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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Federal Trade Commission,	No. CV-20-00047-PHX-DWL
Plaintiff,	**ORDER**
v.	
James D. Noland, Jr., et al.,	
Defendants.	

INTRODUCTION

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

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

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
     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.*
24   at 111-12, 119-20.)

25   [2]   In an October 2020 letter to the FTC, the Individual Defendants' counsel made
     statements about the use of the auto-delete function. (Doc. 228-2 at 42 ["Our clients inform
26   us that they set all conversations to auto-delete with the exception of conversations with
     their attorney."].) During a subsequent deposition, Noland was asked further questions on
27   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'
28   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.)

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

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

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

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

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

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

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

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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
              conduct Success by Media business?
10
            A: I'm not sure what you mean, sir.
11
            Q: Have you used any type of phone application or software system that
12   encrypts the substance of the communication from point to point?

13   A: I mean, I think it's like standard practice now. I don't know. It's
              standard practice.
14
            Q: Do you know that in your course of your work for Success by
15   Media?

16   A: I don't know. Whatever communication. I mean, it's a phone call.
              The encrypted, what Verizon offers.
17
            Q: Do you do anything separately to encrypt your communications
18   apart from what a Verizon provider may do on their end?

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

20   (*Id.*, emphasis added.)

21   On March 19, 2020, the Individual Defendants provided their initial discovery

22   responses pursuant to the Court's Mandatory Initial Discovery Pilot Project ("MIDP").

23   Among other things, the MIDP requires a party to "[l]ist the documents, *electronically*

24   *stored information ('ESI')*, tangible things, land, or other property known by you to exist,

25   whether or not in your possession, custody or control, that you believe may be relevant to

26   any party's claims or defenses." D. Ariz. G.O. 17-08 § B.3 (emphasis added).   In their

27   responses, however, the Individual Defendants did not disclose the existence of any Signal

28   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 ───────────────────
    5   The Court notes that, in the months after Noland sent this email from his ProtonMail
28 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 _____

27 [6]   In its moving papers, the FTC asserts that Curry was only part of the SBH
    Leadership Council group chat until October 2018 (Doc. 259 at 1) but does not attach
    evidence showing that Curry left the SBH Leadership Council at that time. The FTC's
28 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.)

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26   [7]   One of the individuals who responded was Mehler. (Doc. 259-1 at 51.) In his
27   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."
28   (*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.

DISCUSSION

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

I.   Legal Standard

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

> 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:
>
> . . .
>
>   (2)   only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
>   (A)   presume that the lost information was 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.

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

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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.

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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).

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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.
      v. Intuit Inc.*, 2011 WL 2669465, *2-3 (N.D. Cal. 2011); *Hogan v. Higgins*, 2008 WL
26   3200252, *3 (E.D.N.Y. 2008) (where plaintiff's counsel wrote a detailed letter to a non-
      party witness that set forth the plaintiff's theory of the case and asked the witness to offer
27   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
28   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 Defendants on their devices. (*Id.* at 49-59.)[11]

21

22   [11]   The Individual Defendants argue that these persons' failure to identify any responsive Signal or ProtonMail communications "supports the individual defendants'

23   position that they were using the auto-delete feature, and did not intentionally (or in actuality) destroy relevant evidence they were under a duty to preserve." (Doc. 276 at 2.)

24   This argument is unpersuasive. The responding persons did not uniformly assert that they had been using the auto-delete feature, instead often stating, without elaboration, that they

25   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

26   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

27   the relevant communications likely would have been exchanged between the Individual Defendants. That the 10 persons who responded had no relevant messages says nothing

28   about whether there may have been relevant communications between the Individual Defendants.

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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

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

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

[13]   During his December 2020 deposition, Noland provided the following explanation for why he chose to install the Signal app in May 2019: "Best I can remember, we were being – we were being – we were being attacked by different people that Luke Curry was stirring up, and it seemed to be some hacking going on. So we wanted to be able to try to 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

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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).
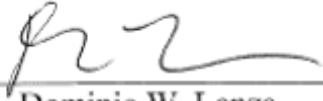
20   Finally, the Individual Defendants suggest that this matter "can better be addressed

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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11   Dominic W. Lanza
                                                   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,   No. CV-20-01448-PHX-DGC

10   Plaintiff,   **ORDER**

11 v.

12 GoDaddy.com LLC, et al.,

13   Defendants.

14

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
     knows of the substantial efforts made to apprise judges and lawyers of the change. It is
     therefore quite frustrating that, years after the 2015 revision, some lawyers and judges are
25   still unaware of its significant change to the law of ESI spoliation. *See*, *e.g.*, *Holloway v.*
     Cnty. of Orange, No. SA CV 19-01514-DOC (DFMx), 2021 WL 454239, at *2 (C.D. Cal.
26   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,
27   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
28   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
           order measures no greater than necessary to cure the prejudice; or
4
           (2) only upon finding that the party acted with the intent to deprive another
5   party of the information's use in the litigation may:

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

7   (B) instruct the jury that it may or must presume the information was
                 unfavorable to the party; or
8
                 (C) dismiss the action or enter a default judgment.
9

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

11   This rule establishes three prerequisites to sanctions: the ESI should have been

12   preserved in the anticipation or conduct of litigation, it is lost through a failure to take

13   reasonable steps to preserve it, and it cannot be restored or replaced through additional

14   discovery. If these requirements are satisfied, the rule authorizes two levels of sanctions.

15   Section (e)(1) permits a court, upon finding prejudice to another party from the loss of ESI,

16   to order measures no greater than necessary to cure the prejudice. Section (e)(2) permits a

17   court to impose more severe sanctions such as adverse inference jury instructions or

18   dismissal, but only if it finds that the spoliating party "acted with the intent to deprive

19   another party of the information's use in the litigation."[3] Fed. R. Civ. P. 37(e)(2). This

20   rule provides the exclusive source of sanctions for the loss of ESI and forecloses reliance

21   on inherent authority. *See* Rule 37(e) advisory committee note to 2015 amendment (Rule

22   37(e) "forecloses reliance on inherent authority or state law to determine when certain

23   measures should be used."); *Mannion v. Ameri-Can Freight Sys. Inc.*, No. CV-17-03262-

24   PHX-DWL, 2020 WL 417492, at *5 (D. Ariz. Jan. 27, 2020).

25

26   [3] Rule 37(e)(2) does not require a finding of prejudice to the party deprived of the
     information. *See* Fed. R. Civ. P. 37(e) advisory committee note to 2015 amendment
27   (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).
28

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 GRSSE 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   *Cmty. 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

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

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

III.   Defendants' Motion for Sanctions Under Rule 37(e).

A.   Plaintiff's Duty to Preserve ESI Arose in May 2018.

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

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

_____

[4] Plaintiff was informed by GoDaddy that her position would be eliminated on 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

- 8 -

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
     that there is a fifth Facebook account associated with Plaintiff entitled "Kristen Fast CRPS
28   Warrior" which has been archived. Doc. 101 at 8.

- 9 -

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.

                                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)

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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
    "leaves judges with discretion to determine how best to assess prejudice in particular
27 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.

28   [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

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[8] This email was a separate form of communication from the Facebook messages being 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**
     Send me the evidence we gathered so I can read tonight and ask u specific
23   questions
     Jun 14, 2019, 10:55 AM
24
     Kristin Fast
25   *This message was unsent.*
     Jun. 14, 2019, 11:57 AM
26
     Kristin Fast
27   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
28   I just can't remember and I'm on way to doctor

[*Jun. 14, 2019, 12:01 PM*][9]

Lee Mudro
U do not show anything from me to u that I can see so I don't think they will listen to me. If u find where our texts r let me know. U have Dave and Arvin's but none from me.
Jun. 14, 2019, 5:47 PM

Lee Mudro
I thought there were texts from when u first went to get leave as I remember telling not to trust them by being off radar with DMSA
Jun. 14, 2019, 5:47 PM

Lee Mudro
Fmla
Jun. 14, 2019, 5:47 PM

Lee Mudro
I don't have any of them anymore as my texts were deleted when my phone went bad a few months again
Jun. 14, 2019, 5:47 PM

Kristin Fast
I have them all
June 14, 2019, 5:48

Kristin Fast
It is in #16
Jun. 14, 2019, 6:23 PM

Doc. 96-1 at 224-25.

This exchange shows that the 11:57 message occurred shortly after Mudro asked for the evidence and four minutes before Plaintiff told where to look in the evidence for relevant information, clearly suggesting that Plaintiff sent Mudro the evidence at 11:57 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.

25   facebook.com/help/messenger-app/194400311449172) (last visited Jan. 31, 2022)). It

26   appears Plaintiff was able to produce the other 108 unsent messages because she tendered

27   a copy of the messages that was generated on September 10, 2021, likely before they were

28   unsent. Doc. 115 at 7 n.3.

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 unsent messages were retrievable is not credible

4 given the operation of Facebook Messenger as discussed above.   And significantly,

5 Plaintiff now admits that she unsent 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 unsent 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**
      Download Telegram Messenger when you have a chance. I have done stuff
27   I want to tell you.
      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

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25 [11] Notably, when a user's account is deleted, their contacts retain copies of the
    messages the user sent to them. Doc. 115-1 at 9. Thus, even if Plaintiff's account had been

26 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
    her inbox in November 2021. Doc. 113-5 at 19. If her account had been deleted, other

28 users presumably would have been unable to send her messages.

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

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

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

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

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[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 unsent

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
           from Facebook into a Word document so she could manually remove
27   irrelevant messages. . . . She removed messages with Mudro that she
           considered irrelevant because they were about deeply personal issues . . . At
28   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

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

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

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

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

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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

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that is to show you that life doesn't stop because you have a disease. Recently, I had a hysterectomy, and I went up against the entire hospital board, all by myself, because it was during COVID and no one was allowed to be there with me. I wanted Ketamine, for 5 days, on a drip, so that the CRPS didn't spread to my abdomen. I was on Fentanyl, Morphine, and Ketamine and I negotiated with surgeons, hospital board administrators and the head pain management doctors. They told me that they had never met anyone like me that was as "functional" as I was while on so many powerful medications. The reason for that is because my brain has remapped itself TO function around the opioids and pain BECAUSE of the opioids and pain because I have never stopped thinking strategically, solving complex 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
             in October I caused a secondary instance of it in my arm in fighting and it's
21   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
22   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 unsent 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:

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

Doc. 96-1 at 246.

The fact that Plaintiff is receiving trial treatments for her CRPS is clearly relevant

to her claim for CRPS damages in this case. She had an obligation under Rule 26(e) to

produce to Defendants, "in a timely manner," accurate versions of her messages with

Mudro rather than the edited versions she produced. Fed. R. Civ. P. 26(e)(1)(A). The

accurate versions came only after discovery was closed and in response to Defendants'

motion for sanctions. Defendants were unable to use them in preparing for any depositions.

Plaintiff has not shown that her failure to produce the accurate messages was substantially

justified or harmless. Sanctions under Rule 37(c)(1) are authorized.

B.   Audio Recordings.

Defendants argue that Plaintiff failed to produce at least four audio recordings she

surreptitiously made of relevant meetings with GoDaddy employees. Doc. 93 at 19. On

March 3, 2021, Defendants served a discovery request that sought "all . . . recordings . . .

relating to the claims, allegations and defenses in this lawsuit." *Id.* at 3. Plaintiff responded

on April 16, 2021 that she had no recordings related to her claims. *Id.* at 4. But shortly

before the close of discovery and after all non-expert depositions had been completed,

Plaintiff produced three of the four recordings. *Id.* at 19.   They were recordings

of Plaintiff's March 26, 2018 call with Defendant Lakshmanan in which they discussed her

medical leave; Plaintiff's April 11, 2018 call with Eva Adams, a human resources

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
     recordings at all because she had never been asked for them. Doc. 113-6 at 45. This is not
27   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
28   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

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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 *Burris*, 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

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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
     to the party seeking sanctions; (4) the public policy favoring disposition of cases on their
27   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
28   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 nots 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   • As discussed above, the Court will give an adverse inference jury instruction at

3   trial based on (1) Plaintiff's deletion of an unknown number of Facebook posts,

4   (2) Plaintiff's "unsending" of the 11:57 message that conveyed a summary of

5   her evidence, and (3) Plaintiff's deletion of Telegram Messenger messages

6   between her and Mudro. Fed. R. Civ. P. 37(e)(2). The parties should discuss

7   the appropriate form of the instruction and include proposals in their submission

8   of jury instructions for the final pretrial conference in this case.[19]

9   • Defendants will be permitted to inform the jury of Plaintiff's undisclosed

10   "redactions" from her Facebook posts. Fed. R. Civ. P. 37(c)(1)(B).

11   • The Court will require Plaintiff to pay some, and perhaps all, of Defendants'

12   attorneys' fees and costs associated with preparing for and litigating the motion

13   for sanctions (Doc. 93), the hearing on December 16, 2021, the supplemental

14   briefing ordered by the Court (including, potentially, Defendants' retention of a

15   forensic evidence expert in connection with the supplemental briefing), and

16   further discovery ordered by the Court in relation to this motion. The amount of

17   fees and costs will be determined after trial, when the Court can evaluate them

18   in light of the ultimate outcome of this case.

19

20   He had an affirmative obligation to ensure that his client conducted diligent and thorough
     searches for discoverable material and that discovery responses were complete and correct
21   when made. *See* Fed. R. Civ. P. 26(g); *Legault v. Zambarano*, 105 F.3d 24, 28 (1st Cir.
     1997) ("The Advisory Committee's Notes to the 1983 amendments to Rule 26 spell out the
22   obvious: a certifying lawyer must make 'a reasonable effort to assure that the client has
     provided all the information and documents available to him that are responsive to the
23   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
24   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
25   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
26   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
27   to remain in [his client's] possession").

     [19] The parties should consider the 2015 advisory committee note to Rule 37(e),
28   *Torgersen*, 2021 WL 2072151, at *5, *Pettit*, 45 F. Supp. 3d at 1114, and other relevant
     sources in crafting their proposed adverse inference instructions.
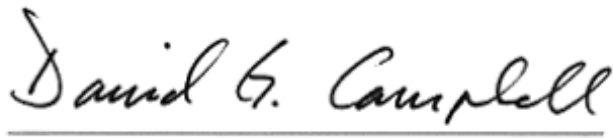
- Defendants will be allowed to conduct a forensic review of Plaintiff's electronic devices, if they choose to do so, to determine whether any spoliated or as-yet-unproduced information is recoverable. Plaintiff is hereby ordered to refrain from any further deletion, alteration, or removal of information 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

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.

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[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.

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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

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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

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                                          3

United States District Court
Northern District of California

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

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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.

27

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i.   Destroyed Email

AllRide has repeatedly and in violation of its duty to preserve and this Court's preliminary

injunction destroyed emails and other files. AllRide concedes this. AllRide has destroyed email

in two ways: (1) by setting its email servers to automatically delete all emails older than 90 days

and maintaining that setting despite knowledge that litigation was imminent, despite receiving the

complaint, and despite this Court's March 22, 2019 preliminary injunction, and (2) by repeatedly

destroying email accounts belonging to certain individuals after the original complaint was filed

and after the preliminary injunction issued.

A.   The Automatic Deletion of All Emails After 90 Days

AllRide created its email server with Microsoft Office 365 in July 2018. Landes Ex. 83.

At the direction of co-founder Peijian Gu, the company changed the default settings of the server

so that all emails would be deleted after 90 days, instead of the default setting to preserve emails

for two years before archiving them. Landes Ex. 11 at 249:1- 20; Landes Ex. 12 at 37:21-38:20.

AllRide represents that it took this action to save a few hundred dollars a month. *See* Landes Ex.

12 at 55:2-59:7; Landes Ex. 4 at 268:15-269:4. FTI was not able to determine whether this action

was intentional because AllRide employees provided "inconsistent" information during its

investigation. Landes Ex. 84 at 19.

The auto-deletion setting remained in place until on or around June 17, 2019, meaning that

nearly all emails sent over AllRide's servers from June or July 2018 through March 2019 were

destroyed. Dkt. No. 231; Pickles, Ex. B at 250:7-13, 253:20-254:11, 257:5-15; Pickles Ex. C at

43:7-44:12; Ex. D, at 134:15-25, 145:13-17. After working with Microsoft, AllRide has been able

to recover or find some emails from this period—primarily emails that were sent to or received

from separate email systems. Pickles Exs. E, F. This time period covers Huang's arrival at

AllRide and any communications he may have had with AllRide before he left WeRide, and the

critical period—August, September and October 2018—where AllRide developed the technology

to pilot the car in the Video. The deleted emails include weekly reports detailing progress and

projects sent from AllRide's engineers to Huang and Wang. Landes Ex. 3 at 359:19-360:1;

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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.

<div align="center">B. <u>Destroyed Email Accounts</u></div>

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

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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
      Reply (*see* Dkt. No. 387 at 2-4), when it did not argue that email account had been spoliated in its
21   original motion. Dkt. No. 391. However, WeRide raised that argument in response to Huang's
      argument that, while still employed by WeRide, he only accessed the test@allride.ai email
22   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
23   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
24   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
      foundation, are speculative, are based on hearsay, and are inadmissible under Federal Rule of
26   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
27   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.
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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.

                                   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

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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.

ii.   Source Code

7

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.

A.   The August 2018 Source Code

26

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

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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.

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
           obstacle car. When we are moving and detect that at some certain

> 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 ███████████

███████████████████████████████████████

████████████████████████████ *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. ██████████████

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

██████████████████████ *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. ███████████████████

████████████████████████████████

████████████████████████████████

███ Landes Ex. 47 ¶¶ 14-15. ███████████████████

1   ██ 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 detecgtion [*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
     Declaration. Dkt. No. 431.

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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

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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.

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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

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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.

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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.

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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

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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.

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.

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

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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

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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.

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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

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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

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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

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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

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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

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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.

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ii.   Rule 37(e)

Terminating sanctions against Huang are also appropriate under Rule 37(e) for his

destruction of ESI on his two WeRide-issued laptops, the personal laptop he returned to an Apple

store, and the AllRide-issued laptop discussed above.

As to the first prong of Rule 37(e), Huang argues that he was under no duty preserve until

he received WeRide's demand letter in the middle of November 2018, therefore he was under no

duty to preserve the WeRide-issued laptops or his personal laptop. *See Porter*, 2018 WL

4215602, at *3. The Court disagrees. "The duty to preserve evidence begins when litigation is

pending or reasonably foreseeable." *Freedom Equity*, 2016 WL 5870218, at *3. Indeed, the duty

may arise "before litigation when a party should reasonably know that evidence may be relevant to

anticipated litigation." *Nation v. Ducey*, 2016 WL 7338341, at *7 (D. Ariz. Dec. 19, 2016). Here,

AllRide created the kun.huang@allride.ai email account and the test@allride.ai email account,

which Huang accessed, in July 2018 while he was still employed by WeRide. He attempted to

recruit WeRide employees to join AllRide while still employed by WeRide. WeRide terminated

his employment for soliciting WeRide employees on July 31, 2018. Over the next two days, he

conducted internet searches for the consequences of soliciting employees. In such circumstances,

a reasonable person would understand that litigation was foreseeable as of July 31, 2018.

Accordingly, the Court finds that Huang was under a duty to preserve the two WeRide-issued

laptops, his personal laptop, and the source code on the AllRide-issued laptop. *See Porter*, 2018

WL 4215602, at *3; *see also Ducey*, 2016 WL 7338341, at *7; *Crown Battery Mfg. Co. v. Club

Car, Inc*., 185 F. Supp. 3d 987, 998 (N.D. Ohio 2016).

The Court finds that the second factor also weighs in favor of terminating sanctions

because Huang failed to take reasonable steps to preserve the ESI on those computers. He admits

to wiping the WeRide-issued MacBook, to deleting files on the WeRide-issued Lenovo, and to

returning his personal MacBook to an Apple store. As to the source code on his AllRide-issued

laptop, he claims that his periodic backups show that he tried to preserve that ESI as well.

However, each backup only saved a portion of his hard drive. Dec. 12, 2019 Kunkel Decl. ¶ 6.

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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

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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

25

26   EDWARD J. DAVILA
                              United States District Judge

27

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.   8:20-cv-00850-AB-AFMx   Date: February 18, 2021

Title   Benebone LLC v. Pet Qwerks, Inc., et al.

Present: The Honorable: ALEXANDER F. MacKINNON, U.S. Magistrate Judge

Ilene Bernal	N/A
Deputy Clerk	Court Reporter / Recorder

Attorneys Present for Plaintiff:	Attorneys Present for Defendants:
N/A	N/A

Proceedings (In Chambers): Order Granting Defendants Pet Qwerks, Inc. and Doskocil Manufacturing Company, Inc. D/B/A Petmate's Motion to Compel Plaintiff Benebone LLC's Production of Slack Communications (ECF No. 88)

Defendants Pet Qwerks, Inc. and Doskocil Manufacturing Company, Inc. d/b/a Petmate (collectively, "Defendants"), have filed a motion seeking to compel Plaintiff Benebone LLC ("Benebone") to be required to produce Slack communications responsive to Defendants' document requests. For the reasons provided below, Defendants' motion is **GRANTED** to the extent set out herein.

I.   **Background**

Slack is a cloud-based software system that allows a company to organize its electronic discussions into user-defined categories called "channels." Plaintiff Benebone uses Slack, as well as standard email, for its internal communications.

During the parties' early discussions regarding discovery of electronically stored information, Defendants sought to include Benebone's Slack messages in the parties' Stipulated ESI Order, and Benebone took the position that Slack messages should be excluded from discovery. The parties requested a telephonic discovery conference with the Court to address this, and each side submitted a short brief outlining its position. (*See* ECF Nos. 60-63.) Defendants included a declaration from Michael Gutierrez, Director of Forensic Services at Xact Data Discovery, an e-discovery vendor that Defendants have engaged for this case. During the telephonic discovery conference on November 23, 2020, the Court concluded that Benebone's Slack messages are relevant, but it lacked sufficient information to determine whether Slack discovery would be proportional to the needs of the case. Accordingly, the Court ordered the parties to meet and confer

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

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further regarding possible Slack production after Benebone had obtained additional information about its Slack account and what would be required to search and produce responsive Slack messages.

As part of the meet and confer process, Benebone informed Defendants that its Slack account contains approximately 30,000 messages. Benebone also estimated that it would cost $110,000 to $255,000 to extract, process, and review these 30,000 messages. Based on these cost estimates, Benebone maintained that searching and producing documents from Slack would be an undue burden and would not be proportional to the needs of the case. Defendants disagreed and filed the present motion to compel Benebone to produce its responsive Slack messages. (ECF No. 88.) The parties filed a joint stipulation pursuant to L.R. 37-2, as well as supplemental memoranda. (*See* ECF Nos. 89-92, 102-104.)

In connection with the motion to compel, Defendants submitted a second declaration from Mr. Gutierrez. In his declarations, Mr. Gutierrez stated that he has been involved in multiple lawsuits where Slack messages have been produced. He described a number of tools that software vendors have developed to streamline review and production of Slack messages and explained how extracting, processing, and reviewing Slack messages could take place using currently available software tools. He also provided a cost estimate for doing so in this case. Mr. Gutierrez stated that Xact offers contract review attorneys at a rate of $40 per hour to conduct the first level review of Slack messages, and he provided a cost estimate of $22,000 for Benebone to find and produce its responsive Slack messages. Benebone, on the other hand, stood by its prior estimate of $110,000 to $255,000 based on a blended attorney rate of $400 per hour for Slack review. Benebone did not provide a declaration from an e-discovery expert to support its conclusions or respond to the evidence provided by Mr. Gutierrez.

The Court held a Zoom hearing on February 3, 2021 regarding Defendants' motion to compel. Mr. Gutierrez attended the hearing and answered the parties' and the Court's questions under oath.

II.   **Discussion**

Federal Rule of Civil Procedure 26(b)(1) provides that a party may obtain discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Factors to consider include "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties'

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resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* Discovery need not be admissible in evidence to be discoverable. *Id.* However, a court "must limit the frequency or extent of discovery otherwise allowed by [the Federal] rules" if "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C). Boilerplate or general objections are not appropriate, and a party's objections should be specific to each particular discovery request and be supported by evidence. *See* Fed. R. Civ. P. 34(b)(2). "Upon a motion to compel discovery, the movant has the initial burden of demonstrating relevance. In turn, the party opposing discovery has the burden of showing that discovery should not be allowed, and also has the burden of clarifying, explaining and supporting its objections with competent evidence." *United States v. McGraw-Hill Cos.*, 2014 WL 1647385, at *8 (C.D. Cal. Apr. 15, 2014) (citations and internal quotation marks omitted)). The Federal Rules of Civil Procedure must be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. [1]

Here, because Benebone uses Slack as part of its internal business communications, there is no real dispute that Benebone's Slack messages are likely to contain relevant information. The crucial issue is whether requiring Benebone to search for and produce responsive Slack messages would be unduly burdensome and disproportional to the needs of this case. In this regard, the Court relies on Mr. Gutierrez's testimony regarding the estimated cost and level of effort necessary for

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[1] Slack is a relatively new communication tool, but a few published cases have addressed production of Slack messages. For example, in *Calendar Research LLC v. Stubhub, Inc.*, 2019 WL 1581406, at *4 (C.D. Cal. Mar. 14, 2019), the court granted the plaintiff's motion to compel production of defendants' remaining relevant Slack messages. Similarly, in *BidPrime, LLC v. SmartProcure, Inc.*, 2018 WL 6588574, at *2 (W.D. Tex. Nov. 13, 2018), the Court ordered production of remaining Slack messages because "they may be relevant and SmartProcure has not provided a specific objection to the contrary." *Id.* In *Milbeck v. Truecar, Inc.*, 2019 WL 4570017 at *3 (C.D. Cal. May 2, 2019), the court denied the plaintiff's motion for Slack production without prejudice, because of an imminent trial date.

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producing the Slack messages. Mr. Gutierrez was a knowledgeable and credible witness on this subject, and his declarations and testimony at the hearing were not rebutted by a Benebone witness.

Mr. Gutierrez testified that third-party tools have been developed over the past several years for collecting and reviewing Slack messages and that review and production of Slack messages has become comparable to email document production through use of these tools. Mr. Gutierrez further testified that it likely would not be necessary for Benebone to search all its Slack messages. Instead, searches likely could be limited to certain Slack channels, users, or custodians – which could significantly reduce the volume of Slack messages requiring review. For instance, in this intellectual property case, it may not be necessary to extract and review messages in a Slack channel dealing with human resources issues.

Moreover, Mr. Gutierrez's declarations and testimony indicate that it is possible to conduct first level review of the pertinent Slack messages via contract attorneys for far less than Benebone's estimated blended rate of $400 per hour. Mr. Gutierrez testified that contract reviewers are available who are licensed attorneys at a rate as low as $40 per hour for first-level review. As discussed during the hearing, Mr. Gutierrez did not include any time or expense for second-level review by more experienced counsel. It is also possible that contract attorneys may cost somewhat more than the hourly rate used in his estimate. Thus, the Court finds that Mr. Gutierrez's estimate of $22,000 for Benebone to review and produce Slack messages is on the low side. However, Benebone's cost estimate of $110,000 to $255,000 for producing the Slack messages is substantially inflated due to its assumption of attorney review of all 30,000 Slack messages at a rate of $400 per hour. As noted above, Benebone did not provide an e-discovery declaration or testimony to support its cost estimate or its position that producing the Slack messages represents an undue burden and is disproportional to the needs of this case.

III.   Conclusion

Based on the evidence presented in the parties' briefing and at the hearing, the Court finds that requiring review and production of Slack messages by Benebone is generally comparable to requiring search and production of emails and is not unduly burdensome or disproportional to the needs of this case – if the requests and searches are appropriately limited and focused. Defendants' evidence supports this conclusion, and Benebone has responded largely with attorney argument but no witness or declarant on the e-discovery issues. E-discovery tools are available for this process, and the Slack messages to be reviewed can be narrowed based on the channels or users likely to have

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responsive information given the relevant issues in this case. Although Benebone makes cursory reference to other proportionality factors (*see* ECF No. 89 at 22.), its focus has been on the purported burdens associated with production of Slack documents and the fact that Benebone is a small company compared to Defendants. Nevertheless, Benebone seeks the full range of monetary damages in this case, plus injunctive relief against Defendants' accused products – sales of which are allegedly in the millions of dollars. As discussed herein, a focused search for and production of Slack messages is proportional to the needs of this case where Benebone regularly uses Slack messaging for internal business communications and users of Slack include Benebone's marketing director, COO, and CEO (who is also a named inventor on the three asserted design patents). Thus, the Court agrees with Defendants that e-discovery in this case shall include Benebone's Slack messages.

To be clear, the parties have not fully briefed, and the Court has not resolved by this order, the question of specific request categories and search methodologies to be used for identification, review and production of Benebone's Slack messages. To address what will be searched for and how the search will take place, the parties shall meet and confer no later than **March 5, 2021**. At least seven days before this meet and confer, Benebone shall provide to Defendants a list of its Slack channels, including the title and a brief description of each Slack channel, the number of messages in each Slack channel, the users associated with each Slack channel, and any other data that will assist the parties in tailoring the Slack review and production.

IT IS SO ORDERED.

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Initials of Preparer	ib

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MOBILE EQUITY CORP.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 2:21-cv-00126-JRG-RSP
	§	
WALMART INC.,	§	
	§	
Defendant.	§	

MEMORANDUM ORDER

On December 29, 2021, the Court held a hearing on a series of motions to compel (Dkt.

Nos. 62, 65, 66, 72, 75, 80) filed by Plaintiff Mobile Equity Corp. ("MEC") and two motions to

compel (Dkt. Nos. 56, 77) filed by Defendant Walmart Inc. This Order summarizes and

memorializes the Court's rulings and reasons. While this Order memorializes such rulings, it in no

way limits or constrains the Court's rulings as announced into the record from the bench.

Unless otherwise stated, all additional production ordered herein is due by **January 10, 202**2.

Accordingly, it is hereby **ORDERED** as follows:

Plaintiff's Motions to Compel

1.   **MEC's Second Motion to Compel Discovery (Dkt. No. 62)**

During the hearing the parties represented they were likely able to reach an agreement with

respect to the substance of this motion. The motion is now **DENIED AS MOOT**.

2.   **MEC's Third Motion to Compel Discovery (Dkt. No. 65)**

MEC's Third Motion to Compel Discovery is **GRANTED**. MEC moves the Court to compel

Walmart to produce Mr. Mike Cook for deposition. Dkt. No. 65 at 2. Defendant objects and argues

that Mr. Cook is an apex witness. The Court finds Mr. Cook is not an apex witness and must be

produced for deposition. Being one of 110 senior vice presidents does make him presumptively an

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apex witness. Additionally, any such presumption would be overcome since there are other witnesses who have identified Mr. Cook as having unique knowledge. In particular, Mr. Cook appears to have unique first-hand knowledge regarding events that are directly relevant to MEC's damages claims as well as relevant to rebut assertions about the availability of non-infringing alternatives.

Due to the closing of Walmart's fiscal year (January 31, 2022), Walmart has indicated that it may be difficult to produce Mr. Cook for deposition. However, MEC has requested to depose Mr. Cook for several months. Walmart, however, has delayed Mr. Cook's deposition causing whatever prejudice may exist. It is **ORDERED** that Mr. Cook be produced for deposition no later than January 20, 2022. The Court, however, directs MEC to be as accommodating to Mr. Cook's schedule as is feasible, but to be clear—he is to be produced no later than January 20, 2022.

3.   MEC's Fourth Motion to Compel Discovery (Dkt. No. 66)

MEC's Fourth Motion to Compel Discovery is **GRANTED-IN-PART**. MEC moves the Court to compel Walmart to answer interrogatory nos. 4 and 7, and to produce documents pursuant to its document requests. Dkt. No. 66 at 2. Walmart is directed to supplement its response to MEC's interrogatory no. 4 and give a definite statement with respect to any arbitration and administrative proceedings, as well as produce any accompanying documents. As written, MEC's interrogatory no. 7 is too broad and does not warrant Walmart to undertake additional search efforts.

4.   MEC's Motion to Reopen Hearing on its First Motion to Compel (Dkt. No. 72)

MEC's Motion to Reopen Hearing on its First Motion to Compel is **GRANTED**. Plaintiff moves the Court to compel Walmart to produce additional source code information, Slack channels, and additional JIRA documentation. The Court is gravely concerned about the continuing resistance—and perhaps defiance—Walmart has shown with respect to the full

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production of its source code and accompanying documentation. For instance, the Court previously ordered "Walmart to produce any source code contained in [the "Store Services"] module." Dkt. No. 55. Walmart did not. Plaintiff has demonstrated there is additional source code in the "Store Services" module that Walmart failed to produce, despite this Court's order.

Walmart is **ORDERED** to export all code in the "github" directory for "Store Services." Walmart is further **ORDERED** to produce all JIRA documents described on Plaintiff's Hearing Slide 20 in native format. Walmart is also **ORDERED** to produce relevant[1] Slack channels.

5.   MEC's Fifth Motion to Compel Discovery (Dkt. No. 73)

MEC's Fifth Motion to Compel Discovery is **GRANTED**. MEC moves the Court to compel Walmart to supplement/answer its interrogatories nos. 2 and 3, and to produce documents pursuant to its document requests. MEC's Interrogatory no. 2 states:

> Describe in detail your data on the usage of the Accused Products in the United States, including, identifying at least (on a monthly basis) for the Accused Products: the data fields you record related to the Accused Products; the number of unique users; the number of transactions[1]; the total transaction dollar value[2]; the amounts paid in transaction fees; the average, median, mean transaction values and amounts for transaction fees; and the sources, documents, and/or systems you use to record and determine this usage.

Dkt. No. 73 at 5. Walmart answered this interrogatory using Rule 33(d). Walmart choose to produce the daily total of Walmart Pay transactions for each of its thousands of stores, instead of a monthly company-wide total as requested. Thus, one day of transactions consumed approximately sixty pages having thousands of data entries.

This is an abusive and improper use of Rule 33(d). It is beyond belief that any Walmart executive takes these documents and manually tabulates them every day.

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[1] There are roughly forty Slack channels Plaintiff identified as relevant. The Court is sensitive to the burden that Walmart would incur if all forty channels are ordered to be produced. The parties are **ORDERED** to meet and confer and narrow the list of forty channels. The Court is hesitant to place a limit on the number of channels that are to be produced but will resolve any dispute remaining after the parties' efforts.

Obviously, Walmart is in a much better position than MEC to accurately answer Plaintiff's

interrogatory no. 2. Practices such as this cause the Court to ignore Walmart's reliance on

huge numbers of documents produced as a sign of good faith efforts to respond to

discovery. Walmart is **ORDERED** to fully answer interrogatory no. 2 and any

accompanying document requests. Walmart shall provide a table that accurately answers

each section of MEC's interrogatory.

> Interrogatory no. 3 states:
>
> Describe in detail the terms of each relationship, including identifying the terms of
> agreements (e.g., financial, security, or other material terms), that you have with
> any payment provider you accept or have accepted for the Accused Products (e.g.,
> "any major card, including VISA, MasterCard, AMEX, and Discover," Chase Pay),
> including the differences, if any, between the terms (e.g., financial terms, security,
> or other material terms) relating to the Accused Products compared to other ways
> customers may make purchases in your stores (e.g., swiping / inserting / tapping a
> card at a point-of-sale terminal or online) from January 2015 and the present.

Id. at 4. Walmart's main argument appears to be that these documents are too sensitive to reveal.

See generally Dkt. No. 89. These agreements are highly relevant for MEC to explore what, if any,

benefit Walmart may have obtained with card network providers in the development of the accused

product. Given the highly relevant nature of the documents and the minimal burden of production,

along with the protective order in place to protect Walmart, Walmart is **ORDERED** to answer

interrogatory no. 3 and produce any accompanying documents, as described in MEC's document

requests.

6.   MEC's Sixth Motion to Compel Discovery (Dkt. No. 80)

MEC's Sixth Motion to Compel Discovery is **GRANTED-IN-PART**. MEC seeks the

production of "three 'buckets' of topics: 1) Walmart's marketing, benefits, or cost savings from

the accused products; 2) Walmart's non-infringing alternatives ("NIAs"); and 3) Walmart's

documents related to willfulness." Dkt. No. 80 at 2.

Walmart's production of marketing documents is seriously deficient. After review, the Court is convinced there are far more relevant documents that Walmart has not produced. This is particularly true in the "finance and treasury" sources. Walmart is **ORDERED** to search and produce documents related to marketing and costs in the marketing and "finance and treasury" sources.

Walmart has agreed to produce documents related to operational costs of maintaining the accused product. Walmart is **ORDERED** to produce operational cost documents as far back as December 2015 by January 10, 2022.

As for for non-infringing alternatives, Walmart is **ORDERED** to supplement its answer to interrogatory no. 16, but the motion is otherwise **DENIED**.

As for documents related to willfulness, Walmart is **ORDERED** to conduct the further search agreed at the hearing for IP policies and Corporate Development Team emails. Walmart also has not produced a definitive statement on its data retention policy. Walmart is **ORDERED** to produce all relevant data retention policies.

Defendant's Motions to Compel

1. **Walmart's Motion to Compel Prosecution-Related Documents for Asserted Patents (Dkt. No. 56)**

Walmart's Motion to Compel Prosecution-Related Documents is **DENIED**. Walmart moves to compel Plaintiff to produce "complete prosecution histories for international patent applications that are related to the patents asserted in this case." Dkt. No. 56 at 2. Based on the

briefing and the argument presented, the Court is satisfied that MEC has produced all the relevant non-privileged documents in its possession.

      2.   **Walmart's Second Motion to Compel Response to Interrogatory No. 8 (Dkt. No. 77)**

      Walmart's Second Motion to Compel Response to Interrogatory No. 8 is **GRANTED-IN-PART**. Walmart's interrogatory no. 8 asks for, among other things, offers to license. MEC did not adequately respond to the "offers" portion of Walmart's interrogatory no. 8 and is ordered to do so.

<u>Fees</u>

      Rule 37(a)(5)(A) provides that the Court "must" assess fees to the losing party unless to do so would be unjust. The Court finds that Walmart was not substantially justified in failing to provide complete discovery responses and that $25,000 is the reasonable award of fees to Plaintiff under the circumstances taking into account the multiple motions and hearings required. Accordingly, Walmart is **ORDERED** to pay MEC, through its counsel, the sum of $25,000 no later than January 31, 2022.

      SIGNED this 4th day of January, 2022.

ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE