IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*, Plaintiffs, v. GOOGLE LLC, Defendant.	Case No. 1:20-cv-03010-APM HON. AMIT P. MEHTA
STATE OF COLORADO, *et al.*, Plaintiffs, v. GOOGLE LLC, Defendant.	Case No. 1:20-cv-03715-APM HON. AMIT P. MEHTA **FILED UNDER SEAL**

MEMORANDUM IN SUPPORT OF PLAINTIFFS STATES' MOTION FOR SANCTIONS AGAINST GOOGLE, LLC AND AN EVIDENTIARY HEARING TO DETERMINE APPROPRIATE RELIEF

I. INTRODUCTION

Plaintiff States bring their motion in support of the motion filed by the U.S. Department of Justice, ECF No. 495, requesting that the Court sanction Google and hold an evidentiary hearing to determine the appropriate remedy for the destruction of relevant materials that would have otherwise been discoverable during the governments' investigations and discovery in this action. Plaintiff States' case has been consolidated with the case brought by the U.S. Department of Justice for pretrial purposes, including discovery and related proceedings, 1:20-cv-03715, Order Granting in Part and Denying in Part Pls. Mot. To Consolidate, ECF No. 67 (Jan. 7, 2021),

and Plaintiff States anticipate that any trial on the merits of the two cases will be conducted jointly. Nov. 30, 2021, Hr'g Tr. at 46:10-47-3.[1] Therefore, the same misconduct in which the U.S. Department of Justice alleges Google has engaged is equally applicable to Plaintiff States and should be subject to all the same curative measures.

Google owes Plaintiff States and the U.S. Department of Justice the same duty to preserve its internal chat messages. Google's duty to preserve employee chat messages began at least as early as 2019 when it anticipated litigation stemming from the U.S. Department of Justice's investigation. Moreover, Google owed a specific duty to preserve these materials as to Plaintiff States when the State of Nebraska served Google with a Civil Investigative Demand ("CID") on January 17, 2020, requesting Google produce the same materials previously produced pursuant to CIDs served by the U.S. Department of Justice. In response to the Nebraska CID, Google agreed to produce documents previously produced to the U.S. Department of Justice. Therefore, Google's practice of deleting chat messages necessarily inflicted overlapping prejudice upon Plaintiff States and the U.S. Department of Justice.

The Electronically Stored Information ("ESI") Order entered by the Court makes plain Google's obligation to preserve internal chat messages. Amended ESI Order, ECF No. 99 (Jan. 21, 2021).[2] The ESI Order requires Google to "modify its retention practices to ensure the preservation of potentially responsive Documents and ESI." *Id*. at 4. Google failed to take these measures, despite internal chat messages being subject to discovery in this case.

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[1] Per the Court's order consolidating the cases for pre-trial, Plaintiff States will file a formal motion to consolidate in a timely manner. 1:20-cv-03715, Order Granting in Part and Denying in Part Pls. Mot. To Consolidate, ECF No. 67 (Jan. 7, 2021).

[2] The original ESI Order, ECF No. 86 (Dec. 21, 2020), contains the same preservation obligations.

In addition, Google's misconduct inflicted particularized prejudice upon Plaintiff States because the spoliated information was likely relevant to the additional anticompetitive conduct alleged by Plaintiff States. These allegations include Google's anticompetitive operation of SA360 and discriminatory treatment of Specialized Vertical Providers ("SVPs"). As Plaintiff States have explained in their opposition to Google's motion for summary judgment, the harm that flows from Google's purchases of exclusive default positions is magnified by its conduct in the operation of SA360 and treatment of SVPs. The three categories of conduct work together to reinforce and facilitate competitive harm as a single coherent set of actions. In response to Plaintiff States' reliance on a broader set of anticompetitive conduct, Google agreed during discovery to provide broader discovery than necessitated by the U.S. Department of Justice's complaint standing alone, including by searching the files of additional custodians. Jt. Status Report, ECF No. 135 (May 24, 2022) ("the Parties agreed on a set of search terms, custodians, and date ranges," which included additional custodians for Plaintiff States' First RFP.). For example, employees focused on the operation of SA360 largely do not overlap with other custodians. To the extent Google failed to preserve documents from custodians with unique relevance to Plaintiff States' case, Plaintiff States suffer additional prejudice.

II. BACKGROUND

Despite Google's representations that it had implemented a legal hold and suspended auto-deletion of relevant information, Google knowingly destroyed documents relevant to this litigation and has done so for years. At issue is Google's decision to destroy relevant instant messages, despite a duty to preserve, collect, and product relevant instant messages from agreed upon custodians. Google's retention of instant messages is largely governed by a user-accessible setting called the "history" button. Chats with the history button on are generally preserved for 30 days to 18 months; chats performed with the history button off are preserved for 24 hours and

then deleted. For one-on-one chats, if users do not intentionally toggle "history on," chats will not be preserved longer than 24 hours. Moreover, if a user toggles "history on" in the middle of an existing chat, only chats from that point forward are retained for more than 24 hours.

Plaintiff States filed their complaint on December 17, 2020, and the Court consolidated Plaintiff States' and the U.S. Department of Justice's actions for pretrial purposes, including discovery and all related proceedings. *See* 1:20-cv-03715-APM, Order Granting in Part and Denying in Part Pls. Mot. To Consolidate, ECF No. 67 (Jan. 7, 2021). As the Court contemplated early in this litigation, Plaintiff States coordinated their discovery efforts with the U.S. Department of Justice and relied upon certain negotiations between Google and the U.S. Department of Justice. ECF No. 108-1, ¶ 9 ("Plaintiffs in the DOJ Action and Plaintiffs in the Colorado Action shall coordinate their requests for production of document…"); *see id.* at fn.6 (indicating that all plaintiffs constitute one "side"). Accordingly, Plaintiff States accepted representations Google made to the U.S. Department of Justice as applying to Google's discovery obligations to Plaintiff States.

As discussed more fulsomely in the U.S. Department of Justice's motion, Google indicated that it put a legal hold in place and that the legal hold suspended auto-deletion. Memorandum in Support of The United States' Motion for Sanctions Against Google, LCC and An Evidentiary Hearing to Determine Appropriate Relief, ECF No. 495, at 28-29. Further, throughout the litigation, Google repeatedly confirmed that it was preserving and collecting chats. *Id.* Importantly, Plaintiff States coordinated with the U.S. Department of Justice in seeking discovery from Google. Indeed, Requests Nos. 1 and 2 of Plaintiff States' First Set of Requests for Production seek all information produced by Google to U.S. Department of Justice

in response to any civil investigative demand or request for production. Ex. A, Plaintiff States' First Requests for Production of Documents to Defendant Google LLC, at 15.

III. STANDARD

A party is entitled to sanctions pursuant to Rule 37(e) when electronically stored information is lost because a party failed to take reasonable steps to preserve it and it cannot be restored or replaced through additional discovery. FED. R. CIV. P. 37(e). A court can issue more severe sanctions upon a finding of intent. FED. R. CIV. P. 37(e)(2). "The standard of proof for the award of issue-related sanctions, such as the preclusion of evidence or adverse inference instructions, is a preponderance of the evidence." *Mannina v. D.C.*, 437 F. Supp. 3d 1, 6 (D.D.C. 2020).

IV. ARGUMENT

A. Google Had a Duty to Preserve Relevant Chat Messages.

Google had a duty to preserve relevant chat messages as early as 2019 when it anticipated litigation stemming from the U.S. Department of Justice' investigation. That obligation was reinforced when the State of Nebraska issued a civil investigative demand in early 2020. It is uncontroverted that Google's employee chats constitute electronically stored information that should have been preserved in anticipation of litigation. Indeed, Google preserved and produced some chats.

A duty to preserve arises when a party anticipates litigation, which reasonably occurs once a governmental investigation has begun. *Borum v. Brentwood Vill.*, 332 F.R.D. 38, 45 (D.D.C. 2019); *See also Gerlich v. U.S. Dep't of Just.*, 711 F.3d 161, 171 (D.C. Cir. 2013) (duty to preserve "triggered . . . by a reasonably foreseeable Department [of Justice] investigation"). Here, the U.S. Department of Justice issued civil investigative demands in 2019 and certain

Plaintiff States issued civil investigative demands in January 2020. As such, Google had a duty to preserve relevant electronically stored information, including chat messages, since receiving those civil investigative demands and that duty has remained constant throughout Plaintiff States' investigation and this litigation.

B. Google Knowingly and Intentionally Destroyed Relevant Chat Messages.

By failing to turn off the auto-delete function for employee chats, or at the very least ensuring that document custodians preserved these materials through some other method, Google "failed to take reasonable steps to preserve" the chat messages at issue here. FED. R. CIV. P. 37(e). Google understood its duty to preserve materials as indicated by its implementation of a litigation hold and representations that it had suspended auto-deletions. However, Google disregarded this duty and routinely deleted relevant chat messages.

Google defaulted most chat sessions to "history-off," requiring each individual custodian to take affirmative steps to preserve each relevant chat. While Google could have set the default "history on" for all employees subject to a legal hold, Google did not do so. Memorandum in Support of The United States' Motion for Sanctions Against Google, LCC and An Evidentiary Hearing to Determine Appropriate Relief, ECF No. 495, Ex. 1, PX-120, at 43:22-44:9; 45:15-17. By Google's own admission in *Epic*[3], it has not preserved all chats for employees under a litigation hold in any case over the past five years. *See Epic*, No. 3:21-md-02981-JD, ECF No. 429 at 6.

Google's destruction of chat messages remained ongoing throughout discovery. Despite its obligations under the ESI Order and requests by Plaintiffs that Google cease destroying

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[3] The Northern District of California recently held an evidentiary hearing on the plaintiffs' motion for sanctions against Google for its chat deletion practices in the litigation *Epic Games, Inc. v. Google, LLC*, No. 3:20-cv-5671, as consolidated, *In Re: Google Play Store Antitrust Litig.*, No. 3:21-md-2981 (together, "*Epic*").

potentially relevant evidence, Google did not agree until February 7, 2023, to cease the destruction and implemented that agreement on February 9, 2023. Google's newfound representation; however, is an empty one. It does nothing to rectify the multiyear destruction of potentially relevant evidence. Indeed, Google's failure harmed Plaintiff States' ability to gather relevant evidence for both the liability and separate remedy proceedings in this litigation. *See* ECF No. 264, ¶ 1 (indicating that there will be a separate proceeding for liability and remedy).

Google cannot shift the burden of maintaining relevant evidence to its employees. *Samsung*, 881 F. Supp. 2d at 1137 ("[I]t generally is recognized that when *a company or organization* has a document retention policy, *it* is obligated to suspend that policy") (cleaned up) (italics added). Moreover, the Court should attribute evidence of destruction by Google's employees to the company. *See, e.g., E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469, 506-07 (E.D. Va. 2011) ("A party may be held responsible for the spoliation of relevant evidence done by its agents."). As such, Google bears responsibility when employees conducted chats about business matters with the retention setting to "history off."

Additionally, Google's conduct represents an intentional disregard of its obligation to preserve relevant electronically stored information. "[A] party's conscious dereliction of a known duty to preserve electronic data is both necessary and sufficient to find that the party 'acted with the intent to deprive another party of the information's use' under Rule 37(e)(2)." *Ungar v. City of New York*, 329 F.R.D. 8, 13 (E.D.N.Y. 2018) (citing cases); *accord, e.g., Doe v. Wesleyan Univ.*, 2022 WL 2656787, at *15 (D. Conn. July 8, 2022) ("[W]hether the spoliator affirmatively destroys the data, or passively allows it to be lost, that party may be sanctioned for the spoliation of evidence" under Rule 37(e)(2).). Upon a finding of intent, "no separate showing of prejudice is required because 'the finding of intent . . . can support . . . an inference

that the opposing party was prejudiced by the loss of information.'" *Borum*, 332 F.R.D. at 48 (citing Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment).

Google plainly ignored its known duty to preserve chat messages. For reasons fully explained in the U.S. Department of Justice' Motions for Sanctions, Google (1) knowingly and intentionally disregarded its discovery obligations; (2) directed sensitive conversations to chats with knowledge that those messages would not be discoverable; and (3) misled Plaintiffs to conceal the company's chat-destruction policy. Memorandum in Support of The United States' Motion for Sanctions Against Google, LCC and An Evidentiary Hearing to Determine Appropriate Relief, ECF No. 495, at 25-28. For these reasons, the Court should sanction Google under Rule 37(e)(2).

C. Google's Conduct Prejudiced Plaintiff States Because They Were Precluded from Collecting Relevant Materials Regarding Google's Business Decisions.

The resulting prejudice from the spoliation of chat messages in a monopolization case is heightened because these materials are likely to demonstrate Google's ability to inflict harm to competition and its incentive or strategy for doing so. In this case there are no disputes about whether Google engages in the conduct alleged by Plaintiff States and the U.S. Department of Justice. Google readily admits that it (1) enters into contracts with third parties to be the default search engine; (2) has not implemented Microsoft features into SA360; and (3) prohibits SVPs from appearing in prominent portions on its search results page. While these facts are undisputed, there remain vigorous dispute over the effects of Google's conduct on competition. As Google's own expert explains, one way to evaluate whether conduct is anticompetitive is to look at whether the company has a stated strategy of predation. Ex. B, Dep. of Kenneth Elzinga (Google Expert) Tr. at 83-4 (Nov. 7, 2022).

However, it is unsurprising that evidence of predation is more likely to be found in internal chats as opposed to emails or memorandums. As explained in the motion filed by the U.S. Department of Justice, Google has instructed employees to avoid discussing sensitive issues, such as issues related to competition, over email. Memorandum in Support of The United States' Motion for Sanctions Against Google, LCC and An Evidentiary Hearing to Determine Appropriate Relief, ECF No. 495, Ex. 10, GOOG-DOJ-01849929, at -929 ("Let's not talk about markets and market share via email."); *Id.*, Ex. 1, PX-120, at -264. (training employees that "off the record" chats are "[b]etter than sending [an] email"). And, documents demonstrate that Google employees are keenly aware to be cautious when communicating in records preserved by the company and tend to be more candid when communicating through informal methods. *Id*. Ex. 19, GOOG-DOJ-03333526, at -528 (reminding others to "keep in mind this chat history is not off."); *Id.,* Ex. 2, GOOG-DOJ-05446651, at -657 ("The assumption is that users often turn History off to discuss sensitive topics."). Therefore, it is likely that the rationale for Google's challenged business conduct reside, not in emails or memorandums, but in the off-the-record chats Google has failed to preserve. That is particularly likely because the conduct in this case is not in controversy; rather the case will turn on competitive effects and it is quite likely that communications on the adverse impact of Google's actions on competition would be prime candidates for residing on "off the record" chats.

Those records, however, are largely unavailable to Plaintiffs because of Google's failure to preserve them. Google only produced 819 chats in this case – a fraction of a percent of the total volume of materials Google produced. However, despite Google's miniscule production of chats in this case, those that were preserved and therefore capable of being produced demonstrate that custodians relevant to Plaintiff States' claims conducted business over chat. In fact, one chat

produced specifically mentions Plaintiff States' allegations against Google for its conduct related to SA360. Ex. C, GOOG-DOJ-3146488, at -4893 ("but activating across all engines would re-emphasize the criticism in the Colorado case that we bias to making Google look better..."). Accordingly, it is highly likely that Google failed to preserve other relevant materials by ignoring its duty to preserve chat messages.

V. The Court Should Hold an Evidentiary Hearing to Determine What Sanctions Are Appropriate.

Plaintiff States agree with the U.S. Department of Justice that substantial sanctions are warranted. The Court has "broad discretion" in imposing sanctions for spoliation. *Feld v. Fireman's Fund Ins. Co.*, 300 F.R.D. 9, 14 (D.D.C. 2014). As such, Plaintiff States' join the U.S. Department of Justice's request that the Court set an evidentiary hearing and, in the interim, order Google to provide answers about its spoliation.

VI. Conclusion

For the foregoing reasons, the Court should grant Plaintiff States' motion for sanctions.

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Respectfully submitted by,

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