

Chapter Three: Ephemeral Messaging Data in Ediscovery

Case Law Rulings to Know on Ephemeral Messaging Data

Every year, courts issue important case law rulings regarding ephemeral messaging data discovery. Here are some of the most notable case law rulings regarding mobile data in ediscovery over the past several years:

- / [Waymo v. Uber Tech.](#) (N.D. Cal. January 30, 2018)
- / [Herzig v. Arkansas Foundation for Medical Care, Inc.](#) (W.D. Ark. July 3, 2019)
- / [WeRide v. Huang et al.](#) (N.D. Cal. April 24, 2020)
- / [Doe v. Purdue, et al.](#) (N.D. Ind. July 2, 2021)
- / [FTC v. Noland](#) (D. Ariz. August 30, 2021)
- / [Fast v. GoDaddy.com](#) (D. Ariz. February 3, 2022)
- / [In re Google Play Store Antitrust Litig.](#) (N.D. Cal. March 28, 2023)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WAYMO LLC,

No. C 17-00939 WHA

Plaintiff,

v.

**OMNIBUS ORDER ON
EXTENT TO WHICH
ACCUSATIONS RE UBER’S
LITIGATION MISCONDUCT
MAY FEATURE AT TRIAL**

UBER TECHNOLOGIES, INC.;
OTTOMOTTO LLC; and OTTO
TRUCKING LLC,

Defendants.

INTRODUCTION

This lawsuit for trade secret misappropriation suffers from a deluge of accusations by plaintiff that defendants tossed out evidence and engaged in litigation misconduct. This order addresses the extent to which the jury will be allowed to hear those accusations and the proof behind them.

STATEMENT

Plaintiff Waymo LLC commenced this civil action on February 23, 2017. An order dated March 16 set a schedule for expedited discovery (Dkt. No. 61) and another order dated May 11 granted in part Waymo’s motion for provisional relief (Dkt. No. 426). Waymo’s case has since been reduced to claims against defendants Uber Technologies, Inc., and Ottomotto LLC (collectively, “Uber”) for misappropriation of eight alleged trade secrets. The trial date has been continued twice and currently remains set for February 5.¹

¹ For the benefit of the court of appeals and with apologies to the public, all record citations herein are to the unredacted versions of the documents cited.

1 Waymo’s imagination has not slept in conceiving of ways it has been wronged by
2 Uber’s alleged litigation misconduct. Over the course of this action, Waymo’s complaints have
3 provoked multiple motions, motions *in limine*, and various requests for relief. Various motions
4 by both sides have already drawn rulings and those rulings remain operative even though only a
5 few are cross-referenced herein. With the benefit of extensive briefing, multiple hearings, and a
6 clear view of the full constellation of issues implicated by Waymo’s grievances, this order now
7 resolves all remaining issues. Here follows a summary of the relevant events to date.

8 On June 21, 2017, Waymo moved for an order to show cause why Uber should not be
9 held in contempt for three alleged violations of the expedited discovery and provisional relief
10 orders (Dkt. No. 676-4). After briefing on that motion, on August 7, Waymo filed a
11 supplemental brief to complain of yet another alleged violation of the expedited discovery order
12 (Dkt. No. 1095). During the motion hearing on August 16, the undersigned judge explained
13 that he was not inclined to hold anyone in contempt but would consider telling the jury about
14 Uber’s pertinent misconduct, if any, and asked Waymo to propose a non-argumentative
15 instruction (*see* Dkt. No. 1261 at 26:21–27:21, 33:8–18, 45:5–9). On September 10, Waymo
16 proposed an argumentative jury instruction along with a “corrected” supplemental brief that
17 complained of yet three more alleged violations of prior orders and requested both remedial and
18 adverse-inference instructions against Uber (Dkt. Nos. 1501-4, 1501-6). The argumentative
19 jury instruction was unusable and will not be given at trial.²

20 Meanwhile, in June 2017 and pursuant to the discovery referral in this action, Magistrate
21 Judge Jacqueline Corley ordered Uber to produce certain evidence pertaining to a due diligence
22 investigation performed by non-party Stroz Friedberg for Uber before its acquisition of
23 Ottomotto and Otto Trucking (collectively, “Otto”) (Dkt. No. 566). The undersigned judge
24 overruled all objections to that order (Dkt. No. 685). Non-party Anthony Levandowski (but not
25 Uber) then petitioned the Federal Circuit for a writ of mandamus, thereby suspending
26 production of the due diligence materials until the Federal Circuit rejected all his arguments and
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28 ² Some of Waymo’s complaints extended to defendant Otto Trucking LLC and to that extent became moot after Otto Trucking prevailed on summary judgment (*see* Dkt. Nos. 2151 at 8–13, 2161).

1 dismissed his petition on September 13 (Dkt. No. 1733). An avalanche of document production
2 followed. Faced with this belated and bone-crushing production of evidence, on September 16,
3 Waymo moved to continue the trial date then set for October 10 (Dkt. No. 1603-4).

4 Shortly thereafter, on September 28, the parties alerted Judge Corley that Uber had just
5 “discovered” a trove of unproduced documents once belonging to Levandowski (from his time
6 at Ottomotto). The trove contained approximately fifteen thousand emails and 85 gigabytes of
7 other documents (*see* Dkt. No. 1890 at 5:14–7:21). As the owner of the newly-discovered
8 trove, Uber produced it, but the delay damage had been done. That late production piled onto
9 the mountain of unexamined due diligence documents Waymo received on the eve of trial.
10 Under the circumstances and after a hearing on October 3, the undersigned judge felt compelled
11 to grant Waymo its first continuance and postponed the trial date to December 4 (*see* Dkt. Nos.
12 1954, 1965 at 36:22–41:12).

13 On October 23, Waymo filed a second supplemental brief on its contempt motion
14 complaining of another two alleged violations of the expedited discovery and provisional relief
15 orders (Dkt. No. 2053-4). That brief reiterated Waymo’s request for an adverse-inference
16 instruction against Uber.

17 On November 13, Waymo filed a new motion seeking yet another adverse-inference
18 instruction against Uber for spoliation of evidence (Dkt. No. 2197-4).

19 On November 22, while briefing on Waymo’s new motion proceeded and the new trial
20 date approached, the undersigned judge received a letter from the Office of the United States
21 Attorney. The letter explained that, during a pending criminal investigation, the government
22 had interviewed a former Uber employee named Richard Jacobs whose allegations about Uber
23 seemed relevant to the trade secret misappropriation claims in this case. Moreover, Jacobs’s
24 attorney had laid out his allegations in a 37-page demand letter dated May 5, 2017, to Attorney
25 Angela Padilla, Uber’s associate general counsel (Dkt. No. 2383). Prior to that communication
26 from the Office of the United States Attorney, no mention of Jacobs, his allegations, or the letter
27 had surfaced in this civil action despite months of grueling discovery.
28

1 After the Court passed this sensational information on to counsel, Waymo requested a
2 second trial continuance (Dkt. No. 2281-4 at 19–20). The second final pretrial conference
3 previously set for November 28 morphed into a two-day evidentiary hearing featuring
4 testimony from Jacobs and Attorney Padilla, among other witnesses. The evidentiary hearing
5 unearthed the existence of a resignation email that Jacobs had sent to Uber’s leadership on April
6 14, 2017, further detailing his allegations against Uber, and a subsequent confidential settlement
7 agreement between Jacobs and Uber. The demand letter, resignation email, and settlement
8 agreement (collectively, “the Jacobs materials”) contained a barrage of scandalous allegations
9 against Uber ranging from deliberate spoliation and systemic abuse of attorney-client privilege
10 to hacking and corporate espionage. At least some allegations, discussed further below, seemed
11 to bear directly on Waymo’s claims in this case (*see, e.g.*, Dkt. No. 2307-2 at 13). Under the
12 circumstances, the undersigned judge agreed to grant Waymo its second continuance and
13 postponed the trial date to February 5, and further granted supplemental discovery to investigate
14 the sensational Jacobs materials (*see* Dkt. No. 2315).

15 At a further case management conference on December 4, the undersigned judge
16 ordered Waymo to submit a complete offer of proof by January 12 of this year, covering not
17 only any new evidence uncovered in supplemental discovery but also how it related, if at all, to
18 the issues under consideration in this case, including Waymo’s previous accusations that Uber
19 had engaged in litigation misconduct and other bad behavior (*see* Dkt. No. 2342 at 45:14–23;
20 *see also* Dkt. No. 2447). On January 12 of this year, Waymo filed a 47-page offer of proof
21 (Dkt. No. 2466-3). On January 19, Uber filed a 64-page rebuttal (Dkt. No. 2500-4).

22 The instant, comprehensive order is based on Waymo’s offer of proof, Uber’s response
23 thereto, and all prior briefing and oral argument relating to the constellation of issues raised by
24 Waymo’s complaints that Uber engaged in litigation misconduct. (To repeat, however, it does
25 not undo any prior evidentiary ruling.)

26 ANALYSIS

27 An overarching guide for this order should be plainly stated at the outset. This was and
28 remains a civil action based on Uber’s alleged misappropriation of eight trade secrets. The trial

1 will be a trial on Waymo’s claims of trade secret misappropriation, not a trial on Uber’s
 2 litigation practices or corporate culture. Of course, evidence of Uber’s litigation misconduct or
 3 other bad behavior may be relevant and admissible insofar as it reasonably bears on actual
 4 claims and defenses in this case. For example, facts like Uber’s use of ephemeral messaging
 5 may be used to explain gaps in Waymo’s proof that Uber misappropriated trade secrets or to
 6 supply proof that is part of the *res gestae* of the case (like the due diligence report).³

7 Such evidence will *not* be permitted, however, to the extent that it becomes cumulative,
 8 invites improper speculation, vilifies Uber without proving much else, or threatens to
 9 overwhelm the trial and distract from the merits of the case. Nor will the Court short-circuit the
 10 ordinary process of proof in a jury trial by ushering in such “evidence” through adverse-
 11 inference instructions (except as explained below). Both sides will have to prove their cases to
 12 the jury the old-fashioned way — by laying the necessary foundation and relying on admissible
 13 evidence and properly-designated witnesses. While this order rules that certain instances of
 14 “misconduct” will be relevant and admissible at trial, this order does not bless any particular
 15 method of proof and the parties must still employ non-objectionable ways to present their
 16 evidence at trial.⁴

17 **1. ALLEGED VIOLATIONS OF PRIOR ORDERS.**

18 As stated, Waymo had an opportunity to propose a non-argumentative instruction that
 19 would present to the jury relevant facts about shortfalls in Uber’s compliance with the expedited
 20 discovery and provisional relief orders. Instead, Waymo proposed an argumentative jury
 21 instruction unsuitable for use at trial (*see* Dkt. No. 1501-6). To repeat, that argumentative
 22 instruction will not be given to the jury.

23 This order now re-examines each of Waymo’s accusations that Uber violated the
 24 expedited discovery and provisional relief orders, denies Waymo’s requests for an adverse-

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 26 ³ Waymo previously moved *in limine* to preclude Uber from presenting evidence or argument that
 27 Uber relied on the due diligence investigation to prevent trade secret misappropriation. A prior order denied
 that motion (Dkt. No. 2493).

28 ⁴ One reason this order cannot bless any particular method of proof is that Waymo, in its most recent
 offer of proof, failed to explain how particular witnesses would sponsor particular items of evidence without
 running into hearsay objections, as discussed further below (*see* Dkt. No. 2470-36).

1 inference and remedial instruction, and explains the extent to which Waymo may attempt to
 2 present the relevant facts to the jury (assuming, of course, that Waymo can do so through
 3 admissible and properly-designated evidence).

4 **A. Original Contempt Motion.**

5 In its contempt motion, Waymo claims Uber violated two provisions of the expedited
 6 discovery and provisional relief orders. *First*, Paragraph 4 of the expedited discovery order
 7 provided (Dkt. No. 61 at 2):

8 By March 31, defendants shall produce for inspection all files and
 9 documents downloaded by Anthony Levandowski, Sameer
 10 Kshirsagar, or Radu Raduta before leaving plaintiff's payroll and
 11 thereafter taken by them. Defendants shall also produce for
 12 copying the card reader, thumb drive, or other media used for the
 13 downloads, as well as all subsequent emails, memoranda,
 14 PowerPoints, text messages, or notes that have forwarded, used, or
 15 referred to any part of said downloaded material. If any part of
 16 said downloaded material has been deleted, destroyed, or modified,
 17 then defendants shall state the extent thereof and produce all
 18 documents bearing on said deletion, destruction, or modification.

14 *Second*, Paragraph 2 of the provisional relief order provided (Dkt. No. 426 at 23):

15 Defendants must immediately and in writing exercise the full
 16 extent of their corporate, employment, contractual, and other
 17 authority to (a) prevent Anthony Levandowski and all other
 18 officers, directors, employees, and agents of defendants from
 19 consulting, copying, or otherwise using the downloaded materials;
 20 and (b) cause them to return the downloaded materials and all
 21 copies, excerpts, and summaries thereof to Waymo (or the Court)
 22 by **MAY 31 AT NOON**.

19 As now explained, however, this order concludes that Uber, for the most part,
 20 substantially complied with the foregoing provisions; that the extent of Uber's noncompliance
 21 may be presented to the jury through admissible evidence and percipient witnesses (including
 22 lawyers if properly designated); and that no jury instruction will be given as a substitute for
 23 evidence on this issue, with the sole exception that the Court will inform the jury as to the
 24 existence of the aforementioned orders and as to two particular violations of the expedited
 25 discovery and provisional relief orders.⁵

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 28 ⁵ To be clear, "downloaded materials," as used in prior orders and herein, is *not* synonymous with
 "alleged trade secrets." A device, server, or document might contain some of the former but none of the latter.
 And, some or all of the alleged trade secrets may fail to qualify for trade secret protection under the law. Of

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(1) *Stroz Friedberg.*

Waymo contends Uber violated Paragraph 2 of the provisional relief order by failing to compel Stroz to return the downloaded materials in its possession even though Stroz has been acting as Uber’s agent and providing e-discovery and digital forensics services in this litigation (Dkt. No. 676-4 at 4–5). Waymo acknowledges that Uber’s counsel wrote to Stroz in a letter dated June 12, 2017, stating (Dkt. No. 677-5):

We are sending this letter to Stroz to make the following points abundantly clear:

1. Uber and Ottomotto do not want Stroz to retain possession of *any* materials it gathered from Levandowski. Uber and Ottomotto are therefore instructing Stroz not to retain any such materials.

2. Uber and Ottomotto do not want Stroz to destroy or delete any materials it gathered from Levandowski. Uber and Ottomotto are therefore instructing Stroz not to destroy or delete such materials.

3. Uber and Ottomotto want Stroz to produce to Waymo any materials that it gathered from Levandowski that may constitute or contain any Google information, or that might possibly contain or reference any Google information, whether reasonably considered “proprietary” information or not (“Google Information”). The term “Google Information” should be interpreted as broadly as possible to include any document that was created at Google (or any affiliate) or that refers to Google (or any affiliate) or anything created at Google (or any affiliate).

4. While we want to see the actions described in items 1–3 above happen, we appreciate that based on the March 21 Levandowski-Stroz Agreement, it appears that Uber and Ottomotto do not have the contractual power to order Stroz to produce such materials to Waymo. For that reason, we are writing to Levandowski today to confirm that if he wishes to cure his failure to cooperate with Uber and Ottomotto’s prior directives, he must instruct Stroz to produce these materials to Waymo. We attach a copy of that letter to this letter. Of course, if Stroz takes a different view of its contractual obligations under these circumstances, and believes it is able to produce any Google Information it may have to Waymo based solely on the wishes expressed by Uber and Ottomotto in this letter, but without the consent of Levandowski, it may do so immediately.

course, Waymo may present evidence and argument to the jury about the downloaded materials as a step in proving Uber’s alleged misappropriation of trade secrets, but Waymo must take care not to conflate these issues.

1 Waymo argues, however, that this letter was “plainly less than the full extent of Uber and
2 Ottomotto’s authority” because it explains near the end that “Uber and Ottomotto do not have
3 the contractual power to order Stroz” to comply with the directives in the letter (Dkt. No. 676-4
4 at 5, 9). This is a non sequitur. It is not “less than the full extent” of Uber’s authority for Uber
5 to acknowledge the limits of that authority. Significantly, Waymo does not dispute that Uber
6 had no contractual authority to order Stroz to produce documents it had obtained from
7 Levandowski under a separate agreement between Stroz and Levandowski. Instead, Waymo
8 faults Uber for being “lukewarm and equivocal” in the June 12 letter (*id.* at 10). But this is
9 merely Waymo’s subjective characterization of the letter. This order declines to find any
10 violation of the provisional relief order based on the mere fact that Uber, in Waymo’s view,
11 should have used more zealous wording.

12 Waymo further contends Uber could have threatened Stroz with termination or
13 withholding of future business “as another lever to pressure Stroz” to comply with Uber’s
14 demands. This contention fails to come to grips with Uber’s point that the requests it made of
15 Stroz in the June 12 letter exceeded Uber’s actual *authority* in the first instance. Waymo
16 essentially faults Uber for failing to exercise the full extent of its bargaining, pressuring, or
17 persuasive powers over Stroz (*see* Dkt. Nos. 676-4 at 10, 886-3 at 5). But Paragraph 2 of the
18 provisional relief order required Uber to exercise the full extent of its “corporate, employment,
19 contractual, or other *authority*,” not any and all non-authoritative *influence* it could bring to
20 bear. What Waymo really seems to be arguing is that Uber was less than enthusiastic in
21 pressuring Stroz to voluntarily turn over materials it received from Levandowski, and that this
22 lack of zeal indicates reluctance to reveal evidence probative of Waymo’s claims. But Waymo
23 may make that argument to the jury with qualified witnesses and evidence, instead of asking the
24 Court to carry Waymo’s water by repeating its message with an instruction simply stating
25 outright that Uber “disobeyed” orders (*see* Dkt. No. 1501-6 at 1–2).

26 Waymo also points out that Uber’s June 12 letter to Stroz came *after* the provisional
27 relief order’s May 31 deadline (Dkt. No. 676-4 at 10–11). Waymo vaguely complains that this
28 delay violated the order because of “the sensitive nature of the documents, the risks that Waymo

1 suffers by having these documents in others' hands, and the compressed nature of this
 2 litigation" (*id.* at 11). These abstract buzzwords insinuate but fail to actually show that Uber's
 3 twelve-day delay in sending the June 12 letter to Stroz really prejudiced Waymo so as to require
 4 a remedial jury instruction. Under these circumstances, the better course is for Waymo, if it
 5 wishes, to simply tell the jury through admissible evidence that Uber missed a deadline by
 6 twelve days and to make its point, if any, to the jury based on that evidence.⁶

7 (2) *Morrison & Foerster.*

8 Also on June 12, 2016, Uber's counsel at Boies Schiller Flexner LLP emailed Waymo
 9 to, among other things, clarify that (Dkt. No. 677-8):

10 [Uber's counsel at Morrison & Foerster LLP] does not have any
 11 downloaded materials (or any copies, excerpts or summaries
 12 thereof), except to the extent that any such material may appear:
 13 (1) excerpted in or as an exhibit to the Stroz Report, which is
 14 privileged; and (2) in certain materials AL and other persons
 15 provided to Stroz to which MoFo was given limited access during
 16 the Stroz investigation pursuant to the terms of the AL-Stroz
 17 contract and the protocol governing the investigation, and under
 18 strict conditions preventing MoFo from sharing those materials
 19 with anyone, including Uber.

20 Waymo contends Uber violated both the expedited discovery and provisional relief orders
 21 because it failed to compel MoFo to return the downloaded materials in its possession (Dkt. No.
 22 676-4 at 7–8, 13). As Uber points out, Waymo's argument is unpersuasive as to the first
 23 category of downloaded materials because that category remained subject to privilege issues
 24 pending before the Federal Circuit at the time. As to the second category identified in BSF's
 25 June 12 email, MoFo subsequently "confirmed that it does not have any such materials in its
 26 possession or control other than as included as exhibits to the Stroz Report, which already is
 27 covered by the first category" (Dkt. No. 885 at 14–15).

28 ⁶ Occasionally, Waymo's brief strays from arguing that Uber violated the provisional relief order to
 arguing that Uber also violated the expedited discovery order with respect to Stroz (*see* Dkt. No. 676-4 at
 11–12). This serves only to muddy up Waymo's arguments, which in any event enjoy greater force as to the
 provisional relief order. The gravamen of Waymo's complaint with respect to Stroz remains that Uber
 supposedly failed to exercise the full extent of its "corporate, employment, contractual, [or] other authority" as
 required by the provisional relief order. This order therefore focuses on that issue notwithstanding Waymo's
 inconsistent references to the expedited discovery order.

1 In its opposition brief, Uber revealed it had learned for the first time on July 11, 2017,
2 that “MoFo has some materials that Levandowski provided to Stroz, and that Levandowski
3 authorized Stroz to provide to MoFo *in its former role as personal counsel for Levandowski*
4 *since the inception of the arbitrations brought by Google* (and not from the Stroz diligence
5 investigation or anything else preceding this litigation)” (*id.* at 15 (emphasis in original); *see*
6 *also* Dkt. No. 883 ¶¶ 6–8, 21–23). In its reply, Waymo complained at length that Uber’s new
7 discovery was inconsistent with BSF’s June 12 email and with other communications between
8 counsel. Even based on Waymo’s own arguments, however, the worst that can be said of
9 Uber’s counsel is that they had to correct certain representations to opposing counsel as this
10 litigation progressed and did so within about a month.

11 Waymo also baldly asserts that “MoFo was obliged to produce these materials in
12 response to the Expedited Discovery Order” but fails to explain why (*see* Dkt. No. 886-3 at
13 3–4). This order agrees with Uber that it did not violate the expedited discovery and
14 provisional relief orders by failing to compel MoFo to produce copies of downloaded materials
15 that, unbeknownst to Uber, MoFo had received and retained in its *former role as Levandowski’s*
16 *counsel in separate arbitration proceedings*.

17 In short, no jury instruction is warranted based on Waymo’s claim that Uber violated
18 orders by failing to compel MoFo to produce the downloaded materials. Nor do the underlying
19 facts described above bear any reasonable nexus to any issues relevant to the claims and
20 defenses in this case. Their probative value, if any, is substantially outweighed by their
21 likelihood of confusing the issues, misleading the jury, and consuming undue time at trial.
22 They are therefore excluded under Federal Rule of Evidence 403.

23 (3) ***The Five Discs.***

24 On June 8, 2017, Uber responded to one of Waymo’s interrogatories as follows (Dkt.
25 No. 677-2 at 4):

26 On or about March 11, 2016, Mr. Levandowski reported to Mr.
27 Kalanick, Nina Qi and Cameron Poetzscher at Uber as well as Lior
28 Ron that he had identified five discs in his possession containing
Google information. Mr. Kalanick conveyed to Mr. Levandowski
in response that Mr. Levandowski should not bring any Google
information into Uber and that Uber did not want any Google

1 information. Shortly thereafter, Mr. Levandowski communicated
2 to Uber that he had destroyed the discs. Uber never received those
3 discs, and does not know whether those discs contained any of the
4 “DOWNLOADED MATERIALS.”

5 Poetzscher, who remains Uber’s vice president of corporate development, also confirmed in his
6 deposition on June 19 that he had known since March 2016 about the supposed destruction of
7 the five disks (*see* Dkt. No. 676-14 at 259:1–260:7).

8 Waymo contends Uber’s failure to sooner disclose the supposed destruction of the five
9 discs violated Paragraph 4 of the expedited discovery order because “these facts and
10 circumstances raise an exceedingly strong inference that the discs did indeed contain
11 downloaded materials” (Dkt. No. 676-4 at 13–14). Uber does not dispute that it should have
12 sooner disclosed the supposed destruction of the five discs and expresses regret for its
13 “oversight” (Dkt. No. 885 at 3). Uber insists, however, that it did not intentionally conceal that
14 information from Waymo (*see id.* at 15–18). According to Uber, it withheld the information as
15 “privileged” for months until the Court ordered it to decide by June 1 whether or not it would
16 waive any privilege. Only then did Uber revisit its assertions of privilege and conclude that the
17 information about the five discs was not privileged after all, leading to the belated disclosure of
18 that information to Waymo (*see id.* at 17).

19 Uber’s vague hand-wringing about the “difficult privilege issues raised in this case” fails
20 to explain how there could have been any confusion on the specific question of whether or not
21 the information about the five discs was privileged. Clearly, it was not. Even a generous
22 reading of this record suggests that Uber liberally asserted privilege over broad swaths of
23 information at the outset of this litigation and only bothered to closely examine the validity of
24 those assertions when faced with the possibility that it would not be able to use information
25 favorable to its own defense absent a timely waiver. In other words, insofar as Uber claims
26 simple carelessness as its excuse, that carelessness proved suspiciously convenient to Uber and
27 its defense strategies.

28 In a similar vein, Uber rationalizes that it “devoted enormous resources” and “conducted
a massive investigation” to comply with the expedited discovery order (*see* Dkt. No. 885 at 4–6,
16–17). These protestations miss the point. The five discs hardly constituted needles in a

1 haystack but stood out as a vital element in the narrative at the core of this case, plainly bearing
2 on the crucial question of whether or not Levandowski funneled Waymo's trade secrets to Uber.
3 It was and remains known to Uber's leadership, including Travis Kalanick, Nina Qi, and
4 Cameron Poetzscher, who all learned about the five discs and their supposed destruction from
5 Levandowski himself. Under these circumstances, Uber's failure to timely disclose the five
6 discs and their supposed destruction — even viewed through the excuse that Uber's counsel
7 apparently let frivolous assertions of privilege go conveniently unchecked for months —
8 constituted a violation of the expedited discovery order. At trial, the Court will inform the jury
9 of these facts and will instruct the jury that it may, but need not, draw any adverse inference
10 therefrom. It will remain up to the jury to decide what inference, if any, to draw.

11 **B. Waymo's First Supplemental Brief on Contempt Motion.**

12 On August 4, 2017, Uber's in-house counsel Attorney Padilla submitted a declaration
13 describing a meeting that took place on March 29, 2017, between her, Kalanick, and
14 Levandowski. According to Padilla, Levandowski revealed to her and Kalanick during that
15 meeting that he had downloaded and deleted Waymo files (Dkt. No. 1082-1 ¶ 6). In its first
16 supplemental brief, Waymo pointed to this declaration and meeting as further evidence that
17 Uber violated the expedited discovery order by failing to timely disclose Levandowski's
18 destruction of downloaded materials (Dkt. No. 1095).

19 Significantly, Kalanick testified about the contents of the March 29 meeting at his
20 deposition on July 27. Uber then insisted the March 29 meeting was *not* privileged to begin
21 with, this to avoid subject-matter waiver as a result of Kalanick's testimony. Judge Corley
22 disagreed, finding that the meeting had been privileged — but that Uber had waived privilege as
23 to the subject matter of that testimony. The undersigned judge overruled Uber's objections to
24 Judge Corley's ruling (Dkt. Nos. 1172, 1267). As even Waymo recognizes, however, this also
25 means the March 29 meeting was indeed privileged in the first instance, so Uber's failure to
26 disclose information from that meeting could not have constituted a violation of the expedited
27 discovery order. Under these circumstances, the appropriate remedy for Uber's actions was
28

1 Judge Corley’s ruling of subject-matter waiver, not a jury instruction that Uber violated the
2 expedited discovery order.

3 **C. Waymo’s “Corrected” Supplemental Brief on Contempt Motion.**

4 During a prior hearing on July 26, 2017, the undersigned judge set forth certain ground
5 rules pertaining to Levandowski’s expected invocation of his Fifth Amendment privilege at
6 trial. In relevant part, the ground rules would instruct the jury that it may, but need not, infer
7 that the testimony Levandowski refused to give would be adverse *to him*. Whether or not that
8 would further lead to an adverse inference against *Uber*, however, would be up to the jury to
9 decide based on all the evidence and argument in the case (*see* Dkt. No. 1050 at 99:3–100:8).

10 Not content with this ruling and the opportunity to propose a non-argumentative
11 instruction about Uber’s alleged violations of orders, Waymo filed a “corrected” supplemental
12 brief urging the Court to extend any adverse inference against Levandowski to include Uber “as
13 an additional sanction” for said violations (*see* Dkt. No. 1501-4 at 1). While Waymo left
14 ambiguous how exactly this “extension” would occur, Waymo’s arguments suggest it wants to
15 instruct the jury that any adverse inference drawn against Levandowski must automatically
16 extend to Uber as well. The sanction Waymo proposes would pose a serious risk of invading
17 the fact-finding province of the jury and hampering the resolution of this action on the merits,
18 particularly since any nexus between Uber’s alleged violations of orders and the substance of
19 Waymo’s misappropriation claims remains tenuous at best. In its “corrected” supplemental
20 brief, Waymo complains that Uber violated prior orders in three additional ways but ultimately
21 provides no reason or authority why such drastic relief is warranted, as now addressed.

22 **(1) Levandowski’s Devices.**

23 Waymo contends Uber violated both the expedited discovery and provisional relief
24 orders by failing to disclose that Stroz had received and possessed approximately one hundred
25 hard drives from Levandowski in connection with the due diligence investigation. Waymo cites
26 Paragraph 4 of the expedited discovery order and Paragraph 2 of the provisional relief order
27 (both discussed above), and further claims Uber violated Paragraph 4 of the provisional relief
28 order, which provided (Dkt. No. 426 at 24):

1 With respect to all other persons, including those with Stroz
2 Friedberg, defendants shall conduct a thorough investigation and
3 provide a detailed accounting under oath setting forth every person
4 who has seen or heard any part of any downloaded materials, what
5 they saw or heard, when they saw or heard it, and for what
6 purpose. . . . The accounting shall not be limited to downloaded
7 materials that happened to make their way into some due diligence
8 report but shall cover any and all downloaded materials. The
9 accounting shall also identify the complete chains of custodians for
every copy of any downloaded materials or due diligence report
referencing downloaded materials. Defendants must also use the
full extent of their authority and influence to obtain cooperation
with the foregoing procedure from all involved. For example, if a
potential custodian refuses to cooperate, then defendants'
accounting shall set forth the particulars, including all efforts made
to obtain cooperation. The accounting must be filed and served by
JUNE 23 AT NOON.

10 Insofar as Waymo's "corrected" supplemental brief simply riffs on its complaint that Uber
11 could have done more to pressure Stroz to turn over materials it received from Levandowski, it
12 does not warrant any further relief for the reasons stated above (Dkt. No. 1501-4 at 2-3).

13 With respect to Paragraph 4 of the provisional relief order, Waymo accuses Uber of
14 misrepresentation because Uber's accounting disclosed that Stroz "collected *and imaged*
15 Anthony Levandowski's personal devices for the purpose of preparing a due diligence report"
16 but did not also specifically call out devices that Stroz collected *but never imaged* (*see id.* at
17 3-4; Dkt. No. 715 at 2 (emphasis added)). On this record, however, the worst that can be said
18 of Uber is that it left ambiguous whether Stroz imaged every device collected from
19 Levandowski and failed to provide a detailed list of those devices — details not explicitly
20 required by the provisional relief order in the first place (*see* Dkt. No. 426 ¶ 4 (requiring an
21 accounting of "every person who has seen or heard any part of any downloaded materials, what
22 they saw or heard, when they saw or heard it, and for what purpose"))).

23 Waymo's real point seems to be that Stroz's failure to image certain devices from
24 Levandowski is probative of Waymo's misappropriation theory because it undermines Uber's
25 narrative that it quarantined Levandowski's devices in a "vault" to keep any purloined trade
26 secrets away from Uber (*see* Dkt. No. 1501-4 at 4). Of course, this point goes to the merits of
27 the case and Waymo may try to present its argument through evidence admissible at trial. This
28

1 does not further show, however, that Uber violated the provisional relief order. The adverse-
2 inference instruction sought by Waymo remains unwarranted on this basis.

3 (2) *Communications Log.*

4 In its “corrected” supplemental brief, Waymo further contends Uber violated Paragraph
5 5 of the provisional relief order, which provided (Dkt. No. 426 at 25):

6 Also by **JUNE 23 AT NOON**, defendants shall provide Waymo’s
7 counsel and the Court with a complete and chronologically
8 organized log of all oral and written communications — including,
9 without limitation, conferences, meetings, phone calls, one-on-one
10 conversations, texts, emails, letters, memos, and voicemails —
11 wherein Anthony Levandowski mentioned LiDAR to any officer,
12 director, employee, agent, supplier, or consultant of defendants.
13 The log shall identify for each such communication the time, place
14 (if applicable), mode, all persons involved, and subjects discussed,
15 as well as any and all notes or records referencing the
16 communication.

12 Waymo points out that, despite the June 23 deadline, Uber continued to supplement its
13 communications log until September 5, and further complains that even Uber’s latest
14 supplementation failed to capture many LiDAR-related communications between Levandowski
15 and Uber personnel (Dkt. No. 1501-4 at 4–11). Uber responds that it was simply doing the best
16 it could under the “blazingly fast discovery schedule in this case,” that Waymo itself prioritized
17 some document productions while delaying others, and that innocent explanations exist for the
18 specific un-logged communications complained of by Waymo (Dkt. No. 1591-4 at 2–3).

19 As stated, the Court will inform the jury as to aspects of the provisional relief order.
20 Uber does not and cannot dispute that it provided an incomplete log prior to June 23 and then
21 proceeded to supplement that log until September 5 (*see* Dkt. No. 1469). The Court will also
22 inform the jury of that fact. Waymo will not, however, be allowed to waste time at trial by
23 unnecessarily parading dozens of examples of communications that arguably fell within the
24 scope of the provisional relief order, as it did in briefing on this issue (*see* Dkt. No. 1501-4 at
25 5–10). While individual examples of un-logged communications may prove relevant to the case
26 in other ways and to that extent may be presented to the jury, generic flyspecking would add
27 little, if any, probative value to the core point that Uber simply did not provide a complete
28

1 communications log by June 23. If Waymo attempts to go down the latter path at trial, it will
2 likely be excluded under FRE 403.

3 Possibly, as Uber argues, its belated supplementation reflected nothing more than the
4 understandable consequences of a compressed discovery schedule. By contrast, it was also
5 possibly symptomatic of something more sinister. Under these circumstances, however, the
6 question of whether and to what extent Uber’s belated supplementation indicated its liability
7 should be answered by the jury, not decided via an adverse-inference instruction imposed as a
8 “sanction” for imperfect logging of voluminous communications.

9 **(3) *Sword-and-Shield Disputes.***

10 Finally, in its “corrected” supplemental brief, Waymo complains that Uber has been
11 using privilege as both a sword and a shield throughout this litigation, both with its own
12 assertions of privilege and with Levandowski’s assertions of his Fifth Amendment privilege
13 (Dkt. No. 1501-4 at 11–14). Setting aside for the moment Waymo’s conflation of two very
14 different privileges asserted by different parties, its grievance has no discernible nexus to its
15 requested relief. Aside from a single nebulous and conclusory comment that Uber’s alleged
16 abuse of privilege “adds to the pattern of intentional non-compliance with this Court’s orders,”
17 Waymo offers no explanation as to how these allegations, even taken as true, show that Uber
18 violated any order. Waymo’s familiar sword-and-shield complaints are quintessentially
19 discovery disputes that should have been brought before Judge Corley for resolution. Waymo,
20 of course, knows this, having done so — and prevailed — before (*see, e.g.*, Dkt. No. 1267).
21 Waymo’s regurgitation of these issues in its “corrected” supplemental brief fails to justify any
22 jury instruction, much less the adverse-inference instruction requested by Waymo.

23 Insofar as this argument also implicates Waymo’s motion *in limine* regarding the subject
24 of Levandowski’s cooperation (or non-cooperation) with Uber, it is addressed further below.

25 **D. Waymo’s Second Supplemental Brief on Contempt Motion.**

26 Waymo also filed a second supplemental brief in furtherance of its quest for a jury
27 instruction and adverse inference against Uber. Waymo’s second supplemental brief raises two
28 additional issues, neither of which justifies the relief requested by Waymo.

1 (1) *Levandowski's Laptops.*

2 Levandowski first asserted his Fifth Amendment privilege in this action on March 29,
3 2017. At the same time, Uber's counsel mentioned that they did not have access to
4 Levandowski's personal devices (*see* Dkt. No. 131 at 5:14–18, 11:25–12:3). On April 20,
5 Uber's in-house counsel Attorney Padilla emailed Levandowski to demand that he turn over for
6 inspection and imaging two personal laptops he had used for Uber work, citing “internal
7 company policies” requiring his compliance (Dkt. No. 2053-5). Levandowski refused through
8 his personal counsel at Goodwin Procter LLP. (Uber later cited this refusal as a ground for
9 terminating his employment (*see* Dkt. No. 519-2).) Uber's counsel then asked Goodwin, as an
10 alternative, to run search terms on Levandowski's personal computers and provide the results to
11 Uber. Goodwin did not share any details about the actual searches with Uber but on May 17
12 transmitted the purported results of those searches to Uber's counsel, who then turned the
13 results over to Waymo (Dkt. No. 2018-3).⁷

14 Waymo contends this handling of the situation with Levandowski's two personal laptops
15 violated the expedited discovery and provisional relief orders. *First*, Waymo seems to complain
16 that Uber's counsel did not do enough to look for the downloaded materials despite obtaining
17 search results from Goodwin. Waymo points to no actual evidence that those search results
18 were incomplete but nevertheless speculates that the requested search parameters could have
19 missed the downloaded materials in various ways — for example, if said materials “were stored
20 in certain types of encrypted, container-type files” (Dkt. No. 2053-4 at 11–12). This argument
21 misses the point. The request between counsel for Uber and counsel for Levandowski was just
22 that — a request between counsel. It was not made pursuant to any “corporate, employment,
23 contractual, and other authority” of Uber's. Levandowski himself made that abundantly clear
24 when, as an Uber employee, he refused Padilla's unequivocal demand to turn over those laptops
25 for inspection and imaging. In short, there is no merit to Waymo's suggestion that Uber
26 somehow failed to exercise its authority over Levandowski just because Uber's counsel did not
27 persuade Levandowski's counsel to voluntarily run more exhaustive searches.

28 _____
⁷ By this point, MoFo no longer represented Levandowski in his personal capacity (Dkt. No. 883 ¶ 6).

1 *Second*, Waymo states in conclusory terms that Uber did not use “the full extent of [its]
2 authority to cause Mr. Levandowski and his agents to return any downloaded materials on the
3 two laptops to Waymo or the Court” (Dkt. No. 2053-4 at 12). This assertion is meritless for the
4 same reasons stated above.

5 To be clear, Waymo may, of course, try to prove to the jury that it sought to inspect
6 Levandowski’s personal laptops but was refused, just as Waymo may try to prove that Uber
7 allowed Levandowski to use those laptops for work despite the very real possibility that he
8 could consult any misappropriated trade secrets stored thereon while guiding the development
9 of Uber’s self-driving technology. Uber, for its part, may try to prove that it asked
10 Levandowski to turn over his laptops but was refused and may also try to prove to the jury
11 MoFo’s efforts to run searches on the laptops through Goodwin. These facts are unquestionably
12 germane to the merits of the case. But, to repeat, in pursuit of these points, both sides must lay
13 the necessary foundation and rely on admissible evidence and witnesses properly designated for
14 trial, including, if necessary, attorneys from MoFo, Goodwin, and Quinn Emanuel Urquhart &
15 Sullivan, LLP. For example, if Uber tries to go down this path, it must prove that the laptops
16 searched by Goodwin were in fact the same personal laptops used by Levandowski for his work
17 at Uber. (Without testimony from Levandowski, this may prove difficult.) Unless and until
18 Uber lays the full foundation, it may *not* claim before the jury that it obtained and turned over
19 search results from the latter (though it may describe its efforts to do so) or otherwise exceed in
20 argument the scope of what admissible evidence and percipient witnesses will support.

21 Waymo’s instant motion, however, does not concern whether or not both sides may
22 present the foregoing narratives to the jury. Rather, it concerns Waymo’s contention that Uber
23 violated orders so as to justify an adverse-inference instruction against Uber. As explained, this
24 order denies such relief with respect to Uber’s handling of Levandowski’s personal laptops.

25 *Third*, Waymo complains that Uber’s accounting pursuant to Paragraph 4 of the
26 provisional relief order did not refer to any efforts to obtain Levandowski’s laptops from his
27 personal counsel at Goodwin, nor did the accounting disclose the two laptops in a section titled
28 “Other Potentially Downloaded Materials” (*id.* at 12–14). Again, Paragraph 4 of the

1 provisional relief order required an accounting of “every person who has seen or heard any part
2 of any downloaded materials, what they saw or heard, when they saw or heard it, and for what
3 purpose.” The accounting also had to “identify the complete chains of custodians for every
4 copy of any downloaded materials or due diligence report referencing downloaded materials.”
5 As Uber points out, however, the Goodwin searches unearthed no downloaded materials.
6 Waymo does not contend otherwise but nevertheless suggests Uber should have included the
7 searches and laptops in its accounting because some downloaded materials could have slipped
8 past the search parameters. This argument rests on speculation and fails to show Uber violated
9 the provisional relief order such that an adverse-inference instruction would be warranted.

10 This issue also ties in to Waymo’s motion *in limine* regarding the subject of
11 Levandowski’s cooperation (or non-cooperation) with Uber and to that extent is addressed
12 further below.

13 (2) ***Due Diligence Materials.***

14 Uber previously moved to exclude evidence or argument about assertions of attorney-
15 client or work-product privilege in this litigation, even those that were ultimately rejected by
16 final court order (*see, e.g.*, Dkt. No. 1546). This case, however, does not present mere
17 assertions of privilege that ultimately failed. As described further below in the context of the
18 spoliation issue, the underlying story about the Otto acquisition and its elaborate setup —
19 including the due diligence investigation and a carefully constructed artifice of interlocking
20 privileges intended to shroud the whole affair in a fog of secrecy — remains vital to the story of
21 the whole case. It cannot simply be excised for fear of revealing to the jury how that elaborate
22 artifice of “privilege” was actually invoked in this litigation. For fairness and balance,
23 however, the undersigned judge ruled that, if Waymo mentions to the jury Uber’s assertion of
24 privilege over the due diligence investigation, then Uber may also tell the jury about Waymo’s
25 assertions of privilege ultimately rejected by final court order (*e.g.*, the Sasha Zbrozek story) —
26 notwithstanding Waymo’s protestations, like Uber’s, that it acted in good faith (*see* Dkt. No.
27 1863 at 24:17–30:12). Uber would thus be able to defend itself against insinuations that it
28

1 wrongfully asserted privilege to conceal damning evidence by retorting that Waymo itself
2 asserted privilege in the same way.

3 In its second supplemental brief, however, Waymo seeks to do more than just present
4 the complete due diligence story to the jury. It wants an adverse-inference instruction based on
5 Uber violating the accounting requirement in the provisional relief order with respect to the due
6 diligence materials — including by failing to disclose information or produce materials that
7 remained subject to pending issues of privilege at the time. Waymo’s actual complaints,
8 however, bear little or no relation to the accounting requirement it cites.

9 *First*, Waymo criticizes various representations made by Uber and its counsel that,
10 according to Waymo, did not fully reflect the truth that the due diligence report and its exhibits
11 contained some downloaded materials. For example, Waymo faults Uber for saying that MoFo
12 viewed “potentially” downloaded materials and Levandowski “allegedly” downloaded a
13 spreadsheet even though the due diligence report and its exhibits would have put both
14 equivocations to rest (Dkt. Nos. 2053-4 at 16–17). Significantly, however, Uber made all the
15 complained-of representations while the due diligence materials remained subject to privilege
16 issues pending before the Federal Circuit. This helps explain ambiguities in Uber’s
17 representations at the time. On this record, the worst that can be said of Uber is that it
18 temporized and occasionally used slick rhetoric to gloss over pending privilege issues and
19 potentially unfavorable facts. Once Uber and Levandowski lost on the privilege issues, Uber
20 came clean. These circumstances are not so egregious as to warrant an adverse inference
21 instruction (though Waymo remains free to put in its proof on this point to the jury).

22 *Second*, Waymo points out that Stroz possessed a Relativity database with data extracted
23 from Levandowski’s personal devices, including downloaded materials. On April 4, 2017,
24 Stroz sent a copy of the database to John Gardner, Levandowski’s personal counsel, apparently
25 pursuant to a separate agreement between Stroz and Gardner. Since then, Uber apparently
26 made no attempt to recover the Relativity database from Gardner or to prevent him from sharing
27 it with Levandowski. Waymo apparently sees this as a violation of Paragraph 2 of the
28 provisional relief order, which required Uber to prevent Levandowski from “consulting,

1 copying, or otherwise using the downloaded materials” (*id.* at 17–18). Yet Waymo makes no
2 attempt to show that Stroz acted as Uber’s agent when it sent Gardner the Relativity database,
3 that Uber had any “corporate, employment, contractual, [or] other authority” to prevent Stroz
4 from doing so, or that Uber had any “corporate, employment, contractual, [or] other authority”
5 to compel Gardner to return the Relativity database.⁸

6 *Third*, Waymo again dissects various comments made by Uber and its counsel and
7 essentially argues that said comments were misleading, incomplete, or otherwise undermined by
8 certain evidence in the due diligence materials (*id.* at 18–20). This rehashes Waymo’s first
9 point and similarly fails to warrant an adverse-inference instruction. Waymo also revives its
10 complaints about Uber’s failure to sooner disclose the five discs (*see id.* at 20–21). That
11 grievance, however, has already been addressed above.

12 Importantly, of course, counsel should not mislead the Court, mislead opposing counsel,
13 or misstate the record. The instant complex of motions and supplements, however, is not an
14 unfettered forum to lodge all manner of complaints about counsel’s half-truths and other slick
15 litigation conduct (of which both sides have been guilty).⁹

16 The problem remains that Waymo fails to explain how Uber’s counsel’s comments in
17 hearings, even if misleading, constituted a violation of the expedited discovery or provisional
18 relief orders such that an adverse-inference instruction is warranted. Yes, buried in the complex
19 of motions and supplements lurk some legitimate criticisms of Uber and its counsel. But it also
20 must be said that Waymo has whined — often without good reason — at every turn in this case,
21 making it hard to separate the wheat from the chaff. Countless hours of time have gone into
22 sorting these issues instead of the merits. Less time would have been consumed had Waymo
23 focused on its best examples of misconduct instead of piling on every miscellaneous grievance.

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25
26 ⁸ Relativity is a software company and platform that provides tools for e-discovery.

27 ⁹ It bears repeating that neither side in this contentious litigation has been above using exaggeration,
28 spin, or other misleading rhetorical flourishes to advance their cause. If the Court were to issue an adverse-
inference instruction for every time that a lawyer for either side, including Waymo, told a half-truth, the merits
of this case would never see the light of day (*see, e.g.*, Dkt. No. 1965 at 10:7–16).

1 To repeat, the central issue in this case remains whether or not Uber misappropriated
2 Waymo's trade secrets, not whether or not Uber is an evil corporation. Waymo's decision to
3 devote so much time and effort to pursuing matters with so little connection to the merits raises
4 the troubling possibility that Waymo is unwilling or unable to prove up a solid case on the
5 merits and instead seeks to inflame the jury against Uber with a litany of supposed bad acts.
6 This order remains sensitive to this concern while also allowing certain facts about Uber's
7 misconduct to go before the jury insofar as they may actually help explain that weak spots in
8 Waymo's case may well be the result of Uber's spoliation or obstruction of discovery.

9 **E. Summary re Alleged Violations of Orders.**

10 In summary, the jury will be instructed as to relevant aspects of the expedited discovery
11 and provisional relief orders and the obligations they imposed on Uber. The jury will also be
12 instructed that, despite Paragraph 4 of the expedited discovery order, Uber did not timely
13 disclose information in its possession regarding the supposed destruction of the five discs.
14 Similarly, the jury will be instructed that, despite Paragraph 5 of the provisional relief order,
15 Uber did not provide a complete communications log by June 23 but continued to supplement
16 that log through September 5. The jury will *not* further be directed to draw any adverse
17 inference against Uber based on these facts but will be free to do so (or not) of its own accord.

18 In addition, Waymo may adduce proof before the jury about Uber's June 12 letter to
19 Stroz and may argue that timing and tone of that letter reflected a reticence to turn up relevant
20 evidence, if Waymo believes such argument is worth its time at trial. Again, Waymo must lay
21 the necessary foundation and rely on admissible evidence and percipient witnesses properly
22 designated for trial. Waymo may *not*, however, further argue that Uber or MoFo violated prior
23 orders by failing to disclose information or produce materials that, at the time, remained subject
24 to privilege issues pending before the Federal Circuit. Nor may Waymo present evidence or
25 argument regarding MoFo's receipt or possession of materials from Levandowski in its role as
26 Levandowski's personal counsel and without Uber's knowledge. *See* FED. R. EVID. 403.

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1 **2. MOTION RE SPOILIATION.**

2 All of the foregoing dealt with Waymo’s contempt motion and supplements thereto
3 based on Uber’s alleged violations of earlier orders. We now turn to Waymo’s separate motion
4 for relief for spoliation.

5 Waymo moves under both Federal Rule of Civil Procedure 37(e) and the Court’s
6 inherent authority for an adverse-inference instruction against Uber on the basis that Uber
7 spoliated evidence (Dkt. No. 2197-4). Because the evidence in question consists of
8 electronically-stored information, FRCP 37(e), not inherent authority, supplies the controlling
9 legal standard. *See* F.R.C.P. 37(e) Advisory Committee’s Note to 2015 Amendment (FRCP
10 37(e) “authorizes and specifies measures a court may employ if information that should have
11 been preserved is lost, and specifies the findings necessary to justify these measures. It
12 therefore forecloses reliance on inherent authority or state law to determine when certain
13 measures should be used”); *see also Regeneron Pharms., Inc. v. Merus N.V.*, 864 F.3d 1343,
14 1364 n.7 (Fed. Cir. 2017) (relying on the Advisory Committee’s Notes to construe FRCP
15 37(e)’s supersession of prior case law).

16 FRCP 37(e) provides:

17 If electronically stored information that should have been
18 preserved in the anticipation or conduct of litigation is lost because
19 a party failed to take reasonable steps to preserve it, and it cannot
20 be restored or replaced through additional discovery, the court:

21 (1) upon finding prejudice to another party from loss of the
22 information, may order measures no greater than necessary
23 to cure the prejudice; or

24 (2) only upon finding that the party acted with the intent to
25 deprive another party of the information’s use in the
26 litigation may:

27 (A) presume that the lost information was
28 unfavorable to the party;

 (B) instruct the jury that it may or must presume
 the information was unfavorable to the party; or

 (C) dismiss the action or enter a default judgment.

1 **A. Anticipation of Litigation.**

2 “Many court decisions hold that potential litigants have a duty to preserve relevant
3 information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law
4 duty.” F.R.C.P. 37(e) Advisory Committee’s Note to 2015 Amendment. Spoliation is the
5 destruction or material alteration of evidence or the failure to preserve property for another’s
6 use as evidence in pending or reasonably foreseeable litigation. *Apple Inc. v. Samsung Elecs.*
7 *Co., Ltd.*, 888 F. Supp. 2d 976, 989 (N.D. Cal. Aug. 21, 2012) (Judge Lucy Koh) (quoting
8 *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). “This is an objective
9 standard, asking not whether the party in fact reasonably foresaw litigation, but whether a
10 reasonable party in the same factual circumstances would have reasonably foreseen litigation.”
11 *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011); *see also Hynix*
12 *Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1345–47 (Fed. Cir. 2011) (litigation does
13 not need to be certain or imminent to be reasonably foreseeable). As the Federal Circuit
14 explained in *Micron*:

15 When litigation is “reasonably foreseeable” is a flexible
16 fact-specific standard that allows a district court to exercise the
17 discretion necessary to confront the myriad factual situations
18 inherent in the spoliation inquiry. This standard does not trigger
19 the duty to preserve documents from the mere existence of a
20 potential claim or the distant possibility of litigation. However, it
21 is not so inflexible as to require that litigation be “imminent, or
22 probable without significant contingencies.”

23 645 F.3d at 1320 (citations omitted).

24 Here, the record clearly shows (and this order finds) not only that a reasonable party in
25 Uber’s circumstances would have reasonably foreseen this litigation in January 2016, but also
26 that Uber *actually* foresaw this litigation in January 2016 when it commenced the process of
27 acquiring Otto. Uber itself previously insisted as much while trying to withhold evidence about
28 the acquisition by arguing to Judge Corley that the parties thereto anticipated, foresaw, and
painstakingly planned for this very litigation so as to give rise to joint-defense and common-
interest privileges between them (*see, e.g.*, Dkt. No. 1414 at 82:4–7). But now, facing
accusations of spoliation, Uber has reversed course and, in a performance deserving of an
Academy Award, claims the exact opposite — that it did *not* reasonably foresee this litigation in

1 2016 and thus supposedly had no duty to preserve evidence (*see* Dkt. No. 2240-4 at 6–13).
2 Uber’s own statements show otherwise.

3 In January 2016, Uber consulted and retained MoFo as litigation counsel to obtain legal
4 advice regarding potential liability exposure arising out of its planned acquisition of Ottomotto
5 and Otto Trucking (collectively, “Otto”), including for potential claims that could be brought by
6 Waymo specifically. Otto was founded by former Waymo employees Levandowski and Lior
7 Ron. Like Waymo, Otto focused on self-driving technology. Based on these factors, the parties
8 to the Otto acquisition entered into a joint-defense agreement by February 2016 (*see* Dkt. No.
9 378 ¶¶ 2–3, 5–6). Also in February 2016, the parties signed a term sheet that included detailed
10 indemnity provisions in the event of “super duper litigation” brought by Waymo for certain
11 “Bad Acts,” including trade secret misappropriation (*see* Dkt. No. 515-14 at 4–5, 50–51).¹⁰

12 In March 2016, in light of the litigation risks presented by the acquisition, Uber also
13 took the unusual step of retaining Stroz to perform a due diligence investigation that would
14 facilitate MoFo’s provision of legal analysis and advice (*see* Dkt. No. 378 ¶¶ 9–10). Stroz’s
15 engagement letter explained that Uber retained its services to ascertain, among other things,
16 “whether certain current or prospective employees . . . of Ottomotto have improperly retained
17 on devices or in storage repositories not belonging to former employers, confidential
18 information belonging to former employers” (Dkt. No. 2197-9 at 1).

19 As it turned out, much of Stroz’s due diligence investigation and report focused on the
20 possibility that Levandowski and other Otto employees might have retained highly confidential
21 and proprietary information from Waymo (*see generally* Dkt. No. 1928-24 (due diligence
22 report)). It has also become clear over the course of this litigation that the purported joint-
23 defense and common-interest privileges among the parties to the Otto acquisition were an
24 elaborate artifice carefully and meticulously constructed for the purpose of shrouding the
25 acquisition and “due diligence” process in secrecy.

26
27
28 ¹⁰ Technically, Levandowski and other Otto employees worked for Google Inc. before its self-driving car project spun out to become Waymo, a separate subsidiary under the same parent company. For simplicity, however, this order refers only to Waymo.

1 Uber argues at length that specific fragments of this picture — *e.g.*, the retention of
 2 litigation counsel, the retention of Stroz, and the indemnification and joint-defense agreements
 3 — show at most that Uber anticipated “potential litigation,” not that this litigation was
 4 “reasonably foreseeable” so as to give rise to a duty to preserve evidence (Dkt. No. 2240-4 at
 5 10–13). Uber attempts to split hairs that cannot be split. The elements of the Otto acquisition
 6 must be viewed as a whole because it is simply implausible that the pieces of such an intricate
 7 scheme hatched in isolation. For example, it would strain credulity to suggest that Uber’s
 8 concern over trade secret misappropriation sprung into being when it signed the term sheet in
 9 February 2016 and retained Stroz in March 2016 but did not previously exist when Uber
 10 retained MoFo in January 2016, or that a transaction as anomalous as the Otto acquisition grew
 11 around “the mere existence of a potential claim or the distant possibility of litigation” as
 12 opposed to the “reasonable foreseeability” of litigation. *See Micron*, 645 F.3d at 1320.

13 This order finds that any reasonable party in Uber’s position would have reasonably
 14 foreseen litigation from Waymo for trade secret misappropriation related to the defections of
 15 Levandowski and other Otto employees. *See ibid.* (“When litigation is ‘reasonably foreseeable’
 16 is a flexible fact-specific standard that allows a district court to exercise the discretion necessary
 17 to confront the myriad factual situations inherent in the spoliation inquiry.”). Indeed, the record
 18 indicates Uber *actually* foresaw this litigation and constructed the byzantine architecture of the
 19 Otto acquisition at least in part as a prophylactic measure to defend it. This order concludes,
 20 based on these findings and pursuant to FRCP 37(e), that Uber had a duty to preserve evidence
 21 at least as of January 2016.¹¹

22 **B. Spoliation of Evidence.**

23 Waymo contends Uber failed to take reasonable steps to preserve five categories of
 24 evidence. *First*, hundreds of text messages among Levandowski, Ron, Kalanick, and Qi have
 25 been deleted. *Second*, Levandowski and Ron also deleted their electronic communications,
 26 files, and Slack records. *Third*, as already stated, Levandowski supposedly destroyed five discs.

27
 28 ¹¹ To be clear, these findings are made only to explain the applicability of FRCP 37(e) and the
 appropriateness of the remedies authorized thereunder. These findings are *not* a jury instruction or adverse
 inference to be used against Uber at trial. Counsel shall not argue otherwise.

1 *Fourth*, emails and email archives from Tyto LIDAR, LLC, were apparently deleted after its
2 acquisition by Ottomotto. *Fifth*, Waymo repeats that it was denied access to Levandowski’s
3 personal laptops.¹²

4 Waymo’s “spoliation” argument regarding Levandowski’s personal laptops (Dkt. No.
5 2197-4 at 13–14) can be summarily rejected. Waymo’s point seems to be that Uber “spoliated”
6 evidence on those laptops because it did not make the data on them available to Waymo’s
7 satisfaction. As explained, however, it was Levandowski’s assertion of his Fifth Amendment
8 privilege — not anyone else’s failure to preserve evidence — that shielded his personal laptops
9 from scrutiny in this litigation. And, as far as this record shows, Uber in fact undertook efforts
10 to make available any evidence on those laptops by demanding their production from
11 Levandowski. Even when those efforts failed, Uber’s counsel continued to pursue the matter
12 and apparently convinced Goodwin to run certain searches on what is claimed to have been
13 those laptops. No doubt, those personal laptops — which Uber allowed Levandowski to use for
14 work — rank high as potential archives of downloaded materials, but for spoliation purposes the
15 point remains that Uber never controlled, destroyed, or otherwise failed to preserve the
16 information on those laptops, as least as far as the record shows. No amount of lawyer
17 argument could transform these facts into anything resembling “spoliation.”

18 As to the other four categories of evidence mentioned in Waymo’s motion, Uber does
19 not dispute that such evidence has been lost and cannot be restored or replaced through
20 additional discovery. Instead, Uber contends no sanction is appropriate because (1) Waymo’s
21 motion came too late (Dkt. No. 2240-4 at 1–5), (2) the spoliated evidence was irrelevant (*id.* at
22 19–20), and (3) Uber acted in good faith (*id.* at 20–22).

23 *First*, Uber’s timeliness argument is not well taken. True, Waymo first caught wind of
24 certain instances of spoliation, like the destruction of the five discs, in June 2017. But as
25 Waymo points out, the issue accreted for several months thereafter. Waymo also reasonably
26 expended additional time investigating the circumstances under which evidence had been lost
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28 ¹² Slack is a collection of tools and services — including, for example, chat messages — used to
facilitate communication and collaboration in a digital workspace.

1 (see Dkt. No. 2199-4 (production of evidence on August 23, 2017, regarding automatic deletion
2 settings for Kalanick’s cell phone)). And, until the eventual court-ordered production of the due
3 diligence materials in September 2017, Waymo did not even have a clear view of the facts
4 underlying the Otto acquisition. This hindered, for example, Waymo’s ability to assess the
5 significance of the five destroyed discs and the deleted messages between Levandowski, Ron,
6 Kalanick, and Qi. Indeed, the spoliation issue continued to evolve even *after* Waymo filed its
7 motion with the eleventh-hour discovery of the Jacobs materials, discussed further below.
8 Under these circumstances, Waymo did not file its motion too late to obtain relief.

9 *Second*, Uber’s arguments that the spoliated evidence was irrelevant are similarly
10 meritless. Uber posits that the hundreds of deleted text messages among Levandowski, Ron,
11 Kalanick, and Qi would have involved innocuous business matters, not trade secret
12 misappropriation, and points out that other contemporaneous evidence supports its
13 proclamations of innocence. Tell this to the jury. Facts about what transpired between
14 Levandowski, Ron, Kalanick, and Qi in connection with Uber’s acquisition of Otto go to the
15 very heart of this case. Having frustrated its adversary’s attempts to mine these facts for
16 damning evidence, Uber cannot now evade spoliation by speculating that all of the lost
17 information was benign.

18 In this connection, Uber claims the five discs destroyed by Levandowski could not have
19 contained relevant information because they were destroyed before he joined Uber. And, Uber
20 points out, Waymo’s searches of *other* devices and servers have turned up no evidence of any
21 misappropriated trade secrets. The glaring fact remains, however, that those five discs, like
22 Levandowski’s personal laptops, could easily have held Waymo’s alleged trade secrets and
23 could have been a link in the chain showing how Levandowski funneled those trade secrets to
24 Uber (if he in fact did so). And, viewed in context, evidence that Uber itself directed
25 Levandowski to destroy those five discs could potentially support either Uber’s narrative that it
26 was trying to *avoid* misappropriation or Waymo’s narrative that it was trying to *conceal* it.

27 In a similar vein, Uber claims no Tyto emails could be relevant because they predated
28 the Otto acquisition and therefore cannot contain evidence of misappropriation. But Waymo

1 can argue — and has argued — that Levandowski brought its trade secrets to Uber indirectly by
2 developing technology at Tyto and Otto that were later absorbed by Uber via a series of
3 corporate acquisitions. Waymo also can argue — and has argued — that the plot for
4 Levandowski to funnel its misappropriated secrets to Uber predated the Otto acquisition itself.
5 Again, under these circumstances, Uber’s unfounded insistence that the evidence it failed to
6 preserve would have been irrelevant does not bar Waymo’s requests for relief.

7 *Third*, Uber argues that there is no evidence of bad faith in its failure to preserve
8 evidence. This argument goes to FRCP 37(e)(2), which requires the Court to find that the party
9 that failed to preserve evidence “acted with the intent to deprive another party of the
10 information’s use in the litigation” before granting certain forms of relief.

11 On this record, there is considerable ground for Waymo to argue that Uber had the
12 requisite intent to warrant relief under FRCP 37(e)(2), particularly in light of evidence
13 stemming from the Jacobs materials discussed further below. At this stage, however, we face a
14 different problem. In advance of Waymo’s offer of proof regarding the Jacobs materials and
15 their relationship to the spoliation and misconduct issues in this case, a prior order specifically
16 asked Waymo to “explain the practical details of how it will implement its offer of proof,
17 including the names of specific sponsoring witnesses and how they will overcome hearsay
18 objections” (Dkt. No. 2447). In response, Waymo provided a bare-bones chart that lists various
19 documents, the names of potential sponsoring witnesses, and boilerplate summaries of rules
20 governing potential hearsay exceptions with no analysis whatsoever of how those exceptions
21 might apply here (*see* Dkt. No. 2470-36). This underscores the recurring problem that Waymo
22 seems unwilling or unable to prove its case at trial with qualified witnesses and evidence and
23 seeks to have the Court fill in the gaps with adverse inferences instead.¹³

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26 ¹³ In yet another example of this recurring problem, Waymo previously sought permission to file yet
27 another “motion for relief based on defendants’ litigation misconduct.” In addition to repeating Waymo’s
28 requests for remedial and adverse-inference instructions, the proposed motion would have sought evidentiary
and terminating sanctions as to Uber’s *liability for trade secret misappropriation*. The proposed motion would
also have argued that “Waymo should be allocated an additional two hours of time at trial, *and Defendants
should be docked two hours*” (Dkt. No. 2472 (emphasis added)). A prior order denied Waymo’s request to file
this proposed motion (Dkt. No. 2494).

1 This order therefore reserves decision on the question of whether or not Uber spoliated
2 evidence with the intent to deprive another party of its use in litigation, and further reserves
3 decision as to whether or not the jury will be instructed that it may or must presume the lost
4 information was unfavorable to Uber. *See* F.R.C.P. 37(e)(2)(B). These questions will be
5 decided after Waymo presents its case-in-chief at trial, during which at least some proof of the
6 facts underlying the spoliation motion (to the extent admissible), and possibly additional
7 evidence on point, will go before the jury anyway. The undersigned judge will use this
8 presentation of proof and any additional evidence on point to supplement the current motion
9 record on the issue of intent for spoliation purposes.

10 **3. OFFER OF PROOF RE JACOBS MATERIALS.**

11 A wholly third universe of Uber’s alleged “misconduct” has flowed from the Jacobs
12 affair. After so many pages, the reader will be forgiven for forgetting that Richard Jacobs was a
13 former Uber employee turned “whistleblower” whose attorney sent Uber a 37-page demand
14 letter dated May 5, 2017, filled with scandalous accusations that led to a jackpot settlement.

15 This order draws three conclusions from Waymo’s lengthy offer of proof regarding the
16 Jacobs materials and Uber’s response thereto, as explained in detail below. *First*, this order
17 rules on Waymo’s request to present certain instances of Uber’s purported “discovery
18 misconduct” to the jury. In that connection, if either side presents evidence or argument
19 regarding the Jacobs letter at trial, the Court will likely inform the jury that Uber withheld the
20 Jacobs letter and explain that the jury may, but need not, draw some adverse inference against
21 Uber based on that fact. *Second*, Waymo may adduce certain facts before the jury to show that
22 Uber sought information about the technical details of Waymo’s self-driving technology, and
23 that Uber sought to minimize its “paper trail” by using ephemeral communications, but other
24 facts and allegations stemming from the Jacobs materials will be excluded under FRE 403.
25 *Third*, the Jacobs materials themselves will be excluded at trial as hearsay, among other things
26 (unless a door is opened), except that they may be used to impeach Jacobs if he testifies at trial.
27 Now follow the details.
28

1 **A. Uber’s “Discovery Misconduct” and Concealment of Jacobs Letter.**

2 The Court agrees with the special master that Uber should have produced the Jacobs
3 letter in discovery (Dkt. Nos. 2396, 2444). Uber’s failure to do so falls into a broader category
4 of “discovery misconduct” complained of by Waymo, as this order now addresses.

5 Waymo previously moved *in limine* to prevent Uber from presenting any evidence or
6 argument that it made good faith efforts to locate the downloaded materials over the course of
7 this litigation (*see* Dkt. No. 913). Uber responded that it should be allowed to adduce facts
8 before the jury showing that Uber (1) conducted extensive searches of its own servers and
9 systems, (2) fired Levandowski for not cooperating with its litigation efforts, and (3) let Waymo
10 conduct eleven inspections of Uber’s facilities and LiDAR designs (*see* Dkt. No. 978). During
11 the motion hearing, the undersigned judge ruled that both sides could present their narratives
12 about Uber’s “good citizen” and “bad citizen” behavior to the jury (*see* Dkt. No. 1050 at
13 72:6–14). Pursuant to that ruling, Waymo submitted a list of 23 instances of Uber’s “discovery
14 misconduct” that Waymo wished to present to the jury, to be vetted before trial (Dkt. No. 1356).
15 This order rules on Waymo’s proposals as follows:

- | | |
|--|---|
| 16 1. Uber’s failure to timely disclose
17 the destruction of the five discs. | As stated, the Court will inform the jury of this fact and instruct the jury that it may, but need not, draw any adverse inference from it. |
| 18 | |
| 19 2/3. MoFo’s receipt and retention of
20 downloaded materials in its former
21 role as Levandowski’s personal
22 counsel. | Excluded as unfounded and irrelevant to the extent and for the reasons stated herein. |
| 23 4. Uber’s failure to compel Stroz to
24 produce downloaded materials. | Excluded as unfounded and irrelevant to the extent and for the reasons stated herein. |
| 25 5. Stroz’s receipt and retention of
26 unexamined devices from
27 Levandowski. | Excluded as unfounded and irrelevant to the extent and for the reasons stated herein. |
| 28 6/9/10/11/12/13/15/16. Uber’s
assertions of privilege throughout
this litigation, including over
information and materials that were | Permitted to the extent stated in prior rulings but excluded under FRE 403 to the extent stated herein insofar as Waymo just wants to complain to the |

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withheld during the pendency of the Federal Circuit appeal and turned over after the Federal Circuit’s decision.

jury that Uber violated prior orders. The latter grievances are largely meritless, offer little to no probative value, risk confusing the issues and unduly consuming time at trial, and are cumulative of other facts that will be presented to the jury regarding said violations.

7. Uber’s supplementation of its communications log after the deadline imposed by the provisional relief order.

As stated, the Court will inform the jury of this fact and instruct the jury that it may, but need not, draw any adverse inference from it.

8/22/23. Waymo’s complaints about Otto Trucking’s conduct.

Excluded as irrelevant because Otto Trucking has been dismissed.

14. Uber’s supplementation of its accounting after the deadline imposed by the provisional relief order.

The Court will inform the jury of this fact for the same reasons and under the same conditions as with Uber’s belated supplementation of its communications log.

17. Imperfections in Uber’s production of text messages between Levandowski and Kalanick that were *not* deleted.

Excluded under FRE 403 because this grievance about text messages that were ultimately produced adds little to no probative value over and above Uber’s failure to preserve other text messages. It would just further distract from the merits and consume undue time at trial.

18. The deletion of text messages between Levandowski and Kalanick.

As stated, Waymo will be allowed to adduce facts showing this to the jury, but this order reserves decision on whether or not to give an adverse-inference instruction as well.

19. Uber’s failure to disclose what Waymo claims to be the connection between Levandowski and Tyto.

Waymo may present evidence and argue before the jury that Uber knew about but concealed Levandowski’s connection to Tyto. Uber may present evidence and argue to the contrary (*see* Dkt. No. 1534 at 6). Such evidence and argument will be allowed while they remain probative of Waymo’s theory that Uber and Levandowski surreptitiously siphoned off trade secrets via a series of corporate transactions, but

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20. Uber produced many documents near the end of discovery, some of which, according to Waymo, seemed relevant to Uber’s defense.

will be excluded if they devolve into more whining about Uber’s supposed obstruction of discovery.

Excluded because this has no discernible relevance to anything in the case. Waymo does not even bother to explain why producing documents near the end of discovery would constitute “misconduct.”

21. Uber’s claim that Levandowski refused to cooperate in this litigation.

This topic is encompassed by and addressed below in the context of Waymo’s motion *in limine*.

In addition to the foregoing, if Waymo uses the Jacobs letter at trial to impeach Jacobs, then the Court will likely inform the jury that Uber should have produced the letter in discovery but failed to do so. Counsel may not reference the letter from the Office of the United States Attorney or the Jacobs materials without prior permission of the Court (but may, of course, reference Jacobs himself).

B. Admissible Evidence Stemming from Jacobs Materials.

Now we turn to certain subjects stemming from the Jacobs materials and the extent to which those subjects (separate and apart from the Jacobs materials themselves) may be pursued via otherwise admissible evidence before the jury.

Uber’s interest in and efforts to collect data about the technical details of Waymo’s self-driving technology for competitive purposes are reasonably probative of Uber’s state of mind regarding competition with Waymo, and therefore of Waymo’s theory that Uber misappropriated Waymo’s trade secrets to improve its own self-driving technology. Waymo will be permitted to present evidence and argument on these issues at trial, provided, of course, that it can do so through qualified witnesses and evidence (*see* Dkt. No. 2466-3 at 12–17). Waymo will not, however, be permitted to further present evidence and argument that Uber also surveilled other competitors because such evidence and argument would be too attenuated from Waymo’s misappropriation claims, substantially more prejudicial than probative, and therefore excluded under FRE 403. If Waymo opens the door, however, by claiming that Uber spied on

1 it, Uber will be allowed to respond with evidence and argument that it spied on everyone and
2 Waymo was not special in that regard. In all events, Uber will be allowed to respond with
3 evidence and argument that its competitive intelligence-gathering efforts were all legitimate and
4 that Waymo itself engaged in similar activities (*see* Dkt. No. 2500-4 at 18–20).

5 Uber’s use of ephemeral communications is also relevant as a possible explanation for
6 why Waymo has failed to turn up more evidence of misappropriation in this case. Waymo will
7 therefore also be permitted to present evidence and argument on this subject at trial, provided
8 that it can do so through qualified witnesses and evidence (*see* Dkt. No. 2466-3 at 20–22). Of
9 course, Uber will be allowed to present its own evidence and argument that its use of ephemeral
10 communications shows no wrongdoing, including by pointing out Waymo’s own use of
11 ephemeral communications (*see* Dkt. No. 2500-4 at 14–18).

12 If Jacobs testifies at trial, then the Jacobs materials themselves, and evidence regarding
13 Jacobs’s settlement with Uber, may be used for impeachment purposes only (*see, e.g.*, Dkt. No.
14 2466-3 at 26 (Waymo’s offer of proof regarding the settlement)). To be clear, such use would
15 only be permissible as to specific passages that actually contradict Jacobs’s testimony at trial.
16 The Jacobs materials as a whole will not sail into evidence under the pretext of impeachment.

17 **C. Inadmissible Evidence Stemming from Jacobs Materials.**

18 Uber’s use of non-attributable devices is excluded under FRE 403 because, as Waymo
19 admits, that problem remained confined to SSG and MA, neither of which are implicated by
20 Waymo’s claims of trade secret misappropriation. The closest Waymo comes to showing any
21 connection is by pointing out that Levandowski used two personal laptops for his work at Uber
22 (*see* Dkt. No. 2466-3 at 17–20). But there is no indication whatsoever that Levandowski’s use
23 of personal laptops had anything to do with Uber’s systemic use of non-attributable devices in
24 the SSG and MA groups. If anything, Waymo’s transparent attempt to conflate two disparate
25 topics by distorting the meaning of the phrase “non-attributable devices” merely confirms that
26 permitting evidence of Uber’s use of non-attributable devices would invite confusion and
27 prejudice Uber without contributing any probative value at trial.
28

1 Uber’s internal policies and practices regarding privilege designations are also excluded
2 under FRE 403. While this information is arguably relevant to show Uber’s efforts to conceal
3 its paper trail, the same point can be made through evidence concerning Uber’s spoliation of
4 evidence and use of ephemeral communications. Its probative value is further diminished
5 because, regardless of how Uber internally designated its documents, its counsel in this
6 litigation separately assessed whether or not to produce those documents. Actual assertions of
7 privilege in this litigation have been hotly contested and examined at length by the special
8 master, Judge Corley, the undersigned judge, and the Federal Circuit. In light of all this, it
9 would be misleading for Waymo to suggest to the jury that Uber’s internal privilege
10 designations translated neatly into obstruction of discovery in this litigation. Finally, allowing
11 Waymo to delve into Uber’s internal privilege designations would invite a counter by Uber that
12 Waymo itself has taken liberties with the appropriate bounds of privilege. We already run the
13 risk that our trial will devolve into finger-pointing over who used the worst litigation gimmicks.
14 The kerfuffle about overbroad internal designations of privilege does not justify further
15 exacerbating this risk.¹⁴

16 Waymo’s offer of proof also strays far out of bounds in describing at length Uber’s
17 consideration of an “Information Governance Initiative to review its process for retaining
18 documents . . . to retain ‘the smallest amount of required data.’” Waymo does not dispute that
19 Uber *never implemented this initiative* but nevertheless insinuates that Uber’s “willingness to
20 consider such a controversial policy, and the internal reaction thereto, raises serious concerns
21 regarding its preservation of relevant data in this case” (*see id.* at 24–26). In other words,
22 Waymo devoted time and effort to describing salacious and inflammatory details about Uber
23 that have no discernible relevance to the claims in this case in an apparent bid to poison the
24 judge, if not the jury, against Uber. This entire narrative is excluded under FRE 403. Indeed,
25 these tactics by Waymo further demonstrate why it remains particularly important in this case to
26 exclude irrelevant and prejudicial evidence and to keep the trial focused on the merits.

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28 ¹⁴ As stated, however, pursuant to a prior ruling, Waymo may present evidence that the due diligence process was shrouded in elaborately-contrived privileges that were ultimately rejected by final court order.

1 Waymo's offer of proof also perpetuates its habit of complaining at length about Uber's
2 supposed obstruction of discovery, including via alleged uses of privilege as both sword and
3 shield (*see* Dkt. No. 2466-3 at 7–12, 36–47). Most of these complaints concern disputes that
4 should have been brought to Judge Corley for resolution in the ordinary course of discovery.
5 No further relief is warranted for such disputes. And, insofar as Waymo's litany of recurring
6 grievances remains relevant only for the single basic point that Uber supposedly obstructed
7 discovery, that point can be more than adequately presented to the jury via the evidence and
8 argument permitted above. The rest of Waymo's laundry list would be cumulative and would
9 offer little to no probative value, while threatening to overshadow the merits. It is therefore
10 excluded under FRE 403. To repeat, Waymo will not be permitted to transform this trial on
11 alleged trade secret misappropriation into a trial on Uber's litigation conduct (or misconduct).

12 Waymo's offer of proof further regurgitates its protests regarding Uber's spoliation of
13 evidence and violations of prior orders (*see id.* at 27–36). Those issues will be dealt with as
14 previously described. No further relief is warranted at this time based on Waymo's offer of
15 proof — although, as stated, this order reserves the possibility of instructing the jury that it may
16 or must presume the evidence Uber failed to preserve would have been unfavorable to Uber.

17 **4. WAYMO'S MIL NO. 14 RE LEVANDOWSKI'S COOPERATION.**

18 One last loose end. Waymo previously moved *in limine* to prevent Uber from
19 presenting evidence or argument that Anthony Levandowski has not cooperated with its defense
20 of this action. Waymo contends Levandowski has in fact cooperated when doing so served his
21 purposes but he and Uber have prevented Waymo from discovering the true degree of
22 cooperation under the guise of privilege, raising a sword-and-shield problem (*see* Dkt. No.
23 1551-4). Insofar as Waymo essentially complains (again) that Uber improperly asserted
24 privilege, this is yet another garden-variety discovery dispute that should have been presented to
25 Judge Corley for resolution.

26 A different problem remains, however, in that Uber's assertions of privilege on this
27 subject, even if proper, still conceal significant swaths of a larger picture from view. It would
28 be misleading and unfair for Uber to make broad representations to the jury about

1 Levandowski's supposed non-cooperation while Waymo remains hamstrung in attempting to
2 counter with evidence of selective cooperation. To mitigate this unfairness, Uber, like Waymo,
3 will be allowed to show non-privileged examples of where Levandowski failed to cooperate but
4 will not be allowed to further argue in general terms that Levandowski rarely or never
5 cooperated, since any such argument would necessarily make implicit representations about the
6 entire field of interactions — privileged or not — on this subject. Should Uber fail to abide by
7 these ground rules at trial, the Court may consider allowing Waymo to adduce before the jury
8 that Uber asserted privilege on this subject, possibly with excerpts of Uber's privilege log to
9 show entries that cast doubt on Uber's claims of non-cooperation. Waymo's motion is
10 **GRANTED** only to the extent stated herein and is otherwise **DENIED**.

11 **5. SUMMARY.**

12 As stated, this order resolves the remaining constellation of issues in this litigation
13 concerning Uber's alleged litigation misconduct and other bad behavior, many of which have
14 waited until now to facilitate a comprehensive and consistent analysis. The subjects addressed
15 herein fall into three categories, which this order now briefly recaps.

16 *First*, the Court itself will inform the jury that, despite the expedited discovery and
17 provisional relief orders, Uber failed to timely disclose the destruction of the five discs and
18 repeatedly supplemented both its communications log and accounting after the ordered
19 deadlines. The Court will instruct the jury that it may, but need not, draw any adverse inference
20 from these facts, and will further explain that the nature of any adverse inference likewise
21 remains up to the jury. To take a hypothetical example, even if the jury infers that Uber
22 deliberately concealed the destruction of the five discs, Uber may argue (and the jury may
23 believe) that it did so not to conceal any misappropriation of trade secrets but for other reasons.
24 (This example is included herein for clarity only and will not be described to the jury.) In
25 addition, please remember that this order reserves the possibility of an adverse-inference
26 instruction pursuant to FRCP 37(e) based on Uber's spoliation of evidence.

27 *Second*, as explained above, evidence of Uber's litigation misconduct or corporate
28 culture may be relevant and admissible insofar as it reasonably bears on the merits of this case.

1 This includes evidence and argument that Waymo has been unable to find stronger proof of its
 2 claims due to Uber's obstruction tactics. But such evidence will not be allowed to consume the
 3 trial to the point that it becomes a distraction from the merits or turns into a public exercise in
 4 character assassination. Again, the point is to maintain a fair balance between allowing Waymo
 5 to reasonably explain any weaknesses in its case on the one hand, and preventing Waymo from
 6 sidestepping its burden of proof by inflaming the jury against Uber on the other.

7 *Third*, all other subjects not expressly ruled out herein (or in earlier orders) may be
 8 pursued via qualified and properly-disclosed witnesses and evidence. Additionally, even
 9 evidence excluded under FRE 403 herein may become admissible if the opposing side opens the
 10 door. In a similar vein, this order is without prejudice to the possibility that, depending on how
 11 events unfold at trial, the balance of considerations may sua sponte shift so as to warrant a
 12 second look at rulings made under FRE 403 herein. But please, no motions for reconsideration.

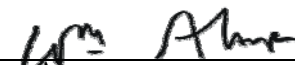
13 No witness or lawyer in this case may reference this order or any finding herein before
 14 the jury. No opening statement or voir dire question may reference the Court's intention to
 15 inform the jury of certain facts. The Court will do so in due course. The opening statements
 16 may, however, reference counsel's intention to prove up underlying facts, *e.g.*, in connection
 17 with Uber's violations of prior orders.

18 CONCLUSION

19 Plaintiff's requests for relief are **GRANTED** only to the extent stated herein and are
 20 otherwise **DENIED**. Any request for relief by either side arising out of the constellation of issues
 21 discussed herein but not addressed by this or any prior order is hereby **DENIED**.

22
 23 **IT IS SO ORDERED.**

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 25 Dated: January 29, 2018.

26 
 27 _____
 28 WILLIAM ALSUP
 UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

BRIAN HERZIG and NEAL MARTIN

PLAINTIFFS

v.

No. 2:18-CV-02101

ARKANSAS FOUNDATION FOR
MEDICAL CARE, INC.

DEFENDANT

OPINION AND ORDER

Two motions are pending before the Court. Defendant Arkansas Foundation for Medical Care, Inc. (“AFMC”) filed a motion (Doc. 26) to dismiss or order an adverse inference for intentional and bad faith spoliation of evidence and a brief (Doc. 27) in support. Plaintiffs Brian Herzig and Neal Martin filed a response (Doc. 30) and brief (Doc. 31) in opposition. AFMC filed a reply (Doc. 38) with leave of Court. The Court held a hearing (Doc. 41) on this motion on February 7, 2019. AFMC also filed a motion (Doc. 33) for summary judgment and a statement of facts (Doc. 34) and brief (Doc. 35) in support. Herzig and Martin filed a response (Doc. 43), statement of facts (Doc. 44), and brief (Doc. 45) in opposition. AFMC filed a reply (Doc. 48). A motion to deem facts admitted on procedural grounds was terminated by the Court, which explained that it will consider the argument to deem facts admitted on the motion for summary judgment.

For the reasons stated herein, the spoliation motion will be granted in part and denied in part and the motion for summary judgment will be granted.

I. Standard

After viewing the record in the light most favorable to the nonmoving party and granting all reasonable factual inferences in the nonmovant’s favor, a motion for summary judgment must be granted “if the movant shows that there is no genuine dispute as to any material fact and the

movant is entitled to summary judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Haggenmiller v. ABM Parking Serv., Inc.*, 837 F.3d 879, 884 (8th Cir. 2016). Facts are material when they can “affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes are genuine when “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* “While the burden of demonstrating the absence of any genuine issue of material fact rests on the movant, a nonmovant may not rest upon mere denials or allegations, but must instead set forth specific facts sufficient to raise a genuine issue for trial.” *Haggenmiller*, 837 F.3d at 884 (quotations omitted). A party must support its assertions or disputes of material fact by citing to the record, and failure to do so may result in the Court deeming facts admitted or disputed. Fed. R. Civ. P. 56(c), (e); W.D. Ark. R. 56.1.

“Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence.” *United Med. Supply Co., Inc. v. United States*, 77 Fed. Cl. 257, 258 (Fed. Cl. 2007). A court has inherent authority to fashion appropriate sanctions for conduct which abuses the judicial process. *Stevenson v. Union Pac. R. Co.*, 354 F.3d 739, 745 (8th Cir. 2004). “A spoliation-of-evidence sanction requires ‘a finding of intentional destruction indicating a desire to suppress the truth.’” *Greyhound Lines, Inc. v. Wade*, 485 F.3d 1032, 1035 (8th Cir. 2007) (quoting *Stevenson*, 354 F.3d at 746). If the movant shows the spoliation was done in bad faith, the Court may give an adverse inference or dismiss the case. *Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1006 (8th Cir. 2006).

II. Facts

Herzig and Martin’s responsive statement of facts (Doc. 44) does not cite to evidence in the record to support the disputes it identifies with AFMC’s statement of facts (Doc. 34). Herzig and Martin fail to show their disputes are genuine. Furthermore, most of the identified disputes

concern facts immaterial to the resolution of Herzig and Martin's age discrimination claims. The material facts in AFMC's statement of facts are deemed admitted, though the Court will continue to draw factual inferences in Herzig and Martin's favor and will consider their legal disputes with AFMC's interpretation of the material facts.

AFMC provides medical necessity review services related to Medicaid under contract with the State of Arkansas. AFMC receives, uses, and transfers protected health information and must observe privacy and security requirements imposed by the Health Insurance Portability and Accountability Act ("HIPAA"). Among those requirements are that AFMC must limit access to protected health information to the minimum personnel necessary to perform AFMC's contractual obligations, AFMC must log electronic access to protected health information for audit purposes, and AFMC must implement appropriate disciplinary actions against individuals who violate HIPAA.

Plaintiff Brian Herzig began working at AMFC in 2005 as a Software Applications Developer and eventually was promoted to Director of Information Technology in 2009. In that position, he was responsible for development, production, and maintenance of AFMC's IT systems and for ensuring employee compliance with data confidentiality and security policies. Herzig reported directly to Nathan Ray, AFMC's Chief Technology Officer.

Plaintiff Neal Martin began working at AFMC in 2010 as Manager of Programming and eventually was promoted to Assistant Director of Information Technology in October, 2016. In that position, he was responsible for application development projects and implementation of programs and applications. Martin's position as Assistant Director was newly-established when he was promoted, and Martin reported directly to Herzig.

In 2016, AFMC designed and developed in-house medical necessity review software called

“ReviewPoint.” ReviewPoint was intended to integrate servers hosting protected health information through a software platform called “Laserfiche” with customized and default features of a software platform called “Salesforce.” AFMC’s Business Intelligence Department in Little Rock was in charge of AFMC’s implementation and use of Salesforce. AFMC’s IT Department in Fort Smith was in charge of the ReviewPoint project. Because AFMC’s IT Department had the only employees with computer program development knowledge and responsibilities, the IT Department was responsible for the Laserfiche Integration Program, which would allow Salesforce to access the Laserfiche-based protected health information in a way that complied with AFMC’s HIPAA obligations to limit and log personnel access to that information. Mark Gossman was the lead programmer responsible for writing the computer code for the Laserfiche Integration Program and was directly supervised by Martin.

At meetings attended by Herzig, Martin, Chief Technology Officer Ray, AFMC Manager of Security D.J. Blaylock, and AFMC General Counsel and HIPAA Privacy Officer Breck Hopkins, the need to meet HIPAA security and logging requirements was emphasized, and Herzig, Martin, and Blaylock agreed that necessary security and logging protections either could be developed or were already in place. Prior to AFMC’s deployment of ReviewPoint on January 13, 2017, Blaylock submitted a security report and Martin assured AFMC leadership that the Laserfiche Integration Program was effective at secure, HIPAA-compliant retrieval of Laserfiche-based protected health information.

On March 7, 2017, employees in the Business Intelligence Department learned of an exploit that they believed would allow a ReviewPoint user to bypass ReviewPoint security and gain unauthorized access to protected health information by changing the document number displayed in the URL on ReviewPoint. The employees contacted HIPAA Privacy Officer Hopkins

and demonstrated the exploit. Hopkins reported the exploit to Chief Technology Officer Ray and to AFMC Chief Operating Officer Marilyn Little. Thereafter, AFMC disabled the Laserfiche Integration Program, preventing ReviewPoint users from uploading medical records. This in turn prevented AFMC personnel from using ReviewPoint to conduct medical necessity reviews pursuant to AFMC's Arkansas Medicaid contract. Hopkins then reviewed the logs for Laserfiche to determine if anyone had actually used the exploit to unnecessarily access protected health information in violation of HIPAA. During that review, Hopkins learned of a second potential problem—Laserfiche was not logging access by users who actually accessed protected health information. Instead, after a user entered his or her credentials into ReviewPoint and then accessed a Laserfiche document containing protected health information, ReviewPoint's security features were bypassed and Laserfiche logged access by Mark Gossman because Gossman had hardcoded his administrative credentials into the Laserfiche Integration Program's code.

On March 7, following the discovery of these issues, Chief Operating Officer Little asked Herzig who, if anyone, had conducted a secondary code review of Gossman's work on the Laserfiche Integration Program. Neither Herzig nor Martin had reviewed the code, and Herzig was initially unable to provide an answer. Little directed Chief Technology Officer Ray to investigate the root cause of the vulnerability. On March 13, Ray asked Herzig about the IT Department's quality control methods, and on March 16, Little again asked Herzig about secondary code review. Herzig remained unable to provide an answer. Herzig then directed Martin by text message to communicate with IT Department staff and find out the answer. After communicating with Gossman and Vieng Siripoun, another programmer in the IT Department, Martin determined that no one fully reviewed the code prior to AFMC's deployment of the Laserfiche Integration Program and on March 17, 2017 sent an email to Herzig communicating

that. Shortly thereafter, Herzig informed Little and Ray that development team members Jarrod Thrift and Vieng Siripoun performed the secondary code review.

Herzig and Martin then had Gossman, Siripoun, and another IT Department employee draft a summary of the quality control and testing methods used in the Laserfiche Integration Program's development. Siripoun noted that the summary ultimately did not make a good case for the IT Department, and accepted complete blame for the Laserfiche Integration Program failures. In addition to providing the summary to their superiors, Herzing and Martin suggested that a change made by the Business Intelligence Department may have contributed to the vulnerability. Ray contacted Jason Scheel, Director of the Business Intelligence Department, regarding this matter. Business Intelligence Department personnel did not have access to or responsibility for developing Laserfiche Integration Program code. Scheel communicated that the Business Intelligence Department made a change to the ReviewPoint page layout, and that the IT Department had been involved in that change. Ray reported to AFMC during his preliminary investigation that the Business Intelligence Department did not contribute to the root cause of the Laserfiche Integration Program issues.

On March 28, 2017, Chief Operating Officer Little put Herzig, Martin, Gossman, and Blaylock on administrative leave with pay pending final completion of AFMC's investigation. Each of them was given a final opportunity to provide information for AFMC's consideration. Gossman took responsibility for the contribution of his coding error to any issues with the Laserfiche Integration Program. Herzig expressed disappointment in his development staff and in Martin, and communicated that he held them accountable for these issues. Martin noted that Chief Technology Officer Ray's preliminary investigation did not include a review of information Martin had provided, which he believed indicated that whatever code errors might exist, any

vulnerability was created only when the Business Intelligence Department incorrectly set ReviewPoint user permissions.

Chief Technology Officer Ray finalized his investigation and submitted a final report recommending that Herzig, Martin, Gossman, and Blaylock be terminated for their contributions to the Laserfiche Integration Program's vulnerabilities and, in Herzig and Martin's case, for repeated misrepresentations to AFMC that the Laserfiche Integration Program was secure and HIPAA-compliant. HIPAA Privacy Officer Hopkins supported and independently made these recommendations. Chief Operating Officer Little agreed and directed Ray to terminate Herzig, Martin, Gossman, and Blaylock's employment. All four were fired on April 4, 2017. At that time, Herzig was 44 years old and Martin was 41 years old. Additionally, Blaylock was 37, Little was 63, Hopkins was 63, and Scheel was 42.

In September 2017, AFMC hired Michael Troop to replace Herzig as Director of Information Technology. At the time of his hire, Troop was 55 years old. AFMC did not hire anyone to fill the position of Assistant Director of Information Technology. That same month, Herzig and Martin filed discrimination charges with the Equal Employment Opportunity Commission, alleging age discrimination. Following receipt of their right-to-sue letters, Herzig and Martin filed the complaint in this action alleging their employment was terminated in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq.

When the parties conferred pursuant to Federal Rule of Civil Procedure 26(f), they agreed that AFMC might request data from Herzig and Martin's mobile phones and that the parties had taken reasonable measures to preserve potentially discoverable data from alteration or destruction. (Doc. 10, ¶ 4). On July 18, 2018 AFMC served requests for production on Herzig and Martin, including a request for production of documents related to communications with current or former

AFMC employees relevant to Herzig and Martin's lawsuit. On August 22, 2018, Herzig and Martin served their responses. Herzig agreed to produce responsive documents. Martin claimed to have no responsive documents. Responsive documents were not produced at that time, however. Rather, on September 4, 2018, Herzig and Martin produced screenshots of parts of text message conversations from Martin's mobile phone, including communications between Herzig and Martin. All produced text message portions ended on August 20, 2018, and Herzig and Martin produced no additional messages. Following a motion to compel, Herzig and Martin produced additional text messages from those text message conversations, but nothing more recent than August 20, 2018. After the August production, Martin installed the application Signal on his phone (Herzig had done so while working at AFMC), and Herzig and Martin used that application for communicating, not only with each other but with Blaylock. Signal allows users to send and receive encrypted text messages accessible only to sender and recipient, and to change settings to automatically delete these messages after a short period of time. Herzig and Martin set the application to delete their communications. Herzig and Martin disclosed no additional text messages to AFMC, and AFMC was unaware of their continued communication using Signal until Herzig disclosed it in his deposition near the end of the discovery period. Herzig and Martin allege that they used the application only to arrange meetings with one another or their attorney, and no longer had any text message communications responsive to AFMC's request for production.

III. Analysis

A. Spoliation Motion

In its motion for dismissal or adverse inference on the basis of spoliation, AFMC argues that despite Herzig and Martin's duty to impose litigation holds and to update responses to requests for production following their initial and reluctant production of text messages, Herzig and Martin

instead intentionally acted to withhold and destroy discoverable evidence by installing and using the Signal application on their mobile devices. Herzig and Martin respond that they had no duty to allow AFMC to see all their communications, only communications responsive to the requests for production, and AFMC has no evidence that Herzig and Martin had responsive communications using Signal or that the destruction of those communications was in bad faith.

Herzig and Martin had numerous responsive communications with one another and with other AFMC employees prior to responding to the requests for production on August 22, 2018 and producing only some of those responsive communications on September 4, 2018. They remained reluctant to produce additional communications, doing so only after AFMC's motion to compel. Thereafter, Herzig and Martin did not disclose that they had switched to using a communication application designed to disguise and destroy communications until discovery was nearly complete. Based on the content of Herzig and Martin's earlier communications, which was responsive to the requests for production, and their reluctance to produce those communications, the Court infers that the content of their later communications using Signal were responsive to AFMC's requests for production. Based on Herzig and Martin's familiarity with information technology, their reluctance to produce responsive communications, the initial misleading response from Martin that he had no responsive communications, their knowledge that they must retain and produce discoverable evidence, and the necessity of manually configuring Signal to delete text communications, the Court believes that the decision to withhold and destroy those likely-responsive communications was intentional and done in bad faith.

This intentional, bad-faith spoliation of evidence was an abuse of the judicial process and warrants a sanction. The Court need not consider whether dismissal, an adverse inference, or some lesser sanction is the appropriate one, however, because in light of the motion for summary

judgment, Herzig and Martin's case can and will be dismissed on the merits.

B. Summary Judgment Motion

Herzig and Martin claim that AFMC's termination of their employment was due to unlawful age discrimination. "It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). "An age discrimination plaintiff may survive the defendant's motion for summary judgment either by setting out direct evidence of discrimination or by creating an inference of discrimination under the *McDonnell Douglas Corp. v. Green* burden-shifting framework." *Haggenmiller*, 837 F.3d at 884 (quoting *Ramlet v. E.F. Johnson Co.*, 507 F.3d 1149, 1152 (8th Cir. 2007)).

Direct evidence is evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action. In this context, whether evidence is direct depends on its causal strength. Direct evidence does not include stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself.

Ramlet, 507 F.3d at 1152 (quotations and citations omitted).

Where a plaintiff lacks direct evidence that termination of his employment was unlawful age discrimination, he may create an inference of age discrimination by showing that he was at least 40 years old at the time of the adverse employment action, and so a member of the protected class; was qualified for his position; and was terminated under circumstances that give rise to an inference of age discrimination, such as being replaced by a younger employee. *Ramlet*, 507 F.3d at 1153. If the plaintiff can make this prima facie case, the defendant must then proffer a legitimate, nondiscriminatory reason for the adverse employment action, and if the defendant can do so, the

plaintiff must then show the proffered reason is pretext for age discrimination. *Id.*

Herzig and Martin lack direct evidence of unlawful age discrimination. Herzig testified in deposition that at some point in October or November 2016, when he was meeting with Chief Technology Officer Ray, Ray mentioned that he was looking to hire some younger talent out of college. (Doc. 33-12, p. 66 (Deposition of Brian Herzig, pp. 258:5–259:20 (Dec. 13, 2018))). However, other than Ray’s central involvement in the investigation that led to Herzig and Martin’s termination, this single remark has no connection to the adverse employment decision. “Direct evidence does not include stray remarks in the workplace, statements by nondecisionmakers, *or statements by decisionmakers unrelated to the decisional process itself.*” *Ramlet*, 507 F.3d at 1152 (quoting *Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 635 (8th Cir. 1998)) (emphasis added).

Because Herzig and Martin do not have direct evidence of discrimination, they must rely on the *McDonnell Douglas* burden-shifting framework to survive summary judgment. Herzig and Martin cannot make a prima facie case that termination of their employment was the result of age discrimination. Both were members of the protected class—Herzig was 44 years old and Martin was 41 years old at the time of termination of their employment. They were qualified for their positions, and were terminated from those positions on April 4, 2017. However, the circumstances surrounding their termination do not give rise to an inference of unlawful age discrimination. Herzig was replaced as Director of Information Technology by someone even older than Herzig (Michael Troop, who was 55 years old at the time of his hire) and Martin was not replaced. Despite Chief Technology Officer Ray’s statement several months prior to the adverse employment action that he wanted to hire younger talent, he did not do so in this case. Although Herzig and Martin point out that some employees younger than them were not fired for involvement in the issues with

the Laserfiche Integration Program, other employees younger than Herzig and Martin—such as Blaylock—*were* fired for involvement. Finally, the only employee who might possibly be similarly situated to Herzig and Martin but treated differently for his involvement in the Laserfiche Integration Program ReviewPoint issues was Director of Business Intelligence Jason Scheel, who was 42 years old and within the same protected class. The circumstances surrounding termination of Herzig and Martin’s employment do not give rise to an inference of discrimination, and they have failed to make a prima facie case.

Even if Herzig and Martin could have made a prima facie case, AFMC has proffered a legitimate, nondiscriminatory reason for terminating their employment. HIPAA requires that appropriate disciplinary action be taken against employees to ensure compliance. Herzig and Martin misled AFMC leadership regarding ReviewPoint’s compliance with HIPAA access and audit requirements and led the Information Technology Department that AFMC determined was ultimately responsible for the potential vulnerabilities in the Laserfiche Integration Program. AFMC believed termination of Herzig and Martin’s employment was appropriate discipline.

Herzig and Martin argue in response that AFMC was incorrect about any vulnerabilities and who caused them. This is insufficient to show that AFMC’s proffered reason was pretext for unlawful discrimination. Whether or not AFMC was ultimately correct about Herzig and Martin’s culpability is immaterial. What matters is whether AFMC believed that Herzig and Martin were responsible for the issues AFMC believed existed. *See McCullough v. Univ. of Ark. for Med. Scis.*, 559 F.3d 855, 861–62 (8th Cir. 2009) (“The critical inquiry in discrimination cases like this one is not whether the employee actually engaged in the conduct for which he was terminated, but whether the employer in good faith believed that the employee was guilty of the conduct justifying discharge.”). Chief Technology Officer Ray investigated the cause of the perceived vulnerability

in the Laserfiche Integration Program, and in their response to AFMC's statement of facts Herzig and Martin both dispute that Ray has the technical capability to accurately determine whether computer code creates a vulnerability or whether a particular AFMC employee actually caused technical issues. As a result, Herzig and Martin argue that AFMC was incorrect and disciplined them for something they were not responsible for; that is, they argue AFMC's proffered reason was wrong, rather than arguing AFMC proffered its reason knowing the reason was untrue, or pretextual.

Even if Herzig and Martin could show that AFMC's proffered reason was pretextual, they cannot show it was pretext for unlawful discrimination. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515–16 (1993) (holding it is not enough that a plaintiff show that an employer's stated reasons were pretextual, but the plaintiff must also show that the underlying reason was unlawful discrimination). "An employee's attempt to prove pretext or actual discrimination requires more substantial evidence than it takes to make a prima facie case, . . . because unlike evidence establishing the prima facie case, evidence of pretext and discrimination is viewed in light of the employer's justification." *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 834 (8th Cir. 2002) (quoting *Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1111 (8th Cir., 2001)). Herzig and Martin did not cite to evidence sufficient to make a prima facie case of unlawful discrimination. Without even that evidence, then whether or not they can show that AFMC's proffered reason for terminating their employment was pretext, they cannot make a showing that the actual cause was unlawful age discrimination.

Without direct evidence of unlawful discrimination or sufficient evidence to raise an inference of unlawful discrimination under the *McDonnell Douglas* burden-shifting framework, no reasonable juror could find in favor of Herzig and Martin on their age discrimination claim.

The motion for summary judgment must be granted.

IV. Conclusion

IT IS THEREFORE ORDERED that Defendant's motion to dismiss or for an adverse inference (Doc. 26) is GRANTED IN PART and DENIED IN PART. The motion is GRANTED insofar as the Court finds Herzig and Martin intentionally spoliated evidence in bad faith, but because the motion for summary judgment will be granted, the requested sanctions are DENIED as moot.

IT IS FURTHER ORDERED that Defendant's motion for summary judgment (Doc. 33) is GRANTED and Plaintiffs' age discrimination claims are DISMISSED WITH PREJUDICE. Judgment will be entered accordingly.

IT IS SO ORDERED this 3rd day of July, 2019.

P. K. Holmes, III

P.K. HOLMES, III
U.S. DISTRICT JUDGE

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

WERIDE CORP., et al.,
Plaintiffs,
v.
KUN HUANG, et al.,
Defendants.

Case No. [5:18-cv-07233-EJD](#)

**ORDER GRANTING MOTION FOR
SANCTIONS; OVERRULING
EVIDENTIARY OBJECTIONS;
GRANTING ADMINISTRATIVE
MOTION TO FILE SUPPLEMENTAL
EXPERT DECLARATION**

Re: Dkt. Nos. 330, 391, 431

Plaintiffs WeRide Corp. and WeRide Inc. (collectively “WeRide”) have moved the Court to issue sanctions, through Federal Rule of Civil Procedure 37(b), Federal Rule of Civil Procedure 37(e), and the Court’s inherent power against Defendants Jing Wang, Kun Huang, Zhong Zhi Xing Technology Co. Ltd. (“ZZX”), and AllRide.AI, Inc. (collectively with ZZX, “AllRide”). WeRide brings the motion in response to Defendants’ alleged spoliation of evidence. Having considered the Parties’ papers and listened to their oral arguments, the Court grants the motion.¹

I. Background

a. Factual Allegations

WeRide brings this suit against its former CEO, Wang; its former Head of Hardware Technology, Huang; Huang’s LLC, ZKA; Wang and Huang’s current company, AllRide; and AllRide’s corporate alter-ego, Kaizr, Inc (“Kaizr”). Second Amended Complaint (“SAC”) ¶ 1.

¹ The Court has filed this Order under seal because it contains material subject to sealing orders. Within seven days of the filing date of this Order, the Parties shall provide the Court a stipulated redacted version of the Order, redacting only those portions of the order containing or referring to material subject to a sealing order and for which the Parties still request the material be sealed. The Court will then issue a redacted version of the order.

1 Against all Defendants, WeRide brings claims for trade secret misappropriation under the Federal
 2 Defend Trade Secrets Act (18 U.S.C. § 1836) and California’s Uniform Trade Secrets Act (Cal.
 3 Civ. Code §§ 3426 *et seq.*) arising out of the alleged misappropriation of WeRide’s trade secret
 4 source code. SAC ¶¶ 137-48, 149-60. Based on Wang’s alleged false and damaging statements to
 5 WeRide’s investors and potential investors, WeRide brings claims against him for Defamation and
 6 Intentional Interference with Prospective Economic Advantage. *Id.* ¶¶ 161-73, 174-90. Based on
 7 those alleged defamatory statements, his alleged solicitation of WeRide employees to join
 8 AllRide, and his alleged use of WeRide’s confidential information, WeRide also brings claims
 9 against Wang for Breach of Contract and Intentional Interference with Contract. *Id.* ¶¶ 201-09,
 10 219-29. Against Huang, WeRide bring claims for Breach of Fiduciary Duty and Duty of Loyalty,
 11 and Breach of Contract arising from his alleged theft of source code and other confidential
 12 material belonging to WeRide, and from his alleged solicitation of WeRide employees to join
 13 AllRide. *Id.* ¶¶ 191-200, 210-18. WeRide brings claims against AllRide and Kaizr for Actual
 14 Fraudulent Transfer (Cal. Civ. Code § 3439.04(a)(1)), Constructive Fraudulent Transfer (Cal. Civ.
 15 Code §§ 3439.04(a)(2) and 3439.05), and Common Law Fraudulent Conveyance stemming from
 16 AllRide’s alleged fraudulent transfer of its business to Kaizr. SAC ¶¶ 230-41, 242-51, 252-60.

17 In January 2018, WeRide alleges, it removed Wang as CEO and that he then executed a
 18 separation agreement that included a non-disparagement provision. *Id.* ¶¶ 51-53. Huang was
 19 employed at WeRide at that time. *See id.* ¶ 75. Both Wang and Huang executed a confidentiality
 20 agreement that was required of all WeRide employees. *See id.* ¶¶ 43, 52, 84. WeRide alleges that
 21 Wang then founded AllRide to compete with WeRide, but he attempted to hide this conduct. *Id.*
 22 ¶¶ 56-59. Through the summer and early fall of 2018, Wang allegedly began disparaging WeRide
 23 to actual and potential investors. *Id.* ¶¶ 60-73. WeRide alleges that his statements caused
 24 investors to withhold or delay tens of millions of dollars of funding. *Id.* ¶¶ 68-73.

25 In June and July 2018, Wang allegedly recruited Huang to AllRide. *See id.* ¶ 86. WeRide
 26 contends that by July 2018, Huang was secretly working for AllRide while still technically
 27 employed by WeRide. *See id.* ¶¶ 88, Landes Ex. 41. During this time, Huang allegedly

1 downloaded an unusually large amount of data from WeRide’s servers. SAC ¶¶ 101-02. WeRide
 2 had issued Huang two company-owned laptops: a personal MacBook and a shared Lenovo. *Id.* ¶
 3 105. WeRide alleges that in June and July, Huang inserted three USB devices into the Lenovo.
 4 *Id.* ¶ 107. On August 7, 2018, Huang allegedly created a series of folders on at least one of the
 5 USB devices. *Id.* ¶ 108. The folders appear to match folders on the Lenovo laptop, indicating that
 6 he copied folders from the Lenovo to the USB device. *Id.* ¶ 108. Huang also allegedly attempted
 7 to solicit other WeRide employees to AllRide. *Id.* ¶¶ 86-88. On July 31, 2018, Huang met with a
 8 WeRide executive and they agreed that, based on his solicitation of WeRide employees, he would
 9 end his employment with WeRide on August 13, 2018. *Id.* ¶ 89. Over the next two days, Huang
 10 ran internet searches for “what is employee solicit and consequence” and “what is employee solicit
 11 consequence penalty.” Kunkel Decl. ¶ 11 & Ex. C. Huang testified that he was worried that
 12 WeRide might sue him for soliciting WeRide’s other employees. Landes Ex. 8 at 466:16-19. A
 13 few days later, on August 7, he re-formatted the MacBook completely erasing its memory, and he
 14 deleted multiple files from the Lenovo. *Id.* ¶ 106; Dkt. No. 34-3 ¶¶ 11-20. WeRide alleges that he
 15 returned the laptops on August 15—two days after his employment had ended. SAC ¶ 106.

16 On October 22, 2018, WeRide allegedly sent an investigator to an AllRide public
 17 recruiting event where Huang displayed a promotional video (the “Video”). *Id.* ¶ 112. The Video
 18 allegedly depicted an autonomous car capable of (1) fusing inputs from multiple sensors to create
 19 an HD map; (2) operating without a safety driver; (3) steering, accelerating, and braking smoothly;
 20 (4) detecting and stopping for pedestrians in crosswalks, and (5) changing lanes to pass a slower
 21 moving vehicle (the “Advanced Capabilities”). *See id.*; Dkt. 34-43 ¶ 17. WeRide further alleges
 22 that the hardware configuration of AllRide’s car matches the hardware configuration of WeRide’s
 23 cars; for example AllRide’s car placed the radar sensors on the front-center of the roof, like
 24 WeRide, and both companies’ cars use the same configuration of wires at the back of the car.
 25 SAC ¶ 117.

26 b. Pre-Suit and Procedural History

27 On October 1, 2018, WeRide sent Wang a cease-and-desist letter concerning his alleged

1 defamatory statements. Dkt. No. 72. The letter raised the possibility of litigation. *Id.* After
2 WeRide learned of the Video, it sent Huang a cease-and-desist letter on November 15, 2018; his
3 counsel acknowledged receipt of the letter. Landes Exs. 73, 74. Huang’s counsel conferred with
4 AllRide co-founder Patrick Lam on November 21, 2018 and Huang’s counsel sent Lam a
5 document hold notice on December 4, 2019. Landes Exs. 35, 40. Lam met with two other
6 AllRide executives to discuss the hold notice, but AllRide took no further action to preserve
7 documents until May and June 2019. LaFond Ex. 17 at 13. It was not until August 2019 that the
8 hold notice was distributed more broadly in the company. *Id.*

9 WeRide filed its original complaint on November 29, 2018, and then moved for a
10 preliminary injunction on December 23, 2018. Dkt. Nos. 1, 34. On March 22, 2019, the Court
11 granted the motion for preliminary injunction as to Huang and AllRide, and denied it as to Wang.
12 Dkt. No. 116. The Court enjoined AllRide and Huang from using or disclosing WeRide’s alleged
13 trade secrets or confidential information. *Id.* at 24. The preliminary injunction specifically
14 prohibited the enjoined parties from “[d]estroying, concealing, disposing, deleting, removing or
15 altering any and all documentation of any kind, whether paper or electronic, . . . data, drafts or
16 other things or materials” that are related to WeRide’s confidential material or information, or
17 AllRide’s source code. *Id.* The Court also ordered Huang to make several devices, including his
18 AllRide-issued laptop, available for inspection by WeRide. *Id.* at 25. The Court allowed WeRide
19 to take discovery from AllRide and Huang, and for the parties to take discovery of each other’s
20 source code. *Id.* at 26-27. The parties filed their Joint Case Management Statement on July 1,
21 2019—after AllRide says it discovered the mass destruction of email, but before it notified the
22 Court or WeRide. Dkt. No. 163. AllRide represented to the Court that “counsel for AllRide and
23 ZZX has discussed with its clients document retention obligations and hired both an outside
24 consultant to assist in the acquisition of electronically stored information.” *Id.* at 11.

25 Discovery gave rise to several disputes. *See, e.g.*, Dkt. Nos. 139, 146, 149, 157, 170, 192.
26 The Magistrate Judge considered these disputes and set a final hearing for August 16, 2019. *See*
27 Dkt. No. 234. The night before the hearing, AllRide filed a letter with the Court disclosing that in

1 mid-June 2019 it became aware that it had not turned off an auto-delete setting on the company’s
2 email server leading to the company-wide destruction of emails predating the middle of March
3 2019, and separately that several individual email accounts associated with Wang and his wife had
4 been destroyed. Dkt. No. 231. The auto-delete function destroyed emails more than three months
5 old. *Id.* The Magistrate Judge ordered the appointment of a neutral forensic inspector—FTI
6 Consulting (“FTI”)—to investigate that destruction and a special master to resolve any disputes
7 related to FTI’s investigation. Dkt. Nos. 266, 273.

8 Based on discovered evidence, WeRide moved, in the summer of 2019 to modify the
9 preliminary injunction to enjoin Wang and the newly added defendants Kaizr and ZKA, and to
10 compel Defendants to make additional sources of information available for discovery. Dkt. No.
11 166. The Court granted the motion so far as to bind Wang, Kaizr, and ZKA by the injunction and
12 to order AllRide to make available any computers, servers, or cloud computing accounts where it
13 had stored source code. Dkt. No. 342 at 14-17. Wang officially became AllRide’s CEO in July
14 2019. Wang Decl. ¶ 24.

15 WeRide filed the present motion on October 23, 2019. Dkt. No. 330. Pursuant to the
16 parties’ stipulation, WeRide filed the motion, Wang, Huang, and AllRide each filed an opposition,
17 WeRide filed a reply, AllRide filed a response to the reply, and WeRide filed a sur-reply. Dkt.
18 No. 353. Huang filed evidentiary objections to WeRide’s reply. Dkt. No. 391. AllRide filed an
19 eleventh hour administrative motion for leave to file a supplement declaration from an expert.
20 Dkt. No. 431. The Court held a hearing on February 27, 2020. Dkt. Nos. 446, 462.

21 c. The Alleged Spoliation

22 Defendants’ alleged spoliation can be broadly categorized as (1) the destruction of emails,
23 through both the deletion of specific email accounts and through AllRide’s company-wide
24 automatic deletion of nearly all emails on its servers from its founding in June or July 2018
25 through March 2019, (2) five different categories of source code that AllRide or Huang allegedly
26 spoliated, and (3) other spoliation by other means.

1 i. Destroyed Email

2 AllRide has repeatedly and in violation of its duty to preserve and this Court’s preliminary
3 injunction destroyed emails and other files. AllRide concedes this. AllRide has destroyed email
4 in two ways: (1) by setting its email servers to automatically delete all emails older than 90 days
5 and maintaining that setting despite knowledge that litigation was imminent, despite receiving the
6 complaint, and despite this Court’s March 22, 2019 preliminary injunction, and (2) by repeatedly
7 destroying email accounts belonging to certain individuals after the original complaint was filed
8 and after the preliminary injunction issued.

9 A. The Automatic Deletion of All Emails After 90 Days

10 AllRide created its email server with Microsoft Office 365 in July 2018. Landes Ex. 83.
11 At the direction of co-founder Peijian Gu, the company changed the default settings of the server
12 so that all emails would be deleted after 90 days, instead of the default setting to preserve emails
13 for two years before archiving them. Landes Ex. 11 at 249:1- 20; Landes Ex. 12 at 37:21-38:20.
14 AllRide represents that it took this action to save a few hundred dollars a month. *See* Landes Ex.
15 12 at 55:2-59:7; Landes Ex. 4 at 268:15-269:4. FTI was not able to determine whether this action
16 was intentional because AllRide employees provided “inconsistent” information during its
17 investigation. Landes Ex. 84 at 19.

18 The auto-deletion setting remained in place until on or around June 17, 2019, meaning that
19 nearly all emails sent over AllRide’s servers from June or July 2018 through March 2019 were
20 destroyed. Dkt. No. 231; Pickles, Ex. B at 250:7-13, 253:20-254:11, 257:5-15; Pickles Ex. C at
21 43:7-44:12; Ex. D, at 134:15-25, 145:13-17. After working with Microsoft, AllRide has been able
22 to recover or find some emails from this period—primarily emails that were sent to or received
23 from separate email systems. Pickles Exs. E, F. This time period covers Huang’s arrival at
24 AllRide and any communications he may have had with AllRide before he left WeRide, and the
25 critical period—August, September and October 2018—where AllRide developed the technology
26 to pilot the car in the Video. The deleted emails include weekly reports detailing progress and
27 projects sent from AllRide’s engineers to Huang and Wang. Landes Ex. 3 at 359:19-360:1;

1 Landes Ex. 8 at 547:8-549:21. No later than August 15, 2018, Huang instructed AllRide’s
2 engineering team to send these weekly reports. Landes Ex. 3 at 359:19-360:1; Landes Ex. 8 at
3 547:8-549:21. Huang specifically requested that the engineers identify the particular files names
4 of the code that they worked on. *See* Landes Ex. 8 at 566:19-567:14; Landes Ex. 25. These
5 reports were not preserved outside of email. Ex. 8 at 567:15-23. AllRide has not produced any of
6 these reports pre-dating November 2018. Mot. at 5. Additionally, any internal email banter
7 among the engineers, executives, or other employees about the development of AllRide’s
8 technology has been lost.

9 On August 15, 2019—the eve of a hearing concerning six motions to compel—AllRide’s
10 counsel represented to the Magistrate Judge that they first learned of the mass destruction of email
11 in June 2019. Dkt. No. 231. For each month between July 2018 and February 2019, AllRide has
12 been able to recover or otherwise collect between 85 and 582 emails for its 15 custodians. Landes
13 Ex. 30. Between March and August 2019, the number of collected emails jumps to between 4,116
14 and 8,328. Landes Ex. 31. The number of emails collected per month from Kun Huang’s
15 Microsoft email account between July 2018 and February 2019 range from 0 to 48, while the
16 numbers collected between March and August 2019 range from 845 to 1682. Mot at 12. For Dr.
17 Yahui Liu, an AllRide software engineer and AllRide’s Rule 30(b)(6) witness for its technical
18 development, AllRide collected between 0 and 11 emails per month from July 2018 and February
19 2019, and between 184 and 552 emails per month from March and August 2019. *Id.* AllRide’s
20 Rule 30(b)(6) witness on the email destruction testified that its scale “cannot be quantified.”
21 Landes Ex. 11 at 174:16-20.

22 B. Destroyed Email Accounts

23 AllRide also destroyed specific email accounts assigned to or used by Huang, Wang, and
24 Wang’s wife—who owns AllRide’s parent company. Even though Huang has stated under oath
25 that he did not have any interactions with AllRide until August 2, 2018 (Landes Ex. 8 at 582:1-
26 588:18), his personal emails indicate that AllRide created the kun.huang@allride.ai email account
27 around July 22 or 23, 2018. Landes Ex. 41. The forensic analysis of his laptop also indicated that

1 Huang logged into the test@allride.ai email on or around July 24; he also accessed WeRide's
 2 source code earlier that day. Kunkel Decl. ¶¶ 6-10; Kunkel Ex. D; Collins Decl. ¶ 8.² Huang
 3 testified that he “d[id not] know” why AllRide had created an email account for him in July 2018.
 4 Landes Ex. 8 at 582:1-588:18. Forensic analysis of his laptop indicates the he accessed AllRide's
 5 Microsoft Office account on July 24, 2018, a few hours after he accessed WeRide's source code
 6 repository. Kunkel Decl. ¶ 12. In August, AllRide destroyed the original kun.huang@allride.ai
 7 email account and then recreated it on the 13th. *See* Landes Ex. 11 at 119:5-123:22. The
 8 test@allride.ai account was omitted from a list of AllRide's email accounts current to the
 9 litigation, leading WeRide to conclude that it too has been destroyed. LaFond Decl. ¶ 9.

10 Sometime in the summer of 2018, AllRide created the email account jing@allride.ai for
 11 Wang because the company did not want him to communicate sensitive information to his
 12 personal Yahoo account. Boroumand Smith Ex. 1 at 20:5-21:1. Wang used the jing@allride.ai
 13 account for business connected to AllRide. Wang Decl. ¶ 5. Wang represents that he was
 14 uncomfortable using this email account because he feared it would lead people to believe that he
 15 had a more formal role with AllRide than he contends that he did. Wang Decl. ¶¶ 6-7, 16. In
 16 December 2018—after the original complaint had been filed—Wang represents that he told Gu he
 17 intended to cease using jing@allride.ai. Wang Decl. ¶ 7; Wang Dep. at 24:2-20, 97:18-98:8.
 18 AllRide then destroyed the email account. Landes Ex. 10 at 24:2-20, 97:18-98:8. From other
 19

20 ² Huang objects to WeRide arguing that the test@allride.ai email account was spoliated in its
 21 Reply (*see* Dkt. No. 387 at 2-4), when it did not argue that email account had been spoliated in its
 22 original motion. Dkt. No. 391. However, WeRide raised that argument in response to Huang's
 23 argument that, while still employed by WeRide, he only accessed the test@allride.ai email
 24 account, not the kun.huang@allride.ai email account. *See* Dkt. No. 370 at 9, 24. Accordingly, the
 Court overrules the objection. To the extent that Huang objects to the Reply Declaration of
 WeRide's computer forensics expert Michael Kunkel for offer new evidence and arguments in
 reply, that objection is overruled for the same reason—the Court finds that WeRide properly offers
 Kunkel's reply declaration in response to arguments that Huang raised in his opposition.

25 Huang also objects to both of Kunkel's declarations on the grounds that his declarations lack
 26 foundation, are speculative, are based on hearsay, and are inadmissible under Federal Rule of
 Evidence 702. Dkt. No. 370 at 13 n.6; Dkt. No 391. The Court disagrees. Kunkel's testimony is
 based on his analysis of Huang's surrendered devices, and Kunkel is qualified, for the purposes of
 this motion, to offer opinions based on his analysis of the devices. *See* Kunkel Decl. ¶¶ 2-3 & Ex.
 A. That objection is overruled as well.

1 sources, AllRide has recovered at least 2,428 emails “associated” with jing@allride.ai. Barce
 2 Decl. ¶ 13(b) & Ex. B at 1. After destroying that email account, AllRide created another email
 3 account for Wang, jack@allride.ai. Ex. 7 at 126:21-128:25. Wang represents that this email
 4 address was created so that AllRide employees could send emails to him while another AllRide
 5 executive, Gu, would monitor the account. Boroumand Smith Ex. 1 at 123:6-16, 124:8-17; Wang
 6 Decl. ¶ 17. AllRide destroyed this email account in February 2019. Landes Ex. 4 at 312:17-
 7 313:2; Landes Ex. 16 at 5. From other sources, AllRide has been able to recover 613 emails
 8 “associated” with jack@allride.ai. Barce Del. ¶ 13(a) & Ex. B at 1. A third email account for
 9 Wang, jw@kaizhe.ai was also created and destroyed at some point. Landes Ex. 10 at 156:22-
 10 157:9; Landes Ex. 42 at -082.

11 Rongrong Guo, Wang’s spouse and the owner of AllRide’s parent company, has had two
 12 @allride.ai email accounts. After the Court issued the preliminary injunction, Guo instructed
 13 AllRide to destroy her first account, rongrong@allride.ai because, she represents, it had been
 14 subjected to a phishing attack. Landes Ex. 5 at 222:5-223:2, 230:1-232:15; Pickles Ex. H at
 15 191:13-193:2. AllRide was able to recover at least 3,620 emails from her deleted account. Barce
 16 Decl. ¶ 13(c) & Ex. B at 1. After her initial email account was deleted, AllRide created a new
 17 email account for her, alice@allride.ai; however, she has for decades used “Lauren” not “Alice” as
 18 an Anglicized. Landes Ex. 5 at 19:24-20:4; 244:19-245:13.

19 Summing up, AllRide has destroyed the following six email accounts:
 20 kun.huang@allride.ai in August 2018, test@allride.ai at an unknown time, jing@allride.ai after
 21 the complaint was filed, jack@allride.ai after the complaint was filed, jw@kaizhe.ai at an
 22 unknown time, and rongrong@allride.ai after the preliminary injunction issued.

23 C. FTI’s Investigation

24 As directed by the Court, FTI undertook the following tasks as part of its investigation: (1)
 25 quantifying and qualifying the scope of AllRide’s document/email destruction, (2) recovering, to
 26 the extent possible using commercially reasonable efforts, any documents destroyed, and (3)
 27 describing, to the extent possible, the nature and contents of any destroyed documents that cannot

1 be recovered. Dkt. No. 266; Landes Ex. 84 at 2; LaFond Ex. 17 at 2; LaFond Ex. 18 at 2. FTI
 2 could not reach a conclusion as to the extent or scope of the email destruction, or to the
 3 significance of the destroyed emails. LaFond Ex. 11 at 18:7-21:22; Pickles Ex. at 93:10-20,
 4 115:20-24, 121:8-14, 124:20-125:16, 133:16-135:4, 150:3-9. FTI did not investigate and did not
 5 reach a conclusion as to whether the AllRide deliberately destroyed email because of this
 6 litigation.

7 ii. Source Code

8 WeRide argues that AllRide and/or Huang have spoliated, or otherwise failed to produce,
 9 five categories of source code: (1) source code that AllRide developed before August 24, 2018
 10 (the “August 2018 Source Code”), (2) the source code actually used by the autonomous car in the
 11 Video (the “October 2018 Source Code”), (3) source code developed by former AllRide
 12 employees Wu Wei and Dongxiang Xu, (4) source code saved on Huang’s AllRide-issued laptop,
 13 and (5) source code AllRide stored in a OneDrive repository.

14 AllRide has kept and accessed its source code in different ways. Originally, it stored its
 15 code in a repository housed on Amazon Web Services. Landes Ex. 47 ¶¶ 2-3. In August 2018,
 16 AllRide used a program call Git to access it. *Id.* ¶ 3; Ohlman Decl. ¶ 23. In October 2018,
 17 AllRide began using Phabricator to make modifications to the source code. Landes Ex. 47 ¶ 3;
 18 Ohlman Decl. ¶ 23. Phabricator automatically generates and sends an email detailing revisions
 19 whenever someone changes the stored code. *See* Landes Ex. 6 at 204:14-205:8; Landes Ex. 27. In
 20 June 2019, AllRide transitioned from Phabricator to another program called GitLab. Landes. Ex.
 21 47 ¶ 4. The actual transition of the code was done, at least in part, manually. Landes Ex. 6 at
 22 201:6-204:10. AllRide has use GitLab since then. Landes Ex. 47 ¶ 4. Both Phabricator and
 23 GitLab interact with Git, so that Git automatically tracks and logs all changes (called “commits”)
 24 to the source code. *Id.* ¶¶ 5-6. These “git logs” show what modifications are made to which
 25 specific file, when the modifications were made, and by whom. *Id.* ¶ 5; Ohlman Decl. ¶ 11.

26 A. The August 2018 Source Code

27 WeRide contends that AllRide has not produced any source code developed before August

1 24, 2018. While arguing against WeRide’s first preliminary injunction motion, Huang represented
 2 to the Court that when he officially started at AllRide on August 13, 2018, he “joined an existing
 3 team of engineers . . . that were already developing the technology.” Dkt. No. 70-1 ¶ 25. Liu
 4 confirmed that AllRide began modifying open source code before Huang joined. *See* LaFond Ex.
 5 1 at 100:8-14, 104:10-13; LaFond Ex. 3 at 142:14-144:7. However, the code and accompanying
 6 logs produced by AllRide (the “Produced Code”) postdate August 24, 2018. Dec. 13, 2019 Walter
 7 Decl. ¶ 17(a). AllRide calls this argument a red herring because Huang had only started working
 8 at AllRide a little over a week before, and because the Produced Code is complete from August
 9 24, 2018 through October 22, 2018.

10 **B. The October 2018 Source Code**

11 WeRide and AllRide fiercely contest whether the Produced Code is the actual 2018 Source
 12 Code or whether the 2018 Source Code has been withheld, hidden, or otherwise spoliated. When
 13 WeRide’s retained expert, Dr. Matthew Walter, analyzed the Video, he concluded that the car
 14 demonstrated Advanced Capabilities that AllRide could not have conceivably developed through
 15 independent means in the relatively short time that the company had existed. Dkt. No. 34-14;
 16 Landes Ex. 59 ¶ 17. WeRide contends that AllRide must have used WeRide’s misappropriated
 17 code to develop the Advanced Capabilities. Huang and AllRide represented to the Court that they
 18 had developed the technology “quickly” with a “pre-existing” team of engineers. Landes Exs. 53
 19 at 7-8, 55 ¶ 25; *see also supra* § I.c.ii.A. AllRide has also indicated that they developed the
 20 October 2018 Source Code by building on a base of open source Autoware code. Landes Ex. 47 ¶
 21 14.

22 On or around May 21, 2019, AllRide software engineer Liu exported from Phabricator the
 23 AllRide source code that, he and AllRide represent, existed in October 2018. Landes Ex. 47 ¶ 8.
 24 Liu then—as AllRide’s corporate designee—testified on June 6 and 7, 2019 about the autonomous
 25 driving capabilities demonstrated in the Video. For example, he testified as follows about
 26 changing lanes to pass a slower vehicle—one of the Advanced Capabilities:

27 There are two vehicles in the same lane. [One] is our car; [one] is the
 28 obstacle car. When we are moving and detect that at some certain

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Northern District of California

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distance ahead of us there is an obstacle, we would analyze it and try to decide the distance between us and its speed. Based on the speed, we would follow for a while. If it moves really slow, below a certain threshold, our car would change lane[s] and continue to move on. That’s what I saw demonstrated in the video.

Landes Ex. 1 at 127:16-128:8. AllRide made the exported code—the “Produced Code”—and the corresponding git logs available to WeRide for inspection on or around July 5, 2019. Landes Ex. 47 ¶¶ 7-9.

Based on Walter’s analyses, WeRide contends that the Produced Code cannot perform the capabilities described by Liu, meaning the Produced Code is not the actual October 2018 Source Code. In other words, WeRide argues that the Produced Code is faked, was not used in the Video, and is irrelevant to the merits of this case. For example, Walter opined that [REDACTED]

[REDACTED]

[REDACTED] See Landes Ex. 46 ¶ 9.

Additionally, when Walter first analyzed the Video, he opined that it showed the use of an HD Map, one of the Advanced Capabilities. Dkt. No. 34-43 ¶¶ 23-24. [REDACTED]

[REDACTED] Landes Ex. 36 ¶ 14 (citing Jun. 6, 2019 Liu Dep. Tr. at 74:11-18). [REDACTED]

[REDACTED] *Id.* ¶¶ 14-15.

AllRide insists that the Produced Code is the October 2018 Source Code. In response to Walter’s analysis, Liu executed two declarations on September 23, 2019 and October 3, 2019. Landes Exs. 47, 48. Liu stated that AllRide made use of waypoints to carry out the functionalities depicted in the Video. *See, e.g.*, Landes Ex. 47 ¶ 25; Landes Ex. 48 ¶¶ 13, 15, 21. Waypoints are not source code, but rather are similar to geographic coordinates that provide instruction to source code. Landes Ex. 49 ¶ 15. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Landes Ex. 47 ¶¶ 14-15. [REDACTED]

1 [REDACTED] Landes Ex. 47 ¶ 25. He disclosed that
2 AllRide did not keep the waypoint files that AllRide used for the Video, so they cannot be
3 produced to WeRide. *Id.* ¶ 26.

4 AllRide retained Matthew Ohlman as an expert to “to test WeRide’s speculation that
5 [AllRide’s] code was somehow different than what was previously made available.” AllRide
6 Opp’n at 8. Mr. Ohlman compared the Produced Code to the source code presently stored in
7 AllRide’s repositories, and he concluded that they are the same. Ohlman Decl. ¶¶ 45-52. He also
8 examined whether the Produced Code had been tampered, and concluded that it had not. *Id.* ¶¶
9 53-64. He opined that there was no evidence that the git logs for the Produced Code had been
10 altered. *Id.* ¶ 65. AllRide submits declarations from two other experts, Dr. Jeffrey Miller and Dr.
11 Daniel Watzenig. Miller opined that lane change maneuver depicted in the Video would be
12 possible by use of the Produced Code, waypoints files, and a remote control. Landes Ex. 49 ¶¶ 9-
13 12. Watzenig opined that Autoware version 1.7.0, with minor modifications, was capable of
14 performing the maneuvers shown in the Video. Watzenig Decl. ¶¶ 4, 15-23. He did not opine as
15 to whether the car in the Video actually used Autoware version 1.7.0 to achieve those maneuvers
16 and he did not examine the Produced Code. *Id.* ¶¶ 4, 13, 23. Two WeRide employees, after
17 viewing the Video, surmised that AllRide had used Autoware for the “route planning map”
18 capability performed by the car. Watzenig Suppl. Decl. Ex. A.³ That is not one of the Advanced
19 Capabilities.

20 C. Source Code Developed by Wu Wei and Dongxiang Xu

21 WeRide contends that AllRide has failed to produce code relating to pedestrian detection—
22 one of the Advanced Capabilities—that was developed by two individuals, Wu Wei and
23 Dongxiang Xu who are no longer with AllRide. Documents recovered from Huang’s devices
24 indicate that they were the “owners” of “[c]rosswalk obstacle detecgion [*sic*],” which was at least
25 80 percent complete before November 4, 2018. Landes Exs. 13-15; LaFond Ex. 4 at 95:12-96:8.

26 _____
27 ³ For good cause, the Court grants AllRide’s Administrative Motion to File Supplemental Expert
28 Declaration. Dkt. No. 431.

1 However, Walter’s analysis of the Produced Code and the corresponding git logs does not indicate
 2 any commits to that portion of code by either Wu Wei or Dongxiang Xu. Dec. 13, 2019 Walter
 3 Decl. ¶ 17(b). The logs indicate that Wu Wei made nine commits to the Produced Code, but none
 4 of them concerned substantive work on pedestrian detection. *Id.* & n.18. WeRide contends
 5 AllRide must have spoliated the source code that they worked on. AllRide counters that the
 6 recovered documents were not status or owner updates and that Liu was the lead for all
 7 perception-related projects. Pickles Reply Decl., Ex. C at 93:18-96:8. AllRide maintains that Wu
 8 Wei and Dongxiang Xu were only interns that made only minor changes to AllRide’s code.

9 D. The Source Code on Huang’s Surrendered Laptop

10 As part of the preliminary injunction issued on March 22, 2019, the Court ordered Huang
 11 to surrender his devices to WeRide by March 26, 2019. Dkt. No. 116 at 26. After retaining a
 12 computer forensics expert, Michael Kunkel, to inspect the devices, WeRide contends that Huang
 13 deleted or otherwise altered files or directories saved to his AllRide-issued computer. Kunkel
 14 Decl. ¶¶ 6-10. Specifically, Kunkel found 3,935 files or folders with “allride” in the name that
 15 have timestamps indicating that they were created or modified on March 24 or 25, and he
 16 identified 1,279 source code files within those folders with creation or modification time stamps
 17 on those days. *Id.* ¶¶ 6-7. However, the 1,279 source code files are publicly available Arduino
 18 open source code. Huang Decl. ¶ 15 & Ex. I. Both WeRide’s code expert, Walter, and AllRide’s
 19 expert, Miller, concluded that the source code on Huang’s computer was not functional, with
 20 Miller characterizing it as “not an arrangement of code that a programmer would utilize.” Landes
 21 Ex. 44 ¶¶ 7-10; Landes Ex. 45 ¶ 12. Huang points out that Kunkel’s analysis also indicated that
 22 some files have timestamps with impossible dates—*i.e.*, dates in the future. Kunkel Decl. ¶ 13 &
 23 Ex. G; Huang Decl. ¶ 14 & Ex. H.

24 E. Source Code Saved to OneDrive

25 During FTI’s investigation, it found that a file titled
 26 “zzx_repo_with_git_log_20190712.zip” was deleted from AllRide’s OneDrive account in late
 27 August 2019. LaFond Ex. 18 at Appendix 003 page 5. WeRide contends that the filename

1 indicates this was a source code repository that AllRide spoliated well after the preliminary
 2 injunction issued. *See* Dec. 13, 2019 Walter Decl. ¶¶ 35-39. AllRide states Liu had provided the
 3 file in question to Allride’s counsel on July 11 or 12, 2019 so that AllRide’s expert, Miller, could
 4 review the code for WeRide’s alleged trade secrets. Jan. 4, 2020 Liu Decl. ¶¶ 3-6. Liu further
 5 states that he “does not believe” that he was successful in uploading the file to OneDrive, which is
 6 why it is not present there. *Id.* ¶ 5.

7 iii. Other Alleged Spoliation

8 Not including the emails and source code discussed above, WeRide alleges that
 9 Defendants have each destroyed other potentially discoverable material. Beginning with Huang,
 10 he admits to destroying Electronically Stored Information (“ESI”) on three computers, including
 11 the two WeRide-issued laptops: the MacBook that he wiped clean, and the Lenovo from which he
 12 deleted certain files. Huang contends that he used the MacBook for personal matters, so it
 13 contained things like personal photographs and his tax returns. Dkt. No. 70-1 ¶ 15. He represents
 14 that he re-formatted it to ensure that these personal files were deleted. *Id.* As for the Lenovo, he
 15 represents—and WeRide does not dispute—that it was shared among his team and at times with
 16 third-party contractors. *Id.* ¶ 14. Huang represents that he deleted files from the Lenovo’s desktop
 17 and cleared its browser history to leave it free of “junk files.” *Id.* WeRide’s analysis of the
 18 Lenovo revealed that three USB devices were plugged into it in June and July 2018. *See* Dkt. No.
 19 34-2 ¶¶ 11-20. Huang returned one of the devices, but maintains that he has no knowledge of the
 20 other two. Dkt. Nos. 29, 70-1 ¶ 17. As for the third computer, on October 1, 2018, the day that
 21 WeRide sent a cease-and-desist letter to Wang, Huang returned his personal MacBook to an Apple
 22 store in exchange for a gift card. Landes Ex. 55 ¶ 16 & Ex. B.

23 When Wu Wei and Dongxiang Xu left AllRide, AllRide wiped their laptops and deleted
 24 their email accounts on or after February 23, 2019, and December 31, 2018. Dkt. No. 383 at ¶¶ 2-
 25 5; Pickles Reply Decl., Ex. B. AllRide has produced fewer than 100 emails from each of them.
 26 Landes Ex. 16 at 22. Their information and hardware were wiped pursuant to an exit policy that
 27 AllRide continued to employ until August or September 2019. Landes Ex. 16 at 22; LaFond Ex.

1 17 at 15-16.

2 As to Wang, in April of 2019 before he officially became AllRide’s CEO, he told AllRide
 3 that the company “better try” using the application DingTalk to correspond internally. Landes Ex.
 4 7 at 183:20-185:21. AllRide then began using it; Wang started using it when he officially became
 5 CEO of AllRide. *Id.*; LaFond Ex. 17 at 13. Wang testified that he liked using DingTalk because it
 6 is “more secure” than other messaging platforms. Landes Ex. 7 at 185:22-186:17. DingTalk
 7 allows for “ephemeral messages” that automatically delete after they have been sent and read. *Id.*
 8 AllRide’s 30(b)(6) witness confirmed that AllRide has not been able to recover any DingTalk
 9 ephemeral messages. Landes Ex. 12 at 26:14-28:20. However, Wang does have some non-
 10 ephemeral DingTalk messages saved on his phone, but he has not produced them because, he says,
 11 he cannot find a vendor to extract them. Wang Decl. ¶ 24 & Ex. 4; Boroumand Smith Decl. ¶ 21.

12 **II. Legal Standard**

13 “When a district court decides to impose sanctions or discipline, it must clearly delineate
 14 under which authority it acts to insure that the attendant requirements are met.” *Williams v.*
 15 *Williams*, 2013 WL 3157910, at *4 (N.D. Cal. June 20, 2013) (citing *Weissman v. Quail Lodge,*
 16 *Inc.*, 179 F.3d 1194, 1200 (9th Cir. 1999)). WeRide seeks terminating sanctions under three
 17 sources of authority: Federal Rule of Civil Procedure 37(b) (“Rule 37(b)”), Federal Rule of Civil
 18 Procedure 37(e) (“Rule 37(e)”), and the Court’s inherent authority to sanction.

19 Wang argues that the Court may not exercise its inherent authority to sanction Defendants
 20 because they allegedly spoliated ESI, and Rule 37(e) governs the spoliation of ESI. WeRide
 21 counters that Wang is misreading the law and that Supreme Court precedent holds that the Federal
 22 Rules may not displace a court’s inherent power to sanction. However, because the Court will
 23 issue terminating sanctions under Rule 37(b) and Rule 37(e), it need not consider whether it may
 24 also sanction Defendants under its inherent power. The Court will not issue sanctions under its
 25 inherent power.

26 Rule 37(b) provides that a court may sanction a party for failure to comply with a court
 27 order. “If a party or a party’s officer, director, or managing agent . . . fails to obey an order to

1 provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the
 2 action is pending may issue further just orders” including “striking pleadings in whole or in part”
 3 and/or “rendering default judgment against the disobedient party.” Fed. R. Civ. P. 37(b)(2)(A).
 4 District courts should consider “(1) the public’s interest in expeditious resolution of litigation; (2)
 5 the court’s need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4)
 6 the public policy favoring disposition of cases on their merits; and (5) the availability of less
 7 drastic sanctions.” *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (quotation and
 8 citation omitted). “[W]here a court order is violated, factors 1 and 2 support sanctions and 4 cuts
 9 against case-dispositive sanctions, so 3 and 5, prejudice and availability of less drastic sanctions,
 10 are decisive.” *Valley Engineers Inc. v. Elec. Eng’g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998).
 11 “While the district court need not make explicit findings regarding each of these factors, a finding
 12 of willfulness, fault, or bad faith is required for dismissal to be proper.” *Leon*, 464 F.3d at 958.
 13 (citations and quotations omitted).

14 Rule 37(e) allows for sanctions where a party fails to preserve ESI. To determine whether
 15 spoliation of ESI has occurred, courts should consider “(1) the ESI ‘should have been preserved in
 16 the anticipation or conduct of litigation’; (2) the ESI ‘is lost because a party failed to take
 17 reasonable steps to preserve it’; and (3) ‘[the ESI] cannot be restored or replaced through
 18 additional discovery.’” *Porter v. City & Cty. of San Francisco*, 2018 WL 4215602, at *3 (N.D.
 19 Cal. Sept. 5, 2018) (quoting Fed. R. Civ. P. 37(e)). Before terminating the action, the Court must
 20 find that “the party acted with the intent to deprive another party of the information’s use in the
 21 litigation.” Fed. R. Civ. P. 37(e)(2). “[T]here is no requirement that the court find prejudice to the
 22 non-spoliating party under Rule 37(e)(2).” *Porter*, 2018 WL 4215602, at *3.

23 The parties dispute whether WeRide must meet the preponderance of evidence standard or
 24 the clear and convincing evidence standard for terminating sanctions. District courts in this
 25 Circuit have split on the question, and the Ninth Circuit has not ruled on it. *Compare, e.g.,*
 26 *OmniGen Research v. Yongqiang Wang*, 321 F.R.D. 367, 372 (D. Or. 2017) (applying
 27 preponderance of evidence standard) *with, e.g., Hynix Semiconductor Inc. v. Rambus Inc.*, 897 F.

1 Supp. 2d 939, 978 (N.D. Cal. 2012) (applying clear and convincing standard). Other Circuits are
 2 split on this question as well. *Compare, e.g., Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 777
 3 (7th Cir. 2016) (holding that the preponderance of evidence standard should apply to terminating
 4 sanctions) *with, e.g., Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1328 (Fed. Cir. 2011)
 5 (holding that terminating sanctions must be proved by clear and convincing evidence). While this
 6 is a close question, the Court finds the reasoning of the cases that apply the preponderance of
 7 evidence standard to be persuasive. In *Ramirez*, for example, the Seventh Circuit considered
 8 multiple Supreme Court holdings that rejected applying higher evidentiary standards in civil cases.
 9 845 F.3d at 777-78 (discussing *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1934
 10 (2016); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 557 (2014); *Grogan v.*
 11 *Garner*, 498 U.S. 279, 285 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989);
 12 *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983)). Those cases, the Seventh Circuit
 13 reasoned, show that unless a statute, a rule or the Constitution requires a higher standard of proof,
 14 then the preponderance of evidence standard should apply. *Ramirez*, 845 F.3d at 778. In civil
 15 litigation, exceptions to the preponderance standard are uncommon, examples of which include the
 16 termination of parental rights, involuntary commitment, deportation, and denaturalization. *Id.*
 17 (discussing *Price Waterhouse*, 490 U.S. at 253 and *Huddleston*, 459 U.S. at 389). Accordingly the
 18 Seventh Circuit held that “[t]he interests implicated by the dismissal of a suit as a sanction for
 19 misconduct occurring in civil litigation (including discovery) are not so important as to demand
 20 that the facts underlying the dismissal be established by clear and convincing evidence. *Id.* The
 21 Court agrees with this analysis and adopts it.

22 On considering a motion for sanctions, a district court may make factual findings and
 23 assess the credibility of witnesses. *See Leon*, 464 F.3d at 958; *see also Valley Engineers*, 158 F.3d
 24 at 1054.

25 **III. Discussion**

26 With these principals in mind, the Court now considers WeRide’s motion as to each
 27 Defendant.

1 a. AllRide

2 The amount of spoliation that AllRide concedes is staggering. AllRide admits that it kept
3 its company-wide policy of deleting from its server all emails older than 90 days until months
4 after the preliminary injunction issued, that it deleted the jing@allride.ai email account after the
5 original complaint was filed, that it deleted the jack@allride.ai email account after the complaint
6 was filed, that it deleted the rongrong@allride.ai email account after the preliminary injunction
7 issued, that it deleted Wu Wei and Dongxiang Xu's email accounts and wiped their laptops after
8 the complaint was filed, that it did not end its policies of deleting the email accounts and wiping
9 the computers of former employees when they leave AllRide until months after the preliminary
10 injunction issued, and that its employees began communicating with DingTalk's ephemeral
11 messaging feature after the preliminary injunction issued. Based on these undisputed facts, the
12 Court finds it appropriate to issue terminating sanctions.

13 i. Rule 37(b)

14 The Court first considers the *Leon* framework for applying terminating sanctions under
15 Rule 37(b). *Leon*, 464 F.3d at 958 & n.4. The preliminary injunction forbade the enjoined parties
16 from “[d]estroying, concealing, disposing, deleting, removing or altering any and all
17 documentation of any kind,” including ESI, related to WeRide or WeRide’s confidential
18 information, or AllRide’s source code. Dkt. No. 116 at 24-25. The preliminary injunction
19 therefore is an “order to provide or permit discovery” under Rule 37(b). *See Williams*, 2013 WL
20 3157910, at *4. Willfulness is shown where “the party ha[d] some notice that the documents were
21 potentially relevant to the litigation before they were destroyed.” *Leon*, 464 F.3d at 959. And the
22 “party demonstrates bad faith by delaying or disrupting the litigation or hampering enforcement of
23 a court order.” *Id.* at 961. AllRide’s conduct demonstrates both willfulness and bad faith. When
24 the preliminary injunction issued, AllRide had received the original complaint, the Second
25 Amended Complaint, and WeRide’s briefing in support of its preliminary injunction. These
26 documents laid out WeRide’s initial theory of the case and indicated the relevance of AllRide’s
27 internal emails and of the computers of AllRide’s employees. Despite this, AllRide left in place

1 the autodelete setting on its email server, began using DingTalk’s ephemeral messaging feature,
 2 and maintained a policy of deleting the email accounts and wiping the computers of former
 3 employees. This practice of destroying potentially discoverable material shows both willfulness
 4 and bad faith.

5 A. The First and Second *Leon* Factors

6 Turning to the first two *Leon* factors, “(1) the public’s interest in expeditious resolution of
 7 litigation; [and] (2) the court’s need to manage its dockets,” the Court finds that they are easily
 8 met. *Leon*, 464 F.3d at 958. AllRide’s admitted violations of the preliminary injunction support
 9 these factors. *Valley Engineers*, 158 F.3d at 1057. Further, even though AllRide represents that it
 10 discovered that the auto-deletion function was active in the middle of June 2019, it did not inform
 11 the Court or WeRide until the eve of a discovery hearing about two months later. Dkt. No. 231.
 12 During those two months, WeRide briefed and the Magistrate Judge considered multiple motions
 13 to compel the production of documents that no longer existed. *See* Dkt. Nos. 157, 170, 235. The
 14 first two factors are met.

15 B. The Third *Leon* Factor

16 The third *Leon* factor, the risk of prejudice to the party seeking sanctions, is the “most
 17 critical [factor] for case-dispositive sanctions,” because it goes to “whether the discovery
 18 violations threaten to interfere with the rightful decision of the case.” *Valley Engineers*, 158 F.3d
 19 at 1057 (quotation and citation omitted). AllRide’s mass destruction of email has irredeemably
 20 prejudiced WeRide’s case against AllRide. WeRide’s theory of liability is that AllRide
 21 misappropriated WeRide’s trade secret source code in order to achieve the five Advanced
 22 Capabilities performed by AllRide’s autonomous car in the Video. Thus, the October 2018
 23 Source Code is critical to this claim.

24 AllRide argues that the Produced Code is the October 2018 Source Code, so the alleged
 25 spoliation has not prejudiced WeRide’s case. Rather, the argument goes, the two autonomous car
 26 companies can simply compare WeRide’s alleged trade secrets to the Produced Code to determine
 27 liability. But the Court is not swayed by this argument because there are doubts that the Produced

1 Code is in fact the October 2018 Source Code. In his deposition as AllRide’s corporate designee,
 2 Liu described the October 2018 Source Code as operating dynamically: “When we are moving and
 3 detect that at some certain distance ahead of us there is an obstacle, we would analyze it and try to
 4 decide the distance between us and its speed. . . . If it moves really slow, below a certain
 5 threshold, our car would change lane[s] and continue to move on.” Landes Ex. 1 at 127:16-128:8.
 6 Whether AllRide’s car would pass the other car depended on analyzing the other car, determining
 7 its speed, and assessing whether that speed dropped below a set threshold. However, when
 8 WeRide’s expert Walter examined the Produced Code, he concluded that it was not capable of
 9 those sorts of dynamic processes. Landes Ex. 44 ¶¶ 11-17; *see also* Walter Decl. ¶ 9(a)-(d), 20(b).
 10 There is a gap between Liu’s testimony and the Produced Code.

11 AllRide’s explanation that it relied on Autoware open source code and waypoint files to
 12 carry out the maneuvers depicted in the Video does not bridge that gap. Walter opines that
 13 Waypoints cannot make dynamic decisions; rather they are “file[s] that directs a car to travel at a
 14 pre-determined speed to certain pre-determined locations.” Walter Decl. ¶ 13; *see also id.* ¶ 20(b).
 15 AllRide appears to agree with this description. *See* Sep. 23, 2019 Liu Decl. ¶ 15; AllRide First
 16 Opp’n at 5 n.2 (“Waypoint files are essentially coordinates.”). That AllRide’s experts Miller and
 17 Watzenig opined that Autoware code and waypoint files could enable a driverless vehicle to
 18 perform as the car in the Video fails to persuade for the same reason. Landes Ex. 49 ¶¶ 9-12;
 19 Watzenig Decl. ¶¶ 4, 15-23. Their analyses do not link Liu’s testimony with the Produced Code.

20 Further, the Court notes that the documents recovered from Huang’s laptop that describe
 21 Wu Wei and Dongxiang Xu as the “owners” of the crosswalk/pedestrian detection capability are
 22 not square with the git logs indicating that neither person made commits to the Produced Code that
 23 involved substantive changes to the pedestrian detection portions of the code.

24 Because AllRide spoliated its internal emails until March 2019, WeRide is not able to test
 25 AllRide’s explanation with internal communications from months before AllRide would make the
 26 Produced Code available to WeRide. The loss of the weekly engineering reports that AllRide’s
 27 engineers sent to Huang and Wang is particularly troubling. Those reports would have offered

1 critical insight to the actual work and the specific code that AllRide used to achieve the Advanced
2 Capabilities shown in the Video. They would likely either erase the apparent discrepancies (a)
3 between Liu’s testimony and the Produced Code, and (b) between the documents on Huang’s
4 computer concerning Wu Wei and Dongxiang Xu and the git logs, or confirm WeRide’s theory
5 that the Produced Code is fake. They would have been highly probative. AllRide’s insistence that
6 the git logs can replace the weekly reports is not persuasive because those logs are derived from
7 the Produced Code; they cannot present a picture of the work AllRide performed in autumn 2018
8 beyond the Produced Code. For the same reason, Ohlman’s analysis of the Produced Code does
9 not move the Court.

10 The Court does not find that AllRide spoliated the October 2018 Source Code nor that
11 Produced Code is a sham. Rather, the Court finds that the discrepancies between Liu’s testimony
12 and the Produced Code, and between the documents on Huang’s computer and the git logs raise
13 material questions as to the authenticity of the Produced Code. Without AllRide’s internal emails
14 from the fall of 2018, a fact finder will not be able to resolve these questions because WeRide has
15 no ability to test AllRide’s proposed theory. The Court finds that AllRide’s mass spoliation of its
16 internal emails was highly prejudicial to WeRide.

17 C. The Fourth *Leon* Factor

18 The public policy favoring disposition of cases on their merits, the fourth *Leon* factor,
19 usually weighs against terminating sanctions. *Valley Engineers*, 158 F.3d at 1057. Here, the
20 Court finds that the prejudice to WeRide is so great that it outweighs this factor. AllRide’s
21 destruction of evidence was so sweeping that this case cannot be resolved on its merits.

22 D. The Fifth *Leon* Factor

23 The last *Leon* factor, the availability of other lesser sanctions, also weighs in favor of
24 terminating sanctions. For this factor, a district court should consider (a) “the feasibility of less
25 drastic sanctions and explain[] [whether] such alternate sanctions would be inappropriate,” (b)
26 whether it “implemented alternative sanctions before ordering dismissal,” and (c) whether it
27 “warned the party of the possibility of dismissal before ordering dismissal.” *Leon*, 464 F.3d 960.

1 Here, AllRide asks the Court to sanction it by instructing the jury that AllRide “had a duty
2 to preserve emails and other information they knew to be relevant to anticipated and pending
3 litigation. If the jury finds that then defendants deleted emails to prevent their use in litigation
4 with [WeRide], the jury will be instructed that it may, but is not required to, infer that the content
5 of the deleted lost emails would have been unfavorable to the defendants.” *Rimkus Consulting
6 Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 646 (S.D. Tex. 2010). This sanction and AllRide’s
7 proposed instruction would be inappropriate here because it is far too mild and vague to
8 sufficiently cure the prejudice to WeRide. Indeed, the Court finds that any jury instruction or
9 exclusion of evidence would be inappropriate here because the spoliation occurred on such a
10 massive scale. Excluding evidence offered by AllRide would not substitute for the spoliated
11 evidence that could have built WeRide’s affirmative case. *See Leon*, 464 F.3d at 960. And
12 because WeRide has been deprived of the evidence necessary to prove its case, “fashioning a jury
13 instruction that creates a presumption in favor of [WeRide] would leave [WeRide] equally
14 helpless to rebut any material that [AllRide] might use to overcome that presumption.” *Id.* Lesser
15 sanctions would be futile. As to the second factor, the Court has already issued a preliminary
16 injunction order that explicitly prohibited AllRide from destroying certain potentially discoverable
17 evidence. Dkt. No. 116. AllRide did not comply with it. Finally, the third factor is inapplicable
18 because AllRide has been destroying emails since before the litigation began, so “the destruction
19 of the evidence occurred before the court had any opportunity to warn” AllRide. *Leon*, 464 F.3d
20 at 960.

21 The Court will issue terminating sanctions against AllRide under Rule 37(b).

22 ii. Rule 37(e)

23 The case against AllRide is even more damning under Rule 37(e). The first requirement
24 for sanctions under Rule 37(e) is that the ESI should have been preserved in anticipation of
25 litigation. *Porter*, 2018 WL 4215602, at *3. “The duty to preserve evidence begins when
26 litigation is pending or reasonably foreseeable.” *First Fin. Sec., Inc. v. Freedom Equity Grp.,
27 LLC*, 2016 WL 5870218, at *3 (N.D. Cal. Oct. 7, 2016). After this litigation began, AllRide

1 massively spoliated ESI through the destruction of specific email accounts for Wang and his wife,
 2 the mass deletion of emails from its servers, and the deletion of the email accounts and the
 3 computers of employees who have left AllRide’s employ. The second requirement is that the
 4 party failed to take reasonable steps to preserve the ESI. *Porter*, 2018 WL 4215602, at *3. Here,
 5 AllRide concedes it destroyed ESI because it failed to change company-wide policies (the auto-
 6 deletion of emails and the wiping of laptops of former employees) and because it chose to delete
 7 certain email accounts despite the commencement of litigation and the preliminary injunction.
 8 Had AllRide deactivated the auto-deletion function when this litigation began in December 2018,
 9 its emails from October 2018 would have been preserved. AllRide did not take reasonable steps to
 10 preserve the ESI. The third requirement is that the ESI cannot be restored or replaced. *Porter*,
 11 2018 WL 4215602, at *3. While the Court appreciates that AllRide has recovered some emails, it
 12 is not enough. Excluding open source code, AllRide has only produced 2,782 documents from the
 13 critical period of July 1, 2018 through October 31, 2018, and only 348 of those files are intact
 14 emails. LaFond Decl. ¶¶ 25-29. The weekly engineering reports that were sent to Wang and
 15 Huang are all gone. Fewer than 100 emails for each of Dongxiang Xu and Wu Wei have been
 16 recovered and their hard drives have been erased. The third factor is satisfied.

17 To issue harsh sanctions, such as dismissal, under Rule 37(e), a court must find that “the
 18 party acted with the intent to deprive another party of the information’s use in the litigation.” Fed.
 19 R. Civ. P. 37(e)(2). “[C]ourts have found that a party’s conduct satisfies Rule 37(e)(2)’s intent
 20 requirement when the evidence shows or it is reasonable to infer, that [the] party purposefully
 21 destroyed evidence to avoid its litigation obligations.” *Porter*, 2018 WL 4215602 at *3 (collecting
 22 cases). AllRide’s conduct shows a disturbing pattern of destroying discoverable material that
 23 began with the company’s founding and continued not only through the commencement of this
 24 litigation but past the preliminary injunction as well. The Court finds that the totality of the
 25 circumstances indicate that AllRide’s spoliation was intentional.

26 And as with the sanctioning power under Rule 37(b), the Court finds that terminating
 27 sanctions are required. No lesser sanction could remedy WeRide’s prejudice and AllRide has

1 already demonstrated its disregard for the Court's orders. The Court will issue terminating
 2 sanctions against AllRide pursuant to Rule 37(e)(2)(C).

3 b. Wang

4 WeRide argues that the Court should issue terminating sanctions against Wang because he
 5 controlled AllRide and thus ratified its massive spoliation. Where one party controls a second
 6 party, the first party may face sanctions for the spoliation of evidence committed by the second
 7 party. *Consumer Fin. Prot. Bureau v. Morgan Drexen Inc.*, 2015 WL 12732004, at *2 (C.D. Cal.
 8 July 6, 2015) (sanctioning CEO personally for spoliation committed by company). So “[a]n
 9 employer may be responsible for the spoliation of its employee.” *Gemsa Enterprises, LLC v.*
 10 *Specialty Foods of Alabama, Inc.*, 2015 WL 12746220, at *9 (C.D. Cal. Feb. 10, 2015). Courts
 11 should apply the general principles of agency law to determine whether to impose sanctions
 12 against a party for spoliation by its employees. *Id.* (citing *Am. Builders & Contractors Supply Co.*
 13 *v. Roofers Mart, Inc.*, 2012 WL 2992627, at *6 (E.D. Mo. July 20, 2012)). California courts apply
 14 a three-factor test to determine whether an officer is legally responsible for the actions of their
 15 employees or companies. *See PMC, Inc. v. Kadisha*, 93 Cal. Rptr. 2d 663 (2000), as modified on
 16 *denial of reh’g* (Apr. 7, 2000). Those factors examine whether the officer had invested in the
 17 company, whether the officer had control of the company, and whether the officer had knowledge,
 18 or reason to know of the conduct at issue. *See id.*

19 In its order modifying the preliminary injunction, this Court found that WeRide had shown
 20 it was likely to prevail at proving that Wang controlled AllRide such that he could be held liable
 21 for AllRide's alleged trade secret misappropriation. Dkt. No. 342 at 4-6. The Court based its
 22 order on Wang's financial interest in AllRide; his wife's ownership of AllRide's parent company;
 23 internal AllRide documents describing him as “le[ading]” AllRide, and indicating that AllRide's
 24 “Management” team reported to him; his close involvement in AllRide's recruiting and hiring; his
 25 receipt of AllRide's weekly engineering reports; his scheduled, weekly meetings with Huang; and
 26 his prior inaccurate representations to the Court about his role with AllRide. *Id.* (citing record and
 27 applying evidence to *PMC*, 93 Cal. Rptr. 2d 663). The Court now finds that this same evidence is

1 sufficient to meet the first two *PMC* factors.

2 The third factor, whether Wang knew of, or had reason to know of, AllRide’s spoliation is
3 also satisfied. Wang’s protestations that he had no knowledge of AllRide’s email practices do not
4 move the Court. The Court notes that it has already found that Wang has made representations to
5 the Court that were “at best inaccurate.” Dkt. No. 342 at 3. Here, the facts do not support Wang’s
6 statements. He has both controlled AllRide and been its codefendant in this litigation. Shortly
7 after the original complaint was filed, AllRide deleted Wang’s first @allride.ai email account.
8 AllRide and Kaizr subsequently created and then destroyed at least two additional email accounts
9 for Wang. One of those email accounts used a fake name. Just days after the preliminary
10 injunction issued, AllRide deleted his wife’s email account and then created a new one for her that
11 also used an alias. Also after the preliminary injunction, Wang—who at the time was not yet
12 officially the CEO—introduced DingTalk to AllRide and instructed AllRide that they “better” use
13 it. Wang tries to nitpick each of these facts, but taken together, they show that Wang was in a
14 position of authority and or control and therefore must have had knowledge of AllRide’s
15 spoliation. The Court finds that AllRide was Wang’s agent when it engaged in mass spoliation.
16 The Court will issue terminating sanctions against Wang.

17 Having found that terminating sanctions should issue based on AllRide’s spoliation, the
18 Court does not consider WeRide’s other arguments for sanctioning Wang.

19 c. Huang

20 WeRide alleges that before it filed the complaint but after Huang’s duty to preserve arose,
21 he spoliated the WeRide-issued Lenovo laptop, the WeRide-issued MacBook and his personal
22 laptop that he turned into an Apple store, and that after the preliminary injunction issued, he
23 spoliated source code files and folders saved to the computer that he was ordered to turn over to
24 WeRide.

25 i. Rule 37(b)

26 Starting with the source code Huang modified after the preliminary injunction issued, the
27 Court finds that terminating sanctions are appropriate under Rule 37(b). The preliminary

1 injunction, which was issued on March 22, 2019, specifically stated that Huang and the other
2 bound parties were prohibited from “[d]estroying, . . . disposing, deleting, removing or altering
3 any . . . computer files, . . . hard drives, disk drives, . . . [or] data . . . relating in any way to
4 WeRide or WeRide Confidential Information . . . [or] relating in any way to source code written,
5 developed, edited, reviewed, or used by Defendants.” Dkt. 116 at 24-25. The Court also ordered
6 to make his current devices available to WeRide for inspection by March 26, 2019. WeRide’s
7 computer forensics expert, Kunkel, examined Huang’s AllRide-issued laptop and concluded that
8 Huang had modified over one thousand source code files on March 24 and 25. Kunkel Decl. ¶¶ 6-
9 10. AllRide’s expert opined that the code remaining on the surrendered laptop was “not an
10 arrangement of code that a programmer would use.” Landes Ex. 45 ¶12.

11 Huang argues that the Court should disregard Kunkel’s analysis because his process also
12 indicated that some files on the laptop had impossible (*i.e.*, future) timestamps. The Court rejects
13 this argument for two reasons. First, Kunkel adequately explains that such glitches are “not
14 uncommon” and “are not an indication of faulty forensics analysis or tools.” Dec. 12, 2019
15 Kunkel Decl. ¶ 4. While Huang retained three computer forensics experts, none questioned
16 Kunkel’s forensic analysis on this ground. Second, none of the files with impossible timestamps
17 are relevant to the litigation. *Id.* Huang also argues that because the source code found on his
18 laptop was open source code, he did not violate the preliminary injunction by modifying it. The
19 Court rejects this argument. It may be open source code, but Huang modified it on his AllRide-
20 issued laptop. It is therefore “source code . . . reviewed, or used by Defendants.” Dkt. No. 116 at
21 24-25.

22 Kunkel’s conclusion that Huang modified source code on March 24 and 25 coupled with
23 the undisputed conclusion of two experts that the remaining source code was useless is sufficient
24 evidence for the Court to conclude that Huang spoliated the source code that had been on his
25 computer before March 24.

26 Because Huang violated the preliminary injunction, the Court finds that the threshold
27 requirement for sanctions under Rule 37(b) is met. Fed. R. Civ. P. 37(b); *Williams*, 2013 WL

1 3157910, at *4. Further, the preliminary injunction directly informed Huang that he should not
2 delete or alter files related to WeRide’s confidential information or AllRide’s source code, and
3 then he did exactly that. His conduct satisfies the willfulness requirement. *Leon*, 464 F.3d at 958
4 The Court finds that the first two *Leon* factors favor terminating sanctions because Huang violated
5 the Court’s preliminary injunction. *Valley Engineers*, 158 F.3d at 1057.

6 As to the prejudice factor, the Court has already discussed—in § III.a.i.B—how evidence
7 concerning the source code actually used by AllRide is critical to WeRide’s trade secrets claims.
8 The Court further finds that the spoliation of these source code files has severely prejudiced
9 WeRide’s case against Huang. This spoliation robbed WeRide of the opportunity to discover the
10 source code that Huang and AllRide were using in the spring of 2019—three months before
11 AllRide would make the Produced Code available to WeRide. Combined with AllRide’s
12 spoliation of email, the spoliation of this source code has robbed WeRide of any chance to test
13 AllRide’s offered theory of independent development and to affirmatively prove its case. The
14 third factor weighs heavily in favor of terminating sanctions.

15 As with AllRide’s spoliation, the Court finds that while the fourth *Leon* factor generally
16 disfavors terminating sanctions, the prejudice to WeRide is so great that a thorough and fair
17 decision on the merits cannot be reached after Huang’s spoliation of this source code. The Court
18 finds that the third factor outweighs the public policy in favor of resolving cases on their merits.

19 Finally, the Court finds that no lesser sanction would suffice. To begin, Huang has already
20 violated the preliminary injunction, indicating that he would likely disregard a warning from the
21 Court. Additionally, as with AllRide’s spoliation, Huang’s spoliation has greatly prejudiced
22 WeRide’s ability to affirmatively prove its case. Thus, excluding evidence from Huang cannot
23 cure the prejudice. *See Leon*, 464 F.3d at 960. And jury instructions will not suffice because
24 WeRide would be unable counter Huang if he rebutted those instructions. *See id.*

25 The Court will issue terminating sanctions against Huang for his spoliation of the source
26 code on his surrendered laptop in violation of the preliminary injunction.

1 ii. Rule 37(e)

2 Terminating sanctions against Huang are also appropriate under Rule 37(e) for his
3 destruction of ESI on his two WeRide-issued laptops, the personal laptop he returned to an Apple
4 store, and the AllRide-issued laptop discussed above.

5 As to the first prong of Rule 37(e), Huang argues that he was under no duty preserve until
6 he received WeRide's demand letter in the middle of November 2018, therefore he was under no
7 duty to preserve the WeRide-issued laptops or his personal laptop. *See Porter*, 2018 WL
8 4215602, at *3. The Court disagrees. "The duty to preserve evidence begins when litigation is
9 pending or reasonably foreseeable." *Freedom Equity*, 2016 WL 5870218, at *3. Indeed, the duty
10 may arise "before litigation when a party should reasonably know that evidence may be relevant to
11 anticipated litigation." *Nation v. Ducey*, 2016 WL 7338341, at *7 (D. Ariz. Dec. 19, 2016). Here,
12 AllRide created the kun.huang@allride.ai email account and the test@allride.ai email account,
13 which Huang accessed, in July 2018 while he was still employed by WeRide. He attempted to
14 recruit WeRide employees to join AllRide while still employed by WeRide. WeRide terminated
15 his employment for soliciting WeRide employees on July 31, 2018. Over the next two days, he
16 conducted internet searches for the consequences of soliciting employees. In such circumstances,
17 a reasonable person would understand that litigation was foreseeable as of July 31, 2018.

18 Accordingly, the Court finds that Huang was under a duty to preserve the two WeRide-issued
19 laptops, his personal laptop, and the source code on the AllRide-issued laptop. *See Porter*, 2018
20 WL 4215602, at *3; *see also Ducey*, 2016 WL 7338341, at *7; *Crown Battery Mfg. Co. v. Club*
21 *Car, Inc.*, 185 F. Supp. 3d 987, 998 (N.D. Ohio 2016).

22 The Court finds that the second factor also weighs in favor of terminating sanctions
23 because Huang failed to take reasonable steps to preserve the ESI on those computers. He admits
24 to wiping the WeRide-issued MacBook, to deleting files on the WeRide-issued Lenovo, and to
25 returning his personal MacBook to an Apple store. As to the source code on his AllRide-issued
26 laptop, he claims that his periodic backups show that he tried to preserve that ESI as well.
27 However, each backup only saved a portion of his hard drive. Dec. 12, 2019 Kunkel Decl. ¶ 6.

1 Further, the most recent backup to when he surrendered the laptop occurred on March 18. *Id.* So,
2 any changes to the laptop's ESI between March 18 and March 26 were not saved. The Court finds
3 that the second factor supports issuing sanctions.

4 Huang does not argue that the ESI from these devices has been recovered or can be found
5 from other sources. The third factor has been met.

6 Finally, from a review of the evidence on the whole, WeRide has carried its burden to
7 show that Huang acted with the intent to deprive WeRide of access to the ESI for this litigation.
8 He spoliated the WeRide-issued laptops after he was terminated but before returning them. He
9 reformatted the WeRide-issued MacBook making it impossible for WeRide to recover any data
10 from that device. The evidence also strongly suggests that Huang turned in his personal laptop
11 because Wang received WeRide's cease-and-desist letter. Wang and Huang were in frequent
12 contact through their work for AllRide. Wang played a key role in recruiting Huang to AllRide.
13 *See* Dkt. No. 116 at 6; 342 at 5-6. After Huang joined AllRide, he instructed AllRide's engineers
14 to send weekly reports to him and Wang. He and Wang had weekly meetings scheduled. Dkt.
15 No. 342 at 6. Apple's receipt for Huang returning the MacBook describes the laptop as
16 "working." *See* Landes Ex. 55 ¶ 16 & Ex. B. The fact that he returned a working laptop on the
17 same day that Wang received WeRide's letter strongly implies that he did so in order cover his
18 tracks. Finally, by the time the preliminary injunction issued, Huang would have understood the
19 importance to this litigation of the source code used by AllRide. The preliminary injunction
20 explicitly forbade him from "altering" source code that had been "reviewed" by him or AllRide.
21 Despite that, he altered the source code saved to his AllRide-issued laptop so that it was not
22 arranged in a coherent manner. Each instance of spoliation by Huang is directly tied to an event
23 leading to, or occurring in this litigation. The Court finds that all of this supports the finding that
24 Huang acted with intent.

25 For the same reasons that a sanction less severe than terminating sanctions was not
26 appropriate under Rule 37(b), a lesser sanction is not appropriate here. Huang spoliated critical
27 evidence; that loss has prejudiced WeRide's ability to raise its affirmative case against Huang and

1 AllRide. Thus, specific jury instructions or an exclusion of evidence offered by Huang cannot
 2 cure the prejudice. *See Leon*, 464 F.3d at 960. Second, Huang destroyed ESI on three of the
 3 devices before the litigation began, so the Court could not have warned him against that spoliation.
 4 He spoliated ESI on the fourth device in violation of the preliminary injunction, which
 5 demonstrates that further warnings would be futile. Terminating sanctions must issue against
 6 Huang.

7 **IV. Conclusion and Order**

8 For the reasons discussed above, the Court orders as follows:

- 9 1. Wang, Huang, and AllRide shall pay WeRide's reasonable fees and costs incurred
 10 in connection with (i) this motion; (ii) all discovery related to their spoliation of
 11 evidence; and (iii) the discovery motion practice before Judge Cousins related to
 12 Docket Nos. 139, 146, 149, 157, 170, 192. *See, e.g., Leon*, 464 F.3d at 961
 13 (awarding fees in addition to terminating sanctions); *Dong Ah Tire & Rubber Co. v.*
 14 *Glasforms, Inc.*, 2009 WL 1949124, at *11 (N.D. Cal. July 2, 2009) (awarding fees
 15 in addition to issue sanctions). WeRide shall submit a declaration supporting its
 16 claimed costs and fees within 14 days of this Order, and the Court will award
 17 WeRide's costs and fees thereafter. Wang, Huang, and AllRide shall be jointly and
 18 severally liable for the payment of the Court's award of WeRide's costs and fees,
 19 and payment shall be due in full within 15 days of the Court's entry of an award.
- 20 2. The Court strikes the answers of Wang (Dkt. No. 261), Huang (Dkt. No. 311); and
 21 AllRide (Dkt. No. 254). The Clerk is directed to enter the default of Wang, Huang,
 22 and AllRide.

23 **IT IS SO ORDERED.**

24 Dated: April 16, 2020



EDWARD J. DAVILA
 United States District Judge

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

JOHN DOE,)	
Plaintiff,)	
)	
v.)	CAUSE NO.: 2:17-CV-33-JPK
)	
PURDUE UNIVERSITY, <i>et al.</i> ,)	
Defendants.)	

OPINION AND ORDER

This matter is before the Court on a Request for Issuance of Order to Show Cause Regarding Plaintiff's Non-Compliance with Order and Spoliation of Evidence [DE 133], filed by Defendants Purdue University, Purdue University Board of Trustees, Michell Elias Daniels, Jr., Alysa Christmas Rollock, and Katherine Sermersheim. The Court held an evidentiary hearing on this issue on February 22, 2021, and the parties filed supplemental briefing on April 27, 2021. For the following reasons, the motion is granted with relief different than requested.

Before turning to the relatively detailed set of facts that led to the filing of the instant motion for sanctions, it is necessary to stress a few key facts, none of which are subject to any reasonable dispute. These facts must not get lost in the sea of other details. First, Plaintiff was under a duty to preserve certain items, including data in his Snapchat account. That duty arose in multiple ways throughout this litigation and is discussed in greater detail below. After such a duty arises, those who bring claims (or defend against them) should remain keenly aware of the importance of preserving data to allow for later production in response to a proper discovery request, agreement of the parties, or court order. Second, after his duty to preserve data arose, through among other things an agreement of the parties, Plaintiff took an affirmative step that led to the deletion of data from his Snapchat account. Third, based upon this destruction of data,

Defendants moved for sanctions in the form of a request to issue an order to show cause. Plaintiff argued that Defendants' motion was motivated by "a sickness toward Plaintiff." (Resp. p. 1, ECF No. 135). But destroying data that one is under a duty to preserve is an extremely serious matter, and those who do should not be surprised to find themselves on the receiving end of a motion for sanctions.

Sanctions are warranted for the reasons discussed in greater detail below. The following detailed recitation of the facts and legal analysis are hardly necessary to reach the conclusion that sanctions are appropriate. The more difficult questions this matter poses are precisely what sanctions to impose, and whether to impose any sanctions on counsel.¹

Procedural Background

On September 25, 2019, Defendants served their first interrogatories and requests for production of documents on Plaintiff. (Br. Supp. Mot. Compel 3, ECF No. 81). Interrogatory 3 stated: "Identify all social media websites or applications that you used, participated on, posted photos, opinions, or statuses, or otherwise had an account with/on at any point during or after August 2015 and for each state your username, account name, or any other identifier for your account." (Br. Supp. Mot. Compel Ex. A ¶ 3, p. 4,² ECF No. 81-2). Request for Production 7 sought: "All of [Plaintiff's] social media postings from August 1, 2015 – present." (Br. Supp. Mot. Compel Ex. A ¶ 7, p. 15, ECF No. 81-2).

¹ At the very least, counsel appears to have delegated the inquiry regarding how to retrieve Snapchat data to Plaintiff, who has no legal training or relevant experience, other than as a Snapchat user, and did so despite the fact Defendants were contesting his explanations. While the Court ultimately declines to sanction counsel individually, this is certainly not meant to condone the investigation—or lack thereof—that went into responding to Defendants' discovery request, the parties' agreement, or the Court's orders.

² Because Defendants' first interrogatories and requests for production are contained in the same exhibit, the page numbers cited by the Court refer to the page numbers assigned by the Court's CM/ECF system.

On November 8, 2019, Plaintiff's counsel served Plaintiff's responses to these discovery requests.³ (Br. Supp. Mot. Compel Ex. A p. 9, 17, ECF No. 81-2). In response to Interrogatory 3, Plaintiff identified only his Instagram and Facebook accounts.⁴ *Id.* at ¶ 3, p. 4. Plaintiff objected to Request for Production 7. *Id.* at ¶ 7, p. 15.

On March 11, 2020, Defendants served their second interrogatories and requests for production of documents on Plaintiff. (Br. Supp. Mot. Compel 3, ECF No. 81). Request for Production 2 sought: "All data from any Snapchat account owned or operated, wholly or in part, by Plaintiff, including the account with the username '[username],' from August 2015 to the present." (Br. Supp. Mot. Compel Ex. B ¶ 2, p. 10, ECF No. 81-3). Request for Production 2 included the following explanation: "This data is the property of the Plaintiff, and may be obtained and downloaded in its entirety as set forth in the following link: <https://support.snapchat.com/en-US/a/download-my-data>." *Id.* The link provided by Defendants leads to a page describing the information available for download from Snapchat, including: "Login History and Account information," "User & Public Profiles," "Snap & Chat History," "Memories," "Purchase & Shop History," "Snapchat Support History," "Friends," "Location," "Search History," and "Bitmoji." *Id.*; SNAPCHAT SUPPORT, *Download My Data*, <https://support.snapchat.com/en-US/a/download-my-data> (last visited July 1, 2021). Plaintiff's counsel objected to the request, asserting that Plaintiff's Snapchat documents did not contain any information that was relevant to this case. (Br. Supp. Mot. Compel Ex. B p. 10-11, ECF No. 81-3).

³ During the February 22, 2021 hearing, Plaintiff testified that he, not his attorney, drafted the answers to Defendants' discovery requests. Additionally, Defendants offered into evidence a document signed by Plaintiff, verifying that the representations contained in his answers to Defendants' first set of interrogatories were "true and correct." (Feb. 22, 2021 Hr'g, Defs.' Ex. H).

⁴ Plaintiff did not identify his Snapchat account anywhere in his earlier responses, and Defendants have explained that they discovered the account "through the due diligence of Defendants' counsel." (Br. Supp. Mot. Compel p. 6 n.1, ECF No. 81; Br. Supp. Mot. Compel Ex. A, ECF No. 81-2).

On May 19, 2020, Defendants filed a motion to compel that sought, *inter alia*, an order compelling Plaintiff to produce his Snapchat data “as may be downloaded from the platform[]” from August 2015 to the present. (Mot. Compel p. 1, ECF No. 80). On June 2, 2020, Defendants filed a Joint Stipulation that resolved both Defendants’ motion to compel and a motion to compel filed by Plaintiff. Per the Joint Stipulation, Plaintiff agreed to provide “a complete data download of all Instagram and Snapchat data from his accounts, from August 2015 to the present.” (Joint Stipulation ¶ 6, ECF No. 89). On June 3, 2020, noting the agreement of the parties, the Court granted the relief implied in the Joint Stipulation and further noted both motions to compel as withdrawn. (June 3, 2020 Order, ECF No. 90).

On July 17, 2020, Defendants filed a motion for sanctions, alleging, *inter alia*, that Plaintiff failed to provide the Snapchat data as agreed per the Joint Stipulation and required by the Court’s June 3, 2020 order. (Mot. Sanctions, ECF No. 92). On July 31, 2020, Plaintiff filed a response to the motion, which included declarations from both Plaintiff and his counsel. In his declaration, Plaintiff explicitly stated that he “put [himself] under oath in setting the record straight. I also discuss Snapchat so the Court can understand the limitations of what can be done as to Snapchat discovery.” (Decl. Pl. ¶ 1, ECF No. 98-2, *refiled at* ECF No. 152-2). Through their declarations, Plaintiff and his counsel asserted that Plaintiff provided his Snapchat username, but represented that “Snapchat does not archive content files.” (Decl. Pl.’s Att’y ¶ 9, ECF No. 98-1, *refiled at* ECF No. 152-1; Decl. Pl. ¶¶ 5, 7, ECF No. 98-2, *refiled at* ECF No. 152-2). Plaintiff stated that Snapchat “does not retain user information past 30 days.” (Decl. Pl. ¶ 7, ECF No. 98-2, *refiled at* ECF No. 152-2). Plaintiff’s counsel similarly stated that Snapchat “does not retain user identity past 30 days,” and additionally represented that Snapchat “does not preserve user content.” (Decl. Pl.’s

Att’y ¶ 17,⁵ ECF No. 98-1, *refiled at* ECF No. 152-1). Plaintiff’s counsel explained that he previously informed defense counsel that all Defendants could learn from Snapchat was “the name or screenname” of Plaintiff’s current friends. *Id.* at ¶ 14. Plaintiff’s counsel further noted that he had “discuss[ed] with Plaintiff and check[ed] whether[,] contrary to the understanding [that counsel] had, content files could be downloaded from Snapchat using a link provided by Defendants’ counsel. What [Plaintiff’s counsel learned] was that content was in fact not available at Plaintiff’s end” *Id.* at ¶ 16. In his own declaration, Plaintiff represented:

In the course of dealing with Defendants’ request for Snapchat content, I explained to my counsel what was and wasn’t available from Snapchat. When Defendants made their sanctions motion, I was in fact discussing further with my counsel and checking whether contrary to my understanding, using a link provided by Defendants’ counsel and doing my own internet research, content files could be downloaded from Snapchat. The link provided by Defendants’ counsel makes clear the kind of information that is obtained, which means Defendants know that content is not what is available at my end.

(Decl. Pl. ¶ 10, ECF No. 98-2, *refiled at* ECF No. 152-2). Plaintiff further represented that “[t]he data I downloaded from Snapchat’s servers regarding my profile contains no images, no videos and no chats contained within it. Hence, that fact confirmed my view that I did not have content files to download per the Stipulation of the Parties.” *Id.* at ¶ 12. Finally, Plaintiff provided an overview of what he represented was the only data included in his download from Snapchat’s servers, which he explained was mostly non-content metadata he felt was irrelevant to this matter. *Id.* at ¶¶ 13-20.⁶ As discussed in more detail below, many of Plaintiff’s representations on this topic were inaccurate.

⁵ Plaintiff’s counsel’s declaration contains two Paragraph 17s; the Court cites to the second. (*See* Decl. Pl.’s Att’y p. 8, ECF No. 98-1, *refiled at* ECF No. 152-1).

⁶ It bears noting that Plaintiff’s declaration inquires: “What is to stop Defendants from harassing present and past friends? I find it disconcerting that Defendants care so much in getting their hands on this sort of information that is irrelevant to this court case.” (Decl. Pl. ¶ 19, ECF No. 98-2, *refiled at* ECF No. 152-2). Plaintiff’s declaration additionally states, “I must ask: why are Defendants so keen on possessing what seems to be irrelevant information

In reply, Defendants argued that Plaintiff had an obligation to produce the Snapchat data pursuant to the Joint Stipulation and the Court's June 3, 2020 order. (Reply p. 1, ECF No. 99). Defendants noted that, by stipulating to produce a complete data download of all Snapchat data from his account from August 2015 to the present, Plaintiff waived any relevancy objections. *Id.* at 2. Defendants further explained that Snapchat collects information such as Snap history, chat history, user profile, friends, account history, location history, and search history. *Id.* at 3.

On September 24, 2020, the Court denied without prejudice Defendants' motion for sanctions, but ordered Plaintiff to provide the Snapchat data consistent with the agreement noted in the Joint Stipulation. (Sept. 24, 2020 Telephonic Status Conference Entry, ECF No. 117). On October 26, 2020, Defendants filed the instant motion for an order to show cause regarding Plaintiff's non-compliance with a court order and for spoliation of evidence. Defendants assert that although Plaintiff produced some of the Snapchat data, he deleted certain files that were subject to the Joint Stipulation and Court's September 24, 2020 order.

On February 22, 2021, the Court held an evidentiary hearing regarding Defendants' motion. Following that hearing, the Court issued an order on April 13, 2021, for supplemental briefing regarding what data the Snapchat mobile application and Snapchat website reflected was available for users to download when the downloads at issue here occurred. (Apr. 13, 2021 Order, ECF No. 163). This order required the parties to file a report—jointly or separately, if they could not come to an agreement—with exhibits either showing, via screenshots, or describing in full the screen displays that existed as Plaintiff would have seen them when he completed a download of his Snapchat data. On April 27, 2021, the parties filed separate reports with the screenshots.

and what would they plan on doing with it?" *Id.* at ¶ 20. It is unclear to whom Plaintiff's questions are aimed. Regardless, Defendants sought Plaintiff's social media data via appropriate discovery requests, and Plaintiff's apparent attempt to cast aspersions on them for doing so is inappropriate, especially given the clear agreement of the parties.

Standard of Review

In addition to Defendants' request for an order to show cause, the Court also considers whether Plaintiff should be found to have spoliated evidence, and whether Plaintiff or his counsel should be sanctioned for their conduct.⁷ "Spoliation of evidence occurs when one party destroys evidence relevant to an issue in the case." *Smith v. United States*, 293 F.3d 984, 988 (7th Cir. 2002). "Sanctions [for spoliation of evidence] include awarding reasonable expenses, attorney fees, barring evidence or arguments, permitting adverse inferences, and dismissing claims or entering default judgment." *Bryant v. Gardner*, 587 F. Supp. 2d 951, 968 (N.D. Ill. 2008) (citing Fed. R. Civ. P. 37(b)(2)(A)(i)-(vii)).

Determining whether sanctions for spoliation of evidence are appropriate requires a multi-part inquiry. *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008); *Malibu Media, LLC v. Tashiro*, No. 1:13-CV-00205-WTL, 2015 WL 2371597, at *10 (S.D. Ind. May 18, 2015). First, the Court must determine whether there was a duty to preserve the destroyed evidence. *Malibu Media, LLC*, 2015 WL 2371597, at *11. Second, the Court must determine that this duty was breached. *Id.* Third, the Court must determine that the destruction of evidence was done in bad faith.⁸ *Id.*

⁷ Federal Rule of Civil Procedure 37(e), as amended on December 1, 2015, permits a court to impose sanctions for electronically stored information ("ESI") that is "lost because a party failed to take reasonable steps to preserve it." Fed. R. Civ. P. 37(e). Some courts have suggested that this amendment makes Rule 37 sanctions the exclusive remedy for "lost" ESI. *See, e.g., DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2021 WL 185082, at *69 (N.D. Ill. Jan. 19, 2021) (listing cases and authority supporting both sides of this "thorny issue"). The Court does not attempt to resolve this issue, because the sanctions ultimately imposed in this case are authorized by Rule 37 and would be proper regardless of the effect of the 2015 amendment. However, in the interest of completeness, the Court analyzes potential sanctions that could have been imposed beyond those supported by Rule 37.

⁸ Some courts have found that the court must also determine that the breach harmed the opposing party. *See Jones v. Bremen High Sch. Dist.* 228, No. 08 C 3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010); *Porche v. Oden*, No. 02 C 7707, 2009 WL 500622, at *5 (N.D. Ill. Feb. 27, 2009). However, these courts rely on language in Rule 37 pertaining to the failure to provide information or identify a witness as required by Rule 26(a) or (e). *See id.*; Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (2), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless.").

In the context of spoliation, bad faith means that the evidence was destroyed “for the purpose of hiding adverse information.” *Bracey v. Grondin*, 712 F.3d 1012, 1019 (7th Cir. 2013) (internal quotation marks and citation omitted) (“When considering the propriety of . . . an adverse inference instruction, ‘[t]he crucial element is not that the evidence was destroyed but rather the reason for the destruction.’” (quoting *Park v. City of Chicago*, 297 F.3d 606, 615 (7th Cir. 2002))); *see also Norman-Nunnery v. Madison Area Tech. Coll.*, 625 F.3d 422, 428 (7th Cir. 2010) (“The crucial element in a spoliation claim is not the fact that the documents were destroyed but that they were destroyed for the purpose of hiding adverse information.”); *Malibu Media, LLC*, 2015 WL 2371597, at *11 (sanctions for spoliation are “appropriate only if the evidence was destroyed for the purpose of hiding adverse information”).

Analysis

The Court begins its analysis with an overview of the Snapchat application, followed by a discussion of the parties’ arguments. The Court then turns to whether Plaintiff was under a duty to preserve the deleted files. Finally, the Court analyzes the potential bases for sanctions and determines what sanctions are appropriate to impose in this matter.

1. The Snapchat Application

Initially, the Court will provide a brief explanation of Snapchat and its Memories function, as that portion of the application underlies the issue currently before the Court. The Snapchat mobile application, owned by Snap, Inc., “allows users to record photographs and videos (called ‘Snaps’) with their smart phones and send them to other Snapchat users.” *Eyebobs, LLC v. Snap, Inc.*, 259 F. Supp. 3d 965, 971 (D. Minn. 2017). “A Snap appears on the receiver’s screen for only a few moments before disappearing. Snapchat users can also send chat messages, create visual ‘Stories’ that remain on the user’s account for one day, and store Snaps indefinitely as

‘Memories.’” *Id.*; see also SNAPCHAT SUPPORT, *How to use Memories*, <https://support.snapchat.com/en-GB/a/about-memories> (last visited July 1, 2021) (“You can save Snaps and Stories to Memories, send your Memories to friends, access your Camera Roll and more!”). To save a Snap as a Memory, users must take an affirmative step and click an icon located at the bottom of the application window on their screen. *Id.* (“To save a Snap to Memories, create a Snap and tap [image of icon] at the bottom.”). To delete a Snap from the Memories folder, users must also take multiple affirmative steps from within the application. *Id.* (“You can send saved Snaps to your friends, add them to My Story, delete them from Memories, or export them to your Camera Roll . . . Swipe up from the Camera screen to go to Memories, press and hold on a Snap, and tap the option you want.”). Per Snapchat’s website: “Memories keeps the Snaps and Stories you save, so you can look back on them at any time! Memories are backed up by Snapchat. If you delete a Snap from your Memories, Snapchat servers are designed to erase that Snap as soon as possible.” SNAPCHAT SUPPORT, *When does Snapchat delete Snaps and Chats?*, <https://support.snapchat.com/en-GB/a/when-are-snaps-chats-deleted> (last visited July 1, 2021).

2. The Parties’ Arguments and Characterization of the Facts

Defendants represent that Plaintiff deleted Snapchat data, and despite much protestation that is a fact that Plaintiff cannot credibly deny. More precisely, Defendants show that on September 30, 2020, Plaintiff produced a Snapchat download which contained broken html links and downloads to 86 images and videos, ranging from 2016 to 2020. (Request Show Cause p. 4, ECF No. 133; Request Show Cause Ex. B, ECF No. 133-2). This production was in response to an agreement of the parties, which was later adopted in an order. (ECF Nos. 89, 90). These files were contained in a subfile marked “memories_history.” (Request Show Cause p. 4, ECF No. 133). A warning printed across the top of this download notes that “[d]ownload links below will expire

7 days from when your data file was made available to you.” (Request Show Cause p. 4, ECF No. 133; Request Show Cause Ex. B, ECF No. 133-2; Defs.’ Report p. 3, ECF No. 165-1). Because the September 30, 2020 production was downloaded on July 16, 2020, the links sent to Defendants had expired by the time they were produced. (Request Show Cause p. 4, ECF No. 133). On October 7, 2020, Plaintiff produced a new Snapchat data download with working links. (Request Show Cause p. 4, ECF No. 133; Request Show Cause Ex. C, ECF No. 133-3). However, the new download omitted 11 links to videos and images that were listed in the September 30, 2020 production. *Id.* Defendants state that, after being notified of the missing items, Plaintiff admitted he had deleted certain files from the Memories folder within the Snapchat application on his phone.

For this deletion, Defendants argue that Plaintiff has spoliated evidence and that sanctions should be imposed. Defendants assert that Plaintiff had a duty to preserve the destroyed data, that he willfully deleted the files in bad faith, and that the only credible explanation for this conduct is that Plaintiff did not want Defendants and the Court to see the 11 images and videos. (Request Show Cause p. 8-9, ECF No. 133). Defendants recount that Plaintiff has repeatedly alleged that Defendants’ actions caused harm to Plaintiff’s honor and damage to his reputation, and note that any inappropriate conduct preserved on social media would undermine such a claim. *Id.* at 10-11.

On October 14, 2020, Plaintiff sent Defendants a document entitled “Plaintiff John Doe on Snapchat Production,” which appears to be a self-styled explanation from Plaintiff concerning the missing media. (Request Show Cause p. 4, ECF No. 133; Request Show Cause Ex. D, ECF No. 133-4). The explanation from Plaintiff, which Defendants attach to their motion, states as follows. When Plaintiff received the initial zip file of data from Snapchat in July 2020, the links did not work. (Request Show Cause Ex. D, ECF No. 133-4). Plaintiff “characterized as metadata the Snapchat zip file from the data that [he] could access and read,” and he was unaware of the

7-day time limit for downloading and viewing files saved in the Memories folder. *Id.* After discovering the issue with the expired links, Plaintiff reproduced 75 images and videos to Defendants. *Id.* As for the missing 11 images and videos, Plaintiff states:

I did delete some files off of the Snapchat application on my phone at some point between zip file productions, with no idea that they would also be deleted from my Snapchat account and Snapchat servers entirely. As my cell phone slows down and fills up over time, I try to find ways to clear space and memory to keep its performance as optimized as possible. I deleted some images and videos off my phone that I did not care for anymore, without the realization that they held any relevance to the zip file productions, or that would be permanently deleted from the Snapchat account. Apparently, however, that was the effect of deleting files off my cell phone.

It was my understanding that the zip files Snapchat produces in response to data download requests were exclusively composed of metadata. As the html links were not working when I examined the zip file initially, and the file sizes were all mere kilobytes in size, I was under the impression that the zip file held no account content. Still, because I have never posted anything relevant to my court case on my social media, I can say that the 11 files were not material to this case. From what I remember, they were comprised of more pictures and video clips from video games and TV shows, a picture of my friend in a car as we drove to a creek, and a picture of a Walt Disney statue at Disney World.

Id.

In response to Defendants' request for a show cause order, Plaintiff's counsel acknowledges the deletion of the files but nonetheless refutes any accusation of wrongdoing. Plaintiff's counsel states that Plaintiff "did not admit intentionally destroying anything," but rather "deleted from his cell phone some data without believing it would affect what Snapchat had on its server from which a 'data download' would be made. Plaintiff did not go to the server and delete anything." (Resp. p. 3, ECF No. 135). Plaintiff's counsel further states:

[B]oth Snapchat downloads had only metadata; the *first* Snapchat download only had metadata and no working links; the *second* Snapchat download had metadata and properly working links to external downloads of Snapchat memory files. Plaintiff John Doe's statements based on the *first* Snapchat download were accurate that the only available data for the download he had at the time were metadata. Plaintiff John Doe never saw the 75 videos and pictures until he did the *second* data

download. If we can get back the 11 videos and pictures from Snapchat, we will do so.

Id. at 7. Finally, Plaintiff's counsel disputes the claim that Plaintiff "had 86 downloaded Snapchat videos and photos in his possession," arguing that this "is incorrect speculation on [Defendants'] part. As noted above and as Plaintiff John Doe explained, the *first* Snapchat download only had metadata and no working links to videos and pictures." *Id.* at 7-8.

Upon review of the parties' filings and the record in this matter, the facts of critical importance are as follows. From 2016 to 2020, Plaintiff intentionally saved at least 86 images and videos to the Memories folder within the Snapchat application on his phone. (Request Show Cause Ex. B, ECF No. 133-2; Feb. 22, 2021 Hr'g Pl.'s Ex. 3). On June 2, 2020, Plaintiff agreed to provide "a complete data download of all Instagram and Snapchat data from his accounts, from August 2015 to the present." (Joint Stipulation ¶ 6, ECF No. 89). On July 16, 2020, Plaintiff downloaded and received a zip file of his Snapchat data, which included links to downloadable videos and images that had been saved in the Memories folder within the Snapchat application on his phone. On July 31, 2020, Plaintiff represented to the Court that "Snapchat does not archive content files" or "retain user information past 30 days," that "content is not what is available at [his] end," and that he had conducted research to determine what content could be downloaded from Snapchat prior to making these representations. (Decl. Pl. ¶¶ 5, 7, 10, ECF No. 98-2, *refiled at* ECF No. 152-2). On September 30, 2020, Plaintiff produced the Snapchat data download from July 16, 2020, but Defendants were unable to use the provided links to access the relevant media. (Request Show Cause p. 4, ECF No. 133). On October 7, 2020, Plaintiff provided a second Snapchat data download. *Id.* This download was missing links to 11 videos and images that were listed in the September 30, 2020 production. *Id.*; Request Show Cause Ex. C, ECF No. 133-3. Given the dates of the two separate Snapchat data downloads, coupled with the 11 files missing from the second

download, it is clear that sometime between July 16, 2020 and October 7, 2020, Plaintiff deleted 11 files from the Memories folder contained in the Snapchat application on his phone.⁹ (*See* Request Show Cause Ex. D, ECF No. 133-4).

3. *Spoliation Claim*

The Court now turns to Defendants' spoliation claim. As noted above, in evaluating a spoliation claim, the Court must determine: (1) whether there was a duty to preserve the destroyed evidence; (2) whether this duty was breached; and (3) whether the destruction of evidence was done in bad faith. *Malibu Media, LLC*, 2015 WL 2371597, at *11. Importantly, in the context of spoliation, bad faith means that the evidence was destroyed "for the purpose of hiding adverse information." *Bracey*, 712 F.3d at 1019.

A. Duty to Preserve

Plaintiff's duty to preserve the relevant Snapchat data arose, at the latest, when Defendants sought this data during discovery. *See Malibu Media, LLC*, 2015 WL 2371597, at *12 ("[C]ourts have noted that the duty to preserve evidence 'certainly arises upon a formal discovery request.'" (quoting *Am. Family Mut. Ins., Co. v. Roth*, No. 05 C 3839, 2009 WL 982788, at *11 (N.D. Ill. Feb. 20, 2009))). Defendants' first requests for production, served on September 25, 2019, sought "[a]ll of [Plaintiff's] social media postings from August 1, 2015 – present." (Br. Supp. Mot. Compel 3, ECF No. 81; Br. Supp. Mot. Compel Ex. A ¶ 7, p. 15, ECF No. 81-2). Defendants' second requests for production, served on March 11, 2020, sought "[a]ll data from any Snapchat account owned or operated, wholly or in part, by Plaintiff, including the account with the username [username] from August 2015 to the present." (Br. Supp. Mot. Compel 3, ECF No. 81; Br. Supp. Mot. Compel Ex. B ¶ 2, p. 10, ECF No. 81-3). Both requests placed an affirmative duty on Plaintiff

⁹ Plaintiff clarified at the February 22, 2021 hearing that he deleted the files from within the Snapchat application, rather than from the camera roll on his phone.

to preserve his Snapchat data from August 2015 to the present. Even if the Court were to accept Plaintiff's counsel's assertion that Snapchat is not social media¹⁰, Plaintiff's duty to preserve the Snapchat data arose no later than March 11, 2020, when it was explicitly requested in the second request for production.

Beyond the duty created by Defendants' requests, Plaintiff was separately obligated to preserve the Snapchat data pursuant to at least one court order. On February 15, 2017, Magistrate Judge Paul R. Cherry issued an order stating:

Each party and each attorney in this case shall take reasonable steps to preserve electronically stored information (ESI) that is relevant to any claim or defense in this case, whether or not the information is admissible at trial. This requirement relates back to the point in time when the party or attorney reasonably anticipated litigation about these matters.

(Feb. 15, 2017 Order, ECF No. 10). Though Plaintiff claims he has never posted anything relevant to this litigation on his social media, he is not the one who decides what is relevant. *See Jones v. Bremen High Sch. Dist.* 228, No. 08 C 3548, 2010 WL 2106640, at *8 (N.D. Ill. May 25, 2010) (“As a non-lawyer and as an interested party, Jurgens is not qualified to judge whether documents are relevant to the suit.”). Plaintiff has previously asserted that he “[has] not used social media to discuss” this case and “[w]hat can be obtained from Snapchat is not any content, but metadata from 2020 when the case deals with what happened in the 2015-2016 school year at Purdue.” (Decl. Pl. ¶¶ 8, 20, ECF No. 98-2, *refiled at* ECF No. 152-2). Plaintiff has further “questioned what Defendants think they can possibly use that is of any relevance to the case which occurred in the 2015-2016 school year at Purdue.” *Id.* at ¶ 8. The fact that the content was created after the events

¹⁰ Courts have generally described Snapchat to be a form of social media. *See, e.g., Lemmon v. Snap, Inc.*, No. 20-55295, 2021 WL 1743576, at *2 (9th Cir. May 4, 2021) (“Snapchat is a social media platform that allows its users to take photos or videos (colloquially known as ‘snaps’) and share them with other Snapchat users.”); *B.L. by & through Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 175 n.1 (3d Cir. 2020), *cert. granted*, 141 S. Ct. 976 (2021) (“Snapchat is a social media application for smartphones that allows users to send private text, photo, and video messages to other users.”).

leading to this lawsuit does not make it irrelevant. *See Charvat v. Valente*, 82 F. Supp. 3d 713, 717 (N.D. Ill. 2015), objections overruled, No. 12-CV-05746, 2016 WL 98570 (N.D. Ill. Jan. 8, 2016) (“It is common sense that information and documents created after filing the Complaint can be relevant and must be produced.”) (listing cases). And, further, a social media post need not directly reference or discuss a lawsuit for it to be relevant to the claims at issue.

The broad scope of discovery permits a party to seek information

regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). “Even when information is not directly related to the claims or defenses identified in the pleadings, the information still may be relevant to the broader subject matter at hand” *Yessenow v. Hudson*, 270 F.R.D. 422, 426 (N.D. Ind. 2010). And, critically, social media content that may reveal information relevant to damages is discoverable under Rule 26. *Higgins v. Koch Dev. Corp.*, No. 3:11-CV-81-RLY-WGH, 2013 WL 3366278, at *2 (S.D. Ind. July 5, 2013) (accepting argument that “Facebook content may reveal relevant information as to the extent [the plaintiffs’] injuries have impacted their ‘enjoyment of life, ability to engage in outdoor activities, and employment,’ along with their ‘claims regarding permanent injuries, lack of pre-existing symptoms, and impairment of future earnings capacity’” and holding “[s]ince the extent of [Plaintiffs’] losses in these areas directly impacts the appropriate damages award, the court finds this information relevant”).

Plaintiff’s Second Amended Complaint alleges that Plaintiff’s “dream and hope . . . to serve his country as a Naval officer has been destroyed” due to Defendants’ actions. (Am. Compl. ¶¶ 1,

107, ECF No. 160). Among other things, the Second Amended Complaint seeks damages for “loss of future career prospects” caused by Defendants’ conduct. *Id.* at ¶ (ii)(a), p. 64. While the Court will certainly not speculate as to the possible content of the deleted Snapchat files, it is entirely conceivable that they could be relevant to these claims. Unfortunately, the Court has no means to evaluate Plaintiff’s assessment as to the relevancy of the 11 files—indeed, because it appears that Plaintiff has permanently deleted the sought files and they are not otherwise recoverable, the Court is left with only Plaintiff’s word.

However, even if Plaintiff’s deletion of the files did not violate Judge Cherry’s February 15, 2017 command to preserve ESI, Plaintiff’s duty to preserve these files was explicitly laid out in at least one other order of this Court. On June 3, 2020, the Court granted the relief implied in the Joint Stipulation. (June 3, 2020 Order, ECF No. 90). And, if that were not enough, on September 24, 2020¹¹, the Court explicitly ordered Plaintiff to provide the Snapchat data consistent with the agreement noted in the Joint Stipulation. (Sept. 24, 2020 Telephonic Status Conference Entry, ECF No. 117). As noted above, the Joint Stipulation stated that Plaintiff agreed to provide “a complete data download of all Instagram and Snapchat data from his accounts, from August 2015 to the present.” (Joint Stipulation ¶ 6, ECF No. 89). This language is unequivocal. There is no interpretation of this provision that would allow Plaintiff to send merely what he chose from his Snapchat account while deleting other files off the Snapchat application on his phone. Plaintiff was under an unambiguous duty to preserve the deleted images and videos.

B. Breach of Duty

Having determined that Plaintiff was under a duty to preserve the destroyed data, the Court turns to the second inquiry: whether this duty was breached. The Court’s determination on this

¹¹ Since all that the record makes clear is that the files were deleted between sometime between July 16, 2020 and October 7, 2020, it is possible the deletion occurred before September 24, 2020.

point is simple. Plaintiff himself concedes that he deleted the files from the Snapchat application on his phone. (*See* Request Show Cause Ex. D, ECF No. 133-4 (“I did delete some files off of the Snapchat application on my phone at some point between zip file productions”). The argument advanced by Plaintiff’s counsel—that Plaintiff “did not admit intentionally destroying anything”—is meaningless in this context. (*See* Resp. 3, ECF No. 135). At the February 22, 2021 hearing, Plaintiff testified that he was aware that he had images and videos saved to the Memories folder within the Snapchat application on his phone. And, as explained in more detail below, Plaintiff offered into evidence an exhibit that showed he saved numerous videos and images to the Memories folder in the Snapchat application on his phone from at least September 2016 through June 2020. (Feb. 22, 2021 Hr’g, Pl.’s Ex. 3). He was further provided with a link from Defendants that explicitly stated that content from his Memories folder could be downloaded from Snapchat’s servers. It is hard to see how Plaintiff would think he only had metadata available via Snapchat.

Moreover, the most superficial internet search reveals that Snapchat, by its very design, will erase files from its servers “as soon as possible” if a user deletes content from the Memories folder in the application on their phone.¹² *See* SNAPCHAT SUPPORT, *When does Snapchat delete Snaps and Chats*, <https://support.snapchat.com/en-GB/a/when-are-snaps-chats-deleted> (last visited July 1, 2021) (“If you delete a Snap from your Memories, Snapchat servers are designed to erase that Snap as soon as possible.”). Plaintiff himself has represented that he conducted research on what kind of information could be obtained from Snapchat. (Decl. Pl. ¶ 10, ECF No. 98-2, *refiled at* ECF No. 152-2) (explaining that Plaintiff “check[ed] whether contrary to [his] understanding, using a link provided by Defendants’ counsel and doing [his] own internet research, content files could be downloaded from Snapchat”). Even if Plaintiff can truthfully claim that he

¹² The Court is loath to conduct independent research on this topic. The parties were given an opportunity to present evidence on this topic at a hearing and in post-hearing submissions.

had no knowledge that a deletion of the files from his phone would potentially impact what might be available from Snapchat's servers—an assertion of which the Court remains skeptical—it would have no effect on the Court's inquiry here. The simple fact is that, at best, Plaintiff undertook no effort to ensure that the files would be preserved elsewhere before he deleted them from his Memories folder. Plaintiff plainly breached his duty to preserve the 11 images and videos.

C. Bad Faith

Finally, the Court must determine whether this breach was done in bad faith. As noted above, to establish bad faith in the context of spoliation, the movant must show that the evidence was destroyed “for the purpose of hiding adverse information.” *Bracey*, 712 F.3d at 1019. To determine whether evidence was destroyed for the purpose of hiding adverse information, the Court must “(a) assess the actual evidence, which one typically cannot do because the evidence no longer exists, or (b) infer bad intent based upon when the destruction occurred in relation to the destroyer's knowledge that the evidence was relevant to potential litigation.” *Sokn v. Fieldcrest Cmty. Unit Sch. Dist. No. 8*, No. 10-CV-1122, 2014 WL 201534, at *7 (C.D. Ill. Jan. 17, 2014). Even if the destroyer knew the evidence was needed for the litigation, the court must examine the “totality of the circumstances” of the destruction, and a party can resist a finding of bad faith by providing a credible explanation for the destruction. *Malibu Media*, 2015 WL 2371597, at *17-18.

The first option is a nonstarter here, since Plaintiff has deleted the sought images and videos and neither the Court nor Defendants have seen what they depicted; no reliable assessment can be made as to their content. The second option is not easily evaluated. Plaintiff claims that the deleted photos and videos are irrelevant to this matter, though, as noted above, he is not qualified to make this determination. *See Jones*, No. 08 C 3548, 2010 WL 2106640, at *8. Defendants, because they have not seen the files, can offer nothing to refute this assertion. Nonetheless, Defendants argue

that there is no credible alternate explanation for Plaintiff's conduct other than bad faith: "Based on [Plaintiff]'s obstructive behavior and the circumstances and timing of his deletion of the Snapchat photos and videos, there can be no doubt that [Plaintiff]'s intent was to prevent the Defendants and the Court from seeing that content." (Request Show Cause p. 9-10, ECF No. 133).

The Court recognizes that Defendants' argument is impeded by Plaintiff's destruction of the files. Without having viewed them, Defendants are hard pressed to present the Court with a compelling argument that Plaintiff deleted the files to hide adverse evidence. Further, the Court finds believable Plaintiff's assertion that he deleted the files to free up space and memory on his phone, rather than out of an attempt to hide their content from Defendants. (*See* Request Show Cause Ex. D, ECF No. 133-4). With nothing but Defendants' speculative assertions to the contrary, the Court cannot find that Plaintiff deleted the files for the purpose of hiding adverse information. *See Rummery v. Illinois Bell Tel. Co.*, 250 F.3d 553, 558 (7th Cir. 2001) ("But Rummery has offered no evidence, other than his own speculation, that [the documents] were destroyed to hide discriminatory information."). As such, Defendants' spoliation claim fails.

4. Other Bases for Sanctions

While the Court will not impose sanctions based on a spoliation claim, Plaintiff is not off the hook for his actions—and, separately, neither is his counsel. In general, federal courts have inherent power to impose sanctions for misconduct. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991); *Dotson v. Bravo*, 321 F.3d 663, 667 (7th Cir. 2003) ("Beyond any rule-based justification, the court's inherent authority to rectify abuses to the judicial process also authorizes sanctions for certain violations."). Federal Rule of Civil Procedure 37 provides that a court can impose sanctions for a party's failure to obey a discovery order:

(A) For Not Obeying a Discovery Order. If a party . . . fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

...

(C) Payment of Expenses. Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(b)(2)(A), (C). Rule 37 also prescribes rules for imposing sanctions specifically for the failure to preserve ESI:

(e) Failure to Preserve Electronically Stored Information. If 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:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice[.]

Fed. R. Civ. P. 37(e)(1). Rule 37(e) "leaves judges with discretion to determine how best to assess prejudice in particular cases." Fed. R. Civ. P. 37(e), advisory committee's note to the 2015 amendment.

One court has explained that “[p]rejudice’ under Rule 37(e) means that a party’s ability to obtain the evidence necessary for its case has been thwarted. Prejudice also occurs when parties are forced to unnecessarily litigate e-discovery issues when ESI is spoliated.” *DR Distributors, LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2021 WL 185082, at *96 (N.D. Ill. Jan. 19, 2021) (citations omitted); *see also BankDirect Cap. Fin., LLC v. Cap. Premium Fin., Inc.*, No. 15 C 10340, 2018 WL 6694904, at *8 (N.D. Ill. Nov. 8, 2018) (explaining, on a motion for sanctions due to spoliation, that “[p]rejudice . . . [was] clear” because “[e]very hour consumed administering needless or unnecessary discovery disputes is an hour taken from other litigants, who must wait in a longer queue for judicial attention. Unnecessary complaints sap the time of judges, forcing parties with substantial disputes to wait in a longer queue and condemning them to receive less judicial attention when their cases finally are heard.”); *Cf. Smoot v. Mazda Motors of Am., Inc.*, 469 F.3d 675, 677-78 (7th Cir. 2006) (noting that the Court of Appeals has “been plagued by the carelessness of a number of the lawyers practicing before the courts of this circuit with regard to the required contents of jurisdictional statements in diversity cases,” that “the lawyers have wasted our time as well as their own and (depending on the fee arrangements) their clients’ money,” and ordering the parties to show cause why counsel should not be sanctioned for mistaking the requirements of diversity jurisdiction, with special consideration given to “the appropriateness, as a sanction, of [counsel] being compelled to attend a continuing legal education class in federal jurisdiction”); *Kasper v. Bd. of Election Comm’rs of the City of Chicago*, 814 F.2d 332, 341 (7th Cir. 1987) (“Every hour [of judicial attention] consumed . . . is an hour taken from other litigants, who must wait in a longer queue.”).

Beyond financial prejudice—i.e., prejudice that results from costs incurred due to unnecessary litigation—Rule 37(e)(1) also encompasses substantive or merits-based prejudice.

This latter type of prejudice “results from harm to the merits of the moving party’s case. To determine the extent of substantive prejudice defendants suffered, [the court] look[s] to whether the content of the missing emails was produced in other documents or whether defendants have obtained similarly relevant or probative information from other sources.” *Tomasian v. C.D. Peacock, Inc.*, No. 09 C 5665, 2012 WL 13208522, at *9 (N.D. Ill. Nov. 8, 2012). Put simply, the Court “ask[s] if, at the end of the day, plaintiff’s failure to preserve evidence deprived defendants of the opportunity to defend against plaintiff’s claims at trial.” *Id.*

District courts have “wide latitude in fashioning appropriate sanctions” for violations of discovery orders. *e360 Insight, Inc. v. Spamhaus Project*, 658 F.3d 637, 642 (7th Cir. 2011) (quotation marks and citation omitted). “[A]n imposition of sanctions ‘must be proportionate to the circumstances surrounding the failure to comply with discovery.’” *Queen v. W.I.C., Inc.*, No. 14-CV-519-DRH-SCW, 2016 WL 11269313, at *4 (S.D. Ill. Dec. 13, 2016) (quoting *Langley by Langley v. Union Elec. Co.*, 107 F.3d 510, 515 (7th Cir. 1997)). “A court must look at the procedural history as a whole and ‘weigh not only the straw that finally broke the camel’s back, but all the straws that the recalcitrant party piled on over the course of the lawsuit.’” *Id.* (quoting *e360 Insight, Inc.*, 658 F.3d at 643).

The Court need not find that a party’s failure to comply with a discovery order was due to willfulness, bad faith, or fault to impose sanctions; “a showing of willfulness, bad faith, or fault is necessary only when dismissal or default is imposed.” *e360 Insight, Inc.*, 658 F.3d at 642. A party’s “culpability for that failure ‘determines only which sanctions the court should impose and not whether any sanctions are appropriate at all.’” *Id.* (quoting *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469, 473 (7th Cir. 1984)). Here, and as explained below, the Court finds that Plaintiff’s deletion of the Snapchat data is sanctionable under Rule 37.

1. Plaintiff's Conduct

As noted above, Plaintiff had a duty to preserve the deleted files because they were sought via formal discovery requests. He was under a separate duty to preserve the deleted files pursuant to at least one, if not multiple, Court orders. Plaintiff unequivocally agreed to provide Defendants with the Snapchat data via the Joint Stipulation, after which Defendants withdrew their motion to compel. Then, despite this agreement and Defendants' withdrawal of their motion, Plaintiff refused to provide the data because *he* deemed it to be irrelevant. Defendants were forced to seek recourse via their motion for sanctions. Though the Court found, at that time, that sanctions were not yet warranted, the Court nonetheless issued an order on September 24, 2020 requiring Plaintiff to comply with his previous agreement to provide the Snapchat data. And, now, it is clear Plaintiff has deleted some of the very files he was ordered to produce. Although it is not entirely clear exactly when that deletion occurred, it was certainly after Judge Cherry's 2017 order requiring the preservation of ESI. It was also after discovery requests specifically requested Snapchat data. Perhaps most importantly, it was also clearly after the June 2020 agreement of the parties to produce the Snapchat data, and this Court's order endorsing that agreement. As such, Plaintiff's actions are sanctionable under Rule 37 for his inarguable failure to comply with the Court's June 3, 2020 order, and was further a violation of the Court's February 15, 2017 order requiring the preservation of electronically stored information.

Plaintiff's failure to comply with the Court's orders was, at a minimum, the result of negligence, "which is a degree of fault sufficient for imposing sanctions" under Rule 37(b)(2)(A). *e360 Insight, Inc.*, 658 F.3d at 643. In fact, Plaintiff's conduct may rise above mere negligence and suggest bad faith. In the context of a party's failure to obey a court's discovery order—rather than in the specific context of spoliation—"bad faith" takes on a different meaning: here, "[b]ad

faith ‘is characterized by conduct which is either intentional or in reckless disregard of a party’s obligations to comply with a court order.’” *Apex Colors, Inc. v. Chemworld Int’l Ltd., Inc.*, No. 2:14-CV-273-PRC, 2018 WL 4853500, at *6 (N.D. Ind. Oct. 5, 2018) (quoting *Marrocco v. Gen. Motors*, 966 F.2d 220, 224 (7th Cir. 1992)).

Here, Plaintiff certainly did not appear to consider the impact of deleting data from his Snapchat application and instead relied on a number of self-serving assumptions about Snapchat’s ability to preserve data, many of which turned out to be wholly inaccurate. On July 31, 2020, Plaintiff represented to the Court that the only material he could produce from Snapchat was non-content metadata and other information, which he deemed irrelevant to this matter. (*See Decl. Pl.* ¶¶ 5, 7, 10-20 ECF No. 98-2, *refiled at* ECF No. 152-2). Indeed, Plaintiff explicitly stated that “Snapchat does not archive content files.” *Id.* at ¶¶ 5, 7. Plaintiff further stated:

In the course of dealing with Defendants’ request for Snapchat content, I explained to my counsel what was and wasn’t available from Snapchat. When Defendants made their sanctions motion, I was in fact discussing further with my counsel and checking whether contrary to my understanding, using a link provided by Defendants’ counsel and doing my own internet research, content files could be downloaded from Snapchat. The link provided by Defendants’ counsel makes clear the kind of information that is obtained, which means Defendants know that content is not what is available at my end.

Id. at ¶ 10.

Not only was Plaintiff wrong about what data is available from Snapchat, but it is also clear that he affirmatively knew that he had access to other files, including images and videos, which were saved to the Memories folder within the Snapchat application on his phone. In Plaintiff’s explanation provided to Defendants regarding the missing files, he described the 75 produced videos and images as “pieces of content that [he] saved over the past few years on [his] account.” (Request Show Cause Ex. D, ECF No. 133-4). Furthermore, and as noted above, Plaintiff testified at the February 22, 2021 hearing that he was aware that he had images and videos saved to the

Memories folder. Indeed, Plaintiff offered into evidence an exhibit listing the dates of the files saved to his Memories folder, which revealed that one video was saved less than *two months* prior to Plaintiff's declaration that "Snapchat does not archive content files and does not retain user information past 30 days." (See Decl. Pl. ¶¶ 5, 7, ECF No. 98-2, *refiled at* ECF No. 152-2; Feb. 22, 2021 Hr'g, Pl.'s Ex. 3). This exhibit further revealed that Plaintiff saved over 80 images and videos to the Memories folder from September 2016 through June 2020.¹³ (Feb. 22, 2021 Hr'g, Pl.'s Ex. 3). Critically, as the Court explained above, users must take an affirmative step from within the Snapchat application to save an image or video to their Memories folder. See SNAPCHAT SUPPORT, *How to use Memories*, <https://support.snapchat.com/en-GB/a/about-memories> (last visited July 1, 2021) ("To save a Snap to Memories, create a Snap and tap [image of icon] at the bottom."). Barring user or technological error—which Plaintiff does not allege here—Plaintiff took knowing, purposeful action to save these files to his Memories folder.

Additionally, the link provided by Defendants in their second requests for production made explicitly clear that the data contained in a user's Memories folder was available for download. (Br. Supp. Mot. Compel Ex. B ¶ 2, p. 10, ECF No. 81-3 (noting that Plaintiff's Snapchat data could be downloaded via the following link: <https://support.snapchat.com/en-US/a/download-my-data>); SNAPCHAT SUPPORT, *Download My Data*, <https://support.snapchat.com/en-US/a/download-my-data> (last visited July 1, 2021) (stating that users can download the files in their Memories folder)).

¹³ As previously noted, Plaintiff disputes the claim that he "had 86 downloaded Snapchat videos and photos in his possession," because "the *first* Snapchat download only had metadata and no working links to videos and pictures." (Resp. 7-8, ECF No. 135). Plaintiff's counsel may be correct that the first Snapchat download contained only metadata and broken links through which the images and videos saved to Plaintiff's Memories folder could not be accessed. However, it appears that the links did not work because they were expired, not because the 86 images and videos were not saved to Plaintiff's Memories folder at the time. As Defendants demonstrate and Plaintiff himself concedes, the 86 videos and images were unquestionably in Plaintiff's possession at the time the download was made, because they were saved to his Memories folder in the Snapchat application on his phone. (See Request Show Cause Ex. B, ECF No. 133-2; Feb. 22, 2021 Hr'g Pl.'s Ex. 3). Whether Plaintiff also "possessed" the videos and images in a *secondary* location—i.e., via a download of his Snapchat data—is meaningless.

Indeed, the screenshots provided by Plaintiff on April 27, 2021—which depict what was displayed on Plaintiff’s screen as he navigated the Snapchat application to complete a download of his data to provide to Defendants—clearly show that the “Data Available for Download” includes “Memories.” (Pl.’s Submission, Mobile Screenshot 5 via provided link, ECF No. 164). A cursory review of Snapchat’s website reveals that Snapchat allows users to save content to their Memories folder in the application, and that these files are saved in both the Memories folder and on Snapchat’s servers indefinitely—unless, of course, they are otherwise deleted by the user. *See* SNAPCHAT SUPPORT, *When does Snapchat delete Snaps and Chats*, <https://support.snapchat.com/en-GB/a/when-are-snaps-chats-deleted> (last visited July 1, 2021) (“Memories are backed up by Snapchat. If you delete a Snap from your Memories, Snapchat servers are designed to erase that Snap as soon as possible.”).

From the very moment Defendants served their second requests for production in March 2020, Plaintiff—and, to be clear, his counsel—had the information necessary to understand that content beyond mere metadata could be downloaded from the Snapchat servers. And, from the first moment that Plaintiff claimed that Snapchat archives no content files, he knew (or should have known) this statement was false—Plaintiff himself had been saving content to the Memories folder contained within the application for years by that time.

Moreover, Plaintiff has provided no innocent explanation to the Court as to why he made affirmative misrepresentations regarding what data was available from Snapchat. The only explanation offered was Plaintiff’s testimony at the February 22, 2021 hearing that he did not “think that in depth” regarding whether a data download from Snapchat’s servers would include the files saved to the Memories folder within the application on his phone. This is a curious statement given the Plaintiff’s obligation to preserve ESI in this case. It is all the more curious

since Plaintiff previously represented that he conducted research to determine what content could be downloaded from Snapchat, and the issue of his Snapchat data has been the subject of ongoing motions practice for over a year now. (*See* Mot. Compel, ECF No. 80; Decl. Pl. ¶ 10, ECF No. 98-2, *refiled at* ECF No. 152-2). The idea that Plaintiff failed to more than minimally consider the issue of what data might be available to download is both completely illogical and contradicted by his own previous representations to the Court. Indeed, it now appears certain Plaintiff misrepresented either (1) his knowledge of what data Snapchat retained; (2) that he conducted research on this same topic; or (3) the results of such research.

Most importantly, however, Plaintiff knew that he was under a Court order to produce his Snapchat data no later than the Court's unambiguous command to do so on September 24, 2020. And, to be clear, Plaintiff was under a Court order to produce the Snapchat data as of June 3, 2020, when the Court granted the relief implied in the Joint Stipulation. (*See* June 3, 2020 Order, ECF No. 90). While Plaintiff testified at the February 22, 2021 hearing that the 11 files at issue were deleted at some point between July 16, 2020 and the second download in early October 2020, but that he could not say exactly when the deletion occurred, the Court is not inclined to accept Plaintiff at his word. Indeed, as described throughout this order, Plaintiff's representations to this Court regarding his Snapchat data have been opaque and misleading at best, intentionally false at worst. Plaintiff's conduct was, in no uncertain terms, an intentional or reckless disregard of his obligations to comply with both his obligations as a litigant and this Court's orders. As such, it was done in bad faith for purposes of Rule 37. *Apex Colors, Inc.*, 2018 WL 4853500, at *6.

Even if the deletion of the 11 files occurred prior to the Court's September 24, 2020 order, or for that matter the Court's June 3, 2020 order, an imposition of sanctions would still be appropriate for Plaintiff's conduct under Rule 37(e). As noted above, Rule 37(e) provides that the

Court can impose measures “no greater than necessary to cure the prejudice” to a party when ESI that should have been preserved has been irretrievably lost due to the failure to take reasonable steps to preserve it. Fed. R. Civ. P. 37(e)(1). Plaintiff was under a duty to preserve the data from his Snapchat account “from August 2015 to the present” no later than March 11, 2020, when this data was explicitly requested in Defendants’ second requests for production. (*See* Br. Supp. Mot. Compel 3, ECF No. 81; Br. Supp. Mot. Compel Ex. B ¶ 2, p. 10, ECF No. 81-3). The latest date by which this duty could have arisen was June 2, 2020, when Plaintiff explicitly agreed to provide the Snapchat data per the Joint Stipulation. (*See* Joint Stipulation ¶ 6, ECF No. 89). Regardless, Plaintiff’s deletion of the 11 files from the Memories folder within the Snapchat application on his phone occurred *after* these dates. Plaintiff’s intentional deletion of the 11 files after these dates was, in no uncertain terms, the failure to take reasonable steps to preserve ESI that should have been preserved, which “cannot be restored or replaced through additional discovery.” *See* Fed. R. Civ. P. 37(e). And Plaintiff’s deletion of the 11 files undoubtedly prejudiced Defendants, as it caused wholly unnecessary litigation to resolve this dispute. *See DR Distributors, LLC*, 2021 WL 185082, at *96. Moreover, and as noted above, the 11 deleted files may have contained evidence relevant to Plaintiff’s claim for damages based on loss of career opportunities. *See Higgins*, 2013 WL 3366278, at *2. Even if Plaintiff’s actions were considered in the best possible light, an imposition of sanctions would still be eminently appropriate.

6. Sanctions Imposed

The sole remaining question before the Court is the appropriate sanction to impose. Any sanction levied by the Court must be proportionate to the circumstance leading to its imposition. *See Queen*, 2016 WL 11269313, at *4. Defendants urge the Court to order Plaintiff to show cause why Count I of the Amended Complaint—alleging a claim under the Fourteenth Amendment to

the United States Constitution and 42 U.S.C. § 1983 for a denial of Plaintiff's protected liberty interest in "his good name, reputation, honor, and integrity" without due process—should not be stricken and, further, why Plaintiff should not be held in contempt of the Court's September 24, 2020 order. The Court will not grant this relief for two reasons. First, the Court finds that striking Count I of the Amended Complaint is a disproportionate punishment for Plaintiff's deletion of the files, especially considering that there is nothing in the record to indicate whether the files were in fact adverse to Plaintiff's case. *Cf. Plunk v. Vill. of Elwood, Ill.*, No. 07 C 88, 2009 WL 1444436, at *11 (N.D. Ill. May 20, 2009) ("As the Seventh Circuit has emphasized, the interests of justice are best served by resolving cases on their merits.") (citing *Long v. Steepro*, 213 F.3d 983, 985 (7th Cir. 2000)). Second, the Court need not receive further explanation from Plaintiff to determine whether he failed to abide by Court orders given the subsequent hearing on this matter.

The Court has discretion to enter any "just orders" to ameliorate the harm created by violation of discovery orders. *See* Fed. R. Civ. P. 37(b)(2)(A). And, further, the Court has the authority to order a measure "no greater than necessary to cure the prejudice" to a party when ESI that should have been preserved has been irretrievably lost due to the failure to take reasonable steps to preserve it. *See* Fed. R. Civ. P. 37(e)(1). Pursuant to this authority, the Court imposes monetary sanctions, will allow for the introduction of evidence related to this issue at trial, and will also allow for a jury instruction related to the deletion of Snapchat data. First, the Court will order Plaintiff to pay Defendants' attorneys' fees and costs associated with litigating the motion for sanctions at Docket Entry 92, the instant motion at Docket Entry 133, the hearing on February 22, 2021, and any other work related to review of Snapchat data or litigation concerning the deleted files. The Court finds that such a sanction is necessary to cure the prejudice incurred by Defendants

in litigating an issue that never should have arisen. *See* Fed. R. Civ. P. 37(b)(2)(A),(C) (permitting courts to order the payment of “reasonable expenses” created by the failure to comply).

Next, the Court will allow for the introduction of limited evidence and the submission of a jury instruction related to Plaintiff’s destruction of this data. While it is true that the current record does not support striking a claim, or even an explicit adverse inference instruction, the egregiousness of Plaintiff’s conduct in deleting the files calls for more than simply requiring that he pay a portion of Defendants’ attorneys’ fees and costs. Accordingly, the parties will be permitted to present evidence to the jury concerning the loss of the Snapchat data, and argument as to the relevance of that data, and the jury will be instructed that it may consider that evidence and argument in making its decision. *See* Fed. R. Civ. P. 37(e), advisory committee’s note to the 2015 amendment (explaining that such a measure, “which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice”). Plaintiff’s failure to comply with his discovery obligations and/or orders of this Court may also pertain to his claim that, were it not for Defendants’ actions, a career in the Navy—a profession that requires strict adherence to rules and procedures—would be open to him. Such further sanctions are additionally appropriate and necessary to address Plaintiff’s misconduct in intentionally deleting files that he had a duty to preserve and produce and to deter such conduct in the future.

The Court will invite the parties to propose further jury instructions at the appropriate time, and will not rule on any particular jury instruction until the close of evidence. Of course, the parties may also still seek summary judgment.

In considering any appropriate jury instructions, the Court notes that the following appears consistent with the record:

1. Plaintiff had a duty to preserve and provide to Defendants data from his Snapchat account from August 2015 to the present;
2. Plaintiff intentionally deleted 11 videos and images from within the Snapchat application on his phone after this duty arose;
3. These files cannot be recovered; and
4. The jury “may consider that evidence, along with all the other evidence in the case, in making its decision.” Fed. R. Civ. P. 37(e), advisory committee’s note to the 2015 amendment.

Either party may submit a proposed jury instruction to accurately capture these facts, and the parties are encouraged to meet and confer concerning any possible joint stipulation that may appropriately narrow issues presented to the jury.

Going forward, the Court urges all parties and all counsel involved in this matter to take care regarding their obligations under the Federal Rules of Civil Procedure, orders of this Court, and to one another. The Court appreciates that litigation is, by its very nature, a contentious and all too often antagonistic venture. Yet, there is little excuse for the rhetoric and animosity evidenced in the filings detailed above.

Conclusion

Accordingly, the Court hereby **GRANTS with relief different than requested** the Request for Issuance of Order to Show Cause Regarding Plaintiff’s Non-Compliance with Order and Spoliation of Evidence [DE 133].

Pursuant to Federal Rule of Civil Procedure 37(b)(2)(C), the Court **AWARDS** Defendants their reasonable expenses incurred in making their previous motion for sanctions and the instant request for an order to show cause, litigating the hearing held on February 22, 2021, and any other

work related to review of Snapchat data or litigation concerning the deleted files. The Court **ORDERS** Defendants to **FILE**, on or before **July 30, 2021**, an affidavit detailing these expenses. Alternatively, the parties may reach an agreement concerning the fees owed to Defendants.

Finally, the Court will allow the parties to present evidence to the jury concerning the loss of the Snapchat data, and argument as to the relevance of that data, and the jury will be instructed that it may consider that evidence and argument in making its decision. The parties may also propose other jury instructions, or a joint stipulation, consistent with this Opinion and Order.

So ORDERED this 2nd day of July, 2021.

s/ Joshua P. Kolar
MAGISTRATE JUDGE JOSHUA P. KOLAR
UNITED STATES DISTRICT COURT

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Federal Trade Commission,

10 Plaintiff,

11 v.

12 James D. Noland, Jr., et al.,

13 Defendants.
14

No. CV-20-00047-PHX-DWL

ORDER

15 **INTRODUCTION**

16 In May 2019, Defendant James Noland (“Noland”) discovered, via the inadvertent
17 disclosure of a bank subpoena, that the FTC was conducting an investigation of him and
18 his business, Success By Health (“SBH”). When the FTC learned its investigation was no
19 longer covert, it specifically advised Noland and SBH to preserve relevant documents.

20 They did no such thing. The day after learning about the FTC’s investigation,
21 Noland instructed the other members of SBH’s leadership team, Defendants Lina Noland,
22 Thomas Sacca (“Sacca”), and Scott Harris (“Harris”) (together with Noland, the
23 “Individual Defendants”), to start using a pair of encrypted communications platforms
24 called Signal and ProtonMail. After doing so, the Individual Defendants stopped using
25 their previous messaging platforms for work-related communications, apparently turned
26 on Signal’s “auto-delete” function, and then proceeded to exchange an untold number of
27 messages related to SBH’s business.

28 In January 2020, after completing its investigation, the FTC filed this action. At the

1 same time, the FTC sought and obtained a temporary restraining order (“TRO”) that,
2 among other things, appointed a receiver to assume control over SBH, required the
3 Individual Defendants to produce their electronic communications, and required the
4 Individual Defendants to turn over the mobile devices they had used to operate the
5 business. Notwithstanding these orders, the Individual Defendants did not initially turn
6 over their mobile devices and did not produce any Signal communications. Additionally,
7 during a post-TRO deposition, Noland failed to disclose the Signal and ProtonMail
8 accounts in response to direct questioning about the existence of any encrypted
9 communications platforms.

10 It gets worse. It has now come to light that, during the months following the
11 issuance of the TRO, Noland used his ProtonMail account to provide third-party witnesses
12 with what can be construed as a script to follow when drafting declarations the Individual
13 Defendants wished to submit in support of their defense. These communications only came
14 to light by fortuity, when one of the recipients anonymously disclosed them to the FTC.

15 Finally, in August 2020, just as they were about to belatedly turn over their mobile
16 devices for imaging, the Individual Defendants deleted the Signal app from their phones in
17 coordinated fashion. As a result, neither side’s forensic specialists have been able to
18 recover any of the Signal communications the Individual Defendants sent and received
19 between May 2019 and August 2020.

20 Based on all of this, the FTC now moves for the imposition of spoliation sanctions.
21 (Doc. 259.) The motion is fully briefed (Docs. 276, 277) and neither side requested oral
22 argument. For the following reasons, the motion is granted. The Individual Defendants’
23 systematic efforts to conceal and destroy evidence are deeply troubling and have cast a pall
24 over this action.

25 **RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

26 This case concerns the business activities of SBH, “an affiliate-marketing program
27 that sells coffee products and other nutraceuticals through its online platform and network
28 of affiliates.” (Doc. 106 at 1-2.) SBH is an unincorporated division of Success by Media

1 Holdings Inc (“SBM”). (*Id.* at 1-2, 6.) The FTC alleges, among other things, that SBH
2 operated as an illegal pyramid scheme and that the Individual Defendants, who held various
3 leadership roles within SBH, made false statements to SBH’s affiliates. (Doc. 3.)

4 On April 26, 2019, the FTC issued a subpoena to Wells Fargo seeking financial
5 information related to Noland and SBH. (Doc. 259-1 at 26-42.)

6 On or around May 15, 2019, Wells Fargo inadvertently disclosed the subpoena to
7 Noland. (Doc. 8-19 at 5 ¶¶ 13-15; Doc. 259-1 at 25.)

8 On May 16, 2019, one day after inadvertently learning about the FTC’s subpoena,
9 Noland sent an invitation to Harris to install “Signal,” a mobile messaging application that
10 emphasizes user privacy,¹ and separately sent a message to the “SBH Leadership Council”
11 (which included Noland, Harris, and Sacca) stating that he had “[j]ust sent y’all an
12 important invite to an app you need to install.” (Doc. 259-1 at 4-5 ¶¶ 7-8, 14 ¶ 19.) The
13 evidence proffered by the FTC, which the Individual Defendants do not dispute, suggests
14 that Noland, Harris, and the other Individual Defendants began using Signal for the first
15 time that same day. (Doc. 228-1 at 2-3; Doc. 259-1 at 136, 147; Doc. 276-1 at 46, lines 3-
16 12.) Thereafter, Noland and the other Individual Defendants began encouraging SBH
17 employees and affiliates to install the Signal app. (Doc. 259-1 at 7-17 ¶¶ 15-23.) It appears
18 the Individual Defendants also turned on Signal’s “auto-delete” function after installing the
19 app, such that messages exchanged via Signal were not preserved.²

20 Around the same time he started using Signal, Noland also began using
21 “ProtonMail,” a Switzerland-based encrypted email service. (Doc. 259-1 at 22 ¶ 38, 140.)

22 ¹ Signal, as noted, emphasizes user privacy. (Doc. 259-1 at 20 ¶ 32, 111-12.) The
23 key security features of Signal are its end-to-end encryption and its assurance that all
24 messaging data, including the content of the communications, cannot be tracked or
observed by Signal itself or any party that does not have access to the user’s device. (*Id.*
at 111-12, 119-20.)

25 ² In an October 2020 letter to the FTC, the Individual Defendants’ counsel made
26 statements about the use of the auto-delete function. (Doc. 228-2 at 42 [“Our clients inform
27 us that they set all conversations to auto-delete with the exception of conversations with
28 their attorney.”].) During a subsequent deposition, Noland was asked further questions on
this topic. (Doc. 259-1 at 139-40.) In response, Noland seemed to confirm the accuracy
of his counsel’s statement in the letter. (*Id.*) Unfortunately, the Individual Defendants’
deletion of the Signal app from their phones has made it impossible to forensically verify
whether and when the auto-delete feature was, in fact, enabled. (Doc. 228-2 at 42.)

1 ProtonMail, like Signal, emphasizes user privacy. (*Id.* at 20 ¶ 33, 115-17.) Thereafter,
2 Noland and the other Individual Defendants encouraged SBH employees and affiliates to
3 use ProtonMail. (Doc. 228-2 at 5 ¶ 14, 6 ¶ 15; Doc. 259-1 at 12 ¶ 17, 13 ¶ 18, 15 ¶ 20, 22
4 ¶ 38.)

5 On May 20, 2019, Noland, through his attorney, contacted the FTC and offered to
6 cooperate with the FTC’s investigation. (Doc. 8-19 at 5 ¶ 15; Doc. 259-1 at 44, 138-39.)

7 On May 29, 2019, the FTC responded by stating that it did “not have any requests”
8 at that time and that “[Noland] and the company should suspend any ordinary course
9 destruction of documents, communications, and records.” (Doc. 259-1 at 44.)

10 Throughout the remainder of 2019, the Individual Defendants instructed each other
11 (as well as SBH employees and affiliates) to use Signal or ProtonMail for “anything
12 sensitive” or “important things.” (Doc. 259-1 at 12 ¶ 17, 18 ¶ 24.) Additionally, some of
13 the Individual Defendants’ unencrypted text messages simply referenced “Signal” or
14 “ProtonMail” or directed persons to check Signal or ProtonMail messages. (Doc. 259-1 at
15 13, ¶ 17, 16 ¶¶ 20-21, 18 ¶ 24.)

16 On January 8, 2020, the FTC initiated this action. (Doc. 3.) That same day, the
17 FTC moved for an *ex parte* TRO, which the Court substantially granted (Docs. 19, 38).³
18 The TRO was served on the Individual Defendants shortly thereafter. (Docs. 44-49.) In
19 the TRO, the Court appointed Kimberly Friday to serve as the receiver (the “Receiver”) of
20 SBH and affiliated entities. (Doc. 38 at 16.)⁴ The TRO required the Individual Defendants
21 to, among other things, “immediately transfer or deliver to the [Receiver] possession,
22 custody, and control of . . . [a]ll Documents of or pertaining to the Receivership Entities,
23 including all communications occurring via electronic mail, electronic messaging service,
24 or encrypted messaging service” (Doc. 21 at 21; Doc. 38 at 21.) The TRO also
25 required the Individual Defendants to turn over “[a]ll keys, codes, user names and
26 passwords necessary to gain or to secure access to any Assets or Documents of or

27 ³ The TRO was later amended. (Docs. 20, 21.) The final, unsealed version of the
28 TRO was filed on January 17, 2020. (Doc. 38.)

⁴ Friday has since been replaced as the Receiver by Peter S. Davis. (Doc. 395).

1 pertaining to the Receivership Entities, including access to their business premises, means
2 of communication, . . . encrypted messaging services . . . , or other property.” (Doc. 21 at
3 21-22; Doc. 38 at 22.) The same obligations applied under the preliminary injunction
4 entered on February 28, 2020. (Doc. 109 at 17-18.)

5 On February 5, 2020, Noland participated in a post-TRO deposition. (Doc. 259-1
6 at 130.) During the deposition, Noland was specifically asked about his use of encrypted
7 communication platforms. (*Id.*) In response, he failed to disclose the existence of his
8 Signal and ProtonMail accounts:

9 Q: Have you ever used any type of encrypted communications to
10 conduct Success by Media business?

11 A: I’m not sure what you mean, sir.

12 Q: Have you used any type of phone application or software system that
13 encrypts the substance of the communication from point to point?

14 A: I mean, I think it’s like standard practice now. I don’t know. It’s
15 standard practice.

16 Q: Do you know that in your course of your work for Success by
17 Media?

18 A: I don’t know. Whatever communication. I mean, it’s a phone call.
19 The encrypted, what Verizon offers.

20 Q: Do you do anything separately to encrypt your communications
21 apart from what a Verizon provider may do on their end?

22 A: *Just have, you know, I think WhatsApp uses that now.*

23 (*Id.*, emphasis added.)

24 On March 19, 2020, the Individual Defendants provided their initial discovery
25 responses pursuant to the Court’s Mandatory Initial Discovery Pilot Project (“MIDP”).
26 Among other things, the MIDP requires a party to “[l]ist the documents, *electronically*
27 *stored information* (‘ESI’), tangible things, land, or other property known by you to exist,
28 whether or not in your possession, custody or control, that you believe may be relevant to
any party’s claims or defenses.” D. Ariz. G.O. 17-08 § B.3 (emphasis added). In their
responses, however, the Individual Defendants did not disclose the existence of any Signal
or ProtonMail messages. (Doc. 259-1 at 95-96.)

1 On May 29, 2020, Noland used his ProtonMail account to send an email entitled
2 “Declarations Needed from SBH Affiliates.” (Doc. 228-2 at 8.) Although the recipient’s
3 name is blacked out in the copy of the email that has been provided to the Court, the FTC
4 asserts (and the Individual Defendants do not deny) that the recipient was Robert Mehler,
5 who previously served as SBH’s director of sales. (Doc. 259 at 13.) In the body of the
6 email, Noland asked Mehler to solicit declarations from SBH affiliates and provided a list
7 of information that affiliates should include in their declarations, such as “The purpose of
8 the company is to sell product,” “Each affiliate and user of the product believes there is a
9 healthful or positive effects [sic] that comes from using the SBH products,” “Affiliates
10 have found financial freedom because of their ability to earn commissions from the sale of
11 products,” and “Does not feels [sic] as though any SBH Affiliate received
12 misrepresentations have been made to them by Success By Health.” (Doc. 228-2 at 8.)⁵
13 After sending this email, Noland deleted it without disclosing it to the FTC. (Doc. 276 at
14 3 [Individual Defendants’ response, conceding that Noland deleted and failed to produce
15 this email].) The email only happened to come to the FTC’s attention months later, via “an
16 SBH Affiliate who requested to remain anonymous.” (Doc. 259 at 13 n.10.)

17 On August 18-19, 2020, the Individual Defendants provided their cell phones to be
18 forensically imaged. (Doc. 228-1 at 2; Doc. 259-1 at 140.) The day beforehand, all four
19 Individual Defendants deleted the Signal app from their phones. (Doc. 228-1 at 2-3; Doc.
20 259-1 at 140.) The Individual Defendants took this step without the knowledge or approval
21 of their counsel, the Receiver, or the FTC. Indeed, during post-destruction correspondence
22 with the FTC, the Individual Defendants’ counsel stated that “our clients, without our
23 knowledge, uninstalled the Signal app a few days before their phones were imaged. . . .
24 [We] had a very unpleasant conversation[] with our clients this morning about what
25 happened.” (Doc. 228-2 at 21-22.) The deletion of Signal has resulted in a total inability
26 of the parties or outside forensic experts to recover the contents of the Signal messages.

27 _____
28 ⁵ The Court notes that, in the months after Noland sent this email from his ProtonMail
account, the Individual Defendants filed an array of declarations from affiliates that seemed
to closely track the statements in Noland’s email. (*See, e.g.*, Docs. 146-1, 146-2.)

1 (Doc. 228-2 at 17-19, 21-22.)

2 In late September or early October 2020, the FTC belatedly learned about the
3 Individual Defendants' use of Signal. (Doc. 228 at 6; Doc. 259-1 at 3 ¶ 5.) The discovery
4 occurred after the Individual Defendants produced a batch of discovery materials to the
5 FTC. (*Id.*) In that production, the Individual Defendants included several Excel
6 spreadsheets containing their text message communications. (Doc. 259-1 at 3 ¶ 5.) Among
7 these were 7,507 WhatsApp messages exchanged within the SBH Leadership Council—a
8 group text message thread consisting of Noland, Harris, Sacca, and nonparty Luke Curry
9 (“Curry”).⁶ (*Id.* at 4-5 ¶¶ 7-8.) Of these 7,507 messages, 7,505 were sent between
10 September 2, 2017 and May 16, 2019, with the remaining two sent in August 2019. (*Id.*)
11 All contact between Noland and the SBH Leadership Council (via the WhatsApp thread)
12 ceased on May 16, 2019, while some messages between Sacca and Harris continued. (*Id.*
13 at 4-7 ¶¶ 7-12.) According to the FTC's investigator, Noland's communications with the
14 SBH Leadership Council group chat averaged 20.82 communications per day in 2017,
15 10.03 communications per day in 2018, and 13.80 communications per day in 2019 before
16 all communications on that platform dwindled after May 16, 2019. (*Id.* at 6 ¶¶ 12-14.)
17 Noland and other SBH leaders also exchanged thousands of text messages through similar
18 iOS messaging groups from 2017 to May 16, 2019. (*Id.* at 5-6 ¶¶ 9-11.) As noted, May
19 16, 2019 is when Noland invited the other members of the SBH Leadership Council to
20 install Signal, and from that point forward Noland, Harris, and Sacca encouraged each
21 other and SBH employees and affiliates to use Signal and ProtonMail for “anything
22 sensitive” and “important things.” (*Id.* at 7 ¶ 15, 10 ¶ 16, 12-14 ¶¶ 17-18, 16-18 ¶¶ 21-24.)

23 The FTC asserts that the WhatsApp and iOS messages from before May 16, 2019
24 reveal that the Individual Defendants and their associates discussed relevant matters—
25 including the Individual Defendants' focus on recruiting, substantial income claims, and

26 ⁶ In its moving papers, the FTC asserts that Curry was only part of the SBH
27 Leadership Council group chat until October 2018 (Doc. 259 at 1) but does not attach
28 evidence showing that Curry left the SBH Leadership Council at that time. The FTC's
declaration indicates that Curry remained part of the WhatsApp chat group through 2019.
(Doc. 259-1 at 4-6 ¶¶ 7-11.)

1 actual financial results—on those platforms before the apparent switch to Signal and
2 ProtonMail. (Doc. 259 at 2; Doc. 259-1 at 7-15 ¶¶ 15-20.)

3 On October 30, 2020, after the parties’ counsel became aware of the unavailability
4 of the Individual Defendants’ Signal and ProtonMail messages, the Individual Defendants’
5 counsel sent a letter to 22 SBH employees or affiliates seeking their Signal and/or
6 ProtonMail communications with the Individual Defendants on relevant topics. (Doc. 259-
7 1 at 18-19 ¶¶ 27-28, 47, 61.) Ten responded. (*Id.* at 18-19 ¶¶ 27-28, 49-59.) All said they
8 did not have any Signal or ProtonMail messages to produce. (*Id.* at 49-59.) Several
9 attributed the absence of messages to their use of Signal’s auto-delete feature (*id.* at 51-53,
10 55) or their suspending or clearing of ProtonMail accounts (*id.* at 53, 55).⁷

11 In December 2020, the FTC deposed the Individual Defendants. (*Id.* at 136-43;
12 Doc. 276-1 at 28-29, 38, 46; Doc. 277-1 at 6.) During these depositions, the FTC asked
13 various questions regarding the use of Signal and ProtonMail. (*Id.*) Noland admitted that
14 he installed Signal on his phone on or around May 16, 2019 and, around the same time,
15 asked Harris and Sacca to install Signal on their phones. (Doc. 259-1 at 136.) Harris and
16 Sacca recalled being asked to install Signal and installing it around this time. (Doc 276-1
17 at 38, 46.) Sacca further testified that Noland informed him about receiving the FTC bank
18 subpoena in May 2019. (*Id.* at 48-49.) Noland, Sacca, and Harris also acknowledged that
19 they deleted Signal from the phones just before imaging. (*Id.* at 19-21, 50-51.) Sacca
20 testified that the deletion was part of a coordinated plan between himself, Harris, and
21 Noland. (*Id.* at 50-51.) Noland provided a similar account of the joint plan to delete the
22 app. (*Id.* at 20 [discussing “a conversation with Scott and Tommy” that preceded the
23 deletion].)

24 On January 28, 2021, the FTC filed the motion for sanctions. (Doc. 259.) The
25 motion thereafter became fully briefed. (Docs. 276, 277.)

26 _____
27 ⁷ One of the individuals who responded was Mehler. (Doc. 259-1 at 51.) In his
28 response, Mehler stated: “I also have no communication via proton mail with the
executives regarding SBH business as . . . there was no ‘company business’ to discuss.”
(*Id.*) Mehler did not, in other words, disclose and produce the ProtonMail email that was
apparently sent to him by Noland on May 29, 2020.

1 **DISCUSSION**

2 The FTC seeks an adverse inference against the Individual Defendants pursuant to
3 Rule 37(e)(2) of the Federal Rules of Civil Procedure based on their intentional spoliation
4 of evidence. (Doc. 259 at 13-17.)

5 I. Legal Standard

6 Rule 37(e) was “completely rewritten” in 2015 to “provide[] a nationally uniform
7 standard for when courts can give an adverse inference instruction, or impose equally or
8 more severe sanctions, to remedy the loss of ESI.” *See generally* 1 Gensler, Federal Rules
9 of Civil Procedure, Rules and Commentary, Rule 37, at 1194 (2021). The text of Rule
10 37(e)(2) now provides:

11 If electronically stored information that should have been preserved in the
12 anticipation or conduct of litigation is lost because a party failed to take
13 reasonable steps to preserve it, and it cannot be restored or replaced through
14 additional discovery, the court:

15 . . .

- 16 (2) only upon finding that the party acted with the intent to deprive
17 another party of the information’s use in the litigation may:
 - 18 (A) presume that the lost information was unfavorable to the
19 party;
 - 20 (B) instruct the jury that it may or must presume the
information was unfavorable to the party; or
 - (C) dismiss the action or enter a default judgment.

21 (*Id.*) A court cannot rely on its inherent authority (or state law) when deciding whether
22 sanctions based on the loss of ESI are appropriate—the standards supplied by Rule 37(e)
23 are exclusive. Gensler, *supra*, at 1198. *See also Newberry v. County of San Bernardino*,
24 750 Fed. App’x 534, 537 (9th Cir. 2018) (“The parties framed the sanctions issue as
25 invoking the district court’s inherent authority. However, at the time the sanctions motion
26 was filed, sanctions were governed by the current version of Rule 37(e) . . . [which]
27 therefore foreclose[d] reliance on inherent authority to determine whether terminating
28 sanctions were appropriate.”) (citations and internal quotation marks omitted).

1 A party seeking sanctions under Rule 37(e) has a threshold duty to show that the
2 ESI at issue was, in fact, lost or destroyed. Fed. R. Civ. P. 37(e) advisory committee’s note
3 to 2015 amendment (“The new rule applies only . . . when [ESI] is lost.”). If such a
4 showing has been made, the court must then determine whether “(1) the ESI should have
5 been preserved in the anticipation or conduct of litigation; (2) the ESI is lost because a
6 party failed to take reasonable steps to preserve it; and (3) the ESI cannot be restored or
7 replaced through additional discovery.” *Porter v. City & County of San Francisco*, 2018
8 WL 4215602, *3 (N.D. Cal. 2018) (cleaned up). *See also* Fed. R. Civ. P. 37(e) advisory
9 committee’s note to 2015 amendment (“The new rule applies only if the lost information
10 should have been preserved in the anticipation or conduct of litigation and the party failed
11 to take reasonable steps to preserve it.”).

12 If each of these questions is answered in the affirmative, the next inquiry under Rule
13 37(e)(2) is whether the nonmovant “acted with the intent to deprive another party of the
14 information’s use in the litigation.” *Porter*, 2018 WL 4215602 at *3. Unlike Rule 37(e)(1),
15 Rule 37(e)(2) “does not include a requirement that the court find prejudice to the party
16 deprived of the information. This is because the finding of intent required by the
17 subdivision can support not only an inference that the lost information was unfavorable to
18 the party that intentionally destroyed it, but also an inference that the opposing party was
19 prejudiced by the loss of information that would have favored its position. Subdivision
20 (e)(2) does not require any further finding of prejudice.” Fed. R. Civ. P. 37(e) advisory
21 committee’s note to 2015 amendment.

22 If such intent is found, the Court has discretion to impose any of the sanctions
23 authorized in subsections (e)(2)(A)-(C) (*i.e.*, an adverse inference, an adverse-inference
24 jury instruction, or a terminating sanction). However, “[f]inding an intent to deprive
25 another party of the lost information’s use in the litigation does not require a court to adopt
26 any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the
27 severe measures authorized by this subdivision should not be used when the information
28 lost was relatively unimportant or lesser measures such as those specified in subdivision

1 (e)(1) would be sufficient to redress the loss.” *Id.*

2 “[T]he applicable standard of proof for spoliation in the Ninth Circuit appears to be
3 by a preponderance of the evidence.” *Compass Bank v. Morris Cerullo World Evangelism*,
4 104 F. Supp. 3d. 1040, 1052-53 (S.D. Cal. 2015). *See also Singleton v. Kernan*, 2018 WL
5 5761688, *2 (S.D. Cal. 2018) (“A party seeking sanctions for spoliation of evidence has
6 the burden of establishing [spoliation of non-electronic records] by a preponderance of the
7 evidence[.]”). The Court is the appropriate finder of fact on a Rule 37(e) motion. *Mannion*
8 *v. Ameri-Can Freight Sys. Inc.*, 2020 WL 417492, *4 (D. Ariz. 2020). *See also Adriana*
9 *Int’l Corp. v. Thoeren*, 913 F.2d 1406, 1408 (9th Cir. 1990) (“The imposition of discovery
10 sanctions pursuant to [Rule 37] is reviewed for abuse of discretion. Absent a definite and
11 firm conviction that the district court made a clear error in judgment, this court will not
12 overturn a Rule 37 sanction. Findings of fact related to a motion for discovery sanctions
13 are reviewed under the clearly erroneous standard. If the district court fails to make factual
14 findings, the decision on a motion for sanctions is reviewed de novo.”) (citations omitted).

15 II. Analysis

16 A. **Whether ESI Was Lost**

17 1. Signal

18 It is undisputed that the Individual Defendants deleted the Signal app and Signal
19 messages. (Doc. 230 at 2; Doc. 259-1 at 139-40, 143, 148; Doc. 276 at 1; Doc. 277-1 at
20 6.) It is also undisputed that the Individual Defendants used Signal to communicate about
21 SBH business. (*See, e.g.*, Doc. 259-1 at 13 ¶ 18, 138-41; Doc. 276 at 1-2; Doc. 276-1 at
22 12-14.) For example, during his December 2020 deposition, Noland stated that he
23 communicated or likely communicated with Harris, Sacca, and various “Staff members”
24 on Signal. (Doc. 159-1 at 138.) Noland also acknowledged that he discussed SBH business
25 on Signal “from time to time.” (*Id.*) He further admitted that he continued to use Signal
26 after the TRO in this case was issued. (*Id.* at 139.)

27 The parties disagree about the precise mechanism by which the Signal messages
28 were lost. The Individual Defendants assert that they used Signal’s “auto-delete” feature,

1 meaning messages would disappear from users’ devices shortly after they were read by the
2 recipient. (Doc. 276 at 1-2; Doc. 276-1 at 18-19.) The FTC sounds a note of skepticism
3 about the Individual Defendants’ use of auto-delete because the Individual Defendants
4 belatedly offered this explanation for the loss of the messages “[w]eeks after admitting to
5 deleting the Signal apps.” (Doc. 259 at 11 n.5.) The FTC also considers this explanation
6 “implausible” for a variety of reasons (Doc. 277 at 4-6) but argues that, regardless of
7 whether the auto-delete function was enabled, the bottom line is that the Individual
8 Defendants caused ESI to be lost. (*Id.* at 4, 8-9.)

9 The Court agrees with the FTC that, for the purposes of the threshold inquiry of
10 whether any ESI was lost, it is irrelevant whether the Signal messages were lost in one fell
11 swoop in August 2020 (when the Individual Defendants deleted the Signal app) or whether
12 the loss occurred on a continuous basis from May 2019 through August 2020 (due to the
13 Individual Defendants’ choice to turn on Signal’s auto-delete feature). Regardless of how
14 and when it occurred, Signal-related ESI was lost. *Cf. DR Distributors, LLC v. 21 Century*
15 *Smoking, Inc.*, 513 F. Supp. 3d 839, 931-33 (N.D. Ill. 2021) (“[A]utodelete functionality is
16 and has been a near ubiquitous feature in programs and email services that produce ESI,
17 leading to a phalanx of publications warning litigators of the need to clearly and adequately
18 inform their clients to investigate and turn off autodelete functions as part of their litigation
19 hold processes. It follows that in cases involving ESI, to satisfy their preservation duties,
20 parties must investigate and disable autodelete functions on email accounts (client and
21 web-based) at the onset of litigation if those accounts reasonably contain relevant
22 information and it is reasonable under the circumstances of the case to do so. . . . [P]arties
23 that ignore their obligations to reasonably investigate the possibility of or disregard
24 autodelete functions run the risk of destroying relevant evidence and visiting prejudice
25 upon their litigation adversaries, thereby earning sanctions.”); The Sedona Conference, *The*
26 *Sedona Conference Primer on Social Media, Second Edition*, 20 Sedona Conf. J. 1, 90-91
27 (2019) (“A client’s use of ephemeral messaging for relevant communications after a duty
28 to preserve has arisen may be particularly problematic, as it would have the potential to

1 deprive adversaries and the court of relevant evidence.”)

2 2. ProtonMail

3 The FTC asserts that it uncovered a May 2020 email from Noland’s ProtonMail
4 account providing instructions for declarations to be submitted to the Court in this action.
5 (Doc. 228-2 at 3 ¶ 5, 8; Doc. 259 at 10 & n.3.) During meet-and-confer correspondence in
6 October 2020, in response to questions about why the Individual Defendants had not
7 produced this email, the Individual Defendants’ counsel admitted that Noland deleted it.
8 (Doc. 228-2 at 29.) And in their response to the FTC’s motion for sanctions, the Individual
9 Defendants again admit that Noland deleted it. (Doc. 276 at 3 n.3 [“Noland . . . deleted at
10 least one post-TRO email from his new [ProtonMail] account”].)

11 Given this backdrop, it is clear that ProtonMail ESI was lost. Although the parties
12 disagree about whether the loss extended beyond the May 2020 email, it is undisputed that
13 at least one email was lost (although another version was found through other channels).⁸

14 **B. Duty To Preserve**

15 Sanctions are available under Rule 37(e) only if the loss of ESI occurred at a time
16 when litigation was pending or reasonably foreseeable. Fed. R. Civ. P. Rule 37(e),
17 advisory committee’s note to 2015 amendment (“The new rule applies only if the lost
18 information should have been preserved in the anticipation or conduct of litigation
19 Many court decisions hold that potential litigants have a duty to preserve relevant
20 information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-
21 law duty; it does not attempt to create a new duty to preserve. The rule does not apply
22 when information is lost before a duty to preserve arises.”). Further, the ESI must have
23 been foreseeably relevant to the pending or foreseeable litigation. *Id.* (“Courts should
24 consider the extent to which a party was on notice that litigation was likely *and that the*
25 *information would be relevant.*”) (emphasis added).

26 ...

27
28 ⁸ The Court clarifies that, even if the FTC hadn’t proved the loss of any ProtonMail
ESI, it would impose an adverse-inference sanction based on the loss of Signal ESI.

1 1. Reasonable Foreseeability Of Litigation

2 As the Ninth Circuit has explained, parties “engage in spoliation of documents as a
3 matter of law only if they had ‘some notice that the documents were potentially relevant’
4 to the litigation before they were destroyed.” *United States v. Kitsap Physicians Serv.*, 314
5 F.3d 995, 1001 (9th Cir. 2002) (citation omitted). “This is an objective standard, asking
6 not whether the party in fact reasonably foresaw litigation, but whether a reasonable party
7 in the same factual circumstances would have reasonably foreseen litigation.” *Waymo LLC*
8 *v. Uber Techs., Inc.*, 2018 WL 646701, *14 (N.D. Cal. 2018) (internal quotation marks
9 omitted). The reasonable foreseeability of litigation “is a flexible fact-specific standard
10 that allows a district court to exercise the discretion necessary to confront the myriad
11 factual situations inherent in the spoliation. This standard does not trigger the duty to
12 preserve documents from the mere existence of a potential claim or the distant possibility
13 of litigation. However, it is not so inflexible as to require that litigation be ‘imminent, or
14 probable without significant contingencies.’” *Id.* at *15 (quoting *Micron Tech., Inc. v.*
15 *Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011)).

16 The FTC argues the Individual Defendants’ preservation obligations arose in May
17 2019, when they became aware of the FTC’s investigation. (Doc. 259 at 14 n.7.)
18 Alternatively, the FTC argues the obligation arose no later than mid-January 2020, when
19 they were served with the TRO. (*Id.* 14.) In response, the Individual Defendants argue
20 that, although they learned about the FTC’s investigation in May 2019, they believed this
21 investigation had concluded (due to the FTC’s rejection of Noland’s offer to cooperate).
22 (Doc. 276 at 2-3.) The Individual Defendants do not address the propriety of continuing
23 to erase Signal messages (and at least one ProtonMail email) after the TRO and preliminary
24 injunction were entered. (*Id.*) The FTC replies that the Individual Defendants have
25 admitted, at a minimum, that they violated their post-TRO preservation obligations, which
26 encompass the duty to preserve any pre-TRO communications that were still available.
27 (Doc. 277 at 4; *see also* Doc. 259 at 13-14 [“From the date of the TRO, Defendants had an
28 obligation to preserve their SBM-related Signal and ProtonMail communications, both pre-

1 and post-TRO.”].)

2 The Court concludes that the Individual Defendants’ document preservation
3 obligations arose on May 29, 2019, when the FTC responded to Noland’s counsel’s email
4 by stating that Noland “and the company should suspend any ordinary course destruction
5 of documents, communications, and records.” (Doc. 259-1 at 44.) Although Noland
6 contends he subjectively believed the FTC’s rejection of his offer to cooperate signaled
7 that the investigation against him (and SBH) was closed, that was not an objectively
8 reasonable conclusion under the circumstances. Noland was aware that the FTC had
9 recently subpoenaed his bank records and was aware that the FTC had unambiguously
10 requested the suspension of document destruction. Additionally, Noland was aware that
11 he remained subject to the consent order arising from a previous FTC enforcement action,
12 *FTC v. Netforce Seminars*. (See generally Doc. 177 at 15 n.7.) It would be objectively
13 unreasonable, under these circumstances, to conclude that litigation is not probable and
14 that the retention of evidence is not required. *Cf. Blazer v. Gall*, 2019 WL 3494785, *3
15 (D.S.D. 2019) (“The clearest signal of impending litigation came when Blazer’s [attorney]
16 . . . emailed an explicit request to Sheriff Boll for the production or preservation of any
17 recordings of Blazer While defendants posit that [the] email was not worded harshly
18 enough to trigger a duty to preserve, the email’s courteous phrasing does not nullify its
19 effectiveness as an indicator of impending litigation.”); *O’Berry v. Turner*, 2016 WL
20 1700403, *3 (M.D. Ga. 2016) (“Here, the duty to preserve the driver’s log and additional
21 PeopleNet data arose at the very latest when Mr. Helms faxed a spoliation letter to
22 ADM[.]”); *Sampson v. City of Cambridge*, 251 F.R.D. 172, 181 (D. Md. 2008) (“It is clear
23 that defendant had a duty to preserve relevant evidence that arose no later than June 26,
24 2006, when plaintiff’s counsel sent the letter to defendant requesting the preservation of
25 relevant evidence, including electronic documents. At that time, although litigation had
26 not yet begun, defendant reasonably should have known that the evidence described in the
27 letter may be relevant to anticipated litigation.”) (internal quotation marks omitted).⁹

28 ⁹ Indeed, a duty to preserve may arise even where no preservation request has issued.
Clear-View Techs., Inc. v. Rasnick, 2015 WL 2251005, *1 (N.D. Cal. 2015) (“At times, a

1 At any rate, the availability of sanctions under Rule 37(e)(2) does not turn on
2 whether the Individual Defendants’ preservation obligations arose in May 2019 or January
3 2020. It is undisputed that the Individual Defendants’ destruction of evidence continued
4 after January 2020—after this date, Signal messages continued to be sent (and deleted), the
5 May 2020 ProtonMail email from Noland to Mehler was sent and deleted, and the
6 Individual Defendants worked together to delete the Signal app in coordinated fashion.

7 2. Reasonable Foreseeability Of The Relevance Of The Signal And
8 ProtonMail Messages

9 The FTC acknowledges that the relevance of the lost ESI cannot be definitively
10 ascertained (because it no longer exists) but argues that, in such circumstances, the
11 Individual Defendants cannot assert any presumption of irrelevance. (Doc. 259 at 16-17.)
12 The Individual Defendants respond that much, if not all, of the missing ESI is irrelevant.
13 (Doc. 276 at 2-4.) First, they argue that the information lost when they deleted Signal was
14 limited to the identities and contact lists of the persons with whom they communicated via
15 the app and that such information “is not relevant and certainly not irretrievable.” (*Id.* at
16 2.) They also dispute the relevance of their post-TRO communications (but not, it appears,
17 their pre-TRO communications) on the ground that “the overwhelming majority of
18 evidence” in this case is public. (*Id.* at 3-4.) The FTC replies that the Individual
19 Defendants do not dispute that the deleted messages included discussion of relevant matters
20 such as SBH’s recruiting focus and income claims and that the Individual Defendants “do
21 not get to pick the evidence that they think is sufficient for the FTC and then destroy the
22 rest.” (Doc. 277 at 11.)

23 The FTC has the better side of these arguments. Noland admitted that he discussed
24 SBH business matters on Signal “from time to time.” (Doc. 259-1 at 138.) Similarly,
25 Sacca admitted that he used Signal to discuss SBH business. (Doc. 276-1 at 45.) This
26 testimony, standing alone, strongly suggests that the deleted ESI was at least “potentially

27 _____
28 defendant’s duty to preserve arises when plaintiff’s counsel provides a defendant with
notice to preserve relevant evidence. However, a future litigant need not make such a
request”) (footnote omitted).

1 relevant to the litigation.” *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006). At
2 any rate, “because the relevance of destroyed documents cannot be clearly ascertained
3 because the documents no longer exist, a party can hardly assert any presumption of
4 irrelevance as to the destroyed documents.” *Id.* (cleaned up). *See also Rasnick*, 2015 WL
5 2251005 at *8 (“[T]he law presumes that spoliated evidence goes to the merits of the case
6”) (internal quotation marks omitted).

7 The lone deleted ProtonMail email that has been recovered further bolsters this
8 conclusion. In that email, Noland asked Mehler to persuade SBH affiliates—that is,
9 potential witnesses in this case—to make exculpatory representations about the purpose of
10 the company, how Affiliates earn income from SBH, the absence of misrepresentations,
11 and the like. (Doc. 228-2 at 8.) These topics are relevant to this litigation.¹⁰ This raises
12 an inference that other lost ESI addressed relevant topics, too. *Cf. Youngevity Int’l v. Smith*,
13 2020 WL 7048687, *3 (S.D. Cal. 2020) (inferring spoliated text messages were relevant
14 where the messages “were exchanged during periods significant to this litigation” and the
15 text messages that had been produced were relevant).

16 The foreseeable relevance of the Signal and ProtonMail messages is also established
17 by circumstantial evidence. For example, the FTC has submitted evidence establishing
18 that the Individual Defendants’ pre-May 2019 communications via WhatsApp and iOS (on
19 the SBH Leadership Council group chat and more generally) covered a variety of relevant
20 topics. Then, in May 2019, almost immediately after learning they were under
21 investigation by the FTC, the Individual Defendants started using Signal and ProtonMail
22 and encouraged others to do so as well. Starting at the exact same time, the Individual
23

24 ¹⁰ Courts have sharply criticized the practice of secretly providing a script for third-
25 party witnesses to follow during depositions or when drafting declarations. *Innospan Corp.*
26 *v. Intuit Inc.*, 2011 WL 2669465, *2-3 (N.D. Cal. 2011); *Hogan v. Higgins*, 2008 WL
27 3200252, *3 (E.D.N.Y. 2008) (where plaintiff’s counsel wrote a detailed letter to a non-
28 party witness that set forth the plaintiff’s theory of the case and asked the witness to offer
testimony consistent with it, observing that “[t]he letter is, conservatively construed, a
blatant attempt to coach a witness, and may reasonably be understood as an attempt to
persuade a witness to change his testimony”). Although the Court reaches no conclusions
about whether Noland’s May 2020 email to affiliates (via Mehler) constituted such a script,
the optics are concerning.

1 Defendants' WhatsApp and iOS communications, on relevant topics or otherwise,
2 dwindled to almost nothing. The reasonable inference to be drawn from these undisputed
3 facts is that the Individual Defendants continued their discussions of relevant matters on
4 Signal and ProtonMail after switching over to those apps. The alternative inference—that
5 the Individual Defendants simply stopped communicating about anything related to their
6 business on any text-messaging platform, at the same time that they installed an encrypted
7 messaging service for the purpose of discussing “anything sensitive” and “important
8 matters”—strains credulity.

9 The FTC has thus carried its burden of showing the reasonably foreseeable
10 relevance of the destroyed ESI to this litigation.

11 C. Reasonable Steps To Preserve

12 The parties do not dispute that the Individual Defendants failed to take reasonable
13 steps to preserve the deleted communications. The Individual Defendants admit that they
14 “uninstalled the Signal messaging application just prior to having their phones forensically
15 imaged” (Doc. 276 at 1); that “Noland did not preserve some emails from an account that
16 was created after the temporary restraining order” (*id.*); and that “the un-installation of
17 Signal was intentional” (*id.* at 4). (*See also* Doc. 259-2 at 2 [Receiver’s Declaration].).

18 These admissions, coupled with the evidence outlined above, establish that the
19 Individual Defendants failed to take reasonable steps to preserve the Signal and ProtonMail
20 messages. This is true irrespective of whether the messages were lost because of
21 intentional deletion, through the intentional use of an auto-delete function, or some
22 combination thereof. *Cf. Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226, 233-34 (D.
23 Minn. 2019) (“There is no doubt that Staley and Wilson are the types of persons likely to
24 have relevant information, given their status as principals of RMA and owners of
25 Deliverance. Nor can there be any reasonable dispute as to the fact that their text messages
26 were likely to contain information relevant to this litigation. . . . Thus, the RMA
27 Defendants were required to take reasonable steps to preserve Staley and Wilson’s text
28 messages. The RMA Defendants did not do so. [They] did not suspend the auto-erase

1 function on their phones . . . [and it] takes, at most, only a few minutes to disengage the
2 auto-delete function on a cell phone. . . . Failure to follow [such] simple steps . . . alone is
3 sufficient to show that Defendants acted unreasonably.”); *Youngevity*, 2020 WL 7048687
4 at *2 (“Defendants’ failure to prevent destruction by backing up their phones’ contents or
5 disabling automatic deletion functions was not reasonable because they had control over
6 their text messages and should have taken affirmative steps to prevent their destruction
7 when they became aware of their potential relevance.”).

8 D. Replaceability

9 The next question under Rule 37(e) is whether the lost discovery “can[] be restored
10 or replaced through additional discovery.”

11 The FTC argues that the lost ESI is irreplaceable, because the deletion of the
12 messages and Signal app “leaves no way to recover them,” and further argues that although
13 the FTC and Individual Defendants’ counsel worked together to attempt to retrieve the
14 missing materials, those efforts were unsuccessful. (Doc. 259 at 17-18.) The Individual
15 Defendants do not dispute these points, acknowledging that the “forensic expert attempted
16 to recover the Signal data and could not.” (Doc. 276 at 2.) Of note, the Individual
17 Defendants’ counsel contacted 22 persons affiliated with SBH and asked them if they had
18 any ProtonMail or Signal communications with the Individual Defendants. (Doc. 259-1 at
19 46-61.) The 10 responding parties reported that they did not have any ProtonMail or Signal
20 communications with the Individual Defendants¹¹ on their devices. (*Id.* at 49-59.)¹¹

21
22 ¹¹ The Individual Defendants argue that these persons’ failure to identify any
23 responsive Signal or ProtonMail communications “supports the individual defendants’
24 position that they were using the auto-delete feature, and did not intentionally (or in
25 actuality) destroy relevant evidence they were under a duty to preserve.” (Doc. 276 at 2.)
26 This argument is unpersuasive. The responding persons did not uniformly assert that they
27 had been using the auto-delete feature, instead often stating, without elaboration, that they
28 simply did not have any records of communications with the Individual Defendants in their
Signal or ProtonMail platforms. (*See, e.g.*, Doc. 259-1 at 49.) Further, only 10 out of 22
persons responded—the parties and the Court thus remain unaware of whether relevant
communications might be found on the remaining 12 persons’ devices. Finally, many of
the relevant communications likely would have been exchanged between the Individual
Defendants. That the 10 persons who responded had no relevant messages says nothing
about whether there may have been relevant communications between the Individual
Defendants.

1 The Court finds that the lost messages cannot be restored or replaced through
2 additional discovery.

3 **E. Finding Of Prejudice Unnecessary**

4 The FTC seeks sanctions under Rule 37(e)(2). (Doc. 259 at 13-17.) That provision,
5 unlike Rule 37(e)(1), does not require a finding of prejudice to another party from loss of
6 the information: “Rule 37(e)(2) does not require that the court find prejudice to the party
7 deprived of the information. While the common law spoliation tests often required a
8 showing of prejudice for the types of severe sanctions covered by Rule 37(e)(2), the
9 Advisory Committee determined that there was no need to require a specific showing of
10 prejudice once a finding of intent to deprive had been made.” 1 Gensler, *supra*, Rule 37,
11 at 1203.

12 Thus, the Individual Defendants’ argument that the FTC has not shown it was
13 prejudiced by the loss of information (Doc. 276 at 3-4) is unavailing. Rule 37(e)(2) does
14 not require a finding of prejudice “because the finding of intent required by the subdivision
15 can support not only an inference that the lost information was unfavorable to the party
16 that intentionally destroyed it, but also an inference that the opposing party was prejudiced
17 by the loss of information that would have favored its position.” Fed. R. Civ. P. 37(e),
18 advisory committee’s note to 2015 amendment. The Court addresses potential prejudice,
19 however, when discussing the appropriate sanction.

20 **F. Intent To Deprive**

21 i. The Parties’ Arguments

22 The parties dispute whether the Individual Defendants’ use of Signal and
23 ProtonMail, and subsequent concealment and deletion of Signal and ProtonMail
24 communications, constitute sufficient evidence of intent to deprive the FTC of these
25 communications. (Doc. 259 at 15-16; Doc. 276 at 4.) The Individual Defendants assert
26 that they switched from WhatsApp and iOS to Signal in May 2019 for an innocent reason—
27 to avoid the hacking, eavesdropping, and infiltration efforts of former SBH associate Luke
28

1 Curry¹² and “a small group of saboteurs.” (Doc. 276 at 3.)¹³ The FTC argues this
2 explanation is implausible. (Doc. 259 at 8 n.2.) The FTC’s investigator ran searches in
3 the Individual Defendants’ document productions and found no communications
4 suggesting that the Individual Defendants were concerned about hacking or other
5 interference from Luke Curry in or around May 2019. (Doc. 259-1 at 21-22 ¶¶ 35-37.)
6 Further, when later asked about the motivation to install Signal, Harris did not mention
7 Luke Curry or any other specific hacking concerns—instead, he more generally stated that
8 the Individual Defendants “wanted to make sure we had whatever was the most secure at
9 the time to be able to – sometimes we send things like a copy of a driver’s license or
10 someone asks for a Social Security number or we send pictures of our kids and things like
11 that.” (*Id.* at 147-48.) Harris did, however, recall that at an unspecified time Noland raised
12 concerns that the company and Noland’s personal phone were being hacked and mentioned
13 that Luke Curry or his associates were responsible. (*Id.* at 148.) Sacca testified that he
14 began to have concerns that his phone was hacked as early as 2016 or 2017 and that he was
15 the person who strongly urged additional cyber and in-person security measures in light of
16 the Luke Curry imbroglio. (Doc. 276-1 at 46-47.) Lina Noland also testified that hacking
17 concerns tied to SBH’s problems with Luke Curry motivated the installation of Signal.

18
19 ¹² The Individual Defendants obtained, by default, a preliminary injunction against
20 Curry in Nevada state court in December 2018. (Doc. 276-1 at 53-55.) The preliminary
21 injunction prevents Curry from advertising, promoting, or selling SBH competitor
22 products; advertising, promoting, or selling SBH products; and making or disseminating
23 disparaging remarks about any aspect of SBH, including SBH personnel. (*Id.* at 54.)

24 ¹³ During his December 2020 deposition, Noland provided the following explanation
25 for why he chose to install the Signal app in May 2019: “Best I can remember, we were
26 being – we were being – we were being attacked by different people that Luke Curry was
27 stirring up, and it seemed to be some hacking going on. So we wanted to be able to try to
28 help, you know, secure some of our messaging with the different attacks that were going
on.” (Doc. 259-1 at 136.) Noland continued: “Like I said, that’s when we started noticing
some issues that were going on with our phones. It seemed like – it just started ramping
up more and more. We thought it was going to die down once we sued Luke in the Nevada
court. We thought that that would – and he had a temporary restraining order on him, and
then he had a preliminary injunction on him from the Nevada state court. . . . So we
thought, with those measures from a judge – from a state judge, that maybe that would
quiet some of that noise down, and it seemed to for a little bit period of time, and then it
started to ramp back up. And then it looked like, as we got into the spring, the attacks
started to ramp up.” (*Id.* at 137.) Noland testified that the same reasons motivated him to
start using ProtonMail. (*Id.* at 140-41.)

1 (Doc. 276-1 at 29-30, 32.)

2 As for Noland’s failure to disclose his ongoing use of Signal and ProtonMail during
3 his February 2020 deposition, Noland contends that he was attempting to provide this
4 information when he was cut off by the FTC’s counsel. (Doc. 259-1 at 141-42.) The FTC
5 asserts that this explanation is implausible. (Doc. 259 at 12.)

6 As for the Individual Defendants’ deletion of the Signal app in August 2020, they
7 contend it was justified because they didn’t want the FTC to learn the names of the
8 individuals who have been donating to their legal defense in this case. (Doc. 276 at 1-2;
9 Doc. 259-1 at 140, 148; Doc. 276-1 at 50-51.) The FTC argues this explanation is
10 implausible because “Defendants do not explain how a mere list of contacts and a phone
11 log would somehow have revealed to the FTC who donated money to them.” (Doc. 277 at
12 7.) Further, the FTC argues, at other points in this litigation the Individual Defendants
13 have represented that they don’t know the identity of their donors, so it is inconsistent for
14 them to aver that they don’t know their donors’ identities while simultaneously positing
15 that they needed to delete Signal to protect those unknown persons’ identities. (*Id.* at 7-8.)

16 ii. Analysis

17 The FTC has easily carried its burden of showing that the Individual Defendants
18 acted with the intent to deprive the FTC of the information contained in the Signal and
19 ProtonMail messages. The most decisive factor is the timing of the installation and use of
20 Signal and ProtonMail. The Individual Defendants installed these apps in late May 2019,
21 *one day* after Noland discovered the FTC was investigating him and SBH. The Individual
22 Defendants would have the Court believe this timing was a coincidence—they happened
23 to install elaborate encrypted privacy-focused apps immediately after discovering they
24 were the subject of an FTC investigation because, around that same time, they noticed
25 hacking attempts from Curry and his fellow “saboteurs.” This explanation is incredible.
26 Apart from the Individual Defendants’ testimony, there is no documentary or other
27 evidence supporting the notion that the Individual Defendants were being hacked at this
28 time. (Doc. 259-1 at 21-22 ¶¶ 35-37.)

1 The plausibility of this explanation is further undermined by Noland’s failure to
2 disclose the existence of the Signal or ProtonMail accounts during his February 2020
3 deposition, despite being asked targeted questions on this exact topic. If the switch to these
4 accounts was part of an innocuous effort to avoid hacking, Noland could have easily said
5 so. His failure to do so raises the inference that the motivation for switching to the accounts
6 was more nefarious. *Herzig v. Ark. Found. for Med. Care, Inc.*, 2019 WL 2870106, *4-5
7 (W.D. Ark. 2019) (concluding, where the plaintiffs “install[ed] and [began] using the
8 Signal application on their mobile devices” after the dispute arose, and used the Signal
9 application to engage in “numerous responsive communications with one another and with
10 other AFMC employees,” yet provided an “initial misleading response . . . that [they] had
11 no responsive communications” and “did not disclose that they had switched to [Signal]
12 until discovery was nearly complete,” that the plaintiffs had engaged in “intentional, bad-
13 faith spoliation of evidence” that constituted “an abuse of the judicial process” and
14 “warrants a sanction”).

15 The Court also rejects the Individual Defendants’ proffered justification for
16 Noland’s failure to disclose the Signal and ProtonMail accounts during his deposition (*i.e.*
17 he was confused and/or got cut off by the FTC’s counsel). The deposition transcript
18 contains no evidence of confusion or an interruption, Noland also failed to disclose the
19 accounts in response to a later question about encrypted communications, and Noland made
20 no effort to correct the transcript after the deposition was complete.

21 The content of the ProtonMail email from May 2020, which the FTC lucked into
22 discovering despite Noland’s efforts to destroy it, serves as further circumstantial proof
23 that the Individual Defendants’ evidence-destruction efforts were not innocuous. 1
24 Gensler, *supra*, Rule 37 at 1202 (“[A] court can find intent to deprive based on
25 circumstantial evidence.”). As discussed elsewhere in this order, the May 2020 email can
26 be construed as an attempt to shape the testimony of third-party witnesses on the key
27 disputed issues in this case. If the evidence being destroyed was potentially harmful to the
28 Individual Defendants’ case, it is reasonable to infer that their motivations for destroying

1 it were not innocuous.

2 Finally, the coordinated deletion of the Signal app from the Individual Defendants’
3 phones in August 2020, just as the phones were about to be turned over for imaging, is the
4 *pièce de résistance*. Notably, the Individual Defendants took this step without the
5 knowledge or approval of their counsel. This was an outrageous maneuver that raises a
6 strong inference of bad faith. *Cf. Ala. Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730,
7 746 (N.D. Ala. 2017) (“No credible explanation has been given as to why they departed
8 from the . . . protocols and intentionally deleted Blake’s information. . . . This type of
9 unexplained, blatantly irresponsible behavior leads the court to conclude that Boeing acted
10 with the intent to deprive . . .”).

11 This inference is not undermined, in any way, by the Individual Defendants’
12 proffered justification for their coordinated deletion effort (*i.e.*, they wanted to prevent the
13 FTC from learning the identify of their donors). As an initial matter, this explanation
14 makes no sense. If, as Noland testified, the Signal app was set on “auto-delete,” then the
15 only information the FTC could have extracted from the Signal apps on the Individual
16 Defendants’ phones was their contact lists and call logs—the content of any messages
17 would have already been deleted. But seeing a contact list and/or call log would not, on its
18 own, tell the FTC anything about which of the Individual Defendants’ contacts were
19 donating to their legal defense. Further, the Individual Defendants have asserted ignorance
20 as to these persons’ identities. If the Individual Defendants are unaware of this
21 information, how could the FTC have gleaned it from a mere examination of their call logs
22 and contact lists? More important, putting aside these logical contradictions, the Individual
23 Defendants “donor protection” defense fails for the more fundamental reason that they
24 were not entitled to take it upon themselves to delete the entire Signal app (which contained
25 at least some discoverable, relevant information) simply because they didn’t want the FTC
26 to have access to other non-privileged information that might be found in the app.

27 **G. Adverse Inference**

28 The FTC seeks an inference that the spoliated evidence is presumed to be

1 unfavorable to the Individual Defendants. (Doc. 259 at 19-20.) The Individual Defendants
2 object to this adverse inference as “yet to be articulated.” (Doc. 276 at 4.) They also assert
3 that the FTC’s motion goes to witness credibility more than the loss of potentially relevant
4 evidence, so the FTC’s interests can be vindicated through cross-examination rather than
5 an adverse inference. (*Id.* at 3-4.) Finally, they emphasize that the prejudice to the FTC is
6 minimal because “this case concerns claims of false and misleading marketing and a
7 fraudulent compensation plan” and “the overwhelming majority of evidence in this case is
8 public knowledge or in the FTC’s possession.” (*Id.* at 4.)

9 It is true that “the severe measures authorized by [Rule 37(e)(2)] should not be used
10 when the information lost was relatively unimportant or lesser measures such as those
11 specified in subdivision (e)(1) would be sufficient to redress the loss.” Fed. R. Civ. P.
12 37(e) advisory committee’s note to 2015 amendment. Nevertheless, the Court concludes
13 that the requested adverse-inference sanction is appropriate. As explained above, it is
14 likely that the deleted Signal and ProtonMail communications addressed matters relevant
15 to this litigation. Further, the Individual Defendants’ conduct violated not only Rule 37(e),
16 but also the MIDP (Doc. 14 at 8); the TRO (Doc. 38 at 21), and the preliminary injunction
17 (Doc. 109 at 17). These violations raise the possibility of Rule 37(b)(2) sanctions,
18 including the drawing of an adverse inference. *See generally Nyerges v. Hillstone Rest.*
19 *Grp. Inc.*, 2021 WL 3299625, *8-17 (D. Ariz. 2021).

20 To the extent the Individual Defendants’ position is that the relevant evidence they
21 destroyed in violation of the Court’s orders was insufficiently prejudicial to warrant an
22 adverse-inference sanction, this argument lacks merit. The information lost does not
23 appear to have been “relatively unimportant” and lesser remedies would be insufficient
24 under the circumstances. Indeed, courts have suggested that even stronger sanctions than
25 those sought here by the FTC may be permissible to address analogous misconduct. *See,*
26 *e.g., WeRide Corp. v. Kun Huang*, 2020 WL 1967209, *9 (N.D. Cal. 2020) (“The amount
27 of spoliation that AllRide concedes is staggering. AllRide admits that it kept its company-
28 wide policy of deleting from its server all emails older than 90 days until months after the

1 preliminary injunction issued . . . and that its employees began communicating with
2 DingTalk’s ephemeral messaging feature after the preliminary injunction issued. Based on
3 these undisputed facts, the Court finds it appropriate to issue terminating sanctions.”);
4 *Paisley Park Enterprises*, 330 F.R.D. at 233-34 (“Failure to [turn off the auto-delete
5 function] . . . alone is sufficient to show that Defendants acted unreasonably. But that is
6 not all the RMA Defendants did and did not do. Most troubling of all, they wiped and
7 destroyed their phones after Deliverance and RMA had been sued, and, in the second
8 instance for Wilson, after the Court ordered the parties to preserve all relevant electronic
9 information, after the parties had entered into an agreement regarding the preservation and
10 production of ESI, and after Plaintiffs had sent Defendants a letter alerting them to the fact
11 they needed to produce their text messages. As Plaintiffs note, had Staley and Wilson not
12 destroyed their phones, it is possible that Plaintiffs might have been able to recover the
13 missing text messages by use of the ‘cloud’ function or through consultation with a
14 software expert. But the content will never be known because of Staley and Wilson’s
15 intentional acts. . . . This is even more egregious because litigation had already
16 commenced.”). Accordingly, a general adverse inference is proper. *Cf. Moody v. CSX*
17 *Transportation, Inc.*, 271 F. Supp. 3d 410, 432 (W.D.N.Y. 2017) (imposing adverse
18 inference sanction when evidence was spoliated with intent to deprive); *Ala. Aircraft*, 319
19 F.R.D. at 746-47 (same).

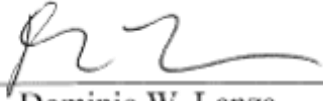
20 Finally, the Individual Defendants suggest that this matter “can better be addressed
21 through an evidentiary hearing.” (Doc. 276 at 1.) However, the Individual Defendants
22 make no effort to identify the evidence they would attempt to submit during such a hearing
23 or explain how it would differ from the voluminous evidence already submitted by the
24 parties in relation to the FTC’s motion. No evidentiary hearing is required in these
25 circumstances. *Cf. Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1164-
26 65 (9th Cir. 2003) (“Paladin is correct that Rule 37(c)(1) permits a court to impose
27 sanctions only ‘after affording an opportunity to be heard.’ However, conforming to the
28 rule does not require an evidentiary hearing in every case. . . . Here, Paladin received notice

1 of the possibility of sanctions when MPC filed its motions for costs. It was afforded the
2 opportunity to respond, and did indeed do so by filing a responsive brief. Given that the
3 issues were such that an evidentiary hearing would not have aided its decision making
4 process, the district court did not abuse its discretion in proceeding without an evidentiary
5 hearing after briefing.”).

6 Accordingly,

7 **IT IS ORDERED THAT** the FTC’s motion for sanctions (Doc. 259) is **granted**.

8 Dated this 30th day of August, 2021.

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13 Dominic W. Lanza
14 United States District Judge
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Kristin Fast,

10 Plaintiff,

11 v.

12 GoDaddy.com LLC, et al.,

13 Defendants.

No. CV-20-01448-PHX-DGC

ORDER

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15
16 Defendants GoDaddy.com, LLC (“GoDaddy”) and Thyagi Lakshmanan have filed
17 a motion for sanctions under Federal Rule of Civil Procedure 37(c)(1) and (e). Doc. 93.
18 The motion is fully briefed (Docs. 93, 96, 101, 113, 115) and the Court heard oral
19 arguments on December 16, 2021. For reasons stated below, the Court will grant
20 Defendants’ motion in part.¹

21 **I. Background.**

22 In February 2018, while Plaintiff was employed by GoDaddy, she injured her knee
23 in a skiing accident and underwent surgery. Plaintiff alleges that she was pressured to
24 return to work prematurely following her surgery and, as a result, developed Complex
25 Regional Pain Syndrome (“CRPS”), a debilitating physical condition. Plaintiff’s job later
26 was eliminated, and she alleges that GoDaddy retained male employees with less technical

27
28 ¹ When the Court ordered briefing on Defendants’ motion, it directed the parties to request an evidentiary hearing if they thought it necessary. Doc. 86. No party requested such a hearing.

1 skill despite its assertion that she was terminated for lacking technical skill. Plaintiff asserts
2 claims for sex and disability discrimination and Family Medical Leave Act (“FMLA”)
3 retaliation.

4 The periods for fact and expert discovery in this case have closed. Defendants claim
5 that Plaintiff knowingly deleted relevant information from her electronic devices and
6 accounts and failed to produce other relevant information in a timely fashion. They seek
7 sanctions under Rule 37(e) for spoliation of electronically stored information (“ESI”) and
8 sanctions under Rule 37(c)(1) for failure to produce relevant information.

9 **II. Legal Standards.**

10 **A. Rule 37(e).**

11 Rule 37(e) was completely revised in 2015 and sets the standards for sanctions
12 arising from the spoliation of ESI. The Court will apply the rule to Defendants’ spoliation
13 claims, taking guidance from the Advisory Committee notes and recent case law.²

14 “Spoliation is the destruction or material alteration of evidence, or the failure to
15 otherwise preserve evidence, for another’s use in litigation.” *Surowiec v. Cap. Title Agency,*
16 *Inc.*, 790 F. Supp. 2d 997, 1005 (D. Ariz. 2011); *see also Pettit v. Smith*, 45 F. Supp. 3d
17 1099, 1104 (D. Ariz. 2014). Spoliation arises from the failure to preserve relevant evidence
18 once a duty to preserve has been triggered. *Surowiec*, 790 F. Supp. 2d at 1005.

19 Rule 37(e) authorizes a court to sanction a party for losing or destroying ESI it had
20 a duty to preserve. Thus, if ESI that “should have been preserved in the anticipation or
21

22
23 ² The undersigned judge chaired the Advisory Committee on the Federal Rules of
24 Civil Procedure when the 2015 revision of Rule 37(e) was developed and adopted, and
25 knows of the substantial efforts made to apprise judges and lawyers of the change. It is
26 therefore quite frustrating that, years after the 2015 revision, some lawyers and judges are
27 still unaware of its significant change to the law of ESI spoliation. *See, e.g., Holloway v.*
28 *Cnty. of Orange*, No. SA CV 19-01514-DOC (DFMx), 2021 WL 454239, at *2 (C.D. Cal.
Jan. 20, 2021) (granting ESI spoliation sanctions without addressing the requirements of
Rule 37(e)); *Mercado Cordova v. Walmart P.R.*, No. 16-2195 (ADC), 2019 WL 3226893,
at *4 (D.P.R. July 16, 2019) (same); *Nutrition Distrib. LLC v. PEP Rsch., LLC*, No.
16cv2328-WQH-BLM, 2018 WL 6323082, at *5 (S.D. Cal. Dec. 4, 2018) (ordering
adverse inference instructions without addressing the strict requirements of Rule 37(e)(2),
and applying the negligence standard that Rule 37(e) specifically rejected).

1 conduct of litigation is lost because a party failed to take reasonable steps to preserve it,
2 and it cannot be restored or replaced through additional discovery,” a court:

3 (1) upon finding prejudice to another party from loss of the information, may
4 order measures no greater than necessary to cure the prejudice; or

5 (2) only upon finding that the party acted with the intent to deprive another
6 party of the information’s use in the litigation may:

7 (A) presume that the lost information was unfavorable to the party;

8 (B) instruct the jury that it may or must presume the information was
9 unfavorable to the party; or

10 (C) dismiss the action or enter a default judgment.

11 Fed. R. Civ. P. 37(e).

12 This rule establishes three prerequisites to sanctions: the ESI should have been
13 preserved in the anticipation or conduct of litigation, it is lost through a failure to take
14 reasonable steps to preserve it, and it cannot be restored or replaced through additional
15 discovery. If these requirements are satisfied, the rule authorizes two levels of sanctions.
16 Section (e)(1) permits a court, upon finding prejudice to another party from the loss of ESI,
17 to order measures no greater than necessary to cure the prejudice. Section (e)(2) permits a
18 court to impose more severe sanctions such as adverse inference jury instructions or
19 dismissal, but only if it finds that the spoliating party “acted with the intent to deprive
20 another party of the information’s use in the litigation.”³ Fed. R. Civ. P. 37(e)(2). This
21 rule provides the exclusive source of sanctions for the loss of ESI and forecloses reliance
22 on inherent authority. *See* Rule 37(e) advisory committee note to 2015 amendment (Rule
23 37(e) “forecloses reliance on inherent authority or state law to determine when certain
24 measures should be used.”); *Mannion v. Ameri-Can Freight Sys. Inc.*, No. CV-17-03262-
25 PHX-DWL, 2020 WL 417492, at *5 (D. Ariz. Jan. 27, 2020).

26 ³ Rule 37(e)(2) does not require a finding of prejudice to the party deprived of the
27 information. *See* Fed. R. Civ. P. 37(e) advisory committee note to 2015 amendment
28 (finding of prejudice generally not needed under Rule 37(e)(2) because intent to deprive
strongly suggests the information would have been favorable to the other party).

1 Finally, the relevant standard of proof for spoliation sanctions is a preponderance of
2 the evidence. *See Burris v. JPMorgan Chase & Co.*, No. CV-18-03012-PHX-DWL, 2021
3 WL 4627312, at *11 (D. Ariz. Oct. 7, 2021); *Compass Bank v. Morris Cerullo World*
4 *Evangelism*, 104 F. Supp. 3d 1040, 1052-53 (S.D. Cal. 2015). The Rule 37(e) discussion
5 below will apply this standard.

6 **B. Rule 37(c)(1).**

7 Rule 37(c)(1) authorizes a court to sanction a party for failing to produce
8 information required by Rule 26(a) or (e). Rule 26(a) requires a party to make initial
9 disclosures of information it may use to support its claims or defenses, and it not at issue
10 in this case. Rule 26(e) requires a party to supplement its Rule 26(a) disclosures *and* its
11 responses to interrogatories, requests for production, or requests for admission. This
12 supplementation must be made “in a timely manner if the party learns that in some material
13 respect the disclosure or response is incomplete or incorrect, and if the additional corrective
14 information has not otherwise been made known to the other parties during the discovery
15 process or in writing[.]” Fed. R. Civ. P. 26(e). This “duty to supplement is a continuing
16 duty, and no additional interrogatories by the requesting party are required to obtain the
17 supplemental information – rather the other party has an affirmative duty to amend a prior
18 response if it is materially incomplete or incorrect.” *Inland Waters Pollution Control v.*
19 *Jigawon, Inc.*, No. 2:05-CV-74785, 2008 WL 11357868, at *18 (E.D. Mich. Apr. 8, 2008)
20 (citing 6 James W. Moore et al., *Moore’s Federal Practice* § 26.1313).

21 In contrast to Rule 37(d), which applies only when a party fails to respond to a
22 discovery request altogether, *see Fjelstad v. Am. Honda Motor Co., Inc.*, 762 F.2d 1334,
23 1339 (9th Cir. 1985), sanctions are available under Rule 37(c)(1) – for violating Rule 26(e)
24 – when a party provides incomplete, misleading, or false discovery responses and does not
25 complete or correct them by supplement. *See, e.g., Tisdale v. Fed. Express Corp.*, 415 F.3d
26 516, 525-26 (6th Cir. 2005) (upholding 37(c)(1) sanctions for failure to comply with Rule
27 26(e) when plaintiff “provided false responses and omitted information from his responses”
28 to discovery requests); *Wallace v. Greystar Real Est. Partners*, No. 1:18CV501, 2020 WL

1 1975405, at *5 (M.D.N.C. Apr. 24, 2020) (holding that “Rule 26(e)’s supplementation
2 mandate also imposed on Defendant GRSSSE the responsibility to promptly correct its prior
3 response to Interrogatory 1”); *YYGM S.A. v. Hanger 221 Santa Monica Inc.*, No. CV 14-
4 4637-PA (JPRx), 2015 WL 12660401, at *2 (C.D. Cal. July 24, 2015) (holding sanctions
5 under Rule 37(c)(1) were warranted because, under Rule 26(e), defendants had “a
6 continuing obligation to correct prior ‘incomplete or incorrect’ responses to discovery”);
7 *Cnty. Ass’n Underwriters of Am., Inc. v. Queensboro Flooring Corp.*, No. 3:10-CV-1559,
8 2014 WL 3055358, at *7 (M.D. Pa. July 3, 2014) (holding sanctions under 37(c)(1) were
9 warranted when defendants violated Rule 26(e) by falsely stating in response to an
10 interrogatory that no tape recording had been made).

11 Rule 37(c)(1) provides that a party who violates Rule 26(e) may not use the withheld
12 information at trial unless the failure was substantially justified or harmless. This is “a
13 ‘self-executing, automatic sanction to provide a strong inducement for disclosure of
14 material.’” *West v. City of Mesa*, 128 F. Supp. 3d 1233, 1247 (D. Ariz. 2015) (quoting *Yeti*
15 *by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)). Blocking
16 the use of information trial is, of course, no penalty when the withheld information is
17 unfavorable to the party that failed to disclose it. But Rule 37(c)(1) also permits a court to
18 order the payment of reasonable expenses caused by the failure, to inform the jury of the
19 party’s failure, or to impose “other appropriate sanctions,” including a variety of sanctions
20 listed in Rule 37(b)(2)(A)(i)-(vi). *See Fed. R. Civ. P. 37(c)(1)(A)-(C)*.

21 The Ninth Circuit has not addressed the standard of proof required for Rule 37(c)(1)
22 sanctions, but “exceptions to the preponderance standard are uncommon” in civil litigation.
23 *WeRide Corp. v. Kun Huang*, 5:18-cv-07233-EJD, 2020 WL 1967209, at *9 (N.D. Cal.
24 Apr. 24, 2020) (considering burden of proof under Rule 37(b)). The Seventh Circuit, in
25 deciding whether to apply the preponderance standard to sanctions under Rule 37(b),
26 reviewed several Supreme Court cases declining to apply a higher standard of proof in civil
27 cases. *See Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 776-81 (7th Cir. 2016). The court
28 emphasized the absence of heightened interests at stake in the underlying suit, which

1 alleged Title VII employment discrimination, concluding that “the case remains a civil suit
2 between private litigants, and what is at stake for [the plaintiff] is the loss of the opportunity
3 to win money damages from his former employer.” *Id.* at 781. The court reasoned that
4 “[t]he preponderance standard appropriately reflects the mutuality of the parties’
5 [discovery] obligations; the clear-and-convincing standard, by contrast, would reflect an
6 unwarranted preference for one party over the other.” *Id.* at 779. District courts in the
7 Seventh Circuit have applied *Ramirez* to Rule 37(c)(1) sanctions. *See, e.g., Sapia v. Bd. of*
8 *Educ. of Chi.*, No. 14-CV-07946, 2020 WL 12139021, at *2 (N.D. Ill. Nov. 30, 2020).

9 The Court finds *Ramirez* helpful. This too is an employment discrimination case,
10 and the ultimate decision for Plaintiff or for Defendants will be made by a preponderance
11 of the evidence standard. The Court will apply that standard to its Rule 37(c)(1) sanctions
12 analysis. The parties have not argued for a higher standard.

13 **III. Defendants’ Motion for Sanctions Under Rule 37(e).**

14 **A. Plaintiff’s Duty to Preserve ESI Arose in May 2018.**

15 Rule 37(e) applies only if Plaintiff had a duty to preserve the ESI at issue – only if
16 the ESI “should have been preserved in the anticipation or conduct of litigation.” Fed. R.
17 Civ. P. Rule 37(e). Rule 37(e)(1) does not identify a starting date for this duty, but instead
18 looks to the common law. *See id.*, advisory committee’s note to 2015 amendment (“Rule
19 37(e) is based on this common-law duty; it does not attempt to create a new duty to
20 preserve.”). Under the common law, a duty to preserve arises ““when a party knows or
21 should know that certain evidence is relevant to pending or future litigation.”” *Surowiec*,
22 790 F. Supp. 2d at 1005 (quoting *Ashton v. Knight Transp., Inc.*, 772 F. Supp. 2d 772, 800
23 (N.D. Tex. 2011)). Defendants argue that Plaintiff’s duty arose in May 2018 when she
24 began gathering evidence to use in a potential lawsuit against GoDaddy. The Court agrees.

25 As early as May 2, 2018, while still employed at GoDaddy,⁴ Plaintiff started
26 coordinating with co-worker Lee Mudro to gather instant messages from her work Slack

27 ⁴ Plaintiff was informed by GoDaddy that her position would be eliminated on
28 April 6, 2018 (Doc. 93 at 2), but she was on paid administrative leave and still technically
employed by GoDaddy until May 6, 2018 (*see* Doc. 93-2 at 75).

1 account for use in potential litigation. Doc. 93-2 at 92 (May 2, 2018, message from Mudro:
2 “So if GoDaddy deletes ours on slack between what u have saved and I have u will be good
3 to sue”). By May 2, Plaintiff had also put together a document detailing evidence she
4 would use in her case. *Id.* at 87-90. By May 4, Plaintiff hired her current lawyer and sent
5 a letter to GoDaddy complaining of discrimination and wrongful termination. *Id.* at 80
6 (May 4, 2018: “I retained my attorney today”); *id.* at 39 (May 9, 2018: “His name is Chris
7 Houk”); *id.* at 75-76 (Facebook message to Mudro with text of letter, asking Mudro “You
8 saw my threat last night right?”); *id.* at 87-90, 92; Doc. 101-1 at 6.

9 Plaintiff confirmed her intent to sue in communications with Mudro on May 7.
10 Doc. 93-2 at 70 (May 7, 2018, message in which Mudro says, “Yep and then sue while on
11 disability,” and Plaintiff responds, “Exactly”). By early June, Plaintiff not only anticipated
12 lawsuits against GoDaddy, but also understood that evidence gathering was underway on
13 both sides. *See* Doc. 93-1 at 80 (June 6, 2018: “So I actually have two lawsuits”); *id.* at
14 72-73 (June 11, 2018, messages from Plaintiff to Mudro stating, “I learned from Chris, the
15 attorney, to be VERY CAREFUL with GoDaddy” and “everything I type I have to consider
16 that they are reading it”); *id.* at 83 (June 6, 2018, message from Mudro: “I want to post
17 here for u as I am sure once Godaddy knows u r suing them, they will start looking for
18 evidence online by reading your Facebook etc. since I may be your witness I do not want
19 them to know we talk.”).

20 Plaintiff argues that she originally retained attorney Houk only to assist with her
21 severance agreement from GoDaddy and that her duty to preserve did not arise until she
22 retained him to file this lawsuit in July 2020. Doc. 96 at 9. But a duty to preserve ESI can
23 arise far in advance of the formal retention of a lawyer or the filing of a lawsuit. As noted
24 above, the duty arises when litigation is reasonably foreseeable and the party knows or
25 should know the ESI may be relevant to pending or future litigation. *See Surowiec*, 790 F.
26 Supp. 2d at 1005; *Champions World, LLC v. U.S. Soccer Fed’n*, 276 F.R.D. 577, 582 (N.D.
27 Ill. 2011) (plaintiff’s duty to preserve arose approximately two years before filing suit,
28 when the plaintiff investigated possible claims against the defendant); *Barsoum v. N.Y.C.*

1 *Hous. Auth.*, 202 F.R.D. 396, 400 (S.D.N.Y. 2001) (duty arose 16 months before litigation
2 when plaintiff was receiving assistance of counsel and it was foreseeable that ESI would
3 be relevant to future litigation). These conditions existed for Plaintiff in early May 2018
4 when she formed the intent to sue GoDaddy and started collecting evidence for that
5 purpose. She therefore had a duty to preserve relevant ESI.

6 **B. Plaintiff's Alleged Spoliation.**

7 Defendants allege that Plaintiff failed to take reasonable steps to preserve (1) an
8 undetermined number of Facebook posts, (2) 109 Facebook Messenger messages to and
9 from Ms. Mudro, (3) the contents of her iPhone, (4) the contents of her @cox.net email
10 account, and (5) Telegram Messenger messages between her and Ms. Mudro. The Court
11 will address each category separately.

12 **1. Deleted Facebook Posts.**

13 Defendants argue that Plaintiff failed to take reasonable steps to preserve “an
14 undetermined number of Facebook posts relating to her alleged treatment by, and
15 termination from, GoDaddy,” as well as related likes and comments. Doc. 93 at 16-17.
16 Defendants assert that these posts were deleted “sometime between 2018 and 2021.” *Id.*
17 at 5. Defendants learned of the posts during Plaintiff’s August 5, 2021 deposition when
18 she admitted deleting a Facebook post dated April 11, 2018 that she had previously
19 produced to Defendants and which stated that she had been fired by GoDaddy for not being
20 “technical enough.” *Id.* at 4. Plaintiff testified that she deleted the post, along with others
21 like it, but could not recall if she had done so in 2018 or more recently. *Id.* (citing Doc. 93-3
22 at 27). Plaintiff testified that she was unsure how many posts she had deleted. Doc. 93-3
23 at 28 (“Q: Okay. How many Facebook posts do you think you’ve deleted since you left
24 GoDaddy? A: I have no idea. Q: Five? A: No idea. Q: Ten? A: No idea. Q: 100? A: I
25 have no idea.”).

26 Plaintiff now concedes that she either “archived” or “deleted” posts from three of
27 her Facebook accounts. Doc. 96 at 9-10.⁵ Plaintiff asserts that she “unarchived” and

28 ⁵ Plaintiff asserts that she has managed four Facebook accounts: her personal
account, a community page set up for CRPS outreach, a business account for her CRPS

1 produced all posts that had been archived, but does not dispute that her deleted posts are
2 no longer accessible and have not been produced. *Id.* at 10. Plaintiff argues that she did
3 not delete anything she considered relevant to this lawsuit and that deletions were not
4 intended to deprive Defendants of the posts. *Id.* Plaintiff asserts that she deleted posts
5 from her public foundation’s Facebook page “upon finding out that the posted information
6 was not scientifically correct,” and “a handful of posts” from her foundation’s business
7 account that she “believed were too dark and negative [because she was] afraid that they
8 would drive future employers away.” *Id.*

9 Plaintiff had a duty to preserve Facebook posts relevant to this suit starting in May
10 2018. The Court finds that the deleted posts likely were relevant to this lawsuit. Plaintiff
11 admitted during her deposition that she was unsure whether she had gone through her social
12 media accounts and turned over everything that might be relevant to her attorney. Doc.
13 93-3 at 29-30. She testified that she was aware of relevant social media information that
14 she may not have turned over to her attorney. *Id.* And she testified that she had deleted
15 the April 11, 2018 post – a post with obvious relevance to this lawsuit – along with
16 “anything out there” that was “like that.” *Id.* at 27.

17 Plaintiff argued at the December 16, 2021 hearing that a fair reading of her
18 deposition shows that the deleted posts were not relevant to this lawsuit, but the above-
19 cited portions of Plaintiff’s deposition belie this characterization. Moreover, in response
20 to being asked, “So when you looked for relevant things, did you look for documents and
21 communications that would relate to your emotional condition and give those to your
22 lawyer?” Plaintiff responded: “That’s what I mean by I didn’t know that they were
23 relatable, so, no, I probably did not think to do that because I don’t think like that.”
24 Doc. 93-3 at 30. When asked, “What about documents that relate to your medical
25 conditions? Did you go through social media to find all of those and give those over to
26 your lawyer?” Plaintiff replied, “I would not think to do that either.” *Id.* When asked,
27 foundation, and a “regular” account for CRPS outreach. Doc. 96-2 at 4. Defendants assert
28 that there is a fifth Facebook account associated with Plaintiff entitled “Kristen Fast CRPS
Warrior” which has been archived. Doc. 101 at 8.

1 “What about documents that relate to your job at GoDaddy and your termination? Did you
2 look for those on social media and give those to your lawyer?” she replied, “I don’t think
3 I’ve done that yet.” *Id.*

4 Plaintiff’s arguments that she deleted the posts because they contained incorrect
5 information and she feared they would make it hard for her to get another job are
6 unpersuasive. If Plaintiff was concerned about incorrect information, she could have
7 archived the inaccurate posts. Doing so would have removed them from public view while
8 preserving them for production in this lawsuit. Plaintiff clearly understood Facebook’s
9 archive feature – she used it. By choosing instead to delete posts, Plaintiff consciously
10 chose to make them permanently unavailable.

11 Nor is it plausible that Plaintiff deleted posts because she was concerned about their
12 possible effect on prospective employers. As Defendants note, Plaintiff found a higher-
13 paying job just a few weeks after leaving GoDaddy and she has been continuously
14 employed ever since. Doc. 93 at 4 n.3. Plaintiff also could have addressed any prospective-
15 employer concerns by archiving the posts.

16 The Court finds by a preponderance of the evidence that the prerequisites to
17 sanctions under Rule 37(e) are satisfied for the deleted Facebook posts. Plaintiff had a
18 duty to preserve the posts after May 2018, she did not take reasonable steps to preserve
19 them, and they cannot be restored or replaced through additional discovery. *See Fed. R.*
20 *Civ. P. 37(e)*. With the prerequisites satisfied, the Court must now determine whether the
21 additional requirements for sanctions under Rule 37(e)(1) and (e)(2) are satisfied.

22 **a. Rule 37(e)(1) Prejudice.**

23 Rule 37(e)(1) sanctions are available if Defendants were prejudiced by Plaintiff’s
24 deletion of the Facebook posts. “Prejudice exists when spoliation prohibits a party from
25 presenting evidence that is relevant to its underlying case.” *Paisley Park Enters., Inc. v.*
26 *Boxill*, 330 F.R.D. 226, 236 (D. Minn. 2019). Proving that lost evidence is relevant can be
27 a difficult task, however, because the evidence no longer exists. “To show prejudice
28 resulting from the spoliation,” therefore, courts have held that “a party must only come

1 forward with plausible, concrete suggestions as to what [the destroyed] evidence might
2 have been.” *TLS Mgmt. & Mktg. Servs. LLC v. Rodriguez-Toledo*, 2017 WL 1155743, *1
3 (D.P.R. 2017) (internal quotations omitted); *see also Paisley Park Enters.*, 330 F.R.D. at
4 236 (finding prejudice where “Plaintiffs are left with an incomplete record of the
5 communications that Defendants had with both each other and third parties.”).⁶

6 The evidence shows that Plaintiff’s intentional deletion of the Facebook posts
7 deprived Defendants of relevant information. Plaintiff testified that she deleted an
8 April 11, 2018 post with obvious relevance to this lawsuit, along with “anything out there”
9 that was “like that.” Doc. 93-3 at 27.⁷ She also testified that she did not preserve posts
10 relating to her emotional condition, her medical condition, and her job and termination
11 from GoDaddy, all of which likely would have been relevant in this case. *Id.* at 30. The
12 Court finds that Defendants have been prejudiced by Plaintiff’s deletion of her Facebook
13 posts. Sanctions under Rule 37(e)(1) are therefore authorized.

14 **b. Rule 37(e)(2) Intent.**

15 Rule 37(e)(2) requires a finding that Plaintiff deleted the Facebook posts with “the
16 intent to deprive” Defendants of their use in this litigation. Fed. R. Civ. P. 37(e)(2).
17 Although direct evidence of such intent is always preferred, a court can find such intent
18 from circumstantial evidence. *See Auer v. City of Minot*, 896 F.3d 854, 858 (8th Cir. 2018)
19 (intent required by Rule 37(e)(2) “can be proved indirectly”); *Laub v. Horbaczewski*,
20 No. CV 17-6210-JAK (KS), 2020 WL 9066078, at *6 (C.D. Cal. July 22, 2020) (“Because
21 courts are unable to ascertain precisely what was in a person’s head at the time spoliation
22 occurred, they must look to circumstantial evidence to determine intent.”); *Paisley Park*
23 *Enters.*, 330 F.R.D. at 236 (circumstantial evidence can be used to prove Rule 37(e)(2)
24 intent); *Moody v. CSX Transportation, Inc.*, 271 F. Supp. 3d 410, 431 (W.D.N.Y. 2017)

25 ⁶ The advisory committee notes to Rule 37(e) make clear that “[t]he rule does not
26 place a burden of proving or disproving prejudice on one party or the other,” but instead
27 “leaves judges with discretion to determine how best to assess prejudice in particular
28 cases.” Fed. R. Civ. P. 37(e) advisory committee note to 2015 amendment. In this case,
the Court has considered evidence from both sides in reaching its decision.

⁷ This post was created before Plaintiff’s duty to preserve arose, but its primary
significance lies in her admission that she deleted other posts like it.

1 (“[T]he Court may infer an intent to deprive from defendants’ actions in this matter.”);
2 *CAT3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 500 (S.D.N.Y. 2016) (in
3 addressing Rule 37(e)(2) intent, “circumstantial evidence may be accorded equal weight
4 with direct evidence”); S. Gensler & L. Mulligan, *Federal Rules of Civil Procedure, Rules
5 and Commentary* (2021) at 1164 (“while direct evidence certainly can show a party’s intent
6 to deprive, it is not needed. Rather, a court can find intent to deprive based on
7 circumstantial evidence.”).

8 The Court finds by a preponderance of the evidence that Plaintiff deleted the
9 Facebook posts with an intent to deprive Defendants of their use in this litigation. This
10 evidence includes (1) the relevancy of the Facebook posts as described above;
11 (2) Plaintiff’s clear consciousness that her posts could be useful to Defendants in this case
12 (*see* Doc. 93-1 at 72-73 (June 11, 2018, messages from Plaintiff to Mudro stating, “I
13 learned from Chris, the attorney, to be VERY CAREFUL with GoDaddy” and “everything
14 I type I have to consider that they are reading it”), *id.* at 83 (June 6, 2018, message from
15 Mudro: “I want to post here for u as I am sure once Godaddy knows u r suing them, they
16 will start looking for evidence online by reading your Facebook etc. since I may be your
17 witness I do not want them to know we talk.”); (3) Plaintiff’s deliberate choice to
18 permanently delete the posts rather than archiving them, as she knew how to do; and (4) the
19 implausibility of her explanation for why she deleted the posts (that they contained
20 incorrect information or could adversely influence prospective employers).

21 Other courts have found Rule 37(e)(2) intent based on similar evidence. *See Ala.*
22 *Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730 (N.D. Ala. 2017) (party may be found
23 to have acted with an intent to deprive within the meaning of Rule 37(e)(2) where “(1)
24 evidence once existed that could fairly be supposed to have been material to the proof or
25 defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative
26 act causing the evidence to be lost; (3) the spoliating party did so while it knew or should
27 have known of its duty to preserve the evidence; and (4) the affirmative act causing the
28 loss cannot be credibly explained as not involving bad faith by the reason proffered by the

1 spoliator.”); *Edwards v. Junior State of Am. Found.*, Civil No. 4:19-CV-140-SDJ, 2021
2 WL 1600282, *8 (E.D. Tex. Apr. 23, 2021) (finding “brazen failure to take reasonable
3 steps to preserve” ESI where plaintiff opted to permanently delete Facebook account rather
4 than temporarily deactivating it, which would have preserved ESI).

5 The Court finds that sanctions under Rule 37(e)(2) are authorized for Plaintiff’s
6 deletion of the Facebook posts.

7 **2. 109 “Unsent” Facebook Messages.**

8 Defendants argue that Plaintiff failed to take reasonable steps to preserve 109
9 Facebook Messenger messages that she “unsent” to Mudro between September 12 and 23,
10 2021. Doc. 93 at 8, 16. Defendants assert that Plaintiff should have produced all of the
11 messages with Mudro in response to a discovery request in April 2021. Instead, she
12 disclosed some of the messages only on September 12, 2021, three days before Mudro’s
13 deposition. *Id.* at 18-19. After the deposition, when Mudro produced a copy of the same
14 messages in response to a subpoena, Mudro’s copy included 487 messages that Plaintiff
15 had omitted from her production (discussed in more detail below) and 109 instances where
16 Plaintiff “unsent” messages to Mudro, making it impossible for Mudro to produce them.
17 *Id.* at 17. The unsent messages were visible in Mudro’s copy because their time stamps
18 remained but the text was replaced with “this message has been unsent.” *Id.* at 8.

19 Plaintiff argues that sanctions are not appropriate under Rule 37(e) for two reasons.
20 First, she has produced a full copy of her messages with Mudro, including the “unsent”
21 messages, although they were not produced until her response to Defendants’ motion for
22 sanctions. *See* Docs. 96 at 4, 96-1 at 69-260. Second, Plaintiff claims she thought a
23 temporal limitation that applied to other discovery requests also applied to the subpoena
24 served on Mudro, so she unsent messages that were outside of that temporal limitation.
25 Doc. 96 at 7-8. But Plaintiff’s Facebook production shows that she clearly collaborated
26 with Mudro in preparation for and during this case, and Plaintiff does not explain why she
27 did not simply suggest to Mudro that she produce only messages within the relevant time
28 period.

1 Although Plaintiff asserted in her response brief that the Mudro messages have been
2 produced, at least one important unsent message has not. *See* Doc. 96-1 at 225. On
3 June 14, 2019, Mudro and Plaintiff were discussing Mudro’s upcoming testimony before
4 the EEOC on Plaintiff’s charge of discrimination against GoDaddy. *Id.* Mudro asked
5 Plaintiff to “[s]end me the evidence we gathered so I can read tonight and ask u specific
6 questions.” *Id.* Plaintiff’s response, sent at 11:57 AM and subsequently unsent by Plaintiff,
7 has never been produced (referred to hereafter as the “11:57 message”). Four minutes after
8 the 11:57 message, Plaintiff sent a follow-up message which reads: “I added you. Start
9 with the #0 Claims as a guide to walk through the case. But your area is heaviest at 14-16
10 I think but you are speckled in throughout I just can’t remember and I’m on way to
11 doctor[.]” *Id.* at 224; Doc. 93-3 at 144 (time stamp of 12:01 PM). It thus appears that the
12 11:57 message contained a summary of the evidence in this case.

13 Following oral arguments, the Court requested supplemental briefing from the
14 parties on when and why the 11:57 message was unsent. While Plaintiff swore in an
15 affidavit attached to her initial response brief that she unsent the message “years ago in
16 2019” (Doc. 96-2 at 9), her affidavit attached to the supplemental brief now admits that she
17 unsent the message on September 10, 2021, five days before Mudro’s deposition in this
18 case. Doc. 113-1 at 1.

19 Plaintiff’s supplemental brief argues that the 11:57 message did not deal with
20 evidence in this case, but instead was a personal message meant for her husband that was
21 erroneously sent to Mudro. Plaintiff asserts that she did not want Mudro to have the
22 message because it included “deeply personal, family, and spiritual” information.
23 Doc. 113 at 2. But she admits that she cannot corroborate her assertion that the message
24 was intended for her husband with any record of communications with her husband at about
25 the same time. *Id.* at 1. And her argument is inconsistent in other respects. Her brief
26 asserts that “[b]ecause the message intended for [her husband] was of a personal nature,
27 [Plaintiff] believed she unsent the message to Mudro immediately upon sending it.” Doc.
28 113 at 2; *see also* Doc. 113-1 at 1. And yet her attached declaration admits that she did not

1 unsend the message until September 10, 2021, shortly before Mudro’s deposition. *Id.*
2 Plaintiff does not explain why, if she realized that she had erroneously sent a highly
3 personal message to Mudro “minutes” after it was sent, she waited two years to unsend it.
4 For these and other reasons explained below, the Court finds Plaintiff’s explanation of the
5 11:57 message implausible.

6 The Rule 37(e) prerequisites are satisfied with regard to the 11:57 message. Plaintiff
7 was under a duty to preserve it for this litigation on September 10, 2021. By purposefully
8 unsending the message that day, Plaintiff failed to take reasonable steps to preserve it, and
9 it cannot now be restored or replaced through discovery.

10 The prerequisites have not been satisfied for the other 108 unsent messages. Those
11 messages have now been produced – albeit in a highly untimely fashion – and Rule 37(e)
12 applies only when lost ESI “cannot be restored or replaced through additional discovery[.]”
13 Fed. R. Civ. P. 37(e). Sanctions under Rule 37(e) therefore are not available for the 108
14 messages, but their untimely production is relevant to other sanctions that may be
15 warranted under Rule 37(c)(1), as discussed below.

16 **a. Rule 37(e)(1) Prejudice.**

17 Plaintiff’s supplemental brief argues that Plaintiff did not withhold any substantive
18 evidence from Defendants when she unsent the 11:57 message. Doc. 113 at 2. In addition
19 to claiming that the message was actually intended for her husband, Plaintiff claims that
20 she did not send any evidence to Mudro until the evening of June 14, 2019. She produces
21 an email from her to Mudro at 6:09 PM that day (referred to hereafter as the “6:09 email”)
22 in which she shared a Google Drive folder with Mudro. Doc. 113-2 at 246.⁸ Plaintiff
23 claims that the document sent at 6:09 PM was what she and Mudro discussed throughout
24 the Facebook messenger conversation on June 14, 2019. Doc. 113 at 2-3. She further
25 argues that the document was a timeline she sent to the EEOC and which has been produced
26 to Defendants in this case. *Id.* She supports this by matching citations in her Facebook

27 ⁸ This email was a separate form of communication from the Facebook messages being
28 discussed in this section – messages which included the unsent 11:57 message. Plaintiff
sent the email at 6:09 PM from her address at kristin.I.fast@gmail.com to Mudro’s email
address at leemudro2005@yahoo.com. *See* Doc. 113-2 at 246.

1 messages to Mudro with sections of the EEOC timeline. *Id.* at 2-3. Plaintiff thus asserts
2 that the “evidence” discussed by her and Mudro has been disclosed to Defendants,
3 eliminating any prejudice caused by her unsending of the 11:57 message. *Id.* at 3.

4 Defendants note in response that they obtained a copy of the EEOC timeline by
5 subpoena to the EEOC, not from Plaintiff’s production. Doc. 115 at 9 n.5. They also
6 question whether the document discussed by Plaintiff in the 6:09 email was in fact the same
7 document they obtained through their EEOC subpoena because Plaintiff says in the email
8 that the document is 250 pages (Doc. 113-2 at 246), but the EEOC timeline is only 190
9 pages. Doc. 115 at 9.

10 Plaintiff’s arguments about the contents of the 11:57 message are not persuasive.
11 As an initial matter, it is apparent that the Google Doc shared by Plaintiff in the 6:09 email
12 is likely a version – but not the same version – of the EEOC timeline Defendants obtained
13 by subpoena. Plaintiff’s citations to portions of the EEOC timeline do match parts of the
14 discussion with Mudro over Facebook messenger, but the Google Doc shared at 6:09 PM
15 had 250 pages (*see* Doc. 113-2 at 246) and the EEOC timeline has only 190 pages (Doc.
16 113-2 at 3-193). It is entirely possible that the same document evolved into a shorter
17 version later shared with the EEOC, given that Google Docs is a highly “fluid workspace
18 where authorized users can add to, delete, [and] alter the contents [of a document] at will.”
19 Doc. 115-1 at 10. The longer document has not been produced in this case.

20 Even more importantly, the context of the Facebook message conversation on
21 June 14, 2019 strongly suggests that Plaintiff shared evidence with Mudro at 11:57 AM:

22 **Lee Mudro**

23 Send me the evidence we gathered so I can read tonight and ask u specific
24 questions

25 *Jun 14, 2019, 10:55 AM*

26 **Kristin Fast**

27 *This message was unsent.*

28 *Jun. 14, 2019, 11:57 AM*

Kristin Fast

I added you. Start with the #0 Claims as a guide to walk through the case.
But your area is heaviest at 14-16 I think but you are speckled in throughout
I just can’t remember and I’m on way to doctor

1 [Jun. 14, 2019, 12:01 PM]⁹

2 **Lee Mudro**

3 U do not show anything from me to u that I can see so I don't think they will
4 listen to me. If u find where our texts r let me know. U have Dave and
5 Arvin's but none from me.

6 *Jun. 14, 2019, 5:47 PM*

7 **Lee Mudro**

8 I thought there were texts from when u first went to get leave as I remember
9 telling not to trust them by being off radar with DMSA

10 *Jun. 14, 2019, 5:47 PM*

11 **Lee Mudro**

12 Fmla

13 *Jun. 14, 2019, 5:47 PM*

14 **Lee Mudro**

15 I don't have any of them anymore as my texts were deleted when my phone
16 went bad a few months again

17 *Jun. 14, 2019, 5:47 PM*

18 **Kristin Fast**

19 I have them all

20 *June 14, 2019, 5:48*

21 **Kristin Fast**

22 It is in #16

23 *Jun. 14, 2019, 6:23 PM*

24 Doc. 96-1 at 224-25.

25 This exchange shows that the 11:57 message occurred shortly after Mudro asked for
26 the evidence and four minutes before Plaintiff told where to look in the evidence for
27 relevant information, clearly suggesting that Plaintiff sent Mudro the evidence at 11:57
28 AM. Later that day, at 5:47 PM, Mudro responded that she could not find messages
between her and Plaintiff, suggesting she had reviewed the material Plaintiff sent at 11:57
AM. Plaintiff immediately responded that "I have them all" and, nine minutes later, sent
the 6:09 email with this explanation: "T[h]is the larger file that has EVERYTHING in it."
Doc. 113-2 at 246. Plaintiff then resumed her Facebook messages telling Mudro where to
look in the evidence. Doc. 96-1 at 225. This exchange clearly suggests that Plaintiff shared
evidence at 11:57 AM, Mudro reviewed it and could not find some relevant

⁹ Doc. 93-3 at 144 (showing timestamp not visible in Doc. 96-1).

1 communications, and Plaintiff replied at 6:09 PM by sending a “larger” file of 250 pages
2 that included “EVERYTHING.”

3 Given this context, the Court finds by a preponderance of the evidence that the 11:57
4 message contained evidence relevant to this case – evidence Plaintiff wanted Mudro to
5 review before her deposition on Plaintiff’s EEOC claim against GoDaddy. Defendants
6 were prejudiced by Plaintiff’s destruction of this evidence as required by Rule 37(e)(1).

7 **b. Rule 37(e)(2) Intent.**

8 Plaintiff asserts that she “did not intend to hide the content of the unsent message
9 from GoDaddy; rather the content had nothing to do with GoDaddy and was of a personal
10 nature meant for her husband’s eyes only.” Doc. 113 at 3 (citing Doc. 113-1 ¶ 3). She also
11 asserts that, when she unsent it, she “never meant to destroy the message altogether, only
12 to unsend it to Mudro.” *Id.* at 3-4 (citing Doc. 113-1 ¶ 7-8). In Plaintiff’s most recent
13 declaration, she asserts that while unsending the message she could have taken some
14 additional step using an option called “Remove” to permanently remove the message from
15 Facebook, but refrained from doing so “because [she] had no intention to destroy the
16 message completely.” Doc. 113-1 ¶ 7. Plaintiff nonetheless states that the 11:57 message
17 is inexplicably permanently gone, unlike the other unsent messages that she states were
18 “retrievable.” *Id.* at ¶ 8-9.

19 Defendants contend that Plaintiff’s representations about the “Remove” button and
20 how she was able to retrieve other unsent messages are attempts to mislead the Court.
21 Doc. 115 at 7 n.3. Defendant’s forensic expert avows that “[u]nsending a message within
22 Facebook Messenger renders the content of the message irrevocably lost[,]” and “[u]nsent
23 messages cannot be ‘retrieved’ from Facebook.” Doc. 115-1 at 10 (citing Facebook, *How*
24 *Do I Remove or Unsend a Message that I’ve Sent on Facebook Messenger?*, <https://www.facebook.com/help/messenger-app/194400311449172>) (last visited Jan. 31, 2022)). It
25 appears Plaintiff was able to produce the other 108 unsent messages because she tendered
26 a copy of the messages that was generated on September 10, 2021, likely before they were
27 unsent. Doc. 115 at 7 n.3.
28

1 The Court is not persuaded by Plaintiff’s argument that she did not unsend the
2 message with the intent to deprive Defendants of it. As an initial matter, her assertions
3 about the “Remove” button and that other unsend messages were retrievable is not credible
4 given the operation of Facebook Messenger as discussed above. And significantly,
5 Plaintiff now admits that she unsend the message on September 10, 2021, while she was
6 reviewing her Facebook Messenger messages in preparation for their disclosure to
7 Defendants. Doc. 113-1 at 6. It is not clear why Plaintiff, more than two years after sending
8 the message and on the eve of her production to Defendants, would no longer want Mudro
9 (with whom she discussed many highly personal matters) to have access to the message.
10 The more plausible reason for Plaintiff to unsend the message at this time was that she did
11 not want Defendants to receive it in discovery.

12 The Court finds by a preponderance of the evidence that Plaintiff unsend the message
13 with the intent to deprive Defendants of its use as required for Rule 37(e)(2) sanctions.
14 *See, e.g., Laub*, 2020 WL 9066078, at *6 (when inferring intent, “[r]elevant factors can
15 include, *inter alia*, the timing of the destruction, the method of deletion (e.g., automatic
16 deletion vs. affirmative steps of erasure), [and] selective preservation”). Sanctions under
17 Rule 37(e)(2) are authorized.

18 **3. Stolen iPhone.**

19 Defendants move for sanctions for loss of data on Plaintiff’s iPhone 12 Pro, which
20 Plaintiff claims was stolen in September 2021. Doc. 93 at 16. Defendants argue that
21 Plaintiff failed to take reasonable steps to preserve the contents of the phone by not backing
22 it up to iCloud. *Id.* at 12-13.

23 Plaintiff argues that she did not need to preserve the ESI contained on her iPhone
24 because she preserved communications on the phone for “nearly two years and had
25 produced everything she considered relevant to the lawsuit in discovery before the phone
26 was stolen.” Doc. 96 at 11. Defendant responds that Plaintiff was under an ongoing duty
27 to preserve the evidence until the end of litigation. Doc. 101 at 8 (citing *Donald J. Trump*

28

1 *for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 5407748, at *9 (W.D. Pa.
2 Sept. 8, 2020)).

3 As explained below, the Court finds that Plaintiff had not produced all relevant
4 information from her iPhone before it was stolen. Thus, at the time of the theft, Plaintiff
5 had an ongoing duty to preserve all relevant ESI on the phone, and the Court must
6 determine whether she failed to take reasonable steps to do so.

7 The advisory committee note to the 2015 amendment of Rule 37(e) provides that
8 the Court should consider a party's sophistication in determining whether the party took
9 reasonable steps to preserve ESI. *See* Rule 37(e) advisory committee note to 2015
10 amendment. Plaintiff argues that she lacks sophistication and "did the best she could."
11 Doc. 96 at 1, 19. But in other contexts, Plaintiff claims to be very tech-savvy. *See, e.g.*,
12 Doc. 93-1 at 52 (Plaintiff commenting on her new job: "I run the entire Dev team. I am
13 going to build up the whole department how I want which is awesome. They are a trash
14 company converting to a tech company and it's perfect for me. They trust whatever I say
15 and I'm the smartest person technically in the room."); Doc. 101-1 at 13 (Plaintiff email to
16 Dr. Rhodes: "I had run 64 home pages globally, and have a very, very unique talent that is
17 extremely marketable. I can pretty much get a job ANYWHERE in the world making as
18 much as a doctor who went to school for a decade."); *id.* at 22 (Plaintiff email to Auguste
19 Goldman: "I am an expert at Jira/Confluence. I built pricing, cart, creative and many others
20 Jira projects so we didn't get bottlenecked waiting! I'm an expert program manager AND
21 product manager."). Given these statements by Plaintiff herself, the Court cannot conclude
22 that she lacked the sophistication to back up her phone.

23 What is more, it appears that Plaintiff did back up her phone at some point during
24 or leading up to this litigation. She claims that when she activated her replacement phone
25 she "discovered that she had three recordings . . . that she had forgotten about years
26 before." Doc. 96 at 13. Plaintiff does not explain why the recordings would have been
27 backed up but not the other contents.

28

1 By failing to back up her iPhone, Plaintiff failed to take reasonable steps to preserve
2 the ESI contained on the phone. *See, e.g., Youngevity Int'l v. Smith*, No. 3:16-cv-704-
3 BTM-JLB, 2020 WL 7048687, at *2 (S.D. Cal. July 28, 2020) (“The Relevant Defendants’
4 failure to prevent destruction by backing up their phones’ contents or disabling automatic
5 deletion functions was not reasonable because they had control over their text messages
6 and should have taken affirmative steps to prevent their destruction when they became
7 aware of their potential relevance.”); *Laub*, 2020 WL 9066078, at *4 (plaintiff failed to
8 take reasonable steps when he “chose not to backup his text messages that were stored on
9 his iPhone”); *Paisley Park Enters.*, 330 F.R.D. at 233 (parties failed to take reasonable
10 steps when they did not use the “relatively simple options to ensure that their text messages
11 were backed up to cloud storage”); *Brewer v. Leprino Foods Co., Inc.*, No. CV-1:16-1091-
12 SMM, 2019 WL 356657, at *10 (E.D. Cal. Jan. 29, 2019) (party failed to take reasonable
13 steps where the was “no effort to back-up or preserve the Galaxy S3 prior to its loss”);
14 *Gaina v. Northridge Hosp. Med. Ctr.*, No. CV 18-00177-DMG (RAOx), 2018 WL
15 6258895, at *5 (C.D. Cal. Nov. 21, 2018) (similar).

16 The Court finds that the prerequisites of Rule 37(e) are satisfied with respect to the
17 loss of Plaintiff’s iPhone. She was under a duty to preserve its contents, failed to do so,
18 and the contents are now lost.

19 **a. Rule 37(e)(1) Prejudice.**

20 Plaintiff argues that Defendants are not prejudiced by the loss of the ESI contained
21 on her stolen phone because she already produced all the information contained on it that
22 she considered relevant. But Plaintiff “is not the one who determines what is relevant.”
23 *Doe v. Purdue Univ.*, No. 2:17-CV-33-JPK, 2021 WL 2767405, at*8 (N.D. Ind. July 2,
24 2021) (citing *Jones v. Bremen High Sch. Dist.* 228, No. 08 C 3548, 2010 WL 2106640, at
25 *8 (N.D. Ill. May 25, 2010) (“As a non-lawyer and as an interested party, Jurgens is not
26 qualified to judge whether documents are relevant to the suit.”)). As discussed elsewhere
27 in this order, Plaintiff repeatedly omitted relevant information from her discovery
28 responses. Further, upon activating her new phone, Plaintiff found clearly relevant ESI –

1 audio recordings of critical meetings in this case – that she had not produced to Defendants.
2 The Court finds that Plaintiff’s failure to take reasonable steps to preserve the contents of
3 her stolen phone prejudiced Defendants. Sanctions under Rule 37(e)(1) are authorized.

4 **b. Rule 37(e)(2) Intent.**

5 The Court cannot conclude that Plaintiff failed to back up her phone with an intent
6 to deprive Defendant of its contents in this litigation. Although Defendants initially
7 questioned whether the phone was actually stolen, Plaintiff produced documentation of her
8 insurance claim for loss of the phone and the Court has seen no other evidence suggesting
9 the phone was not stolen. *See* Docs. 93 at 13, 96-3 at 1-17. Assuming the phone was
10 stolen, that act could not have been foreseen or intended by Plaintiff, and neither could its
11 corresponding loss of ESI. The Court therefore cannot find Plaintiff acted with an intent
12 to deprive as required by Rule 37(e)(2).

13 **4. Deactivated Cox.net Email Account.**

14 Defendants claim that Plaintiff failed to take reasonable steps to preserve the
15 contents of her @cox.net email account. Doc. 93 at 16. They argue that it was
16 unreasonable for Plaintiff not to back up the account when she anticipated losing access to
17 it in August 2020. *Id.* at 17. Defendants also note that, contrary to Plaintiff’s statements
18 that she lost access to the email account in August 2020 when she disconnected her Cox
19 Communications internet service, Cox’s terms of service provide that she retained access
20 to the account for 90 days – until February 2021 – and could have moved the contents to
21 another email provider during that time. *Id.* at 12. Defendants further argue that Plaintiff’s
22 claim to have lost all access to the account is false, as demonstrated by an email she
23 produced in this litigation which was forwarded from the @cox.net email address on
24 May 25, 2021. *Id.*; Doc. 93-3 at 227.

25 Plaintiff claims she disconnected her Cox internet service in August 2020 when she
26 moved to an area in Florida that Cox did not service. Doc. 96 at 11-12. She attempts to
27 explain the May 25, 2021 email by asserting that a “glitch” in her Apple mail app allowed
28 her to retain access to the @cox.net email account after February 2021, but that the “glitch”

1 inexplicably resolved itself after a routine software update in summer 2021, eliminating all
2 access to the @cox.net emails. *Id.* at 12. As a result, she no longer has access to the
3 @cox.net account. *Id.*¹⁰

4 Plaintiff claims she did not realize she would continue to have access to the email
5 account and could transfer the contents to another email provider for 90 days after her Cox
6 service was disconnected, but she describes no efforts she made to investigate that fact –
7 as her duty to preserve required – before the disconnection. *Id.* Nor does she describe any
8 effort she made to download or copy the contents of the @cox.net email account before
9 she had it disconnected.

10 Plaintiff asserts that she did not realize she would lose access to her @cox.net email
11 address after her Cox service was disconnected. Doc. 96-2 at 7. Defendants respond by
12 pointing to Cox’s terms of service, which state that emails are sent to @cox.net users,
13 before the disconnection of an email address, reminding them to save their emails and
14 providing instructions on how to do so. Doc. 101 at 8.

15 Whether Plaintiff in fact lost access to her @cox.net email account in November
16 2020 when she disconnected her Cox service, in February 2021 after the 90-day grace
17 period Cox provides in its terms of service, or in the summer of 2021 after a claimed Apple
18 “glitch” was removed by an update, it is clear Plaintiff lost access to the email account after
19 her duty to preserve arose in May 2018. Plaintiff had a duty to take reasonable steps to
20 preserve the contents of the account and breached that duty when she knowingly ended her
21 account without taking steps to preserve the ESI it contained. Plaintiff agrees the emails
22 cannot now be restored or replaced.

23 Courts long have recognized that when the deletion of ESI is set to occur, parties
24 have an affirmative duty to step in and prevent its loss. *See, e.g., Surowiec*, 790 F. Supp.
25 2d at 1007. While Plaintiff claims not to have known that she would lose access to her
26

27 ¹⁰ Plaintiff’s brief argues that this software update and attendant loss of access to
28 the @cox.net email account happened “[s]ometime in the summer of 2021[.]” *Id.* at 12. Plaintiff’s sworn statement, however, contains no mention of when the update occurred and caused her to lose access to the account. *See* Doc. 96-2 at 7-8.

1 @cox.net emails, she should have known that the Cox-hosted email account would be
2 deactivated when she terminated her Cox services.

3 The prerequisites for Rule 37(e) sanctions have been satisfied. Plaintiff had a duty
4 to preserve the ESI in the email account, she failed to take reasonable steps to preserve it,
5 and the contents of the account cannot now be restored or replaced.

6 **a. Rule 37(e)(1) Prejudice.**

7 The Court finds that loss of the @cox.net email account prejudiced Defendants. The
8 lost ESI likely included communications regarding core events at issue in the case. The
9 one email preserved from the account addresses Plaintiff's recovery from the surgery that
10 is an essential part of her damages claim. *See* Doc. 93-3 at 227-28 (email forwarded from
11 Plaintiff's @cox.net email account with re line "Post Op Instructions"). Sanctions under
12 Rule 37(e)(1) are authorized.

13 **b. Rule 37(e)(2) Intent.**

14 Defendants have not shown, however, that Plaintiff deactivated her Cox services
15 with the intent to deprive Defendants of the contents of her @cox.net email account as
16 required by Rule 37(e)(2). Defendants do not dispute that Plaintiff moved to Florida, and
17 they present no evidence that she discontinued her Cox service at that time with an intent
18 to cause the loss of her @cox.net emails. The Court cannot conclude that her move and
19 disconnection of the service meet the high intent standard of Rule 37(e)(2).

20 **5. Telegram Messages.**

21 At oral argument, Defendants raised another instance of Plaintiff's alleged
22 spoliation, arguing that she deleted messages exchanged between her and Mudro on an
23 application known as Telegram Messenger. This claim is based on Facebook messages
24 provided for the first time with Plaintiff's response to Defendants' motion for sanctions.

25 The messages read as follows:

26 **Plaintiff**

27 Download Telegram Messenger when you have a chance. I have done stuff
I want to tell you.
28 *June 22, 2018, 2:13 PM*

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Plaintiff
Some*
June 22, 2018, 2:13 PM

Plaintiff
Jeff did [*sic*] this isn't safe anymore
June 22, 2018, 2:13 PM

Lee Mudro
Ok I am out now I will let u know when I am able to
June 22, 2018, 2:14 PM

Plaintiff
Ok
June 22, 2018, 2:26 PM

Lee Mudro
Ok I have telegram messenger downloaded
June 23, 2018, 3:49 PM

Lee Mudro
Not sure how to use it I put in your cell phone number
June 23, 2018, 3:54 PM

Doc. 96-1 at 77. Plaintiff and Mudro exchanged no further messages on Facebook Messenger for the next five days. *See id.* at 76-77.

Plaintiff manually deleted the above Facebook messages from her initial production to Defendants and provided no indication that the messages had been removed. *See* Doc. 93-3 at 101. Plaintiff also “unsent” her side of the above exchange to prevent Mudro from producing it in response to Defendants’ subpoena. *See* Doc. 93-1 at 55-56. Defendants note that Mudro, in responding to Defendants’ subpoena, apparently thought there were Telegram messages to disclose, but, upon opening the Telegram app, saw no messages between her and Plaintiff. So Mudro took a screenshot of the empty message inbox and produced it to Defendants. Doc. 115 at 2. The screenshot showed that Plaintiff had been active on Telegram within the previous hour. Doc. 113-5 at 6.

Following oral argument, the Court requested supplemental briefing from the parties on whether the Telegram Messenger messages were spoliated. Plaintiff’s supplemental brief asserts that she “cannot remember if she ever communicated with Mudro on Telegram.” Doc. 113 at 4. Plaintiff argues that “it is likely there never were Telegram messages” between her and Mudro because (1) Mudro’s screenshot of the empty message

1 inbox associated with Plaintiff’s Telegram contact contained a note that read “No messages
2 here *yet*,” and the same note appears in Plaintiff’s Telegram inbox associated with Mudro’s
3 contact; and (2) Plaintiff and Mudro “continued extensive conversations – including about
4 deeply personal topics – on Facebook Messenger within days after Mudro stated she
5 downloaded Telegram in June 2018, suggesting that Facebook Messenger remained their
6 method of communication.” *Id.*

7 The Court is not persuaded by Plaintiff’s arguments. Defendants’ forensic expert
8 avows that the “No messages here yet” notation does not mean that messages were never
9 sent between Plaintiff and Mudro because the same notation appears when messages have
10 been sent and then deleted. Doc. 115-1 at 8. A hallmark of Telegram is that a user can
11 delete sent and received messages for both parties. *Id.* at 6-7. The “No messages here yet”
12 note is consistent with a deleted message chain. *See id.* at 8. And the fact that Plaintiff
13 and Mudro resumed communications on Facebook Messenger five days after they talked
14 about using Telegram does not mean that they did not also exchange messages on
15 Telegram. *See* Doc. 96-1 at 76-77. The evidence shows that Plaintiff and Mudro regularly
16 switched between messaging platforms, including text, email, phone, Slack, and Facebook,
17 rather than using one platform exclusively.

18 Moreover, the Facebook messages cited above, in combination with the Telegram
19 screenshots provided by Plaintiff and Mudro, strongly suggest that they communicated on
20 Telegram. To use Telegram, users must choose to connect with each other. Doc. 115-1 at
21 3-4. The screenshots provided by Plaintiff and Mudro show that they each became contacts
22 on the other’s Telegram account. *See* Doc. 113-5 at 6 (Mudro’s screenshot showing
23 “Kristin Fast” as a contact); *id.* at 19 (Plaintiff’s screenshot showing “Lee Mudro” as a
24 contact). Further, the conversation between Plaintiff and Mudro on Facebook Messenger
25 ceased without any apparent transmission of the “stuff” that Plaintiff said she wanted to
26 share with Mudro, suggesting they continued their conversation on Telegram.

27 Additionally, in December 2018, Mudro used Facebook Messenger to ask Plaintiff
28 for an update on her case, using these words: “Call me sometime now that Godaddy is over

1 u can call. *I don't have that app anymore[.]*" Doc. 96-1 at 259 (emphasis added). Mudro's
2 statement that she did not have "that app anymore" indicates that Mudro no longer had an
3 app they had used to communicate in the past – hence the need for Plaintiff to call. The
4 other "app" could not have been Facebook Messenger because that is how Mudro sent this
5 message. The facts recited above suggest that the "app" likely was Telegram Messenger.

6 In late June 2018, when Plaintiff suggested to Mudro that they move their
7 communications to Telegram, Plaintiff was under a duty to preserve all relevant ESI, and
8 yet Plaintiff cannot produce any Telegram messages. *See* Doc. 113 at 4. Plaintiff suggests
9 that this could be because Telegram deletes a user's account after six months of inactivity,
10 and argues that "her Telegram account may have been deleted by Telegram due to
11 inactivity in about December 2018." This is unlikely. When a Telegram account is deleted
12 due to six months of inactivity, the account is permanently deleted – the user must make a
13 new account to use Telegram again and old messages and contacts are not retrievable in
14 the new account. Doc. 115-1 at 9.¹¹

15 It is apparent from Plaintiff's own affidavit that her Telegram account was not
16 deleted in this manner. She was able to log into the account in November 2021 using "the
17 same log in credentials" she used "years before." Doc. 113-1 at 3. It is also apparent that
18 Plaintiff's account had not been inactive for six months, and thus subject to Telegram's
19 deletion policy, because Mudro's screenshot, taken on October 2, 2021, showed that
20 Plaintiff had been active within an hour before the screenshot was taken.¹² Doc. 115 at 5.

21 Further, Plaintiff's attorney asserted at oral argument that Plaintiff uses Telegram
22 to communicate with family members. Doc. 113-6 at 49. And because Telegram is a
23 cloud-based messaging system, Plaintiff's messages should have been available on any

24 _____
25 ¹¹ Notably, when a user's account is deleted, their contacts retain copies of the
26 messages the user sent to them. Doc. 115-1 at 9. Thus, even if Plaintiff's account had been
deleted due to inactivity, that would not explain why Mudro did not retain access to
Plaintiff's messages.

27 ¹² Moreover, Plaintiff's own screenshot shows that she had ten unread messages in
28 her inbox in November 2021. Doc. 113-5 at 19. If her account had been deleted, other
users presumably would have been unable to send her messages.

1 phone or device she used to log in. Doc. 115-1 at 3, 8-9. The only plausible explanation
2 for why neither Plaintiff nor Mudro can produce Telegram messages is that Plaintiff deleted
3 them for both herself and Mudro. This is especially so given Plaintiff's other attempts to
4 prevent the disclosure of her communications with Mudro.¹³

5 The Court finds by a preponderance of the evidence that Plaintiff communicated
6 with Mudro on Telegram Messenger, that she had a duty to preserve those communications,
7 and that she failed to take reasonable steps to preserve them. The prerequisites for Rule
8 37(e) sanctions are satisfied.

9 **a. Rule 37(e)(1) Prejudice.**

10 Defendants were prejudiced by Plaintiff's failure to preserve Telegram messages.
11 The context of the Facebook conversation preceding Plaintiff and Mudro's Telegram
12 messages shows that the messages were relevant to this case. Plaintiff asked Mudro to
13 download Telegram on June 22, 2018, so Plaintiff could tell Mudro about some "stuff"
14 because she felt that Facebook was not "safe" anymore. Doc. 96-1 at 77. This followed a
15 conversation between Plaintiff and Mudro on June 11, 2018, during which they also
16 discussed whether Facebook was "safe." Plaintiff told Mudro that she "learned from Chris,
17 the attorney, to be VERY CAREFUL with GoDaddy" and that "everything I type I have to
18 consider that they are reading it[.]" *Id.* at 94. In Plaintiff's words, this was "front of mind
19 all the time." *Id.* Mudro asked Plaintiff "Do u feel we r safe here," to which Plaintiff
20 responded, "Facebook is putting up quite the fight right now about data, so I think so[.]"
21 *Id.* "Me too," responded Mudro, "I feel this is the only safe place for us[.]" *Id.* at 93.
22 These exchanges show that "safe" referred to Plaintiff and Mudro's belief that their
23 conversations on certain platforms would not be discoverable by Defendants. This accords
24 with other instances where Plaintiff and Mudro's conversations referenced being "safe."
25 *See, e.g., id.* at 208-09 (Mudro states that messaging on Facebook "is probably safe" but
26 that "[w]e do not want conversations on text or call it will hurt your case"). When Plaintiff

27
28 ¹³ Even if Plaintiff's account had been deleted due to inactivity in December 2018 – which does not appear to have been the case – Plaintiff was under a duty to step in and prevent the deletion or otherwise preserve the messages.

1 told Mudro to switch to Telegram because their Facebook messages were no longer “safe,”
2 then, it appears clear that she wanted to communicate information to Mudro that would not
3 be discovered by Defendants, strongly suggesting that the communications were relevant
4 to this lawsuit.

5 **b. Rule 37(e)(2) Intent.**

6 This context and Plaintiff’s broader course of conduct regarding the Mudro
7 communications also suggest that she deleted the messages with the intent to deprive
8 Defendants of their use. Plaintiff and Mudro’s Facebook messages are replete with
9 references to their desire to keep certain evidence and communications hidden from
10 Defendant GoDaddy. *See, e.g., id.* at 203-04 (Plaintiff: “[T]he only thing I’m not giving
11 [GoDaddy] is the Richard piece[,] [t]hat’s my secret” Mudro: “Ok they do not know about
12 my texts on my phone and I am not telling them”), 194 (Plaintiff: “So they don’t think we
13 are taking [*sic*] right[?] I have not let on that we are don’t don’t [*sic*] worry[.]” Mudro:
14 “They have no idea u and I are talking”), 181 (Mudro: “Do not mention we talked and u
15 know mine save that for court[.]” Plaintiff: “of course not Lee . . . I would never, I am very
16 smart, you are my secret”), 102 (Plaintiff: “I sent over my ‘evidence’ last night. At first I
17 had in a bunch of our texts but he had me remove any evidence of you so I deleted any
18 where there was a connection with you and I[.]” Mudro: “Ok so is that a surprise for them.”
19 Kristin: “It will be.”).

20 Plaintiff also tried to conceal the existence of Telegram Messenger communications
21 from Defendants. She did not disclose them in response to any of Defendant’s discovery
22 requests asking for any and all communications. Doc. 93-3 at 303-04. And in her tardy
23 production of Facebook communications with Mudro, Plaintiff manually deleted the
24 exchange that referenced her and Mudro’s communications on Telegram. She then unsend
25 her side of the exchange to prevent Mudro from producing the same messages in response
26 to Defendants’ subpoena. Plaintiff did not provide the Facebook messages referencing
27 Telegram until compelled to respond to Defendants’ motion for sanctions, and yet by then
28 the Telegram messages were gone. The most reasonable reading of this course of conduct,

1 and the finding the Court makes by a preponderance of the evidence, is that Plaintiff deleted
2 her Telegram messages with Mudro to prevent their disclosure to Defendants. Sanctions
3 under Rule 37(e)(2) are authorized.

4 **IV. Defendants' Motion for Sanctions Under Rule 37(c)(1).**

5 Defendants move for sanctions under Rule 37(c)(1) for Plaintiff's failure to produce
6 (1) 487 Facebook Messenger messages between her and Mudro, (2) at least four covertly-
7 made audio recordings of meetings with GoDaddy employees, and (3) emails between
8 Plaintiff and Dr. Donald Rhodes. Plaintiff does not make specific arguments as to why
9 sanctions under Rule 37(c)(1) are not warranted, but instead merely states that Rule 37(e)
10 exclusively governs sanctions for spoliation of ESI. *See* Doc 96 at 15. But Defendants do
11 not argue that these three categories of information have been spoliated, only that Plaintiff
12 failed to produce them in discovery as required by Rule 26(e). As shown above,
13 Rule 37(c)(1) applies to ESI that is not produced as required by Rule 26(e). The Court will
14 construe Plaintiff's various justifications for non-production as arguments regarding
15 harmlessness or substantial justification for purposes of its Rule 37(c)(1) analysis.

16 **A. Deleted, Altered, and Fabricated Facebook Messages.**

17 Defendants argue that Plaintiff produced her Facebook Messenger messages with
18 Mudro without including 487 messages, with undisclosed modifications to the text of
19 several other messages, and with the complete fabrication of one message. Doc. 93 at 7-8,
20 19. Defendants assert that the modifications were hidden from them by the manner of
21 Plaintiff's production, and that they did not know the production was incomplete until they
22 received a copy of the same messages from Mudro. *Id.* at 6-7, 19.

23 Plaintiff responds with the significant understatement that her production was "not
24 done perfectly" and argues that she "did the best she could to produce information she
25 believed was relevant." Doc. 96 at 7, 19. Plaintiff describes the process she used:

26 [Plaintiff] followed a process in which she converted a PDF download result
27 from Facebook into a Word document so she could manually remove
28 irrelevant messages. . . . She removed messages with Mudro that she
considered irrelevant because they were about deeply personal issues . . . At
times, as she was reviewing the documents, she had to re-type a message
because it disappeared during the download process or she could not simply

1 take out an irrelevant message. As [Plaintiff] worked from the PDF
2 document to remove irrelevant messages, it became too strenuous for her to
3 continue due to CRPS, so she instead read off of the original PDF and hand-
4 typed the relevant messages into her Word document. Although she
5 attempted to recreate the downloaded message, it was not perfect every time,
6 so mistakes were made.

7 *Id.* at 8 (citations omitted). Plaintiff asserts that her ability to produce all discoverable
8 information was hindered by the cognitive effects of her CRPS and the medications she
9 takes to cope with it. *Id.* at 14-15. At oral argument, her counsel asserted that the disability
10 caused by Defendants is now being used to undercut her claim against them. Plaintiff
11 argues that she “deleted only a handful of Facebook message[s]—and they were either not
12 relevant to this lawsuit or she preserved them.” *Id.* at 19-20.

13 The Court cannot accept this characterization of Plaintiff’s actions. She withheld
14 nearly 500 Facebook messages, not a mere “handful,” and the withheld messages were not
15 all irrelevant to her lawsuit. Many of them, while perhaps “deeply personal,” were plainly
16 relevant and included information about her pain and the treatment of her CRPS, *see*
17 Doc. 93-1 at 81-82, 91-92, 97-99, her case against GoDaddy and her search for other jobs,
18 *see id.* at 94-95, and her CRPS blog (which is related to her claim that Defendants caused
19 her CRPS and to the amount of her claimed damages), *see id.* at 60-62, 72. Moreover,
20 while Plaintiff complains of the onerousness of complying with her discovery obligations,
21 she simply could have provided the full PDF download to her attorney without converting
22 it to Word and manually removing hundreds of messages. This would be significantly less
23 onerous than the course Plaintiff describes.

24 Nor can the Court accept Plaintiff’s claim that she was cognitively incapacitated by
25 CRPS and therefore hampered in her efforts to meet her discovery obligations. On
26 February 18, 2019, Plaintiff claimed she is “[c]ognitively . . . 95% stronger than most
27 people” and that she “exercise[s her] brain every day.” Doc. 93-3 at 153 (Facebook
28 message to Mudro). On June 22, 2021, Plaintiff wrote:

I get up at 8:00am, and I log in online and I work, through the pain, and I
lead a large development team. I’m on meetings all day, strategically
thinking through projects, roadmaps, strategy, spending millions of dollars
in company planning sessions, etc. I’m telling you this for one reason, and

1 that is to show you that life doesn't stop because you have a disease.
2 Recently, I had a hysterectomy, and I went up against the entire hospital
3 board, all by myself, because it was during COVID and no one was allowed
4 to be there with me. I wanted Ketamine, for 5 days, on a drip, so that the
5 CRPS didn't spread to my abdomen. I was on Fentanyl, Morphine, and
6 Ketamine and I negotiated with surgeons, hospital board administrators and
7 the head pain management doctors. They told me that they had never met
8 anyone like me that was as "functional" as I was while on so many powerful
9 medications. The reason for that is because my brain has remapped itself TO
10 function around the opioids and pain BECAUSE of the opioids and pain
11 because I have never stopped thinking strategically, solving complex
12 problems, and forcing my brain to create new brain cells and neurons.

8 Doc. 101-1 at 4.

9 What is more, the modifications Plaintiff made to various messages were clear
10 attempts to conceal information, including Plaintiff's participation in a U.S. trial of CRPS
11 treatment. Two examples illustrate.

12 First, Plaintiff's initial production of the Mudro messages contained this message,
13 sent by Plaintiff on February 6, 2019, at 11:00 PM: "No I got it in May so not quite a year.
14 I need the booster because when I fell in October I caused a secondary instance of it in my
15 arm in fighting and it's back in my leg[.]" Doc. 93-3 at 157. A message sent by Plaintiff
16 with the same time stamp was unsent and therefore not produced in Mudro's subpoenaed
17 copy of the messages. See Doc. 93-1 at 47. But a copy of the same message produced in
18 response to Defendants' motion for sanctions reads as follows, with underlining of text that
19 had been deleted in Plaintiff's initial production:

20 No I got it in May so not quite a year. I need the booster because when I fell
21 in October I caused a secondary instance of it in my arm in fighting and it's
22 back in my leg, but I got accepted into a US govt trial I start on Monday. No
idea how they accepted me! I think they know who I am and are letting me
in so I don't hurt their chances of getting approved lol[.]

23 Doc. 96-1 at 254.

24 Second, Plaintiff's initial production of the Mudro messages contained the
25 following, sent by Plaintiff on February 18, 2019, at 4:17 PM: "I'm still doing PT. I'm
26 hoping it will give me the final boost I need. Italy definatelty [*sic*] made a HUGE
27 difference. Cognitively I am 95% stronger than most people and I know that is because of
28 Italy and I exercise my brain every day[.]" Doc. 93-3 at 153. The message does not appear

1 in Mudro’s copy because Plaintiff unsend it. *See* Doc. 93-1 at 39. The same message in
2 Plaintiff’s most recent production reads as follows, with underlining indicating text that
3 was deleted in Plaintiff’s initial production:

4 I’m still doing PT. I’m in a trial right now for the same thing I went to Italy
5 for hoping that getting it again will give me the final boost I need. Italy
6 definately [*sic*] made a HUGE difference. Cognitively I am 95% stronger
7 than most people and I know that is because of Italy and I exercise my brain
8 every day[.]

9 Doc. 96-1 at 246.

10 The fact that Plaintiff is receiving trial treatments for her CRPS is clearly relevant
11 to her claim for CRPS damages in this case. She had an obligation under Rule 26(e) to
12 produce to Defendants, “in a timely manner,” accurate versions of her messages with
13 Mudro rather than the edited versions she produced. Fed. R. Civ. P. 26(e)(1)(A). The
14 accurate versions came only after discovery was closed and in response to Defendants’
15 motion for sanctions. Defendants were unable to use them in preparing for any depositions.
16 Plaintiff has not shown that her failure to produce the accurate messages was substantially
17 justified or harmless. Sanctions under Rule 37(c)(1) are authorized.

18 **B. Audio Recordings.**

19 Defendants argue that Plaintiff failed to produce at least four audio recordings she
20 surreptitiously made of relevant meetings with GoDaddy employees. Doc. 93 at 19. On
21 March 3, 2021, Defendants served a discovery request that sought “all . . . recordings . . .
22 relating to the claims, allegations and defenses in this lawsuit.” *Id.* at 3. Plaintiff responded
23 on April 16, 2021 that she had no recordings related to her claims. *Id.* at 4. But shortly
24 before the close of discovery and after all non-expert depositions had been completed,
25 Plaintiff produced three of the four recordings. *Id.* at 19. They were recordings
26 of Plaintiff’s March 26, 2018 call with Defendant Lakshmanan in which they discussed her
27 medical leave; Plaintiff’s April 11, 2018 call with Eva Adams, a human resources
28 employee at GoDaddy, in which Adams told Plaintiff her position with GoDaddy was
being eliminated; and Plaintiff’s second April 11, 2018 call with Adams in which she and

1 Adams discussed Plaintiff's allegations of FMLA discrimination and complaints about
2 Defendant Lakshmanan. *Id.* at 9-11.¹⁴

3 Plaintiff was required to produce all four recordings in response to Defendants'
4 document production request. Fed. R. Civ. P. 34(b)(2)(B). Her failure to timely correct
5 the false assertion that there were no recordings violated Rule 26(e). *See Cmty. Ass'n*
6 *Underwriters of Am., Inc.*, 2014 WL 3055358, at *7 (holding failure to produce tape
7 recording and false certification that no such tape existed in response to an interrogatory
8 supports sanctions under Rules 37(c)(1) and 26(e)). Plaintiff does not dispute that she had
9 the recordings in her possession, custody, or control and was therefore required to disclose
10 them. She instead claims she forgot about them. But it is very difficult to believe that
11 Plaintiff forgot covert recordings she made of pivotal events in this case, particularly when
12 she identified the recordings in a private catalogue of evidence she planned to use in the
13 case and when she produced to Defendants purported written summaries of the very same
14 meetings. Doc. 93-3 at 205 (Plaintiff's catalogue of evidence, produced by Mudro,
15 documenting May 1, 2018, call with GoDaddy employee Eva Adams and noting "[t]he rest
16 of the conversation was recorded and can be listened to."), 169-70 (Plaintiff's summaries
17 of two March 26, 2018, calls with Defendant Lakshmanan). In any event, Plaintiff was
18 obligated to make a diligent search for discoverable information, including recordings, and
19 she admits that the recordings were available on her phone.

20 Plaintiff has provided no substantial justification for her failure to produce the
21 recordings and the failure was not harmless. Defendants were unable to review or use them
22 during any fact deposition in this case, including Plaintiff's. Her "last-minute tender of
23 [the recordings] does not cure the prejudice." *Milke v. City of Phoenix*, 497 F. Supp. 3d
24 442, 467 (D. Ariz. 2020). And Defendants continue to be prejudiced by the failure of
25 Plaintiff to produce the fourth recording she claimed to have made. It is not clear whether

26 ¹⁴ At oral argument, Plaintiff's counsel suggested that Plaintiff had not withheld the
27 recordings at all because she had never been asked for them. Doc. 113-6 at 45. This is not
28 correct. Defendants asked specifically for audio recordings in their Request for Production
1, served on March 3, 2021. *See* Doc. 93-3 at 4. In her response on April 16, 2021, Plaintiff
certified that she had no recordings relating to her claims. *Id.* at 200-01. Plaintiff
confirmed this response under oath during her deposition. Doc. 93 at 9.

1 that recording is lost or Plaintiff has not produced it. Sanctions under Rule 37(c)(1) are
2 authorized.

3 **C. Email Communications with Dr. Donald Rhodes.**

4 This last category is one of the most troubling. Dr. Donald Rhodes is a podiatrist
5 who treated Plaintiff's CRPS in 2019. Doc. 93 at 13. He signed a letter on July 7, 2020,
6 opining that Plaintiff's CRPS was caused by swelling that resulted from Plaintiff's leg
7 position while working at Defendants' insistence on February 20-23, 2018. This
8 contention – that Defendants caused Plaintiff's debilitating CRPS condition – is a key
9 component of this case. *Id.*

10 Plaintiff did not produce any email communications with Dr. Rhodes in response to
11 Defendants' requests for production prior to Dr. Rhodes's deposition. *Id.* Defendants
12 began to suspect during the deposition that Plaintiff had a hand in preparing his letter about
13 her CRPS. *Id.* Defendants again requested that Plaintiff produce her communications with
14 Dr. Rhodes, but Plaintiff produced nothing. *Id.* at 14. Defendants then subpoenaed Dr.
15 Rhodes for his communications with Plaintiff and he produced several key emails. *Id.* In
16 one email, dated July 2, 2020, Plaintiff asked Dr. Rhodes to write a letter saying that her
17 CRPS was caused by working at GoDaddy after surgery. *Id.* In another, dated July 7,
18 2020, Plaintiff provided Dr. Rhodes with a draft letter expressing that opinion. *Id.*
19 Defendants note that Plaintiff's draft letter is nearly identical to the letter Dr. Rhodes
20 signed, which was also dated July 7, 2020. *Id.* In short, Plaintiff failed to disclose emails
21 showing that she ghostwrote one of the key medical conclusions in this case.

22 Plaintiff responds only by stating that she “does not remember having written the
23 email or the draft itself” and by claiming that she could not find the emails when she
24 searched for Dr. Rhodes's name or “the exact wording” of the email. Doc. 96 at 13. She
25 produces a screenshot of an apparent search of her email account revealing no emails, but
26 she has redacted all search terms in the screenshot, making it impossible to determine what
27 she searched for. *See* Doc. 96-3 at 29. Significantly, Plaintiff does not dispute that the
28

1 emails were sent from her email account, does not claim they were sent by someone else,
2 and does not explain why they are not in her possession, custody, or control.¹⁵

3 Rule 26(e) required Plaintiff to supplement her incomplete response to Defendants'
4 requests for communications with Dr. Rhodes. Her breach of that obligation was not
5 substantially justified or harmless. Without the key emails, Defendants could not prepare
6 fully for the deposition of Dr. Rhodes, explore the origin of his critical letter claiming that
7 Plaintiff's CRPS was caused by Defendants, or challenge his claim that he wrote the letter
8 without Plaintiff's assistance. Sanctions are authorized under Rule 37(c)(1).

9 **V. Sanctions.**

10 The fact that Rules 37(c)(1) and (e) authorize sanctions does not mean that sanctions
11 must be imposed. The Court retains discretion to determine what sanctions, if any, are
12 warranted. As the committee notes to Rule 37(e) observed, "[t]he remedy should fit the
13 wrong, and the severe measures authorized by [Rule 37(e)(2)] should not be used when the
14 information lost was relatively unimportant or lesser measures such as those specified in
15 subdivision (e)(1) would be sufficient to redress the loss." Fed. R. Civ. P. 37(e), advisory
16 committee notes to 2015 amendment.

17 **A. Dismissal for Spoliation.**

18 Defendants argue that the most appropriate sanction is dismissal of Plaintiff's suit.
19 Doc. 93 at 20. They assert that her actions amount to a "pattern of deception and discovery
20 abuse . . . [that makes it] impossible for the district court to conduct a trial with any
21 reasonable assurance that the truth would be available." *Id.* (quoting *Burriss*, 2021 WL
22 4627312, at *16). Citing the five-part test for case-terminating sanctions in *Leon v. IDX*
23 *Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006), Defendants argue that dismissing Plaintiff's
24 suit would further the public's interest in expeditious resolution of litigation and the Court's
25 interest in managing its docket. Doc. 93 at 20. Defendants also argue the risk of prejudice

26
27
28 ¹⁵ Defendants note that Plaintiff recently turned over 115 pages of email communications with Dr. Rhodes. Doc. 101 at 4 n.1. This is very untimely disclosure, but it makes even less clear why she cannot produce the highly relevant July 2 and 7 emails.

1 against them warrants dismissal because Defendants have “been forced to litigate this
2 case . . . based on a partial set of facts that favored Plaintiff.” *Id.*¹⁶

3 Defendants further assert that while the information addressed in their motion has
4 tilted the case in their favor, “these facts are merely the tip of the iceberg” and they will be
5 forced to expend significantly more time and money pursuing additional subpoenas,
6 computer forensic experts, and an evidentiary hearing to present future instances of
7 spoliation if the Court does not dismiss the case. *Id.* Even after taking these additional
8 measures, Defendants argue, there will be no guarantee they “will ever be able to rely on
9 the information Plaintiff produces.” *Id.* Defendants concede that there is a public interest
10 in resolving cases on the merits and that interest is not served by dismissal. *Id.* But they
11 argue that less drastic sanctions are not appropriate given “the wide-ranging scope of
12 Plaintiff’s spoliation, her clear intent to deprive GoDaddy of evidence in the litigation, and
13 the severe prejudice GoDaddy will continue to suffer if it is forced to continue defending
14 against Plaintiff’s claims without ever having full access to the facts.” *Id.*

15 Plaintiff argues that dismissal is not appropriate. Doc. 96 at 17. She asserts that she
16 worked diligently to respond to Defendant’s discovery requests, “provided relevant
17 information and preserved evidence,” and “attempted through multiple channels to retrieve
18 lost information.” *Id.* at 19. The documents she did produce, Plaintiff argues “show that
19 she did the best she could to produce information she believed was relevant.” *Id.*

20 The Court is not persuaded by Plaintiff’s arguments, but dismissal “constitutes the
21 ultimate sanction for spoliation.” *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 593 (4th
22 Cir. 2001). It should be used only when the resulting prejudice is “extraordinary, denying
23 [a party] the ability to adequately defend its case.” *Id.* While not dealing with ESI, *Silvestri*
24 illustrates the type of extreme prejudice that justifies terminating a case as a result of

25 ¹⁶ The five factors cited in *Leon* include “(1) the public’s interest in expeditious
26 resolution of litigation; (2) the court’s need to manage its dockets; (3) the risk of prejudice
27 to the party seeking sanctions; (4) the public policy favoring disposition of cases on their
28 merits; and (5) the availability of less drastic sanctions.” 464 F.3d at 958. *Leon* was a
spoliation case, but it was decided before the 2015 amendments to Rule 37(e) and applied
factors long used in the Ninth Circuit for evaluating case-terminating sanctions. *See, e.g.*,
Malone v. U.S. Postal Serv., 833 F.2d 128, 130 (9th Cir. 1987). The factors are not
specifically tailored to ESI spoliation issues under Rule 37(e).

1 spoliation. The plaintiff in *Silvestri* claimed injury as a result of faulty airbags, but the car
2 in which he was injured was repaired before the defendant could examine it and the plaintiff
3 failed to preserve the airbags. *Id.* at 594. As a result, the defendant was denied access to
4 “the only evidence from which it could develop its defenses adequately.” *Id.* The
5 plaintiff’s spoliation effectively foreclosed a meaningful defense.

6 A similar consequence is not present here. The Court has found Rule 37(e)(2)
7 sanctions authorized for three categories of discovery misconduct: (1) Plaintiff’s deletion
8 of an unknown number of Facebook posts, (2) Plaintiff’s “unsending” of the 11:57 message
9 that conveyed a summary of her evidence, and (3) Plaintiff’s deletion of Telegram
10 Messenger messages between her and Mudro. While this deprives Defendants of evidence
11 that would be favorable to their case, it does not foreclose a meaningful defense. The lost
12 evidence primarily appears to be related to Plaintiff’s damages claims. The Court has seen
13 nothing suggesting that it is central to the principal liability issues in this case – whether
14 Defendants violated Title VII by creating a hostile work environment based on sex,
15 violated the FMLA by interfering with Plaintiff’s treatment and recovery, or violated the
16 Americans with Disabilities Act by discrimination and a failure to provide reasonable
17 accommodations. *See* Doc. 25. And although the spoliation has affected the evidence
18 Defendants have obtained regarding damages, the Court concludes that information
19 obtained through discovery and in response to their motion for sanctions will enable
20 Defendants to prepare and present an effective damages defense, particularly given the
21 other sanctions the Court intends to impose. The Court therefore finds that the ultimate
22 sanction of case dismissal is not warranted. *See* Fed. R. Civ. P. 37(e), advisory committee
23 notes to 2015 amendments (“Courts should exercise caution . . . in using the measures
24 specified in (e)(2)”).

25 The Court also finds, however, that Plaintiff’s intentional conduct and the prejudice
26 it caused Defendants warrant an adverse inference instruction that will allow the jury to
27 infer that the information intentionally deleted by Plaintiff was unfavorable to her case.
28 This remedy is warranted by Plaintiff’s intentional destruction of ESI and will help

1 alleviate the prejudice to Defendants caused by Plaintiff's actions. *See Torgersen v.*
2 *Siemens Bldg. Tech., Inc.*, No. 19-CV-4975, 2021 WL 2072151, at *5 (N.D. Ill. May 24,
3 2021).

4 **B. Dismissal for Redactions.**

5 Defendants argue in their reply brief that dismissal is also warranted for Plaintiff's
6 deletion of messages from the Facebook Messenger conversations with Mudro. Doc. 101
7 at 4-5. Plaintiff characterizes her deletions as "redactions for relevance" (Doc. 96 at 8),
8 but as Defendants correctly note, "redaction" is a misnomer – "what Plaintiff did was
9 manufacture a brand new chain of messages that secretly omitted hundreds of messages,
10 without notifying [Defendants]." Doc. 101 at 4.

11 Defendants rely on two cases: *Evon v. Law Offices of Sidney Mickell*, No. S-09-
12 0760 JAM GGH, 2010 WL 455476 (E.D. Cal. Feb. 3, 2010), and *Islander Group, Inc. v.*
13 *Swimways Corp.*, No. CV 13-00094 LEK-RLP, 2014 WL 12573995 (D. Haw. Jan. 28,
14 2014). But neither case addresses the sanction of dismissal for improper deletions.

15 The Court concludes that dismissal is not warranted under Rule 37(c)(1) for
16 Plaintiff's undisclosed "redactions."¹⁷ Surely that conduct is improper and deserving of
17 serious sanctions, which the Court will impose in the form of the monetary penalties
18 discussed below, but it did not foreclose Defendants from preparing an effective defense.
19 All of the redacted materials have now been produced to Defendants. In addition to the
20 monetary sanctions discussed below, Defendants will be permitted to inform the jury, if
21 they choose to do so, of Plaintiff's withholding of information from her Facebook
22 messages. *See* Fed. R. Civ. P. 37(c)(1)(B).

23 **C. Appropriate Sanctions.**

24 Plaintiff's troubling actions in this case are not mere minor oversights, as her
25 counsel suggests. They are serious violations of Plaintiff's duty to preserve ESI and her
26 obligations under the Federal Rules of Civil procedure.¹⁸

27 ¹⁷ Sanctions are not available under Rule 37(e) because the "redacted" information
28 ultimately was disclosed to Defendants.

¹⁸ The Court is also concerned about the conduct of Plaintiff's counsel in discovery.

1 The Court finds that the following sanctions are appropriate in this case:

- 2
- 3 • As discussed above, the Court will give an adverse inference jury instruction at
4 trial based on (1) Plaintiff's deletion of an unknown number of Facebook posts,
5 (2) Plaintiff's "unsending" of the 11:57 message that conveyed a summary of
6 her evidence, and (3) Plaintiff's deletion of Telegram Messenger messages
7 between her and Mudro. Fed. R. Civ. P. 37(e)(2). The parties should discuss
8 the appropriate form of the instruction and include proposals in their submission
9 of jury instructions for the final pretrial conference in this case.¹⁹
 - 10 • Defendants will be permitted to inform the jury of Plaintiff's undisclosed
11 "redactions" from her Facebook posts. Fed. R. Civ. P. 37(c)(1)(B).
 - 12 • The Court will require Plaintiff to pay some, and perhaps all, of Defendants'
13 attorneys' fees and costs associated with preparing for and litigating the motion
14 for sanctions (Doc. 93), the hearing on December 16, 2021, the supplemental
15 briefing ordered by the Court (including, potentially, Defendants' retention of a
16 forensic evidence expert in connection with the supplemental briefing), and
17 further discovery ordered by the Court in relation to this motion. The amount of
18 fees and costs will be determined after trial, when the Court can evaluate them
19 in light of the ultimate outcome of this case.

20 _____
21 He had an affirmative obligation to ensure that his client conducted diligent and thorough
22 searches for discoverable material and that discovery responses were complete and correct
23 when made. *See* Fed. R. Civ. P. 26(g); *Legault v. Zambarano*, 105 F.3d 24, 28 (1st Cir.
24 1997) ("The Advisory Committee's Notes to the 1983 amendments to Rule 26 spell out the
25 obvious: a certifying lawyer must make 'a reasonable effort to assure that the client has
26 provided all the information and documents available to him that are responsive to the
27 discovery demand.'"); *Bruner v. City of Phoenix*, No. CV-18-00664-PHX-DJH, 2020 WL
554387, at *8 (D. Ariz. Feb. 4, 2020) ("[I]t is not reasonable for counsel to simply give
instructions to his clients and count on them to fulfill their discovery obligations. The
Federal Rules of Civil Procedure place an affirmative obligation on an attorney to ensure
that their clients' search for responsive documents and information is complete. *See* Fed.
R. Civ. P. 26(g)."); *Stevens*, 2019 WL 6499098, at *4 (criticizing "cavalier attitude toward
the preservation requirement" where "counsel failed to immediately preserve obviously
crucial evidence at a time when the duty to preserve existed and instead allowed the phone
to remain in [his client's] possession").

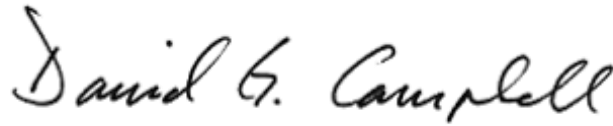
28 ¹⁹ The parties should consider the 2015 advisory committee note to Rule 37(e),
Torgersen, 2021 WL 2072151, at *5, *Pettit*, 45 F. Supp. 3d at 1114, and other relevant
sources in crafting their proposed adverse inference instructions.

- Defendants will be allowed to conduct a forensic review of Plaintiff's electronic devices, if they choose to do so, to determine whether any spoliated or as-yet-unproduced information is recoverable. Plaintiff is hereby ordered to refrain from any further deletion, alteration, or removal of information from any of her electronic devices or accounts prior to this review. If the parties are unable to agree on the scope and timing of this review within two weeks of this order, they shall place a call to the Court to resolve any disagreement.
- Defendants may issue up to four additional third-party subpoenas.

IT IS ORDERED:

1. Defendants' motion for sanctions under Rule 37(c)(1) and (e) is **granted in part and denied in part** as set forth above.
2. The additional discovery authorized in this order shall be completed by **March 31, 2022**. Dispositive motions are due on **April 29, 2022**. Letters regarding dispositive motions (as required in the Court's Case Management Order) are due **March 31, 2022**.

Dated this 3rd day of February, 2022.



David G. Campbell
Senior United States District Judge

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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE GOOGLE PLAY STORE
ANTITRUST LITIGATION

Case No. [21-md-02981-JD](#)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE
CHAT PRESERVATION**

During discovery in this multidistrict litigation (MDL) case, plaintiffs obtained information indicating that Google did not adequately preserve communications that were exchanged internally on its Chat message system. Plaintiffs say that this shortfall was intentional and deprived them of material evidence. They have requested sanctions under Federal Rule of Civil Procedure 37(e). Dkt. No. 349.¹ After substantial briefing by both sides, and an evidentiary hearing that featured witness testimony and other evidence, the Court concludes that sanctions are warranted.

BACKGROUND

The MDL action involves multiple antitrust cases challenging Google’s Play Store practices as anticompetitive. The plaintiffs are Epic Games, Inc., Case No. 20-cv-05671-JD; the consumer plaintiffs, Case No. 20-cv-05761-JD; the Attorneys General of 38 states and the District of Columbia, Case No. 21-cv-05227-JD; and the Match Group plaintiffs, Case No. 22-cv-02746-

¹ Unless otherwise stated, all docket number references are to the ECF docket for the multidistrict litigation case, Case No. 21-md-02981-JD. This order will be filed in unredacted form on the public docket, except for certain employee names which are redacted below. Other sealing requests made in connection with these proceedings will be resolved by a separate order.

1 JD.² An action by software developers was filed and is in the process of settling on a class basis,
2 Case No. 20-cv-05792-JD, and the developer plaintiffs are not part of these proceedings.
3 Plaintiffs allege that Google illegally monopolized the Android app distribution market by
4 engaging in exclusionary conduct, which has harmed the different plaintiff groups in various
5 ways.

6 Even before the MDL was instituted, the Court directed the parties to coordinate discovery
7 with an eye toward containing costs and burdens. This was largely successful and the parties have
8 managed to work things out, with one major exception. In April 2021, plaintiffs asked Google
9 about a curious lack of Chat messages in its document productions. In October 2021, Google said
10 that Google Chats are typically deleted after 24 hours, and that Google had not suspended this
11 auto-deletion even after this litigation began. Google chose instead to let employees make their
12 own personal choices about preserving chats.

13 This decision raised obvious questions that were presented to the Court in a joint statement
14 in May 2022. Dkt. No. 258. With the Court's consent, plaintiffs filed a motion for sanctions
15 under Rule 37 in October 2022, which resulted in substantial briefing by each side, including the
16 filing of declarations and other written evidence. *See* Dkt. Nos. 340, 349, 367, 373.

17 The parties disagreed about a number of factual issues, and the Court was unwilling to
18 resolve the disputes on a dry record. Consequently, the Court held an evidentiary hearing over
19 two days in January 2023. Dkt. Nos. 375, 384, 420. The Court received documentary evidence,
20 heard testimony by Google employees Genaro Lopez, Jamie Rosenberg, and Andrew Rope, and
21 took closing arguments by the parties. Dkt. Nos. 415, 440. This record was supplemented by a
22 transcript of the deposition of former Google employee Tian Lim, Dkt. No. 449, and many follow-
23 up submissions, *see, e.g.*, Dkt. Nos. 428, 429, 431, 432. At the Court's direction, Google
24 produced to plaintiffs in February 2023 approximately 52,271 additional chats, after which both
25 sides filed supplemental briefs addressing this new evidence. Dkt. Nos. 454, 463, 464. Overall,

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27

28 ² The Match Group plaintiffs are Match Group, LLC; Humor Rainbow, Inc.; PlentyofFish Media ULC; and People Media, Inc.

1 the Court has obtained a thorough and highly detailed record with respect to Google’s Chat
2 preservation conduct.

3 The Court makes the ensuing findings of fact and conclusions of law pursuant to Federal
4 Rule of Civil Procedure 52(a). The findings and conclusions are based on the evidence admitted
5 at the hearing and filed on the docket by the parties; the Court’s observation of the demeanor,
6 credibility, and candor of the witnesses; and the arguments of the parties at the hearing and in their
7 post-hearing filings.

8 FINDINGS OF FACT

9 I. GOOGLE IS A FREQUENT AND SOPHISTICATED LITIGATION PARTY

10 1. Google is a well-known and “really big” company that is “in the public eye.” It is
11 frequently a party to government proceedings and private litigation. Dkt. Nos. 418 & 446 (Hrg.
12 Tr.) at 70:9, 102:11-22.

13 2. Google employees are no strangers to document production and discovery
14 obligations. At any given time, Google has thousands of employees who are under a litigation
15 hold for document preservation. Hrg. Tr. at 60:23-61:2, 102:17-22.

16 3. Google employee Jamie Rosenberg testified that he had been “placed under many
17 litigation holds over [his] time at Google,” and he did not recall a time in his last five or six years
18 there when he personally was not under at least one litigation hold. Hrg. Tr. at 99:4-10.

19 4. Former employee Tian Lim, who worked at Google for over five years through
20 early January 2023, testified that the litigation hold he received for this case “was probably one of
21 at least ten or more other litigation holds that I was on.” Dkt. No. 449-1 (Lim Depo. Tr.) at 6:25-
22 7:9, 20:22-21:3.

23 II. GOOGLE TRAINS EMPLOYEES TO “COMMUNICATE WITH CARE”

24 5. Google employees receive training to “Communicate with Care.” Hrg. Tr. at
25 101:23-25. These are live group trainings to teach Google employees how to handle written
26 communications. The trainings are presented by lawyers, with presentation slides. *Id.* at 99:24-
27 100:13.

1 6. One set of training slides was received into evidence. Hrg. Exh. PX-120. The
2 interactive training was titled, “You Said What?!: 10 Things to Ensure You Are Communicating
3 With Care.” The first slide stated, “At Google, We are constantly in the public eye . . . and the
4 courthouse. We often have to produce employee communications as evidence, which means your
5 communications can become public at any time. Our communications can hurt or embarrass us as
6 a company, or as individuals. We need to be cautious in our communications to avoid
7 unnecessary harm. [¶] This is not about ‘hiding stuff’ or not pointing out something that may need
8 fixing. Speaking up is a core company value. This is about being thoughtful in your
9 communication in order to reduce the risk of unintended harm to Google and/or you.” *Id.* at
10 GOOG-PLAY-005029850.

11 7. “Rule 03” in the training was to “Avoid Communicating When Angry or Tired.”
12 *Id.* at GOOG-PLAY-005029855. It gives the example of a fictional Google employee, Echo, who,
13 after “working all night” on a new product, has decided to write an email to the team lead “before
14 calling it a night[,] and wants you to take a look at it before sending it.” *Id.* at GOOG-PLAY-
15 005029856. The team lead “took the night off to attend a basketball game,” and Echo’s draft
16 email ends with the line, “Could have really used your help tonight. Hope you enjoyed the game.”
17 *Id.* The training asks, “What do you think you should tell Echo to do?” It gives four possible
18 options: (1) “Send the email”; (2) “Don’t send the email now. Send it in the morning”; (3) “Talk
19 to the team lead in the morning”; and (4) “Don’t send the email. Chat ‘off the record’ via
20 Hangouts instead.” *Id.*

21 8. In a later slide, Option 4 (“Don’t send the email. Chat ‘off the record’ via
22 Hangouts instead.”) is marked red as a discouraged option, rather than green, like Options 2 and 3.
23 *See id.* at GOOG-PLAY-005029858. A pop-up box provides this commentary about Option 4:
24 “Better than sending the email, but not without risk. While ‘off the record’ Hangout chats
25 between individual corporate accounts are not retained by Google as emails are, any chat
26 participant may save the conversation by simply copying and pasting it into a doc or email -
27 something Echo’s team lead might choose to do in order to discuss the appropriateness of that
28 middle-of-the-night chat with Echo and HR in the morning.” *Id.* at GOOG-PLAY-005029860.

1 The apparent concern is that the chat might then be retained for a much longer period of time than
2 off-the-record chat messages usually are.

3 9. The “Communicate with Care” training gave specific instructions to Google
4 employees about strategies for seeking to make their emails and other communications “protected
5 by the attorney-client privilege.” *Id.* at GOOG-PLAY-005029877. Employees were advised that
6 “You must include an attorney in the address” of an email, and, “In addition to addressing it to an
7 attorney and labeling it as such, for the email to be attorney-client privileged, it must be for the
8 purposes of getting legal advice.” *Id.* at GOOG-PLAY-005029882.

9 10. To complete the training, Google employees were required to certify that “you have
10 fully reviewed, understand and are responsible for applying the advice and guidelines provided in
11 this training to your interactions, responsibilities, and work at and for Google.” *Id.* at GOOG-
12 PLAY-005029900.

13 11. Google employees took the Care training to heart. In multiple instances, internal
14 communications actively expressed concerns about the possibility of disclosure in litigation and
15 the risks of preserving Chats. *See, e.g.*, Hrg. Exh. PX-9 at GOOG-PLAY-007653956 (“Comment
16 freely but please be aware that this doc is not privileged. For anything sensitive, please move to
17 Chat / video call.”); Dkt. No. 468, Ex. 8 (“are we allowed to talk about Runway here?,” “that’s a
18 good question. i would say, if you talk about it, communicate with care - assume anything you say
19 here will be subject to discovery if there are any regulatory or legal proceedings at some point in
20 the future. group chats (like this one) aren’t transient and you can’t turn off history (unlike 1:1
21 chat threads where you can turn off history and they disappear in 24 hours”); *id.*, Ex. 19 (“should
22 we have history off for this? . . . I think our chats about google products are more likely to come
23 up in court”; “Right now it doesn’t feel risky. But just communicate with care.”); *id.*, Ex. 20
24 (“Since history is turned on, be mindful of putting anything discoverable here”); *id.*, Ex. 23 (“just
25 a reminder if you use privileged and confidential in emails an attorney must be in the To line”;
26 “wondering what is the best way to update the team about confidential topics without having to
27 include an attorney in all comms”; “History has to be off I believe”; “yes with history off
28 everything gets wiped . . . but it does exist for 24-48 hrs so if super sensitive you need to use GVC

1 because they could look at your recent ping history and that could go into court[,] also hopefully it
2 won't come to this for any of us."); *id.*, Ex. 27 ("please do not share sensitive information here
3 where possible . . . Until we fix the room architecture, content here is searchable/discoverable
4 within the corp."). At Google, the terms "history on" and "on the record" were used
5 interchangeably to mean the same thing. Hrg. Tr. at 29:8-12.

6 **III. GOOGLE CHAT**

7 12. Google Chat is a "communications instant messaging tool" that allows users to
8 send each other text messages. Hrg Tr. at 18:23-19:3. In effect, it is Google's in-house IM
9 platform. This order focuses on Google's internal use of Chat, and its preservation practices for
10 Chat messages sent on the platform by Google employees.

11 13. Google Chats can take the form of one-on-one chats, Hrg. Tr. at 20:8-11; group
12 chats involving three or more people, *id.* at 21:14-16; or "rooms and spaces," which are "topic- or
13 project-based type[s] of conversations that are specifically oriented around a particular item or
14 subject matter," *id.* at 23:5-11. A "threaded room" is a room with a general topic, where its
15 members can have "threaded" conversations about various sub-topics. *Id.* at 23:17-24:3; Hrg.
16 Exh. DXCH-106.

17 14. Google Chat is an essential tool used daily by Google employees. Jamie
18 Rosenberg testified that he "use[s] Chat every day." Hrg. Tr. at 99:23. Tian Lim also testified that
19 he used Chat "probably every working day." Lim Depo. Tr. at 8:22-25.

20 15. There are no restrictions on the content and topics on Chat. Hrg. Tr. at 47:2-10
21 (Chat can be used for "[a]nything under the sun that [employees] want to communicate.")).
22 Messages are not limited by size or number of characters. Chat is a versatile tool that allows users
23 to attach lengthy documents to a message. *Id.* at 63:19-23.

24 16. "History" can be turned "on" or "off" by users for a particular Chat. *See, e.g.*, Hrg.
25 Exh. DXCH-107. History is off by default for all Chats among Google employees with the sole
26 exception of threaded rooms. Hrg. Tr. at 53:21-23.

27 17. Different types of Chats have different default retention periods. Under Google's
28 standard retention policy, one-on-one Google Chats with history off are retained for 24 hours only.

1 Hrg. Tr. at 26:21-27:8; Hrg. Exh. DXCH-1. After the 24 hours, the Chats are deleted forever and
2 cannot be recovered. Hrg. Tr. at 52:25-53:6. One-on-one chats with history on are retained for 30
3 days. *Id.* at 27:9-17; Hrg. Exh. DXCH-1. History-on chats in a group conversation or “flat (non-
4 threaded) room” are retained for 18 months. *Id.*; Hrg. Tr. at 31:11-13. For chats in a threaded
5 room, history is “always on and can’t be turned off,” and these messages are also retained for a
6 period of 18 months. Hrg. Tr. at 31:14-23; Hrg. Exh. DXCH-1.

7 18. Each Google employee has a corporate Gmail account for email, and if a litigation
8 hold is not in place, emails in an employee’s Gmail account are retained for 18 months unless the
9 user has tagged them for “Indefinite” retention. Hrg. Tr. at 17:22-18:22.

10 19. An employee has several options to preserve a Chat for longer than its default
11 retention period. She can “turn on history” for a Chat in a menu option. The “history on” setting
12 applies to all messages sent in a Chat after the history button has been toggled, and that Chat’s
13 history will stay on until manually turned off. Hrg. Tr. at 28:11-29:21; Hrg. Exh. DXCH-107.

14 20. A Google employee can also retain Chat messages with the “Forward to inbox”
15 feature. The feature “allows a user to select an individual message and up to four preceding
16 messages and send those to their e-mail inboxes for longer-term archiving.” Once in the user’s
17 personal Gmail inbox, the chats would be “subject to the 18-month default retention period.” Hrg.
18 Tr. at 29:23-31:2; Hrg. Exh. DXCH-108.

19 21. Another preservation option entails copying and pasting the chat into a document
20 saved to the employee’s Google Drive. Items in an employee’s Google Drive remain on Google’s
21 systems “indefinitely unless removed by the Googler themselves.” Hrg. Tr. at 17:3-8, 55:16-21.

22 22. Google’s information governance lead, Genaro Lopez, testified that the retention
23 policy for Google Chats is animated by the goals of protecting privacy, reducing the cost of
24 storage, guarding against cybersecurity risks, and promoting employee productivity and
25 efficiency. Hrg. Tr. at 25:17-26:20. But with respect to storage, Lopez was not aware of “any
26 kind of an analysis or study to figure out how expensive it would be or how burdensome it would
27 be to preserve chats,” even just for this case. *Id.* at 76:25-77:8.
28

1 23. Lopez testified that Google Chat was “typically” used for “quick, one-off”
2 questions like an invitation to grab coffee, or for “sensitive,” personal topics like “birth
3 announcements” or “promotion[s].” Hrg. Tr. at 19:8-25. Google has generally pressed the
4 suggestion in its briefs that Chat was primarily a social outlet akin to an electronic break room.

5 24. The record demonstrates otherwise. An abundance of evidence establishes that
6 Google employees routinely used Chat to discuss substantive business topics, including matters
7 relevant to this antitrust litigation. *See, e.g.*, Hrg. Tr. at 92:19-93:4 (Rosenberg email stating to
8 another Google employee, “You mentioned in our IM chat yesterday that Samsung broached the
9 topic of asking for rev share on the Play Store.”); Hrg. Exh. PX-16 (Rosenberg chat thread with
10 other Google employees discussing, vis-à-vis- Samsung, issues such as “get[ting] sample builds
11 for all the configurations contemplated in our waiver so we can validate placement,” “start[ing]
12 the [MADA] signing process” with Samsung; and “CTS approval and device approval”); Hrg. Tr.
13 at 97:16-18 (Rosenberg acknowledging that the conversation he had over Google Chat in Exhibit
14 PX-16 “includes discussions about business topics”); Lim Depo. Tr. at 9:2-10:11 (“[o]ccasionally
15 there were some more substantive conversations” over Google Chat); *id.* at 26:22-25 (Lim “most
16 likely” personally used Google Chat for “substantive business communications”); *id.* at 27:22-
17 29:4 (“many of the colleagues that [Lim] discussed business with over chat had responsibility over
18 Google Play and Android”); *see also* Dkt. No. 468 (plaintiffs’ supplemental brief) at 2-5
19 (providing numerous examples of Chats discussing “topics at the heart of this case,” such as
20 Revenue Share Agreements, Mobile App Distribution Agreements (MADAs), and Google Play
21 Billing and Google’s supracompetitive commission).³

22 **IV. GOOGLE’S CHAT PRESERVATION PRACTICES IN THIS CASE**

23 25. When Google becomes involved in a lawsuit, it undertakes “an investigation to
24 understand what the case generally deals with and identify individuals that may possess potentially
25 relevant information,” and then it “issue[s] a legal hold.” Hrg. Tr. at 109:11-18.

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³ MADAs and their importance to the claims in the MDL are discussed in Paragraph 34.

1 26. While a legal hold is in place, “email data or Gmail data is preserved,” as are
2 “Google Workspace files, which includes Docs, Sheets, Slides; and also Google Drive content,
3 which can include other file types.” Hrg. Tr. at 110:3-8.

4 27. For this case, the “initial notice and hold was put in place in September of 2020,”
5 and four reminders have been sent since then. Hrg. Tr. at 113:9-15. It is Google’s standard
6 practice to “send reminders about every six months.” *Id.*

7 28. Approximately 360 individuals are subject to the legal hold for this case, about 40
8 of whom have been designated as custodians. Hrg. Tr. at 113:16-21.

9 29. Google has the technical ability to set Chat history to “on” as the default for all
10 employees who are subject to a legal hold, but it chooses not to. Hrg. Tr. at 43:22-43:4, 58:19-24.
11 Google has preserved all Chat messages that had history toggled on, *id.* at 44:12-17, 55:2-4, but
12 for any Chat where history was off, Google left it up to each individual hold recipient to decide
13 which, if any, of those one-on-one or group chats should be preserved, *id.* at 45:20-46:7, 55:11-15.

14 30. The litigation hold recipients were (1) instructed not to use Google Chat to “discuss
15 any topics that are related to their legal hold,” and (2) told that “if they do find themselves in a
16 conversation that strays into a topic related to the legal hold, they’re asked to turn history on at
17 that point to make sure that those messages are properly preserved.” Hrg. Tr. at 43:4-20.

18 31. A “Google Chat Retention FAQs” document that is internally available to all
19 Google employees also advises that the “History ON setting” should be used “[w]hen you are
20 discussing a topic identified in any legal hold notice you’ve received.” Hrg. Exh. DXCH-2; Hrg.
21 Tr. at 34:7-35:1.

22 32. Google did not check to see if custodians were actually preserving relevant Chats
23 as directed by the hold notice, and did nothing in the way of auditing or monitoring Chat
24 preservation. Hrg. Tr. at 46:8-17. There is no evidence establishing that Google did any
25 individualized follow-up on Chat preservation with the hold recipients, including those designated
26 as custodians. *See, e.g., id.* at 121:17-20.

V. HOW EMPLOYEES RESPONDED

33. Overall, the record demonstrates that Google employees who received a litigation hold in this case were unable or unwilling to follow the Chat preservation instructions, and sometimes disregarded the instructions altogether.

34. Jamie Rosenberg is now a part-time advisor at Google but was previously a vice president “running a strategy team for [Google’s] platforms and ecosystems organization.” Hrg. Tr. at 78:20-79:3. He received a hold notice for this case and was deposed. *Id.* at 103:11-21. He testified that he had Chat history off during his entire time at Google, including when he was deposed, and has “not done anything to preserve chats for this litigation.” *Id.* at 103:8-17. When asked if he knew if “MADAs are at issue in this case or not,” he responded that he is “not familiar with the specific details of the case,” and he cannot say “in detail” “what topics are and are not relevant to this case.” *Id.* at 89:18-23. A MADA is a Mobile App Distribution Agreement, and it is, according to plaintiffs, a “principal subject” of their claims. Dkt. No. 468 at 3. “The MADAs are contracts that Google requires OEMs to enter into to license Google Mobile Services, a suite of proprietary Google applications and APIs that includes the Google Play Store, Google Search, Gmail, YouTube, and Google Maps, among others.” *Id.* Epic’s complaint alleges, for example, that “[t]hrough its MADAs with Android OEMs, Google requires OEMs to locate the Google Play Store on the ‘home screen’ of each mobile device. Android OEMs must further pre-install up to 30 Google mandatory apps and must locate these apps on the home screen or on the next screen, occupying valuable space on each user’s mobile device that otherwise could be occupied by competing app stores and other services. These requirements ensure that the Google Play Store is the most visible app store any user encounters and place any other app store at a significant disadvantage.” Case No. 20-cv-05671-JD, Dkt. No. 166 ¶ 91.

35. Rosenberg’s testimony highlighted a fundamental problem with Google’s approach to Chat preservation. Google left employees largely on their own to determine what Chat communications might be relevant to the many critical legal and factual issues in this complex antitrust litigation. A lawyer working on this case would know that MADAs are relevant. Jamie Rosenberg did not.

1 36. Tian Lim, who worked in the Google Play product area during the entire period of
2 his 5-year employment with Google, also received a legal hold notice for this litigation. Lim
3 Depo. Tr. at 20:9-16, 25:21-24. Lim believed that he understood the document preservation
4 instructions in the hold notice, and his “interpretation was that if there was substantive information
5 in chat that I should ensure the information was preserved.” *Id.* at 20:17-21:18. He thought that
6 he had complied with this instruction by cutting and pasting chat messages into his own personal
7 document, “but probably more often I would make sure that the information was funneled into the
8 right documents, the right comments in other documents, to make sure that the right stakeholders
9 would actually see it, integrate those thoughts, and action on them.” *Id.* at 21:19-22:8. In effect,
10 Lim believed that he could comply with Google’s document preservation obligations by creating
11 and preserving a summary of a substantive business communication rather than preserving the
12 actual communication itself. *Id.* at 36:5-19, 37:25-38:15.

13 37. Lim knew that his chats were not going to be automatically preserved because
14 Google employees “were generally aware that chats would disappear after 24 hours,” but he did
15 not “ever turn history on in the chat program to save any chat conversations.” *Id.* at 22:9-12,
16 38:16-39:6. Lim testified that the thought process that he might need to save something that was
17 said because he was subject to a legal hold simply “doesn’t occur because, as I said, I’m under so
18 many legal holds, it’s impossible to think that way.” *Id.* at 40:23-41:6.

19 38. Chats produced by Google in February 2023 pursuant to the Court’s order provided
20 additional evidence of highly spotty practices in response to the litigation hold notices. The
21 ensuing Chat exchange between two Google employees, Dkt. No. 468, Ex. 4, is representative.
22 The Court has anonymized the exchange to spare the employees undue attention. It is Google’s
23 preservation obligation and conduct that is the focus here.
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United States District Court
Northern District of California

1 Sent: Thur 3/17/2022 3:26:31 PM (UTC)
From: [REDACTED]@google.com
2 To: [REDACTED]@google.com, [REDACTED]@google.com
Subject: AAAA4RKG7pM-MBI-FLAT:2022-03-16T20:26:30.092879

3 eth [REDACTED]@google.com 2022-03-17T15:26:30.092Z

4 As we are talking about RSA, I have turned on history as per policy.

5 mar [REDACTED]@google.com 2022-03-17T15:33:15.718Z

6 Hi Ethan, can you let me know what the policy you're referring to?

7 mar [REDACTED]@google.com 2022-03-17T15:33:23.807Z

8 I'd prefer to have history off

9 eth [REDACTED]@google.com 2022-03-17T15:33:45.555Z

10 legal/comp can confirm but anything convo regarding RSA i have to have history on

11 mar [REDACTED]@google.com 2022-03-17T15:33:45.830Z

12 I talk about RSA related things all day and I don't have history on for all my chats :)

13 eth [REDACTED]@google.com 2022-03-17T15:33:58.371Z

14 we cannot delete it. I am also on multiple legal hold

15 mar [REDACTED]@google.com 2022-03-17T15:34:02.578Z

16 Ok maybe I take you off this convo 😊

17 mar [REDACTED]@google.com 2022-03-17T15:34:08.567Z

18 As am I...

19 eth [REDACTED]@google.com 2022-03-17T15:35:12.807Z

20 sry why do you prefer to have history off? i think we should have record of our convo so there are no
21 miscomm/understanding no?

22 mar [REDACTED]@google.com 2022-03-17T15:35:26.447Z

23 I can ping Marie and Michael separately. Included you for visibility

24 mar [REDACTED]@google.com 2022-03-17T15:35:41.445Z

25 Yes I do prefer history off

26 eth [REDACTED]@google.com 2022-03-17T15:37:01.904Z

27 pls keep BD team (me) included on any convo regarding Nothing RSA planning

28 eth [REDACTED]@google.com 2022-03-17T15:37:32.226Z

i can send an official email to confirm regarding history but that was the training i had received

mar [REDACTED]@google.com 2022-03-17T15:39:11.475Z

1 Of course I'll keep you included. But sounds like we have to keep history on in this convo specifically. But not in our 1:1
2 chats about RSAs or my 1:1 chats with Marie/Michael about RSAs

3 **mar [REDACTED]@google.com** 2022-03-17T15:39:18.856Z

4 So that's why I'd prefer to move away from this group chat

5 **mar [REDACTED]@google.com** 2022-03-17T15:39:42.832Z

6 It's just causing more touchpoints on my end but I respect you following your training

7 **eth [REDACTED]@google.com** 2022-03-17T15:40:36.082Z

8 ty :) if you feel uncomfortable with history being on here, i understand.

9 **eth [REDACTED]@google.com** 2022-03-17T15:41:01.592Z

10 but even if history is off here, these are all saved on servers anyway

11 **mar [REDACTED]@google.com** 2022-03-17T15:44:15.150Z

12 Thanks [REDACTED]!

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United States District Court
Northern District of California

United States District Court
Northern District of California

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39. In another chat, an employee said he or she was “on legal hold” but that they preferred to keep chat history off, Dkt. No. 468, Ex. 24:

Sent: Thur 12/8/2022 5:52:34 PM (UTC)
From: [REDACTED]@google.com
To: [REDACTED]@google.com, [REDACTED]@google.com
Subject: ITAOBAAAAE-MBI-FLAT:2022-12-07T22:52:33.612671

ott [REDACTED]@google.com 2022-12-08T17:52:33.612Z

Sounds good!

ott [REDACTED]@google.com 2022-12-08T17:52:36.138Z

I'll keep Jan in mind

div [REDACTED]@google.com 2022-12-08T17:52:49.955Z

I am on legal hold

ott [REDACTED]@google.com 2022-12-08T17:52:56.632Z

(making a note via turning on history)

div [REDACTED]@google.com 2022-12-08T17:52:56.898Z

Prefer to keep chat history off

ott [REDACTED]@google.com 2022-12-08T17:53:01.560Z

i'll turn off

VI. GOOGLE IS NOW PRESERVING GOOGLE CHATS FOR THIS ACTION

40. Google represented to the Court in a filing on February 7, 2023, that it “will turn the history setting to ‘on’ for Google Chat, on an interim basis, for all 383 employees who have received a legal hold in this case. These employees will not have the ability to change history to ‘off.’ Google will meet and confer with Plaintiffs regarding which of these 383 legal hold recipients are the ‘core set of relevant custodians’ for which this setting should remain and then report back to the Court.” Dkt. No. 448 at 1.

1 **CONCLUSIONS OF LAW**

2 The new version of Rule 37(e), which was added to the Federal Rules of Civil Procedure in
3 2015, and the Advisory Committee Notes to the 2015 Amendment (Comm. Notes), are the
4 touchstones guiding the Court’s conclusions. Rule 37(e) provides:

5 **(e) Failure to Preserve Electronically Stored Information.** If
6 electronically stored information that should have been preserved in the
7 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:

- 8 (1) upon finding prejudice to another party from loss of the information,
9 may order measures no greater than necessary to cure the prejudice;
or
10 (2) only upon finding that the party acted with the intent to deprive
11 another party of the information’s use in the litigation may:
12 (A) presume that the lost information was unfavorable to the party;
13 (B) instruct the jury that it may or must presume the information was
unfavorable to the party; or
14 (C) dismiss the action or enter a default judgment.

15 Fed. R. Civ. P. 37(e).

16 The Committee Notes for Subdivision (e) state that the rule embodies the “common-law
17 duty” of “potential litigants . . . to preserve relevant information when litigation is reasonably
18 foreseeable.” The parties do not dispute that Google bore that duty as of August 2020, when the
19 first constituent lawsuit in the MDL was filed by Epic Games. *See* Case No. 20-cv-05671-JD,
20 Dkt. No. 1.⁴

21 At the heart of this dispute is a simple question: did Google do the right thing with respect
22 to preserving Chat communications in this case? There is no doubt that Google was perfectly free
23 to set up an internal IM service with any retention period of its choosing for employees to use for
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25 _____
26 ⁴ Plaintiffs made some effort at the evidentiary hearing to move this date forward by referencing
27 document requests issued in other cases that are not a part of this MDL. *See* Hrg. Tr. at 127:17-
28 128:4. The Committee Notes advise that “[t]he fact that a party had an independent obligation to
preserve information does not necessarily mean that it had such a duty with respect to the
litigation, and the fact that the party failed to observe some other preservation obligation does not
itself prove that its efforts to preserve were not reasonable with respect to a particular case.” The
Court focuses on the August 2020 time period for this MDL.

1 whatever purposes they liked. The overall propriety of Chat is not in issue here. What matters is
2 how Google responded after the lawsuits were filed, and whether it honored the evidence
3 preservation duties it was abundantly familiar with from countless prior cases.

4 The record establishes that Google fell strikingly short on that score. Several aspects of
5 Google's conduct are troubling. As Rule 37 indicates, the duty to preserve relevant evidence is an
6 unqualified obligation in all cases. The Court's Standing Order for Civil Cases expressly spells
7 out the expectation that "as soon as any party reasonably anticipates or knows of litigation, it will
8 take the necessary, affirmative steps to preserve evidence related to the issues presented by the
9 action, including, without limitation, interdiction of any document destruction programs and any
10 ongoing erasures of e-mails, voice mails, and other electronically-recorded material." Standing
11 Order for Civil Cases Before Judge James Donato ¶ 8.

12 Google clearly had different intentions with respect to Chat, but it did not reveal those
13 intentions with candor or directness to the Court or counsel for plaintiffs. Instead, Google falsely
14 assured the Court in a case management statement in October 2020 that it had "taken appropriate
15 steps to preserve all evidence relevant to the issues reasonably evident in this action," without
16 saying a word about Chats or its decision not to pause the 24-hour default deletion. Case No. 20-
17 5761, Dkt. No. 45 at 11. Google did not reveal the Chat practices to plaintiffs until October 2021,
18 many months after plaintiffs first asked about them. *See* Dkt. No. 429 (Google's response to
19 Court's questions) at 3 ("Google informed Plaintiffs on October 21, 2021, that it had not
20 suspended the 24-hour retention policy for history 'off' chats."). The Court has since had to spend
21 a substantial amount of resources to get to the truth of the matter, including several hearings, a
22 two-day evidentiary proceeding, and countless hours reviewing voluminous briefs. All the while,
23 Google has tried to downplay the problem and displayed a dismissive attitude ill tuned to the
24 gravity of its conduct. Its initial defense was that it had no "ability to change default settings for
25 individual custodians with respect to the chat history setting," Dkt. No. 427-3 ¶ 25, but evidence at
26 the hearing plainly established that this representation was not truthful.

27 Why this situation has come to pass is a mystery. From the start of this case, Google has
28 had every opportunity to flag the handling of Chat and air concerns about potential burden, costs,

1 and related factors. At the very least, Google should have advised plaintiffs about its preservation
2 approach early in the litigation, and engaged in a discussion with them. It chose to stay silent until
3 compelled to speak by the filing of the Rule 37 motion and the Court’s intervention. The Court
4 has repeatedly asked Google why it never mentioned Chat until the issue became a substantial
5 problem. It has not provided an explanation, which is worrisome, especially in light of its
6 unlimited access to accomplished legal counsel, and its long experience with the duty of evidence
7 preservation.

8 Another major concern is the intentionality manifested at every level within Google to hide
9 the ball with respect to Chat. As discussed, individual users were conscious of litigation risks and
10 valued the “off the record” functionality of Chat. Google as an enterprise had the capacity of
11 preserving all Chat communications systemwide once litigation had commenced but elected not
12 do so, without any assessment of financial costs or other factors that might help to justify that
13 decision.

14 This is in sharp contrast to Google’s handling of email. When a litigation hold is in place,
15 Google automatically preserves all emails from relevant custodians without requiring any
16 individual action. Custodians cannot override the automated preservation of their emails. *See*
17 Hrg. Tr. at 54:12-55:1. Google took the opposite course with Chat, and gave each employee carte
18 blanche to make his or her own call about what might be relevant in this complex antitrust case,
19 and whether a Chat communication should be preserved. The obvious danger of this approach
20 was captured in Rosenberg’s testimony about not really knowing the issues in this litigation, and
21 not preserving his communications. Google aggravated the situation by intentionally deciding not
22 to check up on employee decisions to ensure that relevant evidence was being preserved. In
23 effect, Google adopted a “don’t ask, don’t tell” policy for Chat preservation, at the expense of its
24 preservation duties.

25 Consequently, on the record as a whole, the Court concludes that Google did not take
26 reasonable steps to preserve electronically stored information that should have been preserved in
27 the anticipation or conduct of litigation. Fed. R. Civ. P. 37(e). The record demonstrates that the
28 deleted Chat evidence “cannot be restored or replaced through additional discovery.” *Id.* The

1 record also establishes intentionality for purposes of Rule 37(e)(2). The Court concludes that
2 Google intended to subvert the discovery process, and that Chat evidence was “lost with the intent
3 to prevent its use in litigation” and “with the intent to deprive another party of the information’s
4 use in the litigation.” Comm. Notes, Subdivision (e)(2).

5 A prejudice finding under Rule 37(e)(1) is not strictly necessary because the finding of
6 intent under subdivision (e)(2) supports “not only an inference that the lost information was
7 unfavorable to the party that intentionally destroyed it, but also an inference that the opposing
8 party was prejudiced by the loss of information that would have favored its position.” Comm.
9 Notes, Subdivision (e)(2). It is clear in the record that relevant, substantive business
10 communications were made on Chat that plaintiffs will never see, to the potential detriment of
11 their case. Google says that the prejudice is limited because there are only “21 custodians for
12 which the parties agreed to conduct limited post-Complaint discovery,” and “[f]or only 21 of the
13 total 44 custodians, the parties agreed that Google would search for documents dated *after* August
14 13, 2020. With respect to the remaining 23 custodians, the cut-off date was on or before August
15 13, 2020.” Dkt. No. 429 at 5-6 (emphasis in original; internal citation omitted). The point is not
16 well taken. The agreements between the parties were made while plaintiffs were completely in the
17 dark about Google’s Chat practices, and the Court declines to give Google any benefit from deals
18 made on incomplete information. In addition, prejudice for Rule 37 purposes is a matter of
19 fairness and equity, which is why Rule 37(e) “leaves judges with discretion to determine how best
20 to assess prejudice in particular cases.” Comm. Notes, Subdivision (e)(1). It is also not plaintiffs’
21 burden to prove prejudice, *see id.*, but the plaintiffs’ supplemental briefs and evidence, Dkt.
22 No. 468, certainly did so.

23 The remaining question is about the remedy. Proportionality is the governing concept
24 here. To that end, the Committee Notes advise courts to “exercise caution,” and state that
25 “[f]inding an intent to deprive another party of the lost information’s use in the litigation does not
26 require a court to adopt any of the measures listed in subdivision(e)(2). The remedy should fit the
27 wrong, and the severe measures authorized by this subdivision should not be used when the
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1 information lost was relatively unimportant or lesser measures such as those specified in
2 subdivision (e)(1) would be sufficient to redress the loss.” Comm. Notes, Subdivision (e)(2).

3 The Court has already declined to issue terminating sanctions against Google. This
4 antitrust case will not be decided on the basis of lost Chat communications. The determination of
5 an appropriate non-monetary sanction requires further proceedings. The Court fully appreciates
6 plaintiffs’ dilemma of trying to prove the contents of what Google has deleted. Even so, the
7 principle of proportionality demands that the remedy fit the wrong, and the Court would like to see
8 the state of play of the evidence at the end of fact discovery. At that time, plaintiffs will be better
9 positioned to tell the Court what might have been lost in the Chat communications.

10 For monetary sanctions, it is entirely appropriate for Google to cover plaintiffs’ reasonable
11 attorneys’ fees and costs in bringing the Rule 37 motion, including the joint statement that
12 preceded the motion and the evidentiary hearing and related events. Plaintiffs are directed to file
13 by April 21, 2023, a statement of proposed attorneys’ fees and costs with adequate
14 documentation.⁵ The parties will meet and confer on the proposal, and file a statement by May 12,
15 2023, indicating an agreement or identifying specific areas of disagreement for the Court to
16 resolve.

17 **IT IS SO ORDERED.**

18 Dated: March 28, 2023

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JAMES DUNATO
United States District Judge

⁵ As with counsel fee requests in the class settlement context, declarations of counsel as to the number of hours spent on various categories of activities related to the proceedings by each biller, together with hourly billing rate information may be sufficient, provided that the declarations are adequately detailed. The same goes for costs. Counsel should be prepared to submit copies of detailed billing and costs records if the Court orders.