

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 TVI, INC., a Washington corporation,

CASE NO. C18-1461-JCC

10 Plaintiff,

ORDER

11 v.

12 HARMONY ENTERPRISES, INC., a  
13 Minnesota corporation,

14 Defendant.

15  
16 This matter comes before the Court on Plaintiff's motion to compel and for sanctions  
17 (Dkt. No. 28). Having thoroughly considered the parties' briefing and the relevant record, the  
18 Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons  
19 explained herein.

20 **I. BACKGROUND**

21 The Court previously set forth the underlying facts of this case and will only restate those  
22 facts relevant to the instant motion. (*See* Dkt. No. 34.) On October 3, 2017, a baler manufactured  
23 and installed by Defendant at Plaintiff's Mt. Vernon store (the "Mt. Vernon baler") failed. (Dkt.  
24 No. 20 at 8.) Plaintiff immediately notified Defendant and demanded that Defendant inspect the  
25 Mt. Vernon baler, produce a report on the failure, and remove and dispose of the Mt. Vernon  
26 baler. (*Id.*) Defendant offered to take the Mt. Vernon baler to Minnesota for an evaluation and to

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1 provide Plaintiff with a report on its findings. (*Id.* at 17.) On October 10, 2017, Plaintiff sent  
2 Defendant a letter titled, “Notice of Defect and Potential Claim of Indemnity.” (*Id.* at 31–32.)  
3 The letter conditioned Plaintiff’s relinquishing of the Mt. Vernon Baler on Defendant’s  
4 production of a report as to its failure, and stated that, “[Plaintiff] hereby reserves its right to  
5 pursue all available remedies at law or in equity related to this incident, or any other incident  
6 related to a [Defendant-made] product.” (*Id.* at 2, 31–32.)

7 Prior to its inspection of the Mt. Vernon baler, Defendant’s employees discussed how to  
8 weld certain parts of its balers to address safety issues that had arisen. (*See* Dkt. No. 27 at 5–7.)  
9 Following a brief inspection of the Mt. Vernon baler on or around October 19, 2017, Defendant  
10 found unnecessary welds had contributed to the Mt. Vernon baler’s failure. (Dkt. No. 21 at 6, 9,  
11 14–15, 25.) Defendant has since been unable to locate any notes from the inspection of the Mt.  
12 Vernon baler. (*Id.* at 12.)

13 On November 30, 2017, Plaintiff discovered that a baler manufactured and installed by  
14 Defendant at Plaintiff’s Flagstaff, Arizona business location (the “Flagstaff baler”) was unsound  
15 due to welding failures. (Dkt. No. 20 at 3, 34–39.) Plaintiff immediately notified Defendant and  
16 demanded that Defendant inspect the Flagstaff baler, produce a report on the failure, and remove  
17 and dispose of the Flagstaff baler. (*Id.* at 34–35.) On December 1, 2017, Plaintiff sent Defendant  
18 a letter titled “Second Notice of Defect and Potential Claim for Indemnity: Second Demand for  
19 Inspection,” which reiterated Plaintiff’s demands for reports on the Mt. Vernon and Flagstaff  
20 balers. (*Id.* at 41–42.) The letter also stated that Plaintiff would require Defendant to indemnify  
21 and hold Plaintiff harmless if another of Defendant’s balers failed, and that “[Plaintiff] hereby  
22 reserves its right to pursue all available remedies at law or in equity related to this incident, or  
23 any other incident related to a [Defendant-made] product.” (*Id.* at 42.)

24 Plaintiff did not provide Plaintiff with reports on the Mt. Vernon and Flagstaff balers. (*Id.*  
25 at 3.) In October or November 2017, Defendant prepared a summary of its inspection of the Mt.  
26 Vernon baler, which it shared with its counsel. (Dkt. No. 21 at 20–22.) Defendant did not share

1 this summary with Plaintiff until after Plaintiff filed this lawsuits. (*Id.*; Dkt. No. 20 at 4.) During  
2 Defendant’s Rule 30(b)(6) deposition, Defendant stated that it sent the Mt. Vernon baler to be  
3 scrapped in December 2017. (Dkt. No. 21 at 19.) Defendant’s responses to Plaintiff’s  
4 interrogatories indicate that the Mt. Vernon baler was picked up for scrapping in January or  
5 February 2018. (*Id.* at 40, 61.) Defendant did not notify Plaintiff that the Mt. Vernon baler had  
6 been scrapped. (Dkt. No. 21 at 29.) Ultimately, Plaintiff removed all of Defendant’s balers from  
7 Plaintiff’s stores. (Dkt. No. 20 at 3.) On January 17, 2018, Plaintiff’s counsel sent Defendant a  
8 letter formally requesting a litigation hold on material related to the Mt. Vernon and Flagstaff  
9 balers, and demanding that Defendant “refrain from performing any work on, making any  
10 alterations to, or discarding any part of the [Mt. Vernon baler]” as such could be grounds for  
11 spoliation. (*Id.* at 46.)

12 In September 2018, Plaintiff brought suit against Defendant for various state law claims  
13 arising from Defendant’s allegedly dangerous and defective balers. (*See* Dkt. Nos. 1, 1-2.) On  
14 December 28, 2018, Plaintiff served interrogatories and requests for production on Defendant.  
15 (Dkt. No. 29 at 2.) Interrogatory No. 5 sought information about whether Defendant’s balers had  
16 failed in other instances and, if so, the cause of the failures. (Dkt. No. 21 at 34.) Defendant’s  
17 response listed the Mt. Vernon and Flagstaff balers and stated that it had not found any  
18 malfunctions in either. (*Id.* at 34–35.) Interrogatory No. 8 asked if Defendant believed that it had  
19 provided sufficient warnings to consumers regarding its balers, to which Defendant responded  
20 that it had via the balers’ manuals, which included maintenance instructions, safety instructions,  
21 and warnings, and safety decals affixed to each baler. (*Id.* at 37.)

22 In April 2019, Defendant testified in its Rule 30(b)(6) deposition that a baler it had sold  
23 to Lowe’s had failed in the spring of 2017. (Dkt. No. 29 at 8–10.) Lowe’s notified Defendant of  
24 the failure and, following an inspection by Defendant, Defendant and Lowe’s agreed that the  
25 failure was due to user error. (*Id.* at 10–11.) Defendant did not notify Plaintiff of the Lowe’s  
26 baler failure prior to the Rule 30(b)(6) deposition. (Dkt. Nos. 20 at 4, 21 at 7.) Defendant also

1 disclosed for the first time that the unnecessary welds on the Mt. Vernon baler contributed to its  
2 failure. (Dkt. No. 21 at 25.)

3 During May and June 2019, Plaintiff sought supplemental discovery from Defendant to  
4 cure alleged deficiencies in Defendant's responses. (See Dkt. Nos. 21 at 48–67; 29 at 2, 35–39,  
5 41–44.) Ultimately, Plaintiff filed the instant motion seeking to compel additional responses  
6 from Defendant. (Dkt. Nos. 28 at 3, 29 at 2.) Defendant has since supplemented its written  
7 discovery and produced additional documents. (Dkt. No. 35 at 2.)<sup>1</sup> Plaintiff also moves for  
8 sanctions against Defendant for its alleged spoliation of the Mt. Vernon baler abuse of the  
9 discovery process. (See generally Dkt. Nos. 28, 35.)

## 10 **II. DISCUSSION**

### 11 **A. Spoliation Sanctions**

12 District courts possess inherent authority to impose sanctions against a party in response  
13 to the party's spoliation of relevant evidence. See *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th  
14 Cir. 1993). Spoliation is the “destruction or significant alteration of evidence, or the failure to  
15 preserve property for another's use as evidence, in pending or future litigation.” *Kearney v.*  
16 *Foley & Lardner, LLP*, 590 F.3d 638, 649 (9th Cir. 2009). The party alleging spoliation must  
17 prove:

18 (1) that the party having control over the evidence had an obligation to preserve it  
19 at the time it was destroyed; (2) that the records were destroyed with a ‘culpable  
20 state of mind;’ and (3) that the evidence was ‘relevant’ to the party's claim or  
21 defense such that a reasonable trier of fact could find that it would support that  
22 claim or defense.

21 *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 989 (N.D. Cal. 2012) (collecting cases).

22 The duty to preserve attaches when a party should reasonably know that the evidence at issue  
23 may be relevant to anticipated litigation. *Surowiec v. Capital Title Agency, Inc.*, 790 F. Supp. 2d  
24 997, 1005 (D. Ariz. 2011). In the Ninth Circuit, a court may impose sanctions on a party for  
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26 <sup>1</sup> Plaintiff acknowledges that its motion to compel is now moot but maintains that Defendant's abuse of the discovery process merits sanctions under Rule 37. (Dkt. No. 35 at 5–7.)

1 spoliating evidence if the court finds that the party acted with “conscious disregard” of its  
2 discovery obligations; a finding of bad faith is not required. *See Apple Inc.*, 888 F. Supp. 2d at  
3 998 (citing *Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg. Corp.*, 982 F.2d 363, 368 n.2 (9th  
4 Cir. 1992); *Hamilton v. Signature Flight Support Corp.*, 2005 WL 3481423, slip op. 7 (N.D. Cal.  
5 2005); *Io Grp. Inc. v. GLBT Ltd.*, 2011 WL 4974337, slip op. 7 (N.D. Cal. 2011)).

6 It is undisputed that Defendant had control over the Mt. Vernon baler when it sold it for  
7 scrap, and Defendant does not dispute that the Mt. Vernon baler was relevant to this litigation.  
8 (*See* Dkt. No. 30 at 1, 7–9.) Defendant argues that it did not have an obligation to preserve the  
9 Mt. Vernon baler and could not have acted with a culpable state of mind because Plaintiff asked  
10 Defendant to dispose of it on October 3, 2017. (Dkt. No. 30 at 8–9; *see* Dkt. No. 20 at 8.) But  
11 Plaintiff’s initial request was followed by multiple indications that Defendant had a duty to  
12 preserve the Mt. Vernon baler, including Plaintiff’s October 10, 2017 letter reserving its right to  
13 pursue legal or equitable remedies related to the Mt. Vernon baler’s failure and Defendant’s own  
14 inspection of the Mt. Vernon baler that revealed unnecessary welds that contributed to its failure.  
15 (*See id.* at 2–4, 31–32; Dkt. No. 21 at 14–15, 25.) Further, Defendant shared a summary of its  
16 inspection with its counsel, who may have informed Defendant of the possibility of future  
17 litigation. (Dkt. No. 21 at 20–22.) All of this occurred while Defendant was still in possession of  
18 the Mt. Vernon baler. (*See* Dkt. No. 21 at 19.) Thus, Defendant was on notice of its obligation to  
19 preserve the Mt. Vernon baler, and consciously disregarded that obligation when it sold the Mt.  
20 Vernon baler for scrap. *See Apple Inc.*, 888 F. Supp. 2d. at 989, 998; *Surowiec*, 790 F. Supp. 2d  
21 at 1005.<sup>2</sup> The Court finds that Plaintiff has carried its burden of establishing that Defendant  
22 spoliated the Mt. Vernon baler.

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23 <sup>2</sup> Defendant’s obligation and culpable state of mind are even more apparent if it sold the  
24 Mt. Vernon baler for scrap in January or February 2018, (*see* Dkt. No. 21 at 40, 61), as Plaintiff’s  
25 December 1, 2017 letter reiterated its demand for a report on the Mt. Vernon baler’s failure and  
26 its reservation of rights to pursue legal and equitable remedies and Plaintiff’s January 17, 2019  
letter formally requested a litigation hold on material related to the Mt. Vernon and Flagstaff  
balers. (*See* Dkt. No. 20 at 41–42, 44–46.)

1           When spoliation has occurred, district courts may impose a variety of sanctions,  
2 including:

3           (1) exclusion of evidence, (2) admitting evidence of the circumstances of the  
4 destruction or spoliation, (3) instructing the jury that it may infer that the lost  
5 evidence would have been unfavorable to the party accused of destroying it, or (4)  
6 entering judgment against the responsible party, either in the form of dismissal or  
7 default judgment.

8 *Pettit v. Smith*, 45 F. Supp. 3d 1099, 1105 (D. Ariz. 2014). In determining which sanction to  
9 impose, courts may consider: “(1) the degree of fault of the party who altered or destroyed the  
10 evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a  
11 lesser sanction that will avoid substantial unfairness to the opposing party.” *Apple Inc.*, 888 F.  
12 Supp. 2d at 992 (internal quotations omitted).

13           Defendant had exclusive control over the Mt. Vernon baler, was on notice of the  
14 obligation to preserve it, and consciously disregarded its obligation by selling the baler for scrap.  
15 *See supra*. Plaintiff has been substantially prejudiced by Defendant’s destruction of the Mt.  
16 Vernon baler, as Plaintiff cannot conduct its own examination following Defendant’s disclosures  
17 about the reasons for the baler’s failure during discovery. *See Apple Inc.*, 888 F. Supp. 2d at  
18 992.<sup>3</sup> Thus, the Court finds that an adverse jury instruction regarding Defendant’s spoliation of  
19 the Mt. Vernon baler is an appropriate sanction. The instruction shall inform the jury that  
20 Defendant was on notice that it had an obligation to preserve the Mt. Vernon baler, that  
21 Defendant destroyed the Mt. Vernon baler before Plaintiff could inspect it, that the Mt. Vernon  
22 baler was relevant to Plaintiff’s claims, and that an inspection of the Mt. Vernon baler would  
23 have corroborated Plaintiff’s claim that it was defective.<sup>4</sup>

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24           <sup>3</sup> Although Defendant asserts that Plaintiff has not been prejudiced because other balers  
25 in Plaintiff’s possession have the same extraneous welds, (*see* Dkt. No. 30 at 9–10), none of  
26 those balers, including the Flagstaff baler, have failed in the same way as the Mt. Vernon baler.  
(*See* Dkt. No. 20 at 2–3, 8, 31–32, 34–39, 41–42.)

<sup>4</sup> The Court will consider proposed adverse jury instructions from both parties.

1 In sum, Plaintiff's motion for sanctions based on Defendant's spoliation of the Mt.  
2 Vernon baler is GRANTED. Plaintiff shall be entitled to an adverse jury instruction as approved  
3 by the Court in a future order.<sup>5</sup>

4 **B. Discovery Sanctions**

5 Plaintiff acknowledges that its motion to compel discovery from Defendant is moot and  
6 now seeks only an award of sanctions for Defendant's alleged abuse of the discovery process.  
7 (*See* Dkt. No. 35 at 2, 5–7.) Plaintiff seeks sanctions under Federal Rules of Civil Procedure  
8 37(b) and 37(c) for Defendant's alleged violations of Federal Rules of Civil Procedure 37(c) and  
9 37(d). (*See* Dkt. No. 28 at 11–13); *see also* Fed. R. Civ. P. 37(c) (prohibiting a party from failing  
10 "to provide information or identify a witness as required by Rule 26(a) or (e)"); Fed. R. Civ. P.  
11 37(d) (prohibiting a party from failing to appear for a deposition or "to serve its answers,  
12 objections, or written response" to interrogatories or a request for inspection). But Plaintiff  
13 originally moved to compel complete and accurate responses to its discovery requests following  
14 Defendant's "evasive, incomplete, and untruthful discovery responses," which arise under  
15 Federal Rule of Civil Procedure 37(a). (*See* Dkt. No. 28 at 12; *see also* Dkt. No. 35 at 7); *see*  
16 Fed. R. Civ. P. 37(a)(4).

17 "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any  
18 party's claim or defense." Fed. R. Civ. P. 26(b)(1). If requested discovery is not answered, the  
19 requesting party may move for an order compelling such discovery. Fed. R. Civ. P. 37(a)(1).  
20 "For the purposes of [Federal Rule of Civil Procedure 37(a)], an evasive or incomplete  
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22 <sup>5</sup> Plaintiff's request that Defendant be precluded from arguing that its inspection of the  
23 Mt. Vernon baler revealed that Plaintiff's own misuse caused or contributed to the Mt. Vernon  
24 baler's failure is denied without prejudice. (Dkt. No. 28 at 10.) Defendant has testified that it has  
25 been unable to locate any notes from the inspection and has disclosed its summary of the  
26 inspection to Plaintiff, and precluding Defendant from potentially using the summary to argue in  
its favor would be substantially unfair. (*See* Dkt. Nos. 20 at 4; 21 at 12, 20–22); *Apple Inc.*, 888  
F. Supp. 2d at 992. If Defendant comes forward with additional evidence from the inspection,  
Plaintiff may move to limit or preclude Defendant's use of such evidence.

1 disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.” Fed.  
2 R. Civ. P. 37(a)(4). If a party provides requested discovery only after the opposing party files a  
3 motion to compel, “the court must, after giving an opportunity to be heard, require the party or  
4 deponent whose conduct necessitated the motion . . . to pay the movant’s reasonable expenses  
5 incurred in making the motion, including attorney’s fees.” Fed. R. Civ. P. 37(a)(5). The court  
6 cannot order such payment “if the movant filed the motion before attempting in good faith to  
7 obtain the disclosure or discovery without court action,” the nondisclosure was substantially  
8 justified, or “other circumstances make an award of expenses unjust.” Fed. R. Civ. P.  
9 35(a)(5)(i)–(iii).

10 Defendant’s disclosure of supplementary discovery came after Plaintiff’s repeated good  
11 faith efforts to obtain the requested discovery without court intervention and Plaintiff’s filing of  
12 the instant motion to compel. (*See* Dkt. No. 35 at 5–6.) Defendant has not argued that its  
13 nondisclosure was substantially justified or cited circumstances rendering an award of expenses  
14 unjust. (*See* Dkt. No. 30 at 11–12.) Thus, the Court finds that monetary sanctions consisting of  
15 Plaintiff’s reasonable fees and expenses incurred are warranted under Federal Rule of Civil  
16 Procedure 37(a)(5), and Plaintiff’s request for discovery sanctions is GRANTED as to its  
17 requested monetary sanctions. Plaintiff shall file a motion for attorney fees setting forth its  
18 expenses incurred in making the present motion to compel within seven days of the issuance of  
19 this order.

### 20 **III. CONCLUSION**

21 For the foregoing reasons, Plaintiff’s motion for spoliation sanctions and discovery  
22 sanctions (Dkt. No. 28) is GRANTED. Plaintiff shall be entitled to an adverse jury instruction  
23 regarding Defendant’s spoliation of the Mt. Vernon baler, as approved by the Court in a future  
24 order. Plaintiff shall file a motion for attorney fees setting forth its expenses incurred in making  
25 the present motion to compel within seven days of the issuance of this order.

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1 DATED this 13th day of August 2019.

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5 John C. Coughenour  
6 UNITED STATES DISTRICT JUDGE  
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