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11  
12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION  
14

15 VANESSA BRYANT,  
16 Plaintiff,  
17 vs.  
18 COUNTY OF LOS ANGELES, et al.,  
19 Defendants.

Case No. 2:20-cv-09582-JFW-E

**JOINT STATEMENT REGARDING  
PLAINTIFF’S MOTION *IN LIMINE*  
# 1: (1) TO PRECLUDE  
DEFENDANTS FROM  
PROFFERING EXCULPATORY  
TESTIMONY AND ARGUMENT  
REGARDING SPOILIATED  
EVIDENCE, AND (2) TO ADMIT  
EVIDENCE OF DEFENDANTS’  
DESTRUCTION OF EVIDENCE**

Pretrial Conference:  
February 4, 2022

Hearing on Motions *in Limine*:  
February 11, 2022

Trial Date: February 22, 2022

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1 **I. IDENTIFICATION OF THE MATTER IN DISPUTE**

2 After a citizen submitted a complaint that a Sheriff’s deputy was sharing photos  
3 of Kobe Bryant’s remains at a bar, senior officials within the Los Angeles Sheriff’s  
4 Department (“LASD”) and Los Angeles County Fire Department (“Fire  
5 Department”) orchestrated the widespread deletion of evidence within their respective  
6 departments. Even more evidence was destroyed after this litigation began, when the  
7 Deputy Defendants and other LASD personnel wiped and disposed of electronic  
8 devices on which they had possessed photos of Plaintiff’s loved ones’ remains.

9 By this motion, Plaintiff respectfully requests evidentiary sanctions pursuant to  
10 Rule 37(e) precluding Defendants from offering unverifiable, self-serving testimony  
11 or argument at trial regarding the evidence they destroyed. In particular, Plaintiff  
12 seeks an order precluding Defendants from denying electronic dissemination of the  
13 photos on the spoliated devices, disputing that the deleted photos in their possession  
14 depicted the remains of Plaintiff’s loved ones, or claiming that all of their copies of  
15 the photos have been contained.<sup>1</sup> At a minimum, Plaintiff should be given the  
16 opportunity to present evidence of Defendants’ destruction of evidence to the jury.

17 **II. PLAINTIFF’S CONTENTIONS OF POINTS AND AUTHORITIES**

18 Mrs. Bryant’s efforts to wrest accountability from Defendants has been  
19 obstructed by Defendants’ affirmative steps to prevent her from learning the full truth  
20 about what happened.

21 The Deputy Defendants destroyed the relevant evidence in their possession in  
22 one fell swoop after this litigation began. Defendant Joey Cruz intentionally wiped  
23 all of the data from his phone by resetting his phone to its factory default settings.  
24 The other three Deputy Defendants and six other LASD employees similarly disposed  
25

26 \_\_\_\_\_  
27 <sup>1</sup> As separately addressed in Plaintiff’s prior motion for spoliation sanctions (ECF  
28 Nos. 151, 160) and her contemporaneously filed memorandum regarding the parties’  
disputed jury instructions, Plaintiff also seeks an adverse inference instruction that  
the destroyed evidence would have been unfavorable to Defendants.

1 of their phones before they could be forensically examined. When the phones were  
2 wiped and discarded, the highly relevant ESI they contained was permanently  
3 destroyed. By engaging in this litigation misconduct, these public officials deprived  
4 this Court, the jury, and the community they serve the ability to learn who they texted  
5 the photos to, whether photos were uploaded to the cloud, downloaded to other  
6 devices, shared by AirDrop, or transferred by any of the many other ways photos can  
7 be shared. That the Deputy Defendants and other LASD employees engaged in this  
8 intentional destruction of evidence is not surprising. After all, when a complaint about  
9 the misconduct first surfaced, Sheriff Villanueva immediately offered his employees  
10 a chance to avoid any discipline if they represented they had destroyed all evidence  
11 of their wrongdoing. Those same employees never received any comparable  
12 instruction to preserve their devices—not even after Plaintiff filed her lawsuit.

13 The Fire Department accomplished much the same result when a senior fire  
14 captain orchestrated a mass-deletion campaign to ensure evidence of the photos’  
15 circulation within and beyond the Department was destroyed before the whole truth  
16 could be discovered. The Department itself has characterized the captain’s efforts as  
17 a “primarily self-serving” “attempt to cover up [the captain’s] role in the reported  
18 misuse of the photos.” (J. Bryant Decl. Ex. O at 534; *see also* [ECF No. 197-9](#)  
19 [McCloud Dep. 159:20-161:21].)

20 By destroying the forensic trail, Defendants have prevented Plaintiff from ever  
21 finding out how far the photos spread, how many other people have seen photos of  
22 her loved ones’ remains, and how many photos remain unsecured and susceptible to  
23 going viral online. Now, Defendants seek to exploit the evidentiary void they have  
24 created by using it to downplay their misconduct at trial. Defendants should not be  
25 able to ask the jury to take them at their word that they did not engage in any further  
26 dissemination before wiping their phones and destroying evidence. Under these  
27 circumstances, sanctions under Rule 37(e) are necessary to protect the integrity of the  
28

1 judicial process and prevent Defendants from profiting from the evidentiary  
2 imbalance they have created.

3 **A. Factual Background**

4 **1. Rather Than Secure the Devices or Forensically Preserve  
5 Their Contents, LASD Instructed Its Personnel to Delete  
6 Evidence**

6 On January 29, 2020, shortly after midnight, a citizen submitted a complaint  
7 through the “Contact Us” page on the LASD website. The complaint informed the  
8 Sheriff’s Department that a deputy who responded to the crash site had been showing  
9 graphic pictures of Kobe Bryant’s deceased body at a bar in Norwalk. ([ECF No. 200-](#)  
10 [19.](#)) First thing in the morning, the complaint was forwarded to the Malibu/Lost Hills  
11 Station. ([ECF No. 200-20.](#)) The Captain of that Station, Matthew Vander Horck,  
12 immediately alerted his supervisors and assigned his best lieutenant to do an initial  
13 fact-finding inquiry. (*Id.*; [ECF No. 197-1](#) [Vander Horck Dep. 66:10-67:13].)

14 Then Sheriff Villanueva and the head of his press office, Captain Jorge Valdez,  
15 intervened. This involvement by the Sheriff’s press office in responding to allegations  
16 of personnel misconduct was “extremely unorthodox, out of the ordinary, [and]  
17 outside the chain of command.” ([ECF No. 197-1](#) [Vander Horck Dep. 112:17-19,  
18 129:15-130:8]; [ECF No. 196-13](#) [Mancinas Dep. 46:8-12]; [ECF No. 196-22](#) [Valdez  
19 Dep. 41:18-23].) While Vander Horck was asleep, Valdez called one of Vander  
20 Horck’s subordinates, Lt. Hector Mancinas, to convey orders from the Sheriff that  
21 Lost Hills personnel should be ordered to the station and told they would receive a  
22 performance log entry in lieu of discipline if they deleted the photos. ([ECF No. 196-](#)  
23 [13](#) [Mancinas Dep. 48:4-49:19, 52:6-9, 53:19-54:1]; [ECF No. 200-11](#) at 2462; [ECF](#)  
24 [No. 197-3](#) [Villanueva Dep. 55:25-56:12, 65:16-66:14, 75:9-23].) This, too, was  
25 unconventional. The personnel who carried out the deletion order have testified that  
26 they had never before ordered a subject or witness to delete or destroy material  
27 relevant to an investigation. ([ECF No. 196-22](#) [Valdez Dep. 202:7-17]; [ECF No. 196-](#)  
28 [20](#) [Satterfield Dep. 137:7-138:1].)

1           Upon learning of the deletion order a few hours later, Vander Horck had “a lot  
2 of concerns” and “immediately . . . told [Mancinas] to stop.” ([ECF No. 197-1](#) [Vander  
3 Horck Dep. 104:18-106:18, 107:25-108:17]; [ECF No. 200-21](#) at 2620.) Vander  
4 Horck then called Chief Dennis Kneer and “bombarded him with questions,”  
5 including: “Do you know if these things have evidentiary value? Do you know if the  
6 NTSB are going to want to know about this? What about the FBI? Are we violating  
7 laws? Are people going to be in trouble?” ([ECF No. 197-1](#) [Vander Horck Dep.  
8 134:11-135:16].) Vander Horck also reminded Chief Kneer that “the last time that  
9 our deputies got instructions from our executives in a federal case that they were  
10 arrested and tried for crimes.” ([ECF No. 200-21](#) at 2620.) A short while later, Chief  
11 Kneer called Vander Horck to say: “I discussed this with the Sheriff and he assures  
12 me that this is the proper way that we’re gonna go.” (*Id.* at 2621.)

13           By January 31, several deputies represented that they had deleted their copies  
14 of the photos. (ECF Nos. [170-1](#), [171-1](#), [172-1](#), [173-1](#), [174-1](#), [175-1](#).) But when the  
15 deputies reported to the station as directed, Mancinas simply “took them at their  
16 word” that they had deleted the photos and did not review a single deputy’s cell phone  
17 to determine whether they had shared the photos with others. ([ECF No. 200-11](#) at  
18 2471; [ECF No. 200-5](#) at 2438-39; [ECF No. 196-13](#) [Mancinas Dep. 79:9-19, 80:11-  
19 22, 83:14-23, 85:12-14, 157:22-158:8, 173:12-174:12].)

20           Three weeks later, Vander Horck’s supervisors informed him that the Sheriff  
21 “no longer had confidence in [him]” and that he would be demoted from captain to  
22 lieutenant and stripped of his assignment leading the Lost Hills station. ([ECF No.](#)  
23 [197-1](#) [Vander Horck Dep. 220:15-221:24, 222:3-22].) Vander Horck pressed his  
24 supervisors for reasons why the Sheriff had lost confidence in him and whether the  
25 supervisors agreed with the Sheriff’s decision, but they refused to respond. (*Id.*  
26 [223:3-21, 228:25-229:23].) Two days later, Vander Horck forwarded from his work  
27 email account to his personal Gmail account a copy of his email exchange with  
28 supervisors related to the citizen complaint about improper sharing of crash scene

1 photos. ([ECF No. 200-23](#).) The Sheriff later called Vander Horck out of the blue to  
2 say he could “keep [his] bars”—*i.e.*, remain a captain—but would be transferred to  
3 Men’s Central Jail, a “dumping ground” for those who “fall out of favor with the  
4 Sheriff.” ([ECF No. 197-1](#) [Vander Horck Dep. 233:12-236:20, 248:6-249:9].)

## 5                   2.       LASD Personnel Disposed of Their Devices

6           After the *Los Angeles Times* broke the story about the photo scandal on  
7 February 27, 2020 (J. Bryant Decl. Ex. A), the Sheriff’s Department finally launched  
8 an internal investigation on February 28, 2020 ([ECF No. 200-24](#)). During the belated  
9 investigation by LASD’s Internal Affairs Bureau (“IAB”), the IAB investigators did  
10 not forensically preserve or examine a single device. (*See* [ECF No. 196-16](#) [Jaeger  
11 Dep. 120:14-121:25].)

12           Mrs. Bryant sent LASD a letter threatening legal action on March 2, 2020 (J.  
13 Bryant Decl. Ex. B), sent another written request for information relevant to her  
14 claims a few days later (*id.* Ex. C), submitted a notice of claim in May (*id.* ¶ 4), filed  
15 suit in September (*id.* ¶ 5), sought the Court’s permission to publicly name the Deputy  
16 Defendants in February 2021 ([ECF No. 49](#)), and amended her complaint to add the  
17 Deputy Defendants in March 2021 (ECF Nos. [54](#), [202-1](#)). Throughout this time—  
18 and continuing through November 2021—LASD never told the personnel known to  
19 have possessed photos of the victims’ remains to preserve their cell phones. (*See* [ECF](#)  
20 [No. 196-16](#) [Jaeger Dep. 120:14-121:25].)

21           As a result, after a duty to preserve indisputably arose, nine of the eleven LASD  
22 personnel known to have possessed the illicit photos lost or disposed of their phones  
23 (J. Bryant Decl. Ex. D), and a tenth (Joey Cruz) intentionally wiped his phone of all  
24 data ([ECF No. 185-2](#) at 36; Freskos Decl. ¶ 21). Two Defendants—Rafael Mejia and  
25 Michael Russell—disposed of their phones in 2021 after learning that they would be  
26 added as individual defendants in this case. (J. Bryant Decl. Ex. E [Mejia Dep. 235:1-  
27 239:17]; *id.* Ex. F [Russell Dep. 72:16-73:10].) This destruction of evidence came on  
28

1 the heels of the deputies refusing to turn over the devices to the County’s counsel for  
2 examination. ([ECF No. 151-2](#) [Lavoie Decl.] ¶ 2.)

3 At the same time Deputy Defendants and other LASD personnel were getting  
4 rid of their phones, their counsel were actively negotiating a protocol for a forensic  
5 examination of their employees’ devices with Plaintiff’s counsel. (J. Bryant Decl.  
6 ¶¶ 9-11.) Despite repeated inquiries by Plaintiff’s counsel, Defendants’ counsel did  
7 not come clean about the disposed-of devices until near the conclusion of negotiations  
8 regarding the forensic protocol. (*Id.*) Not until October 4, 2021, did Defendants’  
9 counsel provide a complete list of LASD personnel who had discarded the phones on  
10 which they had previously possessed photos of the victims’ remains:

Custodian	Date Device Replaced / Upgraded
Stephanie Shroust	August 2021
Scott Miller	February 2021
Rafael Mejia	March 2021
Michael Russell	April 2021
Raul Versales	October 2020
Benjamin Sanchez	April 2020
Ruby Cable	November 2020
Christopher Jauregui	July 2021
Doug Johnson	January 2021

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20 (J. Bryant Decl. Ex. D.) As a result of this destruction of evidence, virtually all of the  
21 LASD phones submitted for Defendants’ highly-touted “forensic examination” in this  
22 litigation were not the devices used to take, send, or receive the photos in early 2020,  
23 rendering the examination worthless.

### 24 3. The Fire Department’s Failure to Preserve Evidence

25 On January 31, 2020, Captain Vander Horck called the Fire Department to  
26 advise that two of its employees had taken and obtained photos at the crash scene.  
27 ([ECF No. 197-9](#) [McCloud Dep. 58:7-59:16].) That same day, this information was  
28 conveyed directly to Fire Chief Osby and the head of the Fire Department’s

1 Leadership and Professional Standards Bureau, Chief William McCloud; Chief Osby  
2 also had a one-on-one conversation with Sheriff Villanueva about the situation. (*Id.*  
3 [58:7-59:16, 64:4-65:11, 72:3-23, 201:2-202:18].) Yet the Fire Department did not  
4 take any serious steps to identify the employees involved. (*See id.* [64:22-65:3, 72:19-  
5 74:15, 76:8-77:11, 80:14-81:23, 84:2-25].) During two phone calls made during the  
6 Department’s admittedly “cursory assessment,” Chief McCloud instructed two  
7 employees not to delete any photos in their possession because he “was anticipating  
8 that there might be an investigation” and he recognized that “it’s important to preserve  
9 evidence that might be related to the investigation.” (*Id.* [72:19-73:14, 74:23-75:6,  
10 82:17-83:7].) But the Fire Department did not contact any of the other 50 personnel  
11 who responded to the scene to instruct them to preserve evidence. (*Id.* [201:17-  
12 206:16].)

13 This allowed then-Captain Tony Imbrenda to instruct eight to ten of his  
14 subordinates, friends, and acquaintances to delete all graphic photos from the crash,  
15 and to pass on the deletion order “to everybody that they knew” after the media began  
16 reporting on the misconduct in late February 2020. (*Id.* Ex. G [Imbrenda Dep. 162:13-  
17 163:23, 164:15-23].) Imbrenda gave his instruction to “very connected people”  
18 within the Department who “extrapolate[d]” the deletion order to “many, many  
19 people.” (*Id.* [163:8-23].) Imbrenda also personally deleted approximately 45 photos  
20 from the crash site from his personal cell phone and his work cell phone. (*Id.* [116:15-  
21 117:3, 192:12-196:5].) Following an internal investigation, the Fire Department  
22 concluded Imbrenda’s deletion was a “primarily self-serving” “attempt to cover up  
23 [his] role in the reported misuse of the photos.” (J. Bryant Decl. Ex. O at 534.)

24 A week later, on March 6, 2020, a citizen submitted a complaint that Captain  
25 Imbrenda had been discussing and sharing crash-site photos with a group of off-duty  
26 firefighters and their dates at a public awards gala. Only then—a month after Chief  
27 Osby spoke with Sheriff Villanueva—did the Fire Department finally launch an  
28 internal investigation. ([ECF No. 197-9](#) [McCloud Dep. 86:4-89:25].) The

1 Department-issued cell phones used by other personnel known to have possessed  
 2 photos of the victims’ remains—Brian Jordan and Arlin Kahan—were not preserved  
 3 until months later. (J. Bryant Decl. Ex. H.) By the time Imbrenda’s, Jordan’s, and  
 4 Kahan’s phones were finally preserved, the files they had deleted had already been  
 5 overwritten and permanently destroyed (Freskos Decl. ¶ 25), and the Department did  
 6 not examine their personal devices at all. (J. Bryant Decl. Ex. G [Imbrenda Dep.  
 7 207:11-208:20]; [ECF No. 197-6](#) [Jordan Dep. 146:21-25]; [ECF No. 197-7](#) [Kahan  
 8 Dep. 107:10-109:12, 110:21-111:2].)

9 **B. Defendants Spoliated Extensive Evidence of Their Misconduct,**  
 10 **Warranting Evidentiary Sanctions**

11 The foregoing facts show that Defendants have engaged in spoliation: “the  
 12 destruction or significant alteration of evidence, or the failure to preserve evidence,  
 13 in pending or reasonably foreseeable litigation.” [Spencer v. Lunada Bay Boys, 2017](#)  
 14 [WL 11527978, at \\*6 \(C.D. Cal. Nov. 29, 2017\)](#). Federal Rule of Civil Procedure  
 15 37(e) authorizes sanctions for a party’s failure to preserve “electronically stored  
 16 information,” when it is shown (1) that information “should have been preserved in  
 17 the anticipation or conduct of litigation”; (2) that information “is lost because a party  
 18 failed to take reasonable steps to preserve it”; and (3) the information “cannot be  
 19 restored or replaced through additional discovery.” [Fed. R. Civ. P. 37\(e\)](#). Each of  
 20 these three elements is satisfied with respect to each Defendant.

21 **1. Defendant Joey Cruz Destroyed All ESI on His Phone After**  
 22 **This Litigation Began, and the ESI Cannot Be Replaced**

23 There can be little doubt that Cruz spoliated evidence. He reset his phone to its  
 24 factory settings “at the end of 2020 or the beginning of 2021” ([ECF No. 151-57](#)  
 25 ¶ 25)—many months after Defendants have previously acknowledged the  
 26 preservation duty was triggered. (See [ECF No. 151](#) at 53 [acknowledging Defendants  
 27 had a duty to preserve as of May 8, 2020].) This factory reset permanently deleted all  
 28 data on Cruz’s phone and rendered it “forensically unrecoverable.” ([ECF No. 185-2](#)  
 at 36; see also Freskos Decl. ¶ 21.) Before resetting the device, Cruz did not give his

1 phone to his counsel so that it could be forensically preserved. Nor did he take any  
 2 other steps to preserve the phone's content. (See [ECF No. 151-57](#) ¶ 25.) In the weeks  
 3 and months before the Forensic Examiner collected Cruz's device for examination,  
 4 Plaintiff's counsel repeatedly sought assurance that Cruz would make his phone from  
 5 January 2020 available for examination. (J. Bryant Decl. Ex. at D.) He and his  
 6 counsel never disclosed that he had reset the phone and destroyed all of the evidence  
 7 it contained. (*Id.* ¶ 11.) As a result of Cruz's actions, the third-party Forensic  
 8 Examiner in this case was unable to conduct any analysis of Cruz's device or learn  
 9 anything about Cruz's activity with the photos on the phone. ([ECF No. 185-2](#) at 36.)  
 10 Document discovery has further confirmed Cruz's spoliation: Cruz has not produced  
 11 a single document or text message in this case.<sup>2</sup> (J. Bryant Decl. ¶ 15.)

12 **2. Defendants Rafael Mejia, Michael Russell, and Raul Versales**  
 13 **Disposed of Their Phones After They Had a Duty to Preserve,**  
 14 **and the Lost Data Cannot Be Replaced**

14 Like Cruz, the other Deputy Defendants have not personally produced a single  
 15 text message or other document in this litigation. (J. Bryant Decl. ¶ 16.) And also  
 16 like Cruz, this failure by the Deputy Defendants is a direct result of their failure to  
 17 preserve the devices they were using on January 26, 2020.

18 All three of them got rid of their phones after Plaintiff had filed her lawsuit;  
 19 Mejia and Russell did so shortly after learning they were named as individual  
 20 defendants in March 2021. (J. Bryant Decl. Ex. E [Mejia Dep. 235:1-239:17]; *id.* Ex.  
 21 F [Russell Dep. 72:16-73:10].) Each disposed of his phone at least five months after  
 22 Defendants acknowledge they had a duty to preserve evidence. (See [ECF No. 151](#) at  
 23 53.) In identical declarations, they each aver they disposed of their devices as "part  
 24 of a routine upgrade." (ECF Nos. [151-64](#) ¶ 27, [151-67](#) ¶ 18, [151-70](#) ¶ 22.) Neither  
 25  
 26

27 <sup>2</sup> In total, Cruz was identified as a custodian on only four documents: two came  
 28 from his wireless cell phone provider, and the other two are records from LASD's  
 files that list various training courses Cruz has attended. (J. Bryant Decl. ¶ 15.)

1 Mejia, Russell, nor Versales claim to have preserved, backed up, or transferred any  
2 data from their prior devices. (*See id.*)

3 Defendants have previously asserted—without citing any authority—that  
4 “[u]pgrading your cellphone is not spoliation.” ([ECF No. 151](#) at 62.) Abundant case  
5 law says otherwise. *See, e.g., Aramark Mgmt., LLC v. Borquist*, [2021 WL 864067](#), at  
6 [\\*18 \(C.D. Cal. Jan. 27, 2021\)](#) (trading in iPhone after litigation commenced without  
7 consulting counsel “was not reasonable”).<sup>3</sup> Even “routine” destruction of evidence  
8 constitutes spoliation where, as here, the party is under a duty to preserve evidence.  
9 [Colonies Partners, L.P. v. Cnty. of San Bernardino](#), [2020 WL 1496444](#), at \*7 (C.D.  
10 [Cal. Feb. 27, 2020](#)).

11 The Deputy Defendants’ discarded phones cannot be restored or replaced with  
12 additional discovery. This is not a situation where the destroyed ESI “exists in  
13 multiple locations.” [Fed. R. Civ. P. 37](#) advisory committee’s notes to 2015  
14 amendment. The discarded devices are irretrievably lost and “[g]etting rid of the  
15 device[s] . . . robbed Plaintiff[] of an opportunity to attempt to recover” any deleted  
16 data or forensic artifacts that remained on the devices used in January 2020. [Aramark](#),  
17 [2021 WL 864067](#), at \*18. The Forensic Examiner’s analysis confirmed that the  
18 Deputy Defendants’ copies of the photos, their messages transmitting the photos, and  
19 their related communications were not forensically recoverable. (*See Freskos Decl.*  
20 ¶¶ 19-21.)

21  
22  
23 <sup>3</sup> [Spencer](#), [2017 WL 11527978](#), at \*12 (“[E]ven for an individual without  
24 sophisticated knowledge about litigation or forensic analysis, trading in a phone,  
25 without making a backup, and after becoming aware of pending litigation . . . would  
26 constitute a failure to take reasonable steps to preserve evidence”); [Ronnie Van  
27 Zant, Inc. v. Pyle](#), [270 F. Supp. 3d 656, 670 \(S.D.N.Y. 2017\)](#) (“[G]etting a new  
28 phone after Plaintiffs brought the instant action” without preserving relevant data  
“evince[s] the kind of deliberate behavior that sanctions are intended to prevent.”),  
*rev’d on other grounds sub nom. Ronnie Van Zant, Inc. v. Cleopatra Records, Inc.*,  
[906 F.3d 253 \(2d Cir. 2018\)](#)).

1                   **3. The Sheriff’s Department Deletion Order and Failure to Take**  
 2                   **Reasonable Steps to Preserve Evidence Constitutes Spoliation**

3                   (a) *LASD’s Preservation Duty Attached Upon Receiving the*  
 4                   *Citizen Complaint Regarding Deputy Cruz’s Public*  
 5                   *Sharing of Photos at Bar*

6                   “The duty to preserve material evidence arises not only during litigation but  
 7                   also extends to that period before the litigation when a party reasonably should know  
 8                   that the evidence may be relevant to anticipated litigation.” [CTC Glob. Corp. v.](#)  
 9                   [Huang, 2019 WL 6357271, at \\*2 \(C.D. Cal. July 3, 2019\)](#) (citations omitted). The  
 10                  point at which litigation is reasonably foreseeable is “an objective standard that asks  
 11                  not whether the party in fact reasonably foresaw litigation, but whether a reasonable  
 12                  party in the same factual circumstances would have reasonably foreseen litigation.”  
 13                  [Spencer, 2017 WL 11527978, at \\*6](#) (citation omitted).

14                  Here, the Sheriff’s Department should have anticipated litigation—and in fact  
 15                  did anticipate litigation—almost immediately upon receiving the citizen complaint on  
 16                  January 29, 2020 that a deputy was showing graphic photos of Kobe Bryant’s remains  
 17                  at a bar. See [Mazloun v. Dist. of Columbia Metro. Police Dep’t, 530 F. Supp. 2d 282,](#)  
 18                  [292 \(D.D.C. 2008\)](#) (court had “no difficulty concluding” defendants incurred an  
 19                  obligation to preserve evidence upon learning of complaint alleging police  
 20                  misconduct). The citizen complaint made its way to the Sheriff on the same day it  
 21                  was submitted. (J. Bryant Decl. Ex. I.) As a general matter, “[i]t is common  
 22                  knowledge that citizen complaints alleging police misconduct frequently form the  
 23                  basis of subsequent lawsuits.” [Mazloun, 530 F. Supp. 2d at 291-92](#); see also [Perkins](#)  
 24                  [v. City of Modesto, 2020 WL 1333109, at \\*16 \(E.D. Cal. Mar. 23, 2020\)](#) (police  
 25                  department had duty to preserve officer’s cell phone upon receiving citizen complaint  
 26                  alleging officer misconduct). Nothing about this particular citizen complaint would  
 27                  have given the Sheriff’s Department reason to think this general principle would not  
 28                  apply. If anything, the underlying facts—a graphic, disturbing show-and-tell of a  
 29                  local hero’s dead body over drinks at a bar—made litigation even *more* reasonably

1 likely here than in the case of the usual citizen complaint.

2 Sheriff Villanueva recognized that the “the usual routine” in such situations is  
 3 that “everybody lawyers up.” (J. Bryant Decl. Ex. J.) When asked at deposition  
 4 whether it occurred to him after learning of the citizen complaint that the Department  
 5 might get sued, Captain Vander Horck testified: “I’m sure it crossed my mind.” ([ECF](#)  
 6 [No. 197-1](#) [Vander Horck Dep. 131:1-13].) Indeed, Captain Vander Horck forcefully  
 7 expressed to his supervisor at the time that deleting the photos could constitute  
 8 destruction of evidence. ([ECF No. 200-21](#) at 2620.) Under these circumstances, it  
 9 “defies reason” to suggest the Sheriff’s Department was unaware that the photos and  
 10 related communications could be relevant in potential litigation. *See* [Mazloun, 530](#)  
 11 [F. Supp. 2d at 292](#).

12 Regardless, litigation certainly should have been anticipated by early March,  
 13 when Plaintiff’s outside counsel served *two* written requests for information relevant  
 14 to her potential claims. *See, e.g.,* [Oppenheimer v. City of La Habra, 2017 WL](#)  
 15 [1807596, at \\*10 \(C.D. Cal. Feb. 17, 2017\)](#) (city’s duty to preserve information arose  
 16 when plaintiffs served a written request for information); [Browder v. City of](#)  
 17 [Albuquerque, 187 F. Supp. 3d 1288, 1296 \(D.N.M. 2016\)](#) (letter from plaintiffs’  
 18 attorney “made it crystal clear that litigation was reasonably foreseeable”). In any  
 19 event, it is undisputed that the destruction of the relevant phones continued well past  
 20 May 2020, when Defendants admit they had a duty to preserve. (*See* [ECF No. 151](#) at  
 21 53.)

22 (b) *LASD Failed to Take Reasonable Steps to Preserve*  
 23 *Evidence, and the Lost Evidence Cannot Be Restored or*  
*Replaced*

24 The foregoing establishes that the Sheriff’s Department had a duty to take  
 25 reasonable steps to preserve relevant ESI in the days following the crash. [Fed. R. Civ.](#)  
 26 [P. 37\(e\)](#). But LASD did the opposite. It took affirmative steps to encourage its  
 27 personnel to cover-up their wrongdoing. In fact, not only did the Sheriff’s Department  
 28 fail to forensically preserve the relevant devices itself, it failed to even issue a

1 preservation instruction to the personnel who possessed the photos—the most  
2 fundamental step to preserve ESI. (See J. Bryant Decl. Ex. K at Response to  
3 Interrogatory Number 7.) “A litigation hold, or preservation order, is often the most  
4 appropriate mechanism to ensure potentially relevant documents and information are  
5 not lost deliberately or unintentionally.” Colonies Partners, L.P. v. Cnty. of San  
6 Bernardino, 2020 WL 1496444, at \*8 (C.D. Cal. Feb. 27, 2020). Yet the Sheriff’s  
7 Department did not issue a litigation hold directly to the Deputy Defendants or other  
8 LASD personnel known to have possessed the photos even after this litigation was  
9 filed. While the Department “had an obligation to contact the key players involved  
10 . . . to ensure that they preserved evidence in their possession and on their [devices],”  
11 Montoya v. Orange Cnty. Sheriff’s Dep’t, 2013 WL 12347292, at \*8 (C.D. Cal. Oct.  
12 15, 2013), virtually none of the LASD personnel known to have possessed the photos  
13 were made aware of their preservation obligations,<sup>4</sup> which paved the way for their  
14 wholesale disposal of their devices, which resulted in permanent data loss.

15 Nor can LASD avoid the consequences of its employees’ failure to preserve the  
16 phones they used at the crash site. It of course cannot claim a lack of control over the  
17 LASD-issued phones used by Sergeants Scott Miller and Stephanie Shrout, which  
18 were replaced while this litigation was pending. (See J. Bryant Decl. ¶ 12). Yet, for  
19 reasons that remain unexplained, the Department never preserved these LASD-issued  
20 devices before disposing of them. See, e.g., Perkins, 2020 WL 1333109, at \*15  
21 (finding spoliation where police department reset an officer’s phone after litigation  
22 commenced).

23 LASD’s preservation duties also extended to the other devices its personnel  
24

25 <sup>4</sup> While Defendants have filed carefully parsed submissions about various personnel  
26 who did receive hold notices, they do not deny that the individuals actually involved  
27 in the improper sharing did not receive such instructions. (See J. Bryant Decl. Ex.  
28 M [Cruz Dep. 281:20-282:2]; *id.* Ex. E [Mejia Dep. 240:22-241:4]; *id.* Ex. N  
[Versales Dep. 298:2-10]; *id.* Ex. F [Russell Dep. 266:15-22]; see also ECF No. 191  
¶ 434.)

1 used in the ordinary course of their employment when responding to the crash on  
 2 January 26, 2020. “The obligation to retain discoverable materials is an affirmative  
 3 one; it requires the agency . . . having notice of discovery obligations communicate  
 4 those obligations to employees in possession of discoverable materials.” Montoya,  
 5 2013 WL 6705992, at \*8. Moreover, “courts have extended the affirmative duty to  
 6 preserve evidence to instances when that evidence is not directly within the party’s  
 7 custody or control so long as the party has access to, or indirect control over, such  
 8 evidence.” Cyntegra, Inc. v. Idexx Labs, Inc., 2007 WL 5193736, at \*5 (C.D. Cal.  
 9 Sept. 21, 2007) (imposing adverse inference instruction where corporation failed to  
 10 preserve evidence on third-party contractor’s server). This includes where, as here, a  
 11 party has indirect control over an employee device because it is used for work  
 12 purposes.<sup>5</sup> *See, e.g., Small v. Univ. Med. Ctr., 2014 WL 4079507, at \*11 (D. Nev.*  
 13 Aug. 18, 2014) (finding employer’s failure to preserve, collect, or search personal  
 14 mobile devices employees used at work resulted in spoliation); eDiscovery for  
 15 Corporate Counsel § 29:6 (discovery obligations generally extend to employee  
 16 phones used for work) (collecting authorities). “To hold to the contrary would create  
 17 an obvious loophole for businesses to exploit during litigation.” United States v.  
 18 Cameron-Ehlen Grp., Inc., 2020 WL 9209366, at \*12 n.10 (D. Minn. July 10, 2020),  
 19 affirmed in relevant part & overruled in part on other grounds, 2021 WL 101193 (D.  
 20 Minn. Jan. 12, 2021), at \*25-28.<sup>6</sup> LASD cannot “bypass this duty by abandoning its

22 <sup>5</sup> LASD employees testified that they routinely use their personal cell phones for  
 23 work. (*See, e.g., ECF No. 196-15* [Flores 30(b)(6) Dep. 34:10-35:14, 36:10-37:6,  
 37:13-25, 38:17-23, 40:8-15, 55:18-56:25].)

24 <sup>6</sup> *See also, e.g., Paisley Park Enters., Inc. v. Boxill, 330 F.R.D. 226, 235 (D. Minn.*  
 25 2019) (“The Court will not permit the . . . Defendants to claim that it was reasonable  
 26 to assume data on their personal cell phones would not be subject to discovery when  
 27 the record clearly shows that they used their phones for work purposes.”); Alter v.  
 28 Rocky Point Sch. Dist., 2014 WL 4966119, at \*10 (E.D.N.Y. Sept. 30, 2014) (entity  
 defendants were obligated to preserve work-related ESI “on whatever devices

1 documents to [an employee’s personal device] and claiming lack of control.”  
 2 [Cyntegra, 2007 WL 5193736, at \\*5.](#)

3 **4. The Fire Department’s Failure to Take Reasonable Steps to**  
 4 **Preserve Evidence Constitutes Spoliation**

5 (a) *The Fire Department’s Preservation Duty Was Triggered*  
 6 *By Late January 2020*

7 The Fire Department’s preservation duty arose at the latest on January 31, 2020,  
 8 when it was informed that firefighters were implicated in the illicit photo taking and  
 9 sharing. “Evidence that a defendant *actually* anticipated litigation might include  
 10 emails or meeting minutes discussing potential litigation, actions taken to retain a  
 11 lawyer,” or the assertion of work product protection for documents created during that  
 12 time period. [Aramark, 2021 WL 864067, at \\*4.](#) The County’s privilege log in this  
 13 case reveals that the Fire Department was *actually* anticipating litigation as of January  
 14 31, 2020, when the Department was preparing correspondence to the County’s Board  
 15 of Supervisors “in anticipation of litigation.” (J. Bryant Decl. Ex. L [County Privilege  
 16 Log] at lines 13-15.) The Department’s 30(b)(6) representative likewise testified that  
 17 the Department began having conversations with outside counsel after receiving the  
 18 information from Captain Vander Horck on January 31, 2020. ([ECF No. 197-9](#)  
 19 [\[McCloud Dep. 86:24-87:4\].](#)) He also conceded that as of January 31—or very soon  
 20 thereafter—the Department anticipated an investigation and recognized the  
 21 importance of evidence preservation in light of that likely investigation. (*Id.* [74:5-  
 22 75:6].)

23 A reasonably foreseeable internal investigation—a common precursor to  
 24 litigation—is sufficient to trigger a preservation duty. *See, e.g., Gerlich v. U.S. Dep’t*  
 25 *of Justice*, 711 F.3d 161, 171 (D.C. Cir. 2013); [Musse v. King Cnty., 2021 WL](#)  
 26 [4709875, at \\*3 \(W.D. Wash. Oct. 8, 2021\)](#) (“[A] defendant’s decision to open an  
 27 investigation can indicate that it was reasonable to expect a lawsuit.” (citation  
 28 \_\_\_\_\_  
 contained the information,” including “cellphones” and “any personal digital  
 devices capable of ESI storage”).

1 omitted)); *Stanbro v. Westchester Cnty. Health Care Corp.*, 2021 WL 3863396, at  
 2 \*11 (S.D.N.Y. Aug. 27, 2021) (“In circumstances where a department of corrections  
 3 internally investigates an incident within a prison, the department is obligated to  
 4 preserve ‘[a]ll relevant evidence’ . . . .” (citation omitted)); *Zbylski v. Douglas Cnty.*  
 5 *Sch. Dist.*, 154 F. Supp. 3d 1146, 1163 (D. Colo. 2015) (collecting cases). Otherwise,  
 6 “parties would have an incentive, or at least the opportunity, to destroy evidence while  
 7 avoiding undertaking any investigation that might confirm suspicions of wrongdoing.  
 8 That simply cannot be.” *Zbylski*, 154 F. Supp. 3d at 1166–67.

9 (b) *The Fire Department’s Breach of its Preservation*  
 10 *Obligations Resulted in Permanent Data Loss*

11 The Fire Department did not make any effort to preserve the ESI on  
 12 Department-issued devices used by Imbrenda and others known to have possessed  
 13 photos until *after* Imbrenda had already issued widespread deletion instructions and  
 14 weeks *after* it had received notice that the improper photos were in circulation within  
 15 the Department. Given the volatility of mobile data and the speed at which deleted  
 16 data is overwritten and permanently destroyed (Freskos Decl. ¶¶ 5-8), the  
 17 Department’s belated, post-deletion preservation efforts came far too late (*see id.*  
 18 ¶ 25). As a result of the Department’s inaction, Imbrenda was able to carry out his  
 19 cover-up campaign successfully, and it is no longer possible to determine how many  
 20 people received photos of the victims from Imbrenda, Jordan, and Kahan. (ECF No.  
 21 197-9 [McCloud Dep. 147:12-21, 149:11-18, 156:18-157:9, 164:14-17, 166:9-16].)  
 22 The Fire Department’s five-week delay in contacting relevant employees and taking  
 23 steps to preserve ESI breached its obligation under Rule 37(e).

24 C. **Defendants’ Spoliation of Evidence Has Prejudiced Plaintiff,**  
**Meriting Sanctions Under Rule 37(e)(1)**

25 Sanctions are warranted because the foregoing deletion and destruction of  
 26 evidence in this case has irreparably impeded Plaintiff’s ability to obtain reassurance  
 27 that photos of her loved ones’ remains have been contained and will not someday  
 28 become public. Separate from and in addition to an adverse-inference instruction

1 under Rule 37(e)(2),<sup>7</sup> Plaintiff respectfully requests that the Court impose measures  
 2 “to cure the prejudice” that Defendants’ spoliation has worked on Plaintiff in this  
 3 litigation. [Fed. R. Civ. P. 37\(e\)\(1\)](#); *see also, e.g., Cahill v. Dart*, 2016 WL 7034139,  
 4 at \*4 (N.D. Ill. Dec. 2, 2016) (affirming magistrate judge’s recommendation under  
 5 Rule 37(e)(1) that defendants be precluded at trial from “[p]resenting their theory  
 6 about” the content of “the missing video” they spoliated). “On considering a motion  
 7 for [spoliation] sanctions, a district court may make factual findings and assess the  
 8 credibility of witnesses.” [WeRide Corp. v. Kun Huang](#), 2020 WL 1967209, at \*9  
 9 (N.D. Cal. Apr. 24, 2020) (citations omitted). A party need only prove its entitlement  
 10 to spoliation sanctions by a preponderance of the evidence. *See, e.g., id.*

11 **1. Defendants’ Spoliation Has Prejudiced Plaintiff by Limiting**  
 12 **Her Ability to Prove the Full Extent of Defendants’**  
 13 **Wrongdoing**

14 “Once spoliation is established, upon a showing of prejudice to another party  
 15 from the loss of ESI that cannot be restored or replaced through additional discovery,  
 16 Rule 37(e)(1) provides that the Court may order measures no greater than necessary  
 17 to cure the prejudice.” [Mfg. Automation & Software Sys., Inc. v. Hughes](#), 2018 WL  
 18 5914238, at \*11 (C.D. Cal. Aug. 20, 2018) (citation omitted). “An evaluation of  
 19 prejudice from the loss of information necessarily includes an evaluation of the  
 20 information’s importance in the litigation.” [Fed. R. Civ. P. 37\(e\)](#) advisory  
 21 committee’s notes to 2015 amendment.

22 “When, as here, spoliation is shown, the burden shifts to the guilty party to  
 23 demonstrate that no prejudice resulted from the spoliation,” particularly if the  
 24 spoliation was intentional. [Hughes](#), 2018 WL 5914238, at \*11; *see also, e.g., Apple*  
 25 [Inc. v. Samsung Elecs. Co.](#), 888 F. Supp. 2d 976, 998 (N.D. Cal. 2012). “The

26 <sup>7</sup> Plaintiff is entitled to sanctions under both 37(e)(1) and (e)(2) but addresses only  
 27 the 37(e)(1) sanctions in this motion *in limine*. The adverse inference instruction is  
 28 addressed in Plaintiff’s concurrently filed memorandum regarding the parties’  
 disputed jury instructions.

1 prejudiced party must not be held ‘to too strict a standard of proof regarding the likely  
2 contents of the destroyed or unavailable evidence,’ because doing so ‘would allow  
3 parties who have destroyed evidence to profit from that destruction.’” [Aramark, 2021](#)  
4 [WL 864067, at \\*5](#) (citation omitted); *see also, e.g., Leon v. IDX Sys. Corp., 464 F.3d*  
5 [951, 959 \(9th Cir. 2006\)](#).

6 By any standard, Defendants’ spoliation has prejudiced Plaintiff in this lawsuit.  
7 With the direct evidence of Defendants’ photos of the crash-site destroyed, Plaintiff  
8 has been deprived of all direct evidence of what those photos depicted; which victims  
9 were photographed; how many photos were taken and shared; how far and wide those  
10 photos were stored and disseminated; or even what Defendants wrote about the photos  
11 as they passed them around. And without information of this most basic kind,  
12 Plaintiff has no hope of containing the photos’ spread. Imbrenda testified, for  
13 instance, that he received crash-site photos from approximately seven to nine different  
14 phone numbers. (J. Bryant Decl. Ex. G [Imbrenda Dep. 72:15-74:5, 98:8-99:23].) He  
15 could recall and identify only *two* of the seven to nine individuals who sent him  
16 photos. (*See id.*) Because Imbrenda’s texts and photos from that day have been  
17 destroyed, the additional five to seven Fire Department personnel who sent him  
18 photos of the crash cannot be identified, and their copies of the photos remain  
19 unsecured and at-risk of release at any moment.

20 Nor can Plaintiff know the full extent of Defendants’ invasion of her privacy  
21 or the full degree to which their misconduct shocks the conscience—issues that go to  
22 the heart of Plaintiff’s claims. The information that Plaintiff has managed to discover  
23 on these issues—despite Defendants’ efforts to conceal their conduct—supplies  
24 strong reason to suspect that the spoliated evidence would have further shown that  
25 Defendants gratuitously took and widely shared graphic photos of the victims’  
26 remains. To take just one example, in the days following the crash, Defendant  
27 Michael Russell texted photos containing human remains to a fellow Sheriff’s  
28 deputy—Ben Sanchez—with whom he regularly plays the video game Call of Duty.

1 (See [ECF No. 191](#) ¶¶ 307-313.) Russell’s cell phone records reveal not only outgoing  
2 picture texts to Sanchez on the days immediately after the crash, but also outgoing  
3 picture texts to four other friends with whom Russell plays video games, including  
4 pictures sent in a group chat that included Sanchez. (*Id.* ¶¶ 505, 507-508.) When  
5 Plaintiff raised this issue, Defendants produced the group chat text thread from  
6 Sanchez’s phone, which revealed that several of Russell’s outgoing picture messages  
7 appear to have been surgically deleted by Sanchez, raising the inference that Russell  
8 sent the photos of the victims’ remains to his entire video-game group, not just  
9 Sanchez. (See *id.* ¶ 709.) But because the texts have been deleted by Russell and  
10 Sanchez (*id.* ¶¶ 378, 650), Plaintiff has no way to determine the content of the pictures  
11 Russell was group texting to his friends in the days following the crash.

12 Given this evidence that Plaintiff has managed to obtain in discovery, it is  
13 reasonable to infer that the deleted evidence and timely forensic examinations of the  
14 devices at issue would have revealed even more dissemination and other facts that  
15 would have advanced Plaintiff’s case. But Defendants’ spoliation has prevented  
16 Plaintiff from obtaining this evidence—the precise kind of prejudice Rule 37(e)(1)’s  
17 curative sanctions are designed to address. See, e.g., [GN Netcom, Inc. v. Plantronics, Inc.](#),  
18 [930 F.3d 76, 83 \(3d Cir. 2019\)](#) (affirming finding of prejudice resulting from  
19 party’s spoliation of relevant emails); [CBF Industria de Gusa S/A v. AMCI Holdings, Inc.](#),  
20 [2021 WL 4190628, at \\*17 \(S.D.N.Y. Aug. 18, 2021\)](#) (finding prejudice).

## 21 **2. Defendants’ Prejudicial Spoliation Merits Evidentiary** 22 **Sanctions Under Rule 37(e)(1)**

23 Sanctions are warranted under Rule 37(e)(1) to cure the prejudice Defendants’  
24 spoliation has caused. Specifically, Defendants should be precluded from arguing at  
25 trial that (1) the photos did not depict human remains; (2) the photos depicted the  
26 remains of only certain crash victims; and (3) the photos were not electronically  
27 disseminated from the spoliated devices. See [Fed. R. Civ. P. 37\(e\)](#) advisory  
28 committee notes to 2015 amendment (noting that Rule 37(e)(1) authorizes court “to

1 exclude a specific item of evidence to offset prejudice caused by failure to preserve  
2 other evidence that might contradict the excluded item of evidence”); *see also, e.g.,*  
3 [Cahill, 2016 WL 7034139, at \\*4](#) (affirming magistrate judge’s recommendation that  
4 spoliating parties be precluded from offering any testimony that spoliated video  
5 “would have backed up [their] version of events”). Allowing Defendants to make  
6 these arguments would permit them to exploit the evidentiary imbalance they created  
7 and which, as a result of Defendants’ spoliation, Plaintiff cannot fairly rebut. The  
8 Court should not permit Defendants to advance arguments that “tak[e] unfair  
9 advantage of an evidentiary gap” they “created . . . themselves.” [Charlestown Cap.](#)  
10 [Advisors, LLC v. Acero Junction, Inc., 337 F.R.D. 47, 68 \(S.D.N.Y. 2020\)](#); *see also,*  
11 *e.g., Edwards v. Junior State of Am. Found., 2021 WL 1600282, at \*9-10 (E.D. Tex.*  
12 [Apr. 23, 2021](#)) (precluding plaintiffs from offering evidence or argument regarding  
13 content of deleted Facebook messages “that [p]laintiffs manifestly knew or should  
14 have known [were] critical to th[e] case” because plaintiffs’ deletion created an  
15 “unfair imbalance between [the parties’] ability to procure, examine, and present  
16 evidence”); [Mule v. 3-D Bldg. & Constr. Mgmt. Corp., 2021 WL 2788432, at \\*17](#)  
17 [\(E.D.N.Y. July 2, 2021\)](#) (precluding spoliators “from offering testimony at trial  
18 regarding the coding and characterization of transactions in . . . discarded”  
19 bookkeeping records).

20 At a minimum, Plaintiff should be given the opportunity to present evidence of  
21 Defendants’ spoliation to the jury, and the jury should be permitted to consider that  
22 evidence in evaluating the strength of Plaintiff’s claims and Defendants’ defenses.  
23 *See* [Fed. R. Civ. P. 37\(e\)](#) advisory committee notes to 2015 amendment (noting that  
24 Rule 37(e)(2) governs only “jury instructions that permit or require the jury to  
25 presume or infer that lost information was unfavorable to the party that lost it” but  
26 does “not prohibit a court from allowing the parties to present evidence to the jury  
27 concerning the loss and likely relevance of information and instructing the jury that it  
28 may consider that evidence, along with all the other evidence in the case, in making

1 its decision,” a measure “available under subdivision (e)(1)”; *see also, e.g.,*  
 2 [NuVasive, Inc. v. Kormanis](#), 2019 WL 1171486, at \*2 (M.D.N.C. Mar. 13, 2019)  
 3 (allowing parties “to present evidence to the jury concerning the loss” of ESI and  
 4 instructing the jury that it “may consider [such] evidence . . . in making its decision”);  
 5 [Stanbro v. Westchester Cnty. Health Care Corp.](#), 2021 WL 3863396, at \*16 (S.D.N.Y.  
 6 [Aug. 27, 2021](#)) (authorizing plaintiff “to adduce evidence at trial” regarding spoliated  
 7 video); [Franklin v. Howard Brown Health Ctr.](#), 2018 WL 4784668, at \*7 (N.D. Ill.  
 8 [Oct. 4, 2018](#)) (recommending that “parties be allowed to present evidence and  
 9 argument to the jury regarding the defendant’s destruction/failure to preserve  
 10 electronic evidence in this case”).

11       Allowing Plaintiff to put on evidence and argument regarding the extent of and  
 12 motives for Defendants’ spoliation will help ““rectify the evidentiary imbalance”” that  
 13 Defendants have “created by spoliating relevant ESI” and will “provide[] the jury, as  
 14 finder of fact, with context for that evidentiary imbalance.” [Karsch v. Blink Health](#)  
 15 [Ltd.](#), 2019 WL 2708125, at \*27 (S.D.N.Y. June 20, 2019). Moreover, evidence that  
 16 Defendants willfully spoliated relevant evidence “is itself relevant evidence going to  
 17 the parties’ credibility” that should be presented to the jury. *Id.*; *see also, e.g.,* [Lewis](#)  
 18 [v. Erfe](#), 2020 WL 4581724, at \*4 (D. Conn. Aug. 10, 2020) (allowing parties “to  
 19 present evidence and argument regarding the loss of [spoliated] surveillance footage”  
 20 in part because “the failure to preserve the video may” bear “on the credibility of the  
 21 Defendants”); [Charlestown](#), 337 F.R.D. at 68-69 (allowing movant “to present  
 22 evidence to the finder of fact regarding the loss of [important] emails” so that jury  
 23 could consider it in evaluating witness credibility and making other factual  
 24 determinations”).

### 25 **III. DEFENDANTS’ CONTENTIONS OF POINTS AND AUTHORITIES**

26       Plaintiff’s lawsuit is premised on two inconsistent claims: (i) that crash site  
 27 photos taken by County personnel were deleted and she will never be able to track  
 28 them down; and (ii) Bryant lives in fear that the deleted photos she has never seen

1 will one day be publicly disseminated. Since she cannot prove public dissemination  
2 by the County, she is asking this Court to give her the critical missing element of  
3 public dissemination by way of this motion *in limine*. The Court should refuse.

4 Bryant has known since at least March 2020 that the photos had been  
5 deleted—months before filing her initial complaint. To confirm the photos were  
6 deleted, Defendants proposed a forensic examination of County devices. Bryant  
7 agreed—hoping it would show crash site photos were disseminated by the County.  
8 The parties selected Kroll. And, after reviewing over 20 LASD and LACFD  
9 devices, Kroll confirmed that there are *no* photos containing victims’ remains and  
10 *no* evidence of public dissemination on any of the devices.

11 Left with no evidence of public dissemination by the County, Plaintiff is  
12 seeking spoliation sanctions precluding Defendants from denying that they publicly  
13 disseminated crash site photos—effectively establishing liability for Plaintiff’s  
14 claims. Bryant cannot show spoliation. She cannot show a “culpable state of  
15 mind”; she cannot establish, based on “concrete evidence rather than a fertile  
16 imagination,” that the photos would have “favor[ed]” her; and she cannot show  
17 “prejudic[e].” *Galicia v. Nat’l R.R. Passenger Corp.*, 2018 WL 6314191, at \*4  
18 (C.D. Cal. July 20, 2018) (Walter, J.) (citations omitted).

19 In *Galicia*, plaintiff moved for terminating or, alternatively, issue/evidentiary  
20 sanctions because defendants had failed to prevent video footage from being  
21 overwritten. 2018 WL 6314191, at \*1-2. This Court refused to issue any sanctions  
22 against the defendants, finding that (1) defendants did not have a duty to preserve  
23 the footage merely because an accident had occurred; (2) the video was overwritten  
24 pursuant to defendants’ policies and procedures; (3) plaintiff had failed to  
25 demonstrate relevant evidence was destroyed or that she was prejudiced; and  
26 (4) plaintiff failed to demonstrate defendants acted in bad faith. *Id.* at \*4-6.

27 The same is true here. Sheriff Villanueva did not have a “culpable state of  
28 mind” when a few days after the crash he acted—per Bryant’s request—to make

1 sure the photos did not get out and were deleted. He did what he thought was right  
2 and necessary to protect Bryant. The same is true of LACFD. The deletions were  
3 not for a “culpable” purpose. They were what Bryant asked for and were intended  
4 to, and did, protect her privacy.

5 Spoliation also requires the destruction of “favorable evidence” and  
6 “prejudice.” Neither occurred here. Bryant got what she wanted by virtue of the  
7 deletions: no publication. As this Court concluded in dismissing the Sheriff earlier  
8 in the case: “Although Plaintiff claims that Sheriff Villanueva’s conduct [ordering  
9 the deletions] was a ‘self-serving attempt to avoid embarrassment and legal  
10 headaches,’ [his] conduct may have benefitted Plaintiff by making it less likely that  
11 those photos would be disseminated.” (Dkt. 46 at 7.)

12 And in denying Bryant’s motion for spoliation sanctions, Magistrate Eick  
13 noted that granting the requested sanctions would be “at odds” with this Court’s  
14 previous ruling. Bryant is essentially seeking a ruling that “the Sheriff’s alleged  
15 instruction to delete the photographs establishes that the photographs *were* publicly  
16 disseminated.” (Dkt. 189 at 3.)

17 Through this motion *in limine*, Bryant asks this Court for an order precluding  
18 Defendants from denying public dissemination of the photos, disputing that the  
19 deleted photos depicted the remains of Plaintiff’s loved ones, or claiming that their  
20 copies of the photos have been contained.<sup>8</sup> In other words, Bryant wants the Court  
21 to give her the critical element that is missing from her case, *public dissemination*  
22 by the County, because she cannot prove this element and is trying to backdoor it by  
23 way of this motion *in limine*.

24  
25  
26 <sup>8</sup> Bryant also seeks an adverse inference instruction pursuant to Fed. R. Civ. P.  
27 37(e)(2). Although Plaintiff is not entitled to such an instruction for the same  
28 reasons she is not entitled to sanctions, Bryant’s request is specifically addressed in  
Defendants’ memorandum regarding the parties’ disputed jury instructions.

1 **A. Facts**

2 **1. The LASD Crash Site Photos**

3 *(a) LASD Receives a Complaint*

4 On January 29, 2020, the Sheriff's Information Bureau ("SIB") received an  
5 email from a citizen. (Dkt. 151-56 ¶ 3.) The email stated that a deputy had shown  
6 crash site photos to someone at a bar in Norwalk. (*Id.*) SIB shared the email with  
7 LASD command staff, who launched an immediate inquiry. (*Id.*)

8 By the next day, LASD had identified Joey Cruz as the deputy and learned  
9 that he had shown photos on his cellphone to one of his friends, Victor Gutierrez,  
10 the bartender in Norwalk. (Dkt. 151-57 ¶¶ 19-20.) Deputy Cruz was a 25-year-old  
11 deputy trainee who had been at the crash site. (*Id.* ¶ 2.)

12 According to Victor Gutierrez, he saw between one and three photos, which  
13 Deputy Cruz swiped through while holding his phone. (Dkt. 151-66 Ex. J  
14 [Gutierrez Dep. 20:24-21:8]; Dkt. 151-57 ¶ 14.) He recalled seeing various body  
15 parts in the debris field. (Dkt. 151-66 at Ex. J [Gutierrez Dep. 30:9-13].) Deputy  
16 Cruz did not show the photos to anyone else in the bar, but he did try and show  
17 scene photos to his niece, who refused to look at them. (Dkt. 151-57 ¶ 13.)

18 *(b) LASD Takes Immediate Action*

19 In her deposition, Bryant testified that she asked Sheriff Villanueva to make  
20 sure no photos of her husband and daughter got out: "If you can't bring my husband  
21 and baby back, please make sure no one takes photographs of them. Please secure  
22 the area." (Dkt. 151-66 Ex. F [Bryant Dep. 19:10-15].) When Sheriff Villanueva  
23 learned about the potential showing of crash site photos, he directed his personnel to  
24 launch an immediate inquiry and make sure *no* photos "saw the light of day," that no  
25 photos got outside the department. (*Id.* at Ex. R. [IAB Investigative Summary at  
26 3].) He said if everyone was honest, and did not publicly disseminate any photos,  
27 they would receive a performance log entry in their personnel file in lieu of more  
28 severe discipline. (*Id.*)

1 Malibu/Lost Hills Station Lieutenant Mancinas and Sergeant Phillips  
2 immediately interviewed 28 deputies, reserve deputies, sergeants, and civilian  
3 volunteers. (Dkt. 151-56 ¶ 5.) They determined that all LASD personnel who had  
4 taken, shared or received crash site photos had deleted them. (*Id.* ¶ 6.) Only Deputy  
5 Cruz had shown a photo to anyone outside LASD. (*Id.* ¶ 8.) By the conclusion of  
6 this initial inquiry—within a few days of the crash—all of the LASD employees had  
7 deleted the photos per the Sheriff’s instruction.<sup>9</sup>

8 (c) *The Internal Affairs Bureau Investigates*

9 Once the initial inquiry was complete, IAB conducted a comprehensive  
10 investigation. (Dkt. 151-56 ¶¶ 4-8.) That is the standard operating procedure at  
11 LASD. (*Id.* ¶ 4.) IAB interviewed 41 witnesses and compiled a comprehensive  
12 1,140-page report. (*Id.* ¶ 7.)

13 The investigation revealed that the photos came from the first deputy on  
14 scene, Deputy Johnson, who is not named as a defendant. (Dkt. 151-66 Ex. R [IAB  
15 Investigative Summary at 4].) He took crash site photos for investigative and  
16 operational purposes to communicate to the command post what he was seeing.  
17 (Dkt. 151-60 ¶ 10.) Deputy Johnson sent the photos to Deputy Versales, who was  
18 handling communications at the command post. (*Id.*) Deputy Versales sent the  
19 scene photos to Deputy Mejia, who was working with dispatch to help identify the  
20 helicopter, and to the other personnel at the command post. (Dkt. 151-70 ¶ 12; Dkt.  
21 151-64 ¶ 10.)

22 Deputy Mejia sent the photos to two deputies who were also on scene,  
23 including his trainee, Deputy Cruz. (Dkt. 151-64 ¶ 14.) Deputy Cruz sent the  
24 photos to Deputy Russell, who was at the command post helping to keep  
25

26 \_\_\_\_\_  
27 <sup>9</sup> [Dkt. 151-57 ¶¶ 15-18; Dkt. 151-67 ¶¶ 9-12; Dkt. 151-64 ¶¶ 17-20; Dkt. 151-70  
28 ¶¶ 13-16; Dkt. 151-65 ¶¶ 10-12; Dkt. 151-55 ¶¶ 11-14; Dkt. 151-59 ¶¶ 13-15; Dkt.  
151-62 ¶¶ 12-15.]

1 unauthorized individuals, and the media, away. (Dkt. 151-57 ¶ 12; Dkt. 151-67 ¶ 4.)  
 2 Deputy Russell sent the photos to a deputy who was working at another station and  
 3 planned on responding to the scene the following day. (Dkt. 151-67 ¶ 8; Dkt. 151-  
 4 68 ¶ 3.)

## 5 **2. The LACFD Crash Site Photos**

### 6 *(a) LACFD Receives a Call from LASD*

7 On January 31, 2020, LASD Captain Vander Horck<sup>10</sup> called LACFD Fire  
 8 Chief Anthony Marrone. (Dkt. 151-66 Ex. E [Marrone Dep. 154:12-19].) He told  
 9 Chief Marrone that there was a complaint about a deputy sharing crash site photos  
 10 containing victim remains and advised him that there were two LACFD employees  
 11 at the crash site on January 26, 2020. (Dkt 151-63 ¶ 4.)

12 Chief Marrone notified Deputy Fire Chief McCloud, who oversaw the  
 13 Leadership and Professional Standards Bureau at that time. (Dkt. 151-66 Ex. E  
 14 [Marrone Dep. 155:16-156:2].) LACFD worked to identify the personnel who had  
 15 been present on the first day of the crash site investigation. (*Id.* Ex. K [McCloud  
 16 Dep. 77:12-79:22].) At that time, there were no allegations that LACFD personnel  
 17 had shared photos improperly. (*Id.* [McCloud Dep. 57:6-10]; Ex. E [Marrone Dep.  
 18 163:11-18]; Dkt. 151-63 ¶ 4.)

### 19 *(b) LACFD Starts an Investigation*

20 On or around March 6, 2020, a civilian witness reported to LACFD that a  
 21 LACFD employee had been showing crash site photos on his phone at a first  
 22 responders awards event on February 15, 2020. (Dkt. 151-63 ¶ 5.)

23 LACFD hired an outside law firm to investigate the allegations. (*Id.* ¶ 6.)  
 24

25 <sup>10</sup> Captain Vander Horck is now a Captain at Men's Central Jail. As he testified,  
 26 that transfer had nothing to do with this incident. (Dkt. 151-66 Ex. I [Vander Horck  
 27 Dep. 321:21-232:4]; Dkt. 151-69 ¶¶ 4-7.) Bryant's insistence on alleging otherwise  
 28 is misleading. Defendants have moved to exclude all evidence of Captain Vander  
 Horck's transfer in their contemporaneously filed MIL No. 3.

1 The investigation revealed that on February 15, 2020, then-PIO Captain Imbrenda  
2 had shown crash site photos on his phone to one LACFD employee and two Los  
3 Angeles Fire Department Captains who had worked the incident; and that all  
4 LACFD photos had been deleted. (*Id.*; Dkt. 151-58 ¶ 13.)

### 5 **3. Bryant's Letters and Tort Claims**

6 On March 2, 2020, Bryant's attorney sent letters to LASD and LACFD. (Dkt.  
7 151-7 Exs. 20, 21.) The letters asked the departments to "take immediate action to  
8 secure all photos and videos of the January 26, 2020 crash scene" in their  
9 possession, "including any photos or videos in the possession of or disseminated by  
10 [the departments'] personnel." (*Id.*)

11 Bryant's letters alleged that LASD and LACFD owed a duty of care to  
12 victims' families "*to refrain from publicly disseminating photos of victims'*  
13 *remains.*" (*Id.* (emphasis added).) The letters did not threaten litigation or identify  
14 any legal claims against either department. (*Id.*) The only potential liability the  
15 letters referenced was for the public dissemination of photos, which had not  
16 occurred. Indeed, it has now been almost two years since the crash, and there has  
17 still been *no public dissemination by the County.*

18 On March 8, 2020, Bryant's attorney sent LASD another letter. (*Id.* Ex. 23.)  
19 The letter acknowledged Bryant's awareness that LASD employees had deleted  
20 photos of the crash site. (*Id.*) There was no objection to the deletion of photos or  
21 request that LASD refrain from deleting photos. The letter did not demand that  
22 LASD preserve any documents or materials related to the January 26, 2020 crash.  
23 No potential claim against LASD was identified.

24 Two months later, on May 8, Bryant submitted a tort claim against LASD.  
25 (Dkt. 151-66 Ex. P.) A tort claim against LACFD followed on July 20, 2020. (*Id.*  
26 Ex. Q.)

### 27 **4. LASD's Preservation Efforts**

28 On May 11, 2020—three days after receipt of the tort claim—Captain

1 Maldonado of the Risk Management Bureau notified Captain Becerra of the  
2 Malibu/Lost Hills Station of Bryant’s May 8, 2020 tort claim. (Dkt. 151-56 ¶ 11.)  
3 The notice stated the relevant personnel at the station needed to “preserve all  
4 evidence related to this claim in a location where it can be readily retrieved.” (*Id.*)  
5 Captain Maldonado sent the same notice to Sheriff Villanueva. (*Id.* ¶ 13.)

6 LASD Chief Legal Advisor Elizabeth Miller sent a litigation hold notice to  
7 Commander Johnson of the Professional Standards Division, Lieutenant  
8 Kallenberger of the Risk Management Bureau, Captain Jaeger of IAB, and Captain  
9 Burson of the Professional Standards Division, relating to the alleged sharing of  
10 photos involving the January 26, 2020 helicopter crash. (*Id.* ¶ 15.) The litigation  
11 hold notice directed the recipients to “take steps to ensure that all evidence related to  
12 the crash, the investigation, photos taken at the scene, etc. – all evidence in any way  
13 related to the crash and any related investigation is preserved.” (*Id.* ¶ 16.)

14 Lieutenant Kallenberger responded and advised Chief Legal Advisor Miller that her  
15 office would “notify appropriate involved units.” (*Id.* ¶ 17.) Lieutenant  
16 Kallenberger then asked Janel Ramos of the LASD Civil Litigation Unit to “notify  
17 all appropriate involved units regarding the Bryant crash,” which she did. (*Id.* ¶ 18.)

18 Ms. Ramos forwarded the litigation hold notice to Captain Becerra,  
19 Lieutenant Mancinas, Sergeant Nevarez, and Sergeant Painter of the Malibu/Lost  
20 Hills Station, Commander Valdez, who was the Captain of SIB at the time, and  
21 Lieutenant Blanchard of the Office of the Sheriff. (*Id.* ¶ 19.) Ms. Ramos wrote that  
22 the “request for preservation of evidence related to the Bryant crash was sent from  
23 Chief Legal Advisor, Elizabeth Miller,” and instructed the recipients to “ensure all  
24 evidence in any way related to the crash and any related investigation is preserved  
25 by your unit/station.” (*Id.* ¶ 20.) That same day, Commander Valdez forwarded the  
26 litigation hold notice to Assistant Sheriff Gross, Chief Kneer of the North Patrol  
27 Division, and Constitutional Policy Advisor Glaciano for the Office of the Sheriff.  
28 (*Id.* ¶ 21.) Chief Kneer was involved in coordinating the response by LASD to the

1 January 26, 2020 helicopter crash, the inquiry into the alleged sharing of crash scene  
2 photos, and disciplining certain LASD deputies. (*Id.*)

3 Constitutional Policy Advisor Galviano then forwarded the litigation hold  
4 notice to Captains Jaeger and Burson and Lieutenant Hinchman. (*Id.* ¶ 22.) Captain  
5 Jaeger, who also received Chief Legal Advisor Miller’s litigation hold, was involved  
6 in the IAB investigation into the alleged sharing of crash scene photos. (*Id.*) The  
7 recipients of these litigation hold notices were responsible for notifying the relevant  
8 LASD personnel of their obligations to preserve evidence relating to the crash,  
9 including documents relating to the inquiry and IAB investigation. (*Id.* ¶ 23.) This  
10 included LASD personnel at the Malibu/Lost Hills Station, SIB, and IAB. (*Id.*)

#### 11 **5. LACFD’s Preservation Efforts**

12 On March 3, 2020, LACFD Risk Manager Kim sent a litigation hold to Chief  
13 Marrone, Deputy Fire Chief Pena, Chief of Staff Aguirre, and Battalion Chief  
14 Sprewell. (Dkt. 151-63 ¶ 10.) She also forwarded the litigation hold to Assistant  
15 Fire Chief Alkonis. (*Id.*) Ms. Kim instructed these individuals to “ensure that the  
16 appropriate divisions/sections in your respective bureaus have been notified.” (*Id.*)  
17 She explained that “[a]ny and all existing records, documents, and/or information  
18 related to the Willow Incident should be preserved and forwarded to the Risk  
19 Management Division . . . as soon as possible.” (*Id.*) These individuals received the  
20 litigation hold because it was understood that their bureaus or divisions had  
21 personnel that responded to the crash. (*Id.* ¶ 11.)

22 The litigation hold instructed recipients to “confirm receipt of this notification  
23 and identify documents/files you have within your unit.” (*Id.* ¶ 13.) They all  
24 confirmed receipt of the litigation hold and that the appropriate bureaus/divisions  
25 had been notified. (*Id.* ¶ 14.) The recipients confirmed that all relevant LACFD  
26 personnel, including LACFD personnel who responded to the January 26, 2020  
27 helicopter crash, received written or verbal notice of the litigation hold. (*Id.*) Chief  
28 Marrone confirmed that he had given verbal notice of the litigation hold to then-Fire

1 Captain Jordan and Fire Captain Kahan. (*Id.* ¶ 15.)

2 On July 21, 2020, Ms. Kim sent a revised litigation hold to Chief Marrone,  
3 Deputy Fire Chief Pena, and Chief of Staff Aguirre. (*Id.* ¶ 16.) She also sent the  
4 revised litigation hold to Assistant Fire Chief Alkonis, Deputy Chief Anderson, and  
5 Deputy Chief Ewald. (*Id.*) She instructed the recipients to “ensure that any and all  
6 records, documents, information have been/are preserved.” (*Id.*) The recipients all  
7 confirmed to Ms. Kim in writing and verbally receipt of the litigation hold and that  
8 the appropriate divisions/sections had been notified. (*Id.* ¶ 18.)

#### 9 **6. LACFD’s Orders**

10 On March 6, 2020, Deputy Fire Chief McCloud ordered then-PIO Captain  
11 Imbrenda to return his LACFD electronic devices, and to provide/show LACFD any  
12 photos taken involving the crash. (Dkt. 151-63 ¶ 19 & Ex. E.) In response to the  
13 direct order, Imbrenda turned over his LACFD devices. (*Id.*)

14 On May 29, 2020, Chief Marrone ordered Fire Captain Kahan and former  
15 Fire Captain Jordan to return their LACFD electronic devices, and to provide/show  
16 LACFD any photos taken involving the crash. (*Id.* ¶¶ 20-21.) Kahan and Jordan  
17 were also ordered to “[p]reserve all Electronic Media/Photographs involving the  
18 Willow Incident” that were in their possession. (*Id.*) They complied and turned  
19 over their devices. (*Id.*)

20 The LACFD-issued electronic devices were forensically imaged by the Office  
21 of County Investigations (“OCI”). (*Id.* ¶ 22.) OCI retained possession of the  
22 electronic devices and forensic images until they were turned over to counsel in this  
23 case. (*Id.* ¶ 23.) They were also provided to Kroll. Ms. Kim reviewed the forensic  
24 images of the phones, including photos and text messages. (*Id.*) She confirmed that  
25 they did not contain any crash scene photos depicting human remains and there was  
26 no evidence anyone publicly disseminated any photos. (*Id.* ¶¶ 25-27.)

#### 27 **7. The Forensic Examination**

28 After this lawsuit was filed, the parties agreed to have an independent forensic

1 examiner (Kroll) examine the devices of LASD and LACFD personnel. (Dkt. 151-  
2 66 ¶ 10.) The objective of the examination was to determine whether the devices  
3 contained crash site photos depicting human remains and/or whether any crash site  
4 photos had been publicly disseminated. (*Id.* ¶¶ 11-12.)

5 The forensic examination is complete. Kroll “identified no photographs or  
6 videos of physical remains of the victims [of the crash],” and did not identify any  
7 evidence that such photos were copied, transferred and/or communicated. (*Id.* ¶ 13  
8 & Exs. C-D.) There are no photos and no public dissemination by the County.

### 9 **B. Legal Standard**

10 “A party seeking sanctions for spoliation of evidence must prove the  
11 following elements: (1) the party having control over the evidence had an obligation  
12 to preserve it when it was destroyed or altered; (2) the destruction or loss was  
13 accompanied by a ‘culpable state of mind;’ and (3) the evidence that was destroyed  
14 or altered was ‘relevant’ to the claims or defenses of the party that sought the  
15 discovery of the spoliated evidence[.]” *Galicia*, 2018 WL 6314191, at \*4 (alteration  
16 in original) (citation omitted).

17 It is the moving party’s burden to “establish a reasonable possibility, based on  
18 concrete evidence rather than a fertile imagination, that access to the lost material  
19 would have produced evidence favorable to its cause.” 2018 WL 6314191, at \*4  
20 (citation omitted). The absence of evidence must be prejudicial to the party alleging  
21 spoliation. *Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 627 (C.D. Cal.  
22 2013).

### 23 **C. Defendants’ Duty To Preserve Did Not Begin In January 2020**

24 Bryant’s argument is premised on her claim that Defendants had a duty to  
25 preserve evidence relating to crash site photos in January 2020. This is wrong as a  
26 matter of law. For a party to be on notice of litigation such that the duty to preserve  
27 attaches, the evidence must be relevant to a litigation that has “‘more than a  
28 possibility’ of occurring.” *Garcia v. United States*, 2014 WL 12709430, at \*1 (C.D.

1 Cal. Sept. 3, 2014) (citation omitted). Specifically, “the fact that a tort might have  
 2 occurred cannot by itself be sufficient to place a defendant on notice of impending  
 3 litigation [because] . . . [t]hat is not the law.” *Id.* at \*2. Instead, the duty requires a  
 4 higher standard—that the litigation is *probable*. *Id.*; *Galicia*, 2018 WL 6314191, at  
 5 \*4 (“[A] general concern over litigation does not trigger a duty to preserve  
 6 evidence.” (citation omitted)).

7 Defendants did not have a duty to preserve evidence until Bryant submitted  
 8 her tort claims on May 8, 2020 (LASD) and July 20, 2020 (LACFD). Another court  
 9 in the Central District has addressed this issue in a case concerning audio and video  
 10 footage. *Federated Univ. Police Officers’ Ass’n v. Regents of Univ. of Cal.*, 2016  
 11 WL 9173457 (C.D. Cal. Sept. 8, 2016) (Staton, J.). There, the police chief allegedly  
 12 “ordered the deletion of all audio recordings” and “oversaw the continuing deletion  
 13 of audio recordings.” *Id.* at \*2. Plaintiffs sought an adverse inference for summary  
 14 judgment and trial that the “destroyed evidence” would have shown “that the  
 15 confidential communications . . . were recorded both within and outside of the  
 16 UCIPD and accessed by Defendants.” *Id.* (alteration in original).

17 The Court held that defendants did not have a duty to preserve at the time the  
 18 recordings were deleted, rejecting the “attenuated inference” that the police chief  
 19 “must have known the recordings were illegal and, therefore, must have known of  
 20 the potential for a claim and the possibility of subsequent litigation.” 2016 WL  
 21 9173457, at \*2. Bryant is making the same argument here. At the time the photos  
 22 were deleted, litigation was *not* probable. Sheriff Villanueva, the deputies, and the  
 23 LACFD captains were simply trying to avoid the harm Bryant is suing over: public  
 24 dissemination of crash site photos; and they were doing so at the explicit request of  
 25 Bryant herself.

26 **1. The Citizen Complaint Did Not Trigger a Duty to Preserve**

27 Bryant cites cases for her contention that a citizen complaint triggers a duty to  
 28 preserve; but when examined, these cases actually show that the County did *not*

1 have such a duty in January 2020. In both *Mazloun* and *Perkins*, the complaints  
2 had been submitted by the *plaintiffs* who themselves were harmed by police  
3 conduct. See *Mazloun v. D.C. Metro. Police Dep't*, 530 F. Supp. 2d 282, 292  
4 (D.D.C. 2008) (“[D]efendants were aware that plaintiff had filed a police complaint  
5 arising out of [the] incident.”); *Perkins v. City of Modesto*, 2020 WL 1333109, at  
6 \*14 (E.D. Cal. Mar. 23, 2020) (“Plaintiff submitted a citizen complaint form to the  
7 MPD alleging misconduct in connection with the November 6, 2017, officer-  
8 involved shooting of Plaintiff.”).

9 Unlike the complaints at issue in those cases, the January 29, 2020 citizen  
10 email to LASD did not identify any injury to the *complainant*. The email did not  
11 identify any injured party or potential legal claim against LASD at all. (Dkt 151-66  
12 Ex. R [IAB Summary at 3].) The email merely reported what the citizen had heard  
13 from the bartender. (*Id.* at 39.) The individual who wrote the email had not even  
14 seen the photos. He was reporting what the bartender told him. (*Id.*)

15 The January 29, 2020 citizen email did not notify LASD that litigation was  
16 probable. *Galicia*, 2018 WL 6314191, at \*4; *Garcia*, 2014 WL 12709430, at \*2.  
17 Instead, it notified LASD that it should investigate and determine whether there was  
18 a factual basis for the complaint. That is what LASD did. Within 24 hours, LASD  
19 had identified Deputy Cruz as the deputy at the bar and hailed 28 personnel into the  
20 station to answer questions about the crash site photos. (Dkt. 151-56 ¶¶ 3-6.)  
21 LASD determined that all LASD personnel who had taken, shared or received crash  
22 site photos had deleted them and that only Deputy Cruz had shown a photo to  
23 anyone outside LASD. (*Id.* ¶ 8.)

## 24 **2. An Internal Investigation Does Not Trigger a Duty to Preserve**

25 Bryant contends that LACFD had a duty to preserve beginning on January 31,  
26 2020, because it anticipated an internal investigation. This argument also fails as a  
27 matter of law. None of the authorities Bryant relies on stand for the proposition that  
28 “[a] reasonably foreseeable internal investigation” alone is “sufficient to trigger a

1 preservation duty.” (Plfs. Mot. at 22.) Rather, in each of those cases, courts found  
 2 that the existence of an internal investigation, *when combined with other facts*, could  
 3 serve to put defendants on notice of potential litigation.<sup>11</sup>

4 An internal investigation does not necessarily mean that litigation is probable.  
 5 As authority from this district (which Bryant cites) makes clear, determining  
 6 “[w]hen litigation is ‘reasonably foreseeable’ is a flexible fact-specific standard that  
 7 allows a district court to exercise the discretion necessary to confront the myriad  
 8 factual situations inherent in the spoliation inquiry.” *Spencer v. Lunada Bay Boys*,  
 9 2017 WL 11527978, at \*6 (C.D. Cal. Nov. 29, 2017) (citation omitted).

10 Bryant is blurring the facts to paint a distorted picture. LASD and LACFD  
 11 did everything right. They took a proactive approach even though there were no  
 12 allegations putting them on notice of “reasonably foreseeable” litigation. (*See, e.g.*,  
 13 Dkt. 151-64.)

### 14 **3. Bryant’s Letters Did Not Provide Notice of Probable Litigation**

15 The March 2 and March 8, 2020 letters from Bryant’s attorney did not trigger  
 16 a duty to preserve for Defendants. (Plfs. Mot. at 19.) Bryant cites *Oppenheimer v.*  
 17 *City of La Habra* for the proposition that a written request for information triggers a  
 18 duty to preserve evidence. This is wrong.

19 \_\_\_\_\_  
 20 <sup>11</sup> *See e.g., Gerlich v. U.S. Dep’t of Justice*, 711 F.3d 161, 171 (D.D.C. 2013)  
 21 (“Department officials . . . were on notice that Department investigation *and future*  
 22 *litigation* concerning the 2006 Honors Program improprieties were reasonably  
 23 foreseeable.” (emphasis added)); *Musse v. King County*, 2021 WL 4709875, at \*3  
 24 (W.D. Wash. Oct. 8, 2021) (“A plaintiff’s statements or conduct might put a  
 25 defendant on notice that litigation was likely. Similarly, a defendant’s decision to  
 26 open an investigation *can indicate* that it was reasonable to expect a lawsuit.”  
 27 (emphasis added) (citation omitted)); *Stanbro v. Westchester Cty. Health Care*  
 28 *Corp.*, 2021 WL 3863396, at \*11 (S.D.N.Y Aug. 27, 2021) (regarding  
 circumstances where a department of corrections investigates incident within a  
 prison); *Zbylski v. Douglas Cty. Sch. Dist.*, 154 F. Supp. 3d 1146, 1163-67 (D. Colo.  
 2015) (explaining that an internal investigation can trigger duty to preserve where  
 the investigation provides notice of anticipated litigation).

1 In *Oppenheimer*, the duty to preserve was not caused by the plaintiff sending  
2 a request for information, but rather by plaintiff filing a claim with the defendant  
3 city. 2017 WL 1807596, at \*10 (C.D. Cal. Feb. 17, 2017). Bryant’s reliance on  
4 *Browder v. City of Albuquerque* is similarly misplaced. 187 F. Supp. 3d 1288, 1296  
5 (D.N.M 2016). In *Browder*, plaintiffs’ attorney’s letter made litigation reasonably  
6 foreseeable where the stated purpose of the letter was to put the defendant on notice  
7 that plaintiffs intended to pursue a claim. *See Id.* The letter also requested a  
8 litigation hold on specific evidence. *Id.*

9 Bryant’s letters demanded that the departments “take immediate action to  
10 secure all photos and videos of the January 26, 2020 crash scene,” which they had  
11 already done. (Dkt. 151-7 Exs. 20, 21.) The letters referenced *possible* claims  
12 predicated on harm caused by the “dissemination of photos of victims’ remains,”  
13 which could not occur because the photos had been deleted. (*Id.*) Bryant’s letters  
14 also acknowledged that the crash site photos had been deleted.

15 At most, the letters were an insufficient “vague hint” of possible litigation.  
16 *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 881 F. Supp. 2d 1132, 1145 (N.D. Cal.  
17 2012); *see also Realnetworks, Inc. v. DVD Copy Control Ass’n, Inc.*, 264 F.R.D.  
18 517, 526 (N.D. Cal. 2009) (“A general concern over litigation does not trigger a  
19 duty to preserve evidence.”).

20 LASD’s duty to preserve arose when the May 8, 2020 tort claim came in.  
21 (Dkt. 151-66 Ex. P [LASD tort claim].) It issued its litigation hold on May 11,  
22 2020, with follow-up notices in July 2020. (Dkt. 151-56 ¶¶ 11-23.) LACFD’s duty  
23 to preserve arose on July 20, 2020. (Dkt. 151-66 Ex. Q [LACFD tort claim].) It had  
24 already issued its litigation hold on March 3, 2020. (Dkt. 151-63 ¶¶ 19-21.) By the  
25 time Bryant filed her complaint, on September 17, 2020, litigation holds were in  
26  
27  
28

1 place.<sup>12</sup>

2 **D. Defendants Have Not Spoliated Evidence**

3 In her bid to get spoliation sanctions—that effectively amount to terminating  
4 sanctions—Bryant points to three things: (i) LASD personnel deleting photos in  
5 January 2020; (ii) LACFD personnel deleting photos in February 2020; (iii) and  
6 involved personnel upgrading their personal cellphones after all photos from the  
7 crash site were deleted. Bryant also complains about witnesses being unable to  
8 recall collecting materials for this litigation during their depositions. (Plfs. Mot. at  
9 20.)

10 **1. Deletions That Predate Tort Claims Are Not Spoliation**

11 As explained above, Defendants’ duty to preserve ESI did not arise until May  
12 2020 (LASD) and July 2020 (LACFD). By that time, the photos had been deleted  
13 per Bryant’s request.

- 14 • LASD confirmed that the photos had been deleted by January 31, 2020.  
15 (Dkt. 151-56 ¶¶ 3-6.) All of the individual LASD employees who  
16 possessed crash site photos on their phones have declared under oath that  
17 they deleted the photos and related text messages before there was any  
18 prospect of litigation. (*See, e.g.*, Dkt. 151-57 ¶¶ 15-18; Dkt. 151-67 ¶¶ 9-  
19 12; Dkt. 151-64 ¶¶ 17-20; Dkt. 151-70 ¶¶ 13-16; Dkt. 151-65 ¶¶ 10-12;  
20 Dkt. 151-55 ¶¶ 11-14.)
- 21 • LACFD’s investigation identified all of the personnel who had taken and  
22 possessed photos of the crash site. (Dkt. 151-63 ¶¶ 6-7.) The  
23 investigation confirmed that all photos had been deleted. (*Id.* ¶¶ 22-28.)  
24 The relevant LACFD employees have declared under oath that they  
25 deleted the photos and related text messages before there was any prospect  
26 of litigation. (Dkt. 151-58 ¶ 18; Dkt. 151-61 ¶ 13.)

24 \_\_\_\_\_  
25 <sup>12</sup> Bryant’s reliance on *Colonies Partners, L.P. v. County of San Bernardino*, 2020  
26 WL 1496444, at \*8 (C.D. Cal. Feb. 27, 2020), and *Montoya v. Orange County*  
27 *Sheriff’s Dep’t*, 2013 WL 12347292, at \*8 (C.D. Cal. Oct. 15, 2013), is misplaced.  
28 Both involved defendants who failed to take *any* steps to preserve ESI *after* the  
initiation of litigation. Here, Defendants issued litigation holds and notified relevant  
personnel before Bryant’s lawsuit was filed.

1 The County, its departments, and its personnel did not have a duty to preserve  
2 in January or February 2020. Deletions during that period were not spoliation; they  
3 were efforts to prevent the public dissemination of crash site photos.

4 **2. Upgrading Cellphones Is Not Spoliation**

5 Bryant contends that upgrading and replacing cellphones is spoliation. Bryant  
6 even makes this argument for non-party witnesses.

7 All of the LASD and LACFD personnel—including Deputies Cruz, Mejia,  
8 Russell, and Versales—have declared under oath that their phones were replaced as  
9 part of a routine upgrade; months *after* the crash site photos had been deleted. (*See*,  
10 *e.g.*, Dkt. 151-70 ¶ 22; Dkt. 151-64 ¶ 27; Dkt. 151-67 ¶ 18; 151-57 ¶¶ 24-25.) Each  
11 of these individuals has also consented to (i) a neutral forensic examination of their  
12 devices, and (ii) production of their personal cellphone records. (Dkt. 151-70 ¶ 21;  
13 Dkt. 151-64 ¶ 26; Dkt. 151-67 ¶ 17; Dkt. 151-57 ¶ 23.) The forensic examination  
14 by Kroll confirmed that the devices do not contain crash scene photos and that there  
15 is no evidence of public dissemination on them. (*See* Dkt. 151-66 Ex. C [Kroll  
16 Report] at 69-76.)

17 Bryant’s reliance on *Aramark Management, LLC v. Borgquist*, 2021 WL  
18 864067, at \*18 (C.D. Cal. Jan. 27, 2021), and *Ronnie Van Zant, Inc., v. Pyle*, 270 F.  
19 Supp. 3d 656, 670 (S.D.N.Y. 2017), is misplaced. In both of those cases, the  
20 defendants got rid of their phones despite knowing they contained relevant text  
21 messages. That did not happen here. Here, the LASD and LACFD personnel had  
22 deleted the photos before upgrading their phones.

23 **E. Bryant Cannot Show Loss Of Relevant Evidence**

24 Bryant has the burden of showing that the deleted photos and upgraded  
25 phones would have contained relevant evidence. *Reinsdorf*, 296 F.R.D. at 631  
26 (“The deletion of irrelevant evidence does not support a spoliation claim.” (citing  
27 *Centrifugal Force, Inc. v. Softnet Commc’n, Inc.*, 783 F. Supp. 2d 736, 750  
28 (S.D.N.Y. 2011) (“[A] discovery sanction cannot be based on a failure to preserve

1 irrelevant evidence” (alteration in original)))).

2 Bryant cannot establish “based on concrete evidence rather than a fertile  
3 imagination, that access to the lost [cellphones] would have produced evidence  
4 favorable to [her] cause.” *United States v. Town of Colorado City, Ariz.*, 2014 WL  
5 3724232, at \*7 (D. Ariz. July 28, 2014) (citation omitted). Indeed, the actual  
6 “concrete” evidence in this case—including the 1,140-page IAB report, LACFD’s  
7 investigation and forensic examination, and Kroll’s neutral forensic examination of  
8 over 29 devices—has confirmed that no photos exist.

9 **F. The Request For Sanctions Is Not Supported By The Record Or The Law**

10 Bryant asks the Court to preclude Defendants from arguing at trial that (1) the  
11 photos did not depict human remains, (2) the photos depicted the remains of only  
12 certain crash victims, and (3) the photos were not publicly disseminated. This  
13 request is for a merits ruling that contradicts all of the evidence in this case. In  
14 effect, Plaintiff is trying to win the case by way of this motion.

15 Bryant’s claims require her to show public dissemination *by the County* of  
16 photos containing her family members. *Marsh v. County of San Diego*, 680 F.3d  
17 1148 (9th Cir. 2012) (autopsy photos of deceased child sent to the media);  
18 *Catsouras v. Dep’t of Cal. Highway Patrol*, 181 Cal. App. 4th 856 (2010) (crash  
19 photos published on more than 2,500 websites).

20 But because there was *no public dissemination* by the County, Bryant is now  
21 asking for this Court to fill in the blanks and create viable legal claims. This is  
22 drastic, unprecedented and would be clearly erroneous.

23 In the Ninth Circuit, terminating sanctions, as effectively sought here, are  
24 justified only in “extreme circumstances.” *See Halaco Eng’g Co. v. Costle*, 843  
25 F.2d 376, 380 (9th Cir. 1988) (reversing dismissal sanction); *Ahcom, Ltd. v.*  
26 *Smeding*, 2011 WL 3443499, at \*8-9 (N.D. Cal. Aug. 8, 2011) (imposing monetary  
27 sanctions for intentional destruction of evidence *after* litigation began). Such  
28 circumstances exist only where there are deceptive tactics that demonstrate a pattern

1 of disregard for the court or its orders. *Valley Eng'rs, Inc. v. Elec. Eng'g Co.*, 158  
2 F.3d 1051, 1054, 1057 (9th Cir. 1998) (imposing terminating sanctions when  
3 “smoking gun” destroyed after court order to produce); *Anheuser-Busch, Inc. v. Nat.*  
4 *Beverage Distribs.*, 69 F.3d 337, 348-49 (9th Cir. 1995) (finding dismissal  
5 warranted when “a party has engaged deliberately in deceptive practices that  
6 undermine the integrity of judicial proceedings”).

7 Courts have refused to impose terminating sanctions even when a party has  
8 demonstrated a clear intent to actively destroy evidence *after* it has received notice  
9 that such evidence must be preserved for ongoing litigation. *See e.g., In re Hitachi*  
10 *Television Optical Block Cases*, 2011 WL 3563781, at \*17 (S.D. Cal. Aug. 12,  
11 2011) (no sanction imposed despite intentional destruction of evidence with  
12 knowledge of litigation hold); *Advantacare Health Partners v. Access IV*, 2004 WL  
13 1837997, at \*5-7 (N.D. Cal. Aug. 17, 2004) (rejecting terminating sanction even  
14 after defendants destroyed crucial evidence after being served with temporary  
15 restraining order). No such thing happened here.

16 **G. Bryant Has Not Been Prejudiced**

17 Sanctions are also not appropriate unless the moving is party actually  
18 prejudiced. *Reinsdorf*, 296 F.R.D. at 627; Fed. R. Civ. P. 37(e)(1). There must be  
19 “concrete evidence” showing that the allegedly destroyed evidence would have been  
20 favorable to the moving party. *Hamilton v. Signature Flight Support Corp.*, 2005  
21 WL 3481423, at \*8 (N.D. Cal. Dec. 20, 2005) (denying motion for sanctions).  
22 Courts consider (i) whether the moving party has other evidence to prove its case,  
23 and (ii) the extent to which the non-moving party is prejudiced by the missing  
24 evidence. *Toppan Photomasks, Inc. v. Park*, 2014 WL 2567914, at \*9 (N.D. Cal.  
25 May 29, 2014); *Hamilton*, 2005 WL 3481423, at \*8-9.

26 When the moving party fails “to provide any extrinsic evidence that the  
27 subject matter of the lost or destroyed materials would have been unfavorable to [the  
28 spoliator] or would have been relevant to the issues of this lawsuit,” then the claim

1 of prejudice is based on “pure speculation” and sanctions are not warranted.

2 *Hamilton*, 2005 WL 3481423, at \*8 (alteration in original) (citation omitted).

3 Bryant’s argument that deleted photos and upgraded cellphones “could” have shown  
4 relevant evidence is based on “speculation.”

5 Courts do not impose sanctions when the moving party has alternative  
6 evidence available to prove her claim. *See Toppan*, 2014 WL 2567914, at \*9. Here,  
7 Bryant has had every opportunity to prove her case at trial:

- 8 • Bryant has IAB’s 1,140-page report, which contains 41 witness interviews  
9 and IAB’s conclusions and findings. (Dkt. 151-66 ¶ 8 & Ex. R.)
- 10 • Bryant has the entire file for LACFD’s internal investigation. That  
11 includes the forensic examinations of the LACFD-issued devices. (*Id.*)
- 12 • Bryant has taken 40 depositions. (*Id.* ¶ 14.) In each deposition, Bryant  
13 has asked about taking, sharing, and deleting crash site photos.
- 14 • Bryant served over 100 written discovery requests: 9 interrogatories and  
15 50 requests for admission on the County, 45 requests for admission on  
16 LACFD, and 5 requests for admission on LASD. Defendants responded  
with substantive, verified responses. (*Id.* ¶¶ 28-29.)
- 17 • Defendants collected 500,000 documents, reviewed over 150,000 for  
18 relevance, and produced over 35,000 pages to Plaintiff. (*Id.* ¶ 8.)
- 19 • Bryant has Kroll’s reports on its neutral forensic examination of over 29  
20 devices. (*Id.* ¶¶ 10-13 & Exs. C-D.)
- 21 • All Defendants, and even non-defendant witnesses, agreed to the  
22 production of their cellphone records—showing everyone who they called  
and texted during the relevant time period. (*Id.* ¶ 6 & Ex. A.)

23 Bryant’s inability to prove her case has nothing to do with Defendants’  
24 actions. Bryant knows no crash site photos have ever been publicly disseminated by  
25 the County, and she admittedly has never seen crash site photos containing her loved  
26 ones. In response to the question “[s]o you have no knowledge one way or the  
27 other . . . [o]f any photograph of the crash site taken by [LASD or LACFD]  
28 personnel being posted on the internet or given to the media. Is that correct?”,

1 Plaintiff testified, “[y]eah, that’s correct.” (Tokoro Decl. Ex. G [Bryant Dep.  
2 131:15-23].)

3 Bryant cites to one “example” of how she has been prejudiced—Deputy  
4 Russell’s picture messages to his friends. (Plts. Mot. at 18-19.) Bryant argues she  
5 has no way of knowing the content of those messages because Deputy Russell  
6 deleted the texts. (*Id.*) Not true.

7 Bryant could have deposed those friends and requested that they produce the  
8 texts. She chose not to. Deputy Russell also testified at deposition that the picture  
9 messages did not include crash scene photos, but were instead GIFs and memes.  
10 (Dkt. 151-66 Ex. T [Russell Dep. 314:20-318:2].) His cellphone records show that  
11 he sent the same picture messages to his friends before and after the crash, showing  
12 that they were not crash site photos. (*Id.*) And the text chain was produced to  
13 Bryant, which shows the texts had nothing to do with the crash. It’s more  
14 unfounded speculation.

15 Courts also consider whether the party accused of spoliation will suffer  
16 prejudice. For example, one district court held that *both* parties were prejudiced by  
17 the missing footage. *Hamilton*, 2005 WL 3481423, at \*7; *see also McGinnity v.*  
18 *Metro-N. Commuter R.R.*, 183 F.R.D. 58, 63 (D. Conn. 1998) (“[A]ll parties are  
19 equally prejudiced by the absence of the tape recording, which might have  
20 supported plaintiffs’ contention . . . or might have supported defendant’s  
21 position . . .”).

22 Here, if Defendants had the photos and cellphones, they could conclusively  
23 establish that the photos were taken for legitimate reasons by hardworking First  
24 Responders in an extremely challenging situation. The deleted photos and upgraded  
25 phones are just as likely to prove Defendants’ case as they are to prove Bryant’s.

#### 26 **IV. DEFENDANTS’ CONCLUSION**

27 For the foregoing reasons, Plaintiff’s motion should be denied in its entirety.  
28



