THE HONORABLE SEAN O'DONNELL
Hearing: February 5, 2016 at 9:00 a.m.
With Oral Argument

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

MOVE, INC., a Delaware corporation, REALSELECT, INC., a Delaware corporation, TOP PRODUCER SYSTEMS COMPANY, a British Columbia unlimited liability company, NATIONAL ASSOCIATION OF REALTORS®, an Illinois non-profit corporation, and REALTORS® INFORMATION NETWORK, INC., an Illinois corporation,

Plaintiffs,

v.

ZILLOW, INC., a Washington corporation, ERROL SAMUELSON, an individual, and CURT BEARDSLEY, an individual,

Defendants.

NO. 14-2-07669-0 SEA

DEFENDANT CURT BEARDSLEY'S OPPOSITION TO PLAINTIFFS' MOTION FOR EVIDENCE SPOLIATION SANCTIONS AGAINST DEFENDANTS

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I. INTRODUCTION

This case illustrates, and the present motion highlights, the challenges and risks of discovery in our increasingly digital world. Like Mr. Beardsley, many business people have and use a variety of devices that store and/or transmit electronic data. Some of these are used for business purposes, some are used for personal purposes, and many are used for both. Our devices sometimes fail, sometimes they are lost, and sometimes they are reformatted. These commonplace occurrences regularly result in "lost" information, but this is not spoliation or evidence of it. Rather, such loss reflects the breadth and escalating volume of electronic data creation—and the attendant difficulties of tracking, organizing and maintaining it.

On the record here, and under Washington law, Plaintiffs' motion should be denied:

- Plaintiffs wrongly assert that Mr. Beardsley was under a duty to preserve evidence when he departed Move and sought to protect his personal information, or that he acted improperly in response to Plaintiffs' subpoena.
- Plaintiffs fail to make the required showing of bad faith and an intent to destroy evidence. To the contrary, the evidence demonstrates that Mr. Beardsley did not act with an intention to destroy evidence.
- Plaintiffs do not establish that what they allege is lost would matter; and they do not address the huge quantum of information that has been produced or deleted material that has been recovered. And, as a related matter, Plaintiffs fail to address their own delay in seeking the evidence that they now claim, without support, is so material.
- Washington law does not support the draconian and dispositive sanctions that Plaintiffs request, and disfavors any spoliation finding without an evaluation of live testimony when intent is at issue.

In short, Plaintiffs' claims are inconsistent with the substantial evidentiary record that has been, and continues to be, developed. Thus, the instant motion is an effort to create legal presumptions and evidentiary inferences that will make the case that Plaintiffs cannot make on the actual record. Washington law does not permit the back-door that Plaintiffs seek.

II. STATEMENT OF FACTS

A. There Was No Conspiracy.

Curt Beardsley served Move for over seven years in a variety of positions, and was promoted several times. When Move needed to promptly respond publicly to Mr. Samuelson's

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departure, it turned to Mr. Beardsley as the person to promote. His work at Move was widely praised. *See* Declaration of Michele Stephen, Exs. A, B.[1] He worked long and hard for Move, right up until his departure. Plaintiffs' suggestion that Mr. Beardsley was about to lose his job at Move (Mtn. at 4:6-7) is not only unsupported, it is flatly refuted by the record. Exs. A, C, D, E.

Mr. Beardsley left Move to join Zillow following serious and careful thought. *E.g.* Ex. F. He had lost faith in Move's management and direction, and doubted the company's ability to meet pressing challenges. *Id.* He increasingly viewed Move's ties to the industry as chains to a past that kept the company from meeting the demands of the internet era, which had and still was changing and restructuring the residential real estate industry. He worried both about being, and being seen as, someone who betrayed the industry if he went to work for Zillow, given the insiders' longstanding enmity to Zillow, but he thought there was a way to move to Zillow consistent with both the industry's long-term needs and the demands of consumers on which Zillow focused. Gallegos Decl. at Ex. B; F; G at 174-75 (Bemis, former MLS executive and then former Zillow employee testifying he was referred to in the industry as "Darth Bemis" for having "defected" to Zillow – "the dark side").

Beardsley thus left Move for complex reasons, but he did not leave for money. The compensation he accepted at Zillow was approximately the same that he was offered at Move. Ex. E at 97-98; 107-109. Beardsley neither asked for nor was given an indemnity agreement with Zillow. Ex. E at 274. And Beardsley did not have a non-compete agreement with Move. Ex. H at § 23. He was free to leave Move, even to work for its competitors. Mr. Beardsley had no motive to steal its trade secrets.

Plaintiffs both ignore and distort the record to allege conspiracy. They contend that Beardsley and Samuelson plotted that Beardsley would stay to "harvest" additional trade secrets after Samuelson left. But there is not a shred of evidence to support this, and Plaintiffs ignore the evidence that refutes it. Mr. Samuelson had become negative about his negotiations with Zillow in mid-January 2014. Ex. E at 121-122. After telling Beardsley of concerns from Zillow

[1] Unless otherwise noted, all exhibits cited herein are attached to the Stephen declaration.

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executives about the possibility of his hire, and then expressing disappointment about a requirement that he submit to formal interviews at Zillow in early February, Samuelson then said nothing to Beardsley at all about Zillow. *Id.* at 119-121. To the contrary, Samuelson discussed with Beardsley thoughts about how he might reengage with Move. *Id.* at 117-121. Beardsley understandably thought Samuelson's possible hire at Zillow was off. Indeed, he expressed immediate "shock" not only to third parties when he heard the news of Samuelson's resignation, but also *to Samuelson himself in their private text communication* which Plaintiffs have recovered but about which they do not tell the Court. *Id.*; Ex. E at 45-46; 117-123; Ex. F; Ex. I.

When Samuelson left Move on March 5, Beardsley was uncertain as to whether he also wanted to leave, whether Zillow would hire him, and whether he could make the transition successfully. Ex. E at 91-3. Plaintiffs omit that as of Samuelson's resignation, Beardsley had not had any contact with Zillow at all; Beardsley and Zillow never communicated about potential employment until *after* Samuelson resigned from Move. Ex. E at 91; Ex.F; Ex. II. Plaintiffs omit that Mr. Beardsley told Move's CEO that he then decided to talk with Zillow. Ex. E at 124-125. And not least, Plaintiffs omit that after Mr. Beardsley met with Move's CEO and its Board Chairman to discuss the job Move had offered, and after he'd met with Zillow, Mr. Beardsley turned Zillow down flat: he declined Zillow's offer without making a counter, and simply told Zillow he'd decided to stay at Move. Ex. E at 130; Ex. J.[2] This evidence belies Plaintiffs' claim of conspiracy.

Plaintiffs also allege that Samuelson and Beardsley conspired to steal trade secrets while both were at Move, citing an email that Mr. Beardsley sent to Mr. Samuelson in November 2013 and a private document Mr. Beardsley created in December. Neither supports the allegation. Mr. Beardsley's November 17, 2013 email with Samuelson shares philosophical and

[2] After initially accepting Beardsley's turn-down, Zillow on its own initiative then improved its offer and amped up its recruiting, and Mr. Beardsley then decided to accept. Ex. J. But this doesn't change the contemporaneous record that is plainly and directly at odds with any notion of a conspiracy among Samuelson, Beardsley and Zillow. Furthermore, Beardsley announced his resignation just days in advance of a planned senior management strategy meeting at Move - again, at odds with an allegation that he remained at Move in a scheme to harvest inside information. Ex. L

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personal concerns raised by the possibility of employment with Zillow. Ex. Gallegos Decl. at Ex. B; Ex. E at 28-33. Beardsley analogized the real estate industry to self-contained societies that ultimately fail because they refuse to adapt to the changing environment around them, and expressed his concern about Move's future:

> NARs [sic] model, and Move's model that is tie[d] to that, will cause the industry as we know it today to collapse. It ultimately will not be destroyed from outside – but from within. We cannot change this – since the industry itself does not want to change.

Gallegos Decl. at Ex. B. Beardsley was also concerned about how the industry would react to a move to Zillow, and he wrestled with whether such a move would be seen as a betrayal: "How do we make the jump without feeling like (or having others identify us as) Vichy French." *Id.*

Plaintiffs trumpet this email because of its reference to the infamous Vichy regime, which of course collaborated with the Nazis. But they overreach in doing so, because any fair reading of the document confirms that it reflects the difficult contemplations of an employee who was considering the possibility that he may need to move on, who is giving hard thought to the consequences of that decision, and who wants to be sure he can help his new employer before making a job change he knows will be controversial. Moreover, even though it reflects personal and private thinking, it is entirely inconsistent with the existence of a conspiracy: nothing in this suggests anything like a plan to steal trade secrets or any wrongdoing.

Plaintiffs similarly overreach with regard to a private document Beardsley created in December 2013 (Mtn at 1:22-24, 4:11-13), in which he made notes to himself about how he might compete with Move if he were to depart. *See* Ex. E at 49-50; Ex. M. In this document, entitled "How Z might challenge M", Beardsley pondered whether and how he could succeed if he were to transition to Zillow and records what needs to happen "for Zillow to be more accepted by the industry and to be successful." He did not act on these ideas while at Move nor did he share this document with Samuelson or anyone else. Ex. E at 51; Ex. N at 176-77, 180-81. Nor is there evidence that Beardsley accessed this document after joining Zillow; the evidence shows that he deleted its content *before* leaving Move. Ex HH. And nothing in it

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reflects any Move trade secret; to the contrary, these musings concern issues and concepts already known in the industry. Finally, as discussed above, throughout this time Beardsley continued to perform, and to perform well, his duties for Move.

In short, there is simply nothing wrong or actionable about these documents or Mr. Beardsley's pre-departure activities: he had every right to contemplate employment with Zillow and even to plan to compete.[3] Mr. Beardsley does not deny that he kept private from Move his thoughts about joining Zillow and communications about Samuelson's employment discussions with Zillow. There is nothing sinister about wanting to keep such matters private. To the contrary, there is a legal right to do so.

B. Beardsley Acted in Good Faith Upon Departing Move.

Mr. Beardsley lived a majority of his time on the road in the course of his employment as Move's liaison to the real estate industry. His only computer during the time preceding his departure was a Move-issued laptop. Everything most folks have on their home computers Mr. Beardsley had on the Move laptop. Ex. O at 119, 124, 127-28.

In leaving Move, Mr. Beardsley sought to remove his personal information from the Move laptop, and to take it with him. *Id.* at 119, 124, 127-28. He sought to delete Move information to which he'd otherwise continue to have access, by deleting information from his gmail and other email accounts. *Id.* at 30, 129-30. And he sought to clean up his work space in returning the laptop to Move. Ex. O at 119.

With respect to his Move laptop, on March 15, 2014, Beardsley attempted to remove personal information that had been stored on it; to disconnect the laptop's connection to his personal Dropbox account and delete copies of his Dropbox documents that were stored on the laptop; to disconnect bank and email accounts; and to delete old email archives that Move's policies expressly required be deleted and which Move deemed "to have no business value". *Id.*

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[3] *E.g. Mamou v. Trendwest Resorts, Inc.*, 165 Cal.App.4th 686, 719-20, 81 Cal.Rptr.3d 406 (2008) ("An employee does not breach his duty of loyalty by *preparing* to compete with his employer," emphasis in original; [e]mployees whose contracts are terminable at will have a right to terminate their employment for the purpose of competing with their employer, and may plan and prepare to create a competitive enterprise prior to their termination, without revealing their plans to their employer, so long as they do so on their own time and with their own resources).

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at 11, 12, 119-133; Ex. E at 237-40, 293, 296; Exs. P, Q. His deletions encompassed his personal information or duplicates of information that otherwise existed on his Move laptop, Move's servers or elsewhere within Move. *See, e.g.,* Ex. O. at 121. Because Beardsley had watched pornography on his Move laptop, he also deleted the web browser history on that machine. Ex. O at 124-25.[4]

To get rid of work-related emails he otherwise would continue to have, Beardsley ran searches on his three personal email accounts to locate documents that were Move-related, and deleted those. Ex. O at 129-30.[5] Beardsley frequently used USB drives as part of his work (*e.g.* as a way to exchange, share or print information while on the road), and so he also reformatted the USB drives (which deletes their content) he had at hand when he left Move. Ex. O at 16, 91-93; Ex. S ¶¶ 2-3.

Beardsley promptly returned his Move laptop back to Move following his resignation. Ex. EE. He also advised Move's HR Director that he had reformatted thumb drives and deleted Move documents from his personal accounts. Ex. O at 21-22; Ex. T. Move did not respond that he'd not followed instructions or with any complaint; its HR director said simply: "Thx Curt." *Id.* Her response was commensurate with what had happened: nothing unusual. Nor did Move

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[4] The forensic evidence shows that when Mr. Beardsley resigned, he ran a Microsoft-installed utility called Cipher which overwrites free space on a hard drive – although a majority of that free space was likely already overwritten automatically by a default "TRIM" command setting on the computer, not with any involvement by Beardsley. Crain Decl. ¶¶ 31-35. Plaintiffs falsely accuse Beardsley of lying about using third-party software to remove data from his Move laptop (Mtn 14:1-9). The deposition testimony they cite, however, doesn't reference third-party software. Regardless, Plaintiffs' own expert agrees that he didn't: the expert unequivocally states that Cipher is a "Microsoft program" – *i.e.*, it is part of the Window's operating system on Beardsley's computers. Lloyd-Jones Decl. ¶17; *see also* Crain Decl. ¶¶ 31-35; Ex O. at 76.

Furthermore, Beardsley also ran this utility (as part of a batch file called "cleanup.bat") and another Windows utility ("Disk Cleanup") on his home office and Zillow computers in Fall 2014, for the same reason: to eliminate the record of his visits to pornography websites. Ex. R ¶¶ 3-4; Ex. O at 63-7, 78-9, 82-3. He feared that if his frequent viewing of pornography was revealed to his employer, colleagues in the industry, family and friends or the public, it would not only be extremely embarrassing but perhaps very damaging to his career, reputation, and relationships. Ex. R ¶ 4; Ex. O at 68-9, 74-5.

[5] Although Beardsley undertook reasonable efforts to rid himself of Move-related content, he did not find and delete every Move document located somewhere in his accounts; others, with the help of counsel and forensic experts, were found in response to Plaintiffs' discovery requests in this case, and then timely produced. Ex. O at 43-45, 129. This too is further evidence of good faith (and not, as Plaintiffs' allege, evidence of theft). Moreover, the production of these documents, which Plaintiffs claim are stolen trade secrets, is flatly inconsistent with spoliation.

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give Mr. Beardsley any reason to believe it might be bringing a lawsuit against him. Nothing Plaintiffs cite supports their assertion that Beardsley thought Move would sue him. He did not anticipate that he'd be defending a lawsuit (Ex. E at 44-5) and, in fact, even though Plaintiffs filed their complaint *after* Mr. Beardsley had resigned, they did not assert any claims against him.[6]

C. Beardsley Satisfied His Obligations with Regard to Plaintiffs' Subpoena.

Plaintiffs continued to treat Mr. Beardsley as a non-party to their claims against Zillow and Samuelson, serving a third-party subpoena upon him in July 2014. Ex. Gallagos Decl. at Ex. S. Plaintiffs' April 8, 2014 Amended Complaint (Dkt. 57), operative at the time, made no mention of Beardsley.

Pursuant to CR 45, Beardsley timely served objections, including an objection to the request for electronic storage devices. *Id*., Exs. U, V. Counsel met-and-conferred regarding the objections, and discussed the scope of documents that would be produced, which was then confirmed in writing. Ex. V. In that process, and thereafter, Plaintiffs neither demanded a broader production, nor suggested that the Western Digital device or two USB devices that they now complain are missing might contain relevant evidence, *nor even mentioned them at all* – although (a) they had possession of and had forensically examined Mr. Beardsley's Move laptop and (b) they did expressly name another external drive (a 32 gb SanDisk Cruzer flashdrive that Beardsley connected to his Move laptop on March 15, 2014 ("the SanDisk 32"), which accordingly was preserved. *Id*., Exs. W, V. On September 26, 2014, Beardsley produced documents responsive to the narrowed scope of the subpoena. *Id.*, Ex. X. Plaintiffs accepted this production, and did not suggest that anything else should be preserved.

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[6] Plaintiffs misrepresent the record—and are in conflict with their own expert's analysis—by asserting that Beardsley deleted his email archives *after* Move's HR Director, Carol Brummer, requested that he not erase data from his Move-issued devices before returning them. Mtn. 9:35-41. Beardsley deleted those archives on March 15. Lloyd-Jones Decl., ¶ 17. Ms. Brummer didn't make her request until the following day, on March 16. Gallegos Decl., Ex. R. In any event, Beardsley was under no obligation to comply with Ms. Brummer's request. As noted above, the personal material and information on that laptop were his—and not Move's—business.

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D. Beardsley Has Complied With His Discovery Obligations, and Then Some.

Beardsley was added as a party in this case on March 20, 2015—a year after Zillow and Samuelson were sued and approximately six months after satisfying his obligations under the subpoena. *See* Dkt. 499M.

1. Beardsley's preservation efforts were prompt and continuing.

Plaintiffs first gave Beardsley indication that he might be added to this lawsuit in February 2015. Ex. Y. On March 9, 2015, forensic images of Beardsley's home office and Zillow computers were made. Stephen Decl. ¶ 37. Additional images of these computers were made on May 5 and 6 to ensure they could be reviewed and searched for information responsive to Plaintiffs' discovery requests in light of the Special Master's April 30, 2015 cutoff date for document collection in response to discovery requests. *Id.*

Similar efforts to forensically preserve Beardsley's post-Move iPhone, his iPad mini, three personal email accounts, and data in four cloud accounts were undertaken in April and May 2015. *Id.* Also in April 2015, Beardsley's access to the three personal email accounts was severed (one was a Gmail account, meaning access to his Google Drive was also severed). *Id.* In the summer of 2015, shortly after they were requested, all USB drives that Beardsley found were provided to counsel and imaged; there are 13. *Id.*

2. Beardsley has timely responded to Plaintiffs' discovery requests.

In April 2015 – the month after Beardsley was sued – Plaintiffs served three sets of interrogatories and two sets of requests for production on him. Stephen Decl. ¶ 38. In accordance with the Special Master's May 11 Order (Dkt. 628), Beardsley timely served objections and responses to all five sets of the April discovery requests, and then timely produced documents on June 1. *Id.* Beardsley continued to respond to Plaintiffs' additional discovery—including supplementing where appropriate—in May, June, July, and December of 2015. *Id.* All told Beardsley has produced over 3,800 documents (some 14,800 pages) that Plaintiffs have asked for. *Id.* ¶ 40.

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On April 30, 2015, Plaintiffs served Beardsley with a CR 34 request for inspection of a SanDisk Cruzer USB device connected to Beardsley's Move Laptop on March 15, 2014 and identified that device by serial number. Ex. Z. This is the same device that had been identified in the July 2014 subpoena—and which, since Plaintiffs had identified it, had been preserved. Plaintiffs April 30 requests did not request, and did not mention, the Western Digital or the two USB devices that they now allege are critical. On June 10, 2015, for the first time, Plaintiffs identified certain other external devices connected to the Move laptop in March 2014.[7] Plaintiffs had never previously expressed interest in or even mentioned these devices. Stephen Decl. ¶ 47-49.

Not until June 18, 2015 did Plaintiffs serve a discovery request for those devices (the Western Digital and three USB devices). Ex. BB. Beardsley timely responded: "to the extent that the four storage devices identified in this request are within Mr. Beardsley's possession, he will comply with the Court's forthcoming order upon the Special Master's Report and Recommendation;" and he has fully complied with that order. Ex. CC at 6. On July 15, 2015, Beardsley voluntarily disclosed that, in late August or September 2014, he had disposed of the Western Digital device because it had failed and was no longer functional. Gallegos Decl. at Ex. 2. Of the three USB devices, one drive was located (the 1104 USB), and two have not been located (the SanDisk 64 which much earlier had been given to Mr. Beardsley's college-age son, and the 15AA USB; collectively, the "two lost USBs").[8] Ex. O at 9-14, 18. There is nothing nefarious about discarding a device that stops working, or about giving away thumb drives.

Also on July 15, 2015, Beardsley disclosed that two cleanup programs ("cleanup.bat" and the "Disk Cleanup" program incorporated in Windows' operating system) had been launched on his home office computer (both on October 11, 2014) and Zillow computer

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[7] Plaintiffs were refusing to produce Mr. Beardsley's Move laptop for inspection at the time these were identified, although Beardsley had requested inspection of it three months earlier, in April 2015, and the Court had ordered them to do so. Ex. AA. Thus, Beardsley had no way to know of these devices' connections (which occurred over a year prior), or their serial numbers, and could not test or verify Plaintiffs' assertions at the time made.

[8] Plaintiffs incorrectly assert that three USBs are missing, ignoring counsel's September 2015 correspondence that the 1104 USB had been located. Ex. OO.

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(cleanup.bat on September 29 and Disk Cleanup on November 11). Gallegos Decl., Ex. Z. Beardsley made this disclosure entirely voluntarily. Contrary to Plaintiffs' assertions, these programs were not launched "while the subpoena was pending" (Mtn 11:5-9); Beardsley's obligations as to the subpoena were satisfied on September 26, 2014.

On September 30, 2015, the Court entered an order containing the Protocol Governing Neutral Expert Review recommended by the Special Master (the "Protocol").[9] Dkt. No. 821. Beardsley has provided to the neutral two personal computers (as well as his Zillow laptop), his iPad, his current iPhone, his iPhone while used at Move, 13 USB drives, and access to his four cloud accounts. Stephen Decl. ¶ 50. Not all of these devices are subject to the Protocol, but Beardsley nonetheless provided them in a good faith effort to make the process as efficient as possible and in the interest of full disclosure. *Id.*

E. Beardsley Has Not "Lied" to Plaintiffs or "Misled" The Court.

Plaintiffs' accusations that Beardsley "lied" and "misled the Court to cover up [his] evidence destruction" are false and unsupported. There is no evidence, and Plaintiffs cite none, that Beardsley "lied about the burner phone" or "denied" the existence of such a phone.

Likewise, Beardsley did not lie about the MLS spreadsheet or the AOL Update, the so-called "stolen Move databases." Beardsley's counsel did not "accidentally produce[ ]" these documents. The MLS spreadsheet was timely produced in response to Plaintiffs' discovery requests on June 1, 2015 – the date in the Special Master's May 11, 2015 Order for parties' productions in response to April 30 requests. It was mistakenly given the wrong confidentiality designation, but was quite intentionally produced as part of a process that used a forensic expert to search for all responsive matter.[10]

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[9] Plaintiffs falsely state that Defendants "vigorously opposed" a forensic inspection of their devices and cloud accounts. Mtn. 13:8-23. To be clear: what Defendants objected to was Plaintiffs' demand for unfettered access to those devices and accounts notwithstanding that they contained both privileged and non-responsive private and personal information. Gallegos Decl. at Ex. W. Defendants themselves proposed what the Court then ordered: the use of a forensic neutral for the inspection as an alternative to Plaintiffs' expert's direct inspection, but Plaintiffs rejected that proposal. *Id.* at 6-7.

[10] If evidence about mistaken confidentiality designations and supplemental document productions during discovery are allowed as relevant, then the trial of this matter will be all about the discovery process itself, because Defendants can demonstrate thousands of incorrect designations by Plaintiffs (e.g. publicly available documents

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Crocker's speculative and inconsistent testimony provides no support for Plaintiffs' conclusion that what he supposedly saw was the MLS spreadsheet or anything stolen. Crocker testified that, in fact, he didn't recognize the spreadsheet and doesn't know what it was. Ex FF at 57, 77. Indeed, forensic analysis confirms that *the MLS Spreadsheet in fact was never opened on Beardsley's Zillow computer*, the only computer Crocker ever saw Beardsley use. *Id.* at 72, 77; Crain Decl. ¶ 29. Crocker's credibility is also seriously in question: he declined to make any mention of any of this until he was fired, never said anything about this to anyone at Zillow notwithstanding an express whistleblower policy that assured him of confidentiality, and his testimony at his deposition was directly contrary to what he'd earlier told Zillow counsel, that he had no reason to believe that Mr. Beardsley ever used any Move documents. (*Id*. at 237-8). Put simply, the evidence demonstrates unequivocally that whatever Crocker saw or thinks he saw on Beardsley's Zillow computer, it wasn't the MLS spreadsheet that Beardsley inadvertently discovered and then deleted in April 2014. Plaintiffs' suggestion that it was the same spreadsheet not only is without support, but is affirmatively refuted by the record.[11]

Finally, Beardsley did not mislead the Special Master. Defendants voluntarily disclosed the discarding of the Western Digital drive and the launching of the cleanup programs, precisely to ensure the integrity of the discovery process. Gallegos Decl. at Ex. Z. Again, it was Defendants who suggested a forensic examination of their computers by a court-appointed neutral; Plaintiffs' assertion that Beardsley would have withheld the disclosures had the Special Master not ordered the neutral inspection—which Defendants themselves had suggested—makes no sense at all.

III. ISSUE PRESENTED

Should Plaintiffs be awarded spoliation sanctions when they have failed to establish that (a) Beardsley's actions were in bad faith, (b) the information at issue was important and unique

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designated not only as confidential but as counsel-eyes-only), and thousands of pages of documents responsive to earlier requests that Plaintiffs produced only months later in a supplemental production.

[11] Plaintiffs' assertion that the documents produced by Mr. Beardsley contain "stolen" trade secrets are at odds with their spoliation claim. None of these were deleted—refuting Plaintiffs' claims of intentional spoliation. To the contrary, they were produced from the locations where they had been stored. Mtn. at Exhs. E, F, G.

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evidence in this case, (c) the record is ripe for a determination of any prejudice, (d) the requisite prejudice as a result of that loss; or (e) the sanctions requested are warranted under the law.

IV. EVIDENCE RELIED ON

This brief relies on the declarations of Andrew Crain and Michele Stephen and exhibits attached thereto (including the deposition testimony of Curt Beardsley, which was elicited by Plaintiffs themselves); the pleadings and other materials filed with this Court; and the evidence relied on in Zillow, Inc.'s and Errol Samuelson's materials in opposition to Plaintiffs' motion.

V. ARGUMENT AND AUTHORITY

A. Legal Standard for Spoliation Sanctions.

1. Plaintiffs ignore Washington law on spoliation.

Less than four months ago, the Washington Court of Appeals comprehensively reviewed Washington spoliation law. In *Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448, 360 P.3d 855 (2015), the court carefully analyzed prior Washington decisions regarding spoliation, the policy underpinnings of the doctrine, and the divergent approaches to spoliation taken by various federal and state courts. *Cook* is the up-to-date statement of Washington spoliation law, but Plaintiffs' motion does not even mention *Cook*.

2. In Washington, a spoliation sanction requires proof of bad faith and intent to destroy evidence.

Spoliation is the "intentional destruction of evidence," *Henderson v. Tyrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996). As *Cook* makes clear, under Washington law "intentional" equals bad faith—i.e., an intent not just to do the act that results in the loss of evidence but to gain a litigation advantage as a result. "[U]nless there was bad faith, there is no basis for 'the inference of consciousness of a weak cause,'" which is "the evidentiary inference that spoliation creates[.]" *Cook*, 360 P.3d at 867 (quoting *Henderson*, 80 Wn. App. at 609). In other words, the logic underlying the penalty requires a finding of a bad faith intent to destroy relevant evidence.

Cook illustrates the point. There, the trial court awarded sanctions for destruction of a truck whose event data recorder contained evidence about an accident that may have been "'very

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useful' in determining precrash speed." *Id.* at 858-59. The plaintiff ("Cook") had stored the truck following the crash, where his expert had examined it but not the data recorder. *Id.* at 858-59. Cook's lawyer thereafter authorized the sale of the truck before the defendants had a chance to inspect it. *Id.* at 859. Although the trial court found that Cook had not acted in bad faith or with deliberate intent to destroy evidence, it nonetheless granted the defendants' motion to preclude his expert's testimony and to mandate an adverse inference from the loss of evidence as sanctions for spoliation, because Cook had been aware of the importance and relevance of the vehicle when it was sold. *Id.* at 860.

The Court of Appeals reversed, holding that Washington law imposes no general duty to preserve evidence, even where litigation is foreseeable; rather, bad-faith intent is required to impose spoliation sanctions. *Id.* at 866-67. In doing so, the court noted the lack of uniformity in the law among the states and across the federal courts, discussing at length the federal authority cited by the defendants there. *Id.* at 862-67.

Cook did not change but affirmed the Washington standard for a spoliation determination. This standard was first articulated in *Henderson*, which also involved a serious car accident. Blood samples and other evidence from the car might have been helpful in identifying the driver—the central issue in the case. 80 Wn. App. at 608. Thus, a year before the suit was filed, the lawyer for Henderson asked Tyrell to preserve the car, but just before the suit Tyrrell nonetheless had the car salvaged. *Id*. at 603-04. Notwithstanding Tyrrell's destruction of evidence on the eve of litigation, the spoliation was not sanctioned because there was no evidence that Tyrrell had acted in *bad faith* or with *conscious disregard of the importance of the evidence*, and there was no general duty to preserve the evidence. *Id*. at 610. Rather, the testimony of Tyrrell that he got rid of the car because it reminded him and his mother of the crash provided an acceptable explanation. *Id*; *see also Homeworks Const., Inc.*, 133 Wn. App. 892, 899-901, 138 P.3d 654 (2006) (reversing trial court's award of summary judgment as a spoliation sanction in the absence of a finding of bad faith); *Ripley v. Lanzer*, 152 Wn. App. 296, 326, 215 P.3d 1020 (2009) (affirming denial of summary judgment in a medical-

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malpractice case where the defendants had disposed of the scalpel used in the procedure because there was "no bad faith or other reason to show that [the disposal] was intended to destroy important evidence").

Plaintiffs ask this Court to do exactly what *Cook* reversed the trial court for doing—impose a spoliation sanction based upon destruction of evidence when a party was alleged merely to be on notice of litigation, without proof of bad faith. Plaintiffs do so by selecting certain federal cases that apply a negligence standard based on a common law duty to preserve evidence, a duty at odds with the law of Washington.

3. A spoliation sanction requires proof that lost evidence was important.

In addition to bad faith, a sanction for spoliation requires a showing that the missing evidence was sufficiently important. *Tavai v. Walmart, Inc.*, 176 Wn.App. 122, 135, 307 P.3d 811 (2013). "Whether the missing evidence is important or relevant depends on the particular circumstances of the case" – i.e., whether the loss of evidence resulted in an investigative advantage in light of the other evidence that *is* available. *Henderson*, 80 Wn. App. at 607-08. It is the moving party's burden to establish, "based on concrete evidence rather than fertile imagination, that access to the [lost material] would have produced evidence favorable to [their] cause." *Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 167 F.R.D. 90, 110 (D. Colo. 1996).

Similarly, courts agree that a spoliation sanction must be supported by a finding both that the lost or destroyed evidence was relevant and that its loss caused the moving party to suffer prejudice. *E.g.*, *Reinsdorf v. Sketchers U.S.A.*, 296 F.R.D. 604, 627 (C.D. Cal. 2013) "In the spoliation context, relevance means something more than sufficiently probative to satisfy Rule 401 [ ]. A discarded document is relevant where a reasonable trier of fact could find that the document either would harm the spoliator's case or support the innocent party's case." *Passlogix, Inc.*, 708 F. Supp. 2d 378, 410 (S.D.N.Y. 2010); *see also GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc.*, 282 F.R.D. 346, 353 (S.D.N.Y. 2012) (a court should never impose spoliation sanctions unless there has been a showing of prejudice); *Automated Solutions Corp. v. Paragon Data Sys., Inc.*, 756 F.3d 504, 513-14 (6th Cir. 2014) (affirming denial of spoliation

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sanctions where plaintiff did not prove that defendants had used the allegedly failed and missing hard drives to develop the software at issue in the case).

B. Beardsley Did Not Act in Bad Faith to Deprive Plaintiffs of Evidence, and There is No Showing Any Important Evidence Was Destroyed or Lost.

1. Beardsley's actions upon his departure from Move.

Data on the Move laptop. Plaintiffs contend that Mr. Beardsley rendered unrecoverable the emails he deleted to comply with Move company policy when he ran the Cipher program upon his resignation. But Mr. Beardsley had no basis to believe he would be sued and no duty preserve; moreover his efforts to remove personal information and take it with him, and to rid himself of Move information in personal spaces, are not wrongful. Further, Plaintiffs offer no reason to believe that anything in those old, archived emails is unique, relevant information that cannot be located elsewhere in any number of locations at Move or otherwise. *See* Crain Decl. ¶¶ 7, 36-37. Moreover, the forensic analysis of the Move laptop reveals that Cipher did not cause anything to be lost at all: an automatic overwriting commend called TRIM, which was automatically enabled on that laptop when Move gave it to Beardsley, itself caused the permanent overwriting of deleted information before Cipher was run. Crain Decl. ¶¶ 31-35.

Emails in Personal Accounts and Text Messages. Plaintiffs point to two emails and a text message to assert that Beardsley deleted emails and texts in bad faith upon his departure from Move. As discussed above, these complaints rely on a non-existent duty to preserve, ignore that Mr. Beardsley did not think he would be sued, and ignore the demonstration of good faith of his actions upon departure. Furthermore, there is no evidence as to *when* these two emails and single text were deleted—it could have been days after being sent and long before March 2014. Crain Decl. ¶¶ 48-49. And, of course, those documents were produced which is why Plaintiffs have them; thus they establish only that Defendants have complied with discovery in good faith. Crain Decl. ¶ 7. Plaintiffs also ignore the substantial amount of other communications in Defendants' document productions and text messages produced from Beardsley's devices (*see* Section II(D)(2) below).

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Reformatted SanDisk 32. Plaintiffs falsely state that Beardsley "erased" the SanDisk 32 right before providing it to the neutral. Mtn. 11:1-4; 15:4-5. That simply isn't true: the SanDisk 32 was reformatted shortly after Beardsley saw it contained Move documents, on April 26, 2014—over a year and half before devices were provided to the neutral, well before any subpoena, and well before there were any claims against him. Crain Decl. ¶ 29. Indeed, with respect to the Move documents, "he deleted the documents to avoid impropriety, not to engage in it." *N3 Oceanic, Inc. v. Shields*, 2006 WL 2433731 (E.D.Pa. 2006) (denying spoliation sanctions where former employee, after resigning, erased from his computer copies of documents containing information he believed to be property of his former employer).

2. The Western Digital hard drive and the two lost USBs.

a. There is no basis for a duty to preserve these devices.

Plaintiffs served the third party subpoena on Beardsley four months after asserting their claims against Samuelson and Zillow, but not against him. He was not a party and there were no claims against him; indeed, Plaintiffs' complaint didn't even reference him. There is no basis to graft upon Beardsley the broader preservation obligations of a party.[12]

Further, Beardsley timely objected to the subpoena on July 29, 2014, on grounds including relevance and breadth; that objection ended his obligation to produce personal documents and Plaintiffs never moved to compel. CR 45(c)(2)(B). Nonetheless, on August 14, 2014, Beardsley offered to produce a scope of documents tailored to the claims in the case; Plaintiffs then accepted and never objected to this narrowed scope. *That scope did not include the three drives the loss of which Plaintiffs now complain about*. Beardsley was under no duty to preserve personal documents and devices not within the agreed scope of the subpoena. *See* 9 Sedona Conf. J. 197, 199 and 202 (agreement to limit subpoena's scope also limits scope of

[12] *See* The Sedona Conference® Commentary on Non-Party Production & Rule 45 Subpoenas, 9 Sedona Conf. J. 197, 199 (2008); *see also DeGeer v. Gillis*, 755 F. Supp. 2d 909, 918 (N.D. Ill. 2010) (quoting the Sedona Commentary: "burdens of preservation . . . that the law imposes on litigants should not be the same for non-parties").

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responding party's preservation obligation, and their duty to preserve ends upon production of information that is responsive to that agreed upon scope).

Moreover, even though they knew about the Western Digital and USB drives, Plaintiffs did not mention those in the subpoena or in any of the discussions regarding its proper scope—and that is the only reason efforts weren't made to preserve them. The one drive they asserted was of interest (the SanDisk 32) was looked for, found and reviewed for responsive information and, even though the device itself was excluded from the narrowed scope of the subpoena, was preserved. Plaintiffs waited another year, until June 2015, to mention the Western Digital and the other USB drives they now assert are so important (without any demonstration that they are likely to contain relevant evidence).

Moreover, there is no evidence that the devices contained unique, relevant information; as noted above, the evidence in the record is that these devices contained either personal documents or copies of Move documents put there to do his job for Move (and for no other reason). Ex. O at 16-17, 91-6, 100; Ex. R ¶ 2. Plaintiffs' assertion of their importance is based solely on the fact of their connection to the Move laptop in March 2014 (Mtn 9:16-29; 14:41-15:2), but that is not itself reason to impose a duty to preserve them. In short, Plaintiffs' argument is circular, and assumes the facts that Move must but cannot prove: that Beardsley actually stole trade secrets. If he did not, of course, then he had no basis to believe there was anything relevant to such an allegation on those drives, proving his testimony about his good faith.

In fact, forensic analysis to date indicates they *did not* contain unique, relevant evidence: (i) the *only* documents opened from the Western Digital prior to its destruction were personal, and the drive was *never connected* to Beardsley's Zillow laptop; (ii) there is no evidence that the SanDisk 64 was connected to *any* of Beardsley's computers after he left Move; and (iii) there is no evidence that *any* documents were opened from the 15A USB after Beardsley left Move. Crain Decl. ¶¶ 25-26, 28, 30.

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As noted above, spoliation sanctions require a finding that the lost evidence is important to the case, and that its loss is prejudicial. The mere fact that something may have been lost is not enough, no matter how urgently the party seeking sanctions insists that it was "critical." *See GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc.*, 282 F.R.D. 345, 358-59 (S.D.N.Y. 2012) (rejecting plaintiff's "vastly overblown" insistence that deleted emails went to "the heart of this case" and refusing to assume their relevance).

b. In any event, Beardsley did not act in bad faith.

Even if these devices had contained unique and important documents, Beardsley did not destroy them with the intent to deprive Plaintiffs of evidence. Plaintiffs misrepresent the circumstances regarding these devices. Beardsley disposed of the Western Digital in late August or September 2014 because it had been failing and was no longer reliable, and then failed yet again at that time after he'd dug it out of a drawer and connected it to look for a personal document he wasn't able to find elsewhere. Ex. O at 94-5, 98, 100. He did not believe that he was under an obligation to preserve it (as explained above, there is no basis to say he was), and did not think anything on it had relevance to this lawsuit (there is no reason to think there was). Ex. R ¶ 2. *See Automated Solutions Corp.*, 756 F.3d at 513-14 (burden to show missing hard drive and server contained evidence relevant to copyright claim not met where assertions of relevance were conclusory and unfounded).

Likewise there is no evidence of bad faith intent to deprive Plaintiffs of the two lost USBs. Beardsley testified that shortly after leaving Move he reformatted the SanDisk 64 and gave it to his son who is in college; although both have looked for it, they have not been able to find it. Ex. O at 13-4. That is not bad faith – that is life.

c. Regardless, Plaintiffs' inaction precludes spoliation sanctions.

Plaintiffs' delay in identifying these devices not only supports a finding that Beardsley had no duty to preserve them and rebuts any suggestion of bad faith, it also precludes spoliation sanctions. Spoliation sanctions are not appropriate where the complaining party fails to give notice of its interest in the specific discovery prior to its destruction. *Fujitsu Ltd. v. Federal*

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Exp. Corp., 247 F.3d 423, 436 (2d Cir. 2001) (holding trial court did not abuse discretion in denying request for spoliation sanctions because the complaining party did not request inspection of damaged shipping container despite having notice of its existence); *Klezmer ex rel. Desyatnik v. Buynak*, 227 F.R.D. 43, 52 (E.D.N.Y. 2005) (denying plaintiffs' request for spoliation sanctions because plaintiffs failed to request an inspection); *Sterbenz v. Attina*, 205 F. Supp. 2d 65, 74 (E.D.N.Y. 2002) (three months was adequate opportunity to inspect vehicle and any detriment suffered by complaining party was its own fault); *Gaffield v. Wal-Mart Stores East, LP*, 616 F. Supp. 2d 329, 338 (N.D.N.Y. 2009) (sanctions not warranted where plaintiff failed to inspect bicycle in nearly two year period prior to its disposal).

3. The cleanup programs on the home office and Zillow computers.

To be sure Mr. Beardsley regrets running the "cleanup" programs, which we recognize could raise concerns. Plaintiffs nonetheless must sustain their burden and establish that Beardsley acted with bad faith in so doing, and also that important evidence was lost as a result of those programs. They have failed to do so.

Beardsley launched the deletion or "cleanup" programs to hide what he regards as a shameful history of regular visits to hardcore pornography websites. He did not act with any intent to destroy anything relevant to this case. Ex. O at 57-60, 63-66, 68, 74, 76-84, 98-99; Ex. R ¶ 4. Beardsley is deeply religious, and often stands in to preach at his local church. *Id.* He was profoundly ashamed of what he viewed as a serious moral failing. *Id.* He struggled with his pornography usage, and did not want his new Zillow colleagues, family, or those in the industry in which he worked to know about it. *Id.* He feared what exposure of his pornography use would do to him personally and professionally, that it would be the first thing everyone thought about when they met or saw him. *Id.* Further, the cleanup programs, even if effective, only acted upon already deleted matter. Crain Decl. ¶¶ 31-34, 40, 45-47. Because Mr. Beardsley had not saved and then deleted Move documents on either of these computers (both of which he started using after he left Move), he had no reason to believe, and still does not

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believe, anything relevant to this case was or would have been subject to Cipher. Ex. O at 90-1; Ex. R ¶ 4.

Plaintiffs provide no evidence to undermine, much less to rebut, Beardsley's testimony about his intent. As noted above, Beardsley in fact did make efforts to erase evidence of pornography on the Move laptop. Crain Decl. ¶ 40. And, from a technical perspective, the actions he took on his computers were a reasonable way for an average person to try to eliminate irrelevant pornography. *Id.* ¶¶ 41, 44-45.

The facts also undermine any assertion that relevant evidence was lost as a result of these programs. With respect to the Zillow laptop, any data deleted by Beardsley for any reason would have been eliminated soon thereafter regardless of whether Beardsley ran Cipher, given that computer utilized the TRIM command. Crain Decl. ¶ 47. In fact, forensic analysis indicates TRIM is responsible for the majority of what has been deleted from that computer's unallocated space (where deleted material resides until overwritten). *Id.* Forensic analysis of the home office computer is ongoing and will reveal information about whether and, if so, what information has been deleted from that computer.[13] Crain Decl. ¶ 43. Plaintiffs fail to acknowledge not only this, but also that each of Beardsley's four cloud accounts are under review by the forensic neutral and contain information about activity in the account. Crain Decl. ¶ 42. In sum, Plaintiffs make no showing that any relevant and unique evidence was lost as a result of these programs. *See Arthrex, Inc. v. Parcus Medical, LLC*, 2014 WL 2742813 (M.D.Fla. 2014) (finding no intent to destroy evidence despite deletions on computer and thumb drive, a server and other media, as deleted documents were likely personal or duplicates; denying spoliation motion despite considering defendant's actions "troubling").

[13] For example, based on forensic analysis to date, there is no evidence indicating data related to this litigation was deleted or otherwise affected by the launching of Disk Cleanup (which Plaintiffs mischaracterize as a wiping program) on this computer. Crain Decl. ¶ 46.

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C. Plaintiffs' Motion is Premature in Any Event.

1. Bad faith intent requires findings based on live testimony.

Under Washington law, a spoliation sanction requires a finding of bad-faith intent. (*See* Section V(A) above) Intent is an issue of fact that should be decided based on live testimony. *See Botell v. United States*, 2013 WL 1178226, at *12 (E.D. Cal. Mar. 20, 2013) (declining to infer spoliation before trial because there was "no opportunity to judge the credibility of these witnesses without live testimony and cross-examination"); *Williams v. Klem*, 2010 WL 3812350, at *3 (M.D. Pa. Sept. 22, 2010) (denying motion for pre-trial ruling imposing spoliation sanctions because the disputed intent of alleged spoliator was an issue "inextricably tied to witness credibility determinations" not well-suited to pre-trial ruling).

Here, there is no need to decide whether to find spoliation or impose sanctions now, and live testimony will allow the fact-finder to assess the witnesses' credibility and determine their intent. At trial, if appropriate, the jury can be instructed regarding the standard and applicable inferences, if any. *See Nucor Corp. v. Bell*, 251 F.R.D. 191, 195 (D.S.C. 2008) (allowing the jury to determine whether spoliation had occurred and, if so, apply a presumption).

Moreover, Plaintiffs are asking for more than just sanctions: they are asking for dispositive relief. Such relief is not warranted under Washington law (*see* Section V(D) below), but even if it were, summary adjudication would be inappropriate given the disputed issues of material fact, including intent. *See Lokan & Assocs., Inc. v. Amer. Beef Processing, LLC*, 177 Wn. App. 490, 311 P.3d 1285 (2013) (reversing summary judgment because issues of fact, including parties' intent, were in dispute); *Zimmerman v. W8less Products, LLC*, 160 Wn. App. 678, 248 P.3d 601 (2011) (same). To the contrary, the Washington Supreme Court has stated that, for an "outcome determinative credibility issue," it is preferable for trial judges to hear the witnesses' live testimony. *In re Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003).

2. It is premature to assess the importance of the allegedly lost evidence.

The relative importance of missing evidence must be evaluated in the context of what evidence *is* available. *Henderson*, 80 Wn. App. at 607-08 (examining all other evidence

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produced to determine relative importance of lost evidence). Among other things, this requires that discovery be completed; before that, the court has, at best, an "incomplete picture" of the potential prejudice. *Scott v. Moniz*, 2015 WL 3823705, at *4 (W.D. Wash. 2015); *see also Davis v. Grant Park Nursing Home, LP*, 2010 WL 4642531 (D.C. 2010) (concluding that it was "premature to consider the question of sanctions until discovery ends….").

An extensive amount of documents and information has been produced by the parties.[14] Discovery does not close until April 1, 2016, and is ongoing, including, importantly, the ongoing forensic analysis of the devices and accounts at issue. Computer forensic tools and techniques can often recover data from various sources and devices even where deletions have occurred. Crain Decl. ¶ 7. And even where certain deleted content is not recoverable, forensics can reveal other details such as files names and dates that can provide meaningful information about the relevancy of the deleted content. *Id.*

D. The Sanctions Plaintiffs Seek Are Unsupportable under Washington Law.

1. There is no Washington authority to support the imposition of a terminating sanction for spoliation.

Plaintiffs can point to no Washington case in which a terminating sanction such as they seek was applied or upheld. In every reported case in Washington in which a party requested a terminating sanction, either the trial court denied the sanction and the appellate court affirmed, or the trial court granted it and the appellate court reversed.[15] Entering a default judgment here would be not only unwarranted: it would be unprecedented.[16]

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[14] For example, Defendants have produced over 192,000 documents, totaling over 871,000 pages of material – over 96,000 pages of which came from Mr. Beardsley. Stephen Decl. ¶¶ 40-45. Of that, Beardsley has produced over 3,800 documents (totaling over 14,800 pages). *Id.* Plaintiffs' failure to analyze this important context itself undermines their claim of supposed prejudice.

[15] *Henderson v. Tyrell*, 80 Wn. App. 592, 910 P.2d 522 (1996); *Ripley v. Lanzer*, 152 Wn. App. 296, 215 P.3d 1020 (2009); *Homeworks Construction v. Wells,* 133 Wn. App. 892, 138 P.3d 654 (2006).

[16] Plaintiffs seek to sidestep this by positing that no Washington court has seen spoliation of the magnitude they allege is present. (Mtn at 3) But as discussed above, Plaintiffs greatly overstate the magnitude of destruction, ignore the substantial quantum of undeleted and recovered data, assume without proof or basis that anything lost was important, seek to convert innocent activity that accompanies many job changes into something sinister, and ignore the evidence of the true reasons regarding what they complain about.

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Plaintiffs' argument to the contrary rests exclusively on federal cases—and extreme outliers at that. *Leon v. IDX Systems Corp.*, 2004 WL 5571412 (W.D. Wash. Sept. 30, 2004), *aff'd*, 464 F.3d 951 (9th Cir. 2006), for example, was premised on a general duty to preserve and a spoliation standard at odds with Washington law. The other cases Plaintiffs cite involve conduct that went far beyond even intentional destruction of evidence to include repeated instances of contempt and perjury that rendered any trial pointless. For instance, in *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337 (9th Cir. 1995), the counterclaim-plaintiff repeatedly violated the court's orders regarding talking to the media, concealed and lied about the existence of documents, attempted to mislead the court with apparently falsified financial records, and otherwise demonstrated "an abiding contempt and continuing disregard for this court's orders." *Id*. at 342, 349-352 (internal quotation marks omitted). In short, the sanctioned party would "say anything at any time in order to prevail in this litigation." *Id*. at 352 (internal quotation marks omitted).

Similarly, in *Volcan Group, Inc. v. T-Mobile USA, Inc.*, 940 F. Supp. 2d 1327, 1336-37 (W.D. Wash. 2012), the plaintiff "deliberately and repeatedly lied to both Defendant's counsel and the Court in the form of informal communications, sworn testimony, and in-court testimony," in addition to intentionally destroying and falsifying key documents. Thus, the court expressed its "biggest concern" as "the damage this litigation promises to inflict upon the integrity of the judicial process if it is permitted to continue" to trial where the plaintiff had "undermined the truth-finding function of the Court beyond repair." *Id*. at 1336, 1337. Plaintiffs' hyperbole aside, nothing of the sort is present here.

2. Plaintiffs are not entitled to the mandatory instruction they seek.

Even where a court finds intentional spoliation, it "may impose only the least severe sanction that will be adequate to serve its purpose in issuing a sanction." *Teter v. Deck*, 174 Wn.2d 207, 216, 274 P.3d 336 (2012). In some cases, this will be an adverse inference regarding what the evidence might have shown. *See Henderson*, 80 Wn. App. 592. But even "the adverse inference instruction is an extreme sanction and should not be given lightly."

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Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 220 (S.D.N.Y. 2003). This is because, "[i]n practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome." *Id.*

Here, in the alternative, Plaintiffs seek an instruction that the jury *must* presume that: (1) missing information would have shown that Beardsley "stole" Move information; and (2) Beardsley either conveyed that information to Zillow or used it on Zillow's behalf (the "Proposed Instruction", Mtn at 22:1-7.) There is no basis in the law for this remedy either. To the contrary, even where a presumption or adverse inference is warranted, Washington courts allow the jury to draw a general inference that the missing evidence may have been unfavorable to the spoliator or may tend to corroborate the plaintiff's case, not a presumption regarding specific findings of fact that would conclusively establish elements of a claim. *E.g.*, *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 386 (1977) (loss of evidence permits only general inference that the missing evidence would have been "unfavorable"; reversing broader inference).

Federal courts likewise have rejected such overreaching. Plaintiffs rely on *Nucor Corp. v. Bell*, 251 F.R.D. 191, 195 (D.S.C. 2008), but it does not support the relief they seek. Notwithstanding a finding of intentional spoliation by defendants there, the court found that a default judgment would be too extreme and that an adverse inference would suffice. *Id.* at 201-04. More than that, the court reviewed applicable law and determined the instruction should allow *the jury* to determine whether to apply the inference, with instructions setting forth the elements of spoliation and allowing the jury to conclude—if the elements were met based on the evidence at trial—"that the altered or destroyed evidence would have been unfavorable to defendants." *Id.* at 204. The instruction there, in an egregious case in which the court found intentional spoliation following consideration of live testimony and credibility, goes nowhere near so far as the one Plaintiffs seek here. In short, even if a presumption were warranted—which we submit, on the facts here, it is not—a presumption establishing key elements of Plaintiffs' claims or effectively entitling them to judgment goes far beyond what the law permits.

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VI. CONCLUSION

For all the reasons set forth herein, and in the Zillow and Samuelson motions in which Curt Beardsley joins, Plaintiffs' motion for spoliation sanctions should be denied.

RESPECTFULLY SUBMITTED: January 25, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2016, I served the documents described below:

- **DEFENDANT CURT BEARDSLEY'S OPPOSITION TO PLAINTIFFS' MOTION FOR EVIDENCE SPOLIATION SANCTIONS AGAINST DEFENDANTS;**
- **DECLARATION OF MICHELE STEPHEN IN SUPPORT OF DEFENDANT CURT BEARDSLEY'S OPPOSITION TO PLAINTIFFS' MOTION FOR EVIDENCE SPOLIATION SANCTIONS AGAINST DEFENDANTS AND EXHIBITS THERETO;**
- **APPENDIX OF NON-WASHINGTON AUTHORITIES IN SUPPORT OF DEFENDANT CURT BEARDSLEY'S OPPOSITION TO PLAINTIFFS' MOTION FOR EVIDENCE SPOLIATION SANCTIONS AGAINST DEFENDANTS; AND**
- **CERTIFICATE OF SERVICE.**

via e-filing and by email transmission at the email addresses provided to the following:

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

DATED on January 25, 2016 at Seattle, Washington.

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