UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION TO DISMISS AS A SANCTION
GRANTED IN PART: August 18, 2026

CBCA 7915, 8303

VENERGY GROUP, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

John M. Manfredonia of Manfredonia Law Offices, LLC, Cresskill, NJ, counsel for Appellant.

Jennifer L. Hedge, Office of General Counsel, Department of Veterans Affairs, Pittsburgh, PA; and Jared M. Levin, Office of General Counsel, Department of Veterans Affairs, Brockton, MA, counsel for Respondent.

Before Board Judges **BEARDSLEY**, **LESTER**, and **ZISCHKAU**.

**LESTER**, Board Judge.

On April 28, 2026, respondent, the Department of Veterans Affairs (VA), filed a motion requesting that the Board dismiss these consolidated appeals as a sanction for what the VA alleges is willful and fraudulent misconduct in which it believes one or more corporate representatives of appellant, Venergy Group, LLC (Venergy), engaged during the discovery process.[1]

In these appeals, Venergy is challenging two contracting officer's decisions on three separate matters: (1) the contracting officer's termination of Venergy's contract for default; (2) Venergy's request for an equitable adjustment of just over $4 million and a time extension for performance of its contract; and (3) the VA's demand for payment of approximately $1.8 million. As confirmed during an evidentiary hearing on the VA's motion for sanctions, audited financial statements that Venergy produced in electronic form during discovery were manipulated through the insertion of white boxes in a manner that hid the existence of financial information about Venergy's overhead costs. In addition, dollar figures and commentary throughout the financial statements were substantially modified. Through those manipulations and modifications, Venergy, had its misconduct not been uncovered, would have been better able to support an increase in its general conditions and home office overhead claims of over $1 million. Metadata in the electronic documents purportedly identify the first name of the individual who added the white boxes, which matches the first name of Venergy's Chief Executive Officer (CEO). It is not clear who within Venergy manipulated data and then passed it off as authentic, whether it was the CEO (who, at the hearing, denied responsibility for the changes) or someone else using the CEO's Adobe Acrobat account—Venergy's lack of interest and effort to conduct any kind of internal investigation to identify the malfeasant actor or to determine whether document manipulation efforts extend beyond the manipulated documents that the VA was able to uncover is somewhat shocking—but the intent and purpose of the manipulations is clear: to increase in a significant manner the amount of damages that Venergy could be awarded in these appeals. The actions by Venergy about which the VA complains constitute bad faith and are an affront to the integrity of the Board's processes, which we cannot ignore.

Venergy's argument that we lack jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. § 7101-7109 (2024), to sanction the type of willful misconduct at issue lacks merit. The misconduct here occurred during the discovery process in the proceedings before the Board, not during the procurement or performance phases of the contract, and we have inherent authority to sanction misconduct in proceedings before us. The VA has referred this

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[1] In its motion to dismiss, the VA also asked the Board to amend the then-existing protective order in these appeals to allow it to release protected documents to the VA's Office of Inspector General and potentially other agencies for investigation. By order dated May 7, 2026, we granted the VA's motion to amend the protective order, *see Venergy Group, LLC v. Department of Veterans Affairs*, CBCA 7915, et al., 26-1 BCA ¶ 39,068, at 190,309, leaving only the VA's motion to dismiss open for resolution.

matter to its Office of Inspector General (OIG), but Venergy elected to participate in an evidentiary hearing now rather than to await the results of the OIG's investigation. Given the egregious and intentional nature of the discovery misconduct, coupled with Venergy's failure to engage in any effort to investigate the circumstances under which one of its employees engaged in obviously intentional document falsification, we grant the VA's request to dismiss Venergy's affirmative monetary claim as a sanction.

That being said, the documentation that was electronically manipulated and effectively falsified was needed to allow the VA to develop its defenses to Venergy's affirmative monetary claim. It was unnecessary to the VA's default termination decision or the VA's own affirmative monetary claim. Because case precedent requires that sanctionable misconduct in the discovery process be tied to the particular claim for which the discovery was sought, we have no basis on the existing record to apply any sanction for the alleged discovery misconduct to Venergy's default termination challenge or to the VA's monetary request. Accordingly, we must deny the VA's request for dismissal of Venergy's challenges to the VA's default termination and to the VA's monetary claim. Nevertheless, if, as this case proceeds, the VA uncovers manipulations to documents relevant to the default termination or the VA's monetary claim, the VA is not precluded from seeking additional sanctions.

## Background

On September 30, 2019, the VA awarded a contract to Venergy for the design and construction of major renovations to Research Building No. 2 at the James A. Haley VA Medical Center in Tampa, Florida. On July 28, 2023, long after Venergy was originally supposed to have completed contract performance, the VA contracting officer issued a decision terminating Venergy's contract for default, finding that "Venergy has failed to diligently pursue the remaining work on the contract in order to insure completion." Appeal File, Exhibit 191, at 2396.[2]

Venergy filed a notice of appeal of that termination decision with the Board on October 23, 2023, which the Clerk of the Board docketed as CBCA 7915. Early in the litigation, the parties made the Board aware that Venergy was planning to submit an affirmative monetary claim under the contract to the VA contracting officer. Nevertheless, the parties agreed to commence discovery on the default termination matter, with the understanding that, if the contracting officer denied Venergy's monetary claim, the parties

[2] All exhibits referenced in this decision are contained in the appeal file unless otherwise noted.

might require additional discovery following Venergy's appeal of that denial, which could affect the timing of the resolution of the parties' dispute on the default termination. *See* Conference Memorandum and Scheduling Order (Mar. 6, 2024) at 2 (discussing the parties' representations during a status conference).

On July 30, 2024, Venergy submitted a claim to the VA contracting officer under the CDA, seeking delay damages totaling $4,237,151.53 and a time extension for the completion of contract performance through October 31, 2023. Exhibit 293 at 3107. In its claim, Venergy alleged that the VA had caused and was responsible for 989 days of excusable delays on the project because of suspensions of work, cardinal changes, breaches of the contract, withholding of superior knowledge, defective specifications, and breaches of the implied duty not to hinder performance. *Id.* at 3065, 3085-102. It sought 989 days of direct general conditions costs of $1358.51 per day, totaling $1,343,455.39 (*id.* at 3103); an overhead markup on its general conditions costs of 41%, totaling $550,862.22 (*id.* at 3107); 989 days of unabsorbed home office overhead, calculated using the formula set forth in *Eichleay Corp.*, ASBCA 5183, 60-2 BCA ¶ 2688, totaling $2,170,657.20 (*id.* at 3104-07); and a profit markup of 10% on the *Eichleay* calculation, totaling $217,065.72. *Id.* at 3107. In the *Eichleay* calculation in its claim, Venergy identified total contract billings as $18,099.484.15 and total company billings as $74,787,132.74. *Id.* at 3106. In total, Venergy sought payment of $4,237,151.53 from the VA through its claim, "[p]lus, attorney fees, consultant fees, expert fees, CDA interest and other costs as allowed under the Equal Access to Justice Act." *Id.* at 3107.

Soon thereafter, by motion dated August 9, 2024, the parties jointly requested that the Board stay proceedings in CBCA 7915 pending the contracting officer's issuance of a decision on Venergy's July 30 claim. By order dated August 12, 2024, the Board granted that motion. Subsequently, in a final decision dated December 13, 2024, the contracting officer denied Venergy's delay claim and, at the same time, asserted an affirmative government claim seeking payment to the Government of $1,842,960.31 "because of Venergy's failure to complete the Project by the agreed-upon Contract completion date." Notice of Appeal (CBCA 8303), Attachment 2 at 1. Venergy appealed that decision to the Board on December 26, 2024, and the Clerk of the Board docketed that appeal as CBCA 8303.

At the parties' joint request, by order dated January 7, 2025, the Board consolidated CBCA 7915 and 8303. The Board issued an order adopting, with slight modifications, the parties' proposed schedule for discovery and pre-hearing activities. *See* Consolidation and Scheduling Order in CBCA 7915, 8303 (Jan. 7, 2025) at 4; *see also* Scheduling Order in CBCA 7915 (Nov. 22, 2024) at 1-2. The parties then resumed discovery efforts in both appeals.

On March 5, 2025, Venergy requested, without opposition from the VA, that the Board issue a protective order through which it could limit the distribution of confidential and/or proprietary documents, information, and tangible items in these appeals. The Board granted that unopposed request by order dated March 18, 2025, defining the types of information that Venergy could designate as "protected" in these appeals as follows:

> The term "protected material" as used in this protective order shall mean documents, information, or other tangible items that (a) constitute or contain confidential research, confidential financial information and commercially sensitive information, proprietary commercial information, and/or trade secrets, the disclosure of which might, with reasonable probability, adversely affect a party's or non-party's competitive business position and/or affect a party's or non-party's legally protected rights and (b) are designated protected material by the procedures set forth in this order.

Corrected Protective Order (Mar. 19, 2025) ¶ 1. Nevertheless, the Board directed in the protective order that "[n]othing in this protective order shall be construed to prohibit the disclosure by any federal agency party of materials covered by the protective order to other appropriate persons within the federal government, for those persons' official use." *Id.* ¶ 13.

As discovery continued, the VA, on July 11, 2025, filed a motion to compel Venergy to provide complete responses to outstanding document production requests and interrogatories. On July 25, 2025, soon after the VA filed its motion, Venergy produced what appeared to be its 2020, 2022, and 2023 audited financial statements to the VA, but briefing on the VA's motion to compel continued. As described in the VA's motion to compel, to allow it to respond to Venergy's claims for general conditions costs, overhead, unabsorbed home office overhead under the *Eichleay* formula, and profit, the VA was seeking to obtain financial and cost information for the contract, including, but not limited to, labor reports, payroll records, unabsorbed home office overhead rates, equipment rates, and subcontractor costs. The VA also specifically requested (in production request no. 35) production of all audited and/or unaudited financial statements prepared by or for Venergy for the period from 2017 to 2024, as follows:

> For the period from 2017 to 2024, please produce all audited and/or unaudited financial statements prepared for or by Venergy. Financial statements include balance sheets, cash flow statements, income statements, profit and loss statements, earnings statements, "contract schedules," and similar documents, including all notes and supporting schedules to the financial statements. Financial statements also include any forms or financial condition reports provided to lenders or investors to obtain or attempt to obtain financing.

Exhibit 2 to Respondent's Motion to Compel (July 11, 2025) ¶ 35. In its response to the VA's motion to compel, Venergy offered monitored access to its electronic accounting system and stated that "[i]n response to this motion to compel, Appellant has provided complete copies of [its] annual reports" for the years 2019 through 2023 (but not for 2017, 2018, or 2024). Appellant's Response to Motion to Compel (Aug. 5, 2025) at 3, 9. In response to another VA request (no. 40) for "all company financial forecasts and budgets prepared by or for Venergy from 2017 to 2024," Venergy represented that it "has provided Venergy's financial forecast report for 1/20/2020 to 7/28/2023," a period somewhat shorter than the VA was requesting. *Id.* at 9. It filed the financial statements that it had produced to the VA for 2020 (which encompasses both 2019 and 2020), 2022 (which encompasses both 2021 and 2022), and 2023 as Exhibits 17, 18, and 19 to its response.

In an order dated September 11, 2025, the Board granted the VA's motion in part. Although the VA believed that Venergy should have been required to search its electronic files for all documents responsive to the VA's production requests, the Board ultimately agreed that Venergy's approach—allowing monitored access to Venergy's accounting system through which the VA could conduct searches for responsive information—was consistent with the Federal Rules of Civil Procedure (FRCP). *See Venergy Group, LLC v. Department of Veterans Affairs*, CBCA 7195, et al., 25-1 BCA ¶ 38,910, at 189,396. The Board also agreed with Venergy that the VA had not shown the necessity of producing documents from 2017, 2018, or 2024. *Id.* Nevertheless, the Board required that "[i]n response to request nos. 35 and 40, to the extent that Venergy has previously produced redacted copies of financial audit reports and related information, it . . . again produce those documents but without redactions." *Id.*

Following several requests for extensions of time from the parties, discovery closed on February 13, 2026. *See* Scheduling Order (Dec. 16, 2025) at 2. The parties then requested that the Chair of the Board assign a neutral to assist them in mediation, and the Board temporarily suspended proceedings in these appeals while the parties attempted to resolve their disputes amicably through mediation.

On April 28, 2026, the VA reported that it had withdrawn from mediation and filed what it titled "Respondent's Motion for Sanctions and Request to Release Protected Documents for Investigation." The VA tells us that, after the Board issued its September 11, 2025, order on the VA's motion to compel, Venergy "produced documents purporting to comply with the Board's order (*see* [Appellant's Response to Respondent's Motion to Compel,] Exhibits 17-20)" and that the "VA continued working through discovery." Respondent's Motion for Sanctions at 4. Nevertheless, the VA was having difficulty correlating information that it was being provided with information that it already had. Consistent with the Board's order on the motion to compel, Venergy provided the VA access to its electronic Foundation® construction accounting software system, limited to the contract at issue, but much of the information that the VA's construction damages expert was finding was inconsistent with the 2020, 2022, and 2023 audited financial statements that Venergy had produced to the VA on July 25, 2025.

At a certain point, the VA reports, it discovered an allegedly intentional masking effort that altered the financial information that the VA could see in the produced documents:

> VA's expert spent significant time trying to reconcile the documents produced against other information VA received. He could not. Exhibits 17-19 [to Appellant's Response to Respondent's Motion to Compel] did not tally to the same amount listed in [Venergy's] financial system. Then VA discovered, in Exhibit 17, that someone [identified as the author in an Adobe Acrobat comments box with a name that matched the first name of a corporate officer at Venergy] had changed the document by placing white boxes over sections [using Adobe Acrobat's Rectangle tool] so that they could not be seen.

Respondent's Motion for Sanctions at 4 (footnotes omitted). As the VA explains it, when it opened the version of Venergy's 2020 financial statement that Venergy originally produced (Exhibit 17), "it found that [white] rectangles had been manually placed over financial data" (eliminating the statement's schedule of earnings from contracts, schedule of contracts in progress, and schedule of completed contracts) and that this act had been performed "by a user" identified only by his first name, which is the same first name of Venergy's CEO. Respondent's Sanctions Reply Brief (June 9, 2026) at 3. "When [the white boxes were] removed," the VA reports, "additional pages became visible." *Id.* By removing the electronic white box redactions, a thirteen-page financial report that Venergy produced to the VA became an eighteen-page financial report, reflecting schedules of earnings from contracts, schedules of contracts in progress, and schedules of completed contracts that the VA was unaware existed before it removed the electronic white boxes. Respondent's Motion for Sanctions at 4-6; Appellant's Response to Respondent's Motion to Compel, Exhibit 17; Respondent's Motion for Sanctions, Exhibit I.[3] In addition, the table of contents to the financial statement contained similar white rectangular electronic redactions covering over

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[3] The complete 2020 financial statement that Venergy eventually produced to the VA was nineteen, not eighteen, pages and contained a table of contents that had a page number that differed from that contained in the originally produced (redacted) 2020 financial statement. *Compare* Appellant's Response to Respondent's Motion to Compel, Exhibit 17 *with* Respondent's Motion for Sanctions, Exhibit I. The record contains no explanation of the change to the page number in the financial statement.

any reference to the existence of the redacted schedules, ensuring that the reader would not realize that schedules were supposed to be a part of the statement. Respondent's Motion for Sanctions at 4-6; Respondent's Sanctions Reply Brief at 5.

The same white-box redactions were found in Venergy's 2022 and 2023 financial statements, and the VA also eventually discovered that affirmative alterations to dollar figures and/or commentary changes had been made on every single page of the 2020, 2022, and 2023 financial statements that Venergy originally produced to the VA, creating what looked like inexplicable mathematical errors. *Compare* Appellant's Response to Respondent's Motion to Compel, Exhibits 18, 19 *with* Respondent's Motion for Sanctions, Exhibits J, K. The VA alleged that "Venergy actively concealed the fact that it had stripped critical data (and changed amounts) from the produced documents—data that was directly and materially relevant to Venergy's claim for damages." Respondent's Motion for Sanctions at 17. In addition to requesting dismissal as a sanction, the VA asked for permission to release documents subject to the March 19, 2025, protective order to the OIG and potentially other federal agencies.

We asked Venergy to respond in a short time frame to the VA's request for permission to release information to the OIG, and, on May 7, 2026, following Venergy's response, we issued an order amending the existing protective order to permit that release. *Venergy Group, LLC, v. Department of Veterans Affairs*, CBCA 7915, et al., 26-1 BCA ¶ 39,068, at 190,309. We asked Venergy to respond to the merits of the VA's motion to dismiss by May 28, 2026, which it did. In its response, Venergy first argued that the Board lacks jurisdiction to entertain the VA's motion because it alleges fraud, which the CDA does not permit the Board to decide. Alternatively, it argued, among other things, that: (1) the facts as alleged by the VA are inaccurate; (2) the VA did not notify counsel for Venergy that the financial statements were missing supplementary schedules before depositions were conducted and that, with timely notice, Venergy's counsel could have obtained complete unredacted statements; and (3) the VA improperly did not negotiate with Venergy regarding missing discovery before filing its motion for sanctions. In a declaration from Venergy's CEO that accompanied the response brief, the CEO represented, under penalty of perjury pursuant to 28 U.S.C. § 1746, that "the initial versions of these [financial] statements," when produced to the VA in July 2025, "inadvertently omitted information . . . and contained revisions to the table of contents that excluded reference to those schedules," Venergy CEO Declaration (May 28, 2026) ¶ 5, which Venergy argued was not the type of intentional misconduct for which a sanction of dismissal could be imposed. Venergy also reported that, on February 16 and 17, 2026, after learning that the VA had uncovered white-out redactions and other alterations in Venergy's financial statements, Venergy provided the VA with clean unredacted copies of the statements, *see* Venergy CEO Declaration ¶ 10, which, Venergy argues, eliminates any prejudice from the original defects and renders the motion for sanctions moot.

After receiving the VA's reply brief on June 6, 2026, the Board elected to schedule a fact-finding evidentiary hearing limited to the discovery misconduct alleged in the VA's motion for sanctions. Although the Board offered Venergy the opportunity to delay that hearing until the OIG had indicated whether it intended to investigate this matter, Venergy declined to delay proceedings. At the parties' request, the Board scheduled the hearing for July 29, 2026.

During the hearing, the VA's expert witness presented Adobe Acrobat "Rectangle Properties" metadata from one of the altered financial statements, which showed that white-box redactions to that document, effectively removing (1) the four schedules at the end of the financial statement reflecting company contract billings information and (2) the accompanying portions of the statement's table of contents identifying the existence of the last four pages, were inserted between 5:08 p.m. and 5:10 p.m. on July 24, 2025, the day before the July 25, 2025, production of the financial statements to the VA. Schambach Demonstrative 7. The expert testified that the "most impactful change" to the financial statements, from a damages standpoint, was the change to each year's total company billings, which, because of the manner in which that figure is used in the *Eichleay* calculation, increased Venergy's home office overhead claim by approximately $1.1 million above that which the original audited statements would otherwise have supported. Schambach Demonstrative 19. Another significant impact of the changes was to Venergy's general conditions overhead claim, which, because of alterations to the identified costs of revenue earned, increased Venergy's overhead rate from what it should have been—11.3%—to 21.37% (although Venergy, in its certified claim, had requested 41%), increasing Venergy's claim by more than $100,000. Schambach Demonstratives 20, 21.

Venergy's CEO and its outside Certified Public Accountant (CPA) both testified at the hearing. Even though the CEO had declared, on May 28, 2026, that Venergy had "inadvertently omitted information" from the financial statements when first producing them, Venergy CEO Declaration ¶ 5, he disclaimed any knowledge at the hearing of how the financial statements that were produced in July 2025 were altered from their original form and knew only that he had not personally altered them. The CPA, who also disclaimed any involvement in the alterations, testified that the financial statements which Venergy produced to the VA on July 25, 2025, were not the statements that she had issued. In addition to places where white boxes were inserted to remove information in the table of contents and effectively delete all company contract revenue information, every single page of each financial statement had been altered to insert different information and dollar figures than the original audited financial statements. Schambach Demonstratives 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16; 2020, 2022, and 2023 Financial Statement (FS) Comparison Demonstratives (filed July 24, 2026).

Although both the CEO and the CPA testified that they did not alter the financial statements, the CEO indicated that a now-former employee who was assisting with the production and who was a proponent of using Grok, an artificial intelligence tool (AI), would have had access to the CEO's Adobe Acrobat account but does not know if that employee manipulated them. Nevertheless, Venergy has not contacted that former employee for information or undertaken any other kind of internal investigation to attempt to uncover the original source of the alterations or to determine whether those document alteration efforts extended beyond the manipulated documents that the VA was able to identify. Unable to explain how the redactions and alterations to the financial statements occurred, Venergy's main argument against sanctions is that the VA did not suffer prejudice from the original production of manipulated financial statements because, after the manipulations and alterations were discovered and reported, Venergy provided complete copies of the original financial statements to the VA (although one of them is still missing a page identifying the total contract billings for 2021).

## Discussion

### I. Venergy's Request to Seal Misconduct Allegations

When it filed its motion to dismiss on April 28, 2026, the VA provided the Board with both a protected version of the motion, which was subject to the protective order that the Board had previously issued, and a redacted version that could be made publicly available. In its redacted public version, the VA blacked out financial information that the VA had pulled from documents that Venergy had marked as protected. Three days after the VA filed its motion to dismiss, Venergy filed its own motion seeking to add redactions to the VA's public version of the motion to dismiss. Venergy's proposed redactions would remove from the public version the VA's description of what Venergy allegedly did to manipulate its electronic records (allegedly to hide information) and the names of the individuals on Venergy's side who allegedly may have been involved in manipulating the electronic financial records that Venergy produced to the VA. The Board denied Venergy's request in an order dated May 7, 2026. To the extent that Venergy wants the Board to redact such information from its decision here as well, that request is similarly denied.

The United States Court of Appeals for the Federal Circuit has "consistently recognized that the public has a 'highly significant' and 'longstanding' right of access to 'inspect and copy public records and documents, including judicial records and documents.'" *Global K9 Protection Group, LLC v. United States*, 175 F.4th 1348, 1356 (Fed. Cir. 2026) (quoting *DePuy Synthes Products, Inc. v. Veterinary Orthopedic Implants, Inc.*, 990 F.3d 1364, 1369 (Fed. Cir. 2021) (quoting *Nixon v. Warner Communication, Inc.*, 435 U.S. 589, 597 (1978))); *see Ace-Federal Reporters, Inc. v. General Services Administration*, GSBCA 13298-REM, et al., 02-2 BCA ¶ 31,912, at 157,644 ("It is well settled that accessibility of judicial documents and proceedings to the public is a centuries-old component of our legal system."). "[W]hile public access to court records and proceedings is not absolute, there has been a longstanding presumption in its favor." *Ace-Federal Reporters*, 02-2 BCA at 157,644; *see Global K9 Protection*, 175 F.4th at 1356. "[T]his strong presumption of public access to judicial records applies with equal force to records of the boards of contract appeals." *Ace-Federal Reporters*, 02-2 BCA at 157,644 (citing *AT&T Communications v. General Services Administration*, GSBCA 14732, 2001 WL 37165511 (Oct. 11, 2001)). Nevertheless, "[t]he presumption for access is to be balanced against the countervailing interest of commercial confidentiality." *Id*. at 157,645. The Board "must consider whether the proposed redactions involve commercially sensitive information such that disclosure would cause more harm to the firms' competitive positions than non-disclosure would add benefit to the public's access interest." *Id.* "Tribunals are required to 'skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need.'" *Id.* (quoting *Encyclopedia Brown Productions v. Home Box Office*, 26 F. Supp. 2d 606, 611 (S.D.N.Y. 1998)).

"Those seeking to maintain the confidentiality of judicial records have a heavy burden and must show a compelling interest." *Ace-Federal Reporters*, 02-2 BCA at 157,645. "Only a 'strong justification' shown by a party wanting to restrict access may overcome the presumption of access." *Global K9 Protection*, 175 F.4th at 1356 (quoting *DePuy Synthes*, 990 F.3d at 1369). In its request for additional redactions, Venergy did not make any attempt to explain why protection of the material that it wanted redacted was necessary or justified. Even if we were to attempt to find a basis for protection on Venergy's behalf, we cannot identify any part of the definition of "protected material" in the protective order that could encompass the information that Venergy wanted redacted from public view. Paragraph 1 of the protective order defines the types of information that can be designated as "protected" in these appeals as "confidential research, confidential financial information and commercially sensitive information, proprietary commercial information, and/or trade secrets, the disclosure of which might, with reasonable probability, adversely affect a party's or non-party's competitive business position and/or affect a party's or non-party's legally protected rights." Corrected Protective Order ¶ 1. The material that Venergy wanted redacted is plainly not confidential research, confidential financial information, proprietary commercial information, or a trade secret. The only part of the "protected material" definition that remains is "commercially sensitive information." Even if Venergy could establish that a public description of its alleged misconduct and the fact that the matter has been referred to the VA OIG might "adversely affect [its] competitive business position and/or . . . legally protected rights," it cannot show that the information is "commercially sensitive information."

By definition, "[t]rade secret or commercially sensitive information must be 'important proprietary information.'" *Lodestar Anstalt v. Route 66 Junkyard Brewery*, No. CV 17-0062 JCH/JHR, 2019 WL 1795535, at *6 (D.N.M. Apr. 24, 2019) (quoting *Zoobuh, Inc. v. Rainbow International Corp.*, No. 2:14-cv-00477-DN, 2015 WL 2093292, at *3 (D. Utah May 5, 2015)). "Proprietary information" is "[i]nformation in which the owner has a protectable interest," which, like a "TRADE SECRET," "is kept confidential to maintain an advantage over competitors." Black's Law Dictionary 1414, 1724 (10th ed. 2014); *see* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/proprietary (last visited Aug. 18, 2026) (defining "proprietary" as "of, relating to, or characteristic of an owner or title holder" or "used, made, or marketed by one having the exclusive legal right"). Under FRCP 26(c)(1)(G), to which we may look under the Board's Rules, "a [tribunal] may, for good cause, issue a protective order (or permit a party to avail itself of an already issued protective order) to require that 'a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.'" *Lodestar Anstalt*, 2019 WL 1795535, at *6 (quoting *Coll v. Stryker Corp.*, No. CV 14-1089 KG/SMV, 2017 WL 3190658, at *2 (D.N.M. May 24, 2017)). "When a party seeks such a protective order, it 'must first establish that the information sought is a trade secret [or important proprietary information] and then demonstrate that its disclosure might be harmful.'" *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1190 (10th Cir. 2009) (quoting *Centurion Industries, Inc. v. Warren Steurer & Associates*, 665 F.2d 323, 325 (10th Cir. 1981)). "It is within the sound discretion of the trial court to decide whether trade secrets [and proprietary information] are relevant and whether the need outweighs the harm of disclosure." *Centurion Industries*, 665 F.2d at 326.

Here, the information that Venergy wanted us to withhold from public view is not "important proprietary information." It instead is information that Venergy might find embarrassing, which is an insufficient basis for non-disclosure. *See, e.g.*, *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1074 (3d Cir. 1984) ("The presumption of openness . . . [is] not overcome by . . . the interest of upper-level management in escaping embarrassment."); *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 301 (N.D. Ill. 1993) ("A claim that public disclosure of information will be harmful to a defendant's reputation is not 'good cause' for a protective order."). Venergy does not truly "own" information alleging discovery fraud, as required under the definition of "proprietary" information, since the VA OIG could publicly announce an investigation at any time. Accordingly, Venergy cannot viably assert that information regarding an OIG investigation is proprietary to Venergy. We are unable to find any part of the protective order's definition of "protected material" to which Venergy's proposed redactions could attach.

The Federal Circuit has recently chastised lower tribunals for failing to take seriously their obligations to ensure that information is designated as and considered to be protected only when appropriate. *See Global K9 Protection*, 174 F.4th at 1356. It has held that "[t]he public interest in understanding the course of government-contract litigation is compelling" and that tribunals considering government contract matters "ha[ve] an obligation to ensure that the public right of access is vindicated." *Id.* As a result, we have no basis to keep the VA's decision to refer Venergy's alleged misconduct to the VA OIG's office and the basis of its misconduct allegations private and shielded from public view.

II. The Board's Authority to Dismiss as a Sanction for Discovery Misconduct

"Inherent in the statutory mandate" of the CDA "is a board's authority to control proceedings before it, including discovery, and to interpret and enforce its own rules." *Duckels Construction, Inc.*, AGBCA 89-218-1, 90-3 BCA ¶ 22,955, at 115,239. Pursuant to Board Rule 35(b) (48 CFR 6101.35(b) (published in eCFR)), the Board may impose appropriate sanctions "[i]f a party . . . fails to comply with any direction or order of the Board (including an order to provide or permit discovery) or engages in misconduct affecting the Board, its process, or its proceedings." Permissible sanctions "may include . . . [d]ismissing the case or any part thereof." *Id.* 6101.35(b)(6).

The Board's authority to dismiss an appeal as a sanction in an appropriate case is well-established. *See, e.g.*, *Griffin & Dickson v. United States*, 16 Cl. Ct. 347, 351 (1989); *Metadure Corp. v. United States*, 6 Cl. Ct. 61, 67 (1984). "[T]he case management authority of the [boards of contract appeals] is no different from that of federal trial courts which, by virtue of their case management authority, are given broad discretion to manage the litigation on their dockets." *Avant Assessment, LLC v. Secretary of the Army*, 752 F. App'x 1000, 1003 (Fed. Cir. 2018) (quoting *Metadure Corp.*, 6 Cl. Ct. at 67); *see Suffolk Construction Co. v. General Services Administration*, CBCA 2953, et al., 17-1 BCA ¶ 36,717, at 178,797-78. Like federal courts, "the Board has available to it, and has used, a variety of sanctions designed to enforce compliance with our Rules and orders and secure the just and expeditious resolution of the disputes before us," *Environmental Safety Consultants, Inc.*, ASBCA 58343, 14-1 BCA ¶ 35,786, at 175,050 (citation omitted), including forbidding a party to challenge the accuracy of evidence, refusing to allow a party to support or oppose designated claims or defenses, drawing evidentiary inferences against a party, and, when appropriate, dismissal. Rule 35(b)(2), (3), (6), (8); *see Medtek, Inc. v. Department of Veterans Affairs*, CBCA 1544, 09-2 BCA ¶ 34,285, at 169,368.

Nevertheless, the sanction of dismissal is viewed as "a harsh remedy, which should be reserved for only the most severe abuses of the discovery process." *Hendler v. United States*, 952 F.2d 1364, 1382 (Fed. Cir. 1991). Normally, before authorizing dismissal, the tribunal must "find that the responsible party acted or failed to act with a degree of culpability that exceeds simple inadvertence or mistake before it may choose dismissal as a sanction for discovery violations. Any sanctions . . . must be premised on a finding that the culpable party willfully abused the judicial process or otherwise conducted the litigation in bad faith." *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 776 (7th Cir. 2016); *see Archibeque v. Atchison, Topeka, & Santa Fe Railway Co.*, 70 F.3d 1172, 1174 (10th Cir. 1995) ("Because of the harshness of dismissal . . . , due process requires that the discovery violation be predicated upon 'willfulness, bad faith, or [some] fault of petitioner' rather than inability to comply." (quoting *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640 (1976) (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958)))); *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984) ("A finding of such extreme circumstances necessary to support the sanction of dismissal must, at a minimum, be based on evidence of the sanctioned party's willfulness, bad faith or fault in failing to comply with a discovery order.").

That being said, "it is well-settled that fabricating and submitting knowingly false evidence amounts to willful and bad faith conduct." *American Rena International Corp. v. Sis-Joyce International Co.*, No. CV 12–6972 FMO (JEMx), 2015 WL 12732433, at *23 (C.D. Cal. Dec. 14, 2015). The intentional manipulation or falsification of evidentiary documents that are then produced in discovery is a particularly egregious abuse of process that "undermines the most basic foundations of our judicial system." *Secrease v. Western & Southern Life Insurance Co.*, 800 F.3d 397, 402 (7th Cir. 2015); *see Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 91 F.R.D. 574, 576 (S.D.N.Y. 1981) ("Destruction or concealment by a party of relevant documents in its files threatens the viability and public acceptance of the system."). "Our adversarial system of civil justice rests upon access of all parties to all evidence bearing on the controversy between them, including that in the control of adverse parties. This, of course, requires the absolute honesty of each party in answering discovery requests and complying with discovery orders." *Litton Systems*, 91 F.R.D. at 576. "Imperative to the proper functioning of our system of justice is 'complete and accurate responses to discovery' requests." *In re Tutu Wells Contamination Litigation*, 162 F.R.D. 46, 71 (D.V.I. 1995) (quoting *Averbach v. Rival Manufacturing Co.*, 879 F.2d 1196, 1201 (3d Cir. 1989)). "Our system of civil litigation cannot function if parties . . . suppress information called for upon discovery." *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1345 (5th Cir. 1978).

The harm caused by the receiving party's receipt (and discovery) of a falsified or manipulated document goes beyond concerns about the falsified document itself. It also sows doubt about the veracity of *other* documents that were produced by the falsifying party, even if the receiving party cannot readily establish manipulation of those documents, which in turn undermines perceptions about the integrity of the Board's processes, and it imposes additional costs on the receiving party as that party tries to verify the other documents' true content:

> The submission of falsified evidence substantially prejudices an opposing party by casting doubt on the veracity of all of the culpable party's submissions throughout litigation. The prejudiced party is forced either to attempt independent corroboration of each submission, at substantial expense of time and money, or to accept the real possibility that those discovery documents submitted by the opposing party are inaccurate. Nor is the exclusion of the fabricated evidence always enough to deter discovery misconduct. "Litigants would infer that they have everything to gain, and nothing to lose, if manufactured evidence merely is excluded while their lawsuit continues."

*Garcia v. Berkshire Life Insurance Co.*, 569 F.3d 1174, 1180 (10th Cir. 2009) (quoting *Pope v. Federal Express Corp.*, 138 F.R.D. 675, 683 (W.D. Mo. 1990), *aff'd in part, vacated in part on other grounds,* 974 F.2d 982 (8th Cir. 1992)); *see Slate v. American Broadcasting Cos.*, 941 F. Supp. 2d 27, 48-49 (D.D.C. 2013).

"To permit the fabrication of spurious corroborating evidence without the imposition of a harsh responsive sanction would constitute an open invitation to abuse of the judicial system of the most egregious kind." *Asia Pacific Agricultural & Forestry Co. v. Sester Farms*, No. 3:12-CV-00936-PK, 2013 WL 4742934, at *11 (D. Ore. Sept. 3, 2013); *see New York Credit & Financial Management Group v. Parson Center Pharmacy, Inc.*, 432 F. App'x 25 (2d Cir. 2011) ("Falsifying evidence is sanctionable conduct," and "[s]ubmitting falsified evidence is also properly sanctionable."). "[O]nce culpable conduct is found, the [tribunal] is required to impose such sanctions that are just, both 'to penalize' the wrongful conduct and 'to deter those who might be tempted to such conduct in the absence of a deterrent.'" *Tutu Wells Contamination*, 162 F.R.D. at 63 (quoting *National Hockey League*, 427 U.S. at 643). "The [tribunal's] obligation is to protect not only litigants who may suffer from abusive litigation practices of their adversaries, but also to promote the proper function of a fair and effective judicial system which, while it is adversarial, need not also be callous, uncivil, sneaky or booby-trapped. When it becomes so, the courts must act decisively." *Derzack v. County of Allegheny, Pa.*, 173 F.R.D. 400, 411 (W.D. Pa. 1996).

Courts considering misconduct claims involving the manipulation, falsification, or manufacturing of relevant evidence by a plaintiff or appellant have often found that dismissal is an appropriate sanction. In *Amfosakyi v. Frito Lay, Inc.*, 496 F. App'x 218 (3d Cir. 2012), the United States Court of Appeals for the Third Circuit considered whether dismissal as a sanction was appropriate after a plaintiff was caught falsifying a material document as part of the discovery process. The court referred to a prior court decision, *Poulis v. State Farm*

*Fire & Casualty Co.*, 747 F.2d 863 (3d Cir. 1984), to identify six factors that it believed a tribunal should weigh in deciding whether the sanction of dismissal was appropriate:

> Those six factors include: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the conduct at issue; (3) a history of dilatoriness; (4) whether the conduct of the party was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

*Amfosakyi*, 496 F. App'x at 225. "Not every factor must weigh in favor of dismissal," it recognized, "so long as most do." *Id.* It then discussed the likelihood that an intentional effort by a party to falsify documents in the discovery process that are material to its case, in and of itself, would provide a basis for dismissal as a sanction:

> We agree with the District Court that the record conclusively establishes that [plaintiff] falsified a document produced in discovery that was material to his claim of discrimination, and then testified falsely in his deposition regarding that document. Simply put, a litigant who provides false documentation and/or untruthful testimony during the course of discovery in an improper attempt to influence the outcome of the civil action may be prohibited by the District Court, pursuant to *Poulis* and Rule 37 [of the Federal Rules of Civil Procedure], from proceeding with the civil action. The record establishes that [plaintiff] had a full and fair opportunity to respond to [defendant's] motion for sanctions, and that the Magistrate Judge's findings and recommendations were the result of sound legal analysis and not personal bias. Accordingly, the District Court did not abuse its discretion in granting [defendant's] motion for sanctions.

*Id.* (citation omitted); *see Ingalls Shipbuilding Co. v. United States*, 857 F.2d 1448, 1451 (Fed. Cir. 1988) ("The harsh remedy of de facto dismissal is appropriate where the failure to comply with a pretrial discovery order is due to 'willfulness, bad faith, or . . . fault' on the part of a litigant." (quoting *Societe Internationale*, 357 U.S. at 212)); *Oniha v. Delta Airlines, Inc.*, No. 1:19-CV-05272-LMM, 2021 WL 4930127, at *8 (N.D. Ga. Sept. 13, 2021) ("Simply acting as if Plaintiff had not fabricated a key piece of evidence and then perjured himself at deposition would not adequately address his abuses of the judicial process. Only dismissal would do so."), *aff'd*, No. 21-13532, 2022 WL 580933 (11th Cir. Feb. 25, 2022); *Young v. Office of Senate Sergeant at Arms*, 217 F.R.D. 61, 70 (D.D.C. 2003) ("[D]ismissal is the appropriate sanction where a party manufactures evidence which purports to corroborate its substantive claims." (quoting *Vargas v. Peltz*, 901 F. Supp. 1572, 1580-81

(S.D. Fla. 1995))); *Pacific Far East Line, Inc. v. R.J. Reynolds Industries, Inc.*, No. C 76-2312 AJZ, 1981 WL 2517, at *12 (N.D. Cal. Sept. 14, 1981) ("[W]here deliberate falsehood in the discovery process has been established, the courts have granted the sanction of dismissal."), *aff'd sub. nom. Wyle v. Reynolds Industries, Inc.*, 709 F.2d 585 (9th Cir. 1983).

In fact, because of the egregiousness of intentional document manipulation in discovery and its impact on the integrity of the judicial process, some courts have found that consideration of a lesser sanction than dismissal is not "necessary in a case in which the plaintiff's fraud is criminal in character and would if undetected destroy a legitimate and dispositive defense." *Oliver v. Gramley*, 200 F.3d 465, 466 (7th Cir. 1999); *see Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1119 (1st Cir. 1989) ("[A] federal district judge can order dismissal or default where a litigant has stooped to the level of fraud on the court."); *Omran v. Bleezarde*, No. 1:15-cv-00190-DBH, 2016 WL 5401018, at *9 (D.N.H. Aug. 26, 2016) ("[D]ismissal is appropriate when a party commits a fraud on the court" by manufacturing evidence.), *recommendation adopted*, 2016 WL 5394692 (D.N.H. Sept. 27, 2016), *aff'd*, No. 16-1638, et al., 2018 WL 1840194 (1st Cir. Jan. 8, 2018). It is unclear to the Board, however, if the Federal Circuit would adopt that reasoning. In *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed. Cir. 2011), in which the Court considered a situation involving bad faith spoliation of evidence rather than intentional manipulation and modification of documents, the Court recognized that "[d]ismissal is a 'harsh sanction,' to be imposed only in particularly egregious situations where 'a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings.'" *Id.* at 1328 (quoting *Leon v. IDX Systems Corp.*, 464 F.3d 951, 958 (9th Cir. 2006)). It provided that, before dismissing a case as a sanction (at least where the misconduct involves spoliation), something more than bad faith and prejudice to the opposing party is necessary:

> [T]he presence of bad faith and prejudice, without more, do not justify the imposition of dispositive sanctions. In gauging the propriety of the sanction, the district court must take into account "(1) the *degree* of fault of the party who altered or destroyed the evidence; (2) the *degree* of prejudice suffered by the opposing party; and (3) *whether there is a lesser sanction* that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future." *Schmid* [*v. Milwaukee Electric Tool Corp.*], 13 F.3d [76,] 79 [(3d Cir. 1994)] (emphases added). *See also Leon*, 464 F.3d at 958 (noting that the district court must consider "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanction[s]"). The

> sanction ultimately imposed must be commensurate with the analysis of these factors.

*Micron Technology*, 645 F.3d at 1329. Accordingly, to the extent that we find that Venergy has engaged in sanctionable conduct, we will conduct "a careful weighing of [the] appropriateness" of dismissal as a sanction and consider "the suitability of lesser sanctions." *Dodson v. Runyon*, 86 F.3d 37, 39 (2d Cir. 1996); *see Micron Technology*, 645 F.3d at 1329.

## III. Whether Venergy Engaged in Sanctionable Conduct

### A. The Standard of Proof Necessary to Permit Dismissal as a Sanction

In other circuits, the standard of proof necessary to establish a factual basis for dismissal as a sanction appears somewhat unsettled. Some courts have held that "[a]ny 'fundamentally penal' sanctions—'dismissals and default judgments, as well as contempt orders . . .'—require proof by clear and convincing evidence." *Compton v. Alpha Kappa Alpha Sorority Inc.*, 938 F. Supp. 2d 103, 106 (D.D.C. 2013) (quoting *Shepherd v. American Broadcasting Cos.*, 62 F.3d 1469, 1478 (D.C. Cir. 1995)); *see Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 394 (1st Cir. 1990); *Asia Pacific Agricultural*, 2013 WL 4742934, at *11.[4] Under that view, "[a tribunal] may [dismiss an appeal as a] sanction 'only if it finds, first, that there is clear and convincing evidence that the fraudulent or bad faith misconduct occurred.'" *Compton*, 38 F. Supp. 2d at 106 (quoting *Young*, 217 F.R.D. at 66). More recently, though, courts have increasingly been holding that dismissals as a sanction should require proof by only a preponderance of the evidence, finding no reason to veer from the normal presumptive standard of proof in federal civil cases. *See, e.g.*, *Grogan v. Garner*, 498 U.S. 279, 286-90 (1991) (discussing how the preponderance standard typically applies to proof of fraud absent statutory requirements for a higher standard of proof); *Hoffer v. Tellone*, 128 F.4th 433, 439-40 (2d Cir. 2025) (explaining reasons that it decided to apply a preponderance rather than a clear and convincing standard); *Ramirez*, 845 F.3d at 776-81 (overruling prior precedent to establish that dismissals as a sanction require proof by only a preponderance of the evidence); *In re Vaxart, Inc. Securities Litigation*, No. 20-cv-05949-VC, 2025 WL 1865848, at *6 (N.D. Cal. July 7, 2025) (adopting a preponderance of the evidence standard); *Hernandez v. Franco American Baking Co.*, No. 3:20-cv-00628-LRH-WGC, 2021 WL 6064008, at *3 (D. Nev. Dec. 21, 2021) (same).

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[4] By contrast, "[s]o-called 'issue-related sanctions'—those that are 'fundamentally remedial rather than punitive and do not preclude a trial on the merits'—[only] require proof by a preponderance of the evidence." *Compton*, 938 F. Supp. 2d at 106 (quoting *Shepherd*, 62 F.3d at 1478).

The Federal Circuit, however, has routinely applied the "clear and convincing evidence" standard to dismissals as a sanction, at least for those resulting from spoliation of evidence, requiring clear and convincing evidence of both bad faith and prejudice to the opposing party. *Micron Technology*, 645 F.3d at 1328-29; *see Jones v. United States*, No. 2024-2053, 2026 WL 1113469, at *4 (Fed. Cir. Apr. 24, 2026) (applying *Micron Technology*); *Loesch v. United States*, 645 F.2d 905, 921 (Ct. Cl. 1981) (Fraud, a "conscious wrongdoing with an intention to cheat or be dishonest[,] . . . must be substantiated by clear and convincing proof rebutting every presumption of honesty and fair dealing," and "[t]he degree of proof necessary to establish fraud demands more than a preponderance of the evidence, it demands 'clear and convincing' evidence."). In light of the Federal Circuit's and its predecessor's guidance in *Micron Technology*, we will apply a "clear and convincing" standard of proof in the circumstances here.

B. The Necessity of a Fact-Finding Hearing

In some cases, "[w]here the question of fabrication is disputed, it may be appropriate to resolve the dispute on the basis of factual findings following an evidentiary hearing." *Asia Pacific Agricultural*, 2013 WL 4742934, at *11 (citing *Professional Seminar Consultants v. Sino American Technology Exchange Council, Inc.*, 727 F.2d 1470, 1472 (9th Cir. 1984)). Nevertheless, "a motion for sanctions does not automatically require an evidentiary hearing." *Rossbach v. Montefiore Medical Center*, 81 F.4th 124, 138 (2d Cir. 2023) (citing *Schlaifer Nance & Co. v. Estate of Andy Warhol*, 194 F.3d 323, 335 (2d Cir. 1999)); *see Aoude*, 892 F.2d at 1120. In this case, without deciding on its necessity, we elected to provide Venergy an opportunity to defend against the VA's allegations at a fact-finding evidentiary hearing to allow for a more thoroughly developed record.

C. Venergy's Misconduct

It is clear that, before Venergy produced to the VA electronic versions of its audited financial statements for the years 2020, 2022, and 2023, someone manipulated the documents to hide the last four pages of financial information from each of those statements, to remove or hide correlating sections of the financial statements' table of contents so that the reader would not be placed on notice that the last four pages were missing, and to edit other information (including through changes to other dollar figures and columns) on every single page of each of those statements. Initially, in response to the VA's motion for sanctions, Venergy provided a declaration from its CEO in which he represented that, in producing the financial statements to the VA, the company "inadvertently omitted information (schedules of earnings from contracts, schedules of contracts in progress, and schedules of completed contracts)" from financial statements that "contained revisions to the tables of contents that excluded reference to those schedules," which resulted from "the voluminous nature of the discovery requests and the technical challenges associated with exporting and merging large accounting files from [Venergy's] accountant's system." Venergy CEO Declaration (May 28, 2026) ¶ 5. That explanation is inconsistent with the redactions and changes actually made to the financial statements before they were produced.

Given the effect of the changes, it is impossible that those changes were inadvertent. As the VA's damages expert testified, the changes to the financial statements—particularly the elimination of the portion of the statements' corporate contract billings schedules, along with the targeted deletion of the table of contents' correlating references to the existence of those schedules—allowed Venergy to support an *Eichleay* claim for unabsorbed home office overhead that was $1.1 million higher than the true documents would allow. *See* Schambach Demonstratives 17, 18, 19. Under the *Eichleay* formula, if entitlement to unabsorbed home office overhead is established, quantum is calculated through use of the following formula:

1. Contract billings/Total billings for contract period x Total overhead for contract period = Overhead allocable to the contract.
2. Allocable overhead/Days of performance = Daily contract overhead[.]
3. Daily contract overhead x No. days delay = Amount claimed.

*Eichleay*, 60-2 BCA at 13,568. The input for "[t]otal billings for contract period" refers to total company billings on all of the company's contracts for the period defined by the commencement and completion dates of the contract work. *See Wickham Contracting Co. v. General Services Administration*, GSBCA 8675, 92-3 BCA ¶ 25,040, at 124,818 ("[A]n essential part of the Eichleay calculation compares the total billings under the delayed contract to the total billings under all contracts."), *aff'd*, 12 F.3d 1574 (Fed. Cir. 1994); *G.S.&L. Mechanical & Construction, Inc.*, DOT CAB 1640, 86-3 BCA ¶ 19,026, at 96,097-3 ("What does this formula do? Essentially, it requires one to ascertain the total billings of a contractor for all projects during a period."); Defense Contract Audit Agency (DCAA) Contract Audit Manual, DCAAM 7640.1 (DCAA Audit Manual), ¶ 12-805.1 (Feb. 2026) (available at https://www.dcaa.mil/Portals/88/Documents/Guidance/CAM/CAM_Chapter_12_20260223.pdf?ver=y0RhGRsRGJO67Rbtjv0YBw%3D%3D (last visited Aug. 18, 2026)) ("The audit of Eichleay formula components consists of examining . . . contract billings [on the delayed contract for which compensation is sought] and total contract (company) billings."). "Divid[ing] the total contract billings . . . for the delayed contract's actual performance period by the total company billings for all contracts performed during the delayed contract performance period" results in an "allocation ratio," which is then multiplied "by the company's total fixed overhead . . . for the delayed contract's actual performance period" to create a daily overhead rate. DCAA Audit Manual ¶ 12-804.1. That daily overhead rate is then multiplied by the number of days of delay to establish the company's total unabsorbed home office overhead damage amount. *Id.*

In its certified claim, Venergy identified its total company contract billings for the period of performance here as $74,787,133, Exhibit 293 at 3106, as supported by the manipulated financial statements. Placing that figure into the *Eichleay* formula results in an allocation ratio of 24% and a total calculable home office overhead claim amount (inclusive of a 10% profit markup) of $2,387,723. *Id.* at 3107; Schambach Demonstrative 19. Yet, the contract schedules that were effectively deleted from the manipulated financial statements produced to the VA showed that Venergy's *actual* total company contract billings for the period were almost *twice* as much as Venergy had indicated. Inputting the corrected figures into the *Eichleay* formula generates an allocation ratio of only 13%, which reduces Venergy's total home office overhead claim to $1,283,786, a reduction of more than $1.1 million. Schambach Demonstrative 19.

Another effect of the manipulations was to allow Venergy to increase the amount of its general conditions overhead claim, which is separate and apart from Venergy's home office overhead claim. Although Venergy originally claimed a 41% overhead rate in its certified claim, it had reduced that figure to 21.37% by the time that it responded to the VA's motion to compel. Appellant's Response to Motion to Compel (Aug. 5, 2025) at 4. In generating that revised percentage, Venergy identified what it said were its total indirect costs, which it had divided by what it identified as its total direct costs for all contracts. *See id.* at 5. The schedules that were effectively deleted from the financial statements before production to the VA, along with other manipulations to the statements, allowed Venergy to avoid disclosing its true costs. The original financial statements would have shown that Venergy's total direct costs for all contracts were almost twice as much as what Venergy reported in its motion to compel response, which, dividing indirect costs from direct costs, would have reduced Venergy's general conditions overhead markup to 11.3% (from 21.37%) and the total supportable general conditions overhead claim to $151,823, far less than the $287,120 figure that Venergy calculated with the 21.37% markup. Schambach Demonstratives 20, 21.

Although, in a declaration submitted in response to the VA's motion for sanctions, Venergy's CEO represented that "[a]t no time did Venergy intend to withhold, alter, or misrepresent any financial data," Venergy CEO Declaration ¶ 11, the CEO had no explanation at the fact-finding hearing as to how these deletions and manipulations, which clearly favored Venergy and served to support higher-than-permissible cost claims, could innocently have happened. The only possible explanation that the CEO provided, which was speculation on his part, was that a now-former employee who helped with the production had access to the CEO's Adobe Acrobat account and was a proponent of using Grok, an AI tool. We infer from that comment during the hearing that, if the employee had used an AI tool on Venergy's financial statements prior to production, that might have been the cause of the changes to the documents in Venergy's favor. Whether true or not, it would not absolve

Venergy from responsibility for the intentional modifications. A corporation is responsible, "under a theory of respondeat superior," for the intentional misconduct of an employee "acting within the scope of employment," at least where "those acts [are] motivated—at least in part—by an intent to benefit the corporation." *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982); *see Meyer v. Holley*, 537 U.S. 280, 285 (2003) ("It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment."); *United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 406-07 (4th Cir. 1985) (applying respondeat superior to corporation in criminal context). "The term 'scope of employment' has been broadly defined to include acts on the corporation's behalf in performance of the agent's general line of work." *Automated Medical*, 770 F.2d at 407. Venergy cannot evade or disclaim responsibility for an employee's intentional illicit conduct in the circumstances here, where the changes to the financial statements clearly were intended to benefit and support Venergy's increased damages claims.

For purposes of determining whether the VA has established by clear and convincing evidence Venergy's responsibility for the intentional manipulation of these documents, we recognize that neither we nor the VA can definitively establish who within Venergy manipulated and modified Venergy's financial statements the night before they were produced to the VA. That does not mean that the VA has not established that Venergy itself, as a corporate entity, engaged in intentional discovery misconduct. "'Clear and convincing' evidence has been described as evidence which produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is 'highly probable.'" *Price v. Symsek*, 988 F.2d 1187, 1191 (Fed. Cir. 1993) (quoting *Buildex, Inc. v. Kason Industries, Inc.*, 849 F.2d 1461, 1463 (Fed. Cir. 1988)). In light of the manner in which these redactions and modifications were made, they had to be intentional. We cannot dispute the VA's belief that "[a] file merge error does not rewrite a table of contents." Respondent's Sanction Reply Brief at 4. Given that the manipulations were made on the Venergy CEO's Adobe Acrobat account, that those modifications were made the night before production to the VA, and that the modifications were in Venergy's favor, purporting to support Venergy's request for payment of more than $1 million in Venergy's claim beyond what the original financial statements would support, we must find, even under a clear and convincing evidentiary standard, that the changes were intentional and made by an employee of Venergy who was authorized access to its systems and was assisting in the production effort. That is enough to impose responsibility on Venergy for intentional discovery misconduct. *See Meyer*, 537 U.S. at 285; *Cincotta*, 689 F.2d at 241-42.

IV. Venergy's Defenses to the VA's Discovery Misconduct Claim

A. The Board's Lack of Jurisdiction to Consider Fraud

Venergy argues that the Board lacks jurisdiction to consider the VA's sanctions request. "The gravamen of Respondent's motion for sanctions is based on alleged fraud," Venergy asserts, but, "[u]nder the [CDA], the Board lacks jurisdiction to decide whether a contractor engaged in fraud." Appellant's Sanctions Response Brief (June 3, 2026) at 4-5. Quoting from a decision of one of our predecessor boards, Venergy asserts that "Congress did not wish the Contract Appeals Boards to exercise any jurisdiction over the issue of the existence of fraud in any form." *Id.* at 4 (quoting *Warren Beaves*, DOT BCA 1324, 83-1 BCA ¶ 16,232, at 80,648). It argues that, "[b]ecause the Board lacks jurisdiction to decide fraud even in the context of sanctions, Respondent's request for sanctions should be dismissed for lack of jurisdiction." *Id.* at 5.

As the Federal Circuit has held, "Congress did not intend fraud claims by the government to be included in the dispute resolution process [that commences with the submission of a contractor claim and a final decision by a contracting officer] outlined by section [7103(a) of the CDA]" or "to include claims [challenging fraud by contractors] brought under section [7103(c)(2)] to be within the agency dispute resolution process." *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540, 545 (Fed. Cir. 1988). By extension, because the scope of the Board's CDA jurisdiction is tied to and confined by the contracting officer's decision on review, and because contracting officers' decisions cannot encompass or resolve fraud, the Board similarly lacks jurisdiction to entertain fraud claims. *MLU Services, Inc. v. Department of Homeland Security*, CBCA 8002, 24-1 BCA ¶ 38,655, at 187,917. Outside the context of our CDA jurisdiction, "the Board is barred 'from handling fraud *qua* fraud claims'" because they sound in tort, over which the Board also lacks jurisdiction. *Safe Haven Enterprises, LLC v. Department of State*, CBCA 3871, et al., 15-1 BCA ¶ 35,928, at 175,606 (quoting *Rockwell International Corp.*, EBCA C-9509187, et al., 97-2 BCA ¶ 29,322, at 145,794); *see L'Enfant Plaza Properties, Inc. v. United States*, 645 F.2d 886, 892 (Ct. Cl. 1981) (fraud, independent of a contract, is a tort over which tribunals lacks jurisdiction); *Environmental Safety Consultants, Inc.*, ASBCA 53485, 02-2 BCA ¶ 31,904, at 157,613 ("The Board does not have jurisdiction over criminal or civil fraud and would not have jurisdiction over a claim of fraud.").

The type of misconduct alleged here does not fall into any of those categories. The alleged document manipulation did not occur during the procurement or contract performance periods. Instead, it is alleged to have occurred during the discovery process while these appeals were pending before the Board. To dismiss an appeal as a sanction for willful misconduct in the discovery process, we do not have to find fraud. We have to find only (1) that an appellant willfully and secretly altered evidence during the discovery process in a manner that undermines the integrity of the Board's dispute resolution process and (2) that lesser sanctions are inappropriate. *See, e.g.*, *Amfosakyi*, 496 F. App'x at 225. Even if the actions that the VA claims Venergy undertook could provide a basis for a fraud action in a district court, that does not mean that we have to find fraud to sanction those actions. "[T]he fact that the same occurrences and findings may be relevant to two matters, one of which is within this Board's jurisdiction"—that is, the Board's inherent authority to monitor and enforce integrity in its proceedings—"and the other is not"—that is, pure fraud claims that might be prosecuted under the False Claims Act (FCA), 31 U.S.C. § 3729, or other criminal or civil statutes—"does not serve to oust this Board of jurisdiction over those matters properly before it." *Fidelity Construction Co.*, DOT CAB 1113, et al., 82-1 BCA ¶ 15,633, at 77,216, *aff'd on other grounds*, 700 F.2d 1379 (Fed. Cir. 1983); *see Environmental Systems, Inc.*, ASBCA 53283, 03-1 BCA ¶ 32,167, at 159,053 (finding jurisdiction "to determine whether appellant submitted falsified progress payment requests, in violation of the standard payment clauses," without regard to whether those falsifications, if intentional, might also violate the False Claims Act, 31 U.S.C. § 3729 (2000)).

Under Venergy's theory, the Board's power to sanction a party would be limited to lesser misconduct—for example, if the Board were to create an adverse inference where a party recklessly allowed documents to be destroyed after notice that the documents were relevant. *See Litton Systems, Inc.*, ASBCA 49787, 00-2 BCA ¶ 30,969, at 152,837. If misconduct was *willful* and *intentional* to the point that it could be construed as fraud, however, the Board would, in Venergy's view, be powerless to address it. We cannot accept that the Board's control over proceedings before it can be subdivided in that way. Tribunals like the Board "cannot lack the power to defend their integrity against unscrupulous marauders; if that were so, it would place at risk the very fundament of the judicial system." *Aoude*, 892 F.2d at 1119; *see Suffolk Construction*, 17-1 BCA at 178,797. We can find no authority that would strip the Board of its inherent authority to monitor and control proceedings simply because, in a particular situation, misconduct before the Board could be characterized as fraudulent.

B. The Absence of a Prior Board Order Warning About Sanctions

Venergy asserts that, "[a]s to procedure, before dismissing a contractor's claim as a sanction, the Board typically issues an order establishing the commencement of sanctions." Appellant's Sanctions Response Brief at 9. As support, Venergy cites the Board's decision in *United Facility Services Corp. v. General Services Administration*, CBCA 5272, 22-1 BCA ¶ 38,055, in which we stated that, before imposing sanctions under FRCP 37(d) against a party that provided deficient responses to discovery requests, the Board "might have to issue an order compelling corrections" and provide the party an opportunity to correct the deficiencies. *Id.* at 184,784. Venergy asserts that, because "no such order was issued" in these appeals, "nor could there be since complete and unredacted copies of Appellant's financial statements were provided before Respondent filed a motion for sanctions," sanctions are inappropriate here. Appellant's Sanction Response Brief at 9-10.

We note that, on September 11, 2025, we issued an order granting the VA's motion to compel and directed Venergy, no later than September 30, 2025, to produce unredacted copies of its financial audit reports and related information to the VA. *See Venergy Group*, 25-1 BCA at 189,396. Venergy did not comply with that order. Although it eventually (after the VA discovered document manipulations) provided the VA with authentic unredacted copies of the financial statements, it did not do so until February 2026, after depositions were completed. In accordance with FRCP 37(b)(2)(A)(v), the Board may impose sanctions for failure to comply with an order compelling production. We do not understand why Venergy believes that another warning order was needed.

In any event, contrary to Venergy's position, "an explicit warning that dismissal would be a likely sanction for fabricating evidence . . . is not a prerequisite to the imposition of dismissal sanctions" for intentional misconduct. *Garcia*, 569 F.3d at 1180; *see Archibeque v. Atchison, Topeka & Santa Fe Railway Co.*, 70 F.3d 1172, 1175 (10th Cir. 1995); *Allen v. Gurevich*, No. 09-CV-01533-WYD-MJW, 2010 WL 1963203, at *6 (D. Colo. Apr. 1, 2010), *recommendation adopted*, 2010 WL 1957207 (D. Colo. May 14, 2010). Where a party is engaged in creating false information, "additional warnings are 'superfluous at best.'" *Garcia*, 569 F.3d at 1180 (quoting *Chavez v. City of Albuquerque*, 402 F.3d 1039, 1045 (10th Cir. 2005)). We reject Venergy's argument that we cannot sanction a party for fabricating or manipulating evidentiary documents unless we first issue an order explicitly directing the party not to do that.

C. Whether the VA's Motion for Sanctions is Moot

Venergy argues that, because it provided the VA with unredacted complete copies of its financial statements in February 2026, the VA's motion for sanctions was moot when it was filed and should therefore be denied. Appellant's Sanctions Response Brief at 9.[5] Yet, the type of fraudulent or willful misconduct that occurred here is not necessarily rendered moot by subsequent disclosure after the misconduct is uncovered—the damage to the

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[5] The VA disputes that it has complete copies of all three financial statements, as, at the hearing, one of the financial statements is still missing a page. For purposes of this decision, we will assume, without deciding, that Venergy has provided the VA with complete copies of all three documents.

integrity of the Board's proceedings remains in place. *Salmeron v. Enterprise Recovery Systems, Inc.*, 579 F.3d 787, 797 (7th Cir. 2009); *see also Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350-R, et al., 18-1 BCA ¶ 36,959, at 180,088 (2017) (discussing how a fraudulent actor cannot "cure" misconduct in various circumstances). Other courts have dismissed or affirmed dismissal of an action as a sanction for intentional discovery misconduct despite a wrongdoing party's late disclosure of documents after its misconduct was detected. *See, e.g.*, *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 591 (9th Cir. 1983) (Even if, after "deliberate deception" in discovery is discovered, "a party has come forward with the information sought to be discovered, . . . a partial last-minute tender of documents or information" does not cure the prior deception); *G-K Properties v. Redevelopment Agency of City of San Jose*, 577 F.2d 645, 647 (9th Cir. 1978) ("[T]he appellants' last-minute tender of relevant documents could not cure the problem they had previously created."); *Colella v. Republic of Argentina*, No. 04-CV-2710 (LAP), et al., 2020 WL 4700930, at *4 (S.D.N.Y. Aug. 13, 2020) ("Where a party acts in bad faith, 'the actual effect of the [falsified evidence] on the litigation is not relevant to whether the conduct is sanctionable.'" (quoting *Amerisource Corp. v. Rx USA International Inc.*, No. 02-CV-2514 (JMA), 2010 WL 2730748, at *7 (E.D.N.Y. July 6, 2010), *aff'd sub nom. New York Credit & Financial Management Group v. Parson Center Pharmacy, Inc.*, 432 F. App'x 25 (2d Cir. 2011))), *aff'd*, No. 20-3031-CV, et al., 2021 WL 5895783 (2d Cir. 2021); *Tutor-Saliba Corp. v. United States*, No. 92-581C, et al., 1995 WL 17974477, at *4 (Fed. Cl. May 5, 1995) ("[M]ere compliance, however late, does not absolve [the producing party] of wrongdoing.").

That is because the wrongdoing party's late production, after its intentional deceptive misconduct has been discovered, does not restore trust in the integrity of the Board's proceedings and processes caused by the original document discovery fraud. The loss of trust in the integrity of those processes is a real damage that the Board must be able to address. *See Aoude*, 892 F.2d at 1119; *Garcia*, 569 F.3d at 1180; *Slate*, 941 F. Supp. 2d at 48-49; *Pope*, 138 F.R.D. at 683. The manipulated financial statements "clearly had the capacity to influence the adjudication and to hinder [the VA's] presentation of its case." *Aoude*, 892 F.2d at 1120. "The failure of a party's corrupt plan does not," and should not, "immunize the defrauder from the consequences of his misconduct." *Id.* The Board must be able to provide a remedy to the innocent party whose trust in the Board's processes has been disturbed and to create, as best it can, a strong disincentive from doing so to others who might be willing to engage in the same type of discovery fraud that occurred here. *See National Hockey League*, 427 U.S. at 643; *Derzack*, 173 F.R.D. at 411; *Tutu Wells Contamination*, 162 F.R.D. at 63.

Further, the VA has been required to expend a significant amount of money attempting to ferret out and address Venergy's document discovery fraud. The VA established at the hearing that, since the discovery of the document redactions and manipulations, it has had to pay a consulting firm that is assisting it in document discovery approximately $125,000 in labor hours on damages-related issues. Schambach Demonstrative 22. Its damages expert witness, who is involved in that discovery process, indicated that, conservatively, he believes that 60% of those labor hours were incurred specifically to investigate or document the effect of the document manipulations. *Id.* That is a tangible financial damage to the VA resulting from Venergy's deceptive discovery misconduct. Venergy responds that the VA's investigation costs are irrelevant and not a consideration on a sanctions motion because "[t]his was Respondent's choice" to incur them. Appellant's Sanctions Response Brief at 10. While that might be true, it was *not* the VA's "choice" to be given falsified documents in the course of discovery that could have increased Venergy's claimed damages by more than $1 million. The choice to engage in discovery misconduct was Venergy's. It does not get to blame the victim of its discovery fraud for taking action to protect itself. *See Minneapolis, St. Paul & Sault Sainte Marie Railway Co. v. Moquin*, 283 U.S. 520, 521-22 (1931) (A litigant who engages in misconduct "will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent"). The "extra trouble and expense" that the VA had to incur provide it with "a legitimate claim to dismissal" as a sanction. *Aoude*, 892 F.2d at 1122.

Even now, we do not know whether Venergy's document manipulation extended to documents beyond the 2020, 2022, and 2023 financial statements. Those are the falsifications that the VA was able to identify. Yet, at the hearing, it became clear that Venergy has made no effort to determine how the manipulation of the financial statements occurred or who did it, even though there were only a few people involved in the document collection and production process—it has undertaken no internal investigation and seems to have no real concern about ensuring its document fraud was not more widespread than what the VA, through its own diligent efforts, has been able to uncover. As noted above, "[t]he submission of falsified evidence substantially prejudices an opposing party by casting doubt on the veracity of all of the culpable party's submissions throughout litigation." *Garcia*, 569 F.2d at 1180.

The VA's request for sanctions is not moot.

D. Whether the VA Was Prejudiced by Document Manipulation

Related to its position that the VA's request for sanctions is moot, Venergy tells us that the VA was not prejudiced by any information that was allegedly concealed or manipulated because it was not critical or even relevant to its damages claim. Appellant's Sanctions Response Brief at 7. As an initial matter, we note that some tribunals have found that they are not required "to measure the impact on the litigation of a wrongdoer's willful misconduct before it issues a dismissal sanction." *Salmeron*, 579 F.3d at 797. A tribunal's "inherent power to sanction for violations of the judicial process is permissibly exercised not merely to remedy prejudice to a party, but also to reprimand the offender and 'to deter future parties from trampling upon the integrity of the [tribunal].'" *Id.* (quoting *Dotson v. Bravo*, 321 F.3d 663, 668 (7th Cir. 2003)). That being said, to the extent that Federal Circuit precedent requires a finding of prejudice, there is ample evidence of it here.

At the fact-finding hearing on the VA's motion, the VA more than established the harm that Venergy's shenanigans inflicted on it. Venergy's assertion that the VA "makes no attempt to establish a nexus between [the information allegedly redacted] and [Venergy's] calculation of damages," Appellant's Sanctions Response Brief at 8, is wholly unfounded. The VA's damages expert laid out the manner in which the changes that Venergy made to its financial statements allowed it to support an overstatement of its unabsorbed home office overhead claim by more than $1.1 million and of its general conditions overhead claim by more than an additional $100,000. Had the VA not detected the manipulations and redactions to the financial statements, it would unfairly and unknowingly have to defend itself against overinflated claims without the benefit of evidence showing the true state of affairs.

Venergy attempted in its response to the VA's motion for sanctions to show a lack of prejudice to the VA by disclosing, for the first time, the alleged reasons that it did not include all company contract billings in the *Eichleay* formula in its claim. In Venergy's response brief, in an accompanying declaration from Venergy's CEO, and in testimony from both the CEO and Venergy's CPA at the fact-finding hearing, the Board was informed that, at some point before submitting its certified claim, Venergy decided that, for the "total company contract billings" portion of the *Eichleay* formula, it should not have to include COVID-related sales contract revenues, apparently under the belief that Venergy's home office did not contribute to or support those contracts, and that the only company contract billings that it needed to identify for *Eichleay* purposes were its construction-related contracts.[6] That, Venergy represents, is why it used $74,787,132.74 as its total company

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[6] We are aware of no case law or regulatory support for Venergy's position. "Total [contract] billings [for use in the *Eichleay* formula] are revenues for *all* contracts (including Government and commercial) recognized for the period of actual contract performance including the delay/suspension and extended performance periods and any previous modifications to the completion date." DCAA Audit Manual ¶ 12-804.2(a) (emphasis added). Nevertheless, we need not resolve the viability of Venergy's *Eichleay* argument here. It is enough that it did not disclose to the VA that the total company contract billings identified in its claim did not, in fact, include all company contract billings and then

contract billings in its *Eichleay* calculation rather than its actual total company contract billings (inclusive of COVID-related contracts), which were almost double that figure. *See* Appellant's Sanctions Response Brief at 7-8 ("Only revenues from construction-related projects were included in the Eichleay calculation because the COVID sales were non-relevant costs."); Venergy CEO Declaration ¶ 7.[7] Alas, Venergy never disclosed to the VA that it had excluded any company contract billings in creating its *Eichleay* calculation.[8] Instead of doing that, which would have allowed the issue to be raised so that it could be presented to the Board for resolution, someone manipulated Venergy's financial statements to hide the "total company contracts billing" reduction and to make it look like Venergy's $74,787,132.74 total company contract billings figure was the actual total for all company contracts. Venergy's new disclosure about how it developed inputs for its *Eichleay* claim does not establish that the VA was not prejudiced by its discovery fraud.

Venergy also says that its intentional document manipulation ultimately did not matter because, as a result of the Board's decision on the VA's motion to compel, the VA later obtained "unrestricted online access" to Venergy's Foundation® construction accounting software system from which it could locate accurate information about Venergy's costs, even if those costs had been either misstated or removed from Venergy's doctored financial statements. Appellant's Sanctions Response Brief at 2. Yet, at the hearing, it became clear that the VA was never provided "unrestricted" access to all of Venergy's accounting information but instead was provided more limited access tied to the costs of the specific contract at issue in these appeals. *See* Hearing Exhibit 1. Full information about billings on *other* Venergy contracts, which is necessary to calculate the total company contract billings for purposes of the *Eichleay* formula, was not provided. *Id.* Even today, there is financial

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manipulated its financial statements before they were produced to support the lower total billings figure that it had used.

[7] At the hearing, the VA disputed that the reduction of Venergy's total company contract billings figure to $74,787,132.74 could have been the result of excluding COVID-related contracts and attempted to show, from what evidence it could gather, that Venergy could not have had sufficient COVID-related contracts to account for the approximately $70 million reduction in the total company contract billings figure. We need not here resolve the veracity of Venergy's new disclosure.

[8] Although Venergy asserts that the issue of whether COVID-related contracts should be included in the total company contract billings number should be an issue at a merits hearing, *see* Appellant's Sanctions Response Brief at 7-8, it is unclear to the Board how that would have become an issue when Venergy never disclosed to the VA or the Board what it had done.

information relevant to overhead calculations that the VA does not have and must attempt to fill in through sampling and estimates.

Nevertheless, even if Venergy had provided full Foundation® access to the VA, it would not excuse Venergy's deceptive conduct or eliminate the prejudice to the VA and to the integrity of the Board's process, which necessarily leaves the VA questioning the fulsomeness and authenticity of *all* documents that Venergy has (or should have) produced. Further, as previously discussed, the VA has been required to expend significant monies attempting to ferret out and address Venergy's document discovery fraud, Schambach Demonstrative 22, which is a tangible and prejudicial injury to the VA. Even now, it cannot know whether other documents that Venergy produced were manipulated in ways of which the VA is currently unaware. The damage to the integrity of the Board's processes and proceedings is a form of prejudice that justifies sanctions. *See Secrease*, 800 F.3d at 401; *Litton Systems*, 91 F.R.D. at 576.

V. Whether Dismissal is the Appropriate Sanction

A. Dismissal of Venergy's Affirmative Monetary Claim

Taking the factors that the court in *Amfosakyi* identified as a guide for evaluating whether dismissal is appropriate, which include but expand on the factors that the Federal Circuit identified in *Micron Technologies*, three of the six factors discussed in *Amfosakyi* that favor dismissal are easily satisfied here and need no further discussion: (1) Venergy's personal responsibility for the falsified financial statements; (2) the prejudice to the VA caused by the falsified financial statements; and (3) the willful nature of the misconduct. *See Amfosakyi*, 496 F. App'x at 225.[9]

Beyond that, two more of the *Amfosakyi* factors are met here: (1) Venergy's dilatoriness in taking seriously and addressing its discovery fraud; and (2) the lack of effectiveness of sanctions other than dismissal. Venergy would argue that, as soon as the VA informed it of the document manipulations during depositions of Venergy's CEO and CPA in February 2026, it swiftly produced unredacted and authentic copies of its financial statements for 2020, 2022, and 2023—that is, it responded without delay once the VA notified it of its errors. That may well be true, but Venergy has repeatedly attempted to place

[9] To the extent that someone at Venergy ran the financial statements through some kind of AI platform before producing them so that they would better support Venergy's claim amounts, as Venergy's CEO speculated at the hearing, it would be no less intentional and sanctionable than any other kind of document manipulation in the discovery process.

on the VA the responsibility for Venergy's document fraud. It was the VA, not Venergy, that had to expend the energy and resources to uncover and ferret out Venergy's discovery misconduct. Since then, it appears that Venergy has done nothing to find out what happened, how it happened, and who did it. Venergy is not a large corporation, and only a few of its employees—all known to the CEO—were involved in the production of the financial statements. Yet, the CEO apparently has questioned none of them. No one has been admonished or had his or her employment terminated, although one employee left on his own volition for reasons unrelated to these appeals. Venergy also has taken no steps to determine whether any other documents that it produced to the VA were manipulated in the same way as the financial statements. Apparently, it views such an effort as one that the VA should pay to undertake if and to the extent that it wants to gain any kind of confidence that Venergy's other document productions are not infected by Venergy's prior deceptive misconduct. To the Board, that inaction reflects a lack of seriousness or concern by Venergy about the discovery misconduct in which it engaged.

We are also concerned by the lack of care that Venergy's CEO has taken in making statements under oath to the Board. Venergy submitted a declaration to the Board on May 28, 2026, in which the CEO declared that Venergy's financial statement disclosures in July 2025 "inadvertently omitted information." Venergy CEO Declaration ¶ 5. At the hearing, however, the CEO testified that he had no idea how the documents came to be manipulated and that all he knew was that he did not do it. In addition to the fact that the manipulations and redactions to the financial statements were obviously intentional, we do not understand how the CEO could declare on May 28 that the manipulations were inadvertent when he has no idea how they happened. That is, when he made his declaration on May 28, he could not have known that the manipulations were inadvertent and, therefore, should not have provided a declaration under penalty of perjury to that effect. Even today, as the CEO testified at the hearing on the VA's sanctions motion, he does not know how they happened, and, assuming that he is being honest with the Board, he likely will never know because he is taking no action to investigate what happened and its scope or to make sure that it does not happen again.

Venergy's complete lack of interest in conducting any kind of internal investigation to reveal the cause of and malfeasant actor(s) in the discovery fraud here, coupled with the obvious intentional nature of the document manipulations at issue and the benefit that those manipulations were clearly intended to provide Venergy, leads us to believe that no sanction less than dismissal of Venergy's monetary claim would be effective. We obviously could and will preclude Venergy from relying on the falsified financial statements, but we do not see how that would deter future discovery misconduct. We could not exclude the real financial statements because, if the VA had to defend against Venergy's monetary claim in litigation, it would need to use them on summary judgment or at a merits hearing to cut more than $1.1 million out of Venergy's home office overhead claim and more than $100,000 out of its general conditions overhead claim. "Litigants would infer that they have everything to gain, and nothing to lose, if manufactured evidence merely is excluded while their lawsuit continues." *Garcia*, 569 F.3d at 1180 (quoting *Pope*, 138 F.R.D. at 683).

To the extent that part of the damage here is the costs that the VA had to incur to discover and ferret out Venergy's discovery fraud, we are not aware of any statutory authority that would allow us to require Venergy to compensate the VA for those costs or otherwise to sanction Venergy monetarily. Accordingly, money sanctions are not a way to ameliorate the damage caused by Venergy's discovery fraud.

Importantly, we have no idea whether other documents that Venergy has produced in this litigation, beyond the three financial statements, were manipulated. It is unfair to place on the VA the obligation to expend additional attorney time and resources and to require it to pay additional money to consultants to attempt to determine whether more documents are questionable. *See Garcia*, 569 F.3d at 1180. Venergy has taken no action to investigate what happened or to find a way to reassure the VA and the Board that all other documents Venergy has produced are authentic and have not been manipulated. If we were to require the VA to continue to defend against Venergy's claim, both the VA and the Board would likely have to continue to question every document that Venergy has produced and wonder if it is authentic. Even if we were to designate some facts as uncontested, the idea that we will then have to resolve other factual disputes on a record with questionably unreliable documents is unfair to both the Board and the VA.

At the fact-finding hearing on the motion for sanctions, Venergy's counsel called the VA's focus on sanctions a "red herring" and a "side show," a sentiment that matches Venergy's continuing failure to take its own willful misconduct seriously or to take affirmative steps through a thorough investigation to identify its causes and ensure that no other documents have been manipulated. In light of Venergy's failure to try to reestablish the integrity of these proceedings, as best possible in the circumstances, we cannot require the VA to continue having to defend against Venergy's monetary claim.

B. The Extent to Which Sanctions Can Apply Beyond Venergy's Monetary Claim

There are three separate matters at issue in these appeals: (1) Venergy's challenge to the VA contracting officer's termination of the contract for default; (2) Venergy's monetary claim seeking payment of just over $4 million from the VA; and (3) the VA's monetary claim, set forth in the contracting officer's decision denying Venergy's claim, seeking payment to the VA of $1,842,960.31. In its July 2025 motion to compel seeking production of Venergy's financial statements and financial forecasts, the VA represented that it needed that information "to analyze and validate Venergy's unabsorbed home office overhead claims (calculated using the Eichleay formula)," particularly as it related to Venergy's general and administrative (G&A) costs. Respondent's Motion to Compel at 3; *see* Respondent's Motion for Sanctions at 17 (indicating that the VA needed information in Venergy's financial statements "to support [Venergy's] calculations"). That is, the documents that were electronically manipulated are, in the VA's view, necessary to support and tied to Venergy's money claim.

The VA has identified no such tie between the manipulated financial statements and Venergy's challenges to the VA's default termination or the VA's $1.8 million claim against Venergy. "A [tribunal's] use of sanctions is limited by two standards: (1) any sanction must be just; and (2) it must specifically relate to the particular claim at issue in the discovery order." *Professional Seminar Consultants,* 747 F.2d at 1474; *see Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 707 (1982) (citing FRCP 37(b)(2)); *Alaska Pulp Corp. v. United States*, 41 Fed. Cl. 611, 614 (1998). With regard to the second requirement, the scope of proper discovery, and, by extension, the scope of the sanctions that the tribunal can impose for misconduct in that discovery, turns on whether the material that was requested is tied to a particular claim or defense. *See, e.g.*, *United States ex rel. Wiltec Guam, Inc. v. Kahaluu Construction Co.*, 857 F.2d 600, 602 (9th Cir. 1988) (The defendant's "failure to provide discovery relating to [its] counterclaim was appropriately sanctioned by dismissal of the counterclaim," but "that failure cannot justify any additional sanction involving [plaintiff's] claim, because [of] due process considerations."); *Maxey v. State Farm Fire & Casualty Co.*, No. 1:07-cv-158, 2008 WL 11352587, at *1 (S.D. Ohio Aug. 11, 2008) (limiting discovery violation to relevant claim).

Absent some relationship between Venergy's discovery misconduct and either the default termination claim or the VA's demand for a $1.8 million payment, we have no basis for dismissing Venergy's challenges to them—basically, entering a default judgment in the VA's favor on those claims—as a sanction. At the hearing, the VA acknowledged that, although the financial statements at issue provide an evidentiary basis necessary for analyzing Venergy's affirmative monetary claims, they are not relevant to the default termination or the Government's affirmative monetary claim. The VA asserted that, because of the discovery misconduct relating to Venergy's money claim, the VA will now have to question all documents that it receives from Venergy and cannot trust Venergy, which suggests that it should be provided what in effect would be default judgments against Venergy on the Government's affirmative claims. Although we are sympathetic to the VA's concerns about the integrity of future proceedings, and although the misconduct that occurred here may provide a heightened basis for the Board to question the integrity of Venergy witness testimony in future proceedings, it seems an insufficient basis to impose default judgments against Venergy that would allow the VA, without proving its own costs, to recover $1.8 million from Venergy. Venergy's alleged discovery misconduct tied to its claim for monetary relief does not alleviate the VA's obligation to defend its default termination decision or to support its own $1.8 million monetary claim.

Decision

For the foregoing reasons, we **GRANT** the VA's motion for sanctions to the extent that it seeks dismissal of Venergy's affirmative monetary claim as a sanction for Venergy's discovery misconduct. We **DENY** the VA's motion for sanctions to the extent that it seeks dismissal of or a default judgment in favor of the VA on Venergy's challenges to the default termination decision and the VA's claim for a monetary award. If, in the course of continuing its review of previously produced discovery, the VA identifies additional manipulated documents that are relevant to the default termination or the VA's monetary claim, the VA is not precluded from seeking additional sanctions for that misconduct. The Board will schedule further proceedings on the two claims that remain before the Board by separate order.

*Harold D. Lester, Jr.*
HAROLD D. LESTER, JR.
Board Judge

We concur:

*Erica S. Beardsley*
ERICA S. BEARDSLEY
Board Judge

*Jonathan D. Zischkau*
JONATHAN D. ZISCHKAU
Board Judge