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' REPLY IN SUPPORT OF MOTION TO COMPEL DOCUMENTS RELATED TO SPOLIATION

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600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-2222

INTRODUCTION

Amazon asks the Court to believe the unbelievable. Amazon claims there is "no evidence . . . that Amazon personnel used Signal to discuss the business practices at issue in this case." Opp. at 1. Yet Amazon's top executives—including its ultimate decisionmakers and the architects of the conduct at issue—used disappearing messages on Signal as a side channel to discuss Amazon's business throughout Plaintiffs' pre-Complaint investigation. Mot. at 2-3. When Amazon eventually imaged select Signal users' phones, it took over 2,900 screenshots showing more than 300 instances where disappearing messages were enabled or the timer setting was changed after Amazon was on notice of Plaintiffs' investigation. Opp. at 6, Ex. B.

There are two explanations for the record before the Court. The first is that Amazon's top executives used disappearing messages to discuss matters relevant to this action, among other business; they continued to do so after Amazon was on notice of Plaintiffs' investigation; and Amazon failed to preserve this evidence. Amazon's alternative explanation is that although senior leadership used Signal to discuss work-related matters for over two and half years, they somehow never used disappearing messages to discuss anything relevant to this action. Only one of these explanations is plausible.

There is nothing inherently problematic about using Signal, but a company's choice to use Signal does not alter the company's document preservation obligations during a government investigation or enforcement action. Like any other company document, Amazon was required to preserve potentially relevant Signal messages, including by instructing its employees to disable disappearing messages. *See Distribs., LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 977-79 (N.D. Ill. 2021) ("[D]isabling an autodeletion function is universally understood to be one of the most basic and simple functions a party must do to preserve ESI.").

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(202) 326-2222

Plaintiffs seek Amazon's preservation notices and instructions to understand whether Amazon adequately and timely instructed its employees to preserve Signal messages, which is directly relevant to the legal standard for spoliation. Mot. at 11. Amazon is withholding these documents as privileged, but Plaintiffs' Motion establishes a preliminary showing of spoliation that overcomes Amazon's privilege claims, and Plaintiffs' concerns cannot be addressed through other means. Accordingly, the Court should order Amazon to produce all documents responsive to RFP Nos. 25 and 27.

ARGUMENT

I. PLAINTIFFS HAVE MADE A PRELIMINARY SHOWING OF SPOLIATION.

Plaintiffs established a preliminary showing of spoliation in two independent ways.

First, Plaintiffs established that Amazon destroyed potentially relevant documents. *See Al Otro Lado, Inc. v. Wolf*, 2020 WL 4432026, at *2 (S.D. Cal. July 31, 2020); *United States v. Cmty. Health Network, Inc.*, 2023 WL 4761664, at *5 (S.D. Ind. July 26, 2023). Amazon argues that Plaintiffs were required to cite specific non-deleted Signal messages that are directly material to Plaintiffs' claims, *see* Opp. at 9-11, but that is incorrect. The law requires only "reason for concern that evidence has been lost." *Agne v. Papa John's Int'l, Inc.*, 2012 WL 12882903, at *3 (W.D. Wash. Feb. 6, 2012).

Even without considering any screenshots of non-deleted messages, the undisputed record and case law support a preliminary showing of spoliation. It is undisputed that some Amazon executives who used disappearing messages were "involved in the acts and decisions underlying" Plaintiffs' claims. Mot. at 2, 8; *see Cmty. Health Network*, 2023 WL 4761664, at *5. It is undisputed that those executives deleted Signal messages, depriving Plaintiffs and the Court of the ability to examine their contents. Ex. B; *see Al Otro Lado*, 2020 WL 4432026, at *2

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Washington, DC 20580
(202) 326-2222

("Because [a witness's] notes were destroyed, it is impossible for the Court to say whether defendants' subjective characterization of the notes as 'shorthand, non-substantive notes' that did not contain information relevant to this case is correct."). It is undisputed that those executives continued to delete Signal messages after Amazon received a preservation letter, after Amazon received a voluntary access letter, and after Amazon received a Civil Investigative Demand. Mot. at 8. Indeed, it is undisputed that Amazon executives kept deleting Signal messages after Amazon issued legal holds to them and after Amazon issued guidance about Signal in October 2020 and August 2021 (the details of which Amazon has withheld or redacted on privilege grounds). *Compare* Ex. B *with* Ex. D at 3-5 and Ex. M. From these facts, the Court can reasonably infer that Amazon destroyed potentially relevant documents and should conclude that Plaintiffs have made a preliminary showing of spoliation.

The three examples of Signal messages in Plaintiffs' Motion show that Amazon executives used Signal to discuss antitrust issues and for substantive business purposes, which is further reason for concern that evidence has been lost. The exchange between Peter Krawiec and Carlo Bertucci started two days after Mr. Krawiec received an email titled "Re: Congressional and FTC investigations into Amazon." Exs. H, S. Amazon claims the email has "nothing to do with" Plaintiffs' investigation, Opp. at 9, but that cannot be verified, because Amazon has withheld the email in its entirety. Ex. S. Regardless, the email's subject line also refers to a Congressional investigation, and it was sent days after the House Judiciary Committee issued a Request for Information to Amazon while investigating anticompetitive conduct.[1] Even if the September 2019 exchange between Mr. Krawiec and Mr. Bertucci concerned a Congressional

[1] *See* Request for Information to Amazon, H. Comm. on the Judiciary, 116th Cong. (Sept. 13, 2019), https://democrats-judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/amazon%20rfi%20-%20signed.pdf.

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Washington, DC 20580
(202) 326-2222

investigation rather than the FTC's investigation, it would support the conclusion that Amazon executives were deleting messages related to antitrust enforcement. *See* Exs. H, S.[2] So would the later August 2020 exchange, in which Mr. Bertucci sent a news article discussing antitrust enforcement against technology companies and Mr. Krawiec turned on disappearing messages. Exs. H, 18.

The other two examples cited by Plaintiffs show that Amazon executives were using Signal to discuss substantive business issues: one is a chat between former CEO of Worldwide Operations Dave Clark and Jeff Bezos discussing a contract with the U.S. Postal Service, Ex. I, and the other is a message to Mr. Bezos from Drew Herdener, then Vice President for Global Communications,[3] about press coverage of Amazon barring competing device makers from buying advertising on Amazon's online superstore. Exs. J, 19.

Plaintiffs' preliminary showing of spoliation is not speculative, unlike *Little Hocking Water Ass'n, Inc. v. E.I. du Pont de Nemours & Co.*, 2013 WL 5311292 (S.D. Ohio 2013). In that case, the plaintiff relied solely on gaps in the defendant's data production and some ambiguous 30(b)(6) testimony to argue that the court should infer data had been deleted, which the defendant disputed. *See id.* at 1-3. The court did not find a preliminary showing of spoliation on those facts, and instead directed the defendant to explain whether it could produce the requested data. *See id.* at 4-5. Here, there is no question that Amazon destroyed Signal messages during Plaintiffs' investigation. *See* Ex. B.

Second, Plaintiffs established a preliminary showing of spoliation by showing that Amazon did not take timely steps to adequately preserve Signal messages. *See Al Otro Lado*,

[2] Mr. Bertucci also deleted the Signal app (and all stored messages) from his phone after he received a document preservation notice for Plaintiffs' pre-Complaint investigation. *See* Ex. D at 6, Ex. 14 at 4-5.

[3] Drew Herdener, LinkedIn, https://www.linkedin.com/in/drew-herdener-3620b51 (last visited May 23, 2024).

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Washington, DC 20580
(202) 326-2222

2020 WL 4432026, at *2. Amazon was required to preserve potentially relevant information after receiving the FTC's preservation letter. *See, e.g.*, *Su v. United States Postal Serv.*, 2024 WL 21670, at *5 (W.D. Wash. Jan. 2, 2024) (letter notifying defendant of government investigation "triggered [defendant's] duty to preserve potentially relevant evidence"); *FTC v. F&G Int'l Grp. Holdings, LLC*, 339 F.R.D. 325, 330-31 (S.D. Ga. 2021) (similar). Amazon knew its executives were using Signal, given that Amazon's General Counsel had been using Signal to communicate with other Amazon executives since April 2019. Ex. B at 3. Despite that, Amazon is vague about when it claims its counsel first learned that Amazon executives used Signal for work-related communications. *See* Opp. at 4-5. If Amazon had conducted timely custodial interviews with any of the Signal users who Amazon placed under a legal hold, it would have identified the need to preserve Signal messages. But Amazon chose to delay even basic preservation due diligence until a year later. *See* Ex. D at 9-10; Opp. at 4.

Amazon cannot reasonably claim it believed documents held by its founder and CEO were not relevant to a government investigation into "whether [Amazon] has engaged or is engaging in unfair methods of competition, through anticompetitive or exclusionary conduct related to online retail sales and distribution." Ex. K at 1; *see Knickerbocker v. Corinthian Colls.*, 298 F.R.D. 670, 678 (W.D. Wash. 2014) (duty to preserve extends to "documents in the possession of employees who are 'key players' in the case."). Amazon understood the scope of Plaintiffs' investigation well enough to issue preservation notices to more than 100 other employees, *see* Ex. D at 5-9, and the broad scope of the investigation made it more likely, not less, that the company's ultimate decisionmaker would have potentially relevant information.[4]

[4] Amazon represents that Mr. Bezos was subject to legal holds for other matters before he received a hold for Plaintiffs' investigation. Opp. at 11. If Amazon took steps to preserve Mr. Bezos' Signal messages for other matters but not here, that highlights Amazon's failure to act in this case. If Amazon did not take steps to preserve Signal messages for other matters, Amazon's failure to meet its preservation obligations may extend beyond this case.

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All told, Amazon likely destroyed evidence by neglecting to interview hold recipients until over a year after it was on notice of Plaintiffs' investigation, neglecting to issue a legal hold to Mr. Bezos until April 2020, and not taking timely steps to preserve Signal messages. This establishes a preliminary showing of spoliation. *See, e.g.*, *In re Cathode Ray Tube Antitrust Litig.*, 2023 WL 5667882, at *3 (N.D. Cal. Jan. 27, 2023); *Al Otro Lado*, 2020 WL 4432026, at *2.

As an aside, Amazon suggests its Signal deletions are unimportant because it produced documents from other sources. *See* Opp. at 3, 14. A defendant's "contentions that plaintiffs have more than enough discovery to litigate this case" are "simply irrelevant to the issue now before the Court, which is whether [defendant's] hold letters should be produced in discovery." *Thomas v. Cricket Wireless, LLC*, 2021 WL 1017114, at *5 n.5 (N.D. Cal. Mar. 16, 2021). And candid messages from a secure backchannel between executives may be particularly relevant. *See Pable v. Chicago Transit Auth.*, 2023 WL 2333414 at *24 (N.D. Ill. Mar. 2, 2023) ("[R]eal-time, unguarded communications . . . utilizing an unsanctioned, end-to-end encrypted messaging application are irreplaceable.").

II. THE COURT SHOULD ORDER AMAZON TO PRODUCE ITS PRESERVATION NOTICES AND INSTRUCTIONS.

Amazon argues that it should not have to produce its preservation notices and instructions even if Plaintiffs make a preliminary showing of spoliation, but the case law Amazon cites is either inapplicable or supports Plaintiffs. *Shenwick* and *Allen* did not involve a preliminary showing of spoliation. *Shenwick v. Twitter, Inc.*, 2018 WL 833085, at *4 (N.D. Cal. Feb. 7, 2018); *Allen v. Purss*, 2022 WL 17733679, at *5 (D. Or. Dec. 16, 2022). The *Raynor*, *MedImpact Healthcare*, and *United Illuminated* courts found that the movants did not make a preliminary showing of spoliation, unlike here, and are further distinguishable. In *Raynor v. District of Columbia*, the only basis for the plaintiff's motion was the defendant's failure to

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(202) 326-2222

produce "a handful of documents." 2020 WL 13603997, at *1-2 (D.D.C. May 6, 2020). In *MedImpact Healthcare Sys. v. IQVIA, Inc.*, the primary basis for the defendants' motion was the plaintiffs' failure to produce six emails, the contents of which were "contained within larger email chains" in defendants' possession. 2022 WL 1694428, at *3 (S.D. Cal. May 26, 2022). And in *United Illuminating v. Whiting-Turning Contracting Co.*, the moving party agreed that "the names of the [hold] recipients would certainly be . . . meaningful on their own" during oral argument and failed to establish why the contents of the holds would be significant. Tr. at 36-39, No. 18-cv-327 (D. Conn. Oct. 29, 2020), Dkt. #272.

Cricket Wireless supports Plaintiffs' position. As Amazon notes, the court initially denied a motion to compel the production of legal holds, instead requiring a 30(b)(6) deposition about the defendant's preservation efforts. 2020 WL 7344742, at *2-3 (N.D. Cal. Dec. 14, 2020). But the plaintiffs later renewed their motion, alleging that the defendant's "witnesses either did not know, or were counseled not to answer, basic questions about what kinds and categories of information and documents were covered by the subject hold letters . . . and what specific actions Cricket employees were instructed to take regarding collection and preservation[.]" 2021 WL 1017114, at *4 (N.D. Cal. Mar. 16, 2021). The court granted that motion. *Id.* at *6. Plaintiffs have already sought corporate testimony on Amazon's preservation efforts; Amazon asserted privilege over and deliberately did not prepare its witness to answer questions about the contents of its legal holds. *See* Ex. O at 109:25-110:22, 111:18-112:15. Following *Cricket Wireless*, the Court should grant Plaintiffs' Motion.

The only case Amazon cites where a court found a preliminary showing of spoliation but did not order the production of preservation notices is *Community Health Network*. 2023 WL 4761664 at *10-11. The court denied the relator's motion to compel because the issue in that

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(202) 326-2222

case was the defendant's "failure to issue any litigation hold whatsoever—written or otherwise—to certain custodians," rather than the "scope or effectiveness of the hold notices." *Id.* at *10. Here, the contents of Amazon's preservation notices and instructions are the only way to answer key questions about whether Amazon took reasonable steps to preserve Signal messages, including whether Amazon directed employees to stop using disappearing messages and whether Amazon took any further preservation steps when its employees continued to do so.

III. IN CAMERA REVIEW IS NOT A SUBSTITUTE FOR THE PRODUCTION OF AMAZON'S PRESERVATION NOTICES AND INSTRUCTIONS.

Amazon suggests an *in camera* review as an alternative to producing responsive documents. *See* Opp. at 14-15. Amazon is mischaracterizing the type of *in camera* review some courts have employed in cases like this. In all three of the cases cited by Amazon, the court reviewed documents *in camera* to screen out any privileged material that did not relate to preservation issues, and then ordered the production of preservation-related materials. *See Cricket Wireless*, 2021 WL 1017114, at *6; Order Approving Special Master's Report & Recommendation at 2, *Cathode Ray Tube Antitrust*, No. 4:07-cv-5944-JST (N.D. Cal. Feb. 24, 2023), Dkt. #6166; *Al Otro Lado*, 2020 WL 4432026, at *3. Plaintiffs have no objection to an *in camera* review consistent with those cases.

CONCLUSION

The Court should grant Plaintiffs' Motion and order Amazon to produce all documents responsive to RFP Nos. 25 and 27.

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-2222

Dated: May 23, 2024

I certify that this brief contains 2,473 words, in compliance with LCR 7(e)(4), LCR 7(f)(4), and the Court's May 9, 2024 Order.

Respectfully submitted,

s/ Emily K. Bolles
SUSAN A. MUSSER (DC Bar # 1531486)
EDWARD H. TAKASHIMA (DC Bar # 1001641)
EMILY K. BOLLES (NY Reg. # 5408703)
KARA KING (DC Bar # 90004509)
ERIC ZEPP (NY Reg. #5538491)
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Tel.: (202) 326-2122 (Musser)
(202) 326-2464 (Takashima)
Email: smusser@ftc.gov
etakashima@ftc.gov
ebolles@ftc.gov
kking@ftc.gov
ezepp@ftc.gov

Attorneys for Plaintiff Federal Trade Commission

s/ Michael Jo
Michael Jo (admitted *pro hac vice*)
Assistant Attorney General, Antitrust Bureau
New York State Office of the Attorney General
28 Liberty Street
New York, NY 10005
Telephone: (212) 416-6537
Email: Michael.Jo@ag.ny.gov
Counsel for Plaintiff State of New York

s/ Rahul A. Darwar
Rahul A. Darwar (admitted *pro hac vice*)
Assistant Attorney General
Office of the Attorney General of Connecticut
165 Capitol Avenue
Hartford, CT 06016
Telephone: (860) 808-5030
Email: Rahul.Darwar@ct.gov
Counsel for Plaintiff State of Connecticut

s/ Alexandra C. Sosnowski
Alexandra C. Sosnowski (admitted *pro hac vice*)
Assistant Attorney General
Consumer Protection and Antitrust Bureau
New Hampshire Department of Justice
Office of the Attorney General
One Granite Place South
Concord, NH 03301
Telephone: (603) 271-2678
Email: Alexandra.c.sosnowski@doj.nh.gov
Counsel for Plaintiff State of New Hampshire

s/ Caleb J. Smith
Caleb J. Smith (admitted *pro hac vice*)
Assistant Attorney General
Consumer Protection Unit
Office of the Oklahoma Attorney General
15 West 6th Street, Suite 1000
Tulsa, OK 74119
Telephone: (918) 581-2230
Email: caleb.smith@oag.ok.gov
Counsel for Plaintiff State of Oklahoma

s/ Timothy D. Smith
Timothy D. Smith, WSBA No. 44583
Senior Assistant Attorney General
Antitrust and False Claims Unit
Oregon Department of Justice
100 SW Market St
Portland, OR 97201
Telephone: (503) 934-4400
Email: tim.smith@doj.state.or.us
Counsel for Plaintiff State of Oregon

s/ Jennifer A. Thomson
Jennifer A. Thomson (admitted *pro hac vice*)
Senior Deputy Attorney General
Pennsylvania Office of Attorney General
Strawberry Square, 14th Floor
Harrisburg, PA 17120
Telephone: (717) 787-4530
Email: jthomson@attorneygeneral.gov
Counsel for Plaintiff Commonwealth of Pennsylvania

s/ Michael A. Undorf
Michael A. Undorf (admitted *pro hac vice*)
Deputy Attorney General
Delaware Department of Justice
820 N. French St., 5th Floor
Wilmington, DE 19801
Telephone: (302) 683-8816
Email: michael.undorf@delaware.gov
Counsel for Plaintiff State of Delaware

s/ Christina M. Moylan
Christina M. Moylan (admitted *pro hac vice*)
Assistant Attorney General
Chief, Consumer Protection Division
Office of the Maine Attorney General
6 State House Station
Augusta, ME 04333-0006
Telephone: (207) 626-8800
Email: christina.moylan@maine.gov
Counsel for Plaintiff State of Maine

s/ Gary Honick
Gary Honick (admitted *pro hac vice*)
Assistant Attorney General
Deputy Chief, Antitrust Division
Office of the Maryland Attorney General
200 St. Paul Place
Baltimore, MD 21202
Telephone: (410) 576-6474
Email: Ghonick@oag.state.md.us
Counsel for Plaintiff State of Maryland

s/ Michael Mackenzie
Michael Mackenzie (admitted *pro hac vice*)
Deputy Chief, Antitrust Division
Office of the Massachusetts Attorney General
One Ashburton Place, 18th Floor
Boston, MA 02108
Telephone: (617) 963-2369
Email: michael.mackenzie@mass.gov
Counsel for Plaintiff Commonwealth of Massachusetts

s/ Scott A. Mertens
Scott A. Mertens (admitted *pro hac vice*)
Assistant Attorney General
Michigan Department of Attorney General
525 West Ottawa Street
Lansing, MI 48933
Telephone: (517) 335-7622
Email: MertensS@michigan.gov
Counsel for Plaintiff State of Michigan

s/ Zach Biesanz
Zach Biesanz (admitted *pro hac vice*)
Senior Enforcement Counsel
Office of the Minnesota Attorney General
445 Minnesota Street, Suite 1400
Saint Paul, MN 55101
Telephone: (651) 757-1257
Email: zach.biesanz@ag.state.mn.us
Counsel for Plaintiff State of Minnesota

s/ Lucas J. Tucker
Lucas J. Tucker (admitted *pro hac vice*)
Senior Deputy Attorney General
Office of the Nevada Attorney General
100 N. Carson St.
Carson City, NV 89701
Telephone: (775) 684-1100
Email: LTucker@ag.nv.gov
Counsel for Plaintiff State of Nevada

s/ Ana Atta-Alla
Ana Atta-Alla (admitted *pro hac vice*)
Deputy Attorney General
New Jersey Office of the Attorney General
124 Halsey Street, 5th Floor
Newark, NJ 07101
Telephone: (973) 648-3070
Email: Ana.Atta-Alla@law.njoag.gov
Counsel for Plaintiff State of New Jersey

s/ Jeffrey Herrera
Jeffrey Herrera (admitted *pro hac vice*)
Assistant Attorney General
New Mexico Office of the Attorney General
408 Galisteo St.
Santa Fe, NM 87501
Telephone: (505) 490-4878
Email: jherrera@nmag.gov
Counsel for Plaintiff State of New Mexico

s/ Zulma Carrasquillo-Almena
Zulma Carrasquillo (admitted *pro hac vice*)
Assistant Attorney General
Antitrust Division
Puerto Rico Department of Justice
P.O. Box 9020192
San Juan, Puerto Rico 00901-0192
Telephone: (787) 721-2900
Email: zcarrasquillo@justicia.pr.gov
Counsel for Plaintiff Commonwealth of Puerto Rico

s/ Stephen N. Provazza
Stephen N. Provazza (admitted *pro hac vice*)
Special Assistant Attorney General
Chief, Consumer and Economic Justice Unit
Department of the Attorney General
150 South Main Street
Providence, RI 02903
Telephone: (401) 274-4400
Email: sprovazza@riag.ri.gov
Counsel for Plaintiff State of Rhode Island

s/ Sarah L. J. Aceves
Sarah L. J. Aceves (admitted *pro hac vice*)
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609
Telephone: (802) 828-3170
Email: sarah.aceves@vermont.gov
Counsel for Plaintiff State of Vermont

s/ Gwendolyn J. Cooley
Gwendolyn J. Cooley (admitted *pro hac vice*)
Assistant Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, WI 53707-7857
Telephone: (608) 261-5810
Email: cooleygj@doj.state.wi.us
Counsel for Plaintiff State of Wisconsin