UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America, ex rel., et al., Plaintiffs, v. Cameron-Ehlen Group, Inc., et al., Defendants.	Case No. 13-cv-3003 (WMW/DTS) **ORDER**

The parties brought four motions just before the fact-discovery motion deadline. Defendants seek sanctions for Plaintiffs' violation of various orders and failure to adequately prepare certain 30(b)(6) designees, as well as sanctions for the purported spoliation of information in a complaint hotline file maintained by the Department of Health and Human Services' Office of Inspector General. For their part, Plaintiffs seek sanctions for the purported spoliation of text messages, emails, and a file of Manny's Steakhouse receipts. Plaintiffs further ask the Court to compel Defendants to review and produce certain records that are the source for information memorialized in Precision Lens's general ledger. The Court addresses each of these motions in turn.

I. Defendants' Joint Motion for Sanctions (Dkt. No. 498)

The Defendants' first motion raises issues this Court erroneously thought had been put to bed. First, contrary to court order—and despite several colloquies between this Court and counsel for the Government about its discovery obligations—the Government identified thousands of new allegedly false claims after the close of discovery and in conjunction with its expert report on December 30, 2019. Because these new claims were served in in violation of the Court's orders and prejudice Defendants, they will be excluded.

Defendants also assert three of the Government's 30(b)(6) designees were unprepared for their depositions. The Court has reviewed the transcripts of the depositions. Although the Government's designees were generally sufficiently prepared, their testimony was deficient in two discrete areas. On those topics, the Government will be bound by the testimony of its designees.

A. Overview

Defendants Cameron-Ehlen Group (which conducts business as Precision Lens) and Paul Ehlen (Precision Lens's founder and majority owner) distribute intraocular lenses (IOLs) and other products for ophthalmic surgeries. In the Plaintiffs' theory of the case, Defendants provided physicians who purchase these products with expensive trips, meals, and myriad other in-kind remunerations at no cost or below fair market value. The physicians purchased products they used in surgeries from Precision Lens and then billed Medicare for some of the surgeries. Plaintiffs contend each of these remunerations constitute a "kickback" to the physician in violation of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), so claims involving Defendants' products the physician subsequently submitted to Medicare are false or fraudulent under the False Claims Act, 31 U.S.C. § 3729(a)(1)-(2). Throughout the litigation, the Parties have referred to the time following the alleged kickback as the "taint period."

The Governments' obligation to disclose the allegedly false claims on which its case is premised has been the subject of numerous court proceedings, motions, and orders. The Government has repeatedly questioned the Court's judgment, quarreled with its reasoning, and, ultimately, disobeyed its unequivocal order to identify all allegedly false claims prior to the close of fact discovery. This, despite receiving more than one extension of time to provide the information. The Government's disclosure of

22 new alleged kickbacks and an unspecified number of new claims on December 30, 2019 violated the Court's orders, of which the Government has had more than ample warning. The Court will exclude these new claims as a sanction for the Government's willful violation of the Court's orders.

B. Facts

1. Claims identification

In February 2019, Defendants moved to compel responses to its first two interrogatories, which asked the Government to identify all alleged false claims submitted to the Government and all alleged instances of kickbacks. As to the allegedly false claims, this Court ordered the Government to identify all such claims to the extent of its then-current knowledge, as well as specific physicians and alleged remunerations it knew about. Order, Apr. 2, 2019, at 7, Dkt. No. 203. The Government argued this information was not fact discovery, but rather the province of expert reports. This Court disagreed and explicitly ordered that "[a]ll supplementation of this information must be completed no later than 45 days before the close of discovery." *Id.* As was its right, the Government appealed the April 2, 2019 Order, arguing that it "instead be permitted to complete fact discovery and provide the actual false claims during expert discovery[.]" Objections to Apr. 2, 2019 Order 3, Dkt. No. 240. The District Court affirmed the Order, noting both that the Government could always seek "an extension of the fact discovery deadline" if needed and that it had in fact obtained such an extension while its appeal was pending. Order, Jul. 19, 2019, 4-5, Dkt. No. 285.

During its appeal of the Court's discovery order, the Government nonetheless provided a "working list of kickbacks" on April 16, 2019. Decl. of Alethea M. Huyser Supp. Mot. Sanctions Ex. 2, Dkt. No. 501. Following further discussion among the

Parties and the Court about the sufficiency of the working list, *see id.* at Ex. 3, at 9-10, the Government supplemented its kickback list on June 7, 2019, *id.* at Ex. 4. In its August 5, 2019 supplementation to Defendants' Interrogatory No. 17, the Government combined its responses to Interrogatory Nos. 2 and 17, providing a single document of alleged kickbacks and the period of tainted claims it contended stemmed from each kickback. *Id.* at Ex. 5.

On September 3, 2019, 44 days before the then-operative fact discovery deadline, the Government identified the Medicare claims it contended were false. *Id.* at Ex. 6, Ex. 6A, Ex. 6B, Ex. 6C; Order, Apr. 30, 2019 (extending fact discovery to October 17, 2019). In its response, the Government stated that, "consistent with the Federal Rules and the Court's Order, Plaintiffs may identify additional claims to be added or claims to be removed as discovery in this matter continues, . . ." Huyser Decl. Ex. 6, at 5-6.

A few weeks later, the Government sought to extend all remaining deadlines, including the fact discovery deadline, by 45 days so it could timely supplement its identification. *See generally* Pls.' Req. Extend Remaining Deadlines, Dkt. No. 323. Although the Court declined to extend all remaining deadlines, it recognized that matching Medicare claims data with manufacturer sales data was a "lengthy and laborious process[,]" and so gave the Government until October 31, 2019, to supplement its response to Defendants' Interrogatory No. 1. Order, Oct. 16, 2019, Dkt. No. 380. On October 17, 2019, the close of fact discovery, the Government amended its list of kickback in response to Defendants' Interrogatory No. 17. Huyser Decl. Ex. 9.

Following a one-week courtesy extension of the claims-identification deadline by Defendants, Plaintiffs identified 27,316 new claims on November 7, 2019. *Id.* at Ex. 10,

Ex. 10A, Ex. 10B Ex. 26. Plaintiffs provided an updated list of kickbacks the same day, which identified new purported kickbacks. *Id.* at Ex. 11.

On December 30, 2019, Plaintiffs again served an updated list of kickbacks, identifying new kickbacks and altering the timeframe of the alleged taint period for others. *Id.* at Ex. 20. They also served the expert report of Ian Dew, which included claims not previously identified during fact discovery. *Id.* at Ex. 21.

2. 30(b)(6) depositions

In August 2019, Defendants noticed an organizational deposition of the United States. *Id.* at Ex. 7. Defendants identified several topics for potential questioning, including how the Government matched each alleged false claim to Defendants or Sightpath (a former defendant in this action) and how the Government determined each false claim derived from an alleged kickback. *Id.* After the Parties were unable to reach an agreement regarding the proper scope of the deposition, the Court ordered the Government to produce a witness on two of the topics. Hr'g Tr., Sept. 12, 2020, at 59-61, Dkt. No. 360. The Court also ordered Defendants to provide a list of 25 representative claims to Plaintiffs in advance of the deposition so the designee could answer detailed questions regarding those 25 representative claims. *Id.* at 60. At the October 2019 status conference, the Court again ordered the Government to produce a witness to testify on several topics identified in the Defendants' Third Amended Notice. *See* Pretrial Conference Minutes, Oct. 3, 2019, Dkt. No. 358.

The Parties continued to disagree vehemently on the proper scope of the 30(b)(6) deposition throughout October and November of 2019. The 30(b)(6) deposition of designee Ian Dew on the topic of matching Medicare and Medicaid claims to the Defendants went forward on October 8, 2019. But it occurred a month before the

Government identified over 27,000 additional claims, so Defendants could not question Dew about those claims. The Court attempted to resolve these disagreements informally, but those efforts proved futile. Defendants brought a Motion to Show Cause and Motion to Compel on December 6, 2019. Dkt. No. 454. The Court granted Defendants' motion in part and ordered, among other things, a supplemental deposition on the matching of the 27,000 new claims first identified on November 7, 2019, and a deposition of each of the CMS[1] contractors whose regions overlap Precision Lens's sales territory. Huyser Decl. Ex. 13, at 49-50.

a. The supplemental deposition

Rather than re-designate Ian Dew, who had previously testified on the Government's method of identifying claims involving products sold by Precision Lens, the Government designated an employee of the U.S. Attorney's Office for the supplemental deposition regarding how the Government tied the 27,000 new claims identified on November 7 to the Defendants' products. Early in the deposition, a dispute arose as to whether the deposition was limited to the 25 representative claims. Huyser Decl. Ex. 16, at 13-18, 37-39. Eventually, the Parties called the Court, *id.* at 46-47, which clarified that Defendants could ask general methodology questions regarding the 27,000 claims, as well as questions about the 25 representative claims Defendants had identified.

When asked questions about the 25 representative claims, the witness generally answered ably. *E.g.*, *id.* at 49, 52-53, 69-70, 84-87, 123-24. She was also able to answer several general questions about the 27,000 additional claims, such as why a given surgery may have multiple claims lines and which data Plaintiffs relied on when

[1] Centers for Medicare and Medicaid Services

there were discrepancies between records. *Id.* at 59-62. She also provided an estimate of 27,000 claims for which Plaintiffs lacked medical records specifying the product that was used. *Id.* at 71-72.

However, the witness could not answer questions on many relevant topics. For example, she was unable to specify without speculating what led to the identification of the 27,000 new claims. *E.g.*, *id.* at 34, 135-36. Nor could she say whether Plaintiffs were including claims for pre- or post-operative treatment as potential false claims. *Id.* at 57-59. The witness did not provide a reason why viscoelastic products were identified in some claims, but not others. *Id.* at 114-16. In some instances, counsel for the Government instructed the witness not to answer questions regarding underlying records or changes in Ian Dews's process. *See id.* at 14-15, 21-22, 34.

b. "MAC"[2] depositions

For the 30(b)(6) topics regarding how CMS receives and stores claims data and how it determines whether claims are eligible for payments, the Government designated an employee from each of the CMS contractors whose regions cover Precision Lens's sales territory. *See* Huyser Decl. Ex. 17. Defendants first took the deposition of the designee from Noridian, who indicated she reviewed both the 25 claims identified by Defendants and Medicare and company guidelines. Huyser Decl. Ex. 18, at 9-10.

The Noridian witness answered questions with varying degrees of specificity on numerous topics asked by Defendants. She provided an overview of how one becomes an approved Medicare provider before being able to submit claims. *Id.* at 12-15. She also discussed generally the information a provider would need to submit for a valid claim and what codes are most frequently used in cataract surgeries. *Id.* at 17-18, 25-

[2] Medicare Administrative Contractor

28, 36. Although she could not review the underlying data because she no longer had access to it on Noridan's system, the witness answered many questions regarding the 25 representative claims. *See id.* at 64-108. However, the Noridian witness was unable to answer questions about the data storage system with much depth. *Id.* at 15-16, 48, 64. Based on the information available to her from the claims spreadsheet, the witness also could not say why some claims were approved or denied. *Id.* at 73, 76-77.

Similarly, the designee from the other MAC, NGS, answered questions on many different topics with varying levels of specificity. These included questions on the claim submission process and audits, as well as local coverage determinations. *E.g.*, Huyser Decl. Ex. 19, at 14-19, 29-33. His answers were limited in part because he was only able to review data going back 27 months. *Id.* at 10-11. He also could not answer questions regarding other contractors' processes for reviewing claims. *Id.* at 12-13. Although the witness answered questions regarding Medicare Part B claims, he was not nearly as knowledgeable regarding Part A facility claims for the 25 representative claims about which Defendants inquired. *E.g.*, *id.* at 55-84.

C. Analysis

1. Legal standard

The Federal Rules of Civil Procedure give this Court broad authority to guide litigants through discovery and to sanction parties that do not follow the Court's orders. *See Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 759 (8th Cir. 2006). Under Rule 16, this Court must issue a scheduling order limiting the time to complete discovery and file motions. Fed. R. Civ. P. 16(b)(1)-(3). If a party fails to adhere to the deadlines set in the scheduling order, the Court "may issue any just orders, including those authorized

by Rule 37(b)(2(A)(ii)-(vii), if a party or its attorney . . . fails to obey a scheduling or other pretrial order." *Id.* at 16(f)(1)(C).

Similarly, if a party "fails to obey an order to provide or permit discovery," this Court may issue sanctions, such as "prohibiting the disobedient party . . . from introducing designated matters in evidence[.] *Id.* at 37(b)(2)(A)(ii). Although Rule 37 does not require that a violation of a discovery order be willful, due process must be considered and "the most severe Rule 37(b)(2) sanctions—dismissal, default judgment, and striking pleadings in whole or in part—require a finding of willfulness to avoid being deemed an abuse of discretion." *Card Tech. Corp. v. DataCard Inc.*, 249 F.R.D. 567, 571 (D. Minn. 2008) (citing *Insurance Corp. of Ireland, Ltd. V. Compagnie des Bauxites de Guinee*, 456 US. 694, 705 (1982)).

2. The late claims

Plaintiffs violated this Court's orders by disclosing new claims and kickbacks with their December 30, 2019 expert report, two months after the Court's deadline, and sanctions are appropriate. This Court's orders were clear. The April 2, 2019 order, the genesis of all that followed, decided two key points: (1) Defendants were entitled to the identification of all allegedly false claims as part of fact discovery and (2) all supplementation of the claims identification was to be completed 45 days before the close of fact discovery. Plaintiffs clearly understood the order imposed such an obligation, as they argued with this Court about it, Hr'g Tr. Apr. 16, 2019, at 4-11, and specifically appealed it to the District Court, who overruled the objection. Moreover, as fact discovery was set to close in mid-October of last year, Plaintiffs sought a 45-day extension of all deadlines in the case, explaining it needed the additional time to work

through data and identify additional claims it contended to be false.[3] The Government insisted it was within its rights to disclose new claims after fact discovery closed as part of its supplementation obligation under the Rules. *See, e.g.*, Pls.' Request to Extend Remaining Deadlines 9-10. This Court made it clear that disclosing claims after discovery closed was not proper supplementation under the Rules. Despite this Court's clarity, Plaintiffs identified entirely new kickbacks and false claims during expert discovery. In doing so, Plaintiffs violated both the scheduling orders promulgated under Rule 16 and this Court's discovery order that identification of alleged false claims was properly part of fact discovery.

As they intimated they would in colloquies with the Court, Plaintiffs attempt to hide their naked violation of the Court's orders behind the fig leaf of Rule 26's duty to supplement. Plaintiffs' argument relies on a fundamental misunderstanding of the Rule they invoke. Rule 26(e) creates a duty to supplement an interrogatory response "in a timely manner if the party learns in some material respect the . . . response is incomplete or incorrect," Fed. R. Civ. P. 26(e)(1)(A), but it "does not bestow upon litigants unfettered freedom to rely on supplements produced after a court-imposed deadline[.]" *Murphy by Murphy v. Harpstead*, 2019 WL 6650510, at *6 (D. Minn. Dec. 6, 2019) (internal quotation omitted). Nor does it create a "safe harbor for a party's lack of diligence." *Id.* This case is different from an intellectual property infringement case where the plaintiff's damages continue to accrue after discovery closes all the way to the time of trial. Here, Plaintiffs' damages (i.e., the alleged false claims) stopped

---

[3] Although it did not extend the fact discovery deadline 45 days from October 17—which would have made October 17 the final day to supplement under the April 2, 2019 order—the Court gave Plaintiffs until October 31 to supplement the claims identification, more time than they had requested.

accruing in 2015. The Government has been investigating its allegations in this case since 2013. It could have—and was ordered to—determine which claims were false by October 31, 2019. Its failure to do so in the six years it was given will not be visited upon the Defendants.

Although Plaintiffs suggest some of the late-identified claims are attributable to additional, finite production from Defendants, they acknowledge other late-identified claims are simply the product of "ongoing review and analysis of documents in the record[.]" Resp. Opp'n Defs.' Mot. Sanctions 4, Dkt. No. 556. Nor do Plaintiffs bother to delineate which new claims they attribute to new discovery productions. More to the point, Plaintiffs fully acknowledge they "repeatedly warned [this Court] that the intermediate step of identification of claims via interrogatory response would have limited value in the face of the fact that the final list of false claims would necessarily come via expert report." *Id.* at 5. Whatever duty Plaintiffs may have to supplement under Rule 26, it does not obviate the separate duty to follow the Court's orders.

Plaintiffs erroneously assert the Court must employ a four-factor test from the Eighth Circuit to determine whether the violation is sufficiently justified or harmless to merit sanctions. *Id.* at 10 (citing *Rodrick v. Wal-Mart Stores E., L.P.*, 666 F.3d 1093, 1096-97 (8th Cir. 2012). But the cases Plaintiffs cite involve the untimely or inadequate disclosure of expert reports in violation of Rule 26. For example, *Rodrick* involved a challenge to the use of an expert report at trial because the report did not comply with Rule 26(a)(2). 666 F.3d at 1096-97. As such, Rule 37(c) governed the sanctions, and that Rule precludes a party from using the violating witness or information "to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *see also Engleson v. Little Falls Area*

Chamber of Commerce, 210 F.R.D. 667, 669 (D. Minn. 2002) (explaining that "Rule 16 is buttressed by the sanctions imposed by Rule 37(c)(1)" when the scheduling order violation involves an expert report). By contrast, Plaintiffs violated orders setting discovery deadlines and requiring them to provide specific discovery, so this Court's authority to issue sanctions arises under Rule 16(f) and Rule 37(b)(2), which are not subject to this balancing test.

Regardless, Plaintiffs' violation of the Court's orders is neither justified nor harmless. As explained above, Rule 26(e) does not provide a safe harbor for parties that violate scheduling orders, so cannot justify Plaintiff's actions. And the District Court told Plaintiffs nearly a year ago the proper course if they needed more time to complete fact discovery: ask for an extension.

Plaintiffs' violation also prejudiced Defendants. On December 30, 2019, Plaintiffs identified new alleged kickbacks and false claims, and adjusted the alleged taint periods for 44 other kickbacks. This timing, well after the close of fact discovery, significantly limits Defendants' ability to factually assess the kickbacks and claims. *See Schubert v. Pfizer*, 459 F. App'x 568, 572 (8th Cir. 2012). More strikingly, Plaintiffs added nearly $1,000,000 in alleged false claims involving a previously unidentified physician, creating a significant shift in the total liability Defendants face. Huyser Decl. Ex. 21. At the motion hearing, counsel for the Government lectured, "That's just how litigation works." Hr'g Tr., Feb. 4, 2020, at 39, Dkt. No. 579. But that is not how litigation works: "The purpose of our modern discovery procedure is to narrow the issues, *to eliminate surprise*, and to achieve substantial justice." *Tenbarge v. Ames Taping Tool Sys., Inc.*, 190 F.3d 862, 865 (8th Cir. 1999) (emphasis original). These goals are undermined if litigants are allowed to flaunt carefully considered discovery orders with impunity.

Plaintiffs also argue that Defendants are not prejudiced because, despite identifying new claims for the first time, their December 30 expert report eliminates some alleged false claims that had been included in their initial list on September 3, 2019. But Plaintiffs cannot be credited for eliminating claims it now concedes are not demonstrably false when this narrowing was precisely what the Court ordered to occur in fact discovery. If false claims were eliminated because they were either duplicative or because Plaintiffs have no way of demonstrating they involved a product sold by Defendants, then they are not properly part of the case. Defendants still face new liability on claims they had no opportunity to analyze during fact discovery, when they were apparently investigating claims Plaintiffs had no reason to bring. This is precisely the "shadowboxing" that troubled the District Court early in this case. Hr'g Tr., Aug. 2, 2019, at 55, Dkt. No. 155. Those concerns have come home to roost, despite this Court's admonition at every turn that such conduct would not be tolerated.

The record establishes Plaintiffs' unjustified and prejudicial violation of this Court's April 2, 2019, and October 16, 2019 orders. As a sanction, Defendants request the exclusion from evidence of all alleged false claims and kickbacks identified after November 7, 2019. Such a remedy is squarely within this Court's authority for the violations at issue.[4] Fed. R. Civ. P. 37(b)(2)(A)(ii). It is also appropriate in this case,

[4] Plaintiffs object to Defendants requesting this relief in a non-dispositive motion before the Magistrate Judge. They rely on a recent decision in this District, which noted "[a] majority of circuits treat sanctions as non-dispositive matters unless the sanction awarded by a magistrate judge disposes of a claim." *Smith v. Bradley Pizza, Inc.*, 2019 WL 2448575, at *10 (D. Minn. Mar. 8, 2016). By "claim," the court in *Bradley Pizza* meant "cause of action." *See id.* As Plaintiffs themselves distinguish in their Response, the "false claims" at issue here are not causes of action or bases of liability, but merely "example[s] of Defendants' use of kickbacks to induce the use of their products." Resp. Opp'n 7. Exclusion of some of these alleged false claims does not dispose of any of Plaintiffs' causes of action, and so the Court treats the relief as non-dispositive.

even though "[e]xclusion of evidence is a harsh penalty, and should be used sparingly." *LCA Enter., Inc. v. Sisco Equip-. Rental & Sales, Inc.*, 53 F.3d 186, 190 (8th Cir. 1995). Plaintiffs' violations demonstrate willful disobedience to the Court's orders. At this point, no lesser sanction cures the prejudice Defendants face because of Plaintiffs' violation. To the contrary, re-opening fact discovery would only result in greater costs and, given the course of this litigation, more motion practice. The Government must proceed to trial on the mere tens of thousands of false claims for which it seeks recovery of millions of dollars.

3. 30(b)(6) depositions

Defendants argue Plaintiffs should also be sanctioned for violating the Court's order requiring Plaintiffs to provide 30(b)(6) witnesses on certain topics, contending the designees' inadequate preparation was tantamount to failing to appear. Organizations, including the Government, "have a duty to make a conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6) depositions and to prepare them to fully and unevasively answer questions about the designated subject matter." *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000). Otherwise, "the potential thrives for an inquiring party to be bandied, from one [] representative to another, vainly searching for a deponent who is able to provide a response which would be binding upon that [organization]." *Id.* However, the deposition will only effectively serve its purpose if the noticing party "take[s] care to designate, with painstaking specificity, the particular subject areas that are intended to be questions, and that are relevant to the issues in dispute." *Id.*

The Court has carefully reviewed the deposition transcripts of the three 30(b)(6) designees at issue. As a general matter, the answers were not so deficient as to

demonstrate a failure to adequately prepare the witnesses. No matter how specifically a requesting party notices a topic, the designee will inevitably have imperfect knowledge.

However, the designees' inability to answer questions in two particular areas demonstrate inadequate preparation by the Government. First, the Government's designee for the supplemental deposition regarding the 27,000 claims was wholly unprepared to answer general questions about the claims matching process. This fact became clear early in the deposition and required a telephone conference with this Court to clarify that such questions were within the scope of the deposition. Second, neither MAC designee could meaningfully answer questions about how Medicare claims are reviewed for medical necessity, beyond coding observations.

Defendants seek two separate sanctions for this inadequate preparation: (1) the exclusion of evidence regarding any alleged false claims and kickbacks identified after September 3, 2019, and (2) the exclusion of any testimony or evidence at trial regarding certain topics that were part of the MAC depositions beyond what the MAC designees testified to. Both requests are too harsh, given the Court's conclusion that all three designees were generally prepared and made good faith attempts to answer Defendants' questions. Instead, a more tailored remedy is appropriate: (1) Plaintiffs are bound by the Government designees' answers regarding the claims matching process for the approximately 27,000 claims identified on November 7, 2019, and (2) they may not introduce new testimony or evidence to contest medical necessity for allegedly false claims submitted to CMS.

II. The Spoliation Motions (Dkt. Nos. 508 & 531)

Each side also seeks sanctions for the other's purported spoliation of evidence. Defendants fail to show any spoliation, and Plaintiffs demonstrate their entitlement to sanctions on only a part of their motion.

A. Legal Standard

Once a party knows or should know that evidence in its control is relevant to current or anticipated litigation, that party must take reasonable steps to preserve the evidence. *Paisley Park Enter., Inc. v. Boxill*, 330 F.R.D. 226, 232 (D. Minn. 2019); *see also* Fed. R. Civ. P. 37(e). A court may sanction a party that prejudices its litigation opponents by violating this obligation, and the power to do so stems both from its inherent authority to cure "abuses of the judicial process," *Stevenson v. Union Pac. R. Co.*, 354 F.3d 739, 745, 748 (8th Cir. 2004), and the Federal Rules of Civil Procedure, *e.g.*, Fed. R. Civ. P. 37(e). One court in this District parsed the test thusly: "sanctions are appropriate when a party (1) destroys (2) discoverable material (3) which the party knew or should have known (4) was relevant to pending, imminent, or reasonably foreseeable litigation." *Lexis-Nexis v. Beer*, 41 F. Supp. 2d 950, 954 (D. Minn. 1999) (quoting Jamie S. Gorelick et al., *Destruction of Evidence* § 3.8 (1989)). The moving party bears the burden of establishing spoliation.[5] *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 615-17 (S.D. Tex. 2010).

---

[5] Plaintiffs accurately quote caselaw stating the moving party bears the burden, but the authority those cases cite, which is often *Stevenson*, does not directly stand for that proposition. Regardless, it is nearly axiomatic that the moving party, at least initially, bears the burden. *See Lilienthal's Tobacco v. U.S.*, 97 U.S. 237, 266 (1877) ("Beyond question, the general rule is that the burden of proof in civil cases lies on the party who substantially asserts the affirmative of the issue . . . .").

Although courts have expanded the traditional meaning of spoliation, the harshest sanctions available under this Court's inherent authority for destroying evidence, such as an adverse inference instruction or dismissal, still require a specific finding of "intentional destruction indicating a desire to suppress the truth." *Stevenson*, 354 F.3d 739, 746 (adverse inference); *Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1006 (8th Cir. 2006) (dismissal). But the Eighth Circuit has otherwise left the door open to sanctions for the destruction of evidence absent a finding of bad faith. *Stevenson*, 354 F.3d at 745-46 (noting that not all sanctions imposed under a federal court's inherent authority require a bad-faith determination); *cf. Gallagher v. Magner*, 619 F.3d 823, 845 (8th Cir. 2010) (explaining that "a district court does not abuse its discretion by imposing sanctions, even absent an explicit bad faith finding, where a party destroys specifically requested evidence after litigation has commenced.").

Rule 37(e) of the Federal Rules of Civil Procedure grants the Court specific authority to address the loss of electronically stored information where "a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery[.]" If it finds prejudice to the adverse party, the Court may order sanctions commensurate with that prejudice. Fed. R. Civ. P. 37(e)(1). If (and only if) the Court finds a "party acted with the intent to deprive another party of the information's use in the litigation[,]" the Court may impose those harsh sanctions associated with traditional spoliation, including adverse jury instructions and dismissal. *Id.* at 37(e)(2).

B. Defendants' Spoliation Motion (Dkt. No. 508)

Defendants claim the Government failed to preserve certain records that should have been in a digital file maintained by the Office of Inspector General. But this

argument stumbles out of the gate, as the Defendants fail to show that the Government destroyed, or even failed to retain, the alleged records at issue.

1. Facts

Defendants rely primarily on the deposition testimony of 30(b)(6) designee Mario Pinto and a declaration by one of their counsel, Mr. Beimers, who previously worked for the U.S. Department of Health and Human Services's Office of Inspector General. *See* Beimers Decl. ¶ 5, Dkt. No. 511. The OIG receives complaints of potential program fraud and abuse and maintains the corresponding investigatory file in a case management system called IRIS. Beimers Decl. Ex. 1 (Pinto Dep.), at 7-8, 11. Even when OIG decides not to pursue an investigation, a complaint is still maintained in IRIS and referred to a "Program Safety Contractor" for follow-up through an administrative investigation. *Id.* at 24, 26. Besides the initial complaint, the IRIS file contains "reports of investigation, any report drafted by an agent, and [other] documents that may be relevant to that case as the agent deems it appropriate" to include in the electronic file. *Id.* at 8. IRIS is password-secured, is accessible only by limited personnel, and maintains files indefinitely. *Id.* at 31-33. Even individuals with access cannot alter information or delete documents in IRIS. *Id.*

Through a telephone complaint hotline, OIG received two complaints regarding Defendants' business practices. It received the first complaint in early 2010, assigned the complaint a case number in IRIS, and then referred the complaint to a contractor for an administrative investigation. *Id.* at 34, 36, 39-40; Beimers Decl. Ex. 2, Ex. 3. The contractor subsequently sent a letter to OIG, advising that it was closing its investigation of the complaint. Beimers Decl. Ex. 4. In May 2011, OIG received a second hotline

complaint. *Id.* at Ex. 1, at 59; *id.* at Ex. 5. This complaint was not assigned an IRIS file number, but was instead placed in a civil investigative case file. *Id.* at Ex. 1, at 59-60.

In 2019, Defendants requested production of "[a]ll Documents relating to complaints made to the Office of Inspector General, including communications with government contractors, concerning Precisions Lens [sic], Paul Ehlen or Sightpath." *Id.* at Ex. 7, at 5. Plaintiffs produced several documents, including several of the previously cited exhibits to Mr. Beimers's declaration. *See* Decl. of Andrew Tweeten ¶ 3, Dkt. No. 567. Defendants assert, however, that the file for the first hotline complaint did not contain several documents they expected to find, including additional correspondence, a closing memorandum, and a summary of activities. *See id.* at ¶ 6. They also note the lack of any case file relating to the May 2011 complaint, other than the summary complaint report itself, and that the Government's 30(b)(6) designee had no explanation why the second complaint did not receive an IRIS case number.

2. Analysis

Because they failed to establish that Plaintiffs destroyed any discoverable material, Defendants' motion is denied. *Lexis-Nexis*, 41 F. Supp. 2d at 954-55. Defendants ask this Court to assume two facts from the absence of certain documents in the hotline files: (1) that the documents ever existed at all and (2) Plaintiffs destroyed the documents, or at least allowed them to be destroyed. Both assumptions require too great an inferential leap unsupported by the record. There is no testimony or other evidence of specific documents that once existed but are now missing. Although Mr. Beimers states in his declaration that one would normally expect to find certain documents, including a closing memorandum, in the hotline file, neither he nor Pinto averred that such documents are part of every hotline file in every instance. To the

contrary, Pinto observed several times during his 30(b)(6) deposition that the hotline system was not as sophisticated in 2011 as it currently is and was in fact transitioning to a more automated process at approximately the same time. *E.g.*, Beimers Decl. Ex. 1, at 59. Pinto also noted that case agents have some discretion as to what documents are placed in the IRIS file. *Id.* at 8-9. Once a document is in an IRIS file, there is apparently no way to delete it, as even documents erroneously saved to the wrong file are only "sequestered," not removed. *Id.* at 32-33. Defendants offer no evidence, even in the abstract, showing how Plaintiffs may have destroyed the documents. There is not enough evidence in the record to support a conclusion that it is more likely than not the documents ever existed.

Defendants also fail to demonstrate any real prejudice stemming from the loss of any documents in IRIS. Far from proving that additional documents not in the IRIS file existed, Pinto's testimony equally supports a conclusion that OIG investigators did not seriously follow up on the tip and so did not create other documents Defendants think should be in the file. Similarly, nothing before the Court suggests Plaintiffs intend to present a witness who will claim to know the content of now-lost documents and testify to Defendants' detriment.[6] In short, both parties are free to argue whatever inferences the state of the record supports.

Defendants bear the burden of proving spoliation, which requires as an antecedent that the evidence existed to be destroyed. They failed to carry that burden and their motion is denied.

---

[6] If Plaintiffs were suddenly to change their position and did in fact produce such a witness, the Court would entertain a request to reconsider this ruling.

C. Plaintiff's Spoliation Motion (Dkt. No. 531)

In their spoliation motion, Plaintiffs accuse Defendants of destroying, or at least failing to preserve, three sources of potential evidence: (1) text messages to and from Precision Lens employees; (2) Paul Ehlen's personal Comcast email account; and (3) a file of receipts from Manny's Steakhouse, which Plaintiffs have dubbed "the Manny's file." Only the lost text messages merit sanctions.

1. Facts

a. Text messages

Following FBI interviews of some of its employees in February 2013, Defendants hired outside counsel and issued a litigation hold notice to six record custodians within Precision Lens. Decl. of Chad Blumenfield Ex. 1, Dkt. No. 534; Decl. of Thomas Beimers ¶ 3, Dkt. No. 563. The notice informed the recipients to "preserve all records, including electronic materials such as email." Blumenfield Decl. Ex. 1. Over a year-and-a-half later, in October 2014, the Government served Defendants with an administrative subpoena. Blumenfield Decl. Ex. 2. Mr. Beimers, Precision Lens's outside counsel, advised the company to issue a new litigation hold, which it did. Beimers Decl. ¶ 4; Blumenfield Decl. Ex. 3. The second notice, addressed to all employees, identified 14 categories of information to be preserved, specifically including information on an employee's "Blackberry, iPhone, PDA or other personal storage device[.]" Blumenfield Decl. Ex. 3. However, the Government indicated it was not interested in receiving copies of employees' text messages at the time. Beimers Decl. ¶ 5.

During the time period at issue in this litigation, Precision Lens did not provide cellphones to its employees, but instead reimbursed those who used their personal devices for work purposes. Decl. of William Henneman ¶ 6, Dkt. No. 564. Ehlen testified

he communicated with a "select group" of about 25 physicians by text message. Blumenfield Decl. Ex. 6, at 337. Similarly, Brendan Shiel, an independent sales representative, stated he communicated with physicians by text message, particularly when he had a personal relationship with a physician. Blumenfield Decl. Ex. 7, at 23-25. As time passed and technology trends changed, his use of text messaging increased. *Id.* at 24. However, he primarily used e-mail to organize trips with the physicians. *Id.*

Despite the administrative subpoena and the scope of the litigation hold, Precision Lens, Ehlen, and their employees failed to adequately preserve and produce relevant text messages. Around 2016, before the Government's intervention in August 2017, Ehlen's phone got wet while he was at a lake in Garrison, Minnesota.[7] Decl. of Paul Ehlen ¶ 6; Ex. E, at 50-51, Dkt. No. 565. In separate litigation, Mr. Ehlen testified he took the phone to a Verizon store afterwards because he would "reboot it and it just wouldn't go." *Id.* at Ex. E, at 50-51. He was told he had "worn the phone out" so he traded it in for a new device. *Id.* Verizon employees transferred information from his old phone to the new device using a cloud-based system. *Id.* at Ex E, at 51-52. Although Ehlen testified he was told everything on his phone, including text messages, was saved "to the Cloud[,]" he learned that was incorrect when he attempted to retrieve old text messages in the separate litigation. *Id.* at Ex. E, at 52-53.

In October 2018, as part of its First Set of Requests for Production, the Government sought communications, including text messages, between Defendants and certain physicians. Beimers Decl. Ex. B, at 2. Defendants produced some text

[7] Ehlen testified during his deposition in this matter that his phone "fell in the lake." Blumenfield Decl. Ex. 6, at 338. In a 2017 deposition, he objected to characterizations that he had dropped his phone: "And I'll clarify in the lake, and I told them I didn't drop it. I was at the lake and it got wet." Ehlen Decl. Ex. E, at 49-50.

messages in response to this request, but none from Paul Ehlen. *Id.* at ¶ 8. They acknowledged in their brief that, beyond the handful of messages produced, the remaining custodians "either had no responsive data or had lost any responsive data due to the lengthy passage of time, damage to a cell phone, and/or technology upgrade." Defs.' Opp'n Mot. Sanctions 5-6, Dkt. No. 562. Plaintiffs also obtained some text messages from Precision Lens employees through third-party discovery of physicians that were clearly relevant. *E.g.*, Blumenfield Decl. Ex. 30. Unlike the documents Defendants contend are missing from the OIG file, it is therefore clear from the record that relevant text messages existed but were not preserved.

b. Comcast email account

As part of Ehlen's cable subscription at his prior residence, Comcast provided Ehlen with a complimentary email account. Ehlen Decl. ¶ 4. During its investigation before intervening, the Government reviewed emails sent from this account. *E.g.*, Blumenfield Decl. Ex. 17, Ex. 18, Ex. 19, Ex. 20. It also reviewed emails Ehlen forwarded from his work account to the Comcast account. *E.g.*, *id.* at Ex. 21, Ex. 22, Ex. 23.

Ehlen states he did not use the Comcast account frequently, and the account was deactivated no later than when he moved in 2015. Ehlen Decl. ¶ 4. When Plaintiffs asked about any personal accounts he might also use to conduct business, Ehlen initially denied having such accounts. Blumenfield Decl. Ex. 15. He claims he did not think of the Comcast account because he used it so infrequently. Ehlen Decl. ¶ 4. When Plaintiffs noted they already had emails from the account, Ehlen contacted Comcast. *Id.* at ¶ 5, Ex. A; Blumenfield Decl. Ex. 16. Comcast replied that they had no information

from the account.[8] Ehlen Decl. Ex. B. Defendants informed Plaintiffs that the account was unrecoverable in March 2019. *Id.* at Ex. C. So, although the parties do not dispute the account existed, it was not preserved.

c. The "Manny's file"

Defendants maintained an account at Manny's Steakhouse, where they entertained guests. Ehlen Decl. Ex. D, at 389-90; Blumenfield Decl. Ex. 26, Ex. 27. In response to a subpoena, Manny's produced substantial records relating to Defendants' visits to the restaurant. *E.g.*, Blumenfield Decl. Ex. 26, Ex. 27; Pls.' Mem. Supp. Mot. For Sanctions Due to Spoliation 10, Dkt. No. 551.

During his deposition, former Precision Lens employee Chris Reichert testified that, in addition to recording these Manny's excursions in a general ledger, Ehlen would bring back a paper copy of the receipt, which then went into a file. Blumenfield Decl. Ex. 12, at 154-55. Ehlen testified during his deposition that he did not remember doing this, but instead stated he would sign "a tab" and assumed the restaurant sent a copy to Reichert. Ehlen Decl. Ex. D, at 390-91.

During a September 2019 hearing, this Court ordered Defendants to produce the physical file of receipts if it existed. William Henneman, CFO of Precision Lens, states the company searched for the file, including at a warehouse where they keep backup paper files, but could not find anything matching Reichert's description. Henneman Decl. ¶ 8. Personnel whom Henneman would expect to know about such a file are not

[8] During the investigation, Defendants produced emails from an account, pehlen@refractec.com, which was associated with a company Ehlen partially owned. Blumenfield Decl. Ex. 16. Defendants attempted to access the account, but apparently without success. *Id.*

aware of its existence. *Id.* Other than Reichert's testimony, there is no evidence the file ever existed.

2. Analysis

The facts underlying Plaintiffs' motion demonstrate the problems a protracted pre-intervention investigation creates in a *qui tam* action such as this one. For over four years, Defendants existed in litigation purgatory: they could reasonably expect litigation, but they lacked the benefit of a complaint to frame the scope of potential discovery. Although this fact bears on what pre-intervention preservation steps are reasonable, it cannot excuse true spoliation or even the failure to take reasonable steps to preserve relevant evidence. As to the text messages at issue here, Defendants did not take reasonable steps to preserve discoverable evidence. However, as to Ehlen's Comcast email account, Plaintiffs have not demonstrated Defendants' actions were unreasonable, much less that any destruction was intentional, or that Plaintiffs are prejudiced by the loss of the evidence. As to the Manny's receipt file, the Plaintiffs have not shown the file ever existed or, assuming it did, that they are prejudiced by its loss.

a. Text messages

The Defendants did not take reasonable steps to preserve relevant text messages, despite a duty to do so. To start, Defendants were on notice of potential litigation, and therefore the duty to preserve relevant evidence arose, no later than October 2014. When the Government served the administrative subpoena, it marked Defendants as a target of the investigation, even if Defendants previously believed the

Government was focused on another company.[9] At that point, Defendants could reasonably foresee future litigation.

Even despite the lack of a complaint to guide their conduct, the steps Defendants took to preserve text messages after the duty arose were unreasonable. Although foreseeable litigation does not require a party to freeze all its physical and electronic records perfectly, it does require key players to take reasonable steps to protect "unique, relevant evidence that might be useful to the adversary." *Paisley Park*, 330 F.R.D. at 233 (quoting *In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 299 F.R.D. 502, 517 (S.D. W. Va. 2014)). By the time Defendants issued the November 2014 preservation notice, they knew the investigation concerned the Anti-Kickback Statute and that communications relating to the trips and other remunerations were relevant. Henneman Decl. Ex. B, at 4-5. Logically, Defendants should have also known the "key players"—i.e., the custodians of such information—included Ehlen, the sales representatives who communicated directly with physicians, and any other employees who organized the trips. As to text messages specifically, Defendants communicated with physicians via text about business before October 2014, and so should have known text messages could be relevant. *E.g.*, Blumenfield Decl. Ex. 10, Ex. 29, Ex. 32, Ex. 33, Ex. 34, Ex. 38.

Defendants argue they had no reasonable notice of the need to retain text messages because counsel for the Government, in the context of negotiating the scope of the subpoena, stated he was "not worried" about text messages. This argument is unconvincing, as the authority Defendants cite merely stands for the proposition that a

[9] The duty to preserve may have arisen earlier, following the February 2013 FBI interviews. Because Defendants' preservation actions were inadequate even after October 2014, the Court need not cut the analysis so finely.

party need not preserve evidence that it does not know to be relevant. *See John B. v. Goetz*, 879 F. Supp. 2d 787, 863-65 (M.D. Tenn. 2010); *Valspar Corp. v. Millennium Inorganic Chem., Inc.*, 2016 WL 6902459, at *4 (D. Minn. Jan. 20, 2016). Defendants were clearly aware that communications about remunerations and trips, whether in text messages or elsewhere, were relevant to the potential litigation. A comment by Government counsel regarding the documents he sought through an investigative subpoena does not change what topics are relevant to the prospective litigation. At most, it reflects an attempt to limit the initial production burden during the investigative stage.

Nor can Defendants rely on their "Bring Your Own Device" policy to shield themselves from an obligation to preserve relevant information on their employees' personal devices. The concept of "control" for discovery purposes is quite broad, extending beyond legal ownership or physical possession. *In re Hallmark Capital Corp.*, 534 F. Supp. 2d. 981, 982 (D. Minn. 2008). Even absent a formal policy giving the company control over work-related information on the phone, Defendants have control over their employees and contractors acting in the course of their work responsibilities. *See Ronnie Van Zant, Inc. v. Pyle*, 270 F. Supp. 656, 669-70 (S.D.N.Y. 2017) (finding defendants had sufficient control over non-party's phone because a contract existed between them and the phone was used for business). The Defendants have a practical level of control over the business-related records, including text messages, their employees have on their private devices.[10]

[10] To hold to the contrary would create an obvious loophole for businesses to exploit during litigation.

The question therefore returns to whether Defendants took reasonable steps to preserve text messages they knew could be relevant to reasonably foreseeable litigation. They did not. Although Defendants issued a litigation hold, that act alone is insufficient to satisfy their preservation duties. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004). It appears that is all they did regarding the text messages. Ehlen did not recall taking any affirmative steps to preserve his text messages, or even talking to counsel about what steps to take, during the investigation period. Blumenfield Decl. Ex. 6, at 335-36. Similarly, a 30(b)(6) designee for Precision Lens did not recall the company instructing employees to retain old phones if they upgraded devices. *Id.* at Ex. 8, at 332.

Defendants counter that their actions were reasonable, given both the significant steps they took to preserve digital records generally and the sheer amount of time that passed between the start of the investigation and the Government's intervention. It is true Defendants have spent significant time and financial resources on preservation and discovery in this case, as the Court has noted in the past. And the passage of time, even with the best efforts, inevitably means some relevant information will be lost. But the Defendants did not take even the cheapest, simplest steps to ensure text messages were preserved beyond issuing the hold. For instance, they did not talk to individual custodians about ensuring messages were backed up, either on a cloud-based server or elsewhere. Nor did they remind employees to either keep their old device when upgrading or otherwise ensure the data was preserved. Even the litigation holds Defendants issued were few and far between. Following the November 2014 hold, Precision Lens did not issue another hold notice until February 1, 2019, over four years later and well after the operative Complaint was unsealed. Henneman Decl. ¶ 4, Ex. C.

Ehlen's lake incident demonstrates why simply not deleting text messages was insufficient. Assuming it was merely an accident, such accidents are a foreseeable part of life. People drop, lose, and upgrade their phones regularly. Had Ehlen taken one or two simple steps to ensure his messages were backed up to the cloud, Plaintiffs would have all relevant messages and it would have cost Defendants almost nothing in terms of time and money.

Because Defendants did not take reasonable steps to preserve the text messages, the next question is whether the lost messages can be replaced or restored through additional discovery. Fed. R. Civ. P. 37(e). The "replacement or restored" requirement of Rule 37(e) simply recognizes that loss of information on one device may be harmless if it can be found elsewhere. *Id.* at committee note to 2015 amendment. As Defendants acknowledge, because they had employees use their personal devices, the text messages will not be found on any "Precision lens server or network." Defs.' Opp'n to Mot. 11. Although Plaintiffs have obtained some messages through third-party subpoenas, they almost certainly cannot recover all responsive messages this way. *Paisley Park*, 330 F.R.D. at 235. Many of the physicians, who were not under an obligation to preserve relevant information, likely lost messages to the same passage of time Defendants claim befell them. Plaintiffs have presented sufficient evidence for the Court to infer that at least some responsive text messages, including messages sent internally, cannot be replaced, and that some of them may well have been unique.

Still, the Court may only award sanctions if it finds Plaintiffs were prejudiced or that Defendants "acted with the intent to deprive" them of the information. Fed. R. Civ.

P. 37(e).[11] Here, the prejudice to Plaintiffs follows from the inability to retrieve the lost responsive messages. Plaintiffs are left with holes in the communications between Defendants and physicians, as well as holes in Defendants' internal conversations. *Paisley Park*, 330 F.R.D. at 236. During oral argument, Defendants suggested any prejudice is minimal, both because Plaintiffs have recovered some text messages through third-party discovery and because it is reasonable to assume not many responsive messages were sent during the relevant time period, as text messaging was less common in years past. However, as already noted, recovering some messages does not mean all, or even the most critical, messages were recovered. Further, although text messaging has undoubtedly grown more common in recent years, Plaintiffs have shown responsive text messages from as early as 2009. Blumenfield Decl. Ex. 30.

Although Plaintiffs are prejudiced, the Court does not find that Defendants "acted with the intent to deprive [Plaintiffs] of the information's use in litigation[.]" Fed. R. Civ. P. 37(e)(2). To find such intent, there must be evidence of "a serious and specific sort of culpability" surrounding the loss of the discoverable information. *Auer v. City of Minot*, 896 F.3d 854, 858 (8th Cir. 2018). There is no direct evidence of such culpability here as there was in *Paisley Park*, where two custodians deliberately wiped and discarded their phones after litigation commenced. 330 F.R.D. at 236-37. Nor does the circumstantial evidence support such a finding. Defendants issued a litigation hold that included personal devices. Plaintiffs argue that Defendants' failure to follow their own litigation hold implies the culpable intent, but that is a non sequitur. Failure to do more

[11] The Eighth Circuit has admonished courts to "not allow an exercise of inherent power to 'obscure' the Rule 37 analysis." *Sentis Grp., Inc. v. Shell Oil Co.*, 559 F.3d 888, 899 (8th Cir. 2009).

than issue the litigation hold merely implies a negligent attitude toward the text messages, particularly since the Government stated it was not immediately concerned with text messages. As discussed, Defendants were careless in not providing more specific guidance to their employees. And Ehlen's lake incident may appear questionable, but the timing—well after the investigation began but before litigation commenced—does not support the implication that he intended to deprive Plaintiffs of the messages. Phones get dropped and individuals trade in their devices, so the culpable intent cannot be inferred merely by the loss of messages following the litigation hold. Without offering more, Plaintiffs have not demonstrated Defendants intended to deprive them of the text messages in litigation.

Because Plaintiffs were prejudiced but Defendants did not intend to deprive them of the lost text messages, this Court "may order measures no greater than necessary to cure the prejudice[.]" Fed. R. Civ. P. 37(e)(1). Plaintiffs requested three forms of relief, two of which are appropriate to cure the prejudice. First, this Court will enter a judicial finding that Defendants failed to take reasonable steps to preserve text messages, and that responsive messages were lost as a result. Second, Defendants shall produce all text messages they have or can obtain from employees or contractors that are relevant to the current litigation, irrespective of time period or custodian. Although these messages cannot directly demonstrate Defendants' behavior during the relevant time period for this litigation, they may help Plaintiffs fill in gaps and are a reasonable, though imperfect, replacement.

However, Plaintiffs have not demonstrated that attorneys' fees are appropriate under Rule 37 or this Court's inherent authority. The authority Plaintiffs cite to support sanctions under Rule 37, *Alden v. Mid-Mesabi Assoc. Ltd. P'ship*, awarded attorneys'

fees under Rule 37(b) for the plaintiffs' violation of discovery orders. 2008 WL 2828892, at **4-5 (D. Minn. Jul. 21, 2008). Although Defendants violated a preservation obligation, they did not violate a discovery order regarding the text messages. The relief already ordered sufficiently cures the prejudice Plaintiffs have demonstrated. Further, for this Court to award attorneys' fees under its inherent authority, it must first find bad faith. *Stevenson*, 354 F.3d at 751. As explained above, loss of the text messages stemmed from negligence, not intentional destruction, so there was no bad faith and attorneys' fees are inappropriate.

b. Comcast email account

Plaintiffs also seek sanctions for Defendants' failure to preserve Ehlen's Comcast email account, which contained responsive communications. Ehlen had an affirmative obligation to review the account and preserve relevant communications but did not do so. However, Plaintiffs have not demonstrated the lost email cannot be found elsewhere or that they are otherwise prejudiced. Fed. R. Civ. P. 37(e). Of the examples Plaintiffs included with their motion, several were emails Ehlen forwarded from his work account, and so were part of that preservation and production. Blumenfield Decl. Ex. 21, Ex. 22. In the Court's experience, this is not an uncommon practice and does not by itself suggest frequent use of the Comcast account that would not also be part of Precision Lens's preservation efforts.

Another example was an email chain Ehlen did not initiate, but then forwarded to Chris Reichert's Precision Lens account. *Id.* at Ex. 18. This also does not suggest the existence of other, unique emails not captured by preservation of Precision Lens email servers. Nor does an email from a physician's administrative assistant, who sent the email to both Ehlen's Precision Lens and Comcast accounts. *Id.* at Ex. 23. To the

contrary, it suggests even physicians with whom Ehlen was personally close used his Precision Lens email account for business communications. *See id.* at Ex. 5 (text message from Dr. Davis saying she sent an email to Ehlen's Comcast account because Ehlen's "precision lens email isn't working").

Similarly, Plaintiffs provide an email from Ehlen's Comcast account forwarding an email with photographs from a flyover Ehlen took part in. *Id.* at Ex. 20. Although Ehlen also mentioned business matters, the context of this email is unique, and so it is difficult to infer Ehlen regularly emailed business associates from the account.

Finally, Plaintiffs cite two emails from Ehlen's Comcast account sent to former Sightpath officers and employees. *Id.* at Ex. 17, Ex. 19. These emails are relevant and would not be found on a Precision Lens server. But Plaintiffs do not explain why they would not have all such emails from their investigation of Sightpath. "Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere." Fed. R. Civ. P. 37(e) advisory committee notes to 2015 amendment. Sightpath, unlike the physicians, also had a duty to preserve information while it was under investigation and on notice of potential litigation. Plaintiffs presumably have access to these records or could have obtained them through additional discovery. Absent an explanation, Plaintiffs have not shown they are prejudiced by Ehlen's failure to preserve the messages when he discontinued his Comcast service. Absent a showing of prejudice, Ehlen's poor memory does not compel sanctions.

c. The "Manny's file"

As to the Manny's receipt file, Plaintiffs have not shown this physical file ever existed, and so cannot show it was lost or destroyed. *Lexis-Nexis*, 41 F. Supp. 2d at

954-55. Plaintiffs rely on Chris Reichert's testimony that Precision Lens "would also keep a copy of the receipt from the dinner in a file." Blumenfield Decl. Ex. 12, at 155. The weight of the evidence contradicts this testimony, however. Both Ehlen and Henneman claim to have no knowledge of such a file, despite making reasonable efforts to locate it. Spoliation sanctions are not appropriate given the significant doubt surrounding the file's existence.

Even if the Manny's file existed and was lost, Plaintiffs have not demonstrated prejudice warranting sanctions, as the evidence they seek would be duplicative. Plaintiffs have a general ledger from Defendants documenting all expenditures at Manny's, *Id.* at Ex. 12, at 134, and similar records from Manny's, including receipts for some of the meals, *id.* at Ex. 26, Ex. 27. Plaintiffs argue the receipts in the purported file are unique because they provide a greater level of detail regarding expenditures within a given Manny's outing. Although Plaintiffs may wish to titillate a jury with citations to specific meal orders, they do not say how doing so is relevant to the legal claims or how they cannot achieve the same with the documents they already have.

Plaintiffs also argue the physical receipts kept by Defendants may contain unique marginalia, such as notes of who was at a given meal. In support, they again cite to Reichert's deposition testimony, which they characterize as saying "the only way to find out who Ehlen treated to dinner at Manny's 'would have been from the receipt, from the actual, you know, receipt from Manny's for the dinner.'" Pls.' Mem. Support 29 (quoting Blumenfield Decl. Ex. 12, at 156), Dkt. No. 551. Yet, in the very next sentence, Reichert noted such information is also "probably on Paul's calendar or Linda kept a calendar for Paul." Blumenfield Decl. Ex. 12, at 156. Further, Reichert never testified that the receipts included handwritten notes of who attended, only that Ehlen would "make a

notation on this spreadsheet[.]" *Id.* at 155. Even if this Court concluded the receipts existed, it is too great an inferential leap to conclude on this record that those receipts would provide unique information, distinct from what Plaintiffs already possess. Because Plaintiffs have not demonstrated they are prejudiced by the loss of the Manny's file, assuming it ever existed, sanctions are not warranted.

III. Plaintiffs' Motion to Compel (Dkt. No. 519)

Finally, the Court turns to Plaintiffs' Motion to Compel Expense Reports and Other Source Documents. Plaintiffs initially sought to compel three categories of information: (1) Precision Lens's 2006 and 2007 tax returns, (2) certain missing months from the company's general ledger, and (3) expense reports and other "source documents" that became entries in the general ledger. During oral argument, Plaintiffs acknowledged that Defendants have produced all responsive information in their possession for the first two categories. Hr'g Tr., Feb. 4, 2020, at 68, 76, Dkt. No. 579. Plaintiffs' Motion is accordingly denied as moot as to those categories. As to the underlying "source documents," the Court will not order further production.

A. Facts

To prepare Precision Lens's tax returns, the company's accounting firm maintained a general ledger that tracked business expenses. Decl. of Bahram Samie Ex. D, at 143, Dkt. No. 524; Decl. of William Henneman of Precision Lens ¶ 6, Dkt. No. 561. Defendants would compile information from "source documents," such as employee expense reports and credit card statements, and submit it to the firm to include on the general ledger. Samie Decl. Ex. D, at 143, 147-48.

During both the pre-intervention investigation and discovery, Plaintiffs sought from Defendants any documents regarding remunerations to physicians and other

referral sources. *Id.* at Ex. A, Ex. B. In discovery, Plaintiffs requested any supporting documentation from Defendants' tax returns and financial statements "relating in any way to the treatment of any remuneration provided [to] any physician or other referral source[.]" *Id.* at Ex. B, at 4.

Since the 2014 subpoena, Defendants, working with a third-party vendor, have collected and reviewed at least 326,116 documents for relevancy and privilege. Decl. of Matthew J. Piehl ¶ 3a, Dkt. No. 560. The Parties required the Court's input regarding appropriate search terms for the vendor to use in reviewing this cache of documents. *See* Order, Apr. 16, 2019, at ¶ 5, Dkt. No. 239; Order, May 3, 2019, Dkt. No. 269. Through this process with the third-party vendor, Defendants produced 90,900 documents over the course of six years. Piehl Decl. ¶ 3c.

Copies of the general ledger identify source documents Plaintiffs cannot find in Defendants' productions. As an example, Plaintiffs could not find expense reports from Peter Gosz for January 2010 or January 2011, despite the general ledger reflecting he spent money on ski trips with physicians in Beaver Creek, Colorado in those months. Samie Decl. Ex. E, at 6, 13. When Plaintiffs inquired about Gosz's expense reports for those specific months, Defendants located and produced the January 2011 expense report. *Id.* at Ex. G, Ex. J. Defendants stated in the letter accompanying the production that they "collected, reviewed, and produced relevant expense reports." *Id.* at Ex. J, at 2. They noted the third-party vendor marked the report "not responsive," and likely did so "because nothing on the face of the document indicates that it would be relevant to this litigation." *Id.* Defendants apparently could not locate the January 2010 expense report.

B. Analysis

Generally, a party "may obtain discovery regarding any nonprivileged matter that is relevant to [a] claim or defense and proportional to the needs of the case," with proportionality serving to bound the outer dimension of discovery. Fed. R. Civ. P. 26(b)(1). A court must consider, among other factors, "the amount in controversy, . . . the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.*; *see also id.* at advisory committee notes to 2015 amendment (discussing the importance of proportionality in limiting discovery).

Here, Plaintiffs seek to compel "all expense reports and other source documents for expenses presented on Precision Lens's general ledger for meals and entertainment" for the relevant time period. Mem. L. Supp. Pls.' Mot. Compel 11, Dkt. No. 522. Although they have shown Defendants missed at least some responsive documents in their production, Plaintiffs have not shown this imperfect production is so great that Defendants have fallen short of their discovery obligations. This Court already weighed in on the process leading to production of the source documents and is satisfied the process was proportional to Plaintiffs' needs in the case. Defendants have produced tens of thousands of relevant[12] and responsive documents at significant financial expense. *See* Piehl Decl. ¶ 3.

The sort of exacting search Plaintiffs now request to ensure that no other documents have been missed is extremely burdensome but offers only limited benefit.

---

[12] Plaintiffs emphasized Defendants' use of "relevant" in the letter accompanying the January 2011 expense report to conclude Defendants have selectively withheld documents. The Court accepts Defendants' explanation that the use of "relevant" was a scrivener's error, as they also explained in the letter that the vendor marked the specific document "not responsive."

Although at least one responsive document was missed, other missing source documents the general ledger identifies may simply not exist. Those that do may be duplicative of information Plaintiffs already have through other documents or depositions. And while some expense reports note which physicians attended a meal or event, Samie Decl. Ex. F, others apparently do not, *id.* at Ex. G. Similarly, not every expense categorized as "meals and entertainment" involves the entertainment of physicians. *See id.* Given Defendants' discovery production to date, Plaintiffs have not demonstrated a need for additional review of several hundred thousand documents. As such, Plaintiffs' motion is denied.

ORDER

The Court, being duly advised in the premises, upon all the files, records and proceedings herein, now makes and enters the following Order.

IT IS HEREBY ORDERED:

1. Defendants' Joint Motion for Sanctions [Dkt. No. 498] is GRANTED IN PART AND DENIED IN PART:

    a. Plaintiffs are excluded from introducing evidence regarding any alleged false claims or alleged kickbacks identified after November 7, 2019.

    b. Plaintiffs are excluded from introducing evidence, beyond what the Government testified to during its organizational depositions, regarding:

        i. How it asserts it identified that the allegedly false claims disclosed on November 7, 2019, involve products sold by Defendants;

ii. That the claims submitted to CMS were false because the services were not medically necessary.

c. Defendants' Motion is otherwise DENIED.

2. Defendants' Motion for Sanctions for Spoliation of Evidence [Dkt. No. 508] is DENIED.

3. Plaintiffs' Motion to Compel Expense Reports and Other Source Documents [Dkt. No. 519] is DENIED.

4. Plaintiffs' Motion for Sanctions Due to Spoliation [Dkt. No. 531] is GRANTED IN PART AND DENIED IN PART:

a. The Court hereby FINDS that Defendants failed to take reasonable steps to preserve relevant electronically stored information in the form of text messages and relevant evidence was lost as a result.

b. Within 60 days of the date of this Order, Defendants shall produce all non-privileged text messages in their possession or that they can obtain from employees or contractors that are relevant to the issues in this litigation, irrespective of time period or custodian.

Dated: July 10, 2020

_s/David T. Schultz
DAVID T. SCHULTZ
U.S. Magistrate Judge