

**To Have and To Hold: Strategies for Effective Legal Holds in the
Era of Mixed-Media Communications and Use of Personal Devices**

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Use of technology is ubiquitous worldwide, including the embrace of “remote work” among businesses and governments. Although legal concepts related to preservation and discovery of electronically stored information (ESI) are unique to litigation in the United States, the U.S. legal system casts a long international shadow on foreign entities subject to its jurisdiction. When faced with U.S. litigation, foreign entities are required to preserve and produce relevant evidence – even though the information is stored outside the borders of the United States. To compound matters, judges, lawyers and litigants continue to struggle with precisely when the duty to preserve evidence is triggered, best practices for preserving ESI and protocols/formats for producing ESI. This includes preserving and producing evidence stored on personal devices like cell phones, tablets, removable media and personal cloud storage locations. This white paper explores key concepts and strategies for effective preservation, collection and production of ESI in the era of mixed-media communications in the United States, including tips to avoid sanctions in U.S. courts.¹

As a concept, legal discovery in the United States is simple. In practice, it is much harder. When a lawsuit is threatened or commenced in a state or federal court, the law requires preservation of potentially relevant evidence in the possession, custody or control of the parties to the lawsuit.² This is regardless of where the ESI is located, because the U.S. legal system engages in the mutual exchange of information among parties to litigation. Failure to produce relevant evidence is viewed as hiding evidence from the court and your opponent and can lead to harsh sanctions, including monetary sanctions, prohibition of use of evidence, an adverse inference instruction (essentially the judge telling the jury that a party intentionally destroyed evidence), dismissal of a lawsuit or granting a default judgment – all because a party failed to preserve relevant evidence.

The exchange of information in U.S. litigation is called discovery. It is designed to take place with little court supervision. When things go wrong, issues are raised in conferences with the court and in many cases, through motion practice. Electronic discovery (sometimes referred to as e-discovery) relates specifically to the exchange of ESI. Many courts in the U.S. have procedural rules related to the exchange of ESI. The applicable rules, however, are often colored by inconsistent case law across different state and federal courts. In other words, while conduct in one court is acceptable, the same conduct may be sanctionable in a different court. Rule 37(e) of the Federal Rules of Civil Procedure is the federal court’s attempt to promote a more uniform judicial framework for analyzing remedies and sanctions when a party fails to preserve electronically stored information. Since enactment in December 2015, courts in the U.S. have excused inadvertent destruction of ESI when reasonable steps are taken to preserve it.

¹ This white paper is not intended as legal advice. Nor is it intended to cover every concept related to the preservation and discovery of ESI in the United States. If involved in litigation or faced with the prospect of litigation in the United States, please consult a lawyer for legal advice related to duties, rights and obligations associated with preservation and discovery requirements of specific U.S. jurisdictions.

² The duty to preserve evidence is often triggered earlier than the date a lawsuit is filed.

In a new age of remote work, U.S. litigants must understand the actual technology systems used by their business and their employees – regardless of their location worldwide. Equally important, litigants must understand the effect of foreign privacy laws and specific preservation requirements of U.S. jurisdictions when preserving, collecting and producing ESI. While rules and commentary have developed over the past twenty years specially related to the discovery of ESI; requirements by jurisdiction and individual judges vary. Further exasperating the risk of sanctions are the near infinite forms of ESI and the knowledge of judges, lawyers and clients related to the operation, storage and destruction of ESI on a wide array of technology systems used to conduct day-to-day business; how to preserve ESI stored there; acceptable methods of collection and production of ESI in a format acceptable to the parties and the court.

This white paper will cover a few key issues and strategies, but litigants finding themselves in U.S. courts for the first time (or a specific jurisdiction for the first time) will be best served consulting a lawyer.

I. The Duty to Preserve

The existence of a duty to preserve evidence in the United States is well established. The duty to preserve arises when litigation or a government investigation is reasonably anticipated.³ The duty is a common-law duty to avoid spoliation of relevant evidence that may be used at trial.⁴ The United States traces the rule back to English common-law in the case of *Armory v. Delamirie* decided in 1722.⁵ One judge aptly articulated why preservation of ESI is important:

In an era where vast amounts of electronic information is available for review, discovery in certain cases has become increasingly complex and expensive. Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party. . . . By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records—paper or

³ See generally *The Sedona Conference, Commentary on Legal Holds, Second Edition: The Trigger and The Process*, The Sedona Conference Journal, Vol. 20 (2019) (“Commentary on Legal Holds”); see also *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).

⁴ See *Id.*, p. 10, n. 5 citing Robert Keeling, *Sometimes Old Rules Know Best: Returning to Common Law Conceptions of the Duty to Preserve in the Digital Information Age*, 67 CATH.U. L. 67 (2018) (providing a historical background of the common law duty to preserve and comparing to the application of today’s standard).

⁵ *Nation-Wide Check Corp., Inc. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982) (explaining that this rationale has a long history) (citing *Armory v. Delamirie*, 1 Stra. 505, 93 Eng. Rep. 664 (K.B. 1722)); see also *Wai Feng Trading Co. v. Quick Fitting, Inc.*, No. 13-33WES, 2019 U.S. Dist. LEXIS 4113, *25-26 (D.R.I. Jan. 7, 2019) (“Sanctions for spoliation serve a “prophylactic and punitive” purpose.

electronic—and to search in the right places for those records, will inevitably result in the spoliation of evidence.⁶

Although the above passage was written in 2010, the judge was concerned litigants had not heeded her warning about the duty to preserve back in 2004.⁷ While some practitioners have heard these warnings, the passage applies equally today, when ESI could be stored anywhere in the world. The good news for parties to U.S. litigation; courts are more likely to avoid sanctions if reasonable steps are taken to preserve potentially relevant ESI.⁸ Below are relevant concepts and strategies to avoid sanctions in the United States.

II. When is the Duty to Preserve Triggered?

The duty to preserve evidence arises when litigation is reasonably foreseeable.⁹ The point when litigation becomes reasonably foreseeable “is an objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation.”¹⁰ Foreseeability is often characterized as litigation being “reasonably anticipated.”¹¹ The standard is fact specific and is analyzed by courts on a case-by-case basis.¹²

For example, in *Kieran Ravi Bhattacharya v. Murray*, a federal district court held that plaintiff’s threats of litigation were “too vague or ambiguous” to expect that a reasonable party in the same factual circumstances would have reasonably foreseen litigation over plaintiff’s suspension and eventual expulsion from defendant’s medical school.¹³

⁶ *In re Keurig Green Mt. Single-Serve Coffee Antitrust Litig.*, 341 F.R.D. 474, 492-93 (S.D.N.Y. 2022), quoting *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010) (Scheidlin, J.), abrogated on other grounds, *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012).

⁷ *Zubulake v. UBS Warburg LLC* (Scheidlin, J.), 229 F.R.D. 422 (S.D.N.Y. 2004).

⁸ See generally *7 Steps for Legal Holds of ESI and Other Documents* (ARMA 2009) (update scheduled for release in May 2023).

⁹ *Silvestri v. GMC*, 271 F.3d 583, 591 (4th Cir. 2001) (The duty extends to that period before the litigation when a party “reasonably should know that the evidence may be relevant to anticipated litigation.”).

¹⁰ *Johns v. Gwinn*, 503 F. Supp. 3d 452, 465 (W.D. Va. 2020).

¹¹ *VOOM HD Holdings LLC v EchoStar Satellite L.L.C*, 93 AD3d 33, 41, 939 N.Y.S.2d 321 (1st Dept 2012) (holding that, at a minimum, the party anticipating litigation must institute an appropriate litigation hold.).

¹² *Id.* quoting *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (“This is a flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry.”).

¹³ Civil Action No. 3:19-cv-00054, 2022 U.S. Dist. LEXIS 53201 (W.D. Va. Mar. 23, 2022). Additionally, statements that “identify a dispute but express an invitation to discuss it or otherwise negotiate,” without “openly threatening litigation,” generally do not trigger “the duty to preserve evidence relevant to that dispute” because they do not provide objective “notice that litigation is reasonably foreseeable.” *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 511 (D. Md. 2009)

When analyzing the duty to preserve, it is important for parties to analyze the facts and circumstances surrounding the event giving rise to potential litigation. Are their internal emails saying “we are going to be sued” or other facts that would lead an objective analysis to conclude litigation is more likely than not? Keep in mind, for the duty to preserve to be triggered, the analysis requires more than a mere possibility of litigation.¹⁴

III. Discharging the Duty to Preserve

Once the duty to preserve evidence has been triggered, parties to actual or potential litigation in the United States, must take affirmative steps to avoid destroying relevant evidence.¹⁵ Whether a party took reasonable steps to avoid destruction of potentially relevant evidence is also a fact specific inquiry.¹⁶ The duty to preserve extends to evidence in a party’s “possession, custody or control” which leads to fact specific inquiries regarding control, such as review of a cloud contract or the corporate relationship between a foreign corporation and unrelated U.S. entity.¹⁷

(citing *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 621-24 (D. Colo. 2007)).

¹⁴ The fact that a person or entity “could file a complaint or even might” do so is not enough to trigger the duty to preserve ESI. See *Aberin v. American Honda Motor Company, Inc.*, Case No. 16-cv-04384-JST, 2017 U.S. Dist. LEXIS 208621, *2 (N.D. Cal. Dec. 19, 2017); *In re Napster*, 462 F.Supp.2d 1060, 1068 (2006) (“[F]uture litigation must be probable, which has been held to mean more than a possibility.”); *Realnetworks, Inc. v. DVD Copy Control Ass’n, Inc.*, 264 F.R.D. 517, 526 (N.D. Cal. 2009) (“A general concern over litigation does not trigger a duty to preserve evidence.”); and *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) (fact specific standard allows a district court to exercise the discretion necessary to confront the various factual situations inherent in a spoliation inquiry). See also *Micron Tech., Inc.*, 645 F.3d at 1320-21 (collecting cases).

¹⁵ See *Rivera v. Sam’s Club Humacao*, Civil No. 16-2307, 2018 U.S. Dist. LEXIS 168543 at *7 (D.P.R. Sep. 28, 2018) (“Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”); see also *Crown Battery Mfg. Co. v. Club Car, Inc.*, 185 F. Supp. 3d 987, 999 (N.D. Ohio 2016) (internal citations omitted) (“Once the duty to preserve attaches, a party must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents.”).

¹⁶ See *Brown v. Pa. Dep’t of Corr.*, No. 1:15-CV-918, 2021 U.S. Dist. LEXIS 91278, *16-17 (M.D. Pa. May 13, 2021) (“Conducting this fact-specific inquiry, we simply cannot conclude at this juncture that [plaintiff] has shown that the defendants intentionally destroyed any evidence when the need to preserve those messages was completely unclear.”).

¹⁷ *Phillips v. Netblue, Inc.*, No. C-05-4401 SC, 2007 U.S. Dist. LEXIS 67404, *7 (N.D. Cal. Jan. 22, 2007) (“The fundamental factor is that the document, or other potential objects of evidence, must be in the party’s possession, custody, or control for any duty to preserve to attach.” See *MacSteel, Inc. v. Eramet North America*, No. 05-74566, 2006 U.S. Dist. LEXIS 83338, *1 (E.D. Mich. Nov. 16, 2006); *Townsend v. American Insulated Panel Co.*, 174 F.R.D. 1, *5 (D. Mass. 1997) (“[T]he duty [to preserve evidence] does not extend to evidence which is not in the litigant’s possession or custody and over which the litigant has no control.”) See also Fed.

IV. Spoliation

Spoliation is defined as the destruction of evidence or the significant and meaningful alteration of a document or instrument.¹⁸ Spoliation of evidence, in appropriate circumstances, may warrant the imposition of sanctions.¹⁹ Courts may use their inherent authority to control the discovery process for egregious or willful destruction of tangible evidence,²⁰ but the general concept of good faith and what is reasonable under the circumstances generally applies.²¹ Federal courts now rely on Rule 37(e) of the Federal Rules of Civil Procedure when determining whether sanctions are appropriate when ESI is lost or destroyed.

V. Federal Rules of Civil Procedure 37(e)

The Federal Rules of Civil Procedure are procedural rules that apply to all federal courts in the United States. In addition, thirty-five states have adopted a version of the Federal Rules of Civil Procedure.²²

Rule 37(e) authorizes a court to sanction a party for losing or destroying ESI it had a duty to preserve. If ESI 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,” a court:

R. Civ. P. Rule 26(a)(1)(A)(ii) Initial Disclosure: requires disclosure “of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody or control.”

¹⁸ *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1184 (11th Cir. 2020); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583 (4th Cir. 2001); *Graff v. Baja Marine Corp.*, 310 Fed. Appx. 298, 301 (11th Cir. 2009) (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999) (“Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.”)).

¹⁹ See e.g. *Small v. Univ. Med. Ctr.*, No. 2:13-cv-0298-APG-PAL, 2018 U.S. Dist. LEXIS 134716, at *241 (D. Nev. July 31, 2018) (court granted an adverse jury instruction that defendant failed to comply with its legal duty to preserve discoverable information resulting in loss of ESI).

²⁰ See *Best Payphones, Inc. v. City of New York*, 1-CV-3924(JG)(VMS); 1-CV-8506(JG)(VMS); 3-CV-0192(JG)(VMS), 2016 U.S. Dist. LEXIS 25655, *3 (E.D.N.Y. Feb. 26, 2016) (“Thus as the law currently exists in the Second Circuit, there are separate legal analyses governing the spoliation of tangible evidence versus electronic evidence.”).

²¹ See *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (“Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable”).

²² See Uniformity of State and Federal Procedure, T. Main, Nevada Lawyer (2019), https://www.nvbar.org/wp-content/uploads/NevadaLawyer_June2019_Uniformity-State-Federal.pdf (last visited March 17, 2023).

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

(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.²³

VI. Foreign Entities Involved in U.S. Litigation Have a Duty to Preserve Relevant Evidence

Foreign entities are not excused from preservation obligations simply because they reside outside the United States. If a U.S. court obtains jurisdiction over a foreign litigant, the procedural rules and common law duty to preserve evidence apply.²⁴ For example, in *Lunkenheimer Co. v. Tyco Flow Control Pac. Pty Ltd.*, the court held that a foreign corporation has a duty to preserve evidence related to U.S. litigation.²⁵ Courts apply the same reasonably foreseeable test discussed previously.²⁶ Control in the context of "possession, custody or control" is liberally construed by U.S. courts.²⁷

²³ Fed. R. Civ. P. 37(e).

²⁴ *Lunkenheimer Co. v. Tyco Flow Control Pac. Pty Ltd.*, 2013 U.S. Dist. LEXIS 88960 (S.D. Ohio, June 25, 2013) (Although litigation was not contemplated in the United States, the court held that a foreign corporation's duty to preserve evidence related to U.S. litigation arose when the U.S. court gained jurisdiction over the foreign corporation). See e.g. *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979) (granting motion to compel production of foreign documents); see *Rashbaum, et al.*, "U.S. Legal Holds Across Borders; A Legal Conundrum," 13 N.C.J.L. & Tech 69 (Fall 2011); and see also, *Reino de Espana v. Am. Bureau of Shipping*, 2006 U.S. Dist. LEXIS 81415 (S.D.N.Y. Nov. 2, 2006).

²⁵ 2013 U.S. Dist. LEXIS 88960.

²⁶ See *Glob. Access Inv. Advisor LLC v. Lopes*, 2017 NY Slip Op 31173(U) (N.Y. Sup. Ct. May 31, 2017) (in an issue of first impression for New York state courts, the court held that an email threatening litigation "in a civil court" before litigation was commenced was insufficient to put the party on notice of a potential lawsuit in New York).

²⁷ *Japan Halon Co. v. Great Lakes Chem. Corp.*, 155 F.R.D. 626, 627 (N. D. Ind. 1993) citing *In Re Bankers Trust Co.*, 61 F.3d 465, 469 (6th Cir. 1995) ("In practice, the courts have sometimes interpreted Rule 34 to require production if the party has practical ability to obtain the documents from another, irrespective of his legal entitlement to the documents.").

VII. Proportionality

Discovery in the United States is guided by the legal principle that discovery must be proportional to the needs of the case.²⁸ While proportionality is often thought of as the expense of discovery outweighing the amount in controversy, expense is only one factor. The six proportionality factors are: 1) the importance of the issues at stake in the action; 2) the amount in controversy; 3) the parties' relative access to relevant information; 4) the parties' resources; 5) the importance of the discovery in resolving the issues; and 6) whether the burden or expense of the proposed discovery outweighs its likely benefit.²⁹

Proportionality as a guiding principle in assessing the reasonableness of the steps taken to preserve ESI has been gaining importance since Rule 37(e) was implemented in December 2015.³⁰ As part of revamping the rule, the advisory committee specifically addressed using proportionality to assess a party's preservation efforts:

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data — including social media — to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.³¹

A few courts have held that proportionality should be considered when assessing preservation obligations.³² One court directly analyzing proportionality in preservation obligations

²⁸ See Fed. R. Civ. P. Rule 26(b)(1); *Epac Techs. v. Thomas Nelson Inc.*, No. 3:12-cv-00463, 2015 U.S. Dist. LEXIS 198583, *3-4 (M.D. Tenn. Dec. 1, 2015) quoting Fed. R. Civ. P. 26(b)(1); and see also *Commentary on Legal Holds*, p. 356, n. 27.

²⁹ Fed. R. Civ. P. 26(b)(1).

³⁰ See Fed. R. Civ. P. 37(e) advisory committee notes (2015 Amendments).

³¹ *Id.*

³² See e.g. *Safelite Grp., Inc. v. Lockridge*, No. 2:21-cv-04558, 2022 U.S. Dist. LEXIS 230992, *11 (S.D. Ohio Dec. 22, 2022) (“a court should consider ‘proportionality and reasonableness’ in assessing preservation obligations”); *Zhang v. City of N.Y.*, No. 17-CV-5415 (JFK) (OTW), 2020 U.S. Dist. LEXIS 148031, at *9 (S.D.N.Y. Aug. 17, 2020) quoting *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 18, *Sedona Conf. J.* 14, 148 (2017) (“In determining the reasonableness of the preservation steps taken, courts may consider, among other things, the proportionality of preservation efforts.”); *Craig Hedquist v. Patterson*, No. 14-CV-45-J, 2017 U.S. Dist. LEXIS 237570, *6 (D. Wyo. Nov. 1, 2017) (holding that defendant is not required to continue preservation based on two of the Rule 26 factors: 1) continued preservation will add nothing to resolution and 2) burden and expense of continued preservation greatly outweighs any potential benefit).

wrote, “[w]hile plaintiffs are required to articulate defined requests for preservation and/or production, so too must defendants take seriously their independent obligation to preserve information, and to arrive at workable preservation solutions, which balance the proportionality of preservation against the need for eventual production of information.”³³ In a recent case, plaintiff was ordered to stop sending preservation letters to third parties (who happen to be investors, auditors, business partners and clients) “without an articulable and good faith belief that there is a sufficiently specific, relevant and proportional basis for doing so.”³⁴

VIII. Ephemeral Information

The use of disappearing messaging programs in business has become more prevalent worldwide. However, lawyers and their clients must understand the scope of ESI within instant messaging applications like WhatsApp®, Snapchat® and Telegram®.³⁵ Various messaging platforms offer end-to-end encryption and can automatically delete messages from servers. ESI associated with such applications may be available only on a custodian’s device, but often enterprise editions have messages stored on a server. If the data exists when the duty to preserve is triggered, efforts must be made to preserve the ESI in ephemeral messaging applications.³⁶

³³ *Al Otro Lado, Inc. v. Nielsen*, 328 F.R.D. 408, 418 (S.D. Cal. 2018) (holding that a narrower scope of preservation is acceptable after “[b]alancing the needs of both parties, and mindful of the proportionality requirement under Rule 26. . .”).

³⁴ *Gina Centner v. TMG Util. Advisory Servs.*, No. CV-22-00886-PHX-GMS, 2022 U.S. Dist. LEXIS 137231, *5-6 (D. Ariz. Aug. 2, 2022).

³⁵ “Instant messages and other forms of chat are increasingly used by organizations for substantive communications, both internally and externally. In the past, such data was often labeled ‘ephemeral,’ because it was not retained as a general practice and in many cases did not persist in an easily recoverable form. More modern chat and messaging applications store their conversations in a form that can be maintained and more easily recovered. The data maintained in these applications may be appropriate for preservation and should not be deemed inaccessible in most cases.” *Commentary on Legal Holds*, p. 396, n. 112 (“See *Siras Partners LLC v. Activity Kuafu Hudson Yards LLC*, 2019 N.Y. Slip Op. 03303, 2019 WL 1905478 (N.Y. App. Div. Apr. 30, 2019) (failure to preserve WeChat messages or to recover data from later-damaged phones constitutes gross negligence justifying adverse inference and spoliation sanction); cf. *Monolithic Power Systems, Inc. v. Intersil Corp.*, No. 16-1125, 2018 WL 6075046, *3 (D. Del. Nov. 19, 2018) (‘Intersil’s motion with respect to WeChat messages also must be denied. Intersil has not disproven MPS’s representation that the WeChat messages were ‘deleted in the ordinary course of business, prior to MPS’s legal department becoming aware of the issue.’)).”

³⁶ The Sedona Conference, *The Sedona Conference Primer on Social Media*, 20 Sedona Conf. J. 1, 90-91 (2019) (“A client’s use of ephemeral messaging for relevant communications after a duty to preserve has arisen may be particularly problematic, as it would have the potential to deprive adversaries and the court of relevant evidence.”); *Herzig v. Ark. Found. for Med. Care, Inc.*, No. 2:18-CV-02101, 2019 U.S. Dist. LEXIS 111296 (W.D. Ark. July 3, 2019) (failure to preserve Signal™ application instant messages was bad faith); *Waymo LLC v. Uber Technologies, LLC*, No. C 17-00939 WHA (N.D. Ca. 2018) (trial order allowing Waymo to present facts at trial that “Uber sought to minimize its ‘paper trial’ by using ephemeral communications.”); and *Pable v. Chi. Transit Auth.*, No. 19 CV 7868, 2023 U.S. Dist. LEXIS 34833 (N.D. Ill. Mar. 2, 2023)

IX. Foreign Privacy Laws

It would be harsh to say courts in the United States do not care about privacy laws in the United States or elsewhere.³⁷ However, when it comes to preservation of ESI by a foreign litigant before U.S. courts, failing to take reasonable steps to preserve ESI solely because of foreign privacy laws will likely face harsh judicial scrutiny.³⁸ This is not to say foreign privacy laws should be ignored. It means that privacy laws as a factor need to be raised early with an adversary and with the court. Motion practice may be required to ensure a narrower scope of preservation due to interference or prohibition by a foreign privacy law.

For example, U.S. courts analyzing the impact of the EU's General Data Protection Regulation (GDPR) on discovery have refused to allow redaction of personal data of data subjects.³⁹ Other courts have held that litigation exceptions in international privacy laws, allow unredacted production of personal data.⁴⁰

Needless to say, it is incumbent upon a foreign entity to take reasonable steps to preserve relevant ESI if subject to jurisdiction in the United States.

X. Practical Tips

Attached are the following:

Appendix A – One page desk reference with the language and analytical steps of Rule 37(e).

Appendix B – Multi-page check list for organizations to analyze their current hold practices.

Appendix C – Detailed ESI preservation and discovery protocol filed in *Crosby v. Amazon* (W.D. Wash. Mar. 1, 2022).

Appendix D – Detailed “Reasonable Steps” Preservation Analysis by the head of the Rules Committee, when Fed. R. Civ. P. 37(e) was enacted.

(Magistrate judge recommended dismissing plaintiff's complaint for using Signal™ ephemeral messaging app after the duty to preserve was triggered).

³⁷ See e.g. Fed. R. Civ. P. 5.2 which requires redaction of personal information.

³⁸ *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for S. Dist.*, 482 U.S. 522, 554, n. 29 (1987) (internal quotations omitted) (“it was well settled that foreign laws limiting discovery do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.”).

³⁹ *In re Mercedes-Benz Emissions Litig.*, Civil Action No. 16-cv-881 (KM) (ESK), 2020 U.S. Dist. LEXIS 15967 (D.N.J. Jan. 30, 2020) (existing protective order in case protected privacy of individuals sufficient to permit disclosure of personal data).

⁴⁰ *Knight Capital Partners Corp. v. Henkel AG & Co.*, 290 F. Supp. 3d 681, 691 (E.D. Mich. 2017) (litigation exception in Germany's Federal Data Protection Act does not prevent the unredacted production of personal data); see also *Anywherecommerce, Inc. v. Ingenico, Inc.*, Civil Action No. 19-cv-11457-IT, 2020 U.S. Dist. LEXIS 188361 (D. Mass. Aug. 31, 2020) (ignoring GDPR litigation exception and ordering unredacted production based on comity analysis).

In addition to the Appendices, below are ten practical tips to help demonstrate the reasonableness of preservation and e-discovery efforts:

1. Ensure a written legal hold policy is in place.
2. Issue written legal holds to key custodians and interview them about where relevant data is stored.
3. Document, as best you can, decisions to not preserve certain ESI, with factual and legal support, if possible. This will help understand decisions made years earlier, when reviewed years later.
4. Make friends with the CIO, and each IT person in control of key (and when relevant obscure) IT systems. In house counsel and outside counsel need to understand the ESI lifecycle for all potentially relevant technology systems, including understanding how data is created, stored, modified, and deleted.
5. Know key time frames related to auto-delete functions of IT systems.
6. Develop routine protocols for preservation in place and if you have any doubts about the risks of preservation in place, develop routine collection protocols.
7. Know the limitations of your technology systems. For example, if you have a complex database that is impossible to extract data from (yes, the author has been involved in ESI protocols where screen shots of non-exportable data were captured and produced for weeks on end). Get ahead of preservation and production problems before pressed in costly litigation.
8. Be creative. Challenge the lawyers. Challenge the court. Is there a way that everyone wants the discovery to proceed? Of course. Is there a better, more efficient and least costly way? Of course.
9. Raise difficult issues early. Loss of data or a failure to preserve key ESI does not get better with age.
10. Keep tight controls related to technology systems. In other words, do not let outside counsel develop ESI protocols without your input and approval.

Appendix A

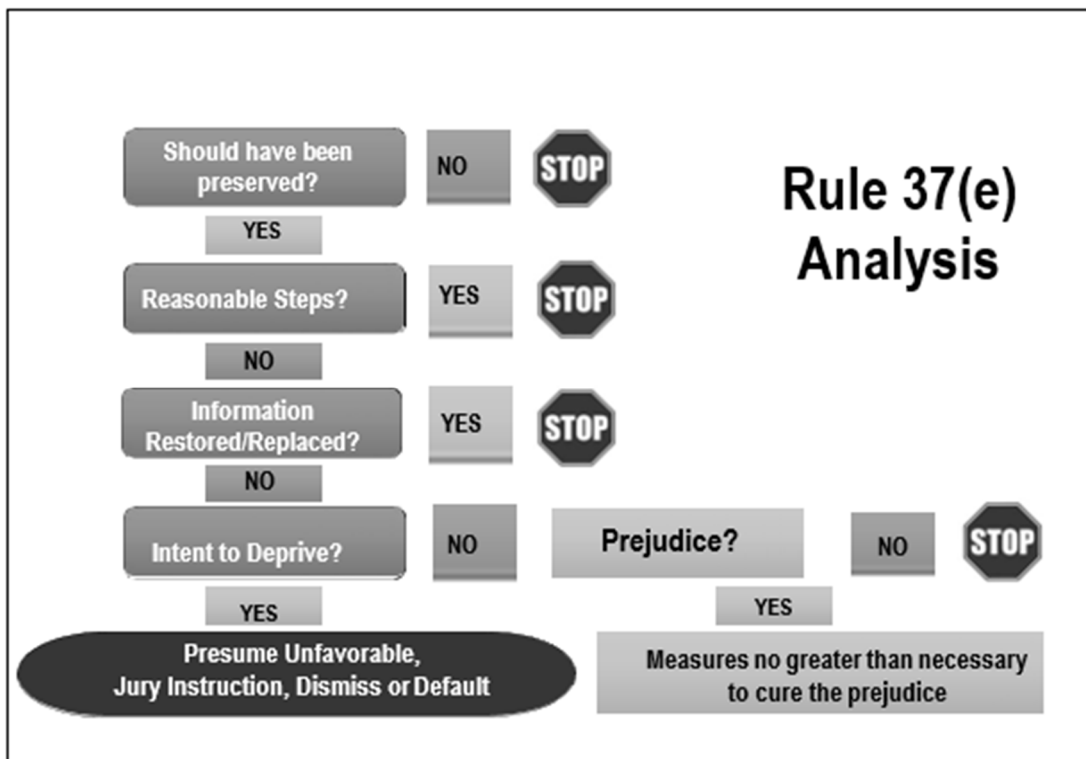
Desk Reference – Rule 37(e) / Federal Rules of Civil Procedure

Under Rule 37(e) of the Federal Rules of Civil Procedure, an organization’s ability to demonstrate use of “reasonable steps” to preserve relevant electronically stored information (ESI) can avoid legal sanctions and reduce costly over-preservation.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

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

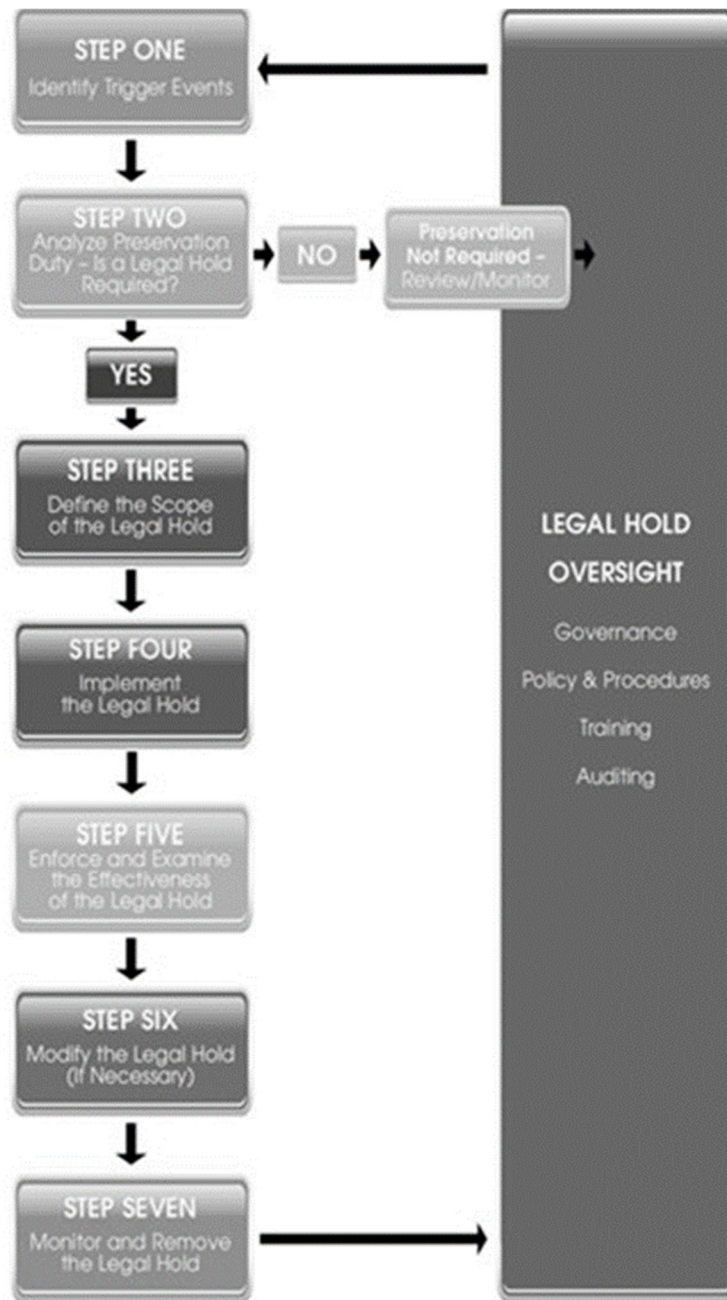


Appendix B

Analyzing the Legal Hold Process

Under Rule 37(e) of the Federal Rules of Civil Procedure, an organization's ability to demonstrate use of "reasonable steps" to preserve relevant electronically stored information (ESI) can avoid legal sanctions and reduce costly over-preservation.

7 "Reasonable" Steps for Legal Holds of ESI and Other Documents (ARMA 2023) is based on a legal hold process flow chart:



STEP ONE: Identify Trigger Events

- Does the organization understand events triggering its common law duty to preserve evidence?
- Are typical trigger events known?
- Is there a process for:
 - identifying potential trigger events?
 - reporting potential trigger events?
 - monitoring potential trigger events?

STEP TWO: Analyze Preservation Duty – is a Legal Hold Required?

- Does the organization have a process for analyzing facts and circumstances causing anticipation of litigation?
- Is a lawyer available to provide legal advice regarding the duty to preserve (inhouse or outside counsel)?
- Is the analysis memorialized?
- Are typical known scenarios analyzed prior to the happening of a trigger event?
- Is there a process in place to timely determine existence of a duty to preserve?

STEP THREE: Define the Scope of the Legal Hold

- Does the organization have a process in place to investigate and identify:
 - Typical or expected lawsuit claims stemming from the trigger event (requires legal advice)?
 - Organizational knowledge regarding typical discovery requests (requires legal advice and experience in prior lawsuits)?
 - Organizational knowledge regarding evidence needed to prosecute or defend lawsuit claims (requires legal advice and experience in prior lawsuits)?
 - Key custodians of information related to the trigger event?
 - Sources of ESI and other documents?

STEP FOUR: Implement the Legal Hold

- Does the organization have a process in place to:
 - Issue a written legal hold notice to custodians?
 - Maintain a copy of the notice?
 - Record date/time transmitted?
 - Obtain acknowledgments?
 - Answer questions regarding the hold?
 - Stop or otherwise take reasonable action to prevent destruction of relevant ESI due to automated systems (e.g. auto-delete and other automatic processes that may delete or alter ESI).
 - Inform HR and IT to prevent inadvertent destruction of departing custodians' ESI and other documents?
 - Any special preservation requirements needed to avoid inadvertent destruction of ESI? (e.g. databases, auto-delete policies, social media, text messages or ephemeral messaging applications).

STEP FIVE: Enforce and Examine the Effectiveness of the Legal Hold

- Does the organization have a process in place to investigate and enforce the legal hold:
 - Perform custodian interviews?
- Emphasize duty to preserve.
- Investigate sufficiency of scope (e.g. time, custodians, ESI, documents)
- Identify atypical or unknown (to the organization) sources of relevant ESI (e.g. text, social media, 3rd parties, collaborative tools, non-approved cloud, SaaS or other applications).
- Identify destruction, if any, between notice and interview:
 - Analyze information gleaned during interviews?
 - Enforce hold against non-compliant custodians, including elevation to superiors and discipline?
 - Rectify deficiencies?
 - Restore or replace lost ESI?
 - Analyze reasonableness of steps?

STEP SIX: Modify the Legal Hold (if necessary)

- Does the organization have a process in place to:
 - Track changes to the scope?
 - Expand/Narrow Scope?
 - Analyze potential changes needed due to discovery requests, witnesses or legal theories (not covered by the current legal hold)?
 - Issue modified legal holds?

STEP SEVEN: Monitor and Remove the Legal Hold

- Does the organization have a process in place to continually monitor the status of legal holds, including:
 - All changes to existing legal holds?
 - Completion of all outstanding items from STEP 5?
 - Compliance audits of specific holds?
 - Reference existing holds prior to authorizing technology system changes that may alter or delete ESI on hold?
 - Issue reminders to custodians?
 - Release legal holds upon matter end?

Legal Hold Oversight: Governance, Policy & Procedures, Training, Auditing

- Does the organization have the following in place to govern the legal hold process:
 - Accountable leader, management support and cross-department team?
 - Written policies and procedures, template notices, form custodian questionnaire and process flow chart?
 - Involvement of key stakeholders?
 - Training tailored to organizational roles (annual and new employees)?
 - Auditing for compliance? And periodic process improvement?

Appendix C

ESI Protocol Example

Crosby v. Amazon.Com, Inc., Case No. 21-1083-JCC (W.D. Wash., Mar. 1, 2022)

THE HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CRAIG CROSBY and CHRISTOPHER
JOHNSON, on behalf of themselves and
others similarly situated,

Plaintiffs,

v.

AMAZON.COM, INC.,

Defendant.

CASE NO. 21-1083-JCC

ORDER

This matter comes before the Court on Plaintiffs’ motion for reconsideration (Dkt. No. 39). Having thoroughly considered the briefing and the relevant record, and finding manifest error in the Court’s understanding of the scope of the disputed items regarding entering an ESI protocol, the Court hereby GRANTS the motion for reconsideration (Dkt. No. 39) and ENTERS the following revised order regarding the discovery of ESI in this matter:

A. General Principles

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

1 2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ.
2 P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the
3 application of the proportionality standard in discovery, requests for production of ESI and
4 related responses should be reasonably targeted, clear, and as specific as possible.

5 **B. ESI Disclosures**

6 Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each
7 party shall disclose:

8 1. Custodians. The custodians most likely to have discoverable ESI in their
9 possession, custody, or control. The custodians shall be identified by name, job title, connection
10 to the instant litigation, and the type of the information under the custodian's control.

11 2. Non-custodial Data Sources. A list of non-custodial data sources (*e.g.*, shared
12 drives, servers), if any, likely to contain discoverable ESI.

13 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to
14 contain discoverable ESI (*e.g.*, third-party email providers, mobile device providers, cloud
15 storage) and, for each such source, the extent to which a party is (or is not) able to preserve
16 information stored in the third-party data source.

17 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable
18 ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically
19 identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P.
20 26(b)(2)(B).

21 5. Foreign data privacy laws. Nothing in this Order is intended to prevent either
22 party from complying with the requirements of a foreign country's data privacy laws, *e.g.*, the
23 European Union's General Data Protection Regulation (GDPR) (EU) 2016/679. The parties
24 agree to meet and confer before including custodians or data sources subject to such laws in any
25 ESI or other discovery request.
26

1 **C. ESI Discovery Procedures**

2 1. On-site inspection of electronic media. Such an inspection shall not be required
3 absent a demonstration by the requesting party of specific need and good cause or by agreement
4 of the parties

5 2. Search methodology. The parties shall timely confer to attempt to reach
6 agreement on appropriate search terms and queries, file type and date restrictions, data sources
7 (including custodians), and other appropriate computer- or technology-aided methodologies,
8 before any such effort is undertaken. The parties shall continue to cooperate in revising the
9 appropriateness of the search methodology.

10 a. Prior to running searches:

11 i. The producing party shall disclose the data sources (including
12 custodians), search terms and queries, any file type and date restrictions, and any other
13 methodology that it proposes to use to locate ESI likely to contain responsive and discoverable
14 information. The producing party may provide unique hit counts for each search query.

15 ii. The requesting party is entitled to, within 21 days of the
16 producing party's disclosure, add no more than 20 search terms or queries to those disclosed by
17 the producing party absent a showing of good cause or agreement of the parties.

18 iii. The following provisions apply to search terms / queries of the
19 requesting party. Focused terms and queries should be employed; broad terms or queries, such
20 as product and company names, generally should be avoided. The producing party may
21 identify each search term or query returning overbroad results demonstrating the overbroad
22 results and a counter proposal correcting the overbroad search or query.

23 b. After production: Within 45 days of the producing party notifying the
24 receiving party that it has substantially completed the production of documents responsive to a
25 request, the responding party may request no more than 20 search terms or queries. The
26 immediately preceding section (Section C(2)(a)(iii)) applies.

1 3. Format.

2 a. ESI will be produced to the requesting party with searchable text in a
3 format to be decided between the parties. Acceptable formats include, but are not limited to,
4 native files, multi-page TIFFs (with a companion OCR or extracted text file), single-page TIFFs
5 (only with load files for e-discovery software that includes metadata fields identifying natural
6 document breaks and also includes companion OCR and/or extracted text files), and searchable
7 PDF.

8 b. Unless otherwise agreed to by the parties, files that are not easily
9 converted to image format, such as spreadsheet, database, and drawing files, will be produced in
10 native format.

11 c. Each document image file shall be named with a unique number (Bates
12 Number). File names should not be more than twenty characters long or contain spaces. When
13 a text-searchable image file is produced, the producing party must preserve the integrity of the
14 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where
15 applicable, the revision history.

16 d. If a document is more than one page, the unitization of the document and
17 any attachments and/or affixed notes shall be maintained as they existed in the original
18 document.

19 4. De-duplication. The parties may de-duplicate their ESI production across
20 custodial and non-custodial data sources after disclosure to the requesting party, and the
21 duplicate custodian information removed during the de-duplication process tracked in a
22 duplicate/other custodian field in the database load file.

23 5. Email Threading. The parties may use analytics technology to identify email
24 threads and need only produce the unique most inclusive copy and related family members and
25 may exclude lesser inclusive copies. Upon reasonable request, the producing party will produce
26 a less inclusive copy.

1 6. Metadata fields. If the requesting party seeks metadata, the parties agree that
2 only the following metadata fields need be produced, and only to the extent it is reasonably
3 accessible and non-privileged: document type; custodian and duplicate custodians (or storage
4 location if no custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file
5 name; file size; file extension; original file path; date and time created, sent, modified and/or
6 received; and hash value. The list of metadata type is intended to be flexible and may be
7 changed by agreement of the parties, particularly in light of advances and changes in
8 technology, vendor, and business practices.

9 **D. Preservation of ESI**

10 The parties acknowledge that they have a common law obligation, as expressed in Fed.
11 R. Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information
12 in the party's possession, custody, or control. With respect to preservation of ESI, the parties
13 agree as follows:

14 1. Absent a showing of good cause by the requesting party, the parties shall not be
15 required to modify the procedures used by them in the ordinary course of business to back-up
16 and archive data; provided, however, that the parties shall preserve all discoverable ESI in their
17 possession, custody, or control.

18 2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P.
19 26(e) with discoverable ESI responsive to a particular discovery request or mandatory
20 disclosure where that data is created after a disclosure or response is made (unless excluded
21 under Sections (D)(3) or (E)(1)-(2)).

22 3. Absent a showing of good cause by the requesting party, the following categories
23 of ESI need not be preserved:

- 24 1. Deleted, slack, fragmented, or other data only accessible by forensics.
25 2. Random access memory (RAM), temporary files, or other ephemeral data
26 that are difficult to preserve without disabling the operating system.

- 1 3. On-line access data such as temporary internet files, history, cache,
- 2 cookies, and the like.
- 3 4. Data in metadata fields that are frequently updated automatically, such as
- 4 last-opened dates (see also Section (E)(5)).
- 5 5. Back-up data that are duplicative of data that are more accessible
- 6 elsewhere.
- 7 6. Server, system or network logs.
- 8 7. Data remaining from systems no longer in use that is unintelligible on the
- 9 systems in use.
- 10 8. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or
- 11 from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided that
- 12 a copy of all such electronic data is automatically saved in real time
- 13 elsewhere (such as on a server, laptop, desktop computer, or “cloud”
- 14 storage).

E. Privilege

16 1. A producing party shall create a privilege log of all documents withheld from
17 production on the basis of a privilege or protection, either fully or redacted for privilege, unless
18 otherwise agreed or excepted by this Agreement and Order. Privilege logs shall include a
19 unique identification number for each document and the basis for the claim (attorney-client
20 privileged or work-product protection). For ESI, the privilege log will be generated using
21 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or
22 title; and date created. Should the available metadata provide insufficient information for the
23 purpose of evaluating the privilege claim asserted, the producing party shall include such
24 additional information as required by the Federal Rules of Civil Procedure. Privilege logs will
25 be produced to all other parties no later than 45 days after delivering a production unless an
26 earlier deadline is agreed to by the parties.

1 2. Redactions need not be logged so long as the basis for the redaction is clear on
2 the redacted document.

3 3. With respect to privileged or work-product information generated after the filing
4 of the complaint, parties are not required to include any such information in privilege logs.

5 4. Activities undertaken in compliance with the duty to preserve information are
6 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

7 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents in this
8 proceeding shall not, for the purposes of this proceeding or any other federal or state
9 proceeding, constitute a waiver by the producing party of any privilege applicable to those
10 documents, including the attorney-client privilege, attorney work-product protection, or any
11 other privilege or protection recognized by law. Information produced in discovery that is
12 protected as privileged or work product shall be immediately returned to the producing party,
13 and its production shall not constitute a waiver of such protection, as set forth in Section 9 of
14 the Stipulated Protective Order.

15 It is so ORDERED this 1st day of March 2022.

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19 John C. Coughenour
20 UNITED STATES DISTRICT JUDGE

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Appendix D

Detailed Fed. R. Civ. P. 37(e) “Reasonable Steps” Analysis

***Fast v. GoDaddy.com LLC*, 340 F.R.D. 326 (D. Ariz. 2022)**

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

9 Kristin Fast,

10 Plaintiff,

11 v.

12 GoDaddy.com LLC, et al.,

13 Defendants.
14

No. CV-20-01448-PHX-DGC

ORDER

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

21 **I. Background.**

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

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

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

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

9 **II. Legal Standards.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 **1. Deleted Facebook Posts.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 **Lee Mudro**

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

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

26 **Kristin Fast**

27 *This message was unsent.*

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

Kristin Fast

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

1 [Jun. 14, 2019, 12:01 PM]⁹

2 **Lee Mudro**

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

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

7 **Lee Mudro**

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

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

11 **Lee Mudro**

12 Fmla

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

14 **Lee Mudro**

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

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

18 **Kristin Fast**

19 I have them all

20 *June 14, 2019, 5:48*

21 **Kristin Fast**

22 It is in #16

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

24 Doc. 96-1 at 224-25.

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

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

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

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

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

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

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

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

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

18 **3. Stolen iPhone.**

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

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

28

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

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

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

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

28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 Courts long have recognized that when the deletion of ESI is set to occur, parties
24 have an affirmative duty to step in and prevent its loss. *See, e.g., Surowiec*, 790 F. Supp.
25 2d at 1007. While Plaintiff claims not to have known that she would lose access to her
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27 ¹⁰ Plaintiff’s brief argues that this software update and attendant loss of access to
28 the @cox.net email account happened “[s]ometime in the summer of 2021[.]” *Id.* at 12. Plaintiff’s sworn statement, however, contains no mention of when the update occurred and caused her to lose access to the account. *See* Doc. 96-2 at 7-8.

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

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

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

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

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

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

20 **5. Telegram Messages.**

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

25 The messages read as follows:

26 **Plaintiff**

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

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

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

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

Plaintiff
Ok
June 22, 2018, 2:26 PM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 Doc. 101-1 at 4.

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

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

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

23 Doc. 96-1 at 254.

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

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

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

9 Doc. 96-1 at 246.

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

18 **B. Audio Recordings.**

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

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

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

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

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

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

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

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

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

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

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

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

9 **V. Sanctions.**

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

17 **A. Dismissal for Spoliation.**

18 Defendants argue that the most appropriate sanction is dismissal of Plaintiff's suit.
19 Doc. 93 at 20. They assert that her actions amount to a "pattern of deception and discovery
20 abuse . . . [that makes it] impossible for the district court to conduct a trial with any
21 reasonable assurance that the truth would be available." *Id.* (quoting *Burriss*, 2021 WL
22 4627312, at *16). Citing the five-part test for case-terminating sanctions in *Leon v. IDX*
23 *Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006), Defendants argue that dismissing Plaintiff's
24 suit would further the public's interest in expeditious resolution of litigation and the Court's
25 interest in managing its docket. Doc. 93 at 20. Defendants also argue the risk of prejudice
26

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

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

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

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

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

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

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

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

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

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

4 **B. Dismissal for Redactions.**

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

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

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

23 **C. Appropriate Sanctions.**

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

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

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

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

- 2 • 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
21 searches for discoverable material and that discovery responses were complete and correct
22 when made. *See* Fed. R. Civ. P. 26(g); *Legault v. Zambarano*, 105 F.3d 24, 28 (1st Cir.
23 1997) (“The Advisory Committee’s Notes to the 1983 amendments to Rule 26 spell out the
24 obvious: a certifying lawyer must make ‘a reasonable effort to assure that the client has
25 provided all the information and documents available to him that are responsive to the
26 discovery demand.’”); *Bruner v. City of Phoenix*, No. CV-18-00664-PHX-DJH, 2020 WL
27 554387, at *8 (D. Ariz. Feb. 4, 2020) (“[I]t is not reasonable for counsel to simply give
instructions to his clients and count on them to fulfill their discovery obligations. The
Federal Rules of Civil Procedure place an affirmative obligation on an attorney to ensure
that their clients’ search for responsive documents and information is complete. *See* Fed.
R. Civ. P. 26(g).”); *Stevens*, 2019 WL 6499098, at *4 (criticizing “cavalier attitude toward
the preservation requirement” where “counsel failed to immediately preserve obviously
crucial evidence at a time when the duty to preserve existed and instead allowed the phone
to remain in [his client’s] possession”).

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

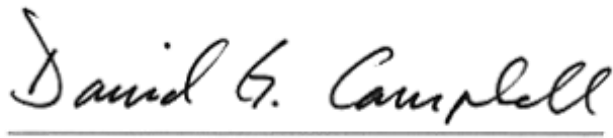
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- Defendants will be allowed to conduct a forensic review of Plaintiff’s electronic devices, if they choose to do so, to determine whether any spoliated or as-yet-unproduced information is recoverable. Plaintiff is hereby ordered to refrain from any 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