UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ORACLE AMERICA, INC., ET AL.,

Plaintiffs,

v.

HEWLETT PACKARD ENTERPRISE COMPANY,

Defendant.

Case No.16-cv-01393-JST (EDL)

ORDER DENYING HPE'S MOTION FOR SANCTIONS

Defendant Hewlett Packard Enterprise Company ("HPE") moves for sanctions against Plaintiff Oracle America, Inc. ("Oracle") under Rule 37(e), for spoliation of electronically stored information ("ESI"). HPE argues that Mark Hurd, Oracle's Co-Chief Executive Officer, violated his duty to preserve evidence about the reasons that Oracle's customers decided to cancel their Oracle support contracts, which HPE contends would support its defense that customers defected from Oracle due to dissatisfaction with Oracle rather than HPE's improper provision of Oracle support patches. HPE seeks a permissive adverse inference jury instruction or that it be allowed to present evidence and argument to the jury concerning the spoliation and the likely relevance of the destroyed evidence. Because HPE has not shown that any documents were lost that could not be restored or replaced through additional discovery as Rule 37 requires before imposing such sanctions, the Court **DENIES** HPE's motion.

I. BACKGROUND

Oracle distributes hardware and software systems and provides support services related to those systems. Dkt. 305, Second Amended Complaint ("SAC") ¶ 2. The support software is copyrighted and is available for purchase and download from Oracle's password-protected

customer support website. Id. ¶ 3. HPE also distributes hardware and software systems. Id. ¶ 1. It offers support services to customers running Oracle systems, "often as part of a 'multivendor' support solution [("MVS")] that includes support for the customer's servers from other manufacturers." Id. ¶ 4. HPE has subcontracted with other entities, including third-party-maintainer ("TPM") TERiX Computer Company, Inc. ("Terix"), "to provide all or some of the support services for [its] customer's Oracle servers." Id.

On September 6, 2010, Oracle announced that Mark Hurd was its new Co-President. Dkt. 652-2, Samplin Decl. Ex. A, Oracle's Cross-Complaint against HPE in Itanium, ¶ 8. Hurd had previously been the CEO of HPE, but was removed by HPE's board in August 2010. Id. ¶ 7.

On June 15, 2011, HPE filed suit against Oracle, alleging that Oracle impermissibly stopped making its software available on HPE servers in order to harm HPE and advantage Oracle's server business ("Itanium"). Oracle asserted cross-claims based on alleged harm to its own server and support businesses.

In July 2013, Oracle sued Terix for copyright infringement (the "Terix Litigation"), asserting that Terix sold hardware and software support services that included the provision of software patches, updates, and bug fixes for Oracle's proprietary Solaris operating system and related system firmware used on Oracle's Sun-branded computers (collectively, "Solaris Updates") in violation of Oracle's copyrights. SAC ¶ 1. Terix ultimately stipulated to judgment in favor of Oracle. On May 6, 2015, Oracle approached HPE about entering a tolling agreement in connection with the subject matter of this case. Dkt. 651-6. The parties agreed that a tolling would be effective as of that date.

On March 22, 2016, Oracle sued HPE, arguing that HPE violated its property rights through its partnership with Terix. Oracle also alleges that HPE had direct services relationships with at least one customer, for which it "unlawfully obtained Solaris Updates and firmware updates." Id. ¶ 52.

Oracle alleges that HPE's wrongful conduct caused Oracle to lose profits from sales of support services and/or licenses for Oracle software programs to current and potential Oracle customers. Id. ¶ 57. Oracle also alleges that it suffered the loss of hardware sales because, by

displacing Oracle as customers' support service provider, HPE was better positioned to replace Oracle's servers with servers manufactured by HPE. Id. ¶ 57. HPE counters that Oracle's customers instead switched to HPE due to Oracle's noncompetitive pricing and inferior products. Dkt. 226-4, 380.

II. PROCEDURAL HISTORY OF CURRENT DISPUTE

On October 3, 2017, the parties filed a joint letter brief that included, among other issues, HPE's assertion that Oracle's discovery responses were missing documents from Hurd. Dkt. 353-23. As evidence, HPE pointed out that some of the documents produced by other Oracle custodians should also have been a part of the collection from Hurd, but Oracle had not produced them from Hurd. Additionally, some of the documents Oracle produced from other custodians suggested that additional relevant documents existed that Oracle had not produced at all. HPE also sought to depose Hurd about several issues including: his knowledge of Oracle's hardware sales; his meetings with key customers about their decisions to leave Oracle and later return to Oracle; documents Hurd wrote in which he appeared to concede that customers' reasons for leaving Oracle were unrelated to HPE; Hurd's knowledge of whether HPE was using Terix to steal Oracle's intellectual property during the time that Hurd worked for HPE; Hurd's monthly meetings regarding Oracle's support operations; Hurd's role in driving the sales of Oracle's hardware with support contracts attached; and Hurd's competitive analysis of the TPM market. But HPE did not ask to depose Hurd regarding his preservation of documents.

On October 16, 2017, the Court ordered Oracle to provide HPE with a declaration describing its efforts to search Hurd's collections. The Court ordered Oracle to address why it had not produced documents from Hurd's collection that appeared in Oracle's production from other custodians and why it had not produced documents that, based on other produced documents, appeared to exist. Dkt. 394. Because Hurd is an "apex" executive of Oracle, the Court granted HPE permission to depose Hurd only on topics for which HPE had shown that it was likely that Hurd had unique knowledge. The Court ruled that HPE had made the requisite showing to depose Hurd about customers' rationales for leaving Oracle, but not about the general management of the support operations or knowledge of intellectual property theft, if any, at HPE.

On October 23, 2017, Christopher Campbell, outside counsel for Oracle, filed a declaration describing Oracle's efforts to search Hurd's documents. Dkt. 420-4. Campbell stated that Hurd had been a document custodian in the Terix litigation and in this litigation and that his document collections were searched in both cases. Campbell's explanation for the fact that some documents appeared to be missing was that they preceded the time when the duty to preserve arose. Campbell specifically searched for documents related to Hurd's meetings with Comcast, but did not uncover any.

On March 21, 2018, the parties filed another joint letter brief, in which HPE accused Hurd of blatantly disregarding his document preservation obligations. In turn, Oracle argued that HPE was inventing problems with Hurd's production in order to force Oracle to abandon other discovery disputes. Oracle noted that HPE had not asked Hurd about his document retention policies at his deposition on December 12, 2017. The Court was frustrated by the harsh rhetoric used by both parties, but especially by Oracle, and issued an order admonishing Oracle and instructing the parties to adhere to the Northern District of California's Guidelines for Professional Conduct and stop using discovery motion practice as an exercise of "tit for tat" retaliation. Dkt. 516. The Court also ordered Oracle to file a second declaration that would, "to the extent possible, comply with the Court's direction to address why the documents in question were not produced, [and] explain[] what happened to the documents in question, i.e., whether they were deleted and if so how and when, rather than simply dispute whether they were required to be preserved." Id. The Court also directed HPE to file a noticed motion if it wished to pursue the question of spoliation, as required by the Court's standing order on discovery procedures. See Dkt. 93.

On April 10, 2018, Jeffrey Ross, Assistant General Counsel for Oracle, filed a declaration to supplement Campbell's October 23, 2017 declaration. Dkt. 517-4. Ross explained that, for some of the email chains that HPE identified as missing, Oracle had produced versions from Hurd's collection that were more comprehensive than the email chain produced by another custodian or had not produced the email chain from Hurd's collections because Oracle had produced a version of the chain containing attachments that were not in Hurd's collections. For

other documents, Ross stated that they must have been deleted at some point. Ross stated that he had provided Hurd with copies of the documents in question to determine if he recalled them, but Hurd did not remember how or when they were deleted. Oracle confirmed, through a separate declaration from Jeff Dalton, Senior Manager of Enterprise Operations at Oracle, that that there had not been any system-wide issues to cause the deletions. Dkt. 518. Dalton explained that, because Oracle's email system does not track or record when emails are deleted, Oracle could not determine when the deletions occurred.

On June 5, 2018, HPE filed this motion for sanctions under Rule 37(e). On June 11, 2018, the Court granted the parties' request to continue the hearing and extend the briefing schedule so that the parties could focus on their motions for summary judgment and the hearing on those motions. The Court held a hearing on this motion on August 7, 2018.

III. TIMELINESS

The Civil Local Rules for the Northern District of California provide that a motion for sanctions "must be made as soon as practicable after the filing party learns of the circumstances that it alleges make the motion appropriate." Civil L.R. 7-8(c). See Adobe Sys. Inc. v. Software Tech, No. 5:14-CV-02140-RMW, 2015 WL 4940899, at *3 (N.D. Cal. Aug. 19, 2015) (holding that motion for sanctions was timely when filed less than one month after receiving relevant discovery responses).

Oracle argues that HPE's motion is untimely because HPE first identified the issues raised in this motion in May 2017 and had all the information it needed to file its motion on April 10, 2018, yet waited until June 5, 2018 to do so. HPE argues that its motion is timely because, after receiving Oracle's declarations on April 10, 2018, it hoped to resolve the matter without further Court intervention and resorted to filing a motion for sanctions only after it became clear that Oracle had no intention of meeting and conferring in good faith.

HPE's approximately two month delay was reasonable in light of the Court's admonishment that the parties should attempt to cooperate. Moreover, Oracle and HPE both filed motions for summary judgment in late February and the parties spent April and May responding to each other's motions and filing their own replies. Accordingly, it was not unreasonable for HPE

to file its motion in early June.

IV. RULE 37 SPOLIATION

Rule 37(e) provides:

> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is *lost* because a party failed to take reasonable steps to preserve it, and *it cannot be restored or replaced* through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e) (emphasis added).

HPE argues that Hurd failed to preserve, as a custodian, documents of which he was the author or a recipient, that were produced from other custodians. In total, Hurd failed to preserve 235 electronic documents, which, when including attachments to emails as well as the emails themselves, amounted to just over 500 documents. These include some documents about the reasons that customers at issue cancelled their Oracle support contracts, which HPE wants to rebut Oracle's contention that HPE harmed Oracle by luring its customers away with the promise of free support patches. See Dkt. 588-9, Samplin Decl. ¶¶ 3-4. HPE seeks a permissive adverse inference instruction under Rule 37(e)(2)(B) on the basis that Oracle and Hurd destroyed the evidence with the intent to deprive HPE of the opportunity to use the information in this litigation. In the alternative, as a remedy to the alleged prejudice that HPE has suffered due to the loss of ESI under Rule 37(e)(1), HPE seeks to present evidence and argument to the jury concerning the loss of ESI and its likely relevance, together with a jury instruction allowing consideration of this evidence and argument.

Oracle responds that HPE is not entitled to sanctions because the allegedly missing documents were created before Hurd had a duty to preserve them, and HPE has not identified any documents that are "lost" within the meaning of Rule 37. It also argues that HPE cannot show any prejudice as a result of the deletion or that it had any intent to deprive HPE of the use of the

information for litigation.

Rule 37(e) essentially functions as a decision tree. The threshold inquiry is whether ESI has been "lost," which in turn requires a showing (a) that discoverable ESI existed when a duty to preserve arose but was not preserved due to a party's negligent failure to take reasonable steps to preserve it *and* (b) that it cannot be restored or replaced. Only if this threshold requirement is met can the court proceed to impose non-dispositive measures to cure any resulting prejudice. HPE seeks the most severe of such potential measures under this prong of Rule 37: allowing it to present evidence to the jury regarding the lost information and its likely relevance. See Fed. R. Civ. P. 37 advisory committee's note (2015) (noting that "serious measures" including "permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument" may be necessary in appropriate cases).

The more severe sanction that HPE seeks of a permissive adverse inference instruction is only available on an even stronger showing that not only was ESI lost, but also that the loss was caused by the party's intent to deprive its adversary of the information for use in the litigation. In essence, proof of that illicit motive establishes that the ESI's loss was not merely negligent or even grossly negligent, but an intentional effort to keep the ESI from the opposing party, and therefore prejudice is reasonably inferred. Because the threshold issue of whether ESI that should have been preserved was "lost" is dispositive here, the Court does not reach the issues of intent or alternatively of prejudice.

A. Duty to Preserve

"As soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action." In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1067 (N.D. Cal. 2006).[1] "[T]he duty to preserve arises not only

[1] Although the current version of Rule 37(e) is relatively recent, the duty to preserve evidence in anticipation of litigation that it includes is not new. Rather, it is based on the common-law rule that "potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable, which many court decisions had already established." Fed. R. Civ. P. 37(e) advisory committee's note (2015).

during litigation, but also extends to the period before litigation when a party should reasonably know that evidence may be relevant to anticipated litigation." Compass Bank v. Morris Cerullo World Evangelism, 104 F. Supp. 3d 1040, 1051 (S.D. Cal. 2015) (citing Patton v. Wal–Mart Stores, Inc., 2013 WL 6158467, at *6 (D. Nev. Nov. 20, 2013)). However, "a general apprehension of lawsuits [over a particular product] does not create a duty to preserve all documentation related to [that product]." Realnetworks, Inc. v. DVD Copy Control Ass'n, Inc., 264 F.R.D. 517, 526 (N.D. Cal. 2009). Rather, when "litigation is 'reasonably foreseeable' is a flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry." Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311, 1320 (Fed. Cir. 2011) (quoting Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)). For example, in Apple Inc. v. Samsung Elecs. Co., the court held that Samsung was on notice of the lawsuit once Apple presented it with a summary of its patent infringement claims against specific Samsung products. 881 F. Supp. 2d 1132, 1145 (N.D. Cal. 2012). The court held that the fact that Samsung sent litigation hold notices to a small number of its employees shortly after that presentation showed that Samsung knew litigation was foreseeable.

Moreover, even when a claim is anticipated, the full scope of preservation may not be reasonably foreseeable. "A party should only be penalized for destroying documents if it was wrong to do so, and that requires, at a minimum, some notice that the documents are potentially relevant." Akiona v. United States, 938 F.2d 158, 161 (9th Cir. 1991). For example, in Abcon Assocs., Inc. v. Haas & Najarian, the court held that the plaintiff did not have a duty to preserve evidence for a "novel" defense to a breach of contract action that the plaintiff could not have anticipated. No. CV 12-928 LDW AKT, 2014 WL 4981440, at *11 (E.D.N.Y. Oct. 6, 2014). Similarly in Schuring v. Cottrell, Inc., the court held that the plaintiff, a layperson who alleged that he had been injured in a fall due to the defendant's lack of appropriate safety features, could not be expected to recognize that the shoes he was wearing during the accident might be relevant to the defendant's defenses. No. 13 C 7142, 2015 WL 8970631, at *2 (N.D. Ill. Dec. 16, 2015). Thus, the court did not award sanctions for spoliation when he continued wearing his shoes until advised

otherwise by counsel. Id.

1. Whether Privilege Log Entries Show the Duty to Preserve Arose in 2010

HPE argues that Hurd's duty to preserve arose in June 2010 based on the fact that Oracle is withholding emails from that time period on the basis of attorney-client privilege and work product. Courts may use the entries in privilege logs to determine when a party identified a claim. See e.g. Blumenthal Distrib., Inc. v. Herman Miller, Inc., No. EDCV141926JAKSPX, 2016 WL 6609208, at *11 (C.D. Cal. July 12, 2016), report and recommendation adopted, No. EDCV1401926JAKSPX, 2016 WL 6901696 (C.D. Cal. Sept. 2, 2016) (using entries in privilege log as evidence that the responding party anticipated litigation when it received a cease-and-desist letter, rather than eight months later when one of its retailers received a cease-and-desist letter from the plaintiff); Resendez v. Smith's Food & Drug Centers, Inc., No. 2:15-CV-00061-JAD, 2015 WL 1186581, at *1, 5, 8 (D. Nev. Mar. 16, 2015) (citing party's privilege log as evidence that it anticipated litigation in the case on the day of the accident at the center of the case, even though the party claimed to have not been on notice of the potential litigation until a year after the accident). However, in both Blumenthal and Resendez, there was apparently no question that the entries in the privilege log related to anticipation of the case then being litigated. In addition, the courts used the privilege logs to confirm that the specific events of a letter or an accident put the responding party on notice.

Oracle's privilege log includes entries for documents dated as early as June 2010 that Oracle withheld under the work product doctrine, on the basis that they were prepared or reviewed in anticipation of litigation regarding Oracle technical support policies or regarding TPM conduct. Oracle has provided a declaration by attorney Brittney Lovejoy with additional information about the content of some of these documents. For example, the declaration explains that a June 24, 2010 document designated as "prepared or reviewed in anticipation of litigation regarding Oracle technical support policies" contained "attorney revisions to Solaris support FAQs," although she did not explain with whom Oracle was anticipating litigation when it revised those FAQs. Lovejoy Decl. ¶ 10. Similarly, she stated that a July 29, 2010 document withheld on the same

basis was a draft letter explaining Oracle's support policies, but did not provide further explanation. Id. For other entries cited by HPE, Lovejoy explains that the documents concerned the competitive threat faced by Oracle from TPMs in general, but do not refer to either HPE or Terix. Id.

Those privilege log entries are insufficient to show that the documents withheld related to HPE or Terix, so they do not demonstrate that Oracle or Hurd's duty to preserve evidence for this case arose in 2010. The fact that Oracle later determined that the documents from 2010 that it is withholding would be relevant to this litigation does not establish that Oracle was anticipating litigation with HPE in 2010. In particular, nothing in the entries shows that Hurd was on notice that customers' reasons for cancelling or not renewing their contracts with Oracle would be relevant to this future litigation.

2. Whether Itanium Triggered the Duty to Preserve in 2011

On June 15, 2011, HPE filed its complaint in Itanium, in which it alleged that Oracle impermissibly stopped making its software available on HPE servers in order to harm HPE and advantage Oracle's server business. Oracle asserted cross-claims based on alleged harm to its own server and support businesses caused by HPE's alleged defamatory campaign against Oracle. In its opposition to HPE's motion, Oracle argues that its role in Itanium did not obligate it to retain documents relevant to this litigation because Itanium concerned different issues: Oracle's development of software for HPE servers, rather than support or TPMs. HPE responds that Oracle's cross-claims against HPE were based exclusively on alleged harm to Oracle's server and support businesses. Oracle's cross-complaint, filed on August 30, 2011, included a claim for intentional interference with contractual relations. Samplin Decl. Ex. B ¶¶ 50-57. Oracle alleged that, due to HPE's actions, Oracle's existing customers were threatening to withdraw their business from Oracle and/or vowing not to do business with Oracle in the future. Id. ¶ 54. Hurd was a document custodian and witness in the Itanium matter. Because the conduct Oracle complained of in its cross-complaint occurred primarily in the spring of 2011, Oracle would have had a duty to preserve evidence for Itanium starting at that time through the period for which it was claiming damages. See Samplin Decl. Ex. B ¶ 33. Oracle argued at the Itanium trial that

HPE was liable for damages for lost service and support contacts through 2016. Samplin Decl. Ex. C. The allegations in this case cover a similar time period. Terix allegedly improperly provided Oracle support patches to customers from 2008 through 2015, and Oracle acquired Sun in January 2010. SAC ¶¶ 9, 29-31.

The fact that Oracle has preserved documents from 2011 because of the litigation holds it put into place for Itanium has benefited discovery in this case. However, HPE has not shown that Oracle was on notice about *this* litigation in 2011. When questioned at oral argument, HPE could not provide any authority to support its argument that Oracle's obligation to preserve evidence in connection with Itanium carries over to this litigation or that this Court could enforce a preservation obligation in a different case conducted before a different judge in a different jurisdiction, which is now on appeal. Accordingly, Oracle did not have a duty to preserve evidence for this litigation based solely on Itanium.

3. Whether the Terix Litigation Triggered the Duty to Preserve in October 2013

On October 11, 2013, Hurd received a litigation hold for the Terix litigation. Ross Decl. ¶ 7. Oracle states that it notified employees of litigation holds as further investigation revealed that they worked with customers who would be relevant to the lawsuit or who would have other information potentially relevant to Oracle's claims that it lost customers for its hardware support business or Terix's defenses. Entries in Oracle's privilege log support HPE's argument that Hurd was involved in the anticipation of the Terix litigation. For example, HPE cites entries for emails that Hurd sent or received in April, June, and July 2013 that were about providing legal advice regarding TPM conduct. See ORCLPRIV08550, ORCLPRIV25893, ORCLPRIV31345.

Oracle argues that because Terix does not sell servers, unlike HPE, it did not have a duty to preserve evidence related to Oracle's hardware sales business when it was in litigation with Terix. However, because HPE and Terix were partners and evidence regarding HPE's conduct at issue in this case was discovered and used in the Terix litigation, this litigation with HPE was foreseeable by the time Oracle decided to sue Terix. Oracle acknowledges that, because HPE and Terix began supporting the relevant customers before Oracle sued Terix, the Terix litigation hold covered

existing evidence regarding HPE's and Terix's unlawful diversion of customers or any defenses thereto. Although Oracle has expanded its focus beyond joint Terix/HPE customers over the course of this litigation, evidence as to why any customers left Oracle had ongoing relevance to HPE's defense that its actions were not the cause of those departures. Because of Hurd's apparent early involvement in the Terix litigation, Hurd had a duty to preserve evidence related to TPM misconduct claims starting at least in October 2013 and possibly earlier that year. Thus, sanctions under Rule 37(e) are available only for ESI from that point onward.

B. Lost Evidence

HPE argues that Hurd destroyed evidence because there were documents produced by other Oracle custodians that should also have been produced by Hurd. Oracle's declarations appear to confirm that Hurd deleted those documents. Most of the examples HPE cites predate 2013, when Oracle's preservation obligation arose. In any event, because Oracle produced those documents to HPE, they are not lost within the meaning of Rule 37(e). See, e.g. Steves & Sons, Inc. v. JELD-WEN, Inc., No. 3:16-CV-545, 2018 WL 2023128, at *7 (E.D. Va. May 1, 2018) ("Information is lost for purposes of Rule 37(e) only if it is irretrievable from another source, including other custodians.") (citing Agility Pub. Warehousing Co. K.S.C. v. Dep't of Def., No. CV 14-1064 (JDB), 2017 WL 1214424, at *2 (D.D.C. Mar. 30, 2017)); CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 497 (S.D.N.Y. 2016) (The "Advisory Committee noted that '[b]ecause electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.' Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment. Thus, relief would not be available under the amended rule where, for example, emails are lost when one custodian deletes them from his mailbox but remain available in the records of another custodian."); Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd., No. 14-CV-62216, 2016 WL 1105297, at *5 (S.D. Fla. Mar. 22, 2016) (a defendant's text messages were not lost under Rule 37(e) because they were provided to the plaintiff by another party). See also Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 431 (S.D.N.Y. 2010) ("No matter how inadequate a party's efforts at preservation may be, however, sanctions are not warranted unless there is proof that some information of significance

has actually been lost.").

HPE argues that the Court can infer that Hurd deleted other relevant documents from the fact that Hurd deleted those approximately 500 documents. For example, HPE notes that Oracle failed to produce a single substantive document from Hurd from 2014. HPE also contends that there are other relevant documents concerning customer dissatisfaction with and complaints about Oracle's product offerings but that it does not know how many of those documents are missing. As evidence, HPE cites two early 2011 emails on which Hurd was copied that Oracle produced in Itanium, but only produced in this litigation after the Court granted HPE's motion to compel. See Dkt. 435 at 3. HPE argues that it does not know how many documents are missing but that Oracle's reluctance to produce those two emails proves that Oracle cannot be trusted.

In addition, to show that relevant documents must be missing, HPE points to the fact that Oracle produced few or no documents from Hurd for two events in which Hurd was directly involved. First, Oracle has not produced any documents from Hurd from 2012, despite the fact that during 2012, Hurd personally negotiated with a major customer for support. Oracle has not produced any documents from Hurd's files memorializing Hurd's meeting with that customer, although it has produced a detailed "Executive Briefing Document" that appears to have been prepared for Hurd for that meeting. See Thomas Decl. Ex. O. However, even assuming that Hurd deleted unique documents, sanctions would not be available for the destruction of that evidence because Oracle's duty to preserve evidence for this case only arose in 2013.

Second, Oracle produced only one email chain from Hurd's collection about a 2015 initiative designed to win back customers from Terix and HPE, even though Hurd closely oversaw the project. HPE argues that it is not credible that Hurd did not exchange more emails regarding this initiative. HPE has not shown that the documents produced from other custodians show that documents unique to Hurd are missing. Oracle has produced some documents from other custodians about this initiative, including email exchanges with Hurd.

HPE argues that it does not have to show that specific documents are missing, noting the difficulty in identifying documents it has not received because they have been deleted. While true as far as it goes, HPE must at least show that categories of irreplaceable relevant documents were

likely lost, as in the cases on which it relies. See, e.g., Alabama Aircraft Indus., Inc. v. Boeing Co., 319 F.R.D. 730, 743 (N.D. Ala. 2017); Matthew Enter., Inc. v. Chrysler Grp. LLC, No. 13-CV-04236-BLF, 2016 WL 2957133, at *5 (N.D. Cal. May 23, 2016). In both of those cases it was clear that significant amounts of evidence had been destroyed. In Matthew Enterprises, the responding party changed email vendors, did not retain the emails contained on the previous system, and did not instruct the outside vendor who stored the relevant customer communications to stop deleting them automatically for almost the entire relevant period. 2016 WL 2957133, at *1. In Alabama Aircraft, when officers in the responding party were instructed to remove and preserve ESI from the computer of the party's Chief Financial Officer that the party had agreed to produce as relevant to the subject of the litigation, they deleted the ESI instead, among other failures to preserve. 319 F.R.D. at 733. No similar showing of wholesale deletion of significant information has been made here. Moreover, in those cases the responding party did not provide duplicates from other custodians to replace the information, so it was "lost."

Hurd's declaration in support of Oracle's opposition stated that he did not believe that he had unique documents related to hardware support that other employees did not also receive. Dkt. 644. As Co-CEO, he had several layers of managers below him who were more directly involved in running Oracle's support business, and was only "kept generally apprised" of the support business. Id. Moreover, as Oracle points out, HPE did not question Hurd about his document retention policies at his December 12, 2017 deposition. Although HPE argues that it was precluded from asking questions on that subject, of significance here, HPE did not ask the Court to allow it to depose Hurd regarding his document retention policies in either of its discovery letter briefs or at any time after Oracle filed its declarations regarding Hurd's document production in April 2018. Although the Court does not condone Hurd's deletion of ESI, it cannot reasonably infer that he improperly deleted troves of relevant documents based on this scant showing that is more reasonably explained by Hurd's busy role at the apex of Oracle in charge of multiple functions rather than the details of customer retention.

However, there is one significant exception to HPE's otherwise vague allegations of missing documents. HPE contends specifically that many "Global Weekly Order Support

Attach" reports are missing. These reports track hardware orders, attach rates, attach rate value, support value, and penetration rate by customer by region. Oracle only produced a few of these reports, despite HPE's requests for the rest. During his deposition, Hurd testified that he used those reports to determine "when a support contract is cancelled and why" and to "figure out where customers were going if they weren't signing support contracts." Thomas Decl. Ex. H at 122:5-25. Hurd also testified that he received weekly or biweekly throughout the entire time he had been at Oracle. Id. The sample report provided by HPE indicates that Hurd received these reports via email. See Thomas Decl. Ex. T. Oracle represented at the hearing that it would be able to provide HPE with all of the weekly reports that HPE is missing. Because these reports can be reproduced, they have not been shown to be lost for Rule 37 purposes. But Oracle must produce them by August 21, 2018.

Accordingly, HPE has not shown that any ESI was lost within the meaning of Rule 37. Because the loss of ESI is a threshold requirement for sanctions under Rule 37, it is not necessary to determine whether Oracle took reasonable steps to preserve evidence or what the remedy for the loss of any documents should be. Therefore, the Court **DENIES** HPE's motion.

IT IS SO ORDERED.

Dated: August 17, 2018

ELIZABETH D. LAPORTE
United States Magistrate Judge

United States District Court
Northern District of California