The Honorable Sean O'Donnell
Noted for Hearing: February 5, 2016 9:00 a.m.
WITH ORAL ARGUMENT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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, and ERROL SAMUELSON, an individual, CURT BEARDSLEY, an individual, and DOES 1-20,

Defendants.

Case No. 14-2-07669-0 SEA

SAMUELSON'S OPPOSITION TO PLAINTIFFS' MOTION FOR SPOLIATION SANCTIONS

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I. INTRODUCTION

Plaintiffs have found no evidence—zero—that Samuelson "stole" trade secrets. So now they argue that means Samuelson must have spoliated evidence, and the Court should so find, relieving them of the burden of proving their case.

Samuelson deleted nothing after Plaintiffs filed this lawsuit. And before that, Samuelson had no reason to think a lawsuit was in the works such that he should be saving information for the litigation. In fact, when he resigned, Move's EVP of HR led him to believe that Move did not intend to sue him (just as it had never sued any departing employee leaving for a competitor) and gave him permission to delete personal information from the only Move computer remaining in his possession before returning it. What's more, his company computers and phones (what Plaintiffs primarily complain about) would not have been where to find evidence of Samuelson's communications with Zillow; starting in January 2014, Samuelson negotiated with Zillow through his personal Gmail account and his wife's cell phone with a personal phone number. Plaintiffs have all responsive communications from Samuelson's Gmail and from the phone, communications that show only a departing executive negotiating his new employment agreement, not any theft of trade secrets.

Samuelson and the other defendants have produced hundreds of thousands of pages of documents plus images of phones, tablets, and computers, all of which have been scoured by Plaintiffs and then by their forensic investigators. A court-appointed forensic neutral is still performing his analysis of what is available, but instead of waiting for those results, Plaintiffs now ask the Court to sanction Samuelson for spoliating evidence because they haven't found a smoking gun. But the absence of a smoking gun isn't because the evidence was destroyed; it's because there never was one. Their motion should be denied.

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II. COUNTERSTATEMENT OF THE FACTS[1]

A. SAMUELSON DID NOT SPEND THE FINAL WEEKS OF HIS CAREER AT MOVE PLOTTING TO STEAL ITS SECRETS

Samuelson started working for Move's predecessor company (Homestore) in 1999, and with the exception of a few years, worked for Move and its affiliated companies until his resignation on March 5, 2014. During most of that time, he was on the road and away from his home and family for over a hundred days a year. Move periodically issued him laptop computers, which he would use for Move business and also for personal communications, because he didn't want to lug around two computers when he travelled. Using these computers for personal communications violated no company rules, but it meant that personal information about his financial, family, medical, and church matters—things that anyone would want to keep private and not rummaged through—was on those computers. Samuelson never had any non-competition agreement as part of his employment with Move, and was always free to leave Move and work for a competitor such as Zillow.

1. Samuelson was pursued by Zillow more than once.

Zillow first tried to hire Samuelson in 2011. But after exploring Zillow's offer, Samuelson told Zillow's Vice-Chairman, Lloyd Frink, that he was flattered, but not interested at that time. He also informed Move's Board Chairman Joe Hanauer (as well as other company executives) that he had been approached by Zillow but had turned down the offer.

On November 11, 2013, Zillow's Chief Executive Officer, Spencer Rascoff, reached out to Samuelson again to see if he might be interested in taking a job at Zillow. Samuelson was intrigued enough to have some preliminary conversations in November and December, but he told Rascoff that he wanted to wait until after the end of the year before deciding whether to pursue serious discussions.

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[1] Except as otherwise stated, this factual statement is supported by the Declaration of Errol Samuelson in Opposition to Plaintiffs' Spoliation Motion, filed herewith.

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Shortly after Rascoff contacted him, Samuelson let Curt Beardsley know about the overture. After Samuelson turned down Zillow in 2011, Zillow had pursued Beardsley instead, although he too ultimately turned down its offer. Beardsley and Samuelson had worked together for many years, and Samuelson thought that Zillow might have contacted Beardsley again, too.

2. Samuelson's response to Beardsley's November 18 email was to protect Move, not hide a conspiracy.

On November 18, 2013, Beardsley sent Samuelson a lengthy email from his personal gmail account while Beardsley was on vacation in Mexico. Gallegos Decl., Ex. B. Samuelson was surprised by the amount of detail Beardsley included in the email regarding his thoughts about how broken Move's business model was and how likely it was that Zillow would succeed where Move was failing. In light of things happening at Move at that time (which Beardsley did not know about), Samuelson thought the email could easily be taken the wrong way later, and could put him in a very awkward position. As Samuelson explains:

> You see, what Curt Beardsley did not know when he sent me that email was that Move was engaged in executive level talks with News Corp at that time about a possible acquisition of Move. Indeed, I was flying out to New York the next day to meet with News Corp executives (including its CEO, CFO, CTO, Chief Strategy Officer and Chief Creative Officer) regarding the possible acquisition. ***When I sent my November 19, 2013 text message to Curt mentioning that someone could "dig up or subpoena" that email, I was not thinking about a future lawsuit against me (for leaving Move) but rather about a future lawsuit against Move by News Corp or its shareholders, by Move's shareholders, or some other type of investigation related to the potential acquisition that was seeming increasingly likely to occur soon.*** Move's CEO, Steve Berkowitz, had already warned me that it was not unusual for shareholder lawsuits to be filed any time there was a major public company merger. I also had seen Move's predecessor company (Homestore) almost demolished by investor lawsuits and Securities and Exchange Commission investigations.

Samuelson Decl., ¶11 (emphasis added). At the time, Samuelson did not even have a job offer from Zillow. Any inference that he was thinking about this lawsuit would be unwarranted.

At the time, Samuelson was cautiously optimistic about News Corp's potential acquisition of Move, and thought that if that acquisition occurred, he might not want to leave Move. But he did share many of the frustrations Beardsley expressed in his November 18 email.

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When Move hired Steve Berkowitz as its CEO in 2009, its associated website (Realtor.com, which competes with Zillow) was probably the most popular online destination for consumers to find a home. Under Berkowitz's leadership, Samuelson had watched both Zillow and another competitor (Trulia) overtake Realtor.com in web traffic and popularity, and innovate in ways that Move could not or would not. Furthermore, Samuelson had personally made promises on behalf of Move to the National Association of Realtors ("NAR") about changes that would be made at Realtor.com, which Move operated for NAR. But Move (and especially Berkowitz) seemed unwilling to fulfill those commitments.

3. <u>There's nothing nefarious about the so-called "burner" phone</u>.

By the beginning of 2014, Samuelson had concluded that a deal between Move and News Corp was unlikely, so discussions in earnest with Zillow resumed. He expected to be having much more detailed and frequent discussions with Zillow about a job there, and naturally did not want to have those discussions on company email or over a company phone.[2] Starting in January and ending in March 2014, after he accepted employment at Zillow, Samuelson used his personal gmail and his wife's old iPhone with a new phone number to communicate with Zillow about going to work there. Although there was nothing criminal or improper about Samuelson exploring a job opportunity at Zillow, he jokingly referred in a couple messages to this personal iPhone as his "burner" phone.

Samuelson began working for Zillow on March 5, 2014, and soon thereafter—on March 16, before this lawsuit was filed—he deactivated the phone account, returned the phone to his wife, and his messages on it were deleted. Declaration of Brian W. Esler ("Esler Decl.") Ex. A. Samuelson did not deactivate the phone in anticipation of this or any other litigation, and he

[2] As anyone who has changed jobs can relate to, Samuelson did not want to use his company phone or email to negotiate for a new job. Indeed, Move's CEO Steve Berkowitz was on the board of an executive recruiting company (Ladders.com) that advised executives "[u]se your own e-mail address and network to conduct your job search and reach out to prospective employers" and to use only their "home and [personal] cell phones for your job search . . .." Esler Decl., Ex. B. Samuelson did just that.

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did nothing to permanently or securely delete anything on it. Forensic examination confirms this. Declaration of Bruce V. Hartley ("Hartley Decl."), ¶8. When the lawsuit was filed, Samuelson gave the phone to his attorneys, who obtained a forensic copy of what was on the phone and produced to Plaintiffs anything that was relevant. Esler Decl. Ex. C. As Plaintiffs acknowledge, they have obtained copies of Samuelson's texts from those who received them. Motion, at 7. What Plaintiffs fail to disclose to the Court is that many of the messages deleted also were found on Samuelson's wife's computer (a forensic copy of which has been provided to the neutral), and have already been provided to Plaintiffs. Esler Decl., Ex. D (Esler 10/12/15 letter w/o exhibits).[3]

4. Samuelson did not conspire with Beardsley.

Beardsley and Samuelson did not leave Move for Zillow together. Their final decision processes were independent of each other. Beardsley replaced Samuelson at Move and might have stayed there, until Zillow, through its CEO Spencer Rascoff, not Samuelson, convinced Beardsley to change his mind. Esler Decl., Ex. I; Gallegos Decl., Ex. M (Samuelson Decl.) ¶35. After mid-February 2014, Samuelson did not disclose to Beardsley his continuing negotiations at all. Samuelson was under no obligation to remain employed at Move, or to not work for a competitor such as Zillow.

B. SAMUELSON ACTED TO PROTECT HIS FAMILY'S PRIVACY, NOT DESTROY EVIDENCE, AND TOLD MOVE EXACTLY WHAT HE DID.

1. Samuelson's Outlook files are backed up on Move's servers.

The day he resigned from Move, Samuelson restored his Move-issued iPad and iPhone to factory settings and returned them. He also tried to remove his personal files and information

[3] Plaintiffs claim that "defendant lied about the burner phone; Samuelson vehemently denied having used a burner phone. . . all three defendants knew all along that plaintiffs were right about the burner phone, but they denied it until they were caught." Motion page 12:1-26. Plaintiffs' only "evidence" for this statement is defendants' continued objection to the semantics of calling this a "burner" phone, which implies some intent to use the phone in a criminal conspiracy and then destroy it. Defendants disclosed this phone and how it was used at the very beginning of the lawsuit, did not hide its use from Plaintiffs or the Court, and had it forensically imaged early in the case.

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from the MacBook (his Move-issued laptop) before he returned it. Samuelson did this because it was not uncommon for Move to provide ex-employee's devices to other employees. As a departing executive, Samuelson did not want other employees at Move having access to sensitive personal information that may have remained on those devices.

But the key fact, which Plaintiffs do not tell the Court, is that Samuelson's emails, calendar entries, task lists, notes and other Outlook data were continuously synched/backed up to Move's corporate servers, where they should remain accessible to this day. Declaration of Andrew Crain ("Crain Decl.") ¶8; Gallegos Decl., Ex. M ¶36. Plaintiffs should still have any and all communications Samuelson sent through the corporate server, regardless of whether he deleted them from his personal devices.

2. Samuelson worked with other Move employees to make sure any Move information on the MacBook was transferred to Move.

Samuelson was using a Move-issued MacBook when he resigned. He wanted to remove sensitive personal and family information that had accumulated on this laptop before returning it to Move, and still make sure that his successor at Move had easy access to his working materials. Accordingly, he went into Move's Vancouver office the afternoon before he resigned intending to transfer all the work related files on the MacBook to DVDs. But he could not figure out how to burn DVDs from the MacBook.

Samuelson enlisted the help of two Move employees, Warren Cree and Ryan Green (who was home sick, but assisted by phone). They tried but could neither burn the files onto a DVD nor transfer them to Move's servers via Move's network. They finally were able to copy files from the MacBook onto Cree's Move computer using Samuelson's own USB drive (the "LaCie"). Samuelson then tried to make sure that all the Move data he had transferred from the LaCie to Cree's computer was deleted from the LaCie.

Samuelson and Cree describe these activities in text messages the next day:

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SAMUELSON:	Sorry I couldn't explain last night but I wanted to make sure that Move had the files it might need. After I passed the chalice to you I wiped my hard drive [the LaCie]. I didn't take any confidential information with me, rumours notwithstanding. I spent 13 years of my life with the company. I wanted to make sure I did all I could for an orderly transition.
CREE:	Its okay they took the files, the only thing they asked about was your hard drive which you used to copy the files to my computer. I said I don't know what happened to it.. [sic] I had Ted come and remove the files and delete it and verify by email to management that he took everything. Thanks for not telling me, it was the best thing to do. . . .
SAMUELSON:	Using the hard drive [LaCie] was my last resort for . . . Obvious reasons. I wiped it after I sent you the files. Now you understand why I screwed around for 30 minutes on the phone [with Ryan Green]. I didn't want any misunderstandings. Just my luck that the Move network didn't work.

Esler Decl. Ex. E.

If another USB drive was connected to the MacBook on March 4 (Plaintiffs say a Chipsbank device was connected), it was likely part of this attempt to transfer Move files to Move. Crain Decl. ¶¶11-12. Samuelson did not leave the Move office that evening with any USB drives other than the LaCie, which was his personal property (but which Plaintiffs now have). If there was a ChipsBank USB drive connected to the MacBook on March 4, 2014, that drive would have remained at the Move offices. Unless Move disposed of it, Move should still have it.

Finally, Move alleges that a Verbatim "Store N Go" device was connected a number of times to Samuelson's Move laptop in the weeks prior to his departure. As he has explained before, he believes he used that device to send a scanned copy of his Non-Disclosure Agreement to Zillow using the MacBook. He thinks he later gave that same thumb drive to one of the organizers of the "Leading RE Conference" in Las Vegas, where he was giving a presentation, on February 27, 2014, so that his presentation could be loaded on the conference laptop and probably never got it back. Regardless, there is no evidence to suggest that thumb drive was

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ever used to access any Move confidential information, or that it was ever used by Samuelson at Zillow. Crain Decl. ¶11-18.

3. Samuelson had Move's permission to remove personal files from the Dell laptop.

Samuelson did not try to "steal an entire hard drive" of Move files, as Plaintiffs allege. Motion at 8. Plaintiffs seem to be referring to a Dell laptop Samuelson had stopped using around November 2013 because it was failing. As confirmed by forensics, this laptop was not used at all between November 26, 2013 and March 9, 2014. Crain Decl. ¶21.

The day after Samuelson resigned, Carol Brummer (Move's EVP of Human Resources) reminded him he still had his Move-issued Dell, which the MacBook had replaced. Samuelson didn't remember that he still had the Dell, but told her he would look for it, and explained that like the MacBook, it contained personal files (containing financial, religious, family and health information). He told her that if he still had the Dell he would want to remove his personal information before returning it. Ms. Brummer did not object to that, as she recounted in an email reminder of the conversation that she sent to herself the same day:

> I spoke with [Samuelson]. He wasn't aware that he has [the Dell] but said it is possible that it's in one of the boxes at home. . . . He also clarified that he downloaded all work files from the Mac that we might need and left them with Warren [Cree] because he had so much personal stuff on it that he wanted to wipe the drive. . . . I asked him not to wipe the Dell, although he could remove personal files before sending it.

Esler Decl., Ex. G; *see also* Ex. F (Brummer Deposition testimony). Samuelson also asked whether he should be worried about a lawsuit by Move against him, and Ms. Brummer gave him no reason to think that was the case. Ex. F, at 203:20 - 205:10.

When Samuelson returned home to Vancouver the following weekend, he found the Dell and took it to a computer store (NCIX) to get help in securely deleting his personal information off of the computer. He dropped the computer off at NCIX on March 11, 2014, and it never came back into his possession again. Samuelson Decl., Ex. 1.

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According to Plaintiffs, an "Eraser" program was run on March 13, 2014, likely by NCIX. What Plaintiffs fail to tell the Court is that the "Eraser" program was run on a ***clone*** of the Dell's hard drive while it was in NCIX's possession, not the original hard drive itself, which remained intact. Once the lawsuit was filed, the cloned copy of the hard drive and the original hard drive that was unchanged from when it was dropped off by Samuelson on March 11, as well as a back-up copy of the hard drive (that was made in mid-2013) were all provided to Plaintiffs' counsel. In other words, Plaintiffs have a full copy of the contents (as of mid-2013) of that Dell computer, plus another copy of the contents (as of about March 11, 2014) of that Dell computer, plus the cloned hard drive from which information may have been erased. Plaintiffs conveniently omit those facts from their motion.

4. <u>Samuelson never hid any of this conduct from Move or the Court</u>.

Admittedly, Samuelson did not reveal his 2014 negotiations with Zillow to Move executives until he had actually finalized an employment offer with Zillow and resigned. But there is nothing wrong with keeping negotiations for a new job secret from a current employer, and Samuelson had no non-compete. Samuelson had no reason to believe he would be the first employee Move ever sued for departing to a competitor, and indeed Move's Carol Brummer had told him she had no reason to believe Move was considering a lawsuit against him. Esler Decl. Ex. F.

Significantly, Samuelson's "deletions" all occurred prior to the lawsuit being filed on March 17, 2014. After that he, his lawyers and his current employer all took steps to preserve all relevant evidence and turn such evidence over to Plaintiffs. As is discussed below, what was "deleted" from one device often shows up on other devices or networks. The bottom line is that Plaintiffs have no evidence that Samuelson misappropriated anything, and are now trying to turn that lack of evidence on its head. The Court should not be swayed by their rhetoric, but rather make an impartial examination of the facts and reasonable inferences for itself.

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III. STATEMENT OF ISSUES

Whether the Court should sanction Samuelson for spoliation where Plaintiffs have failed to show that (i) Samuelson acted in bad faith, (ii) that important and unique evidence is even missing, (iii) that the record is ripe to review this issue, or (iv) that the requested sanctions are warranted under state law.

IV. EVIDENCE RELIED UPON

Samuelson relies on the declarations of Andrew Crain, Brian W. Esler, Brent V. Hartley, and Errol Samuelson and the exhibits attached thereto; the pleadings, filings and other materials filed with this Court and the Special Master in this matter; and the evidence relied on in Zillow, Inc.'s and Curt Beardsley's briefs and supporting materials in opposition to Plaintiffs' motion

V. AUTHORITY

Plaintiffs' Motion likes to treat Samuelson and Beardsley as a single unit, indiscriminately alleging that the "defendants" collectively took certain actions. But spoliation sanctions are always party-specific. *Henderson v. Tyrrell*, 80 Wn. App. 592, 606, 910 P.2d 522 (1996) ("In any case, for a direct sanction to apply the spoliation must in some way be connected to the party against whom the sanction is directed."). Sanctions must also be warranted as to each allegation of spoliation. *See In re Text Messaging Antitrust Litig.*, 46 F. Supp. 3d 788, 801 (N.D. Ill. 2014) (one category of missing documents does not support alleged spoliation of other evidence), *aff'd*, 782 F.3d 867 (7th Cir. 2015). So, as much as Plaintiffs want to group the defendants and allegations together, the Court can sanction Samuelson, if at all, based only on ***Samuelson's*** conduct. And as to Samuelson, Plaintiffs fail to show that relevant evidence is even missing, much less that Samuelson spoliated it.

A. PLAINTIFFS MISREPRESENT WHAT IS MISSING FROM SAMUELSON.

Plaintiffs' Motion accuses Samuelson of spoliation for "destroying" information on several devices and directories, implying that Plaintiffs haven't recovered ***any*** evidence from these sources. This is a gross misrepresentation of the facts. Plaintiffs have a wealth of evidence

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from these devices, both from their forensic examinations and because the same evidence is available elsewhere, ***including on Plaintiffs' own servers***. The problem (for Plaintiffs) is that none of that evidence implicates Samuelson in Plaintiffs' imaginary secret-stealing scheme.

Just because evidence was deleted from one place doesn't mean it's not available somewhere else. Spoliation doesn't occur unless evidence is truly missing. The following summarizes what is and what isn't missing from Samuelson's devices.

1. Outlook data (including emails and calendars) on Samuelson's Move-issued MacBook

All of Samuelson's Outlook data was backed-up on and still resides on Move's servers, available to Plaintiffs in this litigation. Crain Decl. ¶8. We know this because Plaintiffs have produced to date more than 16,000 email items (not counting attachments) in response to discovery requests that identify Samuelson as custodian.

2. Samuelson's Move-issued iPhone and iPad

Samuelson reset his Move-issued iPhone and iPad to factory settings to protect his personal and family information. But his email communications from those devices are on Move's servers (see above), and his text messages have been made available to Plaintiffs from the relevant recipients (Zillow personnel and Beardsley) of those messages. Similarly, all iMessage communications have been preserved. Crain Decl. ¶8; Esler Decl. Ex. D.

3. The USB drives

Plaintiffs' motion discusses three USB drives. They already have one (the LaCie), which Samuelson used to transfer files from his MacBook to Cree's Move computer. Samuelson can't find the other two. But the evidence suggests one of those (the "ChipsBank") should actually be in Move's possession, and significantly, Plaintiffs do nothing to explain what they have done to secure the evidence in their own possession. The ChipsBank connected to Samuelson's MacBook at the same time he was working with Cree to transfer files to Move's servers, but the ChipsBank's capacity was too small to transfer the files. Crain Decl. ¶12. Thirty minutes later,

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Samuelson used the larger-capacity LaCie to finally accomplish the transfer ***to*** Move, not ***from*** Move. Samuelson doesn't recall this ChipsBank drive, but does know he didn't leave Move with it. And in any event, Plaintiffs have the LaCie, which was successfully used to accomplish the same purpose.

As to the third USB drive (the "Verbatim Store N Go"), Samuelson believes he gave it to conference organizers to load his presentation for the Leading RE conference in Las Vegas on February 27, 2014, and never got it back. This is also consistent with the forensics. While he was in Las Vegas, Samuelson connected the Store N Go to his Move-issued MacBook and opened a PowerPoint file called "Leading RE – February 2014 – Realtor.Doc.Com.pptx." Crain Decl. ¶15. After that, there is no record of the Store N Go connecting to Samuelson's MacBook or any other device, suggesting it never went home to Canada with Samuelson. Crain Decl., ¶¶15-18. And there is no reason to believe it ever contained relevant evidence.

4. <u>Text messages from the "burner" phone</u>

To be clear, Plaintiffs have recovered a lot of data from the personal iPhone that belonged to Samuelson's wife, which he borrowed for his discussions with Zillow. Samuelson produced a forensic image of the phone early in this case, nothing from that phone was ever securely deleted, and the available information was produced. Hartley Decl., ¶¶6-12. Plaintiffs also don't tell the Court that the majority of the deleted messages are available from other sources. Plaintiffs received copies of all of the messages exchanged between Samuelson and the Zillow executives with whom Samuelson was negotiating—Rascoff and Philips—via forensic reports of these executives' phones, and those reports can be further corroborated with the detailed phone invoices produced for these executives. Further, it turns out many of the messages from that phone synched to Samuelson's wife's laptop, those messages have been produced, and an image of the laptop has been turned over to the forensic neutral for further examination (another fact Plaintiffs conveniently omit from their papers).

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B. SAMUELSON HAS NOT SPOLIATED EVIDENCE.

As the above shows, just because one copy of a piece of evidence was deleted doesn't mean the evidence is missing. Plaintiffs' focus on what was "destroyed" rather than what is missing is misplaced. Without a good faith, transparent analysis of what relevant information (if any) is actually missing, there can be no spoliation finding, let alone a determination of what the consequence of such a finding might be.

And even missing information does not prove or even give rise to an inference of spoliation. That has been the law in Washington for 30 years. Instead, spoliation has occurred under state law only if the Court concludes (1) Samuelson acted with a "culpable state of mind" (i.e., bad faith) when he deleted information from his devices before this lawsuit; and (2) the missing information is important and relevant to Plaintiffs' claims. *Henderson*, 80 Wn. App. at 607. Under the federal standard that Plaintiffs advance, the Court would *also* have to find that Samuelson had a duty to preserve evidence in the first place. *See Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011) (duty to preserve evidence and bad faith required for jury instruction on spoliation).

1. Samuelson did not act in bad faith.

Under binding Washington law, the Court must find Samuelson acted with a culpable state of mind. "Culpability turns on whether the party acted in ***bad faith***." *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 382, 972 P.2d 475 (1999) (emphasis added); *Henderson*, 80 Wn. App. at 609 ("[U]nless there was bad faith, there is no basis for 'the inference of consciousness of a weak cause.'"). No Washington court has found spoliation without it. Thus, the Court must be convinced that Samuelson acted in bad faith—intentionally aiming to destroy ***evidence***—when he deleted information from his devices before returning them to Move. *Homeworks Const., Inc. v. Wells*, 133 Wn. App. 892, 900, 138 P.3d 654 (2006) (spoliation is a legal conclusion that "a party's destruction of evidence was both willful and improper"); *cf.*

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Micron, 645 F.3d at 1327 (a finding of bad faith requires the court to "do more than state the conclusion of spoliation and note that the document destruction was intentional").

Plaintiffs' federal cases involving evidence destroyed while litigation was pending are again of little use. Samuelson did not delete ***anything*** after he learned Plaintiffs had sued him. In Washington, that's strong evidence against a finding of bad faith. *See Tavai v. Walmart Stores, Inc.*, 176 Wn. App. 122, 136, 307 P.3d 811 (2013) (no bad faith where party discarded evidence before a request from opponent to keep it); *Ripley v. Lanzer*, 152 Wn. App. 296, 326, 215 P.3d 1020 (2009) (no bad faith where party discarded evidence before lawsuit commenced).

Plaintiffs make much of Samuelson's November 2013 text message to Beardsley about the possibility of a subpoena for their communications. But the subpoena Samuelson was concerned about would not come from his employer, but rather investors or government agencies investigating the potential merger with News Corp that looked likely to occur before the end of 2013. At the time, Samuelson did not even have an offer from Zillow, and was hoping that the News Corp acquisition would go through, which probably would have led him to stay at Move. It would be a completely unreasonable inference to suggest that Samuelson could have been concerned about litigation over a Zillow employment offer that had not been made. Move's CEO Mr. Berkowitz had already warned Samuelson to be alert to the possibility of an investor lawsuit arising out of the potential News Corp merger. Certainly, a text in mid-November 2013—mere days after Spencer Rascoff first raised the issue of Samuelson "changing team jerseys" in a text message—does not show a "culpable state of mind." In fact, Samuelson's serious negotiations with Zillow didn't even get started until six weeks later. There is no reason to believe that Samuelson acted in bad faith to, as Plaintiffs put it, "cover his tracks."

That conclusion is supported by the lengths Samuelson went to make sure Move had whatever information his successor would need from his Move devices, and the transparency with which he did so. Samuelson asked two Move employees to help transfer Move-related files from his laptop to Move's servers. And where he deleted information, to protect his and his

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family's private information, he told Move's EVP of Human Resources exactly what he did and why. He also told her he planned to remove his personal information from his old Dell laptop, which he had forgotten he had, ***and received permission to do so***. There's nothing suspicious about an employee wanting to keep sensitive personal information away from his former employer—especially one likely to harbor ill will against an employee who had, in Plaintiffs' words, "defected" to a despised competitor.

Plaintiffs try to minimize the importance of Samuelson's privacy concerns. But the only objective facts, including testimony from Move's own employees, show that Samuelson acted to preserve Move's business information and deleted data to protect his family's privacy. His goal was not "to destroy important evidence" as required for spoliation. *Ripley*, 152 Wn. App. at 326. Indeed, Samuelson knew that Move would have duplicate copies of his Outlook email and calendars on its servers, so he could have no intent to deprive Move of those records, which are where, on Move computers, evidence of misconduct—if there had been any—would be.

Nor does the "burner" phone establish bad faith. First, Samuelson's reason for using this private phone, instead of his Move phone, to negotiate a possible new job at Zillow is not only plausible, it is true. Second, any deletions to the phone were likely done by the time Samuelson canceled the mobile account on March 16, 2014 and returned the phone to his wife, the day before Plaintiffs (without warning) sued him. After Plaintiffs sued, Samuelson identified the phone in his earliest discovery responses and promptly produced forensically-recovered phone records. He produced records off his wife's computer that showed the texts that may have been deleted. There is no evidence that Samuelson (or anyone else) tried to wipe messages off the phone to make them unrecoverable; rather, if any items became unrecoverable it is because the phone randomly overwrote deleted messages. Hartley Decl. ¶8.

Plaintiffs argue (Motion 7:19) that "He (Errol Samuelson) knew how to destroy data so it would stay gone for good." But he didn't destroy any of his gmail. And he didn't run a program that would have made his deleted "burner phone" messages unrecoverable. Hartley Decl. ¶8.

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The actual inference from Move's statement is that Samuelson was ***not*** destroying evidence, even though he knew how to. If Samuelson were really a bad actor, he would have securely deleted the texts on the "burner phone" and the messages in his gmail, not engaged in a pointless exercise to delete information from his Move devices, which were synched to the Move server.

Plaintiffs have utterly failed to show that Samuelson acted in bad faith.

2. <u>None of the missing information from Samuelson is important to Plaintiffs' claims</u>.

Washington law also requires Plaintiffs to show that information missing from Samuelson would have been "important" and relevant to its case. *Henderson*, 80 Wn. App. at 606. This makes sense. Spoliation sanctions are not meant to compensate the plaintiff or even primarily to punish the alleged spoliator, but rather to preserve the court as a forum where claims can be decided on their merits. *See Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002). Missing information that is not related and important to the claims at issue does not affect the court's truth-finding function.

For missing evidence to be important, Plaintiffs must show it would have provided direct proof of their claims, or that its absence gives Samuelson an investigative advantage. *Henderson*, 80 Wn. App. at 607. Missing evidence is less likely to be important if the opposing party has had an opportunity to examine the evidence's source. *Tavai*, 176 Wn. App. at 135. Missing evidence is ***not*** important if the same evidence is available from another source. *Homeworks*, 133 Wn. App. at 899; *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 616 (S.D. Tex. 2010).

Here, Plaintiffs have not shown that information missing from Samuelson is either relevant or important or even explained what is allegedly missing at all. Plaintiffs have the "evidence" used in their motion either because Samuelson disclosed it or because other recipients had copies. Samuelson's Outlook files from his Move computers, iPhone and iPad were all continuously backed up to Move's servers, which we know because Plaintiffs have

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produced over 16,000 of his emails and his calendars. Samuelson deleted nothing from his personal gmail account that he used to negotiate with Zillow, so that is intact and discoverable. Plaintiffs also have possession of Samuelson's old Dell computer and hard drives, including the unaltered original hard drive (the computer vendor ran software on the "clone" only). Nothing of significance is missing there, either. And Samuelson's communications with Zillow's executives are available to Plaintiffs from Spencer Rascoff, Kathleen Philips and others, including messages recovered from the so-called "burner" phone, which Samuelson didn't securely delete.

At most, Plaintiffs may not have every random text message between Samuelson and Beardsley. But that's of minimal importance in a misappropriation case. The "important" communications would be those with *Zillow*, Move's competitor, and Plaintiffs have them. Plaintiffs also have—and tout—some messages between Samuelson and Beardsley. Indeed, those are some of Plaintiffs' most treasured nuggets (Thelma and Louise, "burner" phone, "Vichy French" response). But there is no reason to believe that the random unrecoverable text messages between them would include important evidence showing trade secret misappropriation (both were Move employees at the time who communicated about Move business). *See Tavai*, 176 Wn. App. at 136 (missing surveillance video was not important evidence because plaintiff failed to establish that camera captured disputed event).

3. <u>Samuelson had no duty to preserve evidence before Plaintiffs sued him because there was no reason to anticipate this litigation.</u>

"Washington cases have not recognized a general duty to preserve evidence." *Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448, 360 P.3d 855, 862 (2015). As discussed above, only the intentional destruction of evidence in bad faith is spoliation under state law—negligence is not enough. This alone is reason to deny Plaintiffs' Motion, which is built on a foundation of negligence-based federal cases involving a common law duty that are irrelevant to spoliation under current Washington law.

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But even if a future Washington appellate court recognizes a general duty to preserve evidence, Plaintiffs' Motion fails to show Samuelson had such a duty on the facts of this case. Plaintiffs point the Court almost exclusively to cases where evidence was deleted *after* the litigation had started and the duty is obvious.[4] But Samuelson did not delete any information after Plaintiffs filed this lawsuit. Under federal law, a pre-litigation duty to preserve evidence arises only if Samuelson should have anticipated this litigation. *Micron*, 645 F.3d at 1321.

Litigation is not reasonably anticipated merely because a party thinks he could be sued for something at some point. "A general concern over litigation does not trigger a duty to preserve evidence," nor does the existence of a dispute or hostility between the parties. *Realnetworks, Inc. v. DVD Copy Control Ass'n, Inc.*, 264 F.R.D. 517, 526 (N.D. Cal. 2009); *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006) (duty triggered when plaintiff filed litigation, not when underlying dispute began). Instead, a duty to preserve evidence arises only when the defendant can identify the plaintiff's "potential claim" or when future litigation is "probable." *Realnetworks*, 264 F.R.D. at 526. That is why most courts that have imposed a pre-litigation duty have relied on some warning that litigation is probable, like a demand letter or formal grievance. *See E.E.O.C. v. Fry's Elecs., Inc.*, 874 F. Supp. 2d 1042, 1044 (W.D. Wash. 2012) (duty triggered by employee threatening to make an administrative complaint); *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 511 (D. Md. 2009) (duty triggered by letter that "openly threaten[ed] litigation"). But in all cases the conduct or communication must be sufficient to give the future defendant reason to know litigation is looming.

[4] *Pier 67, Inc. v. King County*, 89 Wn.2d 379 (1977) (records lost after lawsuit filed); *Valley Engineers Inc. v. Electric Engineering Co.*, 158 F.3d 1051 (9th Cir. 1998) (evidence withheld in discovery); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598 (1997) (evidence lost after court issued preservation order); *Olney v. Job.com*, 2014 WL 5430350 (E.D. Cal. Oct. 24, 2014) (evidence lost after complaint was filed); *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543 (1987) (evidence lost after discovery requests); *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257 (2007) (evidence lost after complaint filed); *Wanderer v. Johnston*, 910 F.2d 652 (9th Cir. 1990) (evidence lost after complaint filed).

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Here, Plaintiffs did not foreshadow this litigation at all. Quite the opposite: the day after Samuelson resigned, Carol Brummer told him that she had no reason to believe Move intended to sue him, since Move doesn't "have a habit of suing employees." Esler Decl. Ex. F, at 203:24-205:10. Her assurance fit with Samuelson's own experience. After a decade at Move, Samuelson was not aware of a single time Move sued a departing executive, including those leaving for competitors. Move even allowed one executive to keep working *after* he gave notice he was hired by Trulia (a competing company Zillow later acquired). Esler Decl., Ex. F. Samuelson was admittedly concerned about the difficult relationship he had with Move's CEO Steve Berkowitz and animosity that could be engendered by his going to work for Zillow (viewed by Move as the evil empire). But, particularly since he had done nothing illegal and had made sure all Move data was preserved, there was no objective reason for Samuelson to believe he would be sued, let alone that a lawsuit was imminent. If the Court finds a pre-litigation duty here, then it is likely that all high-level employees must preserve their negotiations with a new employer, just in case the old employer decides to sue down the road. That is not the law, nor should it be.

In sum, Samuelson did not act in bad faith (as required for spoliation in Washington), nor did he have a duty to preserve evidence (as required for spoliation under even the lowest federal standard). The Court should deny the motion.

C. PLAINTIFFS' "PUNISHMENT" WOULD NOT FIT THE "CRIME"

If spoliation has occurred (which it has not), the Court can impose no greater a sanction than necessary considering the relative importance of the missing evidence and Samuelson's culpability. *Henderson*, 80 Wn. App. at 607.

1. A default judgment would be unprecedented.

Despite the serious factual disputes in this case, Plaintiffs boldly ask the Court to enter the harshest sanction available—a default judgment that would terminate Samuelson's right to a jury trial. As Plaintiffs concede, the Court would be the first in Washington to impose such a

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draconian remedy. No reported Washington case has even suggested a default judgment is a *possible* sanction for spoliation in this state's courts. Instead, most Washington spoliation cases, including those where a party has acted in bad faith, discuss only whether an evidentiary presumption or inference should apply. *See Cook*, 360 P.3d at 866-67 (discussing cases where spoliation instruction was given); *Marshall*, 94 Wn. App. at 381 ("To remedy spoliation the court may apply a rebuttable presumption."); *Henderson*, 80 Wn. App. at 606. And the only reported harsher sanction was reversed on appeal. *Homeworks*, 133 Wn. App. at 894-95 (reversing trial court's dismissal of the alleged spoliater's claim).

Federal law doesn't support a default, either. Federal judges rarely order terminating sanctions for spoliation, and when they do, they most often dismiss the spoliator's claim, not grant a default to the opposing party. *See Leon v. IDX Sys. Corp.*, 464 F.3d 951, 957 (9th Cir. 2006) (dismissed plaintiff's claim); *Anheuser-Busch, Inc. v. Nat. Beverage Distributors*, 69 F.3d 337, 343 (9th Cir. 1995) (dismissed defendant's counterclaim). In fact, Plaintiffs cite only one case that granted a default judgment, and it involved a defendant who failed to contest the plaintiff's evidence of spoliation. *See Cabinetware Inc. v. Sullivan*, 1991 WL 327959, *2 (E.D. Cal. July 15, 1991). It is not an exaggeration to say that a default judgment against Samuelson on this contested paper record would be unprecedented.

More importantly, Plaintiffs have not met their burden of proving that Samuelson acted in bad faith. Bad faith is a necessary prerequisite to a terminating sanction under federal law. *Leon*, 464 F.3d at 958. As discussed above, all of Samuelson's alleged acts of spoliation occurred before Plaintiffs filed this lawsuit. Samuelson's sole motivation was to remove sensitive personal information that has nothing to do with this case. Without bad faith, no spoliation has occurred and without doubt no termination sanction can issue.

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2. Plaintiffs are not entitled to an instruction that prevents the jury from deciding if Samuelson spoliated evidence.

Plaintiffs also ask the Court to instruct the jury to presume that any missing information would show that Samuelson misappropriated Plaintiffs' trade secrets. In the alternative, Plaintiffs want an adverse inference instruction. Plaintiffs are not entitled to such relief, especially not at this stage of the case.

Rebuttable presumption. Washington law disfavors instructions that tell the jury what to presume. At a minimum, any presumption should be rebuttable. *Marshall*, 94 Wn. App. at 381. But the better practice is "not to charge the jury that there is a presumption against the party, but to instruct that the jury is at liberty to draw an unfavorable inference against the party if they think it warranted." *Wright v. Safeway Stores*, 7 Wn.2d 341, 347, 109 P.2d 542 (1941); *see also Cook*, 360 P.3d at 863, n.7 (disagreeing with *Marshall* that a rebuttable presumption is appropriate to remedy spoliation because "Washington courts have preferred instructing a jury on a permissible inference").

Adverse inference. A jury instruction, if any, should only allow the jury to draw an adverse inference if they find the evidence warrants it. Though Plaintiffs propose this as the least severe sanction available, the stark reality is "an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome." *Cook*, 360 P.3d at 865. An adverse inference instruction is by no means a compromise.

If the Court gives such an instruction, the jury must be allowed to listen to all the evidence, judge the credibility of witnesses, and decide for itself whether Samuelson spoliated evidence in bad faith. Plaintiffs' authorities confirm that adverse inference instructions "permit the jurors to re-assess the evidence and determine whether, in their judgment, spoliation has occurred at all." *Nucor Corp. v. Bell*, 251 F.R.D. 191, 203 (D.S.C. 2008); *see also Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 157 (4th Cir. 1995) ("Rather than deciding the spoliation issue itself, the district court provided the jury with appropriate guidelines for evaluating the

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evidence."). Thus, the instruction should explain the elements of spoliation and task the jury with deciding whether Samuelson spoliated evidence. If so, the instruction should at most ***allow*** jurors draw an adverse inference, but not ***require*** that they do so.

Finally, it is worth repeating that any catchall instruction on spoliation would be error, since spoliation must be connected to the individual acts of each defendant. *Henderson*, 80 Wn. App. at 606. And at this stage, with discovery still open, and a neutral forensic examiner still performing its work, any decision on such matters is premature.

D. PLAINTIFFS' MOTION IS, AT BEST, PREMATURE.

Plaintiffs' motion is fact-intensive. They are asking the Court to make detailed findings about what, if any, evidence is actually missing, about what motivated each defendant to do certain things, and about what sanctions are appropriate under the all the circumstances. Plaintiffs' motion invites the Court simply to accept the testimony of plaintiffs' forensic expert without affording defendants the chance to even depose him. Plaintiffs apparently believe a disputed paper record is sufficient, even though a proper decision must turn on the credibility of witnesses. Any one of numerous factual disputes here would prevent the Plaintiffs from obtaining summary judgment on this issue. It's not clear how the same record could possibly support Plaintiffs' request for a punitive default judgment, where they carry a burden of proof.

Plaintiffs have failed to come forward with the evidence needed to support any relief for spoliation against any Defendant, and Samuelson urges that the motion be denied. Neither the facts nor the law support any aspect of Plaintiffs' requested relief.

Alternatively, Samuelson joins Zillow's suggestion that, at a minimum, the Court wait to rule on this motion until the results of Neutral Forensic Examination are available, discovery is complete (scheduled for April 1, 2016), and the Court has heard testimony. Samuelson also suggests that the proper time to rule on the motion is in the context of ruling on jury instructions after all the evidence has been heard. Even if Plaintiffs' paper record were accurate and complete, it would be insufficient to support spoliation sanctions. Indeed, most of the cases

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Plaintiffs cite imposed sanctions only after the trial court has heard live testimony and made credibility findings. *See Anheuser-Busch, Inc. v. Nat. Beverage Distributors*, 69 F.3d 337, 343 (9th Cir. 1995) (sanctions imposed only after a four-day evidentiary hearing); *Volcan Group, Inc. v. T-Mobile USA, Inc.*, 940 F. Supp. 2d 1327, 1334 (W.D. Wash. 2012) ("resolution of the [spoliation] motion first requires the Court to make a credibility assessment"); *E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469, 477 (E.D. Va. 2011); *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 546 (1987); *Cabinetware Inc. v. Sullivan*, 1991 WL 327959, *2 (E.D. Cal. July 15, 1991) (unpublished); *see also Leon v. IDX Sys. Corp.*, 2004 WL 5571412 (W.D. Wash. Sept. 30, 2004) (trial court watched video deposition of alleged spoliator).

VI. CONCLUSION

An accusation of spoliation is a serious matter. Plaintiffs not only fail to make a case for spoliation sanctions, they also fail to treat the issue with the seriousness it deserves by explaining to the Court clearly and completely what is allegedly missing and what is not, the facts with respect to each defendant and each alleged act of spoliation that would support their relief. Lacking any evidence to support their crumbling case against Samuelson, Plaintiffs seek to distract the Court by conflating the defendants, mischaracterizing the evidence (both what exists and what is supposedly missing), and failing to give the Court the whole story. Samuelson was under no duty to preserve evidence until he was sued without warning on March 17, 2014. Anything he did before that time was done in good faith to preserve and protect his own and his family's privacy. Plaintiffs have no convincing evidence that Samuelson took any confidential or trade secret information to Zillow, but instead ask the Court to treat their lack of evidence as evidence itself.

The Court should deny the motion outright and with prejudice to remove this issue from the case. But if the Court is not inclined to do that now, it should not make any determination

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until after discovery is closed, when a fuller presentation of the evidentiary picture will be possible.

DATED this 25th day of January, 2016.

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DECLARATION OF SERVICE

The undersigned declares: on the 25th day of January, 2016, a copy of the foregoing document was served on the parties' counsel, via email, at the addresses set forth below.

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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.

Signed at Seattle, Washington this 25th day of January, 2016.

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