

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
MACON DIVISION**

ASHLEY DIAMOND,

Plaintiff,

v.

TIMOTHY WARD, *et al.*,

Defendants.

No. 5:20-cv-00453-MTT

**PLAINTIFF'S MOTION FOR SPOILIATION SANCTIONS  
AGAINST DEFENDANTS BROOKS BENTON, AHMED HOLT, AND ROBERT  
TOOLE**

Pursuant to Rule 37(e) of the Federal Rules of Civil Procedure, and for the reasons set forth in the accompanying Memorandum of Law, Plaintiff Ashley Diamond respectfully moves for spoliation sanctions against Defendants Brooks Benton, Ahmed Holt, and Robert Toole for failing to take reasonable steps to preserve certain video surveillance recordings that they had control over and a duty to preserve in the anticipation or conduct of this litigation. Specifically, Ms. Diamond respectfully requests that the Court, pursuant to Rule 37(e)(1), order all measures necessary to cure the prejudice to her caused by Defendants' spoliation, including by: (1) telling the jury that the video surveillance recordings were not preserved; (2) allowing the parties to present evidence and argument at trial regarding the Defendants' destruction of, or willful failure to preserve, video surveillance recording evidence and instructing the jury that it may consider that evidence along with all the other evidence in the case, in making its decision; and (3) precluding any evidence or argument that the contents of the video corroborated Defendants' version of events, and that, pursuant to Rule 37(e)(2)(A)–(B), the Court will presume that the lost recordings were unfavorable to Defendants and instruct the jury that it may or must presume the recordings were unfavorable

to Defendants, that is, would have corroborated Plaintiff's allegations. Because motions for summary judgment are due on October 17, 2022, Ms. Diamond also respectfully requests that the Court impose additional relief Plaintiff may request in response to, or in light of, any such motion filed by Defendants.

Respectfully submitted,

/s/ A. Chinyere Ezie

Dated: October 17, 2022

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**CERTIFICATE OF SERVICE**

I hereby certify that, on October 17, 2022, the foregoing document and all attachments were served on all counsel of record through the Court's CM/ECF system.

/s/ A. Chinyere Ezie

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## INTRODUCTION

Discovery revealed that Defendants Brooks Benton, Ahmed Holt, and Robert Toole (collectively, “Defendants”), after having received notices of anticipated litigation, intentionally failed to preserve *a single frame* of video recordings that they had control over and that they knew would be directly relevant to the claims and issues in this case. Specifically, before Plaintiff Ashley Diamond filed this suit, Defendants received ante litem notices from her counsel reporting in specific detail six incidents of sexual assault in areas where video cameras would have recorded relevant information, notifying them of potential litigation based on their failures to protect her from sexual assault, and demanding that they preserve evidence, including surveillance video. Ms. Diamond directly reported a seventh sexual assault. Despite having received each of these notices and reports at times in which the video recordings related to those specific incidents of sexual assault existed, Defendants failed to preserve the recordings—even after the Georgia Department of Corrections’ legal department sent a companion preservation notice, and even though PREA and GDC’s own policies require preservation of such video evidence. Evidencing their bad faith, Defendants affirmatively preserved recordings to support false accusations *against* Ms. Diamond and to support their arguments in opposition to her claims, while failing to preserve during the same timetable any video related to Ms. Diamond’s sexual abuse allegations—even where the allegations occurred in the same place one night apart. Because Defendants’ spoliation violates their discovery obligations and severely prejudices her ability to prove her case, Ms. Diamond respectfully requests sanctions both to cure that prejudice and to punish Defendants’ litigation misconduct.

## FACTUAL BACKGROUND

**A. Ms. Diamond notified GDC officials that she had been repeatedly sexually assaulted at Georgia Diagnostic and Classification Prison and put them on notice of anticipated litigation as early as May 1, 2020.**

Ms. Diamond re-entered GDC custody on October 29, 2019, after a probation violation, and was placed at Georgia Diagnostic and Classification Prison (GDCP) where she was sexually victimized within days of arrival and throughout the seven months she was housed there. ECF No. 36, ¶¶ 72–74, 78, 89–90, 95–107. Her counsel notified GDC and GDCP officials about these incidents in three ante litem notices, which were also third-party reports pursuant to the Prison Rape Elimination Act (PREA), addressed to Defendant Timothy Ward, Commissioner of GDC, and copying, among others, Holt, GDC’s general counsel, and lawyers at the Georgia Office of the Attorney General (OAG).

Ms. Diamond’s first ante litem notice and PREA report was sent on May 1, 2020. ECF No. 57-6. It informed GDC that Ms. Diamond had been sexually assaulted by staff and other incarcerated people at GDCP and that she feared further sexual assault. *Id.* at \*2-4. It also informed GDC that Ms. Diamond was represented by counsel, *id.* at \*2, that GDC has a constitutional obligation to protect her from sexual assault, *id.* at \*4, that GDC has turned a blind eye to her safety needs, *id.* at \*4, and that, “[t]o avert further litigation, GDC must take immediate steps to ensure Ms. Diamond’s . . . safety,” *id.* at \*2; *see also id.* at \*7 (“GDC Must Take the Following Actions to Avert Litigation”). It also explicitly demanded that GDC preserve evidence of Ms. Diamond’s conditions of confinement, including “surveillance video,” in anticipation of litigation. *Id.* at \*9 (“GDC Must Fulfill Its Legal Duty to Preserve Evidence”) (citing Fed. R. Civ. P. 37(e)).

On May 4, 2020, shortly after receiving Ms. Diamond’s first ante litem notice, GDC issued a notice to preserve, confirming that Defendants were subject to a duty to preserve “*all records* for Ashley Diamond” because litigation was imminent. Ex. 1 (emphasis added). On May 20, 2020 and

June 3, 2020, Ms. Diamond’s counsel sent Defendants two more ante litem notices and PREA reports based on their failure to protect her from sexual victimization. ECF No. 57-7; ECF No. 57-8 at \*4 (“Ms. Diamond has retained counsel in anticipation of litigation . . . regarding Ms. Diamond’s conditions of confinement, including protection from sexual violence from GDC staff and other incarcerated people. . . . [A]ll audio/video [of Ms. Diamond’s interviews with GDC officials] should be preserved pursuant to a litigation hold.”). Both notices referred to and enclosed all prior ante litem notices.

**B. Ms. Diamond was repeatedly sexually harassed and assaulted at Coastal State Prison and notified GDC and Coastal officials of each incident and their duty to preserve video evidence.**

Ms. Diamond was transferred to Coastal on June 4, 2020. ECF No. 36, ¶ 115. Defendants claimed that Coastal was chosen in part because video “[c]ameras were upgraded in the N building at CSP where Diamond was to be housed.” ECF No. 77-1, ¶ 7; *see also* Ex. 20 ( [REDACTED] ). As at GDCP, incarcerated men continued to sexually victimize Ms. Diamond at Coastal. Ms. Diamond authorized her counsel to report these incidents through ante litem notices and third-party PREA reports. Each notice was addressed to Ward, copied, among others, Benton, Holt, Toole, and lawyers for GDC and OAG, reported detailed information about her assaults at Coastal, including the dates, locations, and approximate time they took place, and referenced potential litigation for their failure to protect Ms. Diamond from sexual assault.

On June 17 and 19, 2020, Defendant Rodney Jackson called two dormitory-wide meetings in which he announced Ms. Diamond’s transgender status and made crude and derogatory sexual remarks about her breasts and genitalia, bemoaned the presence of transgender people in the dormitory, made hostile comments about “snitches,” and explicitly and publicly threatened her. ECF No. 36, ¶¶ 119, 121–23, 126. Ms. Diamond’s counsel notified GDC and Coastal officials about these incidents in a fourth ante litem notice and PREA report dated July 2, 2020. *Id.* at ¶ 127;

*see also* ECF No. 57-9. It explicitly provided: “GDC must preserve all evidence related to Ms. Diamond’s conditions of confinement in anticipation of litigation. . . . This includes, but is not limited to, surveillance video, including any available corresponding audio, of the above incident.” ECF No. 57-9 at \*4 (citing Fed. R. Civ. P. 37(e)). It also referred to and enclosed all prior ante litem notices. *See id.* at \*3 & n.1, 7. As confirmed in discovery, [REDACTED]

[REDACTED]. Ferguson R. 30(b)(6) Dep. Tr. 38:2-40:3 (Ex. 2); Ex. 20.

Benton received the July 2 ante litem notice no later than July 7, 2020. *See* Ex. 3. That day, GDC’s general counsel sent an email to Holt and Toole alerting them to their obligation to preserve video, directing them to “make sure that Warden Benton is preserving the video of the alleged dorm meeting on June 19, 2020.” Ex. 4. This email was forwarded to Benton, who responded “Yes Sir!” *Id.* Yet, contrary to Benton’s statement, and despite the presence of numerous working cameras, no video concerning this incident was preserved. Ex. 20; Ex. 16, 29:20-30:10, 31:4-25; ECF No. 120, ¶¶ 11-16; *see also infra* at 10 n.1.

On July 3, 2020, an incarcerated man followed Ms. Diamond into her cell and sexually assaulted her. ECF No. 36, ¶ 131. On July 8, 2020, Ms. Diamond reported the sexual assault to her mental health counselor, who notified Benton and Defendant Grace Atchison. *Id.* at ¶ 132; *see also* Ex. 5. Ms. Diamond again expressly authorized her counsel to file a detailed report, which they sent to Defendants in a fifth ante litem notice and PREA report dated July 20, 2020. ECF No. 36, ¶ 139; *see also* ECF No. 57-10. It described the sexual assault and provided the following details, which could be corroborated on the cameras in her dormitory: (1) the sexual assault and attempted rape took place during the day on July 3, 2020; (2) “Ms. Diamond’s attacker [was] an incarcerated person from another dormitory [who] was let into Ms. Diamond’s dormitory by a GDC officer

[and who] . . . walked around the dormitory talking with other people for about an hour. Ms. Diamond was standing with a group of people and eventually turned to go back to her room. Her attacker followed and entered the room behind her”; (3) amid the assault, “[t]wo other incarcerated people were able to intervene and stop the attack.” ECF No. 57-10 at \*2–3. It also stated: “Further, GDC is well aware that Ms. Diamond has retained counsel in anticipation of litigation regarding Ms. Diamond’s conditions of confinement, including protection from sexual violence from GDC staff and other incarcerated people.” *Id.* at \*4. It also referred to and enclosed all prior ante litem notices. *See id.* at \*5 & n.2, 7. Benton admits that he received the notice and was “aware . . . that as of July, Ashley Diamond had retained counsel for potential litigation against the department.” Benton Dep. Tr. 187:22–25 (Ex. 6); *see also id.* 210:8–212:17. On July 31, 2020, Ms. Diamond directly corroborated the allegations in the fifth ante litem notice in a statement. Ex. 5. However, despite the fact that the cameras [REDACTED] were operational and would have captured relevant evidence, no video concerning this incident was preserved. Ex. 20; Ex. 16, 29:20–30:10, 31:4–25; ECF No. 120, ¶¶ 11–16; *see also infra* at 10 n.1.

In September 2020, Ms. Diamond endured four sexual assaults in her dormitory over a three-day period. ECF No. 36, ¶¶ 140–44. As described in a sixth ante litem notice to Defendants dated September 29, 2020, in the evening of September 18, 2020, an incarcerated man locked Ms. Diamond in a cell in her dormitory and attempted to rape her. ECF No. 57-11 at \*3. The next morning, on September 19, an incarcerated man sexually assaulted her in her room. *Id.* The following day, on September 20, an incarcerated man raped her in her room. *Id.* Later, she was sexually assaulted in another cell in her dormitory. *Id.* This sixth notice described the sexual assaults in detail including locations, approximate times of day, and other relevant information, reiterated that information relevant to proving the assaults occurred would have been captured on

the video cameras sufficient to support her allegations and aid in identifying the aggressors and witnesses, and accused GDC of deliberate indifference to Ms. Diamond's constitutional rights. ECF 57-11 at \*2-5. It also referred to and enclosed all prior ante litem notices. *See id.* at \*4 & n.1, 5 & n.2, 7. Despite this, and notwithstanding that the cameras [REDACTED] were operational and would have captured relevant evidence, no video concerning these incidents was preserved. Ex. 6, 258:6-14; ECF No. 120, ¶¶ 11-16; *see also infra* at 10 n.1.

On or about October 10, 2020, Ms. Diamond learned that an incarcerated man was seen molesting her in her cell after lock-down. ECF No. 36, ¶ 148; Ex. 8 at 3. The witness to the molestation, who had identified and chased the aggressor out of Ms. Diamond's cell, wrote in a witness statement dated October 15, 2020 that the assault had occurred 1 ½ weeks prior to the date of his statement, meaning October 5-8. Ex. 7. Ms. Diamond's counsel notified Defendants about this incident in a seventh ante litem notice dated October 23, 2020. ECF No. 36, ¶ 149; *see also* ECF No. 57-12. It described the sexual assault reported to Ms. Diamond on October 10 and requested to discuss these matters with GDC "to avert litigation." ECF 57-12 at \*2-4. It also referred to and enclosed all prior ante litem notices. *See id.* at \*2-5. Benton learned of the sexual assault allegation no later than October 15, 2020. *See* Ex. 8. However, despite the fact that the cameras [REDACTED] were operational and would have captured relevant evidence, no video of this incident was preserved yet again. Ex. 6, 258:6-14; ECF No. 120, ¶¶ 11-16; *see also infra* at 10 n.1.

On October 30, 2020, yet another incarcerated man entered Ms. Diamond's cell and molested her after she had taken prescribed sleep medication. ECF No. 36, ¶ 150. She learned of the assault after the aggressor confessed in a dorm meeting, and she reported it on November 1, 2020, Ex. 9, identifying three witnesses to the confession on November 3, 2020. Ex. 10. On

November 4, 2020, another incarcerated person corroborated the confession. Ex. 11. Once again, even though the cameras [REDACTED] were operational and would have captured relevant evidence, no video of this incident was preserved. Ex. 6, 258:6-14; ECF No. 120, ¶¶ 11–16; *see also infra* at 10 n.1.

**C. Despite their failure to preserve video evidence of the sexual assaults committed against Ms. Diamond, Defendants preserved video to aid their defense to her claims.**

The next day, distraught over these uninvestigated serial assaults, Ms. Diamond attempted suicide and was rescued and comforted by a friend in the dormitory. ECF No. 36, ¶¶ 154–55. GDC officials, finding the friend in Ms. Diamond’s cell the next morning, accused her of sexual assault and initiated a PREA investigation, despite her friend’s denial that sexual activity had occurred. In stark contrast to the videos concerning Ms. Diamond’s sexual abuse and harassment allegations at Coastal between June 17 and October 30, 2020, video related to the October 31, 2020 allegation *against* Ms. Diamond was preserved and introduced by Defendants at the hearing on Ms. Diamond’s motion for preliminary injunction. *See* ECF No. 111; *see also* ECF No. 105 (May 12, 2021 Mot. for Preliminary Injunction Hr’g Tr.), 153:13–154:19; ECF No. 120, ¶ 12. On November 6, 2020, Ms. Diamond’s counsel reminded Defendants of their duty to “preserve[] in anticipation of litigation” “all video footage . . . concerning Ashley Diamond.” ECF No. 57-14 at \*2.

**D. Defendants failed to preserve video recordings from the dates of the reported incidents, despite the ante litem notices sent while recordings existed and contrary to GDC policies and procedures.**

On November 23, 2020, after all efforts to communicate with GDC to ensure Ms. Diamond’s safety were exhausted, Ms. Diamond filed this action. Ms. Diamond requested from Benton all video or audio recordings related to the June, July, September, and October incidents. *See* Ex. 12 at \*3–4; Ex. 13 at \*3. Neither Benton nor any other defendant produced video recordings from those dates despite their admission that cameras were installed and video could

be retrieved upon request. Ex. 20; ECF No. 120, ¶¶ 11–16; Ex. 6, 225:6-9. Instead, Defendants *only* downloaded and preserved videos relevant to disciplinary charges that they brought against Ms. Diamond. Ex. 6, 225:18-226:17.

Defendants’ failure to preserve video evidence relevant to Ms. Diamond’s sexual abuse allegations was willful and contrary to GDC’s own policies. Atchison, the Statewide PREA Coordinator, testified on behalf of GDC that, pursuant to GDC policy, prison officials involved in investigating an allegation of a sexual assault are required to review and preserve video recordings that would have captured footage relating to allegations of sexual assaults. Atchison R. 30(b)(6) Dep. Tr. 212:17–25 (Ex. 14). Prison officials are required to document any review of video recordings related to a PREA report, *id.* at 237:15–17, 237:23–238:1, to recover, download, and document any video monitoring recordings onto a disk that would then be “identified using the corresponding incident report number, and stored securely,” and it is “expected” that any malfunction would be documented in the PREA record. *Id.* at 244:4–245:19. As to “the procedure for ensuring that video evidence is properly preserved when litigation is anticipated,” Atchison testified that “[i]t is supposed to be collected as evidence in every case, not just with litigation,” Atchison Dep. Tr. 45:4–10 (Ex. 15), and that video outside Ms. Diamond’s cell on dates in which she alleged she was followed into her cell and sexually assaulted were relevant and should have been reviewed and properly preserved if officials “were notified in the time frame in which it was retrievable,” *Id.* at 143:24–145:25. Benton, as facility warden, was responsible to ensure all sexual assault incidents at Coastal were investigated pursuant to GDC policy. Ex. 14, 25:7–11 (stating, in pertinent part, “ultimately, the facility warden is responsible for the SART investigation.”).

There is no dispute that upgraded cameras were installed in places which would have captured relevant evidence to support Ms. Diamond’s allegations of sexual assault. Ex. 20. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at

61:25–64:4. Michael Anderson, Deputy Warden of Security at Coastal between June and November 2020, also testified that his “understanding of the requirements to document and preserve video evidence” was that it would be “downloaded to a CD, and then you would create a chain of custody that would go with it.” Anderson Dep. Tr. 27:25–28:6 (Ex. 16).

Benton also acknowledged at his depositions that he was “aware, as of July 2020, that there was potentially litigation forthcoming.” Benton Dep. Tr. 188:1–3 (Ex. 6). He understood that he “had a duty to preserve video evidence related to Ashley Diamond’s assault allegations” “if it was available” and that he “had a duty to preserve it regardless of whether it corroborated or disproved her allegation.” *Id.* at 223:3–10; *see also* Benton R. 30(b)(6) Dep. Tr. 56:1–9 (Ex. 17). He admitted he “ha[d] the ability to review and retrieve videos of Ashley’s dormitory from specific days, if [he] wanted to” and “did so from time to time.” Ex. 6, 225:6–11; *see also id.* at 225:25–226:4; Ex. 17, 42:14–21. [REDACTED]

[REDACTED] Ex. 6, 77:6–9. As warden, he admitted he “had a duty to ensure that video evidence related to PREAs was retained” “[i]f it was available.” *Id.* at 41:19–21; *see also* Ex. 17, 55:4–16. He also admitted that “videos concerning Ashley Diamond from days that she made PREA allegations should have been preserved,” and “should

not have been deleted under any circumstances.” Ex. 6, 228:18–23; *see also id.* at 264:16–20.

Benton testified that [REDACTED]. Ex. 17 27:10–18. He “could see who [he] was looking for” in the video recordings. Ex. 6, 76:8–12. After learning about the June 2020 incident, Benton “recall[ed] reviewing the video of that dormitory.” Ex. 17, 57:23–61:12. He could not say whether there were any problems with the cameras [REDACTED] [REDACTED] on July 3, 2020, when Ms. Diamond was followed into her cell and sexually assaulted, but if so there would be “reports” he could pull. Ex. 6, 213:11–16. He “think[s]” he reviewed video related to this sexual assault. Ex. 17, 101:3–8. Although he could not recall whether he reviewed recordings related to the September 2020 sexual assaults, he “c[ould] say it was part of the investigation.” *Id.* at 102:20–22. He believed the cameras [REDACTED] “should have been” working in September and October 2020. Ex. 6, 258:6–11.<sup>1</sup>

Carl Betterson, the PREA Compliance Manager and Sexual Assault Response Team (SART) Investigator for all of the PREA allegations listed above, testified that Benton had authority to approve or deny requests to review video recordings. *See* Betterson Dep. Tr. 197:16–198:13 (Ex. 19). He agreed that “if there’s video recording available” the video recording should be preserved to “prove or disprove the allegations.” *Id.* at 90:5–11. In response to whether he checked the dormitory camera footage, he testified “I wouldn’t have checked those cameras. I would have requested the warden -- the warden review the cameras or have, you know, the times

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<sup>1</sup> [REDACTED]

of the incident reviewed.” *Id.* at 213:6–9.

### ARGUMENT

“Spoliation is defined as the destruction of evidence or the significant and meaningful alteration of a document or instrument.” *Ala. Aircraft Indus., Inc. v. Boeing Co.*, No. 20-11141, 2022 WL 433457, at \*13 (11th Cir. Feb. 14, 2022) (quoting *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1184 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2516 (2021)). “Spoliation of evidence, in appropriate circumstances, ‘may warrant the imposition of sanctions.’” *Id.* (quoting *Tesoriero*, 965 F.3d at 1184). “Federal Rule of Civil Procedure 37(e) governs the procedures and sanctions available when a party spoliates ESI.” *Id.* Under Rule 37(e), sanctions are available against a party for failing to preserve ESI when (1) the ESI existed; (2) the party had control over it; (3) the party had a duty to preserve it; (4) the party failed to take reasonable steps to preserve it; and (5) it cannot be restored or replaced through additional discovery. If those prerequisites are met, then the court has two remedial options, each with its own prerequisite: (1) if the court finds prejudice to the movant from loss of the information, it “may order measures no greater than necessary to cure the prejudice,” Fed. R. Civ. P. 37(e)(1); or (2) if the court finds that the spoliating party “acted with the intent to deprive [the movant] of the information’s use in the litigation”—meaning bad faith—the court 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.” Fed. R. Civ. P. 37(e)(2).

Sanctions are appropriate here because (1) video recordings of the alleged incidents at Coastal existed; (2) Defendants had control over them; (3) Defendants had a duty to preserve them; (4) Defendants nonetheless failed to take reasonable steps to preserve them; and (5) they cannot be restored or replaced. Ms. Diamond is entitled to measures necessary to cure the prejudice from the loss of the recordings and to adverse inferences because Defendants acted in bad faith.

**I. Video recordings of the alleged incidents at Coastal State Prison existed.**

“It is axiomatic that in order for there to be spoliation, the evidence in question must have existed . . . .” *Wilder v. Rockdale Cnty.*, No. 1:13-cv-2715-RWS, 2015 WL 1724596, at \*3 (N.D. Ga. Apr. 15, 2015) (quoting *Sentry Select Ins. Co. v. Treadwell*, 734 S.E.2d 818, 822 (Ga. Ct. App. 2012)). Evidence shows that recordings related to Ms. Diamond’s July, September, and October 2020 sexual assaults existed, as summarized above. *See supra* at 3-10. Although Benton mostly claimed he could not recall whether he reviewed recordings related to each incident, *see* Ex. 17, 61:15–18, 101:3–8, 102:12–25, 103:13–21, he testified that a “directive was put out to preserve video and documents pertaining to any allegation,” *id.* at 67:11–18, and neither he nor Betterson could identify any problems with the cameras [REDACTED] on those dates. *See* Ex. 19, 200:25–201:4; Ex. 6, 258:6–8. Benton also admitted that video footage “was part of the investigation.” Ex. 17, 102:20–22.

**II. Defendants had control over those recordings.**

“It is axiomatic that in order for there to be spoliation, the evidence in question must have . . . been in the control of a party.” *Wilder*, 2015 WL 1724596, at \*3 (quoting *Sentry Select Ins. Co.*, 734 S.E.2d at 822); *accord Watson v. Edelen*, 76 F. Supp. 3d 1332, 1343 (N.D. Fla. 2015) (“For a spoliation sanction to apply, it is essential that the evidence in question be within the party’s control, that is, the party actually destroyed or was privy to the destruction of the evidence.”). “Control has been construed as including the legal right, authority, or practical ability to obtain the evidence upon demand.” *Wilson v. HH Savannah, LLC*, No. CV420-217, 2022 WL 3273718, at \*3 (S.D. Ga. June 1, 2022) (quoting *Lidey v. Moser’s Rides, SRL*, No. 8:16-cv-1241-T-17JSS, 2018 WL 6308012, at \*3 (M.D. Fla. Sept. 7, 2018), *report & recommendation adopted*, 2018 WL 6308697 (M.D. Fla. Sept. 26, 2018)) (cleaned up). Benton, Holt, and Toole had control over the recordings because Benton could access them himself, *see* Ex. 17, 42:14–17; *see also* Ex. 19,

198:11–13, and Holt and Toole were his superiors. ECF No. 36, ¶¶ 24–25; *see also Storey v. Effingham Cnty.*, No. CV415-149, 2017 WL 2623775, at \*3 (S.D. Ga. June 16, 2017) (“[T]he County defendants . . . arguably had control over the video evidence and the video retention policy (*i.e.*, the Effingham County Board of Commissioners, Effingham County, Sheriff Jimmie McDuffie, and Jail Captain Robert L. Brown).”).

### III. Defendants had a duty to preserve those recordings.

“[T]he duty to preserve arises when litigation is ‘pending or reasonably foreseeable’ at the time of the alleged spoliation.” *Ala. Aircraft Indus., Inc.*, 2022 WL 433457, at \*14 (quoting *Oil Equip. Co. v. Modern Welding Co.*, 661 F. App’x 646, 652 (11th Cir. 2016)). “Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant.” Fed. R. Civ. P. 37(e) Advisory Committee Note to 2015 Amendment (“2015 Note”). For example, “[a] spoliation letter triggers a duty to preserve by putting a party on notice of potential litigation.” *O’Berry v. Turner*, No. 7:15-cv-00064-HL, 2016 WL 1700403, at \*3 (M.D. Ga. Apr. 27, 2016) (citing *Stanfill v. Talton*, 851 F. Supp. 2d 1346, 1363 (M.D. Ga. 2012) (Treadwell, J.)) (holding duty to preserve information “arose at the very latest” when spoliation letter was faxed). But a preservation letter is unnecessary. *See, e.g., Bland v. Sam’s E., Inc.*, No. 4:17-cv-190 (CDL), 2019 WL 407406, at \*3 (M.D. Ga. Jan. 31, 2019); *Storey*, 2017 WL 2623775, at \*4.

The duty to preserve requires a party to “preserve what it knows, or reasonably should know, is relevant in the action, or is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.” *Storey*, 2017 WL 2623775, at \*4 (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)) (cleaned up). For example, in *Storey*, a prison deliberate indifference case against a county jail, the Southern District of Georgia held that “any videos” of the decedent’s altercations with the jail’s officers “should have been obviously

relevant and likely to be requested during discovery.” *Id.*; *see also Pettit v. Smith*, 45 F. Supp. 3d 1099, 1105–07, 1111 (D. Ariz. 2014) (holding, in excessive force case, Arizona Department of Corrections had duty to preserve video evidence); *Taylor v. City of New York*, 293 F.R.D. 601, 611–12 (S.D.N.Y. 2013) (holding, in failure-to-protect case, prison officials had duty to preserve video surveillance footage). Similarly, in *Bland*, a wrongful termination case, this Court held that Sam’s knew that video footage of the plaintiff’s dispute with a coworker and his interaction with his supervisor were “plainly relevant to his claims, even if it lacked audio,” because “[w]hile the absence of audio may have made the video footage irrelevant as to what was said, it still could have been relevant as to how the parties physically interacted.” 2019 WL 407406, at \*3.

Here, letters from Ms. Diamond’s counsel put Defendants on notice of the likelihood of litigation before her first sexual assault at Coastal; therefore, they had a duty to preserve video recordings related to those incidents, regardless of what they showed or did not show, because those recordings were not only “obviously” and “plainly” relevant, but also “the best evidence, both neutral and objective, of just what happened to” Ms. Diamond. Each ante litem notice described specific incidents, with dates, locations, and approximate times of day, of sexual assault against Ms. Diamond, alerted Defendants to constitutional violations, accused them of deliberate indifference, and copied lawyers for GDC and OAG. The first, third, fourth, and fifth ante litem notices and November 6, 2020 email explicitly demanded that GDC preserve evidence, including video recordings. *See* ECF No. 57-6 at \*9; ECF No. 57-8 at \*4; ECF No. 57-9 at \*4 (citing Fed. R. Civ. P. 37(e)); ECF No. 57-10 at \*4-5; ECF No. 57-14 at \*2. The first, third, fourth, fifth, and seventh ante litem notices explicitly referred to anticipated litigation as a result of GDC’s failure to protect Ms. Diamond from sexual assault. *See* ECF No. 57-6 at \*2, 7; ECF No. 57-8 at \*4; ECF No. 57-9 at \*4; ECF No. 57-10 at \*4; ECF No. 57-12 at \*4. Each ante litem notice enclosed all



when it merely printed out a single paper copy of the information and put it in a manila folder, which was eventually lost. 2016 WL 1700403, at \*3. Here, Defendants did not even do that. They made no copy whatsoever of the recordings, despite having been notified of the incidents in time to preserve the recordings and despite GDC's own ability to preserve, and policy obligations to preserve, video evidence related to PREA allegations. They did not, for example, attempt to preserve whatever portions of the recordings would have been "feasible" to preserve. Benton's duty to preserve did not require him to change GDC's policies and practices to preserve *all* video recordings related to *all* alleged incidents; instead, it merely required him to take reasonable steps to intervene in that routine operation to preserve video recordings related to Ms. Diamond's timely allegations of sexual harassment and assault in the same manner called for by GDC's PREA policies. Therefore, Defendants' actions in deleting the recordings, or complete inaction in failing to preserve them, was unreasonable.

**V. Ms. Diamond is entitled to measures necessary to cure the prejudice from the loss of the recordings.**

Because Defendants' failure to preserve the video recordings has prejudiced Ms. Diamond's ability to prove her failure-to-protect claims, she is entitled to measures necessary to cure that prejudice. Under Rule 37(e)(1), "upon finding prejudice to another party from loss of the information," the Court "may order measures no greater than necessary to cure the prejudice." "An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation." Fed. R. Civ. P. 37(e)(1) 2015 Note. "The rule does not place a burden of proving or disproving prejudice on one party or the other"; "placing the burden of proving prejudice on the party that did not lose the information may be unfair." *Id.*

Although there is a conflict within the Eleventh Circuit on whether prejudice under Rule 37(e) requires that the lost ESI must be crucial to the movant's case or, instead, that it merely

would have helped evaluate the merits, *see Wilson*, 2022 WL 3273718, at \*7 & n.11, Ms. Diamond can show the required prejudice even assuming, for the sake of argument, that lost recordings must be “crucial.” Ms. Diamond alleges that she was sexually harassed and assaulted on a number of occasions and that she reported those incidents to Defendants directly and through her counsel. She provided the details and authorized her counsel to report them on her behalf in complete reliance on the cameras that would have captured relevant information to sustain her PREA reports and which would have shown that Defendants were deliberately indifferent to her substantial risk of serious harm. Defendants defend in part by denying that certain incidents even occurred; therefore, they could not have been deliberately indifferent to a risk that did not exist. Video recordings of the incidents would have been “‘the best and most compelling evidence of what happened’ to [Ms. Diamond] and would have offered ‘the only unbiased and dispassionate depiction of events.’” *Storey*, 2017 WL 2623775, at \*4–5 (quoting *Jenkins v. Woody*, No. 3:15-cv-355, 2017 WL 362475, at \*18 (E.D. Va. Jan. 21, 2017)); *see also* ECF No. 145 (Mar. 23, 2022 Mot. Hr’g Tr.), 43:7–9 (“Well, it doesn’t show because you have somebody who says it didn’t show, but we can’t show the jury it doesn’t show.”). In turn, they also could have shown that Defendants knew that the incidents occurred but chose not to act when faced with that evidence. *See Wilson*, 2022 WL 3273718, at \*8 (holding plaintiff was prejudiced by defendant’s failure to preserve data about cleaning, repair, and maintenance inspections because that data “would be valuable in evaluating whether [defendant] had notice of a hazard in the room” and because it would have allowed plaintiff “to confirm or challenge . . . testimony” by witnesses about what cleaning “would have” occurred). No wonder, then, that Defendants deleted the recordings or allowed them to be deleted in the normal course: doing so created a ‘she-said-he-said’ situation in which only Defendants had the opportunity to review the best evidence of whether the incident

even occurred and the fact-finder must simply take their word that the recordings did not show what Ms. Diamond alleged.

Examples of available sanctions include “forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies.” Fed. R. Civ. P. 37(e)(1) 2015 Note. For instance, in *Storey*, the Southern District of Georgia ordered “the following sanctions for the [jail’s] destruction of, or failure to preserve, the system surveillance and taser videos: (1) The Court will tell the jury that the video was not preserved; (2) The Court will allow the parties to present evidence and argument at trial regarding the [jail’s] destruction of, or failure to preserve, the videos. The jury will be instructed that it may consider that evidence along with all the other evidence in the case, in making its decision; and (3) The Court will preclude any evidence or argument that the contents of the video corroborated [the jail’s] version of events.” 2017 WL 2623775, at \*5. Ms. Diamond is entitled at least to those same sanctions.

**VI. Ms. Diamond is entitled to an adverse inference that the spoliated recordings were unfavorable to Defendants.**

Furthermore, Ms. Diamond is entitled to an adverse inference that the video recordings Defendants failed to preserve were unfavorable to Defendants because they supported her allegations of men entering her room and sexually assaulting her. Under Rule 37(e)(2), the court “may[] (A) presume that the lost information was unfavorable to the party,” or “(B) instruct the jury that it may or must presume the information was unfavorable to the party.” An adverse inference, in combination with some affirmative evidence for the plaintiff’s cause of action, can defeat summary judgment. *See Morgan v. U.S. Xpress, Inc.*, No. 4:03-cv-88 (CAR), 2006 WL

1548029, at \*3, 5 (M.D. Ga. June 2, 2006); *see also Woodard v. Wal-Mart Stores E., LP*, 801 F. Supp. 2d 1363, 1375–78 (M.D. Ga. 2011) (denying summary judgment so jury could decide issue of bad faith). An adverse-inference jury instruction is appropriate “upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation”—in other words, bad faith. *Ala. Aircraft Indus., Inc.*, 2022 WL 433457, at \*15 (quoting Fed. R. Civ. P. 37(e)(2)).<sup>2</sup> “Generally, bad faith may be found where the [party’s] actions are responsible for the spoliation of evidence and ‘the [party] fully appreciated the significance of the evidence to the anticipated litigation.’” *Lamb v. Outback Steakhouse of Fla., LLC*, No. 1:19-cv-150 (LAG), 2021 WL 4507521, at \*7 (M.D. Ga. Sept. 30, 2021) (quoting *Oil Equip. Co.*, 661 F. App’x at 653).

“Generally, it is difficult to argue good faith when evidence is destroyed after the receipt of . . . clear notice” from a spoliation letter. *Stanfill*, 851 F. Supp. 2d at 1363; *see also Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944–45 (11th Cir. 2005) (affirming finding of bad faith in part because driver and his counsel “displayed a clear dereliction of duty” by ignoring letter requesting to inspect vehicle and selling it for salvage). It is similarly difficult for a party to argue good faith when the party’s own retention policies and practices require preservation, *see Lamb*, 2021 WL 4507521, at \*7–9 (holding Outback acted in bad faith when it allowed surveillance video to be deleted in violation of Outback’s own retention policies), and when the party “could have easily saved” it pursuant to policy. *Bland*, 2019 WL 407406, at \*3. *See also Connor v. Sun Trust Bank*, 546 F. Supp. 2d 1360, 1376–77 (N.D. Ga. 2008) (finding bad faith when email not preserved before automatic deletion). And even if a party makes some effort to preserve, that effort itself can evidence bad faith if insufficient. *Compare Wilder*, 2015 WL 1724596, at \*3 (holding detention center did not act in bad faith when it preserved at least some relevant video recordings), *with*

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<sup>2</sup> The court could “conclude that the intent finding should be made by a jury.” Fed. R. Civ. P. 37(e)(2) 2015 Note.

*O'Berry*, 2016 WL 1700403, at \*4 (finding bad faith in part because defendant preserved ESI merely by printing a single paper copy).

Here, Defendants did not in any way attempt to preserve the recordings or any portion of them, despite knowing that Ms. Diamond's counsel had explicitly demanded that they preserve video recordings and despite being able to preserve the recordings in the same way called for by GDC's policies, practices, and procedures. The recordings were clearly relevant even if they did not support what Ms. Diamond alleged, and a good-faith actor faced with potential litigation would have preserved the recordings to disprove Ms. Diamond's account; instead, Defendants allowed the recordings to be destroyed. An inference of bad faith is self-evident here as well, where Defendants deleted evidence of an October 30, 2020 assault but preserved video footage of the camera outside Ms. Diamond's cell on October 31, 2020, one day later, in an attempt to support their own self-serving disciplinary violation against her. Ex. 6, 225:6-226:17.

### CONCLUSION

The Court should grant Ms. Diamond's Motion for Spoliation Sanctions Against Defendants and impose all sanctions necessary to cure the prejudice to Ms. Diamond and to punish Defendants' litigation misconduct.

Respectfully submitted,

/s/ A. Chinyere Ezie

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**CERTIFICATE OF SERVICE**

I hereby certify that, on October 17, 2022, the foregoing document and all attachments were served on all counsel of record through the Court's CM/ECF system.

/s/A. Chinyere Ezie

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