UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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ATPAC, INC., a California corporation,

Plaintiff,

v.

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

Defendants.
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NO. CIV. 2:10-294 WBS JFM

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

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

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

I. Evidentiary Objections

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

The court is satisfied that the evidence upon which it relies[2] bears indicia of reliability, and thus the parties'

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

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

objections are overruled.

II. Factual and Procedural Background

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

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

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

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

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

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

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

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

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

B. Facts Relevant to Plaintiff's Motion for Terminating

Sanctions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Discussion

A. Appointment of a Special Master and Stay

Defendants ask the court to appoint a special master to

> (1) determine the terms of the protocol for the examination of the County's servers and the side-by-side examination of the CRiis and OnCore source code and related software based on the special master's expertise in the field and from the proposals made by the parties, (2) supervise the examination of the servers and the comparison of CRiis and OnCore along with the parties and their consultants, and (3) make a Report and Recommendation to the Court as to findings of fact with regard to forensic examination of the servers, whether the CRiis and OnCore source code are substantially similar, whether the CRiis GUIs and data files contain the requisite level of creative expression to warrant protection under the Copyright Act, and whether any substantial similarity exists with respect to any other protectable portions of the CRiis and OnCore programs.

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

A court may appoint a special master only to:

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

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

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

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

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

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

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

B. Terminating Sanctions

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

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

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

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

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

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

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

When considering a default sanction in response to

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

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

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

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

1. Extraordinary Circumstances

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

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

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

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

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

2. Willfulness, Bad Faith, or Fault

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

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

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

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

with their obligation to retain potentially relevant evidence.

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

3. Efficacy of Lesser Sanctions

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

4. Nexus between Misconduct and Matters in Controversy

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

5. Prejudice

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

scrubbing.

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

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

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

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

6. Evidentiary Sanctions

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

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

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

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

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

DATED: April 12, 2011

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE