

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

VACATION CLUB SERVICES, INC.,)
)
Plaintiff,)
)
vs.)
)
GIOVANNI RODRIGUEZ, GLOBAL)
RESORT MANAGEMENT, LLC, and)
JEFFREY MORRIS,)
)
Defendants.)
)

Case No. 6:10-CV-247-ORL-31-GJK

**PLAINTIFF’S MOTION FOR SANCTIONS AGAINST DEFENDANT, GLOBAL
RESORT MANAGEMENT, LLC AND FOR AN ORDER TO SHOW CAUSE WHY
GLOBAL SHOULD NOT BE HELD IN CIVIL CONTEMPT**

VACATION CLUB SERVICES, INC. (“VCS” or “Plaintiff”), pursuant to Rule 37 of the Federal Rules of Civil Procedure, moves this Court for on order entering sanctions against the Defendant, GLOBAL RESORT MANAGEMENT, LLC (“Global” or “Defendant”), for failure to comply with this Court’s Order Granting Plaintiff’s Motion to Compel and for the deliberate spoliation of evidence. Additionally, VCS moves this Court for an order to show cause why Global should not be held in contempt for violating this Court’s Temporary Restraining Order and Preliminary Injunction. Oral argument is requested pursuant to Local Rule 3.01(j). In support, VCS states as follows:

Background

1. VCS filed its Verified Amended Complaint for Damages and Injunctive Relief (“Amended Complaint”), on February 24, 2010, against Defendants Global, Giovanni Rodriguez (“Rodriguez”), and Jeffrey Morris (“Morris”) (Dkt. No. 25). VCS brought claims, *inter alia*, for

violations of the Computer Fraud and Abuse Act, misappropriation of trade secrets, conversion, civil theft and violations of Section 721.121, Fla. Stat., against all Defendants.

2. VCS develops timeshare properties through wholly owned subsidiaries and affiliates worldwide. These subsidiaries also manage and operate these timeshare properties. VCS's claims arise from the Defendants' wrongful taking, dissemination and use of VCS's confidential and proprietary member and prospective member lists (the "Confidential Information"). The Confidential Information included the names, addresses, phone numbers and email addresses for 25,391 current VCS members and 130,178 prospective VCS members.

3. Defendant Rodriguez improperly obtained VCS's Confidential information while employed at VCS. Rodriguez then sold the Confidential Information to Morris. Morris then sold the confidential information to Global. Global, a timeshare resale and rental company, used VCS's Confidential Information to solicit VCS's members and prospective members.

4. On February 11, 2010, VCS filed a Verified Complaint and Ex Parte Emergency Motion for Temporary Restraining Order with this Court. (Dkt. Nos. 1, 2). That same day this Court granted Plaintiff's Emergency Motion, ordering, *inter alia*, that Defendants Global and Rodriguez were temporarily restrained from using VCS's Confidential Information, including contacting or soliciting VCS's current or prospective members. (Dkt. No. 6). Global's registered agent was served by process server on February 11, 2010 with this Court's Temporary Restraining Order and Notice of Hearing. (Dkt. No. 10). On February 24, 2010, this Court granted Plaintiff's Motion to Convert the Temporary Restraining Order into a Preliminary Injunction. (Dkt. No. 24). That same day counsel for Global entered an appearance in this case and was thus notified electronically via the CM/ECF system of the entry of the Preliminary Injunction. (Dkt. No. 26).

Summary of Relief Requested

5. This Motion seeks sanctions against Global for three reasons. First, Global has violated this Court's Order granting VCS's Motion to Compel by failing to produce all electronically stored information in its possession and by intentionally destroying evidence. Second, Global has engaged in the deliberate spoliation of evidence by systematically and intentionally destroying evidence prior to its Court-ordered production of forensic images to VCS. Third, Global has repeatedly violated this Court's Temporary Restraining Order and Preliminary Injunction by continuing to contact, solicit and enter into contracts with VCS's members.

6. Based on the above violations, VCS is entitled to: 1) sanctions against Global pursuant to Rule 37, Fed. R. Civ. P., including but not limited to, striking Global's answer and affirmative defenses, rendering a default judgment against Global, treating Global in contempt of court and awarding attorneys' fees and costs to VCS; 2) sanctions against Global for spoliation of evidence, including but not limited to, an adverse inference against Global that the information it destroyed was incriminating against Global, default judgment against Global and an award attorneys' fees and costs to VCS; and 3) an order to show cause as to why Global should not be held in civil contempt for violation of this Court's Temporary Restraining Order and Preliminary Injunction and a hearing for that purpose.

Initial Discovery Disputes Between VCS and Global

7. During the deposition of Global's corporate representative, counsel for VCS questioned Global's corporate representative regarding financial information such as the average sales volume and commissions for Global's sales representatives, Global's financial structure, Global's profits and losses, Global's merchant accounts, the amount Global charged VCS's members and the income Global earned from its use of VCS's Confidential Information. See

Motion to Compel (Dkt. No. 59, at 3-8). Global objected to these questions on relevancy and confidentiality grounds. See Motion to Compel (Dkt. No. 59, at 8). Counsel for Global instructed Global's corporate representative not to answer certain questions, despite the fact that the requested financial information is both relevant and necessary to assist VCS in its prosecution of its claims against Global. See Motion to Compel (Dkt. No. 59, at 8).

8. Further, Global refused to produce documents responsive to several of the requests in Plaintiff's Amended Notice of Taking Rule 30(b)(6) Deposition Duces Tecum of Defendant Global Resort Management, LLC. (Dkt. No. 59, Exhibit A). Likewise, Global failed to timely provide answers to Plaintiff's First Set of Interrogatories to Defendant Global Resort Management LLC (Dkt. No. 59, Exhibit I) or to produce documents responsive to Plaintiff's First Request for Production to Defendant Global Resort Management LLC (Dkt. No. 59, Exhibit I).

9. On June 18, 2010, VCS filed its Motion to Compel (Dkt. No. 59). The Motion to Compel outlines in detail VCS's numerous attempts to obtain responses to its discovery requests without the involvement of this Court. (Dkt. No. 59, at 11-15, Exhibits C, D, E, F, G and H).

10. On July 8, 2010, this Court granted VCS's Motion to Compel in its entirety and ordered Global to respond to all discovery requests raised in the Motion to Compel within fourteen (14) days from the date of the order (the "Discovery Order"). (Dkt. No. 60). Accordingly, Global's responses were due on July 22, 2010.

11. On July 13, 2010, counsel for VCS provided a courtesy letter to counsel for Global informing Global of its obligations pursuant to the Discovery Order and detailing the documents and information that Global needed to produce, as follows:

- Answers to all questions propounded by VCS during the deposition of David Michael, as the corporate representative for Global, regarding Global's financial information,

including but not limited to the average sales volume and commissions for Global's sales representatives, Global's financial structure, Global's financial income, *i.e.*, its profits and losses, Global's merchant accounts, the amount of money charged by Global to VCS's members and the income Global earned from its use of VCS's Confidential Information;

- All documents responsive to Plaintiff's Notice of Deposition and Subpoena Duces Tecum;
- Complete responses to each and every one of VCS's interrogatories;
- Everything requested in VCS's requests for production, produced in native format;
- Forensically obtained copies of the hard drives contained in the primary business computers of David Michael, Travis Thomas, Alex Simao, Kevin Wiegard, Jeffrey Graham, and Jarrod King, all of which copies must date back to at least February 11, 2010.

See Letter dated July 13, 2010, attached hereto as **Exhibit A**.

12. On July 22, 2010, Global hand delivered to counsel for VCS: 1) Defendant, Global Resort Management, LLC's Answers to Plaintiff's First Set of Interrogatories, 2) Defendant, Global Resort Management, LLC's Response to Plaintiff's First Request for Production of Documents, 3) Defendant, Global Resort Management, LLC's Response to Plaintiff's Amended Notice of Taking Rule 30(b)(6) Deposition Duces Tecum, 4) a thumb drive, 5) an external hard drive and 6) documents bates stamped GBL 001-149. See Notice of Compliance (Dkt. No. 61).

13. Despite the fact that Global waived all objections to Plaintiff's discovery requests by not timely responding and that the Court fully granted the Motion to Compel, Global continues to object to several of Plaintiff's requests for production of documents. See Defendant, Global Resort Management, LLC's Response to Plaintiff's First Request for Production of Documents, attached hereto as **Exhibit B**, at ¶¶ 6, 9, 11; Defendant, Global Resort Management, LLC's Response to Plaintiff's Amended Notice of Taking Rule 30(b)(6) Deposition Duces Tecum, attached hereto as **Exhibit C**; see also Dkt. No. 61, at ¶ 4. Moreover,

Global failed to produce a privilege log to accompany any of its objections as required by Federal Rule of Civil Procedure 26(b)(5).

14. Following Global's initial production of some of the documents that this Court ordered Global to produce to VCS, VCS discovered that Global systematically and intentionally destroyed evidence and repeatedly violated this Court's Temporary Restraining Order and Preliminary Injunction. See Declaration of Andrew Reisman, attached hereto as **Exhibit D**, ¶¶ 2, 6, 13.

Global's Intentional Destruction of Relevant Evidence

15. On February 2, 2010, VCS made demand on Global, triggering Global's duty to preserve all evidence potentially relevant to VCS's claims. See Cease and Desist Letter, attached hereto as **Exhibit E**.

16. On February 11, 2010, VCS sent a detailed litigation hold letter to Global, outlining steps that should be taken to ensure Global met its already-existing preservation obligations. See Litigation Hold Letter, attached hereto as **Exhibit F**. Specifically, VCS advised Global that it must immediately preserve all of Global's computer systems, removable media, any existing backup data and any other relevant electronic data existing in any format, as well as any physical evidence or tangible paper files. Further, VCS advised that Global was obligated to take affirmative steps to prevent anyone with access to Global's data, systems and archives from seeking to modify, destroy or hide electronic evidence on network or local hard drives (such as by deleting or overwriting files, using data shredding and overwriting applications, defragmentation, re-imaging or replacing drives, encryption, compression, steganography or the like). Finally, VCS advised that Global immediately obtain, authenticate and preserve a forensically-qualified image of the computer hard drive and other storage media in (or used in conjunction with) Defendant Rodriguez's computer.

17. Global informed counsel for VCS that it created “a full backup of Global’s computers on March 27, 2010.” See Letter dated August 4, 2010, attached hereto as **Exhibit G**. Following the granting of the Discovery Order, Global produced several forensic images to VCS. These images were produced to VCS on July 22, 2010. However, the images were created on July 17, 19, and 20, 2010. See Exhibit D, ¶¶ 7-11. Thus, Global’s statement to VCS that forensic images were completed on March 27, 2010 was either: 1) false, and no images were created on or prior to March 27, 2010 or 2) true, and Global is wrongfully withholding the images created on or prior to March 27, 2010.

18. Additionally, Global’s Notice of Compliance filed with the Court on July 22, 2010, falsely represents that Global delivered to VCS all responsive documents in its possession. (Dkt. No. 61).

19. VCS retained a forensic expert to analyze the external hard drive and thumb drive produced by Global. See Exhibit D, ¶¶ 2-4. Global shredded a large quantity of information relevant to this litigation immediately *before* creating the images that were produced to VCS, but *after* the entry of this Court's Order compelling production. See Exhibit D, ¶ 12. Incredibly, Global created a text file and actually documented a portion of its deliberate spoliation. The following outlines some of Global's wrongful actions prior to production:

- On July 16, 2010, at 1:50 P.M. EDT, whoever was tasked with gathering discovery for Global created a text file titled “GRM Time Log.txt[,]” and modified this file between July 16, 2010 at 1:50 P.M. EDT and July 23, 2010 at 1:25 P.M. EDT. See Exhibit D, ¶ 5. This text file chronicles some of Global’s intentional destruction of evidence incriminating to Global, including entries stating “[d]eleted files previous to 2/11/10 from Alex, David and Travis’ computer images” and “[f]inished Jeff’s drive and started imaging cleaned drive.” Id.
- On July 17, 2010 at 7:55 P.M. EDT, whoever was in possession and control of David Michael’s hard drive intentionally destroyed a great deal of evidence, prior to imaging the hard drive. See Exhibit D, ¶ 7. The destruction included a variety of Word documents, PDF images, Excel spreadsheets, and Zip files from a general folder named “Delete[,]”

and from a variety of other folders, such as “Attendance Records[,]” “DGMF[,]” “Payroll[,]” and “TVC[.]” Id.

- On July 17, 2010 between 1:14 and 1:22 P.M. EDT, whoever was in possession and control of Alex Simao’s hard drive intentionally destroyed a variety of Outlook PST files, prior to imaging the hard drive at 1:41 P.M. EDT. See Exhibit D, ¶ 8. The destruction included the deletion of emails and attachments contained in the Outlook PST files. Id. Additionally, the drive contained a deleted folder named “Delete” located in the “My Documents” folder, which folder was created on July 17, 2010 at 1:06 P.M. EDT. Id.
- On July 19, 2010 at 7:27 A.M. EDT, whoever was in possession and control of Travis Thomas’ hard drive intentionally destroyed evidence, prior to imaging the hard drive at 7:45 A.M. EDT. See Exhibit D, ¶ 9. The destruction included Word documents and Excel spreadsheets from a folder titled “Bills and Taxes[,]” Excel spreadsheets from a folder titled “Daily Totals 06, 07, 08[,]” Word documents and Excel spreadsheets from a folder titled “DGMF misc[,]” Zip files, Word documents and Excel spreadsheets from folders titled “Celebration Leads[,]” “Celebrity leads[,]” “Florida Leads[,]” “Jerry Jones leads[,]” “Marriot Leads[,]” “Mix Leads[,]” “Mix Leads II[,]” “New Leads[,]” “Orange Lake Leads[,]” “Span and Inter Leads[,]” “Star and Westin Leads[,]” “Total Leads[,]” “US Data Test[,]” “Vistana Leads[,]” “Westgate Leads II[,]” “Worldmark leads[,]” “Wyndham Leads[,]” Word documents from folders titled “Weekly Meetings 2006[,]” “Meetings for 2008[,]” “Meetings for 2009[,]” Excel spreadsheets from a folder titled “New Leads from Desktop[,]” and Word documents from various subfolders under the root folder “Training Info[.]” Id.
- On July 19, 2010 between 11:11 P.M. EDT, whoever was in possession and control of Jeffery Morris’ hard drive intentionally destroyed evidence prior to imaging the hard drive at 11:26 A.M. EDT. See Exhibit D, ¶ 10. The destruction included the deletion of a variety of Excel files, Word documents and Zip files from exemplar folders such as “Leads on the Floor[,]” “Emails ENGLISH[,]” “Email Spanish[,]” “Leads on Floor\LUIS2~1[,]” and “Leads on Floor\VT[.]” Id.
- On July 19, 2010 between 10:11 P.M. EDT, whoever was in possession and control of Kevin Wiegand’s hard drive intentionally destroyed evidence, prior to imaging the hard drive at 11:17 A.M. or P.M. EDT on July 20, 2010. See Exhibit D, ¶ 11. The destruction included a variety of Excel files, Word documents and Zip files. Id.

20. All of the above information regarding Global’s deliberate spoliation was communicated to counsel for Global via letter on July 29, 2010, attached hereto as **Exhibit H**.

21. Global’s response letter is attached hereto as Exhibit G. In its response letter, Global, stated that VCS has “made a mountain out of a mole hill,” with regard to Global’s failure to comply with the Discovery Order and Global’s deliberate spoliation of evidence. Id. Further,

regarding Global's violation of the Court's Temporary Restraining Order and Preliminary Injunction, Global responded: "All [Global] did was fulfill the few deals in process at the point of cessation. No harm; no foul." Id.

22. Despite Global's assurances that it would work amicably to resolve this discovery dispute, by the end of August Global failed (and has still failed) to produce the information deleted from David Michael's, Alex Simao's, Travis Thomas', Jeffery Morris', and Kevin Wiegand's hard drives immediately before those hard drives were imaged and produced. Counsel for VCS has repeatedly contacted Global in an attempt to obtain the deleted evidence without involving this Court. See Letter dated August 25, 2010, attached hereto to as **Exhibit I**.

23. To date, Global has yet to produce any of the information deleted from the hard drives of David Michael, Alex Simao, Travis Thomas, Jeffery Morris, and Kevin Wiegand.

Global's Violation of this Court's Temporary Restraining Order and Preliminary Injunction

24. On February 11, 2010 the Court issued a Temporary Restraining Order, restraining and enjoining Global "from using Plaintiff's trade secrets or confidential information—including any database of Plaintiff's members or prospective members—to contact or solicit Plaintiff's current or prospective timeshare members." (Dkt. No. 6, at ¶ 2). On February 24, the Court converted the Temporary Restraining Order into a Preliminary Injunction enjoining the same conduct. (Dkt. No. 24).

25. The information Global produced shows that Global has repeatedly violated both the Temporary Restraining Order and the Preliminary Injunction by continuing to contact and enter into dozens of contracts with VCS's customers after being enjoined and prohibited from doing so. The following is a list that VCS has been able to ascertain to date based on the partial discovery responses from Global of 90 VCS members that were contacted and solicited by

Global (and entered in to contracts with Global) after entry of the Temporary Restraining Order prohibiting such conduct:

Resort Name	Contract Date
Sol Melia Punta Cana Resort	2/17/2010
Sol Melia Puerto Vallarta Resort	2/13/2010
Sol Melia Punta Cana Resort	2/21/2010
Sol Melia Grand Cancun	2/19/2010
Sol Melia Dominican Republic	3/10/2010
Sol Melia Puerto Vallarta Resort	2/12/2010
Sol Melia Grand Cancun	3/22/2010
Sol Melia Punta Cana Resort	2/27/2010
Myan Palace Regency Resort	2/13/2010
Sol Melia Grand Cancun	2/15/2010
Sol Melia Punta Cana Resort	2/19/2010
Sol Melia Cobo Resort (2 contracts)	2/13/2010
Sol Melia Punta Cana Resort	2/14/2010
Sol Melia Cozomel	4/12/2010
Sol Melia Grand Cancun	2/14/2010
Sol Melia Cozomel	2/16/2010
Sol Melia Grand Cancun	3/10/2010
Sol Melia Cozomel	2/16/2010
Sol Melia Cozomel	2/20/2010
Sol Melia Cozomel	2/20/2010
Sol Melia Grand Cancun	3/1/2010
Sol Melia Punta Cana Resort	2/12/2010
Sol Melia Resort (Cancun)	3/4/2010
Sol Melia Punta Cana Resort	2/13/2010
Sol Melia Punta Cana Resort	3/22/2010
Sol Melia Punta Cana Resort	4/15/2010
Sol Melia Dominican Republic	2/12/2010
Sol Melia Cozomel	2/20/2010
Moose Head Resort	2/20/2010
Sol Melia Punta Cana Resort	2/19/2010
Sol Melia Punta Cana Resort	2/12/2010
Sol Melia Puerto Vallarta Resort	3/3/2010
Playa Del Sol	2/12/2010
Sol Melia Grand Cancun	2/15/2010
Sol Melia Puerto Vallarta Resort	2/16/2010
Sol Melia Punta Cana Resort	2/18/2010
Sol Melia Grand Cancun	2/16/2010
Sol Melia Puerto Vallarta Resort	2/16/2010
Sol Melia Grand Cancun	2/16/2010
Sol Melia Punta Cana Resort	2/23/2010
Sol Melia Puerto Vallarta Resort	3/10/2010
Sol Melia Puerto Vallarta Resort	2/17/2010

Sol Melia San Juan	3/11/2010
Sol Melia Grand Cancun	3/26/2010
Sol Melia Grand Cancun	2/22/2010
Wyndham Shawnee Village	2/22/2010
Sol Melia Cozomel	2/26/2010
Sol Melia Punta Cana Resort	2/18/2010
Sol Melia Puerto Vallarta Resort	2/15/2010
Sol Melia Rio Grande	2/13/2010
Sol Melia Grand Cancun	2/12/2010
Sol Melia Cobo Resort	2/19/2010
Sol Melia Cozomel	2/16/2010
Sol Melia Grand Cancun	3/2/2010
Sol Melia Grand Cancun	2/16/2010
Sol Melia Rio Grande	2/17/2010
Sol Melia Punta Cana Resort	2/13/2010
Sol Melia Grand Cancun	3/7/2010
Sol Melia San Juan	2/22/2010
Sol Melia Puerto Vallarta Resort	2/25/2010
Westgate Lakes Resort	3/9/2010
West Gate Lakes	2/15/2010
Westgate Newport Beach	5/5/2010
Liki Tiki Resort	4/6/2010
Bonnet Creek @ Lake Buena Vista	4/27/2010
Sol Melia Punta Cana Resort	3/3/2010
Westgate Lakes	3/3/2010
Westgate Lakes	3/3/2010
Westgate Palace Resort	2/24/2010
Westgate Resort	2/24/2010
Westgate Town Center Resort	2/17/2010
Liki Tiki Resort	3/17/2010
Wyndham Rio Grande	3/17/2010
Westgate Lakes	3/17/2010
Pacific Monarch Cancun Resort	3/17/2010
Sol Melia Grand Cancun	3/9/2010
Westgate Lakes Resort	3/9/2010
Westgate Blue Treet	3/3/2010
Westgate Town Center	2/25/2010
Westgate Palace Resort	2/24/2010
Orange Lake Resort	2/24/2010
Westgate Resort	2/24/2010
Westgate Town Center Resort	2/17/2010
Westgate Lakes Resort	2/17/2010
Westgate Lakes Resort	2/17/2010
Sol Melia Resort	2/17/2010

Sol Melia Resort	2/15/2010
Sol Melia Resort	2/18/2010
Westgate Newport Beach	3/17/2010
Westgate Vacation Villas	3/29/2010

See Contracts and accompanying emails, attached to Exhibit B (All personal identify information has been redacted from the contracts and the underlying documents).¹ All of the referenced individuals were VCS members on the referenced dates. These are only examples of Global's contacts with VCS's members based on the contracts produced by Global—there could be more communications and solicitations that were not documented or not produced by Global. Tellingly, some of the contracts and communications produced by Global reveal that Global was contacting and soliciting VCS's members as late as May 2010, almost three (3) months after entry of the Temporary Restraining Order.

MEMORANDUM OF LAW

I. Global's Failure to Comply with the Discovery Order

Rule 37(b)(2)(A), Fed. R. Civ. P., provides:

If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;

¹ The Contracts reveal that Global received \$87,386.00 from VCS members after entry of the Temporary Restraining Order.

- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

As established above, Global failed to comply with the Discovery Order granting Plaintiff's Motion to Compel by, *inter alia*, failing to produce all documents and information responsive to VCS's discovery requests and intentionally deleting relevant information that is responsive to VCS's discovery requests.

Pursuant to Rule 37, this Court can exercise its discretion to impose sanctions against Global for intentionally disobeying this Court's Discovery Order. See Zocaras v. Castro, 465 F.3d 479, 490 (11th Cir. 2006) (holding that district courts have broad powers to impose sanctions for a party's failure to comply with court orders or the Federal Rules). Additionally, Global is subject to sanctions under Rule 37 both for failing to produce all electronically stored information in its possession and for intentionally destroying evidence prior to its production to VCS. See generally In re Seroquel, 244 F.R.D. 650 (M.D. Fla. 2007) (ordering sanctions against a party for failing to produce 'usable' or 'reasonably accessible' electronic documents).

VCS has been prejudiced and harmed by Global's spoliation and failure to comply with this Court's Discovery Order. VCS has been unable to proceed with additional discovery from third parties due to Global's failure to provide the required responsive information and documents. By way of example, VCS was forced to file a Motion to Extend Deadline to File Motions to Add Parties or Amend Pleadings because of this ongoing discovery dispute with Global. (Dkt. No. 62). Based on the outstanding discovery, VCS may need to add additional parties to this litigation or amend its complaint. In this instance, Global agreed to the

relief sought, and this Court granted VCS's motion and extended the deadline to add parties or amend pleadings two (2) months.

As this case progresses through the coming stages of litigation and nears trial, VCS will continue to be prejudiced and harmed in the prosecution of its case if Global continues to disobey this Court's Discovery Order. Accordingly, VCS requests that this Court use the discretion granted to it in Rule 37, Fed. R. Civ. P., to sanction Global by striking Global's answer and affirmative defenses and rendering a default judgment against Global, treating Global in contempt of court, awarding attorneys' fees and costs to VCS and granting any other sanctions that this Court deems just and appropriate. See Rule 37((b)(2)(A); Serra Chevrolet, Inc. v. General Motors Corp., 446 F.3d 1137, 1147 (11th Cir. 2006) ("A finding of a failure to comply with discovery orders is a finding of civil contempt."); Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1542-44 (11th Cir. 1993) (striking the defendants' answer, entering a default judgment against them and awarding attorneys' fees and costs as sanctions for violating the court's discovery orders).

II. Global's Intentional Destruction of Relevant Evidence

"Spoliation is the intentional destruction of evidence or the significant or meaningful alteration of a document or instrument." Southeastern Mech. Servs, Inc. v. Brody, 657 F. Supp. 2d 1293, 1299 (M.D. Fla. 2009). Federal courts may look to state law principles for guidance. Id. Under Florida law, "spoliation is established when the party seeking sanctions proves that: 1) the evidence existed at one time, 2) the alleged spoliator had a duty to preserve the evidence, and 3) the evidence was crucial to the movant's prima facie case or defense." Id. (citing Golden Yachts, Inc. v. Hall, 920 So. 2d 777, 781 (Fla. 4th DCA 2006)). Additionally, "sanctions for spoliation are appropriate only when there is evidence of bad faith and lesser sanctions will not suffice." Id.

Here, the elements for spoliation are met. First, the electronically stored information existed following the triggering of Global's duty to preserve as is evident from the deleted information on the images produced by Global. See Exhibit D, ¶¶ 7-11. Second, Global had a duty to preserve the evidence as of February 2, 2010, the date of the cease and desist letter from VCS. Exhibit E. In fact, in a litigation hold letter, VCS explained to Global in detail its precise obligations with regard to electronically stored data. Exhibit F.

Third, the deleted evidence is crucial to VCS's claims. By way of example, Global produced a hard copy document of an invoice purporting to represent the \$5,000.00 payment to Jeff Graham for the VCS Confidential Information. See Invoice, attached hereto as **Exhibit J**. As described directly below, the date that this document was created is crucial to VCS's prosecution of its claims, and without the original of the document in native electronic format, VCS can not determine the date of the document's creation.

Pursuant to the Florida Vacation Plan and Timesharing Act, entities—such as Global—that are “resale service providers” or “lead dealers” are required to maintain certain enumerated personal contact information of the persons from whom it obtains leads, including “[t]he date, time, and place of the transaction at which the personal contact information was obtained, along with the amount of consideration paid and a signed receipt from the lead dealer or copy of a canceled check.” § 721.121(1)(c), Fla. Stat. (2010).

The statute further provides a cause of action against any resale service provider or lead dealer that uses personal contact information that is wrongfully obtained; provides for recovery of \$1,000 for each owner about whom personal contact information is wrongfully obtained or used; and provides for reasonable attorneys' fees and costs to a prevailing plaintiff. § 721.121(3), Fla. Stat. Finally, the statute provides that “any failure by a resale service provider

or lead dealer to produce the records required by subsection (1) shall lead to a presumption that the personal contact information was wrongfully obtained.” § 721.121(3), Fla. Stat.

Global has produced only a hard copy of the invoice to satisfy this prong of Section 721.121, and VCS cannot check the metadata of a hard copy reproduction of an electronically created document to determine the true date of creation. Without a copy of the invoice in native electronic format, VCS cannot determine whether the document was drafted before or after this litigation commenced. If the metadata in the electronic original shows that the document was not created at the time of the transaction, then Global would be liable under Section 721.121, Fla. Stat. for wrongfully obtaining and using the stolen leads. Accordingly, this invoice (which was presumably deleted in Global’s massive deletion effort) is crucial to VCS’s claims.

Finally, the circumstances surrounding the destruction of data from Global’s hard drives indicate bad faith. Global had both the motive and opportunity to delete the data from the hard drives. See, e.g., Brody, 657 F. Supp. 2d at 1300. Global’s deletion of the files can only be attributed to deliberate and intentional actions on behalf of Global or its agents. See Exhibit D, ¶ 13. Here, Global actually cataloged its deletion of relevant evidence following this Court’s entry of an Order compelling the production of the deleted information—there is no doubt the deletion was intentional. See Exhibit D, ¶¶ 5-6, 13.

Accordingly, severe spoliation sanctions should be imposed against Global for intentionally destroying highly relevant information. Spoliation sanctions should be sufficient to remedy the immediate prejudice suffered by the Defendant and to serve as an example to other parties to “insure the integrity of the discovery process.” See Brody, 657 F. Supp. 2d at 1302. Failure to punish Global for its willful deletion of relevant evidence prior to production—

deletion that occurred after this Court's Discovery Order compelling production was issued—would harm the integrity of the discovery process. Therefore, VCS requests that this Court impose sanctions against Global, including but not limited to, an adverse inference against Global that the information it destroyed was incriminating against Global, default judgment against Global and an award attorneys' fees and costs to VCS. See, e.g., Optowave Co. v. Niktin, 2006 WL 3231422, *12 (M.D. Fla. Nov. 7, 2006) (granting an adverse inference instruction to the jury directing that the destroyed evidence would have supported the Plaintiff's case); Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 137 (S.D. Fla. 1987) (entering a default judgment as sanctions against a party who destroyed evidence); see also Managed Care Solutions, Inc. v. Essent Healthcare, Inc., 2010 WL 3368654, *12-13 (S.D. Fla. Aug. 23, 2010) (identifying default judgment, adverse inference and attorneys' fees and costs as proper sanctions for spoliation).

III. Global's Violation of the Temporary Restraining Order and Preliminary Injunction

Pursuant to this Court's Temporary Restraining Order and subsequent Preliminary Injunction, Global was (and still is) enjoined "from using Plaintiff's trade secrets or confidential information—including any database or list of Plaintiff's members or prospective members—for any purpose, including, but not limited, contacting or soliciting Plaintiff's current or prospective timeshare members" (Dkt. No. 24, at 6). Global has violated this Court's Order by continuing to contact, solicit and enter into contracts with VCS's members. The documents produced by Global revealed contracts entered into between Global and VCS's current members months after the Preliminary Injunction was entered. See Attachments to Exhibit B.

VCS and its members continue to be harmed by Global's conduct. For example, VCS is harmed by Global continuing to contact its members—VCS's members trust VCS and expect VCS to keep their private information confidential. When outsiders solicit funds from

VCS's members, it diminishes that trust. Additionally, in certain jurisdictions in which VCS does business, if VCS does not maintain the confidentiality of the member information, legal action can be taken against VCS. Thus, Global continuing to contact and solicit VCS's members subjects VCS to potential legal action. Finally, Global's continuous use of VCS's Confidential Information impairs VCS's reputation amongst its members and in the community. Ultimately, if Global continues to contact and solicit VCS's members, VCS's relationships with its members will be harmed or even lost.

The Eleventh Circuit has continuously held that "injunctions are enforced through the district court's civil contempt power." Thomas v. Blue Cross and Blue Shield Ass'n, 594 F.3d 823, 829 (11th Cir. 2010). Thus, this Court has the inherent equitable power to hold Global in contempt for its flagrant violations of this Court's Preliminary Injunction. See Smith Barney, Inc. v. Hyland, 969 F.Supp. 719, 722 (M.D. Fla. 1997). "If a party contends that another party is violating an injunction, the aggrieved party should move the court for an order to show cause why the other party should not be held in civil contempt." Thomas, 594 F.3d at 829. The plaintiff's motion should cite the injunctive provision at issue and allege that the disobedient party has refused to obey its mandate. Reynolds v. Roberts, 207 F.3d 1288, 1298 (11th Cir. 2000). If the court is "satisfied that the plaintiff's motion states a case of non-compliance, the court orders the defendant to show cause why he should not be held in contempt and schedules a hearing for that purpose." Id. Next, "[a]t the hearing, if the plaintiff proves what he has alleged in his motion for an order to show cause, the court hears from the defendant." Id. Ultimately, "the court determines whether the defendant has complied with the injunctive provision at issue and, if not, the sanction(s) necessary to ensure compliance." Id.

The party seeking civil contempt bears the initial burden of proving by clear and convincing evidence that the alleged contemnor violated an outstanding court order. Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1296 (11th Cir. 2002). To find contempt, the court must find that 1) the order violated is valid and lawful, 2) the order violated is clear and unambiguous and 3) the alleged violator had the ability to comply with the order. Id. Once a *prima facie* case is established, the burden shifts to the alleged contemnor to produce detailed evidence to explain its noncompliance. See Thomas, 594 F.3d at 829.

If a court determines that a party is in violation of an injunction, it “has numerous options in imposing sanctions to ensure compliance, as long as the sanctions are not greater than necessary to ensure such compliance.” Hyland, 969 F. Supp. at 722. For example, a court can incarcerate a party or impose a fine against him. See Wyatt v. Rogers, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996).

Here, the Preliminary Injunction is both valid and lawful. It was entered by this Court after a valid, properly-noticed hearing held by this Court, wherein VCS provided sufficient evidence mandating the need for the injunction. Although counsel for Global did not appear in person for the hearing, he was contacted by telephone by this Court during the hearing and was present for this Court’s ruling. Next, the order is clear and unambiguous. It says very directly that Global is enjoined from “using Plaintiff’s trade secrets or confidential information—including any database or list of Plaintiff’s members or prospective members—for any purpose, including, but not limited, contacting or soliciting Plaintiff’s current or prospective timeshare members” This language is clear, limited in scope and identifies the exact behavior that Global shall not engage in. Finally, Global had the ability to comply with the order. Global was properly served with all of the documents requesting relief and with the order itself, and Global’s

counsel was present at the hearing; thus, Global was on notice of the prohibited behavior. Moreover, Global merely had to refrain from engaging in certain behaviors—contacting and soliciting VCS’s members. There was nothing preventing Global from ceasing contact with VCS’s members. Why Global continued to violate this Court’s order months after it was entered is unfathomable.

VCS has presented clear and convincing evidence that Global’s actions are in direct violation of this Court’s Order. Global has deliberately ignored this Court’s orders and has continued to contact and solicit VCS’s members. Counsel for Global claimed in a letter dated August 4, 2010 that “[a]ll they did was fulfill the few deals in process at the point of cessation. No harm; no foul.” See Exhibit G. First, it appears Global did more than just “fulfill the existing deals,” as there is evidence of continuing contact with VCS members as late as three (3) months after entry of the Temporary Restraining Order. Any deals that were existing in January or February would not still be outstanding in May.

Moreover, this Court ordered Global to refrain from contacting or soliciting VCS members. By allegedly “fulfilling the existing deals,” Global continued to contact and solicit VCS members in violation of this Court’s Preliminary Injunction. Counsel for Global’s comment that VCS has “made a mountain out of a mole hill” regarding Global’s violations of this Court’s orders challenges the very integrity of this Court—Global should not be allowed to deliberately and repeatedly violate this Court’s orders without consequence by simply shrugging off its violations as subjectively *de minimis*. See Exhibit G. VCS therefore moves this Court for an order to show cause as to why Global should not be held in civil contempt for violating this Court’s Preliminary Injunction.

WHEREFORE, VCS respectfully requests that this Court 1) enter an order pursuant to Rule 37, Fed. R. Civ. P., sanctioning Global for failing to comply with this Court's Discovery Order by failing to produce all electronically stored information in its possession and by intentionally destroying evidence, including but not limited to, striking Global's answer and affirmative defenses, rendering a default judgment against Global, treating Global in contempt of court and awarding attorneys' fees and costs to VCS; 2) enter an order sanctioning Global for spoliation of evidence, including but not limited to, an adverse inference against Global that the information it destroyed was incriminating against Global, default judgment against Global and an award attorneys' fees and costs to VCS; 3) enter an order to show cause for why Global should not be held in civil contempt for violating this Court's Temporary Restraining Order and Preliminary Injunction and schedule a hearing for that purpose; 4) grant VCS its attorneys' fees and costs associated with bringing this Motion; and 5) grant any other further relief this Court deems proper and just.

Local Rule 3.01(j) Oral Argument Request

Pursuant to Local Rule 3.01(j), VCS respectfully requests a hearing of forty-five (45) minutes to assist this Court in resolving the issues raised in this Motion.

Rule 37 and Local Rule 3.01(g) Certification

Counsel for VCS hereby certifies that he has conferred with counsel for Global in good faith to resolve the issues present in this motion, and counsel were not able to agree on the resolution of this Motion. Counsel for VCS contacted counsel for Global by letter on July 29, 2010 and August 25, 2010 in an attempt to resolve the issues raised in this Motion. See Exhibit H and Exhibit I. Also, counsel for VCS discussed the issues raised in this Motion in detail with counsel for Global by telephone on August 17, 2010 and September 7, 2020, in an attempt to

obtain the requested discovery responses. Despite continuous attempts by VCS to resolve the issues raised in this Motion, Global has failed to sufficiently respond to VCS's requests.

Dated: September 17, 2010

Respectfully submitted,

/s/ Julie A. Angelini

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 17, 2010, I electronically filed the foregoing with the Clerk of the Court pursuant to Administrative Procedures for Electronic Filing in Civil and Criminal Cases of the Middle District of Florida by using the CM/ECF system which will send a notice of electronic filing to Philip F. Bonus, Esq. at philbonus@bonuslawfirm.com, J. Rex Powell, Esq. at rex@rexpowell.com and further certify that a true and correct copy of the foregoing was furnished to Giovanni Rodriguez via U.S. Mail and Electronic Mail at 9429 Daney Street, Gotha, Florida 34734; gioecure@aol.com.

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