

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

INTERNMATCH, INC.,  
Plaintiff,  
v.  
NXTBIGTHING, LLC, et al.,  
Defendants.

Case No. 14-cv-05438-JST

**ORDER GRANTING IN PART  
PLAINTIFF’S MOTION FOR  
TERMINATING SANCTIONS FOR  
SPOILIATION OF EVIDENCE**

Re: ECF No. 63

In this trademark dispute, Plaintiff InternMatch, Inc. alleges that Defendants Nxtbigthing, LLC and Chad Batterman fraudulently obtained registration of the trademark “INTERNMATCH” and seek cancellation of the mark. ECF No. 1. On November 12, 2015, InternMatch filed a Motion for Terminating Sanctions for Spoliation of Evidence, ECF No. 63, which the Court now considers.

**I. BACKGROUND<sup>1</sup>**

**A. Trademark Registration**

Founded in 2009, InternMatch provides online resources and tools to connect students seeking internships with employers seeking interns. ECF No. 1 ¶ 10. InternMatch offers these resources and tools under the name “INTERNMATCH.” *Id.* The company started a trademark application with the U.S. Patent and Trademark Office (USPTO) in 2009 but abandoned the application by July 7, 2010. *Id.* ¶¶ 18–19. The application described the following services:

Employment agency services, namely, providing a website with online video, audio and textual information to support recruiting, employment branding, and general candidate evaluation; recruiting services for filling corporate internship positions; providing an online searchable database featuring employment opportunities and

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<sup>1</sup> Unless stated otherwise, the following background facts are taken from the allegations of the Complaint.

content about employment.

Id. ¶ 20. InternMatch filed a new trademark application in January of 2014, but the application was suspended because of an application for the same mark filed by defendant Nxtbigthing. Id. ¶¶ 21, 27.

Nxtbigthing is a limited liability company owned by Chad Batterman. ECF No. 32 ¶ 2. Chad Batterman first began using the mark INTERNMATCH as a trademark for his job searching services in 2007. Id. ¶ 8. In 2012, Batterman formed Nxtbigthing, LLC to operate the business. On March 27, 2013, Nxtbigthing filed an intent-to-use trademark application for INTERNMATCH, and the application issued on November 18, 2014. ECF No. 1 ¶ 22; ECF No. 32 ¶ 22. The application described the following services:

Online computer services, namely, providing a website that offers the exchange of information in the field of employment opportunities and career placement, recruitment, careers, and job listings, providing an on-line searchable database featuring classified ad listings and employment opportunities, career networking services, providing a web site featuring the ratings, reviews and recommendations on employers and employees and places of employment for use by employees, employers, business owners, and consumers.

ECF No. 1 ¶ 22. In its statement of use, Nxtbigthing states that the trademark was first used in commerce on February 15, 2007. ECF No. 1 ¶ 23.

On January 15, 2014, InternMatch sent Batterman a letter, informing him of InternMatch's "prior rights in the INTERNMATCH trademark." Id. ¶ 28. Batterman responded by offering to settle the INTERNMATCH matter for \$325,000. Id. ¶ 29. Batterman also provided documents to InternMatch, demonstrating use of the INTERNMATCH trademark as early as 2007. Id. The documents included marketing flyers and an activity log. Id. ¶ 30; see id. ¶¶ 31–34 (providing copies of the documents sent to InternMatch). InternMatch did not accept Batterman's offer to sell his rights in the trademark. InternMatch alleges that Defendants subsequently issued trademark claim notices to various social networking services used by InternMatch. Id. ¶ 45.

### **B. Underlying Litigation**

InternMatch filed its complaint on December 12, 2014. See ECF No. 1. In it, InternMatch alleges five causes of action: (1) false designation of origin; (2) cancellation for fraud on the

1 USPTO; (3) cancellation for lack of use in commerce; (4) declaratory judgment that InternMatch  
 2 has superior rights to Nxtbigthing and Chad Batterman in the INTERNMATCH trademark; and  
 3 (5) unfair competition under California’s Business and Professions Code section 17200. Id.  
 4 InternMatch alleges that “Nxtbigthing and Mr. Batterman currently hold or control various  
 5 trademark registrations and/or trademark applications that have been or are being prosecuted  
 6 through the use of false specimens of use at the USPTO.” Id. ¶ 39. InternMatch argues that  
 7 central to these claims is a determination of whether InternMatch or Nxtbigthing has priority in the  
 8 INTERNMATCH trademark and whether Batterman created and provided genuine evidence of  
 9 use documents. ECF No. 63 at 11.

10 Defendants Nxtbigthing and Chad Batterman answered the Complaint on February 25,  
 11 2015. See ECF Nos. 31, 32. Nxtbigthing also filed counterclaims alleging (1) trademark  
 12 infringement, (2) unfair competition under the Lanham Act; and (3) unfair competition under  
 13 California’s Business and Professions Code section 17200.<sup>2</sup> See ECF No. 32. Defendants’  
 14 Answer states that “[f]rom 2007 through current day, Mr. Batterman and Nxtbigthing have  
 15 continuously and extensively used the mark INTERNMATCH® in interstate commerce.” ECF  
 16 No. 32 ¶ 14.

17 On May 6, 2015, the parties submitted a joint case management statement and identified  
 18 the principal factual issues in dispute:

19 Whether the evidence of commercial use of the INTERNMATCH  
 20 trademark by Defendants are genuine and whether statements made  
 21 by Defendants in order to procure its INTERNMATCH trademark  
 22 registration are fraudulent, such that Defendants do not own any  
 rights to the trademark INTERNMATCH. Additionally, the parties  
 dispute whether Plaintiff is an infringer of the INTERNMATCH  
 trademark.

23 ECF No. 49 at 3. The parties’ joint case management statement also stated that the parties’ had  
 24 taken reasonable steps “to preserve evidence relevant to the issues reasonably evidence in this  
 25 action.” Id. at 4.

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28 <sup>2</sup> On December 25, 2015, Nxtbigthing filed a motion to voluntarily dismiss its counterclaims.  
 ECF No. 83. The Court addresses that motion in a separate order.

1           **C.      Loss of Evidence**

2           In discovery, InternMatch sought copies, including electronic copies, of documents that  
3 would support Nxtbigthing and Batterman’s assertions that they have used the InternMatch mark  
4 “continuously and extensively.”<sup>3</sup> In response to InternMatch’s requests for production,  
5 Nxtbigthing informed InternMatch that electronic copies of potentially responsive documents  
6 “were irretrievably lost in August 2011 due to a lightning strike, and in April 2015 due to a power  
7 surge.” See ECF No. 65-1, Keyes Decl., Ex. 7.

8           InternMatch asked Batterman about these assertions at his deposition. He testified that  
9 Nxtbigthing created a database in 2007 or 2008 that permitted users to search for job postings.  
10 ECF No. 64-1, Keyes Decl., Ex. 1, Batterman Tr. 62:12–23. The database was maintained on hard  
11 drives. See id. at 62:24–64:10. Two separate lightning strikes hit Batterman’s office in August  
12 and September or October of 2011. Id. at 75:1–14. Batterman testified that, as a result of the  
13 August 2011 lightning strike, the data on the hard drives were not recoverable. Id. Batterman  
14 purchased a replacement iMac desktop computer in August or September of 2011. Id. at 96:14–  
15 22. Batterman transferred documents evidencing his use of the INTERNMATCH mark to the  
16 desktop computer through a backup jump drive on which Batterman had stored past marketing and  
17 advertising materials and financial information. Id. at 130:16–132:7. Batterman testified that he  
18 was able to reconstruct a new database because many of the job postings existed in paper form.  
19 Id. at 77:17–78:3.

20           Defendants allege that a power surge destroyed the iMac desktop computer and other  
21 electronic devices on April 2, 2015, while this litigation was pending.<sup>4</sup> Sometime between April  
22 5, 2015 and April 12, 2015, various electronic devices, including the iMac desktop computer that  
23 contained corporate records and marketing material central to the parties’ dispute, were discarded.  
24 Defendants did not run diagnostics on the iMac desktop computer to see if the files on the hard  
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<sup>3</sup> The parties have submitted the discovery responses, but not the original requests.

27 <sup>4</sup> Correspondence between Batterman and his insurer notes that Batterman initially reported that  
28 the power surge occurred on April 2, 2015. See ECF No. 65-5, Keyes Decl., Ex. 11.

1 drive could be recovered prior to discarding it. ECF No. 64-1, Keyes Decl., Ex. 1, Batterman Tr.  
 2 19:9–18, 20:5–25. The desktop computer contained the only electric copies of Nxbigthing’s  
 3 marketing materials that allegedly established prior use. ECF No. 63 at 15.

4 On November 12, 2015, InternMatch filed the present motion for terminating sanctions,  
 5 accusing Defendants of intentionally destroying the electronic versions of the evidence of use  
 6 documents. ECF No. 63. Nxtbigthing and Chad Batterman filed a response on December 1,  
 7 2015.<sup>5</sup> ECF No. 72. InternMatch filed a reply on December 4, 2015. ECF No. 77. The Court  
 8 heard argument on December 17, 2015. ECF No. 82.

## 9 **II. JURISDICTION**

10 The Court has jurisdiction under 28 U.S.C. § 1338 and 28 U.S.C. § 1331.

## 11 **III. LEGAL STANDARD**

12 Spoliation is the destruction or significant alteration of evidence, or the failure to preserve  
 13 property for another’s use as evidence in pending or reasonably foreseeable litigation. United  
 14 States v. Kitsap Physicians Svs., 314 F.3d 995, 1001 (9th Cir. 2002). A party must “suspend any  
 15 existing policies related to deleting or destroying files and preserve all relevant documents related  
 16 to the litigation.” In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1070 (N.D. Cal.  
 17 2006) (citation omitted).

18 The court’s authority to sanction a party for despoiling evidence derives from two sources:  
 19 “the inherent power of federal courts to levy sanctions in response to abusive litigation practices,  
 20 and the availability of sanctions under Rule 37 against a party who ‘fails to obey an order to  
 21 provide or permit discovery.’” Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir. 2006)  
 22 (quoting FED. R. CIV. P. 37(b)(2)). The court may make factual findings in relation to a motion for  
 23 sanctions based on the spoliation of evidence. Id. “A court may sanction spoliation by: imposing  
 24 monetary sanctions; instructing the jury to draw an adverse inference against the despoiling party;  
 25 excluding testimony based on despoiled evidence proffered by the despoiling party; or, if  
 26 willfulness is found, entering default judgment against the despoiling party.” Columbia Pictures,  
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28 <sup>5</sup> Defendants’ response was untimely.

1 Inc. v. Bunnell, No. 2:06CV01093 FMC–JCX, 2007 WL 4877701, at \*4 (C.D. Cal. Dec. 13,  
2 2007).

3 Rule 37 of the Federal Rules of Civil Procedure was recently amended, and now provides  
4 as follows:

5 (e) Failure to Preserve Electronically Stored Information. If  
6 electronically stored information that should have been preserved in  
7 the anticipation or conduct of litigation is lost because a party failed  
8 to take reasonable steps to preserve it, and it cannot be restored or  
9 replaced through additional discovery, the court:

10 (1) upon finding prejudice to another party from loss of the  
11 information, may order measures no greater than necessary to  
12 cure the prejudice; or

13 (2) only upon finding that the party acted with the intent to  
14 deprive another party of the information's use in the litigation  
15 may:

16 (A) presume that the lost information was unfavorable to the  
17 party;

18 (B) instruct the jury that it may or must presume the  
19 information was unfavorable to the party; or

20 (C) dismiss the action or enter a default judgment.

21 FED. R. CIV. P. 37(e). Any remedy applied to a spoliator “should be designed to: (1) deter parties  
22 from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who  
23 wrongfully created the risk; and (3) restore ‘the prejudiced party to the same position he would  
24 have been absent the wrongful destruction of evidence by the opposing party.’” Apple Inc. v.  
25 Samsung Elecs. Co., 881 F. Supp. 2d 1132, 1136 (N.D. Cal. 2012) (internal quotation omitted).

26 “A terminating sanction, whether default judgment against a defendant or dismissal of a  
27 plaintiff’s action, is very severe.” Connecticut General Life Ins. Co. v. New Images of Beverly  
28 Hills, 482 F.3d 1091, 1096 (9th Cir. 2007). Entry of a default judgment is permitted when the  
disobedient party has “willfully deceived the court and engaged in conduct utterly inconsistent  
with the orderly administration of justice.” Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 589  
(9th Cir. 1983). A terminating sanction, however, may only issue if the violation or abuse is  
willful, in bad faith, or the fault of the party. Id. “Disobedient conduct not shown to be outside  
the control of the litigant is sufficient to demonstrate willfulness, bad faith, or fault.” Jorgensen v.

1 Cassiday, 320 F.3d 906, 912 (9th Cir. 2003) (quoting Hyde & Drath v. Baker, 24 F.3d 1162, 1166  
2 (9th Cir. 1994)).

3 The Ninth Circuit identifies five factors a court must weigh in determining whether the  
4 terminating sanction is justified:

5 (1) the public's interest in expeditious resolution of litigation; (2)  
6 the court's need to manage its dockets; (3) the risk of prejudice to  
7 the party seeking sanctions; (4) the public policy favoring  
8 disposition of cases on their merits; and (5) the availability of less  
9 drastic sanctions.

10 Leon, 464 F.3d at 958. Finally, "due process concerns further require that there exist a  
11 relationship between the sanctioned party's misconduct and the matters in controversy such that  
12 the transgression 'threaten[s] to interfere with the rightful decision of the case.'" Anheuser-Busch,  
13 Inc. v. Nat. Beverage Distributors, 69 F.3d 337, 348 (9th Cir. 1995) (quoting Wyle v. R.J.  
14 Reynolds Indus., Inc., 709 F.2d 585, 591 (9th Cir. 1983)).<sup>6</sup>

#### 13 **IV. DISCUSSION**

14 As part of the Court's inherent power, InternMatch requests that the Court grant default  
15 judgment against Defendants on all of InternMatch's claims and dismiss with prejudice  
16 Nxtbigthing's counterclaims. Alternatively, InternMatch requests that the Court (1) give an  
17 adverse inference jury instruction, informing the jury that Defendants destroyed evidence that  
18 would have supported InternMatch's claims, and (2) preclude Defendants from offering testimony  
19 or argument that the spoliated evidence supports (or would have supported) Defendants'  
20 allegations that they have priority to the trademark. InternMatch also requests that the Court  
21 impose monetary sanctions against Defendants. See ECF No. 63.

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23  
24 <sup>6</sup> Different courts have applied different tests in determining the appropriate sanction for the  
25 spoliation of electronic evidence. The recent amendments to Rule 37 were "designed to provide a  
26 uniform standard in federal court for use of these serious measures when addressing failure to  
27 preserve electronically stored information." Advisory Committee Notes, FED. R. CIV. P. 37.  
28 Whether a district court must now make the findings set forth in Rule 37 before exercising its  
inherent authority to impose sanctions for the spoliation of electronic evidence has not been  
decided. Here, the Court determines both that the Defendants' conduct was willful and in bad  
faith, and that defendants "acted with the intent to deprive another party of the information's use  
in the litigation." FED. R. CIV. P. 37(e)(2). Accordingly, it need not resolve the question of the  
relationship of the recent amendments to the existing case law.

1           **A.       Duty to Preserve Relevant Evidence**

2           Defendants were under a duty to preserve documents that showed their prior use of the  
3           disputed mark. “As soon as a potential claim is identified, a litigant is under a duty to preserve  
4           evidence which it knows or reasonably should know is relevant to the action.” In re Napster, 462  
5           F. Supp. 2d at 1067. Shortly after litigation commenced, “previous lead counsel”<sup>7</sup> instructed  
6           Batterman to print out a sample of relevant records, including Nxtbigthing’s marketing fliers, and  
7           screenshots of the properties of some of the files, showing the file’s size, local path location,  
8           creation date, and last-modified date. Batterman Decl. ¶ 5. Batterman states that about 100 pages  
9           were printed out. ECF No. 64-1, Keyes Decl., Ex. 1, Batterman Tr. 19:24–20:4. These documents  
10          purportedly showed Nxtbigthings evidence of prior use of the disputed mark.

11          The documents on the discarded iMac desktop computer assertedly included electronic  
12          versions of Defendants’ evidence of use documents. These documents were unarguably relevant  
13          to Defendants’ claims in the litigation, as well as to InternMatch’s assertion that “Defendants  
14          fabricated documents to show their ‘use’ of the InternMatch mark.” ECF No. 63 at 8.

15          InternMatch argues that Defendants were clearly on notice of their duty to preserve  
16          evidence no later than the date that both Defendants were served with the Complaint in January  
17          2015. ECF No. 63 at 21. That duty extended to historical and electronic versions of the  
18          documents showing Defendants’ prior use of the mark, because the Complaint alleges that those  
19          documents are not genuine. ECF No. 1 ¶¶ 30, 32–35. The Court finds that at least by January  
20          2015, Defendants knew about the present action and were under a duty to preserve relevant  
21          evidence.

22          The evidence shows that Defendants violated this duty. Batterman testified that the only  
23          electronic versions of the evidence of use documents were on the iMac desktop which was  
24          discarded months after litigation began. ECF No. 64-1, Keyes Decl., Ex. 1, Batterman Tr. 19:19–  
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26          <sup>7</sup> Defendants were previously represented by Andrew Serros at Schinner and Shain, LLP and Jill  
27          Browning and Jeffrey Handelsman of Greenblum & Bernstein, P.L.C. See ECF No. 37. On  
28          March 6, 2015, Browning and Handelsman moved to withdraw as counsel of record. Id. On  
        March 19, 2015, notice of substitution of counsel was provided noting that Quinn Chevalier of  
        Schinner & Shain, LLP would be the substituted counsel of record for Defendants. ECF No. 41.



1 20:4. At his deposition, Batterman testified that he could not recall whether he or his wife, Silvia  
 2 Santo, discarded that particular computer, *id.* at 19:3–10, but he later submitted a declaration  
 3 averring that his wife discarded it. ECF No. 73, Batterman Decl. ¶ 24 (“The devices that my wife  
 4 disposed of contained all of NXT’s electronically stored information and data, including all  
 5 electronic copies of NXT’s marketing materials that are the subject of this litigation.”). Santo also  
 6 declared that she discarded the iMac desktop. ECF No. 74, Santo Decl. ¶ 7.

7 Prior to discarding the desktop, Batterman did not make any effort to determine whether  
 8 the hard drive on the desktop was salvageable or any data could be recovered from it. ECF No.  
 9 64-1, Keyes Decl., Ex. 1, Batterman Tr. 20:5–25. As a result, the parties can only access the few  
 10 existing paper copies of the relevant documents, rather than the electronic files, which would  
 11 include valuable information such as the creation and modification history of the files.

12 Because the duty to preserve relevant evidence attached by January 2015, and Defendants  
 13 violated that duty, the Court must determine whether to impose sanctions, and if so, in what form.  
 14 As discussed below, the appropriate sanction depends on the culpability of the Defendants and the  
 15 resulting prejudice to InternMatch. *In re Napster*, 462 F. Supp. 2d at 1070.

## 16 **B. Spoliation of Evidence**

17 InternMatch argues Defendants intentionally discarded devices that contained the  
 18 electronic versions of the evidence of use documents and that the April 2015 power surge alleged  
 19 by Defendants is implausible. *See* ECF No. 63 at 8. To support its contentions, InternMatch  
 20 compares Batterman’s deposition testimony with statements made to his insurer and materials he  
 21 submitted to his insurer for his claim.

### 22 **1. Denial of Further Coverage on Batterman’s Insurance Claim**

23 After the alleged power surge, Batterman submitted claims to his homeowner’s insurance  
 24 carrier, Homesite Home Insurance, and to his business insurance carrier, The Hartford. ECF No.  
 25 73, Batterman Decl. ¶ 18. Batterman states that “[b]oth investigations concluded that the power  
 26 surge happened, and both insurance carriers paid out on the claims.” *Id.* ¶ 20. Homesite did pay  
 27 out nearly \$19,000, but part of Batterman’s claim “was denied because they said that some of the  
 28 affected equipment was used for business purposes, and thus not covered by [his] homeowner’s

1 policy.” Id. ¶ 15. Batterman asserts that his insurance carrier has never accused him of  
2 committing fraud. Id. ¶ 16.

3 Records subpoenaed from Batterman’s homeowner’s insurance carrier, however, do not  
4 support his contentions. While the insurance carrier paid out roughly \$18,000 in two installments,  
5 the carrier denied further coverage of the claim.<sup>8</sup> In fact, after conducting an investigation of  
6 Batterman’s claims, Homesite denied coverage, citing “concealment or fraud” as the reason for the  
7 exclusion. See ECF No. 65-5, Ex. 11; ECF No. 65-6, Ex. 12.

8 In a letter dated June 26, 2015, Homesite noted a number of inconsistencies with  
9 statements made throughout the claims process “which supports that misrepresentation of material  
10 facts of the loss has occurred.” ECF No. 65-5, Ex. 11. The insurer noted the following issues:

- 11 • On March 25, 2015, Batterman called to ask about coverage for damages due to a  
12 power surge but stated there were no damages at the time. On April 4, 2015,  
13 Batterman filed a claim for a power surge that occurred on April 2, 2015.
- 14 • Batterman initially claimed he heard a loud noise due to a power surge that blew  
15 the breaker and damaged the devices. In a subsequent statement made to a field  
16 investigator, Batterman stated that he was out running errands and not at home  
17 when the surge occurred.
- 18 • Homesite instructed Batterman that he would need to run a diagnostic report on the  
19 items but he stated that he could not wait that long. In a subsequent statement to  
20 the field investigator, Batterman stated that an electrician ran diagnostics on all of  
21 the damaged items. Batterman stated he could not take the computers to have  
22 diagnostics performed because he did not own a vehicle. However, Santo revealed  
23 to the field investigator that Batterman used a vehicle to dispose of the electronics.
- 24 • On April 10, 2015, Batterman informed the insurer that he still had items that were  
25 damaged. The insurer instructed Batterman on the salvage process, but Batterman  
26 expressed concern about sensitive data that would be turned over to the insurer. On  
27 April 14, 2015, the salvage adjuster called regarding the items but Batterman  
28 informed the adjuster that all items were thrown out and that the insurer did not  
inform him about the salvage process.

Id.

The insurer followed up on July 24, 2015, to respond to Batterman’s inquiries regarding

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<sup>8</sup> InternMatch points out that the insurer’s denial letters came only weeks before Batterman’s deposition. Yet at his deposition, Batterman insisted that his claims were properly paid out. See, e.g., ECF No. 64-4, Ex. 4, Batterman Tr. 231:21–242:3.

1 the denial letter. The insurer reiterated the inconsistencies cited above, and also raised additional  
2 concerns:

- 3 • The insurer suggested that Batterman take the items to Best Buy for diagnostics and  
4 he insisted that he would not do that because of proprietary information on his  
5 computers and because he lacked a vehicle. However, in Batterman's July 15,  
6 2015 email, he denies saying that he wouldn't take the items to Best Buy and that  
7 Best Buy does not offer diagnostics testing.
- 8 • Batterman's email noted that the electrician made two visits: one to inspect the  
9 outlets and another to inspect the computer equipment and run diagnostics. The  
10 insurer only received "a generic invoice dated 4/7/15" regarding the first visit. The  
11 insurer never received the diagnostics report or invoice from the second visit. In a  
12 subsequent conversation with the field investigator, the electrician stated he  
13 changed four outlets and looked at a computer and printer.
- 14 • The insurer instructed Batterman to obtain diagnostics on all damaged items;  
15 however, Batterman did not comply and discarded the computers. The insurer  
16 noted their initial payment "was made in good faith" without Batterman having  
17 completed the requested diagnostics.
- 18 • The receipts for electronics submitted by Batterman show redactions or alterations.  
19 One invoice shipped items to a business called Diamond Ridge Camps. Batterman  
20 stated he had never worked there, but the insurer's investigations identified that he  
21 had previously been an employee there.
- 22 • Both the power company and the property manager had zero reports of surge-  
23 related activity.

24 ECF No. 65-6, Ex. 12. This letter again identified "concealment or fraud" as the policy exclusion.

25 Id.

26 On August 7, 2015, the insurer again confirmed that it would deny the remaining portions  
27 of the claim. ECF No. 66-1, Ex. 13.

28 Internal records from the insurer also show that upon subsequent investigation into  
Batterman's claim, the insurer declined paying further on the claim due to misrepresentation. ECF  
No. 66-2, Ex. 14. The records also detail Batterman's correspondence with the insurer, in which  
stated that he did not agree to release of the details of the claim if the insurer was subpoenaed.<sup>9</sup>

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<sup>9</sup> Defendants point out that that Batterman's business insurance policy has released \$5,000 to assist in the replacement of the items in the power surge. ECF No. 72 at 8; ECF No. 73-1, Batterman Decl., Ex. A. Beyond a confirmatory email from the insurance company, Batterman has not submitted additional information regarding that claim.

1 See id.

2 **2. Implausibility of the Power Surge**

3 On March 25, 2015, Batterman called Homesite Home Insurance, his insurance carrier, to  
 4 inquire about how a power surge claim would be handled.<sup>10</sup> See ECF No. 65-5, Ex. 11; ECF No.  
 5 65-6, Ex. 12. Batterman had no damage to report at that time. Id. Ten days later, on April 4,  
 6 2015, Batterman filed a claim, alleging that on April 2, 2015 – a mere eight days after his call  
 7 asking about power surge claims – his apartment experienced a power surge that irreparably  
 8 damaged several electronic devices in his home office. See id. Batterman claims that all  
 9 electronic devices plugged into affected outlets were “fried,” including: “two iMac desktops, at  
 10 least one MacBook laptop, a printer, a Pogo plug, and two or three external hard drives.” ECF No.  
 11 73, Batterman Decl. ¶ 10. InternMatch contends that this chronology of events demonstrates that  
 12 Defendants fabricated the power surge story. ECF No. 63 at 17.

13 According to Defendants, the power surge affected four to six electrical outlets and the  
 14 electronic devices in one part of the home office of their apartment, but the rest of the apartment  
 15 had electricity. See, e.g., ECF No. 64-6, Keyes Decl., Ex. 6, Santo Tr. 89:13–17. Batterman  
 16 never notified the landlord or property manager of the surge. Id., Ex. 3, Batterman Tr. 179:15–18;  
 17 Ex. 4, Batterman Tr. 284:22–23. A separate insurance coverage letter from Homesite Home  
 18 Insurance, detailing why the additional coverage was denied, noted that its field investigator  
 19 concluded that no reports of any surge related activity were made to the power company and the  
 20 property manager during the time of the alleged power surge. ECF No. 65-12, Keyes Decl., Ex.  
 21 12. InternMatch’s electrical engineering expert, Joseph Greco, also reports that there was no  
 22 evidence of lightning occurring in the area during the time period of the alleged power surge. ECF  
 23 No. 70-1, Ex. 1 at 7. The expert also concluded that a scenario where only four or five electrical  
 24 outlets were affected is “highly unlikely.” Id. at 6.

25 \_\_\_\_\_  
 26 <sup>10</sup> Batterman states he was motivated to inquire about his policy because “stormy weather” in  
 27 March 2015 reminded him of a prior lightning strike and the effect it had on his equipment. ECF  
 28 No. 63 ¶ 8. This prompted him to call this carrier to find out the scope of coverage for lightning  
 strikes and power surges. Id. Batterman testified that in 2011, lightning actually struck the same  
 place twice – in August of 2011, destroying all hard drives, and September or October of 2011,  
 destroying his firewall. ECF No. 64-1, Ex. 1, Batterman Tr. 75:1–9.

1 Defendants offer an expert rebuttal from Dr. John Tobias. See ECF No. 75, Exs. A-C.  
 2 Tobias states that many transient power outages are caused by internal sources within a facility.  
 3 See id., Ex. B at 4. Tobias also opines that “situations” within a residence can cause a transient  
 4 power outage to only one branch circuit, and that Greco’s report did not rule out that possibility as  
 5 a cause of the damage in this case. Id. at 5. Finally, Tobias places emphasis on the testimony of  
 6 the electrician, Stephen Crooks, who came to inspect and replace the electrical outlets after the  
 7 alleged power surge. Tobias notes that “Mr. Crooks’ opinion that the receptacles and equipment  
 8 listed in his statement were damaged by ‘surge’ or overcurrent needs consideration, as the only  
 9 third party and person with electrical training that is known to have observed the physical  
 10 evidence consisting of the damaged equipment.” Id. at 6.

11 The Court need not weigh the competing opinions of the parties’ experts. Batterman’s  
 12 story about the power outage simply is not plausible. His phone call to his insurance carrier a  
 13 mere eight days before the alleged power surge was not a coincidence. The inconsistencies within  
 14 his insurance claims, and between his deposition testimony and his filed claims, strengthen the  
 15 conclusion that Batterman fabricated his account regarding the power surge.

### 16 3. Batterman’s Representations about the Electrician

17 As part of the materials submitted to verify his insurance claim, Batterman included an  
 18 invoice from an electrician named Steve Crooks.<sup>11</sup> ECF No. 66-3, Ex. 15. The invoice  
 19 generically states that it is an “Electrical Work Order” and does not identify the company  
 20 providing the services. See id. The invoice charges \$300 for an outlet voltage test and  
 21 replacement of four outlets.<sup>12</sup> Id. When asked at his deposition about the name of the electrician,  
 22 Batterman repeatedly testified that he could not recall the name of his electrician:

23 Q. Okay. And I believe you testified that you, you weren’t the one  
 24

25 <sup>11</sup> InternMatch notes that this invoice was not produced by Defendants, but rather obtained as a  
 26 result of InternMatch’s subpoena to the insurance carrier. InternMatch received this information  
 after depositions of both Batterman and Crooks concluded. See ECF No. 77 at 4 n.5.

27 <sup>12</sup> Batterman also reported to his insurer that an electrician performed work twice: the first time, to  
 28 replace the outlets and conduct a volt test and the second time, to run diagnostics on his electronic  
 devices. Batterman did not produce any evidence to substantiate the second visit. See ECF No.  
 65-5, Ex. 11; ECF No. 65-6, Ex. 12.

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responsible for contacting the electrician to have the outlets changed, right?

A. No, I didn't say that. I said I didn't recall the name of the electrician that came out.

Q. You what?

A. I said I didn't recall the name of the electrician that came out to change the outlets.

Q. Okay. So sorry if I misunderstood that, so did you, did you personally place a call to the electrician to have the electrician come and –

A. I did. I did.

...

Q. Hold on. Do you have any records of who the electrician was that came to the, that came to the apartment to switch out the outlets?

A. I will check.

ECF No. 64-3, Ex. 3, Batterman Tr. 177:17–178:18.

Q. Okay. How did you get the name of the electrician, if you recall?

A. Doing previous work at my, doing work at my previous job.

Q. You recall -- I don't get it, you recalled the name of this individual from your previous job?

A. I looked it up.

Q. Where did you look it up?

A. I believe notes from my old position.

Q. Notes from your old position?

A. Contact information, yes.

Q. Notes from your old position U.S. Rec?

A. Yes.

Q. Okay. And do you still have those notes?

A. No, I looked him up and I found what I needed and I discarded them.

...

Q. So you've used this electrician on at least two occasions then?

A. Yes.

Q. And you don't remember the name of the company?

A. I do not. Not offhand.

Q. And you don't remember the name of the individual?

A. No. I'll have to check my records.

Id. at 180:3–22; 182:10–17.

On a separate day of his deposition, Batterman again affirmed that he could not recall the

1 name of the electrician, Steve Crooks:

2 Q. How did you find his number?

3 A. I told you on Tuesday. I went to my previous job and I found his  
4 number there, and then I contacted him. And he made arrangements  
5 to come and swap the receptacles out and test for the electrical  
6 disturbance.

7 Q. And you -- you don't -- I can't remember, do you remember his  
8 first name and you don't remember his last name?

9 A. Not off the top of my head, I don't.

10 Q. You don't remember either the first or last name?

11 A. I don't remember who the electrician was right now.

12 Q. Okay. And you don't remember what company he was with?

13 A. I don't. I don't think -- I don't know if he was with a company or  
14 by himself.

15 ECF No. 64-4, Ex. 4, Batterman Tr. 298:17–299:12.

16 When the insurance carrier's field investigator contacted Crooks, as part of its  
17 investigation into the claim, Crooks stated that a friend had referred him, but when asked the  
18 friend's name, he said that he did not know. ECF No. 66-2, Ex. 14.

19 Batterman's repeated, emphatic lack of recollection as to Crooks' identity, as the  
20 electrician who made these repairs, strains belief. At Crooks' deposition, Crooks testified that he  
21 has known Batterman for several years and has assisted Batterman with passing out flyers on 18 to  
22 24 separate occasions. ECF No. 64-5, Ex. 5, Crooks Tr. 20:12–23, 35:10–23. As part of their  
23 Rule 26(a)(1) initial disclosures, Defendants identified Stephen Crooks, an electrical engineer with  
24 SEPTA, as a person "likely to have knowledge of issues related to the use of the trademark  
InternMatch since 2007." ECF No. 65-2, Ex. 8. Defendants stated that Crooks used the job  
service "for years" and also distributed marketing materials for Nxtbigthing "for years." Id.  
Batterman explicitly discussed Crooks as an individual who helped promote the trademark. See  
ECF No. 64-1, Ex. 1, Batterman Tr. 54:5–21, 56:21–24, 153:7–17, 154:9–14.

25 The Court can only conclude that either Batterman lied under oath when he stated he could  
26 not recall the name of his electrician or lied when submitting the invoice for electrical repairs to  
27 his insurer. In either event, Batterman's duplicitous statements regarding Crooks further support  
28 the conclusion that Batterman's power surge story is a fabrication.

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**4. Discarded Devices**

Batterman and Santo testified that after the power surge, they tried to turn on the affected devices, but none would power up. ECF No. 73, Batterman Decl. ¶ 21; ECF No. 74, Santo Decl. ¶ 4. After this discovery, however, Batterman never took the devices to a technician to run diagnostics on the affected devices in order to determine whether the devices or data on the devices could be salvaged. At his deposition, Batterman confirmed that he did not try to salvage the iMac desktop:

Q. So you discarded the October 2011 desktop?

A. Along with some other electronics, yes.

Q. We'll get to those. But who was the one that actually discarded the October 2011 desktop Mac. Was that you?

A. I don't recall. It was myself or my wife, because I believe she discarded a few items and I discarded a few items.

Q. What did you do, just throw it in the garbage?

A. Yeah.

Q. Did you try to salvage it or safe the hard drive?

A. No, mostly because the smell. It was smell like a burnt after keeping it in our apartment for a few days, it just permeated the apartment and it was unbearable so that's why -- that's the main -- really the main reason why it was discarded. Other than that, we would have kept it.

Q. So the October 2011 desktop Mac, it had corporate records on it, right?

A. Um, I believe so. Yeah, I believe so.

Q. You would have had copies of NextBigThing marketing and advertising collateral?

A. Correct. But I also printed everything out in preparation of Greenblum & Bernstein advised me to do.

ECF No. 64-1, Keyes Decl., Ex. 1 Batterman Tr. 19:1–25. Although his home insurance company suggested that he take the computers to Best Buy to run diagnostics, Batterman stated that Best Buy informed him they could not offer technical services in connection with insurance claims. Batterman Decl. ¶ 21. Batterman did not seek out other services.

Batterman and Santo noted that the affected devices emitted a “strong, foul odor of burnt plastic and electronics.” ECF No. 72 at 9; Batterman Decl. ¶ 23; Santo Decl. ¶ 6. Defendants argue that because the odor caused nausea, Santo discarded the affected electronic devices,



1 including the iMac desktop and two or three external hard drives. ECF No. 72 at 10. These  
2 specific devices “contained all of [Nxtbigthing]’s electronically stored information and data,  
3 including all electronic copies of [Nxtbigthing]’s marketing materials that are the subject of this  
4 litigation.” Id.; Batterman Decl. ¶ 24. Coincidentally, Santos discarded all of the devices used by  
5 Nxtbigthing and Batterman discarded all of the devices used personally. See id.; Batterman Decl.  
6 ¶ 27.

7 In opposing the present motion, Defendants primarily argue that although the electronic  
8 devices were discarded after litigation began, they were not discarded *by Defendants*, and so  
9 Defendants bear no responsibility for the loss of evidence. According to them, all of the relevant  
10 electronic devices were discarded by Santo, “and she did so of her own accord without notifying  
11 Defendants in advance.” ECF No. 72 at 12. Defendants stress that Santo, with heightened  
12 olfactory sensitivities from her pregnancy, had no option *but* to discard the devices. Batterman  
13 and Santo had no alternative storage space and Santo was unaware of the “need to safeguard any  
14 potentially relevant evidence for this litigation.” Id. at 10.

15 The Court does not find it credible that *even if* the power surge occurred and *even if* the  
16 power surge damaged the electronic devices, Santo discarded only the electronic devices used by  
17 Nxtbigthing, and Batterman discarded only his personal electronic devices purely by happenstance  
18 – or that such a division of effort occurred at all.

19 Finally, even if the Court accepted this strained version of events in its entirety (and it does  
20 not), Nxtbigthing would still be culpable for spoliation, because Defendants would still have failed  
21 in their obligation to ensure that relevant evidence be preserved. For example, Santo was  
22 apparently never informed about the parameters of the lawsuit against Batterman and Nxtbigthing,  
23 or her duty to preserve evidence, see ECF No. 73, Batterman Decl. ¶ 25; ECF No. 74, Santo Decl.  
24 9, even though she is a contributor to Nxtbigthing and was identified in Defendants’ initial  
25 disclosures as an individual with discoverable information:

26 This person is likely to have knowledge of issues related to the use  
27 of Defendants’ trademark InternMatch since 2007. Ms. Santo has  
28 used Defendants’ service over the years to search for job  
availability, and has traveled the country assisting in the marketing  
of Defendants’ business. Ms. Santo has assisted in the graphic

1 designs of marketing materials. Ms. Santo's relationship began in  
2 Pennsylvania.  
3 ECF No. 65-2, Ex. 8. In light of Santo's role at Nxtbigthing, Defendants failed to meet their  
4 discovery obligations by failing to communicate their discovery obligations to her. See Nat'l  
5 Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 557–58 (N.D. Cal. 1987) (“The  
6 obligation to retain discoverable materials is an affirmative one; it requires that the agency or  
7 corporate officers having notice of discovery obligations communicate those obligations to  
8 employees in possession of discoverable materials.”). Defendants also failed to take any steps to  
9 safeguard relevant evidence once the alleged power surge occurred, having never verified whether  
10 data from the affected devices could be retrieved and preserved. InternMatch's expert, Christian  
11 Hicks, stated that even if a computer had been damaged by a power surge, it is possible for a  
12 technician “to remove the storage medium and connect it to a working computer.” ECF No. 67-5,  
13 Ex. 23. If the data is intact, a technician could then copy the data onto a new storage device. Id.  
14 Batterman did not explore this process.

15 The Court finds that at the very least, Defendants consciously disregarded their obligations  
16 to preserve relevant evidence. There is no evidence that Defendants took any steps to preserve  
17 relevant information after the litigation began. They did not communicate their evidence  
18 preservation obligations to Santo, even though she performed marketing and does graphic design  
19 tasks for Nxtbigthing and has access to Nxtbigthing's electronic devices. After the alleged power  
20 surge, Defendants failed to identify whether data from the electronic devices might be recoverable,  
21 and instead simply discarded the devices.

22 The Court also finds Defendants' evidence that the surge occurred in the first place to be  
23 unbelievable. Not only is the alleged chronology of events highly improbable, but Defendants'  
24 story is filled with inconsistencies. The Court does not know what actually happened to the  
25 missing evidence, if it ever existed, but concludes that Defendants have failed to show that it was  
26 lost in a power surge.

27 In light of the foregoing, the Court concludes that Defendants willfully spoliated evidence.  
28 The Court further finds that the extraordinary measures Batterman undertook to mislead opposing  
counsel and the Court merit a finding of bad faith.

1                   **C.       Warranted Sanctions**

2                           **1.       Default Judgment**

3                   Once a court finds that evidence has been destroyed, it must determine whether sanctions  
4 are appropriate. InternMatch seeks a terminating sanction, i.e., the entry of default judgment,  
5 against Defendants or, in the alternative, an adverse inference jury instruction and the exclusion of  
6 certain evidence.

7                   Courts in this circuit apply a five-factor test to determine whether a terminating sanction is  
8 warranted. See Leon, 464 F.3d at 958 (identifying (1) the public’s interest in expeditious  
9 resolution of litigation; (2) the court’s need to manage its dockets; (3) the risk of prejudice to the  
10 party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5)  
11 the availability of less drastic sanctions). The court need not make explicit findings regarding  
12 each of these factors, but must make a finding of “willfulness, fault, or bad faith” for dismissal to  
13 be proper. Id.

14                   The first two factors weigh in favor of a default judgment. Computer Task Grp., Inc. v.  
15 Brotby, 364 F.3d 1112, 1115 (9th Cir. 2004). The public and the Court have a strong interest in  
16 judicial efficiency and the prompt resolution of cases. Defendants’ willful spoliation of evidence  
17 and the resulting need to resolve the instant motion for sanctions weigh in favor of default  
18 judgment. The fourth factor – the public policy in favor of deciding cases on the merits – weighs  
19 against a terminating sanction. Id. However, the fourth factor alone does not outweigh the others  
20 when determining terminating sanctions. See Rio Properties, Inc. v. Rio Int’l Interlink, 284 F.3d  
21 1007, 1022 (9th Cir. 2002) (“While the public policy favoring disposition of cases on their merits  
22 weighs against default judgment, that single factor is not enough to preclude imposition of this  
23 sanction when the other four factors weigh in its favor.”).

24                   The third factor looks at the risk of prejudice. Prejudice to the moving party exists if the  
25 non-moving party’s discovery abuses “impair the [moving party’s] ability to go to trial or threaten  
26 to interfere with the rightful decision of the case.” In re Phenylpropanolamine (PPA) Prods. Liab.  
27 Litig., 460 F.3d 1217, 1227 (9th Cir. 2006).

28                   As a result of the spoliation, InternMatch is unable to verify the genuineness of

1 Nxtbigthing’s evidence of use documents. InternMatch argues that this is the only documentary  
 2 proof of Defendant’s use of the INTERNMATCH mark pre-dating InternMatch’s use. ECF No.  
 3 63 at 11–12. Without access to the electronic versions of these documents, InternMatch cannot  
 4 determine the date the files were created, the history of the modifications made to the files, and  
 5 other relevant information. InternMatch is unable to test their claim that the documents were  
 6 “concocted by Mr. Batterman on behalf of Nxtbigthing” without these electronic files. See ECF  
 7 No. 1 ¶ 30. Defendants’ spoliation has prejudiced InternMatch by impairing its ability to attack  
 8 Defendants’ claims of prior use at trial. See Leon, 464 F.3d at 960 (concluding that district court  
 9 did not err in finding prejudice where one party deleted files that were obviously relevant to the  
 10 litigation).

11 Finally, the fifth factor looks at the availability of less drastic sanctions. To evaluate this  
 12 factor, the Court examines: “(1) whether the district court explicitly discussed the feasibility of  
 13 less drastic sanctions and explained why such alternate sanctions would be inappropriate; (2)  
 14 whether the district court implemented alternative sanctions before ordering dismissal; and (3)  
 15 whether the district court warned the party of the possibility of dismissal before ordering  
 16 dismissal.”<sup>13</sup> Anheuser-Busch, Inc. v. Nat. Beverage Distributors, 69 F.3d 337, 352 (9th Cir.  
 17 1995). InternMatch argues that a terminating sanction is the only appropriate one, “both for its  
 18 deterrent effect and to remedy the prejudice inflicted on [InternMatch] and on the court.” ECF No.  
 19 63 at 26 (quoting Atl. Recording Corp. v. Howell, No. CV-06-02076-PHX-NVW, 2008 WL  
 20 4080008, at \*3 (D. Ariz. Aug. 29, 2008)).

21 In Howell, recording companies accused the defendant of copyright infringement for  
 22 downloading their sound recordings and distributing them to other users. Id. at \*1. Initially, the  
 23 defendant did not cooperate with the plaintiffs’ requests to conduct a forensic examination of his  
 24 computer hard drive and the backups he allegedly created. Id. The defendant removed the  
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26 <sup>13</sup> The second and third considerations are inapplicable here because Defendants spoliated  
 27 evidence before the Court had an opportunity to compel discovery or otherwise order “lesser  
 28 sanctions” and before the Court had any opportunity to warn Defendants. See Leon, 464 F.3d at  
 960.

1 program and the contents on his shared folder after receiving notice of the lawsuit. Id. He  
2 untruthfully testified that he created backups of his shared folder although the creation dates  
3 suggest that the “backups” were created later. Id. The defendant also reinstalled his computer’s  
4 operating system and installed a program to permanently delete all traces of certain files on his  
5 computer. Id. at \*2. Ultimately, the district court found that terminating sanctions were warranted  
6 because the defendant repeatedly destroyed evidence central to the factual allegations in the case.  
7 Id. The court stressed that the defendant testified to facts that could not be disproved because he  
8 destroyed relevant evidence. Id. The “timing and character” of the defendant’s actions show that  
9 they were deliberately calculated to conceal the truth and that he willfully destroyed evidence to  
10 deceive the court.” Id. The court concluded without the evidence, the recording companies and  
11 the court could not examine the factual accuracy of the defendant’s defenses and “made it  
12 impossible to decide the case on the merits.” Id. Imposition of a default judgment was  
13 appropriate because “[o]ne who anticipates that compliance with discovery rules, and the resulting  
14 production of damning evidence, will produce an adverse judgment, will not likely be deterred  
15 from destroying that decisive evidence by any sanction less than the adverse judgment he (or she)  
16 is tempted to thus evade.” Id. at \*3 (quoting Computer Assoc. Int’l v. Am. Fundware, Inc., 133  
17 F.R.D. 166, 170 (D. Colo. 1990).

18 Howell lends some weight to InternMatch’s request for terminating sanctions. Unlike in  
19 Howell, however, the Court can still resolve this case on the merits. InternMatch seeks  
20 declaratory relief “because it is the true owner of the INTERNMATCH trademark and its rights  
21 are prior to and supersede the rights that Defendants assert in the mark.” ECF No. 1 ¶ 7. A  
22 federal registration is “prima facie evidence of the validity of the registered trademark.” 15 U.S.C.  
23 § 1057. InternMatch, as the party claiming ownership, must establish that it was “the first to  
24 actually use the mark in the sale of goods or services.” Sengoku Works Ltd. v. RMC Int’l, Ltd.,  
25 96 F.3d 1217, 1219 (9th Cir.) as modified, 97 F.3d 1460 (9th Cir. 1996). After the imposition of  
26 appropriate evidentiary sanctions, InternMatch will be able argue prior use, and any prejudice to it  
27 will be largely if not entirely cured.

28 The Court concludes that sanctions short of entry of default are appropriate. See In re

1 Napster, 462 F. Supp. 2d at 1077.

2 **2. Evidentiary Sanctions**

3 InternMatch's alternative request is that, in the alternative, the Court give an adverse  
4 inference jury instruction, informing the jury that (1) Defendants destroyed evidence in bad faith  
5 and (2) the evidence Defendants destroyed and/or failed to preserve would have been favorable to  
6 InternMatch.

7 "[A] party seeking an adverse inference instruction based on the destruction of evidence  
8 must establish (1) that the party having control over the evidence had an obligation to preserve it  
9 at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and  
10 (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable  
11 trier of fact could find that it would support that claim or defense." In re Napster, 462 F. Supp. 2d  
12 at 1078 (quoting Hamilton v. Signature Flight Support Corp., No. C 05-0490, 2005 WL 3481423,  
13 at \*3 (N.D. Cal. Dec. 20, 2005)).

14 As discussed above, the evidence before the Court satisfies these criteria. Defendants  
15 willfully failed to preserve relevant evidence of use documents that they had a duty to preserve.  
16 InternMatch is entitled to an adverse inference instruction. The precise wording of the instruction  
17 will be determined at trial.<sup>14</sup>

18 \_\_\_\_\_  
19 <sup>14</sup> Without now deciding the appropriate wording of the instruction, the Court notes that Judge  
20 Grewal recently ordered that the following adverse inference instruction be given in another  
spoliation case in this district:

21 Samsung has failed to prevent the destruction of relevant evidence  
22 for Apple's use in this litigation. This is known as the "spoliation of  
23 evidence." I instruct you, as a matter of law, that Samsung failed to  
24 preserve evidence after its duty to preserve arose. This failure  
25 resulted from its failure to perform its discovery obligations. You  
26 also may presume that Apple has met its burden of proving the  
27 following two elements by a preponderance of the evidence: *first*,  
28 that *relevant* evidence was destroyed 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 Apple.  
Whether this finding is important to you in reaching a verdict in this  
case is for you to decide. You may choose to find it determinative,  
somewhat determinative, or not at all determinative in reaching your  
verdict.

1           Additionally, Defendants are precluded from offering argument and testimony that the  
2 destroyed evidence, or any versions of it in hard copy or otherwise, supports Defendants’  
3 assertions that they have priority to the trademark. To permit otherwise would unfairly prejudice  
4 InternMatch. See id. at 1077.

### 5                           **3. Attorneys’ Fees**

6           Under its inherent powers, “a district court may also award sanctions in the form of  
7 attorneys’ fees against a party or counsel who acts ‘in bad faith, vexatiously, wantonly, or for  
8 oppressive reasons.’” Leon, 464 F.3d at 961 (quoting Primus Auto. Fin. Servs., Inc. v. Batarse,  
9 115 F.3d 644, 648 (9th Cir. 1997)). The court must make an express finding that the sanctioned  
10 party’s behavior “constituted or was tantamount to bad faith.” Id. (quoting Primus Auto, 115 F.3d  
11 at 648.

12           The Court finds that monetary sanctions are warranted here. As a result of Defendants’  
13 bad faith conduct, InternMatch was forced to spend substantial resources investigating  
14 Defendants’ spoliation. Accordingly, InternMatch is entitled to the attorneys’ fees associated with  
15 bringing the Motion for Terminating Sanctions. Within 30 days of this Order, InternMatch is  
16 ordered to submit a request for a specific amount of fees, with evidentiary support, for the Court’s  
17 consideration. The Court will determine a reasonable award “in light of the degree of  
18 [Defendants’] culpability.” In re Napster, 462 F. Supp. 2d at 1078. If Defendants object to the  
19 reasonableness of the fees claimed, they may submit an opposition within 15 days of  
20 InternMatch’s request.<sup>15</sup> If Defendants file an opposition, InternMatch may file a reply within  
21 seven days.

22           The Court declines to award attorneys’ fees, under 15 U.S.C. § 1117, incurred in the  
23 litigation as a whole.

24           ///

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27 Apple Inc. v. Samsung Elecs. Co., 881 F. Supp. 2d 1132, 1151 (N.D. Cal. 2012).

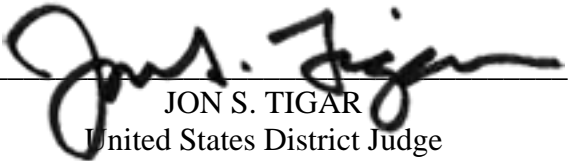
28 <sup>15</sup> Given Nxtbigthing’s filing history, the Court reminds it that the Court may choose to disregard an untimely opposition.

**CONCLUSION**

For the reasons stated above, the Court hereby denies InternMatch’s Motion to the extent InternMatch seeks default sanctions, and grants InternMatch’s Motion to the extent InternMatch seeks a preclusion order, an adverse inference instruction, and attorneys’ fees.

IT IS SO ORDERED.

Dated: February 8, 2016

  
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JON S. TIGAR  
United States District Judge

United States District Court  
Northern District of California

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