UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 12-22807-Civ-TORRES

JOSEPHINE LONG,

Plaintiff,

v.

CELEBRITY CRUISES, INC.,

Defendant.
_____/

ORDER ON PLAINTIFF'S MOTION FOR SANCTIONS FOR SPOLIATION OF EVIDENCE

Plaintiff, Josephine Long, filed this motion before the court seeking sanctions for spoliation of evidence against Defendant, Celebrity Cruises, Inc. [D.E. 25]. In her motion, Plaintiff seeks three forms of relief. Plaintiff requests (1) preclusion of Defendant's liability expert from relying upon the CCTV video or any account as to what is shown of the video; (2) preclusion of Celebrity and its witnesses from testifying as to the contents of the missing Closed Circuit Television ("CCTV") surveillance video depicting the alleged accident; and (3) a special jury instruction stating, "When a party has evidence and fails to preserve it (the jury) may assume that such evidence would have been unfavorable to Defendant in that the alleged hazardous condition existed for a period of time for which Defendant had constructive notice of the hazard and Plaintiff tripped on the alleged hazard." [Id. at 1].

We have reviewed Plaintiffs motion [D.E. 25], Defendant's response [D.E. 37], and Plaintiff's reply to Defendant's response [D.E. 42]. The elements of spoilation are

met, and Plaintiff has established that some, but not all, of the requested sanctions are warranted; thus, the court grants in part and denies in part Plaintiff's motion.

I. FACTUAL BACKGROUND

On August 8, 2011, Plaintiff, a passenger aboard Defendant's cruise ship, suffered injuries while attempting to descend a stair on the ship. Plaintiff received medical care from Defendant's Medical Facility. At that time, Plaintiff filled out a "Consultation Request," a pre-requisite for obtaining medical care while on board the ship. In the request, Plaintiff alleged that a piece of metal sticking out atop the step caused her fall.

This allegation - that the medical treatment concerned a shipboard accident - triggered an investigation by Defendant's safety officer, Spyridon Margaritis. Mr. Margaritis spoke with Plaintiff, interviewed a witness, inspected the area of the incident, and reviewed video surveillance recordings of the incident. After reviewing the video, Mr. Margaritis tried to download the relevant segment of the video for preservation in anticipation of litigation. He then completed an incident report. The report alleged that Plaintiff had not tripped on any piece of metal trim on the stair, but had merely missed the step.

It is undisputed that Mr. Margaritis did not successfully download the segment of the video onto his own laptop. As a result, he asked another ship Officer, whose identity is unknown, to help him download the video for his use in the investigation. After delegating that instruction, he did not follow up with that Officer before the end of the cruise to assure that the download was ultimately successful. After 14 days, the ship's CCTV's video, which is maintained on a computer hard drive, is overwritten in

the normal course. The original CCTV footage of the Plaintiff's fall was thus permanently lost at that point in time. And, as it turns out, neither Mr. Margaritis nor the subordinate unknown Officer he asked for assistance were able to download the video footage onto a thumb drive or Mr. Margaritis's laptop before that happened. Consequently, the video footage no longer exists.

Subsequently, on September 13, 2011, Plaintiff's counsel sent a letter demanding preservation of the relevant surveillance video. A similar letter was sent on May 15, 2012. On September 18, 2012, after the filing of this lawsuit on July 31, 2012, Plaintiff served a Request for Production for the contents of the video. Defendant responded: "Defendant is attempting to determine if any video footage of the alleged incident exists, and will provide same to Plaintiff's counsel if and when it is located."

Defendant ultimately disclosed that it did not have possession of any such video. Defendant admits that the video existed and that Defendant originally had possession of the video onboard the ship, but that standard operating procedure led to the video's deletion. Defendant maintains, however, that the video would corroborate its version of the event. Moreover, based upon the vantage point of the CCTV video, Defendant argues that the video at minimum could not have been useful or critical to the Plaintiff because it would not have been able to depict what the Plaintiff claims happened on the step.

Plaintiff, however, alleges the opposite. Plaintiff argues that the video could have shown that Plaintiff did not in fact miss the step on her own and that it would have corroborated her claim that she tripped on some protruding portion of the step.

At the very least, Plaintiff argues that the video would have allowed her to impeach the testimony of the safety officer to the contrary.

II. ANALYSIS

The court's power to levy sanctions of the type at issue here generally arises from two main sources. One source is the court's "inherent power" to control the judicial process. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). This authority exists to ensure an expedient and unbiased adjudication of all lawsuits. A second source, Fed. R. Civ. P. 37, pertains in particular to violations of discovery rules during litigation. If possible, courts prefer to administer sanctions pursuant to Rule 37 or other similar statutory sources, and only if the Rules cannot provide adequate redress should the court invoke it's inherent power. *Id.*

In this case, we must rely on the Court's inherent powers to assess whether Plaintiff is entitled to any relief from the deletion of the CCTV footage because the video was lost well before any litigation ensued. *See, e.g., Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.,* 982 F.2d 363, 367-68 (9th Cir. 1992) (spoliation sanctions were legally unavailable under Rule 37 where evidence destroyed prior to filing of admiralty subrogation action); *Bell v. Lakewood Eng'g & Mfg. Co.,* 15 F.3d 546, 552 (6th Cir. 1994) (although evidence destroyed during litigation is subject to Rule 37 sanctions, sanctions for pre-litigation destruction "must be found in the substantive law of the case."); *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) ("A federal district court may impose sanctions under Fed. R. Civ. P. 37(b) when a party spoliates evidence in violation of a court order.").

As an initial matter, a court must also determine where state or federal law applies where, as in this case, a federal court has power over the proceedings only on diversity jurisdiction. In the Eleventh Circuit sanctions for spoliation constitute an evidentiary matter. *Flury v. Daimler Chrysler Co.*, 427 F.3d 939, 944 (11th Cir. 2005). Thus, federal law applies even in actions applying substantive state law because, in diversity cases, the Federal Rules of Evidence govern the admissibility of evidence in federal courts. *Id.* Nevertheless, when no federal guideline on point exists, a federal court may look to the relevant state courts for guidance. *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F. Supp. 2d 1317, 1322 (S.D. Fla. 2010); *Commercial Long Trading Corp. v. Scottsdale Ins. Co.*, 2013 U.S. Dist. LEXIS 36031, at *5 (S.D. Fla. 2013).

In ruling on a motion for sanctions for spoliation, the court undertakes a three-step analysis. Initially, the court determines whether spoliation exists. The court then determines whether that spoliation warrants sanctions. Finally, the court determines and levies appropriate sanction(s), if warranted.

A. Spoliation Defined

The concept of "spoliation" has been defined in somewhat different ways. On one hand, many decisions adopt the Black's Law Dictionary's definition of "the intentional destruction, mutilation, alteration, or concealment of evidence." Black's Law Dictionary 1437 (8th ed. 2004). Under this definition, specific intent is an essential prerequisite for the existence of a spoliation claim. *See, e.g., F.T.C. v. First Universal Lending, LLC,* 773 F. Supp. 2d 1332, 1351 (S.D. Fla. 2011) ("Spoliation is

the 'intentional destruction, mutilation, alteration, or concealment of evidence, usu. a document[,]' " quoting Black's Law Dictionary 1437 (8th ed. 1999)); *Managed Care,* 736 F. Supp. at 1322 ("Spoliation has been defined as the "intentional destruction of evidence or the significant and meaningful alteration of a document or instrument.' " quoting *Southeastern Mechanical Services, Inc. v. Brody*, 657 F. Supp. 2d 1293, 1299 (M.D. Fla. 2009)); *see also Optowave Co. v. Nikitin*, 2006 U.S. Dist. LEXIS 81345 (M.D. Fla. Nov. 7, 2006); *Floeter v. City of Orlando*, 2007 U.S. Dist. LEXIS 9527 (M.D. Fla. Feb. 9, 2007); *Victor v. Makita U.S.A., Inc.*, 2007 U.S. Dist. LEXIS 83427 (M.D. Fla. Nov. 9, 2007).

Other courts, including several Eleventh Circuit decisions, suggest that proof of specific intent is not necessarily a prerequisite for spoliation because spoliation was defined as simply "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Graff v. Baja Marine Corp.*, 310 F. App'x. 298, 301 (11th Cir. 2009) (citing *West,* 167 F.3d at 779); *Green Leaf Nursery v. E.I. DuPont de Nemours & Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003) ("spoliation is defined as the 'destruction' of evidence or the 'significant and meaningful alteration of a document or instrument[,]'" quoting *Aldrich v. Roche Biomedical Labs., Inc.,* 737 So. 2d 1124, 1125 (Fla. 5th DCA 1999) (quoting Black's Law Dictionary 1401 (6th ed. 1990)); *Commercial Long Trading Corp. v. Scottsdale Ins. Co.*, 2013 U.S. Dist. LEXIS 36031, at * 5 (S.D. Fla. 2013). Under this approach, one could be liable for spoliation of evidence even if the destructive acts were not intentionally designed to thwart the presentation of evidence in litigation.

The distinction proves to be more semantic and less consequential, however, based upon the requirement, at least in the Eleventh Circuit, that bad faith be established before material sanctions are used to remedy a spoliation claim under the Court's inherent powers. The rule in this Circuit is that "an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith. While this circuit does not require a showing of malice in order to find bad faith, mere negligence in losing or destroying records is not sufficient to draw an adverse inference." *Silver v. Countrywide Home Loans, Inc.*, 483 F. App'x 568, 572 (11th Cir. 2012) (quoting *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1310 (11th Cir. 2009)); *see also Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) ("In this circuit, an adverse inference is drawn from a party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith. . . . 'Mere negligence' in losing or destroying the records is not enough for an adverse inference, as 'it does not sustain an inference of consciousness of a weak case.' ") (quoting *Vick v. Texas Employment Comm'n,* 514 F.2d 734, 737 (5th Cir. 1975)).

The requirement of bad faith is not limited to the adverse inference remedy, however. Courts in this circuit have held that *no* sanctions for spoliation exist unless the moving party demonstrates bad faith. *Floeter v. City of Orlando*, 2007 U.S. Dist. LEXIS 9527, at *15 (M.D. Fla. Feb. 9, 2007); *Commercial Long Trading,* 2013 U.S. Dist. LEXIS 36031 at *2. That is certainly the prevailing view in this District. *See Managed Care,* 736 F. Supp. at 1328 ("In order to obtain spoliation sanctions against the defendant, the plaintiff must show, through direct or circumstantial evidence, that

the defendant acted in bad faith. The plaintiff argues that 'a finding of bad faith only impacts the severity of the sanctions (e.g. whether a dismissal or default judgment should be entered) and not whether a sanction should be issued.' . . . The undersigned disagrees with the plaintiff's position based on the aforementioned Eleventh Circuit cases requiring a showing of bad faith before imposing spoliation sanctions.") (citations omitted).

We note that there is authority and a parallel line of cases that treats bad faith as merely an element of spoliation sanctions, which impliedly supports the view that its absence is not dispositive. Most notably, in *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005), the Eleventh Circuit held based on Georgia law that:

> In determining whether dismissal is warranted, the court must consider: (1) whether the defendant was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the plaintiff acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded. (emphasis added).

Subsequently, a later circuit decision court endorsed this multi-factor balancing test in *Graff v. Baja Marine Corp.*, 310 F. App'x 298, 301 (11th Cir. 2009) ("To determine whether spoliation sanctions are warranted, a court must consider the factors identified in *Flury*"). But that later case also involved a case based purely on application of Georgia law.

Florida law is consistent with *Flury*'s application of Georgia law. Florida courts applying Florida spoliation law also do not require bad faith to sanction a party who loses evidence. *Public Health Trust v. Valcin*, 507 So. 2d 596 (Fla. 1987), the leading case on point, holds that sanctions are still appropriate for negligent loss of evidence

when "the absence of the records hinders [the plaintiff's] ability to establish a prima facie case." *Id.* at 599.[1]

The parties in this admiralty/diversity case do not dispute that the Eleventh Circuit's bad faith requirement must govern. Plaintiff concedes that bad faith is an essential element for its spoliation motion, but argues that she has shown demonstrable bad faith in this matter. We will consider that question further after determining if the remaining elements required for finding spoliation are present in the record.

B. Elements for Finding Spoliation

We turn to consider whether the other essential elements necessary for spoliation are present in this record. No federal statute or common law precisely outlines those elements, and thus the Eleventh Circuit approves looking to state law for guidance. *See Flury,* 427 F.3d at 945. Under Florida law, spoliation is shown when the moving party "proves (1) that the missing evidence existed at one time; (2) the alleged spoliator had a duty to preserve the evidence; and (3) the evidence was crucial to the movant being able to prove its prima facie case or defense." *Floeter,* 2007 U.S. Dist. LEXIS 9527, at *15; *St. Cyr v. Flying J Inc.*, 2007 U.S. Dist. LEXIS 42502, at *8 (M.D. Fla. 2007).

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[1] Additionally, Fed. R. Civ. P. 37, governing sanctions for discovery abuses in the course of litigation, contains no bad faith requirement. Specifically, Rule 37(c) provides relief for destroyed or concealed discovery unless the failure was "substantially justified or harmless." Bad faith is not a prerequisite for sanctions under the Rule. But again, we cannot look to this Rule to resolve this dispute because any spoliation occurred long before the action was pending or imminent.

Defendant admits that the video existed and was in its possession, custody and control at a relevant point in time. Plaintiff thus satisfies this first element.

Defendant did challenge the existence of the second element of the Florida test because it claimed no duty to preserve the video evidence ever arose because neither industry practice nor any law or regulation require surveillance cameras on board. And, because Plaintiff neither alleges that Defendant was obligated to record the incident, nor alleges any contractual duty to maintain any footage, Defendant maintained that no pre-existing duty ever existed.

The problem that Defendant faces, however, is that regardless of any company policy to save video of shipboard incidents, Federal law recognizes a litigant's duty to preserve evidence once it knows, or should know, that such evidence may be relevant to any potential litigation, even before litigation commences. *E.g., Flying J*, 2007 U.S. Dist. LEXIS 42502, at *8. In successfully objecting to Plaintiff's request for production of Mr. Margaritis's incident report on the ground that the report was created in anticipation of litigation, Defendant impliedly acknowledges it was on notice of potential litigation while the video existed.[2] Additionally, Mr. Margaritis admits that he requested the video be saved precisely because of the possible claim that might follow. Why else would he have tried to save the video in the first place but for its possible use in to future litigation? Mr. Margaritis's actions show that Defendant

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[2] Defendant relied on several cases that have recognized work product protection for post-incident investigations conducted by cruise lines in circumstances like the one here. *See, e.g., Fojtasek v. NCL (Bahamas) Ltd.*, 262 F.R.D. 650, 654 (S.D. Fla. 2009); *Alexander v. Carnival Corp.*, 238 F.R.D. 318 (S.D. Fla. 2006); *Lobegeiger v. Royal Caribbean Cruises Ltd.*, 2012 U.S. Dist. LEXIS 34718 (S.D. Fla. Mar. 7, 2012).

recognized it had a duty to preserve evidence. Thus, Plaintiff's case easily meets the second element necessary to find spoliation.

Finally, Plaintiff must demonstrate that the missing evidence is crucial to her prima facie case or defense. Generally, only outcome-determinative evidence constitutes "crucial" evidence. *See, e.g., United States v. McCray*, 2009 WL 2989775, at *2-3 (11th Cir. Sept. 21, 2009). Here, Plaintiff relies upon the video both to bolster her underlying claim, as well as impeachment and a defense against Defendant's alternative theory of the incident.

Defendant, on the other hand, alleges that Plaintiff cannot satisfy the "crucial" nature of the video because, in fact, the video corroborates the Defendant's version of the incident and undermines Plaintiff's account. Defendant relies on Mr. Margaritis's account of the video's contents as evidence of the video's usefulness to Plaintiff's claim.

Generally, a court denies spoliation unless a plaintiff definitively proves that the destruction of evidence leads to an inability to prove the case. *See, e.g, Green Leaf Nursery,* 341 F.3d at 1309. But, courts do not require the moving party to meet an overly-strict standard of proof regarding the content of the destroyed evidence; doing so unduly benefits the spoliating party. *See Southeastern Mech. Servs.,* 657 F. Supp. 2d at 1300.

Here, both parties claim the video shows different events. Neither party commands more credibility than the other. Although Defendant's agent actually viewed the video, the incident directly involved the Plaintiff, so no reason exists to automatically believe one party over the other. In alleging that the video provides

outcome-determinative proof of the alternative theory, Defendant acknowledges that, were the video to prove Plaintiff's theory, it would be outcome-determinative in her favor. Thus, there is enough prima facie evidence in the record to support the Plaintiff's version of events with which to find that the evidence would indeed be crucial if it shows, at a minimum, that Plaintiff simply did not "miss a step" as Defendant posits.

But the answer to this question is easily satisfied here for another reason. Defendant's agent viewed the video and concluded that it indeed supported Defendant's lack of negligence. That agent testified as much in his deposition, which Defendant seeks to introduce at trial. By doing so, Defendant has made the missing video crucial to Plaintiff's impeachment of the agent's credibility, in addition to Plaintiff's own use of the video for her case in chief. The video has been placed at issue by Defendant's own proffered testimony. It is now, by definition, crucial and potentially outcome-determinative for Plaintiff.

In both these ways, Plaintiff has indeed satisfied the third and final element required for the Court to find that spoliation has occurred. We turn, then, to the more difficult question of whether this spoliation warrants any sanction or remedy in this case.

C. Flury *Factors Warrant Sanctions*

After finding spoliation, we can consider the five-factor *Flury* test to determine if the spoliation warrants sanctions. The absence of any one element is not dispositive, although it may preclude imposing certain sanctions.

The destroyed evidence constitutes an important piece of evidence for both parties. The surveillance camera captured the fall. Were it available, it could further the judicial proceedings. This proves clear prejudice against the Plaintiff. And due to Defendant's sole possession of the video before the deletion, Defendant can now seek to describe the video's content with neither Plaintiff, nor judge, nor jury able to form their own impression. This prejudice cannot be cured as the video no longer exists.

The court also considers the potential for abuse should expert testimony regarding the evidence be permitted. Defendant incorrectly argues that no abuse exists because Plaintiff has an opportunity to cross-examine the expert, and so the absence of the footage actually assists the Plaintiff by creating cross-examination material. Alleging that Plaintiff benefits by allowing Defendant's expert testimony about the video, when any potential expert testimony on Plaintiff's behalf cannot include the contents of the video, constitutes a clear error in logic. Plaintiff certainly has an opportunity to cross-examine Defendant's expert witness and attempt to cast doubt on the witness's credibility, but Plaintiff must expend considerable resources to undertake that uphill battle. Forcing this task upon the Plaintiff, when Plaintiff cannot possibly do the same to Defendant, allows the Defendant to abuse the judicial process and benefit from its own spoliation. Additionally, Defendant's expert must necessarily rely on Mr. Margaritis's account of the video, meaning that the jury would hear "expert" testimony founded largely on self-serving hearsay evidence. We are thus left with a situation where Defendant seeks to utilize expert testimony relying on spoliated evidence. This factor, hence, weighs strongly in favor of Plaintiff.

The next *Flury* factor presents a more difficult issue: whether Plaintiff has demonstrated bad faith to warrant any sanctions. Bad faith can be found when a party fails to preserve evidence that it knew or should have known was relevant to litigation. *St. Cyr,* 2007 U.S. Dist. LEXIS 42502, at *8. Courts recognize that because a movant often faces a difficult burden in proving bad faith, and as direct evidence of bad faith is rarely available, circumstantial evidence can be used. *E.g., Britton v. WalMart Stores East, L.P.*, 2011 U.S. Dist. LEXIS 86901, at *38 (N.D. Fla. 2011); *Managed Care,* 736 F. Supp. 2d at 1328.

Generally, destruction of evidence under routine procedures does not indicate bad faith. *See, e.g., Vick,* 514 F.2d at 737. Additionally, courts applying Florida law have held that systematic and routine elimination of electronic data in the ordinary course does not constitute bad faith. *See, e.g., Managed Care,* 736 F. Supp. 2d at 1322.

Plaintiff, however, claims that there is circumstantial evidence of bad faith in this record because it is undisputed that Defendant knew of the video's relevance to potential litigation and understood the duty to preserve the video. We agree, especially given the fact that Defendant has been able on other occasions to identify and preserve CCTV footage onboard its ships. Plaintiff also points to the cavalier manner in which the security officer treated the video footage evidencing Plaintiff's fall. When he could not download the video himself, he delegated the task to an unknown officer but never followed up with that officer to confirm that the video download was successful. Nor did he take steps to correct the problem afterwards when there was still time to do so before the hard drive was over-ridden.

The Court's review of the supporting record shows no tangible evidence of either intent or malice on the security officer's part. He conceded that he erred in not preserving the video but claimed that it would only have supported the conclusions in his investigation. Moreover, the officer's memorialization of what he observed on the video in his incident report also supports the view that there was no reason to intentionally destroy the evidence. Thus bad faith has not been established to the extent that malicious or willful conduct is not found in the record.

But "bad faith" is not limited to acts of malice or willful intent. In the Eleventh Circuit, in a variety of contexts bad faith is deemed to exist in either a case of intentional misconduct or reckless disregard of the consequences. *See, e.g., Amlong & Amlong, P.A. v. Denny's, Inc.*, 457 F.3d 1180, 1190 (11th Cir. Fla. 2006); *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1544 (11th Cir. Ga. 1993); *Peer v. Lewis*, 606 F.3d 1306, 1314 (11th Cir. 2010). Whenever bad faith sanctions are being considered under the Court's inherent powers, a "finding of both faith is warranted where an attorney [or party] knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent. A party also demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of a court order." *Thomas v. Tenneco Packaging Co.,* 293 F.3d 1306, 1320 (11th Cir. 2002) (quoting *Barnes v. Dalton,* 158 F.3d 1212, 1214 (11th Cir. 1998)). "[O]bjectively reckless conduct is enough to warrant sanctions even if the attorney does not act knowingly and malevolently" because conduct is " tantamount to bad faith when he

'either carelessly or deliberately' covered up evidence." *Amlong,* 457 F.3d at 1191 (quoting *Malautea,* 987 F.2d at 1544).

The record here compelling demonstrates the reckless manner in which the security officer treated his duty to preserve relevant evidence. He tried once to download the data but could not do so for some reason. Recognizing the problem, he delegated the task to another officer onboard. But then, for reasons that have never been fully explained, he simply let the matter drop. He did not confirm that the other officer was any more successful than he was. And having failed to confirm this basic fact, he did not take any further actions at the conclusion of the voyage to obtain the assistance of Defendant's technical personnel to download the video before it was over-written. There was ample time to do so, yet it appears that other responsibilities took precedence. For a security officer tasked with investigating a possible claim *in anticipation of litigation* and preserving evidence for that claim to allow the evidence to be lost in this manner is undeniably reckless. It was not only negligent, as Defendant posits, because there was a special duty to preserve this evidence. Under any objective measure, the failure to do so indeed rises to the level of a reckless dereliction of duty. *See Amlong,* 457 F.3d at 1191 ("reckless conduct simply means conduct that grossly deviates from reasonable conduct."); *Schwartz,* 341 F.3d at 1225 (recklessness is "a gross deviation from conduct that might be reasonable in the circumstances").

Accordingly, this record evidence amply satisfies Plaintiff's burden of showing bad faith in the form of reckless or reckless conduct sufficient to find that sanctions are warranted.

D. Appropriate Sanctions

Having found that spoliation exists that warrant some level of sanctions, the Court must determine which sanctions are appropriate under the circumstances. Although no explicit guidelines state which sanctions may or may not be handed down through the court's inherent power, the power must be "exercised with restraint and discretion." *Chambers,* 501 U.S. at 44. Again, we can consider state law principles for guidance so long as they do not conflict with recognized limitations on a federal court's inherent powers. *See, e.g., Flury,* 427 F.3d at 945; *Commercial Long Trading,* 2013 U.S. Dist. LEXIS 36031, at *5.

We have already found that this act of spoliation, which satisfies four of the five *Flury* factors, warrants some appropriate level of sanctions. Plaintiff requests that both the Defendant's fact and expert witnesses be precluded from testifying about the surveillance video's contents, in addition to the use of special jury instructions that require the jury to infer that the missing video evidence would be adverse to Defendant's case.

We agree in part with Plaintiff's position. Defendant's failure to preserve the evidence means Defendant's expert can rely upon the content of the video, while Plaintiff and her expert cannot. Allowing Defendant to benefit in this manner from its own failure to preserve evidence materially prejudices the Plaintiff. Consequently, the

Court must preclude Defendant from eliciting this testimony from the defense liability expert. Nor can the expert rely in any way upon the missing surveillance video or make any reference to the security officer's account of that video.

Similarly, we agree that any of Defendant's other witnesses must also be precluded from testifying as to the content of the video. Allowing Defendant to utilize any testimony regarding the alleged contents of the video would unduly prejudice the Plaintiff. Plaintiff remains unable to challenge the video's contents, whether relied upon by the expert or discussed by any other witness. Admittedly, Plaintiff can use cross-examination of Defendants witnesses to impugn their credibility. But this task represents an undue burden necessary because of Defendant's spoliation and is likely not sufficient to mitigate the prejudice. Granting Plaintiff's request to preclude any of Defendant's witnesses from testifying regarding the video effectively renders the video moot. This promotes justice by allowing the case to proceed without any party gaining an undue advantage from the spoliated evidence. Plaintiff's motion for spoliation sanctions will be Granted in these respects.[3]

That then leads to Plaintiff's additional requested sanction in the form of a special jury instruction. While we certainly have the discretion to grant this instruction despite no evidence of intentional bad faith, where the instruction does not

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[3] The granted sanctions function to effectively curtail any discussion of the spoliated evidence during trial. In this vein, and in light of theses sanctions, we obviously require that Plaintiff must also refrain from any discussion of the video's contents or the absence of any video evidence. Allowing the Plaintiff to discuss the video while simultaneously precluding Defendant from testifying regarding the same video would result in undue prejudice against Defendant. The Court thus strikes any reference to the video during the trial.

require a definitive conclusion and only advises the jury of the power, it need not do so. In precluding Defendant from introducing any testimony or evidence that relies upon or concerns the alleged contents of the video recording, the Court has effectively removed any unfair advantage the Defendant may have gained from the spoliation. A jury instruction regarding the missing video, when no testimony of that video's contents will be discussed, would serve only to confuse the jury and tilt the scale too heavily in Plaintiff's favor. And clearly the Court would not give the instruction without then allowing Defendant to testify as to its contents, which is precisely what Plaintiff does not want to have happen. Having presented this question to Plaintiff's counsel at oral argument, Plaintiff elected to opt for only preclusion of evidence if the Court forced Plaintiff to make that election of remedy.

Accordingly, the Court will deny the request for sanctions in the form of an adverse inference instruction.[4]

* * *

[4] We add that even absent Plaintiff's concession, we would not have granted the requested sanction in this case. The reckless conduct here does not warrant a draconian sanction like an adverse inference instruction. *See Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (an "adverse inference instruction is an extreme sanction and should not be given lightly.").

III. CONCLUSION

Based upon a thorough review of the record as a whole and the arguments articulated by the parties in their motions, it is hereby **ORDERED AND ADJUDGED** that Plaintiff's Motion for Sanctions for Spoliation of Evidence [D.E. 25] is **GRANTED** in part and **DENIED** in part as to the form of sanctions that are Ordered herein.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of July, 2013.

/s/ *Edwin G. Torres*
EDWIN G. TORRES
United States Magistrate Judge