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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES WEST DISTRICT

MARINA J BOYD, ANITA FAYE BOYD, ALEXIS BOYD-HOLLING Plaintiff, vs. CITIMORTGAGE, INC. & SKYWAY REALTY, MARK ALTON Defendants	CASE NO. SC117126 **NOTICE OF MOTION AND MOTION TO COMPEL DEFENDANT CITIMORTGAGE, INC. TO PROVIDE FURTHER RESPONSES TO PLAINTIFF REQUEST FOR PRODUCTION OF DOCUMENTS AND DEMAND FOR SANCTIONS** Hearing Date: February 17, 2016 Hearing Time: 8:30am Room: 2nd Floor, Department O Presiding Judge: Hon. Lisa Hart Cole COMPLAINT FILED: May 18, 2012

To Defendant and to its attorney of record:

NOTICE IS HEREBY GIVEN that on February 17, 2016, or as soon thereafter as the matter may be heard, at 111 N. Spring Street, 8th Floor, Room C, Los Angeles, California 90012, Plaintiffs will, and hereby does, move for an order compelling Defendant, Citimortgage, Inc. to serve on Plaintiffs further responses to Plaintiffs Request for Production of Documents, Set One, served March 9, 2014, and Plaintiffs second set of Request for Production of Documents, served February 25, 2015, within ten day of the order of the court, without objections.

Plaintiffs will further move the Court for an order requiring Citimortgage, Inc. **("CMI")** to pay monetary sanctions in the amount of $68,515, for cost incurred by Plaintiffs as a result of their ongoing wilful discovery abuses, and that the Court will order that **"CMI"** shall not be allowed to withhold any production of documents Plaintiffs have requested based on the objection of privilege communication and, that the jury in this matter be given an instruction of adverse inference at the time of trial regarding the litigation behavior of **"CMI",** that the Court will require **"CMI"** to allow for forensic examination of **"CMIs"** e-mail retention and storage systems by Plaintiff expert, reimbursable to Plaintiff by Defendant if they are found to be attempting to conceal relevant, discoverable documents and to pay the cost of all depositions required for Plaintiffs to prepare for trial if they would otherwise not be required save the defiance of **"CMI",** and to order any other relief allowed by law to ensure future compliance by **"CMI"** with discovery requirements.

Plaintiffs further as that the court will make a referral to the California State Bar asking for an investigation of the attorneys of Wolfe & Wyman, specifically, Stuart B Wolfe, (SBN 156471), Samantha Lamm (SBN 203094) and Cathy L Granger (SBN 156453) to determine if they have conspired with Citimortgage, Inc. to engage in abusive discovery tactics against Plaintiffs and Malicious Defense. Plaintiffs further ask that the court consider issuing a sanction in the form of Default Judgment against **"CMI"** if it determines that, as Plaintiffs believe, their conduct raises to the level of ongoing wilful and wanton discovery abuses and general abuse of the litigation process.

This motion will be based on this notice, the Memorandum of Points and Authorities, Separate Statement of Items in Dispute, and on the declaration of Marina J Boyd set forth below, on the records and files herein, attached Exhibits and on such evidence as may be presented at the hearing of the motion.

DATED: August 4, 2015

By:_____

MARINA J BOYD PLAINTIFF

TABLE OF CONETNTS

TABLE OF AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs commenced this action on May 18, 2012 seeking damages for the disposal of their Personal Property by the Defendants following foreclosure, trustee sale and eviction of the Plaintiffs from 12321 Ocean Park Blvd., Unit 1, Los Angeles, California 90064.

Plaintiffs allege, **"CMI"** conspired with Mark Alston of Skyway Realty to maliciously dispose of Plaintiffs Personal Property to, among other reasons, sabotage Plaintiffs legal challenge to the trustee sale of the Subject Property.

II. BACKGROUND

Plaintiff served Defendants' a Request for Production of Documents, Set One, on March 9, 2014 and a served Request for Production of Documents, Set Two on February 23, 2015.

After having granted **"CMI"** multiple extensions to September 19, 2014, defendant objected to the request as substantially the same as a previous request, however, the Request clearly differentiated itself from the previous request **"CMI"** referenced by specifically requesting Electronically Stored Information (ESI). Further, it should be noted that **"CMI"** in fact never provided document responsive to the previous request which they referenced.

III. ARGUMENT

In considering Discovery Motions, it is better that it be made in favor of granting discovery of the non-discoverable rather than denying discovery of information vital to preparation or presentation of the party's case or to efficacious settlement of the dispute.

In general, "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (§ 2017.010.) Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants (2007) 148 Cal.App.4th 390, 402. 3 Discovery is not a game of cat and

mouse, "where each side tries, as do Tom and Jerry, to sandbag the other." (Zellerino v. Brown (1991) 235 Cal.App.3d1097, 1115.) Its goal "is to enable a party to obtain evidence in the control of his adversary in order to further the efficient, economical disposition of cases according to right and justice on the merits. McGinty v. Superior Court (1994) 26 Cal.App.4th 204, 210.

"CMI" has employed countless litigation and discovery abuses in their efforts to avoid producing documents relating to their Planning and execution of the disposal of Plaintiffs Personal Property ("trash out"), following Plaintiffs eviction from the Subject Property. Specifically, **"CMI"** refuses to produces documents in its possession that would corroborate or refute claims that **"CMI"** was not informed by Mark Alston of Skyway Realty that Plaintiffs had contacted him requesting to retrieve their Personal Property and that they disposed of Plaintiffs Personal Property according to code.

Plaintiffs have demanded, and are entitled to inspect documents which have been retained according in accordance with their statutory retention requirements, and **"CMI"** contention that they have not instructed employees to retain communications beyond the RES.NET system, is not credible.

IV. LEGAL STANDARD

A. Defendant "CMI" has Abused the Discovery Process

"CMI" has engaged in multiple abuses of the discovery process over the last 22 months prior to the filing of this motion. They have propounded duplicative discovery on Plaintiffs, including discovery request of Plaintiff Alexis Boyd-Holling, who was only 14 years old at the time. Further, they have alternated between ignoring Plaintiffs efforts to meet and confer, and utilizing the requirements to meet and confer in order to cause delay. **"CMI"** has made boilerplate objections to legitimate discovery request which were without merit, have redacted passages from documents produced without explanation, and has objected to discovery which was identical to discovery they themselves had propounded. California Code of Civil Procedure 2023.010 holds in part: "Misuses of the discovery process include, but are not limited to, the following: (c) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. (d) Failing to respond or to submit to an authorized method of discovery.

(e) Making, without substantial justification, an unmeritorious objection to discovery. (i) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that an attempt at informal resolution has been made.

Notwithstanding the outcome of the particular discovery motion, the court shall impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct.

As set forth in the Plaintiffs supporting Declaration of Marina J Boyd, **"CMI"** has engaged in abuses which require the Court to order Monetary Sanctions to the Plaintiffs.

B. Plaintiffs have a Statutory Right to Sanctions

If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

The disparity in resources between the Plaintiffs and Defendants already provides **"CMI"** with carte blanche to subject the Plaintiffs to every procedural road block and abuse, and **"CMI"** has availed their self of that opportunity in excess. Failing to award sanctions is a genuine threat to justice and causes extreme prejudice to the Pro Se Plaintiff in this case, beyond what naturally exist.

The trial court should consider both the conduct being sanctioned and its effect on the party seeking discovery and, in choosing a sanction, should "attempt to tailor the sanction to the harm caused by the withheld discovery." Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns (1992) 7 Cal.App.4th 27, 36.

If **"CMI's**" in fact **"CMI"** transferred e-mail communication from its original Electronic format into PDF documents which are not readily printable, they should be sanctioned for their deliberate decision to re-produce ESI into the RES.NET system with different quantities of data and exclude all other e-mail communications from their search for discoverable documentations.

"CMI" has wasted, if not outright stolen time Plaintiffs need to prepare for trial, with endless excuses regarding their failure to comply with discovery requirements, and their actions threaten to

systemically sabotage Plaintiffs case. In Do v. Superior Court, 109 Cal. App. 4th 1210 (Cal. App. 4th Dist. 2003), the Court concluded that fees or monetary sanctions in the form of fees may be ordered where the award does not result in disparate treatment between litigants. And this is true whether or not a party actually "incurs" additional fees as a result of the opposing party's conduct". Failing to award sanctions in this case would leave a dangerous pit of injustice in the system, that for decades, the Courts have attempted to fill. In Kravitz v. Superior Court, 91 Cal. App. 4th 1015 (Cal. App. 2d Dist. 2001) the Court …. determined "*A pro se litigant …… can recover the "reasonable expenses" he has "incurred," including photocopying, computer-assisted legal research, and other identifiable and allocable costs.* It further states that*, "we think that some of the costs that pro se litigants incur, ……., are recoverable as sanctions"* and that *"the meaning of the term 'incur' is fairly broad".*

Plaintiff has, in the attached declaration identified the costs incurred as a result of **"CMI's"** discovery abuses. Plaintiffs have acted with dignity and professionalism in dealings with counsel and to not award sanctions would reward **"CMI's"** legal bullying and would send a terrifying message to all Pro Se litigants that regardless of the time and effort expended in preparing and presenting their case in accordance with the civil procedure and rules of court to maintain the equal standards required of represented litigants, their time invested in doing so is without value. As such, pro se litigants would routinely be crushed under the weight of litigants with bottomless resources. Neither **"CMI**", nor the Court would ever have had cause to concern their selves with the value of Plaintiffs time, were it not for the discovery abuses of **"CMI".**

C. "CMI's" Boilerplate Objections are Unsubstantiated

The objecting party bears the burden of justifying an objection. (Coy v. Superior Court (1962) 58 Cal.2d 210, 220.). Although it's unclear if **"CMI"** intends their statements (*See* **EXHIBIT O**, Declaration of Travis Nurse, Page 3, Line 21-27) to be an "undue burden" objection, the Ninth Circuit Court of Appeals explained that an *"undue burden" objection cannot be sustained without some evidence to support that conclusion.* In *F.D.I.C. v. Garner, 126 F.3d 1138, 1145-46 (9th Cir. 1997.* The objecting party *"must specifically state . . . how each question is . . . unduly burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden").*

Notwithstanding their failure to properly object, **"CMI"** has waited 12 months to raise this objection for the first time, and the time period to make this objection is long past.

When litigation is reasonably anticipated or at the commencement of litigation, counsel must issue a "litigation hold". In addition, they should identify the persons who are "likely to have relevant information" and communicate directly with these "key players" to ensure that they are aware of their duty to preserve relevant information. **"CMI"** has failed to produce the declarations necessary to sustain their objections, and overcome their statutory requirements.

D. The Court should Compel "CMI" to Produce E-Mail Communications Requested By Plaintiffs

Relevant subject matter is liberally construed to allow inquiry into any matters, even irrelevant matters, as long as they may lead to the discovery of admissible evidence. (Dodge, Warren & Peters Ins. Servs., Inc. v. Riley (2003) 105 Cal.App.4th 1414). "[I]n accordance with the liberal policies underlying the discovery procedures, doubts as to relevance should generally be resolved in favor of permitting discovery." (Pacific Tel. & Tel. Co. v. Superior Ct. (1970) 2 Cal.3d 161, 173; see also Obregon v. Superior Ct. (1998) 67 Cal.App.4th 424, 434 [California follows a "principle of liberal construction in favor of discovery"].). "If the requested information is reasonably calculated to lead to admissible evidence, which includes admissions against interest, discovery should be permitted." (Volkswagen v. Superior Court (2006) 139 Cal.App.4th 1481, 1497). In exercising discretion in resolving discovery disputes, courts have recognize that the approach articulated in Volkswagen v. Superior Court (2006) 139 Cal.App.4th 1481, 1497 (italics added) (citations omitted) should be followed. A representation of inability to comply with the particular demand for inspection, copying, testing, or sampling shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand, therefore, **"CMI"** cannot simply declare they will not conduct searches outside of the RES.NET system. They must specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. The statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item.

California's liberal approach to permissible discovery generally has led the courts to resolve any doubt in favor of permitting discovery. In doing so, the courts have taken the view if an error is made in ruling on a discovery motion, it is better that it be made in favor of granting discovery of the non-discoverable rather than denying discovery of information vital to preparation or presentation of the party's case or to efficacious settlement of the dispute.

E. The Court Should Consider Terminating Sanctions if it Finds Ongoing, Wilful Abuse

California Code of Civil Procedure 2031.300 allows that "The court may impose a terminating sanction by ……An order rendering a judgment by default against that party. If a party to whom a demand for inspection, copying, testing, or sampling is directed fails to serve a timely response to it, the party making the demand may move for an order compelling response to the demand".

As this Court set forth in Pringle v. Adams, a court "can ……..levy sanctions in response to abusive litigation practices. This Court's authority to sanction defendants includes the power to impose terminating sanctions in response to abusive litigation practices. When choosing among possible sanctions, the Ninth Circuit has instructed district courts to consider the following factors: "'(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.'"

In addition, "a finding of willfulness, fault, or bad faith is required" for a terminating sanction to be proper. As explained below, all five factors for determining sanctions weigh heavily in favor of imposing terminating sanctions in this case. There are few litigation practices as egregious as ignoring request for production, lying under oath to avoid production, and filing fraudulent motions to avoid production of documents.

The actions of **"CMI"** threaten the integrity of the system, and if taken lightly, declare over loud speaker, it is open season to bully and abuse, Pro Se litigants and dare them to find the time and resources to ask the court for relief.

The disparity in resources between the Plaintiffs and Defendants is a barrier to justice before proceedings begin. Failure to consider the most extreme sanctions in this case provides **"CMI"** with carte blanche to subject the Plaintiffs to every possible litigation abuse, and **"CMI"** has availed their self of that opportunity in excess.

F. Plaintiffs Motion is Timely

Plaintiffs made their first discovery request of "CMI" in March 2014. This matter was removed to Federal Court on December 22, 2014, and discovery continued throughout the Federal Court proceedings with **"CMI"** submitting supplemental responses to Plaintiffs March 2014 Request for Production of Documents and with Plaintiffs propounding additional Request for Production of Documents for e-discovery to **"CMI"**. On June 17, 2015, this case was remanded to State Court, thus Plaintiff calculates time based on this courts resumption of jurisdiction of the matter. According to the plain language of these statutes, *"the state court's jurisdiction is suspended when the defendant seeking removal gives notice to the state court clerk, and it is reacquired when the district court clerk gives notice to the state court clerk in the form of a certified copy of the remand order.* Spanair S.A. v. McDonnell Douglas Corp., 172 Cal. App. 4th 348 (Cal. App. 2d Dist. 2009 (internal citations omitted).

California Code of Civil Procedure states that a party has 45 days from the response, or *supplemental response* in which a party has to bring a motion to Compel Further Responses, and higher courts have held this time is Jurisdictional. As such, the time to bring the motion is tolled while the court jurisdiction is suspended. Based on this Court having resumed jurisdiction of this matter on June 17, 2015, the last day to file this motion is August 6, 2015, but extended by agreement of the parties on August 4, 2015 (see EXHIBIT S) for two weeks to August 18, 2014.

IV. CONCLUSION

Plaintiffs have a legitimate concern that the Defendants has and will intentionally and unlawfully attempt to conceal critical documents which support the Plaintiffs case and intends to continue to obstruct Plaintiffs ability to timely prepare for trial. Defendants have already jeopardized Plaintiffs ability to meet the date milestones set in the Scheduling Order in this case.

Therefore, Plaintiff request that the Court act as swiftly as the law allows in granting this motion ordering **"CMI"** to comply with their discovery obligations as stated herein, that the Court order **"CMI"** to allow forensic examination of **"CMIs"** e-mail retention and storage systems by Plaintiff expert, reimbursable to Plaintiff by Defendant if they are found to be attempting to conceal relevant, discoverable documents, to pay the cost of all depositions required for Plaintiffs to prepare

for trial if they would otherwise not be required save the defiance of **"CMI"** in complying with discovery requirements, and to pay sanctions in the amount of $66,515 based on the declaration certifying expenses attached hereto, and to order any other relief allowed by law in the interest of justice.

Dated: August 6, 2015

By: 
MARINA J BOYD, PLAINTIFF in PRO PER