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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 CHARLES MATTHEW ERHART,
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14 Plaintiff,

15 v.

16 BOFI HOLDING, INC.,
17

18 Defendant.

Case No. 15-cv-02287-BAS(NLS)

**ORDER DENYING DEFENDANT
BOFI HOLDING, INC.'S
MOTION FOR IMPOSITION OF
SANCTIONS FOR SPOILIATION
OF EVIDENCE AGAINST
PLAINTIFF CHARLES
MATTHEW ERHART**

[ECF No. 12]

19 On October 13, 2015, Plaintiff Charles Matthew Erhart commenced this
20 whistleblower retaliation action against Defendant BofI Holding, Inc. (“BofI”)
21 alleging violations of the Sarbanes–Oxley Act of 2002, the Dodd–Frank Wall Street
22 Reform and Consumer Protection Act, and California state law. (ECF No. 1.) Several
23 days later, BofI brought a countersuit against Erhart alleging he violated California
24 state law and the Computer Fraud and Abuse Act by publishing BofI’s confidential
25 information and deleting hundreds of files from his company-issued laptop. *See*
26 *generally BofI Federal Bank v. Erhart*, No. 15-cv-02353-BAS(NLS) (S.D. Cal. filed
27 Oct. 19, 2015) (“Countersuit”).

28 //

1 BofI now seeks a terminating sanction against Erhart because it claims he “has
2 engaged in a pattern and practice of destroying relevant evidence in order to
3 prejudice” BofI and “hinder its ability to defend itself in this action.” (Mot. 1:3–5,
4 ECF No. 12.) Alternatively, BofI requests the Court give an adverse inference jury
5 instruction and impose monetary sanctions against Erhart. (*Id.* 15:1–19:24.) In
6 response, Erhart argues this motion “is about copies of copies of documents that the
7 moving party has always had in its possession,” and BofI is trying “yet another tactic
8 to turn the spotlight away from its own wrongdoing and attack [him] by bringing this
9 motion for sanctions.” (Opp’n 1:2–9, ECF No. 18.)

10 The Court finds this motion suitable for determination on the papers submitted
11 and without oral argument. *See* Fed. R. Civ. P. 78(b); Civ. L.R. 7.1(d)(1). For the
12 following reasons, the Court **DENIES** BofI’s motion for spoliation sanctions.

13 14 **I. BACKGROUND**

15 Erhart is a former BofI employee who claims BofI retaliated against him for
16 reporting conduct he believed to be wrongful to the government. (*See generally*
17 Compl. ¶¶ 9–52, ECF No. 1.) This motion revolves around whether Erhart has
18 destroyed evidence by deleting files from several electronic devices. These devices
19 are: (i) Erhart’s BofI-issued laptop, (ii) two USB flash drives, (iii) Erhart’s personal
20 desktop computer, and (iv) Erhart’s girlfriend’s Apple MacBook laptop. (Armstrong
21 Decl. ¶ 3, ECF No. 13.)

22 Erhart acquired the first of these devices—his BofI-issued laptop—when he
23 joined BofI as an internal auditor in September 2013. (Tolla Decl. ¶ 3, ECF No. 12-
24 5.) Eighteen months later, Erhart requested, and was granted by BofI, an unpaid leave
25 of absence beginning on March 6, 2015. (*Id.* ¶ 5.) Shortly after his leave of absence
26 commenced, Erhart met with regulators at the United States Department of the
27 Treasury’s Office of the Comptroller of the Currency (“OCC”) to report BofI’s
28 alleged wrongdoing. (Erhart Dep. 96:15–19, 162:14–163:6, ECF No. 12-3; *see also*

1 Order Den. BofI’s Am. Mot. For Prelim. Inj., Section I.B., Countersuit, ECF No. 18.)
2 Around the same time, BofI informed Erhart that he was not authorized to retain
3 possession of his BofI laptop while he was on leave. (Tolla Decl. ¶ 5.) Erhart returned
4 the laptop to BofI on March 12, 2015. (*Id.*) Since then, BofI’s forensic analyst has
5 determined that Erhart deleted hundreds of files from the laptop prior to returning it.
6 (*See* Armstrong Decl. ¶¶ 2–3.)¹

7 Erhart explains that, after he provided documents on the laptop to the OCC to
8 support his claims of wrongdoing, he “deleted [from the laptop] some random emails
9 as well as some of the documents in order to make it more difficult [for BofI] to
10 follow our audit trail.” (Erhart Decl. ¶ 7, ECF No. 18-7.) However, when he initially
11 acquired the BofI documents on the laptop, he “did not remove or delete any
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18 ¹ BofI moves for an order sealing portions of the Armstrong Declaration and the entirety of Exhibits
19 B, C, D, E, and F attached to this declaration. (ECF No. 19.) These items contain file names of BofI
20 documents and “provide a detailed snapshot of BofI’s proprietary and non-public information
21 technology infrastructure.” (Tolla Decl. ¶¶ 7–8, ECF No. 15-2.) Under Ninth Circuit law, the legal
22 standard governing public access to filed motions and their attachments turns on whether the motion
23 is more than tangentially related to the merits of the case. *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016). When the underlying motion is more than tangentially
24 related to the merits, the “compelling reasons” standard applies. *Id.* When the underlying motion
25 does not surpass the tangential relevance threshold, the “good cause” standard applies. Here,
26 notwithstanding BofI’s request for a terminating sanction, the Court finds that BofI’s motion is not
27 more than tangentially related to the merits of this whistleblower retaliation action. The motion
28 concerns only whether Erhart deleted files after he reported BofI’s alleged misconduct to the
OCC—it does not concern the merits of Erhart’s whistleblower retaliation claims or his state law
causes of action. Thus, the good cause standard applies to BofI’s request. Upon review of the
declaration of BofI’s Chief Governance, Risk & Compliance Officer filed in support of BofI’s
motion to seal (ECF No. 15-2), the Court finds BofI has made a “particularized showing” of good
cause to seal these items. *See In re Midland Nat. Life Ins. Co. Annuity Sales Practices Litig.*, 686
F.3d 1115, 1119 (9th Cir. 2012). Accordingly, the Court **GRANTS** BofI’s motion to seal (ECF No.
15).

1 information in the Bank's systems[.]”² (*Id.* ¶ 4.) Therefore, Erhart submits that these
2 documents “were all copies of documents at the Bank.”³ (*Id.* ¶ 7.) All of these events
3 occurred prior to Erhart retaining counsel and eventually commencing this action.
4 (*See id.*)

5 Erhart turned over the rest of the electronic devices at issue to BofI during
6 litigation. In BofI's Countersuit, the Court entered a stipulated temporary restraining
7 order. (Countersuit, ECF No. 10 at 2:15–19.) The restraining order required Erhart to
8 deliver to BofI “all BofI records and documents and any Confidential Information in
9 any form, including but not limited to documents or electronically stored information
10 stored in any medium within his . . . custody, possession, or control.” (*Id.* at 2:15–
11 19.)

12 Afterwards, on November 9, 2015, Erhart produced a USB flash drive
13 containing BofI files to BofI's expert. (Armstrong Decl. ¶ 13.) Several files were
14 deleted from the drive a few days prior to it being surrendered to BofI. (*Id.* ¶¶ 13–
15 15.) Erhart states: “Once litigation began, I cooperated with the Bank in its seeking
16 the return of information I had in my possession I organized the materials and
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18 ² Conspicuously missing from BofI's briefing is any indication that it does not possess at least
19 some, if not all, of the files Erhart made copies of at BofI. Presumably, BofI seeks to take advantage
20 of presumptions in spoliation law by demonstrating Erhart destroyed files and then leaving it to
21 Erhart to try to prove BofI still has these files and has not suffered meaningful prejudice. When
22 Erhart responds that he only copied files and that the original files remain on BofI's system, BofI
23 replies with a barrage of evidentiary objections but no meaningful suggestion to the contrary.
24 Although BofI's strategy may be a savvy litigation tactic, the Court has trouble turning a blind eye
25 to the fact that BofI has already demonstrated it is in possession of files Erhart made copies of. In
26 moving for a preliminary injunction against Erhart in its Countersuit, BofI submitted evidence that
27 one of its executives had reviewed the list of files deleted from Erhart's laptop. For various files on
28 this list, he declared that: “These files are Confidential Information because **they are identical to
files held at BofI, which I have personally reviewed** and which contain nonpublic information . .
. . .” (Tolla Decl. ¶ 9, Countersuit, ECF No. 7-4 (emphasis added).)

³ BofI objects to Erhart's statement that these files are “copies of documents at the Bank” because
“Erhart has no personal knowledge regarding the contents of BofI's system or document files.”
(ECF No. 19-5 at 24:25–27.) Erhart may not know which files BofI has retained on its systems, but
he does have personal knowledge to state that the files that were in his possession were copies of
files he found on BofI's systems. Thus, the Court overrules this objection. To the extent the Court
relies on any other evidence objected to by BofI in its twenty-five pages of evidentiary objections
(ECF No. 19-5), the Court overrules BofI's objections.

1 turned them over to forensic people sent to my home by the Bank’s lawyers. From
2 the thumb drive I only deleted duplicates of files I had copied to it.” (Erhart Decl. ¶
3 8.)

4 On November 16, 2015, the Court granted the parties’ request to enter a
5 supplemental temporary restraining order in BofI’s Countersuit. (Countersuit, ECF
6 No. 17.) This order required Erhart to—in addition to those requirements contained
7 in the initial restraining order—provide a signed declaration to BofI that he had
8 returned all of BofI’s information and “[d]elete all references to and/or summaries of
9 BofI’s Confidential Information in his possession, custody, or control.” (*Id.* 2:25–
10 27.) Erhart later provided his personal desktop computer, another USB flash drive,
11 and his girlfriend’s Apple MacBook laptop to BofI in an effort to comply with the
12 parties’ agreements and the Court’s restraining orders. (*See* Armstrong Decl. ¶¶ 16,
13 20, 26.) BofI’s expert determined that, at some point, BofI files had been deleted
14 from these three devices as well. (*Id.* ¶¶ 17–19, 22–24, 28–30.) BofI now moves for
15 spoliation sanctions, claiming Erhart intentionally destroyed evidence by deleting
16 files from his BofI-issued laptop, the two USB flash drives, his desktop computer,
17 and his girlfriend’s laptop. (ECF No. 12.)

19 **II. ANALYSIS**

20 **A. Destruction of Evidence**

21 “Spoliation is ‘the destruction or significant alteration of evidence, or the
22 failure to preserve property for another’s use as evidence[,] in pending or reasonably
23 foreseeable litigation.’” *Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 625 (C.D.
24 Cal. 2013) (alteration in original) (quoting *Zubulake v. UBS Warburg LLC*, 220
25 F.R.D. 212, 216 (S.D.N.Y. 2003)). “The party requesting sanctions bears the burden
26 of proving, by a preponderance of the evidence, that spoliation took place.” *Tetsuo*
27 *Akaosugi v. Benihana Nat’l Corp.*, No. C 11-01272 WHA, 2012 WL 929672, at *3
28 (N.D. Cal. Mar. 19, 2012) (citing *Akiona v. United States*, 938 F.2d 158 (9th Cir.

1 1991)); *see also, e.g., Compass Bank v. Morris Cerullo World Evangelism*, 104 F.
2 Supp. 3d 1040, 1052–53 (S.D. Cal. 2015). Thus, the party seeking sanctions must
3 initially demonstrate that evidence has in fact been destroyed. *See, e.g., Tetsuo*, 2012
4 WL 929672, at *3. To destroy is “[t]o damage (something) so thoroughly as to make
5 unusable, unrepairable, or nonexistent; to ruin <destroying evidence>.” *Destroy*,
6 Black’s Law Dictionary (10th ed. 2014).

7 To illustrate, in *Tetsuo*, the plaintiff in an employment suit copied thousands
8 of files from the defendant employer’s computer onto a USB flash drive the day
9 before his counsel signed his complaint. 2012 WL 929672, at *1–2. He later deleted
10 thousands of files on the flash drive after his deposition and before surrendering the
11 drive to the defendant. *Id.* at *2. There was no indication, however, that the plaintiff
12 “had deleted any documents from the [defendant’s] computer.” *Id.* Upon discovering
13 that the plaintiff had deleted files from the flash drive, the defendant moved for
14 sanctions, despite that it had “since been able to recover approximately 6300 files
15 deleted from the thumb drive.” *Id.* The court denied the motion, reasoning: “[The]
16 [p]laintiff never deleted any documents from the company computer. The deletion of
17 files from the USB drive thus has not limited defendant in its ability to find its own
18 records to defend this suit. Whatever documents were on the company computer are
19 still on it, unharmed.” *Id.* at *3. In other words, the defendant’s documents had not
20 been destroyed. *See id.*

21 Here, the Court finds BofI has not met its initial burden of demonstrating
22 Erhart destroyed evidence with respect to many of the files that are at issue. In its
23 motion, BofI often equates deleting computer files with destroying evidence. (*See,*
24 *e.g., Mot. 11:18–12:7.*) But, as confirmed by BofI’s expert, deleting a computer file
25 does not necessarily destroy the file because it may still be recoverable. (*See*
26 *Armstrong Decl. ¶¶ 11, 19, 24.*) If a file is recoverable, it has not been “damage[d]
27 so thoroughly as to make [it] unusable, unrepairable, or nonexistent.” *See Destroy*,
28 Black’s Law Dictionary (10th ed. 2014). As detailed below, many of the files Erhart

1 deleted are recoverable; therefore, BofI has not met its initial burden of
2 demonstrating these files have been destroyed.

3 4 **1. Erhart's BofI-Issued Laptop Computer**

5 The first instance of claimed spoliation involves Erhart's BofI-issued laptop
6 computer. BofI's expert determined that on March 12, 2015, Erhart deleted "957 files
7 and folders" from the laptop prior to returning it to the company. (Armstrong Decl.
8 ¶ 10.) "Approximately 79 of these deleted objects relate to the operating system and
9 applications and, therefore, are excluded from further discussion." (*Id.*) Thus, 878
10 deleted objects are at issue. (*Id.* ¶ 11.) Consistent with Erhart's statement that he
11 deleted "some random e-mails" from the laptop, the deleted files include e-mails with
12 subject lines such as "BOFI Christmas Party Gift Winners!"; "BOFI SHIRTS"; and
13 "DAYLIGHT SAVING TIME BEGINS." (*Id.* Ex. B.) Although these 878 files have
14 been deleted, 849 "have not been overwritten and are candidates for forensic
15 recovery." (*Id.* ¶ 13.) Accordingly, BofI has not shown that these 849 files have been
16 destroyed.

17 Thus, the Court is left with evidence that 29 files have been destroyed on the
18 laptop. BofI has lost access to potential torpedoes to Erhart's case such as e-mails
19 titled "Register now for two 'Ask the Fed' sessions 'Commercial Real Estate' and
20 'Interest Rate Risk'"; "Flu Season"; and "REFRIGERATOR !!". (Armstrong Decl.
21 Ex. B.) Aside from these e-mails, it does appear that some potentially relevant files
22 have been destroyed. However, many of these overwritten files reappear in a
23 recoverable form on the other media devices discussed in this Order below.

24 25 **2. First USB Flash Drive**

26 On November 9, 2015, Erhart produced a USB flash drive to BofI's expert.
27 (Armstrong Decl. ¶ 13.) The drive contains numerous files that Erhart transferred to
28 the drive on November 7, 2015, to return these items to BofI pursuant to the Court's

1 temporary restraining order in BofI’s Countersuit. (*See id.* ¶ 13, Ex. C.) The drive
2 also indicates that “[e]leven files, also copied to the [device] on November 7, 2015,
3 have been deleted.” (*Id.* ¶ 13.) However, only one of these eleven files has been
4 overwritten and destroyed—a file titled “Employee Account Review 2.” (*Id.* Ex. C.)
5 This particular file is lost, but Erhart returned to BofI another file titled “Employee
6 Account Review.” These two files have the exact same file size—3,291,345 bytes—
7 indicating they are identical. (*See id.*) This indication is consistent with Erhart’s claim
8 that he only deleted “from the thumb drive . . . duplicates of files” that he had copied
9 to the drive. (Erhart Decl. ¶ 8.) Accordingly, because Erhart provided to BofI a
10 duplicate of the only file on this flash drive that has been destroyed, the spoliation
11 inquiry ends here for this electronic device.

12 13 **3. Erhart’s Personal Desktop Computer**

14 The next instance of claimed destruction of evidence involves Erhart’s
15 personal desktop computer, which he surrendered to BofI for analysis on December
16 8, 2015. (Armstrong Decl. ¶ 16.) BofI’s expert opines that “[t]he Recycle Bin of the
17 ‘erhartm’ user profile on the HP desktop computer contains approximately 1,500 files
18 facially relevant to BofI . . . [which] were deleted and **moved to the Recycle Bin** on
19 or around December 5, 2015.” (*Id.* (emphasis added).) In other words, the 1500
20 “deleted” files are still sitting in the computer’s Recycle Bin. (*See id.*) BofI’s expert
21 astutely admits that these files “are candidates for forensic recovery.” (*See id.* ¶ 19.)
22 He did, however, locate an additional six files “beyond the files located in the Recycle
23 Bin” that were previously stored on the device and are potentially related to BofI.
24 (*Id.*) Two of these files have been both deleted and overwritten. (*Id.*) Therefore, out
25 of approximately 1506 files, the Court finds BofI has satisfied its burden of
26 demonstrating just two files have been destroyed.

27 Additionally, many of the files sitting in the desktop computer’s Recycle Bin
28 have the exact same file names and are the exact same sizes as the 29 files that are

1 unrecoverable from the laptop. For example, one of the files on the laptop that has
2 since been destroyed was an e-mail message with the name “RE SEC Subpoena-
3 Internal Audit Review.” (Armstrong Decl. Ex. B.) The file size was 699,904 bytes.
4 (*Id.*) Several copies of an e-mail message with the exact same title are sitting in the
5 Recycle Bin on the image of Erhart’s desktop computer’s drive in BofI’s possession.
6 (*Id.* Ex. D.) Unsurprisingly, these copies also have a file size of exactly 699,904
7 bytes. (*Id.*) Accordingly, aside from potentially losing metadata associated with the
8 destroyed duplicates, which the Court addresses below, BofI has not demonstrated
9 that these files have been destroyed because it has access to duplicate copies sitting
10 in the Recycle Bin on BofI’s image of Erhart’s desktop computer’s hard drive.
11 Instead of seeking a terminating sanction against Erhart, BofI could simply drag these
12 files out of the Recycle Bin and open them.

13 14 **4. Second USB Flash Drive**

15 A second USB flash Drive surrendered by Erhart on December 8, 2015, is the
16 fourth item on the list. It contains a few dozen deleted files in a deleted “BofI” folder
17 and another folder titled “0319025” that remains active on the drive. (Armstrong ¶¶
18 21–24.) All of these files “are candidates for forensic recovery.” (*Id.* ¶ 24.) Therefore,
19 BofI has not met its burden of demonstrating these files have been destroyed, and the
20 spoliation inquiry ends here for this device as well.

21 22 **5. Erhart’s Girlfriend’s Apple MacBook Laptop**

23 The last instance of claimed spoliation involves an Apple MacBook laptop
24 belonging to Erhart’s girlfriend. (Armstrong Decl. ¶ 26.) This device was similarly
25 surrendered to BofI for analysis on December 8, 2015, and it once contained “more
26 than 300 unique facially-relevant filenames.” (*Id.* ¶ 28.) When the expert includes
27 “duplicate copies previously stored across all folders . . . the number of facially-
28 relevant filesexceeds [sic] 550.” (*Id.*) Further, a review of the MacBook’s hard drive

1 “revealed no readily recoverable deleted content pertinent to this investigation.” (*Id.*)
2 Accordingly, these several hundred files appear to have been destroyed. However,
3 almost all of the files deleted from the MacBook appear to be exact duplicates of files
4 on other devices—presumably because they were transferred from Erhart’s Bofl
5 laptop or desktop computer to the MacBook. (*See id.* Exs. B, D, F.) There is no
6 suggestion that the MacBook was used to initially copy files from Bofl’s systems.
7 That said, Bofl has met its burden of showing these particular duplicates and possibly
8 some other files on the MacBook have been destroyed.

9 In sum, it is unclear what, if any, potentially relevant evidence has been
10 destroyed from the five electronic devices used by Erhart. Almost all of the deleted
11 files are likely recoverable—either by extracting them from the Recycle Bin or by
12 using more sophisticated data recovery techniques. As for the files that are not
13 recoverable, it appears there are identical copies of many, or possibly all, of these
14 files available from other sources discussed in this motion.

15 Nonetheless, it is possible that a fraction of the deleted files that have been
16 destroyed are relevant. It is also possible that duplicates of these files are not available
17 from other sources. In addition, Bofl argues there could have been valuable metadata
18 associated with some of the duplicates of files that have been destroyed.⁴ The Court
19 acknowledges this possibility. Thus, the Court turns to considering whether it is
20 appropriate to impose spoliation sanctions against Erhart.

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25 ⁴ “Metadata is simply data that provides information about other data.” *In re Online DVD-Rental*
26 *Antitrust Litig.*, 779 F.3d 914, 925 n.5 (9th Cir. 2015) (quoting *Country Vintner of N.C., LLC v. E.*
27 *& J. Gallo Winery, Inc.*, 718 F.3d 249, 253 n.4 (4th Cir.2013)). In this setting, it is “electronically-
28 stored evidence that describes the ‘history, tracking, or management of an electronic document.’”
See Aguilar v. Immigration & Customs Enf’t Div. of U.S. Dep’t of Homeland Sec., 255 F.R.D. 350,
353–55 (S.D.N.Y. 2008) (quoting *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646 (D.
Kan. 2005)) (discussing metadata and delineating substantive metadata, system metadata, and
embedded metadata).

1 **B. Imposition of Sanctions**

2 Even if a party has destroyed evidence, this fact “does not necessarily mean
3 that the party has engaged in sanction-worthy spoliation.” *See Reinsdorf*, 296 F.R.D.
4 at 626 (quoting *Ashton v. Knight Transp., Inc.*, 772 F. Supp. 2d 772, 799–800 (N.D.
5 Tex. 2011)). To determine whether to impose sanctions for spoliation, “[t]rial courts
6 have widely adopted the Second Circuit’s three-part test” used for determining
7 whether to grant an adverse inference spoliation instruction. *Apple Inc. v. Samsung*
8 *Elects. Co.*, 888 F. Supp. 2d 976, 989 (N.D. Cal. 2012) (“*Apple II*”). This test provides
9 that a party seeking an adverse inference instruction based on spoliation must
10 establish: “(1) that the party having control over the evidence had an obligation to
11 preserve it at the time it was destroyed; (2) that the records were destroyed ‘with a
12 culpable state of mind’; and (3) that the evidence was ‘relevant’ to the party’s claim
13 or defense such that a reasonable trier of fact could find that it would support that
14 claim or defense.” *Id.* at 989–90.

15 Here, BofI has not established that the spoliation criteria are satisfied for each
16 claimed instance of spoliation. In particular, the Court finds that so far as Erhart
17 destroyed files after the Court entered its supplemental temporary restraining order
18 in BofI’s Countersuit, these files were not destroyed “with a culpable state of mind.”
19 *See Apple II*, 888 F. Supp. 2d at 989. The Court’s supplemental restraining order
20 required Erhart to “[d]elete all references to and/or summaries of BofI’s Confidential
21 Information in his possession, custody, or control.” (Countersuit, ECF No. 17 at
22 2:25–27.) Erhart describes his interpretation of this order as follows:

23 After I gave the forensic people everything (with the exception of the
24 cover emails to the OCC, I deleted the files on my own computer and
25 on my girlfriend’s I thought the court order required me not to keep
26 anything after I turned it all over to the forensic people sent by the
27 Bank’s lawyers. I understood that we would later ask for them back
during discovery.

28 (Erhart Decl. ¶ 9.) BofI naturally has a different interpretation of the interplay

1 between the restrictions in the stipulated supplemental temporary restraining order.
2 (See Reply 6:13–22, ECF No. 19.) But the Court agrees with Erhart that part of the
3 restraining order is ambiguous, and the Court will not construe this ambiguity against
4 Erhart to find that he had a culpable state of mind when he deleted files after the order
5 was entered. (See Erhart Decl. ¶ 9, *see also* Order Den. BofI’s Am. Mot. For Prelim.
6 Inj. 20:24–28, Countersuit, ECF No. 18.) Thus, imposing spoliation sanctions as to
7 Erhart’s conduct with respect to his personal desktop computer and his girlfriend’s
8 Apple MacBook laptop is not appropriate.

9 Because the Court already found above that BofI has not met its initial burden
10 of demonstrating Erhart destroyed evidence on the two USB flash drives, the only
11 device left is Erhart’s BofI-issued laptop computer. The Court will assume, for the
12 sake of argument, that BofI has satisfied the three-part test for demonstrating Erhart
13 engaged in spoliation by destroying the fraction of the files on this laptop that are
14 discussed above. Nonetheless, as discussed below, the Court ultimately finds no
15 sanction is appropriate regardless of whether or not Erhart had a duty to preserve
16 these files and deleted them with a culpable state of mind.

17 18 **C. Appropriate Sanction**

19 Assuming Erhart culpably destroyed evidence on his BofI-issued laptop, the
20 Court considers what, if any, sanction is appropriate. “A trial court’s discretion
21 regarding the form of a spoliation sanction is broad, and can range from minor
22 sanctions, such as the awarding of attorneys’ fees, to more serious sanctions, such as
23 dismissal of claims or instructing the jury that it may draw an adverse inference.”
24 *Apple Inc. v. Samsung Elecs. Co.*, 881 F.Supp.2d 1132, 1135 (N.D. Cal. 2012)
25 (“*Apple I*”). “Any remedy applied to a spoliator ‘should be designed to: (1) deter
26 parties from engaging in spoliation; (2) place the risk of an erroneous judgment on
27 the party who wrongfully created the risk; and (3) restore ‘the prejudiced party to the
28 same position he would have been absent the wrongful destruction of evidence by

1 the opposing party.” *Id.* at 1136 (quoting *Victor Stanley, Inc. v. Creative Pipe, Inc.*,
2 269 F.R.D. 497, 521, 534 (D. Md. 2010)). “In considering what spoliation sanction
3 to impose, if any, courts generally consider three factors: ‘(1) the degree of fault of
4 the party who altered or destroyed the evidence; (2) the degree of prejudice suffered
5 by the opposing party; and (3) whether there is a lesser sanction that will avoid
6 substantial unfairness to the opposing party.’” *Apple II*, 888 F. Supp. 2d at 992
7 (quoting *Nursing Home Pension Fund v. Oracle Corp.*, 254 F.R.D. 559, 563 (N.D.
8 Cal. 2008)).

9 In addition, if a party requests a terminating sanction, the Ninth Circuit has
10 explained that district courts should consider five factors before imposing this harsh
11 sanction. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). These factors
12 are: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s
13 need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions;
14 (4) the public policy favoring disposition of cases on their merits; and (5) the
15 availability of less drastic sanctions.” *Id.* (quoting *Anheuser-Busch*, 69 F.3d at 348);
16 accord *U.S. for Use & Ben. of Wiltec Guam, Inc. v. Kahaluu Const. Co.*, 857 F.2d
17 600, 603 (9th Cir. 1988). The court is not required to make explicit findings regarding
18 each of these factors. *Leon*, 464 F.3d at 958 (citing *Willtec Guam*, 857 F.2d at 603).
19 Yet, “a finding of ‘willfulness, fault, or bad faith’ is required for dismissal to be
20 proper.” *Id.* (quoting *Anheuser-Busch*, 69 F.3d at 348). In addition, the court “must
21 consider ‘less severe alternatives’ than outright dismissal.” *Id.* (quoting *Willtec*
22 *Guam*, 857 F.2d at 604).

23 Thus, regardless of the type of sanction requested by BofI, whether it has
24 suffered prejudice influences the Court’s analysis of which sanction “to impose, if
25 any.” See *Apple II*, 888 F. Supp. 2d at 992; see also *Leon*, 464 F.3d at 959–60. “The
26 prejudice inquiry ‘looks to whether the [spoliling party’s] actions impaired [the non-
27 spoliling party’s] ability to go to trial or threatened to interfere with the rightful
28 decision of the case.” *Leon*, 464 F.3d at 959 (alteration in original). “In the Ninth

1 Circuit, spoliation of evidence raises a presumption that the destroyed evidence goes
2 to the merits of the case, and further, that such evidence was adverse to the party that
3 destroyed it.” *Apple II*, 888 F. Supp. 2d at 993 (citing *Dong Ah Tire & Rubber Co.,*
4 *Ltd. v. Glasforms, Inc.*, No. C 06–3359 JF, 2009 WL 1949124, at *10 (N.D. Cal. July
5 2, 2009)).

6 Here, even if spoliation has occurred, the Court finds sanctions are not
7 appropriate because BofI has not suffered any meaningful prejudice. Only a fraction
8 of the files deleted on Erhart’s BofI-issued laptop (29 of 878) have been destroyed.
9 Further, as to the 29 files that have been destroyed, the Court finds Erhart has rebutted
10 the presumption for some of these files that they go “to the merits of the case.” *See*
11 *Apple II*, 888 F. Supp. 2d at 993. For example, destroyed e-mails like
12 “REFRIGERATOR !!” do not concern the merits of Erhart’s whistleblower
13 retaliation claims. And again, for many of the files that have been permanently
14 deleted from the laptop, there are identical copies in BofI’s possession.

15 Faced with Erhart’s claim that it has not suffered any prejudice because it has
16 access to copies of the files he destroyed, BofI argues that “[w]hile it may
17 theoretically be possible to locate the same information in other files on BofI’s
18 system and recreate his investigation and findings, it is not BofI’s burden to do so.”
19 (Reply 7:27–28.) The Court agrees. BofI does not have the burden of proof on
20 Erhart’s claims. Erhart is the one who will need to convince the trier of fact that he
21 reasonably believed BofI’s conduct was a violation of the laws covered by the
22 whistleblower provisions he invokes. *See Tides v. Boeing Co.*, 644 F.3d 809, 814 (9th
23 Cir. 2011). He will also need to identify the documents supporting his claims before
24 trial. *See Fed. R. Civ. P. 26(a)*. If, as BofI claims, he destroyed some of the documents
25 supporting his allegations, then he may have trouble meeting his burden.

26 Nevertheless, BofI repeatedly complains that it has been deprived of the “trail
27 of evidence” supporting Erhart’s allegations. Fortunately for BofI, it can recall the
28 bloodhounds—sitting in the Recycle Bin on the hard drive image in BofI’s

possession is a folder titled “Provided to OCC Via Email from BofI laptop” containing the hundreds of files that were presumably collected by Erhart and sent to the OCC. (*See* Armstrong Decl. Ex. D.) The trail has been blazed—BofI need only follow it instead of seeking sanctions against Erhart.

BofI also relies heavily on the Ninth Circuit’s decision in *Leon v. IDX Systems Corp.*, 464 F.3d 951, 955 (9th Cir. 2006), to support its request for sanctions, but that case is distinguishable. There, after litigation commenced, the plaintiff deleted more than 2,200 files from the defendant company’s laptop and also “wrote a program to ‘wipe’ any deleted files from the unallocated space in the hard drive.” *Leon*, 463 F.3d at 956. Some of the files permanently wiped from the work laptop contained pornographic content, which would have been “at the heart” of the defendant’s defense to the plaintiff’s employment discrimination claims. *Id.* at 956, 960. The Ninth Circuit affirmed because the district court did not abuse its discretion in imposing a terminating sanction. *Id.* at 963. Here, in contrast, only a fraction of the files deleted by Erhart from his BofI-issued laptop have been overwritten and destroyed. Further, duplicates of almost all of these files are available to BofI from the other sources discussed in this motion—in addition to potentially BofI’s own systems. Thus, for these reasons, among others, the prejudice suffered by BofI is minimal in comparison to the defendant in *Leon* and does not justify comparable sanctions.

Accordingly, even if spoliation has occurred, the Court finds spoliation sanctions are not appropriate. In particular, the Court concludes BofI has not suffered, and does not face the risk of, prejudice that is sufficient enough to warrant sanctions against Erhart. The Court denies BofI’s requests for a terminating sanction, an adverse inference jury instruction, and monetary sanctions.

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1 **III. CONCLUSION & ORDER**

2 In sum, the Court finds imposing sanctions for spoliation of evidence is not
3 appropriate. It is unclear whether any potentially relevant evidence has been
4 destroyed. Rather, the “destroyed” evidence Bofl appears to be hunting for is sitting
5 in the Recycle Bin on a hard drive image in Bofl’s possession. Bofl has neither met
6 its burden of demonstrating spoliation has occurred nor shown why imposing
7 sanctions are appropriate.

8 In light of the foregoing, the Court **DENIES** Bofl’s motion for imposition of
9 sanctions for spoliation of evidence against Erhart (ECF No. 12). In addition, the
10 Court **GRANTS** Bofl’s motion to seal (ECF No. 15). The Court **ORDERS** the Clerk
11 of the Court to accept and **FILE UNDER SEAL** the requested documents (ECF No.
12 16).

13 **IT IS SO ORDERED.**

14
15 **DATED: September 21, 2016**


Hon. Cynthia Bashant
United States District Judge