

United States District Court
For the Northern District of California

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E-FILED 05-09-2011

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE COMUNITY LENDING,
INCORPORATED,

No. C08-00201 JW (HRL)

Debtor

**CONDITIONAL ORDER GRANTING
PLAINTIFFS' MOTION TO COMPEL
DISCOVERY**

CHRISTINA PHAM, et al.

Plaintiffs,

**ALTERNATIVE REPORT AND
RECOMMENDATION RE
EVIDENTIARY SANCTIONS**

v.

COMUNITY LENDING INCORPORATED

[Re: Docket No. 137]

Defendant.

AND RELATED CROSS-ACTIONS

Plaintiffs move to compel the production of documents and interrogatory answers. Trustee John Richardson opposes the motion. Upon consideration of the moving and responding papers,¹ as well as the arguments of counsel, this court conditionally grants plaintiffs' motion to compel and issues an alternative report and recommendation as to evidentiary sanctions that they might request.

¹ This court overrules the Trustee's objection to deposition testimony submitted by plaintiffs in connection with their reply papers. The deposition in question did not take place until after the instant motion was filed. In any event, the court finds that the testimony fairly was submitted in rebuttal to the arguments made in the Trustee's opposition papers.

1 Plaintiffs propose wide-ranging discovery concerning ComUnity’s financial condition
2 during the relevant time period because they believe that the company’s claimed insolvency is a
3 crucial issue in the case. In essence, plaintiffs say that the documents the Trustee has yet to
4 produce boil down to:

- 5 • communications with third parties, such as lenders, creditors, and investors;
- 6 • documents concerning ComUnity’s decision to pay millions of dollars to GMAC
7 and Countrywide in September and October 2007, despite personal guarantees
8 on those loans by ComUnity’s officers;
- 9 • documents pertaining to insider transactions, including the forgiveness of loans
10 to insiders (such as CEO Darryl Fry and his relatives) during the very period
11 when the company claimed it was insolvent;
- 12 • communications related to ComUnity’s financial condition between or involving
13 or Diablo Management Group (DMG);
- 14 • documents relating to ComUnity’s valuation of its assets and liabilities,
15 including portfolio and repurchase requests; and
- 16 • emails to, from, and among ComUnity’s “Leadership Group” between August
17 and October 2007 about the company’s financial condition and alleged
18 insolvency, repurchase requests, and insider transactions including loan
19 forgiveness, reorganization, or restructuring.

20 Plaintiffs also say that the Trustee has not provided sufficient answers to interrogatories about
21 the company’s financial condition, including those asking for the identification of debts that
22 became due during the time period in question.

23 The theme of the Trustee’s opposition is that plaintiffs’ requests are overbroad and that
24 the process of locating and producing responsive information would be prohibitively expensive.
25 Here, the Trustee says that he has a wealth of ComUnity information and materials in his
26 possession, custody, and control, including: up to 7.7 terabytes (or 346 million pages) of
27 documents on 35 backup tapes; 600 banker boxes of hard copy documents stored at DMG’s
28 warehouse in Tracy, California; and over 10,000 banker boxes (likely containing loan files)
stored at an Iron Mountain facility. According to the Trustee, compliance with plaintiffs’
requests would drain the \$2 million or so remaining in the bankruptcy estate. He further
contends that the burden of producing responsive discovery outweighs the likely benefit.

1 In describing his search for responsive information, the Trustee appeared to this court to
2 skirt the issue. To be sure, the Trustee says that he has searched for and produced some
3 responsive information, including a search of emails from former ComUnity employees (see
4 Ahmadian Decl. Exs. 1-2). The Trustee says that he has also conducted some searches of the
5 so-called “football”—i.e., a backup copy (said to be less comprehensive than the 35 backup
6 tapes) of shared drive and virpak data from ComUnity when it was an ongoing business.
7 Additionally, the Trustee says that he has made the 600 boxes of documents at DMG’s
8 warehouse available for plaintiffs’ inspection.

9 Nevertheless, in describing the claimed undue burden that would be imposed by
10 plaintiffs’ discovery requests, the Trustee repeatedly referred to the expense of accessing data
11 from the 35 backup tapes, rather than the effort that might be required to conduct a complete
12 search of the “football,” which might be considered a more readily available source of
13 information. The entire “football” has not yet been searched. And, Trustee’s counsel
14 acknowledged that there is more that the Trustee can do that would not involve accessing the 35
15 backup tapes. Additionally, the Trustee suggests that plaintiffs’ discovery requests would
16 require him to search the entire contents of all 35 backup tapes, but there has been no
17 satisfactory explanation why that is the case—unless the 35 tapes contain random information
18 in no particular order and it would be impossible to target documents from the few months in
19 2007 that plaintiffs seek. Nor has there been a showing that the contents of all 600 boxes at
20 DMG’s warehouse must be examined by human eyes in order to locate responsive documents
21 from the relatively short time period in question. Further, plaintiffs say that bankruptcy records
22 indicate that the documents they seek have already been pulled and reviewed by defense
23 counsel.

24 In sum, this court is unpersuaded that the Trustee has lived up to his discovery
25 obligations to search for and produce relevant, responsive, non-privileged documents and
26 information in a reasonable and workmanlike fashion.

27 Accordingly, this court finds that plaintiffs’ motion to compel should be granted as
28 follows: Since the Trustee offered to provide all of his electronically stored information (ESI)

1 to plaintiffs (subject to an appropriate clawback provision for any privileged information), he is
2 ordered to either (1) turn over to plaintiffs mirror images of the ESI in his possession, custody,
3 or control; or (2) run plaintiffs' choice of up to 15 search terms on all ESI except the backup
4 tapes and produce the results to plaintiffs. If there are obvious gaps in the results of those
5 searches, plaintiffs' and defense experts shall meet in person and devise a protocol and cost for
6 examining the backup tapes for responsive documents from the relevant time period. The costs
7 shall be shared by the parties as follows: 2/3 of the costs shall be borne by the Trustee and 1/3
8 shall be borne by plaintiffs. The Trustee shall also serve answers to the interrogatories at issue.
9 If the Trustee believes that he appropriately may produce records in lieu of an answer, then he
10 shall (a) specify the records that must be reviewed, in sufficient detail to enable plaintiffs to
11 locate them as readily as the Trustee could; and (b) produce the records or give plaintiffs a
12 reasonable opportunity to examine and audit the records and make copies, compilations,
13 abstracts, or summaries of them. FED. R. CIV. P. 33(d).

14 This foregoing order, however, is conditioned on the presiding judge's determination
15 that the period for fact discovery and expert disclosures should be re-opened to permit plaintiffs
16 an opportunity to complete the discovery in question and to prepare expert disclosures that take
17 that discovery into account. Additionally, this court recommends that a special master be
18 appointed to address any further discovery disputes that may arise.

19 At oral argument, plaintiffs stated that, given the current posture of this case, they
20 believe that evidentiary sanctions are the more appropriate remedy at this time. As discussed
21 above, this court finds the Trustee's claims as to undue burden to be exaggerated. Although
22 Fed. R. Civ. P. 37(a) generally requires a court order before evidentiary sanctions may be
23 imposed, the period for discovery and expert disclosures has passed and trial is set to begin in a
24 few weeks. As such, there has been prejudice to plaintiffs. Therefore, if the presiding judge
25 decides that modification of the scheduling order to allow additional time for discovery and
26 expert disclosures is not warranted, then this court recommends that he consider imposing the
27 evidentiary sanctions which might be requested by plaintiffs, including a presumption that
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ComUnity was not insolvent at the time when it said it was.

Dated: May 9, 2011



HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

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