

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

FIRST UNIVERSAL LENDING, LLC, a limited liability company,

SEAN ZAUSNER, individually and as owner, officer, or manager of First Universal Lending, LLC,

DAVID ZAUSNER, individually and as owner, officer, or manager of First Universal Lending, LLC, and

DAVID J. FEINGOLD, individually and as officer or manager of First Universal Lending, LLC,

Defendants.

**Case No. 09-82322-CIV-ZLOCH**

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO ENJOIN  
PROSECUTION AND/OR, IN THE ALTERNATIVE, MOTION FOR DISMISSAL OF  
CASE DUE TO PLAINTIFF'S SPOILIATION OF EVIDENCE**

*"Men are only clever at shifting blame from their own shoulders to those of others."*

Titus Livius

**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,”<sup>1</sup> 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 a Temporary Restraining Order against Defendants.<sup>2</sup> That afternoon, the FTC together with the Receiver gained immediate access to the Defendants’ business premises located on the 2<sup>nd</sup> Floor at 5100 PGA Blvd, Palm

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<sup>1</sup> Document #170, Exhibit K (to Defendants’ Motion), Declaration of Vasilios A. Christakos, ¶ 32.

<sup>2</sup> Document #13.

Beach Gardens, Florida.<sup>3</sup>

Upon accessing the Defendants' premises, the Court-appointed Receiver and counsel for the FTC identified what appeared to be a "boiler room" with scores of computers. Counsel for the FTC or the Receiver instructed the independent contractor IT specialist hired by the FTC to make images from certain of the computers that were thought likely to contain relevant information for the case.

From December 7 through December 11, 2009, the Court heard evidence and argument from the parties. At the hearing, the FTC made expressly clear that, at no point in time, had the FTC viewed any of the data that had been imaged from Defendants' computers.<sup>4</sup> Among the reasons for any lapse in time between the FTC's access to the premises and a review of the images from Defendants' computers was Defendant David Feingold's assertion of the attorney-client privilege on one or more of the computers found on site.<sup>5</sup> Because the FTC did not review images from Defendants' computers before the Preliminary Injunction hearing, FTC investigator Liggins did not know and could not have known which of Defendants' computers had actually

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<sup>3</sup> Section XVIII of the Temporary Restraining Order orders the Defendants to ". . . provide counsel for Plaintiff and the Temporary Receiver with any necessary means of access to documents, including, without limitation, the locations of Receivership Defendant's business premises, keys and combinations to business premises locks, computer access codes of all computers used to conduct Receivership Defendant's business, and storage area access information." Nevertheless, Defendants concealed from the Plaintiff both the existence of their 3<sup>rd</sup> floor operations at the same location and another of Defendants' operations located in Pompano Beach, Florida. These business operation locations were, in fact, never disclosed to the Plaintiff, but were later discovered by Plaintiff despite Defendants' attempts to conceal.

<sup>4</sup> Document # 74, page 43, lines 9-13, testimony of FTC investigator Liggins at the Preliminary Injunction hearing attached hereto as Exhibit "A."

<sup>5</sup> Document # 74, page 43, lines 9-13, testimony of FTC investigator Liggins at the Preliminary Injunction hearing attached hereto as Exhibit "A."

been imaged by the FTC independent contractor. On December 18, 2009, the Court issued a Preliminary Injunction,<sup>6</sup> and on January 11, 2010, the Court *sua sponte* issued an Order to articulate its Findings of Fact and Conclusions of Law.<sup>7</sup> 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 consumers' 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."<sup>8</sup> 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").<sup>9</sup>

Defendants Feingold, Sean Zausner, and David Zausner 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.<sup>10</sup> Neither the Receiver, nor her attorney, nor her agent ever directed anyone to destroy evidence, nor did they prevent Defendant Feingold from obtaining his own "images" of

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<sup>6</sup> Document #53.

<sup>7</sup> Document #65.

<sup>8</sup> Document #65, p. 4-5.

<sup>9</sup> Document #65, pp. 15-18.

<sup>10</sup> See Declaration of Tama Kudman attached hereto as Exhibit "B" at ¶ 6.

the computer hard drives.<sup>11</sup> Shortly after the hearing, sometime in December of 2009, the Receiver advised Defendant Feingold that since the computers were leased in his law firm's name and not in the Defendants' name, he could have the computers, but that if he should decide to return the computers to the leasing company, Defendants should first ensure that the computers were scrubbed clean of any personally identifiable information.<sup>12</sup> The Receiver's agent returned the Defendants' computers to Defendant Feingold.<sup>13</sup> The Receiver agreed to allow the Defendants to dispose of or dismantle the computers as they saw fit.<sup>14</sup> From the time that the Receiver's agent returned Defendants' computers to Defendants until the time that Defendants destroyed their entire computer system and memory, the Defendants had complete and unfettered access to their own computers.<sup>15</sup> During this time, Defendants apparently chose not to copy any of the data that they now contend would support their defense.

Sometime in December of 2009, without the FTC's knowledge, Defendants "disassembled, erased, and dismantled the entire computer system."<sup>16</sup> The FTC remained unaware that any computers had been returned, dismantled, or destroyed until at least May of 2010, approximately five months after Defendants destroyed the very evidence they now

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<sup>11</sup> 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.

<sup>12</sup> See Declaration of Jane Moscovitz attached hereto as Exhibit "D" at ¶ 6.

<sup>13</sup> See Declaration of Michelle Berg attached hereto as Exhibit "C" at ¶ 4.

<sup>14</sup> See Declaration of Michelle Berg attached hereto as Exhibit "C" at ¶ 5 and Declaration of Tama Kudman attached hereto as Exhibit "B" at ¶ 3.

<sup>15</sup> See Declaration of Tama Kudman attached hereto as Exhibit "B" at ¶ 7.

<sup>16</sup> Document #170, Exhibit K (to Defendants' Motion), Declaration of Vasilios A. Christakos, ¶¶ 31, 32.

cynically claim was destroyed by the Plaintiff.<sup>17</sup>

### III. *Argument*

A. The FTC has not destroyed any evidence in this case.

The Court, in *Green Leaf Nursery v. E.I. Dupont De Nemours and Co.*, 341 F.3d 1292, 1308 (11<sup>th</sup> Cir. 2003) (cited by Defendants), found that the elements of a spoliation claim are:

(1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence, which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages.

Fundamental to a spoliation claim is the underlying assumption that the party that destroyed the evidence actually had the evidence in the first place. Here, the FTC did not have the evidence at issue, and, indeed, the Commission did preserve all of the evidence that it had imaged. Plaintiff has turned over to Defendants all information that was imaged from Defendants' computers, as well as all non-privileged materials responsive to Defendants' document requests.

Additionally, the FTC has no legal or contractual duty to preserve evidence that it did not have in the first place. If anyone had that duty - both legally and contractually - it was Defendants.

Defendants provide no evidence suggesting that the FTC or its contractors destroyed any evidence that had been imaged, and their general, unsupported allegations of "bad faith" by FTC

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<sup>17</sup> See e-mail from FTC counsel Gideon E. Sinasohn to the Receiver dated May 7, 2010, attached hereto as Exhibit "E."

staff is nothing more than a continuation of Defendants' persistent attempts to distract from the fundamental allegations in this case and "try the prosecutor." The Defendants misrepresent that Counsel for the FTC has personal animus toward or bias toward Defendant Feingold, which Defendant Feingold claims was told to him in conversations he had with the Receiver's agent. This accusation is but part of Defendant Feingold's litany of falsehoods. Counsel for the FTC has not expressed his personal feelings about the Defendants, including his feelings about Defendant Feingold, to either the Receiver or her agent.<sup>18</sup>

- B. Defendants Destroyed Their Entire Computer System and Memory Without the FTC's Knowledge and in violation of the Preliminary Injunction (as well as the Temporary Restraining Order).<sup>19</sup>

Section X. B. of its Preliminary Injunction issued December 18, 2009, titled "Cooperation with the Receiver," enjoins the Defendant from destroying electronically stored information:

**Defendants** and their officers, agents, directors, servants, employees, salespersons, independent contractors, attorneys, members, partners, corporations, subsidiaries, affiliates, successors and assigns, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division or other device, or any of

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<sup>18</sup> See Declarations of Jane Moscovitz attached hereto as Exhibit "D" at ¶ 10, and the Declaration of Michelle Berg attached hereto as Exhibit "C" at ¶ 8.

<sup>19</sup> 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" restrained the Defendants ". . . from destroying, erasing, mutilating, concealing, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, any documents that relate to the business practices or finances of any Defendant, including, but not limited to, any contracts, accounting data, correspondence, advertisements, computer tapes, disks or other computerized records . . ."

them, and all other persons or entities served with a 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; . . .**<sup>20</sup>

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 . . .”<sup>21</sup>

Defendants’ decision to willfully destroy the evidence from its computers also violated the Court’s Preliminary Injunction Order regarding Electronically Stored Information.<sup>22</sup>

Section X.B.2 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

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<sup>20</sup> Document # 53, Section X. B.2.

<sup>21</sup> Document # 53.

<sup>22</sup> Document # 53, Section X. B.2.



Document of the Receivership Defendant, . . .  
including electronically stored information; . . .<sup>23</sup>

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, 459 (6<sup>th</sup> 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 their knowledge that the data on the computers 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 their spoliation to the Plaintiff.

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<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> The FTC was, until five months after the fact, unaware that the Defendants had destroyed evidence in this case.<sup>26</sup>

#### **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.

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

<sup>25</sup> 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.

<sup>26</sup> See e-mail 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 Defendants' Motion to Enjoin Prosecution and/or, in the Alternative, Motion for Dismissal of Case Due to Plaintiff's Spoliation of Evidence with the Clerk of the Southern District of Florida using the CM/ECF system, which will send notice of electronic filing to the following:

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Respectfully submitted,

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