13-cv-6690-PKC-KNF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiff,

- against -

THE CITY OF NEW YORK, ET AL.,

Defendants.

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

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for Defendants The City of New York, Edwin Mateo, Andrew Kress, Michael Green, Joseph McCormack, Michael Licitra, Robert Gallitelli, Brian Stanton, Esmeralda Santana and Vincent Johnson
100 Church Street
New York, N.Y. 10007

Of Counsel: Ashley R. Garman
Barry K. Myrvold
Susan P. Scharfstein
Tel: (212) 356-3539
Matter No. 2013-045609

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PRELIMINARY STATEMENT

The accusations made by plaintiff in her motion for sanctions – that defendants intentionally "obliterated" multiple items of physical evidence critical to plaintiff's case – are extraordinarily serious, and the remedy she seeks – among other things, the striking of defendants' Answer – extraordinarily harsh. Plaintiff, however, wholly fails to ground her hyperbolic allegations in reality. Rather than pointing to evidence in the record to support her accusations (which she cannot do, as they are baseless) plaintiff asks the Court to impose extreme sanctions against defendants based on arguments that are widely speculative, untethered to any facts and, respectfully, at times patently absurd. For example, plaintiff alleges that defendants intentionally orchestrated the destruction, by Superstorm Sandy, of numerous items of evidence including the large kitchen knife with which plaintiff's decedent attacked NYPD officers. Plaintiff's contention that defendants purposely moved the knife and other evidence to an NYPD warehouse in Brooklyn somehow knowing that a devastating hurricane would soon hit New York City, flood that particular warehouse and effectively destroy these items is entirely unfounded and is illustrative of the baselessness of her entire motion.

Not only has plaintiff failed to establish that defendants destroyed all of the allegedly spoliated evidence – incredibly, she also accuses defendants of spoliating the clothing that the decedent was wearing at the time of his death, when that clothing was undisputedly turned over to *plaintiff*'s *own agent* shortly after the incident – plaintiff cannot demonstrate that any City agent destroyed evidence with a culpable state of mind, as required for the imposition of sanctions. Moreover, plaintiff has not established that any of the allegedly spoliated evidence would have supported her claims and that she has been prejudiced due to its unavailability; she simply hypothesizes that examination of these items might have revealed forensic evidence (e.g.,

fingerprints, DNA, blood spatter) that *may or may not* have fit her theory of the case. However, such speculation, not supported by any extrinsic evidence, is insufficient to justify sanctions.

Finally, even assuming, arguendo, that the Court were to find spoliation here, any sanctions against the nine individually-named defendants would be inappropriate, as plaintiff does not (and cannot) allege that a single one of them had custody of any of the evidence in question at the time of its alleged destruction or played any role in rendering it unavailable in this litigation. As set forth herein, plaintiff has entirely failed to justify the imposition of sanctions against defendants in this matter, let alone the severe sanctions she seeks. Plaintiff's motion should be denied in its entirety. Furthermore, given the frivolousness of many of plaintiff's arguments set forth in her motion for sanctions, defendants should be awarded costs in connection with this Opposition.

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

A. Statement of Relevant Facts

This matter involves the 2012 shooting death of Mohamed Bah by members of the NYPD. As set forth in defendants' papers in support of their Motion for Summary Judgment, in the early evening of September 25, 2012, Emergency Service Unit ("ESU") Detectives Edwin Mateo, Andrew Kress and Michael Green each fired multiple rounds from their service weapons after Bah attacked them with a large kitchen knife in the doorway of his apartment, and after attempts to subdue Bah with less-lethal force, including Tasers, were unsuccessful. In support of her motion for sanctions, plaintiff summarily states that after the incident certain evidence "was seized by the NYPD from Mr. Bah's home and was destroyed and rendered unavailable for inspection." Pl. Mem., p. 1. However, defendants feel it necessary to provide the Court with a more detailed statement of the facts and circumstances regarding the non-availability of the evidence in question, so that the Court can fully appreciate the issues at hand.

1. The Crime Scene Unit Investigation

Following the shooting, the incident was investigated by, among other investigative entities, the NYPD's Crime Scene Unit ("CSU"). CSU detectives (none of whom are defendants herein) documented the scene (Bah's apartment) and photographed, collected and vouchered numerous items of physical evidence, including, inter alia:[1] (1) a large kitchen knife; (2) Detective Mateo's long sleeve ESU duty shirt with a defect to the left bicep ("ESU duty shirt") from being slashed by Bah with the knife; (3) cartridges from the Tasers fired by McCormack and Kress during the incident; (4) Taser wires; and (5) the traps from two sinks in Bah's apartment. See Ex. B[2] (Invoices for Kingsland Property). Each of these items was photographed, see Ex. C (Photographs of Kingsland Property), and eventually sent to the NYPD Property Clerk for safekeeping,[3] see Ex. B (Invoices for Kingsland Property). CSU detectives also documented and photographed a six to seven-inch ballistic impact mark ("BIM") in one of the walls of Bah's apartment. See Ex. A (Gilford Dep. Excerpts), 129:10-18, 146:19-148:7; 150:16-20; Ex. F (BIM Photographs). A photograph in the CSU file reveals that at some point during their investigation, CSU detectives removed the section of wall containing the BIM, Ex. G (Wall Photograph); however, the piece of wall was not vouchered as evidence and, on information and belief, its whereabouts are presently unknown. Garman Decl., ¶ 9.

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[1] Among the other items of evidence vouchered were the heavy ballistic vests worn by defendants Kress and Mateo during the incident, which were damaged by Bah's knife. See Ex. K (Vest Invoices); Ex. L (Vest Photographs). Plaintiff's counsel inspected the vests on August 31, 2015. Garman Decl., ¶ 14.

[2] Unless otherwise indicated, all references to exhibits referenced in this Memorandum are attached to the Declaration of Ashley R. Garman, dated May 11, 2016, (the "Garman Declaration") submitted herewith.

[3] Additionally, the information electronically stored within both Tasers was downloaded by investigators from the NYPD Internal Affairs Bureau, and the Taser Usage Printouts containing this data – which contain, inter alia, information regarding the number of discharges of each Taser, the duration of each discharge and the Taser's remaining battery life at time of discharge -- have been produced to plaintiff. Garman Decl., ¶ 16.

2. Kingsland Warehouse and Superstorm Sandy

The knife was initially stored at the NYPD's Pearson Place warehouse in Long Island City, Queens. See Ex. D (Chain of Custody Report), p. 1. On October 25, 2012, the knife, as well as the ESU duty shirt, Taser cartridges and wires and sink traps, were taken to the Kingsland Avenue warehouse in Greenpoint, Brooklyn. Id., p. 2; Ex. E (Capozzi Decl.), ¶ 3. The next day, New York Governor Andrew Cuomo declared a state of emergency in preparation for the potential impact of Superstorm Sandy. See Ex. H to the Declaration of Debra S. Cohen in Support of Plaintiff's Motion for Spoliation Sanctions, dated April 25, 2016 ("Cohen Decl.") (Dkt. No. 134). According to NYPD Sergeant John Capozzi, a nonparty who, on October 29, 2012 (the day that Sandy hit New York City), was a supervisor of the Kingsland Avenue warehouse, the warehouse "was significantly damaged by flood waters... during Hurricane Sandy, and all property and items contained within that facility... were contaminated," such that "the facility itself is closed and no items are allowed to be taken in or out." See Garman Decl., Ex. E, (Capozzi Decl.) ¶ 4. Accordingly, defendants are unable to produce the knife, ESU duty shirt, Taser cartridges and wires and sink traps to plaintiff for her inspection.

3. Bah's Clothing

Bah succumbed to his injuries and was pronounced dead at the hospital on the evening of September 25, 2012. The next day, an autopsy of Bah's body was conducted at the City's Office of the Chief Medical Examiner ("OCME") morgue; the autopsy was attended by CSU detectives and NYPD Internal Affairs Bureau ("IAB") personnel. See Ex. H (Det. Brown CSU File Excerpt). The NYPD personnel in attendance at the autopsy photographed, in addition to Bah's body, the t-shirt, sneakers, socks and sweatpants that Bah had been wearing at the time he was shot. See id.; Ex. I (T-Shirt Photographs); see also Cohen Decl., Ex. N. On September

27, 2012, the OCME released Bah's body – *and all of the aforementioned clothing* – to the custody of the funeral director, pursuant to the authorization of Bah's mother and nearest relative, Hawa Bah. See Garman Decl., Ex. J (Mortuary Release Form and Statement of Authority).[4]

B. Relevant Procedural History

On March 14, 2016, defendants filed a fully-dispositive summary judgment motion[5] in which they contend, inter alia, that the use of less-lethal and ultimately lethal force against Bah was justified given that Bah had lunged at the ESU officers repeatedly with a knife. In her Opposition to defendants' summary judgment motion plaintiff asserts that the existence of the knife, and the fact that Bah was lunging at the officers with it, are disputed facts for the jury – not because there is any testimony or other evidence to the contrary,[6] but because the knife was never tested for DNA or fingerprints and is unavailable for her inspection. See Pl. Mem. of Law in Opposition ("Pl. SJ Op. Mem.") (Dkt. No. 139), pp. 5, 7, 12 n.4.[7]

Plaintiff filed her Opposition on April 25, 2016, and on the same day filed the instant motion for sanctions. Plaintiff alleges that defendants spoliated Bah's clothing, the knife, the ESU duty shirt, the Taser cartridges and wires, the sink traps, and the section of wall containing the BIM, and as a sanction seeks an order striking defendants' Answer, or, in the alternative, preclusion of any testimony or other evidence regarding the allegedly spoliated

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[4] Indeed, the Mortuary Release Form (produced to plaintiff more than two years ago in this litigation) makes explicitly clear that, at 5:38 PM on September 27th, Laurent Seube of the Bergen Funeral Home Queens, upon authority from Hawa Bah, received Bah's body and items of clothing consisting of his shirt, sneakers, socks and sweatpants from the OCME. See Ex. J (Mortuary Release Form and Statement of Authority).

[5] See Dkt. Nos. 120-123. In addition to the their Summary Judgment motion, defendants have also filed a motion to preclude the testimony of plaintiff's two experts, Dr. Michael Baden, M.D., and Gene Maloney, as inadmissible under Fed. R. Evid. 702 and Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) ("Defendants' Daubert Motion"). See Dkt. Nos. 135-137. Both motions are presently pending.

[6] There were no witnesses to the events immediately precipitating the shooting besides Bah and the ESU officers.

[7] See also Plaintiff's Response to Defendants' Local Civil Rule 56.1 Statement of Undisputed Facts (Dkt. No. 140), ¶¶ 168-70, 174, 177, 179.

evidence and/or an adverse inference instruction to the jury, as well as attorneys' fees. Plaintiff's motion lacks merit and is premised, to a large extent, on rank speculation. It should be denied in its entirety.

GOVERNING STANDARD

Spoliation is the destruction or significant alteration of evidence, or the failure to preserve it for another's use in litigation. In re GM LLC Ignition Switch Litig. (Fleck v. General Motors LLC), No. 14-cv-8176 (JMF), 2015 U.S. Dist. LEXIS 172723, at *118 (S.D.N.Y. Dec. 29, 2015). A party seeking severe sanctions for spoliation of evidence must establish that (1) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the evidence was destroyed "with a culpable state of mind"; and (3) the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could infer that it would support that claim or defense. Id. at **118-19; see also Twitty v. Salius, 2012 U.S. App. LEXIS 1115, at *3 (2d Cir. Jan. 19, 2012). Before awarding severe sanctions, such as dismissal, preclusion or an adverse inference, the court must also consider whether the innocent party has suffered prejudice as a result of the loss of relevant evidence. Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC, 685 F.Supp.2d 456, 467 (S.D.N.Y. 2010). "The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis," Zubulake v. UBS Warburg LLC ("Zubulake V"), 229 F.R.D. 422, 430 (S.D.N.Y. 2004) (citation omitted).

ARGUMENT

POINT I

DEFENDANTS DID NOT SPOLIATE EVIDENCE

A. Defendants Did Not Breach A Duty to Preserve Any Evidence

1. No City Agent Had Control Over Bah's Clothing at the Time of its Apparent Destruction

As a preliminary matter, plaintiff's motion as it relates to the clothing that Bah was wearing at the time of the incident is entirely frivolous, given that the clothing was returned to Bah's family shortly after his death. There is no record whatsoever of those items ever returning to the custody of any City agent after they were relinquished to the funeral director – plaintiff's agent – on September 27, 2012; thus, to the extent that the clothing was subsequently discarded or destroyed, this did not occur while it was in defendants' custody. Accordingly, plaintiff's request for sanctions in connection with Bah's clothing must be denied.

2. The City Did Not Have a Duty to Preserve Bah's Clothing, the Section of Wall Containing the BIM, the Taser Wires and Cartridges or the Sink Traps

Furthermore, aside from the knife (and, arguably, the damaged ESU duty shirt), defendant City was under no obligation to preserve the allegedly spoliated evidence. A party has a duty to preserve evidence once it has notice that the evidence is relevant to litigation or it should have known that the evidence may be relevant to future litigation. See Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 436 (2d Cir. 2001). "Identifying the boundaries of the duty to preserve [evidence] involves two related inquires: when does the duty to preserve attach, and what evidence must be preserved?" Zubulake v. UBS Warburg LLC ("Zubulake IV"), 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (emphasis omitted). Defendants do not contest that civil litigation related to the shooting was reasonably foreseeable or that the City's duty to preserve *relevant* (or potentially relevant) evidence arguably attached shortly thereafter. However, taken to its logical conclusion, plaintiff's proposition that defendants were obligated to preserve certain items because those items might potentially contain fingerprints, DNA or ballistic evidence would require that defendants collect and preserve anything else in the apartment that Bah, the officers or any ballistic material could conceivably have come in physical contact with during the

incident – including the floorboards and indeed every single other object in the apartment. In addition to being unfeasible as a practical matter, this is not what the law requires, as "a litigant is under no duty to keep or retain every document in its possession" but must preserve "what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." Zubulake IV, 220 F.R.D. at 217; see also Usavage v. Port Auth. Of N.Y. & N.J., 932 F.Supp.2d 575, 591 (S.D.N.Y. 2013) (acknowledging that duty to preserve video surveillance footage does not include "all footage" but only potentially relevant footage) ("The fact that, with perspective adjusted by hindsight and over a year of discovery, it might be helpful for [defendant] to have preserved the disputed footage does not control.").

Here, defendants had no reason to know that the section of wall containing the BIM, Bah's clothing, the cartridges and wires from the two Tasers and the sink traps were reasonably likely to be relevant or requested by plaintiff during discovery. As set forth below, there is no indication – even today – that these items were relevant to this litigation, and there was certainly no pending discovery request for these items at the time they were destroyed or otherwise rendered unavailable. There being no duty to preserve Bah's clothing, the BIM, the Taser wires and cartridges or the sink traps, defendants cannot be found to have breached any duty to preserve these items and plaintiff's motion as it pertains to them should be denied.

3. No City Agent Destroyed the Evidence Housed at Kingsland Warehouse

Additionally – duty to preserve or no – the record is clear that no City agent destroyed or otherwise caused the unavailability of the knife, ESU duty shirt, Taser cartridges and wires and sink traps, which were vouchered and placed in an NYPD storage facility for safekeeping and were subsequently rendered unavailable, not by any act of any City agent, but

by floodwaters from Superstorm Sandy. As set forth below, plaintiff's argument that the knife and other property were intentionally moved to Kingsland for the purpose of having them destroyed by the storm is wholly unsupported by any facts (and is, respectfully, preposterous). Accordingly, plaintiff cannot demonstrate that any City agent destroyed, or otherwise orchestrated the destruction of, these items.

4. The Individual Defendants Did Not Have Control Over Any of the Allegedly Spoliated Evidence At the Time It Was Destroyed or Otherwise Rendered Unavailable

Furthermore, plaintiff has not demonstrated that the individually-named defendants were in custody of and/or responsible in any way for the destruction of any of the allegedly spoliated evidence. Nor can she do so, as there is nothing in the record to suggest that the individual defendants – four patrol officers and five ESU officers who responded to a 911 call to Bah's apartment – participated in any way in the subsequent investigation of the incident, the collection or preservation of any evidence or in any decision as to what to do with these items after they had been collected. This is of paramount importance, as courts in this Circuit have found sanctions inappropriate as against individual defendants who, as here, had no duty to preserve the missing evidence and played no role in the failure to do so. See, e.g., Field Day, LLC v. County of Suffolk, No. 04-cv-2202, 2010 U.S. Dist. LEXIS 28476, at **13-39 (E.D.N.Y. Mar. 25, 2010) (analyzing the propriety of sanctions against the County and against each individual County-employee defendant separately, and finding sanctions against the individual defendants unwarranted because plaintiff could not demonstrate that any of them personally spoliated any evidence); Grant v. Salius, No. 3:09-cv-21 (JBA), 2011 U.S. Dist. LEXIS 133248 at **6-9 (D. Conn., Nov. 18, 2011) ("In light of the Second Circuit's focus in applying spoliation sanctions on parties with a duty to preserve evidence and a role in the destruction of that evidence...spoliation sanctions...are unwarranted where the party against whom sanctions are

sought has not been shown to have had any responsibilities related to the maintenance, preservation or destruction of the evidence at issue, and the loss of that evidence is instead attributable to non-parties."). Plaintiff having failed to establish that any of the individual defendants breached a duty to preserve any of the allegedly spoliated evidence, her request that the Court impose sanctions of any kind against them must be denied.

B. Defendants Did Not Possess a Culpable State of Mind

"Even where the preservation obligation has been breached, sanctions will only be warranted if the party responsible for the los[t evidence] had a sufficiently culpable state of mind." Taylor v. City of New York, et al., 293 F.R.D. 601, 612 (S.D.N.Y. 2013) (internal quotation marks and citation omitted) (alteration in original). Here, even if the Court were to determine that City agents had breached a duty to preserve any of the allegedly spoliated evidence, plaintiff has failed to establish that defendants possessed culpable state of mind, i.e., that they destroyed evidence negligently, intentionally, or willfully. See Zubulake V, 229 F.R.D. at 431.

1. Defendants Did Not Act With Bad Faith

Though plaintiff accuses defendants of egregious conduct – willfully destroying evidence – she cites no evidence in her motion papers that could conceivably demonstrate bad faith on the part of defendants in connection with the unavailable evidence, nor can she. With respect to Bah's shirt and other clothing items, as set forth above, City agents at the OCME turned these items over to the Bah family's agent from the funeral home together with Bah's body, and therefore no City agent played any role in any subsequent destruction of these items.[8]

[8] Plaintiff's insinuation that defense counsel was in on some conspiracy to withhold evidence because counsel initially stated, on information and belief, that the clothing had been discarded at the hospital is entirely unfounded. Defense counsel made good faith efforts to ascertain the location of the clothing, and indeed to respond to the barrage of eleventh-hour discovery demands made by plaintiff – of which the request to inspect the clothing was

As for the portion of wall containing the BIM, plaintiff asserts only that "it is undisputed that it was cut out during the subsequent police investigation" and that defendants have been unsuccessful in locating it. Pl. Mem., p. 10. As there is no evidence in the record that any City agent intentionally destroyed the piece of wall containing the BIM, there is no basis for a finding of bad faith related to its unavailability. See Deanda v. Hicks, No. 13-cv-1203 (KMK), 2015 U.S. Dist. LEXIS 133765, at**19-23 (S.D.N.Y. Sept. 30, 2015) (no bad faith where officer failed to preserve video/audio recording of traffic stop and arrest of plaintiff; while the recording was destroyed pursuant to automatic deletion policy four months after plaintiff filed her Notice of Claim, there was no evidence that the defendant officer intended to destroy the recording).

With respect to the knife and the other items housed at the Kingsland Avenue warehouse, plaintiff asserts that "[t]he circumstances involving the evidence that was stored at 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." Pl. Mem., p. 9. Plaintiff, however, falls woefully short of tethering such a brazen accusation to any facts. The "circumstances" that she claims demonstrate defendants' purportedly willful destruction of this evidence are: (1) it was originally stored in a warehouse in a non-flood zone (Pearson Place); (2) it was then moved to Kingsland, which allegedly is in a "special flood hazard area, the day before Governor Cuomo declared a state of emergency; and (3) it was subsequently contaminated when Kingsland warehouse was flooded as a result of the hurricane, which plaintiff claims means that "no efforts were made to secure the evidence." Pl. Mem., pp.

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one. Plaintiff, of course, was in a much better position to know that the clothing had been returned with her brother's body. Indeed, while plaintiff now asserts that the items of clothing are of "immense" relevance to this litigation, see e.g., Pl. Mem,, p. 15, and constitutes "a critical item of evidence that plaintiff could have used to support her theory of the case," Pl. SJ Op. Mem., p. 9 n. 3, plaintiff evidently chose not to take steps to preserve the clothing herself, once it had been returned with her brother's body, or to conduct testing on it. Respectfully, plaintiff's request for sanctions related to Bah's clothing demonstrates that plaintiff's motion is more about pointing fingers at defendants than about remedying any actual prejudice she suffered from any unavailable evidence.

7-9. Plaintiff has not and cannot point to a shred of evidence to support her contention any City agents – let alone any of the individual defendants – predicted that the storm would flood Kingsland and had the knife and the other property moved there for the purpose of having it destroyed by floodwaters.[9] To call this argument frivolous would be an understatement. Given the absence of any indication of bad faith by any City agent, extreme sanctions against defendants are plainly unwarranted.

2. Defendants Were Not Grossly Negligent

Plaintiff argues that even if the Court does not find bad faith here, "the various actions, obfuscations and misstatements, to be charitable, of the Defendants at the very least meet the gross negligence standard." Pl. Mem., pp. 10-11. Again, however, plaintiff does not explain how the Court is to come to this conclusion or cite to any facts in the record indicating gross negligence on the part of any of the defendants, nor does the record contain any such facts. Gross negligence is the failure to exercise "even the care which a careless person would use." Harkabi v. SanDisk Corp., 275 F.R.D. 414, 419 (S.D.N.Y. 2010). With respect to the knife and the other items at Kingsland warehouse, plaintiff alleges that these items' effective destruction by floodwaters from Superstorm Sandy evinced defendants' "gross disregard for their duty to preserve the evidence in a manner that would enable Plaintiff to inspect and test the evidence." Pl. Mem., p. 7. However, far from suggesting a "gross disregard" of their preservation

[9] Plaintiff inappropriately accuses defense counsel of deliberately misleading plaintiff and the Court, Pl. Mem., p. 18, by stating that the knife and other evidence stored at Kingsland warehouse had been "destroyed" when the Capozzi Declaration states that it was "contaminated" and could not be accessed, and argues that because counsel never "had an acceptable answer from the beginning of [plaintiff's] evidentiary inquiries" into the availability of the evidence stored in Kingsland warehouse, this somehow further demonstrates that defendants acted in bad faith to cause these items' destruction. Id., p. 9. Plaintiff' accusation that defense counsel engaged in "inexcusable deception," id., p. 18, and is somehow in on a conspiracy to withhold and/or destroy evidence is patently frivolous – not to mention entirely unprofessional. No matter what terminology is used, it is undisputed that the evidence could and cannot be produced for plaintiff's inspection. That plaintiff is resorting to splitting such fine hairs and making *ad hominem* attacks against defense counsel further illustrates the baselessness of her motion.

obligations, the record demonstrates that the City and its agents took appropriate measures to document and preserve evidence related to the incident, and there is not a shred of evidence that any City agent directed property to be transferred to Kingsland with the knowledge that that facility was likely to be flooded by a hurricane.

Likewise, with respect to the section of wall containing the BIM, even if the City had a duty to preserve the wall (which defendants do not concede), plaintiff's contention that the failure to do so, in and of itself, necessitates a finding that defendants were at least grossly negligent is legally unsound. See Taylor, 293 F.R.D. at 612-613 (defendant correction officers defendants were not grossly negligent in connection with the deletion of three hours of surveillance video footage that the Court deemed relevant to plaintiff's lawsuit, because, inter alia, plaintiff introduced no evidence that any DOC officer willfully deleted the footage, and because the footage was deleted prior to plaintiff's filing of his Notice of Claim and defendants had conducted an internal investigation into the incident) (citing, inter alia, Chin v. Port Authority of N.Y. & N.J., 685 F.3d 135, 162 (2d Cir. 2012) (rejecting the proposition that the "failure to institute a 'litigation hold' constitutes gross negligence per se"); Zubulake IV, 220 F.R.D. at 221 (though a defendant was "negligent, and possibly reckless," in preserving relevant documents, defendant had not been intentionally or grossly negligent)). Here, there is nothing in the record to suggest that any City agent destroyed the wall with the BIM (or any other evidence) willfully, nor is there any evidence that the BIM or other evidence was destroyed subsequent to the filing of plaintiff's Notice of Claim.[10] Accordingly, plaintiff cannot establish that defendants were grossly negligent with respect to any of the allegedly spoliated evidence.

[10] Plaintiff filed her Notice of Claim in this matter on or about December 21, 2012. Garman Decl., ¶ 17. There is no evidence in the record, nor, on information and belief, are defendants in possession of any information regarding, when the wall containing the BIM was destroyed (if it even was destroyed at all) or otherwise rendered unavailable.

3. Neither Bah's Clothes Nor the Items in Kingsland Warehouse Were Destroyed as a Result of Any Negligence by Defendants

Nor can plaintiff establish that the City was negligent with respect to Bah's clothing, which was returned to plaintiff via her agent, or any of the evidence housed at Kingsland warehouse, which was contaminated as a result of a natural disaster. Accordingly, plaintiff cannot demonstrate that defendants possessed a culpable state of mind with respect to Bah's clothing or the items stored at Kingsland warehouse, nor can she establish that the portion of wall containing the BIM was destroyed in bad faith or with gross negligence.[11]

C. Plaintiff Cannot Demonstrate That the Allegedly Spoliated Evidence Would Have Been of Assistive Relevance To Her Claims

Even if the Court were to determine that defendants failed to preserve any of the allegedly spoliated evidence with a culpable state of mind, plaintiff's failure to demonstrate that such evidence would have been favorable to her claims in this matter is fatal to her motion for sanctions. A party seeking spoliation sanctions must establish that "the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." Chin, 685 F.3d at 162 (internal quotation marks and citation omitted). It is well-settled that relevance, in this context, "means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence." Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002). Rather, "the party

[11] It bears noting once again that plaintiff does not and cannot argue that any of the individual defendants personally had any obligation to preserve any of the allegedly spoliated evidence or played any role in rendering any of this evidence unavailable. Because the mere fact that evidence "was not preserved without more is insufficient to establish that any particular defendant had control over and a duty to preserve [the evidence] at the time it was destroyed[,] much less a culpable state of mind," Hicks, 2015 U.S. Dist. LEXIS at *22 (internal quotation marks and citation omitted), plaintiff cannot establish that any of the individual defendants possessed a culpable state of mind so as to warrant spoliation sanctions against them. Accordingly, to the extent that the Court were to find that the City had and breached a duty to preserve the piece of wall containing the BIM (or any of the other allegedly spoliated evidence), any such breach would be, at the very most, the product of negligence on the part of City agents who are not parties hereto.

seeking the adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction," Hicks, 2015 U.S. Dist. LEXIS 133765, at *24 (quoting Residential Funding, 306 F.3d at 109) (internal quotation marks omitted); in other words, plaintiff must demonstrate that the allegedly spoliated evidence would have been of some "assistive relevance" and favorable to her claims. Taylor, 293 F.R.D. at 613. Where the destruction of evidence is merely negligent, as opposed to a product of bad faith or gross negligence, the party seeking sanctions bears the burden of demonstrating, through extrinsic evidence, that the evidence would have been unfavorable to the destroying party. Great Northern Ins. Co. v. Power Cooling, Inc., No. 06-cv-874, 2007 U.S. Dist. LEXIS 66798, at *11 (E.D.N.Y. Sept. 10, 2007); see also Orbit One Commc'ns,Inc. v. Numerex Corp., 271 F.R.D. 429, 439 ("In the absence of bad faith or other sufficiently egregious conduct, it cannot be inferred from the conduct of the spoliator that the evidence would have been harmful to him") (internal quotation marks and citation omitted).

Here, as set forth above, to the extent that the Court could find that City agents breached a duty to preserve any of the allegedly spoliated evidence (which defendants deny is the case), at the very most, any such breach was negligent, and plaintiff therefore bears the burden of demonstrating proving that a reasonable jury could find that the missing evidence would have been favorable to her claims. Plaintiff has failed to meet this burden.

1. Plaintiff Cannot Demonstrate That the Knife Would Have Been of Assistive Relevance

Plaintiff's opposition to defendants' summary judgment motion is premised in large part on her contention that whether or not Bah was lunging at the ESU officers with a knife is a disputed issue of fact for the jury because defendants have been unable to produce the actual

knife. See, e.g., Pl. SJ Op. Mem. (Dkt. No. 139), pp. 5, 7, 12 n.4. In her sanctions motion, plaintiff argues that without the knife "there is no way of determining whether the Defendants' allegation [that Bah lunged at the officers with a knife, causing them to reasonably fear for their lives] is true," Pl Mem., p. 12, and that she has been greatly prejudiced because she has not been able to conduct an independent forensic examination of the knife for DNA and fingerprints which "would have shed light on the veracity of Defendants' argument." Id. However, such a speculative argument is insufficient to demonstrate the assistive relevance of the knife to plaintiff's case.

As a preliminary matter, plaintiff does not provide a factual basis for her contention that any particular individual's DNA or fingerprints were actually present on the knife and destroyed.[12] Thus, plaintiff's argument with respect to the knife's purported relevance rests entirely on an unsupported assumption – i.e. that there was DNA and/or fingerprint evidence on the knife that has now been lost – and can therefore not justify spoliation sanctions, as "the spoliation doctrine is predicated on evidence actually existing and being destroyed." Dilworth v. Goldberg, 3 F. Supp. 3d 198, 202 (S.D.N.Y. 2014) (finding that plaintiffs' motion for spoliation sanctions "rests on pure speculation" about the existence of certain documents which is insufficient to sustain a spoliation motion) (quoting Khaldei v. Kaspiev, 961 F. Supp. 2d 564, 569 (S.D.N.Y. 2013)) ("[B]ecause plaintiff's argument that there has been any actual loss of evidence relevant to the claims or defenses in this case amounts to pure speculation, it is insufficient to sustain a motion for spoliation sanctions.").

The decision of the district court in Estate of Jackson v. County of Suffolk, No. 12-cv-1455 (JFB) (AKT), 2014 U.S. Dist. LEXIS 46521 (E.D.N.Y. Mar. 31, 2014) is instructive

[12] Even if Bah's fingerprints and/or DNA had been present on the knife, which is likely, the presence of such evidence on the knife would not support plaintiff's theory of the case.

here. Jackson involved allegations that defendant police officers beat the decedent to death with batons and flashlights. In an argument similar to plaintiff's argument here, the plaintiff in Jackson argued that in failing to preserve the batons and flashlights defendants had destroyed "*potential* fragments of tissue, hair and DNA," which may have been present on those items. 2014 U.S. Dist. LEXIS 46521, at *15 (emphasis in original). The court rejected plaintiff's argument that defendants had spoliated relevant evidence by depriving her, through their "willful actions," "any chance for a proper and full evaluation" of the batons and flashlights, id., at *15, and found plaintiff's allegations that there "***must have been*** hair, and/or fibers on the batons which were destroyed" to be a matter of speculation, and thus insufficient to justify sanctions. Id., at **21-24 (emphasis in original). The argument rejected by the district court in Jackson is precisely the argument set forth by plaintiff here – i.e., that the knife (and, indeed, the other items of allegedly spoliated evidence) *might* contain fingerprints or DNA, and if it did, that such evidence has been destroyed – and should also be rejected here.

Furthermore, plaintiff points to no extrinsic evidence to suggest that if any DNA or fingerprint evidence *had* been present on the knife such evidence would have drawn into question the officers' testimony that Bah was lunging at them with the knife, or would have otherwise supported plaintiff's claims. Plaintiff argues that such evidence "would have shed light on the veracity of Defendants' argument," Pl. Mem., p. 12, not that there is evidence from which a reasonable fact-finder could determine that the knife supported her claims, which is the relevant inquiry here. Nor could plaintiff have credibly made such an argument, as there is ample evidence in the record establishing that Bah *was* lunging at the officers with a knife[13] and

[13] Such evidence includes, inter alia, the slash marks in Mateo's and Kress' heavy vests, see Ex. L (Vest Photographs), the testimony of CSU Detective Gilford that he observed a knife at the crime scene, see Ex. A (Gilford Dep. Excerpts), 129:2-24, photographs of the knife taken by CSU detectives, see Ex. C (Photographs of

conversely not a shred of evidence in the record to suggest, as plaintiff necessarily must be arguing, that the officers planted the knife, concocted a story about it and slashed their own vests and body parts. Plaintiff's assertion, without any factual support, that the knife may have contained evidence that may have been helpful to her case is far too speculative to establish the assistive relevance of the knife and to warrant sanctions for its unavailability. See Sovulj v. United States, No. 98-cv-5550 (FB) (RML), 2005 U.S. Dist. LEXIS 46700, *16-17 (E.D.N.Y. Sept. 19, 2005) (plaintiff's assertion that destroyed x-ray would have revealed a tumor in decedent's lung based on the size of the tumor that was subsequently discovered in the lung insufficient to establish the relevance of the x-ray to plaintiff's case) ("[P]laintiff cannot meet the requirements for obtaining an adverse inference, since any assertion that the x-ray is relevant is pure speculation."); see also Jerry I. Treppel v. Biovail Corp., 249 F.R.D. 111, 122-23 (S.D.N.Y. 2008) (denying adverse inference where defendant failed to start preserving back-up tapes until 7 months after preservation obligation began; plaintiff's generalized assertions such as that "it is highly improbable that relevant documents...were not created between December 2002 and December 2003" and that failure to suspend automatic overwriting of e-mail backups "almost certainly resulted in spoliation of significant relevant evidence" were insufficient to establish relevance for purposes of spoliation sanctions); Abcon Assocs. v. Haas & Najarian, No. 12-cv-928 (LDW) (AKT), 2014 U.S. Dist. LEXIS 142040, **31-32 (E.D.N.Y. Oct. 6, 2014) (declining to impose spoliation sanctions because "the alleged relevancy of [the allegedly spoliated] documents appears purely speculative and conclusory."). Because plaintiff cannot demonstrate that the knife would have had assistive relevance to her claims, her request for sanctions related to the knife must be denied.

Kingsland Property), pp.1-2, as well as the other evidence set forth in defendants' Summary Judgment Motion, including the ESU officers' testimony that Bah lunged at them with a knife and the injury to Mateo's arm.

2. Plaintiff Cannot Demonstrate that Any of the Other Allegedly Spoliated Evidence Would Have Been of Assistive Relevance

Plaintiff's arguments as to the relevance of the other allegedly spoliated evidence are similarly speculative. Plaintiff argues that an inspection of the damaged ESU duty shirt worn by Mateo during the incident "would have shed light on the veracity of Mateo's allegation... that Mateo's arm had been injured by Mr. Bah's use of an alleged knife," and that forensic testing of the shirt for "blood spatter, gun residue or brain matter, would either dispute or substantiate Plaintiff's assertion" that Mateo shot Bah in the head from close range after Bah had already been subdued. Pl. Mem., p. 13. Plaintiff submits a declaration of Dr. Michael M. Baden, plaintiff's forensic pathology expert, in which Dr. Baden states, inter alia, that his inability to examine the ESU duty shirt "limited [his] ability to render a fuller opinion regarding how or whether any defect to his shirt sleeve could have been caused by a knife"; he further asserts that "when a victim is shot in the head at a close enough ranged to produce stippling, there should be other gunshot residue on the victim and blood splatters on the shooter's shirt and/or sleeve." See Cohen Decl., Ex. T (Baden Decl.), ¶ 10. As with the knife, however, plaintiff's claim of relevance rests on her assumption that relevant biological evidence on the ESU duty shirt to begin with. And, as with the knife, plaintiff concedes that whatever evidence may be found on the shirt "would *either dispute or substantiate*" her theory of the case (emphasis added) and is relevant because it would "shed light" on what had transpired during the incident. Pl. Mem., p. 13. Again, however, the relevance analysis for the purposes of spoliation sanctions is not whether missing evidence might have "shed light" on what happened during the incident[14] but

[14] Similarly plaintiff alleges that the section of wall containing the BIM "would have added [*sic*] Plaintiff in her effort to reconstruct the trajectory of the bullets that were fired at her brother," Pl Mem., p. 7, that the BIM "could provide insight" into this matter and that plaintiff would have, if able to, conducted "testing relating to shooting reconstruction, the type of bullet that damaged the wall, and the angle that the bullet penetrated the wall," id., p. 15. Plaintiff has not, however, indicated what "efforts" she has taken to reconstruct the bullet trajectories; indeed, she

whether there is extrinsic evidence from which a reasonable fact-finder could infer that the missing evidence would have been favorable to the innocent party. See, e.g., Hicks, 2015 U.S. Dist. LEXIS 133765, *24 (citation omitted). Plaintiff has therefore not met her burden of demonstrating that an examination of the ESU duty shirt would have revealed evidence that a reasonable fact-finder could determine supported her claims.

Perhaps most illustrative of the outlandishly speculative nature of plaintiff's motion is her contention regarding the purported relevance of the traps removed from two sinks in Bah's apartment. While plaintiff claims that she has been prejudiced because she was not able to "conduct[ ] 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" and because "[i]f 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," Pl. Mem., p. 14, plaintiff cites to no evidence whatsoever that suggests that there was anything washed down those two sinks or that any police officer washed his hands in Bah's apartment, at any time.[15] Once again, plaintiff's assertion that the traps may have possibly contained some relevant information that supports her theory of the case is entirely speculative and not supported by a single iota of evidence.[16]

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has not provided any disclosures pursuant to Fed. R. Civ. P. 26(a)(2) for any witness qualified to opine regarding ballistics and/or crime scene reconstruction. Furthermore, once again, plaintiff's contention that the BIM would have assisted in the reconstruction of the trajectories of bullets fired at Bah, even if true (which defendants do not concede), falls short of a demonstration, supported by extrinsic evidence, that the resultant reconstruction would likely have been favorable to plaintiff's case.

[15] Contrary to plaintiff's assertion, Det. Gilford's testimony does not support her claim that the sink traps were relevant. Det. Gilford testified that he did not feel that the sink traps needed to be removed, but was told to do so by his supervisor. Ex. A (Gilford Dep. Excerpts), 64:20-65:15. Gilford further testified that he did not know why his supervisor wanted him to remove the traps or what kind of substance they might be looking for in the traps (he testified that "it could be anything"), id., 65:16-66:13, and explicitly testified that he had *not* received any information that "there may have been blood rinsed off and washed down the drain," id., 66:14-23.

[16] Similarly speculative are plaintiff's arguments in support of the purported relevance of the Taser cartridges and wires. Plaintiff alleges that she has been prejudiced by her inability to examine the Taser cartridges and wires which

Finally, plaintiff has failed to demonstrate that the clothing Bah was wearing at the time he was shot would have been of assistive relevance to her claims (even though, as set forth above, no City agent was responsible for any destruction of the clothes). Plaintiff contends that the clothing is relevant to Dr. Baden's expert analysis; in the Declaration submitted in support of plaintiff's sanctions motion, Dr. Baden opines that "Mr. Bah's clothing may have contained significant forensic evidence relative to the distance from Mr. Bah and the positions of the shooters and the decedent at the moment when Mr. Bah was shot..." such as "powder residue, tearing of the shirt, blood spatter, DNA evidence and/or fingerprints," and that Baden's inability to examine this evidence "limited [his] ability to render a conclusion to a reasonable degree of scientific certainty as to the distance the shooters were from Mr. Bah when he was shot." Cohen Decl., Ex. T (Baden Decl.), ¶ 8. Plaintiff once again does not point to any extrinsic evidence that suggests that an analysis of Bah's shirt would reveal evidence favorable to plaintiff's case. Furthermore, as set forth in greater detail in defendants' Memorandum of Law in Support of their Daubert Motion (Dkt. No. 137), Dr. Baden, a forensic pathologist, is not qualified to opine in the areas of ballistics or crime scene reconstruction, nor would his testimony about these issues be helpful to the jury. See, generally, Defendants' Daubert Mem. (Dkt. No. 137), pp. 12-16. Accordingly, plaintiff has not demonstrated that the t-shirt or any other clothing Bah was wearing at the time of his death would be of assistive relevance to her claims.

Plaintiff has fallen woefully short of demonstrating that a reasonable fact-finder could determine that the allegedly spoliated evidence would have contained anything helpful to

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"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 along would further raise doubt concerning the ESU Team's use of that device in the situation at hand." Pl. Mem., p. 13. Again, plaintiff cites no evidence in the record indicating that the Tasers might not have been working properly or that the officers' testimony regarding (and the Taser downloads illustrating) the use of the Tasers during the incident and the effects (or lack thereof) of the Tasers on Bah is in any way suspect; moreover, she makes no effort to explain why "determining the precise effects that the Taser use had" on Bah or Mateo would be helpful to her case.

her claims. Indeed, "the only evidence that Plaintiff has adduced suggesting that the unproduced [discovery] would be unfavorable to Defendants is the non-production itself." Treppel, 249 F.R.D. at 122 (quoting Mitchell v. Fishbein, No. 01-cv-2760, 2007 U.S. Dist. LEXIS 67268, 2007 WL 2669581, at *5 (S.D.N.Y. Sept. 13, 2007)) (alteration in original). Accordingly, plaintiff's motion should be denied in its entirety.

POINT II

PLAINTIFF IS NOT ENTITLED TO THE SANCTIONS SHE SEEKS OR ANY OTHER SANCTIONS

Where spoliation sanctions are deemed warranted,"[i]t is well accepted that a court should always impose the least harsh sanction that can provide an adequate remedy." Pension Comm., 685 F.Supp.2d at 469. Available sanctions include, from least to most harsh, "further discovery, cost-shifting, fines, special jury instructions, preclusion, and the entry of default judgment or dismissal." Id. A district court must ensure that the sanctions imposed are "molded" to serve the rationales underlying the spoliation doctrine, which are: "(1) deterring parties from destroying evidence; (2) placing the risk of an erroneous evaluation of the content of the destroyed evidence on the party responsible for its destruction; and (3) restoring the party harmed by the loss of evidence helpful to its case to where the party would have been in the absence of spoliation." Taylor, 293 F.R.D. at 614 (quoting Chin, 685 F.3d at 162) (internal quotation marks omitted). Here, plaintiff asks the Court to impose the most extreme sanction of all – striking defendants' Answer (and presumably entering judgment in favor of plaintiff) – or, in the alternative, the extreme sanctions of preclusion and/or an adverse inference jury

instruction,[17] Treppel, 249 F.R.D. at 120 ("[T]he adverse inference is instruction is an extreme sanction and should not be imposed lightly") (citing Zubulake IV, 220 F.R.D. at 220), and seeks costs and attorneys' fees in connection with her sanctions motion. Defendants maintain that plaintiff has failed to demonstrate her entitlement to *any* sanctions in this matter, as set forth at length above. However, even assuming the Court were to find that City agents spoliated evidence, the harsh sanctions plaintiff seeks would not serve any one of the three underlying rationales for spoliation sanctions, as plaintiff has not demonstrated that she has been prejudiced as a result of the unavailability of any of the evidence in question, and would only serve to unfairly prejudice defendants – particularly the individually-named defendants.

Before awarding severe sanctions, such as dismissal, preclusion or an adverse inference, a district court must also consider whether the innocent party has suffered prejudice as a result of the loss of relevant evidence. Fleck, 2015 U.S. Dist. LEXIS 172723, *119. Here, as set forth in detail above, plaintiff's arguments as to why she has been prejudiced – i.e., because she was not able to conduct testing on the evidence in hopes of discovering some forensic evidence beneficial to her case – are based entirely on speculation. Furthermore, with respect to at least some of the allegedly spoliated evidence, plaintiff had at her disposal reasonable alternatives with which to explore her theories of the case, and an adverse inference instruction is inappropriate if a similar alternative to destroyed evidence is available to plaintiff. See Matteo v. Kohl's Dep't Stores, Inc., No. 09-cv-7830 (RJS), 2012 U.S. Dist. LEXIS 32193, at *13-15 (S.D.N.Y. Mar. 5, 2012); see also Port Auth. Police Asian Jade Soc'y of N.Y. & N.J., Inc. v. Port Auth. of N.Y. & N.J., 601 F. Supp. 2d 566, 570-71 (S.D.N.Y. Mar. 4, 2009) (adverse inference

[17] Defendants are unable to fully address plaintiff's request for an adverse inference instruction because she does not specify what inference or inferences she seeks. See Pl. Mem., p. 19. Plaintiff's request for an adverse inference instruction should be denied for this reason alone.

instruction unwarranted where performance evaluations were destroyed but other official records of plaintiffs' qualifications were available).

For example, plaintiff claims to have been greatly prejudiced by her inability to have Dr. Baden inspect the ESU duty shirt in order to determine if the defect in the sleeve could have been caused by a knife and to inspect the shirt for gunshot residue or biological evidence, which plaintiff hypothesizes might support her theory that Mateo shot Bah in the head from close range, thereby causing such material to land on Mateo's clothing. Pl. Mem., p. 13; Cohen Decl., Ex. T (Baden Decl.), ¶ 10. However, defendants are in possession of Mateo's heavy vest – a piece of equipment which is worn *over* the duty shirt, see Ex. M (McCormack Dep. Excerpt), 88:21-89:23, and which also contained slash marks from Bah's knife, see Ex. L (Photographs of Vests) – and produced Mateo's and Kress' heavy vests for plaintiff's counsel's inspection in August of 2015, Garman Decl., ¶ 14. However, plaintiff never requested that Dr. Baden be permitted to examine the vests to determine the cause of the slash marks in them and/or whether there was any biological evidence present on Mateo's vest. Accordingly, defendants respectfully submit that plaintiff cannot now credibly claim to have been prejudiced because Dr. Baden was unable to examine the shirt worn under that vest.

Because plaintiff has not been prejudiced as a result of the unavailability of the allegedly spoliated evidence, the imposition of extreme sanctions against defendants "would not have the effect of restoring the plaintiff to her position absent the destruction of the [evidence], but rather would prejudice the defendant by allowing plaintiff to profit from the destruction of the [evidence] when no evidence has been presented to support…an inference" that the allegedly spoliated evidence would have been helpful to her case. Sovulj, 2005 U.S. Dist. LEXIS 46700, at *17. Plaintiff's request for extreme sanctions must therefore be denied.

Finally, as set forth above, plaintiff has not demonstrated (or even alleged) that any of the nine individual defendant officers were involved in any way in the alleged spoliation of evidence, nor can she so demonstrate. Accordingly, plaintiff cannot justify sanctions of any kind against any of the individual defendants. The extreme sanctions requested by plaintiff, however, even if awarded only as against the City, would necessarily impact these defendants' defense of this matter because plaintiff's municipal liability claim against the City has not been bifurcated from her claims against the individual defendants for the purposes of trial. Defendants respectfully submit that the imposition of sanctions against wholly innocent parties would be inappropriate and would unjustly deprive them of their ability to defend this matter.

CONCLUSION

While plaintiff's accusations of "intentional derelictions of duty" and willful "obliteration" of evidence by defendants certainly make for dramatic sound-bites, plaintiff has entirely failed to support her hyperbolic rhetoric with any facts, nor can she do so. Accordingly, based on the foregoing, defendants respectfully request that the Court deny plaintiff's motion for spoliation sanctions its entirety, together with such other and further relief that the Court deems appropriate, including costs, expenses and attorneys' fees to defendants in connection with their opposition to plaintiff's sanctions motion.

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Respectfully submitted,

ZACHARY W. CARTER
Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street, Room 3-133A
New York, New York 10007
(212) 3563539
agarman@law.nyc.gov

By: _____

Ashley R. Garman
Barry K. Myrvold
Susan P. Scharfstein