IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JUAN HERNANDEZ, DEQUAN KIRKWOOD, KENT WHEATFALL, and MANUEL TREVINO, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE CITY OF HOUSTON, TEXAS, Defendant.	Case No. 16-CV-3577 (Class Action)

MOTION TO ENFORCE THE COURT'S APRIL 10, 2018 ORDER

Plaintiffs Juan Hernandez, DeQuan Kirkwood, Manuel Trevino, and Kent Wheatfall (collectively, "Plaintiffs"), respectfully move the Court, pursuant to Federal Rule of Civil Procedure 37(b)(2)(A), to enforce the April 10, 2018 Memorandum and Order (ECF Doc. No. 58) and impose discovery sanctions against the City of Houston (the "City" or "Defendant").

INTRODUCTION

After nearly a year of dragging its feet, it is clear that no matter how many chances it gets, the City either cannot or will not comply with its basic discovery obligations. The Court should end this tortured process by entering appropriate sanctions, as laid out in the Court's April 10, 2018 Memorandum and Order (the "Order").

That Order was clear: the Defendant had until April 30, 2018 to produce all non-privileged documents responsive to Plaintiffs' Requests for Production Nos. 1-4, 8 and 9 in accordance with the Court's ESI Protocol. (ECF Doc. No. 58, at 1.) The Court reminded Defendant that it must

produce a privilege log should it choose to withhold documents on the basis of privilege. The Court also laid out the consequences of failing to comply with its order, including a specific adverse inference—one that would cut off the need for any further discovery and move the parties into a merits-based resolution of the claim:

> Failure to comply with this Order will result in sanctions, including but not limited to monetary sanctions and an adverse inference instruction to a jury that any hard drives not produced of former Chief of Police Charles McLelland, Chief of Police Martha Montalvo, Executive Assistant Chief George T. Buenik, Lieutenant Patrick Doughtery, Assistant Chief John Chen, and Assistant Chief Charles Vazquez, were intentionally destroyed and contained documents and communications establishing that: (a) throughout the class period, the City of Houston had a policy and/or practice of not releasing warrantless arrestees who had not received neutral determinations of probable cause within the constitutionally required period of time; (b) throughout the class period, policymakers were aware of this policy and/or practice; and (c) although aware of the policy and/or practice took no action to correct the unconstitutional conduct through fully aware that such inaction would continue an unconstitutional policy of deliberate indifference to a known constitutional violation.

Id. at 1-2.

Yet despite the Court's clear instructions and warning, the City failed to comply. After claiming at the April 3, 2018 hearing that it had identified more than two million potentially relevant documents, the City produced only 368 responsive files on April 3, 2018.[1] This extreme disparity certainly raises eyebrows, but without any sort of transparency into the Defendant's process, it is impossible for Plaintiffs to say what specifically has been held back. In fact, on May 16, 2018, during the parties' meet and confer prior to filing this motion, the City explained it had not reviewed all the documents it referenced at the hearing, or even the set resulting from application of the narrowed search terms. Instead, in violation of the ESI Order, the City had

1 Of the 459 documents the City produced on April 30, 2018, 73 were exact duplicates of other documents in the production, and 91 were not responsive at all. The total number of documents that were neither duplicates nor unresponsive is 368 (many documents fell into both categories). The City did not produce a privilege log.

applied a new set of search terms, without conferring with the Plaintiffs beforehand, or disclosing the terms after the fact. And the City further complicated and obstructed the Plaintiffs' comprehensive analysis of these documents by withholding critical metadata in violation of the ESI Order.

As for the hard drives themselves, the City's story keeps changing. The City admitted the truth in December 2017: the critical files contained on the hard drives were gone, because drives had been wiped and recycled when the custodians who used them left the City's employment. Faced with the possibility of sanctions, however, in April 2018, the City began to equivocate.

> MS. LEMOND: So, we know, at least, one, maybe two, of those hard drives were reimaged, for sure; but one of those individuals --
>
> THE COURT: But why can't you have those -- do I -- if I enter an order seeking to attach those and have them delivered, what would happen?
>
> MS. LEMOND: We would deliver them, your Honor.

(Ex. A, Apr. 3, 2018 Hr'g Tr. at 35:12-18.) The City further represented at the hearing that it would have "[its] people go through each person's hard drive." (*Id.* at 48:24-25.) Yet the City never did that, and indeed, it is dubious that the City ever did anything to attempt to locate those hard drives.[2]

The City now opaquely claims that it has produced all documents that "would be" on the hard drives. (Ex. B, Apr. 27, 2018 Email from C. Lemond.) Yet neither Plaintiffs nor the Court

2 During the parties' May 16, 2018 meet and confer, the City's counsel confirmed what was clear from the production: they had only collected and produced documents from one of the six missing hard drives: that of Lieutenant Patrick Dougherty.

have any ability to say what "would be" on the hard drives. This is precisely the type of situation for which Rule 37(e) sanctions are designed: where "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." Fed. R. Civ. P. 37(e). Where, as here, a party allows relevant data to be overwritten "without ensuring that it had been appropriately preserved," courts routinely infer an intent to deprive and apply an adverse inference, bringing an end to the offending party's discovery evasion. *Moody v. CSX Transp., Inc.*, 271 F. Supp. 3d 410, 431 (W.D.N.Y. Sept. 21, 2017) (citing *Ala. Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730, 746 (N.D. Ala. 2017)).[3]

After almost a year of discovery malfeasance on the part of the City, the Court should reject the City's continued attempts to evade its basic discovery obligations. The Court should enter an adverse instruction against the City as detailed in its April 10, 2018 Order (ECF Doc. No. 58), which would bring document discovery regarding policymaker knowledge of the City's unlawful policy to an end.

FACTUAL BACKGROUND

The history of the City's discovery failures as well as Plaintiffs' extraordinary attempts at cooperation are laid out in Plaintiffs' Motion to Compel and for Discovery Sanctions (ECF Doc. No. 47). An update on what has occurred since the April 3, 2018 hearing is laid out briefly here.

A. Plaintiffs' Continued Attempts at Cooperation

Pursuant to the ESI Order, Defendant may apply agreed-upon search terms as a mechanism to cull the volume of data subject to manual attorney review (ECF Doc. No. 40, §4(a)). At the April 3, 2018 hearing, the City represented that the original search terms (that the City had

3 *See also* Pls.' Mot. to Compel Produc. and for Disc. Sanctions (ECF Doc. No. 47, at 18 n.5) (collecting cases holding that an adverse inference is appropriate where a party destroys evidence despite a duty to preserve it).

previously agreed in writing to use) had hit on "11.3 gigabytes of data or nearly two million documents" and would take "17,000 hours" to review. (*See* Ex. A, at 19:5-21:9.) As discussed at the hearing (*id*. at 53:21-54:10) and in the spirit of further cooperation, Plaintiffs agreed on April 11, 2018, to remove four search terms from the original list of 59 search terms. (*See* Ex. C, Apr. 11, 2018 Email from A. Elbogen.) Removing these four terms would allow the City to focus on Requests for Production 1-4, 8 and 9, which were the specific subject of Plaintiffs' motion and the Court's Order. That left 55 search terms for the City to run.[4]

B. Defendant's Noncompliance and Obfuscation

On April 26, 2018, the City emailed Plaintiffs' counsel, saying that it was "sending a disk containing everything to you by FedEx/USPS so that you can have everything in hand by 4/30." (*See* Ex. E, Apr. 26, 2018 Email from C. Lemond.) Plaintiffs immediately sought clarification from the City as to whether the production included documents from the contested hard drives. (*See* Ex. F, Apr. 26, 2018 Letter from A. Zuckerman.) Plaintiffs asked the City to "advise whether 'everything'—as you used the term in your email—included the documents on the hard drives . . . ." (*Id.*)

The City responded on April 27, 2018 and cryptically said that "the production we sent you does satisfy the requirement that the responsive, non-privileged documents that ***would be*** on the hard drives of those individuals named in the judge's order." (*See* Ex. G, Apr. 27, 2018 Email from C. Lemond (emphasis added).) Obliquely implying that it had searched the hard drives (which it previously claimed were wiped), the City stated that "[n]o responsive documents were

4 Despite Plaintiffs' efforts to streamline the search terms, however, the City entirely ignored Plaintiffs' agreement to remove the four terms from the list and ran those terms anyway. The four search terms were "jail* w/20 condition*"; "jail* w/50 misconduct"; "jail* w/50 complain*"; and "jail* w/50 audit". Dubiously, the City claims that two of those four terms returned zero documents and the other two only returned one document each. (Ex. D, Apr. 30, 2018 Hit Report.)

found on the hard drives of the chiefs." (*Id.*) Rather than explaining how it could search hard drives it previously admitted were wiped and recycled, the City claimed it had "reached out to the chiefs to ensure that we were looking in all of the areas that would have responsive documents." (*Id.*) The City provided a chart showing the times it claims to have had these conversations with the chiefs, some of which appeared to take mere minutes and one of which was in December 2017, months before the April hearing and the Court's April 10 Order. (*See* Ex. H, City of Houston Contact List.)

After this dramatic build up, on April 30, 2018, Plaintiffs received the City's production, which contained only 459 files, 91 of which are either entirely non-responsive or are graphics files (junk images) and 73 of which were duplicates. In other words, after claiming that the agreed-upon search terms had identified more than two million documents, the City produced only 368 in response to the Court's order. The vast majority of these files were emails and attachments with simple tables reflecting the number and gender of arrestees being detained past 24 hours (information that Plaintiffs already have in summary form from the Houston Police Department database).

None of the 368 responsive files were produced in accordance with the ESI Order; the City withheld crucial metadata for all of them. The City further provided a "hit count" report, purporting to show the number of documents retrieved by the search terms. That implausible report—which claims that no emails whatsoever were retrieved by any search term despite the fact that most of the 368 documents are themselves email files—is attached as Exhibit D. The City did not provide any sort of a privilege log, either indicating that there are no documents for which it

asserts the protection of privilege or that it withheld documents without providing a privilege log, in violation of the Court's order.[5]

Finally, on May 16, 2018, the parties conferred by phone in an attempt to resolve the issues Plaintiffs raise in this motion. During that call, counsel for the City made yet another startling assertion: instead of reviewing all of the files produced by the search terms in the order—to which the parties had previously agreed, and that this Court twice ordered the City to comply with—the City decided to narrow the searches using additional terms of the City's choosing, and without conferring with the Plaintiffs. That is an unequivocal violation of the ESI Order. (*See* ECF Doc. No. 40, at 2 ("The parties shall apply ***agreed-upon*** search terms . . . .) (emphasis added).) The City was required by this Court's order to review *all* documents generated by the agreed-upon search terms and to produce all of the reviewed documents that are responsive to Plaintiffs' requests. Counsel for the City did not review the documents. And for that reason alone Plaintiffs are entitled to the relief outlined in the Court's April 10, 2018 Order.

NEED FOR ENFORCEMENT

The City failed to comply with the Court's April 10, 2018 Order. Many documents responsive to Requests for Production 1-4, 8 and 9 appear to be missing, but given the opaque nature of Defendant's discovery process, it is impossible for Plaintiffs to say precisely what was withheld—not least because the City produced documents only after unilaterally applying their preferred search terms. Multiple examples exist, however, to indicate that the City failed to produce all non-privileged documents in accordance with the Court's Order:

5 *Etheredge v. Etheredge*, No. 1:12-0165, 2013 WL 4084642, at *4 (M.D. Tenn. Aug. 12, 2013) ("[T]he unjustified failure to list privileged documents on the required log of withheld documents in a timely and proper manner operates as a waiver of any applicable privilege.") (quoting *Onebeacon Ins. v. Forman Int'l Ltd.,* No. 04 Civ. 2271(RWS), 2006 WL 3771010, at *7 (S.D.N.Y. Dec. 15, 2006)).

The City has not produced ***any*** data or documents from the personal hard drives of the key policymakers in this case.[6] The City promised at the April 3, 2018 hearing to deliver the drives and assured the Court that the documents on them could be produced. (*See* Ex. A, at 35:15-18.) Now, however, the City is walking back that promise and instead baselessly claiming that it has produced any documents that "would be" on the hard drives before those drives were wiped. While counsel for the City alludes to self-serving conversations with the policymakers to support its confusing position, there is no actual evidence that the City has done anything whatsoever to collect and produce files actually located on the hard drives. Nor could it—in December 2017, the City unequivocally stated that the hard drives had been wiped and recycled. Faced now with the possibility of sanctions, the City seeks to muddy the water, but such a run-around of the Court's order should be rejected.

It is further not possible, despite the City's claims, that the documents produced reflect the universe of responsive documents that "would have" been found on the hard drives. Plaintiffs' review of the documents reveal numerous gaps in the City's efforts, including without limitation:

- The City has not produced a ***single*** email written by Chief of Police Charles McLelland, despite his authorship of the Jail Division Assessment from May 2014 (*see* Ex. I, COH0000028). Any email communications related to this report would obviously be relevant to Plaintiffs' case and have been either withheld or destroyed.

- The City has produced only one email (the latest in time email) from a three-message chain dated May 14, 2015 (*see* Ex. J, COH0000246), which began with a message from Chief Vazquez using the word "overcrowding." The City's failure to produce other messages from this chain indicate that it has not properly searched Chief Vazquez's email files pursuant to the ESI Order.

6 The source of documents is usually something that can be quickly and easily determined by looking at the file's metadata. Specifically, the ESI Protocol requires the parties to include the metadata field for "Custodian" (*i.e.,* the name of the person from whom the document was collected or the non-custodial source from which the document was collected; there are 14 named custodians in the ESI Protocol). (ECF Doc. No. 40, at 10, App. A.) The City, however, withheld this metadata, making Plaintiffs' analysis lengthy and burdensome.

- The City has produced numerous documents only as final PDFs. (*See, e.g.*, Ex. K, COH0000602; Ex. L, COH0000914.) Yet Plaintiffs' Requests for Production call for production of ***all*** documents that are responsive—not just final versions of those documents. This likely indicates that either (i) the drafts were not saved to the shared drive, as the City represented they had been (s*ee* Ex. A, at 09:33:17) and are instead located somewhere else (like the missing hard drives); (ii) the City is holding back documents without explanation; or (iii) the City previously destroyed documents relevant to this litigation.[7]

Each of these shortcomings in and of itself demonstrates that the City has failed to comply with both the Court's April 10, 2018 Order (because there are many documents that have not been produced) as well as the ESI Protocol (because the City did not search for or produce documents in line with the procedure it agreed to in that order). Yet it is not Plaintiffs' job to track down all of the ways in which Defendant's production is deficient; indeed it would be impossible for outsiders like Plaintiffs to do so. The Court should bring an end to this otherwise endless game of trailing after the City to honor its basic discovery obligations.

CONCLUSION

For all these reasons, Plaintiffs respectfully request that this Court impose the discovery sanctions set forth in the April 10, 2018 Order, including the adverse inference laid out therein, and any other sanctions this Court deems appropriate.

7 On September 12, 2017, the City first adopted the position, in direct conflict with Federal Rule 34(b)(2)(E), that it was not required to produce drafts of key documents. (*See* ECF Doc. No. 36, at 5.) The City's intransigence on this point was one of Plaintiffs' chief motivations for seeking an ESI Order, so that the parties would agree in writing to produce drafts of documents, consistent with Plaintiffs' First Request for Production of Documents, and so that discovery could proceed in an orderly and uniform manner. (*See* ECF Doc. No. 47-1 ("A draft or non-identical copy is a separate document within the meaning of the term 'document.'"); ECF Doc. No. 36, at 5 (discussing City's refusal to produce drafts).) Nonetheless, even under the threat of sanctions, the City continues to disregard its basic discovery obligations and refuses to produce draft documents.

Dated: May 16, 2018

Respectfully submitted,

By: */s/ Charles Gerstein*

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CERTIFICATE OF CONFERENCE

I hereby aver that Plaintiffs have made all the attempts to meet and confer regarding this motion, as described in detail herein, in good faith, and have not reached agreement as to the disposition of the motion.

/s/ Amanda Elbogen
Amanda Elbogen

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2018, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States District Court for the Southern District of Texas.

/s/ Patrick King
Patrick King