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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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ATPAC, INC., a California corporation,

Plaintiff,

v.

APTITUDE SOLUTIONS, INC., a Florida corporation, COUNTY OF NEVADA, a California County, and GREGORY J. DIAZ, an individual,

Defendants.

NO. CIV. 2:10-294 WBS JFM

MEMORANDUM AND ORDER RE:
PLAINTIFF'S MOTION FOR
TERMINATING SANCTIONS AND
DEFENDANTS' MOTION FOR
APPOINTMENT OF SPECIAL MASTER
AND STAY

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Plaintiff AtPac, Inc., filed this action against defendants Aptitude Solutions, Inc. ("Aptitude"), County of Nevada, and Gregory J. Diaz, alleging breach of contract, misappropriation of trade secrets under the California Uniform Trade Secrets Act ("CUTSA"), Cal. Civ. Code §§ 3426-3426.11, and

1 copyright infringement.¹ Plaintiff now moves for terminating
2 sanctions against defendants, and defendants move for appointment
3 of a special master and a stay of the non-copyright claims.

4 I. Evidentiary Objections

5 The parties have filed numerous evidentiary objections.
6 "While the Federal Rules of Evidence do not necessarily apply in
7 the context of a motion for sanctions, evidence relied upon must,
8 at a minimum, bear indicia of reliability." Sentis Grp., Inc.,
9 Coral Grp., Inc. v. Shell Oil Co., 559 F.3d 888, 901 (8th Cir.
10 2009); see Jensen v. Phillips Screw Co., 546 F.3d 59, 66 n.5 (1st
11 Cir. 2008). Similarly, evidentiary objections are inappropriate
12 on a motion to stay. See Network Appliance Inc. v. Sun Microsystems.
13 Inc., No. C-07-06053, 2008 WL 2168917, at *6 (N.D. Cal. May 23,
14 2008) (taking evidentiary objections into account in assessing
15 the weight of the evidence and disregarding any legal argument or
16 conclusions, but overruling objections on motion to stay). The
17 court can find no cases in which evidentiary objections were made
18 on a motion for appointment of a special master, but it is clear
19 in comparing this type of motion to other pretrial, non-
20 dispositive motions that evidence need not be submitted in a form
21 that would be admissible at trial.

22 The court is satisfied that the evidence upon which it
23 relies² bears indicia of reliability, and thus the parties'

25 ¹ Plaintiff's fourth claim, under the Computer Fraud and
26 Abuse Act, 18 U.S.C. § 1030, was dismissed by the court on August
27 4, 2010. (Docket No. 30.)

28 ² To the extent that the parties' evidentiary objections
are actually arguments about the relevance of evidence or the
weight the court should give to the evidence, the court has

1 objections are overruled.

2 II. Factual and Procedural Background

3 Plaintiff provides software and consulting services
4 related to county clerk-recorder information imaging systems.
5 (First Am. Compl. ("FAC") ¶ 3 (Docket No. 22).) These systems
6 are computer-based and designed to, inter alia, electronically
7 receive, store, and organize information that is within the
8 purview of a county clerk-recorder and store images of relevant
9 documents associated with this information. (Id.) Plaintiff's
10 clerk-recorder imaging information software is distributed under
11 the mark "CRiis." (Id.) In 1999, plaintiff entered into a
12 License Agreement with County of Nevada for the CRiis software
13 and related products and services. (Id. ¶ 12.) The License
14 Agreement was amended between 2001 and 2006, the most recent of
15 which extended the term of the License Agreement until June 30,
16 2010. (Id. ¶ 13.)

17 The License Agreement allegedly provides, inter alia,
18 that plaintiff retains title to the software, that the software
19 constitutes a trade secret and that County of Nevada will not
20 release or disclose the software to third parties (id. ¶ 14),
21 that County of Nevada will notify AtPac immediately of any known
22 or suspected unauthorized use or access of the software (id. ¶
23 16), and that all documents provided to County of Nevada may not
24 be reproduced by County of Nevada (id. ¶ 17). In 1999, pursuant

25 _____
26 considered those arguments. To the extent that statements in
27 declarations are based on speculation, improper legal
28 conclusions, or argument, those statements are not facts and the
court does not consider them as such. See Burch v. Regents of
Univ. of Cal., 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006).

1 to the License Agreement, plaintiff installed the CRIis software
2 on a dedicated AtPac-maintained server, called ER-Recorder, which
3 was housed with County of Nevada. (Id. ¶ 24.) The parties
4 agreed that plaintiff would be the exclusive system administrator
5 of the ER-Recorder server. (Id.)

6 In November of 2008, County of Nevada began discussions
7 with Aptitude to replace plaintiff as the County's clerk-recorder
8 software provider. (Id. ¶ 28.) Diaz, the Clerk-Recorder of
9 County of Nevada, allegedly rejected plaintiff's offer to help
10 the County extract the data from plaintiff's files and convert it
11 into a form usable by Aptitude. (Id. ¶¶ 32-33.) Diaz allegedly
12 represented in a January 8, 2009, letter that County of Nevada
13 would extract the data from the CRIis files on its own, and that
14 County of Nevada would not provide AtPac's trade secret
15 information to Aptitude or save the trade secret and proprietary
16 information. (Id. ¶¶ 33-34.)

17 Plaintiff alleges that County of Nevada did not perform
18 the data extraction itself and that it instead provided Aptitude
19 with plaintiff's trade secret and copyright-protected
20 information. (Id. ¶ 39.) In November of 2008, Aptitude provided
21 County of Nevada with the "AS-Nevada" server to give Aptitude
22 access to County of Nevada's data through a remote connection.
23 (McGrath Decl. in Supp. of Defs.' Opp'n ¶¶ 6-8 (Docket No. 144);
24 Dion Decl. in Supp. of Defs.' Opp'n ¶ 2.) Plaintiff contends
25 that on November 4, 2008, two Aptitude employees used a computer
26 logged in simultaneously to the ER-Recorder server and Aptitude's
27 AS-Nevada server, and that the employees transferred files from
28 the ER-Recorder server to the AS-Nevada server. (Mem. of P. & A.

1 in Supp. of Pl.'s Mot. at 5:12-26 (Docket No. 137).) Plaintiff
2 also contends that Aptitude was able to log in to the AS-Nevada
3 server after that day and remotely connect to the ER-Recorder
4 server. (Id. at 7:2-6.)

5 A. Facts Relevant to Defendants' Motion for Appointment of
6 Special Master and Stay

7 On August 10, 2010, defendants requested to examine the
8 ER-Recorder server, and on October 15, 2010, County of Nevada
9 propounded discovery requests calling for the production of the
10 allegedly infringed aspects of CRIis. (Abu-Assal Decl. in Supp.
11 of Defs.' Mot. ¶¶ 2, 3, Ex. B.) On December 10, 2010, the
12 magistrate judge entered a protective order governing the
13 pretrial handling of documents. (Protective Order (Docket No.
14 70).) The Order required that CRIis be inspected at plaintiff's
15 counsel's office and that Aptitude's software, OnCore, be
16 inspected where the source code is maintained or another mutually
17 agreed-upon location. (Id. at 12:13-26.) Soon thereafter, each
18 party proposed a protocol for reviewing the source codes, which
19 involved some combination of independent reviews and side-by-side
20 comparisons. (Muller Decl. in Supp. of Defs.' Mot. ¶¶ 2-5, Exs.
21 I, J.) As of the filing of the instant motion on February 17,
22 2011, the parties had not yet agreed on a protocol. (Id. ¶ 16.)
23 However, defendants were able to begin an inspection of CRIis
24 between March 2 and 4, but could not finish the inspection
25 because defendants' expert did not have the right equipment.
26 (Thomas Decl. in Supp. of Pl.'s Mot. ¶¶ 3-6; Menz Decl. in Supp.
27 of Pl.'s Mot. ¶¶ 6-7.)

28 B. Facts Relevant to Plaintiff's Motion for Terminating

1 Sanctions

2 In May and June of 2009, before the instant action had
3 commenced, plaintiff requested access to both servers in order to
4 "ensure all AtPac software, and CRIis databases, ha[d] been
5 deleted." (Barale Decl. in Supp. of Defs.' Opp'n ¶ 2, Exs. C,
6 D.) County of Nevada conveyed the request to Aptitude, which
7 confirmed on August 16, 2009, that all data files transferred
8 from the ER-Recorder server had been deleted from the AS-Nevada
9 server. (Id. ¶ 3; McGrath Decl. ¶ 11, Ex. E; Cox Decl. in Supp.
10 of Defs.' Opp'n ¶ 12.) In a September 11, 2009, letter to County
11 of Nevada's counsel, plaintiff acknowledged that the files had
12 been deleted:

13 [Y]ou have represented that the County has deleted all of
14 the CRIis™ program data from the "Aptitude FTP" site,
15 that the County has provided no information belonging to
16 AtPac other than certain ".dat files" to Aptitude, that
17 the County has no intention of providing any additional
18 data from the CRIis™ system to Aptitude, and that the
19 County has received assurances from Aptitude that this
20 information was used solely for extraction purposes and
21 has since been deleted.

22 (McLeran Decl. in Supp. of Defs.' Opp'n ¶ 5, Ex. G.) The letter,
23 which proposed a possible resolution of the dispute, went on to
24 ask for a statement under oath including "confirmation that any
25 and all copies of AtPac's information, including CRIis™ program
26 files and data, have been permanently deleted from both the
27 County's server and from Aptitude's computer systems, including
28 all back-up systems (including all tape backups)" (Id.)

 On September 23, 2009, plaintiff filed a government
tort claim against the County of Nevada, which addressed
defendants' wrongful access to and extraction of data from the

1 ER-Recorder server.³ (Pl.'s Req. for Judicial Notice in Supp. of
2 Mot. Ex. A (Docket No. 118).) On October 20, 2009, counsel for
3 plaintiff instructed defendants' counsel in writing that
4 defendants were obligated to "maintain all copies of data (both
5 in hard copy and electronic form) relevant to this dispute."
6 (Thomas Decl. ¶ 17, Ex. P.) On February 3, 2010, plaintiff filed
7 its initial complaint against defendants.

8 In December of 2009, as part of the virtualization of
9 their physical servers, County of Nevada requested of Aptitude
10 that the AS-Nevada server "be cleaned up and all unnecessary
11 files and configurations removed." (Thomas Decl. ¶¶ 8, 13, Exs.
12 G, L.) Defendants then removed all but the files Aptitude "may
13 need in the future to help with support." (Id. ¶¶ 8, 14, Exs. G,
14 M.) At that time, any CRIis data had already been deleted from
15 the server.

16 On February 19, 2010, soon after the filing of the
17 complaint, the Deputy Counsel for County of Nevada issued a
18 litigation hold notice to the affected employees, instructing
19 recipients to "preserve all records, correspondence, written
20 material, electronically stored material, or other information
21

22 ³ Plaintiff asks the court to take judicial notice of its
23 government tort claim filed on September 23, 2009, and the letter
24 from the County of Nevada Board of Supervisors denying that
25 claim. (Docket No. 118.) The court may take judicial notice of
26 facts "not subject to reasonable dispute" because they are either
27 "(1) generally known within the territorial jurisdiction of the
28 trial court or (2) capable of accurate and ready determination by
resort to sources whose accuracy cannot reasonably be
questioned," Fed. R. Evid. 201, which includes "matters of public
record." Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir.
2001). Both of these documents are matters of public record
whose authenticity is not disputed, and the court will take
judicial notice of them.

1 related to the County's involvement with AtPac, Inc. and Aptitude
2 Solutions, regardless of form" and to "inform any members of
3 [their] staff who might be in possession of such relevant
4 evidence to not discard or destroy any records relating to this
5 prosecution." (McLeran Decl. ¶ 7, Ex. H.)

6 Also on February 19, 2010, Kathy Barale, an Information
7 System Analyst for County of Nevada, and Alana Wittig, a Project
8 Manager for Aptitude, began to discuss scrubbing the AS-Nevada
9 server in preparation for returning it to Aptitude. (Thomas
10 Decl. ¶¶ 8, 15, Exs. G, N.) Defendants contend that the server
11 was scrubbed because County of Nevada's servers were being
12 virtualized and thus the County did not need to retain the
13 physical server. (Monaghan Decl. in Supp. of Defs.' Opp'n ¶ 4.)
14 County of Nevada was required by law to remove public data from
15 the server before returning it to Aptitude. (Id. ¶ 9.) Despite
16 County of Nevada's Deputy Counsel's litigation hold, staff did
17 not believe that the hold precluded them from scrubbing the
18 server because the data had already been deleted and the contents
19 of the server as it then existed were saved on the virtual
20 server. (Id. ¶ 10; Barale Decl. ¶¶ 5-8.) The AS-Nevada server
21 was placed in queue to be wiped on March 22, 2010 (Monaghan Decl.
22 ¶ 9, Ex. J), but because of the backlog of servers to be wiped,
23 the task was reassigned and eventually completed in the middle of
24 October of 2010, but was not reported as completed until November
25 10, 2010. (Paredes Decl. in Supp. of Defs.' Opp'n ¶ 2.)

26 Plaintiff believes that had the server not been
27 scrubbed, it would have been possible for a forensic examination
28 to determine what information from the ER-Recorder server had

1 been transferred to the AS-Nevada server. (Menz Decl. in Supp.
2 of Pl.'s Mot. ¶¶ 4-5.) However, defendants contend that the AS-
3 Nevada server was not configured with the capability or software
4 to track if and when particular files were transferred to or from
5 the server, so forensic examination might not have been effective
6 even before the server was scrubbed. (Dion Decl. ¶¶ 3-4.)

7 Plaintiff complains of several other alleged discovery
8 abuses by defendants: defendants (1) failed to identify the AS-
9 Nevada server as the device corresponding to an IP address known
10 to have accessed the ER-Recorder server; (2) failed to produce
11 any documents related to the spoliation of the AS-Nevada server
12 until after the scrubbing took place, making it impossible for
13 plaintiff to prevent the scrubbing; (3) failed to produce
14 documents relating to Placer County, another county in which
15 Aptitude was engaged in converting from plaintiff's software to
16 its own; and (4) failed to produce handwritten notes until the
17 day before a hearing on plaintiff's motion to compel production.
18 (Def.' Mot. at 14:9-17:8.)

19 Defendants respond by stating that (1) plaintiff never
20 asked for them to identify the IP address (Opp'n at 20:20-24,
21 38:11-14); (2) defendants produced documents related to the
22 scrubbing on or before the date by which they were required to
23 produce such documents (id. at 21:1-5, 38:15-18); (3) Aptitude's
24 in-house counsel mistakenly believed that all documents relating
25 to Placer County had already been collected (id. at 22:12-23:10,
26 37:1-17); and (4) defendants immediately produced the handwritten
27 notes after discovering that they were inadvertently omitted,
28 conduct for which it has already been sanctioned (id. at 38:19-

1 25; Dec. 10, 2010, Order (Docket No. 71)).

2 Plaintiff has previously brought two successful motions
3 to compel, one of which resulted in monetary sanctions against
4 defendants. (Docket Nos. 42, 56, 71.) Two other discovery
5 disputes are currently pending before the magistrate judge.
6 (Docket Nos. 75, 90.)

7 III. Discussion

8 A. Appointment of a Special Master and Stay

9 Defendants ask the court to appoint a special master to
10 (1) determine the terms of the protocol for the
11 examination of the County's servers and the side-by-side
12 examination of the CRiis and OnCore source code and
13 related software based on the special master's expertise
14 in the field and from the proposals made by the parties,
15 (2) supervise the examination of the servers and the
16 comparison of CRiis and OnCore along with the parties and
17 their consultants, and (3) make a Report and
18 Recommendation to the Court as to findings of fact with
19 regard to forensic examination of the servers, whether
20 the CRiis and OnCore source code are substantially
21 similar, whether the CRiis GUIs and data files contain
22 the requisite level of creative expression to warrant
23 protection under the Copyright Act, and whether any
24 substantial similarity exists with respect to any other
25 protectable portions of the CRiis and OnCore programs.

19 (Defs.' Mot. at 2:11-22 (Docket No. 91).)

20 A court may appoint a special master only to:

- 21 (A) perform duties consented to by the parties;
22 (B) hold trial proceedings and make or recommend findings
23 of fact on issues to be decided without a jury if
24 appointment is warranted by:
25 (i) some exceptional condition; or
26 (ii) the need to perform an accounting or resolve a
27 difficult computation of damages; or
28 (C) address pretrial and posttrial matters that cannot be
effectively and timely addressed by an available district
judge or magistrate judge of the district.

27 Fed. R. Civ. P. 53(a)(1). Plaintiff has not consented to the
28 appointment of a special master. Defendants' request for the

1 special master to determine a protocol and supervise the
2 examination appears to be brought under Rule 53(a)(1)(C)
3 regarding pretrial matters, and their request that the special
4 master recommend findings of fact appears to be based on Rule
5 53(a)(1)(B)(i), which relates to trial proceedings when an
6 exceptional condition applies.

7 The impetus for defendants' request for a special
8 master, particularly the first two tasks they wish the special
9 master to perform, appears to be their sense that an impasse has
10 been reached in agreeing on a protocol for examining the parties'
11 source codes. Since the filing of the instant motion, the
12 parties have apparently begun the process of examining the CRiis
13 software. This demonstrates to the court that extraordinary
14 interference in the form of appointing a special master is
15 unnecessary. Defendants have not shown, for example, that the
16 parties are unable to determine the terms of a protocol or that
17 they require supervision to examine the software. To the extent
18 that the parties cannot agree, defendants have not shown that
19 such matters cannot be effectively and timely addressed by the
20 court.⁴ See Fed. R. Civ. P. 53(a)(1)(C). If necessary, the
21 parties may request that the magistrate judge alter the
22 protective order to deal with new conflicts, but a special master
23 is not necessary nor would one be effective for that purpose.
24 The protective order is already in place and defendants have not
25 shown that it is insufficient to protect the parties' interests.

26
27 ⁴ To the extent defendants' motion is based on
28 plaintiff's failure to cooperate in discovery to date, it bears
noting that plaintiff will presumably require review of the
software's source codes in order to establish some of its claims.

1 Furthermore, plaintiff has requested a jury trial. A
2 special master cannot decide questions reserved for the jury.
3 Fed. R. Civ. P. 53(a)(1)(B). While it is possible that the
4 copyright claim could be decided on summary judgment, the court
5 declines to appoint a special master solely to make it easier for
6 defendants to bring a summary judgment motion. Although the
7 ultimate determination of whether defendants infringed on
8 plaintiff's copyright may require technical expertise beyond the
9 competency of a layperson or this court, the parties may present
10 their experts' opinions, which is the ordinary procedure in cases
11 involving technical or specialized knowledge beyond the
12 competency of a layperson or the court. See Fed. R. Evid. 702.
13 If at a later date the appointment of a special master becomes
14 necessary, defendants may renew their motion.

15 Defendants have also moved to stay the non-copyright
16 claims pending a motion for summary judgment on the copyright
17 claim that they intend to file at a later date. The court has
18 the power to stay proceedings "incidental to the power inherent
19 in every court to control the disposition of the causes on its
20 docket with economy of time and effort for itself, for counsel,
21 and for litigants." Landis v. N. Am. Co., 299 U.S. 248, 254
22 (1936). Given that the copyright and non-copyright claims are
23 grounded at least in part in the same set of facts, a stay would
24 be a waste of time and resources and might result in duplicative
25 discovery. Accordingly, the court will deny the motion to stay.

26 B. Terminating Sanctions

27 District courts may impose sanctions as part of their
28 inherent power "to manage their own affairs so as to achieve the

1 orderly and expeditious disposition of cases."⁵ Link v. Wabash
2 R.R. Co., 370 U.S. 626, 630-31 (1962); see also Unigard Sec. Ins.
3 Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368 (9th Cir.
4 1992) (excluding evidence as a sanction for spoliation); In re
5 Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1066 (N.D.
6 Cal. 2006). This power includes the "broad discretion to make .
7 . . . evidentiary rulings conducive to the conduct of a fair and
8 orderly trial.'" Unigard, 982 F.2d at 368 (quoting Campbell
9 Indus. v. M/V Gemini, 619 F.2d 24, 27 (9th Cir. 1980)).

10 A district court's inherent power to sanction may be
11 invoked in response to spoliation of evidence. Spoliation occurs
12 when a party destroys evidence after receiving some notice that
13 the evidence was potentially relevant to litigation. United
14 States v. Kitsap Physicians Serv., 314 F.3d 995, 1001 (9th Cir.
15 2002). If a party breaches its duty to preserve evidence, the
16 opposing party may move to sanction the party that destroyed
17 evidence. See Unigard, 982 F.2d at 365.

18 Courts may sanction parties responsible for spoliation
19 of evidence in three ways. First, a court can instruct the jury
20 that it may draw an adverse inference against the party or
21 witness responsible for destroying the evidence. See Glover v.
22 BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993); Akiona v. United
23

24 ⁵ A court may also impose sanctions pursuant to Federal
25 Rule of Civil Procedure 37 for failure to comply with a court
26 order or disclose, supplement, or admit discovery responses.
27 Fed. R. Civ. P. 37(b), (c). The tests for Rule 37 sanctions and
28 "inherent power" sanctions are "subject to much the same
considerations," Halaco Eng'g Co. v. Costle, 843 F.2d 376, 380
(9th Cir. 1988), but they are not identical. In re Napster, Inc.
Copyright Litig., 462 F. Supp. 2d 1060, 1075 n.4 (N.D. Cal.
2006).

1 States, 938 F.2d 158, 161 (9th Cir. 1991). Second, a court can
2 exclude witness testimony proffered by the party responsible for
3 destroying the evidence and based on the destroyed evidence. See
4 Glover, 6 F.3d at 1329; Unigard, 982 F.2d at 368-69. Finally, a
5 court may enter default judgment against the party responsible
6 for destroying the evidence. See Phoceene Sous-Marine, S.A. v.
7 U.S. Phosmarine, Inc., 682 F.2d 802, 806 (9th Cir. 1982) (court
8 may enter default judgment when sanctionable conduct is related
9 to the merits of the controversy); Columbia Pictures, Inc. v.
10 Bunnell, No. 2:06-cv-01093, 2007 WL 4877701, at *5 (C.D. Cal.
11 Dec. 13, 2007); cf. In re Exxon Valdez, 102 F.3d 429, 432 (9th
12 Cir. 1996) (a court may dismiss claims brought by the party
13 responsible for discovery abuses).

14 A party's destruction of evidence need not be in "bad
15 faith" to warrant a court's imposition of sanctions. Glover, 6
16 F.3d at 1329; Unigard, 982 F.2d at 368 n.2. District courts may
17 impose sanctions against a party that merely had notice that the
18 destroyed evidence was potentially relevant to litigation. See
19 Glover, 6 F.3d at 1329; Akiona, 938 F.2d at 161; cf. Unigard, 982
20 F.2d at 368 n.2 (sanctions may be imposed for "willfulness or
21 fault by the offending party"). However, a party's motive or
22 degree of fault in destroying evidence is relevant to what
23 sanction, if any, is imposed. Baliotis v. McNeil, 870 F. Supp.
24 1285, 1291 (M.D. Pa. 1994); see also Schmid v. Milwaukee Elec.
25 Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994) (courts should choose
26 "the least onerous sanction corresponding to the willfulness of
27 the destructive act and the prejudice suffered by the victim").

28 When considering a default sanction in response to

1 spoliation of evidence, the court must determine "(1) the
2 existence of certain extraordinary circumstances, (2) the
3 presence of willfulness, bad faith, or fault by the offending
4 party, (3) the efficacy of lesser sanctions, [and] (4) the
5 relationship or nexus between the misconduct drawing the
6 dismissal [or default] sanction and the matters in controversy in
7 the case" Halaco Eng'g Co. v. Costle, 843 F.2d 376, 380
8 (9th Cir. 1988). In addition, the court may consider the
9 prejudice to the party victim as an "optional" consideration
10 where appropriate. Id. This multi-factor test is not "a
11 mechanical means of determining what discovery sanction is just,"
12 but rather "a way for a district judge to think about what to
13 do." Valley Eng'rs Inc. v. Elec. Eng'g Co., 158 F.3d 1051, 1057
14 (9th Cir. 1998).

15 "As soon as a potential claim is identified, a litigant
16 is under a duty to preserve evidence which it knows or reasonably
17 should know is relevant to the action." In re Napster, 462 F.
18 Supp. 2d at 1067. "The obligation to retain discoverable
19 materials is an affirmative one; it requires that the agency or
20 corporate officers having notice of discovery obligations
21 communicate those obligations to employees in possession of
22 discoverable materials." Nat'l Ass'n of Radiation Survivors v.
23 Turnage, 115 F.R.D. 543, 557-58 (N.D. Cal. 1987). "Once a party
24 reasonably anticipates litigation, it must suspend its routine
25 document retention/destruction policy and put in place a
26 'litigation hold' to ensure the preservation of relevant
27 documents." In re Napster, 462 F. Supp. 2d at 1070 (citing
28 Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003).

1 Plaintiff contends that defendants' deletion of the
2 relevant files from the AS-Nevada server and the subsequent
3 scrubbing of the server constitute spoliation of evidence because
4 defendants were on notice in September of 2009, when the
5 government tort claim was filed, that defendants' extraction of
6 data from the ER-Recorder server was relevant. Plaintiff's
7 counsel also told defendants in October of 2009 to retain
8 relevant evidence. At the latest, the filing of this action in
9 February of 2010 was certainly sufficient to put defendants on
10 notice of their obligation to retain evidence.

11 Plaintiff asked defendants to delete all CRIis-related
12 data from their servers when the parties were in settlement
13 discussions and before any claim or lawsuit was filed; defendants
14 cannot be at fault for deleting the files at that time. However,
15 by the time defendants scrubbed the server, the instant case had
16 been filed and they were on notice of their obligation to retain
17 evidence. Thus, the court will consider whether sanctions are
18 appropriate in response to defendants' scrubbing of the server,
19 but not their deletion of the files from the server.

20 1. Extraordinary Circumstances

21 In the Ninth Circuit, "extraordinary circumstances
22 exist where there is a pattern of disregard for Court orders and
23 deceptive litigation tactics that threaten to interfere with the
24 rightful decision of a case." See Advantacare Health Partners,
25 LP v. Access IV, No. C 03-04496, 2004 WL 1837997 at *5 (N.D. Cal.
26 Aug. 17, 2004) (citing Valley Eng'rs, 158 F.3d at 1057-58); see
27 also Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d
28 337, 348 (9th Cir. 1995) ("It is well settled that dismissal is

1 warranted where . . . a party has engaged deliberately in
2 deceptive practices that undermine the integrity of judicial
3 proceedings"); Wyle v. R.J. Reynolds Indus., Inc., 709
4 F.2d 585, 591 (9th Cir. 1983) (upholding dismissal where the
5 district court determined that "the deliberate deception and
6 irreparable loss of material evidence justified the sanction of
7 dismissal"); Wm. T. Thompson Co. v. Gen. Nutrition Corp., 593 F.
8 Supp. 1443, 1456 (C.D. Cal. 1984) (holding that default and
9 dismissal were proper sanctions in view of party's "willful
10 destruction of documents and records that deprived [the opposing
11 party] of the opportunity to present critical evidence on its key
12 claims to the jury").

13 Plaintiff has pointed to a litany of alleged discovery
14 abuses by defendants, one of which subjected defendants to
15 monetary sanctions. (Docket Nos. 56, 71.) Two other discovery
16 disputes are currently pending before the magistrate judge.
17 (Docket Nos. 75, 90.) Defendants have proffered explanations for
18 their actions, essentially arguing that their failures to comply
19 with discovery requests and orders were the result of
20 incompetence or confusion rather than deliberate deception.
21 Plaintiff, on the other hand, argues that the sheer volume of the
22 discovery problems suggests deliberateness, a point that is well-
23 taken.

24 The court is not in a position on this motion to make
25 findings that each of the alleged discovery abuses was
26 sanctionable. See Freeman v. Allstate Life Ins. Co., 253 F.3d
27 533, 537 (9th Cir. 2001) (upholding district court judge's
28 decision not to sanction because of moving party's "fail[ure] to

1 prosecute the issue before the magistrate judge as required by"
2 the Eastern District's Local Rules and the court's order); see
3 also Local R. 302(c)(1) (prescribing that "[a]ll discovery
4 motions, including Fed. R. Civ. P. 37 motions" are to be heard by
5 a magistrate judge). However, the court considers the previous
6 orders by the magistrate judge, and the continuing difficulties
7 the parties are apparently having in conducting discovery
8 properly, as evidence pointing to "extreme circumstances."

9 2. Willfulness, Bad Faith, or Fault

10 "For dismissal [or default judgment] to be proper, the
11 conduct to be sanctioned must be due to willfulness, fault, or
12 bad faith." Anheuser-Busch, 69 F.3d at 348 (internal quotation
13 marks omitted). Defendants argue that the scrubbing was simply
14 due to a misunderstanding of the scope of the discovery hold, as
15 the AS-Nevada server was merely one of eighty-two servers that
16 County of Nevada virtualized in an effort to increase efficiency
17 and decrease costs. (Monaghan Decl. ¶¶ 4, 8.) Files that were
18 on the server when it was virtualized were preserved and saved on
19 County of Nevada's virtual server, (id. ¶ 10), and defendants
20 claim that the server was scrubbed as protocol before returning
21 it to Aptitude.

22 Even if an individual employee for County of Nevada or
23 Aptitude may have misunderstood that the litigation hold applied
24 to the AS-Nevada server, which the court doubts for reasons
25 discussed below, defendants cannot escape responsibility by
26 arguing that no willfulness, bad faith, or fault was involved.
27 High-level employees for both defendants must have known that the
28 AS-Nevada server was extremely relevant to the litigation, and it

1 was their responsibility to see that the server was preserved.
2 See In re Napster, 462 F. Supp. 2d at 1070 ("Once a party
3 reasonably anticipates litigation, it must suspend its routine
4 document retention/destruction policy and put in place a
5 'litigation hold' to ensure the preservation of relevant
6 documents." (citing Zubulake v. UBS Warburg LLC, 220 F.R.D. 212,
7 220 (S.D.N.Y. 2003)); Nat'l Ass'n of Radiation Survivors, 115
8 F.R.D. at 557-58 ("The obligation to retain discoverable
9 materials . . . requires that the agency or corporate officers
10 having notice of discovery obligations communicate those
11 obligations to employees in possession of discoverable
12 materials.")). The circumstances surrounding the scrubbing
13 indicate that either the high-level employees failed in their
14 duty to explain the extent of the litigation hold or that the
15 employees responsible for the scrubbing acted in bad faith.

16 Counsel for County of Nevada sent an e-mail to inform
17 the relevant employees of the litigation hold, instructing them
18 to preserve all information related to the County's involvement
19 with AtPac and Aptitude. Later that very day, Kathy Barale, the
20 Information System Analyst for County of Nevada and one of the
21 recipients of the e-mail regarding the litigation hold, began
22 discussing scrubbing the AS-Nevada server with Alana Wittig, a
23 Project Manager for Aptitude. Even if the timing was
24 coincidental and not itself evidence of bad faith, the employees
25 should have at least investigated the issue before irrevocably
26 damaging potentially relevant evidence. There is no indication
27 that Barale, Wittig, or anyone else at County of Nevada or
28 Aptitude even attempted to ensure that the scrubbing would comply

1 with their obligation to retain potentially relevant evidence.

2 While many other servers were virtualized and
3 presumably scrubbed by County of Nevada, only the AS-Nevada
4 server was owned by Aptitude, stored at County of Nevada, and
5 used for making the transfer from AtPac's software to Aptitude's
6 software. Its relevance to the dispute involving AtPac and
7 Aptitude, and the need for treating it differently than other
8 servers, was clear. The fact that all evidence relating to the
9 scrubbing was concealed from plaintiff until after it took place
10 is further indication that defendants knew the scrubbing was not
11 appropriate. Scrubbing the server despite its potential
12 relevance demonstrates willful ignorance or worse, not an
13 innocent misunderstanding.

14 3. Efficacy of Lesser Sanctions

15 Imposition of a default judgment sanction is
16 appropriate where "(1) no lesser sanction would adequately punish
17 [defendants] and deter other parties from engaging in the same
18 conduct or (2) [defendants] ha[ve] engaged in deceptive conduct
19 and will continue to do so." In re Napster, 462 F. Supp. 2d at
20 1074. Plaintiff argues that no lesser sanction would be
21 appropriate because defendants must be prevented from engaging in
22 further discovery abuses. However, at the hearing, plaintiff
23 conceded that an adverse inference jury instruction sanction
24 would be an eye-opener to defendants and could deter future
25 abuses while also punishing defendants for the spoliation. For
26 the reasons set forth below, the court concludes that the lesser
27 sanction of a jury instruction would be adequate. Therefore,
28 this factor weighs against default sanctions.

1 4. Nexus between Misconduct and Matters in
2 Controversy

3 In order for default sanctions to be imposed for
4 defendants' scrubbing of the AS-Nevada server, there must be a
5 nexus between defendants' conduct and the merits such that the
6 conduct interferes with the rightful decision of the action.
7 Halaco, 843 F.2d at 381. In the context of spoliation of
8 evidence, a nexus exists if the party destroyed documents that
9 were relevant to discovery requests. See Anheuser-Busch, 69 F.3d
10 at 351; Advantacare, 2004 WL 1837997, at *6-7. Spoliation of
11 evidence raises a presumption that the destroyed evidence goes to
12 the merits of the case and that such evidence was adverse to the
13 party that destroyed it. Phoceene Sous-Marine, 682 F.2d at 806;
14 Nat'l Ass'n of Radiation Survivors, 115 F.R.D. at 557.
15 Plaintiff's claims are based in part on the allegation that
16 defendants copied copyrighted and trade secret information from
17 the ER-Recorder server to the AS-Nevada server. Assuming the
18 evidence was adverse to defendants, if the AS-Nevada server had
19 not been scrubbed, plaintiff could have proven that the relevant
20 information was copied to the AS-Nevada server. Thus, a nexus
21 exists between the spoliation of the AS-Nevada server and the
22 merits of the action.

23 5. Prejudice

24 The existence and degree of prejudice to the wronged
25 party is an "optional" consideration when determining whether
26 default sanctions are appropriate. Halaco, 843 F.2d at 382. As
27 the nexus between spoliation and the merits indicates, a critical
28 portion of plaintiff's case may have been spoiled by the

1 scrubbing.

2 Defendants argue that no actual prejudice will result,
3 contending that even before having scrubbed the server it would
4 have been impossible to determine what files were transferred to
5 the server and when, because any relevant files were already
6 deleted and the server was not configured to log such activities.
7 However, the fact that a server did not log activities does not
8 preclude the possibility of a forensic examination uncovering
9 deleted files. As the party at fault for scrubbing the server,
10 defendants bear the consequences of this uncertainty. See Nat'l
11 Ass'n of Radiation Survivors, 115 F.R.D. at 557 (holding that
12 where "the relevance of and resulting prejudice from destruction
13 of documents cannot be clearly ascertained because the documents
14 no longer exist . . . [the culpable party] can hardly assert any
15 presumption of irrelevance as to the destroyed documents"
16 (quoting Alexander v. Nat'l Farmers Org., 687 F.2d 1173, 1205
17 (8th Cir. 1982))) (alteration in original); see also Computer
18 Assocs. Int'l, Inc. v. Am. Fundware, Inc., 133 F.R.D. 166, 170
19 (D. Colo. 1990).

20 Defendants also point out that there may be other
21 sources for the same evidence, such as examining the ER-Recorder
22 server, which might shed light on what files were transferred
23 from it to the AS-Nevada server, or the virtualized server
24 containing all the files from the AS-Nevada server before it was
25 scrubbed. Plaintiff responds that the virtualized server would
26 only contain files that existed on the AS-Nevada server, not the
27 traces of previously-deleted files that might have been
28 discovered on the physical server.

1 Finally, defendants argue that evidence might be
2 retrievable from the AS-Nevada server even after the scrubbing.
3 This is highly unlikely given the complexity of the scrubbing
4 performed; furthermore, if any evidence was retrievable from the
5 AS-Nevada server, defendants would be in violation of the court's
6 discovery orders for failing to produce such evidence.

7 Defendants scrubbed a server that they had a duty to
8 preserve and produce to plaintiff. The server was related to the
9 merits of the action, and plaintiff has almost certainly been
10 prejudiced by its destruction. The spoliation, combined with
11 other deceptive discovery practices by defendants, indicates that
12 without some sort of sanction, a fair and just resolution of the
13 action will be impossible.

14 6. Evidentiary Sanctions

15 "[A] party seeking an adverse inference instruction
16 based on the destruction of evidence must establish (1) that the
17 party having control over the evidence had an obligation to
18 preserve it at the time it was destroyed; (2) that the records
19 were destroyed with a culpable state of mind; and (3) that the
20 destroyed evidence was relevant to the party's claim or defense
21 such that a reasonable trier of fact could find that it would
22 support that claim or defense." In re Napster, Inc. Copyright
23 Litig., 462 F. Supp. 2d 1060, 1078 (N.D. Cal. 2006) (quoting
24 Hamilton v. Signature Flight Support Corp., No. C 05-0490, 2005
25 WL 3481423, at *3 (N.D. Cal. Dec. 20, 2005)).

26 As discussed above, defendants had an obligation to
27 preserve the AS-Nevada server at the time it was destroyed, and
28 they willfully destroyed it. In addition, information on the

1 server was relevant to the action. By instructing the jury that
2 it may infer the truth of what plaintiff might have been able to
3 prove, under the best case scenario, if the evidence had not been
4 destroyed, the court believes it can cure any prejudice resulting
5 from defendants' spoliation of the evidence. Therefore, the
6 court will instruct the jury to the effect that it may infer that
7 any files on the ER-Recorder server were transferred to the AS-
8 Nevada server. The precise wording of the instruction will be
9 determined at trial.

10 IT IS THEREFORE ORDERED that defendants' motion for
11 appointment of a special master and stay be, and the same hereby
12 is, DENIED.

13 IT IS FURTHER ORDERED that plaintiff's motion for
14 terminating sanctions or, in the alternative, issue sanctions,
15 be, and the same hereby is, DENIED to the extent plaintiff seeks
16 default sanctions and GRANTED to the extent plaintiff seeks an
17 adverse inference jury instruction.

18 DATED: April 12, 2011

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21 WILLIAM B. SHUBB
22 UNITED STATES DISTRICT JUDGE
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