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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DEERPOINT GROUP, INC., an Illinois corporation,

Plaintiff,

v.

AGRIGENIX, LLC, a Delaware limited liability company; SEAN MAHONEY, an individual; and CUSTOM AG FORMULATORS, INC., a California Corporation,

Defendants.

Case No. 1:18-cv-00536-AWI-BAM

**ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS**

(Doc. 168)

On April 21, 2022, Plaintiff Deerpoint Group, Inc. (“Deerpoint”) filed a motion for sanctions against Defendants Agrigenix, LLC and Sean Mahoney (“Defendants”) for failure to preserve ESI (“Electronically Stored Information”) in violation of Federal Rule of Civil Procedure Rule 37(e). (Doc. 168.) On May 13, 2022, the Court stayed briefing on the motion for sanctions pending resolution of Defendant Agrigenix’s bankruptcy and the motion to withdraw filed by Defendants’ counsel. (Doc. 177.) On July 25, 2022, following the lifting of the stay and the resolution of the motion to withdraw, the Court ordered Defendants to respond to the motion for sanctions. (Doc. 197.) On August 12, 2022, new counsel for Defendants Agrigenix and Sean Mahoney filed the opposition and objections to evidence in the motion for sanctions. (Docs. 200,

1 201.) On August 22, 2022, Plaintiff filed its reply and response to Defendants’ objections. (Docs.  
2 210, 211.) On August 30, 2022, Defendants filed objections to evidence provided in the reply.  
3 (Doc. 214.)

4 Having considered the moving papers, opposition papers, and the record in this action,<sup>1</sup>  
5 the motion for sanctions for failure to preserve ESI in violation of FRCP 37(e) is GRANTED.

6 **FACTUAL AND PROCEDURAL OVERVIEW**<sup>2</sup>

7 This case is a trade secret misappropriation and patent infringement case filed on April 18,  
8 2018, related to chemical water treatment solutions for agriculture irrigation. In its Second  
9 Amended Complaint, Deerpoint seeks compensatory and punitive damages, and injunctive relief,  
10 arising out of the theft of Deerpoint’s proprietary and trade secret information by Defendants  
11 Agrigenix and Mahoney for the benefit of a competing company, Agrigenix. Plaintiff alleges that  
12 Agrigenix, through Mahoney, quickly launched copycat products and unfairly interfered with  
13 Deerpoint’s customer relationships during and after Mahoney’s employment with Deerpoint.  
14 Deerpoint also seeks similar damages for an alleged patent infringement of one its patents by  
15 Agrigenix and Mahoney, and also alleges patent infringement by Defendant Custom Ag  
16 Formulators, Inc.

17 Over the years that this case has been pending, the parties have engaged in extensive  
18 discovery. The Court has been requested to resolve various discovery disputes, and the  
19 Scheduling Order was amended several times to accommodate the delay associated with  
20 obtaining discovery.

21 Then, on April 21, 2022, Deerpoint filed a Motion for Sanctions for Failure to Preserve  
22 Electronically Stored Information (“ESI”) in Violation of FRCP 37(e) (“Motion for Sanctions”).  
23 (Doc. 168.) Plaintiff’s motion alleges that Defendants have intentionally spoliated ESI including:  
24 (1) emails from personal accounts, (2) content from missing computers, (3) content that has been

25 \_\_\_\_\_  
26 <sup>1</sup> In light of the extensive briefing on the motion for sanctions, the Court finds that oral argument would not be  
beneficial. To conserve the resources of the parties and the judiciary, the motion is submitted on the record.

27 <sup>2</sup> The parties are advised that this Court has carefully reviewed and considered all of the briefs, including arguments,  
28 points and authorities, declarations, and/or exhibits. Any omission of a reference to any specific argument or brief is  
not to be construed that the Court did not consider the argument or brief.

1 wiped or encrypted on laptops from employees, (4) files that were stored on a cloud service, and  
2 (5) substantial but unknown volumes of Agrigenix emails.

3 **A. Summary of Plaintiff’s Motion for Sanctions**

4 Mahoney became CEO of Plaintiff Deerpoint in 2013. When the relationship between  
5 Plaintiff and Mahoney deteriorated, Defendant Mahoney initiated a separate employment lawsuit  
6 against Plaintiff in October 2017. (Doc. 168 at 9.)<sup>3</sup> In January 2018, and as is relevant to this  
7 litigation, the parties reached a settlement where Defendant Mahoney represented that apart from  
8 a single email with attachments, he did not retain and would not use any of Plaintiff’s  
9 confidential, proprietary, or trade secret information in the future. (*Id.*) Defendant Mahoney also  
10 agreed to return and then delete any such information he had in his possession. (*Id.*)

11 Thereafter, Plaintiff filed this trade secret misappropriation and patent infringement case  
12 on April 18, 2018. (*Id.*) On February 24, 2020, Plaintiff filed a Second Amended Complaint (now  
13 the operative complaint) alleging eight causes of action including: (1) trade secret  
14 misappropriation under 18 U.S.C. §§ 1836; (2) trade secret misappropriation under Cal. Civ.  
15 Code §§ 3426.1; (3) false advertising under 15 U.S.C. §1125; (4) breach of secrecy agreement;  
16 (5) breach of settlement agreement; (6) intentional interference with prospective economic  
17 advantage; (7) unfair competition under Cal. Bus. Prof. Code §§17200 *et seq.*; and (8) patent  
18 infringement. (Doc. 82.)

19 The parties began discovery in October 2019 when Plaintiff served its initial discovery  
20 requests on Defendants. (Doc. 168 at 10.) Defendants served responses, including commitments  
21 to produce documents, in November 2019. (*Id.*) Defendants began providing documents, mostly  
22 ESI, in December 2019. (*Id.*) After Defendants claimed the production was complete, Plaintiff  
23 determined that there were documents and information missing. (*Id.*) Plaintiff claims counsel  
24 requested additional information and production from Defendants, such as equipment design  
25 information, financial information, and sales efforts. (*Id.*) While Defendants provided some  
26 additional information, Defendants “repeatedly asserted they had provided everything within their  
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28 <sup>3</sup> Page numbers refer to the Court’s CM/ECF pagination.

1 possession, custody, or control.” (*Id.*)

2 Plaintiff points to previously undisclosed information which Plaintiff independently  
3 identified as evidence of Defendants’ failure to comply with their discovery obligations. The  
4 investigation of this information is background to the discovery of concealed or spoliated ESI.  
5 Plaintiff’s arguments are summarized below.

6 1. Agriglobe

7 In June 2021, Plaintiff independently identified the location of a previously unknown site  
8 where an upgraded version of Defendants’ fertigation equipment was being used. (Doc. 168 at  
9 10.) The property was owned by Agriglobe, a third party. (*Id.* at 10-11.) After finding the new  
10 equipment, Plaintiff subpoenaed Agriglobe in August 2021, requesting inspection of the  
11 equipment and testimony along with business records. (*Id.* at 11.) In September 2021, Plaintiff  
12 inspected the equipment and in early October 2021, received 900 pages of documents from  
13 Agriglobe. (*Id.*) Plaintiff states that many of the documents produced by Agriglobe were not  
14 produced by Defendants but were responsive to multiple discovery requests. The documents  
15 produced contained information about a new version of Defendant Agrigenix’s fertigation  
16 equipment (“Green Machine”), information about sales efforts and resulting revenues, and  
17 dealings with a previously undisclosed supplier, Hydrite Chemical (“Hydrite”). (*Id.*; *see* Doc.  
18 168-1, “Michaelson Decl.” ¶9 and Exh. 6.) Mahoney and Agrigenix had not identified Hydrite as  
19 a significant vendor in their prior disclosures or production.

20 2. Hydrite Chemical

21 After following up with Hydrite, Plaintiff received nearly 400 pages of ESI in October  
22 2021 from Hydrite. (Doc. 168 at 11; *see* Michaelson Decl. ¶10.) Plaintiff claims the material  
23 produced by Hydrite was within the scope of multiple discovery requests, but not produced by  
24 Defendants, and revealed that Hydrite was a major supplier to Agrigenix. (Doc. 168 at 11; *see*  
25 Michaelson Decl. ¶10 (“the financial material produced previously by Agrigenix and Mahoney  
26 failed to reflect nearly all transactions involving Agrigenix and Hydrite.”) Further, other  
27 documents produced by Hydrite, but not by Defendants, contained information relevant to  
28 Plaintiff’s claims of trade secret misappropriation, and breach of contract, by using Deerpoint’s

1 fertilizer formulas. (Doc. 168 at 11; *see* Michaelson Decl. ¶10 (“email to Hydrite admitting that a  
2 composition covered by claims 14 and 16 of the patent Deerpoint has asserted in this case could  
3 be made by blending potassium formate or by blending formic acid.”).)

### 4 3. Depositions

5 Deerpoint then undertook efforts to substantiate the information that it had learned  
6 independently about the Green Machine. In October 2021, Plaintiff deposed Jason Chow. (Doc.  
7 168 at 12.) Mr. Chow was a former Deerpoint employee who went to work for Agrigenix after  
8 leaving Deerpoint.<sup>4</sup> (*Id.* at 7-8.) Plaintiff alleges that Chow had access to “substantial amounts of  
9 confidential, propriety, and trade secret Deerpoint information” while employed at Deerpoint. (*Id.*  
10 at 7.) Plaintiff alleges that Mr. Chow falsely asserted that he had little to no knowledge of  
11 Defendant’s fertigation equipment, and he also minimized his role at Deerpoint and knowledge of  
12 their trade secrets. (*Id.* at 12, n.2.) But Mr. Chow admitted that he had seen a schematic for an  
13 Agrigenix fertigation device, which prompted another request for full disclosure of previously  
14 requested information about the Green Machine. (*Id.* at 12.) It was not produced.

15 Plaintiff pursued information about Defendants’ use of Plaintiff’s pricing information,  
16 which is pricing Plaintiff holds in confidence. In December 2021, Plaintiff deposed Nolan  
17 Sorensen. (*Id.*) Mr. Sorensen worked in a sales position with Deerpoint before moving to  
18 Agrigenix. (*Id.*) In his sales position, Mr. Sorensen had access to confidential and proprietary  
19 information regarding Plaintiff’s customers. (*Id.*) During his deposition, Mr. Sorensen testified  
20 that he had helped prepare a document that compared Agrigenix’s pricings with that of  
21 Deerpoint’s, and that he likely used his Agrigenix laptop when using or preparing the document.  
22 (*Id.* at 12; Doc. 200-1, “Bruckner Decl.” Exh. 2 (“Sorenson Depo.” pp. 47, 101–02).) Plaintiff had  
23 independently discovered that such a document existed, though it had not seen a physical copy.  
24 (Doc. 168 at 12.) Plaintiff alleges that Defendants did not respond to requests to produce the  
25 document. (*Id.*)

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26  
27 <sup>4</sup> As best the Court can determine, the major employees of Agrigenix consisted of Eva Kwong, Gail Walker, Nolan  
28 Sorensen, Jason Chow, Steven Wilson, Graham Towerton (a chemist), and Mahoney. (Michaelson Decl. ¶¶3–4.)  
These employees become important to this motion as they relate to the ESI in the employees’ laptops, discussed  
*infra*. There may have been other employees, but they are not discussed in this motion.

1 By this point, Plaintiff was concerned with purposeful withholding and/or destruction of  
2 ESI. In December 2021, Plaintiff deposed Defendant Mahoney under Rule 30(b)(6) regarding  
3 document management systems and practices, document collection efforts, and document  
4 preservation efforts. (*Id.* at 13.) Defendant Mahoney testified that, “(1) all documents covered by  
5 Deerpoint document requests had been provided to defense counsel for production; (2) all  
6 Agrigenix documents continued to exist ‘in the cloud’ and could be obtained through the IT  
7 provider for Agrigenix, called Unity IT; (3) Agrigenix employees had used Agrigenix-owned  
8 laptop computers, but that all of those laptops had been sold or donated to charity in the first  
9 quarter of 2021 and were no longer available; and (4) Agrigenix had only experimented with a  
10 third-party industry-specific document management system called ‘Montage for Ag’ or more  
11 simply ‘Montage.’” (*Id.*) Plaintiff asserts that all of the above testimony was false. (*Id.*)

12 4. Unity IT

13 In an attempt to locate ESI following the deposition of Defendant Mahoney, on December  
14 23, 2021, Plaintiff served a document subpoena on cloud storage provider Unity IT. (*Id.*) Based  
15 on the production of records, Plaintiff learned that Defendants had engaged Unity IT in August  
16 2018 to service 12 employee email accounts and two service email accounts and to maintain  
17 cloud storage for financial data through Intuit and other data through Microsoft OneDrive. (*Id.*)  
18 Plaintiff claims that Agrigenix and Unity transferred all material from the previous infrastructure  
19 to OneDrive (all other business records, including e-mails, calendars, marketing materials,  
20 spreadsheets, research and design documents, etc.), some 2400 files. (*Id.*; Michaelson Decl. ¶14;  
21 Sorenson Depo. p. 41 (the Agrigenix company had an email system).) Plaintiff acknowledges that  
22 Defendants notified Unity from the onset of their dealings of the need to preserve all ESI. (Doc.  
23 168 at 13.)

24 Plaintiff alleges that Defendants failed to consistently pay Unity. (*Id.* at 14.) Defendants  
25 were notified multiple times over a ten-month period that the material archived in the cloud  
26 storage could be lost. (*Id.*) On November 11, 2019, Unity deactivated Defendants’ licenses. (*Id.*)  
27 In February 2020, Defendants began to reactivate some of their licenses with Unity. (*Id.*) Emails  
28 for seven users were restored on March 19, 2020. (*Id.*) However, by February 9, 2021,

1 Defendants were in arrears with Unity again. (*Id.*) In May 2021, Unity sent correspondence to  
2 Defendants concerning unpaid invoices, warning that failures to pay after May 2021 could result  
3 in another purge of ESI. (*Id.*) Mahoney and Agrigenix could have mitigated the effects of a purge  
4 by downloading from the cloud whatever existed there, but did not do so. (Doc. 168-39, “Beeson  
5 Decl.” ¶3.)

6                   5.       Fresno First Bank

7           On December 23, 2021, Plaintiff subpoenaed one of Agrigenix’s banks, Fresno First  
8 Bank, because Agrigenix financial disclosures remained incomplete. (Doc. 168 at 15.) In mid-  
9 January, Fresno First Bank produced documents which included information not previously  
10 disclosed about transactions between Agrigenix and several third parties. (*Id.*) The third parties  
11 included GAR Bennet and Custom Ag, among other customers and suppliers not previously  
12 identified. (*Id.*) The documents revealed that Defendants had sufficient funds to cover the few  
13 hundred dollars or less per month of Unity IT’s cloud services from November 2019 to May  
14 2021. (*Id.*)

15                   6.       Laptops

16           Around January 25, 2022, Mr. Hampton, who formerly represented Agrigenix with  
17 respect to the patent claim, disclosed that Towerton, a former employee, was still in possession of  
18 his company laptop and that another laptop might also be available. (*Id.*) As a result, Plaintiff’s  
19 counsel asked Mr. Manock, former counsel for Defendants Mahoney and Agrigenix, to locate  
20 other laptops. (*Id.*) Plaintiff indicates that recently-recovered ESI revealed that Agrigenix had  
21 purchased six laptops and one desktop on November 30, 2017, and two more laptops in early  
22 2018. (*Id.*; Michaelson Decl. at ¶19, Exh. 24.) By mid-February 2022, Defendants’ former  
23 counsel located seven laptops used by employees of Agrigenix; other laptops were never located.  
24 (Doc. 168 at 15; Michaelson Decl. ¶19 (“There were probably others, because in August 2018  
25 Agrigenix contracted with Unity to set up accounts for 10 Agrigenix computers.”).) Plaintiff does  
26 not know what ESI was contained on these laptops, but documents produced by Unity indicate  
27 that Mahoney used a desktop while at Agrigenix (or had a second desktop) and maintained files  
28 on it that were not stored in the cloud. (Doc. 168 at 15.) Plaintiff does not know where other

1 laptops and the “desktop” referred to in documents are located. (*Id.*)

2                   7.     Retention of Forensic Expert

3             On February 11, 2022, Plaintiff engaged Digital Mountain, a company which provides  
4 computer forensic services, to examine the newly located laptops. (Doc. 168-39, Beeson Decl.  
5 ¶¶1, 5.) Mr. Beeson opines that based on his review of the Unity licenses, Agrigenix could have  
6 downloaded the data stored in the cloud and archived it locally, on computers, external hard  
7 drives, or other storage devices that are in physical possession of Agrigenix. (Beeson Decl. ¶3.)

8             On February 16, 2022, Mr. Beeson physically inspected five laptops belonging to Walker,  
9 Chow, Kwong, Wilson, and Mahoney’s mother. (Beeson Decl. ¶5.) On February 25, 2022,  
10 Digital Mountain received a hard disk drive containing forensic images of two more laptops,  
11 belonging to Towerton and Dorn. (*Id.*) Mr. Beeson was able to access and examine six of the  
12 seven laptops. (*Id.*) Mr. Beeson was unable to access the Wilson hard drive because it was  
13 encrypted, and despite repeatedly asking for a password, no password was provided. (*Id.* ¶7.)

14             Forensic analysis revealed the following about each laptop:

- 15             • Wilson’s laptop: The laptop was found to be encrypted. (Doc. 168 at 16; Beeson Decl.  
16             ¶7.) Plaintiff has been unable to access information on the disk drive. (Doc. 168 at 16.)  
17             Despite several requests for the password, no password has been provided. (Beeson  
18             Decl. ¶7.)
- 19             • Laptop given to Mahoney’s mother: Though the laptop was purchased in 2017 or  
20             2018, the laptop had an operating system that was installed in December 2019. (Doc.  
21             168 at 16; Beeson Decl. ¶8.) The computer contained only one user account, for  
22             Defendant Mahoney’s mother. (Beeson Decl. ¶8.) There were physical signs that the  
23             laptop case had been opened, which would allow for the hard drive to have been  
24             replaced. (*Id.*) The computer contains twelve empty files in a folder labelled  
25             Agrigenix, but does not contain any Agrigenix ESI. (*Id.*)
- 26             • Kwong’s laptop: Forensics revealed that the laptop had a new hard drive installed in  
27             June 2021, coinciding with the time Kwong ceased working at Agrigenix. (Doc. 168 at  
28             17; Beeson Decl. ¶9.) Kwong told Mr. Manock the original hard drive had crashed and



1 needed to be replaced. (Doc. 168 at 17.) Plaintiff requested the original hard drive be  
2 produced, but it has not been produced. (*Id.*) The laptop showed no signs of physical  
3 damage or misuse that might result in such a crash. (Beeson Decl. ¶9.)

- 4 • Chow’s laptop: Evidence shows a first use of the laptop in 2018. Forensics revealed  
5 that there was some ESI on the laptop however, in February 2022, a program  
6 (CCleaner) was used repeatedly in the days before the laptop was turned over to wipe  
7 and delete files so that they cannot be recovered. (Doc. 168 at 17; Beeson Decl. ¶10.)  
8 This is about the time Chow was contacted about returning his laptop. (Doc. 168 at  
9 17.) Plaintiff was able to find an incomplete volume of relevant files such as a number  
10 of image files (digital photographs) but only a handful of files with names or in  
11 folders. (Beeson Decl. ¶10.)
- 12 • Towerton laptop: Forensics found limited copies of some email files for other  
13 Agrigenix employees, including Mahoney, Dorn, Kwong, Walker, Chow, Sorensen,  
14 and Wilson. (Doc. 168 at 13; Beeson Decl. ¶12.) No correspondence after June 7,  
15 2018 was found on Towerton’s laptop. (Beeson Decl. ¶12.)
- 16 • Dorn, Chow, Towerton, and Walker’s laptops: Forensics found some recoverable  
17 email archives and local copies of some of the ESI stored in the cloud. (Doc. 168 at  
18 17; Beeson Decl. ¶11.) But much is missing: emails about the formation of Deerpoint  
19 and many emails from its early days are missing from the laptops, as are any business  
20 emails from between November 11, 2019 and March 19, 2020 and again after  
21 approximately May 2021 (when company employees could only use personal email).  
22 (Doc 168 at 17.)

23 From the forensic analysis, Plaintiff contends that for several laptops recently recovered  
24 and made available, there was a lack of preservation and even affirmative destruction of contents.  
25 Plaintiff identified some limitations in the ESI found on the laptops, including: emails not sent or  
26 received by the owner, emails sent when Unity IT’s services were suspended, and full files stored  
27 in the cloud. At any point before licenses were suspended, Defendants could have downloaded  
28 the data stored in the cloud and stored it locally. (Beeson Decl. ¶3.) Further, several computers

1 were not retrieved.

2 8. GAR Bennett

3 In March 2022, Plaintiff obtained documents from GAR Bennett pursuant to a subpoena.  
4 (Doc. 168 at 18.) The documents contained invoices that showed Defendants had sold  
5 components of their fertigation equipment to GAR Bennett in the midst of this litigation. (*Id.*) The  
6 documents also included other invoices, one of which was not reflected in the documents received  
7 from Fresno First Bank or any QuickBooks files recovered. (*Id.*) No documents memorializing  
8 the sale transaction to GAR Bennett were ever produced by Mahoney or Agrigenix. (*Id.*)

9 9. Additional ESI Plaintiff identifies as missing

10 Plaintiff alleges that emails from personal accounts, presumably used when Unity IT  
11 services were suspended, were not preserved. (*Id.*) Plaintiff also alleges that documents that were  
12 contained in the “Montage” document management system were not preserved. (*Id.*) Documents  
13 that were recently recovered indicate that Montage was used by Agrigenix from January 2018  
14 through at least August 2018. (*Id.*) Finally, Plaintiff found reference to an “F Drive” which  
15 documents reveal was used prior to the use of OneDrive, though no documents from an “F Drive”  
16 were produced. (*Id.*; Michaelson Decl. ¶23d.)

17 In summary, Plaintiff argues that ESI as to customer solicitations, Green Box design,  
18 product formulas, financial and other ESI disappeared upon “wiping” of the Chow laptop, the  
19 supposed “crash” of the Kwong device, encryption of the Wilson computer, disappearance of the  
20 Mahoney computer and other computers, and failure to maintain a backup of cloud ESI.

21 **B. Defendants’ Opposition**

22 1. Background

23 Defendant Mahoney joined Plaintiff as its CEO in Spring 2013. (Doc. 200 at 8.) Mahoney  
24 grew the fledgling fertigation business to \$35 million in annual sales based upon his business  
25 relationships, employees, and expanding his customer base. After the business relationship with  
26 Plaintiff broke down, Defendant Mahoney left Deerpoint in fall of 2017 and claims he did not  
27 intentionally take proprietary, confidential, or trade secret materials when he left. (*Id.*)

28 Mahoney formed Agrigenix in October 2017 and many of Plaintiff’s employees joined

1 Agrigenix. (*Id.* at 8-9.) Mahoney was not in need of any of Plaintiff’s confidential or trade secrets  
2 because Agrigenix hired Custom AG Formulators to blend fertilizer formulas. (*Id.* at 9.)  
3 Agrigenix’s boxes were less expensive and complex than Plaintiff’s and Agrigenix’s boxes were  
4 built with off-the-shelf pumps and tubes. (*Id.*) Based upon Mahoney’s connections with local  
5 growers, who were friends and colleagues, and who were willing to share pricing information,  
6 Mahoney grew Agrigenix. (*Id.* at 9-10.)

7 When this litigation arose, Defendants retained Doerksen Taylor Stokes LLP to represent  
8 them. (*Id.* at 10.) However, due to the cost of the defense, Defendants were not able to afford their  
9 bills and counsel withdrew in March 2019. (*Id.*) Counsel from Doerksen sent Defendants a  
10 litigation hold letter on June 1, 2018, which informed Defendants of the need to preserve  
11 evidence relevant to this case. (*Id.*) The letter required some follow up with Defendants but there  
12 was no response from counsel from Doerksen regarding whether follow up took place. (*Id.*;  
13 Menshikova Decl. ¶2.) Prior counsel did not recall their firms sending out litigation hold letters.  
14 (Menshikova Decl. ¶¶ 3, 4.)

15 Defendants then retained Manock Law and Sierra Law, the latter to represent them with  
16 regards to the patent claims. (Doc. 200 at 10.) At some point Defendants were paying their legal  
17 fees directly until early 2021 when insurance began covering legal fees. (*Id.*) Insurance would not  
18 cover Sierra Law, so Defendants retained Hall Griffin LLP. (*Id.*) Due to financial woes,  
19 Agrigenix ceased operations in March 2021 and filed for bankruptcy on April 25, 2022. (*Id.* at  
20 11.)

## 21 2. Discovery

22 Defendants claim they have complied with all discovery requests and produced substantial  
23 ESI. (*Id.*) Defendants began their production on December 17, 2019. (*Id.*) Defendants claim they  
24 “went to great lengths” to respond to all of Plaintiff’s requests.<sup>5</sup> (*Id.*) Defendants claim Plaintiff

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25  
26 <sup>5</sup> On October 9, 2019, Plaintiff propounded: 57 Requests for Production to Defendant Mahoney, 107 Requests for  
27 Production to Defendant Agrigenix, 7 Interrogatories to Defendant Mahoney, and 13 Interrogatories to Defendant  
28 Agrigenix. On April 17, 2020, Plaintiff propounded: 33 Requests for Production to Defendant Agrigenix, 10  
Interrogatories to Defendant Agrigenix, and 4 Interrogatories to Defendant Mahoney. (Doc. 200 at 11.) Defendants  
produced about 2,402 pages between January 29, 2019 and March 20, 2020. (*Id.* at 6–7.) An additional 11,173 pages  
were produced on February 10, 2022. (*Id.* at 12.)

1 informed the Court on November 4, 2021, that document production was complete, well before  
2 the issues in this motion were raised. (*Id.* at 13.)

3 3. Laptops

4 When Agrigenix ceased operations in March 2021, Defendants believed there was no  
5 longer a need to maintain the laptops. (*Id.*; Doc. 200-3, “Mahoney Decl.” ¶27.) Agrigenix allowed  
6 employees to take their laptops with them. (Mahoney Decl. ¶20.) Defendants took no steps to  
7 wipe the laptops before giving them away. (*Id.*) Defendants sincerely believed that the materials  
8 on the laptops were stored in the cloud and that document production was essentially over. (*Id.*  
9 ¶¶25, 27.) Defendants claim the following about specific laptops (those provided to Wilson,  
10 Kwong, Chow, and Mr. Mahoney’s mother):<sup>6</sup>

- 11 • Wilson Laptop: The laptop was not encrypted by Defendants. (Doc. 200 at 14.)  
12 Defense counsel has attempted to obtain the password to no avail. (*Id.*; Brucker Decl.  
13 ¶8.)
- 14 • Kwong Laptop: The original hard drive appears to have crashed and was replaced  
15 while in Kwong’s possession. (Doc. 200 at 14.) Defendants did not cause the crash or  
16 cause the loss of the crashed drive. (*Id.*; Mahoney Decl. ¶22.)
- 17 • Chow Laptop: To the extent that the laptop was cleaned in February 2022, Defendants  
18 could not control the actions of a third party and did not request that Chow take such  
19 actions. (Doc. 200 at 14.) Further, Chow only deleted personal materials unrelated to  
20 the litigation. (*Id.*; Chow Decl. ¶8.) Moreso, the laptop was not “wiped” as suggested  
21 by Plaintiff, but rather, Chow used a “performance optimizer” that routinely cleans  
22 and speeds up computers. (Doc. 200 at 14.)
- 23 • Laptop given to Mahoney’s mother: Plaintiff admits after examining the laptop that  
24 there was no ESI contained on the laptop. (*Id.*) Even if ESI existed, Defendants took  
25 no steps to delete any content on the laptop before giving it away. (*Id.*) Plaintiff’s  
26 assumptions that the laptop was at some point Mahoney’s and was cleaned or had data  
27 removed is unsupported speculation. (*Id.* at 10.)

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28 <sup>6</sup> Defendants assert that Plaintiff admits that the laptops provided to Walker, Dorn, and Towerton were recovered.

1                   4.     Cloud Data

2             Defendants again state that they believed that the material on the laptops was stored in the  
3 cloud. (*Id.*) In fact, not only did Defendants request Unity IT place a litigation hold on its records,  
4 but Defendants also agreed to pay extra to Unity IT to place the litigation holds. (*Id.*) However,  
5 due to business necessity and the failure to afford services, Defendants were forced to stop paying  
6 Unity IT. (*Id.*) Defendants claim that Agrigenix employee Towerton even paid Unity IT  
7 personally to maintain the services for some time. (*Id.*) Despite being told that services would be  
8 suspended, Defendant Mahoney believed that he would lose access to the information on the  
9 cloud, not that the information would be unrecoverable. (*Id.*; Mahoney Decl. ¶27 (“I understood  
10 and sincerely believed that Agrigenix’s ability to pay Unity IT for its services would only cause  
11 termination of access to the information in the cloud . . . [and] that all of the information  
12 maintained on the Unity IT servers would not be lost and would remain recoverable at a later  
13 date.”).) There is zero evidence that Defendants were warned that material archived in the cloud  
14 could be lost. (Doc. 200 at 15-16.) Rather, Plaintiff omits the language of the warnings. (*Id.*)

15             Exhibits 7–22 of the declaration of Jon Michaelson clearly show: “(1) that Agrigenix  
16 repeatedly requested that its data on the cloud be preserved over the course of several years,  
17 including as recently as March 11, 2021; (2) Agrigenix paid for services when it could afford to  
18 do so; and (3) Unity IT did not explain to Agrigenix before terminating its access to the cloud that  
19 data would be permanently lost if payment was not made.” (*Id.* at 16 (internal citations omitted).)  
20 Specifically, Plaintiff misrepresents Exhibit 17 to Michaelson’s declaration. Exhibit 17 involves  
21 an email between Defendant Mahoney and Unity IT where Unity IT states, “I doubt your old mail  
22 will be there.” (*Id.*) This was in response to Defendant Mahoney’s question as to whether data  
23 that was stored in the cloud prior to the first suspension would still be in the cloud when services  
24 were reactivated. (*Id.*) Plaintiff treats the statement as saying that the data was purged when  
25 services were terminated. (*Id.*) Plaintiff also misrepresents an email from Unity IT (Michaelson  
26 Decl., Exh. 20) which states that data prior to February 2020 may have been purged. (*Id.*)  
27 Defendants claim that Plaintiff misleads the court by arguing that the Defendants were told that  
28 the data had probably already been purged. (Doc. 200 at 16-17.)

1 Defendants claim that to this day they are unaware if the data is recoverable or not. (*Id.* at  
2 17.) However, Defendants admit “Unity IT has reported that it does not currently believe that the  
3 data is still available online given the time that has passed.” (*Id.*)

4 Defendants concede their duty to preserve ESI. (Doc. 200 at 18.) Defendants argue that  
5 Plaintiff has not shown the requisite culpable state of mind. Agrigenix was a small start-up  
6 company, and this litigation has dragged on with four sets of lawyers coming and going. There  
7 was no scheme to spoliage ESI. Any loss of ESI on the laptops was not caused or requested by  
8 Defendants. The data in the cloud was not intentionally spoliated, and Plaintiff merely speculates  
9 as to the data that has been lost. Agrigenix repeatedly requested that its data on the cloud be  
10 preserved and paid when it could to do so. Unity did not explain that the data would be lost. The  
11 issue of personal email is a red herring. Mahoney produced his personal email, and Plaintiff did  
12 not subpoena former employees’ personal email. (*Id.* at 18-21.)

13 Defendants ask the Court to fashion a reasonable remedy under 37(e)(1) if the Court finds  
14 prejudice. Defendants argue that the Court could reopen discovery and continuing all dates  
15 would be an appropriate remedy. Defendants argue that Plaintiff’s request for monetary damages  
16 is excessive and unsupported. Defendants ask the Court to deny the requested adverse factual  
17 findings as impermissible under Rule 37(e)(1). (Doc. 200 at 26.)

### 18 **C. Plaintiff’s Reply**

19 Plaintiff argues that while Defendants admit that they did not take adequate steps to  
20 preserve ESI, they ignore the full nature and scope of the failure. (Doc. 210 at 4.) Defendants try  
21 to minimize their misdeeds.

22 Defendants discuss only four laptops. But ESI was spoliated from no fewer than five  
23 laptops, out of at least eight known laptops used by Agrigenix and at least one desktop. (*Id.*)  
24 Plaintiff believes that all computers used by Defendants were spoliated in one fashion or another.  
25 (*Id.*) Similarly, the timing of the “cleaning” of Chow’s laptop and whatever program he used left  
26 the device with no ESI from the period where he was an Agrigenix employee. All of that data was  
27 spoliated. (*Id.* at 3-4.) Furthermore, Defendants have not addressed in any material respect three  
28 or more computers that were unaccounted for, including two computers Mahoney himself used.

1 (*Id.* at 12.) Defendants have not disclosed whether or not either of Mahoney’s work computers  
2 remain in his possession or were disposed of. (*Id.*) Defendants also emphasize that they  
3 themselves did not wipe any laptops of ESI, however, allowing those devices out of their control  
4 is enough to find that they failed to preserve the laptops and their data. (*Id.* at 13.)

5 As to the data stored in the cloud, ESI in multiple remote locations was spoliated. (*Id.* at  
6 5.) This includes all files maintained on OneDrive by Unity IT and all business-related content on  
7 personal email accounts including dates prior to the formation of Agrigenix and at later times  
8 when the Unity IT system was deactivated. (*Id.*) ESI from a few laptops does not rectify the loss  
9 of unknowable amounts of ESI. (*Id.*) ESI that still remains missing includes:

- 10 • ESI from Agrigenix computers that were never backed up to OneDrive, such as ESI  
11 from the Mahoney desktop and possibly others as well.
- 12 • ESI that was backed up to OneDrive, but that disappeared when the cloud data was  
13 lost because it was not downloaded to a non-spoliated computer.
- 14 • Material from personal email accounts not copied to Agrigenix email addresses during  
15 times when those were active, such as Mahoney communications with the multiple  
16 customers he claimed would elect to do business with Agrigenix.
- 17 • Contents of Montage program files, including customer communications.
- 18 • Contents of the Agrigenix “F Drive.”

19 (*Id.* (internal citations omitted).)

20 The spoliation spans the entire Agrigenix organization and all of its activities prior to its  
21 formation through the close of discovery. (*Id.* at 6.) Defendants attempt to minimize the extent of  
22 the spoliation by claiming Plaintiff failed to demonstrate that the lost material was not duplicative  
23 of items that were produced. However, to prove that the documents would be duplicative would  
24 require Plaintiff to examine the spoliated ESI. (*Id.*)

25 Additionally, it is reasonable to reach conclusions as to what was spoliated based on the  
26 surrounding circumstances as follows. (*Id.*) Deerpoint devoted years to building its business and  
27 spent millions on the technology that made that business a success, yet only months after  
28 Agrigenix was formed and with very little spent on R&D, Defendants offered the same unique

1 products as Deerpoint. (*Id.* at 7.) Deerpoint timely requested discovery that should have been  
2 produced before Defendants' spoliation and was requested at the same time as the spoliation of  
3 the cloud storage. (*Id.* at 8.) No laptop contents from any Agrigenix employee responsible for  
4 sales was recovered, despite Mahoney bragging about 30 grower meetings, and thus any  
5 communications with actual or potential customers have been spoliated. (*Id.*) The development of  
6 the Green Machine and product formulas have been lost. The spoliation of ESI that contained  
7 relevant evidence of theft and use of confidential information and trade secrets has made it  
8 impossible for Deerpoint to prove its case. (*Id.* at 8-9.)

9 Defendants' spoliation was intentional. (*Id.* at 9.) Defendants knew their obligations to  
10 preserve ESI. Indeed, original counsel advised Defendants, in a comprehensive litigation hold  
11 letter, of the duty to preserve. (Mahoney Decl., Exh. 1 (litigation hold letter).) In late March 2021,  
12 Mahoney made a statement to Unity IT that ESI had to be preserved, indicating Mahoney knew  
13 his preservation obligations. (*See* Mahoney Decl. ¶¶ 16–18, 25–27.) Mahoney is a sophisticated  
14 litigant who has been involved in prior lawsuits. Defendants were represented and advised by  
15 counsel at all times.

16 Spoliation began shortly after Defendants were served with discovery. Whether Mahoney  
17 believed that Unity IT ESI would not be spoliated does not relieve Defendants of their  
18 obligations. Defendants stopped paying for ESI licenses and were warned the services would be  
19 terminated. Discontinuing services would result in termination of preservation and the loss of the  
20 data. Defendants' lawyers advised them that discontinuing services would result in termination  
21 of preservation and the loss of the data. (Mahoney Decl., Exh. 1.)

22 There are three or more computers, including two used by Mahoney (a laptop and a  
23 desktop), that are entirely unaccounted for by Defendants. Mahoney has not disclosed whether or  
24 not either of his own work computers remained in his possession for any particular length of time  
25 and what happened to the ESI contained on the computers.

26 Moreover, loss of ESI from computers given to Agrigenix employees is the responsibility  
27 of Defendants. Plaintiff's position is that when Defendants gave away the computers, allowing  
28 those computers to leave their control by giving them to departing employees over whom they no



1 longer had authority, Defendants affirmatively failed to preserve. (Doc. 210 at 13.)

## 2 EVIDENTIARY OBJECTIONS

3 Both parties object to the other's evidence. For instance, Defendants submit objections to  
4 both the evidence in support of the motion for sanctions and the supplemental evidence filed with  
5 Plaintiff's reply. (Docs. 201, 214.) Specifically, Defendants object to statements in the  
6 declarations of Jon Michaelson, Christopher Beeson, and John Miller. Many of Defendants'  
7 objections to Plaintiff's evidence are based on lack of foundation, lack of personal knowledge, or  
8 hearsay. Defendants object to Mr. Beeson's declaration on the grounds that his declaration lacks  
9 foundation, is speculative, is based on hearsay, and is inadmissible under Federal Rule of  
10 Evidence 702. The Court disagrees. Mr. Beeson's testimony is based on his analysis of the  
11 surrendered devices, and Mr. Beeson is qualified, for the purposes of this motion, to offer  
12 opinions based on his analysis of the devices. (Doc. 168-39, ¶¶1-2.)

13 To the extent the Court has relied on evidence to which objections have been made, those  
14 objections are OVERRULED; the Court OVERRULES AS MOOT the parties' remaining  
15 evidentiary objections. "While the Federal Rules of Evidence do not necessarily apply in the  
16 context of a motion for sanctions, evidence relied upon must, at a minimum, bear indicia of  
17 reliability." *AtPac, Inc. v. Aptitude Sols., Inc.*, No. CV 2:10-294 WBS JFM, 2011 WL 13242817,  
18 at \*1 (E.D. Cal. Apr. 13, 2011) quoting (*Sentis Grp., Inc., Coral Grp., Inc. v. Shell Oil Co.*, 559  
19 F.3d 888, 901 (8th Cir. 2009)); *Juul Labs, Inc. v. Chou*, No. 2:21-CV-03056 DSF PDX, 2022 WL  
20 2161063, at \*6 (C.D. Cal. May 6, 2022) (accepting evidence that bears sufficient indicia of  
21 reliability in a sanctions motion). Additionally, other pretrial, non-dispositive motions do not  
22 require that evidence be submitted in a form that would be admissible at trial. *AtPac, Inc.*, 2011  
23 WL 13242817, at \*1. The Court is satisfied that the evidence relied upon bears indicia of  
24 reliability, and therefore, the Defendants' objections are overruled for the purposes of this motion.

## 25 DISCUSSION

### 26 **A. Federal Rule of Civil Procedure 37(e) and ESI**

27 "Federal Rule of Civil Procedure 37 authorizes the district court, in its discretion, to  
28 impose a wide range of sanctions when a party fails to comply with the rules of discovery or with

1 court orders enforcing those rules.” *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir.  
2 1983). Federal Rule of Civil Procedure 37(e) states, “if electronically stored information that  
3 should have been preserved in the anticipation or conduct of litigation is lost because a party  
4 failed to take reasonable steps to preserve it, and it cannot be restored or replaced through  
5 additional discovery” the court may impose sanctions.

6 In evaluating whether spoliation of ESI has occurred, courts should consider three  
7 threshold criteria, whether: “(1) the ESI ‘should have been preserved in the anticipation or  
8 conduct of litigation’; (2) the ESI ‘is lost because a party failed to take reasonable steps to  
9 preserve it’; and (3) ‘[the ESI] cannot be restored or replaced through additional discovery.’ ”  
10 *Facebook, Inc. v. OnlineNIC Inc.*, No. 19-CV-07071-SI (SVK), 2022 WL 2289067, at \*6 (N.D.  
11 Cal. Mar. 28, 2022); *Porter v. City of San Francisco*, No. 16-3771, 2018 WL 4215602, at \*3  
12 (N.D. Cal. Sept. 5, 2018) (quoting Rule 37(e)). Where these three threshold criteria are met and  
13 the Court finds that the “party acted with the intent to deprive another party of the information’s  
14 use in the litigation,” a court may issue terminating sanctions. Fed. R. Civ. Proc. 37(e)(2)(C).  
15 Although Rule 37(e) does not define “intent,” courts have found that “intent” in this context  
16 means “the evidence shows, or it is reasonable to infer, that a party purposefully destroyed  
17 evidence to avoid its litigation obligations.” *Facebook, Inc. v. OnlineNIC Inc.*, No. 19-CV-07071-  
18 SI (SVK), 2022 WL 2289067, at \*6 (N.D. Cal. Mar. 28, 2022).

19 The moving party bears the burden of establishing that spoliation occurred by  
20 demonstrating that the non-moving party destroyed the documents and had some notice of the  
21 document’s relevance to the litigation before they were destroyed. *Ramirez v. Zimmerman*, 2020  
22 WL 905603 at \*5 (S.D. Cal. Feb. 25, 2020) (quoting *Harfouche v. Wehbe*, 705 F. App’x 589, 590  
23 (9th Cir. 2017)). Courts in this circuit have indicated that a preponderance of the evidence  
24 standard of proof is applicable to spoliation motions. *CrossFit, Inc. v. Nat’l Strength &*  
25 *Conditioning Ass’n*, 2019 WL 6527951 at \*28 (S.D. Cal. Dec. 4, 2019) ((following Ninth Circuit  
26 precedent permitting intent under Rule 37(e)(2) by preponderance of the evidence, not clear and  
27 convincing evidence) (citing *OmniGen Research v. Yongqiang Wang*, 321 F.R.D. 367, 372 (D.  
28 Or.) (“[t]he applicable standard of proof for spoliation motions in the Ninth Circuit is the

1 preponderance of evidence.”); *Weride Corp. v. Kun Huang*, 2020 WL 1967209 at \*9 (N.D. Cal.  
2 Apr. 16, 2020); *Compass Bank v. Morris Cerullo World Evangelism*, 104 F.Supp.3d 1040, 1052–  
3 53 (S.D. Cal. May 8, 2015); *Colonies Partners L.P. v. Cty. Of San Bernardino*, 2020 WL  
4 1496444 at \*6 (C.D. Cal. Feb. 27, 2020). Further, a court “may make factual findings and assess  
5 the credibility of witnesses. *Weride Corp.*, 2020 WL 1967209 at \*33.

### 6 **B. The Duty to Preserve and Defendants’ Spoliation**

7 A duty to preserve arises the “moment that litigation is reasonably anticipated.” *Apple*  
8 *Inc., v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132, 1136 (N.D. Cal. July 24, 2012); *Brewer v.*  
9 *Leprino Foods Co.*, 2019 WL 356657 at \*25 (E.D. Cal. January 29, 2019). A party must preserve  
10 evidence that the party knows or should know is relevant to another party’s claim or defense, or  
11 could lead to the discovery of such evidence. *Perkins v. City of Modesto*, 2020 WL 1333109 at  
12 \*46 (E.D. Cal. Mar. 20, 2020). Once the duty attaches, a party must ensure all policies related to  
13 deleting or destroying files are suspended. *Perkins*, 2020 WL 1333109 at \*46. Further, simply  
14 making “some effort” is not sufficient. *Id.* (citing *Apple Inc., v. Samsung Elecs. Co.*, 888 F. Supp.  
15 2d 976, 991–92 (N.D. Cal. Aug. 21, 2012)).

16 Agrigenix and Mahoney were on notice that ESI should have been preserved. At a  
17 minimum, Defendants were informed from a comprehensive litigation hold letter by their former  
18 counsel, instructing Defendants that: “the company’s employees and key custodians” had an  
19 obligation to preserve “documents and data from all sources relating in any way to the  
20 allegations,” to create “a ‘mirror’ [backup] image of each hard drive and storage device” and “to  
21 take steps to prevent deletion and ensure preservation of ESI.” (Mahoney Decl., Exh. 1.)  
22 Mahoney confirmed Defendants’ duty to preserve by alerting Unity IT that cloud data must be  
23 preserved. There is not any dispute that Defendants knew they must preserve ESI, and therefore  
24 the Court will not further evaluate this criterion.

25 Here, the second spoliation criterion—that the party failed to take reasonable steps to  
26 preserve the ESI—is also met. Fed. R. Civ. P. 37(e); *WeRide Corp.*, 2020 WL 1967209, at \*12.  
27 Indeed, there is not any real dispute that Defendants failed to take reasonable steps to preserve  
28 ESI. Defendants acknowledge that they “did not take adequate steps to preserve ESI.” (Doc. 200

1 at 1 (“Despite [Defendants’] efforts, and reviewed with the benefit of hindsight, Defendants did  
2 not take adequate steps to preserve ESI.”) Again, the Court will not further evaluate this criterion.

3 The third criterion is that the ESI cannot be restored or replaced through additional  
4 discovery. Fed. R. Civ. P. 37(e). There appears to be no real dispute that the ESI cannot be  
5 recovered. For instance, current counsel for Defendants has contacted Unity IT, attempting to  
6 locate this ESI, and the ESI is not available online given the amount of time that has passed.  
7 (Doc. 200 at 17 (“In all candor to the Court, Unity IT has reported that it does not currently  
8 believe that the data is still available online given the time that has passed.”).) Significantly, the  
9 laptops for various former employees no longer have the full ESI which was, more than likely,  
10 created on those laptops as part of the employees’ scope of employment. For instance, Mr.  
11 Chow’s laptop was “wiped” prior to being turned over to Plaintiff’s counsel. The Towerton laptop  
12 contained some email from other Agrigenix employees, but the emails are not from a period after  
13 June 7, 2018. (Doc. 168-39, Beeson Decl. ¶12.) Apparently, Mahoney had both a laptop and a  
14 desktop, and neither have been turned over for evaluation of the ESI contents. Retained expert  
15 Mr. Beeson states that the laptop of Steve Wilson is encrypted, and information is irretrievable.  
16 No password has been provided despite repeated requests. (*Id.* ¶7.) Mr. Beeson states that the  
17 laptop given to Mahoney’s mother has physical signs that the laptop case had been opened, which  
18 would allow for the hard drive to have been replaced. (*Id.* ¶8 and Exh. 1.) Mr. Beeson opines that  
19 if the hard drive had been removed deliberately, it resulted in forensically wiping all prior content  
20 because the “computer does contain twelve empty files in a folder labelled Agrigenix,” but not  
21 ESI. (*Id.* ¶8.) Ms. Kwong’s laptop “crashed,” and the most recent files in Towerton’s local copy  
22 are from July 18, 2019. (*Id.* ¶¶10, 13.) Plaintiff was able to recover some of the withheld and  
23 deleted ESI through their forensic evaluation. Other responsive ESI will be unavailable because  
24 the data was destroyed and no longer exists. It is impossible to know now what ESI was available,  
25 but which is now no longer available. Thus, even if the Unity IT ESI can be resurrected, much  
26 more ESI is not recoverable.

27 Defendants argue that the Court could reopen discovery as a reasonable remedy. The  
28 Court does not find that reopening discovery is a viable remedy. This case has been pending

1 since April of 2018. The litigation has involved extensive law and motion practice and  
2 voluminous discovery, including numerous discovery disputes, multiple changes of counsel, a  
3 bankruptcy filing, and other complicating matters, all of which has resulted in large consumption  
4 of party and judicial resources. The Court declines to reopen discovery where there has been  
5 adequate time for full disclosure. Moreover, the Court does not find there is any point to  
6 reopening discovery into data which no longer exists.

7 The Court finds that the three Rule 37(e) threshold criteria—ESI should have been  
8 preserved, but is lost because a party failed to take reasonable steps to preserve it, and the ESI  
9 cannot be restored—are easily satisfied here and that spoliation has occurred. Spoliation is the  
10 “destruction or significant alteration of evidence, or the failure to preserve property for another’s  
11 use as evidence in pending or future litigations. *Kearney, Foley & Lardner, LLP*, 590 F.3d 638,  
12 649 (9th Cir. 2009); *Brewer*, 2019 WL 356657 at \*24-25. ESI which would have and should  
13 have been on the various laptops of Agrigenix’s and Mahoney’s computers and on Unity IT is no  
14 longer available. The only remaining issue before the Court is whether Defendants acted  
15 intentionally and what sanction, if any, should be imposed.

### 16 C. Prejudice and Level of Intent

17 When the Court finds spoliation, Rule 37 then provides for two distinct sets of sanctions.  
18 First, pursuant to subdivision 37(e)(1), the court may order “measures no greater than necessary  
19 to cure the prejudice” when the Court finds a party was prejudiced from the loss of the  
20 information. *Winecup Gamble, Inc. v. Gordon Ranch LP*, 850 F. App’x 573, 574 (9th Cir. 2021)  
21 (If the district court concludes that these threshold findings are met, it must then determine the  
22 appropriate sanction. If the district court finds that the loss of ESI has prejudiced the moving  
23 party, it “may order measures no greater than necessary to cure the prejudice.”)

24 The second sanction is in subdivision 37(e)(2). Before a court may issue sanctions under  
25 Rule 37(e)(2), it must find that “the party acted with the intent to deprive another party of the  
26 information’s use in the litigation.” If the Court finds that the party who spoliated the ESI acted  
27 with the “intent to deprive another party of the information’s use in the litigation,” the Court may:

28 ///

- 1 (A) presume that the lost information as unfavorable to the party;
- 2 (B) instruct the jury that it may or must presume the information was unfavorable to  
the party; or
- 3 (C) dismiss the action or enter default judgment.

4 Fed. R. Civ. P. 37(e)(2). Spoliation of evidence raises a presumption that the destroyed ESI was  
5 both adverse to the party that destroyed it and relevant to the merits of the case. *Apple, Inc.*, 888  
6 F. Supp. 2d at 998 (quoting *Dong ah Tire & Rubber Co.*, 2009 WL 1949124 at \*10 (N.D. Cal.  
7 July 2, 2009)).

8 Courts have the discretion to determine if the spoliation of evidence is prejudicial, and  
9 neither party has the burden of establishing or disproving prejudice. *Hernandez v. Tulare Cty.*  
10 *Corr. Ctr.*, 2018 WL 784287 at \*10 (E.D. Cal. Feb. 7, 2018) (citing Fed. R. Civ. P. 37(e),  
11 Committee Notes on Rules – 2015 Amendment)). However, a moving party must show the non-  
12 moving party had an intent to deprive another party of the spoliated information for subsection  
13 (e)(2) to apply. *See Ramirez*, 2020 WL 905603 at \*5. If the moving party cannot show an intent to  
14 deprive but can show that information was lost because the non-moving party failed to take  
15 reasonable steps to preserve the information, a court may find prejudice. *See Id.* at \*6.

16 Prejudice may be found where the spoiling party's actions impaired another party's ability  
17 to go to trial or threatens to interfere with a rightful decision of the case. *Leon v. IDX Sys. Corp.*,  
18 464 F.3d 951, 958 (9th Cir. 2006) (quoting *United States ex rel. Wiltec Guam, Inc., v. Kahaluu*  
19 *Contr. Co.*, 857 F.2d 600, 604 (9th Cir. 1988)). Determining the prejudice from the loss of the  
20 information unavoidably includes an evaluation of the information's importance in the litigation.  
21 *Id.*

### 22 1. Prejudice

23 Plaintiff argues that it is prejudiced. Plaintiff argues that the loss of ESI has impaired its  
24 ability to prove its case. (Doc. 168 at 21-24.) ESI regarding Agrigenix's communications with  
25 actual and potential customers was spoliated. No laptop contents from any Agrigenix employee  
26 responsible for sales was recovered. (Doc. 210 at 8.) There is little to no ESI regarding  
27 development of the Green Machine or product formulas. (*Id.*)

28 ///

1 Defendants argue that there was no prejudice, or if there is any prejudice, Plaintiff’s lack  
2 of diligence was partially at fault. (Doc. 200 at 7.) First, Defendants argue that there is no  
3 evidence that any important or relevant data was permanently lost. (*Id.*) Defendants argue that  
4 Plaintiff’s allegation that the evidence that was spoliated would have benefitted their case is based  
5 on misrepresentations of deposition testimony. (*Id.* at 22-24.) Defendants further claim that there  
6 is no prejudice because there is no evidence, just misrepresentations of documents and deposition  
7 testimony, that the destroyed evidence was relevant. (*Id.*)

8 Here, Defendants have acknowledged that there is ESI that was not preserved both on the  
9 laptops and in the cloud. However, Defendants then claim that Plaintiff’s “misrepresentation” of  
10 documents and testimony shows there is no prejudice because Plaintiff is speculating as to what  
11 documents may be missing. Defendants cite to *Best Label Co. v. Custom Label & Decal, LLC*, to  
12 argue that speculation is not enough to support a finding of prejudice. 2022 WL 1525301 at \*5  
13 (N.D. Cal. May 13, 2022). However, the Court in *Best Label Co.*, found the claim of prejudice  
14 was highly speculative because the plaintiff failed to discuss the nature of the information that  
15 was missing and its bearing on the case, relied solely on a forensic examiner’s report and did not  
16 ask any defendants or their representatives about the alleged missing files, or provide a  
17 declaration attesting to the likely subject matter of the missing material. 2022 WL 1525301 at \*5.  
18 That is not the case here.

19 Here, Plaintiff has provided the Court with substantial documentation that Plaintiff  
20 attempted to determine what documents were missing. For example, Defendant Agrigenix  
21 produced a pamphlet that it presented to potential customers which claimed Defendants had  
22 “sophisticated fertigation equipment.” (*See* Michaelson Decl. ¶5b). However, Defendants only  
23 produced a one-page sketch of the equipment. (*See id.* and Exh. 5.) The equipment is specialized  
24 and sophisticated, and as Plaintiff argues, discovery should have produced items such as design  
25 documents, equipment lists, schematics, wiring diagrams, software related to programming its  
26 control mechanisms, and testing data. (Doc. 168-41, “Miller Decl.” ¶14.) Plaintiff had requested  
27 additional documents on the topic, but none was produced. (*Id.*) During the Chow deposition, Mr.  
28 Chow made statements that he had seen schematics for an Agrigenix fertigation device, which

1 also prompted Plaintiff to again request all documents be produced. (Michaelson Decl. ¶11; Doc.  
2 200-1, Chow Depo. at 19.) Again, nothing was produced. (Michaelson Decl. ¶11.) Thus, it is not  
3 speculative that such documents existed, as testified to by a former employee and as can be  
4 reasonably inferred should exist.

5 Defendants also claim that Plaintiff is not prejudiced because Plaintiff has recovered ESI  
6 from the recovered laptops. However, there is additional evidence to suggest that there is still  
7 missing ESI from the cloud and other laptops. In one such instance, a screenshot of the cloud file  
8 system used by Defendants showed 18 folders, while the Towerton laptop, which contained the  
9 most ESI, only had 3,500 documents in 10 folders. (Michaelson Decl. ¶22, Exhs. 25, 26.) The  
10 laptop given to Mahoney’s mother showed file folders labeled “Agrigenix,” yet the folder(s) were  
11 empty of any ESI. (Beeson Decl. ¶8.) Little to no sales information and communications were  
12 produced, and little to no financial data was produced.

13 Therefore, it is reasonable that Plaintiff would need to engage in some level of speculation  
14 to argue certain documents may exist. There is more than one source suggesting that certain  
15 documents existed.

16 Further, Defendants argue that Plaintiff could have sought to examine the laptops, take  
17 depositions, and “seriously pursue[] discovery before Agrigenix shut its doors, gave away its  
18 laptops, and stopped being able to pay for cloud services.” (Doc. 200 at 7.) And, that Plaintiff did  
19 not inquire about the computers and documents claimed to be missing during depositions.  
20 (Brucker Decl. ¶2.)

21 It does not appear to the Court that Plaintiff delayed in seeking discovery. Discovery  
22 requests were propounded as early as the end of 2019, and Defendants repeatedly assured  
23 Plaintiff that production of ESI was complete. (Michaelson Decl. ¶6.) Plaintiff then independently  
24 discovered that there were previously undisclosed clients of Defendants that had additional  
25 information, which Plaintiff then pursued. (Michaelson Decl. ¶9 (“Agriglobe documents included  
26 general information about the existence and pricing of the new iteration of Agrigenix equipment  
27 (called the “Grow Green Machine”) that Deerpoint had located independently, about Mahoney  
28 and Agrigenix sales efforts and resulting sales revenues, and about substantial dealings with a



1 supplier (Hydrite Chemical) that Mahoney and Agrigenix had not identified in prior disclosures  
2 or production.”.) Additionally, discovery had not yet closed in this case when Plaintiff was  
3 completing depositions, issuing subpoenas of third parties, and corraling and examining laptops,  
4 (of which Plaintiff was unaware until January 2022). (Doc. 165.)<sup>7</sup>

5 Finally, Defendants claim that there is no evidence that the data stored in the cloud is  
6 irretrievable. (Doc. 200 at 16-17.) Defendants claim that language used by Unity IT in  
7 communications regarding data in the cloud prior to its suspension only suggests that the data  
8 **may** have been purged. (*Id.*) However, Defendants also acknowledge that “Unity IT has reported  
9 that it does not currently believe that the data is still available online given the time that has  
10 passed.” (*Id.* at 16.) Even if the language of the Unity communication is not definitive that the  
11 data is irretrievable, Defendants have not yet produced any support that it may still exist. This  
12 motion has been pending before the Court since April 21, 2022, with Defendants’ opposition filed  
13 August 12, 2022. There has been ample time for Defendants to discover if, at the very least, there  
14 is data that could be retrieved. Moreover, the communication between Defendant Mahoney and  
15 Unity IT shows that Defendants could have ascertained whether older ESI remained on the cloud  
16 when the accounts were reactivated in March 2020. (Michaelson Decl., Exh. 17.) Defendants  
17 have not provided the Court with such information.

18 The Court, therefore, finds that Plaintiff is prejudiced by the spoliation of ESI in the cloud  
19 and on the laptops. While it is unclear how much ESI was lost, the Court finds that such  
20 information, such as design, formula, sales information, financial information, email  
21 communications, etc. could have benefited Plaintiff’s claims. “In the Ninth Circuit, spoliation of  
22 evidence raises a presumption that the destroyed evidence goes to the merits of the case, and  
23 further, that such evidence was adverse to the party that destroyed it. *Apple Inc. v. Samsung*  
24 *Elects. Co.*, 888 F. Supp. 2d 976, 993 (N.D. Cal. 2012) (“[T]hough neither Apple nor the Court

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25 <sup>7</sup> At that point, the parties requested a continuance of the Scheduling Order dates. Part of the reason for the  
26 continuance as stated by the parties, “Mahoney and Agrigenix assert that they believed for a period of time that they  
27 had produced all responsive documents that were available to them and that it was not until the middle or end of  
28 January 2022 that they determined that certain sources of documents (in particular, employee laptops) were under  
their control or in the possession of past Agrigenix employees. Defendant Mahoney had thought (and had testified)  
that between January and April 2021, some of the laptops had been sold or donated to charities and could not be  
accessed.” (Doc. 164.)

1 may ever know the contents of any destroyed Samsung emails, the fact that the emails of key  
2 Samsung witnesses were among those destroyed permits the reasonable inference that Apple was  
3 prejudiced by Samsung’s spoliation.”). Here, Plaintiff has shown that the documents they believe  
4 were spoliated may have aided their case. Thus, the Court finds the spoliation resulted in  
5 prejudice to the Plaintiff.

6           2.     Level of Intent

7           Once the Court finds prejudice, the Court may issue sanctions that are no greater than  
8 necessary to cure the prejudice. Fed. R. Civ. P. 37(e)(1). When employing subdivision (e)(2),  
9 courts must find that there was intentional conduct in the failure to preserve ESI. Destruction of  
10 evidence is willful spoliation if the party had “some notice that the documents were potentially  
11 relevant to the litigation before they were destroyed.” *Leon*, 464 F.3d at 958 (quoting *United*  
12 *States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002)). However, a court need not  
13 find that the party acted in bad faith, a finding of conscious disregard is enough for a court to  
14 issue an adverse inference instruction based on spoliation. *Apple, Inc.*, 888 F. Supp. 2d at 998  
15 (The Court need only find that Apple acted with “conscious disregard” of its obligations.); *accord*  
16 *Al Otro Lado, Inc. v. Wolf*, No. 3:17-CV-02366 BAS KSC, 2021 WL 631789, at \*5 (S.D. Cal.  
17 Feb. 18, 2021), report and recommendation adopted sub nom. *Al Otro Lado, Inc. v. Mayorkas*,  
18 No. 19-CV-01344-BAS-MSB, 2021 WL 1170212 (S.D. Cal. Mar. 29, 2021) (“The requisite  
19 culpable state of mind for purposes of spoliation and adverse inference instructions does not  
20 require a finding of bad faith, but only a party’s ‘conscious disregard’ of its preservation  
21 obligations.”)

22           Courts may find intentional spoliation where it is shown, or reasonably inferred, that the  
23 spoliating party acted purposefully to avoid its litigation obligations. *Brewer*, 2019 WL 356657 at  
24 \*10 (pattern of conduct suggests intentional spoliation). Since the relevance of destroyed  
25 evidence cannot be clearly ascertained, a party cannot assume a presumption that the destroyed  
26 evidence was irrelevant. *Id.*; *Laub v. Horbaczewski*, 2020 WL 9066078, at \*6 (C.D. Cal. July 22,  
27 2020) (“Because courts are unable to ascertain precisely what was in a person’s head at the time  
28 spoliation occurred, they must look to circumstantial evidence to determine intent.”). While

1 “there need not be a ‘smoking gun’ to prove intent . . . there must be evidence of ‘a serious and  
2 specific sort of culpability’ regarding the loss of the relevant ESI.” *Muhammad v. Jenkins*, No.  
3 CV 19-7970 JAK (PVC), 2022 WL 4292341, at \*6 (C.D. Cal. Aug. 26, 2022), report and  
4 recommendation adopted, No. CV 19-7970 JAK (PVC), 2022 WL 4292308 (C.D. Cal. Sept. 15,  
5 2022); *Mkrtchyan v. Sacramento Cty.*, No. 2:17-cv-2366 TLN KJN, 2021 WL5284322, at \*10  
6 (E.D. Cal. Nov. 12, 2021) (It is proper to “consider the timing of the document loss when  
7 evaluating intent.” (internal citations omitted).)

8 Plaintiff argues that Defendants acted with the intent to deprive Plaintiff of the electronic  
9 information. Fed. R. Civ. P. 37(e)(2). (Doc. 168 at 24–25; Doc. 210 at 9-14.) Plaintiff argues:  
10 “Defendants knew their obligations to preserve ESI,” “spoliation began shortly after Defendants  
11 were served with discovery,” “Mahoney’s ‘understanding’ and ‘sincere’ belief that cloud data  
12 would survive termination of licenses is unfounded and not credible,” there are three or more  
13 computers that are entirely unaccounted for, including the two that Mahoney himself used, and  
14 “blaming others does not negate Defendants’ intent.” (Doc. 210 at 9-14.)

15 Defendants counter that there was no intent to deprive, and that Defendants did not act in  
16 bad faith. (Doc. 200 at 18–21.) First, as to the cloud data, Defendants argue that they believed that  
17 the request that Unity IT place a litigation hold on its records was sufficient to preserve the data  
18 in the cloud. (*Id.* at 15.) Defendants agree that they were warned that services would be  
19 terminated. (*Id.*) However, Defendants claim they did not understand that the information in the  
20 cloud would be lost and unrecoverable. Defendants also claim that Plaintiff misrepresents  
21 communications from Unity IT that it was clear that Defendants would lose access to the data.  
22 (*Id.* at 16-17.)

23 The Court finds that it is reasonable to infer that Defendants intended to deprive Plaintiff  
24 of the ESI in the cloud. Defendants had access to the data in the cloud from August 2018 to  
25 November 2019. (Michaelson Decl. ¶14a–c.) The parties began discovery in October 2019. (Doc.  
26 168 at 10.) Based on the arguments and evidence raised in this motion, it does not appear that all  
27 the data stored in the cloud was disclosed to Plaintiff. Unity IT notified Defendants that cloud  
28 services would be terminated in about November or December 2019, Defendants’ responses to

1 Plaintiff's discovery were provided in November 2019—at essentially the same time Defendants  
2 were failing to maintain the cloud storage license through Unity IT. Defendants took no action to  
3 download the cloud ESI. Mr. Beeson states that Agrigenix could have downloaded the ESI.  
4 (Beeson Decl. ¶3 (“[A]t any point before the licenses were disconnected, Agrigenix could have  
5 downloaded the data stored in the cloud and archived it locally.”).)

6 Defendants had their Unity IT licenses suspended twice for failure to pay, both times with  
7 ample warning. (Michaelson Decl., Exhs. 9–16.) Defendants do not dispute that they had notice  
8 the licenses would be suspended. The first time, it is possible that Defendants were unaware of  
9 the consequences of the lapse, i.e., whether the data stored in the cloud would or would not be  
10 purged. Defendants claim that prior to reactivating Unity IT's services and licenses in February  
11 2020, it was not clear if the data had been purged. (*Id.*, Exh. 17.) The language stated in the email  
12 was that the data **may** have been purged. The email referenced also states “the accounts are active  
13 now and you can check” if the old emails remained in the cloud. (*Id.*) Defendants do not explain  
14 if the request to place a litigation hold on certain email accounts held up to the first suspension of  
15 the licenses, or if the emails remained in the cloud. Defendants do not present any evidence of  
16 steps Defendants took to ensure the data remained viable after the reactivation of the Unity  
17 account. Mahoney states that he sincerely believed the data still existed in the cloud, but he does  
18 not state any steps he took to ensure the continued viability of that data, which he knew must be  
19 preserved during the litigation. After the second instance of deactivation, Defendants would have  
20 been aware of the consequences and whether the data would be recoverable based on their  
21 experience with the first deactivation. Again, the Court is not informed of any steps taken to  
22 ensure the viability of the Unity cloud data. Thus, the Court cannot accept that Defendants were  
23 unaware that data would likely be purged when their licenses were again suspended. This  
24 disregard leaves the Court to believe that deprivation of the information was intentional.

25 Moreso, Defendants could have at any time before either deactivation, downloaded and  
26 saved the data on a local computer or hard drive. (*See* Beeson Decl. ¶ 3.) Defendants did not have  
27 a local back up and did not attempt to preserve the data by downloading it after several warnings  
28 that services would be suspended. Again, this might be excusable in the first instance, but when

1 licenses were suspended a second time, Defendants could have and should have preserved the  
2 data by downloading it, but did not. At best, Defendants acted with conscious disregard for the  
3 consequences of the second deactivation by failing to locally save the data. At worst, Defendants  
4 allowed the services to lapse knowing the results would be a purge of the data.

5 Second, as to the laptops, Defendants claim that they were under no duty to maintain ESI  
6 on the laptops when it was also stored on the cloud. Regardless of the cloud, Defendants allowed  
7 departing employees to take their laptops with them when they left from mid-2019 to late-2020.  
8 (Mahoney Decl. ¶20.) This was during the midst of discovery, and Defendants appear to have  
9 taken no steps to ensure the ESI relevant to this litigation was preserved. Defendants claim they  
10 did not take any steps to wipe the laptops before employees took them and are not responsible for  
11 employees' conduct thereafter. (*Id.*) The Court agrees with Defendants that Defendants are not  
12 required under the spoliation doctrine to maintain identical copies. *See Masterobjects, Inc. v.*  
13 *Amazon*, 2022 U.S. Dist. LEXIS 44052 at \*13 (N.D. Cal. Mar. 13, 2022). However, Defendants  
14 should have taken steps, but did not, to ensure that the laptop ESI was preserved, either on the  
15 cloud or otherwise, before allowing the computers to be taken or given away.<sup>8</sup> The Court agrees  
16 with Plaintiff's argument that by allowing the computers to leave Defendants' control, and not  
17 preserving the data or ensuring that it existed in the cloud, and by giving the computers to  
18 departing employees over whom they no longer had authority, Defendants affirmatively failed to  
19 preserve. (Doc. 210 at 13.) Again, the Court need not find the party acted in bad faith, but only  
20 that it acted with conscious disregard in preserving ESI. *See Apple, Inc.*, 888 F. Supp. 2d at 998.

21 Defendants also argue that they are not responsible for former employees' actions  
22 regarding the laptops. Defendants argue they are not responsible for any "wiping" of data on the  
23 hard drives that occurred after the laptops were taken by employees. Defendants claim that (1) the  
24 Wilson laptop was not encrypted by Defendants, but by Wilson after he left Agrigenix, and  
25 (2) that the hard drive on the Chow laptop was not wiped but "cleaned" and even so was not

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26 <sup>8</sup> During the time of both lapses of the Unity licenses, Defendants were represented by competent counsel in this  
27 case. There is no evidence presented by Defendants that they consulted with counsel regarding either of the Unity  
28 lapses, Defendants' duty to preserve data, or any other information communicated to counsel about ESI. While such  
communication is subject to attorney-client privilege, Defendants here are faced with a sanctions motion and the  
Court would anticipate if any consultation had occurred, some mention of that evidence would have been presented.

1 wiped by Defendants. (Doc. 200 at 14; Mahoney Decl. ¶¶21–23; Chow Decl. ¶8.) Defendants  
2 support this claim by again saying they were under no obligation to maintain identical files, and  
3 they sincerely believed all files would be backed up on the cloud.

4 This argument again fails because it was Defendants’ duty to preserve the data before it  
5 left Defendants’ custody and control. The Court finds that it was Defendants’ conscious  
6 disregard in letting the laptops leave their custody and control, knowing that Defendants had  
7 potentially lapsed cloud data. Defendants did not take steps to ensure such cloud data in fact  
8 remained viable before they let the laptops leave their custody and control.

9 The Court’s view of Defendants’ ESI conduct is also colored by their lack of production  
10 and by the bits and pieces of ESI Plaintiff has been able to sleuth forensically. Plaintiff has  
11 presented evidence that there were many documents that were not disclosed or produced by  
12 Defendants. Plaintiff independently uncovered documents from third parties which should have  
13 been produced by Defendants as responsive to document requests. For instance, Plaintiff  
14 independently discovered Agriglobe had done business with Agrigenix and the documents  
15 produced by Agriglobe were not produced by Defendants, but were responsive to multiple  
16 discovery requests. The documents produced contained information about a new version of  
17 Defendant Agrigenix’s Green Machine, sales efforts and resulting revenues, and dealings with a  
18 previously undisclosed supplier, Hydrite. Documents produced from Hydrite, but not by  
19 Defendants, contained information relevant to Plaintiff’s claims of trade secret misappropriation,  
20 and breach of contract, such as using Deerpoint’s fertilizer formulas. Plaintiff subpoenaed Fresno  
21 First Bank which produced documents that included information not previously disclosed about  
22 transactions between Agrigenix and several third parties, such as GAR Bennet and Custom Ag,  
23 among other customers and suppliers. The lack of full production of relevant discovery of  
24 evidence and documents which Plaintiff independently located forces the Court to infer intent to  
25 spoliage ESI by Defendants.

26 The Court wishes to emphasize that it is not solely the lapse of the Unity ESI that forces  
27 the conclusion Defendants acted intentionally to spoliage ESI. The Court infers intent to spoliage  
28 ESI from the totality of Defendants’ conduct, including the lack of production, the laptops, and

1 the third-party information not disclosed. Plaintiff has presented bits and pieces of ESI it has  
2 uncovered in its forensic analysis, as mentioned *infra*. It is not a large stretch for the Court to  
3 make, on this record, that failure to produce documents and Defendants' actions in not disclosing  
4 or producing those documents was intentional. The Court finds that Defendants intentionally  
5 sought to avoid producing responsive documents and other ESI to Plaintiff. In sum, the Court  
6 finds that Defendants acted intentionally and with a conscious disregard of its obligations in  
7 failing to preserve and produce ESI from the cloud and the laptops.

#### 8 **D. Sanctions**

9 Where the requisite intent is found, the Court may impose sanctions. In determining  
10 which sanctions to impose courts consider the following factors: "the degree of fault of the party  
11 who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party;  
12 and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing  
13 party." *Apple, Inc.*, 888 F. Supp. 2d at 992 (quoting *Nursing Home Pension Fund v. Oracle*  
14 *Corp.*, 254 F.R.D. 559, 563 (N.D. Cal. Sept. 2, 2008)). It is not necessary to find bad faith for a  
15 court to impose an adverse inference sanction, however, a party's motive or degree of fault in the  
16 spoliation is relevant to determining what sanctions should be imposed. *Apple, Inc.*, 888 F. Supp.  
17 2d at 992. Courts should impose the least arduous sanction that corresponds to the willfulness of  
18 the destruction and prejudice to the victim party. *Id.* Ultimately, the determination of what  
19 sanctions, if any, should be imposed must be made on a case-by-case basis. *Id.*

20 Here, Plaintiff seeks sanctions of:

- 21 • Costs and fees attributable to Defendants' spoliation. (Doc. 168 at 25.)
- 22 • Findings of fact to cure prejudice Plaintiff has suffered from loss of evidence that once  
23 existed. (*Id.* at 27.)
- 24 • Instruction to the jury that destroyed ESI would have been favorable to Deerpoint and  
25 unfavorable to Mahoney and Agrigenix. (*Id.* at 27-28.)
- 26 • Entry of default judgment as to several Deerpoint causes. (*Id.*)

##### 27 1. Monetary Sanctions

28 Upon a finding of prejudice to the party deprived of the information, a court "may order

1 measures no greater than necessary to cure the prejudice.” Fed. R. Civ. P. 37(e)(1). “The range of  
2 such measures is quite broad if they are necessary for this purpose, and “[m]uch is entrusted to  
3 the court’s discretion.” Fed. R. Civ. P. 37(e)(1), Advisory Committee’s Note to 2015 amendment;  
4 *see, e.g., Sec. Alarm Fin. Enters., L.P. v. Alarm Prot. Tech., LLC*, No. 3:13-cv-00102-SLG, 2016  
5 WL 7115911 (D. Alaska Dec. 6, 2016) (awarding reasonable attorney’s fees incurred in bringing  
6 a discovery motion after determining the moving party was prejudiced by spoliation). In addition,  
7 monetary sanctions also are available under Rule 37(e)(2). Although Rule 37(e)(2) specifies three  
8 types of sanctions that may be imposed upon a finding that a party acted with the intent to deprive  
9 another of the use of information in litigation, these options are not exclusive. Instead, the Court  
10 may order any remedy that “fit[s] the wrong.” Fed. R. Civ. P. 37(e), Advisory Committee’s Note  
11 to 2015 amendment. On this basis, the Court concludes that monetary sanctions are available  
12 under Rule 37(e)(2). *See RG Abrams Ins. v. L. Offs. of C.R. Abrams*, No. 2:21-CV-00194  
13 FLAMAAX, 2022 WL 3133293, at \*45 (C.D. Cal. July 1, 2022).

14 a. *Reasonable Fees and Costs*

15 As detailed above, the Court has found that Plaintiff has been prejudiced by the spoliation  
16 of ESI from various laptops and from Unity IT. The Court thus finds an award of attorneys’ fees  
17 and costs is appropriate. Accordingly, Plaintiff is entitled to monetary sanctions under Rule  
18 37(e)(1). Plaintiff requests they be awarded costs and fees of incurred (1) in performing forensic  
19 analysis on the spoliated laptops, (2) in depositions related to the spoliated evidence, (3) in  
20 issuing subpoenas to third parties, and (4) in preparation of this motion. (Doc. 168 at 25-27.)  
21 Plaintiff seeks a total of \$133,002.26 in costs and fees. (Doc. 168-38.)

22 When an award of attorneys’ fees is authorized, the court must calculate the proper  
23 amount of the award to ensure that it is reasonable. *Hensley v. Eckerhart*, 461 U.S. 424, 433–34  
24 (1983). To determine a reasonable attorneys’ fee, a “Lodestar” is used. The starting point is the  
25 number of hours reasonably expended multiplied by a reasonable hourly rate. *Hensley*, 461 U.S.  
26 at 433. The Court, in considering what constitutes a reasonable hourly rate, looks to the prevailing  
27 market rate in the relevant community. *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The “relevant  
28 community” for the purposes of the lodestar calculation is generally the forum in which the



1 district court sits. *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1205 (9th Cir. 2013). The  
2 relevant community here is the Fresno Division of the Eastern District of California.

3 In the Fresno Division of the Eastern District of California, attorneys with twenty or more  
4 years of experience are awarded \$350.00 to \$400.00 per hour. *See, e.g., Leprino Foods Co. v.*  
5 *JND Thomas Co., Inc.*, No. 1:16-cv-01181-LJO-SAB, 2017 WL 128502, at \*13 (E.D. Cal. Jan.  
6 12, 2017), report and recommendation adopted in part, No. 1:16-cv-01181-LJO-SAB, 2017 WL  
7 432480 (E.D. Cal. Feb. 1, 2017) (finding \$400.00 per hour a reasonable hourly rate for attorney  
8 with more than thirty years of experience); *Sanchez v. Frito-Lay, Inc.*, No. 1:14-CV-00797 AWI-  
9 MJS, 2015 WL 4662636, at \*18 (E.D. Cal. Aug. 5, 2015), report and recommendation adopted,  
10 No. 1:14-CV-797-AWI-MJS, 2015 WL 5138101 (E.D. Cal. Aug. 26, 2015) (finding reasonable  
11 rate for attorney with twenty years of experience was \$350 per hour in a wage and hour class  
12 action). Generally, “\$300 is the upper range for competent attorneys with approximately a decade  
13 of experience.” *Barkett v. Sentosa Props. LLC*, No. 1:14-CV-01698-LJO, 2015 WL 5797828, at  
14 \*5 (E.D. Cal. Sept. 30, 2015) (O’Neill, J.) (citing *Silvester v. Harris*, No. 1:11-CV-2137 AWI  
15 SAB, 2014 WL 7239371, at \*4 (E.D. Cal. Dec. 17, 2014). For attorneys with “less than ten years  
16 of experience . . . the accepted range is between \$175 and \$300 per hour.” *Silvester*, 2014 WL  
17 7239371 at \*4 (citing *Willis v. City of Fresno*, 1:09-cv-01766-BAM, 2014 WL 3563310 (E.D.  
18 Cal. July 17, 2014).

19 Recent cases have maintained the same hourly rates. *Accord Langer v. Cooke City*  
20 *Raceway, Inc.*, No. 1:21-CV-01488 JLT BAK, 2022 WL 2966172, at \*16 (E.D. Cal. July 27,  
21 2022), report and recommendation adopted, No. 1:21-CV-01488 JLT BAK, 2022 WL 3348015  
22 (E.D. Cal. Aug. 12, 2022); *Webb v. Cty. of Stanislaus*, No. 1:19-CV-01716 DAD EPG, 2022 WL  
23 446050, at \*6 (E.D. Cal. Feb. 14, 2022) (In the Fresno Division of the Eastern District of  
24 California, generally, attorneys with twenty or more years of experience are awarded \$325.00 to  
25 \$400.00 per hour, attorneys with ten to twenty years of experience are awarded \$250.00 to  
26 \$325.00, attorneys with five to ten years of experience are awarded \$225.00 to \$250.00, and less  
27 than \$200.00 for attorneys with less than five years of experience.) Finally, “[t]he current  
28 reasonable hourly rate for paralegal work in the Fresno Division ranges from \$75 to \$150,

1 depending on experience.” *Silvester*, 2014 WL 7239371, at \*4 (citations omitted); *accord Langer*,  
2 2022 WL 2966172, at \*16; *cf. Franco v. Ruiz Food Prods., Inc.*, No. 1:10–cv–02354–SKO, 2012  
3 WL 5941801, at \*20 (E.D. Cal. Nov. 27, 2012) (approving a rate of “\$100 per hour” for “legal  
4 assistants”).

5 Here, Plaintiff provides the Court with the following breakdown of rates and hours  
6 expended:<sup>9</sup>

- 7 • Partner Jon Michaelson: rate of \$1,200.00 per hour; expended 31 hours for a total of  
8 \$37,200 in fees.
- 9 • Senior associate Benjamin Kleinman: rate of \$825.00 per hour; expended 63 hours for  
10 a total of \$51,975 in fees.
- 11 • Junior associate Sarah Glendon: rate of \$500.00 per hour; expended 3.5 hours for a  
12 total of \$1,750 in fees.
- 13 • Legal assistants:<sup>10</sup> rate between \$300 and \$395 per hour; expended 9 hours.

14 (Doc. 168-38.) This results in a total of \$90,925 in attorney fees, excluding fees attributed to legal  
15 assistants.

16 While Plaintiff does not provide the experience of the attorneys, the Court takes judicial  
17 notice of the State Bar of California website. Jon Michaelson was admitted to practice in  
18 California in 1978 and therefore, has more than 40 years of experience. Given this information,  
19 the Court finds a rate of \$400 per hour to be reasonable for the services of Mr. Michaelson.

20 The Court takes judicial notice of the State Bar of California website, which shows that  
21 Benjamin Kleinman was admitted to practice in California in 2008 and has more than 10 years of  
22 experience. Given this information, the Court finds a rate of \$350 per hour to be reasonable for  
23 the services of Mr. Kleinman. The Court takes judicial notice of the State Bar of California  
24 website, which shows that Sarah Glendon was admitted to practice in California in 2019 and has  
25 just under 3 years of experience. Given this information, the Court finds a rate of \$200 per hour to

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26 <sup>9</sup> All hours and rates are from Exhibit 37 of the Declaration of Jon Michaelson. (Doc. 168-38.)

27 <sup>10</sup> Plaintiff did not provide an exact hourly rate for legal assistants and included fees and some expenses attributed to  
28 legal assistants’ work. Therefore, the Court cannot ascertain an average hourly rate or how much of the fees are  
specific to the legal assistants. However, the Court is able to determine those legal assistants expended 9 hours of  
work based on the information in Exhibit 37. (*See* Doc. 168-38.)

1 be reasonable for the services of Ms. Glendon. As for the legal assistants, courts in this district  
2 have approved rates of \$100 per hour.

3 The Court must also consider the reasonable number of hours spent. Defendants  
4 challenge the amount of fees that Plaintiff seeks for two depositions which Plaintiff claims were  
5 rendered “worthless,” and Defendants argue that counsel’s assertion of what took place “does not  
6 make it so.” (Doc. 200 at 25.) Defendants also argue that 88 hours allegedly spent in preparing  
7 this motion is excessive.

8 “The party seeking an award of fees should submit evidence supporting the hours  
9 worked.” *Hensley*, 461 U.S. at 434. “The district court . . . should exclude . . . hours that were not  
10 ‘reasonably expended’ ” and “hours that are excessive, redundant, or otherwise unnecessary.” *Id.*  
11 Ultimately, “the [opposing party] bears the burden of providing specific evidence to challenge the  
12 accuracy and reasonableness of the hours charged.” *McGrath v. Cnty. of Nevada*, 67 F.3d 248,  
13 255 (9th Cir. 1995); *Blum v. Stenson*, 465 U.S. 886, 892 n.5 (1984), *Gates v. Gomez*, 60 F.3d 525,  
14 534–35 (9th Cir. 1995)).

15 Defendants challenge Plaintiff’s claims for fees and costs, \$21,558.10, for the “worthless”  
16 depositions of deponent Chow and Agrigenix Rule 30(b)(b) designee. (See Doc. 168-38 at 2.)  
17 The Court agrees with Defendants. The depositions are not worthless, even if Plaintiff did not  
18 obtain the information that it desired. Accordingly, the fees and costs requested by Plaintiff for  
19 these depositions will be disallowed.

20 Defendants also challenge the number of hours claimed by Plaintiff for preparation for the  
21 motion for sanctions. Plaintiff claims a total of 88 hours to prepare the motion with fees of  
22 \$78,270.00 (which fees will be reduced by the appropriate market rate). At first blush, 88 hours  
23 for a single motion may appear excessive. (Doc. 168-38 at 3.) Mr. Michaelson claims 22 hours,  
24 the senior associate claims 60 hours, and the legal assistant claims 6 hours. But both the motion  
25 and the declaration of Michaelson (and Exhibits) provided the Court with considered and careful  
26 recounting of Plaintiff’s investigation and struggles with uncovering the ESI information that  
27 should and could have been produced. The Court does not find the hours claimed, in *this*  
28 particular motion, excessive.

1 Defendants do not challenge the time spent for subpoenaing third parties. Therefore, that  
2 time will be allowed, subject to a reasonable rate.

3 Defendants assert it is unfair to assess Mahoney with fees and costs, as the only viable  
4 payor, since Agrigenix is now defunct. (Doc. 200 at 26-27.) The Court does not find assessment  
5 of fees and costs inappropriate, or inappropriate against a responsible Defendant. Mahoney was  
6 the sole owner and sole manager of Agrigenix. (Doc. 168-1 ¶2; Doc. 200-1, Brucker Decl., Exh. 4  
7 “Mahoney Depo.” at 21. (Mahoney was the owner of the company).) Mahoney testified that he  
8 “sold or donated” the laptops in the first quarter of 2021, during the course of this litigation.  
9 (Mahoney Depo. at 11.) Later, in his declaration in opposition to this motion, Mahoney states:  
10 “Agrigenix provided the laptops to its departing employees as they left on a staggered basis,” in  
11 mid-2019 and late-2020, again while this litigation was ongoing. (Mahoney Decl. ¶20.) Assuming  
12 these two statements are not in conflict, it remained Mahoney’s obligation to ensure compliance  
13 with his and Agrigenix’s duty to preserve ESI. It is clear to the Court that he did not do so, and it  
14 appears to the Court he may have been actively shielding data, as explained *infra*.

15 Using the rates that are reasonable for the district and reasonable hours expended by  
16 counsel for Plaintiff, the Court will award \$32,500<sup>11</sup> in attorney fees. The Court finds this amount  
17 reasonable based on the hours expended on this case.

18 b. *Expert Fees*

19 Plaintiff argues that Plaintiff should be awarded all fees and costs incurred by the forensic  
20 expert for the expense of forensic analysis and attorneys’ fees for identifying and engaging the  
21 forensic service and for overseeing the work of the forensic examiner. (Doc. 168 at 25-26.) This  
22 amount is at least \$26,746.41.

23 Defendants argue that Plaintiff’s counsel merely cites to a chart replete with hearsay and  
24 information that violates the secondary evidence rule (e.g., stating expert fees per invoices, but

25 \_\_\_\_\_  
26 <sup>11</sup> For Mr. Michaelson, partner, at \$400 per hour for 3 hours for Rule 45 subpoenas and 22 hours for the motion for  
27 sanctions is a total of 25 hours at \$400 per hour = \$10,000. For Mr. Kleinman, senior associate, at \$350 per hour for  
28 60 hours for the motion for sanctions is 60 hours at \$350 per hour = \$21,000. For Ms. Glendon, junior associate, at  
\$200 per hour for three hours for Rule 45 subpoenas is a total of 3 hours at \$200 per hour = \$600. For legal  
assistants, at \$100 per hour for three hours for Rule 45 subpoenas and six hours for the motion for sanctions is a total  
of nine hours at \$100 per hour = \$900. Total fees awarded are \$32,500.

1 not providing invoices). (Doc. 168-38; Doc. 200 at 24.)

2 The Court agrees with Defendants. The Court requires Plaintiff to provide supplemental  
3 documentation as to the expert costs associated with the motion in their attempts to recover  
4 spoliated evidence.

5 2. Adverse Findings of Fact and Adverse Instructions

6 Courts employ a three-part test in *Zubulake* to determine whether an adverse inference  
7 spoliation instruction is warranted. *Apple, Inc.*, 881 F. Supp. 2d at 1138; *see Zubulake v. UBS*  
8 *Warburg LLC.*, 220 F.R.D. 212, 220 (S.D.N.Y. Oct. 22, 2003)). “A party seeking an adverse  
9 inference instruction (or other sanctions) based on the spoliation of evidence must establish the  
10 following elements: (1) that the party having control over the evidence had an obligation to  
11 preserve it at the time it was destroyed; (2) that the records were destroyed with a ‘culpable state  
12 of mind’ and (3) that the evidence was ‘relevant’ to the party’s claim or defense such that a  
13 reasonable trier of fact could find that it would support that claim or defense.” *Apple, Inc.*, 881 F.  
14 Supp. 2d at 1138 (quoting *Zubulake v. UBS Warburg LLC.*, 220 F.R.D. 212, 220 (S.D.N.Y. Oct.  
15 22, 2003)) (*Zubulake* factors).

16 As illustrated above, Plaintiff established the first two elements of the *Zubulake* factors.  
17 Defendants admit that there was a duty to preserve the data on either the laptops or the cloud.  
18 Further, this Court has found that Defendants acted intentionally to deprive Plaintiff of the  
19 spoliated ESI. As to the third factor, there is a presumption that spoliated evidence is relevant to  
20 the non-spoiling party’s claims.

21 Here, neither Defendants nor Plaintiff have identified how much ESI is actually gone from  
22 the cloud data or laptops. Plaintiff believes that there were documents such as the price  
23 comparison sheet that was not only relevant but also critical to prove that Defendants were in  
24 possession of confidential, proprietary, and trade secret information. Further, Defendant Mahoney  
25 has already acknowledged that he was in possession of at least one email that contained such  
26 information. (Doc. 168 at 9.) Document productions from third parties including Agriglobe,  
27 Hydrite, and GAR Bennet also suggest there may be documents that support Plaintiff’s claims  
28 that Defendants were in possession of such information and may have used it to conduct business.

1 (See Michaelson Decl. ¶10.) Productions from Agriglobe show a similar product to the White  
2 Box created by Plaintiff. (See Michaelson Decl. ¶9, Exh. 6.) The creation of sophisticated  
3 technology, in short order after Agrigenix’s initial start-up, would only be possible with  
4 supporting technical documentation/ESI, which was not produced. Documents from Hydrite,  
5 none of which were produced by Defendants, show chemical blending strategies used by Plaintiff.  
6 (Michaelson Decl. ¶10.) Documents from GAR Bennett show the sale of components of that  
7 technology even after litigation in this matter began. (Michaelson Decl. ¶17, Exh. 23.)

8 Plaintiff requests that the Court establish certain facts as conclusive, with the first being a  
9 rebuttable presumption:

- 10 1. That when he left the employ of Deerpoint in October 2017, Mr. Mahoney possessed  
11 and retained documents that contained confidential, proprietary, and trade secret  
12 information belonging to Deerpoint with respect to the formulation, manufacture, cost,  
13 and pricing of Deerpoint products and with respect to Deerpoint customers and their  
14 needs.
- 15 2. Mr. Mahoney disclosed the above documents containing Deerpoint information to  
16 Agrigenix (through others who became or were Agrigenix employees) both before and  
17 after Agrigenix was formed.
- 18 3. Mr. Mahoney used documents containing the above Deerpoint information to advance  
19 the business of Agrigenix both before and after January 8, 2018, to the detriment of  
20 Deerpoint.
- 21 4. Agrigenix (through Mr. Mahoney and through its other employees) used documents  
22 containing the above Deerpoint information to advance the business of Agrigenix both  
23 before and after January 8, 2018, to the detriment of Deerpoint.
- 24 5. From and after no later than March 2018, when Chow joined Agrigenix, Mahoney and  
25 Agrigenix had in their possession documents containing confidential, proprietary, and  
26 trade secret information related to Deerpoint’s White Box technology.
- 27 6. Agrigenix, at the direction of Mahoney, used documents containing confidential,  
28 proprietary, and trade secret information obtained with respect to Deerpoint White  
Box technology to create and offer for sale their “Green Machine” fertigation  
equipment, to the detriment of Deerpoint.

(Doc. 168 at 27–28.)

Adverse inference instructions range in their level of severity. *Apple, Inc.*, 881 F. Supp. 2d  
at 1150. The harshest type of adverse inference instruction directs the jury to deem certain facts

1 admitted and accepted as true. *Id.* When a spoliating party has acted willfully or recklessly a  
2 lesser adverse inference instruction imposes a mandatory presumption. *Id.* The least harsh  
3 instruction allows the jury to presume that lost evidence is both relevant and favorable to the  
4 innocent party. *Id.* If the jury makes the presumption, “the spoliating party’s rebuttal evidence  
5 must then be considered by the jury, which must then decide whether to draw an adverse  
6 inference against the spoliating party.” *Id.* The Ninth Circuit has held that a trial court’s “adverse  
7 inference sanction should be carefully fashioned to deny the wrongdoer the fruits of its  
8 misconduct yet not interfere with the party’s right to produce other relevant evidence.” *In re*  
9 *Oracle Corp. Securities Litig.*, 627 F.3d 376, 386 (9th Cir. 2010).

10 To truly right the wrong Defendants have inflicted, Plaintiff is entitled to have some kind  
11 of curative instructions given at trial. Simply, Plaintiff has been obstructed from proving its case.  
12 Because the undersigned will not be the trial judge in this case, the precise contours of the  
13 instructions will be left to the trial judge. A magistrate judge’s specific findings warranted  
14 adverse inference jury instructions, but “[t]he precise contours of such instructions must be left to  
15 the presiding judge who will determine the universe of jury instructions ultimately to be given in  
16 this action.” *Apple Inc.*, 888 F. Supp. 2d at 992; *Doe v. Bridges to Recovery, LLC*, No. 2:20-CV-  
17 348-SVW, 2021 WL 4690830, at \*16 (C.D. Cal. May 19, 2021) (The precise wording of the  
18 instruction will be determined along with the remainder of the jury instructions).

19 However, based on the record before the undersigned, and regardless of the exact  
20 wording, the Court recommends the contours of the instructions should be along the following  
21 lines: First, that the instruction(s) acknowledge that Agrigenix and Mahoney had a duty to  
22 preserve evidence relating to Plaintiff’s complaint. Second, the instruction(s) should inform the  
23 jury that Agrigenix and Mahoney failed to preserve and produce electronically stored  
24 information, and this is known as the “spoliation of evidence.” Third, the instruction(s) should  
25 instruct the jury that as a result of this spoliation of evidence, the jury should presume that the  
26 contents of the electronically stored information would have been favorable to Plaintiff and  
27 unfavorable to Defendants. Fourth, the instruction(s) should specifically instruct the jury on what  
28 the absent evidence would show: (1) that the spoliated evidence contained confidential,

1 proprietary, and trade secret information belonging to Deerpoint with respect to the formulation,  
2 manufacture, cost, and pricing of Deerpoint products and with respect to Deerpoint customers;  
3 and at the trial judge's discretion, the following: (2) Mahoney and Agrigenix used documents  
4 containing Deerpoint's confidential, proprietary, and trade secret information to advance the  
5 business of Agrigenix to the detriment of Deerpoint.

6 The instruction(s) preserve the Defendants' right to produce other relevant evidence. The  
7 contours of the instruction(s) does not preclude Mahoney and Agrigenix, and others, from  
8 testifying as to their own actions for development of equipment, formulas and the like for  
9 Agrigenix, subject to cross-examination regarding the lack of ESI produced on these topics.

### 10 3. Terminating Sanctions

11 Courts may use dismissal as a sanction where a party has deliberately engaged in  
12 deceptive practices that "undermine the integrity of judicial proceedings" because courts have an  
13 inherent power to dismiss actions where parties engage in conduct that is wholly inconsistent with  
14 the "orderly administration of justice." *Leon*, 464 F.3d at 958 (citing *Anheuser-Busch, Inc., v.*  
15 *Natural Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995)). Prior to imposing such severe  
16 sanctions, a court should consider the following factors: "(1) the public's interest in expeditious  
17 resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the  
18 party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and  
19 (5) the availability of less drastic sanctions." *Leon*, 446 F.3d at 958 (quoting *Anheuser-Busch*, 69  
20 F.3d at 348). A court need not make findings specific to each factor, however, there must be a  
21 finding of "willfulness, fault, or bad faith" for dismissal to be proper. *Id.*

22 Plaintiff requests that the Court enter default judgment against Agrigenix as to the second  
23 cause of action and against Defendant Mahoney as to the fourth and fifth causes of action. The  
24 Court does not find that such a judgment should be entered. The Court has not found that  
25 Defendants acted to such a degree that claim dispositive sanctions are warranted. While  
26 Defendants did act intentionally and with conscious disregard for the preservation of documents,  
27 there is no finding of bad faith that would warrant such an extreme sanction.

28 ///



1 **CONCLUSION AND ORDER**

2 For the reasons stated, the Court HEREBY ORDERS as follows:

- 3 1. Plaintiff’s Motion for Sanctions for failure to preserve ESI in violation of Federal Rule of  
4 Civil Procedure 37(e), (Doc. 168), is GRANTED;
- 5 2. Plaintiff is awarded THIRTY-TWO THOUSAND FIVE HUNDRED DOLLARS  
6 (\$32,500.00) in attorney fees, joint and several, against Defendants Agrigenix and  
7 Mahoney;
- 8 3. Plaintiff shall file supplemental briefing as to the expert costs associated with this motion  
9 and the spoliated evidence within fourteen (14) days of this order. Defendants may file a  
10 reply within fourteen (14) days thereafter;
- 11 4. Plaintiff’s request for adverse findings of fact and jury instructions is GRANTED IN  
12 PART, as identified above, and shall be given at a subsequent trial; and
- 13 5. Plaintiff’s request that default judgment be entered at to Plaintiff’s second, fourth, and  
14 fifth causes of action is DENIED.

15 IT IS SO ORDERED.

16 Dated: October 31, 2022

17 /s/ Barbara A. McAuliffe  
18 UNITED STATES MAGISTRATE JUDGE