

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

11 Colette Reiner Mayer*
12 MORRISON & FOERSTER LLP
13 755 Page Mill Road
14 Palo Alto, CA 94304-1018
15 Telephone: (650) 813-5600
16 Facsimile: (650) 494-0792
17 Email: CRMayer@mofocom

18 Attorneys for Plaintiffs
19 *Admitted pursuant to Ariz. Sup. Ct. R. 38(a)
20 Additional counsel listed on next page

21 IN THE UNITED STATES DISTRICT COURT
22 FOR THE DISTRICT OF ARIZONA

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

26 Plaintiffs,

27 v.

28 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;
Mark Morgan, Chief of the United States
Border Patrol, in his official capacity; Jeffrey
Self, Commander, Arizona Joint Field
Command, in his official capacity; and Paul
A. Beeson, Chief Patrol Agent-Tucson
Sector, in his official capacity,

Defendants.

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

**PLAINTIFFS' MOTION FOR
CIVIL CONTEMPT**

CLASS ACTION

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

Action Filed: June 8, 2015

1 Robert J. Esposito*
2 Elizabeth Balassone*
3 MORRISON & FOERSTER LLP
4 425 Market Street
5 San Francisco, CA 94105-2482
6 Telephone: (415) 268-7000
7 Facsimile: (415) 268-7522
8 Email: REsposito@mofo.com
9 Email: EBalassone@mofo.com

Megan Elaine Sallomi*
Elisa Marie Della-Piana*
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS OF THE SAN FRANCISCO
BAY AREA
131 Steuart Street, Suite 400
San Francisco, CA 94105
Telephone: (415) 543-9444
Facsimile: (415) 543-0296
Email: msallomi@LCCR.com
Email: edellapiana@LCCR.com

8 James J. Cekola*
9 MORRISON & FOERSTER LLP
10 12531 High Bluff Drive, Suite 100
11 San Diego, CA 92130
12 Telephone: (858) 720-5100
13 Facsimile: (858) 720-5125
14 Email: JCekola@mofo.com

Attorneys for Plaintiffs

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

12 Linton Joaquin*
13 Karen C. Tumlin*
14 Nora A. Preciado*
15 NATIONAL IMMIGRATION LAW
16 CENTER
17 3435 Wilshire Boulevard, Suite 2850
18 Los Angeles, CA 90010
19 Telephone: (213) 639-3900
20 Facsimile: (213) 639-3911
21 Email: joaquin@nilc.org
22 Email: tumlin@nilc.org
23 Email: preciado@nilc.org

19 Mary Kenney*
20 Melissa Crow*
21 AMERICAN IMMIGRATION COUNCIL
22 1331 G Street NW, Suite 200
23 Washington, D.C. 20005
24 Telephone: (202) 507-7512
25 Facsimile: (202) 742-5619
26 Email: mkenney@immcouncil.org
27 Email: mcrow@immcouncil.org

24 Daniel J. Pochoda (Bar No. 021979)
25 Brenda Muñoz Furnish (Bar No. 027280)
26 ACLU FOUNDATION OF ARIZONA
27 3707 North 7th Street, Suite 235
28 Phoenix, AZ 85014
Telephone: (602) 650-1854
Facsimile: (602) 650-1376
Email: dpochoda@acluaz.org
Email: bmfurnish@acluaz.org

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1 **I. INTRODUCTION**

2 This Court took Defendants to task for “not hesitat[ing] since the inception of this
3 case to allow destruction of the video tapes and inform the Court after the fact, that it was
4 unable to prevent it.” (Court Order (“Sanctions Order”) at 9, ECF No. 64.) Defendants, it
5 would appear, have not hesitated to do so again.

6 Plaintiffs recently learned that Defendants have irreparably destroyed, and
7 otherwise failed to preserve, *the* most critical evidence in this case: video footage of
8 Tucson Sector hold rooms. By their own admission, Defendants have corrupted their own
9 video data archives, rendering them inaccessible, including video showing their own
10 experts inspecting the facilities in January 2016. In so doing, Defendants have now
11 violated two of this Court’s orders, including the order sanctioning Defendants for this
12 very behavior.

13 Even worse, perhaps, than the destruction itself is that although Defendants first
14 learned the data was corrupted and inaccessible last June, they neglected to inform
15 Plaintiffs or this Court until December 19, 2016. They neglected to do so despite this
16 Court’s express order that “Defendants . . . act in good faith to keep Plaintiffs apprised on
17 an ongoing basis of the status of recovery, maintenance, preservation and production of
18 the video recordings.” (Sanctions Order at 12.) Despite learning of the destruction in
19 June, Defendants failed to inform Plaintiffs’ counsel, instead asking opposing counsel to
20 select a narrow band of time for video footage to be produced. Plaintiffs selected January
21 2016, the month when Defendants experts inspected the facilities. Instead of confessing
22 their error and keeping Plaintiffs apprised of the relevant facts, Defendants sent Plaintiffs
23 several hard drives containing video footage that Defendants knew full well was corrupt
24 and thereby inaccessible, but said absolutely nothing.

25 As a result of Defendants’ silence, Plaintiffs expended significant time and effort
26 trying in vain to view the footage. Plaintiffs contacted Defendants in early November,
27 well before the hearing on Plaintiffs’ Motion for a Preliminary Injunction, asking about
28 the footage. Defendants feigned ignorance and said they would report back. It was not

1 until last month, after Plaintiffs' repeated inquiries and after the preliminary injunction
2 hearing, that this destruction was revealed and Defendants finally admitted not only that
3 the data was corrupted and could not be fixed, but that they had known of the corruption
4 nearly half a year before they produced it.

5 To this day, and despite this Court's Order, Defendants have inexplicably refused
6 to provide a comprehensive status report indicating what video data archived to date has
7 been corrupted (and what has not). Thus, Plaintiffs do not know what data or how much
8 of it is corrupt and unusable. What is clear, however, is that the corrupt data includes
9 footage of Tucson Sector hold rooms—without doubt the most important evidence in this
10 case.

11 The Sanctions Order, it is now manifestly clear, failed to deter Defendants from
12 acting in bad faith, from destroying critical evidence, and from violating this Court's
13 orders. If Defendants are to be deterred from further destruction of evidence, Plaintiffs
14 respectfully submit that more serious sanctions are required. The bad faith demonstrated
15 by Defendants should, at the very least, preclude them from continuing to oversee the
16 video evidence preservation efforts. And this Court should address the ongoing prejudice
17 to Plaintiffs who continue, by virtue of Defendants' wrongdoing, to be deprived of critical
18 evidence.

19 Plaintiffs request that this Court hold Defendants, including their counsel of record,
20 in civil contempt of its August 14, 2015, and September 28, 2015 Orders. Plaintiffs
21 further request an order (1) issuing an adverse inference for the trier of fact; (2) appointing
22 a third-party vendor to serve as a Data Monitor and oversee Defendants' video
23 preservation obligations, at Defendants' expense; and (3) ordering Defendants to show
24 cause as to why they should not pay Plaintiffs' attorneys' fees and costs incurred in
25 connection with (a) the technical support to review and attempt repair of inaccessible data
26 produced by Defendants, (b) meet and confer with Defendants on this issue, and (c) this
27 Motion.
28

1 This Motion is urgent because, despite this Court's orders, it is unclear what video
2 footage data has been corrupted and what steps Defendants have taken, if any, to resolve
3 the corruption issue. As far as Plaintiffs' know, the spoliation is ongoing.

4 **II. BACKGROUND**

5 **A. Defendants' Destruction of Video Evidence Prior to Sanctions Order**

6 Defendants' failure to preserve relevant video footage depicting the conditions of
7 confinement in Tucson Sector stations is long- and well-established. Prior to August 14,
8 2015, Defendants destroyed video footage, including footage depicting the detention of
9 the named plaintiffs, Jane Doe #1 and Jane Doe #2. Defendants destroyed this footage
10 despite Defendants' counsel's express assurance that Defendants were fully complying
11 with their legal duty to preserve. (*See* Plts.' Mot. for Sanctions Ex. C at 1, ECF No. 57-3.)
12 It later turned out, however, that Defendants had taken no steps to preserve this video
13 footage whatsoever. Plaintiffs filed a Motion for Expedited Discovery requesting, among
14 other things, the production of this footage. (Mot. Expedited Discovery, ECF No. 25.)

15 On August 14, 2015, this Court ordered Defendants "not [to] destroy or record over
16 any video surveillance tapes [and to] preserve such surveillance tapes currently in their
17 possession." (Court Order ¶ 8, ECF No. 51.)

18 Instead of complying with that Order, or moving to modify it, Defendants made the
19 "operational decision to continue . . . recording current video footage . . . even though this
20 automatically causes recording over some existing stored surveillance footage." (Defs.'
21 2nd Notice of Facts Re Compliance with Ct. Order at 2, ECF No. 55.) Plaintiffs then filed
22 a Motion for Sanctions, asking this Court to sanction Defendants for their continued
23 destruction of video evidence even after the Court's August 14, 2015 Order. (Pls.' Mot.
24 for Sanctions, ECF No. 56.)

25 **B. This Court's Sanctions Order**

26 On September 28, 2015, the Court issued an Order granting in part Plaintiffs'
27 Motion for Sanctions. (Sanctions Order at 12.) The Court concluded "the destruction of
28 the video-tape recordings made prior to this Court's August 14, 2015, Order was, at best,

1 negligent and was certainly willful.” (*Id.* at 9:3-5.) Regarding the video recordings after
2 August 14, the Court found “Defendants acted unilaterally to modify their responsibilities
3 to preserve evidence required by law, rule and direct Order of this Court.” (*Id.* at 9:14-
4 15.)

5 The Court described how “Defendants have not hesitated since the inception of this
6 case to allow destruction of the video tapes and inform the Court after the fact, that it was
7 unable to prevent it. Defendants have unilaterally changed plans and not told the
8 Plaintiffs and have not sought leave of the Court for changes.” (*Id.* at 9:20-25.)

9 The Court also identified Defendants’ failure to communicate with Plaintiffs on
10 issues related to video preservation. (*Id.* at 10:6-9 (“In spite of Plaintiff’s offer to reassess
11 its retention requests upon being better informed regarding Defendants’ data recording
12 and retention systems, the Defendants have made no effort to work with Plaintiffs to
13 address the Defendants’ technical limitations and difficulties.”).) Accordingly, the Court
14 was abundantly clear that Defendants have an obligation to inform Plaintiffs about such
15 issues. The Court ordered that “Defendants shall act in good faith to keep Plaintiffs
16 apprised of an ongoing basis of the status of recovery, maintenance, preservation and
17 production of video recordings.” (*Id.* at 12:5-7.)

18 **C. Plaintiffs’ Recent Discovery of Defendants’ Failure to Preserve Video**
19 **Evidence**

20 On August 23, 2016, Plaintiffs requested that Defendants produce additional video
21 data from six of the Tucson Sector facilities, including all the video from Tucson Station
22 during the month of January 2016. (Declaration of James Cekola in Support of Pls.’ Mot.
23 for Civil Contempt (“Cekola Decl.”) filed herewith, Ex. 1 at 3.) On October 4th, Plaintiffs
24 received hard drives supposedly containing the requested data. (*Id.* Ex. 2 at 2.)

25 On November 3rd, Plaintiffs sent an email updating Defendants on the status of the
26 data. Plaintiffs first told Defendants that they had to resolve various technical issues—for
27 example, issues related to ViconNet software used—to even begin reviewing the video.
28

1 (*Id.* Ex. 1 at 1.) Plaintiffs also notified Defendants that, for at least the Tucson Station,
2 there was no video from the cameras in the holding rooms. (*Id.*)

3 Having received no response to this inquiry, Plaintiffs sent another email on
4 November 10th. (*Id.*) Defendants finally sent an email that day, but offered no
5 substantive response. It stated: “Our local folks have been tied up with the site visits
6 thusbweek [sic], but we are looking into it and will get back to you as soon as we can.”
7 (*Id.*)

8 Another week passed without any substantive information regarding the missing
9 video data. An evidentiary hearing was held on November 14 and 15, 2016, on Plaintiffs’
10 Motion for a Preliminary Injunction. (Day 1, Day 2 Preliminary Injunction Hearing
11 Transcripts, ECF Nos. 237, 239.)

12 Still getting nothing from Defendants, Plaintiffs sent a follow up letter on several
13 outstanding discovery items, including the video footage, on November 19th. (*Id.* Ex. 2.)

14 Defendants responded on November 22nd, requesting that the parties schedule a
15 call. Their email stated: “Regarding your questions about the video, as I mentioned before
16 it has been hard for me to coordinate with my folks in Tucson on this issue given the site
17 visits, hearing, and holiday, but I think I’ll have an answer to your questions on that by
18 tomorrow so I’ll shoot that over to you or give you a call.” (*Id.* Ex. 3.)

19 Plaintiffs were finally able to schedule a call with Defendants regarding the video
20 they produced on December 19, 2016. (Cekola Decl. ¶ 5.) Participants on that call
21 included counsel for Defendants and Plaintiffs, as well as Border Patrol employees
22 involved in the archiving of the video footage, including Gary Weaver and Samuel
23 Shivers.¹ (*Id.*)

24 During this call, Defendants *for the first time* told Plaintiffs that there was an
25 unresolvable corruption issue with the archived footage. (*Id.* ¶ 6.) As explained primarily

26
27 ¹ Mr. Shivers has submitted multiple declarations in this litigation regarding the video
28 surveillance footage, systems, and archiving process. (Declarations of Samuel Shivers III, ECF
Nos. 55-2, 60-2, 66-1.)

1 by Mr. Weaver, for at least the Tucson Station, there are a total of eight Digital Video
2 Recorders (“DVRs”) recording video footage, four of which are related to this litigation.
3 (*Id.*) Those DVRs run Windows 7 OS (operating system). According to Mr. Weaver, an
4 update to that operating system may have gone out while some of the DVRs were being
5 archived, which restarted the systems and resulted in corrupted archives. (*Id.*)

6 Moreover, it seems that no one actually checked the archives, once they were
7 made, to ensure that the data was accessible. (*Id.*) Thus, by the time the corruption was
8 recognized, the DVR system had been overwritten—in other words, taped over—so there
9 was no way to try to make another archive attempt. (*See id.*)

10 Even more shockingly, Mr. Weaver admitted that Defendants first noticed the issue
11 in June 2016.² (*Id.* ¶ 7.) Apparently, he went back to review the archive disks, and could
12 see some messages indicating that the operating system had been rebooted during the
13 archiving process. (*Id.*) And, without any notice to Plaintiffs, Mr. Weaver reported that
14 Defendants had had an internal meeting about the issue in July 2016 and he had
15 distributed a list of his findings internally to Defendants. (*Id.*)

16 Hearing this on the December 19th call, Plaintiffs asked why Defendants did not
17 provide the list back in July, and why they are not providing it to Plaintiffs now. (*Id.* ¶ 8.)
18 Counsel for Defendants responded that she is not sending it to Plaintiffs now because she
19 does not consider the list final and because Plaintiffs had not requested every single video
20 that has been archived. (*Id.*)

21 Plaintiffs then asked what Defendants have done since June 2016, or are doing now
22 to fix the problem. (*Id.* ¶ 9.) Mr. Weaver indicated that, only since October or November
23 2016, Defendants have been “working to minimize” the number of Windows updates to
24 the DVR systems so they “do not get frequent updates, to minimize the DVR restarting.”
25

26 ² The record suggests that Defendants have known about this problem at least a year
27 before June 2016, and done nothing to fix it. (Aug. 27, 2015 Decl. of Samuel R. Shivers III ¶ 9a,
28 ECF No. 55-2) (“Tucson Station- two of four DVRs have backups because two DVRs are failing
and constantly rebooting causing the backup to fail”).)

1 (*Id.*) Mr. Weaver also said that, only since December 2016, someone is actually checking
2 the video archived each month to determine whether it is corrupted. (*Id.*)

3 Finally, Plaintiffs asked whether the corruption problem existed for all the Tucson
4 Sector stations. (*Id.* ¶ 10.) As Mr. Weaver is involved in only the archiving process for
5 the Tucson and Sonoita Stations, he did not know whether anyone was looking into
6 corruption of the archives from the other six stations. (*Id.*)

7 **D. Potential Further Destruction of Video Evidence from Tucson Station**

8 During the December 19th call, Plaintiffs also sought a status update regarding
9 their request for the production of video footage from the Tucson Station for a different
10 month (November 2016). (*Id.* ¶ 11.) Defendants indicated that this archive has not been
11 completed yet because there is a problem with a DVR. (*Id.*) Accordingly, Plaintiffs are
12 concerned that there is a separate issue regarding the DVR itself that may lead to further
13 destruction of video footage from the Tucson Station.

14 **III. LEGAL STANDARD**

15 The standard for finding a party in civil contempt is well-settled. A party moving
16 for civil contempt must show by clear and convincing evidence that the contemnors
17 violated the Court's order. *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir.
18 1999). The burden then shifts to the contemnor to demonstrate why they were unable to
19 comply. *Id.* "This Circuit's rule with regard to contempt has long been whether the
20 defendants have performed 'all reasonable steps within their power to insure compliance'
21 with the court's orders." *Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 856 (9th
22 Cir. 1992).

23 The district court has "wide latitude in determining whether there has been a
24 contemptuous defense of its order." *Gifford v. Heckler*, 741 F.2d 263, 266 (9th Cir.
25 1984); *see Spallone v. United States*, 493 U.S. 265, 276 (1990) (federal courts have
26 inherent power to enforce their lawful orders through contempt). In making its contempt
27 determination, a court may consider the contemnors' history of non-compliance and the
28

1 extent to which the witness failed to comply during the pendency of the motion for
2 contempt. *See, e.g., Stone*, 968 F.2d at 857.

3 “Civil contempt is characterized by the court’s desire to compel obedience to a
4 court order or to compensate the contemnor’s adversary for the injuries which result from
5 the noncompliance.” *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778
6 (9th Cir. 1983) (citations omitted); *see also Ahearn ex rel. N.L.R.B. v. Int’l Longshore &*
7 *Warehouse Union, Locals 21 & 4*, 721 F.3d 1122, 1129 (9th Cir. 2013) (“[A] sanction
8 generally is civil if it coerces compliance with a court order or is a remedial sanction
9 meant to compensate the complainant for actual losses.”).

10 IV. ARGUMENT

11 A. Defendants’ Continued Failure to Preserve Video Evidence is a Clear 12 and Convincing Violation of This Court’s Orders.

13 Once before, already, this Court ordered Defendants “not [to] destroy or record
14 over any video surveillance tapes [and to] preserve such surveillance tapes currently in
15 their possession.” (Court Order ¶ 8, ECF No. 51.) Yet, by their own belated admission,
16 Defendants have failed to preserve evidence in this litigation by knowingly creating
17 corrupted archives of the video footage.

18 And when they found out about the corruption months ago, Defendants did and
19 said nothing. Then, when Plaintiffs did discover the problem, Defendants said they knew
20 nothing and kept Plaintiffs in the dark until after the hearing on the Preliminary
21 Injunction. Defendants’ conduct violates this Court’s explicit direction to “act in good
22 faith to keep Plaintiffs apprised of an ongoing basis of the status of recovery,
23 maintenance, preservation and production of video recordings.” (Sanctions Order at 12:5-
24 7.) Indeed, it is particularly distressing that Defendants appear to have been keeping silent
25 on their violation of the Court’s Orders, in the hopes that Plaintiffs would not discover it.
26
27
28

1 **B. Defendants’ Continued Failure to Preserve Video Evidence Warrants**
2 **Further Sanctions.**

3 **1. An Adverse Inference Is Necessary to Deter Further Destruction**
4 **and Address Plaintiffs’ Loss of The Most Critical Evidence.**

5 In light of Defendants’ continuing failure to preserve evidence, in violation of two
6 Court orders, Plaintiffs renew their request for the following adverse inference:

7 An inference, applicable to all motions and at trial, that the
8 videotapes would have demonstrated all facts described in
9 Plaintiffs’ declarations continue through the present.

10 (Court Order at 11, ECF No. 56.) While noting Defendants’ willful conduct merited a
11 terminating sanction and would best deter Defendants from further spoliation, Plaintiffs
12 have submitted that the adverse inference would adequately—though not completely—
13 restore Plaintiffs to their *status quo ante*. (*Id.*)

14 In its Sanctions Order, the Court explained that while it was not prepared to issue
15 an adverse inference at that time, “[t]he Court will not allow the Defendants to take
16 advantage of the missing evidence.” (Sanctions Order at 11.) The Court was clear about
17 the future consequences of such conduct. “If at any point in time, Defendants seek to
18 obtain such an advantage from the lack of video tape evidence, the Court will entertain
19 applying an adverse inference and will allow Plaintiffs to reurge this sanction.” (*Id.*)

20 Defendants’ acts of bad faith surrounding the preliminary injunction hearing show
21 how they are taking advantage of their own spoliation and preservation failures. Plaintiffs
22 asked Defendants about the corrupted data well in advance of the hearing. Instead of
23 fessing up to their failures, Defendants feigned ignorance and Plaintiffs were forced to
24 rely on the incomplete and spotty video evidence they had. Defendants stonewalled
25 Plaintiffs until well after the hearing, so the spoliation could not be raised with the Court.
26 Defendants have done exactly what the Court warned them not to do. An adverse
27 inference should follow.
28

1 **2. Defendants’ Inability to Address Video Preservation Issues**
2 **Necessitates the Appointment of a Data Monitor.**

3 Defendants’ continuing violation of this Court’s Orders to both preserve video
4 evidence and keep Plaintiffs apprised of the status of video preservation shows that
5 Defendants are not capable of continuing to oversee their obligation to preserve video
6 evidence in this litigation. Moreover, Defendants appear either unable or unwilling to
7 actually address the corruption issue. As described above, Defendants waited at least five
8 or six months to do anything to avoid further corruption of video data. (Cekola Decl. ¶ 7.)
9 And since then, Defendants appear to have tried to “minimize” the issue, for at least the
10 Tucson and Sonoita Stations, by reducing the number of Windows systems updates, but
11 offer nothing to suggest the problem is actually resolved. (*Id.*) Worse, it appears that *no*
12 *one* has checked whether the video data archives for remaining six Tucson Sector stations
13 is corrupted. (*Id.*)

14 In light of Defendants’ failures, Plaintiffs request that the Court appoint a Data
15 Monitor to provide the necessary oversight of Defendants’ video evidence preservation, at
16 Defendants’ expense. A Monitor can be appointed by the Court to assess and report on
17 Defendants’ implementation of a court order. *See, e.g., de Jesus Ortega Melendres v.*
18 *Arpaio*, No. CV-07-02513-PHX-GMS, 2013 U.S. Dist. LEXIS 145859, *57-58 (D. Ariz.
19 Oct. 2, 2013) (“In addition to the underlying collected data, the Monitor and Plaintiffs’
20 representatives shall have access to the results of all Supervisor and agency level reviews
21 of the traffic stop and patrol data.”), *cert denied*, 136 S. Ct. 799. Defendants have shown
22 utter disregard and complete incompetence related to video preservation issues to date,
23 resulting in the loss of critical video evidence and suggesting the high likelihood of future
24 destruction if allowed to continue. A Data Monitor will offer both oversight for
25 Defendants, as well as a resource for Plaintiffs to get timely, complete information on the
26 video preservation and production efforts ordered by the Court.

1 **3. Defendants Should Be Ordered to Show Cause As to Why They**
2 **Should Not Pay Plaintiffs' Attorneys' Fees and Costs Incurred**
3 **Because of Defendants' Conduct.**

4 Because of Defendants' conduct, Plaintiffs incurred significant attorneys' fees and
5 costs in trying to fix the video data Defendants already knew was corrupted, meeting and
6 conferring with Defendants on this issue while Defendants delayed and feigned ignorance,
7 and filing this Motion. (*See* Cekola Decl. ¶¶ 13-14.) When considering a motion for civil
8 contempt or sanctions, a court may assess not only attorneys' fees and costs as a sanction,
9 but those fees and costs incurred with the motion. *See, e.g., Forsythe v. Brown*, 281
10 F.R.D. 577, 588 (D. Nev. 2012) (holding witness in contempt of court and ordered to pay
11 moving party's attorney's fees and costs incurred in filing order to show cause regarding
12 contempt) (citing *Stone*, 968 F.2d at 856); *Surowiec v. Capital Title Agency, Inc.*, 790 F.
13 Supp. 2d 997, 1005 (D. Ariz. 2011) (quoting *Victor Stanley, Inc. v. Creative Pipe Inc.*,
14 269 F.R.D. 497, 533 (D. Md. 2010) ("Sanctions that a federal court may impose for
15 spoliation include assessing attorney's fees and costs, giving the jury an adverse inference
16 instruction, precluding evidence, or imposing the harsh, case-dispositive sanctions of
17 dismissal or judgment).

18 Assessment of fees and costs incurred on the video footage is appropriate because
19 they could have been avoided if Defendants had followed the Court's Sanctions Order and
20 notified Plaintiffs about the corruption. Instead, Defendants said nothing and Plaintiffs
21 expended significant efforts trying to access the video, and then trying to confer with
22 Defendants about the problems they were experiencing. The fees and costs associated
23 with just this technical support and meet and confer totals tens of thousands of dollars.
24 (*See* Cekola Decl. ¶ 14.) Accordingly, Plaintiffs respectfully request that this Court order
25 Defendants to show cause as to why Defendants should not pay Plaintiffs' attorneys' fees
26 and costs associated with (a) the technical support to review and attempt repair of
27 inaccessible data produced by Defendants, (b) meet and confer with Defendants on this
28 issue, and (c) this Motion.

1 **C. Defendants Cannot Excuse Their Noncompliance With This Court's**
2 **Orders.**

3 During the December 19th call, counsel for Defendants repeatedly asserted that
4 they had complied with the Court's Orders because the data had been archived, while
5 ignoring the reality that the archives are inaccessible and therefore, unusable. (*Id.* ¶ 12.)
6 Defendant's position strains all credulity. The notion that this corrupted data satisfies the
7 preservation obligations ordered by this Court is not a "good faith or reasonable
8 interpretation" of its Orders. *Vertex Distrib. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885
9 (9th Cir. 1982). And, of course, it does nothing to excuse Defendants' failure to
10 communicate the corruption issue to Plaintiffs.

11 To the extent Defendants contend that they were acting in good faith—clearly, they
12 were not—that too is not a defense. To find a party in civil contempt, the failure to
13 comply with the Court's order need not be willful or intentional. *In re Dual-Deck Video*
14 *Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). While intent is
15 irrelevant to a finding of civil contempt, Defendants plainly demonstrated bad faith here.
16 Defendants have again disrupted the litigation by failing to preserve relevant evidence, all
17 the while sitting silent while further evidence was destroyed and Plaintiffs were left in the
18 dark.

19 **D. Defendants' Continued Failure to Preserve Video Evidence Continues**
20 **to Prejudice Plaintiffs.**

21 In the same way Defendants' bad faith is not germane to the determination of
22 contempt and sanctions here, this Court need not find prejudice to award Plaintiffs the
23 relief they seek. (*See* Pls.' Reply Sanctions Mot. at 7, ECF No. 61 (citing *Leon v. IDX*
24 *Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (bad faith and prejudice are relevant only
25 where the movants seek the harsh sanction of dismissal or default judgment).)
26 Nevertheless, Plaintiffs continue to be prejudiced by Defendants' continued destruction of
27 what may well be the only visual evidence of Defendants' past and continued
28 wrongdoing. This is particularly true because the corrupted video includes (at least) the

1 holding cells in the Tucson Station, the facility with the largest capacity of any station in
2 the sector and, according to Defendants, “a significant portion of the individuals
3 apprehended in Tucson Sector must be processed through the TCC [Tucson Station.]”
4 (Defs.’ Mot. for Reconsideration, ECF No. 252 at 6.) Moreover, the time period of the
5 footage includes months when one of Defendants’ experts inspected the facilities.
6 (Declaration of Richard Bryce ¶ 11, ECF No. 140-5 (“From January 26-28, 2016, I
7 conducted inspections of Tucson Border Patrol Station, Douglas Border Patrol Station,
8 Nogales Border Patrol Station, and the Casa Grande Border Patrol Station.”).) Plaintiffs
9 have now lost the ability to review video footage during those inspections. And there is
10 likely other critical video footage that has been, and continues to be, lost—Plaintiffs do
11 not know the full extent of Defendants’ spoliation.

12 **V. CONCLUSION**

13 For the foregoing reasons, this Court should grant Plaintiffs’ motion, hold
14 Defendants and their counsel of record in contempt, and issue the sanctions requested by
15 Plaintiffs: (1) an adverse inference for the trier of fact; (2) appointment of a third-party
16 vendor to serve as a Data Monitor and oversee Defendants’ video preservation
17 obligations, at Defendants’ expense; and (3) an order for Defendants to show cause as to
18 why they should not pay Plaintiffs’ attorneys’ fees and costs incurred in connection with
19 (a) the technical support to review and attempt repair of inaccessible data produced by
20 Defendants, (b) meet and confer with Defendants on this issue, and (c) this Motion.

21 Dated: January 9, 2017

By: /s/ Colette R. Mayer

22 Colette Reiner Mayer*
23 MORRISON & FOERSTER LLP
24 755 Page Mill Road
25 Palo Alto, CA 94304-1018
26 Telephone: (650) 813-5600
27 Facsimile: (650) 494-0792
28 Email: CRMayer@mof.com

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

Robert J. Esposito*
Elizabeth Balassone*
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522
Email: RESposito@mofocom
Email: EBalassone@mofocom

James J. Cekola*
MORRISON & FOERSTER LLP
12531 High Bluff Drive, Suite 100
San Diego, CA 92130
Telephone: (858) 720-5100
Facsimile: (858) 720-5125
Email: JCekola@mofocom
Linton Joaquin*
Karen C. Tumlin*
Nora A. Preciado*
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 2850
Los Angeles, CA 90010
Telephone: (213) 639-3900
Facsimile: (213) 639-3911
Email: joaquin@nilc.org
Email: tumlin@nilc.org
Email: preciado@nilc.org

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

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Daniel J. Pochoda (Bar No. 021979)
Kathleen E. Brody (Bar No. 026331)
Brenda Muñoz Furnish (Bar No. 027280)
ACLU FOUNDATION OF ARIZONA
3707 North 7th Street, Suite 235
Phoenix, AZ 85014
Telephone: (602) 650-1854
Facsimile: (602) 650-1376
Email: dpochoda@acluaz.org
Email: kebrody@acluaz.org
Email: bmfurnish@acluaz.org

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 SERVICE

I hereby certify that on this 9th day of January, 2017, 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.

- **PLAINTIFFS’ MOTION FOR CIVIL CONTEMPT**
- **DECLARATION OF JAMES CEKOLA IN SUPPORT OF PLAINTIFFS’ MOTION FOR CIVIL CONTEMPT (WITH EXHIBITS 1-3)**
- **[PROPOSED] ORDER GRANTING PLAINTIFFS’ MOTION CIVIL CONTEMPT**

Colette R. Mayer

(typed)

/s/ Colette R. Mayer

(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 CIVIL CONTEMPT**

The Court, having considered Plaintiffs' Motion for Civil Contempt 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 Civil Contempt is hereby GRANTED.

IT IS ORDERED THAT Defendants and Defendants' Counsel of Record are found to be in civil contempt of the Court's August 14, 2015, and September 28, 2015 Orders.

IT IS FURTHER 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 a third-party vendor be appointed to serve as
2 a Data Monitor and oversee Defendants' video preservation obligations, at Defendants'
3 expense. The parties shall meet and confer to attempt to reach an agreement on the
4 selection of a third-party vendor. Plaintiffs may seek further relief from the Court to the
5 extent such an agreement is not reached.

6 IT IS FURTHER ORDERED THAT Defendants show cause as to why they should
7 not pay Plaintiffs' attorneys' fees and costs incurred in connection with (a) the technical
8 support to review and attempt repair of inaccessible data produced by Defendants, (b)
9 meet and confer with Defendants on this issue, and (c) this Motion.

10 **IT IS SO ORDERED.**

11 Dated: _____

HON. DAVID C. BURY
United States District Judge

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

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

10 Attorneys for Plaintiffs
11 *Admitted pursuant to Ariz. Sup. Ct. R. 38(a)
Additional counsel listed on next page
12

13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE DISTRICT OF ARIZONA
15

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

18 Plaintiffs,

19 v.

20 Jeh Johnson, Secretary, United States
Department of Homeland Security, in his
21 official capacity; R. Gil Kerlikowske,
Commissioner, United States Customs &
22 Border Protection, in his official capacity;
Mark Morgan, Chief of the United States
23 Border Patrol, in his official capacity; Jeffrey
Self, Commander, Arizona Joint Field
24 Command, in his official capacity; and Paul
A. Beeson, Chief Patrol Agent-Tucson
25 Sector, in his official capacity,
26 Defendants.
27
28

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

**DECLARATION OF JAMES
CEKOLA IN SUPPORT OF
PLAINTIFFS' MOTION FOR
CIVIL CONTEMPT**

CLASS ACTION

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

Action Filed: June 8, 2015

1 Robert J. Esposito*
Elizabeth Balassone*
2 MORRISON & FOERSTER LLP
425 Market Street
3 San Francisco, CA 94105-2482
Telephone: (415) 268-7000
4 Facsimile: (415) 268-7522
Email: REsposito@mofo.com
5 Email: EBalassone@mofo.com

Megan Elaine Sallomi*
Elisa Marie Della-Piana*
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS OF THE SAN FRANCISCO
BAY AREA
131 Steuart Street, Suite 400
San Francisco, CA 94105
Telephone: (415) 543-9444
Facsimile: (415) 543-0296
Email: msallomi@LCCR.com
Email: edellapiana@LCCR.com

7 James J. Cekola*
8 MORRISON & FOERSTER LLP
12531 High Bluff Drive, Suite 100
9 San Diego, CA 92130
Telephone: (858) 720-5100
10 Facsimile: (858) 720-5125
Email: JCekola@mofo.com

Attorneys for Plaintiffs

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

11 Linton Joaquin*
12 Karen C. Tumlin*
Nora A. Preciado*
13 NATIONAL IMMIGRATION LAW
CENTER
14 3435 Wilshire Boulevard, Suite 2850
Los Angeles, CA 90010
15 Telephone: (213) 639-3900
Facsimile: (213) 639-3911
16 Email: joaquin@nilc.org
Email: tumlin@nilc.org
17 Email: preciado@nilc.org

18 Mary Kenney*
Melissa Crow*
19 AMERICAN IMMIGRATION COUNCIL
1331 G Street NW, Suite 200
20 Washington, D.C. 20005
Telephone: (202) 507-7512
21 Facsimile: (202) 742-5619
Email: mkenney@immcouncil.org
22 Email: mcrow@immcouncil.org

23 Daniel J. Pochoda (Bar No. 021979)
Brenda Muñoz Furnish (Bar No. 027280)
24 ACLU FOUNDATION OF ARIZONA
3707 North 7th Street, Suite 235
25 Phoenix, AZ 85014
Telephone: (602) 650-1854
26 Facsimile: (602) 650-1376
Email: dpochoda@acluaz.org
27 Email: bmfurnish@acluaz.org

1 I, JAMES J. CEKOLA, hereby declare:

2 1. I am a member of the bar of the State of California, an associate in the law firm
3 of Morrison & Foerster LLP, and counsel of record for Plaintiffs in this litigation. I am
4 admitted *pro hac vice* to practice before this Court in this matter. I have personal
5 knowledge of the facts stated herein and, if called as a witness, could and would
6 competently testify thereto.

7 2. Attached as **Exhibit 1** is a true and correct copy of an e-mail chain between
8 myself and Defendants' counsel dated August 12, 2016 to November 10, 2016.

9 3. Attached as **Exhibit 2** is a true and correct copy of my November 19, 2016
10 letter to Defendants' counsel.

11 4. Attached as **Exhibit 3** is a true and correct copy of a November 22, 2016 email
12 from Defendants' counsel Sarah Fabian to me.

13 5. On December 19, 2016 counsel for the parties had a call regarding the video
14 produced by Defendants. Border Patrol employees involved in the archiving of the video
15 footage, including Gary Weaver and Samuel Shivers, were also on the call.

16 6. During this December 19th call, Defendants stated that there was an
17 unresolvable corruption issue with the archived footage. As explained primarily by Mr.
18 Weaver, for at least the Tucson Station, there are a total of eight DVRs recording video
19 footage, four of which are related to this litigation. Those DVRs run Windows 7 OS
20 (operating system). According to Mr. Weaver, an update to that operating system may
21 have gone out while some of the DVRs were being archived, which restarted the systems
22 and resulted in corrupted archives. Mr. Weaver indicated that no one actually checked the
23 archives, once they were made, to ensure that the data was accessible.

24 7. Mr. Weaver stated that he first noticed the issue in June 2016. He stated that
25 he went back to review the archive disks, and could see some messages indicating that the
26 operating system had been rebooted during the archiving process. He also stated that
27 Defendants' had had an internal meeting about the issue in July and Mr. Weaver had
28 distributed a list of his findings internally to Defendants.

1 8. I then asked Defendants why they did not provide Mr. Weaver's list back in
2 July, and why they are not providing it to Plaintiffs now. Defendants' counsel Sarah
3 Fabian responded that she is not sending it to Plaintiffs now because she does not consider
4 the list final and because Plaintiffs had not requested all the video that has been archived.

5 9. I also asked what Defendants have done or are doing now to fix the problem.
6 Mr. Weaver stated that, only since October or November 2016, Defendants have been
7 working to minimize the number of Windows updates to the DVR systems so they do not
8 get frequent updates, to minimize the DVR restarting. Mr. Weaver also said that, only
9 since December 2016, someone is actually checking the video archived each month to
10 determine whether it is corrupted.

11 10. I also asked whether the corruption problem existed for all the Tucson sector
12 stations. Mr. Weaver indicated that he is involved in only the archiving process for the
13 Tucson and Sonoita Stations, and therefore did not know whether anyone was looking into
14 corruption of the archives from the other six stations.

15 11. Finally, I asked Defendants for a status update regarding Plaintiffs' request for
16 the production of video footage from the Tucson Station for the month of November
17 2016. Defendants stated that this archive has not been completed yet because there is a
18 problem with a DVR.

19 12. Repeatedly during the December 19th call, Defendants' counsel Sarah Fabian
20 stated that Defendants had complied with the orders of this Court because the data had
21 been archived.

22 13. I personally reviewed the billing entries for Plaintiffs' counsel and support
23 staff at Morrison & Foerster LLP—from paralegals up to partners—who substantially
24 contributed to: (a) technical support related to the corrupted video data produced by
25 Defendants; and (b) meet and confer with Defendants related to the corrupted video data.

26 //

27 //

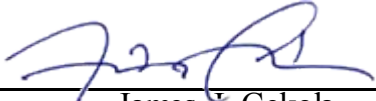
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14. The total amount incurred by Plaintiffs for this work, at the standard hourly billing rate for each attorney or staff member, is at most \$41,211.25.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of January, 2017, at San Diego, California.

By:  _____
James J. Cekola

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**INDEX OF EXHIBITS TO DECLARATION OF JAMES CEKOLA IN SUPPORT OF
PLAINTIFFS’ MOTION FOR CIVIL CONTEMPT 30(a)(2)(B)**

Jane Doe #1 v. Johnson
Case No. 4:15-cv-00250-TUC-DCB

- Exhibit 1** E-mails between James Cekola and Defendants’ counsel dated August 12, 2016 to November 10, 2016.
- Exhibit 2** November 19, 2016 letter from James Cekola to Defendants’ counsel.
- Exhibit 3** November 22, 2016 email from Defendants’ counsel Sarah Fabian.

Exhibit 1

From: [Fabian, Sarah B \(CIV\)](#)
To: [Cekola, James J.](#); [Fishman, Dillon A. \(CIV\)](#); [Shieh, Daniel \(CIV\)](#); [Celone, Michael A. \(CIV\)](#); [Vuong, Sarah L. \(CIV\)](#); [Kisor, Colin \(CIV\)](#)
Cc: [Deten](#)
Subject: RE: Doe v. Johnson, No. 4:15-cv-250-DCB (D. Ariz.) - missing video production
Date: Thursday, November 10, 2016 2:03:02 PM

- External Email -

James:

Our local folks have been tied up with the site visits this week, but we are looking into it and will get back to you as soon as we can.

Sarah

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

From: "Cekola, James J." <JCekola@mof.com>
Date: 11/10/16 1:31 PM (GMT-07:00)
To: "Fabian, Sarah B (CIV)" <sfabian@CIV.USDOJ.GOV>, "Fishman, Dillon A. (CIV)" <dfishman@CIV.USDOJ.GOV>, "Shieh, Daniel (CIV)" <DSieh@civ.usdoj.gov>, "Celone, Michael A. (CIV)" <mcelone@CIV.USDOJ.GOV>, "Vuong, Sarah L. (CIV)" <SVuong@civ.usdoj.gov>, "Kisor, Colin (CIV)" <CKisor@civ.usdoj.gov>
Cc: Deten <Deten@mof.com>
Subject: Re: Doe v. Johnson, No. 4:15-cv-250-DCB (D. Ariz.) - missing video production

Counsel-

We have not received a response to the message below about the missing video production. Please respond.

-James

On Nov 3, 2016, at 3:05 PM, Cekola, James J. <JCekola@mof.com<<mailto:JCekola@mof.com>>> wrote:

Counsel-

Since resolving various technical issues (e.g. with the ViconNet files), we have been reviewing the security video that Defendants produced last month. We noticed that the production for Tucson and Douglas is not complete. Defendants' production was to include all the January 2016 video from these facilities. But video from certain key cameras is missing. For Tucson, we received no video from the cameras in the holding rooms. For Douglas, we received no video from the cameras in the male holding rooms (the seven North side rooms).

Please produce this missing video immediately. Our review is continuing, so we may identify other missing video or camera issues going forward, but given the significance of the gaps identified we wanted to address them now.

James Cekola | Attorney
Morrison & Foerster LLP
12531 High Bluff Dr. Suite 100 | San Diego, CA 92130
P. 858.314.7631 C. 760.672.0974 | JCekola@mof.com<<mailto:JCekola@mof.com>>

From: Fabian, Sarah B (CIV) [<mailto:Sarah.B.Fabian@usdoj.gov>]

Sent: Wednesday, September 28, 2016 3:05 PM

To: Cekola, James J.; Fishman, Dillon A. (CIV); Shieh, Daniel (CIV); Celone, Michael A. (CIV)
Cc: Deten
Subject: RE: Doe v. Johnson, No. 4:15-cv-250-DCB (D. Ariz.) - video production

James:

While you may have shipped the hard drives on 9/2, it does not appear they were sent overnight mail and they were received a few days later at which time Mr. Crelia was out of the office.

Nonetheless, it looks like the downloading process is nearly complete and it looks like the hard drives will be shipped back to you on Friday evening or Saturday morning.

Sarah

Sarah B. Fabian
Senior Litigation Counsel
Office of Immigration Litigation – District Court Section
(202) 532-4824

From: Cekola, James J. [<mailto:JCekola@mofocom>]
Sent: Tuesday, September 27, 2016 6:36 PM
To: Fabian, Sarah B (CIV) <sfabian@CIV.USDOJ.GOV>>; Fishman, Dillon A. (CIV) <dfishman@CIV.USDOJ.GOV>>; Shieh, Daniel (CIV) <DShieh@civ.usdoj.gov>>; Celone, Michael A. (CIV) <mcelone@CIV.USDOJ.GOV>>
Cc: Deten <Deten@mofocom>>
Subject: RE: Doe v. Johnson, No. 4:15-cv-250-DCB (D. Ariz.) - video production

Counsel-

On Sept. 2, 2016, we shipped hard drives to Mr. Crelia for the most recently identified video surveillance data. The drives with data have not yet been returned. Please let me know when we can expect them.

James Cekola | Attorney
Morrison & Foerster LLP
12531 High Bluff Dr. Suite 100 | San Diego, CA 92130
P. 858.314.7631 C. 760.672.0974 | JCekola@mofocom<<mailto:JCekola@mofocom>>

From: Fabian, Sarah B (CIV) [<mailto:Sarah.B.Fabian@usdoj.gov>]
Sent: Wednesday, August 31, 2016 7:03 AM
To: Cekola, James J.
Cc: Mayer, Colette Reiner; Fishman, Dillon A. (CIV); Shieh, Daniel (CIV); Celone, Michael A. (CIV)
Subject: RE: Doe - Video Production

That all sounds correct. I will let Mr. Crelia know to expect both shipments. Thanks.

Sarah B. Fabian
Senior Litigation Counsel
Office of Immigration Litigation – District Court Section
(202) 532-4824

From: Cekola, James J. [<mailto:JCekola@mofocom>]

Sent: Wednesday, August 31, 2016 10:00 AM

To: Fabian, Sarah B (CIV) <sfabian@CIV.USDOJ.GOV><<mailto:sfabian@CIV.USDOJ.GOV>>>

Cc: Mayer, Colette Reiner <CRMayer@mofocom.com><<mailto:CRMayer@mofocom.com>>>; Fishman, Dillon A. (CIV) <dfishman@CIV.USDOJ.GOV><<mailto:dfishman@CIV.USDOJ.GOV>>>; Shieh, Daniel (CIV) <DShieh@civ.usdoj.gov><<mailto:DShieh@civ.usdoj.gov>>>; Celone, Michael A. (CIV) <mcelone@CIV.USDOJ.GOV><<mailto:mcelone@CIV.USDOJ.GOV>>>

Subject: Re: Doe - Video Production

Sarah-

We have two protective "pelican" cases in which Mr. Crelia sent the last batch of drives in February. As before, we plan to send the empty "pelican" cases to Mr. Crelia so he can use them to ship the new drives to MoFo. The new drives will be sent by the vendor we purchase them from. Please let me know if there is any issue with this.

-James

On Aug 26, 2016, at 11:45 AM, Fabian, Sarah B (CIV)

<Sarah.B.Fabian@usdoj.gov><<mailto:Sarah.B.Fabian@usdoj.gov>>> wrote:

We can produce the requested video.

Please send the 26 hard drives to Mr. Crelia at the address in my email below, and please include a note listing the stations/months that you are requesting with the drives. Let me know if you have any other questions.

Sarah B. Fabian
Senior Litigation Counsel
Office of Immigration Litigation – District Court Section
(202) 532-4824

From: Cekola, James J. [<mailto:JCekola@mofocom.com>]

Sent: Tuesday, August 23, 2016 9:11 PM

To: Fabian, Sarah B (CIV); Mayer, Colette Reiner

Cc: Fishman, Dillon A. (CIV); Shieh, Daniel (CIV); Celone, Michael A. (CIV)

Subject: RE: Doe - Video Production

Counsel-

At this time, Plaintiffs want the following additional video data:

- Nogales – Dec. 2015, Jan. 2016
- Casa Grande – Dec. 2015, Jan. 2016
- Tucson – Jan. 2016
- Douglas – Jan. 2016
- Naco – March 2016
- Sonoita – May 2016

Based on the numbers your provided, I would estimate this to require 26 drives. Can you please confirm the actual number of drives to send? Also, I understood from our phone conversation about the videos last week that DOJ may be unable or unwilling to produce data from select time periods / facilities. If that is the case, in light of the identified video data in this e-mail, please explain what the issue is in so that we can understand it and cooperate with you if there is a reasonable work around.

James Cekola | Attorney

Morrison & Foerster LLP
12531 High Bluff Dr. Suite 100 | San Diego, CA 92130
P. 858.314.7631 C. 760.672.0974 | JCekola@mofocom.com <<mailto:JCekola@mofocom.com>>

From: Fabian, Sarah B (CIV) [<mailto:Sarah.B.Fabian@usdoj.gov>]
Sent: Friday, August 12, 2016 12:52 PM
To: Mayer, Colette Reiner; Cekola, James J.
Cc: Fishman, Dillon A. (CIV); Shieh, Daniel (CIV); Celone, Michael A. (CIV)
Subject: Doe - Video Production

Colette and James:

I spoke with my clients and they have informed me that in order to provide 6 or 7 months of additional video data since the last production, they will require you to provide 146 hard drives (see summary below). This will provide you with video data through June 2016 (the number of months vary because some stations provided an extra month of data in the last production).

CAG - 28 drives (7 months)
DGL - 12 drives (6 months)
NCO - 12 drives (6 months)
NGL - 28 drives (7 months)
SON - 14 drives (7 months)
TCA - 28 drives (7 months)
WCX - 24 drives (6 months)

As before, the disks should be sent to:

SOS Michael Crelia
Tucson Sector Headquarters
2430 S. Swan Rd.
Tucson, AZ 85711

Please let me know once you have sent those so that I can let Mr. Crelia know to expect them, and so that he can prepare to begin the download project.

Let me know if you have any questions.

Thank you,
Sarah

Sarah B. Fabian
Senior Litigation Counsel
Office of Immigration Litigation – District Court Section
Department of Justice
PO Box 868, Ben Franklin Station
Washington, DC 20044
(202) 532-4824

<image001.jpg>

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Exhibit 2

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12531 HIGH BLUFF DRIVE
SAN DIEGO, CALIFORNIA
92130-2040

TELEPHONE: 858.720.5100
FACSIMILE: 858.720.5125

WWW.MOFO.COM

MORRISON & FOERSTER LLP
BEIJING, BERLIN, BRUSSELS, DENVER,
HONG KONG, LONDON, LOS ANGELES,
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PALO ALTO, SACRAMENTO, SAN DIEGO,
SAN FRANCISCO, SHANGHAI, SINGAPORE,
TOKYO, WASHINGTON, D.C.

November 19, 2016

Writer's Direct Contact

+1 (858) 314.7631

JCekola@mofocom

Via Email

Sarah B. Fabian (sarah.b.fabian@usdoj.gov)

Sarah L. Vuong (sarah.l.vuong@usdoj.gov)

Michael A. Celone (michael.a.celone@usdoj.gov)

Colin Kisor (colin.kisor@usdoj.gov)

Office of Immigration Litigation, Civil Division, U.S. Department of Justice

Re: *Doe v. Johnson*, No. 4:15-cv-250-DCB (D. Ariz.)

Counsel,

I write about Defendants' continued delays in producing discovery.

Defendants' Document Production / Depositions of Defendants' Witnesses

The deadline for Defendants to respond to Plaintiffs' requests for production was June 29, 2016. From what Plaintiffs know, Defendants began collecting ESI at least four months ago. By July 13, Defendants had collected ESI from the three custodians identified in your search term report (Allen, Bristow, and Defreitas). On August 17, Defendants stated that you had collected "over 4 million e-mails and their attachments" using the then-agreed custodian list and search terms. On August 26, Defendants agreed to search and collect the e-mail of seven additional custodians.

To date, however, Defendants have made just two productions of the collected ESI. On September 19, Defendants mailed USA6722-7244. On October 28, Defendants mailed USA12480-13027. The productions total 1069 pages—amounting to a production rate of less than 500 pages per month. This is not the type of "rolling production" Plaintiffs anticipated when the parties previously discussed the idea.

Additionally, it became even more apparent during the evidentiary hearing on Nov. 14-15 that Defendants hold numerous categories of responsive documents but these remain unproduced. For example:

- Completed medical screening forms, which are responsive, at least, to RFPs 16, 17, 33, 34, 35, 36, 37, 38, and 57. Defendants testified during the

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evidentiary hearing that at least some medical screening forms are maintained. This fact is confirmed by Chief Allen who, in his deposition, stated that completed medical forms would be in detainees' A-files. To date, Defendants' have produced only one: USA-007054.

- Documents regarding the transfer of detainees into a longer-term detention facility or county jail, which are responsive, at least, to RFPs 81 and 82. Despite stating during the hearing that detainees were sent from BP facilities to such longer-term detention, Defendants have produced no documents responsive to this topic.
- Consequence Delivery System ("CDS") documents, which are responsive to RFP 1. Defendants have produced no documents relating to CDS, despite the Court's order that, at the very least, CDS documents related to times and conditions of detention are not covered by the deliberative process privilege and are relevant to Plaintiffs' case.
- Documents regarding detainee complaints—including the complaints themselves—which are responsive, at least, to RFPs 8, 11, 14, 16, 20, 26, 28, 53, 54, 75, and 76. To date, Defendants have produced one document that references detainee complaints: USA-006785.

We are troubled that Defendants do not appear to be even remotely close to finishing their document production. As we previously mentioned, Defendants' complete production of relevant documents is necessary for the noticed depositions that Plaintiffs have yet to take. We expect the complete production will be crucial also for additional depositions that Plaintiffs are likely to notice after the initial round of depositions. Defendants' failure to timely complete their document production will make it impossible for Plaintiffs to prepare expert reports (due December 23) based on a full record.

Missing Video Production

We have still not heard back from Defendants about the missing surveillance video data. To summarize:

- On September 2, Plaintiffs shipped empty hard drives to Mr. Crelia for video data that was to include, among other things, all the January 2016 video from Tucson and Douglas.
- On October 4, Plaintiffs received hard drives supposedly carrying the requested video data from Mr. Crelia.

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Page Three

- On November 3, Plaintiffs notified Defendants that, for Tucson, we received no video from the cameras in the holding rooms and that, for Douglas, we received no video from the cameras in the male holding rooms (the seven North side rooms). We asked Defendants to immediately produce the data.
- On November 10, Defendants stated that you were looking into it and would get back to Plaintiffs as soon as you could.

* * * * *

Please let us know when your document production will be completed and what you have learned from your inquiry about the missing video data. The outstanding document productions, depositions, and video data likely will be crucial for Plaintiffs' expert reports. As such, please let us know how you propose this fact discovery can be timely completed within the case schedule.

Sincerely,



James Cekola

Exhibit 3

From: [Fabian, Sarah B \(CIV\)](#)
To: [Cekola, James J.](#); [Vuong, Sarah L. \(CIV\)](#); [Celone, Michael A. \(CIV\)](#); [Kisor, Colin \(CIV\)](#)
Cc: [Deten](#)
Subject: RE: Doe v. Johnson, No. 4:15-cv-250-DCB (D. Ariz.)
Date: Tuesday, November 22, 2016 3:33:38 PM

- External Email -

James:

We'd like to schedule a call next week to discuss discovery. We are not available Monday, but can you let us know your availability the rest of the week? Regarding your questions about the video, as I mentioned before it has been hard for me to coordinate with my folks in Tucson on this issue given the site visits, hearing, and holiday, but I think I'll have an answer to your questions on that by tomorrow so I'll shoot that over to you or give you a call.

Thanks,
Sarah

Sarah B. Fabian
Senior Litigation Counsel
Office of Immigration Litigation – District Court Section
(202) 532-4824

From: Cekola, James J. [mailto:JCekola@mofo.com]
Sent: Saturday, November 19, 2016 8:30 PM
To: Fabian, Sarah B (CIV) <sfabian@CIV.USDOJ.GOV>; Vuong, Sarah L. (CIV) <SVuong@civ.usdoj.gov>; Celone, Michael A. (CIV) <mcelone@CIV.USDOJ.GOV>; Kisor, Colin (CIV) <CKisor@civ.usdoj.gov>
Cc: Deten <Deten@mofo.com>
Subject: Doe v. Johnson, No. 4:15-cv-250-DCB (D. Ariz.)

Counsel,

Please see the attached letter.

James Cekola | Attorney
Morrison & Foerster LLP
12531 High Bluff Dr. Suite 100 | San Diego, CA 92130
P. 858.314.7631 C. 760.672.0974 | JCekola@mofo.com

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