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SET FOR ORAL ARGUMENT: February 5, 2016

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MOVE, INC., a Delaware corporation, REALSELECT, INC., a Delaware corporation, TOP PRODUCERS SYSTEMS COMPANY, a British Columbia unlimited liability company, NATIONAL ASSOCIATION OF REALTORS®, an Illinois non-profit corporation, and REALTORS® INFORMATION NETWORK, INC., an Illinois corporation, Plaintiffs, v. ZILLOW, INC., a Washington corporation, ERROL SAMUELSON, an individual, CURT BEARDSLEY, an individual, and DOES 1-20, Defendants.	No. 14-2-07669-0 **DEFENDANT ZILLOW, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR EVIDENCE SPOLIATION SANCTIONS**

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I. INTRODUCTION

This is a case about two honorable and respected business executives who decided to leave their jobs at Move, Inc., to go to work for Zillow, Inc. As a result of that decision – and the fiercely competitive business environment in which it occurred – they are now targets in an aggressive but unsubstantiated campaign of disparagement and alleged theft. The stridency of Plaintiffs' rhetoric is directly proportional to their dismay at losing these two industry leaders, and inversely proportional to actual evidence of wrongdoing in this case, which is nil. Recognizing that they have little or no evidence to support their allegations of trade secret misappropriation, Plaintiffs rely almost entirely on "gotcha"-type arguments of evidence destruction, hoping to exploit the complexities, and – yes – innocent human missteps that arise from efforts to protect privacy, and to *avoid* misappropriation, across the plethora of electronic devices and accounts routinely used in the contemporary business environment.

Plaintiffs hope to win by cries of "spoliation" what they cannot win on the merits: either a judgment against Defendants for trade secret misappropriation, or a deeply prejudicial jury instruction that will brand Defendants as dishonest or effectively end the case by directing findings of fact. But as demonstrated below, Plaintiffs have not satisfied the requisite legal standard for imposition of such severe sanctions. First, there was no duty to preserve the material they identify as having been wrongfully deleted. The vast majority of the deletions at issue occurred before this lawsuit was filed, when Defendants did not reasonably foresee litigation, much less foresee the specific subject matter of the (meritless) claims that Plaintiffs concocted and decided to assert. The few post-litigation deletions involve actions by Beardsley before he was named as a party, under circumstances where he reasonably believed his conduct would not destroy unique, relevant evidence in this case. Plaintiffs have made no showing that Beardsley was incorrect in that assessment. Second, Plaintiffs have not shown bad-faith,

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intentional destruction of evidence. Indeed, Defendants have repeatedly and forthrightly explained their conduct. Those explanations are credible and consistent with the vast body of evidence that *does exist* in this case. Third, Plaintiffs have not shown prejudice due to loss of critical evidence. Rather, the evidentiary record, both documentary and testimonial, is extensive, and none of it supports the dark conspiratorial plot that Plaintiffs so sensationally advance.

Ironically, many of the deletions at issue were *good-faith efforts* by Samuelson and Beardsley, prior to the litigation, *to ensure that they did not retain Move documents* when they left the company. Plaintiffs hope to create and exploit a Catch-22: if Samuelson and Beardsley deleted files, they are guilty of evidence destruction; but if they did not delete them (as in a few instances where, among multiple devices and accounts, a small number of Move documents were overlooked), then they are guilty of intentional theft of vitally important trade secrets. The Court should not implicitly endorse, by imposing a debilitating presumption, this litigation tactic.

Finally, Plaintiffs are asking the Court to take precipitous action – not on the merits – to terminate the action, or possibly pre-determine its outcome by imposing a presumption of wrongdoing, without the benefit of findings from a Neutral Forensic Expert appointed by the Court for the very purpose of investigating the allegations at issue in this motion. But it makes no sense to short circuit the Neutral's investigation, which is currently under way, and thereby waste the resources invested in that process. Nor does it make sense to risk a profound injustice by needlessly (and perhaps wrongly) anticipating the outcome of the Neutral's examination.

Because Plaintiffs' conclusory allegations fail to satisfy the legal standard for imposition of spoliation sanctions, and because the investigation into this issue by a Court-appointed expert is not yet complete, the Court should deny Plaintiffs' motion for spoliation sanctions.

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II. FACTUAL BACKGROUND[1]

A. Prior to the Litigation, Samuelson and Beardsley Deleted Personal Data from Move Devices They Returned, and Deleted Move Data From Personal Devices They Kept

Samuelson and Beardsley have both provided detailed accounts of their respective decisions to leave Move and accept new jobs at Zillow. Samuelson made the decision on or about March 4, 2014, and Beardsley on or about March 15, 2014. *See* Declaration of Joseph McMillan, Ex. A at 100-01; Ex. S at 91-100.[2] Both were determined to make the transition in a principled and ethical manner, and both took steps to ensure that they did not inadvertently retain Move's business information after their departure. Many of the deletions Plaintiffs complain about were motivated by that desire. Due to their long tenure and their extensive job-related travel for Move, both also had a great deal of sensitive personal data mixed with business communications on their Move devices. Neither believed that their efforts to remove that personal data from Move devices was inappropriate, nor that it would in any way deny Move any information in which it had a legitimate interest. Indeed, both Samuelson and Beardsley were very transparent about those efforts, informing Move's HR Director that they had taken such steps. *See* Ex. A at 349-54; Ex. C. Move's HR Director did not object, for example responding "thx Curt" after Beardsley told her about the steps he had taken. Ex. C; Ex. D at 261-63.

B. Defendants Did Not Anticipate Litigation, Because They Had Done Nothing Wrong

Move filed this lawsuit against Samuelson and Zillow on March 17, 2014, and added Beardsley a year later, on March 13, 2015. Prior to March 17, 2014, Defendants did not anticipate being involved in this lawsuit, because none of them believed they had done anything wrong. Indeed, Samuelson had previously confirmed that he had not signed a Non-Compete

[1] In order to avoid unnecessary duplication of material, Zillow incorporates by reference the Fact sections set forth in the Opposition briefs of co-defendants Errol Samuelson and Curt Beardsley.

[2] Unless otherwise noted, all Exhibits cited are attached to the McMillan Declaration.

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Agreement with Move that might bar him from working for Zillow, Ex. E ¶ 37, and Beardsley did not have a non-compete either. As soon as the lawsuit was filed, Zillow issued a "Litigation Hold" to company personnel who might have relevant information. That notice has been periodically updated. Declaration of Brad Owens ¶¶ 3, 7-9, Ex. A.

C. Samuelson and Beardsley Have Fully Explained Their Conduct, and Plaintiffs Have Not Shown that Unique, Relevant Evidence Has Been Lost

Plaintiffs have alleged fifteen instances of data loss. *See* Pls.' Mot. at 14-15. They have not shown, however, that those alleged deletions resulted in the loss of unique, relevant evidence. Samuelson reset his Move-issued iPhone and iPad to "factory settings," and deleted the Outlook application on his Move laptop, in order to remove personal information from those devices. Ex. E ¶¶ 13-14. Before completing those deletions, he placed what he believed to be all pertinent Move business files into a folder, which he then transferred to the computer of his colleague at Move. He then deleted that folder from the external hard drive used for that transfer. These facts are forensically corroborated, and are not consistent with an effort to steal confidential information from Move. *Id.* ¶ 15; Declaration of Andrew Crain ¶¶ 8-22.[3]

Plaintiffs complain about various flash drives that were connected to Samuelson's and Beardsley's computers prior to their departure. This was a routine part of their jobs, as they traveled hundreds of days every year and needed to take documents with them. Some of these flash drives have been located; others have not.[4] But the loss of some of these devices is not

[3] Plaintiffs allege that Samuelson "tried to steal an entire hard drive of Move's trade-secret files." Pls.' Mot. at 8. This is false. When Samuelson resigned, he was unaware that he still had an old Move laptop at his home. When informed he had this, he searched his home and located it. He informed Move's HR Director that he was going to delete personal information from it, and she did not object. Ex. A at 350-58. The "Eraser" program Plaintiffs complain about was launched on that computer by a vendor, *not* at Samuelson's direction, and no data was lost because the program was used only on a *copy* of the hard drive. Crain Decl. ¶ 21.

[4] Plaintiffs are wrong in suggesting that the "1104" USB device is missing. *See* B. Lloyd-Jones Decl. ¶ 13. That device is *not* missing; rather, it has been provided to the Neutral Expert for inspection. Crain Decl. ¶ 27.

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evidence of a plot to steal information. Nor were the files on those drives likely to have been unique. *See* Ex. B at 93.

Plaintiffs also complain of Beardsley's deletion of *archived* emails dating from 2013. Pls.' Mot. at 9, 15. Beardsley deleted them because they contained personal communications, but had Move truly been interested in them, it likely could have recovered most of them by searching the Move network server and/or other Move custodians with whom Beardsley was communicating. Crain Decl. ¶ 37. Beardsley has also explained that his use of deletion software was intended to eliminate traces of visits to adult websites, which was extremely embarrassing to him, against his religious beliefs, and something he called a "moral failing." Ex. B at 63-64, 68.

D. The Court Has Appointed a Neutral Forensic Expert to Investigate Alleged Deletion, and that Investigation is Not Yet Complete

On September 30, 2015, this Court appointed a Neutral Forensic Expert in this case, and approved a Protocol to govern the Neutral's investigation. That Protocol provides for a robust deletion analysis that will address the very issues presented by this Motion. Ex. F ¶¶ 2,10, 14. The Neutral's investigation is under way, but not yet complete. Forensic tools can often recover a great deal of deleted material, and there is every reason to expect that will occur in this case. Even if messages are not recovered in their entirety, there is often good evidence bearing on whether deleted material would be relevant. *See, e.g.*, Crain Decl. ¶¶ 7, 43.

E. Defendants Have Not Misled the Court or Lied About Anything in this Litigation

Plaintiffs allege that Defendants lied and misled the Court to cover up evidence destruction. Those allegations are false and reckless. Plaintiffs long argued, with the same sort of sloppy analysis evident in their Motion on this issue, that Defendants were hiding phone records from them. That allegation was, indeed, "thoroughly debunked." Now Plaintiffs are either confused again, or are deliberately misconstruing the record, to falsely suggest that

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Defendants lied about that episode. *See* Samuelson Opp. Likewise, there is no evidence that a Move spreadsheet that Beardsley produced was a "stolen MLS database" that Crocker referenced in his anonymous letter; Crocker later admitted he does not know what he saw.[5] *See* Beardsley Opp. Finally, Defendants did not, as Plaintiffs charge, hide evidence of the loss of a hard drive or the use of deletion software. Rather, Defense counsel disclosed those facts to Plaintiffs as soon as it came to their attention.[6] Moreover, it was *Defendants*, not Plaintiffs, who urged the appointment of a Court-appointed Neutral, in an effort to resolve forensic issues that have been the subject of so much hyperbole from Plaintiffs in this case.[7]

III. ISSUE PRESENTED

Where Plaintiffs fail to show bad-faith, intentional destruction of evidence or prejudice due to lost data, and where an investigation into deletion activity by a court-appointed neutral expert is under way but not yet complete, should the Court impose a severe sanction on Defendants for alleged spoliation of evidence, rather than have this case resolved on the merits?

IV. EVIDENCE RELIED UPON

Zillow relies on the declarations of Andrew Crain, Errol Samuelson, Bruce Hartley, Brad Owens and Joseph McMillan, exhibits attached thereto, and the papers on file in this action.

V. AUTHORITY AND ARGUMENT

A. Legal Standard for Spoliation Sanctions

This case is governed by Washington law on sanctions for alleged spoliation. Under Washington law, "[s]poliation is defined simply as '[t]he intentional destruction of evidence.'" *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wn. App. 81, 93 n.5 (2007) (quoting *Henderson*

[5] Ex. G at 67, 76, 237-38. Notably, Crocker admitted that he had no reason to believe that Samuelson "used or disclosed confidential Move information" *Id*. at 261-63.

[6] *See* Exs. H & I.

[7] *See* Ex. J.

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v. Tyrrell, 80 Wn. App. 592, 605 (1996)); *see also Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 134 (2013) ("Spoliation is the intentional destruction of evidence"); *Ripley v. Lanzer*, 152 Wn. App. 296, 326 (2009) (same). A leading treatise on Washington law describes spoliation as "a term of art, referring to the legal conclusion that a party's destruction of evidence was both willful *and* improper." Karl B. Tegland, 5 WASH. PRAC.: EVIDENCE, § 402.6 at 37 (Supp. 2005).

In deciding whether to apply a sanction for spoliation, Washington courts consider two factors: (1) "the potential importance or relevance of the missing evidence," and (2) "the culpability or fault of the adverse party." *Ripley*, 152 Wn. App. 296 at 326.

1. The potential importance or relevance of the missing evidence

"Whether the missing evidence is important or relevant depends on the particular circumstances of the case." *Tavai*, 176 Wn. App. at 135. Washington law establishes no presumption that lost evidence would have been significant, even where the nature of the evidence suggests that it *might* be. In *Henderson*, for example, a car involved in a crash was scrapped by its owner before the other party examined it, despite a pre-litigation letter from opposing counsel requesting that it be preserved until further notice. 80 Wn. App. at 603-04. The court concluded that "the investigative value of Mr. Tyrrell's car was not clear," despite a consulting engineer's testimony that it "would have provided a better understanding of how the injuries occurred," and Mr. Tyrrell's own experts "believed the car was important enough that they examined a similar car as part of their investigation." *Id*. at 608. The court stated that an "important consideration" in assessing the importance of the evidence "is whether the loss or destruction of the evidence has resulted in *an investigative advantage* for one party over another." *Id*. at 607 (emphasis added). Because no such advantage accrued to either party in *Henderson*, numerous photographs of the car still existed, and the party requesting preservation

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did not act promptly to examine the vehicle when it had the opportunity to do so, the court affirmed the trial court's decision that no sanction was appropriate. *Id*. at 608-09.

Washington courts have similarly declined to presume that discarded *electronic data* is relevant and important. For example, the most recent Washington appellate decision on spoliation (and probably the most thorough discussion of the issue), *Cook v. Tarbert Logging, Inc.*, 2015 WL 5771329 (Wash. Ct. App. Oct. 1, 2015), involved a party's failure to preserve an airbag control monitor. Had that monitor been preserved, it would have provided *potentially* important information, *i.e.*, vehicle speed in the five seconds prior to a collision at issue in the case. *Id.* at *1. But the court declined to presume that the missing evidence was important, much less adverse to the party who disposed of it. Indeed, the court held that the trial court committed *reversible error* in even allowing *argument* to the jury that an adverse inference should be drawn. *Id*. Relying on a widely cited federal case, which is consistent with *Henderson* (*i.e.*, Washington case law) in rejecting an adverse inference, the court required the movant to "adduce sufficient evidence that a reasonable trier of fact could infer that the evidence *would* have—not *might* have—been helpful to its case," as a spoliation sanction requires showing not only that relevant evidence was destroyed, but also that the destroyed evidence would have been favorable to the moving party. *Id.* at *9 (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 221 (S.D.N.Y. 2003)); *see also Tavai*, 176 Wn. App. at 135-36 (deleted data unlikely to be important, as movant "failed to establish that the surveillance video captured the area where [the plaintiff] fell"). Washington cases, therefore, including those dealing with electronic information, do not support Plaintiffs' argument (Pls.' Mot. at 16-17) that missing data should be presumed relevant and important, much less presumed to be adverse to Defendants in this case.[8]

[8] While Washington law governs here, there are also numerous federal decisions – typically more recent than those relied upon by Plaintiffs – that adopt the same approach as *Cook*, *Henderson*, and *Zubulake*. *See, e.g.*, *Digital Vending Servs. Int'l, Inc. v. Univ. of Phx., Inc.*, 2013 WL 5533233, at *5-6 (E.D. Va. Oct. 3, 2013) (denying

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In assessing the importance of lost data, Washington courts also consider whether *other evidence* bearing on the issues is still available. *Ripley*, for example, was a medical malpractice case where a key instrument – a scalpel handle – had been discarded. Despite the fact that the claim arose because the scalpel blade detached from the handle and was left inside the patient, the court held that it was "unclear that the scalpel handle used in [the] surgery [was] important to the litigation." *Ripley*, 152 Wn. App. at 326. The court's assessment turned on the fact that other relevant evidence existed, specifically, "testimony from [the surgeon] and others." *Id.*; *see also Henderson*, 80 Wn. App. at 608-09 (affirming trial court's refusal to impose sanctions for destruction of a car where there were "many photographs [of the car] available to the experts").[9]

To establish relevance or importance, the moving party must demonstrate a link between the lost data and the claims or issues in the case. *See, e.g.*, *GenOn Mid-Atl., LLC*, 282 F.R.D. at 357-60 (rejecting sanctions in part because the "somewhat random sample of restored emails" – providing limited visibility into what was lost – were not relevant to the central issues in the

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sanctions where movant "failed to prove that the evidence on the thumb drive was relevant"; movant identified only one *potentially* relevant document and "only offered speculation regarding the rest of the thumb drive's contents"); *Process Am., Inc. v. Cynergy Holdings, LLC*, 2013 WL 9447569, at *11 (E.D.N.Y. Sept. 23, 2013) (denying severe sanctions where loss of thumb drive was not in bad faith where the movant had not shown the thumb drive was relevant).

[9] The availability of other evidence is also critically important in federal spoliation cases, where it often determines whether the moving party can show prejudice, one of the factors considered in a motion for sanctions. *See, e.g.*, *Toppan Photomasks, Inc. v. Park*, 2014 WL 2567914, at *4, 10 (N.D. Cal. May 29, 2014) ("If spoliation is found, then courts generally consider three factors to determine whether and what type of sanctions to issue: (1) 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") (holding that the moving party, TPI, "has not shown evidentiary prejudice that would justify its proposed adverse inferences. Many of the deleted files have already been recovered, which means that TPI has some evidence to prove its case. Further, the parties have not yet attempted carving [a forensic technique], which may recover some or all of the overwritten files and which will likely result in more evidence to prove TPI's case."); *see also GenOn Mid-Atl., LLC v. Stone & Webster, Inc.*, 282 F.R.D. 346, 353 (S.D.N.Y. 2012) ("a court should never impose spoliation sanctions of any sort unless there has been a showing—inferential or otherwise—that the movant has suffered prejudice") (denying sanctions where there was no prejudice from deletion of files produced from other locations and on irrelevant issues); *Process Am.*, 2013 WL 9447569, at *12 (denying terminating sanction where it appeared that other versions of a lost spreadsheet were available to the moving party).

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case; rather, "[the moving party's] characterization of them as going to 'the heart of this case' [was] vastly overblown"); *see also Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995) ("Due process concerns . . . require that there exist a relationship between the sanctioned party's misconduct and the matters in controversy such that the transgression 'threaten[s] to interfere with the rightful decision of the case.'").[10] Thus, Plaintiffs cannot simply argue "destruction" and then ask for a default judgment on their myriad claims.

2. The culpability or fault of the party responsible for the lost data

As *Cook* implies, "the culpability or fault of the adverse party" is implicated in the assessment of relevance, but it also stands as the second, independent factor in determining whether a sanction is appropriate. *Ripley*, 152 Wn. App. at 326. "In considering culpability, courts examine whether the party acted in bad faith or with conscious disregard of the importance of the evidence, or whether there was some innocent explanation for the destruction." *Cook*, 2015 WL 5771329, at *7. "'Another important consideration is whether the actor violated a duty to preserve evidence.'" *Id*. (quoting *Henderson*, 80 Wn. App. at 610).

Cook provides a detailed discussion of Washington cases on culpability. Based on that review, including a careful reading of *Henderson* (the seminal Washington case on the issue), the court concluded that *negligence alone is not enough* to justify a sanction: "Read as a whole, *Henderson*'s discussion of culpability as a factor implicitly holds that a party's negligent failure

[10] *See also Halalco Eng'g v. Costle*, 843 F.2d 376, 381-82 (9th Cir. 1988) (reversing terminating sanction where alleged "doctoring" of a report did not relate to the issues in the case: "The most critical criterion for the imposition of a dismissal sanction is that the misconduct penalized *must relate to matters in controversy* in such a way as to interfere with the rightful decision of the case") (emphasis added); *Keen v. Bovie Med. Corp.*, 2013 WL 3832382, at *1-3 (M.D. Fla. July 23, 2013) (denying sanctions where movant identified lost documents related to a claim no longer at issue, and documents that were "relevant" but not "crucial" to the case; refusing to "conclude that deleted data would be crucial . . . because [the employee] deemed it to be so damaging that he destroyed it."); *Hardwick Bros. Co. II v. United States*, 36 Fed. Cl. 347, 417-18 (Fed. Ct. Cl. 1996) (no sanction where movant submitted no reliable evidence to show deleted files were "critical or controlling in the resolution of issues"; declining to "speculate on the nature or content" of missing documents).

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to preserve evidence relevant to foreseeable litigation is not sanctionable spoliation." *Cook*, 2015 WL 5771329, at *8. Rather, with respect to inferences, "unless there was bad faith, there is no basis for the inference of consciousness of a weak cause." *Henderson*, 80 Wn. App. at 609.

Washington spoliation cases since *Henderson* have similarly focused on bad faith, understood as *acts intended to deny the other party access to important evidence*. *See, e.g.*, *Tavai*, 176 Wn. App. at 136 (no sanction where "Tavai [did] not show that Walmart acted in bad faith" in deleting videotape); *Ripley*, 152 Wn. App. at 326 (no sanction where the court saw "no bad faith or other reason to show that this act was intended to destroy important evidence"); *Happy Bunch*, 142 Wn. App. at 93 n.5 (no sanction where movant "did not demonstrate" that destruction of evidence "was motivated by a desire to obscure" relevant facts).[11]

Cook also considered "the most recent federal development[s]" on spoliation, culminating in the Amendments to the Federal Rules of Civil Procedure ("FRCP") that took effect on December 1, 2015. The court noted that "the intent [of the amendment] was to reject federal decisions that, under some circumstances, authorize the giving of adverse inference instructions based on a finding of negligence or gross negligence." *Cook*, 2015 WL 5771329, at *10. Instead, the "better rule" is "to limit the most severe measures [including adverse-inference instructions] to instances of intentional loss or destruction of evidence." *Id*. at *11 (quoting Proposed Amendments to FRCP, Rule 37, Advisory Committee note). Significantly, *Cook* cited

[11] Federal decisions likewise require bad faith to impose serious sanctions. *See, e.g.*, *Bracey v. Grondin*, 712 F.3d 1012, 1019-20 (7th Cir. 2013) ("defendants' duty to preserve . . . is not enough"; instead, "destruction in bad faith . . . for the purpose of hiding adverse information" is required to issue an adverse inference instruction); *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1326-27 (Fed. Cir. 2011) (adverse inference sanctions only appropriate where there is "bad faith," meaning an "inten[t] to impair the ability of the [other party] to defend itself"); *Robinson v. Kroger Co.*, 2014 WL 3405874, at *5 (S.D. Ind. July 10, 2014) ("The crucial element is not that the evidence was destroyed but rather the reason for the destruction. In order to show bad faith, it must be established that the evidence was intentionally destroyed for the purpose of hiding adverse information."); *Select Med. Corp. v. Hardaway*, 2006 WL 859741, at *9 (E.D. Pa. Mar. 24, 2006) ("A finding of fault requires evidence that the party accused of spoliation intended to impair the moving party's ability to uncover evidence.").

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with approval a 2014 Texas Supreme Court case, which "observed that its position that an adverse inference sanction is available only for intentional, bad faith spoliation 'aligns with a majority of the federal courts of appeals.'" *Id.* at *9 n.8 (quoting *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 24 (Tex. 2014)). *Cook* quoted at length from that Texas decision, underscoring how severe sanctions can unfairly skew the outcome of a case:

> [T]he imposition of a severe spoliation sanction, such as a spoliation jury instruction, can shift the focus of the case from the merits of the lawsuit to the improper conduct that was allegedly committed by one of the parties during the course of the litigation process. The problem is magnified when evidence regarding spoliating conduct is presented to a jury. Like the spoliating conduct itself, this shift can unfairly skew a jury verdict, resulting in a judgment that is based not on the facts of the case, but on the conduct of the parties during or in anticipation of litigation.

Id. (quoting *Brookshire Bros.*, 438 S.W.3d at 13-14). *Cook* emphasized this point by noting that "[i]n practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome." *Id*. at *10 (quoting *Zubulake*, 220 F.R.D. at 219-20)).

Finally, Washington courts have not adopted the elements of the "federal common law duty to preserve evidence." *Id*. at *11-12 ("*Henderson* did not recognize a general duty to preserve evidence"); *accord Homeworks Constr., Inc. v. Wells*, 133 Wn. App. 892, 901 (2006). Instead, Washington cases hold that the mere "possibility" of a lawsuit is insufficient to create such a duty: "In two relatively recent cases, our court has found that no duty to preserve evidence arises where a person has been injured by an arguably negligent act and a lawsuit is a possibility." *Cook*, 2015 WL 5771329, at *8 (citing *Ripley* and *Tavai*, involving a surgical error and a slip-and-fall in a retail store). While *Homeworks* observed that it "may be correct that a party has a general duty to preserve evidence on the eve of litigation," that comment referred to a duty that might exist *for plaintiffs* "because they knew they were going to sue." *Homeworks*, 133 Wn. App. at 901. It did not refer to potential defendants. In *Ripley* and *Tavai*, which involved

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claims that *defendants* had failed to preserve evidence following events that made future lawsuits a distinct possibility, both courts focused on the lack of any pre-litigation request to preserve evidence in finding that no such duty existed. *See Ripley*, 152 Wn. App. at 326; *Tavai*, 176 Wn. App. at 136. Accordingly, *Cook* declined to hold that federal authority on the duty to preserve (based, as it is, on federal common law) is binding in this jurisdiction. *Id*. at *12.[12]

B. Defendants Did Not Have a Duty to Preserve Data until this Lawsuit Was Filed

Plaintiffs' motion for sanctions should be denied because the deletions alleged by Plaintiffs occurred when no duty to preserve evidence existed. Plaintiffs allege fifteen instances of data loss. *See* Pls.' Mot. at 14-15. Ten of those instances occurred prior to the commencement of this lawsuit on March 17, 2014. Those alleged deletions are as follows:

Samuelson

- All of the data on Samuelson's Move-issued iPhone
- All of the data on Samuelson's Move-issued iPad
- All of the emails on Samuelson's Move-issued MacBook
- All of the other Outlook data on Samuelson's Move-issued MacBook
- Two USB drives Samuelson connected to his Move MacBook prior to his departure from Move on March 5, 2014

[12] Aside from *Homeworks*, with its "the eve of litigation" language, we have not been able to locate other reported Washington cases addressing whether a duty to preserve evidence arises as a result of *anticipated* litigation. Federal cases, on the other hand, generally hold that "[t]he duty to preserve evidence begins when litigation is pending or reasonably foreseeable." *Micron Tech.*, 645 F.3d at 1320. "[T]he mere existence of a potential claim" does not trigger the duty, however, as "'litigation is an ever-present possibility in American life.'" *Id*. at 1320, 1322. The Advisory Committee notes on the 2015 Amendment to FRCP 37 emphasize a restrained approach in light of "the continued exponential growth in the volume of [electronically stored] information." In deciding "whether and when a duty to preserve arose[,] . . . [c]ourts should consider the extent to which a party was on notice that litigation was *likely* and that *the information would be relevant*. . . . Often . . . events provide only limited information about . . . prospective litigation, however, so that the scope of the information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed." Fed. R. Civ. P. 37, Comm. Notes, 2015 Amend. (emphasis added). "Due to the ever-increasing volume of electronically stored information and the multitude of devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. . . . The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, *particularly individual litigants*, may be less familiar with preservation obligations than others . . . ." *Id*. (emphasis added).

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Beardsley

- USB drives that Beardsley connected to his Move-issued laptop prior to his departure from Move
- Data lost when Beardsley ran Cipher deletion software on his Move-issued laptop
- Archived 2013 emails that Beardsley deleted from his Move-issued laptop
- An unknown number of emails deleted from Beardsley's "personal email account" used to communicate with Samuelson about changing jobs
- An unknown number of emails deleted from Beardsley's Move-issued cell phone

The first four deletions listed above relate to Samuelson's efforts in the day or two prior to his departure from Move to remove his private information from devices that he returned to Move on the evening of March 4, 2014. Samuelson has explained this many times. *See, e.g.*, Ex. E ¶¶ 13-14, 37; Ex. A at 348-66.

As for the two USB devices, the documents opened from the "Store N Go" in February 2014 are identifiable by their file names and thus are *not* "lost," though the device was probably left with a conference organizer before the litigation. *See* Ex. A at 363-66; Crain Decl. ¶¶ 10, 15-18. The Chipsbank, connected on March 4, 2014, was part of Samuelson's effort to copy and leave Move data with a Move co-worker prior to his departure. *Id.* ¶¶ 10-14.

At the time of these events, Samuelson did not anticipate litigation, and had no reason to do so. While he recognized that Move would not be *happy* about his decision to join Zillow (and might even be vindictive), he had confirmed that he never signed a Non-Compete Agreement, and by returning all Move devices he was trying to ensure that he did not inadvertently retain any Move business information. In short, he had done nothing wrong and saw no basis for claims against him. Under these circumstances, despite the mere possibility of litigation, no duty to preserve the data listed above existed. *See Cook*, 2015 WL 5771329, at *8 ("our court has found that no duty to preserve evidence arises" merely because of an event that could "arguably" give rise to a claim, even if "a lawsuit is a possibility"). Moreover, the fact that Samuelson has not

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been able to locate the flash drives does not mean (1) that he destroyed them, or (2) that he had a duty to preserve them prior to the onset of this litigation.[13]

The same is true with respect to the alleged deletions associated with Beardsley listed above. Like Samuelson, Beardsley's frequent work-related travel entailed use of thumb drives for carrying presentations and documents. Ex. B at 16-19, 120. Like Samuelson, Beardsley has explained that his actions on the eve of his departure were intended to (1) organize his files so they could be useful to team members remaining at Move, (2) delete personal information, and (3) ensure that he did not take Move information with him. *Id*. at 11-12, 119.[14]

To the extent that federal case law may be regarded as persuasive on spoliation issues, that authority counsels against finding a duty to preserve here. "The duty to preserve does not extend to every document [a party] possesses, only to unique, relevant evidence," and "relevancy must be proven by offering probative evidence, not the hyperbole of argument." *Digital Vending Servs.*, 2013 WL 5533233, at *5-6. Moreover, "[t]he duty to preserve is also defined by whether steps taken to preserve are *proportional* to the particular case." *Id*. (emphasis added). Thus, Plaintiffs' implicit contention that Defendants had a duty to preserve *all* electronic files, on *all* possible subjects, before a lawsuit was filed or any request to preserve data had been communicated, and that they can carry their burden by merely stating that data was deleted – which is all they have done here – is contrary to both Washington and federal law.

[13] *See Digital Vending Servs.*, 2013 WL 5533233, at *5-6 (denying sanctions, as the fact that a party "simply lost the thumb drive, without more, does not demonstrate willful destruction, and certainly does not demonstrate destruction for the purpose of depriving [movant] of the evidence").

[14] With respect to Plaintiffs' allegation that Beardsley used Cipher to overwrite unallocated space on his Move computer, it is important to note that Zillow does not have access to that device and cannot corroborate that claim. The deletion analysis currently being performed by the Neutral Forensic Expert should illuminate this issue further, but regardless of the findings, actions taken by Beardsley in connection with departing Move do not violate a duty to preserve, as Beardsley had no reason to anticipate litigation. Plaintiffs complain about two produced emails (dated 11/17/13 and 1/6/14), but have not shown when they were allegedly deleted. Crain Decl. ¶¶ 48-49.

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The evidence cited by Plaintiffs to try to prove that Defendants anticipated litigation does no such thing. Samuelson's November 2013 text to Beardsley simply refers to the possibility of sensitive emails being dug up or subpoenaed in the future, and then misconstrued (precisely as Plaintiffs are doing in this case). Samuelson was *far* from deciding to accept a job at Zillow, and has explained his state of mind at that time. *See* Ex. A at 100-01, 152-53, 166-68. Likewise, Samuelson's indemnification request was not unusual for senior executives, and merely reflects that litigation against company leadership is always theoretically possible. In fact, Samuelson received indemnification terms that were actually narrower than terms provided to other Zillow senior executives. Owens Decl. ¶ 2. Finally, review of the Samuelson and Rascoff testimony cited by Plaintiffs does not support their allegations. *See* Ex. A at 163-64; Ex. K at 456-59. That testimony merely notes that documents can be deliberately misconstrued by interested parties in litigation. It does not suggest that Samuelson or Rascoff anticipated *this* lawsuit, or the specific claims asserted.

The other five instances of alleged data loss occurred either at unknown dates, or after the lawsuit was filed but before Beardsley was named as a Defendant.[15] Those instances are:

Samuelson

- An unknown number of text messages on the pre-paid iPhone that Samuelson used to communicate regarding the job at Zillow between January-March 2014

Beardsley

- The disposal of the Western Digital hard drive after it failed in September 2014
- The re-formatting of the 32 GB SanDisk Cruzer external drive
- Data lost when deletion software was run on Beardsley's home computer
- Data lost when deletion software was run on Beardsley's Zillow laptop

[15] Beardsley was added as a defendant on March 13, 2015. The deletion software run on Beardsley's home and Zillow computers appears to have run on at least two dates in the fall of 2014, and portions of it may have run. on other dates as well (in some cases automatically). Both of those devices were imaged on March 9, 2015, prior to Beardsley being added as a Defendant in this case. No relevant data loss would have occurred after the imaging.

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With respect to texts allegedly deleted from Samuelson's pre-paid iPhone, that device was in use from early January to approximately March 16, 2014. Ex. A at 214-21. Samuelson provided the phone to his counsel at "the outset of the case," and a forensic copy of its contents was provided to Plaintiffs. Ex. L ¶ 4. Plaintiffs complain about a pair of texts dating from January 2014 that Rascoff and Beardsley produced, but Samuelson did not. If those texts were deleted from Samuelson's iPhone, there is no evidence that it occurred after the litigation commenced. Nor is there evidence that other texts were lost from that device, much less texts relevant to the issues in this case.[16] In short, Plaintiffs have made no showing that Samuelson deleted texts in violation of a duty to preserve.

Likewise, Plaintiffs have made no showing that Beardsley violated a duty to preserve in connection with the four episodes listed above, all of which occurred prior to him being named a Defendant (and hence before *his* conduct was at issue in the case, which bears on assessments of relevance). Beardsley used the Western Digital hard drive "to keep *copies* of documents, primarily personal documents," and it was discarded when it failed in August or September of 2014. Ex. B at 94-101. The 32 GB SanDisk Cruzer was re-formatted by Beardsley on April 26, 2014, when he needed it for personal use. While he had previously seen (to his surprise) that it contained a Move document, he did not believe it was in any way unique or relevant to this case. *Id*. at 34-37, 93.[17] Likewise, his use of deletion software on his home and Zillow computers – which did not delete material in the first instance, but overwrote unallocated space to try to obscure internet browsing history – occurred *after* he had gathered material responsive to the July 16, 2014 subpoena, and was only intended to eliminate traces of visits to adult websites.

[16] Notably, the numerous texts to and from Samuelson that have been produced strongly corroborate his explanations. *See, e.g.*, Ex. M (3/5/14 texts with Warren Cree); Ex. N (Rascoff texts); Ex. O (Philips texts).

[17] The 32 GB drive was never connected to his Zillow computer, and (unlike a person trying to steal data), Beardsley reformatted the drive shortly after seeing that it contained that Move document. Crain Decl. ¶ 29.

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Beardsley has explained all of this, and that he neither intended, nor believes, that any of this activity led to the loss of unique, relevant evidence in this case. *Id.* at 63-64, 77-81, 86-89, 92-93. Plaintiffs offer nothing to rebut that testimony, other than strident claims that Beardsley must be lying. Those unsupported allegations are insufficient to show that Beardsley violated a duty to preserve. *Digital Vending Servs.*, 2013 WL 5533233, at *5 ("The duty to preserve does not extend to every document . . . , only to unique, relevant evidence").

C. Plaintiffs Have Not Shown that Defendants Acted in Bad Faith to Intentionally Deny Plaintiffs Access to Evidence in this Case

Plaintiffs' motion for sanctions should be denied for the independent reason that Plaintiffs have not shown that Defendants acted in bad faith. On the contrary, both Samuelson and Beardsley have credibly explained that their conduct was intended (1) to ensure that they did not take Move information with them, and (2) to delete personal information. Ex. B at 9-13, 16-17, 119, 124; Ex. A at 357-58. It was not intended to deny Plaintiffs access to relevant evidence in this case. *See N3 Oceanic, Inc. v. Shields*, 2006 WL 2433731, at *5, *10 n.6 (E.D. Pa. Aug. 21, 2006) (denying sanctions where party deleted "copies of documents containing information he believed to be proprietary" to his former employer, which was an effort "to avoid impropriety, not to engage in it"); *Select Med. Corp.*, 2006 WL 859741, at *9 (no spoliation where party deleted files to remove his access to his former employer's information); *see also Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644-45 (7th Cir. 2008) (no sanction where party deleted files "in order to protect confidential information about its employees").

Likewise, given the work routines and extensive travel by Defendants, the loss of certain thumb drives is not at all suspicious, and does not prove intentional destruction of evidence. *See Digital Vending Servs.*, 2013 WL 5533233, at *5-6; *Park v. City of Chicago*, 297 F.3d 606, 614-17 (7th Cir. 2002) (no sanctions where, "[s]imply put, the City lost these documents," but that

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loss did not show bad faith). Nor was Beardsley's use of deletion software intended to deny Plaintiffs any relevant evidence in this case. Rather, he has credibly explained that it was motivated by a desire to remove traces of his private web-browsing history.[18]

For its part, Zillow promptly implemented a litigation hold and scrupulously honored its discovery obligations. *See* Owens Decl. ¶¶ 3-6 & Exs. A-C. Under these circumstances, Plaintiffs have failed to carry their burden of showing bad faith.

D. Plaintiffs Have Not Shown Prejudice, *i.e.*, Loss of Unique or Important Evidence

Plaintiffs' motion should be denied for the additional reason that they have failed to show any loss of important or relevant information (or, as the federal cases put it, failed to show prejudice). *GenOn Mid-Atl.*, 282 F.R.D. at 353 ("a court should never impose spoliation sanctions of any sort unless there has been a showing—inferential or otherwise—that the movant has suffered prejudice"); *Keen*, 2013 WL 3832382, at *1-3 (denying sanctions where employee deleted personal files and wiped hard drive: "While it may be true that [the employee's] decision to wipe the laptop hard-drive is suspicious and, as a result, [movant] does not know the full extent of information that was on it, [movant] still has not identified any missing evidence").

In trying to establish the relevance of alleged missing evidence, Plaintiffs point to nothing more than: (1) a Samuelson text to Beardsley saying he has a new phone number for discussions about a possible job change, (2) a Beardsley email to Samuelson with his thoughts on a possible move to Zillow, (3) a Samuelson text asking Beardsley to avoid putting detailed musings on that subject in writing, as it could be misconstrued, (4) a few non-substantive texts (mostly on logistics) between Samuelson and Rascoff during their employment negotiations, and (5) a single email (produced by Zillow) that was part of the employment negotiation. *See* Pls.' Mot. at 17.

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[18] Forensic evidence shows that the deletion programs could be effective, at least in part, in removing traces of pornography. Removing *all* such traces from a computer, however, would have required a degree of technical savvy that few non-specialists possess. *See* Crain Decl. ¶ 45.

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The first point in response, of course, is that this evidence *has not been lost*. Rather, it has been produced by one or another of the Defendants in this case. Plaintiffs complain because they may not have identical productions of every electronic file from *every* Defendant. But Plaintiffs are not prejudiced by that fact, which unreasonably demands perfection among multiple actors, across multiple platforms, in a complex preservation effort. *See GenOn Mid-Atl.*, 282 F.R.D. at 353 (denying sanctions where there was no prejudice from deletion of files produced from other locations); *Process Am.*, 2013 WL 9447569, at *12 (denying serious sanction where other versions of a lost spreadsheet were produced).[19]

Moreover, none of the items identified by Plaintiffs have anything to do with the alleged trade secrets or other related claims asserted in this case, and Plaintiffs have not even attempted to tie any allegedly-deleted items to *particular trade secret issues*. Plaintiffs' 60-page trade secret list includes "trade secrets" in a variety of areas. For example, any alleged loss of files on direct feeds is irrelevant to whether files were lost on Trulia, and the alleged loss of files from Beardsley could not relate to Trulia because Plaintiffs do not even allege he was involved in those discussions. Thus, a general instruction that would allow an adverse inference on any or all issues would be inappropriate and prejudicial, as Plaintiffs have not shown a "nexus between the missing information and *the issue* on which the [adverse] instruction is requested" and have not presented "corroborating" evidence of prejudice. *In re Nat'l Century Fin. Enters., Inc.*, 2009 WL 2169174 *12 (S.D. Ohio July 16, 2009) (emphasis added). Where the "only contested issue that might have been illuminated by the documents" is largely immaterial, no sanction should be imposed. *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155-56 (7th Cir. 1998); *see also In re Text Messaging Antitrust Litig.*, 46 F. Supp. 3d 788, 801 (N.D. Ill. 2014) (failure to keep one type of document did not "influence the Court's decision on other spoliation arguments").

[19] Move email from employee devices is backed-up to Move servers. *See* Ex. P, Interrog. # 31.

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Only through the most strained and implausible reading can the documents Plaintiffs point to be distorted into anything relevant to the alleged wrongdoing in this case. Thus, even if Plaintiffs' *speculation* about the loss of similar material is credited (which it should not be), such loss would not prejudice Plaintiffs, because it shows nothing more than lawful employment discussions. In this respect, this case is similar to *GenOn Mid-Atl.*, where "[t]he somewhat random sample of restored emails . . . refute[d] the suggestion that valuable information was lost." 282 F.R.D. at 360; *see also Delta/Airtran Baggage Fee Antitrust Litig.*, 770 F. Supp. 2d at 1308-10 (N.D. Ga. 2011) ("Where . . . the moving party is not able to establish that the allegedly destroyed evidence is critical to the case, courts have consistently refused to impose spoliation sanctions"); *Hardwick Bros.*, 36 Fed. Cl. at 417-18 (court declined to "speculate on the nature or content" of missing documents, and denied sanctions where movant proffered no reliable evidence showing that deleted files were "critical or controlling in the resolution of issues").

In addition, "[i]n weighing the importance of the destroyed evidence," Washington courts consider whether it provided an "investigative advantage" for one side over the other, as well as the availability of other relevant evidence. *Cook*, 2015 WL 5771329, at *7. Both these considerations counsel against sanctions in this case. Defendants gained no investigative advantage from reviewing anything Plaintiffs allege to be lost. Moreover, due to their aggressive (and continuing) discovery in this case,[20] Plaintiffs have repeatedly asserted that they already have a "mountain of evidence" to establish their claims.[21] Having made this representation when it suits their purposes, they should be held to it, and this motion for sanctions denied based on a failure to show prejudice. Indeed, there *is* a mountain of evidence in this case – and it fully

[20] Against Zillow alone, Plaintiffs have served over 440 document requests and over 50 interrogatories. In addition, 47 depositions have been taken to date. Zillow has produced over 850,000 pages of documents.

[21] *See, e.g.*, Ex. Q at 1 (referring to "the growing mountain of evidence in this case supporting the plaintiffs' claims"); Ex. R at 1 (claiming "ample evidence that the plaintiffs' confidential and trade-secret information was misappropriated by the defendants").

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corroborates Defendants' testimony that no confidential Move data has been disclosed or used for Zillow's benefit, and no evidence destroyed to deny Plaintiffs access to it.

E. Plaintiffs Have Made No Showing that Zillow Is Liable for Spoliation

Plaintiffs have failed to make the requisite showing for sanctions against any of the Defendants, but their arguments with respect to Zillow are particularly weak. Plaintiffs argue that Zillow knew about the subpoena issued to Beardsley in July 2014, but "did nothing to prevent him from destroying evidence." Pls. Mot. at 17. As an initial matter, Plaintiffs have made no showing that Beardsley destroyed evidence. But even if Beardsley's use of deletion software on his Zillow computer is *assumed* to have destroyed relevant data (it should not be), Zillow should not be held responsible for that conduct. Zillow was unaware of Beardsley's use of deletion software and had issued a litigation hold, which it periodically updated, and which Beardsley has acknowledged he received. *See* Owens Decl. ¶¶ 3-6; Ex. B at 23. Moreover, Zillow independently collected Beardsley's entire Outlook mailbox from the company network for review and production. That collection occurred on August 18, 2014 (while Beardsley was under subpoena), and is likely to have captured any relevant emails on Beardsley's Zillow laptop. McMillan Decl. ¶ 2.[22]

Further, the cases cited by Plaintiffs are factually distinguishable, and do not support their argument that Zillow is responsible for Beardsley's conduct. In fact, in *Nucor Corp. v. Bell*, 251 F.R.D. 191 (D.S.C. 2008), the court declined to hold an employer responsible for an employee's disposal of a thumb drive, where the employee "never disclosed the SanDisk's existence nor consulted with anyone at [his place of employment] about discarding the device." *Id*. at 196. Those facts, which *are* present here with respect to Beardsley's use of deletion software, "indicate[d] that [the employee] was not acting within the scope of his employment" or for his

[22] In addition, Zillow has disciplined Beardsley for his mistakes in judgment in this case. Owens Decl. ¶ 10.

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employer's benefit; instead, he was acting "for his own benefit." *Id.*[23] The *Nucor* court *did* extend liability to the employer for continued use of the company laptop. *Id*. at 197-99. But that holding was prompted by circumstances *not* present here, including (1) a finding that all defendants knew "the laptop would contain relevant evidence," and (2) the "deliberate, repeated installation and de-installation of programs" by the employer's IT technicians – including an "Ultimate Cleaner program" – in a suspicious manner prior to the imaging of the computer, when that process would overwrite significant quantities of data, making it unrecoverable. *Id*. No such thing occurred here. In addition, *Nucor* applied outdated Fourth Circuit spoliation law, which "expressly reject[ed] bad faith as an 'essential element of the spoliation rule.'" *Id*. at 199. But under Washington law (and *current* federal law, since the 2015 Amendment to FRCP 37), a showing of bad faith *is* required for severe sanctions. *See Cook*, 2015 WL 5771329, at *12.[24]

F. The Court Should Await the Results of the Neutral Forensic Examination

The Court should deny Plaintiffs' motion based on their failure to show loss of relevant and important evidence due to bad faith. However, even if the Court believes that Plaintiffs *have* proven bad faith, it should refrain from ruling on this motion until the results of Neutral Forensic Examination are available and discovery is complete. Discovery extends until April 1, and no

[23] *Nucor* held that "[o]rdinary agency principles govern a party's responsibility for spoliation committed by its employees." 251 F.R.D. at 196. "An employer is liable for any acts committed by employees acting within the scope of their employment. . . . 'An act is within the scope of a servant's employment [where] reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business.'" *Id*.

[24] The facts of the other case relied upon by Plaintiffs, *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469 (E.D. Va. 2011), were even less similar to the facts here. In *du Pont*, seven "key employees," after learning of the litigation, "set out to willfully and intentionally, and in bad faith, delete from their computers relevant documents, files and emails." *Id*. at 505. Indeed, a manager called a special meeting and "instructed [them] . . . to begin the process of gathering potentially relevant documents and email items for deletion," which they proceeded to do. *Id*. at 502. Further, a key "litigation hold" was in *English* only, when all of the key players were Korean and would not have been familiar with such notices. *Id*. at 501. Under these circumstances, the coordinated and deliberate destruction of relevant evidence was attributable to the company under "[s]tandard principles of agency law." *Id*. at 506. *Du Pont* was also decided in the Fourth Circuit, which *at that time* did not require a showing of bad faith.

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assessment of whether Plaintiffs have been prejudiced by a loss of evidence can be made before that date. The Neutral's investigation into the very issues presented by this motion is in its preliminary stages. Imposing sanctions of any kind before obtaining his findings and the completion of discovery would be precipitous and ill-advised, wasting the extensive resources devoted to those efforts and risking a serious miscarriage of justice. *See Toppan*, 2014 WL 2567914, at *10 (denying adverse inference sanction where "on the current record . . . it is not yet possible to determine the degree of evidentiary prejudice as to the overwritten files. The Court finds that in light of this incomplete showing of prejudice, the adverse inferences sought by [movant] are not appropriate."); *FMC Tech., Inc. v. Edwards*, 2007 WL 1725098, at *10 (W.D. Wash. June 12, 2007) (denying sanctions: "In *Leon*,[25] spoliation of evidence was clear. Here, however, Plaintiffs' allegations regarding the destruction of computer files are anything but clear and this Court cannot find Plaintiffs' assertions any more or less credible than Defendants' explanations for the 'missing' data. Moreover, most of the allegations hinge on witness credibility, . . . [which] will be evaluated by the jury in this case in due course.").

VI. CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Sanctions should be denied.

[25] Plaintiffs' heavy reliance on *Leon* is misplaced. *Leon* involved clear, bad faith intent to deny the movant access to data of "obvious relevance" when the spoliator knew he had a duty to preserve that evidence. The deleted material included pornography, relevant to whether the company had grounds to terminate the spoliator, and health care communications, relevant to the spoliator's ADA claim. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959-60 (9th Cir. 2006). *See In re Hitachi Television Optical Block Cases*, 2011 WL 3563781, at *11 (S.D. Cal. Aug. 12, 2011) (citing *Leon* but denying sanctions where party deleted files through a "defragmentation program" rather than "specifically target[ing]" "critical or unique information pertaining to the disputes in this litigation," and where many of the files could be determined to be irrelevant based, for example, on recovered file names).

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DATED: January 25, 2016

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CERTIFICATE OF SERVICE

On January 25, 2016, I caused to be served upon counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document entitled DEFENDANT ZILLOW, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR EVIDENCE SPOLIATION SANCTIONS.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of January, 2016.

s/ Vicki Lynn Babani
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