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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CORY SPENCER, an individual;
DIANA MILENA REED, an
individual; and COASTAL
PROTECTION RANGERS, INC., a
California non-profit public benefit
corporation,

Plaintiffs,

v.

LUNADA BAY BOYS; THE
INDIVIDUAL MEMBERS OF THE
LUNADA BAY BOYS, including but
not limited to SANG LEE, BRANT
BLAKEMAN, ALAN JOHNSTON
aka JALIAN JOHNSTON,
MICHAEL RAE PAPAYANS,
ANGELO FERRARA, FRANK
FERRARA, CHARLIE FERRARA
and N.F.; CITY OF PALOS
VERDES ESTATES; CHIEF OF
POLICE JEFF KEPLEY, in his
representative capacity; and DOES 1-
10,

Defendants.

Case No. CV 16-02129-SJO (RAOx)

AMENDED REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE ON
MOTION FOR SANCTIONS
AGAINST DEFENDANTS CHARLIE
FERRARA, FRANK FERRARA, AND
SANG LEE

This Amended Report and Recommendation (“Amended Report”) is
submitted to the Honorable S. James Otero, United States District Judge, pursuant

1 to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for
2 the Central District of California, and pursuant to the District Court’s referral order
3 in this matter dated August 28, 2017. On October 20, 2017, this Court issued a
4 Report and Recommendation addressing Plaintiffs’ Motion for Sanctions Against
5 Defendants Charlie Ferrara, Frank Ferrara, and Sang Lee (“October 20 Report”).
6 Dkt. No. 496. On November 3, 2017, Defendants Charlie Ferrara and Frank
7 Ferrara filed Objections to the October 20 Report. Dkt. No. 518. On November 14,
8 2017, Plaintiffs filed their Response to the Objections. Dkt. No. 522. This
9 Amended Report addresses the Objections of Defendants Charlie and Frank Ferrara
10 and Plaintiffs’ Response.

11 **I. INTRODUCTION**

12 On August 22, 2017, Plaintiffs Coastal Protection Rangers, Inc., Diana
13 Milena Reed, and Cory Spencer (collectively, “Plaintiffs”) filed a Motion for
14 Sanctions (“Motion”) against Defendants Charlie Ferrara and Frank Ferrara
15 (collectively, the “Ferrara Defendants”), and Defendant Sang Lee. Dkt. No. 425.
16 The Motion is based on the alleged failure to preserve or destruction of evidence
17 related to communications between codefendants on their cellular phones. The
18 Motion was referred to the undersigned by District Judge Otero on August 28, 2017
19 for a Report and Recommendation. Dkt. No. 435.

20 The Court held telephonic hearings regarding the Motion and other referred
21 matters on September 5, 2017 (“September 5 hearing”) and September 12, 2017
22 (“September 12 hearing”). Dkt. Nos. 443, 452. The Court ordered Plaintiffs to
23 meet and confer with Defendant Lee and the Ferrara Defendants to assess whether
24 the allegedly spoliated evidence could be recovered and to determine the scope of
25 any unrecoverable evidence. Dkt. No. 452. The parties submitted joint status
26 reports on their meet and confer efforts, and the Court ordered further briefing on
27 the Motion. Dkt. Nos. 458, 459, 461.

1 On September 28, 2017, Plaintiffs filed their supplemental brief in support of
2 their Motion. Dkt. No. 468.¹ The MPA is supported by the declaration of William
3 T. Kellerman (“Kellermann Declaration”), Dkt. No. 468-2, and the declaration of
4 Samantha D. Wolff (“Wolff Declaration”), Dkt. No. 468-4. Plaintiffs contend that
5 Defendant Lee and the Ferrara Defendants spoliated relevant evidence, resulting in
6 the loss of contents of text messages exchanged between Defendant Lee and the
7 Ferrara Defendants and the loss of cellular phone billing records for Defendant
8 Charlie Ferrara. Plaintiffs request that the Court impose sanctions in the form of an
9 adverse inference or jury instruction and denial of Defendants’ motions for
10 summary judgment.

11 Defendant Lee filed his Opposition to the Motion on October 5, 2017 (“Lee
12 Opposition”). Dkt. No. 472. The Lee Opposition is supported by the declaration of
13 Giselle Morales (“G. Morales Declaration”), Dkt. No. 472-1, and the declaration of
14 Tera Lutz (“Lutz Declaration”), Dkt. No. 472 at 12-82. Defendant Lee argues that
15 he did not intentionally delete text messages with codefendants and that Plaintiffs
16 have not been prejudiced by this loss.

17 The Ferrara Defendants filed their Opposition to the Motion on October 5,
18 2017 (“Ferrara Opposition”). Dkt. No. 473. The Ferrara Opposition is supported
19 by the declaration of Courtney Serrato (“Serrato Declaration”), Dkt. No. 473-1, the
20 declaration of Alison K. Hurley (“Hurley Declaration”), Dkt. No. 484-1,² and the

21 ¹ Plaintiffs filed their brief as a separate motion for sanctions against Defendant Lee
22 and the Ferrara Defendants. However, the arguments in the supplemental brief
23 build upon the arguments presented in the Motion filed on August 22, 2017. The
24 Court will refer to Plaintiffs’ Memorandum of Points and Authorities (“MPA”) attached to the September 28, 2017 filing as the primary moving arguments of
25 Plaintiffs in support of their Motion.

26 ² The declaration of Alison K. Hurley attached to the Ferrara Opposition failed to
27 include certain exhibits. *See* Dkt. No. 473-3. The Ferrara Defendants filed a notice
28 of errata and re-submitted the Hurley Declaration with all exhibits attached. Dkt.
No. 484. The Court will refer to the Hurley Declaration found at Dkt. No. 484-1
for purposes of this Report.

1 declaration of Alex Morales (“A. Morales Declaration”), Dkt. No. 474. The Ferrara
2 Defendants also filed evidentiary objections. Dkt. No. 473-2. In their Opposition,
3 the Ferrara Defendants concede that their initial responses to Plaintiffs’ discovery
4 requests did not meet the Court’s standards or expectations. But they argue that
5 there was no intentional spoliation of any relevant or admissible evidence.

6 Plaintiffs filed their Reply to the Lee Opposition (“Lee Reply”) and their
7 Reply to the Ferrara Opposition (“Ferrara Reply”) on October 9, 2017. Dkt. Nos.
8 477-478. The Lee Reply and Ferrara Reply are supported by the declaration of
9 Samantha D. Wolff (“Wolff Reply Declaration”). Dkt. No. 477-1. Plaintiffs also
10 filed responses to the Ferrara Defendants’ evidentiary objections, Dkt. No. 479, and
11 objections to evidence in the Ferrara Opposition, Dkt. No. 480.

12 The Ferrara Defendants filed their responses to Plaintiffs’ evidentiary
13 objections on October 10, 2017. Dkt. No. 485.

14 The Court held a hearing for the Motion on October 12, 2017 (“October 12
15 hearing”) and took the matter under submission. Dkt. No. 489.

16 Having considered the parties’ moving and opposing papers and other
17 records in this case, as well as the statements and arguments made during the
18 related telephonic conferences and hearings, for the reasons set forth below, the
19 Court recommends that Plaintiffs’ Motion be granted in part.

20 **II. BACKGROUND**

21 **A. Procedural Background**

22 Plaintiffs filed their Complaint on March 29, 2016, against the Lunada Bay
23 Boys, Sang Lee, Brant Blakeman, Alan Johnston, Michael Papayans, Angelo
24 Ferrara, Frank Ferrara, Charlie Ferrara, N.F., City of Palos Verdes Estates, and
25 Chief of Police Jeff Kepley (collectively, “Defendants”).³ Dkt. No. 1. Plaintiffs
26

27 ³ Defendant N.F. was dismissed from this action without prejudice on July 27,
28 2017. Dkt. No. 297. The Court will refer to Defendants Lee, Blakeman, Johnston,

1 assert the following causes of action against Defendants: (1) violation of the Bane
2 Act, California Civil Code § 52.1(b), against the Lunada Bay Boys and Individual
3 Defendants; (2) public nuisance pursuant to California Civil Code §§ 3479 and
4 3480 against the Lunada Bay Boys and Individual Defendants; (3) violation of the
5 Equal Protection Clause of the Fourteenth Amendment to the United States
6 Constitution, pursuant to 42 U.S.C. § 1983, against City Defendants; (4) violation
7 of the Privileges and Immunities Clause of Article IV of the United States
8 Constitution, pursuant to § 1983, against City Defendants; (5) violation of various
9 provisions of the California Coast Act against Defendants; (6) assault against the
10 Lunada Bay Boys and Individual Defendants; (7) battery against the Lunada Bay
11 Boys and Individual Defendants; and (8) negligence against the Lunada Bay Boys
12 and Individual Defendants. *See* Compl. ¶¶ 43-106.

13 Plaintiffs allege that the Individual Defendants and other members of the
14 Lunada Bay Boys have unlawfully interfered with Plaintiffs' usage and enjoyment
15 of Lunada Bay, located in the Palos Verdes Estates area. *See* Compl. ¶¶ 15-26.
16 Plaintiffs allege that Lunada Bay is well-known in the surfing world for localism, a
17 practice whereby resident surfers attempt to exclude outsiders through threats,
18 intimidation, and violence. *See id.* ¶ 17. Plaintiffs allege that Plaintiff Spencer
19 visited Lunada Bay on two occasions in January and February 2016, and was
20 verbally harassed, threatened, and physically injured by members of the Lunada
21 Bay Boys. *Id.* ¶ 21. Plaintiff Reed visited Lunada Bay on January 29, 2016,
22 February 5, 2016, and February 13, 2016, and was allegedly harassed by the
23 Lunada Bay Boys. *Id.* ¶¶ 22-26. Plaintiffs allege that members of the Lunada Bay
24 Boys coordinate their attacks on visitors by, among other actions, communicating
25 via text message group chats, email, mobile phones, and other electronic devices.
26 *See id.* ¶¶ 18, 47, 59.

27 Papayans, Angelo Ferrara, Frank Ferrara and Charlie Ferrara collectively as the
28 "Individual Defendants."

1 On July 11, 2016, Plaintiffs' claims pursuant to the Privileges and Immunities
2 Clause and the California Coast Act were dismissed with prejudice by the District
3 Judge. *See* Dkt. No. 84. On February 21, 2017, the District Judge denied
4 Plaintiffs' motion for class certification. *See* Dkt. No. 225.

5 On August 8, 2017, Plaintiffs filed their Motion for Administrative Relief
6 Pursuant to FRCP 56(d) ("Rule 56(d) Motion"). Dkt. No. 397. On August 22,
7 2017, Plaintiffs filed their Motion for Sanctions. Dkt. No. 425. On August 28,
8 2017, the District Court referred to the undersigned Plaintiffs' Rule 56(d) Motion
9 for disposition and Plaintiffs' Motion for Sanctions for a Report and
10 Recommendation. Dkt. No. 435 ("Referral Order"). The District Court also
11 authorized the undersigned to consider all pending discovery matters and conduct
12 further hearings and proceedings as may be appropriate or necessary. *Id.*

13 The parties have been involved in a number of discovery disputes before the
14 undersigned, starting in November 2016. *See, e.g.*, Dkt. Nos. 141, 151, 212, 217.
15 The Court has permitted the parties to contact the Court for discovery disputes so
16 that, when possible, disputes can be resolved informally without extensive briefing.
17 *See, e.g.*, Dkt. No. 212 (directing the parties to contact the Court's Courtroom
18 Deputy Clerk to schedule a telephonic conference if the parties are unable to reach
19 a resolution through meet and confer efforts). The background and proceedings
20 specific to Defendant Lee and the Ferrara Defendants are addressed below.

21 **B. Defendant Lee**

22 Defendant Lee was served with the Complaint on June 21, 2016. *See* Dkt.
23 No. 82. Defendant Lee retained counsel on July 5, 2016. *See id.* On July 6, 2016,
24 Plaintiffs served Defendant Lee with a litigation hold letter. Wolff Reply Decl. ¶ 2
25 & Ex. 1. Defendant Lee filed his Answer to the Complaint on August 1, 2016.
26 Dkt. No. 94. On August 18, 2016, Defendant Lee submitted his cellular phone to a
27 forensic analyst for imaging and an extraction report. Lutz Decl. ¶ 2.

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1 On November 7, 2016, Plaintiffs propounded requests for production of
2 documents on Defendant Lee. Wolff Decl. ¶ 8 & Ex. 7. The requests sought,
3 among other things, any text messages or records of phone calls with a codefendant
4 in this matter. Wolff Decl. Ex. 7. Defendant Lee produced a redacted copy of his
5 562-page extraction report to Plaintiffs on December 12, 2016. Lutz Decl. ¶ 3. The
6 extraction report included 17 occasions of text messages exchanged with
7 codefendants in this matter, including Defendants Blakeman, Johnston, and the
8 Ferrara Defendants, but with no substance of the text messages. Wolff Decl. ¶ 11;
9 Lee Opp'n at 3; Lutz Decl. ¶¶ 3-4 & Exs. A-B.

10 At a July 13, 2017 hearing, Plaintiffs raised a dispute with Defendant Lee
11 regarding the heavy redactions in his extraction report and the asserted privileges in
12 his privilege log. *See* Dkt. No. 267. The Court directed the parties to meet and
13 confer to schedule a further telephonic conference regarding the dispute and to file
14 the redacted privilege log along with any prior meet and confer documents. *See id.*
15 On July 19, 2017, the Court held a telephonic hearing for the discovery dispute, and
16 ordered Defendant Lee to lodge an unredacted copy of the extraction report for an
17 *in camera* review. Dkt. No. 273. The Court conducted an *in camera* review and
18 held another telephonic hearing on July 25, 2017. Dkt. No. 290. The Court ordered
19 Defendant Lee to produce his extraction report, limiting redactions only to sensitive
20 personal photographs, Defendant Lee's residential address, and communications
21 between Defendant Lee and his attorneys. *Id.*

22 On August 7, 2017, Plaintiffs filed their motion to compel against Defendant
23 Lee. Dkt. No. 392. Plaintiffs requested that Defendant Lee be ordered to produce
24 all documents that had not been turned over, and requested a ruling that the
25 objections and asserted privileges are not proper. *Id.* at 5. Plaintiffs also sought an
26 order that Defendant Lee and his attorneys improperly withheld documents and that
27 Defendant Lee destroyed evidence. *Id.* On August 9, 2017, the Court denied the
28 motion as untimely. Dkt. No. 401. The Court noted that to the extent Plaintiffs'

1 motion related to alleged spoliation, the Court believed the motion would be
2 properly brought before the District Court. *Id.*

3 After the Motion for Sanctions was referred to the undersigned, the Court
4 directed Plaintiffs and Defendant Lee to meet and confer regarding the possibility
5 of extracting any further data from Defendant Lee's phone. *See* Dkt. Nos. 443, 452.

6 On September 18, 2017, Plaintiffs and Defendant Lee filed their joint status
7 report regarding further extraction efforts. Dkt. No. 458. The status report
8 provided that the vendor's tools had not recovered any additional text messages. *Id.*
9 A forensic analyst completed a physical extraction of Defendant Lee's phone, and
10 performed several additional tests. Lee Opp'n at 4; G. Morales Decl. ¶¶ 12-16.
11 Although the contents of some text messages were found, none related to the text
12 messages requested by Plaintiffs. Lee Opp'n at 4; G. Morales Decl. ¶ 16. Because
13 the contents of the text messages at issue could not be recovered, the parties
14 submitted their supplemental briefing on spoliation based on these unrecoverable
15 text messages. Dkt. Nos. 468, 472, 478.

16 **C. The Ferrara Defendants**

17 There is no record of when the Ferrara Defendants were served with the
18 Complaint. On July 26, 2016, Plaintiffs filed a proof of service stating that a copy
19 of the Notice of Initial Scheduling Conference was sent to the Ferrara Defendants
20 on July 26, 2016 via UPS. Dkt. No. 91. The Ferrara Defendants first appeared in
21 the case through their counsel's appearance at the August 29, 2016 initial
22 scheduling conference. Dkt. No. 120. The Ferrara Defendants filed their Answers
23 to the Complaint on September 2, 2016. Dkt. Nos. 124-125.

24 On November 16, 2016, Plaintiffs propounded requests for production on the
25 Ferrara Defendants. Wolff Decl. ¶ 8 & Exs. 3-4. The requests sought, among other
26 things, text messages or records of phone calls with a codefendant. Wolff Decl.
27 Exs. 3-4.

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1 The Ferrara Defendants served their responses on December 19, 2016. Wolff
2 Decl. ¶ 9 & Exs. 5-6. In their responses, the Ferrara Defendants stated that they did
3 not possess any responsive text messages or records of phone calls and they
4 objected to the requests as burdensome. *Id.* The Ferrara Defendants did not
5 produce any documents with their responses. Wolff Decl. ¶ 9.

6 On December 29, 2016, Defendant Lee produced an extraction report
7 evidencing communications with codefendants, including the Ferrara Defendants.
8 *Id.* ¶ 10.

9 From January to July 2017, Plaintiffs' counsel communicated with the
10 Ferrara Defendants' counsel at least 17 times via phone, email and letter, seeking
11 the production of responsive documents. *Id.* ¶ 12. Defendant Charlie Ferrara was
12 deposed on July 7, 2017. Wolff Decl. ¶ 14 & Ex. 9. At his deposition, Charlie
13 Ferrara stated that he "hadn't tried very hard" to obtain his cell phone bills. *Id.* As
14 late as July 10, 2017, counsel for the Ferrara Defendants responded that they were
15 attempting to obtain phone records and would inquire into imaging the data on the
16 Ferrara Defendants' cellular phones. Wolff Decl. Ex. 10.

17 The Court held a telephonic hearing on July 13, 2017 regarding production of
18 cellular phone records by the Ferrara Defendants. Dkt. No. 267. The Court ordered
19 the Ferrara Defendants to produce responsive documents by July 17, 2017. *Id.*

20 The parties participated in another telephonic hearing on July 26, 2017, when
21 the Court was informed that the Ferrara Defendants had not completed their
22 production by the ordered deadline and had yet to complete their production as of
23 the time of the hearing. *See* Dkt. No. 296. The Court ordered briefing on
24 Plaintiffs' request for monetary sanctions for the Ferrara Defendants' failure to
25 comply with the Court's July 13, 2017 order. *Id.*

26 After the July 26 hearing, the Ferrara Defendants produced additional
27 documents on July 26, 27, and September 1, 2, 5, and 21. Wolff Decl. ¶ 23.

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1 Plaintiffs and the Ferrara Defendants filed their briefing on Plaintiffs' request
2 for monetary sanctions and the Court held a hearing on August 23, 2017. Dkt. Nos.
3 403, 423, 432. The Court granted Plaintiffs' request for monetary sanctions as it
4 pertained to the failure to comply with the Court's July 13, 2017 order, but denied it
5 without prejudice to the extent the request was based on the Ferrara Defendants'
6 alleged spoliation of evidence. *Id.* The Court directed Plaintiffs' counsel to submit
7 a declaration detailing expenses caused by the failure to comply with the Court's
8 order. *Id.* On September 5, 2017, Plaintiffs' counsel filed a declaration stating that
9 the parties agreed to resolve the request for monetary sanctions through the Ferrara
10 Defendants' payment of the amount sought by Plaintiffs in their motion. Decl. of
11 Samantha Wolff Regarding Pls.' Mot. for Monetary Sanctions, Dkt. No. 444, ¶ 4.
12 Plaintiffs' counsel stated that Plaintiffs no longer sought the Court's assistance in
13 determining the amount to be awarded for the Ferrara Defendants' failure to
14 comply with the Court's July 13 order and that Plaintiffs would not seek any further
15 monetary sanctions from the Court for the alleged spoliation of evidence raised in
16 their request for monetary sanctions. *Id.* ¶ 5.

17 At the September 5 hearing, counsel for the Ferrara Defendants represented
18 that additional documents were still being gathered and produced, including those
19 being located by a cellular service provider. At the September 12 hearing, counsel
20 for Defendants Charlie and Frank Ferrara stated that with the exception of specific
21 older records that their third-party provider was attempting to locate, all records that
22 exist had been produced. However, counsel stated that some text message chains
23 had not been recovered. Plaintiffs and the Ferrara Defendants were directed to
24 submit a status report regarding any unrecoverable data. *See* Dkt. No. 452.

25 On September 18, 2017, Plaintiffs and the Ferrara Defendants filed their joint
26 status report. Dkt. No. 459 ("Ferrara Joint Status Report"). With respect to Frank
27 Ferrara, the joint status report provides that the contents of nine text messages
28 exchanged with Defendant Lee on March 31, 2016, April 18, 2016, and July 29,

1 2016 are the only requested records that have not been produced. *Id.* at 3. The
2 parties agreed that these messages are not recoverable. *Id.* With respect to Charlie
3 Ferrara, the joint status report provides that the contents of six text messages
4 exchanged with Defendant Lee on June 30, 2016 and July 20, 2016 are not
5 available because Defendant Charlie Ferrara no longer has a cell phone available
6 for extraction predating August 15, 2016. *Id.* at 6. In addition, the missing cell
7 phone billing records from December 15, 2015 through January 11, 2016 and
8 records of text messages from December 15, 2015 to February 24, 2016 had been
9 requested from Sprint, but Sprint had not been able to complete the request at the
10 time of filing. *Id.* at 4. Finally, any data stored on the mobile phone used by
11 Charlie Ferrara prior to August 15, 2016 are no longer available. *Id.* at 5.

12 As it appeared that there would be text messages and potentially other data
13 that would not be recoverable, the Court set a briefing schedule for Plaintiffs'
14 Motion for Sanctions and the parties filed their supplemental briefs. Dkt. Nos. 468,
15 473, 477.⁴

16 **III. LEGAL STANDARD**

17 Spoliation is the destruction or significant alteration of evidence, or the
18 failure to preserve evidence, in pending or reasonably foreseeable litigation.
19 *Compass Bank v. Morris Cerullo World Evangelism*, 104 F. Supp. 3d 1040, 1051-

20
21 ⁴ The Ferrara Defendants raise numerous objections to evidence Plaintiffs present in
22 support of their Motion. Dkt. No. 473-2. Plaintiffs filed a response to the
23 evidentiary objections and filed objections to evidence in the Ferrara Opposition.
24 Dkt. Nos. 479, 480. The Ferrara Defendants responded to Plaintiffs' objections on
25 October 10, 2017. Dkt. No. 485. The Court has primarily relied on portions of the
26 declarations and exhibits that have not been objected to in arriving at its findings,
27 conclusions and recommendations. To the extent the Court relies on any evidence
28 objected to without addressing the objections, the objections are overruled. All
other evidentiary objections raised by either Plaintiffs or the Ferrara Defendants are
denied without prejudice as moot, with leave to reassert the objections at a later
stage in the proceedings. *See Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604,
611 n.5 (C.D. Cal. 2013).

1 52 (S.D. Cal. 2015) (citing *United States v. Kitsap Physicians Serv.*, 314 F.3d 995,
2 1001 (9th Cir. 2002)). The standard of proof for spoliation in the Ninth Circuit
3 “appears to be by a preponderance of the evidence.” *Ramos v. Swatzell*, Case No.
4 ED CV 12-1089-BRO (SPx), 2017 WL 2857253, at *5 (C.D. Cal. June 5, 2017);
5 *see also* *Compass Bank*, 104 F. Supp. 3d at 1052-53.

6 Federal Rule of Civil Procedure 37(e) governs the loss of electronically
7 stored information. Rule 37(e) applies “[i]f electronically stored information that
8 should have been preserved in the anticipation or conduct of litigation is lost
9 because a party failed to take reasonable steps to preserve it, and it cannot be
10 restored or replaced through additional discovery.” The advisory committee notes
11 to the 2015 Amendment provide that the amended rule “forecloses reliance on
12 inherent authority or state law to determine when certain measures should be used”
13 for failure to preserve electronically stored information. Fed. R. Civ. P. 37(e),
14 Committee Notes on Rules—2015 Amendment (“Committee Notes”).

15 The common-law duty to preserve continues to apply even under Rule 37(e).
16 *See* Committee Notes. “A party must preserve evidence it knows or should know is
17 relevant to a claim or defense of any party, or that may lead to the discovery of
18 relevant evidence.” *Compass Bank*, 104 F. Supp. 3d at 1051. This is an objective
19 standard that asks not whether the party in fact reasonably foresaw litigation, but
20 whether a reasonable party in the same factual circumstances would have
21 reasonably foreseen litigation. *ILWU-PMA Welfare Plan Board of Trustees v.*
22 *Connecticut General Life Insurance Co.*, No. C 15-02965 WHA, 2017 WL 345988,
23 at *4 (N.D. Cal. Jan. 24, 2017). “When litigation is ‘reasonably foreseeable’ is a
24 flexible fact-specific standard that allows a district court to exercise the discretion
25 necessary to confront the myriad factual situations inherent in the spoliation
26 inquiry.” *Security Alarm Financing Enterprises, L.P. v. Alarm Protection*
27 *Technology*, Case No. 3:13-cv-00102-SLG, 2016 WL 7115911, at *3 (D. Alaska

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1 Dec. 6, 2016) (quoting *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320
2 (Fed. Cir. 2011)).

3 To satisfy Rule 37(e), the electronically stored information must have been
4 lost because the party “failed to take reasonable steps to preserve them.” The
5 Committee Notes advise that courts “should be sensitive to the party’s
6 sophistication with regard to litigation in evaluating preservation efforts,” and the
7 resources available to a party.

8 Rule 37(e) authorizes two tiers of sanctions for spoliation, both of which
9 apply only if information should have been preserved in the anticipation or conduct
10 of litigation, a party failed to take reasonable steps to preserve the information,
11 information was lost as a result, and the information could not be restored or
12 replaced by additional discovery. *See* Committee Notes.

13 Under Rule 37(e)(1), upon a finding of prejudice to another party from loss
14 of the information, a court may employ measures “no greater than necessary to cure
15 the prejudice.” Rule 37(e)(1) does not place a burden of proving or disproving
16 prejudice on one party or the other. *See* Committee Notes. Curative measures
17 under subdivision (e)(1) must not have the effect of measures permitted under
18 subdivision (e)(2). *Id.*

19 If a court finds that the spoliating party “acted with the intent to deprive
20 another party of the information’s use in the litigation,” Rule 37(e)(2) permits a
21 court to impose harsh sanctions, including presuming that the lost information was
22 unfavorable to that party, instructing the jury that it may or must presume the
23 information was unfavorable to that party, dismissing the action, or entering a
24 default judgment. However, finding an intent to deprive does not require a court to
25 adopt any of the measures listed in subdivision (e)(2). *Id.* “Rule 37(e) intentionally
26 leaves to the court’s discretion exactly what measures are necessary.” *Matthew*
27 *Enter., Inc. v. Chrysler Grp. LLC*, 2016 WL 2957133, at *3 (N.D. Cal. May 23,
28 2016).

1 Rule 37(e)(2) does not prohibit a court from allowing the parties, as a
2 measure under subdivision (e)(1), to present evidence to the jury concerning the
3 loss and likely relevance of information and instructing the jury that it may consider
4 that evidence, along with all the other evidence in the case, in making its decision.
5 See Committee Notes.

6 For spoliation of evidence that is not electronically stored, a district court
7 may sanction the offending party pursuant to its inherent powers. *Knickerbocker v.*
8 *Corinthian Colleges*, 298 F.R.D. 670, 678 (W.D. Wash. 2014) (citing *Unigard Sec.*
9 *Ins. Co. v. Lakewood Engineering & Mfg. Corp.*, 982 F.2d 363, 371 (9th Cir.
10 1992)). Courts often apply a three-part test in determining whether sanctions
11 pursuant to the court’s inherent authority are warranted for spoliation of evidence:
12 (1) whether the party having control over the evidence was obligated to preserve it
13 when it was destroyed or altered; (2) whether the destruction or loss was
14 accompanied by a culpable state of mind; and (3) whether the evidence that was
15 destroyed was relevant to the claims or defenses of the party seeking discovery of
16 the spoliated evidence. See, e.g., *Zubulake v. UBS Warburg LLD*, 220 F.R.D. 212,
17 216 (S.D.N.Y. 2003); *Montoya v. Orange County Sheriff’s Dep’t.*, 2013 WL
18 6705992, at *7, Case No. SACV 11-1922 JGB (RNBx) (C.D. Cal. Oct. 15, 2013).
19 If the court finds that spoliation occurred, it is tasked with imposing sanctions
20 “commensurate to the spoliating party’s motive or degree of fault in destroying the
21 evidence.” *Apple, Inc. v. Samsung Electronics Co.*, 888 F. Supp. 2d 976, 992 (N.D.
22 Cal. 2012).

23 IV. DISCUSSION

24 A. Evidence at Issue and Applicability of Rule 37(e)

25 Plaintiffs contend that 65 text messages exchanged between Defendant Lee
26 and other codefendants have not been produced and are no longer recoverable.
27 MPA at 5-6. Defendant Lee contends that only 17 text messages with codefendants
28 are no longer recoverable. Lee Opp’n at 3. Although there is a discrepancy as to

1 the number of text messages at issue, the parties agree that the content of at least 17
2 text messages responsive to Plaintiffs' discovery requests are no longer recoverable.

3 With respect to Defendant Frank Ferrara, the parties are in agreement that
4 there are nine text messages exchanged with Defendant Lee on March 31, 2016,
5 April 18, 2016, and July 29, 2016, that are not recoverable. Ferrara Joint Status
6 Report at 3.

7 With respect to Defendant Charlie Ferrara, at least six text messages
8 exchanged with Defendant Lee on June 30, 2016 and July 20, 2016, are no longer
9 recoverable. Ferrara Joint Status Report at 6; MPA at 6.⁵ Cellular data stored on
10 Defendant Charlie Ferrara's phone that he traded in on August 15, 2016 is not
11 recoverable. Ferrara Joint Status Report at 4. In addition, billing records for the
12 time period December 15, 2015 through January 11, 2016 and records of text
13 messages exchanged between December 15, 2015 and February 24, 2016 have not
14 been produced. *Id.* at 4. Although Defendant Charlie Ferrara is attempting to
15 locate these records through his cellular phone provider, the provider has not
16 confirmed that the records can be located and has not provided an estimated date of
17 production. *Id.* at 4.

18 The contents of the unrecoverable text messages were electronically stored
19 on cellular phones. As such, the Court will apply Rule 37(e) to the loss of this
20 evidence. Neither Plaintiffs nor Defendant Charlie Ferrara has represented whether
21 the cellular phone billing records are electronically stored. However, it appears
22 from the Sprint records that have been produced that the information was
23 electronically stored. *See* Hurley Decl. Ex. 16. In addition, counsel for the Ferrara
24 Defendants refers to "tape back-up" in her emails to Sprint, again suggesting that
25

26 ⁵ Although Plaintiffs state in their MPA that seven text messages are at issue,
27 Charlie Ferrara contends that the communication on July 19, 2016 between him and
28 Defendant Lee was a phone call. Ferrara Opp'n at 9 n.9; Hurley Decl. ¶ 18 & Ex.
16.

1 the cellular phone records were electronically stored, such that they could be
2 transferred onto a back-up tape. *See* Hurley Decl. Ex. 15. The Court will thus
3 apply Rule 37(e) to the loss of the cellular phone billing records.⁶

4 It is not disputed that the contents of at least some text messages are
5 unrecoverable for Defendant Lee and each of the Ferrara Defendants. In addition,
6 there are cellular phone billing records that are missing for Defendant Charlie
7 Ferrara and there is no indication if or when the records may be recovered by his
8 cellular service provider. The Court finds that Rule 37(e)'s requirement that the
9 electronically stored information "cannot be restored or replaced through additional
10 discovery" is satisfied for the evidence at issue.

11 **B. Defendant Lee**

12 i. Duty to Preserve

13 Plaintiffs assert that Defendant Lee's duty to preserve arose in late March or
14 early April 2016, given the significant press attention of the lawsuit and his
15 frequent communications with codefendants during this time. MPA at 10.
16 Plaintiffs submit as evidence several articles regarding the lawsuit that were
17 published on or shortly after the date the Complaint was filed. Wolff Decl. ¶ 1 &
18 Ex. 1. Plaintiffs present evidence that Defendant Johnston was aware of the lawsuit
19 on March 30, 2016,⁷ Defendant Lee exchanged text messages with Defendant
20 Johnston on March 31, 2016, and Defendant Lee had an 18-minute phone call with
21 Defendant Johnston on April 6, 2016. MPA at 2; Wolff Decl. ¶ 6. Plaintiffs also
22 point to several other communications between codefendants that occurred within a
23

24 ⁶ Although the Court applies the Rule 37(e) standard to the alleged spoliation in this
25 Motion, the Court notes that it would arrive at the same findings, conclusions and
26 recommendations had it applied the *Zubulake* standard pursuant to the Court's
inherent authority to impose sanctions for spoliation.

27 ⁷ Defendant Johnston received a text message from non-party Charlie Mowat
28 alerting Johnston and nine others about the lawsuit and to "[w]atch out for
subpoenas [and] be on the ultra down-low." Wolff Decl. Ex. 2.

1 few weeks of the filing of the lawsuit as evidence that Defendant Lee should have
2 been aware of the litigation shortly after the filing date. MPA at 2; Wolff Decl. ¶ 6.

3 Defendant Lee asserts that he was not aware of the lawsuit until he was
4 served with the complaint on June 21, 2016.⁸ Lee Opp'n at 6. In addition,
5 Defendant Lee contends that the duty to preserve would not apply to any of the
6 unrecoverable text messages because they occurred months after the alleged
7 incidents, and, for the text messages to be relevant, they must show
8 communications between Defendant Lee and his codefendants prior to or
9 immediately after the January and February 2016 incidents alleged in the
10 Complaint. Lee Opp'n at 7. Defendant Lee further argues that there is no evidence
11 to suggest any of the text messages relate to the lawsuit, and not a single defendant
12 or witness has testified they received or sent text messages to Defendant Lee
13 regarding the alleged incidents. *Id.* at 9; Lutz. Decl. ¶ 9.

14 The Court finds that Defendant Lee's duty to preserve arose, at the latest, on
15 June 21, 2016, when he was served with the Complaint. After service, Defendant
16 Lee should have been aware of the pending litigation against him and the
17 allegations involving the use of cellular phones. The parties do not dispute that
18 there are text messages between Defendant Lee and other codefendants that were
19 exchanged after Defendant Lee was served, and that the contents of these text
20 messages are unrecoverable. The Court is not persuaded by Defendant Lee's
21 argument that only text messages occurring around the dates of the incidents
22 involving Plaintiffs would be relevant, as text messages exchanged at a later time,
23 especially between codefendants, may still relate to allegations in the lawsuit.

24 Plaintiffs identify 25 text messages exchanged with codefendants after June
25 21, 2016 that are no longer recoverable, while Defendant Lee argues there are only
26 eight. Defendant Lee has not presented any argument to explain the reason for this

27 ⁸ The Court notes that this assertion is not supported in the Lee Opposition with a
28 declaration of Defendant Lee or his deposition testimony.

1 discrepancy. It appears to the Court that Plaintiffs identified the 25 text messages
2 from Defendant Lee's and others Defendants' cellular phone billing records, while
3 Defendant Lee has identified the eight text messages from his extraction report.
4 The Court finds that the billing records would contain more accurate information
5 regarding occasions when text messages were exchanged as the extraction report
6 only retrieves data from the cellular phone and such data may be overwritten.
7 Kellerman Decl. ¶¶ 6-7; G. Morales Decl. ¶¶ 19-20. Therefore, there are at least 25
8 unrecoverable text messages that were exchanged between Defendant Lee and
9 codefendants after Defendant Lee had a duty to preserve the text messages.

10 ii. Reasonable Steps to Preserve

11 Plaintiffs argue that Defendant Lee deleted the unrecoverable text messages
12 that were exchanged with codefendants between January 2016 and July 2016.
13 MPA at 5; Wolff Decl. ¶ 36. None of these text messages could be recovered from
14 Defendant Lee's phone, and only three of these text messages were produced by a
15 codefendant. MPA at 6; Lee Reply at 1. Plaintiffs confirmed the exchange of these
16 text messages through analysis of Defendants' cellular phone bills. *Id.*

17 Defendant Lee argues that he took reasonable steps to preserve cellular data.
18 Lee Opp'n at 7. Defendant Lee submitted his phone for forensic analysis, and an
19 extraction report was completed on August 18, 2017. *Id.* Additional tests were
20 also performed on his phone to extract any further data. *Id.* at 8. Defendant Lee
21 also maintains that he did not delete any of the lost text messages, and that they
22 were overwritten by a process that is not under his control. Lee Opp'n at 8. As
23 evidence, Defendant Lee points to his extraction report, which lists whether a text
24 message has been flagged for deletion. *Id.* Although 120 text messages in his
25 extraction report were flagged as deleted, none of those were with codefendants.
26 *Id.* In addition, Defendant Lee testified at his deposition taken on May 31, 2017
27 that he did not delete evidence related to the case. Lutz Decl. ¶ 6 & Ex. C.

28 ///

1 Plaintiffs and Defendant Lee dispute how the contents of the unrecoverable
2 text messages were lost and whether Defendant Lee affirmatively deleted text
3 messages. Plaintiffs and Defendant Lee each submitted a declaration by an
4 individual with knowledge of computer forensic analysis. The declarants agree that
5 when a user deletes a text message on a cellular phone, it is flagged as deleted and
6 is recoverable as long as the underlying data is not overwritten. Kellerman Decl. ¶
7 6; G. Morales Decl. ¶ 20. It also appears undisputed that a typical user cannot
8 control when data is overwritten. Kellerman Decl. ¶ 8. Various factors affect when
9 data is overwritten, including the type of operating system of the device, the amount
10 of free storage, the amount of user activity, and the length of time the text message
11 was flagged for deletion. G. Morales Decl. ¶ 19. Plaintiffs' declarant states that the
12 sooner one acts to recover deleted data, the better the chances are of recovering that
13 data. Kellerman Decl. ¶ 8. Defendant Lee's declarant provides that she cannot
14 make a determination on whether a text message was deleted if the entry for that
15 text message on the extraction report does not have a "Yes" in the "flagged as
16 deleted" column of the report. G. Morales ¶ 18.

17 The Court finds that it is indeterminable from the forensic experts'
18 declarations and other evidence whether cellular phone data on Defendant Lee's
19 phone could have been overwritten without being flagged for deletion, or if
20 Defendant Lee was aware that data from his phone was being overwritten even if
21 the data had not been flagged for deletion. Moreover, Defendant Lee imaged his
22 phone in mid-August of 2016. Given the relatively quick preservation of his
23 cellular phone after he appeared in the case, the Court cannot conclude at this time
24 that Defendant Lee failed to take reasonable steps to preserve evidence.

25 However, Plaintiffs, through no fault of their own, have not been able to
26 sufficiently explore and develop the record regarding spoliation. Defendant Lee's
27 deposition took place in May 2017, before the Court resolved the discovery dispute
28 regarding redactions of Defendant Lee's extraction report and ordered production

1 of an almost completely unredacted report on July 25, 2017. *See* Dkt. No. 290. In
2 addition, the number of unrecoverable text messages was only clarified after further
3 testing of Defendant Lee's cellular phone as ordered by the Court at the September
4 5 and September 12 hearings. Plaintiffs also did not have available to them in May
5 2017 various records and documents evidencing communications with other
6 Defendants due to delays in production, which have since been resolved. *See, e.g.*,
7 Dkt. Nos. 267, 296 (Ferrara Defendants); Dkt. No. 452 (Defendant Papayans).
8 Given this timeline, the Court finds it would not be fair to expect Plaintiffs to have
9 been able to question Defendant Lee in depth at his deposition on topics relevant to
10 spoliation, such as when he became aware of the litigation, whether he took
11 reasonable steps after he became aware of the litigation, whether he deleted any of
12 the text messages at issue, and whether there was ever an intent to deprive Plaintiffs
13 of their use of the content of text messages in the litigation.

14 Accordingly, the Court recommends that, at this time, no sanctions be
15 imposed upon Defendant Lee. The Court recommends that Plaintiffs be permitted
16 to present evidence and argument at trial concerning what evidence was lost and the
17 potential relevance of such evidence, when Defendant Lee had notice of the
18 litigation,⁹ and how the evidence was lost. The Court additionally recommends that
19 Plaintiffs be permitted to take a second deposition of Defendant Lee in order to
20 further explore the alleged spoliation of text messages. Because this additional
21 discovery is not meant to be a sanction against Defendant Lee, it is recommended
22 that the costs for the second deposition be shared equally between Plaintiffs and
23 Defendant Lee.

24 ///

25 _____
26 ⁹ Although the Court makes a finding for purposes of this Amended Report that
27 Defendant Lee had a duty to preserve relevant evidence at the latest by June 21,
28 2016, the Court does not intend for this finding to preclude Plaintiffs from
presenting evidence or argument at trial that his duty to preserve arose at an earlier
date.

1 **C. The Ferrara Defendants**

2 i. Duty to Preserve and Reasonable Steps to Preserve

3 a. *Defendant Frank Ferrara*

4 Plaintiffs contend that Defendant Frank Ferrara was aware of the litigation by
5 April 7, 2016, the date an article in the Daily Breeze was published regarding this
6 lawsuit. MPA at 10. Plaintiffs also argue that the Ferrara Defendants' knowledge
7 of the lawsuit can be inferred by the fact that they both attempted to dodge service
8 throughout July and August 2016. MPA at 10-11; Wolff Decl. ¶ 7. Plaintiffs argue
9 that Frank Ferrara deleted text messages with Defendant Lee, and that the Ferrara
10 Defendants' obstructive conduct evidences their willfulness to destroy evidence.
11 MPA at 11-12.

12 Defendant Frank Ferrara contends that he did not have a duty to preserve
13 until he made an appearance through counsel at the August 29, 2017 initial
14 scheduling conference. Ferrara Opp'n at 3. Defendant Frank Ferrara argues that
15 the quotes in the April 7, 2016 article cannot be identified as attributed to him. *Id.*
16 at 4.¹⁰ Defendant Frank Ferrara also contends that there is no evidence that he
17 intentionally destroyed the unrecoverable text messages, and that over the past
18 several months, he has made diligent efforts to produce the requested discovery.
19 Ferrara Opp'n at 5.

20 The Court finds that Defendant Frank Ferrara had a duty to preserve by April
21 7, 2016. On April 7, 2016, an article was published on the Daily Breeze website.
22 Wolff Decl. ¶ 3 & Ex. 1 at 19. The article quotes Frank Ferrara. *Id.* Defendant
23 Frank Ferrara testified at his deposition that he was contacted by Megan Barnes, the
24 author of the Daily Breeze article, and that they had a telephone conversation

25 ¹⁰ Defendant Frank Ferrara also objects to the April 7, 2016 article as hearsay.
26 However, the Court only uses this article to establish that on April 7, 2016, an
27 article was published with quotes from Frank Ferrara. Because the statements
28 within the article are not being used to prove the truth of the matter asserted therein,
the Ferrara Defendants' hearsay objection is overruled.

1 lasting 20 to 30 minutes regarding the lawsuit, the named individual Plaintiffs of
2 the lawsuit, Lunada Bay, and some of the allegations of the lawsuit. Wolff Reply
3 Decl. Ex. 3. Specifically, Defendant Frank Ferrara testified that Ms. Barnes asked
4 him about whether he heard about individuals using walkie-talkies to coordinate
5 efforts or to harass outsiders. *Id.* In addition, Defendant Frank Ferrara testified in
6 response to a question about a phone conversation with Defendant Lee around the
7 time the lawsuit was filed that he talked about the lawsuit with Defendant Lee.
8 Hurley Decl., Ex. 3.

9 The evidence shows that Defendant Frank Ferrara became aware of the
10 lawsuit, at the latest, when he had the telephone conversation with the Daily Breeze
11 article author regarding the lawsuit, which necessarily was on or before April 7,
12 2016, the publication date of the article. Defendant Frank Ferrara became aware at
13 this time that communications between codefendants or other surfers at Lunada Bay
14 were at issue in the lawsuit. Therefore, at the latest, Defendant Frank Ferrara had a
15 duty to preserve text messages and other communications with codefendants
16 starting on April 7, 2016.

17 Given this finding, the content of eight text messages exchanged on April 18,
18 2016, and July 29, 2016 between Defendant Frank Ferrara and Defendant Lee were
19 necessarily lost after Frank Ferrara had a duty to preserve.

20 The Court also finds that Frank Ferrara did not take reasonable steps to
21 preserve the contents of the text messages at issue. As with Defendant Lee,
22 Plaintiffs and Frank Ferrara dispute whether the text messages were intentionally
23 deleted. Plaintiffs and Defendant Frank Ferrara both submit declarations by
24 individuals with knowledge of forensic analysis. As with Defendant Lee, the Court
25 cannot determine whether Defendant Frank Ferrara intentionally deleted text
26 messages that are now unrecoverable. However, unlike Defendant Lee, the Court
27 has found that Frank Ferrara was aware of the lawsuit from early April 2016, yet he
28 failed to image his phone or otherwise preserve text messages with codefendants

1 until a Court order required him to produce the documents to Plaintiffs over a year
2 later. *See* Dkt. No. 267. Plaintiffs’ forensic analyst declares that “the sooner one
3 acts to recover deleted data, the better the chances are of recovering that data before
4 it is overwritten.” Kellerman Decl. ¶ 8. The Court finds that Plaintiffs have
5 presented sufficient evidence that the contents of the text messages were lost as a
6 result of Frank Ferrara’s failure to take reasonable steps to preserve the evidence for
7 over a year after he had a duty to preserve.

8 At the October 12 hearing, as an example of how data can be deleted without
9 a user manually flagging the data for deletion, counsel stated that it is possible on
10 an older phone that when the storage capacity is at its limit, the phone may prompt
11 the user to delete older data in order to save new data. However, in this situation, it
12 appears the user does have control over whether something would be deleted off of
13 that user’s phone. When under a duty to preserve certain evidence on one’s phone,
14 the Court finds that it would not be reasonable to allow the phone to overwrite older
15 data that may encompass relevant evidence. Given the Ferrara Defendants’ late
16 compliance with discovery requests, it would not have been reasonable for
17 Defendant Frank Ferrara to continue to have data overwritten on his phone while
18 sitting on his obligation to preserve and produce responsive data from that phone.

19 b. *Defendant Charlie Ferrara*

20 Plaintiffs contend that Defendant Charlie Ferrara must have been aware of
21 the lawsuit in late March or early April 2016 given the significant press attention
22 and his communications with codefendants, including his father, during this time.
23 MPA at 10. Plaintiffs argue that Charlie Ferrara failed to preserve relevant
24 evidence by trading in his phone after he became aware of the pending litigation.
25 *Id.* at 12. With respect to the missing cellular phone billing records, Plaintiffs
26 contend that Defendant Charlie Ferrara was not diligent in preserving the records.

27 *Id.*

28 ///

1 Defendant Charlie Ferrara contends that, like Defendant Frank Ferrara, he
2 did not have a duty to preserve until he made an appearance through counsel at the
3 August 29, 2016 initial scheduling conference. Ferrara Opp'n at 3. Defendant
4 Charlie Ferrara argues that he traded his phone in on August 15, 2016, before he
5 was under any obligation to preserve evidence from it. *Id.* at 1, 10. With respect to
6 the missing cellular phone billing records, Defendant Charlie Ferrara maintains that
7 he has been working diligently to recover these documents, and has made a legal
8 demand from Sprint to retain and produce the records. *Id.* at 9-10.

9 Although there is no record of when Charlie Ferrara was served with the
10 Complaint, Plaintiffs filed a proof of service that a copy of the Notice of Initial
11 Scheduling Conference (“Notice”) was sent to the Ferrara Defendants via UPS on
12 July 26, 2016. Dkt. No. 91. Although counsel for the Ferrara Defendants argued at
13 the October 12 hearing that there is no evidence that the Ferrara Defendants even
14 received this document, the fact that they retained counsel who appeared at the
15 Initial Scheduling Conference on their behalf suggests that they did receive the
16 Notice. The Court finds that the duty to preserve potentially relevant evidence
17 arose for Charlie Ferrara, at the latest, by early August 2016, when he should have
18 received the Notice.

19 Defendant Charlie Ferrara traded his phone in on or around August 15, 2016
20 when he transferred cellular phone service from Sprint to AT&T. Ferrara Joint
21 Status Report at 4-5. This took place after he had a duty to preserve potentially
22 relevant evidence, including communications with codefendants. Defendant
23 Charlie Ferrara did not preserve a backup of his cellular data from his old phone
24 and did not have his text messages properly transferred to his new phone.¹¹ The

25 ¹¹ Although counsel for the Ferrara Defendants argued that Charlie Ferrara had to
26 trade in his old phone for a new phone because he could not afford a new phone
27 without the credits for the old phone, this argument is not supported by testimony
28 or declaration of Charlie Ferrara. Moreover, there is no explanation or evidence as
to why Charlie Ferrara had to switch providers and dispose of his cellular phone at

1 lost data includes six text messages that Defendant Charlie Ferrara exchanged with
2 Defendant Lee. The Court finds that even for an individual without sophisticated
3 knowledge about litigation or forensic analysis, trading in a phone, without making
4 a backup, and after becoming aware of pending litigation where communications
5 with codefendants were potentially relevant, would constitute a failure to take
6 reasonable steps to preserve evidence.

7 Additionally, Defendant Charlie Ferrara is missing cellular phone billing
8 records that would show whether phone calls were made from December 15, 2015
9 through January 11, 2016, and records that would show whether texts were
10 exchanged from December 15, 2015 through February 24, 2016. Ferrara Joint
11 Status Report at 4. Sprint's general policy is to retain only 18 months of billing
12 records. Wolff Decl. Ex. 15. Although counsel has submitted a request to Sprint
13 for these records, Sprint has not provided counsel with an estimate or answer as to
14 when or if the records can be located. Hurley Decl. Ex. 15. Had Defendant Charlie
15 Ferrara preserved or requested these records when he became aware of the lawsuit
16 in early August 2016, when he retained counsel around the time of his appearance
17 in the case at the August 29, 2016 initial case management conference, when he
18 received the document requests from Plaintiffs in November 2016, or even when
19 his counsel was meeting and conferring with Plaintiffs' counsel from January 2017
20 to June 2017 regarding these very records, the now lost records would have been
21 available to him. However, it was not until after the Court ordered production of
22 the records on July 13, 2017 that Defendant Charlie Ferrara attempted to locate and
23 produce these records. By that time, the records from December 15, 2015 through
24 February 24, 2016 no longer had to be retained according to Sprint's policy and
25 were no longer readily available to Defendant Charlie Ferrara. The Court finds that
26 ///

27 this specific time, that is, approximately two weeks after he was mailed the Notice
28 and should have been aware of the allegations of the lawsuit.

1 the failure to preserve these records until after the Court ordered production in July
2 2017 was not reasonable.

3 Accordingly, the Court concludes that both Ferrara Defendants failed to take
4 reasonable steps to preserve electronically stored information that should have been
5 preserved in the anticipation or conduct of litigation, and the electronically stored
6 information was lost as a result and cannot be restored or replaced through
7 additional discovery.

8 ii. Sanctions

9 The spoliation analysis next turns to whether sanctions are warranted, and, if
10 so, the severity of the measures. The harsh sanctions pursuant to Rule 37(e)(2) are
11 available only upon finding that the Ferrara Defendants acted with the intent to
12 deprive Plaintiffs of the information's use in the litigation, while only a finding of
13 prejudice to Plaintiffs from loss of the information is required for the Court to order
14 measures "no greater than necessary to cure the prejudice" under Rule 37(e)(1).

15 a. *Intent to Deprive*

16 Plaintiffs argue that because the Ferrara Defendants had a clear awareness of
17 the lawsuit but failed to preserve or destroyed relevant evidence, Defendants acted
18 with the intent to deprive Plaintiffs of their use of this evidence for their litigation.
19 MPA at 11.

20 Defendant Frank Ferrara argues that there is no evidence he intentionally
21 destroyed any of the nine unrecovered messages. Ferrara Opp'n at 7. His forensic
22 analyst declares that there was no indication that any software or application was
23 installed to wipe data from his phone. *Id.* In addition, hundreds of other text
24 messages from around the same time period as the unrecoverable text messages
25 exchanged with Defendant Lee were also not available for recovery. *Id.*

26 Defendant Charlie Ferrara contends that because the duty to preserve had not
27 attached when he disposed of his old cellular phone, this action does not rise to
28 even negligence under the circumstances. Ferrara Opp'n at 17-18. With respect to

1 the cellular phone bills, counsel is in the process of remedying the situation with the
2 pending request to Sprint. *Id.* at 17, Hurley Decl. ¶ 17 & Ex. 15.

3 The Court finds that Frank Ferrara's failure to preserve his cellular data,
4 including text messages with codefendants, for well over a year constitutes at least
5 gross negligence. Similarly, the Court finds that Defendant Charlie Ferrara's
6 disposal of his cellular phone after becoming aware of the lawsuit constitutes at
7 least negligence and Defendant Charlie Ferrara's failure to preserve his cellular
8 phone records for well over a year after he appeared in the action constitutes at least
9 gross negligence. However, the Court is not persuaded at this time that either of the
10 Ferrara Defendants intentionally deleted text messages or failed to preserve
11 evidence with the intent to deprive Plaintiffs of their use of the evidence in
12 litigation. At this time, the Court does not find that Plaintiffs have offered
13 sufficient evidence to warrant the severe sanctions that may be imposed under Rule
14 37(e)(2).

15 As with Defendant Lee, the Court finds that Plaintiffs have not had the
16 opportunity to fully develop the record regarding intent and spoliation by the
17 Ferrara Defendants. Plaintiffs were not aware that there were any unrecoverable
18 text messages until after the Court ordered production of the cellular phone records
19 on July 13, 2017. Defendant Charlie Ferrara was deposed on July 7, 2017 and
20 Frank Ferrara was deposed on July 10, 2017. *See* Hurley Decl. Exs. 3, 4. It would
21 be unfair to expect Plaintiffs to have been able to fully probe spoliation and the
22 intent behind the destruction or failure to preserve evidence when Plaintiffs were
23 unaware that any evidence previously in possession or under the control of the
24 Ferrara Defendants was unrecoverable, and various documents related to the
25 evidence was not available yet to Plaintiffs. *See supra*, Section IV.B.ii. Plaintiffs
26 should not be precluded from presenting evidence at trial as to whether the Ferrara
27 Defendants acted with the intent to deprive Plaintiffs of the use of the evidence.

28 ///

1 b. *Prejudice*

2 Because the Court declines to find that the harsh sanctions under Rule
3 37(e)(2) are warranted at this time, the Court turns to whether less severe measures
4 under Rule 37(e)(1) are necessary to cure any prejudice to Plaintiffs from the loss
5 of the evidence at issue.

6 Plaintiffs argue that the lost evidence was relevant as Plaintiffs have alleged
7 in their Complaint that Defendants conspired to exclude Plaintiffs and other
8 individuals from accessing and enjoying a public space via phone calls, text
9 messages and email. MPA at 13. Although Plaintiffs have not been able to recover
10 any of the lost text messages at issue for the Ferrara Defendants, Plaintiffs have
11 been able to obtain the contents of three text messages exchanged between
12 Defendant Lee and other codefendants. MPA at 15 n.13; Lee Reply at 1. At least
13 two of these text messages relate to incidents alleged in the complaint. *Id.*¹²
14 Plaintiffs argue that have been prejudiced as they have been forced to oppose
15 motions for summary judgment brought by Defendants based on lack of evidence.
16 *Id.* at 13. In addition, Plaintiffs will be prejudiced at trial in having to establish
17 their claims without the use of the contents of these text messages. *Id.* at 14.

18 The Ferrara Defendants argue that there is no factual support that the fifteen
19 unrecoverable text messages contain any information that is relevant to the case.
20 Ferrara Opp'n at 18.

21 ///

22 _____
23 ¹² Plaintiffs were able to recover a text message exchanged between Defendant Lee
24 and Defendant Angelo Ferrara on January 29, 2016 that asks locals to come out to
25 Lunada Bay in response to certain individuals coming to the bay to surf. Wolff
26 Decl. ¶ 36. In addition, Plaintiffs were able to recover a series of text messages
27 exchanged between Defendant Papayans, Defendant Lee and other individuals on
28 January 29, 2016 which references two individuals at the bay and asks others to
join. Wolff Reply Decl. Ex. 2. January 29, 2016 is the date Plaintiff Reed
allegedly visited Lunada Bay with a friend and when they were allegedly harassed
by members of the Lunada Bay Boys. *See* Compl. ¶ 22.

1 The Court finds that Plaintiffs have suffered and will continue to suffer
2 prejudice from the loss of these text messages and cellular data. The text messages
3 at issue were exchanged between codefendants in this lawsuit. The few text
4 messages exchanged between codefendants that Plaintiffs were able to recover from
5 other sources contain communications that appear to be highly relevant to the
6 action, suggesting that other text messages exchanged between codefendants would
7 also contain relevant content. The Court finds that Plaintiffs have already been
8 prejudiced in having to oppose motions for summary judgment without this
9 potentially relevant evidence. In addition, Plaintiffs will be prejudiced at trial by
10 not being able to present or rely on the contents of these text messages. With
11 respect to Defendant Charlie Ferrara, Plaintiffs are also prejudiced because they are
12 without any records of phone calls or text messages exchanged during a highly
13 relevant period of time surrounding the alleged incidents of harassment of the
14 named Plaintiffs.

15 c. *Appropriate Sanctions to Cure the Prejudice*

16 Plaintiffs request as sanctions that the jury be instructed that the spoliated
17 evidence was unfavorable to these three defendants and that the Court designate as
18 established the fact that a conspiracy exists between Defendants Lee, Frank Ferrara,
19 and Charlie Ferrara. MPA at 15. Plaintiffs also request that the Court deny these
20 three Defendants' motions for summary judgment. *Id.*

21 The Ferrara Defendants contend that the nine text messages exchanged with
22 Defendant Lee form the single thread connecting him to Plaintiffs' claimed harm in
23 the case, and no parties have testified that he participated in any actions or inactions
24 supportive of Plaintiffs claims. Ferrara Opp'n at 7. Similarly, the Ferrara
25 Defendants argue that the six text messages Charlie Ferrara exchanged with
26 Defendant Lee form the only basis for Plaintiffs contention that Charlie Ferrara was
27 connected to Plaintiffs' claimed harm. *Id.* at 11. The Ferrara Defendants argue that
28 because Plaintiffs present no evidence that the text messages or cellular phone

1 billing records at issue contained any information relevant to the action, Plaintiffs’
2 requested sanction is not justified. *Id.* at 17.

3 With respect to Plaintiffs’ request that the Ferrara Defendants’ motions for
4 summary judgment be denied, counsel for the Ferrara Defendants represented at the
5 October 12, 2017 hearing that they may be amenable to withdrawing their motions
6 for summary judgment and would be willing to meet and confer with Plaintiffs’
7 counsel. The Court ordered counsel to meet and confer by October 16, 2017. Dkt.
8 No. 489. On October 16, 2017, the Ferrara Defendants withdrew their motions for
9 summary judgment. Dkt. No. 491.

10 With respect to Plaintiffs’ requests for an adverse inference instruction or a
11 designation that a conspiracy is established as a fact, the Court finds that these
12 severe sanctions are not warranted because the Court has not found that the Ferrara
13 Defendants acted with the intent to deprive Plaintiffs of the use of the lost evidence
14 in the litigation.

15 With respect to monetary sanctions, the Court initially recommended in its
16 October 20 Report that monetary sanctions be imposed against the Ferrara
17 Defendants in the form of attorneys’ fees and costs.

18 The Ferrara Defendants object to the recommendation of monetary sanctions.
19 Dkt. No. 518 at 2. The Ferrara Defendants assert that counsel for the Ferrara
20 Defendants and counsel for Plaintiffs agreed to a monetary amount to be paid by
21 the Ferrara Defendants to Plaintiffs to fully and finally resolve monetary sanctions
22 related to all discovery disputes between the parties as of August 29, 2017. *Id.*
23 Specifically, in an August 29, 2017 email, counsel for the Ferrara Defendants asked
24 counsel for Plaintiffs to confirm that the parties agreed to, among other things, the
25 following: “The amount paid by BWBO shall constitute a voluntary settlement of
26 the entirety of Plaintiffs request for monetary sanctions dealing with all existing
27 discovery disputes between the Parties as of today, without an admission by BWBO
28

1 or its clients of their reasonableness.”¹³ Dkt. No. 518-1 at 22. On August 30, 2017,
2 Plaintiffs’ counsel replied to the August 29, 2017 email and agreed to this
3 statement. *Id.* at 31. The Ferrara Defendants argue that Plaintiffs have accepted
4 payment in exchange for the release of their right to recover monetary sanctions
5 resulting from this discovery dispute, and the Court’s recommendation of a
6 monetary sanction conflicts with the parties’ valid agreement. Dkt. No. 518 at 4.

7 Plaintiffs respond that the Court’s authority to award sanctions is broad and
8 Plaintiffs did not agree to limit the Court’s authority. Dkt. No. 522 at 7.

9 The monetary sanctions at issue here are compensatory, as they are meant to
10 “cure the prejudice” to Plaintiffs, and not to punish the Ferrara Defendants. For
11 that reason, the parties had the right to bargain away these sanctions. *See HM*
12 *Electronics, Inc. v. R.F. Technologies, Inc.*, 171 F. Supp. 3d 1020, 1028-29 (S.D.
13 Cal. 2016) (collecting cases and finding that compensatory sanctions may be
14 bargained away, while punitive and other non-monetary sanctions may not). The
15 Court finds that Plaintiffs and the Ferrara Defendants entered into a valid agreement
16 to resolve the issue of compensatory monetary sanctions for all discovery disputes
17 existing between the parties as of August 29, 2017. This precludes the Court from
18 awarding further compensatory monetary sanctions to cure the prejudice from the
19 Ferrara Defendants’ spoliation of evidence, which was the subject of the instant
20 Motion for Sanctions filed on August 22, 2017. Therefore, the Court recommends
21 that no further monetary sanctions be imposed against the Ferrara Defendants.

22 The Ferrara Defendants did not object to the remainder of the October 20
23 Report, including the recommendation for further discovery and presentation of
24 evidence of spoliation at trial.

25 Because Plaintiffs have not had the opportunity to fully explore the spoliation
26 issues and the level of culpability or intent behind the failure to preserve the text

27 ¹³ BWBO stands for Bremer, Whyte, Brown & O’Meara, LLP, counsel for the
28 Ferrara Defendants.

1 messages and cellular phone billing records, the Court recommends that Plaintiffs
2 be permitted to depose both of the Ferrara Defendants for a second time, with costs
3 to be shared equally between Plaintiffs and the Ferrara Defendants.

4 Finally, the Court recommends that Plaintiffs be permitted to submit
5 evidence concerning what evidence was destroyed, when the Ferrara Defendants
6 had notice of the litigation, and the Ferrara Defendants' intent with regard to the
7 destruction of the evidence. Although the Court declines to recommend as a
8 sanction at this time that an adverse inference jury instruction be given at trial, the
9 Court notes that, depending on the sufficiency of Plaintiffs' evidence at trial
10 regarding intent, the District Court may decide at trial whether to give an adverse
11 inference instruction. *See* Committee Notes. Alternatively, if the intent finding is
12 left for the jury, the District Court may instruct the jury that it may infer from the
13 loss of the information that it was unfavorable to the party that lost it only if the
14 jury first finds that the party acted with the intent to deprive another party of the
15 information's use in litigation. *See id.*

16 **V. RECOMMENDATION**

17 For the reasons discussed above, **IT IS RECOMMENDED** that the District
18 Court issue an Order approving and accepting this Amended Report and
19 Recommendation, and ordering that Plaintiffs' Motion for Sanctions (Dkt. No. 425)
20 be granted in part as follows:

21 (1) Plaintiffs be permitted to depose Defendants Charlie and Frank Ferrara
22 regarding issues relevant to spoliation, costs to be shared by Plaintiffs and the
23 Ferrara Defendants;

24 (2) Plaintiffs be permitted to depose Defendant Lee regarding issues relevant
25 to alleged spoliation, costs to be shared by Plaintiffs and Defendant Lee; and

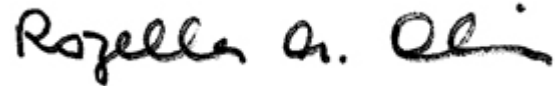
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1 (3) At trial, the parties be permitted to present evidence and argument related
2 to the unrecoverable text messages for Defendant Lee and the Ferrara Defendants
3 and the unavailable cellular billing records for Charlie Ferrara.

4 DATED: November 29, 2017

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6 _____
7 ROZELLA A. OLIVER
8 UNITED STATES MAGISTRATE JUDGE

9 **NOTICE**

10 Reports and Recommendations are not appealable to the Court of Appeals,
11 but may be subject to the right of any party to file objections as provided in Local
12 Civil Rule 72 and review by the District Judge whose initials appear in the docket
13 number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure
14 should be filed until entry of the Judgment of the District Court.