

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

MICHAEL POWERS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

NO. 2:21-00517 TSZ

PLAINTIFF’S MOTION FOR  
SANCTIONS

NOTED FOR CONSIDERATION:  
FEBRUARY 24, 2023

**I. INTRODUCTION**

On February 7, 2023, the United States produced critical documents that it wrongfully withheld from Plaintiff for over a year and supplemented its privilege log with thirty-five responsive documents. Prior to two days ago, there was only one document on the Government’s privilege log. To Plaintiff’s dismay, the recent production reveals that the Government has engaged in a pattern of abusive discovery tactics that have put Plaintiff at a severe disadvantage in this litigation, including in recent dispositive motions practice. Indeed, the Government withheld information that refuted its motion to dismiss on discretionary function immunity grounds and that supported Plaintiff’s motion for summary judgment on the Government’s discretionary function defense. As explained in greater detail below, the discovery violations that have come to light permeate the case to such an extent that there can be no reasonable assurance that this case could ever be tried with the true facts or decided on the merits.

1 Rule 37 is designed to provide relief under these circumstances. As the Supreme Court has  
2 held, “Rule 37 sanctions must be applied diligently both ‘to penalize those whose conduct may be  
3 deemed to warrant such a sanction [and] to deter those who might be tempted to such conduct in  
4 the absence of such a deterrent.” *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 763–64 (1980)  
5 (quoting *Nat’l Hockey League v. Met. Hockey Club*, 427 U.S. 639, 643 (1976)). Given the purpose  
6 of the rule, and given the severity and widespread impact of the Government’s discovery violations  
7 in this matter, justice requires that the Court enter default judgment against the Government and  
8 impose monetary sanctions as described below.

## 9 II. BACKGROUND

### 10 A. 2021–2022 Discovery Overview.

11 Plaintiff has struggled to learn the actual facts of this case, the majority of which are  
12 completely within the Government’s control. Below is a brief summary outlining some key  
13 difficulties, and Plaintiff’s attempts to resolve discovery issues through discussion and  
14 cooperation—without Court intervention—consistent with the spirit of the Federal Rules.  
15 Unfortunately, this week it became clear from the Government’s last-minute production that the  
16 Government has taken advantage of these attempts. Indeed, the Government’s February 7<sup>th</sup>  
17 production reveals the severity and extent of its discovery abuses, and Plaintiff now has no option  
18 but to turn to the Court.

#### 19 1. Interrogatory Responses and Document Production.

20 On December 16, 2021, Plaintiff served his first set of discovery requests on the Coast  
21 Guard, and he received responses on February 10, 2022, after allowing an extension. Declaration  
22 of Sara K. Leonetti, Exs. 1-3. Several requests that are particularly relevant to this motion are  
23 discussed below.

#### 24 i. Plaintiff’s Interrogatory No. 4 and RFP No. 2.

25 These requests dealt with investigations of the incident, asking whether the Government  
26 had ever conducted a formal or informal investigation. Among other things, these requests ask the

1 Government to identify the people involved in the investigation, as well as those who received the  
2 results of any such investigation. The Government provided only the following substantive  
3 response to each: “Other than the Case Study produced to plaintiff in response to his attorneys’  
4 FOIA request, the United States conducted no other investigation into the incident.” Leonetti Decl.,  
5 Ex. 2. These requests were the subject of Plaintiff’s prior motion to compel. *See* Dkt. 54.

6 **ii. Plaintiff’s RFP No. 3**

7 This request directed the Government to provide “copies of all policies, procedures,  
8 training manuals and/or presentations, USCG circular publications, and/or guidelines of defendant  
9 that were in effect in May of 2019 . . . that could apply to the incident, including policies and  
10 procedures regarding data collection.” The Government did not produce any documents and  
11 instead told Plaintiff that “[d]ocuments responsive to this Request can be find (sic) at online at  
12 SAR Manuals (uscg.mil) and SAR Publications (uscg.mil).”

13 Then, throughout discovery, Government witnesses referenced unproduced policies that  
14 were obviously responsive to RFP No. 3. Plaintiff spent significant time and energy chasing these  
15 documents down, either through their own research or through repeatedly requesting them from  
16 the Government. Leonetti Decl., ¶ 2. Moreover, on multiple occasions, the Government made  
17 remarkably untimely productions responsive to RFP No. 3, but instead of acknowledging or  
18 referencing RFP 3, the Government simply asserted that it was properly supplementing its initial  
19 disclosures. *Id.*

20 In addition, when responding to the Government’s Motion to Dismiss on Discretionary  
21 Function Immunity Grounds, Plaintiff’s counsel, through her own research, found a responsive  
22 Coast Guard policy document that directly refuted the Government’s arguments—the Coast  
23 Guard’s Telecommunications Policy Manual. Dkt. 77-4. The Government’s failure to provide  
24 responsive documents to RFP 3 is further explained in the Supplemental Declaration of Sara K.  
25 Leonetti in Support of Plaintiff’s Replies, Dkt. 66, which Plaintiff incorporates here. Given this  
26 track record, Plaintiff has no confidence whatsoever that he received all responsive documents to

1 RFP No. 3.

2 **iii. Plaintiff's RFP No. 8**

3 This request asked for the production of “any Coast Guard teaching and/or informational  
4 materials that have used or referenced facts underlying this incident.” Leonetti Decl., Ex. 1 at 7.  
5 The Government responded that it would “produce non-privileged documents responsive to this  
6 Request,” but it did not specify any particular documents, or state when it would produce them.  
7 On July 1, 2022, the Government produced one PowerPoint training and accompanying notes that  
8 were clearly responsive, without any explanation for its delay.

9 **iv. Plaintiff's RFP Nos. 12 and 13**

10 RFP No. 12 asked the Government to “Please produce all internal emails and  
11 correspondence that concern, refer, or relate to the incident in question or the Plaintiff.” Leonetti  
12 Decl., Ex.1 at 8. The Coast Guard deleted this RFP from its responsive pleading without notice to  
13 Plaintiff. Thus, Plaintiff was unaware of the Government’s failure to respond. RFP No. 13 asked  
14 the Government to please produce all activity logs “for any and all personnel and department[s]  
15 involved in the search and rescue effort on May 2, 2019.” The Government also deleted this  
16 request.

17 When meeting and conferring on Plaintiff’s motions to compel at Dkts.53 and 54,  
18 Plaintiff’s counsel also stated that she intended to move to compel production of communications  
19 related to the incident. Leonetti Decl. at ¶ 3. DOJ counsel quickly told her that she could not move  
20 to compel something she had never asked for, and directed her to point to a discovery request for  
21 such communications. *Id.* Plaintiff’s counsel looked through the Government’s responses to  
22 Plaintiff’s discovery, and not seeing RFP No. 12 or any response to it, she concluded that she must  
23 have been mistaken. *Id.* She stated that she would issue a request for production, as there was still  
24 sufficient time. *Id.* DOJ counsel responded that they would produce the documents without a  
25 formal request. *Id.*

1 On October 12, 2022, Plaintiff's counsel learned that the Government had actually *deleted*  
2 RFP Nos. 12 and 13, and that RFP 12 covered internal communications and correspondence  
3 concerning the incident and alerted DOJ counsel. Leonetti Decl., Ex. 4. On October 17, 2022, DOJ  
4 attorneys responded that they would take immediate steps to remedy the problem. *Id.* Plaintiff's  
5 counsel followed up via email on October 31, November 3, November 10, 2022, and January 20,  
6 and February 1, 2023; counsel stated they were working on the production. Leonetti Decl., Exs. 5-  
7 8. And in December of 2022 (right before the filing of dispositive motions), DOJ counsel told  
8 Plaintiff's counsel that he was in the process of reviewing the documents responsive to Plaintiff's  
9 RFP 12 and hoped to have them to her shortly. *See* Leonetti Decl., Ex. 7.

## 10 2. Coast Guard Depositions.

11 In March, Plaintiff noted a Rule 30(b)(6) deposition of the Coast Guard. Plaintiff went to  
12 great lengths to find a mutually agreeable place and time for the deposition(s) and discussed the  
13 topics with opposing counsel numerous times, at length. DOJ counsel objected to topics and stated  
14 they would not produce a representative on certain topics unless ordered by the Court. *See e.g.*,  
15 Leonetti Decl., Ex. 9. The first deposition was eventually noted for April 27, 2022, but The  
16 Government subsequently postponed the deposition multiple times. Dkt. 66 at ¶ 3. The longest  
17 delay occurred over the course of the summer, when defense counsel stated they were transferring  
18 the task to an attorney who had personal conflicts. *Id.* The first 30(b)(6) deposition, which *did not*  
19 cover all of the noticed topics, did not occur until October 5, 2022. *Id.* The final 30(b)(6) deposition  
20 occurred on November 23, 2022. During the final deposition, which covered the topic of Coast  
21 Guard asset availability in this case, the deponent—OU Polyak—stated that he was not prepared  
22 to discuss which assets could have responded to the incident in any particular amount of time. *See*  
23 Leonetti Decl., Ex. 10 at 19:19–20:3, 54:18–56:22.

24 The Government's counsel requested that Plaintiff depose its fact witnesses before taking  
25 the 30(b)(6) deposition(s), claiming that this was the most efficient way to proceed in light of the  
26 delay. Leonetti Decl. at ¶4. In the spirit of cooperation, Plaintiff agreed to adjust his discovery plan

1 and move forward with fact witness depositions,<sup>1</sup> deposing Communications Unit Watchstander  
2 (“CU”) Jason Guy, Command Duty Officer (CDO) Chris Florescher, Operations Unit  
3 Watchstander (“OU”) Alexander Polyak, Situations Unit Watchstander (“SU”) Cynthia Torres,  
4 and SAR Mission Coordinator (“SMC”) Blair Sweigart. *Id.* As further discussed in the context of  
5 Plaintiff’s argument below, these witnesses professed that they could not recall much and provided  
6 only vague summaries of the incident.

7 **B. The Government’s Last-Minute Production on February 7, 2023.**

8 On February 1, 2023, Plaintiff’s counsel asked to meet and confer regarding the  
9 Government’s failure to respond to RFP 12. After that, and after the Court denied the  
10 Government’s motion to dismiss, the Government provided 217 pages of documents responsive to  
11 RFP 12. Leonetti Decl., Ex. 11, Ex. 12. It also withheld 65 documents, on claims of privilege  
12 and/or work product. Additionally, the Government supplemented RFP No. 3 (policies) again, this  
13 time with its Telecommunications Manual. Leonetti Decl., Ex. 11, Ex. 13.

14 The production contained responsive documents central to this case. Reviewing them now,  
15 less than a month before trial, Plaintiff understands that despite lengthy and costly discovery  
16 (including conducting eleven depositions, filing two motions to compel, and repeatedly attempting  
17 to get the responsive documents directly from counsel), he was deprived of an opportunity to  
18 prepare and develop his case. Perhaps even more disturbingly, Plaintiff did not receive these  
19 documents until after the briefing on dispositive motions was complete and after the Court denied  
20 the Government’s motion to dismiss this case with prejudice.

21 Plaintiff discusses the all-encompassing nature of the production in greater detail below, in  
22 the context of his arguments. But briefly, the production includes, among other things: Coast Guard  
23 presentations about this case that explain the facts and what went wrong, “alignment” emails  
24 discussing how to frame the facts of what occurred in the Case Study, emails discussing changes

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25  
26 <sup>1</sup> This change in plan benefited the Government by allowing the Government’s 30(b)(6) witnesses the benefit of reviewing the testimony of witnesses involved in the incident before testifying. Nevertheless, Plaintiff agreed to this plan in good faith to move discovery forward.

1 to the Coast Guard’s formal timeline of events (the MISLE log), communications between the  
 2 Coast Guard and NWFR agents regarding the case, and additional unproduced Coast Guard logs  
 3 (“situation reports”). The documents also reveal that the Government did not disclose at least ten  
 4 people with knowledge of the incident, and they demonstrate that certain Coast Guard witnesses  
 5 had a *much* greater understanding of the case and its subsequent investigation than they testified  
 6 to under oath.

### 7 III. AUTHORITY & ARGUMENT

#### 8 A. The Government’s discovery violations warrant sanctions under Rule 37(b) and (c).

9 Rule 37 governs discovery sanctions. Under Rule 37(b)(2)(A), a court may impose  
 10 sanctions where a party “fails to obey an order to provide or permit discovery,” including a  
 11 scheduling order under Fed. R. Civ. P. 16(f). *Dreith v. Nu Image Inc.*, 648 F.3d 779, 787 (9th  
 12 Cir.2001); *In re Phenylpropanolamine (PPA) Products Liability Litig.*, 460 F.3d 1217, 1227 (9th  
 13 Cir. 2006); *see also* Fed. R. Civ. P. 16(f) (citing Fed. R. Civ. P. 37(b)). Under Rule 37(c), courts  
 14 may impose sanctions when a party fails to comply with Rules 26(a) and (e), governing initial  
 15 disclosures and supplemental disclosures, respectively. Under either rule, available sanctions  
 16 include “dismissing the action or proceeding in the whole or in part,” and “rendering a default  
 17 judgment against the disobedient party.” Fed. R. Civ. P. 37(b)(2)(A)(v)-(vi).

18 The Government’s most recent production consists of information responsive to Plaintiff’s  
 19 discovery requests, which was a year ago (after an extension):

- 20 • The document produced in response to RFP 3 was responsive to RFP 3.
- 21 • The presentations referencing the facts of this case and explaining where the Coast  
 22 Guard went wrong were responsive to RFP No. 8, at minimum.
- 23 • All of the documents produced in response to RFP 12 are responsive to RFP 12.
- 24 • Reports that were responsive to RFP No. 13, including Situation Reports.
- 25 • The people identified throughout the Government’s response to RFP 12, who were  
 26 involved in the case study investigation, should have been identified in response to

1 Interrogatory No. 4, at minimum. These appear to include: CDR Jon Laraia, CDR Eric  
 2 Roy, LT Samuel Guinn, MCPO Michael Labine, LT Nicholas Powell, LCDR Roy  
 3 Cromer, LT Christopher McElvaine, LCDR Elizabeth Tatum, CDR Joel Carse, LT  
 4 George Bannon, LCDR Juan-Carlos Avila, Charles Wolfson, Scott Giard, CDR Xochitl  
 5 Castaneda, Douglas Samp, and Valerie Willis.

6 This information was not timely supplemented under Rule 26(e), and it was not provided until  
 7 long after the discovery cutoff, in violation of the Court's scheduling order. *See* Dkt. 50.  
 8 Accordingly, sanctions are appropriate under Rule 37 (b) and (c).

9 **B. Given the magnitude, widespread impact, and willfulness of the violations, justice  
 10 requires dispositive sanctions.**

11 The district court must consider five factors before dismissing a case or declaring a default:

12 (1) the public's interest in expeditious resolution of the litigation; (2) the court's  
 13 need to manage its docket; (3) the risk of prejudice to the other party; (4) the public  
 policy favoring the disposition of cases on their merits; and (5) the availability of  
 less drastic actions.

14 *Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir.1990). In addition, when “the  
 15 sanction results in default, the sanctioned party’s violations must be due to the willfulness, bad  
 16 faith, or fault of the party.” *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162, 1169 (9th Cir. 2012).  
 17 “Disobedient conduct not shown to be outside the litigant's control meets this standard.” *In re PPA*  
 18 *Products Liability Litig.*, 460 F.3d at 1233 (internal quotation and citations omitted).

19 Under Ninth Circuit precedent, “dismissal is appropriate where four factors support  
 20 dismissal, or at least three factors “strongly” support dismissal. *Id.* (citing *Hernandez v. City of El*  
 21 *Monte*, 138 F.3d 393, 399 (9th Cir.1998); *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th  
 22 Cir.1999)). And when evaluating a motion for sanctions, district courts “look to all incidents of a  
 23 party’s misconduct” and consider them together, as a whole. *Adriana Int'l Corp.*, 913 at 1411; *see*  
 24 *also* “*Sanai v. Sanai*, No. C02-2165Z, 2005 WL 1593488, at \*7 (W.D. Wash. 2005).

25 **1. Precedent provides strong support for dispositive sanctions here.**

26 **i. The first and second factors, which consider the public’s interest in  
 expeditious resolution of the litigation and the Court’s need to manage**





1 motion.

2 **ii. The risk of prejudice to Plaintiff weighs heavily in favor of dispositive**  
3 **sanctions against the Coast Guard.**

4 A party suffers prejudice when the opposing party's "actions impair [] [its] ability to go to  
5 trial or threaten to interfere with the rightful decision of the case." *In re PPA Products Liability*  
6 *Litig.*, 460 F.3d at 1227 (quoting *Adriana*, 913 F.2d at 1412). The failure to produce documents  
7 pursuant to the court's discovery orders is "considered sufficient prejudice," and "late tender is no  
8 excuse." *Id.* (internal quotations and citations omitted). Moreover, if a case is "an involved,  
9 complex case," then the prejudice from delay increases, as "[e]arly preparation and participation  
10 are essential in such circumstances." *Id.* (internal quotation and citations omitted)). And, notably,  
11 when assessing prejudice, the Ninth Circuit has reminded district courts that a deponent's "claim  
12 [of] 'I don't remember,' can be a lie if the speaker does remember, and even though no one can  
13 see another's memory, the falsity is subject to proof by circumstantial evidence, admissions, and  
14 other evidence." *Valley Engineers Inc.*, 158 F.3d at 1055.

15 There can be no doubt that the Government's discovery violations have impaired Plaintiff's  
16 ability to go to trial and have interfered with a rightful decision of this case. This case involves  
17 complex, disputed facts, as well as challenging legal issues. *At minimum*, this last-minute tender  
18 reveals the pervasive prejudice discussed below, which warrants dispositive sanctions against the  
19 Government.

20 First, the production includes information central to liability issues and the Government's  
21 discretionary function defense. One clear example is the PowerPoint presentation developed and  
22 taught by Coast Guard personnel regarding this case, which was contained in a 2019 email between  
23 LCDR Jeff Padilla and SAR Specialist Scott Giard (a person who has not been previously  
24 disclosed). Leonetti Ex. 12 at US003195. Mr. Giard asks LCDR Padilla for "all the ppt's etc. that  
25 [he] used for the safety stand downs" because he'd like to "steal a few things" for a "presentation  
26 for the Senior Leadership Workshop." *Id.* The slides shared walk through what the Coast Guard

1 did wrong, focusing on “cognitive bias factors,” such as “anchoring bias,” “groupthink,” “status  
2 quo bias,” “attribution error,” and “introspection illusion.” *See id.* at 143–157. This presentation  
3 is *obviously* a document responsive to Plaintiff’s RFP Nos. 8 and 12, highly probative of liability,  
4 and damaging to the Coast Guard’s case.

5 The presentation also provides evidence fundamental to the Coast Guard’s motion to  
6 dismiss on discretionary function grounds. At the same time the Government asked the Court to  
7 dismiss this case with prejudice on the grounds that it was immune from suit under the  
8 discretionary function exception, it withheld evidence that contradicted that assertion. By  
9 withholding the presentation, the Government hid evidence directly relevant to the two prongs of  
10 the discretionary function exception—(1) whether the alleged negligent conduct was discretionary  
11 and (2) whether it was susceptible to policy-based considerations.<sup>2</sup> Indeed, the presentation does  
12 not raise any policy-based considerations that factor into this scenario, nor does it state that any  
13 policy-based considerations would have been appropriate to consider in this scenario. Instead, it  
14 focuses on “cognitive bias” and “critical thinking” errors, which are not covered by the  
15 discretionary function exception and are instead simply errors in professional judgment for which  
16 the Government may be liable. Notably, the presentation also applies mandatory Coast Guard  
17 policies that direct specific actions to the facts of this case, such as the “Continual Searching  
18 Policy” and Marine Assistance Policy (MSAP), located in Chapters 3 and 4 of the Coast Guard  
19 Addendum, rebutting the Coast Guard’s argument that the Coast Guard officials involved had  
20 broad discretion when acting in this case. *Id.* at 165–167.

21 Additionally, the presentation directly contradicts testimony from the Coast Guard’s  
22 30(b)(6) representative and expert. Plaintiff deposed that witness, Commander Mitchell, on  
23 October 5, 2022, and the Government used his testimony extensively in its motion to dismiss. *See*  
24 *e.g.*, Dkt. 69 at 8, 13–15. Commander Mitchell testified that MSAP policy, which provides policy  
25 responses to certain SAR situations, does not apply to this case at all. Leonetti Decl., Ex. 14 at  
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<sup>2</sup> *Young v. United States*, 769 F.3d 1047, 1055 (9th Cir. 2014).

1 106:17–117:9. He went as far as to state: “If you were to ask a SAR professional if they had a  
2 phone call just as [OU] Polyak had, if they would immediately turn to this section of policy  
3 [MSAP] for guidance to respond, then I don't think any SAR professional would focus on this.”  
4 *Id.* at 113:23-114:2. He further testified that based on “the intent of the [MSAP] policy and the  
5 way [it] is instructed upon” and trained upon, it does not apply to this case. *Id.* at 116:11–117:9.  
6 The Coast Guard presentation on this case, however, directly applies MSAP policy, twice  
7 including the flowchart from the MSAP policy directing specific Coast Guard action in relation to  
8 this case. There is *no legitimate explanation* for Commander Mitchell’s testimony, or the  
9 Government’s reliance on it in its Motion to Dismiss, in light of the PowerPoint presentation  
10 disclosed on Tuesday.

11 Second, Plaintiff faces severe prejudice regarding this late disclosure because it identifies  
12 a host of individuals that likely have knowledge of the underlying facts, as well as knowledge of  
13 the investigation and errors made in the prosecution of this SAR. Plaintiff would have taken a  
14 vastly different approach in discovery had he been aware of these individuals.

15 Third, this evidence strongly suggests that Coast Guard witnesses evaded deposition  
16 questions and provided purposefully incomplete and misleading answers. For example, Plaintiff  
17 deposed SU Torres early on in litigation, hoping to learn the facts of the case. In addition, the Coast  
18 Guard Case Study concluded that SU Torres believed the Coast Guard should have sent its own  
19 search asset to look for Mr. Power’s boat, and Plaintiff wanted more information on this point. SU  
20 Torres remembered very little from the day, and could not recall why she would have told the case  
21 study investigator that the Coast Guard should have sent its own asset. Leonetti Decl., Ex. 15 at  
22 24:13-18. She also testified that she “might have” read the case study “when it first came out,”  
23 suggesting that she didn’t remember the case study or the investigation clearly. But the  
24 Government’s February 7<sup>th</sup> production contains messages between SU Torres and SMC Randy  
25 Corbett about the case and case study *more than two years after the incident, when SU Torres*  
26 *attended National SAR School and took a class on this case study.* They said, in relevant part:

1 Torres, Cynthia J PO2 USCG SEC MIAMI (USA) 1:44 PM:

2 hi sir! going over a case study in SAR school and its our deception pass one.  
3 how are you and everything there in seattle??

4 Corbett, Randy L CIV USCG (USA) 1:46 PM:

5 Seattle is still Seattle, and i can't wait to leave. Other than that it is pretty  
6 much the same. A lot of time being spent here because of the shortage  
7 caused by transfer season. Take the comments of the case study with a grain  
8 of salt, i know how it has been presented. anyway, how are you doing?

9 There is *no legitimate explanation* for SU Torres's testimony. Not only was Plaintiff denied the  
10 opportunity to challenge her testimony during the deposition, but he was denied the fundamental  
11 opportunity to learn information regarding the case itself and the training she attended.  
12 Additionally, Plaintiff made a strategic decision not to depose Mr. Corbett, but had he known that  
13 Mr. Corbett was telling other officers who worked the case *not to worry about the case study or*  
14 *their actions*, Plaintiff would have deposed him.

15 Similarly, when Plaintiff deposed Commander Brook Serbu—a D13 employee—she  
16 testified that she could not remember discussing the case at length with anybody after the fact.  
17 While she was “aware of the case study” and had “read it several years ago,” she could not recall  
18 if she was ever interviewed for the case study herself, nor could she remember if she'd had any  
19 formal discussions about the Case Study. The only conversation she could recall was a casual  
20 conversation with her coworker at D13. She testified to the following:

21 A. I don't know if I was interviewed or not for the case study. I actually don't  
22 recall.

23 Q. Okay. And did anybody ever discuss with D13 or anybody in the Coast  
24 Guard, to your knowledge, about what was done correctly and incorrectly  
25 regarding this case?

26 A. Are you asking if -- what are you asking specifically?

Q. Specifically, has anybody from the Coast Guard, your recollection in your  
entire time, come to you or anybody else in the Coast Guard that you know of,  
to review this case, to talk about lessons learned, to try to improve from it?

A. Are you asking if I'm aware of the case study?

Q. No.

1 A. Oh.

2 Q. I'm asking if any -- I'm asking if any Coast Guard personnel -- let's just  
3 break it down a piece at a time.

4 A. Yeah.

5 Q. Has any Coast Guard personnel come to you to discuss this case for the  
6 purposes of improving having lessons learned, to your knowledge, yes or no?

7 A. I don't -- I don't quite understand the question, but --

8 Q. Sure.

9 A. -- I have not been approached regarding this case beyond the SAR case  
10 study. And I actually can't recall if I was interviewed as part of that case study  
or not. I know that there's -- that there was transcripts of the phone calls  
included, I believe.

11 Q. Have you ever discussed this case with anyone in the Coast Guard, after  
12 the fact, to your knowledge?

13 A. Yes. I've discussed this case.

14 Q. And who have you discussed this case with, after the fact?

15 A. I discussed the case with a co-worker of mine at D13.

16 Q. Okay. And what was the nature of that conversation?

17 A. I don't -- I don't recall specifics, but it's not uncommon for search and rescue  
18 mission coordinators to discuss different cases with each other or for command  
duty officers to discuss different cases with each other.

19 Q. Okay. And do you have any memory of it? Was it a casual conversation?  
Was it a sit down in a room and structured job related conversation?

20 A. Oh, it would have been casual. Yeah.

21 Q. Casual.

22 A. It would have been casual. Sure.

23 Q. That's what I was getting at. So it would have been a casual conversation.  
24 Any formal discussions about this case, to your knowledge at all, after the  
fact? Anybody --

25 A. Again, I don't -- I don't recall if I was interviewed as part of the case study.  
And my apologies on that. I just don't remember.

26 Q. No. And that's fine

1  
2 A. So -- so if I was interviewed as part of the case study, I would -- I would  
3 deem that formal. But beyond that, I have no recollection of a formal  
4 interview or conversation related to this case.

5 Leonetti Decl., Ex. 16 at 74:7-77:13.

6 Despite repeatedly testifying that she had no recollection of job-related conversations about  
7 the case after the fact, and professing to not even remember whether she was interviewed for the  
8 case study investigation, emails produced on Tuesday show that Commander Serbu played a  
9 significant, if not lead role in the Case Study investigation process. For instance, she emailed the  
10 Coast Guard official assigned to author the Case Study to arrange her involvement, as  
11 demonstrated by a portion of Commander Serbu's May 10, 2019 email to that official—LCDR  
12 Kristen Preble (emphasis added):

13 Hi Kristen,

14 Welcome back and thank you for supporting the District Directed "PIWs located  
15 near Whidbey Island" SAR Case Study. Attached is your direction memo signed  
16 by RADM Throop.<sup>3</sup> Additionally, *I've attached a list of persons involved and  
17 provided a brief case summary below for some general context. Documentation  
18 collection continues, but we should be in a very good place by Monday.* LCDR  
19 Jeff Padilla (SPS CC Chief) and Scott Giard (D13 SAR Specialist) have been  
20 assigned as your team to assist you with the study and I've attached the new case  
21 study policy for quick reference. And for awareness, a claims investigation is being  
22 conducted concurrently by LT Emily Ivashenko (D13 staff). *Before you get started,  
23 lets chat so I can provide some additional background and clarify a few things in  
24 the memo.* I'll be around all day Monday, so just let me know what time works best  
25 for you. *And then based on your schedule, I'll set up a conference call/meeting  
26 with all the players to discuss timelines, POCs, logistics, etc., to ensure alignment  
and give you an opportunity to address any questions/concerns.*

Leonetti Decl., Ex. 12 at 11.

Commander Serbu also emailed and apparently met with SMC Sweigart and a Coast Guard  
public affairs officer about the press release regarding this incident on May 8, 2019. *Id.* at 16.  
Then, on May 9, she recommended changes to the press release via email. *Id.* at 17. In addition,  
Commander Serbu was copied on emails regarding Mr. Powers' debrief and the likelihood that he  
would go to the media, *id.* at 22, and she also coordinated and invited Coast Guard officials,

<sup>3</sup> Plaintiff does not have a copy of this memo.

1 including SPS Commander Padilla to a meeting entitled “IN-BRIEF/ ALIGNMENT MEETING—  
2 SAR Case Study (PIWs located near Whidbey Island),” *id.* at 30. These are just a few examples  
3 of Commander Serbu’s significant involvement in the subsequent formal investigation of this case.  
4 And notably, many of these emails list attachments that the Government continues to withhold  
5 from Plaintiff. *See e.g., id.* at 19 (“Attachments: 02 May Wx Observations.pptx), 89  
6 (“Attachments: SAR Case Study Direction Memo PIW RECOVERED NEAR WHIDBEY  
7 ISLAND.pdf”). In short, there is *no legitimate explanation* for Commander Serbu’s testimony.

8           Moreover, the February 7<sup>th</sup> production shows that the SMC Sweigart—the SMC  
9 responsible for this SAR—also engaged in the Case Study investigation evaluating SPS’s actions.  
10 But in his deposition, he testified that he could not recall having conversations critiquing or  
11 admonishing his or CDO Florscher’s actions that day, dancing around counsel’s questions to avoid  
12 disclosing his involvement in the investigation:

13           Q. Were you ever talked to about how to do differently in the future as a result of this  
14 case?

15           A. Not -- not with -- not that I recall, not with anything that said do -- do something  
16 differently in the future.

17           Q. Okay. Were you ever criticized from anybody in the Coast Guard because of this  
18 case?

19           A. Not directly.

20           Q. Indirectly then?

21           A. Not that I'm aware of. So sorry, by directly I mean no one came to me and criticized  
22 me.

23           Q. I see. I think I asked a bad question. Are you aware of any criticism?

24           A. Other than –

25           Q. To you about this case?

26           A. To me directly, no.

          Q. Okay. And did you ever go back and discuss this case after the fact with Senior  
          Chief Floscher?

          A. I believe we discussed this case both following and pursuant to the case study.



1 Q. What did you guys talk about?

2 A. I don't recall.

3 Q. Did you ever review his performance as a result of this case?

4 A. Not -- not in a direct manner, no.

5 Q. Okay. Did you ever report him as a result of his performance in this case in any  
6 way?

7 A. No, I did not.

8 ...

9 Q. Okay. Did you speak to anybody who would have been a supervisor in any way  
10 about the -- of the case relating to Senior Chief Floser's actions?

11 A. Yeah, I mean, specifically about his actions I don't recall discussing it. And I  
12 apologize for what I'll say here is I think in the way that you're trying to get at, ***I do  
not remember having any conversations along those lines of admonishment or  
criticism, et cetera.***

13 Q. Okay. Well, thank you for that. I appreciate you helping me get to that. Sometimes  
14 these questions you want to be thorough, it's not always easy to box in, I don't mean  
15 to be difficult.

16 So I just want to know that if we were to get in court I know the information you  
17 have and who you talked to and that's why I ask.

18 Is there anything you think I should know in looking at this case that would be  
19 helpful that we haven't talked about today?

20 A. I mean, nothing specifically comes to mind.

21 Leonetti Decl., Ex. 17 at 54:23-58:14. Given the February 7<sup>th</sup> production, there is absolutely *no*  
22 *legitimate explanation* for SMC Sweigart's testimony.

23 Fourth, the new evidence demonstrates that the Coast Guard's official MISLE log  
24 documenting this case was effectively edited and "corrected" by committee, including Commander  
25 Serbu. The Government has consistently maintained that the Case Study was corrected after the  
26 fact by OU Polyak and SPS Commander Padilla in order to fix the purportedly mistaken entries of  
OU Michael Allen. The Coast Guard's case study discusses this process briefly, stating "D13  
directed the SCC to correct the timeline of this case, at which point the Sector Command Center

1 Chief and OU who worked the case both reviewed and made corrections based off of the DVL and  
2 R21 recordings.” Dkt. 73-2 at 11. The Incident Management Timeline (IMA) shows that these  
3 corrections were made by Padill and Polyak on May 10 and indicates that D13 directed them to  
4 make these corrections that same day. *Id.* at 60. Plaintiff now knows that, in reality, Commanders  
5 Serbu and Padilla—neither of whom was actually involved in the SAR case on the morning of  
6 May 2, 2019—discussed changes and found information to incorporate into the MISLE log on  
7 May 9, 2019. These discrepancies with respect to who controls the official factual timeline of this  
8 case are particularly troubling in light of the staunch position taken by the Government in response  
9 to Plaintiff’s previous motions to compel that Plaintiff did not need additional fact discovery  
10 because he already had “essentially [the same] understanding of the events of that morning as the  
11 USCG itself has.” Dkt. 60 at 10.

12 Fifth, the Government’s production included an inadequate privilege log showing that it  
13 continues to withhold at least 35 responsive documents. Leonetti Decl., Ex. 18. Plaintiff has been  
14 deprived of the opportunity to discover these documents and should not be forced to address these  
15 claims on the eve of trial, months after the discovery cutoff.

16 In sum, Plaintiff faces overwhelming prejudice. After a year of costly, time-consuming,  
17 and hard-fought discovery, it is incredibly troublesome to learn that the Government withheld  
18 basic factual information and key documents from Plaintiff. What is more troubling is that  
19 Defendant moved to dismiss Plaintiff’s claims with prejudice without first producing these  
20 documents, even though the Coast Guard and DOJ counsel had these documents in their  
21 possession. The third factor weighs heavily in favor of dispositive sanctions.

22 **iii. Public policy favoring disposition of cases on the merits.**

23 Typically, this factor counsels against dispositive sanctions. Underlying that general rule  
24 is the assumption that a case may be tried on the merits despite the discovery abuses committed.  
25 But, as the Ninth Circuit has held, when “a party’s discovery violations make it impossible for a  
26 court to be confident that the parties will ever have access to the true facts,” dispositive sanctions

1 may be appropriate. Indeed, “[t]here is no point to a lawsuit, if it merely applies to lies. True facts  
2 must be the foundation for any just result.” *Valley Engineers Inc.*, 158 F.3d at 1058 (citing  
3 *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 352 (9th Cir. 1995)). Thus,  
4 when “a party’s discovery violations make it impossible for a court to be confident that the parties  
5 will ever have access to the true facts,” dispositive sanctions may be appropriate.

6       Regarding this factor, the Ninth Circuit has also recognized that courts should not give it  
7 much weight when a “case that is stalled or unreasonably delayed by a party’s failure to comply  
8 with deadlines and discovery obligations.” *In re PPA Products Liability Litig.*, 460 F.3d at 1228. In  
9 those instances, the case “cannot move forward toward resolution on the merits.” *Id.*

10       For all of the reasons described in the preceding section discussing the third factor—  
11 prejudice to Plaintiff—the Court should conclude that this factor is neutral. The fact that the  
12 Government had these key documents containing information that Plaintiff had sought for over a  
13 year in its possession, and moved for dismissal with prejudice without first providing them, is  
14 preposterous. Such actions confirm that, at this point, there can be no assurances that this case  
15 could ever be tried on the true facts.

16                   **iv.       The availability of less drastic sanctions.**

17       “What is most critical for case-dispositive sanctions, regarding . . . [the factor of] less  
18 drastic sanctions, is whether the discovery violations ‘threaten to interfere with the rightful  
19 decision of the case.’” *Valley Engineers Inc.*, 158 F.3d at 1057 (quoting *Adriana*, 913 F.2d at  
20 1412). “Dismissal is appropriate where a ‘pattern of deception and discovery abuse made it  
21 impossible’ for the district court to conduct a trial ‘with any reasonable assurance that the truth  
22 would be available.’” *Id.* at 1057–58 (quoting *Anheuser–Busch, Inc. v. Natural Beverage*  
23 *Distributors*, 69 F.3d 337, 352 (9th Cir.1995)). “[W]here a party so damages the integrity of the  
24 discovery process,” dispositive sanctions may be appropriate. *Id.* at 1058.

25       As discussed above, the Government’s last-minute document production—consisting of  
26 documents that the Government has had all along—completely destabilizes Plaintiff’s

1 understanding of this case less than a month before trial. The Government gained a tactical  
2 advantage by withholding these documents, shaped discovery in its favor, and even moved to  
3 dismiss the case without disclosing these documents, which are highly relevant to liability and the  
4 Government's discretionary function defense. The Government's actions support but one logical  
5 conclusion: at least until February 2, 2023, when the Court denied the Government's Motion to  
6 Dismiss, the Government argued for and would have gladly accepted the Court's dismissal of  
7 Plaintiff's claim, even knowing such dismissal would not have been on the true facts of the case.  
8 Given the severity, breadth, and pattern of the Government's discovery abuses in this matter, the  
9 Court will not be able to conduct a trial "with any reasonable assurance that the truth w[ill] be  
10 available." *See Valley Engineers Inc.*, 158 F.3d at 1057–58. Thus, dispositive sanctions are  
11 appropriate.

12 **v. Bad faith, willfulness, or fault.**

13 The Government's conduct easily meets the "bad faith, willfulness, or fault" requirement  
14 because the Government's conduct, which was disobedient and flouted the discovery rules, was  
15 not "outside [its] control." *In re PPA Products Liability Litig.*, 460 F.3d at 1233 (internal quotation  
16 and citations omitted). With this requirement met, and with four of the five factors for dispositive  
17 sanctions weighing heavily in favor of default, default is justified and warranted as a sanction here.

18 **C. The Government's outrageous conduct warrants additional, monetary sanctions.**

19 Rule 37 allows for the imposition of multiple sanctions depending on the conduct. "Rule  
20 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to  
21 warrant such a sanction [and] to deter those who might be tempted to such conduct in the absence  
22 of such a deterrent." *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 763–64 (1980) (quoting *Nat'l*  
23 *Hockey League v. Met. Hockey Club*, 427 U.S. 639, 643 (1976)). Additional sanctions are  
24 warranted and justified here, where the Government's conduct has obfuscated discovery for over  
25 a year, purposely misled Plaintiffs even as to basic facts about the case, wasted Plaintiff's time and  
26 resources, and willfully deprived Plaintiff and the Court of crucial information at the dispositive

1 motions phase. In order to properly sanction the Government for its actions here, and in order to  
2 deter future similar conduct, the Court should also impose a \$500,000 fine and award Plaintiff his  
3 reasonable attorneys' fees, to be later determined by the Court.

4 **IV. CONCLUSION**

5 The Court should grant Plaintiff's Motion for Sanctions.

6  
7 DATED this 9<sup>th</sup> day of February, 2023.

8 **PETERSON | WAMPOLD**  
9 **ROSATO | FELDMAN | LUNA**

10 */s/Sara K. Leonetti*

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CERTIFICATE OF SERVICE

I hereby certify that on the date shown below I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

**Dated:** February 9, 2023.

/s/Dana Vizzare

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dana@pwrfl-law.com

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