Harold J. McElhinny*
Kevin M. Coles*
Elizabeth Balassone*
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522
Email: HMcElhinny@mofo.com
Email: KColes@mofo.com
Email: EBalassone@mofo.com

Attorneys for Plaintiffs

** Admitted pursuant to Ariz. Sup. Ct. R. 38(a)*

Additional counsel listed on signature page

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' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SANCTIONS

CLASS ACTION

(Assigned to the Honorable David C. Bury)

Action Filed: June 8, 2015

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

"On July 8, 2015," Chief Allen declares, "a litigation hold was distributed related to this case, which I received." (Declaration of George Allen ("Third Allen Decl.") ¶ 2, ECF No. 60-1.) There can be no doubt that from that point on Defendants had a duty to preserve all "evidence that *might* be useful" to Plaintiffs. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (emphasis added). Defendants were "expected, at the very least, to 'suspend [their] routine document and retention/destruction policy.'" *ACORN v. Cty. of Nassau*, No. CV 05-2301(JFB) (WDW), 2009 WL 605859, at *2 (E.D.N.Y. Mar. 9, 2009) (citation omitted).

Yet between July 8 and August 14, Defendants destroyed relevant video footage depicting the conditions of confinement in Tucson Sector stations—including footage depicting the detention of the named plaintiffs, Jane Doe #1 and Jane Doe #2. Defendants destroyed this footage despite Defendants' counsel's express assurance that Defendants were fully complying with their legal duty to preserve. "We appreciate the preservation notifications and reminders you sent, and have received them," wrote Dillon Fishman. (Motion for Sanctions, Ex. C, ECF No. 57-3.) "We have taken all required preservation steps, and will continue to comply with the relevant rules and law." (*Id.*) Defendants do not mention Mr. Fishman's assurances in their opposition, nor do they submit any explanation for Mr. Fishman concerning the justification, if any, for his false representations.

In spite of their assurances, Defendants had taken no steps to preserve this video footage whatsoever. Although Chief Allen had in hand a litigation hold on July 8, he did not even begin to assess Tucson Sector's video storage capabilities until August 14. (Third Allen Decl. ¶¶ 2, 7.) Had Defendants informed Plaintiffs that they were refusing to preserve, had they raised any argument they now raise in their opposition to this motion, Plaintiffs could have sought immediate relief from this Court. Instead, Defendants' counsel proffered false assurances—assurances that were hugely prejudicial and directly responsible for weeks of destroyed video evidence.

On August 14, this Court ordered Defendants "not [to] destroy or record over any video surveillance tapes [and to] preserve such surveillance tapes currently in their possession." (Court Order ¶ 8, ECF No. 51.) It would seem self-evident that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *United States v. United Mine Workers of Am.*, 300 U.S. 258, 293 (1947) (citations omitted). Rather than approach this Court to seek to modify the order, Defendants made the "operational decision to continue . . . recording current video footage . . . even though this automatically causes recording over some existing stored surveillance footage." (Defs.' 2nd Notice of Facts Regarding Compliance with Ct. Order at 2, ECF No. 55.) This is the definition of contempt.

Their misconduct exposed, Defendants erect a phalanx of straw men. They argue that Plaintiffs have not demonstrated bad faith or prejudice. Because Plaintiffs do not seek a default judgment sanction, Plaintiffs need neither demonstrate Defendants' bad faith nor prejudice to Plaintiffs. Nonetheless, Plaintiffs demonstrate both. Defendants also argue that the destroyed footage is not relevant, all the while conceding relevance by stating that they "themselves fully intend to use all available video footage" to litigate this case. (Opp'n at 7 n.3, ECF No. 60.) They argue that they had insufficient notice that Plaintiffs sought retention of surveillance footage. But they concede that Plaintiffs' June 23 Motion for Expedited Discovery expressly sought "surveillance video footage." (Mot. for Expedited Discovery at 1, ECF 25.) They argue that preservation of surveillance footage would be unduly burdensome and costly, but their behavior after this Court's August 14 Order demonstrates that they could have preserved and produced the requested evidence. Finally, they argue that they were compelled to overwrite existing footage because the safety and security of individuals at Border Patrol stations depends on continuous video recording. This, however, is undermined by their admission that several Tucson Sector stations have never had any functioning video-recording capabilities.

II. ARGUMENT

A. Because Plaintiffs Do Not Seek A Default Judgment Sanction, Plaintiffs Need Neither Demonstrate Bad Faith Nor Prejudice, But Plaintiffs Nevertheless Demonstrate Both.

Defendants have the law wrong. Bad faith and prejudice are relevant only where movants seek, or a court *sua sponte* decides to impose, the "'harsh sanction' of dismissal" or default judgment. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (citation omitted); *accord Slep-Tone Entm't Corp. v. Granito*, No. CV-12-258 TUC DCB, 2014 WL 65297, at *6 (D. Ariz. Jan. 8, 2014). Because Plaintiffs seek an adverse inference and the immediate production of footage in Defendants' possession, but not default judgment, Defendants' bad faith and Plaintiffs' prejudice are not germane. Regardless, Defendants' counsel's false assurances were in bad faith, and severely prejudiced Plaintiffs.

1. Defendants' Disregard of Their Legal Duty to Preserve and Their Defiance of This Court's Order Demonstrates Bad Faith.

Ninth Circuit law is clear that a party's destruction of evidence need not be in "bad faith" to warrant a court's imposition of sanctions. *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir.1993) (affirming adverse instruction sanction). District courts may impose sanctions against a party that merely had notice that the destroyed evidence was potentially relevant to litigation. *Id.* Defendants were on notice legally when this case was filed on June 8, 2015. *Pettit v. Smith*, 45 F. Supp. 3d 1099, 1105 (D. Ariz. 2014). Defendants concede they were on notice factually on July 8, 2015, when "a litigation hold was distributed related to this case." (Third Allen Decl. ¶ 2.) Defendants were obligated to immediately suspend the automatic deletion function on their digital video surveillance. *In Re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006) (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)). Nonetheless, Defendants continued—and continue to this day—to destroy relevant evidence. (Third Allen Decl. ¶¶ 3, 8.)

Regardless, Defendants clearly demonstrated bad faith. "A party 'demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court

order.'" *Leon*, 464 F.3d at 961 (citation omitted). Defendants did both. They disrupted the litigation by destroying relevant evidence, all the while professing compliance with their legal obligation to preserve. They then hampered the enforcement of this Court's order by making the "operational decision" to continue spoliating.

2. Defendants' Spoliation Prejudiced Plaintiffs.

Although this Court need not find prejudice to award Plaintiffs the sanctions they seek, Defendants' spoliation has prejudiced Plaintiffs by forever eliminating what may well be the only visual evidence of Defendants' past and continued wrongdoing. Defendants' unremitting destruction of the video footage combined with Defendants' counsel's false assurances has, at the very least, "threatened to interfere with the rightful decision of the case." *Slep-Tone*, 2014 WL 65297, at *6 (citations & internal quotation marks omitted). And by trying to force Plaintiffs to "rely on incomplete and spotty evidence," Defendants have severely impaired Plaintiffs' ability to litigate their claims. *Id.* (citations omitted). The prejudice is clear.

Defendants assert, however, that other available evidence suffices. (Opp'n at 8.) But the case on which Defendants rely recounts the "inadvertent loss" of three out of 623 medical slides, a factual scenario hardly commensurate with the weeks and weeks of footage that Defendants knowingly and recklessly destroyed. *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 306 F.3d 806, 823-25 (9th Cir. 2002).

More to the point, the other evidence in *Medical Laboratory*, while not "as reliable as the original slides, [was sufficient] to permit diagnosis." *Id.* at 825. It was, in other words, fully probative of the lost evidence. But here, as Chief Allen's statement makes clear, the e3DM records that Defendants tout only tell half the story. While the "e3DM tracks" time in custody, age, gender, and so forth, "agents *can* also 'log'" medical treatment, meals, showers, welfare checks, and other data that goes to the heart of Plaintiffs' claims and that the destroyed footage would have provided. (Third Allen Decl. ¶ 10) (emphasis added). In essence, Defendants demand that Plaintiffs and this Court accept their version of the facts. The e3DM records are composed of entries made by

agents, and are necessarily subjective; the destroyed footage, on the other hand, is objective evidence that the trier of fact could use to judge whether the hold rooms were clean, whether detainees appeared cold, and so forth. Likewise with Defendants' generalized invocation of "other records," the nature of which Defendants do not explain. (Opp'n at 8.) And while it is true that Plaintiffs will be inspecting four Tucson Sector stations, Plaintiffs have been deprived of an objective method for confirming that conditions in the inspected facilities are representative of the day-to-day conditions in all Tucson Sector stations, and the conditions experienced by Jane Doe #1 and Jane Doe #2.

Just as Defendants cannot "assert any presumption of irrelevance as to the destroyed [evidence]," they cannot assert any presumption that the e3DM data, "other records," and inspections will adequately offset the destroyed footage. *Leon*, 464 F.3d at 959 (citation omitted).

B. Defendants Breached Their Obligation to Preserve Relevant Evidence.

The relevance of this footage is beyond doubt—a fact that Defendants concede by noting that "[they] themselves fully intend to use all available video footage to show that conditions at Border Patrol stations in the Tucson sector fully comply with the requirements of the Constitution." (Opp'n at 7 n.3.) Defendants, moreover, cannot credibly argue that the footage of the *named Plaintiffs* is irrelevant, and yet if Defendants' declarations are accurate, the footage depicting named Plaintiffs' detention has been destroyed. Jane Doe #1 and Jane Doe #2 were detained at the Tucson and Casa Grande stations (Compl. ¶¶ 23, 35, 38), neither of which has preserved any historical footage (Declaration of Samuel Shivers ("Second Shivers Decl.") ¶ 3(a), (c), ECF No. 60-2.)

Defendants nonetheless argue that the "footage that existed when the Complaint was filed" and "before the Complaint was filed is not relevant." (Opp'n at 10.) Even if that were true, which it is not, Defendants have not contested the relevance of footage taken *after* the Complaint was filed—indeed, they have admitted it. (Second Shivers Decl. ¶ 3 (lack of historical footage in most stations).) Nor could they contest relevance here, as the duty was unquestionably triggered when litigation commenced, *Pettit*, 45 F.

Supp. 3d at 1105, and it encompassed all information "relevant to the claims or defenses of *any* party"—including Defendants—or "relevant to the subject matter involved in the action," *Zubulake*, 220 F.R.D. at 218 (citations and internal quotation marks omitted). The destroyed footage was plainly relevant to this action's subject matter: the conditions of confinement in Defendants' stations.

Defendants' argument that "the conditions on the tape are the conditions experienced by people who are not in the class and are thus irrelevant" fares no better. (Opp'n at 10.) Should this Court certify Plaintiffs' class, then, pursuant to the "relation back" doctrine, anyone detained on or after June 8 will be part of the class, and the footage of their detention will, without question, be highly relevant to the case. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991) (describing relation-back doctrine).

Because "a party cannot destroy documents based solely on its own version of the proper scope of the complaint," *Diersen v. Walker*, No. 00 C 2437, 2003 WL 21317276, at *5 (N.D. Ill. June 6, 2003), Defendants' certitude that this Court will deny certification does not excuse Defendants of their preservation obligation.[1] That, however, is exactly how Defendants justify their spoliation.

C. Defendants Knew Plaintiffs Sought Surveillance Footage.

Defendants claim that they had insufficient notice that Plaintiffs sought retention of video recordings. (Opp'n at 11-12.) They claim they could not have known that Plaintiffs sought the preservation of video recordings of CBP facilities because Plaintiffs' June 10 preservation letter contained "vague references to 'video recordings,' 'digital recordings,' and 'films.'" (Opp'n at 11 (quoting Preservation Letter, Ex. A at 3, ECF No. 57-1.) Defendants imply they could not have known of the importance of the surveillance video

[1] As if referring to this very case, Judge Shira Schiendlin, *Zubulake*'s author, has observed that the scope of relevant material is broad "because such material may be subject to discovery on a court order [and] such an order would be moot if there was not a duty to preserve material to that extent." A. Benjamin Spencer, *The Preservation Obligation: Regulating & Sanctioning Pre-Litigation Spoliation in Fed. Ct.*, 79 Fordham L. Rev. 2005, 2012 (2011) (quoting Judge Scheindlin). By the time this Court ordered Defendants to preserve the footage, most of it had been destroyed, effectively mooting this Court's order.

evidence until Plaintiffs' counsel referred to them during the August 13 telephonic hearing. (Opp'n at 12 (quoting Telephonic Hearing Transcript, Ex. D at 40:8-10, ECF No. 57-4.)

These assertions strain credulity. Plaintiffs' preservation letter is more than sufficiently specific for these purposes. In addition to using the phrases "video recordings," "digital recordings," and "films"—all of which are discrete and specific—Plaintiffs expressly requested that Defendants "immediately halt all routine business practices that destroy potential evidence, including but not limited to . . . server back-up rotation, scheduled destruction of back-up media, [and] reimaging of drives." (Preservation Letter, Ex. A at 3, ECF No. 57-1.) Moreover, as Defendants concede, the first page of Plaintiffs' motion for expedited discovery expressly sought "surveillance video footage." (Opp'n at 11 n.6 (citing Mot. for Expedited Discovery at 1, ECF No. 25.) Defendants cannot credibly claim they were unaware that the surveillance tapes fell within the scope of their preservation duties prior to August 13, 2015.

D. Defendants' Own Behavior Demonstrates That Preservation Was Neither Unduly Burdensome Nor Costly.

Citing Federal Rule of Civil Procedure 26(b)(2)(B), Defendants claim that CBP could not be expected to fund its preservation obligations because of budgetary constraints. (Opp'n at 11-14.) Defendants confuse their discovery obligations with their broader preservation obligations. Rule 26(b)(2)(B) pertains to the *provision* of discovery, rather than the duty to preserve *possibly* discoverable material. *See, e.g.*, *Zubulake*, 220 F.R.D. at 217 ("[A]nyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that *might* be useful to an adversary") (emphasis added). Regardless, the proper procedure would have been to "move[] for a protective order pursuant to Rule 26(c)[] to address the issue of burden and cost," and not to unilaterally decide to destroy relevant evidence. *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 432 (S.D.N.Y. 2009). Moreover, Defendants' behavior after this Court's August 14 Order demonstrates that "Defendants could have preserved and produced the

requested evidence." *Id.* Indeed, the "undue expense" is probably Defendants' fault. Had Defendants taken steps to preserve the footage when they were supposed to, they would not have had to "implement [an] *emergency* upgrade" (Third Allen Decl. ¶ 9 (emphasis added)), and incur costs inherent in that type of accelerated work.

Defendants' additional arguments about burden and cost are unavailing. Defendants cite their "varied and complex" mission as a reason to dodge their preservation obligations. (Opp'n at 11.) This, however, ignores the ability of virtually all other sophisticated litigants to balance complex business or governmental operations with their preservation obligations. Defendants also argue they were unable to comply with their preservation obligations because funds were in short supply near the end of their fiscal year, but cite no authority for the proposition that a litigant's preservation obligations depend upon when in their fiscal year litigation commences. (*Id.* at 12.) Defendants refer to the footage as only "marginal[ly] relevan[t]" to this action. (*Id.* at 12 n.7.) As already discussed, however, this evidence does not duplicate other available evidence but instead provides the fact-finder with a unique and direct view of the conditions of confinement in Defendants' facilities, thus placing it in the category of evidence that must be preserved. *Zubulake*, 220 F.R.D. at 217-18.

E. Defendants Did Not Overwrite Relevant Footage For Security Reasons.

In a last-ditch attempt to justify their misconduct, Defendants argue that they overwrote relevant "video footage in order to protect important safety and security interests." (Opp'n at 10, 14.) They argue, in other words, that station video recordings are crucial to protecting "all individuals at Border Patrol stations." (*Id.*) This argument is not credible. Area Manager Shivers declared under oath that several digital video recorders (DVRs) in Tucson station are broken (Second Shivers Decl. ¶ 3(a)); that "no video has ever been recorded [at Ajo Station] as this system was never operational" (*id.* ¶ 3(b)); and that cameras at Sonoita station were only just configured to record footage (*id.* ¶ 3(d)). In other words, several Tucson Sector stations have long been without any functioning video-recording capability, suggesting that the lack of recorded video never posed, nor

poses, any real security threat. This Court should not credit Defendants' invocations of safety and security to excuse their past and present spoliation.

F. The Sanctions Plaintiffs Seek Are Reasonable.

Courts balance deterrence, restitution, and relative burden when fashioning sanctions. *Surowiec v. Capital Title Agency*, 790 F. Supp. 2d 997, 1008-09 (D. Ariz. 2011); *accord Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 287 (E.D. Va. 2001) (finding that "[o]nce spoliation has been established, the sanction chosen must achieve deterrence, burden the guilty party with the risk of an incorrect determination and attempt to place the prejudiced party in the evidentiary position it would have been in but for the spoliation.") (citation omitted).

Defendants failed to take their preservation obligations at all seriously; they defied an explicit order of this Court; and they destroyed unique and relevant evidence, including footage of the named Plaintiffs. In light of Defendants' flagrant disregard of their duty, the adverse inference Plaintiffs seek is not "unduly onerous" (Opp'n at 16), but rather "serves the dual purposes of remediation and punishment." *Shaffer v. RWP Grp., Inc.*, 169 F.R.D. 19, 25 (E.D.N.Y. 1996). An adverse inference is warranted in this case.

III. CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion and sanction Defendants.

Dated: September 8, 2015 By: */s/ Harold J. McElhinny*

Harold J. McElhinny*
Kevin M. Coles*
Elizabeth Balassone*
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522
Email: HMcElhinny@mofo.com
Email: KColes@mofo.com

Colette Reiner Mayer*
MORRISON & FOERSTER LLP
755 Page Mill Road
Palo Alto, CA 94304-1018
Telephone: (650) 813-5600
Facsimile: (650) 494-0792
Email: CRMayer@mofo.com

Louise C. Stoupe*
Pieter S. de Ganon*
MORRISON & FOERSTER LLP
Shin-Marunouchi Building, 29th Floor
5-1, Marunouchi 1-Chome
Tokyo, Chiyoda-ku 100-6529, Japan
Telephone: +81-3-3214-6522
Facsimile: +81-3-3214-6512
Email: LStoupe@mofo.com
Email: PdeGanon@mofo.com

Linton Joaquin*
Karen C. Tumlin*
Nora A. Preciado*
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 2850
Los Angeles, CA 90010
Telephone: (213) 639-3900
Facsimile: (213) 639-3911
Email: joaquin@nilc.org
Email: tumlin@nilc.org
Email: preciado@nilc.org

Mary Kenney*
Emily Creighton*
Melissa Crow*
AMERICAN IMMIGRATION COUNCIL
1331 G Street NW, Suite 200
Washington, DC 20005
Telephone: (202) 507-7512
Facsimile: (202) 742-5619
Email: mkenney@immcouncil.org
Email: ecreighton@immcouncil.org
Email: mcrow@immcouncil.org

Victoria Lopez (Bar No. 330042)**
Daniel J. Pochoda (Bar No. 021979)
James Duff Lyall (Bar No. 330045)**
ACLU FOUNDATION OF ARIZONA
3707 North 7th Street, Suite 235
Phoenix, AZ 85014
Telephone: (602) 650-1854
Facsimile: (602) 650-1376
Email: vlopez@acluaz.org
Email: dpochoda@acluaz.org
Email: jlyall@acluaz.org

Travis Silva*
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
OF THE SAN FRANCISCO BAY AREA
131 Steuart Street, Suite 400
San Francisco, CA 94105
Telephone: (415) 543-9444
Facsimile: (415) 543-0296
Email: tsilva@lccr.com

Attorneys for Plaintiffs

** Admitted pursuant to Ariz. Sup. Ct. R. 38(a)*
*** Admitted pursuant to Ariz. Sup. Ct. R. 38(f)*

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 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)