

CAUSE NO. 017-242348-09

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TARRANT COUNTY  
2010 OCT 11 AM 10:30  
THOMAS SCOTT WILDER  
DISTRICT CLERK

CARY WALLER, SHELLI WALLER,  
AND ABIGAIL WALLER  
PLAINTIFFS

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IN THE DISTRICT COURT

Vs.

RITA LANG, MICHAEL LANG,  
STATE FARM COUNTY MUTUAL  
INSURANCE COMPANY OF TEXAS,  
AND CARY WALLER,  
DEFENDANTS

TARRANT COUNTY, TEXAS

17<sup>TH</sup> JUDICIAL DISTRICT

**Brief in Support of Plaintiffs' Request For Sanctions  
For Defendants' Failure to Appear at Depositions**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Plaintiffs – Cary Waller, Shelli Waller, and Abigail Waller – and file this brief in support of the request for sanctions contained in Plaintiffs' Second Motion To Compel Depositions And Request For Sanctions ("The Motion"), and would respectfully show the Court as follows:

**I. Factual Summary**

1. As detailed in The Motion, after unsuccessfully seeking agreed dates for Defendants' depositions, Plaintiffs were forced to file *Plaintiffs' Motion to Compel Depositions and Request For Expedited Hearing* on May 27, 2010.

2. On May 28, 2010 (during a hearing on Plaintiffs' separate motion to compel written discovery responses), Defendants' counsel stipulated in open Court that Defendants Rita Lang and Michael Lang would both be presented for deposition on June 23, 2010, at the offices of their personal counsel, David Flowers.

3. Plaintiffs accepted such stipulation and served Defendants with deposition notices confirming both depositions would occur on June 23.

4. As set out in The Motion, Plaintiffs' counsel and the court reporter appeared pursuant to the notices, but neither Defendant appeared. Defendants had not sought to quash their deposition notices or obtain a protective order. A certificate of non-appearance as to each deposition was taken.

5. By intentionally refusing to appear, Defendants and their counsel intentionally breached, violated, and refused to abide by the stipulation made in open court that they would appear for their depositions on June 23, and refused to comply with the notices despite never filing any motion to quash or otherwise seeking court permission not to appear.

6. On July 1, 2010, this Court conducted a partial hearing on The Motion, concluded that it was well-taken, and entered an order compelling Defendants to appear for their depositions on July 14, 2010. Because Defendants' counsel Carlos Balido was not present at such hearing, Plaintiffs' counsel informed the Court and counsel that Plaintiffs would not proceed at that time with the hearing on Plaintiffs' request for sanctions, but would go forward with such at a future date, preferably when Mr. Balido could be available.

7. Subsequently, Defendant Rita Lang finally appeared for her deposition on July 14, as ordered. Mr. Lang was out of the country and Defendants offered to make him available by telephone; however, Plaintiffs prefer to depose him in person, and such deposition remains to be taken. The parties are attempting to cooperate in order to complete these depositions and these continuing efforts are not the subject of The Motion. At this time, Plaintiffs simply seek monetary sanctions and relief based on Defendants' original failure to appear for their depositions as noticed on June 23, and the time and expense to which Plaintiffs and their counsel were put as a result.

## **Grounds For Relief**

8. Sanctions in this situation are mandatory. Pursuant to Tex. R. Civ. P. 215, if a party fails to appear for his or her deposition after being served with a proper notice, the discovering party may move for an order compelling an appearance and for sanctions. *See* Rule 215.1(b)(2)(A). If the motion is granted, “**the court shall**” require the deponent party, his attorney, or both, to pay the moving party “the reasonable expenses incurred in obtaining the order, including attorneys fees.” Such payments are mandatory “unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of sanctions unjust.” Tex. R. Civ. P. 215.1(d). *See also, e.g., Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992) (The court may charge the costs and expenses of discovery against the disobedient party or the party’s attorney.)

9. In this case, Defendants did not make any motion to quash or for protection, so the issue of substantial justification is not raised. They simply willfully refused to appear. Moreover, no other circumstances make an award of sanctions unjust, particularly given Defendants’ stipulation in open court that they would appear, and the groundlessness of their last-minute refusal. Accordingly, Plaintiffs must be awarded their expenses and attorneys fees, in addition to other appropriate sanctions.

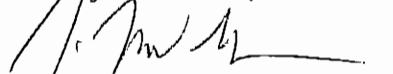
10. Further, under Rule 199.3, service of the deposition notices upon Defendants’ attorney had “the same effect as a subpoena served on the witness” under Rule 176; accordingly, Defendants’ failure to appear constitutes and may be punished as contempt of court, including by fine, confinement, or both. Tex. R. Civ. P. 176.8(a). Indeed, a defendants’ failure to appear for deposition as noticed is regarded as a very serious offense, authorizing the court to impose the ultimate sanction of default judgment. Tex. R. Civ. P. 215.2(b)(5); *see, e.g., Greater Houston*

*Transp. Co. v. Wilson*, 725 S.W.2d 427, 431 (Tex.App.–Houston [14<sup>th</sup> Dist.] 1987, writ ref'd n.r.e.) (Default judgment entered against defendant who did not appear for deposition).

11. In this case, Plaintiffs would show – through evidence and testimony at the time of the hearing hereon – that Plaintiffs’ counsel have spent significant time and incurred reasonable and necessary expenses and costs in, among other things: attempting to schedule the depositions by agreement; preparing and filing a motion to compel; noticing and preparing to take depositions that did not occur despite stipulation and notice; researching and preparing a second motion to compel and for sanctions; preparing for and attending the motion to compel hearing; and preparing for and attending the current hearing. Plaintiffs will show that their reasonable and necessary attorneys fees and expenses in such regard are substantial. *But see, Scott Bader, Inc. v. Sandstone Prods.*, 248 S.W.3d 802, 817 (Tex.App.–Houston [14<sup>th</sup> Dist.] 2008, no pet.)(when attorneys fees are imposed as sanctions, no proof of the reasonableness or necessity of such fees is required.)

12. The conduct of Defendants and their counsel was blatant, extreme, unjustified, and calculated to result in unfair prejudice to Plaintiffs. Defendants and/or their counsel should be sanctioned, as this Court deems just and appropriate, including an award of Plaintiffs’ attorneys fees, monetary sanctions, and other appropriate sanctions and relief. This Court has the inherent authority to enter such sanctions, as well as authority under Tex. R. Civ. P. 215 and other applicable law.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing instrument was served this 8<sup>th</sup> day of October, 2010, on the following attorneys of record via telefax:

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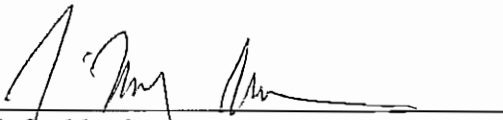
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