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14 **UNITED STATES DISTRICT COURT**
15 **DISTRICT OF ARIZONA**

17 C.M., on her own behalf and on behalf of her
minor child, B.M.; et al.

18 Plaintiffs,

19 v.

20 United States of America,

21 Defendant.

No. 2:19-cv-05217-SRB

MOTION FOR SANCTIONS

22 A.P.F. on his own behalf and on behalf of his
23 minor child, O.B.; et al.

24 Plaintiffs,

25 v.

26 United States of America,

27 Defendant.

No. 2:20-cv-00065-SRB

1 **I. INTRODUCTION**

2 After the close of fact discovery on July 15, 2022, Defendant made more than thirty
3 document productions consisting of thousands of documents, none of which Plaintiffs had
4 the benefit of reviewing before deciding who to depose or what to cover during the vast
5 majority of the fact depositions. Two sets of late-produced documents are the subject of
6 this motion: (1) handwritten notes from key witnesses that Defendant did not collect and
7 produce in the fall of 2020, when it represented to Plaintiffs that it was doing so, and (2)
8 re-produced Immigration and Customs Enforcement (“ICE”) documents that were
9 originally produced stripped of their track changes and comments (the “Annotated
10 Documents”).¹

11 The late-produced documents, penned, in many cases, by senior government
12 officials—including former Customs and Border Protection (“CBP”) Commissioner Kevin
13 McAleenan, former Executive Associate Director for ICE’s Enforcement and Removal
14 Operations Matthew Albence, former Department of Homeland Security (“DHS”)
15 Secretaries Kirstjen Nielsen and John Kelly, and former Acting Secretary of DHS Elaine
16 Duke—are critical documents that [REDACTED] and that Plaintiffs
17 would have used in multiple fact witness depositions. [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED].²

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23 ¹ After the close of fact discovery, Defendant also disclosed that handwritten notes taken
24 by former ICE Chief of Staff Thomas Blank were destroyed after Plaintiffs sent a
25 document preservation notice to Defendant on February 22, 2019. Mr. Blank took these
26 notes during high-level meetings in which family separation was discussed. Plaintiffs may
27 address appropriate sanctions for Mr. Blank’s spoliated notes in a later motion, after
28 Plaintiffs take the deposition of Mr. Blank and further meet and confer with Defendant.

² As stated in prior briefing [REDACTED]

1 As early as June 18, 2020, Defendant was on notice that the District of Arizona's
2 Mandatory Initial Discovery Pilot (MIDP) project applied to these cases. *C.M.* ECF No. 47
3 ¶ 1; *A.P.F.* ECF No. 50 ¶ 1. The MIDP requires the ongoing collection and disclosure of
4 evidence "relevant to any party's claims or defenses," D. Ariz. G.O. 17-08 § B.3,
5 including "[h]ard-copy documents . . . as they are kept in the usual course of business," *id.*
6 § C.1. Defendant also represented to Plaintiffs that it was searching for hard-copy
7 documents for the agreed-upon MIDP custodians—which included the senior government
8 officials mentioned above—on multiple occasions, including during a meet and confer in
9 October 2020. McMillan Decl. ¶ 11(a) and Ex. A. Yet, it was not until Defendant
10 "renewed its efforts" to collect handwritten notes in the summer and fall of 2022, and [REDACTED]
11 [REDACTED]
12 [REDACTED], that Defendant collected and produced the key notes at issue in this motion.
13 With respect to the Annotated Documents, Defendant did not notify Plaintiffs about a
14 production issue with these documents until August 10, 2022, and the Annotated
15 Documents were not produced until after the end of fact discovery. *See* McMillan Decl. ¶
16 11(b) and Ex. B.

17 Defendant's failure to collect and produce handwritten notes, and its failure to
18 produce complete ICE documents until long after the close of depositions and fact
19 discovery, prejudiced Plaintiffs. Plaintiffs were unable to question deponents about these
20 documents and were forced to make key strategic decisions—including who to depose and
21 what to ask the deponents—based on an incomplete record.

22 Given Defendant's failure to collect and produce all relevant evidence in
23 accordance with the MIDP Order, sanctions are warranted.³ The Court already cautioned
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 ³ On October 5, 2022, the parties held a meet and confer to discuss Defendant's failure to
28 timely collect and produce the documents subject to this motion. Defendant suggested re-
opening depositions to allow Plaintiffs the opportunity to examine witnesses about the

1 that a party who fails to disclose information that may be *helpful* to that party’s case will
 2 be sanctioned: “Parties who fail to timely disclose relevant information will be precluded
 3 from using it in the case and may be subject to other sanctions.” ECF No. 47 ¶ 4 n.1.
 4 Here, Plaintiffs seek an equivalent sanction for Defendant’s failure to disclose information
 5 that may be *harmful* to its case. As such, Plaintiffs seek an order that (1) the late-produced
 6 handwritten notes and hard-copy documents be deemed admitted at trial if offered by
 7 Plaintiffs; (2) Defendant be precluded from contesting or otherwise using the handwritten
 8 notes and hard-copy documents at trial; and (3) the late-produced Annotated Documents
 9 be deemed admitted at trial if offered by Plaintiffs.⁴

10 II. BACKGROUND

11 On September 19, 2019, Plaintiffs filed the Complaint in the *C.M.* action.
 12 Complaint, ECF No. 1. On June 18, 2020, the Court confirmed that the MIDP applied to
 13 that case.⁵ ECF No. 47 ¶ 1. “[T]he MIDP requires the parties to identify all ‘documents’
 14 that ‘may be relevant to any party’s claims and defenses’ and to produce those documents
 15 alongside their initial MIDP response (or make them available on that date).” *Brennan v.*
 16 *New 4125 LLC*, No. CV-18-01717-PHX-DWL, 2019 WL 1150799, at *7 (D. Ariz. Mar.
 17 13, 2019) (quoting D. Ariz. G.O. 17-08 § B.3.). Hard-copy documents “must be produced
 18 as they are kept in the usual course of business.” D. Ariz. G.O. 17-08 § C.1. The
 19 requirement to provide responses—and, by extension, to produce documents—is a
 20 “continuing” one. *Id.* § A.8; *see also SiteLock LLC v. GoDaddy.com LLC*, No. CV-19-
 21 02746-PHX-DWL, 2022 WL 3716499, at *1 (D. Ariz. Aug. 29, 2022) (judicially affirming

22 _____
 23 belatedly produced documents, while Plaintiffs suggested the sanctions sought below.
 24 McMillan Decl. ¶ 10. On October 25, 2022, the Court “rejected the idea that [Plaintiffs]
 25 should go back and have to re-depose [deponents] because there has been a late disclosure
 26 of their notes.” and directed Plaintiffs to file a motion detailing their request. *See C.M.*
 27 ECF No. 301.

28 ⁴ Defendant conducted a relevance review prior to its production of documents, and even
 withheld relevant documents under the deliberative process privileged until that issue was
 resolved by the Court.

⁵ The *A.P.F.* Complaint was filed on January 10, 2020. *A.P.F.* Complaint, ECF No. 1. The
 Court confirmed that the MIDP applied to the *A.P.F.* case on September 10, 2020. ECF
 No. 50 ¶ 1. The cases have been effectively consolidated for discovery purposes since
 September 3, 2020. *See* ECF No. 44.

1 continuing duty). The requirement ends only on the date set by the Court—here February
2 11, 2022. *C.M.* ECF No. 144 ¶ 4; *A.P.F.* ECF No. 144 ¶ 4.

3 Between June and November 2020, the parties negotiated custodians and search
4 terms. McMillan Decl. ¶ 11(a) and Ex. A. The parties also exchanged correspondence
5 confirming their understanding that Defendant would search for both ESI and hard-copy
6 documents. *Id.* For example, on October 23, 2020, the parties agreed in writing that
7 Defendant would collect and produce “relevant hard copy documents . . . from the
8 identified custodians.” *Id.* By then, Defendant had identified Ms. Nielsen, Mr. McAleenan,
9 Mr. Albence, Mr. Blank and Mr. Kelly as custodians. McMillan Decl. ¶ 11(c) and Ex. C;
10 McMillan Decl. ¶ 11(d) and Ex. D.

11 On July 15, 2022, nearly two years after Defendant made its representation that it
12 would collect and produce relevant hard-copy documents from its custodians, the parties
13 substantially completed fact discovery, in accordance with the Court’s Amended Case
14 Management Order. McMillan Decl. ¶ 3. Plaintiffs reasonably assumed that, with the
15 exception of documents that were being re-produced pursuant to the Court’s June 29, 2022
16 deliberative process privilege order, Defendant had collected and produced all relevant
17 hard-copy and ESI documents for the custodians agreed-upon during the MIDP process.
18 *C.M.* ECF No. 144 ¶ 4; *C.M.* ECF No. 246; *A.P.F.* ECF No. 144 ¶ 4; *A.P.F.* ECF No. 236.⁶
19 As of July 15, 2022, all that remained for Plaintiffs’ fact discovery was to depose DHS’s
20 30(b)(6) witness and several government apex witnesses. It was during the apex
21 depositions in September 2022 that Plaintiffs first learned that Defendant had not collected
22 and produced handwritten notes for critical witnesses.

23 On September 9, 2022, Plaintiffs deposed apex witness Thomas Homan, the former
24 Acting Director of ICE. McMillan Decl. ¶ 11(e). Mr. Homan testified that [REDACTED]
25 [REDACTED]
26 [REDACTED]. McMillan

27 _____
28 ⁶ On June 29, 2022, the Court issued an order requiring Defendant to reproduce documents relating to the family separation policy that Defendant had redacted pursuant to the deliberative process privilege. *See C.M.* ECF No. 246; *A.P.F.* ECF No. 236.

1 Decl. ¶ 11(e) and Ex. E at 184:2–186:10. Defendant has not produced Mr. Blank’s notes
2 because “these notes were destroyed.” McMillan Decl. ¶ 11(f) and Ex. F.

3 On September 13, 2020, Plaintiffs deposed apex witness Kevin McAleenan, the
4 former CBP Commissioner. McMillan Decl. ¶ 11(h). Minutes before Mr. McAleenan’s
5 deposition, counsel for Defendant informed Plaintiffs’ counsel that Mr. McAleenan also
6 took handwritten notes and that he retained handwritten notes that might be relevant to the
7 case. *See* McMillan Decl. ¶ 11(g) and Ex. G. During his deposition, Mr. McAleenan

8 [REDACTED]
9 [REDACTED]. McMillan Decl. ¶ 11(h) and Ex. H at 15:23–16:2. Although Mr.
10 McAleenan has always been a key custodian in the case, Defendant did not produce Mr.
11 McAleenan’s notes until September 30, 2022—14 days after his deposition, 45 days after
12 the close of fact discovery, and almost *two years* after Defendant represented to Plaintiffs
13 that it was collecting hard-copy documents. McMillan Decl. ¶ 4.

14 [REDACTED], Defendant stated that
15 government counsel had asked the relevant agencies to search for handwritten notes in
16 June 2022, and that it had [REDACTED]
17 [REDACTED]
18 [REDACTED]—after the end of the bulk of fact discovery, and well after Mr.
19 Albence’s deposition, which took place on June 24, 2022.⁷ McMillan Decl. ¶ 11(i) and Ex.
20 I. Defendant further stated that, as of October 2022, it was “renewing” its efforts to collect
21 handwritten notes. *Id.* Defendant subsequently produced notes penned by former DHS
22 Secretaries Kelly and Nielsen, as well as former USCIS Director Francis Cissna. McMillan
23 Decl. ¶¶ 6-8. Although Plaintiffs asked several times, Defendant has not told Plaintiffs
24 what it did to collect handwritten notes during the MIDP process.

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26 ⁷ Notably, Defendant did not inform Plaintiffs that it had directed its agencies to search for
27 handwritten notes in June 2022. When Defendant produced these notes, it also did not
28 notify Plaintiffs that it had belatedly discovered relevant handwritten notes. At that time, in
August 2022, Plaintiffs had no idea that Defendant was collecting and producing relevant
documents that should have been produced as part of the MIDP process—including notes
taken by individuals Plaintiffs already had deposed.

1 The belatedly produced notes are voluminous and highly relevant. Mr. McAleenan's
 2 notes alone amount to dozens of pages of on-topic admissions. McMillan Decl. ¶ 4. The
 3 late-produced notes address [REDACTED]
 4 [REDACTED]
 5 [REDACTED] and that should have been produced to Plaintiffs long ago. The same
 6 goes for the thousands of pages of ICE documents that Defendant produced without
 7 tracked changes and comments. McMillan Decl. ¶ 9.⁸

8 While Plaintiffs take Defendant at its word that the mis-production of the ICE
 9 documents was inadvertent, many of the stripped comments and edits are highly relevant,
 10 and Plaintiffs would have used them in depositions to question witnesses. In them, [REDACTED]
 11 [REDACTED]
 12 [REDACTED], McMillan Decl. ¶ 11(j) and Ex. J, [REDACTED]
 13 [REDACTED], McMillan Decl. ¶ 11(k) and Ex. K, and [REDACTED]
 14 [REDACTED], McMillan Decl. ¶ 11(l) and Ex. L. As with the
 15 notes, [REDACTED]
 16 [REDACTED]
 17 [REDACTED].⁹

18 Taken together, the late-produced documents undermine Defendant's defenses in
 19 critical ways. For example, Defendant's principal theory has been that family separation
 20 was a mere byproduct of Defendant's prosecuting all those amenable to prosecution, and

21 ⁸ While it is not entirely clear from the productions, Plaintiffs believe that the late-
 22 produced handwritten notes and hard-copy documents are Bates Ranges: CD-US-0218389
 23 - CD-US-0218392; CD-US-0219125 - CD-US-0219148; CD-US-0219211 - CD-US-
 24 0219301; CD-US-0219320 - CD-US-0219551; CD-US-0219552; CD-US-0219554 - CD-
 25 US-0219561; CD-US-0219588 - CD-US-0219589; CD-US-0219590 - CD-US-0219620;
 26 CD-US-0219621 - CD-US-0219622. The Annotated Documents are all documents that
 27 contain the letter "T" at the end of the Bates number. In *C.M.*, those documents are
 28 included in Defendant's 80th production (dated August 31, 2022), 83rd production (dated
 September 7, 2022), 84th production (dated September 14, 2022) and 87th production
 (dated September 16, 2022), and in *A.P.F.*, those documents are included in Defendant's
 87th production (dated August 31, 2022), 90th production (dated September 7, 2022), 91st
 production (dated September 14, 2022), and 94th production (dated September 16, 2022).

⁹ Defendant produced the Annotated Documents without identifying the custodian of the
 documents, or who inserted the various comments. Instead, the Annotated Documents
 simply list the custodian as "ICE" and the comments include only the custodians' initials.

1 that deterrence was never the goal of separation. *E.g.*, *C.M.* ECF No. 37 ¶ 27 (denying
2 Plaintiffs’ allegation that the Zero Tolerance policy was designed to “deter individuals
3 from seeking asylum or otherwise coming into the United States”); *C.M.* ECF No. 18 at 13
4 (arguing that separation was the collateral result of “[s]trict enforcement of the Nation’s
5 immigration laws”); *A.P.F.* ECF No. 21 at 17 (same); McMillan Decl. ¶ 11(m) and Ex. M
6 at 228:2–11 [REDACTED]
7 [REDACTED]
8 [REDACTED]); *see also* McMillan Decl. ¶ 11(n) and Ex. N at 328:1– 329:2 ([REDACTED]
9 [REDACTED]
10 [REDACTED]); McMillan Decl. ¶ 11(s)
11 and Ex. O at 249:9–15 ([REDACTED]
12 [REDACTED]
13 [REDACTED]).

14 Defendant’s theory that deterrence was not the goal of separation is [REDACTED]

15 [REDACTED]
16 [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 McMillan Decl. ¶ 11(p) and Ex. P (highlighting added). And Mr. McAleenan’s late-
28 produced notes indicate that [REDACTED]

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[REDACTED]

McMillan Decl. ¶ 11(u) and Ex. U (highlighting added). If Defendant had produced these notes prior to the depositions of Mr. McAleenan, Mr. Homan, Mr. Albence and other ICE deponents, [REDACTED]

[REDACTED].

The late-produced documents [REDACTED]

[REDACTED] Under the Homeland Security Act of 2002, a child is considered an “unaccompanied alien child [‘UAC’]” if he or she “(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.” 6 U.S.C.

§ 279(g). If a child is deemed a UAC, DHS must transfer the child to the custody of the Department of Health and Human Services (“HHS”)’s Office of Refugee Resettlement (“ORR”), within 72 hours. 8 U.S.C. § 1232(b)(1), (3). HHS, and thus, ORR, only has

1 statutory authority for the custody and care of UACs, and not for children who are
2 accompanied by a parent. *See id.*

3 During his deposition, Mr. McAleenan testified that [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]. McMillan Decl. ¶ 11(v) and Ex. V at 71:21–24; *see e.g. id.* at 73:5–
7 24. Yet Mr. McAleenan’s late-produced notes show [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED] *Compare id.* at 71:21–
15 24, *with* McMillan Decl. ¶ 11(w) and Ex. W. Had such notes been timely produced,
16 Plaintiffs would have used these notes to press Mr. McAleenan on his understanding, [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 The late-produced Annotated Documents also show inconsistencies in deposition
20 testimony relating to [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 McMillan Decl. ¶ 11(x) and Ex. X at 245:4–15. Yet, according to the Annotated

1 Documents, [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED] McMillan Decl. ¶ 11(q) and Ex. Y. Again, Plaintiffs would
5 have used the late-produced documents to [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 III. LEGAL STANDARD

9 Rule 37 of the Federal Rules of Civil Procedure empowers a court to sanction parties
10 who violate discovery orders, fail to make required disclosures or cooperate with the
11 discovery process, or spoliage evidence. Fed. R. Civ. P. 37. “Order” is “read broadly” to
12 “include any order related to discovery.” *Sali v. Corona Reg’l Med. Ctr.*, 884 F.3d 1218,
13 1222 (9th Cir. 2018) (citations omitted). The MIDP qualifies as an order related to
14 discovery and, it follows, Rule “37(b)(2) shall apply to mandatory discovery responses
15 required by [the MIDP] order.” D. Ariz. G.O. 17-08 § A.11. Indeed, multiple District of
16 Arizona courts have found that violations of the MIDP are sanctionable under Rule
17 37(b)(2). *See, e.g., FTC v. Noland*, No. CV-20-00047-PHX-DWL, 2022 WL 2341221, at
18 *3 (D. Ariz. June 29, 2022); *McGee v. Zurich American Insurance Co.*, No. CV-17-04024-
19 PHX-DGC, 2021 WL 6070608, at *1 (D. Ariz. Dec. 22, 2021).

20 To prevail on their request for sanctions, Plaintiffs bear the initial burden of
21 demonstrating that Defendant failed to comply with the MIDP. *Noland*, 2022 WL
22 2341221, at *3. Because Plaintiffs do not seek terminating sanctions, they need not
23 demonstrate that Defendant acted willfully, in bad faith, or with fault. *See Von Brimer v.*
24 *Whirlpool Corp.*, 536 F.2d 838, 843–44 (9th Cir. 1976). Indeed, sanctions may be imposed
25 even for negligent failure to provide discovery. *Khalaj v. City of Phoenix*, No. CV-17-
26 01199-PHX-GMS (JZB), 2021 WL 222408, at *4 (D. Ariz. Jan. 22, 2021). If Plaintiffs
27 meet their burden, the Court may impose merits sanctions, Fed R. Civ. Pro. 37(b)(2)(A),
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1 the contours of which are left to the Court’s discretion, *see Payne v. Exxon Corp.*, 121
2 F.3d 503, 510 (9th Cir. 1997).

3 Rule 37(b) enumerates some, but not all, possible merits sanctions. *Nyerges v.*
4 *Hillstone Restaurant Group Inc.*, No. CV-19-02376-PHX-DWL, 2021 WL 3299625, at *8
5 (D. Ariz. Aug. 2, 2021) (noting that Rule 37(b)(2)’s enumerated list of merits sanctions is
6 “not exhaustive”). The court may “strike out portions of pleadings; deem certain facts as
7 established for purposes of the action or preclude admission of evidence on designated
8 matters; dismiss all or part of the action; or render a default judgment against the
9 disobedient party.” *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365,
10 1369 (9th Cir. 1980) (citing FRCP 37(b)).

11 **IV. ARGUMENT**

12 **A. Defendant Failed to Comply with the MIDP Discovery Order**

13 The MIDP is “designed to accelerate the exchange of relevant information that
14 would otherwise be produced later in the litigation through traditional discovery requests.”
15 *FTC v. Hite Media Grp., LLC*, No. CV-18-02221-PHX-SPL, 2018 WL 4676158, at *2 (D.
16 Ariz. July 23, 2018). Courts in this District have affirmed that the MIDP’s required
17 information exchange includes the “produc[ti]on of] documents and ESI that may be
18 relevant to any party’s claims or defenses.” *Salt River Project Agric. Improvement &*
19 *Power Dist. v. Trench France SAS*, 303 F. Supp. 3d 1004, 1006 (D. Ariz. 2018) (internal
20 quotation marks omitted); *accord Brennan*, 2019 WL 1150799, at *7. Pertinent to this
21 case, “[h]ardcopy documents must be produced as they are kept in the usual course of
22 business.” D. Ariz. G.O. 17-08 § C.1. The requirement to produce documents is a
23 “continuing” one. *SiteLock LLC*, 2022 WL 3716499, at *1.

24 There can be little doubt that, by its terms and as judicially interpreted, the MIDP
25 required Defendant to locate and produce the handwritten notes and the Annotated
26 Documents, and to do so continually until the February 11, 2022 cut-off date. Indeed, in
27 October 2020, Defendant acknowledged and agreed that Defendant would search for both
28 ESI and hard-copy documents from the agreed-upon custodians, which Plaintiffs



1 confirmed in an email summary to Defendant. McMillan Decl. ¶ 11(a) and Ex. A. [REDACTED]
2 [REDACTED]
3 [REDACTED]. McMillan Decl. ¶ 11(c) and Ex. C; McMillan Decl. ¶ 11(d) and Ex.
4 D. Plaintiffs took Defendant at its word that it was collecting hard-copy documents for the
5 MIDP custodians but, despite its representations to Plaintiffs, Defendant did not produce
6 relevant hard-copy documents. Instead, it appears Defendant did not collect hard-copy
7 documents for many of the key custodians until *after* the bulk of the depositions had been
8 completed and, in many instances, only after witnesses admitted during depositions that
9 government officials took notes in meetings in which family separation was discussed.
10 Defendant also did not produce the Annotated Documents until after the end of fact
11 discovery.

12 Simply put, Defendant “fail[ed] to obey an order to provide . . . discovery.” Fed. R.
13 Civ. P. 37(b)(2)(A). As a consequence, Plaintiffs have been, for much of this case,
14 deprived of access to significant evidence. While Plaintiffs need not demonstrate prejudice
15 to prevail here, prejudice does stem from the belated disclosure of on-point evidence. *See*
16 *SiteLock LLC v. GoDaddy.com LLC*, No. CV-19-02746-PHX-DWL, 2021 WL 2895503, at
17 *9 (D. Ariz. July 9, 2021), *reconsideration denied*, No. CV-19-02746-PHX-DWL, 2021
18 WL 9597871 (D. Ariz. July 21, 2021) (imposing sanctions for the disclosure of evidence
19 on the discovery deadline because belated disclosure prevented a party from pursuing
20 additional, related discovery).

21 **B. The Requested Sanctions Are Appropriate**

22 Early on, this Court urged the parties to “review[] carefully” General Order 17-08,
23 which “implements the MIDP.” *C.M.* ECF No. 47 ¶ 4 n.1. The Court warned that
24 “[p]arties who unreasonably postpone disclosure of relevant information to the end of the
25 discovery period will,” pursuant to General Order 17-08, “be subject to sanctions.” *Id.*
26 Defendant unreasonably postponed disclosure of highly relevant information until *after* the
27 discovery period. Sanctions, therefore, are appropriate.

1 This Court has articulated one possible sanction for violations of the MIDP order.
2 “Parties who fail to timely disclose relevant information,” the Court wrote, “will be
3 precluded from using it in the case and may be subject to other sanctions.” *C.M.* ECF No.
4 47 ¶ 4 n.1. Precluding Defendant from using the handwritten notes does not help Plaintiffs,
5 however, because Defendant’s untimely evidence favors Plaintiffs, rather than Defendant.
6 Instead, Plaintiffs propose a similar form of preclusion that is tailored to reflect
7 Defendant’s failure to produce documents that are potentially *harmful* to its case: (1) that
8 the notes are deemed admitted at trial if offered by Plaintiffs; and (2) that Defendant is
9 precluded from contesting or otherwise using the notes at trial. Plaintiffs seek an even
10 more limited sanction for Defendant’s failure to timely produce the Annotated Documents,
11 to reflect Defendant’s apparent lack of fault, while also remediating the significant
12 prejudice to Plaintiffs—namely, that the Annotated Documents be deemed admitted at trial
13 if offered by Plaintiffs.

14 Plaintiffs’ proposed sanctions are relatively modest. Rule 37’s enumerated merits
15 sanctions include, among others, “deem[ing] certain facts as established for purposes of
16 the action.” *Sumitomo Marine & Fire Ins. Co.*, 617 F.2d at 1369. Given Defendant’s
17 failure to comply with the MIDP’s clear mandate with respect to the handwritten notes, it
18 would be entirely fair to deem established Defendant’s admissions—
19 —made in the late-produced notes.

20 A more severe sanction would be warranted here because it was the government that
21 disobeyed the MIDP order. As the Ninth Circuit has said:

22 The effectiveness of and need for harsh measures is particularly
23 evident when the disobedient party is the government. The public
24 interest requires not only that Court orders be obeyed but further
25 that Governmental agencies which are charged with the
enforcement of laws should set the example of compliance with
Court orders.

26 *Sumitomo Marine & Fire Ins. Co.*, 617 F.2d at 1370 (cleaned up). Nonetheless, Plaintiffs
27 seek sanctions designed only to prohibit witnesses from disputing or explaining away the
28 contents of notes that Plaintiffs did not have the benefit of during depositions—sanctions

1 that are consistent with the type of sanctions contemplated by the Court in the Case
2 Management Order. Plaintiffs submit that the requested sanctions would adequately
3 restore Plaintiffs to their *status quo ante*.¹⁰

4 Although Plaintiffs do not wish to prolong this case by taking additional
5 depositions, Plaintiffs request that, if the Court does not grant Plaintiff's requested relief,
6 Plaintiffs be permitted to depose any government trial witnesses who authored late
7 produced notes or annotations about those documents, prior to their testimony at trial.¹¹

8 V. CONCLUSION

9 Based on the foregoing, Plaintiffs request that the Court issue an order that (1) the
10 late-produced handwritten notes and hard-copy documents are deemed admitted at trial if
11 offered by Plaintiffs; (2) that Defendant is precluded from contesting or otherwise using
12 the late-produced handwritten notes and hard-copy documents at trial; and (3) that the late-
13 produced Annotated Document are deemed admitted at trial if offered by Plaintiffs.

14 Respectfully submitted this 14th day of December, 2022.

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22 ¹⁰ This sanction is particularly reasonable since, under the Federal Tort Claims Act, the
23 case will be subject to a bench trial and not a jury trial, and the Court will be able to
determine the weight of the evidence. *See* 32 CFR § 750.32(b) (citing 28 U.S.C. § 2402).

24 ¹¹ The court in *Nyerges v. Hillstone Restaurant Group Inc.* acknowledged that reopening
25 depositions after the close of fact discovery is not an adequate sanction as it would "cause
26 undue delay" and would "inadequately deter [the disobedient party's] discovery violation."
27 No. CV-19-02376-PHX-DWL, 2021 WL 3299625, at *16 (D. Ariz. Aug. 2, 2021) (citing
28 Mandatory Initial Discovery Users' Manual for the Dist. of Ariz. § C.1(h) ("Courts should
remember that the effectiveness of the MIDP will depend significantly on the willingness
of judges to impose real consequences on parties who fail to comply with their mandatory
discovery obligations.")). Something more is required. To the extent Plaintiffs must take
additional depositions to probe potential trial testimony about the late produced
documents, Plaintiffs will seek to recover fees and costs for those depositions from
Defendant. *See* Fed. R. Civ. P. 37(b)(2)(C).

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