UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 12-00885-JVS (RNBx)	Date	May 5, 2014
Title	Terry J. Fanning, et al. V. HSBC Card Services Inc., et al.		

Present: The Honorable	James V. Selna

Karla J. Tunis	Sharon Seffens
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Elizabeth Arleo	Lisa Simonetti

Proceedings: **Plaintiff's Motion for Sanctions for Spoliation (fld 3-3-14)**

Plaintiff's Motion for Partial Summary Judgment (fld 3-3-14)

Cause called and counsel make their appearances. The Court's tentative ruling is issued. The Court and counsel confer. The Court sets a further Status Conference for Monday, September 8, 2014 at 10:30 a.m. The Court GRANTS the Plaintiff's Motion for Sanctions and DENIES the Plaintiff's Motion for Summary Judgment . The Court makes these rulings in accordance with the tentative ruling as follows:

Plaintiffs Terry J. Fanning ("Fanning") and Tatiana Jabbar ("Jabbar") (collectively "Plaintiffs") move to impose sanctions against Defendants HSBC Card Services Inc. ("Card Services") and HSBC Technology & Services (USA) Inc. ("Tech Services") (collectively "Defendants") for the spoliation of evidence. (Plaintiffs' Motion for Sanctions for the Spoliation of Evidence ("Sanctions Mot."), Docket No. 219.) Plaintiffs have also filed a motion for partial summary judgment pursuant to Federal Rule of Civil Procedure 56 on the issue of Fanning's standing. (Plaintiffs' Motion for Partial Summary Judgment on Issue of Standing ("PSJ Mot."), Docket No. 220.) Defendants have filed oppositions to both motions. (Defendants' Opposition to Sanctions Mot. ("Sanctions Opp'n"), Docket No. 237; Defendants' Opposition to MPSJ Mot. ("PSJ Opp'n"), Docket No. 235.) Plaintiffs replied. (Plaintiffs' Response to Defendants' Sanctions Opp'n ("Sanctions Reply"), Docket No. 238; Plaintiffs' Response to Defendants' MPSJ Opp'n ("MPSJ Reply"), Docket No. 239.) During the April 21, 2014 hearing on this Motion, the Court granted leave to file supplemental briefing because the Court's tentative ruling relied upon evidence initially presented by Plaintiffs in their Reply. (Docket No. 243.)

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Both Plaintiffs and Defendants have submitted supplemental briefing addressing the previous tentative ruling. (Plaintiffs' Supplemental Brief in Further Support of Sanctions Mot. and PSJ Mot. ("Pl.'s Supp. Br."), Docket No. 244; Defendants' Sur-Reply in Opposition to Sanctions Mot. and PSJ Mot. ("Def.'s Sur-Reply"), Docket No. 245.) For the following reasons, Plaintiffs' Motion for Sanctions is **GRANTED** and Plaintiffs' Motion for Partial Summary Judgment is **DENIED**.

I. Background[1]

Plaintiffs filed this putative class action against Defendants, alleging that Defendants violated California's Invasion of Privacy Act ("CIPA"), California Penal Code §§ 630 et seq., by recording telephone calls without Plaintiffs' and class members' consent. (Compl., Docket No. 1.) Plaintiff Fanning is a California resident and holder of a credit card account with nonparty HSBC Bank Nevada, N.A. ("Bank Nevada").[2] (Statement of Uncontroverted Facts and Conclusions of Law in Support of Sanctions Mot. and PSJ Mot. ("SUF") ¶¶ 1-2, Docket No. 220-1.) Card Services serviced credit card accounts issued by Bank Nevada. (Id. ¶ 4; Statement of Genuine Disputes of Material Fact in Support of PSJ Opp'n ("SDF") ¶ 37, Docket No. 236.) Tech Services provides technical support for Card Services. (SUF ¶ 4.)

As part of its servicing responsibilities, Card Services made collection calls to Bank Nevada customers whose accounts were delinquent.[3] (SUF ¶ 4.) Between October and December 2010, Defendants initiated over 300 outbound collection calls to Fanning. (Id. ¶ 18.) On October 7, 2010 and October 12, 2010, Card Services representatives engaged in telephone conversations with Fanning regarding the credit card account Fanning opened with Bank Nevada. (Id. ¶¶ 19, 22.) Tech Services recorded a random

[1] Unless otherwise noted, the facts set forth in this section are uncontroverted. To the extent that challenged evidence is material to the Court's decision, meritorious objections are resolved herein.

[2] Bank Nevada is no longer in operation. (PSJ Opp'n 2 n.2.)

[3] All of Card Services' internal records, including recordings made of outbound collection calls, were transferred to Capital One Financial Corporation ("Capital One") pursuant to an agreement entered into by Capital One with HSBC Finance Corporation, HSBC USA Inc., and Tech Services. (SDF ¶ 33; Docket No. 139-1.)

sample of outbound collections calls made by Card Services's agents.[4] (Id. ¶¶ 4-5.) Approximately 3% to 30% of each agent's calls were recorded during the class period. (Id. ¶ 5.) These recordings consist of an audio recording of the telephone call as well as a video recording of the Card Services agent's screen during the phone call. (Declaration of Arjun P. Rao in Support of PSJ Opp'n ("Rao PSJ Decl.") Ex. 5 ¶ 6, Docket No. 235-2.) During both of Fanning's October 2010 calls with Card Services representatives, the representatives' telephone systems were connected to the Tech Services part-time recording system. (SUF ¶¶ 20, 23.) However, whether these calls were actually recorded remains in dispute. (See PSJ Mot. 11-13; PSJ Opp'n 8-11.) Similarly, whether Fanning was aware of Defendants' practice of randomly recording outbound collection calls or consented to any such recording remains in dispute. (Compare SUF ¶¶ 27-30, with SDF ¶¶ 27-30.)

Defendants have indicated that recordings of outbound collection calls were generally deleted after 30 days pursuant to their usual recording retention policy. (SDF ¶ 43.) Notably, Defendants suspended these policies as a result of the filing of an earlier putative class action asserting CIPA claims against Defendants, Bailey v. Household Finance Corporation of California, United States District Court, Southern District of California, Case No. 3:10-cv-0857-WQH-RBB. On May 20, 2010, the Bailey Court issued an evidentiary preservation protocol ("Bailey Protocol") under which Defendants were only required to record five randomly-selected calls per day at each of their twenty-eight call centers. (SUF ¶ 15; Declaration of Elizabeth J. Arleo in Support of PSJ Mot. ("Arleo PSJ Decl.") Ex. 2, Docket No. 220-4.) Under the Bailey Protocol, Defendants could continue to purge all other recordings pursuant to their regular retention protocols. (Id.) By November 7, 2011, 150,000 calls had been preserved under the Bailey Protocol. (SUF ¶ 16.) The parties settled the Bailey litigation on March 8, 2012. (Rao PSJ Decl. Ex. 5.) Consequently, Defendants suspended the Bailey Protocol and resumed their normal recording retention protocols "in or about April 2012." (SUF ¶ 17.)

Prior to the dismissal of the Bailey litigation, Plaintiffs' counsel attempted to prevent Defendants from abandoning the Bailey Protocol.[5] On March 7, 2012, Plaintiffs'

[4] These recordings were made for quality control and customer service purposes. (SDF ¶ 42.) A selection of these recordings were reviewed by Card Services supervisory personnel. (SUF ¶ 8.)

[5] Plaintiffs' counsel in this case also represented the plaintiff in the Bailey litigation.

counsel sent a letter to Defendants' counsel demanding the continued implementation of the Bailey Protocol despite the imminent dismissal of the Bailey litigation. (Declaration of Elizabeth J. Arleo in Support of Sanctions Mot. ("Arleo Sanctions Decl.") Ex. 1, Docket No. 219-1; SDF ¶ 48.) The relevant language in the letter is as follows:

> You are hereby informed that the same counsel that represented Ms. Bailey anticipate filing a new lawsuit on behalf of other putative class members against HFC's subsidiaries, HSBC Card Services Inc., and HSBC Technology Services, for violations of the Rosenthal Fair Debt Collection Practices, Cal. Civil Code § 1788 et seq., and the Invasion of Privacy Act, Cal. Penal Code § 630 et seq. We demand that your clients continue all evidence preservation efforts undertaken in the Bailey matter.

(Arleo Sanctions Decl. Ex. 1.) Defendants' counsel sent a letter in response on March 12, 2012 indicating their belief that Defendants are under no continued obligation to bear the cost of the Bailey Protocol given that the Bailey case has been dismissed. (Arleo Sanctions Decl. Ex. 2.) Defense counsel further noted that Plaintiffs' counsel failed to identify any client for this anticipated class action in the March 7, 2012 letter. (Id.) Plaintiffs' counsel sent another letter to Defendants' counsel on April 3, 2012. (Supplemental Declaration of Elizabeth J. Arleo in Support of Sanctions Reply ("Supp. Arleo Sanctions Decl.") Ex. 1, Docket No. 238-1; SDF ¶ 50.) This letter did not mention the Bailey Protocol. However, it did identify Fanning and Jabbar as potential plaintiffs with CIPA claims against Defendants and offered to enter into pre-litigation settlement negotiations regarding these claims.[6] (Id.) In addition, the letter expressed their intent to file a class action asserting these claims in the event that meaningful settlement negotiations did not commence within five days. (Id.)

Plaintiffs have filed a motion for sanctions for spoliation of evidence based upon the Defendants' failure to maintain the Bailey Protocol. (Sanctions Mot. 1.) Additionally, Plaintiffs have filed a Motion for Partial Summary Judgement on the issue of Plaintiff Fanning's standing.[7] (PSJ Mot. 1.)

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[6] The letter also identified Allison Taplin as a client. (Supp. Arleo Sanctions Decl. Ex. 1.) She is no longer a named plaintiff in this litigation.

[7] During the litigation, the Defendants repeatedly indicated their intention of challenging Fanning and Jabbar's standing. On November 19, 2013, this Court stayed the action except for

II. Legal Standard

A. Motion for Sanctions for Spoliation

Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence, in pending or future litigation." Kearney v. Foley & Lardner, LLP, 590 F.3d 638, 649 (9th Cir. 2009). A party that has despoiled evidence can be sanctioned by a district court under two sources of authority: "the inherent power of federal courts to levy sanctions in response to abusive litigation practices, and the availability of sanctions under Rule 37 against a party who fails to obey an order to provide or permit discovery." Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir. 2006) (internal quotations and citations omitted). In this case, Defendants have not asserted that Defendants failed to obey a discovery order. Accordingly, this Motion relies on the Court's inherent authority to levy sanctions.

The obligation to preserve relevant evidence attaches when litigation is "pending or reasonably foreseeable." Sunrider Corp. v. Bountiful Biotech Corp., 2010 WL 4590766, at *29 (C.D. Cal. Oct. 8, 2010) (citing Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)); see also United States v. Kitsap Physicians Serv., 314 F.3d 995, 1001 (9th Cir. 2002) (finding no spoliation because the defendant was not on notice of a "future, specific" lawsuit). Courts in the Ninth Circuit generally agree that this duty is triggered "[a]s soon as a potential claim is identified." Apple, Inc. v. Samsung Elecs Co., 888 F. Supp. 2d 976, 991 (N.D. Cal. 2012) (citations omitted). This duty to preserve extends to evidence that parties knew or should have known was relevant or may be relevant to future litigation. Kitsap, 314 F.3d at 1001; Sunrider Corp., 2010 WL 4590766, at *29; see also Wm. T. Thompson v. Gen. Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984.) ("Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information."). Notably, a finding of bad faith is not required to justify a spoliation sanction. Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993).

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discovery and motions practice relating to the standing issue. (Order, Docket No. 199.)

"The court has broad discretion to fashion, on a case-by-case basis, an appropriate sanction for spoliation." Cyntegra, Inc. v. Idexx Laboratories, Inc., 2007 U.S. Dist. LEXIS 97417, at *4 (C.D. Cal. Sept. 21, 2007) (citing Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp., 982 F.3d 363, 367 (9th Cir. 1992). District courts may employ a variety of different sanctions in response to the spoliation of evidence, including monetary sanctions, evidentiary sanctions, civil contempt sanctions, and default judgment. See In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1066 (N.D. Cal. 2006). However, the Court's "inherent powers must be exercised with restraint and discretion." Advantacare Health Partners v. Access IV, 2004 U.S. Dist. LEXIS 16835, at *12 (N.D. Cal. Aug. 17, 2004) (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)). When selecting the appropriate sanction, the Court generally considers: "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party." Apple, 888 F. Supp. 2d at 992 (citing Nursing Home Pension Fund v. Oracle Corp., 254 F.R.D. 559, 563 (N.D. Cal. 2008). Spoliation sanctions should be "commensurate to the spoliating party's motive or degree of fault in destroying the evidence." Cottle-Banks v. Cox Comm'ns, Inc., 2013 WL 2244333, at *13 (S.D. Cal. May 21, 2013) (quoting Apple, 888 F. Supp. 3d at 992-93). Therefore, the Court may deny a request for harsh sanctions when the "degree of fault and level of prejudice were insufficient to justify the imposition of the sanctions." Apple, 888 F. Supp. 2d at 993.

B. Motion for Partial Summary Judgment

Summary judgment is appropriate where the record, read in the light most favorable to the nonmovant, indicates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). Summary adjudication, or partial summary judgment "upon all or any part of [a] claim," is appropriate where there is no genuine dispute as to any material fact regarding that portion of the claim. Fed. R. Civ. P. 56(a); see also Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim . . . .") (internal quotation marks omitted).

Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 248 (1986). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex, 477 U.S. at 322. A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. To demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . [T]he nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986) (citations and internal quotation marks omitted). In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255. Nevertheless, inferences are not drawn out of the air, and the opposing party must produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. If the moving party meets its burden, then the nonmoving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. See id. at 322–23. If the nonmoving party meets this burden, then the motion will be denied. Nissan Fire & Marine Ins. Co. v. Fritz Co., 210 F.3d 1099, 1103 (9th Cir. 2000).

III. Discussion

A. Sanctions for Spoliation

Plaintiffs argue that Defendants' deletion of the recordings preserved under the Bailey Protocol entitles them to sanctions for the spoliation of evidence. (Sanctions Mot. 1.) Plaintiffs request the Court to "order the use of adverse inferences deeming as established the facts that defendants electronically recorded credit card collection calls with plaintiff Fanning on October 7, 2010 and October 12, 2010." (Id.) Plaintiffs also request an order "precluding defendants from introducing evidence that plaintiffs' telephone conversations with its Card Services' representatives were not recorded." (Id.) Defendants contend that these requested sanctions are unjustified because they had no duty to preserve the recordings. (Sanctions Opp'n 1.)

1. Finding of Spoliation

The Court will first address whether the destruction of the Bailey Protocol recordings constituted spoliation. Defendants have a duty to preserve evidence it knew or should have known was relevant or may be relevant to pending or reasonably foreseeable litigation. Consequently, the first inquiry is when the instant litigation became reasonably foreseeable to Defendants.

Plaintiffs contend that the present litigation became reasonably foreseeable on March 7, 2012 when plaintiffs' counsel sent defendants' counsel a letter explaining that they "anticipate filing a new lawsuit on behalf of other putative class members [in the Bailey litigation]" and demanding the continued implementation of the Bailey protocol. (Arleo Sanctions Decl. Ex. 1; Sanctions Mot. 10-11.) Defendants claim that this letter was insufficient to trigger any duty to preserve because it does not indicate on whose behalf Plaintiffs' counsel asserts these alleged violations of CIPA and the Rosenthal Act. (Sanctions Opp'n 14-15.) Defendants argue that no "potential claim" can be identified without an ascertainable claimant. (Id.) However, any uncertainty regarding the "claimant" was clearly resolved by the letter sent by Plaintiffs' counsel on April 3, 2012, which identified Fanning and Jabbar as potential future plaintiffs alleging CIPA violations against Defendants for recording calls made between 2009 to 2011. (Supp. Arleo Sanctions Decl. Ex. 1.) The evidence before the court indicates that the Bailey Protocol recordings were destroyed "in or around April 2012."[8] (SUF ¶ 17.) The Court finds this sufficient to establish that the recordings were destroyed at a time when the instant litigation was reasonably foreseeable.[9]

[8] At one point in their Statement of Genuine Disputes of Material Fact, Defendants indicate that it is "undisputed" that the Bailey Protocol was suspended "in or about April 2012." (SDF ¶ 17.) Elsewhere, they assert that the Bailey recordings were deleted in mid-to-late March or April 2012. (Id. ¶ 53.) However, the evidence that they cite indicates that the recordings were deleted "in or about April 2012." (Defendant HSBC Card Services Inc.'s Responses to Plaintiffs' Standing Interrogatories, Arleo PSJ Decl. Ex. 9 at 163; Defendant HSBC Technology & Services (USA) Inc.'s Responses to Plaintiffs' Standing Interrogatories, Arleo PSJ Decl. Ex. 10 at 176.)

[9] Plaintiffs' also argue that the pendency of Afrasiabi v. HSBC Bank USA, N.A., United States District Court, Southern District of California, Case No. 3:12-cv-685-MMA-DHB, gave rise to a duty to preserve on the part of the Defendants. (Sanctions Mot. 10.) However, the Court agrees with Defendants that the filing of the Afrasiabi case is not relevant to the duty to preserve evidence relevant to this litigation. (Sanctions Opp'n 15.)

In order to establish spoliation, Plaintiffs must also demonstrate that Defendants' destroyed evidence that was potentially relevant to the reasonably foreseeable litigation. See Housing Rights Center v. Sterling, 2005 U.S. Dist. LEXIS 44769, at *10 (C.D. Cal. Mar. 3, 2005) ("[A] litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.") (citing Zubulake, 220 F.R.D. at 217). Defendants argue that Plaintiffs have failed to show that the recordings initially preserved under the Bailey Protocol were relevant to the present litigation. (Mot. 12-14.) Defendants emphasize that the probability that at least one of the two collection calls made to Fanning in October 2010 were recorded and retained under the Bailey Protocol is 1 in 18,000, or 0.056%.[10] (Id. at 7, 12-14.) However, the fact that the destroyed evidence may not have contained a relevant recording is not dispositive. The critical inquiry is whether the Defendants had "some notice that the documents were potentially relevant." Cyntegra, 2007 U.S. Dist. LEXIS 97417, at *8 (quoting Akiona v. United States, 938 F.2d 158, 161 (9th Cir. 1991)) (emphasis added). Here, the calls to Fanning were made during the time period that the Bailey Protocol was in place. Therefore, the recordings preserved during that time period were potentially relevant to his claims and they should not have been destroyed.[11] See, e.g., Kwon v. Costco Wholesale Corp., 2010 U.S. Dist. LEXIS 13614, at *7 n.1 (D. Haw. Feb. 17, 2010) (finding that the fact that the destroyed videotape may not have captured the relevant incident is irrelevant because the destroying party had been on notice that the videotape was "potentially relevant"); cf. Residential Funding, 306 F.3d at 109 (noting that holding victims of spoliation "to too strict a standard of proof regarding the likely contents of the destroyed evidence . . . would . . . allow parties who have . . . destroyed evidence to profit from that destruction") (internal citation and quotation marks omitted).

[10] While the Court concludes that the low probability that recordings of Fanning's calls were preserved under the Bailey Protocol does not preclude a finding of spoliation, the Court does find it to be relevant to the Court's determination of the appropriate sanction in this case.

[11] In their Sur-Reply, Defendants argue that the letters did not trigger a duty to preserve the Bailey Protocol recordings because those recordings were preserved solely for use in the Bailey litigation. (Def.'s Sur-Reply 2-3.) However, once Defendants were put on notice of the potential relevance of various Bailey Protocol recordings to this litigation, they had a duty to continue their preservation of those recordings. It is irrelevant that the initial preservation of the recordings was the consequence of another litigation.

Accordingly, the Court finds that the evidence supports a finding of spoliation.

2. Appropriate Sanction

The Court next considers what sanction should be imposed in light of Defendants' spoliation of the Bailey Protocol recordings. Plaintiffs request the Court to issue and order "deeming as established the facts that defendants electronically recorded credit card collection calls with plaintiff Fanning on October 7, 2010 and October 12, 2010." (Sanctions Mot. 1.) This requested sanction would essential constitute summary judgment on an element of Fanning's CIPA claim.[12] Given the dispositive nature of that requested sanction, the Court concludes that it constitutes a default sanction. See, e.g., Peschel v. City of Missoula, 664 F. Supp. 2d 1137, 1145-46 (D. Mont. 2009) (characterizing plaintiff's request for the court to designate as established a disputed fact as a default sanction because it functionally grants summary judgment of an issue); Brodle v. Lochmead Farms, Inc., 2011 U.S. Dist. LEXIS 119000, at *6 (D. Or. Oct. 13, 2011) (same).

In the Ninth Circuit, default sanctions are only appropriate when "a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings." Leon, 464 F.3d at 958 (quoting Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 348 (9th Cir. 1995)). Such sanctions require a showing of "willfulness, bad faith, and fault." Reinsendorf v. Skechers U.S.A., 296 F.R.D. 604, 627 (C.D. Cal. 2013) (citing Connecticut General Life Ins. Co. v. New Images of Beverly Hills, 482 F.3d 1091, 1096 (9th Cir. 2007)). The imposition of such drastic sanctions require the Court to consider the following five factors: (1) the existence of extraordinary circumstances, (2) the presence of willfulness, bad faith, or fault by the offending party, (3) whether lesser sanctions would be more appropriate, and (4) the relationship between the sanction, misconduct, and matters in controversy. Halaco Eng'g Co. v. Costle, 843 F.2d 376, 380 (9th Cir. 1988). The Court also has discretion to consider the prejudice to the non-offending party. Id.

[12] This requested sanction is not an adverse inference sanction as suggested by Plaintiffs. An adverse inference is a sanction carried out as an instruction to the trier of fact that "evidence made unavailable by a party was unfavorable to that party." Nursing Home Pension Fund, 254 F.R.D. at 563. This is fundamentally different than a sanction deeming a particular fact established.

The Court concludes that Plaintiffs have failed to satisfy the Ninth Cirucit's demanding standard for default sanctions. The evidence does demonstrate that the Defendants consciously destroyed evidence potentially relevant to the merits of this litigation. Leon, 464 F.3d at 959 ("A party's destruction of evidence qualifies as willful spoliation if the party has 'some notice that the documents were potentially relevant to the litigation before they were destroyed.'") (citing Kitsap, 314 F.3d at 1001); In re Napster, 462 F. Supp. 2d at 1075 ("In the context of spoliation of evidence, a nexus [between the misconduct and the matters in controversy] exists if the party destroyed documents that were relevant to discovery requests."). However, the actual prejudice caused to Plaintiffs by the deletion of the Bailey recordings is lessened by the fact that the probability that Plaintiffs' calls were actually preserved during the Bailey Protocol is considerably low. See SEC v. Mercury Interactive LLC, 2012 WL 3277165, at *8 (N.D. Cal. Aug. 9, 2012) ("To determine prejudice in the context of spoliation, the test 'is whether there is a reasonable possibility, based on concrete evidence, that access to the evidence which was destroyed or altered, and which was not otherwise obtainable, would produce evidence favorable to the objecting party.'") (quoting Hamilton v. Signature Flight Support Corp., 2005 WL 3481423, at *8 (N.D. Cal. Dec. 20, 2005)). In addition, the Court does not find that Plaintiffs have sufficiently demonstrated "extraordinary circumstances" that warrant default sanctions. In re Napster, 462 F. Supp. 2d at 1071 ("In the Ninth Circuit, extraordinary circumstances exist when "there is a pattern of disregard for Court orders and deceptive litigation tactics that threaten to interfere with the rightful decision in the case.") (internal citations and quotation marks omitted). While Defendants appear to have deleted the Bailey recordings despite their knowledge of their potential relevance to this litigation, the evidence does not establish a pattern of deceptive litigation tactics that warrant a harsh default sanction. Lastly, as explained below, the Court finds that a lesser sanction more appropriately responds to Defendants' spoliation of the Bailey recordings.

While Plaintiffs are not entitled to a default sanction, the Court does find that an evidentiary sanction is warranted. This Court has "the inherent discretionary power to make appropriate evidentiary rulings in response to the destruction or spoliation of evidence." Akiona, 938 F.3d at 161. For the same reasons discussed above, the Court does not find that the nature of the misconduct and the degree of prejudice suffered by Plaintiffs in this case as a result of the spoliation justifies the evidentiary preclusion sanction requested by Plaintiffs. However, the Court does find that the circumstances of the spoliation in this case warrant shifting the burden of proof regarding the disputed

issue of whether Fanning's calls were recorded.[13] Therefore, Plaintiffs no longer carry the burden of demonstrating that a call to Fanning was recorded. Instead, Defendants bear the burden of proving that the October 2010 calls were not recorded. The Court finds that this lesser sanction will appropriately place the risk of an erroneous judgment caused by the destruction of the evidence on the party who created the risk and appropriately deter similar conduct in the future.

B. Partial Summary Judgment on Fanning's Standing

Plaintiffs also move for partial summary judgment on the issue of whether Fanning has standing to pursue this litigation.[14] (PSJ Mot. 1.) At numerous points in this litigation, Defendants have indicated their intention of challenging Fanning's standing to pursue this litigation against Defendants. (See, e.g., Opposition of Defendants to Motion of Stefan O. Lindgren to Intervene 1, Docket No. 184.) Given that standing is a fundamental threshold jurisdictional inquiry, this Court stayed the action except for discovery and motions practice related to the standing issue on November 19, 2013. (Order, Docket No. 199.) Consequently, Plaintiffs have now filed this Motion to resolve the contested standing issue.

This Court's Article III jurisdiction over the case "depends on the existence of a 'case or controversy.'" GTE Cal., Inc. v. FCC, 39 F.3d 940, 945 (9th Cir. 1994). A "case or controversy" exists only if a plaintiff has standing to bring the claim. Nelson v. NASA, 530 F.3d 865, 873 (9th Cir. 2008), rev'd on other grounds , NASA v. Nelson, 131 S. Ct. 746 (2011). To have standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that their injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Nelson, 530 F.3d at 873 (9th Cir. 2008).

[13] Jabbar's calls with Defendants occurred in 2009 (PSJ Mot. 1 n.1), prior to the implementation of the Bailey Protocol. Consequently, this evidentiary sanction does not apply with respect to the fact question of whether Jabbar's calls were recorded.

[14] The motion for partial summary judgment does not raise the issue of Plaintiff Jabbar's standing. (PSJ 1 n.1.)

As the party seeking to invoke federal jurisdiction, Fanning bears the burden of demonstrating that he has standing in this action. Lujan, 504 U.S. at 561. "The plaintiff bears the burden of proof to establish standing 'with the manner and degree of evidence required at the successive stages of the litigation.'" Oregon v. Legal Servs. Corp., 552 F.3d 965, 969 (9th Cir. 2009) (quoting Lujan, 504 U.S. at 561). "To prevail on a Federal Rule of Civil Procedure 56 motion for summary judgment . . . a plaintiff must establish that there exists no genuine issue of material fact as to justiciability or the merits." Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 329 (1999); cf. Central Delta Water Agency v. United States, 306 F.3d 938, 947 (9th Cir. 2002) (noting that the plaintiffs only need to show that "there is a genuine issue of material fact as to the standing elements" to defeat the defendants's summary judgment motion on the issue of standing).

Fanning seems to assume, at least implicitly, that the Court granted his sanctions motion, and awarded the requested relief by deeming the October 2010 calls to have been recorded. (PSJ Mot. 12.) Clearly, the Court's analysis would be far simpler if that were the case. But the Court declined to deem the calls recorded. (See Section III.A.2, supra.) Thus, the Court turns to the usual analysis of whether there is a genuine question of material fact as to the standing elements.

The Court finds that the existence of an electronic recording of a call between Fanning and Card Services representatives is obviously necessary to proving that Fanning has suffered an injury-in-fact.[15] Here, whether such a recording ever existed is a hotly disputed factual issue. Defendants emphasize that no recording of these calls has been found during the discovery process. (See, e.g., PSJ Opp'n 9-10.) However, it is undisputed that Card Services agents did engage in telephone conversations with Fanning during outbound collection calls made on October 7, 2010 and October 12, 2010 and that between 3% and 30% of calls made by these agents were recorded. (SUF ¶¶ 5, 19, 22.) Under these facts, it is definitely possible that one of Fanning's October 2010 telephone conversations were recorded. Given that there is a genuine dispute of material fact as to

[15] Under section California Penal Code section § 632(a), "[e]very person who, intentionally and without the consent of all parties to a confidential communication, . . . records the confidential communication" violates the statute.

whether Fanning's call was recorded,[16] the Court denies Fanning's motion that for partial summary judgment on the standing issue.[17]

IV. Conclusion

For the forgoing reasons, Plaintiffs' Motion for Sanctions is **GRANTED** and Plaintiffs' Motion for Partial Summary Judgment is **DENIED**.

IT IS SO ORDERED.

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[16] Given that Fanning has not demonstrated an absence of a genuine dispute with respect to whether his call was recorded, the Court need not consider his arguments regarding the confidentiality of his communications or his lack of consent to the recordings. (PSJ Mot. 9-14.)

[17] The Court emphasizes that this denial of Fanning's motion does not necessarily mean that Fanning can no longer continue as a plaintiff in this litigation. If Defendants were to bring a motion for partial summary judgment on the issue of standing, Fanning would only need to show a genuine dispute as to the standing elements. See In re ATM Fee Antitrust Litig., 686 F.3d 741, 747 (9th Cir. 2010) ("[W]hen standing is challenged on summary judgment, "[t]he court shall [not] grant summary judgment if the movant shows that there is [a] genuine dispute as to any material fact....") (citations omitted). He would not need to conclusively prove that his call was in fact recorded. Indeed, to conclude otherwise would require Fanning to prove his CIPA claim in order to have standing to assert that claim.