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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Southern Counties Oil Company,

No. CV-18-02307-PHX-DWL

10 Plaintiff,

ORDER

11 v.

12 Lucas Henry, et al.,

13 Defendants.
14

15 **INTRODUCTION**

16 Southern Counties Oil Co. (“Plaintiff” or “SC Fuels”) employed Lucas Henry,
17 Thomas Parsons, and Christopher Reinesch (together, “the Individual Defendants”) until
18 they left to work for competitor Fuelco Energy LLC (“Fuelco”) at various points in 2018.
19 In this action, Plaintiff alleges that the individual Defendants provided confidential and
20 trade secret information to Fuelco, in violation of the Individual Defendants’
21 confidentiality, non-competition, and/or non-solicitation agreements, and that the
22 Individual Defendants and Fuelco (collectively, “Defendants”) used that information to
23 commit various business torts. (Doc. 55.)¹
24

25 ¹ Plaintiff includes the following summary of its claims in its operative pleading, the
26 Second Amended Complaint (“SAC”): “Fuelco recruited and hired Defendants Henry,
27 Parsons, and Reinesch away from SC Fuels, has obtained from these individual defendants,
28 SC Fuels’ confidential, proprietary and trade secret information and is now actively using
such information to unlawfully compete with SC Fuels and solicit its customers and
business away. In addition, . . . Fuelco is aware of certain contractual agreements these
individual defendants previously entered into with SC Fuels while still employed, which
Fuelco is actively inducing and encouraging them to breach.” (Doc. 55 ¶ 5.)

1 The discovery process in this case took an unexpected turn when Thomas Gibson,
2 Fuelco’s Rule 30(b)(6) representative, disclosed the existence of two documents—an Excel
3 spreadsheet and a Word document (together, “the Business Case Documents”)—that he
4 had used to propose an expansion of Fuelco’s operations into Arizona and Colorado in
5 early 2018. During the deposition, Gibson suggested that he had been in contact with
6 Parsons and Henry while they were still employed by Plaintiff and that Parsons and Henry
7 had helped “populate” the sales projection data that appeared in the Business Case
8 Documents. This was a potentially explosive admission because it suggested that Parsons
9 and Henry had been leaking Plaintiff’s sensitive information to a potential competitor while
10 still employed by Plaintiff to assist that competitor in deciding whether to expand into
11 Plaintiff’s territory.

12 Because the existence of the Business Case Documents had not been previously
13 disclosed to Plaintiff, Plaintiff’s counsel requested their immediate production. Six months
14 later—and only after multiple follow-up requests by Plaintiff’s counsel—Defendants
15 produced a .pdf copy of a PowerPoint presentation and stated that it was the document to
16 which Gibson was referring during the Rule 30(b)(6) deposition.

17 Dissatisfied with this explanation, Plaintiff filed a motion for discovery sanctions,
18 arguing that the PowerPoint could not possibly be the Business Case Documents (because,
19 among other things, it was in a different format than the Word and Excel documents Gibson
20 previously described and seemed to post-date Gibson’s account of when those documents
21 were created). To resolve the parties’ dispute over this issue, the Court ordered forensic
22 imaging of certain email accounts and hard drives belonging to the Individual Defendants
23 and Gibson.

24 The discovery process took a further unexpected turn during the forensic imaging
25 process. Many months after the Court issued the imaging order, Defendants revealed for
26 the first time that Parsons’s and Henry’s hard drives had been lost and that Gibson’s
27 computer had been replaced at some point due to a virus (although Defendants contend it
28 was duplicated and is functionally identical to his prior laptop).

1 Based on these developments, Plaintiff has now filed a renewed motion for
2 sanctions. (Doc. 188.) For the following reasons, the motion is granted in part and denied
3 in part.

4 **FACTUAL AND PROCEDURAL BACKGROUND**

5 I. The Individual Defendants' Employment At SC Fuels And Fuelco

6 Henry worked as Plaintiff's business development manager from February 2014
7 until April 2, 2018, "when he abruptly resigned his position to work for" Fuelco. (Doc. 55
8 ¶ 2.) Henry then worked for Fuelco from April 9, 2018 until January 30, 2020. (Doc. 204-
9 2 ¶ 2.)

10 Parsons worked as Plaintiff's site manager from January 2017 until March 22, 2018,
11 "when he abruptly resigned his position to work for" Fuelco. (Doc. 55 ¶ 2.) Parsons then
12 worked for Fuelco from April 2, 2018 until July 8, 2019. (Doc. 200-3 ¶ 2.)

13 Reinesch worked as Plaintiff's sales representative from January 2013 to June 26,
14 2018, "when he resigned his position to work for" Fuelco. (Doc. 55 ¶ 4.) During oral
15 argument, defense counsel confirmed that Reinesch no longer works for Fuelco.

16 II. The Revelation Concerning The Business Case Documents (June 2021)

17 On June 30, 2021, Plaintiff deposed Fuelco, with Gibson serving as Fuelco's Rule
18 30(b)(6) representative. (Doc. 192-1 at 21, 28.) Gibson testified that he and Keith
19 Maxwell, Fuelco's CEO, began discussing Fuelco's potential expansion into Arizona in
20 "late 2017 or early 2018." (*Id.* at 30.) Fuelco had not previously conducted any business
21 in Arizona. (*Id.* at 29-30.) Around the same time, Gibson connected with Parsons about
22 potentially working for Fuelco. (*Id.* at 30-31.) According to Gibson, Parsons "[knew]
23 customers and sales personnel in the industry in the Phoenix area that [Fuelco] could
24 possibly use to expand [its] business." (*Id.* at 30.)

25 To assess the feasibility and potential associated with the Arizona market, Gibson
26 "prepared a . . . financial business case to review with Mr. Maxwell" sometime in "early
27 2018." (*Id.* at 31.) As discussed below, Gibson later clarified that "the business case that
28 was . . . submitted to Mr. Maxwell included . . . two components[.] One was a Word

1 document that included the narrative, and then the other was [an] Excel spreadsheet that
2 included the projections.” (*Id.* at 37.) When asked to elaborate, Gibson said, “I do not
3 recall the specifics of those pro formas. But generally, it was just . . . a financial projection
4 of an expansion into . . . what we internally call the southwest region.” (*Id.* at 31.) Gibson
5 confirmed that the Business Case Documents did not include “customer specificity” and
6 the projections within them were largely based on “[v]olumes and margins.” (*Id.*) Gibson
7 also stated that the margins were determined through conversations with Parsons. (*Id.*) He
8 further testified that the first time he spoke with Parsons was “January or February of
9 2018.” (*Id.*) Gibson confirmed that during his first few interactions with Parsons, Fuelco’s
10 decision whether to expand into Arizona had “not yet been made” and instead it was “sort
11 of a desire of the company to expand its footprint, to diversify its customer base away
12 from—not away from, but just in addition to the oil field . . . industry.” (*Id.*) Gibson further
13 testified that the projections he submitted to Maxwell assumed that Parsons, Henry, and
14 Reinesch would join Fuelco. (*Id.* at 34.) However, Gibson testified that the names of
15 Parsons, Henry, and Reinesch did not appear in the Business Case Documents. (*Id.* at 36
16 [Q: “Do you recall whether the names of Mr. Parsons, Mr. Henry, or Mr. Reinesch were
17 on that document?” A: “No, I don’t—I don’t think their names were incorporated into the
18 document.”].)

19 Gibson was asked whether “at the time [Gibson] submitted the business case pro
20 forma document . . . did [he] already have a commitment from Mr. Parsons, Mr. Henry,
21 and Mr. Reinesch that they would be interested in joining Fuelco if Fuelco elected to
22 expand into Phoenix.” (*Id.* at 35.) Gibson responded:

23 I believe I did. The . . . pro forma projections business case that I put together
24 was kind of a living document. So it sort of, you know—it started as a
25 discussion document between [Parsons] and I, and—and just sort of, you
26 know, had a life of its own for three or four or five months, or—onto
27 becoming projections of the company—at least for the southwest region.

28 (*Id.*)

Based on the Business Case Documents, Maxwell and Gibson concluded that
Fuelco should expand into Arizona. (*Id.* at 36.) When further probed, Gibson recalled that

1 the Business Case Documents also contained “pro forma projections of about three years
2 with . . . maybe a six-month period for 2018” so, in total, they included projections for
3 “part of 2018, all of 2019, and all of 2020.” (*Id.*) Gibson indicated that the documents also
4 included projections for Colorado. (*Id.*)

5 This exchange followed:

6 Q: Did they ever—did any of those three ever provide to you—prior to
7 the time you submitted your pro forma to Mr. Maxwell, did any of
8 those three provide you with any written documents that contained
any sales data or financial data?

9 A: Well, [Parsons] and I were working on the pro forma together. So he
10 and I were, you know—I think [Henry] may have had inputs to the
11 pro formas also, from a volume or sales perspective—margin
perspective. But . . . it was more of an electronic document that we
were—that was growing and, you know, that was the source of our
projections.

12 Q: Do you recall what kind of a document the pro forma was?

13 A: It was an Excel—Excel worksheet.

14 Q: Do you recall who—and I understand it was—different folks had
15 input on the Excel spreadsheet. But do you recall who first created the
spreadsheet?

16 A: Who was what?

17 Q: Who created the spreadsheet?

18 A: No, I don’t.

19 Q: But the spreadsheet was shared with Mr. Parsons and Mr. Henry;
20 correct?

21 A: Yes.

22 Q: And Mr. Parsons and Mr. Henry added information to the spreadsheet;
is that correct?

23 A: Yes.

24 Q: And then, you of course added some information to the spreadsheet
25 as well; is that right?

26 A: I can’t remember if I really did a lot of inputting to the spreadsheet. I
27 was more of a reviewer of the output. I was more of an author of the
narrative—the business case narrative.

28 Q: Was the business case narrative part of the spreadsheet as well?

A: No. It was a Word document.

1 Q: So fair to say the business case that was documents submitted to Mr.
2 Maxwell included at least two components? One was a Word
3 document that included the narrative, and then the other was the Excel
4 spreadsheet that included the projections?

5 A: Yes.

6 Q: Was there any other components of that business case?

7 A: No, I don't believe so.

8 (*Id.* at 37.) During the deposition, Plaintiff's counsel asked defense counsel to produce the
9 Business Case Documents. (*Id.* at 35 ["SC Fuels is requesting from Counsel that that
10 document be produced in the case. I just wanted to get that on the record."].)

11 III. Plaintiff's Follow-Up Efforts (Second Half Of 2021)

12 During the second half of 2021, Plaintiff's counsel emailed defense counsel five
13 different times to inquire about the production of the Business Case Documents. (Doc. 150
14 ¶ 6.) The inquiries were sent on July 9, July 15, September 22, October 6, and October 18.
15 (*Id.*)

16 On November 5, 2021, defense counsel indicated that Defendants were still
17 searching. (*Id.*)

18 On December 10, 2021—which was after the formal close of discovery, per the
19 deadlines in the scheduling order (Docs. 51, 141)—Plaintiff's counsel sent a formal letter
20 to defense counsel again requesting the Business Case Documents. (Doc. 150-5.) Among
21 other things, the letter generally recounted the timeline of requests and the nearly six
22 months that had passed since the initial request. (*Id.* at 2-3.) Plaintiff's counsel requested
23 production of the documents on or before December 17, 2021, or he would file a motion
24 for spoliation sanctions. (*Id.* at 3-4.)

25 On December 20, 2021, after receiving no response, Plaintiff's counsel sent a
26 follow-up email to defense counsel. (Doc. 150-6 at 2-3.)

27 On December 22, 2021, after again receiving no response, Plaintiff's counsel sent
28 another follow-up email to defense counsel. (*Id.* at 2.)

On December 29, 2021, after yet again receiving no response, Plaintiff's counsel
sent yet another follow-up email to defense counsel. (*Id.* at 1.)

1 On December 30, 2021, defense counsel responded: “as you’ve seen, I’m [out] of
2 the office. My client will produce the document referenced in Todd Gibson’s Deposition
3 as soon as possible.” (*Id.* at 2.)

4 On January 4, 2022, defense counsel elaborated: “[W]e will produce the document
5 referenced in Todd Gibson’s deposition on or by Friday January 14th.” (Doc. 150-6 at 6.)
6 That same day, Plaintiff’s counsel inquired why, if the document is merely an Excel
7 spreadsheet, it could not be produced sooner. (*Id.* at 5.) He requested that defense counsel
8 confirm possession of the document, indicate whether the emails would also be attached,
9 and indicate whether the narrative portion of the document had also been located. (*Id.*)

10 That same day, defense counsel replied as follows:

11 [A]s I said, it will be produced by January 14th. If it can be produced sooner,
12 then it will be. Your other questions relate to attorney client privileged
13 communications and will not be addressed. Any and all existing documents
14 that are located and that are responsive to your discovery requests (and that
you raise below) will be produced.

15 (*Id.*)

16 IV. The Disclosure Of The PowerPoint (January 2022)

17 On January 14, 2022, defense counsel emailed Plaintiff’s counsel a .pdf version of
18 a PowerPoint presentation:

19 [P]lease see the attached per my January 4th email. This is the document that
20 was raised during Todd Gibson’s deposition and requested by you during his
21 deposition (page 56). There are no other items, documents or
22 communications surrounding this document to produce or that are responsive
to SC Fuels’ discovery requests (that have not already been produced).

23 (Doc. 150-7 [email with enclosure: “Fuelco Energy Business Plan.pdf”]. *See also* Doc.
24 153-1 at 8-27 [actual .pdf of PowerPoint].)

25 A series of email exchanges between the two attorneys followed. (*See generally*
26 Doc. 150-8.) Additionally, around January 18 or 19, 2022, counsel had a phone call about
27 the disclosure of the PowerPoint. (*See id.* [emails setting up a call and stating the call took
28 place].) Each side contests the purpose of and what was discussed during the call. In his
declaration, Plaintiff’s counsel states that, during the call, defense counsel “refused to

1 confirm whether or not Parsons or Henry had been asked to search for the Business Case
2 Documents but agreed that she would speak to them and get back to me.” (Doc. 150 ¶ 9.)

3 On January 20, 2022, Plaintiff’s counsel sent an email expressing his understanding
4 that defense counsel would confer with Henry and Parsons about their searches for the
5 Excel spreadsheet and related communications and report those findings to him the next
6 day and, in the event the spreadsheet was not located, discuss a “discovery conference.”
7 (Doc. 150-8 at 5.)

8 On January 21, 2022, defense counsel replied: “Your email does not accurately
9 reflect our conversation.” (*Id.* at 4.) In this email, defense counsel recalled a dispute over
10 whether there was any “reason to believe that any such communications ever were made
11 or existed to begin with.” (*Id.*) Defense counsel further characterized Plaintiff’s counsel’s
12 suggestion that “the spreadsheet was ever sent or received by Tom Parsons or Luke Henry”
13 as a “false assumption” and “confirm[ed] that no emails or other communications were
14 exchanged between Tom Parsons, Luke Henry and/or Todd Gibson regarding the
15 spreadsheet or the content in the spreadsheet or attaching or including the spreadsheet that
16 appears as the last page of the business overview. Tom Parsons had no manual input into
17 the spreadsheet, nor did Luke Henry.” (*Id.*) She concluded: “There is nothing more to
18 produce, nothing more exists or ever existed, regarding ‘the excel spreadsheet and/or
19 communications regarding it.’” (*Id.* at 5.)

20 That same day, Plaintiff’s counsel replied, “I appreciate the response by today and
21 your confirmation that Parsons and Henry have searched for, but cannot locate any
22 documents relating to the excel projections.” (*Id.* at 3.) However, he disagreed about
23 whether Gibson’s testimony suggested that Parsons or Henry had manual input into the
24 spreadsheet. (*Id.*) Plaintiff’s counsel further indicated he would be moving forward with
25 seeking a “discovery conference” with the Court. (*Id.*)

26 Several email exchanges followed. Generally, Plaintiff’s counsel sought to move
27 forward with either a motion for sanctions or a discovery dispute. (*See* Doc. 150-9 [email
28 exchange].) Plaintiff’s counsel also suggested forensic imaging of Henry’s, Parsons’s, and

1 Fuelco’s email accounts and hard drives, specifically to search for the Business Case
2 Documents. (*Id.* at 2.)

3 V. The First Sanctions Motion (February 2022)

4 On February 9, 2022, Plaintiff filed a motion for spoliation sanctions. (Doc. 149.)
5 In general, Plaintiff argued that (1) the Business Case Documents were responsive to
6 numerous discovery requests and should have, at any rate, been included in Defendants’
7 disclosures pursuant to the Mandatory Initial Discovery Pilot Project (“MIDP”); (2) the
8 PowerPoint could not be the Business Case Documents, both because the format is
9 incorrect and because it was not created until April 2018, which is when Henry and Parsons
10 began working for Fuelco; and (3) Defendants’ failure to locate additional materials despite
11 continued search efforts established that the Business Case Documents had been lost or
12 destroyed. (*Id.* at 11-13, 15.)

13 In response, Defendants argued that sanctions were unwarranted because they had
14 produced the Business Case Documents in the form of the PowerPoint presentation. (Doc.
15 153 at 6.) Defendants also asserted that Gibson’s description of the Business Case
16 Documents during the deposition, *i.e.*, as comprising a Word document and an Excel
17 document, was the product of a mistaken memory. (*Id.* at 11 [“[T]he Business Case
18 document was created in PowerPoint, rather than Word or Excel as Todd Gibson originally
19 thought”].) Defense counsel, Gibson, Parsons, and Henry each submitted a supporting
20 declaration. Defense counsel stated that the produced PowerPoint was indeed responsive
21 to the MIDP requirements and had not been produced earlier because Gibson did not find
22 it during his initial searches. (Doc. 154-1 at 5 ¶ 23.) Gibson avowed that his earlier
23 description of the Business Case Documents was inaccurate and that the PowerPoint was
24 the only responsive document. (Doc. 153-1 at 2-3 ¶ 10 [“There has never been a *Word*
25 document or *Excel* spreadsheet as part of the Business Case I prepared. I created the
26 narrative section and spreadsheet in the Business Case document using PowerPoint.”].)
27 Gibson further contradicted his deposition testimony by stating that “[n]o other person
28 besides me added content to the Business Case document that I created, nor was it

1 circulated to any other person by email for input.” (*Id.* at 4 ¶ 13.) Gibson also stated that
2 the PowerPoint was never emailed to Maxwell and, instead, was only provided to Maxwell
3 in hard-copy format. (*Id.* at 4 ¶¶ 14-15.) Finally, Gibson avowed: “Fuelco personnel and
4 I have performed multiple searches for documents and electronically stored information
5 during the discovery phase of this lawsuit, and since, including hard drives, network drives,
6 emails, inboxes, sent folders, archived and deleted folders.” (*Id.* at 5 ¶ 17.)

7 Parsons provided a declaration, asserting that he “did not create [the PowerPoint] or
8 any portion of it” or “input any content.” (Doc. 153-4 ¶ 3.) Regarding the spreadsheet on
9 the last page of the PowerPoint, Parson averred: “I have not seen this spreadsheet or any
10 version of it before being provided it to review in January 2022.” (*Id.* ¶ 5.) Parsons also
11 stated that he believed that, sometime between March 2018 and January 2022, he was
12 “shown a hard copy of the narrative section of the document by” Gibson but that he was
13 “not given a copy of the document nor did [he] ever possess a copy of the document.” (*Id.*
14 ¶ 6.) Parsons further avowed that he “preserved, retained and produced all documents and
15 electronically stored information that could potentially be relevant to the allegations in this
16 lawsuit during discovery.” (*Id.* ¶ 8.) However, Parsons did not make any avowals related
17 to any searches he conducted personally. (*Id.*)

18 Henry’s declaration was nearly identical to Parsons’s. (Doc. 153-5.)

19 In reply, Plaintiff argued that the PowerPoint and Gibson’s declaration were
20 inconsistent based on the date of the produced presentation and Gibson’s numerous
21 recollections during his deposition. (Doc. 157 at 3.)

22 VI. The Forensic Examination Order (May 2022)

23 On May 3, 2022, the Court held a hearing to address the spoliation motion. (Docs.
24 178, 187.) Plaintiff’s counsel argued that there were “inconsistencies between [Gibson’s]
25 clear testimony at [his] deposition and then ultimately how he changed that testimony in
26 very material ways when he submitted the declaration in opposition to this motion.” (Doc.
27 187 at 44.) Plaintiff’s counsel further argued that the still-unproduced Business Case
28 Documents are a “smoking gun.” (*Id.* at 46.) Plaintiff’s counsel elaborated that “the reason

1 why this is so important is that the other individual defendants had confidentiality
2 agreements and other contractual obligations to my client during their employment. . . . To
3 the extent that they were sharing customer information and communications with the
4 competitor while they were employed, that's a violation of their restrictive covenants, it's
5 a violation of the confidentiality agreements, to the extent they were sharing confidential
6 information as defined in those agreements. It's a breach of their duty of loyalty. It's
7 potentially misappropriation of trade secrets, depending on what information was shared.”
8 (*Id.* at 48-49.) Plaintiff's counsel conceded, however, that Gibson's testimony alone
9 establishes some of those points. (*Id.* at 49.)

10 The Court questioned defense counsel about the seeming timeline discrepancy
11 raised by Plaintiff's counsel. (*Id.* at 53.) Defense counsel responded that the document,
12 per Gibson's deposition, “formed the basis for [Fuelco's] expansion, the decision to expand
13 into the southwest region. It was not the basis—and he did not testify that it was the basis
14 for hiring Luke Henry or Tom Parsons.” (*Id.* at 54.) Plaintiff's counsel disagreed, arguing
15 that “[t]he decision whether or not to expand was tied obviously to the decision to hire the
16 individual defendants.” (*Id.* at 57.) Plaintiff's counsel further noted that April 2018 (*i.e.*,
17 the date the PowerPoint was created) “is well after the decision [to expand] had been
18 made.” (*Id.*)

19 Ultimately, the Court denied without prejudice Plaintiff's request for an adverse
20 inference sanction. (*Id.* at 61.) “[H]aving carefully reviewed everything that the parties
21 filed and heard the argument today,” the Court remained unconvinced that Plaintiff “has
22 shown, at least yet, that anything was lost or destroyed.” (*Id.*) However, the Court
23 acknowledged “we've got a difficult situation here where . . . the core claim is having to
24 do with breaching these confidentiality agreements with a competitor while they're still
25 employed.” (*Id.* at 62-63.) The Court also stated that it retained “some lingering doubts”
26 about Defendants' explanation for the belated production of the PowerPoint, because
27 Plaintiff had raised “certain reasons” from which “one could reasonably infer that the
28 PowerPoint that has now been produced is not really the same thing that [Gibson] was

1 talking about during the deposition.” (*Id.* at 62.) Accordingly, the Court ordered a forensic
2 examination, with costs initially borne by Plaintiff. (*Id.* at 63-65 [“If it turns out that the
3 forensic exam supports the position they’ve taken, maybe at a later point down the road we
4 could talk about shifting the costs on it.”].)

5 VII. Further Developments Regarding The Forensic Examination (Second Half Of 2022)

6 On July 25, 2022, the parties petitioned the Court for guidance as to the parameters
7 of the forensic examination. (Doc. 185.) The details of the parties’ dispute reveal that
8 Defendants proposed that only “the hard drive of Todd Gibson” should be forensically
9 imaged, while Plaintiff requested examination of the “hard drives and emails of Parsons,
10 Henry, and Gibson.” (*Id.* at 3-4. *See also* Doc. 195-2 [email exchange outlining the
11 discovery dispute, with Plaintiff’s counsel asking: “[I]s there a reason why the hard drives
12 of Parsons and Henry would be off-limits?”].)

13 On July 26, 2022, the Court issued the following clarification: “On the one hand,
14 the Court agrees with Plaintiff’s contention that the forensic examination need not be
15 limited to Gibson’s hard drive. Instead, it should include the email accounts and hard
16 drives of Parsons, Henry, and Gibson. On the other hand, the Court disagrees with
17 Plaintiff’s contention that the examination should go beyond a search for the Business Case
18 Documents themselves and include a search for ‘any email correspondence between
19 Parsons, Henry, and Gibson, relating to the Business Case Documents.’” (Doc. 186.)

20 The parties then agreed on an examination protocol to be conducted by a third-party
21 vendor (“Ankura”). (Doc. 189 ¶ 12; Doc. 192-1 at 9-14 [protocol].)

22 On October 21, 2022, defense counsel emailed Plaintiff’s counsel to report that
23 “I’ve confirmed the hard drives [of Henry and Parsons] will not be produced. They are not
24 available. I will provide full background as to their unavailability and you can take
25 whatever steps, if any, you feel are necessary.” (Doc. 189-8 at 2.)

26 The same day, Plaintiff’s counsel asked for an “explanation about the unavailability
27 of the hard drives.” (*Id.*) The email also addressed whether Ankura would get access to
28 the “remaining emails.” (*Id.*)

1 On October 25, 2022, defense counsel sent another email stating that “Fuelco no
2 longer has the hard drives in question.” (Doc. 189-9 at 3.) Defense counsel then outlined
3 Fuelco’s standard practice for a litigation hold, which included sending the hard drives to
4 a third-party vendor, but confirmed “we have now verified that the hard drives did not go
5 there. We will produce an affidavit outlining the steps taken to preserve and the findings
6 made as described herein.” (*Id.*) As for the email issue, defense counsel stated that she
7 anticipated Ankura would get “access to the remaining 3 email accounts tomorrow.” (*Id.*)

8 The same day, Plaintiff’s counsel requested the affidavit be provided “by the end of
9 the week” and listed several questions that he wanted addressed, including:

- 10 1. The dates Henry, Parsons, and Gibson turned over their computers
11 containing the hard drives to Fuelco, and what Fuelco then did with
12 them.
- 13 2. Whether Reinesch’s hard drive has also been lost.
- 14 3. The name(s) of the individuals who last had possession of each of the
15 3 hard drives (4 hard drives if Reinesch’s has been lost), and the
16 date(s) they last had such possession.
- 17 4. The dates, if any, that any searches were run on the 3 (or 4) hard
18 drives.
- 19 5. Whether and when the hard drives were searched in connection with
20 producing documents responsive to SC Fuels’ document requests and
21 Fuelco’s mandatory initial discovery obligations.
- 22 6. Whether and when the hard drives were searched to locate the
23 Business Case Documents.
- 24 7. When Fuelco became aware that the hard drives had been lost or
25 destroyed.
- 26 8. Why Fuelco did not bring this to Plaintiff’s or the Court’s attention
27 sooner.

28 (*Id.* at 2.)

On October 26, 2022, defense counsel informed Plaintiff’s counsel via email that
“two of the email account credentials were provided last week to Ankura and the remaining
three email account credentials were provided today.” (Doc. 189-10 at 7.) As for the hard
drive issue, defense counsel reiterated: “you were informed last week that they have not

1 been located and the explanation was also provided to you on Monday. Fuelco offered to
2 provide an affidavit regarding the explanation and, again, that will be provided.” (*Id.*)

3 That same day, Plaintiff’s counsel responded by asking both when the affidavit
4 would be provided and whether it would “include the information I requested in the email
5 I sent yesterday.” (*Id.* at 6.) Plaintiff’s counsel replied that same day: “Again, as stated,
6 the affidavit will be provided once it is completed and it will provide the explanation as to
7 the hard drives and why they are not able to be produced.” (*Id.*) Later that day, Plaintiff’s
8 counsel again outlined his overarching frustrations about the search for the Business Case
9 Documents. (*Id.* at 4-5.) He also indicated that he would be filing another motion for
10 sanctions and requested that defense counsel provide a timeline for the affidavit along with
11 whether she intended to answer his enumerated questions. (*Id.*)

12 On October 28, 2022, defense counsel responded. (*Id.* at 3.) First, defense counsel
13 characterized Plaintiff’s counsel’s email as “false and inflammatory” and asked him to
14 “immediately discontinue your reckless accusations and threats.” (*Id.*) As for the affidavit,
15 defense counsel stated that it “has been offered and will be provided.” (*Id.*) As for timing,
16 defense counsel represented that she notified Plaintiff’s counsel the same day she “received
17 confirmation regarding the hard drives.” (*Id.*) Defense counsel posited that the reason
18 Plaintiff’s counsel was so focused on the hard drives was due to a change in Ankura’s
19 search protocol. (*Id.*) More specifically, defense counsel stated that she “learned today
20 that you blatantly authorized, or intentionally failed to restrict against, Ankura’s wholesale
21 forensic examination of Defendants’ emails. This is exactly what we warned against, given
22 your repeated attempts to do so, and which the Court ordered against.” (*Id.*) Defense
23 counsel indicated that she planned to advise the Court of Plaintiff’s counsel’s conduct. (*Id.*)

24 Later the same day, Plaintiff’s counsel responded: “I will address only your
25 contentions about the inspection protocol since you have not substantively addressed any
26 of our concerns about the hard drive spoliation.” (*Id.* at 2.) Plaintiff’s counsel then accused
27 defense counsel of manufacturing her concern about the forensic examination protocol to
28 “distract from your client’s discovery abuses” and maintained he has “no idea what issues

1 you are complaining about” and generally has “no reason to believe they are not following
2 the protocol.” (*Id.*) In closing, Plaintiff’s counsel offered to confer further on the Ankura
3 issue if defense counsel provided additional information. (*Id.*)

4 On November 8, 2022, defense counsel informed Plaintiff’s counsel via email that
5 Henry’s hard drive had been located and it was possible that Parsons’s hard drive would
6 be located as well. (Doc. 189-11 at 2.) Defense counsel further represented that the
7 “company responsible for retaining the laptops was acquired by another company,
8 unknown to Fuelco, and in short it has been a very difficult process.” (*Id.*) Regarding
9 email access, defense counsel surmised that any delay at this point was Ankura’s fault,
10 given that she has “provided all the necessary credentials.” (*Id.*) Additionally, defense
11 counsel confirmed that Ankura went beyond the “limits of the protocol and even violated
12 terms of the protocol” and stated that she was “alarmed by the failure to properly advise
13 Ankura about the protocol and the limits of their searches.” (*Id.*)

14 That same day, Plaintiff’s counsel responded by inquiring about the status of
15 Gibson’s original hard drive and when Henry’s hard drive would be produced. (*Id.*) At
16 that time, defense counsel provided no further updates on the status of the hard drives.
17 (Doc. 189 ¶ 18.)

18 VIII. The Second Sanctions Motion (December 2022)

19 On December 7, 2022, Plaintiff filed the now pending motion, seeking (1) a default
20 judgment against Defendants pursuant to Rule 37(e) of the Federal Rules of Civil
21 Procedure, the Court’s inherent authority, and/or Rule 11; or (2) in the alternative, an
22 adverse-inference instruction and an order reopening discovery. (Doc. 188 at 16-17, 23-
23 24.)

24 In response, Defendants submitted various pieces of evidence related to the results
25 of the forensic examination. One of those submissions is a declaration from defense
26 counsel, the majority of which is devoted to the controversy over the forensic imaging
27 protocol and whether she timely provided Ankura with access to Defendants’ email
28 accounts. (*See, e.g.*, Doc. 192-1 at 1-5 ¶¶ 2-29.)

1 As for the hard drive issue, defense counsel stated that on October 21, 2022,
2 “Defendants believed that the Fuelco issued laptops of Tom Parsons and Luke Henry were
3 not available and that Todd Gibson had turned over his prior laptop and thus it was not
4 available.” (*Id.* at 5 ¶ 30.) However, defense counsel clarified that on December 9, 2022,
5 “it was confirmed to [her] that Todd Gibson’s prior laptop used during the search period
6 was ‘swapped out’ due to a virus and that a mirror image of the hard drive contents of the
7 prior laptop was transferred to his current laptop. Therefore, the hard drive for the search
8 period was available and would be produced for search and examination.” (*Id.* at 7 ¶ 36.)²
9 Attached to defense counsel’s declaration are copies of Ankura’s search protocol (*id.* at 9-
10 14), an overview document that Defendants refer to as a “narrative” (*id.* at 16-20), and
11 Gibson’s deposition (*id.* at 21-87).

12 Defense counsel also outlined the results of the forensic imaging process. (*Id.* at 3
13 ¶ 16.) She reported that three responsive Word documents and three responsive Excel
14 workbooks were recovered and thereafter produced to Plaintiff. (*Id.*) The Word documents
15 were “exact duplicates” of a Word document entitled “Overview of Commercial Southwest
16 fuels and lubes business” (“Overview”) that had previously been disclosed to Plaintiff.
17 (Doc. 192-1 at 3-4 ¶¶ 16-20; Doc. 195-1 [original disclosure of email with attachment].)
18 The Excel documents were “exact duplicates” of an Excel document entitled “FY’18
19 Commercial Budget” that had not been previously produced and did not appear to match
20 the spreadsheet embedded in the PowerPoint. (Doc. 192-1 at 4 ¶¶ 21-22.) Finally, as for
21 the forensic search of the “Defendants’ email accounts,” defense counsel avowed that
22 Ankura “identified no deleted, erased, missing or altered emails or attachments to emails
23 during its forensic review.” (*Id.* at 3 ¶ 15.)

24 Defendants also provided a declaration from Kevin Fung, who was responsible for
25 Fuelco’s “equipment inventory management processes including company-issued tablets
26 and phones” and, in 2022, “was given formal responsibilities over company-issued
27

28 ² Defense counsel also described her email communications with Plaintiff’s counsel
(Doc. 192-1 at 6-7 ¶¶ 31-35), which are summarized earlier in this order.

1 laptops.” (Doc. 192-2 ¶ 3.) Fung avowed that he has “knowledge of the steps taken by
2 Fuelco in this case with regard to retaining the computer hard drives of former and current
3 employees.” (*Id.* ¶ 4.) Regarding litigation holds, Fung explained that Fuelco’s general
4 practice is to “preserve company-issued computers and hard drives of employees or former
5 employees flagged as a result of an official ‘Litigation Hold.’” (*Id.* ¶ 5.) Between 2018-
6 2020, Fung knew of one attorney (General Counsel) and one paralegal who were in charge
7 of the litigation hold process. (*Id.* ¶¶ 6-7.) Fuelco’s “standard practice” was that the
8 paralegal “would prepare a Litigation Hold memo on litigation matters served on the
9 company and either talk to the applicable General Counsel (private or public) personally
10 or by phone as to internal personnel who should be copied on the Litigation Hold. She
11 would then circulate Fuelco’s standard Litigation Hold memo to persons identified as
12 copied on the memo.” (*Id.* ¶ 7.) Here, however, in place of a litigation hold memo,
13 opposing counsel’s July 2018 litigation hold letters were used. (*Id.* ¶ 8; Doc. 55-16 [cease
14 and desist letter to Henry]; Doc. 55-17 [cease and desist letter to Parsons]; Doc. 55-18
15 [cease and desist letter to Reinesch].) Fung explained that, after a litigation hold is in place,
16 Fuelco’s usual practice is that “the computers and/or hard drives identified are forwarded
17 to an outside third-party data discovery vendor. During the relevant time period, the vendor
18 that Fuelco and all other companies used was Xacta Data Discovery.” (Doc. 192-2 ¶ 9.)

19 Fung also explained that Parsons and Henry were issued laptops while they were
20 employed by Fuelco. (*Id.* ¶ 11.) Fuelco employed Parsons from April 2, 2018, through
21 July 8, 2019, at which time Parsons returned his computer to the company. (*Id.* ¶ 12.)
22 Fuelco employed Henry from April 9, 2018, through January 30, 2020, at which time
23 Henry returned his computer to the company. (*Id.* ¶ 13.) For context, Fung explained that
24 this litigation began in July 2018, with Defendants’ initial disclosures “issued in October
25 2018” and the responses to discovery requests and subpoenas submitted in January 2019
26 (with supplemental responses occurring afterwards). (*Id.* ¶ 10.) It was Fung’s
27 understanding that after Parsons’s departure in July 2019, “Fuelco intended for a legal hold
28 to be placed on the computer he used, serial number 9T6FMH2.” (*Id.* ¶ 15.) Similarly,

1 after Henry's departure in January 2020, "a legal hold was believed to have been placed on
2 the computer he used, serial number 8L6FMH2." (*Id.* ¶ 16.)

3 However, in the response brief, Defendants confirm that Parsons's and Henry's hard
4 drives have been lost. (Doc. 192 at 12.) How this happened is somewhat unclear.
5 According to Fung, after the Court ordered a forensic examination of the computers,
6 "Fuelco reached out to Xacta to locate and access the laptops/hard drives of Tom Parsons
7 and Luke Henry." (Doc. 192-2 ¶ 17.) "Fuelco received no response from Xacta for several
8 weeks. Fuelco then reached out to the customer service representative from Xacta and
9 learned that the company had been acquired by another company known as Consilio." (*Id.*
10 ¶ 18.) Fung described a November 8, 2022 conference call with Consilio, during which
11 "Consilio conducted an electronic inventory search and stated that the name 'Luke Henry'
12 came up on the list. Consilio then began the process of locating and retrieving Luke
13 Henry's computer and agreed to, at the same time, search for Tom Parsons' computer."
14 (*Id.* ¶¶ 19-20.) However, in December 2022, "Consilio confirmed to Fuelco that it was
15 unable to locate the laptop inventoried under Luke Henry's name" and was also unable to
16 locate the laptop issued to Parsons. (*Id.* ¶ 21.) Fung explained that Fuelco's discovery
17 responses "were based on searches of company computers, as well as any other databases
18 or sources that may contain responsive or discoverable information." (*Id.* ¶ 22.)

19 Finally, as for Gibson's laptop, Fung stated that it became infected with a virus in
20 October 2020. (*Id.* ¶ 23.) Per company policy, the laptop was "swapped" and the new
21 laptop was functionally an identical copy of the original laptop. (*Id.* ¶¶ 23-27.) Although
22 the original version is no longer available, the swapped version of the laptop was produced
23 to Ankura. (*Id.* ¶¶ 28- 29, 31.) Defense counsel confirms that Ankura searched this version
24 of Gibson's hard drive. (Doc. 192-1 at 4-5 ¶¶ 23-24.)

25 During the forensic search of Gibson's replacement laptop, Ankura identified 14
26 potentially responsive items, but none of them were "Word or Excel documents" and
27 "Ankura identified no deleted, erased, missing or altered files, documents or data during
28 its forensic search of Todd Gibson's hard drive." (*Id.* at 5 ¶¶ 24-26.)

1 IX. Defendants' Supplemental Submissions (February 2023)

2 On February 22, 2023, after reviewing the parties' motion papers, the Court held a
3 telephonic status conference. (Doc. 199.) The Court requested that Defendants file "a
4 declaration from witnesses who are competent to testify attesting to the results of the
5 forensic email search and providing the details regarding the searches that occurred with
6 respect to the Henry and Parsons hard drives before they were lost." (Docs. 199, 202.)

7 Those documents were timely filed. (Docs. 200-2 [Ingold decl.], 200-3 [Parsons
8 decl.], 204-2 [Henry decl.].)³ Defense counsel's supplemental declaration provides that,
9 as of February 2023, Ankura was able to access Parsons's, Henry's, and Gibson's Fuelco
10 email accounts. (Doc. 200-2 ¶¶ 16-18.) Per the search protocol, 13 emails were found that
11 had Excel or Word document attachments during the relevant period, but "none of the 13
12 items were 'responsive.'" (*Id.* ¶ 18.) Ankura also "identified no deleted, erased, missing
13 or altered emails or attachments to emails." (*Id.* ¶ 19.)

14 Parsons's supplemental declaration confirms he had his laptop until July 8, 2019,
15 when he was no longer employed by Fuelco. (Doc. 200-3 ¶ 2.) Parsons searched this
16 computer in "September and October 2018 for use in providing responses under the
17 [MIDP]; in December 2018 and January 2019 for use in providing responses to Plaintiff's
18 requests for production; and between March and July 2019 as requested by counsel." (*Id.*
19 ¶ 6.) Parsons avows that "[a]ll discoverable items that were located by me on my company
20 laptop/hard drive as a result of these searches, if any, have been produced." (*Id.* ¶ 7.)

21 Henry's supplemental declaration confirms he had his Fuelco-issued laptop until
22 January 30, 2020. (Doc. 204-2 ¶ 2.) Henry "conducted multiple searches of my company
23 laptop/hard drive as part of my discovery obligations. My numerous searches for relevant,
24 potentially relevant, and discoverable documents and information included, but were not
25 limited to, my company laptop/hard drive." (*Id.* ¶ 5.) As for the timing of his searches,
26 Henry searched "in September 2018 for use in providing responses under the [MIDP];" "in
27

28 ³ Defense counsel's declaration was inadvertently filed twice. (Docs. 200-1, 200-2.)
Defendants corrected this error at Doc. 204.

1 December 2018 and January 2019 for use in providing responses to Plaintiff’s requests for
 2 production;” “in July, August and September 2019 for use in providing responses to
 3 Plaintiff’s discovery requests;” and “between December 2019 and January 2020 as
 4 requested by counsel.” (*Id.* ¶ 6.) Henry concludes that “[a]ll discoverable items that were
 5 located by me on my company laptop/hard drive as a result of these searches have been
 6 produced.” (*Id.* ¶ 7.)

7 DISCUSSION

8 I. Legal Standard

9 “Spoliation is the destruction or material alteration of evidence, or the failure to
 10 otherwise preserve evidence, for another’s use in litigation. Spoliation arises from the
 11 failure to preserve relevant evidence once a duty to preserve has been triggered.” *Fast v.*
 12 *GoDaddy.com LLC*, 340 F.R.D. 326, 334 (D. Ariz. 2022) (citation and internal quotation
 13 marks omitted).

14 When, as here, a party seeks sanctions based on the spoliation of one particular
 15 category of evidence, electronically stored information (“ESI”), the request is governed by
 16 Rule 37(e) of the Federal Rules of Civil Procedure. Rule 37(e) was “completely rewritten”
 17 in 2015 to “provide[] a nationally uniform standard for when courts can give an adverse
 18 inference instruction, or impose equally or more severe sanctions, to remedy the loss of
 19 ESI.” *See generally* 1 Gensler, Federal Rules of Civil Procedure, Rules and Commentary,
 20 Rule 37, at 1216 (2022). The text of Rule 37(e) now provides:

21 If electronically stored information that should have been preserved
 22 in the anticipation or conduct of litigation is lost because a party failed
 23 to take reasonable steps to preserve it, and it cannot be restored or
 replaced through additional discovery, the court:

- 24 (1) upon finding prejudice to another party from the loss of the
 25 information, may order measures no greater than necessary to
 cure the prejudice; or
- 26 (2) only upon finding that the party acted with the intent to deprive
 another party of the information’s use in the litigation may:
 - 27 (A) presume that the lost information was unfavorable to the
 28 party;
 - (B) instruct the jury that it may or must presume the

1 information was unfavorable to the party; or

2 (C) dismiss the action or enter a default judgment.

3 (*Id.*) A court cannot rely on its inherent authority (or state law) when deciding whether to
4 impose the categories of sanctions authorized by Rule 37(e)—the standards supplied by
5 Rule 37(e) are exclusive. Gensler, *supra*, Rule 37, at 1221. *See also Newberry v. Cnty. of*
6 *San Bernardino*, 750 Fed. App’x 534, 537 (9th Cir. 2018) (“The parties framed the
7 sanctions issue as invoking the district court’s inherent authority. However, at the time the
8 sanctions motion was filed, sanctions were governed by the current version of Rule 37(e)
9 . . . [which] therefore foreclose[d] reliance on inherent authority to determine whether
10 terminating sanctions were appropriate.”) (citations and internal quotation marks omitted).

11 A party seeking sanctions under Rule 37(e) has a threshold duty to show that the
12 ESI at issue was, in fact, lost or destroyed. Fed. R. Civ. P. 37(e), advisory committee’s
13 note to 2015 amendment (“The new rule applies only . . . when [ESI] is lost.”). If such a
14 showing has been made, Rule 37(e) “establishes three prerequisites to sanctions: the ESI
15 should have been preserved in the anticipation or conduct of litigation, it is lost through a
16 failure to take reasonable steps to preserve it, and it cannot be restored or replaced through
17 additional discovery.” *Fast*, 340 F.R.D. at 335. “If these requirements are satisfied, the
18 rule authorizes two levels of sanctions. Section (e)(1) permits a court, upon finding
19 prejudice to another party from the loss of ESI, to order measures no greater than necessary
20 to cure the prejudice. Section (e)(2) permits a court to impose more severe sanctions such
21 as adverse inference jury instructions or dismissal, but only if it finds that the spoliating
22 party ‘acted with the intent to deprive another party of the information’s use in the
23 litigation.’” *Id.* However, “[f]inding an intent to deprive another party of the lost
24 information’s use in the litigation does not require a court to adopt any of the measures
25 listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures
26 authorized by this subdivision should not be used when the information lost was relatively
27 unimportant or lesser measures such as those specified in subdivision (e)(1) would be
28 sufficient to redress the loss.” Fed. R. Civ. P. 37(e), advisory committee’s note to 2015

1 amendment.

2 “[T]he relevant standard of proof for spoliation sanctions is a preponderance of the
3 evidence.” *Fast*, 340 F.R.D. at 335. *See also Compass Bank v. Morris Cerullo World*
4 *Evangelism*, 104 F. Supp. 3d 1040, 1052-53 (S.D. Cal. 2015) (same); *Singleton v. Kernan*,
5 2018 WL 5761688, *2 (S.D. Cal. 2018) (same). The Court is the appropriate finder of fact
6 on a Rule 37(e) motion. *Mannion v. Ameri-Can Freight Sys. Inc.*, 2020 WL 417492, *4
7 (D. Ariz. 2020). *See also Adriana Int’l Corp. v. Thoeren*, 913 F.2d 1406, 1408 (9th Cir.
8 1990) (“The imposition of discovery sanctions pursuant to [Rule 37] is reviewed for abuse
9 of discretion. Absent a definite and firm conviction that the district court made a clear
10 error in judgment, this court will not overturn a Rule 37 sanction. Findings of fact related
11 to a motion for discovery sanctions are reviewed under the clearly erroneous standard. If
12 the district court fails to make factual findings, the decision on a motion for sanctions is
13 reviewed de novo.”) (citations omitted).

14 II. The Parties’ Arguments

15 Plaintiff argues that a default judgment sanction is warranted based on Defendants’
16 intentional spoliation of ESI, withholding of evidence, and false and misleading statements
17 regarding the same. (Doc. 188 at 9.) Plaintiff contends that Defendants could not have
18 actually searched the hard drives for the Business Case Documents because Gibson’s was
19 not the original hard drive and Henry’s and Parsons’s have been lost. (*Id.*) Plaintiff also
20 accuses Defendants of hiding the hard drive destruction issue since at least Gibson’s
21 deposition in June 2021. (*Id.* at 8.) Between the deception and spoliation, Plaintiff
22 questions the diligence and accuracy of Defendants’ initial discovery responses. (*Id.* at 9.)
23 All told, Plaintiff argues that Defendants have “compromised the integrity of the legal
24 proceedings.” (*Id.*) In the alternative, Plaintiff seeks an adverse-inference instruction as
25 well as the re-opening of discovery for “an opportunity to probe Defendants’ prior
26 discovery and seek discovery of Defendants’ emails and hard drives anew through a court-
27 supervised process in which that ESI is examined by experts for responsive documents.”
28 (*Id.* at 23.) Of primary concern to Plaintiffs is Defendants’ refusal to “answer basic

1 question[s] about which hard drives were lost, when they were lost, and when and whether
2 they were searched for the Business Case Documents and documents responsive to requests
3 for production and MDIP [sic] requests.” (*Id.*)

4 In response, Defendants argue: “There is unequivocally no basis for seeking, much
5 less imposing, default judgment against Defendants as there has been no loss or destruction
6 of any discoverable information or evidence in this case, nor has there been any misleading
7 or false representation made to this Court by any Defendant or counsel.” (Doc. 192 at 1.)
8 Defendants argue that the premise of Plaintiff’s spoliation theory concerning the Business
9 Case Documents—*i.e.*, “that the PowerPoint document was not the same as the Word and
10 Excel documents and, thus, they must have been destroyed”—has now been conclusively
11 disproved by the forensic examination, which “produced no such ‘other’ documents, nor
12 did it reveal any deleted or erased files.” (*Id.* at 11-12.) In Defendants’ view, there can be
13 no sanctionable conduct where “the forensic searches confirmed that no documents were
14 destroyed, deleted or removed from Defendants’ email accounts or hard drive that were
15 searched.” (*Id.* at 2.) Defendants also argue that, to the extent Plaintiff seeks to rely on the
16 Court’s inherent authority as the basis for the sanctions request, this reliance is misplaced
17 because Rule 37(e) supplies the exclusive standards for imposing a default-judgment
18 sanction. (*Id.* at 15-16.) Defendants acknowledge that Henry’s and Parsons’s hard drives
19 were “not available for Plaintiff’s forensic search” but maintain that sanctions are not
20 warranted based on the loss of those hard drives because they took reasonable steps to
21 preserve the hard drives and because the hard drives were “searched for relevant and
22 discoverable materials” after the litigation began. (*Id.*)

23 In reply, Plaintiff contends that “Defendants do not even attempt to explain or even
24 address their numerous misrepresentations.” (Doc. 194 at 4.) Plaintiff further notes that,
25 during the forensic examination, a Word document was found attached to at least three
26 emails, yet those corresponding emails were never disclosed. (*Id.*)⁴ Overall, Plaintiff

27
28 ⁴ Specifically, the Overview document was attached to at least three additional emails
between Henry, Parsons, and Gibson that were not disclosed. (Doc. 194 at 4.)

1 accuses Defendants of hiding the ball and reiterates its request for a default judgment. (*Id.*
2 at 5.) Plaintiff takes particular umbrage with Defendants’ representation that the email
3 addresses and Gibson’s hard drive were searched, given that the only email accounts
4 Ankura accessed were Parsons’ and Henry’s *personal* email accounts. (*Id.* at 6; Doc. 195
5 ¶ 6.) Plaintiff encourages the Court to infer widespread non-responsiveness given that
6 “[r]esponsive documents are likely to reside in the unsearched locations.” (*Id.* at 6-7
7 [describing the Ankura search results and corresponding 31 emails, only six of which
8 contained the attachments].) Plaintiff also takes issue with the late disclosure of the
9 PowerPoint, which was a “key, responsive document.” (*Id.* at 7.) Finally, Plaintiff
10 identifies at least seven supplemental disclosures that post-date Parsons’s departure from
11 Fuelco in July 2019 yet omit the unavailability of his hard drive and outlines the timeline
12 of Defendants’ allegedly misleading statements to the Court as to their search for the
13 Business Case Documents. (*Id.* at 8-12.) In conclusion, Plaintiff reiterates: “We know that
14 Defendants initially withheld the 2018 PowerPoint and are currently withholding dozens
15 of key emails between Gibson, Parsons, and Henry. Those are among the most critical
16 documents in the entire case! Plaintiff did not have the benefit of those documents during
17 depositions. The emails were only found via a very limited and incomplete forensic
18 examination that Plaintiff was forced to spend tens of thousands of dollars in fees and costs
19 to obtain.” (*Id.* at 13.)⁵

20 III. Analysis

21 As an initial matter, Plaintiff variously invokes Rule 37(e), the Court’s inherent
22 authority, and Federal Rule of Civil Procedure 11 as the bases for its sanctions request.
23 (Doc. 188 at 9-10, 16 [“For the same reasons that a default sanction should be entered under
24 the court’s inherent authority, it can and should also be entered as a sanction under Rule
25 37(e).”].) This approach is misplaced, at least in relation to Plaintiff’s requests for a default
26 sanction or an adverse inference based on the spoliation of ESI. When a litigant seeks the

27 ⁵ Plaintiff also contends that “Defendants failed to respond to Ankura’s December
28 30, 2022, email again requesting access” to the Fuelco corporate email accounts for Henry,
Parsons, and Gibson. (Doc. 194 at 14.)

1 imposition of sanctions based on the spoliation of ESI and seeks the types of sanctions
2 authorized by Rule 37(e), that rule supplies the exclusive source of authority. *Newberry*,
3 750 Fed. App'x at 537.⁶

4 During oral argument, Plaintiff argued that the Court should look beyond Rule 37(e)
5 because the request for terminating sanctions is based, in part, on Defendants' false
6 statements and coverup attempts since the ESI spoliation occurred. When asked to identify
7 "the most egregious" misconduct that might give rise to such sanctions, Plaintiff pointed
8 to various statements in Gibson's February 2022 declaration (Doc. 153-1), which
9 Defendants submitted in response to the first sanctions motion.

10 The Court declines to rely on its inherent authority to impose additional sanctions
11 beyond the Rule 37(e) sanctions discussed elsewhere in this order. Even if, as Plaintiff
12 argues, such sanctions are potentially available based on litigation misconduct that is
13 related to (but distinct from) the challenged acts of spoliation,⁷ the imposition of additional
14 sanctions is unwarranted here for two related reasons. First, the Court is not persuaded that
15 the challenged statements in Gibson's February 2022 declaration are as egregious as
16 Plaintiff suggests. In some cases, Plaintiff's theory of falsity turns on unresolved semantic
17 and definitional disputes, such as what constitutes the "Business Case Documents." In

18 ⁶ Additionally, and as Defendants correctly note, "when citing Rule 37(e) in support
19 of its request for sanctions . . . Plaintiff at no time specifies whether its motion is brought
20 under sections 37(e)(1) or 37(e)(2)." (Doc. 192 at 16 n.3.) Despite this imprecision, the
21 Court construes Plaintiff's motion as seeking relief under both provisions—although the
22 main request is for a terminating sanction and one of the fallback requests is for an adverse-
inference instruction, which are two of the severe sanctions authorized under subdivision
(e)(2), Plaintiff also makes a fallback request for the reopening of discovery, which could
be viewed as a "measure[] no greater than necessary to cure the prejudice" under
subdivision (e)(1).

23 ⁷ See, e.g., *Jones v. Life Care Centers of Am., Inc.*, 2022 WL 4389727, *34 (M.D.
24 Fla. 2022) ("Use of inherent authority instead of rule-based or statutory authority to
25 [impose terminating sanctions against] Ms. Jones is appropriate because neither the rules
26 nor the statute are up to the task. Rule 11 is geared less toward perjury and more toward
27 factual allegations or assertions lacking support for which curing through withdrawal after
28 warning is appropriate. Rules 16(f), 26(g), and 37(e) address timing and discovery
violations. Although Ms. Jones's affidavit and testimony related to a discovery violation,
her perjury constitutes an independent, non-discovery affront to the judicial process.")
(citations and internal quotation marks omitted); *Williams v. Am. College of Educ., Inc.*,
2019 WL 4412801, *10 (N.D. Ill. 2019) ("The inherent power should be used sparingly, to
punish misconduct (1) occurring in the litigation itself, not in the events giving rise to the
litigation and (2) not adequately dealt with by other rules.") (cleaned up).

1 other cases, although certain representations have turned out to be false, Gibson may have
2 honestly believed in their truthfulness at the time he made them.⁸ This is not the sort of
3 litigation conduct that could properly give rise to terminating sanctions under the Court’s
4 inherent authority. *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1088 (9th Cir. 2021)
5 (“Because of their very potency, inherent powers must be exercised with restraint and
6 discretion.”) (citation omitted). Second, the Rule 37(e) sanctions being imposed here are,
7 in the Court’s estimation, carefully calibrated to remedy all of the prejudice to Plaintiff
8 arising from Defendants’ challenged conduct. For example, as discussed *infra*, the Court
9 is now awarding Plaintiff all of the reasonable costs and fees arising from both sanctions
10 motions, as well as the costs associated with the forensic examination. Thus, to the extent
11 Defendants’ challenged litigation conduct (separate from the challenged acts of spoliation)
12 complicated and delayed the process of getting to the bottom of the spoliation issues, that
13 conduct has been fully addressed through the Rule 37(e) sanctions. Thus, there is no need
14 to supplement the Rule 37(e) sanctions with additional inherent-authority sanctions.
15 *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) (“[W]hen there is bad-faith conduct in
16 the course of litigation that could be adequately sanctioned under the Rules, the court
17 ordinarily should rely on the Rules rather than the inherent power. But if in the informed
18 discretion of the court, neither the statute nor the Rules are up to the task, the court may
19 safely rely on its inherent power.”).

20 With those considerations in mind, the Court turns to the relevant considerations
21 under Rule 37(e).

22 **A. Whether ESI Was Lost**

23 “A party seeking sanctions under Rule 37(e) has a threshold duty to show that the
24 ESI at issue was, in fact, lost or destroyed.” *Cramton v. Grabbagreen Franchising LLC*,

25
26 ⁸ For example, Plaintiff correctly notes that paragraph 18 of Gibson’s February 2022
27 declaration (“Fuelco has produced everything that was located that relates to the issues in
28 this case or is responsive to discovery requests served by Plaintiff.”) is false, because the
forensic examination that the Court ordered after Gibson submitted his declaration revealed
the existence of some additional, previously undisclosed documents. But this development
does not show that Gibson knew his statement was false at the time he made it.

1 2019 WL 7048773, *8 (D. Ariz. 2019).

2 Plaintiff's motion is best construed as arguing that three discrete sets of ESI have
3 been lost: (1) the Business Case Documents, (2) Gibson's hard drive; and (3) Parsons's and
4 Henry's hard drives. (Doc. 188 at 17-18, 21-22.) The Court will discuss each in turn.

5 1. Business Case Documents

6 Whether the Business Case Documents were lost turns on whether the PowerPoint
7 that Defendants belatedly produced in January 2022 is the same document that Gibson
8 described during Fuelco's Rule 30(b)(6) deposition as the combination of a Word
9 document and an Excel document.

10 On the one hand, the Court remains skeptical of Defendants' contention that Gibson
11 simply made a mistake when describing the Business Case Documents during the
12 deposition. This skepticism is based on three considerations.

13 First, Gibson's description of the Business Case Documents during the deposition
14 was not some offhand, passing remark. The relevant questioning occupies several
15 transcript pages and Gibson offered a very specific and seeming unequivocal recollection
16 of how the Business Case Documents came into existence. He specifically recalled that
17 they comprised both a Word document and a separate Excel document and specifically
18 recalled that Parsons and Henry were responsible for inputting data into the Excel
19 document, which he then reviewed. (Doc. 192-1 at 37.) However, eight months later—
20 and after the seeming significance of his testimony resulted in a sanctions motion—Gibson
21 claimed in a declaration that, actually, there were never any Word and Excel documents
22 and, actually, Parsons and Henry never had any role in inputting the data into the
23 spreadsheet that was embedded within the PowerPoint. (Doc. 153-1 ¶¶ 10-14.) This about-
24 face is, frankly, hard to believe.

25 Second, Defendants still have not adequately addressed the timing issue. Gibson
26 testified during the deposition that after Maxwell expressed an interest in "late 2017 or
27 early 2018" about expanding into Arizona, he began speaking to Parsons (who was, at the
28 time, still employed by Plaintiff). (Doc. 192-1 at 30-32.) Gibson further testified that these

1 conversations with Parsons began in “January or February of 2018” and that he spoke with
2 Parsons at least five times before submitting the Business Case Documents to Maxwell.
3 (*Id.*) Critically, Gibson testified that the purpose of submitting the Business Case
4 Documents to Maxwell was to decide *whether* Fuelco should expand into Arizona. (*Id.* at
5 36 [agreeing that “during that meeting, you and Mr. Maxwell both agree[d] that it made
6 sense to move forward” and that this agreement “was primarily based on the pro forma
7 document that you prepared”].) In a related vein, Gibson testified that the names of
8 Parsons, Henry, and Reinesch did not appear in the documents. (*Id.* at 36 [Q: “Do you
9 recall whether the names of Mr. Parsons, Mr. Henry, or Mr. Reinesch were on that
10 document?” A: “No, I don’t—I don’t think their names were incorporated into the
11 document.”].) The difficulty with these assertions is that they are inconsistent with the
12 PowerPoint that Defendants now claim is the document that Gibson was describing during
13 the deposition. The PowerPoint is dated “April 2018” (Doc. 153-1 at 8), identifies Arizona
14 as one of the states where Fuelco had an “Active Footprint” (*id.* at 11), identifies Parsons,
15 Henry, and Reinesch by name in Fuelco’s organizational chart (*id.* at 13), and elsewhere
16 identifies Parsons and Henry as “key management” employees who had already been hired
17 (*id.* at 23-24). The seeming inescapable conclusion from all of this is that the PowerPoint
18 is a document that was created after the decision to expand into Arizona—and hire
19 Parsons,⁹ Henry, and Reinesch in support of the expansion effort—had already been made,
20 which is far different from the Business Case Documents that Gibson described during the
21 deposition (which were intended to evaluate whether to expand into Arizona).

22 Third, and more broadly, the Court finds it particularly appropriate to adopt a “trust,
23 but verify” approach when evaluating Defendants’ contentions regarding the Business
24 Case Documents in light of Defendants’ approach to other discovery issues in this case.

25 On the other hand, the results of the forensic examination, although not dispositive,
26

27 ⁹ Fuelco made the job offer to Parsons on March 21, 2018. (Doc. 192-1 at 55.) This
28 further undermines the suggestion that the “April 2018” PowerPoint is the same document
that Gibson described during his deposition as being used to decide whether to expand into
Arizona (and hire Parsons as part of the expansion effort).

1 tend to support Defendants’ contention that Gibson made a mistake when testifying that
2 the Business Case Documents comprised both a Word document and an Excel document.
3 If that testimony were correct, one would have expected such documents to be found during
4 the forensic examination of Gibson’s hard drive. But no such documents were found. As
5 Defendants correctly note, this suggests that the documents never “existed” in an
6 alternative format. (Doc. 192 at 17.)

7 The Court acknowledges that, with the loss of Henry’s and Parsons’s hard drives,
8 this conclusion is not airtight. However, the forensic search of Henry’s and Parsons’s
9 personal email accounts also did not reveal any Word or Excel documents that matched the
10 Business Case Documents description. (Doc. 191-2 at 3-4 ¶¶ 15-18, 21-22; Doc. 200-2
11 ¶ 19.) The search of Gibson’s email account likewise came up empty for any such
12 documents. (*Id.*)

13 This backdrop creates a frustrating record. Both sides have pointed to certain
14 evidence that tends to support their position while failing to make any real effort to
15 harmonize their position with the other side’s evidence. At any rate, because the Court is
16 required (for purposes of resolving Plaintiff’s motion) to make a factual determination
17 about whether the Business Case Documents were lost, it will offer its best attempt to
18 provide an explanation that harmonizes all of the evidence. That explanation is that
19 although Gibson may have misremembered, during the deposition, the *format* of the
20 documents he used to create the business-case presentation to Maxwell (which would
21 explain why no responsive Word or Excel documents were found during the forensic
22 search), he did not misremember the *timing*—he created a PowerPoint at some point in
23 February or March 2018 that made the case for expanding into Arizona, Maxwell found
24 this presentation persuasive, and Fuelco thereafter decided to expand into Arizona and
25 hired the individual Defendants as part of that expansion. Where is this version of the
26 PowerPoint? One possible explanation is that it no longer exists because Gibson
27 subsequently created new versions of it, with updated information, after Parsons and Henry
28 were hired. This would explain why the version that Defendants eventually produced is

1 dated “April 2018” and identifies Parsons and Henry as current employees. This
2 explanation is also consistent with Gibson’s testimony during the deposition that the pro
3 forma was a “living document” that was changed and updated over time. (Doc. 192-1 at
4 35 [“[T]he pro forma projections business case that I put together was kind of a living
5 document. So it sort of, you know—it started as a discussion document between Tom
6 [Parsons] and I, and—and just sort of, you know, had a life of its own for three or four or
7 five months, or—onto becoming projections of the company—at least for the southwest
8 region. . . . I’m sure I have a version of it.”]; *id.* [agreeing that “that document is a living
9 document . . . [that] changed as time went on and as [Gibson] obtained additional
10 information”].) Finally, this explanation is also consistent with Gibson’s testimony during
11 the deposition that Parsons and Henry were responsible for inputting some of the data into
12 the spreadsheet portion of the document (*id.* at 37)—although they may not have inputted
13 the data that appeared in the original version, given that they did not even work for Fuelco
14 at the time, they could have begun inputting data into subsequent versions of the document
15 after they joined.

16 This explanation, to be clear, may not be correct—it simply represents the Court’s
17 best attempt to harmonize all of the evidence that has been proffered to date. The best way
18 to test this explanation would be to perform a forensic examination of the PowerPoint itself.
19 Presumably, the metadata associated with the document will reveal when it was created
20 and subsequently edited.

21 Given that discovery must be reopened regardless of the resolution of this issue (for
22 the reasons discussed in later portions of this order), the Court declines at this time to make
23 a final decision as to whether the Business Case Documents were lost. Instead, the parties
24 may renew their arguments on this topic, if necessary, after the reopened discovery process
25 is completed.¹⁰

26 ¹⁰ The Court also notes that, if it were confirmed that Gibson initially created the pro
27 forma in February/March 2018 as a PowerPoint but then created subsequent versions of
28 the document (thereby rendering unavailable the original version), this could affect the
resulting sanctions analysis under Rule 37(e)—for example, the analysis might turn on
when, exactly, the original version was altered and whether Defendants had a duty to
preserve on that date. The Court expresses no prejudgment on such issues and simply

1 2. Gibson’s Hard Drive

2 Plaintiff argues that it is “undisputed that Fuelco spoliated Gibson’s hard drive.”
3 (Doc. 188 at 22.) This is inaccurate. Fung submitted a declaration attesting to the
4 procedure for performing a “swap” for a contaminated computer. (Doc. 192-2 ¶¶ 23-27.)
5 He explained that “all existing and historical data” was transferred onto Gibson’s new
6 laptop, such that it is a functional equivalent of the old laptop. (*Id.* ¶¶ 26-27.) Further,
7 Ankura, which performed the forensic examination of the hard drive, did not find any
8 evidence of tampering. (Doc. 192-1 at 5 ¶ 26 [“Ankura identified no deleted, erased,
9 missing or altered files, documents or data during its forensic search of Todd Gibson’s hard
10 drive.”].) Given the common-sense need for a company to be able to maintain continuity
11 of operations when a laptop becomes infected with a virus, Plaintiff’s arguments for
12 spoliation in relation to Gibson’s hard drive are unpersuasive.

13 In any event, even assuming the 2018 hard drive was spoliated, the virus in that
14 computer was a circumstance outside Defendants’ control. Fed. R. Civ. P. 37(e), advisory
15 committee note to 2015 amendment (“[T]he rule . . . is inapplicable when the loss of
16 information occurs despite the party’s reasonable steps to preserve. For example, . . .
17 information the party has preserved may be destroyed by events outside the party’s
18 control—the computer room may be flooded, a ‘cloud’ service may fail, a malign software
19 attack may disrupt a storage system, and so on.”). Therefore, Plaintiff has not made the
20 necessary showing under Rule 37(e) to obtain sanctions based on the purported loss of
21 Gibson’s hard drive.¹¹

22 3. Parsons’s And Henry’s Hard Drives

23 It is beyond reasonable dispute that Parsons’s and Henry’s hard drives have been
24 lost. Defendants acknowledge that although there was some initial hope the hard drives
25 identifies them as another reason why it makes sense to hold off any definitive resolution
26 of the sanctions request based on the Business Case Documents.

27 ¹¹ Additionally, even if the Court found that Gibson’s original hard drive was
28 spoliated, it can be (and has been) replaced, which provides another reason why sanctions
are unavailable under Rule 37(e). *Fast*, 340 F.R.D. at 355 (one of the “prerequisites to
sanctions” under Rule 37(e) is that the lost ESI “cannot be restored or replaced through
additional discovery”).

1 could be recovered from Consilio, they ultimately could not be located and are thus lost.
2 (Doc. 192 at 12.) Defendants’ argument that Gibson’s hard drive is a functional equivalent
3 is unavailing. Parsons and Henry are individual Defendants in this case who are accused
4 of, *inter alia*, appropriating confidential and trade secret information from a former
5 employer. Parsons’s and Henry’s supplemental declarations establish that Fuelco was last
6 in possession of their hard drives on July 8, 2019, and January 30, 2020, respectively. (Doc.
7 200-3 ¶ 2; Doc. 204-2 ¶ 2.) Therefore, the Court finds by a preponderance of the evidence
8 that Henry’s and Parsons’s hard drives are lost. Defendants offer no additional evidence
9 as to when Fuelco was last in possession of the hard drives, despite the numerous
10 opportunities to do so, so the Court finds that the hard drives were lost as of the dates
11 Parsons and Henry returned them to Fuelco. Thus, only as to Parsons’s and Henry’s hard
12 drives, the Court turns to the next steps in the analysis under Rule 37(e).

13 **B. Duty To Preserve**

14 1. Reasonable Foreseeability Of Litigation

15 As the Ninth Circuit has explained, parties “engage in spoliation of documents as a
16 matter of law only if they had ‘some notice that the documents were potentially relevant’
17 to the litigation before they were destroyed.” *United States v. Kitsap Physicians Serv.*, 314
18 F.3d 995, 1001 (9th Cir. 2002) (citation omitted). “This is an objective standard, asking
19 not whether the party in fact reasonably foresaw litigation, but whether a reasonable party
20 in the same factual circumstances would have reasonably foreseen litigation.” *Waymo LLC*
21 *v. Uber Techs., Inc.*, 2018 WL 646701, *14 (N.D. Cal. 2018) (internal quotation marks
22 omitted). The reasonable foreseeability of litigation “is a flexible fact-specific standard
23 that allows a district court to exercise the discretion necessary to confront the myriad
24 factual situations inherent in the spoliation. This standard does not trigger the duty to
25 preserve documents from the mere existence of a potential claim or the distant possibility
26 of litigation. However, it is not so inflexible as to require that litigation be ‘imminent, or
27 probable without significant contingencies.’” *Id.* at *15 (quoting *Micron Tech., Inc. v.*
28 *Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011)).

1 There can be no reasonable dispute that Defendants were on notice of the duty to
2 preserve the hard drives of Henry and Parsons. Each individual Defendant was sent a
3 cease-and-desist letter that stated “you are required, under the law, to preserve, maintain,
4 and not destroy or discard any information that pertains to the allegations made in this
5 letter, including any electronically or digitally stored information that may exist on . . .
6 laptops, computer hard drives, . . . or e-mail accounts.” (Docs. 55-16, 55-17.) *Cf. Sampson*
7 *v. City of Cambridge*, 251 F.R.D. 172, 181 (D. Md. 2008) (“It is clear that defendant had a
8 duty to preserve relevant evidence that arose no later than June 26, 2006, when plaintiff’s
9 counsel sent the letter to defendant requesting the preservation of relevant evidence,
10 including electronic documents. At that time, although litigation had not yet begun,
11 defendant reasonably should have known that the evidence described in the letter may be
12 relevant to anticipated litigation.”) (internal quotation marks omitted). Also, Fuelco was
13 under an independent obligation to preserve the hard drives. *Colonies Partners, L.P. v.*
14 *Cnty. of San Bernardino*, 2020 WL 1496444, at *7 (C.D. Cal. 2020), *report and*
15 *recommendation adopted*, 2020 WL 1491339 (C.D. 2020) (“An entity and employee
16 defendants can both be under a duty to preserve, and therefore culpable for spoliation of
17 ESI, even if one or the other is directly responsible for the destruction of evidence.”).
18 Fuelco was indisputably on notice of the need to preserve Henry’s and Parsons’s laptops
19 at the time of their respective departures, which occurred while this case was pending.

20 2. Reasonable Foreseeability Of Relevance

21 “A party should only be penalized for destroying documents if it was wrong to do
22 so, and that requires, at a minimum, some notice that the documents are potentially
23 relevant.” *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991).

24 Plaintiff’s briefing highlights the importance of the hard drives. First, the fact that
25 the hard drives were lost casts some doubt on the adequacy of Defendants’ discovery
26 responses. (Doc. 188 at 9.) Second, despite the saga of searching for the Business Case
27 Documents after Gibson revealed their existence during Fuelco’s Rule 30(b)(6) deposition
28 in June 2021, it is clear that Henry’s and Parsons’s hard drives were not searched as part

1 of that effort (as the hard drives were lost long before then). Given that Defendants have
2 admitted to searching the hard drives for responsive documents earlier in the litigation
3 (Doc. 192 at 17), it follows that it was reasonably foreseeable that the hard drives would
4 contain relevant information.

5 C. Reasonable Steps to Preserve

6 The Court must next determine whether the ESI was lost “through a failure to take
7 reasonable steps to preserve it.” *Fast*, 340 F.R.D. at 355. Defendants argue they took
8 reasonable steps to safeguard the hard drives from destruction by putting them under a
9 litigation hold, which ultimately resulted in the computers being in the possession of
10 Consilio (formerly Xacta). (Doc. 192 at 9-10, 17.)

11 Defendants’ evidence on these points is unpersuasive. Instead of avowing to events
12 that *took place*, Fung’s declaration equivocates on what Fuelco “intended” to be done or
13 what the company “believed” was done with the hard drives at the time of Parsons’s and
14 Henry’s departures. (*See, e.g.*, Doc. 192-2 at ¶ 15 [“Following Tom Parsons’ departure on
15 July 8, 2019, Fuelco intended for a legal hold to be placed on the computer he used, serial
16 number 9T6FMH2.”]; *id.* ¶ 16 [“Following Luke Henry’s departure on January 30, 2020,
17 a legal hold was believed to have been placed on the computer he used, serial number
18 8L6FMH2.”].) This testimony raises more questions than it answers as to what, in fact,
19 occurred.

20 The Court acknowledges there is some evidence supporting an inference that Fuelco
21 put a litigation hold on Henry’s laptop. Fung testified that on a November 8, 2022
22 conference call, “Consilio conducted an electronic inventory search and stated that the
23 name ‘Luke Henry’ came up on the list,” but ultimately, the computer could not be located.
24 (Doc. 192-2 ¶¶ 20-21.) This evidence, however, does not persuade the Court that
25 reasonable efforts were made to preserve Parsons’s and Henry’s computers. Standing
26 alone, Fung’s acknowledgment that the general procedure Fuelco intended to have in place
27 was not followed suggests that reasonable steps were not taken.¹² Neither Fung nor defense

28 ¹² Additionally, Fung’s testimony that the 2018 cease and desist letters were used “in
place of the standard company Litigation Hold memo” does not seem based on Fung’s

1 counsel could identify the last date the laptops were in Fuelco’s possession aside from
2 when Henry and Parsons left the company. (See Doc. 192-2 ¶ 12 [“[Parsons] was issued a
3 company laptop upon hiring and it was turned back in to Fuelco upon his termination.”];
4 *id.* ¶ 13 [“[Henry] was issued a company laptop upon hiring and it was turned back in to
5 Fuelco upon his termination.”]; Doc. 192-1 at 6 ¶ 31 [“We will produce an affidavit
6 outlining the steps taken to preserve and the findings made as described herein.”].)
7 Moreover, Defendants did not provide any evidence communicating that a litigation hold
8 memo was sent or “copied” to anyone. (Doc. 192-2 ¶ 7 [“[T]he standard practice for all
9 companies was that Ms. Colvard would prepare a Litigation Hold memo on litigation
10 matters served on the company She would then circulate Fuelco’s standard Litigation
11 Hold memo to persons identified as copied on the memo.”].)

12 Some of Defendants’ contentions during oral argument, although perhaps helpful to
13 the defense on other issues, underscore the unreasonableness of Defendants’ preservation
14 efforts related to the Parsons and Henry hard drives. In the tentative order issued before
15 oral argument, the Court expressed concern that Defendants’ conduct in the months
16 following the May 2022 hearing on Plaintiff’s first sanctions motion—during which
17 Defendants sought to persuade Plaintiff, and then the Court, not to include the Parsons and
18 Henry hard drives in the forensic examination—was intended to conceal the fact that the
19 hard drives had been lost. During oral argument, defense counsel argued that this inference
20 was unwarranted because “[a]t no time before October of 2022 did . . . counsel for the
21 Defendants know that the laptops had not . . . been retained as we believed that they had.”
22 But assuming this is true, it means that Defendants did not bother to look for the Parsons
23 and Henry hard drives, let alone confirm with the outside vendors that the hard drives were
24 being preserved, during the six-month period between June 2021 and January 2022 in
25 which Defendants were belatedly searching for the Business Case Documents, then again
26 failed to look for the Parsons and Henry hard drives (let alone ensure their continued

27 _____
28 personal knowledge of what occurred, given that he also testified that Fuelco’s general
counsel and paralegal handled litigation holds. (Doc. 192-2 ¶¶ 7-8.)

1 preservation) after Plaintiff filed the first sanctions motion in February 2022 that
2 specifically requested the forensic examination of the Parsons and Henry hard drives as a
3 remedy. (Doc. 149 at 2 [“Plaintiff seeks an order that the Spoliation Defendants submit to
4 an independent forensic examination of the applicable email addresses and hard drives of
5 Henry and Parsons”].) Instead, by Defendants’ account, it was only in October 2022—
6 more than a year after the controversy over the Business Case Documents erupted, and
7 months after they asked the Court not to include that Parsons and Henry hard drives in the
8 forensic examination—that Defendants got around to checking whether the hard drives
9 were being preserved by the outside vendors. This underscores the unreasonableness of
10 the preservation effort. Perhaps earlier efforts to look for the hard drives would have been
11 successful.

12 Thus, the Court finds by a preponderance of the evidence that Defendants did not
13 take reasonable steps to preserve the lost ESI.

14 D. Replaceability

15 The next question under Rule 37(e) is whether the lost discovery “can be restored
16 or replaced through additional discovery.” Here, Henry’s and Parsons’s hard drives cannot
17 be replaced through additional discovery because they are lost. Defendants have confirmed
18 they have not been found despite months of searching.

19 E. Prejudice

20 Plaintiff’s briefing appears to seek sanctions under Rule 37(e)(2) by referencing a
21 default judgment and an adverse inference, both of which are specifically enumerated as
22 remedies under subdivision (e)(2). (Doc. 188 at 22-23.) Defendants argue that Plaintiff
23 cannot show prejudice under Rule 37(e)(1) but acknowledge that it is unclear which
24 provision of Rule 37(e) Plaintiff seeks to invoke. (Doc. 192 at 16-17; *id.* at 16 n.3.)
25 Plaintiff makes no clarification in reply.

26 Subdivision (e)(2), unlike (e)(1), does not require an independent showing of
27 prejudice to another party from loss of the information. Fed. R. Civ. P. 37(e), advisory
28 committee’s note to 2015 amendment (“This is because the finding of intent [under (e)(2)]

1 can support not only an inference that the lost information was unfavorable to the party
2 that intentionally destroyed it, but also an inference that the opposing party was prejudiced
3 by the loss of information that would have favored its position.”). Thus, for Plaintiff’s
4 request for sanctions under subdivision (e)(2), a showing of prejudice is unnecessary.

5 However, given the Court’s interpretation that Plaintiff is, in the alternative, seeking
6 sanctions under subdivision (e)(1), a showing of prejudice is required in relation to those
7 alternative requests. “The prejudice inquiry ‘looks to whether the [spoilage party’s] actions
8 impaired [the non-spoilage party’s] ability to go to trial or threatened to interfere with the
9 rightful decision of the case.’” *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006)
10 (quotation omitted).

11 Plaintiff’s prejudice argument encapsulates concerns over the general integrity of
12 Defendants’ discovery responses and whether any of those searches can be verified given
13 the loss of the hard drives. (Doc. 188 at 21-22.) Because the hard drives are missing,
14 Plaintiff “has no idea how many other key documents have been withheld or spoliated”
15 and “Plaintiff will never know since [the] hard drive[s] have been lost for some time.” (*Id.*
16 at 21.) Defendants respond that “Plaintiff can make no showing of prejudice” because,
17 despite the loss of Henry’s and Parsons’s hard drives, those hard drives “were searched for
18 relevant and discoverable materials and evidence during discovery and documents were
19 identified and disclosed from these same hard drives in discovery—including the narrative
20 ‘Overview’ document.” (Doc. 192 at 17.)

21 Defendants’ arguments are unpersuasive. To start, the concern over the loss of the
22 Business Case Documents prompted the Court’s forensic imaging order. That imaging
23 remains incomplete because of the loss of the hard drives. Assuming the Business Case
24 Documents were a “living document” and Gibson could not remember who created the
25 document, it seems possible that a version of the document lived on Henry’s or Parsons’s
26 hard drive. But the Court and Plaintiff will never have the answer to that question because
27 the hard drives are lost.

28 More problematic is that the Business Case Documents dispute, which arose in June

1 2021, eventually caused the PowerPoint to emerge as a belatedly produced document.
2 (Doc. 153-3 ¶ 10 [production of the PowerPoint on January 14, 2022].) Defendants do not
3 dispute that the PowerPoint should have been disclosed far earlier. (*Id.* at ¶ 23 [“The
4 Business Case document is responsive to the MIDP disclosures; however Todd Gibson did
5 not locate the Business Case document when he searched for documents and ESI during
6 discovery.”].) Plaintiff never had the opportunity to question Fuelco (via Gibson), Henry,
7 or Parsons about the PowerPoint because it was revealed after the close of discovery.

8 Separately, during the forensic imaging examination, Ankura located the Overview
9 document (which, to be fair, was previously produced) in formerly undisclosed contexts—
10 specifically, in emails between Henry, Gibson, and Parsons. However, Plaintiff was never
11 allowed to question those individuals about those emails because (1) they were not
12 produced during discovery, (2) they were only discovered in the course of the court-ordered
13 forensic imaging, and (3) Defendants continue to maintain that those emails are
14 unresponsive. (Doc. 192-1 at 3-4 ¶¶ 16-20.) Admittedly, Parsons and Gibson were shown
15 the Overview document during their depositions, but Plaintiff did not have the benefit of
16 knowing the context in which that document had been shared between the Individual
17 Defendants. (*Id.* at 4 ¶¶ 18-20; Doc. 195-1 [original disclosure showing an email from
18 Parsons to a “Lauren”].) Also, a responsive, never-before-produced Excel document was
19 uncovered during Ankura’s forensic review. (Doc. 192-1 at 4 ¶¶ 21-22.)

20 Finally, as noted, Defendants are unable to articulate when exactly the laptops were
21 lost other than Henry’s and Parsons’s last days with Fuelco. The supplemental declarations
22 provided by Henry and Parsons recite generic and all-encompassing statements of searches
23 without providing any specifics. (*See* Docs. 200-3, 204-2.)

24 The bottom line is that the search for the Business Case Documents exposed
25 additional documents, previously unknown to Plaintiffs, that should have been disclosed
26 long ago. Forcing Plaintiff to proceed to trial without an opportunity to further explore
27 these newly uncovered documents, as well as the opportunity to probe further into
28 Plaintiff’s generic diligence recitations based on the hard drive spoliation, would

1 undoubtedly prejudice Plaintiff's trial preparation.

2 **F. Intent To Deprive**

3 Turning back to subdivision (e)(2), the next relevant inquiry is whether the
4 nonmovant "acted with the intent to deprive another party of the information's use in the
5 litigation." "Destruction of evidence is willful spoliation if the party had some notice that
6 the documents were potentially relevant to the litigation before they were destroyed.
7 However, a court need not find that the party acted in bad faith, a finding of conscious
8 disregard is enough for a court to issue an adverse inference instruction based on
9 spoliation." *Deerpoin Grp., Inc. v. Agrigenix, LLC*, 2022 WL 16551632, *15 (E.D. Cal.
10 2022) (cleaned up). "Courts may find intentional spoliation where it is shown, or
11 reasonably inferred, that the spoliating party acted purposefully to avoid its litigation
12 obligations." *Id.* Although Rule 37(e) does not define "intent," courts have found that
13 "intent" exists in this context if "the evidence shows, or it is reasonable to infer, that a party
14 purposefully destroyed evidence to avoid its litigation obligations." *Id.* at *11 (quoting
15 *Facebook, Inc. v. OnlineNIC Inc.*, 2022 WL 2289067, *6 (N.D. Cal. 2022)). "Intent may
16 be inferred if a party is on notice that documents were potentially relevant and fails to take
17 measures to preserve relevant evidence, or otherwise seeks to 'keep incriminating facts out
18 of evidence.'" *Colonies Partners, L.P.*, 2020 WL 1496444, at *9 (quotation omitted).

19 1. The Parties' Arguments

20 Plaintiff argues that Defendants have engaged in a "pattern of abusive and deceptive
21 litigation tactics and false and misleading representations relating to Defendants' hard
22 drives and there is a clear nexus tying the hard drives to the merits of the case." (Doc. 188
23 at 23.)

24 Defendants respond that Plaintiff filed its motion prematurely, before the results of
25 the forensic examination were known, and that the motion "falsely and intentionally
26 exaggerat[es] claims of misconduct." (Doc. 192 at 2.) Defendants contend they engaged
27 in "no wrongful conduct" and "certainly no 'extraordinary' conduct warranting any
28 sanction." (*Id.* at 3.)

1 In reply, Plaintiff argues that “Defendants do not even attempt to explain or even
2 address their numerous misrepresentations” and “do not address the false and misleading
3 statements made under oath.” (Doc. 194 at 4-5.)

4 2. Analysis

5 The Court concludes, albeit with some hesitation, that Defendants did not act with
6 the intent to deprive Plaintiff of access to the Parsons and Henry hard drives. Fung’s
7 declaration explains that Defendants made various efforts to preserve the hard drives, only
8 for the hard drives to go missing due to missteps. Defendants may have been negligent in
9 their preservation efforts, such that other antecedent inquiries under Rule 37(e) (*i.e.*,
10 whether they took reasonable steps to preserve) should be resolved against them, but a
11 negligent failure to meet preservation obligations is not the same thing as an intentional
12 plan to destroy evidence.

13 Plaintiff’s intent arguments rely primarily on defense counsel’s conduct throughout
14 the search for the Business Case Documents. (*See, e.g.*, Doc. 188 at 10-16.) This includes
15 defense counsel’s emails, representations to the Court, declarations, and motion papers.
16 But that conduct, which is discussed in other portions of this order, occurred after the hard
17 drives were lost and does not bear on whether the loss of the hard drives itself was
18 intentional. As the old adage goes, the cover up can be worse than the crime.

19 Focusing only on Defendants’ conduct before and up to the time of the loss, the
20 evidence is that Defendants retained the hard drives after this case was filed, ran some post-
21 litigation discovery searches on the hard drives (Doc. 204-1 ¶ 5 [Parsons: “During the
22 course of this litigation which was first filed in July 2018, I conducted multiple searches
23 of my company laptop as part of my discovery.”]; Doc. 204-2 ¶ 5 [Henry, same]), and then
24 lost track of the hard drives after Henry and Parsons left the company. (Doc. 192-2 ¶¶ 12-
25 13.) This timing suggests carelessness, rather than intentional spoliation. Also, the laptops
26 were lost in July 2019 and January 2020, which is well before the Business Case
27 Documents dispute arose in June 2021. (Doc. 192-2 at ¶¶ 12-13; Doc. 153-1 at 2 ¶ 2.) It
28 is not as if the hard drives mysteriously went missing just after the dispute over the Business

1 Case Documents began or just after the Court ordered the forensic examination. *Colonies*
2 *Partners, L.P.*, 2020 WL 1496444, at *9 (“Courts . . . consider the timing of the document
3 loss when evaluating intent.”).

4 There is also no evidence of coordination between Defendants. Parsons and Henry
5 left Fuelco at different times. (Doc. 192-2 ¶¶ 12-13.) Fung avowed that Henry’s name
6 may have come up in Consilio’s inventory search, but there’s no concrete evidence of
7 whether Parsons’s name did. (*Id.* ¶ 20.)

8 Finally, it bears emphasizing that Defendants have not concocted an incredible or
9 unbelievable explanation for how the hard drives were lost. Instead, it appears Fuelco
10 strayed from its standard litigation hold procedure, instituted some short-cuts, and,
11 possibly, can’t quite remember why it proceeded in that manner. Thus, the Court finds by
12 a preponderance of the evidence that Defendants did not act with the intent to deprive
13 Plaintiff of the use of the hard drives.

14 G. Remedy

15 1. Rule 37(e)(2) Sanctions

16 Plaintiff has not established that Defendants acted with the intent to deprive in
17 relation to the Parsons and Henry hard drives. Such a showing is a prerequisite to the
18 imposition of the harsh sanctions enumerated in Rule 37(e)(2). Accordingly, the Court
19 declines to impose the sanctions of default or an adverse inference in relation to the loss of
20 Parsons’s and Henry’s hard drives.¹³

21 2. Rule 37(e)(1) Sanctions

22 Under Rule 37(e)(1) “upon finding prejudice to another party from loss of the
23 information, [the Court] may order measures no greater than necessary to cure the
24 prejudice.”

25
26 ¹³ To be clear, this ruling only applies to Plaintiff’s request for Rule 37(e)(2) sanctions
27 in relation to the Parsons and Henry hard drives. Because, as discussed in Part III.A.1
28 above, the Court has not yet reached any determination as to whether the Business Case
Documents were lost—instead, discovery is being reopened in part so that issue can be
further developed—any analysis as to the propriety of Rule 37(e)(2) sanctions based on the
loss of that category of ESI would be premature.

1 To cure the harm here, Plaintiff has requested that the Court reopen discovery “to
2 allow Plaintiff an opportunity to probe Defendants’ prior discovery and seek discovery of
3 Defendants’ emails and hard drives anew through a court-supervised process in which that
4 ESI is examined by experts for responsive documents.” (Doc. 188 at 23-24.) Defendants
5 oppose this request, arguing that Plaintiff made repeated requests to reopen discovery
6 before this “recent attempt” (Doc. 192 at 2-3) and that “Plaintiff has already completed
7 expert searches of Defendants’ email accounts and Todd Gibson’s hard drive for
8 ‘responsive documents’” and there is “no basis for yet another wholesale search conducted
9 by yet another expert” (*id.* at 17-18).

10 Plaintiff has the better of this argument. Reopening discovery is a measure no
11 greater than necessary to cure the prejudice to Plaintiff. New, potentially important
12 documents have been uncovered and disclosed since the close of discovery, and Plaintiff
13 should be allowed to depose the relevant actors about those documents.

14 The Court is also sensitive to Plaintiff’s argument that there are reasons to be
15 skeptical of the overall comprehensiveness of Defendants’ discovery efforts. It is
16 concerning, to put it mildly, that Parsons did not locate the PowerPoint (even assuming it
17 is the Business Case Documents) during his initial searches. Separately, even more new,
18 previously undisclosed documents came to light during the forensic examination (which
19 Plaintiff vociferously opposed and swore was unnecessary). Finally, although Parsons and
20 Henry have submitted declarations avowing that they conducted some searches of the hard
21 drives before the loss, these declarations are too vague and non-specific to create any
22 confidence in the thoroughness of their searches.

23 As additional remedies, the Court will order Defendants to disclose (1) the native
24 version of the PowerPoint, so the parties can follow up on some of the uncertainties and
25 unresolved questions identified in Part III.A.1 above; and (2) all non-privileged emails
26 from January 1, 2018 through April 30, 2018 in which two or more of Gibson, Parsons,
27 Henry, and Reinesch was a sender or recipient (including cc’s).¹⁴

28 ¹⁴ Plaintiff requested the addition of this second category during oral argument, and
the Court agrees it is warranted for the reasons stated during oral argument. Although these

1 Defendants also include an undeveloped request for an evidentiary hearing in the
2 final sentence of their response brief. (Doc. 192 at 18.) This request is denied without
3 prejudice. For one thing, it is unclear what evidence Defendants could offer at an
4 evidentiary hearing to dispute the finding of ESI destruction related to Henry’s and
5 Parsons’s hard drives. More important, in light of the reopening of discovery, an
6 evidentiary hearing would be premature. *Cf. Paladin Assocs, Inc. v. Montana Power Co.*,
7 328 F.3d 1145, 1164-65 (9th Cir. 2003) (“Paladin is correct that Rule 37(c)(1) permits a
8 court to impose sanctions only ‘after affording an opportunity to be heard.’ However,
9 conforming to the rule does not require an evidentiary hearing in every case. . . .”). If,
10 following the reopened discovery process, Plaintiff renews its request for Rule 37(e)(2)
11 sanctions based on the loss of the Business Case Documents (or on some other basis), an
12 evidentiary hearing might be warranted at that time.

13 Finally, the Court is not persuaded that a full-scale forensic examination is
14 warranted to address the prejudice. The Court is concerned that the Overview document
15 (Doc. 195-1) was found attached to emails between Gibson, Parsons, and Henry, yet those
16 emails were not previously disclosed. (Doc. 194 at 4 [“The Opposition and (currently
17 incomplete) forensic examination also confirms that Defendants withheld critical emails
18 between Gibson, Parsons, and Henry attaching a ‘narrative’ Word document regarding the
19 business case for Fuelco’s expansion. Defendants still do not have those emails, or other
20 likely responsive emails located by Ankura.”].) Further, the PowerPoint was not disclosed
21 until after the close of discovery. But these discrete items are amenable to a discrete
22 resolution—namely, production of a native version of the PowerPoint, production of the
23 emails attaching the Overview document (as well as other emails from a discrete timeframe
24 involving Gibson and the Individual Defendants), new depositions, and the discovery of
25 more information concerning the details of the searches performed on the hard drives.

26 ...

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28 emails may fall outside the scope of the forensic examination as initially authorized,
subsequent developments suggest that the Court should err on the side of inclusion.

1 **H. Costs & Fees**

2 Both sides have requested fees and costs. (Doc. 188 at 24; Doc 192 at 18.)

3 The Court awards fees and costs to Plaintiff. Defendants do not dispute that fees
4 are legally available in this circumstance¹⁵ and, contrary to Defendants’ assertion (Doc.
5 192 at 2), Plaintiff has not prematurely come running to the Court for assistance.

6 As for the scope of the award, Plaintiff should be allowed to recover the reasonable
7 costs and fees associated with bringing both sanctions motions, as well as the costs of the
8 forensic examination. The controversy regarding the Business Case Documents has been
9 live since June 2021. After Defendants dragged their feet for months, repeatedly failing to
10 respond to emails from Plaintiff’s counsel requesting more information and then belatedly
11 producing the PowerPoint, Plaintiff was forced to file the first sanctions motion. In
12 response, Defendants swore that nothing was amiss and that there was no need for a
13 forensic examination. Those assurances were inaccurate—the forensic examination
14 revealed the existence of additional undisclosed documents, plus the loss of the Parsons
15 and Henry hard drives came to light. This prompted the second sanctions motion, which
16 Defendants again oppose without substantial justification—even if Plaintiff’s request for
17 terminating sanctions is too severe, it is hard to see how Defendants could, with a straight
18 face, oppose any reopening of discovery, which is the position they initially took. (Doc.
19 192 at 3 [“There are no bases for spoliation sanctions and there is utterly no basis for default
20 judgment or the re-opening of discovery.”].) Nor are there any extenuating circumstances
21 that would make an award of attorneys’ fees unjust, especially given that the sanctions
22 being imposed here are on the mild end of what Plaintiff sought. In a related vein, the
23 Court is unpersuaded by Defendants’ contention, during oral argument, that the fee award
24 should be limited to some percentage (say, 20%) of the reasonable costs and fees that
25 Plaintiff incurred. Even though Plaintiff may have overreached by seeking terminating

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27 ¹⁵ Even if Defendants hadn’t forfeited the issue, the Court would find—as discussed
28 in more detail at the outset of Part III of this order—that an award of costs and fees is
appropriate under Rule 37(e)(1) as a “measure no greater than necessary to cure the
prejudice” to Plaintiff.

1 sanctions, Plaintiff has acted reasonably overall in seeking answers and information from
2 Defendants and, ultimately, judicial relief.

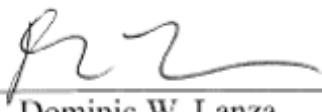
3 Accordingly,

4 **IT IS ORDERED** that Plaintiff's motion for sanctions (Doc. 188) is **granted in**
5 **part and denied in part.**

6 **IT IS FURTHER ORDERED** that discovery is reopened on the limited terms
7 discussed elsewhere in this order. As part of the reopened discovery process, Plaintiff may
8 redepose Parsons, Henry, and Fuelco. Before those additional depositions, and within 21
9 days of the issuance of this order, Defendants must produce (1) a native version of the
10 PowerPoint; (2) the emails to which the Overview document was attached; and (3) all non-
11 privileged emails from January 1, 2018 through April 30, 2018 in which two or more of
12 Gibson, Parsons, Henry, and Reinesch was a sender or recipient (including cc's). The
13 parties are encouraged to complete the reopened discovery process expeditiously, so as not
14 to further postpone the trial in this case, which is set to begin on October 10, 2023.

15 **IT IS FURTHER ORDERED** that Defendants pay Plaintiff's reasonable
16 attorneys' fees and costs associated with bringing both motions for sanctions, as well as
17 the costs of the forensic examination. The parties must meet and confer about the size of
18 the fee award and by whom it must be paid. If the parties cannot resolve the matter,
19 Plaintiff must file a motion (and supporting evidence) within 14 days of this order.
20 Defendants' response must be filed within 14 days of the motion. No reply may be filed.

21 Dated this 11th day of April, 2023.

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25 _____
26 Dominic W. Lanza
27 United States District Judge
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