22-1377

United States Court of Appeals For the Second Circuit

RICHARD HOFFER,

Plaintiff-Appellant,

-v-

POLICE OFFICER ELYSSA TELLONE, SHIELD #730837, POLICE OFFICER TREVOR GOFF, SHIELD #731915, POLICE OFFICER LAMONT BROWN, SHIELD #734149, AND POLICE OFFICER DARCY DRUMMOND, SHIELD #731907,

Defendants-Appellees,

-and-

CITY OF YONKERS, CITY OF YONKERS POLICE DEPARTMENT, POLICE OFFICER JOHN DOE 1, POLICE OFFICER JOHN DOE 2, POLICE OFFICER JOHN DOE 3, POLICE OFFICER JOHN DOE 4, POLICE OFFICER JOHN DOE 5, POLICE OFFICER JOHN DOE 6, POLICE OFFICER JOHN DOE 7, AND POLICE OFFICER JOHN DOE 8,

Defendants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR DEFENDANTS-APPELLEES

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June 3, 2024

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 1

ARGUMENT 9

I.

PLAINTIFF WAIVED THE RIGHT TO CHALLENGE THE DISTRICT COURT'S DENIAL OF AN ADVERSE-INFERENCE INSTRUCTION BASED UPON AN ALLEGED SPOLIATED VIDEO OF THE FIRST DEPLOYMENT OF OFFICER GOFF'S TASER—AND THEREBY FORECLOSED APPELLATE REVIEW 10

II.

PLAINTIFF'S WAIVER ASIDE, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION—LET ALONE FUNDAMENTALLY ERR—IN DETERMINING THAT PLAINTIFF WAS NOT ENTITLED TO AN ADVERSE-INFERENCE INSTRUCTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 37(E)(2) 15

A. The District Court Correctly Recognized That Plaintiff Bore The Burden Of Proving An Entitlement To An Adverse-Inference Instruction By Clear And Convincing Evidence 18

B. The District Court Prudently Refused To Let Plaintiff Carry His Burden Using The Testimony Of Cuebas—Plaintiff's Girlfriend, The Mother Of His Child, And An Admitted Liar 20

TABLE OF CONTENTS (cont'd)

PAGE

ARGUMENT POINT II (cont'd)

C. The District Court Soundly Determined That The Remaining Evidence On Which Plaintiff Relied Did Not Clearly And Convincingly Establish An Entitlement To An Adverse-Inference Instruction 25

1. There Was No Video Of The First Taser Deployment—No "Electronically Stored Information That Should Have Been Preserved In Anticipation Or Conduct Of Litigation" 26

2. No Party "Acted With The Intent To Deprive" Plaintiff Of Any Video Of The First Taser Deployment That Might Have Existed 28

3. It Was Reasonable For The District Court To Deny An Adverse-Inference Instruction Because The Court Permitted Plaintiff To Put The Issue Of Alleged Spoliation Before The Jury Via Other Means 35

4. The District Court Was Not Required To Submit Factual Questions Regarding Spoliation To The Jury 38

CONCLUSION 40

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

CASES **PAGE**

Berni v. Barilla S.p.A.,
964 F.3d 141 (2d Cir. 2020) 17

Boudreau v. Smith,
Case No. 3:17-cv-00589-SRU,
2020 U.S. Dist. LEXIS 56747 (D. Conn. Mar. 31, 2020) 19

Bursztein v. Best Buy Stores, L.P.,
Case No. 1:20-cv-00076-AT,
2021 U.S. Dist. LEXIS 92978 (S.D.N.Y. May 17, 2021) 19

Business Guides, Inc. v. Chromatic Commc'ns Enters., Inc.,
498 U.S. 533 (1991) 29

Chepilko v. Henry,
Case No. 1:18-cv-02195-SDA,
2024 U.S. Dist. LEXIS 50199 (S.D.N.Y. Mar. 21, 2024) 18

ComLab, Corp. v. Kal Tire & Kal Tire Mining Tire Grp.,
Case No. 1:17-cv-01907-PKC-OTW,
2018 U.S. Dist. LEXIS 154983 (S.D.N.Y. Sept. 11, 2018) 39

Doe v. Trump Corp.,
6 F.4th 400 (2d Cir. 2021) 11

Europe v. Equinox Holdings, Inc.,
592 F. Supp. 3d 167 (S.D.N.Y. 2022) 19

Fabri v. United Techs. Int'l, Inc.,
387 F.3d 109 (2d Cir. 2004) 16

Jarvis v. Ford Motor Co.,
283 F.3d 33 (2d Cir. 2002) 16

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

Hapag-Lloyd Aktiengesellschaft v. United States Oil Trading LLC,
814 F.3d 146 (2d Cir. 2016) 11

Hyland v. Navient Corp.,
48 F.4th 110 (2d Cir. 2022) 17

Johnson v. Perry,
763 F. App'x 81 (2d Cir. 2019) (summary order) 31

Khatabi v. Bonura,
Case No. 1:10-cv-01168-ER-PED,
2017 U.S. Dist. LEXIS 61921 (S.D.N.Y. Apr. 21, 2017) 39

Lokai Holdings LLC v. Twin Tiger USA LLC,
Case No. 1:15-cv-09363-ALC-DCF,
2018 U.S. Dist. LEXIS 46578 (S.D.N.Y. Mar. 12, 2018) 19

Luck v. McMahon,
Case No. 3:20-cv-00516-VAB,
2022 U.S. Dist. LEXIS 184688 (D. Conn. Feb. 11, 2022) 19

Matthews v. New York State Dep't of Corrs. & Community Supervision,
Case No. 9:17-cv-000503-GTS-ML,
2023 U.S. Dist. LEXIS 52318 (N.D.N.Y. Mar. 28, 2023) 18–19

Matthews v. Sweeney,
Case No. 9:17-cv-000503-GTS-ML,
2024 U.S. Dist. LEXIS 65150 (N.D.N.Y. Apr. 10, 2024) 39

Moses v. New York Times Co.,
79 F.4th 235 (2d Cir. 2023) 30

Pavelic & LeFlore v. Marvel Entertainment Grp.,
493 U.S. 120 (1989) 29

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

Popat v. Levy,
Case No. 1:15-cv-01052-EAW-HKS,
2022 U.S. Dist. LEXIS 177716 (W.D.N.Y. Sept. 29, 2022) 19

Puckett v. United States,
556 U.S. 129 (2009) 11

Regulatory Fundamentals Grp., LLC v. Governance Risk Mgmt. Compliance, LLC,
Case No. 1:13-cv-02493-KBF,j
2014 U.S. Dist. LEXIS 107616 (S.D.N.Y. Aug. 5, 2014) 39

Residential Funding Corp. v. DeGeorge Fin. Corp.,
306 F.3d 99 (2d Cir. 2002) 29, 31

Rossbach v. Montefiore Med. Ct.,
81 F.4th 123 (2d Cir. 2023) 38, 39

Sandstrom v. Montana,
442 U.S. 510 (1979) 30

SEC v. DiBella,
587 F.3d 553 (2d Cir. 2009) 16

Siani v. State Univ. of New York at Farmingdale,
Case No. 2:09-cv-00407-JFB-SIL,
2011 U.S. Dist. LEXIS 69173 (E.D.N.Y. June 28, 2011) 39

Silge v. Merz,
510 F.3d 157, 160 (2d Cir. 2007) 29

Stanbro v. Westchester County Health Care Corp.,
Case Nos. 7:19-cv-10857-KMK & 7:20-cv-01591-KMK,
2021 U.S. Dist. LEXIS 163849 (S.D.N.Y. Aug. 7, 2021) 12, 31, 35

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

Tang v. Citizens Bank,
741 F. App'x 11 (1st Cir. 2018) (summary order) 14

Ungar v. City of New York,
329 F.R.D. 8 (E.D.N.Y. 2018) 31

United States v. Anglada,
524 F.2d 296 (2d Cir. 1975) 39, 40

United States v. Graham,
51 F.4th 67 (2d Cir. 2022) 11, 15

United States v. Locke,
759 F.3d 760 (7th Cir. 2014) 14

United States v. Olano,
507 U.S. 725 (1993) 11

United States v. Spruill,
808 F.3d 585 (2d Cir. 2015) 12

Venture Grp. Enters. v. Vonage Bus. Inc.,
Case No. 1:20-cv-04095-RA-GS,
2022 U.S. Dist. LEXIS 180304 (S.D.N.Y. Sept. 30, 2022) 19

CONSTITUTIONAL PROVISIONS

U.S. Const.,
Amend. IV 2, 3
Amend. VII 38

TABLE OF AUTHORITIES (cont'd)

STATUTES AND RULES **PAGE**

42 U.S.C. § 1983 2

Federal Rule of Civil Procedure 37 ..... *passim*

Federal Rule of Criminal Procedure 52 16

OTHER AUTHORITIES

Fed. R. Civ. P. 37 Advisory Comm. Note to 2015 Amend..... 31

The Merriam-Webster Dictionary (2004 ed.)..... 30

STATEMENT OF QUESTIONS PRESENTED

1. Did plaintiff Richard Hoffer waive the right to challenge the district court's denial of his request for an instruction that the jury must or may infer that what plaintiff surmised was a spoliated video of defendant Yonkers Police Officer Trevor Goff's use of his taser against plaintiff was adverse to the position of Officer Goff and his co-defendants, thereby foreclosing any appellate review of the court's ruling?

2. Plaintiff's waiver aside, did the district court soundly exercise its discretion in determining that plaintiff was not entitled to an adverse-inference instruction because he failed to clearly and convincingly establish that such an instruction was warranted under Federal Rule of Civil Procedure 37(e)(2)?

STATEMENT OF THE CASE

1. In 2018, plaintiff Richard Hoffer commenced the action underlying this appeal by filing a complaint in the United States District Court for the Southern District of New York against four Yonkers police officers: Officer Elyssa Tellone, Officer Trevor Goff, Officer Lamont

Brown, and Officer Darcy Drummond.[1] (D. Ct. Dkt. No. 1.) The complaint, brought under 42 U.S.C. § 1983, alleged that defendants had committed several violations of the United States Constitution in connection with an incident that supposedly occurred on November 20, 2016 in Yonkers, New York. (D. Ct. Dkt. No. 1 at 9–12.)

As relevant here, in the complaint as amended later in 2018, plaintiff advanced two claims that, during the incident in question, the defendant officers violated his rights under the Fourth Amendment. First, plaintiff claimed that the officers violated the Fourth Amendment by inflicting excessive force upon him. (Appellant's App. 31–32.) And second, plaintiff claimed that each officer additionally violated the Fourth Amendment by failing to intervene as the other officers inflicted excessive force upon him. (Appellant's App. 31–32.) Plaintiff sought $25 million in compensatory damages and $25 million in punitive damages, to be awarded against defendants jointly and severally. (Appellant's App. 33.)

[1] Plaintiff named other defendants, too, but all of those other defendants were either dropped from the case by plaintiff himself (*see* Appellant's App. 21), or dismissed from the case by court order (D. Ct. Dkt. No. 92 at 2), prior to the start of trial.

2. In 2021, the district court (Krause, M.J., sitting by consent) held a trial on plaintiff's Fourth Amendment claims. Plaintiff and defendants were represented by counsel.

The evidence presented at trial tended to establish that, on November 20, 2016, plaintiff was spending time with a man named Courtney Sullivan and a woman named Sandra Cuebas—who was then plaintiff's friend, but by the time of trial had become his girlfriend—in Cuebas's apartment in Yonkers. (Appellant's App. 369–370.) Around 6:30 p.m., plaintiff asked Cuebas if she would drive him to a location on Riverview Place, a Yonkers street. (Appellant's App. 369–370.) Cuebas agreed. (Appellant's App. 369.) Cuebas, Sullivan, and plaintiff then got into Cuebas's car, and the trio drove to Riverview Place. (Appellant's App. 370.) Soon after they arrived there, however, two men approached the car, entered the car, drew guns, and attempted to rob Cuebas, Sullivan, and plaintiff at gunpoint. (Appellant's App. 370–371.)

Cuebas and Sullivan ran away, escaping to a nearby deli. (Appellant's App. 338, 371.) Plaintiff did not escape immediately. He threw his wallet on the ground, and while the would-be robbers were

searching for it, plaintiff got into Cuebas's car and drove away. (Appellant's App. 338.)

Cuebas called 9-1-1 and reported the car stolen. (Appellant's App. 373.) Meanwhile, plaintiff had driven the car to a wooded area where he had stashed a gun, recovered that gun, and then got back in the car and resumed driving. (Appellant's App. 335.) At approximately 7:30 p.m., Officer Brown, who was driving in a police car with Officer Tellone, heard a report of an armed carjacking come across the police radio. (Appellant's App. 398–399, 403.) About 10 minutes after he heard the report, Officer Brown spotted the car that plaintiff was driving, drove behind it, and activated his car's lights and sirens. (Appellant's App. 343, 399–400.) Plaintiff sped away, eventually entering the Saw Mill Parkway and traveling at roughly 70 miles per hour. (Appellant's App. 343, 400.) Officer Brown pursued plaintiff for a little over a mile, at which point plaintiff's car collided with another vehicle. (Appellant's App. 332, 344–345, 400.)

Eventually, plaintiff—with his gun on his person—got out of the car. (Appellant's App. 347–348, 354.) Yonkers police officers caught up with plaintiff at a location near the Saw Mill Parkway's exit ramp at

Rumsey Road. (Appellant's App. 332.) The circumstances of what happened next at Rumsey Road, however, were disputed between the parties.

Plaintiff claimed that he was lying on his stomach with his hands between his stomach and the ground, and that he "tried to stand up" and "[t]ried to crawl" but could not do either. (Appellant's App. 208–209.) According to plaintiff, a phalanx of Yonkers police officers, including Officer Tellone, descended upon him and kicked him repeatedly. (Appellant's App. 209–211, 333.) At some point during the beating, plaintiff was tased twice in his lower back. (Appellant's App. 212, 333, 352–353.)

Defendants disputed key aspects of plaintiff's account. They contended that only a small number of police officers used force on plaintiff after plaintiff was lying on the ground, and only to the extent necessary to subdue him. (Appellant's App. 420–421.) Officer Goff acknowledged that he used his taser on plaintiff twice in succession around 8 p.m. First, he activated the taser and shot it at plaintiff's back from a distance. (Appellant's App. 423.) Because, according to defendants, that action did not suffice to bring plaintiff into compliance,

Officer Goff then walked toward plaintiff, pressed the taser to plaintiff's back, and deployed it once again. (Appellant's App. 424.)

3. When Officer Goff's taser is working properly, arming it activates a recording system that captures video footage of whatever is transpiring in front of the taser. (Appellant's App. 425.) And to that end, defendants introduced the video that the taser had automatically produced capturing the *second* time Officer Goff used the taser against plaintiff on the night of November 20, 2016. (Appellant's App. 427; *see* Appellant's App. 850.) However, at least as of the time of trial, there was no video available of the *first* deployment.

Midway through trial, plaintiff orally requested that the district court issue the jury an instruction that the jury must or may infer that what plaintiff surmised was a spoliated video of Officer Goff's first deployment of his taser against plaintiff was adverse to defendants' position. Plaintiff did not request an evidentiary hearing on the issue. Instead, he argued, through counsel, that an adverse-inference instruction was warranted on the basis of certain witnesses' trial testimony. (Appellant's App. 451–456, 520–523, 604–605.)

At the charge conference, the district court orally denied plaintiff's request. The court explained its rationale in a detailed oral statement that will be discussed at greater length in the "Argument" section of this brief below. (Appellant's App. 644–647.)

The district court identified the governing law as Federal Rule of Civil Procedure 37, "Failure to Make Disclosures or to Cooperate in Discovery; Sanctions." (Appellant's App. 644.) The court pointed specifically to subdivision (e), a part of the rule amended into its current form in 2015 and entitled "Failure to Preserve Electronically Stored Information." (Appellant's App. 644.) The court observed that, under Rule 37(e), an adverse-inference instruction would only be appropriate if, as a threshold matter, the alleged video of the first taser deployment actually existed and had been spoliated. (Appellant's App. 644.) And the court found no "clear evidence" that any such video existed in the first place. (Appellant's App. 644.) In the court's view, the evidence did not rule out the possibility that the taser simply malfunctioned and never created a video to begin with. (Appellant's App. 644.)

The district court also noted that, under Rule 37(e), an adverse-inference instruction would be warranted only if "either the individual

defendants or perhaps by extension the City of Yonkers acted with an intent to deprive plaintiff of the use of the video and in the current litigation." (Appellant's App. 644.) Based upon the evidence presented, the court said "it would be surprising" to learn "that the Yonkers Police Department went to such lengths to destroy [the alleged] video." (Appellant's App. 645.)

The district court did agree, however, to allow plaintiff's counsel to raise the issue of spoliation in her closing argument. (Appellant's App. 647.) The court also noted that it had permitted plaintiff's counsel to question witnesses about the issue, and that plaintiff's counsel had in fact done so. (Appellant's App. 646–647.)

Thereafter, the district court read its jury charge—which did not contain an adverse-inference instruction—aloud to the jury. (Appellant's App. 687–719.) With the jury still present, the court then put the following question to plaintiff's counsel: "Now, let me just ask a question, and it should be just a yes-or-no answer for now. Ms. Radlin, does the Plaintiff have any objection or concern with respect to the jury instruction as read?" (Appellant's App. 719.) Plaintiff's counsel responded: "No, Judge." (Appellant's App. 720.)

The jury then began its deliberations, which culminated in a verdict of no liability. (Appellant's App. 813–815.) On December 9, 2021, the court entered judgment against all defendants accordingly. (Appellant's App. 851–852.)

Plaintiff filed a motion for a new trial but did not include in that motion any challenge to the jury charge. (Appellant's App. 853–858.) The district court denied the motion. (Appellant's App. 860–867.) Plaintiff then filed a notice of appeal. (Appellant's App. 868–869.)

ARGUMENT

The final judgment entered by the district court on December 9, 2021 should be affirmed, because plaintiff presents no cause to disturb it based upon the court's denial of his request for an instruction that the jury must or may infer that what plaintiff surmised was a spoliated video of Officer Goff's use of his taser against plaintiff was adverse to defendants' position at trial. Affirmance is proper for either of two independent reasons. *First*, plaintiff waived the right to challenge the court's denial of his request for an adverse-inference instruction, and thereby foreclosed any appellate review of the ruling. *Second*, and in any event, the ruling reflects a sound application of Federal Rule of Civil

Procedure 37(e)(2)—the Rule that governs the issuance of sanctions for spoliation of electronically stored evidence—to the facts and circumstances in this case.

I.

PLAINTIFF WAIVED THE RIGHT TO CHALLENGE THE DISTRICT COURT'S DENIAL OF AN ADVERSE-INFERENCE INSTRUCTION BASED UPON AN ALLEGED SPOLIATED VIDEO OF THE FIRST DEPLOYMENT OF OFFICER GOFF'S TASER—AND THEREBY FORECLOSED APPELLATE REVIEW

Plaintiff asserts (Plaintiff's Opening Br. 22; *see* Plaintiff's Opening Br. 3) that this Court reviews a district court's denial of a request to issue a discovery sanction, including an instruction that the jury must or may infer that an item of spoliated evidence would have been adverse to the party who spoliated it, for abuse of discretion. And to be sure, when such rulings are reviewed, abuse-of-discretion is the standard that ordinarily applies. But the district court's decision denying plaintiff's request for an adverse-inference instruction based upon the supposed spoliation of a video of the first time Officer Goff used his taser against plaintiff on the night in question—a video plaintiff's posits had been made by the taser's automatic recording function but was destroyed at some point

thereafter—should not be reviewed. Plaintiff, via affirmative steps taken in the district court, waived his right to challenge the decision on appeal.

Waiver is "a litigant's intentional relinquishment of a known right." *Doe v. Trump Corp.*, 6 F.4th 400, 409 n.6 (2d Cir. 2021). Waiver is often discussed hand-in-hand with forfeiture, which is the loss of a right due to inadvertence. *Id.* But the concepts are analytically distinct. Specifically, this Court "ha[s] discretion to consider forfeited arguments," but "a waived argument may not be revived." *Id.* Waiver "eliminates [this Court's] discretion to reach the issue." *Hapag-Lloyd Aktiengesellschaft v. United States Oil Trading LLC*, 814 F.3d 146, 156 n.23 (2d Cir. 2016). And for good reason: If a party affirmatively disclaims his right to challenge a ruling as erroneous, then the ruling is appropriately viewed as "no error at all." *Puckett v. United States*, 556 U.S. 129, 138 (2009); *accord United States v. Olano*, 507 U.S. 725, 733 (1993) (explaining that a party's waiver of a right to seek certain relief renders a court's denial of that relief "not 'error'"). As this Court has put it, waiver of a right to challenge an alleged error "'extinguishes an[y] error' along with any appellate review." *United States v. Graham*, 51 F.4th 67, 80 (2d Cir. 2022) (quoting *Olano*, 507 U.S. at 733).

Waiver will be found "where the totality of circumstances * * * demonstrate the requisite intentional action" on the litigant's part. *United States v. Spruill*, 808 F.3d 585, 599 (2d Cir. 2015). No magic words are required. And, as particularly relevant here, a party waives a right to challenge a ruling "where [the] party asserts, but subsequently withdraws, an objection in the district court." *Id.* at 597. That course of action is exactly what transpired here regarding plaintiff's request for an instruction that the jury must or may infer that what he hypothesizes was the spoliated video of Officer Goff's first taser deployment would have been adverse to Officer Goff and his co-defendants.

Initially in the district court, plaintiff, through counsel, orally advocated for an adverse-inference instruction based upon what he contended was the spoliation of the alleged taser video, and he provided the court with electronic database citations for *Stanbro v. Westchester County Health Care Corp.*, Case Nos. 7:19-cv-10857-KMK & 7:20-cv-01591-KMK, 2021 U.S. Dist. LEXIS 163849 (S.D.N.Y. Aug. 7, 2021), a trial-court ruling that, in his view, supported his position. (Appellant's App. 451–456, 520–523, 603–605.) At the charge conference, the court denied plaintiff's request for an adverse-inference instruction.

(Appellant's App. 643–648.) Thereafter, the parties' counsel presented their closing arguments; in her closing argument, plaintiff's counsel discussed the spoliation issue at some length. (Appellant's App. 680–681.) Following closing arguments, the court read aloud its jury charge—a charge that did not contain the adverse-inference instruction plaintiff had requested. (Appellant's App. 687–719.)

Immediately after reading the jury charge, the district court, with the jury still present, put the following question to plaintiff's counsel: "Now, let me just ask a question, and it should be just a yes-or-no answer for now. Ms. Radlin, does the Plaintiff have any objection or concern with respect to the jury instruction as read?" (Appellant's App. 719.) Plaintiff's counsel responded: "No, Judge." (Appellant's App. 720.) The jury then began its deliberations, which culminated in a verdict of no liability. (Appellant's App. 813–815.) Plaintiff filed a motion for a new trial but did not include in that motion any challenge to the jury charge. (Appellant's App. 853–858.) The court denied the motion. (Appellant's App. 860–867.)

The record does not explain *why* plaintiff's counsel stated that she had no objection or concern regarding the jury charge. Perhaps it was a tactical choice. Perhaps plaintiff's counsel felt that she had sufficiently

raised the specter of spoliation during her summation. Or perhaps plaintiff's counsel responded to the court as she did for some other reason entirely.

But the rationale behind plaintiff's counsel's response—whatever it might have been—is irrelevant. The salient point is that the response, on its face, bespeaks an intent to disavow any requests for additional instructions not contained within the jury charge as read, including an adverse-inference instruction based upon what plaintiff posited was the spoliated video of the first taser deployment. To reiterate: With the jury present, in response to the court's question whether plaintiff had "any objection or concern with respect to the jury instruction as read," plaintiff's counsel responded "No, Judge." (Appellant's App. 719–720.) Thus, "while the jury [was] still there and open to instruction the judge [was] made to understand that he [was] no longer being requested to correct, clarify or supplement the instruction he had given"—a course of action that cannot be construed as "anything but" waiver. *Tang v. Citizens Bank*, 741 F. App'x 11, 13 (1st Cir. 2018) (summary order) (Souter, J., sitting by designation); *see also United States v. Locke*, 759 F.3d 760, 763 (7th Cir. 2014) (explaining that "a defendant who

affirmatively states 'I do not object' * * * has not forfeited the right [to object], but rather intentionally relinquished or waived the right and cannot ask for review").

The response given by plaintiff's counsel to the district court's question following the reading of the jury charge "extinguishe[d] an[y] error" associated with the court's denial of plaintiff's request for an adverse-inference instruction. *Graham*, 51 51 F.4th at 80. The response therefore likewise "extinguishe[d] * * * any appellate review." *Id.* This Court should therefore decline to review the district court's ruling on the merits and should affirm its final judgment.

II.

PLAINTIFF'S WAIVER ASIDE, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION—LET ALONE FUNDAMENTALLY ERR—IN DETERMINING THAT PLAINTIFF WAS NOT ENTITLED TO AN ADVERSE-INFERENCE INSTRUCTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 37(E)(2)

If the district court's decision remains reviewable notwithstanding plaintiff's counsel's disavowal of "any objection or concern with respect to the jury instruction as read" (Appellant's App. 719), the standard of review is even more deferential than abuse of discretion. Indulging the notion that plaintiff did not *waive* his right to challenge the district

court's denial of his request to give an adverse-inference instruction based upon what he theorizes was a spoliated video of Officer Goff's first taser deployment, still, at the very least, plaintiff *forfeited* that right. And as a result, he cannot obtain appellate relief unless he shows that the district court's denial of his request to issue the adverse-inference instruction constitutes "fundamental error," *SEC v. DiBella*, 587 F.3d 553, 569 (2d Cir. 2009): error "so serious and flagrant that it goes to the very integrity of the trial." *Id.* (quoting *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 62 (2d Cir. 2002)). As a point of comparison, from the perspective of an appellant "[t]he fundamental error standard 'is more stringent than the plain error standard applicable to criminal appeals under Federal Rule of Criminal Procedure 52(b)." *Id.* (quoting *Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 119 (2d Cir. 2004)).

Plaintiff does not so much as acknowledge the "fundamental error" standard of review, let alone argue that the district court fundamentally erred in determining that plaintiff had not established an entitlement to an adverse-inference instruction based upon what he contends was the spoliated video of the first taser deployment.

But at any rate, plaintiff has not satisfied the (still very deferential) abuse-of-discretion standard that he thinks applies. As the district court recognized, plaintiff's request for an adverse-inference instruction is governed by Federal Rule of Civil Procedure 37(e)(2), as amended in 2015, which provides:

> 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 * * * 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.

Plaintiff has not demonstrated that the district court's determination that he failed to make the necessary Rule 37(e)(2) showing "rests on a legal error or clearly erroneous factual finding, or falls outside the range of permissible decisions." *Hyland v. Navient Corp.*, 48 F.4th 110, 117 (2d Cir. 2022) (quoting *Berni v. Barilla S.p.A.*, 964 F.3d 141, 146 (2d Cir. 2020)).

A. The District Court Correctly Recognized That Plaintiff Bore The Burden Of Proving An Entitlement To An Adverse-Inference Instruction By Clear And Convincing Evidence

To begin, the district court appropriately recognized that plaintiff bore the burden of proving the various Federal Rule of Civil Procedure 37(e)(2) elements by clear and convincing evidence. (*See* Appellant's App. 644.)

Rule 37 itself does not specify the applicable burden by which a proponent of an adverse inference must prove he is entitled to one. The notes to the 2015 amendments prepared by the Advisory Committee on Civil Rules, which drafted them, do not specify the applicable burden, either. And this Court has not opined on the issue.

But, district courts throughout this Circuit have weighed in. And they have routinely rejected requests for adverse-inference instructions upon finding that the proponents have not made a clear and convincing case. Those courts have consistently explained that, in light of the severity of such a sanction, only the most exacting burden available in a civil action will do. *See, e.g.*, *Chepilko v. Henry*, Case No. 1:18-cv-02195-SDA, 2024 U.S. Dist. LEXIS 50199, at *11 n.2 (S.D.N.Y. Mar. 21, 2024); *Matthews v. New York State Dep't of Corrs. & Community Supervision*,

Case No. 9:17-cv-000503-GTS-ML, 2023 U.S. Dist. LEXIS 52318, at *44 (N.D.N.Y. Mar. 28, 2023); *Venture Grp. Enters. v. Vonage Bus. Inc.*, Case No. 1:20-cv-04095-RA-GS, 2022 U.S. Dist. LEXIS 180304, at *7 (S.D.N.Y. Sept. 30, 2022); *Popat v. Levy*, Case No. 1:15-cv-01052-EAW-HKS, 2022 U.S. Dist. LEXIS 177716, at *21 (W.D.N.Y. Sept. 29, 2022); *Europe v. Equinox Holdings, Inc.*, 592 F. Supp. 3d 167, 179 (S.D.N.Y. 2022); *Luck v. McMahon*, Case No. 3:20-cv-00516-VAB, 2022 U.S. Dist. LEXIS 184688, at *101 (D. Conn. Feb. 11, 2022); *Bursztein v. Best Buy Stores, L.P.*, Case No. 1:20-cv-00076-AT, 2021 U.S. Dist. LEXIS 92978, at *25 (S.D.N.Y. May 17, 2021); *Boudreau v. Smith*, Case No. 3:17-cv-00589-SRU, 2020 U.S. Dist. LEXIS 56747, at *35 (D. Conn. Mar. 31, 2020); *Lokai Holdings LLC v. Twin Tiger USA LLC*, Case No. 1:15-cv-09363-ALC-DCF, 2018 U.S. Dist. LEXIS 46578, at *3–4 (S.D.N.Y. Mar. 12, 2018).

Notably, plaintiff does not quarrel with the district court's selection of the clear-and-convincing-evidence burden of proof. Plaintiff recognizes that the court held him to that burden. He notes that the court rested its decision on, among other things, the "factual finding that there was no 'clear evidence' that video footage ever existed of the taser's initial

deployment." (Plaintiff's Opening Br. 24; *accord, e.g.*, Plaintiff's Opening Br. 23 (observing that "the court found that there was no 'clear evidence' that a second taser video existed 'in the first place'").) Plaintiff argues that he *satisfied* the clear-and-convincing-evidence burden—or, more precisely, that he could have satisfied that burden had he been permitted to make his spoliation case to the jury. (*See infra* 38–40.) But plaintiff does not deny that the district court's choice of the clear-and-convincing-evidence burden was proper.

B. The District Court Prudently Refused To Let Plaintiff Carry His Burden Using The Testimony Of Cuebas—Plaintiff's Girlfriend, The Mother Of His Child, And An Admitted Liar

In attempting to prove his entitlement to an adverse-inference instruction, plaintiff relied, in part, on testimony from Sandra Cuebas. The testimony concerned what Cuebas said transpired while she was sitting in a waiting area of the Yonkers Police Department Detectives Division on the night in question, after she had been transported there from the scene at Rumsey Road. According to Cuebas, she saw Officer Tellone—a longtime mutual acquaintance of both plaintiff and Cuebas—pace back and forth approximately three feet away from her and speaking on a telephone. (Appellant's App. 378.) Officer Tellone supposedly saw

her, too. (Appellant's App. 378.) Cuebas testified that Officer Tellone said, into the phone, "I got Hoffer. I got a few good kicks in on him." (Appellant's App. 378.) With Cuebas still sitting just feet away, Officer Tellone then engaged in an in-person conversation with Officer Goff, Cuebas said (Appellant's App. 390.) Per Cuebas: Officer Tellone held in her hand a "USB plug" and told Officer Goff that "[i]t shows everything that we did and nothing that he did." (Appellant's App. 389.)

The district court declined to credit Cuebas's statement that she saw Officer Tellone holding a "USB plug" and heard her tell Officer Goff that "[i]t shows everything that we did and nothing that he did." (*See* Appellant's App. 500.) That credibility determination is amply supported by the record. It is not clearly erroneous.

For starters, other evidence in the record tends to undercut Cuebas's statement. When Officer Goff was asked whether he "ha[d] any conversation with Officer Tellone at the detectives division," he answered: "I don't recall any specific conversation that we had." (Appellant's App. 449.) Officer Goff also testified that he did not "ever have any communication or discussion about this taser after [he] handed it over to Lacey," referring to Sergeant Lacey, the superior to whom he

gave his taser at the scene at Rumsey Road. (Appellant's App. 436.) Further, Officer Goff testified that he had "never seen a USB drive used in the department." (Appellant's App. 436.) Officer Tellone testified that she, too, had "never seen a USB being used at work." (Appellant's App. 599.) Indeed, she denied ever having "used a USB."[2] (Appellant's App. 599.)

Additionally, by the time Cuebas gave her testimony, she had already lied for plaintiff at least once in this case. The evening of the incident, when Cuebas arrived at Rumsey Road, police advised her that they had apprehended persons who they suspected of having stolen her car. An officer pointed to plaintiff, who was lying on a stretcher, and asked Cuebas whether he was one of the perpetrators. (Appellant's App. 375–376.) She said that he was not. (Appellant's App. 376.) Later that

[2] During her closing argument, plaintiff's counsel mentioned that one of the entries on the taser usage log says "USB connected" (Appellant's App. 681; *see* Appellant's App. 848.) Plaintiff's counsel did not bring that evidence to the district court's attention during or before the charge conference, however. And when, after closing arguments, the court subsequently read the jury charge—which did not contain an adverse-inference instruction—and asked plaintiff's counsel whether plaintiff had "any objection or concern with respect to the jury instruction as read," plaintiff's counsel responded, "No, Judge." (Appellant's App. 719–720.)

night, Cuebas gave a written statement to detectives that plaintiff had not been with her at the time of (what she still thought was) the carjacking—*i.e.*, completely exculpating him of any potential involvement in the incident for which he was apparently being investigated. (Appellant's App. 380.) Cuebas later admitted that she "lied to the detectives" in that statement: Plaintiff *was* with her at the time. (Appellant's App. 381.)

Notably, Cuebas told that lie in November 2016, back when her relationship with plaintiff was just platonic. (Appellant's App. 365.) By the time trial was held in December 2021, her ties to plaintiff had intensified considerably. Cuebas had been dating plaintiff since January 2018; during her testimony, she described him as her "boyfriend." (Appellant's App. 365.) In addition to being girlfriend and boyfriend, Cuebas and plaintiff were the parents of a three-year-old child (Appellant's App. 365.)

Further, in addition to Cuebas's obvious motive to help plaintiff, she also had motive to penalize Officer Tellone. Specifically, Cuebas had motive to harm friends and family of Officer Tellone's brother Anthony,

whom Cuebas "kn[e]w for certain" had antagonized plaintiff and plaintiff's family for years. (Appellant's App. 368.)

Plaintiff explained details of the feud, which he called "an ongoing problem with this kid"—Anthony—"for a long time, a long time." (Appellant's App. 287.) Sometime between 2011 and 2013, Anthony vandalized plaintiff's car, plaintiff's brother's car, and plaintiff's father's car. (Appellant's App. 287.) Plaintiff "had more than one physical altercation with him," as well. (Appellant's App. 287.) Plaintiff explained one such encounter that happened in September 2016. "I had a situation where him and his friend tried to, like—they tried to fight me, like, two-on-one fight, with, like beer bottles and stuff," plaintiff said. (Appellant's App. 285.) "They came at me with beer bottles trying to take me out." (Appellant's App. 286.)

Moreover, in context, Cuebas's testimony that Officer Tellone held in her hand a "USB plug" and told Officer Goff that "[i]t shows everything that we did and nothing that he did" (Appellant's App. 389), is inherently implausible. Believing that testimony requires believing that, after Officer Tellone, knowingly within earshot of Cuebas, stated that she had beaten up a man named "Hoffer"—a statement that Officer Tellone

surely realized Cuebas would interpret as referring to plaintiff—Officer Tellone, still knowingly within earshot of Cuebas, then made another statement suggesting that she had, in her possession, a video of the beating. That supposed sequence of events strains credulity.

Finally, Cuebas did not mention the supposed conversation about the USB drive until redirect examination. Although Cuebas testified on direct examination and cross examination about portions of her supposed encounter with Officer Tellone, Cuebas did not mention during that testimony the conversation she allegedly witnesses between Officer Tellone and Officer Goff.

For all of those reasons, the district court's decision not to credit Cuebas's testimony about that alleged conversation between Officer Tellone and Officer Goff was well-founded.

C. The District Court Soundly Determined That The Remaining Evidence On Which Plaintiff Relied Did Not Clearly And Convincingly Establish An Entitlement To An Adverse-Inference Instruction

Equally well-founded is the district court's conclusion that the remaining evidence on which plaintiff relied in requesting an adverse-inference instruction was insufficient. The court did not abuse its discretion in determining that the evidence other than Cuebas's

testimony did not clearly and convincingly establish the elements of Federal Rule of Civil Procedure 37(e)(2).

1. There Was No Video Of The First Taser Deployment—No "Electronically Stored Information That Should Have Been Preserved In Anticipation Or Conduct Of Litigation"

Contrary to plaintiff's contention (Plaintiff's Opening Br. 24–26), Officer Goff's testimony does not definitively establish that his taser created a video of the first time he used it against plaintiff on the night in question. In the parlance of Rule 37(e)(2), Officer Goff's testimony falls short of clearly and convincingly showing that there was "electronically stored information that should have been preserved in the anticipation or conduct of litigation" to begin with.

Officer Goff testified that "whenever you use a taser, you have to give that to a superior." (Appellant's App. 434.) He then stated, "I believe they bring it to the crime scene unit and then they download it." (Appellant's App. 434.) Officer Goff also said the following: "After the incident we were informed that the file had somehow been overwritten." (Appellant's App. 426.) Officer Goff learned of that development "[w]hen speaking with Mr. McCormick"—the attorney who represented him and

the other defendants at trial—while preparing his defense. (Appellant's App. 434.)

That testimony is, at best, equivocal as to the reason why, at the time of trial, there was no taser video of the first deployment. True, the taser might have created such a video, the crime scene unit might have downloaded it, and, the video, as downloaded, might have been overwritten. In that version of events, then there would have been a video of the first taser deployment that constituted "electronically stored information that should have been preserved in the anticipation or conduct of litigation." *See* Fed. R. Civ. P. 37(e).

But that version of events is not the only plausible version consistent with Officer Goff's testimony. His trial attorney might have used the word "overwritten" to communicate that some error occurred *within the taser* to prevent the video that should have been created from actually being created in the first place. Admittedly, that use of the word "overwritten" is perhaps less technologically precise than the use posited by plaintiff. But the lack of technological precision fits: The at-issue testimony comes from a police officer reporting what he heard from his

lawyer, neither of whom have any particular technological training, as far as the record reveals.

Moreover, the scenario in which the taser did not create a video of the first deployment is supported by the taser usage log maintained by the Yonkers Police Department in the ordinary course of business. (*See* Appellant's App. 428, 848–849). The usage log indicates that, on the evening of the incident, Officer Goff's taser engaged in just a single deployment, lasting seven seconds in length. (Appellant's App. 848.)

Thus, at the end of the day, the district court did not clearly err in finding that plaintiff had not clearly and convincingly established the existence of a video of Officer Goff's first deployment of the taser against plaintiff on the evening in question. This Court need go no further and may affirm on that basis alone.

2. No Party "Acted With The Intent To Deprive" Plaintiff Of Any Video Of The First Taser Deployment That Might Have Existed

As discussed above, plaintiff failed to clearly and convincingly establish the existence of a video of the first taser deployment in the first place. But assume that such a video did exist. This Court may still affirm the final judgment below for the independent reason that the district

court soundly perceived a lack of clear and convincing evidence that any of the trial defendants "acted with the intent to deprive" plaintiff of that video.

As a legal matter, plaintiff argues (Plaintiff's Opening Br. 29–32) that "intent to deprive" under Rule 37(e)(2) encompasses negligence and gross negligence, and is not restricted to conduct undertaken for the purpose of depriving the opposing party of the information at issue. Plaintiff rests this argument on *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), a case decided under the law of spoliation sanctions in effect before Rule 37(e)(2) was amended in 2015 to require "intent to deprive." In that case, the Court held that the proponent of spoliation sanctions could establish the requisite intent by showing negligence or gross negligence on the spoliator's part. 306 F.3d at 101.

Plaintiff's position is wrong. This Court "give[s] the Federal Rules of Civil Procedure their plain meaning." *Business Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 540 (1991) (quoting *Pavelic & LeFlore v. Marvel Entertainment Grp.*, 493 U.S. 120, 123 (1989)); *accord, e.g.*, *Silge v. Merz*, 510 F.3d 157, 160 (2d Cir. 2007). And

the notion that negligence or gross negligence suffices under Rule 37(e)(2) contradicts the plain meaning of the text as amended. Namely, "'intent' and 'purpose' are roughly synonymous." *Sandstrom v. Montana*, 442 U.S. 510, 521 n.11 (1979); *accord The Merriam-Webster Dictionary* 379 (2004 ed.) (defining "intent" as "purpose, aim"). "Intent to deprive" plainly requires that the spoliator have deprivation as one or more of his conscious purposes.

Moreover, the Advisory Committee on Civil Procedure, in its note to the 2015 amendments to Rule 37(e), squarely rejected plaintiff's position in so many words. This Court routinely relies upon Advisory Committee notes in interpreting and applying the Federal Rules of Civil Procedure. *See, e.g.*, *Moses v. New York Times Co.*, 79 F.4th 235, 242–243 (2d Cir. 2023). And the Advisory Committee disavowed the precise interpretation plaintiff posits, right down to his chosen case citation. Here, exactly, is what the Advisory Committee had to say on the matter:

> This subdivision [*i.e.*, subdivision (e)(2)] authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's used in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserved electronically stored

> information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

Fed. R. Civ. P. 37 Advisory Comm. Note to 2015 Amend.

Plaintiff is mistaken in his assertion (Plaintiff's Opening Br. 30–31) that this Court's summary order in *Johnson v. Perry*, 763 F. App'x 81 (2d Cir. 2019) (summary order) indicates that this Court has chosen to depart from the Advisory Committee note on Rule 37(e)(2)'s proper interpretation. The Court in *Johnson* did not mention Rule 37(e)(2). Nor did the Court state that negligence or gross negligence remained sufficient to satisfy the scienter element following the 2015 Amendment.

Further, the *Stanbro* trial-court decision, which plaintiff held out to the district court as the right way to do spoliation analysis (Appellant's App. 520–522), expressly embraces the Advisory Committee Note explanation. The court in *Stanbro* recited the operative portion of the Advisory Committee Note verbatim and explained that the 2015 "intent to deprive" language "modif[ies] the state of mind required of a spoliator." 2021 U.S. Dist. LEXIS 163849, at *14 (quoting *Ungar v. City of New York*, 329 F.R.D. 8, 13 (E.D.N.Y. 2018)). The district court can hardly be faulted

for selecting the scienter requirement that the sole legal authority plaintiff provided to the court indicated should be selected.

The district court did not abuse its discretion in applying the "intent to deprive" scienter standard to the facts and circumstances of this case. Officer Goff explained that "whenever you use a taser, you have to give that to a superior." (Appellant's App. 434). On the night in question, Officer Goff did just that, giving his taser to a "Sergeant Lacey" at the scene. (Appellant's App. 434.) Officer Goff testified that he did not "ever have any communication or discussion about this taser after [he] handed it over to Lacey." (Appellant's App. 436.) Nor is there any evidence that any of the other trial defendants had any communications or discussions about the taser, either—aside from inferences that could conceivably be drawn from Cuebas's testimony, which the district court properly discredited (*see supra* 20–25). The credible evidence thus supports the conclusion that Officer Goff followed proper procedure in turning over his taser at the scene, and that neither he nor any of the other trial defendants attempted to influence the handling or processing of the taser thereafter.

Underscoring defendants' clean hands, as the district court noted, is Officer Goff's deposition testimony about his use of the taser on the night in question. Had Officer Goff been resolved to prevent plaintiff from exploring the possibility that his taser had created a video of the first time he deployed it against plaintiff that evening, he could have testified that he only used the taser against plaintiff once that night. That testimony would have found support in the taser usage log, which reflects only one deployment. (Appellant's App. 848.) But Officer Goff was forthcoming and acknowledged that he had deployed the taser against plaintiff twice during the incident. (*See* Appellant's App. 501.)

The district court did not abuse its discretion in finding that plaintiff had not clearly and convincingly shown that any of the trial defendants took actions "with the intent to deprive" plaintiff of the alleged video of the first taser deployment.

It should be noted that there is no evidence that anyone *else* associated with this case undertook any actions with the intent to deprive plaintiff of the supposed taser video, either. But even if there were such evidence, it would be immaterial to the Rule 37(e)(2) spoliation inquiry.

The conduct of other persons or entities is not a cognizable predicate for an adverse-inference instruction against any of the trial defendants.

The Rule 37(e)(2) scienter standard measures the scienter of the spoliating "party." And the only other persons or litigants who had ever been named as defendants—the City of Yonkers, the Yonkers Police Department, Police Officer John Doe 1, Police Officer John Doe 2, Police Officer John Doe 3, Police Officer John Doe 4, Police Officer John Doe 5, Police Officer John Doe 6, Police Officer John Doe 7, and Police Officer John Doe 8—were dismissed from the case prior to trial. Police Officer John Doe 7 and Police Officer John Doe 8 were dropped when plaintiff filed his amended complaint. (Appellant's App. 21.) And the City of Yonkers, the Yonkers Police Department, Police Officer John Doe 1, Police Officer John Doe 2, Police Officer John Doe 3, Police Officer John Doe 4, Police Officer John Doe 5, and Police Officer John Doe 6 were dismissed by court order shortly before trial commenced. (D. Ct. Dkt. No. 92 at 2.) Thus, none of those one-time defendants were "parties" whose conduct could support an adverse-inference instruction under Rule 37(e)(2).

The district court's determination that plaintiff had not established Rule 37(e)(2)'s scienter element is sound.

3. It Was Reasonable For The District Court To Deny An Adverse-Inference Instruction Because The Court Permitted Plaintiff To Put The Issue Of Alleged Spoliation Before The Jury Via Other Means

Even if all of Rule 37(e)(2)'s elements are satisfied, a district court is not absolutely required to give an adverse-inference instruction. The Rule is phrased permissively: The court "may" do so. *Id.* "May." Not "must." The district court's decision here is fully supported by that leeway. It was eminently reasonable for the court to deny an adverse-inference instruction because the court opted to allow plaintiff to put the issue of alleged spoliation of the supposed video of the first taser deployment before the jury via other means. *See Stanbro*, 2021 U.S. Dist. LEXIS 163849, at *44 (denying pre-trial request for adverse-inference instruction on the grounds of an alleged spoliated video but permitting proponent to adduce evidence at trial regarding the creation of the video, the obligation to preserve the video, the absence of the video, and the video's relevance to plaintiff's case on the merits).

The district court permitted plaintiff's counsel to question witnesses on the spoliation issue. (*See* Appellant's App. 646–647.)

Counsel elicited testimony from Sandra Cuebas that (at least on its face) conceivably bore upon the issue, namely the statement that, while sitting in the Yonkers Police Department Detectives Division waiting area, she saw Officer Tellone hold in her hand a "USB plug" and heard her tell Officer Goff that "[i]t shows everything that we did and nothing that he did." (Appellant's App. 389.) Counsel questioned Officer Goff on matters related to what plaintiff posited was the spoliated first taser video, as well. (Appellant's App. 426, 433–436). And likewise with Officer Tellone. (Appellant's App. 598–599.)

The district court also permitted plaintiff's counsel to address the issue of spoliation during her closing arguments. (*See* Appellant's App. 647.) Indeed, plaintiff's counsel did so at some length:

> You know, and then this taser, the taser video, you know, heh, I don't know what to say about it. The first taser video, it's funny that it went missing in 2018 right when this case was filed, and I believe that that taser video would have shed the most light on what happened this evening, and these taser videos, the purpose for them is to allow these police to have protection to also back up why they did what they did that evening. You know, Sergeant Goff said that it had been overwritten. You know, well, that's his story and he' s going to stick to it.
>
> You also heard from Ms. Cuebas, who, yes, she has a kid with Richard, but I believe that if you evaluate how she came in here, her demeanor, she has nothing to gain. I mean, she's,

> she's with Richard, but, you know, they're not—they don't live together at the moment, and mere minutes or hours after this in the detective's division, when she hears these things between Tellone and Goff, talking about a USB, and now this USB is gone. Or, I'm sorry, the USB, we've never seen one. I'm going to ask that you look at the taser report, and on one of the last entries, it says "USB connected." These officers know that there's USBs related to these tasers, that's how the information is downloaded, and it's plugged into a computer and that's how it works, that's how it's transmitted, but, you know, that's their story and they're going to stick to it.

(Appellant's App. 680–681.)

Moreover, no instruction in the jury charge that the district court subsequently read aloud to the jury in open court precluded the jury from drawing an adverse inference against defendants based upon the alleged spoliation of the supposed video of the first time Officer Goff deployed his taser against plaintiff during the night in question. In short, plaintiff was given a full and fair opportunity to make his case on spoliation notwithstanding the denial of an adverse-inference instruction, so it cannot be said that, in context, the denial of plaintiff's request for that instruction was an irrational exercise of discretion on the district court's part.

4. The District Court Was Not Required To Submit Factual Questions Regarding Spoliation To The Jury

Plaintiff insists (Plaintiff's Opening Br. 27–29, 32–39) that the district court erred as a matter of law by resolving factual issues underlying the Rule 37(e)(2) inquiry. In plaintiff's view, the court was duty-bound to submit questions of credibility, as well as questions of the weight to be assigned certain evidence or factual inferences from the evidence, to the jury.

Not so. "[A] motion for sanctions, when premised on a party's fraud on the court or discovery misconduct under Rule 37, does not implicate the Seventh Amendment's jury trial guarantee." *Rossbach v. Montefiore Med. Ct.*, 81 F.4th 123, 138 (2d Cir. 2023). Thus, "[r]esolving such a motion, including by imposing a case-terminating sanction, is solely within the purview of the district court as trier of fact." *Id.* The district court's purview includes making credibility determinations. Because "one of the district court's roles in resolving a motion for sanctions is to act as factfinder," it is "a necessary corollary" that the court is empowered to "gauge witness credibility." *Id.* Indeed, "'[a]ssessing the credibility of witnesses at a sanctions hearing"—and, by extension, at a trial, like the

district court did here—"is peculiarly within the province of the district court." *Id.* (alteration marks and ellipses omitted).

Accordingly, district courts within this Circuit have properly been resolving factual disputes in connection with requests for discovery sanctions for years. *See, e.g.*, *Matthews v. Sweeney*, Case No. 9:17-cv-000503-GTS-ML, 2024 U.S. Dist. LEXIS 65150, at *14 (N.D.N.Y. Apr. 10, 2024); *Khatabi v. Bonura*, Case No. 1:10-cv-01168-ER-PED, 2017 U.S. Dist. LEXIS 61921, at *23 (S.D.N.Y. Apr. 21, 2017); *ComLab, Corp. v. Kal Tire & Kal Tire Mining Tire Grp.*, Case No. 1:17-cv-01907-PKC-OTW, 2018 U.S. Dist. LEXIS 154983, at *1–2 (S.D.N.Y. Sept. 11, 2018); *Regulatory Fundamentals Grp., LLC v. Governance Risk Mgmt. Compliance, LLC*, Case No. 1:13-cv-02493-KBF, 2014 U.S. Dist. LEXIS 107616, at *23 n.3 (S.D.N.Y. Aug. 5, 2014); *Siani v. State Univ. of New York at Farmingdale*, Case No. 2:09-cv-00407-JFB-SIL, 2011 U.S. Dist. LEXIS 69173, at *11 (E.D.N.Y. June 28, 2011).

Those district courts have not been running afoul of this Court's decision in *United States v. Anglada*, 524 F.2d 296 (2d Cir. 1975), as plaintiff's view would have it (Plaintiff's Opening Br. 28–29). The Court in *Anglada* invoked the unremarkable proposition that a jury in a

criminal case must decide factual disputes pertaining to the bona fides of the criminal defendant's affirmative defense of entrapment. *See* 524 F.2d at 297. Neither that issue nor any issue sufficiently like it is present here.

The district court acted properly in assuming a fact-finding role.

CONCLUSION

The district court's final judgment entered on December 9, 2021 should be affirmed.

June 3, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because it is proportionately spaced, has a typeface of 14 points, and contains 7,959 words, not counting the words excepted by Federal Rule of Appellate Procedure 32(f).

June 3, 2024

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