IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

BEAR RIVER MUTUAL INSURANCE COMPANY, Plaintiff, vs. FORD MOTOR COMPANY, a Michigan corporation, Defendant.	MEMORANDUM DECISION & ORDER ON DEFENDANT'S RENEWED MOTION FOR SPOLIATION SANCTIONS Case No. 2:12-CV-731 Judge Dee Benson

This matter is before the Court on Defendant Ford Motor Company's ("Ford") Renewed Motion for Spoliation Sanctions (Dkt. No. 86), Defendant's Motion to Exclude Opinions of Jeff Morrill (Dkt. No. 80), and Defendant's Motion to Exclude Opinions of Tad Norris (Dkt. No. 81). At oral argument on the motions, Ford was represented by Clay A. Guise, Tracy H. Fowler and Paul W. Shakespear. Plaintiff Bear River Mutual Insurance Company ("Bear River") was represented by Eric Olsen and Sarah Marie Wade. At the conclusion of the hearing, the Court took the matter under advisement. Now, having further considered the law and facts relating to

the motions, the Court renders the following Memorandum Decision and Order.

BACKGROUND

The facts of this case are generally undisputed and have been set forth in detail, for the most part, in the Court's prior Order on Defendant's Motion for Spoliation Sanctions. (Dkt. No. 35.) In sum, Plaintiff Bear River claims that the speed control deactivation switch (SCDS) in the 1994 Ford F-150 pickup truck owned by its insureds, Jeff and Julie Schoepf, was defective and caused a fire that spread from the truck to the Schoepf's house.[1] Bear River's claim is based on an investigation conducted by Bear River's expert, Tad Norris, a fire investigator with IC Specialty Services, who was assigned to inspect the scene and determine the origin of the fire. On behalf of Bear River, Mr. Norris inspected the scene and decided what evidence should be preserved without Ford's presence, consent or input. As part of that investigation, Mr. Norris removed the SCDS' hexport and electrical housing and claims that he sent both to another expert, Jeff Morrill, who requested an examination of the hexport. Mr. Morrill acknowledged receipt of the hexport, but claims he never received the electrical housing. Following Norris' inspection and investigation, the scene of the fire was destroyed. Additionally, Plaintiff lost the hexport before it could be inspected and tested by Ford, and Plaintiff lost the electrical housing before inspection and/or testing by anyone.

At the outset of this case, given Plaintiff's failure to include Ford in the scene inspection combined with Plaintiff's loss of critical evidence, Ford filed a Motion for Spoliation Sanctions, requesting dismissal of the case in its entirety. (Dkt. No. 20.) At that same time, the parties filed

[1]The Complaint was filed by Jeff and Julie Schoepf, but Bear River substituted in their place based on its subrogation rights pursuant to its insurance policy with the Schoepfs.

a "Joint Motion to Stay Discovery" in order to "conserve resources while the parties and Court address the viability of this case." (Dkt. No. 18.)

On August 12, 2014, following briefing and oral argument on Ford's Motion for Spoliation Sanctions, the Court entered an order that granted, in part, Ford's motion for spoliation sanctions. (Dkt. No. 35, Order on Defendant's Motion for Spoliation Sanctions.) The Court's Order recognized the culpability of Bear River and the resulting prejudice to Ford, but stopped short of dismissing this action based on the information that was then-known regarding Mr. Norris'scene inspection and the loss of the SCDS.

Over two years later, and following the completion of expert discovery, Ford filed the motion now before the court – a Renewed Motion for Spoliation Sanctions – once again requesting dismissal of the case. Bear River opposed the motion, arguing that Ford's "renewed" motion "proffers no substantial new evidence or arguments" and is therefore an improper motion to reconsider that should be denied. (Dkt. No. 98, Pl.'s Opp'n at 6, 11.) Ford acknowledges that its initial motion for spoliation sanctions generally identified the same issues – Bear River's failure to preserve the scene and the inadequate testing and subsequent loss of the hexport for the SCDS. However, Ford asserts that during the two and one-half years since Ford filed its initial motion the evidence relating to those issues has developed and significantly changed. According to Ford, these subsequent developments fundamentally alter the spoliation analysis and merit dismissal of the case.

DISCUSSION

Federal courts possess inherent powers necessary "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). Among those inherent powers is "the ability to fashion an appropriate sanction." Id. at 44; see also Smith v. Northwest Fin. Acceptance Inc., 129 F.3d 1408, 1419 (10th Cir. 1997 ("[A] federal court possesses the authority to impose . . . sanctions under its inherent power to control and supervise its own proceedings."); Martinez v. Roscoe, 100 F.3d 121, 123 (10th Cir. 1996) (providing a district court's imposition of sanctions under its inherent power is reviewed for abuse of discretion).

"When deciding whether to sanction a party for the spoliation of evidence, courts have considered a variety of factors, two of which generally carry the most weight: (1) the degree of culpability of the party who lost or destroyed the evidence, and (2) the degree of actual prejudice to the other party." Jordan F. Miller Corp. v. Mid-Continent Aircraft Services, Inc., 139 F.3d 912, 1998 WL 68879 (10th Cir. 1998) (unpublished) (citing Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994)); Dillon v. Nissan Motor Co., 986 F.2d 263, 67-68 (8th Cir. 1993); Vasquez-Corales v. Sea-Land Serv., Inc., 172 F.R.D. 10, 13-14 (D.P.R. 1997) (collecting cases). In applying this standard, the Court remains mindful that "a court should impose the least onerous sanction that will remedy the prejudice and, where applicable, punish the wrongdoer and deter future wrongdoing." Jordan F. Miller Corp., 139 F.3d 912, 1998 WL 68879, at *6. And "dismissal is usually appropriate only where a lesser sanction would not serve the interest of justice." Id. (quoting Meade v. Grubbs, 841 F.2d 1512, 1520 (10th Cir. 1988).

Nonetheless, dismissal as a sanction is clearly within the district court's discretion. See Chambers, 501 U.S. at 44 ("[O]utright dismissal of a lawsuit . . . is a particularly severe sanction, yet is within the court's discretion.").

In this case, Ford claims that since the initial motion to dismiss for spoliation sanctions, Bear River's experts have been deposed and their testimony has revealed new facts that alter the spoliation analysis, warranting dismissal. Specifically, Ford claims it has obtained new and significant information regarding: (1) Plaintiff's failure to follow National Fire Protection Association (NFPA) codes and standards resulting in a failure to properly document and preserve evidence at the scene, (2) the lack of reliability and conclusiveness of the SEM testing, and (3) the significance of the loss of the electrical housing. Having carefully reviewed Ford's renewed motion, the written submissions of the parties, and the arguments of counsel, the Court agrees.

1. The Spoliation of the Scene

Since Ford's initial motion and the Court's August 2014 Order, new evidence has been discovered regarding Mr. Norris' failure to follow proper procedures with regard to his investigation of the fire. National Fire Protection Association (NFPA) 921 is a scientific-based investigation standard which requires an investigator to identify and evaluate all potential causes of a fire. See NFPA 921, § 19.2. Although Mr. Norris purported to follow NFPA 921, discovery has revealed multiple times when Mr. Norris failed to meet his obligations.

For example, under NFPA 921, Mr. Norris had a duty to notify all parties of his investigation. See NFPA 921, § 15.2.8.2. During his first inspection of the Schoepf's garage,

Mr. Norris determined the area of origin was in the northwest corner. Because this "first inspection" revealed and/or identified other interested parties, consistent with his obligations under NFPA 921, Mr. Norris "preserved the scene" and "didn't do any destructive further examination at that time." (Dkt. No. 86-3, Norris Dep. at 73.) Mr. Norris knew that in order to proceed, a "joint inspection" was necessary and "potential parties needed to be put on notice and given an opportunity" to inspect the scene. (Norris Dep. at 73, 95.) Thereafter, Mr. Norris notified his client, Bear River, but otherwise did nothing to notify Ford or others of the second scene inspection. (Norris Dep. at 95-96.) When Ford did not appear for the second inspection, Mr. Norris did nothing to confirm whether Bear River had notified Ford and whether Ford wanted to inspect the scene. (Norris Dep. at 97-98.) Plaintiff's failure to notify Ford of the second inspection failed to comply with NFPA 921.

Then, during the second inspection, without Ford present, Mr. Norris failed to meet his obligations under NFPA 921 by failing to properly document the scene and identify and preserve evidence related to all potential causes of the fire. Because the scene was not properly documented, the total number of potential causes of the fire remains uncertain. As Ford points out, "evidence regarding specific potential causes associated with an electric receptacle were not preserved." (Dkt. No. 86-7, Colwell Dep. at 72, 106-07.) Although Mr. Norris identified a timer for the sprinkler system that was plugged into this "electric receptacle" as a potential cause of the fire, he failed to identify an electric fence that was plugged into the same receptacle. (Colwell Dep. at 78-79.) The air compressor that Mr. Norris identified as a potential cause of the fire was located on a shelf near the electric receptacle, but Mr. Norris did not preserve the male

plug blades from the electric fence, the sprinkler timer, or the air compressor. (Colwell Dep. at 106-07.) According to Ford's expert, "these blades would have helped determine whether or not they could have acted as an ignition source." (Colwell Dep. at 107.) Moreover, Bear River's opposition to Ford's motion acknowledges that an additional potential cause of the fire – an electric dog fence – was not known to Ford when it filed its initial motion. NFPA warns that the failure to fully analyze and excavate the fire scene "may lead to an incorrect analysis." NFPA 921, § 18.3.2.3.

Mr. Norris then compounded the prejudice caused by his failure to properly document and preserve evidence at the scene by also failing to take steps to notify Ford before the scene was demolished. Although NFPA does not require "infinite preservation of the fire scene," it provides:

> Once the scene has been documented by interested parties, and the relevant evidence and the relevant evidence removed, there is no reason to continue to preserve the scene. The decision as to when sufficient steps have been taken to allow the resumption of normal activities should be made by all interested parties known at the time.

NFPA 921, § 17.3.7. In this case, it is undisputed that Mr. Norris identified Ford as an "interested party" after his first inspection of the scene. Then, after the second inspection, Mr. Norris focused on the SCDS from the Ford F-150 as the cause of the fire. Mr. Norris was also aware that the scene, the vehicle, and the SCDS had not been "documented" by Ford as contemplated by NFPA 921, and yet he took no effort to involve Ford in the decision to determine if "sufficient steps ha[d] been taken" to allow the demolition of the scene and the permanent destruction of evidence of potential causes of the fire.

In sum, the court concludes that discovery in this case has provided new information regarding Mr. Norris's failure to comply with NFPA 921 in terms of identifying possible causes of the fire, preserving evidence regarding these causes, and involving interested parties such as Ford in these decisions. As a result, Ford has been severely prejudiced by Bear River's conduct and has been deprived the ability to assess all potential causes of the fire.

2. The Spoliation of the Hexport

Additionally, the Court finds that the prejudice to Ford resulting from the loss of the hexport is more significant than originally understood.

Back in 2014, the Court was informed that although Plaintiff had lost the hexport, prior to the loss, Plaintiff's expert, Mr. Morrill, had obtained a Scanning Electron Microscopy (SEM) analysis of the hexport. And, relying on the SEM data – which identified the presence of copper on the face of the hexport – Plaintiff's experts opined that there was an internal failure within the SCDS which caused the fire. (Dkt. No. 23-3, Ingersoll Aff. at ¶11.) Accordingly, Plaintiff asserted that the loss of the hexport was not particularly prejudicial to Ford "because the SCDS ha[d] already been scanned and hard data obtained from that scan [was] available to Ford." (Dkt. No. 23, Pl.'s Mem. In Opp'n at 12.) In other words, Plaintiff claimed that even though it had lost the hexport, there was minimal prejudice to Ford because the SEM data was available to both parties and it provided clear evidence regarding the fire.

However, expert discovery has shed new light on the extent to which Plaintiff's testing of the SCDS was inadequate and has revealed that the SEM data is not as reliable as Plaintiff initially suggested. For example, Mr. Morrill testified that the purpose of conducting the SEM

analysis was to identify the presence (or absence) of copper on the face of the hexport because in its "as-manufactured" condition the face of the hexport contains no copper. (Dkt. No. 23-2, Morrill Aff. ¶ 11.) Morrill stated that in his experience, "when an SCDS internally fails, copper is deposited on the face of the hexport." (Dkt. No. 23-2, Ex. 3, Letter from J. Morrill to Bear River.) Morrill defined a "failure" as an arcing of the SCDS's electrical contacts, which is necessary for a fire to start in the SCDS. (Dkt. No. 23-2, Morrill Aff. ¶ 12; Morrill Dep. at 94-95.) Thus, the SEM analysis assumes that if copper is on the face of the hexport then it must have come from the SCDS' electrical contacts.

Mr. Morrill admitted, however, that the face of the hexport was not cleaned before the SEM analysis was conducted. (Morrill Dep. at 50-51, 57-58.) And he admitted that the SEM data included various elements from unknown sources – presumably debris from the fire. (Morrill Dep. at 80-81.) Because debris was present on the face of the hexport when the SEM analysis was conducted, there is no way to know whether the copper identified in the SEM data was from debris or from the arcing of the SCDS' electrical contacts.

These limitations in the SEM analysis are compounded by the fact that when Morrill sent the hexport for analysis he did not request any elemental maps necessary to identify "copper morphology." (Morrill Dep. at 80-83, 86.) The absence of this data is significant because Mr. Morrill admits that if there was an arcing of the SCDS' electrical contacts he would expect to find copper morphology, i.e., some readily identifiable shape containing copper. (Morrill Dep. at 82.)

In sum, subsequent discovery has confirmed problems with the SEM analysis requested

by Mr. Morrill and the need for more thorough testing. However, this testing cannot occur because Plaintiff lost the hexport.

3. The Spoliation of the Electrical Housing

As explained in detail at oral argument, the SCDS contains two main components: (1) the metal hexport, and (2) the electrical housing that contains the SCDS' electrical contacts. At the time of Ford's initial spoliation motion, Plaintiff glossed over the loss of the electrical housing by focusing on the fact that prior to losing the hexport, Plaintiff obtained a SEM analysis of the hexport, which plaintiffs claimed was reliable evidence that the SCDS caused the fire. However, as explained above, discovery has shown that the SEM analysis is not as reliable as plaintiffs initially asserted.

Having determined that the SEM data is not as reliable as initially believed, the prejudice caused by Plaintiff's additional loss of the electrical housing is substantially increased. The electrical housing is significant because, as both parties acknowledge, analysis of the electrical housing could conclusively eliminate the SCDS as the cause of the fire. The experts on both sides agree that the SCDS' contacts must arc in order for a fire to start in the SCDS and an x-ray of the electrical housing would reveal arced contacts. Stated another way, if the electrical contacts in the electrical housing remained intact, then the SCDS could not have caused the fire. Unfortunately, however, Plaintiff lost the SCDS' electrical housing before *either party* had been able to conduct *any* testing.

During his August 17, 2011 inspection, Mr. Norris elected to preserve the SDCS' hexport and electrical housing, which Norris testified were placed into bags marked 42-7 (housing) and

42-8 (hexport). (Norris Dep. at 72-72, 153-55, 161-62.) On September 8, 2011, Norris sent the hexport and electrical housing of the SCDS to Mr. Morrill. (Norris Dep. Ex. 3 (letter confirming 42-7 and 42-8 were sent to Mr. Morrill).) Mr. Morrill testified that the SCDS came in a small box containing two zip lock bags, but he denied that the package contained the electrical housing for the SCDS. (Morrill Dep. at 16-18, 31-34, 42.) Morrill did not photograph or videotape what he received, so neither he nor Mr. Norris can explain when or how the electrical housing was lost.

Morrill concedes the significance of the electrical housing because, as he explains, the process that can lead to a fire at the SCDS necessarily requires leakage of brake fluid into the electrical housing and the formation of a path from the contacts in the housing, through the fluid, to the grounded hexport. (Morrill Dep. at 68-71.) Moreover, Morrill concedes that a fire cannot occur at an SCDS unless the contacts have arced and melted. (Morrill Dep. at 75-76, 94-95.) Accordingly, Morrill admitted that if he had received the electrical housing, a simple and quick x-ray would establish the condition of the contacts and could conclusively eliminate the SCDS as the cause of the fire. (Morrill Dep. at 35.)

In sum, Plaintiff concedes that taking an x-ray of the electrical housing is a standard and inexpensive procedure that could conclusively eliminate the SCDS as the cause of the fire. Yet the depositions of Plaintiff's experts show that very little, if any, attention was given to the documentation, preservation and analysis of this critical piece of evidence. Neither Mr. Norris nor Mr. Morrill can explain what happened to the electrical housing portion of the SCDS, and as a result of Plaintiff's failure to document and preserve the electrical housing, Ford has been

denied the opportunity to analyze evidence that could conclusively eliminate the SCDS, and therefore the Ford F-150, as the cause of the fire.

CONCLUSION

The court finds that expert discovery has revealed new information regarding Bear River's failure to document, preserve and test critical evidence – information that was not available when Ford filed its initial motion for spoliation sanctions. The discovery in this case has also illuminated the carelessness and culpability of Plaintiff and Plaintiff's experts with regard to the destruction and loss of the most critical evidence in this case.

In light of this, the Court agrees with the following statement by Ford:

> At every turn – in arranging for inspections of the scene, in conducting those inspections, in making decisions regarding the preservation of evidence, in documenting the preserved evidence, in transmitting evidence, and in deciding what testing would (and would not) be performed – Bear River and its experts made conscious decisions and took, at best, reckless actions that have irreparably prejudiced Ford's defense of this case.

(Dkt. No. 109, Def.'s Reply at 10.) Consequently, the Court concludes that the spoliation of evidence in this case requires the dismissal of Bear River's claims. Ford's Renewed Motion to Dismiss for Spoliation Sanctions is GRANTED. This action is DISMISSED in its entirety. Defendant's Motions to Exclude the Opinions of Jeff Morrill and Tad Norris are MOOT.

Dated this 22nd day of May, 2017.

Dee Benson
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

BEAR RIVER MUTUAL INSURANCE COMPANY, Plaintiffs, v. FORD MOTOR COMPANY, a Michigan corporation, Defendant.	**FORD MOTOR COMPANY'S RENEWED MOTION FOR SPOLIATION SANCTIONS AND SUPPORTING MEMORANDUM** Case No: 2:12-cv-00731 Honorable Judge Dee Benson

Defendant Ford Motor Company ("Ford") moves to dismiss Plaintiff's claims because of the spoliation of the scene and speed control deactivation switch remains by Plaintiff's experts, Tad Norris and Jeffrey Morrill. This Court has already recognized their culpability and the resulting prejudice to Ford, but stopped short of dismissing Plaintiff's claims. However, the

subsequent testimony of Mr. Norris and Mr. Morrill (and other experts) has revealed the irreparable prejudice to Ford from the actions of Plaintiff and its experts. Accordingly, Ford requests that the case be dismissed in its entirety. The legal and factual bases for Ford's request are set forth and explained as follows:

I. SUMMARY

Plaintiff Bear River Mutual Insurance Company claims the speed control deactivation switch ("SCDS") in the 1994 Ford F-150 pickup truck owned by its insureds, Jeff and Julie Schoepf, was defective and caused a fire that spread from the truck to the Schoepfs' house.[1] This claim is based on an inspection of the scene and the selection of evidence to be preserved by Plaintiff's expert, Tad Norris, without Ford's consent or input. Mr. Norris removed the SCDS' hexport and its electrical housing and claims that he sent them to another expert, Jeff Morrill, who requested a limited laboratory examination of the hexport. Mr. Morrill denied that he received the electrical housing. However, Plaintiff and its experts admit the scene was destroyed and the hexport *and* the electrical housing were lost before they could be inspected and tested by Ford.

On August 12, 2014, the Court entered an order that granted, in part, Ford's motion for spoliation sanctions based on information then known regarding Mr. Norris' scene inspections and the loss of the remains of the SCDS. See Order on Defendant's Motion for Spoliation Sanctions, Exhibit 1. After the Court's Order, the parties completed expert discovery, which revealed additional facts regarding Mr. Norris' actions and the full extent of the unfair prejudice to Ford if Plaintiff is allowed to proceed.

[1] The Complaint in this matter was filed by Jeff and Julie Schoepf, but Bear River substituted in their place based on its subrogation rights pursuant to its insurance policy with the Schoepfs.

First, while the Court's Order recognized the prejudice to Ford because it was not able to inspect the scene, expert discovery revealed specific potential causes of the fire *within the area of origin identified by Mr. Norris* that were not documented or preserved. Mr. Norris claims he followed NFPA 921 in his investigation, but NFPA 921 includes specific requirements related to the identification of potential causes, preserving evidence, and documenting the scene – and it requires consultation with potentially responsible parties in these decisions. Because Mr. Norris failed meet these requirements, critical evidence regarding possible causes of the fire was not preserved and cannot be evaluated.

Second, Mr. Norris testified that he sent the SCDS' electrical housing to Mr. Morrill, but Mr. Morrill denies receiving it. However, Mr. Morrill admits that the electrical housing is a critical piece of evidence and he admits an x-ray can conclusively eliminate the SCDS as the cause of the fire. Because Mr. Norris failed to document, x-ray, or preserve the electrical housing, Ford has lost the opportunity to develop important and potentially conclusive evidence that the SCDS did not cause the fire.

Third, Mr. Morrill admitted that he did not request the cleaning of the surface of the hexport before the SEM analysis was conducted. As a result, Mr. Morrill admitted that he cannot explain the source or composition of various debris identified in the SEM report. He also admitted the SEM report does not contain elemental maps that are necessary to show copper morphology, which Mr. Morrill would expect to see in an SCDS that caused a fire. Because the hexport was lost, these problems cannot be corrected.

Individually and collectively, these issues have allowed Plaintiff to proceed with its claim against Ford while preventing Ford from conclusively rebutting this claim based on the analysis and testing of the lost evidence. In fact, Plaintiff's spoliation of evidence prevents Ford from developing the very evidence that Mr. Norris and Mr. Morrill concede would be dispositive in

eliminating the SCDS as the cause of the fire. As a result, Plaintiff is *benefitting* from the spoliation of evidence by its experts. The only remedy to prevent the resulting prejudice to Ford is dismissal.

II. FACTUAL AND PROCEDURAL BACKGROUND

The following facts are not in dispute and have been previously addressed by the Court. See Order, Exhibit 1.

1. On July 23, 2011, a fire occurred at the home of Jeff and Julie Schoepf in Highland, Utah.

2. The Schoepfs' home and its contents were insured by Bear River Mutual Insurance Company ("Bear River").

3. Bear River assigned Tad Norris, a fire investigator with IC Specialty Services, to conduct a scene inspection and determine the origin and cause of the fire.

4. On July 26, 2011, Mr. Norris went to the scene, but only the Schoepfs were present.

5. At that time, Mr. Norris determined that the area of origin covered a large area in the northwest corner of the garage.

6. Mr. Norris identified several potential causes within this area, including an irrigation timer, an air compressor, and the Schoepfs' 1994 F-150.

7. Mr. Norris contacted Bear River and proposed a joint inspection involving all potentially interested parties, which included Ford.

8. Bear River sent two letters to Ford regarding the joint inspection, but neither letter used the correct address, and Bear River did not confirm their receipt by Ford.

9. On August 17, 2011, Mr. Norris returned to the scene for a second inspection.

10. Ford was not aware of the inspection, and no one from Ford attended.

11. During his second inspection, Mr. Norris made decisions regarding the evidence that would be photographed and retained.

12. During his second inspection, Mr. Norris separately identified, photographed, and removed the SCDS' hexport and electrical housing.

13. Mr. Norris put the hexport in a bag marked "42-8 Speed Control Deactivation Switch Hex Port."

14. Mr. Norris did not photograph the bag or the hexport in the bag.

15. Mr. Norris claims that he put the remains of the electrical housing into a bag marked "42-7 Speed Control Deactivation Switch Wiring." Norris Dep. at 153-155, 161-164 and Norris Dep. Exhibits 8-11 (Norris' photographs of the electrical housing of the SCDS at the scene), excerpts attached as Exhibit 2.

16. Mr. Norris did not photograph the bag or the electrical housing in the bag.

17. Mr. Norris took possession of the hexport, the electrical housing, and other evidence he identified at the scene and it was stored by his employer, IC Specialty Services.

18. On or about September 7, 2011, Mr. Norris sent the SCDS evidence contained in the bags marked 42-7 and 42-8 to Mr. Morrill. See Letter from IC Specialty Services to MorrFire Investigations, dated September 7, 2011, attached as Exhibit 3.

19. Mr. Morrill admits he received the hexport, but he denies that he received the electrical housing.

20. On or about September 20, 2011, Mr. Morrill sent a letter to Bear River documenting the SEM analysis that he requested of the hexport. See Letter from Jeffery T. Morrill to Marcy Johnson at Bear River, Sept. 20, 2011, attached as Exhibit 4.

21. Mr. Morrill never photographed or videotaped any of the SCDS evidence that he received from Mr. Norris.

22. On or about November 15, 2011, Mr. Morrill returned the SCDS evidence he received to Mr. Norris at IC Specialty Services. See Evidence Transmittal Letter, Exhibit 5.

23. Mr. Norris did not x-ray the electrical housing of the SCDS.

24. Mr. Morrill did not x-ray the electrical housing of the SCDS.

25. The scene was demolished without notice to Ford and before Ford had a chance to inspect it.

26. The electrical housing was lost before it could be inspected or x-rayed by Ford.

27. The hexport was lost before it could be inspected or tested by Ford.

III. LEGAL ARGUMENT

"A litigant has a duty to preserve evidence that he knows or should have known is relevant to imminent or ongoing litigation." Jordan F. Miller Corp. v. Mid-Continent Aircraft Services, Inc., 139 F.3d 912, ---, 1998 WL 68879, *5 (10th Cir. 1998).[2] "Th[e] duty [to preserve evidence] is heightened for an insurer because it is a sophisticated entity experienced in litigation." Workman v. AB Electrolux Corp., 03-4195-JAR, 2005 WL 1896246, *6 (D. Kan. Aug. 8, 2005) (citing Northern Assur. Co. v. Ware, 145 F.R.D. 281, 284 (D.Me. 1993)). A litigant's breach of this duty is frequently addressed through the Court's inherent powers to ensure the orderly and expeditious disposition of cases pending before it. Id. at *3 (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 43 (quotation omitted)). Among this Court's inherent powers is "the ability to fashion an appropriate sanction." Id. The Tenth Circuit "reviews a court's imposition of sanctions under its inherent power for abuse of discretion." Id.

[2] Although Jordan F. Miller Corp. is unpublished, the decision was cited and discussed with approval in published decisions. See e.g. 103 Investors I, L.P. v. Square D Co., 470 F.3d 985, 989 (10th Cir. 2006) ("Defendant was not required to show that plaintiff acted in bad faith in destroying the evidence in order to prevail on its request for spoliation sanctions.").

Sanctions imposed through a court's inherent power do not require bad faith destruction of evidence. Id. at *4 (noting, while discussing Aramburu v. Boeing Co., 112 F.3d 1398 (10th Cir. 1997), that "[c]ourts have not generally imposed a similar requirement of bad faith when considering other sanctions for the spoliation of evidence" (citing Allstate Ins. Co. v. Sunbeam Corp., 53 F.3d 804, 806-07 (7th Cir. 1995) (upholding dismissal of claims as sanction for spoliation, even in absence of bad faith on part of despoiler)); Dillon v. Nissan Motor Co., 986 F.2d 263, 267-69 (upholding exclusion of evidence as sanction for spoliation, even in absence of bad faith on part of despoiler); Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.2d 363, 368-69 (9th Cir. 1992) (same); see also Workman, supra ("The Tenth Circuit does not impose a similar requirement of bad faith when considering other sanctions [aside from an adverse inference] for spoliation, however.").

"When deciding whether to sanction a party for the spoliation of evidence [pursuant to a court's inherent powers], courts have considered a variety of factors, two of which generally carry the most weight:

(1) the degree of the culpability of the party who lost or destroyed the evidence, and

(2) the degree of actual prejudice to the other party."

Id. (citations omitted). "A defendant suffers prejudice if the plaintiffs' actions impair the defendant's ability to go to trial or threatened to interfere with the rightful decision of the case." State Farm Fire & Cas. Co. v. Broan Mfg. Co., Inc., 523 F. Supp. 2d 992, 997 (D. Ariz. 2007) (quoting Anheuser-Busch, Inc. v. Natural Beverage Distributors, 69 F.3d 337, 353-54 (9th Cir. 1995).

Here, Plaintiff and its experts were keenly aware that they had a duty to preserve evidence related to *all* potential causes of the fire. Mr. Norris failed to do so. Ford and its experts cannot inspect the scene and they cannot evaluate various potential causes of the fire that

Mr. Norris did not document or preserve. Then, having identified the critical portion of the SCDS – the electrical housing containing the contacts that allegedly failed – Mr. Norris did not properly document this evidence and created a dispute between him and Mr. Morrill as to whether it was sent to Mr. Morrill for analysis. At some point, this critical evidence was lost before it could be x-rayed. Likewise, Mr. Norris lost the hexport before it could be subjected to a complete SEM analysis. As a result, Plaintiff and its experts have placed Ford at an extreme and unfair disadvantage. Plaintiff's culpable conduct and the resulting prejudicial failures are discussed below.

A. The Failure to Preserve and Document Potential Causes of the Fire.

NFPA 921 is a scientific-based investigation standard "used in the field and by courts." Landry v. State, 2016 UT App 164, ¶ 36, n. 4. NFPA 921 requires an investigator to identify and evaluate all potential causes of a fire. See NFPA 921, § 19.2. In its Order, the Court recognized that plaintiffs and its experts "had a duty to preserve, among other things, evidence related to all potential causes of the fire, including the SCDS" and that they had "failed to ensure that Ford had the opportunity to inspect the fire scene before it was demolished." See Order at 7. Subsequent discovery identified multiple times when Mr. Norris failed to meet his obligations under NFPA 921 to identify and preserve evidence of potential causes of the fire. Mr. Norris' actions resulted in the spoliation of critical evidence that has prevented Ford from evaluating specific potential causes of the fire.

Mr. Norris claimed that he followed NFPA 921 in connection with his investigation of the alleged incident. Norris Dep. at 30-31. "[A]n expert purporting to invoke [NFPA 921] must show he applied the methodology reliably to the facts of the case." Werth v. Hill-Rom, Inc., 856

F. Supp. 2d 1051, 1060 (D. Minn. 2012) (citations omitted).[3] Under NFPA 921, Mr. Norris had a duty – which was magnified because he works in the private sector – to notify all parties of his investigation.

> The investigator, particularly the private sector investigator, may need to make a reasonable effort to notify all parties, identifiable at that time, who may have a legal interest in the investigation.

NFPA 921, § 15.2.8.2 (2014 ed.).[4] During his first inspection, Mr. Norris determined that the area of origin was within the northwest corner of the garage. Consistent with his obligations under NFPA 921, he did not conduct a destructive examination of the scene at that time because he had identified other interested parties. Norris Dep. at 95-98. He notified Bear River, but otherwise did nothing to notify Ford or others of the second scene inspection. Id. at 95-96. And when Ford did not appear for the second inspection, he did nothing to confirm if Ford had been notified or whether Ford wanted to inspect the scene. Id. at 97-98. Mr. Norris' failure to notify Ford of the second inspection did not comply with NFPA 921.

During the second inspection, Mr. Norris made determinations regarding the evidence that would be preserved. Id. at 116-117. NFPA 921 specifically addresses the identification and preservation of evidence related to potential causes of the fire:

> During the course of any fire investigation, the fire investigator is likely to be responsible for locating, collecting, identifying, storing, examining, and arranging for testing of physical evidence. The fire investigator should be thoroughly familiar with the recommended and accepted methods of processing such physical evidence.

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[3] Mr. Norris' failure to follow NFPA 921 is also discussed in Ford's Memorandum in Support its Motion to Exclude Opinions of Tad Norris. This motion focuses on the prejudice to Ford from Mr. Norris' failure to preserve evidence of potential causes of the fire.

[4] To the extent Plaintiff claims that either the 2008 or 2011 version of NFPA applies to Mr. Norris' investigation, both of these versions contain the same provisions cited herein (although they have different numbers).

> Physical evidence, defined generally, is any physical or tangible item that tends to prove or disprove a particular fact or issue. Physical evidence at the fire scene may be relevant to the issues of the origin, cause, spread, or the responsibility for the fire.

NFPA 921, § 17.1, 17.2.1. NFPA 921 also warns that the failure to fully analyze and excavate the fire scene "may lead to an incorrect analysis." NFPA 921, § 18.3.2.3. Mr. Norris did not meet his obligations under NFPA 921 because evidence related to potential causes of the fire was not identified or preserved.

Ford's expert, Jeff Colwell, agreed with Mr. Norris' initial determination that the fire originated in the northwest corner of the garage. See Colwell Dep., p. 98:3-99:9, excerpts attached as Exhibit 6. However, the documentation of the scene before it was destroyed prevents the identification of all potential causes of the fire in this area because the scene was not properly documented and preserved. Id. at 99:15-105:10, 105:22-106:20.

> A: And had I been at the fire scene, I would have done this [scene diagram] totally different and would have actually made a two-scale [sic] sketch, and the we would know what was there, but that was not done at this fire scene, and so therefore, there's significant uncertainty as to what was actually there.

Id. at 102:23-103:3. See also id. at 104:20-104:21 ("fire scene was not properly excavated, properly handled"). Under NFPA 921, Mr. Norris should have measured the garage, identified the locations of components, and "collected all of the physical evidence and not left portions of it in the garage to be disposed of later." Id. at 104:25-105:15.

Despite the uncertainty regarding the total number of potential causes of the fire, Mr. Colwell identified evidence regarding specific potential causes associated with an electric receptacle located in front of the Schoepfs' F-150 that were not preserved. Id. at 72:5-72:19, 106:21-107:12. Mr. Norris identified a timer for the sprinkler system that was plugged into this receptacle as a potential cause of fire. However, he did not identify an electric fence that was

plugged into the same receptacle. Id. at 78:11-79:16. The air compressor that Mr. Norris identified as a potential cause of the fire was located on a shelf near the receptacle. However, Norris did not preserve the male plug blades from the electric fence, the sprinkler timer, or the air compressor. Id. at 106:21-107:19. These blades "would have helped determine whether or not they could have acted as an ignition source." Id. at 108:15-109:9.

Mr. Norris compounded the prejudice caused by his failure to properly document the scene and his failure to preserve evidence of potential causes of the fire by failing to take steps to notify Ford before the scene was demolished. NFPA does not require "infinite preservation of the fire scene," but it clearly contemplates involvement by "interested parties" in the documentation of the scene and the decision to demolish the scene:

> Once the scene has been documented by interested parties and the relevant evidence and the relevant evidence removed, there is no reason to continue to preserve the scene. The decision as to when sufficient steps have been taken to allow the resumption of normal activities should be made by all interested parties known at that time.

NFPA 921, § 17.3.7 (2008 ed.). Here, it is not disputed that Mr. Norris had identified Ford as an "interested party" after his first inspection of the scene and, following his second inspection, he focused on the SCDS as the cause of the fire. However, Mr. Norris knew the scene, vehicle, and SCDS had not been "documented by" Ford as contemplated by NFPA 921. And he undertook no effort to involve Ford in the decision to determine if "sufficient steps have been taken" in the investigation to allow the demolition of the scene and the permanent destruction of the evidence of potential causes.

Numerous courts have recognized the resulting prejudice to Ford because it was denied the opportunity to inspect the scene and identify potential causes. "A manufacturer of a product that is allegedly responsible for causing a fire is prejudiced if it cannot have its own cause and origin expert inspect the fire scene for other potential causes." Workman, 2005 WL 1896246, *6

(citation omitted). In State Farm Fire & Cas. Co. v. Broan Mfg. Co., 523 F. Supp. 2d 992, 997 (D. Ariz. 2007), the Court specifically described this problem: "Not only is the evidence incomplete, but it is also limited to that which Plaintiff chose to preserve, and Defendant cannot conduct an independent investigation of the fire scene." Id. at 997. The Broan court went on to state: "Plaintiffs' spoliation threatens to interfere with the rightful decision of the case by preventing full development of the alternative theories of causation." Id.

As in Broan, Ford has been irreparably prejudiced because its experts were not able to inspect the scene and by Mr. Norris' failure to preserve evidence of specific potential causes within the area of origin. Mr. Norris' actions, including his failure to notify Ford of the inspection or demolition of the scene, require dismissal of this case.

B. The Loss of the Electrical Housing of the SCDS.

During expert discovery, Mr. Norris and Mr. Morrill discussed the loss – and the significance of the loss – of the electrical housing of the SCDS. During his August 17, 2011 inspection, Mr. Norris elected to preserve certain evidence, including the remains of the hexport of the SCDS and the electrical portion of the SCDS, which Mr. Norris testified were placed into bags marked 42-7 (housing) and 42-8 (hexport). Norris Dep. at 72-73, 153-155, 161-162. On September 8, 2011, Mr. Norris sent the electrical housing of the SCDS to Jeff Morrill. Id. See also Exhibit 3 (letter confirming that 42-7 and 42-8 were sent to Mr. Morrill). Mr. Morrill testified that the SCDS evidence came in a small box containing two zip lock bags, but he *denied* that the package contained the electrical housing for the SCDS. Morrill Dep. at 16-18, 31-34, 42, excerpts attached as Exhibit 7. Mr. Morrill did not photograph or videotape what he received, id. at 43, so neither he nor Mr. Norris can explain when or how the electrical housing was lost.

Mr. Morrill conceded the significance of the electrical housing because the process that can lead to a fire at the SCDS necessarily requires leakage of brake fluid into the electrical housing and the formation of a path from the contacts in the housing, through the fluid, to the grounded hexport. Morrill Dep. at 68-71. And Mr. Morrill concedes that a fire cannot occur at an SCDS unless the contacts have arced and melted. Id. at 75-76, 94-95.[5] Accordingly, Mr. Morrill admitted that if he had received the electrical housing, an x-ray, which he described as the "best analytical tool to use," would establish the condition of the contacts. Id. at 31-34. He noted that he has x-ray capabilities in his office and this analysis is "very quick." Id. at 35. Dr. Shukri Souri, Ford's expert, similarly testified: "[I]f I had, for example, the electrical cavity, I could do a very simple x-ray to see what state the terminal was in, and come to a conclusion of whether or not there was arcing." Shukri Souri Dep. at 33, excerpts attached as Exhibit 8. See also Souri Dep. at 64-67 (discussing arcing and showing example of x-ray where arced contacts appear as copper balls). Dr. Souri confirmed an x-ray would conclusively eliminate the SCDS as the cause of the fire: "[I]f I had the electrical cavity to do an x-ray … there would be no question that there was no arcing." Id. at 133. And if there is no evidence of arcing, Mr. Morrill would agree that a fire could not have started at the SCDS.

Plaintiff cannot explain why the electrical housing had to be shipped to Georgia – or why Mr. Norris did not x-ray the electrical housing himself. Further, Plaintiff cannot claim that no prejudice occurred from the loss of the electrical housing because evidence of arcing can be obtained from the SEM of the hexport. First, as discussed below, Ford disputes the manner in which the SEM was conducted. Second, Ford disputes Mr. Morrill's conclusion regarding the process by which copper can be deposited on the face of the hexport. However, everyone agrees that the SCDS' contacts must arc in order to have a fire start at the SCDS and everyone agrees

[5] Mr. Morrill also recognizes that an arcing event can occur and not cause a fire. Id. at 75.

that arced contacts would be visible in an x-ray of the electrical housing. As a result, Plaintiff benefits from the loss of the electrical housing because it deprives Ford of evidence that would directly and conclusively contradict Mr. Morrill's claims.

In Jordan F. Miller Corp., the Court recognized the significant prejudice to a party who has been deprived of the opportunity to inspect and test the component at issue. In that case, Jordan F. Miller Corp. ("Miller") sought recovery from the seller of an airplane after the left landing gear collapsed causing significant damage to the airplane. Miller's insurer paid to repair the airplane, but a mechanic discarded the components to the left landing gear to avoid any claims by the FAA that he was utilizing unapproved parts in his repairs and because he was not aware of the litigation. Id. at *2. The district court dismissed the case because "hands-on inspection and testing is critical to a fair trial and due process for the Defendants," and the Tenth Circuit affirmed. Id. at 3 (quoting the district court's decision). The same result should occur here as the destruction of the electrical housing by Plaintiff's experts denies Ford the chance to inspect, test, and x-ray this critical evidence.

C. The Incomplete SEM Analysis.

The loss of the hexport to the SCDS is addressed in Ford's memorandum in support of is Motion to Exclude Opinions of Jeff Morrill and it was also discussed in Ford's prior motion to dismiss. In responding to the latter motion, Plaintiff claimed no prejudice occurred "because the SCDS has already been scanned and hard data obtained from that scan is available to Ford." See Plaintiffs' Memorandum in Opposition to Motion for Spoliation Sanctions, Docket #23 at 12. Plaintiff also claimed "a presence of copper on a component part is indicative of internal arcing failure" and that the SEM data "showed very high levels of copper on the SCDS." Id. Plaintiff criticized Ford because it did not explain how additional SEM scans would be different or "why those scans are necessary to evaluate this claim." Id. at 12-13. Subsequent discovery, however,

has confirmed the problems with the SEM analysis requested by Morrill and revealed the need for a more thorough analysis.

Based on his review of photographs provided by Mr. Norris, Mr. Morrill was aware that the hexport was found on the ground under the engine compartment of the Schoepfs' truck. Morrill Dep. at 60. Mr. Morrill does not know what other materials were found in this area. Id. He does not know what these materials are and, accordingly, cannot confirm if any contained copper. Mr. Morrill admits the face of the hexport contains debris. Id. at 61-67.

Morrill's daughter took the hexport to a laboratory – MAS – so that it could perform an SEM on the face of the hexport. Id. at 47-48. Mr. Morrill testified that the purpose of conducting the SEM is to identify the presence (or absence) of copper because in its as-manufactured condition, the face of the hexport contains no copper. Id. at 67-68. Morrill claims that copper will be deposited on the hexport when the "failure occurs" – which he defines to be arcing of the SCDS' electrical contacts. Id. at 70-71. Mr. Morrill believes that an arcing event is necessary for a fire to start at an SCDS. Id. at 75-76, 94-95.

Mr. Morrill was not present for MAS' SEM analysis. Id. at 50. He does not know what was done – but assumes the lab followed his prior instructions and did not clean the hexport. Id. at 50-51, 57-58. Cleaning debris from the face of the hexport is important because the analysis assumes that if copper is present, it must have come from the SCDS' electrical contacts. See e.g., id. at 67-68. Accordingly, if debris is present on the face of the hexport, there is no way to know if any copper is from the debris or corrosion of the electrical contacts. Moreover, Mr. Morrill admits that the SEM identified many elements that are not part of the hexport or the contacts. Id. at 80-81. He admits these elements are "part of the debris that's adhering that's on the face of the hexport" and that they were not cleaned before the SEM work was conducted. Id.

at 80-81. These facts should have immediately alerted Mr. Morrill to the fact that the copper identified in the SEM did not come from the arcing of the SCDS' electrical contacts.

This conclusion – and the limitations of the SEM report – are further supported by Mr. Morrill's admission that the lab provided nothing that shows copper morphology on the hexport. Id. at 87. Mr. Morrill admitted that he requested no elemental maps that are necessary to identify copper morphology. Id. at 82-83. This fact (and the absence of this data) is significant because Mr. Morrill admits that if an arcing event occurred in the SCDS, he would expect to find copper morphology – i.e., some readily identifiable shape containing copper. Id. at 82.

Accordingly, Mr. Morrill's testimony directly rebuts Plaintiff's prior claims regarding the significance of the SEM and the absence of prejudice to Ford because it cannot request a complete SEM analysis of the hexport. First, the SEM data provided by Mr. Morrill is flawed – as he admits – because the hexport was not cleaned and contains various elements from unknown sources. Second, Mr. Morrill admits these elements are debris from the fire and he cannot distinguish the copper identified from this debris (or provide any basis to claim the copper observed resulted from arcing). Third, the SEM report does not show "high levels of copper" as Plaintiff claimed because it does not include elemental maps that would indicate copper morphology. Finally, Mr. Morrill recognized the benefits of further analysis, including cleaning the hexport and requesting elemental maps – none of which can occur because the hexport was lost.

IV. CONCLUSION

As described above, Mr. Norris repeatedly failed to meet his obligations to preserve evidence in this case. During his scene inspections, he failed to identify and preserve evidence regarding potential causes of the fire within the area of origin. After these inspections, he ignored his obligations under NFPA 921 to ensure that Ford had an opportunity to inspect the

scene and evaluate potential causes. Then, he failed to document and preserve the remains of the SCDS, including his removal of the electrical housing of the SCDS from the scene, creating an incredible situation in which Mr. Norris claims that he sent the electrical housing to Mr. Morrill, and Mr. Morrill denies it. However, Plaintiff does not dispute that a simple x-ray would conclusively reveal the condition of the contacts. Mr. Morrill attempted to back into a conclusion regarding the condition of the electrical contacts through an incomplete and substantively flawed SEM analysis. The problems with the SEM analysis could have been corrected, but the hexport was lost.

As a result of the loss of the SCDS evidence, Plaintiff has been allowed to proceed with an SCDS claim that is based largely on the fact that the SCDS was subject to a recall. However, the recall does not prove the potential condition described in that action actually occurred in the Schoepfs' vehicle and three experts – Mark Hoffman, Jeff Colwell, and Shukri Souri – have concluded that it did not. Unfortunately, their ability to conclusively establish this fact has been prejudiced by Plaintiff's repeated spoliation of critical evidence. Plaintiff and its experts should not be allowed to benefit from their actions. Accordingly, Ford requests the dismissal of Plaintiff's claims with prejudice.

DATED this 27th day of September 2016.

SNELL & WILMER L.L.P.

/s/ Paul W. Shakespear
Tracy H. Fowler
Paul W. Shakespear
Attorneys for Ford Motor Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **FORD MOTOR COMPANY'S RENEWED MOTION FOR SPOLIATION SANCTIONS AND SUPPORTING MEMORANDUM** was filed on this 27th day of September, 2016, with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

BEAR RIVER MUTUAL INSURANCE COMPANY, Plaintiff, v. FORD MOTOR COMPANY, a Michigan corporation, et al, Defendants.	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO FORD MOTOR COMPANY'S RENEWED MOTION FOR SPOLIATION SANCTIONS** Case No. 2:12-cv-00731 DB District Judge Dee Benson

Plaintiff, by and through counsel, hereby opposes Defendant Ford Motor Company's ("Ford") Renewed Motion for Spoliation Sanctions ("Renewed Motion").

INTRODUCTION

This Court should deny Ford's Renewed Motion. The Renewed Motion does not present any new fact of consequence or argument that was not presented, or available for presentation, to this Court in Ford's first motion for spoliation sanctions. As such, it is an improper motion to reconsider and should be denied as such. Further, the sanctions already imposed are onerous for Plaintiff. Because it is now clear that this case focuses on defective design, greater sanctions than

those imposed already are not warranted. As such, this Court should deny Ford's Renewed Motion.

ADDITIONAL RELEVANT FACTS

1. On May 9, 2013, the parties conducted a joint inspection of the evidence gathered from the scene of the fire. (*See Defendant Ford Motor Company's Notice of Inspection*, Dkt. No. 20-11.).

2. At that inspection, Ford's expert saw and photographed remains of items preserved from the scene of the fire, including an air compressor and apparent sprinkler system control unit. (*See* Colwell Dep. p. 71:5-23, Colwell Dep. Exh. 16 pp. 1, 46, 56 (containing photos of the compressor and apparent sprinkler system control unit), cited pages attached as Exhibit A.)

I. FORD'S RENEWED MOTION SHOULD BE DENIED AS AN IMPROPER MOTION TO RECONSIDER.

"[A] motion for reconsideration is nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment." 56 Am. Jur. 2d Motions, Rules, and Orders § 40. While Ford titles the current Motion as a renewed motion for sanctions, it is actually a motion for reconsideration because it addresses the same factual circumstances and law addressed in its first motion for sanctions. Under Federal Rule of Civil Procedure 54(b), this Court has discretion to revisit and revise its prior non-dispositive motions. However, under Rule 54(b) and case law interpreting it, this Court should deny Ford's Renewed Motion because it addresses the same factual circumstances and law as Ford raised, or could have raised, in its first motion for sanctions.

The Tenth Circuit, in addressing a motion for reconsideration under Rule 60(b), explained the policy and principles underlying motions to reconsider. In *Servants of Paraclete v. Does*, 204

F.3d 1005 (10th Cir. 2000), the court explained that "a motion for reconsideration" is an "inappropriate vehicle[] to reargue an issue previously addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion. Absent extraordinary circumstances, . . . the basis for the second motion must not have been available at the time the first motion was filed." *Id.* at 1012. "Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. [Citation omitted.] It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id.* These principles have been applied to motions for reconsideration under Rule 54(b). *E.g. The SCO Grp., Inc. v. Novell, Inc.*, 2007 WL 2746953 (D. Utah Sept. 14, 2007) (citing *Servants of Paraclete,* explaining "SCO restates its previous arguments and asserts new arguments that were available to it at the time of the original briefing on this issue. These do not provide grounds for a motion to reconsider" and denying motion to reconsider).

Indeed, this very Court has relied on these principles to deny "motions for reconsideration" filed under different titles. In *Albright v. Attorney's Title Ins. Fund*, 2008 WL 376247 (D. Utah Feb. 11, 2008) (attached as Exhibit B), this Court granted partial summary judgment in favor of one group of defendants. When a second group of defendants, which had been acting as agents for the first group for the relevant claims, filed a similar motion for partial summary judgment, the Court stated the plaintiffs' opposition was "more accurately characterized as a motion to reconsider." *Id.* at *2. The Court explained:

> "Although Rule 54(b) allows a Court to revisit any order that rules on less than all of the claims in a case, a motion to reconsider is not appropriate when it merely restates the party's position taken in the initial motion." *SCO Group, Inc. v. Novell, Inc.*, 2007 WL 2746953, *1 (D.Utah Sept.14, 2007). Absent extraordinary

> circumstances, the basis for the motion to reconsider must not have been available at the time the first motion was filed. *Servants of the Paracletes v. Does*, 204 F.3d 1005, 1012 (10th Cir.2000). "A motion to reconsider must be made upon grounds other than a mere disagreement with the court's decision and must do more than rehash a party's former arguments that were rejected by the court." *SCO Group*, 2007 WL 2746953, at *1.

Id. at *2. This Court granted the motion for partial summary judgment, explaining that the "[p]laintiffs merely disagree with the order, restate their previous arguments and assert new arguments that were available to them at the time of the original briefing on this issue. These do not provide grounds for a motion to reconsider." *Id.*

Similarly, Ford merely restates arguments it made, or otherwise had available, in its first filings for sanctions. Ford proffers three reasons for its Renewed Motion: first, Mr. Norris did not preserve all relevant evidence from the scene of the fire, thereby prohibiting Ford from eliminating all potential causes of the fire; second, Ford lost out on the opportunity to run tests on the electrical housing of the SCDS that could have provided "conclusive evidence" that the SCDS was not defective; and, third, because Mr. Morrill did not remove debris from the hexport before performing the SEM analysis, the results of the SEM analysis are irreversibly defective. Renewed Motion, p. 3, Dkt. 86.

Not only did Ford advance these same three arguments in its original briefing, it supported them with a declarations from its expert, Mark Hoffman. First, Mr. Hoffman explained that "I have reviewed photographs of the scene that were taken before the house was demolished and before the truck was moved. . . . These photographs provide insufficient evidence for me to identify or eliminate all potential causes of the fire." Decl. of Mark Hoffman at ¶¶ 14–15, Dkt. 20-6. Second, Mr. Hoffman also explained that "an x-ray" of the electrical housing of the SCDS "can show that the contacts have not failed and can allow the elimination of the SCDS as a potential

cause of the fire. However, because these remains apparently have not been preserved, an x-ray cannot be taken." *Id.* at ¶ 30. Third, Mr. Hoffman explained that "it appears the fire debris on the hexport- which is obvious in the scene photographs- was not removed" prior to Mr. Morrill performing the SEM analysis. *Id.* at ¶ 34. "This cleaning effort is necessary to determine if the identified copper is actually from internal leakage of the SCDS and corrosion of the SCDS' contacts." *Id.* Mr. Hoffman concluded that "additional analysis is necessary to fully evaluate if the SCDS caused the fire. Ford's inability to conduct additional analysis has deprived Ford of the ability to fully and adequately defend itself in this matter." *Id.* at ¶ 39. After oral argument, Ford was allowed to bolster these opinions with a supplemental declaration from Mr. Hoffman that provided even more detail on each of these issues. *See* Supp. Decl. of Mark Hoffman, Dkt. 33-1.

In making its ruling, this Court demonstrated that it had been informed of and considered each of these circumstances and their consequences. In explaining how Plaintiff[1] violated its duty to preserve evidence related to all potential causes of the fire, this court explained that "plaintiffs failed to ensure that Ford had the opportunity to inspect the fire scene before it was demolished" and that "these decisions have prevented Ford from identifying and eliminating all possible causes of the fire." Order on Defendant's Motion for Spoliation Sanctions, p. 7, Dkt. 35 ("Sanctions Order"). This Court recognized that because the SCDS was lost, Ford was not able to perform additional testing on the module, resulting in "significant prejudice" to Ford. *Id.* at 8. This Court

[1] At the time of the Sanctions Order, the named plaintiffs were Jeff and Julie Schoepf. However, on June 17, 2015, this Court entered an order that Bear River Mutual Insurance Company be substituted as plaintiff in this matter in place of Jeff and Julie Schoepf. *See* Order re: Motion to Substitute Plaintiff, Dkt. 43.

quoted from Mr. Hoffman's first declaration in explaining why the failure to remove debris from the SCDS before performing the SEM scan limits the results of the tests. *Id.*

To the extent Ford claims facts about the male ends of plugs from various electronics in the garage were not preserved, Ford knew of this by May 9, 2013 when its expert inspected items preserved from the fire, including the compressor and what appears to be the sprinkler system control unit. *See* Exhibit A. The sole new issue is the electric dog fence. However, misplaced evidence, or insufficiently retained evidence, and its impact of not allowing Ford to rule out additional possible causes of the fire was contemplated in the first ruling, as explained above.

In summary, Ford raises no new arguments for why the harsh sanction of dismissal should be imposed on Plaintiff. This Court has already considered and ruled on the merits of Ford's position. Because Ford proffers no substantial new evidence or arguments in support of its Renewed Motion, the Court should deny Ford's request for additional sanctions.

II. THE CURRENT SANCTIONS ARE ALREADY MORE THAN SUFFICIENTLY ONEROUS.

As stated by this Court, a sanction for spoliation "should impose the least onerous sanction that will remedy the prejudice and, where applicable, punish the wrongdoing and deter future wrongdoing." Sanctions Order, p. 9, Dkt. 35. No additional sanction is necessary because the current sanctions are already more than sufficiently onerous and the prejudice to defendants in design defect claims are less than the prejudice to defendants of other defective product claims.

Here, this Court has already determined that Plaintiff "had a duty to preserve, among other things, evidence related to all potential causes of the fire." *Id.* at 7. This Court has already determined Plaintiff violated that duty. *Id.* at 7–8. This Court already determined that, as a result of that breach, "Ford has suffered significant prejudice." *Id.* at 8. This Court then imposed two

sanctions on Plaintiff: first, an adverse inference instruction at trial; and, second, a requirement that Plaintiff "pay Ford an amount equal to 20% of the amount awarded to" Plaintiff. *Id.* at 10. As argued by Plaintiff in opposing the first motion for sanctions, these sanctions are very onerous.

First, not only does Plaintiff have to meet its high burden of proof in this product liability action, they have to do it with the jury receiving an adverse instruction. Second, assuming the jury will find Defendant liable and make an award to Plaintiff, what is finally awarded is reduced by 20%. This is not a simple 20% reduction of the total damages the jury finds Plaintiff suffered, but is a reduction in addition to any reduction for contributory negligence found by the jury.

To illustrate, Plaintiff has alleged damages of at least $1,314,853.17.[2] Ford, as its second affirmative defense, asserted contributory negligence. *See* Answer of Ford Motor Company to Plaintiffs' Complaint, p. 7, Dkt. 6. Ford intends to attempt to introduce evidence that it sent the Schoepfs seven written notices of the recall on the defective SCDS. *See* Ford Motor Company's Motion for Spoliation Sanctions and Supporting Memorandum at 5, Dkt. 20. While Plaintiff maintains that Ford is solely liable for the harms caused by their defective SCDS, and that the Schoepfs in no way contributed to the loss, if evidence of the letters is admitted, it is possible a jury disagree and attribute, for example, 49% of the fault for the harm to Plaintiff. Assuming they grant the damages identified by Plaintiff in its Complaint, Plaintiff's recovery will be reduced to $670,575.12. This number would then be reduced again by an additional 20% to $536,460.09. So, the end result is that Ford is responsible for less than 41% of the damages that occurred because

[2] This is provided as an example and should not be construed as a limit on damages to be claimed by Plaintiff at trial.

it designed a dangerously defective product. These sanctions are more than sufficient to "remedy the prejudice and, where applicable, punish the wrongdoing and deter future wrongdoing."

This is especially true when you consider this case arises from a defectively designed product. The prejudice suffered by defendants of design defect claims where the defective product is lost is much less than defendants of manufacturing defect claims. While *North v. Ford Motor Co.*, 505 F. Supp. 2d 1113 (D. Utah 2007) is distinguishable because Judge Stewart found no evidence of deliberate or negligent spoliation, it is instructive on the prejudice suffered by a defendant from the losing of the defective product where the plaintiff's claims arise from a design defect.

In *North*, a Ford Explorer had been destroyed following an accident about 8 years before the plaintiffs or their insurer were aware of a potential design defect. Following remand from an MDL, Ford filed a motion seeking dismissal of the plaintiffs' claims arguing, inter alia, plaintiffs' "failure to preserve the subject vehicle" justified the sanction of dismissal. Justice Stewart explained that "the potential prejudice to a defendant from the loss of an allegedly defective product is much less because the alleged defect is a defect in design rather than in manufacturing." *Id.* at 1116. *See also, e.g., Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23, 29 (1st Cir. 1998) (denying motion to dismiss for failure to preserve vehicle with allegedly defective air bag because prejudice to manufacturer was lessened where it was a design defect claim); *Bericochea-Cartagena v. Suzuki Motor Co.*, 7 F.Supp.2d 109, 113 (D.P.R. 1998) (denying motion to dismiss due to destruction of vehicle where the complaint alleged that all vehicles had the design defect); *Davis v. Ford Motor Co.*, 375 F.Supp.2d 518 (S.D.Miss. 2005) (denying plaintiff's request for a negative inference jury instruction against Ford where a leasing company owned by Ford disposed

of the vehicle in the normal course of its business at a time neither company had any notice of impending litigation).

When the first motion for sanctions was filed, fact discovery had not ended. Plaintiff had filed a complaint alleging claims sounding in negligence and strict liability based on Ford's negligent and/or defective design, manufacture, and warning related to the Ford. Based on those allegations, and the circumstances of the unpreserved scene and lost SCDS, this Court imposed the aforementioned sanctions. Now that discovery is completed and has clarified that Plaintiff's claims are primarily characterized as arising from design defects, this Court should deny Ford's Renewed Motion because the actual prejudice is "much less" than originally contemplated.

In addition, the prejudice Plaintiff would suffer with a dismissal of its claims has increased substantially since Ford's first motion for sanctions. Plaintiff has not done anything new to spoliate evidence. However, Plaintiff has incurred thousands of dollars in costs and hundreds of man-hours in working on this case. To dismiss the claims now, with no new harms or actions occurring after the spoliation was first considered, would be extremely prejudicial to Plaintiff. Plaintiff already views the current sanctions as overly onerous for this design defect case.

Lastly, this motion must be considered in context: it is not a guarantee that had the SCDS been preserved, the additional testing would have shown the results Ford argues could conclusively establish the SCDS module was not defective. The prejudice to Ford, which this Court has already determined to be "significant," is the loss of the opportunity to perform some additional testing that could possibly be conclusive. In other words, while the lost opportunity was real, Ford's hoped-for test results are speculative. As such, Plaintiff requests this Court deny Ford's Renewed Motion.

III. THE "NEW" HARMS DO NOT JUSTIFY IMPOSING ADDITIONAL SANCTIONS.

As pointed out by this Court in its prior ruling and by Ford, there are generally two factors to consider in evaluating whether to sanction a party: "(1) the degree of culpability of the party who lost or destroyed the evidence, and (2) the degree of actual prejudice to the other party." *Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv., Inc.*, 139 F.3d 912, 1998 WL 68879 (10th Cir. 1998) (unpublished); Sanctions Order, p. 6, Dkt. 35; Renewed Motion, p. 7, Dkt. 86.

As explained above, the sole new fact learned by Ford was that there was also an electric dog fence plugged into an outlet located near the corner of the garage where the fire originated. *See supra*. In its briefing, Ford does nothing to identify anything that would demonstrate any type of intentional or negligent attempt by Plaintiff to keep this fact from Ford. The extent of what was preserved, and the manner in which it was preserved, was well known to Ford prior to filing its first motion. *See supra*. The only culpable conduct Ford is alleging was addressed in Ford's first motion for sanctions. *See supra*. As such, the culpability at issue in the Renewed Motion is non-existent to minimal.

As to the second point, as explained repeatedly herein, the prejudice to Ford has already been considered by this Court in formulating the existing sanctions. Based on arguments proffered by Ford, this Court has already found that Ford suffered "significant prejudice" by Plaintiff's "fail[ure] to preserve critical evidence that was in their possession and control," including "evidence related to all potential causes of fire." Sanctions Order, p. 7–8, Dkt. 35. There is no previously unconsidered prejudice. To the extent there is additional prejudice, it should be viewed as minimal in light of the fact that this case is a design defect case. *See supra*.

CONCLUSION

Based on the foregoing, this Court should deny Ford's Renewed Motion. The Renewed Motion does not present any substantial new fact or argument that was not presented, or available for presentation, to this Court in Ford's first motion for spoliation sanctions. As such, it is an improper motion to reconsider and should be denied as such. Further, the sanctions already imposed are great and burdensome for Plaintiff. Because it is now clear that his case focuses on defective design, greater sanctions are not warranted. As such, this Court should deny Ford's Renewed Motion.

DATED this 4th day of November, 2016.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

BEAR RIVER MUTUAL INSURANCE COMPANY, Plaintiff, v. FORD MOTOR COMPANY, a Michigan corporation, Defendant.	**FORD MOTOR COMPANY'S REPLY MEMORANDUM IN SUPPORT RENEWED MOTION FOR SPOLIATION SANCTIONS** Case No: 2:12-cv-00731 Honorable Judge Dee Benson

Defendant Ford Motor Company ("Ford"), through counsel of record, hereby submits its Reply Memorandum in Support of Renewed Motion for Spoliation Sanctions.

I. INTRODUCTION

Plaintiff Bear River Mutual Insurance Company ("Bear River") asks the Court to deny Ford's Renewed Motion for Spoliation Sanctions because it does not raise new facts or arguments. While Ford agrees that its initial motion for spoliation sanctions identified the same issues – Bear River's failure to preserve the scene, the inadequate testing and subsequent loss of the hexport for the speed control deactivation switch ("SCDS"), and the failure to preserve the electrical portion of the SCDS – the evidence relating to these issues has significantly changed and developed in the 2 ½ years since Ford filed its initial motion. First, Bear River is now the plaintiff in this case (not the Schoepfs) and this change significantly impacts the evaluation of culpability for the spoliation of evidence. Second, Bear River's experts have been deposed and their testimony revealed new facts regarding their failure to follow NFPA 921, their failure to document and preserve evidence, the purported conclusiveness of the SEM testing, and the loss of the electrical housing – which reveal new evidence regarding the resulting prejudice to Ford from these actions. Finally, Bear River has recently sued Tad Norris and his employer for negligence, which belies past claims that the spoliation of evidence caused no harm.

Accordingly, while Ford knew about the spoliation of the scene and the components of the SCDS when it filed its initial motion, it could not have known about these subsequent developments. Together, these new facts fundamentally alter the spoliation analysis as they reveal the carelessness and culpability of Bear River and its experts for the destruction of the most critical evidence in this case, and they rebut the claims Plaintiffs made in opposing Ford's initial motion for spoliation sanctions. Bear River's opposition to Ford's renewed motion ignores these new facts and fails to offer any response to the testimony of its own experts. Indeed, only by doing so can Bear River claim that Ford's renewed motion raises no new facts. However, these new facts confirm the culpability of Bear River for the repeated spoliation of evidence in this case and the resulting prejudice to Ford. As a result, the Court should reject

Bear River's second argument – that it has already been sufficiently punished – as the repeated spoliation of evidence in this case requires the dismissal of Bear River's claims.

II. FORD'S MOTION IS PROPER AS IT IS BASED ON NEW EVIDENCE

Bear River's arguments that Ford's motion should be denied because it is an improper motion for reconsideration that raises no new arguments is unpersuasive because new facts and evidence have been discovered that were not previously known to Ford and Bear River. Bear River cites Rule 54(b) regarding judgments involving multiple parties/claims and Rule 60 regarding relief from judgment – neither of which applies to Ford's motion. Moreover, the authorities cited by Bear River recognize that a motion for reconsideration is only improper when it raises "arguments, or supporting facts *which were available at the time of the original motion*." Plaintiff's Memorandum in Opposition at 2-3 (quoting Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000) (emphasis added). Bear River supports its argument by discussing the affidavits of Mark Hoffman, a Ford employee, that were filed in connection with the initial motion. However, Ford's renewed motion did not rely on Mr. Hoffman's prior affidavits. Instead, Ford's motion is based on new facts – Bear River's substitution as plaintiff in place of the Schoepfs, the depositions of Bear River's experts, and Bear River's decision to sue Mr. Norris – that were not available when Ford filed its initial motion.

The opposition to Ford's initial motion for spoliation sanctions reveals the significance of these new facts. When Ford filed that motion in 2014, Jeff and Julie Schoepf were the plaintiffs. In their opposition to Ford's motion, the Schoepfs repeatedly cited this fact and its alleged significance to the resolution of the motion:

- "In addition, the litigants in this case bear no culpability for the loss of the SCDS. It is undisputed that Plaintiffs did not do anything to procure the SCDS's misplacement. Therefore, there is no conduct to sanction."

- "Mr. and Mrs. Schoepf complied with their obligation to preserve the evidence in their home in anticipation for litigation and did so properly."
- "The present factual circumstances are vastly different and easily distinguishable [from a case involving spoliation by an insurance company]. First, Bear River has not intervened as the plaintiff in this matter. The plaintiffs are still Mr. and Mrs. Schoepf and this action is being prosecuted in their names."

(Plaintiffs' Memorandum in Opposition to Defendant's Motion for Spoliation Sanctions at 3, 11, and 13, Dkt Document 23 filed March 7, 2014). The Schoepfs are no longer the plaintiffs in this case; Bear River is. It is undisputed that an insurer bears a high degree of responsibility for preserving evidence, particularly where, as in this case, the insurer took control of the scene and hired an expert, Tad Norris, to control the documentation of the scene and the preservation of evidence. Workman v. AB Electrolux Corp., 03-4195-JAR, 2005 WL 1896246, *6 (D. Kan. Aug. 8, 2005) (citing Northern Assur. Co. v. Ware, 145 F.R.D. 281, 284 (D.Me. 1993)) ("duty [to preserve evidence] is heightened for an insurer because it is a sophisticated entity experienced in litigation").

The Schoepfs' opposition to Ford's initial motion also sought to capitalize on the limited discovery that had occurred, claiming dismissal was not appropriate because there was "clear evidence" that the SCDS in the Schoepfs' 1994 F-150 pickup truck caused the fire. (Opp. to Motion for Spoliation Sanctions, Dkt. No. 23). Under NFPA 921 – a guide for fire investigation that Bear River's expert, Tad Norris, admitted he followed – all potential causes of a fire must be considered. Before Ford deposed Mr. Norris, Ford could not have known that he did not follow the proper procedure for fire investigation. However, as detailed in Ford's renewed motion, Mr. Norris admitted he did not preserve evidence of all potential causes of the fire – a new admission that directly rebuts the years-ago claim of "clear evidence" regarding the cause of the fire and is a new fact that shows why critical evidence was not preserved.

New evidence that the SEM data from hexport is unreliable also rebuts the Schoepfs' claims in 2014 that there was minimal prejudice to Ford because the SEM data from the hexport provided clear evidence regarding the cause of the fire. As discussed in Ford's renewed motion, Bear River's expert, Jeff Morrill, admitted the hexport was not cleaned before the SEM was conducted. Mr. Morrill also admitted that the SEM results did not provide clear evidence of SCDS failure and, in fact, did not include the very evidence (copper morphology) that he would expect to find in an SCDS that failed and caused a fire. In 2014, the prejudice to Ford may not have been clear because Plaintiffs claimed the parties could rely on the SEM analysis. There is now clear evidence of significant prejudice to Ford because the SEM data is not reliable and there is no hexport from which reliable data can be obtained.

Finally, neither Mr. Norris nor Mr. Morrill could explain what happened to the electrical portion of the SCDS. However, Mr. Morrill admitted that a simple x-ray of the housing could have conclusively ruled out the SCDS as the cause of the fire. Again, this testimony provided new and important information regarding the efforts to document, preserve, and test this critical evidence that was not available when Ford filed its initial motion for spoliation sanctions.

Ford was entitled to address the spoliation of the scene and SCDS evidence before significant discovery had been completed and should not be denied an opportunity to re-address these issues now that new evidence has come to light and the facts known to the parties have changed. Ford's initial motion for spoliation sanctions provided an opportunity for the Court and the parties to consider the prejudice to Ford before significant and expensive discovery occurred. In responding to Ford's initial motion, the Schoepfs – who were then the plaintiffs in this case – believed the SEM results were reliable and could be relied upon to show that the SCDS caused the fire and there was minimal prejudice to Ford because it had enough evidence to dispute this claim. Subsequent discovery, including testimony from Bear River's experts, has revealed new facts that show significant prejudice to Ford and expose the egregious conduct of Bear River's

experts. And since these new facts have come to light, Bear River has decided to sue Mr. Norris and his employer. Ford had every right and reason to renew its motion for spoliation sanctions and Bear River cites no rule or case to the contrary. In fact, the cases that Bear River cites support Ford's motion based on new facts.

III. BEAR RIVER'S REPEATED SPOLIATION OF EVIDENCE

As described in Ford's motion, it is undisputed that Bear River had a duty to preserve evidence related to its claims and that the Court has the ability to fashion appropriate sanctions for the spoliation of such evidence. Jordan F. Miller Corp. v. Mid-Continent Aircraft Services, Inc., 139 F.3d 912, ---, 1998 WL 68879, *5 (10th Cir. 1998).[1] In evaluating whether to sanction a party for the spoliation of evidence, two factors generally carry the most weight: (1) the degree of the culpability of the party who lost or destroyed the evidence, and (2) the degree of actual prejudice to the other party." Id. (citations omitted). Here, the testimony of Bear River's experts revealed new facts regarding the culpability of Bear River and the resulting prejudice to Ford – in fact, not once (the scene), not twice (the hexport), but three times (the electrical housing), Bear River and Mr. Norris failed to document, test, and preserve the critical evidence in this case. These actions merit dismissal of Bear River's claims.

A. The Spoliation of the Scene

Since Ford's initial motion in 2014, new evidence has been discovered regarding the culpability of Bear River's expert, Tad Norris, in the spoliation of the scene. As discussed in Ford's motion, during his deposition Mr. Norris described his inspections of the scene – when no one from Ford was present – his determinations regarding the evidence that would be removed from the scene, and the steps that he took to preserve this evidence. Mr. Norris admitted that he purported to follow NFPA 921 in connection with this work. Ford's motion detailed the

[1] Although Jordan F. Miller Corp. is unpublished, it was cited and discussed with approval in published decisions. See e.g. 103 Investors I, L.P. v. Square D Co., 470 F.3d 985, 989 (10th Cir. 2006).

requirements of NFPA 921 and Mr. Norris' admitted failures to actually do what is required under NFPA 921 in terms of identifying possible causes of the fire, preserving evidence regarding these causes, and involving interested parties (including Ford) in these decisions. Bear River is correct that the Court discussed the spoliation of the scene in its order on Ford's initial motion, but Mr. Norris' testimony provided new evidence regarding the factors to be considered in evaluating the spoliation of evidence, including the culpability of Bear River and Mr. Norris for failing to involve Ford in this process and the prejudice to Ford because it cannot adequately assess all potential causes of the fire.

Further, new evidence of the actual prejudice to Ford is clear from Bear River's opposition, which admits that a specific additional potential cause of the fire – an electric dog fence – was not known to Ford when it filed its initial motion. Bear River's opposition to Ford's renewed motion provided no response regarding the procedure required by NFPA 921, Mr. Norris' admitted failure to preserve alternate causes, or the significance of these failures in establishing a specific cause of the fire. Quite simply, under NFPA 921, all potential causes must be considered and eliminated until only one explanation or possible cause remains. Because evidence of potential causes was not preserved, they cannot be eliminated. Mr. Norris' admissions regarding these facts are inconsistent with the prior claims of "clear evidence" regarding the cause fire. These admissions are significant new facts and require dismissal because Mr. Norris's conduct prevents Ford from investigating alternative causes of the fire.

B. The Spoliation of the Hexport

The prejudice to Ford from the loss of the hexport is more significant than originally known because new facts prove that the SEM data is unreliable. In response to Ford's initial motion, the Schoepfs claimed there was "little prejudice to Ford" because the hexport was scanned before it was lost and that data was provided to Ford. (Opp. to Motion for Spoliation Sanctions at 2, Dkt. No. 23). However, in his deposition, Mr. Morrill provided a much different

evaluation of the quality and significance of the SEM data. Mr. Morrill admitted the face of the hexport was not cleaned before the SEM analysis was conducted. Mr. Morrill admitted that the SEM data included debris that is not from the hexport or the electrical contacts. Accordingly, Mr. Morrill cannot tell if the copper identified in the SEM data is in the debris or is from the corrosion of the contacts. Mr. Morrill also conceded the presence of copper – even if it came from corrosion of the contacts – does not mean the switch caused the fire. Finally, he admitted that the SEM data included no evidence of copper morphology, which he would expect to see if the switch caused the fire.

Bear River's opposition did not address Mr. Morrill's testimony.[2] However, this testimony provides new facts regarding the purported conclusiveness of the SEM data and the prejudice to Ford because the hexport is not available for proper cleaning and analysis. These facts were not available for the Court's consideration when Ford filed its initial motion for spoliation sanctions and present a much different picture regarding the claim that the SCDS caused the fire.

C. <u>The Spoliation of the Electrical Housing</u>

The SCDS contains two main parts – the metal hexport and the housing that contains the switch's electrical contacts. At the time of Ford's initial motion in 2014, Plaintiffs minimized the loss of the electrical housing for SCDS – in large part by focusing on the SEM data from the hexport, which they claimed showed that the SCDS caused the fire. As described above, the SEM data is unreliable. However, the experts agree that if the electrical contacts in the electrical housing were intact, the switch could not have caused the fire. As Mr. Morrill testified, taking

[2] To be fair, Ford filed a motion to strike Mr. Morrill's testimony, to which Bear River has recently responded. However, Bear River's response contains no evidence and basically asks the Court to trust Mr. Morrill's opinions because he has inspected many fires and because they are supported by "other" similar incidents (for which he provided no foundation in his report, deposition, or the response to Ford's motion).

an x-ray of the electrical housing is a standard and inexpensive procedure and can conclusively eliminate the SCDS as the cause of the fire.

The depositions of Mr. Norris and Mr. Morrill revealed little attention to the documentation, preservation, and analysis of this critical evidence. Mr. Norris admitted that he photographed the housing and removed it from the scene. However, neither Mr. Norris nor Mr. Morrill could explain what happened to the electrical housing after it was photographed. Mr. Norris said he put it in an evidence bag, but he never photographed the bag or its contents. Mr. Norris says he sent the housing to Mr. Morrill, but Mr. Norris did not photograph what he sent. Mr. Morrill denied receiving the electrical housing, but he did not photograph what he received. Their inability to explain what happened to the electrical housing of the SCDS provides new evidence regarding their culpability in the loss of this evidence.

This testimony also provided new evidence regarding the prejudice to Ford as Mr. Morrill admitted that if the electrical contacts contained in the housing were intact, the switch could not have caused the fire. Unfortunately, Mr. Norris' limited photographs of the switch prevent a conclusive evaluation of the condition of the contacts. Further, because the housing has been lost, this analysis or a simple x-ray of the housing cannot occur. These new facts regarding the decisions made not to document critical evidence and preserve the electrical housing show that this conduct was particularly egregious because Ford has been denied an opportunity to analyze evidence that could conclusively eliminate the SCDS as the cause of the fire. These new facts are important to the evaluation of culpability and the resulting prejudice to Ford.

IV. BEAR RIVER'S CLAIMS SHOULD BE DISMISSED

Bear River claims that it has been punished enough and the Court should not impose additional sanctions. The Court should reject this argument because any prejudice to Bear River has been caused by the negligence of its own experts – a fact that Bear River recognized when it decided to sue Mr. Norris and ICS. (Am. Comp., Bear River Mutual Insurance Company vs.

Intermountain Claims, Inc. and Tad Norris, copy attached as Exhibit A). If Bear River is entitled to any recovery, it should come from that lawsuit, not this one as Ford's renewed motion shows that Ford has been severely prejudiced by the separate and repeated spoliation of the critical evidence in this case – the scene, the hexport, and the electrical housing. At every turn – in arranging for inspections of the scene, in conducting those inspections, in making decisions regarding the preservation of evidence, in documenting the preserved evidence, in transmitting evidence, and in deciding what testing would (and would not) be performed – Bear River and its experts made conscious decisions and took, at best, reckless actions that have irreparably prejudiced Ford's defense of this case. These actions require the dismissal of Bear River's claims. Ford's Motion should be granted.

V. CONCLUSION.

Based on the foregoing, the Court should grant Ford's Motion and dismiss Plaintiff's claims.

SNELL & WILMER L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **FORD MOTOR COMPANY'S REPLY MEMORANDUM IN SUPPORT RENEWED MOTION FOR SPOLIATION SANCTIONS AND SUPPORTING MEMORANDUM** was filed on this 2nd day of December 2016, with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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