

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

~~SSS~~
FEDERAL TRADE COMMISS



I. *Preliminary Statement*

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), hereby submits its Opposition to Defendants' third emergency motion and third attempt to dismiss or stay this action. The Defendants' motion fails because Plaintiff has not destroyed any evidence. As set forth in more detail herein, the Defendants are trying to shift the blame for their own decision to destroy their "entire computer system and memory" an action the Commission believes violated the Court's Preliminary injunction.

Given that the Defendants destroyed their computer system and memory with absolutely no consultation with the FTC, the Defendants' motion should be denied. The Defendants claim to have relied upon one tiny snippet of testimony from the FTC investigator, and ignored pages of testimony which made it clear that the FTC had not yet looked at any of the data that had been imaged to determine whether everything had or had not been copied. In any case reliance is not an element of a spoliation claim. Even if it were, the Defendants' reliance was utterly unreasonable and cannot form the basis of a spoliation action against the FTC. Accordingly, Defendants' motion should be denied.

II. *Background*

On November 18, 2009, Plaintiff Federal Trade Commission filed its Complaint against the Defendants. On November 19, 2009, the Court issued an Temporary Restraining Order against Defendants.² That afternoon, the FTC together with the Receiver gained immediate access to the Defendants' business premises located on the 2nd Floor at 5100 PGA Blvd, Palm

¹ Document #170, Exhibit K (to Defendants' Motion), Declaration of Vasilios A. Christakos, ¶ 32.

² Document #13.

³ Section XVII of the Temporary Restraining Order orders the Defendants to “ . . . provide counsel for Plaintiff and the Te

been imaged by the FTC independent contractor. On December 18, 2009, the Court issued a Preliminary Injunction,⁶ and on January 11, 2010, the Court sua sponte issued an Order to articulate its Findings of Fact and Conclusions of Law.⁷ Included among the Court's findings is the fact that "Defendants use false and deceptive claims that Defendant First Universal Lending will obtain loan modifications to make consumer mortgage payments substantially more affordable in all or virtually all instances," and that "Defendants do not obtain for consumers mortgage loan modifications in all, or virtually all, instances that will make their mortgage payments substantially more affordable, as promised."⁸ The Court found that there was a substantial likelihood that Plaintiff will succeed in proving that corporate and individual Defendants violated Section 5 of the Federal Trade Commission Act ("FTC Act") and the Telemarketing Sales Rule ("TSR").⁹

Defendants Fingold, Sean Zusner, and David Zusner informed the Receiver and her attorney that all substantive consumer information, including monetary tracking, was stored on Salesforce, a cloud computing company and not maintained in the hard drives of the office computers.¹⁰ Neither the Receiver, nor her attorney, nor her agent ever directed anyone to destroy evidence, nor did they prevent Defendant Fingold from obtaining his own "images" of

⁶ Document #53.

⁷ Document #65.

⁸ Document #65, p. 4.

⁹ Document #65, pp. 158.

¹⁰ See Declaration of Tami Kudman attached hereto as Exhibit "B" at ¶ 6.

See Declaration of Tamara Kudman attached hereto as Exhibit

cynically claim was destroyed by

¹⁷ See email from FTC counsel Gideon E. Sinasohn to the Rec dated May 7, 2010, attached hereto as Exhibit "E."

¹⁸ See Declarations of Jane Mosowitz attached hereto as Exhibit "D" at ¶ 10, and the Declaration of Michelle Berg attached hereto as Exhibit "C" at ¶ 8.

¹⁹ Document #13. From November 19, 2009 until the entry of the Preliminary Injunction on December 18, 2009, the Court's Temporary Restraining Order, Section XX, Preservation of Records

them, and all other persons or entities served with copy of this Order, are hereby restrained and enjoined from directly or indirectly:

2. Destroying, secreting, defacing, mutilating, concealing, altering, transferring, or otherwise disposing of any Document of the Receivership Defendant, including but not limited to books, records, tapes, discs, accounting data, checks (fronts and backs), correspondence, forms, advertisements, website designs and texts, telemarketing scripts or outlines, brochures, manuals, banking records, customer lists, customer files, customer payment histories, invoices, telephone records, ledgers, payroll records, or other Documents of any kind, including electronically stored information; . . .²⁰

Furthermore Section V. C. of the Preliminary Injunction Order is titled "Duties of Hosts of Defendants' Computer Equipment" and requires the preservation of Defendants' computer equipment and reads, Prevent the removal of the computer equipment from its present location except as authorized by further order of this Court . . .²¹

Defendants' decision to willfully destroy the evidence from its computers also violated the Court's Preliminary Injunction Order regarding Electronically Stored Information.²²

Section X.B2 of the Preliminary Injunction Order reads, in pertinent part

Defendants . . . are hereby restrained and enjoined from directly or indirectly:

Destroying, . . . or otherwise disposing of any

²⁰ Document # 53, Section X. B.2.

²¹ Document # 53.

²² Document # 53, Section X. B.2.

Document of the Receivership Defendant, . . .
including electronically stored information; . . .²³

There is no exception to this clear provision that prohibits Defendants from destroying their electronically stored information merely because they were under the false impression that the FTC had imaged all of the data from all of their computers. The FTC quite simply had nothing to do with the destruction of any data. Any data destruction was done by the Defendants who were the only ones with access to the computers at that point in time. Moreover, there is no support for the notion that electronic evidence can be destroyed even if one of the parties had indeed imaged all of the data at issue.

“As a general matter, it is beyond question that a party to civil litigation has a duty to preserve relevant information, including ESI [electronically stored information], when that party “has notice that the evidence is relevant to litigation or . . . should have known that the evidence may be relevant to future litigation. [cites not quoted]. It is the responsibility of the parties to ensure that relevant ESI is preserved, and when that duty is breached, a district court may exercise its authority to impose appropriate discovery sanctions.” *John B. v. M.D. Goetz*, 531 F. 3d 448, 455th Cir. 2008); see also *Southeastern Mechanical Services, Inc. v Brody*, No. 8:08-CV-1151, 2009 WL 2242395 at *2 (M.D. Fla. July 24, 2009).

Here, Defendants are in the best position to determine what is relevant to their defenses. Plaintiff would not necessarily know what should be preserved in Defendants' own records that relate to Defendants' defenses. Yet, despite the knowledge that the data on the computer was relevant to this litigation, Defendants willfully destroyed it in violation of the Court's Preliminary Injunction, and now impudently try to shift the blame for the spoliation to the Plaintiff.

²³ Document # 53, Section X. B.2.

At the Preliminary Injunction hearing, Plaintiff's investigator testified that neither he nor anyone else from the FTC had yet reviewed data that had been imaged from Defendants' computers.²⁴ The FTC investigator, therefore, did not know and could not have known with certainty which, if any, of Defendants' computers had been imaged prior to the Preliminary Injunction hearing. After the Receiver returned the computers to the Defendants, the Defendants purposefully destroyed what Defendants now contend was evidence necessary for the FTC to prove its case and necessary for the Defendants to establish their defenses. Neither the Receiver, nor her attorney nor her agent ever advised the Defendants to destroy anything of an evidentiary nature.²⁵ The FTC was, until five months after the fact, unaware that the Defendants had destroyed evidence in this case.²⁶

IV. *Conclusion.*

In short, the FTC has not destroyed any evidence in this matter. It is, in fact, the Defendants who have spoliated evidence in this matter. Defendants' latest emergency motion is nothing more than yet another desperate attempt to hijack this litigation, distract the Court, and find a basis to escape the repercussions of the deceptive practices they plied on thousands of unsuspecting consumers across the United States. The FTC respectfully requests that the motion be denied and that the parties be allowed to focus on the allegations set forth in the FTC's complaint.

²⁴ Document #74, page 43, lines 1-13 (PI testimony of FTC investigator Michael Liggins) attached hereto as Exhibit "A."

²⁵ See Declaration of Tama Kudman attached hereto as Exhibit "B" at ¶ 7 and Declaration of Michelle Berg attached hereto as Exhibit "C" at ¶¶ 5 and 7.

²⁶ See email from FTC counsel Gideon E. Sinasohn to the Receiver dated May 7, 2010, attached hereto as Exhibit "E."

Dated: December 21, 2010

Respectfully submitted,

/s/Gideon E. Sinasohn

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 21, 2010, I electronically filed the foregoing
Plaintiff's Opposition to