UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-cv-21882-KMW

TITLE CAPITAL MANAGEMENT, LLC,

Plaintiff,

HEARING REQUESTED

v.

PROGRESS RESIDENTIAL, LLC, et al.,

Defendants.
_____/

MOTION TO DISMISS UNDER RULE 37(e)
BASED ON PLAINTIFF'S INTENTIONAL DESTRUCTION OF EVIDENCE

The Plaintiff in this case, Title Capital Management, LLC ("TCM") and its principal, Erik Wesoloski, intentionally destroyed critical evidence prior to filing this lawsuit.

Wesoloski ordered the destruction of virtually all of TCM's internal email and other electronically stored information on the eve of being sued by Progress Residential LP ("Progress") in Florida state court. At the time the evidence was destroyed, TCM and Wesoloski (an experienced attorney licensed to practice law in Florida) had already engaged in months of pre-suit settlement discussions with Progress and were fully aware that a lawsuit was imminent. TCM and Wesoloski had a duty to preserve the evidence and destroyed it specifically to deprive Progress and its affiliates, Defendants Progress Residential LLC and FREO Florida, from using the evidence in litigation. As a result of TCM and Wesoloski's unlawful destruction of evidence, the ability of the Defendants in this case to defend and disprove TCM's claims has been irreparably prejudiced. Accordingly, this action should be dismissed pursuant to Rule 37(e)(2)(c) of the Federal Rules of Civil Procedure.

TCM and Wesoloski's unlawful destruction of evidence has already been fully litigated in the parallel State Court Action. After holding an evidentiary hearing, in which Wesoloski testified,

the state court (Honorable Judge Bronwyn C. Miller) issued an order on December 29, 2016. The court concluded that TCM and Wesoloski wrongfully destroyed the critical evidence and then made misleading statements to the court and opposing counsel in an effort to cover up their misconduct. "TCM and Wesoloski had a duty to preserve the electronically stored information, yet directed its destruction, and then failed to disclose to opposing counsel and the court the fact that it no longer existed," the court said. "Only one conclusion may be gleaned: the evidence was critical to establishing plaintiff's claim and equally compelling evidence may not be garnered." (*See* Order on Plaintiff's Spoliation Motion attached as Exhibit 1).

FACTUAL BACKGROUND

1. Background

This case arises out of the fraudulent and unlawful conduct of TCM and its principal, Wesoloski. TCM and Wesoloski entered into a contract with Progress in 2012 to perform due diligence, foreclosure auction bidding, and related services for Progress in connection with its investments in the Florida real estate market. Instead of performing these services appropriately, TCM and Wesoloski provided false and fraudulent information to Progress in order to induce Progress to pay higher prices for the properties it acquired and thereby inflate the commissions paid to TCM and Wesoloski.

TCM and Wesoloski were hired to perform due diligence on target properties that Progress and FREO Florida were interested in buying. This due diligence culminated in TCM completing a "bid sheet," which Progress and FREO Florida relied upon for the calculation of maximum bid prices for the target properties. Bid sheets are Microsoft Excel spreadsheet templates, which contain empty data fields that are completed by foreclosure auction bidding agents such as TCM and Wesoloski. The bid sheets contain many basic real estate data fields, such as property size,

comparable sales, property taxes, home owners association dues, and capitalization rates. A preloaded formula in the bid sheets takes the data from all of these fields and calculates the maximum bid price for any particular property.

These bid sheets, including the formula used to calculate the maximum bid price, were provided to TCM by FREO Florida. Once the bid sheets were completed by filling out the data fields, TCM and Wesoloski were given authority to purchase certain properties at auction. TCM and Wesoloski were paid a commission on each property that was successfully acquired.

Unbeknownst to Progress and FREO Florida, the information supplied by TCM and Wesoloski was materially false. TCM and Wesoloski misrepresented the proper amount of carrying charges including homeowner's association dues and property taxes for many properties. TCM and Wesoloski also manipulated the bid sheets by improperly reducing the capitalization rate for many of the properties. The effect of these misrepresentations was to artificially increase the maximum bid price that Progress and FREO Florida would authorize. This improper increase in bid authority allowed TCM and Wesoloski to purchase more properties at higher prices, which resulted in TCM and Wesoloski wrongfully securing greater commissions.

2. <u>TCM and Wesoloski's Intentional Destruction Of Evidence</u>

In May 2013, Progress terminated Wesoloski and TCM. Progress ultimately filed suit against Wesoloski and TCM in September 2013. In the months immediately preceding the filing of suit, in an effort to avoid litigation, the parties engaged in substantial settlement negotiations.

By April, 2013, Progress had discovered evidence of TCM and Wesoloski's misconduct, and by May 20, 2013, Progress informed TCM and Wesoloski that it had retained counsel to pursue appropriate action against TCM. (*See* email correspondence attached as Exhibit 2). Wesoloski

responded on behalf of TCM, indicating that TCM had engaged counsel to represent TCM in its dispute with Progress. (Exhibit 2).

By May 24, 2013, Progress had retained undersigned counsel, Gail McQuilkin, Esq. of Kozyak, Tropin & Throckmorton LLP, and McQuilkin contacted Wesoloski. (*See* email correspondence attached as Exhibit 3). On or about May 29, 2013, TCM retained Patrick O'Connor, Esq. of Harper Meyer Perez Hagen O'Connor Albert & Dribin LLP to represent TCM in pre-suit negotiations with Progress. (*See* Motion to Withdraw attached as Exhibit 4).

From May to September, 2013, Wesoloski and counsel for TCM, Patrick O'Connor and George Harper, had extensive pre-suit settlement communications with counsel for Progress. (*See* email correspondence attached as Exhibit 5). On June 5, 2013, Wesoloski and O'Connor met with counsel for Progress at the offices of Kozyak Tropin & Throckmorton LLP for a settlement conference. (*See* affidavit of Gail McQuilkin attached as Exhibit 6). At the settlement conference, the parties exchanged settlement offers and continued to discuss settlement over the following weeks and months. (Exhibit 6).

The parties' pre-suit settlement discussions were unsuccessful, and on September 23, 2013, Progress filed suit against TCM, alleging breach of contract, breach of fiduciary duty, and constructive fraud. (Exhibit 6). At approximately the same time that Progress filed suit, in September 2013, TCM and Wesoloski destroyed the computer hard drives and emails of all 17 of TCM's staff analysts. The exact timing and circumstances of the destruction remain unclear. As Judge Miller noted, "Wesoloski was vague with regard to the destruction date and the circumstances surrounding the disposal during the evidentiary hearing." (Exhibit 1). However, it is clear that TCM destroyed virtually all of its internal email and electronically stored information in the same month that it was sued by Progress in the State Court Action.

After the suit was filed, Progress sought the production of all emails generated by TCM's office staff in conjunction with the services TCM and Wesoloski performed on behalf of Progress and FREO Florida. (*See* discovery requests attached as Exhibit 7). On January 14, 2014, TCM produced certain documents in response to the request. On July 10, 2015, Progress sought production of additional documents, including internal emails between TCM employees. (*See* Motion to Compel attached as Exhibit 8). TCM objected to the requested production, indicating the following: "TCM is now inactive with no employees. It is unfair and prejudicial to require TCM to expend additional resources to go back and search for any such responsive documents, which would have been easier and less costly to locate in the same year that the request was made." (*See* TCM's response to Progress' Motion to Compel attached as Exhibit 9). On August 12, 2015, the Court ordered production of the additional documents. (*See* order attached as Exhibit 10).

On September 11, 2015, TCM served Progress with an affidavit of Wesoloski. The affidavit indicated that, with the exception of computers belonging to Wesoloski and Javier Perez, the computers of all TCM staff were wiped clean and discarded or given away in September, 2013. (See affidavit of Erik Wesoloski attached as Exhibit 11). This was the first time that TCM or Wesoloski ever disclosed to Progress or the court that this electronically stored information had been destroyed.

Progress filed a spoliation motion, for sanctions based on TCM and Wesoloski's destruction of evidence, and an evidentiary hearing was conducted by the state court on December 5, 2016. (Exhibit 1). On December 29, 2016, Judge Miller entered an Order granting the motion. (Exhibit 1). Among other things, Judge Miller concluded that sanctions were appropriate because TCM and Wesoloski did not act in good faith in destroying TCM's internal emails and

electronically stored information, and that TCM and Wesoloski attempted to mislead Progress and the court in order to cover up their misconduct. Specifically, Judge Miller stated that:

> Although TCM and Wesoloski contend that this [destruction] was a good-faith act, conducted in furtherance of winding up TCM, the discovery responses, and ensuing correspondence and hearings, were clearly designed to thwart Plaintiff's access to the information. Rather than disclose that the data and correspondence had been destroyed, TCM and Wesoloski produced incomplete documents and vigorously opposed further efforts directed at obtaining full disclosure of electronic data. … These actions undoubtedly resulted in erosion of witness memory, preventing Plaintiff from obtaining the equivalent information. The Court rejects the contention that the destruction occurred in "routine, good faith operation of an electronic information system," and concludes that sanctions are indeed warranted. … TCM and Wesoloski had a duty to preserve the electronically stored information, yet directed its destruction, and then failed to disclose to opposing counsel and the Court the fact that it no longer existed. Only one conclusion may be gleaned: the evidence was critical to establishing Plaintiff's claim and equally compelling evidence may not be garnered.

(Exhibit 1).

ARGUMENT

Spoliation is the destruction or significant alteration of evidence in pending or reasonably foreseeable litigation. *Graff v. Baja Marine Corp.*, 310 Fed.Appx. 298, 301 (11th Cir.2009) (*quoting West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999)). In the Eleventh Circuit, sanctions for spoliation of evidence "are intended to prevent unfair prejudice to litigants and to ensure the integrity of the discovery process*." Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F. Supp. 2d 1317, 1323 (S.D. Fla. 2010) (*quoting Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005)).

The spoliation of electronically stored information ("ESI") is specifically governed by Rule 37(e) of the Federal Rules of Civil Procedure. Rule 37(e) was recently amended, effective as of December 1, 2015, and courts now look to the newly amended Rule when considering a claim of spoliation involving ESI. *Living Color Enters. v. New Era Aquaculture Ltd.*, 2016 U.S. Dist. LEXIS 39113, *10, 2016 WL 1105297 (S.D. Fla. Mar. 22, 2016).

Rule 37(e) now provides as follows:

> **(e) Failure to Preserve Electronically Stored Information**. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
> (A) presume that the lost information was unfavorable to the party;
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> (C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e).

1. The Threshold Requirements Of Rule 37(e) Are Satisfied

Each of the threshold requirements of the rule is met. First, the emails and hard drives that were destroyed by TCM are plainly "electronically stored information," and therefore Rule 37(e) is applicable. *See Living Color*, 2016 U.S. Dist. LEXIS 39113, *13; *see also Cat3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 500 (S.D.N.Y. 2016).

The information should have been preserved in the anticipation of litigation and TCM had a duty to preserve the information. Litigants have an obligation to preserve evidence that predates the filing of the complaint and arises once litigation is reasonably anticipated. *EEOC v. Ventura Corp.*, No. 11–1700(PG), 2013 WL 550550, at *3 (D.P.R. Feb.12, 2013) (internal citations omitted). Here, Progress notified TCM that it had retained counsel and was considering legal action as early as May 2013. Wesoloski, himself an experienced attorney licensed to practice law in Florida since 2001, then retained counsel for TCM and began a period of pre-suit negotiations that lasted for several months. As Judge Miller concluded "Wesoloski knew at that time that absent a negotiated settlement agreement, litigation was imminent." (Exhibit 1). Despite being fully

aware that litigation was imminent, TCM and Wesoloski destroyed TCM's internal emails and computer files.

The evidence was lost because TCM and Wesoloski failed to take reasonable steps to preserve it. Indeed, TCM and Wesoloski *intentionally destroyed the evidence* by directing that all of the staff computers be wiped and then destroyed or given away. When the destruction is intentional, courts uniformly find that the spoliating party failed to take reasonable steps to preserve it. *See, e.g., Schlossberg v. Abell (In re Abell)*, 2016 Bankr. LEXIS 1690, *58 (Bankr. D. Md. Apr. 14, 2016).

Finally, the destroyed evidence cannot be restored or replaced through additional discovery. As TCM has admitted, all of the company's staff computers were wiped and then discarded or given away. This destruction of the company's internal emails and computer hard drives means that the information cannot be retrieved from any other source through additional discovery. See *Living Color*, 2016 U.S. Dist. LEXIS 39113, *13 (deleted text messages could not be restored or replaced through additional discovery). Further, as Judge Miller concluded, the delay of several years caused by TCM and Wesoloski's improper efforts to mislead the state court and Progress "undoubtedly resulted in erosion of witness memory, preventing [Progress] from obtaining the equivalent information." (Exhibit 1).

2. <u>TCM and Wesoloski's Acted With Intent To Deprive</u>

Rule 37(e)(2) authorizes the court to enter severe sanctions for spoliation when the party who destroyed the evidence "acted with the intent to deprive another party of the information's use in the litigation."

TCM and Wesoloski's intent to deprive Progress of the use of TCM's internal ESI in litigation is obvious from the circumstances of the destruction and from TCM and Wesoloski's

subsequent conduct. First, the evidence was destroyed at almost *exactly the same time* that pre-suit settlement negotiations ended and Progress filed suit against TCM and Wesoloski in state court. Second, the fact that Wesoloski, a licensed member of the Florida bar with more than 10 years of practice, ordered the destruction of all of TCM's staff email accounts and computer files, after months of discussions about a possible lawsuit by Progress, exemplifies bad faith. Finally, TCM and Wesoloski's lack of credibility and subsequent cover up, through persistent misleading conduct in the State Court Action, shows that the destruction of evidence was not done in good faith and was instead done to deprive Progress of the evidence.

For purposes of evaluating a party's intent, the timing of the spoliation is usually telling. *In re Abell*, 2016 Bankr. LEXIS 1690, at *58 (party wiped computers shortly before they were to be imaged in discovery). Where, as here, the party who destroyed the evidence did so on the eve of litigation or at a time when its discovery by an opposing party was imminent, courts regularly conclude that the destruction was intended to deprive another party of the use of the information in litigation. *See Victor Stanley*, 269 F.R.D. at 504 ("the fact that Pappas undertook to delete ....only days before a scheduled imaging of his work computer's contents compels the conclusion that he was knowingly engaged in efforts to destroy evidence that he regarded harmful to Defendants and beneficial to the Plaintiff."); *Technical Sales Associates, Inc. v. Ohio Star Forge Co.*, 2009 U.S. Dist. LEXIS 22431, 2009 WL 728520, at *8 (E.D. Mich. Mar. 19, 2009) (wiping program used right after request for forensic examination so "the timing of the destruction appears more than coincidental."); *United States v. Krause (In re Krause)*, 367 B.R. 740, 768 (Bankr. D. Kan. June 4, 2007) (defendant purged the ESI just prior to turning over computer per court order); *Columbia Pictures, Inc. v. Bunnell ("Columbia Pictures II")*, 2007 U.S. Dist. LEXIS 96360, 2007 WL 4877701, at *6 (D.C. Cal. Dec. 13, 2007) ("timing of the change" belies innocent explanation

proffered by defendant); *Smith v. Slifer Smith & Frampton/Vail Assocs. Real Estate, LLC*, 2009 U.S. Dist. LEXIS 17923, 2009 WL 482603, *12 (D. Colo. Feb. 25, 2009) ("timing of the destruction indicates that whoever was responsible knew that the evidence discovered would very well reveal information defendants did not want revealed."); *Johnson v. Wells Fargo Home Mortg., Inc.*, 558 F. Supp. 2d 1114, 2008 WL 2142219, *4 (D. Nev. 2008) (finding plaintiff's conduct willful where hard drive reformatted within five days after receipt of notice of intent to seek discovery of contents of hard drive); *Rosenthal Collins Group, LLC v. Trading Techs. Int'l*, 2011 U.S. Dist. LEXIS 17623, 2011 WL 722467, *10 (N.D. Ill. Feb. 23, 2011) ("This Court finds it impossible to believe that it is merely coincidence that the seventh disk happened to be wiped ...the same day that [the forensic consultant] was scheduled to inspect it."); *Multifeeder Tech., Inc. v. British Confectionery Co., Ltd.*, 2012 U.S. Dist. Lexis 133197, *54-55 (D. Minn. Apr. 26, 2012) (bad faith when wiping program executed "just days before [computer] was scheduled to be imaged").

In this instance, TCM and Wesoloski destroyed the ESI at approximately the same time that Progress filed suit in state court. TCM and Wesoloski were aware that litigation was imminent and that Progress would certainly request and obtain the ESI in discovery. Under these circumstances, the conclusion that TCM and Wesoloski destroyed the evidence with the intent to deprive Progress of its use in litigation is obvious.

In evaluating destruction of evidence, courts should be sensitive to the parties' sophistication with respect to litigation. Sophisticated parties are expected to have a higher degree of awareness of preservation obligations. *DVComm, LLC v. Hotwire Communs., LLC*, 2016 U.S. Dist. LEXIS 13661, *14 (E.D. Pa. Feb. 3, 2016). Here, TCM's principal was a licensed Florida attorney and named partner at the firm of Wesoloski Carlson, PA. Wesoloski had been hired as

an attorney by Progress, and has been a member of the Florida bar since 2001. It is difficult to imagine a party with a greater degree of sophistication with respect to litigation and with a higher degree of awareness of the preservation obligations imposed by law.

The fact that such a sophisticated attorney chose to destroy nearly all of TCM's internal emails and computer files ***after*** being notified that Progress had retained counsel to pursue legal action against TCM, ***after*** many months of settlement negotiations involving lawyers retained on both sides, and ***after*** such settlement discussions failed and litigation was imminent, shows that the destruction was ordered because the information was harmful to TCM, helpful to Progress, and TCM did not want Progress to have the information available for litigation.

TCM and Wesoloski's conduct following the destruction of evidence also shows a lack of good faith. As Judge Miller concluded, "TCM and Wesoloski had a duty to preserve the electronically stored information, yet directed its destruction, *and then failed to disclose to opposing counsel and the Court the fact that it no longer existed.*" (Exhibit 1, emphasis added). Rather, TCM and Wesoloski produced incomplete documents, "vigorously opposed further efforts directed at obtaining full disclosure of electronic data," and took steps "designed to thwart [Progress's] access to information." (Exhibit 1). Further, the innocent explanations offered by Wesoloski and supported by his testimony at the spoliation hearing in state court were not credible. As Judge Miller concluded, "Wesoloski was vague with regard to the destruction date and the circumstances surrounding the disposal during the evidentiary hearing." (Exhibit 1).

The persistent cover up and lack of credibility by TCM and Wesoloski illustrate the absence of good faith and support a finding that TCM and Wesoloski destroyed evidence with the intent of depriving Progress of its use in litigation. *Atl. Recording Corp. v. Howell*, 2008 U.S. Dist. LEXIS 113242, *5-7 (D. Ariz. Aug. 29, 2008) (timing and character of defendants' actions

showed that they were deliberately calculated to conceal the truth and implausible alternative explanations called his credibility into question); *see also In re Abell*, 2016 Bankr. LEXIS 1690, *58 (intentional effort to prevent ESI from being retrieved in discovery established in part by lack of credibility of alternative explanations).

3. Defendants Have Been Prejudiced

All of the Defendants in this case have been irreparably prejudiced by TCM and Wesoloski's destruction of evidence. The intentional destruction of TCM's internal email and computer files makes it extremely difficult, if not impossible, for the Defendants to challenge the copyright claims now being asserted by TCM in this action.

TCM claims to have valid copyrights in the Excel Spreadsheets or bid sheets that were prepared during its work for Progress. TCM claims that the bid sheets are its exclusive intellectual property and that the Defendants are liable, perhaps for millions of dollars, for copyright infringement. Because TCM has evidently filed for copyright protection with the US copyright office, it is entitled to a prima facie presumption that its copyrights are valid.

However, it is axiomatic that copyright protection exists only in "***original*** works of authorship." 17 U.S.C. § 102(a) (emphasis added). *See Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970); *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980). Contrary to TCM's claims, the bid sheets are not original works created by TCM. In fact, the bid sheets and the formulas contained therein for calculating maximum bid prices on property were provided by Progress in the first instance. In addition, TCM made no changes or other contributions sufficient to establish the level of originality required for copyright protection. The information contained in the bid sheets, such as property size, comparable sales, property taxes, and HOA dues, are common metrics used by practically every participant in the US real estate

market. Further, TCM made no original contributions to the design of the bid sheets, and any information added to the bid sheets during the course of TCM's work came from other sources that already existed.

TCM's internal computer files would show that TCM did not design, create, or contribute anything original to the bid sheets sufficient to support copyright protection. TCM's staff analysts were the ones who actually edited the bid sheets, by inputting property information and perhaps making minor formatting adjustments. Their emails and computer files would contain locked in time bid sheets, and would also show exactly what changes were made to the bid sheets, at what time, and would also indicate whether any changes were original or were being made based on other sources that already existed.

Courts routinely find that ESI such as this is highly relevant in intellectual property cases, and find prejudice when such evidence is destroyed. *See InternMatch, Inc. v. Nxtbigthing, LLC*, 2016 U.S. Dist. LEXIS 15831, *36-37 (N.D. Cal. Feb. 8, 2016) ("Without access to the electronic versions of these documents, InternMatch cannot determine the date the files were created, the history of the modifications made to the files, and other relevant information … Defendants' spoliation has prejudiced InternMatch by impairing its ability to attack Defendants' claims of prior use at trial"); *see also Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 440 (S.D.N.Y. 2009) ("the evidence that was destroyed is directly relevant to Plaintiffs' legal claims. For example, Plaintiffs' claims for direct and secondary copyright infringement require a showing that Plaintiffs' copyrights have been infringed (i.e., the Digital Music Files must have existed on

Defendants' system and must have been uploaded or downloaded by one or more of Defendants' subscribers)").

The evidence that has been destroyed cannot be obtained from any other source. The locked-in-time bid sheets were stored on the computer systems and in the emails that TCM and Wesoloski erased. Further, and correspondence related to changes made to the bid sheets was contained on the same computer systems. Due to TCM and Wesoloski's misconduct, several years have passed and it is unlikely that any witness will recall the same information in a sufficient degree of detail. There is simply no way for the Defendants to present the lost evidence to the Court.

In addition, when the evidence establishes that the party who destroyed the evidence did so with the intent to deprive another party of its use in litigation, the evidence is presumed to be relevant and no showing of prejudice is required because prejudice is presumed. *See In re Abell*, 2016 Bankr. LEXIS 1690, *65-67. "The reason relevance is presumed following a showing of intentional or willful conduct is because of the logical inference that, when a party acts in bad faith, he demonstrates fear that the evidence will expose relevant, unfavorable facts." *Sampson v. City of Cambridge, Md.*, 251 F.R.D. 172, 179 (D. Md. 2008) (*citing Vodusek v. Bayliner Marine Corp*., 71 F.3d 148, 156 (4th Cir.1995)).

Further, courts should typically place the burden on the party who destroyed the evidence to show a lack of prejudice. "To require a party to show, before obtaining sanctions, that unproduced evidence contains damaging information would simply turn 'spoliation law' on its head." *Brown v. Chertoff*, 563 F. Supp. 2d 1372, 1379 (S.D. Ga. 2008); *Pinkney v. Winn-Dixie Stores, Inc.*, No. 14-CV-075, 2015 U.S. Dist. LEXIS 24122, 2015 WL 858093, at *5 (S.D. Ga. Feb. 27, 2015) ("Allowing Defendant to avoid spoliation sanctions through the testimony of its

witness that the destroyed evidence would not have benefited Plaintiff would turn spoliation law on its head."); *see also Residential Funding Corp. v. Degeorge Financial Corp.*, 306 F.3d 99, 109 (2d Cir. 2002) ("Courts must take care not to hold the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed or unavailable evidence, because doing so would subvert the purposes of the adverse inference, and would allow parties who have destroyed evidence to profit from that destruction.").

Under these circumstances, dismissal is generally the appropriate remedy because the party that destroyed the evidence has "dictated the scope of the ESI evidence that will be available." *Schlossberg v. Abell (In re Abell)*, 2016 Bankr. LEXIS 1690, *70 (Bankr. D. Md. Apr. 14, 2016). Here, the Defendants are only left with whatever TCM and Wesoloski chose not to delete. *See Erie Ins. Exch. v. Davenport Insulation, Inc.*, 659 F. Supp. 2d 701, 708 (D. Md. 2009) (finding dismissal to be the only appropriate remedy because the plaintiff negligently spoliated evidence that irretrievably prejudiced a party's ability to defend itself).

4. <u>Dismissal Is The Appropriate Sanction</u>

Dismissal is the appropriate sanction here because of the extreme and indefensible conduct of TCM and Wesoloski. Dismissal is appropriate when the "timing and character" of a party's actions show that they were deliberately calculated to conceal the truth. *Atl. Recording Corp. v. Howell*, 2008 U.S. Dist. LEXIS 113242, *8-9 (D. Ariz. Aug. 29, 2008) (entering default judgment against defendant who destroyed evidence). Here, TCM and Wesoloski destroyed the company's internal ESI on the eve of being sued in state court by Progress. The destruction of evidence was authorized by an experienced Florida attorney, Wesoloski, who was fully aware that a lawsuit was imminent and had just concluded unsuccessful pre-suit negotiations with counsel for Progress. TCM and Progress willfully destroyed evidence to deceive Progress and the Court and to deprive

Progress of using the ESI in litigation. *Id*. (finding that dismissal is appropriate where party willfully destroyed evidence to deceive the court). Dismissal is necessary and appropriate here because without the evidence destroyed by TCM and Wesoloski, the factual accuracy of TCM's claims cannot be examined and it is impossible to decide the case on the merits. *Id*.

Dismissal is also a necessary and appropriate remedy here because of TCM and Wesoloski's persistent lack of candor and efforts to mislead Progress and the state court. *See Schlossberg v. Abell (In re Abell)*, 2016 Bankr. LEXIS 1690, *73-81 (Bankr. D. Md. Apr. 14, 2016) (entering judgment against defendant who destroyed evidence and stating that "in determining what sanction is appropriate, the court may consider the party's prior discovery conduct*"); see also United States v. Shaffer Equipment Co.*, 11 F.3d 450, 462 (4th Cir. 1993) ("[W]hen a party . . . abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process, the court has the inherent power to dismiss the action"). After destroying the evidence, TCM and Wesoloski provided incomplete document productions, and made misleading and inaccurate statements in hearings, and "vigorously opposed further efforts directed at obtaining full disclosure of electronic data." (Exhibit 1). As Judge Miller concluded, these actions "were clearly designed to thwart Plaintiff's access to the information." *Id*. "TCM and Wesoloski had a duty to preserve the electronically stored information, yet directed its destruction, and then failed to disclose to opposing counsel and the Court the fact that it no longer existed. Only one conclusion may be gleaned: the evidence was critical to establishing Plaintiff's claim and equally compelling evidence may not be garnered." *Id*.

Dismissal is the appropriate sanction here because "[o]ne who anticipates that compliance with discovery rules, and the resulting production of damning evidence, will produce an adverse judgment, will not likely be deterred from destroying that decisive evidence by any sanction less

than the adverse judgment he (or she) is tempted to thus evade." *Howell*, 2008 U.S. Dist. LEXIS 113242, *8-9 (*quoting Computer Assoc. Int'l v. Am. Fundware, Inc.*, 133 F.R.D. 166, 170 (D. Colo. 1990).

Finally, dismissal is the only appropriate sanction here because the destruction of evidence was carried out by the Plaintiff. Because the Plaintiff destroyed evidence, the Defendants' ability to challenge the claims and defend themselves is irretrievably prejudiced. *Erie Ins. Exch. v. Davenport Insulation, Inc.*, 659 F. Supp. 2d 701, 708, 2009 U.S. Dist. LEXIS 90638, *20 (D. Md. 2009) (holding that plaintiff's claim must be dismissed because its negligent spoliation irretrievably prejudiced defendant's ability to defend itself). Where, as here, Defendants are the victims of spoliation, due process concerns are implicated and courts must consider dismissal of the action even if the spoliation was only caused by negligent or inadvertence. *Id*. (negligent spoliation). In this case, the conduct of TCM and Wesoloski is far more egregious, obviously intentional, and done with intent to deprive a party of the use of the information in litigation. Where, as here, the plaintiff comes before the Court with unclean hands and asks the Court to award it millions of dollars in damages, the only appropriate sanction for its willful destruction of evidence is dismissal. *Id*.

5. <u>TCM Is Collaterally Estopped From Re-Litigating The Spoliation Issue</u>

Under the Full Faith and Credit Act, 28 U.S.C. § 1738, a federal court must give preclusive effect to a state court judgment to the same extent as would courts of the state in which the judgment was entered. *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1331 (11th Cir. 2010) (*citing Kahn v. Smith Barney Shearson Inc.*, 115 F.3d 930, 933 (11th Cir. 1997); *see also Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S.Ct. 1327, 1332, 84 L. Ed. 2d 274 (1985) (stating that § 1738 "directs a federal court to refer to the preclusion law of the State in

which judgment was rendered"). Here, the spoliation issue was already fully litigated and decided in the State Court Action, and Florida preclusion law controls.

Under Florida law, issue preclusion operates to prevent re-litigation of issues that have already been decided between the parties in an earlier lawsuit. *See Mortg. Elec. Registration Sys., Inc. v. Badra*, 991 So. 2d 1037, 1039 (Fla. 4th DCA 2008) (stating that issue preclusion "precludes re-litigating an issue where the same issue has been fully litigated by the same parties or their privies, and a final decision has been rendered by a court"); *State Dep't of Revenue v. Ferguson*, 673 So. 2d 920, 922 (Fla. 2d DCA 1996) ("The doctrine of collateral estoppel prevents identical parties from relitigating issues that have previously been decided between them."); *Rohan v. Trakker Maps, Inc.*, 633 So. 2d 1176, 1177 (Fla. 3d DCA 1994) ("The application of collateral estoppel prevents the parties in a second suit from litigating those points in question which were actually adjudicated in the first suit."); *Liberty Mut. Ins. Co. v. Jozwick*, 204 So. 2d 216, 218 (Fla. 3d DCA 1967) ("Estoppel by judgment [or issue preclusion] prevents parties from litigating in a second suit common issues which were actually adjudicated in a prior action.").

The "essential elements" of issue preclusion under Florida law are "that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216, 1235 (Fla. 2006) (quotation marks omitted); *see also Dep't of Health & Rehabilitative Servs. v. B.J.M.*, 656 So. 2d 906, 910 (Fla. 1995) (same); *Mobil Oil Corp. v. Shevin*, 354 So. 2d 372, 374 (Fla. 1977) (same); *Holt v. Brown's Repair Serv., Inc.*, 780 So. 2d 180, 182 (Fla. 2d DCA 2001) ("[F]or the doctrine of collateral estoppel to apply, an identical issue must be presented in a prior proceeding; the issue must have been a critical and necessary part of the prior determination; there must have been a full and fair opportunity to litigate

that issue; the parties in the two proceedings must be identical; and the issues must have been actually litigated.").

When those elements are present, issue preclusion can be applied. *Brown*, 611 F.3d at 1334. Here, the entire spoliation issue was fully litigated and decided in the State Court Action. TCM and Wesoloski were parties to the action and the spoliation motion, and had a full and fair opportunity to present their arguments. Indeed, Wesoloski testified at the hearing. Progress filed the spoliation motion, and was joined by Defendant FREO Florida. Further, even though Defendant Progress Residential is not a party to the State Court Action, strict identity of parties is not required where additional parties are in privity with those who participated in the earlier action. *Cook v. State*, 921 So. 2d 631, 635 (Fla. 2d DCA 2005) ("A person who was not a named party to an action will nonetheless be subject to collateral estoppel arising from that action if that person was in privity with a party or virtually represented by a party").

After a full and fair opportunity to litigate the issue in the State Court Action, Judge Miller entered an order finding that TCM and Wesoloski wrongfully destroyed critical evidence and then made misleading statements to the court and opposing counsel in an effort to cover up their misconduct. TCM should not be given a second bite at the apple here. Issue preclusion applies to bar TCM from attempting to re-litigate the issue and claiming (improbably) that the state court got it wrong.

CONCLUSION

The Plaintiff in this case, TCM, intentionally destroyed critical evidence prior to filing this lawsuit. Virtually all of TCM's internal email and other electronically stored information was destroyed on the eve of TCM being sued in state court. At the time the evidence was destroyed, TCM and Wesoloski had engaged in months of pre-suit settlement discussions and were fully

aware that a lawsuit was imminent. TCM and Wesoloski had a duty to preserve the evidence and destroyed it specifically to deprive Progress and its affiliates, Defendants Progress Residential and FREO Florida, from using the evidence in litigation. As a result of TCM and Wesoloski's unlawful destruction of evidence, the ability of the Defendants in this case to defend and disprove TCM's claims has been irreparably prejudiced.

"TCM and Wesoloski had a duty to preserve the electronically stored information, yet directed its destruction, and then failed to disclose to opposing counsel and the court the fact that it no longer existed. Only one conclusion may be gleaned: the evidence was critical to establishing plaintiff's claim and equally compelling evidence may not be garnered." (Exhibit 1). Accordingly, this action should be dismissed pursuant to Rule 37(e)(2)(c) of the Federal Rules of Civil Procedure.

REQUEST FOR HEARING

Defendants respectfully request that an evidentiary hearing be conducted on this matter. In order to grant the relief sought by the Defendants in this motion, it may be necessary for the Court to make findings of fact that will require the presentation of evidence. Further, given the complex factual and procedural history of this case, which encompasses a State Court Action that has been pending for more than three years, Defendants believe that a hearing would be beneficial to the Court. We estimate that approximately 2 hours will be required for the hearing.

Dated: January 24, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of January, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record either via transmission of Notices of Electronic Filing generated by CM/ECF.

By: /s/ Monica M. McNulty
Monica M. McNulty