THE HONORABLE SEAN O'DONNELL
NOTED FOR CONSIDERATION: February 5, 2016
Oral Argument Requested

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' CONSOLIDATED REPLY TO ZILLOW, SAMUELSON, AND BEARDSLEY'S RESPECTIVE OPPOSITIONS TO PLAINTIFFS' MOTION FOR EVIDENCE SPOLIATION SANCTIONS AGAINST DEFENDANTS*

REDACTED VERSION

* Although Plaintiffs filed a single motion, Zillow, Samuelson, and Beardsley each filed separate 24-page opposition briefs. Rather than file a separate 5-page reply to each opposition, for the court's convenience Plaintiffs have consolidated their replies to all three defendants into this single, consolidated reply brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

I. Introduction

Defendants' view of Washington law is indefensible. As they tell it, litigants in Washington are free to destroy evidence when they know they are going to be sued and even during litigation. When a person in Washington receives a subpoena demanding the production of a specific device, he is free to smash the device to smithereens as long as he objects to the subpoena first. Parties can obliterate hundreds or even thousands of gigabytes of evidence – literally hundreds of thousands of pages – and courts cannot do anything about it.

This is not the law. Washington, like everywhere else, recognizes that spoliation of evidence is a serious problem.[1] The cases Defendants contend create impossibly high barriers to punishing spoliation involve vastly different facts and are not applicable in a situation like this one. This isn't a case where a single item was tossed out in the normal course of business before anyone anticipated a lawsuit.[2] This isn't a case where a person who was in a car accident gets rid of his car years later because he doesn't want a wrecked car in his yard.[3] This is a case where two sophisticated executives with technology backgrounds, who anticipated that they would be sued and that their communications would be subpoenaed, permanently erased data from multiple computers, smartphones, and mobile devices, deleted thousands of emails and an unknown number of text messages, used and even wrote special software programs to wipe even more data, and continued to destroy evidence even while the litigation was in progress and a subpoena was pending. And instead of condemning their conduct, their employer and co-defendant Zillow ratified and defended it. It is true that spoliation on this scale is unprecedented in Washington – but that does not mean Washington courts can or should condone it.

Defendants' attempts to minimize their conduct are deeply troubling. Zillow characterizes Samuelson and Beardsley's destruction of data across numerous devices as

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[1] *See Pier 67, Inc. v. King County*, 89 Wn.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).

[2] *Tavai v. Walmart Stores, Inc*. 176 Wn. App. 122, 136 (2013); *Ripley v. Lanzer*, 152 Wn. App. 296, 326 (2009).

[3] *Henderson v. Tyrell*, 80 Wn. App. 592, 610-611 (1996).

"innocent human missteps" and accuses Plaintiffs of "unreasonably demand[ing] perfection."[4] Beardsley is even more dismissive – "that is life," he shrugs.[5] Again, and not to belabor the point, Plaintiffs are not here seeking the gravest of sanctions because somebody misplaced a thumb drive or accidently deleted a few emails. Defendants obliterated massive amounts of evidence over an extended time period, including while they were subject to litigation hold notices issued by multiple employers and while a subpoena was pending. And they misrepresented the facts of their misconduct multiple times, and are continuing to do so even now, as they offer up a pile of excuses and explanations for their behavior that defy credibility and/or contradict their previous testimony. This is not just "life happening," it is severe, intentional spoliation that calls out for real consequences.

Defendants' contention that nothing relevant was destroyed because any Move documents they deleted were likely backed up on Move's servers is a red herring. The issue here is the destruction of evidence, not the loss of Move's business documents. The most critical evidence in this case is the metadata associated with the specific electronic files Defendants copied – not just what files were deleted, but also data showing which files were in Defendants' possession when they changed jobs; which files were copied and by whom; when the files were accessed and by whom; and what other computers or devices they were transferred to. When Defendants wiped their computers and devices, trashed the hard drives and flash drives they used to copy files, and ran deletion software, they destroyed this critical evidence.

Evidence destruction goes to the core of the Court's truth-seeking function. When a party destroys evidence, the jury cannot do its job. Victims go uncompensated; wrongdoers go unpunished; judicial resources are wasted on trials that have no hope of arriving at the truth. Serious sanctions, up to and including terminating sanctions, are warranted here. At minimum, the Court should instruct the jury to presume that the missing evidence would have shown that

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[4] Zillow Opp. 1, 20.
[5] Beardsley Opp. 18.

Samuelson and Beardsley misappropriated Plaintiffs' trade secrets and confidential information, and either disclosed it to Zillow or used it on Zillow's behalf, because that is the only way to ensure Defendants do not benefit from their misconduct.[6]

II. Defendants Deliberately Destroyed Evidence.

Defendants concede, as they must, that Samuelson and Beardsley destroyed massive amounts of data. They admit that while under subpoena, Beardsley destroyed the Western Digital hard drive he connected to his Move computer on March 4, 2014, the day before Samuelson left Move for Zillow. *See* Zillow Opp. 17; Beardsley Opp. 16-17. They admit that Samuelson no longer has the Verbatim "Store N Go" USB drive or the Chipsbank USB drive that he connected to his Move-issued Mac laptop in the weeks before he defected to Zillow. Zillow Opp. 14; Samuelson Opp. 7.[7] They admit Samuelson wiped all of the data from his iPhone and iPad, and that he deleted the text messages from his burner phone on March 16, 2014, the day before Move sued him – and, not coincidentally, the same day that Beardsley, who knew Move was planning to sue Samuelson, joined him at Zillow. Zillow Opp. 4; Samuelson Opp. 11. And they admit Beardsley wrote code and used special software to permanently delete files from his home-office computer, Zillow laptop, and Move laptop. Zillow Opp. 15; Beardsley Opp. 6, 15.

Unable to dispute the basic fact that a mountain of evidence was destroyed, Defendants argue that they cannot be sanctioned because their spoliation was supposedly only negligent and not intentional. Essentially, they have a million excuses: This device was smashed in a fit of anger, that device was left at a conference, this other device was lost by Beardsley's son, this computer was wiped to hide pornography, these phones and tablets were erased to protect personal information, these emails were erased by mistake, nobody had any idea Move would sue, they didn't know they were supposed to preserve evidence, etc. These excuses are at best implausible and at worst obvious lies that conflict with the record evidence. As summarized

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[6] *See Pier 67,* 89 Wn. 2d at 385-86.

[7] Samuelson now claims he left the Chipsbank USB drive at Move's office. However, Samuelson did not return a Chipsbank device on his last day at Move. *See* Supp. Gallegos Decl., Ex. HH.

below, there is more than enough evidence to support a finding that Zillow executives Samuelson and Beardsley intentionally destroyed evidence.

A. It Is Undisputed That Beardsley Destroyed Evidence While Under A Subpoena And Multiple Litigation Holds.

Beardsley knew he was destroying evidence every step of the way. He contends he did not know about the impending lawsuit or that he was supposed to preserve evidence when he destroyed email archives, deleted text messages, and ran wiping software on his Move computer right before he left to join Samuelson at Zillow. *E.g.*, Beardsley Opp. 15. Beardsley is not telling the truth. Beardsley knew about the impeding suit against Samuelson and was subject to a litigation hold issued on March 6, 2014, the day after Samuelson's departure. On that date, Move sent Beardsley a litigation hold notice telling him "please make sure you do not destroy ANYTHING related to Errol. That includes anything on Outlook or other electronic data or documents, or hard copy documents." Kontonickas Decl., Ex. A. After receiving the hold notice, Beardsley ran the wiping program Cipher *nine times* on his Move computer (a fact he lied about in his deposition, but now admits), deleted thousands of emails, and deleted his text messages with Samuelson from his Move-issued cell phone. *See* Lloyd-Jones Decl.,¶17, 20-22; *see also* Beardsley Opp. 15-16. That alone is intentional spoliation.

Likewise, it is undisputed that Beardsley destroyed the Western Digital hard drive, "lost" several flash drives, and permanently deleted data from his home-office and Zillow computers while he was under a subpoena. Beardsley's claim that he did not understand he was under an obligation to produce these devices in response to the subpoena is unbelievable. The subpoena expressly demanded "[a]ll electronic memory devices (for example external hard drives or flash drives) onto which you saved documents pertaining to the business of any of the plaintiffs or onto which you saved documents from any computer issued to you by Move." Gallegos Decl., Ex. S. The fact that the subpoena did not identify these devices by name or by serial number does not excuse destroying these devices instead of producing them.

B. Samuelson And Beardsley Knew Their Communications Would Be Subject To Discovery, And Planned To Not Leave A Paper Trail.

Further proving that Samuelson and Beardsley's evidence destruction was intentional is the fact that they understood from the outset that they would be sued and their communications would be subject to discovery. In November 2013, in response to an email from Beardsley discussing how they would defect to Zillow without being viewed as "Vichy French," Samuelson sent Beardsley a text warning him not to communicate about their plans in writing because "*someone could, in hindsight, try to dig up (or subpoena) the emails (or text messages which apparently are archived on my iMac.)*" Lloyd-Jones Decl., Ex. A; Mot. 5. Two months later, Samuelson acquired a prepaid "burner" cell phone so that he could have undiscoverable conversations with Zillow's CEO, Spencer Rascoff, while he was still working at Move. *Id.*

Samuelson and Beardsley are now lying about these facts. In his opposition and declaration, Samuelson claims he sent the text warning Beardsley about potential subpoenas supposedly because he was concerned that if Move merged with News Corp it would trigger a government investigation. Samuelson Opp. 8. This conflicts with his prior, sworn testimony. When asked in his deposition who he expected to subpoena his communications, Samuelson testified that *he expected Move to sue him*. Gallegos Decl., Ex. I (Samuelson Dep. Tr. 163:24-164:6) (explaining that if he decided to go to Zillow, someone could use Beardsley's email to "try to make the case we were not working in the company's best interest"). He said nothing about fearing some hypothetical government investigation. *See id.*

Samuelson's claim that he did not anticipate this lawsuit is also belied by his insistence that Zillow indemnify him, specifically, because he was concerned Move would sue him for trade secret theft. *See* Gallegos Decl., Ex. H; *see also* Supp. Gallegos Decl., Ex. II (text from Samuelson to Rascoff telling him the "indemnification issue" relates to the "disclosure of Move's confidential information"). Although Zillow contends that Samuelson's indemnity agreement was "not unusual," Zillow Opp. 16, Zillow's Audit Committee Chairman disagreed,

testifying that Samuelson's indemnity package was "relatively unusual" in that it required board approval, unlike other indemnity packages. *See* Supp. Gallegos Decl., Ex. JJ.

Further confirming that Samuelson saw this litigation coming, he destroyed the text messages on his burner phone and deactivated his account on March 16, 2014. Samuelson claims he could not have known about the suit on March 16 because it was not filed until the following day, March 17. But surely Beardsley, who quit Move to join Samuelson at Zillow on March 16, 2014, told Samuelson that he was about to be sued.

C. The Sheer Volume Of Evidence Destroyed Proves The Destruction Was Willful.

Even without taking into account the subpoena, the litigation holds, text messages, and other evidence proving that their evidence destruction was premeditated, the sheer volume of evidence destroyed – hundreds or thousands of gigabytes, across numerous devices – by itself proves that Defendants' evidence destruction was intentional. *See Krumwiede v. Brighton Assocs., LLC*, No. 05-3003, 2006 WL 1308629, at *10 (N.D. Ill. May 8, 2006) (noting that the "volume and timing" of the destruction was "sufficient to find willful and bad faith spoliation); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-2299, 2014 WL 2921653, at *52 (W.D. La. June 23, 2014) ("The scale of the spoliation in this case is further evidence that the documents were destroyed in bad faith. Takeda destroyed documents of relevant custodians on three continents over a period of approximately ten years. *This repeated, systemic, and wide-spread destruction can only be the result of a willful and intentional failure to preserve; i.e., a bad faith refusal to preserve evidence in the face of a known obligation to do so*.") (emphasis added). It would be virtually impossible to destroy as much evidence as Samuelson and Beardsley did through mere negligence.

D. Defendants Misled The Court About Their Evidence Destruction.

Defendants' bad faith is even further illustrated by their attempts to mislead the Court into thinking that they voluntarily came clean about their evidence destruction. *E.g.,* Beardsley Opp. 9-10 Zillow Opp. 6. What actually happened, as the record shows, is that Plaintiffs sought

an inspection after Beardsley's lawyers produced a stolen Move database that they mistakenly thought was a Zillow document. *See* Mot. 13. All three defendants opposed any inspection, swearing up and down that no evidence was missing and accused Plaintiffs of filing the motion solely for harassment. *E.g.,* Def. Opp. to MTC Inspection at 1 ("Plaintiffs' insinuation that Mr. Beardsley's document production is unreliable or deficient, or that he deleted evidence in this case, is unfounded.").[8] It was only *after* Judge Hilyer ordered the neutral inspection that they grudgingly admitted that Beardsley destroyed one of the devices that was to be inspected, "lost" three of the others, and ran wiping software on two of the computers. *See* Gallegos Decl., Ex. Z. In other words, they *volunteered nothing* until getting caught was inevitable.[9]

The record is replete with other examples of Defendants misrepresenting the facts. As ordered by Judge Linde, in March and July of 2014, respectively, Samuelson and Beardsley each certified that they had returned all of Move's trade-secret data. Gallegos Decl. DD-GG. Beardsley lied; he actually kept two entire stolen databases, as well as a highly confidential strategy memo. *See* Gallegos Decl., Exs. E, F, G. Samuelson also lied about having a burner phone until his text messages referring to his "burner phone" were forensically uncovered. *See* Lloyd-Jones Decl.,¶20, Ex. 3. These are not parties who have been forthcoming with the Court.

E. Samuelson's Shaggy-Dog Stories Are Particularly Unbelievable.

Samuelson, in particular, is proffering disingenuous explanations for destroying evidence and stealing and attempting to steal Move's data. For example, Samuelson claims that the reason he plugged a bunch of flash drives into his Move laptop the night before he left was because he was trying to transfer Move documents that were on his Move laptop to the Move network.

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[8] Defendants are also not telling the truth when they try to take credit for having the neutral expert appointed. That was their fallback argument, in the event they did not manage to avoid the inspection altogether. *See* Def. Opp. to MTC Inspection at 7.

[9] Just two weeks ago, Samuelson disclosed that he had additional Move documents in a bag full of flash drives that he supposedly "found" last month behind a bookshelf. Supp. Gallegos Decl., Ex. KK. A few hours after Samuelson's disclosure, Beardsley revealed that he, too, had another flash drive he supposedly just found. Supp. Gallegos Decl., Ex. LL. These drives are not among those that are the subject of the motion; they are additional drives that Samuelson and Beardsley are only coughing up now because they are afraid the neutral's inspection will reveal their existence.

Samuelson Decl.,¶26-31. That makes no sense at all. If Samuelson was giving Move the laptop back, there was no reason for him to copy documents that were on the laptop to flash drives and give them to Move separately. The most likely scenario is that Samuelson made up this story to explain what he was doing when a coworker walked in on him – after hours – attempting to connect his computer to Move's network the night before he left.

Samuelson's convoluted story about why he cloned the hard drive on the Move laptop he had under his bed is even less believable – he claims he was trying to protect his "personal information" so instead of just deleting it he had the hard drive cloned, but (the story goes) the computer store tampered with it somehow by using Eraser software without his authorization, and so on. Yet the most troubling part of Samuelson's story is that, if things had gone as planned, he would have returned the laptop to Move with a cloned hard drive – while keeping the original hard drive, with all of Move's trade-secret files – for himself. *Nowhere in his declaration does Samuelson deny that he planned to keep the original Move hard drive*.[10]

* * * *

Courts have found spoliation and issued adverse inference instructions on facts similar to the ones present here. For example, in *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 644 (S.D. Tex. 2010), the court found:

> The evidence that the defendants knew about the litigation with Rimkus when they deleted the emails; the inconsistencies in the explanations for deleting the emails; the failure to disclose information about personal email accounts that were later revealed as having been used to obtain and disseminate information from Rimkus; and the fact that some of the emails reveal what the defendants had previously denied—that they took information from Rimkus and used at least some of it in competing with Rimkus—support the conclusion that there is sufficient evidence for a reasonable jury to find that the defendants intentionally and in bad faith deleted emails . . . .

[10] Defendants try to bolster their story by having Crain recite their excuses in his declaration. Crain does not have personal knowledge about whether Samuelson and Beardsley's excuses are true. *See* Plaintiffs' Objections to Declaration of Andrew Crain.

Id. The evidence is more than sufficient to support a finding that Samuelson and Beardsley intentionally destroyed evidence in this case, notwithstanding their excuses.

III. The Evidence Defendants Destroyed Was Relevant.

Straining to avoid accountability for their actions, Defendants assert, wrongly, that they cannot be sanctioned unless Plaintiffs can prove up the content of the documents, files, emails, texts, and electronic data that Defendants destroyed, and further establish that the destroyed evidence would have helped Plaintiffs' case. Zillow Br. 8. This isn't the rule. It is only in cases of negligent spoliation where a sanction requires proof that the spoliated evidence would have helped the other side. *Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448, 465 (2015) (party seeking an adverse-inference instruction for "*merely negligent*" spoliation must show that the evidence lost would have been helpful). Here, Defendants *intentionally* destroyed hundreds of thousands of pages of evidence. *See* Plt. Mot. 6-15. When parties intentionally destroy evidence, "the spoliator's mental culpability itself [is] evidence of the relevance of the documents destroyed." *Id*. (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 221 (S.D.N.Y. 2003)) (emphasis omitted).

Moreover, Courts understand that a party cannot be expected to prove the contents of emails, documents, files, texts, and other evidence destroyed by the opposing party. *See Leon v. IDX Sys. Corp.*, No. 03-1158, 2004 WL 5571412, at *3 (W.D. Wash. Sept. 30, 2004) *aff'd*, 464 F.3d 951 (9th Cir. 2006). Thus, "a party responsible for the destruction of potential evidence has no right to a presumption that the documents destroyed were irrelevant." *Id*. (quoting *National Assn . of Radiation Survivors v. Turnage,* 115 F.R.D. 543, 557 (N.D. Cal. 1987).

For the purpose of analyzing spoliation, a document destroyed by a party is relevant if "a reasonable trier of fact could find that the document either would harm the spoliator's case or support the innocent party's case." *Passlogix, Inc. v. 2FA Tech., LLC*, 708 F. Supp. 2d 378, 411 (S.D.N.Y. 2010) (collecting cases). This standard is plainly met here. Among other things, Samuelson and Beardsley deleted their text and email communications with each other during

the time they were scheming to defect to Zillow and attack Move. *See, e.g.*, Lloyd-Jones Decl., Exs. 3, 4; Gallegos Decl., Exs. B, K, U. By any measure, these texts and emails are relevant.

Samuelson and Beardsley also destroyed, "lost," and/or wiped an external hard drive and numerous flash drives that they plugged into their computers days before the left Move for Zillow. These devices, if they had not been destroyed, would either prove that Samuelson and Beardsley stole Move files (such as the Move databases and strategy memo Beardsley had in his possession), or they would support Defendants' claim that they did not. Thus, they satisfy the test for relevance. *See Passlogix*, 708 F. Supp. 2d at 411.

Importantly, Defendants have already conceded the relevance of Samuelson and Beardsley's computer files, texts, and emails. When Defendants moved to compel the production of Beardsley's Move laptop, they argued that the *lack* of incriminating data on the device would help prove that Beardsley was diligently working and not stealing trade secrets while at Move. Supp. Gallegos Decl., Exs. MM, NN. Now that we know Beardsley ran wiping software on that computer, this claim seems pretty disingenuous. In any event, the Discovery Master agreed with Defendants, finding that "Beardsley is correct that the most obvious source of evidence outlining his activities during that employment would be his computer and iPhone." *Id.*, Ex. OO.[11] Having taken this position and prevailed, Defendants cannot now claim this information is irrelevant.

IV. Defendants' Claim That The Evidence They Destroyed Was Not Truly "Lost" Is Without Merit.

Defendants attempt to minimize their conduct by claiming that much of what they destroyed was not really "lost" – because it was backed up on Move's servers, or because it was recovered or could potentially be recovered or, in the case of deleted emails and texts, because Move could potentially track them down from the other party. These arguments fail.

First, there is no way to recover evidence from the missing flash drives or the smashed Western Digital hard drive. Those devices are gone. Although some information about the names

[11] This Court adopted the Discovery Master's ruling on July 23, 2015.

of the files on the devices can be obtained from the computers to which they were connected, this information does not include all of the files. Supp. Lloyd-Jones Decl.,¶6-9. Additionally, file names without file contents tell us very little since anyone can name a file of stolen Move documents something innocuous, like "Health Info." *Id*. The most important data can only be recovered from the devices themselves. For example, without the devices there is no way to gather complete information about (1) the names and contents of all of the files on the device; (2) the folders saved on the device; (3) metadata showing when the files on the device were accessed, modified, and created; (4) whether and when the device was reformatted; and (5) whether efforts were made to wipe the device. *Id*.,¶4.

Second, Defendants' argument that the Move files on the missing drives were not lost because Move probably had other copies completely misses the point. Of course Move would probably have copies of any confidential Move files that Defendants stole. The reason Defendants' spoliation prejudices Move is not because they destroyed files and now Move does not have them anymore. Move is prejudiced because it has the burden to prove that Samuelson and Beardsley misappropriated Move data, and Samuelson and Beardsley destroyed the best evidence of that – i.e., the drives that would show what files they copied, when those files were accessed, and whether they were transferred to any other devices, such as Zillow computers.

Third, Defendants point out that in some cases Plaintiffs have been able to recover a deleted text or email from the other party to the communication. That is true in a few instances, despite Defendants' best efforts to avoid such recovery. However, since Samuelson and Beardsley both *admitted* they destroyed texts and emails, a majority of the most important communications in the case were likely destroyed on both ends. Mot. 6-11. Defendants' briefing completely fails to account for this fact.

Fourth, there is no way to recover any of the data that was lost when Beardsley used software to permanently delete data from his Move laptop, Zillow laptop, and home-office

computer. Lloyd-Jones Decl., ¶ 17; Supp. Lloyd-Jones Decl., ¶¶ 11-13. Defendants have not suggested that the lost data was backed up anywhere or that it can be recovered.[12]

Fifth, Defendants contend that the Outlook emails and other data they deleted from their Move laptops, phones, and tablets would have been backed up on Move's servers. But that is only true of emails sent to their "@Move" addresses. Peterson Decl., ¶ 2. We know that Samuelson and Beardsley used web-based accounts such as Gmail as well, and emails to and from web-based accounts that were synched with Outlook would not have been backed up on Move's servers. *Id.*; Supp. Lloyd-Jones Decl.,¶2. Likewise, when Samuelson restored his iPhone and iPad to factory settings, third-party email accounts and communication applications (e.g., Skype and WhatsApp) would have been permanently deleted. In fact, it is very likely that Samuelson and Beardsley deleted emails and other data that was *not* backed up to Move's servers. Their excuse for the deletions – that they deleted their emails to keep Move from having their "personal information" – doesn't make any sense if the only items they were deleting were saved on Move's server and already available to Move elsewhere.

V. Defendants Were Obligated Not To Destroy Evidence.

Shockingly, Defendants contend that in Washington parties are free to destroy evidence even if they know they are going to be sued, and even when a subpoena is pending. *See, e.g.*, Zillow Br. 13, Beardsley Br. 16. This is not the law at all.

Beardsley's contention that he wasn't required to preserve evidence even though he received a subpoena asking for it is nonsense. Rule 45 requires a party responding to a subpoena to produce the items sought. Civ. R. 45(d)(1). Trashing them instead is not listed as an acceptable

[12] Defendants claim that the free space on Beardsley's Move computer was overwritten not by the Cipher program he ran but instead by a default 'TRIM' setting on his computer. Beardsley Opp. 6 n. 4. If true, this just proves Beardsley was destroying evidence on purpose. Either he knew about the TRIM setting and was running Cipher anyway to make doubly sure evidence was deleted, or he did not know about it and was running Cipher because he thought he had to in order to destroy evidence. Either way, the TRIM setting does not help him. Additionally, Beardsley misrepresents his own expert's declaration in his brief, claiming on page 15 that "the forensic analysis of the Move laptop reveals that Cipher did not cause anything to be lost at all" when in fact Mr. Crain stated that the "majority" – not "all" – of the overwritten space was overwritten by TRIM instead of Cipher. Crain Decl., ¶ 34.

alternative option. *See id.*; *see also In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1068 (N.D. Cal. 2006) (organization under a legal obligation to preserve documents based on a third party subpoena).[13]

Beardsley was also under an obligation to preserve evidence when he wiped his computer and deleted files on his last day at Move. At the time, Beardsley knew the lawsuit was going to be filed, and was subject to a litigation hold notice issued by Move. Kontonickas Decl., Ex. A; *see also Homeworks Const, Inc. v. Wells*, 133 Wn. App. 892, 901 (2006) (recognizing a "general duty to preserve evidence on the eve of litigation"). And Beardsley continued to be subject to a hold notice while he was at Zillow yet, while subject to Zillow's litigation hold, he destroyed a hard drive and multiple flash drives, and permanently deleted data from his Zillow computer. It is mind-boggling that Zillow takes the position that Beardsley was under no obligation to preserve evidence *when he was subject to a hold notice issued by Zillow*. Zillow Opp. 17-18.[14]

Samuelson, likewise, had a duty to preserve evidence before the case was filed because, as discussed above, he anticipated the lawsuit and was deliberately taking steps to cover his tracks. The cases cited by Defendants are inapposite in that they involved situations where parties who were not on notice of potential litigation discarded irrelevant items in the normal course of business. *E.g.*, *Tavai*, 176 Wn. App. at 136 (discarded video would not have captured plaintiff's fall); *Ripley*, 152 Wn. App. at 326 (in malpractice case, discarded scalpel handle was irrelevant because there was no dispute about whether it was defective).

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[13] The conference paper Beardsley relies upon recognizes that a subpoena recipient's duty to preserve evidence can under some circumstances can be *broader* than the subpoena itself – in particular where, as here, the recipient would have gleaned from the subpoena that he was likely to become a party in the case. See The Sedona Conference® Commentary on Non-Party Production & Rule 45 Subpoenas, 9 Sedona Conf. J. 197, 199 (2008) ([T]he receipt of a subpoena may serve to notify a non-party that it may become a party in the litigation or in a future litigation. In that case the non-party should take affirmative steps to preserve documents responsive to the subpoena and the potential broader scope of the proceeding.").

[14] [redacted]

VI. There Is No Basis To Postpone Ruling Until The Neutral Examination Is Complete.

The Court should reject Defendants' request that a ruling be postponed until the neutral expert's work is complete. Contrary to Defendants' misrepresentations, the neutral expert was not "appointed by the Court for the very purpose of investigating the allegations at issue in this motion." Zillow Opp. 2. The neutral expert was appointed to inspect certain devices and cloud accounts that Defendants claimed contained privileged communications and other sensitive information. Gallegos Decl., Ex. N, at p. 7. Defendants are being permitted to screen his findings before Plaintiffs may see them. *Id.*, Ex. N, at pp. 11-12.

Additionally, the neutral expert cannot conceivably make a finding that Defendants did not destroy any evidence. Some of the evidence was undisputedly physically destroyed, such as the hard drive that Beardsley smashed. In addition to the hard drive, a number of other devices that were supposed to be subject to the protocol – in particular, many of the USB storage devices listed in the protocol – cannot be inspected because Samuelson and Beardsley supposedly lost them. *Id.*, Ex. N, at p. 8. Moreover, to the extent Defendants successfully wiped evidence from their devices, the neutral expert will not be able to recover it. The neutral expert's ability to recover missing evidence is also restricted because the Discovery Master prohibited him from accessing Samuelson and Beardsley's web-based email accounts, even though there is evidence Beardsley destroyed relevant emails from his accounts, which Beardsley apparently does not deny. *See* Mot. 11; Beardsley Opp. 15. It is certainly possible that the neutral expert will identify *additional* instances of evidence destruction, but he cannot restore everything that was lost.

VII. Severe Sanctions, Up To And Including A Default Sanction, Are Warranted.

The remedies Plaintiffs seek for Defendants' conduct are not out of the ordinary for spoliation on this scale. In analogous cases, courts have not hesitated to award very severe sanctions – including terminating sanctions, evidentiary sanctions, and millions of dollars in fines. *See, e.g.*, *SK Hynix Inc. v. Rambus Inc.*, No. 00-20905, 2013 WL 1915865 (N.D. Cal. May 8, 2013) ($250 million monetary sanction against plaintiff who destroyed thousands of

documents, sanction applied as credit against judgment); *Philips Elecs. N. Am. Corp. v. BC Tech.*, 773 F. Supp. 2d 1149 (D. Utah 2011) (where defendant's employees deleted thousands of files and folders from five laptop computers, court granted a motion to strike defendant's answer and dismiss counterclaims, entered a default liability judgment for plaintiff, and recommended the matter be referred to the U.S. Attorney for investigation and criminal prosecution); *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004) (spoliation sanction precluding all individuals who had failed to comply with the document retention program from testifying in any capacity at trial and a monetary sanction of $2,995,000).[15]

Terminating sanctions are warranted here given the scope of Defendants' misconduct and the amount of evidence lost. If it were not for their own mistakes – accidentally producing a stolen database, failing to completely delete every incriminating email and text – they could have pulled off the "perfect crime." If Defendants are not sanctioned, they will exploit and benefit from their evidence destruction at trial, by spinning tales of innocence and arguing to the jury that they did not do anything wrong. If the Court is not inclined to grant terminating sanctions, we respectfully request that the Court mitigate the prejudice to Plaintiffs from Defendants' evidence destruction 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. *See Pier 67,* 89 Wn. 2d at 385-86. Substantial monetary sanctions are also warranted. To do nothing would be to reward spoliation and encourage others to engage in the same conduct.

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[15] *See also Ceglia v. Zuckerberg*, No. 10-00569, 2013 WL 1208558 (W.D.N.Y. Mar. 26, 2013) *report and recommendation adopted*, No. 10-00569, 2014 WL 1224574 (W.D.N.Y. Mar. 25, 2014) *aff'd*, 600 F. App'x. 34 (2d Cir. 2015) (dismissing plaintiffs' claim with prejudice due to spoliation of electronic evidence); *Taylor v. Mitre Corp.*, No. 1:11-01247, 2012 WL 5473715 (E.D. Va. Sept. 10, 2012) *report and recommendation adopted, No.* 1:11-1247, 2012 WL 5473573 (E.D. Va. Nov. 8, 2012) (dismissing plaintiffs' claims with prejudice for destroying up to 16,000 files with a cleaner tool); *In re Hawaiian Airlines, Inc.*, No. 03-00817, 2008 WL 185649 (Bankr. D. Haw. Jan. 22, 2008) (court, in an earlier order, sanctioned spoliating defendant by making findings of fact in favor of plaintiff on major issues of the case, and later ruled against defendant); *In re Krause*, 367 B.R. 740 (Bankr. D. Kan. 2007) *aff'd*, No. 08-1132, 2009 WL 5064348 (D. Kan. Dec. 16, 2009) *aff'd*, 637 F.3d 1160 (10th Cir. 2011) (Defendant installed program on his computers and wiped files; court entered partial default judgment and required defendant to turn over all networked computers and cover costs for copying and imaging).

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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.

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