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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

PETER OLNEY, et al. Case No. 1:12-cv-01724-LJO-SKO  
Plaintiffs,  
v. **ORDER GRANTING DEFENDANTS'**  
JOB.COM, et al., (Doc. Nos. 157, 158)  
Defendants.

**I. INTRODUCTION**

On July 26, 2014, Defendants Job.com, Inc. ("Job.com") and Windy City Call Center, LLC ("Windy City") (collectively, "Defendants") filed motions for sanctions against Plaintiff for spoliation of evidence during the course of discovery. (Docs. 157, 158.) Plaintiff filed briefs in opposition to both motions (Docs. 164, 165), and Defendants filed reply briefs on August 6, 2014. (Docs. 168, 169.) Plaintiff filed objections to each reply brief on August 7, 2014. (Docs. 170, 171.) A hearing was held on September 24, 2014; Jason Ibey, Esq., and Robert Hyde, Esq., appeared on behalf of Plaintiff; Hugh McCabe, Esq., Dan Bitterlin, Esq., appeared on behalf of Job.com; Fred Puglisi, Esq., appeared on behalf of Windy City.

For the reasons set forth below, Defendants' motions for spoliation sanctions in the form of dismissal is DENIED; Defendants' alternative motion for an adverse jury inference is GRANTED;

1 and Defendants' motion for monetary sanctions is GRANTED.

2 **II. BACKGROUND**

3 **A. Factual Background<sup>1</sup>**

4 On August 12, 2012, Plaintiff registered his resume with a website called "Resume-Now"  
5 as part of his efforts to seek new employment. Resume-Now is owned and operated by  
6 LiveCareer, Inc. ("LiveCareer"). Registration with Resume-Now generally consists of three steps.  
7 First, the registrant is prompted to create or upload a new resume. Second, the registrant is asked  
8 for information regarding the job he or she seeks. Third, the registrant is asked to enter and  
9 confirm his or her email address. According to Job.com, at this point the registrant also (1) is  
10 given an opportunity to review Resume-Now's terms of use and privacy policy; (2) is asked to  
11 acknowledge that he or she has read and agrees to the terms of use and privacy policy; and (3) is  
12 allowed to uncheck a box that reads: "[R]ecive . . . free information on managing my career."

13 On August 13, 2012, Plaintiff used Resume-Now's resume posting service, a service that is  
14 offered only to subscribing members. To initiate the resume posting service, Plaintiff clicked a  
15 button labeled: "Post Resume. Instantly post your resume to 90+ job boards." Plaintiff was then  
16 directed to the resume posting splash page, where Plaintiff was given the option to choose from  
17 various categories of job-search websites where he wished his resume to be posted. Plaintiff chose  
18 to post his resume on "General Sites." Upon choosing "General Sites," Plaintiff was directed to a  
19 pop-up page displaying a list of additional job sites where his resume would be sent. "Job.com"  
20 was one of the websites listed in the pop-up page.

21 As part of this process, Plaintiff was required to provide additional contact information.  
22 The website reads: "Enter your mailing address and current phone [number] so that recruiters and  
23 potential employers can contact you." Plaintiff entered his cell phone number on this page.  
24 Plaintiff was then given another chance to review Resume-Now's terms of use and privacy policy.  
25 Plaintiff reviewed the policy and completed the resume posting process by clicking "Post."

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28 <sup>1</sup> This background section is taken from the district court's June 19, 2014, order on the third-parties' motions for judgment on the pleadings. (Doc. 146.)

1 On August 17, 2012, Plaintiff registered an account with Job.com via Resume-Now's  
2 website. The registration process consisted of populating fields on five pages, one of which was  
3 the "Profile" page. On the Profile page, Plaintiff's cell phone number was entered in the "Home  
4 Phone" field. Job.com asserts that Plaintiff also left a box checked that read "[B]y keeping the box  
5 above checked, I'd like to be contacted by phone to discuss educational opportunities to help  
6 prepare me for my dream career." Although the box was checked by default, a registrant may  
7 uncheck the box if he or she wishes to opt out of the service. Plaintiff claims that he never visited  
8 Job.com, never saw the opt-out box, and therefore could not have checked it nor left it unchecked.

9 Job.com forwarded Plaintiff's profile, including his phone number, to a third party, Windy  
10 City. Windy City operates the Windy City Call Center, which is used to provide "education leads"  
11 to higher learning institutions. Job.com, through Windy City, placed multiple calls a day to  
12 Plaintiff on August 17, 2012, through September 4, 2012, for the purpose of selling Job.com and  
13 Windy City's or a third party's services.

14 Plaintiff filed this suit on October 19, 2012, on behalf of himself and all other similarly  
15 situated individuals. According to the currently operative Second Amended Complaint ("SAC"),  
16 Plaintiff seeks statutory damages and injunctive relief against Job.com and Windy City for  
17 negligent willful violations of the Telephone Consumer Protection Act ("TCPA").

## 18 **B. Discovery and Procedural Background**

### 19 **1. Plaintiff's Deposition**

20 On October 4, 2013, Job.com deposed Plaintiff and asked him about his job search and  
21 job-related websites he visited at or around the time he paid to have his information provided to  
22 Job.com. Plaintiff was asked to identify the computer he used to perform his job search; Plaintiff  
23 indicated his home computer was used. Plaintiff was instructed not to "take any steps to delete  
24 any Web browsing history or any information from that computer and we may be requesting  
25 access to that through discovery."

### 26 **2. Job.com's Request for Production of Tangible Things**

27 On October 11, 2013, Job.com served Plaintiff with a second set of Request for Production  
28 of Tangible things which sought production of two items: (1) the cell phone Plaintiff alleges he

1 was called on in violation of the TCPA; and (2) the home computer Plaintiff testified at his  
2 deposition he used to conduct his job search. Regarding Plaintiff's home computer, Job.com  
3 specifically indicated its examination would include "internet history, cookies, and temporary files  
4 related to Plaintiff's access and visitation of job-related websites" as well as "local electronic files  
5 pertaining to any and all emails related to Plaintiff's job search and access of job-related websites,  
6 including any attachments to those emails, and any and all resumes or cover letters." (Doc. 158-7  
7 Exhibit B.) On November 19, 2013, Plaintiff objected to Job.com's request for production. The  
8 parties engaged in a lengthy meet and confer process, and ultimately requested an informal  
9 discovery dispute conference with the Court, which was held on January 9, 2014.

### 10 **3. Court Orders Plaintiff To Produce Computer to Neutral Expert**

11 On January 10, 2014, following an informal telephonic conference with the Court, Plaintiff  
12 was ordered to turn over his computer and phone to the parties' agreed-upon neutral expert for  
13 imaging by no later than January 14, 2014, which was extended by stipulation of the parties to  
14 January 17, 2014. (Doc. 97.) Plaintiff's computer was turned over to neutral expert BCT  
15 Consulting ("BCT") on Friday, January 17, 2014. The results of BCT's initial investigation were  
16 produced on January 21, 2014. (Doc. 158-17, Exhibit L.)

### 17 **4. Neutral Expert's Reports**

18 BCT's report indicated the presence of a computer program called "Winclear" on Plaintiff's  
19 computer. This program is used to delete internet history, cookies, and web files. On February  
20 19, 2014, the parties held a conference with Marshall Moll of BCT and requested further  
21 investigation of the Winclear program. On February 21, 2014, Mr. Moll provided further  
22 investigation results which revealed the Winclear program was run only once on January 16, 2014,  
23 the day before Plaintiff turned over his computer for inspection. (Doc. 158-17, Exhibit L.)

24 Plaintiff informed Job.com that Winclear was not run manually by Plaintiff, but had  
25 "popped up" on Plaintiff's computer. The parties again contacted Mr. Moll at BCT to ask him to  
26 investigate the issue further in light of Plaintiff's explanation.

27 Mr. Moll responded to the parties on March 3, 2014, indicating it was "very unlikely" that  
28 the program ran on its own. Mr. Moll also discovered two additional programs, PC Doctor and

1 PC Optimizer Pro, which were run on January 16, 2014, and January 17, 2014. Mr. Moll was  
2 asked to prepare a report, which Mr. Moll produced on April 1, 2014. (Doc. 158-20, Exhibit O.)  
3 Job.com's and Plaintiff's counsel met and conferred regarding Job.com's request to obtain its own  
4 expert to analyze Plaintiff's hard drive, but Plaintiff refused to stipulate to further expert  
5 examination of the computer data.

6 **5. Parties Permitted to Hire Experts to Evaluate Plaintiff's Computer Data**

7 On May, 1, 2014, the parties appeared again for an informal telephonic discovery dispute  
8 conference. Following the conference, the Court issued a minute order permitting Job.com to  
9 retain its own expert to review a mirror image of Plaintiff's hard drive. (Doc. 124.)

10 **6. Job.com's Expert: Global Digital Forensics, Inc.**

11 Job.com retained forensic expert Global Digital Forensics, Inc. ("GDF") to inspect the  
12 image of Plaintiff's hard drive. On May 30, 2014, GDF provided a formal report of its findings.  
13 (Doc. 158-22, Exhibit Q.) GDF concluded that the computer clock setting had been intentionally  
14 manipulated to roll the computer date backwards to December 1999. The computer system event  
15 log showed four entries confirming the date change was a user-initiated action, not something the  
16 system did without intervention. (Doc. 158-22, Exh. Q, p. 5.) GDF also concluded that a program  
17 named PC Optimizer Pro was initially installed in November 2012, and re-installed on May 27,  
18 2013. The program was set to run on a scheduled basis to destroy and remove data from the  
19 computer hard drive. The last time PC Optimizer was run, on January 17, 2014, 2,318 items were  
20 "cleaned" off the system. Between December 21, 2012, and December 28, 2013, a total of 15,686  
21 files were purged from the system. (Doc. 158-22, Exh. Q, p. 5.) GDF summarized the Windows  
22 prefetch data in relevant part as follows:

23 It is possible to determine the number of times a program has been used, and the  
24 last date it was run, by examining the metadata of the prefetch files.

25 Based on the analysis of the extracted metadata [from Plaintiff's hard drive], the PC  
26 Optimizer program was run only once, on January 17, 2014. Since we know that  
27 the PC Optimizer program was used more than once, evidenced by the recovered  
28 log files, the only way the prefetch metadata could display a single use is that the  
prefetch files were deleted. Additional review of other program files listed in the  
prefetch folder also indicate single or very few runs. This condition would indicate

1 that multiple prefetch files were deleted. Further analysis indicated that in excess  
2 of 70 prefetch files were created between January 12, 2014, and January 17, 2014  
(see Exhibit #4 A and 4 B).

3 (Doc. 158-22, p. 10.) GDF concluded the Winclear program was run on Plaintiff's computer and  
4 detected 12,775 items on January 16, 2014.

5 **7. Plaintiff's Expert: Hansen Legal Technologies, Inc.**

6 Upon review of GDF's report, Plaintiff retained Jeffrey Hansen to review GDF's findings  
7 and conduct another evaluation of Plaintiff's computer regarding the spoliation issue. (Doc. 158-  
8 25; 164-5.)

9 **a. Date Manipulation Not Caused by Plaintiff**

10 Mr. Hansen's report indicates the data on Plaintiff's computer does not reflect that Plaintiff  
11 manually attempted to manipulate the date, but that the computer system was "simply  
12 synchronizing with the NTP server." Any log entries showing a change in date was momentary  
13 and showed only that Windows, Plaintiff's computer operating system, was synchronizing its time  
14 with an NTP server. He concluded there was "no possibility that anything other than a  
15 synchronization with an NTP server created [the date change] event." (Doc. 164-5, p. 8.)

16 **b. PC Optimizer Program Ran Automatically**

17 GDP determined that the PC Optimizer program was set to run automatically every two  
18 weeks, three times a week, on Tuesday, Thursday, and Saturday at 11 a.m. Mr. Hansen  
19 determined that PC Optimizer was actually configured to run every Tuesday, Thursday, and every  
20 other Saturday at 11:00 a.m. Nevertheless, the data on the computer indicates the program was  
21 last run on *Friday*, January 17, 2014. Mr. Hansen asserts that when PC Optimizer is scheduled to  
22 run and the time it actually runs can vary. For example, Mr. Hansen notes PC Optimizer ran on  
23 December 16, 2013, which was a Monday, and not a regularly scheduled scan day. Mr. Hansen  
24 states there are many reasons why the scheduled run of PC Optimizer could be delayed, such as  
25 the computer being placed in sleep mode at the time of a scheduled run. Mr. Hansen opines there  
26 is no evidence to suggest that Plaintiff had any involvement with PC Optimizer being run on a day  
27 other than when it was scheduled, and it ran on an unscheduled day because the computer was  
28

1 sleeping or shut down on the day it was scheduled to run. (Doc. 164-5, p. 12.)

2 **c. The Effect of Winclear is Disputed**

3 The version of Winclear on Plaintiff's computer was an unregistered version, and  
4 Winclear's system summary shows that no items were removed on the previous scans. According  
5 to GDF, there was a registry in the Windows Operating system that tracked access to files in an  
6 area known as "mru" or "Most Recently Used." Within this registry key, there was direct  
7 navigation and access to a Winclear log. When the drive was searched, the log was identified in  
8 the recycle bin, indicating it had been deleted by the user. Mr. Hansen opines that Plaintiff did not  
9 perform the deletion, but that PC Optimizer scanned that file, and the access time of the file was  
10 changed. PC Optimizer then sent the file to the recycle bin, and emptied the recycle bin. (Doc.  
11 164-5, p. 13.) Mr. Hansen also notes the log shows when the file was created and deleted. The  
12 Winclear log file was sent to the recycle bin at 3:43 and 20.716999 seconds, and 0.007999 seconds  
13 later the file was deleted. Plaintiff could not have deleted the file, moved it to the recycle bin, and  
14 emptied the bin all within 0.00799 seconds. Moreover, PC Optimizer runs using the pmojjo2003  
15 account on Plaintiff's computer. Because GDF mistakenly assumed that Plaintiff was the only  
16 user of that account, GDF pointed to this user account recorded in the log as additional evidence  
17 that Plaintiff was manually directing the deletions of the Winclear scan. In actuality, PC  
18 Optimizer also runs under that account. In sum, Mr. Hansen opines that only a software program  
19 can access a file, delete it, and navigate to the recycle bin to empty it in 0.007999 seconds; PC  
20 Optimizer can perform such a task, and would have done so under Plaintiff's user account  
21 pmojjo2003.

22 **d. Deletion of Files by the Neutral Expert**

23 When comparing files deleted from the recycle bin, the MFT entries showed that files were  
24 deleted on January 18, 2014, after Plaintiff turned his computer over to BCT. This deletion  
25 occurred before a "dd image" was made of the hard drive – i.e., "all forensic examinations done on  
26 this drive . . . ., were done on an image in which log files and restore points that are at issue in this  
27 case [were] modified, accessed, or deleted while in the custody of the neutral expert." (Doc. 164-  
28 5, p. 18.) Six items were deleted on January 18, 2014. According to Mr. Hansen, the system was

1 not turned on after the last entry in the log files of January 17, 2014, yet the drive has time stamps  
2 of January 18, 2014, spanning over a four-hour period showing 60 files being created, accessed,  
3 modified, or deleted. "This can only be done by booting a computer with a different operating  
4 system than what is on the drive and accessing that drive." Mr. Hansen opines that either the  
5 neutral expert was not reliable or erased the data purposefully. (Doc. 164-5, p. 20.)

6 **e. Disc Defragmenter**

7 GDP noted that a disc defragmentation utility on Plaintiff's computer was scheduled to run  
8 on Wednesdays, but the files show that the disc defragmenter also ran on Friday, January 17,  
9 2014. Mr. Hansen inspected the registry key and found there was no history of a scan on  
10 Wednesday, January 15, 2014. Mr. Hansen opines the history was deleted by PC Optimizer, and  
11 when "Windows Defrag" detected there was no entry of a disc defragmentation on Wednesday,  
12 January 15, 2014, it ran the disc defragmentation utility again on Friday, January 17, 2014. (Doc.  
13 164-5, p. 21.)

14 **f. Internet Explorer and USB Devices**

15 Although GDF noted that Google Chrome's browser history was regularly purged, Mr.  
16 Hansen opines this is not unexpected given that "this is what PC Optimizer Pro does." (Doc. 164-  
17 5, p. 22.) GDF also opined that it was highly unlikely that the end user of the computer did not  
18 use Internet Explorer during the past five years. Mr. Hansen responds, however, that Google  
19 Chrome browser was installed as the default browser and Internet Explorer would not be used  
20 unless the user goes "out of his way to open Internet Explorer." He opines that, given this  
21 configuration, Internet Explorer is likely to have never been used (or seldom used) for however  
22 long Google Chrome was installed on the computer.

23 GDF also noted that Plaintiff's Android phone was connected to his computer on January  
24 15, 2014. Mr. Hansen asserts many users connect their phones to a computer USB port to charge  
25 the phone. Although BCT found no email on the phone, Mr. Hansen asserts it failed to use the  
26 proper imager to export files from an Android phone.



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**g. Conclusion**

Mr. Hansen concludes that the deleted files mentioned by GDF in its report were not manually deleted by the user of Plaintiff's computer. Mr. Hansen opines Plaintiff is a novice computer user, the neutral expert deleted or modified files which calls into question the integrity of any examination of the hard drive, and the web history and files were automatically deleted by PC Optimizer. (Doc. 164-5, p. 23-24.)

**8. GDF's Supplemental Report**

On July 26, 2014, GDF prepared a supplemental report to rebut the opinion of Mr. Hansen, which is summarized below.

**a. Computer Proficiency of Plaintiff**

GDF disagrees with Mr. Hansen's conclusion that Plaintiff is a novice computer user who did not possess the skill and understanding to use the wiping programs to delete internet history files. GDF notes Plaintiff testified at his deposition he took introductory computer classes in college, he received training on multiple computer programs including SAP and CMMS, both of which GDF maintains require a level of expertise to program that would certainly not be considered novice. (Doc. 164-4, p. 6.) Plaintiff testified he could "spend an hour talking about computer training," and he demonstrated a good understanding of how resumes are processed by computers in the current job market. He also referenced a "Cono system" and correctly described it as a cloud-based server, again indicative of his technical understanding of computer and internet "architecture" which a novice computer user would not grasp. Plaintiff also made two separate purchases for a program called Winclear long before he claims he bought PC Optimizer to deal with "spam." Plaintiff claimed to have been the victim of identity theft, which caused him to be cautious about submitting personal information through a website. In light of this information, GDF opined it was unlikely Plaintiff would purchase, download, and install the PC Optimizer Pro knowing nothing about the program, especially after being an identity-theft victim and previously purchasing Winclear, which had a similar function.

1                                   **b.        Manipulation of Computer Clock**

2            According to GDF, a change in the computer clock raises a red flag for a computer  
3 forensic expert. (Doc. 164-4, p. 7.) GDF specifically notes that files were created and deleted on  
4 January 18, 2014, the day after Plaintiff turned over his computer to BCT, and attributes this to the  
5 general date anomalies that appear on the system. GDF maintains that the time changes were not  
6 part of the "normal" Windows time synchronization, as Mr. Hansen opined. The time clock was  
7 changed under the user account "pmojjo2003-PC" by a third-party utility, and not the Windows  
8 Network Time Protocol ("NTP"). NTP changes to the system are normal and expected. However,  
9 the time changes on Plaintiff's computer were unrelated to the Windows NTP service.  
10 Specifically, Windows NTP does not change the time backwards, which is what happened here.  
11 Instead, it synchronizes the computer time with the Network Time Server selected in the registry.  
12 Plaintiff's computer included a program called PC Doctor for Windows, which tests the system  
13 and hardware as a health check, and manipulates the computer clock under the user account. This  
14 program is a third-party utility and not a normal component of Windows operating system. GDF  
15 opines that Mr. Hansen's statement regarding NTP and Epoch time simply does not apply in this  
16 case to explain the date anomalies. Further, as it pertains to Mr. Hansen's claim that GDF's time  
17 clock was incorrectly set to Eastern Standard Time, GDF uses a commercial program that converts  
18 UTC to local file times and is independent of the examiner's system time clock.

19            GDF concludes that the computer clock "provided a number of anomalies on Plaintiff's  
20 computer and made its investigation very difficult. GDF is unable to identify why the time and  
21 dates are failing. However, when GDF analyzes Plaintiff's computer as a whole, we still opine  
22 Plaintiff most likely caused the date discrepancies." (Doc. 164-4, p. 19.)

23                                   **c.        PC Optimizer's Deletion of Information**

24            Despite the date anomalies on Plaintiff's computer, GDF maintains it was able to verify  
25 that PC Optimizer was last run at 5:16 a.m. on January 17, 2014, the day the computer was to be  
26 turned over to BCT. GDF contends that PC Optimizer was manually configured by Plaintiff to  
27 run on a particular schedule, establishing that Plaintiff knew how to use the program and was able  
28 to direct the program's scan schedule. The PC Optimizer scan started at 5:16 a.m. and was

1 cancelled at 5:21 a.m. by the user, establishing that Plaintiff was interacting with the program and  
2 understood its functionality. PC Optimizer deleted 2,318 files on January 17, 2014.

3 **d. Winclear**

4 Plaintiff purchased Winclear in May 2008 and again in August 2009. (Doc. 158-23, p. 12.)  
5 The Winclear directory contains 2,000 files that were transferred onto Plaintiff's computer when  
6 the program was installed. Thus, GDF concludes that Plaintiff purchased the program, copied it to  
7 his computer system, and installed it, contradicting Plaintiff's statement that Winclear simply  
8 appeared on his computer. GDF also opines that Winclear is not a program a novice computer  
9 user would install. Prominently displayed on Winclear screen is a definition of the program's  
10 design: "Winclear is an Internet history eraser that protects your Internet privacy by cleaning up  
11 all tracks of your Internet and computer activity." (Doc. 158-23, p. 13.) Although Winclear did  
12 not delete any items, there is no explanation why Winclear was run on January 17, 2014. The  
13 prefetch data shows that Winclear was installed on January 16, 2014, the scan results were saved  
14 to a .txt file, and the file was opened and manually erased.

15 **e. Windows Prefetch**

16 GDF opines that PC Optimizer does not delete files from the prefetch folder. Thus,  
17 deletion of the prefetch files would not have been automatically performed by PC Optimizer, as  
18 Mr. Hansen claims. Also, the prefetch files show that PC Optimizer ran only once. Because the  
19 data on the computer indicates PC Optimizer ran more often, the prefetch folder would only  
20 indicate a single use if the prefetch files were deleted. GDF's analysis indicates that in excess of  
21 70 prefetch files were created between January 12, 2014, and January 17, 2014. (Doc. 158-23, p.  
22 14.)

23 **f. Restore Points**

24 According to GDF, restore points on a computer allow users a choice to roll back to a  
25 previous system state. Restore points are created automatically by the Windows operating system  
26 every 24 hours. Here, there was only a single restore point on the system directory. According to  
27 GDF, the lack of restore points is suspicious. Although Mr. Hansen claims PC Optimizer deleted  
28 restore points, GDF maintains there is no evidence of this. Rather, PC Optimizer prompts users to

1 create a restore point before making changes to the system.

2 **g. Disc Defragmenter**

3 Defragmenting a drive overwrites deleted data in free space to store data in a contiguous  
4 way to speed up access. The end result is that data is overwritten. Whether the program ran  
5 automatically or was manually run, it deleted data on the computer.

6 **h. Internet Explorer**

7 Although Mr. Hansen opines that Plaintiff simply did not use Internet Explorer, deleted  
8 files contain Internet Explorer records proving the Internet Explorer browser was used, including  
9 in January 2014. Mr. Hansen identified 1,982 hits for the key word "job.com." GDF confirms  
10 there were relevant entries indicating Plaintiff accessed the Job.com website, but because the data  
11 was deleted, there is no record of what he did at that website.

12 **i. Deletion of Data by BCT**

13 GDF reviewed the equipment used by BCT to mirror Plaintiff's hard drive, and confirmed  
14 with BCT that it did not delete any data. GDF opines the date discrepancies on Plaintiff's  
15 computer are responsible for deletions that allegedly occurred on January 18, 2014. BCT used  
16 industry standard technology for the mirror image, and no evidence of wrongdoing on BCT's part  
17 has been presented.

18 **j. Conclusion**

19 GDF notes even Mr. Hansen concedes that information was deleted from Plaintiff's  
20 computer. The fragments of data recovered show that Plaintiff interacted with Job.com, which is  
21 information Defendants claim is relevant to their defenses. The only dispute is whether Plaintiff's  
22 conduct in deleting evidence was willful. GDF claims the evidence in its report is quite clear that  
23 Plaintiff's actions were willful and deliberate. Moreover, the entire process could have been  
24 avoided if Plaintiff had used a competent expert to preserve the system data after being instructed  
25 to do so.

26 **9. Mr. Hansen's Supplemental Report**

27 Plaintiff obtained a supplement report from Mr. Hansen to respond to GDF's supplemental  
28 report. (Doc. 164-6.) Mr. Hansen asserts that GDF took Plaintiff's deposition testimony out of

1 context, and Plaintiff's training on particular computer software does not establish he has computer  
2 programming abilities. Regarding the date irregularities, Mr. Hansen reaffirms his original  
3 statement that the system and its programs, not Plaintiff, were responsible for any time-change  
4 issues. As to PC Optimizer being reinstalled in May 2013, the program was probably replaced by  
5 a new one; even if it was re-installed, this is a very simple process and does not establish that  
6 Plaintiff had any exceptional knowledge of the program itself. Regarding PC Optimizer's scan  
7 being cancelled on January 17, 2014, users will routinely stop scans when they interfere with the  
8 processing speed of the computer. Also, if Plaintiff were truly attempting to delete data, he would  
9 not have *stopped* the scan. Winclear was purchased by Plaintiff in 2008, but Plaintiff allowed his  
10 license to expire, rendering the program unregistered. When unregistered, Winclear will run  
11 automatically but will not delete data. According to Mr. Hansen, "Winclear did not delete  
12 anything long before litigation began and to investigate it further would accomplish nothing."  
13 (Doc. 164-6, p. 20.) Neither Winclear nor PC Optimizer is a desirable program for an advanced  
14 computer user.

15 Mr. Hansen also contends that the prefetch folder was actually deleted by Windows itself.  
16 Windows only allows 128 files in the prefetch folder, and anything beyond that is automatically  
17 deleted. As to restore points, because Plaintiff's computer is old, it can only hold a certain number  
18 of restore points. The disc defragmentation program was run automatically. Regarding Internet  
19 Explorer, Mr. Hansen explains he never stated Plaintiff did not use the browser, but that Plaintiff  
20 may simply not have used it in lieu of Google Chrome. Finally, Mr. Hansen reiterates that BCT  
21 did delete data on January 18, 2014, as evidenced by "hash values."

22 **10. GDF's Supplemental Report and BCT's Responsive Declaration Will Not Be**  
23 **Considered**

24 Job.com and Windy City each attached to their reply briefs a second supplemental report  
25 prepared by GDF on August 6, 2014. Plaintiff objects to this supplemental report because it was  
26 filed with a reply brief, and Plaintiff was not given an adequate opportunity to respond.

27 The Court declines to consider this supplemental report because it is merely a rebuttal of  
28 Mr. Hansen's supplemental report. Rebuttal expert reports are potentially endless in this

1 circumstance, and declining to consider the additional expert report attached to the reply brief  
2 avoids a Kafkaesque supplemental report problem. The Court also held a two-hour hearing on  
3 September 24, 2014, and the parties were given ample time, along with their experts who each  
4 appeared telephonically, to respond to any argument or issue raised in the briefs or reports. As  
5 such, the supplemental expert report attached to Defendants' reply briefs will not be entertained.

6 BCT filed a statement with the Court refuting Mr. Hansen's allegations that it deleted any  
7 data in the mirror imaging of Plaintiff's computer. (Doc. 184.) Neither this statement, nor the  
8 declaration attached to Defendants' reply briefs were considered for purposes of this decision.

### 9 III. PARTIES' ARGUMENTS

10 Job.com and Windy City each filed motions for sanctions, seeking dismissal of Plaintiff's  
11 complaint.<sup>2</sup> Defendants argue that Plaintiff's conduct in allowing file deletion programs to run on  
12 his computer during the course of the litigation after the duty to preserve was triggered amounted  
13 to a willful and deliberate destruction of relevant computer data. Defendants assert the destruction  
14 of computer data was so substantial, no sanction less than dismissal will address the harm.  
15 Alternatively, both Defendants seek an adverse inference jury instruction. Finally, Defendants  
16 seek monetary sanctions against Plaintiff for the fees and costs associated with their motions.

17 Plaintiff claims he had no notice that his computer data was relevant to the litigation before  
18 his October 2013 deposition. Because he had installed deletion programs on his computer years  
19 before the lawsuit and before the duty to preserve was triggered, all data possibly relevant to this  
20 litigation was deleted long before his October 2013 deposition. Further, Plaintiff did not make any  
21 deliberate attempts to manually delete data on his computer, particularly after the Court ordered  
22 production of the hard drive. As no relevant data was destroyed at a time when the duty to  
23 preserve was triggered, no sanctions are warranted. Further, even if sanctions were appropriate,  
24 the best remedy would be to require Plaintiff to pay to have its expert recover the deleted data.

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<sup>2</sup> The motions are nearly identical; they seek the same relief on the same grounds. As such, the Court considers them in tandem.

1 **IV. DISCUSSION**

2 **A. Plaintiff Spoliated Relevant Evidence**

3 The duty to preserve arises not only during litigation, but also extends to the period before  
4 litigation when a party should reasonably know that evidence may be relevant to anticipated  
5 litigation. *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002). Once the  
6 duty to preserve evidence arises, a party must "suspend any existing policies related to deleting or  
7 destroying files and preserve all relevant documents relating to the litigation." *In re Napster, Inc.*  
8 *Copyright Litig.*, 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006). Spoliation results from "the  
9 destruction or significant alteration of evidence, or failure to preserve property for another's use as  
10 evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*,  
11 167 F.3d 776, 779 (2d Cir. 1999). In addition to showing a party destroyed evidence after the duty  
12 to preserve was triggered, it must also be shown that the party acted with a culpable state of mind.  
13 In other words, prior to imposing any sanction, the court must make a finding of fault. Therefore,  
14 to determine whether spoliation has occurred, the Court must consider (1) when Plaintiff's duty to  
15 preserve evidence was triggered; (2) whether relevant evidence was destroyed or altered by  
16 Plaintiff after the duty was triggered; and (3) whether Plaintiff acted with a culpable state of mind  
17 in destroying or altering relevant evidence. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216  
18 (S.D.N.Y. 2003).

19 **1. Plaintiff had a Duty to Preserve Computer Data By August 2012**

20 Plaintiff contends he had no basis to reasonably understand or know, before his deposition,  
21 that *any* of the data on his computer was even potentially relevant to the litigation. This litigation  
22 is about telephone calls under the TCPA, and there was no reason for Plaintiff to understand it  
23 would have anything to do with his computer. The earliest any duty to preserve evidence would  
24 have arisen was at Plaintiff's deposition on October 4, 2013, when he was instructed by  
25 Defendants' counsel to save data on his computer.

26 Defendants argue the phone calls at issue here arise out of Plaintiff's computer job search  
27 activities during which he provided his phone number and consented to telephone contact by  
28 Defendants. Plaintiff was informed during one of these calls at issue that Job.com had obtained

1 his number. According to Defendants, by virtue of Job.com's name, it is obviously an internet  
2 company that has something to do with jobs. The link between the calls and Plaintiff's online job  
3 search should have been reasonably apparent. At the time he contemplated his lawsuit, Plaintiff  
4 should have known his computer job-search activities could be potentially relevant to the  
5 litigation.

6 Litigants have an obligation to preserve potentially relevant evidence from the moment that  
7 litigation is reasonably anticipated. But a party only engages in spoliation as a matter of law if it  
8 had some notice that the evidence was at least potentially relevant to the litigation before it was  
9 destroyed. *Kitsap Physicians Serv.*, 314 F.3d at 1001.

10 Plaintiff's assertion that the duty to preserve his computer data did not arise until his  
11 October 2013 deposition is unpersuasive. As Defendants note, the calls at issue arise out of  
12 Plaintiff's *online* job search, which was conducted through use of his home computer. When  
13 Plaintiff had telephone contact with Windy City in August 2012, he discovered his cellular  
14 telephone number was obtained through Job.com, an internet company against whom Plaintiff  
15 filed suit approximately 6 weeks later. As Defendant notes, Job.com's name itself indicates it is an  
16 internet company and implies it has something to do with jobs. Given that Plaintiff was  
17 contemporaneously conducting an online job search, Plaintiff should reasonably have been aware  
18 that the phone call arose out of his online job-search activities. While Plaintiff may not have had  
19 actual knowledge how data on his computer related to his job search would be used by  
20 Defendants, he should have known that his online job search activities on his home computer were  
21 at least potentially relevant to the litigation.

22 Moreover, Plaintiff retained experienced class-action counsel with three law firms who  
23 should have known his computer could contain potentially relevant information. *See Surowiec v.*  
24 *Capital Title Agency, Inc.*, 790 F. Supp. 2d 997, 1006 (D. Ariz. 2011) ("The preservation  
25 obligation runs first to counsel, who has a duty to advise his client of the type of information  
26 potentially relevant to the lawsuit and of the necessity of preventing its destruction." (quoting  
27 *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 290 (S.D.N.Y. 2009))). The link  
28 between the complained-of phone calls and Plaintiff's online job search was reasonably clear at the



1 time Plaintiff contemplated his suit in August 2012.<sup>3</sup> Because Plaintiff knew his online job search  
2 was conducted on his home computer, he was on notice that his computer may contain potentially  
3 relevant evidence in his action against Job.com.

4 Even if the potential relevance of his computer data was not reasonably known at the time  
5 the lawsuit was contemplated, the duty to preserve Plaintiff's computer data, particularly anything  
6 related to his job-search activities, became apparent in July 2013 when Defendants requested a list  
7 of each and every website Plaintiff accessed for purposes of posting his resume. Additionally,  
8 Plaintiff was specifically instructed at his October 2013 deposition to preserve data on his  
9 computer. Finally, in January 2014, Plaintiff was ordered to turn over his computer for  
10 examination for relevant evidence. It is not disputed that Plaintiff had installed Optimizer Pro in  
11 November 2012 and this program deleted internet history and files from its installation until the  
12 computer was turned over to the parties' neutral expert in January 2014.

13 Although Plaintiff contends he had no reason to make a connection between the litigation  
14 and data on his computer in August 2012, as the litigation progressed, Plaintiff was presented with  
15 specific indicators that his computer data was relevant to Defendants' defenses. What should have  
16 been *reasonably known* to Plaintiff at the time he contemplated his lawsuit about the relevance of  
17 data on his computer bloomed into *actual knowledge* by his October 2013 deposition. In sum,  
18 data on Plaintiff's computer was deleted after the duty to preserve it was triggered in August 2012.  
19 The next question is whether any of the destroyed data was relevant.

## 20 **2. Plaintiff Destroyed Relevant Computer Data**

21 Plaintiff argues that, even if the duty to preserve evidence on his computer was triggered as  
22 early as August 2012, deletion programs on his computer were continuously running and would  
23 have deleted relevant information before the duty was triggered. In other words, by the time any  
24 duty to preserve attached, all potentially relevant information would already have been deleted.  
25 Plaintiff also contends that nothing he did on his computer *after* the August 2012 phone calls were  
26 received could be considered relevant to Job.com's defenses.

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28 <sup>3</sup> Plaintiff stated at his deposition that he consulted with his attorney days after receiving his first telephone calls from Defendants. (Doc. 158-6, Exhibit A, Olney Depo., 174:14-20.)

1 Defendants assert Plaintiff's online job search activities, even those searches after the  
2 phone calls from Windy City, potentially contain circumstantial evidence as to the scope of  
3 Plaintiff's consent to receive phone calls about educational opportunities. Defendants assert that  
4 the scope of Plaintiff's consent remains a factual issue in the litigation.<sup>4</sup>

5 Plaintiff's argument rests on two premises: first, nothing Plaintiff did on his computer *after*  
6 the phone calls with Windy City is relevant to the issue of consent so any deletions after August  
7 2012 would not have involved any relevant evidence; and second, even if post-call online activity  
8 were relevant to Defendants' defenses, this data was subject to continual deletion by wiping  
9 programs installed on the computer and therefore any relevant evidence would have been deleted  
10 by the time any duty to preserve arose.

11 Plaintiff's arguments are not persuasive. The parties dispute whether computer data *after*  
12 Plaintiff's phone calls with Windy City could establish the scope of Plaintiff's consent. Plaintiff  
13 contends consent under the TCPA cannot be implied and must be given *prior* to the call.  
14 Defendants argue the scope of Plaintiff's consent to the telephone contact by Windy City may be  
15 established implicitly and circumstantially by demonstrating Plaintiff's interest in educational  
16 opportunities – which was the subject of the calls. Defendants also maintain that that post-call  
17 computer data gives rise to an inference regarding Plaintiff's scope of consent. For example,  
18 Plaintiff's search for educational opportunities when he agreed to be called is relevant to  
19 establishing the scope of his consent to be called about educational opportunities.  
20 Notwithstanding the merits of Defendants' scope-of-consent defense, they are entitled to discovery  
21 and to present evidence relevant to that defense. Plaintiff is not entitled to pre-judge Defendants'  
22 defense as lacking merit and then refuse to provide discovery based on that determination.

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23  
24 <sup>4</sup> In its order on Job.com's motion for summary judgment, the district court held that an individual may *indirectly*  
25 provide a third party with express consent to be called under the TCPA. (Doc. 122, 9:28-10:1.) The Court determined  
26 it was "undisputed that Plaintiff provided his cell phone number to Defendant to be contacted about potential  
27 **employment** opportunities." Defendants argued that Plaintiff's express prior consent to be called about **employment**  
28 opportunities also extended to being called about **educational** opportunities when he provided his cell phone number  
to Resume-Now. Plaintiff asserted that he provided Defendant prior express consent only to discuss **employment**  
opportunities, and **educational** opportunities are different from **employment** opportunities. The Court determined  
that "[i]t may be true that potential opportunities that Windy City was offering could have helped Plaintiff's  
employment prospects; however, it is equally possible that the opportunities were wholly irrelevant to Plaintiff's  
employment goals. The Court therefore finds that genuine issues of material fact exist as to whether the scope of  
Plaintiff's express consent extended to Windy City's calls regarding educational opportunities." (Doc. 122, 11:10-15.)

1           Moreover, "relevance" as it pertains to discovery is defined broadly. *Garneau v. City of*  
2 *Seattle*, 147 F.3d 802, 812 (9th Cir. 1998). For discovery purposes, relevance means only that the  
3 materials sought are reasonably calculated to lead to the discovery of admissible evidence. *See*  
4 *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Here, Defendants have a right to  
5 present their chosen defenses and to collect discovery relevant to that defense -- they have  
6 adequately established the relevance of the data they sought on Plaintiff's computer and its nexus  
7 to their defense.

8           Plaintiff's second premise – that all relevant data on his computer *before* the calls with  
9 Windy City would necessarily have been deleted long before the duty to preserve the data arose –  
10 is also flawed. First, Plaintiff confirmed at the hearing there is no evidence that Winclear was  
11 deleting information in 2012. As Plaintiff's expert noted in his reports, Plaintiff purchased  
12 Winclear program licenses in 2008 and 2009 which lapsed, and there is no evidence Winclear was  
13 actually deleting any data on Plaintiff's computer in any relevant period during 2012.<sup>5</sup> Plaintiff  
14 did not install Optimizer Pro until November 2012; therefore, even pre-call computer data was still  
15 ostensibly in existence at the time the duty to preserve arose. Second, Defendants' expert found  
16 some website history data on Plaintiff's computer from July 2012 indicating Plaintiff visited  
17 Job.com's website prior to the lawsuit;<sup>6</sup> had Plaintiff taken steps to preserve the data at an earlier  
18 time, there may have been more content that escaped being wiped from the computer. Plaintiff's  
19 argument that all the relevant data was deleted *before* a duty to preserve was triggered is self-  
20 serving and not corroborated by the data recovered by Defendants' expert. In sum, relevant  
21 computer data was destroyed by Plaintiff after a duty to preserve was triggered.

### 22           **3. Plaintiff Acted with A Culpable State of Mind**

23           The Court must next consider Plaintiff's degree of culpability in the destruction of the  
24 computer data. At a minimum, the culpable state of mind is negligence. *Glover v. BIC Corp.*, 6  
25 F.3d 1318, 1329 (9th Cir. 1993) (simple notice of potential relevance to litigation is sufficient to

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26 <sup>5</sup> The parties dispute whether an unregistered version of Winclear was run by Plaintiff in January 2014. However,  
27 Plaintiff's expert indicates the license for Winclear lapsed after 2009, and the unregistered version of the program was  
not capable of actually deleting any information. (*See* Jeff Hansen Report, Doc. 164-6, p. 20.)

28 <sup>6</sup> *See* Doc. 158-23, p. 17 (ECF pagination); Doc. 158-4, Ozura Decl., ¶ 5.

1 impose sanctions for spoliation); *see also Unigard Sec. Ins. Co. v. Lakewood Eng'r & Mfg. Corp.*,  
2 982 F.2d 363, 368-69, n.2 (9th Cir. 1992) (negligent destruction of evidence is sufficient to  
3 warrant a sanction excluding evidence).

4 A significant portion of the parties' expert reports and briefs is devoted to Plaintiff's degree  
5 of culpability in installing the file deletion programs and allowing them to run after the duty to  
6 preserve evidence arose. Plaintiff's expert opines that Plaintiff is a novice computer user who had  
7 no idea how Winclear or PC Optimizer functioned. Defendants' expert opines that, based on  
8 Plaintiff's deposition testimony, he has substantial computer knowledge and the evidence strongly  
9 suggests he manually ran PC Optimizer on January 17, 2014 – the day he turned his computer  
10 over to BCT – to delete information on his computer, thereby preventing the expert from  
11 reviewing it.

12 Plaintiff's conduct meets the minimum culpability threshold in several regards. Plaintiff's  
13 installation of PC Optimizer in November 2012 was at least negligent. Even though the duty to  
14 preserve computer data, particularly internet data, should have been known to Plaintiff when he  
15 contemplated his lawsuit in August 2012, neither he nor his attorneys took any steps to mirror  
16 image Plaintiff's hard drive at that time or at any time after the lawsuit was filed in October 2012.  
17 Plaintiff installed PC Optimizer in November 2012, only one month after filing his lawsuit.  
18 Although Plaintiff's brief indicates he had no idea what PC Optimizer did, and he informed his  
19 expert, Mr. Hansen, Plaintiff did not understand the purpose of the program, Plaintiff's declaration  
20 carefully avoids any unequivocal statement that he did not know that PC Optimizer was a file-  
21 deletion program. It has not been established that Plaintiff knew that PC Optimizer would delete  
22 internet history relevant to the litigation and installed it for that purpose. Plaintiff's deposition  
23 testimony indicates, however, that he had enough computer knowledge to understand that PC  
24 Optimizer would delete files on his computer. In light of the pending litigation, Plaintiff should  
25 have ascertained the precise nature PC Optimizer's deletion function *before* it was installed. The  
26 failure to take steps to do so was negligence.

27 In July 2013, Defendants served discovery requiring Plaintiff to identify all websites where  
28 he posted his resume, which further implicated the relevance of Plaintiff's use of his computer

1 during his job search as a likely source of potentially relevant evidence to Defendants' defenses.  
2 Yet, neither Plaintiff nor his counsel made an attempt to mirror image the hard drive or confirm  
3 whether evidence on the computer was being preserved.

4 At Plaintiff's October 2013 deposition, he and his attorneys were expressly directed by  
5 Job.com's counsel to preserve internet history on Plaintiff's computer, but no steps were taken to  
6 do so. Job.com sought production of Plaintiff's computer data through formal discovery later in  
7 October 2013, and even at this point no steps were taken by Plaintiff or the three law firms  
8 representing him to either mirror image the computer or ascertain whether data on the computer  
9 was being preserved.

10 Finally, Plaintiff was ordered to turn over his computer on January 10, 2014, and again  
11 neither Plaintiff nor his counsel took any steps to ascertain whether computer data was being  
12 preserved.

13 In sum, Plaintiff was *negligent* with regard to the installation of PC Optimizer in  
14 November 2012 and its routine deletions of data after installation; he was *grossly negligent* in  
15 failing to take any steps whatsoever to preserve his computer data after Defendants' counsel  
16 instructed him at his October 2013 deposition to preserve his computer data; and, as discussed  
17 below, Plaintiff's failure to preserve evidence after the court ordered production of his computer  
18 hard drive constituted *willful and deliberate* spoliation.

19 **4. Conclusion: Spoliation Sanctions are Warranted**

20 As Plaintiff destroyed relevant evidence at a time when the duty to preserve had been  
21 triggered, and because Plaintiff acted with more than the minimum degree of culpability, sanctions  
22 are warranted. The Court next considers an appropriate sanction.

23 **B. Form of the Appropriate Sanction**

24 Defendants seek terminating sanctions, asserting that Plaintiff's conduct in deleting  
25 computer data was purposeful and deliberate. In the alternative, Defendants seek an adverse jury  
26 instruction. Defendants also seek monetary sanctions.

27  
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1           **1.       Legal Standard**

2           "There are two sources of authority under which a district court can sanction a party who  
3 has despoiled evidence: the inherent power of federal courts to levy sanctions in response to  
4 abusive litigation practices, and the availability of sanctions under Rule 37 against a party who  
5 'fails to obey an order to provide or permit discovery.'" *Leon v. IDX Sys. Corp.*, 464 F.3d 951 (9th  
6 Cir. 2006) (quoting *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1337-38 (9th Cir. 1985)).

7           A trial court's discretion in selecting the form of a spoliation sanction is broad, and can  
8 range from comparatively minor sanctions, such as awarding attorneys' fees, to more severe  
9 sanctions, such as dismissal. The Court's discretion is not unlimited, and it must weigh several  
10 factors when deciding what type of sanction should be imposed on a party who despoiled  
11 evidence. The remedy crafted should achieve the following: (1) deter parties from engaging in  
12 spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the  
13 risk; and (3) restore the prejudiced party to the same position he would have been absent the  
14 wrongful destruction of evidence by the opposing party. *Apple Inc. v. Samsung Electronics Co.,*  
15 *Ltd.*, 881 F. Supp. 2d 1132, 1136 (N.D. Cal. 2012) (internal quotation marks and citation omitted),  
16 as modified in *Apple Inc. v. Samsung Elec. Co., Ltd.*, 888 F. Supp. 2d 976, 1000 (N.D. Cal. 2012)  
17 ("*Apple, Inc. II*").

18           Federal courts also have authority to sanction a party who "fails to obey an order to  
19 provide or permit discovery" under Federal Rule of Civil Procedure 37(b)(2)(A). *Leon v. IDX Sys.*  
20 *Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). Federal Rule 37 provides that where a party fails to  
21 comply with a court order, a court may issue any just order for sanctions, including the following:  
22 (1) direct that the matters embraced in the order or other designated facts be taken as established  
23 for purposes of the action, as the prevailing party claims; (2) prohibit the disobedient party from  
24 supporting or opposing designated claims or defenses, or from introducing designated matters in  
25 evidence; (3) striking pleadings in whole or in part; (4) staying further proceedings until the order  
26 is obeyed; (5) dismissing the action or proceeding in whole or in part; (6) rendering a default  
27 judgment against the disobedient party; or (7) treating as contempt of court the failure to obey any  
28 order except an order to submit to a physical or mental examination. Fed. R. Civ. P. 37(b)(2)(A).

1 In crafting the appropriate sanction, courts must choose the least onerous sanction  
2 corresponding to the willfulness of the destructive actions and the prejudice suffered by the victim.  
3 *Apple Inc., II*, 888 F. Supp. 2d at 992. The remedy should serve "the prophylactic, punitive, and  
4 remedial rationales underlying the spoliation doctrine." *West*, 167 F.3d at 779.

## 5 **2. Terminating Sanctions Are Not Warranted**

6 Defendants argue that dismissal is the appropriate sanction. According to Defendants, the  
7 five-factor test applied by the Ninth Circuit in *Leon* favors dismissal. Defendants contend  
8 Plaintiff's refusal to produce his computer data required extensive meet and confer efforts that  
9 resulted in a discovery production order. Once Plaintiff's computer was produced, it was  
10 discovered Plaintiff had deletion programs that had destroyed relevant data. Defendants assert  
11 Plaintiff's extended refusal to produce his computer was an attempt to buy more time to purge files  
12 from his computer. (Doc. 158-1, 17:14-18.) Defendants also assert severe prejudice resulted from  
13 the deletions of data because, as noted by the court in *Leon*, Defendants have no way to know  
14 what might have been stored on Plaintiff's computer and no way of recreating it. Defendants'  
15 experts identified thousands of files that were deleted from Plaintiff's computer since the lawsuit  
16 was filed. Data from the websites Plaintiff visited during his job search and any materials he may  
17 have downloaded are relevant to the issue of consent. Defendants argue a lesser sanction would  
18 force them to go to trial with less than complete evidence, would reward Plaintiff for his behavior,  
19 and would not deter future litigants.

20 Dismissal or default is an appropriate sanction when "a party has engaged deliberately in  
21 deceptive practices that undermine the integrity of the judicial proceedings" because "courts have  
22 inherent power to dismiss an action when a party has willfully deceived the court and engaged in  
23 conduct utterly inconsistent with the orderly administration of justice." *Anheuser-Busch, Inc. v.*  
24 *Nat'l Beverage Distrib.*, 69 F.3d 337, 348 (9th Cir. 1995). Before imposing this harsh sanction,  
25 however, district courts should consider the following factors: "(1) the public's interest in  
26 expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of  
27 prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their  
28 merits; and (5) the availability of less drastic sanctions." *Leon*, 464 F.3d at 958 (quoting

1 *Anheuser-Busch*, 69 F.3d at 348). While the court is not required to make explicit findings  
2 regarding each of the factors, dismissal is only proper if a finding of "willfulness, fault, or bad  
3 faith" has been found. *Anheuser-Busch*, 69 F.3d at 348. The district court must also consider less  
4 severe alternative sanctions rather than outright dismissal.

5 Here, the interests of expeditious resolution of the litigation have not been thwarted by  
6 Plaintiff's conduct. While the file-deletion programs have created a considerable discovery issue,  
7 the litigation has not been unnecessarily protracted. Even if this discovery dispute had not arisen,  
8 other motions remained pending such that the parties were not ready to move into class discovery  
9 sooner. Second, management of the Court's docket has not been disrupted – a trial date has not yet  
10 been set and therefore the schedule has not required modification. While the Court has invested  
11 significant time and resources into the parties' discovery dispute, it has not unduly impacted what  
12 is already a very congested docket. Although the deletions have prejudiced Defendants in  
13 presenting a full defense on their scope-of-consent defense, an adverse jury inference is an  
14 alternative, less severe sanction that will adequately address Defendants' harm. *Leon*, 464 F.3d at  
15 958 (district court must consider "less severe alternatives" than outright dismissal). Given the  
16 existence of a curative and lesser sanction, dismissal is not warranted.

### 17 **3. An Adverse Jury Inference is an Appropriate Sanction**

18 As an alternative to terminating sanctions, Defendants seek the imposition of an adverse  
19 jury inference instruction. The imposition of an adverse inference sanction is based on evidentiary  
20 and policy rationales that seek to deter a party who has notice of an item's potential relevance to  
21 the litigation from destroying it. A finding of bad faith is not required – even a finding of simple  
22 negligence will suffice to support an adverse inference sanction. *Glover*, 6 F.3d at 1329.

23 Because an adverse inference sanction may be imposed with the minimum level of  
24 culpability for the imposition of sanctions, the elements are the same as the threshold for imposing  
25 any spoliation sanction: (1) the spoliating party had an obligation to preserve the evidence; (2) the  
26 evidence was destroyed or significantly altered with a culpable state of mind; and (3) the evidence  
27 was relevant to the other party's claim in that a reasonable trier of fact could find that it would  
28 support that claim. Courts have recognized, however, that adverse inference sanctions are



1 nonetheless a harsh remedy. *See, e.g., Apple II*, 888 F. Supp. 2d at 993-994 (adverse jury  
2 inference is a severe sanction that should not be given lightly). If the degree of culpability of the  
3 spoliating party is not high, the prejudice to the non-spoliating party generally must be greater to  
4 warrant this sanction. *See id.* at 992 (court should consider *both* degree of culpability of spoliator  
5 and prejudice to non-spoliator in fashioning sanction).

6  
7 **a. Plaintiff's Duty to Preserve Computer Data Was Triggered in August 2012**

8 As discussed above, the duty to preserve Plaintiff's computer data was triggered when  
9 Plaintiff consulted his attorneys regarding his claims in August 2012. *Kitsap Physicians Serv.*,  
10 314 F.3d at 1001; *Graham v. Teledyne-Continental Motors*, 805 F. 2d 1386, 1390 n.9 (9th Cir.  
11 1987) (citing *Bowmar Instrument Corp. v. Texas Instruments, Inc.*, 25 Fed. R. Serv. 423, 427  
12 (N.D. Ind. 1977) for the proposition that sanctions are appropriate where the spoliating party  
13 should have known it would be relevant in future litigation). Due to Job.com's obvious identity as  
14 an internet company having to do with employment, Plaintiff's online job search, and information  
15 that Job.com was responsible for the phone calls at issue, the link between the litigation and  
16 Plaintiff's computer data should have been reasonably known by Plaintiff and his counsel when  
17 they contemplated filing suit in August 2012. Plaintiff acted negligently by installing PC  
18 Optimizer in November 2012, one month after the complaint was filed, which undisputedly  
19 deleted Plaintiff's internet history and other computer data Defendants seek to discover.

20 Moreover, even if the duty to preserve evidence was not triggered in August 2012 or at the  
21 time the suit was filed in October 2012, Plaintiff was instructed not to delete his computer data at  
22 his deposition in October 2013. Thus, at the very *latest*, Plaintiff's duty to preserve his computer  
23 data attached on that date.

24 **b. Plaintiff Destroyed Relevant Computer Data**

25 Plaintiff confirmed at the hearing on September 24, 2014, that there is no evidence  
26 Winclear was deleting data on Plaintiff's computer in 2012. While Plaintiff purchased Winclear  
27 licenses in 2008 and 2009, those licenses had lapsed and he apparently had only an unregistered  
28 version of Winclear on his computer in 2012, which was not capable of data deletion. PC

1 Optimizer was not installed until November 2012, one month after the lawsuit was filed. Thus,  
2 Plaintiff's assertion that anything relevant would have been deleted long before the suit was filed is  
3 incorrect.

4 Plaintiff disputes the legal merits of Defendants' scope-of-consent defense and whether  
5 Plaintiff's internet searches could show the scope of Plaintiff's consent to receive calls about  
6 educational opportunities. This dispute as to the merits of Defendants' scope-of-consent defense  
7 does not preclude Defendants from conducting discovery in support of their defenses. Defendants  
8 cannot be held to a particularly strict standard for showing relevance because the evidence was  
9 destroyed by Plaintiff. Defendants contend Plaintiff consented to the calls at issue by providing  
10 his phone number to Resume-Now, the nature or scope of the calls to which Plaintiff consented  
11 remains a factual issue in dispute. For purposes of consent to Job.com's terms and conditions and  
12 opting-in or out of telephone calls, Plaintiff states that he cannot recall visiting Job.com's website,  
13 and Job.com can refute Plaintiff's assertion only by examining Plaintiff's computer website history  
14 – which has, in large measure, been deleted. Thus, Defendants have articulated how the destroyed  
15 evidence would have been helpful to proving their claims and have established its relevance. *See*  
16 *Pension Committee of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d  
17 456, 467 (S.D.N.Y. 2010) (innocent party must show that the evidence would have been helpful in  
18 proving its claims or defenses), *abrogated by Chin v. Port Authority of New York & New Jersey*,  
19 685 F.3d 135 (2d Cir. 2012) (holding agency failure to institute litigation hold regarding certain  
20 evidence did not constitute gross negligence per se).

21 Even if the duty to preserve did not arise until October 2013, Plaintiff has failed to show  
22 relevant information was not deleted after that time. Plaintiff argues only that PC Optimizer  
23 would have deleted any relevant evidence long before that time. Yet, Defendants' experts  
24 recovered fragments of internet history from July 2012. Had PC Optimizer been uninstalled as of  
25 Plaintiff's October 2013 deposition, it is likely that more relevant evidence would have been  
26 preserved. As Plaintiff deleted his computer data, it is impossible for Defendants to prove *when*  
27 and *what* was deleted. Plaintiff is not entitled to a presumption that the destroyed evidence was  
28 *not* relevant or that anything relevant *must* have been destroyed during an earlier deletion purge by

1 PC Optimizer. *Leon*, 464 F.3d at 959 ("Moreover, because the relevance of . . . [destroyed]  
2 documents cannot be clearly ascertained because the documents no longer exist, a party can hardly  
3 assert any presumption of irrelevance as to the destroyed documents." (quoting *Alexander v. Nat'l*  
4 *Farmer's Org.*, 687 F.2d 1173, 1205 (8th Cir. 1982))).

5 **c. Plaintiff's Spoliation Was Deliberate and Willful**

6 While Plaintiff's failure to preserve data prior to being instructed to do so in October 2013  
7 was grossly negligent, according to Defendants, Plaintiff took additional measures to delete data  
8 after the Court's order to turn over his hard drive for mirror imaging and forensic examination.  
9 According to GDF, on January 16, 2014, Plaintiff re-installed a non-registered version of Winclear  
10 already existing on his machine; on January 17, 2014, Plaintiff opened the Winclear log, deleted  
11 its contents, saved the empty log, deleted the .txt Winclear to the recycle bin, and then emptied the  
12 recycle bin. (Doc. 158-3, Carruso Decl. ¶ 14.) GDF also indicates that "an unusual amount of  
13 activity" took place on Plaintiff's computer starting on January 10, 2014, regarding deletions of  
14 data and reconfiguration of his computer. GDP opines that PC Optimizer was run by the user on  
15 January 16, 2014, and deleted 2,318 files before the scan was cancelled, Plaintiff's disk  
16 defragmenter was run on January 15, 2014, and January 17, 2014, and Chrome Internet browser  
17 history was deleted on January 17, 2014.

18 Plaintiff's degree of culpability is quite high. First, the degree of deletion activity in the  
19 week following the Court's order that Plaintiff's computer be turned over to a neutral expert is  
20 suspect. A disc defragmentation was performed on January 15, 2014, and again on January 17,  
21 2014. The Winclear program was initiated to scan the computer, its scan was deleted, and PC  
22 Optimizer ran on an unscheduled date and time.

23 Second, and more importantly, even if PC Optimizer is responsible for the bulk of the  
24 deletions, Plaintiff installed that program and willfully allowed it to continue to delete data.  
25 Plaintiff's conduct in installing PC Optimizer after the duty to preserve was triggered in August  
26 2012 and allowing it to continue to run during the course of the litigation even after he was  
27 ordered on January 10, 2014, to turn his computer hard drive over to an expert for imaging was  
28 deliberate and willful. The parties' experts understandably dedicate a great portion of their reports

1 debating explanations for how the deletions on January 16 and 17, 2014, occurred. But  
2 notwithstanding the lengthy explanations, hypotheses, and technical jargon, the following remains  
3 undisputed: (1) Plaintiff *purchased* file deletion programs for his computer – they did not appear  
4 by virus; (2) Plaintiff installed both deletion programs; (3) Plaintiff installed PC Optimizer in  
5 November 2012 after *researching* the program; and (4) Plaintiff allowed deletion programs to run  
6 on his computer even after being admonished to save his computer data and after the court ordered  
7 that his computer be turned over for mirror imaging. Allowing these programs to continue  
8 deleting data was *deliberate and willful conduct*. While it is not conclusive as to Plaintiff's  
9 subjective intent, i.e., whether he had a bad-faith intent to disrupt the litigation and prevent  
10 Defendants from obtaining relevant evidence, Plaintiff was aware that he was deleting his  
11 computer data and was willful and deliberate in failing to uninstall these programs or take any  
12 affirmative steps to preserve his computer data. The ostrich did not bury its head in the sand by  
13 accident.

14 Although Plaintiff suggests<sup>7</sup> he never knew or understood the real function of either of  
15 these deletion programs, his conduct belies that assertion. Plaintiff purchased two licenses for  
16 Winclear in 2008 and 2009; he purchased a license for PC Optimizer in November 2012 after  
17 researching the program and took affirmative steps to install these programs on his computer. The  
18 Court finds it implausible that Plaintiff would repeatedly purchase licenses for computer data  
19 deletion programs of a similar type over a course of years, conduct computer research about PC  
20 Optimizer, install these programs, and allow them to run over a large span of time yet not  
21 understand what the programs did or how they functioned. Notably, Plaintiff's declaration stops  
22 short of an unequivocal statement that he did not know that the programs deleted data. Rather, he  
23 states he believed the programs could enhance the performance of his computer and could help  
24 with "such things as spam, unwanted programs and damaged/corrupt files." (Doc. 164-10, Olney  
25 Decl., ¶¶ 19-20.)

26 In the face of Plaintiff's deposition testimony, Plaintiff's suggestion he did not know these  
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28 <sup>7</sup> The Court notes that Plaintiff's opposition briefs and declaration do *not* actually state that Plaintiff had no idea that Winclear and PC Optimizer delete computer data. Plaintiff's statements in this regard are far more equivocal.

1 programs deleted data is even more implausible. Plaintiff testified he took basic computer classes  
2 while enrolled in college; after college he had training on "[b]asic programming of multiple  
3 different programs, SAP, CMMS," and indicated he could "spend an hour talking about  
4 computerized training." (Olney Depo., Doc. 158-6, p. 15:2-25.) Plaintiff explained that SAP and  
5 CMMS programs were used by companies to manage finances and goods, as well as track work  
6 orders. (Olney Depo., Doc. 158-6, 16:13-19.) Plaintiff also testified he received computer  
7 training on internal software programs while employed with Frito Lay. This testimony  
8 demonstrates Plaintiff had sufficient computer training to understand and appreciate the nature of  
9 Winclear and Optimizer Pro, especially since he purchased, installed, and ran the programs for  
10 years on his personal computer.

11       Moreover, Plaintiff took no steps to uninstall these programs after his deposition or after  
12 the Court ordered him to produce his computer. In the face of direct commands to preserve his  
13 computer data for purposes of the litigation, Plaintiff failed to take any steps to ascertain whether  
14 the programs would jeopardize his preservation duties, and instead continued to allow the  
15 programs to run and delete data. Even if Plaintiff did not manually initiate the deletions on his  
16 computer between January 10, 2014, and January 17, 2014, he is indisputably responsible for the  
17 installation of those programs on his computer and allowing them to delete data despite the  
18 following: (1) an admonition from opposing counsel, (2) a production request for his computer  
19 data, and (3) a court-order requiring that he produce the computer. And, while Plaintiff argues the  
20 Court's January 10, 2014, order to produce his computer to a neutral expert does not expressly  
21 *require* him not to use his computer, his duty to preserve the evidence on his computer is implicit.  
22 A party's duty to preserve evidence is not necessarily triggered by an express court order or a  
23 discovery request – it is triggered by some notice that the information is relevant to a potential  
24 claim. *See Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal.  
25 1987). Notwithstanding that the duty to preserve the computer data was triggered long before  
26 Plaintiff's deposition, by January 10, 2014, the computer data was the subject of an outstanding  
27 discovery request *and* the subject of discovery production order. Plaintiff's duty to preserve the  
28 computer data by January 10, 2014, was unquestionable. Yet, even on the day it was to be

1 produced, Plaintiff allowed over 2,000 files to be deleted from his computer.

2 Because fragments of files from 2012 and 2013 have been recovered by Defendants'  
3 experts, it is not foregone that all potentially relevant evidence that Defendants seek was  
4 necessarily deleted by January 10, 2014, or at any particular time after PC Optimizer was installed.  
5 As Defendants note, it is clear that at least some file fragments escaped deletion; there is simply no  
6 way to know the extent of what was deleted and when.

7 Plaintiff's *negligence* in installing PC Optimizer in November 2012 after the duty to  
8 preserve was triggered in August 2012 grew to *gross negligence* by allowing the program to run  
9 on his computer after he was expressly admonished to save his computer data at his October 2013  
10 deposition. On January 10, 2014, the Court ordered Plaintiff to turn over his computer to a neutral  
11 expert, and yet Plaintiff continued to allow PC Optimizer to delete data on his computer until the  
12 very day the computer was produced. This conduct was not only *deliberate and willful*  
13 disobedience of a court order, it was also *willful and deliberate spoliation of evidence*. If Plaintiff  
14 was able to research,<sup>8</sup> purchase, install, and run the program on his computer, he was most  
15 certainly able to uninstall PC Optimizer. Instead of preserving data on his computer, Plaintiff did  
16 absolutely nothing and in doing so, deliberately and willfully allowed the destruction of  
17 potentially relevant evidence on his computer.

18 Plaintiff also contends that BCT deleted data after the computer was turned over by  
19 Plaintiff, calling into question the entire mirror imaging process. In light of the date anomalies  
20 noted by GDF, there is little evidence that anything was deleted by BCT in the imaging process.  
21 Moreover, there is no dispute that Plaintiff purchased a deletion program, installed it while the  
22 litigation was pending, and deliberately allowed it to continue to run up until the day it was  
23 required to be turned over to BCT. No deletions by BCT ameliorate Plaintiff's conduct with  
24 regard to PC Optimizer, nor is there sufficient evidence of deletion by BCT such that the entire  
25 mirror imaging process is suspect.

26 ///

27 \_\_\_\_\_  
28 <sup>8</sup> Plaintiff states in his declaration that after his Winclear program expired, he "began researching online for other software programs that could help [him] enhance the performance of [his] computer." (Doc. 164-10, Olney Decl., ¶ 19.)

1                   **d.       Prejudice to Defendants**

2           Defendants argue they were irreparably prejudiced by the deletions. "The prejudice  
3 inquiry 'looks to whether the [spoliating party's] actions impaired [the non-spoiling party's] ability  
4 to go to trial or threatened to interfere with the rightful decision of the case.'" *Leon*, 464 F.3d at  
5 959 (quoting *Kahaluu Constr. Co.*, 857 F.2d at 604.) "In the Ninth Circuit, spoliation of evidence  
6 raises a presumption that the destroyed evidence goes to the merits of the case, and further, that  
7 such evidence was adverse to the party that destroyed it." *Dong Ah Tire & Rubber Co., Ltd. v.*  
8 *Glasforms, Inc.*, No. C 06-3359 JF, 2009 WL 1949124, at \*10 (N.D. Cal. July 2, 2009) (citing  
9 *Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th Cir. 1982)). If  
10 spoliation is shown, the burden of proof logically shifts to the guilty party to show that no  
11 prejudice resulted from the spoliation because that party is in a much better position to show what  
12 was destroyed and should not be able to benefit from its wrongdoing. *Hynix Semiconductor, Inc.*  
13 *v. Rambus Inc.*, 591 F. Supp.2d 1038, 1060 (N.D. Cal. 2006), *rev'd on other grounds*, 645 F.3d  
14 1336, 1344-47 (Fed. Cir. 2011).

15           Defendants contend that a remaining factual issue in the litigation is whether Plaintiff  
16 consented to receive calls about educational opportunities from Defendants. Some of the  
17 recovered data on Plaintiff's computer indicates he visited the University of Alabama website in  
18 November 2012 and in December 2013 to obtain information about a training certification.  
19 Evidence showing Plaintiff was searching for educational opportunities is relevant to the issue of  
20 the nature of the calls to which Plaintiff consented. Because Plaintiff destroyed his computer data,  
21 Defendants have been deprived of the complete scope of his website searches about educational  
22 opportunities.

23           Plaintiff's declaration in support of his opposition to Job.com's motion for summary  
24 judgment states he has no recollection of visiting Job.com's website, but some of the recovered  
25 data on Plaintiff's computer indicate he viewed a job posting on Job.com's website in July 2012.  
26 Had Plaintiff not destroyed his computer data, Defendants would have been able to investigate the  
27 extent of Plaintiff's contact with Job.com's website, including the pages he viewed and whether he  
28 visited pages that included the opt-out box regarding calls about educational opportunities.

1 Moreover, this evidence would also be relevant for purposes of impeachment. This data was  
2 contained exclusively on Plaintiff's computer – Job.com has no record of Plaintiff's contact with  
3 its website absent some interaction with the site that would generate and submit a form to  
4 Job.com.

5 Other websites Plaintiff visited are also relevant because they may have similar consent  
6 procedures to Job.com or offer registered users a similar opportunity to receive calls about  
7 educational opportunities. If Plaintiff visited these websites, such evidence may be  
8 circumstantially relevant to the scope of Plaintiff's consent to be contacted when he interacted with  
9 Job.com through Resume-Now. While Plaintiff argues none of this evidence can possibly be  
10 relevant to show his prior express consent under the TCPA, this contention is a dispute over the  
11 merits of Defendants' defense, not a basis to preclude discovery of evidence relevant to  
12 Defendants' chosen defense.

13 Plaintiff's deletion of his computer data has prejudiced Defendants' ability to present a full  
14 defense on the scope-of-consent issue, and threatens to interfere with the rightful decision of the  
15 case. *See Leon*, 464 F.3d at 959 (prejudice hinges on whether spoliation impaired the other party's  
16 "ability to go to trial or threatened to interfere with the rightful decision of the case"). Plaintiff  
17 argues that its expert has indicated it may be possible to recover some of the deleted files, and  
18 contends the only reasonable sanction, if one is warranted at all, is to require Plaintiff to pay for  
19 the recovery of any relevant files that may be deleted. This, however, does not cure the prejudice  
20 suffered by Defendants. Even if some data can be recovered, there is no way to know whether all  
21 of it was recovered; similarly, it would remain a mystery whether unrecovered files ever existed or  
22 whether the files simply could not be recovered. Such a recovery effort does not guarantee  
23 recovery of *all* files, and does not cure the harm to Defendants.

24 **e. An Adverse Inference is an Appropriate Sanction**

25 As Plaintiff's culpability and Defendants' degree of harm is high, an adverse inference is  
26 warranted. An adverse inference jury instruction is a less-harsh sanction than dismissal and  
27 because it can adequately address Defendants' harm, it is an appropriate sanction.

28 The adverse instruction itself can take many forms, which can range in degree of



1 harshness. *See generally Pension Comm.*, 685 F. Supp. 2d at 470 (S.D.N.Y. 2010). In *Pension*  
2 *Committee*, the court explained that at its harshest, where a party has acted with bad faith, the jury  
3 may be instructed that certain facts are deemed admitted and must be accepted as true. Where a  
4 party has spoliated evidence willfully or recklessly, a court may impose a mandatory presumption  
5 which can be rebutted. The least harsh instruction permits – but does not require – the jury to  
6 presume lost evidence is both relevant and favorable to the innocent party.

7 As discussed above, Plaintiff's degree of culpability grew during the course of the litigation  
8 and his failure to preserve data in the face of pending discovery requests and a court order to  
9 produce data was willful and deliberate. Because there is no way to ensure that the full extent of  
10 the destroyed computer data can be recovered or obtained from another source, only a strongly  
11 worded jury inference will adequately address the harm to Defendants. A rebuttable presumption  
12 inference will not address evidence Plaintiff chooses to introduce to attempt to rebut the  
13 presumption – leaving Defendants in the same position and without the evidence they need to  
14 adequately present their scope-of-consent defense. *See Leon*, 464 F.3d at 960 (affirming district  
15 court's finding that fashioning a jury instruction creating a presumption in favor of the non-  
16 spoliating party would leave that party equally helpless to rebut any material that the spoliating  
17 party may use to overcome the presumption). The Court orders the jury be instructed as follows:

18  
19 Plaintiff has failed to prevent the destruction of relevant evidence for Defendants'  
20 use in this litigation. This is known as the “spoliation of evidence.”

21 I instruct you, as a matter of law, that Plaintiff failed to preserve evidence after his  
22 duty to preserve arose. This failure resulted from his failure to perform his  
23 discovery obligations.

24 You shall presume that Defendants have met their burden of proving the following  
25 two elements by a preponderance of the evidence: *first*, that *relevant* evidence was  
26 destroyed by Plaintiff after the duty to preserve arose. Evidence is relevant if it  
27 would have clarified a fact at issue in the trial and otherwise would naturally have  
28 been introduced into evidence; and *second*, the lost evidence was favorable to  
29 Defendants.

Whether this finding is important to you in reaching a verdict in this case is for you

1 to decide.<sup>9</sup>

2 **C. Monetary Sanctions Are Warranted**

3 As Plaintiff spoliated evidence both prior to the Court's January 10, 2014, order and after  
4 the Court's January 10, 2014, order, the Court is empowered to order monetary sanctions under  
5 both its inherent powers as well under Rule 37(b)(2)(C). Plaintiff willfully and deliberately  
6 allowed the destruction of computer data on his computer after the Court ordered that it be  
7 produced to a neutral expert. Monetary sanctions are warranted under Rule 37(b)(2)(C).

8 Both Defendants are entitled to their reasonable attorney fees. While Windy City  
9 submitted the fees and costs it incurred in filing its motion for sanctions, Job.com requests that it  
10 be permitted to file declarations to support its request for attorneys' fees and costs.

11 **V. CONCLUSION AND ORDER**

12 Plaintiff spoliated relevant data on his computer after the duty to preserve had been  
13 triggered, and he did so with a culpable state of mind. In considering the appropriate sanction, the  
14 Court finds Plaintiff acted willfully and deliberately, Defendants were severely prejudiced, and  
15 only a strongly worded adverse inference will cure the harm suffered.

16 Accordingly, IT IS HEREBY ORDERED that:

- 17 1. Defendants' motion for a spoliation sanction of dismissal is DENIED;
- 18 2. Defendants' alternative motion for a spoliation sanction in the form of an adverse  
19 jury inference is GRANTED;
- 20 3. The following adverse inference jury instruction shall be given to the jury:

21 Plaintiff has failed to prevent the destruction of relevant evidence for Defendants'  
22 use in this litigation. This is known as the "spoliation of evidence."

23 I instruct you, as a matter of law, that Plaintiff failed to preserve evidence after his  
24 duty to preserve arose. This failure resulted from his failure to perform his  
25 discovery obligations.

26 You shall presume that Defendants have met their burden of proving the following

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27 <sup>9</sup> This instruction is modeled after that crafted by U.S. Magistrate Judge Grewal in *Apple, Inc.*, 881 F. Supp. 2d at  
28 1151. The district court modified this instruction upon review. *Apple II*, 888 F. Supp. 2d 976, 1000 (N.D. Cal. 2012).  
Here, because of the unrecoverable nature of Plaintiff's complete computer data, this strongly worded inference is  
necessary to cure the harm suffered by Defendants. A rebuttable presumption would not fully address Defendants'  
harm and would leave them in much the same position for purposes of presenting evidence at trial.

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two elements by a preponderance of the evidence: *first*, that *relevant* evidence was destroyed by Plaintiff after the duty to preserve arose. Evidence is relevant if it would have clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence; and *second*, the lost evidence was favorable to Defendants.

Whether this finding is important to you in reaching a verdict in this case is for you to decide.

4. Defendants' request for monetary sanctions is also GRANTED, and the parties shall submit their billing statements and cost statements in support of their request within 20 days from the date of this order.

IT IS SO ORDERED.

Dated: October 24, 2014

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE