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KING COUNTY
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CASE NUMBER: 14-2-07669-0 SEA

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

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

Plaintiffs,

v.

ZILLOW, INC., a Washington corporation,
ERROL SAMUELSON, an individual, Curt
Beardsley, an individual, and DOES 1-20,

Defendants.

NO. 14-2-07669-0

**PLAINTIFFS' MOTION FOR
EVIDENCE SPOILIATION
SANCTIONS AGAINST
DEFENDANTS**

REDACTED VERSION

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INTRODUCTION

No Washington Court, to our knowledge, has ever faced premeditated evidence destruction on the scale that has occurred here. Defendants, who knew from day one that they would be sued for their unlawful conduct, obliterated hundreds of gigabytes – hundreds of thousands of pages – of relevant files. They destroyed (or “lost” as they put it) at least a half-dozen key electronic storage devices, and wiped data from multiple computers, smartphones, and mobile devices. The most important emails and text messages in the case are gone and cannot be recovered. As one court has aptly put it: “Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence.”¹ This is an extreme case, and demands the harshest possible sanction.

In March 2014, Move’s Chief Strategy Officer, Errol Samuelson, and his right-hand man, Curt Beardsley, defected to Move’s largest direct competitor Zillow. Their move was the culmination of months of planning, in which they plotted to steal Move’s trade secrets to help Zillow “attack” Move, and strategized how they would carry out their plans without being viewed as double agents like the notorious “Vichy French.” After they decided to join Zillow, they stayed at Move for weeks, harvesting more trade secrets to take with them, while spending their evenings talking to Zillow CEO Spencer Rascoff on Samuelson’s self-described “burner” phone and clandestinely copying files from their Move computers. Confidential Move files have been found in their possession, including entire proprietary databases belonging to Move.

When they finally departed for Zillow, Samuelson and Beardsley went to stunning lengths to destroy the evidence of their misconduct. On his last day at Move, Samuelson destroyed all of the data on his Move-issued iPhone and iPad, deleted thousands of emails and other data (including calendars, notes, and task lists) from his Move computer, and wiped text messages from his burner phone. He destroyed or “lost” two USB drives that he plugged into his

¹ *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257, 258-59 (2007).

1 Move computer in the days before he left. He also attempted to pull off an elaborate hoax that
2 involved removing data from a Move laptop, cloning the cleansed hard-drive, and then returning
3 the clone to Move while keeping the original (which was filled with confidential Move files) for
4 himself.
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8 Beardsley was worse. Before returning his Move laptop, he deleted his entire 2013 email
9 archives. He ran special data-wiping software on his Move laptop to permanently delete files so
10 that they would not be forensically recoverable. At some indeterminable point in time, he deleted
11 texts to and from Samuelson from his cell phone. He also destroyed emails from his personal
12 email account that were sent and received during the critical November 2013 to March 2014 time
13 period, including emails with Samuelson discussing Zillow.
14

15
16 Beardsley continued trashing evidence after this lawsuit was filed, while he was a senior
17 executive at Zillow. He took an external hard drive that was expressly sought by a subpoena,
18 smashed it to bits, and threw the pieces into a garbage dump. He destroyed or “lost” three other
19 USB drives that were also sought by the subpoena. On top of that, while the subpoena was
20 pending, Beardsley ran two different software programs to permanently delete data on his home-
21 office computer and Zillow laptop. Beardsley claims he was trying to hide the fact that he used
22 those computers to watch pornography. But Beardsley did not care about keeping that a secret:
23 The laptop Beardsley returned to Move had evidence of his pornography use all over it that he
24 didn’t bother to erase.
25

26
27 Most of Beardsley’s evidence destruction occurred while he was employed by Zillow, yet
28 Zillow apparently did nothing to prevent him from destroying it and did not even discipline him
29 for wiping a Zillow computer while under a subpoena. To the contrary, Zillow has repeatedly
30 vouched for Beardsley’s honesty and denied that any evidence destruction occurred.
31

32
33 Defendants’ purposeful spoliation has radically altered the course of this litigation,
34 undermined this Court’s truth-seeking function, and severely prejudiced Plaintiffs. It is essential
35 that the Court sanction Defendants and send a strong message to them, and others who would
36

emulate their conduct, that evidence destruction will not be tolerated by the Washington state court system.

RELIEF REQUESTED

To our knowledge, no Washington state court has ever faced spoliation of this magnitude. Fortunately, federal case law – which Zillow admits applies in the absence of Washington case law – provides guidance. Where, as here, a party intentionally destroys so much evidence as to “undermine the integrity of judicial proceedings,” the appropriate sanction is to enter judgment against the spoliating party. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) (entering terminating sanctions where plaintiff ran wiping software on his computer prior to filing the lawsuit); *see also Cabinetware, Inc. v. Sullivan*, No. 90-313, 1991 WL 327959 at *4 (E.D. Cal. Jul. 15, 1991) (issuing default sanction against defendant whose deliberate evidence destruction demonstrated “contempt for the judicial system”).

At minimum, the Court should instruct the jury to presume that the missing evidence would have shown that Samuelson and Beardsley misappropriated Plaintiffs’ trade secrets and confidential information, and either disclosed it to Zillow or used it on Zillow’s behalf. This exact remedy has been applied in trade secret cases where, as here, the defendants copied the plaintiffs’ files then wiped computers to cover their tracks. *See, e.g., Advantacare Health Partners v. Access IV*, 2004 WL 1837997 (N.D. Cal. 2004) (in trade-secret case where defendants downloaded thousands of confidential files from plaintiffs’ system before leaving to start a competing firm and then used memory-wiping tools to purge their computers, appropriate sanction was “a presumption that [defendant] copied every file on the [plaintiff’s] system.”). The Washington Supreme Court agrees that a presumption must be drawn against a party who intentionally destroyed evidence. *See Pier 67, Inc. v. King County*, 89 Wash. 2d 379, 385-86 (1977) (where defendant King County destroyed assessment records in a case alleging discrimination in tax assessments, “the only inference which may be drawn” is that discrimination took place during the years for which there were no records).

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STATEMENT OF FACTS

I. Samuelson and Beardsley Plotted to Defect to Zillow and Take Move's Trade Secrets with Them.

In late 2013, after realizing their futures at Move were in doubt, Samuelson and Beardsley began communicating with Zillow and plotting to steal trade secrets and use them against Move. They drew up detailed plans, and devised strategies to "attack" ListHub, Move's listings syndication service. Gallegos Decl, Ex. A. They discussed how much money they could get from Zillow, and noted that they would likely be viewed as "Vichy French." *See id.*, Ex. B.

Even after they decided to join Zillow, Samuelson and Beardsley did not leave Move right away. Instead, they stayed for a while to harvest additional trade secrets to take with them to Zillow. As Judge Linde found when she issued a preliminary injunction against Zillow and Samuelson: "On March 3-4, at a time that Mr. Samuelson knew he would resign from Move and join Zillow, Mr. Samuelson received additional information on several confidential and sensitive strategies being pursued by Move and NAR. Mr. Samuelson obtained some of this information in response to communications he initiated." PI FOF ¶ 18. Judge Linde also found that, shortly before he left, Samuelson "rekindled" a conversation with Plaintiff National Association of Realtors ("NAR") about its "secret strategies." *Id.*, ¶ 19.

Evidence has come to light in this case showing that Samuelson and Beardsley's conduct was worse than Plaintiffs originally thought. In April 2014, a whistleblower – former Zillow Vice President Chris Crocker – came forward and revealed that Beardsley had a database stolen from Move that he was using while working at Zillow, and which he was hiding in a cloud account to avoid having to produce it. Gallegos Decl., Ex. C. All three Defendants forcefully denied these allegations. Then, in June 2015, Beardsley's lawyers accidentally produced a copy of the database, which apparently was saved on Beardsley's home computer – a computer he purchased *after* he left Move for Zillow. *Id.*, Exs. E, Q (Beardsley Dep. Tr. 60:13-16). The database was filled with proprietary, trade-secret information about nearly every MLS in the

1 county, and Move's confidential agreements and relationships with those MLSs. Ex. E. The
2 metadata associated with the database showed that Beardsley had accessed it while working at
3 Zillow. *Id.* Beardsley, now on this second or third different story, now claims he has no idea how
4 Move's proprietary database got on his home computer. *Id.*, Ex. Q (Beardsley Dep. Tr. 90:16-
5 23). A highly confidential Move strategy memo was also found in Beardsley's possession, as
6 well as another stolen database of Move. *See id.*, Exs. F, G.

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12 **II. Samuelson And Beardsley Knew They Would Be Sued And Took Steps To Cover**
13 **Their Tracks.**

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15 Months *before* they left Move, Samuelson and Beardsley foresaw this lawsuit. On
16 November 19, 2013, Samuelson warned Beardsley that their emails and text messages could be
17 subpoenaed in litigation, writing: “[I]t is probably best not to send emails (or even text
18 messages) on this topic since someone could, in hindsight, try to dig up (or subpoena) the
19 emails (or text messages which apparently are archived on my iMac.)” Lloyd-Jones Decl., Ex.
20 4 (emphasis added). In January 2014, Samuelson demanded a broad indemnity provision from
21 Zillow as part of his compensation package. In response to his demand, Zillow assured
22 Samuelson that it would “support” him if Move sued. Gallegos Decl., Ex. H.

23
24 In his deposition, Samuelson explained that he expected Move to sue him. Gallegos
25 Decl., Ex. I (Samuelson Dep. Tr. 163:24-164:6). He understood that he would have to produce
26 his communications in a lawsuit, testifying that he “could just imagine a demand for production
27 on [sic] give me everything related to Zillow.” *Id.* (Samuelson Dep. Tr. 163:17-19). Zillow
28 shared Samuelson's concern. Zillow CEO Rascoff testified that he too took steps to avoid
29 creating evidence that could be used in a lawsuit. *Id.*, Ex. J (Rascoff Dep. Tr. 458:23-459:16).

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31 Consistent with Samuelson and Rascoff's desire not to create a paper trail, in January
32 2014, Samuelson acquired his burner cell phone so that he could talk to Rascoff off the radar.
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34 See Gallegos Decl., Exs. K, L. Throughout the end of February and beginning of March, while
35 he was still working at Move, Samuelson had numerous burner-phone conversations with
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2 Rascoff. *See id.* The burner phone became known within Zillow as Samuelson’s “secret Zillow
3 phone.” *Id.*, Ex. K.
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5 **III. Samuelson Destroyed Evidence.**
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7 **A. Samuelson Spent His Last Weeks At Move Copying Move Files, Then Got**
8 **Rid Of The Evidence.**
9

10 In addition to gathering additional trade secrets to take to Zillow, and having secret
11 conversations with Zillow CEO Rascoff on his burner phone, Samuelson spent his last two
12 weeks at Move copying files from his Move-issued MacBook laptop onto portable USB drives.
13 Between February 17 and March 5, 2014 (Samuelson’s last day at Move), Samuelson connected
14 USB drives to his MacBook at least 9 different times. Lloyd-Jones Decl., ¶ 8. According to
15 forensic analysis, he used a Verbatim “Store N Go” USB drive, a Chipsbank USB drive; and a
16 LaCie Rikiki USB drive. *Id.* ¶4, 8.
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22 Samuelson claims he no longer has two of the three USB drives (the Verbatim “Store N
23 Go” and the Chipsbank USB drive). Gallegos Decl., Ex. N. Common sense dictates they were
24 destroyed or are being hidden. Without these devices, Move cannot ascertain with any certainty
25 what Move files Samuelson copied to take with him. *See* Lloyd-Jones Decl., ¶9.²
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29 **B. Samuelson Wiped All The Data From His iPhone and iPad.**
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31 Shortly before he left Move, Samuelson restored his Move-issued iPhone and iPad to
32 factory settings. Lloyd-Jones Decl., ¶ 11. Restoring an iPhone or iPad to its factory settings
33 destroys all of the data on it – including text messages, voicemails, emails, notes, calendar
34 entries, and so on – so that it cannot be recovered, even using forensic tools. *Id.*
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38 Samuelson’s iPhone contained critical evidence that has been destroyed. Samuelson used
39 his iPhone to communicate with Beardsley about their plans to leave Move for Zillow. For
40 example, the email Samuelson sent Beardsley warning him not to leave a paper trail was sent
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45 ² Samuelson did produce the third drive (the LaCie Rikiki). That drive had Move documents on it, confirming that
Samuelson was using the drives to copy Move data. *See* Lloyd-Jones Decl., ¶ 8.

1 from Samuelson's iPhone. *See id.*, Ex. 4. Consistent with Samuelson's instruction, Beardsley
2 deleted this text after he received it. Lloyd-Jones Decl., ¶ 21.³ Since Beardsley was also deleting
3 these communications on his end, *see id.*, ¶¶ 20-22, there is no way to know how many relevant
4 emails and texts have been permanently lost.
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7 Samuelson also deleted the local Outlook folder from his MacBook, which erased all of
8 the emails, calendar entries, task lists, notes, and other Outlook data. Lloyd-Jones Decl., ¶ 6. It is
9 impossible to fully quantify or recover the data Samuelson destroyed. *Id.*, ¶ 7. When data is
10 deleted from a MacBook, the deleted data is overwritten by the operating system and cannot be
11 recovered from the device, even using forensic tools. *Id.* None of this data-wiping was a mistake.
12 Samuelson has a computer programming background. *See* Gallegos, Decl., Ex. I (Samuelson
13 Dep. Tr. 11:17-25). He knew how to destroy data so that it would stay gone for good.
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15 **C. Samuelson Deleted Messages From His Burner Phone.**

16 In addition to wiping his iPhone and iPad, permanently deleting files from his Move
17 MacBook, and destroying or "losing" two USB drives, Samuelson *also* deleted text messages
18 that he sent and received on his secret Zillow burner phone. We know this because a few
19 messages slipped through the cracks. For example, one of Samuelson's first burner phone texts
20 was to Zillow CEO Rascoff, telling him he had "picked up a prepaid 'burner' phone this
21 afternoon." Gallegos Decl., Ex. K. Samuelson deleted this text from his phone, but Rascoff
22 produced it. *See id.*, Ex. K.
23

24 The same day he texted Rascoff, Samuelson sent a similar text to Beardsley, telling him
25 "[t]his is my new prepaid 'burner' phone." Lloyd-Jones Decl., Ex. 3. Beardsley and Samuelson
26 both deleted this message; however, Beardsley's attempted deletion was unsuccessful and the
27 message was ultimately recovered from his phone. *Id.*, ¶ 20. Again, with Samuelson and
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³ The text of the message was produced by Beardsley as part of an excel spreadsheet. *See* Lloyd-Jones Decl., Ex. 4. It is unclear how Beardsley's lawyers obtained it since Plaintiffs are in possession of, and have examined, both the phone that sent it and the phone that received it, and it does not exist on either phone. It is possible that the data Beardsley produced was recovered from a backup on his iCloud account, his iPad, or other media. *See id.*, ¶ 21.

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2 Beardsley *both* deleting the text messages they sent to each other, it is impossible to determine
3 how many key texts have been permanently lost.
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5 **D. Samuelson Tried To Steal An Entire Hard Drive Of Confidential Move Files.**
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7 Samuelson also tried to steal an entire hard drive of Move's trade-secret files. In
8 November 2013 – while discussing a potential move to Zillow – Samuelson was using a Dell
9 laptop Move had issued to him. The Dell laptop had numerous highly-confidential Move files on
10 it. When Move gave Samuelson the MacBook, Samuelson should have returned the Dell – but he
11 didn't. He slipped it under his bed. Gallegos Decl., Ex. M, ¶ 17.
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14 Samuelson did not return the Dell laptop when he left Move, even though Move asked
15 him for it multiple times. In fact, he resigned from Move on March 5, 2014, yet did not return the
16 Dell until May 12, 2014. *See* PI FOF ¶ 23. In other words, a new Zillow executive kept a highly
17 confidential Move computer for more than two full months. After this lawsuit was filed,
18 Samuelson revealed he had taken the laptop to a computer store to have the hard drive cloned.
19 *Id.*, Ex. I (Samuelson Dep. Tr. 353:22-354:6). Forensic analysis has shown that thousands of files
20 were deleted from the Dell laptop's hard drive, including by using a software program called
21 "Eraser." Lloyd-Jones Decl., ¶ 10. Samuelson has admitted his plan was to delete files from the
22 original hard drive, clone it, put the cloned hard drive in the Dell, and return the Dell to Move
23 while keeping the original hard drive for himself. *See* Gallegos Decl., Ex I (Samuelson Dep. Tr.
24 353:22-354:6). Although Judge Linde did not know the full scope of Samuelson's evidence
25 destruction at the time she issued the preliminary injunction, she was troubled by the fact that
26 Samuelson copied data from the Move-owned Dell laptop and refused to return it. *See* PI FOF ¶
27 23 (drawing adverse inference against Samuelson due to his destruction of evidence, including
28 erasing data from the Dell laptop and refusing to return it).
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2 **IV. Beardsley Destroyed Evidence.**

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4 **A. Like Samuelson, Beardsley Copied Files From His Move Laptop Right**
5 **Before He Quit To Join Zillow.**

6 After Samuelson decamped for Zillow on March 5, 2014, unaware that Beardsley had
7 been scheming with Samuelson for months, Move promoted Beardsley. Beardsley told Move he
8 was shocked and angered by Samuelson's departure, and professed to have had "no idea" that
9 Samuelson was even thinking of leaving Move. Gallegos Decl., Ex. P. That was a lie. In reality
10 Beardsley was secretly preparing to join Samuelson at Zillow, and to take Move documents with
11 him while squeezing a bit more information from Move.
12

13 Just as his boss Samuelson had done, Beardsley used electronic storage devices to copy
14 files from his Move laptop before he left. On March 4, 2014, the day before Samuelson quit,
15 Beardsley connected a Western Digital brand external hard drive to his Move-issued laptop.
16 Lloyd-Jones Decl., ¶ 12. Then, over the next 12 days, Beardsley connected four more USB drives
17 to his computer: a General USB flash drive, a General UDisk USB drive, a 64-GB SanDisk
18 Cruzer USB drive, and a 32-GB SanDisk Cruzer USB drive. *Id.*, ¶ 13. Beardsley has admitted
19 that he copied files, including Move-related documents, onto the 64-GB SanDisk Cruzer.
20 Gallegos Decl., Ex. Q (Beardsley 9/18/15 Dep. Tr. 107:10-108:20).
21

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23 **B. Like Samuelson, Beardsley Permanently Destroyed Files On His Move laptop**
24 **And Messages On His Move-Issued Cell Phone.**

25 Again, following in Samuelson's footsteps, Beardsley destroyed evidence on his Move
26 laptop and Move-issued cell phone. When Beardsley gave his notice on March 16, 2014, Move's
27 Director of Human Resources instructed him to return his laptop and phone *without* deleting any
28 data on them. Gallegos Decl., Ex. R. Beardsley did the opposite. Beardsley deleted his 2013
29 email archives – thousands of emails – from his Move computer. Lloyd-Jones Decl., ¶ 17.
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31 Even worse, Beardsley permanently destroyed an unknown amount of additional data on
32 his Move-issued laptop by running a wiping program called CIPHER.exe ("CIPHER") *nine times* in
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1 *his last three days at Move. Id.* Cipher overwrites the free space of a computer hard drive,
2 permanently destroying any deleted data. *Id.* Because Beardsley ran the Cipher program, it is not
3 possible to identify, or forensically recover, the files Beardsley deleted from his Move laptop. *Id.*
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7 Additionally, before he returned his Move-issued cell phone, Beardsley deleted his text
8 messages with Samuelson in which they discussed Zillow. We only know this because Beardsley
9 failed to completely erase a few relevant messages, such as Samuelson's "burner phone" text.
10 *See Lloyd-Jones Decl., Ex. 3.* Apart from the few isolated messages that we were able to recover,
11 the text messages Beardsley sent and received during the critical weeks before he left Move
12 appear to have been completely wiped out.
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17 **C. While Under A Subpoena In This Case, Beardsley Smashed One Device,**
18 **"Lost" Three Others, And Wiped Data From Two More Computers.**
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20 On June 16, 2014, Plaintiffs served a subpoena on Beardsley, who was not yet a
21 defendant in the case. The subpoena sought, among other things, "[a]ll electronic memory
22 devices (for example external hard drives or flash drives) onto which you saved documents
23 pertaining to the business of any of the plaintiffs or onto which you saved documents from any
24 computer issued to you by Move." Gallegos Decl., Ex. S. As noted above, in the two weeks
25 before he followed Samuelson to Zillow, Beardsley copied files from his Move-issued laptop to
26 at least five electronic memory devices (the Western Digital external hard drive, and four USB
27 drives). So these five devices were all directly responsive to the subpoena. *See id.*
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34 Beardsley did not produce the Western Digital hard drive or any of the other storage
35 devices in response to the subpoena. Instead, in August or September of 2014 – while the
36 subpoena was pending – Beardsley *smashed* the Western Digital hard drive and disposed of it at
37 his local garbage dump. Gallegos Decl., Ex. Q (Beardsley Dep. Tr. 99:5-102:1).
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41 As for the four USB drives, Beardsley claims he does not have three of them. *See*
42 Gallegos Decl., Ex. N. He finally coughed up the 32-GB SanDisk Cruzer in October of this year,
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1 when he was ordered to produce it to a neutral expert for forensic analysis. But Beardsley
2 reformatted (i.e., erased) the device before producing it. *See id.*, Ex. Q.

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5 While the subpoena was pending, Beardsley also ran two software programs – called
6 “cleanup.bat” and “Disk Cleanup” – to permanently wipe data from his home-office computer
7 and the Zillow-owned laptop that he used for work. Gallegos Decl., Ex. T. A former software
8 developer, he even wrote one of the programs himself (Beardsley Dep. Tr. 76:3-15). The purpose
9 of these programs was to delete all data on these computers relating to Beardsley’s internet
10 activity. *Id.*, Ex. Q (Beardsley Dep. Tr. 78:1-83:6). Although Beardsley claims he did this to hide
11 the fact that he visited pornographic websites, he actually deleted *all* internet browsing history,
12 including visits to DropBox or cloud services where Beardsley could have been storing stolen
13 Move documents. *Id.*, Ex. Q (Beardsley Dep. Tr. 78:10-80:12). Despite his supposed sensitivity
14 about his pornography habit, Beardsley did not bother to erase evidence of pornography from the
15 laptop he returned to Move. *See* Lloyd-Jones Decl., ¶ 19, Ex. 2.

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24 **D. Beardsley Destroyed Even More Relevant Emails.**

25 Beardsley also expunged damaging emails from his personal account. For example he
26 deleted the “Vichy French” email he sent Samuelson on November 17, 2013. Gallegos Decl., Ex.
27 B. He also deleted a January 6, 2014 email chain with Samuelson about a letter Samuelson
28 proposed to send Zillow CEO Rascoff, alerting him to changes in the industry involving “large
29 online players” that would impact Zillow’s valuation and demanding ten million in stock options.
30 *Id.*, Ex. U. Samuelson produced these emails but Beardsley did not. Beardsley’s counsel
31 searched his accounts for these emails, but did not find them. *Id.*, Ex. V. The only possible
32 conclusion is that Beardsley deleted them.⁴

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44 ⁴ The Discovery Master refused to allow the neutral forensic expert to search for missing emails in Beardsley’s
45 accounts, based on the representations of Beardsley’s counsel that they had reviewed the account and produced all
relevant emails that were there.

1 **V. Defendants Lied To Plaintiffs And Misled The Court To Cover Up Their Evidence**
2 **Destruction.**

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4 At no point in this case have Defendants come clean about their evidence destruction.
5 Instead, they have obstructed and dissembled at every turn to keep their misconduct from coming
6 to light. They only reveal damaging destruction evidence when cornered.
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9 First, Defendants lied about the burner phone. Plaintiffs discovered early last year that
10 Samuelson had used a burner phone to keep his secret conversations with Zillow off the record.
11 Samuelson vehemently denied having used a burner phone. In court papers, he called Plaintiffs'
12 allegation "silly," "false," and "thoroughly debunked." *See, e.g.*, Gallegos Decl., Exs. W, X.
13 Then, Plaintiffs' forensic analysis of Beardsley's phone revealed a text message that he had tried
14 to delete. The message, dated January 6, 2014, said: "Errol here. This is my new prepaid 'burner'
15 phone" *See* Lloyd-Jones Decl., Ex. 3. Then Zillow produced a text message from
16 Samuelson to Zillow CEO Spencer Rascoff that said: "Hi Spencer. Errol here. I picked up a
17 prepaid 'burner' phone this afternoon. This is my number." Rascoff responded: "Cool. So cloak
18 and dagger." Gallegos Decl., Ex. K. In other words, all three Defendants *knew all along* that
19 Plaintiffs were right about the burner phone, but they denied it until they were caught.
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21
22 Second, Defendants lied about the stolen Move databases. Judge Linde's preliminary
23 injunction ordered Defendants to return all of Move's trade-secret data. PI Order, ¶ 10. All
24 Defendants certified that they had done so. Gallegos Decl., Exs. DD-GG. When whistleblower
25 Chris Crocker came forward and revealed that Beardsley had an MLS database stolen from
26 Move that he was using while working at Zillow, Defendants vehemently denied Mr. Crocker's
27 allegation. Zillow was particularly aggressive, insisting that Mr. Crocker was lying, and referring
28 to him in court papers as a "bitter, terminated employee." *Id.*, Ex. D. Then, in June 2015,
29 Beardsley's counsel accidentally produced the very stolen MLS database Mr. Crocker had
30 referenced in the letter. The only reason the database was produced was because *Beardsley's*
31 *lawyers believed it belonged to Zillow*. We know this because they marked it as *Zillow's* trade-
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1 secret document under the Protective Order.⁵ If Beardsley's counsel had not made this mistake,
2 Defendants would still be calling Mr. Crocker a liar – and the truth would never have come out.
3
4 Defendants then produced another stolen database of Move data for its ListHub product.
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6

7 Third, Defendants misled Judge Hilyer about Beardsley's evidence destruction while
8 under a subpoena. After the stolen Move database was accidentally produced, Plaintiffs filed a
9 motion with Judge Hilyer seeking a forensic inspection of various computers and USB devices in
10 the possession of Defendants. Among other things, the motion requested that Beardsley produce
11 for inspection his home office computer, his Zillow laptop, and the Western Digital hard drive
12 and USB devices he connected to his Move laptop in the weeks before he quit. All three
13 Defendants vigorously opposed the motion, forcefully denying that Beardsley had deleted
14 evidence. *E.g.*, Def. Opp. to MTC Inspection at 1 (“Plaintiffs’ insinuation that Mr. Beardsley’s
15 document production is unreliable or deficient, or that he deleted evidence in this case, is
16 unfounded.”). They accused Plaintiffs of harassing Beardsley and Samuelson by “rummaging
17 through” private information about their religion, families, and medical conditions. *Id.* at 5.
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26 At no point in their briefs or at the argument before Judge Hilyer did Defendants disclose
27 that one of the hard drives that was the subject of the motion had actually been destroyed by
28 Beardsley more than eight months earlier or that three of the four USB drives sought by the
29 motion had gone missing. Nor did they disclose that Beardsley had run software to permanently
30 delete files from the computers that were the subject of the motion. It was not until *after* Judge
31 Hilyer granted the motion that Defendants realized the gig was up and confessed. *See* Gallegos
32 Decl., Ex. Z. If Defendants had succeeded in convincing Judge Hilyer to deny the inspection, it
33 would never have come to light that Beardsley destroyed evidence while under a subpoena.
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43 ⁵ Beardsley's counsel produced the stolen database with the designation “Outside Counsel's Eyes Only – Don't
44 Show Plaintiffs.” Gallegos Decl., Ex. E. Under the protective order, his designation can only be used for *Zillow's*
45 trade secrets. *Id.*, Ex. Y, ¶ 3. Obviously, if Defendants had recognized the database as belonging to Move, they
would not have marked it as a trade-secret *Zillow* document.

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2 Fourth, when Beardsley was asked in his deposition whether he had used third-party
3 software to permanently delete any data from his Move computer, he denied under oath having
4 done so. Gallegos Decl., Ex. Q (Beardsley Dep. Tr. 125:9-22). Yet, as noted above, Plaintiffs'
5 expert discovered forensic evidence that Beardsley used the software program Cipher to
6 permanently wipe data from his Move computer. *See* Lloyd-Jones Decl., ¶17.

7 8 9 10 **ARGUMENT**

11 12 **I. Defendants Committed Spoliation.**

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14 Defendants intentionally destroyed evidence so Plaintiffs would not be able to use it in
15 this case. That is spoliation. *Henderson v. Tyrrell*, 80 Wash. App. 592, 605 (1996) (spoliation is
16 “intentional destruction of evidence” (quoting BLACK’S LAW DICTIONARY 1401 (6th ed. 1990))).

17 18 19 **A. An Enormous Amount Of Evidence Was Destroyed.**

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21 There is no plausible basis on which to hold that spoliation did not occur. At least the
22 following data and devices have been destroyed:

- 23
24 • All of the data on Samuelson’s Move-issued iPhone.
- 25
26 • All of the data on Samuelson’s Move-issued iPad.
- 27
28 • All of the emails that were on Samuelson’s Move-issued MacBook.
- 29
30 • All of the other Outlook data (calendars, task lists, notes, etc.) that were on
31 Samuelson’s Move-issued MacBook.
- 32
33 • Two USB drives Samuelson connected to his Move-issued MacBook in the weeks
34 before he left Move for Zillow, then supposedly lost.
- 35
36 • An unknown number of text messages from Samuelson’s burner cell phone,
37 which he used to communicate with Zillow CEO Rascoff and Beardsley between
38 January and March 2014.
- 39
40 • The Western Digital hard drive that Beardsley connected to his Move-issued
41 laptop the day before Samuelson left for Zillow, and then smashed after Plaintiffs
42 subpoenaed it.
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- Three USB drives that Beardsley connected to his Move-issued laptop in the weeks before he followed Samuelson to Zillow.
- The data from Beardsley's 32 GB SanDisk Cruzer USB drive, which he erased before turning over to the neutral expert.
- The files and data that were destroyed when Beardsley ran the Cipher deletion software on his Move-issued Laptop.
- Thousands of emails that Beardsley deleted from his Move-issued laptop.
- The data that was destroyed when Beardsley ran deletion software on his home computer.
- The data that was destroyed when Beardsley ran deletion software on his Zillow laptop.
- An unknown number of emails Beardsley deleted from the personal email account that he used to communicate with Samuelson about their plans to defect to Zillow.
- An unknown number of text messages Beardsley deleted from cell phone, which we know included messages to and from Samuelson relating to their plans to defect to Zillow.

See Lloyd-Jones-Decl., ¶¶3-22; see also pp. 5-15 above, and evidence cited therein.

B. Samuelson And Beardsley Destroyed Evidence On Purpose So That It Could Not Be Used Against Them In This Lawsuit.

Samuelson and Beardsley destroyed all of this evidence intentionally. "A party's destruction of evidence qualifies as willful spoliation if the party has 'some notice that the documents were potentially relevant to the litigation before they were destroyed.'" *Leon*, 464 F.3d at 959 (quoting *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir.2002)). This requirement is plainly met here.

Beardsley destroyed and/or "lost" four devices that were expressly called for by a pending subpoena. He also ran software to permanently delete data from two computers while a subpoena was pending. Destroying evidence while under a subpoena is willful spoliation as a matter of law. See *Olney v. Job.com*, No. 1:12-01724, 2014 WL 5430350, at *14, 19 (E.D. Cal.,

1 Oct. 24, 2014) (“Plaintiff’s failure to preserve evidence after the court ordered production of his
2 computer hard drive constituted *willful* and *deliberate* spoliation.”) (emphasis in original).
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5 Moreover, spoliation is not limited to evidence destruction that occurs before the lawsuit
6 was filed. *See, e.g., Advantacare Health Partners*, 2004 WL 1837997 at *1-2. To the contrary,
7 the relevant question is whether the spoliating parties were on notice of the potential litigation
8 when they destroyed the evidence, as Samuelson and Beardsley clearly were here. *See, e.g.,*
9 Lloyd-Jones Decl., Ex. 4 (Samuelson text warning Beardsley they should be careful not to leave
10 a paper trail because, in the event of a lawsuit, their communications would be subpoenaed),
11 Gallegos Decl., Ex. I (Samuelson Dep. Tr. 163:17-164:6) (Samuelson testifying he was concerns
12 about being sued and receiving a discovery request for all documents relating to Zillow); *see also*
13 *id.*, Ex. J (Rascoff Dep. Tr. 458:23-459:16) (Rascoff testifying that Zillow expected to be sued
14 and that he tried not to write emails that could be used against him in a deposition.).
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23 **C. The Court May Not Credit Defendants’ Unsupported Assertions That They**
24 **Were Just trying To Protect “Personal Information.”**

25 Defendants will claim that everything Samuelson and Beardsley destroyed was
26 “personal” and therefore not relevant to this lawsuit. The Court cannot and should not accept
27 their word on this. It is well-settled that “a party responsible for the destruction of potential
28 evidence has no right to a presumption that the documents destroyed were irrelevant.” *Leon v.*
29 *IDX Sys. Corp.*, No. C03-1158 P, 2004 WL 5571412, at *3 (W.D. Wash. Sept. 30, 2004) (issuing
30 terminating sanctions against party who wiped his computer’s hard drive and refusing to credit
31 his excuse that he was just deleting personal materials and pornography), *aff’d*, 464 F.3d 951
32 (9th Cir. 2006); *see also Nat’l Ass’n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557
33 (N.D. Cal. 1987) (“Where one party wrongfully denies another the evidence necessary to
34 establish a fact in dispute, the court must draw the strongest allowable inferences in favor of the
35 aggrieved party”); *Alexander v. Nat’l Farmers Org.*, 687 F.2d 1173, 1205-06 (8th Cir. 1982)
36 (same). This makes sense. The only way to verify Defendants’ claim that they destroyed only
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1 irrelevant, personal material would be to review the data and devices that Defendants destroyed –
2
3 *which cannot be done because Defendants destroyed them.*
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5 Additionally, any claim by Samuelson or Beardsley that they only deleted personal
6 information is implausible given the scale of the destruction. Samuelson and Beardsley
7 destroyed, lost, wiped, or otherwise tampered with *over a dozen* computers, phones, and
8 electronic memory devices. They wiped the memory of an entire phone and an entire iPad,
9 destroyed thousands of emails, deleted an unknown quantity of text messages, permanently
10 deleted files from four computers, and smashed an entire hard drive. There is no way they were
11 just erasing a few family photos or copies of their mortgage paperwork.
12

13 Moreover, we know Defendants deleted relevant evidence, not just personal information,
14 because the deleted items that were recovered included highly relevant documents such as
15 Samuelson’s burner-phone texts, the “Vichy French” email, Samuelson’s warning to Beardsley
16 not to leave a paper trail, and emails about Samuelson’s demand to Zillow for millions in
17 compensation. *See, e.g.*, Exs. 3, 4, B, K, U. The fact that Samuelson and Beardsley attempted to
18 delete these key documents confirms they were destroying relevant evidence.
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21 **D. Zillow Is Liable For Beardsley’s Spoliation.**
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23 The Court should reject any attempt by Zillow to argue that it is not responsible for the
24 spoliation that occurred here. Beardsley is a Zillow employee. While he was under a subpoena in
25 a case where Zillow was a defendant, he ran wiping software on his Zillow-owned laptop,
26 destroying data that was potentially relevant to the lawsuit.
27

28 Zillow knew about the subpoena and knew (or should have known) that Beardsley’s
29 laptop could contain relevant evidence. Yet Zillow did nothing to prevent Beardsley from
30 destroying evidence. There is no evidence that Zillow instituted a “litigation hold” notifying
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1 employees, including Beardsley, of the need to preserve relevant documents and data.⁶ Zillow
2 did not review Beardsley's Zillow laptop when the subpoena was issued, and Beardsley's
3 lawyers (who are being paid by Zillow), did not review the Zillow laptop either. Gallegos Decl.,
4 Ex. Q (Beardsley Dep. Tr. 85:5-19). When Plaintiffs sought a forensic inspection, Zillow jumped
5 to Beardsley's defense and wrote a brief, which its lawyers signed, attesting that Beardsley had
6 not destroyed any evidence. *Id.*, Ex. W. [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
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17 On these facts, Zillow is certainly responsible for Beardsley's spoliation. *See, e.g., E.I.*
18 *Du Pont de Nemours and Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469, 500-507 (E.D. Va.
19 2011) (company was liable for spoliation when "key employees" were directly involved in the
20 events underlying the litigation "deleted files and email items from their personal computers in
21 the days after Du Pont filed the action and after being appraised of their duty to preserve relevant
22 information"); *Nucor Corp. v. Bell*, 251 F.R.D. 191, 199 (D.S.C. 2008) (company was liable for
23 spoliation of data on employee's work laptop).

24 **II. Defendants' Conduct Justifies a Default Sanction.**

25 Default sanctions are justified here due to the massive scope of Defendants' spoliation.
26 Some of the most important documents in the case are gone for good, including communications
27 between Samuelson and Beardsley, texts from Samuelson's burner phone, and records of which
28 files Samuelson and Beardsley copied from their Move computers to take to Zillow. The
29 decimation of so much critical evidence undermines this Court's truth-seeking function and
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41 ⁶ Zillow claims there was such a hold in place, but has refused to produce the memo that was supposedly distributed
42 to its employees on grounds of privilege. Zillow also asserted the privilege to bar Plaintiffs' counsel from
43 questioning Beardsley about what Zillow's lawyers told him regarding evidence preservation. *See, e.g., Gallegos*
44 *Decl., Ex. Q* (Beardsley Dep. Tr. 25:4-12). Accordingly, having used the privilege to avoid any questions about
45 evidence-preservation attempts, Zillow cannot now present evidence of what, if anything, it communicated to
Beardsley regarding evidence preservation. *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992)
(privilege cannot be used "as both a sword and a shield").

1 creates serious questions about whether a fair trial is even possible. These are precisely the
2 circumstances under which a default sanction is warranted. *See Leon*, 464 F.3d at 958
3 (“Dismissal is an available sanction when ‘a party has engaged deliberately in deceptive
4 practices that undermine the integrity of judicial proceedings.’”) (quoting *Anheuser–Busch, Inc.*
5 *v. Natural Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir.1995)); *see also Cabinetware*, 1991 WL
6 327959 at *4 (issuing default sanction against defendant whose deliberate evidence destruction
7 demonstrated “contempt for the judicial system”).
8
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10 Defendants will likely point to the dearth of Washington cases awarding terminating
11 sanctions. But the paucity of case law does not mean Washington courts turn a blind eye toward
12 spoliation – it just means no Washington litigant has ever engaged in the massive, premeditated
13 spoliation that occurred here. Federal courts, however, have faced these issues and, as
14 Defendants are fond of pointing out, Washington courts may look to federal case law for
15 guidance when there is no on-point Washington authority. *See, e.g., Zillow’s Mtn. to Compel*
16 *NAR to Produce Documents* at 8 (arguing that the court should follow federal authority where
17 “Washington law on this question is ‘sparse’”); *see also Defendants’ Answer to Petitioners’*
18 *Motion for Discretionary Review* at 25 (“Washington courts often rely on federal authority
19 where, as here, a federal rule closely parallels Washington’s rule.”); *Russell v. Dep’t of Human*
20 *Rights*, 70 Wash. App. 408, 415 (1993) (when a state law is similar to a parallel federal law,
21 “Washington courts look to federal law” for guidance).
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24 A dismissal or default sanction requires a finding of “willfulness, fault, or bad faith.”
25 *Leon*, 464 F.3d at 958 (quoting *Anheuser–Busch*, 69 F.3d at 348). As explained above, some of
26 the evidence was destroyed while a subpoena was pending, and the rest of it was deliberately
27 destroyed because Defendants anticipated this lawsuit. These facts are more than sufficient to
28 show willfulness, fault, and bad faith. *Leon*, 2004 WL 5571412 at *5 (finding bad faith and
29 ordering default sanctions against plaintiff who wrote and ran software to permanently delete
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1 files on his computer); *Cabinetware*, 1991 WL 327959 at *4 (ordering default sanctions against
2 defendant who deliberately destroyed evidence after being served with a request for production).
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5 Additionally, before imposing a terminating sanction, the court should consider the
6 following factors: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s
7 need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public
8 policy favoring disposition of cases on their merits; and (5) the availability of less drastic
9 sanctions.” *Leon*, 464 F.3d at 958; *Volcan Group, Inc. v. T-Mobile USA, Inc.*, 940 F. Supp. 2d
10 1327, 1333-34 (W.D. Wash. 2012). Although courts are obligated to consider these factors, “the
11 list of factors amounts to a way for a district judge to think about what to do, not a series of
12 conditions precedent before the judge can do anything, and not a script for making what the
13 district judge does appeal-proof. *Volcan Grp.*, 940 F. Supp. 2d at 1334. (quoting *Valley*
14 *Engineers Inc. v. Elec. Eng’g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998)). Moreover, because the
15 first two factors will generally favor the imposition of sanctions, and the fourth factor generally
16 cautions against dismissal, “the key factors are prejudice and the availability of lesser sanctions.”
17 *Id.* (quoting *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990)).
18

19
20 Defendants’ conduct has irreparably prejudiced Plaintiffs by depriving them of critical
21 communications and electronic evidence that would help prove that Defendants misappropriated
22 Plaintiffs’ trade secrets. With all of this evidence safely destroyed, Defendants can sit back and
23 tell the jury that Plaintiffs have no smoking-gun text message or forensic proof that Samuelson
24 or Beardsley stole specific trade-secret files – so therefore their whole case must be nothing but
25 “speculation.” This is the definition of prejudice. *See Leon*, 464 F.3d at 959 (The prejudice
26 inquiry is satisfied when a party’s refusal to provide certain documents “‘forced [the other party]
27 to rely on incomplete and spotty evidence’ at trial.”) (quoting *Anheuser–Busch*, 69 F.3d at 354).
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30 Importantly, Plaintiffs are not required to prove the contents of the destroyed files and
31 other evidence in order to show prejudice. *See Leon*, 464 F.3d at 960 (holding that a showing of
32 prejudice does not require “recreating the contents” of the destroyed files, and affirming
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1 terminating sanctions where the plaintiff's massive spoliation "threatened to distort the
2 resolution of the case . . . because any number of the 2,200 files could have been relevant to
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4 IDX's claims or defenses, although it is impossible to identify which files or how they might
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6 have been used") (internal citation omitted); *Kronisch v. United States*, 150 F.3d 112, 128 (2d
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8 Cir. 1998) ("Indeed, holding the prejudiced party to too strict a standard of proof regarding the
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10 likely contents of the destroyed evidence would . . . allow parties who have intentionally
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12 destroyed evidence to profit from that destruction.").

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14 The harshest possible sanction, default, is appropriate here because Defendants' conduct
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16 was egregious. *Leon*, 2004 WL 5571412 at *5. They destroyed massive amounts of evidence,
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18 some of which was directly responsive to an outstanding subpoena, and lied multiple times,
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20 including deceiving the Discovery Master, to avoid being caught. Under these circumstances, it
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22 is not necessary for the Court to impose less serious sanctions first, or to give any explicit
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24 warnings. *See Volcan Grp.*, 940 F. Supp. 2d at 1334 (quoting *Valley Eng'rs*, 158 F.3d at 1057).
25
26 To the contrary, "it is appropriate to reject lesser sanctions where the court anticipates continued
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28 deceptive misconduct." *Id.* (quoting *Anheuser Busch*, 69 F.3d at 352).

29
30 A lesser sanction such as a rebuttal-presumption instruction, though better than nothing,
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32 would not come close to curing the prejudice caused by Defendants' conduct. With so much
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34 evidence gone, Plaintiffs could be "helpless to rebut any material [Defendants] might use to
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36 overcome the presumption." *Leon*, 2004 WL 5571412 at *5. Additionally, allowing the trial to
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38 go forward after Defendants have radically and unlawfully shifted the playing field in their favor
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40 by destroying large amounts of evidence would reward spoliation and encourage others to
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42 engage in the same unlawful conduct. *Id.*

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44 **III. Alternatively, the Court Should Adopt a Jury Instruction that Prevents Defendants**
45 **from Benefiting from Their Misconduct.**

At all stages of a case, evidence destruction gives rise to an inference or presumption that
the evidence destroyed was adverse to the party who destroyed it. Accordingly, if default

1 sanctions are not granted, the Court should instruct the jury to presume that the missing data,
2 texts, emails, and other evidence, if it had not been destroyed, would have shown that Samuelson
3 and Beardsley stole Move's information and either conveyed that information to Zillow or used
4 it on Zillow's behalf. This will help to mitigate the prejudice caused by Defendants' spoliation,
5 while still allowing Defendants to rebut the presumption if they can, or to assert other defenses.
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10 The Washington Supreme Court has approved such a presumption. In *Pier 67, Inc. v.*
11 *King County*, 89 Wash. 2d 379, 385-86 (1977), the plaintiff sued the County for discriminatory
12 assessments over a several-year period. The County produced approximately two years worth of
13 records that proved the County had discriminated in its assessments; however, the County failed
14 to provide the remaining records, despite being on notice of the litigation. *Id.* at 385. The trial
15 court found no discrimination during the seven years for which there were no records. *Id.* The
16 Supreme Court reversed, ruling that because the County had destroyed the records, "*the only*
17 *inference which may be drawn*" is that the discrimination also took place during the remaining
18 years" *Id.* at 386 (emphasis added); *Advantacare Health Partners*, 2004 WL 1837997 (where
19 defendants downloaded thousands of confidential files from plaintiffs' system before leaving to
20 start a competing firm and then used memory-wiping tools to purge their computers, appropriate
21 sanction was "a presumption that [defendant] copied every file on the [plaintiff's] system."').⁷
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25 In deciding whether to adopt a rebuttable-presumption jury instruction, courts consider
26 (1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault
27 of the adverse party. *Henderson*, 80 Wash. App. at 607. Both of these factors favor such an
28 instruction here. The evidence Defendants destroyed was obviously important, because it
29 included communications, documents, texts, and emails created during the months Samuelson
30 and Beardsley were scheming to defect to Zillow, in addition to electronic evidence that would
31 show what files Samuelson and Beardsley took with them to Zillow. Plaintiffs never had the
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44 ⁷ At minimum, the Court should adopt an "adverse inference" instruction informing the jury that, because evidence
45 has been destroyed, they may infer that the evidence would have corroborated Move's case and discredited the
defense. *See Henderson*, 80 Wash. App. at 605.

1 opportunity to review this evidence before it was destroyed and, as noted above, the fact that it is
2 gone benefits Defendants and makes it more difficult for Plaintiffs to investigate their claims and
3 prevail at trial. *See id.* at 605 (in assessing the importance of missing evidence, courts may
4 consider “whether the loss or destruction of the evidence has resulted in an investigative
5 advantage for one party over another, or whether the adverse party was afforded an adequate
6 opportunity to examine the evidence”). Moreover, Defendants plainly satisfy the culpability
7 requirement since they willfully destroyed evidence so it could not be used in this lawsuit,
8 including while a subpoena was pending. *See* Section III.B.

15 **IV. The Court May Award Monetary Sanctions**

17 Defendants’ conduct has impugned the integrity of this Court. Monetary sanctions alone
18 are not an appropriate redress and, even if they were, they could never make Plaintiffs whole.
19 But the Court may impose monetary sanctions payable to the Court, as an additional punishment
20 on top of the remedies requested above. Any sanction should take into account the severity of the
21 misconduct – i.e., the destruction of massive amounts of evidence by top executives at a publicly
22 traded company worth billions, which the company *ratified and defended* instead of investigating
23 and punishing. *See, e.g., In re Prudential Insurance Co. Sales Practices Litig.*, 169 F.R.D. 598,
24 617 (D.N.J. 1997) (million-dollar sanction where spoliation was not even intentional, as it is
25 here, to punish defendants for the unnecessary consumption of the Court’s time and resources in
26 regard to the issue of document destruction” and to inform “the public of the gravity of repeated
27 incidents of document destruction and the need of the Court to preserve and protect its
28 jurisdiction and the integrity of the proceedings before it”).⁸ To be clear, Plaintiffs do not seek a
29 monetary sanction against Defendants’ counsel but a financial penalty against the Defendants
30 themselves is more than justified in this circumstance.

43 ⁸ The sanction requested is for the purpose of punishment and deterrence, not to compensate Plaintiffs for the
44 massive costs incurred due to Defendants’ spoliation. Plaintiffs reserve the right to seek payment of their spoliation-
45 related fees and costs as an additional sanction once this litigation is complete.

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CONCLUSION

Defendants' vast evidence destruction should result in a terminating sanction. We understand such a drastic sanction is only used in the rarest of circumstances, but the facts of this case – a wealthy, publicly traded company and its senior executives who tried not to create evidence because they feared litigation and asked for indemnity for that potential litigation, but then destroyed a half dozen electronic devices, deleted hundreds of emails, ran evidence erasure programs across multiple other computers and handheld electronic devices, and smashed a key external hard-drive against a wall in the middle of discovery – warrant a terminating sanction.

Alternatively, we respectfully request that the Court mitigate the prejudice to Plaintiffs by instructing the jury that they are to presume that the evidence, if it had not been destroyed, would have shown that Samuelson and Beardsley stole Move's information and either conveyed that information to Zillow or used it on Zillow's behalf.

DATED: January 8, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2016, the foregoing was hand delivered under seal with the Clerk of the Court and an electronic copy served by email transmission at the email addresses provided thereto:

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1 I declare under penalty of perjury under the laws of the State of Washington that the
2
3 foregoing is true and correct.
4

5 DATED at Seattle, Washington on January 8, 2016.
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
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,

vs.

ZILLOW, INC., a Washington corporation,
ERROL SAMUELSON, an individual, and
CURTIS BEARDSLEY, an individual, and
DOES 1-20,

Defendants.

Case No. 14-2-07669-0 SEA

**[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION FOR EVIDENCE
SPOILIATION SANCTIONS**

1 This matter came before the Court on plaintiffs' motion for evidence spoliation sanctions.
2 The Court has considered the briefing in support of and in opposition to plaintiffs' motion for
3 evidence spoliation sanctions. The Court deems itself fully advised.

4 NOW THEREFORE, it is hereby ORDERED:

- 5 1. Plaintiffs' motion for a default sanction is GRANTED; or
- 6 2. Plaintiffs' motion that the Court should instruct the jury to presume that the
7 missing data, texts, emails, and other evidence, if it had not been destroyed, would have shown
8 that Samuelson and Beardsley stole Move's information and either conveyed that information to
9 Zillow or used it on Zillow's behalf is GRANTED; and/or
- 10 3. Plaintiffs' motion for a monetary sanction in the amount of _____ is
11 GRANTED.

12 Dated this ____ day of _____, 2016.

13
14 _____
15 THE HONORABLE SEAN O'DONNELL
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