

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 AL OTRO LADO, INC., et al.,
12 Plaintiffs,

13 v.

14 CHAD F. WOLF, Acting Secretary, U.S.
15 Department of Homeland Security, in his
16 official capacity, et al.,

17 Defendants.

Case No.: 3:17-cv-02366-BAS-KSC

**REPORT AND RECOMMENDATION
FOR ORDER GRANTING IN PART
AND DENYING IN PART PLAINTIFFS'
MOTION FOR SANCTIONS**

[Doc. No. 549]

18 Before the Court is the parties' Joint Motion for Determination of Discovery Dispute
19 Concerning Spoliation Sanctions (the "Joint Motion" or "Jt. Mot."). Doc. No. 548 (sealed);
20 Doc. No. 549 (redacted, public version). In the Joint Motion, plaintiff requests evidentiary
21 sanctions be imposed against defendants for the destruction of handwritten meeting notes.
22 Because the requested sanctions may affect the conduct of the trial in this matter, the
23 undersigned Magistrate Judge makes this Report and Recommendation to the Honorable
24 Cynthia A. Bashant pursuant to 28 U.S.C. § 636 and Civ.LR 72.1. *See Dong Ah Tire &*
25 *Rubber Co., Ltd. v. Glasforms, Inc.*, Case No. C 06-3359 JF (RS), 2009 WL 1949124, at
26 *10 (N.D. Cal. July 2, 2009) (noting that the "precise contours" of evidentiary sanctions
27 "must be left to" the judge presiding over the trial). Having carefully considered the
28 ///

1 parties' submissions and the arguments of counsel, and for the reasons set forth below, the
2 Court **RECOMMENDS** that plaintiffs' request for sanctions be **GRANTED IN PART**
3 and **DENIED IN PART**. The Court will address the parties' request to seal confidential
4 exhibits attached to the Joint Motion, and portions of the Joint Motion that reveal
5 confidential information, by separate Order. *See* Doc. Nos. 547, 677.

6 I. BACKGROUND

7 Plaintiffs' underlying claims in this case arise out of defendants' implementation of
8 the so-called "Turnback Policy," which plaintiffs assert defendants wrongfully
9 implemented to discourage individuals from seeking asylum in the United States. *Jt. Mot.*
10 at 4; *see also* Doc. No. 189 at ¶¶ 3, 5, 72-83. Certain aspects of the Turnback Policy are
11 referred to as "queue management" or "metering." *Jt. Mot.* at 4.¹

12 The instant dispute concerns handwritten notes taken by Randy Howe and Todd
13 Owen during daily meetings with leadership personnel at the U.S. Customs and Border
14 Protection's ("CBP") Office of Field Operations ("OFO"), during which queue
15 management, metering and/or the Turnback Policy may have been discussed. *Id.* at 4-6, 8,
16 19-20. To remedy the destruction of the meeting notes, plaintiffs state the "proper
17 sanction" is for the Court to "adopt a rebuttable presumption that (a) at the daily OFO
18 leadership meeting, Mr. Owen and Mr. Howe instructed CBP officers to turn back asylum
19 seekers who were arriving at ports of entry on the U.S.-Mexico border and (b) the notes
20 taken by Mr. Owen and Mr. Howe would show that the [T]urnback [P]olicy is based on
21 pretext." *Id.* at 13.

22 Defendants admit that Messrs. Owen and Howe, two senior officials at OFO,
23 destroyed the notes they took during these briefings. *Id.* at 20-21. However, they argue the
24 requested rebuttable presumption is not warranted, because plaintiffs have failed to
25

26
27 ¹ Citations herein are to the Court's ECF-generated page numbers, except for witness and counsel
28 declarations, citations to which are to numbered paragraphs.

1 demonstrate both that the spoliated evidence was relevant to their claims, and that they
2 were prejudiced by the spoliation. *Id.* at 23-28.

3 **II. LEGAL STANDARD**

4 The law imposes upon litigants “a duty to preserve evidence which [they] know[] or
5 reasonably should know is relevant to” pending or reasonably anticipated legal action. *In*
6 *re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1067 (N.D. Cal. 2006). Once the
7 duty to preserve evidence is triggered, a party must “preserve all relevant documents
8 related to the litigation.” *Id.* at 1070. Litigants need not preserve “every shred of paper,”
9 but they must take care not to destroy “unique, relevant evidence that might be useful to an
10 adversary.” *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003). A
11 party’s “failure to preserve documents or things for another’s use as evidence in pending
12 or reasonably foreseeable litigation” is known as spoliation. *Compass Bank v. Morris*
13 *Cerullo World Evangelism*, 104 F. Supp. 3d 1040, 1052 (S.D. Cal. 2015).

14 The Court may sanction a party who has spoliated evidence in the exercise of its
15 inherent powers, or under Federal Rule of Civil Procedure 37. *See id.* at 1052-53 (noting
16 these “two sources of authority” for imposing spoliation sanctions). “A trial court’s
17 discretion in selecting the form of a spoliation sanction is broad, and can range from
18 comparatively minor sanctions, such as awarding attorney’s fees, to more severe sanctions,
19 such as dismissal.” *Rockman Co. (USA), Inc. v. Nong Shim Co., Ltd.*, 229 F. Supp. 3d
20 1109, 1121 (N.D. Cal. 2017). In exercising this discretion, the Court should consider “(1)
21 the degree of fault of the party who altered or destroyed the evidence; (2) the degree of
22 prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will
23 avoid substantial unfairness to the opposing party.” *Id.* at 1122 (citation omitted).

24 The Court may impose sanctions for spoliation even in the absence of bad faith. *See*
25 *Lofton v. Verizon Wireless (VAW) LLC*, 308 F.R.D. 276, 288 (N.D. Cal. 2015). Indeed,
26 even “simple notice” of the evidence’s “potential relevance to the litigation” is a sufficient
27 basis to impose sanctions. *Id.* (quoting *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir.
28 1993)). “However, a party’s motive or degree of fault is relevant to what sanction, if any,

1 is imposed.” *In re Napster*, 462 F. Supp. 2d at 1066-67. As a rule, “courts should
2 choose “the least onerous sanction corresponding to the willfulness of the destructive act
3 and the prejudice suffered by the victim.”” *Id.*

4 III. DISCUSSION

5 **A. The Spoliated Meeting Notes**

6 The Court begins its discussion with a description of the documents at issue. Mr.
7 Howe testified at his deposition that each weekday at 8:15 a.m. he and others in operations
8 leadership met with Mr. Owen to “brief” him “on the daily happenings of the last 24-hour
9 period.”² Deposition of Randy Howe (“Howe Depo.”), Doc. No. 549-3 at 14. Mr. Howe
10 declares that “[t]he intent of these daily meeting was to brief [Mr.] Owen on significant
11 events that occurred at all ports of entry,” and the operations meetings were “relatively
12 informal.” Declaration of Randy Howe (“Howe Decl.”), Doc. No. 549-10, ¶ 3. The topics
13 for each meeting varied and the discussion “consisted of a high-level overview of
14 significant events and issues.” *Id.*, ¶¶ 3-4.

15 Messrs. Owen and Howe acknowledge that the topics of queue management
16 generally and metering specifically may have come up at the operations meetings. *See*
17 Declaration of Todd C. Owen (“Owen Decl.”), Doc. No. 549-9, ¶ 8; Deposition of Todd
18 Owen (“Owen Depo.”), Doc. No. 549-12, at 15-16; Howe Decl., ¶ 4; Howe Depo. at 16-
19 17. However, both deny that there was any deliberation related to metering or queue
20 management *per se* at the operations meetings. Mr. Howe states that because the daily
21 operations meeting was intended only to “provide a ... high-level snapshot” to Mr. Owen,
22 it would not have been the appropriate venue for “substantive discussion and decision-
23 making” regarding “the implementation of particular policies.” Howe Decl., ¶ 4. Mr.
24 Owen similarly describes the operations meetings as “an operational recap” of significant
25 events and issues over the preceding 24 hours. Owen Decl., ¶ 4. Mr. Owen further states
26

27
28 ² The Court refers to the daily 8:15 a.m. meetings of operations leadership as the “operations meetings.”

1 that “the purpose of these meetings is not to make substantive decisions or to have
2 substantive discussions about the implementation of particular policies.” *Id.*, ¶ 7.

3 Mr. Howe testified that in preparation for the operations meetings, he wrote down
4 on “loose-leaf paper” some “very basic words to trigger [his] mind” about matters about
5 which he was to “advise” Mr. Owen. Howe Depo. at 14-15. During the meetings, Mr.
6 Howe might then “make a little note” about anything he needed to discuss with his direct
7 reports, with whom he met every weekday at 9:00 a.m. – that is, immediately following
8 the 8:15 operations meeting.³ *Id.* at 15, 16. Once both meetings concluded, Mr. Howe’s
9 custom was to “place [the notes] in his shred bin.” *Id.* at 15. The day before Mr. Howe’s
10 January 2020 deposition, defendants’ counsel disclosed to plaintiffs’ counsel that they had
11 discovered Mr. Howe did not preserve his handwritten notes of the operations and staff
12 meetings, which was also confirmed in later-served interrogatory responses. *See*
13 Declaration of Katherine J. Shinnors (“Shinnors Decl.”), Doc. No. 549-8, ¶ 3; Doc. No.
14 549-5 at 4; Doc. No. 549-4 at 13.

15 Plaintiffs deposed Mr. Owen in December 2019, during which he was neither
16 questioned nor offered testimony about his own note-taking practices at the operations
17 meetings. *See generally* Doc. No. 549-12. He subsequently revealed, however, that during
18 the operations meetings he would “write down particular words or phrases to remind
19 myself to take future action” and to “jog [his] memory of particular follow up actions.”
20 Owen Decl., ¶ 10. Like Mr. Howe, Mr. Owen’s “standard practice” was to “discard” his
21 notes once any “appropriate follow up” had been completed. *Id.*, ¶ 11. Defendants
22 informed plaintiffs of the possibility that Mr. Owen failed to preserve his notes from the
23 operations meetings through an interrogatory response served in June 2020. *See* Doc. No.
24 549-4 at 13; Shinnors Decl., ¶ 6.

25 ///
26
27

28 ³ The Court refers to Mr. Howe’s daily meetings with his direct reports as the “staff meetings.”

1 A third witness, Todd Hoffman, also attended the operations meetings. Defendants
2 submit excerpts of Mr. Hoffman’s June 2020 deposition and his sworn declaration, which
3 reveal that Mr. Hoffman’s practice was to keep a “notebook” that he used to take notes at
4 any meetings he attended, including the operations meetings. *See* Declaration of Todd
5 Hoffman (“Hoffman Decl.”), Doc. No. 549-11, at ¶¶ 4-5; Doc. No. 549-13 (“Hoffman
6 Depo.”) at 8-9. When one notebook was full, he would start a new one. Hoffman Depo. at
7 5-6. Although Mr. Hoffman testified that it was “possible” that he attended operations
8 meetings during which queue management was discussed and did not take notes, his belief
9 was that “[his] notes are pretty comprehensive in that regard.” *Id.* at 9. Mr. Hoffman
10 preserved his notebooks (six in total) which were turned over to defendants’ counsel and,
11 ultimately, produced to plaintiffs in the litigation.⁴ *Id.* at 8; *see also* Hoffman Decl., ¶ 6;
12 *Jt. Mot.* at 21, 27.

13 **B. Litigation Holds**

14 In further support of their request for spoliation sanctions, plaintiffs assert that
15 “[d]efendants’ document preservation efforts” in this litigation “were woefully incomplete
16 and under-inclusive.” *Jt. Mot.* at 8. Plaintiffs note that although Mr. Owen was notified
17 of the need to preserve relevant documents in July 2017, Mr. Howe did not receive his first
18 litigation hold notice until December 2018 – more than a year after this litigation was
19 initiated, and more than a year after he assumed his OFO leadership role. *Id.*; *see also*
20 Howe Decl., ¶ 9 (stating that Mr. Howe first received a litigation hold notice in December
21 2018). Plaintiffs posit that the document destruction that occurred was the “predictable”
22 result of defendants’ “shoddy” document preservation. *Jt. Mot.* at 8.

23 In response, defendants stress that they have made “comprehensive preservation
24 efforts,” including “early and frequent distribution of litigation hold notices” – although
25 not, admittedly, to Mr. Howe. *Id.* at 28-29 (acknowledging that Mr. Howe did not receive
26
27

28 ⁴ The parties do not state whether any witness maintained or produced notes of the staff meetings.

1 a “formal litigation hold in a timely manner”). Defendants’ interrogatory responses
2 indicate that written litigation hold notices were distributed to custodians at OFO’s
3 headquarters in July 2017, June 2018, December 2018, and March 2020. Doc. No. 549-4
4 at 11-13. Without revealing their contents, the Court notes that the litigation hold notices
5 were broadly drafted and generally directed recipients to resolve any doubts on the side of
6 preservation. Defendants also issued identical litigation hold notices to custodians in field
7 offices in San Diego, Tucson, Laredo, and El Paso on multiple occasions beginning in July
8 2017 and continuing through June 2020. *See generally id.* at 14-24. In addition, verbal
9 notices and supplemental reminders of the obligation to preserve documents were given
10 sporadically from July 2017 through May 2020. *Id.* at 15.

11 Mr. Howe testified that he was advised by defendants’ counsel that he “needed to
12 preserve documents that were relevant to this case,” and that he “understood” that the
13 lawsuit related to defendants’ practices with respect to processing individuals at ports of
14 entry along the U.S.-Mexico border. Howe Depo. at 19-20. Although he received detailed
15 instructions as to the preservation of evidence related to this case through litigation hold
16 notices issued in December 2018 and again in March 2020, Mr. Howe stated he did not
17 “interpret” those notices as requiring him to preserve his meeting notes because the notes
18 did not “fall into the same category as the documents requiring preservation.” Howe Decl.,
19 ¶ 9. He explained at his deposition that he made the subjective determination that his notes
20 were not encompassed by the litigation holds because “[t]hey weren’t substantive notes ...
21 They were only things to trigger me. It was just little notes to me. Nothing in great
22 detail[.]” Howe Depo. at 20. Thus, he did not believe he was acting “in violation” of the
23 litigation hold when he shredded his meeting notes. *Id.*

24 Mr. Owen declares he received four litigation holds in the action, the first of which
25 he received in July 2017. Owen Decl., ¶11. Mr. Owen also “did not view [his meeting
26 notes] as substantive records” requiring preservation pursuant to those litigation holds
27 because they “[did] not convey the substance of any discussions or the substance of any
28 ///

1 particular incident.” *Id.* Thus, like Mr. Howe, Mr. Owen did not consider his notes
2 “responsive to the litigation holds in this case.” *Id.*

3 **C. Plaintiffs Are Not Entitled to the Requested Adverse Inferences at Trial**

4 As noted above, there is no dispute that Messrs. Howe and Owen destroyed
5 evidence. The parties’ dispute concerns what, if any, sanction for that spoliation is
6 warranted. Plaintiffs request an adverse-inference sanction, which is “among the most
7 severe sanctions” the Court can impose.⁵ *See Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 888
8 F. Supp. 2d 976, 994 (N.D. Cal. 2006) (further noting that “an adverse inference instruction
9 ... should not be imposed casually”) (citation omitted); *see also Compass Bank*, 104 F.
10 Supp. 2d at 1054 (noting that to “justify” an adverse inference instruction “the spoliating
11 party’s degree of fault and the resulting prejudice to the other party must be significant”).
12 Courts in this Circuit typically apply a three-part test, requiring the party seeking an adverse
13 inference from spoliation to show that: “(1) the party having control over the evidence had
14 an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with
15 a ‘culpable state of mind’; and (3) the evidence was ‘relevant’ to the party’s claim or
16 defense such that a reasonable trier of fact could find that it would support that claim or
17 defense.” *Apple*, 888 F. Supp. 2d at 989 (noting that “[t]rial courts have widely adopted”
18 this three-part test). “The purpose of an adverse inference is not to impose any moral blame
19 but to restore evidentiary balance and the risk should fall on the party responsible for the
20 loss.” *Victorino v. FCA US LLC*, 2017 WL 4541653, at *9 (S.D. Cal. Oct. 11, 2017)
21 (citation omitted).

22 ///

23
24
25 ⁵ The Court understands that this matter will be tried by bench trial, so the adverse inference would not
26 take the form of a jury instruction but would simply be adopted by the District Judge as she weighs the
27 evidence. *See, e.g., Matter of Hornblower Fleet, LLC*, Case No. 16CV2468 JM-LL, 2019 WL 1506870,
28 at **2-3 (S.D. Cal. Apr. 5, 2019) (collecting cases and recommending the adoption of an adverse inference
in a bench trial); *Perez v. United States Postal Serv.*, Case No. C12-00315 RSM, 2014 WL 10715267, at
*1 (W.D. Wash. Sept. 3, 2014) (imposing sanctions in bench trial and noting that “[t]he adverse inference
will ... be drawn by the Court in deciding this case”).

1 **1. Defendants Had an Obligation to Preserve the Meeting Notes**

2 The notes defendants’ witnesses took during the daily operations meetings were both
3 “unique” and – as will be addressed in greater detail below – “relevant” documents that
4 would have been “useful” to plaintiffs in developing their case, and should have been
5 preserved. *Zubulake*, 220 F.R.D. at 217; *see also* Howe Depo. at 23, 26 (Mr. Howe’s
6 testimony that his notes were a unique record of the operations meetings and the staff
7 meetings). Defendants do not advance any persuasive argument that the meeting notes
8 were exempt from this obligation – nor could they, as the notes are comfortably within the
9 scope of defendants’ litigation hold notice. *See* Doc. No. 682-1. The Court is not persuaded
10 by the witnesses’ “interpret[ation]” that the notes were not subject to the litigation hold
11 because they were not “substantive records.” Owen Decl., ¶ 11; *see also* Howe Decl.,
12 ¶¶ 8-9. Both witnesses acknowledge that the metering policy and operations at ports of
13 entry were discussed during the operations meetings. *See* Owen Depo. at 15; Howe Depo.
14 at 16. Having reviewed the litigation hold notice, which is broadly drafted and
15 unambiguously alerts recipients to the need to preserve potentially relevant evidence, the
16 Court finds no support for the witnesses’ interpretation that the meeting notes were
17 excepted from this instruction. And, the fact that another witness, Mr. Hoffman, preserved
18 and produced his own handwritten notes from the operations meetings reinforces the
19 Court’s reading of the plain terms of the litigation hold notice. The Court agrees with
20 plaintiffs that neither Mr. Howe nor Mr. Owen was permitted to “substitute their judgment
21 for that reflected in the litigation hold that they received.” Jt. Mot. at 6. Accordingly, the
22 Court finds that defendants had an obligation to preserve the handwritten meeting notes.

23 **2. Defendants Acted with a Culpable State of Mind**

24 The requisite culpable state of mind for purposes of spoliation and adverse inference
25 instructions does not require a finding of bad faith, but only a party’s “conscious disregard”
26 of its preservation obligations. *Apple*, 888 F. Supp. 2d at 998 (citation omitted). The
27 required culpable state of mind “includes negligence.” *Lewis v. Ryan*, 261 F.R.D. 513, 521
28 (S.D. Cal. 2009)).

1 Mr. Howe acknowledged at his deposition that he was instructed by defendants’
2 counsel “to retain information related to this case,” and that he understood the case related
3 to the processing and inspection of individuals at ports of entry along the U.S.-Mexico
4 border. Howe Depo. at 17, 19-20. Mr. Owen likewise admits to having received
5 instructions to preserve documents relevant to the litigation. Owen Decl., ¶ 11. Defendants
6 and their witnesses also concede that “implementation of queue management was
7 sometimes discussed at these meetings, from an operational perspective.” Jt. Mot. at 25;
8 *see also* Howe Depo. at 16; Owen Decl., ¶ 8. Regarding his practice of shredding his notes
9 from the operations meetings, Mr. Howe testified he did not believe he was violating his
10 attorneys’ instruction to preserve documents because the “notes weren’t substantive,” but
11 just “little notes to [himself]” to “remind” or “trigger” him to take any appropriate next
12 steps based on the discussion at the meeting. Howe Depo. at 20; *see also* Howe Decl., ¶ 7
13 (describing the notes as “one or two words that [he] would use to assist ... in recalling a
14 certain discussion point or reminding myself to follow up”). In a similar vein, Mr. Owen
15 declares that his notes were “not substantive” but consisted of “particular words or phrases
16 to remind [himself] to take future action,” and therefore he did not consider them
17 responsive to the litigation holds he received. Owen Decl., ¶ 10. Defendants also explain
18 that no “substantive discussion and decision-making” occurred at the operations meetings,
19 but was reserved for “other follow up meetings.” *Id.*; *see also* Howe Decl., ¶ 4. According
20 to Messrs. Howe and Owen, any “significant events” or follow-up actions from the
21 operations meeting “would have been captured in electronic form.” Howe Depo. at 20;
22 Owen Decl., ¶ 10.

23 Based on the foregoing, the Court finds that neither Mr. Howe nor Mr. Owen acted
24 in bad faith because there is no indication they destroyed their handwritten meeting notes
25 with the “intent to deprive [plaintiffs] of relevant evidence.” *See Coburn v. PN II, Inc.*,
26 Case No. 2:07-cv-00662-KJD-LRL, 2010 WL 3895764, at *7 (D. Nev. Sept. 30, 2010);
27 *see also U.S. E.E.O.C. v. Wedco, Inc.*, Case No. 3:12-cv-00523-RCJ-VPC, 2014 WL
28 4635678, at *5 (D. Nev. Sept. 15, 2014) (declining to find bad faith where witness

1 “shredded his handwritten notes” because he viewed them as a “draft” and the “important
2 information” was transferred to the final document). Nevertheless, as explained above,
3 Mr. Howe’s and Mr. Owen’s reading of the litigation hold notices – which specifically
4 directed the preservation of internal communications and handwritten notes, among other
5 things – was unreasonable. *See* Doc. No. 682-1. Both Mr. Howe and Mr. Owen (a named
6 defendant in the case) knew or should have known that their meeting notes were potentially
7 relevant to the litigation, and of their preservation obligations. Therefore, the Court finds
8 the destruction of their meeting notes despite clear instructions from their attorneys to
9 preserve them was negligent.

10 True, Mr. Howe did not receive a litigation hold notice until December 2018, and
11 some of the spoliation occurred before that date. *Howe Decl.*, ¶¶ 2, 9. Plaintiffs initiated
12 this action in July 2017, and Mr. Howe assumed a leadership role at CBP in October 2017
13 – yet, he did not receive his first hold notice until December 2018. *See Howe Decl.*, ¶ 9.
14 Defendants’ failure to timely issue a hold notice to Mr. Howe is an independent breach of
15 their duty of preservation, because it was incumbent upon defendants’ senior personnel to
16 “communicate” the organization’s preservation obligations “to employees in possession of
17 discoverable materials.” *Napster*, 462 F. Supp. 2d at 1070 (quoting *Nat’l Ass’n of*
18 *Radiation Survivors*, 115 F.R.D. 543, 557-58 (N.D. Cal. 1987)). Defendants emphasize
19 that they have made “comprehensive preservation efforts,” including “early and frequent
20 distribution of litigation hold notices,” but do not offer any explanation to justify the
21 extraordinary delay in issuing a hold notice to Mr. Howe specifically. *Jt. Mot.* at 29.
22 Furthermore, the “implementation of a litigation hold” is “only the beginning” of
23 compliance with a party’s discovery obligations, and “[c]ounsel must oversee
24 compliance... [and] monitor[] the party’s efforts to retain and produce the relevant
25 documents.” *Czuchaj v. Conair Corp.*, Case No. 13cv1901 BEN (RBB), 2016 WL
26 4161818, at *4 (S.D. Cal. Apr. 1, 2016) (quoting *Zubulake v. UBS Warburg LLC*, 229
27 F.R.D. 422, 432 (S.D.N.Y. 2004)). Thus, while the Court finds that defendants’ otherwise
28 thorough document preservation efforts preclude a finding of bad faith, they negligently

1 failed to take the necessary steps to preserve relevant evidence in Mr. Howe’s possession,
2 and therefore bear responsibility for the spoliation of his notes. *Reinsdorf*, 296 F.R.D. at
3 628 (stating that the “negligent destruction of evidence may be sanctioned because ‘each
4 party should bear the risk of its own negligence’”) (citation omitted).

5 Because the Court finds that Mr. Howe’s and Mr. Owen’s shredding of their meeting
6 notes and defendants’ unexplained delay in issuing a litigation hold notice to Mr. Howe
7 were negligent, the requirement that the evidence was destroyed with a culpable state of
8 mind is satisfied.

9 **3. Relevance and Prejudice**

10 The final inquiry in the Court’s sanctions analysis is whether plaintiffs have shown
11 that the spoliated evidence was “relevant” to plaintiffs’ claims “such that a reasonable trier
12 of fact could find that it would support th[ose] claim[s].” *Apple*, 888 F. Supp. 2d at 989
13 (citation omitted). “Courts generally agree that ‘relevance’ for spoliation purposes ‘is a
14 two-pronged finding of relevance and prejudice’ because ‘for the court to issue sanctions,
15 the absence of the evidence must be prejudicial to the party alleging spoliation of
16 evidence.’” *Reinsdorf*, 296 F.R.D. at 627 (citation omitted).

17 Defendants assert that plaintiffs have not demonstrated relevance because they have
18 not established a “reasonable possibility” that the spoliated evidence would have been
19 favorable to plaintiffs. *Jt. Mot.* at 23. The Court disagrees. “The relevance standard is
20 commonly recognized as one that is necessarily broad in scope in order ‘to encompass any
21 matter that bears on, or that reasonably could lead to other matter that could bear on, any
22 issue that is or may be in the case.’” *Compass Bank*, 104 F. Supp. 3d at 1051 (quoting
23 *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). The meeting notes easily
24 satisfy that test: they are a contemporaneous record of meetings attended by CBP’s senior
25 leadership, at which metering and queue management were admittedly topics of discussion.
26 *Id.* at 25. It is immaterial that the meetings were “not held for the purpose of making
27 substantive decisions” or that the notes themselves were, in the subjective view of the note-
28 takers, “non-substantive,” not “meaningful,” and not “significant.” *Id.* at 26. Plaintiffs

1 are not required to “accept on faith” defendants’ assertion that there was nothing of
2 significance in the meeting notes. *Tipp v. Adeptus Health, Inc.*, Case No. CV-16-02317-
3 PHX-DGC, 2018 WL 447256, at *4 (D. Ariz. Jan. 17, 2018).

4 The Court is likewise unpersuaded by defendants’ argument that plaintiffs cannot
5 simply rely on their “fertile imaginations” but must provide “concrete evidence” that there
6 were “specific” and relevant “facts ... reflected in the notes.” Jt. Mot. at 24-25. Due
7 entirely to defendants’ negligent destruction of the meeting notes, that is an impossible
8 task. *See Compass Bank*, 104 F. Supp. 3d at 1054 (noting that spoliation creates a
9 “dilemma” because “there is no way to know what the spoliated evidence would have
10 revealed”); *see also Leon v. IDX Sys. Corp.*, 464 F. 3d 951, 959 (9th Cir. 2006) (observing
11 that the “relevance” of spoliated documents “cannot be ascertained because the documents
12 no longer exist”) (citation omitted). Defendants’ spoliation caused “the absence of specific
13 evidence” and is precisely the basis upon which plaintiffs may be entitled to have the trier
14 of fact draw inferences in their favor. *Compass Bank*, 104 F. Supp. 3d at 1054.

15 Despite the relevance of the meeting notes, however, the Court does not find
16 plaintiffs’ claims of prejudice from their destruction to be “particularly strong.” *Apple*,
17 888 F. Supp. 2d at 994. It is true that, had the notes been available, plaintiffs may have
18 been able to develop further testimony from Mr. Howe and Mr. Owen regarding any
19 discussion of queue management or metering that may have transpired at “high-level
20 meetings.” Jt. Mot. at 12. And although “many” of the items discussed at the daily
21 operations meetings were later memorialized in emails or other form, *id.* at 26, the Court
22 does not believe that selective, post-meeting documentation is a substitute for the
23 witnesses’ spontaneously-taken notes. *See Reed v. Honeywell Intern., Inc.*, Case No. CV
24 07-0396-PHX-MHM, 2009 WL 886844, at *10 (D. Ariz. Mar. 31, 2009) (finding that
25 loss of handwritten notes was prejudicial even where typed summaries of the notes were
26 available).

27 Nevertheless, the Court cannot agree that plaintiffs were “substantially denie[d]” the
28 “ability to support [their] claims” by dint of the notes’ destruction. Jt. Mot. at 11; *accord*

1 *Leon*, 464 F.3d at 959 (noting that prejudice inquiry requires assessment of whether
2 spoliation “impaired” plaintiffs’ “ability to go to trial or threatened to interfere with the
3 rightful decision of the case”) (citation omitted). Discovery in this case has been
4 voluminous, and the spoliated meeting notes – while unique – are certainly not the only
5 source of evidence in support of plaintiff’s claims. *See, e.g., Lofton*, 308 F.R.D. at 288
6 (noting that courts may decline to impose sanctions where “other evidence exists to prove
7 the same information”); *see also Reinsdorf*, 296 FR.D. at 631 (finding no prejudice where
8 defendant “produced other ... evidence” supporting plaintiff’s claims); *PacificCorp v. Nw.*
9 *Pipeline GP*, 879 F. Supp. 2d 1171, 1190 (D. Or. 2012) (noting that “the existence of
10 secondary evidence can reduce prejudice”). As defendants report, they have produced
11 “hundreds of thousands of other contemporaneous documents” reflecting meetings and
12 internal communications related to defendants’ border-management practices. Jt. Mot. at
13 28. Plaintiffs have deposed not only Messrs. Howe, Owen and Hoffman – all attendees at
14 the operations meetings – but dozens of other witnesses who undoubtedly offered relevant
15 testimony as to these matters. Given the volume of discovery undertaken in this case, the
16 Court is not persuaded that plaintiffs have been “forced to rely on incomplete and spotty
17 evidence” to prove their claims. *Id.* at 11. Indeed, there is an obvious tension between
18 this assertion and plaintiffs’ pending motion for summary judgment – which they
19 presumably brought because they believe the evidence in the case is not only complete, but
20 so overwhelmingly in their favor as to warrant judgment as a matter of law. *See generally*
21 *Doc. No. 535*.

22 For the above reasons, although defendants negligently spoliated relevant evidence,
23 the Court finds that plaintiffs’ requested adverse-inference sanctions are disproportional to
24 the prejudice caused by the spoliation. *See Apple*, 888 F. Supp. 2d at 994-95 (finding
25 “strong adverse inference instruction” was not warranted where prejudice to opposing party
26 was minimal). The Court agrees with defendants that the imposition of plaintiffs’
27 requested sanctions “would result in a windfall for [p]laintiffs.” Jt. Mot. at 29. Therefore,
28 the Court **RECOMMENDS** that the District Court decline to adopt a rebuttable

1 presumption that Mr. Owen and Mr. Howe instructed CBP officers to turn back asylum
2 seekers at the U.S.-Mexico border, and decline to adopt a rebuttable presumption that the
3 spoliated notes would show that the Turnback Policy is based on a pretext.

4 **D. The District Court Should Exclude Evidence or Testimony from Defendants**

5 **Regarding the Operations Meetings**

6 Notwithstanding its finding that plaintiff has not made a showing that the requested
7 rebuttable presumptions are appropriate, the Court determines that other sanctions are
8 warranted in light of the clear evidence of defendants’ negligent destruction of relevant
9 documents. *See Reinsdorf*, 296 F.R.D. at 626 (stating that upon finding spoliation has
10 occurred, the Court “must then consider all available sanctions and determine the
11 appropriate one”). Because sanctions for negligent spoliation are not intended to be
12 punitive, the Court should impose the least burdensome sanction that will deter future
13 spoliation while providing a remedy for the evidentiary imbalance caused by the loss of
14 relevant evidence. *Id.*

15 As an alternative to the adoption of any rebuttable presumption in plaintiffs’ favor,
16 defendants propose that the District Court “preclude [them] from relying on testimony
17 about the [operations] meetings in support of their defenses to [p]laintiffs’ allegations.” *Jt.*
18 *Mot.* at 29. Evidentiary exclusion is an available sanction for the negligent destruction of
19 evidence. *See Lewis*, 261 F.R.D. at 522 (citing *Unigard Sec. Ins. Co. v. Lakewood Eng’r*
20 *& Mfg. Corp.*, 982 F.2d 363, 368-69, n.2 (9th Cir. 1982)). The Court finds that precluding
21 defendants from offering testimony or other evidence about the daily operations meetings
22 in support of their defenses will “place the risk of an erroneous judgment” on defendants,
23 the spoliating party, while also remedying the prejudice to plaintiffs that resulted from
24 defendants’ negligence. *See Reinsdorf*, 296 F.R.D. at 626. Therefore, the Court
25 **RECOMMENDS** the District Court preclude such evidence at trial.

26 ///

27 ///

28 ///

1 **CONCLUSIONS AND RECOMMENDATION**

2 For the foregoing reasons, the Court finds that spoliation sanctions are warranted in
3 this case, but that the adverse inference requested by plaintiffs is not appropriate. The
4 Court finds that an alternative evidentiary exclusion sanction is appropriate to deter future
5 spoliation and to remedy the evidentiary inequity caused by defendants' negligent
6 spoliation.

7 Accordingly, it is **RECOMMENDED** that the Joint Motion be **GRANTED IN**
8 **PART** and **DENIED IN PART**; and

9 It is **FURTHER RECOMMENDED** that the District Court decline to adopt a
10 rebuttable presumption that Mr. Owen and Mr. Howe instructed CBP officers to turn back
11 asylum seekers at the U.S.-Mexico border, and decline to adopt a rebuttable presumption
12 that the spoliated notes would show that the Turnback Policy is based on a pretext; and

13 It is **FURTHER RECOMMENDED** that defendants be precluded from offering
14 testimony or other evidence about the discussions at the daily operations meetings in
15 support of their defenses during the trial of this matter.

16 **IT IS HEREBY ORDERED** that any party may object to this Report and
17 Recommendation. Any objections must be filed with the Court and served on all parties
18 **no later than March 19, 2021** and should be captioned "Objections to Report and
19 Recommendation." The parties are advised that failure to file objections within the
20 specified time may waive the right to raise those objections on appeal of the Court's order.
21 *See Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998).

22 **IT IS SO ORDERED.**

23 Dated: February 18, 2021

24 
25 Hon. Karen S. Crawford
26 United States Magistrate Judge
27
28