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7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF ARIZONA**

9

10 Dustin Michael Woods,
11 Plaintiff,

No. CV-17-08038-PCT-GMS

ORDER

12 v.

13 Jason Scissons,
14 Defendant.

15

16 Pending before the Court is the Motion for Sanctions of Plaintiff Dustin Michael
17 Woods (Doc. 60). For the following reasons the motion is granted in part and denied in
18 part.

19 **BACKGROUND**

20 Plaintiff Dustin Woods brought this § 1983 action against Defendant Jason
21 Scissons, alleging a claim of excessive force against Officer Scissons arising out of Woods’
22 arrest in June 2016.

23 On June 25, 2016, Officer Scissons arrested Woods after a brief pursuit and a
24 confrontation during which Woods attempted to pull a gun on Officer Scissons. Other
25 officers arrived on the scene shortly after Scissons successfully disarmed Woods and
26 handcuffed him. According to Woods’ complaint, after Scissons placed him in handcuffs,
27 Scissons struck Woods several times while he lay face-down on the pavement. Woods
28 alleges that the incident resulted in a fracture to his lower back which has left him in severe

1 pain and will likely require future surgery to repair.

2 At some point, Officer Scissons called for medical assistance for Woods. (Doc. 60-
3 3 at 42.) Paramedics arrived. More officers also arrived at the scene, including Sergeant
4 Heath, Scissons' commanding officer. Heath filed a Use of Force Report two days after
5 the incident. Heath's report concluded that Scissons' use of force was justified. (Doc. 60-
6 3 at 41–44.) The report makes no mention of any force used after Scissons handcuffed
7 Woods. (*Id.*) Nor does the report indicate that it was made after reviewing any recordings
8 that may have been made of the incident by any of the police units that were present at the
9 scene. Following the initial report, Prescott Police Department leadership determined that
10 the incident “warranted a full Incident Review Board,” which consisted of law enforcement
11 personnel and the city attorney. (*Id.* at 46.) The Board issued its report on July 22, 2016.
12 It concluded, after reviewing “all of the reports, the pictures associated with the call as well
13 as the Use of Force Report,” that no “criminal, civil or Department Policy violations” had
14 occurred, and that “Officer Scissons showed great restraint and professionalism during this
15 incident.” (*Id.* at 47.) Again, however, there is nothing in the Board's report that suggested
16 it requested, or reviewed, any of the recordings of the incident that may have been made at
17 the scene.

18 Woods filed this action in February 2017. Scissons agreed to waive service of
19 summons on April 18, 2017. (Doc. 14 at 2.) Woods now seeks spoliation sanctions,
20 arguing that non-party City of Prescott violated a duty to preserve evidence of the alleged
21 incident—video footage automatically captured by the cameras in the various officers'
22 vehicles—by allowing the footage to be automatically deleted from the police department's
23 systems.

24 DISCUSSION

25 I. Analysis

26 A. The Duty to Preserve Electronically Stored Evidence

27 “A duty to preserve information arises when a party knows or should know that the
28 information is relevant to pending or future litigation.” *Pettit v. Smith*, 45 F. Supp. 3d

1 1099, 1105 (D. Ariz. 2014). “The failure to preserve electronic or other records, once the
2 duty to do so has been triggered, raises the issue of spoliation of evidence and its
3 consequences.” *Id.* at 1103 (quoting *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219
4 F.R.D. 93, 100 (D. Md. 2003)). Spoliation is the “destruction or significant alteration of
5 evidence, or the failure to preserve property for another’s use as evidence, in pending or
6 future litigation.” *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 649 (9th Cir. 2009)
7 (quotation marks and citations omitted).

8 Sanctions under Federal Rule of Civil Procedure 37(e) are available when
9 “electronically stored information that should have been preserved in the anticipation or
10 conduct of litigation is lost because a party failed to take reasonable steps to preserve it,
11 and it cannot be restored or replaced through additional discovery.” Fed. R. Civ. P. 37(e);
12 *see also Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (party that fails to
13 preserve or destroys evidence subject to sanctions for spoliation). There are, broadly
14 speaking, two categories of remedies available under Rule 37(e). Both categories require
15 the satisfaction of the first part of the Rule—*i.e.*, the court must conclude (1) that
16 electronically stored information was lost; (2) the loss is attributable to the failure by a
17 party to take reasonable steps to preserve it; and (3) the information cannot be restored or
18 replaced by more discovery.

19 The first category of remedies allows a court, upon finding that the loss of the
20 information has prejudiced another party, to “order measures no greater than necessary to
21 cure the prejudice.” Fed. R. Civ. P. 37(e)(1). The second category allows a court to take
22 more drastic measures if it finds that the party “acted with the intent to deprive another
23 party of the information’s use in the litigation.” *Id.* (2). Intent may be shown “when the
24 evidence shows or it is reasonable to infer, that . . . a party purposefully destroyed evidence
25 to avoid its litigation obligations.” *Porter v. City & Cnty. of San Francisco*, Case No. 16-
26 CV-03771-CW(DMR), 2018 WL 4215602, at *3 (N.D. Cal. Sept. 5, 2018) (citing *First*
27 *Fin. Sec., Inc. v. Freedom Equity Grp., LLC*, No. 15-CV-01893-HRL, 2016 WL 5870218,
28 at *3 (N.D. Cal. Oct. 7, 2016)). If intent is found, the court may presume that the lost

1 information was unfavorable to the party that lost it, issue an adverse inference instruction
2 to the jury, or even dismiss the action or enter a default judgment. Fed. R. Civ. P.
3 37(e)(2)(A)–(C). The Advisory Committee Notes for Rule 37 stress that the sanctions
4 available under (e)(2) are not to be used unless a party intentionally destroyed evidence.
5 *See* Fed. R. Civ. P. 37(e)(2) advisory committee’s notes to 2015 Amendment.

6 **B. Considerable evidence suggests that footage from the incident existed.**

7 Scissons asserts that there is no evidence that any video recording of the alleged
8 incident ever existed. (*See, e.g.*, Doc. 72 at 10) (“There is no evidence that any of the
9 Prescott police units recorded relevant footage.”). This *ipse dixit* is unsupported by the
10 facts. Vehicles in the Prescott Police Department vehicle fleet have cameras mounted on
11 their dashboards. The cameras automatically turn on when the vehicle is turned on. Police
12 vehicles have three “levels” for their emergency lights and siren. Level one is where the
13 rear emergency lights are activated. (Doc. 60-3 at 28–29.) Level two is where the overhead
14 emergency lights are fully activated. (*Id.*) Testimony from the department’s evidence
15 technician suggests that all units’ dash cams automatically start recording at level two. (*See*
16 Doc. 72-2 at 105) (“Dashcams were mounted in Prescott police vehicles and were generally
17 set to activate automatically when overhead lights were activated.”). Level three means
18 fully activated overhead lights as well as the unit’s siren. (Doc. 60-3 at 28–29.) It may be
19 that some units’ dash cams do not automatically begin recording until level three is
20 activated. (*Id.*)

21 Uncontradicted testimony from multiple officers establishes that absent some
22 equipment malfunction—evidence of which has not been presented here—video
23 recordings would have been taken by at least some of the units the day of Woods’ arrest,
24 and that the recordings may have been relevant to his claim.

25 Officer Siller, one of the first officers to respond to the scene, testified that he
26 activated his unit’s lights and sirens as he drove to the scene—meaning he activated level
27 three in his vehicle. (Doc. 60-3 at 17.) His dash cam would therefore have been recording
28 footage, for at least part of the encounter. Siller drove into the parking lot and parked his

1 vehicle directly behind Woods' truck. (*Id.* at 19.) No one has contradicted this testimony,
2 so the evidence establishes that Siller's dash cam would have been recording footage that
3 could have been relevant to Woods' claim.

4 Officer Martin, another responding officer, testified that he had a dash cam in his
5 vehicle and that he drove at level three to the scene. (*Id.* at 27, 30.) He parked his vehicle
6 across the road from the scene and ran towards Officer Scissons' vehicle. (*Id.* at 30.) While
7 Martin's vehicle seems to have been parked away from the scene, his dash cam would have
8 captured video or audio that may have been relevant to Woods' claim. Martin testified that
9 he was the first officer, other than Scissons, on the scene. (*Id.* at 33.) He also testified that
10 when he arrived, Officer Scissons' vehicle was parked in front of Woods' vehicle with its
11 lights and sirens on. (*Id.*) ("Q. And what did you see when you got there? A. At that point,
12 Officer Scissons' vehicle, lights and sirens, and the truck in front of his vehicle."). Woods
13 was already on the ground, handcuffed, and Officer Scissons was standing over him. (*Id.*)¹

14 Officer Scissons, however, testified that he activated his lights (*i.e.*, at least level
15 two) when he followed Woods' vehicle into the parking lot where the incident occurred.
16 (Doc. 60-3 at 5.) After Woods parked his vehicle, Officer Scissons parked his unit in front
17 of Woods' vehicle, facing it at an angle. (*Id.* at 8.) In a separate Declaration, Scissons
18 states that his truck was parked perpendicular to Woods' vehicle, and that the "front end of
19 [his] police vehicle extended past the front of Woods' truck and was angled . . . fac[ing] in
20 the opposite direction from the passenger side of Woods' truck. (Doc. 72-1 at 2.) It is
21 nevertheless possible that Scissons' could have recorded video relevant to Woods' claim."²

22 Woods' account differed. He testified that when he saw Scissons' patrol vehicle
23 enter the parking lot, he "did not recognize lights on the top of the vehicle." (Doc. 60-3 at
24 38.) He also testified, in response to a question suggesting that Officer Scissons' vehicle

25 ¹ This timeline does not necessarily preclude the possibility that Martin or Siller were
26 present when the assault allegedly occurred. Woods' Complaint alleges that Scissons
27 attacked him after he was handcuffed, and that another officer pulled Scissons off Woods
28 and then stood between Woods and Scissons to prevent further attacks. (*See* Doc. 45 at 3.)
For that reason, dash cam footage from either vehicle, but particularly from Officer Siller's
vehicle, may have captured some of the alleged events.

² Officer Scissons testified that he did not bring the vehicle's microphone with him when
he left the vehicle to confront Woods. (Doc. 60-3 at 12-13.)

1 had its emergency lights activated when it pulled into the parking lot, “Not that I’m aware
2 of, no. I never seen [sic] an emergency light on.” (*Id.* at 39.)

3 There is no testimony as it pertains to the other police vehicles that eventually
4 arrived at the scene. Nor is there any testimony before the Court of which it is aware that
5 suggests what would stop the recording(s) once they had begun.

6 But, the available evidence, taken as a whole, establishes that dash cam footage was
7 recorded by at least two vehicles that could have been relevant to Woods’ claim. Officer
8 Siller’s patrol unit had its lights and sirens activated, and so did Officer Martin’s. Based
9 on that evidence, both officers’ units would have been automatically recording dash cam
10 footage. The evidence also suggests that Scissons’ dash cam may have recorded footage,
11 since both Officer Scissons and Officer Martin testified that the vehicle’s lights were
12 activated, and Martin further testified that its sirens were on. At a minimum, this
13 inconsistency in the testimonies suggests that evidence on this point should be presented
14 to the finder of fact.

15 **C. Woods would be prejudiced by the loss of the video footage.**

16 The deposition testimony previously discussed establishes that at least two patrol
17 vehicles would have recorded some part of the scene of the alleged incident—the units of
18 Officer Martin and Officer Siller—and that the unit of Officer Scissons may have as well.
19 Those recordings may well have had relevant footage. Scissons and Siller testified that
20 they parked their units near Woods’ vehicle. The alleged incident took place on the
21 passenger side of Woods’ vehicle. Even if the exact angle was not perfect such that the
22 recordings did not actually capture images of the incident, it is enough that the cameras
23 may have captured any footage of the incident. *See LaJocies v. City of N. Las Vegas*, No.
24 2:08-cv-00606-GMN-GWF, 2011 WL 1630331, at 2 (D. Nev. April 28, 2011) (“Despite
25 the limited viewing angle of the videotape . . . , it is likely that it did still capture at least
26 some of the altercation (whether sights or sounds) and could have potentially assisted the
27 jury to understand the tenor of the event and to evaluate the credibility of the witnesses
28 who are providing conflicting descriptions”).

1 Moreover, because “the relevance of . . . [destroyed] documents cannot be clearly
2 ascertained because the documents no longer exist,” Scissons “can hardly assert any
3 presumption of irrelevance as to the destroyed documents.” *Leon v. IDX Systems Corp.*,
4 464 F.3d 951, 959 (9th Cir. 2006) (citing *Alexander v. Nat’l Farmers Org.*, 687 F.2d 1173,
5 1205 (8th Cir. 1982)). The Court therefore declines to assume that any recordings from
6 the vehicles in question would have been irrelevant to Woods’ claim. The deletion of the
7 video footage could “threaten[] to distort the resolution of” Woods’ case. *Id.* (quoting *U.S.*
8 *for Use and Ben. of Wiltec Guam, Inc. v. Kahaluu Const. Co., Inc.*, 857 F.2d 600, 604 (9th
9 Cir. 1988)) (quotation marks omitted). And the footage’s value cannot simply be replaced
10 by having eyewitness testimony regarding Woods’ arrest—much of the value provided by
11 video footage is that it allows a jury to make its own determination. *Peschel v. City of*
12 *Missoula*, 664 F. Supp. 2d 1137, 1145 (D. Mont. 2009) (“The on-the-scene officers will
13 testify the force used was entirely reasonable under the circumstances. The obvious
14 inherent value of the video recording is that it would have allowed the jury, the arbiter of
15 the facts, to see the actual events unfold and make its own collective assessment.”). For
16 those reasons, the Court concludes that Woods would have been prejudiced by any loss of
17 video footage.

18 **A. The City of Prescott had a duty to preserve evidence but failed to do so.**

19 The next issue is whether the City of Prescott, as a non-party, had a duty to preserve
20 the video footage from the officers’ dash cams. A similar question was presented in *Pettit*
21 *v. Smith*. In that case, a prisoner brought a § 1983 action against department of corrections
22 employees. 45 F. Supp. 3d at 1102. A video recording of the alleged incident was
23 intentionally deleted by non-party prison employees, and other related pieces of evidence
24 went missing. *Id.* at 1103–04. The defendants argued that spoliation sanctions were
25 inappropriate because the Arizona Department of Corrections (“ADC”) was not a party to
26 the case and they (the defendants) had no personal culpability for the destruction of the
27 missing evidence. *Id.* at 1106. The court disagreed, reasoning that although ADC was a
28 non-party, it was not a disinterested non-party. *Id.* Rather, ADC was the entity that had

1 complete control over evidence that it reasonably should have known would be relevant in
2 future litigation. *Id.* Further, ADC was an agent of the State of Arizona, which was
3 statutorily obligated to indemnify its employees for “any damages for which the employee
4 becomes legally responsible if the acts or omissions resulting in liability were within the
5 employee’s course and scope of employment.” *Id.* (quoting Ariz. Rev. Stat. § 41-621(P))
6 (quotation marks omitted). Since ADC “control[ed] the evidence and who ha[d] access to
7 it, and the State [was] defending [the] case and w[ould] pay any judgment that results from
8 it,” the court concluded that ADC was not a disinterested third party. *Id.* Indeed, ADC
9 was in precisely the same position as parties on whom courts regularly impose a duty to
10 preserve evidence. *Id.*

11 So too here. The Prescott Police Department, as an agency of the City, exercised
12 exclusive control over any video recordings of the incident. Officer Scissons did not
13 himself control the video.³ Like the prisoner in *Pettit*, Woods would have had no access
14 to the video. Woods asserts, and Scissons does not contest the assertion, that the City of
15 Prescott pays for legal representation of Officer Scissons and would indemnify him for any
16 judgment entered against him. (Doc. 60 at 8.) Like ADC, the City of Prescott occupies
17 the same position as parties on whom the court regularly imposes a duty to preserve
18 evidence. The City of Prescott therefore had a duty to preserve any video recordings from
19 the responding officers’ dash cams once it knew that litigation was reasonably likely. *Id.*
20 (citing *Wilson v. Beloit Corp.*, 921 F.2d 765, 767 (8th Cir. 1990)).

21 But the City failed to do so. As testimony from a department evidence technician
22 establishes, there were no requests made for any footage that may have been recorded that
23 day, (Doc. 72-1 at 105–06), and the parties do not dispute that any footage has been erased.

24 **B. The duty arose before the video would have automatically been erased.**

25 The duty to preserve evidence “arises when a party knows or should know that the
26 information is relevant to pending or future litigation.” *Pettit*, 45 F. Supp. 3d at 1105. “The

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28 ³ An evidence technician for the department testified that recorded video footage is
automatically uploaded to the department’s servers when the police vehicle is near the
police station. (Doc. 72-1 at 105.)

1 duty to preserve is triggered not only when litigation actually commences, ‘but also extends
2 to the period before litigation when a party should reasonably know that evidence may be
3 relevant to anticipated litigation.’” *Id.* (quoting *Suroweic v. Capital Title Agency, Inc.*, 790
4 F. Supp. 2d 997, 1005 (D. Ariz. 2011)).

5 Even before the City was aware of the actual litigation, the City should have
6 foreseen that litigation could arise from Woods’ arrest. The “Use of Force Report” for the
7 alleged incident was completed on June 28, 2016. (Doc. 60-3 at 41.) That report concluded
8 that Scissons used appropriate force, but did so, apparently, without requesting to review
9 any possible recordings of the incident. (*Id.*) But the City was aware that this was not a
10 run-of-the-mill case. Officer Scissons had deployed a taser against the subject and was
11 involved in a physical altercation with Woods in which he “delivered several knee strikes
12 to [Woods’] body. (Doc. 72-1 at 84.) Scissons’ actions to subdue Woods were severe
13 enough that Scissons called for medical aid to assist Woods. (*Id.*) Based on this, the City
14 determined that the arrest warranted further internal review by the Incident Review Board.
15 (*See id.* at 46.) That review was completed on July 22, 2016, but again was apparently
16 finished without a request to review the possible recordings of the incident. (*Id.*) Because
17 the City determined that a heightened level of review of the incident was warranted and
18 that Woods had required medical assistance, it should have known that the incident might
19 have resulted in litigation. Since the date of the decision to assemble a full Incident Review
20 Board is not clear, the date of the issuance of that Board’s decision—July 22, 2016—
21 functionally approximates the date on which the City’s duty to preserve the video footage
22 would have arisen.

23 And even if the City’s duty did not arise by that date, the City had actual knowledge
24 that litigation was occurring by April 18, 2017. Officer Scissons received a waiver of
25 service of summons and agreed to waive service on April 18. After that date, the City
26 knew that litigation was occurring. Both July 22, 2016 and April 18, 2017 were less than
27 one year after Woods’ arrest on June 25, 2016. At either of these points, the video footage
28 would have still existed. (See Doc. 72-1 at 106) (“In June 2017, the police server was

1 programmed to erase video non-segregated footage 366 days after upload to the server.”).

2 Prescott Police Department was aware that its patrol vehicles recorded dash cam
3 video and was also aware that litigation was occurring. For these reasons, the City had a
4 duty to preserve the video footage that arose before the date on which the footage would
5 have been automatically deleted from the servers pursuant to Prescott Police policy.

6 **C. The spoliation can be imputed to Scissons.**

7 The question of whether spoliation by a non-party employer can be imputed to an
8 employee that is a party has not been answered by the Ninth Circuit. District courts within
9 the circuit have split. *See Pettit*, 45 F. Supp. 3d at 1110 (finding “strong reasons” to impute
10 spoliation by employer to employee, but declining to do so because other movant failed to
11 show that case-dispositive sanctions were appropriate); *Ramos v. Swatzell*, No. ED CV 12-
12 1089-BRO (SPx), 2017 WL 2857523, at *7 (C.D. Cal. June 5, 2017) (spoliation by
13 employer may be imputed to employee “to avoid unfair prejudice to plaintiffs”); *Peters v.*
14 *Cox*, 341 F. Supp. 3d 1192, 1194–95 (D. Nev. 2018) (disagreeing with proposition that
15 “individual defendants could be sanctioned for spoliation caused within a prison system
16 over which they had no direct control” because doing so raised Seventh and Eleventh
17 Amendment concerns); *Gemsa Enterprises, LLC v. Specialty Foods of Alabama, Inc.*, No.
18 LA CV13-00729 JAK (RZx), 2015 WL 12746220, at *9–*10 (C.D. Cal. Feb. 10, 2015)
19 (declining to impute spoliation by employee to employer because employee was not acting
20 as employer’s agent in spoliating evidence).

21 On the facts of this case, it is appropriate to impute the spoliation of the video
22 recordings by the Prescott Police Department to Scissons for the purpose of imposing
23 sanctions. First, as previously discussed, the Police Department is not merely a
24 disinterested non-party. Woods has alleged—and Scissons has not refuted—that the City
25 would pay any judgment against Scissons in this case. The City’s incentives for preserving
26 evidence thus align with Scissons’ and the City is therefore in the same functional position
27 as other parties subject to sanctions for spoliation. *Cf. Pettit*, 45 F. Supp. 3d at 1106 (“ADC
28 is in the same position as parties on whom courts routinely impose a duty to preserve.”).

1 Further, allowing the Police Department to destroy evidence and then declining to impose
2 appropriate sanctions simply because it is not a party could incentivize such behavior by
3 future non-party indemnifying employers. Additionally, leaving Woods without a remedy
4 here for the destruction of relevant evidence would be an unjust result. *See Pettit*, 45 F.
5 Supp. 3d at 1110 (“For the same reasons that the Court found that ADC had a duty to
6 preserve the evidence lost in this case, the Court finds that there is strong reason to impute
7 the spoliation of ADC to Defendants to ensure that fairness is done at trial.”); *Swatzell*,
8 2017 WL 2856523, at *7 (“CIW’s spoliation of Garcia’s personnel file and breach of duty
9 to preserve evidence may be imputed onto Garcia to avoid unfair prejudice to plaintiffs.”).⁴

10 **D. What measures are appropriate?**

11 Under Rule 37(e), if electronic evidence that should have been preserved is lost
12 because the party that should have preserved it failed to take reasonable steps to do so, the
13 court “may order measures no greater than necessary to cure the prejudice.” Fed. R. Civ.
14 P. 37(e)(1). In order to impose any of the sanctions listed in 37(e)(2), however, there must
15 first be a determination that the spoliating “party acted with the intent to deprive another
16 party of the information’s use in the litigation.” The Court declines to make such a finding
17 on the facts before it now on this motion. However, for the reasons discussed, it is
18 appropriate to allow the parties to present evidence to the jury regarding the potential
19 existence of video footage that was subsequently erased. The jury will further be instructed
20 that the City of Prescott had a duty to preserve the evidence. The jury will thereafter be
21 allowed to make its findings with all the facts in mind pertaining to the possibly deleted
22 recordings. It will be instructed that, should it conclude, based on the evidence produced
23 at trial, that the City of Prescott or the Prescott Police Department destroyed evidence and

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25 ⁴ The Eleventh Amendment concerns discussed in *Pettit* and *Peters* are absent here because
26 the entity whose spoliation is being imputed to Scissons is a municipality rather than a state
27 entity. The Supreme Court has consistently held that state sovereign immunity does not
28 bar suits against municipalities. *See, e.g., Alden v. Maine*, 527 U.S. 706, 757 (1999) (“The
second important limit to the principle of sovereign immunity is that it bars suits against
States but not lesser entities. The immunity does not extend to suits prosecuted against a
municipal corporation or other governmental entity which is not an arm of the State.”).

1 acted with the intent to deprive Woods of the use of the videotape during this litigation, it
2 may assume that the video footage would have been favorable to Woods.

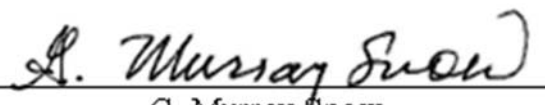
3 This remedy is no greater than necessary to cure the prejudice, *see* Fed. R. Civ. P.
4 37(e), would allow the determination of intent to be made on a more fully developed
5 evidentiary record, and is in harmony with the Advisory Committee Notes to the rule.⁵

6 **CONCLUSION**

7 Because there is evidence that video recordings of the alleged event existed but were
8 not preserved, the jury will hear evidence concerning the potential existence of video
9 footage and will be instructed that it may consider that evidence along with all other
10 evidence in reaching its decision. It will also be instructed that if it determines that the
11 Police Department destroyed evidence and did so with the intent to deprive Woods of the
12 use of the video footage, it may infer that the footage would have been favorable to Woods.
13 However, the Court declines to give the instruction as requested by Woods because the
14 question of intent will be submitted to the jury.

15 **IT IS THEREFORE ORDERED** that Plaintiff Dustin Woods' Motion for
16 Spoliation Sanctions (Doc. 60) is **GRANTED in part and DENIED in part** as discussed
17 in this Order.

18 Dated this 14th day of August, 2019.

19 
20 _____
21 G. Murray Snow
22 Chief United States District Judge
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24

25 ⁵ *See* Fed. R. Civ. P 37(e) committee's notes to the 2015 Amendment ("Subdivision (e)(2)
26 requires a finding that the party acted with the intent to deprive another party of the
27 information's use in the litigation. This finding may be made by the court when ruling on
28 a pretrial motion, when presiding at a bench trial, or when deciding whether to give an
adverse inference instruction at trial. If a court were to conclude that the intent finding
should be made by a jury, the court's instruction should make clear that the jury may infer
from the loss of the information that it was unfavorable to the party that lost it only if the
jury finds that the party acted with the intent to deprive another party of the information's
use in the litigation.").