

1 SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

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4 MOVE, INC., et al.,) VERBATIM REPORT OF

5 Plaintiffs,) THE PROCEEDINGS

6 vs.) Cause No. 14-2-07669-0 SEA

7 ZILLOW, INC., et al.,) HEARING

8 Defendants.)

9 -----

10
11 TRANSCRIPT

12 of the proceedings had in the above-entitled cause

13 before the HONORABLE Sean O'Donnell, Superior Court

14 Judge, on the 25th day of April, 2016, reported by

15 Michelle Vitrano, Certified Court Reporter, License

16 No. 0002937.

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1 APPEARANCES:

2 FOR THE PLAINTIFFS: DAVID SINGER, JEFFREY M.
3 THOMAS, RICHARD L. STONE and
4 MICHAEL ROSENBERGER
5 Attorneys at Law

6
7 FOR THE DEFENDANT: DAVID J. BURMAN and
8 JOSEPH M. MCMILLAN
9 (Zillow, Inc.) Attorneys at Law

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11 FOR THE DEFENDANT: K. MICHAEL FANDEL
12 (Errol Samuelson) Attorney at Law

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14 FOR THE DEFENDANT: JAMES P. SAVITT
15 (Curtis Beardsley) Attorney at Law

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I N D E X

TESTIMONY

BY DEFENDANTS

ANDREW CRAIN

Redirect Examination. Page 4

E X H I B I T S

EXHIBIT

IDENTIFIED

ADMITTED

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1 PROCEEDINGS

2 April 25, 2016, afternoon session

3 THE COURT: Please be seated.

4 Mr. Crain, come on back up. You remain under
5 oath.

6 Redirect.

7 ANDREW CRAIN,

8 Called as a witness at the request of the
9 Defendants, being previously duly sworn according
10 to law, did testify as follows herein:

11 REDIRECT EXAMINATION

12 BY MR. WILLEY:

13 Q Good afternoon, Mr. Crain.

14 A Good afternoon.

15 Q There were a number of different documents
16 that we discussed this morning. I just want to
17 walk through some of those. You testified and Mr.
18 Singer asked you some questions about the MLS
19 report; do you recall that?
20

21 A I do.

22 Q And that's a document that's been produced in
23 the case?

24 A I believe it has.

25 Q You were asked about a document entitled, how

1 Z might challenge M. Do you recall the document?

2 A Correct.

3 Q And you had assisted in the recovery and
4 production of that document in its revision
5 history, correct?

6 A That's correct. We discussed that.

7 Q You were also asked about the SAS document,
8 and that's been produced in the case as well?

9 A That's my understanding.

10 Q Have you made any effort to recover files that
11 were in Mr. Beardsley's Dropbox account?

12 A Yes. And we may have discussed that
13 previously or not.

14 Q And you recovered actually a substantial
15 portion of those files; is that right?

16 A Yes. So the result there was about a 98
17 percent recovery of the 694 documents contained in
18 Mr. Beardsley's Dropbox as evidenced by his Move
19 laptop. That was what gave us the starting set.

20 Q Got it. And then there were 515 Dropbox files
21 on the SanDisk 32; is that correct?

22 A I think the 515 is a discussion of those
23 documents stored on the SanDisk 32 with a last
24 access date of April 26, 2014.

25 Q And were you able to recover these documents

1 as well?

2 A We've recovered a similar percentage of those.

3 Q 98 percent?

4 A I think it was about 98 percent, yeah.

5 Q Got it.

6 A That is they're contained in the 98 percent of
7 the 694 recovery.

8 Q Understood. They've been recovered, they're
9 evidence in the case?

10 A Correct.

11 Q This morning Mr. Singer asked you about the
12 SanDisk 32 device, and you may recall that he was
13 asking you questions premised upon Mr. Lloyd-Jones'
14 assumption that there was a suggested mystery
15 computer; remember that?

16 A Yes.

17 Q And Mr. Lloyd-Jones' assumption was premised
18 on his understanding that there was no connection
19 history on April 26th, right?

20 A I think that's correct.

21 Q And yet we know in fact that there was
22 connection history on April 26th?

23 A That's correct. That's the PC Doctor stuff
24 that's been discussed.

25 Q Got it. So the assumption that is being made

1 by Mr. Lloyd-Jones is incorrect. We've shown that.

2 Mr. Singer also asked you about what caused
3 the last access date for those 515 files on the
4 SanDisk 32 to be updated with the April 26th date.
5 Do you remember that line of questioning?

6 A Yes, I do.

7 Q And he was asking you about, well, isn't it
8 possible there was a mystery computer, right? You
9 remember that?

10 A Sure.

11 Q And I think you told him that that was a
12 possibility but that there were other
13 possibilities, right?

14 A Yes.

15 Q Tell me some of the other possibilities.

16 A Well, as I may have mentioned, you know, a
17 virus scan is one possibility, or you might have a
18 similar situation that you have in the context of
19 discussing the LaCie hard drive on the Samuelson
20 side where the last access date may get touched by
21 some sort of operation by the operating system that
22 you can never really affirmatively pin down.

23 Q So a virus scan, and that's -- I think that
24 Mr. Singer had showed you an opinion you submitted
25 in an Allied North American Insurance case some

1 years ago; you remember that?

2 A I do.

3 Q And there was a large volume of files that had
4 a last access date update, right?

5 A That's correct.

6 Q And your testimony was in that case that
7 number of files was last access date was updated by
8 a virus scan?

9 A That's correct.

10 Q So that's one possibility. And another
11 possibility is that you can take a hard drive or an
12 external device, like a SanDisk 32, and simply plug
13 it into a Windows system and their last access date
14 updated?

15 A That's possible.

16 Q How do you know that's possible?

17 A Well, that's part of the testing that I
18 performed.

19 MR. SINGER: Objection, your Honor. This
20 goes to the ruling you made this morning.

21 MR. WILLEY: Mr. Singer opened the door,
22 your Honor. State V. Bird, 147 Wn. App. 923, 2008.

23 MR. SINGER: Your Honor, asking the
24 witness about what he did before the testing that
25 you carved out doesn't open the door. I'm allowed

1 to ask him about what he testified at your last --
2 at the last hearing when he was here without giving
3 up the right to have him bring in new testing and
4 new evidence. That's not opening the door. I
5 didn't ask him about any of the new testing he
6 conducted. I asked him about what he testified
7 under oath the last time he was here.

8 MR. WILLEY: Mr. Singer --

9 THE COURT: Hold on a second.

10 So Mr. Singer, your question is, and I wrote
11 it down cuz it caught my ear when you asked it,
12 was, your opinion was more reliable on the last
13 access date than Mr. Lloyd-Jones. Is that -- that
14 was your question to him.

15 MR. SINGER: In connection with the old
16 declaration; is that with you're referring to?

17 THE COURT: No. I think the question is,
18 and my apologies, I don't have the daily or the
19 realtime up in front of me right now, but I wrote
20 down here in my notes, the question was, your
21 opinion is more reliable on the last access date
22 compared to the opinion of Mr. Lloyd-Jones. And I
23 wrote it down because it didn't seem to me to be
24 limited to prelast Friday or the Friday before. So
25 let me hear -- go ahead. Do you want to add

1 anything to your --

2 MR. SINGER: I don't -- I don't -- the
3 only time we spoke about him relying on last access
4 date was in connection with the testing he had done
5 on this backup file, which is in his report.
6 That's what I was asking Mr. Crain about. He did
7 testing in his report on a separate file, Mr.
8 Samuelson's contact information. He gave a written
9 opinion on that in his March original report. His
10 opinion was, relied on the last access date of
11 backup.PST. So I didn't ask him anything about
12 virus scans or the testing he did last week.

13 THE COURT: No. It was actually -- it was
14 such a general question, which is why it caught my
15 ear or my attention when you asked it. You are
16 correct, the questions regarding the timing of his
17 testing and the disclosure of the timing of the new
18 testing he did was a separate issue, and you were
19 circumspect in terms of the question posed there.

20 Let me turn back to you, counsel.

21 MR. WILLEY: Yeah. I mean State V. Berg
22 holds that once a party has raised a material
23 issue, the opposing party is permitted to explain,
24 clarify, or contradict the evidence. And this
25 morning Mr. Singer asked numerous questions of Mr.

1 Crain trying to pin him down on buying into Mr.
2 Lloyd-Jones' theory that last access date updates
3 on the SanDisk 32 could only be caused by a mystery
4 computer.

5 And he asked Mr. Crain, isn't this possible,
6 isn't this consistent with the evidence, and Mr.
7 Crain said, well, it could be, but there are other
8 possibilities. And then Mr. Singer wisely avoided
9 further inquiry, but he walked right up to it. He
10 asked the material question. He asked the witness,
11 and I think the witness is entitled to explain,
12 clarify, contradict the evidence presented by Mr.
13 Lloyd-Jones.

14 THE COURT: All right. Mr. Singer.

15 MR. SINGER: So because he did new
16 testing, I'm not allowed to talk about any of the
17 testimony he gave that was fair game. That's
18 basically what I'm hearing, that -- because my line
19 of inquiry -- he testified at length about this,
20 about what could have caused it, what didn't.

21 He came into court and said under oath, these
22 are the causes, these aren't. I shouldn't be cut
23 off from revisiting that. This is my
24 cross-examination within the scope of that, and I
25 shouldn't be cut off because they decided to do new

1 testing.

2 THE COURT: I don't disagree with you on
3 that. The thing that I am, not stuck on, but am
4 focused on is the question that is his opinion is
5 more reliable on than Mr. employed Jones' on the
6 issue of the last access date. And it seemed to be
7 a very broad and open-ended question. But I didn't
8 write it down in its entirety, and I'm not sure if
9 any of you all out there were taking more thorough
10 notes.

11 MR. SINGER: No. I didn't suggest that
12 his opinion was more reliable.

13 THE COURT: I'm sorry?

14 MR. SINGER: I don't think I ever said
15 that he was more reliable. I may have said that he
16 testified that he was more reliable. I wouldn't be
17 doing such a good job if I was out there saying
18 he's more reliable, your Honor.

19 THE COURT: No. You were asking this
20 witness. It was his testimony that his opinion,
21 this witness's opinion, was more reliable than Mr.
22 Lloyd Jones's. That was how I captured the
23 question that you posed, which again I'm going back
24 to this notion --

25 MR. SINGER: I do recall asking that

1 question, or something to that effect.

2 THE COURT: Right. I recall you asking it
3 as well, which leads to the issue that we're
4 getting raised right now, which is whether or not
5 you opened the door to him explaining why his
6 opinion is more reliable. And if it includes the
7 latter testing, it would seem to me that that would
8 be an appropriate response.

9 MR. MCMILLAN: Your Honor, I made a note
10 as well, and it didn't capture the question you
11 wrote down, but my note is that Mr. Singer asked of
12 the witness, Mr. Crain, language closely to the
13 effect that your theory, Mr. Crain, of connection
14 to the home office computer leaves unexplained the
15 update of the last access date on the 32 gigabyte
16 SanDisk. So your theory leaves unexplained was
17 kind of the operative point that I felt --

18 THE COURT: That's a different issue.

19 MR. WILLEY: Well, but it's a question --
20 it's the same question exactly about causation.
21 He's asking questions designed to elicit the
22 answer, I mean the question about causation or the
23 last access date updates. His testimony --

24 MR. SINGER: I agree with Mr. McMillan. I
25 did ask him.

1 THE COURT: You did.

2 MR. SINGER: And he did testify the last
3 time he was there, before -- I could have done my
4 cross right after he said that, and I would be able
5 to ask him, you said it's unexplained. I don't see
6 how they can get rewarded for fixing his testimony
7 this past week and come in here. That's not me
8 opening the door. That's me crossing him on
9 exactly what he said when he came in and testified.

10 Just because they did additional testing that
11 has your Honor excluded should not preclude from me
12 challenging the witness on his prior testimony.

13 THE COURT: I don't disagree with you.

14 Anything else you want to add.

15 MR. WILLEY: Your Honor, this is not
16 fixing testimony. This is explaining a rebuttal
17 point, Mr. Lloyd-Jones saying, this is what
18 happened. And when Mr. Singer is asking the
19 questions that deliberately set up that question,
20 in fact the witness's response was, well, that's
21 one possibility; there are other possibilities.

22 THE COURT: Well, no one else wrote that
23 question down. As I said, I don't have the live
24 transcript in front of me, because I would like to
25 know. Anyone else write it down there out there?

1 No one else wrote it down.

2 Well, you can ask him why his opinion is more
3 reliable than, if he believes that, than Mr.
4 Lloyd-Jones's. The question of whether the
5 additional testing, I guess it really depends on --
6 why don't you give me an offer of proof of what
7 your answer would be to that question, whether or
8 not your opinion is more reliable than Mr.
9 Lloyd-Jones's on the last access date analysis.

10 MR. WILLEY: Do you want me to ask the
11 question, your Honor?

12 THE COURT: No. I just did.

13 MR. WILLEY: Do you understand the
14 question?

15 THE COURT: Do you understand the
16 question?

17 THE WITNESS: Sorry. No.

18 THE COURT: So you were asked the question
19 whether your opinion was more reliable than Mr.
20 Lloyd-Jones's on the issue of the last access date
21 on that topic. I didn't write down your answer,
22 but --

23 THE WITNESS: That's --

24 Q (BY MR. WILLEY) And this is the 515 files on
25 the Samsung.

1 A Yeah, I'm on the issue. I didn't recall the
2 question of specifically whether my opinion was
3 more reliable or not. I thought what Mr. Singer
4 had asked me was whether the forensic evidence was
5 consistent with Mr. Lloyd-Jones's explanation, and
6 what I remember saying was, that's one possibility,
7 and there are others.

8 THE COURT: Okay. That's your answer.

9 I don't believe the door's been opened
10 sufficiently to go into the Windows-based testing
11 that I excluded. I said you could ask him
12 questions about the subsequent testing that he did
13 on the Mac, the confirmatory testing he did with
14 the Mac operating system but not the Windows.

15 And I will take that answer, which was an
16 offer of proof, as evidence for purposes of this
17 hearing.

18 MR. WILLEY: Can we make an offer of proof
19 with respect to the testing that occurred?

20 THE COURT: You may.

21 Q (BY MR. WILLEY) In terms of the question that
22 was framed by Mr. Singer and by the Court as to
23 whether or not your opinion as to the last access
24 date update for the 515 files and what makes your
25 opinion in your view reliable versus Mr.

1 Lloyd-Jones, what is the bases for the reliability
2 of that opinion?

3 MR. SINGER: Objection, your Honor.

4 THE COURT: The basis.

5 MR. SINGER: The same objection. That's
6 not an offer of proof. He's just trying to bring
7 out the same testimony that your Honor just ruled
8 on.

9 THE COURT: Well, the problem is he never
10 said his opinion was more reliable. He said that
11 the evidence may have been consistent with A or B,
12 but he never said his opinion was more reliable,
13 and that's why I said, in terms of the offer of
14 proof you just made, you're stuck with that answer.

15 Q (BY MR. WILLEY) Do you have an opinion as to
16 whether or not your view is more reliable than Mr.
17 Lloyd-Jones's view? Mr. Lloyd-Jones posits a
18 mystery computer. I don't think you agree with
19 him. Is your opinion more reliable or his, in your
20 opinion?

21 A I believe my opinion is more reliable because
22 you have a known connection to the home office
23 computer on that date.

24 Q Is there any other reason why your opinion is
25 more reliable with respect to why the 515 files

1 have a last access update? So we know there's a
2 connection to that home office computer on that
3 date. Is there any other reason why your opinion
4 is more reliable?

5 MR. SINGER: Same objection.

6 THE COURT: Right. He can answer it
7 within the constraints of my earlier ruling on the
8 subsequent Windows testing.

9 So you can talk about it, anything you like.
10 Just don't bring up the testing you did on the
11 Windows-based operating system.

12 Q (BY MR. WILLEY) So we talked about things
13 that cause last access date changes?

14 A Correct.

15 Q And those things, for example, are known, some
16 of them are known, like virus scans, correct?

17 A Correct.

18 Q And there are other things other than virus
19 scans, other programs that cause last access date
20 updates, correct?

21 A That's correct.

22 Q And do you know whether or not the connection
23 of an external device to a Windows operating system
24 with no action by the user can cause last access
25 date changes?

1 A I do know that it can.

2 Q And so that's a cause, that's a potential
3 cause?

4 A That's one possible cause.

5 Q So we have a connection of this device to a
6 windows computer on April 26; that's undisputed?

7 A I think so, yes.

8 Q In fact, it's the home office computer?

9 A Yes, we have that.

10 Q And there is a direct connection, and we have
11 no evidence of those files being opened?

12 A That's correct.

13 Q And we know that virus scans can update, and
14 we know that direct connection can update?

15 A Correct.

16 MR. SINGER: Objection. It's leading,
17 your Honor.

18 THE COURT: It's sustained. It was -- the
19 last question was leading, but on to your next
20 question.

21 MR. WILLEY: Appreciate it, your Honor.

22 Q (BY MR. WILLEY) I want to move on and ask you
23 a question about the MLS document that was
24 referenced as being in the SkyDrive. I want to be
25 clear. This document was in a SkyDrive folder on

1 Mr. Beardsley's home office computer; is that
2 correct?

3 A That's correct.

4 Q So it's in a folder on the computer?

5 A Yeah, on the C drive of the home office.

6 Q It's there. It's not in the Cloud?

7 A Yeah. I think I answered that before.

8 It's --

9 Q And that document has an autosave designation
10 in the name, correct?

11 A That's part of the name is parenthetical
12 autosave.

13 Q And then you also looked at Mr. Beardsley's
14 Cloud accounts for both SkyDrive and OneDrive?

15 A I think, as we heard testimony before, the
16 SkyDrive product underwent this rebranding and
17 became OneDrive. So as of spring 2015, when we
18 preserve the Cloud, or I should say the documents
19 stored in the Cloud instance of Mr. Beardsley's
20 account, it's called OneDrive. And I think what
21 you're asking is the MLS spreadsheet is not there.

22 Q Got it. So it was on the computer but not on
23 the Cloud?

24 A Correct.

25 Q There was some questions this morning from Mr.

1 Singer about when Mr. Beardsley's of computers were
2 imaged. Do you know when Mr. Beardsley was named
3 as a defendant in this case?

4 A I believe that date is March the 16th, 2015.

5 Q Got it. And do you know when Mr. Beardsley's
6 computers were first imaged?

7 A I think we went over that, March the 9th --

8 Q So before --

9 A -- 2015.

10 Q -- he was named as a defendant?

11 A So one week.

12 Q Last question, very simple. I think we've had
13 testimony that's clear that when you open a
14 document, that will update the last access date,
15 right?

16 A That is correct.

17 Q But if I understand it, last access date
18 update doesn't mean the document's been opened?

19 A That is also correct.

20 Q So in the phraseology of logic games that I
21 did poorly in college at, A equals B, but B does
22 not equal A?

23 A I think that's fair.

24 MR. WILLEY: No further questions.

25 THE COURT: Recross.

1 MR. SINGER: Nothing further, your Honor.

2 THE COURT: All right. Sir, you may step
3 down.

4 Are we ready for Mr. Owens?

5 MR. BURMAN: We have some cleanup items,
6 your Honor. One of those, exhibit A of exhibit
7 3100 was the three hold orders or memos. Your
8 Honor had admitted just that part of the exhibit,
9 but it hadn't been showing up on the exhibit list
10 as admitted. I think we've clarified that now. So
11 we don't have to use Mr. Owens for that.

12 You had suggested that we could move to
13 replace the full depositions with the deposition
14 excerpts that were used for impeachment, and we'd
15 like to do that at this time. That's for exhibits
16 800, 802, 810, 824, 825, and 3332.

17 THE COURT: And is this by agreement?

18 MR. BURMAN: I believe it is.

19 MR. STONE: We got this Sunday night. We
20 haven't had a chance to look at it. I'm sure we
21 can work it out. But we just have to have an
22 opportunity to make sure that he covers the pages
23 that he used in impeachment. I don't think it's
24 going to be controversial, but we haven't had a
25 chance to review these.

1 MR. BURMAN: Well, I think we've been
2 giving you updates through --

3 MR. STONE: We got an email from John
4 Gray.

5 MR. BURMAN: I realize that because after
6 we got the last transcript, we checked everything.

7 MR. STONE: Like I said, I don't think
8 it's going to be a big problem.

9 THE COURT: Okay. Well, why don't you
10 take a look at it. And the worst case is I have to
11 read the whole deposition. But the best case
12 scenario is you'll agree on the excerpts, and it
13 sounds like that's not going to be a real fist
14 fight.

15 MR. BURMAN: Similarly, your Honor, we
16 move to substitute certain exhibits where we've
17 redacted confidential phone numbers. Those are
18 exhibits -- plaintiffs' exhibits 191, 813, 816,
19 819, 821, 826, defendants' exhibits 3005, 3005,
20 3015, 3060, 3329, 3330, and 3331.

21 And I believe those also we did just get to
22 them, and we obviously would hear any concerns they
23 have with those.

24 THE COURT: Any objection to that?

25 MR. STONE: I agreed to a handful that Mr.

1 Gray showed me earlier. This is beyond the
2 handful. Obviously if there had been some
3 cooperation of folks that approached me last week,
4 I could have been prepared to tell your Honor, but
5 on the spot here, without knowing this additional
6 end point, I can't commit. I don't think it will
7 be an issue, but I would like an opportunity to
8 just quickly review the stuff. I think we can get
9 something to your Honor probably tomorrow.

10 THE COURT: This is fine as well. I mean
11 this isn't an instance where it's going back to the
12 jury, so timeliness is not of the essence. But on
13 the principle that you just want to redact the
14 personal phone numbers of particular participants
15 in this case, that seems like a reasonable request,
16 and I'll just wait to hear from plaintiffs if
17 there's objection.

18 MR. SINGER: Of course it's reasonable as
19 long as it doesn't obscure the ability to tell that
20 there's a message between the defendants or Zillow,
21 so that's all we're looking out for, your Honor.

22 THE COURT: I understand. So I'll give
23 you an opportunity to look at that. And knowing
24 then, counsel, which exhibits you wish to
25 substitute.

1 MR. BURMAN: Thank you, your Honor.

2 And then finally last week, we had -- or I
3 guess it was the first week of testimony, we had
4 submitted dep designations and video for the
5 depositions of Mr. Berkowitz, Ms. Brummer, Cofano,
6 Evans, Glazer, and Move through the 30(b)(6)
7 deposition of Mr. Berkowitz.

8 We just wanted to make sure that those were in
9 the record, and if the Court had any problem with
10 the video, obviously address that.

11 THE COURT: Yeah. No problems.

12 MR. BURMAN: And with that, your Honor, I
13 believe the defendants are done with our part of
14 the spoliation hearing.

15 MR. SAVITT: Actually there's one issue
16 that I wanted to raise with the Court. I feel
17 duty-bound, your Honor, to reoffer and to make one
18 more pass at the Court on the subpoena objection.
19 It will take me two minutes or less, but before we
20 close the evidence, I am going to ask that they be
21 admitted.

22 THE COURT: I'm sorry, which objection?

23 MR. SAVITT: This is the -- it relates to
24 the objections that were submitted on Mr.
25 Beardsley's behalf to the subpoena that was served

1 on him in July of 2015. I offered those in
2 connection with Mr. Beardsley's examination. And
3 then it came up again, the Court will remember, the
4 next day on Mr. Singer's redirect, and I haven't
5 had an opportunity to mention this again. The
6 Court may well rule the same, but I think the Court
7 may --

8 THE COURT: Which is the exhibit number,
9 Mr. Savitt?

10 MR. SAVITT: The exhibit number, your
11 Honor, there are four of them. 3029 is the
12 objections that were submitted by Mr. Beardsley to
13 the subpoena. 3032 and 3033, and I'll hand them to
14 Madam Clerk so you have them, your Honor, the full
15 set, 3022 and 3033 were subsequent letters sent on
16 Mr. Beardsley's behalf stating his legal position.
17 And 3030 is the letter from Move's lawyer, from
18 plaintiffs' counsel, to which one of those letters
19 responds.

20 And again I'll be as -- I'm going to be
21 really, really short, your Honor. 3029, the
22 objections -- the objections have legal
23 significance of themselves. They are -- they have
24 legal effect and are the classic verbal act,
25 although they're written, but they are classically

1 a verbal act under the (unintelligible) and
2 therefore not hearsay.

3 3032 and 3033 are statements of legal
4 position, which we submit have relevance, and
5 therefore because they are statements of that
6 position likewise are not hearsay, because they're
7 not offered for the truth. They're offered that
8 those legal positions were in fact asserted.

9 THE COURT: So 3033 -- oh, it's 3030 that
10 you were saying is from plaintiffs' counsel.

11 MR. SAVITT: Right.

12 THE COURT: Did you even mark that? I
13 don't think it was ever marked.

14 MR. SAVITT: Well, I'm not sure we
15 actually -- I think when the Court -- I marked
16 3029.

17 THE COURT: 3029 you did, yes.

18 MR. SAVITT: And then when I got to 303 --
19 3030 -- actually my notes show that all but 3033
20 were marked, but --

21 THE COURT: 3030 was never marked, at
22 least according to my clerk.

23 MR. SAVITT: It's possible I didn't get
24 there because when the Court ruled that the other
25 ones were inadmissible, I obviously moved on. But

1 if so, I would mark it now. I guess I could say to
2 the Court, 3030 is the one that concerns me the
3 least. It's for completeness because it's the
4 letter to which one of the others responds. But
5 they're all premarked, and I could offer them.

6 THE COURT: So you're offering 30 -- let's
7 start with 3030, which is plaintiffs' response to
8 apparently a letter written by Mr. Savitt
9 concerning discovery issues.

10 Any objection to that?

11 MR. SINGER: To 3030?

12 THE COURT: Yes.

13 MR. SINGER: Yes. Objection. Hearsay.

14 And --

15 THE COURT: It's your letter.

16 MR. SINGER: Oh, plaintiffs' letter, 3030.

17 THE COURT: That's the plaintiffs' letter,
18 so it would be an admission or an operative
19 admission, since it's from Mr. Cock to Mr. Savitt.

20 MR. SINGER: I agree that it is admissible
21 in that regard, but if this comes in, they're going
22 to claim that they need the others for context, and
23 I don't have the witness here to cross-examine. I
24 mean this is all trying to build up what his state
25 of mind was when we already went through this. The

1 Court ruled on these objections.

2 He testified about his state of mind. He
3 didn't talk about having helped write these
4 letters, and now counsel's coming in after the
5 witness is long gone and trying to get this in.

6 THE COURT: What's your position on 3029?
7 It hasn't changed from earlier, has it?

8 MR. SINGER: No. I mean it hasn't
9 changed. They're trying to put in a lawyer's
10 letter with objections and somehow argue that that
11 relieves him of his duty to preserve under a
12 subpoena. That's all that's going on here.

13 And the witness didn't testify about this
14 letter. He didn't write it. There's no
15 foundation, and it's hearsay.

16 MR. SAVITT: Your Honor, let me respond to
17 that, if I could.

18 THE COURT: You know, I've heard a lot.
19 I've heard you both before on these letters. Do
20 you have something new?

21 MR. SAVITT: Well, your Honor, I mean I am
22 actually -- what we talked about when Mr. Singer
23 was doing his redirect of Mr. -- remember the Court
24 elicited a stipulation from me that we would only
25 rely on these letters for Mr. Beardsley's state of

1 mind. But putting that aside, they are relevant
2 for another purpose that has nothing to do with Mr.
3 Beardsley's state of mind.

4 There's a subpoena. It carries a basket of
5 obligations. The Court may have to determine what
6 those are. That basket of obligations may well be
7 influenced by the fact that there was an objection
8 timely served to the subpoena, which has legal
9 effect and consequences of its own under civil rule
10 45(c) and the law thereunder.

11 We're entitled to show that that objection is
12 relevant. Putting aside Mr. Beardsley's state of
13 mind, putting aside anything else, it's the classic
14 verbal act. The objections were made. They have
15 legal significance. We're entitled to have those
16 in.

17 I really don't see what the argument is
18 against 3029, the objections. And I would say with
19 regard to 3022, and 3033, really it's an extension
20 because they are further statements of Mr.
21 Beardsley's legal position, and that legal position
22 may have consequence. We're going to argue it has
23 consequence as to, you know, what the full scope of
24 duty here was. So --

25 THE COURT: All right. Anything else, Mr.

1 Singer?

2 MR. SINGER: Nothing, other than I guess
3 we at least agree that there is a legal dispute
4 here. But I don't think these can come in as
5 evidence brought in by counsel.

6 THE COURT: Well, 3029, for the limited
7 purpose of whether there was an objection to the
8 subpoena, I'll admit it for that. I'm not going to
9 get behind the scenes though and into the weeds of
10 why the objections were being lodged.

11 3032 and 3033, my previous rulings stand.
12 3030 is an adoptive admission by plaintiffs, and I
13 just need to know if you're objecting to your
14 letter coming in. Are you still offering 3030?

15 MR. SINGER: I mean I disagree with his
16 characterization of what it says or what it is, but
17 I don't -- I don't -- there's no legal act or legal
18 agreement or any sort of stipulation in this letter
19 at all. It's just two parties disagreeing.

20 THE COURT: I don't think he's saying that
21 your letter constitutes a legal act or the words
22 are operative in some nonhearsay manner, but your
23 letter would otherwise come in as a statement of a
24 party opponent.

25 MR. SINGER: And the relevance being?

1 THE COURT: I didn't hear you object on
2 relevance. I heard you object on hearsay grounds.

3 MR. SINGER: Well, our original objection
4 included relevance. I just want -- I didn't hear
5 any argument on why it's relevant. I
6 misunderstood. I thought he's saying that this is
7 somehow evidence of a legal act I heard.

8 THE COURT: I heard that from his letters
9 that they were legally significant because they're
10 objecting to your subpoena.

11 Mr. Savitt, are you still offering 3030?

12 MR. SAVITT: I am, your Honor.

13 MR. SINGER: And I guess my only remaining
14 objection would be to relevance, because it is our
15 letter.

16 THE COURT: Well, I'm going to admit 3030.
17 But my rulings on the other exhibits stand. 3029
18 is admitted for a limited purposes, and that's just
19 to lodge an objection, the fact of an objection to
20 the subpoena.

21 All right. So you're not calling Mr. Owens.
22 And are we ready to proceed with closing remarks?
23 So I'm looking at our time. 40 minutes for
24 plaintiffs, an hour for defendant, defendants, and
25 then a 15-minute break. I'm going to keep you to

1 the original time slots, and I think that will take
2 us right to four o'clock.

3 Who's going to present on behalf -- all right.
4 Mr. Singer. Let me just say this. I know you all
5 have prepared remarks, and I'm not going to
6 discourage you from following the prepared remarks.
7 One area that I'm interested in hearing from you,
8 and I imagine that this will be in those prepared
9 remarks, is evidence of documents or destroyed and
10 not recovered. Does that make sense?

11 MR. SINGER: Yes.

12 THE COURT: All right. Go ahead, Mr.
13 Singer.

14 MR. SINGER: We have -- do you want a hard
15 copy of our slides?

16 THE COURT: Sure. Thank you.

17 MR. SINGER: It is telling that I find 40
18 minutes to be tight, and I will be hustling through
19 this presentation. I think that speaks volumes as
20 to the scope of spoliation that we have here.

21 The way I've organized it is to cover
22 relatively quickly duty to preserve. I am going to
23 talk about evidence of destruction and deletion. I
24 will then cover prejudice, which I think goes more
25 directly to what your Honor was just asking about.

1 I will then cover the defendants' willfulness
2 and state of mind and their wrongful intent, and
3 then credibility, and I will do my best to slow
4 down in the areas where I think the Court has
5 expressed the greatest interest.

6 With respect to the duty to preserve here, the
7 duty to preserve is triggered when a party knows or
8 reasonably should know that evidence may be
9 relevant to pending or future litigation. It is an
10 objective standard coast to coast and in
11 Washington.

12 The duty will apply, will be triggered
13 prelitigation, before a complaint has been filed.
14 There's no special exceptions for personal
15 documents or pornography. These are well-settled
16 legal principles.

17 For Mr. Beardsley, it's hard to imagine anyone
18 being -- having a greater duty to preserve than Mr.
19 Beardsley. It goes back to November 2013 where he
20 and Mr. Samuelson were discussing being subpoenaed,
21 a subpoena that would cover their going to Zillow
22 in terms of topics.

23 Mr. Beardsley actually received a hold notice
24 from the litigation VP at Move telling him not to
25 destroy anything related to Errol Samuelson. He

1 was told by Move's HR department not to erase
2 anything, including personal files on his
3 computers.

4 And on top of it all, if that weren't enough,
5 he admitted here in court that the filing of the
6 lawsuit triggered a duty to preserve. And
7 obviously that was followed by other things like
8 the subpoena and the preliminary injunction, which
9 is bolstered by an already existing duty to
10 preserve.

11 For Mr. Samuelson, again prelitigation,
12 obviously once the lawsuit's filed, no one's
13 disputing he has a duty to preserve, but long
14 before then, Mr. Samuelson, he was obsessed with
15 getting sued by Move. He spoke about it in emails.
16 He didn't just talk about a potential subpoena. He
17 talked about a subpoena regarding him and Mr.
18 Beardsley not working and going to Zillow, and
19 whether it was News Corp. or anyone else, there's
20 still a duty to preserve.

21 He had email exchanges with Zillow again
22 talking specifically about Move suing him, not just
23 getting indemnity generally, but he expressed
24 concerns and exchanged emails with Zillow talking
25 about getting sued. He submitted a declaration

1 where he says that in the January/February time
2 frame, when he was negotiating indemnity, he
3 referred to the likelihood that in my case, Move
4 would come after me. That is literally an
5 admission that he was aware of a likelihood that he
6 would be sued.

7 As far as Zillow goes, they had the
8 communications with Mr. Samuelson, and there was
9 back and forth. The two of them were discussing a
10 potential lawsuit by Move. They weren't just
11 saying indemnity in general. There was an
12 expressed concern by Mr. Samuelson to Zillow about
13 him being sued by Move in connection with Move's
14 confidential information, and Zillow expressed in
15 return that they would stand behind him.

16 So again well before the filing of a lawsuit,
17 Zillow knew that there was going to be a lawsuit
18 against Mr. Samuelson and Zillow, and obviously
19 conservatively, at least once the lawsuit is filed,
20 clearly there's a duty to preserve on Zillow's
21 behalf because they are a named defendant.

22 I'm going to move into the evidence of actual
23 deletion and destruction. Right out of the gate
24 Mr. Beardsley, remember we looked at this email
25 from March 6, 2014, this is right after Errol

1 Samuelson leaves, Mr. Beardsley's told by the VP of
2 litigation at Move, do not destroy anything related
3 to Errol, that's Errol Samuelson.

4 And what does he do between that time and the
5 time he resigns, he conducts searches on his
6 personal email accounts using the key word Errol
7 and Samuelson, gathers up all the stuff he was told
8 not to erase and then erases it.

9 Of course Mr. Beardsley's spoliation doesn't
10 end there. This slide looks busy, but there's no
11 other way to do it. There is so much; it's hard to
12 fit on a piece of paper. We've got missing
13 computers, as many as two. We've got two missing
14 USB devices, one destroyed hard drive, three wiped
15 USB drives, and I will circle back and focus a bit
16 more on these when I talk about prejudice, but
17 we've seen this enough so I'm trying to move
18 through it quickly, and if I didn't -- running
19 Cipher I've counted 17 times.

20 So in terms of the level of spoliation that
21 was going on with Mr. Beardsley, it's really never
22 been seen before. This may very well be the first
23 six-day hearing on evidence destruction, which is a
24 sad commentary on what the defendants were doing.

25 As far as Mr. Samuelson's spoliation goes,

1 we've got -- just to remind the Court, we've got a
2 complete factory reset of his work iPhone, which
3 included his personal Gmails. We've got a complete
4 factory reset of the iPad. Both of those devices
5 also had text messages and so forth. We've got
6 deletion that took place on his Move Mac.

7 We've got him connecting the LaCie hard drive
8 to we think the evidence strongly shows is a
9 missing computer. He deleted all of his text
10 messages on his burner phone. There is the 17100
11 drive, which he shared with Mr. Beardsley, that's
12 also been reformatted, and we have these two other
13 devices, which admittedly we don't know much about.
14 He was the last person to have them, and he used
15 them while he was at Move.

16 I'll focus a little bit more on the missing
17 computers, because we've talked about it a lot
18 today and at the last hearing. There's evidence
19 pointing to at least three instances of a missing
20 computer. First there's the SanDisk 64 that Mr.
21 Beardsley says was reformatted the weekend of March
22 15th. All the experts are agreeing on that. Yet
23 there's no forensic evidence that the SD 64 was
24 connected to any of Beardsley's computers that we
25 know about. And Mr. Crain didn't have an answer

1 for this either.

2 So the weight of the evidence, the only
3 explanation that we can posit, unless Mr.
4 Beardsley's been lying about what he's been doing,
5 is that there is at least one missing computer.

6 With respect to the SanDisk 32 device, Mr.
7 Crain and Mr. Lloyd-Jones both say it was
8 reformatted on April 26th. The test you would
9 normally conduct to see if it was reformatted on
10 any of Beardsley computers, on his home computer,
11 because that's the only one it was connected to at
12 all, back when he was at Move, that test shows no
13 evidence of it being reformatted there.

14 And if you look at the neutral's list of these
15 deleted files on the SD 32, the 515 files which
16 have last access dates of April 24th, everybody
17 agrees that if Mr. Beardsley were to have copied
18 his files off that SD 32 onto another computer, or
19 opened them from another computer, that would have
20 done it.

21 There's no speculation about that. We know
22 for sure and that that have would have updated
23 those last access dates, but instead what we have
24 is Mr. Crain postulating about possibilities as if
25 this were a criminal trial, and if only he could

1 raise some reasonable doubt that that would get
2 them out of it. But the great weight of the
3 authority, the preponderance of the evidence, is
4 that this device was simply connected to another
5 unknown computer, just like the SanDisk 64. That's
6 the more reasonable explanation for what this
7 device was connected to on April 26th.

8 And again the speculation about virus scans,
9 it's the same -- creates the same cloud Mr. Crain
10 doesn't answer, that these virus scans would have
11 updated, as Mr. Lloyd-Jones said, everything on
12 there. We didn't hear that the virus scans take
13 hours, right. So they would have updated
14 everything on the SanDisk 32, but instead we see
15 some files updated on the 26th of April, some
16 updated on different dates. It's not consistent.

17 So unless Mr. Crain wants us to believe that
18 he plugged the SD 32 into an unknown computer and
19 unplugged it at the perfect time again, the great
20 weight of the evidence is that there's an unknown
21 computer.

22 With respect to Mr. Samuelson's LaCie hard
23 drive, again the weight of the evidence is that he
24 simply connected this drive to another computer.
25 We've got 7,000 plus files with one explained last

1 access dates when both experts say they would have
2 updated if it was plugged into another computer and
3 he copied files over to it. And that would also
4 explain different last access dates within a
5 folder.

6 And we know that if he copied those files to
7 his Zillow computers, there would be evidence, so
8 that's not happening. And what they're left with
9 is, I mean it was, you know, Spotlight, which is a
10 black box. We don't quite know if he plugged it
11 in, he unplugged it, he did that five times, or if
12 that doesn't answer everything, it also could have
13 been the virus scans and throw in a little quick
14 look, I heard, and no real explanation that ties it
15 together.

16 And they're trying to fill in these holes when
17 the more obvious explanation, the weight of the
18 evidence, the preponderance of the evidence, is
19 that he simply connected it to another computer.

20 I'm going to move to the prejudice now,
21 because I think it's something that we want to
22 focus on. What we've seen, and we've I think aptly
23 characterized as the tip of the iceberg, we've
24 basically gotten lucky. We've been able to find a
25 few documents, like incriminating text messages,

1 the if Zillow wanted to challenge Move ListHub
2 document, the stolen MLS report. We got lucky.

3 These are all documents and texts that Mr.
4 Beardsley and Mr. Samuelson tried their darnedest
5 to delete. They didn't preserve them. They just
6 failed to delete them. And what they are is
7 they're just traces of everything that's under the
8 waterline. I mean if this is what we were able to
9 find, these documents shed light on what else could
10 be missing.

11 And so when we look at them one by one, again
12 this is just the tip of the iceberg, but this
13 document here, the Attack ListHub document, they
14 downplay it, but this is a smoking gun. This is
15 the kind of thing that will convince a jury of what
16 Mr. Beardsley's state of mind was, what he was up
17 to, and what his intentions were.

18 And if there was another one, two, or three
19 documents like that, that would be a very big deal
20 in a jury trial. And this is a document that they
21 didn't preserve. Mr. Beardsley tried. He tried to
22 delete everything in it. He typed in, this is a
23 test doc, to delete everything else. So as far as
24 Mr. Beardsley was concerned, this is all that he
25 left behind, this is a test doc. Everything else

1 he thought was gone.

2 Another tip of the iceberg document, the text
3 from Samuelson to Beardsley. Let's not send
4 emails. Someone could subpoena us. Well, we got
5 lucky again because Samuelson restored his iPhone
6 to factory settings, and it was overwritten.
7 Beardsley's iPhone, it was deleted and overwritten.

8 Samuelson's Move MacBook, which they claim was
9 at least a partial backup, well, it was gone from
10 there too, and we got lucky, and it was on his
11 iPad. This text here, Errol here, this is my new
12 prepaid burner phone, again another incriminating
13 text that shows Samuelson's premeditated state of
14 mind.

15 We see here that Samuelson deleted it, and it
16 was overwritten from his burner phone, gone from
17 Beardsley's iPad. He deleted it, but it wasn't
18 quite overwritten from his iPhone, so we got lucky,
19 and it wasn't on Ms. Samuelson's MacBook. So again
20 no thanks to the defendants who were trying to
21 delete these. We got lucky.

22 The same with the stolen MLS report. Mr.
23 Beardsley tried to delete that from the SanDisk 32,
24 and he doesn't even know how it ended up on his
25 computer in a SkyDrive folder, but I goes we just

1 got there lucky too. So that sheds light on what
2 else is now missing below the waterline.

3 Going back to the iPhones and the overwriting,
4 there is overwriting happening on these phones.
5 This first text here, on Mr. Beardsley's iPhone,
6 was not on there. It had been overwritten. The
7 other two were still on there. They had been
8 deleted. But that first one wasn't on there.

9 So we know the fire is burning, as Mr.
10 Lloyd-Jones put it. The same with Mr. Samuelson.
11 These two texts here, where he refers to it as a
12 burner phone, or hey, Louise, it's Thelma, another
13 incriminating text.

14 THE COURT: You're not suggesting though
15 that the overwriting on the iPhones, for example,
16 is deliberate. I mean I gathered that from the
17 testimony that it's the function of the volatility
18 of iPhones, and you don't keep text messages
19 forever.

20 MR. SINGER: It's absolutely deliberate.
21 There's no two-step process in getting rid of text
22 messages on your iPhone. They're acting like,
23 well, we didn't push the overwrite button. There's
24 no overwrite button. Their own expert came and
25 said it's Russian Roulette. Once you swipe the

1 lead, it's Russian Roulette. I mean if Russian
2 Roulette is not conscious disregard of the
3 evidence, while they're on notice of a lawsuit,
4 then it's hard to imagine what is. So what we're
5 talking about here though --

6 THE COURT: We may be talking about two
7 different things. The thumb swipe of a delete, I
8 agree with you, it's a deliberate act, but the
9 phone itself does the overwriting. Once you move
10 it to the trash, or whatever, the delete file, it's
11 not like they're going back and affirmatively
12 taking another step to cause the deletion.

13 MR. SINGER: I think that's right, but
14 although I do think when you restore a phone to
15 factory settings, it's more than just one step.
16 I've done it myself.

17 But this idea, it's not on the email. When
18 you put an email in the trash on an iPhone, you can
19 actually go to the trash and get it back. Try that
20 with a text message, there's no trash. So if they
21 had second thoughts, there was no getting these
22 back.

23 So the point of the slide though is to show
24 that stuff is being overwritten, and the point of
25 these next few slides is to show that their story

1 that everything's been backed up and there is this
2 great safety net is false. Because we've gone
3 through, as Mr. Lloyd-Jones said, critical texts in
4 this case were not found on Mr. Samuelson's Move
5 MacBook. Some texts were missing from Ms.
6 Samuelson's MacBook.

7 Same thing for Beardsley's iPad. Neither of
8 these two texts were found on there. So this idea
9 that there's this great safety net is a fallacy.
10 And again I come back to what Dr. Hartley said,
11 their witness, when he described the process as
12 Russian Roulette once they get deleted.

13 So I'm going to move on to prejudice with
14 respect to other devices here. These storage
15 devices that we've been talking about, they did
16 contain Move documents. We've got obviously the
17 Western Digital, which contained a whole bunch of
18 Move documents.

19 These ones here, I do want to point out that
20 the 15AA and the 17100, our point is not that the
21 end-all, be-all, is that the EAC product overview
22 or the RES March presentation is those are the Holy
23 Grail Move documents. The point is we found Move
24 documents on thumb drives that these defendants
25 were using, in some cases back and forth, and then

1 reasonable inference is strong inferences can be
2 drawn that there were other Move documents, but we
3 don't get the chance to prove it, but there's some.

4 Now, we're not coming in and saying, oh, the
5 EAC document, or the RES document. The point is
6 these are devices that had Move documents on them
7 that the two defendants had and were using at
8 Zillow. One point that I will jump back to and
9 address on the iPhone here is --

10 THE COURT: Go back to that.

11 MR. SINGER: Yeah.

12 THE COURT: So the issue of presuming that
13 it is a destroyed Move document, that there's no
14 record in the devices that were under the
15 possession and control of the defendants, is there
16 any other evidence on your end, as you look at
17 everything that's happened in the case, to
18 conclude, aha, they could have only made this
19 decision by possessing document X?

20 Document X doesn't show up on any of their
21 devices, any of the thumb drives, any of the
22 computers, but we know that they've decided this at
23 some point, and by they, I mean Zillow and Mr.
24 Beardsley and Samuelson, and they can only have
25 decided this if they had document X.

1 MR. SINGER: Are you getting at --

2 THE COURT: Does that make sense what
3 I'm --

4 MR. SINGER: Maybe in two ways. Are you
5 saying that there's circumstantial evidence that
6 shows that there's a document that we haven't found
7 that they may have had?

8 THE COURT: That they had to have had in
9 order to have taken some affirmative step on the
10 other end; they couldn't have taken the step
11 without the document.

12 MR. SINGER: I think this is actually a
13 good example that just popped into my head, which
14 may answer your question. But Mr. Lloyd-Jones
15 testified that he looked at Mr. Samuelson's burner
16 phone phone bill, the Rogers phone bill, which
17 shows the number of texts, and he said there's like
18 54 -- I think he found 59. He said there was 59
19 texts on the phone bill, right, but when we look at
20 the burner phone, we can see how many texts there
21 were, and he said there were only 46.

22 So that's exactly what your Honor is talking
23 about. We know -- we can't tell you what's in
24 texts that are gone, because they're gone, but we
25 know that there's 13 texts that are missing, that

1 are gone, and there is circumstantial evidence.
2 That's not just us saying something's missing, take
3 our word for it. That's evidence that something is
4 missing and gone.

5 And as far as the documents that they may have
6 relied on, that's the whole point of this
7 proceeding, which is that's every inference we
8 think that a jury should be making. That's why we
9 should have a fair shot at rebutting some of the
10 claims that they're going to make, which I'm going
11 to get into in a minute, but the misappropriation,
12 the decisions that they made, for example, whether
13 it was going after Trulia or not renewing the
14 ListHub agreement, which your Honor is going to be
15 reading about in the summary judgment papers, all
16 sorts of documents.

17 These hub files, for example, and I'm not
18 saying again that is the end-all, be-all, but I'm
19 just giving you an example. Those aren't -- those
20 show the user interface, this awesome product that
21 Move was going to launch.

22 Zillow thinks Move is a bunch of, you know,
23 old buffoons who can't do anything great, and we
24 had actual documentation showing we were way
25 further along than these guys knew. And if that

1 gets into the hands of Zillow, they're going to act
2 on it, and they did act on it.

3 Samuelson and Beardsley go over to Zillow, and
4 Zillow is ready to renew with ListHub. They didn't
5 love it, but they were ready to do it. And then
6 Samuelson and Beardsley get over there, and the
7 clock T-minus, you know, 300 days, or whatever it
8 was, the strategy changed.

9 So that -- you know, if you're able to fill
10 that in and see all the documents that they may
11 have had, they didn't have an aha moment. We got
12 lucky that the ListHub shows what they were
13 thinking. We've got that stolen MLS report, which
14 they're downplaying, right, but we actually have
15 documents, the same numbers in there end up in
16 Samuelson's hand, end up in a presentation before
17 Rascoff. Those same numbers are getting relied on.

18 THE COURT: All of that, which would help
19 your case, for example, in proving theft. And I
20 think you get this, and you're focusing on it, but
21 it's the document or the corroboration that what
22 may have been destroyed they had acted on, and
23 because it vanished from their devices and
24 computers and the like, proves your spoliation
25 claim.

1 MR. SINGER: Well, I guess two things.
2 And it's been a frustrating question that we've
3 talked about a lot, which is, you know, we're being
4 asked to come forward and show the document that
5 nobody knows about. I mean --

6 THE COURT: Well, you would know about it.
7 If they're acting on the other end, can only act
8 based on information they took from you, some
9 document that had, of course you know the business
10 far better than I ever will, some document they had
11 that would have provoked that action, couldn't have
12 taken the action without the document, wouldn't you
13 be waving that document around on --

14 MR. SINGER: It's a question of -- what's
15 happened is we've got these tip of the iceberg
16 documents, and they're shooting them down. We've
17 got this SAS strategy memo, which tells a lot of
18 what we were doing, and we've got these listing
19 accounts, which would have helped them greatly, and
20 they're saying -- they're shooting it down; this
21 one doesn't tell the whole story; that's public,
22 that's not. And they're cutting up each of these.

23 If we had 15 of them, right, we can put that
24 in front of a jury, one, two, three, four, five.
25 It's a lot harder for them to shoot those down. So

1 it also really goes to the weight of the evidence.
2 Yes, we got lucky.

3 And then the other thing is, this case is not
4 about lost documents. I said it when I only had
5 one minute to speak; it seems like a lifetime ago
6 in February. But we're not fumbling around looking
7 for lost Move documents.

8 But there's basically three categories of
9 missing evidence here. There's proof that they had
10 our stuff, and whatever Mr. Beardsley or Mr.
11 Samuelson thought was the most useful, the proof
12 that they actually had it on a hard drive, putting
13 aside whether they even accessed it, is evidence.
14 That shows that they took it and they had it. The
15 other thing is -- and that's missing because stuff
16 has been destroyed and thrown out and reformatted.

17 And the other thing that is missing is the
18 metadata, as your Honor has noted, which is the
19 time it was opened or copied to another device.
20 That's crucial evidence that we're not getting
21 somewhere else.

22 And then the third category isn't even Move
23 documents at all. It's what the defendants call
24 personal documents, like any email about them going
25 to Zillow, the Vichy French email, Attack ListHub,

1 all the texts back and forth, apparently have
2 nothing to do with Move; those are all personal.
3 Those aren't things that would be backed up on Move
4 servers.

5 So for the life of me, I could never imagine
6 that we'd see a document like the ListHub document,
7 so I couldn't tell you what else is out there for
8 those. I know that if I had one, two, or three
9 more documents like that, that would make a billing
10 difference in a jury trial.

11 But the biggest prejudice, your Honor, the
12 biggest prejudice is what we experienced here over
13 this six-day hearing, and I have a few examples,
14 just to highlight it. The questions that Mr.
15 Beardsley's counsel and Mr. Samuelson's counsel
16 asked them during these proceedings are a preview
17 of what they're going to argue to the jury.

18 Mr. Savitt asked his client, Mr. Beardsley,
19 did you see any Move documents on this at or around
20 the time that you destroyed it, talking about the
21 Western Digital? I did not. He asks him at the
22 bottom of the page here, at any time after
23 departing Move, did you ever access or open any
24 Move documents from the Western Digital? I did
25 not.

1 Well, I guess we'll just to take his word for
2 it and go home because we don't have the Western
3 Digital hard drive. So this is the kind of stuff
4 that the jury is going to hear from them. Look at
5 this example. Can you tell me what was on the
6 missing 15AA device? Nope, I can't. Well, did you
7 copy any devices, any documents from the 15AA, any
8 computers, after you left Move? I did not.

9 I guess Mr. Beardsley didn't do anything
10 wrong, and just disproving that alone would be
11 valuable. Whether it's the linchpin document or
12 not, you know, we don't just have -- there are
13 breach of fiduciary duty claims and breach of
14 contract claims that go beyond trade secrets. We
15 now don't have the device to disprove what he's
16 going to say.

17 Here's another example from Mr. Samuelson.
18 Did you produce all the emails in this case,
19 Gmails, excuse me? Yes. Well, do you know what
20 would have been the best way to test whether he
21 produced all his Gmails or deleted them? It would
22 have been his Move iPhone or Beardsley's iPhone
23 that had the whole set of Gmails on there which he
24 wiped after he knew there was litigation coming.
25 That evidence is gone. We don't have it anymore.

1 That's prejudice.

2 THE COURT: This is probably going to
3 reveal my lack of appreciation, why wouldn't a
4 subpoena to Gmail be the best way to obtain what
5 was on the Gmail server?

6 MR. SINGER: It's a long story with a lot
7 of case law behind it, but the owner of the account
8 is the only one who can do that unless you're like
9 law enforcement. I mean Google is a bit nutty
10 about it, and we've looked at that issue. But Mr.
11 Samuelson has told us, and let's take his word for
12 it, he's gathered everything. Everything he hasn't
13 gathered is gone.

14 So we'll just take him at his word and assume
15 that what's not gathered has been deleted, but the
16 only way to check that is what we had at one point
17 had he not completely wiped it.

18 Again when asked for documents in this case,
19 did you withhold anything? Nope. Well, can't
20 disprove that now, can we, because the evidence is
21 gone. Under questioning from his own lawyer, he
22 was asked, so are we missing any texts between you
23 and Curt on the tower iPhone between February 17th
24 and March 13th? And he answers no.

25 Now, this is a critical time period. The two

1 of them are actually denying that -- I think their
2 story now is that in -- in January Beardsley didn't
3 know what Samuelson was doing, and it kind of goes
4 up and down, but these are the texts that would
5 show us. If it was only two texts that were
6 overwritten, or three, that would be crucial
7 evidence. But it's gone, and now they're going to
8 come in and tell the jury, no, there was nothing,
9 and our ability to disprove that is gone. We would
10 have had it, but it's gone.

11 Now, I want to talk briefly about sort of
12 state of mind issues, and I'm not going to repeat
13 all of the law that's in our brief. I would direct
14 the Court particularly to our supplemental brief
15 where we recap and lay it out.

16 But it's very clear in Washington that yes,
17 willfulness is required for determining sanctions.
18 We think we easily meet that here with all of the
19 evidence. But it's also clear under the law,
20 particularly of the Pier 67 case, which is a
21 Supreme Court case, that bad faith is not required
22 for an adverse inference.

23 THE COURT: I should probably ask you
24 this. What date are you, maybe it's in one of your
25 charts here, are you selecting for each of the

1 three defendants that the duty to preserve
2 attached?

3 MR. SINGER: Well, for -- we're going to
4 -- the earliest date for that, but I would say and
5 I can go back, let me remember what slide I'm on
6 here, but I'm going to --

7 THE COURT: If you're going to get to it,
8 that's fine.

9 MR. SINGER: Well, I've gotten to it and
10 went past it, because the date attaches, for
11 Beardsley, we think that his exchanges with
12 Samuelson as far back as November.

13 THE COURT: So November 19 for Beardsley?

14 MR. SINGER: For Beardsley, Samuelson, and
15 Zillow would be the earliest point we could put it,
16 but we don't need to.

17 THE COURT: All of them?

18 MR. SINGER: Now, I think for Zillow it's
19 actually a little bit later because they weren't a
20 party at that time. If you have the Zillow slide.
21 Theirs knows goes back to January, when they're
22 already discussing with Samuelson the lawsuit by
23 Move.

24 THE COURT: So January 7th for Zillow?

25 MR. SINGER: Right.

1 THE COURT: Beardsley and Samuelson you're
2 saying November 19th?

3 MR. SINGER: Correct, correct. And again
4 it matters cuz that's where we think it definitely
5 arises, but there's multiple trigger points for
6 each of them, and there's multiple violations after
7 all of those. So even if we wanted to be
8 conservative and push it forward, there's still
9 multiple times and heavy evidence that they were on
10 notice to preserve.

11 Now, spoliators are going to come in and
12 they're going to say, I didn't do it. Otherwise we
13 wouldn't be here today. So the spoliator always
14 denies, and then you have to ask, what are courts
15 going to look at to show that he did intend to
16 delete, that there was willfulness?

17 And we've got a lot of case law on this, and
18 we can look at what other courts have looked at,
19 and we've listed them here. You've got destruction
20 of a massive volume of evidence, wholesale,
21 indiscriminate wiping of computer files, writing
22 and running software to permanently delete computer
23 files so that they can't be forensically recovered.

24 The Leon case, which I highly recommend
25 reading, talks about that as a factor you can look

1 at to get to the state of mind of a spoliator.
2 Destroying evidence that's expressly covered by a
3 recovery request, that's also evidence of wrongful
4 intent. Failing to take steps to preserve
5 electronic evidence, including failing to instruct
6 employees not to destroy evidence, that can be
7 evidence of bad faith.

8 Spoliating electronic evidence on the eve of
9 court-ordered imaging, that can be evidence of bad
10 faith. Lying to cover up the destruction or
11 offering false or inconsistent explanations, again
12 courts have relied on these exact things to make
13 findings of wrongful intent. Installing wiping
14 software after duty to preserve is triggered. The
15 timing of when the wiping software is run. Is it
16 right after a court-ordered inspection? Unusual
17 amounts of deletion activity, asking whether the
18 evidence of destruction impeded resolution of the
19 case.

20 Courts have found that spoliation is willful
21 if the accused party was under a duty to preserve
22 but wrote a program to write over deleted
23 documents. So this is the constellation of
24 evidence that other courts have relied on. And we
25 have all of that here, every one of those, check

1 check, check, check, check.

2 These are just a few examples because I know
3 I'm up against a tight clock here. But the 15AA
4 device, which we talked about a lot during the past
5 couple weeks, this is a device that Mr. Beardsley
6 had. He had Move documents on it back when he was
7 at Move, uses it; the PI comes and goes. He still
8 has it, doesn't hand it over when he's subpoenaed,
9 is using it in August 2014. He's using it in June
10 of 2015.

11 And it's only when the discovery master and
12 this Court order a neutral inspection June 27 that
13 we learn, literally less than two weeks later, that
14 it's missing. He has the device June 2015. This
15 Court orders an inspection, and it goes missing.
16 So that timing in and of itself is exactly what
17 we're talking about when we say evidence of
18 willfulness or bad faith.

19 The 17100 device, also this device, they pass
20 it around. There's Move documents on it. Gets
21 handed into the neutral in 2015, but only after
22 it's been reformatted.

23 I'm going to jump around a little bit.

24 THE COURT: And you have about ten minutes
25 left.

1 MR. SINGER: Okay.

2 THE COURT: I think I got that right. You
3 started at 2:07.

4 MR. SINGER: If I have time, I'll come
5 back to this, but I can dive into them. Mr.
6 Samuelson's burner phone, first of all, the fact
7 that he's calling it a burner phone is evidence of
8 wrongful intent. That's premeditation, yet it's a
9 joke they're saying. The reason it's a joke is
10 because it's just like a burner phone.

11 He got a phone that wasn't traceable that he's
12 using just for this purpose, to cover his tracks,
13 and then instead of burning it or throwing it in
14 the trash, he's deleting all the texts off it. So
15 it wouldn't be such a funny joke if he wasn't using
16 it like a burner phone, and that tells you what Mr.
17 Samuelson's premeditated state of mind was when he
18 decided, ha ha, I'll call this a burner phone.

19 This here, which also goes to, you know,
20 credibility, state of mind, taking advantage of
21 missing evidence, when they first produced the call
22 logs from the burner phone, it ended March 17, when
23 the lawsuit was filed. After we pushed back and
24 got a new production, we see that there are --
25 there is activity on March 24th, after the lawsuit,

1 and there's deletion activity after the lawsuit.
2 And Mr. Samuelson himself said he may have deleted
3 everything then. But they tried to take advantage
4 of that missing evidence.

5 In terms of Zillow's liability, cuz I don't
6 want this to get lost in my presentation, we're
7 talking about two extremely high ranking executives
8 at Zillow; one of them is a chief, chief industry
9 development officer and a vice president. All of
10 this destruction and reformatting and deletion here
11 that you see on the screen in front of you happened
12 under Zillow's watch.

13 Zillow gets hit with a complaint on March 17,
14 2014, which has claims of evidence destruction by
15 its employee, and what do they do? They send an
16 email to Mr. Beardsley after that telling him to
17 permanently remove Move documents from his
18 computers. That's their reaction. They learned
19 about the lawsuit, and they tell Beardsley to
20 permanently delete Move information. That's March
21 19th, after the lawsuit is filed.

22 The imaging that we heard about from Mr. Crain
23 this morning, the lawsuit was filed March 17, 2014.
24 Their own expert says, it's critical to image.
25 They waited six months before imaging Samuelson's

1 Zillow laptop. That's beyond negligent. They
2 waited a year before they got to Beardsley. And
3 then a year and a half before they went to
4 Beardsley's family computer. So that's Zillow.
5 That's not Samuelson and that's not Beardsley.

6 At every step Zillow has not been part of the
7 solution; they've been part of the problem. They
8 have fought tooth and nail. When we were
9 requesting additional evidence, they said that this
10 was a waste of the special master's time.

11 They said in another motion that our
12 insinuation, how dare we insinuate that Mr.
13 Beardsley's document production is unreliable or
14 deficient; it's all unfounded. These are Zillow's
15 briefs, not Mr. Beardsley's.

16 As far as the discipline goes, and I put it in
17 quotes on purpose, we heard from Mr. Rascoff that,
18 oh, if he gets to the bottom of this, heads will
19 roll if something happened. Well, this was laid
20 out for a year and a half in front of Zillow. They
21 did nothing. No discipline, no investigation,
22 nothing happened. And then Mr. Rascoff says, oh,
23 he finally gets around to reading this court-
24 ordered deposition transcript that this Court
25 ordered of Mr. Beardsley to get to the bottom of

1 it.

2 Zillow finally reads that transcript and says,
3 geez, we got to do something about it. And what do
4 they do? What's the big discipline for his gross
5 display of spoliation that we've seen? Beardsley
6 gets his full bonus, a paid increase; he gets the
7 two-week unpaid vacation time where he goes to
8 Mexico, and he's out 10 grand. That's a big deal,
9 but he gets a raise, gets more stock options.
10 Samuelson, nothing.

11 Well, the courts take it a lot more seriously.
12 This is a big deal. This isn't a slap on the
13 wrist. This isn't two weeks unpaid. This is no
14 act serves to threaten the integrity of the
15 judicial process more than the spoliation of
16 evidence.

17 And we know that in Washington it matters too
18 from the Holland America case and Judge Rothstein,
19 that yes, it matters. It matters in Washington
20 too. I'm going to use my last few minutes just to
21 talk about --

22 THE COURT: Do you want to save some for
23 rebuttal?

24 MR. SINGER: How much time do I have left?

25 THE COURT: You have about five to six

1 minutes for rebuttal.

2 MR. SINGER: I mean I'll save a couple
3 minutes for rebuttal, but I need to get to this
4 point because I want to talk about credibility.
5 Credibility matters. I think it's what -- in many
6 respects it drove the Court to want to have this
7 hearing.

8 Samuelson's burner phone story, in a
9 declaration March 2015, at the outset of the case,
10 I gave my phone to my lawyers; they made a forensic
11 copy, and we produced anything that was relevant.
12 Any court that looks at this is going to think that
13 this guy handed over his phone, made a forensic
14 copy, and gave it all over. What do we find out a
15 year later? Well, it's likely I also deleted any
16 text messages that were on it around the time I
17 canceled the account.

18 He misled the Court. That is a party that
19 can't be trusted. Mr. Samuelson deceived the Court
20 again. He said, I didn't use that thumb drive or
21 any thumb drive to download any Move confidential
22 documents, but we know that's not true.

23 We know from their own expert that he did have
24 a Move presentation, and he did open it in March of
25 2015. Now, he says, oh, my lawyers made me do it,

1 but he didn't tell that to the Court. He wasn't
2 straight with the Court, your Honor.

3 Mr. Samuelson also tries to tell the Court --
4 we know that he tried to delete his whole profile
5 off the Mac computer, which would have wiped out
6 all his text messages; he tried and failed, and
7 then he has the nerve to come in and say, they were
8 preserved. Because he was unable to delete stuff
9 that he intended to delete, he's now calling that
10 preservation. That's misleading.

11 Real quick, on Mr. Samuelson's Dell computer,
12 Mr. Samuelson came in here and said that he had to
13 delete all of his personal stuff off his Dell
14 computer cuz he wanted to protect his coworkers.
15 He was noble and he wanted to protect his coworkers
16 because there was all kinds of stuff on there about
17 them.

18 Then we find out under cross-examination by
19 Mr. Stone that Samuelson thought he already handed
20 in the computer to Move without sending it in to a
21 computer store. So that puts the lie to the first
22 part of the story, but he thought in November he
23 already returned it without wiping anything, which
24 says he really wasn't worried.

25 And then what puts the lies even more is he

1 comes in here and he testifies, and he starts
2 naming names gratuitously of employees that he
3 worked with being with prostitutes and having
4 unwanted pregnancies. He didn't need to do that.
5 So this idea that he tries to project to the Court
6 that he is noble and concerned about his coworkers
7 is not believable.

8 And finally Mr. Beardsley, and I'll probably
9 leave myself two minutes, if I'm lucky, on
10 rebuttal, I don't know what more to say than this
11 example here. Mr. Beardsley sends an email to
12 Samuelson about jumping together to Zillow and what
13 it will take. He admits this one is to Samuelson.
14 He then pastes that email into his ListHub document
15 in January and has the nerve to look at the Court
16 and to look at us and say, that had nothing to do
17 with Errol, it was unrelated to him. That's what
18 he said.

19 Then he starts telling us that once we jump
20 and we can't go back, maybe that refers to him and
21 his family. That's Mr. Beardsley's credibility.
22 I'll reserve the rest for rebuttal.

23 THE COURT: All right. We're going to
24 take our afternoon recess for 15 minutes. Be back
25 here right at 3 o'clock.

1 (Brief recess taken.)

2 THE COURT: Please be seated.

3 Counsel, you may proceed.

4 MR. MCMILLAN: Good afternoon, your Honor.
5 Joe McMillan for defendant Zillow. I've prepared a
6 PowerPoint slide for this closing, and I would like
7 to hand up a hard copy, as well as a case which is
8 not included in the briefing, and a demonstrative
9 that I intend to refer to. I've provided copies to
10 plaintiffs' counsel.

11 I want to talk about three things here on
12 closing. First, the legal standards for spoliation
13 sanctions. Second, how plaintiffs have failed to
14 meet those standards, and then third a few remarks
15 about Zillow's conduct and appropriate remedies in
16 this case.

17 I'd like to direct the Court's attention most
18 particularly to the most recent and thorough
19 discussion of Washington law on spoliation
20 sanctions, which is the Cook V. Tarbert Logging
21 case, a 2015 decision which was recently the
22 subject of a petition for review by the Supreme
23 Court, and on March 30th that petition was denied.

24 So it stands as, in a sense, the most complete
25 and most recent discussion of where Washington law

1 stands on spoliation sanctions.

2 THE COURT: Well, but wasn't Tarbert about
3 negligent destruction versus the allegation here,
4 which is willful?

5 MR. MCMILLAN: It is in fact correct, and
6 that is a very telling fact because the sanction
7 which was imposed by the trial court was not an
8 adverse inference instruction but simply permitting
9 counsel to argue about the missing evidence and to
10 invite the jury to infer that it was adverse to the
11 spoliating party. And the trial -- the Court of
12 Appeals held that that was legal error.

13 So here we have a standard, a sanction less
14 severe than an instruction, even a permissive
15 inference instruction, less severe adopted by the
16 trial court, which the Court of Appeals holds is
17 still too extreme in light of the fact that there
18 is not bad faith. There is not that bad faith
19 intentional spoliation.

20 In fact, there's only negligent spoliation of
21 evidence in that case. But it was extremely
22 important evidence in that case. That's another
23 point that bears noting about the Cook case. It
24 involved this air bag control monitor, right, which
25 would be highly probative, telling you the parties'

1 speed in the five seconds before the accident
2 that's at issue. And, you know, it was admittedly
3 destroyed by the plaintiffs. But it was done so
4 without the culpability factor, without the bad
5 faith that would justify even the kind of sanction
6 that the trial court imposed, something less than
7 an adverse inference.

8 The holding of the Court of Appeals is
9 essentially summarized here, that for a severe
10 sanction, such as an adverse inference, not to
11 mention a terminating sanction, these two factors
12 must be established. There must be prejudice to
13 the moving party, that is the loss of important
14 evidence, and there must be bad faith on the part
15 of the party that destroyed or lost the evidence.
16 Bad faith meaning a clear intent to deny the other
17 side access to that information in the litigation.

18 So not just it was intentional, an
19 intentional, you know, glossing away of the
20 evidence, but doing so with an intent to deny the
21 other side access to that information.

22 Well, the Court discussed how Washington law
23 addresses these various factors. And on the first
24 of them, with respect to assessing prejudice, these
25 two questions are present in Washington case law.

1 First, in assessing whether there's prejudice,
2 courts will look at whether any investigative
3 advantage is gained by one side or the other.

4 In this case the answer is no. There's no
5 reason to believe that defendants have gained some
6 sort of investigative advantage over plaintiffs
7 with respect to evidence that's lost.

8 The other factor, which is even more telling
9 in this case, the other factor bearing on whether
10 prejudice exists, is is there other evidence in the
11 case from which a jury could reach a conclusion on
12 the merits? And in this case, as we'll see, there
13 is a huge quantity of existing evidence.

14 Plaintiffs have served over 440 document
15 requests; over -- you know, over a million pages of
16 documentation have been produced; scores of
17 witnesses have been deposed. You heard Mr. Crain
18 talk about the extensive forensic evidence that
19 exists, which is very telling, despite the admitted
20 loss of certain -- you know, of certain devices.
21 So --

22 THE COURT: Let me ask you about this, the
23 first bullet there. And I'm probably not going to
24 attribute the quote correctly, but I think it was
25 actually Donald Rumsfeld who said something along

1 the lines of we know what we know, we know what we
2 don't know, but we don't know what we don't know.
3 And between that second and third point, with the
4 alleged destruction here, is there a difference --

5 MR. MCMILLAN: Plaintiffs are in the
6 Rumsfeld category of unknown unknowns.

7 THE COURT: So focus then on, can you
8 distinguish between the Move devices and documents
9 that pass through the Move devices and the personal
10 devices in being able to know the contours of the
11 unknown unknown? So for example, I asked Mr.
12 Singer the question during his presentation on if
13 Move had some sort of critical document X, if the
14 defendants destroyed it, yet on the other end
15 defendants are allegedly taking some action that
16 had to depend on document X, there would be
17 circumstantial evidence that document X was with
18 him and then removed.

19 MR. MCMILLAN: Yeah.

20 THE COURT: Do you follow that?

21 MR. MCMILLAN: I do. Your questions go
22 directly to the requirement that plaintiffs have
23 but have not met to come forward with
24 circumstantial evidence about the importance of the
25 evidence that is missing, about the specific

1 content of the evidence that is missing, and about
2 why -- how that prejudices them in not being able
3 to go forward to a jury to have this case resolved
4 on the merits.

5 You asked right at the outset of your remarks,
6 you asked, please focus on documents that have been
7 destroyed and not recovered, and then subsequently
8 you asked, you know, please, Mr. Singer, plaintiffs
9 would know about certain documents if there was
10 circumstantial evidence based on Zillow's conduct
11 that they only could have engaged in by virtue of
12 coming upon these trade secrets in some way or
13 another, and you got unsatisfactory answers to both
14 of those questions.

15 THE COURT: Is that the case though for
16 the personal devices and the personal
17 communications between, for example, Mr. Beardsley
18 and Mr. Samuelson, that the circumstantial -- that
19 there would be an ability to produce circumstantial
20 evidence in that -- in that instance?

21 MR. MCMILLAN: Well, I guess I'd submit,
22 your Honor, that a vast quantity of texts, for
23 example, which are the personal communications,
24 have been produced in this case. I mean over 400
25 texts between these two individuals, or between the

1 four key players, are compiled in this case.

2 Now, can an expert, a forensic expert, sit
3 here and say, I guarantee you we have every last
4 text and we know the content, no. But the reported
5 cases find that kind of showing more than adequate.

6 In Zubulake, for example, this case which Cook
7 V. Tarbert relies on and quotes from, we have a
8 case where there are missing backup tapes and there
9 are -- there are missing emails in these backup
10 tapes. So here's Judge Scheindlin, and I'm
11 focusing on this 2003, there's a whole bunch of
12 Zubulakes, but the underlying section here, we see
13 Zubulake 3 specifically held that nowhere in the 68
14 emails produced to the Court is there evidence that
15 Chapin, that is the defendant, that his dislike of
16 Zubulake, that is the plaintiff, related to her
17 gender.

18 And those 68 emails that exist, and that it
19 should be emphasized were selected by Zubulake as
20 being relevant to those as a sample of what was
21 produced, there's no reason to believe that the
22 lost emails would be any more likely to support the
23 specific claims of Zubulake of gender
24 discrimination.

25 So you have a recovered sample, says Judge

1 Scheindlin; they don't show the kind of animus that
2 would support a gender discrimination claim. We
3 acknowledge that things are missing, but based on
4 this sample, I'm not go to infer that's what's lost
5 is bad.

6 And let me just point out, you know, one
7 additional, you know, one additional case on that,
8 which we -- you know, which we do cite in our
9 briefs, and this is the -- you know, this is
10 another federal case called GenOn Mid-Atlantic vs.
11 Stone & Weber. And here again we have a situation
12 where there is, in this underlying passage, a
13 somewhat random sample of restored emails, which
14 also refute the suggestion that valuable
15 information was lost.

16 We have more than a random sample, I'd submit
17 to the Court, in this case. We have something
18 almost approaching the entirety of, for example,
19 the text messages. And the case law holds that
20 that's the kind of circumstantial evidence from
21 which conclusions about important -- important data
22 being lost can be drawn. Plaintiffs have come
23 forward with no such circumstantial evidence.

24 THE COURT: Well, isn't there arguably,
25 I'm not saying it's the case necessarily, but

1 compared to Zubulake, isn't there a little more
2 smoke associated with the emails recovered here
3 than an absence of information concerning gender
4 discrimination, right? I mean if you -- worst-case
5 scenario for you, when you have emails talking
6 about burner phones, and the like, wouldn't one
7 make -- couldn't one make a presumption from that,
8 or make an inference probably is the better phrase,
9 from that, that additional emails of similar ilk
10 existed?

11 MR. MCMILLAN: Well, I mean you'll be the
12 one who's sort of assessing and drawing the
13 inferences from these documents that plaintiffs
14 feature as evidence of bad acts or evil intent. I
15 mean I'd submit that they are no such thing. I
16 mean Errol Samuelson, you know, doing the right
17 thing by not using a Move cell phone in order to
18 conduct long distance telephone calls with a
19 potential new employer, and joking about it being a
20 burner phone, you know, I mean their position is
21 this is evil intent. Our position is it's no such
22 thing.

23 You had an opportunity to assess Mr. Samuelson
24 on the stand. You know, I'd submit that that, and
25 all the other what they characterize as smoking gun

1 documents, which would build a case that would be
2 damning, are nothing of the sort. I mean the
3 Attack ListHub, how Z might challenge M document,
4 that was never shared with anybody. That was a
5 personal scratch pad where Mr. Beardsley is sort of
6 working through in his own mind how he can make
7 this jump from one company to a competitor, which
8 will admittedly be, you know, controversial and it
9 will be, you know, a big deal in the industry. I
10 mean, you know, can he succeed in that by -- can he
11 develop a way to compete?

12 But that's -- there's nothing illegal about
13 that. That is his right to change employers. He's
14 not bound by a noncompete. And he's simply making
15 notes for himself about how to do it, and he never
16 sent it anywhere. So the circumstantial evidence
17 that exists simply does not support evil intent or
18 bad faith.

19 Moreover, and this is extremely telling, the
20 plaintiffs have not come forward with an identified
21 inference that they've asked the Court to, you
22 know, to basically instruct the jury on. They want
23 a nonspecific generic instruction that ladies and
24 gentlemen of the jury, you are entitled, you know,
25 to draw the inference that essentially defendants

1 are intent on the frustration of -- on destruction
2 of evidence, on the frustration of the
3 administration of justice. But the case law
4 doesn't support that kind of unbounded,
5 indiscriminate inference.

6 I'll just click forward to the requirement
7 that there be a nexus. Corey, is this going to
8 move for me? If I can move forward to basically
9 slide 19, and this is also part of the sort of
10 prejudice requirement that there be a nexus between
11 the missing data and the claims in the case.

12 And the image, the pleading on the right here
13 is the supplemental trade secret disclosure, which
14 has been the subject of so much discussion, of
15 course. Plaintiffs have made absolutely no effort
16 in the space of six days of testimony to link any
17 alleged, you know, destroyed data to any claim in
18 that document. No effort whatsoever.

19 They have suggested, with respect to these
20 personal communications, that there was some sort
21 of conspiracy between Mr. Samuelson and Mr.
22 Beardsley, but the conspiracy claims have been
23 dismissed from this case.

24 THE COURT: Well, that doesn't mean you
25 can't use evidence of individuals conspiring,

1 perhaps not in the legal sense of the term, as
2 circumstantial evidence of a theft, for example.

3 MR. MCMILLAN: Well, okay. Well, let's
4 move on. I mean the Washington case law makes
5 clear that there needs to be this nexus, there
6 needs to be a linkage between the missing evidence
7 and a disputed fact in the case, whether it's a
8 theft, perhaps, as you posit, or a conspiracy,
9 which has been dismissed.

10 All right. This is the Tavai case involving a
11 slip and fall in the Walmart store. Tavai, the
12 plaintiff, asks for spoliation sanctions, an
13 adverse inference, because the surveillance video
14 had been overwritten, had been destroyed, not
15 preserved.

16 The motion was denied because the Court held
17 that Tavai failed to carry her burden in that
18 context, failed to establish that the surveillance
19 video captured the area where she fell, and
20 therefore was linked in some way to a claim in the
21 case. And this nexus requirement is set out in
22 great profusion in the many federal cases that
23 we've cited to the Court, you know, in our
24 briefing.

25 If we can shift over to the Concord Boat case,

1 which is a case that we cited in our supplemental
2 brief. It sets out the requirement for extrinsic
3 evidence to be brought forward by the movant to
4 show that there has been a loss of important
5 information and that they are prejudiced thereby.

6 Some extrinsic evidence of the content of the
7 evidence is necessary for the trier of fact to be
8 able to determine in what respect and to what
9 extent it would have been detrimental.

10 Furthermore, before an adverse inference may be
11 drawn, there must be some showing that there is in
12 fact a nexus between the proposed inference, the
13 subject of what the jury is being invited to infer,
14 and the information that's contained in the lost
15 evidence.

16 And no such showing has been made. And the
17 Court -- you know, the Court in this case was
18 confronted with precisely the same situation as
19 this Court is. You know, and it stated, assuming
20 for the moment that relevant emails have been
21 deleted, the Court finds that plaintiffs have not
22 presented any evidence that the relevant emails
23 would support the specific inference that they
24 requested.

25 It would be inappropriate to give an adverse

1 inference instruction based on speculation that
2 deleted emails would be unfavorable to defendant's
3 case. Without some evidence, direct or
4 circumstantial, of the unfavorable content of the
5 deleted emails, the Court simply cannot justify
6 giving that adverse inference.

7 THE COURT: So the sophisticated spoliator
8 would likely only leave circumstantial evidence of
9 what was in the deleted emails or deleted texts.
10 But what would that -- I mean give me an example of
11 when you would give the instruction.

12 MR. MCMILLAN: Well, I mean, you know,
13 there are cases where people in deposition, or
14 through existing documents, are able to show
15 something about the content of the destroyed
16 evidence. There are circumstances where there is
17 some circumstantial evidence that's brought
18 forward. Someone takes the stand and says, hey, I
19 kept all my records, you know, in that file and,
20 you know, I handed it in to my employer and
21 suddenly he trashed it, or something like that. So
22 it's not hard to posit that such circumstantial
23 evidence could be advanced.

24 I mean and moreover, with respect to like the
25 sophisticated spoliator, I think we've heard enough

1 testimony from the experts on the respective sides
2 to get some sense of the extraordinary complexity
3 of the electronic environment as it exists today.
4 And, you know, even Cook V. Tarbert Logging alludes
5 to that and how difficult it can be to sort of run
6 to ground and close off absolutely every
7 possibility for files to be recovered.

8 You know, Cook V. Tarbert Logging quotes quite
9 liberally from the federal amendments to the rules
10 of civil procedure that went into effect in
11 December of 2015.

12 And, you know, if I can just, you know, just
13 sort of draw your attention to some of the -- you
14 know, some of the comments by the advisory
15 committee on those amendments. The previous rule
16 had failed to adequately address the serious
17 problems resulting from the continued exponential
18 growth in the volume of such information.

19 Okay. You know, again, due to the ever-
20 increasing volume of electronically stored
21 information, and the multitude of devices that
22 generate that information, perfection in preserving
23 all relevant electronically stored information is
24 often impossible. So the rule therefore recognizes
25 that reasonable steps to preserve should suffice.

1 It does not call for perfection.

2 And it's important for a Court, when facing a
3 sanction motion, not to sort of collapse the time
4 and sort of suddenly bring to bear all the
5 sophisticated, you know, inquiry of forensic
6 experts and hold in some cases, you know, average
7 workers and individuals to this standard of
8 familiarity with all the ways in which forensic
9 evidence can be, you know, can be -- can be
10 preserved. So, you know, it's important, the Court
11 should be --

12 THE COURT: Hold on. Which of the
13 defendants is average in that respect?

14 MR. MCMILLAN: Well, I think these are two
15 highly competent individuals. I'm not suggesting
16 that they're anything less than that. But
17 nevertheless, they are people who travel
18 extensively throughout the year, that's in
19 evidence, and they are people who are carrying
20 presentations on a multiplicity of thumb drives.

21 So the idea that thumb drives might be missing
22 is -- you know, is somehow evidence of spoliation,
23 it simply doesn't follow, right. And here's
24 another case that we cited in our brief, this
25 Digital Vending Service case where, you know, the

1 fact that Mr. Wyman simply lost the thumb drive,
2 without more, doesn't demonstrate willful
3 destruction. It certainly doesn't demonstrate
4 destruction for the purposes of destroying or
5 depriving, you know, defendants of evidence.

6 You know, and again then this Court goes on to
7 engage in the same kind of inquiry about, you know,
8 requiring what the evidence is. There needs to be
9 a showing about what the destroyed evidence is,
10 which plaintiffs haven't made in this case, and
11 likewise here, defendants failed to prove that the
12 evidence on the thumb drive was relevant to their
13 claims.

14 You know, relevancy must be proven by offering
15 probative evidence, not the hyperbole of argument,
16 which is what we heard a great deal of, and, you
17 know, defendants haven't met that standard in this
18 case.

19 THE COURT: All right. I've got one last
20 question for you, and then I need you to sum it up,
21 if you would. In your estimation, on what date did
22 the duty to preserve attach for your client?

23 MR. MCMILLAN: Well, it attached on March
24 17th, 2014.

25 THE COURT: The date of the lawsuit?

1 MR. MCMILLAN: The date of the lawsuit.
2 And I'd submit it attached that date for all the
3 defendants, frankly.

4 THE COURT: Mr. Beardsley as well?

5 MR. MCMILLAN: I think so. I mean, you
6 know, Mr. Savitt will speak perhaps more directly
7 to that March 6th email, which doesn't mention a
8 lawsuit, which Mr. Beardsley, I think the testimony
9 was, doesn't even recall getting, he's on the road,
10 you know, about don't destroy anything related to
11 Errol. But, you know, is that a litigation hold?
12 It's not expressly clearly a litigation hold.

13 In any event, that is I think the best view.
14 And actually Cook V. Tarbert Logging is very
15 interesting on that case on the duty to preserve as
16 well, your Honor. You know, pointing to cases,
17 recent Washington cases where courts, even in the
18 face of the possibility of litigation, as in the
19 slip and fall in Tavai, or the Ripley case
20 involving a scalpel blade that's left inside a
21 patient and then discarded.

22 So even where there's a distinct possibility
23 of litigation, Washington courts have not held a
24 duty to preserve prior to the onset of the
25 litigation.

1 I do need to just close by a very short
2 comments about Zillow. There has been next to no
3 evidence submitted that Zillow did anything wrong
4 and that in any way failed to live up to its
5 obligations in this case. Zillow issued a prompt
6 litigation hold.

7 Zillow issued a very responsible set of
8 transition memos to new, incoming individuals,
9 which plaintiffs are trying to categorize as
10 somehow, you know, complicit or urging them to
11 destroy evidence. Now, you know, on the morning of
12 the 19th of December, you know, Mr. Beardsley comes
13 on board with Zillow. He gets from Mr. Brad Owens,
14 the general counsel, a memorandum, which is in
15 evidence, saying, hey, make sure you don't bring
16 any of your employer's, your former employer's,
17 information with you. If you've got it on your
18 personal devices as well, make sure you get rid of
19 it.

20 Later that same day, the litigation hold goes
21 out, and the litigation hold is a very thorough and
22 regularly updated instrument. There's no
23 suggestion that in any respect Zillow has failed,
24 no evidence that they failed to live up to their
25 obligations.

1 And the column on the far right of this
2 demonstrative, your Honor, I think captures how,
3 you know, Zillow's knowledge or control of all of
4 these devices, which are -- you know, have been put
5 in issue here, no. I mean they -- the idea that a
6 personal backup device is being connected to a home
7 computer by Mr. Beardsley and, you know, it fails
8 and is disposed, Zillow had no knowledge of these
9 things and had no control over those things.

10 THE COURT: Thank you, counsel.

11 Who's next?

12 MR. FANDEL: I'm next, your Honor.

13 THE COURT: All right. Mr. Fandel.

14 MR. FANDEL: I also have a brief
15 presentation which I'll hand up. There's a copy
16 right there, Jeff.

17 Can I have the clicker?

18 MR. MCMILLAN: Sure.

19 MR. FANDEL: So your Honor, my thought,
20 because the purpose of this hearing, I understood,
21 was for you to be able to evaluate the credibility
22 of the witnesses who are presenting these two
23 diametrically opposing factual scenarios, I
24 intended therefore to begin with credibility.

25 If you want, if there's questions that you

1 have, that you want me to address in particular
2 during this time, I'm happy to do that.

3 The plaintiffs -- plaintiffs filed this action
4 less than two weeks after Mr. Samuelson left Move
5 and went to Zillow. They made sweeping allegations
6 of misappropriation and evidence destruction that
7 they didn't adequately investigate before they made
8 them. And many of the claims they made allegations
9 were false, like this one.

10 They allege that Mr. Samuelson had been
11 consistently warned not to delete personal
12 information, and that was all -- that all belonged
13 to Move. But we know for a fact that just ten days
14 before the plaintiffs filed their lawsuit, Carol
15 Brummer had told Mr. Samuelson, yes, in fact you
16 have permission to delete personal information from
17 your computer.

18 And you'll see with Mr. Berkowitz's testimony
19 that you have not yet read, he says, Move didn't
20 have any interest in the personal information that
21 Mr. Samuelson kept on his computer. Another false
22 allegation is that all memory from Mr. Samuelson's
23 laptop, all memory from Mr. Samuelson's laptop had
24 been erased. They knew that was false because they
25 had the laptop. They knew the attempt to delete

1 his user profile had failed.

2 They knew they had thousands upon thousands of
3 texts that had been backed up from his Move iPhone
4 on that computer. So they just didn't really look,
5 look through things thoroughly before they made
6 these allegations.

7 And like a dog to a bone, as the evidence has
8 continued to come in, and they have had to change
9 their theories, they continue to cling to the
10 spoliation arguments. Back when the personal
11 preliminary injunction came in, they were all
12 talking about things called SentiLock and top-
13 level domains as the concerns. Those things have
14 long since gone by the wayside.

15 The Terrace phone originally was a phone that
16 Errol had actually disposed of, and they found out
17 that it wasn't disposed. They allege that he had
18 hidden what he stole from the Dropbox. Then the
19 forensic evidence said, well, he didn't really go
20 to that Dropbox after Mr. Rascoff initially
21 contacted him. His last contact with the Dropbox
22 was November 9th.

23 This month's new theory, the phantom computer,
24 is wrong also. It just hasn't been around long
25 enough for them to move off of it on to something

1 new. The point is that the only thing consistent
2 about the allegations that the plaintiffs have been
3 making in this case is they're always changing to
4 fit whatever the new evidence is. That's not a
5 credible approach.

6 In contrast, Errol Samuelson's story about
7 what happened in this case has never wavered. I
8 think it's important for the Court to look at
9 exhibit 182, which is Mr. Samuelson's April 2nd,
10 2014 declaration. The hallmark of credibility is
11 consistency.

12 As a matter of fact, Mr. Singer pointed out a
13 case about the importance of inconsistent
14 explanation as some evidence of lack of
15 credibility. Well, Mr. Samuelson has been
16 consistent from day one.

17 He says, back in April, before he left Move, I
18 took steps to minimize the destruction to Move and
19 to leave things in good order for whomever my
20 successor should be. I went to the trouble of
21 securely deleting personal information from my
22 laptop because I wanted to protect my privacy and
23 the privacy of other members of my family.

24 When the burner phone allegations came up, he
25 said the same thing. I got a personal phone so

1 that I could communicate with Zillow without using
2 Move's information.

3 What can't be emphasized enough about the
4 consistency of Mr. Samuelson's testimony is that
5 when he first was told this story, before the
6 parties spent tens of millions of dollars on
7 discovery, all of the things that Mr. McMillan went
8 through, the scores of depositions, the millions of
9 pages of documents, the imaging of computers, he
10 told that story before any of that happened, and he
11 told the exact same story here in court.

12 Discovery has caused Move to constantly change
13 its approach to this case and its theories. It has
14 never changed what Errol Samuelson said, and the
15 reason for that is simple. He has always been
16 telling the truth, and no amount of discovery, no
17 matter what happens, is going to change that.

18 The other two people whose credibility I want
19 to touch on in the context of this motion are Mr.
20 Lloyd-Jones and Mr. Crain. Now, Mr. Lloyd-Jones
21 couldn't find a lot to say about Mr. Samuelson in
22 terms of the spoliation. He did concede that there
23 is no evidence that any emails or Move documents
24 had been lost.

25 Now, let me address here the point that Mr.

1 Samuelson -- excuse me, Mr. Samuelson's Gmail, the
2 Gmail that we produced in this case came from a
3 recovered, a fully recovered file from Google that
4 Celerity, Mr. Hartley's -- the company that Mr.
5 Hartley worked for originally, went to Google, got
6 the full and complete set of Gmail, and we produced
7 everything relevant.

8 So the idea that there's something missing
9 because the Move iPhone isn't here, it's simply
10 wrong. And again Mr. Lloyd-Jones had nothing, said
11 there's no forensic evidence that any email of any
12 kind, either the @move.com email or Gmail is
13 missing.

14 He also agreed that nothing had been spoliated
15 from the Dell Solid State Drive, that whether we're
16 lucky or not, this is a spoliation hearing, and
17 nothing is spoliated. That drive that was handed
18 over to NCIX is now in the hands unaltered of Move.

19 No Google docs have been spoliated. Nothing
20 has been spoliated from the Western Digital. Mr.
21 Lloyd-Jones couldn't identify any forensic evidence
22 inconsistent with Errol's testimony. What he did
23 offer were basically three spoliation opinions.

24 The first -- and this goes to your question,
25 your Honor, about deleted but not recovered. He

1 had said there were 138 user files deleted from the
2 Move Mac that he could not find on the LaCie or the
3 For Warren folder on the Move Dell. Now, he said
4 that in a supplemental report and we deposed him on
5 it. That didn't make it into his presentation
6 here, so I'm not sure whether they're still even
7 arguing that. But if they are, they shouldn't be,
8 because you heard Mr. Samuelson say, he only looked
9 in three places those documents are not likely to
10 be. If you look in places they're likely to be, he
11 would find them.

12 So there's no competent evidence here of any
13 documents that Mr. Samuelson ever had that had been
14 deleted and not recovered.

15 The second thing that --

16 THE COURT: When you say documents, let's
17 define that a little bit. You mean Move documents
18 that allegedly were absconded with, versus text
19 messages or emails between the defendants?

20 MR. FANDEL: Yeah. I will talk about text
21 messages, but in terms of documents, when this is a
22 misappropriation case, let's remember, and when
23 you --

24 THE COURT: I haven't forgotten.

25 MR. FANDEL: -- misappropriate, you should

1 be-- you think you would take these documents and
2 you would find them over at Zillow. Well, Mr.
3 Samuelson never did any deletion at all after March
4 the 16th, when he gave the phone back to his wife.
5 And there's no evidence of any documents of any
6 import that would be the crown jewels of Move
7 anywhere in Mr. Samuelson's possession or Zillow's
8 possession.

9 And the reason for that is clear, because the
10 crown jewels weren't any documents at Move. The
11 crown jewels were Mr. Samuelson and his
12 relationships. He didn't need any of those
13 documents to take with him, and he didn't take
14 anything with him.

15 THE COURT: I'm sorry. And in the context
16 of this point, are you going to address the
17 Chipsbank thumb drive?

18 MR. FANDEL: I will. I will. And I do
19 think it's important, in terms of misappropriation,
20 that we know there was the For Warren file that Mr.
21 Samuelson created that contained all of the
22 important current information, tens of thousands of
23 pages of documents that he provided to Move so that
24 Move could continue to work. Then he deleted it.

25 If there's something that was valuable in this

1 cache that Mr. Samuelson supposedly had, it would
2 be that For Warren file, but that thing is gone.
3 He deleted it as soon as he got back on the 5th
4 before he went over to Zillow.

5 The second issue that Mr. Lloyd-Jones talks
6 about is that there may be, I think he said
7 probably are, missing texts between Mr. Samuelson
8 and Mr. Beardsley. Now, I want to make sure that
9 we're clear on this. There are texts that were
10 exchanged between Mr. Samuelson and Zillow, and Mr.
11 Lloyd-Jones agreed there's no evidence that any of
12 those have been lost.

13 He also said text, email exchange between Mr.
14 Samuelson and Mr. Beardsley could go as either SMS
15 messages or iMessages. If they went as the latter,
16 they would have been backed up to one of the
17 computers. So what we're talking about, what he's
18 talking about, is possibly there are SMS messages
19 exchanged between Mr. Samuelson and Mr. Beardsley
20 that we don't have.

21 We have 240 of them right here. And I asked
22 him whether reading through those, it gives him --
23 it suggests to him that anything is missing, and he
24 said, no, there's nothing that I can point to.

25 Mr. Singer pointed out that apparently Mr.

1 Lloyd-Jones has now counted a number of SMS texts
2 and compared them against the 59 that were reported
3 in Mr. Samuelson's phone records and concluded that
4 there are some missing. But he's making a false
5 assumption there, and that is that things that are
6 identified as SMS messages may not also be
7 iMessages.

8 Look at this. You can compare exhibits 816
9 and 191 here. These are the exact same messages.
10 The bottom comes from the iMessage chat from
11 Terrace phone. They're identified as iMessages.
12 The top, the exact same messages, are identified as
13 SMS messages. There are a number, there are 30
14 messages on Terrace iChat that we don't know how
15 they would appear on Errol's phone, because they
16 were deleted and randomly overwritten.

17 Any number of those that appear in iMessages
18 in Terrace -- in Terrace iCheck backup could also
19 have been SMS messages on Mr. Samuelson's phone.
20 So the presumption, implicit presumption, in
21 whatever math Mr. Lloyd-Jones did is wrong.

22 And then the last thing, the last theory of
23 Mr. Lloyd-Jones is the phantom computer, which I
24 hope is the last refuge of a meritless claim,
25 because it defies forensics and common sense. He's

1 speculating or just wrong on a number of things
2 that form the basis of this opinion.

3 He vastly overstates the significance of the
4 last access date artifact as evidence of opening or
5 copying. He kind of had to back away from that on
6 the stand, but clearly in his presentation he was
7 trying to leave the impression that access means
8 copying or opening. He had to back down from that.

9 He agreed that literally hundreds of programs
10 could touch that artifact, but he couldn't identify
11 them. He testified that Spotlight indexing
12 absolutely doesn't update that artifact, and Mr.
13 Crain has proved that he's wrong on that.

14 And beyond these forensic issues, his
15 superficial explanation is fundamentally
16 counterintuitive. We today submitted the evidence
17 with all of the files that actually were among the
18 1372, and they're old.

19 Again the For Warren folder is not in this
20 cache of documents that supposedly is on this
21 phantom computer, and over 80 percent of them,
22 according to this chart, are from 2004 or behind.
23 Why is there any reason to believe that someone in
24 Mr. Samuelson's position, who's trying to sneak
25 stuff onto a phantom computer, would take all this

1 old stuff and ignore the For Warren stuff and
2 ignore all the current information?

3 And to the extent there is current
4 information, those 23 files up there, they are also
5 set forth, either -- the full file path is set
6 forth in the exhibits, and there's nothing of
7 importance in there.

8 I submit that the reason that Mr. Lloyd-Jones
9 didn't go into this issue, he just said, we've
10 spoliated, but he didn't try to make the argument
11 that these folders that are on this -- these files
12 that are on this phantom computer are relevant,
13 which he should have, because this is a spoliation
14 motion, and that's the standard, he didn't go there
15 because he knew there's absolutely no relevance of
16 anything among these 1372 files whose last access
17 date was updated.

18 So Mr. Lloyd-Jones' opinions I think lack
19 credibility, not because -- because of how he
20 approached this assignment. Because this is his
21 first time out as a testifying expert, he let
22 himself be pushed into taking positions that he
23 hadn't fully researched and couldn't substantiate,
24 among those saying, absolutely under no
25 circumstances will Spotlight indexing update a file

1 when he hadn't even done the work to check it.

2 And by the way, he's now had ten days since I
3 asked him that question to do that experiment, and
4 apparently -- well, I don't know whether he's done
5 it or not. If he has done it, he certainly doesn't
6 want to talk about it. And he also allowed Move's
7 lawyers to limit the scope of his work.

8 He wasn't asked to look into the question you
9 had, whether stuff had been deleted and isn't
10 recoverable. To Mr. Lloyd-Jones, his job was to
11 find out what was deleted and stop there, not ask
12 whether the stuff still exists.

13 Now, in contrast, Andy Crain was more thorough
14 and scientific, and he pointed out numerous errors
15 in both the data that Lloyd-Jones relied on and his
16 conclusion. In terms of the texts, Andy conceded
17 that Samuelson can't prove there are no lost texts.
18 We can't prove a negative. We never will be able
19 to.

20 But rather than presuming from -- based upon
21 that that there were some lost, he looked into the
22 content and the context. He testified that there
23 were no gaps, no hanging conversations. We have --
24 and we have a collection from six different sources
25 that we combined in the compendium to put together

1 the 240 that we do have. The conclusion that it's
2 probable that a text is missing is just
3 speculation. There's no forensic evidence to back
4 it up.

5 Now, in terms of the phantom computer, Andy
6 Crain showed you how the last accessed artifact can
7 be -- is not as significant as Lloyd-Jones said it
8 is and testified that you need to look beyond that
9 artifact for more reliable evidence. In his
10 testimony here, he said, he would summarize his
11 conclusions as we have affirmative forensic
12 evidence of several types that lead to a conclusion
13 that all of these last access stamps, as contained
14 on Mr. Samuelson's LaCie, can be accounted for by
15 his Zillow laptop.

16 And those affirmative evidence of several
17 types includes the fact we know that the Zillow
18 laptop was connected to the LaCie on those days.
19 We know that the Spotlight was actively writing to
20 the LaCie during those times.

21 And we have the last access date. I mean in
22 this sense, the last accessed artifact actually
23 corroborates what Mr. Samuelson -- what Mr. Crain
24 is saying. It doesn't contradict it. It is
25 something that is -- it confirms that there was a

1 connection between the LaCie and the Zillow, and
2 the Zillow was reaching out and doing stuff
3 automatically.

4 Now, in terms of the legal issues, Mr.
5 McMillan covered them. I don't have anything to
6 add to that. But I do want to talk about some of
7 the evidence in light of the standards that he
8 referred to.

9 THE COURT: You have about three minutes.

10 MR. FANDEL: Oh, my goodness. All right.

11 THE COURT: Just so everybody knows,
12 you've given me your PowerPoints. I'm going to
13 read again the presentations you've put together.

14 MR. FANDEL: Let me talk about first the
15 bad faith. Now, how -- if a party who, before any
16 suit is filed, asks for and receives permission to
17 delete personal information, and then acts in
18 reliance upon that, and then can then be sanctioned
19 for spoliation for doing what he was said he could
20 go ahead and do, then the bad faith standard in
21 Washington means nothing.

22 Mr. Samuelson's deletions all followed one
23 rule, and that was he wanted to avoid putting
24 personal information out there. And in terms of
25 him talking in court about sensitive things, you

1 know, I tried hard to get -- to have that testimony
2 be outside the presence of the media, and they
3 pushed back. That was not his decision to say
4 that. It was the plaintiffs that forced him to do
5 that.

6 THE COURT: Which part, the personal
7 information or the information about the fellow
8 employees?

9 MR. FANDEL: What was on there that was
10 personal that he wanted to avoid, including the
11 hereditary disease that his mother had, the next
12 day that was on the NAR website and on the New York
13 Post, the very next day, the information that he
14 wanted to protect.

15 Tara's iPhone, again I think the testimony is
16 clear there's no bad faith there. The thumb
17 drives, there's no evidence that any of these thumb
18 drives have been lost at all, much less destroyed.
19 The calendar evidence that we have shows that in
20 terms of the -- in terms of the Verbatim Store 'n'
21 Go and the other one --

22 THE COURT: Chipsbank.

23 MR. FANDEL: Those first two that were in
24 February, he was at work, and how acting
25 inconsistently with how he had been working for ten

1 years, in terms of exchanging thumb drives,
2 constitutes bad faith, I don't know.

3 Now, in terms of the Chipsbank, the Chipsbank
4 device, the timing of it is right when he is
5 transferring the For Warren folder. As Mr. Crain
6 testified, there was not enough capacity on that
7 Chipsbank device to hold that For Warren file.
8 It's pretty clear, what he did is he stuck it in
9 there to see if he could use that for the For
10 Warren file. He couldn't. It was only on for a
11 minute. He pulled it out. And it's probably still
12 there at the Move office in Vancouver, where it was
13 to begin with.

14 The idea that Mr. Samuelson can be sanctioned
15 for spoliation on that, when they haven't even
16 established that he ever really had possession of
17 it, makes no sense.

18 THE COURT: Final thought.

19 MR. FANDEL: All right. My final thought,
20 your Honor, is that there's no evidence that
21 anything of any import is missing. There's no Move
22 documents; there's no email of any kind; there's no
23 texts with Zillow; and there's really no reason to
24 conclude that any texts with Mr. Beardsley that
25 would make any difference to this case are gone.

1 So the very basis of spoliation that we've
2 lost some evidence I think has not been established
3 in this case.

4 THE COURT: Thank you.

5 MR. FANDEL: Thank you.

6 THE COURT: Mr. Savitt.

7 MR. SAVITT: Thank you, your Honor. Even
8 though I've only got 20 minutes, let me start by
9 thanking the Court for its patience with not only
10 me but all the parties in this proceeding. Not
11 everybody gives the kind of patience that the Court
12 has done, and I would like to thank the Court for
13 it.

14 As I thought about this over the past few
15 days, I realized, your Honor, that I couldn't
16 possibly say everything I thought important in the
17 20 minutes. So I take some comfort in the fact
18 that the Court has asked for findings of fact and
19 conclusions of law, which will in short present a
20 full record to the Court.

21 But I thought more that I would focus on a few
22 things and try to get into them, rather than
23 discuss everything. And I rely upon the Court who,
24 it's been quite clear, has been paying very, very
25 close attention. Obviously the Court should ask me

1 whatever questions it wishes.

2 And I also want to say that for most of the
3 testimony I'm going to reference, most of the
4 evidence, I have cites, if the Court wants them,
5 but they'll be in our findings of fact and
6 conclusions.

7 So first thing I want to talk about is a
8 couple of very telling points from Mr.
9 Lloyd-Jones's testimony. And Mr. Fandel alluded to
10 this very briefly. When he was asked why he didn't
11 undertake a carving analysis, Mr. Lloyd-Jones did
12 not say, I didn't do it because I didn't think I
13 would find anything; there was no point in doing
14 it. He did not say in response to Mr. Willey's
15 question that it would be too much expensive.

16 He gave a clear and simple answer. He didn't
17 do it because his instructions were to look for
18 evidence destruction, quote, not for recovering
19 deleted data.

20 And then a moment later he said he didn't ask
21 the neutral for information that would help him
22 determine whether files are recoverable because he
23 said, that wasn't part of my instructions, and I
24 wasn't trying to see what was recoverable.

25 Let's take a step back here for a second. The

1 quantum of information that was presented and made
2 available in this case is extraordinary. At least
3 23 computers, storage devices, phones, and Cloud
4 accounts of Mr. Beardsley alone, there's probably a
5 similar amount of Mr. Samuelson, was made available
6 to the plaintiffs, everything he owned, every thumb
7 drive he could find, 13 of them, all three of his
8 computers, both of his phones, his iPad mini, all
9 of this, and plaintiffs decided not to try to see
10 what evidence they could recover. They made no
11 effort to try and find the evidence they contend is
12 missing.

13 To the contrary, they gave their forensic
14 expert instructions that ensured he wouldn't look
15 for the evidence they claim is missing. So they're
16 telling the Court, we need a major sanction because
17 the information we want to prove our case is gone,
18 but we never tried to find it.

19 This is a spoliation hearing. You would
20 expect, your Honor, to hear plaintiffs' expert be
21 telling you about how his effort, he tried to
22 recover information, but I couldn't, I couldn't get
23 it; I tried and it's just not there. But he
24 testified to the opposite, that he didn't even
25 bother to try.

1 How can the plaintiffs claim to the Court that
2 the evidence they need is gone if they instructed
3 their expert not to look for it? The plaintiffs'
4 own failure to use the forensic process and the
5 extraordinary stuff they had to try and find
6 missing evidence would seem to me to be fatal to a
7 claim that important evidence is missing.

8 And in all events, in all events, your Honor,
9 it shows what's really going on here. Plaintiffs,
10 they're not trying to prove their case. They're
11 trying to get your Honor to win it for them.

12 And let me just address very briefly the
13 metadata issue, because that was the response that
14 came off on direct. If they had recovered Move
15 trade secret documents in the deleted space of any
16 of Mr. Beardsley's devices, or any of his Cloud
17 accounts, the absence of metadata, or at not least
18 all of the metadata, wouldn't prevent them from
19 arguing their case.

20 In fact, Mr. Singer, in the closing remarks he
21 gave just a few moments ago, made exactly that
22 point. He said it's important that they're there.
23 If they had found Move trade secret documents on a
24 computer -- and remember, Mr. Beardsley's
25 computers, he didn't even own these. If they had

1 found the Move trade secret document on those
2 computers, your Honor, they would say, see, it's in
3 the deleted space, he deleted it, this is evidence
4 that he was deleting our trade secrets, but they
5 didn't even try.

6 And in any event, as I noted, it's a red
7 herring, the metadata issue, because the
8 instructions, they didn't look for them; they
9 didn't make a decision, oh, we're not going to --
10 Mr. Lloyd-Jones's testimony wasn't the reason I
11 didn't do carving, the reason I didn't try and
12 recover is I couldn't. He just said, nobody gave
13 me an instruction.

14 The second telling thing was the emergence in
15 Mr. Lloyd-Jones' testimony here in his proceeding
16 about the mystery computer. That wasn't -- it's
17 not mentioned in the motion that brings us here
18 back in January. There's no mention of that.

19 They need to conjure the existence of the
20 mystery computer today because the forensic
21 evidence obtained from the multitude of devices
22 shows that is exceptions only for what Mr.
23 Beardsley already disclosed. He did not open or
24 copy Move documents on any of his computers.

25 And by the way, let me take a step aside here.

1 So Mr. -- Mr. Singer said the prejudice is Mr.
2 Beardsley is going to get up and say, I didn't
3 open, I didn't copy Move documents from the Western
4 Digital, and I didn't open Move documents from the
5 15AA. We don't have to take his word for it.

6 The forensic experts agree on it. This is the
7 point. There's no evidence that Move documents
8 were opened or copied except for the things Mr.
9 Beardsley owned and talked about. There's things
10 that were discussed, but except for what was
11 already known, this forensic process with access to
12 terabytes of data, hasn't shown that any Move
13 documents were opened or copied on any of those
14 devices.

15 So their claim is out the window unless they
16 find, unless they conjure up the mystery computer.
17 So that's how they're trying to save their case.
18 That's why we're hearing it. So let me talk about
19 the mystery computer because the actual evidence
20 here suggests that it is rank speculation that such
21 a thing exists.

22 Mr. Lloyd-Jones based his opinion that there
23 may well be a mystery computer, he's not even
24 saying there is, he's saying he bases it on his
25 conclusion that there was no access, there was --

1 that the SanDisk 32 was not opened -- was not
2 connected to, excuse me, was not connected to the
3 SanDisk 32 on April 26th of 2014. That's the
4 basis, and he's saying, so since there was no
5 device connection --

6 THE COURT: Well, I thought it was a
7 reformatting versus a device connection. I'm
8 sorry. No, it was. You're right.

9 MR. SAVITT: It's a device. His whole
10 opinion builds off of his conclusion that there was
11 no connection that day.

12 THE COURT: Because your client testified
13 he reformatted it?

14 MR. SAVITT: The client testified that he
15 reformatted it, and they then -- so they say, well,
16 since it wasn't connected to the -- since the
17 SanDisk 32 was not connected to the home office
18 computer, boom, there must be a mystery computer.
19 But in fact, this is what the PC Doctor logs show,
20 there was a connection that day.

21 And the fact that the last access dates were
22 updated, as we well know, does not mean the
23 documents were opened or copied. Any number of
24 things could have done that. Mr. Crain testified
25 to that.

1 So now we're talking, you know, Occam's razor,
2 the simplest line, is there a mystery computer that
3 -- there's no trace of it on any of the other
4 multitude of devices in the case. There's no trace
5 of it anywhere. Is that more likely, or now that
6 we know the whole basis for Mr. Lloyd-Jones'
7 conclusion is wrong, is it more likely that there
8 is no mystery computer?

9 THE COURT: And what about the -- I'm
10 sorry. I think I transposed the devices. I was
11 going to ask you about the SanDisk 64 and your
12 client's testimony.

13 MR. SAVITT: That's correct. Now, the
14 SanDisk 64 is the other one. Now, that one, of
15 course, there's no evidence that any documents were
16 opened or copied or moved from it. But Mr.
17 Beardsley, remember, he testified about this.
18 Because this one actually Mr. Singer asked Mr.
19 Beardsley about it.

20 He said, hey, you thought it happened on the
21 home -- on the Move computer. Well, it doesn't
22 show. And then -- but what Mr. Beardsley said was,
23 well, it could have been on my father's computer,
24 and of course he gave it to his son. Presumably it
25 could have been on his son's computer.

1 But remember that one, there's not a shred of
2 evidence. What the bootstrap here was the
3 connection, and then I have 515 documents. On the
4 SanDisk 64, yeah, on that one, I don't have a
5 forensic basis to say that where it was -- where it
6 was reformatted. I accept Mr. Crain's testimony
7 that we do not know.

8 But what's clear is is that it wasn't
9 connected to any of the other devices we know of.
10 We are still in the world of rank speculation that
11 there is a mystery computer.

12 Now, let me move on to the second topic.

13 THE COURT: Do you want to address the
14 allegations surrounding the SanDisk 64 and then the
15 claim of spoliation versus alleged theft?

16 MR. SAVITT: Well, I'm not sure what
17 question the Court is asking me. Certainly given
18 the Court is asking me, I do.

19 THE COURT: Well, I mean it seems to me
20 that there are two different things going on, the
21 SanDisk 64 and whether there's evidence associated
22 to that device of theft, alleged theft of
23 documents, versus alleged destruction.

24 MR. SAVITT: Right. Well, actually -- so
25 one of the things I wanted to go through is --

1 let's talk about this. Let me talk about this, and
2 hopefully -- there are two things I really do want
3 to say to the Court, but let me talk about this
4 because it's what's the Court's focused on.

5 This actually gets right at the Court's
6 question of how could they possibly make the link,
7 what could they show that would be the
8 circumstantial evidence. Well, they know that
9 problem. They know that for their spoliation claim
10 to have any links, they have to make a case that
11 the information or device is lost, had information
12 that was important to their case, and really where
13 they went, and that's why they focused on the
14 connection dates.

15 They say, see, Beardsley connected these
16 devices to his Move laptop in the two weeks before
17 he left Move. That's the link they're trying to
18 make. Therefore, you should infer that he was
19 downloading trade secret documents to steal.

20 But in fact, we've got a whole bunch of
21 evidence about why Mr. Beardsley actually was using
22 those documents in the last two weeks before he
23 left Move, and none of them of suggest an intent to
24 steal trade secrets or to download trade secrets.

25 I'll start with the two SanDisks, and Mr.

1 Beardsley explained that the SanDisk 64 was given
2 to his son. He explained that he had used it to
3 download his personal directory in connection with
4 leaving Move, and that he then gave it to his son.
5 And again while the forensic evidence can't
6 possibly confirm that he actually gave it to his
7 son, there's nothing that would suggest that he
8 didn't.

9 There's nothing that would suggest that in
10 fact he was not copying his personal directory.
11 That's a reasonable thing to do when you're leaving
12 a job. And indeed the forensic evidence shows
13 nothing from that drive was ever opened on any
14 device we can find after Mr. Beardsley left Move.
15 That's very consistent with he gave it to his kid.

16 On the SanDisk 32, he testified that he used
17 that device just before departing Move to copy
18 Dropbox documents. We've got forensic evidence
19 corroborating that's what he did because we found
20 the Dropbox folders here.

21 The plaintiffs want to argue, he was stealing
22 the Dropbox folders. We say, no, it was just part
23 of making sure he didn't lose it, because there's
24 no spoliation issue there. We've got the
25 documents. Mr. Crain recovered 98 percent of the

1 Dropbox folder. They want to say those are the
2 mother load. Have at it. We've got the evidence.
3 There's no need for a spoliation sanction.

4 And the evidence with regard to the other
5 devices that they say Mr. Beardsley downloaded
6 trade secrets on is even weaker for crying out
7 loud. The 15AA connection, we actually narrowed
8 it. It was March 5th and March 11th. Remember Mr.
9 Beardsley explained, I used these things for
10 presentations. Well, if you look at the record,
11 and in fact, bingo, he had a presentation on March
12 5th. He had a presentation on March 11th.

13 The external world confirms his testimony
14 about that he was not downloading trade secrets but
15 was going about his job. We have the February 24th
16 date. We know the EAC document was there. We know
17 it's not a trade secret. We know what he was using
18 it for.

19 With regard to the Western Digital connection
20 on March the 4th, again Mr. Beardsley's testimony
21 was, I typically back up parts of my computer
22 before I hit the road because my computer could get
23 damaged or lost on the road. And yep, externally
24 we see he was hitting the road on March the 4th,
25 totally consistent with his testimony.

1 The 1104 device, again it was downloaded on --
2 it shows a download of a Move document, or a
3 connection, excuse me, on March the 12th. Yeah,
4 there was a presentation in Chicago on March the
5 12th. And we know what that document was. We know
6 it wasn't confidential. We know it was presented
7 in an opening meeting.

8 So the link would be if they can actually show
9 some reason to believe that Mr. Beardsley was
10 downloading trade secrets on to the devices, and
11 now they're gone and I can't prove it. And they've
12 tried to make that case. But the only thing
13 they've got is he happened to plug these things
14 into his computers some time in the two weeks or so
15 before he left.

16 Well, that can't make the case, because there
17 are many, many legitimate reasons why he would do
18 so, and we aren't just relying on the existence of
19 legitimate reasons. We're actually tying it up to
20 events in the external world to show it's more
21 likely. Remember they got the burden of proof.
22 It's more likely. So that is my response on that.

23 Now, how much more time do I have?

24 THE COURT: You have approximately five
25 minutes.

1 MR. SAVITT: Okay. Well, let me -- I'll
2 see at the end of this. Maybe I won't be so
3 thankful about the patience of the Court.

4 But let me talk about the Rumsfeld issue, if I
5 could. Because I like the Rumsfeld issue. Because
6 when you go through the devices device by device,
7 what's amazing is how little we don't know. And is
8 there something we don't know? Yeah. But it's
9 amazing how little we don't know.

10 Let's start with the computers. We have
11 records going back to when we first turned on as to
12 what devices were connected to them, what documents
13 were opened from those devices and, in fact, every
14 document opened on those devices. So we know
15 everything that's been opened. The claim is trade
16 secret misappropriation. Even if we don't know
17 everything that was on something, what matters is
18 what was used.

19 I mean if there were a whole bunch of
20 documents on a thumb drive, and no one ever looked
21 at it, no one ever used it, that's not the case.
22 He's got to have used it. Well, we know what was
23 opened on the computers. We have data showing what
24 documents were opened on the computers. We know
25 what devices were connected. We know what

1 documents he opened.

2 So we're not -- in terms of Rumsfeld land, we
3 know what Move documents were opened on the
4 computer. We're not guessing about that. We know
5 it. And in this regard, importantly, Mr. Crain did
6 the least of analysis of the home office computer,
7 the Zillow laptop, and the family computer. He did
8 not find any loss of Move documents on any of those
9 computers. None.

10 That's undisputed testimony because Mr.
11 Lloyd-Jones decided not to do a deletion analysis
12 on those three. They're not trying to find this
13 stuff.

14 Internet history, thousands of artifacts were
15 found, says Mr. Crain, thousands. And remember the
16 Russian Roulette point. This goes back to Rumsfeld
17 as well. We found thousands of artifacts; they're
18 not just pornography artifacts. There are others
19 too. And indeed they include visits to Cloud
20 accounts.

21 Now, if we found six, six searches, six
22 Internet browsing, that wouldn't tell us anything.
23 But when you find thousands, your Honor, and it's
24 in the world of whether -- remember, Mr. Beardsley
25 doesn't control that. He doesn't have any control

1 over what we found. If you found thousands, you
2 can start to conclude it's a representative sample.

3 It shows us what the world of what was deleted
4 looks like. And there's no suggestion,
5 notwithstanding the thousands of artifacts found in
6 the Internet history, that one of them, one of them
7 shows he was using Cloud accounts to access Move
8 information. Again what we know.

9 What we don't know is very limited because we
10 have thousands of Russian Roulette responses, which
11 should give us a good indication about what was
12 there. Cloud accounts, same thing. Remember,
13 Dropbox has an events pane that provides granular
14 history about the files added, the revision history
15 that enabled us to find the ZM document. It's
16 there.

17 The bottom line, Mr. Lloyd-Jones testified
18 he's not offering any opinion that Move documents
19 were deleted from any of the Cloud accounts, Mr.
20 Lloyd-Jones's testimony.

21 Text messages, now maybe we don't have them
22 all, but everybody agrees we got -- I think
23 Lloyd-Jones agrees it was substantial, and he said
24 probably a majority. Again, remember, neither Mr.
25 Samuelson nor Mr. Beardsley control what was

1 recovered and what was found.

2 Mr. Beardsley actually produced 1655 texts,
3 including hundreds, 700, that had been deleted on
4 his iPhone, 414 mails had been put together.
5 Everybody agrees we have most of them. What basis
6 is there to think that there's something out there
7 that we didn't stumble upon the right things?

8 Personal emails, Mr. Samuelson's testimony
9 that he produced all of the emails between he and
10 Curt is undisputed. Indeed, Mr. Lloyd-Jones
11 testified, there's no forensic evidence
12 inconsistent with that testimony.

13 The Move laptop, the main thing they're
14 complaining on the Move laptop is the Dropbox
15 documents, which they contend contain a trove of
16 trade secrets, but they're not lost, 98 percent
17 found. Nobody's saying that's the trade secret.

18 And the other deletions, it's undisputed that
19 99.84 percent of what was on the Move laptop is
20 either nonuser generated files or has been
21 recovered. We're only looking at .16 percent of
22 what's not recovered. In other words, we know a
23 tremendous amount. We know a tremendous amount
24 here. We have a tremendous amount of evidence. We
25 know what was connected, and we've recovered

1 tremendous amounts, enough to tell us, come on,
2 none of that stuff we recovered is relevant?

3 This is why we have the mystery computer,
4 because they recovered so much and none of it's
5 helping. That's why we need -- we need your Honor.
6 I know your Honor wants to tell me to sit down.
7 May I just --

8 THE COURT: I want to tell you to wrap it
9 up. Close to sitting down.

10 MR. SAVITT: Okay. I'm going to wrap it
11 up. One final point. I won't have a wrap-up. Let
12 me just make the final point. We put on the
13 testimony, your Honor, that Mr. Beardsley not only
14 didn't use the trade secrets, but there is no trade
15 secret he could have used because of how he went,
16 and he didn't just assert it. He explained it.

17 They didn't touch that in cross. They didn't
18 come at him at all on that. The undisputed record
19 is here, the undisputed record of this proceeding,
20 it's as undisputed as anything gets, that none of
21 these trade secrets could even have helped him do
22 his job. Now, it may well be they'll say, well, I
23 can prove that at trial, I just didn't try to prove
24 it. Well, their whole point here is there should
25 be no trial.

1 This is the record. The record here is devoid
2 of any reason or motive for Mr. Beardsley to do
3 what they're saying. His undisputed testimony is
4 that he didn't need it. Now, remember, he didn't
5 get any more money.

6 THE COURT: All right. Thank you.

7 Mr. Singer.

8 MR. SAVITT: I actually am going to say,
9 thank you for your patience, your Honor.

10 THE COURT: Mr. Singer, I know you had
11 some prepared remarks. I'll let you get to them.
12 I want you to focus at least at some point on two
13 things. It seems to me that there's two categories
14 of potentially spoliated evidence. One is
15 potentially inculpatory communications between the
16 defendants, and the second category would be
17 documents stolen from Move, destroyed, and their
18 absence would make it impossible or difficult for
19 Move to prove its theft of trade secrets cases.

20 MR. SINGER: One correction. It's not
21 about destroyed documents. No one's complaining
22 about destroyed documents. It's destroyed
23 evidence. And there's a big difference, right.
24 So, you know, and I will address those.

25 THE COURT: Thank you.

1 MR. SINGER: But I did want to make it
2 clear that what we're talking about when we say
3 destroyed evidence, they have our Move documents
4 that Mr. Lloyd-Jones didn't go back to Move and
5 look everywhere for those missing documents is like
6 ships passing in the night. They don't get it, or
7 they don't want to get it.

8 We've got a Western Digital drive. No one is
9 disputing that that drive had valuable Move
10 information on it. Mr. Beardsley copied his whole
11 documents folder over there, everything, from his
12 Move computer. Their expert doesn't even deny it.
13 He didn't talk about it.

14 So Now you've got this Western Digital drive.
15 We've got their expert also admitting that if you
16 believe Mr. Beardsley, then the SD 64 was connected
17 to a mystery computer. It wasn't a mystery
18 computer. He says, if you're going to believe
19 Beardsley, there's no evidence at all that it was
20 connected to the ones we know about; it must be
21 another one.

22 THE COURT: Let's take the Western
23 Digital. If you know that there's Move documents
24 on there, and it was destroyed, why does that
25 support a default or terminating sanction versus

1 it's just evidence that you're going to use at
2 trial to cover up supports the crime?

3 MR. SINGER: Because both experts have
4 said that the only way to know for sure the actual
5 files that were on there, if you want to click it
6 open and show the jury what files are on there and
7 how important they were, the only place is at the
8 bottom of some dump right now.

9 And if you want to show the jury, this was
10 last accessed three months ago, four months ago, a
11 year ago, look at it, it doesn't lie, I don't have
12 that. Now, talk about a misappropriation case and
13 the most valuable evidence in a case, it's what
14 they looked at and when. And it's gone. And he
15 threw it against the wall. He is a sophisticated
16 executive that is blaming that he couldn't find a
17 sermon, and he threw this hard drive against a
18 wall, destroyed it, and buried it in the dump. If
19 that were the only thing in this case, that would
20 be a terminating sanction right there.

21 And this idea, this known unknowns, I mean I'm
22 almost falling out of my chair, this idea that
23 these are all unknown unknowns. We have unrefuted
24 testimony that these devices that are missing, the
25 15AA, the Western Digital, you know, we've got at

1 least one missing computer that their expert agrees
2 with, that these devices had Move documents. I
3 mean no one is coming in and disputing this.

4 You've got missing devices with Move
5 documents. You've got wiped phones. I mean Mr.
6 Samuelson's burner phone, his words, not mine.
7 Every communication on there is relevant, cuz it's
8 all about the negotiations. It's him talking to
9 Curt Beardsley. It's him talking to Zillow.
10 That's his testimony.

11 By his own admission, everything on there is
12 relevant. So if we're missing just one or two
13 texts, they're saying, no big deal; you got a
14 flavor. Their brief actually said, the jury will
15 get the flavor of it. Unacceptable to us.
16 Unacceptable because one text or two texts could
17 convince a juror or an entire jury.

18 And the idea that gosh, we've done pretty
19 good, you got the flavor, that's unacceptable. And
20 then again this idea that we can't draw crazy
21 inferences, that's the whole tip of the iceberg.
22 We know that they tried to delete. That tells us
23 what they wanted to delete.

24 They were trying to delete the Attack ListHub
25 document. They were trying to delete emails about

1 looking like the Vichy French. They were trying to
2 delete text messages about burner phones and
3 tipoffs, and all these other things. And that's
4 the inference. That's not a stretch; that's not
5 wild. We know what they were trying to delete.

6 We know they had all this other stuff in
7 there, and now that stuff is gone, and now we just
8 have to take their word for it. That's basically
9 their case. And that's the opposite of what Leon
10 says, the opposite of what the Ninth Circuit says
11 and what the Leon Court said.

12 Leon says that to show prejudice, you do not
13 need to recreate the contents of destroyed
14 electronic devices, because any number of those
15 files could have been relevant. And every court
16 that's addressed this question doesn't punish the
17 victim and doesn't reward the spoliator for
18 destroying evidence.

19 Leon says that the party responsible for
20 destroying potentially relevant evidence has no
21 right to a presumption that the destroyed evidence
22 is irrelevant. So they're asking the wrong
23 question. They have it backwards. And we have put
24 forward way more than we need to to show that they
25 had basically these briefcases with Move documents

1 in them, they've disappeared, and all the evidence,
2 which both of the experts agree that we would need
3 to show what they had and what they looked at is
4 gone.

5 And to address the Court's other question,
6 which was these communications between the
7 defendants that are -- you know, I think you said,
8 I don't know, I wrote down incriminating, but --

9 THE COURT: I probably said inculpatory.

10 MR. SINGER: It sounded like incriminating
11 to me.

12 THE COURT: The same thing.

13 MR. SINGER: All of the texts that we
14 pointed to that were deleted, these are devastating
15 texts for that side. I mean this is, you know,
16 Samuelson and Beardsley conspiring. This is -- you
17 know, this is what makes a case when you have a
18 circumstantial evidence case like we do.

19 When you don't have defendants who are willing
20 to come in and admit that they did bad things, you
21 need to look to that information. So, you know,
22 all we need to do is look at what they tried to
23 unsuccessfully delete. They weren't a hundred
24 percent good enough. It's true, they were
25 sophisticated. These are actually software

1 programers, both of them, so they know what they
2 are doing.

3 I just don't think in their wildest dreams
4 that it would have ever gotten this far. I don't
5 think they thought that Judge Hilyer would order a
6 forensic inspection, which is why Beardsley
7 panicked and Errol left and started running Cipher.
8 And I don't think that this Court, that they ever
9 thought in their wildest dreams that this Court
10 would spend six days looking into it.

11 So we can see what they tried to delete, and
12 that tells us a whole hell of a lot about their
13 state of mind. This cavalier attitude that they
14 come in with in their briefs, oh, it's a thumb
15 drive, your Honor, they're cheap, I put them in a
16 coffee mug. If we ever came into court 20 years
17 ago or 30 years ago and I said, judge, paper is
18 cheap, this is like five cents, I'd lose it, I
19 misplaced it, I destroyed it, it's in the shedder,
20 that's what their argument is about thumb drives
21 because thumb drives are cheap, that somehow the
22 evidence on them is invaluable.

23 You know, Zillow refers to this as innocent
24 human missteps; it's unfortunate but understandable
25 that defendants were less than rigorous and left

1 themselves open to second-guessing. Samuelson's
2 brief talks about how, you know, oh, just cuz
3 plaintiffs don't have every random text between
4 Samuelson and Beardsley, really, because one or two
5 texts could make a dig difference in this case.

6 And Mr. Beardsley, and I'll end on this note,
7 actually has the gall to put in his brief, this is
8 life. These past six days, everything that we've
9 put up on there, Beardsley's response is, this is
10 life. And I'll leave the Court with this thought.
11 No, it's not. Thank you.

12 THE COURT: Thank you, everyone, for your
13 presentations.

14 And I said on Friday, some of you were here,
15 but not all of you, what I've asked each party to
16 do is to prepare separate proposed findings and
17 conclusions of law for each case, So Zillow's case,
18 Mr. Beardsley's case, Mr. Samuelson's case.

19 Let's very briefly talk about when you think
20 you think you might get those in, and I'm going to
21 push you to get it to me sooner rather than later,
22 only because I have a number of others decisions
23 that are waiting for this issue to be resolved, and
24 your trial date is coming up very soon. So would a
25 week from today be sufficient time for those

1 proposed findings?

2 MR. SINGER: Yes. Yes, your Honor.

3 MR. MCMILLAN: Yes.

4 THE COURT: Let's plan on that. If you
5 can get them to me by noon on Monday, the 2nd, that
6 would be ideal.

7 MR. SINGER: We will, your Honor.

8 THE COURT: All right. I think that
9 covers it for today, and I think I'm seeing you
10 again relatively soon.

11 MR. SAVITT: Your Honor, let me just make
12 sure I understand, if I could.

13 THE COURT: Yes.

14 MR. SAVITT: In other words, Zillow should
15 submit a findings and conclusions, we should submit
16 a separate one. And for the plaintiffs, are they
17 submitting three separate ones, one for each of us,
18 or are they submitting one that covers everything?

19 THE COURT: I think that's probably the
20 cleanest, for plaintiffs to do it for each
21 defendant. You can combine it in a single
22 document, plaintiffs, you can do it that way as
23 well, but you ought to --

24 MR. SINGER: Yes.

25 THE COURT: You ought to make it clear for

1 any appellate review who you're referring to in
2 your findings and your conclusions --

3 MR. SINGER: Yes. Yes, your Honor.

4 THE COURT: -- when you submit those
5 findings and conclusions. And again I'll just warn
6 you all in advance, I likely will have my own
7 findings in there. I often will take some of
8 yours, if I think they're on point, and craft them
9 in the final orders.

10 All right. Thank you, everyone.

11 (Whereupon, the proceedings were
12 concluded.)

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C E R T I F I C A T E

STATE OF WASHINGTON)

) SS.

COUNTY OF KING)

I, Michelle Vitrano, Certified Court Reporter,
in and for the State of Washington, do hereby
certify:

That to the best of my ability, the foregoing
is a true and correct transcription of my shorthand
notes as taken in the cause of MOVE, INC., et al.,
vs. ZILLOW, INC., et al., on the date and at the
time and place as shown on page one hereto;

That I am not a relative or employee or
attorney or counsel of any of the parties to said
action, or a relative or employee of any such
attorney of counsel, and that I am not financially
interested in said action or the outcome thereof;

Dated this 26th day of April, 2016.

Michelle Vitrano

Certified Court Reporter