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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 EDIFECS, INC.,

11 Plaintiff,

12 v.

13 WELLTOK, INC.,

14 Defendant.

CASE NO. C18-1086JLR

ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFF'S MOTION FOR
EVIDENTIARY SANCTIONS

15
16 **I. INTRODUCTION**

17 Before the court is Plaintiff Edifecs, Inc.'s ("Edifecs") motion for evidentiary
18 sanctions. (Mot. (Dkt. # 27).) Edifecs seeks sanctions based on Defendant Welltok,
19 Inc.'s ("Welltok") alleged spoliation of (1) records of text messages on Welltok
20 employees' personal cell phones, and (2) online job postings. (See Mot. at 5.) Welltok
21 filed a response. (Resp. (Dkt. # 34).) Edifecs filed a reply. (Reply (Dkt. # 38).) The
22 court held oral argument on November 1, 2019. (See 11/1/19 Dkt. Entry.) The court has

1 considered the parties’ submissions, the relevant portions of the record, and the
2 applicable law. Being fully informed, the court GRANTS in part and DENIES in part
3 Edifecs’s motion for sanctions.

4 **II. BACKGROUND**

5 This action revolves around Edifecs’s allegation that Welltok’s former Vice
6 President, David Profant, “engaged in an unlawful raid of senior Edifecs employees.”
7 (Mot. at 5.) Mr. Profant left Edifecs for Welltok in late 2016. (*See* Mot. at 6¹; Resp. at
8 6.) Shortly after, a number of Edifecs employees with whom Mr. Profant was close (the
9 “Employees”) applied for and were offered positions at Welltok. (*See, e.g.*, Uriarte Decl.
10 (Dkt. # 28) ¶¶ 9-11, Exs. 8-10.) Edifecs alleges that Mr. Profant “secretly negotiate[d]
11 with Welltok executives to leave Edifecs for Welltok.” (*See* Mot. at 5-6.) Welltok
12 responds that the Employees made independent decisions to apply for their Welltok
13 positions. (*See* Resp. at 8.)

14 Edifecs originally sued Mr. Profant in March 2017 (the “Profant Case”) for breach
15 of a clause in Mr. Profant’s employment agreement that disallowed Mr. Profant from
16 soliciting Edifecs employees for one year following termination of his Edifecs
17 employment. (*See* Compl. (Dkt. # 1) ¶ 18.) During that litigation, Mr. Profant’s counsel
18 represented that Mr. Profant conducted a thorough search for responsive documents,
19 including text messages, in his “personal devices (iPhone and iPad), and the PC he uses
20 for work (a Welltok-owned device).” (*See* 4/24/17 Ltr. (Dkt. # 24-2) at 3.) Mr. Profant

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22 ¹ Throughout this order, the court cites to documents in the record using the page
numbers provided by the court’s electronic filing system.

1 passed away unexpectedly in March 2018 as the Profant Case was in progress. (*See*
2 Resp. at 8.) Edifecs decided to shift the focus of its litigation away from Mr. Profant and
3 towards Welltok. (*See id.* at 8 (citing Cohen Decl. (Dkt. # 35) ¶ 24, Ex. 23 at 1).)
4 Edifecs filed this action against Welltok on July 4, 2018, alleging a new tortious
5 interference theory. (*See* Compl. ¶¶ 40-49.) Edifecs then voluntarily dismissed the
6 Profant Case. (*See* Resp. at 8.)

7 Mr. Profant disclosed his Edifecs employment agreement to Welltok. (*See* Uriarte
8 Decl. ¶ 3, Ex. 2 (“Addendum”).) Welltok prepared and sent the Addendum to its offer
9 letter to Mr. Profant on November 13, 2016, which stated that “[w]e do not believe your
10 acceptance of employment . . . will violate the [non-solicitation clause] or any other
11 obligation you have to Edifecs, in part, because we are not a competitor of that
12 company.” (*See id.* at 3.) “Nevertheless,” the Addendum goes on, “we have some
13 special rules that you must follow.” (*Id.*) The “special rules” instruct Mr. Profant on
14 how he may and may not communicate with his former Welltok colleagues. (*See id.*
15 (“Do not affirmatively contact former colleagues telephonically, by text or by email
16 during any restricted period to discuss employment with Welltok or to suggest or
17 encourage them to apply for employment at Welltok.”).)

18 Welltok, which was not a defendant in the Profant Case, purportedly received
19 notice of that lawsuit on March 15, 2017, and issued a litigation hold notice to former

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1 Edifecs employees Dave Profant, Jennifer Forster, John Schlichting, Dave Arnone, Derek
2 Baehre, and Matt Dziedzic. (*See Mot.* at 8.²)

3 Edifecs served subpoenas on Welltok, Mr. Profant, and the Employees on May 24,
4 2017. (*See id.* at 7.) The Employees, through Welltok’s counsel, objected to producing a
5 number of documents. (*See Resp.* at 6.) Nevertheless, Welltok’s counsel agreed to
6 produce emails between Mr. Profant and the Employees, including “all emails to or from
7 Mr. Profant dated from September 1, 2016 to the date when each left Edifecs to work for
8 Welltok.” (*See Cohen Decl.* ¶ 22, Ex. 21.) On October 11, 2017, Mr. Profant’s counsel
9 made a formal demand under the Stored Communications Act, 18 U.S.C. § 2702(c)(2), to
10 Mr. Profant’s cell phone carrier, AT&T Wireless, requesting “copies of any and all text
11 message records sent from or received by Mr. Profant’s AT&T-subscriber cell phone
12 number . . . for the time period November 1, 2016 to the present, including but not
13 limited to text message detail, logs and transcripts.” (*Cohen Decl.* ¶ 23, Ex. 22.) By
14 April 24, 2018, counsel for the parties appear to acknowledge that nearly all of Mr.
15 Profant’s text messages for the relevant time period had been deleted. (*See Cohen Decl.*
16 ¶ 24, Ex. 23.)

17 In August 2017, Welltok switched to a new job posting system and lost access to
18 its prior job posting records. (*Mot.* at 9-10; *Uriarte Decl.* ¶ 15, Ex 14 (“Welltok cannot
19 access its history of sales job postings during the period January 1, 2016 to July 30, 2017,
20 because Welltok no longer uses the same job posting platform that it used during that
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22 ² The litigation hold notice does not appear in the record.

1 period . . .”). Edifecs believes that “Welltok hopes to profit from its spoliation of job
2 posting records by arguing that there were public job postings for the subject positions.
3 Edifecs cannot test this argument due to Welltok’s spoliation.” (Mot. at 6 n.2.)

4 Welltok asserts that Edifecs was unwilling to take Welltok depositions that were
5 “repeatedly offered.” (Resp. at 9.) Edifecs did not depose the Employees until
6 September and October 2019. (*See* Cohen Decl. (Dkt. # 35) ¶¶ 2, Ex. 1 (Bhardwaj Dep.),
7 3, Ex. 2 (Forster Dep.), 4, Ex. 3 (Arnone Dep.), 5, Ex. 4 (Singh Dep.), 33 (declaring that
8 Welltok’s counsel did not include excerpts from the depositions of “Mr. Baehre, Mr.
9 Dziejcz, Mr. Hinkle or others because they occurred recently and to date they have only
10 been provided in draft form.”).) During these depositions, Edifecs’s counsel questioned
11 the Employees about their use of their personal email accounts and cell phones, and
12 whether they maintained records of text messages sent to or received from Mr. Profant in
13 late 2016 and early 2017. (*See, e.g.*, Forster Dep. 115:18-25 (“Q: Was it your habit to
14 delete text messages after you received them from Mr. Profant? A: It’s my habit to
15 periodically clean out my text messages, but not specifically – usually because I get
16 pages of conversations. Q: How often do you do that? A: Depends on when I have
17 downtime.”).) The Employees testified that they searched their email accounts for and
18 produced responsive documents in the Profant Case. (*See, e.g.*, Forster Dep. at 159:21-24
19 (“Q: You don’t know if those emails were collected? A: I gave everything that I had at
20 the time when I was asked for them.”).)

21 The Employees were not parties to the Profant Case. A number of the Employees
22 used their cell phones for work purposes. (*See* Reply at 4 (citing Swaminathan Decl. ¶ 4,

1 Ex. 2 (Arnone Dep.) at 53:24-54:8.) It is unclear from the briefing at what date the
2 Employees deleted potentially relevant text messages (or whether they were deposed on
3 this topic), and if they did so prior to joining Welltok.

4 **III. ANALYSIS**

5 **A. Timeliness of Welltok's Response**

6 As an initial matter, Edifecs asks the court to strike Welltok's response brief
7 because Welltok filed it two days late. (*See Reply* at 2.) Edifecs filed its motion on
8 September 20, 2019, and noted it for October 11, 2019. Welltok's opposition was due on
9 October 7, 2019. *See Local Civil Rules LCR 7(d)(3)*. Welltok filed its response on
10 October 9, 2019. (*See Resp.*) Although the court does not condone Welltok's late filing,
11 Edifecs asks the court to impose harsh sanctions on Welltok. The court finds that
12 Welltok would be substantially prejudiced if the court disregarded entirely its late-filed
13 brief. Therefore, the court considers Welltok's opposition, but cautions Welltok that it
14 must strictly adhere to the deadlines imposed by the Local Civil Rules and the court's
15 scheduling order.

16 **B. Spoliation Standard**

17 Spoliation occurs when a party "destroys or alters material evidence or fails to
18 preserve" evidence when the party is under a duty to preserve it. *Apple Inc. v. Samsung*
19 *Elec. Co., Ltd.*, 888 F. Supp. 2d 976, 989 (N.D. Cal. 2012). A party has a duty to
20 preserve evidence "when litigation is pending or reasonably anticipated." *Moore v.*
21 *Lowe's Home Ctrs., LLC*, No. C14-1459RJB, 2016 WL 3458353, at *3 (W.D. Wash.
22 June 24, 2016). "Circuit courts describe the duty to preserve evidence as attaching when

1 a party should know that evidence may be relevant to litigation that is anticipated, or
2 reasonably foreseeable.” *PacifiCorp v. Nw. Pipeline GP*, 879 F. Supp. 2d 1171, 1188 (D.
3 Or. 2012) (internal quotation marks omitted). “[W]hen litigation is ‘reasonably
4 foreseeable’ is a flexible fact-specific standard that allows a district court to exercise the
5 discretion necessary to confront the myriad factual situations inherent in the spoliation
6 inquiry.” *Id.* (citing *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir.
7 2011)).

8 If a party had a duty to preserve evidence and did not, “the court considers the
9 prejudice suffered by the non-spoliator and the level of culpability of the spoliator,
10 including the spoliator’s motive or degree of fault.” *Moore*, 2016 WL 3458353, at *3.
11 “[A] finding of ‘willfulness, fault, or bad faith,’” satisfies the culpability component.
12 *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006) (quoting *Anheuser-Busch, Inc.*
13 *v. Nat. Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995)). “A party’s destruction of
14 evidence qualifies as willful spoliation if the party has ‘some notice that the documents
15 were potentially relevant to the litigation before they were destroyed.’” *Leon*, 464 F.3d at
16 959 (quoting *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir.
17 2002)). “There are two sources of authority under which a district court can sanction a
18 party who has despoiled evidence: the inherent power of federal courts to levy sanctions
19 in response to abusive litigation practices, and the availability of sanctions under [Federal
20 Rule of Civil Procedure] 37 against a party who fails to obey an order to provide or
21 permit discovery.” *Id.* at 958.

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1 There is scant Ninth Circuit authority squarely considering whether and under
2 what circumstances spoliation of evidence may be imputed to a defendant who did not
3 participate in the spoliation. *See Pettit v. Smith*, 45 F. Supp. 3d 1099, 1110 (D. Ariz.
4 2014) (discussing authorities). The current trend among district courts appears to be to
5 impute liability for an agent’s spoliation to the principal “based on traditional notions of
6 agency law, in which a defendant principal exercises control and authority over its
7 third-party agent who possess the spoliated evidence.” *See Dykes v. BNSF Ry. Co.*, No.
8 C17-1549-JCC, 2019 WL 1128521, at *6 (W.D. Wash. Mar. 12, 2019) (citing *Goodman*
9 *v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 523 n.16 (D. Md. 2009)); *see also Gemsa*
10 *Enterprises, LLC v. Specialty Foods of Alabama, Inc.*, 2015 WL 12746220, at *9 (C.D.
11 Cal. Feb. 10, 2015).

12 A district court imputed a nonparty’s spoliation to a party where the spoliator was
13 “an interested third party that controlled [the party’s] personnel file and had access to it,
14 and [was] also providing [the party’s] legal defense,” *see Ramos v. Swatzell*, No.
15 EDCV121089BROSPX, 2017 WL 2857523, at *6 (C.D. Cal. June 5, 2017), *report and*
16 *recommendation adopted*, No. EDCV121089BROSPX, 2017 WL 2841695 (C.D. Cal.
17 June 30, 2017). Another court did the same where “not merely a disinterested” third
18 party destroyed physical evidence while on notice that litigation involving that evidence
19 would likely ensue, and “could potentially be liable for indemnifying” the party. *Dykes*
20 *v. BNSF Ry. Co.*, No. C17-1549JCC, 2019 WL 1128521, at *6 (W.D. Wash. Mar. 12,
21 2019).

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1 Other district courts have declined to impute a non-party's spoliation to a party
2 where a defendant's employee destroyed a USB thumb drive "to protect himself," not his
3 employer, had not disclosed its existence to the employer, and had not consulted with the
4 defendant company about discarding the device, *see Nucor Corp. v. Bell*, 251 F.R.D. 191,
5 196 (D.S.C. 2008) (holding that the employee was not acting within the scope of his
6 authority when he destroyed the thumb drive), and have observed that "spoliation
7 inferences are only appropriately entered against the party that actually destroyed the
8 evidence," *Gurvey v. Fixzit Nat'l Install Servs., Inc.*, Civ. No. 06-1799(DRD), 2011 WL
9 550628, at *5 (D.N.J. Feb. 8, 2011).

10 **C. Duty to Preserve**

11 The first prong of the spoliation analysis requires the court to determine when
12 Welltok's duty to preserve arose. A duty to preserve can arise before litigation is filed,
13 and is determined based on "an objective standard, asking not whether the party in fact
14 reasonably foresaw litigation, but whether a reasonable party in the same factual
15 circumstances would have reasonably foreseen litigation." *Apple*, 888 F. Supp. 2d at 990
16 (quoting *Micron Tech.*, 645 F.3d at 1320). Edifecs argues that Welltok's duty to preserve
17 arose as early as November 2016, but not later than March 15, 2017. (*See Mot.* at 6-7.)
18 The November 13, 2016 date is based on Welltok's provision to Mr. Profant of the
19 Addendum, and based on Welltok's response to an Edifecs request for production. (*See*
20 *id.*)

21 The court first concludes that Welltok's duty to preserve did not arise on
22 November 13, 2016. First, Welltok had not hired the Employees as of that date. (*See*

1 Compl. (Dkt. # 1) ¶ 24 (alleging that Jennifer Forster resigned from Edifecs on December
2 16, 2016, and that the other Employees resigned from Edifecs on February 1, 2017).)
3 Welltok could not reasonably anticipate on November 16, 2016, that Edifecs would sue
4 Welltok based on Edifecs employees moving to Welltok when they had not yet done so.

5 Second, the November 16, 2016 Addendum appears to represent Welltok taking
6 precautions to prevent legal conflict with Edifecs by instructing Mr. Profant to not violate
7 his contract with Edifecs. (*See* Addendum.) The Addendum is aimed—at the most—at
8 preventing litigation, not responding to litigation that could reasonably be anticipated at
9 the time. (*See id.*) Third, Edifecs reads too far into Welltok’s discovery responses.
10 Edifecs requested “ALL DOCUMENTS related to the potential or actual recruitment or
11 hiring of David Profant.” (Uriarte Decl. ¶ 6, Ex. 5 at 9.) Welltok responded in part by
12 stating “Welltok also objects to this request *to the extent* that it is overly broad and
13 unduly burdensome and requires the production of documents protected by the
14 attorney-client privilege and/or work product privilege.” (*Id.* (emphasis added).)
15 Contrary to Edifecs’s arguments, this response can hardly be read as an admission that
16 Welltok anticipated Edifecs would sue Welltok prior to March 15, 2017. *See* Moore,
17 2016 WL 3458353, at *3-4 (finding that a defendant did not have a duty to preserve a
18 plaintiff’s emails despite later invoking work product protections).

19 The court concludes that Welltok’s duty to preserve arose on March 15, 2017, the
20 date of the earliest evidence in the record showing Welltok was aware of Edifecs’s
21 lawsuit against Profant. (*See* Mot. at 8.) Edifecs sued Welltok directly only after Mr.
22 Profant died unexpectedly. (*See* Resp. at 8.) However, the lawsuit against Mr. Profant,

1 then a Welltok employee, was so related to Welltok’s hiring decisions, that Welltok
2 should have been aware of a probability that Edifecs would sue Welltok as of March 15,
3 2017. Additionally, Welltok does not contest that Welltok reasonably anticipated
4 litigation with Edifecs as of March 15, 2017. (*See generally* Mot.)

5 **D. Spoliation**

6 As soon as Welltok’s duty to preserve arose, it was “under a duty to preserve
7 evidence which it knows or reasonably should know is relevant to the action.” *Apple*,
8 888 F. Supp. at 991 (quoting *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060,
9 1067 (N.D. Cal. 2006)). Therefore, the next question the court must decide is whether
10 Welltok met its duty to preserve with respect to employee text messages and job posting
11 data.

12 1. Text Messages

13 The text messages at issue resided on the Employees’ personal cell phones. (*See*
14 *Resp.* at 13; *Reply* at 4.) Although Edifecs presents substantial evidence that the
15 Employees texted with Mr. Profant in late 2016 to January 2017, (*see* Uriarte Decl. ¶ 8,
16 Ex. 7), Edifecs presents no evidence that the Employees maintained records of those text
17 messages as of March 15, 2017 (*see generally* Mot.; *Reply*). At oral argument, counsel
18 for Edifecs confirmed that they did not know when the messages were deleted, even
19 after deposing the Employees. Based on the Employees’ deposition testimony, it appears
20 likely that the Employees deleted text messages on their personal cell phones as a matter
21 of course. (*See Resp.* at 10 (citing Forster Dep.; Arnone Dep.)) The court cannot

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1 conclude that the messages were spoliated absent evidence that the text messages still
2 existed at the time Welltok's duty to preserve arose.

3 Even if such evidence existed, Edifecs has not persuasively argued why the
4 Employees' alleged spoliation should be imputed to Welltok. Edifecs, despite having
5 deposed the Employees, does not present evidence that the Employees deleted text
6 messages to protect Welltok, as opposed to protecting themselves, or simply to clear
7 space on their phones. (*See generally* Mot.) Accordingly, the court concludes, based on
8 the record before it, that Welltok cannot be held responsible for spoliation based on
9 deleted employee text messages.

10 2. Job Postings

11 The court finds, however, that Welltok engaged in spoliation by destroying its
12 historical job posting data. Once a duty to preserve attaches, a defendant may be required
13 to "suspend any existing policies relating to deleting or destroying files and preserve all
14 relevant documents related to the litigation." *In re Napster*, 462 F. Supp. 2d at 1070.
15 Welltok failed to do so when it switched systems and lost its online job posting records in
16 August 2017. (Mot. at 9-10; Uriarte Decl. ¶ 15, Ex 14 ("Welltok cannot access its history
17 of sales job postings during the period January 1, 2016 to July 30, 2017, because Welltok
18 no longer uses the same job posting platform that it used during that period . . .").)
19 Welltok's destruction of evidence was willful because Welltok had "some notice that the
20 documents were *potentially* relevant to the litigation before they were destroyed." *See*
21 *Leon*, 464 F.3d at 959 (quoting *Kitsap Physicians Serv.*, 314 F.3d at 1001).

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1 **E. Relevance**

2 “Sanctions for spoliation are appropriate only if the party had notice that the
3 evidence is potentially relevant to a claim.” *EEOC v. Fry’s Electronics, Inc.*, 874 F.
4 Supp. 2d 1042, 1044 (W.D. Wash. 2012) (citing *Leon*, 464 F.3d at 958). Welltok argues
5 that “Edifecs failed to put Welltok on notice that it believed its historical job postings
6 were relevant or should be preserved” before Edifecs sued Welltok directly. (*Id.* at 12.)
7 However, Welltok should have been aware that the job postings were at least “potentially
8 relevant” to the litigation regardless of whether Edifecs formally requested them. *See*
9 *Kitsap Physicians Serv.*, 314 F.3d at 1001.

10 Welltok’s historical job post data was certainly “potentially relevant,” although
11 Edifecs likely overstates its importance to this case. If the Employees applied to their
12 positions through the job posts, the posts could support Welltok’s position that the
13 Employees independently applied for their positions, as opposed to applying by way of
14 prodding from Mr. Profant. Additionally, if the data still existed, Edifecs would be able to
15 confirm whether the positions at issue were in fact posted publicly.

16 **F. Appropriate Remedy**

17 “In considering what spoliation sanction to impose, if any, courts generally
18 consider three factors: (1) the degree of fault of the party who altered or destroyed the
19 evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether
20 there is a lesser sanction that will avoid substantial unfairness to the opposing party.”
21 *Apple*, 888 F. Supp. 2d at 992 (internal quotations omitted).

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1 Although Welltok is at fault for deleting its job post data, the court finds that
2 Welltok’s “degree of fault” is low. *See id.* (internal quotations omitted). The court does
3 not condone Welltok’s conduct in deleting its job posting records, but the record is
4 insufficient to establish that Welltok engaged in widespread or reckless spoliation.
5 Edifecs has shown, at most, that Welltok lost its job posting records when it switched to a
6 new system.

7 Second, evidence of resulting prejudice to Edifecs is not particularly strong.
8 Emails sent by the Employees in which they applied for their positions were produced,
9 along with other emails from the same custodians. (*See* Cohen Decl. ¶ 22, Ex. 21.)
10 Additionally, Edifecs has now deposed the Employees, and has had the opportunity to
11 examine them in detail about the circumstances surrounding their decisions to apply for
12 positions at Welltok. (*See, e.g.,* Bhardwaj Dep.; Forster Dep.; Arnone Dep.; Singh Dep.)
13 Edifecs has not persuasively explained how the existence or lack thereof of job posting
14 records for the Employees’ positions has more than de minimis relevance to this case.
15 The records of the job postings, without more, would do little to prove that the
16 Employees applied because of improper actions by Welltok or because they simply
17 wanted to work there. Edifecs should be able to glean material evidence on the same
18 topic “from the documents actually produced, the extensive deposition testimony, and the
19 written discovery between the parties.” *See in re Oracle Corp.*, 627 F.3d at 386; *see also*
20 *Apple*, 888 F. Supp. 2d at 994 (finding that prejudice to the non-spoliating party was “not
21 particularly strong” where the spoliating party had produced documents and emails sent
22 to and from the Employees, and the non-spoliating party deposed key witnesses whose

1 | emails were not preserved). Therefore, the court finds that the degree of prejudice to
2 | Edifecs is low.

3 | Third, although Edifecs seeks an adverse inference instruction (*see* Mot. at 16), the
4 | court finds that “there is a lesser sanction that will avoid substantial unfairness to the
5 | opposing party.” *Apple*, 888 F. Supp. 2d at 992 (internal quotations omitted). Adverse
6 | inference instructions are “among the most severe sanctions a court can administer.” *Id.*
7 | at 994 (quoting *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 619
8 | (S.D. Tex. 2010)); *see also Keithley v. Homestore.com, Inc.*, No. C-03-04447 SI(EDL),
9 | 2008 WL 2830752, at *10 (N.D. Cal. Nov. 6, 2008) (“An adverse inference instruction is
10 | a harsh remedy.”); *Zubulake*, 220 F.R.D. at 219-20 (“In practice, an adverse inference
11 | instruction often ends litigation—it is too difficult a hurdle for the spoliator to
12 | overcome Accordingly, the adverse inference instruction is an extreme sanction and
13 | should not be given lightly.”).

14 | The limited prejudice to Edifecs from the loss of the job postings suggests that an
15 | adverse inference instruction is too harsh a sanction in this case. *See, e.g., Keithley*, 2008
16 | WL 2830752, at *10. Instead, the court concludes that a limited exclusion sanction is
17 | more appropriate. Therefore, the court **ORDERS** that at trial, Welltok will not be
18 | allowed to present testimony or evidence as to the contents of any particular job postings
19 | for the positions to which the Employees applied. Welltok will be able to present
20 | evidence and argue that the Employees applied in response to job postings, without
21 | discussing their contents, and Edifecs may cross-examine on and argue the significance

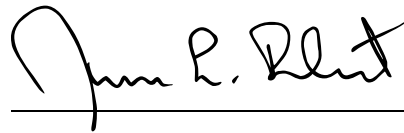
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1 of the missing job postings. The court finds that this limited exclusion is sufficient to
2 remedy the limited prejudice Edifecs may face due to the loss of the job postings.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the court GRANTS in part and DENIES in part
5 Edifecs's motion for evidentiary sanctions (Dkt. # 27).

6 Dated this 8th day of November, 2019.

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9 JAMES L. ROBART
10 United States District Judge
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