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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THE ESTATE OF CINDY LOU HILL, by and through its personal representative, Joseph A. Grube; and CYNTHIA METSKER, individually, Plaintiffs, vs. NAPHCARE, INC, an Alabama corporation; HANNAH GUBITZ, individually; and SPOKANE COUNTY, a political subdivision of the State of Washington, Defendants.	No. 2:20-cv-00410-RMP PLAINTIFFS' RULE 37(e) MOTION FOR DEFAULT JUDGMENT AND OTHER SANCTIONS AGAINST DEFENDANT SPOKANE COUNTY FOR SPOLIATION OF EVIDENCE February 7, 2022 Without Oral Argument

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I. INTRODUCTION & RELIEF REQUESTED

In this jail death case, Defendant Spokane County admits sanctioning the destruction of nearly an entire day's worth of crucial video surveillance evidence. The destroyed video was central to Plaintiffs' claims—indeed, it may have been decisive against the County and its co-defendants. The County admits it was fully aware litigation was likely when it permitted the video's destruction. It admits it had ample chance to preserve the footage but consciously chose to allow its erasure. It admits the video was deleted despite a known preservation obligation. It admits the video cannot be restored or replaced and that there is no substitute for it. It admits the destruction was inappropriate and without good reason.

For these reasons, Plaintiffs move for terminating sanctions against Spokane County under Federal Rule of Civil Procedure 37(e) and the Court's inherent power. Moreover, because the spoliation has impaired Plaintiffs' punitive damages case against the County's co-defendants (who themselves were innocent in the spoliation), Plaintiffs move for monetary sanctions against the County.

II. STATEMENT OF FACTS

This action concerns the August 25, 2018 death of Cindy Hill in the Spokane County Jail. Plaintiffs allege that Ms. Hill, a 55-year-old pretrial detainee, was allowed to languish for an entire day—alone, unmonitored, and without care—after complaining of severe abdominal pain caused by a perforation in her upper bowel. Her condition was treatable and correctable with medical care. But she got no care

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and died of this condition on the floor of her jail cell—despite a written order that she be monitored in person, twice hourly, all day.

The defendants are (1) Spokane County, which operates the jail through its Department of Detention Services; (2) NaphCare, Inc., a private, for-profit correctional healthcare corporation that contracts with the County to provide medical services to inmates and detainees at the jail; and (3) Hannah Gubitz, RN, a former NaphCare employee and the only medical person who saw Ms. Hill on the day of her death—before she was found unresponsive.

A. Cindy Hill's Detention Leading Up to August 25, 2018

Cindy Hill was booked in the Spokane County Jail as a pretrial detainee on Tuesday, August 21, 2018. Ex. A (Rept. of L. Roscoe, Ph.D.) at 4.[1] The next day, after Ms. Hill told a nurse she used heroin, she was placed on a protocol known as COWS (Clinical Opiate Withdrawal Scale). *Id*. at 4-5. COWS assessments over the next few days documented no severe withdrawal symptoms. *Id*.

B. The Morning of August 25: Ms. Hill Reports Severe Abdominal Pain

At about 8:45 a.m. on August 25, NaphCare employee Hannah Gubitz, RN, came to Ms. Hill's cell for a routine COWS assessment. Ex. B (Gubitz dep.) at 106:1-17. At the time of this visit, Ms. Hill was housed in a general population cell numbered 3W04. *Id*. at 150:3-6. When the nurse arrived at Ms. Hill's cell, it was immediately evident that Ms. Hill was suffering excruciating abdominal pain. She lay on the cell floor, naked from the waist up. *Id*. at 108:24-109:8. She told

[1] All cited exhibits are attached to the declaration of Edwin S. Budge.

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Defendant Gubitz she was "too sick to move." *Id*. at 109:9-18. Because she could not come to the cell door under her own power, and because Defendant Gubitz did not want to enter the cell without an additional officer, Ms. Hill's cellmate "roll[ed] her in a blanket and drag[ged] her" towards the threshold of the cell door to be assessed. *Id*. at 109:19-110:10. After being dragged nearer to the cell door, Ms. Hill "lay next to the toilet screaming." *Id*. at 111:5-13. Her cellmate told Defendant Gubitz that Ms. Hill had been suffering from "severe abdominal pain" and suggested it was likely her appendix. *Id*. at 114:7-14. Ms. Hill lay "curled in a fetal position" on the floor. *Id*. at 116:1-9. When the nurse attempted to gently touch her abdomen and back, Ms. Hill "screamed in pain." *Id*. at 124:20-25. Defendant Gubitz did not believe Ms. Hill was exaggerating or faking her symptoms. *Id*. at 61:17-25. Nor did she doubt that Ms. Hill felt too sick to move. *Id*. at 109:14-18. Although Defendant Gubitz did not document the time of this encounter at Cell 3W04, video surveillance from the hall outside the cell shows it occurred between 8:43 and 8:48 a.m. *Id*. at 154:24-155:10.

C. Defendant Gubitz Orders That Ms. Hill Be Moved to a Different Cell in Another Wing and Places Her on 30-Minute "Medical Watch."

Despite the potential seriousness of Ms. Hill's condition, her limited ability to assess her patient, and her inability to diagnose the cause of the pain, Defendant Gubitz did not consult with or alert any other medical person or arrange for hospital transport. Ex. B (Gubitz dep.) at 62:9-14; 84:9-11; 24:6-13; 20:5-23:3. Instead, she directed corrections officers to move Ms. Hill to another part of the jail known as 2-West, where she would be assigned to a solitary cell and placed on a 30-minute

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"medical watch." *Id*. at 167:22-169:17. A chart note states that Ms. Hill was "placed on 30-minute medical watch for severe abdominal pain and having to be dragged to door by cellmate to be assessed." Ex. C. Video surveillance from the hall outside Cell 3W04 shows jail staff removing Ms. Hill from Cell 3W04 and placing her in a wheelchair *en route* to 2-West at 9:08 a.m. Ex. B (Gubitz dep.) at 155:11-156:13.

At 9:30 a.m., Defendant Gubitz completed a special form instructing jail staff to initiate "30-minute medical watch" at Ms. Hill's new location in 2-West—a cell numbered 2W27. *Id*. at 167:16-168:17; Ex. D. The form instructed officers to monitor Ms. Hill every 30 minutes and gave examples of "important changes to report to medical." Ex. D. Because no device monitored the inside of Cell 2W27, officers needed to physically visit the cell to see Ms. Hill or communicate with her at each of the required checks. *See*, *e.g*., Ex. E (Dep. of T. Titchenal) at 34:1-36:4; Ex. F (Dep. of T. Byington) at 20:16-22; Ex. G (Dep. of J. Wirth) at 22:24-23:4.

Ms. Hill remained confined alone in Cell 2W27 for the next approximately eight hours. At 5:24 p.m., an officer found her lying unresponsive on the cell floor. Ex. A at 7; Ex. H (Dep. of M. Milholland at 38:21-39:17). She was taken to the hospital and pronounced dead at 6:31 p.m. Ex. A (Roscoe Rept.) at 7.

The cause of Ms. Hill's death was overwhelming sepsis from a perforation in her duodenum that allowed her bowel contents to leak into her abdominal cavity. Ex. I (Rept. of S. Schubl, M.D.) at 2; Ex. J (Rept. of A. Barnett, M.D.) at 5. This was a treatable condition, and Ms. Hill likely would have survived had she been sent to the hospital any time before she became unresponsive late in the day. Ex. I at 6-7; Ex. J at 8. Due to the perforation and the caustic contents leaking inside her, Ms.

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Hill would have been in "severe, constant and irrevocably worsening" pain during the entire day in Cell 2W27. Ex. I at 5. Her pain that day would have been "among the most painful things a human being can experience," and it would only have increased until she lost consciousness and died. *Id*. at 7. *See also* Ex. J at 6.

In her deposition, Defendant Gubitz explained why she transferred Ms. Hill to 2-West on the morning of August 25, why she ordered 30-minute medical watch, and what she expected the jail staff to do at each 30-minute cell visit. She explained that "the medical watch cells on 2 West are used for patients who need[] acute medical monitoring." Ex. B (Gubitz Dep.) at 169:24-170:8. By initiating 30-minute medical watch, Defendant Gubitz expected that jail staff would visit Cell 2W27 every 30 minutes to monitor Ms. Hill for abdominal pain, nausea, or vomiting. Gubitz Dep. at 176:20-23; 177:2-17. She expected not only that they would visually assess Ms. Hill but also that they would verbally interact with her and pay heed to her pain. *Id*. at 178:2-23; 179:8-12. She felt the officers were "qualified to appropriately and carefully watch patients for signs and symptoms of medical distress" and that they would regularly interact with and question Ms. Hill about her state of health during their twice-hourly visits to Cell 2W27. *Id*. at 180:12-181:1.

Defendant Gubitz expected that officers would spend 30-60 seconds during each required visit to 2W27 to determine whether Ms. Hill was doing better or worse or staying the same. *Id*. at 181:2-14. It was her understanding that jail staff were trained "to closely and carefully monitor the inmate patients up on medical watch." *Id*. at 181:24-182:2. Indeed, when she moved Ms. Hill to 2-West, Defendant Gubitz claims to have "specifically instructed" corrections staff that Ms. Hill was

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suffering from abdominal pain and "that she should be checked on for worsening abdominal pain throughout the course of the day." *Id*. at 185:21-186:8. When she initiated the watch, she told the officer in charge of 2-West that staff should look for any change in Ms. Hill's health, including changes in consciousness. *Id*. at 64:9-65:21. She expected the officers would be the "eyes and ears" of medical staff. *Id*. at 186:9-16. She asserts that she would not have put Ms. Hill on medical watch unless she felt she would be "closely, regularly and thoroughly monitored by guards who were appropriately trained on how to do medical watch." *Id*. at 187:22-188:5.

At the heart of this case is what happened (or did not happen) between the time Ms. Hill was placed on medical watch at 9:30 a.m. and time she was discovered unresponsive on the cell floor at 5:24 p.m. It is undisputed that Ms. Hill received no medical treatment or care throughout her approximately eight-hour stay in Cell 2W27. This begs multiple questions: What monitoring, if any, *did* Ms. Hill receive in Cell 2W27 between 9:30 a.m. and 5:24 p.m.? Given her severe pain at 8:45 a.m., given that she would have been in unrelenting and worsening pain throughout the day, and given that she died in her cell from the condition that was causing the pain, why did she languish all day with no care when she was supposed to be carefully checked twice hourly? Did anyone check her? If they did, did they do so regularly? If any checks occurred, did the officers look carefully at Ms. Hill and interact with her? Or were the checks (if any) just perfunctory glances through the cell window lasting only a few seconds?

Plaintiffs have long believed that the 30-minute checks jail staff were *supposed* to conduct either (1) did not happen at all, or (2) were merely passing

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glances through the window of Cell 2W27—just long enough for officers to note on a posted log that they had been to the door. Indeed, the 30-Minute watch log initiated by Defendant Gubitz, which was posted outside Cell 2W27, contains eleven cryptic entries by jail staff written during the day, between 10:15 a.m. and 3:20 p.m. Ex. D. But the entries contain zero information about Ms. Hill's condition other than the guards' perceptions about whether she was awake or asleep. *Id*.

It is undisputed that no person with medical training saw Ms. Hill while she was on "medical watch," with one *alleged* exception: Defendant Gubitz insists that she came to Cell 2W27 at an uncertain time that afternoon and that Ms. Hill supposedly "refused" to be assessed. Ex. B (Gubitz Dep.) at 192:22-194:12. In her deposition, Defendant Gubitz estimated that this alleged encounter (which, other than her encounter at 8:45 a.m., would have been the only other time she saw Ms. Hill before she was found unresponsive) took place in the mid-afternoon—likely around 3:00 p.m. *Id*. at 193:19-195:8. However, Plaintiffs believe Defendant Gubitz is not being truthful and that this alleged encounter did not actually occur.

To begin, the only charted information about the alleged encounter consists of twelve words in a note made by Defendant Gubitz more than an hour after the alleged 3:00 p.m. visit in which she did not document the time of the claimed visit and stated only: "Patient refused assessment. No [signs/symptoms] of distress noted. CO Janke present." Ex. K at 3.[2] But Defendant Gubitz admitted in her deposition that governing policy, on which she was trained, mandated that any refusal of care

[2] The timestamp is in central time. The local time of the entry was 4:10 p.m.

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be documented in a special refusal form signed by Ms. Hill or witnessed by another. Ex. B (Gubitz Dep.) at 230:12-234:11. Defendant Gubitz claims she was "usually very good" about complying with this policy "the vast majority of time." *Id*. at 281:11-282:2. However, there is no refusal form for the alleged encounter—an anomaly for which Defendant Gubitz has no explanation. *Id*. at 234:12-22.

Moreover, although the only official mention of Defendant Gubitz's alleged encounter at 2W27 is the 12-word entry described above, the next day—*after* she learned of Ms. Hill's death—Defendant Gubitz sent an e-mail to her Napchare supervisors, describing the alleged encounter in much greater detail:

> In the afternoon I saw her with Justin CMA and CO Janke between 2 and 3. There was no vomit, blood, urine, diarrhea, or bodily fluids to be seen on the bunk, floor, or toilet in her cell. Her cell was the cleanest I have seen a cell in some time. She was laying on her right side on the bunk with her back against the wall when we arrived and her legs were moving. I asked her if she would like to be checked for detox at that time. She indicated she did want to be checked and sat up some in bed. She sat up enough that I was able to make eye contact with her. Her skin tone to her face, arms, legs were normal for her ethnicity with no redness, swelling, or color change noticeable from the door. While I could not see her pupils up close, her eyes were tracking between CO Janke and I at the door while we spoke with her. She was responsive and forthcoming and was not screaming at all during this conversation. She made a comment that her stomach still hurt and then said she didn't want to be checked and laid back down. As she appeared in no acute or immediate distress we ended the conversation and assessment.

Ex. L. In her deposition, Nurse Gubitz added even more detail, claiming that this encounter included opening Ms. Hill's cell door and conversing with her—with Ms. Hill supposedly stating that she was feeling "a little bit sick to her stomach" but otherwise "fine" and calmly and coherently declining the nurse's offer of "a full head-to-toe assessment." Ex. B (Gubitz dep.) at 203:22-206:16; 206:24-207:22.

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According to Plaintiffs' medical expert, Defendant Gubitz's post-death description of the alleged encounter is "medically impossible." He explains:

> RN Gubitz notes that when she appeared at [Cindy Hill's] cell for the second visit, she called CH's name and CH "sat up" from a lying position in her bed. This is physically impossible for someone with the kind of abdominal peritonitis that CH had. Her abdomen would have been entirely rigid, and any even very slight movement of her abdominal muscles would have caused incredible amounts of pain. There is no way CH was able to "sit up" without assistance. Additionally, there is nothing about a perforated viscus that allows for the pain to be relapsing/remitting. It is severe, constant and irrevocably worsening until the patient loses consciousness from shock or dies. The idea that at the morning assessment she was screaming in pain and in the afternoon, CH was complaining of "feeling a little sick to her stomach" is also impossible.

Ex. I (Rept. of S. Schubl, M.D.) at 5. *See also id.* at 7 (explaining medical impossibility of Defendant Gubitz's description). Even NaphCare's own physician (the company's Chief Medical Officer at the time) testified that she would not expect a patient with Ms. Hill's condition—who died from this condition 2-3 hours after the claimed visit—to appear as Defendant Gubitz described and that she would expect her to be very sick, in pain, and unable to sit up and engage in calm conversation. Ex. M (Dep. of E. Feely, M.D.) at 96:12-99:21.

In addition to the fact that Defendant Gubitz's description of her afternoon encounter with Ms. Hill is medically impossible, neither of the two people she claims was with her, CMA Justin Rogers and jail officer Brett Janke, can corroborate the visit. Officer Janke testified that he had no memory of such an encounter and that he would have remembered it and documented it if it took place. Ex. N (Dep. of B. Janke) at 22:17-23:2. CMA Rogers likewise has no recall of the alleged encounter. Ex. O (Dep. of J. Rogers) at 19:9-18.

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C. Plaintiffs Seek Production of Video Surveillance of Cell 2W27

The key to answering the questions at the crux of this case lies in the review of video surveillance evidence. The County has video cameras installed throughout the jail, continuously recording activity (and the absence of activity) in jail hallways. This includes a camera that regularly records activity in the hallway directly outside Cell 2W27. By inspecting that video footage, anyone would be able to answer the crucial questions: Who came (or did not come) to Cell 2W27 during the day on August 25? How many visits occurred, if any? What time did the visits, if any, occur? How long did any such visit last? And what does the video show anyone doing while they were at the cell door (e.g., opening it, peering through the glass, speaking through the communication slot, etc.)?

To gain the pivotal video footage, Plaintiffs issued the following requests for production to Spokane County at the outset of this litigation:

> Request for Production No. 8: Produce all video footage showing Cindy Lou Hill or showing the outside of any cells in which she was confined.
>
> Request for Production No. 9: Produce all video footage showing cell 2W27 (the cell in which Cindy Hill was housed on the day of her death) as well as all video footage showing the hallway and exterior of her cell from the moment she was confined there on the morning of August 25, 2018 until her body was removed from the jail.

Ex. P. The County did not object to the requests. Budge Decl., at ¶ 19.

Unaccountably, however—even though Ms. Hill was confined in Cell 2W27 from shortly after 9:00 a.m. until being found unresponsive at 5:24 p.m.—the County produced only limited video excerpts from that period. *Id.* The produced portions included a short segment from the morning when Ms. Hill was first moved

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to Cell 2W27 (before the medical watch was even initiated) and another segment beginning at 4:00 p.m. and running until 6:30 p.m.—after Ms. Hill was taken unresponsive to the hospital. *Id*. The County did not produce *any* video for the 6-hour-and-45-minute period between 9:15 a.m. and 4:00 p.m.—the period during which *every* 30-minute check by jail officers, as well as Defendant Gubitz's afternoon visit, allegedly occurred. *Id*. In other words, the missing 6-hour-and-45-minute segment was the very segment bearing on whether Ms. Hill was actually monitored as claimed and, if so, for how long, when, how, and by whom.

D. The Rule 30(b)(6) Deposition of Spokane County on the Missing Video

After confirming that the missing video could not be produced, Plaintiffs set a Rule 30(b)(6) deposition of the County on the subject of the missing footage. Ex. Q. The County designated the administrative lieutenant of Spokane County Detention Services, Don Hooper, as its Rule 30(b)(6) representative. Lt. Hooper testified on July 21, 2021. *See* Ex. R (Dep. of Lt. Don Hooper). In his deposition, Lt. Hooper admitted that the crucial six hours and 45 minutes of missing video footage was spoliated by the County—and much more. Lt. Hooper explained, *inter alia*:

1) As of August 25, 2018, the jail had a video camera pointed down the hallway that runs along the outside of Cell 2W27. It regularly recorded footage of all activity outside that cell. Ex. R at 49:4-17; 50:23-51:11.

2) The recorded footage would show whether any person came to Cell 2W27, who that person was, whether they paused or stopped in front of the cell, the time of day they came, and anyone else who was present. The footage would permit anyone to verify whether any check occurred, who did the check, and the length of the check. *Id*. at 50:23-53:20; 54:13-55:13.

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3) As of August 25, 2018, all jail video footage was automatically preserved for 60 days without any extra or additional effort. *Id*. at 21:25-22:24; 23:7-12. This included video of the hallway outside Cell 2W27. *Id*. at 49:18-23; 70:9-17.

4) The system was designed so the video footage would be overwritten after 60 days. *Id*. at 22:13-16. However, after any significant event, including a death, the footage could—and normally would—be saved to a disc for permanent preservation. *Id*. at 23:19-24:14; 25:7-15; 25:23-25; 37:7-14; 44:8-14.

5) Spokane County Detention Services (SCDS) "knew it had an in-custody death on its hands, namely the death of Cindy Hill," by at least the early evening of August 25, 2018. *Id*. at 32:1-5. As of August 25, all surveillance video from the entirety of that day existed and could be permanently preserved during a 60-day window. *Id*. at 32:6-20. SCDS knew, as of Ms. Hill's death, that it was obligated to preserve evidence relating to her confinement. *Id*. at 45:6-12.

6) From the moment it knew it had an in-custody death on its hands, SCDS "had at least 60 days to choose what portions of the video to preserve and, conversely, what video to destroy or allow to be destroyed." *Id*. at 32:21-33:2.

7) As of the date of Ms. Hill's death, SCDS knew that her death (1) would likely be investigated by law enforcement; (2) might well result in public records requests by family members; and (3) was reasonably likely to result in civil litigation. *Id*. at 60:10-61:20; 41:17-21.

8) Within a day or two of Ms. Hill's death, Lt. Hooper's normal procedure would have included informing county risk management and preserving materials relating to Ms. Hill's confinement. *Id*. at 39:19-41:3; 45:13-17.

9) Lt. Hooper was aware, shortly after her death, that Ms. Hill had been housed in Cell 2W27 "under circumstances where she was supposed to be on 30-minute medical watch" throughout the day. *Id*. at 47:18-48:15. Within a day or two of her death, Lt. Hooper was aware of the medical watch form containing the handwritten entries of jail officers who were supposed to be checking Ms. Hill. *Id*. at 48:2-7. When he became aware of the circumstances of her confinement, all "video footage from [Ms.] Hill's last day still exist[ed] and [was] capable of permanent preservation" for at least 60 days. *Id*. at 48:16-49:3.

10) SCDS knew how to permanently preserve the video, and it was a relatively easy process to do so. *Id*. at 63:18-64:8.

11) SCDS chose to preserve video footage of Defendant Gubitz's morning encounter with Ms. Hill at Cell 3W04—an encounter that was already well documented in Ms. Hill's medical chart. Budge Decl., ¶ 20. It also chose to

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preserve limited portions of the hallway surveillance video outside Cell 2W27. Specifically, the County chose to preserve 32 minutes of video between 8:43 a.m. and 9:15 a.m. (most of which is before Ms. Hill even came to the cell) and approximately 2 ½ hours of the same video between 4:00 p.m. and 6:30 p.m. (including significant portions after Ms. Hill was taken to the hospital). *Id*. at 70:2-8; 70:23-71:4.

12) Conversely, SCDS chose to allow the *destruction* of *all* portions of hallway surveillance video between 9:15 a.m. and 4:00 p.m.—the period covering *all* of the alleged 30-minute checks by jail officers *and* the critical alleged afternoon visit by Defendant Gubitz. *Id*. 71:5-13.

13) The 6-hour-and-45-minute span of deleted video has been permanently destroyed and cannot be restored or replaced. *Id*. at 71:14-21.

14) There is no person who can testify what the 6-hour-and-45-minute span of destroyed video revealed; nor did SCDS create any written record—such as a timeline, series of screenshots, notes, or any other documentation—to show what the 6-hour-and-45-minute span revealed. *Id*. at 74:8-21.

15) It "was a conscious choice by Spokane County Detention Services" to permit the destruction of the portions of video that were not preserved, and SCDS knew the destruction would be permanent. *Id*. at 66:11-67:1.

16) It would have been possible, with relatively minimal effort, for SCDS to preserve the entire day of hallway surveillance video instead of allowing the vast majority of it to be destroyed. *Id*. at 72:16-24.

17) In light of SCDS's decision to permit the destruction the 6-hour-and-45-minute span, it is no longer possible to verify (1) whether *any* of the claimed eleven checks that were recorded in handwriting by officers actually occurred; (2) anything about the nature or duration of the alleged checks; or (3) if any other person, including any member of NaphCare staff, did nor did not come to Cell 2W27 between the hours of 9:15 a.m. and 4:00 p.m. *Id.* at 71:22-72:15.

18) Spokane County has no explanation for permitting the destruction of the 6-hour-and-45-minute span. *Id*. at 73:11-21; 62:13-19; 63:14-17; 74:22-75:1.

D. The Deposition of the Director of Spokane County Detention Services

To further explore the spoliation, Plaintiff deposed the Director of Spokane County Detention Services, Michael Sparber. He confirmed the following:

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1) SCDS anticipates litigation from *all* inmate deaths. Ex. S (Sparber Dep.) at 32:4-33:6.

2) As of the date of Cindy Hill's death, SCDS "fully unders[stood] that given the possibility of litigation it was obligated to preserve *all* written and electronically stored information pertaining to [Ms. Hill] in its possession, custody or control." *Id*. at 33:7-13 (emphasis added). *See also id*. at 34:21-35:2.

3) As of August 25, 2018, the "usual and ongoing understanding and custom was that Spokane County Detention Services would preserve for purposes of civil litigation all written and electronically stored information, including videos, pertaining to the confinement of a deceased inmate." *Id*. at 35:6-15.

4) The only way to verify whether Ms. Hill was monitored as required would be to look at video that the County chose to destroy. *Id*. at 59:22-60:18.

5) It was not appropriate, and there was no good reason, to allow the destruction of the 6-hour-and-45-minute span. *Id*. at 60:19-61:21; 62:2-9.

The resulting harm to Plaintiffs cannot be quantified because it's impossible to know what the destroyed video showed. It might have shown that staff did not check Ms. Hill at all. It might have shown that only some of the claimed checks occurred. It might have shown that the claimed checks were cursory and inadequate. It might have proven that Defendant Gubitz did not visit Cell 2W27 as she claims. It might have shown that, if she did, she was only there for seconds and never opened the cell door. In sum, the video might have bolstered Plaintiffs' liability case significantly or proven it definitively—particularly if it revealed that Defendant Gubitz and/or the officers were untruthful in their documentation or testimony. Further, the video might have significantly strengthened the punitive damages claims against Defendants Gubitz and NaphCare—a form of damages that are not allowed against the County as a matter of Section 1983 law (as discussed below).

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Notably, it is not just Plaintiffs who have been potentially harmed. Defendant Gubitz testified that, with the video, she could answer questions in her own potential defense that she cannot otherwise substantiate. These would include when she came to Cell 2W27, who she was with, how long she stayed, whether she opened the cell door or just looked in from the outside, and others. Ex. B (Gubitz dep.) at 213:17-215:7. Defendant Gubitz agreed that "in order to shed light on these questions that we can't exactly answer, [she] would like to be able to see the video surveillance showing the hallway outside 2 West 27 on that afternoon." *Id*. at 214:16-22.

III. ARGUMENT AND AUTHORITY

Spoliation is the destruction of evidence, or the failure to preserve evidence, for pending or future litigation. *Univ. Acctg. Serv., LLC v. Schulton*, No. 3:18-cv-1486, 2019 U.S. Dist. LEXIS 96062, at *2 (D. Or. June 7, 2019). Spoliation does not depend on the presence of existing litigation. Rather, "[t]he obligation to preserve relevant evidence attaches when litigation is pending *or reasonably foreseeable*." *Musse v. King Co*., No. C18-1736-JCC, 2021 U.S. Dist. LEXIS 195221, at *5 (W.D. Wash., Oct. 8, 2021) (internal quotation marks omitted) (emphasis added). "[T]here is no question that the duty to preserve relevant evidence may arise even before litigation is formally commenced." *Apple v. Samsung Elecs. Co*., 888 F. Supp.2d 976, 990 (N.D. Calif. 2012). The duty to preserve evidence is triggered whenever a party foresaw, or should have foreseen, the reasonable possibility of litigation. *Id*. at 990-91 (citing multiple cases).

A district court can impose spoliation sanctions under Rule 37(e) or pursuant to its inherent power. *Musse, supra*, 2021 U.S. Dist. LEXIS at *3-4; *Estate of*

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Moreno v. Correctional Healthcare Cos., No. 4:18-cv-5171-RMP, 2020 U.S. Dist. LEXIS 108370, at *31 (E.D. Wash. June 1, 2020). Rule 37(e), as amended in 2015, codifies the consequences if a litigant fails to preserve electronically stored information in anticipation of litigation and gives the Court broad remedial authority, including entry of a default judgment. Under Rule 37(e), the duty to preserve electronic data is defined very broadly to include all discoverable evidence. *Brewer v. Leprino Foods*, No. 1:16-1091, 2019 U.S. Dist. LEXIS 14194, at *26 (E.D. Cal. Jan 29, 2019) (citing *Leon v. IDX Sys., Corp.*, 464 F.3d 951, 959 (9th Cir. 2006)). With spoliation motions, the standard of proof is the preponderance of evidence. *OmniGen Research, LLC v. Wang*, 321 F.R.D. 367, 372 (D. Or. 2017).

Under Rule 37(e), a finding of intentional non-preservation eliminates any requirement that the moving party show prejudice to be entitled to a default judgment. *OmniGen*, 321 F.R.D. at 371-72. This is because the destruction makes it impossible for the spoliation victim to prove the consequences of what was lost. *Id*.

"Intent" is not defined in Rule 37(e). Courts applying Rule 37(e) rely on the willfulness standard set out in *Leon v. IDX Sys., Corp.*, 464 F.3d 951 (9th Cir. 2006). Under this standard, "[a] party's destruction of evidence qualifies as willful if the party has 'some notice that the documents were potentially relevant to litigation before they were destroyed.'" *OmniGen*, 321 F.R.D. 321 at 371 (quoting *Leon*, 464 F.3d at 959). *See also HP Tuners, LLC v. Sykes-Bonnett*, No. 3:17-cv-05760, 2019 U.S. Dist. LEXIS 175748, at *10 (W.D. Wash. Sept. 16, 2019). In cases involving the automatic overwriting of jail surveillance video, the failure to preserve footage after an incident—knowing that non-preserved portions will be overwritten after 60

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days—is the equivalent of culpable destruction. *Musse*, 2021 U.S. Dist. LEXIS 195221 at *9-10 (finding county "acted culpably and committed spoliation" when it failed to preserve jail video on 60-day overwrite schedule).

Here, there is no reasonable dispute that the County intentionally permitted the destruction of six hours and 45 minutes of highly relevant video. The County acknowledges that it knew, immediately after Ms. Hill's death, that litigation was reasonably likely. The County knew the circumstances of her confinement, the fact that she was on a watch schedule in a special cell, and the importance of the destroyed segments. The County had the means, method, and time to easily preserve the video (indeed, it preserved segments before and after the relevant time) and knew that any portions not preserved would be permanently lost. The County understood its obligation to preserve all video, yet it consciously allowed the destruction of the portion that matters most. It kept no record of what the erased video revealed, has no witness to testify what was on the video, cannot offer any exculpatory explanation, and acknowledges the inappropriateness of the destruction.

In considering the appropriate sanctions under Rule 37(e), the Court should consider five factors: (1) the public's interest in expeditious resolution of the litigation; (2) the Court's need to manage its docket; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions. *See HP Tuners*, 2019 U.S. Dist. LEXIS 175748, at *12-13 (citing *Leon*, 464 F.3d at 958-59). In this case, the first and second factors are neutral. The third, fourth, and fifth factors, however, weigh heavily in favor of terminating sanctions against the County.

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A. The Court Should Enter a Default Judgment Against Spokane County.

The "risk of prejudice" to Plaintiffs, and the "public policy favoring disposition of cases on their merits," both strongly support dispositive sanctions. Video recordings are uniquely powerful pieces of evidence that create an "irrefutable record of what occurred" and can "lay to rest disagreements that would otherwise remain unresolved." *Floyd v. City of New York*, 959 F. Supp. 2d 668, 685 n. 65 (S.D.N.Y. 2013). The "prejudicial *risk"* to Plaintiffs here is enormous. In large part, Plaintiffs' liability case centers on the inference that because Ms. Hill's pain would have been severe, unrelenting, worsening, and obvious, the claimed checks must not have occurred or must have been so cursory as to be meaningless. Yet Defendants claim that Ms. Hill *was* checked and that she was in no apparent distress. While this strains credulity, the destroyed video could have shown, beyond doubt, that Plaintiffs' theory is correct—and that Defendant Gubitz and others are not telling the truth. For the same reason, the County's destruction of the video has permanently thwarted the "public policy favoring disposition of cases on their merits." The video would have been the best evidence for the jury to decide the case on its merits. Without it, the jury will be left to wonder what it *would* have shown.

As to the fifth and final factor, the only sanction short of default would be an instruction requiring the jury to presume the evidence was unfavorable. This remedy is untenable under the unique circumstances of this case for this simple reason: there is no instruction that can fairly cure the prejudice to Plaintiffs and, *at the same time*, not unfairly punish the County's co-defendants—Defendant Gubitz and NaphCare—who were not guilty of spoliation. Simply put, the County's spoliation

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may have grossly prejudiced Plaintiffs' case against Defendants Gubitz and NaphCare just as it has against the County. To be adequate, any instruction would have to direct presumptions against Defendants Gubitz and NaphCare. Yet, neither of them was culpable in the spoliation. There is no middle ground to cure the harm to Plaintiffs without impairing the defense of parties innocent to the spoliation.

Even setting aside the above quandary, an instruction could fall well short of remedying the harm to Plaintiffs. Plaintiffs' experts have been deprived of the video. Plaintiffs were deprived of the video's use in fifteen depositions of County and NaphCare witnesses. Budge Decl., ¶ 25-26. And there is no substitute for the visual impact of video—which is the ultimate form of impeachment and proof. It would be unfeasible to craft an instruction that adequately remedies the potential harm caused by the theft of nearly seven hours of visual evidence. Thus, even setting aside the fact that no instruction can be fair to both Plaintiffs and the County's co-defendants, an instruction could give Plaintiffs far less than the video itself might have provided.

B. The Court Should Impose Monetary Sanctions for Impairing Plaintiffs' Punitive Damages Case Against Defendants Gubitz and Naphcare.

Under Rule 37(e) and the Court's inherent power, the Court may also impose monetary sanctions against a spoliator, "calibrated in terms of their effect on the particular case." *Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, No. 14-1926, 2016 U.S. Dist. LEXIS 184932, at *79-80 (C.D. Calif. July 12, 2016). *See also Amamark Mgmt. v. Borgquist*, No. 18-cv-01888, 2021 U.S. Dist. LEXIS 45569, at *70 (C.D. Cal. Jan. 27, 2021) (citing multiple cases).

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Under the distinct scenario of this case, not even a default judgment against the County—with a trial against it for compensatory damages—will sufficiently remedy the spoliation. This is because the County's spoliation may have enfeebled Plaintiffs' punitive damages claim against Defendants Gubitz and NaphCare—a form of damages not legally available against the County. *Stearns-Groseclose v. Chelan Co. Sheriff's Dept.*, No. 04-1312, 2006 U.S. Dist. LEXIS 4496, at *45 (E.D. Wash. Jan. 13, 2006) (citing *City of Newport v. Fact Concerns, Inc.*, 453 U.S. 247, 271 (1981)). In other words, the County's spoliation has likely impaired Plaintiffs' claims against its co-defendants for damages that might be very substantial and for which the County cannot itself be liable as a matter of Section 1983 law. Thus, *even with* default against the County, *even with* trial against the County for compensatory damages, and *even with* trial against Defendants Gubitz and NaphCare for punitive damages, there is still a significant risk that Plaintiffs' case is impaired.

The only way to remedy this is through substantial monetary sanctions against the County, calibrated to the risk caused by the loss of the punitive damages evidence. Therefore, Plaintiffs request that the Court, in addition to entering a default judgment, order monetary sanctions against the County—in a just and equitable amount to be determined through later briefing and/or hearing.

IV. CONCLUSION

For the reasons stated above, a default judgment should be entered against Spokane County with an order awarding monetary sanctions against the County in an amount to be determined after additional briefing and/or hearing.

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Respectfully submitted this 17th day of December, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the date stated below this document was filed with the Clerk of the Court for the United States District Court for the Eastern District of Washington, via the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

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