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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA,

SAN FRANCISCO DIVISION

IN RE GOOGLE PLAY STORE ANTITRUST LITIGATION

This Document Relates To:

Epic Games Inc. v. Google LLC et al., Case No. 3:20-cv-05671-JD

In re Google Play Consumer Antitrust Litigation, Case No. 3:20-cv-05761-JD

State of Utah et al. v. Google LLC et al., Case No. 3:21-cv-05227-JD

Match Group, LLC et al. v. Google LLC et al., Case No. 3:22-cv-02746-JD

Case No. 3:21-md-02981-JD

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SANCTIONS

Judge: Hon. James Donato

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TABLE OF CONTENTS

Page

I. Introduction 1

II. Background 2

A. Google's Chat Product 2

B. Google's Preservation Efforts 4

C. Procedural History 4

III. Argument 4

A. Google Took Reasonable Steps to Preserve Relevant Chats. 5

B. Plaintiffs Fail to Demonstrate That They Suffered Any Prejudice. 7

C. Plaintiffs Fail to Show that Google Intended to Deprive Plaintiffs of Information. 9

IV. Conclusion 10

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TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Apple, Inc. v. Samsung Elecs. Co.,
881 F. Supp. 2d 1132 (N.D. Cal. 2012) 6

CAT3, LLC v. Black Lineage, Inc.,
164 F. Supp. 3d 488 (S.D.N.Y. 2016) 10

Chinitz v. Intero Real Est. Servs.,
No. 18-cv-05623-BLF, 2020 WL 7389417 (N.D. Cal. May 13, 2020) 5

Colonies Partners, L.P. v. County of San Bernardino,
No. 5:18-cv-00420-JGB (SHK), 2020 WL 1496444 (C.D. Cal. Feb. 27, 2020) 10

Fast v. GoDaddy.com LLC,
No. CV-20-01448-PHX-DGC, 2022 WL 325708 (D. Ariz. Feb. 3, 2022) 10

FTC v. Qualcomm Inc.,
969 F.3d 974 (9th Cir. 2020) 2

Function Media, L.L.C. v. Google, Inc.,
No. 2:07–cv–279–CE, 2011 WL 4017953 (E.D. Tex. Sept. 9, 2011) 9

Glaukos Corp. v. Ivantis, Inc.,
No. SACV 18-620 JVS (JDEx), 2020 WL 10501850 (C.D. Cal. June 17, 2020) 6

John v. County of Lake,
No. 18-cv-06935-WHA(SK), 2020 WL 3630391 (N.D. Cal. July 3, 2020) 10

Leon v. IDX Sys. Corp.,
464 F.3d 951 (9th Cir. 2006) 7

Lokai Holdings LLC v. Twin Tiger USA LLC,
No. 15cv9363 (ALC) (DF), 2018 WL 1512055 (S.D.N.Y. Mar. 12, 2018) 8

Matthew Enterprise, Inc. v. Chrysler Group LLC,
No. 13-cv-04236-BLF, 2016 WL 2957133 (N.D. Cal. May 23, 2016) 8

Sanchez v. Jiles,
2012 WL 13005996 (C.D. Cal. June 14, 2012) 7

Small v. Univ. Med. Ctr.,
No. 2:13-cv-0298-APG-PAL, 2018 WL 3795238 (D. Nev. July 31, 2018) 5

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857 F.2d 600 (9th Cir. 1988) 7

DOCKET ALARM
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WeRide Corp. v. Kun Huang,
No. 5:18-cv-07233-EJD, 2020 WL 1967209 (N.D. Cal. Apr. 24, 2020).....6, 10

Youngevity Int'l v. Smith,
No. 3:16-cv-704-BTM-JLB, 2020 WL 7048687 (S.D. Cal. July 28, 2020).....9

FEDERAL RULES

Fed. R. Civ. P. 37 .....1, 5, 7, 9

Fed. R. Civ. P. 37, Comment (2015).....6

Fed. R. Civ. P. 37(e)..... 1, passim

Fed. R. Civ. P. 37(e)(1) 2, 5

Fed. R. Civ. P 37(e)(2) 2, 5, 9

Fed. R. Civ. P. 37(e) & Comment (2015) 1, 5

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I. INTRODUCTION

Google fully complied with its discovery obligations by taking robust steps to preserve relevant chats, including by issuing litigation hold notices regarding chat preservation and automatically preserving certain categories of chats. As a result of its efforts, Google has produced thousands of chats and *millions* of other documents in this litigation.

Plaintiffs disregard Google's preservation efforts and contend that Google is required to automatically preserve every chat from every custodian, regardless of relevance. But that is not the law; Rule 37 requires "reasonable steps" not "perfection." Adv. Comm. Notes to 2015 Amend. of Fed. R. Civ. P. 37(e). Nor do Plaintiffs show that Google acted with the "intent to deprive" Plaintiffs of information in this litigation—a prerequisite for imposing the extreme sanction of an adverse inference instruction. To the contrary, Google's efforts to preserve and produce chats and other information dispel any notion that Google sought to deprive Plaintiffs of evidence. The Court should deny this meritless motion.

First, Google took reasonable steps to preserve relevant ESI. Google automatically preserved relevant employees' emails, custodial documents, and certain categories of chats. In addition, Google issued timely litigation hold notices and reminders to custodians regarding the preservation of chats. As a result of these efforts, Google has produced over *3.1 million* documents in this litigation, including 3,084 relevant chats from a collection of over 176,000 chats. Plaintiffs appear to contend these efforts were not just inadequate, but also *irrelevant*—that Google was subject to a *per se* rule requiring preservation of *every chat* by every custodian. Mot. at 6. That is not the law, and Plaintiffs do not cite any case establishing this purported *per se* rule.

In fact, Rule 37(e) "does not call for perfection," and recognizes that "reasonable steps to preserve suffice." Adv. Comm. Notes to 2015 Amend. of Fed. R. Civ. P. 37(e). As deposition testimony in this case confirms, unlike emails, chats are typically used by Google employees to discuss *non-substantive* issues and coordinate simple logistics, such as employees' availability for meetings or video calls. In light of this fact, Google reasonably relied on a combination of litigation hold instructions regarding chats and automatic preservation for some categories of chats (as accurately described in Google's retention policy, contrary to Plaintiffs' selective misquoting).

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