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10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE DISTRICT OF ARIZONA

13
14 Jane Doe #1; Jane Doe #2; Norlan Flores, on
behalf of themselves and all others similarly
15 situated,

16 Plaintiffs,

17 v.

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

24 Defendants.

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

**PLAINTIFFS' MOTION FOR
SANCTIONS**

CLASS ACTION

Oral Argument Requested

**(Assigned to the
Honorable David C. Bury)**

Action Filed: June 8, 2015

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1 **I. INTRODUCTION**

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

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

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

1 **II. BACKGROUND**

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

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

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

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

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

7 On August 13, 2015, at the hearing on Plaintiffs’ Motion for Expedited Discovery,
8 the Court ordered Defendants “not to record or record over or otherwise destroy any such
9 surveillance tapes . . . and to preserve those which are presently in their possession which
10 have not been recorded over or otherwise destroyed.” (Mayer Decl., ¶ 5 and Ex. D at
11 41:9-13). The following day, August 14, 2015, the Court issued a written order requiring
12 that Defendants “shall not destroy or record over any video surveillance tapes . . . and
13 shall preserve such surveillance tapes currently in their possession.” (ECF No. 51, ¶ 8.)

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

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

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

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

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

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

- 24
- 25 • "[T]he stations have made the operational decision to continue, where
26 possible, recording current video footage for the protection of officers and
27 staff . . . even though this automatically causes recording over some existing
28 stored surveillance footage." (Second Notice at 2.)
 - Border Patrol is still working "to bring online the additional capacity to
store video in full compliance with the Court's [August 14, 2015] order."
(*Id.* at 2-3.)

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

13 III. ARGUMENT

14 A. Defendants Engaged in Spoliation of Critical Evidence.

15 Spoliation is “the destruction or significant alteration of evidence, or the failure to
16 preserve property for another’s use as evidence[,] in pending or reasonably foreseeable
17 litigation.” *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)
18 (citation omitted). Trial courts have the “inherent discretionary power to make
19 appropriate evidentiary rulings in response to the destruction or spoliation of evidence,”
20 *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993), and may impose sanctions for
21 spoliation under their inherent powers to manage their own affairs, *Leon v. IDX Sys.*
22 *Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). Moreover, where—as here—a party “fails to
23 obey an order to provide and permit discovery,” courts may impose sanctions under
24 Federal Rule of Civil Procedure 37. Fed. R. Civ. P. 37(b); *Leon*, 464 F.3d at 958.

25 “A party seeking sanctions for spoliation of evidence must prove the following
26 elements: 1) the party having control over the evidence had an obligation to preserve it
27 when it was destroyed or altered, 2) the destruction or loss was accompanied by a
28

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

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

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

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

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

27 Notwithstanding Defendants’ notice—and notwithstanding their assurance that
 28 they had “taken all the required preservation steps”—Defendants failed to suspend CBP

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

8 Even then, Defendants only promised full compliance on or around August 22,
9 2015. (*Id.* (declaring intention to comply with the Order "within 48-72 hours").)
10 Defendants, however, have failed to meet even this deadline. On August 27, 2015,
11 Defendants filed a "Second Notice of Facts Regarding Compliance with Court's Order"
12 with supporting declarations. (ECF Nos. 55, 55-1, 55-2.) These documents establish that,
13 nearly two weeks after the Court ordered Defendants not to "destroy or record over any
14 video surveillance tapes of any and all detainee holding areas" and to "preserve such
15 surveillance tapes currently in their possession," Defendants were still failing to comply
16 with their preservation obligations. Defendants' failure continues.

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

23 **2. Defendants Evinced a Culpable State of Mind.**

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

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

3 Defendants’ post-Order conduct makes it clear that had they taken their
4 preservation obligations seriously, they could have preserved weeks of video footage.

5 Two months after this litigation began, for the very first time Defendants:

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

13 Defendants’ failure to take these very measures in June, when Defendants were
14 indisputably on notice, is evidence that Defendants behaved willfully, and therefore
15 culpably: “When a party on notice intentionally destroys, rather than accidentally loses,
16 th[e] evidence, it is a ‘willful’ spoliator even if it did not intend to deprive an opposing
17 party of relevant evidence.” *Food Servs. of Am., Inc. v. Carrington*, No. CV–12–00175–
18 PHX–GMS, 2013 WL 4507593, at *21 (D. Ariz. Aug. 23, 2013), *reconsideration denied*,
19 2013 WL 5655664 (Oct. 17, 2013) (citing *Leon*, 464 F.3d at 959). At the very least,
20 Defendants’ failure to suspend their automatic-delete protocol evidences the necessary
21 culpable state of mind. *E.g., Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132,
1146–47 (N.D. Cal. 2012).

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

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

3 **3. The Destroyed Video Footage is Relevant to Plaintiffs’ Claims.**

4 Relevance for spoliation purposes tracks Federal Rule of Evidence 401. *Slep-Tone*,
5 2014 WL 65297, at *5. This is a low bar, *Slaughter-Payne v. Shinseki*, 522 F. App’x 409,
6 410 (9th Cir. 2013), and is one that is easily surmounted here.

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

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

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

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

1 discovery of electronically stored information from sources that the party identifies as not
2 reasonably accessible because of undue burden or cost.” Fed. R. Civ. P. 26(b)(2)(B). In
3 any event, Defendants own post-Order conduct demonstrates that the footage Plaintiffs
4 seek was in no way physically inaccessible. Nor was the cost of further backup storage
5 prohibitive.¹ An initial “expenditure of approximately \$10,000, with an additional
6 expenditure of \$5,000 every 90-120 days” is not negligible. (See “Notice of Facts
7 Regarding Compliance with Court’s Order” (ECF No. 53) at 2.) But given that the CBP’s
8 2015 budget was over \$12.7 billion, the relative burden of storing the footage—even for
9 many months—can hardly be deemed undue. See U.S. Department of Homeland
10 Security, Budget in Brief, Fiscal Year 2016 at 10, *available at*
11 http://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf.

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

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

20 In fashioning sanctions, Courts look to what would “best (1) deter[] parties from
21 future spoliation, (2) place[] the risk of an erroneous judgment on the spoliating party, and
22 (3) restore[] the innocent party to their rightful litigation position.” *Slep-Tone*, 2014 WL
23 65297, at * 3 (citation omitted). “Sanctions that a federal court may impose for spoliation
24 include assessing attorney’s fees and costs, giving the jury an adverse inference

25
26 ¹ In any event, Defendants’ counsel never raised the issue of cost or other burden,
27 nor did they seek any kind of compromise when they provided assurances to Plaintiffs’
28 counsel that they had “take[n] all required preservation steps.” (Mayer Decl., ¶ 4 and
Ex. C.)

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

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

- 7
- 8 • An inference, applicable to all motions and at trial, that the videotapes
would have demonstrated all facts described in Plaintiffs’ declarations
continue through the present.
 - 9 • Immediate production of a copy of the oldest retained video-recording for
10 each detainee holding area.

11 **IV. CONCLUSION**

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

17
18 Dated: August 28, 2015

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Attorneys for Plaintiffs

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

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.2(j)

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

Colette R. Mayer
(typed)



(signature)

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CERTIFICATE OF SERVICE

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

Harold J. McElhinny

(typed)

/s/ Harold J. McElhinny

(signature)

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

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

Plaintiffs,

v.

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

Defendants.

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

**[PROPOSED] ORDER
GRANTING PLAINTIFFS'
MOTION FOR SANCTIONS**

The Court, having considered Plaintiffs' Motion for Sanctions pursuant to Federal Rules of Civil Procedure 37(b) and the Court's inherent discretionary power to make appropriate evidentiary rulings regarding destruction or spoliation of evidence and to manage its own affairs, and finding that good cause appears, orders as follows:

Plaintiffs' Motion for Sanctions is hereby GRANTED.

IT IS ORDERED THAT an inference is established, applicable to all motions and at trial, that the videotapes would have demonstrated all facts described in Plaintiffs' declarations continue through the present.

1 IT IS FURTHER ORDERED THAT Defendants shall immediately produce a copy
2 of the oldest retained video-recording for each detainee holding area at each of the eight
3 Tucson Sector Border Patrol stations.

4 **IT IS SO ORDERED.**

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