IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

In re: Gold King Mine Release in San Juan County, Colorado on August 5, 2015 *This Document Relates to:* *No. 16-cv-465-WJ/LF* *No. 16-cv-931-WJ/LF* *No. 18-cv-319-WJ* *No. 18-cv-744-WJ*	No. 1:18-md-02824-WJ

SGC's MOTION FOR SANCTIONS UNDER FEDERAL RULE OF CIVIL PROCEDURE 37(e)

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I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 37(e) and the inherent authority of this Court, Defendant Sunnyside Gold Corporation ("SGC") moves for sanctions against the Federal Parties to remedy the harm caused by the Federal Parties' discovery misconduct and to deter such conduct going forward. Counsel for SGC conferred with counsel for the Federal Parties' regarding the underlying spoliation issues and could not resolve this matter without Court involvement.

II. FACTUAL BACKGROUND

The Federal Parties failed to uphold their duty to ensure preservation of unquestionably relevant documents, data, and electronically stored information ("ESI") in the custody of the Environmental Protection Agency ("EPA"). Despite issuing a legal hold notice, the Federal Parties and the EPA waited almost nine months to take any steps to ensure that key EPA personnel would preserve ESI on their devices and failed to take any steps to ensure that the content of those key devices was otherwise maintained. The Federal Parties disregard of their preservation obligations has directly prejudiced SGC's ability to defend itself against claims in this litigation as well as SGC's ability to pursue an affirmative due process claim. The missing ESI relates to the two most critical EPA employees—Steve Way and Hays Griswold.

In an October 23, 2020 letter, the Federal Parties informed all parties regarding circumstances that arose during the process of collecting responsive documents, ESI, and related data. Although the Federal Parties insist that they implemented reasonable steps to preserve potentially relevant data on mobile phones and devices, most of the data on these devices was lost. As set out more fully by the Sovereign Plaintiffs' Motion for Sanctions Due to the Federal

Parties Spoliation of Evidence (Doc. 1179),[1] the Federal Parties' failures include the following undisputed facts: (1) Mr. Way's iPad can no longer be accessed due to a screen encryption from a forgotten password; (2) Mr. Griswold's iPad was reset to "factory settings" and the ESI contained therein destroyed; (3) certain folders from Mr. Griswold's OneDrive account are now missing after they were previously retrieved, including Gold King related documents and photos; and (4) the call log reflecting text messages from Mr. Griswold's 2014 iPhone cannot be extracted. (*See* Doc. 1179-4, Oct. 23, 2020 Letter from Nick Morales to Counsel).

The Federal Parties assert that the "screen encryption" on Mr. Way's iPad could be unlocked by a password, "Mr. Way does not recall the password he used for his iPad prior to retirement, and he cannot locate a password for it." *Id.* at 6. No explanation was given as to why the Federal Parties did not obtain Mr. Way's password before he retired. Nor was an explanation given regarding how this lapse complied with the Federal Parties' ongoing duty to monitor their litigation hold.

A meet and confer conference was held on October 27, 2020 regarding the scope of the Federal Parties' discovery and the failure to preserve highly relevant ESI. During the meet and confer, the Federal Parties' failed to answer several questions about the collection, preservation and production of responsive information from Hays Griswold and Steve Way.

On November 2, 2020, the Federal Parties sent a follow up letter. While this letter tried to resolve several questions that the Federal Parties could not previously answer, the Federal Parties were still unable to explain why Mr. Griswold's iPad was reset to factory settings or to confirm that the parties had received all of Mr. Griswold's relevant text messages.

[1] SGC incorporates the arguments made by the Sovereign Plaintiffs in Doc. 1179. To avoid duplication and for the ease of the Court, we incorporate those argument rather than restating them in full.

On December 23, 2020, the Federal Parties' sent another follow up letter regarding Mr. Griswold's iPhone. This letter confirmed that Mr. Griswold was issued an iPhone in August or September of 2014 ("2014 iPhone"). Inexplicably, EPA delayed until May or June of 2016 before collecting the 2014 iPhone for the purpose of preserving data related to the Gold King Mine spill. The EPA issued Mr. Griswold a replacement iPhone around the same time they finally took custody of the 2014 iPhone ("2016 iPhone"). The EPA does not believe that any of the information from the 2014 iPhone was transferred to the 2016 iPhone. In May 2018, EPA's Mobile Device unit determined that Mr. Griswold's 2016 iPhone was not enrolled in Apple's Device Enrollment Program and was in danger of suspension of email service. To enroll the 2016 iPhone, the phone was reset to factory settings and then reactivated, without first preserving whatever data the phone contained. Upon Mr. Griswold's retirement in October of 2018, EPA finally took custody of the 2016 iPhone and preserved it. While the Federal Parties' were able to preserve 2016 iPhone data after Griswold's retirement, most of that information is irrelevant to the Gold King Mine Spill. As for the 2014 iPhone, an encrypted backup was created with a password "so easy to memorize that there would be no way they would ever forget it." The password has been forgotten and the backup is inaccessible. (Doc. 1179-5 at 4).

After no resolution, the Federal Parties', the Sovereign Plaintiffs, and SGC held a meet and confer conference again on March 18th, 2021. At that time, to avoid a sanctions motion, the Federal Parties offered to waive the attorney client privilege and attorney work product protection for the documents identified on a spreadsheet provided to the parties, as well as documents identified on the privilege log from production USA028 where Mr. Griswold and Mr. Way were the custodian, sender, addressee or copied. The Federal Parties' offered this waiver on the following conditions: (1) the parties would forego filing any sanctions motion for any

claim of spoliation relating to Mr. Griswold and Mr. Way; (2) the documents produced would be labeled as confidential or subject to the protective order for confidential information; and (3) the documents to be released would be subject to a Rule 502(d) order which would preclude a privilege waiver in any other litigation. (Exhibit 1—April 5, 2021 Email).

Mr. Way and Mr. Griswold are undisputedly two of the most important witnesses in this litigation, as are their devices. The Federal Defendants identified them both as "key custodians" of relevant information. (Exhibit 2 at 72). Mr. Way was the primary on-scene coordinator in charge of the 2014 and 2015 Gold King Mine work. Mr. Way was on vacation the day of the August 5, 2015 Gold King Blowout, and Mr. Griswold was filling in for Mr. Way as the On-Scene Coordinator. The actions of Mr. Way and Mr. Griswold led directly to the Blowout. Mr. Way retired from the EPA in 2016, and Mr. Griswold retired from the EPA in October of 2018. With respect to their devices, the 30(b)(6) witness on the topic testified that "It was deemed a very high priority to collect information from their phones, especially devices that had been in use at the time of the release. Also knowing that all technology can physically degrade over time included data within, it was deemed important to capture those devices and information from those devices, and subsequently, the devices themselves. It was priority to the agency to collect those." (Exhibit 2 at 77). Despite recognizing the priority, the Federal Defendants failed to collect the devices and preserve any information they contained.

Mr. Griswold and Mr. Way had numerous critical communications before, during, and directly after the Gold King Mine Spill on a number of different devices, including their iPhones, iPads, and Microsoft OneDrive accounts.[2] Mr. Griswold and Mr. Way communicated to others

[2] EPA provides Microsoft OneDrive accounts, a cloud-based network drive, to its employees to store work-related information.

via email, text message, phone calls and voicemail. Text messages, in particular, were only retained on the iPhones themselves, and the Federal Parties recognized this fact. "[T]he information, especially, we were looking for was texts because text messages are not backed up to some sort of central server or cloud-based storage. We didn't want people walking around with devices that had information that was unique to the device only." (Exhibit 2 at 78). Nevertheless, the Federal Parties have caused these critical devices, communications, and related ESI to be lost or made otherwise inaccessible.

The Federal Parties failed to meet their obligation to preserve and disclose evidence, that evidence has been destroyed and or/ otherwise rendered inaccessible, and SGC has been prejudiced as a result.

III. STANDARD OF REVIEW

The Federal Rules of Civil Procedure and the inherent powers of the federal courts provide district courts with considerable authority to remedy discovery misconduct and to enforce the "high duty" placed upon litigants to protect the integrity of the judicial process. *Lee v. Max Int'l, LLC*., 683 F. 3d 1318, 1320 (10th Cir. 2011) ("District courts enjoy a very broad discretion to use sanctions where necessary to insure that lawyers and parties fulfill their high duty to insure the expeditious and sound management of the preparation of cases for trial.") "A federal court possesses the authority to impose…sanctions based on its inherent power to control and supervise its own proceedings." *Jordan F. Miller Corp v. Mid-Continent Aircraft Serv., Inc.*, 139 F.3 912, 1998 WL 68879, at *3 (10th Cir Feb. 20, 1998); Fed. R. Civ. P. 37. Sanctions for discovery misconduct serve important purposes beyond ensuring justice as between the parties to a particular case, including preventing the corruption of the judicial process and deterring those who might be tempted to engage in similar conduct. *See Nat'l Hockey League v. Metro. Hockey*

Club, Inc., 427 U.S. 639, 643 (1976); see also *Philips Elec. N. Am. Corp. v. BC Tech.*, 773 F. Supp. 2d 1149, 1197,1212-13 (D. Utah 2011).

Spoliation is one form of discovery misconduct. Spoliation is defined as "the destruction or significant alteration of evidence, or failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *McCargo v. Tex. Roadhouse, Inc.*, 2011 WL 1638992, at*2 (D. Colo. May 2, 2011). A court possesses authority to sanction a litigant for spoliation under both Federal Rule of Civil Procedure 37 and pursuant to the Court's inherent authority. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45, (1991); *Silverstri v. Gen. Motors Corp.*, 271 F. 3d 583, 590 (4th Cir. 2001); Fed. R. Civ. P. 37(b) and (c).

"Sanctions for spoliation of evidence are appropriate when (1) a party had a duty to preserve the evidence because it knew, or should have known, that litigation was imminent, and (2) the other party was prejudiced by the destruction of the evidence." *U.S. ex rel. Baker v. Community Health Systems, Inc.*, 2012 WL 12294413, at * 3 (citing *Turner v. Pub. Serv. Co. of Colo.*, 563 F 3d. 1136, 1149 (10th Cir. 2009)). In determining whether sanctions are appropriate, a court also must consider whether the missing documents or material would be relevant to an issue at trial. *Id.* The moving party has the burden to prove, by a preponderance of the evidence, that the opposing party failed to preserve evidence or destroyed it. *Ernest v. Lockheed Martin Corp.*, 2008 WL 2945608, *1 (D. Colo. July 28, 2008). Whether imposed under Rule 37 or under the Court's inherent authority, spoliation sanctions may take a variety of forms, including monetary sanctions, adverse inferences, the preclusion of evidence, and dismissal. *See* Fed. R. Civ. P. 37(b)(2).

IV. ARGUMENT

A. THE FEDERAL PARTIES' WILLFUL FAILURES HAVE RESULTED IN THE PERMANENT DESTRUCTION OF HIGHLY RELEVANT EVIDENCE.

"To ensure that the discovery permitted by Rule 26(b)(1) does not become a futile exercise, putative litigants have a duty to preserve documents or materials that may be relevant to potential future litigation." *Asher Assocs., LLC v. Baker Hughes Oilfield Operations, Inc.*, 2009 WL 1328483, at *5 (D. Colo. May 12, 2009); *Philips*, 773 F. Supp. 2d at 1195; *Jordan F. Miller Corp.*, 1998 WL 68879 at *5. To that end, "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents" and ESI. *Philips*, 773 F. Supp. 2d at 1195; *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010). When litigants fail to take the necessary steps to ensure relevant evidence is preserved, "the integrity of the judicial process is harmed, and the courts are required to fashion a remedy." *Philips*, 773 F. Supp. 2d at 1196.

After issuing a litigation hold, the Federal Parties' failed to exercise the necessary oversight to ensure that relevant documents were actually preserved. "A party's discovery obligations do not end with the implementation of a 'litigation hold'—to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents." *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

Here, the litigation hold distributed to personnel in EPA's office, transmitted and overseen by EPA attorney Richard Sisk, was clearly inadequate to preserve all potentially relevant evidence. Mr. Griswold received a litigation hold from Richard Sisk, on August 11, 20215 and again August 18, 2015, shortly after the spill. (Exhibit 3 – USA_003873508; Doc.

1179-5 at 2). This litigation hold pertained to "Gold King Mine Release Incident" and requested that personnel "please click the link below to review the current custodian list and answer the questioner." The electronic devices of key witnesses were not immediately sequestered or backed up, nor were sufficient steps taken to preserve whatever information the devices contained.

As a result of the Federal Parties' inadequate litigation hold and followup, critical documents and materials were certainly lost or destroyed. (Doc. 1179-5 at 3–5). For example, while a backup of Mr. Griswold's 2014 iPhone in use at the time of the Blowout was eventually made, the Federal Parties' are only able to extract and produce the call log from Mr. Griswold's iPhone from April of 2016 to present, seven months after the Blowout. (*Id.*). The Federal Parties' are altogether unable to produce the original text message log from Mr. Griswold's 2014 iPhone. They knew there were problems with accessing the encrypted backup shortly after the backup was created in May or June of 2016, (Doc. 1179-5 at 4–5), yet they waited until October of 2020 to disclose the issue.

EPA employees were directed to forward any potentially relevant text messages on their work phones to an EPA email account for preservation. This approach gave EPA employees the ability to self-select which text messages they sent for preservation, an inherently flawed process. There is no way to confirm that Mr. Griswold or Mr. Way sent all relevant text messages to the EPA account for preservation. As noted in the Sovereign Plaintiffs' Motion, EPA OIG investigators questioned Mr. Griswold's credibility regarding representations made in that timeframe. (Doc. 1179 at 20; Doc. 1179-16 at 2–3). Furthermore, the Federal Parties have indicated that Mr. Griswold did not even know how to send text messages to the EPA for preservation. (Doc. 1179-7). While some text messages were produced on November 21, 2019

(Production USA006), and December 30, 2019 (Production USA015), the data the Federal Parties' did produce was not in compliance with the mutually agreed upon Document Production Protocol Order, Doc. 171, and was not complete.

ESI is no longer accessible from either Mr. Way's or Mr. Griswold's iPads due to the Federal Parties lack of preservation efforts. Mr. Way and Mr. Griswold were issued iPads by the EPA in July of 2015, one month prior to the Gold King Mine Spill. Mr. Way's iPad can no longer be accessed due to screen encryption. The Federal Parties' allege that Mr. Way does not recall the password he used for his iPad before his retirement, and the EPA did not collect that password. Without the password, collecting the device is meaningless.

Even more concerning, Mr. Griswold's iPad has been reset to factory settings, a process which cleared any data the device might have contained, despite the existence of a litigation hold. When the Federal Parties' 30(b)(6) witness was asked whether the iPad was reset to factory settings before Mr. Griswold turned it in, he testified:

> It would have occurred before he turned it in, yes. I will say more precisely, speaking to the service desk that accepted that I pad or received it, they said there was not data on it, or it had been reset to factory settings, you know, and the only type of data that would have been on it was the type of data that would be part of the device that had been reset to factory settings.

(Doc. 1179-5 at 8–9). The iPad in question was an EPA issued device that Mr. Griswold used for work, including for work on the Gold King project. The Federal Parties failed to take custody of the device, failed to create a backup of the device, and instead allowed Mr. Griswold to restore the device to factory settings before returning it. A device restored to factory settings, like an encrypted device without a password, is useless.

Finally, ESI stored on Mr. Griswold's Microsoft OneDrive can no longer be located. The Federal Parties' were able to identify and determine that information from Mr. Griswold's

OneDrive account contained information relating to the Gold King Mine, but the information could no longer be identified at the time of collection. The Federal Parties' could not locate the following two folders during the collection process: (1) a folder at the pathway "Griswold_hays_epa_gov/Pictures/GoldKing" and (2) a folder with pathway "Griswold_hays_epa_gov/Document/MyProjectDocuments/GoldKingMine." The Federal Parties are unable to determine whether the information contained within the two missing folders has been collected and produced from other sources.

B. THE FEDERAL PARTIES' FAILURE TO ADEQUATELY PRESERVE EVIDENCE HAS SEVERELY PREJUDICED SGC.

The prejudice resulting from Federal Parties' willful misconduct is both apparent and presumed. As a general matter, "[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner." *Pension Comm.,* 685 F. Supp. 2d at 476. The facts set forth above demonstrate at least gross negligence. Regardless, the Court need not presume the relevance of the lost ESI and the resulting prejudice to SGC because it is apparent that SGC's ability to mount a comprehensive defense or to pursue its due process counterclaim has been significantly compromised by the Federal Parties' misconduct.

The ESI that has been destroyed due to Federal Parties' preservation failures is of unquestionable relevance. Among other things, Mr. Griswold's and Mr. Way's files would have (1) revealed the timing and extent of the spill; (2) Mr. Griswold's and Mr. Way's culpability for the spill; and (3) Mr. Griswold and Mr. Way and perhaps other's decision to look to SGC to pay for cleaning up the Blowout EPA had caused. Given their role as EPA On-Scene Coordinators, Mr. Way's and Mr. Griswold's files would have contained the most extensive repository of data before, during, and after the Blowout.

Critical to SGC's claims and defenses in this litigation is the fact that after the Blowout, Mr. Griswold and the EPA attempted to shift liability away from themselves to third parties like SGC. Mr. Griswold testified when asked if he felt responsible for the Blowout, "Again, I was in charge. So I guess the buck stopped with me, right?" (Exhibit 4, Griswold Transcript at 504, 1-11). Despite accepting responsibility for causing the Blowout, Griswold quickly suggested that the EPA should be looking for another party to pay for some or all of the costs of cleaning up the Blowout he had caused.

> Q: Why did you think EPA should be pursuing a PRP?"
>
> A: Because of all that happened. And if we could find a PRP, we could at least help with some of EPA's costs.
>
> Q: That would be the purpose of the PRP, it would be somebody to share the cost that EPA was incurring, right?
>
> A: Say that again?
>
> Q: The purpose of a PRP is it would be somebody who could share the cost that EPA was incurring, right?
>
> A. Or get a total cost recovery, yes.

(Exhibit 4, Griswold Transcript at 528, 1-14). The PRP Mr. Griswold had in mind was SGC and its corporate affiliate, Kinross Gold Corporation.

Mr. Griswold stated in in an email sent from his iPad that he would be able to "provide some leads" so the EPA could find a PRP to pay for EPA's Blowout costs. (Exhibit 5 – Deposition Exh. Griswold 869). Whether additional emails or texts addressed this topic is unknown. Griswold's desire to shift the cost of the Blowout to another party was an effort undertaken on the very devices EPA has now made inaccessible.

It is highly likely that Mr. Griswold's and Mr. Way's electronic devices would have contained additional relevant evidence. *See Pension Comm.*, 685 F. Supp. 2d at 478 ("[I]t is

impossible to know the extent of the prejudice suffered by the [defendant] as a result of those emails and documents that have been permanently lost due to plaintiffs' conduct. The volume of missing emails can never be learned, nor their substance be known.") What is known is that on August 17, 2015, twelve days after the Blowout, as he pondered an explanation for the disaster he had caused, Griswold wrote in an email to Steve Way, "Steve I have been circulating this to myself as I add to it mostly because I am not confident enough yet to save it as draft on my Ipad. As I add to it I send it to myself." (Exhibit 6 – Deposition Exhibit 866). While the email has been preserved, anything actually saved to the iPad has been lost. At the very least, it is clear that the wholesale destruction of these key players' electronic documents has directly undermined SGC's access to critical evidence.

To make matters worse, the Federal Parties' expansive assertion of the deliberative process, attorney-client, and attorney work product privilege in connection with Mr. Griswold and Mr. Way's records has further precluded SGC's ability to access vital information. As a result, SGC has been forced to expend considerable time, money and effort in discovery attempting to uncover the extent of the Federal Parties' knowledge. In recreating what Mr. Griswold's and Mr. Way's destroyed documents likely would have shown, SGC has deposed numerous witnesses, issued repeated document requests, and spent countless hours attempting to piece together evidence of the government's knowledge. These resources could have been conserved had Mr. Griswold's and Mr. Way's documents simply been appropriately preserved.

C. THE SHEER VOLUME OF DOCUMENTS PRODUCED BY THE FEDERAL PARTIES DOES NOT EXCUSE OR CURE THE PREJUDICE CAUSED BY THE SPOLIATION.

During the meet and confer process and in response to an email from the Sovereign Plaintiffs, the Federal Parties have argued that "there is no indication of any unique information loss, given the abundance of information produced and the likelihood that any ESI that is

inaccessible or lost exists in some other location that has been produced." (Exhibit 7, April 15, 2021 Email).

As set out more fully in the Sovereign Plaintiffs' brief, the Federal Parties waited a significant amount of time before disclosing the spoliation issues, despite extensive eDiscovery planning meetings between the parties weekly and later bi-weekly, starting in August of 2019 and running through May of 2020. The problems created by the delayed notification of the spoliation are compounded by the discovery production from the Federal Parties. Fact discovery began on August 5, 2019, and it did not close until January 29, 2021. Docs. 257; 889. Yet, despite knowing the issues with ESI related to Mr. Way and Mr. Griswold, the Federal Parties chose to delay production of the majority of relevant and responsive documents from those custodians until October of 2020, at a time when fact discovery was set to close on December 31, 2020 and the parties were completing multiple depositions every week. Of the approximately 30,715 records listing Mr. Way or Mr. Griswold as a custodian, approximately 14,327, or almost half, were produced in or after October of 2020. This significantly delayed production further prevented the parties from being able to timely evaluate what other depositions might have been needed as a result of the spoliation or whether there were indications that unique information was lost.

This timing issue was compounded by the back-loaded production schedule from the Federal Parties overall. From October of 2020 (more than a year into fact discovery) through May 3, 2021 (more than three months after fact discovery closed), the Federal Parties produced more than 357,780 additional documents consisting of millions of pages. With just months left before the fact discovery deadline, the Federal Parties produced nearly half of their entire document production. There was no way for the parties to review and evaluate that large of a

document set produced so late in the discovery process to determine whether there is or could be any accuracy to the Federal Parties' representations that no unique information had been lost.

Remarkably, the Federal Parties have continued to produce documents without justification for the delay and now months after the close of fact discovery. For example, on April 9, 2021, the Federal Parties provided 9,538 new documents. The production letter indicated they were producing more materials "out of an abundance of caution" and provided "all remaining materials collected from the hard drives from the Durango Command Center." (Exhibit 8 – April 9, 2021 Production Letter). This set also included additional documents originally found to be "non-responsive" and thus not produced before the close of fact discovery. (*Id*.) The Federal Parties provide no explanation, however, as to why the "remaining materials" from the Durango Command Center could not have been provided in a timely manner, or when the other items from that location were provided.

This volume of production, and the timing of the overall production, significantly exacerbates the prejudice created by the spoliation. For example, Mr. Griswold testified that he sent notes to himself regarding the incident and NCP consistency on his iPad. (Exhibit 4 – Griswold Transcript at 508 lines 4-25). Rather than producing these initial emails pursuant to the document production protocol which would include metadata regarding the sender and recipient information, the Federal Parties produced the emails as "ezrecords" that only included the information in the text of the document without other identifying information that would link the document to Mr. Griswold. (*See, e.g.*, Exhibit 3 – USA_003873508). This approach made it impossible to locate and review all emails Mr. Griswold had sent to himself to evaluate whether there were other similar notes he used his iPad to draft. While this might be a harmless deviation from the production protocol in a smaller production set, the size of the production, involving

millions of pages of documents, necessitates accurate metadata to allow for effective searching and review. In addition to making the iPad's inaccessible today, the way emails sent from the iPad were produced made it impossible to discern the nature and extent of missing information.

D. SANCTIONS SHOULD BE IMPOSED AGAINST THE FEDERAL PARTIES FOR DISCOVERY MISCONDUCT.

The severe prejudice to SGC supports corresponding sanctions for the Federal Parties' deliberate failure to preserve key players' electronic data. The Federal Parties' failure to follow the most basic discovery obligation has tainted the case. This misconduct should have consequences both to remedy the Federal Parties' failings and to deter similar misconduct by other litigants in the future. *See Nat'l Hockey League*, 427 U.S. at 643; *Phillips*, 773 F. Supp. 2d at 1197, 1212-13. [T]he courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated. . . when this does not happen, the integrity of the judicial process is harmed and the courts are required to fashion a remedy." *Pension Comm.*, 685 F. Supp. 2d at 461.

A party seeking sanctions based upon the spoliation of evidence must establish:

> (1) That the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind" and (3) that the destroyed evidence was "relevant" to the party's claim or defenses such that a reasonable trier of fact could find that it would support that claim or defense.

Zubulake V, 229 F.R.D. at 430; *Benton v. Dlorah, Inc*., 2007 WL 3231431, at *4 (D. Kan. Oct. 30, 2007). *Baker v. Community Health Systems, Inc.*, 2012 WL 12294413 (D. NM. Aug. 31 2012). Each of these elements is met here.

First, the Federal Parties' were under an obligation to preserve all ESI. They failed, despite issuing a litigation hold to Mr. Griswold three days after the spill. The Federal Parties' were certainly obligated to preserve data before Mr. Griswold's iPad was wiped and cleared to

factory settings or his OneDrive folders were deleted and Mr. Way's iPad content was no longer accessible due to the screen encryption from his forgotten password. The Federal Parties knew Mr. Griswold's 2014 iPhone might contain relevant information, including text messages, but instead of preserving this information, they encrypted it with a "forgotten" password and then kept that information to themselves for roughly four years.

Second, for an adverse inference to be appropriate, a "culpable state of mind" includes ordinary negligence. *Id.* at 431 (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002)); *see also Benton*, 2007 WL 3231431, at *4 (noting that "a culpable state of mind" "may include ordinary negligence, gross negligence, recklessness, willful, or intentional"). Here, the Federal Parties' conduct far exceeds ordinary negligence, and includes "failing to timely issue a litigation hold, failing to follow up on that litigation hold, failing to request discovery from key employees, and so forth." *Philips*, 733 F. Supp. 2d at 1206. The Federal Defendants' conduct "reveals [an] intentional failure to meet discovery obligations and [a] flagrant disregard of the obvious great risk that it was highly probable the destruction of relevant documents would result from [DOJ's] behavior." *Id.*

Third, as discussed above, there can be no question that Mr. Way's and Mr. Griswold's destroyed ESI was "relevant" to SGC's claims and defenses. Way and Griswold were the On-Scene Coordinator's in charge of EPA activity at the Gold King Mine before, during, and after the Blowout. They regularly used their cell phones and iPads to communicate about this work and the Blowout they caused. Griswold actively sought to find a PRP to pay for the cleanup. The audacity to cause an environmental disaster and then blame someone else for it is a central tenet of SGC's underlying defense and affirmative due process claim.

E. THE SANCTIONS REQUESTED ARE PROPORTIONAL AND APPROPRIATE.

As noted, the Court has wide discretion to determine an appropriate sanction, under both its inherent authority and under Rule 37 of the Federal Rules of Civil Procedure. The reasons for an adverse inference have been set forth herein and in the Sovereign Plaintiffs' Motion for Sanctions (Doc. 1179). In equity and fairness, the relief should be directed to a remedy in proportion to the Federal Parties' misconduct. While SGC defers to the Court's judgment with respect to appropriate sanctions, the following relief would appropriately address the need for both remediation and deterrence.

SGC seeks an adverse inference instruction that the spoliated documents would have been unfavorable to EPA. EPA caused the Gold King Blowout. EPA seeks to recover the cost of responding to the Blowout from SGC. Under CERCLA, the Federal Parties are typically entitled to a presumption that response costs incurred are not inconsistent with the NCP. *U.S. v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992). The spoliation at issue has deprived SGC of evidence that could have rebutted that presumption. The Court should find the presumption rebutted.

SGC seeks to have its due process claim reinstated. On March 6, 2020, this Court concluded that SGC's allegation that EPA was "trying to divert attention away from EPA and towards Sunnyside" was "not so egregious as to shock the judicial conscience." Doc 484 at 5. The Federal Parties' conduct in failing to appropriately preserve critical evidence shocks the conscience. In addition, the spoliation has deprived SGC of the ability to demonstrate EPA's shocking conscience behavior in causing the Blowout and then blaming it on SGC. An inference that the documents destroyed would have been sufficient to shock the judicial conscience would allow reinstatement of SGC's due process claim.

SGC seeks waiver of privilege for those documents where Mr. Griswold and Mr. Way were the custodian, sender, addressee or were copied with documents before, during, and after the Blowout. SGC accepts the Federal Parties' condition that any such documents would be labeled as confidential or subject to the protective order for confidential information and subject to a Rule 502(d) order which would preclude a privilege waiver in any other litigation. The failure to appropriately preserve communications from these individuals, and the method and timing by which available responsive information was produced, justify this sanction.

SGC seeks an order that permits SGC to introduce evidence of the Federal Parties' spoliation at trial.

SGC seeks an order awarding SGC all reasonable attorneys' fees and costs associated with investigating the Federal Parties' spoliation and preparing this motion.

Finally, SGC seeks any and all relief the Court deems appropriate.

V. CONCLUSION

For the foregoing reasons, Defendant Sunnyside Gold Corporation requests that the Court grant SGC's Motion for Sanctions Under Federal Rule of Civil Procedure 37(e) and impose the requested relief.

Dated this 24th day of May, 2021.

Respectfully submitted,

CROWLEY FLECK PLLP

By /s/ *Neil G. Westesen*

Neil G. Westesen (*admitted pro hac vice*)
900 North Last Chance Gulch, Suite 200
Helena, MT 59601
Telephone: (406) 556-1430
Facsimile: (406) 556-1433
nwestesen@crowleyfleck.com

Jeffery J. Oven (*admitted pro hac vice*)
Pamela C. Garman (*admitted pro hac vice*)
490 North 31st Street, Suite 500
PO Box 2529
Billings, MT 59103-2529
Telephone: (406) 252-3441
Facsimile: (406) 252-5292
joven@crowleyfleck.com
pgarman@crowleyfleck.com

Attorneys for Defendant Sunnyside Gold Corporation

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2021, the foregoing was filed via the U.S. District Court of New Mexico's CM/ECF electronic filing system and a copy was served upon all counsel of record via the CM/ECF.

/s/ *Neil G. Westesen*
Neil G. Westesen