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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KEVIN BROWN, et al.,)	
)	Case No. 2:15-cv-01964-LDG-CWH
Plaintiffs,)	
)	<u>ORDER</u>
vs.)	
SAM’S WEST INC., et al.,)	
)	
Defendants.)	

This matter is before the court on Plaintiffs Kevin Brown and Jennifer Brown’s Motion for Sanctions due to Spoliation of Evidence (ECF No. 50), filed on July 17, 2017. The court also considered Defendant Sam’s West’s response (ECF No. 56), filed on July 31, 2017, the Browns’ reply (ECF No. 57), filed on August 3, 2017, and Sam’s West’s surreply (ECF No. 74), filed on October 19, 2017.¹ The court held an evidentiary hearing on the motion on October 23, 2017. (Order (ECF No. 72); Mins. of Proceedings (ECF No. 77).)

BACKGROUND

This matter involves a slip-and-fall incident that occurred on May 15, 2015, at a Sam’s Club store owned by Sam’s West. The incident occurred in the aisle between the cooler and the freezers towards the back of the store. There is no dispute that Kevin Brown slipped on a piece of frozen banana. Nor is there a dispute that no surveillance video of the actual slip and fall existed. The Browns seek sanctions for Sam’s West’s spoliation of video surveillance from areas of the store nearby the aisle where the slip and fall occurred, and also for Sam’s West’s failure to preserve the original conditions of the floor, which was resurfaced as part of a store remodel about

¹ The court grants Sam’s West’s motion to file a surreply (ECF No. 73) and denies the Browns’ motion to strike (ECF No. 76) the surreply.

1 seven months after the incident. The Browns argue that Sam's West should have collected video
2 of the general area of the incident, which would show whether Sam's West's employees conducted
3 inspections as required by its policies. Additionally, Sam's West had the floor re-surfaced after the
4 incident, and before giving the Browns the opportunity to inspect it, thereby preventing their expert
5 from conducting an inspection of the flooring where the incident occurred.

6 The Browns argue they have been prejudiced in conducting the necessary discovery to
7 support their claims based on Sam's West's failure to preserve evidence. As a remedy, the Browns
8 argue Sam's West's answer should be stricken, or in the alternative, the court should give an
9 adverse instruction that had the surveillance video and the condition of the floor been preserved,
10 such evidence would be helpful to Browns' case, or harmful to Sam's West's case. Sam's West
11 responds that it had no duty to preserve video surveillance of areas nearby the slip-and-fall
12 incident, or to provide advance notice that the floors were going to be resurfaced as part of a
13 remodel project.

14 DISCUSSION

15 An owner or occupier of premises is liable for an injury to its invitee that was caused by an
16 unreasonably dangerous condition on its premises, if the owner had actual or constructive notice of
17 its presence. *Sprague v. Lucky Stores, Inc.*, 849 P.2d 320, 322-23 (Nev. 1993); *Asmussen v. New*
18 *Golden Hotel Co.*, 392 P.2d 49, 50 (Nev. 1964). "Where a foreign substance on a floor causes a
19 patron to slip and fall, and the business owner or one of its agents caused the substance to be on the
20 floor, liability will lie, as a foreign substance on the floor is usually not consistent with the standard
21 of ordinary care." *Sprague*, 849 P.2d at 322. "Where the foreign substance is the result of actions
22 of persons other than the business or its employees, liability will lie only if the business had actual
23 or constructive notice of the condition and failed to remedy it." *Id.* Constructive notice exists if
24 the foreign substance was present for such a length of time that the business owner, in the exercise
25 of reasonable diligence, should have discovered and removed it. *Zumbusch v. Wal-Mart Stores,*
26 *Inc.*, 940 F. Supp. 2d 1308, 1314 (D. Or. 2013) (citing *Van Den Bron v. Fred Meyer, Inc.*, 738 P.2d
27 1011, 1012 (Or. App. 1987)); *Adams v. Valley Hope Ass'n*, 2012 WL 12903146, *2 (D. Ariz. June
28 28, 2012) (citing *Walker v. Montgomery Ward & Co.*, 511 P.2d 699, 702 (Ariz. App. 1973)). The

1 injured person’s ability to prove that the business owner had actual or constructive notice may well
2 depend on evidence that is substantially, if not exclusively, in the control of the business owner and
3 its agents.

4 “Spoliation is the destruction or significant alteration of evidence, or the failure to preserve
5 property for another’s use as evidence in pending or reasonably foreseeable litigation.” *West v.*
6 *Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (9th Cir. 1999). There are two sources of
7 authority under which the court can sanction a party for spoliation of evidence—its inherent
8 authority or Federal Rule of Civil Procedure 37. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th
9 Cir. 2006). Regardless of whether it is under Rule 37 or its inherent authority, a federal court
10 applies federal law when addressing issues of spoliation of evidence. *See Glover v. BIC Corp.*, 6
11 F.3d 1318, 1329 (9th Cir. 1993) (applying federal law when addressing spoliation in diversity
12 litigation). Here, the Browns implicitly request that the court exercise its inherent authority to
13 enter an order to strike the answer or for an adverse inference jury instruction.

14 The court has “inherent discretionary power to make appropriate evidentiary rulings in
15 response to the destruction or spoliation of relevant evidence.” *Id.* Such broad power includes
16 permitting an adverse inference from the spoliation of relevant evidence against the spoliating
17 party. *Id.* The adverse inference sanction is based on evidentiary and policy rationales that seek to
18 deter a party who has notice of an item’s relevance to litigation from destroying it. *Akiona v.*
19 *United States*, 938 F.2d 158, 161 (9th Cir. 1991). Therefore, the duty to preserve begins when a
20 party reasonably should have known that the evidence is relevant to anticipated litigation. *See In*
21 *re Napster*, 462 F. Supp. 2d 1060, 1067 (N.D. Cal. 2006). A finding of bad faith is not a
22 prerequisite for an adverse inference. *Glover*, 6 F.3d at 1329. A spoliation remedy, however,
23 requires some degree of culpability. *In re Napster*, 462 F. Supp. 2d at 1067. The court need only
24 find that the nonmoving party acted with “conscious disregard” of its obligations. *Apple Inc. v.*
25 *Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 988 (N.D. Cal. 2012).

26 Although the Ninth Circuit has approved the use of adverse inferences as sanctions for
27 spoliation of evidence, it has not articulated a precise standard for determining when spoliation
28 sanctions are appropriate. *Id.* at 989. “Trial courts have widely adopted the Second Circuit’s

1 three-part test, which provides that a party seeking an adverse inference instruction based on the
2 destruction of evidence must establish: (1) that the party having control over the evidence had an
3 obligation to preserve it at the time it was destroyed; (2) that the evidence was destroyed with a
4 culpable state of mind; and (3) that the evidence was relevant to the party's claim or defense such
5 that a reasonable trier of fact could find that it would support that claim or defense." *Id.* at 989-90
6 (quotations omitted); *see also Leon*, 464 F.3d at 959 (stating that "[a] party's destruction of
7 evidence qualifies as willful spoliation if the party has some notice that the documents were
8 *potentially* relevant to the litigation before they were destroyed." (quotation omitted)).

9 **A. NOTICE**

10 Sam's West does not dispute it was on notice of the slip and fall. It took witness
11 statements, prepared an incident report, received a notice of injury from Brown's attorney within a
12 few days of the incident, and forwarded the correspondence from Brown's attorney to its claims
13 handler. (Mot. (ECF No. 50), Exs. 1, 7-9, 10; Resp. (ECF No. 57), Exs. 1-2.) Therefore, Sam's
14 West had sufficient notice on the date of the incident that litigation was reasonably foreseeable,
15 thereby triggering the duty to preserve relevant evidence.

16 **B. RELEVANCE**

17 **1. Video Surveillance**

18 The parties do not dispute that there is no video of the actual slip-and-fall incident. But
19 video recordings did exist of the general area where the incident occurred, including adjacent
20 aisles. Sam's West did not preserve any of those video recordings. The issue is whether Sam's
21 West had a legal duty to preserve video evidence of general activity in the area, and adjacent aisles.
22 Sam's West argues that it had no such legal duty.

23 In slip-and-fall cases such as this one, actual or constructive notice of the dangerous
24 condition is relevant to the question of a property owner's liability. Sam's Club's Rule 30(b)(6)
25 witness testified that Sam's West's employees are required to perform safety sweeps of their
26 respective departments or areas as often as possible whenever they are walking the sales floor to
27 look for and correct potential hazards, and they are encouraged to conduct safety sweeps to and
28 from their designated work area, to and from breaks and lunches, and anytime they are on the sales

1 floor. (Mot. (ECF No. 50), Ex. 2 at 49:10-20, 54:03-05.) Additionally, Sam's West's maintenance
2 associates are tasked with the responsibility of conducting safety sweeps throughout the day—they
3 are there to prevent hazards and clean up after members by responding to calls, taking care of the
4 trash, sweeping, mopping, and whatever else necessary. (*Id.* at 50:06-17.) The Browns argue that
5 evidence of employee activity in the aisle where the incident occurred, or adjacent aisles, would
6 demonstrate whether Sam's West conducted regular inspections of the aisles to ensure they were
7 safe. They further argue that Sam's West's investigatory procedures after a customer incident
8 require that video evidence be retained. Of note, the Step 3 of the process requires the
9 management to:

10 Obtain Video. It is essential to pull any CCTV video following the
11 incident/accident, even if the incident/accident occurs in the general area or next
12 aisle from where the camera is located. Include additional video from other
cameras if video is present and is relevant to the investigation. Obtain video at least
one (1) hour prior to and one (1) hour after the incident. . . .

13 (Pl.'s Mot. (ECF No. 50), Ex. 3.)

14 This procedure for obtaining video demonstrates that Sam's West recognizes the relevance
15 of activity in the general area of an incident, both before and after the incident. A reasonable trier
16 of fact could find that video of the general area of the incident, both before and after the incident,
17 would support the claims or defenses in this case. Specifically, video of activity in the surrounding
18 areas is relevant to the Browns' claim that Sam's West had actual or constructive notice of the
19 dangerous condition, as well as to Sam's West's defense that it had no constructive notice of the
20 hazard. As the Browns note in their reply, Sam's West argues in its motion for summary judgment
21 that it had no notice of the dangerous condition. (Def.'s Mot. Summ. J. (ECF No. 52), at 5-6.)

22 Before a court will sanction a party for spoliation of relevant evidence, however, the
23 moving party must demonstrate that relevant evidence existed. *See, e.g., Epstein v. Toys-R-Us*
24 *Delaware, Inc.*, 277 F. Supp. 2d 1266, 1276-77 (S.D. Fla. 2003) (holding that to prevail on a
25 motion for sanctions for the destruction of a videotape, the moving party must establish facts
26 indicating that the video existed). At the evidentiary hearing, Sam's West's asset protection
27 manager, Rachel Coyle, whose duties included dealing with video surveillance and who reviewed
28 the video footage from the day of the incident, confirmed that Sam's West possessed video

1 evidence of the surrounding area of the incident. Although she did not specifically recall
2 reviewing the video surveillance of the day in question, the asset protection manager testified that
3 she had memorialized her review of the surveillance video in an email related to her investigation
4 stating there was no footage showing “anything from the incident” or the aisle where the incident
5 occurred, so she did not save or record any video surveillance. She stated that “[t]here was no
6 camera shot in the club that [she] could find that showed [her] anything that had anything to do
7 with the incident”

8 Coyle testified that although there was not a camera trained on the aisle between the cooler
9 and the freezers where the incident occurred, there were other cameras that existed at the time of
10 the incident, which was before the store was remodeled, including the “back grocery aisle” camera,
11 the “paper doors” camera, and a “PTZ” camera.² Coyle stated that the “back grocery aisle”
12 camera was approximately 100 feet from the incident’s location. She testified that from the “back
13 grocery aisle” camera’s vantage point, one possibly could see store associates walking into the
14 freezer/cooler aisle where the incident occurred. Coyle not recall whether she checked for footage
15 from the “paper doors” camera, which was about forty feet from the end of the freezer/cooler aisle,
16 but she testified that from its vantage point, she would have been able to see whether there were
17 people walking down the aisle on the opposite side of the freezer/cooler area. Coyle also testified
18 that the PTZ camera could have captured video of the area surrounding the incident, but that
19 camera was facing toward the liquor aisle at the time of the incident.

20 Based on the distance of the “back grocery aisle” and “paper doors” cameras from the
21 freezer/cooler aisle, Coyle stated she would not have been able to see something small, like a piece
22 of banana on the floor, but that from the “back grocery aisle” camera she would have been able to
23 see people turning into the freezer/cooler aisle or a store associate pushing a broom into the
24 freezer/cooler aisle. Coyle further testified that from the “paper doors” camera, she would have
25 been able to see a store associate pushing a broom in the area near the cooler. Coyle could not
26 recall whether the video footage she reviewed showed any store associates walking down the
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28 ² PTZ signifies the camera’s ability to pan, tilt, and zoom.

1 freezer/cooler aisle.

2 Although she is the asset protection manager responsible for collecting video surveillance,
3 Coyle stated that she was not aware of the store’s policy regarding collecting video surveillance of
4 the incident and the general area of the incident when she conducted her investigation. She saw the
5 policy for the first time during her deposition in this case. However, she testified that she would
6 have understood the general incident area to include something “valuable” to the incident, such as
7 the element that caused the accident, the person that was involved in the accident, or anything that
8 would help her understand the incident. Coyle testified that when the store was remodeled in 2016,
9 a new DVR was installed, and any previous images would have been deleted.

10 Based on Coyle’s testimony, the court finds that video surveillance footage of the general
11 area of the incident existed, but it was not saved at the time of her investigation. Further, given
12 that new recording equipment was installed during the 2016 remodel project, any video footage of
13 the general area no longer exists. Although Coyle testified that she did not save the surveillance
14 video because it did not show anything related to the incident, a reasonable fact finder could
15 conclude that even video footage showing “nothing” would support the claims or defenses in this
16 case. For instance, video footage showing “nothing” directly relates to the issue of whether Sam’s
17 West had constructive knowledge of the piece of banana. Thus, relevant video surveillance existed
18 and was destroyed.

19 **2. Floor Condition**

20 Brown’s argument that the resurfacing of the concrete floor constituted the spoliation of
21 relevant evidence of the condition of the floor is not persuasive. Sam’s West re-surfaced the
22 concrete flooring by conducting a “floor grind” approximately seven months after the incident.
23 However, there is no dispute that Brown slipped on a piece of frozen banana, not on an otherwise
24 slippery floor. Brown’s expert opined that the flooring contaminated with a banana would have a
25 slip resistance lower than smooth ice, a clearly hazardous condition. Accordingly, the slip
26 resistance, and the Brown’s inability to test the original flooring before it was resurfaced, is not
27 relevant. The court therefore declines to impose sanctions with respect to Sam’s West’s failure to
28 preserve the condition of the floor.

1 **C. CULPABILITY**

2 Given that relevant video evidence of adjacent aisles existed, the Browns must prove that
3 Sam's West had a culpable state of mind in failing to preserve or in destroying the video
4 surveillance. *See Apple*, 888 F. Supp. 2d at 998; *In re Napster*, 462 F. Supp. 2d at 1078. Here, it
5 appears that Sam's West consciously disregarded its obligation to preserve the relevant video. It
6 was aware of the incident and had a store policy requiring that the video be preserved. Its only
7 explanation for why it failed to preserve the video is Coyle's testimony that she did not see any
8 camera shots that had anything to do for the incident. This failure is negligent or reckless action
9 that warrants an adverse inference jury instruction. As a result, the Browns have carried their
10 burden of demonstrating that Sam's West failed to preserve video surveillance with a culpable state
11 of mind.

12 A defendant who violates its duty to preserve evidence relevant to anticipated litigation
13 should suffer the appropriate sanction. The court therefore will exercise its inherent authority to
14 order an adverse inference instruction as a sanction for Sam's West's failure to preserve video of
15 the areas surrounding the incident. The jury should be instructed that it may infer that the
16 destroyed videos of the surrounding area would not have shown employees conducting safety
17 sweeps before the incident. The exact phrasing of the jury instruction will be determined by the
18 United States district judge assigned to this case at the time the parties settle the jury instructions.

19 **CONCLUSION**

20 IT IS THEREFORE ORDERED that Plaintiffs Kevin and Jennifer Brown's Motion for
21 Spoliation of Evidence (ECF No. 50) is GRANTED in part and DENIED in part. The jury will
22 receive an adverse instruction with respect to the failure to preserve video surveillance as stated in
23 this order.

24 IT IS FURTHER ORDERED that Defendant Sam's West's Motion for Leave to File a
25 Surreply (ECF No. 73) is GRANTED.

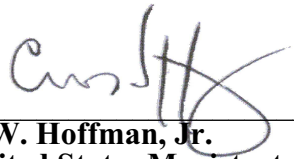
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1 IT IS FURTHER ORDERED that Plaintiffs Kevin and Jennifer Brown's Motion to Strike
2 Defendant Sam's West's Surreply (ECF No. 76) is DENIED.

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4 DATED: January 26, 2018

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7 **C.W. Hoffman, Jr.**
8 **United States Magistrate Judge**

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