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THE HONORABLE JOHN H. CHUN

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

FEDERAL TRADE COMMISSION, *et al.*,  
  
Plaintiffs,  
  
v.  
  
AMAZON.COM, INC., a corporation,  
  
Defendant.

**CASE NO.: 2:23-cv-01495-JHC**  
  
**PLAINTIFFS' MOTION TO  
COMPEL PRODUCTION OF  
DOCUMENTS RELATED TO  
SPOILIATION**

NOTE ON MOTION CALENDAR:  
May 10, 2024

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1 **INTRODUCTION**

2 Amazon is a company that tightly controls what its employees put into writing. It  
3 famously uses dense six-page memos that conform to detailed guidelines rather than PowerPoint  
4 decks or other common types of business documents, and it sets internal mandates on how  
5 employees discuss sensitive topics, including competition. But Amazon’s senior leadership also  
6 used another channel for internal communications and avoided the need to talk carefully by  
7 destroying the records of their messages.

8 For years, Amazon’s top executives, including founder and former CEO Jeff Bezos,  
9 “discuss[ed] sensitive business matters, including antitrust, over the Signal encrypted-messaging  
10 app instead of email.” Ex. A at 9.<sup>1</sup> These executives turned on Signal’s “disappearing message”  
11 feature, which irrevocably destroys messages, even after Amazon was on notice that Plaintiffs  
12 were investigating its conduct. (Am. Compl. ¶ 39.) Plaintiffs bring this motion to compel  
13 Amazon to produce documents related to the company’s failure to preserve Signal messages,  
14 namely Amazon’s document preservation notices and its instructions about the use of ephemeral  
15 messaging applications, including Signal.

16 As to both sets of documents, Plaintiffs easily meet the “preliminary showing of  
17 spoliation” standard required to overcome Amazon’s privilege assertions. There is ample  
18 evidence suggesting that spoliation occurred. Key Amazon executives, including Mr. Bezos,  
19 conducted Amazon business using Signal for years. Amazon executives deleted many Signal  
20 messages during Plaintiffs’ pre-Complaint investigation, and Amazon did not instruct its  
21 employees to preserve Signal messages until over fifteen months after Amazon knew that  
22 Plaintiffs’ investigation was underway. It is highly likely that relevant information has been

23 \_\_\_\_\_  
24 <sup>1</sup> Citations in the form Ex. \_\_\_ refer to the exhibits to the Declaration of Emily K. Bolles filed in support of this Motion.

1 destroyed as a result of Amazon’s actions and inactions. Plaintiffs should be allowed discovery  
 2 into Amazon’s document preservation efforts (or the lack thereof) so that they can determine the  
 3 full extent of the possible spoliation.

#### 4 **BACKGROUND**

##### 5 **A. Amazon’s Destruction of Signal Messages**

6 While the true breadth of Amazon’s use of the Signal app is yet unknown, Amazon  
 7 admits that dozens of its employees used the app, Ex. B, and that some used it for “substantive  
 8 work communications potentially responsive to” pre-Complaint compulsory process. Ex. C at 3.  
 9 Notable Signal users at Amazon identified to date include Mr. Bezos, current CEO Andy Jassy,  
 10 General Counsel David Zapolsky, former CEO of Worldwide Consumer Jeff Wilke, and former  
 11 CEO of Worldwide Operations Dave Clark. Ex. B. These executives played key roles in  
 12 developing and implementing Amazon’s anti-discounting and fulfillment strategies that are at  
 13 issue in this case. (*See* Am. Compl. ¶¶ 329-30, 364, 404-407.) Amazon’s use of Signal was  
 14 instigated by Mr. Bezos and his team. Ex. E; Ex. F at 279:20-25; Ex. G at 203:2-4; 208:17-209:2.  
 15 From messages that were not deleted, it is apparent that Amazon executives used Signal to talk  
 16 about competition-related business issues. *See, e.g.*, Ex. H (messaging about an antitrust news  
 17 article); Ex. I (messaging about a contract with USPS); Ex. J (messaging about advertising); Ex.  
 18 A at 9 (reporting that Amazon executives used Signal to discuss antitrust).

19 Amazon executives manually enabled Signal’s “disappearing message” feature, which  
 20 permanently and irretrievably deletes messages after a time period set by the user.<sup>2</sup> When this

---

23 <sup>2</sup> Signal Support: Set and Manage Disappearing Messages, [https://support.signal.org/hc/en-](https://support.signal.org/hc/en-us/articles/360007320771-Set-and-manage-disappearing-messages)  
 24 [us/articles/360007320771-Set-and-manage-disappearing-messages](https://support.signal.org/hc/en-us/articles/360007320771-Set-and-manage-disappearing-messages) (last visited April 25, 2024) (noting that “when the disappearing message timer reaches the end . . . [t]he message is deleted from disk.”).

1 feature is enabled, the sender and all recipients see that it is turned on.<sup>3</sup> Although the contents of  
2 deleted messages are impossible to recover, the app shows when a user turns the disappearing  
3 message feature on, off, or changes the timer for deletions, leaving breadcrumbs showing that  
4 Amazon executives' deletions were widespread. *See* Ex. B. As even Amazon admits, due to its  
5 executives' use of disappearing messages, "it is possible that some responsive communications  
6 have not been preserved." Ex. C at 3.

7 Amazon executives began using Signal in April 2019 and kept using it through Plaintiffs'  
8 pre-Complaint investigation. *See* Ex. B. The FTC sent a document preservation letter to Amazon  
9 on June 17, 2019, putting Amazon on notice that the FTC was investigating "whether [Amazon]  
10 has engaged or is engaging in unfair methods of competition, through anticompetitive or  
11 exclusionary conduct related to online retail sales and distribution." Ex. K at 1. That letter  
12 specifically instructed Amazon to "take the necessary measures to preserve all documents and  
13 information and cease all document destruction activities with respect to matters that may be of  
14 relevance to this investigation," and expressly included "electronic correspondence" in its ambit.  
15 *Id.* The FTC subsequently sent a request for documents to Amazon on August 5, 2019, and  
16 served a Civil Investigative Demand on February 20, 2020. Bolles Decl. ¶ 4. Amazon issued a  
17 first wave of document preservation notices to its employees on July 2, 2019, but did not issue a  
18 preservation notice to Mr. Bezos (then Amazon's CEO) until over nine months later, on April 13,  
19 2020. Ex. D at 3. Amazon did not send custodian questionnaires or conduct custodian interviews  
20 until Summer 2020, a full year after it received the FTC's document preservation letter. *See id.* at  
21 10. Amazon claims that it did not learn about its employees' use of Signal until the summer of  
22

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23  
24 <sup>3</sup> *Id.* ("Each and every disappearing message will have a timer countdown icon that is visible at the bottom of the message bubble.").

1 2020, *see* Ex. L at 3, even though Amazon’s top executives, including its General Counsel Mr.  
2 Zapolsky, had been using Signal since 2019. Ex. B at 4.

3 After the summer of 2020, Amazon provided new guidance about Signal, but employees  
4 kept using the app and kept deleting messages. In October 2020, Amazon provided “secure  
5 messaging guidance for senior leaders.” Ex. M. Amazon issued further instructions in August  
6 2021, including a guide about how to turn off Signal disappearing messages. *See id.* (privilege  
7 log identifying “Legal Hold FAQ that includes guidance on Signal,” dated August 27, 2021); Ex.  
8 N (guidance titled “How turn [sic] off disappearing messages on Signal”; redactions in original);  
9 Ex. O at 189:11-17 (corporate representative testifying that a link to Ex. N is embedded in the  
10 “Legal Hold FAQ”). Seven months later, on March 2, 2022, Mr. Zapolsky sent an email to  
11 several executives instructing them how to download a new Amazon-owned secure messaging  
12 app, Wickr, that allows Amazon to save messages centrally for individuals on legal hold. *See* Ex.  
13 P (redactions in original). All the while, Amazon executives continued to use Signal’s  
14 disappearing message feature to destroy records of their internal communications. *See* Ex. B  
15 (showing use of Signal disappearing messages until at least May 2022).<sup>4</sup>

16 On March 4, 2022, two days after Mr. Zapolsky asked executives to switch to a different  
17 secure messaging app, Amazon disclosed its use of Signal to Plaintiffs for the first time. Ex. D at  
18 9. Amazon made this disclosure just days before the *Wall Street Journal* publicized Amazon  
19 executives’ use of Signal, on March 10, 2022. *See* Ex. A. Once Plaintiffs learned about  
20 Amazon’s use of Signal, and the ensuing potential for spoliation, Plaintiffs requested that  
21 Amazon log Signal messages and deleted messages for a targeted group of custodians, *see* Ex. B;

22 \_\_\_\_\_  
23 <sup>4</sup> Amazon only logged Signal use through May 2022. *See* Ex. B at 1 (“this log includes potentially work-related  
24 Signal communications through May 2022.”). Plaintiffs have requested and the parties are currently negotiating  
production of Signal messages past May 2022. Whether and when Amazon employees stopped using Signal for  
work is unknown.

1 conducted in-person reviews of certain Signal messages that still exist, *see* Ex. D at 1; conducted  
2 an investigational hearing of the company related to its preservation efforts and use of Signal, *see*  
3 Ex. O; and questioned several witnesses about their Signal usage in investigational hearings, *see*  
4 Ex. F (excerpt of Signal discussion with Mr. Bezos); Ex. G (excerpt of Signal discussion with  
5 Mr. Blackburn).

6 Amazon claimed privilege over the contents of its preservation notices and instructions  
7 throughout Plaintiffs' investigation. *See* Ex. O at 108:19-20 (Amazon's counsel stating "[w]e  
8 view the contents of the hold notice as privileged."); Ex. F at 287:4-288:16 (instructing Mr.  
9 Bezos not to answer whether Amazon's document preservation notices discussed Signal or  
10 ephemeral messaging on basis of privilege); Ex. D at 2 ("Amazon is not producing th[e] legal  
11 guidance documents in order to maintain privilege . . ."). It refused to say whether its  
12 preservation notices addressed Signal or other ephemeral messaging. *See* Ex. O at 109:14-111:2.  
13 In fact, Amazon did not even educate its corporate witness on the contents of its preservation  
14 notices. *See id.* at 109:25-110:7. An Amazon executive testified, however, that when he received  
15 document preservation notices, he did not understand Signal messages to be covered by those  
16 notices. *See* Ex. G at 221:16-20.

## 17 **B. Plaintiffs' Requests for Production**

18 On November 14, 2023, Plaintiffs served the following Requests for Production on  
19 Amazon:<sup>5</sup>

20 **RFP No. 25.** All litigation holds, preservation notices, or similar documents sent  
21 by Amazon in connection with the June 17, 2019 preservation letters, August 5,  
22 2019 Voluntary Access Letter, February 20, 2020 Civil Investigative Demand,  
23 and/or September 26, 2023 Complaint in this matter.

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24 <sup>5</sup> Bolles Decl. ¶¶ 5-6.



1 **RFP No. 27.** All documents relating to instructions or advice given to employees  
2 about the use of ephemeral messaging, including but not limited to Signal or Wickr.

3 Amazon has categorically refused to produce any documents responsive to RFP No. 25  
4 based on privilege and has also refused to produce certain documents and portions of documents  
5 responsive to RFP No. 27 on the same grounds. Ex. Q at 3; Ex. R at 5. The parties have met and  
6 conferred several times but are at an impasse. Bolles Decl. ¶ 2. Plaintiffs file this motion to compel  
7 Amazon to produce all documents responsive to RFP Nos. 25 and 27 despite Amazon's  
8 generalized assertions of privilege.

### 9 LEGAL STANDARD

10 A preliminary showing of spoliation overcomes the protections against disclosure that  
11 may otherwise apply to document preservation notices. *See Agne v. Papa John's Int'l, Inc.*, No.  
12 2:10-cv-01139-JCC, 2012 WL 12882903, at \*3 (W.D. Wash. Feb. 6, 2012); *Al Otro Lado, Inc. v.*  
13 *Wolf*, No. 3:17-cv-02366-BAS-KSC, 2020 WL 4432026, at \*2 (S.D. Cal. July 31, 2020); *Major*  
14 *Tours, Inc. v. Colorel*, No. 1:05-cv-03091-JBS, 2009 WL 2413631, at \*2-3 (D.N.J. Aug. 4,  
15 2009). The same is true for instructions about preservation, including attorney-client  
16 communications about litigation holds or spoliation. *See Stevens v. Brigham Young Univ. -*  
17 *Idaho*, No. 4:16-cv-00530-BLW, 2020 WL 7366318, at \*4 (D. Idaho Dec. 11, 2020)  
18 (“[A]lthough a litigation hold, and general instructions to a client regarding spoliation, would  
19 generally be privileged and not subject to disclosure, where, as here, there is evidence of  
20 spoliation, such information is discoverable.”); *In re Cathode Ray Tube Antitrust Litig.*, No. 07-  
21 cv-05944-JST, 2023 WL 5667882, at \*5 (N.D. Cal. Jan. 27, 2023) (“Attorney-client  
22 communications regarding litigation holds, in addition to the hold itself, have been ordered to be  
23 produced by courts when a preliminary showing of spoliation has been made.”).

1 A preliminary showing of spoliation means only that “there is reason for concern that  
 2 evidence has been lost.” *Agne*, 2012 WL 12882903, at \*3. Such “reason for concern” can be  
 3 shown where potentially relevant evidence has been destroyed or where a party failed to take  
 4 adequate steps to preserve information. *See Al Otro Lado*, 2020 WL 4432026, at \*2 (noting that  
 5 “[e]ither . . . is sufficient to make a preliminary showing of spoliation”). At this juncture,  
 6 Plaintiffs do not need to prove the prima facie elements of spoliation, prejudice, or intent. *United*  
 7 *States v. Cmty. Health Network, Inc.*, No. 1:14-cv-01215-RLY-MKK, 2023 WL 4761664, at \*5  
 8 (S.D. Ind. July 26, 2023) (“[C]ourts have made the requisite finding of a preliminary showing of  
 9 spoliation and ordered discovery of litigation holds by focusing on only . . . whether data was  
 10 lost after the duty to preserve began – and refraining from any extended discussion of fault.”).

### 11 ARGUMENT

12 The Court should find that Plaintiffs have made a preliminary showing of spoliation on  
 13 two independent grounds: because Amazon destroyed potentially relevant Signal messages and  
 14 because Amazon failed to take adequate steps to preserve Signal messages. Based on that  
 15 showing, the Court should order Amazon to produce its hold notices and instructions about  
 16 preservation because these documents will assist Plaintiffs and the Court in determining the  
 17 scope of spoliation in this case.

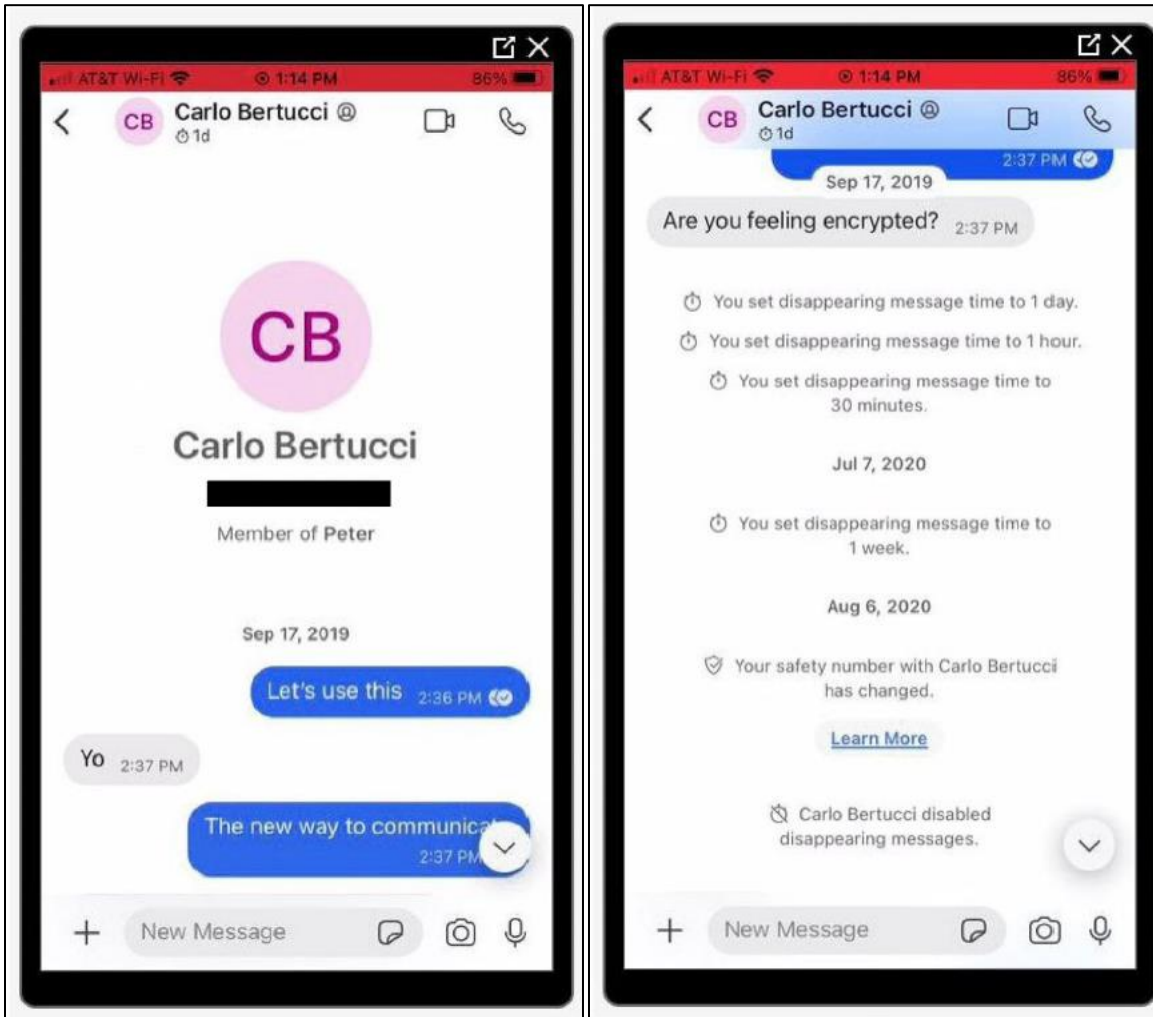
#### 18 **I. AMAZON’S WIDESPREAD DELETION OF SIGNAL MESSAGES DURING** 19 **PLAINTIFFS’ PRE-COMPLAINT INVESTIGATION ESTABLISHES A** 20 **PRELIMINARY SHOWING OF SPOLIATION.**

21 Evidence that a party destroyed potentially relevant documents is sufficient to establish a  
 22 preliminary showing of spoliation. *See Al Otro Lado*, 2020 WL 4432026, at \*2 (finding  
 23 preliminary showing of spoliation where it was undisputed that a witness’s notes were destroyed,  
 24 and the court found those notes were “*potentially* relevant”).

1 It is undisputed that Amazon deleted numerous Signal messages. *See generally* Ex. B.  
2 Plaintiffs are not required to prove the contents of the messages Amazon destroyed to show that  
3 they were potentially relevant. One court found a defendant’s loss of “mailboxes and OneDrive  
4 data of a certain subset of the many custodians involved in this case” sufficient where the  
5 custodians in question “were involved in the acts and decisions underlying the claims and  
6 defenses in this case.” *Cnty. Health Network*, 2023 WL 4761664, at \*5. Another court  
7 recognized that “because [a witness’s] notes were destroyed, it is impossible for the Court to say  
8 whether defendants’ subjective characterization of the notes as ‘shorthand, non-substantive  
9 notes’ that did not contain information relevant to this case is correct.” *Al Otro Lado*, 2020 WL  
10 4432026, at \*2.

11 The facts here paint a clear picture. Amazon admits “it is possible that some responsive  
12 communications” were destroyed. Ex. C at 3. Senior Amazon executives who are known to have  
13 deleted Signal messages were involved in acts and decisions relevant to the claims in this case,  
14 and they deleted those messages during Plaintiffs’ pre-Complaint investigation after Amazon  
15 received a document preservation letter, a voluntary access letter, and a civil investigative  
16 demand. *See generally* Ex. B (Amazon log identifying Amazon executives’ use of Signal’s  
17 disappearing messaging feature during the time period April 2019 through May 2022); Ex. K  
18 (document preservation letter dated June 17, 2019); Bolles Decl. ¶ 3 (Voluntary Access Letter  
19 sent Aug. 5, 2019); *id.* ¶ 4 (Civil Investigative Demand served Feb. 20, 2020). Amazon  
20 employees used Signal to talk about antitrust and competition-related business topics shortly  
21 before turning disappearing messages on. *See* Ex. H; Ex. I; Ex. J. For example, two days after  
22 Amazon Legal sent an email to Amazon’s senior leadership team, or “S-team,” titled “RE:  
23 Congressional and FTC investigations into Amazon - privileged & confidential,” *see* Ex. S  
24

1 (excerpt of privilege log), two Amazon executives started using Signal and immediately turned  
 2 on disappearing messages:<sup>6</sup>



17 Public reporting corroborates that Amazon executives used Signal to discuss antitrust issues. *See*  
 18 *Ex. A* at 9. This evidence surpasses the bar set by other cases and by itself establishes a  
 19 preliminary showing of spoliation.

21 <sup>6</sup>*See Ex. H.* Peter Krawiec is identified as the custodian of this document as produced by Amazon. Bolles Decl. ¶ 14.  
 22 In September 2019, Mr. Krawiec was Amazon’s Senior Vice President of Worldwide Corporate and Business  
 Development, and Carlo Bertucci was a Vice President for Corporate Development. *See* Peter Krawiec, LinkedIn,  
 23 <https://www.linkedin.com/in/peter-krawiec-89a2121> (last visited April 25, 2024); Carlo Bertucci, LinkedIn,  
<https://www.linkedin.com/in/carlo-bertucci-1946294> (last visited April 25, 2024). Mr. Krawiec is a member of  
 24 Amazon’s senior leadership team. *See Amazon’s S-Team: Meet the 31 members who make up our senior leadership team*, Amazon (Dec. 14, 2023), <https://www.aboutamazon.com/news/workplace/amazon-s-team-members>.

1 **II. AMAZON’S FAILURE TO TAKE TIMELY ACTION TO PREVENT THE**  
2 **DESTRUCTION OF SIGNAL MESSAGES FURTHER ESTABLISHES A**  
3 **PRELIMINARY SHOWING OF SPOLIATION.**

4 A party’s failure to take adequate steps to preserve information, such as by issuing timely  
5 preservation notices or taking action to stop automatic deletions, also establishes a preliminary  
6 showing of spoliation. *See Al Otro Lado*, 2020 WL 4432026, at \*2 (finding that failure to  
7 instruct a custodian to “preserve relevant documents until . . . over a year after this litigation was  
8 initiated” was “sufficient to make a preliminary showing of spoliation”); *Cathode Ray Tube*,  
9 2023 WL 5667882, at \*3 (holding that company’s “more than eight-month delay before issuing  
10 any litigation hold is sufficient to establish a preliminary showing of spoliation” and “failure to  
11 suspend its automatic email destruction practice as soon as its duty to preserve arose further  
12 supports” the finding). Courts have explained that it is “reasonable to infer that relevant evidence  
13 has been destroyed” where steps are not taken to preserve it. *Tate & Lyle Americas, LLC v. Glatt*  
14 *Air Techniques, Inc.*, No. 2:13-cv-2037-EIL, 2014 WL 10209161, at \*3 (C.D. Ill. Aug. 4, 2014);  
15 *see also City of Colton v. Am. Promotional Events, Inc.*, No. 5:09-cv-01864, 2011 WL  
16 13223880, at \*2, \*5 (C.D. Cal. Nov. 22, 2011) (“[I]t is reasonable to infer from this lengthy  
17 delay [in issuing a preservation notice] that some relevant evidence was lost.”).

18 Amazon did not take timely steps to adequately preserve Signal messages. Amazon failed  
19 to issue a preservation notice to Jeff Bezos until April 13, 2020, ten months after the FTC’s June  
20 17, 2019, document preservation letter put Amazon on notice that it was under investigation. Ex.  
21 D at 3; Ex. K. Mr. Bezos’ documents and communications were clearly within the scope of the  
22 investigation: as Amazon’s founder and CEO, he was the ultimate decision-maker at Amazon.

23 Mr. Bezos was a heavy Signal user, *see* Ex. B, and instructed others to use the app. *See*  
24 Ex. E, Ex. F at 279:20-25, Ex. G at 203:2-4; 208:17-209:2. Further, while Amazon issued  
preservation notices to other employees starting on July 2, 2019, Amazon did not issue custodial

1 questionnaires or conduct custodial interviews until the summer of 2020, and did not issue  
2 instructions about how to preserve Signal messages until October 2020. *See* Ex. D at 10; Ex. M.  
3 Given this delay, it is likely that Amazon’s custodians were not properly instructed to preserve  
4 Signal messages until over 15 months after Amazon was put on notice of Plaintiffs’  
5 investigation. Together, these circumstances rise above the level of a preliminary showing of  
6 spoliation such that Amazon should be ordered to produce its preservation notices and  
7 instructions about preservation.

8 **III. AMAZON’S PRESERVATION NOTICES AND INSTRUCTIONS ABOUT**  
9 **PRESERVATION WILL ASSIST IN DETERMINING THE EXTENT OF**  
10 **SPOLIATION IN THIS CASE.**

11 Requiring Amazon to produce its preservation notices and instructions will shed light on  
12 the extent of spoliation in this case and its relevance to the record that will ultimately be before  
13 the Court. The Court may ultimately impose sanctions if it finds that “electronically stored  
14 information that should have been preserved in the anticipation or conduct of litigation is lost  
15 because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced  
16 through additional discovery.” Fed. R. Civ. P. 37(e). If the spoliation was negligent, the Court  
17 may “order measures no greater than necessary to cure the prejudice.” Fed. R. Civ. P. 37(e)(1). If  
18 the spoliation was intentional, the Court may impose more severe sanctions. Fed. R. Civ. P.  
19 37(e)(2).

20 The Court should allow Plaintiffs to assess the scope of Amazon’s spoliation of evidence  
21 and to determine whether Amazon’s spoliation was intentional. The documents Plaintiffs seek in  
22 this motion are relevant to both inquiries. Amazon’s preservation notices and instructions about  
23 preservation will show whether, when, and how Amazon employees were instructed to preserve  
24 Signal messages; whether, when, and how Amazon employees were instructed to preserve work-  
related materials on their phones; and whether any such instructions applied to communications

1 relevant to this case. Plaintiffs need these documents to assess whether Amazon failed to take  
2 reasonable steps to preserve documents and to map out what information has been destroyed. *See*  
3 *Thomas v. Cricket Wireless, LLC*, No. 19-cv-07270-WHA-AGT, 2020 WL 7344742, at \*2 (N.D.  
4 Cal. Dec. 14, 2020) (“[L]itigation holds and related correspondence are relevant to plaintiffs’  
5 examination of [the defendant’s] document preservation practices and efforts and whether [the  
6 defendant] spoliated relevant evidence.”).

7 Document hold notices and instructions about preservation are also relevant to  
8 determining a party’s intent to destroy information, which bears on the appropriate sanction for  
9 any spoliation. *See Al Otro Lado*, 2020 WL 4432026, at \*2 (“[T]he content of the litigation hold  
10 notice is relevant to a determination of whether the spoliation was willful or merely negligent.”);  
11 *Stevens*, 2020 WL 7366318, at \*5 (“Counsel’s mental impressions, conclusions, opinions, and  
12 legal theories related to a litigation hold [and] general instructions regarding spoliation . . . are  
13 directly at issue in determining the intentionality of the spoliation.”).

#### 14 CONCLUSION

15 Plaintiffs have established a preliminary showing that Amazon engaged in spoliation.  
16 Discovery into Amazon’s preservation notices and instructions about preservation is the next  
17 step in uncovering the extent and intent underlying Amazon’s possible spoliation of evidence.  
18 Accordingly, the Court should overrule Amazon’s objections and order Amazon to produce all  
19 documents responsive to RFP Nos. 25 and 27.

1 Dated: April 25, 2024

*I certify that this brief contains 3,468 words, in compliance with LCR 7(e)(4).*

2 Respectfully submitted,

3 *s/ Emily K. Bolles*

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