SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **IAS MOTION 47EFM**

Justice

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ABL ADVISOR, LLC,LOUIS FORSTER, LANTERN ENDOWMENT PARTNERS, L.P.

Plaintiff,

- v -

PATRIOT CREDIT COMPANY, LLC,BLUEFIN CAPITAL PARTNERS, LLC,

Defendant.

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INDEX NO. 651985/2015

MOTION DATE 08/29/2019

MOTION SEQ. NO. 012

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 012) 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 230

were read on this motion to/for DISCOVERY.

In this action for breach of a participation agreement in a secured loan, plaintiffs move to compel defendants' compliance with their discovery obligations and for spoliation sanctions. Plaintiffs claim that defendants failed to produce and/or failed to preserve certain documents concerning the loan, namely, (1) email/letter correspondence between the parties and between defendants and the borrowers concerning the underlying loan; (2) documents related to calculation of amounts paid under the loan and the amounts due to plaintiffs; (3) the purported buyout of plaintiffs' participation interest; and (4) documents related to defendants' counterclaim for legal fees.

Plaintiffs' motion for spoliation is based primarily on the deposition testimony of Ian Peck, defendants' principal. At the deposition, Mr. Peck testified that one employee, Genia Iartchouk, maintained the documents relevant to the underlying loan for the entire life of the loan. Spannhake Aff. Ex. T, Peck Dep. Tr. 68:12-16. Mr. Peck testified that Ms. Iartchouk was

the only person who would make calculations regarding the payment of the loan, paid the plaintiffs, and communicated with them when necessary. Id. at 68:12-15, 74:23-24, 89:23-24, 106:16-17, 273:22-274:5. Ms. Iartchouk left defendants' employ after this litigation started and defendants never took any measures to preserve this information. Id. at 70:8-71:1, 93:1013. According to Mr. Peck, each of defendants' own their own computers, take them when they leave and there is nothing in place to this day to preserve their records. Id. at 276:14-277:6, 413:13-21. As a result, defendants never produced a single email bearing Ms. Iartchouk's name, even though she was the only employee who handled the loan at the heart of this dispute.

Moreover, Mr. Peck provided contradictory testimony at his deposition whether he searched Ms. Iartchouk's email account, first stating that he did not have access to it and then, testifying that he did search her account. Id. at 92:1-94:1, 251:11-18, 413:22-414:23, 419:2-420:13. Nevertheless, defendants failed to produce any emails bearing Ms. Iartchouk's name. It also appears, based on plaintiffs' reply papers, that defendants did not even properly search and produce documents from Ian Peck's account as there are relevant emails from this account which defendants did not produce. Spannhake Aff. dated May 28, 2019, ¶ 19 and Exh. 4.

With respect to the destruction of ESI evidence, such as the emails, New York courts follow the federal standard articulated in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). Under this standard, "[a] party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind"; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." *Voom HD Holdings LLC v. EchoStar Satellite LLC*, 93 A.D.3d 33, 45 (1st Dep't 2012) (citing

Zubulake). The intentional destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross negligence. *Id.* "Failures which support a finding of gross negligence, when the duty to preserve electronic data has been triggered, include: (1) the failure to issue a written litigation hold, when appropriate; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail. *Id.* Finally, CPLR 3126 authorizes sanctions based on a party's failure to comply with court-ordered discovery, including the award of attorneys' fees and costs. *Jackson v. OpenCommunications Omnimedia, LLC*, 147 A.D.3d 709 (1st Dep't 2017).

Here, defendants failed to preserve relevant evidence by failing to institute a litigation hold and failing to preserve the documents and emails on Ms. Iartchouk's computer. This is sufficient to warrant a finding of gross negligence and the relevance of these documents is therefore presumed. *Voom HD*, 93 A.D.3d at 45; *see also Arbor Realty Funding, LLC v. Herrick, Feinstein LLP*, 140 A.D.3d 607, 608 (1st Dep't 2016) (plaintiff's destruction of evidence was at a minimum grossly negligent given its failure to institute a litigation hold). Although sanctions are warranted, it must reflect "an appropriate balancing under the circumstances." *Arbor Realty*, 140 A.D.3d at 609 (quoting *Voom HD*). Here, the sanction of striking defendants' answer is unwarranted as it appears that plaintiffs were able to obtain the relevant information from the borrowers themselves and thus the spoliated evidence does not constitute the "sole means" by which plaintiffs can prove their case. *Id.* Accordingly, an adverse inference charge is an appropriate sanction under the circumstances. In addition, defendants shall be required to pay discovery sanctions to plaintiffs for the attorneys' fees and costs incurred in making this motion in the amount of $2,000.

Other than Ms. Iartchouk's documents, it appears that the other documents plaintiffs claim are outstanding relate to defendants' counterclaims. With respect to the defendants' counterclaim for attorneys' fees, defendants' argument that the production of these documents is premature as liability has not yet been adjudicated is meritless as this claim is not contingent on defendants prevailing in this lawsuit. Thus, these documents must be produced. Likewise, defendants must amend their response to question 3 in plaintiffs' second set of interrogatories which relate to defendants' damages. With respect to defendants' counterclaim regarding the buy-out, defendants must produce any responsive documents to the extent they have not yet been produced. Defendants must also simultaneously produce a privilege log to the extent they are withholding or redacting any of these documents based on privilege. Failure to comply with these directives will result in an order precluding defendants from submitting any evidence in support of their counterclaims. Accordingly, it is

ORDERED that the motion is granted; and it is further

ORDERED that at the time of trial, plaintiffs are entitled to an adverse inference charge regarding the missing emails and loan calculation documents, including but not limited to the inference that defendants failed to properly maintain such records to the extent this is required by the participation agreements; and it is further

ORDERED that defendants shall reimburse plaintiffs for the costs incurred in relation to this motion in the amount of $2,000, with payment made to plaintiffs' counsel and written proof of such payment to be provided to the Clerk of Part 47 within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that in the event that timely payment is not made, the Clerk of the court, upon service of this order with notice of entry and an affirmation or affidavit of non-payment,

shall enter a judgment in favor of plaintiffs and against defendants in the aforesaid sum; and it is further

ORDERED that defendants shall, within twenty days of notice of entry of this order, produce all documents they intend to rely on to show damages in support of their counterclaims, including any invoices and payments, and produce a privilege log simultaneously therewith for any documents withheld or redacted based on privilege; and it is further

ORDERED that defendants shall, within thirty days of notice of entry of this order, amend their responses to question 3 in plaintiffs' second set of interrogatories to accurately reflect the damages they claim they incurred and how they were calculated; and it is further

ORDERED that defendants shall also produce, within twenty days of notice of entry of this order, any additional documents related to their buy-out counterclaim; and it is further

ORDERED that to the extent defendants have withheld any responsive documents based on the alleged buy-out in July 2015, all such documents must be produced within twenty days of notice of entry of this order; and it is further

ORDERED that defendants' failure to comply with these directives will result in an order precluding defendants from producing evidence of their counterclaims at trial; and it is further

ORDERED that the parties shall appear for a status conference on October 10, 2019, at 9:30 a.m.

9/3/19
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	☐ DENIED		GRANTED IN PART	☐	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐	REFERENCE