22-1377

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD HOFFER,

Plaintiff-Appellant,

v.

POLICE OFFICER ELYSSA TELLONE, SHIELD #730387, POLICE OFFICER TREVOR GOFF, SHIELD #731915, POLICE OFFICER LAMONT BROWN, SHIELD #734149, POLICE OFFICER DARCY DRUMMOND, SHIELD #731907,

Defendants-Appellees,

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, POLICE OFFICER JOHN DOE 8,

Defendants.

On Appeal from the U.S. District Court for the Southern District Of New York, No. 7:18-cv-1197 (Krause, M.J.)

APPELLANT'S OPENING BRIEF AND SPECIAL APPENDIX

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INTRODUCTION

This appeal presents the age old question: Who decides? In some contexts that can be a hard question, but not here.

Over the course of four trial days, Richard Hoffer presented evidence to a jury supporting his claims that police officers Elyssa Tellone, Trevor Goff, Lamont Brown, and Darcy Drummond used excessive force when they arrested him in connection with what they mistakenly believed was a carjacking. Hoffer also presented evidence that not only was the officers' conduct captured on video from a taser used at the scene, but that video, according to defendant Tellone, "show[ed] everything that we did." But the jury never got to see that footage—or at least not all of it. Defendant Goff testified at trial—for the first time—that there originally were *two* videos recorded from his taser that evening, but that the first video had been somehow "overwritten."

In light of that stunning revelation, Hoffer requested that the trial judge, Magistrate Judge Andrew E. Krause, instruct the jury that it could draw adverse inferences from defendants' spoliation of the taser video—evidence that undeniably could have been of central importance in the case. The trial court denied that request, however, based on its own

factual findings that there was insufficient evidence that a second video ever existed (despite a defendant's repeated admission it did) or that defendants destroyed it with the intent to deprive Hoffer of its use (despite witness testimony that the video "show[ed] everything" the officers "did"). That decision—contradicting the "good old rule, that on questions of fact, it is the province of the jury," *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794)—was an abuse of discretion.

Because the evidence presented at trial could readily support a finding that a second taser video existed and that defendants spoliated it with the requisite scienter, Hoffer should receive a new trial so those factual questions—along with what, if any, adverse inferences should follow as a result—can be placed before a jury properly instructed and empowered to decide.

JURISDICTION

The district court had subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343 because this action arose under 42 U.S.C. § 1983 for violation of Plaintiff-Appellant Richard Hoffer's Fourth Amendment right to be free from the use of excessive force. Following a jury trial, the district court entered final judgment on December 9, 2021.

On January 6, 2022, Hoffer filed a post-trial motion that the district court construed to be a timely motion under Rule 50(b) or Rule 59(b). 4A-853, 4A-861–62. The district court denied that motion on June 10, 2022. 4A-860–67. Hoffer then filed a timely notice of appeal on June 27, 2022. 4A-868. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291. *See* Fed. R. App. Proc. 4(a)(4)(A).

STATEMENT OF THE ISSUE

Did the district court abuse its discretion in refusing to give an adverse inference instruction relating to defendants' spoliation of taser video footage?

STATEMENT OF THE CASE

This appeal follows a jury trial conducted before Magistrate Judge Andrew E. Krause on claims brought under 42 U.S.C. § 1983 alleging that defendant-appellees violated plaintiff-appellant Richard Hoffer's Fourth Amendment rights through their use of excessive force and failure to prevent or intervene to stop the use of excessive force. Following a jury verdict in defendants' favor on all counts, the district court entered judgment for defendants, 4A-851, and denied Hoffer's motion for a new trial, 4A-860.

A. Events Leading up to Hoffer's Arrest

On November 20, 2016, Richard Hoffer had a very bad day. While the evening began with Hoffer getting a ride from two of his friends, by the end of the night Hoffer had been robbed, caught in a police chase, hit by a police car, beaten by police officers, tased twice, and arrested.

In brief, the night started when Hoffer caught a ride with his friends, Sandra Cuebas and her then-boyfriend Courtney Sullivan. 1A-195. When they got to their destination (somewhere on Riverview Place in Yonkers, New York, *id.*), two individuals got in the back seat of the black Honda CRV, 1A-211, and held Hoffer and his friends up at gunpoint, 1A-197. Chaos quickly ensued, as sometime while the robbers were taking Hoffer's phone, money, and a small amount of marijuana, a gunshot went off. 1A-199. While Cuebas and Sullivan fled on foot down the street, Hoffer ended up behind the wheel of Cuebas' car and sped away. *Id.*; *see also* 2A-371 (Cuebas' testimony). Hoffer drove to Vishal Rai's house, 1A-200, as Rai had previously introduced him to the would-be robbers.[1] Hoffer and Rai then left to look for Cuebas and Sullivan to

[1] Hoffer testified that the robbers owed Hoffer money for an ounce of marijuana, and Rai had made the introduction. 2A-336–37; 2A-339.

see if they made it to their home. 1A-201. Unable to find them or contact them with Rai's phone, Hoffer started to drive back to Rai's home to drop him off. 1A-202–03.

Meanwhile, Cuebas—thinking the robbers stole her car—reported the car as stolen. 2A-373. While Hoffer was en route to return to Rai's house, a police car came behind the Honda CRV and turned on its lights. 1A-203. Hoffer, concerned because he had a gun, panicked and decided to flee rather than pulling over. 1A-203–04; *see also* 2A-399 (Defendant Lamont Brown's testimony). After a short chase along the Saw Mill Parkway, the car Hoffer was driving became disabled after colliding with another car. 1A-206.

B. Hoffer's Arrest and Defendants' Use of Force

The evidence and testimony surrounding the time between that point and when Hoffer was taken into custody are central to this litigation and appeal. The trial record suggests there are essentially four components key to understanding these critical events: Hoffer's testimony, Defendant Trevor Goff's testimony, real-time documentation of the events, and testimony from medical professionals who later examined Hoffer.

1. Hoffer's account

Hoffer testified that after his vehicle was immobilized, he got out of the car, "took like a couple steps," and "got hit from the back . . . by a Ford Explorer" driven by a police officer. 1A-207, 2A-332–33. He testified the force from that hit knocked him into the air and he landed by "hit[ting] the concrete." 1A-207–08.[2] At that point, he couldn't move or stand up. 1A-208. Unable to get up, Hoffer testified that at that point he was beat up by officers. First, he felt someone jump on his back and put a knee into his spine. 1A-209. He testified that his hands were "on [his] stomach," as he was trying to crawl. *Id.* Next, Hoffer testified that Defendant Tellone kicked him in the face, explaining that he saw a female officer kicking him and he later learned Tellone was the only female officer at the scene. 1A-210. Other officers joined in kicking and punching him. 1A-210–11. Cuebas partially corroborated Hoffer's testimony, as she testified that later that evening at the police station

[2] Although Rai testified at trial that he did not see what exactly struck Hoffer, he agreed that he saw Hoffer "fly because something struck him." 2A-469. Hoffer's treating physician, Dr. Chung, testified that Hoffer's injuries were "consistent with being struck by a motor vehicle." 2A-311.

she overheard Tellone state, "I got Hoffer, I got a few good kicks in on him," 2A-377–78.

Then Hoffer was tased. He testified that although he couldn't remember the "exact moment" he was tased, he was "laying on the ground," "getting beat up," and was "incapacitated" when tased. 1A-212. Hoffer testified that he was "tased twice in the buttocks area." 1A-214.

2. Goff's account

Although none of the defendants admitted to seeing Hoffer being hit by a car or being beaten up, 2A-403–06 (Brown), 2A-420 & 433 (Goff), 3A-580–81 (Tellone), 3A-611 & 614 (Drummond), there is no dispute that Officer Goff tased Hoffer twice that night. Goff testified that he used the taser twice that evening. He first used the taser when two other officers were allegedly unable to control Hoffer, who allegedly was trying to "push past them and throw his arms around to avoid capture." 2A-420–21. Goff then "got about 10 feet away, at which point [he] withdrew [his] department-issued taser," gave the standard warning (repeating the word "taser" three times), and fired the taser to engage a five-second cycle of electrical current. 2A-421–23. Goff testified that although the taser's prongs may not have fully contacted Hoffer's skin, Hoffer "and the two

other officers that were there did all fall to the ground," leaving Hoffer "on the ground, on his stomach facing the ground."[3] 2A-423.

Goff then explained that after the first deployment of the taser, Hoffer appeared to be "trying to collect himself and get up to flee again," so he performed a second maneuver called a "drive stun," in which he approached Hoffer and touched his lower back area directly with the taser device to "incapacitate the muscles" for five seconds. 2A-424. Goff testified that he performed this second maneuver at 8:02 p.m. 2A-437. Following this second use of the taser, Goff said officers handcuffed Hoffer and took him into custody. 2A-425, 429-30.

3. Records from the evening

Goff testified that the Yonkers Police Department regularly keeps records of all incoming information that is "typed into the computer as [headquarters] receive[s] information." 2A-440. According to those

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[3] Defendant Officer Drummond testified that he "believe[d]" Hoffer was standing when Goff first tased him, and afterward Hoffer was "on the ground." 2A-611. According to Drummond, at that point Hoffer was "flailing his legs around," so Drummond "put [his] body weight on [Hoffer's] legs so nobody got kicked." *Id.* On cross, Drummond explained he also saw Goff use the taser a second time to drive stun Hoffer, during which Drummond was sitting on Hoffer's legs. 2A-620–21, 623. As explained below, however, footage from the taser introduced at trial contradicts this testimony.

records, admitted as Plaintiff's Exhibit 2 (4A-819), the putative carjacking was first reported around 7:32pm. Officers caught up with Hoffer in the CRV around 7:50 p.m., and a "collision" occurred at the Rumsey Road exit around 7:55 p.m. *Id.* Following the collision, another log entry notes that officers were "getting suspects in custody, resisting" at 7:56:39 p.m., and called in an all-clear alert at 7:57:16 p.m. stating "10-23 2 [were] in custody." *Id.* Goff testified that this report meant "that the 4th precinct sergeant is saying the situation is under control," and "two people are in custody." 2A-441; *see also* 2A-625–26 (Drummond confirming 10-23 means "situation is under control" and, in context of a suspect fleeing on foot, it would mean the suspect had been handcuffed).

Goff's taser also produced two types of documentary evidence from the evening: a log and a video. Goff explained that the taser generated a log, admitted as Defendants' Exhibit B (4A-848), that tracked "every time the taser is cycled on . . . and the trigger's pulled." 2A-428. The taser's November 20, 2016 report captured two incidents in which the trigger was armed and triggered that day. First at 4:16 p.m., when Goff began his shift and tested the taser to "make sure it's functioning properly." 2A-429. Second at 8:02 p.m., which Goff testified

corresponded to the "second time" he used the taser on Hoffer. 2A-437. The log also shows an event at 10:24 p.m. that evening titled "USB Connected," which tracks Goff's testimony that the device was brought to the crime scene unit that night so that all the information from the taser could be downloaded. 4A-848, 2A-434. No witness explained why the taser log only shows Goff's taser being deployed once at the scene despite undisputed testimony that Goff tased Hoffer twice.

The taser also has a "video component" that is activated whenever the taser is armed. 2A-425. Despite using the taser twice on Hoffer that evening, Goff testified that only one video from the device is still available. He explained that the video of the first deployment of the taser (before he performed the drive stun) "had somehow been overwritten." 2A-426. Hoffer's counsel only learned of this fact at trial through Goff's testimony. 2A-452.

Although he could not explain exactly how the video was lost (or destroyed), Goff said the device "only has a memory of four hours." *Id.* No explanation was offered, however, as to why the four-hour memory could have caused the video to have been overwritten in light of the "USB Connected" entry in the taser log showing that the device was connected

and synced less than two and a half hours after the incident. 4A-848. Nor could Goff explain "how [the first video] would have been overwritten if it was downloaded. I don't know how it could have happened." 2A-433–34.

Because the first video was "overwritten," only video showing Goff's second use of the taser—the drive stun tactic—was available at trial. 2A-426–27. That video was admitted as Defendant's Exhibit A and will be submitted to this Court for its review.

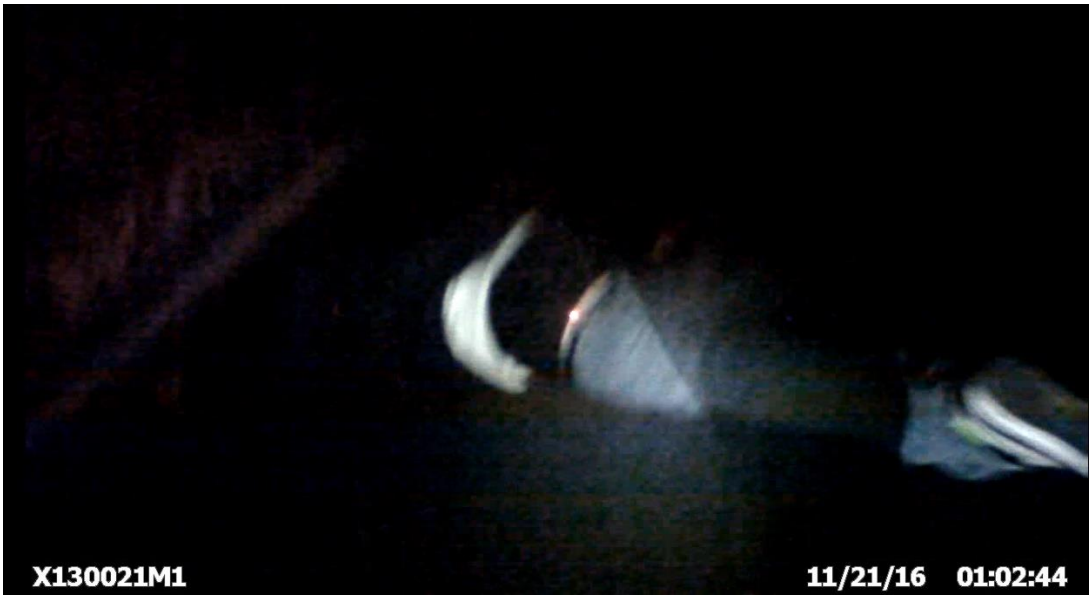
The video is short and, when viewed at full speed, rather chaotic. On cross-examination, however, Hoffer's counsel walked Goff through the video slowly, practically frame-by-frame. In doing so, Goff confirmed: (1) he saw the thin electrical wires that would have been shot from the taser during the first deployment, (2) he could not see anyone else around Hoffer, (3) Hoffer was lying on the road with what looked to be a visible road marking, and (4) Hoffer's arms were underneath him. 2A-443–44.

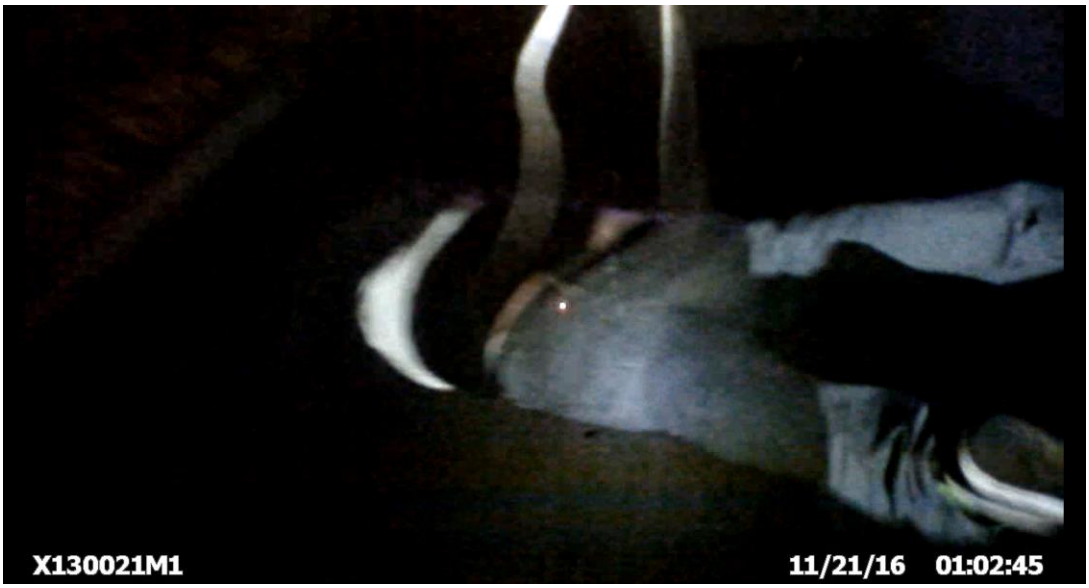
Goff's partner that evening, Defendant Drummond, also testified about the taser video. 3A-608. Despite testifying that he was on Hoffer's legs at the time of the second tasing, Drummond admitted that neither he nor any other officers are seen in the video. 3A-626–28. He also

confirmed that he did not see "any movement in Mr. Hoffer's body at all" and could not see Hoffer's arms. 3A-629. He explained that the red dot seen throughout the video was probably from the taser. 3A-629–30.

Embedded below are still images taken from the first two seconds of Defendants' Exhibit A. These confirm that Hoffer was lying on the ground, with at least one of his shoes visible but not his arms. The text at the bottom of the images comes from the taser device and tracks the information found on the log described above (other than that the timestamps in the images are exactly five hours ahead of the timing given in all other reports of the incident, suggesting the taser may have been synced to Greenwich Mean Time).[4]

[4] Counsel has not edited or manipulated these stills in any way. Given the darkness and printer limitations, the images may be best viewed using the electronic version of this brief.





Apart from the officers, other witnesses also provided testimony that, in retrospect, confirmed Goff's testimony that a second video once existed. Before Goff testified and revealed that another video existed, Cuebas testified that after Hoffer's arrest she went to the Detectives Division at the police station and encountered Tellone. 2A-389. Cuebas

testified that she saw Tellone holding a USB drive in her hand and, while speaking with Goff, Tellone said: "It shows everything that we did and nothing that he did." 2A-389–90.

4. Testimony from Hoffer's examining doctor

Hoffer sustained several significant injuries as a result of the force used by officers during his arrest. Hoffer's treating physician, Dr. Sulin Chung, testified that Hoffer presented with contusions and hematomas on the right side of his head and body, 2A-303, 307, right hip pain, 2A-302, a spinal disc herniation, 2A-309, and substantial pain that required intravenous pain medication (morphine), 2A-312. Dr. Chung also testified that these injuries were "significant" and "consistent with being struck by a motor vehicle" and landing on one's right side. 2A-311, 330. Hoffer summed up his lasting injuries from the incident: "I couldn't move, I couldn't walk." 1A-241.

Dr. Chung explained that the injuries would have long-term effects on Hoffer's quality of life. 2A-311–12. She testified that Hoffer presented with chronic pain after the incident, 2A-301, underwent a year of physical therapy, 2A-307, was referred to an orthopedic specialist for the persisting pain, and was prescribed opioid pain medications for several

months, 2A-308. Indeed, Hoffer stated that his injuries were "life-changing" and, to this day, impact his ability to engage in regular activities of daily life. 2A-294.

C. The District Court Proceedings

Hoffer filed suit on February 9, 2018, seeking damages against Police Officers Elyssa Tellone, Trevor Goff, Lamont Brown, and Darcy Drummond under 42 U.S.C § 1983 for the unlawful use of excessive force and failure to intervene to prevent or stop the use of excessive force during his arrest. 1A-31–32. A jury trial began on December 1, 2021.

1. The Destroyed Taser Video and the Charge Conference

At the charge conference, the district court addressed the "adverse inference question" arising out of Goff's testimony that a second taser video had been overwritten. 3A-643. The court assumed that Rule 37(e) of the Federal Rules of Civil Procedure applied and explained that "in order for that adverse inference instruction to be appropriate, it would require a finding that 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." 3A-644. The court found that "we just don't have enough evidence of that in this case." *Id.*

The court began by expressing uncertainty over the existence of a second video, doubting "that there's even any clear evidence that there was such a video in the first place." *Id.* While acknowledging that Defendant Goff "testif[ied] to something being overwritten," the court found it "not at all clear what that meant," as "nothing about Sergeant Goff's testimony suggested that he had any direct knowledge or experience with the document management system for these taser videos, let alone anything having to do with this particular video." 3A-645. The court instead credited the taser report showing only one activation of the taser (apart from a test at the beginning of Goff's shift) for eight seconds at a time stamp of 8:02:43 p.m. 3A-644; *see also* 4A-848. The district court was uncertain what that report meant, speculating that perhaps "both the initial shot of the taser from a distance and the drive stun operation happened within that same eight-second period," or perhaps "the first shot [of the taser] didn't trigger a video at all because there's no separate triggering at least evidenced in this record . . . of a prior discharge followed by the drive stun discharge" that was captured as Defendants' Exhibit A. 3A-644–45.

The district court further found that there was no "direct or circumstantial evidence that the City of Yonkers or any of the individual defendants had the requisite intent to warrant an adverse inference instruction," under Rule 37(e)(2). 3A-646. The court emphasized that "the notion that the Yonkers Police Department went to such lengths to destroy a video and manipulate this taser record . . . is really undercut by the fact that the testimony at trial . . . was that there were these two deployments." 3A-645. The court reasoned that "if there was an effort to cover up that fact, it would be surprising to have heard all of the testimony that we heard about there being [two] distinct episodes." 3A-645–46.

During the charge conference and in previous colloquies with the court, Defendants' counsel made no argument disputing Goff's testimony that a second video once existed. Nor did he make any meaningful argument that no adverse inference instruction was warranted. *See* 2A-452–57, 3A-520–23, 643–48.

2. Jury Deliberations

The jury deliberated over three days. During the deliberations, the jury requested read backs of several portions of testimony and specifically

asked to review the available footage from the taser. *See* 3A-723, 4A-775, 786. Near the end of the second day of deliberations, the jury sent a note informing the court that it was unable to reach a unanimous verdict with respect to two of the defendants. 4A-797–98. The magistrate judge gave a modified *Allen* charge and instructed the jury to continue to deliberate. 4A-801–03. After further deliberations the following morning, the jury returned a unanimous verdict finding for all defendants. 4A-851.

3. Post-Trial Motion

On January 6, 2022, Hoffer timely filed a motion that the district court construed as a motion for new trial as to Goff under Rule 59(a), because no reasonable juror would have concluded that Goff's actions did not constitute excessive force. 4A-853, 860.

The district court denied Hoffer's motion on June 10, 2022, concluding that the jury's verdict was not "egregious." 4A-860, 862. The district court rejected Plaintiff's arguments over the discrepancy in the timing of the "10-23" call (at 7:57 p.m.) and the taser video (at 8:02 p.m.) as evidence that excessive force was used after Hoffer was already in custody. The court found that gap did not provide a sufficient basis to disturb the jury's evaluation of the evidence and assessment of the

witness' credibility. 4A-865-66. In doing so, the district court reasoned that "there were any number of colorable reasons why the jury may have chosen to reject Plaintiff's desired interpretation of the [time stamps]." *Id.* at 865. For example, the district court speculated that the "10-23" call might not have "accurately reflected the status of YPD's efforts to arrest Plaintiff," or that there may have been a "discrepancy in the timekeeping systems." 4A-866. No evidence was presented at trial to support either of these explanations. In fact, the only evidence suggesting the inaccuracy of these time stamps was Officer Goff's unsupported conjecture that the taser record might have been "corrupted." 2A-441–42.

In short, the district court concluded that although Hoffer's testimony, if credited, may have supported a finding that Goff had used excessive force, the testimony from Goff and Drummond, if credited by the jury, would refute that claim. 4A-866.

This timely appeal followed. 4A-868. And on June 12, 2023, this Court granted Hoffer's motion for appointment of pro bono counsel and directed appointed counsel to "brief, among any other issues, whether the magistrate judge erred by declining to grant an adverse inference

spoliation instruction." Dkt. No. 55. The Court appointed the undersigned counsel on June 29, 2023. Dkt. No. 60.

SUMMARY OF ARGUMENT

The district court committed reversible error in refusing to give a permissive adverse inference instruction that would have allowed (but not required) the jury to consider defendants' spoliation of a video recording of Goff's first use of his taser on Hoffer. Both of the district court's reasons for denying that requested instruction are flawed.

First, abundant evidence—including a defendant's own testimony—demonstrates that the recording existed. Goff testified on both direct and cross-examination that the first video was "overwritten." No witness from either side testified that the video never existed. To the contrary, the jury heard testimony that could reasonably be understood as evidence that Tellone not only saw the missing footage but that it showed what the officers "did" to Hoffer. The district court's sua sponte determination that there was insufficient evidence that the video ever existed rested on a clearly erroneous understanding of the record and, in any event, should have been left to the jury to resolve.

Second, the record also contained sufficient evidence that defendants destroyed the first recording with the requisite scienter. In demanding that Hoffer prove that defendants acted with an intent to deprive him of the evidence, the district court applied an incorrect legal standard that imposed a higher burden on Hoffer than this Court has applied in similar excessive-force cases. And irrespective of what level of standard should apply, the record presented a legitimate factual dispute that only a jury could resolve. In making credibility determinations and drawing its own inferences from the testimony, the district court erred by usurping the jury's role and definitively resolving the spoliation issue against Hoffer.

Footage from the first time Goff was tased could have been significant at trial. This was a close case in which the jury deliberated for three days, during which the trial court gave an *Allen* charge. The destroyed footage very likely would have shed further light on the conditions of Hoffer's arrest and aided the jury in evaluating Hoffer's testimony that he was kicked, punched, and tased while lying on the ground unable to move after being hit by a police car. Instead, by allowing that recording to be overwritten (or worse), defendants

transformed this case into one that largely pitted Hoffer's word against those of multiple officers of the Yonkers Police Department. The district court erred by refusing to instruct the jury to consider the destruction of the taser video and, if appropriate, to draw adverse inferences against defendants.

ARGUMENT

The District Court Committed Reversible Error by Refusing to Instruct the Jury That It Could Make Factual Findings and Draw Adverse Inferences Regarding Defendants' Spoliation of the Taser Video.

This Court reviews for abuse of discretion a district court's decision on a motion for discovery sanctions—including the propriety of an adverse inference instruction. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)).

Traditionally, this Court has found it appropriate for a trial court to give an adverse inference instruction when a party establishes: "(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were

destroyed 'with a culpable state of mind'; and (3) that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Id.* As this Court explained, the "culpable state of mind" can be satisfied by a showing that the evidence was destroyed either "knowingly, even if without intent to breach a duty to preserve it, or negligently." *Id.* at 108 (quoting *Byrnie v. Town of Cromwell*, 243 F.3d 93, 109 (2d Cir. 2001)) (cleaned up).

Here, however, the district court analyzed Hoffer's request for an adverse inference instruction under Federal Rule of Civil Procedure 37(e), as amended in 2015. 3A-644–46. That rule governs the consequences when a party fails to preserve electronically stored information and provides that the instruction can be given "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation[.]" Fed. R. Civ. Proc. 37(e)(2)(B).

Applying Rule 37, the district court denied Hoffer's request for an adverse inference instruction on two grounds. First, the court found that there was no "clear evidence" that a second taser video existed "in the first place." 2A-644. Second, the court found there was no "direct or

circumstantial evidence that the City of Yonkers or any of the individual defendants had the requisite intent to warrant an adverse inference instruction" under Rule 37(e)(2). 2A-646. Both grounds constitute error warranting reversal.

A. The district court clearly erred in finding insufficient evidence that a second taser video existed.

The magistrate judge's factual finding that there was no "clear evidence" that video footage ever existed of the taser's initial deployment is flatly contradicted by Defendants' own testimony. 2A-644.

As Officer Goff testified on direct examination, the taser's video recording function is "activated" when an officer arms the taser, and "at that point it will start recording." 2A-425. Goff explained that the video in the record—Defendants' Exhibit A—"just depicts the drive stun portion of the incident," that is, the second use of the taser. 2A-426. When his counsel asked "what's the reason why there was no video" of the "first deployment of the taser before [Goff] performed the drive stun," Goff testified that "[a]fter the incident we were informed that the file had somehow been overwritten." *Id.* He repeated that testimony on cross-examination. When asked what was "overwritten," Goff said, "the first deployment where the prongs are shot out from the cartridge," and to his

knowledge, by 2018 "the entire video [was] gone" 2A-434–35; *see also* 2A-443 (Goff testifying that in viewing Defendants' Exhibit A he could see "the thin electrical wire attached to the prongs that would have gone with the first deployment"). Goff also clarified on cross-examination that he followed normal protocols for preserving the taser evidence, including giving the taser to his superior officer, Sergeant Lacey (2A-436), who would then "bring it to the crime scene unit and then they download" all the information on the device. 2A-434. Goff testified that procedure is what "happened that night." *Id.*

For his part, defendants' counsel never disputed Goff's account of what happened. *See* 2A-452–57, 520–23, 643–48. Nor did counsel argue against the propriety of any adverse-inference instruction. Instead, he only represented that the video played at trial was produced to Hoffer and "was the only video that existed *since 2018*." 2A-453 (emphasis added). In other words, Defendants did not claim that video of Goff's first use of the taser *never* existed. Indeed, in closing argument defense counsel told the jury that "as Sergeant Goff testified," the video of the taser's initial discharge "was either overwritten, malfunctioned, or

whatever. In any event, everyone's in agreement, there's no taser video on that first deployment." 3A-658.

Furthermore, Cuebas' testimony—provided before Goff testified and before Hoffer or his counsel even knew that a second video previously existed—tends to corroborate Goff's account.[5] Cuebas testified that at the police station following Hoffer's arrest, she overheard Officer Tellone talking to Goff while holding a USB drive: "It shows everything that we did and nothing that he did." 2A-389–90. Given that neither Tellone nor

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[5] At times, the magistrate judge appeared to fault Hoffer's counsel for not uncovering before trial that a second video had previously existed. 2A-453–54 (court inquiring about Goff's deposition testimony). In fact, however, there was a simple and understandable explanation: Goff had testified at deposition that he was "aware of" only one video. Regrettably, this deposition excerpt was not presented to the district court during the heat of trial. On remand Hoffer will introduce Goff's deposition testimony where he was asked:

> Q: Have you ever seen the video for, any Taser video in relation to this incident?
>
> A: Yes.
>
> Q: How many videos have you seen?
>
> A: Just one.
>
> Q: Is there more than one?
>
> A: Not that I'm aware of.

Even as the record stands, however, the unrebutted evidence is that Hoffer and his counsel first became aware that another video once existed while Goff was testifying at trial. 2A-452.

any other officers could be seen in the taser footage played at trial, 2A-443–44 (Goff's testimony), Tellone's statement—as recounted by Cuebas—evidently refers to some video other than Defendants' Exhibit A.

Despite this testimony from Cuebas and the unequivocal testimony of the officer who tased Hoffer that a video of Goff's first use of the taser previously existed and was overwritten, the magistrate judge instead relied solely on the taser log, 4A-848, that shows only one activation during the time of Hoffer's arrest. That determination necessarily required the judge to make a credibility determination that should have been left to the jury. Although Hoffer's counsel expressly argued that Cuebas' testimony supported the existence of a second tape, the magistrate judge discredited that testimony because she "has a relationship with the plaintiff." 2A-500.[6]

Thus, even if the parties disputed whether a recording of the taser's first use ever existed (and the record is clear there was no such dispute), the magistrate judge erred in resolving that factual dispute that should

[6] Following the incident, Cuebas and Hoffer became romantically involved and, in 2018, had a child together. 1A-192.

have been left to the jury. The court should have instead, at the very least, instructed the jury that they should conduct that factfinding and, if warranted, draw adverse inferences.

Case law agrees with that approach. For example, in *United States v. Atkinson*, 316 F. App'x 93, 95 (3d Cir. 2008), there was a factual dispute about whether surveillance footage existed that should have been produced. The Third Circuit noted that the district court instructed the jury that "The existence or non-existence of a tape is a question of fact, and it is for you, and you alone, to decide[.]" *Id.* There, the jury was instructed that they "may or may not, depending on what [they] find credible in this case, draw any inferences suggested by [counsel] . . . with respect to the video tape and with respect to anything else." *Id.*; *cf. United States v. Andasola*, 13 F.4th 1011, 1016 (10th Cir. 2021) (holding trial court erred in instructing jury "that only one video existed," as the district court "introduced new evidence to the jury by deciding a disputed factual issue for the jury") (citing Fed. R. Evid. 605).

This Court has followed a similar approach for other types of jury instructions that require a predicate showing. In determining whether a jury may consider an entrapment defense, for example, "the production

of any evidence negating [defendant's] propensity [to commit the offense] . . . requires submission to the jury, however unreasonable the judge would consider a verdict in favor of the defendant to be." *United States v. Anglada*, 524 F.2d 296, 298 (2d Cir. 1975) (quoting *United States v. Riley*, 363 F.2d 955, 959 (2d Cir. 1966)). *Anglada*'s reasoning fits this case too, as issues surrounding spoliation and propensity both "frequently present an issue of credibility as between the agent [or officers] and the defendant . . . [and] resolution of such an issue is peculiarly within the jury's province." *Id.* (quoting *Riley*, 363 F.2d at 958).

In fully discrediting a defendant's own testimony that a video existed but was overwritten, the trial court erred by making a factual finding that (1) should have been left for the jury and (2) was a "clearly erroneous assessment of the evidence." *Cooter & Gell*, 496 U.S. at 405.

B. The district court based its scienter ruling on an erroneous view of the law.

The second basis for the magistrate judge's refusal to give an adverse inference instruction—that there was no "direct or circumstantial evidence" that the police department or the defendants had the "requisite intent," 3A-646—also does not withstand scrutiny.

As a threshold issue, the trial court held Hoffer to a higher standard of scienter than the law warrants. The court relied on Federal Rule of Civil Procedure 37(e). 3A-646. Since 2015, that rule—which applies to electronically stored information—requires a finding that "the party acted with the intent to deprive another party of the information's use in the litigation" to instruct the jury that "it may or must presume the information was unfavorable to the party[.]" Fed. R. Civ. Proc. 37(e)(2)(B).

But it does not appear that this Court has ever applied Rule 37(e)'s "intent to deprive" standard to the spoliation of videotape evidence—let alone in the context of an excessive-force claim. Instead, in excessive-force cases arising after Rule 37's 2015 amendment, this Court has continued to apply the "culpable state of mind" standard from *Residential Funding* that encompasses the "negligent destruction of evidence." 306 F.3d at 108. In *Johnson v. Perry*, 763 F. App'x 81 (2d Cir. 2019), this Court relied on *Residential Funding* when it considered the propriety of an adverse inference instruction when the plaintiff—alleging that he was the victim of excessive force on Rikers Island—argued that surveillance videos from the facility should have been produced. Although the Court

ultimately affirmed the trial court's refusal to give the instruction, the circumstances were quite different from those present here. In *Johnson*, an investigator from the Department of Corrections "testified that no footage captured any aspect of the physical altercation" at issue and there was evidently *no* evidence of any culpable state of mind. *Id.* at 84; *see also Johnson v. Perry*, 2018 WL 623574, at *3 (S.D.N.Y. Jan. 30, 2018) (district court opinion denying motion for new trial, noting that there "was no evidence supporting his contention that relevant evidence had been spoliated."). Although the jury trial in *Johnson* took place in 2017, *id.* at *1, neither the district court nor this Court ever suggested that Rule 37(e) had displaced the *Residential Funding* standard.

Moreover, when at least one other circuit encountered the choice between Rule 37(e) and prior spoliation standards in excessive-force cases, it declined to resolve the issue. *See Boone v. Everett*, 751 F. App'x 400, 402 & n.3 (4th Cir. 2019) (declining to resolve "whether Rule 37(e) or our preexisting spoliation doctrine governs" unproduced video recording at plaintiff's correctional institution).

This Court should reaffirm that the "culpable state of mind" standard recited in *Residential Funding* remains valid in the context of

missing videotape footage relating to alleged use of excessive force by law enforcement.

C. The district court abused its discretion in refusing to allow the jury to resolve disputed factual questions concerning the destruction of the taser video.

Irrespective of whether Rule 37(e)'s intent-to-deprive standard controls this case, the district court abused its discretion by refusing to give the requested adverse inference instruction. When resolving disputed questions about a party's state of mind with respect to spoliated evidence, courts have held that resolution of such factual disputes are for the jury alone.

The Fifth Circuit's recent decision in *Van Winkle v. Rogers*, 82 F.4th 370 (5th Cir. 2023), is particularly instructive. There, the court held that the trial court abused its discretion in refusing to give an adverse inference instruction where there was "sufficient circumstantial evidence to create a genuine dispute of material fact as to whether Defendants destroyed [evidence] in bad faith." *Id.* at 379. The Fifth Circuit explained that the destroyed evidence—remnants of a damaged tire that had separated and hit plaintiff's vehicle—was "the most crucial piece of evidence to a potential lawsuit," and that defendant was "on notice of the

need [to preserve the tire] from the accident itself and the injuries to Van Winkle." *Id.* at 377. Although the defendant "ha[d] no evidence of what actually happened to the remnants of the tire," the company "speculate[d] that the tire remnants were accidentally sold or destroyed pursuant to its ordinary course of business." *Id.* at 376–77. But plaintiff offered circumstantial evidence of intent based, in part, on the fact that defendant apparently destroyed the scraps six weeks after the accident but offered no actual knowledge as to what happened to the evidence. *Id.* at 378. The Fifth Circuit held that the defendant's failure to implement policies to preserve evidence and its "inability to produce any actual evidence of what happened to the tire[ ] creat[ed] a fact question on bad faith." *Id.* at 377.

And that fact question, the court held, is one for the jury alone. Drawing from decisions from three other circuits, the *Van Winkle* court held that "bad faith is a question of fact like any other," meaning that "[i]f a genuine dispute of material fact exists as to bad faith, a jury should make that determination." *Id.* at 378 (quoting *Bracey v. Grondin*, 712 F.3d 1012, 1019 (7th Cir. 2013)). The court noted that both the Fourth and Third Circuits have similarly held that in such circumstances the

proper course is for the trial judge to give "a permissive adverse inference jury instruction to allow the jury to resolve the genuine disputes of material fact concerning spoliation." *Id.* (citing *Vodusek v. Bayline Marine Corp.*, 71 F.3d 148, 157 (4th Cir. 1995); *GN Netcom, Inc. v. Plantronics, Inc.*, 930 F.3d 76, 81–85 (3d Cir. 2019)).

Ultimately, the Fifth Circuit held that the circumstantial evidence—including the destruction of "the most crucial piece of evidence" shortly after the accident, the defendant's inability to explain what happened to the evidence, and defendant's failure to demonstrate that "it had any formal preservation or retention policy" following injuries—created a fact question over intent, "necessitating a jury determination." *Id.* at 379. Furthermore, that determination would be made following an instruction "that if jurors find bad faith, they may infer that the destroyed evidence would have been adverse" to the defendant's defense. *Id.*

While the *Van Winkle* court did not consider Rule 37(e)—as the destroyed tire was not electronically stored information—nothing in the Fifth Circuit's opinion is at odds with the Rule's 2015 amendments. Indeed, the Committee Notes to the 2015 Amendment expressly

contemplate courts giving a similarly permissive jury instruction, explaining:

> If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may [draw an adverse inference] only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. Fed. R. Civ. Proc. 37(e), Committee Notes on Rules – 2015 Amendment.

The circumstances of the destruction of the video of Goff's first use of the taser on Hoffer similarly demanded a jury determination and an instruction that expressly permitted the jury to draw adverse inferences if it made the requisite finding of culpability. First, the destroyed video was central to Hoffer's case. Hoffer testified that multiple police officers including Tellone beat him up before he was tased. 1A-210; *see also* 1A-377–78 (Cuebas recounting Tellone's statement that she "got a few good kicks in" on Hoffer). The jury also heard testimony that Cuebas overheard Tellone telling Goff that there was a video "show[ing] everything that we did and nothing that [Hoffer] did," while holding a USB drive. 1A-389–90. This testimony, if credited by the jury, would establish that a second video existed because, as defendants admitted, the video produced at trial showed no other officers around Hoffer, *see*

2A-443–44 (Goff); 3A-627–28 (Drummond). More importantly, the jury could well conclude that Tellone's statement was inculpatory in that she not only had actually seen the video but that the now-destroyed video showed that defendants "did" things to Hoffer—things that could very well include punching and kicking him as Hoffer testified.

Second, as in *Van Winkle*, defendants here offered no meaningful explanation for how the video footage was destroyed or "overwritten." This is *not* a case in which a party argued that evidence was deleted pursuant to a preexisting document retention policy. Instead, testimony only confirmed that the taser was brought to the department's crime scene unit so its data could be downloaded. 2A-434.

At minimum, these circumstances present a classic factual dispute that is within the province of the jury to resolve. The jury heard testimony that one of the defendants had apparently seen (or knew of) the video of the taser's first use, that footage showed officers doing (presumably physical) things to Hoffer, and defendants could offer no plausible explanation for how or why the video was later overwritten. In line with *Van Winkle* and the Committee Notes to Rule 37(e), the district court should have instructed the jury to resolve any dispute over

defendants' intent. 82 F.4th at 379; *see also Vodusek*, 71 F.3d at 157 ("Rather than deciding the spoliation issue itself, the district court provided the jury with appropriate guidelines for evaluating the evidence.").

Instead, the district court arrogated to itself that responsibility. In doing so, the court took a myopic view of the record. According to the court, Defendants could not have intended to destroy the video because there was consistent testimony at trial and in depositions "that there were these two deployments." 3A-645. The district court rejected the possibility of a "cover up," given "all of the testimony that we heard about there being [two] distinct episodes." 3A-645–46. But of course this misses the point. The issue is not whether Hoffer was tased twice. The issue is what were the circumstances when Goff tased Hoffer. Was he already on the ground, immobilized after he was hit by a car? Was he being repeatedly kicked and punched by an army of officers that had arrived at the scene? Or was he standing, actively attempting to break away from the officers and flee?

Even apart from Hoffer's allegations of being punched and kicked, video of Goff's first use of the taser would have been critical in resolving

the hotly disputed question of whether Goff's second use of the taser was lawful. This Circuit's precedents hold that "it was clearly established before April 2015 that officers may not use a taser against a compliant or non-threatening suspect." *Jones v. Treubig*, 963 F.3d 214, 227 (2d Cir. 2020) (quotation marks and citation omitted). The use of force is "objectively unreasonable" against a suspect "when he has been stopped and no longer poses a risk of flight." *Soto v. Gaudett*, 862 F.3d 148, 158 (2d Cir. 2017). *Jones*'s applicability here is undeniable: If the jury concluded that Hoffer "was no longer resisting arrest and posed no threat to the safety of police officers or others after the first tasing," Goff's second use of the taser would have violated clearly established Fourth Amendment law. *Jones*, 963 F.3d at 228–29. Although Hoffer submits that the video of Goff's second use of the taser is itself sufficient to conclude that defendants are liable under *Jones*, the destroyed videotape could have convinced the jury that Hoffer truly was as immobilized as he testified. 1A-208–11, 212 ("Q: And there was never a time that you were walking or running or jogging and then got tased, correct? A: No. Q: You got tased when you were laying on the ground? A: Yes.").

Accordingly, it would be eminently reasonable for a jury to infer that the video would have corroborated Hoffer's account and discredited the officers'. For one, testimony and the video admitted at trial demonstrated that when he was tased the second time, Hoffer was already lying on the ground, with his hands on his stomach, and not visibly moving. 2A-443–44, 3A-629. And that video bore a timestamp of 8:02 p.m., suggesting that the second time Hoffer was tased was about five minutes *after* officers had made an "all clear" call, signaling that two people (Hoffer and Rai) were in custody. 4A-820 (log), 2A-441 (Goff testimony), 3A-625–26 (Drummond testimony).

Because the trial record presented a legitimate factual dispute over defendants' culpability in destroying the taser video, the trial court abused its discretion and committed reversible error when it refused to give an instruction allowing the jury to resolve that dispute and, if warranted, draw adverse inferences based on the video's destruction. *See Adkins v. Wolever*, 554 F.3d 650, 653 (6th Cir. 2009) (en banc) (finding legal error in trial court's spoliation analysis and remanding "for determination of whether sanctions for spoliation are appropriate and whether Adkins is entitled to a new trial").

D. Hoffer satisfied the remaining elements to warrant an adverse inference instruction.

Although the magistrate judge did not base his decision on any other reasoning and defense counsel never raised (and thus forfeited) any argument against the giving of the instruction, the record shows that Hoffer satisfies any remaining elements necessary to warrant an adverse inference instruction. *See, e.g.*, *Aponte v. Perez*, 75 F.4th 49, 60 n.6 (2d Cir. 2023) ("The appellees failed to make these arguments before the district court, and we need not address them on appeal."). Under *Residential Funding*, that requires a showing that "the party having control over the evidence had an obligation to preserve it at the time it was destroyed," and "that the destroyed evidence was 'relevant' to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." 306 F.3d at 107.

1. Defendants had an obligation to preserve the video.

The district court evidently agreed that defendants had a duty to preserve video of the incident: "[t]he question of whether there was an obligation to preserve it . . . seem[s] to be less of a problem for you in terms of establishing the potential entitle[ment] to an adverse inference." 2A-522.

That observation tracks how other courts have considered the issue in similar circumstances. For example, in *Storey v. Effingham County*, 2017 WL 2623775, at *3 (S.D. Ga. June 16, 2017), the court rejected law enforcement's reliance on a "routine retention policy" where plaintiff "was tased, tied up, and roughed up several times" before being taken to the hospital. Noting that "tasings are not so ordinary or commonplace that ensuing litigation . . . would be a surprise," the court "cannot fathom a reasonable defendant who would look at those facts and not catch the strong whiff of impending litigation on the breeze." *Id.*

Cases from within this Circuit agree. "In 'situations where a party has knowledge that certain types of incidents tend to trigger litigation, courts within the Second Circuit have found that a duty to preserve relevant video footage may attach as soon as the triggering incident occurs and prior to when a claim is filed.'" *Stanbro v. Westchester Cnty Health Care Corp.*, 2021 WL 3863396, at *13 (S.D.N.Y. Aug. 27, 2021) (quoting *Taylor v. City of N.Y.*, 293 F.R.D. 601, 610 (S.D.N.Y. 2013)). In *Stanbro*, for example, the court concluded that the defendants' "duty to preserve evidence arose before the Video was even taken," because "there was a reasonable likelihood that litigation would ensue" from the

defendants' use of force against a prisoner. *Id.* (collecting cases). The plaintiff sustained serious injuries from a use of force that occurred under "unusual circumstances" and that an employee had described as "unnecessary." *Id.* at *13. "[G]iven this and in light of the frequency with which prisoners injured in custody bring lawsuits," the defendants "should have known that there was a reasonable likelihood that litigation would ensue." *Id.*

Defendants here were in similar circumstances. Goff testified that over 25 officers reported to the scene of Hoffer's arrest. 2A-447. And officers testified that following the incident they prepared Use-of-Force Incident Reports as required by Department policy. 2A-431, 3A-613. Hoffer's arrest is therefore consistent with the "unusual circumstances" noted in *Stanbro*, such that defendants should have reasonably anticipated litigation over their use of force. 2021 WL 3863396, at *13 (collecting cases applying similar standard).

2. The destroyed taser video was relevant to Hoffer's case, and its destruction prejudiced him.

Under *Residential Funding*, Hoffer must show the spoliated evidence was "relevant" to and would support his claims. As the extended discussion above shows, the record here readily satisfies this element.

As this Court held in *Jones*, "[i]t is beyond doubt that any reasonable police officer would know that the use of a taser, like pepper spray, constitutes significant force." *Jones*, 963 F.3d at 226. And, by the time of Hoffer's arrest in November 2015, "it was clearly established in this Circuit that it is a Fourth Amendment violation for a police officer to use significant force against an arrestee who is no longer resisting and poses no threat to the safety of officers or others." *Id.* at 225 (citing *Tracy v. Freshwater*, 623 F.3d 90, 98-99 (2d Cir. 2010)).

Accordingly, if the video of the first tasing showed that Hoffer was not resisting arrest and posed no threat to the officers—for example, because he was on the ground and not moving—then it would have been favorable to his excessive force claims. The trial record is replete with testimony and evidence supporting Hoffer's account that he was not resisting arrest when he was tased:

- Hoffer testified that, prior to being tased, he was hit by a car and unable to get up. 1A-207.
- Hoffer's passenger, Rai, likewise saw Hoffer "fly because something struck him." 2A-469.

- Hoffer's treating physician testified that his injuries were "consistent with being struck by a motor vehicle." 2A-311.
- The taser video of the Goff's drive-stun maneuver showed Hoffer lying on the ground, unmoving—as Goff and Drummond conceded. 2A-445, 629.

The destroyed video of Goff's first tasing thus likely would have shown that Hoffer was not resisting arrest and was instead already immobile on the ground. And—based on Cuebas' testimony that Tellone "got a few good kicks in on" Hoffer and saw video showing "everything that we did," 2A-377–78, 389–90—the destroyed video very well could have further provided dispositive proof of Hoffer's claims of excessive force.

Similarly, even if defendants argue on appeal that a showing of prejudice is required under Rule 37(e)(1)—an argument they did not raise below and have thus forfeited, *see Aponte*, 75 F.4th at 60 n.6—the above facts satisfy that requirement. In *Stanbro*, for example, the court found the missing video "would thus have been favorable to [the] [p]laintiff's deliberate indifference claim," as other record evidence supported the contention that the video would have shown the plaintiff was paralyzed at the relevant time. *Stanbro*, 2021 WL 3863396, at *15;

see also Castro v. Smith, 2023 WL 5371311, at *11 (S.D.N.Y. Aug. 22, 2023) (finding prejudice where "deleted video may have shown physical effects of the Incident helpful to Plaintiff's claims"); *Crema v. Las Vegas Metro. Police Dept.*, 2023 WL 6262556, at *5 (D. Nev. Sept. 25, 2023) (finding excessive-force plaintiff "was prejudiced" because spoliated "body camera footage cannot be replaced with additional discovery" as "missing footage was especially valuable" in showing degree of force and plaintiff's conduct).

CONCLUSION

For these reasons, Hoffer requests that the Court vacate the district court's December 9, 2021 judgment and June 10, 2022 order denying Hoffer's motion for a new trial, and remand for a new trial.

Dated: January 17, 2024
Los Angeles, CA

Respectfully submitted,

/s/C. Mitchell Hendy

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the type-volume limit of Local Rule 32.1 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 8,977 words, as computed by Microsoft Word's word count function.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface in 14-point Century Schoolbook.

I filed this brief with the Clerk of the United States Court of Appeals for the Second Circuit on January 17, 2024, via the Court's CM/ECF system, which will cause service on counsel for all parties of record who are registered CM/ECF users.

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SPECIAL APPENDIX CONTENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

RICHARD HOFFER,

Plaintiff,

-against-

POLICE OFFICER ELYSSA TELLONE, SHIELD # 730387; POLICE OFFICER TREVOR GOFF, SHIELD # 731915; POLICE OFFICER LAMONT BROWN, SHIELD # 734149; and POLICE OFFICER DARCY DRUMMOND, SHIELD # 731907,

Defendants.
----------x

JUDGMENT

18 Civ. 1197 (AEK)

WHEREAS, Plaintiff Richard Hoffer ("Plaintiff") brought the above-entitled action against Defendants Police Officer Elyssa Tellone, Shield # 730387; Police Officer Trevor Goff, Shield # 731915; Police Officer Lamont Brown, Shield # 734149; and Police Officer Darcy Drummond, Shield # 731907 (collectively "Defendants");

WHEREAS, this action was assigned to the Honorable Lisa Margaret Smith, United States Magistrate Judge, by consent of the parties pursuant to 28 U.S.C. § 636(c) (ECF No. 43), and reassigned to the undersigned on October 15, 2020;

WHEREAS, this action proceeded to a jury trial on December 1, 2021;

WHEREAS, on December 8, 2021, the jury reached a unanimous verdict in favor of Defendants on all claims that were presented to the jury;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that judgment is entered in favor of Defendants with respect to all claims. Accordingly, the Clerk is respectfully requested to close the case.

Dated: December 9, 2021
White Plains, New York

SO ORDERED.

ANDREW E. KRAUSE
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

RICHARD HOFFER,

Plaintiff,

DECISION AND ORDER

-against-

18 Civ. 1197 (AEK)

POLICE OFFICER ELYSSA TELLONE, SHIELD # 730387; POLICE OFFICER TREVOR GOFF, SHIELD # 731915; POLICE OFFICER LAMONT BROWN, SHIELD # 734149; and POLICE OFFICER DARCY DRUMMOND, SHIELD # 731907,

Defendants.
----------x

ANDREW E. KRAUSE, United States Magistrate Judge

Plaintiff Richard Hoffer ("Plaintiff") brought this action against Defendants Police Officers Elyssa Tellone, Trevor Goff, Lamont Brown, and Darcy Drummond (collectively, "Defendants"), asserting claims pursuant to 42 U.S.C. § 1983 for the alleged violation of his Fourth Amendment right to be free from the use of excessive force and for Defendants' alleged failure to intervene to prevent and/or stop the use of excessive force. The trial commenced on December 1, 2021, and on December 8, 2021, the jury returned a verdict in favor of all Defendants on both claims. ECF No. 99. Currently before the Court is Plaintiff's "motion for a directed verdict" against Officer Goff as to the claim against him for use of excessive force. *See* ECF No. 100 ("Mem. in Supp."). Plaintiff argues that the Court "should set aside the excessive force jury verdict in [D]efendant Goff's favor and enter a verdict on [P]laintiff's behalf and either set a date for [a] compensatory damage trial or award plaintiff nominal damages." Mem. in Supp. at 3. For the reasons that follow, Plaintiff's motion is DENIED.

I. Legal Standard

Plaintiff's motion is labeled as a "Motion for Directed Verdict," a framing that is generally understood to be a request for relief pursuant to Rule 50 of the Federal Rules of Civil Procedure. *See* Advisory Committee Notes to Rule 50—1991 Amendment (explaining that this revision of Rule 50 "abandons the familiar terminology of *direction of verdict*" and that such a motion should be referred to instead as a motion for judgment as a matter of law (emphasis in original)). Rule 50(b) of the Federal Rules of Civil Procedure permits the filing of a motion for judgment as a matter of law no later than 28 days after the entry of judgment. But a party may file a Rule 50(b) motion only if the Court previously denied that party's motion for judgment as a matter of law made pursuant to Rule 50(a) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 50(a) (requiring that an initial motion for judgment as a matter of law be made "at any time before the case is submitted to the jury"); *see* Fed. R. Civ. P. 50(b) ("If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), . . . the movant may file a *renewed* motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59." (emphasis added)). Because Plaintiff here did not make a Rule 50(a) motion at any point during the trial, he cannot now make a Rule 50(b) motion post-trial. *See Stoma v. Miller Marine Servs., Inc.*, 271 F. Supp. 2d 429, 430 (E.D.N.Y. 2003) ("It is undisputed that [the plaintiff] failed to move for judgment as a matter of law before submission of the case to the jury. Thus, the plaintiff may not post-verdict seek the benefit of a judgment as a matter of law under Rule 50(b)." (quotation marks and citation omitted)). Accordingly, the

pending motion will be treated as a motion for a new trial pursuant to Rule 59(a)(1)(A) of the Federal Rules of Civil Procedure.[1]

As set forth in Rule 59(a), "[t]he court may, on motion, grant a new trial on all or some of the issues—and to any party [] after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). For a district court to order a new trial pursuant to Rule 59(a), it must conclude that the jury "reached a seriously erroneous result" or that "the verdict is a miscarriage of justice." *Manley v. AmBase Corp.*, 337 F.3d 237, 245 (2d Cir. 2003) (quotation marks omitted).

A motion for a new trial pursuant to Rule 59 may be granted "even when there is evidence to support the jury's verdict." *AMW Materials Testing, Inc. v. Town of Babylon*, 584 F.3d 436, 456 (2d Cir. 2009); *see Manley*, 337 F.3d at 244-45 ("a new trial under Rule 59(a) may be granted even if there is substantial evidence supporting the jury's verdict," and "a trial judge is free to weigh the evidence himself [or herself], and need not view it in the light most favorable to the verdict winner") (quotation marks omitted). But a court "should only grant such a motion when the jury's verdict is egregious," and "should rarely disturb a jury's evaluation of a witness's credibility." *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2d Cir. 1998) (quotation marks omitted); *see Mugavero v. Arms Acres, Inc.*, 680 F. Supp. 2d 544, 558-59 (S.D.N.Y. 2010) ("In weighing the evidence, . . . the Court should not ordinarily ignore the jury's role in resolving factual disputes and assessing witness credibility") (quotation marks omitted).

The Court assumes the parties' familiarity with the facts of this case and does not recite them here except as necessary to resolve the motion.

[1] Despite the terminology used by Plaintiff in the motion papers, the case law and legal standards cited by Plaintiff are those applicable to a motion pursuant to Rule 59.

II. Analysis

Plaintiff claims that no reasonable juror could have found that Officer Goff did not use excessive force against Plaintiff. The Court disagrees.

At trial, Plaintiff and Officer Goff testified and provided entirely different accounts of the moments immediately leading up to Plaintiff's arrest. Plaintiff conceded that he led Yonkers Police Department ("YPD") officers on a high-speed car chase; at the conclusion of the chase, according to Plaintiff, he exited his vehicle and was struck by a YPD police car, which caused him to be propelled through the air. Plaintiff claimed that he never attempted to flee from the police when the vehicle he had been driving came to a stop, and did not resist arrest in any way, in part because he was largely incapacitated by the injuries he allegedly sustained from being struck by the YPD vehicle. In contrast, Officer Goff testified that when Plaintiff's vehicle stopped, Plaintiff exited the vehicle and began running in the direction of a wooded area adjacent to the parkway exit ramp. He further testified that he pursued Plaintiff on foot and ultimately deployed his Taser two times in an effort to take Plaintiff into custody. Officer Drummond, who was Officer Goff's partner on November 20, 2016, also testified that he was involved in the apprehension of Plaintiff after Plaintiff fled from his vehicle; this testimony generally was consistent with Officer Goff's account. Officers Tellone and Brown were not directly involved in placing Plaintiff under arrest after the conclusion of the car chase, though they also testified that they did not see Plaintiff get struck by any YPD vehicle after he exited the vehicle he had been driving.

As part of his case-in-chief at trial, Plaintiff introduced Exhibit 2, *see* ECF No. 100-1, a document that reflects communications between YPD officers and YPD dispatchers regarding the events preceding and following Plaintiff's arrest on November 20, 2016. As indicated in the

document and in trial testimony, there is a line in Exhibit 2 that reads "10-23 [two] in custody"; the "10-23" notation is a shorthand code indicating that the situation at the scene was under control. According to Exhibit 2, a YPD officer communicated a "10-23" to the YPD dispatcher at 19:57:16, *i.e.*, 7:57:16 p.m.

Meanwhile, Defendants introduced Exhibit B, *see* ECF No. 100-2, a usage report for the Taser device that Officer Goff was using on November 20, 2016, which recorded the times and durations of certain activity involving the device on the night in question. Exhibit B indicates that the Taser was triggered at 20:02:44, *i.e.*, 8:02:44 p.m., for a period of five seconds, and returned to "safe" mode at 20:02:51, *i.e.*, 8:02:51 p.m. Officer Goff testified that he deployed his Taser twice, before Plaintiff was in custody, as part of his efforts to apprehend Plaintiff. He explained that the first deployment of the Taser was not successful, even though it caused Plaintiff to fall to the ground, because the Taser prongs did not attach to Plaintiff's body. Officer Goff testified that because Plaintiff continued to resist arrest while on the ground, he executed a "drive stun" maneuver using the Taser as part of his efforts to arrest Plaintiff. Only the second of these Taser deployments is reflected in Exhibit B.

In addition, the jury had multiple opportunities to watch and listen to video and audio generated by the Taser device when Officer Goff deployed the Taser for the "drive stun" maneuver. Plaintiff argues in his motion papers that the video shows Officer Goff using the Taser after Plaintiff "was under arrest and in custody." Mem. in Supp. at 2. In his opposition submission, Officer Goff maintains that the video shows Plaintiff's arms/hands in front of him, underneath his body, as opposed to behind his body in handcuffs. Therefore, according to Officer Goff, the Taser video "demonstrates that [P]laintiff was not in custody when Officer Goff drive stunned him." ECF No. 103 at 3. The Taser video and audio introduced in evidence

at trial was brief and loud, and showed a chaotic encounter that was difficult to clearly parse, even with multiple viewings, and despite Plaintiff's counsel's efforts to slow down the recording and review it piecemeal with the jury.

* * * * * * * * * *

Plaintiff's argument in this motion is straightforward: because the timestamps from the YPD dispatcher log and the Taser usage report appear to indicate that the Taser was deployed five minutes *after* the "10-23" call indicating "[two] in custody," the deployment of the Taser by Officer Goff—purportedly after Plaintiff was already in custody—was necessarily an application of excessive force in violation of the Fourth Amendment.

A more holistic consideration of the evidence introduced at trial, however, makes it impossible for the Court to conclude that the jury "reached a seriously erroneous result" or that "the verdict is a miscarriage of justice." *Manley*, 337 F.3d at 245. The timestamps in Exhibit 2 and Exhibit B contributed to a viable theory of liability for Plaintiff to present to the jury, and Plaintiff's counsel did so, emphasizing the apparent timing discrepancy both in the presentation of evidence and in closing argument. But there were any number of colorable reasons why the jury may have chosen to reject Plaintiff's desired interpretation of the evidence. Among other things, there was no testimony as to which of the many YPD officers who were at the scene transmitted the "10-23" to the dispatcher, nor any evidence offered as to specifically what the communicating officer was able to observe at that particular moment regarding the efforts to arrest Plaintiff and Vishal Rai.[2] It was therefore not clear whether the "10-23" communication

[2] Mr. Rai, who also testified at the trial, was the other individual who was arrested on November 20, 2016 as part of the events that gave rise to this lawsuit. Based on the testimony of Mr. Rai and multiple Defendant YPD officers, there was no dispute that Mr. Rai did not attempt to flee from the vehicle after it came to a stop; Mr. Rai was placed under arrest in close proximity to the vehicle.

of "[two] in custody" accurately reflected the status of the YPD's efforts to arrest Plaintiff on November 20, 2016. There also was no evidence offered at trial regarding whether the Taser equipment and the YPD dispatcher communication system are calibrated to ensure that they show the same times, either with respect to the specific Taser device used by Officer Goff on November 20, 2016, or in general. Thus, it was not clear whether the "10-23" call actually occurred five minutes before the recorded Taser deployment, or whether there may have been a discrepancy in the timekeeping systems that could have accounted for the sequencing reflected in the documents.

Perhaps most importantly, the jury had before it the video of the Taser deployment—which it viewed multiple times—and the testimony of numerous witnesses who gave markedly different accounts of what transpired during the course of Plaintiff's arrest. As the parties' respective arguments in connection with this motion demonstrate, different interpretations of the video are possible; one plausible understanding of the video is that Plaintiff's hands were not in handcuffs at the time that the Taser was deployed, and that he was continuing to struggle with law enforcement officers. Moreover, while Plaintiff's testimony, if credited by the jury, may have supported a finding that the force used by Officer Goff was not "objectively reasonable in light of the facts and circumstances," *Chamberlain v. City of White Plains*, 960 F.3d 100, 113 (2d Cir. 2020), the testimony of Officer Goff and Officer Drummond, if credited by the jury, certainly could have supported the jury's determination that Officer Goff's deployment of the Taser did not constitute an excessive use of force.

In light of all of these factors, the Court cannot conclude that the jury's verdict in this case was egregious. Plaintiff's renewed arguments regarding the timing of events, as reflected in Exhibit 1 and Exhibit B, do not provide a sufficient basis for the Court to disturb the jury's

evaluation of the evidence and assessment of the witnesses' credibility with respect to Officer Goff's use of the Taser during the course of Plaintiff's arrest. *See DLC Mgmt. Corp.*, 163 F.3d at 134.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for a directed verdict (ECF No. 100) is DENIED.

Dated: June 10, 2022
White Plains, New York

SO ORDERED.

ANDREW E. KRAUSE
United States Magistrate Judge

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY.

(1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) *Appropriate Court.* A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) *Specific Motions.*

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) *Payment of Expenses; Protective Orders.*

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) FAILURE TO COMPLY WITH A COURT ORDER.

(1) *Sanctions Sought in the District Where the Deposition Is Taken.* If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) *Sanctions Sought in the District Where the Action Is Pending.*

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination*. If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)–(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses*. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) FAILURE TO DISCLOSE, TO SUPPLEMENT AN EARLIER RESPONSE, OR TO ADMIT.

(1) *Failure to Disclose or Supplement*. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi).

(2) *Failure to Admit*. If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) PARTY'S FAILURE TO ATTEND ITS OWN DEPOSITION, SERVE ANSWERS TO INTERROGATORIES, OR RESPOND TO A REQUEST FOR INSPECTION.

(1) *In General*.

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) *Unacceptable Excuse for Failing to Act.* A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) *Types of Sanctions.* Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)–(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

(f) FAILURE TO PARTICIPATE IN FRAMING A DISCOVERY PLAN. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Pub. L. 96–481, §205(a), Oct. 21, 1980, 94 Stat. 2330, eff. Oct. 1, 1981; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr.