

1 same time the FTC V R X J K W D Q G R E W D L Q H G D W H P S R U D U \\
2 among other things, appointed a receiver to assume control over SBH, required the
3 Individual Defendants to produce their electronic communications, and required the
4 Individual Defendants to turn over the mobile devices they used to operate the
5 business. Notwithstanding these orders, the Individual Defendants did not initially turn
6 over their mobile devices and did not produce any Signal communications. Additionally,
7 during a post-TRO deposition, Noland failed to disclose the Signal and ProtonMail
8 accounts in response to direct questioning about the existence of any encrypted
9 communication platforms.

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

15 Finally, in August 2020, just as they were about to relatedly turn over their mobile
16 devices for imaging, the Individual Defendants deleted the Signal app from their phones in
17 F R R U G L Q D W H G I D V K L R Q \$ V D U H V X S O A W B E @ H A B L E T O H U
18 recover any of the Signal communications the Individual Defendants sent and received
19 between May 2019 and August 2020.

20 Based on all of this, the FTC now moves for the imposition of spoliation sanctions.
21 (Doc. 259) The motion is fully briefed (Docs. 276, 277) and neither side requested oral
22 argument. For the following reasons, the motion is granted. 7 K H , Q G L Y L G X D O '
23 systematic efforts to conceal and destroy evidence are deeply troubling and
24 over this action.

25 RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

26 This case concerns the business activities of SBH, a direct marketing program
27 that sells coffee products and other nutraceuticals through its online platform and network.
28 R I D I I L Q D D W O B at 12.) SBH is an unincorporated division of Success by Media

1 (Doc. 2282 at 1719, 2122.)

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

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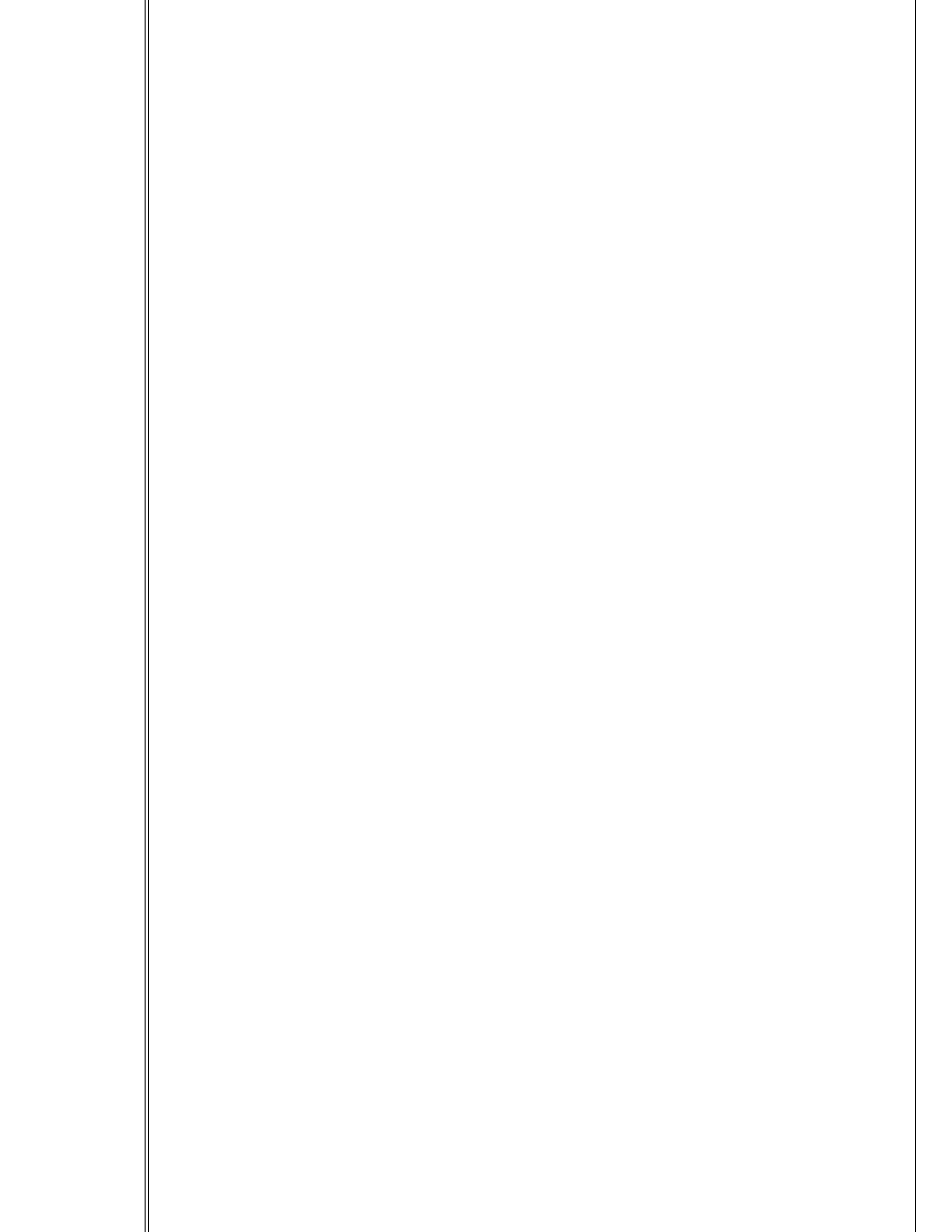
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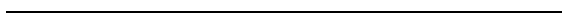
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(e)(1) would be sufficient to redress the loss.
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E \ D S U H S R R Q W H K U H D Q F I L C H H Q F H . *Morris Cerullo World Evangelism*,
104 F. Supp3d. 1040, 105253 (S.D. Cal. 2015) See also *Singleton v. Kernan*, 2018 WL
6 ' & D O ³ \$ S D U W \ V H H N L Q J V D Q F W L R Q V F R
the burden of establishing [spoliation of electronic records] by a preponderance of the
H Y L G H Q T H E C O U R T is the appropriate finder of fact on a Rule 37(e) motion.
Union v. Ameri-Can Freight Sys. Inc., 2020 WL 417492, *4 (D. Ariz. 2020) See also *Adriana*
, *Q W ¶ O & R U S* , 913 F.2d 1106, H Q W K & L U he 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 fact-

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and post-TRO. ' @

The Court concludes that the Individual ' H I H Q G D Q W V ¶ S G R V X B M D obligations arose on May 29, 2019. Z K H Q W K H) 7 & U H V S R Q G S H G a i W R by stating that 1 R O D Q G ³ D Q G W K R X D R P S 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 rejections 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 had 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.

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At any rate, the availability of sanctions under Rule 37(e)(2) does not turn on whether the, Q G L Y L G X D O presence of Douglas in May 2019 or January 2020. I W L V X Q W K V S W K W K L G X D O 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. Reasonable Foreseeability Of The Relevance Of The Signal And ProtonMail Messages

The FTC acknowledges that the relevance of the ESI cannot be definitively ascertained (because it no longer exists) but argues that, in such circumstances (such as those presented here), the relevance of the ESI cannot be definitively ascertained.

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dwindled to almost nothingThe 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 inference is that
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 D Q \ W K H Q J L W L Y H ´ D Q G
P D W W strains 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
3 X Q L Q V W D O O H G W I S S O L I E D O L R H Q M D J L S K S R U L R I C A L Y R K
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1 function on their phones. . [and it]takes,at most, only a few minutes to disengage the
2 auto-delete function on a cell phone. . . . Failure to follow [such] simple steps . . . alone is
3 sufficient to show that Defendants acted unreasonably. *Youngevity*, 2020 WL 7048687
4 D W 3 ' H I H Q G H D Q W R V S I U I H D Y L O Q W G H V W U X S F W R L Q R Q V E \ F B D P
5 disabling automatic deletion functions was not reasonable because they had control over
6 their text messages and should have taken affirmative steps to prevent their destruction
7 when they became aware of the deletion function. (Doc. 259 at 17.)

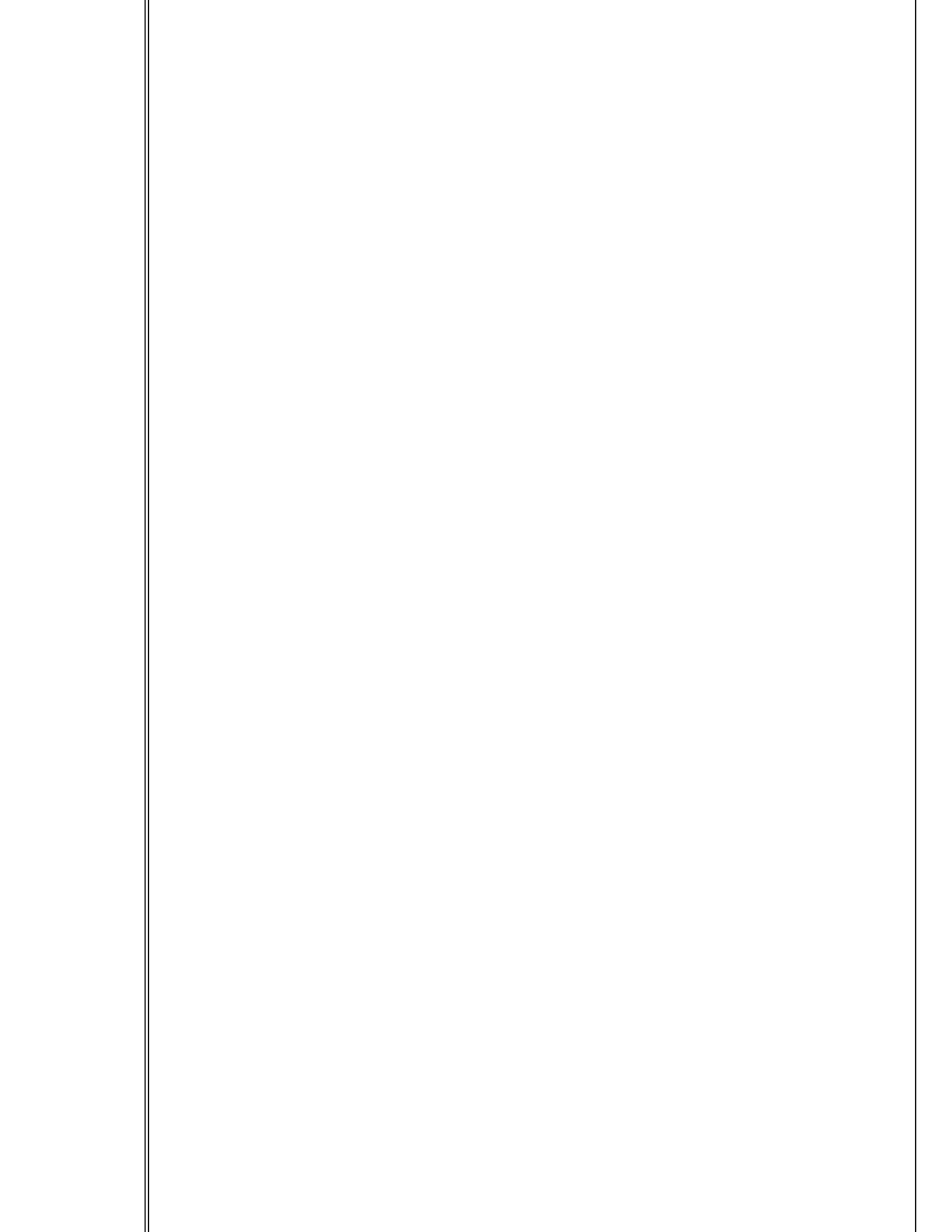
8 D. Replaceability

9 7 K H Q H [W X T Q G M W L S R O Z H H W K H U G W K F R O R U W 3 F D Q > @
10 R U U H S O D F H G W K U R X J K D G G L W L R Q D O G L V F R Y H U \ '
11 The FTC argues that the lost ESI is irreplaceable, because deletion of the
12 P H V V D J H V D Q G 6 L Q Q D Z O D S R 3 U H F R O M G M U X W S H A P U
13 W K H) 7 & D Q G , Q G L Y L G X D O ' H I H Q G D Q W V D U J X H W L I G D H Q W W L K H
14 missing materials, those efforts were unsuccessful. (Doc. 259 at 17.) The Individual
15 Defendants do not dispute these points. D F N Q R Z O W K O D M R U H Q V L F H [S H U V
16 W R U H F R Y H U W K H 6 L J Q D O R E S D W D D O O G F R X I O G Q R W
17 Defendants contacted 22 persons affiliated with SBH and asked them if they
18 any ProtonMail or Signal communications with the Individual Defendants. (Doc. 259
19 46-61.) The 10 responding parties reported that they did not have any ProtonMail or Signal
20 communications with the Individual Defendants on their devices. (at 49-59.)¹¹

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22 ¹¹ The Individual Defendants are in a position that they were using the auto-delete feature, and did not intentionally (or in
23 actuality) delete the ESI. (Doc. 259 at 49-59.)
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The Court finds that the lost messages cannot be restored or replaced through additional discovery.



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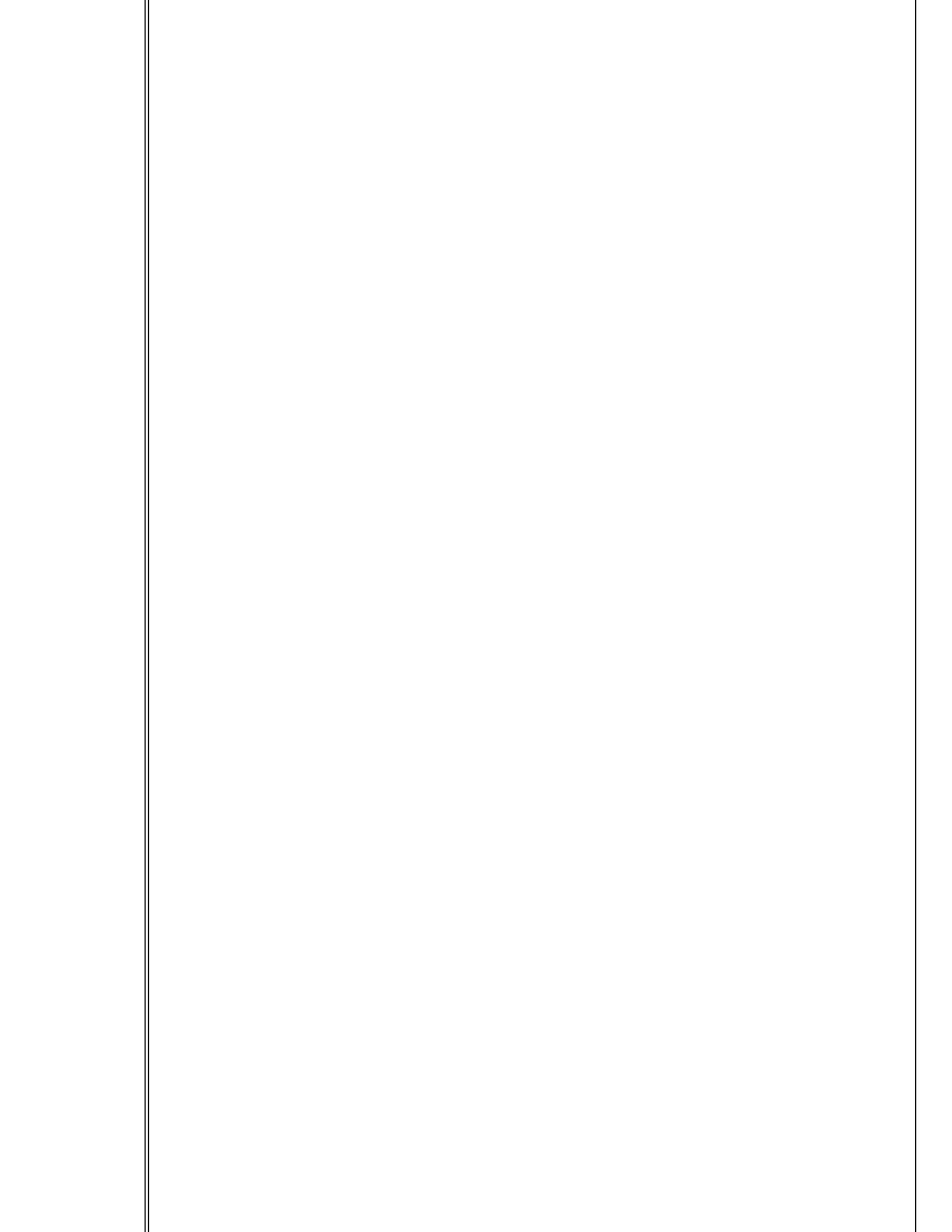
The plausibility of this explanation is further undermined by Noland's failure to disclose the existence of the Signal or ProtonMail accounts during his February 2020 deposition, despite being asked targeted questions on this exact topic. If such accounts was part of an innocuous effort to avoid hacking, Noland could have easily so. His failure to do so raises the inference that the motivation for creating the accounts was more nefarious. *Herzig v. Ark. Found. for Med. Care, Inc.*, 2019 WL 2870106, *5 (W.D.

1 it were not innocuous.

2 Finally, tKH FRRUGLQDWHG GHOWLRQ RI WKH 6LJQ
3 phones in August 2020, just as the phones were about turned over for imaging the
4 *pièce de résistance*. Notably, the Individual Defendants took this step without the
5 knowledge or approval of their counsel. This was an outrageous maneuver that raises a
6 strong inference of bad faith. *Cf. Ala. Aircraft Indus., Inc. v. Boeing Co.*, 319 F.R.D. 730,

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preliminary injunction issued . . . and that its employees began communicating with
' L Q J 7 D O N T V H S K H P H U D O W K V V S U H Q J L R H Q D W X U I H Q M I X Q F
these undisputed facts, the Court finds it appropriate to issue termination of F W L R G
Paisley Park Enterprises, 330 F.R.D. at 233³) D L O X W K U W Q R B X W E B K H
function] . . . alone is sufficient to show that Defendants acted unreasonably. But that i
not all the RMA Defendants did and did not do. Most troubling, they wiped and
destroyed their phones after Deliverance and RMA had been sued, and, in the seco
instance for Wilson, after the Court ordered the parties to preserve all relevant electron
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 fa
they needed to produce their text messages. As Plaintiffs note, had Staley and Wilson r
destroyed their phones, it is possible that Plaintiffs might have been able to recover the
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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
F R P P H Q F Accordingly, a general adverse inference is proper. *Moody v. CSX*
Transportation, Inc., 271 F. Supp. 3d 110, 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 74647 (same)

Finally, the Individual Defendants V X J J H V W W K D W W K L V P D W W H
W K U R X J K D Q K H Y D L U G L C B M V L D U D H W 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
S D U W L H V L Q U H O D W L R Q No Written Hearing is Required Under
circumstances *Cf. Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1164

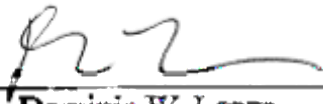
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of the possibility of sanctions when MPC filed its motions for costs. It was afforded the opportunity to respond, and did indeed do so by filing a responsive brief. Given that the issues were such that an evidentiary hearing would not have aided its 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 P R W L R Q I R U y a n t e F W L R

Dated this 30th day of August, 2021.



Dominic W. Lanza
United States District Court for the District of Columbia