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Chapter Four: Handling Zoom and A/V Data in Ediscovery and Investigations

Key Case Law Rulings Regarding Audio/Video Evidence in Ediscovery

We have seen several important case law rulings regarding A/V data sources. Some of the most recent and notable opinions follow.

- Talbot v. Foreclosure Connection, Inc. (D. Utah July 29, 2020)
- Tate v. City of Chicago (N.D. Ill. August 3, 2020)
- Reed v. Royal Caribbean Cruises, Ltd. (S.D. Fla. October 2, 2020)
- Root v. Montana Dep't of Corrections (D. Mont. April 23, 2021)
- Bursztein v. Best Buy (S.D.N.Y. May 17, 2021)
- Jones v. Barlow et al. (M.D. Fla. January 24, 2022)
- Hollis v. CEVA Logistics U.S., Inc. (N.D. Ill. May 19, 2022)
- Sony Music Entertainment v. Vital Pharmaceuticals, Inc. (S.D. Fla. September 13, 2022)
- Rapp v. Naphcare, Inc. (W.D. Wash. May 31, 2023)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

LYNDA TALBOT, Plaintiff, vs. FORECLOSURE CONNECTION, INC., JASON WILLIAMS, and DAVID GARCIA, Defendants.	**MEMORANDUM DECISION AND ORDER** Case No. 2:18-cv-169 Judge Clark Waddoups

INTRODUCTION

Lynda Talbot contends she was a non-exempt employee at Foreclosure Connection, Inc., and accrued over 600 hours of overtime between January 2017 to November 2017, for which she was not paid. She has filed a Motion for Sanctions on the ground that Defendants engaged in discovery abuses. For the reasons stated below, the court grants Ms. Talbot's motion.

FACTUAL BACKGROUND

Talbot' Employment

Foreclosure Connection, Inc. (the "Company") purchases properties that are in foreclosure, renovates them, and then rents them. Talbot Affidavit, ¶ 4 (ECF No. 55-1). Ms. Talbot started working for the Company on October 26, 2016, and helped the Company with its accounting and bookkeeping. *Id.* ¶¶ 5, 8. From her start date through December 30, 2016, Ms. Talbot remained

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classified as an hourly, non-exempt employee.[1] *See id.* ¶¶ 15, 21. On January 1, 2017, the Company changed her status to a salaried, exempt employee. *Id.* ¶ 22. Defendant Jason Williams contends that Ms. Talbot asked him if she could be a salaried employee, and because it made sense for the Company, he agreed. J. Williams Affidavit, ¶ 9 (ECF No. 62-1 at 13).[2] When Ms. Talbot became a salaried employee, however, her pay was equivalent to 40 hours a week at the rate of $25.00 an hour. *See* Talbot Affidavit, ¶ 22. In other words, she received no pay increase. Ms. Talbot contends her job duties never changed when she was reclassified as a salaried employee. *Id.* ¶ 26. Mr. Williams contends the opposite. J. Williams Affidavit, ¶ 12 (ECF No. 61-1 at 14).

Ms. Talbot alleges that while she was on a salary she accrued over 600 hours of overtime from about January 2017 to October 2017. Talbot Affidavit, ¶ 38. Then when her hours dropped to about thirty hours a week in October, Alisha Williams, the President of the Company, explained during an evidentiary hearing "we weren't going to pay her salary for a 40-hour work period and only get 30 hours of work."[3] Hearing Tr., at 24 (ECF No. 55-4). As a result, the Company switched her back to hourly pay on November 1, 2017. Talbot Affidavit, ¶ 36 (misstating year as 2018). Seven days later, on November 8, 2017, Ms. Talbot was terminated for cause.[4]

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[1] The Company asserts Ms. Talbot was paid as an independent contractor at the start of her employment due to a job posting through a temporary employment agency. What Ms. Talbot's employment classification was from October through December 2016 does not alter the court's analysis for the motion before the court. The court, therefore, does not address this issue.

[2] When the court cites a page number from a document in the record, the reference is to the ECF pagination at the top of the page rather than any numbering at the bottom of the page.

[3] The evidentiary hearing occurred on December 11, 2017, before an administrative law judge who addressed Ms. Talbot's claim for unemployment. Hearing Tr., at 2 (ECF No. 55-4).

[4] Ms. Talbot asserts she had to place her mother in assisted living and was attempting to get a second job started at the same time. Hearing Tr., at 40–44 (ECF No. 55-4). Due to her asserted

Prior FLSA Violation

During the same time period as Ms. Talbot's employment with the Company, Mr. Williams and the Company were defendants in a lawsuit for violating the Fair Labor Standards Act ("FLSA"). The United States Secretary of Labor initially sued the Company on September 11, 2015 for matters involving employees other than Ms. Talbot. The Secretary alleged the Company and Mr. Williams had retaliated against the employees for reporting the Company's failure to pay them overtime. Additionally, the Secretary alleged the defendants had obstructed the Department of Labor's ("DOL") investigation by withholding and falsifying documents. On September 22, 2015, a Preliminary Injunction was issued by Judge Dale A. Kimball in this district. Among other things, the defendants were enjoined from (1) retaliating against employees, (2) "altering, editing, and/or destroying Defendants' time records and records reflecting payments made to employees of or workers for Defendants," (3) obstructing the DOL investigation, and (4) falsifying documents. Preliminary Injunction, at 1–2 (ECF No. 16 in Case No. 2:15-cv-653).

After the Preliminary Injunction was imposed, Mr. Williams pressured an employee to falsify a document. Findings of Fact & Conclusions of Law, at 16 (ECF No. 62 in Case No. 2:15-cv-653). When the employee refused, Mr. Williams informed him he would have no more work and constructively fired him. *Id.* Mr. Williams did not report the termination to the DOL as required by the Preliminary Injunction. Judge Kimball found Mr. Williams' actions violated four provisions of the Preliminary Injunction. *Id.* at 16–17. Judge Kimball further found the Company and Mr. Williams had "failed to come into compliance with the FLSA even while under the direct

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family obligations and other job, Ms. Talbot did not show up for work and was terminated on that basis.

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scrutiny of [the DOL] and an order from the Court." *Id.* at 38.

The Company and Mr. Williams further impeded litigation by failing to produce documents and denying they had such documents. *Id.* at 14, 35–36. Notably, Mr. Garcia had the responsibility to gather the requested records that were produced untimely during the litigation. *Id.* at 14. Defendants also provided falsified tax documents, which Mr. Garcia later admitted where not provided to employees in the years specified. *Id.* at 14–15.

Following a six-day bench trial, Judge Kimball concluded the Company had willfully violated the FLSA. *Id.* at 35–36. Part of that finding was based on the recorded conversation that showed Mr. Williams knew about FLSA requirements and had deliberately chosen to violate them. *Id.* at 35. The recording further showed that Mr. Williams had instructed multiple employees to lie and evade DOL investigators on threat of retaliation. *Id.* He also had instructed employees to falsify documents. *Id.* at 35–36. Judge Kimball ordered the Company to pay for overtime the employees had worked, along with other damages.

On May 17, 2017, Judge Kimball issued an injunction that permanently enjoins the Company and Mr. Williams from violating the FLSA, including its overtime provisions, and "from altering, editing, and/or destroying Defendants' time and payroll records." Permanent Injunction, at 2 (ECF No. 64 in Case No. 2:15-cv-653). The injunction has remained in effect since its inception and was in effect at the time of the events alleged in this case.

Reported Spoliation of Evidence

Five months after the Permanent Injunction issued, the dispute with Ms. Talbot started. During a meeting on October 16, 2017 with Jason and Alicia Williams, David Garcia, and Ms.

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Talbot, Ms. Williams recorded the conversation.[5] When Ms. Talbot learned about the recording, she requested that the defendants provide her a copy. Ms. Williams attested in affidavits that she provided the recording on a CD to Ms. Talbot at the time of the DWS hearing in December 2017. Second A. William Affidavit, ¶ 24 (ECF No. 62-1 at 5); Third A. William Affidavit, ¶¶ 10–11 (ECF No. 73). Ms. Williams' third attestation came after the court admonished "all parties, Ms. Williams, and counsel to take care in the representations" they made to the court. Order, at 3 (ECF No. 69). Nevertheless, the court finds the evidence in the record does not support Ms. Williams' attestation.

After the Company terminated Ms. Talbot, she filed for unemployment. The Company opposed payment of unemployment on the ground that Ms. Talbot had been terminated for cause. The Department of Workforce Services ("DWS") concurred following an administrative hearing in December 2017. Although the administrative hearing focused on Ms. Talbot's unemployment claim, emails around the time of the hearing and the transcript of the hearing are instructive on Ms. Talbot's present request for sanctions.

Prior to the administrative hearing, the parties submitted evidence to DWS. The Company submitted a CD that purportedly contained the recording of the October 2017 meeting. Because the meeting lasted for over two hours, the Chief Administrative Law Judge requested that the

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[5] Defendants attest "that someone routinely recorded events such as important meetings and depositions that Jason Williams participated in so that Jason would have his own record to later replay in lieu of Jason taking notes as he is blind and unable to take notes." A. Williams Affidavit, ¶ 12 (ECF No. 62-1 at 3). Defendants further attested that "tapes are generally recorded by David Garcia on his cell phone." Discovery Responses, at 10 (ECF No. 55-10); *see also* Garcia Affidavit, ¶ 9 (ECF No. 62-1 at 9) (stating he routinely recorded meetings unless someone else was recording it). In this case, however, Ms. Williams attested that she recorded the October 16, 2017 meeting on her cell phone. A. Williams Affidavit, ¶ 11 (ECF No. 62-1 at 3).

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Company submit only relevant excerpts of the meeting.[6] The Company then selected three segments, and only those excerpts were admitted at the hearing. It was through this process that Ms. Talbot learned that the meeting had been recorded.

On December 7, 2017, Ms. Talbot sent an email to Defendants stating the following:

> Yesterday it was brought to everyone's attach [sic] that the complete conversation of 10/16/2017 . . . was recorded. I request a complete copy of that conversation/meeting as to I was the main focus. Be provided to me and the Federal Wage and Labor Division. I would be glad to compensate Foreclosure Connection, Inc. for any financial inconvenience.
>
> I do not want this new found evidence to slip away like so many other[] things do. Or be corrupted, or changed. . . .
>
> Thank you for recording the conversation on 10/16/2017, it can completely explain the unpaid issues of overtime on my behalf.

Email, at 2 (ECF No. 55-5).

On Sunday, December 10, 2017, Ms. Talbot sent an email to DWS and the defendants informing them she could not open certain email attachments that she had received from the defendants. The attachments were two excerpts of the recording. Ms. Talbot then stated, "[n]ow concerning the 10/16/2017 recording on Mr. David Garcia's phone[7] I have formally requested a complete copy of this as seen on 12/07/2017 due to the ongoing case with the Federal Wage and Labor Commission. That one recording would explain the yet unresolved issue of unpaid overtime." *Id.* at 3. Ms. Talbot concluded her email by stating, "[a]gain I still desire a complete

[6] As addressed further below, some confusion on the CD exists. DWS now reports the CD was blank when received.

[7] Later information supports that Ms. Williams recorded the conversation and not Mr. Garcia. A. Williams Affidavit, ¶ 11 (ECF No. 62-1 at 3).

copy of the conversation of 10/16/2017, which is found on Mr. Garcia's Phone and would gladly . . . pay for the reproduction for both myself and the Federal Wage and Labor Commission." *Id.* at 4.

The following day, on December 11, 2017, DWS held a hearing on Ms. Talbot's unemployment claim. Although the hearing was about unemployment, Ms. Talbot raised the issue about her wage claim. She asked if the defendants had "entered into this court a complete recording of the conversation on 10/16/2017?" Hearing Tr., at 13 (ECF No. 55-4). The ALJ responded, "[t]here is a segment of the recording, but not the complete recording. It was a long recording and so the Chief Administrative Law Judge asked that portions—the relevant portions be submitted because it was over two hours." *Id.* Towards the end of the hearing, Ms. Talbot asked for the "full recording of that 16th meeting," because "more things were discussed on that recording . . . [that] had to do with the labor commission in the overtime." *Id.* at 43. Her request was denied by the ALJ because DWS was only addressing unemployment and not wage matters. *Id.* at 44.

On February 26, 2018, Ms. Talbot filed a *pro se* Complaint, which commenced this case. Complaint (ECF No. 3). In that Complaint, Ms. Talbot asserted a civil rights action under § 1983. The body of the Complaint, however, stated the nature of her case was "unpaid overtime" and other compensation matters. *Id.* at 3. She noted in her Complaint that she would be seeking to acquire "Recording 10/16/2017." *Id.* at 4.

After Defendants filed a Motion to Dismiss, Ms. Talbot filed a Motion Supporting Correct Jurisdiction, along with a supporting affidavit. She attested the Company had a common practice of "leaving former employee's unpaid." Talbot Affidavit, ¶ 7 (ECF No. 11 at 2). She also noted

her "[c]ontinuing attempts to receive a full audio copy of the recording made by my former employers." *Id.* ¶ 8. She attached copies of subpoenas she had tried to serve on Defendants by certified mail, requesting the recording again, but the mailings went unclaimed. *Id.* at 7–12.

On April 13, 2018, Ms. Talbot filed a Motion to Amend Complaint (ECF No. 19). In her proposed Amended Complaint, she stated she was asserting a claim for unpaid overtime and other unpaid compensation. Proposed Amended Complaint, at 1 (ECF No. 19-1). She asserted she was not an exempt employee, and noted she had subpoenaed records, "[i]ncluding a complete copy of an Audio recording on 10/16/2017." *Id.* at 2. For relief, she said she wanted payment of all amounts, "[a]nd the entire copy of the audio recording of 10/16/2017." *Id.*

On April 20, 2018, Ms. Talbot filed a Motion Asserting the Courts Enforcement of the Subpoena's Isssued (sic). Ms. Talbot attached the subpoenas she had attempted to serve on Defendants, and which requested the "Entire Audio recording of 10/16/2017," as well as time records. Motion and Exhibits, at 1, 4–7 (ECF No. 20). Magistrate Judge Dustin B. Pead denied the motion on the ground the motion to dismiss and motion to amend had to be heard first. Order, at 1 (ECF No. 22). Nevertheless, Ms. Talbot's filing is relevant to the issue of notice.

In May 2018, Ms. Talbot had subpoenas personally served on Mr. Garcia, Ms. Williams, and Mr. Williams, which requested "Complete Audio recording of 10/16/2017, complete payment history for Lynda Talbot 10/01/2016 to 11/30/2017 . . . and all electrionic [sic] communications both email and text during the above time frame." Subpoenas, at 2–9 (ECF No. 55-9). On May 21, 2018, Judge Pead quashed the subpoenas consistent with his previous order and directed Ms. Talbot not to issue further subpoenas until he resolved pending motions and a scheduling order was entered. Order, at 1 (ECF No. 28). Notably, although the subpoenas were quashed,

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Defendants acknowledged they had been served with them. Second Motion to Quash, at 2 (ECF No. 27). Again, this goes to the issue of notice.

On June 1, 2018, the Utah Court of Appeals affirmed DWS's decision that Ms. Talbot had been terminated for cause. Order of Summary Disposition (ECF No. 62-1 at 16). The decision noted that Ms. Talbot had "claimed that she was denied a complete copy of the two-hour recording," and that she "had an ongoing dispute with the employer before the Labor Commission and may have wanted to use the recording to explore issues related to that case." *Id.* at 18.

On June 8, 2018, Ms. Talbot filed a motion asking for leave to serve an Amended Complaint by alternative means because her process server had attempted to serve Defendants multiple times, but they were avoiding service. Ms. Talbot attached documents from her process server showing active efforts by Defendants to evade service. Service Documents, at 5–10 (ECF No. 32). Judge Pead denied the motion and directed her not to file further motions until he resolved the motion to dismiss and motion to file an amended complaint. *See* Docket Text Order (ECF No. 34).

On July 3, 2018, Judge Pead granted Ms. Talbot leave to amend, but directed her to correct the deficiencies in her complaint. Order, at 6 (ECF No. 36). He denied the motion to dismiss. *Id.* On July 18, 2018, counsel for Ms. Talbot appeared and filed an Amended Complaint asserting violation of the FLSA rather than a § 1983 action. Amended Complaint, at 1 (ECF No. 37).

On January 18, 2019, in response to a formal interrogatory requesting information about any recordings involving Ms. Talbot, Defendants responded as follows:

> As to recordings of meetings where Plaintiff was present, she was provided copies as well as the Utah Department of Workforce Services. Plaintiff claimed she was unable to listen to the tapes. Same recordings were sent to the State for their investigation and a

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> scheduled hearing related to Plaintiff's claim of unemployment benefits. The recordings were played by the Administrative Law Judge, without objection from Talbot, at the hearing and she was able to listen to such. The tapes were maintained pending the entire appeal process that Talbot initiated and *afterward there was no reason to maintain and such deleted*. [8]

Response to Interrogatory No. 10, at 10 (ECF No. 55-10) (emphasis added). In answer to a request for production "of any and all recordings of the Plaintiff," Defendants responded, "All recordings of meetings where Plaintiff was present were solely for the purpose of Jason Williams and after his use *all have been deleted*." Request No. 7 and Response to Request No. 7, at 12 (ECF No. 55-10) (emphasis added).

On April 19, 2019, Ms. Williams attested, "as Jason Williams no longer needed the 10/16/2017 Meeting recording, the unemployment matter ended, and she needed to free up space on her personal cell phone, Affiant *deleted the recording from her cell phone in early June 2018*." A. Williams Affidavit, ¶ 28 (ECF No. 62-1 at 5) (emphasis added). By June 2018, Ms. Talbot had asked for the recording or referenced the need to produce it multiple times. Moreover, this litigation had been commenced four months earlier and was ongoing at the time Ms. Williams deleted the recording.

[8] The "recordings" referenced in this paragraph only pertain to the three excerpts. It is those excerpts that Ms. Talbot had difficulty playing when they were sent to her as an attachment to an email. She objected to the excerpts being admitted because she was unable to listen to two of them. Hearing Tr., at 13–14 (ECF No. 55-4). The ALJ resolved that objection by playing the excerpts at the hearing. *Id.* at 14. After the excerpts were played, the ALJ asked if Ms. Talbot had any objections to their admission. *Id.* at 33. The transcript is clear that Ms. Talbot did object to one of the excerpts being admitted without its full context. *Id.* The objection was overruled. *Id.* The interrogatory response is therefore misleading and inaccurate.

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Motion for Sanctions

After being informed the defendants spoliated evidence by deleting the recording, Ms. Talbot filed a Motion for Sanctions.[9] In opposition to the motion, Defendants asserted the following:

> Plaintiff's motion for sanctions is a desperate attempt to create a genuine issue of material fact – specifically that the parties agreed to "compensatory time" in lieu of overtime and her only alleged evidence to support this claim she raised for the first time on March 27, 2029, just so happens to be on a deleted recording . . . .

Memo. in Opp'n to Sanction Mot., at 1 (ECF No. 62). Defendants also argued there was no other evidence of a compensatory agreement, and if the court allowed an adverse inference that the recording contained such information, it "would open the door to other parties" to also "claim that the lost or destroyed evidence in their case contained the only evidence to support their position." *Id.* at 6.

Defendants pointed out that "courts require evidence of intentional destruction or bad faith before a litigant is entitled to a spoliation instruction." *Id.* at 7 (citing *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997). Defendants then asserted:

> It is important to point out at this juncture that although Plaintiff asserts that Defendants destroyed the recording and even states that the Defendants admitted they destroyed the recording, that goes against the evidence produced. Alicia Williams testifies in her Affidavit that she deleted the recording on her phone. Deleting is an act of removing. Destroying on the other hand conjures up images of smashing the recording (cell phone).

Id. (footnotes omitted).

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[9] In her motion, Ms. Talbot also reported that the defendants had not produced certain time and payroll records. She noted it for purposes of showing how the defendants have obstructed discovery and not for purposes of seeking additional sanctions. Reply Memo., at 6 (ECF No. 63).

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Defendants further asserted they did not act in bad faith because Ms. Talbot had styled her Complaint as a Civil Rights claim.

> Defendant knew that the recording had absolutely nothing to do with a Civil Rights claim and therefore reasonably believed in light of the need for cell phone storage space and Jason Williams had long before indicated he no longer needed the recording plus the fact they had provided the recording to Plaintiff for the unemployment hearing, it was ok to delete.

Id. at 12.

Finally, Defendants argued the court should not impose sanctions because Ms. Talbot had failed to follow Rule 37 of the Federal Rules of Civil Procedure. *Id.* at 14. She did not even seek a "meet and confer." *Id.* at 15. Additionally, Ms. Talbot did not file a Short Form discovery motion. *Id.*

Hearing on Motion for Sanctions

The court held a hearing on the sanctions motion on October 9, 2019, where Defendants' counsel argued the defendants could not have known they needed to preserve the recording because he did not tell them to do so. Order, at 2 (ECF No. 69). The court was troubled by the argument because Defendants are not unsophisticated litigants. *Id.* at 1–2. Defendants are under a Permanent Injunctions for prior destruction of evidence and willfully violating the FLSA. Additionally, Defendants' counsel is the same counsel who had represented the defendants in the previous lawsuit. Nevertheless, Defendants' briefing has been devoid of recognition that *willfully* deleting evidence is a problem. Based on the posture of the case, the court informed Defendants the issue was "not whether sanctions will be imposed against Defendants for spoliating evidence again, but what those sanctions will be." *Id.* at 2.

Because of Defendants' continued representations that they had provided the recording to

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Ms. Talbot as part of the unemployment hearing, however, the court required Defendants to provide supplemental evidence to prove that fact. *Id.* at 3. Defendants subsequently provided a statement from DWS stating a CD had been provided, but "the disc they received was blank" and "it was likely destroyed." DWS Response, at 12, 15 (ECF No. 70). Foreclosure Connection then sent three audio files to DWS containing short portions of the recording. *Id.* at 15. Those were the recordings played at the hearing.

Defendants' supplemental evidence also referenced a letter Ms. Talbot sent to DWS by fax on December 6, 2017. A timestamp shows the letter was received at 4:07 p.m. that day. Talbot Lttr., at 17 (ECF No. 70). After summarizing the evidence she had received from Defendants, Ms. Talbot said:

> Now I would like to present the additional exhibits I have prepared, along with a [Thank You] to Foreclosure Connection, Inc. for providing the necessary information needed to receive my overtime from the Federal Wage Commission. I have forwarded the recording to them, my case for the overtime of $23,151.01, has just been made.

Id. at 19. Ms. Talbot then referenced the recording multiple times and its contents. *Id.* at 20–21. Defendants contend unless Ms. Talbot had the full recording, she could not have made the statements she made. Defs. Supp. Brief, at 16 (ECF No. 70). The court disagrees.

Ms. Talbot sent her letter on December 6, 2017 at 4:07 p.m. At 11:55 that day, Ms. Williams sent the first audio excerpt to Ms. Talbot and DWS. Email, at 6 (ECF No. 70-2). At 12:41 p.m., Ms. Williams sent the second and third excerpts. Email, at 7 (ECF No. 70-2). Ms. Talbot asserted at the hearing, however, she did not learn about the other two excerpts until later and could not open them. Hence, Ms. Talbot's reference to "the recording" did not signify she had received the full recording. It appears to reference the first excerpt.

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When Ms. Williams submitted the first excerpt to DWS, she noted the topics discussed on it. *Id.* at 6. She stated that Ms. Talbot "acknowledge[d] she knew she was not going to make any overtime and that she wasn't making $25.00 an hour with her salary and she even says that is correct." *Id.* Ms. Williams' statement to DWS was misleading because, as discussed below, Ms. Talbot had asserted on other portions of the full recording that she believed she would be receiving overtime. Had Ms. Talbot been given the full recording, she could have submitted portions to show Ms. Williams was not forthright on the overtime matter.

Moreover, as stated above, on December 7th and 10th, Ms. Talbot had asked Defendants to provide her with a copy of the full recording. During the hearing on December 11th, Ms. Talbot reiterated her requests for a copy of the full recording, and the ALJ denied that request. Hearing Tr., at 13, 43–44 (ECF No. 55-4). At no point during the hearing did Defendants say they had given Ms. Talbot the complete recording. These contemporaneous events rebut that Ms. Talbot's December 6th letter referred to receiving the complete recording. Moreover, the contemporaneous events rebut Ms. Williams' present attestations to the contrary and Defendants' supplemental briefing.

In contrast, Ms. Talbot's supplemental briefing contained even more documentation about requests or inquires she had made for the recording in late 2017 and early 2018. Emails, at 109, 112 (ECF No. 71-1) (asking DOL to obtain the recording to assist in her wage claim). When coupled with all the evidence previously provided, it supports that Ms. Talbot persistently and continuously sought the recording. Such efforts refute any claim that the recording was provided to her despite Defendants' representations to the court to the contrary.

The court also notes Defendants' purported production of the full recording runs contrary

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to their pattern of production. During the hearing, the ALJ instructed the defendants to email the second excerpt to Ms. Talbot again. Hearing Tr., at 33 (ECF No. 55-4). Defendants delayed doing so. When Defendants filed a Motion to Dismiss in this case, the evidence shows they did not serve Ms. Talbot; she found out about it and avoided dismissal by happenstance. Motion Supporting Jurisdiction, at 1–2 (ECF No. 10).[10] Defendants also withheld production of time and payroll records until after this court ordered their production. *See* Order, ¶ 6 (ECF No. 69 at 4). When Defendants did produce them, they stated the following:

> Defendants emailed payroll records on 1/16/2019 directly to their counsel and counsel inadvertently believed they were also sent to Plaintiff's counsel per Plaintiff's request for production of documents. If Plaintiff's counsel would have inquired about the missing documents by email, or phone, or letter or the like, Defendant's Counsel would have noted his error and provided the missing documents.

Defs. Supp. Brief, at 1 (ECF No. 70-1). This is a curious response. Ms. Talbot filed her Motion for Sanctions on April 9, 2019. Although the Motion was not directed towards production of the payroll records, Ms. Talbot did inform the court those records had not been produced. And yet, Defendants never remedied the problem until November 6, 2019 upon order of the court.

Defendants engaged in a pattern of non-production in the case before Judge Kimball and appear to have continued that pattern in this case. Based on the totality of Defendants' actions, there simply is no credible evidence that they provided Ms. Talbot a copy of the recording in December 2017. Thus, their purported deletion of the recording in June 2018 was egregious. Most

[10] The court asked Defendants' counsel to provide the email showing proof of service if he could rebut Ms. Talbot's contention. Order, ¶ 8 (ECF No. 69 at 4). Defendants' counsel could not do so. Instead, he only provided proof of service of Defendants' reply to the Motion to Dismiss. *See* Defs. Supp. Briefing, at 19, 27–30 (ECF No. 70-2).

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notably, however, after the court informed Defendants they would be sanctioned and the only issue that remained was what the sanction would be, Defendants were able to produce a copy of the recording they had withheld for almost two years. Notice of Filing (ECF No. 74).

Contents of the Recording

The recording contains a discussion about Ms. Talbot being switched from an hourly employee to a salaried employee. It also contains a discussion about the responsibilities Ms. Talbot had and the degree of control the defendants exercised over her. This evidence is relevant to Ms. Talbot's FLSA claim.

Additionally, the recording does contain a discussion about Ms. Talbot's overtime. Ms. Talbot said she would use her excess hours to offset time she would be away from the office. Recording, at 24:50. She commented "that was the way we'd worked it." *Id.* at 25:00. She further said they had told her she would need to be paid for the excess hours, and so she kept track of them. *Id.* at 25:05.

At about 37:00 on the recording, Mr. Williams said they were moving her back to hourly because he would not pay her for 40 hours when she only worked 20 hours. At about 37:15, Ms. Talbot again said she would use her excess hours to fill the difference. Defendants then disputed they had discussed excess hours, and said because she was a professional, she could only receive compensatory time by agreement of management. When Ms. Talbot attempted to state her understanding of their agreement, she was cut off. At 53:45, Ms. Talbot brought up that Mr. Williams had been excited about her working on salary because of the financial benefit to him. She said she had worked long hours to get the office in order and essentially had been paid the equivalent of $12.50 per hour. At about 54:18, she attempted again to state her understanding of

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their agreement, but Defendants cut off her statement.

The recording shows the thinking of the respective parties before Ms. Talbot was terminated and litigation arose. Additionally, on November 2, 2017, Ms. Talbot sent an email to Mr. Garcia. She stated, "Jason and I discussed that . . . when I was caught up which is where I am he would be paying me for less than 40 hours due to the fact I had worked much more than that to bring his/or Leesa's company current." Email, at 3 (ECF No. 55-6). The email also was sent before Ms. Talbot was terminated.

The recording and email are contrary to the following representation Defendants made to the court in an effort to obtain summary judgment:

> In the case at hand Plaintiff has for the first time ever inserted an allegation that Defendants agreed that she could have compensatory time for time she worked in excess of 40 hours a week. Aside from the fact none of the Defendants are aware of any agreement as to "compensatory time," *there is not a scintilla of evidence to support this allegation*. There are *no emails*, no indications reflected on payroll records, *no recording*, no written agreement, nothing. . . In short, this is a *sham argument* raised for the first time after Defendants filed their motion for summary judgment.

Defs. Sum. Jdmt. Reply Memo., at 8–9 (ECF No. 58) (emphasis added). The email and recording also are contrary to affidavits submitted by Defendants where they attested under oath that a compensatory agreement had never been discussed or agreed to by them. *See* J. Williams Aff'd, ¶ 7 (ECF No. 58-1 at 3); Garcia Aff'd, ¶ 7 (ECF No. 58-1 at 7); *see also* Defs. Opp'n Memo to Sanction, at 3 (ECF No. 62) ("Defendants state that the parties did not discuss 'compensatory time' during the entire 10/16/2017 Meeting."). The court is not saying the recording provides conclusive evidence that a compensatory agreement was reached. But the evidence does refute Defendants' attestations that the topic of compensatory time was never discussed. Now that the court has reviewed the

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recording, it does show Defendants withheld an important piece of evidence from Ms. Talbot.

Defendants' Subsequent Argument

Finally, in Defendants' supplemental response, Defendants again asserted Ms. Talbot was at fault for not following Rule 37 and engaging in a meet and confer, and had she followed the rules, "we may not be here now arguing about sanctions." Defs. Supp. Response, at 3–4 (ECF No. 75). Defendants further asserted that since the recording was recovered and produced, the comment to Rule 37-1(e) provides "there is nothing further to do on the matter." *Id.* at 4.

ANALYSIS

"Discovery is not supposed to be a shell game, where the hidden ball is moved round and round and only revealed after so many false guesses are made and so much money is squandered." *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1322 (10th Cir. 2011). For reasons that are inexplicable, neither Defendants nor Defendants' counsel seem to recognize how serious their discovery abuses are despite being under an injunction from past discovery misconduct. Before proceeding to address what sanctions will be imposed, the court addresses Defendants' argument about Rule 37 requirements.

I. RULE 37 REQUIREMENTS

Rule 37(a) requires a party to meet and confer with opposing counsel before filing a motion to compel discovery. Fed. R. Civ. P. 37(a). Ms. Talbot, however, did not move to compel Defendants to produce the recording. She moved for sanctions after Defendants told her they had deleted the recording in June 2018 despite Ms. Talbot's repeated requests for production of the recording since December 2017. When a party has destroyed evidence, whether it be by deleting

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a recording or smashing a cell phone, there no longer exists evidence for which production may be compelled. Thus, Rule 37(a) is inapplicable.

Rule 37(e) addresses electronically stored information that is lost and cannot be recovered. A Committee Note clarifies Rule 37(e) "applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere." Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment. At the time Ms. Talbot filed her Motion for Sanctions, the posture of the case was that Defendants had deleted the recording and had no substitute for it. Only after the court informed Defendants they would be sanctioned, did Defendants produce the recording. Such production does not excuse Defendants from sanctions because the fact remains Defendants engaged in discovery abuses. Defendants representations and attestations to the court also have been troubling.

The Tenth Circuit has stated "a court may exercise its inherent powers to sanction bad-faith conduct that abuses the judicial process." *Xyngular v. Schenkel*, 890 F.3d 868, 873 (10th Cir. 2018) (citation omitted). It is upon that authority that the court addresses the defendants' discovery abuses.

II. DISCOVERY ABUSES

A. Reported Spoliation

Ms. Talbot initially moved for judgment in her favor as a sanction for spoliation of evidence. "Spoliation sanctions are proper when (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence." *Turner v. Public Serv. Co.*, 563 F.3d 1136,

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1149 (10th Cir. 2009) (quotations and citations omitted). Ms. Talbot presented evidence sufficient to meet that standard. Hence, the court concluded it would impose sanctions and sought further information to determine what those sanctions should be.

As stated above, Defendants then changed course. They produced the recording that supposedly had been destroyed and for which there was no other copy. Thus, the court's analysis now takes into consideration that production.

B. Ehrenhaus Factors

Ms. Talbot contends even though the recording has been produced, default should still be entered due to Defendants' conduct. The Tenth Circuit has stated "dismissal represents an extreme sanction appropriate only in cases of willful misconduct." *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992) (citations omitted). The court applies the same standard to Ms. Talbot's request for default judgment.

The Tenth Circuit also has noted that "[i]n many cases, a lesser sanction will deter the errant party from further misconduct." *Id.* Although the court has inherent authority to impose a sanction for discovery abuses, the "sanction must be both 'just' and 'related to the particular claim'" at issue. *Id.* (citation omitted). Thus, the Tenth Circuit has set forth the following factors for consideration when a court determines if default is appropriate: "'(1) the degree of actual prejudice to the [party]; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for non-compliance; and (5) the efficacy of lesser sanctions.'" *Id.* at 921 (quotations, citations, and alterations omitted). These factors "do not represent a rigid test" and are non-exclusive. *Lee*, 638 F.3d at 1323 (quotations and citations omitted).

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i. *Degree of Actual Prejudice*

This litigation pertains to whether Ms. Talbot was a non-exempt employee entitled to overtime pay.[11] Relevant to that decision are discussions Ms. Talbot had with Defendants about why they changed her from an hourly employee to a salaried employee, what her job duties were, the degree of control the defendants exercised over her, and whether there was any overtime agreement. The recording provides relevant information on these issues. Had it actually been destroyed and non-recoverable, Ms. Talbot would have been denied an important piece of evidence. Now that the recording has been produced, the remaining prejudice to Ms. Talbot arises from the costs she incurred as a result of Defendants' action and delayed resolution of this case. The Tenth Circuit has "recognized prejudice from 'delay and mounting attorney's fees.'" *Faircloth v. Hickenlooper*, 758 F. App'x 659, 662 (10th Cir. 2018) (quoting *Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir. 1993)). Both have occurred here due to Defendants' actions. Thus, while the prejudice is not as great as it would have been, prejudice is still present.

ii. Amount of Interference with the Judicial Process

With respect to the second factor, the court concludes Defendants' conduct resulted in substantial interference with the judicial process. Although Defendants have now produced the recording, the production occurred only after multiple requests for production, full briefing on a motion for sanctions, a hearing on the motion, and an order stating sanctions would be imposed.

[11] Defendants' briefing contains argument that compensatory time was never at issue. Memo. in Opp'n to Sanctions Mot., at 8–10 (ECF No. 62). This misses the point. Regardless of whether Defendants discussed overtime pay or compensatory time in lieu of pay, Ms. Talbot asserts Defendants violated the FLSA by not compensating her for over 600 hours of overtime. She has asserted her overtime claim from the outset. Defendants' argument therefore is not well-taken for purposes of this motion.

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Defendants also attempted to persuade the court that Ms. Talbot manufactured a sham argument and that she had created the present problem by not pursuing a meet and confer with the defendants. Ms. Talbot then had to defend herself against these accusations.[12] Defendants have abused the litigation process significantly without any apparent acknowledgment that their conduct was improper.

iii. Degree of Culpability

To establish "willfulness, bad faith, or some fault," a moving party must prove discovery abuses by clear and convincing evidence. *Xyngular*, 890 F.3d at 873 (quotations and citation omitted). Ms. Talbot has met this standard. Defendants had clear notice that the recording was relevant to Ms. Talbot's wage claim. She asked for the recording many times so it could be submitted to the Labor Commission on her wage claim. She never did receive it for that proceeding.

When Ms. Talbot filed a *pro se* civil rights complaint, Defendants contend that did not put them on notice. Such an argument is specious. Although Ms. Talbot did not cite to the FLSA properly, she did state her complaint was for overtime and she expressly identified the recording

[12] Defendants' briefing attempts to divert the court through red herring arguments. For example, they refer to the unemployment proceedings where DWS determined Ms. Talbot had been terminated for cause and had to repay unemployment benefits due to a finding of fraud. The court notes that "fraud" in the unemployment context is unlike fraud in most legal contexts. Under DWS rules, "[k]nowledge is established when the claimant knew *or should have known* that the information submitted to the Department was incorrect or that the claimant failed to provide required information." *Migenes v. Dep't of Workforce Servs.*, 2016 UT App 129, ¶ 4, 378 P.3d 116 (citing Utah Admin. Code R994-406-401(a)(b)). And if a claim or document contains "false statements, responses or deliberate omissions," then willfulness is established. *Id.* (citing Utah Admin. Code R994-406-401(1)(c)). Thus, if a document has a false statement and the claimant knew *or should have known* that the statement was incorrect, one can be found liable for "fraud" in the unemployment context. This is a lower and different standard than intentional fraud. Thus, Defendants' attempt to divert attention away from their own conduct by briefing what occurred during the unemployment proceeding is not well-taken.

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as being relevant to her claim. As stated above, litigation is not a shell game. Defendants had a *duty* to preserve evidence that Ms. Talbot identified as relevant. Defendants ignored their duty and deliberately deleted the very evidence Ms. Talbot had requested on multiple occasions. They then accused Ms. Talbot of creating a sham argument about compensatory time. And they did not do a comprehensive search of devices to locate a copy of the recording until after they were informed sanctions would be imposed. The evidence is more than sufficient to prove intentional misconduct by clear and convincing evidence.

iv. *Warning*

The fourth factor requires consideration of whether Defendants had notice that dismissal was a possibility. Although this is a factor for consideration, the Tenth Circuit has "point[ed] out that notice is not a prerequisite for dismissal under *Ehrenhaus*." *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1149 (10th Cir. 2007) (citations omitted). This means dismissal or default judgment may occur even "without a specific warning." *Id.* Nevertheless, "notice is an important element in the *Ehrenhaus* analysis." *Id.*

Here, the court did not provide notice to Defendants that default judgment was a possibility prior to most of their conduct. This case, however, does not stand in isolation because Defendants are subject to a permanent injunction enjoining them from further discovery abuses. The injunction was entered on May 17, 2017. Permanent Injunction (ECF No. 64 in Case No. 2:15-cv-653). And yet, by December 2017, Defendants had started to withhold relevant evidence in another dispute.

The injunction is not directly on point for it enjoins "altering, editing, and/or destroying Defendants' time and payroll records." *Id.* ¶ 5. The recording was not a time or payroll record.

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A court should not have to tell a defendant, however, each and every item a defendant should not destroy. When Ms. Talbot requested the recording on December 7, 2017, she offered to pay for its production. She then expressly noted her concern that she did "not want this new found evidence to slip away like so many other[] things do. Or be corrupted, or changed." Email, at 2 (ECF No. 55-5). Ms. Talbot knew that was a possibility because Defendants did that with other evidence while she worked at the Company. As it turns out, Ms. Talbot had cause for concern because Defendants deliberately deleted the recording in June 2018, and did not restore a copy until November 2019, when facing sanctions.

Moreover, when the court ordered Defendants to produce supplemental evidence, it admonished them to take care in the representations they made to the court. Order, at 3 (ECF No. 69). Thereafter, Ms. Williams filed an affidavit under oath that is contrary to the evidence and Defendants' arguments ignore facts in such a way that advocacy ended and misleading information began. Thus, although the court did not issue a warning about default judgment in this case, Defendants were on notice that their conduct could result in serious sanctions.

v. Adequacy of Lesser Sanctions

The court now addresses whether lesser sanctions than default judgment are appropriate. The court is mindful of "the judicial system's strong preference to decide cases on the merits." *Sanchez v. Beaver County Sheriff*, No. 2:18-cv-69, 2020 U.S. Dist. LEXIS 107853, at *3 (D. Utah June 18, 2020) (citing *DeBardeleben v. Quinlan*, 937 F.2d 502, 504 (10th Cir. 1991)). Nevertheless, the discovery abuses in this case are unacceptable. Counsel seems to be complicit rather than acting in a manner to curtail such misconduct. Besides withholding evidence, Defendants and counsel also have not been forthright with the court in affidavits and

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representations. To this day, Defendants have not shown any awareness that their conduct was wrong. Instead, they contend that because they produced the recording, there is nothing more that should be done. As stated before, Defendants' conduct is troubling.

Moreover, this is not the first time Defendants have engaged in abusive litigation tactics. Sanctions are for the purpose of addressing a wrong and deterring future conduct. If a permanent injunction was insufficient to stop Defendants from destroying evidence and interfering with the litigation process, the court fails to see how a sanction other than default judgment will have any deterrent impact. Accordingly, the court concludes the appropriate sanction in this case is to enter default judgment on liability. The court also concludes counsel should be sanctioned personally for his conduct as set forth below.

By imposing these sanctions, the court's purpose is to deter Defendants and counsel from withholding relevant evidence, submitting sworn affidavits with false or misleading information in them, and making arguments to the court or other tribunals that misrepresent facts and law.

III. DAMAGES AND SANCTIONS

A. Proof of Damages

Although the court concludes default judgment is appropriate on the issue of liability, this does not mean the court accepts Ms. Talbot's representations about the amount of overtime she claims. Defendants assert they caught Ms. Talbot cheating on her time in October 2017. Memo. in Opp'n to Sanctions Mot., at 11 (ECF No. 62). They found her clocked in on a Saturday when she was not in the building. *See id.* Because of that action, Defendants called the meeting on October 16, 2017 and the matter is discussed on the recording.

At an administrative hearing, Ms. Williams testified that Ms. Talbot "was salaried so it

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didn't matter how many hours she worked. She was salaried and she got paid for it. She got paid the same amount of money whether she'd worked 10 hours." Hearing Tr., 29–30 (ECF No. 55-4). Based on this representation, it begs the question why Defendants considered Ms. Talbot to be cheating on her time if hours were not being tracked. That said, because issues do exist about how many hours Ms. Talbot worked, a sanction without consideration of Ms. Talbot's actions would be inequitable.

Ms. Talbot asserts "she worked 617.27 of overtime" and "is entitled to $23,147.63 in overtime compensation based on an hourly rate of $25.00."[13] Talbot Affidavit, ¶¶ 38–39 (ECF No. 55-1). On the recording, however, there is support that Ms. Talbot performed work on a second job while clocked in at the Company. The recording also supports that Ms. Talbot was clocked in on a Saturday but was not in the building. Additionally, Ms. Talbot did not work forty hours a week the last pay period she was on salary. Instead, she worked 60:19 for that two-week period, but was paid her regular salary. Pay Stub, at 33 (ECF No. 70-1).

When Defendants finally produced timesheets and payroll records, they noted which time entries were "questionable." Timesheets, at 35–45 (ECF No. 70-1). They further noted time entries that were "very confusing" based on how Ms. Talbot clocked out and clocked in. *Id.* The

[13] Ms. Talbot also asserts the Company docked $600 from her pay when it switched her from salary to hourly on January 1, 2017. Talbot Affidavit, ¶ 23 (ECF No. 55-1). The payroll records for the end of December 2016 and the beginning of January 2017 are inconsistent as to when one payroll period ended and the other started. *Cf* Dec. Pay Stub (ECF No. 70-1 at 11) *with* Jan. Pay Stub (ECF No. 70-1 at 12); Defs. Statement (ECF No. 70-1 at 1). The length of first payroll period in January 2017 also is inconsistent with subsequent payroll periods. Nevertheless, the record shows Ms. Talbot was not docked pay. While it is true the Company paid Ms. Talbot $1,400 rather than $2,000 for that period, it is because the period was shorter. It included six business days and one holiday for a total of seven compensable days. *See* Jan. Pay Stub (ECF No. 70-1 at 12). Seven eight-hour days at $25.00 per hour equals $1,400. Thus, the Company did not dock her pay due to the New Years holiday.

court does not address the "confusing" entries for it finds the documentation submitted by Defendants creates its own confusion. With few exceptions, the hours reported on the timesheets do not match the hours reported on the pay stubs. Because pay stubs contain comprehensive payroll information and are the Company's official record, the court finds the pay stubs are more reliable for determining overtime hours.

Based on the pay stubs, Ms. Talbot worked 642:58 hours of overtime.[14] Because she did not work 80 hours during the last pay period she was on salary, the court deducts 19:41 hours from her overtime, for a net total of 623:17 hours.

Additionally, the court credits the entries on the timesheets that Defendants marked "questionable" as being a fair approximation of hours that should be deducted from the overtime hours. The "questionable" entries total 125:45 hours. When subtracted from 623:17, the remaining overtime hours are 497:32. As stated above, Ms. Talbot's hourly rate was $25.00. Overtime accrues at "one and one-half times the regular rate at which [the person] is employed." 29 U.S.C. § 207(a)(1). Here, the overtime rate is $37.50 per hour for 497:32 hours,[15] which equals $18,657.49. The court concludes that amount reflects an appropriate sanction for Defendants'

[14] Ms. Talbot's initial documentation shows how she calculated hours based on her pay stubs. Talbot Spreadsheet, at 13 (ECF No. 11). There are two entry errors, which resulted in lower claimed hours of overtime in comparison to the pay stubs. Additionally, the spreadsheet does not claim overtime for the first pay period in January 2017. Although the pay stub for that period shows only 68:18 hours were worked, as explained above, that pay period was shorter. Pay Stub, at 12 (ECF No. 70-1). It had seven compensable days, which would equate to a 56-hour pay period. Ms. Talbot worked 12:18 hours more than the pay period required. The court has included that amount in its calculation. When combined with the corrected entry errors, the total overtime on the pay stubs is higher than the amount reported by Ms. Talbot.

[15] The court notes that 32 minutes is a 0.533 fraction of an hour and equates to $19.99 when the hourly rate is $37.50.

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misconduct, while taking into account concerns over Ms. Talbot's reported overtime.

B. Attorney Fees

The FLSA mandates an award of attorney fees and costs when a plaintiff prevails on an FLSA claim. 29 U.S.C. § 216(b). Here, the case has not been decided on the merits. Instead, default judgment has been awarded as a sanction for Defendants' misconduct. Had Ms. Talbot proceeded to trial, however, she may have prevailed on her FLSA claim. Moreover, Ms. Talbot incurred attorney fees to seek discovery of the recording and documents that had been withheld. She further incurred attorney fees related to her Motion for Sanctions. Were the court to withhold an award of attorney fees to Ms. Talbot, Defendants would benefit from their misconduct.

Accordingly, as an additional sanction, the court awards attorney fees in favor of Ms. Talbot. The court concludes attorney fees are a sufficient additional sanction for Defendants' misconduct. Thus, Ms. Talbot shall bear her own costs.

C. Sanction of Counsel

As discussed above, the conduct of Defendants' counsel also has been troubling. Not advising about a preservation letter, submitting evidence and argument with misleading information, and failing to acknowledge the seriousness of Defendants' misconduct are contrary to how counsel should conduct itself in a case. Accordingly, Defendants' counsel shall personally pay Ms. Talbot $2,500 as a sanction. Payment shall be remitted to Ms. Talbot's attorney for distribution to her.

CONCLUSION and SCHEDULING ORDER

For the reasons stated above, the court GRANTS Ms. Talbot's Motion for Sanctions (ECF No. 56). The court specifically cautions Defendants and counsel about the need for preservation

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and timely production of evidence, making careful and truthful representations to the court, and adherence to court orders. By so specifying, this does not mean Defendants and counsel have not been warned about other litigation abuses. The following award is imposed to correct a wrong, to warn, and to deter Defendants and counsel from engaging in future litigation abuses.

1. Default Judgment is entered in favor of Ms. Talbot in the amount of $18,657.49
2. Attorney fees are awarded in favor of Ms. Talbot, but she shall bear her own costs.
3. On or before August 19, 2020, Ms. Talbot shall file documentation to support the amount of attorney fees claimed. If Defendants oppose the amount of fees claimed, they shall file an opposition brief on or before September 9, 2020. Any reply brief shall be filed on or before September 23, 2020.
4. On or before September 30, 2020, Defendants' counsel shall remit $2,500 to Ms. Talbot's counsel for distribution to her.

SO ORDERED this 29th day of July, 2020.

BY THE COURT:

Clark Waddoups
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EBONY TATE, et. al.,

Plaintiffs,

v.

THE CITY OF CHICAGO, et. al.,

Defendants.

No. 18 C 7439

Magistrate Judge Jeffrey T. Gilbert

MEMORANDUM OPINION AND ORDER

This case comes before the Court on CBS Broadcasting Inc.'s ("CBS") Motion to Quash Defendants' Subpoenas Duces Tecum [ECF No. 158]. For the reasons discussed below, CBS's Motion is granted in part and denied in part. The Motion is granted to the extent CBS need not produce any documents described in the first and third categories of Defendant Officers' February 12, 2020 subpoenas, namely, any notes or documents concerning interviews with Plaintiffs or any communications, correspondence, text messages or other messages between individuals at CBS, Plaintiffs, or Plaintiffs' attorneys. The Motion is denied to the extent CBS is ordered to produce any and all video or audio recordings containing Plaintiffs' statements regarding the search of their residence on August 9, 2018, and the events that followed.

BACKGROUND

On August 9, 2018, officers from the Chicago Police Department executed a search warrant at Plaintiffs' basement apartment in search of an individual who was identified by a confidential informant as being a convicted felon in possession of a semi-automatic handgun. [ECF Nos. 70, 72] at ¶ 31. As the officers executed the search warrant at the home, Plaintiffs allege that the officers

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repeatedly pointed machine guns or assault rifles at Plaintiffs, four of whom are minor children. [ECF No. 70] at ¶ 2. According to Plaintiffs, the family was made to sit outside of the home for over an hour, exposed to the elements, while the search was conducted. [ECF No. 70] at ¶ 3. Cynthia Eason, one of the Plaintiffs and the grandmother of the minor children who were present, was allegedly forced to sit outside in nothing more than a t-shirt and underwear during that time. [ECF No. 70] at ¶¶ 4-6. As a result of the search, Plaintiffs allege they suffered severe, long-lasting emotional and psychological harm. [ECF No. 70] at ¶¶ 11-12. Plaintiffs subsequently filed suit under 42 U.S.C. § 1983 for unlawful search, false arrest, and false imprisonment. Plaintiffs further brought causes of action arising under state law for assault, false arrest, false imprisonment, and intentional or negligent infliction of emotional distress. Plaintiffs' complaint also includes a custom, policy, or practice claim under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

In July 2018, CBS began investigating and producing news reports about allegations being made by numerous Chicago-area families, including Plaintiffs, that the Chicago Police Department had improperly searched their homes. [ECF No. 158-2] at ¶ 3. CBS broadcast its first news report touching on the incident at Plaintiffs' home in November 2018 and subsequently broadcast at least two additional news reports concerning the search of Plaintiffs' home or discussing Plaintiffs themselves. [ECF No. 158-2] at ¶ 5. CBS further produced and broadcast a 28-minute documentary about the Chicago-area families who were allegedly the subject of improper searches by the Chicago Police Department, including Plaintiffs. [ECF No. 158-2] at ¶ 7.

On February 12, 2020, Defendant Officers issued subpoenas to non-party CBS seeking the following three categories of information regarding the allegations in this case:

> "1. From August 9, 2018 to the present, any and all notes or other documents of interviews and statements made by:
>
> A. Ebony Tate

B. E'Monie Booth
C. La'Niya Booth
D. Legend Booth
E. LaKai'ya Booth
F. Cynthia Eason

2. From August 9, 2018 to the present, any and all video/audio 'outtake' recordings, or any video/audio not publicly disseminated containing statements of:
   A. Ebony Tate
   B. E'Monie Booth
   C. La'Niya Booth
   D. Legend Booth
   E. LaKai'ya Booth
   F. Cynthia Eason

3. From August 9, 2018 to the present, any and all communications, correspondence, text messages or other messages between Dave Savini, or any other CBS employee, and any of the above listed individuals named in Requests 1 and 2, and/or their respective attorneys." [ECF No. 158-1] at 5.

CBS now asks this Court to quash the above-referenced subpoenas on two grounds. First, CBS argues that the subpoenas require disclosure of reporting materials otherwise shielded by the Illinois "reporter's privilege" and the Court therefore should quash the subpoenas under Rule 45(d)(3)(A)(iii). Second, CBS argues that compliance with the subpoenas would impose an undue burden on them under Rule 45(d)(3)(A)(iv) because of their status as a non-party media organization and the potential volume of material responsive to the above requests.

DISCUSSION

Although CBS invokes both the letter and spirit of the Illinois reporter's privilege in support of its Motion, neither shield the materials sought in this federal question case. The Seventh Circuit has clearly established that state-law privileges – specifically, Illinois' statutory version of the reporter's privilege, 735 ILCS 5/8–901 – are not "legally applicable" in federal question cases such as this. *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (enforcing subpoena against third-party journalists) (citing FED.R.EVID. 501; *Patterson v. Caterpillar, Inc.*, 70 F.3d 503, 506 (7th Cir. 1995)).

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Building upon its holding in *McKevitt*, the Seventh Circuit struck the death knoll for any federal question application of the Illinois reporter's privilege in *United States Dept. of Educ. v. National Collegiate Athletic Ass'n.,* 481 F.3d 936, 938 (7th Cir. 2007) when it rejected the NCAA's assertion of an investigatory privilege, stating: "There isn't even a reporter's privilege in federal cases." (citing *Branzburg v. Hayes,* 408 U.S. 665 (1972); *University of Pennsylvania v. EEOC,* 493 U.S. 182, 201 (1990); *McKevitt,* 339 F.3d 530). Other courts in this circuit are in accord. *Mosely v. City of Chicago,* 252 F.R.D. 421, 424 (N.D. Ill. 2008) (the Illinois reporter's privilege is inapplicable in federal question cases); *Thayer v. Chiczewski,* 257 F.R.D. 466, 469 (N.D. Ill. 2009).

The Court therefore can find no basis, in law or in "equity," for recognizing a reporter's privilege in these proceedings. Yet even were such a privilege cognizable, CBS may have waived any privilege it could have asserted by not complying with Rule 45 of the Federal Rules of Civil Procedure. FED.R.CIV.P. 45(d)(3)(A)(iii) ("On timely motion, the court for the district where compliance is required must quash or modify a subpoena that…requires disclosure of privileged or other protected matter, *if no exception or waiver applies*.") (emphasis added). Just as a party asserting privilege in the face of a discovery request must compile a privilege log under Rule 26(b)(5), Rule 45(e)(2)(A)(ii) requires a non-party withholding subpoenaed information under a claim of privilege to "describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim." CBS not only did not serve a privilege log in compliance with Rule 45(e)(2)(A)(ii), but it is further silent in both its Motion [ECF No. 158] and Reply [ECF No. 180] as to any excuse for its noncompliance. Although CBS may have agreed with Defendant Officers that it did not need to serve a privilege log with its objections to the subpoenas, it has not said so. But neither have Defendant Officers argued waiver in response to CBS asserting the reporter's privilege now. The Court raises the issue only because it is relevant to any analysis under Rule 45. Ultimately,

this Court's substantive ruling that the reporter's privilege does not apply here is not based on any waiver of that privilege.

The issue before the Court, then, rests squarely on a determination under Federal Rules of Civil Procedure 26 and 45. Rule 45 empowers a party to issue a subpoena directing a non-party to produce documents or other items in that person's possession, FED.R.CIV.P. 45(a)(1)(A)(iii), yet this power is not unlimited. "A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," FED.R.CIV.P. 45(d)(1), and courts "must quash or modify a subpoena that…subjects a person to undue burden." FED.R.CIV.P. 45(d)(3)(A)(iv). Courts should further ensure that a third-party subpoena "directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas." *McKevitt*, 339 F.3d at 533.

Whether a subpoena is "reasonable in the circumstances" or imposes an "undue burden" is a case-specific inquiry: there is "no formula for determining reasonableness." *United States v. Banks*, 540 U.S. 31, 36 (2003). Nor is any "category of information or class of witness [] immune from subpoena." *Mosely*, 252 F.R.D. at 427. Rather, whether to quash a subpoena rests squarely within the court's discretion, *Griffin v. Foley*, 542 F.3d 209, 223 (7th Cir. 2008), with due consideration to the following factors: "(1) the likelihood that compliance will result in production of the information, (2) whether the discovery is unreasonably cumulative or duplicative, (3) whether the information sought is readily obtainable from another, more convenient, less burdensome (but equally reliable) source, and (4) whether the burden of the proposed discovery outweighs its likely benefit." *Taylor v. City of Chicago*, 2015 WL 6561437, at *3 (N.D. Ill. 2015) (citing *Mosely*, 252 F.R.D. at 427); *see also, Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923, 927 (7th Cir. 2004).

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The Court takes each of the three categories of information sought by Defendant Officers in turn, starting with the only subpoena request with which the Court ultimately believes CBS must comply: Defendant Officers' request for any and all video or audio outtake recordings, or any video or audio not publicly disseminated containing Plaintiffs' statements. When the Court balances the burden of compliance against the benefits of the requested production of these video or audio clips, *Northwestern Memorial Hospital,* 362 F.3d at 927, any recorded statement made by Plaintiffs about the subject matter that is at the very heart of this litigation is clearly relevant to the claims and defenses in this case and proportionate to the needs of the case. It is further likely, if not definite, that CBS's compliance with the above subpoena request will result in production of the information sought. Whatever the ultimate probative value of the additional video and audio sought, both CBS and Defendant Officers agree that CBS is, in fact, in possession of unedited footage of interviews with Plaintiffs. [ECF No. 170] at 10; [ECF No. 180] at 10. So, too, is CBS the only source from which such information could readily be obtained. Although the Court recognizes there will be some burden on CBS to compile the video and audio files requested, the likely benefit significantly outweighs this burden. Plaintiffs' statements, captured verbatim in audio and video form currently in CBS's exclusive possession, are not only substantively relevant to the claims and defenses in this case, but highly relevant to possible damage calculations and credibility determinations at trial.

By bringing this lawsuit, Plaintiffs have put their own statements to third parties at issue where they otherwise may not have been, insofar as they bear directly on the subject matter at the core of this litigation. Nor can Plaintiffs or CBS reasonably be said to have a heightened privacy interest or concern about a potential chilling effect on truthful interviews given to the news media as a whole if Defendant Officers' subpoenas are enforced here, and that also bears on the Court's analysis. Ordering that CBS produce the above audio and video clips involving Plaintiffs is consistent with both Plaintiffs' and CBS's expectation at the time the interviews were given that the

content of those interviews, in whatever form, would be made available for public consumption. *See, e.g., Mosley,* 252 F.R.D. at 431 ("…it is illogical to argue the future non-confidential interviewees will be deterred from cooperating with [a reporter] because she might have to reveal in the future something she had the absolute right to reveal in the first place.").

The Court disagrees with CBS that a decision about whether this material should be produced should be deferred until fact discovery is complete or it is clear this case will not settle. Defendant Officers need the video or audio recordings containing Plaintiffs' statements during discovery and not just before any trial. Indeed, both Defendant Officers and Plaintiffs have asked the Court to defer Defendant Officers' filing of a response to Plaintiffs' motion for a protective order concerning the depositions of the minor Plaintiffs until fourteen days after the Court decides CBS's Motion to Quash, and the Court granted that motion. [ECF Nos. 190, 193]. CBS's Motion to Quash needs to be decided now precisely so this case can move forward through fact discovery and depositions.

As for the request that CBS produce any and all notes or other documents of interviews and statements made by Plaintiffs, the Court finds this subpoena is unreasonably cumulative and unduly burdensome as framed. Although court-ordered compliance with the above request would likely result in production of some responsive notes or documents, that information is almost certain to be cumulative of the video or audio recordings that ultimately memorialize those interviews, which the Court has ordered CBS to produce. The video and audio recordings are also likely to be the best evidence of Plaintiffs' statements to CBS, as contrasted with the personal notes of a reporter who would assuredly need to be deposed (and CBS undoubtedly would object to such a deposition) in order to decipher the notes and render them in any way useful for trial. *See, e.g., Patterson v. Burge,* 2005 WL 43240, at *4 (N.D. Ill. 2005). The particular burdens demonstrated by CBS in this case – namely, the hours that would be required to compile any responsive notes or documents from any reporter or employee involved in Plaintiffs' interviews over the past eighteen months of news

production on the Chicago-area searches – outweigh any minimal benefit to either side in this case from production of those materials or the relevance of those materials to the claims and defenses raised.

Finally, the Court declines to order production of any communications, correspondence, text messages or other messages between individuals at CBS, Plaintiffs, or Plaintiffs' attorneys for many of the same reasons discussed above. Not only have Defendant Officers failed to show that the likely benefit of this material outweighs the significant burden compliance would impose on CBS under Rule 45, but the information sought is readily available from Plaintiffs themselves. Plaintiffs are a more convenient, less burdensome, and equally reliable source of the information Defendant Officers' seek, particularly given Plaintiffs' status as parties to the litigation and CBS's own status as a non-party media organization.

For all of these reasons, CBS is ordered to comply with Defendant Officers' February 12, 2020 subpoenas to the extent it must produce any and all video or audio recordings containing Plaintiffs' statements regarding the search of their residence on August 9, 2018 and the events that followed. The Court hereby quashes the subpoenas with respect to the requests for any notes or documents concerning interviews with Plaintiffs and any communications, correspondence, text messages or other messages between individuals at CBS, Plaintiffs, or Plaintiffs' attorneys.

It is so ordered.

Jeffrey T. Gilbert
United States Magistrate Judge

Dated: August 3, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-24668-CIV-LENARD/O'SULLIVAN

DEBORAH REED,

Plaintiff,

v.

ROYAL CARIBBEAN CRUISES, LTD.,

Defendant.

_____/

ORDER

THIS MATTER comes before the Court on the Plaintiff's Motion for Sanctions for Spoliation of Evidence and Supporting Memorandum of Law (DE# 57, 9/3/20).

BACKGROUND

On April 12, 2019, Deborah Reed (hereinafter "plaintiff" or "Ms. Reed") was a cruise ship passenger onboard a vessel operated by defendant Royal Caribbean Cruises, Ltd. (hereinafter "defendant" or "RCCL"). See Second Amended Complaint for Damages and Demand for Trial by Jury (DE# 35 at ¶¶ 11-12, 5/26/20) (hereinafter "SAC"); Answer and Affirmative Defenses to Plaintiff's Second Amended Complaint (DE# 37 at ¶¶ 11-12, 6/5/20). The plaintiff alleges that:

> 13. On or about April 12, 2019, Plaintiff participated in a RCCL-organized dance party. During the dance party, besides a[ ] RCCL DJ playing 70's music, the RCCL Cruise Director staff [was] teach[ing] passengers "The Hustle" line dance.
>
> 14. As Plaintiff participated in the RCCL organized dance party, a fellow intoxicated male passenger, JOHN DOE, approached Plaintiff. JOHN DOE was not known to Plaintiff and was not one of her travelling companions.

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> 15. Plaintiff initially consented to dancing with JOHN DOE, but Plaintiff did not consent to any touching between the two. Nonetheless, JOHN DOE grabbed Plaintiff's hand and despite her pleas that he not twirl her, JOHN DOE refused to comply with Plaintiff's requests. Suddenly, . . . JOHN DOE spun Plaintiff and forcefully released her causing Plaintiff to fall and land on the marble floor. As a result of the fall, Plaintiff suffered traumatic injuries that included, but [were] not limited to, a fractured wrist which required surgery.

SAC at ¶¶ 13-15.[1]

Following the incident, the plaintiff provided both a written statement (DE# 57-1) and an oral statement to RCCL staff.[2] See Declaration of Deborah Kay Reed (DE# 57-2 at ¶ 6, 9/3/20) (hereinafter "Plaintiff's Decl."). In the written statement, the plaintiff described the incident as follows: "some man grabbed me [and] twirled me. . . . I was about to walk away [and] he twirled me [and] I fell." Guest Injury Statement (DE# 57-1 at 2, 9/3/20). According to the plaintiff, RCCL staff obtained the plaintiff's permission to record her oral statement. Plaintiff's Decl. at ¶ 6. In her oral statement, the plaintiff told RCCL staff that John Doe was intoxicated. Id. at ¶ 7.

On May 15, 2019, approximately one month after the incident, the plaintiff's counsel sent a certified letter of representation to the defendant. See Exhibit 4 (DE# 57-4, 9/3/20). The letter advised the defendant of the plaintiff's intent to file a lawsuit and asked that the defendant preserve certain evidence:

> We request that you maintain and preserve the area and materials involved in the incident so that we may inspect the same. Do not change

[1] The defendant states that John Doe "has since been identified and disclosed to Plaintiff." Response at 1.

[2] The plaintiff's declaration uses the terms "RCCL security/safety officers," "RCCL staff members" and "RCCL security/safety staff members" interchangeably. See Plaintiff's Decl. at ¶¶ 6-7, 9. To avoid confusion, the undersigned will use the term "RCCL staff."

> or alter the area and materials involved in the incident. Be advised that any such alterations may constitute spoliation of evidence, which will necessitate appropriate legal action.
>
> **We likewise request that you preserve any video records (including, but not limited to, any and all CCTV footage of our client taken at any and all times during the entire cruise, and CCTV footage of the area where the incident occurred, and where alcohol was served to the intoxicated passenger who may have been involved in the incident, at least one hour prior through one hour afterwards)**, photographs, accident/incident reports, and any and all other records produced by your cruise line as a result of, or relevant to, the incident. We also request that you keep records and contact information of any and all individuals who were involved in any way with the incident.

Id. (emphasis added).[3]

On September 3, 2020, the plaintiff filed the instant motion seeking spoliation sanctions over the defendant's failure to preserve more than approximately six minutes of the CCTV footage of the incident and the body camera footage of the plaintiff's oral statement concerning the incident. See Plaintiff's Motion for Sanctions for Spoliation of Evidence and Supporting Memorandum of Law (DE# 57 at 4-5, 9/3/20) (hereinafter "Motion"). The defendant filed a response in opposition on September 17, 2020. See Defendant's Response to Plaintiff's Motion for Sanctions for Spoliation of Evidence (DE# 64, 9/17/20) (hereinafter "Response"). The plaintiff filed her reply on September

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[3] The defendant has filed a declaration attesting that:

> The CCTV cameras on Royal Caribbean's ships have 24-hour monitoring. If CCTV footage is not specifically saved, it is taped over due to storage capabilities based on the 24-hour monitoring. **The footage of Ms. Reed's incident would have been taped over well before Plaintiff's counsel's letter of May 15, 2019** requesting Royal Caribbean preserve at least one hour prior and one-hour subsequent [to] Plaintiff's incident.

Declaration of Amanda Campos (DE# 64-3 at ¶11, 9/17/20) (hereinafter "Campos' Decl.") (emphasis added).

22, 2020. See Plaintiff's Reply in Support of Her Motion for Sanctions for Spoliation of Evidence and Supporting Memorandum of Law (DE# 65, 9/22/20) (hereinafter "Reply").

On September 22, 2020, the plaintiff sent an email to the Court (and opposing counsel) providing two videos of the approximately six minutes of the CCTV footage which was preserved.

This matter is ripe for adjudication.

STANDARD OF REVIEW

The parties agree that Rule 37(e) applies here. Motion at 5; Response at 2-3. Rule 37(e) governs the failure to preserve electronically stored information ("ESI") and states as follows:

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

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

"The rule 'does not place a burden of proving or disproving prejudice on one

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party or the other.'" Williford v. Carnival Corp., No. 17-21992-CIV, 2019 WL 2269155, at *6 (S.D. Fla. May 28, 2019) (citing Fed. R. Civ. P. 37(e) advisory committee's notes (2015)). Nonetheless, some "courts have concluded that the party accused of spoliating evidence, not the party moving for spoliation sanctions, bears the burden of showing the lack of prejudice." Coward v. Forestar Realty, Inc., No. 4:15-CV-0245-HLM, 2017 WL 8948347, at *8 (N.D. Ga. Nov. 30, 2017).

"Rule 37(e) significantly limits a court's discretion to impose sanctions for ESI spoliations." Williford, 2019 WL 2269155, at *5. The Court may only impose sanctions under Rule 37(e) if four requirements are met: "(1) the information sought constitutes ESI; (2) the ESI should have been preserved in anticipation of litigation; (3) the ESI is lost because a party failed to take reasonable steps to preserve it; and (4) the ESI cannot be restored or replaced through additional discovery." Title Capital Mgmt., LLC v. Progress Residential, LLC, No. 16-21882-CV, 2017 WL 5953428, at *3 (S.D. Fla. Sept. 29, 2017) (citing Fed. R. Civ. P. 37(e)).[4]

"If the answer to any of these . . . inquiries is 'no,' then the Court need proceed no further in its analysis under Rule 37(e), and a motion for spoliation sanctions or

[4] Some cases group or number the requirements of Rule 37(e) differently. See, e.g., In re Abilify (Aripiprazole) Prod. Liab. Litig., No. 3:16-MD-2734, 2018 WL 4856767, at *2 (N.D. Fla. Oct. 5, 2018) (listing the four requirements of Rule 37(e) as follows "First, the ESI should have been preserved in the anticipation or conduct of the litigation. Second, the ESI is lost or destroyed. Third, the loss of the ESI is due to the party's failure to take reasonable steps to preserve the ESI. Last, the ESI cannot be restored or replaced through additional discovery."); Living Color Enters., Inc. v. New Era Aquaculture, Ltd., No. 14-CV-62216, 2016 WL 1105297, at *4 (S.D. Fla. Mar. 22, 2016) (describing the requirements of Rule 37(e) as three requirements because it considered the question of whether the spoliated evidence was ESI to be a threshold issue). However, the requirements of Rule 37(e) are essentially the same.

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curative measures must be denied. If instead the answer to all . . . questions is 'yes,' then the Court must proceed with its analysis of the (e)(1) and (e)(2)" categories of relief. Chi Nguyen v. Costco Wholesale Corp., No. 9:19-CV-80393, 2020 WL 413898, at *2 (S.D. Fla. Jan. 27, 2020) (citation and some internal quotation marks omitted).

Rule 37(e) "has two categories of relief: those in subsection (1) and the more-consequential ones in subsection (2). The sanctions available in subsection (2) require bad faith (i.e., the 'intent to deprive')." Williford, 2019 WL 2269155, at *5. Both categories of relief require a showing of prejudice. Id. at *12.

ANALYSIS

A. Spoliated Evidence

(1) Incomplete CCTV Footage

The plaintiff attests that she observed John Doe's erratic behavior approximately ten to 15 minutes[5] prior to the incident:

> 4. [The plaintiff] had observed [John Doe] approximately ten to fifteen minutes before he accosted [the plaintiff], but [she] assumed that RCCL was also aware of his **unruly, erratic, intoxicated, and dangerous behavior**, and [she] assumed that RCCL had security ready that would have protected [the plaintiff] if [John Doe] started to accost [her]."
>
> 5. [The plaintiff] observed [John Doe] **stumbling, not keeping his balance well, and not keeping proper distance with his fellow passengers**.

Plaintiff's Decl. at ¶¶ 4-5 (emphasis added).

[5] In a different paragraph of her declaration, the plaintiff attests that John Doe was behaving erratically approximately "five to fifteen minutes before accosting [her]." Plaintiff's Decl. at ¶10 (attesting that the plaintiff "believe[d] that the additional CCTV footage that RCCL's cameras captured showed that [John Doe] was in a state of visible intoxication, and was exhibiting unruly, erratic, and dangerous behavior at least five to fifteen minutes before accosting [the plaintiff]").

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The defendant preserved approximately six minutes of CCTV footage of the subject incident, "approximately three and a half minutes before, and two and a half minutes after" the plaintiff's fall. Motion at 3.

The plaintiff argues that the defendant "had a duty to at least preserve a minimum of five minutes of CCTV footage before Ms. Reed's incident and five minutes after." Motion at 7. The plaintiff asserts that the defendant's failure to preserve more than approximately six minutes of CCTV footage warrants sanctions because the missing footage "would have clearly show[n] John Doe in a dangerous and intoxicated state" and would have "clearly show[n] that RCCL was on notice of his danger to Ms. Reed." Id. at 2.

(2) Allegedly Missing Body Camera Footage

The plaintiff attests that following the incident, the plaintiff provided both a written statement (DE# 57-1) and an oral statement to RCCL staff. See Plaintiff's Decl. at ¶ 6. According to the plaintiff, RCCL staff obtained the plaintiff's permission to record her oral statement. Id. In her oral statement, the plaintiff told RCCL staff that John Doe was intoxicated. Id. at ¶ 7.

RCCL staff also obtained an oral statement from the plaintiff's travel companion, Tracey Powell. See Plaintiff's Decl. at ¶ 9. Ms. Powell, who had been near the plaintiff when the incident occurred, also told RCCL staff that John Doe was "in an intoxicated state before he accosted [the plaintiff]." Id. at ¶¶ 8-9.

The defendant does not address the missing body camera footage in its Response. However, the plaintiff has filed an email from the defendant which asserts

that no recording of the plaintiff's oral statement was made. Exhibit 3, Email dated 8/20/2020 (DE# 57-3 at 1, 9/3/20) (asserting that "there was never any body camera footage of the plaintiff's statement after the subject incident.").

The plaintiff argues that the "body camera footage of [the plaintiff's] oral report . . . would have made it clear that she had believed John Doe was intoxicated long before deciding to file suit." Motion at 5.

B. Rule 37(e) Requirements

As noted above, the Court must find that four requirements are met before it may grant relief under Rule 37(e): "(1) the information sought constitutes ESI; (2) the ESI should have been preserved in anticipation of litigation; (3) the ESI is lost because a party failed to take reasonable steps to preserve it; and (4) the ESI cannot be restored or replaced through additional discovery." Title Capital Mgmt., LLC, 2017 WL 5953428, at *3. The undersigned will address each requirement below.

(1) Whether the Information Sought Constitutes ESI

The parties do not dispute that the CCTV footage constitutes ESI. Motion at 7; Response at 3. In Sosa v. Carnival Corp., this Court found that CCTV footage was ESI governed by Rule 37(e). No. 18-20957, 2018 WL 6335178, at *11-15 (S.D. Fla. Dec. 4, 2018). Although the defendant does not address the body camera footage, the undersigned also finds that body camera footage constitutes ESI under the reasoning in Sosa.

The first requirement of Rule 37(e) has been met.

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(2) Whether the ESI Should Have Been Preserved in Anticipation of Litigation

"[The] issue [of whether the ESI should have been preserved] can also be framed with another question: was the party under a duty to preserve?" Incardone v. Royal Carribean Cruises, Ltd., No. 16-20924-CIV, 2019 WL 3779194, at *20 (S.D. Fla. Aug. 12, 2019). "Once a party reasonably anticipates litigation, it has an obligation to make a conscientious effort to preserve electronically stored information that would be relevant to the dispute." Chi Nguyen, 2020 WL 413898, at *2 (S.D. Fla. Jan. 27, 2020) (citation omitted).

Here, the defendant anticipated litigation as of the date of the incident because it has asserted the work product doctrine over a guest incident report prepared on the day of the incident or shortly thereafter. See Exhibit 7 (DE# 57-7 at 1, 9/3/20). In Hoover v. NCL (BAHAMAS) Ltd., the court determined that the defendant "anticipated litigation as of the [date of the] incident" because "it [had] asserted work product protection over incident reports generated the same day and photographs (at least one of which appears to have been taken the same day)." No. 19-22906-CIV, 2020 WL 4505634, at *3 (S.D. Fla. Aug. 5, 2020).

At issue in the instant case, however, is not whether the defendant had a duty to preserve CCTV footage of the incident. The defendant in fact preserved approximately six minutes of CCTV footage. At issue is whether the defendant had a duty to preserve more than the approximately six minutes it did preserve.

The plaintiff argues that "RCCL cannot dispute that it anticipated that Ms. Reed's incident might result in litigation, and that it therefore had a duty to at least preserve a

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minimum of five minutes of CCTV footage before Ms. Reed's incident and five minutes after, as well as to preserve the body camera footage of Ms. Reed's oral report." Motion at 7.

The plaintiff asserts that the defendant had a policy of preserving a minimum amount of CCTV footage based on the deposition testimony of the defendant's corporate representative, Amanda Campos.[6] In another case, Ms. Campos testified that preserving video surveillance of "five minutes before and five minutes after" an incident was "basic investigation." Motion at 3 (citing Deposition of Amanda Campos, Exhibit 5 (DE# 57-5 at 127, 9/3/20)).

The plaintiff argues that "the admission of RCCL's corporate representative that RCCL had a policy to record at least five minutes before, and five minutes after an incident . . . clearly shows that RCCL knew, or at least should have known, that this minimum amount of footage was important in plaintiffs' personal injury cases." Reply at 2-3.

The defendant counters that it preserved a sufficient amount of CCTV footage concerning the incident:

> Royal Caribbean preserved video based upon the contentions made by Plaintiff herself at the time of her incident, and those assertions made by eyewitnesses. (See Plaintiff's Guest Injury Statement and Witness Statement, attached hereto as Exhibits 1 and 2 respectively). Plaintiff, herself, indicated she lost her balance while dancing. (Ex. 1). In other words, CCTV was saved sufficient to identify the nature and cause of Plaintiff's incident based upon the information, assertions, and evidence available to the security department at that time.

[6] Ms. Campos is the Director of Guest Claims and Litigation for Royal Caribbean Cruises. Campos' Decl. at ¶ 1.

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Response at 4.

The defendant filed a declaration from Ms. Campos which states, in part, that the defendant does not have a policy of preserving a specific amount of CCTV footage:

> 8. At my deposition, I was asked questions about Procedure 7.05 Personal Injury Investigations. I testified to the best of my recollection regarding 7.05 but stated that "I have to review it" to be certain of specific guidelines regarding the storage of CCTV footage within the procedure.
>
> 9. I have since reviewed Procedure 7.05. The Procedure indicates that shipboard personnel should store CCTV footage of an injury; however, **it does not indicate a specific amount of video that should be preserved**. Procedure 7.05 indicates that "Footage leading up to the injury, the actual injury and any response to the injury" should be preserved.
>
> ***
>
> 12. There is nothing in Royal Caribbean's policies and procedures that requires preserving CCTV footage of one hour prior and one-hour subsequent [to] an incident. **Footage sufficient to capture the lead up to the incident, the incident, and the response to the incident is saved pursuant to Procedure 7.05**. Such a procedure was followed in this case.

Campos' Decl. at ¶¶ 8-9 (emphasis added).

"[T]he mere fact that a party had the ability to preserve more ESI does not necessarily mean that a decision to preserve less is evidence of a breach of the duty to preserve." Incardone, 2019 WL 3779194, at *22. In Incardone, the defendant preserved approximately 91 minutes of CCTV footage of a ship during a storm. Id. at *1. The plaintiffs in Incardone argued that the defendant should have preserved all 14,400 hours of CCTV footage, a position which the Court described as "illogical and impractical on its face." Id. at *22; id. at *23 (concluding that the defendant was not under an obligation to preserve all the CCTV video).

The Court in Incardone noted that "[l]itigants do not have a duty to preserve any and all evidence, but only that which is potentially relevant." 2019 WL 3779194, at *22. The Court noted that "deciding the issue of whether [the defendant] preserved a sufficient representative sample of the CCTV video is not dependent on the specific number of minutes which were preserved" but "[i]nstead, it focuses on the nature and significance and proportionality of the portions preserved." Id. at *23. As an example, the Court noted that had the defendant "preserved 10 hours of CCTV [footage] which focused mostly on interior walkways and did not adequately depict the decks, waves, wind and damage to the vessel" during the storm, the defendant "would have breached its duty to preserve ESI," "even though 10 hours of CCTV [footage] is substantially more than 91 minutes." Id.

The plaintiff asks the Court for a rule requiring the defendant to preserve at least five minutes before and five minutes after an incident. Motion at 7. However, "[t]here are no hard and fast rules establishing a specific cutoff point for how many minutes of CCTV [footage] must be preserved in order to be reasonable" because "[i]t would be difficult, if not impossible, to come up with some specific number because the reasonableness also depends on the quality and fairness of the clips." Incardone, 2019 WL 3779194, at *24 (noting that "[t]hree hours of clips from the early part of the storm showing modest wind and waves is probably less reasonable than 15 minutes of representative clips during the nastiest part of the storm").

Additionally, the Court cannot find that the defendant violated its own policy when it failed to preserve more than the approximately six minutes of CCTV footage. Based

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on Ms. Campos' declaration, the undersigned finds that the defendant did not have a policy requiring it to preserve a specific amount of CCTV footage following an incident. See Campos' Decl. at ¶¶ 8-9. Notably, the plaintiff has not presented any written policy to counter Ms. Campos' declaration.

As stated in Incardone, the Court must "focus[ ] on the nature and significance and proportionality of the portions [of CCTV footage] preserved." 2019 WL 3779194, at *23. In the instant case, the plaintiff wrote in an injury statement that "some man grabbed [her and] twirled [her] . . . . [She] was about to walk away [and] he twirled [her] [and she] feel [sic]." Guest Injury Statement (DE# 57-1 at 2, 9/3/20). The plaintiff and her travel companion also orally reported to RCCL staff that John Doe was intoxicated.[7]

Here, the defendant preserved approximately six minutes of CCTV footage. These approximate six minutes captured, "approximately three and a half minutes before, and two and a half minutes after" the plaintiff's fall. Motion at 3. The Court has closely reviewed the CCTV footage that was preserved and finds it to be sufficient. The CCTV footage captures the lead-up and immediate aftermath of the plaintiff's fall. It shows the plaintiff and a male passenger dancing with each other at approximately 3:10. At approximately 3:32, the male passenger spins the plaintiff and the plaintiff falls.

While the plaintiff would have liked more than the three and a half minutes of footage preceding the incident in the hopes that it would have captured John Doe's

[7] Although the defendant disputes that the plaintiff's oral statement was recorded, Exhibit 3, Email dated 8/20/2020 (DE# 57-3 at 1, 9/3/20), the defendant has not presented any evidence to counter the plaintiff's assertion that she provided an oral statement. Plaintiff's Decl. at ¶ 6.

erratic behavior, the undersigned does not find that the defendant had a duty to preserve more CCTV footage under the circumstances of the instant case given the nature of the incident and the witnesses' descriptions of the incident, including the plaintiff oral statement that John Doe was intoxicated.

Moreover, the plaintiff's "belie[f] that the additional CCTV footage that RCCL's cameras captured [would have] show[n] that [John Doe] was in a state of visible intoxication, and was exhibiting unruly, erratic, and dangerous behavior at least five to fifteen minutes before accosting [the plaintiff],"[8] is speculative. The plaintiff attested that prior to the incident, she "observed [John Doe] stumbling, not keeping his balance well, and not keeping proper distance with his fellow passengers." Id. at ¶ 5. The undersigned notes that the CCTV footage that was preserved shows a crowded dance floor, with many passengers constantly moving around. If any one passenger were "stumbling, not keeping [his or her] balance well, and not keeping proper distance with . . . fellow passengers," it would have been difficult to tell given the number of passengers on the dance floor and their constant movement.

With respect to the CCTV footage, the second requirement of Rule 43(e) has not been met.

The plaintiff also argues that the defendant had an obligation to preserve the body camera footage of the plaintiff's oral statement. Motion at 7. The parties dispute whether a body camera recording of the plaintiff's oral statement was ever made. Ordinarily, the Court would need to hold an evidentiary hearing to resolve this factual

[8] Plaintiff's Decl. at ¶ 10.

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dispute. However, the record here does not evidence any prejudice to the plaintiff from the allegedly missing body camera footage. Therefore, it is not necessary for the Court to resolve the factual dispute over whether body camera footage of the plaintiff's oral statement was ever taken in the first place.

The plaintiff seeks to use the body camera footage to show that the plaintiff told the defendant, shortly after the incident, that John Doe was intoxicated. See Motion at 5 (stating that "body camera footage of [the plaintiff's] oral report . . . would have made it clear that she had believed John Doe was intoxicated long before deciding to file suit"). Both the plaintiff and her travel companion, Tracey Powell, witnessed John Doe's intoxicated behavior and reported this information to RCCL staff. Assuming the Court will allow it, the plaintiff or Ms. Powell may testify at trial that they told RCCL staff on the day of the incident that they believed John Doe was intoxicated. The missing body camera footage (assuming it existed) does not prejudice the plaintiff.

If there is no prejudice to the plaintiff, "then no remedial measures may be ordered" under Rule 37(e). Williford, 2019 WL 2269155, at *12; Incardone, 2019 WL 3779194, at *25 (stating that "[p]laintiffs would still need to demonstrate prejudice in order to obtain even the milder-type sanctions available in [Rule 37(e)(1)]."). Because there is no prejudice to the plaintiff stemming from the allegedly missing body camera footage, the undersigned will not further address the allegedly missing body camera footage.

(3) Whether the ESI was Lost Because a Party Failed to Take Reasonable Steps to Preserve It

"Rule 37(e) does not define the 'reasonable steps' necessary to preserve ESI,

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nor does it explain what a party must show to meet its burden to establish that a party failed to take those reasonable steps." Sosa, 2019 WL 330865, at *5. Nonetheless, the Advisory Committee's Notes provide some guidance in evaluating this requirement: "'[t]he court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.'" Id. (quoting Fed. R. Civ. P. 37 advisory committee's notes (2015)).

The plaintiff argues that this requirement is met because "RCCL indisputably anticipated litigation, yet it inexplicably allowed usual key pieces of evidence to be destroyed, the CCTV footage of the incident, as well as body camera footage of Ms. Reed's oral report." Motion at 9. The plaintiff notes that:

> RCCL offers no reasonable explanation for why it apparently took no measures to preserve at least five minutes of CCTV footage prior to Ms. Reed's incident, and five minutes afterwards, nor does it explain why it failed to preserve any body camera footage at all, let alone the body camera footage of Ms. Reed and Ms. Powell's oral statement.

Id. at 10.

"Reasonable steps to preserve [ESI] . . . does not call for perfection." Fed. R. Civ. P. 37(e) advisory committee's notes (2015); see also Marten Transp., Ltd. v. Platform Advert., Inc., No. 14-CV-02464-JWL-TJJ, 2016 WL 492743, at *4 (D. Kan. Feb. 8, 2016) (noting that "[d]ue to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible."). "'[A] corporation under a duty to preserve [evidence] is not required to keep every slued of paper, every e-mail or

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electronic document, and every backup tape'" and "'the duty to preserve evidence extends to . . . unique, relevant evidence that might be useful to the adversary.'" Chi Nguyen, 2020 WL 413898, at *3 (quoting Ala. Aircraft Indus., Inc. v. Boeing Co., 319 F.R.D. 730, 740-41 (N.D. Ala. 2017)).

The undersigned finds that the defendant preserved a reasonable amount of the CCTV footage given the plaintiff and other witnesses' descriptions of the incident, including the plaintiff's oral statement that John Doe was intoxicated. The portion of the CCTV footage that was not preserved was taped over during the normal course of operation. See Campos Decl. at ¶ 11 (attesting that "[i]f CCTV footage is not specifically saved, it is taped over due to storage capabilities based on the 24-hour monitoring.").

The third requirement of Rule 37(e) has not been met.

(4) Whether the ESI Cannot be Restored or Replaced through Additional Discovery

In Sosa, this Court found that the fourth requirement was met where "[t]here [was] no other video available to show what the area where [the plaintiff] fell looked like at the time of her fall or whether water was on the floor" and the Court "[did] not deem deposition answers from eyewitnesses to be an adequate substitute, especially when some of the witnesses did not recall seeing anything either way." 2018 WL 6335178, at *20.

Here the parties agree that missing portions of the CCTV footage cannot be restored or replaced through additional discovery. Motion at 10; Response at 5.

The fourth requirement of Rule 37(e) has been met.

Because not all of the requirements of Rule 37(e) are present in the instant case,

the Court denies the instant Motion.

CONCLUSION

Based on the foregoing, it is

ORDERED AND ADJUDGED that the Plaintiff's Motion for Sanctions for Spoliation of Evidence and Supporting Memorandum of Law (DE# 57, 9/3/20) is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida this **2nd** day of October, 2020.

JOHN J. O'SULLIVAN
CHIEF UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

DANIEL ROOT, Plaintiff, vs. MONTANA DEPARTMENT OF CORRECTIONS dba MONTANA WOMEN'S PRISON, PAUL LAW and ALEX SCHROECKENSTEIN, Defendants.	CV 18-164-BLG-SPW-TJC **ORDER**

Plaintiff Daniel Root ("Root") brings this action against Defendants Montana Department of Corrections (the "DOC") and Alex Schroeckenstein for retaliation relating to his employment as a correctional officer at the Montana Women's Prison. (Doc. 1.) Presently before the Court is Root's Motion in Limine Regarding Spoliation of Evidence.[1] (Doc. 64.) The motion is fully briefed and ripe for the Court's review.

[1] Although captioned as a "Motion in Limine," Root's motion actually seeks sanctions. A motion "in limine" refers to "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984). Here, Root is not seeking to exclude evidence, but is rather seeking a sanction against the DOC for failing to preserve evidence. A motion for sanctions due to spoliation under Rule 37 and/or the Court's inherent power is a non-dispositive pre-trial matter "provided that the actual sanctions imposed are non-dispositive." *Apple Inc. v. Samsung Electronics Co., Inc.*, 888 F.Supp.2d 976, 987-88 (N.D. Cal. 2010). Because the Court is not imposing dispositive sanctions here, the determination of

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Having considered the parties' submissions, the Court finds Root's motion should be **GRANTED in part and DENIED in part**.

I. FACTUAL BACKGROUND

Root is an employee of the DOC, and works as a correctional officer at the Montana Women's Prison ("MWP"). Root alleges that in May 2017, he reported that his supervisor, Lt. Paul Law, had engaged in inappropriate sexual conduct with or towards a female prisoner in violation of the Prison Rape Elimination Act ("PREA").

After he did so, Law conducted a staff briefing on May 24, 2017, where he reportedly acted out and expressed disdain for any officer who made complaints against him, accused them of being vindictive, derided their commitment to the job, and recommended any such officer stop coming to work and take time off. Root contends Law's purpose in acting out at the briefing was to deter subordinate officers from making complaints about Law's conduct.

Based on Law's conduct at the briefing, Root presented a grievance under his union contract on May 26, 2017. Cynthia Davenport ("Davenport") was ultimately assigned to investigate the handling of the grievance. As part of her

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Root's motion is within the province of the undersigned's authority under 28 U.S.C. § 636(b)(1)(A). *Id.*

investigation, Davenport conducted phone interviews with several witnesses, which she recorded by audiotape. The audiotapes were not produced in discovery, and the DOC has not been able to locate any of them.

In November 2017, Root applied for an open lieutenant position at the MWP. Root was interviewed for the position in January 2018, but was not selected. Handwritten notes from the January 2018 interview panel were produced to Root through the course of discovery in this suit.

On November 18, 2018, Root filed this lawsuit, alleging retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (Count I); the Montana Human Rights Act ("MHRA"), Mont. Code Ann. Title 49 (Count II); and 42 U.S.C. § 1983 for violation of his First Amendment rights (Count III).

On December 4, 2019, Root again interviewed for an open lieutenant position at the MWP, and again was not selected. He was interviewed by a six-person panel, who took notes during the interview. The notes were not provided to Root in discovery. The DOC explained that the notes were shredded immediately after the interview, purportedly in accordance with HR procedure. Root has not amended the Complaint to include any claims based on the December 2019 hiring decision.

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II. DISCUSSION

Root contends the DOC failed to preserve material evidence in the form of: (1) the audio recordings of the investigative interviews regarding Root's May 26, 2017 grievance, and (2) the December 4, 2019 hiring committee's contemporaneous notes of candidate performance. Root moves for sanctions, including an adverse inference jury instruction. The DOC counters that Root is not prejudiced by the absence of the audio recordings or interview notes because the information was obtained through other discovery and is not relevant to any present claims.

A. Legal Standards

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Compass Bank v. Morris Cerullo World Evangelism*, 104 F. Supp. 3d 1040, 1051-52 (S.D. Cal. 2015). Parties have a duty to preserve evidence that they know or should know is relevant to a claim or defense of any party, or that may lead to the discovery of relevant evidence. *Id.* at 1051. "The failure to preserve electronic or other records, once the duty to do so has been triggered, raises the issue of spoliation of evidence and its consequences." *U.S. Legal Support, Inc. v. Hofioni,* 2014 WL 172336, *3 (E.D. Cal. Jan. 15, 2014) (citing *Thompson v. U.S. Dep't of Housing & Urban Dev.,* 219 F.R.D. 93, 100 (D.

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Md. 2003)).

There are two sources of authority under which a district court can sanction a party for spoliation of evidence: under Rule 37 against a party who fails to preserve electronically-stored information, and pursuant to the inherent power of federal courts to levy sanctions in response to abusive litigation practices. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006); Fed.R.Civ.P. 37(e).

Rule 37(e) governs the loss of electronically-stored information and provides:

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

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

Thus, Rule 37(e) authorizes two tiers of sanctions for spoliation. Under subdivision (e)(1), the Court must find prejudice to the non-spoliating party from the loss of information. Rule 37(e)(1). "An evaluation of prejudice from the loss

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of information necessarily includes an evaluation of the information's importance in the litigation." Rule 37, Advisory Committee Notes 2015 Amendment ("Committee Notes"). The range of available sanctions under (e)(1) is "quite broad." *Id.* But they must "not have the effect of measures that are permitted under subdivision (e)(2)." *Id.* Permissible sanctions under (e)(1) include measures such as "forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies." *Id.*

Under subdivision (e)(2), the Court may impose more severe sanctions, including instructing the jury to presume the lost information was unfavorable to spoliating party. The measures listed in subdivision (e)(2), however, are only appropriate if the Court finds the spoliating party acted with the intent to deprive. Rule 37(e)(2). Courts are instructed to exercise caution in using the measures specified in subdivision (e)(2). Committee Notes. Even if a court finds an intent to deprive, that "does not require a court to adopt any of the measures listed in subdivision (e)(2)." *Id.*

Sanctions for the loss of evidence that is not electronically-stored may be imposed pursuant to the court's inherent authority. *Glover v. BIC Corp.*, 6 F.3d

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1318, 1329 (9th Cir. 1993); *Spencer v. Lunda Bay Boys*, 2017 WL 11527978, *7 (C.D. Cal. Nov. 29, 2017). Courts generally consider the following factors in determining whether sanctions under the court's inherent power are warranted: "(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." *Apple Inc. v. Samsung Electronics Co., Ltd.*, 888 F.Supp.2d 976, 992 (N.D. Cal. 2012).

A wide range of sanctions may be imposed for spoliation under the court's inherent power, including ordering the exclusion of certain evidence, admitting evidence of the circumstances surrounding the destruction of evidence, instructing the jury that it may draw an adverse inference against the spoliating party, and entry of default judgment or dismissal. *Peschel v. City of Missoula*, 664 F. Supp. 2d 1137, 1142 (D. Mont. 2009). A party seeking an adverse inference instruction under the court's inherent power, must establish: "(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed 'with a culpable state of mind'; and (3) that the evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Apple, Inc.*, 888 F.Supp.2d at 989-90.

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B. Audio Recordings

Root argues he is prejudiced by the loss of the audio recordings for two reasons: (1) the recordings detail the circumstances of known retaliatory conduct by Law that is a central fact of Root's claims; and (2) the word choice and tone of the interviews would provide information and context that cannot be transmitted via notes alone. Root, therefore, requests he be permitted to elicit testimony and present evidence at trial concerning the spoliated tapes. He further requests an instruction advising the jury that the DOC had a duty to preserve the recordings and failed to do so, and that if the jury finds the DOC acted with intent to deprive him of evidence, it may presume the recordings were favorable to Root.

The DOC counters that Root is not prejudiced by the loss of the audio recordings. The DOC asserts the recordings are irrelevant because Root's claim concerning the May 26, 2017 grievance was not timely preserved, and does not form a proper part of this litigation. The DOC further argues that the lost information can be, and was restored through other discovery.

The Court finds Root is prejudiced by the loss of the audio recordings. Contrary to the DOC's argument, the events in May 2017 remain a part of Root's claims in this litigation. Summary judgment based upon failure to timely exhaust administrative remedies has only been granted with respect to Root's MHRA claim in Count II of his Complaint. (*See* Doc. 69 at 15-17 (granting partial summary

judgment on Count II for claims occurring prior to August 25, 2017), adopted by Doc. 72.) The Defendants did not move for summary judgment based on failure to timely exhaust Root's Title VII claim in Count I. Therefore, the May 2017 events, including the investigation of the May 26, 2017 grievance are at least still relevant to Root's retaliation claim in Count I. Moreover, the audio recordings made during that investigation would likely have supplied probative evidence of what occurred, including providing context and tone to the witness statements. This type of contextual information cannot be restored or replaced through additional discovery. The loss of the audio recordings is, therefore, prejudicial to Root. As such, sanctions are appropriate under Rule 37(e)(1).

As a sanction for the DOC's spoliation, the Court finds Root should be permitted to present evidence and argument at trial concerning the lost audio recordings, and the DOC's intent with regard to the lost evidence. The jury should be permitted to draw whatever reasonable inferences may follow from the evidence presented. Root may also request the District Court give a jury instruction to assist the jury in its evaluation of such evidence. The propriety of such an instruction will be determined by Judge Watters following the presentation of evidence at trial. The Court finds these measures are sufficient, but not "greater than necessary to cure the prejudice" resulting from the DOC's spoliation of the audio recordings. Rule 37(e)(1).

On the present record, the Court does not find the DOC acted with the necessary intent to deprive Root of the ability to use the audio recordings to justify more severe sanctions under Rule 37(e)(2). Davenport testified that during the time the audio recordings were made, she was under extreme personal and professional stress, which tends to indicate the absence of a culpable state of mind. That being said, if further information develops through trial that shows the DOC intended to deprive Root of the recordings, Root may request the District Court consider giving an adverse inference instruction, should the Court determine it is warranted.

C. Interview Notes

Root asserts the DOC was, at best, grossly negligent in destroying the interview notes from the 2019 hiring panel. He argues that the fact the DOC preserved the notes from his 2018 interview raises a reasonable suspicion that the 2019 notes were destroyed with the intent to deprive him of material evidence. Root, therefore, requests the Court give an adverse inference instruction, directing the jury to presume that the lost notes are relevant and favorable to his case.

In response, the DOC argues that because Root has not amended the Complaint to include any claim arising from the December 2019 hiring decision, the notes from that interview are not relevant. The DOC further asserts that four of

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the six December 2019 interview panel members have been deposed, and therefore, Root was able to obtain any relevant information by other means.

The DOC should have preserved the notes from the December 2019 interview. For one, the present litigation was ongoing when the December 2019 interview was conducted. The DOC, therefore, reasonably should have known the evidence could be relevant to the litigation. Further, Administrative Rule of Montana 2.21.3724(4) requires State agencies to retain recruitment and hiring records for a period of three years, which includes "all applications, supplemental question responses, *evaluation notes*, reference checks, and any other application materials received." Mont. Admin. R. 2.21.3726 (4)(a) (emphasis added). Nevertheless, the Court finds sanctions are not warranted for the spoliation.

The bare fact that evidence has been lost or destroyed "does not necessarily mean that the party has engaged in sanction-worthy spoliation." *Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 626 (C.D. Cal. 2013). To support a finding that sanctionable spoliation has occurred, the lost or destroyed evidence must be relevant or material. *Wooten v. BNSF Railway Co.*, 2018 WL 2417858, *8 (D. Mont. May 29, 2018). *See also Lavell Enterprises, Inc. v. Am. Credit Card Processing Corp.*, 2007 WL 4374914, *11 (D. Mont. Dec. 11, 2007) ("Absent a finding that the destroyed evidence was relevant or material, a sanction for spoliation cannot be imposed.").

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"Courts generally agree that 'relevance' for spoliation purposes 'is a two-pronged finding of relevance and prejudice' because 'for the court to issue sanctions, the absence of the evidence must be prejudicial to the party alleging spoliation of evidence.'" *Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 627 (C.D. Cal. 2013) citing *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 531 (D. Md. 2010). The prejudice inquiry looks to whether the non-spoliating party's ability to go to trial was impaired or the loss of information threatened to interfere with the rightful decision of the case. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006); *Reinsdorf*, 296 F.R.D. at 627 (noting the non-spoliating party must show "that the evidence would have been helpful in proving its claims or defenses – i.e., that the innocent party is prejudiced without the evidence").

Here, the lost interview notes are not relevant or material to the claims in this case because Root has not amended the Complaint to bring any retaliation claims based on the 2019 hiring decision. Moreover, the notes from the December 2019 interview would not be material or probative of whether retaliation occurred during the January 2018 interview. The loss of the interview notes, therefore, has not undermined the "search for the truth" of what happened at any of the times relevant to the claims in this case. *Wertheimer H., Inc. v. Ridley USA, Inc.*, 2020 WL 1031141, *1 (D. Mont. Mar. 3, 2020). As a result, the Court finds Root is not prejudiced by the loss of the information.

Accordingly, Root's request for sanctions, including an adverse inference instruction, based on the DOC's destruction of the 2019 interview notes is denied.

D. Fees and Costs.

Finally, Root requests the Court grant a remedial award of fees and costs incurred related to the DOC's spoliation of evidence. Monetary sanctions may be imposed where one party has lost or destroyed evidence. *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 558 (N.D. Cal. 1987). Here, however, the Court does not find monetary sanctions are warranted. Root's request for costs and fees is therefore denied.

III. CONCLUSION

Based on the foregoing, **IT IS HEREBY ORDERD** that Root's Motion in Limine Regarding Spoliation of Evidence (Doc. 64) is **GRANTED in part and DENIED in part**.

IT IS ORDERED.

DATED this 23rd day of April, 2021.

TIMOTHY J. CAVAN
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PERLA BURSZTEIN,

Plaintiff,

-against-

BEST BUY STORES, L.P. and BEST BUY CO., INC.,

Defendants.

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20-cv-00076 (AT) (KHP)

OPINION & ORDER ON MOTION FOR SANCTIONS

KATHARINE H. PARKER, United States Magistrate Judge:

Plaintiff Perla Bursztein moves to sanction Defendants Best Buy Stores, L.P. and Best Buy Co., Inc., (collectively, "Best Buy") pursuant to Federal Rule of Civil Procedure 37 ("Rule 37") for Defendants' failure to comply with discovery obligations and spoliation of evidence. Plaintiff bases her motion on Best Buy's failure to produce video surveillance footage showing the area of Plaintiff's fall and certain other relevant documents despite the Court's Rule 26(f) discovery order. Defendants oppose the motion and also note Plaintiff's misconduct throughout discovery. Plaintiff, in her reply, disputes several of Defendants' representations. The Court addresses each of the parties' key arguments in the sanctions analysis below.

BACKGROUND

I. General Background

On November 10, 2017, Plaintiff alleges that she tripped and fell over a raised piece of metal on the landing at the top of an escalator in a New York City Best Buy Store. Plaintiff further alleges that, as a result of the fall, she seriously injured her shoulder such that she required surgery. Immediately after the fall, Plaintiff's husband recorded two short video clips

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on his phone capturing the surrounding area in the store. (ECF No. 49 at 7.) According to Plaintiff, while waiting for EMS workers to arrive a Best Buy employee told Plaintiff that the hazardous condition had been present for "a couple of weeks" and that he had reported the issue to maintenance, although it had yet to be repaired. (ECF No. 43-10 at 49.) After being examined at the scene, Plaintiff decided not to go to the hospital and flew home to Florida before seeking further medical attention. (ECF No. 48 at 22.)

II. Discovery Timeline

Discovery in this case has been plagued by obstruction, lack of communication, and boilerplate objections. Plaintiff's initial discovery requests served on April 1, 2020 were met with silence. (ECF No. 43 ¶ 6.) These initial requests included requests for video surveillance footage; inspection, maintenance, and repair records for the location of the fall; and Best Buy's customer safety policy—all of which are at issue in the instant motion. (ECF No. 43-5.) On May 13, 2020 – six weeks after the initial requests – Plaintiff sent Best Buy a follow-up letter requesting responses to her discovery demands. (ECF No. 43 ¶ 6.) On May 27, 2020, Best Buy served its responses, which consisted of three pages of general objections and four pages of boilerplate specific objections to the individual requests. Best Buy also asserted that it did not possess additional responsive documents to Plaintiff's requests. (*See generally* ECF No. 43-7.) Only two documents were produced to Plaintiff: the Safety Incident Review for Plaintiff's accident and a Facilities Services Agreement. (*Id.*) Similarly, Best Buy's answers to Plaintiff's interrogatories consisted of boilerplate objections with limited helpful information. (*See generally* ECF No. 43-8.)

On June 8, 2020, twelve days after receiving Defendants' response, Plaintiff sent Defendants a deficiency letter specifying which responses were deficient and why and requesting that the deficiencies be cured within ten days. (ECF No. 43-9.) Plaintiff was, once again, met with silence. On June 23, 2020, Plaintiff's counsel followed up with Best Buy requesting a response to the deficiency letter. (ECF No. 43-11.) On June 30, 2020 Plaintiff's counsel followed up again. (ECF No. 43-12.) Then, on July 8, 2020, a month after receiving the deficiency letter, Defendants responded. (ECF No. 43-13.) In their response, Defendants offered only minor clarifications; they maintained that they do not possess surveillance footage of the accident, that they do not maintain records of inspection, and that they do not maintain any schedule of inspection or maintenance. (*Id.*) No additional documents were produced and no additional interrogatory responses were provided. (*Id.*) Notwithstanding these alleged deficiencies, Plaintiff agreed to table the disputes until after deposing Best Buy's 30(b)(6) witness. (ECF No. 43-14; ECF No. 43-17 at 2.)

The 30(b)(6) deposition took place on August 13, 2020. Best Buy produced Spencer Stanfield, the general manager of the store in which the incident took place, to testify on behalf of Best Buy. (ECF No. 43-16.) Despite Defendants' obligation to prepare Stanfield to testify on matters outlined in the deposition notice, Stanfield was not prepared to testify about numerous pertinent topics. (*See* ECF No. 43-15.) In particular, Stanfield was unable to testify about: (1) the installation, maintenance, and repair protocols of the escalator where the accident took place; (2) the store's maintenance and inspection policy and related records; (3) the electronic surveillance system used at the store; or (4) complaints and reports concerning the area

surrounding the escalator (ECF No. 43-16 at 13-18,) all of which were listed in the deposition notice. (ECF No. 43-15.)

However, Stanfield was able to testify about certain other matters. He testified (1) that Best Buy employees received copies of policies and procedures for store safety (ECF No. 43-16 at 38-43, 68); (2) that employees were also trained through on-line videos (*id.* at 40-41); (3) that all repair and maintenance requests were logged on the Facilities Request System (*id.* at 50-51, 58); (4) that surveillance footage of the incident exists; and (5) that Stanfield preserved that footage personally (*id.* at 76-77). These representations directly conflicted with Defendants' discovery responses, outlined above.

On August 27, 2020, Plaintiff served post-deposition demands seeking the surveillance footage, the employee training materials concerning safety procedures, and the relevant entries in the Facilities Request System. (ECF No. 43-18.) Two months later, on October 28, 2020, Defendants served their responses. (ECF No. 43-22.) The responses were laden with the same boilerplate objections referenced above. Annexed to the responses were numerous invoices for escalator maintenance and repairs carried out between June and November 2017. (*Id.*) Best Buy also asserted that the training materials, procedures for store maintenance and inspection, and Facilities Request System entries were no longer in Best Buy's custody and control. (*Id.*) Defendants further represented that Stanfield was the person responsible for routing facilities requests to the proper remediating team, which directly contradicted Stanfield's own deposition testimony. (*Compare* ECF No. 43-22 ¶ 10 *with* ECF No. 43-16 at 52.) Finally, in response to Plaintiff's demand for the video surveillance footage, Defendants

represented that Best Buy did not possess any such footage and that Stanfield was mistaken in his testimony. (ECF No. 43-22 ¶ 12.)[1]

On December 8, 2020 Defendants served Plaintiff's counsel with a letter in which they reiterated that Best Buy produced a safety inspection document, that no training materials or written guidelines were in effect at the time of the accident, and that Best Buy had no more documents to produce. (ECF No. 43-23.) Plaintiff then filed the instant motion on December 23, 2020. (ECF No. 42.)

On January 8, 2021, Stanfield executed a sworn affidavit claiming that he had misunderstood the question concerning the video footage during his deposition. In the affidavit, he explains that he understood Plaintiff counsel's question to relate to his general practice of saving surveillance footage as opposed to the specific surveillance footage at issue in this case. (ECF No. 48-2.) Stanfield's affidavit does not address any of the other inconsistencies between his deposition testimony and Best Buy's prior discovery responses.

LEGAL STANDARD

Plaintiff alleges that Best Buy violated a discovery order and accuses Best Buy of spoliation of evidence. Both allegations and the related requests for sanctions are governed by Federal Rule of Civil Procedure 37. The relevant subsections are discussed in turn below.

I. Rule 37(b)(2)

[1] Confusingly, on the very same day, Defendants' counsel represented that he was endeavoring to obtain the surveillance footage from Best Buy in a status letter filed with the Court. (ECF No. 32.)

Rule 37(b)(2) states that "[i]f a party . . . fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders." Such orders may include: (1) directing that matters addressed in the order be taken as established by the prevailing party; (2) prohibiting the sanctioned party from supporting or opposing claims or defenses or from introducing evidence; (3) striking pleadings in whole or in part; (4) staying the proceedings until the order at issue is obeyed; (5) dismissing the action in whole or in part; (6) entering judgment against the disobedient party; and (7) treating the failure to obey the orders at issue as contempt of court (except where the orders direct the party to submit to a physical or mental examination). Fed. R. Civ. P. 37(b)(2)(A). The Rule also provides that "[i]nstead of or in addition to the orders above, the court must order the disobedient party . . . to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C).

Discovery sanctions are designed to serve several purposes: (1) to ensure that a party will not benefit from its failure to comply; (2) to obtain compliance with the court's orders; and (3) to deter noncompliance, both in the particular case and in litigation in general. *See Cine Forty–Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1066 (2d Cir. 1979); *see also Southern New England Tel. Co. v. Global NAPs Inc.*, 624 F.3d 123, 147–49 (2d Cir. 2010) (district court did not err by imposing default judgment on defendants who willfully deleted and refused to produce relevant documents); *Update Art, Inc. v. Modiin Publ'g, Ltd.*,

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843 F.2d 67, 70–71 (2d Cir. 1988) (granting summary judgment to plaintiff was an appropriate sanction where defendant engaged in extreme dilatory tactics).

When determining whether sanctions should be imposed under Rule 37, courts in the Second Circuit weigh the following non-exhaustive factors: "(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance; and (4) whether the non-compliant party had been warned of the consequences of . . . noncompliance." *World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp.*, 694 F.3d 155, 159 (2d Cir. 2012) (alteration in original) (quoting *Agiwal v. Mid Island Mortg. Corp.*, 555 F.3d 298, 302 (2d Cir. 2009)). No single factor is dispositive and "they need not each be resolved against the party challenging the district court's sanctions . . . to conclude that those sanctions were within the court's discretion." *See World Wide Polymers*, 694 F.3d at 159 (quoting *Southern New England Tel. Co.*, 624 F.3d at 144).

The imposition of sanctions lies within the sound discretion of the court. *See Valentine v. Museum of Modern Art*, 29 F.3d 47, 49 (2d Cir. 1994). "When faced with a 'breach of a discovery obligation [that] is the non-production of evidence, a District Court has broad discretion in fashioning an appropriate sanction.'" *Doe v. Delta Airlines Inc.*, 672 F. App'x 48, 50 (2d Cir. 2016) (alteration in original) (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 101 (2d Cir. 2002), superseded by statute on other grounds as stated in *CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 495 (S.D.N.Y. 2016)). However, when considering whether to impose discovery sanctions, the Court's discretion is limited to the imposition of sanctions that are both "just" and "commensurate" in severity with the non-compliance. *See*

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Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 140 (2d Cir. 2007) (internal quotation marks and citation omitted); *see also Joint Stock Co. Channel One Russia Worldwide v. Infomir LLC*, No. 16-cv-1318 (GBD) (BCM), 2017 WL 3671036, at *21 (S.D.N.Y. July 18, 2017), adopted by 2017 WL 4712639 (S.D.N.Y. Sept. 28, 2017). Harsh sanctions, such as dismissal or default, are reserved for extreme situations, such as those involving "willfulness, bad faith, or any fault by the non-compliant litigant." *Agiwal*, 555 F.3d at 302 (internal quotation marks and citation omitted) (sanctions against pro se litigant appropriate where he refused to follow the orders issued by the presiding magistrate judge over a six-month period). Although courts "should always seek to impose the least harsh sanction that will remedy the discovery violation and deter such conduct in the future," courts are "not required to exhaust possible lesser sanctions before imposing dismissal or default if such a sanction is appropriate on the overall record." *Joint Stock Co. Channel One Russia Worldwide*, 2017 WL 3671036, at *21 (internal quotation marks and citations omitted); *see also Urbont v. Sony Music Entm't*, No. 11-cv-4516 (NRB), 2014 WL 6433347, at *3 (S.D.N.Y. Nov. 6, 2014) ("deliberate and persistent noncompliance will render lesser sanctions inappropriate") (quoting *Embuscado v. DC Comics*, 347 F. App'x 700, 701 (2d Cir. 2009) (alterations omitted)).

II. Rule 37(e)

"Rule 37(e) provides the sole source to address the loss of relevant ESI that was required to be preserved but was not because reasonable steps were not taken, resulting in prejudice to the opposing party." *DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 12-cv-50324, 2021 WL 185082, at *75 (N.D. Ill. Jan. 19, 2021). The rule is best envisioned as a

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flowchart. *See id.* (providing a visual flowchart). The Rule has five threshold requirements: (1) the information must be ESI; (2) there must have been anticipated or actual litigation that triggers the duty to preserve ESI; (3) the relevant ESI should have been preserved at the time the litigation was anticipated or ongoing; (4) the ESI must have been lost because a party failed to take reasonable steps to preserve it; and (5) the lost ESI cannot be restored or replaced through additional discovery. Fed. R. Civ. P. 37(e); *DR Distributors, LLC*, 2021 WL 185082, at *76. If any of these requirements are not met, sanctions are inappropriate under Rule 37(e). Furthermore, absent a showing of "intent to deprive another party of the information's use in the litigation," the sanctions enumerated under subsection (2) of Rule 37(e) are not available.

Sanctions for spoliation without a showing of intent to deprive are governed solely by subsection (1). *Simon v. City of New York*, No. 14-cv-8391 (JMF), 2017 WL 57860, at *7 (S.D.N.Y. Jan. 5, 2017). Sanctions available under Rule 37(e)(1) may only be imposed upon a finding of prejudice to the moving party, and "[c]are must be taken . . . to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2)." Fed. R. Civ. P. 37(e) (advisory committee's note to 2015 amendment). Available sanctions under Rule 37(e)(1) may include "forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument." *Id.* Ultimately, "[t]he decision of what type of sanction is appropriate in a given case is left to the sound discretion of the district court." *Tchatat v. O'Hara*, 249 F. Supp. 3d 701, 706 (S.D.N.Y. 2017) (cleaned up).

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The harsher sanctions permitted under Rule 37(e)(2) – which require a finding of "intent to deprive" – include adverse inferences, adverse jury instructions, and default judgement. Fed. R. Civ. P. 37(e) (advisory committee's note to 2015 amendment). Unlike subdivision (e)(1), subdivision (e)(2) does not "include a requirement that the court find prejudice to the party deprived of the information," as "the finding of intent [to deprive] . . . support[s] . . . an inference that the opposing party was prejudiced by the loss of information." *Id.* Although Rule 37(e)(2) does not specify the standard by which the "intent to deprive" must be established, given the severity of the sanctions permitted under that provision of the Rule courts in this Circuit have found the standard to be clear and convincing evidence. *See Cat3, LLC*, 164 F. Supp. 3d at 499 (finding that, where a party seeks "terminating sanctions" pursuant to Rule 37(e)(2), "it is appropriate to utilize the clear and convincing standard" in making a finding of intent to deprive); *see also Lokai Holdings LLC v. Twin Tiger USA LLC*, No. 15-cv-9363 (ALC) (DF), 2018 WL 1512055, at *8 (S.D.N.Y. Mar. 12, 2018).

"In addition to any other sanctions expressly contemplated by Rule 37(e), as amended, a court has the discretion to award attorney's fees and costs to the moving party, to the extent reasonable to address any prejudice caused by the spoliation." *Lokai Holdings LLC*, 2018 WL 1512055, at *9.

ANALYSIS

The instant motion concerns four categories of evidence: (1) video surveillance footage, (2) store safety training materials, (3) Facilities Request System requests, and (4) copies of the inspection report for the escalator. The first three categories of ESI are particularly relevant to

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the instant motion for sanctions under Rule 37(e). First, however, the Court must address several preliminary arguments before assessing the merits of Plaintiff's motion.

I. Rule 26(f) Order Provides Sufficient Basis for Plaintiff to Seek Sanctions

On April 2, 2020, Judge Torres entered a Rule 26(f) scheduling order directing that all fact discovery shall be completed by August 1, 2020 and requiring the parties to conduct discovery in accordance with the Federal Rules of Civil Procedure and the Local Rules. (ECF No. 24.) Plaintiff bases its motion for sanctions, in part, on this order, arguing that Defendants' delay and stonewalling violate the scheduling order's broad directives. Best Buy, on the other hand, argues that Plaintiff should be barred from seeking sanctions because Plaintiff neglected to file a motion to compel before making this instant application. Defendants argument is unavailing. Rule 37(b)(2)(A) explicitly provides that "[i]f a party . . . fails to obey an order to provide or permit discovery, including an order under Rule 26(f)" sanctions may be warranted. Thus, Rule 37(b)(2)(A) provides an independent ground for sanctions and a Rule 37(a) motion to compel is not, as Best Buy apparently contends, a prerequisite to Plaintiff's motion. To be sure, the instant dispute might have been resolved if Plaintiff filed a motion to compel earlier in the litigation. However, the Rule 26(f) order itself – if found to have been violated – would provide an ample basis for this Court to impose sanctions at this juncture.

II. Unclean Hands Doctrine does not Bar Plaintiff's Motion

Next, Best Buy argues that Plaintiff comes to this Court with unclean hands and is therefore barred from seeking sanctions. The equitable doctrine of unclean hands is an "ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad

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faith relative to the matter in which he seeks relief." *Republic of Turkey v. Christie's Inc.*, No. 17-cv-3086 (AJN), 2021 WL 1089487, at *1 (S.D.N.Y. Mar. 22, 2021) (quoting *Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)). A finding of bad faith is required to justify invocation of the unclean hands doctrine. *See Deere & Co. v. MTD Holdings, Inc.*, No. 00-cv-5936 (LMM), 2004 WL 1794507, at *2 (S.D.N.Y. Aug. 11, 2004) ("[i]t is undisputed that an unclean hands defense requires a finding of bad faith"). Courts have been split, however, on whether this doctrine requires a finding of injury caused by the inequitable conduct. *Chevron Corp. v. Salazar*, No. 11-cv-0691 (LAK), 2011 WL 3628843, at *10 (S.D.N.Y. Aug. 17, 2011).

According to Best Buy, Plaintiff has acted inequitably in this case by failing to provide Best Buy with certain documents. Specifically, Best Buy claims that Plaintiff has not produced invoices, receipts, or other medical records showing Plaintiff's damages and has failed to provide the video footage taken by Plaintiff's husband immediately after the fall. (ECF No. 48 at 11-12.) Further, Best Buy argues that these documents are central to Best Buy's defenses and that Plaintiff's failure to provide these documents and information has stifled discovery in this case. Even assuming that Plaintiff has access to these materials, Best Buy's unclean hands defense fails because Best Buy has not demonstrated that Plaintiff acted in bad faith.

Moreover, the evidence indicates that many of the documents allegedly withheld from Best Buy were produced by Plaintiff in mid-August of 2020, well before the close of discovery in this case. (ECF No. 36; ECF No. 49-3; ECF No. 49-4.) Plaintiff's counsel further maintains that certain outstanding receipts have not been exchanged because counsel is still waiting for

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Plaintiff to locate and provide them. (ECF No. 49 at 6 n.5.) While both parties have been uncooperative throughout discovery, the conduct alleged falls short of bad faith. Therefore, Plaintiff's motion is not barred by the unclean hands doctrine.

III. The Pending Motion for Summary Judgment

Under Rule 37, this Court has broad discretion to issue sanctions which could affect Defendants' pending motion for summary judgement. While the motions are somewhat related and while a ruling on one could certainly impact the scope or import of the other, that is no bar to the imposition of sanctions at this juncture. Indeed, the purpose of the Court's sanctions power is to deter noncompliance in this specific case *and* in litigation in general. Therefore, if sanctions are warranted, they should be imposed.

IV. Defendants' Credibility

Defendants have thwarted and disrupted discovery throughout the life of this case. As already outlined above, Defendants repeatedly flouted their discovery obligations, failed to promptly communicate with opposing counsel, and repeatedly lodged baseless boilerplate objections to Plaintiff's discovery requests. Best Buy's attempts to use those objections to avoid producing documents are a "paradigm of discovery abuse." *See Jacoby v. Hartford Life & Accident Ins. Co.*, 254 F.R.D. 477, 478 (S.D.N.Y. 2009). Further, courts in this District have previously said that general objections should rarely be used, unless the objections specifically apply to each document request at issue. *See Fischer v. Forrest*, No. 14-cv-1304 (PAE) (AJP), 2017 WL 773694, at *3 (S.D.N.Y. Feb. 28, 2017). The vast majority of Best Buy's responses in this case start with the phrase "Defendant Best Buy objects to this demand as vague,

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ambiguous, overly broad, unduly burdensome and/or oppressive. Furthermore, please refer to Best Buy's General Objections outlined above. Defendant moreover objects to materials sought which were prepared in contemplation of litigation," or some variation thereof. (*See, e.g.*, ECF Nos. 43-7 - 43-8.) In fact, even where Defendants did see fit to provide a response, the response follows these boilerplate objections. Other issues, such as Best Buy's failure to prepare Stanfield to testify about matters for which he was presented at the 30(b)(6) deposition as well as other intentional dilatory tactics have also crept up. Tellingly, Defendants only produced three or so relevant documents in discovery.

Now, faced with the instant motion for sanctions, Defendants seek to explain and justify these deficiencies, but their explanations strain credulity. First, Defendants claim that they never received Plaintiff's preservation letter and were therefore under no obligation to preserve evidence. (ECF No. 48 at 6-7.) This is not true. The letter was sent by Plaintiff on November 22, 2017 via certified mail and Plaintiff received a signed return receipt, which has been submitted to the Court. (ECF No. 43-1.) Receiving that notice placed Best Buy (and its agents) on notice to preserve all documents potentially relevant to this litigation. Moreover, on December 5, 2017 – eleven days after the preservation letter was delivered and less than a month after the accident took place – Best Buy's claims administrator contacted Plaintiff's counsel to discuss the case. (ECF No. 49-1.) Thus, it is clear that Defendants were promptly notified of this lawsuit.

Defendants also rationalize their delay in obtaining Stanfield's clarifying affidavit by claiming that Plaintiff failed to make the transcript of the deposition available to the

Defendants. However, the transcript of the deposition was emailed to Defendants on September 28, 2020, on the same day it was requested and well in advance of January 8, 2021, the date the affidavit was ultimately produced. (ECF No. 49-2; ECF No. 48-2.) Defendants' counsel's office responded to that email, asking for a differently formatted version of the transcript, and Plaintiff's counsel promptly supplied it. (ECF No. 49-2.)

Finally, Defendants misrepresent the nature of the documents they have produced. Defendants produced the Weekly Safety Checklist and a set of instructions for how to follow that list. (ECF No. 48-3; ECF No. 48-4.) According to Defendants, the checklist demonstrates that Best Buy "performed numerous safety inspections." (ECF No. 48 at 4.) However, the checklist is merely an unfilled form and, therefore, it does not tend to demonstrate that the procedures contained therein were followed at the store in question. Furthermore, the bottom of the checklist explicitly states that, once filled out, the checklist must be retained for one year in the Asset Protection Office. (ECF No. 48-3). Further still, the documents explicitly acknowledge that the checklist is a discoverable document and detail Best Buy's document retention policy, which provides that safety related documents are to be retained for seven years. (ECF No. 48-4 at 17.) Therefore, these documents suggest two possibilities: either Best Buy was violating its own policy by not conducting weekly safety checks in the store, or Best Buy possesses additional documents (such as the filled-out checklist relevant to Plaintiff's claims) that were withheld from Plaintiff or destroyed before they could be produced.

V. Rule 37(e) Analysis – Video Surveillance Footage, Facilities Request System Entries, and Safety Training Materials were Destroyed

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As noted above, in order to determine whether sanctions for the spoliation of ESI are appropriate, the Court must assess whether: (1) the information at issue is electronically stored; (2) there was a duty to preserve the ESI; (3) the relevant ESI should have been preserved while litigation was anticipated; (4) the ESI was lost because a party failed to take reasonable steps to preserve it; and (5) the lost information can be replaced through additional discovery. Fed. R. Civ. P. 37(e); *DR Distributors, LLC*, 2021 WL 185082, at *76.

First, the surveillance footage and Facilities Request System Entries are clearly ESI. Additionally, based on the deposition testimony of Stanfield, employees underwent structured, online trainings as part of their onboarding process. (ECF No. 43-16 at 40-41). Therefore, the training materials are also, at least in part, ESI.

Second, as explained in further detail above, Best Buy received Plaintiff's preservation letter, which advised Best Buy of imminent litigation and put it on notice that documents relating to Plaintiff's fall had to be preserved. There was, therefore, a duty to preserve this ESI.

The ESI at issue is also highly relevant to the case. Of course, any video footage of the fall itself would be relevant. Further, the Facilities Request System entries have the potential to show how long the defect existed prior to the accident and how long Best Buy was aware of the safety hazard. The training materials are also potentially relevant as they evidence the steps Best Buy employees should have taken to remedy any hazardous conditions around the escalator.

The question of whether the ESI was lost because Best Buy failed to take reasonable steps to preserve it is somewhat more complicated. Best Buy has repeatedly asserted that it

never possessed the documents sought by Plaintiff. That said, Best Buy's 30(b)(6) witness testified to the contrary. When asked whether he had "actually" viewed the footage at issue in this case, Stanfield responded that he had viewed the video and that he took steps to preserve the video sometime in the month thereafter. (ECF No. 43-16 at 76-77.) Moreover, Stanfield affirmatively represented that he saw "a trip" in the video. (*Id.*) Later on in the deposition Stanfield made a similar, and perhaps more concrete statement to the same effect:

> Q. And at some point, you did review the footage and saw her tripping and falling, correct?
> A. Yes.

(*Id.* at 84.) To be sure, Stanfield subsequently executed an affidavit to recant this testimony. However, the questions posed to Stanfield and his answers were abundantly clear. Moreover, the affidavit was submitted months after the close of discovery in this case and approximately five months after Stanfield's deposition. Stanfield's sworn testimony, the attempted recantation of that testimony through an affidavit filed at the eleventh hour, and Best Buy's pattern of dilatory and obstructive conduct throughout discovery lead me to find that the video footage likely existed at one point and that Best Buy had a duty to preserve that footage, pursuant to both the litigation hold it received and its own internal policies. Furthermore, Stanfield confirmed that the Facilities Request System entries and the training materials existed as well. Therefore, all of the ESI in question did exist and should have been preserved in anticipation of this litigation.

Finally, Best Buy apparently concedes that this ESI cannot be obtained through additional discovery. While Plaintiff could have pursued additional documents from, for

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example, Best Buy's escalator service vendor, there is no evidence that the vendor would have access to the surveillance footage, the training materials, or entries in Best Buy's Facilities Request System.

VI. Rule 37(e) Analysis – Intent

For the Court to impose sanctions under Rule 37(e)(2), the Court must find that Best Buy destroyed the ESI with the intent to deprive Plaintiff of the information therein. Plaintiff has offered limited evidence of Defendants' intent in her briefing. On the other hand, the Court has already outlined above Best Buy's extensive misconduct thus far in the litigation. Therefore, this case presents a close call on the issue of intent.

Other courts in this Circuit have inferred an "intent to deprive" through circumstantial evidence where the data loss could not be "credibly explained" other than by bad faith. *Moody v. CSX Transp., Inc.*, 271 F. Supp. 3d 410, 431 (W.D.N.Y. 2017). *Moody* involved a train accident where the defendants' foreman uploaded data from the incident onto a laptop and then purportedly uploaded that data onto a backup server. The data was not properly loaded onto the backup server and was eventually lost when the foreman's laptop was recycled by the defendants. Given the importance of the evidence, the Court held that the defendants' conduct was "so stunningly derelict as to evince intentionality." *Id.* at 432.

Although Best Buy has not offered a single credible excuse for losing the surveillance footage or the other ESI at issue, its conduct does not compare to the more proactive misconduct in *Moody*. Whereas in *Moody* the defendants actively erased the crucial data for the litigation, Plaintiff here has not provided any evidence that Best Buy affirmatively deleted

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the footage on purpose. Although sanctions may be warranted on other grounds, it is unclear if Best Buy engaged in the tactics outlined *supra* to intentionally deprive Plaintiff of evidence or if the loss of ESI is simply the product of incompetence. Moreover, given the contradictions between Stanfield's deposition testimony and subsequent representations by counsel, it is also unclear if Defendants have been forthcoming with their attorneys concerning the documents actually in their possession. Therefore, because Plaintiff bears the burden of proving such intent by clear and convincing evidence, I find that Rule 37(e)(2) sanctions are inappropriate at this time.

VII. Sanctions and Attorney's Fees are Appropriate

Absent a basis for more severe sanctions under Rule 37(e)(2), the Court can issue appropriate sanctions for spoliation under Rule 37(e)(1) if Plaintiff is prejudiced by the loss of information. Under New York Law, "[t]o impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it." *Habecker v. KFC U.S. Props., Inc.*, 928 F. Supp. 2d 648, 654 (E.D.N.Y. 2013) (quoting *Sermos v. Gruppuso*, 95 A.D.3d 985, 944 N.Y.S.2d 245, 246 (2d Dep't 2012)). In this case, Best Buy failed to preserve and produce the surveillance footage and the Facilities Request System entries, as outlined in detail above. Moreover, Stanfield affirmatively testified at his deposition that he viewed that footage and that any employee who noticed something wrong with the escalator would have logged the hazard in the Facilities Request System. Plaintiff also alleges that the Best Buy employee who filled out the accident report on the date of the incident told Plaintiff that the

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hazardous condition had been present for weeks. Thus, the missing ESI is the primary evidence that Plaintiff would otherwise rely on to show that Best Buy had actual or constructive notice of the alleged dangerous condition near the escalator and that Best Buy was negligent in failing to address the alleged hazard. Under these circumstances, I find that the loss of this ESI prejudices Plaintiff.

By failing to produce surveillance footage, facilities records, and training materials, Defendants have improperly strengthened their case against Plaintiff. While the Court finds that Best Buy should not be precluded from introducing any evidence at this time, Plaintiff should be permitted to present evidence at an eventual trial regarding the spoliation of liability-related ESI and whether such ESI ever existed in the first place, to the extent that any such evidence exists. *Karsch v. Blink Health Ltd.*, No. 17-cv-3880 (VM) (BCM), 2019 WL 2708125, at *27 (S.D.N.Y. June 20, 2019) (holding presentation of evidence at trial regarding spoliation sufficient to address the evidentiary imbalance created by a destroyed server containing relevant data). Plaintiff should also, of course, be permitted to submit evidence to an eventual jury concerning Stanfield's initial deposition testimony regarding the surveillance footage.

Additionally, I find that monetary sanctions are particularly appropriate in this case to compensate Plaintiff for the time and resources spent because of Defendants' dilatory conduct. Fed. R. Civ. P. 37; *see also R.F.M.A.S., Inc. v. So*, 271 F.R.D. 13, 52-53 (S.D.N.Y. 2010) ("[c]osts, including attorney's fees, are appropriate when a defendant has unjustifiably destroyed evidence that it was under a duty to preserve, causing the plaintiff to expend time and effort in attempting to track down the relevant information") (internal quotation marks omitted). Bust

Buy's excuses and defenses to Plaintiff's sanctions motion contradict the evidence before the Court. (*See* Section IV *supra*.) In short, as already shown above, Best Buy has not taken its discovery obligations seriously, which necessitated the instant motion. Accordingly, Best Buy shall be liable for Plaintiff's fees and costs incurred in briefing the instant motion for sanctions.

CONCLUSION

For the reasons set forth above, Plaintiff's motion for sanctions (ECF No. 42) is hereby GRANTED in part and DENIED in part. By May 31, 2021 Plaintiff's counsel shall file a short motion with the Court providing verified attorney time records attributable to the sanctions motion. The Court will then review the application and determine whether the requested fees are reasonable.

SO ORDERED.

DATED: New York, New York
May 17, 2021

Katharine H Parker

KATHARINE H. PARKER
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

HOLLEY JONES,

Plaintiff,

v. Case No: 2:19-cv-114-JES-NPM

ANDREW BARLOW and CHRISTIAN ROBLES,

Defendants.

OPINION AND ORDER

This matter comes before the Court on review Plaintiff's Motion to Compel Production of the Complete, Unedited Videos, or to Grant an Adverse Inference Against Defendants (Doc. #185) filed January 18, 2022. Defendants filed a Response (Doc. #188) on January 21, 2022. A jury trial is set to begin February 1, 2022.

This civil action arises from the allegedly unlawful detainment of plaintiff by defendants. As stated by plaintiff (which defendants do not dispute), on November 7, 2019, plaintiff sent his discovery requests to Defendants. (Doc. #185, p. 1.) On March 10, 2020, defendants responded to the requests, which included the production of 8 body camera videos. (Id. p. 2.) Unbeknownst to plaintiff, defendants "cut-out" certain audio portions from the video. (Id.) Defendants, however, did not serve plaintiff with any objections or privilege claims concerning

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the redactions. (Id. p. 5.) The discovery deadline in this case was July 24, 2020. (Doc. #81.)

Plaintiff discovered the "cut-out" audio on January 13, 2022, including portions with witness interviews, and inquired about the issue with defendants. (Doc. #185, p. 2.) Defendants admitted that the audio was redacted by "the city," but then refused to produce complete videos upon plaintiff's request. (Id.) Plaintiff then filed the current motion. (Doc. #185.) Defendants oppose the motion, arguing timeliness. (Doc. #188.) Defendants also state: "In some video, the audio is silenced by the officers which is permissible by the department under specific circumstances. The circumstances when the officers are silenced is when they are not speaking with anyone other than members of the department." (Id. ¶ 7.)

The Court finds good cause to modify the scheduling order, Fed. R. Civ. P. 16(b)(4), and in the exercise of discretion, grants plaintiff's motion to compel. Fed. R. Civ. P. 37; Rodriguez v. Powell, 853 F. App'x 613, 619 (11th Cir. 2021) ("the district court's discretion over discovery issues is ordinarily quite broad"). First, although plaintiff's motion to compel was filed a short two-weeks before trial, plaintiff quickly sought court intervention once defendants admitted that the originally produced videos were altered. Plaintiff's late request was due to, at least in part, defendants' own actions and failure to put plaintiff

on notice that the videos were, in fact, altered. Thus, good cause exists to allow plaintiff to seek to compel discovery at this stage.

Second, full and fair discovery requires granting the motion to compel. Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985) ("The Federal Rules of Civil Procedure strongly favor full discovery whenever possible.") Defendants did not object or assert any privilege, Fed. R. Civ. P. 26(b)(5), concerning the original production of the altered videos. Defendants cannot be permitted to evade their discovery obligations by purposefully redacting information from a file without disclosing such redaction to plaintiff. Defendants' statement that they may silence or purposefully redact audio "under special circumstances" provides no legal basis for nondisclosure. And notably, defendants do not argue any prejudice or burden if they were ordered to produce complete copies at this stage.

Accordingly, it is now

ORDERED:

Plaintiff's Motion to Compel (Doc. #185) is **GRANTED.** Defendants **shall** produce complete, unedited versions of the videos **no later than January 27, 2022 at 5:00 p.m.** Plaintiff's alternative request for an adverse inference is **denied.**

DONE and ORDERED at Fort Myers, Florida, this 24th day of January 2022.

JOHN E. STEELE
SENIOR UNITED STATES DISTRICT JUDGE

Copies: All Parties of Record

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

DARREN HOLLIS, Plaintiff,	)	
	)	No. 19 CV 50135
v.	)	Judge Iain D. Johnston
CEVA LOGISTICS U.S., INC., Defendant.	)	

MEMORANDUM OPINION AND ORDER

For years now, even before the advent of TikTok, video recordings have been ubiquitous. Many of these recordings evidence the bizarre fascination of recording every aspect of human existence. Some video recordings, such as cat videos, serve useful societal purposes. Jessica Gall Myrick, *Emotion regulation, procrastination, and watching cat videos online: Who watches Internet cats, why, and to what effect?*, 52 Computers in Human Behavior 168 (November 2015) (watching cat videos relieves stress and improves mood). But one of the most important and useful purposes of video recordings is to investigate various allegations of wrongdoing. For decades now, law enforcement has used video recordings from all manner of sources to investigate allegations, including but not limited to, dash camera video recordings, body camera recordings, CCTV recordings, cell phone recordings made by witnesses, and doorbell video recordings—just to name a few. Indeed, for decades, basic police investigative work involves obtaining and reviewing video recordings. *See, e.g., Clipper v. Takoma Park*, 876 F.2d 17, 19-20 (4th Cir. 1989). And pulling video is not limited to law enforcement. Indeed, it is a basic investigative tool used by human resources departments nationwide. *See, e.g., Davis v. Huntington Ingalls, Inc.*, No. 20 CV 18, 2021 U.S. Dist. LEXIS 241119, *10 (S.D. Miss. Dec. 17, 2021); *Sinegal v. Martin Marietta Materials, Inc.*, No. 3:18 CV 360, 2020 U.S. Dist. LEXIS 78534, *13 (S.D. Tex. Apr. 9, 2020); *In re Tribune Media Co.*, No. 08-13141, 2016 Bankr. LEXIS 875, *25 (D. Del. Mar. 18, 2016); *United States EEOC v. Suntrust Bank*, No. 8:12 CV 1325, 2014 U.S. Dist. LEXIS 47703, *10-11 (M.D. Fla. Apr. 7, 2014). The common, pedestrian step of determining if a video recording of an event exists, and if so, observing and preserving it to be used in an investigation, makes CEVA Logistics' unexplained and cavalier failure to take these steps—in the face of explicit and repeated requests from a terminated employee, no less—all the more troubling and deserving of a curative measure.

For the following reasons, the Court will impose a curative measure for CEVA's failure to take reasonable steps to fulfill its duty to preserve relevant ESI that cannot be restored or replaced, resulting in prejudice to Darren Hollis. The Court will leave to the jury the decisions of whether CEVA possessed the requisite intent, and if so, whether the spoliated ESI was unfavorable to CEVA. So, the Court grants, in part, and denies, in part, Hollis' Motion for Missing Evidence Instruction. Dkt. 65.

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A. Background Facts

Based on the parties' filings, the following facts are undisputed.

CEVA hired Mr. Hollis on November 12, 2017, to work as a material handler/operator, a non-managerial position. He worked in the receiving area of the warehouse. On November 28, 2018, an incident involving Mr. Hollis and coworker Phillip Bayer occurred, though exactly what happened is hotly disputed. According to CEVA, witnesses reported that Mr. Hollis got into an argument with Mr. Bayer, yelled at him, and initiated some form of physically threatening behavior or touching. These alleged actions resulted in Mr. Hollis' termination on December 4, 2018. CEVA identifies three written statements from the day of the incident from witnesses, including Mr. Bayer, who all reported that Mr. Hollis was yelling and pushing or grabbing Mr. Bayer. Those three witnesses are white. CEVA also collected written statements from Mr. Hollis and one other witness describing Mr. Hollis putting his hands up to stop Mr. Bayer, but not touching Mr. Bayer. A third witness later stated in a declaration that he told Mr. Hollis' supervisor, Anthony Berkshire, that he never saw Mr. Hollis touch Mr. Bayer. Those three witnesses are African American. As a result, CEVA faced a classic swearing contest as to whom to believe. Ultimately, Mr. Berkshire credited the three white witnesses who claimed that Mr. Hollis grabbed Mr. Bayer on November 28, 2018, rather than the African American witnesses who asserted that Mr. Hollis never touched Mr. Bayer. Based on this credibility determination, CEVA fired Mr. Hollis.

Three security cameras were aimed at the area of the incident. CEVA presented no evidence that any of its employees ever attempted to view, preserve, or recover the footage before Mr. Hollis' termination. On December 5, 2018, the day after his termination, Mr. Hollis wrote to CEVA's human resources department about the termination in a document he labeled a "formal letter of complaint against CEVA Logistics for workplace race discrimination." Dkt. 65 at 97. Twice in the letter he refers to his request that someone review footage of the incident: "I suggested Tom pull and watch the video as the entire warehouse is being monitor[ed]," and "Finally, if I had put my hands around any person's neck, management could confirm what took place by viewing the cameras." *Id.* at 98. So, the evidence establishes that the very next day after the incident, Mr. Hollis verbally requested the general manager to review the video recordings, and about a week later in a document complaining about race discrimination, twice requested a review of the video recordings that he asserted would clear him of wrongdoing.

Mr. Hollis timely filed a charge of discrimination with the EEOC on March 13, 2019, and, after receiving a right-to-sue letter, filed this suit on June 6, 2019. The plaintiff served discovery requests on February 18, 2020, seeking the video recordings and the identity of the custodian of the video. CEVA responded on April 3, 2020, that no video existed and that the custodian of the video recordings was Unisight, a third-party vendor. But in a deposition, a representative of Unisight testified that it was never the custodian of footage from the CEVA plant, that Unisight merely sold the recording equipment, and that CEVA owned and operated the system and recordings. Recordings on CEVA's security camera equipment are normally retained between 30 and 90 days.

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Critically, in August 2018—before Mr. Hollis' termination—CEVA supervisor Anthony Berkshire investigated an unrelated claim of misconduct brought by a different employee. During that investigation, Mr. Berkshire pulled security camera video recordings of the alleged incident to review. During his deposition, Mr. Berkshire described the simple process he used to obtain the video: He requested it by contacting security.

B. Applicable Law

Rule 37(e) provides the sole source to address the loss of relevant ESI that was required to be preserved but was not because reasonable steps were not taken, resulting in prejudice to the opposing party. *See DR Distributors v. 21 Century Smoking*, 513 F. Supp. 3d 839, 956 (N.D. Ill. 2021). Rule 37(e) has five threshold requirements:[1] (1) the information must be ESI; (2) there must have been anticipated or actual litigation that triggers the duty to preserve ESI; (3) the relevant ESI should have been preserved at the time of the litigation was anticipated or ongoing; (4) the ESI must have been lost because a party failed to take reasonable steps to preserve it; and (5) the lost ESI cannot be restored or replaced through additional discovery. Fed. R. Civ. P. 37(e); *DR Distributors*, 513 F. Supp. 3d at 958. If any of these requirements are not met, then curative measures and sanctions are unavailable under Rule 37(e).

If all these threshold requirements are met, the court must then determine if the party seeking the ESI has suffered prejudice or if the party with possession, custody, or control of the ESI intended to deprive the seeking party of the ESI. *See* Fed. R. Civ. P. 37(e)(1), (2). If prejudice but not intent exists, then the court may impose curative measures, including but not limited to, an instruction that jurors may consider the circumstances surrounding the loss of the ESI. *See DR Distributors*, 513 F. Supp. 3d at 958. If intent exists, the court can impose sanctions, including presuming that the information was unfavorable, instructing the jury to presume the information was unfavorable, or entering dismissal or default. *See* Fed. R. Civ. P. 37(e)(2).

The Court reviews each of the relevant inquires in turn.

C. Analysis

1. Was the Information ESI?

Mr. Hollis alleges that the video recording of the incident between him and Mr. Bayer existed but was not preserved. Video is a form of ESI, *see Freidig v. Target Corp.*, 329 F.R.D. 199 (W.D. Wisc. 2018); *see also Stanbro v. Westchester Cty. Health Care Corp.*, No. 19 CV 10857, 2021 U.S. Dist. LEXIS 163849, *27 (S.D.N.Y. Aug. 27, 2021). So, the first threshold element would seem easily satisfied. But CEVA contends that this case does not involve ESI because there is no evidence that video of the incident ever existed, and that a party has no obligation to produce information that does not exist, citing *Love v. City of Chicago*, No. 09 CV

[1] An analytical decision tree is depicted in Hon. Iain D. Johnston & Thomas Y. Allman, *What Are the Consequences for Failing to Preserve ESI: My Friend Wants to Know,* Circuit Rider 57-58 (2019). This decision tree has been printed in full in other court opinions. *See, e.g., Hamilton v. Oswego Cmty. Unit Sch. Dist. 308,* No. 20 CV 292, 2022 U.S. Dist. LEXIS 33398, *6 (N.D. Ill. Feb. 2, 2022).

3631, 2017 U.S. Dist. LEXIS 184081, at *12 (N.D. Ill. Nov. 7, 2017). It speculates, without any evidence, that "many things could cause a video camera not to work (e.g. power loss, cable disconnections, malfunctions, or recorder software errors)." Response [83] at 4. Albeit odd and begging the ultimate question, CEVA's syllogism is simple: No video; no ESI. According to CEVA, the "Plaintiff must first *prove* that a video camera recorded Plaintiff's encounter with Bayer." *Id.* at 6. Under CEVA's theory, as a practical matter, the spoliation itself prevents a claim of spoliation.

The Court begins with the burden of proof. CEVA contends that the burden falls on Mr. Hollis to prove that the video existed, and to do so by a preponderance of the evidence, citing in support *Sonrai Sys., LLC v. Romano*, No. 16 CV 3371, 2021 U.S. Dist. LEXIS 72444 at *23 (N.D. Ill. Jan. 20, 2021). Although *Sonrai* states that the burden falls on the party seeking relief to establish each of the prerequisites under Rule 37(e), the cases on which *Sonrai* relies never actually place the burden on the party seeking relief. In *Worldpay, US, Inc. v. Haydon* and this Court's own decision in *Snider v. Danfoss, LLC,* the courts merely set out the five prerequisites under Rule 37(e) and then examined the record to determine whether the prerequisites were met. *See Worldpay, US, Inc. v. Haydon*, No. 17 CV 4179, 2018 U.S. Dist. LEXIS 193562, at *9-14 (N. D. Ill. Nov. 14, 2018); *Snider v. Danfoss, LLC*, No. 15 CV 4748, 2017 U.S. Dist. LEXIS 107591, *8-10, 13-19 (N.D. Ill. July 12, 2017), *report and recommendation adopted by* 2017 U.S. Dist. LEXIS 120190 (N.D. Ill. Aug. 1, 2017). The third case cited, *Raimrez v. T&H Lemont, Inc.*, 845 F.3d 772 (7th Cir. 2016), did not address missing ESI at all.

Other district courts outside the Seventh Circuit seem to support CEVA's contention that the party seeking relief bears the burden of establishing that video footage existed. *See, e.g., Reed v. Royal Caribbean Cruises, Ltd.*, No. 19 CV 24668, 2021 U.S. Dist. LEXIS 26209, at *8-15 (S. D. Fla. Feb. 11, 2021); *Mavoides v. Ryan*, No. 17 CV 4187, 2021 U.S. Dist. LEXIS 23083, at *8 (D. Ariz. Feb. 5, 2021). But this Court is not convinced that the burden to establish that ESI ever existed falls on the movant. Burdens of proof generally fall on the party with better access to the information. *See Schaffer v. Weast*, 546 U.S. 49, 60 (2005). Here, CEVA knew by at least December 5, 2018, just a week after the incident, that Mr. Hollis was repeatedly requesting someone obtain and review the video recordings. CEVA does not deny receiving the letter, admits that it does not know whether anyone investigated whether the recording existed, and nothing else in the record reveals any other effort by CEVA near the time of the incident or Mr. Hollis' December 5, 2018, letter to determine whether the video recording existed. Mr. Hollis made reasonable efforts to alert CEVA to the importance of any security footage that existed within days of the incident at a time that any video recording would still have existed. Once alerted, determining whether video of the incident was recorded fell within the sole control of CEVA.

But even if the burden were to fall on Mr. Hollis, the Court finds he has satisfied it. CEVA does not dispute Mr. Hollis' assertion that just weeks earlier the security camera system was working, and that a supervisor knew how to access the recordings and obtained and reviewed video recordings as part of his investigation of an unrelated incident. CEVA does not contest Mr. Hollis' assertion that multiple security cameras were pointed in the direction of the incident. Instead, CEVA speculates about events that could have prevented its cameras from recording the event, such as a power outage. But no evidence in the record—zero—even

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remotely hints that any of these events occurred or that anything else interfered with the camera systems' normal and intended function. The most reasonable inference is that given CEVA's investment in security equipment to capture video of unexpected events, it would make efforts to keep the equipment operational. After all, why install video recording equipment if the video will not be viewed when it can answer a swearing contest, which would ensure an accurate employee disciplinary decision. In the absence of any other evidence, the inference that video recordings of the incident between Mr. Hollis and Mr. Bayer existed is bolstered, if not proven, by CEVA's previous use of video recordings in a similar incident in the same warehouse. Based on this record, the Court finds video of the November 28, 2018, incident between Mr. Hollis and Mr. Bayer was recorded, and therefore was ESI.

2. Was There a Duty to Preserve the ESI?

The duty to preserve under Rule 37(e) is based on the common law, and so is triggered when litigation is commenced or reasonably anticipated. *The Sedona Principles*, 19 Sedona Conf. J. at 51. This means that the duty to preserve can arise before litigation is filed. *Philips Elecs. N. Am. Corp. v. BC Technical*, 773 F. Supp. 2d 1149, 1195 (D. Utah 2011). The scope of the duty to preserve includes ESI that is expected to be relevant and proportional to the claims or defenses in the litigation. *The Sedona Principles*, 19 Sedona Conf. J. at 51. In a traditional tort setting, the moving party bears the burden of proof to establish that a duty existed. *See Shurr v. A.R. Siegler*, 70 F. Supp. 2d 900, 934-35 (E.D. Wisc. 1999) *modified in irrelevant part by* 1999 U.S. Dist. LEXIS 25497 (E.D. Wisc. Dec. 16, 1999). And in a traditional tort setting, duty is a question of law determined by the factual circumstances presented. *See Masters v. Heeston Corp.*, No. 99 C 50279, 2001 U.S. Dist. LEXIS 6732, at *27-28 (N.D. Ill. May 23, 2001) (citing *Quinton v. Kuffer*, 582 N.E.2d 296, 300 (Ill. App. Ct. 1991)).

CEVA contends that no duty to preserve the video footage arose until March 27, 2019, the date on which it claims that it first learned of Mr. Hollis' charge of discrimination filed with the EEOC. By then, it contends, the ninety day retention period would have passed and the video would no longer be available, if it ever was. In support, it relies on *Jones v. Bremen High Sch. Dist. 228*, No. 08 CV 3548, 2010 WL 2106640 (N.D. Ill. May 25, 2010), in which a court concluded that the defendant's duty to preserve electronic documents was triggered by the plaintiff's filing of a charge of discrimination with the EEOC. But, in *Jones*, the plaintiff had not been fired, and so her charge of discrimination filed with the EEOC was the employer's first notice of her allegations of discrimination. In painfully obvious contrast, Mr. Hollis' December 5, 2018, letter that he referred to as a "formal letter of complaint against CEVA Logistics for workplace race discrimination," alerted CEVA both to the nature of his allegations and the relevance of any video recording of the incident. His letter is akin to the incident report a customer filed after a slip-and-fall in *Freidig*, 329 F.R.D. at 207, which triggered a duty to preserve video of the incident.

CEVA attempts to distinguish *Freidig* because the incident between Mr. Hollis and Mr. Bayer was not a slip-and-fall. So what? Both types of incidents—a slip and fall and a racially motivated termination—potentially subject a defendant to liability. And, according to the statements CEVA relied on to fire Mr. Hollis, the incident was at least as noteworthy as a slip-and-fall, and may well have constituted a battery. Whether a duty to preserve has arisen is an

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objective inquiry, viewed from the perspective of the defendant at the time. *Id.* CEVA's knowledge of the incident on its premises, its termination of Mr. Hollis for his role in the incident, and Mr. Hollis' letter alerting the defendant to his allegation of discrimination and that video of the incident would be relevant to determining what occurred, triggered a duty to preserve any video of the incident that existed. Under these facts, litigation was reasonably anticipated. *See Storey v. Effingham Cty.*, No. 4:15 CV 149, 2017 U.S. Dist. LEXIS 93147, *11 (S.D. Ga. June 16, 20170 ("The Court cannot fathom a reasonable defendant who would look at these facts and not catch the strong whiff of impending litigation on the breeze.").

3. Was the ESI Relevant?

The next factor is whether the ESI "should have been preserved," which amounts to whether the ESI is relevant.[2] *See Snider*, 2017 U.S. Dist. LEXIS 107591, at *9 n.9. Under general discovery principles, the party seeking to compel discovery has the burden of showing relevance. *See Mason Tenders Dist. Council of Greater N.Y. v. Phas Constr. Servs.*, 318 F.R.D. 28, 36 (S.D.N.Y. 2016). This burden is not a high standard for at least two reasons. First, relevance is determined under the standard in Federal Rule of Civil Procedure 26(b)(1), not the standard of Federal Rule of Evidence 401, which itself is not a high standard. *See Snider*, 2017 U.S. Dist. LEXIS 107591, at *9 n.9. Second, the principle that the party with access to the proofs generally bears the burden on an issue should temper, at least to some extent, the quantum necessary to meet the burden. *See Schaffer*, 546 U.S. at 60 (the party with access to the proofs bears the burden of proof). In the context of spoliation, the party seeking sanctions does not have access to all the necessary proof, in large part, because the other side spoliated it.

CEVA has not addressed this analytical step explicitly. But throughout its brief CEVA claims that if the video existed, it would not necessarily have helped Mr. Hollis because written witness statements, plus similar deposition testimony obtained later from witnesses, confirm that Mr. Hollis grabbed or pushed Mr. Bayer. According to CEVA, "[b]ased on this evidence, it seems highly likely the video may have ended Hollis's case." Response [83] at 10. But this argument establishes the evidence's relevance. Indeed, even under Fed. R. Evid. 401, the relevance of evidence does not turn on whether it supports its proponent's position, but rather it is relevant if "it has any tendency to make a fact *more or less* probable than it would be without the evidence." (emphasis added). And, of course, CEVA's argument entirely ignores that Mr. Hollis has presented witness testimony supporting his position, and contrary to the witnesses upon which CEVA relied. Additionally, as most counsel and courts know, sometimes eyewitnesses change their testimony when confronted with video recordings.

To the extent that CEVA is arguing that Mr. Hollis had a burden to establish that the video recordings would have been favorable, some courts have rejected that contention. *See, e.g., Ungar v. City of New York*, 329 F.R.D. 8, 16 (E.D.N.Y. 2018); *see also Stanbro*, Nos. 19 CV 10857 & 20 CV 1591, 2021 U.S. Dist. LEXIS 163849 at *27 (noting conflict). Even if this Court were to impose a "favorableness" requirement, in this case, the reasonable inference is that the video recordings would have been favorable. Mr. Hollis explicitly and repeatedly asked CEVA to review them not only before CEVA terminated him, but immediately after his termination. That's powerful proof; proof that CEVA has failed to confront, let alone rebut.

[2] This factor likely has a proportionality component to it, as well.

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The video would have been relevant to whether Mr. Hollis engaged in the conduct for which he was fired, or whether allegations of the conduct were merely pretext for discrimination.

4. Was the ESI Lost Because a Party Failed to Take Reasonable Steps?

Some courts place the burden on the party seeking sanctions to show that the opposing party failed to take reasonable steps to preserve ESI that no longer exists. *See, e.g., Sosa v. Carnival Corp.*, No. 18 CV 20957, 2018 U.S. Dist. LEXIS 204933, at *47-48 (S.D. Fla. Dec. 4, 2018). This Court has previously expressed concern that in such cases, the burden has been misplaced. *See DR Distributors*, 513 F. Supp. 3d at 979. As the Court has recounted already in this order, burdens of proof generally fall on the party with better access to information. *Schaffer*, 546 U.S. at 60. In the context of destroyed ESI, generally, the movant would not have access to the information programs or systems or the relevant resources and skills of the party that destroyed the ESI. Moreover, placing the burden on the movant for this requirement just begs for the dreaded discovery-on-discovery quagmire.

Regardless of which party bears the burden, in this case, nothing before the Court even hints that CEVA ever intervened to stop its security system from proceeding as designed and discarding any video recordings after thirty to ninety days. Even after Mr. Hollis' December 5, 2018, letter alerted CEVA to the relevance and potential importance of any footage that had been recorded, CEVA did nothing. During his deposition, in particularly damning testimony that CEVA ignores, CEVA's general manager testified that he could not recall any reason why it would not have looked at the video to determine which version of the events was more accurate. Dkt. 53-2 at 110-11. The Court concludes that CEVA did not take reasonable steps to preserve any security footage after learning about the incident, or even after receiving Mr. Hollis' letter asking that the footage be reviewed. Indeed, CEVA took no steps, let alone reasonable steps, to preserve the video recording. Assuming Mr. Hollis bore the burden on this issue, he met it with evidence of CEVA's complete failure to take any steps to preserve the ESI.

5. Was the Lost ESI Unable to be Restored or Replaced?

As with the reasonable steps factor, some courts place the burden on the moving party to show that the lost ESI in incapable of being replaced or restored. *See, e.g., Sosa*, 2018 U.S. Dist. LEXIS 204933, at *47-48. This Court has the same concerns about such an allocation. But again regardless of the burden, nothing before the Court establishes that the video recording can be restored or replaced. CEVA asserts that statements of witnesses can serve as a substitute for the security footage. But obtaining statements from witnesses is *not* what Rule 37(e) meant by "restored or replaced through additional discovery." Fed. R. Civ. P. 37(e). The question is whether the *electronically stored information* can be restored or replaced. *Id.* And, in any event, the witnesses are not in agreement about what happened between Mr. Hollis and Mr. Bayer. That's the point. In contrast, video of the incident would have definitively established what occurred. *See Schmalz v. Vill. of N. Riverside*, No. 13 CV 8012, 2018 U.S. Dist. LEXIS 216011, at *10-11 (N.D. Ill. Mar. 23, 2018) (under Rule 37(e), testimony about the content of lost text messages is no substitute for the text messages themselves); *see also Dukes v. Freeport Health Network Mem. Hosp.*, No. 19 CV 50189, 2022 U.S. Dist. LEXIS 66453, *2 n.1 (N.D. Ill. Apr.

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11, 2022) (video recordings resolve disputed facts). Indeed, video recorded evidence is so powerful that the Supreme Court altered how summary judgment motions are decided when the video evidence contradicts testimony of a party. *See Scott v. Harris*, 550 U.S. 372, 378-81 (2007). Accordingly, the Court finds that nothing in the record establishes that the video recordings can be restored or replaced.

6. Was There Intent to Deprive/Was There Prejudice?

Having navigated the five-part inquiry and arriving at the conclusion that the record establishes that the video existed, a duty to preserve it existed, the video would have been relevant, CEVA failed to take reasonable steps to preserve it, and the video cannot be restored or replaced, the focus now turns to the questions of intent and prejudice. If there was intent, then under Fed. R. Civ. P. 37(e)(2) the court may impose sanctions such as adverse jury instructions, default, or dismissal. Fed. R. Civ. P. 37(e)(2), advisory committee's notes to 2015 amendments. If intent is established, then prejudice is presumed. *See DR Distributors*, 513 F. Supp. 3d at 980 (citing Fed. R. Civ. P. 37(e)(2), advisory committee's notes to 2015 amendments). On the other hand, to obtain curative measures under Fed. R. Civ. P. 37(e)(1), only prejudice needs to exist. Some courts place the burden to establish intent on the moving party. *See, e.g., Freidig*, 329 F.R.D at 210. But some courts don't. *Laub v. Horbaczewski*, No. 16 CV 24266, 2020 U.S. Dist. LEXIS 258867, *19 (C.D. Cal. Jul. 22, 2020). This conflict is unsurprising. Rule 37(e) gives the court discretion to determine which party bears the burden to establish prejudice. *See Schmalz*, 2018 U.S. Dist. LEXIS 216011, at *9; Fed. R. Civ. P. 37(e), advisory committee's notes to 2015 amendments.

The Court begins with prejudice. Establishing prejudice can be a dicey proposition because the ESI is gone. *See Schmalz*, 2018 U.S. Dist. LEXIS 216011, at *8 ("Establishing prejudice when the ESI has been destroyed and the contents are unknown can be challenging."); *Snider*, 2017 U.S. Dist. LEXIS 107591, at *5 ("Obviously, establishing prejudice is tricky business."). So, courts evaluate prejudice in the context of determining the harm inflicted by the non-existence of relevant information, an undertaking different and more challenging than the general concept of prejudice in different contexts under Rule 37. The process can be challenging in at least two ways: (1) marshalling the evidence to show harm because of the absence of evidence, and (2) determining which party bears the burden of proof to show prejudice. Because of these difficulties, the rule gives the court discretion as to how to best determine prejudice. Fed. R. Civ. P. 37(e), advisory committee's note to 2015 amendments.

"Prejudice" under Rule 37(e) includes the thwarting of a party's ability to obtain the evidence it needs for its case. *J.S.T., Corp. v. Robert Bosch, LLC*, No. 15 CV 13842, 2019 U.S. Dist. LEXIS 90645, at *19 (E.D. Mich. May 30, 2019), *expert advisor's report and recommendation adopted by* 2019 U.S. Dist. LEXIS 90431, at *3 (E.D. Mich. May 30, 2019). The record in this case establishes prejudice. Some witness testimony will favor the version of events advanced by Mr. Hollis, while other witness testimony will favor the version advanced by CEVA. Definitive proof would have been recorded by CEVA's security cameras aimed at the scene. But despite Mr. Hollis alerting CEVA to the importance of the video recording, CEVA took no steps to view, let alone preserve, the video. As a result, the video is lost and unavailable.

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Because Mr. Hollis is left unable to obtain the video of the incident he needed for his case, the loss of ESI has prejudiced him as that term is used under Rule 37(e).

Turning now to intent, obviously, intent is difficult for a moving party to prove and for a court to find. *See SL EC, LLC v. Ashley Energy, LLC*, No. 4:18 CV 1377, 2021 U.S. Dist. LEXIS 179169, *13 (E.D. Mo. Sep. 21, 2021); *Wheeler Bros. v. Jones*, No. 2:14 CV 1258, 2016 U.S. Dist. LEXIS 203181, *17 (M.D. Ala. May 20, 2016) ("intent to deprive" is a difficult question). The evidence used to establish intent is almost always circumstantial, not that there is anything wrong with that. *BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc.*, No. 15 CV 10340, 2018 U.S. Dist. LEXIS 57254, *30 (N.D. Ill. Apr. 4, 2018).

In this case, plenty of evidence exists in the record that could lead a reasonable person to conclude that CEVA acted with intent. Specifically, there is evidence that CEVA does not know of anything done in response to Mr. Hollis' request for video, even though just months earlier it pulled and reviewed video of an unrelated incident. As Judge Reinhard noted in his order denying CEVA' motion for summary judgment, CEVA's

> decision not to review the surveillance video is certainly difficult to understand. . . . An inference can be drawn in plaintiff's favor from the investigators' decision not to review, or even look for, video of the Incident—video they knew was likely available. The inference that can be drawn is that the investigators did not want to know what the video might show; that they preferred to make their decision using only the witness statements and interviews and to make their determination of witness credibility based on factors other than what they might have been able to see with their own eyes by viewing the video. *Deciding to ignore the video is not a decision likely to be made by investigators seeking the truth.*

Order [61] at 4-5 (emphasis added). This evidence supports a reasonable inference that CEVA intentionally disregarded Mr. Hollis' request so that the ESI would be lost, no one could view what actually occurred, and Mr. Hollis could not use the video evidence to get his job back or support a likely lawsuit.

In addition, when CEVA responded in 2020 to Mr. Hollis' discovery requests seeking the identity of the custodian of the security video, CEVA stated that the custodian was "Unisight," a third-party vendor in Colorado. But in response to a subpoena, Unisight stated that it merely sold the video equipment to CEVA and had never been the custodian of any video recorded by the equipment. CEVA responds that its discovery response shows only that it was wrong, not that it acted in bad faith. But a reasonable person could conclude that CEVA's response was an attempt to deflect attention away from its own intentional conduct of allowing the automatic deletion of the video. As Magistrate Judge Jeff Cole aptly noted, "False exculpatory statements are often evidence of consciousness of guilt." *See BankDirect Capital Fin., LLC*, 2018 U.S. Dist. LEXIS 57254 at *31.

The Court has recounted evidence that could support a conclusion that CEVA intentionally allowed ESI to be destroyed. And tellingly CEVA has failed to even present the

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usual obligatory after-the-fact affidavit so often filed in spoliation cases that it did not intentionally fail to preserve the video recordings.

But a competent counsel who is willing to argue that her client is not inculpatory but is instead incompetent could make a reasonable argument that the failure to pull, preserve, and peruse the video recordings was not intentional. Granted, a jury may not credit this argument, but that should not prevent CEVA from attempting to sell that pitch under these facts. Like District Judge Tom Durkin, the Court is a believer of Hanlon's Razor. *See Raila v. Cook Cty. Officers Electoral Bd.*, No. 19 CV 7580, 2021 U.S. Dist. LEXIS 215458, *1 (N.D. Ill. Nov. 8, 2021) ("An adage known as 'Hanlon's Razor' says, in its most polite form, that we should not infer malice from conduct that can be adequately attributed to incompetence."); *DR Distribs.*, 513 F. Supp. 3d at 951. Humans are just as likely to be dimwitted as they are dastardly.

Because of the difficulty to establish intent, the Court will leave that determination to the jury. *See* Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment. At this point, the Court will not impose sanctions under Rule 37(e)(2), such as instructing jurors to presume that the missing ESI would have been unfavorable to CEVA. However, based on its findings that all five prerequisites under Rule 37(e) are established, the Court will impose curative measures.

D. Curative Measure Imposed.

Under Rule 37(e)(1), the Court may impose only those measures that are no greater than necessary to cure the prejudice resulting from the loss of the ESI.[3] A common curative measure is instructing the jury that it can consider the circumstances surrounding the loss of the ESI. Thomas Y. Allman, *Dealing with Prejudice: How Amended Rule 37(e) Has Refocused ESI Spoliation Measures*, 26 RICH. J. L. & TECH. 1, 64-66 (2020) (collecting cases). This Court will provide factual findings to the jury along with an instruction as to how to apply that factual finding under Rule 37(e). The factual findings and instruction are attached to this order as an appendix. The Court has not decided when it will provide the factual findings and instruction to the jury. The three options are (1) during the introductory instructions, (2) at the close of Mr. Hollis' case-in-chief, or (3) at the close of evidence and following arguments, with all the other instructions. The Court will obtain the input of the parties before deciding this issue.

[3] Although not a perfect analog, Rule 37(e)(1)'s guidance is reminiscent of Title 18, Section 3553(a)'s command when sentencing a criminal defendant: "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." 18 U.S.C. § 3553(a).

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CONCLUSION

For these reasons, the motion for a missing evidence instruction [65] is granted in part. The jury will be provided with the attached appendix for use in its deliberations.

Date: May 19, 2022

By: 

Iain D. Johnston
United States District Judge

APPENDIX

Factual Findings and Jury Instruction

Introduction

Before trial, the Court made the following factual findings, which you must accept as true. You will use these factual findings, as well as any other factual findings you make based on the evidence, and the jury instructions to make your decisions. Do not assume because I made these factual findings that I hold any opinion as to how you should decide this issue or this case. It is for you—not the Court—to make these decisions.

Factual Findings

The receiving department at the CEVA warehouse has surveillance cameras installed. These cameras record video. The video recordings are preserved between 30 and 90 days. Surveillance cameras are located immediately above and next to the area where the incident involving Darren Hollis and Philip Bayer occurred on November 28, 2018.

In August 2018, a few months before Hollis was terminated, another incident occurred at the receiving department of the CEVA warehouse involving different employees. For this August 2018 incident, Anthony Berkshire obtained a video recording from the surveillance system to investigate the allegations. Anthony Berkshire was able to obtain this video recording for the August 2018 incident by submitting a request to security.

On December 5, 2018, two days after CEVA terminated Darren Hollis' employment, he wrote a letter to CEVA regarding his complaint of workplace discrimination. In this letter, Hollis noted that on November 29, 2018 (the day after the incident), he suggested to General Manager Tom Henkel to "pull and watch the video." In the letter, Hollis also noted that "management could confirm what took place by viewing the cameras."

Before this trial, Hollis requested that CEVA produce a copy of the video recording of the receiving department at the warehouse for November 28, 2018. CEVA informed Hollis that it did not possess the recording. Instead, according to CEVA, a third party called Unisight possessed the video recording. Under oath, a representative of Unisight testified that it never possessed the video recording and that it merely sold the video surveillance system to CEVA.

No individual from CEVA ever submitted a request to security, obtained, or viewed the video recording of the warehouse on November 28, 2018, involving Hollis and Bayer. CEVA did not preserve the video recording of the CEVA warehouse from November 28, 2018.

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Jury Instruction

If you decide that CEVA intentionally failed to preserve the video recording of November 28, 2018, to prevent Hollis from using the video recording in this case, you may—but are not required to—presume that the video recording was unfavorable to CEVA.[1]

You may then consider your decision regarding the video recording, along with all the other evidence, to decide whether CEVA terminated Hollis because of his race.[2]

[1] The instruction is patterned after the suggested language in the Advisory Committee Notes. Fed. R. Civ. P. 37(e), advisory committee's notes to 2015 amendments. The instruction also intentionally omits the burden of proof. In the Seventh Circuit, the burden of proof on this issue is the preponderance of the evidence standard. *Ramirez v. T&H Lemon, Inc.*, 845 F.3d 772, 778 (7t0-h Cir. 2016). And this instruction uses the phrase "if you decide." Seventh Circuit Civil Pattern Jury Instruction 1.27 already provides that when the court uses the phrase "if you decide" in an instruction, the preponderance of the evidence standard applies, and the instruction then goes on to define the preponderance of the evidence standard. So, including the burden of proof would be not only redundant but also make the instruction unnecessarily cumbersome.

[2] The instruction tracks the language of Seventh Circuit Civil Pattern Jury Instruction 3.01, which is used for Title VII claims.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:21-cv-22825-WPD/Becerra

SONY MUSIC ENTERTAINMENT, *et al.*,

Plaintiffs,

v.

VITAL PHARMACEUTICALS, INC. *d/b/a* BANG ENERGY, *et al.*,

Defendants.
_____/

ORDER

THIS CAUSE came before the Court on Plaintiffs Sony Music Entertainment, Sony Music Entertainment US Latin LLC, Zomba Recording LLC, Arista Music, Arista Records LLC, LaFace Records LLC, Records Label, LLC, and Volcano Entertainment III LLC's (collectively, "Plaintiffs") Motion for Spoliation Sanctions (the "Motion"), ECF No. [80]. Plaintiffs also filed an affidavit by Plaintiffs' counsel in support of the Motion, ECF No. [81]. Defendants Vital Pharmaceuticals, Inc. d/b/a Bang Energy and Jack Owens (collectively, "Defendants") filed a Response in Opposition to the Motion (the "Response"), ECF No. [104], and an affidavit by Defendants' counsel in support of the Response, ECF Nos. [105], [107]. Plaintiffs filed a Reply (the "Reply"), ECF No. [122], and a Notice of Supplemental Authority, ECF No. [195]. Defendants later filed two additional affidavits in support of the Response, ECF Nos. [202], [203]. The Parties appeared before the undersigned for a hearing on the Motion on September 8, 2022 (the "Hearing"). *See* ECF No. [212]. Upon consideration of the Motion, the Parties' arguments, and the pertinent portions of the record, and for the reasons stated below, Plaintiffs' Motion is hereby **GRANTED IN PART AND DENIED IN PART.**

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I. BACKGROUND

Plaintiffs are before the Court seeking sanctions for Defendants' failure to preserve and produce copies of the videos that are at the heart of this action—namely, Defendants' marketing videos that Plaintiffs allege were used without their permission and that include Plaintiffs' copyrighted music. There is no dispute that some of the videos at issue were not preserved at all, and there is no dispute that many of the videos that were produced were not preserved with the engagement data (i.e., how many views, how many "likes") that Defendants should have preserved. Now, Plaintiffs seek sanctions against Defendants for spoliation of those videos and the engagement data associated with them.

The discovery cutoff in this case was May 12, 2022. ECF No. [33]. Prior to that deadline, the Parties appeared before the undersigned on May 3, 2022, for a discovery hearing regarding, among other issues, Plaintiffs' request for multiple videos that Defendants did not produce. *See* ECF No. [39]. On May 9, 2022, the Court ordered Defendants to produce the responsive videos within seven days. ECF No. [40]. Defendants did not produce the videos.

The Parties appeared before the undersigned again on May 10, 2022, for a discovery hearing regarding, among other issues, the same unproduced videos. *See* ECF No. [41]. The Court ordered Defendants *again* to produce the responsive videos by 6:00 p.m. that day. ECF No. [43]. Defendants did not produce the videos.

Two days later, the Parties once again appeared before the undersigned for a discovery hearing regarding, among other things, the same unproduced videos. *See* ECF No. [45]. Again, after further representations from Defendants that materials were still being gathered, this Court ordered Defendants to produce all videos at issue by May 12, 2022. ECF No. [46]. Again, Defendants failed to produce the videos.

Following yet another discovery hearing, this Court issued an order on May 26, 2022, ECF No. [61], in which the undersigned permitted Plaintiffs to file a motion for sanctions regarding Defendants' repeated failure to produce the videos. Indeed, given the undersigned's Discovery Procedures, Plaintiffs were not permitted to file a written motion on the issue without leave of court.

Plaintiffs filed the instant Motion, ECF No. [80], as well as an affidavit by Plaintiffs' counsel David Rose supporting the same, ECF No. [81], on June 7, 2022. Plaintiffs' Motion seeks sanctions for spoliation of evidence by Defendants. *See* ECF No. [80]. Specifically, Plaintiffs allege that Defendants failed to preserve certain videos containing infringing copyright music, as well as the engagement data associated with those and other videos. *Id.* at 2–3. Plaintiffs assert that the spoliation was in bad faith, that Plaintiffs were severely prejudiced by the failure to preserve the evidence, and that sanctions are warranted. *Id.* As a result, Plaintiffs propose the following sanctions: (1) the imposition of "an adverse inference that for each video identified by Plaintiffs that cannot now be located because that video was not properly preserved, the video is deemed to have embodied the copyrighted sound recording as alleged"; (2) the imposition of an adverse inference that "the videos that were not preserved were viewed as many times and had as much social media engagement and reach as the most popular videos posted by Defendants or their influencers on social media"; and (3) an award of attorneys' fees. *Id.* at 13.

Defendants filed a Response on June 17, 2022, ECF No. [104], and an affidavit by Defendants' Counsel supporting the same, ECF Nos. [105], [107]. Defendants' Response emphasizes that an additional set of documents was produced on June 2, 2022, including screenshots of some of the missing videos. *See* ECF No. [104] at 4. This production, Defendants contend, negates most if not all prejudice caused by the failure to produce videos. *Id.* Defendants

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assert that there was no bad faith conduct in the spoliation of evidence because the failure to preserve was inadvertent. *Id.* at 7–8. Finally, Defendants contend that if sanctions are deemed appropriate by this Court, the specific sanctions requested by Plaintiffs are overbroad. *Id.* at 8. Defendants instead put forth the following inferences: (1) that "the video existed"; (2) that the video "embodied the song listed"; and (3) that the video "either (a) received as much engagement as the average post by that account, or (b) received as much engagement as the video posted immediately before or after on that same account." *Id.* at 10.

Plaintiffs' Reply asserts that Defendants' late production of screenshots was insufficient to cure any prejudice because, as Defendants noted, "the name of the song used on the TikTok video itself does not always correlate with the actual song used in the video." ECF No. [122] at 4 (quoting ECF No. [104] at 5). Plaintiffs also reiterate that Defendants do not dispute that they had a duty to preserve the videos at issue and they failed to do so. *Id.* at 5. Whether that failure was intentional, Plaintiffs argue, is of no effect because the standard for bad faith is either "intentional misconduct or reckless disregard of the consequences." *Id.* at 6.

On August 16, 2022, Plaintiffs filed a Notice of Supplemental Authority (the "Notice of Authority"). ECF No. [195]. The Notice of Authority alerted the undersigned to an order entered on August 11, 2022, by Magistrate Judge Patrick Hunt in *UMG Recordings, Inc. v. Vital Pharmaceuticals, Inc. d/b/a Bang Energy* (hereinafter, the "Universal Sanctions Order"), a pending case brought against the same Defendants that posed virtually the exact issues here (hereinafter, the "Universal Matter"). *See generally id.* (citing Order, *UMG Recordings, Inc. v. Vital Pharms., Inc. d/b/a Bang Energy*, No. 21-cv-60914 (S.D. Fla. Aug. 11, 2022), ECF No. [261]). There, the Court awarded sanctions against Defendants for their failure to preserve and produce the marketing videos, the same kind of videos at issue here. *See* ECF Nos. [195] at 1–3;

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[195-1]. Judge Hunt imposed the following sanction to address the spoliation of evidence: (1) an adverse, rebuttable inference against Defendants that "should song ownership be proven, [p]laintiffs have also established the second element of a copyright infringement claim, copying of constituent elements of the work that are original"; and (2) an adverse, rebuttable presumption that for the deleted videos, "the videos had the same reach as an average or comparable post by the account on which the video was posted." *See id.* Plaintiffs assert that Magistrate Judge Hunt's order is instructive in finding bad faith and awarding spoliation sanctions. ECF No. [195] at 2.

On August 30, 2022, Defendants filed two additional affidavits in support of their Response: an affidavit by Defendants' counsel, Shauna Manion (the "First Manion Affidavit"), ECF No. [202]; and an affidavit by the Senior Director of Marketing for Defendant Vital Pharmaceuticals, Inc., Meg Liz Owoc (the "Owoc Affidavit"), ECF No. [203]. The First Manion Affidavit outlines details of yet another document production on August 17, 2022, approximately two months after the date of Defendants' Response, and months after the close of discovery. ECF No. [202] at 2. The Owoc Affidavit asserts that Defendants did not intentionally delete the videos requested but rather removed them from social media platforms quickly in an effort to comply with Plaintiffs' demands, and cannot now locate or reproduce them due to the nature of how the videos are stored and organized. ECF No. [203] at 1–3. Defendants filed another affidavit on September 2, 2022, by Defendants' counsel, Shauna Manion (the "Second Manion Affidavit"), ECF No. [208]. The Second Manion Affidavit outlined an additional production by Defendants on September 2, 2022 of more videos and associated screenshots. *See* ECF No. [208].[1]

[1] On September 8, 2022, immediately prior to the Hearing, Defendants filed a Notice of Withdrawal of Particular Arguments from Defendants' Motion for Summary Judgment and Defendants' Reply in Support of Summary Judgment, ECF No. [211]. In that Notice, Defendants withdrew "their argument, discussed on page 12 of their Motion for Summary Judgment (DE 126), as it pertains to those 11 Accused Videos that are subject to the pending spoliation motion, on the

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At the Hearing, the Parties clarified their positions on the matters before the Court, and provided updated information regarding the status of the production of videos and engagement data by Defendants. The videos at issue fall into two categories. First, there is a set of twenty two videos which were neither produced prior to the close of discovery, nor by the dates set forth in the subsequent orders of the Court (the "Unproduced Videos"). Second, there is a set of 171 videos for which videos have now been produced but for which no engagement data[2] was produced (the "Data-Free Videos"). The undersigned will address each in turn.

II. ANALYSIS

The moving party carries the burden of proof to establish spoliation. To do so, "the party seeking sanctions must prove several things; first, that the missing evidence existed at one time; second, that the alleged spoliator had a duty to preserve the evidence; and third, that the evidence was crucial to the movant being able to provide its prima facie case or defense." *Penick v. Harbor Freight Tools, USA, Inc.*, 481 F. Supp. 3d 1286, 1291–92 (S.D. Fla. 2020) (quoting *Walter v. Carnival Corp.*, No. 09-cv-20962, 2010 WL 2927962, at *2 (S.D. Fla. July 23, 2010)). However, even when these elements are met, a party's actions only merit sanctions when the spoliation comes about as the result of bad faith. *Id.* "Courts in this district have interpreted 'bad faith' in the spoliation context to not require a showing of malice or ill-will, but rather conduct evidencing more than mere negligence." *Id.* at 1293 (collecting cases).

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basis that Defendants have since found and produced the 11 videos since the filing of their Motion for Summary Judgment." ECF No. [211] at 1. In short, Defendants' argument that Plaintiffs failed to produce eleven videos at issue was withdrawn after Defendants were able to locate and produce them instead. *Id.*; ECF No. [126] at 12.

[2] Engagement data as used herein refers to the analytics associated with videos showing interactions with videos (likes, comments, views, etc.) on the date of takedown. Whether the information was obtained at the time of takedown is no consequence, so long as the data itself is reflective of data at the time of takedown.

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A. The Unproduced Videos

Plaintiffs assert that there were twenty-two videos that were not produced *at all* prior to the discovery cut-off. ECF No. [122] at 2. Defendants do not dispute the timing of production, but rather emphasize the fact that screenshots and/or videos for most of that subset were *eventually* produced and those videos should not be considered when assessing sanctions. ECF No. [104]. Defendants' failure to produce these videos within the allotted discovery period cannot be cured with a unilateral rolling production extending well-beyond discovery and even into the summary judgment stage. Therefore, the Court will consider all twenty-two videos as the set of Unproduced Videos for its analysis. At the Hearing, the Parties conceded that this set of videos was in a different posture. As to the Unproduced Videos, the undersigned finds that Defendants' conduct here was in bad faith, as defined. Defendants were well-aware of their duty to retain the videos, having been asked to do so as early as April 13, 2021. ECF No. [80] at 3. It is unclear why Defendants were unable to produce these twenty-two videos prior to the discovery cutoff, yet somehow were able to produce videos and/or corresponding screenshots of them afterwards. Defendants failed to preserve these videos as required, and further failed to disclose the corresponding screenshots in time. Defendants' subsequent production occurred so late as to eventually deprive Plaintiffs of a meaningful opportunity to include the videos in this case. Such actions deprived Plaintiffs of crucial evidence to which they were entitled and caused them prejudice, as they cannot adequately address them in this case—which they are clearly entitled to do. Indeed, Plaintiffs subsequently filed a Notice to Supplement the Record to include some of these late videos for purposes of their Motion for Summary Judgment, ECF No. [206], but the Notice was stricken by the District Court as the record was closed. ECF No. [210]. The

undersigned finds that Defendants' actions, taken as a whole, more than satisfy the bad faith standard for spoliation regarding the Unproduced Videos.

The Universal Matter contained nearly identical facts related to the unproduced videos in that case. As a sanction for the spoliation, Magistrate Judge Hunt entered the following adverse, rebuttable inference: "should song ownership be proven, [p]laintiffs have also established the second element of a copyright infringement claim, copying of constituent elements of the work that are original." [195-1] at 6. At the Hearing, the Parties agreed that that inference here would also be proper. Because there was spoliation as to the Unproduced Videos, the undersigned finds that an adverse inference regarding copying is appropriate, and adopts the same inference provided by Judge Hunt. Thus, for each of the Unproduced Videos, Plaintiffs shall receive a rebuttable presumption that, should song ownership be proven, Plaintiffs have also established the second element of a copyright infringement claim, copying (both legal and factual) of constituent elements of the work that are original.

B. The Data-Free Videos

Plaintiffs assert that there are 171 videos for which engagement data was missing at the time of the discovery cutoff, although some videos without the data have been produced. ECF No. [80] at 8. Defendants discussed at length during the Hearing the fact that there was subsequent production of engagement data for many of the videos. However, after considerable argument, Defendants ultimately revealed that additional data was only provided for 5 of the 171 videos at issue. Again, it is unclear why Defendants were unable to produce engagement data in a timely fashion for the Data-Free Videos and then produce data for an incredibly small subset only following the discovery cutoff. Defendants should have preserved this data, notified any other custodians to do the same, and implemented appropriate measures for that preservation within the

discovery period. Therefore, as with the Unproduced Videos, the Court will consider all 171 videos as the set of Data-Free Videos, and disregard the fact that any additional data was produced after the discovery cutoff given that the material produced appears to be very limited in scope and in value given the limited information that was provided.

As to the Data-Free Videos, the undersigned finds that Defendants' conduct here was in bad faith, as defined. Defendants were well-aware of their duty to retain the videos in their original form with accompanying data, having been asked to do so as early as April 13, 2021. ECF No. [80] at 3. Defendants failed to preserve these videos as required, and have inexplicably lost or destroyed the original formats of the same containing engagement data. Defendants' subsequent, nominal production occurred so late and under such circumstances as to essentially deprive Plaintiffs of a meaningful opportunity to include that engagement data in this case. Such actions deprived Plaintiffs of crucial evidence to which they were entitled and caused them severe prejudice, as they cannot adequately address them in this case—which they are clearly entitled to do. The undersigned finds that Defendants' actions, taken as a whole, more than satisfy the bad faith standard for spoliation regarding the Data-Free Videos.

Here, too, the Universal Matter had nearly identical facts related to data-free videos in that case. Given the spoliation, Magistrate Judge Hunt entered the following adverse, rebuttable inference, that: "the videos had the same reach as an average or comparable post by the account on which the video was posted." *See* ECF No. [195-1]. At the Hearing, Plaintiffs argued that the Court should not use the same language of Judge Hunt's Order, but that a stronger inference, that each Data-Free Video received as many views and had as much social media engagement and reach as the most popular videos posted by Defendants or their influencers on social media. Defendants argued that the Court should, at most, use the same inference that Judge Hunt ordered,

preferably with the exclusive inference that each Data-Free Video received only the *average* number of views (as opposed to "average or comparable") and amount of social media engagement and reach as all of the videos posted by Defendants or their influencers on social media.

Because there was spoliation as to the Data-Free Videos, the undersigned finds that an adverse inference as to the viewership of the videos is an appropriate sanction. The undersigned finds that the inference ordered in the Universal Matter is appropriate here, with one minor adjustment. The Parties' arguments at the Hearing revealed the imprecision behind the use of "average" in this context when multiple accounts are posting unique videos. The undersigned finds that the use of "comparable" alone would reduce some of the ambiguity. Thus, for each of the Data-Free Videos, Plaintiffs shall receive a rebuttable presumption that the videos had the same reach as a *comparable* post by the account on which the video was posted.

C. Attorneys' Fees

Plaintiffs additionally seek attorneys' fees pursuant to Federal Rule of Civil Procedure 37. ECF No. [80] at 13. For the reasons stated above and the reasons stated at the Hearing, Defendants failed to comply with *multiple* discovery orders of this Court. Thus, in addition to the above, Plaintiffs are entitled to reasonable attorneys' fees and costs associated with the instant Motion, including but not limited to drafting the Motion and Reply, and attending the *various* hearings on this issue. As stated at the Hearing, the Parties are ordered to confer regarding the amount of attorneys' fees and costs that are reasonable in this instance. Specifically, Plaintiffs shall provide Defendants with their reasonable request for attorneys' fees and costs within thirty days of the date of this Order. Should the Parties be unable to agree on an amount of reasonable fees, they are directed to set a hearing before the undersigned pursuant to the undersigned's Discovery Procedures so that the matter of the amount can be resolved expeditiously.

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III. CONCLUSION

For the reasons stated above, Plaintiffs' Motion is hereby **GRANTED IN PART AND DENIED IN PART**. For each of the Unproduced Videos, Plaintiffs shall receive a rebuttable presumption that, should song ownership be proven, Plaintiffs have also established the second element of a copyright infringement claim, copying (both legal and factual) of constituent elements of the work that are original. For each of the Data-Free Videos, Plaintiffs shall receive a rebuttable presumption that the videos had the same reach as a comparable post by the account on which the video was posted. Finally, Plaintiffs are awarded attorneys' fees and costs associated with the instant Motion.

DONE AND ORDERED in Chambers at Miami, Florida, on September 13, 2022.

JACQUELINE BECERRA
UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOHN RAPP et al., Plaintiffs, v. NAPHCARE, INC. et al., Defendants.	CASE NO. 3:21-cv-05800-DGE ORDER GRANTING MOTION FOR SANCTIONS (DKT. NO. 91)

I INTRODUCTION

This matter comes before the Court on Plaintiffs' motion for sanctions pursuant to Federal Rule of Civil Procedure 37(e). (Dkt. No. 91.) After reviewing the parties' briefing and the remainder of the record, the Court GRANTS Plaintiffs' motion and ENTERS DEFAULT JUDGMENT against Defendant Kitsap County.

II BACKGROUND

The Court briefly recounts the factual and procedural background of this case relevant to this motion.

Nicholas Rapp ("Mr. Rapp") was arrested by Kitsap County Sheriff's deputies on the evening of December 31, 2019, after getting into an argument with his partner Megan Wabnitz. (Dkt. No. 63 at 16.) Mr. Rapp, who had a history of mental illness and drug abuse, was taken to Kitsap County Jail and booked into jail that same night. (*Id.* at 17.) While in jail, Clinical Institute Withdrawal Assessment for Alcohol ("CIWA") and Clinical Opiate Withdrawal Score ("COWS") assessments were initiated to evaluate Mr. Rapp for alcohol and opioid withdrawal. (Dkt. No. 89-1 at 260.) Mr. Rapp was housed in Central A Unit to permit medical officials to monitor him as he went through detox. (*Id.* at 129.)

According to his medical records, Mr. Rapp underwent COWS and CIWA assessments by nursing staff at approximately 12:25AM on January 1, 2020. (*See* Dkt. No. 159 at 7–12.) Mr. Rapp's medical records indicate subsequent CIWA and COWS assessments at around 2:35 AM, 10:49 AM, 2:52 PM, and 10:47 PM on January 1. (*Id.* at 14–28.) The medical records also document that Nurse Ripsy Nagra ("Ms. Nagra") performed additional COWS and CIWA assessments at 10:39 AM on January 2. (*Id.* at 30–34.)

At approximately 1:42 PM on January 2, Correctional Officer Merile Montgomery discovered Mr. Rapp on the floor of his cell, "ashen in color" and with his mattress cover tied around his neck. (Dkt. No. 89-1 at 141.) Officer Montgomery called for backup. (*Id.*) Additional correctional officers arrived at the scene and began performing CPR and using an automatic external defibrillator ("AED"). (*Id.* at 142–43.) Officers were able to generate a pulse and Mr. Rapp was transported to Tacoma Medical Hospital. (*Id.* at 145.) Mr. Rapp was ultimately taken off life support on January 9, 2020. (*Id.* at 146.)

After Mr. Rapp's suicide, the Kitsap County Sheriff's Office "asked the Kitsap Critical Incident Response Team ("KCIRT") . . . to perform an independent investigation of Nicholas

Rapp's death." (Dkt. No. 110 at 3.) Lieutenant Keith Hall, a corrections officer tasked with managing the Kitsap County Jail's surveillance system, was charged with responding to KCIRT requests for surveillance videos. (*Id.*) According to Lieutenant Hall, KCIRT sought videos from January 2, 2020, as well as video footage related to Mr. Rapp's parents visit to the jail on January 1, 2020. (*Id.* at 3–4.) Lieutenant Hall was not asked by KCIRT to produce other videos from January 1, 2020. (*Id.* at 4.)

Plaintiffs emailed and faxed litigation preservation letters to the Kitsap County's Sheriff's Office and Prosecutor's Office on January 17, 2020. (*See* Dkt. No. 179-1.) These letters specifically requested Kitsap County preserve "[a]ll video/audio footage of Mr. Rapp while in custody, both while alive and deceased." (*Id.* at 2.) The letters further requested "all materials related to the arrest, prosecution, incarceration, medical treatment, and death of Nicholas Winton Rapp must be preserved and left unedited and unredacted for future litigation." (*Id.* at 3.) Kitsap County was therefore on notice on January 17th, 2020, of its obligation to preserve evidence relevant to Mr. Rapp's suicide. *See In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1067 (N.D. Cal. 2006) ("As soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action."). According to Lieutenant Hall, the Kitsap County Jail maintained a 60-day retention policy for video recordings in the jail (Dkt. No. 89-1 at 935), so the videos were still available to the County on the date this request was sent.

Once the Kitsap County Sheriff's Office received these litigation preservation letters, Lieutenant Hall determined, apparently unilaterally, that the relevant "event" for purpose of information preservation was Mr. Rapp's suicide. (Dkt. No. 110 at 4.) Lieutenant Hall then reviewed Mr. Rapp's inmate log to determine Mr. Rapp's location during the entire time he was

detained at the jail. (*Id.* at 5.) Lieutenant Hall decided that because the surveillance cameras purportedly could not capture images of inmates while in their cells[1] and because inmates in Central A Unit were on lockdown (e.g., could not leave their cells) during the afternoon of January 1st, the surveillance video from the afternoon and evening of January 1st "would not capture any footage of Mr. Rapp." (*Id.* at 6.) However, Lieutenant Hall did not "personally watch all footage captured during Mr. Rapp's incarceration." (*Id.*) 11 hours of video of Central A Unit from 12:59 PM to 11:59 PM on January 1, 2020, were ultimately deleted pursuant to Kitsap County's data retention policies. (Dkt. No. 89-1 at 963.)

Plaintiffs filed their lawsuit on October 28, 2021. (Dkt. No. 1.) As part of their initial requests for production, Plaintiffs requested:

> **REQUEST FOR PRODUCTION NO. 1:** Produce all documents and materials that mention, reference, or relate to Nicholas Rapp, including jail records, medical records, any kind of form or report, photos, texts, e-mails, social media messages, diaries, notes, memos, or any other printed or electronically stored information. If any such materials once existed but have been deleted, misplaced, or erased, please describe what once existed with as much particularity as you can and state when the material was deleted, discarded, or lost.

(Dkt. No. 89-1 at 515.) To which Kitsap County responded:

> RESPONSE: Objection. Request contains undefined and/or vague terms (to wit: "relate to") and cannot be responded to without clarification. In addition, request is overly broad, and is not reasonably calculated to lead to the recovery of admissible evidence; it is unduly burdensome in that it seeks records which can be derived within the possession of the examining party or which can be derived with substantially the same burden by either the examining or responding party. To the extent this request seeks information regarding the provision of health and mental health care services to Nicholas Rapp at the jail, it is better directed to Naphcare.

[1] The Court is compelled to point out, based on its review of the record, that it is possible to see at least portions of individuals in their cells through the cameras at issue and Lieutenant Hall also acknowledges the same in his affidavit. (*See* Dkt. Nos. 94 at 130; 110 at 2.)

> Without waving the foregoing objection, defendant Kitsap County responds as follows:
>
> See KCSO records provided herein as Bates No. Rapp - 1st RFPs to KC – 00001 to 01040. Also see jail videos and calls provided herein.

(*Id.*)

Kitsap County did not mention in its response to the Request for Production that 11 hours of video of Central A Unit had been deleted. In mid-August 2022, approximately five months after Kitsap County served its initial responses to Plaintiffs' requests for production, Plaintiffs reached out to Kitsap County seeking recordings from Central A Unit for the afternoon and evening of January 1, 2020. (*Id.* at 536–37.) On August 16, 2020, Kitsap County confirmed they did not have video of Central A Unit from 1:00 PM to 11:59 on January 1, 2020. (*Id.* at 535.)

Plaintiffs filed their motion for sanctions against Kitsap County on December 8, 2022. (Dkt. No. 91.) Kitsap County filed their response in opposition to the motion on December 19, 2022 (Dkt. No. 108) and Plaintiffs filed their reply on December 23, 2022 (Dkt. No. 116). On April 18, 2023, the Court asked Plaintiffs and Kitsap County to provide potential adverse evidentiary jury instructions to assist its analysis of the sanctions motion. (Dkt. No. 176.) On April 24, 2023, Plaintiffs and Kitsap County filed its supplemental adverse evidence jury instruction. (Dkt. Nos. 180, 182.) NaphCare filed supplemental responses to the adverse evidentiary jury instructions on May 2, 2023. (Dkt No. 190.)

III DISCUSSION

Plaintiffs move for sanctions under Federal Rule of Civil Procedure 37(e) against Kitsap County, alleging Kitsap County failed to preserve video from Central A Unit, where Mr. Rapp was jailed, from 12:59pm to midnight on January 1, 2020. (Dkt. No. 91 at 2–4.)

A. Legal Standard

A party "engage[s] in spoliation of documents as a matter of law only if they had 'some notice that the documents were potentially relevant' to the litigation before they were destroyed." *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002) (quoting *Akiona v. United State*s, 938 F.2d 158, 161 (9th Cir. 1991)). The Court may issue sanctions for spoliation based on its own inherent authority or by virtue of Rule 37. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). Rule 37(e), which deals with sanctions for failure to preserve electronically stored information ("ESI"), provides:

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

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

The party seeking sanctions under Rule 37(e) needs to establish "(i) the evidence at issue qualifies as ESI, (ii) the ESI is 'lost' and 'cannot be restored or replaced through additional discovery,' (iii) the offending party 'failed to take reasonable steps to preserve' the ESI, and (iv) the offending party was under a duty to preserve it." *Hunters Cap., LLC v. City of Seattle*, No. C20-0983 TSZ, 2023 WL 184208, at *6 (W.D. Wash. Jan. 13, 2023) (internal citations omitted).

Rule 37(e) permits terminating sanctions "only when the party who lost the information 'acted with the intent to deprive another party of the information's use in the litigation.' A finding of intent . . . eliminates the requirement that the opposing party be prejudiced by the

spoliation." *OmniGen Rsch. v. Yongqiang Wang*, 321 F.R.D. 367, 371–72 (D. Or. 2017). "Intent may be inferred if a party is on notice that documents were potentially relevant and fails to take measures to preserve relevant evidence, or otherwise seeks to keep incriminating facts out of evidence." *Est. of Hill by & through Grube v. NaphCare, Inc.*, No. 2:20-CV-00410-MKD, 2022 WL 1464830, at *11 (E.D. Wash. May 9, 2022) (quoting *Colonies Partners, L.P. v. Cty. of San Bernardino*, No. 518CV00420JGBSHK, 2020 WL 1496444, at *9 (C.D. Cal. Feb. 27, 2020)).

B. Whether Kitsap County Spoliated Evidence

Neither party disputes that 11 hours of videotape of Central A Unit from January 1, 2020, has been deleted and there is no way to replace it. (*See* Dkt. No. 89-1 at 535.) Kitsap County also does not dispute it was on notice of an obligation to preserve evidence upon receiving Plaintiffs' litigation preservation letters nor does it dispute it was under an obligation to "preserve video evidence depicting the events of and immediately surrounding Mr. Rapp's suicide." (Dkt. No. 108 at 12.) Instead, Kitsap County asserts it intentionally did not retain the video at issue because Lieutenant Hall did not believe the video at issue was relevant to Plaintiffs' requests. (Dkt. No. 110 at 4–6.) Kitsap County argues it did preserve all evidence it was obligated to preserve—e.g., what was proportional and relevant to the case from its perspective. (Dkt. No. 108 at 11–12.) While a party need not preserve every last document in anticipation of litigation, "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

The Court finds Kitsap County did not take reasonable steps to preserve evidence relevant to this litigation. In his 30(b)(6) deposition, Lieutenant Hall testified as follows:

> Q. Are you aware of any written records, any instructions, anything like that, that was given to anybody, emails or anything, in connection with deciding what to preserve and what not to preserve as far as video retention of Mr. Rapp?
> A. Not that I'm aware of.
> Q. Were you given any instructions, any written instructions, any emails about what to preserve and what to allow to expire with regard to video of Mr. Rapp?
> A. Other than the PRA, no.
> Q. Were you given any verbal instructions by any supervisors in regard to what portions of video of Mr. Rapp to preserve and what to allow to expire?
> A. No.

(Dkt. No. 89-1 at 961.) [1]

The Court notes, with astonishment, that Lieutenant Hall was apparently solely responsible for determining what videos were or were not responsive to Plaintiffs' litigation preservation letter.[2] Kitsap County has provided no other evidence or assertions to the Court about what role counsel played in the document preservation process in the aftermath of Mr. Rapp's suicide. "Since at least 2006, counsel have been required to take an active, affirmative role in advising their clients about the identification, preservation, collection, and production of ESI." *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 927 (N.D. Ill. 2021). The Court cannot find Kitsap County acted reasonably when it took no steps to implement what have long been considered standard ESI preservation practices.[3] *See, e.g.*, *Scalia v. KP Poultry, Inc.*, No. CV193546TJHPLAX, 2020 WL 6694315, at *5 (C.D. Cal. Nov. 6, 2020).

C. Intent to destroy evidence.

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[2] In his affidavit, Lieutenant Hall does not reference whether counsel for Kitsap County was involved in determining which documents and videos were relevant to Plaintiffs' litigation preservation letter, or whether they advised their clients of their obligations to preserve relevant evidence. (*See generally* Dkt. No. 110.)

[3] The Court cautions counsel to review their ESI obligations for future practice. *See* Joshua C. Gillil and Thomas J. Kelley, *Modern Issues in E-Discovery*, 42 CREIGHTON L. REV. 505, 513 (2009) ("[I]f you know you are being sued and you do not turn off your auto-delete procedure, you are not acting in good faith.")

Having found that Kitsap County was a under a duty to preserve evidence and that it failed to take reasonable steps to preserve such evidence, the Court must now determine whether the destruction of the 11 hours of videotape was intentional. *See Est. of Hill*, 2022 WL 1464830, at *11–12. "Only upon a finding of intent may the Court impose severe sanctions such as an adverse-inference instruction or default judgment." *Hunters Cap.*, 2023 WL 184208, at *8.

Kitsap County asserts there is no evidence it acted with "with a culpable state of mind in not preserving such evidence." (Dkt. No. 108 at 13.) According to Kitsap County, "[e]ven if Lt. Hall might have been ultimately mistaken, there is no evidence he acted with intent to deprive Plaintiffs of information." (*Id.* at 14.)

"Although direct evidence of such intent is always preferred, a court can find such intent from circumstantial evidence." *Fast v. GoDaddy.com LLC*, 340 F.R.D. 326, 339 (D. Ariz. 2022). Courts have inferred an intent to destroy evidence where parties were willfully ignorant of their obligations to preserve evidence. *See, e.g.*, *Kelley as Tr. of BMO Litig. Tr. v. BMO Harris Bank N.A.*, No. 19-CV-1756 (WMW), 2022 WL 2801180, at *6 (D. Minn. July 18, 2022) ("[W]illful ignorance despite a duty to preserve evidence can be indicative of a party's bad-faith intent.").

Here, there is no doubt that Lieutenant Hall intentionally did not preserve the 11 hours of videotape at issue—Lieutenant Hall admits as much. (*See* Dkt. No. 110 at 6) (noting that "I did not preserve video footage from 12:59 p.m. through midnight on January 1, 2020.") The closer question is whether such conduct may be construed as intended "to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2). "A party's destruction of evidence qualifies as willful spoliation if the party has 'some notice that the documents were potentially relevant to the litigation before they were destroyed.'" *Leon*, 464 F.3d at 959; *see also Est. of*

Hill, 2022 WL 1464830, at *11 (explaining that intent may be inferred where party is on notice of documents' potential relevance to anticipated litigation). Lieutenant Hall was certainly on notice of the video's potential relevance to anticipated litigation—he acknowledged the Sheriff's Office received Plaintiffs' litigation preservation letter and that he "was tasked with identifying and preserving responsive videos." (Dkt. No. 110 at 4.)[4]

The totality of the circumstances suggest it is appropriate to infer Lieutenant Hall, and by extension Kitsap County, intended to deprive Plaintiffs of the 11 hours of videotape from January 1, 2020. As discussed, Lieutenant Hall was aware at the time of his review of the relevant videos that Plaintiffs had requested the preservation of "all materials related to the arrest, prosecution, incarceration, medical treatment, and death of Nicholas Winton Rapp." (Dkt. No. 110 at 4.) Lieutenant Hall appears to have been solely responsible for determining which video was relevant to both Plaintiffs' preservation request and the concurrent public records act request. (Dkt. No. 89-1 at 967–68.) Counsel for the Sheriff's Office does not appear to have issued a litigation hold notice after receiving Plaintiffs' litigation preservation letter and did not provide Lieutenant Hall with any guidance as to what materials should be preserved. (*Id.* at 961.) Lieutenant Hall testified it would be standard operating procedure to preserve all video that Mr. Rapp appeared on during his confinement. (*Id.* at 947–48.) Lieutenant Hall also asserts that he did not review any of the eleven hours of video at issue. (*Id.* at 967) ("Q. So in making the determination whether or not to allow that 11 hours to expire, is it your testimony that the video was not reviewed? A. I did not review it.").

[4] The Court also notes this was the second suicide at Kitsap County Jail in under a year, a fact which suggests Kitsap County should have been aware of the potential importance of retaining video evidence in the instant case. *See Smith v. NaphCare Inc.*, No. 3:22-CV-05069-DGE, 2023 WL 2477892, at *2 (W.D. Wash. Mar. 13, 2023).

These series of missteps go well beyond gross negligence and permit the Court to infer an intent to deprive Plaintiffs of this video evidence. *Cf. Laub v. Horbaczewski*, No. CV 17-6210-JAK (KS), 2020 WL 9066078, at *6 (C.D. Cal. July 22, 2020) (noting relevant factors to consider when determining intent include "the timing of the destruction, the method of deletion (e.g., automatic deletion vs. affirmative steps of erasure), selective preservation, the reason some evidence was preserved, and, where relevant, the existence of institutional policies on preservation."). The Court therefore finds Kitsap County deleted the video at issue with the intent to deprive Plaintiffs of access to it.

D. Video Relevance.

Kitsap County asserts sanctions aren't warranted because Plaintiffs have failed to demonstrate the missing evidence would support Plaintiffs' claims. (Dkt. No. 108 at 14.)

Spoliation of evidence raises a presumption that the evidence relates to the merits of the case and was adverse to the party that destroyed it. *Jerry Beeman & Pharmacy Servs., Inc. v. Caremark Inc.*, 322 F. Supp. 3d 1027, 1037 (C.D. Cal. 2018). "[A]n offending party cannot assert a 'presumption of irrelevance' as to destroyed material because the relevance of destroyed documents 'cannot be clearly ascertained.'" *Hunters Cap.*, 2023 WL 184208, at *8; *see also Stedeford v. Wal-Mart Stores, Inc.*, No. 214CV01429JADPAL, 2016 WL 3462132, at *8 (D. Nev. June 24, 2016) ("A party guilty of intentional spoliation 'should not easily be able to excuse the misconduct by claiming' that the spoliated evidence was of 'minimal import.'")

The Court agrees with Plaintiffs that evidence that Mr. Rapp's COWS and CIWA assessments in the afternoon and evening of January 1, 2020, were not actually performed would be highly relevant to this case. Both parties acknowledge (and the Court has confirmed through review of the record), that the times listed on Mr. Rapp's medical records do not actually reflect

the actual time in which a medical assessment was performed. (*See* Dkt. Nos. 91 at 3; 180 at 3.) Indeed, in one instance a CIWA was recorded more than two hours after it was actually performed. (Dkt. Nos. 89-1 at 287; 159 at 18–20; 180 at 3.) Plaintiffs' experts have also testified alcohol withdrawal and opiate withdrawal are both known suicide risk factors. (See Dkt. No. 158-15 at 17–18.) Failure to administer the COWS and CIWA assessments, and by extension to identify potential withdrawal symptoms that Mr. Rapp was undergoing, would reasonably be relevant to Plaintiffs' claims.

The Court finds Kitsap County has failed to rebut the presumption that the deleted videos are relevant to Plaintiffs' claims.

E. Sanctions

Since the Court has found that Kitsap County intentionally spoliated evidence, the Court may "(A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment." Fed. R. Civ. P. 37(e)(2). To determine the appropriate sanction, including whether terminating sanctions are warranted, the Court must consider the following factors: "(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 sanctions." *Leon*, 464 F.3d at 958 (quoting *Anheuser-Busch, Inc. v. Nat. Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995)).

"The first two of these factors favor the imposition of sanctions in most cases, while the fourth cuts against a default or dismissal sanction. Thus, the key factors are prejudice and availability of lesser sanctions." *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990).

Kitsap County's failure to retain (or review) eleven hours of video records on January 1st substantially prejudices Plaintiffs' claims. A central tenet of Plaintiffs' claims against the NaphCare defendants is that Ms. Nagra and other NaphCare Defendants did not actually conduct COWS and CIWA assessments or otherwise tend to Mr. Rapp while he was undergoing withdrawal. (*See, e.g.*, Dkt. Nos. 63 at 25–26; 91 at 10–11.) Plaintiffs similarly assert Kitsap County employees acted negligently and failed to adequately care for Mr. Rapp. The missing video would likely confirm or deny Plaintiffs' theories by demonstrating whether Kitsap County and NaphCare personnel actually conducted medical assessments of Mr. Rapp or otherwise checked in on Mr. Rapp in the afternoon and evening of January 1, 2020. Kitsap County's deletion of this video, in defiance of Plaintiffs' preservation request and in the absence of guidance from legal counsel "interfere[s] with the rightful decision of the case." *Halaco Eng'g Co. v. Costle*, 843 F.2d 376, 381 (9th Cir. 1988).[5] Accordingly, the Court finds this factor weighs in favor of a default judgment.

The Court must also assess whether less drastic sanctions are available. While terminating sanctions are to be used only in exceptional circumstances, the Court finds it cannot issue a lesser sanction without prejudicing NaphCare's interests in this litigation. As in *Estate of Hill*, the spoliated evidence, for which Kitsap County is solely responsible, is relevant to Plaintiffs' claims against other Defendants in this action. *Est. of Hill*, 2022 WL 1464830, at *15. While Kitsap County proposed the Court could issue an adverse evidentiary instruction to the

[5] Kitsap County's decision to delete this evidence has interfered not only with Plaintiffs' adjudication of their case, but also with the NaphCare Defendants' defense. As NaphCare notes, they have "been prejudiced by the unavailability of this video evidence, which would only confirm that NaphCare and its employees provided timely and appropriate medical care." (Dkt. No. 178 at 2.)

jury, their proposed instruction does little to actually ameliorate the harm to Plaintiffs and the Court disregards it. (*See* Dkt. No. 180 at 1–2.)

Plaintiffs' proposed jury instruction is as follows:

> Defendant Kitsap County at one time possessed a video recording from a camera located outside of Nicholas Rapp's cell in the Kitsap County Jail, covering the period from 12:59 p.m. to midnight on January 1, 2020. Kitsap County failed to preserve this footage for Plaintiffs' use in this litigation after its duty to preserve it arose. You may assume that, had Kitsap County preserved the video, the footage would have shown no interaction with medical staff, including NaphCare employees Defendants Amninder Nagra and Haven LaDusta. You may further assume that the footage corroborates Plaintiffs' evidence and undermines any contrary evidence. Whether this information is important to you in reaching your verdict is for you to decide.
>
> This instruction does not allow you to draw the same adverse inference against Defendants NaphCare, Inc., Amninder Nagra, Haven LaDusta, or any Defendant other than Kitsap County when considering: (1) Plaintiffs' 42 U.S.C. § 1983 claims against Defendants NaphCare, Inc., Amninder Nagra, and Haven LaDusta; (2) Plaintiffs' negligent hiring claim against NaphCare, Inc.; and (3) Plaintiffs' corporate negligence claim against NaphCare, Inc.

(Dkt. No. 182 at 1.)

As in *Estate of Hill*, such an instruction would require the Court to direct the jury to assume facts for one defendant that they would then have to completely disregard when assessing liability for Defendants Nagra and LaDusta. The Court agrees this would "confuse the jury and create a risk that the jury would impermissibly consider the adverse inference when determining the liability of" the other Defendants. *Est. of Hill*, 2022 WL 1464830, at *16. As NaphCare notes, the proposals by both parties "run afoul of the applicable law because they exclusively target NaphCare and its employees, who had no control over the video at issue and no involvement in the alleged spoliation." (Dkt. No. 190.) The Court therefore finds it cannot issue a lesser sanction and this factor weighs in favor of entry of default judgment.

Because the Court finds that sanctions are warranted for spoliation of video evidence and because the Court cannot issue a lesser sanction without creating unfair prejudice to the NaphCare Defendants, the Court grants Plaintiffs' request for the Court to enter default judgment against Kitsap County. Plaintiffs are also awarded attorneys' fees and costs incurred directly as a result of Kitsap County's spoliation of evidence. *See Hunters Cap.*, 2023 WL 184208, at *10.

IV CONCLUSION

Accordingly, and having considered Plaintiffs' motion (Dkt. No. 91), the briefing of the parties, and the remainder of the record, the Court finds and ORDERS that Plaintiffs' motion is GRANTED.

1. DEFAULT JUDGMENT shall be ENTERED against Kitsap County on Plaintiffs' negligence and § 1983 claims against Kitsap County. Damages shall be determined at trial.
2. The parties are DIRECTED to meet and confer and to file a status report regarding whether the Court's decision implicates pending motions to which Kitsap County is a party (Dkt. Nos. 93, 152). The parties shall submit their joint status report within three weeks of the issuance of this order.

Dated this 31st day of May, 2023.

David G. Estudillo
United States District Judge