

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

CINEMARK USA, INC.,

Plaintiff,

v.

**ROBLOX CORPORATION and
NUMEROUS UNNAMED JOHN/JANE
DOES,**

Defendants.

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Civil Action No. 3:16-cv-01576-O

ORDER

Before the Court is Plaintiff’s Emergency Motion to Preserve Evidence and Supporting Memorandum of Law (ECF No. 3), filed June 13, 2016. Plaintiff avers that “Defendants are in possession of extensive electronic data that is essential to Cinemark’s claims that could easily be overwritten, transferred, or expunged.” Pl.’s Mot. 4, ECF No. 3. Plaintiff argues that “[m]oreover, Defendants’ electronic data may even be lost through Defendants’ computer’s and/or servers’ normal use. For example, information and data contained on a computer’s hard drive are automatically written over and replaced with new data.” *Id.* Plaintiff concludes that “unless ordered to the contrary, Cinemark has reasonable belief that Defendants may alter, destroy, conceal, or otherwise dispose of electronic information relating to this action, immediately upon being served with the summons and complaint in this action.” *Id.*

“A motion to preserve evidence is an injunctive remedy and should issue only upon an adequate showing that equitable relief is warranted.” *Madden v. Wyeth*, No. 3-03-CV-0167-R, 2003 WL 21443404, at *1 (N.D. Tex. Apr. 16, 2003) (Kaplan, M.J.); *see also Humble Oil & Refining Co.*

v. Harang, 262 F. Supp. 39, 42 (E.D. La. 2966) (concluding that a preservation order functions as a form of restraining order). However, *all litigants* are obligated to take appropriate measures to preserve documents and information which are reasonably calculated to lead to the discovery of admissible evidence and likely to be requested during discovery.” *Madden*, 2003 WL 21443404, at *1. “Lawyers have an affirmative duty to advise their clients of pending litigation and the requirement to preserve potentially relevant evidence.” *Id.* (citing *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991)).

In *AT&T Mobility, LLC v. Arena Trading, Inc.*, a Northern District of Texas court granted a motion to preserve evidence in a trademark case. *See generally* 3:08-CV-0330-P, 2008 WL 624104 (N.D. Tex. Mar. 5, 2008) (Kaplan, M.J.). There, the plaintiffs alleged that defendants were “likely in possession of hundreds of such [unlawful] phones” and “may sell or otherwise dispose of [the] phones in their possession immediately upon being served” *Id.* at 1 (internal citation omitted). The court also considered that “[t]he destruction of potentially relevant evidence has been *confirmed* by investigators hired by plaintiffs, who have observed garbage bags full of empty GoPhone packing materials in dumpsters maintained by [the] [d]efendant.” *Id.* (emphasis added).

Conversely, in *Madden v. Wyeth*, a Northern District of Texas court denied a motion to preserve evidence where the plaintiffs alleged that “there exists the possibility for defendants and their agents or employees to unintentionally or intentionally destroy or lose materials and documents relating to Children’s Advil” 2003 WL 21443404, at *1. The court held that because the “[p]laintiffs d[id] not allege, much less prove, that defendants will flaunt their obligation under the federal rules without a preservation order,” and that “without some proof that evidence may be lost or destroyed without a preservation order, the court is not inclined to enter such an order” *Id.*

Here, similarly, Cinemark does not prove that Roblox would “flaunt [its] obligation under the federal rules without a preservation order.” *Id.* Cinemark does not provide any evidence that the relevant electronic data will be destroyed absent a court order.

To the extent Cinemark argues that “Defendants’ electronic data may even be lost through Defendants’ computer’s and/or server’ normal use,” citing *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (D. Minn. 2002), Cinemark’s claim also fails. Indeed, in *Antioch*, the court reasoned that “the Defendants may have relevant information on their computer equipment, which is lost through normal use of the computer, and which might be relevant to the Plaintiff’s claims, or the Defendants’ defenses.” *Id.* at 652. However, the court also stated, “As the Advisory Committee notes to Rule 34[] [of the] Federal Rules of Civil Procedure make clear, discovery of documents applies to electronic data compilations from which information can be obtained only with the use of detection devices.” *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.d. 645, 652 (D. Minn. 2002). “Moreover, it is a well accepted proposition that deleted computer files . . . are discoverable.” *Id.* (citing *Rowe Entm’t, Inc. v. The Williams Morris Agency, Inc.*, 205 F.R.D. 421, 427, 431 (S.D.N.Y. 2002); *McPeck v. Ashcroft*, 202 F.R.D. 31, 31, 34 (D.D.C. 2001); *Kleiner v. Burns*, No. 00-2160-JWL, 2000 WL 1909470 (D. Kan. Dec. 15, 2000)). Ultimately, the *Antioch* court concluded that “deleted information, on the Defendants’ computer equipment, may well be both relevant and discoverable,” and therefore, “Antioch should be able to attempt to resurrect data which has been deleted from the Defendants’ computer equipment” *Id.* Here, based on the reasoning Cinemark cites, Cinemark has not demonstrated how the relevant electronic data would not be discoverable absent a court order.

“To supplement every complaint with an order requiring compliance with the Rules of Civil

Procedure would be a superfluous and wasteful task, and would likely create no more incentive upon the parties than already exists.” *Hester v. Bayer Corp.*, 206 F.R.D. 683, 685 (M.D. Ala. 2001). Based on the foregoing, Plaintiff has not demonstrated that a court order is necessary for Defendants to preserve relevant evidence to the parties’ pleadings. Accordingly, Plaintiff’s Motion to Preserve Evidence is **DENIED**.

SO ORDERED on this **14th day of June, 2016**.


Reed O'Connor
UNITED STATES DISTRICT JUDGE