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CITIMORTGAGE, INC.

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF LOS ANGELES, WEST DISTRICT - SANTA MONICA

14 MARINA J. BOYD, ANITA FAYE BOYD,
15 ALEXIS BOYD-HOLLING,

16 Plaintiff,

17 v.

18 CITIMORTGAGE, INC.; SKYWAY REALTY,
19 and DOES 1-10,

20 Defendants.

Case No. SC117126

Assigned to Hon. Lisa H. Cole
Dept. WE-O

**DEFENDANT CITIMORTGAGE, INC.'S
NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT OR, IN
THE ALTERNATIVE, SUMMARY
ADJUDICATION; MEMORANDUM OF
POINTS AND AUTHORITIES**

*[Filed Concurrently with Separate Statement
of Undisputed Material Facts, Request for
Judicial Notice, Declarations of Cindy Swan,
Mark Alston, Cathy Granger and Exhibits
Attached thereto]*

Hearing Date: May 18, 2016
Time: 8:30 a.m.
Dept.: WE-O

Reservation No.: 150911070483

Action Filed: May 18, 2012
Trial Date: June 27, 2016

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28

1 **TO PLAINTIFF MARINA J. BOYD:**

2 PLEASE TAKE NOTICE that on May 18, 2016 at 8:30 a.m. or as soon thereafter as the
3 matter may be heard in Department WE-O of the Los Angeles County Superior Court, located at
4 1725 Main Street, Santa Monica, CA 90401, Defendant CitiMortgage, Inc. ("CMI") will and hereby
5 does move the Court, pursuant to Code of Civil Procedure section 437c, for summary judgment or,
6 in the alternative, summary adjudication in its favor and against Plaintiff Marina J. Boyd
7 ("Plaintiff").

8 This Motion is made on the grounds that this action has no merit, there is no triable issue of
9 material fact, and CMI is entitled to a judgment as a matter of law on each of the following issues:

10 **Issue No. 1:** All causes of action are without merit because CMI lawfully disposed of the
11 personal property left on its premises in accordance with Code of Civil Procedure section 1174 and,
12 therefore, is immune from liability to Plaintiff.

13 **Issue No. 2:** Plaintiff's first cause of action for conversion has no merit because Plaintiff
14 cannot establish the essential elements of her claim.

15 **Issue No. 3:** Plaintiff's third, fourth, fifth and seventh causes of action have no merit
16 because Plaintiff has no private right of action under Civ. Code, §§ 1983, 1987, 1988, or 2080.

17 **Issue No. 4:** Plaintiff's third cause of action for violation of Civil Code section 1983 has no
18 merit because CMI did not owe a legal duty to Plaintiff pursuant to section 1983.

19 **Issue No. 5:** Plaintiff's third cause of action for violation of Civil Code section 1983 has no
20 merit because Plaintiff received notice that substantially complied with section 1983.

21 **Issue No. 6:** Plaintiff's fourth cause of action for violation of Civil Code section 1987 has
22 no merit because CMI did not owe a legal duty to Plaintiff pursuant to section 1987.

23 **Issue No. 7:** Plaintiff's fourth cause of action for violation of Civil Code section 1987 has
24 no merit because Plaintiff failed to comply with the statutory requirements for reclaiming personal
25 property left on the premises.

26 **Issue No. 8:** Plaintiff's fifth cause of action for violation of Civil Code section 1988 has no
27 merit because the personal property was properly disposed of without public auction.



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Issue No. 9: Plaintiff's seventh cause of action for violation of Civil Code section 2080 has no merit because Plaintiff's personal property was not "lost" and therefore the statute did not apply.

Issue No. 10: All causes of action are barred by the doctrine of unclean hands.

Issue No. 11: Plaintiff's claim for punitive damages has no merit because Plaintiff cannot establish oppression, fraud, or malice by clear and convincing evidence.

Issue No. 12: Plaintiff's claim for punitive damages has no merit because Plaintiff cannot establish that an officer, director, or managing agent of CMI was personally guilty of, authorized, or ratified oppression, fraud, or malice, or otherwise present any evidence to support imposing punitive damages on CMI for the acts of real estate broker Mark Alston.

This Motion is based upon this Notice; the attached Memorandum of Points and Authorities; the Separate Statement of Undisputed Material Facts; the Declarations of Cindy Swan and Mark Alston; the depositions of Marina Boyd, Alexis Boyd-Holling, and Mark Alston; the Request for Judicial Notice; the pleadings and papers on file herein; and any further evidence or argument that the Court may properly receive at or before the hearing.

Dated: February 26, 2016

WOLFE & WYMAN LLP

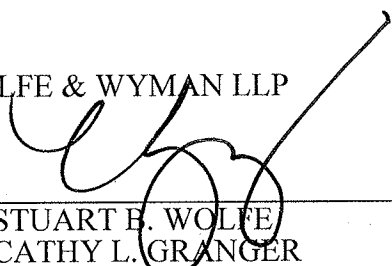
By: 
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Attorneys for Defendant
CITIMORTGAGE, INC.



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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This case is about the disposition of certain personal property left behind after an eviction.
4 Plaintiff Marina J. Boyd was evicted by virtue of a writ of possession issued in an unlawful detainer
5 action. The writ warned Plaintiff that personal property remaining on the premises would be
6 disposed of unless she paid the judgment creditor, CitiMortgage, Inc. ("CMI"), the reasonable cost of
7 storage and took possession of the personal property within 15 days. A notice was also posted on the
8 premises, advising any owners of the personal property that the property was being stored on-site
9 and would be disposed of after 18 days. In the weeks following her eviction, Plaintiff did not make
10 arrangements with CMI to pick up her personal property. Instead, she repeatedly broke into the
11 premises, hired movers, and removed most of the personal property. The personal property Plaintiff
12 failed to take was disposed of after Plaintiff's time for claiming the property had expired.

13 Plaintiff has now sued CMI, claiming CMI wrongfully disposed of the personal property that
14 remained on the premises. Plaintiff's fourth amended complaint alleges causes of action for
15 conversion and violations of Civil Code sections 1983, 1987, 1988, and 2080. CMI is entitled to
16 judgment as a matter of law on each of these claims for several independent reasons. First, CMI
17 cannot be liable to Plaintiff because CMI disposed of the property in accordance with section 1174
18 of the Code of Civil Procedure, and section 1174 bars Plaintiff's claims as a matter of law. Second,
19 Plaintiff's claim for conversion fails as a matter of law because Plaintiff cannot present evidence to
20 show CMI wrongfully exercised dominion over the personal property left on the premises, at a time
21 when Plaintiff had the right to possess that property. Third, Plaintiff's claims for violations of the
22 Civil Code fail as a matter of law because there is no private right of action for violation of the cited
23 sections; sections 1983, 1987, and 2080 do not apply to the disposition of personal property left
24 behind after Plaintiff's eviction; and Plaintiff cannot present evidence to establish any statutory
25 violation by CMI. Fourth, the undisputed facts establish Plaintiff is guilty of unclean hands, which is
26 a complete defense to Plaintiff's action. And finally, there is no evidence to support Plaintiff's claim
27 for punitive damages.



1 **II. STATEMENT OF FACTS**

2 On September 28, 2010, CMI purchased Plaintiff's condominium at a trustee's foreclosure
3 sale. (See Separate Statement of Undisputed Material Facts ("UMF") 1-2.) After acquiring title to the
4 condo, CMI entered into an agreement with Skyway Realty ("Skyway") pursuant to which Skyway
5 would prepare and list the condo for sale. (UMF 3, 199.) Skyway is owned by real estate broker
6 Mark Alston. (UMF 3.)

7 On November 24, 2010, CMI filed an unlawful detainer action seeking to recover possession
8 of the condo from Plaintiff. (UMF 4.) A trial was held on June 22, 2011, and judgment for
9 possession was entered in favor of CMI and against Plaintiff. (UMF 5.)

10 On September 2, 2011, the court clerk issued a writ of possession to enforce the unlawful
11 detainer judgment. (UMF 7.) On September 15, 2011, a deputy sheriff served Plaintiff with a copy of
12 the writ and a 5-day notice to vacate the premises. (UMF 8.) After Plaintiff failed to vacate the
13 condo, on September 22, 2011, a deputy sheriff executed the writ of possession and placed CMI in
14 possession of the condo. (UMF 11.)

15 The writ of possession gave Plaintiff notice that she had 15 days to pay reasonable storage
16 fees and remove her personal property from the condo, stating:

17 WRIT OF POSSESSION OF REAL PROPERTY. If the premises are not vacated
18 within five days after the date of service on the occupant or, if service is by posting,
19 within five days after service on you, the levying officer will remove the occupants
20 from the real property and place the judgment creditor in possession of the property.
21 Except for a mobile home, personal property remaining on the premises will be sold
or otherwise disposed of in accordance with CCP 1174 unless you or the owner of the
property pays the judgment creditor the reasonable cost of storage and takes
possession of the personal property not later than 15 days after the time the judgment
creditor takes possession of the premises.

22 (UMF 9.) This 15-day period expired on October 7, 2011. (UMF 12.)

23 On September 23, 2011 (the day after the eviction), Mr. Alston posted a notice at the condo,
24 stating that the personal property had been stored on-site and would be disposed of after 18 days
25 from the date of the posting, i.e., after October 11, 2011. (UMF 40.) The notice also provided
26 Skyway's office address and phone number and Mr. Alston's direct phone number. (UMF 40.)

1 CMI and Mr. Alston did not receive any communication from Plaintiff during the time
 2 allowed for reclaiming her personal property. (UMF 13, 42, 45.) Mr. Alston was, however, receiving
 3 calls from Plaintiff's former neighbors and the property management, who reported seeing Plaintiff
 4 coming and going from the condo on several occasions after her eviction. (UMF 19.) The locks had
 5 been changed when Plaintiff was evicted, and it appeared Plaintiff was breaking into the condo
 6 through the windows. (UMF 157, 159, 170.) Plaintiff has refused to testify regarding these events,
 7 but she does admit that she entered the condo on October 2 when she hired movers to retrieve her
 8 personal property. (UMF 21-22.) According to Plaintiff's daughter (who lived with Plaintiff at the
 9 condo), the movers took everything they wanted from the condo, and left only the things they did not
 10 want to take. (UMF 23.) According to Plaintiff, the property that was left behind included pictures,
 11 "trophies and things of sentimental value," old toys, clothes, and boxes. (UMF 26.) Based on his
 12 experience and knowledge as a real estate broker, Mr. Alston believed that the personal property left
 13 at the condo had a resale value of \$250. (UMF 29.) Mr. Alston also believed the property had been
 14 abandoned by Plaintiff, particularly since he knew Plaintiff had re-entered the condo on several
 15 occasions and had taken additional property out of the condo. (UMF 30.) The personal property was
 16 stored at the condo until it was disposed of on October 23, 2011. (UMF 14.)

17 Five days after the property was disposed of, Plaintiff wrote to Mr. Alston, claiming she had
 18 been trying to reach him to get access to her personal property. (UMF 69-71.) Plaintiff's efforts to
 19 reach Mr. Alston on or before October 11, 2011, consisted of driving by the condo to see if Mr.
 20 Alston happened to be there, and calling Mr. Alston's office on October 8, 2011 (16 days after the
 21 eviction) and leaving a voicemail. (UMF 49, 54.) Mr. Alston did not receive this alleged voicemail
 22 or any other communication from Plaintiff before the property was disposed of on October 23.
 23 (UMF 15, 50.)

24 **III. PROCEDURAL HISTORY**

25 On May 18, 2012, Plaintiff filed this action against CMI and Skyway for "intentional tort"
 26 and "exemplary damages." CMI demurred, and the Court sustained the demurrer to the complaint
 27



1 with leave to amend. By June 20, 2014, the Court had also sustained demurrers to Plaintiff's first
2 amended complaint and second amended complaint.

3 On November 19, 2014, Plaintiff filed her third amended complaint, now alleging federal
4 claims. CMI timely removed this action to federal court based on federal question jurisdiction, and
5 filed a motion to dismiss and a motion to strike portions of the third amended complaint. The district
6 court granted the motion to dismiss with leave to amend.

7 On February 13, 2015, Plaintiff filed her fourth amended complaint against CMI, Skyway,
8 and Mr. Alston. The fourth amended complaint alleged ten causes of action: (1) civil conversion and
9 conspiracy to commit civil conversion; (2) intentional infliction of emotional distress; (3) violation
10 of Civil Code section 1983; (4) violation of Civil Code section 1987; (5) violation of Civil Code
11 section 1988; (6) violation of Code of Civil Procedure section 1174; (7) violation of Civil Code
12 section 2080; (8) violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.); (9) violation of
13 the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1961 et seq.); and
14 (10) violation of Unfair Business Practices Act (Bus. & Prof. Code, § 17200 et seq.).

15 On March 13, 2015, Skyway and Mr. Alston were dismissed from the case for lack of
16 prosecution and for Plaintiff's failure to comply with the orders of the court. On June 17, 2015, the
17 district court entered an order dismissing Plaintiff's RICO claim with prejudice. The court also noted
18 that to the extent Plaintiff "is asserting a claim against CMI for conspiracy to commit conversion
19 pursuant to 18 U.S.C. § 241, (see 4AC at ¶¶ 48-57), it too fails since that statute is a criminal statute
20 and does not provide a private right of action." After dismissing the only federal claims, the district
21 court declined to exercise supplemental jurisdiction over the remaining state law claims and
22 remanded those claims back to this Court.

23 Following remand, CMI filed a demurrer to certain causes of action and a motion to strike
24 portions of the fourth amended complaint. This Court sustained the demurrer to the sixth and eighth
25 causes of action, and granted the motion to strike the second and tenth causes of action and the
26 addition of Alexis Boyd-Holling (Plaintiff's daughter) and Anita Faye Boyd (Plaintiff's sister) as
27

1 plaintiffs. As a result of this ruling, and the federal district court's previous ruling, Plaintiff's first,
2 third, fourth, fifth, and seventh causes of action are the only claims still at issue.

3 **IV. LEGAL STANDARD**

4 A defendant may move for summary judgment where an action has no merit. (Code Civ.
5 Proc., § 437c, subd. (a).) Similarly, a defendant may move for summary adjudication "as to one or
6 more causes of action within an action, . . . one or more claims for damages, or one or more issues of
7 duty" where there is no merit to the cause of action, claim, or issue. (§ 437c, subd. (f)(1).)

8 A defendant moving for summary judgment or summary adjudication "has met his burden of
9 showing that a cause of action has no merit if he has shown that one or more elements of the cause
10 of action cannot be established, or that there is a complete defense to that cause of action." (*Caloroso*
11 *v. Hathaway* (2004) 122 Cal.App.4th 922, 926.) The burden then shifts to the plaintiff "to show that
12 a triable issue of one or more material facts exists as to that cause of action or a defense thereto."
13 (Code Civ. Proc., § 437c, subd. (p)(2).)

14 **V. ARGUMENT**

15 **A. CMI Lawfully Disposed of the Remaining Personal Property Pursuant to the**
16 **Unlawful Detainer Act and, Therefore, Is Immune from Liability.**

17 An unlawful detainer action is a statutory proceeding governed solely by sections 1159
18 through 1179a of the Code of Civil Procedure, commonly known as the Unlawful Detainer Act.
19 (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1424-25.) "The purpose
20 of such action[] is to expedite return of possession of real property wrongfully withheld or detained."
21 (*Hudec v. Robertson* (1989) 210 Cal.App.3d 1156, 1162.) The judgment for possession obtained in
22 an unlawful detainer action is enforced by a writ of possession. (See Code Civ. Proc., § 1174, subd.
23 (d); see also *id.* §§ 712.010, 715.010.) The writ of possession serves to place the judgment creditor in
24 possession of real property, and gives notice to the judgment debtor that any personal property
25 remaining on the real property "will be sold or otherwise disposed of in accordance with Section
26 1174 unless the judgment debtor . . . pays the judgment creditor the reasonable cost of storage and
27

1 takes possession of the personal property not later than 15 days after the time the judgment creditor
2 takes possession of the real property." (Code Civ. Proc., § 715.010.)

3 After a judgment creditor is placed in possession of real property pursuant to a writ of
4 possession, Code of Civil Procedure section 1174 (hereafter section 1174) establishes the procedure
5 for the disposition of personal property remaining on the premises. (Code Civ. Proc., § 715.030.)¹
6 Section 1174 requires that the judgment creditor give notice anyone else "(other than the [judgment
7 debtor]) reasonably believed by the [judgment creditor] to be the owner of personal property
8 remaining on the premises," and "store the personal property in a place of safekeeping until it is
9 either released pursuant to subdivision (h) or disposed of pursuant to subdivision (i)." (§ 1174,
10 subds. (d), (g).)

11 The personal property must be released to the judgment debtor pursuant to subdivision (h) if
12 the judgment debtor "pays the costs of storage as provided in Section 1990 of the Civil Code and
13 claims the property not later than the date specified in the writ of possession before which the
14 [judgment debtor] must make his or her claim" (§ 1174, subd. (h).) "Personal property not
15 released pursuant to subdivision (h) shall be disposed of pursuant to Section 1988 of the Civil Code."
16 (§ 1174, subd. (i).) Pursuant to section 1988, the judgment creditor "may retain the property for his
17 or her own use or dispose of it in any manner" if the creditor "reasonably believes that the total
18 resale value of the property" is less than \$300; if the property is believed to be of greater resale
19 value, "it shall be sold at public sale by competitive bidding." (Civ. Code, § 1988, subd. (a).)²

20 A judgment creditor who disposes of personal property in accordance with this procedure is
21 immune from liability to the judgment debtor for conversion of the property. (See § 1174, subd. (l)
22 [providing that "[w]here personal property is disposed of pursuant to Section 1988 of the Civil Code,
23

24 ¹ In this context, "references in Section 1174 and in provisions incorporated by reference in
25 Section 1174 to the 'landlord' shall be deemed to be references to the judgment creditor and
26 references to the 'tenant' shall be deemed to be references to the judgment debtor or other occupant."
(Code Civ. Proc., § 715.030.) References to "judgment creditor" and "judgment debtor" have been
27 placed in brackets when quoting section 1174, and the provisions incorporated by reference in
28 section 1174, in this Memorandum.

² Effective January 1, 2013, this value threshold was increased to \$700. (See Assem. Bill.No.
2521 (2011-2012 Reg. Sess.) § 8.)

1 the [judgment creditor] is not liable with respect to that property to" the judgment debtor].) Here,
2 CMI disposed of the personal property left behind at the condo in accordance with the statutory
3 procedure and, thus, is immune from liability to Plaintiff.

4 It is undisputed that Plaintiff was served with the writ of possession, which gave Plaintiff
5 notice that she had 15 days from the eviction to reclaim any personal property she left behind at the
6 condo. CMI stored the personal property at the condo during the 15-day period, which ended on
7 October 7, 2011. Because Plaintiff failed to reclaim her personal property by October 7, 2011, CMI
8 was entitled to dispose of the property. Mr. Alston reasonably believed, based on his knowledge and
9 experience as a real estate broker, including his work with peer groups handling similar valuations,
10 that the personal property had a total resale value of \$250, so CMI was authorized to retain the
11 property or dispose of it in any manner. CMI disposed of the personal property, as authorized under
12 section 1174. Based on these undisputed facts, CMI cannot be liable to Plaintiff with respect to her
13 personal property and is entitled to summary judgment.

14 **B. Plaintiff's Cause of Action for Conversion Lacks Merit.**

15 In her first cause of action, Plaintiff alleges that CMI converted the personal property she left
16 behind at the condo after she was evicted. "Conversion is the wrongful exercise of dominion over the
17 property of another. The elements of a conversion are the plaintiff's ownership or right to possession
18 of the property at the time of the conversion; the defendant's conversion by a wrongful act or
19 disposition of property rights; and damages." (*Spates v. Dameron Hosp. Ass'n* (2003) 114
20 Cal.App.4th 208, 221, citation omitted.) Plaintiff cannot establish these essential elements.

21 CMI was lawfully placed in possession of the condo on September 22, 2011, pursuant to the
22 writ of possession. The writ allowed Plaintiff 15 days to recover any personal property left at the
23 condo. The day after the eviction, a notice was posted at the condo, stating that the remaining
24 personal property would be disposed of after 18 days. Assuming arguendo this notice gave Plaintiff
25 additional time to recover her property, that time expired no later than October 11, 2011.

26 From September 22 through October 11, CMI stored the personal property at the condo.
27 There is no evidence that CMI exercised dominion over the personal property, or "prevent[ed] the
28

1 Plaintiff from having access" to the personal property during this time. (4AC ¶ 55.) On the contrary,
 2 it is clear that Plaintiff did have access to her personal property, entering the condo and removing
 3 any items she wanted. Because there was no "wrongful exercise of dominion" over the property by
 4 CMI, Plaintiff cannot establish a conversion on or before October 11. (See *Zaslow v. Kroenert*
 5 (1946) 29 Cal.2d 541, 550 ["the act of taking possession of a building and locking it does not, of
 6 itself, constitute a conversion of the personal property therein"].)

7 CMI anticipates Plaintiff will try to argue that CMI's lawful possession/storage of the
 8 personal property suddenly transformed into a conversion after Plaintiff left a voicemail message for
 9 Mr. Alston on October 8. Such an argument would be unfounded. When a defendant originally
 10 obtains possession of property lawfully, as CMI did in this case, a conversion generally does not
 11 occur until the defendant refuses to return the property on demand. (See *Stan Lee Trading, Inc. v.*
 12 *Holtz* (C.D. Cal. 1986) 649 F.Supp. 577, 581; *Flennaugh v. Heinrich* (1948) 89 Cal.App.2d 214,
 13 222.) The refusal is the act that shows the defendant has the requisite "intention or purpose to
 14 convert the goods and to exercise ownership over them, or to prevent the owner from taking
 15 possession of the property." (*Zaslow v. Kroenert, supra*, 29 Cal.2d 541, 550.) As such, "a refusal to
 16 deliver must be absolute and amount to a positive denial of plaintiff's right to possession." (*Kagee v.*
 17 *Bencich* (1938) 27 Cal.App.2d 469, 472; see also *Spates v. Dameron Hosp. Ass'n, supra*, 114
 18 Cal.App.4th 208, 222 ["conversion requires affirmative action to deprive another of property, not a
 19 lack of action"].) Here, there is no evidence that CMI (or Mr. Alston) ever refused, or even received,
 20 a demand from Plaintiff on or before October 11. Absent such evidence, Plaintiff cannot establish
 21 the essential element of a wrongful act of dominion over the property.

22 After October 11, Plaintiff had no right to claim possession of the personal property
 23 remaining at the condo. (See *Sanowicz v. Bacal* (2015) 234 Cal.App.4th 1027, 1041 [plaintiff "must
 24 have 'either ownership and the right of possession or actual possession [of the property] at the time
 25 of the alleged conversion thereof'"], citation omitted.) CMI, in turn, had no obligation to return the
 26 personal property to Plaintiff. (See 10 Miller & Starr, Cal. Real Estate (4th ed.) § 34:214 ["A
 27 landlord is guilty of conversion when he or she refuses to permit the tenant to remove property