same time, the FTC VRXJKW DQG REWDLQHG D WHPSRUDU\ among other things, appointed a receiver to assume control over SBH, required th Individual Defendants to produce their electronic communications, and required the Individual Defendants to turn over the mobile devices they had used to operate the business. Notwithstanding these orders, the Individual Defendants did not initially turn over their mobile devices and did not produce any Signal communications. Additionally, during a post-TRO deposition, Noland failed to disclose the Signal and ProtonMail accounts in response to direct questioning about the existence of any encrypted communications platforms.

It gets worse. It has now come to light that, during the months following the issuance of the TRO, Noland used his ProtonMail account to provide third-party witnesses with what can be construed as a script to follow when drafting declarations the Individual Defendants wished to submit in support of their defense. These communications only came to light by fortuity, when one of the recipients anonymously disclosed them to the FTC.

Finally, in August 2020, just as they were about to belatedly turn over their mobile devices for imaging, the Individual Defendants deleted the Signal app from their phones in FRRUGLQDWHG IDVKLRQ $V D UHVXOW Defendants have been unable to recover any of the Signal communications the Individual Defendants sent and received between May 2019 and August 2020.

Based on all of this, the FTC now moves for the imposition of spoliation sanctions. (Doc. 259) The motion is fully briefed (Docs. 276, 277) and neither side requested oral argument. For the following reasons, the motion is granted. 7KH ,QGLYLGXDO ' systematic efforts to conceal and destroy evidence are deeply troubling and cast a pall over this action.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This case concerns the business activities of SBH ³DQ D-to-C marketing program that sells coffee products and other nutraceuticals through its online platform and network RI DIILOLDWH ZHEVLWHV´ (Doc. 106 at 2.) SBH is an unincorporated division of Success by Media

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(Doc. 228-2 at 17-19, 21-22.)

In late September or early October 2020, the FTC belatedly learned about the

ª •V°A])b6Wq Ž a''ë fD#ä3!)e($xI.° •Y k Ò–#ew (à y.¡])@612 7784.92 re WT Q0 00 T

(e)(1) would be sufficient to redress the loss.” *Id.*

“[T]he applicable standard of proof in the Ninth Circuit appears to be by a preponderance of the evidence.” *Compass Bank v. Morris Cerullo World Evangelism*, 104 F. Supp. 3d 1040, 1052-53 (S.D. Cal. 2015). *See also Singleton v. Kernan*, 2018 WL [...] (S.D. Cal. [...]) (“A party seeking sanctions bears the burden of establishing [spoliation of relevant electronic records] by a preponderance of the evidence.”). The Court is the appropriate finder of fact on a Rule 37(e) motion. *Mannion v. Ameri-Can Freight Sys. Inc.*, 2020 WL 417492, *4 (D. Ariz. 2020). *See also Adriana Int’l Corp. v. Thoeren*, 913 F.2d 1406, [...] (9th Cir. [...]) (“The imposition of discovery sanctions pursuant to [Rule 37] is reviewed for abuse of discretion. Absent a definite and firm conviction that the district court made a clear error in judgment, this court will not overturn a Rule 37 sanction. Findings of fact related to a motion for discovery sanctions are reviewed under the clearly erroneous standard. If the district court fails to make factual findings [...]

and post-TRO. ´ (@

The Court concludes that the Individual ' H I H Q G D Q W V ¶ S U H V H U Y D W L R Q obligations arose on May 29, 2019 Z K H Q W K H) 7 & U H V S R Q G s-Gmail W R by stating that 1 R O D Q G ³ D Q G W K R X E R P Y D Q S H Q G D Q \ R U G L Q of documents, communications, and records ' R F -1 at 44.) Although Noland contends he subjectively E H O L H Y H G rejection of his offer to cooperate signaled that the investigation against him (and SBH) was closed, that was not an objectively reasonable conclusion under the circumstances. Noland was aware that the FTC h recently subpoenaed his bank records and was aware that the FTC had unambiguously requested the suspension of document destruction. Additionally, Noland was aware that he remained subject to the consent order arising from a previous FTC enforcement action, *FTC v. Netforce Seminars*. (*See generally* Doc. 177 at 15 n.7.) It would be objectively unreasonable, under these circumstances, to conclude that litigation is not probable and that the retention of evidence is not required.

At any rate, the availability of sanctions under Rule 37(e)(2) does not turn on whether the Individual Defendants' preservation obligations arose in May 2019 or January 2020. It is undisputed that the Individual Defendants' destruction of evidence continued after January 2020: after this date, Signal messages continued to be sent (and deleted), the May 2020 ProtonMail email from Noland to Mehler was sent and deleted, and the Individual Defendants worked together to delete the Signal app in coordinated fashion.

2. <u>Reasonable Foreseeability Of The Relevance Of The Signal And ProtonMail Messages</u>

The FTC acknowledges that the relevance of the lost ESI cannot be definitively ascertained (because it no longer exists) but argues that, in suc suc suDltt7n8 (suDltumst

UHOHYDQW WR OLWLJDWLRQ *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006). At DQ\ UDWH ³EHFDXVH WKH

'HIHQGDQWV¶ :KDWV$SS DQG L26 FRPPXQLFDWLRQ dwindled to almost nothing. The reasonable inference to be drawn from these undisputed facts is that the Individual Defendants continued their discussions of relevant matters on Signal and ProtonMail after switching over to those apps. The alternative inference²that the Individual Defendants simply stopped communicating about anything related to their business on any text-messaging platform, at the same time that they installed an encrypted messaging service for the purpose of discussing ³DQ\WKLQJ VHQVLWLYH´ DQG PDWWHUV²strains credulity.

The FTC has thus carried its burden of showing the reasonably foreseeable relevance of the destroyed ESI to this litigation.

C. Reasonable Steps To Preserve

The parties do not dispute that the Individual Defendants failed to take reasonable steps to preserve the deleted communications. The Individual Defendants admit that they ³XQLQVWDOOHG WKH 6LJQDO DSSOLFDWLRQ« [illegible] LPDJHG´ 'RF DW WKDW³1R HOHFWURQLF GLVFRYHU\ ZDV FUHDWHG [illegible] id. Q 6LJQDO ZDV [illegible] id. at 4). (See also Doc. 259 at 2 [Re HLYHU¶V 'HFODU

function on their phones. . . [and it] takes, at most, only a few minutes to disengage the auto-delete function on a cell phone. . . . Failure to follow [such] simple steps . . . alone is sufficient to show that Defendants acted unreasonably." *Youngevity*, 2020 WL 7048687 DW ³'HIHQGDQWV¶ IDLOXUH WR SUHYHQW GHVWUXFWLRQ E\ EORFN disabling automatic deletion functions was not reasonable because they had control over their text messages and should have taken affirmative steps to prevent their destruction when they became DZDUH RI WKHLU SRWHQWLDO UHOHYDQ

D. Replaceability

7KH QH[W TXHVWLRQ LV ZKHWKHU WKH ORVW (6, ³FDQ >@ RU UHSODFHG WKURXJK DGGLWLRQDO GLVFRYHU\ ´

The FTC argues that the lost ESI is irreplaceable, because the deletion of the PHVVDJHV DQG 6LJQDO DSS ³UHQGHUHG WKHP XQUHFRYHUDEOH although WKH)7& DQG ,QGLYLGXDO 'HIHQGDQWV¶ attempt to retrieve the missing materials, those efforts were unsuccessful. (Doc. 259 at 17-18.) The Individual Defendants do not dispute these points DFNQRZOHGJLQJ WKDW IRUHQVLF H[SHUWV ZHUH XQDEOH WR UHFRYHU WKH 6LJQDO GDWD DQG note, the Individual Defendants¶ FRXQVHO contacted 22 persons affiliated with SBH and asked them if they had any ProtonMail or Signal communications with the Individual Defendants. (Doc. 259 at 46-61.) The 10 responding parties reported that they did not have any ProtonMail or Signal communications with the Individual Defendants on their devices. (*Id.* at 49-59.)[11]

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[11] The IndLYLGXDO 'HIHQGDQWV DUJXH WKDW WKH\ UHVSRQVLYH 6LJQDO RU 3URWRQ0DLO FRPPXQLFDWLRQ position that they were using the auto-delete feature, and did not intentionally (or in actuality) destroy UHOHYDQW HYLGHQFH WKH\

The Court finds that the lost messages cannot be restored or replaced throug additional discovery.

The plausibility of this explanation is further undermined by Noland's failure to disclose the existence of the Signal or ProtonMail accounts during his February 202 deposition, despite being asked targeted questions on this exact topic. If the switch to these accounts was part of an innocuous effort to avoid hacking, Noland could have easily sa so. His failure to do so raises the inference that the motivation for switching to the accounts was more nefarious. *Herzig v. Ark. Found. for Med. Care, Inc.*, 2019 WL 2870106, *4-5 (W.D.

it were not innocuous.

Finally, t K H F R R U G L Q D W H G G H O H W L R Q R I W K H 6 L J Q phones in August 2020, just as the phones were about to be turned over for imaging, is the *pièce de résistance*. Notably, the Individual Defendants took this step without the knowledge or approval of their counsel. This was an outrageous maneuver that raises a strong inference of bad faith. *Cf. Ala. Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730,

1 ' $ O D ³1 R F U H G L E O H H [S O D Q D W L R Q K D from the .. ° P ŽVG D Q L QWY H Q W L R D OŽ\ G S O XWY H E O D Y I

preliminary injunction issued . . . and that its employees began communicating with 'LQJ7DON¶V HSKHPHUDO PHVVDJLQJ IHDWXUH ... these undisputed facts, the Court finds it appropriate to issue terminating VDQFWLRQ *Paisley Park Enterprises*, 330 F.R.D. at 233 ³)DLOXUH WR XVH WKH auto-delete function] . . . alone is sufficient to show that Defendants acted unreasonably. But that is not all the RMA Defendants did and did not do. Most troubling of all, they wiped and destroyed their phones after Deliverance and RMA had been sued, and, in the second instance for Wilson, after the Court ordered the parties to preserve all relevant electronic information, after the parties had entered into an agreement regarding the preservation and production of ESI, and after Plaintiffs had sent Defendants a letter alerting them to the fact they needed to produce their text messages. As Plaintiffs note, had Staley and Wilson not destroyed their phones, it is possible that Plaintiffs might have been able to recover the PLVVLQJ WH[W PHVVDJHV RI WKH µFORXG¶ IXQFWLRQ R software expert. But the content will never be known because of Staley and Wilson¶ intentional acts. . . . This is even more egregious because litigation had already FRPPHQFHG´ Accordingly, a general adverse inference is proper. *Cf. Moody v. CSX Transportation, Inc.*, 271 F. Supp. 3d 410, 432 (W.D.N.Y. 2017) (imposing adverse inference sanction when evidence was spoliated with intent to deprive); *Ala. Aircraft*, 319 F.R.D. at 746-47 (same).

Finally, the Individual Defendants VXJJHVW WKDW WKLV PDWWHU WKURXJK DQ HYLGHQWLDU\ KHDULQJ´ However, the Individual Defendants make no effort to identify the evidence they would attempt to submit during such a hearing or explain how it would differ from the voluminous evidence already submitted by the SDUWLHV LQ UHODWLRQ WR WKH)7&¶V PRWLRQ No evidentiary hearing is required in these circumstances. *Cf. Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1164

of the possibility of sanctions when MPC filed its motions for costs. It was afforded the opportunity to respond, and did indeed do so by filing a responsive brief. Given that the issues were such that an evidentiary hearing would not have aided its decision making process, the district court did not abuse its discretion in proceeding without an evidentiary hearing after briefing´

Accordingly,

IT IS ORDERED THAT WKH)7&¶V PRWLRQ IRU $WWRUQH\V¶)HHV DQG 1RQWD[DEOH Granted.

Dated this 30th day of August, 2021.

Dominic W. Lanza
United States District Judge