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MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

VESTER A. WILSON, III, and, JULIA R. WILSON, Plaintiffs, vs. JOHN POWERS, individually, JOHN POWERS, JR., individually, RYAN CONSTRUCTION RETIREMENT FUND, Michael Ryan, Trustee, MICHAEL RYAN, individually, and DOE DEFENDANTS 1-100, Defendants.	Cause No. DV-09-627 1152 Department No. 2 **OPINION AND ORDER TO SHOW CAUSE**

Plaintiffs Vester A. Wilson, III ("Mr. Wilson") and Julia R. Wilson (collectively, the "Wilsons") are represented by Reid J. Perkins, Esq. of Worden Thane P.C. Defendants John Powers, John Powers, Jr., Ryan Construction Retirement Fund, and Michael Ryan (collectively, "Defendants") are represented by Brian J. Smith, Esq. and Kathryn S. Mahe, Esq. of Garlington, Lohn & Robinson, PLLP.

Pending before the Court are:

1. Plaintiffs' *Motion for Sanctions* (Doc. # 81);

2. Defendant Ryan Construction Fund's *Motion for Summary Judgment Re: Dismissal of Ryan Construction Retirement Fund* (Doc. # 90);

3. Defendants' *Motion for Summary Judgment Re: Count IV (Fraud/Negligent Misrepresentation)* (Doc. # 92);

4. Defendants' *Motion for Summary Judgment Re: Count I* (Rescission/Revocation) (Doc. #95);

5. Defendants' *Motion for Summary Judgment Re: Count V* (Civil Conspiracy) (Doc. #97);

6. Defendants' *Motions in Limine* (Doc. #101);

7. *Plaintiffs' Motion for Adverse Inferences Based on Spoliation of Evidence and Brief in Support* (Doc. # 127);

8. Defendants' *Motion for Protective Order and Supporting Brief* (Doc. # 131); and

9. Defendants' *Motion in Limine Re: Expert Opinions of Thomas Copley and Brief in Support* (Doc. # 140).

The Court continues to consider and intends to treat the motions listed as items 2- 9 above in a separate opinion or opinions. In the interest of a just, speedy and inexpensive resolution of this matter pursuant to Montana Rule of Civil Procedure 1, the Court now considers certain aspects of the Defendants' discovery conduct pursuant to Plaintiffs' *Motion for Sanctions* (Doc. # 81) and the Court's own motion. Plaintiffs' motion has been fully briefed and, as set forth elsewhere in this *Opinion and Order to Show Cause*, a show cause hearing is now

scheduled for Friday, September 21st, 2012 in this matter.

A. BACKGROUND

A.1 Nature of the Claim & Key Issues

The Wilsons sued the Defendants for contract rescission, injunction, usury, fraud, negligent misrepresentation, and civil conspiracy in connection with three promissory notes. Defendants John Powers, John Powers, Jr. And Michael Ryan counterclaimed solely for default on the promissory note dated November 29, 2005 in the face amount of $ 270,000 (the "$270,000 Note"). On February 3, 2011, the Court granted Defendants' motion for summary judgment with respect to the promissory note in the face amount of $165,000 and the promissory note in the face amount of $695,000. Therefore, the remaining matters in this cause arise out of only the $270,000 Note.

The Wilsons and Mr. Wilson's friend Dan Wolsky ("Mr. Wolsky") signed the $270,000 Note in favor of Defendants John Powers, John Powers, Jr., and Michael Ryan. Under the terms of the $270,000 Note, interest accrued at 15% per annum, starting November 22, 2005. The Wilsons' residence in Ravalli County secured the $270,000 Note. Monthly payments in the amount of $3,375.00 were due beginning on December 22, 2005 with a final payment of $270,000 due on November 22, 2010. Cornerstone Financial, Inc. ("Cornerstone"), which is now in receivership, was involved in the transaction, but is not a party to this action. Plaintiffs stopped making monthly payments on the $270,000 Note sometime in August 2009.

To date, the Court has devoted considerable attention in this matter to the key issues of (1) whether, to what extent, and through what mechanism Defendants charged, received, reserved or otherwise took interest above the legal limit of 15%, (2) whether Cornerstone was Defendants'

agent, and (3) whether Defendants committed usury as a matter of law. In the Court's February 3, 2011 *Opinion and Order* (Doc. # 66), the Court ruled on Defendants' *Motion for Summary Judgment Re: $695,000 Loan* (Doc. # 42), Defendants' *Motion for Summary Judgment Re: Usury* (Doc. # 44), and Plaintiffs' cross motion for summary judgment (Doc. #45). In that *Opinion and Order*, the Court held, among other things, (1) that there was a material issue of fact with respect to whether and to what extent Cornerstone was Defendants' agent, (2) the existence of a usury savings clause is not dispositive because usurious intent is implied if excessive interest is intentionally taken, and (3) that Plaintiffs were entitled to summary judgment on the issue that Defendants charged Plaintiffs usurious late fees on the $270,000 loan.

In the Court's October 24, 2011 *Opinion and Order Re: Spreading Doctrine* (Doc. # 105), the Court denied Defendants' *Motion for Partial Summary Judgment Re: Spreading Doctrine* (Doc. # 70), clarifying that the spreading doctrine does not control the determination as to whether late fees were usurious in the Court's February 3, 2011 *Opinion and Order*.

In the Court's February 16, 2012 *Opinion and Order* (Doc. # 126), the Court granted Plaintiffs' October 14, 2011 *Motion to Compel* (Doc. # 99) with respect to more than fifty discovery items, many of which were relevant to the key issues of Cornerstone's agency and the mechanism and extent of usury.[1]

The Court hereby incorporates its February 3, 2011 *Opinion and Order* (Doc. # 66), October 24, 2011 *Opinion and Order Re: Spreading Doctrine* (Doc. # 105), and February 16,

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[1]The Court's February 16, 2012 *Opinion and Order* (Doc. # 126) ordered Plaintiffs to provide an affidavit of reasonable expenses to this Court in connection with the *Motion to Compel* by August 24, 2012.

2012 *Opinion and Order* (Doc. # 126) into this *Opinion and Order to Show Cause*.

A.2 Undisputed Facts

Upon review of the record, the facts below appear undisputed, unless otherwise noted.

On July 21, 2010, Defendants served their responses to *Plaintiff's First Combined Discovery Requests*; Defendants' counsel, Brian J. Smith, signed the response for each Defendant. (Doc. # 34-37). On July 23, 2010, Defendant John Powers ("Defendant Powers") signed a sworn verification of *John Powers [sic] Responses to Plaintiffs' First Combined Discovery Requests* (the "John Powers Response") (Doc. # 82 Ex. 1 p. 45).

The John Powers Response contained the following:

> INTERROGATORY NO.9: For each instance in which yourself, any family member, or any business entity of which you or a family member are a member or shareholder of, ***received any portion of the money*** that Cornerstone Financial took as its "commission," "settlement charges," or other fees, please state:
>
> . . .
>
> d. how much you received, from whom you received the money, and the method you received the money;
>
> e. how the amount of money given to each person, including yourself, was calculated (i.e. on a percentage, flat rate, or other); . . .
>
> ANSWER: ***None.***
>
> . . .
>
> INTERROGATORY NO. 16: Please ***describe any oral agreements you had with Cornerstone Financial, Robert Congdon, Keith Kovick, and/or*** Dennis Minemyer. A complete answer will include, but not be limited to, any agreements whereby yourself, any member of your family, or any business entities which you have an interest in were to receive a portion of the percentage held back by Cornerstone Financial or other compensation from Cornerstone Financial as a result of being a lender on a Cornerstone Financial loan.
>
> ANSWER: ***There are no such agreements.***

(Doc. # 82 Ex. 1) (Emphasis added).

Defendant Michael Ryan's July 21, 2010 *Responses to Plaintiff's First Combined*

Discovery Request (Doc. # 82 Ex. 2) (the "Michael Ryan Response") contained responses identical to the John Powers Response to the above two interrogatories. (Doc. # 82 Ex. 2 Interrog. 9 & 15). The Court could not locate a signed sworn verification of the Michael Ryan Response in the Court's file, although the unsigned verification form appears in the record at least twice. (*See* Doc. # 82. Ex. 2; Doc. # 106 Ex. C).

On July 30, 2010, John Powers, Jr. signed a sworn verification of *John Powers, Jr. Responses to Plaintiffs' First Combined Discovery Requests* (the "John Powers, Jr. Response") (Doc. # 106 Ex. B p. 44). The John Powers, Jr.'s Response contained the following:

> INTERROGATORY NO. 9: For each instance in which yourself, ***any family member***, or any business entity of which you or a family member are a member or shareholder of, ***received any portion of the money*** that Cornerstone Financial took as its "commission," "settlement charges," or other fees, please state:
>
> a. what the loan commission, charge or fee was associated with;
>
> . . .
>
> b. everyone whom you suspect received money from that same commission, charge, or fee . . .
>
> e. how the amount of money given to each person, including yourself, was calculated (i.e. on a percentage, flat rate, or other; . . .
>
> ANSWER: ***None.***

(Doc. # 82 Ex. 4).

Moreover, the John Power's Response, the John Power, Jr. Response, and the Michael Ryan Response all limited their answers to *Plaintiff's First Combined Discovery Requests* to providing information for loans on which they were lenders from 2005 to the date of the responses in 2010. (Doc. # 82 Ex. 1 p. 9, Ex. 2 p. 9, Ex. 4 p. 9)

In addition, as explained more fully in this Court's February 16, 2012 *Opinion and Order*, the John Powers Response, the John Power, Jr. Response, and the Michael Ryan Response also

objected repeatedly that, among other things, (1) Plaintiffs' requests sought information subject to the attorney client privilege because Plaintiffs requested the "basis" for any defense; (2) Plaintiffs' requests that sought "non-privileged" documents (which support or refute various claims, factual contentions and allegations) were in reality requests for the work product of Defendants' counsel, (3) Plaintiffs' requests were not reasonably calculated to lead to discovery of admissible evidence because they related to loans not at issue; and (4) Plaintiffs' requests were not reasonably calculated to lead to discovery of admissible evidence to the extent they related to the promissory note for the face amount of $695,000. The Defendants, however, did not file any motion for a protective order until April 17, 2012, more than a month after the Court's February 16, 2012 *Opinion and Order* granting nearly all of Plaintiffs' *Motion to Compel.*

On September 20, 2010, Defendants moved for summary judgment on Plaintiffs' usury claims. (Doc. # 44). In addition to arguing that Plaintiffs' usury claims were barred for failing to make a statutorily required written demand prior to filing suit, Defendants argued that (1) Plaintiffs' usury claims failed because Defendants did not have the necessary intent to make a usurious loan and (2) the loans were not usurious when made. (Doc. # 45)

October 7, 2010, Plaintiffs filed a cross motion for summary judgment with respect to usury, arguing several different theories as to why the loans went beyond the usurious interest rate limit of 15 %. Two of these theories are especially pertinent here: (1) that Cornerstone, which received a 10% commission, acted as Defendants' agent and (2) that Cornerstone provided Defendants with a kickback. (Doc. # 48). On November 5, 2010, Defendants filed the *Affidavit of John Powers Re: Opposition to Plaintiffs' Cross Motion for Summary Judgment* ("Second Powers Affidavit") (Doc. # 58), which Defendant Powers had signed under oath. In the Second

Powers Affidavit, Defendant Powers stated:

> 10. None of the lenders on these notes ever received any portion of the amount withheld as a commission by Cornerstone Financial in connection with these loans.
>
> . . .
>
> 15. Neither I, nor any of the other Defendants in this matter, were ever co-owners of Cornerstone Financial. ***Nor did we receive a share of the profits of Cornerstone Financial.***
>
> . . .
>
> 20. ***While I did not receive a share in any of Cornerstone Financial's profits***, I did invest a great deal of money in loans arranged by Cornerstone Financial on behalf of borrowers. . .

(Emphasis added).

On November 5, 2010, Defendants filed their brief in opposition to Plaintiffs' cross motion for summary judgment. (Doc. # 57). In the brief, Defendants argued that Plaintiffs' allegations regarding the "formation and actions of Cornerstone Financial Inc." were "superfluous and irrelevant" to Plaintiffs' motion under Montana Rule of Evidence 402 and that Plaintiffs' alleged "facts" only "contain[ed] snippets of the full story." (Doc. # 57 pp. 4-5). Defendants cited as an example Defendants' lack of involvement in Cornerstone's charge of a loan origination fee. *Id.* In addition, Defendants accused the Plaintiffs of "attempting to overwhelm Defendants and this Court with a two hundred and ninety-five page statement of facts, most of [which] are wholly irrelevant . . ." (Doc. 57 p. 3). In the same brief, Defendants argued that "Plaintiffs have failed to establish how amounts charged by, or paid to, a third party, i.e. Cornerstone, can possibly establish that Defendants intended to charge a usurious interest. . . Further, Plaintiffs have not shown that money withheld or charged by Cornerstone is equivalent to Defendants charging a usurious interest." (Doc. # 57 pp. 9-10). The brief also urged that Plaintiffs failed to meet their burden with respect to Cornerstone serving as Defendants' agent,

making arguments under the theory of "ostensible agency." (Doc. # 57 pp. 10-11).

At the December 29, 2010 hearing on the three motions for summary judgment, Defendants' counsel stated:

> And the other thing I would mention is that all of these facts and circumstances arising with Cornerstone and all of their problems with Cornerstone withholding money don't really apply to us because in this case the defendants don't own Cornerstone. They didn't receive any of that money. They received no kickbacks, and there's just no evidence there to support any money that Cornerstone may have received being imputed back on the defendants. . .
>
> . . .
>
> The notes are not usurious on their face. It has to be something else that's considered interest because the interest rate specifically provided in the note is legal, the 15 percent, as a matter of law.
>
> . . .
>
> The other issue is that it was the borrowers who were directing Cornerstone where the money was supposed to go, their agent. It's undisputed that the lenders gave the full amount of the money to Cornerstone, who the lenders believed was acting as the borrower's agent, and that whatever agreements that the borrowers had with Cornerstone, for Cornerstone to take out a fee, that has nothing to do with the lenders. The lenders did not receive any portion of that 10-percent fee.
>
> . . .
>
> The lenders never got any benefit from the 10 percent held back by Cornerstone.

On January 25, 2011 the Court issued a *Stipulated Protective Order* (Doc. # 64) signed by Plaintiffs' counsel, Defendants' counsel, and Eric Nord, as receiver for Cornerstone, Inc., providing the terms under which the parties might have access to Cornerstone's records.

On January 28, 2011, Plaintiffs' counsel emailed Defense counsel Brian Smith a draft protective order with respect to material produced by either party during the discovery process. (Doc. # 82 Ex. 15). However, the parties did not sign such a stipulation until October 20, 2011, nearly 10 months later.

Pursuant to the January 25, 2011 *Stipulated Protective Order* (Doc. # 64) with

Cornerstone, on February 2, 2011, Plaintiffs' counsel traveled to Helena, MT to review Cornerstone documents held by the State Auditor's office in relation to a ponzi scheme investigation. Defendant John Powers and his counsel, Brian Smith, attended the document inspection. Plaintiffs' counsel failed to locate any documents with respect to Plaintiffs' loans. However, Plaintiffs found copies of two closing statements on other loans. (Doc. # 82 Ex. 8). One closing statement indicated that John Powers was a 50% investor in the loan and that "Joe and John" together received 50% of the net profit on the loan. *Id.* In the other closing statement, none of the Defendants were listed as an investor but the closing statement indicated that "Joe and John" received 50% of the net profit of the loan. *Id.*

On February 3, 2011, the Court's *Opinion and Order* (Doc. # 66) granted Plaintiffs summary judgment on the issue that Defendants charged Plaintiffs usurious late fees on the $270,000 loan but denied Plaintiffs' cross motion for summary judgment on usury in all other respects.

On March 4, 2011, Plaintiffs deposed Defendant John Powers. At the deposition, Defendant John Powers disclosed that he had an agreement with Cornerstone's principals, Keith Kovick and Robert Congdon, under which he, Defendant Michael Ryan ("Micky"), and Joe Berlin would receive a portion of the money from Cornerstone's commissions on certain loans because Keith Kovick and Robert Congdon were to "blame" for certain other business losses:

> Q. Were you making any allegations against Keith or Bob in that lawsuit?
> A. Keith and Bob, no, not in that lawsuit.
> Q. So they worked for Questa, but they didn't – you weren't placing any blame on them individually for what happened in Oregon; is that accurate?
> A. Not exactly.
> Q. So you were placing some blame on them?
> A. They received 30 percent of the commission, and they owned up to 30

percent of the blame.

...

Q. If I understand you correctly, you attribute some blame, or Bob and Keith accepted some blame before the Oregon mess?

A. Oh, yes.

Q. And they agreed or you got them to agree to pay 30 percent of what you thought you were damaged?

Mr. Smith: Object to the form. Either they agreed, or he got them to agree. They had to pay it one way or the other.

Q. Can you tell me which one it is? Did you get them to agree to that, or did they agree to that?

A. Cripes, I don't know. There was an agreement that they would pay 30 percent of our loss.

Q. Okay. ***When you say there was an agreement, was that in writing, or was that just an oral agreement?***

A. As far as I know, it was oral. I don't have a copy.

Q. So is it fair to say that wasn't part of some settlement agreement in the lawsuit?

A. No. The lawsuit was totally separate.

. . .

A. I think as the lawsuit was going on, we were receiving payments; because that's the last thing they wanted to do was be involved in a lawsuit.

Q. And at that time, they were at Cornerstone?

A. Yes, sir.

Q. So tell me how that would work. How were you getting money - - how were they paying you out of their commissions?

A. ***If we did a deal with somebody, whatever they received, I believe we got 15% of it. Excuse me. We got 50 percent of their commission until a certain amount was reached, and I believe that was $15,000. And then after that, we got 40 percent of their commission.***

Q. And was that on all deals that they did or just the ones that you were a lender on?

A. ***It would be deals that either Joe, Mickey, I, or – I think there was one in there that was a friend of one of us that did, but it was not all deals.*** God only knows how may deals they did.

Q. Do you remember how much, total, they agreed to pay you?

A. Yes, sir.

Q. How much was it?

A. $73,800.

(Doc. # 86 Ex. 1: Transcr. Depo. John Powers 27:9 to 30:25 (Mar. 4, 2011) (Emphasis added).

On July 13, 2011 Defendants filed *Motion for Partial Summary Judgment Re: Spreading*

Doctrine (Doc. # 70). Defendants' briefing on the motion side stepped the issue of Cornerstone acting as Defendants' agent or providing Plaintiffs with kick backs by framing the issue as (a) the amount of interest Defendants were allowed to charge over the five year term and (b) whether the interest collected coupled with late fees rendered the $270,000 loan usurious. (See Doc. # 71; # 74). Plaintiffs' response to the motion reincorporated the earlier detailed statement of facts presented in Plaintiffs' October 7, 2010 *Statement of Facts in Opposition to Defendants' Motions for Summary Judgment* (Doc. # 48) and reiterated Plaintiffs' theories, including that the lenders received a concealed kick-back from Cornerstone's 10% loan origination fee. Plaintiffs' brief also cited the Court's prior holdings, including that there was material dispute of fact over whether the 10% fee that Cornerstone Financial charged was attributable to Defendants under an agency theory. (Doc. # 73). Plaintiffs incorporated their earlier briefs by reference and argued that the law of the case applied. (Doc. # 73). Plaintiffs did not provide the Court with updated facts with respect to the issue of agency (an issue that Defendants' framing of the issue avoided.) *Id.*[2]

On September 9, 2011, Plaintiffs filed the instant Plaintiffs' *Motion for Sanctions* (Doc. # 81).

On September 21, 2011, Defendants John Powers and Michael Ryan signed, through their attorney Kathryn S. Mahe, *John Powers and Michael Ryan's First Supplemental Responses to Plaintiffs' First Combined Discovery Requests* (Doc. # 86 Ex. 2) (the "Supplemental Response").

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[2]This information regarding the concealed oral agreement in connection with the instant motion, however, was provided while Defendants' *Motion for Partial Summary Judgment Re: Spreading Doctrine* (Doc. # 70) was still pending.

On September 22, 2011, Defendant John Powers signed a sworn verification of the Supplemental Response. (Doc. # 106 Ex. D). On September 29, 2011 Defendant Michael Ryan signed a sworn verification of the Supplemental Response. *Id.*

The Supplemental Response continued to assert that Defendants John Powers and Michael Ryan "did not receive any money from Cornerstone Financial that was part of its 'commission,' 'settlement charges,' or 'other fees.'" The supplemental response did admit that both Defendant John Powers and Defendant Michael Ryan had an agreement with Cornerstone's principals (Keith Kovick and Robert Congdon), whereby they would receive 50% of Mr. Kovick's and Mr. Congdon's commission on certain loans:

> INTERROGATORY NO.9: For each instance in which yourself, any family member, or any business entity of which you or a family member are a member or shareholder of, ***received any portion of the money*** that Cornerstone Financial took as its "commission," "settlement charges," or other fees, please state:
>
> . . .
>
> d. how much you received, from whom you received the money, and the method you received the money;
> e. how the amount of money given to each person, including yourself, was calculated (i.e. on a percentage, flat rate, or other); . . .
>
> SUPPLEMENTAL ANSWER: Mr. Powers and Mr. Ryan did not receive any money from Cornerstone Financial that was part of its "commission," "settlement charges," or "other fees." However, they did receive money from Keith Kovick and Bob Congdon as settlement of a legal claim involving a loan entered into when Questa was in operation. Mr. Powers and Mr. Ryan do not believe this settlement is responsive to the Interrogatory posed. Subject to the fact that this information is not responsive, the details of this settlement are provided in the interest of avoiding a discovery dispute. Mr. Kovick and Mr. Congdon agreed to pay Mr. Powers, Mr. Ryan and Mr. Berlin $73,800 to settle the claim against them related to a Questa loan. ***Mr. Kovick and Mr. Congdon entered into a workable payment plan whereby they would give Mr. Powers, Mr. Ryan and Mr. Berlin 50% of Mr. Kovick and Mr. Congdon's commission on particular loans until the first $15,000 was paid and 40% of their commission on particular loans until the remainder was paid.*** This money was not received as a result of being a lender on any loan or as a share of the profits of Cornerstone, rather it was received it [sic] as part of a settlement agreement with Mr. Kovick and Mr.

> Congdon, which included a workable payment plan. Mr. Kovick and Mr. Congdon provided Mr. Powers with a spreadsheet detailing the breakdown of the payment of the $73,800.

(Doc. # 86 Ex. 2)(emphasis added).

On October 25, 2011 the Court denied Defendants' *Motion for Partial Summary Judgment Re: Spreading Doctrine* (Doc. # 70). The Court indicated that the $270,000 Note was usurious on its face because any late fee charged would make a usurious rate on the note a reality and therefore, the spreading doctrine did not apply.[3] (Doc. # 104).

A.3 Parties' Arguments

Plaintiffs argue that pursuant to Montana Rules of Civil Procedure 37(d), 26(g), 11, and 56(g), Defendants should be sanctioned for answering written discovery dishonestly and evasively and for submitting a false affidavit in opposition to summary judgment. Defendants argue that as a matter of law, Plaintiffs are not entitled to sanctions under any of the rules Plaintiffs cite.

The Court begins with a discussion of the applicable version of the Montana Rules of Civil Procedure, continues by discussing the purpose of the discovery rules and the Court's attitude with respect to discovery sanctions, and treats whether the Court should issue an order to show cause with respect to sanctions under Rules 37(d), 26(g), Rule 11, and Rule 56.

[3]The parties most recent filings with the Court indicate that the parties may be confused as to whether the spreading doctrine will apply in this cause at trial. It will not apply.

B. DISCUSSION

B.1 Applicable Version of the Montana Rules of Civil Procedure

The new version of the Montana Rule of Civil Procedure took effect on October 1, 2011 and governs proceedings after that date in an action then pending unless:

> (A) the supreme court specifies otherwise; or
> (B) the court determines that applying them in a particular action would be unfeasible or work an injustice.

See Sup. Ct. Ord. No. AF 07-1057 (Apr. 26, 2011); M. R. Civ. P. 86.

In the case at bar, the instant motion, the brief in support of that motion, and the response were filed before October 1, 2011. Plaintiffs filed their reply brief on October 14. 2011. The principal acts of alleged sanctionable conduct occurred on July 21-30, 2010 and November 5, 2010.

The new versions of Rules 11, 26, 37 and 56 substantively change the old versions of the rules to follow, at least in substantial part, the federal approach. Comm. Notes to M. R. Civ. P. 11, 26, 37, 56 Sup. Ct. Ord. No. AF 07-1057 (Apr. 26, 2011). Key distinctions continue in the areas of automatic preliminary pretrial disclosures and expert disclosures. Comm. Notes to M. R. Civ. P. 26 Sup. Ct. Ord. No. AF 07-1057 (Apr. 26, 2011)

With respect to Rule 11, the substantive changes include a new safe harbor, mandatory joint liability for firms, greater court discretion, and detailed limitations as part of a new comprehensive approach to Rule 11 sanctions. Comm. Notes to M. R. Civ. P. 11 Sup. Ct. Ord. No. AF 07-1057 (Apr. 26, 2011). With respect to Rule 26, the substantive changes include a new procedure for handling information withheld under claimed privilege. Comm. Notes to M. R. Civ. P. 26 Sup. Ct. Ord. No. AF 07-1057 (Apr. 26, 2011). Rule 37 now contains a requirement

that the movant certify that he or she conferred or attempted to confer with the party failing to act in an effort to obtain a response without court action. Comm. Notes to M. R. Civ. P. 37 Sup. Ct. Ord. No. AF 07-1057 (Apr. 26, 2011).

The parties' briefing assumed that the old version of the Montana Rules of Civil Procedure will govern the Court's decision in this matter. Given the comprehensive nature of the amendments bringing the Montana Rules of Civil Procedure in closer alignment with the federal approach, the Court determines that applying the new version or the rules or portions of the new rules to the sanctions issues in this *Opinion and Order to Show Cause* is not workable. The Court will apply the version of the Montana Rules of Civil Procedure in effect at the time this case was filed, the alleged sanctionable conduct principally occurred, and the instant motion was filed. The Court determines, therefore, that applying the post-October 1, 2011 amended version of the Montana Rules of Civil Procedure to conduct committed and a motion substantially briefed under the old rules is unfeasible and would work an injustice in the case at bar. *See*, e.g., *In re Generes*, 69 F.3d 821 (7th Cir. 1995), cert. denied, 117 S.Ct. 81, 519 U.S. 823, 136 L.Ed.2d 39; *Silva v. Witschen*, 19 F.3d 725, 727 (1st Cir. 1994).

B.2 Purpose of Discovery and Discovery Sanctions

In Montana:

> The purpose of discovery is to promote the ascertainment of truth and the ultimate disposition of the lawsuit in accordance therewith. Discovery fulfills this purpose by assuring the mutual knowledge of all relevant facts gathered by both parties which are essential to proper litigation. Modern instruments of discovery, together with pretrial procedures, make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.

Richardson v. State, 2006 MT 43, ¶22, 331 Mont. 231,130 P.3d 634 (citations and quotations

omitted).

Placing a litigant in the situation in which he cannot properly evaluate the merits of his case "substantially reduces the chances of settlement." *Richardson*, ¶55.

The Montana Supreme Court "strictly adheres to the policy that dilatory discovery actions shall not be dealt with leniently." *Richardson*, ¶ 56. "[T]he trial courts . . . must remain intent upon punishing transgressors rather than patiently encouraging their cooperation." *Id.* "Accordingly, the imposition of sanctions for failure to comply with discovery procedures is regarded with favor." *Id.* "[T]he price for dishonesty must be made unbearable to thwart the inevitable temptation that zealous advocacy inspires." *Id.* The Montana Supreme Court has adopted the policy of intolerance regarding discovery abuse because of crowded dockets and the need to maintain fair and efficient judicial administration. *Id.*

B.3 Rule 37

Montana Rule of Civil Procedure 37, as in effect prior to the October 1, 2011 amendments, provides in pertinent part:

> Rule 37(a)
> . . .
> (3) Evasive or incomplete answer. For purposes of this ***subdivision*** an evasive or incomplete answer is to be treated as a failure to answer.
> . . .
> Rule 37(b)
> . . .
>
> (2) . . . [T]he court in which the action is pending may make such orders in regard to the failure as are just and among others the following:
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing

designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

. . .

Rule 37 (d)

If a party . . . fails . . . (2) ***to serve answers or objections*** to interrogatories submitted under Rule 33, after proper service of the interrogatories . . .the Court in which the action is pending on motion ***may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision b(2) of this rule.*** In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(Emphasis added).

Defendants argue that Rule 37 does not apply to the alleged sanctionable conduct because the Defendants did not completely fail to answer interrogatories. A first glance, this view has some merit. Rule 37(d) provides for sanctions when a party fails "to serve" answers or objections. Pursuant to Rule 37(a)(3), an evasive or incomplete answer is to be treated as a "failure to answer." However, by its own terms, Rule 37(a)(3) applies for purposes of "this subdivision;" that is, for purposes of subdivision (a). Montana Rule of Civil Procedure 37(d)(4) is similar to Federal Rule of Civil Procedure 37(d)(4), which "permits an immediate sanction against a party for a ***complete*** failure to respond to a notice of deposition, interrogatories, or a request for inspection." *See* Wright & Miller § 2282 p. 601-602. (Emphasis added).[4] Somewhat

[4]The new version of Rule 37(a)(4), which replaced the previous Rule 37(a)(3), now specifically states "this subdivision (a)" instead of "this subdivision":

in accordance with this view, the Montana Supreme Court has stated that, "an immediate sanction imposed under Rule 37(d) generally contemplates a complete failure or outright refusal to cooperate." *Jerome v. Pardis*, 240 Mont. 187, 191, 783 P.2d 919, 922 (1989). Under this approach, the Montana Supreme Court nonetheless upheld the sanction of dismissal with prejudice in a case involving concealment of information by relying on Montana Rule of Civil Procedure 26(g), discussed below. *Jerome*, 240 Mont. at 192-193, 783 P.2d at 922-923.

Prior to *Jerome*, however, the Montana Supreme Court held that "a complete failure to answer interrogatories or otherwise respond to discovery requests is not required before sanctions are allowed under Rule 37(d)." *Eisenmenger by Eisenmenger v. Ethicon, Inc.*, 264 Mont. 393, 402, 871 P.2d 1313, 1318 (1984). In *Eisenmenger*, the Montana Supreme Court cited *Vehrs v. Piquette*, 210 Mont. 386, 684 P.2d 476 (1984) as a case in which it had affirmed 37(d) sanctions for "unsigned, late, not-fully-responsive answers to interrogatories." *Id.*

Since *Jerome*, the Montana Supreme Court has permitted the sanction of a default judgment under Rule 37(d) when a party knowingly concealed evidence from the other party. *See Willson v. Addison*, 2011 MT 179, ¶26, 361 Mont. 269, 258 P.3d 410 (citing *Schuff v. A.T. Klemens & Son*, 2000 MT 357, 303 Mont. 274, 16 P.3d 1002).[5]

> For purposes of this subdivision (a), an evasive or incomplete answer or response must be treated as a failure to answer or respond.

The comments to Rule 37 state that the amendments include "general restyling . . . to make them more easily understood." *In Re: Revisions to the Montana Rules of Civil Procedure*, AF 07-0157, M. R. Civ. P. 37 Comm. Notes (Apr. 16, 2011).

[5]In *Willson*, the Montana Supreme Court clarified that a motion for default judgment on liability as a sanction for failure to provide a destroyed Narcotic Count Record in response to a

In *Schuff*, the district court had found that a defendant's response to certain interrogatories and requests for production in 1993 "clearly indicated that [the defendant] did not do any of the alleged negligent electrical work as set forth by [the plaintiff's] theory of the case." *Schuff*, ¶¶ 15-16. The *Schuff* plaintiff's document review three years later in 1996 revealed that the defendant had done more than six hours of work relocating electrical conduit in accordance with the plaintiff's theory of the case. *Schuff*, ¶ 18. In 1997, the district court concluded that 'considering all of this evidence together . . . the concealment of this information over a period of 3 ½ years , from the first service of interrogatories, was willful and in bad faith' and granted the plaintiff's motion for default judgment on the issue of liability. *Schuff*, ¶ 20.

The Montana Supreme Court characterized this concealment as a failure to answer interrogatories under Rule 37(d), concluding:

> the default judgment resulted from . . . one Rule 37(d) violation in particular - - the failure to answer interrogatories concerning the scope of work performed by [the defendant] . . . [The district court] ultimately concluded that "considering all of this evidence together . . . *the concealment of this information* over a period of 3 ½ years, from the first service of interrogatories, was willful and in bad faith." (Emphasis added) The court then stated that this *concealment* "clearly went to the heart of [the plaintiff's claim] and [the defendant's] defense. The Court then explained how the *concealment* – and only the concealment – prejudiced [the plaintiff's] case. A review of the briefing and the hearing transcript leading up to the court's order indicates that this lone rationale pursuant to Rule 37(d) - - the failure to serve answers to interrogatories submitted under Rule 33 - - was the basis for the court's decision.

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request for production "is properly a motion for sanctions under M. R. Civ. P. 37" (as opposed to an independent claim for spoliation of evidence) but held that the district court did not abuse its discretion in denying the sanction because the other party neither concealed evidence nor concealed the destruction of the evidence. *Willson*, ¶¶ 22-29.

Schuff, ¶ 66. (Emphasis in original).[6]

Therefore, Montana permits sanctions under Rule 37(d) in discovery abuse cases involving knowing concealment of information.

In the case at hand, Defendants concealed the existence of (1) an oral agreement between Defendant Powers and Cornerstone's principals relating to a 50% kickback in Cornerstone's commissions to Defendants John Powers and Michael Ryan on certain other loans and (2) the fact that Defendants John Powers and Michael Ryan received a portion of the money that Cornerstone took as its "commission," "settlement charges," or other fees on certain other loans. The Court infers that such concealment was a knowing concealment from (1) Defendant John Power's, John Power, Jr.'s and Michael Ryan's systematically evasive and incomplete answers to interrogatories necessitating Plaintiffs' meritorious motion to compel and (2) the timing of John Power's disclosure after Plaintiffs' review of Cornerstone's documents. The Court could not determine from the record when Plaintiffs served their *Plaintiffs' First Combined Discovery Requests*. However, Defendants John Powers, Michael Ryan, and (with respect to the receipt of the money) John Powers, Jr. concealed this information from Plaintiffs from at least July 21, 2010 (the date of their responses) until John Power's deposition on March 11, 2011.

This concealment went to the heart of the claims and defenses in this cause. Because the stated interest rate in the $270,000 promissory note was 15% - the absolute legal limit - the most

[6]The *Schuff* case would have been decided under the same version of the Montana Rules of Civil Procedure as apply to the case at bar. Because the sanctionable conduct in *Schuff* occurred after 1990, the 1990 version of Montana Rule of Civil Procedure 37 would have applied. Rule 37(a), (b), and (d) were not amended between 1990 and the amendments effective October 1, 2011. *See* Rule 37, M. R. Civ. P. contained in Title 25, MCA (2011).

salient issues in this case have been (a) whether, to what extent, and through what mechanism Defendants charged, received, reserved or otherwise took interest above 15% and (b) whether Cornerstone, who took a 10% commission on the loan, was Plaintiffs' or Defendants' agent. Defendants also sought summary judgment on the ground that they did not "intend" to charge Plaintiffs usurious interest. The concealment of an agreement with Cornerstone's principals that provided for a 50% or more kickback on loans related to Defendants John Powers or Michael Ryan goes to the heart of the agency, usury, and intent issues in this case.

This concealment has also prejudiced Plaintiffs' case, although perhaps not to the extent the *Schuff* plaintiffs were prejudiced. Defendants' concealment has made this case substantially more burdensome for Plaintiffs. Defendants filed motions for summary judgment at an early stage in these proceedings, while handicapping Plaintiffs' ability to file a similar motion. Plaintiffs had to provide a response to Defendants' motion for summary judgment on usury without being able to point to Defendant John Power's now admitted agreement with Cornerstone's principals. Plaintiffs also filed a motion for summary judgment. As a result of Defendants' concealment, Plaintiffs needed to provide a long statement of facts and supporting evidence from third party sources. Defendants exploited Plaintiffs' ignorance of the oral agreement and the money Defendants John Powers and Michael Ryan received from commissions in their summary judgment briefing, accusing Plaintiffs of providing superfluous and irrelevant snippets of the story. Moreover, Plaintiffs had to rely on negotiating a protective order with a third party bankruptcy receiver to find evidence, the substance of which could have easily been sent as an answer to an interrogatory nine months earlier. In addition, because of the concealment and the continued evasive discovery tactics evident in the Supplemental Response,

Plaintiffs can not reasonably trust that Defendants have now provided complete and accurate discovery. As a result, Plaintiffs have been prevented from fully evaluating their case.

Therefore, the Court concludes that Defendants John Powers, Michael Ryan, and John Powers, Jr should show cause why they should not be sanctioned for violating Montana Rule of Civil Procedure 37(d) with the Court's anticipated sanction. The Court anticipates that - at a minimum - a just sanction will be (1) an order that Defendants pay Plaintiffs' reasonable expenses resulting from Defendants' failure to act in accordance with Rule 37(d) since July 21, 2012 and (2) an order that the following facts be taken to be established for the purposes of this action:

> 1. Cornerstone, Keith Kovick, and Robert Congdon were the agents of John Powers, John Powers, Jr., and Michael Ryan, acting under John Power's, John Powers, Jr.'s, and Michael Ryan's authority during all times relevant to this cause;
>
> 2. Defendants John Powers, John Powers, Jr., and Michael Ryan, through their agents Cornerstone, Keith Kovick, and Robert Congdon, took a 10% commission of the $270,000 Note from the proceeds of the 270,000 loan;
>
> 3. Defendants John Powers, John Powers, Jr., and Michael Ryan, received 50% of the 10% commission on the $270,000 Note in the form of a kickback from their agents Cornerstone, Keith Kovick, and Robert Congdon; and
>
> 4. Defendants John Powers, John Powers, Jr., and Michael Ryan concerted their action with each other and with Cornerstone, Keith Kovick, Robert Congdon to charge, reserve, receive and/or take more than the legal rate of interest from Plaintiffs.

B.4 Rule 26(g) & Rule 11

As the Montana Supreme Court's approach made clear in *Jerome*, the Court need not rely on Rule 37 as a basis to sanction Defendants in cases in which Defendants have provided a

signed discovery response because Rule 26(g) permits an equivalent sanction, if such a sanction is appropriate.

Montana Rule of Civil Procedure 26(g), as in effect prior to October 1, 2011, provides:

> Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . The signature of the attorney or party constitutes a ***certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry*** it is (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.
>
> ***If a certification is made in violation of the rule, the court, upon motion*** or upon its own initiative, ***shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction***, which may include an order to pay the amount of the reasonable expenses incurred because of the violation including a reasonable attorney's fee.

(Emphasis added). Rule 11, as in effect prior to October 1, 2011, contains language similar to the language the Court emphasizes in Rule 26(g) above.[7]

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[7]Montana Rule of Civil Procedure 11 provided:

> Every pleading, motion, or other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any

Defendants argue that Plaintiffs are not entitled to sanctions under Rule 26(g) and the similarly worded Rule 11 because "Rules 11 and 26(g) apply to attorneys, when the party is represented by an attorney." (Doc. # 86 p. 4). Defendants are incorrect. The rules clearly state that the Court "shall impose" an appropriate sanction "upon the person who made" the certification or signed the pleading, the party, "or both." Rule 11, Rule 26(g), M. R. Civ. P. Moreover, Defendant John Powers signed a sworn verification of the John Powers Response and Defendant John Powers, Jr. signed a sworn verification of the John Powers, Jr. Response. While the record is not clear with respect to whether Defendants Michael Ryan signed a sworn verification of the Michael Ryan Response, Defendants have not argued that he did not.[8]

By signing responses to the discovery Plaintiffs requested, Defendants and Defendants' counsel certified that, based on a reasonable inquiry, the responses were (1) consistent with the rules of discovery, (2) not interposed for any improper purpose, and (3) not unreasonable or unduly burdensome.

> improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . ***If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction,*** which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(Emphasis added).

[8]If Defendants Michael Ryan did not sign the Michael Ryan Response although the record indicates a verification form was prepared, Defendants' counsel likely did not conduct a reasonable inquiry under Rules 26(g) and 11 with respect to the Michael Ryan Response.

The John Powers Response, the John Powers, Jr. Response, and the Michael Ryan Response fail on each ground. A reasonable inquiry would have revealed that the responses with respect to whether an oral agreement existed and whether Defendant John Powers "received a portion of the money that Cornerstone took" as its "commission," mislead Plaintiffs by concealing information material to the core of the parties' claims and defenses in this matter. Withholding of information is clearly not consistent with the rules "and spirit" of discovery. *See Jerome*, 240 Mont. at 193, 783 P.2d 919 at 923. Concealing information is an improper purpose. In this case, a reasonable inquiry would have revealed that the concealment would cause an unnecessary delay because Plaintiffs needed to work with the receiver of a third party to find such documentation and other third parties if Defendants did not provide the information. Finally, a reasonable inquiry would have revealed that the responses would create an unreasonable burden and increased expense in causing Plaintiffs to be unprepared for depositions and having to prepare summary judgment briefs with only "snippets of the story."

Because Rule 26(g) is broader than Rule 11 in the discovery context, the Court will not discuss Rule 11 fully in this *Opinion and Order to Show Cause*. It is sufficient to note that sanctions may be imposed on Defendants John Powers, John Powers, Jr., and Michael Ryan under Rule 11 for interposing the John Powers Response, John Powers, Jr. Response, and Michael Ryan Response for the improper purpose of concealing information.[9]

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[9]The Court will certainly consider Rule 11 cases in determining appropriate sanctions under both Rule 26(g) and Rule 11. *See Fjelstad v. State ex rel. Dep't of Highways*, 267 Mont. 211, 226, 883 P.2d 106, 114 (1994) (Rule 11, which was adopted along with amendments to Rule 26(g) in 1984, provided guidance for determining appropriate standard of review for Rule 26(g)). In imposing any sanction, however, the Court must enter findings specifically pertaining to Rule 26(g) and Rule 11, as applicable, in order for the Montana Supreme Court to review the

Therefore, the Court concludes that Defendants John Powers, Michael Ryan, and John Powers, Jr should show cause why they should not be sanctioned for violating Montana Rule of Civil Procedure 26(g) and/or Rule 11, by imposing an appropriate sanction, such as the anticipated sanction the Court outlined above.

B.4 Rule 56(g)

Montana Rule of Civil Procedure 56(g), as in effect prior to the October 1, 2011 amendments, provides:

> **Rule 56(g). Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Given Defendant John Power's systematic discovery abuses in this cause, the Court believes there is sufficient evidence in the record for it to conclude that the Second John Powers Affidavit was presented in bad faith for the purpose of concealing the fact that Defendants John Powers and Michael Ryan received a share of the profits of Cornerstone Financial on certain loans. Accordingly, Defendant John Powers should show cause why he should not be sanctioned pursuant to Rule 56(g) for such affidavit.

Court's order. *Fjelstad*, 267 Mont. at 227, 883 P.2d at 115.

ORDER

IT IS THEREFORE ORDERED:

1. Defendant John Powers, John Powers, Jr., and Michael Ryan shall appear in this Court **on Friday, the 21st of September, 2012 at 9:00 a.m. (2½ hour maximum)** and show cause why this Court should not impose the following sanctions on them pursuant to Montana Rules of Civil Procedure 37, 26(g), and/or 11 (as such rules were in effect immediately prior to the October 1, 2011 amendments) for concealing the existence of an oral agreement with Keith Kovick and Robert Congdon to receive up to 50% of the proceeds of the commissions Cornerstone received from certain loans and/or for signing, and/or having Defendants' attorney sign, as applicable, the John Power Response (Doc. # 82 Ex. 1), the John Power, Jr.'s Response (Doc. # 82 Ex. 4), the Michael Ryan Response (Doc. # 82, Ex. 2), and the Supplemental Response (Doc. # 106 Ex. D):

a. an order that the following facts shall be taken to be established for the purposes of this action:

i. Cornerstone, Keith Kovick, and Robert Congdon were the agents of John Powers, John Powers, Jr., and Michael Ryan, acting under John Power's, John Powers, Jr.'s, and Michael Ryan's authority during all times relevant to this cause;

ii. Defendants John Powers, John Powers, Jr., and Michael Ryan, through their agents Cornerstone, Keith Kovick, and Robert Congdon, took a 10% commission of the $270,000 Note from the proceeds of the 270,000 loan;

iii. Defendants John Powers, John Powers, Jr., and Michael Ryan, received 50% of the 10% commission on the $270,000 Note as a kickback from their agents Cornerstone, Keith Kovick, and Robert Congdon; and

iv. Defendants John Powers, John Powers, Jr., and Michael Ryan concerted their action with each other and with Cornerstone, Keith Kovick, Robert Congdon to charge, reserve, receive and/or take more than the legal rate of interest from Plaintiffs; and

b. an order that Defendants John Powers, John Powers, Jr., and Michael Ryan pay Plaintiffs' reasonable expenses, including attorney's fees, caused by Defendants' failure to act in compliance with Rules 37, Rule 26(g), and Rule 11 in connection with this matter from July 21, 2010; and

c. an order setting forth any other appropriate sanction.

2. Defendant John Powers shall appear in this Court **at the above scheduled hearing on the 21st of September, 2012** and show cause why this Court should not impose sanctions pursuant to Montana Rule of Civil Procedure 56(g) (as such rule was in effect immediately prior to the October 1, 2011 amendments) for presenting the Second Powers Affidavit in bad faith or solely for the purpose of delay.

3. Plaintiffs shall file and serve upon Defendants by **Wednesday, September 12, 2012**, an affidavit itemizing (by Rule) Plaintiffs' reasonable expenses, including attorney's fees, caused by Defendants John Power's, John Power, Jr.'s and Michael Ryan's failure to act in compliance with Rules 37, Rule 26(g), and Rule 11 (and caused by Defendant John Powers's violation of Rule 56(g)) in this matter from July 21, 2010.

4. The hearing on the **21st of Setptember, 2012**, will provide the parties with an opportunity to present argument and evidence with respect to the issue of reasonable expenses caused by Defendant John Power's, Defendant John Power, Jr.'s, and Defendant Michael Ryan's failure to act in compliance with Rules 37, 26(g), 11, and 56(g).

DATED this 29th day of August, 2012.

HON. JAMES A. HAYNES, District Judge

8-30-12 tc
cc: counsel of record