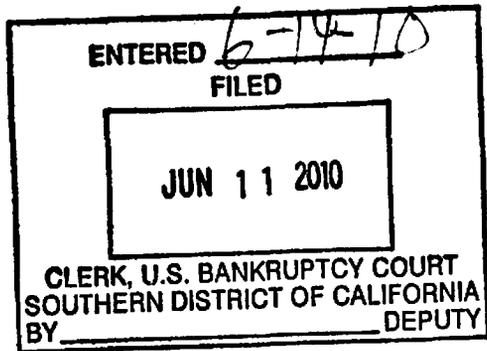


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NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re
EQUIPOINT FINANCIAL NETWORK,
Debtor.
EQUIPOINT FINANCIAL NETWORK,
Plaintiff,
v.
BRIAN PIERCE SR. AND BRIAN
PIERCE JR.,
Defendants.

Bankruptcy No. 08-05555-JM11
Adversary No. 08-90488-JM

MEMORANDUM DECISION REQUIRING
ADDITIONAL BRIEFING AND
DECLARATIONS FOR SANCTIONS,
SETTING DEADLINES AND SCHEDULING
FURTHER HEARING

I

The Defendants filed a motion for summary judgment, a motion to compel discovery and a motion for sanctions against the Plaintiff under Fed.R.Bankr.P. 9011. The motions were taken under submission after hearing. The Court has determined that sanctions are appropriate in this case. However, additional briefing and a

1 further hearing are required to determine the appropriate amount of
2 sanctions to impose.

3
4 II

5 **FACTS AND PROCEDURAL BACKGROUND**

6
7 The Debtor filed a Chapter 11 petition on June 20, 2008. Brian
8 Pierce Sr. and Brian Pierce Jr. ("Pierces" or "Defendants") filed
9 proofs of claim for unpaid compensation and expenses on August 4,
10 2008. The Debtor objected to the claims on November 5, 2008, on the
11 grounds that there was no agreement to reimburse the Pierces for
12 expenses and that the Pierces and other management had agreed to
13 salary reductions after a board meeting, so their salaries were
14 reduced, not deferred.

15 On November 5, 2008, the Debtor also filed the complaint to
16 initiate this adversary proceeding ("Complaint"). The Complaint
17 relates to the Pierces' tenure in overseeing many of the Debtor's
18 branch offices after an acquisition in November 2006 until their
19 employment was terminated in December 2007. The Complaint contains
20 claims for breach of contract, conversion, fraud, breach of
21 fiduciary duty and breaches of the implied covenants of good faith
22 and fair dealing. The Complaint contends on information and belief
23 that the Pierces created many financial accounts which they kept
24 hidden from the Debtor, that they improperly diverted revenue from
25 the branches they managed to themselves and caused damage of at
26 least \$500,000 to the Debtor. The Complaint also alleges that the
27 Pierces provided inaccurate and false accounting data to hide their
28 activities and that they may also have created false expense

1 accounts.

2 The Pierces filed an answer to the Complaint on December 3,
3 2008. They admitted they were responsible for overseeing over one
4 hundred of the Debtor's branch offices at one point. They also
5 admitted that they created and maintained many financial accounts
6 for the branches, but denied the accounts were hidden from the
7 Debtor. The Pierces admitted receiving reimbursements based on
8 their agreement with the Plaintiff, but denied any of the
9 reimbursements were for false or overstated expenses.

10 At the initial hearing on the objections to claims, those
11 objections were consolidated with this adversary proceeding, and the
12 matters continued to February 27, 2009. On February 10, 2009,
13 counsel submitted a joint certificate of compliance pursuant to
14 Local Rule 7016-2 ("Certificate"). The Certificate stated the
15 parties had agreed on a discovery plan. The Certificate indicated
16 the Debtor expected to complete discovery by July 2009, would be
17 ready for trial by August 1, 2009, and intended to call seven
18 witnesses at trial. After the hearing on February 27, 2009, the
19 matters were continued to May 15, 2009, and the parties were to
20 participate in mediation.

21 On March 13, 2009, the Defendants served Plaintiff with
22 interrogatories, to which Plaintiff responded on April 21. The
23 response was very limited, and in response to the request for facts
24 to support the allegations of wrongdoing in the Complaint offered
25 the following:

26 Plaintiff's investigation and discovery are
27 continuing. Plaintiff discovered, by a review of
28 available financial documents from its internal documents,
that the Defendants were generating more overhead and
operational costs than Defendants' reported operations

1 could possibly create. When Plaintiff requested backup
2 information for Defendants' operations, the Defendants
3 refused to produce operational, financial documents.
4 Plaintiff has since begun investigations into whether
5 Defendants produced sales for which Plaintiff did not
6 receive documentation and/or profits. Plaintiff has yet
7 to find the existence of other bank accounts, but
8 continues to conduct discovery. Plaintiff will shortly
9 subpoena various banks at which Defendants appeared to
10 have business dealings. Plaintiff will supplement this
11 response. Plaintiff has also discussed the matter with
12 former employees and officers of Equipoint, which are
13 willing to testify as to their belief that Defendants
14 were, indeed, misappropriating funds. Finally, Plaintiff
15 believes that Defendants have sole possession to most of
16 the necessary documentation and financial information that
17 Plaintiff's will need to prove their allegations.

18 On May 1, 2009, the Defendants made a written request for
19 further responses to the interrogatories within ten days, based on
20 the absence of any facts in the initial responses to support the
21 allegations of wrongdoing in the Complaint. On May 11, 2009, the
22 Pierces served the Debtor's attorney with a motion for sanctions
23 under Fed.R.Bankr.P. 9011 ("Rule 9011 Motion"), which triggered the
24 safe harbor provisions of that rule. By letter dated May 12,
25 Debtor's attorney, Mr. Bravo, pointed out that both sides had
26 ignored the requirement to provide initial disclosures before
27 commencing formal discovery, and included the Debtor's disclosures.
28 Mr. Bravo agreed that the Debtor's responses to interrogatories were
not the best, but explained they had been preoccupied with the
reorganization. He indicated that the Debtor was in the process of
drafting amended responses to the Defendant's discovery requests,
and would provide amended responses no later than May 27, 2009. Mr.
Thompson, the Defendant's attorney, responded by letter dated May
15, and described the request for initial disclosures as
"kafkaesque", explaining that "unless some specifics are provided,

1 it will be difficult to know which persons or documents will refute
2 plaintiff's allegations." The Plaintiff did not file a motion to
3 require disclosures or compel further discovery from the Defendants.

4 By letter dated June 1, 2009, Mr. Thompson reminded Mr. Bravo
5 of the agreement to amend discovery responses by May 27. The Debtor
6 did not amend the discovery responses, and did not withdraw or
7 modify the Complaint within 21 days of service of the Rule 9011
8 Motion. On July 6, 2009, the Defendants filed a motion for summary
9 judgment, a motion to compel discovery and for sanctions under
10 Fed.R.Bankr.P. 7037 ("Discovery Motion"), and the Rule 9011 Motion
11 requesting dismissal of the Complaint and monetary sanctions against
12 the Plaintiff (collectively the "Three Motions"). The Three Motions
13 were supported by declarations from Mr. Thompson which attached
14 copies of documents, including the Complaint, the Defendants'
15 discovery requests, the Debtor's responses thereto, and the ensuing
16 correspondence between the attorneys.

17 The Three Motions were originally set for hearing on August 20,
18 2009. On July 15, the Debtor filed an Ex Parte Application to
19 extend the time to respond to the Three Motions and continue the
20 hearing date ("July 15 Application"). The July 15 Application was
21 accompanied by declarations of the Debtor's president, Bruce Barnes,
22 and its' attorney, Mr. Bravo. To justify the extensions, the July
23 15 Application referred to the Defendants' failure to provide
24 initial disclosures required by Fed.R.Bankr.P. 7026 and their
25 "woeful" responses to discovery requests. The July 15 Application
26 described the Three Motions as having "an unmistakable mocking tone,
27 as if to say, we've hidden our wrongdoings well enough that we
28 believe you have no way of proving we did anything wrong, and we'll

1 do everything in our power to cut short your time to conduct any
2 discovery and investigation that could produce such evidence." Mr.
3 Bravo claimed that due to the lack of cooperation by the Pierces the
4 Debtor was forced to issue subpoenas to the Tigard Branch of the
5 U.S. Bank to obtain the Debtor's banking records, most of the
6 records would not be received until July 20, and then the attorneys
7 needed time to analyze the records and conduct depositions of the
8 Pierces and others to establish the facts alleged in the Complaint.

9 After a hearing, the Court granted the July 15 Application and
10 extended the date for the Debtor to respond to the Three Motions to
11 September 18, 2009. On September 16, 2009, the Debtor requested a
12 further extension claiming that additional bank accounts had just
13 been discovered due to a misdirected email, and the Debtor had
14 approached the Pierces' attorney to request available dates to
15 depose the Defendants. The Court granted the second extension until
16 October 14, 2009.

17 On September 28, 2009, the Plaintiff served deposition
18 subpoenas for the Defendants and Kathryn Pierce. The depositions
19 were scheduled for October 8, 9 and 12 in San Diego. The Pierces
20 live in Oregon. On October 1, Mr. Thompson informed Plaintiff's
21 counsel that the deposition dates were good and he would accept
22 service for Kathryn Pierce, who is not a party to the litigation.
23 On October 7, 2009, at 5:07 p.m. counsel for Plaintiff sent an email
24 to cancel the scheduled depositions. The Defendants had already
25 traveled to San Diego from Oregon and Washington.

26 On October 14, 2009 the Debtor filed a notice of non-opposition
27 to the motion for summary judgment and the Discovery Motion, with a
28 status report ("Non-Opposition"), and an opposition to the Rule 9011

1 Motion ("Opposition"). Each was accompanied by a declaration from
2 Bruce Barnes.

3 The Barnes declaration in support of the Non-Opposition states
4 that the Debtor cannot afford to pursue the case. They reviewed the
5 bank statements, but need further explanation as to how the bank
6 statements related to the Defendants' operations. The Debtor
7 consulted with forensic accountants and learned it would cost over
8 \$50,000 to audit the transactions and create financial statements
9 for the Defendants' operations. Mr. Barnes explained that the main
10 reason for the inability to press forward with the litigation is
11 "the fact that the Pierces failed to provide adequate, accurate
12 reports to the Debtor during their operations and are now
13 understandably unwilling to provide any assistance in a case that
14 was legitimately filed against them." Attached as Exhibit A to the
15 Non-Opposition declaration was a document labeled Settlement Offer
16 which was addressed to Mr. Barnes from Brian Pierce, Sr.
17 ("Exhibit"). In the declaration, Mr. Barnes refers to the Exhibit
18 as evidence of problems caused by the Pierces after the filing of
19 the Complaint, and highlights allegations Mr. Pierce makes about the
20 Debtor's wrongdoing in Nevada.

21 The Court finds that pages 2 - 4 of the Exhibit are more
22 relevant for the issues at hand. The information provided in those
23 three single spaced pages of the Exhibit contains detailed
24 disclosures of the Defendants' side of the litigation¹. The Exhibit
25

26 ¹ The Exhibit sets out the Defendants' version of the facts surrounding the acquisition by
27 Equipoint Financial Network (EFN) of the Retail Branch Division (RBD) built by the Pierces. The
28 acquisition occurred before Mr. Barnes was employed as President of the Debtor. Excerpts from the
Exhibit include the following information from Mr. Pierce:

28 - "the \$300,000 claimed by Debtor is a misrepresentation; in fact this money was invested in the
company as a whole in the form of licensing new states, bonds for the whole company, and

1 was apparently sent to Mr. Barnes some time in December 2008,
2 because it contains a deadline of December 23, 2008, to respond to
3 the settlement offer.

4 The declaration of Mr. Barnes submitted in support of the
5 Opposition explains that he took over as president of the Debtor
6 shortly after the bankruptcy petition was filed in June 2008. The
7 declaration repeats the allegations of the Complaint, which all
8 relate to a time before Mr. Barnes was employed as president of the
9 Debtor. There is no evidence to indicate that he had any personal
10 knowledge of the allegations in the Complaint, or in Paragraphs 5

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13 administrative overhead.”

14 - “the accounting claims are patently ridiculous. The RBD provided all QuickBooks files (QBW)
15 files to EFN in a timely manner whenever requested. The RBD gave full access to all accounting records
16 and information at all times. Representatives of EFN were given full access to all RBD information.
17 In one particular visit EFN CFO Harry Puglisi and Newcastle representative Roy Mall visited the RBD
18 for a two day audit of all RBD accounting. Their assessment of the RBD accounting department was
19 extremely high. In addition to providing the QBW files, the RBD provided a detailed report showing
20 details of all revenue and expenses. This report was produced in cooperation with the EFN CFO and
21 EFN Comptroller and was reviewed in detail monthly. This report and the QBW files detail all income
22 and expenses.”

18 - “All financial accounts were created and maintained for the express purpose of building and
19 maintaining the RBD. All financial accounts were in complete accordance with the business model
20 presented to and adopted by the Debtor. The Debtor was given access to all account information as
21 stated in the Accounting Policies and Procedures. The Accounting Policies and Procedures were refined
22 by the RBD and approved under the direction of the Debtor and the Debtor’s CFO, Comptroller,
23 President and CEO. The Debtor received truthful, accurate, current, and detailed account information
24 on a regular schedule, as all accounting files were sent monthly to the CFO and Comptroller of the
25 Debtor.”

22 - “US Bank was the only bank used for RBD accounting and all accounts were established at the
23 same US Bank branch in Wilsonville Oregon. There were simply no hidden bank accounts.”

23 - “All accounts created for EFN by the RBD were transferred to Ron Oliveira on December 7,
24 2007.”

24 - “Expense reports for Pierce and Pierce Sr. were paid only for legal IRS allowable expenses as
25 incurred for legitimate business expenses. Expenses were thoroughly reviewed and accounted for by
26 the key financial personnel of the debtor; as determined by the accounting policies and procedures which
27 the Debtor’s financial personnel put in place. All accounts and related expenses were constantly
28 disclosed to the debtor through monthly reports.”

27 - “Many of the documents and information proving the debtor’s knowledge of the accounts and
28 expenses are contained in the documents and servers seized by the debtor when its personnel lied to the
RBD management and locked out the entire office of RBD employees on December 7, 2007. Inspection
and copies of the servers will be required in the bankruptcy proceeding, and forensic specialists will be
able to determine if any of the information on those servers has been altered since December 7.”

1 through 10 of the declaration². Mr. Barnes explains that the facts

2
3 ² The declaration of Mr. Barnes, which was dated October 14, 2009, states:

4 5. From approximately November 2006 to December 2007, Pierce Sr. and Pierce, Jr. were
5 responsible for overseeing several of Debtor's branch offices, which at one point numbered over 100
6 offices (collectively, the "Branch Offices"), from their main offices in Tigard, Oregon. During this time,
7 Debtor spent approximately \$300,000 to keep the Branch Offices in operation and was unable to obtain
8 detailed information on why the Branch Offices being overseen by the Pierces were generating
9 overwhelming expenses. Further, the operations of these branches generated approximately \$500,000
10 in losses....

11 6. The Debtor's management and board of directors for the Debtor during the time period that
12 the Pierces operated their branches was no longer with the Debtor when Debtor filed for bankruptcy
13 protection. Shortly after the filing of the bankruptcy, I took over as president of the Debtor and
14 undertook the operations of the Debtor. As part of the bankruptcy process, I attempted to gather as much
15 information as could be gathered regarding the Debtor's previous operations, including the operations
16 of the Pierces' various branches. In discussing the status of the Debtor with senior personnel, including
17 Debtor's controller, Diana Clegg, I was informed that when the Debtor entered into its agreement with
18 the Defendants, Home Capital Funding, Inc., one of Debtor's clients, warned the Debtor about the
19 Defendants and suggested that the Debtor keep a close eye on the Pierces' accounting records. Ms.
20 Clegg, who has been with the Debtor for over ten years and was present during the time the Pierces were
21 involved with the Debtor, also informed me that during the time period that the Pierces were operating
22 branches for the Debtor, Ms. Clegg had compared funding/pipeline reports that the Pierces had delivered
23 to the Debtor with internal reports generated from within the Pierces' internal computer records and the
24 financial numbers did not match up. When Ms. Clegg brought it to the attention of her superiors, Mr.
25 Pierce, Sr. was informed of the discrepancy. Mr. Pierce, Sr. became agitated, threatening to quit
26 Equipoint and to take his entire operation with him. It appears that after this event, the Pierces made
27 sure to deny access to their internal records to anyone at Equipoint. I believe that, because Equipoint
28 was already hemorrhaging money, they acquiesced to Mr. Pierce Sr.'s demand that his operation work
autonomously.

7. At that point, I determined a further review of the Debtor's records was necessary. A review
of available records revealed to me that the Pierces' branches had operated at a consistent loss, totaling
over \$500,000. However, the documents available to me did not present a full picture of the Defendants'
operations and the available records did not have any backup data to support those losses. Further, the
records revealed that there was no way of determining how much revenue those branches had generated.
I believe, only the Pierces would have access to information and records that could explain away the
\$500,000 in losses...

8. I was also informed that the Pierces had opened over one hundred accounts during the time
of their operations, the names and titles of these accounts had never been reported to the Debtor. The
Pierces never provided an explanation as to why so many accounts were needed and never explained
how this plethora of accounts interrelated to their operations and accounting records, even after the
commencement of the suit and despite requests from Debtor's counsel for identification of these same
accounts.

9. I learned that, sometime in December of 2007, the decision was made by the Debtor to shut
down the Pierces' operation and to attempt to recover the documents and property of the Debtor. Before
the Debtor was able to gain access to the Tigard, Oregon office, the Pierces, or someone working on
their behalf, had removed various physical files that likely contained financial information and
operations information. Furthermore, the Pierces, or someone on their behalf, had removed the office's
computers, making it impossible for the Debtor to access the full records of the Tigard, Oregon. It
wasn't until the Debtor had to request that the computers be returned that the Debtor received them and
the Debtor had no way of telling whether the financial records in those computers had been altered.

10. When the office was taken over by the Debtor, representatives of the Debtor spoke to various
former employees of the Pierces who represented that the Pierces had highly dubious operational and
accounting methods and some employees suspected the Pierces had been taking money from the Debtor
for their personal benefit.

1 he refers to were gleaned from his attempt to gather as much
2 information as he could about the Debtor's previous operations as
3 part of the bankruptcy process. The sparse details of the
4 Defendants' suspected wrongdoing were all based on things he was
5 told while gathering information. Most of the information was
6 provided to him by unnamed representatives of the Debtor who spoke
7 to other unnamed people. Mr. Barnes did name Diana Clegg, the
8 Debtor's controller, as one source of the information he based the
9 decision to pursue claims against the Defendants. Conspicuously
10 absent from the Debtor's Opposition is a declaration by Ms. Clegg
11 under penalty of perjury.

12 The Defendants filed a reply to the Opposition, accompanied by
13 declarations from the Pierces, their attorney, and nine former
14 employees of the Debtor. The declarations were dated between May 13
15 and October 22, 2009. The positions held by the former employees
16 included the operations manager, an operations assistant who handled
17 expense reports, the accounting manager, an accounting assistant,
18 the human resources manager and the system developer/programmer, all
19 of whom worked at the Tigard office with the Defendants. There were
20 also declarations from two branch managers of Portland locations,
21 who were present and observed events which occurred on December 7
22 and 10, 2007, when the former officers of the Debtor took over the
23 Tigard Operations Office, changed the locks and terminated the
24 Defendants and several other employees. The declarations were very
25 detailed and included many pages of specific facts about the
26 operations of the Tigard Office, financial information shared with
27 the Debtor and the surprise takeover and lock out of the employees
28 in Tigard on December 7, 2007.

1 attached to the Barnes Declaration in Support of Non-Opposition, was
2 sent to Mr. Barnes in December 2008. The Exhibit contained a
3 significant amount of information of the Defendants' version of the
4 lawsuit. The Debtors' own responses refer to a review of available
5 financial documents to support the allegations of losses, but failed
6 to identify the contents of any available financial documents.

7 The Court also rejects the Debtor's argument that the Discovery
8 Motion is moot, so it should be denied. The Discovery Motion is
9 still relevant in two respects - first, to the extent the responses
10 may be needed to develop the Rule 9011 Motion, and second for an
11 award of expenses under Rule 37(a)(5)(A). Based on the
12 correspondence between counsel, the Court finds that the Defendants
13 attempted in good faith to obtain the discovery without court
14 action, the Debtor's response was not substantially justified, and
15 there are no other circumstances to make an award of expenses
16 unjust. The Debtor was provided ample opportunity to supplement the
17 discovery responses, but failed to take advantage of those options.

18 Defendants are instructed to submit a declaration to itemize
19 the costs to pursue the Discovery Motion, by June 28, 2010.

20

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IV

22

Rule 9011 Motion

23

24 The Defendants also request dismissal of the Complaint with
25 prejudice, and monetary sanctions under Rule 9011. The Defendants
26 contend that the Complaint was filed for an improper purpose, and
27 that the allegations in the Complaint lacked evidentiary support.
28 Before filing the Rule 9011 Motion, the Defendants tried to discern

1 the basis for the allegations through discovery, made the safe
2 harbor service of the Rule 9011 Motion, and waited far beyond the
3 required 21 days after service before filing the Rule 9011 Motions
4 with the Court. The Debtor was granted two lengthy extensions to
5 respond, and then as the final deadline expired, almost a year after
6 filing the Complaint, the Debtor responded that it had decided not
7 to proceed with the case for financial reasons.

8 The Debtor argues that Mr. Barnes had uncovered alarming
9 information and based on this information, the Debtor's attorneys
10 decided it was necessary to file the lawsuit to prevent destruction
11 of records and conduct discovery. The Debtor urges that Rule 9011
12 sanctions are serious and only appropriate in exceptional
13 circumstances when a claim is patently unmeritorious or frivolous.
14 A filing is frivolous if it is both baseless and made without
15 reasonable and competent inquiry. Business Guides Inc. v. Chromatic
16 Communications Enterprises, Inc., 498 U.S. 533 (1991). Debtor also
17 cites to the objective standard which the Court is to apply, as
18 viewed from the perspective of a competent attorney.

19 The Debtor argues that the Rule 9011 Motion is based on the
20 sole premise that the Debtor should be sanctioned for filing the
21 Complaint because at the time it was filed, the Debtor did not have
22 specific, concrete proof of Defendants' wrong doing. The Debtor
23 contends that it had a good faith belief that the Defendants had
24 committed improper acts, and that the Defendants had control of the
25 proof of their wrongdoing, and insists that the Defendants' lack of
26 cooperation in discovery hindered the Debtor's ability to find
27 concrete evidence of the allegations. The Debtor argues that the
28 objective standard of whether a pleading is frivolous is applied by

1 examining the facts of the case at the time it was filed. If the
2 relevant facts are in control of the opposing party, more leeway
3 must be given, and that imprecision at the outset of litigation is
4 tolerated, citing to Cooter & Gell v. Hartmarx Corp., 496 U.S. 384,
5 (1990).

6 The Debtor's arguments were sufficient for the Court to grant
7 extensions to respond to the Three Motions, but the record reveals
8 the flaws in the Debtor's position as a defense to the Rule 9011
9 Motion. While the Defendants may not have served the Debtor with a
10 document entitled "Initial Disclosures", the Exhibit with the
11 Settlement Offer which was sent to Mr. Barnes soon after the
12 Complaint was filed contained the Defendants version of the facts.
13 The Exhibit disclosed that all branch accounts were maintained at
14 the U.S. Bank in Wilsonville, and that each branch manager had
15 information about the finances for that branch. Mr. Pierce
16 explained that the financial information was located in the
17 documents and servers seized by the Debtor on December 7, 2007. At
18 that early stage of the litigation, in December 2008, Mr. Pierce
19 suggested to Mr. Barnes that "inspection and copies of the servers
20 will be required in the bankruptcy proceeding, and forensic
21 specialists will be able to determine if any of the information on
22 those servers has been altered since December 7" [2007].

23 The Debtor provided no admissible evidence to explain what
24 efforts were made to review the documents, servers and computers
25 which were in the possession of the Debtor. The declarations
26 submitted by the Defendants with their reply to the Opposition were
27 from people that were employed by the Debtor. The Debtor does not
28 explain why it does not have contact information on its former

1 employees. There is no explanation for the lack of a declaration
2 from Diana Clegg, despite Mr. Barnes' claimed reliance on
3 information she provided in pursuing the Complaint. Finally, the
4 Debtor did not provide support for its claim that the Pierces failed
5 to cooperate in discovery. Their responses gave the location,
6 address and contact information for the U.S. Bank where they had
7 opened accounts for the Debtor, they provided correspondence and
8 emails relating to the December 7, 2007 lock out, and expense
9 requests. They made themselves available for deposition when
10 requested by Debtor.

11 A further problem with the Debtor's position is the reliance on
12 cases which were issued before the 1993 Amendments to Rule 11 were
13 enacted. Before 1993, motions for sanctions under Rule 11 were
14 spawning a significant amount of satellite litigation which became
15 burdensome on the Federal Courts. Rule 11 was amended in 1993 to
16 add the safe harbor provision which permits a party to avoid
17 sanctions by withdrawing a pleading during the 21 day period after
18 service of a Rule 11 motion.³ As the Committee Notes to the 1993
19 Amendment state, once a party learns that a claim lacks merit, it is
20 sanctionable conduct to persist in the prosecution of the claim.
21 The focus is not limited to the Debtor's knowledge at the time the
22 Complaint was filed, but extends to a reasonable inquiry throughout
23 the litigation.

24 The declarations submitted with the Defendant's reply to
25 Opposition attest to the surprise nature of the December 7 lock out,
26 and the assertion that the office was left in its normal state,
27

28 ³ The safe harbor provision was added to Rule 9011 in the 1997 Amendments.

1 without removing or destroying records. The Debtor has not provided
2 a credible explanation for filing the Complaint without additional
3 investigation. Debtor cites to no impending statute of limitations.
4 The Pierces were locked out of the office in December 2007, Debtor
5 has not identified any documents or records that they would have the
6 ability to destroy a year later. The information and investigation
7 offered by the Debtor do not provide an objectively reasonable basis
8 of any facts to support the allegations in the Complaint. The Rule
9 9011 Motion is well founded, and is granted. A further hearing is
10 necessary to assess an appropriate sanction.

11
12 V

13 CONCLUSION AND ORDER

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15 The Non-Opposition states that the Debtor consents to entry of
16 an order dismissing the complaint with prejudice. The Discovery
17 Motion and Rule 9011 Motions are granted, but the Court requires
18 additional declarations and support to ascertain the proper measure
19 for sanctions. Therefore,

20 IT IS ORDERED that:

21 1) The Motion for Summary Judgment is granted, and the
22 objections to claims are overruled. Counsel for the Pierces is
23 instructed to submit orders to that effect;

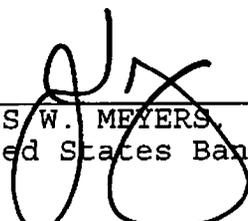
24 2) Defendants have until June 28, 2010, to file and serve
25 declarations and further briefing to support an award of sanctions
26 for the Discovery Motion and the Rule 9011 Motions;

27 3) Plaintiff has until July 7, 2010, to file and serve any
28 objection to Defendants' declarations, and any responsive brief;

1 4) Defendants have until July 14, 2010, to file and serve a
2 reply;

3 5) The Court will conduct a further hearing on the amount of
4 sanctions to be awarded in connection with the Discovery Motion and
5 the Rule 9011 Motion, on Wednesday, July 21, 2010 at 2:00 p.m. in
6 Dept 5, Room 318, U.S. Bankruptcy Court, 325 West F Street, San
7 Diego, CA. 92101.

8 Dated: **JUN 11 2010**

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11 _____
12 JAMES W. MEYERS, Judge
13 United States Bankruptcy Court
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