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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

Portland Division

**OBSIDIAN FINANCE GROUP, LLC and
KEVIN D. PADRICK,**

Civil No. CV 11-0057 HA

Plaintiffs,

v.

CRYSTAL COX,

**MEMORANDUM IN SUPPORT
OF PLAINTIFFS' FRCP 37
MOTION FOR SANCTIONS AND
TO COMPEL**

Defendant.

I. INTRODUCTION

Plaintiffs move for sanctions and for an order to compel against defendant Cox because she has willfully failed to respond to properly served written discovery and failed to appear at her properly noticed deposition. At the same time that defendant Cox refuses to respond to proper discovery, she continues to spend countless hours writing about this case on the numerous blogs she maintains. Her behavior demonstrates willfulness and bad faith. Under the circumstances, the Court should issue an order of default against defendant Cox. Alternatively, it should at a minimum issue an order requiring Ms. Cox to (1) produce documents and answer interrogatories immediately, (2) appear in Portland for her deposition on a date selected by Plaintiffs and (3) pay the attorney fees and costs plaintiffs incurred in having their attorney travel to Montana for the deposition.

II. FACTUAL BACKGROUND

During the scheduling conference on August 30, 2011, this Court set a deadline of October 15, 2011, for the parties to complete discovery. Following the conference, on September 2, 2011, plaintiffs served their First Set of Requests for Production and First Set of Interrogatories by mail and email. (Aman Decl., ¶ 2, Ex. 1). Under FRCP 34, the responses to those discovery requests were due on October 6, 2011. Defendant has never responded to the requests.

On September 6, 2011, plaintiff's counsel sent defendant an email asking whether defendant was available on October 12, 13 or 14 for her deposition. (Aman Decl., ¶ 3, Ex. 2). Defendant did not respond. Plaintiffs' counsel left a voicemail message for defendant on September 7, 2011, with the intent of conferring on the motion to dismiss defendant's

counterclaims, and also to follow up on the email about scheduling her deposition. (Aman Decl. ¶ 4). Defendant did not respond.

On September 8, 2011, plaintiffs' counsel sent defendant an e-mail in a follow-up effort to confer on the motion to dismiss. (Aman Decl. ¶ 4, Ex. 3). Defendant did not respond.

On September 12, 2011, plaintiffs' counsel served defendant by mail and e-mail with a notice of deposition ("Notice") for October 12, 2011. (Aman Decl. ¶ 5, Ex. 4). The deposition was scheduled to take place in Kalispell, Montana at a local court reporter service and to start at 10 a.m. Kalispell is located near defendant's residence in Eureka, Montana. Defendant did not respond or in any way object to the Notice. (Aman Decl. ¶ 6).

On September 20, 2011, plaintiff's counsel sent an email asking defendant to confirm she had received the Notice. (Aman Decl. ¶ 7, Ex. 5). Defendant again did not respond. During this time period while Defendant was ignoring plaintiffs' counsel's efforts to confer, defendant continued to communicate with the Court's staff by email. (Aman Decl. ¶ 8, Exs. 6 and 7).

Defendant did not provide any response to the discovery requests by October 6, 2011. On Monday, October 10, 2011, plaintiffs' counsel sent yet another email to defendant requesting that defendant bring the documents to the noticed deposition on Wednesday, October 12. (Aman Decl. ¶ 9, Ex. 8). Defendant again did not respond.

Plaintiffs' counsel traveled to Montana and appeared at the noticed date, time and location of the deposition. Defendant failed to appear or to otherwise contact plaintiffs' counsel about the deposition. (Aman Decl. ¶ 10).

Plaintiffs incurred approximately \$4,875 in attorney fees, \$363.80 for airfare, and \$72.77 for rental car charges associated with plaintiffs' counsel travel to and from Montana and preparing for and appearing at the deposition. Plaintiffs also incurred \$515 in court reporter and videographer charges. (Aman Decl. ¶ 11).

On October 13, 2011, plaintiffs' counsel sent an email to defendant asking to contact him to confer about this motion for sanctions and to compel. (Aman Decl. ¶ 12, Ex. 9). Defendant did not respond. Plaintiffs' counsel also left defendant a voicemail on October 14, 2011 but received no response (Aman Decl. ¶ 12).

Since early September 2011, defendant has continued to make dozens of posts about plaintiffs and this case on the blogs that she maintains. (Aman Decl. ¶ 13, Ex. 10).

III. THE COURT SHOULD ISSUE AN ORDER SANCTIONING DEFENDANT COX AND/OR COMPELLING HER TO RESPOND TO THE DISCOVERY AND APPEAR FOR HER DEPOSITION

Federal Rule of Civil Procedure 37(d) gives this Court broad authority to sanction defendant Cox for her willful refusal to appear for her deposition and respond to proper discovery requests. There is no question that defendant Cox has willfully refused to respond to discovery in this case. Courts have issued harsh non-monetary and monetary sanctions against parties for such willful misconduct, even where the parties were not represented by counsel. *See, e.g., CoStar Realty Information, Inc. v. Field*, 737 F.Supp.2d 496, 501-02 (D.Md. 2010) (entering default judgment against *pro se* defendant who failed to respond to discovery requests and failed to appear for deposition despite repeated notification from opposing party's counsel).

The appropriate sanction against Ms. Cox is an order of default, leaving the issue of damages for trial. Ms. Cox has refused to respond to discovery while at the same time apparently spending hours continuing her campaign against plaintiffs. The Court should send a

strong message that this kind of misconduct will not be tolerated. Defendant's conduct also is prejudicial to plaintiffs given the rapidly approaching trial date.

Alternatively, the Court should issue an order requiring defendant (1) to produce the requested documents, (2) to answer the interrogatories and (3) to appear in Portland for her deposition on a date selected by plaintiffs.

Finally, the Court should order defendant to pay the reasonable attorneys' fees and costs associated with the earlier noticed deposition, in the amount of \$5,826.57. *See* FRCP 37(d)(3) (fee-shifting required absent substantial justification or other circumstances that would make it unjust).

DATED this 14th day of October 2011.

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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFFS' FRCP 37 MOTION FOR SANCTIONS AND TO COMPEL** on:

Crystal L. Cox
PO Box 505
Eureka, Montana 59917
Crystal @CrystalCox.com

- by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said party's last-known address and depositing in the U.S. mail at Portland, Oregon on the date set forth below;
- by causing a copy thereof to be e-mailed to said party at her last-known email address on the date set forth below;

DATED this 14th day of October 2011.

TONKON TORP LLP

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