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1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

4 **IN RE GOOGLE PLAY STORE**
5 **ANTITRUST LITIGATION**

6 THIS DOCUMENT RELATES TO:

7 *Epic Games, Inc. v. Google LLC et al.*,
8 Case No. 3:20-cv-05671-JD

9 *In re Google Play Consumer Antitrust*
10 *Litigation*, Case No. 3:20-cv-05761-JD

11 *State of Utah et al. v. Google LLC et al.*,
12 Case No. 3:21-cv-05227-JD

13 *Match Group, LLC et al. v. Google LLC et al.*,
14 Case No. 3:22-cv-02746-JD

Case No. 3:21-md-02981-JD

PLAINTIFFS' SUPPLEMENTAL BRIEF
ON GOOGLE'S CHAT PRODUCTION

Judge: Hon. James Donato

1 Plaintiffs respectfully submit this brief in response to the Court’s February 27, 2023 Order.

2 To test Google’s contention that its destruction of Chats did not prejudice Plaintiffs, the Court
3 ordered Google to produce Chats that had been preserved for litigation-hold recipients. The Court
4 described this as an “experiment to test [the] proposition” that there had been a “treasure trove” of
5 relevant Chats “in the off-the-record category that was systematically deleted.” (1/31/2023 Tr. 283:14-
6 284:24.) Google completed that production on February 24, 2023.

7 The outcome of the Court-ordered experiment is clear. Google’s production contains a trove of
8 Chats establishing beyond any doubt that the company’s intentional campaign to destroy sensitive
9 communications resulted in the loss of invaluable communications regarding matters at the heart of
10 these cases. Google employees regularly and intentionally diverted to “history off” Chats
11 conversations about Google’s anticompetitive Revenue Share Agreements, Mobile Application
12 Distribution Agreements, Google Play Billing payment policies and pricing, and a variety of other
13 critical issues—specifically to ensure that those Chats would be destroyed. Google’s conduct
14 prejudiced Plaintiffs and requires a substantial, trial-related penalty.

15 The newly produced Chats reveal a company-wide culture of concealment coming from the
16 very top, including CEO Sundar Pichai, who is a custodian in this case. In one Chat, Mr. Pichai began
17 discussing a substantive topic, and then immediately wrote: “***also can we change the setting of this***
18 ***group to history off.***”¹ Then, nine seconds later, Mr. Pichai apparently attempted (unsuccessfully) to
19 delete this incriminating message. (Byars Decl. Ex. 1, GOOG-PLAY5-000453593.) When asked
20 under oath about the attempted deletion of the message, Mr. Pichai had no explanation, testifying “I
21 definitely don’t know” and “I don’t recall.” (*Id.* Ex. 2, Pichai Dep. Tr. 195:7-12.)

22 Like Mr. Pichai, other key Google employees, including those in leadership roles, routinely
23 opted to move from history-on rooms to history-off Chats to hold sensitive conversations, even though
24 they knew they were subject to legal holds. Indeed, they did so ***even when discussing topics they***
25 ***knew were covered by the litigation holds in order to avoid leaving a record that could be produced***
26 ***in litigation.*** As the examples below make clear, Google destroyed innumerable Chats with the intent
27 to deprive Plaintiffs and other litigants of the use of these documents in litigation.

28

¹ All emphasis is added unless otherwise noted.

1 The new Chats further establish that Google’s company-wide campaign to destroy evidence
 2 prejudiced Plaintiffs, and this prejudice demands a substantial, trial-related penalty. Although this
 3 Court has previously suggested that it is unlikely to order an instruction that the jury *must* find that the
 4 destroyed evidence would have been unfavorable to Google, Plaintiffs respectfully submit that the
 5 newly produced Chats support such a remedy. For the reasons set forth in Plaintiffs’ previous
 6 submissions (MDL Dkt. Nos. 349, 373, 428, 432), and in light of the recently produced documents,
 7 anything less than a clear adverse inference instruction—instructing the jury as to what Google did and
 8 what the jury should make of it—would reward Google for its years-long, calculated policy of
 9 systematically destroying evidence, and would encourage Google to maintain, rather than eradicate,
 10 the corporate culture of litigation misconduct it has nurtured for many years.

11 **I. Google’s Court-Ordered Production Confirms That Google’s Destruction of Chats**
 12 **Significantly Prejudiced Plaintiffs.**

13 Google’s Court-ordered supplemental Chat production demonstrates that Plaintiffs have
 14 suffered enormous prejudice because of Google’s actions. The production—which consists entirely of
 15 Chats from legal hold recipients in these cases that occurred during the pendency of this litigation—
 16 confirms that Google employees routinely discussed matters critical to this litigation in off-the-record
 17 Chats in order to ensure that those conversations would never be revealed in a courtroom. It also
 18 confirms that the destroyed Chats on those topics were more candid than the email correspondence and
 19 on-the-record Chats Google produced. (*See, e.g.*, Byars Decl. Ex. 3, GOOG-PLAY5-000436389
 20 (“*Historically (ha) [Google employees] have history off so that [they] can speak (more) freely.*”)
 21 And it further confirms that Google’s culture of concealment pervaded the company.

22 **A. Google Destroyed Chats Concerning Issues Critical to this Litigation.**

23 Below are illustrative examples of Chats reflecting Google’s destruction of candid discussions
 24 concerning topics at the heart of this case.

25 **Revenue Share Agreements (“RSAs”).** A principal focus of Plaintiffs’ cases is Google’s
 26 anticompetitive RSAs with original equipment manufacturers (“OEMs”) and wireless carriers. In
 27 these agreements, Google gives OEMs and carriers a percentage of its revenue, often in exchange for
 28 their agreement not to preinstall competing app stores on their devices.

1 Google’s supplemental production makes clear that Google employees routinely used “history
 2 off” chat to discuss RSA contracts. For example, the Head of Strategy for Android chastised a Senior
 3 Strategic Partnerships Development Manager about wanting to chat on-the-record regarding Google’s
 4 RSAs. Despite acknowledging the “multiple legal holds” under which they were operating, she
 5 boasted: “*I talk about RSA related things all day and I don’t have history on for all my chats :).*”
 6 When her colleague tried to turn on history, she stated: “Ok maybe I take you off this convo 😊,” and
 7 “Yes I do prefer history off.” She then wrote: “sounds like we have to keep history on in this convo
 8 specifically. But not in our 1:1 chats about RSAs or my 1:1 chats with Marie/Michael about RSAs
 9 So that’s why I’d prefer to move away from this group chat.” Then the on-the-record
 10 conversation abruptly ended. (*Id.* Ex. 4, GOOG-PLAY5-000364738.)²

11 **Mobile App Distribution Agreements (“MADAs”).** Another principal subject of Plaintiffs’
 12 claims is Google’s MADAs. The MADAs are contracts that Google requires OEMs to enter into to
 13 license Google Mobile Services, a suite of proprietary Google applications and APIs that includes the
 14 Google Play Store, Google Search, Gmail, YouTube, and Google Maps, among others. Through the
 15 MADAs, Google secures prime placement for the Play Store on Android device home screens and
 16 imposes a variety of anticompetitive restrictions on OEMs.

17 Google’s recent production reflects that employees discussed the MADAs in off-the-record
 18 Chats. For instance, in one Chat, two Google employees began discussing the MADAs. One
 19 requested: “*would it be too much to ask you to turn history off? . . . lots of sensitivity with legal these*
 20 *days :).*” The other responded “can do”, and “wanted to keep the MADA info for reference”—
 21 referring to an apparently destroyed portion of this Chat. The jury, Court, and Plaintiffs will never
 22 know what “MADA info” was discussed and deleted. (*Id.* Ex. 7, GOOG-PLAY5-000374364.)

23 **Google Play Billing and Google’s Supracompetitive Commission.** Another prominent pillar
 24 of Plaintiffs’ cases is Google’s requirement that apps distributed through the Play Store (1) use only
 25 Google Play Billing to conduct transactions for digital goods and services, such as the purchase of
 26

27
 28 ² The same executive repeatedly admonished several other employees to turn history off. (*See also,*
e.g., id. Ex. 5, GOOG-PLAY5-000163578 (“Hi Tim, if OK, can I ask you to turn off history :).”); *id.*
 Ex. 6, GOOG-PLAY5-000374365 (“also this is pretty silly but do you mind turning history off 😊”).)

1 cosmetics in games or a subscription to a dating app or streaming service, and (2) pay the 30% fee it
2 charges on most such transactions. Plaintiffs intend to prove that the requirement that developers offer
3 only Google Play Billing is anticompetitive and that Google’s commission rate is supracompetitive.

4 Google’s recent production reveals that Google employees diverted discussions regarding
5 Google’s billing policies and commission rate to off-the-record Chats to ensure those conversations
6 would not be produced in discovery. For example, in one Chat, Google employees in a threaded room
7 asked whether they were “allowed” to talk about Project Runway, Google’s codename for a highly
8 relevant internal project involving changes to Google Play’s commission rate in response to complaints
9 from developers and regulators. A Google employee responded that because “**anything you say here**
10 **will be subject to discovery,**” Google employees should “communicate with care,” warning that
11 “**group chats (like this one) aren’t transient and you can’t turn off history (unlike 1:1 chat threads**
12 **where you can turn off history and they disappear in 24 hours).**” (*Id.* Ex. 8, GOOG-PLAY5-
13 000482224.)

14 In another Chat that includes three custodians in this case, a Google Manager of Partner
15 Programs started a “war room” Chat to discuss Project Runway. Almost immediately after the room
16 was created, she wrote: “**Heads up we may need to change from a room to a group chat to get the**
17 **right settings here (i.e., history off).** LMK if any of you know how to make that tweak in a room so
18 we can keep the sweet name, otherwise **you’ll likely see a new thread in a bit.**” Google’s Director of
19 Play App Partnerships (a custodian and litigation hold recipient), then asked a substantive question
20 about why Google had limited the “framing” of the project to focus on “small devs.” The on-the-
21 record portion of the Chat abruptly ended. (*Id.* Ex. 9, GOOG-PLAY5-000161588.)

22 In another Chat, a Director of Privacy Engineering shared a document with his colleagues
23 related to changes to Google Play’s payments policy in India. As the conversation progressed, the VP
24 of Product Management, Google Pay, warned the group: “***please note this chat does NOT have**
25 **History OFF*** and India does not have Attorney client privilege.” When others continued chatting, he
26 warned again: “Folks, ***Please do consider if we nee[d] to start a HISTORY OFF chat for this?***
27 Threaded chats you can’t turn off history.” (*Id.* Ex. 10, GOOG-PLAY5-000362732.)

28 In another example, Google employees discussed Google’s post-litigation change to its

1 payments policy that required Epic’s Bandcamp app, numerous Match Plaintiffs’ apps, Spotify,
 2 Netflix, and others to begin using Google Play Billing and begin paying Google’s supracompetitive
 3 commission rate, when they had previously not been required to do either. A Sales Strategy Manager
 4 sent a message to a litigation-hold recipient and Finance Manager, Google Play Apps & Games. She
 5 wrote: “I was wondering if you had guidance on how much \$ uplift we may see from policy
 6 enforcement? . . . *i know its a sensitive number that we shouldnt put anywhere.*” She then wrote:
 7 “*actually the chat history is on . . . ill bring this up in the team meeting this afternoon.*” The other
 8 employee agreed, and then suggested a video call after the team meeting was canceled. While the
 9 Sales Strategy Manager was initially prepared to discuss that sensitive number in this Chat, she
 10 decided not to as soon as she realized that history was “on.” (*Id.* Ex. 11, GOOG-PLAY5-000477797.)

11 In yet another example, an employee turned history on midway through a conversation, and the
 12 first message that appears in the document is a message from the Senior Director of Product
 13 Management, YouTube, stating: “*sorry, in general we need to keep ping [i.e., chat] history off.*” A
 14 Software Engineer, who apparently caused history to be turned on, responded: “Sorry, I have this
 15 extension which enables automatically.” A Product Manager then referenced “Play Billing,” and the
 16 on-the-record conversation then went dark, presumably because the Google employees turned history
 17 off. (*Id.* Ex. 12, GOOG-PLAY5-000160237.)³

18
 19
 20
 21 ³ Littered throughout Google’s new production are “screenshots” of partial chats between
 22 custodians regarding matters relevant to this case that occurred “off-the-record”. (*See e.g.*, Byars Decl.
 23 Ex. 13, GOOG-PLAY5-000389042 (screenshot of an off-the-record Chat regarding renewal of Google
 24 and Activision’s Project Hug agreement, which Plaintiffs intend to prove was an anticompetitive deal);
 25 *id.* Ex. 14, GOOG-PLAY5-000389043 (same); *id.* Ex. 15, GOOG-PLAY5-000168593 (screenshot of
 26 an off-the-record Chat regarding app conversion rates on various platforms, evidence that helps to
 27 inform the relevant market).) Plaintiffs happen to have these Chat snippets only because one of the
 28 recipients took a screenshot of the chat and inserted it into another Chat that had “history on”. This
 was done for reasons entirely unrelated to document preservation; for example, relaying what a senior
 Google Play executive said to a member of her team working on a substantive issue (*id.* Ex. 16,
 GOOG-PLAY5-000389029 (chat attaching *id.* Exs. 13, GOOG-PLAY5-000389042, and 14, GOOG-
 PLAY5-000389043)), or to recall instructions from executives who “automatically” turn history off
 (*id.* Ex. 17, GOOG-PLAY5-000168578 (employee notes he took a screenshot of *id.* Ex. 15, GOOG-
 PLAY5-000168593, because “everytime I try to turn ‘history on’ with [a custodian in this case] he
 automatically turns it off”)).

1 **B. Google’s Destruction of Relevant Chats Is Extensive.**


2 During the January 12 and 31, 2023 evidentiary hearings, Plaintiffs proved that Google trains
3 its employees to “communicat[e] with care” because Google “often ha[s] to produce employee
4 communications as evidence.” (PX-120 at 3-4.) Plaintiffs also proved that as part of that training,
5 Google employees are instructed that chatting ““off the record”” is “[b]etter than sending . . . email”
6 specifically *because* Google destroys off-the-record Chats every 24 hours, whereas it retains emails to
7 produce in litigation. (*Id.* at 14.) Plaintiffs further proved that Google employees heed those
8 instructions and often warn each other that they should avoid saying anything sensitive if their Chat
9 history is turned on. (*E.g.*, PX-9; PX-103.) Notably, following such admonitions, the retained portions
10 of conversations almost invariably end. Google’s supplemental Chat production contains a trove of
11 additional Chats showing that Google employees subject to legal holds destroyed Chats to ensure that
12 they could not be used in court, instructed their colleagues to turn history off to discuss sensitive
13 business topics, and reminded each other to “communicate with care”—all to avoid Google’s
14 obligations to preserve and produce these highly relevant conversations during discovery.

15 The recently produced Chats are not only conclusive evidence of Google’s misconduct, but
16 likely only the tip of the iceberg. For every Chat where employees discussed turning Chat history
17 “off,” it is reasonable to infer that there are many more where the employees simply followed their
18 training and/or instructions from other Google employees and chatted off the record, leaving no trace
19 of discussions they were obligated to preserve because they were relevant to this case. Here are just a
20 few examples:

- 21 • Google employees began to discuss two restraints that Plaintiffs challenge: those on
22 downloading apps directly from developers, and those on third-party app stores. Before the
23 conversation developed further, a Program Manager wrote: “*Since this is a sensitive*
24 *discussion, I’m going to move it to a smaller room.*” A Senior Software Engineer Team Lead
clarified: “*Group chat.. with the history off ;).*” The on-the-record portion of the Chat ended.
(Byars Decl. Ex. 18, GOOG-PLAY5-000383680.)
- 25 • A Workplace Programs Design Partner began a Chat by asking: “what would you say is the
26 strategic benefit of Google photos,” one of the Android apps that Google requires OEMs to
27 preinstall under the MADA. One minute later, a Product Manager asked: “*should we have*
28 *history off for this? . . . I think our chats about google products are more likely to come up in*
court 😊.” A Group Product Manager volunteered: “Right now it doesn’t *_feel_ risky*. But
just communicate with care.” (*Id.* Ex. 19, GOOG-PLAY5-000164222.)

- 1 • Google employees created a “PMO Leads” (“Project Management Office Leads”) Chat with
 2 history on. The Google Play Operations Program Manager Lead quickly warned the group:
 3 “***Since history is turned on, be mindful of putting anything discoverable here.***” The Lead
 4 Project Manager for Google Photos asked: “***should we turn history off?***” The on-the-record
 5 portion of the Chat abruptly ended. (*Id.* Ex. 20, GOOG-PLAY5-000383187.)
- 6 • A Senior Software Engineer pasted a link about how to keep Chat history on and wrote: “am i
 7 the only one who is only now finding out about [this].” This comment provoked a discussion
 8 about Chat history. A Software Engineer wrote: “***most times I try to turn it on, the other***
 9 ***person turns it straight back off again !!!***” The Senior Software Engineer agreed: “i’ve had
 10 other people observe that same thing.” Another Software Engineer agreed: “i have also had
 11 the experience where i turn on history and it immediately gets turned off.” And a Program
 12 Manager wrote: “***If anyone wants to hear horror stories of chat histories being used in***
 13 ***depositions at Google ... just ask me and I can speak generally. I used to read that stuff in***
 14 ***preparation for litigation. It’s bad news 🙄.***” The Chat then went silent. (*Id.* Ex. 21, GOOG-
 15 PLAY5-000382012.)
- 16 • A Senior Staff Engineering Manager wrote in a threaded room Chat: “BTW: I didn’t realize
 17 this was a restriction until I created this threaded dynamite room and added everyone to it, but
 18 . . . ‘Threaded rooms do not have a history setting. In other words, History is default on and
 19 users can not turn it off’ So, if we want to go back to the history off old way of doing
 20 things, I’ll need to recreate this one more time without threads... which I’m ‘happy’ to do...
 21 😊.” He then asked the group: “what do we value more – threads? or 24 hour history?” A
 22 YouTube Gaming Product Partnerships employee wrote: “Dislike threads.” A Software
 23 Engineer reacted: “***I prefer not to be deposed*** for the contents of kappa chat.” Another
 24 employee wrote: “***Yup . . . It needs to be history off.***” The Chat abruptly ended. (*Id.* Ex. 22,
 25 GOOG-PLAY5-000473143.)
- 26 • In another Chat, Google’s Head of Support Strategy & Operations, Android OS and Chrome
 27 OS, sent others “a reminder if you use privileged and confidential in emails an attorney must be
 28 in the To line.” A Manager, Product Operations, Google Play, asked for the “next best
 alternative.” She then asked: “[W]hat about pings [*i.e.*, Chats] . . . wondering what is the best
 way to update the team about confidential topics without having to include an attorney in all
 comms.” The first employee wrote: “History has to be off I believe.” Another confirmed:
 “***yes with history off everything gets wiped . . . can confirm based on our last convo with legal***
given we are on hold for a GC lawsuit . . .” The employee also warned that “***if super sensitive***
you need to use a GVC [Google Video Chat] because they could look at your recent ping
history and that could go into court.” (*Id.* Ex. 23, GOOG-PLAY5-000389316.)
- In another Chat, a Strategy Manager appears to have turned on Chat history midway through a
 conversation, meaning that everything that was said in the Chat prior to that point was
 destroyed. A Finance Manager and legal hold recipient responded to this decision by writing:
 “***I am on legal hold . . . Prefer to keep chat history off.***” The Strategy Manager responded
 “i’ll turn off,” at which point the on-the-record portion of the conversation ended, presumably
 because he turned history off. (*Id.* Ex. 24, (GOOG-PLAY5-000364253.)
- A Group Product Manager started a Chat and asked about “marketshare” for Android web
 browsers. A Product Manager quickly responded: “***quick aside – do we want history on?***” An
 Android engineer responded “***NO.***” A Senior Product Manager wrote: “***History is on. I***

1 **suggest everyone leave the room and create a new one with history off. I am happy to punt**
 2 **everyone out.”** Everyone then left the room. (*Id.* Ex. 25, GOOG-PLAY5-000383422.)

- 3 • A Senior Staff Software Engineer began a Chat by stating: “there has been some conversation
 4 about turning off history for this channel (which means 24 hour message expiry)” and asked for
 5 others’ views. Another engineer responded: “***It’s easy to get carried away in chat and***
 6 ***communicate with less care than you might with email.***” Another wrote: “maybe we can all
 7 commit to not talk about things we shouldn’t be talking about here, and ***move to shorter lived***
 8 ***channels for sensitive stuff.***” (*Id.* Ex. 26, GOOG-PLAY5-000366760.)
- 9 • A Program Manager created a Chat “for ops/policy/BD/escalations issues that need faster
 10 response. Please note: I would like to keep history off.” An employee wrote: “***please do not***
 11 ***share sensitive information here where possible Until we fix room architecture, content***
 12 ***here is searchable/discoverable*** within the corp.” (*Id.* Ex. 27, GOOG-PLAY5-000163640.)
- 13 • The Head of Strategy for Android began a Chat: “***heeeey . . . also just realized our history is***
 14  ***. . . can we turn it off? haha.***” A Design Strategist in the Platforms & Ecosystems
 15 business that includes Google Play and Android replied: “***yes let’s turn it off 😊.***” The
 16 conversation then went silent. (*Id.* Ex. 28, GOOG-PLAY5-000433345.)
- 17 • A Google employee created a group Chat. A Program Manager wrote immediately: “***We can’t***
 18 ***turn history on due to potential sensitive information being shared.***” A Software Engineer
 19 asked if history had been turned on because of a “Chrome plugin for enabling history.”
 20 Another Software Engineer wrote: “Uhh, I removed the extension. Its still getting turned on.”
 21 The Chat then went silent. (*Id.* Ex. 29, GOOG-PLAY5-000394430.)
- 22 • Another Chat consists of two messages. In the first, a Google employee wrote: “I’d imagine
 23 history is intentionally off though I know some have extensions that automatically turn it on.”
 24 In the second and final message, Google’s Principal, Trust & Safety, confirmed: “***Yes, history***
 25 ***is intentionally turned off for all our war rooms.***” (*Id.* Ex. 30, GOOG-PLAY5-000423751.)
- 26 • A Group Product Manager began a threaded room Chat by asking: “thoughts on threading v
 27 history.” A Director, Product Management, responded: “***Ah the dilemma of choosing between***
 28 ***no history vs threads. Why can’t we have both 😞.***” A Group Product Manager replied:
 “Threading is more important and ***history is a liability.***” The Group Product Manager
 concluded: “history > threads.” A Director, Product Management, agreed: “***Seems like.. the***
more we chat the more threads we need and the more history gets dangerous 😊.” The
 Group Product Manager then decided: “ok we’ll go back to history-less (and consequently
 threadless).” He then pasted a link “to the old room,” and the on-the-record Chat went silent.
 (*Id.* Ex. 31, GOOG-PLAY5-000408349.)
- Google employees started a threaded room. A Software Engineer quickly asked: “Does this
 one allow to turn history off though?” Another Software Engineer wrote: “Hmm..I don’t see
 that option,” and then pasted a link to Google’s Chat retention policy, stating it was “***irritating***”
 that he could not turn history off. The Product Management Lead for Strategic Projects then
 suggested: “If Chad can’t make the change ***I’m pretty sure that if we create a new room from***
scratch we can disable history. We should find a way to do that rather than continuing in
perma-history mode.” The on-the-record conversation ended shortly thereafter. (*Id.* Ex. 32,
 GOOG-PLAY5-000375854.)

- A Google employee shared a link to an article about an investigation of Facebook. A Staff Privacy Engineer quickly warned: “Comment with care.” The Senior Director, Privacy, Safety and Security, wrote: “I will go further: ***Dont editorialize/comment in this group chat because it is long-lived.***” An employee asked “why this chat needs to be long-lived,” to which another replied: “***for me the history being on acts as a barrier to information sharing . . . I think history being off would increase the likelihood of casual, expedient sharing across teams.***” Another wrote: “in our line of duty, it serves us well to be watchful of what we comment without A/C privilege . . . with that said, ***if this chat serves us better being short lived.. happy to change it.***” (*Id.* Ex. 33, GOOG-PLAY5-000383657.)

These Chats leave no doubt that for the past 10 years, Google employees intentionally diverted untold numbers of relevant conversations with unique and sensitive business information to off-the-record Chats, and that they did so because they knew that evidence of those conversations would disappear after 24 hours. While these admonitions to turn history off happen to have been preserved, it is reasonable to infer that most sensitive discussions began and ended with history off, leaving no trace. Indeed, according to Google’s sworn interrogatory responses, only 11 of the 37 custodians whose documents were collected in these matters could recall turning history on ***even once at any point*** during their custodial period (Dkt. 427-03 ¶ 34), and evidentiary hearing witnesses Jamie Rosenberg and Tian Lim testified that they used Google Chat every day but ***never*** turned their history on (1/12/2023 Tr. 80:6-8; 103:8-17 (Rosenberg); MDL Dkt. No. 449-1 (Lim Tr.) 26:9-14; 43:12-14).⁴ Mr. Lim, for example, testified on January 12, 2023 that “my general policy was not to delete documents” (Dkt. 449-1 at 20:22-21:10) and that he made “a good-faith effort to comply with [his] obligations to preserve chat communications that were subject to the legal hold” (*id.* at 23:6-11). Yet, Google’s supplemental production reveals that he is one of the many Google employees who admonished his co-workers to turn history ***off*** to ensure that his Chats would be deleted.⁵

The jury will never know what these custodians and others said in their off-the-record Chats about matters highly relevant to this case, because Google deliberately destroyed them. Google’s pervasive destruction of ESI has severely prejudiced Plaintiffs.

⁴ Moreover, one of the 11 employees admitted during her deposition that—contrary to Google’s interrogatory response—she ***never*** turned on her Chat history. (*See* MDL Dkt. 433-2 at 12.)

⁵ Byars Decl. Ex. 34, GOOG-PLAY5-000495759 (Mr. Lim: “***btw not sure why history is on for our chat, but can you turn it off?***”); *id.* Ex. 35, GOOG-PLAY5-000495760 (Mr. Lim: “***hey history is on in this chat, needs to be off***”).

II. Google's Chat Destruction Was Intentional.

There can be no doubt that Google's conduct was intentional. Google knew its employees used "history off" Chats for sensitive business discussions because it directed them to do so. Yet it destroyed those Chats every 24 hours even after this litigation began. And then it hid the truth regarding that destruction from the Court and Plaintiffs for over a year. The Chats submitted during the evidentiary hearing and discussed above make clear that Google employees understood that, when they wanted to discuss something "sensitive" or "risky," they should do so in "off the record" Chats even though they were subject to a legal hold. The Chats also reveal that employees understood that the *reason* for chatting off the record was to ensure that relevant evidence would be destroyed.

Google's intent to deprive Plaintiffs of that relevant evidence in this litigation is alone sufficient to warrant the jury instruction that Plaintiffs requested. *See* Fed. R. Civ. P. 37(e)(2) ("[U]pon finding that the party acted with the intent to deprive another party of the information's use in the litigation," the Court may instruct the jury to "(A) presume that the lost information was unfavorable to the party; [or] (B) instruct the jury that it may or must presume the information was unfavorable to the party."). The extraordinary prejudice that Plaintiffs have proven makes it even clearer that this remedy is needed.

* * *

While Plaintiffs would welcome the opportunity to further address these matters if it would be helpful to the Court, the record as it currently exists makes clear that the instruction requested in Plaintiffs' January 24 submission is the substantial, trial-related penalty that is appropriate, specific, and proportionate to address Google's blatant and deliberate disregard for its discovery obligations. (*See* MDL Dkt. No. 428 at 8.)

1 Dated: March 14, 2023

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E-FILING ATTESTATION

I, Lauren A. Moskowitz, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(h)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

/s/ Lauren A. Moskowitz
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