession of Disney documents – a fact the trial court could reasonably interpret as demonstrating consciousness of guilt and a desire to keep the full extent of the misconduct secret.

This evidence leads to the reasonable conclusion, as found by the trial court, that SSI “had to suspect Sands was engaged in questionable conduct,” and “[y]et . . . essentially closed its eyes.” In other words, SSI, at best, acted with deliberate indifference to whether Sands' conduct was legal.

4. *SSI's Alteration of Documents With the Intent to Mislead*

As noted in the preceding section, the trial court found that copies of the Restricted Items List and Interrogatory Tables contained in Pati Slesinger's files had been altered by her or someone on SSI's behalf to delete all notations of confidentiality. The purpose of these alterations, the court inferred, was "to create the false impression" that the documents were not confidential, or the false impression (as argued by SSI at the sanction hearing) that Disney had created both confidential and non-confidential sets. Based on Slesinger's demeanor as a witness and the evidence linking her to the documents, the court disbelieved her testimony that she was not responsible for the alterations.

On appeal, SSI does not challenge the trial court's finding that copies of the Restricted Items List and Interrogatory Tables produced by Pati Slesinger were altered. SSI argues, however, that there is no evidence that the alterations were made by Slesinger or anyone else *with the intent to mislead*. However, SSI points to no other motive suggested by the evidence. Indeed, the inference of intended deception is self-evident from the act of alteration: deleting confidentiality markings from illicitly-obtained documents makes the documents appear non-confidential, makes questions about their provenance less pointed, and makes their unexplained possession appear less blameworthy.

SSI notes that in 2002 it first produced copies of the Restricted Items List and the Interrogatory Tables bearing the "confidential" markings, and then later produced the altered versions. According to SSI, this chronology undermines the inference that SSI intended to conceal from Disney its possession of confidential documents. The argument misses the point. SSI concealed its possession of documents with confidential markings *until* 2002, when it finally produced them. Its later production of the altered versions without the confidentiality markings says nothing about the purpose behind the alterations when they were made. In

any event, as one federal appellate court has explained in upholding a terminating sanction for egregious misconduct, “[t]he failure of a party’s corrupt plan does not immunize the defrauder from the consequences of [its] misconduct.” (*Aoude, supra*, 892 F.2d at p. 1120.)

5. The Usefulness of the Documents to SSI

The trial court found that the illicitly-obtained documents retained by SSI were “decidedly not useless. A number of key writings SSI retained are directly related to this litigation and reveal, among other things, privileged information useful to an opponent such as SSI.” SSI contends that this finding is unsupported, because “each of the categories of papers mentioned in the trial court’s ruling as potentially useful to Slesinger is either not privileged, not useful, or both.”

In making its contention, SSI parses each document in isolation rather than considering the significance of the documents in totality. SSI also sanitizes its analysis by ignoring the illicit methods by which it obtained the documents and tried to keep its conduct secret. SSI claims that the conclusions in the Suit Overview Document “became hopelessly outdated years ago,”²² and that the Fuller memorandum was “benign” because it simply recited an analysis that Disney had already disclosed to SSI. SSI also claims that its possession of the Restricted Items List and the Interrogatory Tables, even if obtained through gross misconduct, is insignificant, because they contained information that SSI was otherwise entitled to obtain through discovery.

²² SSI’s claim that the Suit Overview Document was not significant is at odds with the fact that when SSI finally produced the document, it attempted to conceal the confidential nature of the document by omitting its face page.