2. An order from the District of Arizona granting a request from the FTC for spoliation sanctions and an adverse inference based on spoliation of evidence from email and messaging applications used to hide evidence from the FTC.

In *F.T.C. v. Noland*, 2021 WL 3857413 (D. Ariz. Aug. 30, 2021), U.S. District Judge Dominic W. Lanza granted the FTC's motion for spoliation sanctions against defendants, Success By Health (SBH) and members of SBH's leadership team (the Individual Defendants), and granting the FTC's request for an adverse inference based on the Individual Defendants' intentional spoliation of evidence from email and messaging applications used to hide evidence from the FTC.

The FTC alleged that SBH operated as an illegal scheme and that the Individual Defendants made false statements to SBH's affiliates. *Id*. at *1. After the FTC issued a subpoena to Wells Fargo seeking individual defendant James Noland's and SBH's financial information, Wells Fargo inadvertently disclosed the subpoena to Noland on May 15, 2019. *Id*. at *2. On May 16, one day after receiving the subpoena, Noland invited one of the other Individual Defendants, Scott Harris, and the SBH Leadership Council to download Signal, a mobile messaging application that emphasizes user privacy. It was undisputed that Noland and the other Individual Defendants began using Signal for the first time that same day. The Individual Defendants also began encouraging other SBH employees and affiliates to install Signal and turned on the auto-delete function to ensure that messages exchanged were not preserved. Around the same time he began using Signal, Noland began using and encouraging SBH employees and affiliates to use ProtonMail, a Switzerland-based encrypted email service that similarly emphasizes user privacy.

A few days after beginning to use Signal and ProtonMail, Noland contacted the FTC through his attorney and offered to cooperate with its investigation. The FTC responded that while it had no present requests, Noland and the company should suspend any ordinary-course destruction of documents, communications, and records. The Individual Defendants instructed one another and other SBH employees and affiliates to continue using Signal and ProtonMail for sensitive or important items throughout the remainder of 2019. *Id*. at *3. Some unencrypted text messages simply referenced "Signal" or "ProtonMail" or directed recipients to check one or the other.

The FTC initiated the present action on January 8, 2020, and moved for an *ex parte* temporary restraining order (TRO) on the same day, which the court granted. The court additionally appointed a receiver of SBH and affiliated entities. The TRO instructed the Individual Defendants to deliver documents related to SBH and affiliated entities to the receiver and to turn over keys, codes, usernames, and passwords necessary to obtain access to assets or documents pertaining to these entities.

Noland participated in a deposition on February 5, during which he failed to disclose the existence of his Signal and ProtonMail accounts when asked whether he had ever used encrypted communications to conduct SBH business. Later, in their initial discovery responses pursuant to the court's Mandatory Initial Discovery Pilot Project, the Individual Defendants again failed to disclose the existence of Signal or ProtonMail messages.

Noland sent an email on May 29 from his ProtonMail account to a redacted individual that the FTC claimed was the previous director of sales for SBH, Robert Mehler. *Id*. at *4. Noland asked Mehler to solicit declarations from SBH affiliates and prepare a list of information they should

include in their declarations. After sending this email, Noland deleted it without disclosing it to the FTC, and the email came to the FTC's attention only months later via an anonymous SBH affiliate. Later, just prior to providing their cell phones to be imaged, the Individual Defendants deleted the Signal app from their phones without the knowledge of their counsel, the receiver, or the FTC. The deletion of the app resulted in a total inability for the parties or outside forensic experts to recover the contents of the Signal messages.

The FTC eventually learned about the Individual Defendants' use of Signal but not before the Individual Defendants produced discovery that included Excel spreadsheets containing text message communications through the app WhatsApp. Notably, all communications between Noland and SBH leadership in their WhatsApp thread ceased around the time the Individual Defendants began using Signal and ProtonMail, after averaging 10 to 21 messages per day from 2017 to that point. Noland and other individual members of SBH leadership also exchanged thousands of text messages through iOS between 2017 and May 2019, when Noland invited the SBH leadership to install Signal. The FTC asserted that the WhatsApp and iOS messages from prior to their use of Signal reveal that the Individual Defendants and associates discussed relevant matters on those platforms prior to their switch to Signal and ProtonMail. *Id*. at *5.

On October 30, 2020, counsel for the Individual Defendants sent a letter to 22 SBH employees or affiliates seeking their Signal and ProtonMail communications with the Individual Defendants on relevant topics after they became aware of the unavailability of the Individual Defendants' messages and emails. Only 10 responded, and each stated he or she did not have messages or emails to produce, in part due to Signal's auto-delete feature or because they suspended or cleared their ProtonMail accounts.

In depositions taking place in December 2020, Individual Defendants admitted that Noland installed Signal in May 2016 and around that time asked other Individual Defendants to install it as well. One of the other Individual Defendants admitted that Noland informed him about receiving the FTC subpoena in May 2019, and several Individual Defendants admitted to deleting Signal from their phones just before imaging as part of a coordinated plan.

Judge Lanza began his analysis with Federal Rule of Civil Procedure 37(e). Judge Lanza first examined whether ESI was lost, stating that while it was undisputed that the Individual Defendants deleted the Signal app and messages and that they used Signal to communicate about SBH business, the parties disagreed about the precise mechanism by which the Signal messages were lost. The Individual Defendants raised Signal's auto-delete feature that deleted messages shortly after being read by the recipient. The FTC considered this explanation "implausible" in part due to the fact that this explanation was provided weeks after the Individual Defendants admitted to deleting the Signal apps but also irrelevant as the Individual Defendants still caused the ESI to be lost. Citing the Sedona Conference's Primer on Social Media, Judge Lanza agreed with the FTC for purposes of the threshold inquiry, stating that the precise mechanism did not matter, just that the Signal ESI was lost. *Id*.; see Sedona Conference, *The Sedona Conference Primer on Social Media, Second Edition*, 20 Sedona Conf. J. 1, 90-91 (2019).

Judge Lanza similarly concluded that ProtonMail ESI was lost. *Id*. at *8. At a meet-and-confer conference and later in their response to the FTC's motion for sanctions, the Individual Defendants' counsel admitted that a May 2020 email from Noland's ProtonMail account that the

FTC had previously uncovered was not produced because Noland had deleted it. The parties disagreed on the volume of emails lost, but Judge Lanza concluded that it was undisputed that at least this one email was lost.

Judge Lanza then examined whether there was a duty to preserve the lost ESI. He stated that under Rule 37(e), sanctions are available only if the loss of ESI occurred at a time when litigation was pending or reasonably foreseeable, and the ESI was foreseeably relevant. He explained that in the Ninth Circuit, litigation is reasonably foreseeable when parties have some notice that the documents were potentially relevant to the litigation before they were destroyed. Judge Lanza added that this was an objective, fact-specific standard. He stated that the mere existence of a potential claim did not trigger the duty to preserve documents, nor did litigation have to be imminent or probable without significant contingencies.

The FTC argued that the Individual Defendants' duty to preserve ESI arose in May 2019 when they became aware of the FTC's investigation, or alternatively in January 2020 when they were served with the TRO. The FTC argued that, at minimum, the Individual Defendants violated their post-TRO preservation obligations to at least preserve pre-TRO messages that were still available. The Individual Defendants argued that when they learned about the investigation in May 2019, they believed that the investigation had concluded. They did not address continuing to delete Signal messages and ProtonMail emails after the TRO and preliminary injunction were entered.

Judge Lanza held that the Individual Defendants' document preservation obligations arose in May 2019 when the FTC emailed Noland's counsel stating that Noland and the company should suspend any destruction of documents, communications, and records in the ordinary course of business. *Id*. at *9. Judge Lanza found that Noland's subjective belief that the FTC's rejection of his offer to cooperate signaled the close of the investigation against him was not objectively reasonable. He elaborated that Noland was aware that the FTC had recently subpoenaed his bank records and requested the suspension of document destruction and that he was still subject to a consent order arising from a previous FTC enforcement action. Judge Lanza also stated that the availability of Rule 37(e) sanctions did not hinge on whether the duty to preserve arose in May 2019 or January 2020.

Judge Lanza found that the FTC carried its burden of showing the reasonable foreseeability of the relevance of the Signal and ProtonMail messages. The FTC argued that the Individual Defendants could not assert a presumption of irrelevance of the lost ESI, although its relevance could not be ascertained. Further, it was undisputed that the deleted messages included discussion of relevant matters and that the Individual Defendants did not get to pick the evidence they believed to be relevant and destroy the rest. The Individual Defendants argued that most of the missing ESI was irrelevant, consisting of identities and contact lists of the individuals with whom they communicated, and, post-TRO, the overwhelming majority of evidence was public. Judge Lanza was more persuaded by the FTC's arguments, noting admissions that Signal was used to discuss SBH matters and that parties that deleted documents were not entitled to a presumption of irrelevance as to those documents.

Judge Lanza bolstered his conclusion by pointing to the deleted ProtonMail email and stated that it was reasonable to infer that other relevant information was discussed on Signal and ProtonMail. The communications produced from prior to May 2019 showed that the Individual Defendants

discussed relevant matters on other messaging platforms before learning that they were under investigation by the FTC and switching to Signal and ProtonMail. Judge Lanza observed that it "strained credulity" to infer that the Individual Defendants simply stopped communicating about anything related to their business on any text-messaging platform when they installed an encrypted messaging service for the purpose of discussing "anything sensitive" and "important matters."

Judge Lanza next briefly discussed areas in which the parties were in agreement. First, the parties agreed that the Individual Defendants failed to take reasonable steps to preserve the deleted communications. Judge Lanza added that this conclusion was true regardless of whether the messages were lost due to intentional deletion, intentional use of an auto-delete function, or a combination of the two. Judge Lanza then stated that based on the agreement of the parties, the court found that the lost discovery could not be restored or replaced through additional discovery. *Id*. at *11. Judge Lanza also noted that Rule 37(e)(2) did not require a finding of prejudice to another party from loss of the information. However, Judge Lanza addressed potential prejudice when discussing the appropriate sanction.

Next, Judge Lanza found that the FTC "easily carried its burden of showing that the Individual Defendants acted with the intent to deprive the FTC of the information contained" in the missing discovery. *Id*. at *12. Judge Lanza stated that the "most decisive factor" was the timing of the installation of Signal and ProtonMail. The Individual Defendants argued that they switched to Signal in May 2019 for the "innocent reason" of avoiding the infiltration efforts of a former SBH employee. The FTC argued in response that there were no discussions raising concerns about such efforts leading up to the switch to Signal, nor was this raised when discussing the move to Signal itself. Judge Lanza described the argument that this timing was a coincidence as "incredible," considering they installed the applications a single day after Noland found out the FTC was investigating him and SBH. Further, there was no evidence at this time that their chats were being hacked other than the Individual Defendants' testimony.

Judge Lanza rejected Noland's explanation regarding the failure to disclose the ongoing use of Signal and ProtonMail during his February 2020 deposition, namely that he attempted to do so but was cut off by the FTC's counsel. Judge Lanza stated that Noland's explanation was not plausible, as he was asked targeted questions regarding the existence of these accounts and could reasonably infer from his conduct that the true motivation was more nefarious. *Id*. at *13. Judge Lanza went on to say that the contents of the ProtonMail email from May 2020 that the FTC "lucked into" discovering suggested that they were attempting to shape the testimony of third-party witnesses.

The Individual Defendants argued that deleting the Signal app in August 2020 was justified to conceal the names of individuals who were donating to their legal defense from the FTC. *Id*. at *12. Judge Lanza did not find this relevant, as Noland had testified that Signal was set to auto-delete messages that would prevent the FTC from finding this out anyway. In addition, the justification as stated did not entitle the Individual Defendants to delete Signal altogether.

Judge Lanza then raised the FTC's request for an adverse inference that the spoliated evidence be presumed unfavorable to the Individual Defendants. *Id*. at *14. The Individual Defendants argued that the motion related more to the credibility of witnesses as opposed to the loss of potentially relevant evidence, so the FTC's interests could be vindicated through cross-examination rather than an adverse inference. They further argued that prejudice was minimal because most of the

evidence in the case was public or in the FTC's possession. Judge Lanza held that because the Individual Defendants' conduct violated both Rule 37(e) and the preliminary injunction, the adverse inference was warranted under Rule 37(e)(2). He found that the destroyed evidence was likely relevant and that some courts would allow even stronger sanctions. Judge Lanza further rejected the Individual Defendants' argument that this matter would be better addressed through an evidentiary hearing, as they did not identify the evidence they would submit during such a hearing or how it would differ from the evidence already submitted by the parties regarding the FTC's motion. *Id*. at *15.