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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jane Doe #1; Jane Doe #2; Norlan Flores, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Jeh Johnson, Secretary, United States Department of Homeland Security, in his official capacity; R. Gil Kerlikowske, Commissioner, United States Customs & Border Protection, in his official capacity; Michael J. Fisher, Chief of the United States Border Patrol, in his official capacity; Jeffrey Self, Commander, Arizona Joint Field Command, in his official capacity; Manuel Padilla, Jr., Chief Patrol Agent-Tucson Sector, in his official capacity,

Defendants.

Case No. 4:15-cv-00250-TUC-DCB

PLAINTIFFS' MOTION FOR SANCTIONS

CLASS ACTION

Oral Argument Requested

(Assigned to the Honorable David C. Bury)

Action Filed: June 8, 2015

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I. INTRODUCTION

Defendants have destroyed critical video-recordings that demonstrated that immigrant detainees in Tucson Sector Border Patrol stations were deprived of sleep in overcrowded rooms, exposed to unsanitary conditions, denied adequate food, and otherwise subjected to unconstitutional conditions of confinement. (Defs.' Mot. to Dismiss (ECF No. 52) at 6–17.) Defendants knew they had an obligation to preserve the video-recordings and even reassured Plaintiffs' counsel that they had "take[n] all required preservation steps." (Declaration of Colette R. Mayer in Support of Plaintiffs' Motion for Sanctions ("Mayer Decl.") filed herewith, ¶ 4 and Ex. C.) Despite these assurances, Defendants stood by and let approximately two months of video-recordings be destroyed, apparently including the recordings related to the identified Doe plaintiffs. Worse, Defendants permitted this destruction to occur while Plaintiffs sought the same video-recordings in its expedited discovery motion filed on June 23, 2015. (ECF No. 25.)

This Court's order of August 14, 2015, requiring Defendants to produce the video-recordings, forced Defendants to admit what they had done. In summary, from early June to mid-August, Defendants took few steps, if any, to preserve relevant evidence. Defendants failed to issue a litigation hold at the outset of this case and took no steps to determine whether relevant video footage existed and was preserved. Defendants also failed to ensure that they had the technical wherewithal to preserve footage—a fact that Defendants now advance to justify their continued spoliation.

Given Defendants' reckless disregard for the well-established obligation to preserve all relevant evidence, sanctions are warranted. The destruction of relevant evidence must cease immediately. Plaintiffs seek an order (1) issuing adverse inferences for the trier of fact; and (2) requiring Defendants immediately to produce a copy of the oldest retained video-recording for each detainee holding area. This motion is urgent because, despite this Court's order that Defendants "not destroy or record over any video surveillance tapes of any and all detainee holding areas" (ECF No. 51), it appears Defendants continue to erase stored surveillance footage even today.

II. BACKGROUND

Plaintiffs filed the Complaint in this action on June 8, 2015. (ECF No. 1.) On June 10, 2015, Plaintiffs' counsel sent via email to Department of Homeland Security ("DHS") Office of the General Counsel copies of a preservation letter addressed to the Office of the General Counsel, U.S. Customs and Border Protection ("CBP") Office of the Chief Counsel, and CBP Assistant Chief Counsel (hereafter "Preservation Letter"). (Mayer Decl., ¶ 2 and Ex. A.) A copy of the same letter was delivered to those agencies via Fed-Ex on June 11. (*Id.* at ¶ 2.) The letter (1) demanded an immediate halt to "business practices that destroy potential evidence" including "scheduled destruction of backup media" and other practices; (2) identified among the items of evidence to preserve "video recordings, audio recordings, digital recordings . . . pictures, photographs, films, computer records [and] voice recordings;" and (3) requested that all DHS, CBP and Border Patrol employees and contractors be given prompt notification of their duty to preserve evidence. (*Id.* at Ex. A.)

Defendants were served with the Complaint between June 12 and June 16, 2015 (Mayer Decl., ¶ 8), and on June 17, 2015, Sarah Fabian and Dillon Fishman from the U.S. Department of Justice both entered appearances as counsel for all Defendants. (ECF Nos. 18, 23.)

On July 14, 2015, Plaintiffs' counsel sent an email to Ms. Fabian and Mr. Fishman, attaching a copy of the Preservation Letter and reminding Defendants of their duty to preserve evidence. (Mayer Decl., ¶ 3 and Ex. B.) Plaintiffs' counsel specifically noted that it "wanted to make sure [Defendants' counsel] had received a copy and that it has been sent to all relevant personnel." (*Id.* at Ex. B.) The following day, Mr. Fishman acknowledged receipt of the letter and stated that Defendants had "taken all required preservation steps" and would "continue to comply with the relevant rules and laws." (Mayer Decl., ¶ 4 and Ex. C.)

On June 23, 2015, Plaintiffs filed a Motion for Expedited Discovery. (ECF No. 25.) Plaintiffs sought permission to "[r]eview and reproduce all . . . surveillance

video footage." (*Id.* at 7.) In their Opposition, Defendants nowhere argued that the surveillance video footage Plaintiffs sought was irrelevant. (*See* Opp'n to Plts.' Mot. for Expedited Disc. (ECF No. 39).) Defendants did argue, however, "There Is No Basis to Find That the Evidence [Plaintiffs] Seek Will Be Unavailable in the Normal Course of Discovery," and that "there is no basis to believe . . . that Defendants will intentionally destroy or transfer evidence in this case." (*Id.* at 7-8.)

On August 13, 2015, at the hearing on Plaintiffs' Motion for Expedited Discovery, the Court ordered Defendants "not to record or record over or otherwise destroy any such surveillance tapes . . . and to preserve those which are presently in their possession which have not been recorded over or otherwise destroyed." (Mayer Decl,, ¶ 5 and Ex. D at 41:9-13). The following day, August 14, 2015, the Court issued a written order requiring that Defendants "shall not destroy or record over any video surveillance tapes . . . and shall preserve such surveillance tapes currently in their possession." (ECF No. 51, ¶ 8.)

On August 19, 2015, Defendants filed a "Notice of Facts Regarding Compliance with Court's Order" (ECF No. 53) and supporting Declaration of George Allen (ECF No. 53-1). These documents acknowledge that:

- Defendants' counsel did not know the relevant maintenance procedures for video recordings taken at Border Patrol stations before the August 13, 2015 hearing (ECF No. 53 at 1);
- Border Patrol is "currently implementing emergency measures to comply" with the Court's August 14, 2015 Order (*id.* at 2);
- Border Patrol expected to have additional temporary electronic storage in place within 48 to 72 hours of the notice (*id.*);
- Assistant Chief Patrol Agent George Allen directed Tucson Sector stations to determine the location of all cameras recording any detainee holding areas and the corresponding periods of video footage retention only after learning about the Court's August 13, 2015 Order (*id.*);
- "[N]ew video continuously records over stored video" (*id.*), meaning video surveillance tapes were continuously destroyed for more than two months while this litigation was pending;
- Border Patrol did "not currently have the capability to maintain video surveillance" beyond the 15 to 30 days capacity of their digital storage devices "such as digital video recorders (DVR) and computer hard drives" (*id.* at 2-3).

On Friday, August 21, 2015, Plaintiffs' counsel sent a letter via email and certified mail to Ms. Fabian and Mr. Fishman addressing Plaintiffs' concerns with Defendants' August 19, 2015 Notice, including that the notice made no mention of any effort to preserve video recordings prior to August 13, 2015. (Mayer Decl., ¶ 6 and Ex. E.) The letter requests that Defendants provide information regarding any notice to Defendants' employees regarding their duty to preserve evidence and information regarding "any destruction, deletion or erasure of video surveillance media." (*Id.* at Ex. E.) Plaintiffs' counsel received no response to the letter. (*Id.* at ¶ 6.)

On Monday, August 24, 2015, Plaintiffs' counsel sent a follow-up letter seeking to meet and confer with Defendants' counsel regarding the substance of Plaintiffs' August 21, 2015 letter. (Mayer Decl., ¶ 7 and Ex. F.) Again, Plaintiffs received no response. (*Id.* at ¶ 7.)

On August 26, 2015, Plaintiffs' counsel telephoned the Court's law clerk to ask about the appropriate expedited procedure for resolving the issues raised in Plaintiffs' August 21 and 24, 2015 letters. (Mayer Decl., ¶ 9.) The Clerk initiated a meet and confer with counsel for both parties. During the meet and confer, Defendants' counsel, Ms. Fabian, represented that Plaintiffs were not entitled to the information they requested, and to the extent they were entitled to any information, Defendants' counsel had no intention of providing that information. (*Id.*)

On August 27, 2015, Defendants filed a "Second Notice of Facts Regarding Compliance with Court's Order" (ECF No. 55) ("Second Notice") and supporting declarations of George Allen ("Aug. 27 Allen Decl.") (ECF No. 55-1) and Samuel R. Shivers III (ECF No. 55-2). These documents acknowledge that:

- "[T]he stations have made the operational decision to continue, where possible, recording current video footage for the protection of officers and staff . . . even though this automatically causes recording over some existing stored surveillance footage." (Second Notice at 2.)
- Border Patrol is still working "to bring online the additional capacity to store video in full compliance with the Court's [August 14, 2015] order." (*Id.* at 2-3.)

- Only four of the eight stations in Tucson Sector currently "have the resources to store recorded video footage on an ongoing basis." (Aug. 27, Allen Decl. ¶ 8.)
- As of August 26, 2015, closed circuit television digital video recorders were failing, not operational or disconnected and powered down in four of the eight Border Patrol Tucson Sector stations. (Shivers Decl. ¶ 9.)
- Two stations were "currently working to overcome operational difficulties to implement the emergency upgrade" necessary to comply with the Court's August 14, 2015 Order. (Aug. 27 Allen Decl. ¶ 8.)
- A number of unspecified "technical and access issues" were encountered upon installation of disk storage arrays, and that unspecified "[r]emediation plans were put into action on those DVRS that experienced technical or access issues." (Shivers Decl. ¶¶ 5–6.)
- "[T]he oldest continuous video [at Douglas Station] is from July 6, 2015," nearly a month after this action was commenced. (*Id.* at ¶ 9.g.)
- The security system at Wilcox Station "is not compatible with OIT's backup solution." (*Id.* at ¶ 9.h.)

III. ARGUMENT

A. Defendants Engaged in Spoliation of Critical Evidence.

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." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (citation omitted). Trial courts have the "inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of evidence," *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993), and may impose sanctions for spoliation under their inherent powers to manage their own affairs, *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). Moreover, where—as here—a party "fails to obey an order to provide and permit discovery," courts may impose sanctions under Federal Rule of Civil Procedure 37. Fed. R. Civ. P. 37(b); *Leon*, 464 F.3d at 958.

"'A party seeking sanctions for spoliation of evidence must prove the following elements: 1) the party having control over the evidence had an obligation to preserve it when it was destroyed or altered, 2) the destruction or loss was accompanied by a

'culpable state of mind,' and 3) the evidence that was destroyed or altered was relevant to the claims or defenses of the party that sought the discovery of the spoliated evidence.'" *Slep-Tone Entm't Corp. v. Granito*, No. CV–12–298–TUC DCB, 2014 WL 65297, at *3 (D. Ariz. Jan. 8, 2014) (Bury, J.) (quoting *Surowiec v. Capital Title Agency, Inc.*, 790 F. Supp. 2d 997, 1005 (D. Ariz. 2011)).

1. Defendants Had an Obligation to Preserve the Video Footage that They Destroyed and Continue to Destroy.

A duty to preserve information, including videographic information, arises when a party knows or should know that the information is relevant to pending or future litigation. *Pettit v. Smith*, 45 F. Supp. 3d 1099, 1105 (D. Ariz. 2014). The duty is unquestionably triggered "when litigation actually commences." *Id.* Plaintiffs filed their Complaint on June 8, 2015. This triggered Defendants' duty to preserve.

Defendants, moreover, were reminded of their obligation to preserve the specific evidence at issue in this motion on or around June 10, 2015, when Plaintiffs sent the Preservation Letter. (Mayer Decl., ¶ 2 and Ex. A.) The letter notified Defendants of their "ongoing duty to preserve all evidence relevant to this litigation," including "video recordings . . . digital recordings [and] films." (*Id.*) It demanded that Defendants "immediately halt all routine business practices that destroy potential evidence, including but not limited to document destruction . . . server back-up tape rotation . . . scheduled destruction of back-up media [and] re-imaging of drives." (*Id.*) And it requested that Defendants "promptly communicate the preservation obligation to all DHS, CBP, and Border Patrol employees and contractors." (*Id*).

On July 14, 2015, Plaintiffs mailed a copy of the Preservation Letter to Defendants' counsel, who, the following day, acknowledged receipt and assured Plaintiffs that Defendants "have taken all required preservation steps, and will continue to comply with the relevant rules and law." (Mayer Decl., ¶¶ 3-4 and Exs. B-C.)

Notwithstanding Defendants' notice—and notwithstanding their assurance that they had "taken all the required preservation steps"—Defendants failed to suspend CBP

stations' automatic-delete protocol and failed to preserve video footage of (among other things) the detainee holding areas. Indeed, it was not until August 14, 2015, when this Court ordered Defendants "not [to] destroy or record over any video surveillance tapes of any and all detainee holding areas [and to] preserve such surveillance tapes currently in their possession," (ECF No. 51 at 3), that Defendants finally took "emergency steps" to preserve the footage (*see* Defs.' Notice of Facts Regarding Compliance with Ct.'s Order (ECF No. 53) at 2).

Even then, Defendants only promised full compliance on or around August 22, 2015. (*Id.* (declaring intention to comply with the Order "within 48-72 hours").) Defendants, however, have failed to meet even this deadline. On August 27, 2015, Defendants filed a "Second Notice of Facts Regarding Compliance with Court's Order" with supporting declarations. (ECF Nos. 55, 55-1, 55-2.) These documents establish that, nearly two weeks after the Court ordered Defendants not to "destroy or record over any video surveillance tapes of any and all detainee holding areas" and to "preserve such surveillance tapes currently in their possession," Defendants were still failing to comply with their preservation obligations. Defendants' failure continues.

This Court has noted that a "party engages in spoliation if he or she has 'some notice that the documents were potentially relevant' to the litigation before they were destroyed." *Slep-Tone*, 2014 WL 65297, at *3 (citation omitted). At the very latest, Defendants were on notice on July 15, 2015, the day Defendants assured Plaintiffs that they were preserving evidence. Yet for several weeks thereafter, Defendants continued to destroy—or failed to prevent the destruction of—videographic evidence.

2. Defendants Evinced a Culpable State of Mind.

Even after litigation had commenced, even after receiving a preservation demand letter, and even after assuring Plaintiffs that they "ha[d] taken all the required preservation steps," Defendants kept their automatic-delete protocol in place. Defendants only undertook preservation efforts when ordered to do so by this Court. But it does not take a court order to trigger the preservation obligation. *See* Fed. R. Civ. P. 37(f) advisory

committee note to 2006 amendment ("A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case").

Defendants' post-Order conduct makes it clear that had they taken their preservation obligations seriously, they could have preserved weeks of video footage. Two months after this litigation began, for the very first time Defendants:

- "[D]etermine[d] the location of all cameras that were currently recording any detainee holding areas and the corresponding periods of video footage retention." (Aug. 19, 2015 Declaration of George Allen (ECF No. 53-1) ("Aug. 19 Allen Decl.") ¶ 4.)
- Took "urgent steps to address [Tucson Sector's] needs for additional electronic storage space for video footage to ensure full compliance with the Court's order." (*Id.* at ¶ 6.)
- Promised "additional recording capacity functioning on all cameras in the Tucson Sector." (*Id.*)

Defendants' failure to take these very measures in June, when Defendants were indisputably on notice, is evidence that Defendants behaved willfully, and therefore culpably: "When a party on notice intentionally destroys, rather than accidentally loses, th[e] evidence, it is a 'willful' spoliator even if it did not intend to deprive an opposing party of relevant evidence." *Food Servs. of Am., Inc. v. Carrington*, No. CV–12–00175–PHX–GMS, 2013 WL 4507593, at *21 (D. Ariz. Aug. 23, 2013), *reconsideration denied*, 2013 WL 5655664 (Oct. 17, 2013) (citing *Leon*, 464 F.3d at 959). At the very least, Defendants' failure to suspend their automatic-delete protocol evidences the necessary culpable state of mind. *E.g.*, *Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132, 1146–47 (N.D. Cal. 2012).

Lest there be any doubt, Defendants are not entitled to Rule 37(e)'s safe harbor from sanctions arising from the loss of electronically stored information as a result of the "routine, good faith operation of an electronic information system." Fed. R. Civ. P. 37(e). This safe harbor provision does not apply to parties who fail to stop the operation of a system that is obliterating information that may be discoverable in litigation. *See* Fed. R. Civ. P. 37(f) advisory committee note to 2006 amendment ("A party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by

allowing that operation to continue in order to destroy specific stored information that it [was] required to preserve").

3. The Destroyed Video Footage is Relevant to Plaintiffs' Claims.

Relevance for spoliation purposes tracks Federal Rule of Evidence 401. *Slep-Tone*, 2014 WL 65297, at *5. This is a low bar, *Slaughter-Payne v. Shinseki*, 522 F. App'x 409, 410 (9th Cir. 2013), and is one that is easily surmounted here.

The video footage of detainee holding areas would reveal the cleanliness of hold cells, detainees' access to beds and bedding, the existence of medical screening, and a host of other facts that are "of consequence in determining" whether the conditions of confinement in Defendants' facilities pass constitutional muster. Fed. R. Evid. 401(b). In addition, the footage would serve to demonstrate that Defendants systematically fail to abide by their own policies and procedures in violation of the Administrative Procedure Act.

Defendants have never disputed the relevance of the footage—not in their Opposition to Plaintiffs' Motion for Expedited Discovery (ECF No. 39), nor during the August 13 hearing (Mayer Decl., ¶ 5 and Ex. D). Nor could they. As the only visual evidence of Defendants' misconduct, the footage is not merely relevant, but critical to Plaintiffs' claims. Now that footage has been destroyed, Defendants may try to minimize this point. But because "the relevance of . . . [destroyed] [evidence] cannot be clearly ascertained because the [evidence] no longer exist[s]," Defendants "can hardly assert any presumption of irrelevance as to the destroyed [evidence]." *Leon*, 464 F.3d at 959 (internal quotes and citation omitted; second and third brackets added).

4. Defendants Cannot Credibly Claim That the Preservation of Relevant Footage Would Have Caused an Undue Burden.

Defendants may claim that preservation of the evidence would have placed an undue burden on Defendants. But any such claim would confuse the obligation to preserve with the requirement to produce materials in discovery. All evidence, even inaccessible back-up tapes must be preserved even though "[a] party need not provide

discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." Fed. R. Civ. P. 26(b)(2)(B). In any event, Defendants own post-Order conduct demonstrates that the footage Plaintiffs seek was in no way physically inaccessible. Nor was the cost of further backup storage prohibitive.[1] An initial "expenditure of approximately $10,000, with an additional expenditure of $5,000 every 90-120 days" is not negligible. (*See* "Notice of Facts Regarding Compliance with Court's Order" (ECF No. 53) at 2.) But given that the CBP's 2015 budget was over $12.7 billion, the relative burden of storing the footage—even for many months—can hardly be deemed undue. *See* U.S. Department of Homeland Security, Budget in Brief, Fiscal Year 2016 at 10, *available at* http://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf.

B. Sanctions Are Appropriate, and Should Include an Adverse Inference and the Immediate Production of Remaining Videographic Evidence.

"Courts in this Circuit have suggested that a 'finding of fault or simple negligence is a sufficient basis on which a [c]ourt can impose sanctions against a party that has destroyed documents.'" *Surowiec*, 790 F. Supp. at 1008 (quoting *Melendres v. Arpaio*, No. CV–07–2513–PHX–GMS, 2010 WL 582189, at *5 (D. Ariz. Feb. 12, 2010)). Defendants' conduct was not merely negligent; it was grossly negligent, reckless, and arguably in bad faith. Sanctions are appropriate.

In fashioning sanctions, Courts look to what would "best (1) deter[] parties from future spoliation, (2) place[] the risk of an erroneous judgment on the spoliating party, and (3) restore[] the innocent party to their rightful litigation position.'" *Slep-Tone*, 2014 WL 65297, at * 3 (citation omitted). "Sanctions that a federal court may impose for spoliation include assessing attorney's fees and costs, giving the jury an adverse inference

[1] In any event, Defendants' counsel never raised the issue of cost or other burden, nor did they seek any kind of compromise when they provided assurances to Plaintiffs' counsel that they had "take[n] all required preservation steps." (Mayer Decl., ¶ 4 and Ex. C.)

instruction, precluding evidence, or imposing the harsh, case-dispositive sanctions of dismissal or judgment." *Surowiec*, 790 F. Supp. 2d at 1008 (citation omitted).

While Defendants' willful conduct merits a terminating sanction and would best deter Defendants from further spoliation, *see Leon*, 464 F.3d at 958, Plaintiffs submit that the following sanctions would adequately—though not completely—restore Plaintiffs to their *status quo ante*:

- An inference, applicable to all motions and at trial, that the videotapes would have demonstrated all facts described in Plaintiffs' declarations continue through the present.
- Immediate production of a copy of the oldest retained video-recording for each detainee holding area.

IV. CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court (1) issue adverse inference findings that the videotapes would have demonstrated all observable facts described in Plaintiffs' declarations continuing through the present; and (2) order Defendants to immediately produce a copy of the oldest retained video-recording for each detainee holding area.

Dated: August 28, 2015 By: */s/ Harold J. McElhinny*

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.2(j)

I hereby certify that after personal consultation and sincere efforts to do so, Plaintiffs' counsel has been unable to satisfactorily resolve this request for expedited discovery with counsel for the Defendants.

Colette R. Mayer
(typed)

(signature)

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2015, I caused a PDF version of the documents listed below to be electronically transmitted to the Clerk of the Court, using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to all CM/ECF registrants and non-registered parties.

Harold J. McElhinny	/s/ *Harold J. McElhinny*
(typed)	(signature)