IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GN NETCOM, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1318-LPS
	:	
PLANTRONICS, INC.,	:	
	:	
Defendant.	:	

Joseph J. Farnan, Jr., Brian E. Farnan, and Michael J. Farnan, FARNAN LLP, Wilmington, DE.

Christopher S. Finnerty, Jeffrey S. Patterson, Michael R. Murphy, and Morgan T. Nickerson, K&L GATES LLP, Boston, MA.

Attorneys for Plaintiff.

Jack B. Blumenfeld, Rodger D. Smith II, and Jennifer Ying, MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, DE.

Jonathan M. Jacobson, Chul Pak, David H. Reichenberg, Robert Corp, and Yuan Ji, WILSON SONSINI GOODRICH & ROSATI PC, New York, NY.

Attorneys for Defendants.

MEMORANDUM OPINION

REDACTED PUBLIC VERSION
RELEASED ON JULY 12, 2016

July 6, 2016
Wilmington, Delaware

STARK, U.S. District Judge:

Pending before the Court is Plaintiff GN Netcom, Inc.'s ("Plaintiff" or "GN") Motion for Sanctions. (D.I. 261) ("Motion") Briefing on the Motion was completed on January 4, 2016 (D.I. 262, 271, 280) The Court held an evidentiary hearing and heard argument on the motion on May 18, 2016. (*See* D.I. 331) ("Tr.")

At the hearing, the Court heard testimony from witnesses called by each side. GN called its expert, Dan Gallivan, as well as Plantronics, Inc. ("Plantronics" or "Defendant") General Counsel, Richard R. Pickard. Plantronics called: (1) Plantronics CEO Ken Kannappan; (2) Don Houston, the Plantronics senior manager whose email deletion is the focus of the Motion; and (3) Plantronics Associate General Counsel Peggy Fawcett. (*See id.* at 40-160) The Court has fully considered the testimony of these witnesses, which supplements the extensive factual record before the Court, which is summarized below. Based on this record, the Court has made factual findings, which are incorporated throughout this Memorandum Opinion.

For the reasons set forth below, the Court will grant the Motion in part.

I. BACKGROUND

GN filed this lawsuit on October 12, 2012, alleging claims of monopolization and attempted monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2; restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14; and common-law tortious interference with business relations against Plantronics, based on Plantronics' implementation and enforcement of its Plantronics Only Distributor ("POD") program for distributors of its headsets. (D.I. 1 at ¶¶ 65-91) On September 23, 2013, the Court denied Plantronics' Motion to Dismiss, finding that: (1) GN had adequately

pled antitrust injury and that GN and Plantronics are direct competitors in the relevant market; (2) GN's market definition was adequate for pleading purposes; (3) GN had adequately alleged anti-competitive conduct; and (4) GN had adequately pled tortious interference. (D.I. 20; D.I. 21 (*GN Netcom, Inc. v. Plantronics, Inc.*, 967 F. Supp. 2d 1082 (D. Del. 2013))

The pending Motion arises from the intentional and admitted deletion of emails by Don Houston, Plantronics' Senior Vice President of Sales and a member of its 12-person executive committee. Mr. Houston, as the head of the sales department at Plantronics, "is responsible for all domestic sales functions including distributor, OEM and retail sales forces" (D.I. 263 Ex. 25; *see also* D.I. 263 Ex. 26 at 25-26), including being ultimately responsible for the execution and implementation of the POD agreements which are the focus of this lawsuit (*see* D.I. 263 Ex. 27 at PLT-00297457, PLT-00297254 (Mr. Houston's signature on 2007 POD agreements); D.I. 272 at A395 (same))[1]

Upon receiving GN's demand letter in May 2012, Plantronics promptly issued a litigation hold to relevant employees and provided training sessions to ensure compliance. (D.I. 272 at A2-8, A34-35) When this lawsuit was filed, Plantronics issued an updated litigation hold, additional

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[1]*See also* D.I. 282 at ¶¶ 4-9 (former Plantronics Senior Director of Sales, Central Region, Johnnie Burleson, stating that throughout his employment – 1996 to 2009 – "Don Houston had ultimate responsibility for the POD program and he was personally involved with any material decision affecting POD's or the POD program" and giving examples); D.I. 281 Ex. 8 at 114-15 (Mr. Meadows stating Mr. Houston was responsible for decisions regarding POD agreement termination); *but see* D.I. 274 at ¶¶ 3-4 (Vice President of U.S. Commercial Sales for Plantronics, Roland Willard Rice, explaining that Mr. Rice "had day-to-day responsibility for overseeing and coordinating the Plantronics POD . . . program since 2012," and although he "report[s] to Don Houston," "Mr. Houston has rarely been involved in the daily operations of the POD program" for years); D.I. 281 Ex. 9 at 78-79 (Mr. Rice discussing meeting with Mr. Houston and Mr. Gonzalez about POD program); D.I. 271 at 15 n.11 ("[O]f the 24 POD agreements produced – all that Plantronics has – Mr. Houston signed only two (and none since 2007).")).

training sessions were held, and quarterly reminders were sent out requiring affirmative acknowledgment of compliance. (*Id.* at A2-6, A10, A36-38) Plantronics has retained back-up tapes of employees' emails dating back to November 2013. (*Id.*)

On November 19, 2012, one month after the filing of this lawsuit, and despite the litigation hold, Mr. Houston replied to an email chain saying, "Team, please be careful about competitive statements like what was said below. ***I would suggest everyone immediately delete this message***, thanks." (D.I. 263 Ex. 2 at PLT-000984601) (emphasis added) On October 13, 2013, one year after this case was filed - and one week after the Court's denial of Plantronics' motion to dismiss – Mr. Houston replied to an email chain with the following message: "Given the sensitive nature of this issue and the on going legal issues, ***please delete this entire string of emails for everyone that has been copied ASAP!***" (*Id.* at PLT-0007863) (emphasis added) The underlying email chain discussed competition from GN (also referred to as Jabra), and it included the following statement: [redacted] brought the Jabra rep into [redacted] who was 100% PLT [i.e., Plantronics]. The customer is now switching their cordless headsets to Jabra 9400. I was under the impression [redacted] was a POD distributor and could not sell Jabra." (*Id.* at PLT-00047865) The email chain was subsequently deleted by Mr. Houston as well as two of its three recipients, Roy Meadows and Jose Gonzalez.[2] (*See* D.I. 263 Ex. 3 at BSD000000473) On April 29, 2014, Mr. Houston replied to another email chain, saying, "Team this is an inappropriate email, ***please delete immediately. Bill you should call Lou Ann directly for any information relating to competition or a competitive situation!!!***" (D.I. 263 Ex. 2 at PLT-01423969)

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[2]When later asked if he had followed Mr. Houston's instruction to delete the email chain, Mr. Gonzalez said, "if I would have done that, that would have been just stupid of me." (D.I. 272 at A15)

(emphasis added)

In addition to instructing others to delete emails, Mr. Houston also deleted his own emails. In total, Mr. Houston deleted more than 40% of his emails from November 18, 2013 through February 19, 2014. (*See* D.I. 281 Ex. 1 at 149-50) These emails were double-deleted, both from Mr. Houston's legal folder and from his deleted files folder. (*See id.* at 145-46; Tr. at 12-13, 59)

In addition to Mr. Houston's email deletion, the Motion also implicates other actions taken by Plantronics executives. In January 2014, Lee Bradley, a senior Plantronics manager, called members of the sales team to remind them to use code words to refer to competitors, such as "zebra" for GN. (D.I. 263 Ex. 23 at PLT-00735676) Code words had been used by Plantronics sales representatives to refer to GN/Jabra since at least November 10, 2012, at the instruction of senior managers. (*See id.* at PLT-01016345; *see also* D.I. 272 at A150-51) Eventually, Roy Meadows asked them to stop using the code words. (D.I. 272 at A151)

Also relevant to the Motion is a March 10, 2014 internal email stating that Plantronics' CEO, Ken Kannappan, had said he was "positive we [Plantronics] would win if pushed to court, however not positive that there were not damning statements in a variety staff emails that their [i.e., GN's] legal team would dig up that would be 'emotionally relevant' in court and perhaps cause us some grief (ie . . . like . . . '***smashing the competition***')." (D.I. 263 Ex. 22 at PLT-01375973) (emphasis in original)

Mr. Houston's email deletion was discovered in February or March 2014 when Plantronics' Associate General Counsel, Peggy Fawcett, became concerned about his document retention. (D.I. 272 at A11-16; *see also id.* at A22, A39) Ms. Fawcett decided to put Mr.

Houston's assistant, Doris Lara, on a litigation hold in case she had duplicate emails; and Ms. Fawcett contacted the IT department, which implemented an anti-email-deletion litigation hold feature and provided Ms. Fawcett with Mr. Houston's back-up tapes going back to November 2013. (*Id.* at A13-15) Plantronics engaged BlackStone Discovery ("BlackStone"), its discovery vendor, to back up 40 PST files, restore the back-up tapes, and image Mr. Houston's iPhone and Microsoft Surface tablet to assist in the preservation and recovery of his emails. (*Id.* at A20-21, 99-100, A111-22) At the end of June 2014, Plantronics retained a leading forensics expert, Stroz Friedberg ("Stroz"), to recover as many of Mr. Houston's deleted emails as possible. (*Id.* at A23-25, A124) Plantronics also agreed to produce to GN documents for 21 additional custodians who corresponded with Mr. Houston. (*See id.* at A58-62, A129, A141-48; D.I. 194 at 1)

Mr. Houston was deposed on July 9, 2014. In his deposition, Mr. Houston admitted that he had "made a mistake" in asking others to delete emails, but he could not remember having deleted any emails himself. (D.I. 272 at A71-74) Despite his admission, and despite having internally confirmed by June 24, 2014 the email deletion by Mr. Houston, Mr. Meadows, and Mr. Gonzalez (*see* D.I. 263 Ex. 3 at BSD00000473), Plantronics' outside counsel, David Reichenberg, emailed GN's outside counsel on July 18, 2014, stating, "[i]t is incorrect to assume deletion as you suggest," because Mr. Houston "testified, multiple times, that he did not recall if he deleted email, and did not know if anyone else had deleted emails" (D.I. 263 Ex. 4 at 1).

Stroz created a PowerPoint on the scope of Houston's deletion of emails, dated August 14, 2014 (hereinafter "Stroz Report"). (D.I. 263 Ex. 5; D.I. 272 at A29 (identifying "Document entitled, 'Quantifying Missing Email in Don Houston's Account,' dated 8/14/2014")) That same day, Stroz, Plantronics, and its outside counsel held a teleconference, during which Stroz said it

would not be able to recover all of Mr. Houston's missing emails. (D.I. 272 at A26-27, A30) According to Plantronics, its outside counsel, and Stroz, Stroz did not present the full findings of the Stroz Report during the teleconference, but rather used it as "talking points . . . in conveying the information to Wilson Sonsini [outside counsel] and Plantronics." (*Id.* at A136-37, A30-32) The Stroz Report revealed that: (1) between the date Mr. Houston received the litigation hold, May 25, 2012, and the last date for which Plantronics does not have back-up tapes, November 4, 2013, Mr. Houston deleted between 36,397 and 90,574 unrecoverable emails; (2) based on an estimated responsiveness rate of 6.5%, 2,380 to 5,887 of these unrecoverable emails are likely to have been responsive to one or more of GN's discovery requests; and (3) based on an estimated 40% of these emails not being sent to the "top 10 Plantronics people," 952 to 2,354 of these responsive emails were estimated to be actually missing. (D.I. 263 Ex. 5 at STROZ_000031; *see also* D.I. 263 Ex. 6 at 107; D.I. 263 Ex. 7)

On August 20, 2014, Stroz informed Plantronics' outside counsel that $2,000 to $5,000 more would be needed "to finish up with BlackStone and get the numbers we need." (D.I. 263 Ex. 8 at STROZ_000654) Stroz's Rule 30(b)(6) witness, Sam Rubin, described the Stroz Report as constituting merely "preliminary findings" and a "work in progress." (D.I. 272 at A135, A138-40; *see also id.* at A28-32) However, Plantronics did not further engage Stroz to finalize its analysis, and "the back-up tapes previously restored by Stroz were 'unrestored' after Stroz's engagement ended." (D.I. 262 at 3-4; *see also* D.I. 290 at 13-14, 19-20)

On January 27, 2015, GN took a second deposition of Mr. Houston, in which Mr. Houston testified that he did not believe he had "delete[d] any e-mails that had to do with competitive issues and/or GN and Jabra." (D.I. 263 Ex. 11 at 35) He explained that the reason

he "told [others] to delete the e-mails was that was not the conduct and the method I wanted them to talk about competition," and he "didn't like the tone of the e-mails." (D.I. 272 at A83-84) Mr. Houston said he had been "docked compensation of $50,000 for not following the legal hold and instructions from the company."[3] (*Id.* at A82)

On February 19, 2015, CEO Kannappan testified that he was only aware of "[t]hree instances in which [Mr. Houston] had deleted emails and instructed others to delete emails" (D.I. 263 Ex. 12 at 78), adding "we believe at this point in time . . . that we have recovered any emails that he has deleted" (*id.* at 179). It was during Mr. Kannappan's deposition that GN learned for the first time that Plantronics had engaged a forensic expert. (*See* D.I. 262 at 5) When GN requested the name of the forensic expert, Plantronics refused to provide it, asserting a work-product privilege on behalf of Stroz. (*See* D.I. 263 Ex. 13 at 2) The Court held a teleconference on April 27, 2015 to discuss this and other issues, during which Plantronics' outside counsel, Chul Pak, represented to the Court that "there is no report" from Stroz. (D.I. 263 Ex. 14 at 13)[4]

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[3]At the May 2016 hearing, Mr. Houston testified that he had by that date incurred "about $1 million of financial penalty," including the elimination of an equity award, an option, a restrictive grant, a bonus, and a raise potential. (Tr. at 105)

[4]Plantronics and its outside counsel contend that they did not discover the Stroz Report until June 2015, when GN subpeonaed Stroz. (D.I. 272 at A29, A59, A136-37; *see also* D.I. 263 Ex. 14 at 13) Mr. Pak's billing statement includes an entry for August 11, 2014 referencing over four hours on "Work on spoliation and Stroz report, negotiations with GN re additional custodians, search terms and dates in light of Houston issue," as well as an entry for August 14, 2014 referencing a one-hour "Telephone meeting with Stroz re spoliation analysis results." (D.I. 263 Ex. 15 at PLT-03845597) At the May 18 hearing, Plantronics' counsel explained that, to his knowledge, there was no written report that had been prepared by Stroz, either at the time of his billing entries or even by April 2015 when Mr. Pak told the Court there was no report. (*See* Tr. at 179-80; *see also* D.I. 330 at 7 (Mr. Pak: "The context of my statement to Your Honor that there was no report was in the context of a request from GN that we produce the Stroz report in written form. And at that time, I didn't know that there was such a presentation, so I had nothing to give, which is why I said there is no report. I admit that we had that conversation with Stroz in

At the end of this teleconference, the Court ordered a 60-day extension of fact discovery to allow for, *inter alia*, discovery into Mr. Houston's email deletion and Plantronics' efforts to recover Mr. Houston's emails. (D.I. 199 at 30)

As a result, in June 2015, GN learned about the Stroz Report. (*See* D.I. 262 at 6) GN subsequently took a third deposition of Mr. Houston on September 25, 2015, in which Mr. Houston now maintained that "[t]o the best of my knowledge, I fully complied with the litigation hold." (D.I. 263 Ex. 9 at 19) Mr. Houston explained that he was not attempting to suppress or withhold evidence from GN, but rather was concerned about inappropriate or "sloppy" language in the emails, which would reflect poorly on Plantronics. (D.I. 272 at A83-86, A96-97) Mr. Houston further testified that he kept relevant emails in a special "legal" folder, and that he "was under the impression that IT always saved all of our emails no matter what, so they were never permanently deleted." (*Id.* at A69-70, A76-81, A87-97) GN also took a second deposition of Mr. Kannappan on September 25, 2015, in which Mr. Kannappan testified that, with respect to Mr. Houston's deleted emails, "I believe they've all been recovered, yes." (D.I. 263 Ex. 10 at 26)

In October 2015, GN retained its own forensic expert, Dan Gallivan, to investigate "the statistical method employed to estimate the number of deleted emails and potential relevancy of those deleted emails." (D.I. 263 Ex. 16 at ¶ 9) Mr. Gallivan agreed with Stroz's methodology for estimating the total number of deleted Houston emails, which consisted of comparing "the total number of actually collected or recovered emails from Mr. Houston during the post litigation hold collection window beginning in May 2012" with "emails extracted from backup tapes between November 2013 and February 2014." (*Id.* at ¶¶ 12-13) However, he found that

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August of 2014, but as of the Spring of 2015, I didn't know they had a PowerPoint.")

Stroz's estimated 6.5% responsiveness rate was on the lower end of an expected responsive rate range of 6.5% to 16.5%. (*Id.* at ¶ 34) In other words, according to Mr. Gallivan's analysis, approximately 2,380 to 15,309 of Mr. Houston's deleted, unrecoverable emails would have been responsive to GN's discovery requests. (*See id.*)

Blackstone, Plantronics' e-discovery vendor, estimates, albeit with a "low degree of certainty," that less than 5% of Mr. Houston's deleted emails were duplicated in other custodians' mailboxes, and that approximately half (59) of Mr. Houston's "emails that [were] found on [an] earlier date but [are] not found on [the] latest collection date" (114) had search term hits. (D.I. 263 Ex. 24; *see also* D.I. 272 at A108-10) GN's analysis found that only 129 of the documents produced by other custodians "were new emails that contained Don Houston as a custodian" (D.I. 263 Ex. 21 at 10), whereas Plantronics represents that "1,287 unique documents were produced from the additional custodians that had not previously been produced to GN"[5] (D.I. 275 at ¶ 10). Altogether, Plantronics has produced over 58,000 pages of documents from Mr. Houston, out of a total of over 4 million pages of documents produced overall. (*Id.* at ¶ 6) "Of the documents produced with Mr. Houston as a custodian or duplicate custodian, over 1,400 documents contain the words GN or Jabra." (*Id.*)

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 37(e), as revised by the December 1, 2015 amendments, "specifically addresses the applicability of sanctions for spoliation of electronically stored information [("ESI")]." *Accurso v. Infra-Red Servs., Inc.*, 2016 WL 930686, at *3 (E.D. Pa. Mar.

[5]Plantronics characterizes a document as "unique" if it "has no identical copy in the entirety of Plantronics' document production to GN." (D.I. 275 at ¶ 10)

11, 2016). Pursuant to Rule 37(e),

> 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).[6] The 2015 Advisory Committee Notes to amended Rule 37(e) explain that "[a]n evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation," and a court is "not require[d] . . . to adopt any of

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[6] *Accurso* explains:

> The text of subdivision (e) of Rule 37 became effective December 1, 2015. On April 29, 2015 the Supreme Court, pursuant to 28 U.S.C. § 2072, submitted to Congress amendments to the Federal Rules of Civil Procedure. The Court ordered that these amendments would be applicable to all proceedings commenced on or after December 1, 2015, and all proceedings then pending "insofar as just and practicable." . . . The Court . . . finds that the amendment to Rule 37(e) is procedural in nature and that it is just and practicable to apply this rule, as amended, to the Defendants' request for sanctions . . . .

2016 WL 930686, at *3 n.6.

the measures listed in subdivision (e)(2)" if "lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss." 2015 Advisory Comm. Notes to Rule 37(e).

Rule 37(e), as amended, substantially reflects pre-existing Third Circuit law regarding sanctions for spoliation. *See, e.g.*, *Accurso*, 2016 WL 930686, at *3 ("[T]his rule change does not appear to have substantively altered the moving party's burden, in this Circuit, of showing that ESI was destroyed in 'bad faith' when requesting an adverse inference."); *see also Bull v. United Parcel Serv., Inc.*, 665 F.3d 68, 79 (3d Cir. 2012) ("[A] finding of bad faith is pivotal to a spoliation determination."); *Magnetar Techs. Corp. v. Six Flags Theme Park Inc.*, 886 F. Supp. 2d 466, 480 (D. Del. 2012) ("[W]here a party neglects the duty to preserve evidence, or actively obstructs it, a court has the authority to impose sanctions.") (internal quotation marks omitted). "To make a determination of bad faith, the court must find that the spoliating party 'intended to impair the ability of the potential defendant to defend itself.'" *Micron Tech., Inc. v. Rambus Inc.*, 917 F. Supp. 2d 300, 315 (D. Del. Jan. 2, 2013) (quoting *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 80 (3d Cir. 1994)); *see also St. Clair Intellectual Prop. Consultants, Inc. v. Toshiba Corp.*, 2014 WL 4253259, at *5 (D. Del. Aug. 27, 2014) (finding no bad faith where conduct consists of "inadvertence, negligence, inexplicable foolishness, or part of the normal activities of business or daily living").

The related "question of prejudice turns largely on whether a spoliating party destroyed evidence in bad faith." *Micron*, 917 F. Supp. 2d at 319 (internal quotation marks omitted). A finding of prejudice requires a party to "come forward with plausible, concrete suggestions as to what the lost evidence might have been" and a showing that its loss "materially affect[ed] the

substantial rights of the adverse party and is prejudicial to the presentation of the case." *Magnetar*, 886 F. Supp. 2d at 481 (internal quotation marks omitted). Where evidence was destroyed in bad faith, "the burden shifts to the spoliating party to show lack of prejudice. A bad faith spoliator carries a heavy burden to show lack of prejudice because [a] party who is guilty of intentionally [destroying] documents . . . should not easily be able to excuse the misconduct by claiming that the vanished documents were of minimal import." *Micron*, 917 F. Supp. 2d at 319 (internal quotation marks omitted).

In *Schmid*, 13 F.3d at 79, the Third Circuit listed three "key considerations" for determining appropriate sanctions for spoliation of evidence: "(1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future." A court may impose dispositive sanctions for spoliation to remedy prejudice and deter future misconduct. *See Micron*, 917 F. Supp. 2d at 328 ("Any lesser sanction would, in effect, reward [the spoliator] for the gamble it took by spoliating and tempt others to do the same.").

III. DISCUSSION

It is undisputed that thousands of Mr. Houston's emails "should have been preserved in the anticipation or conduct of litigation," were "lost," and "cannot be restored or replaced through additional discovery." Fed. R. Civ. P. 37(e). However, Plantronics argues that three of Rule 37(e)'s additional requirements for the imposition of sanctions are not satisfied. It contends that it took reasonable steps to preserve ESI, that it had no intent to deprive GN of discovery and

therefore did not act in bad faith, and that GN has not demonstrated any prejudice. The Court addresses each of these arguments before turning to its consideration of the appropriate sanctions for the spoliation it concludes has occurred in this case.

A. Reasonable Steps to Preserve ESI

Plantronics argues there can be no finding of spoliation because it "went to great lengths to ensure that its employees were aware of and understood their preservation obligations," and upon learning "that there might be a problem with Mr. Houston's emails[,] Plantronics immediately took steps to preserve documents and prevent any further loss of data, and to recover whatever missing data it could." (D.I. 271 at 8) Although it is undisputed that Plantronics issued multiple litigation holds, conducted training sessions to ensure compliance with these holds, and responded promptly to Mr. Houston's deletion of emails (*see, e.g.*, D.I. 272 at A2-8, A10-15, A34-38), the Court agrees with GN that Plantronics' reliance on these actions to excuse the intentional, destructive behavior of Mr. Houston requires a "perverse interpretation" of Rule 37(e), one which would set a dangerous precedent for future spoliators (*see* D.I. 280 at 1-3). Plantronics' extensive document preservation efforts do not absolve it of all responsibility for the failure of a member of its senior management to comply with his document preservation obligations.

It is undisputed that, despite the litigation hold, Mr. Houston, a top-level Plantronics executive, intentionally deleted thousands of emails – more than 40% of his total emails from November 18, 2013 through February 19, 2014 – and instructed others to do so as well. (*See, e.g.*, D.I. 281 Ex. 1 at 149-50; D.I. 272 at A27-28, A71-74, A82; D.I. 263 Ex. 5 at STROZ_000031; *see also* D.I. 263 Ex. 6 at 107; D.I. 263 Ex. 7) Mr. Houston's conduct is the

opposite of taking reasonable steps to preserve ESI, and it is not excused by his professed belief that he thought IT personnel would nevertheless continue to have access to the deleted emails. (*See* D.I. 272 at A69-70, A76-81, A87-97) Importantly, Mr. Houston is not a low-level employee, but rather the Senior Vice President of Sales, to whom the Vice President of U.S. Commercial Sales, who oversees the POD program on a day-to-day basis, reports. (*See* D.I. 274 at ¶ 3; *see also Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 137 (S.D. Fla. 1987) ("[W]e can only assume that Mr. Arnold's destruction order was designed, however mistakenly, to further the corporation's interests. . . . OHD, in short, must take responsibility for the actions of its ranking corporate officers acting within their official capacities.")).

Moreover, the Court is not convinced that Plantronics took all the reasonable steps it could have taken to recover deleted emails after discovering that Mr. Houston had instructed others to delete emails. Despite knowing that spoliation extended beyond Mr. Houston to other custodians, such as Mr. Gonzalez and Mr. Meadows (*see* D.I. 263 Ex. 3 at BSD00000473), Plantronics engaged Stroz only to recover Mr. Houston's emails (*see* D.I. 272 at A24) and asked BlackStone to conduct back-up tape collections only for Mr. Houston (*see id.* at A104). With respect to Mr. Gonzalez and Mr. Meadows, Plantronics only conducted an "internal investigation" in which Mr. Gonzalez said "that he did not believe he deleted [an email]." (*See* D.I. 272 at A65; *see also id.* at A15) Plantronics could have searched its back-up tapes for Mr. Gonzalez's and Mr. Meadows' deleted emails, which would have increased the likelihood of recovering Mr. Houston's deleted emails, but Plantronics chose not to do so. Plantronics also chose not to pay the estimated additional $2,000-$5,000 that would have been necessary for Stroz to complete its statistical analysis and it decided to "unrestore" back-ups it had previously paid

Stroz to restore.

B. Bad-Faith Intent to Deprive GN of Discovery

Next, Plantronics argues that it did not act in bad faith with the intent to deprive GN of discovery. Pointing to its ESI preservation efforts, Plantronics contends that Mr. Houston's actions were "contrary to the company's directives," suggesting that they should not be attributed to Plantronics in analyzing intent to deprive. (D.I. 271 at 11) However, here, unlike in *In re Hitachi Television Optical Block Cases*, 2011 WL 3563781, at *14 (C.D. Cal., Aug. 12, 2011) (finding company lacked intent to deprive where its employee deleted files to prevent company from discovering employee's violation of company's policy against taking work files home), Mr. Houston's deletion activities were not undertaken for personal reasons. Rather, in Plantronics' own words, Mr. Houston instructed others to delete emails "for purposes of protecting the business." (D.I. 263 Ex. 20 at 12) Indeed, Mr. Houston's October 2013 email instructing others to delete the underlying email chain expressly identified his motivation: "the sensitive nature of this issue and the on going legal issues." (D.I. 263 Ex. 2 at PLT-0007863) The "legal issues" to which he was referring were, obviously, issues for Plantronics; specifically, they are the alleged antitrust violations. They are not "legal issues" of Mr. Houston's.

Moreover, the timing of Mr. Houston's emails instructing others to delete the underlying email chains strongly suggests an intent to deprive GN of discovery, as one of his emails was sent just one month after this lawsuit was filed, and another was sent just one week after Plantronics' motion to dismiss was denied – at which point the commencement of fact discovery was imminent. (*See* D.I. 263 Ex. 2 at PLT-00098460, PLT-0007863) Another fact supporting the Court's conclusion that Mr. Houston's deletion of his own emails was undertaken to deprive

GN of discovery are that he double deleted emails. That is, he deleted messages not just from his inbox, but he also took the further step of deleting the deleted emails from his deleted items folder. (*See* D.I. 281 Ex. 1 at 145-46, 149-50) The Court agrees with GN that Mr. Houston acted in bad faith with an intent to deprive GN of discovery, and that, given his position as a senior executive (*see* D.I. 263 Ex. 25; *see also* D.I. 263 Ex. 26 at 25-26), Mr. Houston's actions undertaken in bad faith can properly be attributed to Plantronics.

The Court reaches this conclusion based on the totality of the record, which includes Mr. Houston's testimony at the hearing. The Court found Mr. Houston largely credible. The Court further found his explanation for his directives to other employees – that he was telling his employees to "delete" email chains so as to prevent those chains from continuing to proliferate, rather than instructing them to destroy permanently the already-existing chains – somewhat plausible. That is, the Court believes that this, in fact, was at least part of what motivated Mr. Houston to repeatedly direct Plantronics employees to delete emails. Even so, the fact remains that Mr. Houston did ***repeatedly direct Plantronics employees to delete emails***, despite knowing of the litigation hold, and at least partly out of concern as to how those emails would be used in litigation against Plantronics if they were produced to GN. In the context of a hotly-contested antitrust lawsuit between fierce competitors, such repeated instruction from a high-level executive who has ultimate responsibility for the allegedly anti-competitive program that is at the center of this case, the Court can only conclude that at least part of Mr. Houston's motivation was also to deprive GN of discovery to which it was entitled.

Furthermore, there is nothing in the record that would support a finding that the employees who received Mr. Houston's instruction would have understood his direction that they

"delete" emails to mean, instead, merely that they "stop the conversation." (*See, e.g.*, Tr. at 137-38, 165-66) To the contrary, the evidence is that other employees did delete emails in response to Mr. Houston's direction. Mr. Houston's actions, therefore, resulted not just in "stopping the conversation" but, instead, in the permanent destruction of a large amount of emails, including many that would have been responsive to GN's discovery requests, thereby seriously prejudicing GN.

Evidence of Plantronics' intent to deprive GN of discovery extends beyond Mr. Houston's initial deletion of emails and his instructions that others do so as well. Although unrelated to Mr. Houston's email deletion, a reasonable inference from the record is that Plantronics employees' use of code words like "zebra" and "j-bird" was intended to evade discovery of documents referencing GN or Jabra. (*See* D.I. 263 Ex. 23 at PLT-00735676, PLT-01016345) However, this practice is unlikely to have caused prejudice to GN because these code words were ultimately used as search terms. (*See* D.I. 271 at 9 n.5)

The Court's finding of bad faith is buttressed by Plantronics' conduct in connection with litigating the deletion issue. Even after knowing that Mr. Houston and at least two other Plantronics employees had deleted emails in violation of the litigation hold (*see* D.I. 263 Ex. 3 at BSD00000473), counsel for Plantronics told counsel for GN that GN was "incorrect to assume deletion" (D.I. 263 Ex. 4 at 1). Plantronics avoided disclosing to GN that it had retained a forensic expert to recover Mr. Houston's emails (*see* D.I. 262 at 5), and it refused to disclose Stroz's identity (*see* D.I. 263 Ex. 13 at 2) until after the Court ordered additional discovery related to that issue (*see* D.I. 263 Ex. 14 at 30). Further evidence of bad faith may be discerned in Plantronics' disengagement of Stroz sometime after the August 2014 teleconference, despite

having been informed that finalization of Stroz's "preliminary findings" of its "statistical exercise" would only cost between $2,000 and $5,000 (*see* D.I. 263 Ex. 8 at STROZ_000654; D.I. 272 at A135, A138-40; *see also id.* at A28-32), and in the subsequent "unrestoring" of the back-up tapes previously restored (*see* D.I. 262 at 3-4).

Relatedly, Mr. Houston repeatedly refused to acknowledge his misconduct. (*See* D.I. 272 at A71-74 (testifying on July 9, 2014 that he did not recall having deleted any emails); D.I. 263 Ex. 11 at 35 (testifying on January 27, 2015 that he had not "delete[d] any e-mails that had to do with competitive issues and/or GN and Jabra"); D.I. 263 Ex. 9 at 19 (testifying on September 25, 2015 that "[t]o the best of my knowledge, I fully complied with the litigation hold"); *but see* D.I. 272 at A71-74 (testifying on July 9, 2014 that he had "made a mistake" in asking others to delete emails)) Mr. Kannappan also inaccurately stated the scope of Mr. Houston's email deletion and the success of Plantronics' recovery efforts. (*See* D.I. 263 Ex. 12 at 78-79 (testifying on February 19, 2015 that he was only aware of "three instances in which [Mr. Houston] had deleted emails and instructed others to delete emails" and that "at this point in time . . . we have recovered any emails that he has deleted"); D.I. 263 Ex. 10 at 26 (testifying on September 25, 2015 that he believed Mr. Houston's emails had "all been recovered"))

In light of all this evidence, including Plantronics' repeated obfuscation and misrepresentations related to Mr. Houston's email deletion and its investigation of it, the Court finds that Plantronics did act in bad faith, "intend[ing] to impair the ability of the other side to effectively litigate its case." *In re Wechsler*, 121 F. Supp. 2d at 423; *see also Micron*, 917 F. Supp. 2d at 318 ("In light of the full record, the court finds that Rambus' litigation misconduct further evidences bad faith.").

C. Prejudice to GN

As Plantronics' counsel candidly acknowledged, "[i]t is undisputed that some number of Mr. Houston's emails have been deleted, can't be recovered, and obviously we can't know what is on them." (Tr. at 167) The Court finds that the scale of Mr. Houston's deletion is substantial, regardless of which party's expert's estimates are more accurate, and the number of missing, responsive emails is high. Stroz estimated that 952 to 2,354 of Mr. Houston's unrecoverable deleted emails responsive to GN's discovery requests were missing (*see* D.I. 263 Ex. 5 at STROZ_000031; *see also* D.I. 263 Ex. 6 at 107; D.I. 263 Ex. 7), and Mr. Gallivan concluded that this estimate was on the lower end of what is statistically probable (D.I. 263 Ex. 16 at ¶¶ 28-36). Based on its own comparison to emails deleted by Mr. Houston that were retained by other custodians, GN estimates that Mr. Houston deleted more than 95% of his emails that contained the words "GN" or "Jabra."[7] (*See* D.I. 263 Ex. 21 at 8; *see also* D.I. 281 Ex. 2 at 44-49; *but see* D.I. 272 at A48-49, A52-53, A103-05, A108-10; D.I. 273 at ¶¶ 4-14)

Although "'it is impossible to identify which files [were relevant to plaintiff's claims] and how they might have been used,'" *Gutman v. Klein*, 2008 WL 4682208, at *12 (E.D.N.Y. Oct. 15, 2008) (quoting *Leon v. IDX Sys., Corp.*, 464 F.3d 951, 960 (9th Cir. 2006)); *see also Telectron*, 116 F.R.D. at 110 ("While it is now impossible to determine precisely what the destroyed documents contained or how severely the unavailability of these documents might have prejudiced Plaintiff's ability to prove the claims set forth in its Complaint, we find OHD's contention that no significant prejudice has resulted from this pattern of destruction to be wholly unconvincing."), GN has come forward with "plausible, concrete suggestions as to what that

[7]Plantronics disputes this percentage but does not offer its own estimate.

evidence might have been," *Schmid*, 13 F.3d at 80. Among the deleted emails recovered from other custodians are "emails which discuss negotiations about the POD agreement[s], which show efforts made by Plantronics to enforce the POD restrictions, and which describe the competitive situation and strategy," as well as "emails which describe strategy for the contact center market – a market which Plantronics has repeatedly said does not exist and does not receive any of the company's focus." (D.I. 262 at 12) (citing D.I. 263 Ex. 18) Indeed, it was in response to an email chain about Plantronics' contact center market competition that Mr. Houston implored his colleagues: "Team just a word of caution, let's keep the competition discussion to a minimum on email, thanks!" (D.I. 263 Ex. 18 at PLT-02037190) Mr. Kannappan had expressed concern about "damning" emails sent by Plantronics employees. (D.I. 263 Ex. 22 at PLT-01375973) Importantly, Mr. Houston was ultimately responsible for executing at least some of the POD agreements which are the focus of this lawsuit (D.I. 263 Ex. 27 at PLT-00297254, PLT-00297457; D.I. 272 at A395; D.I. 282 at ¶¶ 4-9; D.I. 281 Ex. 8 at 114-15; *see also* D.I. 281 Ex. 9 at 78-79; D.I. 274 at ¶¶ 3-4; *but see* D.I. 271 at 15 n.11).

Because the Court has found that Plantronics acted in bad faith, the burden shifts to Plantronics to show a lack prejudice to GN resulting from Mr. Houston's deletion of emails. *See Micron*, 917 F. Supp. 2d at 319. Plantronics makes three arguments for why GN has not been prejudiced from Mr. Houston's deletion of emails.

First, Plantronics argues that the missing documents do not help GN. (*See* D.I. 272 at A157-58) (summarizing deleted emails produced by other custodians) Pointing as an example to the "smoking gun" email chain which Mr. Houston instructed others to delete, Plantronics explains that this email actually hurts GN because it shows that Plantronics "did not advise

[a POD distributor] that [having sales representative accompany GN on a sales visit to a large account] was a violation of the agreement and took no action against " (D.I. 271 at 13) (citing D.I. 272 at A152-56, A195-96) However, the email chain does appear to implicate Plantronics' enforcement of its POD program, with Mr. Meadows stating that "we should have been given the courtesy of a call informing us that there was a problem and that the customer was requesting a visit from our competitors." (D.I. 263 Ex. 18 at PLT-00044119; *see also* Tr. at 86-87) There is, at minimum, a factual dispute as to whether this email favors GN or Plantronics. At bottom, this email chain does not help Plantronics meet its "heavy burden" to show a lack of prejudice to GN.

Second, Plantronics argues that the expansion of discovery to 21 additional custodians – alongside the collection of back-up tapes of Mr. Houston's emails – mitigated any potential prejudice to GN. (*See, e.g.*, D.I. 272 at A146-47) However, this would only eliminate prejudice to GN if it resulted in the production of all of Mr. Houston's responsive deleted emails. Less than 5% of Mr. Houston's deleted emails are estimated to have been duplicated in other custodians' mailboxes (D.I. 263 Ex. 24), and GN asserts that it obtained only 129 new documents from the additional 21 custodians (D.I. 263 Ex. 21 at 10). For its part, Plantronics believes that 1,287 "unique" documents (i.e., documents having "no identical copy in the entirety of Plantronics' document production to GN") were produced by the additional custodians. (D.I. 275 at ¶ 10) Regardless of which party's estimate is more accurate, they both fall far short of the experts' estimates as to the number of responsive emails that were not recovered, a number Mr. Gallivan estimates to have been 2,380 to 15,309 emails and which even Stroz estimates to have been at least 952 emails. (*See* D.I. 263 Ex. 5 at STROZ_000031; D.I. 263 Ex. 16 at ¶ 34)

These numbers do not help Plantronics to meet its burden to show a lack of prejudice to GN.

Still, Plantronics contends that the missing, responsive emails do not prejudice GN, based on Plantronics' characterization of 59 responsive, deleted but later recovered emails – which did not have other Plantronics custodians in addition to Mr. Houston – that "hit" on search terms. In Plantronics' view, none of these 59 deleted emails "relate substantively to the POD program and, except for [four] (content-less) Outlook meeting invites/acceptances, none of the documents is even relevant." (D.I. 271 at 14) (citing D.I. 275 at ¶¶ 2-3) Plantronics' argument fails to meet its heavy burden of showing no prejudice to GN, for at least three reasons.

First, as GN points out, one of the 59 emails explicitly discusses Plantronics' and GN's respective market shares, which is relevant to GN's antitrust claims. (*See* D.I. 263 Ex. 28) Second, Plantronics does not explain why the other 55 ***responsive*** emails are substantively irrelevant despite hitting on search terms. Plantronics appears to ignore the possibility that substantively-devoid meeting invitations could nevertheless provide valuable insights to GN in the discovery process, such as by identifying third parties which might have relevant information. Third, Plantronics assumes without any evidence that the content of the 59 responsive emails in this batch is representative of the content of all of Mr. Houston's unrecoverable and responsive deleted emails. While Mr. Gallivan agreed with Stroz that "the backup set provides certainty about email activity between November 2013 and February 2014 and allows one to make valid ***statistical*** inferences regarding the missing data" from before November 2013 (D.I. 263 Ex. 16 at ¶ 13) (emphasis added), Mr. Gallivan said nothing about the ***substance*** of the missing emails and whether one could view the recovered emails as a representative sample of the substantive content in the missing emails.

Plantronics tries to buttress its argument that no substantively relevant emails are actually missing by pointing out that (1) Mr. Houston would only occasionally have been involved in implementation and enforcement of the POD program given its 25-year-long existence (*see* D.I. 262 at ¶¶ 5, 7; D.I. 272 at A186); (2) there are no cross-references in the millions of documents already produced or deposition testimony to "anything relevant that GN does not have;" and (3) "non-party document productions contain just a trivial number of instances in which Mr. Houston was the only Plantronics employee" (D.I. 271 at 14) (citing D.I. 275 at ¶¶ 4-5). Again, none of these arguments meets Plantronics' heavy burden to show a lack of prejudice in light of Mr. Houston's bad faith deletion of thousands of emails, particularly considering that he was ultimately responsible for the POD agreements (and considering GN's ongoing concern that not all POD agreements have been produced). (*See* D.I. 263 Ex. 27 at PLT-00297457, PLT-00297254; D.I. 272 at A395; D.I. 282 at ¶¶ 4-9; D.I. 281 Ex. 8 at 114-15; *see also* D.I. 274 at ¶¶ 3-4; D.I. 281 Ex. 9 at 78-79) At best, Plantronics makes out a case for the Court to find that the prejudice to GN is not as great as it could have been. *See generally Micron*, 917 F. Supp. 2d at 319 ("'A party who is guilty of intentionally [destroying] documents . . . should not easily be able to excuse the misconduct by claiming that the vanished documents were of minimal import.'") (quoting *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1328 (Fed. Cir. 2011)) (internal citation omitted).

Lastly, Plantronics argues that no missing document would affect the merits of GN's antitrust claims because GN's claims fail as a matter of law. First, Plantronics argues that "GN's own CEO admitted that the POD agreements have had no adverse effect on market prices." (D.I. 271 at 15) (citing D.I. 272 at A180-81) However, Plantronics fails to explain why this requires

GN's claims to fail as a matter of law, particularly where there may be evidence of other anticompetitive effects. *See generally Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 2016 WL 2600321, at *4 (3d Cir. May 4, 2016) ("We also analyze the likely or actual anticompetitive effects of the exclusive dealing arrangement, including whether there was reduced output, increased price, or reduced quality in goods or services."). Furthermore, GN's claims have already survived a motion to dismiss; the Court does not have before it a motion for summary judgment, nor would the Court would find it appropriate at this point in this case to allow Plantronics – the party that has destroyed evidence in bad faith – to press what would effectively be an untimely case-dispositive motion.

Next, Plantronics points to a 1991 POD agreement which it argues undermines GN's allegations that Plantronics implemented its POD program in response to GN's entry into the market (*see* D.I. 272 at A186), allegations which the Court took as true in denying Plantronics' motion to dismiss (*see* D.I. 20 at 3-5). The Court's reliance on GN's allegations was a component of its analysis of "the particular structure and circumstances of the industry at issue," *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 283 (3d Cir. 2012) (internal quotation marks omitted), and that reliance was not the entire basis of the Court's denial of Plantronics' motion. The Court did not foreclose the possibility that GN could prevail on the merits of its claims by proving different factual circumstances. (*See* D.I. 20 at 3-5) Similarly, Plantronics argues that discovery has validated other disputed factual contentions it made in connection with its motion to dismiss – that POD agreements can be terminated on short notice, which GN disputed (*see* D.I. 20 at 4 & n.2; D.I. 271 at 16 (citing D.I. 272 at A202, A209-10, A216-17, A220-21, A225-26, A229, A234, A283)); and that PODs are not prohibited from buying directly from GN, accepting

GN's sales incentives, and promoting GN products (*see* D.I. 20 at 3-4; D.I. 271 at 16 (citing D.I. 272 at A200, A284-85, A255-81, A188-93, A198, A288-89, A292, A203-04, A211-12, A214-17, A219-21, A229, A234, A277-79). But these arguments about the underlying facts are all made against a backdrop in which GN has been deprived of some of the very documents on which it should have been able to rely in order to make out its case on these disputed points. In totality, Plantronics has not met its heavy burden to show that there is no prejudice to GN from the deletion of responsive emails.

In finding prejudice to GN, the Court is cognizant of the Supreme Court's statement that, "in antitrust cases, . . . proof is largely in the hands of the [defendant]." *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976). In an antitrust case with similar claims to those made here, in which a senior-level manager ordered the destruction of sales correspondence after being served with plaintiff's complaint, the district court found prejudice based on the "loss forever of records whose value to [plaintiff] can never be determined with any certainty." *Telectron*, 116 F.R.D. at 123 ("Given the nature of Telectron's claims against OHD and the scope of production sought, we are at a loss to conceive of a category of documents more directly relevant to Telectron's grievances than 'sales correspondence' and other sales-related materials contained in the files of Advance personnel. This evidence bears directly upon the relationship between OHD and its distributors and would have been directly pertinent to the Plaintiff's antitrust-related claims.").

In the end, Plantronics has not persuaded the Court that GN's inability to access Mr. Houston's deleted emails cannot even "***plausibly*** be thought likely to affect the outcome of the trial." *Estate of Spear v. Comm'r*, 41 F.3d 103, 115 (3d Cir. 1994) (emphasis added). As GN

puts it:

> Destruction of internal emails regarding the decisions made, the discussions had, and the resulting impact would make it difficult, if not impossible, for GN to effectively and fully challenge Plantronics' one sided view of how the POD agreements and POD distributors operated in practice. In short, Plantronics attempts to set up a heads-I-win-tails-you-lose scenario by arguing that 'there is no way for GN to succeed on the merits' while Plantronics' own spoliation leaves GN with a spotty and incomplete factual picture of the marketplace with which to combat Plantronics' claims.

(D.I. 280 at 10)

D. Appropriate Sanctions

Having found that Plantronics, due to Mr. Houston's deletion of emails and his instructing of others to delete emails, failed to take reasonable steps to preserve ESI which cannot be restored or replaced, that it did so in bad faith with the intent to deprive GN from using the information contained in the emails, and that GN is prejudiced by the loss of the emails, the Court must now determine the appropriate sanctions. *See* Fed. R. Civ. P. 37(e). In doing so, the Court must weigh its findings that Plantronics has a high degree of fault and that GN will suffer a considerable amount of prejudice against the availability of sanctions that would deter future spoliation while avoiding substantial unfairness to Plantronics. *See Schmid*, 13 F.3d at 79.

Before contemplating the imposition of sanctions provided for by subsection 2 of Rule 37(e) – an adverse inference, a jury instruction relating to a permissive or compulsory adverse inference, or a dispositive sanction – the Court considers whether "lesser measures" pursuant to subsection 1 of the Rule would be "sufficient to redress the loss." 2015 Advisory Comm. Notes to Rule 37(e).

One possibility is a discovery sanction. The Court could order discovery to be re-opened

so that Plantronics could collect documents from additional custodians, such as third parties who communicated with Mr. Houston about the POD program. (*See* D.I. 248 at 10-11, 19-21) (GN discussing possibility of needing additional third-party discovery depending on sanctions Court may impose) However, given that the 21 additional Plantronics custodians only produced between 129 and 1,287 new responsive documents (*compare* D.I. 263 Ex. 21 at 10 *with* D.I. 275 at ¶ 10), and because it is impossible for GN to determine how many other individuals Mr. Houston instructed to delete emails, including third parties, the Court believes that re-opening discovery to allow GN to subpoena additional third parties would not redress GN's loss. As an alternative discovery sanction, the Court could order Plantronics to re-restore its back-up tapes and allow GN to conduct its own analysis of them to determine the scale of other, non-Houston custodians' deletion of emails pursuant to Mr. Houston's directions. (*See* D.I. 290 at 11-15, 19-20, 24, 26-27) This would allow GN to determine if a forensic expert should be engaged to recover documents from additional custodians. (*See id.*) However, because there is no reason to suspect that additional custodians would have retained more communications with Mr. Houston than the additional 21 custodians whose records have already been searched by Plantronics – which have accounted for less than 5% of Mr. Houston's deleted emails (*see* D.I. 263 Ex. 24) – such measures would also be unlikely to redress GN's loss. Moreover, in light of how slowly discovery has proceeded in this case, and the number of discovery disputes the parties have referred to the Court (*see, e.g.*, D.I. 128, 132, 199, 248, 290, 330), the Court does not deem it appropriate to re-open discovery and further delay the already long-delayed resolution of this case.

Monetary sanctions, although unable to fully redress the prejudice to GN, are warranted.

While "[t]he risk of having to pay an opponent's fees and costs, or even punitive damages, is likely to pale in comparison to the potential windfall that would-be spoliators could otherwise receive," *Micron*, 917 F. Supp. 2d at 325, GN requests, as partial relief, "an award of fees and costs for all its efforts pursuing nearly 18 months of discovery to get [to] the bottom of the deletion story despite Plantronics' obstruction" (D.I. 262 at 17). This is an appropriate component of relief for the prejudice to GN and the Court will grant it.

Additionally, the Court finds that Plantronics' high degree of fault, its bad-faith intent to deprive GN of responsive documents, and the prejudice it has caused to GN's case – along with the difficulties it has created for GN in "getting to the bottom of the deletion story" and its (at times) unwillingness to acknowledge wrongdoing – further merit punitive monetary sanctions. Therefore, the Court will impose a sanction in the amount of $3,000,000 on Plantronics, payable to GN. This is treble the approximate amount of the financial penalty Plantronics imposed on Mr. Houston personally. (*See* Tr. at 105)[8]

The parties have not identified any evidentiary sanction that could fully redress GN's loss. Because GN bears the burden of proof on its antitrust claims, GN's inability to substantiate its claims with evidence it was entitled to receive may not be fully remediated by an order precluding Plantronics from using particular evidence to defend itself. *See Columbia Pictures, Inc. v. Bunnell*, 2007 WL 4877701 (C.D. Cal. 2007) ("A rule excluding evidence would be futile, since the issue[] here is not the efforts by Defendants to introduce evidence which could be

[8]While not entirely clear from the record, it appears that Plantronics may have financially benefitted from the penalty imposed on Mr. Houston, as Plantronics may have "saved" the approximately $1 million of income and other value it would otherwise have paid to Mr. Houston. (*See* Tr. at 105)

excluded, but rather Defendants' destruction or concealment of evidence, forcing Plaintiffs to go to trial with 'incomplete and spotty evidence' at trial . . . ."). Still, as this case proceeds toward trial, GN should propose evidentiary sanctions it believes are warranted, which the Court will then evaluate in the context in which they are presented.

In short, "lesser sanctions" are inadequate to fully redress the prejudice to GN. Thus, the Court must consider the adequacy of other alternatives set out in Rule 37(e)(2).

Having done so, the Court concludes that the only sanction under Rule 37(e)(2) that is warranted is an instruction to the jury that it may – not that it must – presume that the information missing from Plantronics' production was unfavorable to Plantronics.[9] Unlike in *Micron*, 917 F. Supp. 2d at 326, where such a sanction would have been "ineffective as a remedy, punishment, or deterrent," here some of the content of the deleted emails has been recovered, so the jury will be in a position to make reasonable inferences as to the likely content of the missing information and as to how harmful it would have been to Plantronics' defense.

In the highly fact-specific, contextualized, complex circumstances of this antitrust case between two competitors, contrasting though reasonable inferences may be drawn from almost any piece of evidence. Even the instruction from Mr. Houston to delete emails may be viewed by a reasonable jury as part of a massive cover-up to hide antitrust violations Plantronics knew it was guilty of, or, alternatively, as merely a misguided fear that innocuous, pro-competitive conduct might be misunderstood by a competitor (and ultimately a factfinder) to be improper. A

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[9]The Court does not agree with Plantronics that GN has "waived" its right to seek an adverse inference due to its failure to propose such an inference in its briefing on the Motion. (*See* Tr. at 168-69, 180, 182) In arguing for the most severe type of sanction, a dispositive sanction, GN did not forego the other, less severe options the Court is required to consider under Rule 37(e). (*See id.* at 189-90)

jury should resolve the genuine disputes of material fact in this case. While GN's ability to make its case on the disputed facts has been hampered by Plantronics' conduct, the Court believes that the sanctions it is imposing do what is warranted to rectify that prejudice while still permitting both sides to proceed before a factfinder with a full and fair opportunity to prevail on the merits.

The Court does not deem it warranted to presume that the lost information was unfavorable to Plantronics, to instruct the jury that it must presume that the information was unfavorable to Plantronics, or to enter a default judgment. Although courts have found dispositive sanctions to be appropriate in cases with comparable or even less egregious conduct than that proven here,[10] a dispositive sanction "is a last resort and should be imposed if no alternative remedy is available." *Magnetar*, 886 F. Supp. 2d at 481. Here, the combination of sanctions the Court is imposing on Plantronics do make out an adequate, alternative remedy.

Accordingly, the Court will impose: (1) monetary sanctions in the form of the reasonable fees and costs incurred by GN in connection with the disputes leading to today's Order; (2) punitive sanctions in the amount of $3,000,000; (3) possible evidentiary sanctions, if requested by GN and found by the Court to be warranted as this case progresses toward trial; and (4) instructions to the jury that it may draw an adverse inference that emails destroyed by Plantronics would have been favorable to GN's case and/or unfavorable to Plantronics' defense. The Court concludes that this combination of sanctions, while fully justified by Plantronics'

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[10] *See., e.g.*, *Leon*, 464 F.3d at 960 (affirming dismissal based on spoliation of 2,200 files); *Telectron*, 116 F.R.D. at 137 (entering default judgment in antitrust case based on company-wide spoliation of relevant documents); *U.S. ex rel. Berglund v. Boeing Co.*, 835 F. Supp. 2d 1020, 1055 (D. Or. 2011) (dismissing claims based on spoliation of hundreds of emails and three hard drives); *Gutman*, 2008 WL 4682208, at *12 (dismissing claims based on spoliation of files on single laptop).

conduct, does as much as the Court can to remedy the prejudice to GN, to punish and deter Plantronics, and to deter other litigants from engaging in the type of bad faith, destruction of responsive evidence that Plantronics undertook here, while avoiding substantial unfairness to Plantronics.

IV. CONCLUSION

For the reasons set forth above, GN's motion for sanctions is granted in part. An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GN NETCOM, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 12-1318-LPS
	:	
PLANTRONICS, INC.,	:	
	:	
Defendant.	:	

ORDER

At Wilmington this **6th** day of **July, 2016**:

For the reasons set forth in the Memorandum Opinion issued this same date,

IT IS HEREBY ORDERED that:

1. Plaintiff GN Netcom, Inc.'s ("GN") Motion for Sanctions (D.I. 261) is **GRANTED IN PART**. As sanctions for spoliation, Plantronics, Inc. ("Plantronics") shall be subject to: (1) monetary sanctions in the form of the reasonable fees and costs incurred by GN in connection with the disputes leading to today's Order; (2) punitive sanctions in the amount of $3,000,000; (3) possible evidentiary sanctions, if requested by GN and found by the Court to be warranted as this case progresses toward trial; and (4) instructions to the jury that it may draw an adverse inference that emails destroyed by Plantronics would have been favorable to GN's case and/or unfavorable to Plantronics' defense.

2. The parties shall meet and confer and shall submit, no later than **July 15, 2016**, a proposed schedule for how this case should now proceed.

3. Because the Memorandum Opinion has been filed under seal, the parties shall

meet and confer and shall, no later than **July 8, 2016**, provide the Court with a proposed redacted version of the Memorandum Opinion. Thereafter, the Court will issue a publicly-available version of the Memorandum Opinion.

HON. LEONARD P. STARK
UNITED STATES DISTRICT JUDGE