FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 01, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

ESTATE OF MARC A. MORENO, by and through its personal representative Miguel Angel Moreno; MIGUEL ANGEL MORENO, individually; and ALICIA MAGANA MENDEZ, individually, Plaintiffs, v. CORRECTIONAL HEALTHCARE COMPANIES, INC.; CORRECT CARE SOLUTIONS, LLC; and ASHLEY CASTANEDA, individually, Defendants.	NO: 4:18-CV-5171-RMP ORDER GRANTING PLAINTIFFS' RULE 37(e) MOTION FOR DEFAULT JUDGMENT

BEFORE THE COURT is Plaintiffs' Rule 37(e) Motion for Default Judgment against Defendants Correct Care Solutions and Correctional Healthcare Companies, ECF No. 96. A telephonic hearing was held on this motion on May 11, 2020. The Court has considered the record, the arguments of counsel, the relevant precedent, and is fully informed.

BACKGROUND

Marc Moreno's Death

Marc Moreno was eighteen years old when he was arrested on March 3, 2016. *See* ECF No. 1 at 2. That day, his family had brought him to the County Crisis Response Unit to receive help for a mental health crisis. ECF No. 122 at 132. Eventually Crisis Response Unit staff called the police to transport Mr. Moreno to the hospital. *Id*. However, seeing that Mr. Moreno had misdemeanor warrants out for his arrest, the police took him to the Benton County Jail instead. *Id*. After he was booked, Mr. Moreno was placed in an isolation cell, which had no bed, toilet, sink, or access to drinking water. ECF No. 122 at 137–39.

In 2016, Benton County Jail contracted with Correct Care Solutions (CCS) to provide healthcare services to inmates. ECF No. 1 at 4. CCS hired and directed nurses to provide medical care for the inmates in Benton County Jail. In 2014, CCS acquired Correctional Healthcare Companies (CHC). ECF No. 97-7 at 6. Both CCS and CHC are named Defendants in this action. In 2018, CCS changed its name to Wellpath. *Id*. at 10.

When Mr. Moreno arrived at the Benton County Jail on March 3, 2016, one CCS nurse checked on him. *See* ECF No. 122 at 135. The nature and purpose of that interaction is disputed. After that, a jail social worker named Anita Vallee would check on Mr. Moreno each weekday morning. *See* ECF No. 122 at 142–146. Ms. Vallee was not employed by CCS. Ms. Valle reported that, during her observation

periods, Mr. Moreno was unable to communicate with her, that he was naked, that he was rolling around on the floor, that he would talk to the wall, and that he would play with his feces. *See id*. Jail staff also reported that Mr. Moreno would cry, pace, crawl around, and talk to the wall. *See* ECF No. 122 at 148–72.

On March 8, 2020, jail staff informed Ms. Vallee that Mr. Moreno had not eaten or ingested fluids for two days. ECF No. 122 at 144. Upon learning this information, Ms. Vallee made a referral to CCS medical staff, which stated, "Per jail staff report, inmate Moreno has not ingested fluids or food for at least the last two days." ECF No. 122 at 59, 176. Vallee asserts that she submitted the referral electronically and placed a hard copy in a designated box in the medical office at the jail. ECF No. 122 at 59. She also instructed jail staff to begin monitoring and recording Mr. Moreno's food and fluid intake. *Id*.

CCS Nurse Ashley Castaneda, who is a Defendant in this action, asserts that she did not see any referral regarding Mr. Moreno until March 10, two days after Ms. Vallee recounts submitting it and seven days after Mr. Moreno was incarcerated on misdemeanor warrants. ECF No. 122 at 14–17. Upon seeing the referral, Ms. Castaneda went to Mr. Moreno's isolation cell to check on him. At that point, Mr. Moreno was lying face down on the floor, naked and singing. ECF No. 122 at 19–20. When Ms. Castaneda checked the record of Mr. Moreno's food and fluid intake, it showed no fluid intake. ECF No. 122 at 21. At that time, it appears from the record that Mr. Moreno had not ingested fluids in four days. *See* ECF No. 122 at 176–81.

However, no steps were taken to provide immediate medical assistance to Mr. Moreno.

Jail staff discovered Mr. Moreno dead in his cell the following day, March 11, 2016. ECF No. 122 at 177. He had died from cardiac arrhythmia and dehydration. ECF No. 122 at 223. Mr. Moreno's autopsy shows that he lost thirty-eight pounds over the course of his eight-day confinement at Benton County Jail. *Id*. Plaintiffs argue that, had Mr. Moreno been taken to an emergency room prior to his death, his life would have been saved. ECF No. 121 at 11.

Plaintiffs' Claims

Plaintiffs in this case are Marc Moreno's parents, Miguel Moreno and Alicia Mendez, as well as the Estate of Marc Moreno, which is represented by Marc's father. Plaintiffs filed a complaint in this Court on October 30, 2018, alleging that Defendants Ashley Castaneda, CHC, and CCS violated Mr. Moreno's constitutional rights, and in so doing, caused his death. Plaintiffs allege that Defendants violated Mr. Moreno's Fourteenth Amendment rights by denying him constitutionally required medical and/or mental health care and treatment and by subjecting him to inhumane conditions of confinement. Additionally, Plaintiffs Miguel Moreno and Alicia Mendez allege that they "suffered the loss of their son's society and companionship, in violation of their own Fourteenth Amendment rights." ECF No. 1 at 25.

Plaintiffs bring their constitutional claims pursuant to 42 U.S.C. § 1983. To succeed on their Section 1983 claims against entity Defendants CCS and CHC, Plaintiffs must prove those claims on a *Monell* theory of liability. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). Under *Monell*, "it is only when execution of [Defendants'] policy or custom inflicts the injury that [Defendant] as an entity is responsible." *Long v. Cty. of L.A.*, 442 F.3d 1178, 1185 (9th Cir. 2006) (citing *Monell*, 436 U.S. at 690). Thus, to be successful on their *Monell* claim against entities CHC and CCS, Plaintiffs must establish that these Defendants had a policy or custom that caused the constitutional violations alleged.

Procedural History and Discovery

On January 4, 2018, prior to filing this lawsuit, Plaintiffs sent a letter to Defendants, notifying Defendants that they were planning to file a lawsuit. ECF No. 98-1. The letter advised CCS and CHC to "preserve all paper and electronic records that may be relevant to our clients' claims" including "all e-mails and other electronic and paper records regardless of where they are maintained." *Id*. at 4. Plaintiffs filed this lawsuit on October 30, 2018. ECF No. 1.

On December 17, 2018, Plaintiffs served discovery requests on CCS and CHC. ECF Nos. 98-2 and 98-3. These included requests for certain categories of ESI, including emails, relevant to Marc Moreno, as well as the entities' policies and practices at the Benton County Jail. *See* ECF No. 98-2 at 3 and ECF No. 98-3 at 3 (both defining "documents and materials" to include emails).

Plaintiffs filed a motion to compel discovery on February 12, 2019. ECF No. 21. On April 4, 2019, Defendants still had not provided full discovery to Plaintiffs, and the Court ordered that Defendants respond to Plaintiffs' discovery requests. The Court ordered Defendants to "provide full and complete responses to Plaintiffs' initial discovery requests within 14 days of the entry of [its] Order." ECF No. 31 at 6.

On May 6, 2019, Plaintiffs were forced to file a second motion to compel because Defendants still had not provided sufficient responses to Plaintiffs' initial discovery requests. *See* ECF No. 35. Shortly after the motion was briefed, but before it was heard, Defendants retained new counsel. ECF No. 63 at 3. Defendants' new counsel provided the majority of the contested discovery before the Plaintiffs' second motion to compel was heard and agreed to provide the remainder at a later date. Accordingly, the Court denied Plaintiffs' second motion to compel as moot. *Id*.

On October 28, 2019, Plaintiffs filed a third motion to compel, arguing that Defendants had not complied with the Court's April 4, 2019 Order, requiring Defendants to provide full discovery responses to Plaintiffs' initial discovery requests. ECF No. 69. In their motion, Plaintiffs argued that Defendants had not provided sufficient ESI. *See id*. at 2–3. The Court granted the motion, ordered Defendants to work with Plaintiffs to come up with a reasonable ESI discovery plan, and issued sanctions against Defendants under Rule 37(b). ECF No. 90 at 13.

Additionally, the Court found that Defendants were in contempt of its April 2019 Order directing them to respond to Plaintiffs' initial discovery requests. *Id*.

Defendants Admit to Email Purge

While Plaintiffs' third motion to compel was pending, on November 22, 2019, the parties filed a stipulation related to discovery, in which Defendants admitted that they had purged emails and that they had deleted the email accounts of relevant former employees after receiving Plaintiffs' discovery requests. ECF No. 79. Defendants conceded that "the purge occurred after a request for preservation of documents was sent . . . , after this lawsuit was filed and served, and after discovery requests were served on Defendants by Plaintiffs." *Id*. The purge occurred before Defendants retained their present counsel. *Id*. The parties agreed that Plaintiffs should be allowed to conduct limited additional discovery, including a Rule 30(b)(6) deposition, related to the email purge. The parties also agreed that "Plaintiffs should be permitted to file a motion under Rule 37(e)" after conducting additional discovery. *Id*. The instant motion is a result of the parties' stipulation and Plaintiffs' additional discovery regarding the email purge.

Plaintiffs Discover Defendants' Mid-Litigation Execution of New Document Retention Policy

Through additional discovery, including the Rule 30(b)(6) deposition of CHC/CCS Chief Information Officer Robert Martin, Plaintiffs confirmed that Defendants destroyed responsive ESI. Defendants destroyed responsive ESI through

a newly implemented document retention policy governing email preservation, which was implemented nationwide during this litigation, beginning in February of 2019. ECF No. 97-7 at 5. Prior to this policy, Defendants had no document retention policy, and all employee and former employee emails were retained indefinitely. ECF No. 97-7 at 10.

Defendants' new document retention policy stores emails for varying periods of time depending on the status of the email. *See* ECF No. 97-7 at 9. For instance, if an employee deletes an email, the new system will archive the deleted email for six months, then destroy it automatically. *Id*. Similarly, the system stores undeleted emails for one year, then erases them automatically. *Id*. If an employee wants to retain an email for longer than one year, the employee must move the email to a special retention folder. *Id*. In that instance, the system will retain the email for five years before purging it. *Id*. Any email that is automatically destroyed is erased permanently. Chief Information Officer Martin testified that, nationwide, Defendants erased millions of emails permanently when they implemented their new policy. ECF No. 97-7 at 18. Additionally, pursuant to the policy, the account of any CHC/CCS employee who had not worked for Defendants for over one year was permanently deleted. ECF No. 97-7 at 15. However, Defendants could prevent the deletion of emails and accounts through the automatic system by placing the relevant employee's account on a litigation hold. ECF No. 97-7 at 9.

Before implementing the new system, Defendants assert that they conferred with outside counsel, to determine which employees' accounts should be placed on litigation holds. ECF No. 97-7 at 17. With respect to this litigation, Defendants reached out to Lee Smart, Defendants' previous attorneys in this matter. ECF No. 97-7 at 7. On January 9, 2019, Defendants sent an email to Lee Smart, which they claim put their attorneys on notice of their new document retention policy. *See* ECF No. 97-9. The letter was sent by Defendants' claims management group, which is led by Director of Claims Management Geri Ashley. *See id*. The letter states, in relevant part:

> Hello Colleague:
>
> Wellpath f/k/a Correct Care Solutions is instituting a new Preservation Process and in order to help us ensure that key information is not being deleted from the preservation process, we are asking that you identify each **open** case in your office. From the open files please provide the following information:
>
> - Name of individual employed parties named in lawsuit (Doctors, nurses, PA etc.). Corp entities are not needed.
> - You should also include individuals not named that could be considered key witnesses in this matter.

ECF No. 97-9 at 2 (emphasis in original). In response to the letter, Mr. McIvor of Lee Smart identified only one employee, Ashley Castaneda, named Defendant in this litigation. ECF No. 97-10 at 2. There is no evidence that Defendants followed up with Mr. McIvor, or provided any additional information about their new email retention policy.

When it came time to execute the new policy, the same litigation group that sent the letter to Lee Smart was responsible for deciding which emails and accounts to purge. ECF No. 97-7 at 12–13. After Lee Smart identified Ashley Castaneda in response to Defendants' email, the litigation group put a litigation hold on Ms. Castaneda's account, saving her emails indefinitely. All other emails and former employee email accounts were then permanently deleted consistent with Defendants' newly implemented policy. These include the emails of 56 employees who worked at the Benton County Jail during the relevant time period, ten of whom worked shifts at the jail while Mr. Moreno was confined there. ECF No. 97 at 7–10.

The fact that the litigation group managed by Ms. Ashley oversaw the email purge is significant, as the same litigation group also was responsible for processing and responding to Plaintiffs' discovery requests in this case. ECF No. 97-7 at 13. In his Rule 30(b)(6) deposition, Defendants' Chief Information Officer, Mr. Martin, explained that Plaintiffs' discovery requests would have been reviewed by the "claims management group, which Geri Ashley was the head of, who would then do the discovery or do the searches of the emails and determine what would be placed on hold." ECF No. 97-7 at 13.

In summary, Defendants deleted an extensive amount of responsive ESI through the implementation of a new document retention policy, long after receiving a letter requesting preservation of evidence and after receiving formal discovery requests from Plaintiffs. The individuals responsible for destroying that ESI were the

same individuals in charge of providing responsive discovery in this case. Even though Defendants implemented their document retention policy in early 2019, Defendants repeatedly reassured the Court and opposing counsel that they would provide the requested ESI. Defendants did not admit the extensive document destruction until November 22, 2019, when the parties filed a joint stipulation in which Defendants finally admitted to the purge. Plaintiffs argue that the document destruction never would have come to light had they not filed their third motion to compel, which highlighted the fact that Defendants had produced suspiciously little ESI.

The Document Retention Policy's Purpose

During his deposition, Mr. Martin was asked why Defendants implemented the new document retention policy. Mr. Martin explained that it was important that the company have uniform policies nationwide surrounding document preservation, which were lacking prior to the policy's creation. ECF No. 97-9 at 14. Additionally, he mentioned that it was very expensive for the company to save employee emails indefinitely, and that the new policy would save money. *Id*.

Mr. Martin also explained that a factor in Defendants' decision to implement the policy was to avoid "discovery risks." *Id*. Plaintiffs' counsel then asked him, "Was it part of the motivation of [Defendants] in early 2019 that there should be a system in place to automatically delete old emails in case, for example, there were any bad emails out there?" ECF No. 97-9 at 14–15. Mr. Martin responded, "I

wouldn't say that was a primary consideration, but it's certainly a consideration." ECF No. 97-9 at 15. Mr. Martin subsequently agreed that the automatic deletion of bad emails was "a factor for sure" in Defendants' decision to implement the new policy. *Id*.

Mr. Martin's deposition excerpt states his answers as follows:

> Q. I mean, prior to early 2019, all emails were retained. What was the problem with that?
>
> A. Well, it's very costly to do. Everything you do is exponentially more difficult when you have such a large number of emails. And the information contained in—in emails can be good or bad, right, depending on many, many factors. So I don't think it's unusual for a business to do that. This is a normal thing businesses do is have policies around document retention and email retention.
>
> Q. Was it part of the motivation of CCS and CHC and Wellpath in early 2019 that there should be a system in place to automatically delete older emails in case, for example, there were any bad emails out there?
>
> A. I wouldn't say that was—
>
> [Objection to Form]
>
> [A]. I wouldn't say that was a primary consideration, but it's certainly a consideration.
>
> []

> Q. And did CHC and CCS and Wellpath take that into account in making the decision to implement that policy in March of 2019?
>
> [Objection to Form]
>
> [A]. It was a factor for sure.

ECF No. 97-9 at 14–15.

DISCUSSION

Rule 37(e)

Plaintiffs seek dispositive sanctions pursuant to Federal Rule of Civil Procedure 37(e), which governs the spoliation of ESI. To issue any sanction under Rule 37(e), a district court must find that three factors are met: (1) the lost ESI "should have been preserved in the anticipation or conduct of litigation"; (2) the ESI was lost "because a party failed to take reasonable steps to preserve it"; and (3) the ESI "cannot be restored or replaced through additional discovery." Fed. R. Civ. P. 37(e*); see also WeRide Corp. v. Kun Huang*, Case No. 5:18-cv-07233-EJD, 2020 WL 1967209, at *12 (N.D. Cal. Apr. 24, 2020). To impose dispositive sanctions under Rule 37(e), the court also must expressly find that the party who destroyed the ESI "acted with the intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2)(C). If the court finds that a party acted with the intent to destroy ESI, it need not find that the party requesting sanctions was

prejudiced by the destruction. *WeRide Corp.*, 2020 WL 1967209, at *9 (quoting *Porter v. City and Cty. of San Francisco*, Case No. 16-cv-03771-CW(DMR), 2018 WL 4215602, at *3 (N.D. Cal. Sept. 5, 2018)).

With respect to the first Rule 37(e) factor, Defendants concede that they failed to preserve ESI by purging emails after the Complaint was filed and while in the middle of discovery. *See* ECF No. 79. Thus, the first Rule 37(e) factor is met. Similarly, Defendants have not contested the second factor, which asks whether Defendants took reasonable steps to preserve the lost ESI. The record in this case supports that Defendants implemented a new document retention policy that destroyed broad swaths of emails, including all of the email accounts of former employees, without taking reasonable steps to preserve emails pertinent to Plaintiffs' claims. Therefore, the Court finds that the second Rule 37(e) factor is met. Finally, because Defendants agree that the emails were permanently deleted and the Court finds that no additional discovery can restore the content of those emails, the Court finds that the third Rule 37(e) factor is met as well. *See* ECF No. 106 at 7.

Defendants do not dispute that sanctions are warranted in this case. *See* ECF No. 106 at 17. However, Defendants argue that the Court may not impose dispositive sanctions under Rule 37(e)(2) because the evidence does not show that they permanently destroyed the emails with the intent to deprive these specific Plaintiffs of their use in this litigation. ECF No. 106 at 11. Rather, they claim that the emails

were destroyed unintentionally, pursuant to Defendants' new document retention policy.

The parties disagree on the definition of "intent" for the purposes of Rule 37(e)(2). The intent requirement was added by the 2015 Amendment to the Federal Rules, and neither the Rule itself nor the Ninth Circuit have provided a definition of "intent" in this context. *See Porter*, 2018 WL 4215602, at *3. However, since the 2015 Amendment was adopted, district courts in the Ninth Circuit "have found that a party's conduct satisfies Rule 37(e)(2)'s intent requirement when the evidence shows or it is reasonable to infer that [the] party purposefully destroyed evidence to avoid its litigation obligations." *WeRide Corp.*, 2020 WL 1967209, at *12 (quoting *Porter*, 2018 WL 4215602 at *3). Thus, in deciding whether Defendants acted with intent, the Court will consider whether it is reasonable to infer that Defendants purposefully destroyed the emails to avoid their litigation obligations.

Defendants maintain that their correspondence with their then-attorneys, Lee Smart, negates a finding of intent in this case. Defendants assert that their email to Lee Smart regarding their new preservation policy reveals that they intended to preserve responsive ESI, rather than destroy it. It is supported that Defendants asked their former attorneys to identify the named Defendants and key witnesses in each open case that they managed for Defendants. *See* ECF No. 97- 9. Additionally, the email to Lee Smart makes clear that Defendants planned to implement a new document retention policy, but without detailing the new policy. *See id*. At the

hearing, Defendants argued that, while they should have dug deeper and followed up with Mr. McIvor of Lee Smart, they relied on this correspondence in good faith in executing their document retention policy.

The Court is not persuaded by this argument. Nowhere in Defendants' email to Lee Smart do Defendants explain the details of the new policy or their true intentions. *See id*. The correspondence with Lee Smart does not mention that Defendants planned to permanently delete the emails of any employee or former employee that Lee Smart failed to identify, nor does it ask any questions about the prudence or legality of such a policy. *See id*. The Court does not find that Defendants' limited correspondence with Lee Smart illustrates good faith, or a lack of intent, on behalf of Defendants.

Additionally, the Lee Smart correspondence is overshadowed by the testimony of Defendants' own Chief Information Officer, who agreed during his deposition that one of the motivating factors behind Defendants' decision to adopt the new email policy was to destroy bad emails that could be produced in discovery. ECF No. 97-9 at 14.

Moreover, Defendants' intentions in this matter are revealed by the actions of the litigation group that implemented the new document retention policy with respect to this case. That litigation group, headed by Ms. Ashley, was the same group overseeing discovery in this case. Based on Mr. Martin's testimony, that group would have been familiar with this case and with Plaintiffs' discovery requests. *See*

ECF No. 97-7 at 13. Nevertheless, the group chose to permanently erase massive amounts of ESI that Plaintiffs had requested or could reasonably be expected to request.

The Court finds that it is reasonable to infer from the actions of the litigation group, in conjunction with Mr. Martin's testimony, that Defendants purposefully destroyed evidence to avoid their litigation obligations. Therefore, the Court rejects Defendants' argument that their limited correspondence with their attorney negates a finding of intent.

Defendants also argue that, because the document retention policy was a nationwide policy, it could not have been applied with the intent to deprive the Moreno family of responsive emails in this specific litigation. However, Defendants' argument implies that if a company undertakes an imprudent and possibly unlawful policy that affects a large number of people that they should be excused from having harmed fewer people. The Court will not allow Defendants to rely on the widespread nature of their document destruction to avoid sanctions in this case.

Mr. Martin testified that Defendants began deleting emails in March of 2019 pursuant to the new policy that was implemented in February of 2019. ECF 97-7 at 13. Therefore, Mr. Martin's deposition supports the conclusion that Defendants implemented a new, sweeping document destruction policy after Defendants had been sent a preservation letter in January of 2018, after Plaintiffs filed this lawsuit in October 2018, after Plaintiffs had promulgated discovery requests, and after Plaintiffs

filed their first motion to compel in February of 2019. The Court rejects the concept that Defendants are immune from dispositive sanctions under Rule 37(e)(2) because they intended to destroy harmful ESI in all of their cases, rather than the harmful destruction that they caused in this particular case.

Even if Rule 37(e)(2) required the Court to conclude that Defendants intended to deprive the Moreno family of evidence, such a finding would be appropriate here. This is not a case where Defendants negligently forgot to stop an automatic document destruction system already in place. Rather, this is a case in which Defendants decided to begin a new document destruction policy in the middle of litigation over a teenager's death. Additionally, as this Court has explained repeatedly, the litigation group that applied the new, nationwide destruction policy to the instant case is the same group of employees that was responsible for providing discovery to the Moreno family. *See* ECF No. 97-7 at 13. Those employees made decisions about what to delete in this case specifically, and they chose to delete everything except the emails of Ashley Castaneda. That decision was based on a new policy that was designed, in part, to avoid the discovery of bad emails in litigation. ECF No. 97-7 at 14–15. The fact that Defendants' new policy applied to all of its sites does not preclude a finding that Defendants destroyed evidence to avoid their litigation obligations in this case.

For the foregoing reasons, the Court finds that Defendants acted with intent, pursuant to Rule 37(e)(2). Thus, the Court may issue terminating sanctions under that rule.

The *Leon* Factors

The Ninth Circuit consistently has reiterated the severity of terminating sanctions for discovery abuse. Accordingly, even if a district court finds that the requisite factors have been met for issuing terminating sanctions, the court still should consider the five factors laid out by the Ninth Circuit in *Leon v. IDX Systems Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). *See Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007). These factors do not provide a "mechanical" test that the district court must exhaust. *Conn. Gen Life Ins. Co.*, 482 F.3d at 1096. Rather, they provide the district court with a framework to analyze what to do when asked to impose terminating sanctions. *Id*. The factors that district courts should consider are: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on the merits; and (5) the availability of less drastic sanctions." *Id*.

First and Second Leon Factors

The Court considers the first two *Leon* factors together, which address "the public's interest in expeditious resolution of litigation" and the Court's "need to manage its dockets." *See id*. This litigation has been hindered significantly by Defendants' failure to provide responsive discovery and their failure to admit in a timely fashion to their destruction of evidence. Although Defendants began their new email policy in February of 2019, the Court was not made aware of Defendants'

email purge until November of 2019. Prior to Defendants' admission that they had engaged in an email purge, Plaintiffs and the Court attempted to compel Defendants to provide the relevant ESI. Moreover, Defendants assured Plaintiffs that they would produce additional emails, without admitting the email purge. ECF No. 96 at 10.

Plaintiffs raised the issue of incomplete discovery responses, including Defendants' failure to produce ESI, in two separate motions to compel, which the Court considered and granted. *See* ECF Nos. 31 and 90. While these two motions did not deal solely with email production, the fact that Defendants had provided so few emails was a source of confusion and concern for months.

Therefore, the Court finds that the first two *Leon* factors, which consider the efficient resolution of litigation and docket management concerns, weigh in favor of dispositive sanctions here.

The Third, Fourth, and Fifth Leon Factors

The Court considers the final three *Leon* factors together because, in this case, they are intertwined. The final three *Leon* factors address, respectively, the risk of prejudice to the party seeking sanctions, the strong public policy favoring disposition of cases on their merits, and the possibility of less severe sanctions. *Conn. Gen. Life Ins. Co.*, 482 F.3d at 1096. The Court finds that these three factors are connected here, as they all require the Court to consider whether a legitimate trial on the merits is possible, considering Defendants' widespread spoliation.

The Ninth Circuit has explained, "In deciding whether to impose case-dispositive sanctions, the most critical factor is not merely delay or docket management concerns, but truth." *Id*. at 1097. In other words, "What is most critical for case-dispositive sanctions, regarding risk of prejudice and of less drastic sanctions, is whether the discovery violations 'threaten to interfere with the rightful decision of the case.'" *Id*. (quoting *Valley Eng'rs v. Electric Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998) (quoting *Adriana Intl. Corp. v. Lewis & Co.*, 913 F.2d 1406, 1412 (9th Cir. 1990))). "Where a party so damages the integrity of the discovery process that there can never be assurance of proceeding on the true facts, a case dispositive sanction may be appropriate." *Id*. Additionally, pursuant to Ninth Circuit precedent, the Court may refuse to impose a less severe sanction if the Court "anticipates continued deceptive misconduct." *Id*.

Mr. Moreno was confined in the Benton County Jail in March of 2016. Defendants' email purge destroyed all employee emails, except those of Ashley Castaneda, that predated March of 2018. These include the emails of nurses and managers who worked shifts at the jail while Mr. Moreno was confined. They include the emails of the employees who conducted Mr. Moreno's mortality review. They include the emails of the nurse who discovered Mr. Moreno dead in his cell. Additionally, as Plaintiffs point out, Defendants terminated the employment of one nurse after Mr. Moreno's death for failing to follow proper procedure. *See* ECF 97-18 at 19. Defendants destroyed that nurse's emails, as well as the emails of her

manager. While nobody can know the information contained in the destroyed emails, the breadth of the destruction is stunning. These emails cannot be reconstructed for Plaintiffs, or the factfinder, to review.

Plaintiffs argue, "The full extent of the damage to [their case] cannot be assessed because it is impossible to know what the destroyed e-mails of . . . dozens of employees contained." ECF No. 96 at 14. At the same time, Plaintiffs maintain that the risk of prejudice to their *Monell* claims is severe. They argue that "the best source of *Monell* evidence were [Defendants'] own employees, and there is no substitute for contemporaneous emails about the customs and practices of [Defendants'] jail employees." ECF No. 96 at 20.

The Court agrees with Plaintiffs' assertion. Had Defendants not destroyed nearly all of their employees' emails from the relevant time period, those emails would have been a key source of information for Plaintiffs' *Monell* claims against Defendants. To succeed on their *Monell* claims, Plaintiffs must establish that Defendants had a policy or practice that caused the constitutional harm alleged. *See Long*, 442 F.3d at 1185 (citing *Monell*, 436 U.S. at 690). Plaintiffs argue that Defendants had multiple policies and practices that caused Mr. Moreno's death in violation of his constitutional rights, such as the failure to adequately train nurses and the failure to sufficiently staff the Benton County Jail. ECF No. 121 at 14. The Court can think of few sources of information that would be more helpful in evaluating a *Monell* claim than the internal communications between Defendants'

employees with respect to Defendants' policies and practices. While the Court cannot speculate as to whether the information contained in the destroyed communications would have bolstered Plaintiffs' case, the Court finds that contemporaneous emails about Defendants' operations and practices, as well as any other emails related to Mr. Moreno's confinement and subsequent death, would have been invaluable to Plaintiffs as they shaped their case theory and engaged in discovery. Additionally, the communications almost certainly would have been useful for the examination of defense witnesses, both during depositions and at trial.

Defendants argue that default judgment is too severe of a remedy and that the prejudice to Plaintiffs can be cured through lesser sanctions. ECF No. 106 at 18. Defendants maintain that Plaintiffs are not prejudiced significantly by the spoliation. *Id*. at 19. Defendants also argue that the deleted emails would have been more helpful to Defendants than to Plaintiffs, but Defendants provide no evidence to support that argument. *Id*. Additionally, Defendants claim that "there is no reason to believe that any lost emails would bear on causation, i.e. that a deliberately indifferent training program was the cause of Mr. Moreno's death." *Id*. at 20. These arguments are speculative and offensive to the integrity of the judicial system, which requires an exchange of information for a neutral factfinder to consider before arriving at a conclusion. Accordingly, the Court rejects the argument that Defendants can destroy a startling amount of discovery while litigation is ongoing, then defend against discovery sanctions by arguing that the spoliation likely benefited

Plaintiffs. For the reasons stated above, the Court finds that Plaintiffs face a serious risk of prejudice. Thus, the third *Leon* factor weighs heavily in favor of dispositive sanctions.

The Court acknowledges that the Fourth *Leon* factor, which considers the strong public policy of deciding cases on their merits, typically weighs against dispositive sanctions. However, Defendants' destruction of countless email communications between its employees in this case "threaten[s] to interfere with the rightful decision of the case" such that a trial on the merits of Plaintiffs' *Monell* claim no longer is possible. *See Valley Eng'rs v. Electric Eng'g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998) (quoting *Adriana Intl. Corp. v. Lewis & Co.*, 913 F.2d 1406, 1412 (9th Cir. 1990)). Therefore, the fourth *Leon* factor does not weigh heavily against dispositive sanctions here.

For the same reason, namely Defendants' obstruction of the truth through the permanent deletion of countless emails, the Court finds that it cannot craft a lesser sanction that would effectively remedy the risk of prejudice to Plaintiffs. For instance, the Court has considered the lesser sanction permitted under Rule 37(e) of a jury instruction requiring the jury to presume that the destroyed emails were unfavorable to Defendants. However, due to the significance of the erased emails to Plaintiffs' *Monell* claims, the breadth of information covered by those emails, and the potential that the content of those emails would have helped Plaintiffs much more than a presumption, a jury instruction is insufficient to remedy the risk of prejudice to

Plaintiffs. The Court agrees with Plaintiffs' assertion that, unlike cases where specific documents were destroyed, it is not feasible to draft an instruction that conveys or remedies the scope of the harm that Defendants have caused here. Thus, the fifth and final *Leon* factor weighs in favor of terminating sanctions.

The Court further finds that dispositive sanctions are appropriate given Defendants' "continued deceptive misconduct" throughout this litigation. *See Conn. Gen. Life Ins. Co.*, 482 F.3d at 1097. Defendants repeatedly failed to provide responsive discovery to Plaintiffs, even after being compelled to do so by this Court, such that the Court found Defendants in contempt of its April 2019 Order. ECF No. 90 at 14. Similarly, Defendants failed to notify Plaintiffs and the Court of the spoliation for approximately eight months while this litigation was ongoing. Rather than telling Plaintiffs or the Court what had occurred, Defendants misled Plaintiffs by promising to provide responsive emails at a later date. Due to the way that Defendants have conducted themselves over the course of this litigation, the Court finds that lesser sanctions are not warranted.

Upon consideration of Rule 37(e)(2) and the Ninth Circuit's *Leon* factors, the Court concludes that dispositive sanctions as to Plaintiffs' Section 1983 claims against CHC and CCS are appropriate here. The only claims that Plaintiffs have asserted against Defendants CHC and CCS are Section 1983 claims for violating the Fourteenth Amendment rights of Mr. Moreno and his parents. ECF No. 1 at 25. Therefore, the dispositive sanctions identified in this Order apply to those claims.

In the alternative, the Court issues these sanctions pursuant to its inherent power to levy sanctions in response to abusive litigation practices. *See Leon*, 464 F.3d at 958. To issue dispositive sanctions under its inherent power, the Court must find that Defendants acted willfully, in addition to considering the *Leon* factors. *Id*. at 959. "A party's destruction of evidence qualifies as willful spoliation if the party has 'some notice that the documents were potentially relevant to the litigation before they were destroyed.'" *Id*. (quoting *United States v. Kitsap Physicians Serv*., 314 F.3d 995, 1001 (9th Cir. 2002)). For the reasons described above, the Court finds that Defendants had notice that their employees' emails were potentially relevant to this litigation prior to destroying them. Thus, in the alternative, the Court issues these sanctions pursuant to its inherent power. *See id*. at 958.

Accordingly, **IT IS HEREBY ORDERED**:

1. Plaintiffs' Rule 37(e) Motion for Default Judgment, **ECF No. 96**, is **GRANTED**.
2. Pursuant to the Court's reasoning *supra*, Defendants' Motion for Partial Summary Judgment, **ECF No. 104**, which seeks the dismissal of Plaintiffs' *Monell* claims against Defendants Correctional Healthcare Companies, Inc. and Correct Care Solutions, LLC, is **DENIED AS MOOT**.
3. Judgment shall be entered as to liability against Defendants Correctional Healthcare Companies, Inc. and Correct Care Solutions, LLC, on Plaintiffs' Section 1983 claims. The Court makes no finding as to whether all

Plaintiffs have standing to pursue these claims. That issue has not been briefed or presented to the Court.

4. This matter will proceed to trial pursuant to the present case schedule for a determination of damages against Correctional Healthcare Companies, Inc. and Correct Care Solutions, LLC.

5. This matter also will proceed to trial pursuant to the present case schedule for a determination of liability and damages as to Defendant Ashley Castaneda.

IT IS SO ORDERED. The District Court Clerk is directed to enter this Order, enter judgment consistent with this Order, and provide copies to counsel.

DATED June 1, 2020.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
United States District Judge