UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 16-00018 JVS (DFMx)	Date	February 17, 2017
Title	Wendi Oppenheimer, et al. V. The City of La Habra, et al.		

Present: The Honorable	James V. Selna
Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: **(IN CHAMBERS) Court's Order:**
DENYING Plaintiffs' Motion for Partial Summary Judgment as to Plaintiffs' Second Claim for Relief (Docket No. 66);

GRANTING Plaintiffs' Motion for Partial Summary Judgment as to Defendants Williams and G4S's Defenses (Docket No. 67) ;

GRANTING Plaintiffs' Motion for Partial Summary Judgment as to Defendant City of La Habra's Affirmative Defenses (Docket No 68 & 71);

GRANTING IN PART and DENYING IN PART Plaintiffs' Motion for Default Judgment against Defendants City of La Habra, Tanna Williams and G4S Secure Solutions (USA) Inc. (Docket No. 69);

DENYING Defendants City of La Habra, Tanna Williams and G4S Secure Solutions' Motion for Partial Summary Judgment (Docket No. 72)

There are five motions at issue.

First, Plaintiffs Wendy Oppenheimer ("W. Oppenheimer"), Vannes Oppenheimer ("V. Oppenheimer"), and Jeffrey Perea ("Perea") (collectively, "Plaintiffs") moved for partial summary judgment against Defendants City of La Habra ("the City"), Tanna Williams ("Williams"), and G4S Secure Solutions (USA) Inc. ("G4S") (collectively, "Defendants") on the issue of liability as to Plaintiffs' second claim for relief for wrongful death. (Mot., Docket No. 66.) Defendants filed an untimely opposition. (Opp'n, Docket No. 83.) Plaintiffs replied, and within the reply, Plaintiffs requested that

the Court strikes portions of Defendants' opposition. (Reply, Docket No. 90.) Defendants responded to Plaintiffs' demand that the Court strikes portions of the Defendants' opposition. (Resp., Docket No. 104.)

For the reasons set forth below, the Court **denies** Plaintiffs' motion.

Second, Williams moved for partial summary judgment. (Mot., Docket No. 72.) Plaintiffs opposed. (Opp'n, Docket No. 76.) Williams replied. (Reply, Docket No. 95.) Williams also objected to portions of the declaration of Joel Goodman ("Goodman") submitted in support of Plaintiffs' opposition. (Obj., Docket No. 96.) Plaintiffs objected to additional facts introduced in Williams' reply brief. (Obj., Docket No. 97.) Williams responded to Plaintiffs' objections. (Resp., Docket No. 102.)

For the reasons set forth below, the Court **denies** Williams' motion.

Third, Plaintiffs moved for default judgment as to liability against Defendants on the ground that Defendants willfully spoiled evidence. (Mot., Docket No. 69.) Defendants filed an untimely opposition. (Opp'n, Docket No. 84.) Plaintiffs replied. (Reply, Docket No. 91.) Plaintiffs filed an ex parte application to continue the hearing. (Appl., Docket No. 101.) The Court granted the application. (Order, Docket No. 107.) Plaintiffs filed supplemental briefing in support of their motion for sanctions. (Suppl. Br., Docket No. 125.) Defendants responded. (Resp., Docket No. 134.)

For the reasons set forth below, **grants in part** and **denies in part** this motion.

Fourth, Plaintiffs moved for partial summary judgment regarding several of Williams and G4S' affirmative defenses. (Mot., Docket No. 67.) Williams and G4S filed an untimely opposition.[1] (Opp'n, Docket No. 87.) Plaintiffs replied. (Reply, Docket No. 94.)

For the reasons set forth below, the Court **grants** this motion.

[1] Williams and G4S' response is titled "Opposition," but within the document, Williams and G4S state that they do not oppose the Court striking their affirmative defenses. (Opp'n, Docket No. 87 at 2.)

Fifth, Plaintiffs again moved for partial summary judgment regarding several of Williams and G4S' affirmative defenses. (Mot., Docket No. 68.) However, Plaintiffs' motion in Docket No. 67 and their motion in Docket No. 68 are identical motions. Plaintiffs filed a notice of errata with the corrected motion. (Ntc., Docket No. 71.) In the corrected document, the Plaintiffs move for partial summary judgment regarding several of the City's affirmative defenses. (Mot., Docket No. 71-1.) For clarity, the Court will refer to Docket No. 71 for this motion. The City filed an untimely opposition.[2] (Opp'n, Docket No. 86.) Plaintiffs replied. (Reply, Docket No. 93.)

For the reasons set forth below, the Court **grants** this motion.

I. BACKGROUND

This case arises from the death of Daniel Oppenheimer ("D. Oppenheimer") on January 2, 2015, in the La Habra city jail. (Compl., Docket No. 26 ¶ 1.) Plaintiffs allege that D. Oppenheimer was arrested while on methamphetamine and Zoloft. (Id. ¶ 2.) According to Plaintiffs, Williams, who was the jailer, knew that D. Oppenheimer was on methamphetamine and Zoloft, which is a dangerous combination that can cause serious harm to the user. (Id. ¶¶ 25, 27, 29.) Despite this knowledge, Williams left D. Oppenheimer unmonitored for some periods of time. (Id.) During one of these periods, D. Oppenheimer hung himself in the jail cell. (Id. ¶ 30.) D. Oppenheimer was pronounced dead at a nearby hospital. (Id. ¶ 31.)

Plaintiffs allege that the Defendants are responsible for D. Oppenheimer's death due to the negligence and deliberate indifference of Williams and the negligence of G4S. (Id. ¶¶ 32–33.) The City is allegedly responsible under section 815.4 of California's Government Code and respondeat superior. (Id. ¶¶ 34, 50.)

Plaintiffs are the survivors of D. Oppenheimer. (Id. ¶ 14.) On April 20, 2015, V. Oppenheimer filed an Administrative Claim for Damages with City Defendant and sought information related to D. Oppenheimer's death. (Id. ¶ 15.) V. Oppenheimer's Administrative Claim for Damages was denied on August 17. (Id. ¶ 16.) The Orange

[2] The City's response is titled "Opposition," but within the document, the City states that it does not oppose the Court striking its affirmative defenses. (Opp'n, Docket No. 86 at 2.)

County Coroner and District Attorney's Office publicly released a report on D. Oppenheimer's death on September 28. (Id. ¶ 17.) On November 26, W. Oppenheimer and Perea filed Administrative Claims for Damages with the City Defendant. (Id. ¶ 18.) The City did not provide any response to W. Oppenheimer and Perea's claims within 45 days of the filing of their November 26 claims. (Id.)

II. LEGAL STANDARD

A. Motion for Summary Judgment

Summary judgment is appropriate where the record, read in a light most favorable to the nonmovant, indicates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). Summary adjudication, or partial summary judgment "upon all or any part of [a] claim," is appropriate where there is no genuine dispute as to any material fact regarding that portion of the claim. Fed. R. Civ. P. 56(a); see also Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim . . . .") (internal quotation marks omitted).

Material facts are those necessary to the proof or defense of a claim and are determined by referring to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255.[3]

The moving party has the initial burden of establishing the absence of a material fact for trial. Id. at 256. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . ., the court may . . . consider the fact

[3] "In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." L.R. 56-3.

undisputed." Fed. R. Civ. P. 56(e)(2). Furthermore, "Rule 56[(a)][4] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. Therefore, where the moving party carries its initial burden, if a nonmovant does not make a sufficient showing to establish the elements of its claims, a court must grant the motion.

B. Motion for Sanctions Based on the Spoilation of Evidence

Spoliation occurs when a party destroys, significantly alters, or fails to preserve evidence in pending or reasonably foreseeable litigation. United States v. Kitsap Physicians Serv., 314 F.3d 995, 1001 (9th Cir. 2002). A party must "suspend any existing policies related to deleting or destroying files and preserve all relevant documents related to the litigation." In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006) (citation omitted).

Two sources provide a court with authority to sanction a party for spoiling evidence: "the inherent power of federal courts to levy sanctions in response to abusive litigation practices, and the availability of sanctions under Rule 37 against a party who 'fails to obey an order to provide or permit discovery.'" Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir. 2006).

1. Inherent Authority

When conduct is not in violation of any discovery order governed by Rule 37, then a district court will rely on its "inherent authority" to sanction. Id.

A court may make factual findings for a motion for sanctions based on the spoliation of evidence. Id. For spoilation, courts can use a variety of sanctions: a monetary sanction, an adverse-inference jury instruction, an exclusion of testimony, or, if willfulness is found, a default judgment. UMG Recordings, Inc. v. Hummer Winblad

[4] Rule 56 was amended in 2010. Subdivision (a), as amended, "carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine 'issue' becomes genuine 'dispute.'" Fed. R. Civ. P. 56, Notes of Advisory Committee on 2010 amendments.

Venture Partners et al., 462 F. Supp. 2d 1060, 1066 (N.D. Cal. 2006). Any remedy "should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore 'the prejudiced party to the same position he would have been absent the wrongful destruction of evidence by the opposing party.'" Apple Inc. v. Samsung Elecs. Co., 881 F. Supp. 2d 1132, 1136 (N.D. Cal. 2012) (internal quotation omitted).

"A terminating sanction, whether default judgment against a defendant or dismissal of a plaintiff's action, *is very severe*." Connecticut General Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1096 (9th Cir. 2007) (italics supplied). Entry of a default judgment is valid when a party "*willfully deceived* the court and engaged in conduct utterly inconsistent with the orderly administration of justice." Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 589 (9th Cir. 1983) (italics supplied). However, a court may only issue a default judgment if the violation or abuse is due to "*willfulness, bad faith, or the fault of the party*." Id. (italics supplied). "Disobedient conduct not shown to be outside the control of the litigant is sufficient to demonstrate willfulness, bad faith, or fault." Jorgensen v. Cassiday, 320 F.3d 906, 912 (9th Cir. 2003) (quoting Hyde & Drath v. Baker, 24 F.3d 1162, 1166 (9th Cir. 1994)).

The Ninth Circuit has established five factors that a court must weigh when determining whether the terminating sanction is justified:

> (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. Finally, "due process concerns further require that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression 'threaten[s] to interfere with the rightful decision of the case.'" Anheuser-Busch, Inc. v. Nat. Beverage Distributors, 69 F.3d 337, 348 (9th Cir. 1995) (quoting Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 591 (9th Cir. 1983)).

2. Rule 37(e)

Rule 37(e) of the Federal Rules of Civil Procedure was amended to establish the findings necessary to support certain curative measures for failure to preserve electronically stored information. This amendment "forecloses reliance on *inherent authority* or state law to determine when certain measures should be used" to address spoliation of electronically stored information. See Fed. R. Civ. P. 37(e), Advisory Committee Note to 2015 Amendment (italics supplied). Rule 37(e) recites the following:

> (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). This version of Rule 37(e) applies to civil cases commenced after December 1, 2015, "and, insofar as just and practicable, all proceedings then pending." See 2015 US Order 0017; 28 U.S.C. § 2074(a).

III. DISCUSSION

A. Plaintiffs' Motion for Partial Summary Judgment Regarding Their Second Claim

Plaintiffs argue that no genuine dispute of material fact exists regarding their wrongful death claim under section 845.6 of California's Government Code ("section 845.6"). (Mot., Docket No. 66 at 10.) Defendants state that there are no additional facts relevant to the issue raised by Plaintiffs, but there is a genuine dispute that the parties need to litigate. (Opp'n, Docket No. 85.)

For the following reasons, the Court **denies** Plaintiff's motion for partial summary judgment regarding their second claim.

Section 845.6 states the following:

> [n]either a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in his custody; but, except as otherwise provided by Sections 855.8 and 856, a public employee, and the public entity where the employee is acting within the scope of his employment, is liable *if the employee knows or has reason to know* that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care.

Cal. Gov't Code § 845.6 (italics supplied).

"[T]o state a claim under § 845.6, a prisoner must establish three elements: (1) the public employee knew or had reason to know of the need (2) for immediate medical care, and (3) failed to reasonably summon such care." Jett v. Penner, 439 F.3d 1091, 1099 (9th Cir. 2006). Therefore, section 845.6 imposes "a statutory duty to summon medical care." Watson v. State of Cali., 21 Cal. App. 4th 836, 841 (1993). However, liability is "limited" to the failure to summon care for "serious and obvious medical conditions requiring immediate care" of which the defendant has "actual or constructive knowledge." Id.

"[S]ection 845.6 imposes liability for a failure to reasonably summon medical care for a serious medical need of which the defendant has actual *or constructive* knowledge." M.H. v. Cty. of Alameda, 62 F. Supp. 3d 1049, 1099 (N.D. Cal. 2014) (italics in original) (citing Watson, 21 Cal. App. 4th at 841); Zeilman v. Cnty. of Kern, 168 Cal. App. 3d 1174, 1184 (1985) ("[Q]uestions about jail personnel's actual or constructive knowledge of a prisoner's need for immediate medical care as well as the reasonableness of actions taken to meet this need are factual questions."); Johnson v. Cnty. of Los Angeles, 143 Cal. App. 3d 298, 317 (1983) ("[T]he questions of Sheriffs' actual or constructive knowledge of Decedent's need for immediate care, and of Sheriffs' reasonable action to summon or not to summon such care, are questions of fact to be determined at trial."). Therefore, section 845.6 has an objective knowledge standard. Id. (citing Lucas v. Cnty. of Los Angeles, 47 Cal. App. 4th 277, 288 (1996)).

California courts acknowledge that questions about jail personnel's actual or constructive knowledge of a prisoner's need for immediate medical care, as well as the reasonableness of actions, are questions for the factfinder. See, e.g., Zeilman,168 Cal. App. 3d 1174, 1184 (1985) (finding that it was not appropriate to enter summary judgment on a section 845.6 claim); Johnson, 143 Cal. App. 3d at 317 ("[T]he questions of Sheriffs' actual or constructive knowledge of Decedent's need for immediate care, and of Sheriffs' reasonable action to summon or not to summon such care, are questions of fact to be determined at trial").

Here, a jury could determine that Williams knew or had reason to know that D. Oppenheimer needed immediate medical care. Robert Fonzi ("Fonzi"), Defendants' jail procedures and supervision expert, opined that D. Oppenheimer was preparing a ligature to strangle himself after 11:56:30 a.m. (Fonzi Report, Docket No. 66-8 at 14.) Williams stated that she walked past D. Oppenheimer's cell and looked through the window at D. Oppenheimer at 11:59:58 a.m. (Williams Depo., Docket No. 66-7 at 87:18–88:13, 92:11–93:25.) In addition, in the video, Williams appears at the window at 11:59:58 a.m. (Id.; Mason Decl. Ex. E, Docket No. 66-7.) Furthermore, when Williams saw D. Oppenheimer strangling himself, she did not enter the cell immediately, and there was no policy at the jail that an officer should not enter a cell after observing an inmate strangling to death. (Mason Decl. Ex. E, Docket No. 66-7; Goodman Decl., Docket No. 66-4 ¶ 7;

Baylos Depo., Docket No. 66-8 at 108:23–109:7; 110:22–111:7.) Based on these facts, a jury could find that Williams knew or had reason to know that D. Oppenheimer needed immediate medical care.

However, a jury could also find that Williams did not know or have reason to know that D. Oppenheimer needed immediate medical care. Williams stated at her deposition that the "booking cell has a glass window that you can see through from the hallway in the booking area."[5] (Williams Dep., Docket No. 83 at 74:17–18.) Williams indicated that she believed the lower frame of the window was four feet above the floor. (Id. at 74:21–75:10.) The phone was inside the booking cell on the wall below the window, so the jury could find that Williams was not able to see D. Oppenheimer constructing the ligature because her view was obstructed by the wall. (Id. at 130:2–11.) Prior to 12:04:25, Williams did not see D. Oppenheimer with a ligature around his neck. (Id. at 176:1–6.) Williams also testified that she has been trained to never enter an occupied cell alone, even for a medical emergency, because it could be a set up. (Id. at 149–50.) The Orange County District Attorney's ("OCDA") report states that "Williams was not able to see Oppenheimer through the window and believed he may have been seated on the floor, up against the common wall between the booking office and booking room 2, where the telephone is located, as inmates are known to do from time to time." (Report, Docket No. 66-7 at 3.) Because of these facts, a jury could find that Williams did not know or have reason to know that D. Oppenheimer needed immediate medical care.

Because a jury could reach two different conclusions regarding the facts, there is a genuine dispute of material fact. Accordingly, the Court **denies** Plaintiffs' motion.

[5] Plaintiffs argue that the Court must strike Defendants' facts within their opposition must because Defendants did not provide a concise statement of genuine dispute. (Reply, Docket No. 90 at 3.) However, the Court will not ignore facts simply because of this technicality. Furthermore, Defendants attached Williams' deposition as an exhibit, and the entire exhibit, including the opposition memorandum, is only thirty-three pages. (Opp'n, Docket No. 83.) In conclusion, the Court **denies** Plaintiffs' request to strike portions of Defendants' opposition.

B. Williams' Motion for Partial Summary Judgment

Williams moves for partial summary judgment regarding Plaintiffs' first claim for deliberate indifference in violation of the Eighth Amendment, the Fourteenth Amendment, and 42 U.S.C. § 1983. (Mot., Docket No. 72.)

For the following reasons, the Court **denies** Williams' motion.

The government must provide medical care to incarcerated individuals. See Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014). In order to prevail on an inadequate medical care claim, a plaintiff must show "deliberate indifference to his serious medical needs." Id. (quotations omitted). In the Ninth Circuit, there are two parts to the deliberate indifference test. Jett, 439 F.3d at 1096. "First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." Id. (citations and internal quotation marks omitted). "Second, the plaintiff must show the defendant's response to the need was deliberately indifferent." Id. (citation omitted).

Williams argues that "under the uncontroverted facts, there was no evidence that Daniel had a serious medical need that he was suicidal, or that Williams was aware of facts from which an inference of a substantial risk of serious harm to Daniel at his own hands could be drawn." (Mot., Docket No. 72 at 8.)

However, the Court denies Williams' motion for the same reasons that it denies Plaintiffs' motion for partial summary judgment. See supra Section III.A. A jury could determine that Williams saw D. Oppenheimer strangling himself. (Mason Decl. Ex. E, Docket No. 66-7; Goodman Decl., Docket No. 66-4 ¶ 7; Baylos Depo., Docket No. 66-8 at 108:23–109:7, 110:22–111:7.) In contrast, the phone was inside the booking cell on the wall below the window, so the jury could find that Williams was not able to see D. Oppenheimer.[6] (Williams Dep., Docket

[6] Plaintiffs object to Williams' introduction of new facts and evidence in support of her motion. (Obj., Docket No. 97.) However, because the Court agrees that these additional facts demonstrate factual disputes, the Court will not disregard the evidence. Additionally, this evidence helps Plaintiffs overcome

No. 83 at 130:2–11.) Accordingly, there is a genuine dispute of material facts regarding whether Williams observed D. Oppenheimer strangling himself.

In conclusion, the Court **denies** Williams' motion for partial summary judgment.

C. Plaintiffs' Motion for Sanctions Based on the Spoilation of Evidence

Plaintiffs request that the Court finds that Defendants have committed willful spoilation of evidence, which warrants an entry of default for liability as to both of Plaintiffs' claims for relief. (Mot., Docket No. 69 at 3.)

For the following reasons, the Court **grants in part** and **denies in part** Plaintiffs' motion. The Court finds that the proper sanction is to instruct the jury that it *may* presume information in Williams' text messages and e-mails was unfavorable to the Defendants.

1. Spoilation of Evidence

Plaintiffs argue that three types of evidence demonstrate spoilation: (1) the video footage, (2) text messages between Williams and Lieutenant Jason Forgash ("Lieutenant Forgash"), and (3) Williams' work e-mails. (Id.) In addition, Plaintiffs argue that the Vickery Materials contain an entire directory of files titled "Do NOT Forward to New Counsel." (Suppl. Br., Docket No. 125 at 8.)

a. Video Footage

Rule 37 does not directly address destruction of video equipment or video footage, so the Court will examine whether sanctions are appropriate under its inherent authority. See Fed. R. Civ. P. 37; Leon, 464 F.3d at 958.

Plaintiffs assert that Defendants intentionally altered and spoiled the video footage. (Mot., Docket No. 69 at 8.) To support their argument, Plaintiffs point to the fact that the footage also has incorrect date and time stamps displayed. (Id. at

summary judgment.

8.) Plaintiffs argue that the City officials who regularly use the system testified that the malfunctions have never happened before. (Id.) In addition, after Oppenheimer's death, Defendants discarded and replaced the video recording system in the jail, so the original recording system is gone. (Id. at 12.) Plaintiffs also point to the fact that Lieutenant Forgash and Sergeant Jeffrey Baylos ("Baylos") had access to the server, viewed the footage, and had the capability to manipulate the recorded content. (Suppl. Br., Docket No. 125 at 10.) The original video system also had eighteen cameras, but Defendants only included sixteen camera feeds in the copy that they provided to the OCDA investigators. (Id. at 6.)

In addition, Plaintiffs argue that the footage mysteriously freezes at certain points. (Mot., Docket No. 69 at 12.) For example, at 12:55:20,[7] camera 4 stops/freezes while Oppenheimer is seated on the bench. (Id. at 9.) Plaintiffs state that the camera again stops/freezes at 13:05:45 when Lieutenant Forgash enters the cell. (Id.) Plaintiffs also hired a audio-video forensic analyst, who examined all possible explanations for the freezing and could not rule out intentional user intervention. (Id. at 10.)

However, the Plaintiffs have not provided evidence that Defendants *willfully* altered the video footage or omitted sections. To reach this conclusion, the Court would need to make many inferences. The entire footage is poor quality, and errors occur throughout the video, not just in key moments. (Video Footage, Docket No. 66-7.) The only evidence Plaintiffs have put forth suggests that these errors should not occur, but Plaintiffs have not demonstrated that Defendants *caused* these errors—Plaintiffs' audio-video forensic analyst merely found that he could not rule out intentional user intervention. (Carner Decl., Docket No. 66-3 ¶¶ 7–8.)

Plaintiffs also reference the deposition of the City's 30(b)(6) Designee, Lieutenant Adam Foster ("Lieutenant Foster"), which occurred on January 6, 2017. (Suppl. Br., Docket No 125 at 9.) Lieutenant Foster made the following statements at the deposition regarding the removal of the old video recording system:

[7] The hour stamp on the video footage is an hour fast, so in the video, 12:55 p.m., as reflected on the tape, is 11:55 a.m. real time. When referring to video footage, the Court will refer to the time stamp.

Q. Did the City throw out the original system?
A. I do not know who threw it out.
Q. But you know that it was thrown out?
A. I was told that it no longer exists. I'm not trying to be a smart-ass about it. I don't know if it was the company. I don't know if it was the City. The new company is the one that came in and installed it, so I don't know if they were the ones who did it or the City did it.
Q. Okay. Who told you that?
A. The jail manager.

. . . .

Q. Can you give me an estimate as to approximately when the new system was installed?
A. I believe it was May of 2015.

. . . .

Q. You said you talked to Lieutenant Capelletti, and he told you that the prior system, the system in place as of January 2nd, 2015, including its original storage server, had been thrown away; correct?
A. I believe it was Lieutenant Angle.

. . . .

Q: But you're clarifying for me today, as a spokesperson for the City, that the City doesn't have it; correct?
A. Correct.
Q. You're clarifying for me today, as a spokesperson for the City, that I asked you to bring it here, and you didn't do so; correct?
A. I did not bring it, correct.
Q. And the reason you did not bring it is because you, the

City, do not have it; correct?
A. Correct.
Q. And you, the City, have no way of going and digging it up from wherever it is; correct?
A. Correct.

(Foster Dep., Docket No. 125-2 at 23:7–20, 39:16–40:18.) In regards to the City's access to the footage, Lieutenant Foster made the following statements:

Q. What was the storage medium on which the footage from those cameras was stored?
A. It was digital.
Q. Can you characterize the system any more precisely than that?
A. It was a hard drive.
Q. Okay. Where was the -- so like a server, would you call it? When you say a hard drive, I take that to mean a part of a computer system.
A. Not -- again, I'm not trying to be silly. It looked like a computer tower, so I think of a server as being bigger.
Q. Oh, not anymore. They are tiny things now. Got it. So it looked like a computer tower sitting on a rack in a closet or something like that?
A. Yes.
Q. All right. Where was this rack?
A. Watch commander's office.

. . . .

Q. As of January 2nd, 2015, at approximately 12:00 noon, who was the watch commander?
A. Sergeant Jeff Baylos.
Q. Okay. The watch commander's office also had a screen for playback; correct?
A. Yes.
Q. So that one could go into the watch commander's office,

access the servers, and review the footage; correct?
A. Yes.

. . . .

Q. To make a physical copy, burn a CD, how would that be done?
A. He would go over to the tower system, use the screen, the mouse that was all related to that system, put in the CD, run the program, and burn a CD.

. . . .

Q. Okay. Have you ever personally observed anyone reviewing footage from that server?
A. Yes.
Q. And when you review footage from the server, you have the ability to fast-forward, go back; correct?
A. Yes.
Q. You have the ability to pause the frame?
A. Yes.
Q. Okay. And that you said is with a mouse or a keyboard, hit pause?
A. Both. If you were going to pause it, you would have to use the mouse.

(Id. at 29:10–30:2, 30:7–16, 31:2–6, 31:10–21.) The following testimony about the freezing in the video footage also occurred:

Q. So when I talk about the footage freezing at various moments so that an interval of time of a minute or two is simply lost forever, do you know what I'm talking about?
A. I know that it froze.
Q. Okay. You actually saw the freezing on the footage from January 2nd, 2015?
A. I watched the video, yes, and I've watched it in its entirety.

Q. So you have seen the freezing episode that I'm talking about?
A. Yes.
Q. . . . . Had you ever before seen the video footage freeze in the way you saw it freeze in our video?
A. No.
Q. Okay. Had anyone ever told you --
A. No.
Q. . . . . Had anyone ever told you that they had observed the video freezing in the way you saw it freeze in our video?
A. No.

(Id. at 37:25–38:11, 38:17–22, 39:4–7.) Plaintiffs' attorney also questioned Lieutenant Foster about the creation of the DVD that contained the video footage:

Q. You testified that the system had 18 cameras. Thus, you could potentially see 18 squares of footage; correct?
A. Correct.

. . . .

Q. The disk that was provided to the Orange County District Attorney's office only has 16 squares in it. Do you agree with me?
A. I believe that's correct, yes.
Q. So somebody made the decision to eliminate from that disk these other two cameras; right?
A. Yes.
Q. Okay. Now -- and this is going to be the end of it if you don't know the answer to this question. The disk -- and you've watched it, so you probably know what I'm talking about. One does not see content in all boxes at all times. Do you agree with me on that?
A. Yes.
Q. A lot of the boxes are simply blank for much of the time that is shown on the disk; correct?

A. Correct.
Q. Is that or is it not -- or if you don't know, tell me, but is that because somebody made the decision to eliminate those additional cameras from the footage that was to be provided to the Orange County District Attorney's office?
A. I don't know.
Q. Final question. Since the server and its control mechanisms are gone and destroyed, there's no way to go back and try and figure out exactly what happened during that process of creating the disk for the Orange County District Attorney; correct?
A. Correct.

(Id. at 119:11–14, 120:11–121:13.) Plaintiffs assert that this deposition testimony "has now established definitively that the City Destroyed evidence with notice of actual and foreseeable litigation, and that the City utterly disregarded its obligation to identify and preserve evidence." (Suppl. Br., Docket No. 125 at 9.)

However, the Court disagrees. Lieutenant Foster's testimony does not establish that the City willfully destroyed evidence; instead, the testimony simply creates a possibility that the City could destroy evidence because it had access. Because "default judgment against a defendant . . . *is very severe*," this Court will not grant a default judgment because of a mere possibility. Connecticut General, 482 F.3d at 1096.

In addition, the OCDA examined the video footage and stated that "it appears the frozen footage is a result of an error within the recording system and can in no way be attributed to improper conduct of LHPD officers or anyone else. (Report, Docket No. 66-7 at 4.) The District Attorney stated the following:

> Although the video footage from the booking office froze as Oppenheimer began to hang himself, there are significant indications that this malfunction was in no way due to nefarious conduct on the part of the LHPD. During the morning of Oppenheimer's arrest, there were four cameras continuously recording in the LHPD, including Camera 04, which recorded

Oppenheimer's booking cell, and Camera 01, which recorded the doorway outside of the booking cell. Cameras 02 and 03 recorded two other unoccupied cells and captured little or no movement of any kind during the hour preceding Oppenheimer's suicide. Each of these cameras froze intermittently, for brief periods and at arbitrary times, independently of each other. Because each of the cameras, including the ones that captured no movement whatsoever, froze intermittently and at arbitrary times, the freezing appears to be due to a malfunction within the recording system and there is no indication it is attributable to improper conduct on the part of LHPD personnel.

Of even greater significance is the fact that the footage from the booking office resumed while Oppenheimer was still upright and animated, alone in his cell, holding- and moving- his arm above his head. The footage continues for approximately 20 seconds before Oppenheimer slumps over and his hand drops from the air. To be clear, the only conceivable reason for purposefully concealing or destroying camera footage would be if it revealed officers inflicting harm on Oppenheimer or somehow forcing Oppenheimer to hang himself. Yet the footage resumes when Oppenheimer was upright and animated. As he was hanging from a telephone cord that was less than three feet from the floor, he would have been fully capable of saving himself in the twenty seconds between the time the footage resumes and the time Oppenheimer slumps over, presumably losing consciousness. This contradicts any notion that LHPD personnel acted maliciously or used force of any kind and further supports the conclusion that the freezing was the result of a malfunction within the recording system.

Finally, the footage freezes for a total of 50 seconds, which is far less time than it would take for Oppenheimer to remove the zipper from his jumpsuit, attach it to the telephone, and loop it around his neck. Yet, while Oppenheimer's face and hands are out of the camera's range for several minutes before the footage freezes, his

> legs are visible. During these minutes his legs do not move a significant amount and it is clear he is sitting still in his cell- all during the time he must have been removing and preparing his zipper for use as a ligature. The footage thereby corroborates the statements of Officer Nelson and Custodial Officer Williams and confirms that, even up to the moments prior to hanging himself, Oppenheimer remained calm and appears to have made every effort to avoid alerting LHPD officers of his intent to harm himself.

(Id. at 6–7.)

In conclusion, in regards to the video footage, Plaintiffs have not shown willfulness, bad faith, or fault.

b. Electronically Stored Information

Because the text messages and the e-mails are electronically stored information and Plaintiffs filed their complaint on January 6, 2016, this Court needs to apply Rule 37(e). 2015 US Order 0017; 28 U.S.C. § 2074(a). Rule 37(e) "takes the duty as it is established by case law, which uniformly holds that *a duty to preserve information arises when litigation is reasonably anticipated.*" See Fed. R. Civ. P. 37(e), Advisory Committee Note to 2015 Amendment.

Here, the duty to preserve information arose around April 20, 2015. Plaintiffs served the City with a written request for information on April 21, 2015, and the City responded by May 27, 2015. (Mason Decl. Ex. Z, Docket No. 66-9; Mason Decl. Ex. AA, Docket No. 66-9.) In addition, V. Oppenheimer filed an administrative claim on April 20, 2015. (Mason Decl. Ex. W, Docket No. 66-9.) Furthermore, the OCDA had an open investigation regarding D. Oppenheimer's death, and that investigation did not conclude until September 28, 2015. (Mason Decl. Ex. F, Docket No. 66-7.)

There is no question that litigation was reasonably anticipated by the time that Lieutenant Forgash deleted the text messages. Lieutenant Forgash, a City official, admitted that he exchanged text messages with Williams between July

2014 and July 2015, and he deleted those messages around January 30, 2016, which was after Plaintiffs filed this action. (Forgash Depo., Docket No. 66-8 at 48:6–54:16.) Because of Lieutenant Forgash's actions, these communications are completely lost, so Defendants failed to uphold their duty to preserve information.

In addition, litigation was reasonably anticipated by the time that the City deleted e-mails. When Plaintiffs requested e-mails, the City cited its e-mail policy, which is that the City does not keep any e-mails after 180 days. (Mason Decl. Ex. U, Docket No. 66-9; Mason Decl. Ex. V, Docket No. 66-9.) However, 180 days from the date of D. Oppenheimer's death is roughly July 2015, but litigation could be reasonably anticipated by April 20, 2015. Therefore, even assuming the City's policy limits its preservation of e-mails, the City had a duty to preserve the e-mails, which it breached.

In conclusion, Defendants had a duty to preserve the e-mails and the text messages.

c. The Vickery Materials

Judge McCormick has been reviewing a cache of documents (the "Vickery materials"), which Defendants' prior attorneys released on the internet. (Order, Docket No. 56.) The title for one directory is "Do NOT Forward to New Counsel." (Mason Decl. Ex. 3, Docket No. 125-2 at 37.)[8] Plaintiffs argue that the Vickery materials are additional evidence of spoilation. (Suppl. Br., Docket No. 125 at 8.) However, the Court disagrees; Judge McCormick has not concluded his review of these documents, so the parties and the Court do not know whether the Vickery materials contain evidence of spoilation.

2. Appropriate Sanctions

Plaintiffs argue that the most appropriate remedy is to enter default judgment against Defendants for willful spoilation. (Mot., Docket No. 69 at 19.)

[8] For clarity, the Court refers to the pages of this exhibit by the docket page numbers.

a. Video Footage

An entry of a default judgment is too severe of a sanction for Defendants' transgressions. As previously discussed, due process concerns require that the deletion of evidence interfere with the rightful decision of the case. Anheuser-Busch, 69 F.3d 337, 348. Because Plaintiffs have not offered any evidence, or arguments, suggesting that the deleted text messages and e-mails are material to their case, the Court cannot issue a termination sanction.

However, Plaintiffs are free to argue to the jury the fact that the recording system was destroyed. While the Court will not give an adverse-inference instruction, Plaintiffs are free to question what the destroyed system might have shown.

b. Electronically Stored Information

Because the Court determined that Defendants had a duty to preserve the text messages and the e-mails, the Court needs to examine whether (1) Plaintiffs are prejudiced by the loss of information or (2) Defendants intended to prevent the Plaintiffs from using the information during litigation. Fed. R. Civ. P. 37(e).

i. Prejudice

"[U]pon finding prejudice to another party from loss of the information, [the court] may order measures no greater than necessary to cure the prejudice . . . ." Fed. R. Civ. P. 37(e)(1). When imposing sanctions under Rule 37(e)(1), "[t]he range of [curative] measures is quite broad" and "much is entrusted to the court's decision." See Fed. R. Civ. P. 37(e), Advisory Committee Note to 2015 Amendment.

The Court finds that Plaintiffs will be prejudiced because of Defendants' actions. Because the electronic information can no longer be recovered, Plaintiffs have lost the ability to present potentially relevant information. Defendants argue that Plaintiffs have not shown the lost information contained relevant evidence, but the Court disagrees. The string of text messages between Lieutenant Forgash and

Williams demonstrates that D. Oppenheimer was a subject of discussion.[9] In conclusion, the Plaintiffs will experience prejudice because the information is permanently gone.

However, the Committee Notes also state the following:

> In an appropriate case, it may be that serious measures are

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[9] The string of text messages states the following:

> [Lt. Forgash:] Hey friend, Just saw the article about jail hanging lawsuit and wanted to offer my support. You did fine. That asshole made his own decision! The police department and G4S legal will work through this. Be at peace and be well amazing lady!
>
> [Williams:] You are very sweet! I am confident in the situation and the events leading up to his choice to end his life. I know I went above and beyond what was expected of me and my position. Fuck him and his family!!!! That bitch called the department thanking everyone for saving her life from him and now wants to claim he was a victim . . .
>
> [Williams:] I really appreciate you and your support.
>
> [Lt. Forgash:] Yeah, she's a peach. Money does things to people. Ditto! You rocked that position and we're [sic] always supportive of me as well. Now we've both moved on to positions closer to our passions! My school pain ends in July so plan on that beer! Until then, be well!
>
> [Williams:] Awww you are the best!!! You are very respected and loved. According to the report she didn't know she could sue until la habra told her she can only get the report when she signs an agreement to waive the right to a law suite [sic].

(Mot. Ex. T, Docket No. 66-9 (alterations to paragraph format and spacing).)

> necessary to cure prejudice found by the court, 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. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation.

See Fed. R. Civ. P. 37(e), Advisory Committee Note to 2015 Amendment. Accordingly, even though Plaintiffs will experience prejudice, the Court cannot grant an adverse jury instruction on this ground alone. To determine whether the Court can grant an adverse jury instruction, the Court needs to examine intent.

ii. Intent

If the Court finds that Defendants acted with the intent to deprive the Plaintiffs of the information's use during litigation, then the Court may instruct the jury that it may or must presume the information was unfavorable to the party. Fed. R. Civ. P. 37(e).

For example, in First Financial Security, Inc. v. Freedom Equity Group, LLC, No. 15-CV-1893-HRL, 2016 WL 5870218, at *4 (N.D. Cal. Oct. 7, 2016), the court issued an adverse-inference jury instruction to remedy the spoilation of electronic evidence. In First Financial, the defendant conceded that its agents deleted discoverable text messages. Id. at *3. The court found that these text messages were not deleted because of innocent mistakes, and it provided the following reasoning:

> Furthermore, the "spoliation of evidence raises a presumption that the destroyed evidence goes to the merits of the case[ ] and . . . that such evidence was adverse to the party that destroyed it." Samsung, 888 F. Supp. 2d at 993. The undersigned infers that

> [defendant's] agents created incriminating text messages, realized the text messages would be discoverable, and, by deleting the text messages, acted improperly upon their shared intent to keep incriminating facts out of evidence. . . . The undersigned is therefore satisfied that [defendant's] agents acted with the intent to deprive [plaintiff] of the use of the deleted text messages.
>
> . . . . Still, it is not certain that the spoliated text messages contained, in fact, clear evidence as to the intentions of [defendant's] principals. The undersigned therefore concludes that it would fairly redress the loss of the text messages if the jury were instructed that it may, but need not, presume the spoliated text messages were favorable to [plaintiff] in showing that [defendant] intended to recruit Moua, Lee, and their subordinates away from [plaintiff].

Id. at *3–4.

Here, the Court follows the reasoning in First Financial, and it finds that Defendants intended to prevent the Plaintiffs from using the text messages and e-mails in the litigation. When Plaintiffs requested e-mails, the City cited its e-mail policy, but the City did not provide any other reason for why it deleted the e-mails. (Mason Decl. Ex. U, Docket No. 66-9; Mason Decl. Ex. V, Docket No. 66-9.) In addition, Lieutenant Forgash admitted that he exchanged text messages with Williams between July 2014 and July 2015, and he deleted those messages around January 30, 2016, which was after Plaintiffs filed this action. (Forgash Depo., Docket No. 66-8 at 48:6–54:16.) Accordingly, the Defendants intentionally deleted the electronic evidence, so it did not disappear because of a mistake or accident.

Moreover, Defendants stated that an appropriate sanction would be an adverse jury instruction:

> Given all that, even if it could be said that the plaintiffs suffered some sort of prejudice as a result of the deletion of the texts and E-mails, and [sic] far less extreme sanction than default would be

> appropriate. *Instructing the jury to draw an adverse inference would seem to be the appropriate sanction, and only if the jury concluded that the plaintiffs had in fact suffered some sort of prejudice as a result of the deletions of the texts and E-mails.*

(Opp'n, Docket No. 84 at 7.)

In conclusion, the Court finds that instructing the jury that it *may* presume information in the text messages and e-mails was unfavorable to the Defendants is an appropriate sanction.

D. Plaintiffs' Motion for Partial Summary Judgment Regarding Williams and G4S' Affirmative Defenses

Plaintiffs moved for partial summary judgement regarding affirmative defenses 1, 2, 9, 11, 12, 19, 20, 23, 26, 28, 29, 31, 32, and 33. (Mot., Docket No. 67.) In their opposition, Williams and G4S state that they do not oppose the striking of these defenses. In conclusion, the Court **strikes** these affirmative defenses.

E. Plaintiffs' Motion for Partial Summary Judgment Regarding the City's Affirmative Defenses

Plaintiffs moved for partial summary judgement regarding affirmative defenses 1, 2, 3, 4, and 7. (Mot., Docket No. 67.) In its opposition, the City states that it does not oppose this motion. (Opp'n, Docket No. 86.) In conclusion, the Court **strikes** these affirmative defenses.

IV. CONCLUSION

For the aforementioned reasons, the Court (1) **denies** Plaintiff's motion for partial summary judgment, (2) **denies** Williams' motion for partial summary judgment, (3) **grants in part** and **denies in part** Plaintiffs' motion for default judgment, (4) **grants** Plaintiffs' motion regarding Williams and G4S' affirmative defenses, and (5) **grants** Plaintiffs' motion regarding the City's affirmative defenses.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 16-00018 JVS (DFMx) Date February 17, 2017

Title Wendi Oppenheimer, et al. V. The City of La Habra, et al.

IT IS SO ORDERED.

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