

Bramson, Plutzik, Mahler & /  
Birkhauser, LLP  
Attn: Birkhauser, Daniel E.  
2125 Oak Grove Rd., Ste. 120  
Walnut Creek, CA 94598

Simmonds & Narita LLP  
Attn: Narita, Tomio B.  
44 Montgomery St.  
#3010  
San Francisco, CA 94104-4816

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**Superior Court of California, County of Alameda**  
**Rene C. Davidson Alameda County Courthouse**

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Reimann  <p style="text-align: right;">Plaintiff/Petitioner(s)</p> VS.  Brachfeld  <p style="text-align: right;">Defendant/Respondent(s) (Abbreviated Title)</p>	No. <u>RG10529702</u>  Order  Motion for Sanctions Granted
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The Motion for Sanctions filed for Michael DaRonco and Judith Reimann was set for hearing on 07/12/2019 at 10:00 AM in Department 21 before the Honorable Winifred Y. Smith. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

**IT IS HEREBY ORDERED THAT:**

The Motion of plaintiffs for discovery sanctions is **GRANTED IN PART**.

**THE COMPLAINT AND THE PARTIES**

The Complaint contains causes of action for (1) Rosenthal Act Claim (specifically alleged violations of Civil Code 1788.17) and (2) Unfair Competition Law (Bus. & Prof. 17200). On 10/23/10 the Defendants filed an answer while the case was in federal court.

The defendants fall into three categories:

Erica Brachfeld is an individual. The order of 8/2/13 granted Ms. Brachfeld's motion for judgment on the pleadings. On 8/26/13, the court entered judgment in favor of Ms. Brachfeld. She is no longer in the case.

BLG was a law firm that was apparently controlled and managed by Ms. Brachfeld. BLG allegedly sent dunning letters and filed lawsuits on behalf of Midland. BLG filed a certificate of dissolution on 2/2/15. (Order of 7/27/18.) It is unclear whether BLG is still a party in the case.

Midland Funding, LLC, Midland Credit Management, LLC and Midland Funding NCC-2 Corp. (collectively, "Midland") purchased defaulted debt and made efforts to collect that debt. Midland is a party to the case.

The Order of 12/1/11 required the parties to preserve and maintain evidence related to this case. (Rosenberg Dec. Exh 1.) In 2012 Ms. Brachfeld stopped practicing law. In 2013 BLG went out of business and destroyed its business records and client files. In 2013-2014, Midland settled claims against it in the nationwide case of Vassalle v. Midland Funding, (N.D. Ohio) 3:11-cv-0096.) (Rosenberg Class certification Dec, para 11.) BLG filed a certificate of dissolution on 2/2/15.

Midland's contract with BLG gave Midland control over the client files that BLG retained for Midland. Midland had a contractual right to ask for those files at any time. (Rosenberg Dec. Exh 9, para 7.) California Rule of Professional Conduct 3-700 (renumbered 1.16) also gave Midland control over its client files and Midland had the ability to request them at any time.

#### BLG's DESTRUCTION OF DOCUMENTS.

The court GRANTS IN PART the motion for the discovery sanctions against BLG.

The terminating sanction is a drastic penalty and should be used sparingly. A trial court must be cautious when imposing a terminating sanction. The trial court should select a sanction that is tailored to the harm caused by the withheld discovery. Sanctions "should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery.

In extreme cases a court has the authority to order a terminating sanction as a first measure. That said, a terminating sanction should generally not be imposed until the court has attempted less severe alternatives and found them to be unsuccessful and/or the record clearly shows lesser sanctions would be ineffective. (Lopez v. Watchtower Bible & Tract Society of New York, Inc. (2016) 246 Cal.App.4th 566, 603-604.) In Williams v. Russ (2008) 167 Cal.App.4th 1215, the court imposed terminating sanctions for failure to preserve evidence. There was no court order and the court stated, "A terminating sanction is appropriate in the first instance without a violation of prior court orders in egregious cases of intentional spoliation of evidence" In Miranda v. 21st Century Ins. Co. (2004) 117 Cal.App.4th 913, 928-929, the court imposed terminating sanctions as a first sanction. The court stated, "Thus, the evidence established that plaintiff flatly refused to obey a court order. This was not an inadvertent failure to respond to discovery, or a mere late service of a discovery response. It was defiant disobedience of the court's order." The court found that lesser sanctions would not have sufficed. In Alliance Bank v. Murray (1984) 161 Cal.App.3d 1, 10, the court imposed terminating sanctions based on the failure to appear at two deposition dates. The record showed that it was not a scheduling mishap. The record showed that the dismissed party took a calculated risk that he could disregard the judicial process. The court found no abuse of discretion in the terminating sanction.

Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply ... and (2) the failure must be willful. (Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc. (2008) 163 Cal.App.4th 1093.)

There was a failure to comply. The Order of 12/1/11 ordered BLG to "securely maintain, and not destroy or delete, sources of potentially discoverable information." The order specifically mentioned computers and computer files. Ms. Brachfeld testified that all of BLG's records were destroyed in 2013. (Rosenberg Dec., Brachfeld Depo at 53-55, 58, 398-389; Narita Dec., Brachfeld Depo at 101-102.)

BLG argued that the information that was destroyed was not subject to the order because plaintiffs' claims concern Midland's and BLG's process and not the substance of the letters and filings that resulted from the process. The court is not persuaded. "Potentially discoverable information" is a broad description given the definition of discoverable information. (CCP 2017.010.) BLG cannot define the scope of what it was required to preserve by what it thought was relevant to the claims.

BLG's failure was willful. BLG's express argument is that it did what its clients asked it to do. (Narita Dec., Brachfeld Depo at 101-102.) BLG's implicit argument is that it no obligation to do more than what its clients asked it to do, including compliance with the Order of the Court. BLG's related implicit argument is that to the extent it defined its obligations by its obligation to its client, it was negligent is not recognizing that it had an obligation to the court.

The court finds that BLG's destruction of documents was willful. BLG was a law firm and was presumably aware of the importance of court orders. BLG was presumably aware that Midland was involved in litigation, both in this case and in the federal Vassale case. Even if BLG acted in good faith in retaining documents for purposes of the federal case only while the federal case was pending, it had an obligation under this court's order to continue to retain documents.

The sanction must be tailored to the harm. The court discusses the sanction/remedy below.

## MIDLAND'S ACTIONS IN NOT OBTAINING DOCUMENTS FROM BLG BEFORE THE DOCUMENTS WERE DESTROYED.

The court GRANTS IN PART the motion for the discovery sanctions against Midland for the destruction of documents that were in the actual possession of BLG and the constructive possession of Midland.

Midland did not have actual possession of the documents in BLG's physical possession.

Midland was in constructive possession of the documents in BLG's physical possession. The documents were within Midland's possession, custody or control given the Midland had the right to obtain the documents under both contract and the Rules of Professional Conduct. (Rosenberg Dec. Exh 9, para 7; California Rule of Professional Conduct 3-700 (renumbered 1.16))

There was a failure to comply. Midland had an affirmative obligation under the court's order to preserve and maintain evidence related to this case, and that included an obligation to either get actual possession of its files and other discoverable documents that were in BLG's possession or to ensure that BLG did not destroy the client files and other discoverable documents in its possession.

Midland conducted substantial business with BLG and the court can easily conclude that Midland knew that BLG was going out of business. Midland failed to obtain its client files from BLG when BLG went out of business.

Midland's failure was willful. Midland was party to this case and the federal litigation and was presumably aware of the importance of court orders. As with BLG, even if Midland acted in good faith in retaining documents for purposes of the federal case only while the federal case was pending, it had an obligation under this court's order to continue to retain documents

### THE SANCTION/REMEDY

The sanction must be tailored to the harm. Identifying the harm is complicated by the fact that the destroyed information included (1) court filings, which are not privileged or protected; (2) internal BLG notes, which would be protected work product; and (3) BLG communications with Midland, which would be privileged.

Plaintiffs cannot demonstrate harm because BLG and Midland did not preserve protected and privileged documents that BLG and Midland could have withheld from production in discovery.

The court cannot determine the harm until the nature of plaintiff' claims and the scope of BLG's and Midland's assertion of protection and privilege are clarified closer to trial.

The court does not issue specific sanctions at this time.

The court is inclined to instruct the jury with CACI 203 (inferences that can be drawn when a party with access to stronger evidence produces weaker evidence and) and CACI 204 (inferences from willful suppression of evidence). (Evid Code 412 and 413.)

The use of the CACI jury instructions is complicated by Evidence Code 913(a), which states that neither the court nor counsel may comment on the exercise of the attorney-client privilege and no presumption shall arise because of the exercise of the privilege. The evidence regarding what notice BLG gave to Midland before destroying the files and what instructions or communications Midland had with BLG regarding document destruction would arguably be confidential attorney-client communications. (Evid Code 952.) BLG has asserted the privilege. (Order of 4/26/19.)

The court is inclined to (1) order the use of a stipulation of facts regarding BLG's destruction of documents (CACI 106), (2) order that the parties cannot present or elicit other evidence regarding BLG's destruction of documents or Midland's failure to get its documents before they were destroyed (Evid Code 352), and (3) instruct the jury with CACI 203 and 204 and Evid Code 913(b).

The court anticipates the stipulation of facts would in the nature of: (1) Midland contracted with the law

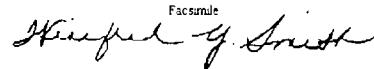
firm of BLG to collect the debts at issue in this case; (2) on 12/1/11 the court ordered Midland and BLG to [insert text from order]; (3) discoverable information is information that is relevant to the claims and defenses in the case (CCP 2017.010); (4) Midland's contract with BLG stated that BLG's records regarding Midland remained Midland's property and that Midland had the right to those records at any time (Rosenberg Dec. Exh 9, para 7.); (5) BLG had a professional obligation to return Midland's records if Midland requested the return of its records (Rule of Professional Conduct 3-700 (renumbered 1.16)); (6) in 2013 BLG went out of business and destroyed its business records and client files; and (7) there is no evidence regarding whether BLG informed Midland that BLG would destroy the records or what instructions, if any, Midland gave to BLG about the destruction of the records.

The court anticipates jury instructions to the effect of (1) the jury must not draw inferences about why BLG's business records and client files are not evidence in this trial (Evid Code 913) but (2) the jury may draw inferences from the absence of evidence that would be expected to be in BLG's business records and client files (CACI 203 and CACI 204).

The court directs the parties to meet and confer regarding the content of a stipulation of facts regarding BLG's destruction of documents and the content of jury instructions.

If the parties cannot reach agreement, then in any briefing the parties are to address (1) the scope of BLG's and Midland's assertion of work product protection and attorney-client privilege; (2) whether communications about the return or destruction of client files are confidential communications under Evid Code 952, (3) whether the court can reconcile Evid Code 412 and 413 with Evid Code 913, and (4) if not, which provision(s) prevail in the event of an irreconcilable conflict.

Dated: 07/31/2019

Facsimile  


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Judge Winifred Y. Smith

Superior Court of California, County of Alameda  
Rene C. Davidson Alameda County Courthouse

Case Number: RG10529702  
Order After Hearing Re: of 07/31/2019

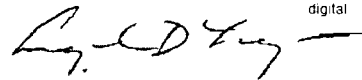
**DECLARATION OF SERVICE BY MAIL**

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 08/01/2019.

Chad Finke Executive Officer / Clerk of the Superior Court

By

 digital

Deputy Clerk