UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

CASE NO: 14-CV-10028-JEM

TREAVOR EIMERS, as Personal Representative of the Estate of **CHARLES EIMERS**, Deceased,

Plaintiff,

vs.

CITY OF KEY WEST, a Florida Municipality; **HENRY DEL VALLE**, an Officer with the City of Key West Police Department, ***et al.***,

Defendants.
_____/

PLAINTIFF'S OMNIBUS REPLY IN SUPPORT OF MOTION FOR SANCTIONS [DE 96]

Pursuant to Local Rule 7(c) for the United States District Court, Southern District of Florida and this Court's December 15, 2014 Order Re: Briefing Plaintiff's Motion for Sanctions and Scheduling In-Person Hearing **[DE 99, 102],** Plaintiff replies as follows in Support of his Motion for Sanctions **[DE 96]**:

Let there be no mistake: Plaintiff's Motion for Sanctions stems from a "pattern of misconduct" not solely predicated upon the failure to preserve evidence. Rather, its underpinnings involve multiple instances of police officers' perjury that are not subject to a "spoliation" analysis as well as several instances, -- not just one, -- of the willful destruction of evidence they otherwise were duty-bound to preserve. Defendants' hallow attempts to piece together an explanation for the absence of material public records simply are not credible and fall right in line with the unfortunate circumstances giving rise to the instant Motion and this case.

Furthermore, Plaintiff's motion expressly seeks sanctions "including" default and "any further relief this Court deems just and proper." The term "including" which Plaintiff used in its introductory and concluding paragraphs is not a term of exclusion or limitation as the City of Key West and its commonly represented Defendant officers imply. Rather, Plaintiff is mindful of this

Court's ability and authority to fashion an appropriate sanction in an attempt to remedy the prejudice precipitated by Defendants' conduct.[1]

Officer Lovette challenges this Court's authority to determine the Plantiff's Motion for Sanctions. However, Federal Magistrate Judges in the Eleventh Circuit frequently enter orders in cases where parties seek sanctions, including default judgments or dismissals, for spoliation. ***Point Blank Solutions, Inc. v. Toyobo America, Inc.***, 2011 WL 1456029, *3 (S.D. Fla. Apr. 5, 2011), citing Calixto v. Watson Bowman Acme Corp., 2009 WL 3823390 (S.D. Fla. Nov. 16, 2009)(Rosenbaum, J.). And further, there are sanctions sought here, for which the imposition of same constitutes a non-dispositive ruling that this court absolutely may determine. *Id.*

Lastly, it bears mention that the opportunity the City and its commonly represented officer Defendants took to paint Mr. Eimers in a negative light in the first three pages of its Response, – as a fleeing felon, walking dead man, public endangerer and suspected marijuana possessor, -- is nothing more than a transparent attempt to prejudice this Court against the Plaintiff and divert attention away from the material facts, -- the excessive forces applied and the misconduct thereafter.[2]

The Court has asked that the parties answer six questions with respect to the task at hand so that it may properly consider the evidence and appropriateness of any sanctions.

1. **<u>Can the Court impose sanctions against all Defendants based on the misconduct of one defendant or less than all Defendants?</u>**

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[1] "The determination of an appropriate sanction should be made on a case-by-case basis." ***Simon Property Group, Inc. v. Lauria***, 2012 WL 6859404 *8 (M.D. Fla. Dec. 13, 2012), *citing* ***Optowave Co. v. Nikitin***, 2006 WL 3231422, at *12 (M.D. Fla. Nov. 6, 2006). Sanctions include but are not limited to default judgment, adverse inference or rebuttable presumption instructions to the jury, striking pleadings and an award of fees and costs incurred by the injured party as a result of the spoliation. *See* ***Flury v. Daimler Chrysler Corp***., 427 F.3d 939, 944-45 (11th Cir. 2005).

[2] Testing at Lower Keys Medical Center revealed no illegal drugs or alcohol in Mr. Eimers' system. **Reply Exhibit 1**. Further, in its December 4, 2014 Internal Affairs "After Action" report Sgt. Joe Tripp essentially stated in the section **"Patient or Prisoner?"** that Mr. Eimers was not under arrest, was not charged with a crime and "was free to leave should he have regained consciousness." He also described the pursuit of Eimers as slow speed 25-30 mph. **Reply Exhibit 2.** Further, the medical evidence reflects that Mr. Eimers had a life expectancy of 3-5 years and at most a 20% chance of sudden death. **Reply Exhibit 3.** He was healthy enough to handle the stress of a simple arrest without suffering from a catastrophic cardiac event. Hence, but for the excessive forces visited upon him by these criminal police officers, Mr. Eimers would not have suffered a cardiac death.

With regard to the individual Defendants, **no.** The actions of one individual defendant may not be used as a basis for sanctions against another individual defendant. However, regarding the City of Key West, the case law indicates that the City may be held responsible for the litigation misconduct of its individual officers. *See* ***Swofford v. Eslinger,*** 671F.Supp.2d 1274 (M.D. Fla. 2009)(recommending adverse inference sanctions against Sheriff in his official capacity and two of his deputies for destruction of police officers' laptop and radios used during use of excessive force against homeowner who officers shot); ***Tramel v. Bass,*** 672 So.2d 78 (Fla. 1st DCA 1996)(rejecting sheriff's argument that he cannot be held liable for his deputy's intentional acts simply by virtue of his office, and awarding sanctions against sheriff for his deputy's (employee's) having intentionally provided shortened version of dash cam to the court and plaintiff). The default was a sanction for the perpetration of a fraud (not a tort giving rise to damages)). *See also,* Answer to Question Three, *infra.*

2. <u>Does the Court need to pinpoint which defendant engaged in a particular type of misconduct before imposing sanctions?</u>

If the undersigned understands the Court's question correctly, **yes**, the Court should pinpoint which individual Defendant engaged in which particular type of misconduct before imposing sanctions against that individual Defendant. The sanction should fit the conduct and the determination of an appropriate sanction should be assessed "on a case by case basis." ***Simon Property Group, Inc. v. Lauria***, 2012 WL 6859404, *9 (M.D. Fla. 2012)(recommending default as it was commensurate with severity of defendant's bad faith in throwing her computer into the river and degree of prejudice to plaintiff who consequently never would have access to the computer's contents). *See also,* ***Swofford v. Eslinger***, 671 F.Supp.2d 1274, 1280 (M.D. Fla. 2009)(excessive force case in which bad faith was found and sanctions were ordered after police officers' guns, computer, radios, and uniforms were destroyed or lost). When determining the severity of the sanctions to impose, the Court considers the (1) willfulness or bad faith of the party responsible for the loss; (2) the degree of prejudice sustained; and (3) what is required to cure the prejudice. ***Simon Property Group, Inc.***, 2012 WL 6859404, at *8.

In ***Swofford***, the Court engaged in an analysis of each Defendants' conduct in failing to preserve evidence, evaluated each item lost and each Defendant's role in its destruction. Hence, the Court therein ordered sanctions of adverse inferences and jury instructions based on certain conduct of certain officers. *Id.* 1284-1287.

3. Can the Court impose sanctions against The City of Key West based on the discovery misconduct of individual police officers?

Yes. See answers to Questions 1 and 2, above and specifically discussion of ***Tramel v. Bass***, *supra*. Additionally, in ***Swofford*** the Court addressed whether sanctions imposed under its order were to be imposed against "all Defendants in this case, including [Deputies] Morris and Remus, or only against the SCSO [Seminole County Sheriff's Office]." *Id.* at 1282. The court found, among other things that, based on the sheriff's and Deputy Remus's disregard of the preservation letter and the Deputy's less than candid testimony concerning activity on his laptop, the imposition of the adverse inference regarding the laptop was appropriate and as such that the jury would be instructed that it may infer Deputy Remus' laptop contained detrimental information to Remus and the Sheriff's office. *Id.* at 1284. The Court also found that an adverse inference should be imposed against all Defendants for the destruction of emails by Deputies Remus and Morris in light of the Defendants' blatant disregard of their obligation to preserve electronic information (no litigation hold ever was placed) and Deputy Remus's "Lotto Killa" conversation over instant message. See Answer to Question 6, *infra.* The Court stated that it could surmise that emails deleted by Morris and Remus and perhaps other SCSO officers contained content detrimental to Defendants' case. *Id.* at 1285.

4. Is "Clear and Convincing Proof" the standard which the Court should use when determining whether the requisite Bad Faith exists to impose sanctions under the Inherent Power Doctrine?

It depends. In ***Shepherd v. American Broadcasting Companies, Inc.***, 62 F.3d 1469 (D.C. Cir. 1995)[3] the court considered as a matter of first impression the fundamental question of whether the inherent power to sanction or enter default is proper for fraudulent or bad faith litigation misconduct proven only by a preponderance of the evidence, or instead, whether such misconduct must be proven by clear and convincing evidence. *Id.* at 1476. After a lengthy and reasoned analysis that differentiated between remedial (issue-related sanctions) as opposed to punitive sanctions (which preclude a trial on the merits), the court concluded that issue-related sanctions do not require a heightened standard of proof. Thus, it held that a district court may impose issue-

[3] ***Shepherd*** is cited in this Court's opinion in ***Quantum Communications Corp. v. Star Broadcasting, Inc.***, 473 F.Supp.2d 1249 (S.D. Fla. 2007) as support for the proposition that no sanction less than default judgment and reasonable attorney's fees and costs would "sufficiently punish and deter the abusive conduct while allowing a full and fair trial on the merits." *Id.* at 1270.

related sanctions whenever a preponderance of the evidence establishes that a party's misconduct has tainted the evidentiary resolution of the issue. *Id.* at 1478. *See generally*, discussion at 1474-1479.

This reasoning was recognized and cited by Magistrate Judge Andrea Simonton in her opinion in ***In re Brican America LLC Equipment Lease Litigation***, 977 F.Supp.2d 1287, n.6 (S.D. Fla. Oct. 1, 2013), *albeit* an opinion wherein she recommended denying plaintiff's motion for dispositive sanctions based on witness tampering.

> The evidentiary standard governing use of a court's inherent power varies with the nature of the sanction imposed. So-called "issue-related sanctions" – those that are fundamentally remedial rather than punitive and do not preclude a trial on the merits – require proof by a preponderance of the evidence. Any "fundamentally penal" sanctions – dismissals and default judgments, as well as contempt orders, awards o attorneys' fees, and the imposition of fines" – require proof y clear and convincing evidence. A court may enter the latter form of sanction only if it finds, first, that there is clear and convincing evidence that the fraudulent or bad faith misconduct occurred, and second, that a lesser sanction would not sufficiently punish and deter the abusive conduct while allowing a full and unfair trial on the merits provid[ing] a specific reasoned explanation for rejecting lesser sanctions."

Campton v. Alpha Kappa Alpha Sorority, Inc., 938 F.Supp.2d 103, 106 (D.D.C. 2013), *citing* ***Shepherd***, *supra*.

In this Circuit courts have determined that clear and convincing proof of bad faith is necessary for the sanction of dismissal. In re Brican America LLC Equipment Lease Litigation, 977 F.Supp.2d 1287, 1300 (S.D. Fla. 2013). Additionally, fraud on the court also requires clear and convincing evidence that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier or unfairly hampering the preservation of the opposing party's claim or defense. ***McDowell v. Seaboard Farms of Athens, Inc.***, 1996 WL 684140, *2, (M.D. Fla. Nov. 4, 1996); ***Vargas v. Peltz***, 901 F.Supp. 1572, 1579 (S.D. Fla. 1995).

5. <u>Can the Court enter a Bad Faith finding under a "Clear and Convincing" standard of proof if one or more witnesses provide testimony contrary to the finding?</u>

Subject to the answer to Question 4, above, **yes**. The "clear and convincing" standard is an intermediate standard lying somewhere between the "beyond a reasonable doubt" and the "preponderance of the evidence" standard of proof. ***Addington v. Texas***, 441 U.S. 418, 425 (1979).

"Although an exact definition is elusive, 'clear and convincing evidence' has been described as evidence that 'place[s] in the ultimate factfinder an abiding conviction that the truth of its factual contentions are highly probable.' " ***Sensormatic Electronics Corp. v. The Tag Company US, LLC,*** 632 F.Supp.2d 1147, 1158-59, *citing* ***Pfizer, Inc. v. Apotex, Inc.***, 480 F.3d 1348, 1359 n. 5 (Fed.Cir.2007) (*quoting* ***Colorado v. New Mexico***, 467 U.S. 310, 316 (1984)).

Not to belabor the facts and record evidence, but Plaintiff has much more than a glove that simply does not fit or the plaintiff wail of a dog assumedly over the demise of its owner, *etc.* By way of example only, and not including the reasonable inferences to be drawn, Plaintiff has documented admissions of Officer Lovette that he [gratuitously] struck Mr. Eimers like a bomb on his head and that "… Listen, I tased a motherfucker in custody today. I don't care. I gotta call my PBA rep." [DE 96, Exhibit 1, Taser Cam footage at 35:52]. We have documented proof of Mr. Eimers' bleeding head, blood on Officer Lovette's hand seen during the course of the arrest, medical tests in the ER for basilar skull fracture. We have Officer Wanciak's testimony as well as that of Officer Lovette that his Taser was out and pressed against Mr. Eimers. We have Office Lovette admitting he armed his Taser during the arrest and hence, that it was recording. We have missing Taser Cam footage and an excited utterance of an eye witness asking a Columbian tourist with a video camera if he got them tasing [Mr. Eimers]. We have Lovette's admissions given at a time when he did not know he was being recorded and his sworn denials of the facts contained in those admissions.

6. <u>Regardless of which standard of proof is used, may the Court enter a sanctions award by evaluating the credibility of different witnesses and concluding that certain witnesses are more believable?</u>

Yes. This Court may evaluate witnesses' credibility and may enter sanctions based upon the Court's findings in that regard. On December 17, 2014 the Honorable Jose Martinez referred Plaintiff's Motion for Sanctions to Your Honor. [DE 104]. The Order of referral was pursuant to 28 USC §636(b)(1). In ***United States v. Raddatz***, 447 U.S. 667, 681 (1979) the Supreme Court made clear that §636(b)(1) permits the district court to adopt the <u>credibility findings</u> made by a magistrate judge without conducting a new hearing before making a final determination. Hence, the very fact of the referral made in this case contemplates that the Magistrate Judge is expected to assess and make findings as to the witnesses' credibility. *See, e.g,* ***Amlong & Amlong PA v. Denny's, Inc.,*** 500 F.3d 1230, 1251 (11th Cir. 2006)(finding district court abused its discretion in

rejecting magistrate judge's findings of fact and credibility determinations and in substituting its own without hearing witness at sanction hearing). *See also*, ***Britton v. Wal-Mart Stores East, L.P.***, 2011 WL 3236189, *5 – 9 (N.D. Fla. June 8, 2011)(making credibility determinations of various witnesses in the context of a motion for sanctions due to the destruction of surveillance tape depicting plaintiff's sons who were accused of shoplifting); ***Southeastern Mech. Svcs., Inc. v. Brody***, 657 F.Supp.2d 1293, 1300 (M.D. Fla. 2009)(stating "despite the denials by Individual Defendants that they deleted any information, emails, text messages, call logs or memory from their BlackBerries, their assertions are not credible."); ***Swofford v. Eslinger,*** 671 F.Supp.2d 1274, 1283 (M.D. Fla. 2009)(finding police officer's testimony regarding an instant message conversation he had lacked credibility in excessive force case wherein key evidence within the police agency's control was spoiled).

> Further the Court questions the veracity of Defendants' testimony in this case. Both [deputies] suggested as law enforcement officers that they were not aware of the need to preserve relevant evidence. The Court finds this testimony lacks credibility. The Court also questions Remus's candor, specifically in light of Remus's testimony regarding an instant message conversation he engaged in with another officer. In the conversation, the other officer referred to Remus as the "Lotto killa." Remus replied facetiously to the officer, "I need to go to the sign shop and have them put that name on the side of the car. In this regard it was widely known that Mr. Swofford had won the Florida lottery prior to his unfortunate encounter with the Deputies. However, when questioned about the "Lotto killa" conversation, Remus testified that, at the time of the conversation in which he fully participated, he did not know that the term "Lotto killa" was in reference to Mr. Swofford. He further testified that his responses to the other officer during that conversation were just to "get him to stop talking to me." The Court does not take lightly . . . Remus's less than candid response that he did not know what the conversation was about and his demeanor during the hearing on this issue call into question the veracity of his testimony in its entirety.

Swofford, 671 F.Supp.2d at 1283-84. Similarly, Lovette's claim that he merely was embellishing or decompressing when he said he came down on Mr. Eimers head "like a f'ing bomb" and that he just "tased a M-F'er in custody", etc., are just as specious as those of Deputy Remus.[4]

[4] Additionally, regarding "lost emails" and Officer Lovette's credibility, he can be heard on the Taser Cam receiving or sending emails or text messages. He states on the recording that he received "17 million" texts. Yet, when ordered by this Court to produce same, according to Lovette and his counsel, he had none. "A party has an obligation to retain relevant documents, including emails, where litigation is reasonable anticipated." ***Managed Care Solutions, Inc.***, 736 F.Supp.2d at 1324. In ***Southeastern Mechanical Svcs., Inc. v. Brody***, 657 F.Supp.2d 1293, 1299 (M.D. Fla. 2009) the court found an adverse inference jury instruction was the most appropriate sanction regarding the failure of former employees to preserve data on

The Defendants respective answers of "No" on this pointed question are plainly incorrect in light of the above and are misguided in that they rely on completely inapplicable case law. ***Feliciano v. City of Miami Beach,*** 707 F.3d 1244 (11th Cir. 2013), is a summary judgment case in which the Eleventh Circuit found that the District Court improperly made credibility determinations.

> When considering a motion for summary judgment, including one asserting qualified immunity, 'courts must construe the facts and draw all inferences in the light most favorable to the nonmoving party . . . . Even if a district court 'believes that the evidence presented by one side is of doubtful veracity, it is not proper to grant summary judgment on the basis of credibility choices.' This is because credibility determinations and the weighing of evidence 'are jury functions, not those of a judge.'

Feliciano, 707, F.3d at 1252 (11th Cir. 2013)(citations omitted).[5] Clearly Defendants' collective position that the jury should decide the witnesses' credibility is legally unsupported.

Analysis

As previously stated, perjury by all of the subject Key West Officers as well as spoiled evidence form the basis for Plaintiff's Motion. Perjury is the act of deliberately making a material statement that is false or misleading while under oath. On the spectrum of sanctionable conduct, perjury is perhaps the most egregious as few crimes strike more viciously against the integrity of our system of justice than the crime of perjury. Both perjury and spoliation subvert the sanctity of the judicial process.

As this Court is well aware, spoliation refers to the destruction of evidence or the significant and meaningful alteration of a document or instrument.[6] ***Point Blank Solutions, Inc.***, at *8. *Blacks*

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their wireless handheld devices that they frequently used in their work as defendants had wiped all emails, calendar items, text messages and phone records from the wireless devices.

[5] On summary judgment the court is not to engage in a credibility determinations. It is well settled that "[a]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 249 (1986). Thus, ***Feliciano*** is not instructive on Plaintiff's sanctions Motion.

[6] Federal law governs the imposition of spoliation sanctions, but the Court's opinion may be "informed" by state law as long as it is consistent with federal law. ***Flury v. Daimler Chrysler Corp.***, 427 F.3d 939, 944 (11th Cir. 2005), *cert. den.*, 548 U.S. 903 (2006). Florida law on spoliation is consistent with Federal law. ***Managed Care Solutions, Inc. v. Essent Healthcare, Inc.***, 736 F.Supp.2d 1317, 1322 (S.D. Fla. 2010). In ***Flury v. Daimler Chrysler Corp.,*** 427 F.3d 939 (11th Cir. 2005) the Eleventh Circuit

Law Dictionary defines it as the "*intentional* destruction, mutilation, alteration or concealment of evidence..." *Id.* However, because the 11th Circuit in ***Green Leaf Nursery v. E.I. DuPont de Nemours & Co.,*** 341 F.3d 1292, 1308 (11th Cir. 2003) did not include "intentional" in its definition, this Court also has not included that requirement in previous cases. *See, e.g.,* ***Point Blank Solutions, Inc***., at *8.

Spoliation is established if missing evidence (1) existed at one time; (2) the spoliator had a duty to preserve the evidence; and (3) the evidence is crucial to the movant being able to prove its prima facie case. ***Simon Property Group, Inc. v. Lauria***, 2012 WL 6859404 at *5 (M.D. Fla. 2012). A party has an obligation to retain relevant documents when litigation is reasonably anticipated. ***Simon Property,*** at *6 (informing defendant that plaintiff was initiating full audit and that litigation may result put defendant on notice and triggered a duty to preserve).

Regarding Defendants' duty to preserve evidence, Chapter 119, Florida Statutes states that "[p]roviding access to public records is a **duty** of each agency. ***Fla. Stat.* §119.01(1)**. The Taser Cam footage, CAD recordings, DASH Cam Recordings ordered by Sergeant Francisco Zamora minutes before police arrested Mr. Eimers are all public records which the City of Key West had a duty to provide (and preserve so that it may provide) upon request of any member of the public until such time as the public records may be destroyed in accordance with established retention schedules. ***Fla. Stat.* §257.36(6).**

Further, in a letter dated December 27, 2013 – less than one month after the incident, Plaintiff's counsel wrote a letter to the Key West Police Department, operations bureau advising of its representation of the Plaintiff herein and therein issued a Ch. 119 public records request for multiple items including all audio footage/video footage, recordings and transcripts, police communications and audio of police communications, dispatch reports, etc. **Reply Exhibit 4.** Hence, at all material times Defendants were on notice and had a duty to preserve the evidence for what was unquestionably, "reasonably anticipated litigation." See, e.g., ***U.S. EEOC v. Suntrust Bank,*** 2014 WL 1364982, *6 (M.D. Fla. Apr. 7, 2014).

> [e]ven absent defendant's unambiguous request for [the car's] location, plaintiff should have known that the vehicle, which was the very subject of his lawsuit, needed to be preserved and examined as evidence central to his case.

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also found that Georgia law on spoliation "is wholly consistent with federal spoliation principles." *Id.* at 944.

Flury, 427 F.3d at 945. And in line with this and other cases cited, *supra,* Officer Lovette should have known his Taser Cam, emails and texts should have been retained and the City of Key West should have so advised him.

> The obligation to retain discoverable materials is an affirmative one; it requires that the agency or corporate officers having notice of discovery obligations communicate those obligations to employees in possession of discoverable materials.

Swofford v. Eslinger, 671 F.Supp.2d at 1279.

Regarding the "crucial" evidence element, it is not enough for evidence to merely be relevant to a claim or defense, ***Managed Care Solutions, Inc., v. Essent Healthcare, Inc.***, 736 F.Supp.2d 1317, 1327-28 (S.D. Fla. 2010). Spoliated evidence is not crucial if it is merely cumulative or the movant would still be able to prove its case through additional already obtained evidence. ***Managed Care Solutions, Inc. v. Essent Healthcare, Inc.***, 736 F.Supp.2d 1317, 1328-29 (S.D. Fla. 2010). However, that the lost information might have been used to <u>impeach</u> the spoliator can make it crucial. ***Simon Property Group, Inc. v. Lauria***, at *7.

In ***Flury***, the Eleventh Circuit dismissed a plaintiff's products liability lawsuit because the plaintiff got rid of the allegedly defective vehicle. The Court in its opinion acknowledged that the experts had to use <u>much less reliable means</u> of examining the product's condition. Thus, while there was another method of proving its defense, the Court found that "[no] simple jury instruction could cure the resulting prejudice to [Daimler Chrysler]." ***Flury v. Daimler Chrysler Corp.***, 427 F.3d 939, 946 (11th Cir. 2005)(instruction advising that spoliation creates presumption that evidence is unfavorable to spoliator but that such presumption may be rebutted was insufficient). *Id.* at n.9. "Without the vehicle, defendant <u>lost a valuable opportunity to test plaintiff's theory</u> that the airbag was indeed defective." *Id.* at 946.

In the Eimers case we are not just dealing with the absence of one piece of key evidence. We are dealing with multiple pieces of missing evidence all going to the same issue, -- the key material issue of Defendants' excessive force. The Taser Cam footage of the arrest is the best (crucial) evidence of what occurred (like the tape in US EEOC v. SunTrust Bank). While other officers may testify about what they saw, they have a dog in this fight and Mr. Eimers is not here to counter them. While we have bystander video, it pans away at key times and is not taken from a vantage point that could have captured what was going on inside the cluster of officers, whether or not Eimers was tased, how many times he was tased and by whom, where Lovette's Taser was

contacting Eimers, whether Lovette came down on Eimers' head like a bomb, when Eimers lost consciousness, whether Garrido ever really got his finger stuck as proof of Eimers' alleged resistance, whether Eimers was resisting, and whether Eimers was screaming in pain, forcibly fighting, or merely responding to officers' [excessive] forces. Unquestionably, tasering Eimers and coming down on Eimers' head like a bomb would have been, under the circumstances, gratuitous forces that would be deemed excessive.

On the Taser issue, the CAD recording for COM 1 was produced in two parts. The second part, interestingly starts at the second entry for the very time that "SUSPECT TASED" is found. Why two separate sections? Defendant does not address this. Neither does City employee Keith Kline's Affidavit (DE 112-11). Nothing Defendants provided in their response address how Keith Kline on COM1 could be typing what was being said on COM2 and clearly Officer Wanciak admitted she was on COM2 and that one of Mr. Kline's typed entries was what she said on COM2. Further, Mr. Kline's is unable to explain the origin of how the "suspect tased" information got into his CAD report. He has no information or explanation for where the supposedly corrective "TASER DEPLOYED" information came from. No Taser download had even occurred as of the time of Kline's second entry at 10:38:11. Why is a Taser even an issue at that time (before the download)? Mr. Kline's Affidavit leaves more questions than answers and frankly, under these circumstances is suspect. Even the Fire and Rescue Channel dispatcher said that the victim was "tased" and that they were not sure if he was still breathing. That information is not on the CAD Report and how do two separate people get the same "wrong" information? Unfortunately, Defendants did not provide an affidavit from the female Fire & Rescue Channel Dispatcher.

Regarding the physical evidence of tasing, the City of Key West Detective Todd Stevens took no photos of Eimers right ear, back or neck. When Mr. Eimers was removed from life support seven days later, even Monroe County Medical Examiner E. Hunt Scheuerman testified that the burn marks, if any were produced, could have disappeared or healed in that time before death and before autopsy.

Defendants argue that Plaintiff cannot prove the evidence he complains is missing, ever existed. This is a difficult thing to do when the evidence, if created, is within the sole possession and control of the police who potentially stand to benefit from its loss, and who are charged with identifying and corralling all the evidence. It is like asking the wolf who is guarding the hen house

if there are any chickens inside. When the wolf says "no," despite the fact that chickens are known to frequent the house, one has to wonder if the wolf already has eaten them.

In this case, Officer Lovette clearly testified that he took out his Taser during the arrest. Officer Wanciak testified Lovette had his Taser pressed to Eimers' back. Question: How many officers draw their service weapon with the safety still engaged? Likewise how many officers draw their Taser and place it onto a subject without arming it first? Indeed, Officer Lovette by his own testimony said he armed it and that he was threatening to tase Eimers. The Taser materials state that when the Taser is armed, it is recording. Nevertheless the Taser footage of the arrest is missing.

We know Lovette's Taser was recording while he was on the beach after the whole incident went down. What was produced here give the appearance that it started recording, for some unexplained reason, while it was in Lovette's holster. Why is this the case if Lovette did not do his supposed "test fire" until several hours later? Clearly, the hard record facts and the reasonable inferences therefrom support that the evidence Plaintiff claims was spoiled did at one time exist.

While the court has broad discretion to impose sanctions for litigation misconduct based on its inherent power, even where parties have shown that crucial, existing evidence which the spoliating party was duty bound to preserve has been lost, a finding of bad faith is required before sanctions may be imposed. *Id.* ***Commercial Long Trading Corp., v. Scottsdale Ins. Co.***, 2013 WL 1100063, *2 (S.D. Fla. Mar. 15, 2013)(same). While mere negligence (or gross negligence) in losing or destroying records does not amount to bad faith, "the spoliating party need not have acted with *malic*e when spoliating the evidence in order for the court to draw an adverse inference." **S*wofford v. Eslinger***, 671 F.Supp.2d at 1280, citing ***Graff v. Baja Marine Corp***., 310 F. Appx. 298 (11th Cir. 2009); ***U.S. EEOC v. Suntrust Bank***, 2014 WL 1364982, *10 (M.D. Fla. Apr. 7, 2014), *citing*, ***Britton v. Wal-Mart Stores East, L.P.,*** 2011 WL 3236189, *13 (N.D. Fla. Jun. 8, 2011). Moreover, bad faith may be shown by direct or circumstantial evidence.[7]

[7] Circumstantial evidence may establish bad faith if it is shown that (1) evidence once existed that fairly could be supposed to be material; (2) the spoliator engaged in an affirmative act causing the loss of evidence; (3) the spoliator did so while it knew or should have known of its duty to preserve the evidence; and (4) the spoliator cannot credibly explain why the affirmative act causing the loss did not involve bad faith. *See*, ***Commercial Long Trading Corp.***, 2013 WL 1100063, at *7; ***Managed Care Solutions, Inc.***, 736 F.Supp.2d at 1322-23.

While the first and third prongs regarding the use of circumstantial evidence has already been addressed (existence, materiality and duty to preserve), *supra*, the second factor, that of an affirmative act causing the loss is also present here. The City made no attempt to identify and sequester witnesses and in fact shoed witnesses away. It took two written statements of witnesses to the police pursuit of Eimers to the beach, yet at the same time purposefully did not take the statement of a man who was visibly upset and who voiced his concern to police over the fact that he just witnessed murder. The police made no attempt to get the bystander video tapes. The City, in producing the recording of the COM1 channel did so in two separate recordings, the second of which started immediately after the CAD Report statement of "Suspect Tased." The City provided no solid evidence of how that happened and quite frankly, has provided no evidence of why all of these failures occurred. The City made no attempt to immediately obtain every officer's taser and instead of separating the officers or advising them not to speak with each other about the incident, allowed them ample time to discuss the incident and discuss their need to get together and "get their sh*t straight."

In ***Swofford*** the Court readily found bad faith. In that case the Court stated "it is not sufficient to notify employees of a litigation hold and expect that the employee will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified, searched and preserved. *Id.* at 1281. In ***Swofford***, the sheriff's office collected several officers' guns including those involved in the shooting so they all could be sent to the manufacturer for dismemberment and replacement. The Sheriffs' office never sought their return despite having known of the request for preservation.

> This is not a circumstance of inadvertent destruction of evidence or negligence in the loss of material data from which the Court is being asked to infer bad faith. Rather, it is a case of knowing and willful disregard for the clear obligation to preserve evidence that was solely within the possession and control of the Defendants and whose contents have no other source than that which has now been spoilated. Thus, the bad faith is clear, and the prejudice to the Plaintiff is substantial. The Sheriffs in that case disregarding spoliation letters they received and their failed to direct their lower level employees to preserve evidence.

Swofford, 671 F.Supp.2d at 1282.

The Court also found that the deputies "willfully contributed to the spoliation of relevant evidence by turning evidence into the sheriffs' office with knowledge that the evidence would be destroyed. One of the deputies computers was turned in to be recycled as part of a program.

Defendant could offer no "cogent, benign explanation for the failure to exclude Deputy Remus's computer from that routine purging of old computers in light of the preservation demand.

It has been said, "[i]n spoliation cases, courts must not hold the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence because doing so allows the spoliators to profit from the destruction of evidence." ***Southeastern Mech. Svcs., Inc.,*** 657 F.Supp.2d at 1300. In this case what the missing recordings had to have captured is at the heart of the very matter. The perjured testimony also is at the heart of this matter. Officer Lovette admitted on tape that he tased Mr. Eimers. If he tased Mr. Eimers, that recording should be in existence. Officer Lovette admitted in deposition that he armed his Taser and applied it to Eimers. The evidence in this case is that if he armed his Taser, then it would have been recording. Now that Lovette has had the benefit of counsel, he no longer is sure if he armed his Taser and adamantly denies that he tased Eimers. The prejudice to Plaintiff in this excessive force case is glaring. When one considers all the other allegedly innocent errors and mistakes of recollection by trained police officers, the affirmative acts of bad faith ought to be clear.

Some of the arguments in Officer Lovette's Response to the Motion to Dismiss necessitate some pointed criticisms. First, at pg. 5 of his Response [DE 111], Lovette discusses how it would be a denial of his right to a full trial on the merits were this court to grant sanctions or enter a default prior to his summary judgment motion. He cites the ***Quantum*** opinion as support therefor. However, the ***Quantum*** opinion cannot possibly stand for the proposition that a court may not enter sanctions against a defendant before that defendant has the opportunity to have its summary judgment considered. To hold such would be to allow the party who is found to have subverted the judicial process to use that process further to his benefit. ***Quantum*** merely said that the court there granted summary judgment in plaintiff's favor before considering the plaintiff's sanctions request***. Quantum Communications Corp. v. Star Broadcasting, Inc***., 473 F.Supp.2d 1249 (S.D. Fla. 2007).

On pp. 5-6 of his Response, Lovette discusses Plaintiff's assertion that Lovette committed perjury based on examples of Lovette's deposition testimony in comparison with the second tourist video. (*See* DE 96-14). Lovette claims he was not given the opportunity to review the 2nd tourist video prior to his deposition and that he provided testimony regarding his recall of the incident almost one year after it occurred. He then proffers that none of Plaintiff's examples establish that Lovette committed perjury.

This is silly. Lovette did not sit around for one year not thinking about this case until deposition time. He interviewed with his PBA representative. He interviewed with his superiors in the police department; he interviewed with the FDLE and testified before the Grand Jury, all before his deposition. The truth, then, is that Lovette did not get to see the second tourist video prior to his deposition so that he could tailor his testimony to what it showed.

Officer Lovette's Response at p..5-6 also challenges the Plaintiff's reference to the recorded statement of Officer Garrido that we need to "get together and work that sh*t out." He states it is not even clear what is being said on the recording. In fact, it is loud and clear and it clearly was in reference to the "supplementals" [supplemental reports] the officers were going to have to prepare. Why were they concerned about consistency if they did nothing wrong?

Further challenge is made, also on pp. 5-6 regarding the Plaintiff's reference to what "KWPD" told EMT's regarding how Eimers was found. Lovette argues that the FDLE investigative report makes it clear that EMT Randy Charles did not remember whether he obtained the information he wrote in his report about Eimers running and collapsing from an officer or dispatch. Lovette reiterates in his Response that he did not even talk to EMS and the Plaintiff has failed to present any evidence that the information in the EMS report came from Lovette.

While it is true that Plaintiff does not know which Key West Police Department employee – and officer or someone from dispatch – told EMS that Eimers collapsed on the beach, we know with certainty that (a) dispatch can only get the information it reports to EMS from a police officer on scene; and (b) that the EMS report indicated that "KWPD reported PT left vehicle, ran, and then collapsed on the beach." So, we are left to infer that an officer lied to EMS. (They apparently lied to Dispatch too).

On pp. 8-9 of his Response, Lovette challenges Plaintiff's assertion that Lovette lied under oath about Plaintiff being lifted up after he was restrained since the video does not show that. He accuses Plaintiff of misconstruing Lovette's deposition testimony. He argues that Plaintiff's counsel's questions were misleading, compound and confusing. He argues that Lovette's testimony was consistent with the second tourist video and that it shows Lovette kneeling by Eimers' feet assisting with placing the hobble, etc. He argues that regardless of whether Eimers was lifted up by the other officers after he was restrained is immaterial to whether the officer used reasonable force when placing him in handcuffs.

Lovette misses the mark. Procedurally, Plaintiff's counsel was entitled to ask this adverse witness leading questions and the Officer Lovette has been around enough that he knows how to give a deposition.[8] Substantively, the other Officers, in addition to Lovette who testified that they stood Eimers up (ie: Del Valle for example), attempted to make it appear (in the absence of any known video evidence to the contrary) that Eimers was on his own power, conscious and standing up when he suddenly collapsed. They did not want him unconscious under their [excessive] forces. They wanted to completely eviscerate Plaintiff's causation case and tried to do so with the fabricated statements that "we stood him up and he was breathing when we stood him up." *See, e.g.*, Officer Gary Lovette's Deposition at p. 235, lines 17-24:

A: We had already applied the hobble restraint to his legs and were trying to lift him up. He had already been handcuffed, and he was breathing when we stood him up.
Q: He was breathing when you stood him up?
A: He was still fighting and talking. We didn't get very far before we were told he was out.

There is little that is consistent between the video and Lovette's testimony. The video speaks for itself in this regard.

Lovette then engages in a discussion at pp. 9-10 about Plaintiff's position regarding Lovette's use of his Taser. He criticizes reliance on the "unsworn statements made by an unknown, unidentified male to the Colombian cameraman which are captured on the 2nd tourist video. "Notably, what Plaintiff fails to point out to this Court is that the Colombian cameraman and his female companion respond to the unknown male by repeatedly saying "No."" He states that regardless, simply because these eye witness statements contradict Lovette does not establish that Lovette committed perjury. Eye witness testimony is "notoriously unreliable" according to Lovette and he states that these eye witnesses may have been mistaken that a Taser actually was fired. Lovette chastises Plaintiff for not addressing the download performed on 11/28/13 purportedly showing a Taser never was fired during the encounter and for discounting Lovette's repeated statements that he did not fire his Taser because Garrido's finger was stuck. Lovette then tries to deflate Plaintiff's argument of Lovette lying under oath by referencing Lovette's denial of punching, striking or kicking Eimers.

[8] *See,* ***Ardoin v. J. Ray McDermott & Co., Inc***., 684 F.2d 335, 336 (5th Cir. 1982)(leading questions should be permitted on cross examination, even if the witness is friendly).

To this Plaintiff responds there are five people who attest to Eimers being Tased. The Colombian cameraman, the witness off camera, and the three folks at Southernmost Café. (Joelle Grassi, William Barrow and the unknown alleged NY retired police officer who believed KWPD murdered Eimers and from whom Officer Wanciak did not secure a formal statement for the file). Lovette admitted on his Taser Cam Recording that he "Tased a M-F'er" in custody and that he "dropped like a f'ing bomb" on his head. The video showed blood on Eimers' head. The ER doctor, Zivko Gajic examined Eimers for basilar skull fracture. The photograph of Eimers on the orange EMT gurney showed coagulated blood and diluted blood stains on the sheet below near Eimers head. Officer Zamora saw blood on Lovette's hand and Lovette too admitted this.

Lastly, Lovette at p. 14 of his Response argues that Plaintiff failed to present any evidence that "17 million" text messages or emails even exist. To this Plaintiff simply responds with the fact that its source was an admission of a party, to wit: Officer Lovette.

Plaintiff respectfully submits that ample evidence of litigation misconduct exists in the form of perjury and spoliation of evidence by the Defendants in this case. The totality of the circumstances here more than demonstrate bad faith using direct and circumstantial evidence and that the evidence is disconcerting and strong. Based on the foregoing, Plaintiff respectfully requests that this Court grant his Motion for Sanctions and fashion sanctions that appropriately meet the Defendants' actions, individually and collectively, and that the Court enter an award of any further relief deemed just and proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served this 30TH day of DECEMBER, 2014 upon all persons and counsel listed on the attached Service List via CM/ECF or regular mail for those not authorized to receive service via electronic means.

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