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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  
  
ORDER ON MOTION TO COMPEL  
DOCUMENTS RELATED TO  
SPOILIATION

**I**  
**INTRODUCTION**

Before the Court is Plaintiffs’ Motion to Compel Documents Related to Spoliation. Dkt. # 198. For the reasons below, the Court DENIES the motion without prejudice. After completion of the Rule 30(b)(6) deposition of Defendant’s representative on document retention, Plaintiffs’ may renew their motion if warranted.

**II**  
**BACKGROUND**

Plaintiffs move to compel production of Defendant’s “document preservation notices and its instructions about the use of ephemeral messaging applications, including Signal.” Dkt. # 198

1 at 4. Specifically, Plaintiffs seek documents responsive to their Requests for Production (RFPs)  
2 25 and 27. Dkt. # 198 at 8–9. These RFPs seek: “[a]ll litigation holds, preservation notices or  
3 similar documents sent by Amazon in connection with the June 17, 2019 preservation letters,  
4 August 5, 2019 Voluntary Access Letter, February 20, 2020 Civil Investigative Demand, and/or  
5 September 26, 2023 Complaint in this matter.” *Id.* at 8 (RFP No. 25). And “[a]ll documents  
6 relating to instructions or advice given to employees about the use of ephemeral messaging,  
7 including but not limited to Signal or Wickr.” *Id.* at 9 (RFP No. 27).

8 Defendant responds that documents responsive to these RFPs are privileged and has  
9 refused to produce them. *Id.* (citing Dkt # 202-17 and Dkt. # 202-18).

### 10 III 11 DISCUSSION

12 The Court agrees with Plaintiffs that the documents they seek may be necessary to their  
13 assessment of whether Defendant spoliated relevant evidence. But Defendant correctly notes  
14 that “litigation hold notices are not discoverable, ‘particularly when a party has made an  
15 adequate showing that the letters include material protected under attorney-client privilege or the  
16 work-product doctrine.’” *Agne v. Papa John’s Int’l, Inc.*, No. C10-1139-JCC, 2012 WL  
17 12882903, at \*3 (W.D. Wash. Feb. 6, 2012) (quoting *Major Tours, Inc. v. Colorel*, C05-3091,  
18 2009 WL 2413631, at \*2 (D.N.J. Aug. 4, 2009)); *see also Al Otro Lado, Inc. v. Wolf*, NO. 3:17-  
19 cv-02366-BAS-KSC, 2020 WL 4432026, at \*2 (S.D. Cal. July 31, 2020). Confidential legal  
20 advice is similarly privileged. *United States v. Sanmina Corp.*, 968 F.3d 1107, 1116 (9th Cir.  
21 2020).

22 Plaintiffs do not dispute these presumptions. Dkt. # 198 at 9. Instead, they assert that  
23 “[a] preliminary showing of spoliation overcomes the protections against disclosure that may  
24 otherwise apply to document preservation notices . . . and attorney-client communications about

1 litigation holds or spoliation.” Dkt. # 198 at 9. Many district courts have employed this  
2 “preliminary showing” approach. *See, e.g., Al Otro Lado, Inc.*, 2020 WL 4432026, at \*2  
3 (concluding that, despite the presumption of privilege, “plaintiffs have made a sufficient  
4 preliminary showing of spoliation to overcome the attorney-client privilege that presumably  
5 attached to the litigation hold notice); *see also Major Tours Inc.*, 2009 WL 2413631, at \*5; *In re*  
6 *Cathode Ray Tube Antitrust Litig.*, No. 07-cv-05944-JST, 2023 WL 5667882, at \*5 (N.D. Cal.  
7 Jan. 27, 2023) (facts provided by plaintiffs “suffice to make a preliminary showing of spoliation  
8 adequate to overcome the attorney-client privilege.”).

9       Among its various responses to Plaintiffs’ “preliminary showing” arguments, Defendant  
10 asserts that the proper relief would be not to order the production of the privileged documents but  
11 to “order a corporate deposition of the non-movant[.]” Dkt. # 223 at 16. The Court agrees. This  
12 “deposition first” approach has also been employed by various district courts. For example, in  
13 *Thomas v. Cricket Wireless, LLC*, the court declined to grant plaintiffs’ motion to compel  
14 litigation hold notices before the Rule 30(b)(6) deposition. No. 19-cv-07270-WHA (AGT), 2020  
15 WL 7344742, at \*2–\*3 (N.D. Cal. Dec. 14, 2020) (“Plaintiffs have offered no convincing reason  
16 why the Court should deviate from the Rule 30(b)(6) deposition-first approach, and the Court  
17 declines to do so here.”). Similarly, in *Al Otro Lado*, the court found a preliminary showing of  
18 spoliation was made sufficient to warrant production of litigation hold letters, based in part on  
19 deposition testimony that had been obtained. 2020 WL 4432026, at \*1–\*2.

20       Plaintiffs assert that they “have already sought corporate testimony on Amazon’s  
21 preservation efforts” and that “Amazon asserted privilege over and deliberately did not prepare  
22 its witness to answer questions about the contents of its legal holds.” Dkt. # 235 at 8 (citing Dkt.  
23 # 202-15 at 6). They cite excerpts from the October 7, 2022, Investigational Hearing of  
24 Amazon’s corporate representative, Robert Stangler, conducted during the pre-Complaint

1 investigation. Dkt. # 202 at 4. When the witness was asked about the document preservation  
2 notices that had been circulated at that point, counsel for Defendant explained “we view the hold  
3 notices, including and specifically how they are laid out and what’s in them as privileged, and for  
4 that reason we have not had the witness review the specific hold notices, and so I don’t think  
5 he’s going to be able to answer that.” Dkt. # 202-15 at 6. This, Plaintiffs assert, indicates that a  
6 Rule 30(b)(6) deposition would be fruitless.

7 Notwithstanding the foregoing, the Court does not believe that a deposition-first approach  
8 would necessarily be fruitless. The Court orders that a Rule 30(b)(6) deposition of Defendant’s  
9 representative on document retention take place within 30 days of this order. During the  
10 deposition, Plaintiffs may inquire into (1) when and to whom the litigation hold notices were  
11 given, (2) what kinds and categories of information and data Defendant’s employees were  
12 instructed to preserve and collect, and (3) what specific actions they were instructed to take to  
13 that end. *See Thomas*, 2020 WL 7344742, at \*3. If, after the deposition, Plaintiffs have still not  
14 obtained the information necessary to analyze the “full extent of the possible spoliation[,]” Dkt. #  
15 198 at 5, they may renew their motion to compel. *See, e.g., Thomas v. Cricket Wireless, LLC.*,  
16 No. 19-cv-07270-WHA(AGT), 2021 WL 1017114, at \*1 (N.D. Cal. Mar. 16, 2021) (after denial  
17 without prejudice of plaintiffs’ motion to compel defendant’s litigation hold letters and related  
18 correspondence pending a Rule 30(b)(6) deposition, the court considered a renewed motion to  
19 compel after the deposition did not provide “relevant answers about the basic details surrounding  
20 the hold letters at issue.”).

#### 21 IV

#### 22 CONCLUSION

23 For these reasons, the Court DENIES Plaintiffs’ motion to compel without prejudice.  
24 After the Rule 30(b)(6) deposition, Plaintiffs may renew their motion to compel if warranted.

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Dated this 9th day of July, 2024.



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John H. Chun  
United States District Judge