

3. A ruling from the U.S. District Court for the Northern District of California denying in part a motion to compel responses to an interrogatory about the defendants' document retention and litigation hold because the plaintiff had not made a showing of spoliation but granting the motion in part to compel certain information that would assist with resolving discovery disputes between the parties.

In *In re Google RTB Consumer Privacy Litigation*, No. 21-cv-02155-YGR (VKD), 2024 WL 3407069 (N.D. Cal. July 11, 2024), U.S. Magistrate Judge Virginia K. DeMarchi addressed the standards under Rule 26 for compelling a party to produce information regarding its litigation holds.

This nationwide data privacy class action was brought on behalf of Google account holders alleging that Google shares and sells users' personal information with companies that participate in Google's digital ad auction system, called Google Real-Time Bidding (RTB).

In discovery, Plaintiffs served Google an interrogatory with multiple subparts seeking "extensive information about essentially everything Google did with respect to the retention and preservation of any information responsive to a claim or defense in this action." *Id.* at *3. This included information regarding Google's retention and preservation of Plaintiffs' data in certain logs and its retention and preservation of logs or data sources that contain information "associating or linking information transmitted in Google RTB bid requests with personal Google accounts." In response, Google offered to provide certain information regarding the logs, including (i) the standard retention period and any changes thereto during the class period; (ii) the data fields being preserved; (iii) the earliest date for which Google has any data available in these logs; and (iv) the earliest date for which Google has any data for the named plaintiffs available in these logs. The parties could not reach agreement, and Plaintiffs moved to compel.

Magistrate Judge DeMarchi began her analysis with a summary of the relevant portions of Rule 26, which provides that a party "may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* (quoting Rule 26(b)(1)). In addition, Rule 26(b)(2) provides that the Court may limit the extent of discovery otherwise permitted if it determines that the proposed discovery "is outside the scope permitted by Rule 26(b)(1)."

Applying these standards, Magistrate Judge DeMarchi first concluded that Plaintiffs had not met their burden of demonstrating that they required "detailed information about Google's litigation holds in this and other litigations." *Id.* at *3. In particular, she found that Plaintiffs should be able to readily discern whether Google timely preserved potentially relevant data based on Google's agreement to produce information concerning its "standard data retention periods, changes made to those periods, and the earliest dates for which it has preserved data" in the relevant logs.

Magistrate Judge DeMarchi rejected Plaintiffs' argument that they had made a "preliminary showing" of spoliation by Google sufficient to "overcome the attorney-client privilege that

typically protects litigation holds from discovery and to obtain other information about how Google implemented its litigation holds.” She concluded that Plaintiffs had not made a preliminary showing of spoliation or any other showing sufficient to justify this discovery and stated that “[a]t most, there is a dispute about what Google was required to preserve or produce.” In reaching this conclusion, she distinguished two cases Plaintiffs relied on in making their argument: *In re Cathode Ray Tube Antitrust Litigation*, 2014 WL 5667882, at *2, *3-*5 (N.D. Cal. Jan. 27, 2023) (where the Defendant admitted it failed to timely preserve relevant information for eight months, relied exclusively on an “oral” litigation hold, acknowledged that it misunderstood the scope of what should be preserved, and then failed to document its preservation efforts in any manner) and *Thomas v. Cricket Wireless, LLC*, 2020 WL 7344742, at *1-*2 & n. 3 (N.D. Cal. Dec. 14, 2020) (where the Defendant had already conceded that it did not retain legacy databases covering a time period relevant to the litigation even though it was on notice of its obligation to preserve at least some of the data).

Magistrate Judge DeMarchi reached a different conclusion regarding Plaintiffs’ request for another subpart of the interrogatory requesting information about the “retention period(s) ... and any changes to the retention period during the class period” for logs “capable of associating or linking information transmitted in Google RTB bid requests with personal Google accounts ... including log(s) or data source(s) or decryption or encryption keys whereby [G]oogle maps or links various identifiers to each other.” *Id.* at *4. She noted that the parties had an ongoing dispute regarding the distinction between what constituted a “decryption key” and whether Google had a duty to preserve and produce such keys. Google also argued that Plaintiffs had obtained fully responsive information during a Rule 30(b)(6) deposition, although Plaintiffs questioned the completeness and accuracy of the testimony and other information Google had provided. Under these circumstances, Magistrate Judge DeMarchi concluded that requiring Google to provide a “precise answer” to this part of the interrogatory would “resolve unnecessary disputes regarding Google’s retention and preservation of decryption keys,” and she ordered Google to do so.