

NOV 19 2010 *MC*

John A. Clarke, Executive Officer/ Clerk

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

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F. CHARLES SANDS, Individually and on behalf)
of others similarly situated,)

Plaintiffs,)

vs.)

SERVICE CORPORATION INTERNATIONAL,)
INC. a Texas corporation, SCI CALIFORNIA)
FUNERAL SERVICES, INC., a California)
corporation; EDEN MEMORIAL PARK)
MANAGEMENT CO., a California corporation;)
EDEN MEMORIAL PARK ASSOCIATION, a)
California business entity, EDEN MEMORIAL)
PARK, a California business entity, JAMES R.)
BIBY, an individual and DOES 1 through 100,)

Defendants.)

Case No.: BC421528

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
REQUEST FOR SANCTIONS**

I. Introduction

Plaintiffs claim that Defendants have destroyed evidence in violation of an evidence preservation letter served on Defendants on September 10, 2009 (Decl. of Avenatti, Ex. F) and the order entered by Judge Wiley on October 15, 2009.¹ Plaintiffs claim that Defendants intentionally destroyed evidence (1) by removing evidence from the dump site at Eden on multiple occasions and (2) by failing to properly

¹ The October 15, 2009 Order was expressly agreed to by both Plaintiffs and Defendants and was read into the record in this court. Judge Wiley asked Defendants' counsel "This is something that the defense is agreeing to, not being imposed on them," to which Defendants counsel responded "we understand, your honor." (Transcript, 16:23-25.) Plaintiffs had initially requested a temporary restraining order but the parties agreed to stipulate on the record in lieu of pursuing injunctive relief.

1 document and/or failing to wait for Plaintiff's counsel to properly document evidence prior to burying it
2 underground.

3 Plaintiffs move the Court here for the following sanctions: (1) essentially terminating sanctions
4 against Defendants, (2) issue sanctions against Defendants finding that Defendants threw away broken
5 pieces of OBCs and/or human remains, (3) mixed issue/evidentiary sanctions against Defendants
6 preventing them from arguing and/or offering evidence that pieces of OBCs and/or human remains were
7 not thrown away in the dump site, (4) issue sanctions preventing Defendants from arguing that Plaintiffs
8 have not offered any physical evidence of OBCs or human remains to support their claims and/or
9 preventing Defendants from arguing that they should not be liable due to the lack of physical evidence,
10 (5) a jury instruction that Defendants violated the October 15, 2009 Order by intentionally tampering
11 with and/or destroying evidence that would have proven Plaintiffs' claims and that the jury may
12 consider said conduct in determining Defendants' liability, and (6) a jury instruction that in September
13 2009, Defendants intentionally tampered with and/or destroyed evidence that would have proven
14 Plaintiffs' claims and that the jury may consider said conduct in determining Defendants' liability.

15 **III. Analysis:**

16 Trial courts have inherent powers to control their processes. CCP § 128; *Slesinger v. Walt*
17 *Disney Co.* (2007) 155 Cal.App.4th 736, 757-765. California courts have the flexibility to exercise
18 historic inherent authority in modern circumstances, fashioning procedures and remedies as necessary to
19 protect litigants' rights. (See *Board of Supervisors v. Superior Court* (1994) 23 Cal.App.4th 830, 848;
20 *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1377-1378.) Without such power, the court would
21 sacrifice its essential role of determining, in accordance with the fair application of relevant law, who
22 should prevail in the case or controversy presented. In addition, the court may impose issue and
23 evidence sanctions against a party who misuses the discovery process. CCP §§ 2023.030(b), 2023.030

24 (c)

25 In moving for sanctions, Plaintiffs have the initial burden of making a prima facie showing that
26 Defendants destroyed evidence. As the court in *Williams v. Russ* (2008) 167 Cal.App.4th 1215, stated:

27 A party moving for discovery sanctions based on the spoliation of evidence must
28 make an initial, prima facie showing that the responding party in fact destroyed

1 evidence that had a substantial probability of damaging the moving party's ability
2 to establish an essential element of his claim or defense.

3 *Id* at 1226-27. Additionally, in order to impose sanctions, noncompliance with an order of the court or
4 discovery rules by the nonmoving party must be willful. *Alliance Bank v. Murray* (1984) 161
5 Cal.App.3d 1, 11.

6 On two separate occasions, Defendants and Defendants' counsel were ordered not to destroy
7 evidence relating to the instant action: first on September 10, 2009, and again on October 15, 2009.

8 First, the parties do not dispute that Defendants received a letter from Plaintiffs' counsel on
9 September 10, 2009, seeking the preservation of certain evidence related to this action. (*See Decl. of*
10 *Avenatti, Ex. F.*) Defendants claim that the letter only notified Defendants (and Defendants' counsel)
11 that they needed to preserve only documents, not actual evidence on site at Eden. (*Opposition 7:16-22.*)
12 However, the letter states "[Plaintiff] requests that [Defendants] preserve all documents, **tangible things**
13 and electronically stored information, **including but not limited to . . .**" (*Decl. of Avenatti, Ex. F, pg.*
14 *1*) (emphasis added.) Whether Defendants knew that they should not engage in a site cleanup
15 immediately after receiving the letter seems inconsequential. Defendants' counsel received the letter
16 and should have advised their clients on what actions were appropriate at that time.

17 Second, on October 15, 2009, Defendants were ordered not to destroy any evidence, to inform
18 Plaintiffs of any further damage to OBCs, and to provide counsel the opportunity to document evidence
19 of damaged OBCs. (*See Transcript, 17:7-2-:13.*) One condition of that Order was that Plaintiffs'
20 counsel would have to complete their documentation of the evidence no later than one hour before
21 services were to begin. (*Transcript, 19:19-28.*)

22 Plaintiffs have made a prima facie showing that Defendants destroyed evidence. Plaintiffs detail
23 an incident in mid-March 2010 in which Defendants destroyed evidence from the "Jacob" section of
24 Eden—the same area which used to be the dump site for Eden where Plaintiffs claim Defendants threw
25 away broken OBCs and human remains. (*Motion 4:8-22.*) Defendants were digging a new grave in the
26 "Jacob" section when they came across broken pieces of an OBC. (*Id, Depo. of Medina, 23:15-24:18;*
27 *59:3-63:8; 80:21-84:20; Depo. of Ruelas, 65:19-72:10.*) Defendants do not dispute this. Defendants
28 failed to notify Plaintiffs or Plaintiffs' counsel about the discovery. (*Decl. of Avenatti, ¶ 10.*) Again,
defendants do not dispute this. Defendants then "covered up" that evidence with a new grave.

1 Defendants do not dispute this either. Defendants argue that they were not required to notify Plaintiffs'
2 counsel, notwithstanding the October 15, 2009 Order, because there was no evidence that the OBC was
3 damaged *on that day*. The court does not accept this argument. In language that is not ambiguous, the
4 Order requires Defendants to notify Plaintiffs' counsel of uncovered damage to OBCs.² Defendants
5 violated the October 15, 2009 Order. Then, by placing another grave on that site, they effectively
6 destroyed that evidence. Considering that that evidence was located in the old dump site for all of Eden,
7 there is no way to ascertain what could have been in and around that new grave. This alone constitutes a
8 prima facie showing that Defendants destroyed evidence.

9 Worse yet, after receiving the September 2009 letter about preserving evidence related to this
10 case, Defendants did more damage. In Defendants' words:

11
12 After the lawsuit was filed, James Biby advised the then General Manager,
13 Anthony Lampe, that debris in the cemetery dump should be cleaned up because
14 it did not look good. Therefore, Mr. Lampe asked the grounds superintendent,
15 Pedro Gonzalez, to have members of the grounds crew clean the concrete out of
16 the field area. The grounds crew started moving pieces of concrete and pieces of
17 sectionals.

18 Opposition, 7:23-27³.

19 After Mr. Biby told Mr. Lampe what to do, Mr. Lampe told Mr. Gonzalez, in so many words, to
20 get the "evidence" (his word), retrieve it, put it in a dumpster, and have it taken off the property. This
21 occurred despite Judge Wiley's order that nothing be taken off the property. Defendants then spent
22 some two days cleaning the dump, which apparently had never been cleaned up before. Over the
23 preceding twenty years, things had gone into the dump, but nothing had been taken out. This court has
24 seen a video that depicts people hand-picking concrete pieces as opposed to digging. At one point
25 defendants said that the people were hand-picking material sitting on top of the soil and cleaning it over
26 to make area look better. However, on the video one can see a backhoe in use. What's more, a security
27 guard is present on the film. Defendants argue he was there to secure the park against people placing

28 ² The October 15, 2009 Order states "Defendants agree that they will provide Plaintiff's counsel with immediate notice in the event that there's any physical damage to a burial vault. Plaintiffs' counsel or their representatives will then be permitted to inspect the burial vault including taking photographs . . ." (Transcript, 19:14-22.)

³ Plaintiffs state that the pictures contained in exhibits G and H to Decl. of Avenatti, show how the pile of OBC fragments grew over the course of several hours. Inspection of those pictures confirms this.

1 bones into the area, in other words, “planting” evidence. The court does not accept that argument.
2 There is no indication that anyone was attempting to frame the Defendants. The more reasonable
3 inference is that the guard was present to protect the Defendants from being observed while they
4 destroyed what they knew was evidence in this action. Plaintiffs analogize what appears on the video to
5 executives in a board room shredding documents. The analogy is not far-fetched.

6 Defendants argue that nothing in the area was “thrown out,” that everything is still sitting in a
7 pile in Eden⁴. This contradicts the testimony of Mr. Medina, who claims that that pile has been
8 disappearing since the Order was issued. In any event, Defendants have admitted tampering with
9 evidence by moving it from its original setting, thus destroying the context in which it was found. In
10 this regard, defendants overlook the fact that we are dealing with two types of evidence: the concrete
11 items themselves and the scene in which they were originally found. At minimum the scene was
12 compromised. It is as if blood-spatter evidence at a crime scene was washed away before the scene
13 could be photographed or otherwise preserved.

14 Plaintiffs have shown that there is a substantial probability that the lack of physical evidence will
15 damage Plaintiffs’ ability to establish their claims. In opposing Plaintiffs’ motion for a preliminary
16 injunction, the defense relied at least in part on the lack of physical evidence showing the desecration of
17 human remains. That forces the plaintiffs to rely heavily on the depositions of four somewhat
18 questionable witnesses: former employees -- and perhaps disgruntled former employees -- whose
19 testimony Defendants routinely attacked for their purported lack of credibility. If at the trial, Defendants
20 succeed in destroying those witnesses’ credibility, then Plaintiffs will have scant evidence with which to
21 prove their case. At that point, it is substantially probable that the absence of physical evidence will
22 prevent Plaintiffs from prevailing.

23 Plaintiffs have made a prima facie showing that Defendants destroyed or tampered with evidence
24 in this case. The two specific incidents referenced above clearly show that Defendants acted without
25 regard to Plaintiffs’ request to preserve evidence and in direct violation of the October 15, 2009 Order.
26 The court is within its power to sanction Defendants for their actions.

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28 ⁴ Exhibit I to the Decl. of Avenatti, is a video—apparently from Eden—and shows what appears to be a pile of concrete fragments.

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2 As set out below, the court grants this motion in part and, also as detailed below, grants other
3 relief on its own motion. However, the court denies without prejudice Plaintiffs' request for a finding of
4 liability on all causes of action as well as requests for the jury instructions set out in items 5 and 6 of
5 Plaintiffs' notice of motion for sanctions. Those sanctions are too harsh for what has occurred. What
6 the court will do is the following:

- 7 1) At minimum the court will give CACI 204, the jury instruction that addresses
8 willful suppression of evidence. CACI 204—Willful Suppression of Evidence—states:

9
10 You may consider whether one party intentionally concealed
11 or destroyed evidence. If you decide that a party did so, you
12 may decide that the evidence would have been unfavorable to
13 that party.

- 14 2) Although the court plans to limit each side to a certain number of hours within which
15 to conduct direct and cross-examination, the court recognizes that the plaintiffs may
16 need additional time to engage in liberal and probing examination, both direct and
17 cross, of witnesses with respect to the instances of tampering, suppressing, and
18 destroying evidence, including but not limited to the two incidents about which
19 Plaintiffs complain in this motion. The court also recognizes that the plaintiffs may
20 need additional time to prove their case because of what has happened. Therefore, the
21 court grants the plaintiffs ten extra hours, above and beyond the time limit the
22 defendant will have, in order to engage in these activities.

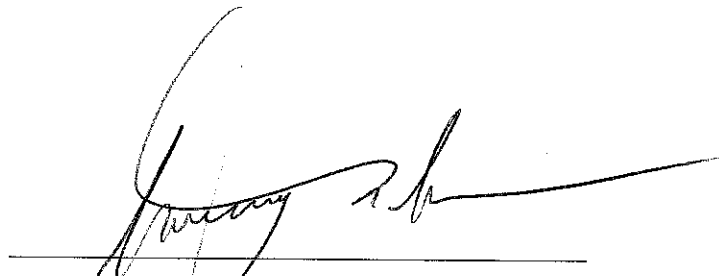
- 23 3) The court will be allocating a certain amount of time to each side in connection with
24 the opening and closing statements. Plaintiffs may devote up to thirty minutes beyond
25 this allotted time in their opening statement and thirty minutes beyond this allotted
26 time in their final arguments to describing and discussing defendants' actions with
27 respect to tampering, suppressing, and destroying evidence, including but not limited
28 to the two incidents about which Plaintiffs complain in this motion.

- 1 4) Depending on the evidence adduced during the trial, the court will consider: (1)
2 entering an order precluding Defendants from arguing that protective burial vaults
3 and/or human remains were not thrown away in the cemetery dump and/or (2) shifting
4 the burden of proof to the Defendants with respect to one or more elements of
5 Plaintiffs' causes of action. *Williams, supra*, 167 Cal.App.4th at 1225-1227.
6 5) At the trial, Defendants will be barred from: (1) arguing that Plaintiffs have failed to
7 offer any physical evidence in support of their claims and (2) arguing that Defendants
8 should not be held liable because of the lack of physical evidence.
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10 The balance of the motion is denied.

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13 **IT IS SO ORDERED.**

14 DATED: November 19, 2010



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16 Anthony J. Mohr

17 Judge of the Los Angeles Superior Court
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