UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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OUMOU BAH, AS THE ADMINISTRATOR OF THE ESTATE OF MOHAMED BAH,

1:13-cv-06690-PKC-KNF

Plaintiff,

-against-

THE CITY OF NEW YORK, ET AL.,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS FOR SPOLIATION OF EVIDENCE

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Plaintiff Oumou Bah, Administrator of the Estate of Mohamed Bah, by her attorneys hereby submits this Memorandum of Law in support of her motion for sanctions for the spoliation of evidence.

PRELIMINARY STATEMENT

Plaintiff seeks relief from the Court for the destruction by the City of New York ("City") and its employees of the New York City Police Department ("NYPD") for the willful destruction of multiple pieces of key evidence that after the killing of Mohamed Bah was seized by said Defendant and its employees. Such evidence, as more fully set forth below, was in the sole possession, custody and control of the Defendant City and its employees. Said Defendant and its employees knew or should have known of the relevance and importance of such evidence, for the conduct of a full investigation of the circumstances surrounding Mr. Bah's death as well as to the Plaintiff's case against the City and its employees and the City's defense in said action. Despite that knowledge the City and its NYPD employees failed to safeguard the evidence and, in fact, willfully destroyed it. In light of the foregoing, the most severe sanctions are appropriate against the City and the Defendants herein.

STATEMENT OF FACTS

On September 25, 2012, NYPD employees of the City responded to the home of Mohamed Bah as a result of a call from his mother, Hawa Bah, for assistance in taking her son to the hospital. As a result of the interactions between the individual Defendants and Mr. Bah, he was shot and killed in his apartment. The following evidence was seized by the NYPD from Mr. Bah's home and was destroyed and rendered unavailable for inspection: Detective Mateo's ESU long sleeve duty shirt, a knife, marked SG15, that was allegedly in Mr. Bah's possession at the

time of the incident, two Taser cartridges, Taser wires, marked CP1, the chrome-plated tubular trap from a sink in Mr. Bah's apartment, marked MD1, the brass trap, marked MD2, from a sink in Mr. Bah's apartment, the clothes that Mr. Bah was wearing when he was shot, and a piece of the wall from Mr. Bah's apartment that contained a ballistic impact mark.

None of this evidence was produced during discovery despite Plaintiff's efforts to obtain same from the Defendants. Accordingly, none of the evidence could be tested forensically to refute Defendant's arguments that the warrantless entry into Mr. Bah's apartment and the use of deadly force was warranted or in support of Plaintiff's arguments to the contrary.

ARGUMENT

POINT I

DEFENDANT CITY HAD A DUTY TO PRESERVE THE SEIZED EVIDENCE

A. Spoliation and the Duty to Preserve Evidence

Spoliation is defined as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). The party seeking sanctions for spoliation must establish "(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim…such that a reasonable trier of fact could find that it would support that claim." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002).

Where a party seeks sanctions as a remedy to the unavailability of the destroyed evidence, the moving party must first show that the party had control over the evidence and a duty to preserve the evidence at the time it was destroyed. *Id.* at 128. This duty to preserve generally begins when the party has notice that the evidence is relevant to litigation. *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 107 (2d Cir. 2001); *Kronisch v. United States,* 150 F.3d 112, 126 (2d Cir. 1998); *see Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 515-16 n.23 (D. MD. 2010 (stating it is well established that "a party to a lawsuit, and its agents, have an affirmative responsibility to preserve relevant evidence). The courts have held that "the duty to preserve evidence arises when a party reasonably anticipates litigation." *See Casale v. Kelly*, 710 F.Supp.2d 347, 365 (S.D.N.Y. 2010); *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001), 247 F.3d at 436 (relating that the duty to preserve not only arises once the party has notice, but also when the party should have known that the particular evidence would be relevant to future litigation). In addition, it has been held that where a party has knowledge that certain types of incidents tend to trigger litigation, courts within the Second Circuit have found that a duty to preserve relevant video footage may attach as soon as the triggering incident occurs and prior to when a claim is filed. *Taylor v. City of New York*, 293 F.R.D. 601, 610 (S.D.N.Y. 2013); *see, e.g.*, *Slovin v. Target Corporation*, 2013 WL 840865 (S.D.N.Y. 2013) (holding that the duty to preserve video footage of a customer's fall began "at the time of the accident"); *Mateo v. Kohl's Department Stores, Inc.*, 2012 WL 760317 (S.D.N.Y. 2012) (finding that Kohl's had a duty to preserve video of the accident as "there can be little doubt that, at the time of the accident, Defendants could have expected Plaintiff to file a lawsuit").

As the relevant case law shows, a simple slip and fall in a department store is enough to put a party on notice that it has a duty to preserve. *See Mateo*, 2012 WL 760317. Accordingly, it is obvious that when police shoot and kill a civilian, especially a civilian who is an EDP, that type of incident tends to "trigger litigation." *See Taylor*, 293 F.R.D. at 610. It is quite clear that the NYPD and the City of New York knew or should have known that such an incident as the one that occurred between the NYPD and Mr. Bah on September 25, 2012 would lead to future litigation. Simply, future litigation was inevitable. Although the NYPD took possession of the destroyed evidence the City is unable to produce any of these items to the Plaintiff for inspection.

Once the trial court finds that the nonmoving party indeed had a duty to preserve, the party seeking sanctions must establish that the evidence was destroyed with a culpable state of mind. *See Residential Funding Corp.*, 306 F.3d at 107. Despite a failure to preserve evidence, sanctions are only appropriate when that party did so with a sufficiently culpable state of mind. *In re WRT Energy Securities Litigation*, 246 F.R.D. 185, 196 (S.D.N.Y. 2007) (citing to *Residential Funding*, 306 F.3d at 107-08; *Byrnie*, 243 F.3d at 107-09). The party responsible for the destruction or loss of evidence need not have acted intentionally or necessarily in bad faith, at the bare minimum, negligence alone is enough to warrant at least some type of sanction. *Id.*; *see Zubulake v. UBS Warburg*, LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) (stating "once the duty to preserve attaches, any destruction of [evidence] is, at a minimum, negligent"). It is well established in this Circuit, that courts may choose to impose sanctions for mere negligence because "[i]t is cold comfort to a party whose potentially critical evidence has just been destroyed to be told that the spoliator did not act in bad faith." *See Orbit One Commc'ns, Inc. v. Numerez Corp.*, 271 F.R.D. 429, 438 (S.D.N.Y. 2010). Certainly, gross negligence is

encompassed within this state of mind spectrum because it also satisfies the culpability requirement. *See Chin v. Port Authority of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012). Gross negligence has been defined as "a failure to exercise even that care which a careless person would use." *See Pension Comm. of Montreal Pension Plan v. Banc of Am. Sec.* ("*Pension Comm.*"), 685 F.Supp. 456, 464 (S.D.N.Y. 2010) (citing Prosser & Keeton on Torts § 31 at 169 (5th ed. 1984) (quoting Restatement (Second) of Torts § 282)).

B. The Destruction of Evidence

The Defendants have failed to produce any of the aforementioned evidence. With respect to Mr. Bah's clothing the Defendants have admitted that they are not in possession of the clothing that he wore when he was shot. Ashley Garman, one of the attorneys from the City's Law Department, stated in a telephone conference on October 20, 2015, before the Honorable Kevin Nathaniel Fox, that "We've made inquiries in light of plaintiff's counsel's assertion that it was removed at the ME's office and my understanding is that if we had it, if we were in possession of it, if defendants were in possession of it at one time, we no longer are. It was not vouchered and therefore not preserved." *See* page 15, lines 6-12 of the transcript of the October 20th telephone conference. A copy of the transcript is annexed to the Cohen Declaration as Exhibit A.

This blatant failure to preserve Mr. Bah's clothing is very troublesome as it is a common and fundamental principle in crime scene investigation that "[i]n any shooting scene the victim's clothing should be collected and properly preserved for gunshot residue analysis." A copy of the relevant pages from Charles S. DeFrance's and Carlo J. Rosati's, *A Practical Guide to Shooting Scene Preservation for Crime Scene Investigators*, 15 J. OF THE ASS'N FOR CRIME SCENE

RECONSTRUCTION 29, 29 (Fall 2009) is annexed to the Cohen Declaration as Exhibit B. Furthermore, preservation of the victim's clothing is vital for shooting reconstruction because the pattern of gunshot residue is indicative of the distance of the gun from the target. *Id.* Even where there are no visible signs of gunshot residue, the victim's clothing should still be collected because laboratory testing may detect such evidence. *Id.* at 31.

At or about the time of the autopsy, NYPD employees took photographs of Mr. Bah's clothing and Detective William Brown documented his observations pertaining to same. A copy of Detective Brown's memoranda is annexed as Exhibit C to the Cohen Declaration. Detective Brown noted that the "white t-shirt the suspect was wearing had a taser probe attached to the front of the shirt which was consistent with small round bruising on the suspect's chest." See Exhibit C. He also noted that the "the bloody t-shirt also contained ballistic damage consistent with the suspects [sic] bullet wounds." *See* Exhibit C. Despite the investigation into the shooting of Mr. Bah and the observations of Detective Brown, the Defendants failed to preserve Mr. Bah's clothes. The Defendants were responsible for collecting Mr. Bah's clothes and had an unequivocal duty to preserve this evidence.

Additionally, the Defendants failed to preserve a section of the wall, which contained relevant ballistic damage as a result of the shooting, from Mr. Bah's apartment that was seized by NYPD detectives. At the aforementioned October 20th conference, Ms. Garman told the Court, "As with the clothing, we have done a good faith search to try to find out what happened to the section of the wall which as Ms. Cohen indicated was photographed both when it was – the section of the wall contained a ballistic impact mark, so the wall was photographed by crime scene unit when it was still an intact wall with the ballistics, showing the ballistic impact mark on the wall. And then the wall – there are photographs of the wall with the section cut out

showing the cutout portion. Like the clothing, the piece of the wall that was cut out was not vouchered and we do not have it to produce to plaintiff for inspection." *See* pages 21-22 of Exhibit A. Again, the Defendants have failed to fulfill their duty to preserve crucial evidence that would have added Plaintiff in her effort to reconstruct the trajectory of the bullets that were fired at her brother.

In regard to the evidence that the Defendants seized and did not go missing, the Defendants exhibited a gross disregard for their duty to preserve the evidence in a manner that would enable Plaintiff to inspect and test the evidence. On September 26, 2012, a knife, marked SG15, was recovered and packaged in a cardboard box by Crime Scene Unit Investigator Samuel Gilford. A copy of the property clerk invoice (DEF002897) is annexed as Exhibit D to the Cohen Declaration. A request was made to have the knife tested forensically. Copies of evidence reports (DEF1707 and 002891) and Defendants 3rd Supplemental Discovery Response are annexed as Exhibits E and F, respectively, to the Cohen Declaration. No documents were produced by Defendants that provided the results of any testing on the knife to determine if fingerprints were present, whose fingerprints were present, or whether any DNA was present on the knife because no such testing was ever done.

On September 28, 2012, the knife was transferred from the 26th Precinct to the Pearson Place Warehouse. Inexplicably, on October 25, 2012, the knife, Taser cartridges, Taser wires, and Mateo's ESU shirt were transferred from the Pearson Place Warehouse to the Kingsland Warehouse. A copy of the chain of custody invoice (DEF 002899-2900) is annexed as Exhibit G to the Cohen Declaration. A day after the transfer of these items of evidence, Governor Cuomo declared a State of Emergency in New York in preparation of Hurricane Sandy, urging New Yorkers to plan for hurricane conditions. A copy of Gov. Cuomo's Press Release is annexed as

Exhibit H to the Cohen Declaration. In the press release, it specified that New York City and Long Island were considered to be the most at risk because they are adjacent to coastal waters. *Id.* Overall, the release instructs everyone to learn the storm surge history and elevation for your area, as well as to store important documents in waterproof containers. *Id.* Despite these warnings no efforts were made to secure the evidence that had been transferred to the Kingsland Warehouse that was in a special flood hazard area. *See* Exhibit I, annexed to the Cohen Declaration, which is a FEMA memo. On October 29, 2012, Hurricane Sandy hit and caused substantial flooding, which damaged the Kingsland Warehouse. Annexed to the Cohen Declaration as Exhibit J is a copy of Sgt. Capozzi's affidavit which stated that the evidence stored in the Kingsland Warehouse was contaminated after the hurricane.

Contrary to what Sgt. Capozzi state in his affidavit, on July 21, 2014, in response to Plaintiff's discovery demands Defendants stated that the items of evidence that were stored at the Kingsland Warehouse were destroyed during Hurricane Sandy and thus cannot be produced. A copy of the relevant pages of Defendants' Objections & Responses to Plaintiff's First Set of Interrogatories – 3rd Supplement is annexed as Exhibit K. Subsequently, on June 5, 2015, Ms. Garman stated that the knife is "no longer in defendants' possession, custody or control, as previously disclosed in defendants' Third Supplemental Discovery Responses, dated July 21, 2014." A copy of the relevant pages of Defendants' Responses and Objections to Plaintiff's Second Document Request and First Demand for Inspection is annexed as Exhibit L to the Cohen Declaration. Additionally, on July 9, 2015, in response to Plaintiff's request for any forensic testing of the knife, Ms. Garman stated in an email that "upon information and belief, no responsive document exists." A copy of the July 9th email is annexed as Exhibit M to the Cohen Declaration. Finally, on August 17, 2015, Defendants submitted an affidavit from Sergeant John

Capozzi that explicitly stated that items Plaintiff had been seeking to inspect had not been destroyed, but were contaminated. See Exhibit J. Sgt. Capozzi averred that on October 29, 2012, the Kingsland Warehouse was considerably damaged due to a flood caused Hurricane Sandy. *Id.* Due to this damage, all the property and items were contaminated and the warehouse was closed, leaving the items there inaccessible. *Id.*

The circumstances involving the evidence that was stored at the Kingsland Warehouse, inevitably leads to the conclusion that the evidence was intentionally placed there and not protected from the potential destructive effects of the impending hurricane. The evidence was originally vouchered in a non-flood area and days before one of the most destructive hurricanes in the history of the Northeast occurs, the evidence was moved to a flood zone area and placed in a warehouse within that zone on the first floor. Plaintiff was repeatedly advised that this evidence was "destroyed" by Hurricane Sandy. In fact, the evidence was not destroyed and actually still exists, but is contaminated and inaccessible. The Defendants' never had an acceptable answer from the beginning of these evidentiary inquiries and collectively, these circumstances show their bad faith and the willfulness of the actions that led to the destruction of critical evidence.

Despite the readily apparent duty to preserve, the Defendants' knowingly decided to effectively "destroy" the evidence aforementioned. The Defendants initially claimed that since Mr. Bah was rushed to the hospital in an attempt to resuscitate him, the hospital had taken possession of his blood stained clothes and threw them away. *See* Exhibit A, 14:21 to 15:4. Ms. Garman claimed that "we have done a good faith search for the clothing and my understanding is it was never vouchered and was destroyed." *See* Exhibit A, 15: 5-7. Further, Ms. Garman stated that it was her understanding that if the Defendants were in possession of the clothes at one time;

they no longer were because Mr. Bah's were never vouchered and consequently, not preserved. *Id.* at pg. 15:9-12.

However, contrary to Ms. Garman's assertion, NYPD detectives took photographs of Mr. Bah wearing his pants, socks, one shoe, and his shirt. In one photo an NYPD investigator's reflection can be seen in the window of the drying room where Mr. Bah's pants are hanging as he takes the photograph. A copy of the relevant photos from the Bah Autopsy are annexed as Exhibit N. When questioned by the Magistrate Judge Fox as to how the Defendants could account for the post autopsy photograph, Ms. Garman stated that she was unable to speak about the photograph and admitted not only that "the clothing could very well have been in our possession at one time," but also that it was their understanding that the clothing would have been discarded. *See* Exhibit A, 15:13-22. It is evident that the Defendants had been in possession of these autopsy photos and Mr. Bah's clothes, and yet they claimed that the hospital took possession of the clothes and discarded them.

In regard to the portion of the wall that was removed, it is undisputed that it was cut out during the subsequent police investigation into the shooting and killing of Mr. Bah. A copy of the photographs of the wall is annexed as Exhibit O to the Cohen Declaration. Once again, the Defendants admitted that they had been unsuccessful in locating the section of the wall that they had removed. *See* Exhibit A, 21-22. In now what is becoming a constant rather than an exception, the Defendants have dismally failed again to product another piece of evidence in this case.

Even if these circumstances are somehow found not to support an intentional and willful culpable state of mind on behalf of the Defendants, the various actions, obfuscations and

misstatements, to be charitable, of the Defendants at the very least meet the gross negligence standard. The Defendants' failure to preserve Mr. Bah's clothes and the cutout from the wall in his apartment from destruction, and the failure to secure properly the evidence that was placed at Kingsland Warehouse are all examples of a failure to exercise care that "even a careless person would use." *See Pension Comm.*, 685 F.Supp.2d at 464. For these failures, sanctions are warranted to deter the City and future defendants from such conduct.

Point II

THE DESTROYED EVIDENCE WAS RELEVANT

In seeking sanctions for spoliation, the party seeking sanctions must also establish that the destroyed evidence was "relevant to the party's claim" insomuch "that a reasonable trier of fact could find" that the evidence would have supported the claim. *Residential Funding Corp.* 306 F.3d at 107. However, when evidence is intentionally or willfully destroyed or is destroyed in bad faith, then that fact alone satisfies the relevance requirement. *Zubulake*, 220 F.R.D. at 220. Conversely, when evidence is negligently destroyed, the party seeking the spoliation sanctions must prove its relevance. *Id.* Under these circumstances, "[c]ourts must take care not to 'hold[ ] the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence,' because doing so 'would subvert the…purposes of the adverse inference, and would allow parties who have…destroyed evidence to profit from that destruction." *Residential Funding Corp.*, 306 F.3d at 109 (quoting *Kronisch*, 150 F.3d at 127; *Byrnie*, 243 F.3d at 110). The relevancy of the destroyed evidence can be shown through extrinsic evidence that shows that the missing evidence likely would have been favorable to the moving party. *See Treppel v. Biovail Corp.*, 249 F.R.D. 111, 122 (S.D.N.Y. 2008).

Unequivocally, it is the Plaintiff's position that the Defendants intentionally and willfully destroyed this evidence. Therefore, the Defendants intentional and willful conduct will satisfy the relevance requirement. In the event that the Court does not find this degree of culpability, Plaintiffs submit that the destroyed evidence is relevant.

First, the contamination of the knife prevented Plaintiff from conducting her own independent forensic examination of the knife, including DNA testing and fingerprint analysis. It is the Defendants' position that Mr. Bah allegedly had a knife in his hand when the officers unlawfully entered his apartment. The knife is essential to the case at bar because it is the Defendants' position that Mr. Bah was allegedly holding this knife and caused the officers to reasonably fear for their lives and injury. However, there is no way of determining whether the Defendants' allegation is true because the Defendants have destroyed or made unavailable a significant piece of evidence that would have shed light on the veracity of Defendants' argument. The Defendants knew that such testing was necessary and even took the requisite steps to request a laboratory examination report. *See* Exhibits E and F. When the Plaintiff's became aware that this testing was requested, the Plaintiff wanted access to the results. Unfortunately, the Defendants responded that "no laboratory tests were performed on the knife, and therefore that no documents pertaining to 'forensic reports or analysis' or 'finger print testing or analysis' exist. *See* Exhibit K, pg. 2. Yet again, the Defendants' were unable to produce evidence that may have allowed the Plaintiff's to proceed in the absence of their own independent physical examination of the knife. Ultimately, the knife is highly relevant to the Defendants' claims and to Plaintiff's case in chief. The absence of the knife greatly prejudices the Plaintiff.

Second, the ESU long sleeve duty shirt that was contaminated is also highly relevant. Detective Mateo was wearing this ESU long sleeve shirt the day of the incident and Detective

Mateo stated, "… he started stabbing me with the knife." A copy of the relevant pages of the Mateo is annexed as Exhibit P to the Cohen Declaration. Significantly, an inspection of the ESU shirt would have shed light on the veracity of Mateo's allegation and the City's contention that Mateo's arm had been injured by Mr. Bah's use of an alleged knife. Additionally, examination of the shirt, or results of testing by the City, for blood spatter, gun residue or brain matter, would either dispute or substantiate Plaintiff's assertion that other evidence supports the conclusion that Mateo shot Mr. Bah in the head from close range after Mr. Bah was gravely wounded and on the ground. Therefore, the shirt he was wearing is extremely relevant for the Defendants' assertion that deadly force was justified and Plaintiff's counterassertions.

Third, the two Taser cartridges and the Taser wires are relevant to the case at hand. Due to the destruction of this evidence, the Plaintiff cannot examine the Taser cartridges or its wires. At the time these items were collected by the Defendants they made a request for a Laboratory Examination Report pertaining to the two Taser cartridges and the X-26 Taser. A copy of the Request for Lab Exam Report, 9/26/12, DEF1941-42, is annexed as Exhibit Q. However, the Defendants' failed to produce the lab results and have successfully impeded the Plaintiff from conducting any of its own testing. Specifically, the Plaintiff has been wrongfully barred the opportunity to conduct testing relating to whether the cartridges and/or its wires were functioning properly and whether the Taser cartridges were uninsulated training cartridges. *See* pages 2-3 of Plaintiff Expert Report of Gene Maloney. A copy of Mr. Maloney's Expert Report is annexed as Exhibit R. These additional investigations would have helped determine the precise effects that the Taser use had on Mr. Bah or Mateo. Moreover, if the cartridges and wires were not adequately maintained and thus not operating correctly those facts alone would further raise doubt concerning the ESU Team's use of that device in the situation at hand. Through no fault

of her own, the Plaintiff has been greatly prejudiced again by the Defendants from reviewing highly relevant and pertinent evidence to the case at bar.

Fourth, the chrome-plated tubular trap, marked MD1, and brass trap marked MD2, are relevant. A clear indication of the relevancy of these sink traps is exemplified in Detective Samuel Gilford's deposition. While being questioned about his report, Detective Gilford explained that another crime scene processing task that he had to do was removing the sink traps in Mr. Bah's apartment. A copy of the relevant pages from Detective Gilford's deposition and Crime Scene evidence reports for the sink traps are annexed as Exhibit S. Although Detective Gilford stated he did not think it was necessary to remove them, he testified that he was given direct orders from Captain Benoit to remove the sink traps. *See* Exhibit S, 65:7-15. Detective Gilford stated that he was not given an explanation of why the Captain wanted the sink traps removed, but he did hear Captain Benoit speaking with the Detective Bureau discussing that "something might have been poured or dumped down the drain." Exhibit S, 65:16-22. Interestingly, when Detective Gilford was asked why that would be relevant for a homicide by a gunshot, he stated that they could be looking for a chemical, "blood that might have been cleaned up and washed down the sink that got caught in the trap," or anything. Exhibit S, 66:3-13. Obviously, Captain Benoit recognized that the traps were relevant to the case and indeed, ordered Detective Gilford to remove them. Additionally, a seasoned NYPD Crime Scene Unit Detective perfectly described the substantial degree of relevance that the sinks traps might have in this case. The Plaintiff would have conducted the necessary forensic testing to determine whether any of Mr. Bah's blood was caught in the traps and whether any DNA other than Mr. Bah's was present. If a police officer had washed his hands in either of the sinks that contained these traps, then the Plaintiff would have had an opportunity to discover that evidence.

Unfortunately, the Plaintiff has been precluded from examining yet another relevant piece of evidence in this case.

Fifth, the clothes Mr. Bah was wearing when he was shot and killed are immensely relevant. It has been well documented by Detective Michael Brown that the shirt that Mr. Bah was wearing was bloody and "contained ballistic damage that was consistent" with the bullet wounds he sustained. Exhibit C. Also, Detective Brown noted that the several photographs of the shirt either exhibited definite ballistic or possible ballistic damage. *Id.* Accordingly, Mr. Bah's clothes are extremely relevant, especially in terms of the Plaintiff's expert analysis and report. Dr. Michael Baden had requested that the Plaintiff arrange for him to be able to examine the clothes Mr. Bah was wearing when he was killed. A copy of Dr. Baden's Declaration is annexed to the Cohen Declaration as Exhibit T. In his declaration, Dr. Baden opined that Mr. Bah's clothing may have contained forensic evidence in relation to not only the distance of gun discharges, but also the positions of the shooters and the decedent at the time of the shooting. *See* Exhibit T. The Plaintiff has been deprived of the opportunity to conduct forensic analysis on the clothes, but has also been tremendously disadvantaged as Dr. Baden was unable to furnish a complete opinion without an inspection of Mr. Bah's clothes.

Finally, the cutout portion of the wall that was removed from Mr. Bah's apartment wall is relevant. The cutout portion of the wall could provide insight into the trajectory of the bullets that were fired at Mr. Bah. Detective Gilford testified that the cutout portion of the wall contained a ballistic impact mark. *See* Exhibit S, 129:11-18. The Plaintiff's examination of the cutout portion of the wall would have involved testing relating to shooting reconstruction, the type of bullet that damaged the wall, and the angle that the bullet penetrated the wall. Undoubtedly, the Plaintiff has been denied access to relevant evidence once again.

In light of the destruction of so many critical items of evidence, Plaintiffs submit that the highest sanctions should be levied against the Defendants to punish them for the destruction of evidence and to deter future acts of misconduct.

Point III

APPROPRIATE SANCTIONS INCLUDE STRIKING OF DEFENDANT'S ANSWER, AT THE VERY LEAST AN ADVERSE INFERENCE, PRECLUSION BY THE DEFENSE TO QUESTION WITNESSES ABOUT THE DESTROYED EVIDENCE, AND AN AWARD OF ATTORNEYS' FEES IN REGARDS TO THIS MOTION.

The district court has the discretion to impose sanctions for spoliation due to its inherent power to control the judicial process and litigation. *West*, 167 F.3d at 779 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45 (1991)); *see Residential Funding Corp.*, 306 F.3d at 106-07 (2d Cir. 2002); *see also Fujitsu Ltd.*, 247 F.3d at 436 (explaining that the trial judge has ample discretion to choose an appropriate sanction); *Reilly v. Natwest Mkts. Grp. Inc.*, 181 F.3d 253, 267 (2d Cir. 1999) (specifying that the trial court has wide discretion in ordering sanctions against a party). Accordingly, a district court's wide discretion in deciding the appropriate sanction for spoliation should reflect the "prophylactic, punitive, and remedial rationales" that are the core principles of the spoliation doctrine. *West*, 167 F.3d at 779 (citing to the rationales discussed in *Kronisch*, 150 F.3d at 126). Put differently, the sanction should be decided on the basis of these underlying rationales. Possible sanctions include further discovery, cost-shifting, fines, special jury instructions, preclusion, adverse inference, entry of default judgment, and dismissal. *See Slovin*, 2013 WL 840865, at *6 (citing *Passlogix v. 2FA Technology, LLC*, 708 F.Supp. 378, 420 (S.D.N.Y. 2010)). Dismissal of a lawsuit is only appropriate when there is a showing of willfulness, bad faith, or fault on the sanctioned party. *West*, 167 F.3d at 779. It has been held that gross negligence falls under the definition of "fault," which passes the initial

threshold allowing the court to consider a sanction of default. *See Chan v. Triple 8 Palace, Inc.*, 2005 WL 1925579 (S.D.N.Y. 2005) (citing *Pastorello v. City of New York*, 2003 WL 1740606 (S.D.N.Y. 2003). Even where the requisite culpability is met, courts have held that striking the nonmoving party's answer or precluding their use of the destroyed evidence are drastic remedies, which "should be imposed only in extreme circumstances, usually after consideration of alternative, less drastic sanctions." *See Chan*, 2005 WL 1925579, at *9 (quoting *West*, 167 F.3d at 799); *see also Ocello v. White Marine, Inc.*, 347 F. App'x 639, 641 (2d Cir. 2009). In order to determine the appropriate sanction, the district court should focus on three factors. *West*, 167 F.3d at 779. Specifically, the sanction imposed should: "(1) to deter parties from engaging in spoliation, (2) to place the risk of an erroneous judgment on the party who wrongfully created the risk, and (3) to restore the prejudiced party to the same position he or she would have been in absent the wrongful destruction of evidence." *Id.*

A. Defendants' Answer Should be Stricken

These intentional derelictions of duty by the Defendants' have tremendously and emphatically prejudiced the Plaintiff because the evidence that was highly relevant is now unavailable and irretrievable. The Plaintiff has no recourse with the exception of this present motion. Notwithstanding, it is close to impossible to completely remedy the detrimental effects of all of this missing evidence, the Court should award the harshest sanction within its discretion. The Court should strike the Defendants' answer due to their blatant disregard of their obligations under the law and to the administration of justice. The Defendants' have displayed "willful and contumacious" conduct with their destruction of an incredible amount of evidence, and when combined with the surrounding circumstances, this unacceptable behavior warrants the Court to strike their answer. *See Byam v. City of New York*, 68 A.D.3d 798, 801 (2d Dept. 2009) (striking

the defendants' answer because of "the defendants' willful and contumacious conduct can be inferred from their repeated failures, over an extended period of time, to comply with the discovery orders, together with the inadequate, inconsistent, and unsupported excuses for those failures to disclose"); *but cf. Wahhab v. City of New York*, 2003 WL 21910865 (S.D.N.Y. 2003) (denying plaintiffs' motion to strike defendants' answers when defendants failed to appear for three sets of two depositions); *see also Flynn v. City of New York*, 955 N.Y.S.2d 637 (2d Dept. 2012) (striking the defendants' answer due to "the willful and contumacious conduct of the defendant, City of New York, can be inferred from its repeated failures over an extended period of time and without an adequate excuse…").

The Defendants in this case have failed to disclose evidence to the Plaintiff because it was destroyed, or missing. On top of this failure, the Defendants also misled the Plaintiff and the Court when it was revealed the "destroyed" evidence did actually exist, but was contaminated. In sum, the Defendants' inexplicable failures and inexcusable deception amounts to willful and contumacious conduct. Therefore, the Court should strike the Defendants' answer.

B. Preclusion of the Destroyed Evidence

Alternatively, the Court should preclude the Defendants from introducing any evidence, through testimony or exhibits, in support of their instant motion for summary judgment or at trial that was destroyed, not produced or otherwise made unavailable to Plaintiff. Preclusion has been classified as an "extreme" sanction. *Taylor*, 293 F.R.D. at 615 (citing *Outley v. New York*, 837 F.2d 587, 591 (2d Cir. 1988). Nevertheless, courts will often employ such a remedy "to mitigate the specific prejudice that a party would otherwise suffer" from the spoliation of the offending party. *Taylor*, 293 F.R.D. at 615 (citing *In re WRT Energy Sec. Litig.*, 246 F.R.D.185, 200

(S.D.N.Y. 2007); *West*, 167 F.3d at 780). If the Defendants are allowed to rely on this evidence at trial or in support of their pending motion for summary judgment, the Plaintiff would suffer harm. *See Chin*, 685 F.3d at 162. Finally, preclusion would be appropriate here because the use of the destroyed evidence places the injured party, the Plaintiff, at risk of "an erroneous evaluation," where the risk should be placed on the Defendants. *See Taylor*, 293 F.R.D. at 615 (citing *Chin*, 685 F.3d at 162). The Defendants are the ones who obliterated the evidence and the Plaintiff should not be penalized for Defendants' intentional and willful actions.

C. Adverse Inference Instruction to the Jury

Finally, the Court should consider a mandatory adverse inference instruction to the jury regarding the destroyed and unavailable evidence. The basis of an adverse inference charge is to serve two fundamental purposes, remediation and punishment. *See Donato v. Fitzgibbons*, 172 F.R.D. 75, 81 (S.D.N.Y. 1997); (citing *Shaffer v. RWP Grp., Inc.*, 169 F.R.D. 19, 25 (E.D.N.Y. 1996); *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991)). When a party is seeking an adverse inference, as with any spoliation sanction, the party must establish the three factors set forth in *Residential Funding Corp. v. DeGeorge Fin. Corp.* 306 F.3d at 107. Due to the Defendants' failure to preserve, their willful intentions, and the degree of relevancy that the lost evidence possessed, this case satisfies all three elements. Therefore, the Court should, at a minimum, exercise its discretion permit an adverse instruction due to the spoliation of evidence.

D. The Court Should Award Attorneys' Fees

The Court should require the Defendants to pay the costs and attorneys' fees associated with this motion. Monetary sanctions are deemed appropriate in order to punish and deter the offending party and award the non-offending party for costs, including attorneys' fees. *See*

Richard Green (Fine Paintings) v. McClendon, 262 F.R.D. 284, 292 (S.D.N.Y. 2009) (citing *In re WRT Energy Securities Litigation*, 246 F.R.D. at 201; *Turner*, 142 F.R.D. at 77-78)). Due to the absence of a tremendous amount of evidence, the Defendants have forced Plaintiff to spend a considerable amount of time and money preparing this motion, as well as an extraordinary amount of the time dedicated to requesting and attempting to find unavailable evidence.

CONCLUSION

For all of the foregoing reasons, the Plaintiff respectfully requests that this Court issue sanctions against the Defendants for the spoliation of evidence, together with such other relief as this Court may deem just, equitable, and proper.

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Respectfully submitted,

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