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

TITLE CAPITAL MANAGEMENT, LLC, a Florida limited liability company, 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.	Case No. : 16-cv-21882-KMW

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, TITLE CAPITAL MANAGEMENT, LLC, ("Plaintiff" or "Title Capital") sues Defendants PROGRESS RESIDENTIAL, LLC, f/k/a Fundamental REO, LLC, ("Progress Residential"), JOHN DOE 1, FREO FLORIDA, LLC ("FREO"), JOHN DOE 2, JAMES E. ALBERTELLI, P.A. ("Albertelli P.A."), JAMES E. ALBERTELLI ("Albertelli"), and JONATHAN D. SAWYER ("Sawyer") (collectively "Defendants") and alleges:

Introduction

1. This matter arises under the United States Copyright Act of 1976, as amended, 17 U.S.C. §§ 101 et seq. (the "Copyright Act").

2. Title Capital is the owner of: (1) U.S. Copyright Registration Number TXu 1-990-009 covering an original "compilation, selection and organization of section headings of [a] real

TFB EXHIBIT
A

property spreadsheet," *see* Composite Exhibit A (certificate of registration, spreadsheet and assignment), and (2) U.S. Copyright Registration Number TXu 1-990-000 covering an original "compilation, selection and organization of section headings of [a] real property spreadsheet," *see* Composite Exhibit B (certificate of registration and spreadsheet). Collectively, the two spreadsheets covered by these two copyright registrations are referred to herein as the "Copyrighted Works."

3. After further opportunity for investigation or discovery, the facts will likely show that, in violation of 17 U.S.C. § 106, Defendants directly and indirectly infringed Plaintiff's exclusive rights to: (a) reproduce, (b) prepare derivatives of, (c) distribute, and (d) display the Copyrighted Works.

The Parties

4. Title Capital is a limited liability company organized and existing under the laws of the State of Florida.

5. Progress Residential is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business located at 7500 N. Dobson Road, Suite 300, Scottsdale, AZ 85256.

6. Progress Residential is registered with the Florida Department of State, Division of Corporations as a foreign limited liability company authorized to transact business in Florida, and may be served with process herein by delivery to its registered agent, C T Corporation System at 1200 South Pine Island Road, Plantation, FL 33324.

7. John Doe 1 is an individual whose name and address are presently unknown. He is a member, manager, or officer of Progress Residential and for the reasons set forth below is jointly and severally liable for the infringement. Plaintiff will be able to identify John Doe 1 by

name in an amended complaint after Plaintiff is able to propound and obtain discovery to determine his identity.

8. FREO is a limited liability company organized and existing under the laws of the State of Delaware, with its principal place of business located at 7500 N. Dobson Road, Suite 300, Scottsdale, AZ 85256.

9. FREO is registered with the Florida Department of State, Division of Corporations as a foreign limited liability company authorized to transact business in Florida, and may be served with process herein by delivery to its registered agent, C T Corporation System at 1200 South Pine Island Road, Plantation, FL 33324.

10. John Doe 2 is an individual whose name and address are presently unknown. He is a member, manager, or officer of FREO and for the reasons set forth below is jointly and severally liable for the infringement. Plaintiff will be able to identify John Doe 2 by name in an amended complaint after Plaintiff is able to propound and obtain discovery to determine his identity.

11. Progress Residential and FREO are related corporate entities that share a common parent or controlling interest.

12. Albertelli P.A. is a professional association organized and existing under the laws of the State of Florida, with its principal place of business located at 208 N. Laura Street, Suite 900, Jacksonville, Florida 32202.

13. Albertelli P.A. also has an office, from which it regularly conducts business, located at 633 SE 3rd Avenue, Fort Lauderdale, Florida 33301.

14. Albertelli P.A. may be served with process herein by delivery to its registered agent, Smith Husley & Bulsey, Professional Association, at 225 Water Street, Suite 1800, Jacksonville, Florida 32202.

15. Albertelli is an individual who resides at 13868 Atlantic Boulevard, Jacksonville, Florida 32224.

16. Sawyer is an individual who resides at 4925 Andros Drive, Tampa, Florida 33629.

Jurisdiction and Venue

17. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1338 (patents, copyrights, trademarks and unfair competition). This Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

18. This Court also has personal jurisdiction over all Defendants because each: (i) operated, conducted, engaged in, or carried on a business or business venture in Florida or had an office or agency in Florida from which the cause(s) of action alleged herein arise; (ii) committed the tortious act(s) alleged herein within Florida; (iii) owned, used, or possessed real property within Florida which is the subject of the cause(s) of action alleged herein; (iv) caused injury to Title Capital in Florida and in this judicial district; and/or (v) engaged in substantial and not isolated business activities in Florida.

19. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because (i) a substantial part of the events or omissions giving rise to the claim(s) occurred in this district, or (ii) Defendants are subject to the Court's personal jurisdiction within this district; additionally,

venue is proper in this judicial district pursuant to 28 U.S.C. § 1400(a) (venue for copyright cases) because Defendants' agents reside or may be found in this district.

Factual Background

A. The Nature of the Copyrighted Works

20. The Copyrighted Works are sophisticated spreadsheets created from substantial time and effort and contain an original order, selection, and arrangement of rows and columns, as well as original macros.

B. The Title Capital / FREO Business Relationship

21. FREO and Progress Residential are related companies that share a common parent or controlling interest and are in the business of acquiring and managing real property.

22. FREO acquires and holds the title to real property.

23. Progress Residential manages and collects rent from the real property owned by FREO.

24. In late 2012, Title Capital entered into a business arrangement with FREO and Progress Residential whereby Title Capital would provide services to them. A partially-executed written contract, describing the terms and conditions of the proposed business relationship, was initially sent by Title Capital to nonparty Fundamental REO LP for execution. Fundamental REO LP subsequently executed the contract and assigned its rights and obligations under the written agreement to Defendant FREO, effective November 2012. Copies of the Contract and Assignment are attached hereto as Composite Exhibit 1.

25. During the term of Title Capital and FREO and Progress Residential's business relationship, Title Capital provided FREO and Progress Residential with the Copyrighted Works.

26. In consideration for its services, and the use of the Copyrighted Works, Title Capital received a four percent (4%) commission on the real property that FREO acquired using Title Capital's services or the Copyrighted Works.

27. FREO uploaded the Copyrighted Works to a shared folder that was accessible to FREO and Progress Residential employees.

28. Title Capital, FREO and Progress Residential planned on acquiring approximately one hundred million dollars ($100,000,000) worth of real property.

29. During the term of Title Capital, FREO and Progress Residential's business relationship, FREO used Title Capital's services and the Copyrighted Works to acquire approximately thirty million dollars ($30,000,000) worth of real property.

C. Termination of the Title Capital / FREO Business Relationship and Infringement of the Copyrighted Works

30. By April 2013, FREO stopped paying Title Capital the commissions that were owed on properties that Title Capital acquired for FREO and, at that time, FREO and Progress Residential initiated meetings with a competitor seeking to perform Title Capital's work and offering to perform Title Capital's services for half the commission. FREO also stopped paying Title Capital for the title and lien searches needed to identify target properties at that time. FREO and Progress Residential terminated their business relationship with Title Capital shortly after meeting with this competitor in or about April or May of 2013.

31. After further opportunity for investigation or discovery, the facts will likely show that at or around the time of the termination of FREO and Progress Residential's business relationship with Title Capital, FREO and Progress Residential engaged Albertelli P.A., Albertelli, and Sawyer to provide substantially the same services that Title Capital had theretofore provided them.

32. Albertelli P.A., Albertelli, and Sawyer performed this work for a commission of two percent (2%), which is half the commission that FREO and Progress Residential had agreed to pay Title Capital.

33. After further opportunity for investigation or discovery, the facts will likely show that Albertelli P.A., Albertelli, and Sawyer reproduced, prepared derivative works from, publicly displayed, and otherwise used the Copyrighted Works to provide services to FREO and Progress Residential.

34. But for their infringement, Albertelli P.A., Albertelli, and Sawyer would not have earned commissions, the associated profits should be disgorged in connection with this litigation.

35. Albertelli P.A., Albertelli, and Sawyer also performed ancillary legal services for FREO and Progress including title and lien searches for which they made fees.

36. But for their infringement, Albertelli P.A., Albertelli, and Sawyer would not have made these fees, the associated profits should be disgorged in connection with this litigation.

37. After further opportunity for investigation or discovery, the facts will likely show that FREO, Progress Residential, Albertelli P.A., and Albertelli reproduced, prepared derivative works from, publicly displayed, and otherwise used the Copyrighted Works to identify, price, and then cause FREO to purchase approximately forty million dollars ($40,000,000) worth of real property.

38. As intended at the time of acquisitions, the real property acquired by FREO with Albertelli P.A., Albertelli, and Sawyer's assistance appreciated substantially.

39. Progress Residential managed and collected rents from the real property acquired by FREO when it was working with Albertelli P.A., Albertelli, and Sawyer.

40. Title Capital did not authorize FREO, Progress Residential, Albertelli P.A., Albertelli, or Sawyer to reproduce, prepare derivative works from, to publicly display, or to otherwise use the Copyrighted Works when Title Capital was not involved.

41. After further opportunity for investigation or discovery, the facts will likely show that FREO and Progress Residential distributed copies of the Copyrighted Works to Albertelli P.A., Albertelli, and Sawyer with the intention and knowledge that they would reproduce, prepare derivative works from, publicly display, and otherwise use the Copyrighted Works in the performance of their services to FREO and Progress Residential.

42. Title Capital did not authorize FREO and Progress Residential's distribution of the Copyrighted Works to Albertelli P.A., Albertelli, or Sawyer.

43. John Doe 1 knew or should have known that Progress Residential was not authorized to reproduce, prepare derivative works from, public display, and otherwise use the Copyrighted Works after FREO, Progress Residential and Title Capital's business relationship was terminated.

44. John Doe 2 knew or should have known FREO was not authorized reproduce, prepare derivative works from, public display, and otherwise use the Copyrighted Works after FREO, Progress Residential and Title Capital's business relationship was terminated.

45. After further opportunity for investigation or discovery, the facts will likely show that John Doe 1 personally directed and benefited from Progress Residential's infringement of the Copyrighted Works.

46. John Doe 1 possessed the authority to prevent the infringement of the Copyrighted Works.

47. After further opportunity for investigation or discovery, the facts will likely show that John Doe 2 personally directed and benefited from FREO's infringement of the Copyrighted Works.

48. John Doe 2 possessed the authority to prevent the infringement of the Copyrighted Works.

49. Progress Residential and FREO, and John Does 1 and 2 through their respective positions at Progress Residential and FREO, had the right and ability to supervise or control the manner in which Albertelli P.A., Albertelli, and Sawyer provided their services.

50. After further opportunity for investigation or discovery, the facts will likely show that John Doe 1 personally directed and benefited from Progress Residential's unauthorized distribution of the Copyrighted Works to Albertelli P.A., Albertelli, and Sawyer, rather than utilizing the authority and power of his position with Progress Residential to prevent such actions.

51. After further opportunity for investigation or discovery, the facts will likely show that John Doe 2 personally directed and benefited from FREO's unauthorized distribution of the Copyrighted Works to Albertelli P.A., Albertelli, and Sawyer rather than utilizing the authority and power of his position with FREO to prevent such actions.

52. Indeed, as a result of the infringements, John Does 1 and 2 profited from the infringements described herein through the receipt of payment in the form of salaries, bonuses, dividends, and/or distributions.

53. Title Capital did not authorize Albertelli P.A., Albertelli, and Sawyer's reproduction, preparation of derivative works from, public display, and other uses of the Copyrighted Works, and Defendants knew or should have known that such was not authorized.

54. After further opportunity for investigation or discovery, the facts will likely show that Albertelli personally directed and benefited from Albertelli P.A.'s unauthorized reproduction, preparation of derivative works from, public display, and other uses of the Copyrighted Works, rather than utilizing the authority and power of his position with Albertelli P.A. to prevent such actions.

55. As a result of the infringements described herein, FREO profited by, inter alias: (i) the reduced commissions paid to Albertelli P.A., Albertelli, and Sawyer; and (ii) through the acquisition of and appreciation in value of the real property; these profits should be disgorged in connection with this litigation.

56. As a result of the infringements described herein, Progress Residential profited by receiving rental income and management fees, and these profits should be disgorged in connection with this litigation.

Miscellaneous

57. All conditions precedent to brining this action have occurred or been waived.

COUNT I
Direct Infringement of Copyrights
(Against Defendant Progress Residential, LLC)

58. The allegations set forth in paragraphs 1-57 are hereby re-alleged as if fully set forth herein.

59. Title Capital is the owner of the Copyrighted Works each of which covers an original work of authorship.

60. After further opportunity for investigation or discovery, the facts will likely show that Progress Residential reproduced, distributed, and/or displayed the constituent elements of each of the original Copyrighted Works, and/or created derivative works based thereon.

61. Plaintiff did not permit, consent, or authorize Defendant's copying, distributing, displaying, or creating derivate works based on the Copyrighted Works.

62. As a result of the foregoing, Progress Residential violated Plaintiff's exclusive rights to:

A. Reproduce the Copyrighted Works in copies, in violation of 17 U.S.C. §§ 106(1) and 501;

B. Prepare derivative works based upon the Copyrighted Works, in violation of 17 U.S.C. §§ 106(2) and 501;

C. Distribute copies of the Copyrighted Works to the public by sale or other transfer of ownership, or by rental lease, or lending, in violation of 17 U.S.C. §§ 106(3) and 501; and

D. Display the Copyrighted Works publicly, in violation of 17 U.S.C. §§ 106(5) and 501.

63. Progress Residential's infringements were committed "willfully" within the meaning of 17 U.S.C. § 504(c)(2).

64. As a direct and proximate result of Progress Residential's infringement Plaintiff suffered substantial monetary damages and other irreparable harm.

65. As a direct and proximate result of Progress Residential's infringement Progress Residential made substantial profits.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of Plaintiff and against Defendant as follows:

(A) Permanently enjoin Defendant from continuing to infringe Plaintiff's exclusive copyrights;

(B) Order that Defendant destroy all copies of Plaintiff's Copyrighted Works that are in Defendant's possession, custody, or control;

(C) Award Plaintiff the actual damages suffered as a result of the infringements and Defendant's profits that are attributable to the infringements, pursuant to 17 U.S.C. § 504(b); and

(D) Grant Plaintiff all such other and further relief this Court deems just and proper.

COUNT II
Direct Infringement of Copyrights
(Against Defendant FREO Florida, LLC)

66. The allegations set forth in paragraphs 1-57 are hereby re-alleged as if fully set forth herein.

67. Plaintiff is the owner of the Copyrighted Works each of which covers an original work of authorship.

68. After further opportunity for investigation or discovery, the facts will likely show that FREO reproduced, distributed, and/or displayed the constituent elements of each of the original Copyrighted Works, and/or created derivative works based thereon.

69. Plaintiff did not permit, consent, or authorize FREO's copying, distributing, displaying, or creating derivate works based on the Copyrighted Works.

70. As a result of the foregoing, FREO violated Plaintiff's exclusive rights to:

A. Reproduce the Copyrighted Works in copies, in violation of 17 U.S.C. §§ 106(1) and 501;

B. Prepare derivative works based upon the Copyrighted Works, in violation of 17 U.S.C. §§ 106(2) and 501;

C. Distribute copies of the Copyrighted Works to the public by sale or other transfer of ownership, or by rental lease, or lending, in violation of 17 U.S.C. §§ 106(3) and 501; and/or

D. Display the Copyrighted Works publicly, in violation of 17 U.S.C. §§ 106(5) and 501.

71. Defendant's infringements were committed "willfully" within the meaning of 17 U.S.C. § 504(c)(2).

72. As a direct and proximate result of Defendant's wrongful conduct, Plaintiff has suffered substantial monetary damages and other irreparable harm.

73. As a direct and proximate result of FREO's infringement FREO made substantial profits.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of Plaintiff and against Defendant as follows:

(A) Permanently enjoin Defendant from continuing to infringe Plaintiff's exclusive copyrights;

(B) Order that Defendant destroy all copies of Plaintiff's Copyrighted Works that are in Defendant's possession, custody, or control;

(C) Award Plaintiff the actual damages suffered as a result of the infringements and Defendant's profits that are attributable to the infringements, pursuant to 17 U.S.C. § 504(b); and

(D) Grant Plaintiff all such other and further relief this Court deems just and proper.

COUNT III
Direct Infringement of Copyrights
(Against Defendant James E. Albertelli, P.A.)

74. The allegations set forth in paragraphs 1-57 are hereby re-alleged as if fully set forth herein.

75. Plaintiff is the owner of the Copyrighted Works each of which covers an original work of authorship.

76. After further opportunity for investigation or discovery, the facts will likely show that Albertelli, P.A. reproduced, distributed, and/or displayed the constituent elements of each of the original Copyrighted Works, and/or created derivative works based thereon.

77. Plaintiff did not permit, consent, or authorize Defendant's copying, distributing, displaying, or creating derivate works based on the Copyrighted Works.

78. As a result of the foregoing, Albertelli P.A. violated Plaintiff's exclusive rights to:

A. Reproduce the Copyrighted Works in copies, in violation of 17 U.S.C. §§ 106(1) and 501;

B. Prepare derivative works based upon the Copyrighted Works, in violation of 17 U.S.C. §§ 106(2) and 501;

C. Distribute copies of the Copyrighted Works to the public by sale or other transfer of ownership, or by rental lease, or lending, in violation of 17 U.S.C. §§ 106(3) and 501; and/or

D. Display the Copyrighted Works publicly, in violation of 17 U.S.C. §§ 106(5) and 501.

79. Albertelli P.A.'s infringements were committed "willfully" within the meaning of 17 U.S.C. § 504(c)(2).

80. As a direct and proximate result of Albertelli P.A.'s wrongful conduct, Plaintiff has suffered substantial monetary damages and other irreparable harm.

81. As a direct and proximate result of Albertelli P.A.'s infringement, Albertelli P.A. made substantial profits.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of Plaintiff and against Defendant as follows:

(A) Permanently enjoin Defendant from continuing to infringe Plaintiff's exclusive copyrights;

(B) Order that Defendant destroy all copies of Plaintiff's Copyrighted Works that are in Defendant's possession, custody, or control;

(C) Award Plaintiff the actual damages suffered as a result of the infringements and Defendant's profits that are attributable to the infringements, pursuant to 17 U.S.C. § 504(b); and

(D) Grant Plaintiff all such other and further relief this Court deems just and proper.

COUNT IV
Direct Infringement of Copyrights
(Against Defendant James E. Albertelli)

82. The allegations set forth in paragraphs 1-57 are hereby re-alleged as if fully set forth herein.

83. Plaintiff is the owner of the Copyrighted Works each of which covers an original work of authorship.

84. After further opportunity for investigation or discovery, the facts will likely show that Albertelli reproduced, distributed, and/or displayed the constituent elements of each of the original Copyrighted Works, and/or created derivative works based thereon.

85. Plaintiff did not permit, consent, or authorize Defendant's copying, distributing, displaying, or creating derivate works based on the Copyrighted Works.

86. As a result of the foregoing, Albertelli violated Plaintiff's exclusive rights to:

A. Reproduce the Copyrighted Works in copies, in violation of 17 U.S.C. §§ 106(1) and 501;

B. Prepare derivative works based upon the Copyrighted Works, in violation of 17 U.S.C. §§ 106(2) and 501;

C. Distribute copies of the Copyrighted Works to the public by sale or other transfer of ownership, or by rental lease, or lending, in violation of 17 U.S.C. §§ 106(3) and 501; and/or

D. Display the Copyrighted Works publicly, in violation of 17 U.S.C. §§ 106(5) and 501.

87. Albertelli's infringements were committed "willfully" within the meaning of 17 U.S.C. § 504(c)(2).

88. As a direct and proximate result of Albertelli's wrongful conduct, Plaintiff has suffered substantial monetary damages and other irreparable harm.

89. As a direct and proximate result of Albertelli's infringement, Albertelli made substantial profits.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of Plaintiff and against Defendant as follows:

(A) Permanently enjoin Defendant from continuing to infringe Plaintiff's exclusive copyrights;

(B) Order that Defendant destroy all copies of Plaintiff's Copyrighted Works that are in Defendant's possession, custody, or control;

(C) Award Plaintiff the actual damages suffered as a result of the infringements and Defendant's profits that are attributable to the infringements, pursuant to 17 U.S.C. § 504(b); and

(D) Grant Plaintiff all such other and further relief this Court deems just and proper.

COUNT V
Direct Infringement of Copyrights
(Against Defendant Johnathan D. Sawyer)

90. The allegations set forth in paragraphs 1-57 are hereby re-alleged as if fully set forth herein.

91. Plaintiff is the owner of the Copyrighted Works each of which covers an original work of authorship.

92. After further opportunity for investigation or discovery, the facts will likely show that Sawyer reproduced, distributed, and/or displayed the constituent elements of each of the original Copyrighted Works, and/or created derivative works based thereon.

93. Plaintiff did not permit, consent, or authorize Defendant's copying, distributing, displaying, or creating derivate works based on the Copyrighted Works.

94. As a result of the foregoing, Sawyer violated Plaintiff's exclusive rights to:

A. Reproduce the Copyrighted Works in copies, in violation of 17 U.S.C. §§ 106(1) and 501;

B. Prepare derivative works based upon the Copyrighted Works, in violation of 17 U.S.C. §§ 106(2) and 501;

C. Distribute copies of the Copyrighted Works to the public by sale or other transfer of ownership, or by rental lease, or lending, in violation of 17 U.S.C. §§ 106(3) and 501; and/or

D. Display the Copyrighted Works publicly, in violation of 17 U.S.C. §§ 106(5) and 501.

95. Sawyer's infringements were committed "willfully" within the meaning of 17 U.S.C. § 504(c)(2).

96. As a direct and proximate result of Sawyer's wrongful conduct, Plaintiff has suffered substantial monetary damages and other irreparable harm.

97. As a direct and proximate result of Sawyer's infringement, Sawyer made substantial profits.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of Plaintiff and against Defendant as follows:

(A) Permanently enjoin Defendant from continuing to infringe Plaintiff's exclusive copyrights;

(B) Order that Defendant destroy all copies of Plaintiff's Copyrighted Works that are in Defendant's possession, custody, or control;

(C) Award Plaintiff the actual damages suffered as a result of the infringements and Defendant's profits that are attributable to the infringements, pursuant to 17 U.S.C. § 504(b); and

(D) Grant Plaintiff all such other and further relief this Court deems just and proper.

COUNT VI
Indirect Infringement of Copyrights
(Against Defendant Progress Residential, LLC)

98. The allegations set forth in paragraphs 1-57 are hereby re-alleged as if fully set forth herein.

99. Plaintiff is the owner of the Copyrighted Works each of which covers an original work of authorship.

100. After further opportunity for investigation or discovery, the facts will likely show that Progress Residential distributed copies of the Copyrighted Works to Albertelli P.A., Albertelli, and Sawyer for the purpose of causing them to use the Copyrighted Works in ways that infringe Plaintiff's exclusive copyrights.

101. As such, Progress Residential induced and is liable for Albertelli P.A., Albertelli, and Sawyer's infringements of Plaintiff's exclusive copyrights.

102. After further opportunity for investigation or discovery, the facts will likely show that Defendant, with knowledge of the infringing activity, induced, caused, or materially

contributed to Albertelli P.A., Albertelli, and Sawyer's infringements of Plaintiff's exclusive copyrights.

103. At all relevant times, Progress Residential had the right and ability to supervise or control Albertelli P.A., Albertelli, and Sawyer's infringing conduct. Defendant failed to exercise sufficient supervision or control to prevent Albertelli P.A., Albertelli, and Sawyer's infringements. After further opportunity for investigation or discovery, the facts will likely show that as a direct and proximate result of such failure, Albertelli P.A., Albertelli, and Sawyer infringed Plaintiff's exclusive copyrights.

104. Progress Residential derived substantial financial benefits from Albertelli P.A., Albertelli, and Sawyer's infringements.

105. Progress Residential's conduct constitutes contributory and vicarious infringement of Plaintiff's copyrights in violation of 17 U.S.C. §§ 106, 115, and 501, and further constitutes inducement of infringement.

106. Progress Residential's contributory, vicarious, and inducement of infringement was committed "willfully" within the meaning of 17 U.S.C. § 504(c)(2).

107. As a direct and proximate result of Progress Residential's infringement Plaintiff has suffered substantial monetary damages and other irreparable harm.

108. As a direct and proximate result of Progress Residential's infringement, Progress Residential made substantial profits.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of Plaintiff and against Defendant as follows:

(A) Permanently enjoin Defendant from continuing to infringe Plaintiff's exclusive copyrights;

(B) Order that Defendant destroy all copies of Plaintiff's Copyrighted Works that are in Defendant's possession, custody, or control;

(C) Award Plaintiff the actual damages suffered as a result of the infringements and Defendant's profits that are attributable to the infringements, pursuant to 17 U.S.C. § 504(b); and

(D) Grant Plaintiff all such other and further relief this Court deems just and proper.

COUNT VII
Indirect Infringement of Copyrights
(Against Defendant FREO Florida, LLC)

109. The allegations set forth in paragraphs 1-57 are hereby re-alleged as if fully set forth herein.

110. Plaintiff is the owner of the Copyrighted Works each of which covers an original work of authorship.

111. After further opportunity for investigation or discovery, the facts will likely show that FREO distributed copies of the Copyrighted Works to Albertelli P.A., Albertelli, and Sawyer for the purpose of causing them to use the Copyrighted Works in ways that infringe Plaintiff's exclusive copyrights.

112. As such, FREO induced and is liable for Albertelli P.A., Albertelli, and Sawyer's infringements of Plaintiff's exclusive copyrights.

113. After further opportunity for investigation or discovery, the facts will likely show that Defendant, with knowledge of the infringing activity, induced, caused, or materially contributed to Albertelli P.A., Albertelli, and Sawyer's infringements of Plaintiff's exclusive copyrights.

114. At all relevant times, FREO had the right and ability to supervise or control Albertelli P.A., Albertelli, and Sawyer's infringing conduct. Defendant failed to exercise

sufficient supervision or control to prevent Albertelli P.A., Albertelli, and Sawyer's infringements. After further opportunity for investigation or discovery, the facts will likely show that as a direct and proximate result of such failure, Albertelli P.A., Albertelli, and Sawyer infringed Plaintiff's exclusive copyrights.

115. FREO derived substantial financial benefits from Albertelli P.A., Albertelli, and Sawyer's infringements.

116. FREO's conduct constitutes contributory and vicarious infringement of Plaintiff's copyrights in violation of 17 U.S.C. §§ 106, 115, and 501, and further constitutes inducement of infringement.

117. FREO's contributory, vicarious, and inducement of infringement was committed "willfully" within the meaning of 17 U.S.C. § 504(c)(2).

118. As a direct and proximate result of FREO's infringement Plaintiff has suffered substantial monetary damages and other irreparable harm.

119. As a direct and proximate result of FREO's infringement, FREO made substantial profits.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of Plaintiff and against Defendant as follows:

(A) Permanently enjoin Defendant from continuing to infringe Plaintiff's exclusive copyrights;

(B) Order that Defendant destroy all copies of Plaintiff's Copyrighted Works that are in Defendant's possession, custody, or control;

(C) Award Plaintiff the actual damages suffered as a result of the infringements and Defendant's profits that are attributable to the infringements, pursuant to 17 U.S.C. § 504(b); and

(D) Grant Plaintiff all such other and further relief this Court deems just and proper.

COUNT VIII
Indirect Infringement of Copyrights
(Against Defendant John Doe 1)

120. The allegations set forth in paragraphs 1-57 are hereby re-alleged as if fully set forth herein.

121. Plaintiff is the owner of the Copyrighted Works each of which covers an original work of authorship.

122. John Doe 1 was a member, manager, or officer of Progress Residential with the right and ability to supervise or control the conduct of its employees and agents.

123. After further opportunity for investigation or discovery, the facts will likely show that John Doe 1, with knowledge of the infringing activity, directed, participated in, induced, caused, materially contributed to, and benefited from: (A) Progress Residential's use of the Copyrighted Works in ways that infringed Plaintiff's exclusive copyrights therein; and (B) Progress Residential's unauthorized distribution of the Copyrighted Works to Albertelli P.A., Albertelli, and Sawyer for the purpose of allowing Albertelli P.A., Albertelli, and Sawyer to use the Copyrighted Works in ways that infringed Plaintiff's exclusive copyrights.

124. At all relevant times, John Doe 1 had the right and ability to supervise or control Progress Residential's direct and indirect infringing conduct. Defendant failed to exercise sufficient supervision or control to prevent Progress Residential's infringements. After further opportunity for investigation or discovery, the facts will likely show that as a direct and proximate result of such failure, Progress Residential directly and indirectly infringed the Copyrighted Works.

125. John Doe 1 derived substantial financial benefits from Progress Residential's direct and indirect infringements of the Copyrighted Works.

126. John Doe 1's conduct constitutes contributory and vicarious infringement of Plaintiff's copyrights in violation of 17 U.S.C. §§ 106, 115, and 501, and further constitutes inducement of infringement.

127. As such, John Doe 1 is liable for Progress Residential's direct and indirect infringement.

128. John Doe 1's contributory, vicarious, and inducement of infringement was committed "willfully" within the meaning of 17 U.S.C. § 504(c)(2).

129. As a direct and proximate result of John Doe 1's infringement, Plaintiff has suffered substantial monetary damages and other irreparable harm.

130. As a direct and proximate result of John Doe 1's infringement, John Doe 1 made substantial profits.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of Plaintiff and against Defendant as follows:

(A) Permanently enjoin Defendant from continuing to infringe Plaintiff's exclusive copyrights;

(B) Order that Defendant destroy all copies of Plaintiff's Copyrighted Works that are in Defendant's possession, custody, or control;

(C) Award Plaintiff the actual damages suffered as a result of the infringements and Defendant's profits that are attributable to the infringements, pursuant to 17 U.S.C. § 504(b); and

(D) Grant Plaintiff all such other and further relief this Court deems just and proper.

COUNT IX
Indirect Infringement of Copyrights
(Against Defendant John Doe 2)

131. The allegations set forth in paragraphs 1-57 are hereby re-alleged as if fully set forth herein.

132. Plaintiff is the owner of the Copyrighted Works each of which covers an original work of authorship.

133. John Doe 2 was a member, manager, or officer of FREO with the right and ability to supervise or control the conduct of its employees and agents.

134. After further opportunity for investigation or discovery, the facts will likely show that John Doe 2, with knowledge of the infringing activity, directed, participated in, induced, caused, materially contributed to, and benefited from: (A) FREO's use of the Copyrighted Works in ways that infringed Plaintiff's exclusive copyrights therein; and (B) FREO's unauthorized distribution of the Copyrighted Works to Albertelli P.A., Albertelli, and Sawyer for the purpose of allowing Albertelli P.A., Albertelli, and Sawyer to use the Copyrighted Works in ways that infringed Plaintiff's exclusive copyrights.

135. At all relevant times, John Doe 2 had the right and ability to supervise or control FREO's direct and indirect infringing conduct. Defendant failed to exercise sufficient supervision or control to prevent FREO's infringements. After further opportunity for investigation or discovery, the facts will likely show that as a direct and proximate result of such failure, FREO directly and indirectly infringed the Copyrighted Works.

136. John Doe 2 derived substantial financial benefits from FREO's direct and indirect infringements of the Copyrighted Works.

137. Defendant's conduct constitutes contributory and vicarious infringement of Plaintiff's copyrights in violation of 17 U.S.C. §§ 106, 115, and 501, and further constitutes inducement of infringement.

138. As such, John Doe 2 is liable for FREO's resulting direct and indirect infringement.

139. John Doe 2's contributory, vicarious, and inducement of infringement was committed "willfully" within the meaning of 17 U.S.C. § 504(c)(2).

140. As a direct and proximate result of John Doe 2's wrongful conduct, Plaintiff has suffered substantial monetary damages and other irreparable harm.

141. As a direct and proximate result of John Doe 2's infringement, John Doe 2 made substantial profits.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of Plaintiff and against Defendant as follows:

(A) Permanently enjoin Defendant from continuing to infringe Plaintiff's exclusive copyrights;

(B) Order that Defendant destroy all copies of Plaintiff's Copyrighted Works that are in Defendant's possession, custody, or control;

(C) Award Plaintiff the actual damages suffered as a result of the infringements and Defendant's profits that are attributable to the infringements, pursuant to 17 U.S.C. § 504(b); and

(D) Grant Plaintiff all such other and further relief this Court deems just and proper.

COUNT X
Indirect Infringement of Copyrights
(Against Defendant James E. Albertelli)

142. The allegations set forth in paragraphs 1-57 are hereby re-alleged as if fully set forth herein.

143. Plaintiff is the owner of the Copyrighted Works each of which covers an original work of authorship.

144. Albertelli was a shareholder, director, executive, and/or officer of Albertelli P.A. with the right and ability to supervise or control the conduct of its employees and agents.

145. After further opportunity for investigation or discovery, the facts will likely show that Albertelli, with knowledge of the infringing activity, directed, participated in, induced, caused, materially contributed to, and benefited from Albertelli P.A.'s use of the Copyrighted Works in ways that infringed Plaintiff's exclusive copyrights.

146. At all relevant times, Albertelli had the right and ability to supervise or control Albertelli P.A.'s infringing conduct. Defendant failed to exercise sufficient supervision or control to prevent Albertelli P.A.'s infringements. After further opportunity for investigation or discovery, the facts will likely show that as a direct and proximate result of such failure, Albertelli P.A. infringed the Copyrighted Works.

147. Defendant derived substantial financial benefits from Albertelli P.A.'s infringement.

148. Defendant's conduct constitutes contributory and vicarious infringement of Plaintiff's copyrights in violation of 17 U.S.C. §§ 106, 115, and 501, and further constitutes inducement of infringement.

149. As such, Albertelli is liable for Albertelli P.A.'s infringement.

150. Albertelli's contributory, vicarious, and inducement of infringement was committed "willfully" within the meaning of 17 U.S.C. § 504(c)(2).

151. As a direct and proximate result of Albertelli's wrongful conduct, Plaintiff has suffered substantial monetary damages and other irreparable harm.

152. As a direct and proximate result of Albertelli's infringement, Albertelli made substantial profits.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of Plaintiff and against Defendant as follows:

(A) Permanently enjoin Defendant from continuing to infringe Plaintiff's exclusive copyrights;

(B) Order that Defendant destroy all copies of Plaintiff's Copyrighted Works that are in Defendant's possession, custody, or control;

(C) Award Plaintiff the actual damages suffered as a result of the infringements and Defendant's profits that are attributable to the infringements, pursuant to 17 U.S.C. § 504(b); and

(D) Grant Plaintiff all such other and further relief this Court deems just and proper.

COUNT XI
Indirect Infringement of Copyrights
(Against Defendant Jonathan D. Sawyer)

153. The allegations set forth in paragraphs 1-57 are hereby re-alleged as if fully set forth herein.

154. Plaintiff is the owner of the Copyrighted Works each of which covers an original work of authorship.

155. Sawyer was a shareholder, director, executive, and/or officer of Albertelli P.A. with the right and ability to supervise or control the conduct of its employees and agents.

156. After further opportunity for investigation or discovery, the facts will likely show that Sawyer, with knowledge of the infringing activity, directed, participated in, induced, caused, materially contributed to, and benefited from Albertelli P.A.'s use of the Copyrighted Works in ways that infringed Plaintiff's exclusive copyrights.

157. At all relevant times, Sawyer had the right and ability to supervise or control Albertelli P.A.'s infringing conduct. Defendant failed to exercise sufficient supervision or control to prevent Albertelli P.A.'s infringements. After further opportunity for investigation or discovery, the facts will likely show that as a direct and proximate result of such failure, Albertelli P.A. infringed the Copyrighted Works.

158. Defendant derived substantial financial benefits from Albertelli P.A.'s infringement.

159. Defendant's conduct constitutes contributory and vicarious infringement of Plaintiff's copyrights in violation of 17 U.S.C. §§ 106, 115, and 501, and further constitutes inducement of infringement.

160. As such, Sawyer is liable for Albertelli P.A.'s infringement.

161. Sawyer's contributory, vicarious, and inducement of infringement was committed "willfully" within the meaning of 17 U.S.C. § 504(c)(2).

162. As a direct and proximate result of Sawyer's wrongful conduct, Plaintiff has suffered substantial monetary damages and other irreparable harm.

163. As a direct and proximate result of Sawyer's infringement, Sawyer made substantial profits.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of Plaintiff and against Defendant as follows:

(A) Permanently enjoin Defendant from continuing to infringe Plaintiff's exclusive copyrights;

(B) Order that Defendant destroy all copies of Plaintiff's Copyrighted Works that are in Defendant's possession, custody, or control;

(C) Award Plaintiff the actual damages suffered as a result of the infringements and Defendant's profits that are attributable to the infringements, pursuant to 17 U.S.C. § 504(b); and

(D) Grant Plaintiff all such other and further relief this Court deems just and proper.

COUNT XII
Breach of Contract
(Against Defendant FREO Florida LLC)

164. The allegations set forth in paragraphs 1-57 are hereby re-alleged as if fully set forth herein.

165. In November 2012, FREO accepted an assignment of a written contract that required it to pay Title Capital a four percent (4%) commission on the winning bid price for all properties acquired by Title Capital for FREO.

166. Between November 2012 and April 2013, FREO performed on its obligation to pay Title Capital its four percent commission on properties acquired at auction for FREO.

167. In April 2013, Title Capital successfully acquired ten (10) properties at auction for FREO. Despite demand by Title Capital, FREO has refused to pay TCM its four percent commission for the acquisition of these properties.

168. FREO's refusal to pay these commissions is a material breach of the Contract.

169. Title Capital also completed title and lien searches for approximately 2000 properties in or about April 2013 in an effort to determine target properties. Pursuant to the

Contract FREO was obligated to pay Title Capital $30.00 per title search and was required to reimburse Title Capital's costs for the lien searches.

170. FREO failed to pay Title Capital for these title and lien searches, which constituted another material breach of the Contract.

171. As a direct and proximate result of FREO's breaches, Title Capital has been damaged in excess of $75,000.00

172. Title Capital performed all material obligations under the Contract and all conditions precedent to the institution and maintenance of this action have been satisfied, fulfilled, or otherwise waived.

173. Title Capital has retained the undersigned counsel to represent its interests in this action is obligated to pay a fee for counsel's services. Pursuant to the Contract, Title Capital is entitled to recover its attorneys' fees, expenses and costs in seeking to enforce the Contract.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of Plaintiff and against Defendant FREO Florida LLC as follows:

(A) Award Plaintiff the actual damages suffered as a result of the breaches of contract, plus interest;

(B) Award Plaintiff its Attorneys' Fees and Costs, as incurred in seeking to enforce payment under the Contract; and

(C) Grant Plaintiff all such other and further relief this Court deems just and proper.

COUNT XIII
Breach of Verbal Conrtact
(Against Defendant FREO Florida LLC)

174. The allegations set forth in paragraphs 1-57 are hereby re-alleged as if fully set forth herein.

175. In the event that the written Contract and/or Assignment are deemed invalid, FREO Florida breached a verbal agreement with Title Capital that required it to pay Title Capital a four percent commission on the winning bid price for properties that Title Capital successfully acquired at auction for FREO after November 2012 and that required it to pay Title Capital $30.00 for title searches and to reimburse Title Capital for the cost of lien searches, which are necessary to identify target properties.

176. Between November 2012 and May 2013, Title Capital and FREO had an agreement whereby Title Capital would perform auction bidding services for FREO and, in return, FREO would pay Title Capital a fee of four percent of the winning bid price on all properties that Title Capital acquired at auction for FREO. The agreement also required FREO to pay Title Capital $30.00 for title searches and to reimburse the costs of lien searches.

177. The parties fully performed based on this agreement and, between November 2012 and April 2013, FREO paid Title Capital its four percent fee on properties acquired for FREO, and it paid the title search fees and lien search reimbursements.

178. In reliance on the aforementioned agreement, and based on past performance by FREO, Title Capital conducted title and lien searches on approximately 2,000 properties and subsequently acquired ten (10) of them at auction for FREO during the month of April 2013. Despite demand by Title Capital, however, FREO has refused to pay TCM its four percent commission for the acquisition of these properties and it has not paid for the title and lien searches.

179. FREO's refusal to pay the commissions and for the title and lien searches constitutes a material breach of the agreement between the parties.

180. As a direct and proximate result of FREO's breach, Title Capital has been damaged in an amount that exceeds $75,000.00.

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor of Plaintiff and against Defendant FREO Florida LLC as follows:

(A) Award Plaintiff the actual damages suffered as a result of the breaches of contract, plus interest; and

(B) Grant Plaintiff all such other and further relief this Court deems just and proper.

Demand For Jury Trial

Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: September 30, 2016.

Respectfully submitted,

/s/ M. Keith Lipscomb
M. Keith Lipscomb, Esq.
Fla. Bar No. 429554
David F. Tamaroff, Esq.
Fla. Bar No. 92084
LIPSCOMB, EISENBERG & BAKER, PL
2 S. Biscayne Boulevard, Penthouse 3800
Miami, Florida 33131
Tel: (786) 431-2228
Fax: (786) 431-2229
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-and-

Todd L. Wallen, Esq.
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todd@whlmlegal.com
jlee@whlmlegal.com
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of September, 2016, a true and correct copy of the foregoing was filed with the Clerk of the Court and served on all of those parties receiving electronic notification via the Court's CM/ECF electronic filing system.

By: /s/David F. Tamaroff
David F. Tamaroff

FLORIDA ACQUISITION SERVICES AGREEMENT

THIS BIDDING AGREEMENT (this "Agreement"), dated as of November ____, 2012 (the "Effective Date") is entered into by and between Fundamental REO LP, a Delaware Limited Partnership ("FREO"), and Title Capital Management LLC, a Florida limited liability company ("TCM")(each individually, a "Party" and collectively, the "Parties").

RECITALS

WHEREAS, FREO is a real estate investment fund that acquires, leases and manages single family assets across the United States; and

WHEREAS, TCM is a service provider for the procurement of distressed real estate acquisitions in the State of Florida and an expert in the foreclosure auction arena;

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and obligations set forth in this Agreement, the Parties hereby agree as follows:

1. **Services to be Provided by TCM.** TCM will provide the following services to FREO:
    a. Bid at County Foreclosure Auctions in counties designated by FREO, which presently include Charlotte, Duval, Hillsborough, Lee, Manatee, Orange, Pasco, Pinellas and Polk. This list of counties may be expanded or reduced from time to time.
    b. Complete due diligence on properties that are the subject of upcoming foreclosure auctions including:
        i. Conducting a Title Search on each FREO designated target; and
        ii. Conducting a Lien Search on each FREO designated target.
    c. Provide title insurance on each property acquired at auction by TCM for FREO.

2. **Payment Terms.**
    a. For the auction bidding, FREO will pay TCM 4% (FOUR PERCENT) of the auction winning bid price for each property successfully acquired by TCM for FREO at auction (the "Bidding Fee").
    b. For due diligence matters, FREO shall pay TCM the following:
        i. $30 per Title Search conducted; and
        ii. Reimbursement of any Lien Search fees, if any, charged by the municipality, county or city where a FREO designated target is located.
    c. For title insurance, FREO will pay TCM the Florida promulgated rate and any additional charge for a certified title search charged by the title underwriter.

A

3. **Payment Schedule.**
   a. For the auction bidding, FREO will pay TCM the Bidding Fee per property when FREO delivers the balance of winning auction bid payment to the applicable Clerk of Court, which is within 24 business hours of successfully winning the bid.
   b. For due diligence matters, TCM will invoice FREO monthly and FREO will deliver payment to TCM upon receipt of the invoice.
   c. For title insurance, FREO will pay TCM per property upon issuance and delivery of the title policy to FREO.

4. **Notices.** All notices, demands or other communications given hereunder shall be in writing and shall be deemed to have been duly given when delivered in person or transmitted by facsimile transmission or on the first business day after being sent by overnight currier, to the following addresses or to such other address as any party hereto shall designate to the other for such purpose in the manner set forth in this **Paragraph 4:**

   If to FREO: _____
   _____
   _____
   Email:

   If to TCM: 848 Brickell Avenue
   Suite 300
   Miami, Florida 33131
   Email: erik@wesoloskicarlson.com

5. **Modifications and Waivers.** No supplement, modification, or waiver of this Agreement or any provision hereof shall be binding unless executed in writing by all Parties hereto. No waiver of any of the provisions of this Agreement shall constitute a waiver of any other provision, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided.

6. **Invalidity.** The invalidity, illegality or unenforceability of any provision or provisions of this Agreement will not affect any other provision of this Agreement, which will remain in full force and effect, nor will the invalidity, illegality or unenforceability of a portion of any provision of this Agreement affect the balance of such provision. In the event that any one or more of the provisions contained in this Agreement or any portion thereof shall for any reason be held to be invalid, illegal or unenforceable in any respect, this Agreement shall be reformed, construed and enforced as if such invalid, illegal or unenforceable provision had never been contained herein.

7. **Governing Law; Attorneys' Fees; Jurisdiction.** This Agreement shall be construed in accordance with the laws of the State of Florida, without application of the principles of

conflicts of laws. If it becomes necessary for any party to institute legal action to interpret or enforce the terms and conditions of this Agreement, the successful party will be awarded reasonable attorneys' fees at all trial and appellate levels, expenses and costs. Exclusive jurisdiction for any action arising out of this Agreement shall be the Federal or state courts in Miami-Dade County, Florida.

8. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of all signatories' respective successors, legal representatives, grantees and assigns, as applicable and appropriate.

9. **Execution of Counterparts.** This Agreement may be executed in any number of counterparts, including facsimile and pdf signatures which shall be deemed as original signatures. Each counterpart when so executed and delivered shall be deemed an original, all of which shall together constitute one and the same instrument.

10. **Entire Agreement.** This Agreement contains the entire understanding of the Parties and supersedes all previous verbal and written agreements; there are no other agreements, representations or warranties not set forth herein.

11. **Construction; Interpretation.** The headings, titles, or captions of sections contained in this Agreement are provided for convenience of reference only, and shall not be considered a part of this Agreement. Such headings, titles, or captions are not intended to define, limit, extend, explain, or describe the scope of this Agreement or any of its terms, provisions, representations, warranties, covenants or the like, in any way whatsoever. All pronouns and variations thereof shall be deemed to refer to the masculine, feminine, or neuter, and to the singular or plural, as the identity of the person(s) may require. Any rule or principle of contractual construction that would otherwise require any aspect of this Agreement to be interpreted against the party primarily responsible for its drafting shall not be employed in the interpretation hereof.

[Signature page follows]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the Effective Date.

TITLE CAPITAL MANAGEMENT, LLC

By: _____
Erik Wesoloski, President

FUNDAMENTAL REO LP

By: _____
Donald Mullen, _____

ASSIGNMENT

THIS ASSIGNMENT is made effective as of November, 2012 (the "Effective Date"), by Progress Residential LP f/k/a Fundamental REO LP ("Assignor") and FREO Florida, LLC ("Assignee").

WITNESSETH:

WHEREAS, as of November, 2012, Assignor entered into that certain Florida Acquisition Services Agreement (the "FASA") with Title Capital Management, LLC; and

WHEREAS, in connection with Assignor's execution of the FASA, Assignor desired and intended to assign to Assignee any and all rights held by Assignor under or through the FASA, and Assignee desired and intended to accept said assignment.

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, as well as other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto, intending to be legally bound hereby, covenant and agree as follows:

1. It was the intent of the Assignor that effective upon execution of the FASA that any and all of Assignor's rights, interests, duties and responsibilities under or through the FASA be assigned to Assignee, and it was the intent of Assignee to accept said assignment and assume all of Assignor's rights, interests, duties and responsibilities set forth under or though the FASA.

2. At all material times following the execution of the FASA, Assignor and Assignee substantively operated and performed under the FASA with an intention and understanding that FASA had been assigned from Assignor to Assignee.

3. It is hereby the intent of Assignor and Assignee to reflect the parties' prior and continuing intention and desire that FASA be assigned by Assignor to Assignee and by executing this Assignment, agree to further document, in writing, said assignment.

4. Effective as of the Effective Date, Assignor hereby expressly grants, transfers, conveys and assigns any and all of Assignor's rights, title and interest in and to the FASA and any and all other rights, interests, or other matters related to or flowing from the FASA, including all causes of action, held by Assignor at any time, whether at law or in equity, to Assignee.

5. Effective as of the Effective Date, Assignee hereby agrees to accept said assignment identified in Paragraph 4 above and otherwise described herein and further agrees to assume, perform and be bound by the FASA in the same manner as Assignor.

6. The provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns.

7. This Assignment constitutes the entire understanding between the parties pertaining to the subject matter of this Assignment. Nothing contained in this Assignment shall be deemed to be a waiver by either party of any right or interest which is not otherwise expressly identified and waived in writing by both parties, all of which are hereby expressly reserved and may be exercised at any time.

8. If any one or more of the provisions of this Assignment is held invalid or unenforceable, the provision will be modified to the minimum extent necessary to make it or its application valid and enforceable, and the validity and enforceability of all other provisions of this Assignment and all other applications of such provisions will not be affected by any such invalidity or unenforceability.

9. THIS ASSIGNMENT WILL BE GOVERNED BY AND CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE LAWS OF THE STATE OF FLORIDA, WITHOUT REGARD FOR ANY CONFLICT OF LAW PRINCIPALS THAT WOULD LEAD TO THE LAW OF A DIFFERENT STATE BEING APPLIED IN THE ABSENCE OF THIS PROVISION.

10. This Assignment may be executed in any number of counterparts, whether by original signature, copy, or telecopy, each of which, when executed and delivered, will be deemed an original, but all of which together will constitute one binding agreement and instrument.

IN WITNESS WHEREOF, the parties hereto have caused this Assignment to be duly executed as of the Effective Date identified above.

[Signature Pages to Follow]

WITNESSES:

Print
Name: Jeffrey Perigi

Print
Name: Lauren Warman

ASSIGNOR:

Progress Residential LP f/k/a Fundamental REO LP

By: _____
Name: Donald Mullen
Title: Authorized Person
Date: July 26, 2016

STATE OF NEW YORK
COUNTY OF NEW YORK

THE FOREGOING instrument was acknowledged before me this 26 day of July, 2016, by Donald Mullen, as Authorized Person of Progress Residential LP f/k/a Fundamental REO LP. He/She is personally known to me or has produced _____ as identification.

Priscilla R. Coleman Dykes
Print, Type or
Stamp
Name: Priscilla R. Coleman Dykes
Notary Public, State of New York
Serial No., if any:

PRISCILLA R COLEMAN DYKES
Notary Public - State of New York
No. 01CO6197368
Qualified In New York County
My Commission Expires December 1, 2016

WITNESSES

Print
Name: Jeffrey Maggi

Print
Name: Lauren Waxman

ASSIGNEE:

FREO Florida, LLC

By: _____
Name: Donald Mullen
Title: Authorized Person
Date: July 26, 2016

STATE OF NEW YORK
COUNTY OF NEW YORK

THE FOREGOING instrument was acknowledged before me this 26 day of July, 2016, by Donald Mullen, as Authorized person of FREO Florida, LLC. He/She is personally known to me or has produced _____ as identification.

Priscilla R. Coleman-Dykes
Print, Type or
Stamp
Name: Priscilla R. Coleman-Dykes
Notary Public, State of New York
Serial No., if any:

PRISCILLA R COLEMAN DYKES
Notary Public - State of New York
No. 01CO6197368
Qualified in New York County
My Commission Expires December 1, 2016

Monica McNulty

From: Donald Mullen <dmullen@fundamentalreo.com>
Sent: Wednesday, May 22, 2013 9:40 AM
To: erik@wesoloskicarlson.com
Subject: Re: Follow up on Call

They will call you

From: Erik Wesoloski <ew@wesoloskicarlson.com>
Organization: Wesoloski Carlson PA
Reply-To: Erik Wesoloski <erik@wesoloskicarlson.com>
Date: Wednesday, May 22, 2013 9:38 AM
To: Don Mullen <dmullen@fundamentalreo.com>
Subject: RE: Follow up on Call

Understood. Will they call me? Or is there a specific attorney I should call?

Best regards,
Erik

Erik Wesoloski, Esq.
Wesoloski Carlson, P.A.
848 Brickell Avenue, Suite 300
Miami, Florida 33131
Tel 305-329-1000
Fax 305-532-7804
ew@wesoloskicarlson.com

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From: Donald Mullen [mailto:dmullen@fundamentalreo.com]
Sent: Wednesday, May 22, 2013 9:29 AM
To: erik@wesoloskicarlson.com
Subject: Re: Follow up on Call

Please speak to greenberg

From: Erik Wesoloski <ew@wesoloskicarlson.com>
Organization: Wesoloski Carlson PA
Reply-To: Erik Wesoloski <erik@wesoloskicarlson.com>
Date: Wednesday, May 22, 2013 9:25 AM
To: Don Mullen <dmullen@fundamentalreo.com>
Subject: RE: Follow up on Call

We know about the outside reviews. We have been copied on the emails to Property Debt Research and Greenberg. Are the HOA numbers off? Yes. But they are off for two distinct reasons which is the primary subject

TFB COMPOSITE EXHIBIT
B

matter of my requested meeting. This could significantly speed up a resolution before tens of thousands of dollars are spent on lawyers. Please reconsider my request for a short meeting. I should be heading to the airport if I am going to make the flight.

Best regards,
Erik

Erik Wesoloski, Esq.
Wesoloski Carlson, P.A.
848 Brickell Avenue, Suite 300
Miami, Florida 33131
Tel 305-329-1000
Fax 305-532-7804
ew@wesoloskicarlson.com

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From: Donald Mullen [mailto:dmullen@fundamentalreo.com]
Sent: Wednesday, May 22, 2013 8:33 AM
To: erik@wesoloskicarlson.com
Subject: Re: Follow up on Call

As I have said, you need to speak to our lawyers, I have had more than just our tampa office review this matter and believe it is best left in the hands of our outside lawyers. I will not meet with you until you have spoken with them and they advise me.

From: Erik Wesoloski <ew@wesoloskicarlson.com>
Organization: Wesoloski Carlson PA
Reply-To: Erik Wesoloski <erik@wesoloskicarlson.com>
Date: Wednesday, May 22, 2013 8:27 AM
To: Don Mullen <dmullen@fundamentalreo.com>
Subject: RE: Follow up on Call

I don't blame you for having that opinion of me based on the information you have so far. And you can choose to believe what I have to say or not. Regardless, I can assure you that it will be a productive meeting that will give you a much better understanding of the situation.

My flight is at 11am (arrives at 2pm), and I am leaving the office in an hour to catch the flight. Don, can you please reconsider giving me a short meeting?

Best regards,
Erik

Erik Wesoloski, Esq.
Wesoloski Carlson, P.A.
848 Brickell Avenue, Suite 300
Miami, Florida 33131
Tel 305-329-1000
Fax 305-532-7804
ew@wesoloskicarlson.com

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From: Donald Mullen [mailto:dmullen@fundamentalreo.com]
Sent: Wednesday, May 22, 2013 6:44 AM
To: erik@wesoloskicarlson.com
Cc: Donald Mullen
Subject: Re: Follow up on Call

When are lawyers speak to you you can discuss w them
You have no credibility be me

Sent from my Verizon Wireless 4G LTE DROID

Erik Wesoloski <ew@wesoloskicarlson.com> wrote:

You are bizarre man. I have been trying to speak with you guys for a month about this. First, Caballero wouldn't hear me. Then Curt. Now, you. I have some very important information to share with you. If you wait for it to come out in discovery, the management team is going to have big problems with the FREO LPs.

Best regards,
Erik

Erik Wesoloski, Esq.
Wesoloski Carlson, P.A.
848 Brickell Avenue, Suite 300
Miami, Florida 33131
Tel 305-329-1000
Fax 305-532-7804
ew@wesoloskicarlson.com

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From: Donald Mullen [mailto:dmullen@fundamentalreo.com]
Sent: Tuesday, May 21, 2013 10:12 PM
To: erik@wesoloskicarlson.com
Subject: Re: Follow up on Call

Please do not come to our office or I will call security

From: Erik Wesoloski <ew@wesoloskicarlson.com>
Organization: Wesoloski Carlson PA
Reply-To: Erik Wesoloski <erik@wesoloskicarlson.com>
Date: Tuesday, May 21, 2013 7:39 PM
To: Don Mullen <dmullen@fundamentalreo.com>
Subject: RE: Follow up on Call

Don:

I am going to be in New York tomorrow afternoon. All I need is 10 minutes. I am not going to BS or grovel. I would like you to hear our side which is not the story you have been fed from your Tampa guys who are covering their own behinds. It will be brief and you can always blow me up with your lawyers after the meeting if that is what you want to do.

Best regards,
Erik

Erik Wesoloski, Esq.
Wesoloski Carlson, P.A.
848 Brickell Avenue, Suite 300
Miami, Florida 33131
Tel 305-329-1000
Fax 305-532-7804
ew@wesoloskicarlson.com

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From: Donald Mullen [mailto:dmullen@fundamentalreo.com]
Sent: Monday, May 20, 2013 10:00 AM
To: erik@wesoloskicarlson.com
Subject: Re: Follow up on Call

As I said our lawyer will call you

From: Erik Wesoloski <ew@wesoloskicarlson.com>
Organization: Wesoloski Carlson PA
Reply-To: Erik Wesoloski <erik@wesoloskicarlson.com>
Date: Monday, May 20, 2013 9:56 AM
To: Don Mullen <dmullen@fundamentalreo.com>
Subject: RE: Follow up on Call

I can be at your office Wednesday afternoon to meet with you and Curt. Please confirm.

Best regards,
Erik

Erik Wesoloski, Esq.
Wesoloski Carlson, P.A.
848 Brickell Avenue, Suite 300
Miami, Florida 33131
Tel 305-329-1000
Fax 305-532-7804
ew@wesoloskicarlson.com

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From: Donald Mullen [mailto:dmullen@fundamentalreo.com]
Sent: Monday, May 20, 2013 9:04 AM
To: erik@wesoloskicarlson.com
Subject: Re: Follow up on Call

I have sent our analysis to our lawyers, they will proceed with all appropriate action. We have no confidence in your numbers or integrity.

From: Erik Wesoloski <ew@wesoloskicarlson.com>
Organization: Wesoloski Carlson PA
Reply-To: Erik Wesoloski <erik@wesoloskicarlson.com>
Date: Monday, May 20, 2013 8:58 AM
To: Don Mullen <dmullen@fundamentalreo.com>
Subject: RE: Follow up on Call

Don:

I am writing to follow up on our conversation from Thursday last week. I didn't get a chance to give you our side of the story before you hung up the phone abruptly.

We have provided serious value to FREO, and we have always had the best interests of FREO and its limited partners in mind when making each acquisition. Over the course of 220 acquisitions, we delivered over $2.1M in discounts to strike prices even after taking into account the HOA corrections and approximately $4M in discounts to fair market value.

Our internal review shows that some of the HOAs were input too high and some were input too low. The overall effect on the discount to strike was about $175,000. In our telephone conversation, you stated that it was $500,000, which is far from correct. I would like to show you our final report based on written HOA confirmations. I apologize for sending your Tampa office the prior HOA review report on April 20th which was (1) rushed and (2) based on "verbal" verifications which proved inaccurate in many cases. I think that report may have caused additional confusion and concern.

We would ask that we meet in person at your offices in New York so that we can discuss an equitable solution to this situation. More than anything, we would like to restore your confidence in us and the foreclosure auctions. In the month of April, FREO was on track to acquire just as many properties at auction via TCM as it acquired on the MLS before we stopped on April 17th. The properties acquired at auction are acquired at substantial discounts to what FREO is paying for similar properties on the MLS. The auctions should be an integral part to your capital deployment program and our improved systems will help you to achieve your goals. To date, we have delivered tremendous value to FREO, and we would like the opportunity to have a second chance to deliver even greater value to FREO.

On the phone you stated that you would be sending this matter to your counsel. While we would prefer that we find an amicable resolution to this matter, if you are intent on following the legal route, please find the contact information of our counsel below. I kindly ask that you send our counsel's contact information to your attorney as well.

Dale Bergman
Roetzel & Andress
350 East Las Olas Boulevard
Las Olas Centre II, Suite 1150
Fort Lauderdale, FL 33301
Direct Dial No. 954.759.2721
Main Phone No.: 954.462.4150
Cell No. 305.495.4157
Fax No.: 954.462.4260

Email: dbergman@ralaw.com
www.ralaw.com

We trust however, that we may reach an amicable resolution to these matters. Please let me know if we can meet with you and Curt anytime this week. Thank you.

Best regards,
Erik

Erik Wesoloski, Esq.
Wesoloski Carlson, P.A.
848 Brickell Avenue, Suite 300
Miami, Florida 33131
Tel 305-329-1000
Fax 305-532-7804
ew@wesoloskicarlson.com

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From: Donald Mullen [mailto:dmullen@fundamentalreo.com]
Sent: Thursday, May 16, 2013 8:17 AM
To: erik@wesoloskicarlson.com
Subject: RE: Follow up on Call

I will call you later today

Don

From: Erik Wesoloski [mailto:ew@wesoloskicarlson.com]
Sent: Wednesday, May 15, 2013 6:10 PM
To: Donald Mullen
Subject: Follow up on Call

Don:

I just returned your phone call and left you a voicemail. You can reach me at my direct line which is 305-329-1030. You can also reach me at my cell at 305-725-3031 at any time. Thank you.

Best regards,
Erik

Erik Wesoloski, Esq.
Wesoloski Carlson, P.A.
848 Brickell Avenue, Suite 300
Miami, Florida 33131
Tel 305-329-1000
Fax 305-532-7804
ew@wesoloskicarlson.com

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IN THE CIRCUIT COURT OF THE 11TH

JUDICIAL CIRCUIT IN AND FOR MIAMI-
DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

CASE NO.: 2013-30433 CA 01

PROGRESS RESIDENTIAL, LP f/k/a
FUNDAMENTAL REO LP,

Plaintiffs,
v.

TITLE CAPITAL MANAGEMENT LLC;
ERIK WESOLOSKI; ROCKET LIEN SEARCH, LLC;
WESOLOSKI CARLSON, PA; ERIK
WESOLOSKI, PA; and CARMEN SERRANO,

Defendants.
_____/

ORDER ON PLAINTIFF'S SPOLIATION MOTION AGAINST TITLE CAPITAL MANAGEMENT, LLC AND ERIK WESOLOSKI FOR DESTRUCTION OF EVIDENCE

THIS CAUSE, having come before the Court on December 5, 2016 on Plaintiff's Spoliation Motion Against Title Capital Management, LLC and Erik Wesoloski for Destruction of Evidence, The Court having considered the motion, Title Capital Management LLC's Notice of Filing Excerpts from Notebook Provided to the Court During the December 5, 2016 Hearing, Title Capital Management's Notice of Supplemental Filing Under Seal in Reference to Progress Residential LP's Spoliation Motion, Erik Wesoloski's Cross Designations of Portions of Deposition of Brett Wiard, Erik Wesoloski's Notice of Filing [Emails], Defendants' Notice of Filing in Reference to Progress Residential LP's Spoliation Motion, all evidence presented at the evidentiary hearing, the procedural history, argument of counsel, and all relevant legal authority, the Court hereby **FINDS** as follows:

Background:

TFB EXHIBIT
C

On September 23, 2013, Plaintiff, Progress Residential LP f/k/a Fundamental Reo LP ("Plaintiff"), filed suit against Defendants, Title Capital Management LLC ("TCM"), Erik Wesoloski ("Wesoloski"), Rocket Lien Search, LLC, Wesoloski Carlson, PA, Erik Wesoloski, PA, and Carmen Serrano alleging breach of contract, breach of fiduciary duty, and constructive fraud. Plaintiff alleged that it hired Wesoloski and TCM to serve as its agent in conjunction with the acquisition of property at foreclosure auctions. Under the asserted arrangement, Wesoloski and TCM were to provide "complete due diligence on properties that [were] the subject of . . . foreclosure auctions." TCM employed analysists to perform research on the properties, including lien search, title search, comparables, and determining the value of the properties. The analysts then prepared bid sheets, reflecting the research results, which were forwarded to Plaintiff in advance of the auction. The bid sheets were prepared in the form of Microsoft Excel spreadsheets and included property size, comparable sales, property taxes, homeowner's association dues, and capitalization rates. The data was subsequently input into a formula to calculate the maximum authority extended to TCM and Wesoloski to bid on a given property. TCM and Wesoloski were paid a four percent commission on each piece of property acquired by TCM on Plaintiff's behalf.

Plaintiff alleges that Wesoloski and TCM manipulated data, specifically inflating the carrying costs associated with each acquired property. This, in turn, resulted in a greater profit for Wesoloski and TCM and caused financial loss to Plaintiff.

In May 2013, Plaintiff terminated Wesoloski and TCM. In the months immediately preceding the filing of suit, in an effort to avoid litigation, the parties engaged in substantial settlement negotiations. The negotiations ultimately failed. After suit was filed, Plaintiff sought the production of all emails generated by TCM's office staff in conjunction with the services

TCM and Wesoloski performed on behalf of Plaintiff. On January 14, 2014, TCM produced certain documents in response to the request. On July 10, 2015, Plaintiff sought production of additional documents, including internal emails between TCM employees. 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." On August 12, 2015, the Court ordered production of the additional documents. On September 11, 2015, TCM served Plaintiff 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.

Plaintiff contends that TCM was under a duty to preserve the email correspondence, that the evidence was critical, thus, the imposition of spoliation sanctions is appropriate. Plaintiff further contends that the evidence demonstrated that after bidding was suspended in April, 2013, an unknown individual accessed TCM's iCloud backup system and tampered with data in an attempt to further conceal evidence. Plaintiff argues this demonstrates bad faith. TCM and Wesoloski oppose the imposition of sanctions and assert that the destruction of electronic data was part and parcel with the termination of the business relationship.

Legal Analysis:

Spoliation "can be defined as the failure to preserve evidence that is relevant to pending or potential litigation." *Jimenez–Sanchez v. Caribbean Restaurants, LLC*, 483 F. Supp. 2d 140, 143 (D.P.R. 2007); *see also Green Leaf Nursery v. E.I. DuPont De Nemours and Co.*, 341 F. 3d 1292, 1308 (11th Cir. 2003) ("[S]poliation is defined as the destruction of evidence or the

significant and meaningful alteration of a document or instrument."). "A court may impose sanctions, including exclusion of evidence, even '[i]f such evidence is mishandled through carelessness . . .'" *E.E.O.C. v. Ventura Corp.*, No. CIV. 11–1700 PG, 2013 WL 550550, at *7 (D.P.R. Feb. 12, 2013), *citing Trull v. Volkswagen of America, Inc.*, 187 F. 3d 88, 95 (1st Cir. 1999).

In federal court, the determination of whether adverse-inference sanctions should be imposed against the defendants for the spoliation of electronically stored information is no longer governed by case law, in light of recently amended Federal Rule of Civil Procedure 37(e). *See First Financial Security, Inc. v. Freedom Equity Group, LLC*, No. 15–CV–1893–HRL, 2016 WL 5870218, at *3 (N.D. Cal. Oct. 7, 2016); *Matthew Enterprise, Inc. v. Chrysler Group, LLC*, Case No. 13–cv–04236–BLF–PSG, 2016 WL 2957133, at *1 (N.D. Cal. May 23, 2016). The recently amended Rule 37(e) provides that 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" may take the following actions:

> (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). The Advisory Committee Notes to the 2015 Amendment state that Rule 37(e), as amended, "forecloses reliance on inherent authority or state law to determine when certain measures should be used." Fed. R. Civ. P. 37(e) Advisory Committee Notes to 2015 Amendment.

Although, the Florida Rules do not contain an identical provision, in 2012, Florida Rule of Civil of Procedure 1.380(e) was amended to add the following language:

> (e) Electronically Stored Information; Sanctions for Failure to Preserve. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

The Committee Notes to the amended provision further state:

> 2012 Amendment. Subdivision (e) is added to make clear that a party should not be sanctioned for the loss of electronic evidence due to the good-faith operation of an electronic information system; the language mirrors that of Federal Rule of Civil Procedure 37(e). Nevertheless, the good-faith requirement contained in subdivision (e) should prevent a party from exploiting the routine operation of an information system to thwart discovery obligations by allowing that operation to destroy information that party is required to preserve or produce. In determining good faith, the court may consider any steps taken by the party to comply with court orders, party agreements, or requests to preserve such information.

Fla. R. Civ. P. 1.380(e) Committee Notes to 2012 Amendment. As it is undisputed that the purportedly spoliated evidence at issue in the instant case consists of electronically stored information, the Court must consider established Florida spoliation case law in conjunction with the 2012 Amendment to Rule 1.380(e).

Under Florida law, prior to a court exercising any leveling mechanism due to spoliation of any form of evidence, the court must answer the following three threshold questions: (1) whether the evidence existed at one time; (2) whether the spoliator had a duty to preserve the evidence; and (3) whether the evidence was critical to an opposing party being able to prove its prima facie case or a defense. *Jordan ex rel. Shealey v. Masters*, 821 So. 2d 342, 347 (Fla. 4th DCA 2002).

In the instant case, with regard to the first prong, the record evidence establishes that the analysts had functional email accounts in use during the time TCM provided services to Plaintiff.

The record further establishes that contemporaneous communications were exchanged between the analysts and others in conjunction with the bidding process. Analysts, at times, emailed rows of information for potential properties. Emails were exchanged regarding TCM's criteria for acquiring and comparing properties. New analysts emailed questions. Analysts may have emailed amongst themselves to obtain information regarding prospective properties. Thus, it is clear that the electronic information existed at one time.

Next, the Court must consider whether TCM was under a duty to preserve the emails. "Litigants are under a duty to preserve evidence which they know, or reasonably should know, is relevant in an action." *Slattery v. Precision Response Corp.*, 2005 WL 6103681 *6 (S.D. June 30, 2005), *citing Banco Latino, S.A.C.A. v. Gomez Lopez*, 53 F. Supp. 2d 1273, 1277 (S.D. Fla. 1999*). See also Velez v. Marriott PR Management, Inc.*, 590 F. Supp. 2d 235, 258 (D.P.R. 2008), *citing Perez–Velasco v. Suzuki Motor Co. Ltd.*, 266 F. Supp. 2d 266, 268 (D.P.R. 2003). ("Litigants have the responsibility of ensuring that relevant evidence is protected from loss or destruction."). This obligation 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). *See also Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001) ("The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidenced may be relevant to anticipated litigation."), *citing Kronish v. United States*, 150 F.3d 122, 126 (2nd Cir. 1998); *Micron Technology, Inc., v. Rambus, Inc.*, 645 F. 3d 1341 (Fed. Cir. 2011); *Hagopian v. Publix Supermarkets, Inc.*, 788 So. 2d 1088, 1090 (Fla. 4th DCA 2001) (Expanding the concept of duty in negligent spoliation case to scenario where a case

has not yet been filed); *Fed. Ins. Co. v. Allister Mfg. Co.*, 622 So. 2d 1348, 1351 (Fla. 4th DCA 1993) (Imputing duty pre-suit to preserve relevant evidence).

The concept of a duty to preserve prior to written notice and prior to the filing of suit was discussed at great length by the Second District Court of Appeal in *Osmulski v. Oldsmar Fine Wines, Inc.*, 93 So. 3d 389 (Fla. 2d DCA 2012). The *Osmulski* court noted that in *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777 (Fla. 4th DCA 2006), its sister court had adopted a more expansive definition of duty. In considering the evolution of such a definition, the *Osmulski* court stated:

> Indeed, the court in *Golden Yachts, Inc.* cited *American Hospitality Management Co. of Minnesota v. Hettiger*, 904 So. 2d 547 (Fla. 4th DCA 2005), which clearly states that where a defendant has evidence within its control, it can "be charged with a duty to preserve evidence where it could reasonably have foreseen the [plaintiff's] claim." *Id*. at 549. Thus, it could be argued that in the absence of a written request to preserve such evidence, as long as a plaintiff's claim is reasonably foreseeable, a formal request to preserve the evidence is not required in order for a plaintiff to be entitled to a jury instruction on spoliation.

Id. at 393. The court further noted:

> We recognize that courts in other jurisdictions have found defendants to be on notice that a claim is reasonably foreseeable once they have knowledge that a claim has been submitted to their insurance carrier. *See, e.g., Smith v. Shipping Utils., Inc.*, No. Civ. 05–500–GPM, 2005 WL 3133494 at *3 (S.D.Ill.2005) (holding that there was a reasonable possibility that trial court would have ruled against defendant when deciding whether reasonable person should have foreseen that evidence was material to potential civil action where plaintiff sent insurance carrier a letter referencing both a compensable work accident and personal injury and where workers' compensation carrier sent letter to plaintiff's counsel discussing right of subrogation to any settlement); *Keene v. Brigham & Women's Hosp., Inc*., 439 Mass. 223, 786 N.E.2d 824, 833 (2003) (holding that defendant's duty to preserve evidence arose on day that plaintiffs filed notice with defendant's insurance carrier of a potential claim based on plaintiff's injuries).

Id. at 393-94.

In the instant case, on May 20, 2013, Wesoloski wrote the following to Don Mullen at Progress Residential.

> On the phone you stated that you would be sending this matter to your counsel. While we would prefer that we find an amicable resolution to this matter, if you are intent on following the legal route, please find the contact information of our counsel below. I kindly as that you send our counsel's contact information to your attorney as well.

Two days later, Wesoloski wrote: "This could significantly speed up a resolution before tens of thousands of dollars are spent on lawyers." The content of the correspondence establishes that Wesoloski knew at that time that absent a negotiated settlement agreement, litigation was imminent. Wesoloski's email correspondence further acknowledged discrepancies in the carrying costs. Under these circumstances, Wesoloski, a licensed Florida attorney, was certainly aware that analyst emails generated in conjunction with bid sheets and the computation of carrying costs were relevant to the dispute. Wesoloski signed an affidavit indicating that the hard drives were not disposed of until September, 2013.[1] As the electronically stored information was in the possession, custody, and control of Wesoloski and TCM and litigation was reasonably anticipated, Wesoloski and TCM were under a duty to preserve the emails. *See Leon v. IDX Systems Corp.*, 464 F. 3d 951, 959 (9th Cir. 2006); *U.S. v. Kitsap Physicians Service*, 314 F. 3d 995, 1001 (9th Cir. 2002); and *Akiona v. United States*, 938 F. 2d 158, 161 (9th Cir. 1991). *See also American Hospitality Management Co. of Minnesota v. Hettiger*, 904 So. 2d 547, 549 (Fla. 4th DCA 2005) ("In the context of a claim for spoliation of evidence other than medical records, we have held that a defendant could be charged with a duty to preserve evidence where it could reasonably have foreseen the claim").

With regard to the third prong of the spoliation test, the critical nature of the electronic information is readily apparent from the pleadings in the instant case. Plaintiff's theory of the case is that Wesoloski and TCM breached their duty to act in the best interests on behalf of

[1] Wesoloski was vague with regard to the destruction date and the circumstances surrounding the disposal during the evidentiary hearing.

Plaintiff by manipulating and inflating the costs relating to the acquired properties, thus, justifying higher bids and generating greater commissions. In is axiomatic that internal exchanges regarding the methodology and data employed in the computation of those costs would be critical to either proving or disproving Plaintiff's theory of the case.

Moreover, TCM and Wesoloski have actively disputed the scope of the service contract, contending that Plaintiff's asserted theory of liability extends beyond the "complete due diligence services." The emails would establish exactly which services the analysts regularly performed. Moreover, the emails would further explicate whether the data that was provided by the analysts was properly transferred to the bidding sheets or Wesoloski or another individual manipulated the data upon transfer. As the data is precisely numerical in nature and several years have elapsed, Plaintiff is without an alternative adequate avenue for obtaining this critical information.

Finally, the Court concludes that Florida Rule of Civil Procedure 1.380(e) is not implicated. TCM and Wesoloski allegedly cleaned and disposed of the hard drives. Although TCM and Wesoloski contend that this 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. Specifically, TCM stated "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." 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.

"Lawyers owe a . . . duty of fidelity to their clients, as well as countless other duties to their clients and the courts far too numerous to merit mention . . . but of no lesser importance." *Masztal v. City of Miami*, 971 So. 2d 803, 809 (Fla. 3d DCA 2007). TCM and Wesoloski had a duty to preserve the electronically stored information, yet directed its destruction, and then failed to disclose opposing counsel and the Court the fact that it no longer existed.[2] Only one conclusion may be gleaned: the evidence was critical to establishing Plaintiff's claim and equally compelling evidence may not be garnered.

Conclusion:

Plaintiffs will be entitled at the time of trial to admit evidence necessary to establish the circumstances surrounding Defendants' failure to maintain electronic evidence and the jury shall be instructed as follows:

> The Court has determined that Defendants had a duty to maintain and keep the electronically stored information. Because Defendants did not maintain or keep the electronically stored information, you should find that Plaintiffs established their claim against Defendants unless Defendants prove otherwise by the greater weight of the evidence.

See Fla. Civ. Jury Instr. 301.11b.

WHEREFORE, the Court hereby **GRANTS** Plaintiff's Spoliation Motion Against Title Capital Management, LLC and Erik Wesoloski for Destruction of Evidence, as specified. The Court hereby **DENIES** Plaintiff's Motion for Attorneys' Fees and Costs.

---

[2] Wesoloski has filed emails purportedly printed from an account maintained by former analyst Luz Perez. Wesoloski contends that the analysts were terminated in mid-2013. The record is devoid as to an explanation as to how Wesoloski was able to retrieve said emails, as he alleges that the accounts no longer exist and the hard drives were destroyed.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 12/29/16.

BRONWYN C. MILLER
CIRCUIT COURT JUDGE

No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.