

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA**

TITLE CAPITAL MANAGEMENT, LLC, a	)	
Florida limited liability company,	)	Case No. : 16-cv-21882-KMW
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
PROGRESS RESIDENTIAL, LLC, a	)	
Delaware limited liability company, f/k/a	)	
Fundamental REO, LLC; JOHN DOE 1, an	)	
individual; FREO FLORIDA, LLC, a	)	
Delaware limited liability company; JOHN	)	
DOE 2, an individual; JAMES E.	)	
ALBERTELLI, P.A., a Florida professional	)	
association; JAMES E. ALBERTELLI, an	)	
individual; and JONATHAN D. SAWYER,	)	
an individual,	)	
	)	
Defendants.	)	

**RESPONSE IN OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS UNDER RULE 37(e)**

Pursuant to S.D. Fla. L.R. 7.1, Plaintiff, Title Capital Management LLC, hereby advises the Court that it opposes Defendants’ “Motion to Dismiss under Rule 37(e) Based on Plaintiff’s Intentional Spoliation of Evidence [D.E. 36 and 37], and respectfully submits the following memorandum explaining why FREO’s Motion should be denied.

1. Defendants seek the harshest possible discovery sanction against TCM before any discovery has even been requested in this matter. Specifically, they seek to take advantage of a nonfinal order that was entered by a state court judge in a separate action involving a nonparty

**to this action.**<sup>1</sup> Although FREO Florida LLC did recently file a complaint in that state court action, *well after this action as initiated against it herein,*<sup>2</sup> the state court specifically ruled that it was not party to the spoliation motion heard by the state court. *See* 12/5/16 Hrg. Trans., at 14-16, attached as Exhibit 1. Defendants' motion is utterly baseless and designed to prejudice the Court against TCM based on collateral issues. The motion should be denied.

2. Defendants complain that TCM was forced to let go of staff, staff computers, and staff email accounts when it shut down its business in 2013 and, thereby, lost email accounts for a number of low-level employees. They further complain that this was done after negotiations had taken place to settle certain claims that had been asserted by a nonparty herein—**claims that have nothing whatsoever to do with the copyright infringement claims** in this case.

3. At page 2 of their motion, [D.E. 36], the Defendants subtly jump from a discussion of the negotiations with the nonparty, to a conclusion that the staff email accounts were destroyed in 2013 in order to keep, not only the nonparty, but its “affiliates, Progress Residential LLC and FREO Florida LLC, from using the evidence in litigation.” In doing so, Defendants fail to specify *which* “litigation” they are referencing. Nowhere in the Defendants’ motion and joinder, do they contend that settlement negotiations had taken place between *them* and TCM in 2013; nor do they contend that the copyright claims were the subject of any presuit settlement discussions.

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<sup>1</sup> As they did in their prior Motion to Dismiss, the movants fail to identify themselves in D.E. 36 in an effort to blur the distinction between “Progress Residential LP,” a nonparty here, and “Progress Residential LLC” and “FREO Florida LLC,” which are parties herein. And, throughout the motion, they continue with this subterfuge by making references to “Progress” without identifying the entity to which they refer.

<sup>2</sup> A motion to dismiss FREO Florida LLC’s claims or, in the alternative, to abate them pending this action is currently pending before the state court.

4. The fact of the matter is that TCM was not informed that FREO Florida LLC and Progress Residential LLC had moved TCM's intellectual property from one cloud-based server to another, in order to provide the spreadsheets to a competitor, the Albertelli defendants, for use at half the commission that had been charged by TCM in 2013. Indeed, that fact was actively concealed by the Defendants from 2013-16, and TCM discovered the infringement *approximately two-and-a-half years after the staff email accounts had been discarded*.

5. It was simply impossible for TCM to foresee what information would be relevant to its unforeseeable copyright claims at the time that the email accounts were discarded and, as such, there is simply no basis for the sanctions requested by the Defendants. Defendants essentially ask the Court to reward them for their deceit and successful concealment of their use of TCM's copyrighted material from 2013-16.

6. Defendants do not even contend that TCM anticipated, or should have anticipated, the instant litigation in 2013, when its business was shut down and the staff email accounts were discarded. As such, there is no basis whatsoever for any finding of intentional misconduct as it pertains to this litigation,<sup>3</sup> and Rule 37(e)(2), which could only apply if TCM acted with an intent to deprive these Defendants of information relevant to "the litigation" herein, simply has no application here. *See also In re Ethicon, Inc. Pelvic Repair Sys. Product Liability Lit.*, 299 F.R.D. 502, 511 (S.D.W.Va. 2014) (citing *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D.

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<sup>3</sup> Defendants attempt to confuse the Court by stating, at p. 7 of D.E. 36, that "Progress notified TCM that it had retained counsel and was considering legal action as early as May 2013." Then, at page 10, they add that the purported "evidence" was "destroyed "approximately the same time that Progress filed suit in state court" and that the evidence was destroyed "with the intent to deprive Progress of its use in litigation." The "Progress" repeatedly referenced therein is not a party to this action and the "litigation" is not this litigation. No party to this action had notified TCM of possible legal action in 2013; and TCM certainly did not notify the Defendants herein of copyright claims that did not come to light until 2016.

497, 522-23 (D. Md. 2010) for proposition that the duty is to preserve information that “is relevant to specific, predictable, and identifiable litigation.”).

7. Perhaps more importantly, the email accounts at issue belonged to low-level employees who merely inserted figures into data fields, within the copyrighted spreadsheets, *after the spreadsheets had been created*; they played no role whatsoever in creating the copyrighted spreadsheets themselves and Defendants provide not a scintilla of evidence to show otherwise. And their bald, conclusory, assertion that “TCM’s staff analysts were the ones who actually edited the bid sheets, by inputting property information and perhaps making minor formatting adjustments,” [D.E. 36 at 13 (emphasis added)] [D.E. 37 at 2 (the “internal communications ... included the creation of bid sheets in spreadsheet format.”)],<sup>4</sup> does not cut it. *See e.g. Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*, 2016 WL 1105297, \*5 (S.D. Fla. 2016) (denying spoliation motion because movant’s “extremely conclusory statement ... does not establish any prejudice” and movant “has not explained any direct nexus between the missing text messages and the allegations in [the] Complaint.”).

8. So, in addition to having no duty to preserve the email accounts at issue for purposes of this litigation under federal law, Defendants are not prejudiced by the absence of those accounts.

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<sup>4</sup> Defendants’ additional conclusory assertion that “the locked-in-time bid sheets were stored ... in the emails that TCM and Wesoloski erased,” [D.E. 36 at 14], is not only supported by no evidence whatsoever, it is also completely nonsensical. All of the bid sheets were stored in a cloud-based server that was fully accessible by FREO Florida LLC and Progress Residential LLC. Indeed, that is what enabled FREO Florida LLC and Progress Residential LLC to transfer the materials from one cloud-based server to another, for use by the Albertelli Defendants, which agreed to perform the function of TCM’s staff analysts and upload data into the spreadsheet—but for half the commission. Defendants did not need TCM’s analyst email accounts to steal TCM’s intellectual property, and they do not need them to defend themselves in this action.

9. “[I]t is well settled that ‘a corporation ... is not required to keep every shred of paper, every e-mail or electronic document, and every backup tape ... In essence, the duty to preserve evidence extends to those employees likely to have relevant information—the key players in the case, and applies to unique, relevant evidence that might be useful to the adversary.’” *Marshall v. Dentfirst, P.C.*, 313 F.R.D. 691, 697 (N.D. Ga. 2016) (quoting *In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liability Litg.*, 299 F.R.D. 502, 517-18 (S.D.W.Va. 2014)). *See also Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (as a general rule, a party need not preserve all backup tapes for email even when it reasonably anticipates litigation.).

10. Defendants present no evidence to show that the staff analysts are “key players” in terms of the creation of the spreadsheets at issue. And, even if they had played a role in the creation of the spreadsheets (which they did not), Defendants have not established prejudice because they are free to set those analysts for deposition to confirm their lack of involvement in the creation of the copyrighted materials. The fact that they seek drastic sanctions before attempting even to speak with these individuals is telling.

11. Defendants undermine any smidgeon of credibility, moreover, **by way of their contention that it was them**—and not TCM (or its staff analysts)—who actually created the copyrighted material in the first place. Specifically, they state: “In fact, the bid sheets and formulas contained therein for calculating maximum bid prices on property were provided by Progress in the first instance.” [D.E. 36 at 12]. Notwithstanding their continued failure to disclose which “Progress” entity they are referencing, Defendants’ cannot seriously contend that they are defenseless in this action without TCM’s staff emails given that representation to the

Court. Presumably, Defendants have the proof to back up their assertion—which belongs in a responsive pleading, rather than in a discovery motion.

12. Defendants simply have not shown, and they cannot show, that any of the analyst emails were “critical” to their defense of this copyright action and, hence, spoliation sanctions of any kind are wholly inappropriate. *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 770 F. Supp. 2d 1299, 1310 (N.D. Ga. 2011) (“the moving party is not able to establish that the allegedly destroyed evidence is critical to the case, courts have consistently refused to impose spoliation sanctions.”)

13. Although the Court need not reach the collateral estoppel issue, moreover, it is worth noting that the Defendants completely misstate the law on issue preclusion. Issue preclusion only occurs after entry of a final judgment. *See Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1332 (11th Cir. 2010) (“the parties and issues must be identical, and ... the particular matter [must have been] fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction.”). Interlocutory orders do not have preclusive effect and, hence, the findings of the state court judge can (and will) still be challenged in the state court action, either by way of a motion for reconsideration or on appeal. There is no bar to re-litigation of the issues, if any were even relevant, here. *See Mahshie v. Infinity Ins. Co.*, No. 12-20148-C1V, 2013 WL 12085506, at \*3 (S.D. Fla. 2013) (“Nonappealable interlocutory orders are not entitled to collateral estoppel or res judicata effect.”). Issue preclusion also requires an identity of parties, *Brown*, 611 F.3d at 1332, which is lacking here as well. *See* Exh. 1.

14. Defendants are wrong on the issue of “duty;” they are wrong on the issue of “prejudice;” and they are wrong on the “law” as it applies to issue preclusion.

15. Defendants' motions should be denied and their counsel should be admonished for presenting patently frivolous arguments in a bad faith attempt to prejudice the Court against TCM, for attempting to deceive the Court concerning the distinction between the legal entities, and for blatantly misstating the law on issue preclusion. The Defendants that have not answered should be compelled to do so, and a discovery schedule should be established.

WHEREFORE, based on the foregoing Defendants' motions, D.E. 36 and 37, should be denied.

Respectfully submitted,

/s/ Todd Wallen  
Todd Wallen  
Fla. Bar No. 151203  
Wallen Hernandez Lee Martinez, LLP  
255 Aragon Avenue, Suite 200  
Coral Gables, Florida 33134  
Tel: 305.842.2100  
Fax: 305.842.2105  
[todd@whlmlegal.com](mailto:todd@whlmlegal.com)  
*Attorneys for Plaintiff*

Respectfully submitted,

/s/ M. Keith Lipscomb  
M. Keith Lipscomb, Esq.  
Fla. Bar. No. 429554  
Lipscomb & Partners, PLLC  
25 S.E. Second Avenue, 8<sup>th</sup> Floor  
Miami, FL 33131  
Tel: (786) 431-2228  
Fax: (786) 431-2229  
[kl@lipscombparkers.com](mailto:kl@lipscombparkers.com)  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 7, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all counsel of record and interested parties through this system.

By: /s/ Todd Wallen  
Todd Wallen, Esq.