UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DERRICK JONES, JEROME JONES, MARRELL WITHERS and DARNELL RUSAN, on behalf of themselves and all similarly situated individuals,	)	Cause No. 4:21-cv-600
Plaintiffs,	)	
v.	)	
CITY OF ST. LOUIS, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF EMERGENCY MOTION TO PRESERVE RELEVANT VIDEOS

Plaintiffs move pursuant to Rule 37(a) of the Federal Rules of Civil Procedure for an Order compelling the defendant City of St. Louis to: (a) preserve all potentially discoverable surveillance and other video footage of Use of Force incidents at the City Justice Center ("CJC"); and (b) promptly produce supplemental responses to Plaintiffs' Second Set of Requests for Production, including responsive surveillance and other video footage.

The City of St. Louis is not only withholding evidence in this case; they are destroying it. Plaintiff brings this Emergency Motion—nearly two and a half years into litigation—after the City's 30(b)(6) designee admitted that for nearly that entire time Defendant City of St. Louis has knowingly failed to preserve relevant videos essential to Plaintiffs' claims. Defendant's actions violate both their duty to preserve relevant records under Rule 37 and their explicit promise to Plaintiffs' attorneys that this important evidence was being preserved. The City's egregious failure was not simply the inadvertent deletion of hypothetically relevant information: **The City**

knowingly deleted videos that are the subject of a pending Motion to Compel before this Court and directly relevant to Plaintiffs' excessive force claims.

This behavior by a party in litigation cannot be countenanced. Plaintiffs request this Court issue an immediate Order of Preservation that directs Defendant City of St. Louis to cease deletion of videos of Use of Force Incidents, immediately produce relevant and responsive videos which still exist, and provide further information to the Court and Parties detailing the specifics of when and how relevant video footage was destroyed and not preserved.[1]

FACTUAL BACKGROUND

Plaintiffs filed this lawsuit in May 2021. Doc. 1. Plaintiffs allege that they were subject to excessive force and torturous detention conditions at CJC, because of City policies, practices, and customs, including, *inter alia*, punitively and indiscriminately deploying excessive amounts of mace, without warning or justification. *Id.* Plaintiffs later sought to amend their Complaint to bring injunctive claims for relief on behalf of all detainees within CJC and filed a Motion for Class Certification. Docs. 71, 105, 131. From the moment this lawsuit was filed, Defendant City of St. Louis was on notice that Plaintiffs' individual, *Monell,* and later class allegations revolve around the same practice and customs under which Defendants deploy unconstitutional and excessive amounts of chemical agents against people detained at CJC.

Prior to filing this lawsuit, Plaintiffs' attorneys explicitly sent a preservation letter to Defendants. This letter, dated March 29, 2021, clearly asked Defendants to preserve CJC surveillance video related to the December 2020 use of OC spray against plaintiff Derrick Jones. *See* Exh. A, *March 29, 2021 Preservation Letter*. The letter also notified the City that the records

[1] Due to the emergency nature of this Motion, Plaintiffs are only asking for an Order Directing Preservation of Evidence in the hopes to salvage remaining videos. Plaintiffs will address in later Motions the need for sanctions address the multiple years of knowing spoliation of evidence

described (which included video footage) was relevant to potential litigation: "We are putting you on notice that the information requested be preserved as it is material to the potential litigation in this matter." *Id*. at 2.

During the parties' Rule 26(f) conference in September 2021, counsel for the parties discussed the preservation of video footage within CJC. At that conference and in a subsequent email, Defendants' counsel represented that, "when this lawsuit was filed, steps were taken to ensure that all then-existing video relating to the three plaintiff's claims was retained." *See* Exh. B, *Counsel Email Confirming Preservation*. Because Plaintiffs asserted *Monell* claims, which necessary involves a pattern and practice outside solely the named plaintiffs' experiences, Plaintiffs' counsel reiterated the need to retain video footage of any macing incidents:

> [W]e ask that the City immediately take steps to preserve all video recordings of macing and water shut-off incidents (and the time immediately leading up to and following said incidents) for the pendency of the litigation. This includes preserving footage of incidents where none of the three named plaintiffs are present. This evidence is directly relevant to both Monell claims pending against the City, which allege a custom and practice beyond just the three named plaintiffs here.

Id. On September 10, 2021, the City responded, affirming that "[e]fforts are being made to ensure that evidence related to any of these future [use of force] events, including video footage, is preserved." *Id*. The City counselor confirmed again on September 13, 2021: "**Corrections is pulling the video and saving it**." *Id*. Plaintiffs' counsel expressly reserved the right to seek sanctions under Rule 26 in the event the City failed to take reasonable steps to preserve evidence, including video footage. *Id*.

On September 22, 2021, Plaintiffs served their Second Set of Requests for Production, which sought, in relevant part:

> Any and all audio, visual, or audio-visual recordings that shows, in part or whole, one or more correctional staff member deploying a chemical agent on a detainee at the City Justice Center.
>
> Records showing the date of recording and date of destruction for any audio, visual, or audio-visual recordings, including but not limited to surveillance recordings, which records were destroyed, and the staff responsible for destroying those records from December 2020 through the present date.

See Exh. C., *Second Requests for Production*. In good faith, Plaintiffs agreed to limit the time frame of Request No. 1 to three years prior to the lawsuit to present day. Doc. 47 at 6; Doc. 183 at 8. These Second Requests have been the subject of past motions to compel as Defendants have so far refused to produce any videos which do not involve any of the four named plaintiffs. Docs. 47, 50, 183, 188. The City has maintained this position despite the fact that these videos are discoverable, and contrary to their prior representations to the Court that they would produce such video. Doc. 47 at 6; Doc. 183 at 8.

On January 6, 2023, Plaintiffs deposed the City of St. Louis's 30(b)(6) designee. One of the topics contained in Plaintiffs' notice of 30(b)(6) deposition was the City's efforts to comply with its obligations to preserve evidence. During this deposition, the designee revealed the following:

- Video surveillance has increased at CJC over the past ten years, and "there are scores of cameras throughout the facility." Exh. D*, Roth Dep*. 17:15-23.
- The cameras in the facility are "automated" and "should be capturing video 24 hours a day." *Id.* 18:11-17, 23.
- All surveillance feed videos are recorded and saved in a dedicated server. *Id.* 22:5-7.
- After 60 days, the videos are automatically deleted. *Id.* 25:1-7.
- Senior management can request certain videos be saved from deletion. 23:12-25.

- Around the time the lawsuit was filed, CJC staff were instructed to preserve all videos showing use of force incidents. *Id.* 29:21-25, 30:1-10.
- The staff did not comply with this request. *Id.* 30:16-25.
- **To this day, the City is not saving videos showing use of chemical agents on detainees from deletion:** "Is every use of force saved and put into the vault? A **No."** *Id.* 24:14-16. "… sitting here today, if a correctional officer used OC spray on a detained individual, would that video be prevented – would that video necessarily be prevented from automatic deletion? A It would -- it would not categorically be protected from it." *Id.* 25:8-16. "Q: So since May 2021, it has been the case that there are videos of the use of chemical agents on detainees that were not exempted from automatic deletion? A: "Yes. I would say it the opposite way, that not all have been saved … it's not part of the process or procedure for all uses of force that might be captured by video to be exempted from this." *Id.* 25:25, 26:1

At no point before this deposition did Defendants or Defendants' counsel discuss with Plaintiffs that despite their explicit promises to the contrary, Defendants were **not** preserving these videos. It was only at this deposition that Plaintiffs discovered that while Defendants withheld discovery pursuant to the outcome on the pending Motion to Compel, they were destroying the evidence. More egregiously, at no point during briefing on still-pending motions to compel did Defendants notify the Court that the videos at issue were routinely being destroyed. *See* Doc. 50 at 5, 7-8; Doc. 76; Doc. 183 at 8; Doc. 188 at 2-4. To the contrary, in the last hearing before the Court the Defendants represented to this Court that if that their motion to sever and bifurcate were denied, they would produce videos which were "relevant [and] proportional" without mentioning that their client was actively deleting relevant videos. Doc. 108, Transcript of May 3, 2022 at 14:17-16:19.

LEGAL STANDARD

Parties must take "reasonable steps" to preserve ESI relevant to anticipated litigation. *See* FED. R. CIV. P. 37(e). Generally, a defendant's duty to preserve evidence is triggered at the time the case is filed, "unless the defendant before that time becomes aware of facts from which it should reasonably know that evidence is to be preserved as relevant to future litigation." *The Valspar Corp. v. Millennium Inorganic Chemicals, Inc*., 2016 WL 6902459, at *4 (D. Minn. Jan. 20, 2016); *see Blazer v. Gall*, 2019 WL 3494785, at *3 (D.S.D. Aug. 1, 2019) ("The obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation."). While an opposing party might explicitly request preservation of some information (as Plaintiffs did here), parties must also independently evaluate their obligation to preserve. *Starline Windows Inc. v. Quanex Bldg. Prod. Corp*., No. 15-cv-1282-L-WBG, 2016 WL 4485568, at *12 (S.D. Cal. Aug. 19, 2016); see also *Scalera v. Electrograph Systems, Inc*., 262 F.R.D. 162, 171 (E.D.N.Y. 2009) (the "obligation to preserve relevant evidence exists whether or not the evidence has been specifically requested in a demand for discovery.").

Although a corporate defendant is not required to keep every type of electronic communication, Rule 37(e) extends to "key players" in its employ likely to have relevant information that could prove useful to an adversary. *Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226, 233 (D. Minn. 2019) (citation omitted); *see also Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) ("Thus, the duty to preserve extends to those employees likely to have relevant information-the 'key players' in the case."). "Anyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary." *Zublake v. UBS Warburg, Inc*., 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

ARGUMENT

Defendants were aware of their duty to preserve video footage by May 2021 at the latest. They assured Plaintiffs' counsel that video footage was being preserved. And they assured this Court that they would produce relevant video footage if and when their motion to sever and bifurcate was denied. Plaintiffs have now learned that the City is not preserving all relevant video footage. An order requiring the City to preserve relevant video is warranted, especially in light of the City's pattern of misconduct in discovery in this case.

1. Defendants were on notice of their duty to preserve by no later than May 2021.

Here, Plaintiffs sent a preservation letter on March 29, 2021 specifically requesting preservation of certain videos showing use of chemical agents. Plaintiffs then filed this lawsuit on May 24, 2021, asserting individual *and Monell* claims alleging a facility-wide pattern and practice of excessive force involving use of chemical agents. While the preservation letter and reasonable certainty of impending litigation should have triggered the City's duty to preserve as of March 2021, there can be no question that the City had a clear duty to preserve video footage of the use of OC spray at CJC as of May 2021. Had Defendants independently evaluated their obligation to preserve, as the law requires, they would have preserved video footage showing the use of chemical agents on people detained at CJC.

Despite Defendants' independent obligation, Plaintiffs also took significant steps to put Defendants' on notice of their obligation. In September, counsel for all parties discussed retention of video footage at length. Plaintiffs' counsel exchanged multiple emails with the City counselor's office to ensure *all* relevant video footage was preserved and the City's lawyers confirmed it was. *See* Exh. B. Plaintiffs then sent a specific discovery request requesting videos showing use of chemical agents on detainees on September 22, 2021. Not only should Defendant City have

independently evaluated its obligation to preserve videos showing use of chemical agents on detainees, but these videos were also specifically requested by Plaintiffs.

2. An order directing Defendants to preserve relevant video footage is clearly warranted.

Given the clear testimony from the City's 30(b)(6) designee that—despite its assurances to Plaintiffs' counsel— the City is not preventing deletion of videos relevant to Plaintiffs' class and *Monell* claims, this Court should issue an order directing Defendants to stop their ongoing deletion of videos showing the use of chemical agents on detainees.

In determining whether a preservation order should be entered, other courts routinely use a three-factor test laid out in *Capricorn Power Inc. v. Siemens Westinghouse Power Corp.*:

> 1) the level of concern that the court has for the continuing existence and maintenance of the integrity of the evidence in question in the absence of an order directing preservation of the evidence; 2) any irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation; and 3) the capability of an individual, entity, or party to maintain the evidence sought to be preserved, not only as to the evidence's original form, condition, or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.

220 F.R.D. 429, 433–34 (W.D.Pa. 2004); *see*, *e.g.*, *City of Wyoming, Minnestoa v. Proctor & Gamble Co*., 2016 WL 6908110 at *2 (D. Minn. 2016). Plaintiffs address each factor in turn.

A. <u>The City admitted under oath that it is currently deleting videos which are relevant to Plaintiffs' claims and the subject of current discovery motions before this Court.</u>

The burden of establishing the risk that documents will be destroyed in the future is "often met by demonstrating that the opposing party has lost or destroyed evidence in the past or has inadequate retention procedures in place." *Pueblo of Laguna*, 60 Fed.Cl. 133,138 (Fed. Cl. 2004); *see also Capricorn Power*, 220 F.R.D. at 437 ("Had there been evidence of attempted damage or destruction of the report or the data compilations used to produce it, the Court's level of concern for the protection of the integrity and existence of the evidence would have been different.").

The testimony from the City's 30(b)(6) designee shows that the City has lost and destroyed large portions of two and a half years' worth of highly probative videos. Even more concerningly, the 30(b)(6) designee represented the current position of the City is that it will not be taking steps to maintain all currently stored videos showing use of chemical agents on detainees.

B. Plaintiffs will be irreparably harmed if the City is permitted to continue deleting relevant evidence.

Under *Capricorn,* there are two factors that show irreparable harm: first, if "evidence may be a one-of-a-kind, an irreplaceable item" and second, if "The loss or destruction of certain evidence can result in significant prejudice to the party seeking to use it in proving the party's claims." *Capricorn Power*, 220 F.R.D. at 435. A party is prejudiced where relevant evidence is destroyed and the party cannot obtain that evidence through other means. *Am. Builders & Contractors Supply Co. v. Roofers Mart, Inc.*, No. 1:11-CV-19 (CEJ), 2012 WL 2992627, at *3 (E.D. Mo. July 20, 2012) (citing *Koons v. Aventis Pharm., Inc*., 367 F.3d 768, 780 (8th Cir. 2004)).

The requested videos showing incidents where correctional officers deploy chemical agents on detainees are clearly, indisputably relevant to Plaintiffs' claims regarding the pattern and practices for use of chemical agents on detainees. In fact, recordings of similar use-of-force incidents at CJC are the most highly probative evidence available to prove a custom of excessively and indiscriminately deploying chemical agents as alleged in Plaintiffs' Complaint.[2] It is well established that a pattern of similar unconstitutional incidents can give rise to an actionable *Monell* claim. *See Parrish v. Luckie*, 963 F.2d 201, 205 (8th Cir. 1992) (to establish a city's liability based on its failure to prevent misconduct by employees, the plaintiff must show that city officials had

[2] Defendants have tried twice to dispose of Plaintiffs *Monell* claims, but the Court denied both Defendants' Motion to Dismiss and Defendants' Motion to Sever and Bifurcate. *See* Docs. 50 and 88. Plaintiffs' Monell claim is thus well pleaded and actively pending.

knowledge of prior incidents of police misconduct and deliberately failed to take remedial action). As this court recently stated:

> The Court finds the clear majority of case law, as set forth above, supports the conclusion that subsequent incidents may be probative of what policies, practices, or accepted customs existed at the time of Plaintiff's arrest, which would be relevant to his Monell claims. From this post-incident evidence the jury may imply the existence of a pre-incident policy, and the evidence may also infer knowledge and moving force.

Whitt v. City of St. Louis, No. 4:18-CV-1294 RLW, 2020 WL 7122615, at *7–9 (E.D. Mo. Dec. 4, 2020) (collecting cases). Further, Plaintiffs' Complaint seeks injunctive relief on behalf of an entire class because of an ongoing pattern and practice. Plaintiffs' *Monell* claim (which has already survived a Motion to Dismiss) requests on-going injunctive relief. Defendants should be restricted from deleting any more relevant evidence to show the necessity of this on-going injunctive relief.

It is no comfort to Plaintiffs that correctional supervisors have been cherry-picking a few incidents to maintain footage of. If the missing evidence is "different or more helpful" than evidence available to the movant, prejudice is likely. *USI Ins. Servs. LLC*, 2020 WL 7753690, at *3. "The Rules of Discovery do not countenance self-selecting discovery by any party." *Buycks–Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 338, 343 (N.D.Ill. 1995). Clearly, videos of **every** incident involving chemical agents will be different and more helpful than videos of only the incidents correctional supervisors want Plaintiffs and this court to see. Indeed, Defendants have even failed to preserve all video related to the individual incidents pled by Plaintiffs.

Nor are written incident reports any substitute for video footage of an incident. Incident reports are written up by correctional officers following an event. Because of the brevity of the City's forms, they cannot contain every detail about an incident. They are written by jailers, and thus biased against detainees. And, as they say: A picture is worth a thousand words. Defendants'

written reports (which, to be clear, still have not been produced in full) are no substitute for the evidence contained in video footage the City continues to destroy.

C. Video evidence showing use of chemical agents ais one-of-a-kind, highly probative evidence and Plaintiffs are significantly prejudiced in proving their claims by the City's continued destruction of that evidence.Defendants can preserve videos showing the use of chemical agents on detainees which have not already been deleted.

Lastly, the City has the capability to preserve relevant video footage, and has provided no evidence to Plaintiffs' counsel or this court demonstrating otherwise. An order requiring the City to preserve video footage going forward is warranted.

"That litigation may require a party to deviate from its normal data ESI management protocols is not unusual, or on its face, a viable basis for objection. Nor does a data management system that regularly overwrites information in the normal course of operation excuse a party from fulfilling their duty to preserve documents and information." *Al Otro Lado, Inc. v. Nielson*, 328 F.R.D. 408, 419 (S.D. Ca. 2018). To be sure, a defendant entity does not need to preserve "every shred of paper, every email or electronic document" but it "it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action." *Zublake*, 220 F.R.D. at 217. Particularly when corporate entities already have a mechanism to save certain types of electronic data from automatic deletion, there is a clear duty to use that mechanism to preserve relevant evidence. *Jones v. Hirschbach Motor Lines, Inc.*, 2022 WL 4354856 at *3 (D.S.D. Nov. 20, 2022). When litigation is imminent or has already commenced, "a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy." *Lewy v. Remington Arms Co. Inc.*, 836 F.2d 1104, 1112 (8th Cir. 1988).

Is simply not reasonable for Defendant City to say it has no way to stop, as of today, automatic deletion for videos showing the use of chemical agents on detainees. Defendant City already has admitted it has a dedicated server for these recordings. Exh. D, 22:5-7. If the City had

genuine concerns regarding storage space, they failed to mention it, and made no effort to explore alternative options, including by simply asking Plaintiffs' counsel for an available location (such as an external hard drive) for the recordings. Nor are personnel concerns persuasive. According to the City's testimony, the videos are already separated by floor and specific camera. The City also maintains there is a use of force form for every incident which should describe: the date of the incident; the time of the incident; what floor and pod the incident happened in; and whether chemical agents were used. Defendant City thus has an easy guide which should allow staff to quickly identify which camera footage needs to be prevented from deletion.

Moreover, according to the City's sworn testimony, the only videos within the system are: (i) older videos which have already been flagged to save; and (ii) videos stored from the prior continuous 60 days. Simply preventing the deletion of even more highly relevant information does not present an undue burden.

CONCLUSION

For two and a half years of litigation, Plaintiffs have trusted Defendant City's representations that its staff were preserving highly relevant evidence. Now, a week before the close of discovery, the City admits it did not and will not do so. Plaintiffs submit this Court should intervene and direct Defendant City of St. Louis to retain and not delete any video footage showing the use of chemical agents by correctional staff on detainees.

Wherefore, the Plaintiffs respectfully request this Court enter an Order of Preservation directing the following:

a) First, Defendant City of St. Louis must take immediate steps to identify and save from deletion any surveillance or other video footage which shows the use of chemical agents on persons who are detained, including at a minimum from the last 60 days onward, and to

provide a certification to the Court that these procedures are being followed by City personnel;

b) Second, Defendant City of St. Louis must provide Plaintiffs with a production schedule for existing videos responsive to Plaintiffs Second Request for Production, with actual production to follow in the next 7 days; and

c) Third, Defendant City of St. Louis must provide information to the Court and Plaintiffs on the specifics of deletion of CJC video footage between May 24, 2021 and January 13, 2023, including amount of video deleted, amount of video saved from deletion, persons responsible for video deletion and storage, what instruction to preserve video related to this lawsuit was given and by whom, and what steps were taken to comply with those instructions (if any).

This order is narrowly tailored and necessary to prevent Plaintiffs from experiencing additional prejudice. [3]

Dated: January 13, 2023

Respectfully submitted,

By: *<u>/s/ Shubra Ohri (w/consent)</u>*

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[3] Plaintiffs' reserve the right to later seek sanctions for the City's spoliation of electronic evidence, including but not limited to an adverse inference instruction.

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RIGHTS BEHIND BARS

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