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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

Brandy Brewer,

Plaintiff,

v.

Leprino Foods Company, Inc.,

Defendant.

No. CV-1:16-1091-SMM

ORDER

16 Before the Court is Defendant Leprino Foods Company, Inc.’s (“Leprino”) Motion
17 for Sanctions. (Doc. 41.) Plaintiff Brandy Brewer (“Brewer”) filed her Opposition (Doc.
18 43), and Leprino filed its Reply in support (Doc. 45).

19 This case arose in 2016 when Brewer, a former employee of Leprino, filed a
20 complaint alleging violations of the Family and Medical Leave Act (“FMLA”) and
21 California’s Fair Employment and Housing Act (“FEHA”). The parties’ discovery efforts
22 became frustrated in 2017, and consequently, Leprino filed an Ex Parte Application
23 requesting, amongst other things, that the Court impose discovery sanctions on Brewer
24 pursuant to Federal Rule of Civil Procedure 37. The Court deferred ruling on the issue of
25 sanctions; however, at a September 5, 2018 telephonic status conference, the Court allowed
26 the parties to brief the instant motion.

27 **I. BACKGROUND**

28 Leprino is a dairy product manufacturer, who claims it is the world’s largest

1 mozzarella cheese producer. (Doc. 33-1 at 8.) According to Leprino, as a manufacturer
2 using energized equipment, one of its most critical safety procedures is its Lockout/Tagout
3 (“LOTO”) policy – which requires an employee to disconnect and personally lock the
4 energy sources on a machine, so that the machine cannot be reenergized and energy cannot
5 be released when an employee is working on it. (Id. at 9.) In 2011, Leprino states it enacted
6 “zero-tolerance” for LOTO violations, making even first-time violations subject to strong
7 discipline up to and including termination. (Id.)

8 Brewer started working at Leprino in 2009. (Doc. 34 at 5.) Throughout her
9 employment, Brewer took various leaves of absence under the FMLA; however, Brewer
10 contends that she was not provided all leaves of absence she requested. (Doc. 36 at 3.)
11 Brewer also claims that her supervisor, Jennifer Miranda (“Miranda”), was negatively
12 affected by her use of FMLA leave. (Id.) On numerous occasions, Miranda told Brewer
13 that she was a “bad employee” for taking FMLA leave. (Id.) Miranda also stated to Brewer
14 that she preferred working with men because they did not have family obligations, and that
15 she was tracking Brewer’s FMLA hours to “take it to management to get her fired.” (Id.)

16 From April 2014 to June 2014, Brewer discussed Miranda’s comments with her
17 superiors. (Doc. 34-4 at 2.) First, Brewer informed Senior Supervisor Erin McDaniel
18 (“McDaniel”) about Miranda’s negative FMLA comments and perceived threats. (Id.)
19 Next, Brewer complained to Senior Supervisor Jason Rocha (“Rocha”), who responded
20 that she was “lucky to have a job” at Leprino and “not flipping burgers at Burger King.”
21 (Id.) On or about July 1, 2014, Brewer also complained to Processing Manager Don Doyle
22 (“Doyle”) that she believed Miranda was retaliating against her and wanted to get her fired.
23 (Id.; Doc. 33-5 at 101.)

24 On July 9, 2014, Brewer committed a LOTO violation, and Miranda filed an
25 incident report regarding the violation. (Docs. 33-1 at 13; 34 at 9; 41-1 at 5.) Per Leprino’s
26 LOTO policy, Brewer was suspended pending investigation. (Docs. 33-1 at 14; 34 at 9.) In
27 her suspension meeting, Brewer attempted to discuss Miranda’s retaliation; however,
28 Brewer alleges that “nobody at the meeting did anything about it.” (Doc. 34 at 10.) Brewer

1 was ultimately terminated from Leprino on July 18, 2014. (Docs. 33-1 at 15; 41-1 at 5.)

2 The following day, on July 19, 2014, Brewer filed a complaint with the California
3 Department of Fair Employment and Housing (“DFEH”). (Doc. 41-2 at 147.) Then, on
4 December 16, 2015, the DFEH notified Brewer that it had concluded its investigation, it
5 was unable to determine that the information Brewer provided established a violation of a
6 statute, and it provided Brewer a Right to Sue letter. (Docs. 43 at 6; 43-2 at 72-74.) Four
7 months later, on April 25, 2016, Brewer filed the instant action in the Superior Court of
8 California, County of Kings. (Docs. 41-1 at 5; 43 at 6.) Leprino subsequently removed this
9 action to federal court. (Doc. 41-1 at 6.)

10 Brewer’s remaining causes of action include: (1) retaliatory discharge in violation
11 of the FMLA and FEHA; (2) gender discrimination in violation of FEHA; and (3) failure
12 to prevent discrimination in the work place in violation of FEHA.¹ (Doc. 36 at 16.) This
13 case is currently set for trial on April 1, 2019.

14 **A. The Parties’ Discovery Efforts**

15 On May 25, 2016, Leprino served its initial discovery requests which included a
16 Demand for Production (“Demand”) of Documents, setting forth 21 separate document
17 demands. (Doc. 41-1 at 6.) Demand Number 3 requested: “Any and all documents,
18 including without limitation, notes, diaries, memoranda, calendars or journals, which refer
19 or relate in any way to your employment with Defendant.” (Doc. 41-2 at 15.) Demand
20 Number 9 requested: “Any and all documents that in any way relate to any communications
21 between you and any current or former employee of Defendant.” (*Id.*) In Demand Number
22 21, Leprino further requested: “Any and all postings by you on any social media site that
23 relate in any way to your employment with Defendant.” (*Id.* at 17.)

24 On July 20, 2016, Brewer produced 165 documents and served written responses to
25 Leprino’s initial discovery requests. (Doc. 41-1 at 6.) In response to Leprino’s Demand
26 Number 3, Brewer stated: “Plaintiff has made a diligent search and reasonable inquiry, and

27 ¹ In a July 19, 2018 Order, the Court granted in part and denied in part Leprino’s
28 Motion for Summary Judgment. (Doc. 36.) The Court dismissed Brewer’s retaliatory
discharge claim under California Labor Code § 1102.5 and Brewer’s intentional infliction
of emotional distress claim. (*Id.* at 14, 16.)

1 Plaintiff will produce all documents responsive to this request currently in her possession,
2 custody, or control.” (Doc. 1 at 129.) In addition, Brewer responded to Demand Numbers
3 9 and 21: “After a reasonable and diligent search, Plaintiff is unable to comply with this
4 request because no responsive documents are currently in Plaintiff’s possession, custody,
5 or control. Discovery is ongoing.” (Id. at 131, 136.)

6 Leprino deposed Brewer on February 13, 2017. (Doc. 41-1 at 6.) In her deposition,
7 Brewer was questioned about her document productions; specifically, Brewer was asked
8 about the existence of any journals in her possession. (Id. at 11.) Brewer testified that her
9 journal – that detailed her work activities from 2012 to 2014 – was not in her possession.
10 (Id.)

11 On or about March 20, 2017, Brewer attempted to serve Leprino with subpoenas for
12 its hourly employees. (Docs. 43 at 6, 11; 20-3 at 14.) However, Leprino would not accept
13 service on their behalf. (Docs. 43 at 6, 11; 20-3 at 14.) Consequently, in April 2017, Brewer
14 began to communicate with Leprino’s hourly employees to obtain the individuals’
15 addresses to serve subpoenas. (Doc. 43 at 6, 11.) Specifically, Brewer sent text messages
16 to Elmer Meade (“Meade”) and Gabriel Cervantes (“Cervantes”) on April 5, 2017 and
17 April 7, 2017, respectively. (Doc. 41-2 at 62-64.) Brewer asserts that, during this
18 conversation with Cervantes, Cervantes stated that Leprino “retaliates” against its
19 employees if they go against it. (Docs. 43 at 11; 43-2 at 7; 41-2 at 64.)

20 On April 7, 2017, Brewer notified Leprino that she located her journal. (Docs. 43 at
21 7; 43-1 at 2; 41-1 at 11.) Then, on April 14, 2017, fact discovery closed. (Doc. 41-1 at 6.)

22 **B. The Parties’ Conduct After the Close of Discovery**

23 **1. Brewer’s Document Productions**

24 After the close of discovery, between April 14, 2017 and July 18, 2017, Brewer sent
25 Leprino seven document productions totaling over 125 documents. (Doc. 41-1 at 6.)
26 Further, Brewer produced 270 documents in September 2017. (Id. at 8.) The Court
27 discusses Brewer’s document productions, and the circumstances surrounding those
28 productions, below.

1 On April 20, 2017, Brewer produced a copy of her journal to Leprino. (Docs. 43 at
2 7; 43-1 at 2.) The record reveals a pattern of Brewer producing the journal to Leprino,
3 Leprino finding Brewer's productions to be illegible, the parties meeting and conferring
4 about the journal, and Brewer reproducing the journal to Leprino. (Doc. 43-1 at 2-3.) This
5 exchange occurred multiple times. (Id.) On May 19, 2017, Leprino conducted an in-person
6 inspection of the original journal and discovered that the journal contained responsive
7 pages that had not yet been produced. (Docs. 43 at 7; 41-2 at 38.) In an e-mail dated May
8 25, 2017, Leprino requested that Brewer produce the missing pages, and Brewer produced
9 a copy the following day. (Docs. 41-2 at 100; 43 at 7.)

10 At Meade's and Cervantes's depositions held on June 6, 2017 and June 7, 2017,
11 Leprino discovered that Brewer had sent Meade and Cervantes text messages in April
12 2017. (Doc. 41-2 at 28, 38.) At the time of the depositions, Brewer had not produced these
13 messages to Leprino. (Doc. 41-1 at 7; 41-2 at 38.)

14 On June 22, 2017, Leprino wrote a letter to Brewer detailing its concerns with
15 Brewer's document productions and demanding that Brewer produce all remaining
16 responsive discovery within one week. (Doc. 41-2 at 37-39.) On June 29, 2017, the parties
17 held a telephonic meet and confer regarding Brewer's document productions. (Id. at 41.)
18 Prior to and following the meet and confer, Leprino e-mailed Brewer a record of her
19 document productions. (Id., 43.) Brewer responded to further summarize the parties' meet
20 and confer efforts. (Id. at 44-45.) Then, in a letter dated June 30, 2017, Leprino clarified
21 its concerns about Brewer's document productions, described the documents that it
22 requested Brewer produce, and detailed the form in which the documents should be
23 produced. (Id. at 47-48.) Leprino also extended the deadline for Brewer to produce all
24 responsive documents to July 7, 2017 and stated that, if Brewer failed to comply, Leprino
25 would seek a Court order compelling Brewer to do so. (Id.)

26 On July 14, 2017, Brewer provided a partial document production to Leprino;
27 however, Brewer informed Leprino that, because of a technical issue, she would be unable
28 to produce all the responsive text messages until July 18, 2017. (Doc. 43 at 8.) On July 18,

1 2017, Brewer produced the remaining responsive documents. (Id.)

2 On August 1, 2017, Leprino filed an Ex Parte Application requesting that the Court
3 reopen discovery for limited purposes. (Docs. 25; 25-1.) To support its motion, Leprino
4 stated that Brewer produced over 125 documents after the close of discovery, depriving
5 Leprino of the opportunity to depose Brewer about the documents. (Doc. 25-1 at 6.) In
6 addition, Leprino asked the Court to impose discovery sanctions on Brewer pursuant to
7 Federal Rule of Civil Procedure 37. (Id. at 16.) In a September 6, 2017 Order, the Court
8 granted Leprino’s Ex Parte Application; reopened fact discovery to redepose Brewer; and
9 ordered Brewer to produce all remaining relevant text messages, Brewer’s journal, and
10 relevant social media postings. (Doc. 28.) The Court also extended the dispositive motion
11 deadline and deferred ruling on discovery sanctions. (Id.)

12 Pursuant to the Court’s Order, on September 29, 2017, Brewer produced 270
13 documents including text messages dated between April 2017 and September 2017; three
14 digital videos of Leprino’s processing facility taken in 2014 and 2017; and documents that
15 were located on Brewer’s electronic storage account, Dropbox, including screenshots of
16 Facebook and Snapchat conversations with Leprino employees dated between 2014 and
17 2017, and 135 undated photographs of Leprino’s facilities. (Docs. 41-1 at 8; 43 at 8-9.)

18 **2. Brewer’s Redeposition**

19 On October 23, 2017, Leprino redeposed Brewer. (Doc. 41-1 at 8.) Leprino
20 questioned Brewer about her preservation efforts and her efforts to search for documents
21 that were responsive to Leprino’s initial discovery request. Specifically, Leprino
22 questioned Brewer about: (1) text messages from 2014 that describe an alleged affair
23 between Miranda and another Leprino employee and that discuss the LOTO violation that
24 led to Brewer’s termination; (2) text messages dated between April 2017 and September
25 2017; (3) documents found on Brewer’s Dropbox account; and (4) Brewer’s journal.

26 First, Brewer testified that she used a Samsung Galaxy S3 (“Galaxy S3”) while she
27 was employed at Leprino. (Doc. 41-2 at 134.) Defense counsel questioned whether Brewer
28 used the phone to communicate with Leprino employees, and Brewer named over 20

1 employees with whom she had communicated. (Docs. 41-1 at 8; 41-2 at 134-38; 43 at 11.)
2 For example, Brewer testified that in April 2014 she received text messages from Leprino
3 employees detailing an alleged affair between Miranda and another Leprino employee.²
4 (Docs. 41-1 at 9; 41-2 at 142.) In addition, Brewer testified that she received text messages
5 from Leprino employees regarding the LOTO violation that led to her termination. (Docs.
6 41-1 at 9; 41-2 at 143.) In response to Brewer’s testimony, defense counsel asked Brewer
7 to identify the individuals who had sent her the text messages detailing Miranda’s affair
8 and discussing Brewer’s LOTO violation, and Brewer responded: “To be honest, I don’t
9 know. A lot of people, and to say one specific person over another, I don’t know.” (Doc.
10 41-2 at 143.)

11 Brewer further testified that she did not search the Galaxy S3 in response to
12 Leprino’s initial discovery request because she lost the phone in October 2014 when she
13 accidentally placed the phone on the hood of her car and drove away. (Docs. 41-2 at 148;
14 43 at 10-11.) Brewer testified that she could not recall the phone number or the wireless
15 carrier for the phone. (Docs. 41-1 at 9; 41-2 at 124-26.) Moreover, Brewer stated that she
16 did not recall receiving a billing statement for the phone. (Docs. 41-1 at 9; 41-2 at 125.)

17 Second, Brewer testified that she did not communicate with Leprino employees
18 between July 2014 – the date of her termination – and April 2017; however, she began to
19 text message Leprino hourly employees in April 2017. (Docs. 41-1 at 10; 41-2 at 150-51;
20 43 at 11.) When asked what steps she took to preserve the 2017 text messages, Brewer
21 stated that she called her wireless carrier in September 2017 “to do a print out of text
22 messages”; however, the wireless carrier did not offer that service.³ (Docs. 41-1 at 9; 41-2

23
24 ² In her complaint, Brewer alleges that she confronted Miranda about the affair, and
25 Miranda refused to discuss the matter. (Doc. 1 at 13.) After the confrontation, Brewer
26 alleges that she reported Miranda’s preferential treatment of male employees to her
supervisor, McDaniel. (*Id.*) Brewer contends that Miranda’s harassment began after she
confronted Miranda and complained to McDaniel. (*Id.*)

27 ³ In her Opposition, Brewer contends that “[Leprino’s] assertion of Plaintiff not
28 searching for documents until September of 2017 is contradicted by the evidence in that
Plaintiff produced text messages to [Leprino] in June of 2017.” (Doc. 43 at 12.) Even if
Brewer produced some messages to Leprino in June 2017, she testified several times that
the first time she attempted to *preserve* the messages was in September 2017. (Brandy
Brewer Dep. vol. 2, 312:9-13; 314:11-16; 317:14-17.)

1 at 114.) Brewer extracted the messages to her Gmail account that same month. (Doc. 41-2
2 at 117.)

3 Third, Brewer testified that she had a Dropbox account while she was employed
4 with Leprino. (Doc. 41-2 at 129.) Brewer stated that Dropbox was an application on her
5 Galaxy S3. (Id. at 130.) Brewer also claimed that, although photographs were stored on the
6 Dropbox account, she did not know how the photographs from her phone were uploaded
7 to Dropbox. (Id. at 130-32.) Brewer stated “I know it’s linked to my e-mail account. And
8 the only thing I remember that I ever do on my phones, but I haven’t done on this one, is I
9 usually sync my MSN account with it – the phone. So it’s linked to my e-mail;” (Id. at
10 132.) “To be real honest, I don’t know exactly how it’s set up.” (Id.) Brewer further testified
11 that she did not search her Dropbox account in response to Leprino’s initial discovery
12 request. (Id. at 158-59.)

13 Fourth, Brewer stated that she located her journal in a box at her mother’s house in
14 March or April 2017. (Doc. 41-2 at 153.) Brewer further testified that she had lived in her
15 mother’s house since 2015. (Id. at 154.) In fact, Brewer stated that, at the time she received
16 Leprino’s initial discovery request, Brewer lived and stored personal property at her
17 mother’s house. (Id. at 156-57.) However, Brewer testified that she did not search the box
18 in response to Leprino’s request. (Id. at 153.)

19 **3. Leprino’s Motion for Sanctions**

20 After the dispositive motion deadline, the Court scheduled a telephonic status
21 conference to set this matter for trial. (Doc. 38.) At the hearing, defense counsel requested
22 to bring the issue of discovery sanctions before the Court, and the Court advised the parties
23 that it would allow briefing on the issue. (Id.) Accordingly, Leprino filed the instant motion
24 on September 28, 2018. (Doc. 41.) Brewer filed her Opposition⁴ (Doc. 43), and Leprino
25 filed its Reply in support (Doc. 45).

26 _____
27 ⁴ In her Opposition, Brewer requests that the Court impose sanctions on Leprino
28 because Leprino disclosed an additional witness after the close of discovery. (Doc. 43 at 5-
6.) The Court declines to resolve this issue because the issue is not properly brought before
the Court. To properly bring this issue before the Court, Brewer must file a separately
noticed Motion for Sanctions.

1 **II. DISCUSSION**

2 Leprino requests that the Court impose discovery sanctions on Brewer. (Doc. 41-1
3 at 5.) Leprino contends sanctions are appropriate for the following reasons: (1) pursuant to
4 Federal Rule of Civil Procedure 37(a)(5), Leprino is entitled to recover the fees and costs
5 it incurred in making its Ex Parte Application; (2) pursuant to Federal Rules of Civil
6 Procedure 37(c) and 30(d), Leprino should be reimbursed the fees and costs it incurred in
7 redepousing Brewer; and (3) pursuant to Federal Rule of Civil Procedure 37(e), Leprino is
8 entitled to sanctions for Brewer’s failure to preserve electronically stored information
9 (“ESI”). (Id.) The Court considers each of Leprino’s arguments in turn.

10 **A. Sanctions under Federal Rule of Civil Procedure 37(a)(5)**

11 Leprino contends that it is entitled to the fees and costs it incurred in making its Ex
12 Parte Application under Rule 37(a)(5). (Doc. 41-1 at 11-12.) Specifically, Leprino argues
13 that, because it attempted to meet and confer with Brewer in good faith prior to filing its
14 motion and because the Court granted Leprino’s motion, it is entitled to recover its fees
15 and costs in the amount of \$10,480.00. (Id.)

16 Pursuant to Rule 26, a party must automatically disclose documents in the party’s
17 “possession, custody, or control” that the party will use to support its claims or defenses.
18 Fed. R. Civ. P. 26(a)(1)(A)(ii). Similarly, Rule 34 requires a party to produce all
19 discoverable and responsive documents that are in the party’s possession, custody, or
20 control in response to a request for production. Fed. R. Civ. P. 34(a)(1)(A); Kissinger v.
21 Reporters Comm. for Freedom of the Press, 445 U.S. 136, 164 n.6 (1980). Thus, a party
22 must make a “reasonable search” for responsive documents. City of Colton v. Am.
23 Promotional Events, Inc., NO. EDCV 09-01864 PSG (SSx), 2011 WL 13223968, at *4
24 (C.D. Cal. Nov. 28, 2011). Further, Rule 26 also requires a party to timely supplement its
25 disclosures if the party learns that its disclosures have become materially incomplete or
26 inaccurate. Fed. R. Civ. P. 26(e)(1)(A).

27 Rule 37 is a mechanism that a party can employ to obtain documents subject to
28 disclosure. See generally Fed. R. Civ. P. 37. Pursuant to Rule 37(a)(1), a party may move

1 for an order compelling disclosure after the party has attempted in good faith to obtain the
2 disclosure without court action. Fed. R. Civ. P. 37(a)(1). If a court grants the motion, then
3 the court must order the party “whose conduct necessitated the motion... to pay the
4 movant’s reasonable expenses incurred in making the motion, including attorney’s fees.”
5 Fed. R. Civ. P. 37(a)(5)(A). The court must not award monetary sanctions if “the movant
6 filed the motion before attempting in good faith to obtain the disclosure or discovery
7 without court action”; “the opposing party’s nondisclosure, response, or objection was
8 substantially justified”; or “other circumstances make an award of expenses unjust.” Fed.
9 R. Civ. P. 37(a)(5)(A)(i)-(iii).

10 The nonmoving party has the burden to establish substantial justification or that
11 other circumstances make the sanctions award unjust. Hyde & Drath v. Baker, 24 F.3d
12 1162, 1171 (9th Cir. 1994) (finding burden of showing substantial justification and special
13 circumstances is on party facing sanctions under Rule 37(d)); Subramani v. Wells Fargo
14 Bank, N.A., No. 13-cv-01605-SC, 2015 WL 12964616, at *1 (N.D. Cal. Mar. 18, 2015)
15 (applying same burden to Rule 37(a) because language is identical to Rule 37(d)). Conduct
16 is substantially justified where “there is a ‘genuine dispute’” or “if reasonable people could
17 differ as to [the appropriateness of the contested action].” Pierce v. Underwood, 487 U.S.
18 552, 565 (1988) (defining “substantial justification” under Equal Access to Justice Act);
19 Subramani, 2015 WL 12964616, at *1 (applying same definition to “substantial
20 justification” under Rule 37(a)(5)). “The test for substantial justification is one of
21 reasonableness.” Cathey v. City of Vallejo, No. 2:14-cv-01749-JAM-AC, 2015 WL
22 5734858, at *8 (E.D. Cal. Sept. 29, 2015) (internal quotations omitted) (quoting United
23 States v. First Nat. Bank of Circle, 732 F.2d 1444, 1447 (9th Cir. 1984)).

24 Here, Leprino contends that it fulfilled its obligation to meet and confer in good
25 faith because it engaged in hours of good faith meet and confer efforts by phone and in
26 writing to secure documents that were responsive to its initial discovery request. (Docs.
27 41-1 at 12; 45 at 6.) The Court agrees. The evidence clearly demonstrates that Leprino met
28 and conferred with Brewer at least three times prior to filing its Ex Parte Application and,

1 in each meet and confer, Leprino detailed its concerns about defects in Brewer's
2 disclosures. (Doc. 41-2 at 37-39, 41, 43-45, 47-48.) Despite Leprino's efforts, Brewer
3 failed to cure the defects in subsequent productions and continued to withhold responsive
4 documents from Leprino. (Id.) Therefore, Leprino sufficiently satisfied its meet and confer
5 obligations under Rule 37(a)(1) and Local Rule 251(b)⁵ prior to filing its Ex Parte
6 Application.

7 In addition, Brewer has failed to advance a legitimate argument that would
8 substantially justify her discovery conduct. See Hyde & Drath, 24 F.3d at 1171 (stating
9 burden to prove substantial justification is on party facing sanctions). Brewer does not
10 explicitly argue that her conduct was substantially justified. To give her the fullest
11 consideration, the Court construes the following statements from her Opposition as arguing
12 such. First, Brewer contends that, because Leprino refused to accept service on behalf of
13 its hourly employees, Brewer was required to communicate with Leprino's employees in
14 2017 to obtain their addresses to facilitate service of subpoenas. (Doc. 43 at 11.)
15 Accordingly, Brewer argues that the late disclosure of those messages was justified because
16 the messages did not exist at the time of Leprino's initial discovery request. (Id.) While the
17 Court understands Brewer's need to communicate with Leprino's employees, Brewer's
18 argument does not justify the untimely disclosure of those communications. The record
19 shows that Brewer communicated with Meade and Cervantes on April 5, 2017 and April
20 7, 2017, respectively, but waited until after the close of discovery to produce those
21 messages. (Docs. 41-1 at 7; 41-2 at 28, 38, 62-64.) Because the messages existed prior to
22 the close of discovery, Brewer should have disclosed the messages during that period, and
23 her failure to do so violated Rule 26(e). See Fed. R. Civ. P. 26(e)(1)(A). Moreover,
24 Brewer's late disclosure also violated Rule 26(a). Brewer claims that, during the
25 conversation with Cervantes in April 2017, he stated that Leprino "retaliates" against its
26 employees if they go against it. (Doc. 43 at 5, 11.) Because this statement directly supports

27
28 ⁵ Local Rule 251(b) states that a discovery motion will not be heard unless the parties meet and confer prior to filing the motion and the parties "set forth their differences and the bases therefor in a Joint Statement re Discovery Disagreement." L.R. 251(b).

1 Brewer's retaliation claims against Leprino, Brewer was required to disclose the messages
2 without awaiting a response. See Fed. R. Civ. P. 26(a)(1)(A)(ii). However, the record
3 shows that Brewer produced the messages only after Leprino discovered them at a June
4 2017 deposition and subsequently requested that the messages be produced. (Docs. 41-1 at
5 7; 41-2 at 28-30, 33-34, 37-39.) Thus, Brewer's late disclosure of the text messages was
6 not substantially justified.

7 Next, Brewer contends that the late disclosure of her journal was substantially
8 justified because, at the time of Leprino's original discovery request and at the time of her
9 deposition, she was unaware of the journal's existence. (Doc. 43 at 14.) The timing of
10 Brewer's discovery and subsequent production of her journal is suspect. At the time of
11 Leprino's initial discovery request, Brewer lived and stored property at her mother's house,
12 but she failed to search all the property at her mother's house – including the box where
13 her journal was located – in response to Leprino's request. (Docs. 41-2 at 153, 156-57; 43-
14 2 at 12.) Brewer's failure to make even the most cursory inspection of the personal property
15 at her mother's house was unreasonable and violated Rule 34. See Fed. R. Civ. P. 34; see
16 also Am. Promotional Events, Inc., 2011 WL 13223968, at *4. Moreover, Brewer's late
17 disclosure also violated Rule 26(e). Brewer alleges that she located the journal after her
18 initial deposition and one week prior to the close of discovery; however, she waited until
19 after the close of discovery to produce it. (Doc. 43 at 7.) Thus, Brewer failed to timely
20 supplement her disclosures in violation of Rule 26(e). See Fed. R. Civ. P. 26(e)(1)(A).
21 Further, Brewer failed to articulate any argument that would justify withholding responsive
22 pages from the journal when she produced it to Leprino.

23 Brewer further argues that the late disclosure of documents found on her Dropbox
24 account was justified because she volunteered the documents to Leprino when she located
25 them in August 2017. (Doc. 43 at 15.) However, this does not justify her failure to search
26 the Dropbox account earlier. The record shows that Brewer had a Dropbox account while
27 she was employed with Leprino, and although she was unaware how photographs were
28 uploaded to Dropbox, she knew that photographs were stored on the account. (Doc. 41-2

1 at 129-32.) Thus, Brewer's failure to search her Dropbox account in response to Leprino's
2 request was unreasonable and violated Rule 34. See Fed. R. Civ. P. 34; see also Am.
3 Promotional Events, Inc., 2011 WL 13223968, at *4. Moreover, Brewer's supplemental
4 disclosures were untimely because she waited until after the close of discovery to search
5 the Dropbox account for responsive documents. See Fed. R. Civ. P. 26(e). Accordingly,
6 Brewer has failed to establish that her discovery conduct was substantially justified.

7 Nor has Brewer established that a sanctions award would be unjust. See Hyde &
8 Drath, 24 F.3d at 1171 (stating party facing sanctions has burden to prove circumstances
9 would make award unjust). Brewer contends that sanctions would be unjust because she
10 did not act intentionally or conceal information from Leprino during the discovery process;
11 rather, she contends that she volunteered information to Leprino as she discovered it. (Doc.
12 43 at 19.) Even if Brewer's conduct was not intentional, her failure to comply with her
13 disclosure obligations under Rule 26(a) and (e) was, at the very least, negligent. A court
14 may impose sanctions even for negligent conduct. See Marquis v. Chrysler Corp., 577 F.2d
15 624, 642 (9th Cir. 1978) (citation omitted). Accordingly, Brewer has failed to carry her
16 burden of proving that a sanctions award would be unjust.

17 Therefore, the Court finds that Leprino is entitled to its reasonable expenses incurred
18 in filing its Ex Parte Application pursuant to Rule 37(a)(5) because Leprino attempted in
19 good faith to secure responsive documents without court action, and Brewer failed to
20 establish that her conduct was substantially justified or that circumstances would make a
21 sanctions award unjust. The Court, however, will determine the amount of fees and costs
22 to be awarded at the conclusion of this trial.

23 **B. Sanctions under Federal Rules of Civil Procedure 37(c) and 30(d)**

24 Leprino requests that the Court order Brewer to pay the fees and costs that Leprino
25 incurred in redepositing Brewer in the amount of \$7,413.05 pursuant to Rules 37(c) and
26 30(d). (Doc. 41-1 at 12-14.)

27 Under Rule 37(c), a party who fails to make a disclosure under Rule 26(a) or (e) is
28 prohibited from using that information on a motion, hearing, or at trial. Fed. R. Civ. P.

1 37(c)(1); see also Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th
2 Cir. 2001). However, a party may use the information if the failure is substantially justified
3 or harmless. Fed. R. Civ. P. 37(c)(1). The burden to establish substantial justification or
4 harmless is on the party facing sanctions. Yeti by Molly, Ltd., 259 F.3d at 1107. The
5 Ninth Circuit has found that disruption to a court's schedule is not harmless. Wong v.
6 Regents of the Univ. of Cal., 410 F.3d 1052, 1062 (9th Cir. 2005).

7 Here, the Court has already found that Brewer's discovery conduct violated Rule
8 26(a) and (e) and that Brewer failed to substantially justify her conduct. The Court also
9 finds that Brewer has failed to establish that her late disclosures were harmless. See Yeti
10 by Molly, Ltd., 259 F.3d at 1107 (stating burden on party facing sanctions to prove
11 harmless). Brewer contends that her conduct was harmless because Leprino has not
12 suffered prejudice. (Doc. 43 at 15.) The Court disagrees. The bulk of Brewer's disclosures
13 were produced after the close of fact discovery, depriving Leprino of the opportunity to
14 depose Brewer about the information during the discovery period. (Doc. 41-1 at 6, 8.)
15 Consequently, the Court reopened Brewer's deposition to mitigate the prejudice to Leprino
16 and extended the dispositive motion deadline to accommodate Brewer's redeposition.
17 (Doc. 38.) However, this modification to the Court's schedule was not harmless. See
18 Wong, 410 F.3d at 1062. Because Brewer's failure to comply with Rule 26(a) and (e) was
19 neither substantially justified nor harmless, sanctions are warranted under Rule 37(c).⁶

20 Although Rule 37(c) provides for the preclusion of evidence when a party fails to
21 comply with its disclosure obligations, the Court may impose other appropriate sanctions
22 including payment of reasonable expenses and instructing the jury of the party's failure to
23 comply. See Fed. R. Civ. P. 37(c)(1)(A)-(C). Because the late disclosed evidence – namely,
24 the text messages created in 2017, the documents found on Brewer's Dropbox account, and
25 Brewer's journal – may support both Brewer's and Leprino's cases, the Court finds that
26 preclusion is not appropriate. Instead, the Court finds that monetary sanctions are
27 warranted. However, the Court will determine the amount of fees and costs to be awarded

28 ⁶ Because the Court finds that sanctions are appropriate under Rule 37(c), the Court declines to analyze whether sanctions are also appropriate under Rule 30(d).

1 at the conclusion of this trial.

2 **C. Sanctions Under Federal Rule of Civil Procedure 37(e)**

3 Leprino moves for Rule 37(e) sanctions, arguing that Brewer failed to take
4 reasonable steps to preserve text messages – created in 2014 on Brewer’s Galaxy S3 that
5 discuss an alleged affair between Miranda and another Leprino employee and detail the
6 LOTO violation that led to Brewer’s discharge – when she was under a duty to do so. (Doc.
7 41-1 at 14-16.)

8 Spoliation is the “destruction or significant alteration of evidence, or the failure to
9 preserve property for another’s use as evidence, in pending or future litigation.” Kearney
10 v. Foley & Lardner, LLP, 590 F.3d 638, 649 (9th Cir. 2009) (internal quotations and
11 citations omitted). A district court may impose sanctions for spoliation pursuant to its
12 inherent authority and Federal Rule of Civil Procedure 37(e). Leon v. IDX Sys. Corp., 464
13 F.3d 951, 958 (9th Cir. 2006). Rule 37(e) provides the legal standard for spoliation of ESI.
14 See Fed. R. Civ. P. 37(e); see also Porter v. City and County of San Francisco, No. 16-cv-
15 03771-CW(DMR), 2018 WL 4215602, at *3 (N.D. Cal. Sept. 5, 2018). Under Rule 37(e),
16 spoliation occurs if: (1) the relevant ESI “should have been preserved in the anticipation or
17 conduct of litigation”; (2) the ESI “is lost because a party failed to take reasonable steps to
18 preserve it”; and (3) “[the ESI] cannot be restored or replaced through additional
19 discovery.” Fed. R. Civ. P. 37(e).

20 A duty to preserve evidence arises “the moment that litigation is reasonably
21 anticipated.” DelGiacco v. Cox Commc’ns, Inc., No. SACV 14-0200 DOC(DFMx), 2015
22 WL 1535260, at *22 (C.D. Cal. Apr. 6, 2015) (internal quotations omitted) (quoting Apple
23 Inc. v. Samsung Elecs. Co., 881 F. Supp. 2d 1132, 1136 (N.D. Cal. 2012)). “This is an
24 objective standard, asking not whether the party in fact reasonably foresaw litigation, but
25 whether a reasonable party in the same factual circumstances would have reasonably
26 foreseen litigation.” Waymo LLC v. Uber Techs., Inc., No. C 17-00939 WHA, 2018 WL
27 646701, at *14 (N.D. Cal. Jan. 29, 2018) (internal quotations omitted) (quoting Micron
28 Tech., Inc. v. Rambus Inc., 645 F.3d 1311, 1320 (Fed. Cir. 2011)). The Ninth Circuit has

1 not explicitly identified when the duty to preserve arises; however, “trial courts in this
2 Circuit generally agree that, “[a]s soon as a potential claim is identified, a litigant is under
3 a duty to preserve evidence which it knows or reasonably should know is relevant to the
4 action.” Rockman Co. (USA), Inc. v. Nong Shim Co., 229 F. Supp. 3d 1109, 1122 (N.D.
5 Cal. 2017) (quoting In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1067 (N.D.
6 Cal. 2006)). The duty to preserve may arise before litigation has formally commenced. See
7 Apple Inc., 881 F. Supp. 2d at 1136.

8 The duty to preserve extends only to relevant evidence. Zubulake v. UBS Warburg
9 LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003). “Relevance for purposes of discovery is
10 defined very broadly.” Garneau v. City of Seattle, 147 F.3d 802, 812 (9th Cir. 1998).
11 Relevance means that the discovery sought is “reasonably calculated to lead to the
12 discovery of admissible evidence.” Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 352
13 (1978) (quoting Fed. R. Civ. P. 26(b)(1)). Moreover, the Ninth Circuit has stated that
14 “because ‘the relevance of... [destroyed] documents cannot be clearly ascertained because
15 the documents no longer exist,’ a party ‘can hardly assert any presumption of irrelevance
16 as to the destroyed documents.’” Leon, 464 F.3d at 959.

17 If spoliation occurs and a court finds prejudice to the nonspoliating party, then the
18 court may impose sanctions “no greater than necessary to cure the prejudice.” Fed. R. Civ.
19 P. 37(e)(1). However, if a court finds that the spoliating “party acted with the intent to
20 deprive another party of the information’s use,” then the court may impose harsher
21 sanctions. Fed. R. Civ. P. 37(e)(2). A court may find intentional spoliation where “the
22 evidence shows or it is reasonable to infer, that the [] party purposefully destroyed evidence
23 to avoid its litigation obligations.” Porter, 2018 WL 4215602, at *3.

24 Here, Leprino contends that Brewer’s duty to preserve evidence arose when she
25 filed a complaint with the DFEH. (Doc. 41-1 at 15.) In contrast, Brewer argues that the
26 duty to preserve did not arise until she filed the instant lawsuit because she did not intend
27 to sue Leprino at the time that she filed the complaint with the DFEH. (Doc. 43 at 9-10.)
28 The Court agrees with Leprino. Despite Brewer’s contention that she did not intend to sue

1 Leprino at the time she filed the DFEH complaint, the facts and circumstances as alleged
2 by Brewer, the parties' briefings on the instant motion, and all the prior pleadings in this
3 case suggest otherwise. According to Brewer, Miranda began harassing Brewer after
4 Brewer confronted Miranda about text messages she received, detailing Miranda's alleged
5 affair. (Doc. 1 at 13.) After the confrontation, Brewer alleges that Miranda made negative
6 comments about Brewer's use of FMLA leave, Miranda stated she preferred working with
7 men, and Miranda told Brewer she was tracking Brewer's use of leave to take it to
8 management to get her fired. (Doc. 36 at 3.) Brewer perceived these comments as "threats,"
9 and as the "threats" continued, Brewer reported Miranda's behavior to numerous
10 supervisors including McDaniel, Rocha, and Doyle. (*Id.*) However, Brewer contends that
11 management refused to investigate Brewer's allegations and threatened her job. (Docs. 34
12 at 6-7; 36 at 4.) Brewer alleges that Miranda's conduct continued, and on July 9, 2014,
13 "Miranda suspended [] Brewer for a false reason of failing to lock out the palletizer." (Doc.
14 34 at 9.) In her suspension meeting, Brewer claims that she attempted, once again, to report
15 Miranda's retaliation; however, "nobody at the meeting did anything about it," and Brewer
16 was terminated. (*Id.* at 10.) The day after her termination, Brewer filed a complaint with
17 the DFEH. (Doc. 41-2 at 147.) Because Brewer repeatedly attempted to report and remedy
18 the harassment she was experiencing, a reasonable person in Brewer's situation would have
19 reasonably foreseen future litigation the moment that she filed a complaint with the DFEH.
20 See Waymo LLC., 2018 WL 646701, at *14. Therefore, Brewer's duty to preserve arose
21 when she filed a complaint with the DFEH.

22 Additionally, Leprino asserts, and Brewer does not dispute, that the messages would
23 have been highly relevant to Brewer's claims. (Docs. 41-1 at 15; 43 at 11.) The Court
24 agrees and finds that the messages may have some relevance. According to Brewer, on or
25 around April 2014, various employees sent Brewer text messages detailing Miranda's
26 alleged affair. (Docs. 1 at 12; 41-1 at 16.) Brewer claims that Miranda's harassment began
27 after she confronted Miranda about the affair. (Doc. 1 at 13.) Accordingly, these text
28 messages are probative of Brewer's gender discrimination and retaliation claims. Brewer

1 also alleges that various employees sent Brewer text messages regarding the LOTO
2 violation that led to her discharge. (Doc. 41-1 at 15-16.) Because Brewer alleges that
3 Miranda discriminated against her in reporting the LOTO violation, these text messages
4 are also relevant to her gender discrimination and retaliatory discharge claims. Therefore,
5 the Court finds that these messages may have some relevancy at trial.

6 The Court further finds that Brewer failed to take reasonable steps to preserve the
7 text messages. As Leprino highlights, and Brewer fails to dispute, Brewer “made no effort
8 to back-up or preserve the Galaxy S3” prior to its loss in October 2014. (Doc. 41-1 at 15.)
9 Thus, Brewer failed to preserve the text messages when she was under a duty to do so.

10 Next, Brewer contends that spoliation did not occur because the messages could be
11 obtained from third parties. (Doc. 43 at 11-12, 14.) However, Brewer foreclosed that
12 possibility. Although Brewer provided Leprino a laundry list of individuals whom she
13 generally communicated with on the Galaxy S3, when asked to specifically identify the
14 individuals who sent the messages detailing Miranda’s alleged affair and Brewer’s LOTO
15 violation, Brewer refused. (Doc. 41-2 at 134-38, 143.) As such, it is unreasonable to expect
16 Leprino to obtain replacement messages from third parties when Brewer refused to
17 specifically identify any of the individuals who sent her the text messages at issue. Thus,
18 it is not possible to obtain replacement messages from third parties. Nor is it possible to
19 obtain replacement messages directly from the wireless carrier. Brewer testified that she
20 cannot remember the Galaxy S3’s phone number or wireless carrier. (Doc. 41-2 at 124-
21 26.) In addition, Brewer testified that she does not recall viewing a billing statement for
22 the phone. (*Id.* at 125.) Thus, it is not possible to restore or replace the messages from either
23 third parties or the wireless carrier.

24 Therefore, the Court finds that spoliation occurred and sanctions under Rule 37(e)
25 are warranted because Brewer failed to take reasonable steps to preserve relevant text
26 messages while she was under a duty to do so, and the messages cannot be restored or
27 replaced.

28 Sanctions are appropriate under Rule 37(e)(1) because Leprino was prejudiced by

1 Brewer's spoliation. See Fed. R. Civ. P. 37(e)(1). The prejudice to Leprino is clear.
2 Because the text messages were highly probative of Brewer's claims, Leprino is prejudiced
3 because it is unable to review and properly prepare a defense to evidence that would be
4 offered against it at trial.

5 Sanctions are also appropriate under Rule 37(e)(2) because Brewer "acted with the
6 intent to deprive [Leprino] of the information's use in litigation." Fed. R. Civ. P. 37(e)(2).
7 As a defense and in an effort to sidestep a finding of intent, Brewer claims that she
8 innocently lost the text messages in October 2014 when she placed her phone on the hood
9 of her car and drove away. (Doc. 43 at 10-11.) At first blush, Brewer's explanation seems
10 plausible, but the overwhelming objective evidence, and her lack of corroboration, suggests
11 otherwise. Brewer failed to take any measures to preserve the text messages prior to
12 October 2014 despite her duty to do so; Brewer provided no independent record of the
13 phone; and Brewer refused to identify the individuals with whom she communicated,
14 essentially depriving Leprino of any possibility of resurrecting the messages or coming to
15 a meaningful understanding of the messages' content. Thus, Brewer's pattern of conduct
16 suggests intentional spoliation.

17 Leprino requests the following sanctions: (1) monetary sanctions in the amount of
18 Leprino's fees and costs associated with its Ex Parte Application; (2) monetary sanctions
19 in the amount of Leprino's fees and costs associated with Brewer's redeposition; (3)
20 monetary sanctions in the amount of Leprino's fees and costs associated with the instant
21 Motion for Sanctions; (4) an order precluding Brewer from "referring to or presenting
22 evidence at trial about any alleged communications" about the LOTO violation that led to
23 her discharge or the alleged affair between Miranda and another Leprino employee; and
24 (5) and order dismissing Plaintiff's claims, or in the alternative, providing an adverse
25 inference jury instruction at trial. (Doc. 41-1 at 18.) However, "[t]he remedy should fit the
26 wrong." Fed. R. Civ. P. 37(e) advisory committee note to 2015 amendment. Because the
27 spoliated evidence appears to be favorable to Brewer, the Court finds that preclusion is
28 premature at this time. The Court may, however, provide an adverse inference instruction

1 at trial regarding Brewer's intentional spoliation of evidence.⁷

2 **III. CONCLUSION**

3 Based on the foregoing, the Court finds that Leprino is entitled to fees and costs
4 incurred in making its Ex Parte Application and in redepositing Brewer. Although Leprino
5 is entitled to monetary sanctions, the Court will determine the amount of fees and costs to
6 be awarded at the conclusion of this trial.

7 Further, the Court finds that an adverse inference instruction at trial regarding
8 Brewer's intentional spoliation of evidence may also be an appropriate sanction.

9 Accordingly,

10 **IT IS HEREBY ORDERED** granting in part and denying in part Leprino Foods
11 Company Inc.'s Motion for Sanctions. (Doc. 41.)

12 **IT IS FURTHER ORDERED** that Brewer shall pay Leprino's fees and costs
13 incurred in making its Ex Parte Application in an amount to be determined at the conclusion
14 of this trial.

15 **IT IS FURTHER ORDERED** that Brewer shall pay Leprino's fees and costs
16 incurred as a result of her redeposition in an amount to be determined at the conclusion of
17 this trial.

18 **IT IS FURTHER ORDERED** that the Court reserves the right to provide an
19 adverse inference instruction at trial regarding Brewer's intentional spoliation of evidence.

20 Dated this 29th day of January, 2019.

21
22
23 
24 Honorable Stephen M. McNamee
25 Senior United States District Judge
26
27

28 _____
⁷ Although not raised by the parties, as a trial matter, the Court notes that the spoliation of these text messages also gives rise to the issue of Federal Rule of Evidence 1002, the "best evidence" rule. See Fed. R. Evid. 1002.