UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

WESTERN DIVISION (BISMARCK)

CISSY THUNDERHAWK; WAŠTÉ WIN YOUNG; REVEREND JOHN FLOBERG, and JOSÉ ZHAGÑAY on behalf of themselves and all similarly-situated persons, Plaintiffs, vs. COUNTY OF MORTON, NORTH DAKOTA; SHERIFF KYLE KIRCHMEIER; GOVERNOR DOUG BURGUM; FORMER GOVERNOR JACK DALRYMPLE; DIRECTOR GRANT LEVI; SUPERINTENDENT MICHAEL GERHART JR; TIGERSWAN LLC; and DOES 1 to 100 Defendants.	Case No. 1:18-cv-00212-DLH-CSM

PLAINTIFFS' MOTION TO COMPEL
FULL AND COMPLETE DISCOVERY RESPONSES

Pursuant to Rule 37(a)(3)(B)(iii) and (iv) of the Federal Rules of Civil Procedure, Plaintiffs move to compel Defendant TigerSwan LLC to produce documents responsive to

Plaintiffs' discovery requests, and to otherwise fully respond to those requests. The court may order a party to provide further responses to an "evasive or incomplete disclosure, answer, or response." Fed. R. Civ. P. 37(a)(4). Plaintiffs' counsel has conferred with TigerSwan's counsel, and the parties have participated in a telephone call with Judge Miller, but have been unable to resolve the dispute.

TigerSwan has produced almost none of the evidence central to this case it possessed when the case was filed, despite its initial disclosure obligations and Plaintiffs' detailed requests for production. The primary reason TigerSwan has given for its lack of responsiveness is that it has contractual obligations to a third party, Energy Transfer Partners (ETP), which require it either to divest itself of the relevant documents (regardless of pending litigation) or to refuse to disclose those documents. This is not a valid basis for failing to comply with discovery obligations imposed by the Federal Rules of Civil Procedure. Accordingly, Plaintiffs respectfully request that this Court compel TigerSwan to provide full and complete responses to Plaintiffs' discovery requests, or, in the alternative, impose sanctions on TigerSwan.

BACKGROUND

Plaintiffs filed this case on October 18, 2018 against TigerSwan, several state and local public officials, and Morton County. On September 1, 2020, Judge Traynor denied in part the motions to dismiss filed by the state and county defendants, as well as TigerSwan's Motion for Summary Judgment, or in the Alternative, Motion to Dismiss. Doc. 88.[1] Judge Traynor's order allowed Count I (Free Speech) to proceed in full against all defendants, including TigerSwan. *Id.* Shortly thereafter, Judge Miller held a scheduling conference, in which counsel for TigerSwan participated, resulting in a scheduling order for discovery issued on September

[1] Judge Traynor also dismissed all of TigerSwan's counterclaims on this date.

18, 2020. The scheduling order set the first discovery deadline, for Rule 26(a)(1) initial disclosures, for October 23, 2020, which was subsequently extended by ten days.

On October 29, 2020—with its initial disclosures due in just four days—TigerSwan "returned" to Energy Transfer Partners (ETP) the majority of the evidence relevant to this matter that had been in TigerSwan's possession. *See* Exhibit 1, TigerSwan July 26, 2021 Email to the Court, at 002[2]; Exhibit 2, TigerSwan Response to Interrogatories, at 003. As part of this "return," TigerSwan selectively destroyed its remaining copies of significant evidence relevant to this case. *See* Exhibit 2, TigerSwan Response to Interrogatories, at 004. As a result, TigerSwan no longer has this evidence in its possession or, it claims, control. TigerSwan did not notify Plaintiffs or this Court prior to or at the time of said "return" of its intention to dispossess itself of most evidence relevant to this case. Rather, Plaintiffs only became aware of this through TigerSwan's explanations accompanying its initial disclosures, which did not include a single document, and TigerSwan's subsequent failure to produce materials in response to Plaintiffs' January 22, 2021 discovery requests. TigerSwan now claims that it took this extraordinary step "pursuant to a contract" between TigerSwan and ETP that, according to TigerSwan, designates all evidence possibly relevant to this case as "confidential" and mandates the return of "confidential" information to ETP under certain circumstances. Exhibit 1, TigerSwan July 26, 2021 Email to the Court, at 002; Exhibit 2, TigerSwan Response to Interrogatories, at 003. Shortly before this "return," TigerSwan had finalized a settlement with the North Dakota Private Investigation and Security Board in a separate legal proceeding, in which TigerSwan unsuccessfully advanced similar arguments regarding its contract with ETP--and was sanctioned.

[2] The page numbers listed correspond to the Bates Stamps on each separately attached exhibit document.

Plaintiffs have been persistent in attempting to secure the production of DAPL- and ETP-related documents from TigerSwan. *See, e.g.*, Exhibit 3, Smith-Drelich - Boughey Email Chain, at 002; Exhibit 4, Plaintiffs' First Discovery Requests to TigerSwan, at 002-011; Exhibit 12, Amy Knight July 22, 2021 Letter to the Court, at 002. Indeed, Plaintiffs' first discovery requests, served on TigerSwan on January 22, 2021, were largely tailored to this goal. Exhibit 4, Plaintiffs' First Discovery Requests to TigerSwan, at 002-011. Many of those requests were met with the same response: that the requested documents had been returned to ETP. Exhibit 2, TigerSwan Response to Interrogatories, at 003-007. However, although TigerSwan had averred in its November 2, 2020 initial disclosures that it had *no* evidence whatsoever remaining in its possession following its October 2020 "return" and had explicitly and emphatically reaffirmed this to Plaintiffs,[3] TigerSwan has eventually acknowledged that it had maintained some "confidential" evidence, but would not produce it until it got permission from ETP, which it represented for over four months was imminent ("ASAP"; "within a week or two"; "within the next week"). Exhibit 12, Amy Knight July 22, 2021 Letter to the Court, at 002.

After months of no such production materializing, Plaintiffs requested a conference with this Court, after which Judge Miller ordered TigerSwan to fully respond to Plaintiffs' discovery requests by August 6, 2021. Judge Miller also cautioned TigerSwan that "the court is likely to conclude that the mere fact the requested documents are subject to a third-party confidentiality agreement is not itself a valid reason for non-production. If such a response is made and later becomes the subject of a motion to compel, TigerSwan has been so warned and

[3] In explaining its failure to produce any documents in its initial disclosures TigerSwan wrote: **"**All documents, electronic or otherwise, relating to our work for ETP or DAPL have – due to contractual obligations – been returned to the owner of those documents, ETP. We no longer retain any materials relating to ETP or DAPL." TigerSwan's Rule 26(a) Disclosure, at 121. In response to a subsequent email from Plaintiffs asking, "you no longer have any copies of any documents related in any way to DAPL or our case?," TigerSwan responded: "Anyway, to answer your question, THAT IS CORRECT. As soon as the Board case was concluded, we returned EVERYTHING to ETP." Exhibit 3, Smith-Drelich - Boughey Email Chain, at 002 (emphasis in original).

the court may consider that it in deciding whether costs or other sanctions (e.g., requiring disclosure of the documents without the benefit of protective confidentiality order) are appropriate." Doc. 145 at 2-3. The order also permits Plaintiffs to "file a motion to compel without first having to seek another conference call with a magistrate judge." *Id.* at 2.

TigerSwan finally responded to Plaintiffs' discovery requests on August 6, 2021, producing over 10,000 pages of invoices and receipts (but little else). Conspicuously absent from TigerSwan's August 6 disclosure is *any* response to Plaintiffs' request for certain documents or communications "specifically including but not limited to notes, emails, text messages, chats (e.g. WhatsApp), memos, reports, situation reports, intelligence updates, photographs, videos, and PowerPoint or similar presentations." Exhibit 4, Plaintiffs' First Discovery Requests to TigerSwan, at 010 (Request #2).

Also apparently absent is any response to Plaintiffs' request No. 4, which asks for personnel records relating to or associated with the DAPL. In its original March 8, 2021 response, TigerSwan declined to produce anything in response to this request because it deemed the request "vague, overbroad, unduly burdensome, seeking information not relevant to this action, and [] seeking confidential and/or proprietary information." This Court's July 27, 2021 order specifically states it "will not be acceptable" to provide merely "a list of general objections followed by a statement that, subject to the objections, that certain documents are being produced in a manner that makes it impossible to tell whether or other non-identified documents are being withheld under the general objections." Doc. 145 at 2 n.1. TigerSwan's August 6, 2021 further response made no mention of this request or whether it had documents it was withholding, and if so on which of these grounds.

Plaintiffs once again reached out to TigerSwan on August 16, 2021, to once again note that TigerSwan's discovery responses were inadequate, and to seek further information and clarification from TigerSwan. *See* Exhibit 5, Amy Knight August 16, 2021 Email to TigerSwan, at 002. As of the date of this filing, approximately three weeks later, TigerSwan has not responded to Plaintiffs' email.

Plaintiffs file this Motion to Compel seeking TigerSwan's production of all materials responsive to Plaintiffs' discovery requests, as well as attorney's fees. In the event that TigerSwan fails to produce all of the evidence that was in its possession or control as of October 18, 2018, Plaintiffs also seek sanctions.

ARGUMENT

A party's failure to produce documents justifies the filing of a Motion to Compel a Discovery Response. Fed. R. Civ. P. 37(a)(3)(A), (B)(iv). Any such motion to compel "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery." Fed. R. Civ. P. 37(a)(1). Disclosures, answers, or responses that are "evasive or incomplete . . . must be treated as a failure to disclose, answer, or respond." Fed. R. Civ. P. 37(a)(4). The federal rules, further, provide that the nondisclosing party "must . . . . pay the movant's reasonable expenses incurred in making the motion, including attorney's fees," unless the movant failed to attempt in good faith to obtain the disclosures without court action, the nondisclosure was "substantially justified," or "other circumstances make the award of expenses unjust." Fed. R. Civ. P. 37(a)(5).

1. Evidence that Plaintiffs Seek is Relevant to this Case

Although there may be some disagreement between Plaintiffs and TigerSwan regarding whether all of the evidence Plaintiffs seek is relevant to this case, there can be little

dispute that much of it is: in stating that it dispossessed itself of all evidence in any way connected with this matter (other than, it now it appears, certain agreements, billing statements, and receipts), TigerSwan acknowledges that at least some of the evidence "returned" is relevant. According to TigerSwan, the "returned" evidence in question includes information "on protestors effecting [sic] private property, this includes confidential informants and law enforcement officers who were receiving confidential information and providing it to TigerSwan . . . [, and t]his includes information that was then supplied to the governor's task force." Exhibit 6, Order Denying Motion to Seal Discovery Materials, at 003 (quoting an affidavit submitted by James Reese). This evidence alone could be crucial to proving not only that TigerSwan was a state actor for purposes of this suit, but that TigerSwan "persistently and misleadingly labeled indigenous speech and prayer as riotous," leading to "State and Local Defendants increasingly adopt[ing] and misleadingly appl[ying] this label," *e.g.*, Amend. Compl. ¶¶ 99, 5—a fact potentially dispositive in not only Plaintiffs' suit against TigerSwan, but against state and local defendants (for which the nature of Water Protector conduct is one of the key factual issues in dispute).

Altogether, given TigerSwan's role "coordinat[ing] and implement[ing] all security and intelligence operations for their client, Energy Transfer Partners," Amend. Compl. ¶ 93, and TigerSwan's close "intertwinement with North Dakota law enforcement officials," Amend. Compl. ¶ 95, there is significant reason to believe that TigerSwan is—or was recently—in possession of a particularly valuable, and likely unique, trove of evidence relevant to Plaintiffs' claims against TigerSwan, state defendants, and county defendants. *See generally, also*, Amend. Compl. ¶¶ 24, 93-101 (detailing, with significant particularity, allegations specific to TigerSwan). The relatively small amount of evidence from TigerSwan that has made it to the

public's eye—including some "sitreps" (situation reports) and other similar documents provided to law enforcement that misleadingly characterize Water Protector speech and prayer—confirms as much. There is simply no plausible argument that the material sought is not relevant to this litigation—and TigerSwan has never even really advanced one.

2. TigerSwan had an Obligation to Preserve this Evidence

"During discovery, a litigant often possesses damaging evidence which would be extremely valuable to his opponent, yet it is evidence of which the opponent is unaware. If the litigant spoliates this unknown evidence by destroying or misplacing it, his opponent will find it very difficult to discover the spoliation." Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 Cardozo L. Rev. 793, 795 (1991). Given the significant potential harm done by evidence spoliation, the duty to preserve evidence has long been recognized as "one of the fundamental common-law foundations of the adversarial system of justice." The Honorable Paul W. Grimm et. al., *Discovery About Discovery: Does the Attorney-Client Privilege Protect All Attorney-Client Communications Relating to the Preservation of Potentially Relevant Information?*, 37 U. Balt. L. Rev. 413, 418 (2008).

The duty to preserve extends to all evidence potentially relevant to a claim or defense of any party. Relevancy is broadly construed in this context: evidence is considered relevant "if there is any possibility the information sought is relevant to any issue in the case." *Met–Pro Corp. v. Industrial Air Technology, Corp.*, No. 8:07CV262, 2009 WL 553017, * 3 (D. Neb. March 4, 2009). Indeed, "unless it is clear the information sought can have no possible bearing on the subject matter of the action," evidence should be deemed relevant. *Id.* The duty to preserve relevant evidence extends to all evidence that the party "has in its possession, custody or control." Fed. R. Civ. P. 26(a)(ii); *Phillips v. Netblue, Inc.*, 2007 WL 174459 at *3 (N.D. Cal.

Jan. 22, 2007) ("The fundamental factor is that the document, or other potential objects of evidence, must be in the party's possession, custody, or control for any duty to preserve to attach.").

A party's obligation to preserve evidence "begins when a party knows or should have known that the evidence is relevant to future or current litigation." *Ewald v. Royal Norwegian Embassy*, No. 11-CV-2116 SRN/SER, 2014 WL 1309095, at *15 (D. Minn. Apr. 1, 2014). Because the filing of a case serves as an unmistakable beacon that puts named parties on notice of the need to preserve evidence, if "destruction of evidence occurs after litigation is imminent or has begun, no bad faith need be shown by the moving party" to justify sanctions. *E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 589 (D. Minn. 2005) ("When litigation is imminent or has already commenced, 'a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.'"); *Gallagher v. Magner*, 619 F.3d 823, 845 (8th Cir. 2010). Sanctions for the spoliation of evidence include adverse inference instructions, monetary sanctions, attorney's fees, preclusion of evidence, and default. When considering spoliation sanctions, courts consider whether the party had a duty to preserve, whether that party destroyed the evidence willfully, and whether that evidence was relevant to the other party's claims. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003); *see also Stevenson v. Union Pacific R. Co.*, 354 F.3d 739, 745 (8th Cir. 2004).

At the time that TigerSwan dispossessed itself of the evidence in question, it had long been on notice of a duty to preserve this evidence. Plaintiffs filed this suit, making detailed allegations, in October 2018. This is not an instance in which there is some question as to whether litigation could be reasonably contemplated, or as to the scope of relevant issues—this case was being actively litigated. Indeed, at the time that TigerSwan dispossessed itself of

evidence relevant to this litigation, it knew it would otherwise have to turn it over in less than a week, per this Court's order just days prior. Where this Court required disclosure, TigerSwan instead chose destruction.

3. TigerSwan's Contract with ETP Does Not Explain Its Failure to Produce the Requested Documents.

TigerSwan has premised its various discovery failures, including its months of withholding and most egregiously its "return" of significant evidence relevant to this case, on the assertion that TigerSwan's contract with ETP labels these documents as "confidential" and therefore both limits their production and required their "return." But this claim fails on its face. TigerSwan's contract with ETP specifically provides: "Confidential information shall not include information which: . . . (iv) is required to be disclosed by law, rule, regulation, legal process or order of any court or government body having jurisdiction over the same." Exhibit 7, TigerSwan's Professional Services Agreement with ETP, at 015-016 (Section 11.1) (emphasis added). By the unambiguous terms of its contract with ETP, TigerSwan has no contractual duty to withhold or otherwise refuse to produce documents as part of this litigation.

Nor did the contract require this evidence to be returned, and all remaining copies destroyed: under its "Return of Information" provision, the information to be returned is only that meeting the definition of "confidential," which explicitly excludes information subject to legal process. The return provision also permits TigerSwan to "retain a single copy of all information upon which its services are based for record purposes only." Exhibit 7, TigerSwan's Professional Services Agreement with ETP, at 016 (Section 11.4).

Thus, TigerSwan's claims that its hands were contractually tied are completely specious.

4. TigerSwan Cannot Contract with a Third Party to Avoid its Discovery Obligations with Plaintiffs

Even if TigerSwan's contract with ETP unambiguously purported to require that it withhold or destroy the evidence in question—and it does not—private contracts do not limit a party's obligations under the Federal Rules of Civil Procedure or any other authority of the courts. This is a well-recognized legal rule, including by this very court: "the court rejects the contention that private contractual obligations of confidentiality trump a party's legal obligation to respond to discovery." *Pipeline Co. v. Factory Mut. Ins. Co*., 270 F.R.D. 456, 466-67 & n.6. (D.N.D. 2010) (recognizing, also, "that most confidentiality agreements provide an exception for when a party is obligated by law or court order to turn over the confidential information"); *see also, e.g.*, *Stumph v. Spring View Physician Practices, LLC.*, No. 3:19-cv-00053, 2021 WL 395762, at 4 (W.D. Ky. Feb. 4, 2021) (third-party confidentiality agreements are not themselves grounds for not responding to discovery requests and citing other cases in support); *In re Application of O'Keeffe*, No. 2:14-cv01518, 2016 WL 2771697, at *3 (D. Nev. Apr. 4, 2016) (same); *Global Material Technologies, Inc. v. Dazheng Metal Fibre Co., Ltd.*, 133 F. Supp. 3d 1079, 1087 (N.D. Ill. 2015) (same); *Williston Basin Interstate Pipeline Co. v. Factory Mutual Ins. Co.*, 270 F.R.D. 456, 465-66 (D.N.D. 2010) (same).

Even cursory legal research would have swiftly alerted TigerSwan to this well-established and common-sense rule. But worse, TigerSwan had actual notice prior to "returning" these documents that its contract with ETP would not shield it from any disclosure obligations. In its proceedings with the North Dakota Private Investigation and Security Board, TigerSwan argued, as it would later do here, that it need not produce any materials because its contract with ETP directed TigerSwan to "refuse[] to disclose any [confidential] documents or materials."

Exhibit 8, James Patrick Reese's Affidavit in Regards to Our Alleged Noncompliance, at 002. James Reese, TigerSwan's founder and former CEO continued in an affidavit: "It is for this reason that, throughout this litigation, [TigerSwan has] done everything we could do to prevent disclosure of anything we may have on hand relating to ETP and the work we did for them." *Id.* (noting that TigerSwan sought to "not provide the board any discovery" (emphasis in original)). In a response filed just two months prior to TigerSwan's "return," the North Dakota Private Investigation and Security Board reminded TigerSwan that its contract "specifically exempts from the definition of 'Confidential Information' the requested discovery in this case," while noting also that "a private contractual obligation of confidentiality does not trump a party's legal obligation to discovery." Exhibit 14, NDPISB's Reply to TigerSwan-Reese Supplemental Response to Board's Motion for Sanctions and Notice of Noncompliance, August 3, 2020, at 005 (citing *Pipeline Co. v. Factory Mut. Ins. Co.*, 270 F.R.D. 456 (D.N.D. 2010)). TigerSwan was thus alerted not only to the plain contractual infirmity of its present argument, but to on-point case law in this very district directly rejecting TigerSwan's position.

Further, the Administrative Law Judge considering the matter was not persuaded by TigerSwan's specious arguments, calling TigerSwan's objections "improper or meritless," and noting its motions "have little merit and have asserted arguments and objections with virtually no authority." *See, e.g.*, Exhibit 16, January 2020 Order, at 008. Indeed, after giving TigerSwan numerous chances to comply with its discovery obligations—issuing *seven* orders regarding discovery in total—the ALJ ultimately found that TigerSwan's "objections to providing discovery were not made in good faith," and that "[t]here is no other alternative, or less severe, sanction[] available" than that TigerSwans' answer be stricken and TigerSwan be

deemed in default. Exhibit 15, August 17, 2020 Recommended Order, at 009. All of this occurred before TigerSwan "returned" its evidence to ETP.

5. Appropriate Sanctions

Plaintiffs' primary request is that TigerSwan produce the documents it held at the time this lawsuit was filed that are responsive to Plaintiffs' discovery requests. Both the timing of its asserted "return" and the contract's facial failure to require TigerSwan to shirk its discovery responsibilities suggest that TigerSwan could, in fact, produce these documents. This Court should unambiguously demand that it do so, and further that it fully comply with this Court's order that it identify any documents it possesses but continues to withhold on any basis.

Should TigerSwan refuse—and if its conduct in other litigation is any guide, it very well might—this Court has inherent authority to issue sanctions for discovery violations, including regarding a party's failure to preserve evidence. *See, e.g.*, *Stevenson v. Union Pacific R. Co.*, 354 F.3d 739, 745 (8th Cir. 2004); *Dillon v. Nissan*, 986 F.2d 263 (8th Cir. 1993). Additionally, because TigerSwan's evidence "return" appears to encompass both tangible and electronic evidence, Federal Rule of Civil Procedure 37(e) applies. Federal Rule of Civil Procedure 37(e) "specifically addresses the applicability of sanctions for spoliation of electronically stored information [(ESI)]." *Accurso v. Infra-Red Servs., Inc.*, 2016 WL 930686, at *3 (E.D. Pa. Mar. 11, 2016). Pursuant to Rule 37(e),

> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
> (A) presume that the lost information was unfavorable to the party;
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or

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

Fed. R. Civ. P. 37(e).

As the Advisory Committee Notes to Rule 37(e) explains, "[a]n evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation." 2015 Advisory Comm. Notes to Rule 37(e). The "question of prejudice turns largely on whether a spoliating party destroyed evidence in bad faith." *GN Netcom, Inc. v. Plantronics, Inc.*, No. CV 12-1318-LPS, 2016 WL 3792833, at *6 (D. Del. July 12, 2016). When the evidence was destroyed in bad faith, "the burden shifts to the spoliating party to show lack of prejudice. A bad faith spoliator carries a heavy burden to show lack of prejudice because a party who is guilty of intentionally destroying documents should not easily be able to excuse the misconduct by claiming that the vanished documents were of minimal import." *GN Netcom, Inc. v. Plantronics, Inc.*, No. CV 12-1318-LPS, 2016 WL 3792833, at *6 (D. Del. July 12, 2016) (alterations omitted).

Here, the near certainty of actual prejudice resulting from TigerSwan's conduct weighs strongly in favor of the most severe sanctions. As discussed in Part 1 (Relevancy), the loss of even a smidgeon of this evidence—let alone all of it—could prove enormously consequential to Plaintiffs' case against not only TigerSwan but against the state and local defendants in this matter. Plaintiffs' allegations in this case describe TigerSwan's significant role, working on behalf of the company constructing the disputed pipeline, in feeding misleading and false depictions of Water Protectors to state and local officials to secure the construction of the pipeline at any cost. One of the central issues in dispute between Plaintiffs and all defendants—which would prove dispositive to this case should Plaintiffs prevail—is that this TigerSwan-fed narrative does not accurately reflect the true character of the NoDAPL

movement. The materials "returned" by TigerSwan may represent the best or only evidence of this deceit. Plaintiffs believe, based on media reports, that these materials include the "sitreps" (situation reports) produced by TigerSwan and provided to state and local officials—one of the primary means by which TigerSwan passed along its anti-protestor propaganda repackaged as intelligence—as well as documents and communications associated with the preparation and transmission of these sitreps. These materials also include the significant amount of interfacing between TigerSwan, ETP, and the wide range of other security firms engaged during this period, as well as information about and from a number of confidential informants directed to infiltrate the NoDAPL movement. The accuracy, completeness, and professionalism of TigerSwan's materials designed to influence the law enforcement response to the NoDAPL movement may be proven through no other evidence than that "returned" by TigerSwan. And the primary defense presented by TigerSwan and its co-defendants in this matter would crumble if these documents reveal, as Plaintiffs believe that they will, the exaggerated and misleading nature of the defendants' narrative about the NoDAPL movement.

Because of the likely damning nature of this evidence, it is perhaps unsurprising that TigerSwan has done whatever it can to avoid disclosing it, rather than simply carrying out its contractual and discovery obligations in good faith. TigerSwan's bad faith is manifest. Two years after this case was filed and TigerSwan was unambiguously put on notice of its duty to preserve this evidence, and just days prior to its court-ordered deadline for disclosing this evidence, TigerSwan intentionally and selectively dispossessed itself of nearly all evidence potentially relevant to this suit. TigerSwan allegedly acted based on a facially implausible reading of its contract (that had recently been rejected by an ALJ) that would lead to a conclusion that defies both common sense and well-established case law on discovery (to which

TigerSwan had recently been alerted). The burden is therefore on TigerSwan to show that not a single shred of the evidence that it "returned" would make a whit of difference in Plaintiffs' suit against TigerSwan or its co-defendants. And that is impossible.

Although the prejudice is obvious, this Court need not find prejudice—actual or presumed—to impose even the strictest sanctions because TigerSwan's "return" of these materials was knowing and intentional, and not some unfortunate accident. *See, e.g.*, Fed. R. Civ. P. 37(e). TigerSwan fully understood not only that its position was legally unsound, but that the immediate consequence of its actions would be to render this evidence unavailable for this lawsuit, and yet TigerSwan proceeded, and has not expressed any contrition whatsoever about its evidence "return," nor acknowledged its obligations. This case is similar to *GN Netcom v. Plantronics*, where the court found an intent to deprive based on the timing of attempts to dispose of evidence: the emails requesting deletion in that case were sent "just one month after this lawsuit was filed, and another was sent just one week after [the] motion to dismiss was denied – at which point the commencement of fact discovery was imminent." *GN Netcom, Inc. v. Plantronics, Inc.*, No. CV 12-1318-LPS, 2016 WL 3792833, at **7-8 (D. Del. July 12, 2016); *cf. also Colonies Partners, L.P. v. Cty. of San Bernardino*, No. 518CV00420JGBSHK, 2020 WL 1496444, at *8 (C.D. Cal. Feb. 27, 2020), *report and recommendation adopted*, No. 518CV00420JGBSHK, 2020 WL 1491339 (C.D. Cal. Mar. 27, 2020) (considering as relevant to the question of intent the sophistication of the party and whether it has the assistance of experienced counsel). TigerSwan's "return" was likewise made following the denial of its motion to dismiss when fact discovery was imminent, and while TigerSwan was represented by counsel. It knew better.

6. Plaintiffs' Requested Order

Plaintiffs request that this Court issue an order compelling TigerSwan's full and complete response to Plaintiffs' discovery requests, including both Plaintiffs' interrogatories and requests for production. TigerSwan's primary given reason for its extremely limited response—the supposed demands of its contract with ETP—is unreasonable and, under these circumstances, cannot be deemed made in good faith. Though it might seem that TigerSwan has little left to produce following its "return," TigerSwan initially claimed it had zero documents before producing over 10,000 pages. Neither Plaintiffs nor this Court can be confident it now actually really does have nothing else.

If TigerSwan really does not currently have access to these documents or communications, Plaintiffs request that this Court order TigerSwan to obtain them from ETP—by subpoena if necessary—and provide them to Plaintiffs. All such documents returned to ETP were done so wrongly, pursuant to a specious reading of TigerSwan's contract with ETP and in plain violation of TigerSwan's legal obligation to preserve and produce evidence for this case. And ETP presumably has a complete set of the returned documents if, as TigerSwan has averred "[u]pon information and belief, all of the documents TigerSwan returned remain in the possession of Energy Transfer." Exhibit 2, TigerSwan Response to Interrogatories, at 003.

Plaintiffs also request that this Court order TigerSwan to produce a complete and detailed log of all evidence returned to ETP and/or destroyed by TigerSwan between October 18, 2018 (the date Plaintiffs filed this case)[4] and the present. Plaintiffs requested this information in

[4] TigerSwan's obligation to preserve significantly precedes this date; TigerSwan would have been on notice of the possibility of litigation from the date of its initial engagement, and TigerSwan was specifically sent document preservation notices related to its work with ETP by other potential plaintiffs on June 6, 2017 and March 13, 2018. Exhibit 9, Benjamin M. Stoll, June 6, 2017 Document Preservation Notices, at 001-016; Exhibit 10, Benjamin M. Stoll, June 6, 2017 Document Preservation Notices, at 001-016; Exhibit 11, R. Michael Flynn, March 13, 2018 Document Preservation Notice, at 002-008.

their Interrogatories served on TigerSwan in January 2021, to which TigerSwan responded: "TigerSwan objects to Interrogatory 2 as overbroad, vague, unduly burdensome, and as calling for the disclosure of confidential and proprietary information, in violation of TigerSwan's agreement with Dakota Access, LLC. Subject to the objections, the documents TigerSwan returned to Energy Transfer number in the thousands and TigerSwan cannot reasonably identify and describe them." But if TigerSwan does not identify what documents and communications it returned to ETP, there is no way of determining that any subsequent production of documents or communications is complete: even if TigerSwan ultimately produces some additional evidence to Plaintiffs, there remains a possibility that other relevant evidence was lost or destroyed as part of TigerSwan's "return" (or subsequently by ETP), which could only be ascertained by examining an evidence log.

Finally, if TigerSwan is unable or unwilling to produce such a log *and* to comprehensively demonstrate that each item described on said log is produced to Plaintiffs (or is legitimately privileged), Plaintiffs request that TigerSwan's answer be stricken and TigerSwan found in default. By dispossessing itself of significant evidence relevant to this case long after the case had been filed and shortly before its deadline for initial disclosures—based on a facially absurd, legally infirm, and recently rejected argument about its contractual obligations—TigerSwan has placed into jeopardy a large body of evidence crucial not only to Plaintiffs' case against TigerSwan, but against TigerSwan's numerous co-defendants in this case. *See* Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 Cardozo L. Rev. 793, 795 (1991) (describing the monumental harm done by such evidence spoliation). Plaintiffs recognize that the entry of default is a severe step that should not

be taken lightly by this Court. No lesser sanction, however, would do justice in these circumstances.

Dated: September 7, 2021

Respectfully Submitted

By:

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