

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 18-620 JVS (JDEx) Date June 17, 2020

Title Glaukos Corporation v. Ivantis, Inc.

Present: The **James V. Selna, U.S. District Court Judge**
Honorable

Lisa Bredahl

Not Present

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: [IN CHAMBERS] Order Regarding Motion for Adverse Inference Instruction and Exclusion

Plaintiff and Counter-Defendant Glaukos Corporation (“Glaukos”) moved for an adverse inference instruction and exclusion regarding Defendant Ivantis, Inc.’s (“Ivantis”) alleged spoliation of evidence. Mot., [Dkt. No. 413](#) (sealed version at [Dkt. No. 429-7](#)). Ivantis opposed. Opp’n, [Dkt. No. 495](#) (sealed version at [Dkt. No. 509](#)). Glaukos replied. Reply, [Dkt. No. 526](#) (sealed version at [Dkt. No. 541](#)).

For the reasons stated in this Order, the Court **GRANTS** Glaukos’s motion.¹

I. BACKGROUND

Glaukos filed this action for patent infringement against Ivantis on April 14, 2018. Complaint, Docket No. 1. Glaukos asserts two patents: (1) U.S. Patent No. 6,626,858 (“the ’858 patent”), and (2) U.S. Patent No. 9,827,143 (“the ’143 patent”) (collectively, the “Asserted Patents”). *Id.*, Exs. A, B. The Asserted Patents disclose inventions relating to the treatment of glaucoma. *See id.* Glaukos alleged “[t]he infringing Ivantis product is a medical device known as the Hydrus Microstent (‘Hydrus’).” *Id.* ¶ 1. Glaukos further alleged “[o]n information and belief, Ivantis currently manufactures the Hydrus at its facility in Irvine, California, for use outside of the safe harbor provided under [35 U.S.C. § 271\(e\)\(1\)](#), including for commercial use in international markets.” *Id.* ¶ 2.

¹ The Court has reviewed Ivantis’s request for a hearing and finds that oral argument would not be helpful in this matter. [Fed. R. Civ. P. 78](#); L.R. 7-15.

UNDER SEAL

UNDER SEAL

UNDER SEAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 18-620 JVS (JDEx) Date June 17, 2020

Title **Glaukos Corporation v. Ivantis, Inc.**

Ivantis maintained a document policy that automatically deletes emails after 12 months; it instituted this policy in 2013. Declaration of Lisa Glasser (“Glasser Decl.”), Exs. 49, 61; Declaration of David Van Meter (“Van Meter Decl.”) ¶ 3 Ivantis claims it instituted its email policy to alleviate burdens on its IT systems. Van Meter Decl. ¶¶ 2-4. It is impossible for Ivantis to recover any emails that were deleted. Glasser Decl, Ex. 14. Ivantis made no effort to preserve documents related to Glaukos before Glaukos filed suit in April 2018. Glasser Decl., Exs. 2, 10, 15. Ivantis instituted a litigation hold on April 19, 2018. Van Meter Decl. ¶ 5. Thus, emails as of April 19, 2017 were not subject to the mandatory deletion policy. *Id.*

II. LEGAL STANDARD

Spoilation is “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence, in pending or future litigation.” *Kearney v. Foley & Lardner, LLP*, [590 F.3d 638, 649](#) (9th Cir. 2009). A party that has despoiled evidence can be sanctioned by a district court under two sources of authority: “the inherent power of federal courts to levy sanctions in response to abusive litigation practices, and the availability of sanctions under Rule 37 against a party who fails to obey an order to provide or permit discovery.” *Leon v. IDX Sys. Corp.*, [464 F.3d 951, 958](#) (9th Cir. 2006) (internal quotations and citations omitted).

The obligation to preserve relevant evidence attaches when litigation is “pending or reasonably foreseeable.” *Sunrider Corp. v. Bountiful Biotech Corp.*, [2010 WL 4590766](#), at *29 (C.D. Cal. Oct. 8, 2010) (citing *Zubulake v. UBS Warburg LLC*, [220 F.R.D. 212, 216](#) (S.D.N.Y. 2003)); see also *United States v. Kitsap Physicians Serv.*, [314 F.3d 995, 1001](#) (9th Cir. 2002) (finding no spoliation because the defendant was not on notice of a “future, specific” lawsuit). Courts in the Ninth Circuit generally agree that this duty is triggered “[a]s soon as a potential claim is identified.” *Apple, Inc. v. Samsung Elecs Co.*, [888 F. Supp. 2d 976, 991](#) (N.D. Cal. 2012) (citations omitted). This duty to preserve extends to evidence that parties knew or should have known was relevant or may be relevant to future litigation. *Kitsap*, [314 F.3d at 1001](#); *Sunrider Corp.*, [2010 WL 4590766](#), at *29; see also *Wm. T. Thompson v. Gen. Nutrition Corp.*, [593 F. Supp. 1443, 1455](#) (C.D. Cal. 1984.) (“Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible

UNDER SEAL

UNDER SEAL

UNDER SEAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 18-620 JVS (JDEx) Date June 17, 2020

Title **Glaukos Corporation v. Ivantis, Inc.**

evidence, and destroys such documents and information.”). Notably, a finding of bad faith is not required to justify a spoliation sanction. Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993).

“The court has broad discretion to fashion, on a case-by-case basis, an appropriate sanction for spoliation.” Cyntegra, Inc. v. Idexx Laboratories, Inc., 2007 U.S. Dist. LEXIS 97417, at *4 (C.D. Cal. Sept. 21, 2007) (citing Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg. Corp., 982 F.3d 363, 367 (9th Cir. 1992)). District courts may employ a variety of different sanctions in response to the spoliation of evidence, including monetary sanctions, evidentiary sanctions, civil contempt sanctions, and default judgment. See In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1066 (N.D. Cal. 2006). However, the Court’s “inherent powers must be exercised with restraint and discretion.” Advantacare Health Partners v. Access IV, 2004 U.S. Dist. LEXIS 16835, at *12 (N.D. Cal. Aug. 17, 2004) (citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)). When selecting the appropriate sanction, the Court generally considers: “(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.” Apple, 888 F. Supp. 2d at 992 (citing Nursing Home Pension Fund v. Oracle Corp., 254 F.R.D. 559, 563 (N.D. Cal. 2008)). Spoliation sanctions should be “commensurate to the spoliating party’s motive or degree of fault in destroying the evidence.” Cottle-Banks v. Cox Comm’ns, Inc., 2013 WL 2244333, at *13 (S.D. Cal. May 21, 2013) (quoting Apple, 888 F. Supp. 3d at 992-93). Therefore, the Court may deny a request for harsh sanctions when the “degree of fault and level of prejudice were insufficient to justify the imposition of the sanctions.” Apple, 888 F. Supp. 2d at 993.

Rule 37(e) of the Federal Rules of Civil Procedure was amended to establish the findings necessary to support certain curative measures for failure to preserve electronically stored information. This amendment “forecloses reliance on inherent authority or state law to determine when certain measures should be used” to address spoliation of electronically stored information. See Fed. R. Civ. P. 37(e), Advisory Committee Note to 2015 Amendment (emphasis added).

Rule 37(e) recites the following:

UNDER SEAL

UNDER SEAL

UNDER SEAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 18-620 JVS (JDEx) Date June 17, 2020

Title **Glaukos Corporation v. Ivantis, Inc.**

e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the *intent* to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

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

UNDER SEAL

UNDER SEAL

UNDER SEAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 18-620 JVS (JDEx) Date June 17, 2020

Title Glaukos Corporation v. Ivantis, Inc.

III. DISCUSSION

A. Finding of Spoliation

In order to establish spoliation, Glaukos must demonstrate that Ivantis destroyed evidence that was potentially relevant to the reasonably foreseeable litigation. See Housing Rights Center v. Sterling, 2005 WL 3320739, at *3, 2005 U.S. Dist. LEXIS 44769, at *10 (C.D. Cal. Mar. 3, 2005) (“[A] litigant is under no duty to keep or retain every document in its possession ... it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.”) (citing Zubulake, 220 F.R.D. at 217). The duty to preserve relevant documents attaches when future litigation is “probable,” which means “more than a possibility.” Realnetworks, Inc. v. DVD Copy Control Ass’n, 264 F.R.D. 517, 524 (N.D.Cal. 2009). The critical inquiry is whether Ivantis had “some notice that the documents were potentially relevant.” Cyntegra, 2007 WL 5193736, at *2, 2007 U.S. Dist. LEXIS 97417, at *8 (quoting Akiona v. United States, 938 F.2d 158, 161 (9th Cir. 1991)) (emphasis added).

Glaukos moves for an adverse inference jury instruction and preclusion sanctions based on Ivantis’s failure to preserve emails when litigation allegedly became reasonably foreseeable. See generally, Mot. Glaukos claims that Ivantis’s failure to suspend its email policy, which deleted all company emails annually, resulted in spoliation of evidence. Id. According to Glaukos, there are four reasons why litigation was reasonably foreseeable before Ivantis suspended its email policy.

First, in 2009, one of the two inventors of the Asserted Patents, Dr. Reay Brown, told Ivantis that he was sure the Hydrus “must infringe,” and then followed up with an email stating that the “essential features” of the device “are depicted” in the parent patent to the Asserted Patents and that the patent “perhaps anticipat[e] some of the features in your device.” Glasser Decl. Exs. 3, 11. Dr. Brown retained this email, which is how Glaukos obtained it; Ivantis did not produce it. Mot. at 5. Ivantis’s CEO responded to Dr. Brown that Ivantis was “certain [its] IP does not infringe.” Declaration of Christina Lee (“Lee Decl.”), Ex. G.

UNDER SEAL

UNDER SEAL

UNDER SEAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 18-620 JVS (JDEx) Date June 17, 2020

Title **Glaukos Corporation v. Ivantis, Inc.**

Second, in 2013, Ivantis hired outside patent litigation counsel to conduct diligence related to Glaukos's patents. Glasser Decl., Exs. 10, 40. Additionally, Ivantis asserts the work product privilege over documents dating back to at least September 2017; Glaukos argues this must mean these documents were prepared in anticipation of litigation regarding the Hydrus. Mot. at 6; Glasser Decl., Exs. 14, 40, 54.

Third, multiple investors considered investing in Ivantis or acquiring it but declined to do so based on concerns about patent litigation by Glaukos. Mot. at 6. In 2017, one investor stated that Glaukos's patents presented "a big issue," while another stated the same year that it would not invest based on "IP overhang." Glasser Decl., Exs. 42, 46, 47. In May 2017, Ivantis's CEO circulated a report from an industry analyst, who stated that he expected that Glaukos would initiate patent litigation in 2018. Mot. at 6-7, Glasser Decl., Ex. 44. Another industry analyst report, from November 2017, stated that Glaukos was expected to initiate legal proceedings against Ivantis. Glasser Decl., Ex. 43.

Fourth, Ivantis began preparing *inter partes* review petitions to challenge Glaukos's Asserted Patents by no later than March 2018, a month before Glaukos filed its Complaint. Glasser Decl., Exs. 15, 45.

Ivantis generally argues that it openly developed the Hydrus and therefore that Glaukos was aware of the product. Opp'n at 3-4; Van Meter Decl. ¶¶ 6-9. Glaukos, according to Ivantis, "never undertook any actions to put Ivantis on notice . . . whether through express notice to Ivantis or any other means, despite being fully aware of Ivantis's development of the Hydrus." Opp'n at 11; Van Meter Decl. ¶ 10.² The Court is not convinced that Glaukos's choice not to explicitly put Ivantis on notice of litigation excuses Ivantis's obligation to preserve emails relevant to litigation, at the point that it was reasonably foreseeable. See Thompson v. U.S. Dep't of Housing & Urban Development, 219 F.R.D. 93, 100 (D. Md. 2003) ("While a litigant certainly may request that an adversary agree to preserve electronic records . . . it is not required, and a failure to do so does not vitiate the independent obligation of an adverse party to preserve such information."); Apple, 881 F. Supp. 2d at 1136 (plaintiffs' "failure" to send preservation letter "does not vitiate the independent obligation of an adverse party to preserve such

² Ivantis also argues that the Glaukos's August 2016 litigation hold as to Ivantis is relevant; the Court does not find that this date is relevant as to when *Ivantis* was obligated to preserve emails.

UNDER SEAL

UNDER SEAL

UNDER SEAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 18-620 JVS (JDEx) Date June 17, 2020

Title **Glaukos Corporation v. Ivantis, Inc.**

information’ if the adverse party knows or should know of impending litigation”); Napster, 462 F. Supp. 2d at 1069 (duty to preserve evidence arose over a year before receipt of preservation letter where defendant “should reasonably have believed that litigation against it was probable.”).

Additionally, Ivantis also argues that litigation “was at most a possibility” until early 2018, and that it was not on notice about *this* litigation prior to Glaukos filing suit. Opp’n at 10; see Oracle Am., Inc. v. Hewlett Packard Enter. Co., 328 F.R.D. 543, 551 (N.D. Cal. 2018). For example, Ivantis argues that its IPR filings did not involve litigation, and neither did its retention of outside counsel to perform patent diligence. Opp’n at 11-12. The work product entries in Ivantis’s privilege log, it claims, “are not related to this litigation (or the potential for it),” although Ivantis does not point to other litigation that would justify asserting the work product privilege. Id. at 12. Finally, the “apprehension from the investing community regarding a risk of litigation,” according to Ivantis, does not amount to a *probability* of litigation. See Realnetworks, 264 F.R.D. at 526 (“[a] general concern over litigation does not trigger a duty to preserve evidence.”).

The Court has reviewed the relevant sequence of events and concludes that actions taken by Ivantis, and various communications made by third parties to Ivantis, illustrate not only that a reasonable party in Ivantis’s position would have reasonably foreseen this litigation, but that Ivantis *actually* foresaw this litigation, at least by the beginning of 2017, if not earlier. See Waymo LLC v. Uber Techs., 2018 WL 646701, at *15 (N.D. Cal. Jan. 30, 2018). Ivantis’s retention of outside counsel to perform due diligence, and its assertion of the work product privilege, reveal that it apprehended it would be sued. Id. at *15 (noting that the defendant “consulted and retained [] litigation counsel to obtain legal advice regarding potential liability exposure,” retained a firm to perform “a due diligence investigation,” and then asserted privilege over such activities). The communications by Dr. Brown, multiple potential investors, and industry analysts buttress this conclusion. See, e.g., Surowiec v. Capital Title Agency, Inc., 790 F. Supp. 2d 997, 1005–06 (D. Ariz. 2011) (letter from third party warning that plaintiff might sue sufficient to create a reasonable apprehension of suit); see also Metrokan, Inc. v. Built NY, Inc., 2008 WL 4185865, at *5 (S.D.N.Y. Sept. 3, 2008) (email exchange between bag designer and principal of defendant that bags were “confusingly similar” created anticipation of trademark suit). Finally, its preparation of the IPR filings also illuminates an apprehension of the likelihood of litigation.

UNDER SEAL

UNDER SEAL

UNDER SEAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 18-620 JVS (JDEx) Date June 17, 2020

Title **Glaukos Corporation v. Ivantis, Inc.**

Therefore, even if Ivantis’s policy supported the annual, automatic deletion of emails, Ivantis was required to cease deleting emails once the duty to preserve attached. Since Ivantis acknowledges that it did not cease its email policy, the Court finds that the evidence supports a finding of spoliation and that the Court may impose sanctions. See Zubulake, 220 F.R.D. at 220 (“Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.”).

2. Appropriate Sanction

The Court next considers what sanction(s) should be imposed in light of Ivantis’s spoliation. Glaukos requests two remedies: (1) an adverse inference instruction, and (2) a sanction prohibiting Ivantis from referring to any pre-suit investigation of the Asserted Patents as a basis for believing that it did not infringe or that the patents were invalid. Mot. at 18-19.³

First, the Court concludes that Rule 37(e)—a rule that Glaukos identifies in its motion for sanctions—applies to the relief sought. Since the Advisory Committee Notes to the 2015 amendment of Rule 37(e) make clear that the new rule “forecloses reliance on inherent authority or state law to determine when certain measures should be used” to address spoliation of electronically stored information, the Court is unable to exercise its inherent power to sanction the alleged conduct by Ivantis. Rule 37(e) was amended to promote uniformity because the previous rule caused circuits to “establish[] significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information.” Fed. R. Civ. P. 37(e), Advisory Committee Note to 2015 Amendment. Thus, even if the Court were not foreclosed from exercising its inherent power to sanction in this context, the Court still would not do so because the remedies under Fed. R. Civ. P. 37(e) are directly applicable to the alleged conduct at issue.

An adverse inference is a sanction carried out as an instruction to the trier of fact that “evidence made unavailable by a party was unfavorable to that party.” Lewis, 261 F.R.D. at 521 (quoting Nursing Home Pension Fund v. Oracle Corp., 254 F.R.D. 559, 563 (N.D.Cal. 2008)). In order for the Court to impose an adverse inference Glaukos

³ Glaukos no longer asks the Court to exclude evidence relating to Ivantis’s hypothetical negotiation theory. Reply at 18 n.7.

UNDER SEAL

UNDER SEAL

UNDER SEAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 18-620 JVS (JDEx) Date June 17, 2020

Title **Glaukos Corporation v. Ivantis, Inc.**

must establish that: “(1) the party having control over the evidence had an obligation to preserve it; (2) the records were destroyed with a culpable state of mind; and (3) the destroyed evidence was relevant to the party's claim or defense.” *Id.* (quoting Residential Fund’g Corp. v. De-George Fin. Corp., 306 F.3d 99, 107 (2d Cir.2002)). The “culpable state of mind” includes negligence. *Id.*

Before the Court may impose sanctions, Glaukos must demonstrate that it suffered prejudice from Ivantis’s failure to suspend its email deletion policy. Glaukos argues that it suffered prejudice because was unable to review emails from key custodians. Mot. at 14. For example, the earliest email produced from Dave Van Meter, the CEO, was from October 2016. *Id.* As a result, Glaukos contends that it has been deprived of evidence concerning Ivantis’s copying and willful infringement. *Id.* at 15. Ivantis did not produce emails concerning the design of the Hydrus; not did it produce communications made in connection with Dr. Brown’s warning about infringement. *Id.* Glaukos also points out that the deleted emails would likely include those concerning Ivantis’s investigation of Glaukos’s patents as of 2009. Reply at 13.

Ivantis suggests that Glaukos has not suffered prejudice because all emails from April 2017 onward were retained and preserved. Van Meter Decl. ¶¶ 4–5; Opp’n at 9-10. And Ivantis contends that Glaukos only offers speculation about what information it was not able to obtain, and that it was able to obtain relevant information and documents from other sources. *Id.* at 17-18. Of course, a measure of speculation is somewhat inherent in this activity, as Glaukos reasonably cannot identify every specific deleted document that would be helpful to its case. The Court is satisfied with the categories of information Glaukos identifies that are covered by the relevant time period of the email policy.

The Court finds that Glaukos suffered prejudice from being deprived of emails that likely would have been probative to the claims at issue in this action. See Apple, 881 F. Supp. 2d at 150 (finding prejudice due to deletion of emails from “key custodians”). “Prejudice may appear in many forms, such as plaintiffs being unable to fully respond to the secondary evidence or being required to go to great lengths in discovery to fill in the gaps in the evidence.” 4DD Holdings, LLC v. United States, 143 Fed. Cl. 118, 132 (Fed. Cl. 2019).

For the Court to issue an adverse inference instruction under Rule 37(e)(2),

UNDER SEAL

UNDER SEAL

UNDER SEAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 18-620 JVS (JDEx) Date June 17, 2020

Title **Glaukos Corporation v. Ivantis, Inc.**

Glaukos must also establish that Ivantis acted with the intent to deprive Glaukos of evidence. Ivantis argues that it did not act with the requisite culpable state of mind or the intent to expunge evidence because it adopted its policy five years before Glaukos filed suit, for the entirely innocent reason of making its IT system workable. Opp'n at 13-14; see Micron Tech., Inc. v. Rambus Inc., 645 F.3d 1311, 1322 (Fed. Cir. 2011) (“most document retention policies are adopted with benign business purposes.”).

Glaukos argues that “the circumstances of Ivantis’s deletion of relevant documents demonstrate that Ivantis acted with intent to deprive Glaukos of the use of such information in this litigation.” Mot. at 16-17. Ivantis instituted its email deletion policy in 2013, the same year it retained patent litigation counsel. Glaukos contends that subsequent events – Ivantis performing diligence regarding Glaukos’s patents, being repudiated by investors based on litigation concerns, receiving reports about the inevitability of litigation, and preparing IPR filings – “show more than just negligence, but an intentional decision to continue deleting documents once litigation was not only anticipated but actually underway.” Mot. at 17.

The Court agrees and finds that Glaukos’s proposed jury instruction⁴ and preclusion sanction are appropriate, given that Ivantis did not suspend its automatic email deletion policy even when litigation was reasonably foreseeable. The Court may infer an intent to deprive Glaukos of the relevant emails from Ivantis’s actions. See, e.g., Moody v. CSX Transportation, Inc., 271 F. Supp. 3d 410, 431-32 (W.D.N.Y. 2017). The emails would have been probative to the claims at issue in this action, and as a result, Glaukos is forced to go to trial lacking this evidence. The amount of discovery Ivantis and Glaukos produced is irrelevant to whether Glaukos suffered prejudice; contrary to Ivantis’s

⁴ This is the text of the instruction:

Ivantis intentionally deleted and failed to preserve relevant evidence for this litigation. Ivantis anticipated patent infringement litigation from Glaukos, but nonetheless adopted and maintained a policy that deleted all company email after 12 months, resulting in the destruction of virtually all emails at Ivantis that pre-date April 2017, including emails specifically relating to the Glaukos Asserted Patents. You may presume from that destruction that the destroyed evidence was favorable to Glaukos and unfavorable to Ivantis, including on the issue of whether Ivantis willfully infringed the Asserted Patents.

UNDER SEAL

UNDER SEAL

UNDER SEAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 18-620 JVS (JDEx) Date June 17, 2020

Title **Glaukos Corporation v. Ivantis, Inc.**

argument (see Opp'n at 16) what matters is the relevant time period (2009 to early 2017) during which Ivantis annually deleted emails. The preclusion sanction is appropriate because Glaukos cannot counter Ivantis's references to its pre-suit investigation of the Asserted Patents as a basis for believing it did not infringe.⁵

Therefore, the Court **GRANTS** Glaukos's motion.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Glaukos's motion.

The Court asks the parties to meet and confer and notify the Court which parts of the order should be redacted within seven days.

IT IS SO ORDERED.

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⁵ To the extent that pre-suit investigation evidence was work product, Ivantis and/or its counsel would necessarily have to waive the privilege to present it at trial.