Budge & Heipt, PLLC
808 E. Roy St.
Seattle, WA 98102
(206) 624-3060

The Trejo Law Firm, Inc.
701 N. First St., Suite 100
Yakima, WA 98901
(509) 452-7777

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

THE ESTATE OF MARC A. MORENO, by and through its personal representative, Miguel Angel Moreno; MIGUEL ANGEL MORENO, individually; and ALICIA MAGAÑA MENDEZ, individually, Plaintiffs, vs. CORRECTIONAL HEALTHCARE COMPANIES, INC.; CORRECT CARE SOLUTIONS, LLC; and ASHLEY CASTANEDA, individually, Defendants.	No. 18-cv-05171-RMP PLAINTIFFS' RULE 37(e) MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANTS CORRECTIONAL HEALTHCARE COMPANIES, INC. AND CORRECT CARE SOLUTIONS, LLC FOR SPOLIATION OF EVIDENCE April 23, 2020 Without oral argument

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

I. INTRODUCTION

Defendants Correctional Healthcare Companies, Inc. (CHC) and Correct Care Solutions, LLC (CCS) recently confessed to destroying large amounts of discoverable evidence. CHC/CCS destroyed the evidence on purpose. They destroyed it permanently, so it is not recoverable. They did so after receiving a written preservation demand, after this litigation began, and in the face of pending discovery requests that called for the evidence they then destroyed. One motive for the destruction was to avoid "discovery risk" from the possibility of unfavorable evidence. And CHC/CCS only admitted to the destruction after Plaintiffs spent nearly a year persistently pursuing the evidence and seven months after the Court ordered it produced. CHC/CCS's audacious spoliation implicates this Court's power under Fed. R. Civ. P. 37(e) to order terminating sanctions.

II. RELIEF REQUESTED

Plaintiffs request that the Court enter judgment against CHC and CCS.

III. STATEMENT OF FACTS

On April 1, 2014, CHC contracted with Benton County to provide healthcare services at the Benton County Jail. *See* Decl. of Edwin S. Budge, Ex. A. The contract ran from at least April 1, 2014 until March 31, 2017. *Id*. After the contract began, CHC combined with CCS. ECF 1 at ¶¶ 7-8; Dep. of R. Martin at 12:2-4 (Budge Decl., Ex. G). For the balance of the contract, CHC/CCS provided on-site healthcare for inmates at the jail and employed the nurses and other healthcare professionals working there. ECF 1 at ¶ 8; Balson Decl., ¶¶ 27-28; Exs. 17, 18.

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

As alleged in the Complaint, 18-year-old Marc Moreno was taken to the Benton County Jail and confined there as a pretrial detainee beginning on March 3, 2016. For the next eight days, leading up to his death on March 11, Mr. Moreno was isolated in a "safety cell" near the jail's booking area. During his eight-day lockup, his healthcare needs were the responsibility of CHC/CCS and their employed healthcare workers. Plaintiffs allege that Mr. Moreno died from dehydration caused by the failure of CHC/CCS and their on-site medical workers to secure proper medical care for him. *See generally* ECF 1 at ¶¶ 15-38.

A. Plaintiffs' Pretrial Demand for Preservation of Evidence

About eleven months before filing suit, on January 4, 2018, Plaintiffs' counsel sent a letter to prospective defendants, including counsel for CHC/CCS: Craig McIvor of the Lee Smart law firm. *See* Balson Decl., Ex. 1. The letter notified the prospective defendants that Plaintiffs were preparing to file a federal civil rights lawsuit and invited a pre-filing mediation. *See id.* The letter's conclusion advised the prospective defendants "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" on various topics relating to Mr. Moreno, as well as e-mails and records concerning policies, procedures, protocols, investigations, inspections, reviews, training, budget data, mental health services, and communications about healthcare at the jail. *Id.*

B. Plaintiffs File and Serve this Lawsuit

In May of 2018, the prospective parties mediated. Balson Decl., ¶ 4. At mediation, Plaintiffs reached a pre-filing settlement with Benton County. *Id.*

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

However, no settlement was reached with CHC/CCS. Accordingly, on October 30, 2018, Plaintiffs filed this lawsuit under 42 U.S.C. § 1983 against CHC/CCS (as well as its employee Ashley Castaneda), alleging violations of Mr. Moreno's Fourteenth Amendment rights leading up to and surrounding his death. *See* ECF 1. Plaintiffs served CHC/CCS with the lawsuit on November 16, 2018. *See* ECF 5, 7. Nine days after being served, CHC/CCS formally appeared through the same counsel to whom the preservation letter was previously sent. *See* ECF 8.

Plaintiffs' 26-page complaint described the events during the eight-day period between Mr. Moreno's arrival at the jail and his death. *See generally* ECF 1 at ¶¶ 15-38. It alleged that CHC/CCS medical personnel—including Defendant Ashley Castaneda—were aware of Mr. Moreno's dire medical needs but that they failed to take constitutionally-required action to address them. *See id*. at ¶¶ 34-36.

The complaint further alleged that the failure to secure constitutionally adequate medical care for Mr. Moreno was part of a constitutionally deficient pattern and practice, giving rise to corporate liability against CHC/CCS under § 1983. These included allegations regarding CHC/CCS's deficient health care customs and practices, a pattern of failing to properly monitor and address inmates' needs, failing to adequately train and supervise personnel, failing to ensure adequate communication among health care staff and others, understaffing, and other allegations supporting *Monell* liability. *See generally* ECF 1 at ¶¶ 45-48.

During the 2014-17 contract period, CHC/CCS employed at least 57 different healthcare workers on site at the jail. *See* Balson Decl., at ¶ 27; Ex. 17. CHC/CCS's on-site workforce included licensed practical nurses, registered

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

nurses, health services administrators, medical assistants, and at least one doctor. *Id*. Regarding Plaintiffs' myriad *Monell* allegations—patterns, practices, and customs before and after Mr. Moreno's confinement and death—any of these individuals might have communicated via e-mail with one another, with off-site CHC/CCS managers, and/or with others regarding relevant concerns.

During the *specific* eight-day period of Mr. Moreno's March 2016 confinement, at least eleven separate CHC/CCS healthcare employees were working shifts on-site at the Benton County Jail. Balson Decl., ¶ 28; Ex. 18. These employees, who were stationed in offices near the cell where Mr. Moreno was isolated 24/7, would be a natural source of information about facts surrounding his day-by-day deterioration and need for higher level care, as well as the *Monell* allegations against CHC/CCS generally. Many would have routinely passed Mr. Moreno's windowed segregation cell and communicated with one another and/or with CHC/CCS management. And all of them, like the nearly 50 *other* CHC/CCCS employees who worked on-site at the jail before and after Mr. Moreno's confinement, were overseen by CHC/CCS's off-site Regional Manager and Director of Operations who, in turn, reported to upper-level CHC/CCS management. *See* Declaration of Linda Gerhke, ECF 76 at 17 ¶ 2.[1]

An employee roster produced by CHC/CCS shows that by the spring of 2017, CHC/CCS terminated *all but one* of the 57 employees who worked at the jail during the contract period. *See* Balson Decl., Exs. 17 & 18. Thus, as of 2018, there

---

[1] In the 2015-16 timeframe, CCS operated at about 400 facilities across the country. Dep. of L. Gehrke at 42:12-19 (Ex. R to Budge Decl.).

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

were 56 *former* CHC/CCS on-site employees who might have used e-mail during the contract period to communicate about *Monell*-related issues generally. Eleven of these former employees worked at the jail during the days of Mr. Moreno's confinement and might have used e-mail to communicate about Mr. Moreno specifically. In addition, off-site CHC/CCS employees, like the regional manager, oversaw Benton County Jail operations and attended a mortality review into the facts surrounding Mr. Moreno's death. Budge Decl., ¶ 17, Ex. L.

C. Plaintiffs Serve Discovery Requests on CHC and CCS

On December 17, 2018, immediately following the parties' Rule 26(f) conference, Plaintiffs served discovery requests on CHC and CCS. *See* Balson Decl., at ¶ 6; Exs. 2 & 3. Plaintiffs' requests defined "documents and materials" to cover all electronic data, "including the contents of e-mails," backups and "information stored in, or accessible through, computer or other information retrieval systems." *Id.* Plaintiffs demanded, *inter alia*, "all documents and materials that mention, reference, or relate to Marc A. Moreno, including . . . e-mails . . . or any other printed or electronically stored information." *See id.* (RFP 1). Plaintiffs requested all investigative materials relating to Mr. Moreno's confinement and any inquiry into the circumstances surrounding his death. *See id.* (RFP 2). Plaintiffs asked for all materials relating to mortality reviews, morbidity reports, and similar audits or reviews into Mr. Moreno's death. *See id.* (RFP 7)

Plaintiffs also demanded information relevant to the *Monell* allegations, including materials reflecting training, guidance, practices, policies, customs, and standards concerning inmate medical care at the jail generally. *See id.* (RFP 3, 11).

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

Plaintiffs sought information regarding formal or informal grievances or complaints that people at the jail were not provided with appropriate healthcare during the contract period. *See id.* (RFP 16). Plaintiffs requested materials pertaining to prospective risk-management analysis about inmate deaths, information regarding quality improvement, and information that might reflect financial motives for failing to properly care for inmates. *See id.* (RFPs 16, 19, 20 & 25). Moreover, in a Joint Status Report, filed January 8, 2019, Plaintiffs advised Defendants of their intent to pursue further discovery, and the parties agreed to "use good faith in negotiating terms for the production of ESI [Electronically Stored Information], including the form of production and the methods for locating responsive records" moving forward in the case. ECF 15 at p. 4.

D. CHC/CCS Fail to Respond to Discovery—Resulting in a Motion to Compel and a Court Order Deeming Objections Waived and Requiring Full and Complete Responses

CHC and CCS failed to respond to Plaintiffs' discovery requests despite numerous entreaties by Plaintiffs' counsel. Balson Decl., ¶¶ 7-14. On February 12, 2019, Plaintiffs were forced to file a Motion to Compel Discovery against CHC and CCS. ECF 21. The motion was supported by a declaration from Plaintiffs' counsel, which explained that CHC/CCS produced no discovery, made no objections, and that their counsel repeatedly ignored inquiries about their failure to respond. *See* ECF 21-1. The Court granted Plaintiffs' motion to compel, deemed most objections waived, and ordered "full and complete responses." ECF 31.

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

E. CHC/CCS Secretly Destroy Discoverable E-Mails

Starting in February of 2019 and irreversibly executed in early March (at the same time Plaintiffs' motion to compel was pending)—*but entirely unbeknownst to Plaintiffs*[2]—CHC/CCS permanently wiped out all e-mails and all backups of such e-mails from the accounts of almost every former CHC/CCS employee who worked at the jail, ***regardless of their relevance to this litigation or pending discovery requests***. Because the employment of 57 CHC/CCS employees working at the jail during the contract period ended by the spring of 2017, this wholesale eradication of discoverable e-mails necessarily included the e-mails of every RN, LPN, and CMA employed by CHC and CCS at the jail, as well as the two Health Services Administrators and even the on-site CHC/CCS physician—no matter the topic of the e-mail or its responsiveness to pending discovery. The only exception to this was a narrow hold placed on individual-defendant Ashley Castaneda's e-mail account.[3] Moreover, CHC/CCS permanently wiped all e-mails and all backups of e-mails (regardless of employment status) that were old enough to have covered the eight-day period of Mr. Moreno's jail confinement and the Benton County Jail contract generally. Thus, even if off-site managers remained employed with CHC/CCS in early 2019, any of their e-mails from the contract period and for Mr. Moreno's confinement period were destroyed by CHC/CCS.

---

[2] Balson Decl., ¶¶ 29, 30; Budge Decl.,¶ 6.

[3] *See* Decl. of R. Strickland (ECF 76 at 10-11 ¶ 5); Rule 30(b)(6) Dep. of R. Martin at 13:25-14:3; 41:20-42:25 (attached as Ex. G to Budge Decl.).

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

The fact, timing, breadth, and depth of this astonishing purge was only revealed to Plaintiffs' counsel at 9:42 p.m. on November 12, 2019 when existing counsel for CHC/CCS,[4] faced with an imminent response deadline to Plaintiffs' *third* motion to compel, provided Plaintiffs' counsel with a sworn declaration from an Information Technology Security Manager who has "worked at Wellpath/CHC/CCS for the past 10 years approximately."[5] The declaration of IT Security Manager Richard Strickland, served on Plaintiffs' counsel on the evening of November 12th and filed at 11:50 p.m. that same night, states, in pertinent part:

> Starting in February 2019, the email account of every employee whose employment ended prior to this date, and whose account was not placed on a legal hold, was permanently wiped from the Wellpath Email System including the ("Storage Area Network") system . . . . Backup emails of each such account of a former employee not placed on a legal hold were also permanently purged from the Wellpath SAN as of February 2019. As such, unless there was an existing legal hold in place with Wellpath in February 2019, all email accounts relating to former employees were permanently purged from the Wellpath Email System and Backups located on the SAN.
>
> To my knowledge, based on my review of the Wellpath Email System, the only legal hold placed on an employee who worked at the Benton County Jail in March 2016 related to Ashley Castaneda . . . .
>
> All emails of current Wellpath employees older than 12 months are also permanently purged from the Wellpath Email System and cannot be recovered electronically through backups or forensic recovery methods.

---

[4] Existing counsel appeared for CHC/CCS in May 2019 and former counsel for CHC/CCS withdrew at that time. ECF 48, 49, 56.

[5] "Wellpath" is simply the new name for CHC/CCS. *See, e.g.,* Budge Decl., at Ex. G at 10:14-19; 12:8-11; 27:15-28:14 (excerpts from CHC/CCS Rule 30(b)(6) designee R. Martin); Budge Decl. ¶ 7, Ex. D.

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

> Prior to February 2019, emails dating back several years were stored in our Email System or Commvault backups. To my knowledge, all e-mails of prior Wellpath/CCS/CHC employees not placed on legal hold were permanently purged from this system and are also not recoverable as of February 2019.

Decl. of Richard Strickland (ECF 76 at 10-11 ¶¶ 4-7).

F. CHC/CCS Keep the Purge Secret, Give Misleading Discovery Responses, and Repeatedly Assure Plaintiffs' Counsel that E-Mails Will be Produced

Not knowing that CHC/CCS had carried out a *sub rosa* purge, Plaintiffs' counsel spent much of the spring, summer, and fall of 2019 trying to understand why CHC/CCS was not producing e-mails and endeavoring to force their production. CHC/CCS kept Plaintiffs in the dark about their purge and assured Plaintiffs' counsel that e-mail production was just around the corner—failing to reveal that the emails had earlier been destroyed.[6] Plaintiffs' efforts to gain production of e-mails after the Court's April 9, 2019 order included the following:

1) On May 2nd, Plaintiffs' counsel conferred with defense counsel about the lack of e-mail production in response to the Court's April 9th order and wrote a letter on the subject of e-mails and other discovery that had not been produced. Budge Decl., ¶ 4, Ex. B.

2) On May 20th, Plaintiffs issued a detailed and precise interrogatory to CHC/CCS requesting that CHC/CCS explain with specificity the steps they took to locate all e-mails. Balson Decl., ¶ 18, Ex. 8.

---

[6] Plaintiffs do not contend that current counsel for CHC/CCS countenanced the purge, were involved with it, knew of the purge until recently, or intentionally misled Plaintiffs' counsel. It may well be that their clients misled them or did not communicate the fact of the purge to them until recently.

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

3) On June 19th, CHC/CCS answered that email accounts "for all current and former employees were searched" for the term "Moreno" and that "[a]dditional information is currently being pursued." Balson Decl., Ex 8.

4) On June 20th, Plaintiffs' counsel wrote to defense counsel about their commitment to pursue additional information concerning e-mail production and received a response advising that "after exhausting all search efforts, there is no additional responsive information." Budge Decl., ¶ 5, Ex. C.

5) On June 25th Defendants supplemented their answer concerning the scope of e-mail searches stating that "[n]o additional responsive information could be located." Balson Decl., ¶ 19, Ex. 9.

6) On July 3rd, after obtaining public records from Benton County showing that county officials were e-mailing CHC/CCS before Mr. Moreno's death to express concerns about nursing competency, failing to follow procedures, understaffing, and "making mistakes and putting the Benton County Sheriff's Office in a position of liability from a medical standpoint," Plaintiffs issued a new request to CHC/CCS for "all e-mails . . . . pertaining to CHC's and/or CCS's compliance with its contractual obligations at the Benton County Jail between April 1, 2014 and March 31, 2017." Balson Decl., ¶ 21, Ex. 11.

7) On August 7th, CHC/CCS responded that they "do not possess" the requested information. Balson Decl., ¶ 21, Ex. 12.

8) On August 14th, Plaintiffs' counsel wrote to defense counsel explaining that the former CHC/CCS Health Services Administrator at the jail testified in her deposition to writing highly relevant e-mails to CHC/CCS management on topics relevant to *Monell* liability and urged defense counsel, "Please produce these responsive e-mails." Balson Decl., ¶ 23, Ex 14 at p. 2.

9) On three occasions from late August to mid-September 2019, Plaintiffs' counsel conferred with defense counsel about the lack of e-mail production and was told that the issue was being addressed by an IT professional and that CHC/CCS expected to produce responsive e-mails. Balson Decl., ¶¶ 24-25, Exs. 15, 16. Plaintiffs' counsel confirmed these exchanges in writing, including the assurances from CHC/CCS that the matter of e-mail production was being addressed by CHC/CCS. Balson Decl., Exs. 15, 16.

Eventually, it became clear that Plaintiffs' efforts were for naught, thus necessitating a third motion to compel (ECF 69). *Yet, throughout this entire period*

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

of time, Plaintiffs' counsel was never informed of the earlier purge. Balson Decl., ¶¶ 25, 29-30; Budge Decl., ¶ 6. CHC/CCS only came clean on the night of November 12th when an imminent response deadline to Plaintiffs' third motion to compel forced them to confess their purge of e-mails eight months earlier.

F. CHC/CCS's (30)(b)(6) Representative (1) Confirms the Breadth, Depth, and Timing of the Purge, (2) Admits to the Destruction of Potentially Relevant Evidence, and (3) Admits that a Primary Purpose was to Avoid "Discovery Risk" of Unfavorable E-Mails

Due to the admitted discovery violations by CHC/CCS, Plaintiffs gained leave to conduct discovery about CHC/CCS's spoliation. *See* ECF 80 (granting stipulation regarding Fed. R. Civ. P. 37(e) Issues (ECF 79)). On December 19th, Plaintiffs deposed CHC/CCS's Rule 30(b)(6) designee—their Tennessee-based Chief Information Officer, Robert Martin. In his deposition Mr. Martin acknowledged the staggering breadth and depth of the purge, admitted to the destruction of potentially relevant evidence, and conceded that a motivating factor was to eliminate the possibility of unfavorable e-mails and lessen "discovery risk."

Mr. Martin's full 30(b)(6) transcript is provided herewith. *See* Budge Decl., Ex. G. His testimony confirms, *inter alia*:

1) As of early 2019, CHC/CCS/Wellpath collectively possessed *all* e-mails of all current and former employees, including those of every CHC/CCS employee during the relevant contract period and during the days of Mr. Moreno's confinement. Martin Dep. at 23:23-24:3; 26:2-7; 29:3-13; 31:22-32:2; 38:17-24; 39:19-23; 53:19-54:10; 54:17-19.

2) In March of 2019, CHC/CCS/Wellpath executed a calculated, deliberate, and permanent *nationwide* purge of millions of e-mails. *See id*. at 23:23-26:12; 27:3-9; 43:19-44:8; 58:24-59:18.

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

3) The purge was guided by upper-level in-house legal counsel for CHC/CCS/Wellpath. *Id*. at 35:14-36:2; 82:17-83:2.

4) Termed a new "retention policy," it was actually a new *eradication* policy partly motivated by a general desire to get rid of potentially unfavorable e-mails and thereby lessen "discovery risk." *See id*. at 23:23-24:17; 26:2-12; 39:10-18; 43:19-44:8; 44:23-46:14. When asked whether CHC/CCS and Wellpath took into account the desire to get rid of e-mails that might be "bad," Mr. Martin responded that "it's certainly a consideration" and that "[i]t was a factor for sure." *Id*. at 45:14-46:14.

5) When asked, "Do you acknowledge that beginning in February 2019 that e-mails with potential relevance to this lawsuit were permanently deleted by Wellpath?" Mr. Martin stated, "I do." *Id*. at 6:18-22.

6) CHC/CCS/Wellpath's plan called for (and resulted in) the permanent deletion of e-mails from current or former employees more than one year old ***regardless of their substance or relevance to pending discovery*** unless CHC/CCS/Wellpath decided to place a particular person's e-mail on litigation hold. *Id*. at 23:23-26:12; 39:10-18; 41:20-42:25; 72:12-23; 75:15-23.

7) Based on a letter from Lee Smart, dated January 16, 2019, CHC/CCS/Wellpath determined that the only "key witnesses" in this case were Ashley Castaneda and a non-CHC/CCS employee (Anita Vallee). Thus, in this case, *only* Ms. Castaneda's e-mails were exempted from destruction; the e-mails of all former and current employees old enough to cover the contract period and the period of Mr. Moreno's confinement were destroyed regardless of their responsiveness to discovery. *Id*. at 13:16-14:3; 14:10-20; 15:15-17:2; 18:13-19:8; 19:21-20:14; 23:23-26:12; 41:20-42:25; 67:9-71:18; 72:12-23. *See also*, Budge Decl., Exs. I & J.

8) Documents produced in connection with the Rule 30(b)(6) deposition further confirm this: of the 57 employees working at the Benton County Jail during the contract period—including all eleven employees working during the eight days of Mr. Moreno's confinement—the e-mails of all but Ms. Castaneda were destroyed in early 2019 along with e-mails of off-site CHC/CCS managers with responsibility concerning the Benton County Jail and others. Budge Decl., ¶¶ 11-14, Ex. H; Balson Decl., Exs. 17 & 18.

9) CCS/CHC/Wellpath's in-house Director of Claims, the person who made the decision to retain only the e-mails of Ashley Castaneda, was also the person

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

who ran the in-house group that would have received Plaintiffs' December 17, 2018 discovery requests. Martin Dep. at 35:2-11; 37:19-38:16.

10) The destruction of e-mails included all attachments to e-mails—again, regardless of substance or subject matter. *Id*. at 72:12-23; 77:2-6; 78:5-11.

11) Wellpath is legally defending CCS/CHC and Ms. Castaneda. *Id*. at 34:10-18.

The full extent of the damage to Plaintiffs cannot be assessed because it is impossible to know what the destroyed e-mails of these dozens of employees contained. At a minimum, we know that CHC/CCS eradicated all e-mails relating to Mr. Moreno (other than those of Defendant Castaneda) between and among CHC/CCS's on-site employees and others—whether contemporaneous with his confinement or whether post-death. In-and-of itself, this is jaw-dropping. But CHC/CCS also permanently destroyed all e-mails between and among CHC/CCS on-site staff and others containing information about jail understaffing, substandard practices, patterns of failing to follow jail medical policies, lack of training, and/or other topics directly relevant to *Monell* liability.

Indeed, among *known witnesses alone*, CHC/CCS destroyed the e-mails of its former regional manager Linda Gehrke even though she participated in a mortality review concerning Mr. Moreno's death, was involved in decisions about his care prior to his death, terminated a CCS nurse after his death for failing to follow policies and procedures, and had concerns about *Monell*-related issues relating to understaffing and training. Budge Decl., ¶¶ 17-18, 22; Exs. L, M, H, R. Ms. Gehrke admitted in her deposition that e-mail was used for nurse training, daily communications with upper-level management about frustrations at the jail, and possibly regarding her investigation into Mr. Moreno's death and to express

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

staffing concerns. Budge Decl., Ex. R (Gehrke Dep.) at 18:10-19:2; 38:10-39:25; 86:3-23; 105:17-23; 106:2-6. CHC/CCS also destroyed the e-mails of the terminated nurse—the same nurse who saw Mr. Moreno when he first came into the jail, who worked shifts (largely as the only RN on duty) during the week of his confinement, and who observed him dead in his cell. *Id*., ¶ 18, Exs. M, H. CHC/CCS destroyed the e-mails of the on-site Health Services Administrator, who also participated in the mortality review following Mr. Moreno's death and who admitted to writing relevant e-mails. *Id*. at ¶ 19, Exs. N, H, L. CHC/CCS destroyed the e-mails of its only on-site physician, identified by Defendant Castaneda as having instructed her to "continue to monitor" Mr. Moreno the day before he was discovered dead. *Id*. at ¶ 20, Exs. O, H. CHC/CCS destroyed any e-mails that might bear on an undated letter by an unknown author contained in Defendant Castaneda's personnel file complaining that the "CCS medical staff at the Benton County Jail have been struggling to provide appropriate, safe, and efficient medical services" and warning of a "very obvious downward spiral in our attempts to provide the medical services required." *Id*. at ¶ 16, Ex. K. CHC/CCS destroyed the e-mails of another nurse who discovered Mr. Moreno deceased in his cell. *Id*. at ¶ 21, Ex. Q. And these are just several witnesses among the dozens whose e-mails were indisputably subject to Plaintiffs' retention demand and discovery requests.

IV. ARGUMENT

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence, in pending or future litigation." *Univ. Accounting Serv., LLC v. Schulton,* No. 3:18-cv-1486, 2019 U.S. Dist. LEXIS 96062, at *2 (D. Or., June 7, 2019) (internal quotation omitted).

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

Fed. R. Civ. P. 37(e), as amended in 2015, codifies the consequences if a litigant destroys or fails to preserve electronically stored information:

> FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon a finding of prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

In the context of Rule 37(e), the duty to preserve electronic data is "defined very broadly" and extends to all such information reasonably calculated to lead to the discovery of admissible evidence. *Brewer v. Leprino Foods*, No. 1:16-1091, 2019 U.S. Dist. LEXIS 14194, at *26 (E.D. Cal., Jan 29, 2019) (internal quotations omitted) (citing *Leon v. IDX Sys., Corp*., 464 F.3d 951, 959 (9th Cir. 2006)). The standard of proof for Rule 37(e) motions is the preponderance of evidence. *OmniGen Research, LLC v. Wang*, 321 F.R.D. 367, 372 (D. Or. 2017).

The duty to preserve evidence extends not only to parties, but also to any interested third-party or their agents who have access or control of the evidence and are providing the defendants' legal defense. *See Kindred v. Price*, No. 1:18-cv-00554, 2019 U.S. Dist. LEXIS 160922, at *2 (E.D. Calif., Sept. 19, 2019); *Ramos*

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

v. Swatzell, No. 12-1089, 2017 U.S. Dist. LEXIS 103014, at *18 (C.D. Calif., June 5, 2017); *Dykes v. BNSF Ry. Co*., No. C17-1549, 2019 U.S. Dist. LEXIS 39718, at *18 (W.D. Wash., Mar. 12, 2019). When a party claims to have relied on counsel's advice, the actions of the attorney are imputed to the spoliating party. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 515 n. 23 (D. Md. 2010).

Under Rule 37(e), and as explained in the Rule's Advisory Notes, a finding of intentional destruction eliminates any requirement that the moving party show prejudice in order to be entitled to relief up to and including the entry of a default judgment. *OmniGen Research,* 321 F.R.D. at 371-72 (D. Or. 2017). This is because a party that destroys electronic data puts the moving party in the impossible position of proving 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 by the Ninth Circuit in *Leon v. IDX Sys., Corp*., 464 F.3d 951 (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'" but destroys them anyway. *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); *CrossFit, Inc. v. Nat'l Strength & Cond. Assn*., No. 14-cv-1191, 2019 U.S. Dist. LEXIS 209319, at *29 (S.D. Cal., Dec. 4, 2019).[7]

[7] CCS knows that "[p]roduction of e-mails is a standard request in all civil cases" that they *must* be preserved, and has been warned against their spoliation.

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

In this case, unlike those involving destruction of evidence pre-litigation, there is no debate about CHC/CCS's notice of their relevance. When they were purged, litigation was not a mere possibility or even a probability—the litigation was active. Not only that, but the e-mails were the subject of discovery requests issued 2-3 months before the purge, and a preservation demand nearly a year before that. Plaintiffs had also notified the Court and counsel of Plaintiffs' intent to continue discovery and CHC/CCS agreed to use good faith in ESI searches.[8]

Nor is there any dispute that the purge was intentional. CHC/CCS did not, for example, simply fail to protect their computer systems or accidentally allow the e-mails to be deleted as part of an existing destruction protocol. Instead, they willfully and permanently wiped not only the primary stores, but also all backup files. Moreover, the purge was not implemented naively. Rather, it was executed with substantial input from the companies' own claims director and in-house counsel. *See* Budge Decl., Ex. G (Martin Dep.) at 35:2-36:2. On the record before the Court, it is objectively clear that CHC/CCS took intentional action to permanently erase discoverable data *en masse* in existing litigation when its discoverability was squarely on the table.

See Rembert v. Cheverko, No. 12-cv-9196, 2015 U.S. Dist. LEXIS 138719 at *11 and 13 (S.D.N.Y. Oct. 9, 2015) (warning CCS about e-mail spoliation).

[8] As healthcare providers at a public jail, CHC/CCS were likely subject to Washington's Public Records Act, further underscoring their brazenness. *Clarke v. Tri-Cities Animal Care & Control Shelter*, 181 P.3d 881 (Wn. App. 2008).

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

In considering the appropriate sanctions under Rule 37(e), the Court should consider five factors: (1) the public's interest in expeditions 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 and *Anheuser-Busch v. Natural Beverage Distribs*., 69 F.3d 337, 348 (9th Cir. 1995)). Each of these factors weighs in favor of a default judgment against CHC/CCS.

The first two factors weigh heavily in favor of default. By destroying evidence and failing to admit it for many months—even while Plaintiffs persistently pursued the evidence and explanations for its non-production and occupied the Court with motions to compel—CHC/CCS multiplied the expense of this case, misled Plaintiffs and the Court, and obscured the factual underpinnings of the case while deadlines passed and trial approached. Indeed, had Plaintiffs not filed a third motion to compel, and instead relied on assurances of CHC/CCS that discoverable e-mails just did not exist, the fact of the purge (let alone its scope) would never have been known. When the destruction of ESI causes unnecessary motions and misleads the other party, a default judgment is favored. *See Christoffersen v. Malhi*, No. 16-08055, 2017 U.S. Dist. LEXIS 94700 at *9 (D. Az., June 20, 2017). *See also Leon*, 464 F.3d 951, 958 at n. 1. Moreover, it would be wholly unfeasible to remedy the spoliation short of default—e.g. by re-opening discovery for Plaintiffs to depose dozens of ex-employees about faded memories of years-old emails, supplement expert reports and so on. And it would be impossible to do so without massive delay and gross disruption to the docket.

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

The third factor, "*risk* of prejudice" to Plaintiffs, and the fourth factor, "public policy favoring disposition of cases on their merits," both weigh heavily in favor of default. CHC/CCS's destruction of e-mails from *at least* 57 former on-site employees (and others off site) carries a high probability that information about Mr. Moreno's confinement was lost, that vast amounts of impossible-to-replicate *Monell* evidence was destroyed, that Plaintiffs' experts have been deprived of information, and that Plaintiffs have otherwise been robbed of evidence.[9] The purge also hid the importance of possible witnesses (since it is not practical to depose 57+ witnesses, but e-mails would have identified anyone who corresponded about *Monell*-related issues), and hampered Plaintiffs' ability to carry their burden of proof (a burden that *depends* on *Monell* evidence). It is impossible to say what might have existed—whether there were smoking guns that could have proved Plaintiffs' case or whether the e-mails would have simply bolstered Plaintiffs' claims. But the best source of *Monell* evidence were CHC/CCS's own employees, and there is no substitute for contemporaneous emails about the customs and practices of CHC/CCS's jail employees. And besides just liability, the trove of destroyed e-mails from CHC/CCS jail employees (or people higher up who knew of deficient practices there) could have enhanced Plaintiffs' claim for punitive damages. The destruction thwarted the disposition of this case on its merits.

[9] In jail death cases, the inmate's death causes an "asymmetry of information beyond what is typical in similar cases." *See Blodgett v. Correct Care Sols.*, LLC, No. 17-cv-2690, 2018 U.S. Dist. LEXIS 209535, at *16 (D. Colo., Dec. 12, 2018).

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

As to the fifth factor, the only available sanction short of default would be an instruction that the jury must presume the evidence was unfavorable. This remedy is insufficient because it cannot fully compensate for the possibility that the e-mails would have helped Plaintiffs much more than a mere "presumption" of unfavorability. Merely presuming that the e-mails were unfavorable begs the question of *how* unfavorable. Would the instruction allow the jury to speculate whether the destroyed e-mails were very unfavorable or only moderately so? And how could such an instruction compare to *showing* the jury e-mails among employees revealing, for example, their specific knowledge of Mr. Moreno's daily deterioration and lack of care, the companies' notice of understaffing, management's cutting corners by refusing to budget appropriate amounts for inmate care, consistent complaints by CHC/CCS employees to CHC/CCS management about deficient training, the customary failure to follow health care protocols, or any number of other kinds of incriminating evidence? How would such an instruction impact the question of punitive damages? What about the fact that the e-mails could have led to key witnesses who could expand on their e-mails in oral testimony? In short, unlike other cases where specific documents were destroyed, it would be very difficult to craft an instruction that remedies the harm done by this purge and the magnitude of its scope. An instruction would give Plaintiffs far less than the destroyed information itself might have provided.

IV. CONCLUSION

For the reasons stated above, the Court should enter a default judgment against CHC/CCS.

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060

Respectfully submitted this 4th day of March, 2020.

BUDGE & HEIPT, PLLC

s/ Edwin S. Budge
Edwin S. Budge, WSBA #24182
Hank Balson, WSBA #29250
Erik J. Heipt, WSBA #28113
808 E. Roy St.
Seattle, Washington 98102
ed@budgeandheipt.com
hank@budgeandheipt.com
erik@budgeandheipt.com
(206) 624-3060
Attorneys for Plaintiffs

THE TREJO LAW FIRM, INC.

s/ George P. Trejo, Jr.
George P. Trejo, Jr., WSBA #19758
701 N. 1st Street, Ste. 100
Yakima WA 98901
gptrejo@thetrejolawfirm.com
(509) 452-7777
Attorney for Plaintiffs

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:

Michele C. Atkins, WSBA #32435
Chad W. Beck, WSBA #45773
Fain Anderson VanDerhoef Rosendahl O'Halloran Spillane, PLLC
701 Fifth Ave., Suite 4750
Seattle, WA 98104
(206) 749-0094
michele@favros.com
chad@favros.com
Attorneys for Defendants Correctional Healthcare Companies, Inc.; Correct Care Solutions, Inc.; and Ashley Castaneda

Dated this 4th day of March, 2020.

s/ Edwin S. Budge
Edwin S. Budge

BUDGE & HEIPT, PLLC
ATTORNEYS AT LAW
808 E. Roy St.
SEATTLE, WA 98102
TELEPHONE: (206) 624-3060