

1 **LAW OFFICES OF JEFFREY F. SAX**

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6 Attorneys for Plaintiff
7 **ALL CITIES REALTY, INC.**

8
9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11
12 ALL CITIES REALTY, INC.

13
14 Plaintiff

15 v.

16 CF REAL ESTATE LOANS, INC.

17
18 Defendant

) Case No: SACV05-615 AHS
) (MLGx)

)
) **DECLARATION OF JEFFREY F.**
) **SAX AND EXHIBITS IN**
) **OPPOSITION TO DEFENDANTS'**
) **MOTION FOR AWARD OF**
) **ATTORNEY'S FEES AND COSTS**
) **OF SUIT AND TERMINATING**
) **SANCTIONS**

)
) Date: February 23, 2009
) Time: 10:00 a.m.
) Ctrm: 10-A

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23
24 **AND RELATED COUNTER-CLAIM**
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DECLARATION OF JEFFREY F. SAX

I, Jeffrey F. Sax declare:

1. I make this declaration of my own personal knowledge on the facts set forth below and if called as a witness I could and would testify competently thereto.

2. I am an attorney at law licensed to practice in the State of California and am co-counsel of record for All Cities Realty Inc.

3. I make this declaration to provide the factual support for items within my personal knowledge as asserted in the points and authorities in opposition to Defendant's motion for sanctions. The declaration generally recites the facts in the order that they appear in the points and authorities.

4. During the proceedings in this All Cities Realty® v. Re/Max All Cities Realty action, Plaintiff propounded interrogatories to Defendant. In response to certain interrogatories, Defendant Re/Max All Cities Realty disclaimed responsibility for its real estate agents' conduct in the use and marketing of the All Cities Realty® name and the damages caused thereby. I attach a copy of Defendant's interrogatory responses containing this information as Exhibit A.

5. Based upon this "verified" position, All Cities Realty® filed a second lawsuit against the disclaimed agents in California State Court, Case No. BC 355724 ("the State Court action") who had operated under the All Cities Realty® name. The State Court lawsuit against the agents was an attempt to bring all parties responsible for using the All Cities Realty name before a judicial tribunal. There were no settlement discussions or warnings to Defendant prior to filing. In other words, Plaintiff did not say in substance, if you do not settle, we will file this action against your agents and former agents. Plaintiff simply filed without comment.

6. When Re/Max All Cities Realty learned of the State Court action, it sought to intervene in the State Court action and was allowed to do so. Re/Max All Cities Realty then sought a stay of the State Court action. During the "stay" proceedings, Re/Max All Cities Realty reversed its position and stated under penalty

1 of perjury that it would defend and indemnify any named agent that requested it. I
2 attach as Exhibit B a copy of a memo from Holly Thomas, Defendant's in house
3 attorney, dated August 25, 2006 which Defendant filed in the State Court proceeding
4 as part of its motion to stay. As part of this submission, Defendant attached about
5 400 indemnity agreements out of the 1,695 agent defendants who were named.

6 7. However, Re/Max All Cities Realty never provided any proof to the
7 State Court that it had the financial wherewithal to honor its commitment to the
8 agents, even to the extent that it could pay the first appearance fee on behalf of the
9 agents, an amount in excess of \$600,000. Without being able to pay the first
10 appearance fee, Re/Max All Cities Realty could not honor its stated commitment to
11 defend the defendant agents in the State Court action, and certainly, based upon that
12 assumption, could not honor its stated promise to indemnify them. In our State
13 Court filings, we pointed out this dilemma. It was later brought to my attention
14 (probably by Defendant) that this paradox was the subject of some commentary by
15 Joseph Miner on his web site. (I rarely read Miner's web site, and only when
16 prompted by something Defendant has accused him of doing.)

17 8. Although Mr. Sandelands has made inferences in various filings with
18 the Courts that the State Court defendants were represented, at NO TIME, even as of
19 today, have I ever been notified that ANY of the State Court defendants were, in
20 fact, represented by an attorney (except Re/Max All Cities Realty as the intervenor).
21 Certainly, the identity of that attorney has never been disclosed.

22 9. In the State Court action, the court granted Re/Max All Cities Realty's
23 petition for a stay and currently the State Court action is stayed pending the outcome
24 of the All Cities Realty® v. Re/Max All Cities Realty action. Because of the stay,
25 there has been no litigation activity in that case since about September 2006. It
26 cannot be litigation abuse.

27 10. The filing of the Hollymax/Commbroker action was an attempt to bring
28 all responsible parties before the Court. There were never threats made to Defendant

1 prior to the filing of this lawsuit that they should settle or it would be filed. In fact,
2 the subject of the filing was never discussed with Defendant or its counsel in
3 advance of the filing.

4 11. Although I am reluctant to raise the subject matter of settlement
5 discussions, I would be doing Plaintiff a disservice if I left Defendant's recount of
6 those discussions un rebutted. I do not believe it is appropriate to include settlement
7 discussions as a centerpiece of a motion seeking affirmative relief (other than in a
8 motion to enforce the settlement) but I am placed in this uncomfortable position by
9 Defendant's filing.

10 12. During mediation in this case conducted on September 28, 2007, a
11 Friday, Defendant threatened to bring a defamation action against Joseph Miner on
12 the following Monday if Plaintiff did not settle the case, based upon the content of
13 his web site. Attending the mediation on behalf of the Defendants were Kelli Todd
14 (CEO), Dan Verdin (VP), Holly Thomas (in house legal counsel), and David
15 Sandelands (outside legal counsel). Dan Verdin asked for a private meeting with the
16 mediator and Plaintiff's counsel (myself, and Bobby Ghajar (special IP counsel at
17 Howry & Simon).

18 13. In fact, on October 4, 2007, as promised, Re/Max All Cities Realty filed
19 a defamation action against Joseph Miner, Los Angeles Superior Court Case No.
20 YC056028 (and to make certain it had impact, Defendant also sued his wife with not
21 a shred of evidence against her). A copy of the caption page of that filing is attached
22 hereto as Exhibit C. In that action, Miner immediately propounded discovery via
23 deposition notices. A copy of one such notice is attached hereto as Exhibit D.
24 Instead of answering that discovery, Re/Max All Cities Realty dismissed the action
25 on October 19, 2007. A copy of the docket sheet showing the dismissal is attached
26 hereto as Exhibit E.

27 14. In a conversation I had with Andrew Leff, State Court counsel for
28 Re/Max All Cities Realty in the defamation action, Mr. Leff stated that the action

1 was being dismissed because Re/Max All Cities Realty did not want to engage in
2 discovery.

3 15. Defendant places my settlement communications with Andrew Leff's
4 partner, Steven Spile, in issue and attempts to characterize them as a litigation abuse.
5 I am highly offended by Defendant's presentation and it is patently false.

6 16. Specifically, Mr. Sandelands references my August 6, 2008 email to
7 Steven Spile. Mr. Sandelands was not a party to this communication or the
8 discussions which accompanied it. He has no personal knowledge of what transpired
9 and there is no declaration from Mr. Spile, who is the only person I communicated
10 with regarding settlement at that time.

11 17. Mr. Spile had taken the initiative to try to restart settlement discussions
12 (as Re/Max All Cities Realty's general litigation counsel) since communications had
13 broken down with Mr. Sandelands. (I could say much more about Mr. Sandelands'
14 conduct as a lawyer in this case, but will refrain.) At that time, Mr. Spile had solicited
15 a written communication for a global settlement of the three pending cases for his
16 client's consideration and that was why I wrote the email.

17 18. At the time that this email was written, the Hollymax case had been
18 stayed. Plaintiff was preparing a motion to lift the stay and I shared that information
19 with Mr. Spile. Ultimately, Plaintiff filed such a motion and the Hollymax stay was
20 lifted for purposes of discovery. (Then due to Commbroker's bankruptcy, the
21 Hollymax action is again stayed pending the outcome of Plaintiff's soon to be filed
22 petition for relief of stay.) The email specifically addresses this point by stating:
23 "Before we escalate the litigation again by filing our motion to lift the stay in the
24 Hollymax case ..."

25 19. On August 7, 2008, Defendant responded with a counter offer. In that
26 counter offer, Defendant specifically stated that "This is remains part of the
27 confidential settlement negotiations." Apparently, only Defendant's words were
28 meant to remain confidential as Defendant has selectively used Plaintiff's words. A

1 copy of Defendant's email (with numbers redacted) is attached as Ex. F. As the
2 Court can see from the tone of the email, generated by Defendant (and not counsel),
3 there is no indignation, intimidation, or anything of the sort.

4 20. After this motion was filed, I communicated with Mr. Spile who
5 expressed shock and surprise to me that a motion had been filed on the basis of our
6 settlement discussions. I offered to send him a copy of the motion and did so. Mr.
7 Spile stated to me that he was not consulted before this motion was filed and he had
8 not spoken with Sandelands about the settlement communications. I decided to
9 accept Mr. Spile at his word since throughout the course of my dealings with him, he
10 has acted honorably and not broken his word.

11 I declare under penalty of perjury that the foregoing is true and correct.
12 Executed this 9th day of February, 2009 at Los Angeles, California.

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Jeffrey F. Sax