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14 UNITED STATES DISTRICT COURT  
15 DISTRICT OF ARIZONA

16 Manuel de Jesus Ortega Melendres,  
17 et al.,

18 Plaintiffs,

19 vs.

20 Joseph M. Arpaio, et al.,

21 Defendants.

22 No. CV 07-2513-PHX-GMS

23 **MOTION FOR SANCTIONS**

24 (Oral Argument Requested)

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1 Pursuant to the Court's Order (dkt. 220), the Court's inherent power and Fed. R.  
2 Civ. P. 26 and 37, Plaintiffs move for sanctions against Defendants Joseph M. Arpaio  
3 and the Maricopa County Sheriff's Office (collectively "MCSO"). This Motion is  
4 supported by the following Memorandum and the attached Declaration of Peter S.  
5 Kozinets ("Kozinets Decl.").

6 MEMORANDUM OF POINTS AND AUTHORITIES

7 Preliminary Statement

8 This Motion is necessitated by Defendants' spoliation of evidence concerning  
9 their crime suppression sweeps. Plaintiffs recently learned that Defendants have  
10 destroyed an entire category of responsive documents, namely "stat sheets" describing  
11 each individual MCSO officer's or volunteer's activities during the sweeps at issue.  
12 **Defendants admit that they have been systematically destroying stat sheets since**  
13 **this action commenced in December 2007, despite receiving repeated requests from**  
14 **Plaintiffs for those very documents.** [*Id.* Ex. A (Madrid Dep. 82:25 – 83:18, 110:2-9,  
15 186:9-16) and Ex. L (Sousa Aff. ¶ 9); Dkt. 220 at 1] In addition, Defendants may have  
16 permanently deleted relevant emails. Sgt. Manny Madrid – a supervisor in the unit that  
17 spearheaded Defendants' sweeps – testified that he had deleted emails relating to the  
18 sweeps from his "deleted" and "sent" folders. [Kozinets Decl. Ex. A (Madrid Dep.  
19 107:21 – 109:15)] Defendants have since stated that they have undertaken a new search  
20 for emails, but have not explained how the search will capture permanently deleted or  
21 overwritten emails. For at least three reasons, Plaintiffs are entitled to sanctions.

22 First, sanctions are warranted because Defendants failed to preserve sweep-  
23 related documents when this lawsuit commenced in December 2007. Defendants  
24 evidently did *not* issue a litigation hold until eight months later, in July 2008. Even then,  
25 the hold was *not* communicated to key witnesses like Sgt. Madrid, and Defendants never  
26 stopped destroying the stat sheets.

27 Second, Defendants shredded the stat sheets even while receiving multiple  
28 requests from Plaintiffs for these documents. Plaintiffs identified these materials for

1 preservation and production in July 2008, and served Rule 34 document requests for  
2 them in February 2009. After Defendants produced a smattering of these records in  
3 response, Plaintiffs made repeated efforts to obtain the remaining stat sheets and  
4 additional emails. [See *infra* at 5-6] At the October 21, 2009 Rule 16 Conference – four  
5 days *after* Sgt. Madrid had shredded the latest batch of stat sheets – Defendants’ counsel  
6 told the Court: “Every stat sheet that we have been able to locate – when I say ‘we,’ my  
7 client – has been produced. If we found it, it’s been given. It’s been produced.”  
8 [Kozinets Decl. Ex. D (Oct. 21, 2009 Hr’g Tr. at 13:5-7)] Yet, by October 21,  
9 Defendants had destroyed nearly every stat sheet that they ever had.

10 Third, Defendants have never disputed that the stat sheets are discoverable and  
11 responsive to Plaintiffs’ document requests. Indeed, the records contain critical and  
12 unique evidence about what MCSO’s officers and volunteer “posse” did during each of  
13 the sweeps. Officers and posse were generally required to complete stat sheets at the end  
14 of their sweep shifts. [Kozinets Decl. Ex. A (Madrid Dep. at 81:8 – 83:6); Ex. O  
15 (DiPietro Dep. 94:1 – 95:6)] The stat sheets called for them to provide information  
16 about the hours they worked that day and the traffic stops, citations, arrests, immigration  
17 holds and other activities they conducted during those hours, and included space for  
18 individual notes. This basic data has critical evidentiary value for Plaintiffs’ positions.  
19 Defendants’ destruction of the stat sheets deprived Plaintiffs of hundreds or thousands of  
20 documents that, in combination with other information, would have helped demonstrate  
21 that Defendants used discretionary traffic stops to target Latinos. Because “the loss of an  
22 entire source of documents significantly hampers [P]laintiffs’ ability to prepare and  
23 prosecute their case,” Defendants should be sanctioned. *In re Napster, Inc. Copyright*  
24 *Litigation*, 462 F. Supp. 2d. 1060, 1077 (N.D. Cal. 2006).

25 Plaintiffs are also entitled to sanctions because Defendants failed to search for all  
26 potentially responsive emails before the depositions of MCSO’s witnesses in October  
27 2009. After Sgt. Madrid’s deposition, Defendants *admitted* that they had not yet  
28 conducted a search for emails within the last six months, despite receiving numerous

1 letters from Plaintiffs questioning their email productions, and after Plaintiffs had  
 2 already deposed six MCSO witnesses. [See *infra* at 5-6, 8] Without all emails between  
 3 and among members of Sgt. Madrid's Human Smuggling Unit ("HSU") and others at  
 4 MCSO, Plaintiffs lack many details of how the sweeps were planned and executed.

5 Defendants' destruction of stat sheets, deletion of untold emails and failure to  
 6 timely search for and produce other emails – despite repeated requests for these  
 7 materials – has prejudiced Plaintiffs. Defendants cannot be allowed to selectively  
 8 preserve certain categories of documents within their control, but discard other relevant  
 9 and responsive documents. Because Defendants' spoliation prevents the Court from ever  
 10 knowing the precise contents of the destroyed documents, the Court should "draw the  
 11 strongest allowable inferences in favor of the aggrieved party." *Nat'l Ass'n of Radiation*  
 12 *Survivors v. Turnage*, 115 F.R.D. 543, 557 (N.D. Cal. 1987). To remedy Defendants'  
 13 misconduct, the Court should grant Plaintiffs' requests for adverse inferences and other  
 14 sanctions, as shown below and set forth in the attached Proposed Order.

#### 15 Factual Background

##### 16 **A. Defendants Have Known Since December 2007 that the Sweeps Were** 17 **at Issue, But They Failed to Implement and Enforce the Necessary** 18 **Litigation Hold.**

19 Plaintiff Manuel de Jesus Ortega Melendres filed this putative class action  
 20 challenging Defendants' anti-immigration operations on December 12, 2007. That filing  
 21 expressly put Defendants on notice that their crime suppression sweeps were the subject  
 22 of pending litigation. [Dkt. 1] The Complaint specifically discussed two sweeps (in the  
 23 Towns of Cave Creek and Queen Creek), in which MCSO deputies detained, questioned  
 24 and arrested scores of Latinos without probable cause to believe that any of those  
 25 individuals had violated Arizona criminal law. [Dkt. 1 ¶¶ 58-59] The Complaint alleged  
 26 these and other actions demonstrated that "Defendants have devised and implemented  
 27 an invidious and unconstitutional custom, policy and practice of racial profiling towards  
 28 Hispanic and Latino persons in Maricopa County." [*Id.* 55] The Complaint sought  
 class-wide relief on behalf of Latinos subjected to such "racially-discriminatory stops,

1 detention, arrests and/or searches....” [*Id.* ¶¶ 66, 68] On July 16, 2008, Plaintiffs lodged  
2 their First Amended Complaint, which built upon these allegations and challenged  
3 Defendants’ continued sweeps and misconduct. [Dkt. 17; *see also* Dkt. 26]

4 On July 21, 2008, Plaintiffs reminded Defendants of their preservation duties and  
5 demanded, in writing, that Defendants “preserve all documents, including but not  
6 limited to all electronically stored information (‘ESI’)” relevant to Plaintiffs’  
7 allegations. [Kozinets Decl. Ex. E (July 21, 2008 letter from Mr. Bodney to Mr. Casey  
8 at 1)] Plaintiffs’ demand expressly covered all documents relating to Defendants’ crime  
9 suppression sweeps, including “emails, memoranda and other communications  
10 pertaining to planning, execution and results” of the sweeps, and “reports or analysis of  
11 these operations.” [*Id.* at 2] The same day, Plaintiffs requested copies of these  
12 documents under A.R.S. § 39-121 *et seq.* (the Arizona Public Records Law). [*Id.* Ex. F]

13 During the November 12, 2009 discovery teleconference with the Court,  
14 Defendants’ counsel represented that he had transmitted Plaintiffs’ July 21, 2008  
15 correspondence to MCSO on the day that he received it, along with litigation hold  
16 instructions, and had been assured by a “Deputy Chief” that the hold would be  
17 communicated “down the chain of command.” However, the message to retain  
18 documents was not communicated to Sgt. Madrid. [Kozinets Decl. ¶ 18] Evidently, little  
19 or no effort was made to follow up with Sgt. Madrid and others to ensure that they had  
20 notice of, and complied with, the litigation hold. Defendants’ counsel said nothing about  
21 taking the requisite steps to preserve these records when the lawsuit was filed (in  
22 December 2007), or at any time up until July 2008. That omission is tantamount to an  
23 admission that Defendants’ lawyer did not discharge his duty to oversee Defendants’  
24 compliance with their discovery obligations.

25 **B. Plaintiffs Served Document Requests for Stat Sheets and Emails in**  
26 **February 2009.**

27 Plaintiffs served Defendant MCSO with Rule 34 document requests that sought  
28 stat sheets and emails on February 25, 2009. Request for Production (“RFP”) No. 3

1 covered all documents relating to Defendants' "Crime Suppression Operations," defined  
2 as "the law-enforcement activities of MCSO that have also been referred to as  
3 'saturation patrols' or 'sweeps' ... performed on or after January 1, 2007." [Kozinets  
4 Decl. Ex. C at 1-2, 6-7] RFP No. 3 included "all documents relating to...A. MCSO's  
5 decision to conduct Crime Suppression Operations in any particular area of Maricopa  
6 County, including...emails...; C. Identifying information for MCSO [personnel and  
7 officers] participating in any Crime Suppression Operation; and D. Debriefing, after-  
8 action or other reports, lists or logs associated with" the sweeps." [*Id.* at 6-7]

9 RFP No. 4 similarly sought "[a]ll documents relating to all traffic stops  
10 performed by every MCSO supervisor, officer, posse member or other volunteer for  
11 years 2005 to present...." [*Id.* at 7] Other requests also sought these materials. [*See, e.g.,*  
12 *id.* at 8-9 (RFP No. 10 ("All documents relating to MCSO's implementation and  
13 administration of the MOA, including...G. All 287(g) Stat/Summary forms completed  
14 after administrative arrests or transfers")); *id.* at 9-10 (RFP No. 14 ("All documents  
15 relating to MCSO's Human Smuggling Unit...or volunteer posse...as they pertain to:  
16 ...Crime Suppression Operations"))]

17 Defendants produced a handful of stat sheets in response to Plaintiffs' discovery  
18 requests in early 2009. [Kozinets Decl. Ex. G at 3]

19 **C. Plaintiffs Repeatedly Attempted to Secure Production of the Stat**  
20 **Sheets and Emails.**

21 On September 10, 2009, with depositions approaching, Plaintiffs' counsel  
22 demanded that MCSO produce emails and other documents reflecting communications  
23 between or among MCSO leadership and other staff relating to the sweeps. [Kozinets  
24 Decl. Ex. G (Sept. 10, 2009 letter from Mr. Kozinets to Mr. Casey)] Plaintiffs also  
25 demanded that Defendants produce all "Individual Stat Sheets." [*Id.* at 3]

26 Defendants ignored the letter, forcing Plaintiffs' counsel to write again on  
27 September 30. Plaintiffs wrote that "The September 10 letter raises several issues that  
28 must be resolved to ensure that Plaintiffs' depositions of MCSO's witnesses – which are

1 fast-approaching – proceed efficiently and productively.” [Kozinets Decl. Ex. H (Sept.  
2 30, 2009 letter from Mr. Kozinets to Mr. Casey at 1)] On October 20, 2009, Plaintiffs’  
3 counsel again wrote about these discovery issues. In addition to discussing Defendants’  
4 failure to produce emails from top MCSO officers, Plaintiffs wrote: “[W]e have not  
5 received any additional individual officer ‘stat sheets’ for MCSO’s crime suppression  
6 operations .... As emphasized in my prior letters, these stat sheets are responsive to  
7 plaintiffs’ request, and they all should be disclosed.” [Kozinets Decl. Ex. I (Oct. 20,  
8 2009 letter from Mr. Kozinets to Mr. Casey at 2)]

9 At the Rule 16 Conference the next day, Plaintiffs counsel discussed both the  
10 missing emails and stat sheets. [Kozinets Decl. Ex. D (Hr’g Tr. at 10:1 – 11:25)]  
11 Defendants’ counsel responded, in part, by stating that Defendants had produced every  
12 stat sheet that they had been able to locate. [*Id.* at 13:5-10]

13 **D. Despite Plaintiffs’ Repeated Requests and Defendants’ Counsel’s**  
14 **Representations, Defendants Shredded the Stat Sheets.**

15 Six days later, Plaintiffs deposed Sgt. Madrid, one of the founding members and  
16 supervisors of the HSU. [Kozinets Decl. Ex. A (Madrid Dep. at 11:18 – 12:8, 15:7-14)]  
17 Sgt. Madrid prepared “shift summaries,” or aggregate statistical reports, for nearly all of  
18 the sweeps. He testified that individual deputies were given blank stat sheets to complete  
19 and turn in at the end of their shifts, and that he combined the statistics reported by the  
20 officers into one master stat sheet that reflected aggregate total numbers of certain law  
21 enforcement activities for each sweep. [*Id.* at 82:19 – 83:6, 84:4 – 84:18]

22 Sgt. Madrid then testified that he shredded the individual officer stat sheets:

23 Q. After the sweep from about two weeks ago, were you  
24 given stat sheets by the individual officers who participated?

25 A. Yes.

26 Q. And do you still have them?

27 A. No.

28 Q. What did you do with them?

A. **I believe I shredded those.**

Q. And you would have shredded those shortly after the  
sweep concluded?



1 A. I would have shredded them after I compiled them and  
added them all up and made the total -- total sheet.

2 . . . .

3 Q. ....[A]fter you did the first day's totals, you would have  
shredded the stat sheets for that day?

4 A. Yeah.

5 [*Id.* (Madrid Dep. 186:9 – 187:9) (emphasis added)] In fact, Defendants systematically  
6 destroyed stat sheets throughout the course of this action. [*Id.* (Madrid Dep. 82:25 –  
7 83:18, 110:2-9) and Ex. L (Sousa Aff. ¶ 9)] Sgt. Madrid testified that he was never  
8 advised to preserve the stat sheets. [*Id.* at 83:16 – 83:18 (“Q. At a certain point, were  
9 you advised to start keeping the stat sheets? A. No.”); *id.* at 84:1 – 84:3 (“Q. [H]ave you  
10 ever been asked since December 2007 to keep the stat sheets? A. No.”)]

11 The stat sheets contained a wealth of information about the activities of  
12 individual officers and posse volunteers during the sweeps. The eight surviving stat  
13 sheets that Defendants produced are labeled “Individual Stat Sheet.” They begin with a  
14 note stating “\*Must be turned into Supervisor at the end of shift\*,” and they have entries  
15 calling for the following information: date, sworn deputy or posse number, call sign,  
16 sign-in and sign-out times, total numbers of contacts, arrests, citations, “Triple I holds”  
17 (i.e., immigration holds), and other per-officer or per-posse statistics. The bottom of the  
18 form also contains several lines for a “Brief Summary of Arrest/Incident: DR #, and any  
19 notable incidents below.” [Kozinets Decl. Ex. L (Sousa Aff., Ex. A)]

20 According to the November 4, 2009 Affidavit of Joseph Sousa, in April 2008 Lt.  
21 Sousa replaced the stat sheet form discussed above with a new form. [*Id.* (Sousa Aff. ¶  
22 10, Ex. B)] The new sheet “seeks the recording of the individual deputy’s number of  
23 certain events” [*id.* (Sousa Aff. ¶ 14)], including total numbers of criminal arrests, 287g  
24 (or immigration) arrests, traffic citations, all contacts, total hours worked for the shift,  
25 and total traffic stops made. [*Id.* (Sousa Aff. Ex. B)] The form also contains a place for  
26 the recording of “Misc:” information, and it contains ample white space at the bottom of  
27 the form for officer or posse notes. [*See id.*] Because 100-200 officers and posse  
28 participated in several sweeps, hundreds, if not thousands, of stat sheets would have

1 been available to Plaintiffs but for Defendants' shredding of the documents. [See  
2 Kozinets Decl. Ex. A (Madrid Dep. 81:8 – 83:6, 158:1-6)]

3 **E. Defendants Deleted Relevant Emails and Failed to Update Their Prior**  
4 **Productions – Despite Plaintiffs' Repeated Requests for Emails.**

5 Sgt. Madrid also testified that his practice is to delete emails from his "deleted"  
6 and "sent" folders whenever he receives a message indicating that his email box is full.  
7 [Kozinets Decl. Ex. A (Madrid Dep. 107:21 – 109:15)] He admitted that, pursuant to  
8 this practice, he had deleted sweep-related emails. [Id.] He deleted these emails despite a  
9 series of letters from Plaintiffs' counsel that questioned the adequacy of Defendants'  
10 email production. [Kozinets Decl. Ex. G (Sept. 10, 2009 letter at 1-3), Ex. H (Sept. 30,  
11 2009 letter at 1) and Ex. I (Oct. 20, 2009 letter at 1-2)]

12 In response to correspondence from Plaintiffs' counsel about Sgt. Madrid's  
13 testimony, Plaintiffs' and Defendants' counsel conferred telephonically on November  
14 10, 2009. [Kozinets Decl. Ex. J (Nov. 2, 2009 letter from Mr. Kozinets to Mr. Casey at  
15 1-2)] Defendants' counsel stated that a new search was now underway for responsive  
16 email; that this new search was the first one that had been conducted since the last  
17 search, which had occurred six months prior; and that he did not know how the last  
18 search had been conducted, but that it would have included all "deleted" emails if such  
19 emails still resided on MCSO's "master server." He did not know how long such  
20 "deleted" emails were kept until permanently deleted from the system. [Id. ¶ ]<sup>1</sup>

21 On November 12, 2009, after a telephonic discovery conference regarding these  
22 matters, the Court issued an Order stating, in part, as follows:

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23  
24  
25 <sup>1</sup> On November 10, 2009, Defendants produced the results of a further search for emails  
26 to or from Sgt. Madrid, Sgt. Palmer and Lt. Sousa. Defendants identified 32 pages of  
27 "E-mails re Sgt. Madrid," most of which had been produced previously. Defendants did  
28 not indicate whether any of these emails had been recovered from any "deleted" files.  
[Kozinets Decl. ¶ 19] Defendants have represented that another email production will be  
forthcoming, but have not explained how that production would (or even could) include  
emails that were permanently deleted or overwritten.

Counsel for Defendants acknowledges that requests for [documents pertaining to Defendants' sweeps] were transmitted to the MCSO as of July, 2008, and further acknowledges that, despite this request, the "stat" sheets that are prepared by individual officers during the course of the "crime suppression sweeps" or "saturation patrols," have not been maintained by the Defendants. It is also possible, but less clear, that e-mails discussing these operations have also been deleted by the Defendants.

[Dkt. 220 at 1] "In light of the failure to maintain requested documents," the Court authorized Plaintiffs to file this Motion for Sanctions, and it ordered all parties to prevent the destruction of responsive documents. [*Id.* at 1-2]

### Argument

#### **I. Plaintiffs Are Entitled to Adverse Inference Instructions for Defendants' Spoliation of Evidence.**

Plaintiffs are entitled to adverse inference instructions as a sanction for Defendants' elimination of an entire category of responsive records and deletion of an untold number of responsive emails. This Court has ample inherent power to sanction Defendants for their destruction of relevant documents. *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). This power includes the power to draw adverse inferences against Defendants, exclude testimony and evidence, and award fees and costs. *Id.*; *Napster*, 462 F. Supp. 2d at 1077-78.<sup>2</sup>

A party seeking an adverse inference instruction based on destruction of evidence generally must establish: "(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." *Napster*, 462 F. Supp. 2d at 1078 (citation and quotation omitted). The degree of "culpability" required includes "fault" and ordinary negligence.

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<sup>2</sup> Sanctions may also be appropriate under Rules 26(e), 26(g) and 37(c) insofar as "[t]he destruction of responsive documents is only the most egregious variant of nonproduction," especially where "a reasonable inquiry would have led to their preservation and inclusion in defendant's discovery responses." *Nat'l Ass'n of Radiation Survivors*, 115 F.R.D. at 558 n.4. Accordingly, sanctions should also be entered pursuant to Rule 37(c)(1) and the other subparts of Rule 37 incorporated therein.

1 *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfr'g Corp.*, 982 F.2d 363, 369 n.2 (9th  
 2 Cir. 1992); *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d  
 3 Cir. 2002). When evidence is destroyed intentionally or willfully, proof of the third  
 4 element – relevance – is presumed; “[s]imilarly, a showing of gross negligence in the  
 5 destruction or untimely production of evidence will in some circumstances suffice,  
 6 standing alone, to support a finding that the evidence was unfavorable to the grossly  
 7 negligent party.” *Residential Funding*, 306 F.3d at 109. All three requirements for  
 8 adverse inference instructions are easily met here.

9 **A. Defendants’ Duty to Preserve Stat Sheets and Emails Relating to the**  
 10 **Sweeps Arose in December 2007.**

11 First, it is undisputed that Defendants had control of the stat sheets and emails in  
 12 question, and were under a duty to preserve those documents when they were destroyed.  
 13 Defendants’ duty to preserve documents relating to the sweeps has existed since at least  
 14 December 12, 2007, when Plaintiff Ortega-Melendres filed this putative class action  
 15 challenging Defendants anti-immigration operations – including Defendants’ sweeps in  
 16 the Towns of Cave Creek and Queen Creek. [*See supra* at 3-4] Since being served with  
 17 the original Complaint in December 2007, Defendants have been obligated to preserve  
 18 all potentially relevant evidence relating to this litigation. *Napster*, 462 F. Supp. 2d. at  
 19 1067 (“As soon as a potential claim is identified, a litigant is under a duty to preserve  
 20 evidence which it knows or reasonably should know is relevant to the action.”).  
 21 Defendants’ preservation duty encompassed all documents relating to Defendants’  
 22 sweeps, including stat sheets and emails between and among members of the HSU and  
 23 MCSO’s leadership.

24 To effectuate their duty, Defendants were required to implement a “litigation  
 25 hold,” suspend any existing policies or practices relating to destroying files and preserve  
 26 all relevant documents. *Napster*, 462 F. Supp. 2d at 1070. *See also Zubulake v. UBS*  
 27 *Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“*Zubulake IV*”) (“Once a party  
 28 reasonably anticipates litigation, it must suspend its routine document

1 retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation  
 2 of relevant documents.”). Moreover, Defendants’ counsel was required to “oversee  
 3 compliance with the litigation hold, monitoring the party’s efforts to retain and produce  
 4 the relevant documents.” *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432  
 5 (S.D.N.Y. 2004) (“*Zubulake V*”). Among other things, Defendants’ counsel had to  
 6 “communicate directly with the ‘key players’ in the litigation, i.e., the people identified  
 7 in a party’s initial disclosure and any subsequent supplementation thereto,” explain the  
 8 preservation duty “clearly to them” and “periodically remind[ ] [them] that the  
 9 preservation duty is still in place.” *Id.* at 433-34.

10 **B. In Clear Violation of Their Preservation Duties, Defendants Shredded**  
 11 **Nearly All Stat Sheets and Deleted an Unknown Number of Emails.**

12 Second, Defendants destroyed the records intentionally or willfully. Defendants  
 13 knew that the stat sheets were responsive and relevant to Plaintiffs’ claims, yet they kept  
 14 on destroying them. Even if Sgt. Madrid was not given litigation hold instructions, his  
 15 superiors in the MCSO “chain of command” were fully informed about this lawsuit. For  
 16 example, Sgt. Madrid’s supervisor, Lt. Sousa, knew or reasonably should have known  
 17 that the stat sheets were relevant and responsive. Yet he failed to do anything to prevent  
 18 their destruction – as his Affidavit shows. [See Kozinets Decl. Ex. L (Sousa Aff. ¶ 9)]  
 19 See *Nat’l Ass’n of Radiation Survivors*, 115 F.R.D. at 557 (“It is no defense to suggest,  
 20 as the defendant attempts, that particular employees were not on notice. To hold  
 21 otherwise would permit an agency, corporate officer, or legal department to shield itself  
 22 from discovery obligations by keeping its employees ignorant.”).

23 Especially after cases like *Zubulake*, Defendants’ failure to communicate with  
 24 key witnesses like Sgt. Madrid and follow-up regarding the litigation hold was  
 25 inexcusable – and demonstrates gross negligence at best. Sgt. Madrid, a witnesses  
 26 identified in Defendants’ Initial Disclosure Statement, testified that no one had ever  
 27 instructed him to retain the individual officer stat sheets, or to refrain from deleting  
 28 sweep-related emails. [Kozinets Decl. Ex. A (Madrid Dep. at 108:1-4; 83:19 – 84:3);

1 Ex. N (Defs.' Initial Disclosures at 4)] This was not mere negligence. Rather, MCSO  
 2 continued its pre-litigation practice of destroying individual officer stat sheets  
 3 throughout the course of this litigation, despite their duty to preserve relevant  
 4 documents, Plaintiffs' preservation notice and Plaintiffs' document requests and follow-  
 5 up correspondence. [Kozinets Decl. Ex. L (Sousa Aff. ¶ 9) and Exs. C, E-I]

6 **C. The Destroyed Documents Were Relevant and Critical.**

7 Third, because Defendants destroyed the stat sheets and deleted emails willfully  
 8 or intentionally, the documents' "relevance" should be presumed. *Residential Funding*,  
 9 306 F.3d at 109. But even if the destruction was merely negligent, the stat sheets were  
 10 not merely "duplicative" or "immaterial" – rather, they were a unique source of  
 11 individual officer or posse member activity not available in other documents. MCSO  
 12 does not keep any other records that readily provide a breakdown of law enforcement  
 13 conduct for each shift that individual officers and posse worked during each sweep.  
 14 Defendants have not provided Plaintiffs with a ready alternative source of the same  
 15 information. MCSO does not keep per-officer records of individual stops that do not  
 16 result in a citation or arrest. [Kozinets Decl. Ex. D (Hr'g Tr. at 14:1-9)] Defendant's  
 17 destruction of the stat sheets – "an entire source of documents" – unquestionably  
 18 prejudices Plaintiffs. *Napster*, 462 F. Supp. 2d at 1077. Defendants' destruction of an  
 19 unknown number of responsive emails likewise prejudices Plaintiffs.<sup>3</sup>

20 Combined with other records, the stat sheets would help Plaintiffs establish that  
 21 Defendants used discretionary traffic stops to target Latinos. Some of Defendants'  
 22 witnesses have asserted that they instructed deputies working during the sweeps to stop  
 23 all vehicles that violated any part of the vehicle or traffic code, without allowing for the

24 <sup>3</sup> MCSO's "CAD database traffic stop data base system" cannot replace unique  
 25 information on the stat sheets. [Cf. Kozinets Decl. Ex. L (Sousa Aff. ¶ 15)] The database  
 26 does not contain summaries of individual officers' shifts. Moreover, there appear to be  
 27 serious discrepancies between the CAD database and other MCSO records. For  
 28 example, according to another HSU supervisor, Sgt. Brett Palmer, MCSO deputies made  
 7 traffic stops during a sweep in the Town of Fountain Hills on May 6, 2008, including  
 at least three by Deputy Charley Armendariz. [Kozinets Decl. Ex. M] However, when  
 Plaintiffs searched for traffic stops by Deputy Armendariz for that date in the CAD  
 database, none could be found. [Kozinets Decl. ¶ 20]



1 exercise of any discretion. Sgt. Palmer testified that he had instructed deputies on this  
2 “zero-tolerance” approach to deflect racial profiling complaints. [Kozinets Decl. Ex. B  
3 (Palmer Dep. at 56:2-5, 57:12-17)] Specifically, he stated: “Well, sir, if we were to use  
4 discretion and we had these same numbers, would somebody not claim we were racially  
5 profiling every one of the vehicles we stopped?” [*Id.* at 58:4-9] Stat sheets showing that  
6 an officer was on duty for an 8-hour shift, but made only two traffic stops during that  
7 time, would strongly suggest that the officer did not stop everyone for whom he  
8 observed some type of traffic or vehicle violation, but rather exercised discretion and  
9 was more selective when deciding whom to stop. Combining these sheets with records  
10 showing that the same officer’s stops led to the arrests of predominantly Latino suspects  
11 would provide further proof of Plaintiffs’ claims.

12 The missing stat sheets would also help Plaintiffs identify specific officers whom  
13 to depose (or about whom to seek further discovery), including officers who exhibited a  
14 pattern of making very few traffic stops while working multi-hour shifts. For the same  
15 reason, the individual stat sheets would have aided efforts by the HSU supervisors to  
16 monitor the conduct of their own deputies and look for patterns that could provide  
17 indicia of racial profiling. However, the HSU supervisors seemed distinctly uninterested  
18 in such monitoring and supervision – rather, they testified that they simply “trust” their  
19 officers not to racially profile. [Kozinets Decl. Ex. A (Madrid Dep. 198:2-12) and Ex. B  
20 (Palmer Dep. 78:1-19)] Finally, Defendants’ spoliation prevents Plaintiffs and the Court  
21 from ever knowing if deputies or posse made notes on the destroyed stat sheets that  
22 support Plaintiffs’ claims.

23 Courts have long recognized that “plaintiffs should not suffer because of [a  
24 defendant’s destruction of evidence. Where one party wrongfully denies another the  
25 evidence necessary to establish a fact in dispute, the court must draw the strongest  
26 allowable inferences in favor of the aggrieved party.” *Nat’l Ass’n of Radiation*  
27 *Survivors*, 115 F.R.D. at 557. Accordingly, Plaintiffs are entitled to adverse inference  
28 findings, the nature and extent of which should be determined at the summary judgment

1 stage or, if necessary, at trial. *Napster*, 462 F. Supp. 2d at 1078.

2 **II. Plaintiffs Are Entitled to Evidence Preclusion Sanctions.**

3 Defendants' spoliation also warrants the preclusion of evidence and/or testimony.  
4 In *Unigard*, the court affirmed the exclusion of the plaintiff's expert testimony where  
5 "plaintiff's destruction of key evidence render[ed] a full defense impossible." *Unigard*,  
6 982 F.2d at 368. Here, Defendants' destruction of the stat sheets deprives Plaintiffs of  
7 key evidence regarding what Defendants' officers and volunteers did during the sweeps.  
8 Without that evidence, Plaintiffs are handicapped in their ability to reconstruct what  
9 occurred during the sweeps. In the circumstances, allowing Defendants to introduce  
10 evidence and testimony about their so-called "zero tolerance" approach would unfairly  
11 prejudice Plaintiffs and thus preclude the Court's ability to conduct a fair trial.  
12 However, because the full extent of Defendants' failure to preserve and produce relevant  
13 evidence, including emails, is not yet known, Plaintiffs respectfully submit that the  
14 nature and extent of appropriate preclusion sanctions should be determined at summary  
15 judgment or, if necessary, at trial. *Napster*, 462 F. Supp. 2d at 1077-78.

16 **III. Plaintiffs Are Entitled to Monetary Sanctions for Bringing this Motion and**  
17 **Re-Deposing MCSO's Witnesses.**

18 Courts routinely award monetary sanctions "where one party has wrongfully  
19 destroyed evidence." *Napster*, 462 F. Supp. 2d at 1078. Defendants could have  
20 forestalled much time and effort by informing Plaintiffs months ago that the stat sheets  
21 had been destroyed, and by suspending their practice of shredding such documents.  
22 Even after Plaintiffs served several requests and wrote several letters addressing the stat  
23 sheets, Defendants failed to suspend that practice – resulting in the permanent loss of an  
24 entire category of responsive records. In these circumstances, Plaintiffs should be  
25 awarded their attorneys' fees and costs associated with bringing this motion, the letter  
26 writing that led up to it, and the meet-and-confer process. *See, e.g., id.* at 1078  
27 (awarding fees for similar expenses); *Nat'l Ass'n of Radiation Survivors*, 115 F.R.D. at  
28 558-59 (awarding fees and costs, and assessing fines). Moreover, Plaintiffs should be



1 permitted to re-depose MCSO's witnesses – at MCSO's expense – to inquire about  
2 document destruction issues and any new emails that come to light as a result of this  
3 discovery dispute.

4 Conclusion

5 For the foregoing reasons, the Court should grant Plaintiffs' Motion for Sanctions  
6 and enter the attached Proposed Order.

7 RESPECTFULLY SUBMITTED this 20th day of November, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2009, I caused the attached document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrant:

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I further certify that I caused a copy of the attached document to be mailed on the 20th day of November, 2009 to:

Hon. G. Murray Snow  
United States District Court  
Sandra Day O'Connor U.S. Courthouse  
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Phoenix, Arizona 85003-2154

/s/ Monica Medlin  
Legal Secretary

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