

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

LUIS SOUSA,

Plaintiff,

v.

SEEKONK SCHOOL COMMITTEE;  
RICH DROLET, in his personal and  
official capacities; KIMBERLY SLUTER,  
in her personal and official capacities,

Defendants.

Civil Action No. 1:22-cv-40120-IT

**MOTION FOR AN  
ADVERSE INFERENCE**

**REQUEST FOR ORAL ARGUMENT**

Defendants spoliated their surveillance footage of Plaintiff's January 5, 2022, protest. This video would have shown events occurred as Plaintiff said, not as Defendants tell it. Thus, per Fed. R. Civ. P. 37(e) and the authority of the Court, Plaintiff Luis Sousa files this motion that the Court make an adverse inference in consideration of the pending motion for preliminary injunction and other pretrial matters and instruct the jury as to the same at trial. This motion is based on all the pleadings and papers on file herein and the attached Memorandum of Points and Authorities and any further argument and evidence as may be presented at hearing.

**REQUEST FOR ORAL ARGUMENT**

Pursuant to L.R. 7.1(d), Plaintiff hereby requests oral argument on this motion. A hearing may facilitate this Court's understanding of the factual and legal issues given the numerous disputes at issue.

WHEREFORE, Plaintiff respectfully requests this Honorable Court make an adverse inference that the spoliated surveillance footage would not have show Mr. Sousa yelling and banging on a window on January 5, 2022, and to instruct the jury as to the same.

Dated: December 16, 2022.

Respectfully Submitted,

/s/ Marc J. Randazza

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**LOCAL RULE 7.1(a)(2) CERTIFICATION**

I, Marc J. Randazza, counsel for Plaintiff in the above-captioned matter, hereby certify that, pursuant to Rule 7.1(a)(2) of the Local Rules of the United States District Court of Massachusetts, I conferred with Attorney Hamel, counsel for the Defendants, by phone on December 15, 2022 and again on December 16, 2022. Counsel for Defendants intend to oppose this Motion.

/s/ Marc J. Randazza  
Marc J. Randazza

**CERTIFICATE OF SERVICE**

I hereby certify that on December 16, 2022, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Marc J. Randazza  
Marc J. Randazza

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Civil Action No. 1:22-cv-40120-IT

**MEMORANDUM OF LAW IN SUPPORT  
OF PLAINTIFF’S MOTION FOR AN  
ADVERSE INFERENCE**

A significant factual dispute exists in this case, which the Court must act on in connection with the upcoming December 22, 2022, hearing and the remainder of this litigation. Plaintiff has offered into evidence a video of himself protesting outside the January 5, 2022, closed-session meeting of Defendant Seekonk School Committee. Doc. No. 27-3. Defendant Sluter, reiterated at times by the other defendants, has stated that Plaintiff was yelling and banging on windows, which does not appear in Plaintiff’s video. Defendants had their own security video footage of this event, but they spoliated this significant evidence. Per Fed. R. Civ. P. 37(e) and traditional spoliation doctrine, this Court should take an adverse inference about the contents of that deleted video footage in evaluating the pending motion for preliminary injunction (Doc. No. 28) (and for all other pre-trial purposes where relevant) and instruct the jury to do the same at trial.

**1.0 BACKGROUND**

On January 5, 2022, Sousa arrived at a Seekonk School Committee (“Committee”) meeting with the intention of addressing the Committee during Public Speak. *See* Declaration of Luis Sousa (“Sousa Decl.”), Doc. No. 62-1, at ¶ 4. When Sousa arrived, the door was locked. *Id.* at ¶ 5; *see also* First Amended Complaint (“FAC”), Doc. No. 27 at ¶¶ 8-16. Sousa observed that the

Committee meeting was being held inside the Superintendent’s office. Sousa Decl. at ¶ 6; *see also* Luis Sousa Declaration, Doc. No. 57-2 at ¶ 5.

Sousa turned on his cell phone to record his protest and began protesting. Sousa Decl. at ¶ 7. Sousa recorded his entire January 5 Protest. *Id.* Sousa can be heard saying, “Why are we not allowed at the meeting? You canceled two meetings. Why can’t we go?” *See* Recording of Jan. 5, 2022 Incident, FAC Ex. 3, Doc. No. 2-3 at 0:00 – 0:07; Sousa Decl. at ¶ 8. Sousa then walked up to the window and continued to record. Defendants then left the Superintendent’s office. *Id.* at 0:09-0:41 *see also* Sousa Decl. at ¶ 9. As Defendants left the office, Sousa turned off his camera and walked to his car. *Id.* at 0:41-0:44; *see also* Sousa Decl. at ¶ 10.

Soon thereafter, police officers arrived. *See* Jan. 5, 2022 Police Report, FAC Ex. 4, Doc. No. 27-4; *see also* FAC at ¶¶ 11-16. Defendant Kimberly Sluter falsely told police that Sousa was “banging on the windows” and “screaming.” Doc. No. 27-4 at 3. No other Committee member corroborated these allegations. Sousa Decl. at ¶¶ 13-15. Officers asked if Sousa had threatened anyone. Doc. No. 27-4. “No one could recall any direct threats[.]” *Id.* The police reported Sousa as calm and respectful. The police report noted “No Crime Involved.” Doc. No. 27-4 at 2; Sousa Decl. at ¶¶ 16-18. Sousa recorded his entire protest, and there was no “banging on windows” before the recording began. Sousa Decl. at ¶ 19; Doc. No. 57-2 at ¶ 5.

On Jan. 10, 2022, Drolet wrote to Sousa threatening to issue a no trespass order because Sousa’s “behavior on January 5” allegedly caused a “disturbance.” *See* Jan. 10, 2022 No Trespass Order, Doc. No. 27-5 at 2; Doc. No. 57-2 at ¶ 6; Sousa Decl. at ¶ 20. On Jan. 18, Sousa and Drolet met. Sousa recorded that meeting. Sousa Decl. at ¶ 21. Drolet affirmed to Sousa that there was no banging on the windows. *See* Sousa Decl. at ¶ 22; *see also* Recording of Jan. 18, 2022, Meeting,

FAC Ex. 6, Doc. No. 27-6 at 3:02 (“One thing I wanted to clarify, I made sure in the letter that it didn’t say you were banging or screaming.”)<sup>1</sup>

In a September 27, 2022, letter, Drolet threatened to issue a permanent no trespass order against Sousa for his conduct, *inter alia*, on January 5, 2022. Doc. No. 27-10 at 2. On October 3, 2022, Drolet met with Sousa. *See* Recording of Meeting October 3, 2022, FAC Ex. 11, Doc. No. 27-11; Sousa Decl. at ¶ 28. During the meeting, Drolet demonstrated shifting narratives by now claiming that Sousa was “screaming” during his January 5 protest. Doc. No. 27-11 at 1:17-2:23; Sousa Decl. at ¶ 31. On Oct. 4, 2022, Drolet unilaterally banished Sousa from school property based, in part, on his January 5 protest. *See* Oct. 4, 2022, No Trespass Order, FAC Ex. 13, Doc. No. 27-13 at 2; *see also* Doc. No. 57-2 at ¶ 10; *see also* Sousa Decl. at ¶ 32.

Security surveillance footage of the January 5, 2022, events existed. *See* Declaration of Marc J. Randazza (“Randazza Decl.”), Doc. No. 62-2 at ¶ 4. Defendants destroyed that security footage in March 2022; despite there being a pending criminal and potentially civil matter, the Defendants destroyed the tape. *Id.* at ¶ 7.

On November 11, 2022, Plaintiff filed his First Amended Complaint (“FAC”) in this action. Doc. No. 27. On November 11, 2022, Plaintiff filed his Renewed Emergency Motion for a Temporary Restraining Order and for a Preliminary Injunction. Doc. Nos. 28-29. Both the FAC and the preliminary injunction motion rely on Sousa’s recording and version of the facts being what actually happened.

Defendants rely on their counter narrative. Drolet filed an affidavit, under penalty of perjury, that Sousa “yelled” during the January 5, 2022, protest, though he previously used the term “screamed”. Doc. No. 16-1 at ¶ 7. Defendants utilized Drolet’s affidavit in their opposition

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<sup>1</sup> Defendant Sluter, however, appears to continue to maintain that this is not true.

to the original motion for injunctive relief and admitted the January no-trespass order was issued on account of that version. Doc. No. 16 at 7-8. In their Answer to the FAC, Defendants repeatedly deny that Sousa’s characterization of the events of January 5, placing that question of fact at issue. *See, e.g.*, Doc. No. 43 at ¶¶ 10, 11, 16, 23, 25 & 47. And, in opposition to the pending motion for preliminary injunction, Defendants again relied on Drolet’s affidavit. Doc. No. 41 at 11.

It is anticipated that Sluter and the other defendants will continue to press her false claim that Mr. Sousa was banging on the windows. On December 9, 2022, the Court observed there is a factual dispute regarding whether Sousa was pounding on windows that will need to be resolved. Doc. No. 55 at 19:11-21:2. In response, Sousa filed a declaration attesting that his video was complete and proof that the events occurred per his statements in this case. Sousa Decl. at ¶ 7.

To further address the factual dispute, Plaintiff sought to obtain the best evidence of the event in Defendants’ possession. On December 13, 2022, Sousa sought early discovery on the basis that there is a video camera that covers the area where this incident took place. Doc. No. 58. On December 15, 2022, at 2:09 PM, Counsel for the Defendants informed the undersigned that the footage had been destroyed pursuant to a policy that the footage is destroyed after 60 days. Randazza Decl. at ¶ 7.

## 2.0 ARGUMENT

The Court must make an adverse inference in considering the motion for preliminary injunction and, where relevant, for all other pretrial purposes, and it must instruct the jury as to the same at trial. Defendants had an obligation to preserve the video evidence, but they spoliated it.

Rule 37(e) of the Federal Rules of Civil Procedure provides that “[i]f electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court” may “order measures”, “presume that the lost information

was unfavorable to the [spoliating] party”, and “instruct the jury that it may or must presume the information was unfavorable to the [spoliating] party”. *See* Fed. R. Civ. P. 37(e).<sup>2</sup> The rule requires that where there is prejudice to the non-spoliating party, curative measures may be taken, with the presumptions and adverse inferences made where there was an intent to deprive the non-spoliating party of litigation use of the material. *Id.*

Where a proper evidentiary foundation has been laid, as here, the court may infer that the destruction of video footage of a contested event showed evidence that was unfavorable to the party that destroyed it. *See Booker v. Mass. Dep't of Pub. Health*, 612 F.3d 34, 45 (1st Cir. 2010) (quoting *Testa v. Wal-Mart Stores, Inc.*, 144 F.3d 173, 177 (1st Cir. 1998)). As further explained:

“This permissive negative inference springs from the commonsense notion that a party who destroys a document . . . when facing litigation, knowing the document's relevancy to issues in the case, may well do so out of a sense that the document's contents hurt his position.”

*Hankey v. Town of Concord-Carlisle*, 136 F. Supp. 3d 52, 71 (D. Mass 2015) (citing *Testa*, 144 F.3d at 177).

The proper evidentiary foundation here is that 1) there was footage of the incident, and 2) Defendants destroyed it knowing criminal or civil proceedings arising therefrom were likely. Defendants pursued a criminal complaint when they called the police on January 5. They issued two no-trespass orders on account of it—including one when the video footage still existed. If only one of these events, the criminal complaint or the no trespass order, were good faith actions, the Defendants would have preserved the video of this incident. Defendants refused, pre-suit, to back down with respect to their claim that Sousa was banging on the windows.

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<sup>2</sup> The rule also permits the Court to enter default judgment, but Plaintiff believes that is a disproportionate response. However, if further discovery violations occur, Plaintiff reserves the right to seek entry of a default judgment.

They had a duty to preserve the video. This “banging on the windows” was the predicate act for a request for the police to come and arrest Sousa. Footage showing the events would establish guilt or innocence on Sousa’s part. It is common sense that someone making a criminal complaint would keep footage of the alleged criminal activity, at least for more than 60 days.

It would also be common sense that if Drolet issued a no trespass order, he would have preserved his evidence of wrongdoing as well.

If it was destroyed, this implies that the footage does not support the Defendants’ story.

Accordingly, the Court and the jury should infer that the footage would support Mr. Sousa’s rendition of the events.

Dated: December 16, 2022

Respectfully Submitted,

/s/ Marc J. Randazza

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Luis Sousa

**CERTIFICATE OF SERVICE**

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/s/ Marc J. Randazza  
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