

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DVCOMM, LLC : CIVIL ACTION
 :
 v. :
 : NO: 14-5543
HOTWIRE COMMUNICATIONS, LLC, :
et al. :

FINDINGS OF FACT AND CONCLUSIONS OF LAW

KEARNEY, J.

February 3, 2016

Following pre-hearing briefing, post-hearing Certifications of the parties and counsel and evaluating credibility of witness testimony at our January 22, 2016 hearing on Defendants' Motion for Sanctions arising from alleged spoliation of evidence, we find facts and conclusions of law supporting our accompanying Order granting Defendants' Motion for Sanctions including adverse inference sanctions under Fed. R. Civ. P. 37(e)(2):

Findings of Fact

1. DVComm, LLC ("DVComm") through its owner, Steven C. Sizemore, sued Defendant Hotwire Communications, LLC and Hotwire Communications, Ltd. (together, "Hotwire") claiming Hotwire breached a non-disclosure agreement ("NDA") by using DVComm's April 2010 business plan prepared for Hotwire to create a fiber optics network in the Atlanta area without using DVComm and then not paying DVComm for its net profits allegedly generated by Hotwire based on DVComm's business plan.

2. DVComm claims its April 2010 business plan is "confidential information" under the NDA.

3. The NDA defined “confidential information” as “any and all information disclosed orally, visually or in tangible form” before or after December 16, 2009.

4. Under the NDA, no party could use the confidential information except in connection with a potential business transaction between the parties.¹

5. A key issue for the jury is whether Hotwire is excused from the self-imposed obligation if, under its NDA, it can demonstrate DVComm’s business plan “was in the public domain at the time it was disclosed” to Hotwire or subsequently entered the public domain, through no fault of Hotwire; or was independently developed by Hotwire’s employees or agents without referring to DVComm’s confidential information.²

6. Our August 21, 2015 Order closed discovery on October 12, 2015 with trial beginning February 5, 2016.³ On September 22, 2015, we granted DVComm’s motion for an extension of time to complete discovery to no later than October 21, 2015.⁴

7. In response to Hotwire’s interrogatories focusing on its defense the business plan existed in the public domain, DVComm represented all documents in its possession had been produced, including all drafts of the business plan, documents relating to whether DVComm wrote the business plan, or if the information from the business plan originated from a third-party and, whether DVComm’s agent Steven C. Sizemore gave the plan to anyone other than Hotwire.

8. DVComm did not produce any e-mails or communication with any third-party relating to the business plan.

9. DVComm and its agent Sizemore did not identify two AT&T colleagues, Jackson Land or M. Kolten Kowalsky, in response to Hotwire’s discovery request to identify third-parties with whom DVComm, through Sizemore, discussed its business plan.

10. On October 6, 2015, DVComm’s Sizemore testified:

- a. he drafted the plan himself without help from anyone;
- b. his employer AT&T did not know of his business plan as he was planning to leave AT&T;
- c. there were only two drafts of the plan which he had already produced in discovery;
- d. information in the business plan was known only to him and came out of his head based on his experience in the telecommunications industry;
- e. his effort in preparing the business plan was separate from his work for AT&T;
- f. he gave the business plan to no one other than Hotwire; and,
- g. he had gathered all of his historic e-mails with Hotwire and otherwise relating to his business plan and produced all responsive communications in discovery.

11. After deposing Sizemore, Hotwire subpoenaed Sizemore's employer, AT&T, seeking its responsive documents.⁵

12. DVComm asked for nine (9) days to decide whether it would move to quash the AT&T subpoena and then moved to quash the subpoena upon AT&T on October 18, 2015.⁶

13. On October 19, 2015, we denied DVComm's motion to quash and directed AT&T to produce subpoenaed information.⁷

14. At this stage, DVComm knew information on the AT&T computers would soon be produced to Hotwire.

15. By November 20, 2015, AT&T produced almost 1,000 pages of responsive information including many e-mails regarding the business plan never previously produced in discovery and which DVComm testified, on October 6, 2015, did not exist to its knowledge.

16. As now confirmed by Hotwire's forensic computer consultant, many of the emails produced by AT&T, but not produced by DVComm or Sizemore, existed on Sizemore's computer devices on November 12, 2015 at 9:55 p.m.⁸

17. Hotwire promptly moved for additional discovery and sanctions on November 25, 2015.⁹

18. On November 30, 2015 following oral argument on Hotwire's motion, we ordered:

- a. DVComm and Sizemore produce all requested documents, particularly any draft business plans, in either paper or electronic version along with a sworn affidavit describing the location, history and present status of any version of the Business Plan provided to Hotwire which it no longer retained; and,
- b. Hotwire's request for costs or an adverse inference was denied without prejudice to seek remedies depending upon the completion of the deposition record.¹⁰

19. On January 5, 2016, following a conference with all counsel, we ordered DVComm:

- a. To allow Hotwire's computer forensic consultant to image Sizemore's electronic devices, storage media, computers and services containing any documents or communications relating to any version of the business plan.

Hotwire could image each device and/or hard drive and inspect each device for information relating to drafts or versions of the business plan;

- b. Provide the forensic consultant with access to all accounts to allow the consultant to collect and inspect these accounts for information relating to the drafts or versions of the business plan;
- c. The forensic consultant would inventory all devices and shall produce a report of its findings and conclusions to all counsel no later than **January 18, 2016**; and,
- d. In the event the forensic consultant's initial examination revealed drafts or versions of the business plan distributed, transferred or shared to other devices, accounts, media or services not provided for inspection, DVComm would supply those devices, or access to those accounts, or cooperate with Hotwire in obtaining access to those devices and accounts. The forensic consultant will conduct a follow up examination of any supplemental device account, media or service containing such information and shall produce an inventory and a report on these supplemental devices or accounts.¹¹

20. Hotwire's forensic consultant, consistent with our January 5, 2016 Order, presented its report at our January 22, 2016 hearing.¹²

21. The forensic consultant found, without a credible challenge or contrary evidence:
 - a. Seven hundred and thirty one (731) documents responsive to agreed search terms on Sizemore's one device alone (a Lenovo mini desktop, personal computer);
 - b. Many of these responsive emails were deleted on or after November 4, 2015;

- c. Sizemore had access to many of the missing responsive emails as of November 12, 2015; and,
- d. In December 2015 or January 2016, Sizemore plugged seven (7) USB devices into Sizemore's devices, never disclosed to this Court or Hotwire, including three (3) devices plugged in within a day of the forensic consultant arriving at Sizemore's home under our January 5, 2016 Order. Sizemore and DVComm had not turned over these devices by our January 22, 2016 hearing.

22. Hotwire's forensic consultant testified several of Sizemore's e-mails including many produced by AT&T are no longer able to be recovered from any computer source and were "double deleted" by Sizemore after November 12, 2015.¹³

23. In a detailed chart attached to his forensic exhibit and described at the January 22, 2016 hearing, the forensic consultant identified specific email headers, or portions of e-mails, able to be recovered but without the substance of the email or attachments to the email, including:

- a. an April 21, 2010 e-mail with the subject "HBS" sent from Sizemore to Kolten Kowalsky;
- b. a June 6, 2010 e-mail with the subject "business plan thoughts" sent by Sizemore to himself; and,
- c. a July 8, 2010 e-mail with the subject "Re: 90 day plan" sent from Sizemore to Kowalsky.

24. As Hotwire's forensic consultant testified, DVComm, through Sizemore, had access to these e-mails as of November 12, 2015 and deleted them sometime between November

12, 2015 and the forensic consultant's review in early January under this Court's January 5, 2016 Order.

25. We are particularly focused on two of the permanently deleted documents addressed at our January 22, 2016 hearing at length.

26. At 7:16 A.M. on April 21, 2010, in a partial e-mail referenced in a document produced by AT&T but not produced by DVComm, Sizemore told AT&T's Kowalsky "look at the rough draft I have come up with so far and let me know what you think. Feel free [sic] to modify. I have copy and pasted different [sic] ideas so it is in no way organized." In response, AT&T's Kowalsky told Sizemore at 8:39 A.M., "Got it...will work it in a template...will send it to you by 1 [P.M.] today". Approximately two (2) hours later, Sizemore e-mailed Kowalsky "thanks". The recovered email did not have an attached rough draft of a business plan.¹⁴

27. As the parties agree, the original "rough draft" of the business plan is permanently lost.

28. While Hotwire's forensic consultant confirmed Sizemore double deleted the April 21, 2010 e-mail after November 12, 2015, Sizemore did not know remnants of these documents could be recovered in the e-mail unallocated space but the original e-mail and the attachment no longer exists on any of DVComm's devices and no party has been able to produce it including DVComm.

29. We also reviewed an e-mail deleted by Sizemore after November 12, 2015 but found in its unallocated space by Hotwire's forensic consultant.¹⁵ In Exhibit 33, Sizemore initially tells AT&T's Kowalsky on April 21, 2010 at 8:30 p.m.: "I need your help. I need to get this to them tomorrow morning. They are asking for it. I am panicking...". The next morning at

10:05 A.M., Kowalsky responds to Sizemore: “Made changes, coming along nice, need another one hour to finish, will send to you by 11 today, don’t worry, looks great”. Approximately forty-five (45) minutes later, Sizemore replied to Kowalsky: “Any changes? I have to run with it ASAP.”

30. Sizemore’s testimony regarding the reasons for his “double deletion” is confusing at best. Although self-styled as the “Godfather of Technology”, he cannot credibly explain why he would have, or could have, “double deleted” this information.¹⁶ His credibility is further strained by his inability to remember such conduct which occurred sometime within the last sixty (60) days.

31. Sizemore’s most recent Certification defends his position and attempts to minimize the relevance of his actions, but does not explain his conduct in double deleting these April 2010 emails on or after November 12, 2015.¹⁷ For example, Sizemore claims he “does not recall Mr. Kowalsky working anything into a template.”¹⁸ Sizemore relies on Kowalsky’s testimony recalling assisting DVComm in “only” writing the three paragraph introductory section.¹⁹

32. Sizemore offers no explanation other than his self-serving conclusion he did not intentionally delete this key responsive information. We find his conclusion is not credible. He is the self-styled “Godfather of Technology” and we do not find he, as a person skilled in multiple computer devices and sophisticated fiber optic telecommunications, simply made some type of inexplicable mistake on some date after November 12, 2015 which would result in deleting these emails first from his active inbox and then from his trash email folders. He concealed the existence of AT&T’s Kowalsky’s and Jackson Land’s involvement in his business

plan until AT&T produced his documents. Much of his conduct is captured on an AT&T computer contrary to his sworn statement of AT&T's lack of knowledge or possible knowledge.

33. DVComm, through its agent Sizemore, "double deleted" and permanently destroyed the rough draft business plan attachment to the April 21, 2010 e-mails related to these communications. Only portions or fragments of these e-mails are recoverable from Sizemore's computer's unallocated space, found only through the computer forensic consultant required by this Court's Order to analyze Sizemore's computer.

34. Sizemore, the only person with control over his computer, "double deleted" information following the close of discovery and after his employer AT&T turned over 1,000 pages of previously undisclosed evidence of his role in the business plan and working with AT&T employees in creating his business plan.

35. Sizemore's "double deletions" deprive this Court and its jury of the ability to evaluate his rough-draft of the business plan to determine whether it is really his plan or, as he says in his e-mail, the extent of his "copy and paste" from other sources.

36. Hotwire's forensic consultant confirmed, in specific detail, the existence of these e-mails in the unallocated space of Sizemore's computer and the placement there through a double deletion. Sizemore, sole owner of his computer, attempted to twice delete this information not fully aware of the ability of unallocated space to capture at least portions of e-mails he attempted to delete. He succeeded, until today, in concealing the importance of the rough draft of DVComm's business plan.

37. While no direct evidence exists, and probably could never exist unless an eye-witness heard or saw Sizemore "double deleting" this information so it shows up in unallocated space, Hotwire's forensic examination confirms the substantial evidence of the deletion of these

emails on Sizemore's computer regarding the April 21, 2010 rough draft of the business plan and communications with AT&T personnel.

38. Tellingly, Sizemore deleted this information when he, and DVComm's counsel, knew of this Court's Orders and after he knew AT&T may turn over substantial subpoenaed evidence from his AT&T computer after we denied DVComm's motion to quash.

39. Hotwire's forensic consultant testified there are several ways in which some evidence of DVComm's responsive information could be recovered through the unallocated space, but only fractions of the information can be recovered and certainly not attachments or e-mails pre-dating the most recent e-mail on the top of the e-mail chain.

40. While some part of the e-mail chains have been recovered through the court-ordered production from AT&T over DVComm's motion to quash and through Hotwire's forensic consultants under this Court's Orders, we remain confident the original rough draft of the business plan is permanently lost and Hotwire and this Court has no ability to evaluate the merits of DVComm's claim of creating the plan itself based on information in Sizemore's head.

Conclusions of Law

41. Federal Rule of Civil Procedure 37(e), effective December 1, 2015, governs sanctions by district courts upon motion by a party, due to loss of Electronically Stored Information ("ESI") by an opposing party.

42. As a prerequisite to imposing sanctions under Rule 37(e), evidence must be "lost." If a party intentionally destroys electronic evidence but such evidence may be obtained from a third party, no sanctions are available under Rule 37(e) because no evidence is "lost."

43. A court may not impose sanctions or curative measures under Rule 37(e) if the ESI can "be restored or replaced through additional discovery."²⁰

44. Rule 37(e) applies only to ESI “lost because a party failed to take reasonable steps to preserve it.” This is an objective test.²¹

45. In evaluating preservation efforts, courts should be sensitive to the parties’ sophistication with respect to litigation. Sophisticated parties are expected to have a higher degree of awareness of preservation obligations.²²

46. A finding of prejudice is a prerequisite for curative measures under Rule 37(e)(1). The degree of prejudice is to be considered in fashioning a remedy. Courts are permitted by Rule 37(e) to “order measures no greater than necessary to cure the prejudice.” No curative measure under subdivision (e)(1) may include the sanctions imposable only under (e)(2).

47. Serious sanctions other than those available under Rule 37 (e)(2) may be imposed under Rule 37 (e)(1) including: directing designated facts be taken as established; prohibiting the non-preserving party from supporting or opposing designated claims or defenses; barring non-preserving party from introducing designated matters in evidence; striking pleadings; allowing introduction into evidence concerning failure to preserve, *Decker v. GE Healthcare, Inc.*, 770 F.3d 378 (6th Cir. 2014); allowing argument on failure to preserve; giving jury instructions other than adverse inference to assist jury in evaluating testimony or argument concerning failure to preserve.²³

48. In assessing curative remedies under Rule 37(e)(1), a court must assess the extent to which a party knew of and protected against the risk of loss of evidence. Destruction of ESI by events outside a party’s control may not warrant sanctions because in such circumstances, there is no intent.

49. To impose any of the specific sanctions enumerated in Rule 37 (e)(2), the court must find subjective intent. A party must submit evidence of intentional destruction to warrant an adverse inference instruction.²⁴

50. A showing of prejudice is not required before imposing sanctions under Rule 37(e)(2) for loss of evidence, but may be considered in fashioning a remedy.

51. Hotwire, as the party claiming prejudice from the lost ESI, must establish the facts warranting our findings under Rule 37(e) by a preponderance of the evidence. While we recognize some courts have applied the stricter “clear and convincing” standard when the movant seeks a judgment disposing of the case, we decline to do so.²⁵ Discovery sanctions are a remedy in civil litigation. The non-monetary sanctions do not involve fraud. While we examine, in part, the state of mind of the party destroying evidence, we do not find this factor requires meeting the burden of proof by clear and convincing evidence. For example, several claims involving some indicia of state of mind, such as breach of contract and negligence, require proof by a preponderance of the evidence. We also do not find a value in the higher standard of proof upon the aggrieved party who is left trying to understand and explain facts of which it could not definitely know absent the spoiling party’s admission. The higher onerous standard may, contrary to the purposes of Rule 37, allow the spoliator to benefit from its conduct. We are also aware Hotwire has not requested a judgment in its favor in the underlying case but asks for an adverse inference.

52. We consider five factors in determining whether spoliation sanctions under Rule 37(e)(2) are warranted: (1) whether the party seeking sanctions suffered prejudice by destruction of evidence; (2) whether the prejudice can be cured; (3) practical importance of the evidence; (4)

whether the spoliating party acted in good or bad faith; and (5) the potential for abuse if the evidence is not excluded.²⁶

53. The more intentional the destruction, the more reliable the inference the evidence would have been harmful to the spoliator. Destruction of evidence during pendency of litigation may suffice to support an inference the party destroyed responsive ESI because it was harmful. The more central to the case the spoliated evidence is, the more prejudicial its loss may be deemed to be.

54. Rule 37 (e)(2) does not require a showing of bad faith, only “intent to deprive another party of the information’s use.” Once intent is proven, no further showing of state of mind is necessary. Upon showing of intentional destruction, the court may impose any of the Rule 37 (e) (2).

55. Without limitation, litigation misconduct may also be otherwise sanctioned by the inherent power of the court. This court is vested with broad discretion to fashion an appropriate sanction pursuant to its inherent powers to sanction and redress litigation abuse. This is so regardless of whether any party suffered prejudice as a result of the activity.

56. As we find substantial evidence DVComm destroyed ESI under Rule 37 (e) (2), we do not examine our ability to impose additional non-monetary sanctions under our inherent power.

57. Evaluating each of the factors found persuasive by the Court of Appeals for the Tenth Circuit relating to sanctions under Rule 37 (e) (2), we find Hotwire has shown, by both clear and convincing evidence and a preponderance of the evidence, DVComm, regardless of its lack of express bad faith, acted with intent to deprive Hotwire of information relating to the rough draft of the business plan as of April 21, 2010 warranting an adverse inference instruction

to the jury that it may, but is not required to, presume the lost information was unfavorable to DVComm as more fully described in the accompanying Order.

58. Prejudice. Hotwire is prejudiced by DVComm's destruction of the April 21, 2010 rough draft of the business plan. This rough draft appears to be the first forensic evidence of a plan. DVComm's Sizemore admits it is a "copy and paste" presentation. A core defense is whether this business plan partially or entirely existed in the public domain or shared with third parties. The rough draft, representing the genesis of the writing, would provide persuasive evidence of the derivative information.

59. Inability to cure prejudice. Hotwire cannot cure this prejudice. Hotwire retained a computer forensic firm to image, search and examine every available computer device to find the rough draft of the business plan. Sizemore testified he does not know where we would find the rough draft: "I don't know where it is actually."²⁷ Unless a witness admits a full photographic memory of this April 21, 2010 rough draft able to withstand cross examination, Hotwire and the jury are deprived of knowing the source of DVComm's confidential information in the business plan.

60. Practical importance to the case. The lost rough first draft of the business plan is of significant practical importance to Hotwire's defense. There is no other basis to cross-examine DVComm on its claim of original thinking and its ideas came from Sizemore alone and not as part of the public domain. Further, Hotwire's expert will opine the business plan is within the public domain and without the first rough draft, the jury and Hotwire's expert cannot evaluate the contents of Sizemore's mind in April 2010.

61. Bad faith. While we cannot specifically examine Sizemore's head and confirm DVComm acted in bad faith by double deleting emails after November 12, 2015 because of his

denials, there is substantial circumstantial evidence DVComm acted with an intent to deprive Hotwire of the underlying documents which it only discovered in response to its subpoena upon AT&T. The timing here is instructive. The documents existed as of November 4, 2015 and possibly as late as November 12, 2016. We denied DVComm's motion to quash the subpoena upon AT&T on October 19, 2015. DVComm and Sizemore then knew, despite their efforts to stop discovery of information on AT&T's computers, Hotwire would soon obtain AT&T's production. Sometime after November 4 or 12, 2015, Sizemore double deleted the crucial email sending his rough draft "copy and paste" business plan to AT&T's Kowalsky.

62. Potential for abuse outside of adverse inference. Significant potential for abuse exists if we do not allow instruct the jury as to an adverse inference. Any less significant sanction would not deter this conduct. A more severe sanction, such as dismissing the action, would not be narrowly tailored to the fact issue concerning the origin of the business plan. Permanently deleting crucial information which a party concealed throughout discovery and which the adversary discovers only through a subpoena from a third party cannot be permitted. This is not a case involving a question of whether a duty to preserve attached. DVComm and Sizemore, represented by counsel, first concealed this information and then deleted it. Their conduct, particularly as related to concealment and delay in producing information which has been recovered in part will be addressed as part of a monetary sanction following review of submitted invoices and objections.

CONCLUSION

DVComm, through Sizemore, deleted crucial information concerning the rough first draft of the business plan. A computer forensic expert confirmed, without a credible challenge, Sizemore double deleted the emails attaching this document as well as several other emails after

November 12, 2015. Sizemore's conduct destroyed Hotwire's ability, as well as our jury's, to determine the merits of his theory the original business plan came solely from his head and is not derived from information in the public domain, and thus not subject to the NDA signed with Hotwire. Sizemore may be able to testify as to his knowledge, but based on his sworn admission he does not know where the rough draft is now, the most apt and narrowly tailored sanction for the permanent destruction of this central ESI under Rule 37 (e)(2) is an adverse inference described in the accompanying Order.

¹ The parties admitted exhibits at the January 22, 2016 hearing marked sequentially. The central NDA is Exhibit 1 ("Hearing Ex. 1").

² *Id.*

³ ECF Doc. No. 31

⁴ ECF Doc. No. 41

⁵ ECF Doc. No. 44

⁶ ECF Doc. No. 44

⁷ ECF Doc. No. 46

⁸ Hearing Ex. 29

⁹ ECF Doc. Nos. 63, 64

¹⁰ ECF Doc. No. 69

¹¹ ECF Doc. No. 97

¹² Hearing Ex. 29

¹³ As described by Hotwire’s computer forensic consultant, we understand “double deleted” to mean the operator hits the delete key both to move the email into the trash folder and then hits the delete key on the same email once in the trash folder. Hotwire’s forensic consultant testified emails which are “double deleted” may be recovered in part in the computer’s “unallocated space.”

¹⁴ Hearing Ex. 32

¹⁵ Hearing Ex. 33

¹⁶ Hearing Ex. 20

¹⁷ ECF Doc. No. 127

¹⁸ *Id* at ¶ 7(a)

¹⁹ *Id*

²⁰ Fed.R.Civ.P. 37(e).

²¹ *Micron Tech., Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011).

²² *See* Rule 37(e), Advisory Committee notes.

²³ Fed.R.Civ.P. 37, Adv.Comm. note to 37(e).

²⁴ *Moreno v. Taos Cty. Bd. of Commrs.*, 587 F.App’x 442, 444 (10th Cir. 2014); *Turner v. United States*, 736 F.3d 274, 282 (4th Cir. 2013).

²⁵ *See generally* *CAT3, LLC v. Black Lineage, Inc.*, No. 14-5511, 2016 WL 154116, at *7-8 (S.D.N.Y. Jan. 12, 2016)(collecting cases).

²⁶ *See* *McCauley v. Bd. of Commrs. For Benalillo Cty.*, 603 F.App’x 730 (10th Cir. 2015)

²⁷ N.T. 186)

IN THE UNITED STATES DISTRICT COURT
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ORDER

AND NOW, this 3rd day of February 2016, upon consideration of our January 25, 2016 Order granting Defendants' Motion for Sanctions (ECF Doc. No. 124), Defendants' Certification of deleted and unrecoverable documents (ECF Doc. No. 126), Plaintiff's response Certification (ECF Doc. No. 127), after evaluating witness credibility at our January 22, 2016 hearing on Defendants' Motion for Sanctions (ECF Doc. Nos. 90, 91), and for the reasons in the accompanying Findings of Fact and Conclusions of Law, it is **ORDERED**:

1. We find Defendants demonstrated substantial grounds for non-monetary sanctions under Fed. R. Civ. P. 37(e)(2): Plaintiff's electronically stored information regarding the authorship of the "rough draft" of its business plan as of April 21, 2010 and the source of information for the copy and pasting of information in the "rough draft" ("Lost Information") is now lost because Plaintiff failed to take responsible steps to preserve it; the Lost Information cannot be restored or replaced through additional discovery; and Plaintiff, on or after November 12, 2015, acted with intent to deprive Defendants of the ability to use the Lost Information;

2. Defendants are entitled to a narrowly tailored non-monetary adverse inference sanction under Fed.R.Civ.P. 37(e)(2) : a jury instruction providing the jury may presume the Lost

Information would be unfavorable to the Plaintiff's argument that it created the business plan from the business knowledge of Steven C. Sizemore; and,

3. On or before **February 8, 2016**, Defendants shall supplement their proposed jury instructions (ECF Doc. No. 83) to offer an adverse inference instruction consistent with this Order and Fed.R.Civ.P. 37(e)(2).¹



KEARNEY, J

¹ Under our January 25, 2016 Order (ECF Doc. No. 124), we defer ruling on additional monetary sanctions under Fed.R.Civ.P. 37 and our inherent power arising from Plaintiff's alleged delay and obstruction of discovery not directly leading to the deletion of the Lost Information.