IN THE CIRCUIT COURT FOR THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

COMPLEX BUSINESS LITIGATION SECTION

CASE NO. 08- 55741 CA 40

LENNAR CORPORATION, a Delaware Corporation, and LENNAR HOMES OF CALIFORNIA, INC., a California Corporation,

Plaintiffs,

vs.

BRIARWOOD CAPITAL, LLC, a Delaware Limited Liability Company; NICOLAS MARSCH III, a California Individual; BARRY MINKOW, a California individual; FRAUD DISCOVERY INSTITUTE, INC., a California Corporation; and DOES 1-10, inclusive,

Defendants.
_____/

**ORDER GRANTING LENNAR PLAINTIFFS' MOTION FOR SANCTIONS AGAINST DEFENDANTS BARRY MINKOW AND FRAUD DISCOVERY INSTITUTE, INC.**

**THIS CAUSE** came before the Court on Plaintiffs Motion for Sanctions and for entry of default and other relief against Defendants Barry Minkow and the Fraud Discovery Institute, Inc. for their willful and egregious litigation misconduct. The parties filed extensive papers in support and in opposition of the motion, and the Court held a two-day evidentiary hearing on August 26 and 27, 2010 at which time Mr. Minkow was examined by Plaintiffs' and Defendants' counsel, as well as the Court.

Having carefully considered all the papers, the evidence filed by both parties, evidence introduced at the hearing, including Mr. Minkow's testimony, and arguments of counsel, it is

**ORDERED** and **ADJUDGED** that Plaintiffs' Motion be, and the same is hereby, **GRANTED** as set forth below, based on the following findings of fact and conclusions of law.

## OVERVIEW

Plaintiffs, Lennar Corporation and Lennar Homes of California, ("Lennar") have moved for sanctions based on evidence of gross litigation and discovery misconduct by Defendants Barry Minkow and the Fraud Discovery Institute, Inc. Lennar has requested entry of default and reimbursement of attorneys' fees and costs against Minkow and Fraud Discovery Institute, Inc., as a sanction for and remedy to address Defendants' alleged misconduct.

As set forth in detail below, Mr. Minkow is recognized as an expert in fraud investigation, is an experienced litigant readily familiar with the rules of litigation and discovery, and the appropriate means of obtaining information. At all times in this case, he was represented by at least three qualified attorneys. With full knowledge of the rules and his obligations as a litigant in this Court, Mr. Minkow has withheld key documents, destroyed or discarded important evidence, concealed the identity of material witnesses, wilfully violated court orders, and engaged in actions to cloud his misconduct. Minkow repeatedly intentionally misrepresented these matters to his own lawyers, in sworn affidavits filed with this Court, at depositions in this

case, and at the evidentiary hearing itself, including in response to questions from this Court. Mr. Minkow was repeatedly impeached by his own documents, documents he never produced in this case as to material issues. The evidence clearly and convincingly established that Minkow has acted knowingly, unilaterally, and improperly in deciding what evidence is relevant and what information Lennar, the Court, and his lawyers should and should not know.

Minkow's misconduct has been pervasive, intentional, and committed to gain unfair advantage over Plaintiffs and to deceive this Court. Lennar and its counsel spent numerous hours investigating Minkow's activities in this litigation, and evidence which Plaintiffs have repeatedly requested has been discarded and/or irretrievably lost.

Plaintiffs' right to fair process and trial has been severely and irrevocably compromised. No remedy short of default, together with full reimbursement of the attorneys' fees and costs incurred in connection with Plaintiffs' extensive and continuous efforts to obtain evidence and discovery, can restore Plaintiffs to "the position [it] would have occupied in the absence of [Minkow's] willfulness and bad faith." *Figgie Int'l v. Alderman*, 698 So. 2d 563, 568 (Fla. 3d DCA 1997); *Babe Elias Builders, Inc. v. Pernick*, 765 So. 2d 119, 121 (Fla. 3d DCA 2000); *Bitterman v. Bitterman*, 714 So. 2d 356, 365 (Fla. 1998) (trial court has inherent authority to award attorneys fees against party for bad faith conduct in litigation). "Courts throughout this state have repeatedly held that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve her ends." *Rosenthal v. Rodriguez*, 750 So.2d 703, 704 (Fla. 3d DCA 2000).

Additionally, "[t]ampering with the administration of justice . . . involves far more than injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the

public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Ramey v. Haverty Furniture Cos., Inc.*, 993 So. 2d 1014, 1020-21 (Fla. 2d DCA 2008). "A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way." *Cox v. Burke*, 706 So. 2d 43, 47 (Fla. 5th DCA 1998); *Baker v. Myers Tractor Servs., Inc.*, 765 So. 2d 149, 150 (Fla. 1st DCA 2000). Based thereon, "the most severe in the spectrum of sanctions"—default and reimbursement of attorneys' fees—is necessary "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976); *accord Tramel v. Bass*, 672 So. 2d 78, 84 (Fla. 1st DCA 1996) (determining sanction needed "as much for their deterrent effect on others as for the chastisement of the wrongdoing litigant").

In its papers and at the evidentiary hearing, Lennar introduced substantial evidence that Minkow created and tendered false documents in this case. (Exs. 25; 35; 40; 41; 45; 47; 48; 50; 51; 81; 131; 137; 163; and 190.) While the Court believes the evidence raises serious questions, the Court does not make or rely on any findings as to whether Minkow created the manufactured and/or altered documents.

## SPECIFIC FINDINGS OF FACT

A party is entitled to dismissal or default "where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." *Cox*, 706 So. 2d at 46 (citation omitted); *accord Arzuman v. Saud*, 843 So. 2d 950,

952 (Fla. 4th DCA 2003). The overview described above and each specific finding set forth below were established by clear and convincing evidence.

## I. THE PARTIES

**Fact No. 1:** Lennar Corporation and Lennar Homes of California, Inc. ("Lennar") are the Plaintiffs in the instant lawsuit. (Ex. 1.)

**Fact No. 2:** The Defendants are Nicolas Marsch, III and his company Briarwood Capital, LLC (collectively "Marsch"), and Barry Minkow and the Fraud Discovery Institute, Inc. ("Minkow"). (Ex. 1.)

**Fact No. 3:** For more than a decade, Minkow has worked on his own, and closely with federal prosecutors, state prosecutors, the Federal Bureau of Investigation, the Securities and Exchange Commission, the Internal Revenue Services, and other federal and state agencies, as well as with highly-experienced private investigators investigating alleged fraud and other misconduct allegedly perpetrated by companies and individuals. Minkow has taught courses in fraud detection at the FBI's Quantico Headquarters, at some of the country's most prominent law firms, and at seminars. (Ex. 4; Aug. 26, 2010 Sanctions Hrg. Tr. at 167:13-24, 173:14-24.)

**Fact No. 4:** Over the last 20 years, Minkow has been a defendant in at least four significant lawsuits, including this matter. (Aug. 26, 2010 Sanctions Hrg. Tr. at 52:21-53:2.)

**Fact No. 5:** Despite his extensive, sustained personal experience, Minkow testified at the August 26, 2010 hearing that he is a novice, "incompetent," and an "idiot" with respect to fraud investigation, litigation responsibilities, and computer technology. (Aug. 26, 2010 Sanctions Hrg. Tr. at 53:19-54:2; (Aug. 27, 2010 Sanctions Hrg. Tr. at 281:7-11.).) The Court does not find this testimony credible.

**Fact No. 6:** The Court finds that Minkow is an expert in fraud investigation and is readily familiar with the rules of litigation and discovery, and the appropriate means of obtaining information. (Ex. 4; Aug. 26, 2010 Sanctions Hrg. Tr. at 52:21-53:2, 167:13-24, 173:14-24.)

**Fact No. 7:** In this case, Minkow has been represented by three experienced, capable attorneys: Alvin Entin and Joshua Entin of Florida, and Michelle Baker of California. The Court finds that Minkow misled his attorneys multiple times on material issues. Messrs. Entin, and Ms. Baker bear no fault or responsibility for Minkow's fraudulent activities in this litigation. (Aug. 27, 2010 Sanctions Hrg. Tr. at 281:16-20.)

## II. DOCUMENT WITHHOLDING, WILLFUL VIOLATION OF COURT ORDERS, AND ADDITIONAL MISCONDUCT

### A. Withholding/Destruction of Evidence and Other Misconduct

**Fact No. 8:** On January 15, 2009, immediately after filing this lawsuit, Lennar served Minkow with a document preservation letter instructing him to notify all agents to preserve all documents related to the litigation and to turn off any auto-delete functions on their email systems. (Ex. 37.)

**Fact No. 9:** Minkow testified he could not recall whether he sent the letter to any person with whom he worked on the Lennar investigation, including Tracy Coenen, Terry Gilbeau, Paul Palladino, Jeff Sachs, Sam Antar, or Shannon Boelter, or otherwise instruct any person to preserve documents in connection with this litigation. (Aug. 26, 2010 Sanctions Hrg. Tr. at 50:4-51:13.)

**Fact No. 10:** Minkow produced no evidence showing that he transmitted or otherwise communicated the notice of preservation to these individuals. The Court finds he did not transmit or communicate the notice to any of these individuals.

**Fact No. 11:** The evidence also showed that Tracy Coenen, Terry Gilbeau and Sam Antar deleted emails about Lennar they had exchanged with Minkow. (Ex. 36 at 28:3-29:24; Ex. 33 at 66:16-23, 67:16-68:5; Ex. 31 at 14:3-24, 97:4-12; Ex. 14 at 289:6-291:11.)On April 3, 2009, Lennar served Minkow with a Notice of Deposition *duces tecum* in this case. (Ex. 8.)

**Fact No. 12:** On May 4, 2009, Minkow filed a Motion for Protective Order concerning the Notice of Deposition *Duces Tecum* Lennar served on April 3, 2009. (Ex. 77.).

**Fact No. 13:** On June 15, 2009, the Court denied Minkow's Motion for Protective Order and ordered Minkow to produce all responsive documents and submit a privilege log by July 6, 2009. (Ex. 16.)

**Fact No. 14:** On June 26, 2009, Minkow filed a Motion for Enlargement of Time to comply with the Court's June 15 order. (Ex. 18.)

**Fact No. 15:** On July 9, 2009, the Court denied the Motion for Enlargement of Time and ordered Minkow to produce all responsive documents and submit a privilege log by July 27, 2009. (Ex. 20.)

**Fact No. 16:** On July 27, 2009 Minkow produced approximately 1,300 pages of documents, and included by reference 28 pages of documents Minkow had produced in connection with his deposition in the "Bridges case." (Ex. 79; Ex. 184 (FDI 1-1332)(documents produced by Minkow on July 27, 2009).)

**Fact No. 17:** The "Bridges case" is a lawsuit between Lennar and other parties and Marsch pending in the Superior Court of California, County of San Diego under case number GIC 877446 (Hon. William J. Nevitt, Jr. presiding).

**Fact No. 18:** On April 7, 8, and 17, 2009, Minkow had been deposed in the Bridges case. At the request of Minkow and pursuant to this Court's Order, Minkow's deposition testimony on April 7, 8, and 17, 2009 was deemed to have been taken in this action. (Ex.16; Ex. 78; Aug. 26, 2010 Sanctions Hrg. Tr. at 8:21-10:7, 190:2-8.)

**Fact No. 19:** On October 6, 2009, Minkow next produced eight additional pages of documents consisting of certain telephone phone records, and a single invoice to an FDI consultant. (Ex. 23.)

**Fact No. 20:** Minkow never submitted a privilege log in this case in violation of this Court's July 9, 2009 order. (Aug. 26, 2010 Sanctions Hrg. Tr. at 136:14-20.)

**Fact No. 21:** On October 7, 2009 Minkow submitted an affidavit swearing that he had produced all documents in his possession, custody, and control responsive to Lennar's document demands and this Court's June 15 and July 9, 2009 Orders. (Ex. 10 at ¶¶ 5-7; Ex. 8; Ex. 16; Ex. 20.)

**Fact No. 22:** These sworn statements in Minkow's October 7, 2009 affidavit were false. At the time he represented that he had made a complete production, Minkow had possession, custody, or control of numerous documents responsive to Lennar's document demands and this Court's June 15 and July 9, 2009 Orders, including but not limited to, the following documents material to this case:

- a version of the November 30, 2008 engagement agreement between Minkow and Nicolas Marsch containing a six-page, 11-point "confidential proposal" (Ex. 202);
- another version of the November 30, 2008 engagement agreement between Minkow and Nicolas Marsch containing materially different compensation terms (Ex. 200);
- numerous emails with Mr. Marsch, Paul Palladino, Tracy Coenen, Sam Antar, Terry Gilbeau, Shannon Boelter, and other individuals involved in the Lennar investigation;
- drafts of the January 9, 2009 report about Lennar. (Ex. 8.)

**Fact No. 23:** Minkow knew he had possession, custody, or control of these and other documents, but made the decision to withhold them. (Aug. 26, 2010 Sanctions Hrg. Tr. at 128:6-11.)

**Fact No. 24:** Over the last ten months, Minkow has had ample opportunities to correct the violation by producing the concealed documents.

**Fact No. 25:** At the August 26, 2010 hearing, Minkow admitted that he withheld these documents and others but said it was "negligent" because, at the time he represented he had produced all responsive documents, Minkow was working "18 hours a day" filming a movie about his life and he was "swamped and overwhelmed." (Aug. 26, 2010 Sanctions Hrg. Tr. at 184:8-12.) The Court does not find this testimony credible and rejects this excuse.

**Fact No. 26:** On several subsequent occasions, when he was not filming a movie including as recently as August 11, 2010, Minkow continued to withhold documents and falsely represent that he had produced all documents in his possession, custody, or control responsive to Lennar's document demands and this Court's June 15 and July 9, 2009 Orders. (Ex. 10; Ex. 23; Ex. 24; Ex. 58; Ex. 235.)

**Fact No. 27:** On each occasion, Minkow knew he had possession, custody, or control of such documents responsive to the Court's Orders, but he—alone—made the decision to withhold them. (Aug. 26, 2010 Sanctions Hrg. Tr. at 128:6-11.)

**Fact No. 28:** Minkow's year-long withholding of documents was not inadvertent, accidental, or negligent. (Aug. 26, 2010 Sanctions Hrg. Tr. at 110:6-18 & 127:5-128:11; Ex. 10; Ex. 24; Ex. 58; Ex. 262; Ex. 194 (Minkow December 18, 2009 Depo.) at 133:5-133:25; Ex. 185 at 1302-1743.)

**Fact No. 29:** Minkow withheld documents he perceived to be harmful to his case. Among other things, the concealed documents demonstrate:

- that Minkow's investigators questioned the accuracy of statements of fact he included in his report on Lennar;
- the perfunctory nature of Minkow research and investigation before he accused Lennar and its executives of operating like a ponzi scheme, giving its COO a disguised kickback, being a financial crime in progress, and other statements; and
- Minkow's use of possibly illegal means to obtain personal, confidential information about Lennar, its executives, and others. (Ex. 110; Ex. 111; Ex. 194 (Palladino Feb. 18, 2010 Depo.) at 104:10-105:14.)

**Fact No. 30:** By withholding these documents, Minkow wilfully violated the Court's June 15, 2009 Order and the Court's July 9, 2009 Order. (Ex. 16; Ex. 20.)

**Fact No. 31:** Minkow introduced no credible evidence to substantiate his assertion that he was unable to produce documents because his Hewlett Packard computer was stolen, crashed, and/or was hacked. (Ex. 10 at ¶ 7; Ex. 5 at 68:8-69:6; 135:19-136:4; 136:10-18; 614:10-615:9; 748:15-751:10; Ex. 61 at 49:14-50:6; Ex. 194 (Minkow December 18, 2009 Depo.) at 34:8-35:8, 62:18-65:2; Aug. 26, 2010 Sanctions Hrg. Tr. at 210:21-214:8.)

**Fact No. 32:** The evidence showed that in February 2010, Minkow was named as a defendant in another matter by a company called Medifast, Inc. That case bearing *Case No. 10-CV-03282 JLS (WMc)* pends in the United States District Court, Southern District of California. Lennar is not a party to that case. (Aug. 26, 2010 Sanctions Hrg. Tr. at 53:19-25.)

**Fact No. 33:** In April and May 2010, Medifast had served Minkow with requests for documents in their case. On July 1, August 10, 16, and 23, 2010, Minkow produced more than 4,000 pages of documents to Medifast, including scores of emails. Among the documents produced to Medifast were documents that should have been, but were not, produced in this case despite this Court's June 15 and July 9, 2009 Orders. (Ex. 130; Ex. 145; Ex. 146, Ex. 5 at 68:8-69:6, 135:19-136:4, 136:10-18, Ex. 61 at 49:14-50:6; Ex. 194 (Minkow December 18, 2009 Depo.) at 34:8-35:8, 62:18-65:2.)

**Fact No. 34:** When confronted at the evidentiary hearing with a document from the Medifast production, but not produced here, one that was responsive to Lennar's document requests—Minkow testified, "I never even thought this had anything to do with it...What in the world would make me think I had to turn it over to Lennar?" (Ex. 8; Ex. 130; Aug. 26, 2010 Sanctions Hrg. Tr. at 91:1-18.)

**Fact No. 35:** This testimony is not credible and, even if it were, demonstrates Minkow's contemptuous disregard for the rules of litigation and his belief that he—not the Court—determines what is relevant.

**Fact No. 36:** The documents Minkow produced to Medifast—but not in this case—refute Minkow's testimony that he was unable to produce emails in this case because his computer had been stolen, crashed, and/or hacked. (Ex. 130; Ex. 145; Ex. 146, Ex. 5 at 68:8-69:6, 135:19-136:4, 136:10-18, Ex. 61 at 49:14-50:6; Ex. 194 (Minkow December 18, 2009 Depo.) at 34:8-35:8, 62:18-65:2.)

**Fact No. 37:** Lennar has incurred great expense to procure some evidence from third parties, and it is highly probable considerably more evidence that Minkow should have produced has been withheld, deemed irrelevant by Minkow himself, concealed and/or destroyed. Due to Minkow's misconduct, neither Lennar nor the Court has any way of knowing the nature, extent, or volume of evidence that should have been produced but

has been concealed and destroyed. (Ex. 61 at 51:1-58:1; Ex. 194 (Minkow December 18, 2009 Depo.) at 30:24-31:25; Ex. 36 at 28:3-29:24; Ex. 33 at 66:16-23, 67:16-68:5; Ex. 31 at 14:3-24, 97:4-12; Ex. 14 at 289:6-291:11.)

**Fact No. 38:** Plaintiffs' right to responsive documents and other evidence to which it is entitled has been irrevocably prejudiced. (Ex. 61 at 51:1-58:1; Ex. 194 (Minkow December 18, 2009 Depo.) at 30:24-31:25.)

**Fact No. 39:** On October 19, 2009, Lennar served Minkow with Requests for Production seeking the production of the computers on which he performed work related to his investigation of Lennar. (Ex. 30.)

**Fact No. 40:** Minkow had represented that the Hewlett Packard computer on which he performed the vast majority of work related to his investigation of Lennar (and on which he had exchanged untold numbers of emails with Tracy Coenen, Terry Gilbeau, Paul Palladino, Jeff Sachs, Sam Antar, Shannon Boelter and others) had earlier been hacked, and likely was destroyed and/or discarded; after Minkow was added as a defendant in this case, after being served with a preservation letter, after being served with a Notice of Deposition *Duces Tecum* requiring the production of documents, and after Plaintiff had filed its first sanctions motion. (Ex. 8; Ex. 30; Ex. 37; Ex. 61 at 57:1-58:1; Aug. 26, 2010 Sanctions Hrg. Tr. at 72 :17-75 :18.)

**Fact No. 41:** Minkow has not introduced any credible evidence that all information from the Hewlett Packard was copied, duplicated, stored, and preserved without the loss of discoverable evidence.

**Fact No. 42:** Minkow admitted that the transfer of his email archives from the Hewlett Packard to a new computer was "incomplete." (Aug. 26, 2010 Sanctions Hrg. Tr. at 203:9-12.)

**B. Failure to Appear at Evidentiary Hearing and Misrepresentations**

**Fact No. 43:** On July 21, 2010, the Court ordered Minkow to appear and provide testimony at an evidentiary hearing scheduled for August 4, 2010. The Court allowed Minkow to appear in San Diego and provide testimony via videoconference.

**Fact No. 44:** Lennar made significant preparations to arrange the videoconference for the hearing on August 4. (Aug. 4 Hrg. Tr. at 6:1-7:25.)

**Fact No. 45:** On July 30, 2010, Minkow agreed to voluntarily appear live in Miami at the evidentiary hearing scheduled for August 4, 2010. (Aug. 4 Hrg. Tr. at 6:1-7:25.)

**Fact No. 46:** Lennar relied on Minkow's representation and Lennar's counsel made

significant preparations to attend and examine Minkow in person at the hearing on August 4 in Miami. (Aug. 4 Hrg. Tr. at 8:1-25.)

**Fact No. 47:** On the morning of August 3, 2010, Minkow informed the Court that he would not attend the hearing scheduled for August 4, 2010 in person or via videoconference from California. Minkow asserted that on August 2, 2010, while in Los Angeles awaiting a flight to Miami, he became ill and went to the emergency room at a Los Angeles hospital. Minkow represented that he was restricted from traveling to Florida for the hearing. (Ex. 211.)

**Fact No. 48:** On August 4 and 10, 2010, the Court ordered Minkow to produce, among other things, evidence that he had been to the emergency room / hospital. (Aug. 4 Hrg. Tr. at 14:4-10; Aug. 10, 2010 Court Order; Aug. 26, 2010 Sanctions Hrg. Tr. at 33:8-34:7.)

**Fact No. 49:** Ten days later, on August 20, 2010, Minkow submitted an affidavit wherein he admitted that he had not gone to the emergency room. Minkow had lied to Plaintiffs, the Court, and his own lawyers. (Ex. 222; Aug. 26, 2010 Sanctions Hrg. Tr. at 16:9-17:14.)

**Fact No. 50:** Minkow swore that he could not "recall" what he had said to his lawyers and his assistant the morning of August 3, 2010 because he was on pain medications. The Court does not find this testimony credible. (Ex. 222; Aug. 4, 2010 Hrg. Tr. at 14:4-10; Aug. 26, 2010 Sanctions Hrg. Tr. at 32:19-34:1; 38:13-39:17.)

**Fact No. 51:** The Court finds that Minkow intentionally deceived Plaintiffs and the Court regarding the emergency room visit because he knew that such a claim would require this Court to postpone the August 4, 2010 hearing. (Ex. 222; Aug. 4, 2010 Hrg. Tr. at 14:4-10; Aug. 26, 2010 Sanctions Hrg. Tr. at 32:19-34:1; 38:13-39:17.)

**Fact No. 52:** At the August 26, 2010 hearing, Minkow testified that he "didn't think it [whether he went to the emergency room] mattered. I had a doctor verifying I was ill, and I thought that is all that mattered." (Aug. 26, 2010 Sanctions Hrg. Tr. at 33:1-7.)

**Fact No. 53:** This testimony is not credible and demonstrates Minkow's contemptuous disregard for the rules of litigation and his belief, again, that he—not the Court—determines what is relevant.

**Fact No. 54:** At the August 26, 2010 hearing, when Minkow was impeached by the fax header on his own doctor's letter, Minkow testified for the first time that the assistant who picked him up in Los Angeles was not in San Diego, California, as he earlier had testified, but rather was in Orange County, California. (Ex. 212; Ex. 222; Aug. 26, 2010 Sanctions Hrg. Tr. at 15:5-28:16.)

**Fact No. 55:** This testimony contradicts his affidavit of less than a week earlier in which he swore that his assistant "dr[o]ve to Los Angeles from San Diego, California." (Ex. 222 at ¶ 7.)

**Fact No. 56:** When confronted with his contradictory affidavit, Mr. Minkow testified that the location of his assistant was "irrelevant." (Aug. 26, 2010 Sanctions Hrg. Tr. at 29:11-18.)

**Fact No. 57:** This testimony is not credible and demonstrates Minkow's contemptuous disregard for the rules of litigation and his consistent belief that he, not the Court, determines what is relevant.

## II. INTENTIONAL CONCEALMENT OF WITNESSES

### A. Paul Palladino

**Fact No. 58:** Minkow deliberately concealed the identity of Paul Palladino, a private investigator whom Minkow has known for 25 years. Minkow paid Palladino at least $5,000 to work on the investigation of Lennar and they communicated regularly by telephone and email regarding the January 9, 2009 report on Lennar. (Ex. 107; Ex. 185 at 1302-1505; Ex. 112; Aug. 26, 2010 Sanctions Hrg. Tr. at 106:4-110:10; Demonstrative Slides 1, 2.)

**Fact No. 59:** At his April 7, 2009 deposition, Minkow was asked to identify every person Minkow had told he was working on a report about Lennar. Minkow did not identify Mr. Palladino. (Ex. 194 (Minkow April 7, 2009 Depo.) at 109:21-110:24.)

**Fact No. 60:** At his April 7, 2009 deposition, Minkow also was asked to identify every person who knew Minkow was investigating Lennar prior to the date that Minkow's report was released. Minkow did not identify Mr. Palladino. (Ex. 194 (Minkow April 7, 2009 Depo.) at 288:1-289:22.)

**Fact No. 61:** Minkow's failure to identify Mr. Palladino in response to these questions was false and misleading.

**Fact No. 62:** In his October 7, 2009 affidavit to the Court, Minkow did not disclose that he possessed at the time, or previously possessed, numerous email communications with Palladino. His failure to make this disclosure rendered his affidavit false and misleading. (Ex. 8; Ex. 10 at ¶¶ 5-7; Ex. 16; Ex. 20; Ex. 185 at 1302-1743.)

**Fact No. 63:** On October 30, 2009, Minkow produced a small number of emails with Palladino and submitted another affidavit to the Court asserting that he had not produced these documents earlier because Palladino's participation in the Lennar report was "minimal." (Ex. 24 at ¶ 2; Ex. 58; Ex. 262; Ex. 194 (Minkow December 18, 2009 Depo.) at 133:5-133:25.)

**Fact No. 64:** This testimony was false. Mr. Palladino's participation in the Lennar report was likely extensive, not "minimal." Minkow had paid Palladino at least $5,000 to work on his investigation of Lennar. (Ex. 107). Minkow and Palladino exchanged more than 140 emails about Lennar and related topics in the weeks before the date Minkow disseminated the Lennar report. Minkow and Palladino spoke seven times for a total of 72 minutes the day before the report was released. (Ex. 185 at 1302-1743; Ex. 112.)

**Fact No. 65:** Minkow produced the emails with Palladino only after Palladino's identity was disclosed by third-party witnesses and after third-party witnesses produced various Palladino documents. (Ex. 58 at ¶ 2.; Aug. 26, 2010 Sanctions Hrg. Tr. at 110:6-18.)

**Fact No. 66:** When Minkow produced the small number of emails with Palladino in conjunction with his October 30, 2009 affidavit to the Court, he failed to produce, or disclose, the existence of numerous other emails regarding which Lennar he exchanged with Palladino. (Aug. 26, 2010 Sanctions Hrg. Tr. at 110:6-18 & 127:5-128:5; Ex. 24; Ex. 58; Ex. 262; Ex. 194 (Minkow December 18, 2009 Depo.) at 133:5-133:25; Ex. 185 at 1302-1743.)

**Fact No. 67:** Minkow solely reviewed the emails with Mr. Palladino and decided which ones to produce on October 30, 2009. Minkow falsely told his lawyers that he had given them all responsive documents with Mr. Palladino. (Aug. 26, 2010 Sanctions Hrg. Tr. at 128:6-11.)

**Fact No. 68:** At the August 26, 2010 evidentiary hearing, Minkow testified that he had "no reason" to hide Mr. Palladino and that he "didn't think [Mr. Palladino's] omission was detrimental." (Aug. 26, 2010 Sanctions Hrg. Tr. at 107:3-13.) The Court does not find this testimony credible and finds it demonstrates Minkow's contemptuous disregard for the rules of litigation and his belief that he, not the Court,determines what is relevant.

**Fact No. 69:** Minkow's concealment of Mr. Palladino's identity and withholding of documents were intentional. The evidence showed Minkow sought to conceal, among other facts, that Palladino disagreed with the content of Minkow's January 9, 2009 report and objected to Minkow's public dissemination of it (Ex. 110; Ex. 194 (Palladino February 18, 2010 Depo.) at 104:10-105:14.).

**B. Jeff Sachs**

**Fact No. 70:** Minkow deliberately concealed the identity of Jeffrey Sachs, a man Minkow described to others in documents not produced in this litigation as his "partner[] in the Nick Marsch case." (Ex. 204; Aug. 26, 2010 Sanctions Hrg. Tr. at 207:12-208:25; Ex. 145.)

**Fact No. 71:** Minkow testified in his October 7, 2009 and October 30, 2009 affidavits to the Court that he had produced all documents responsive to Plaintiffs' document demands. (Ex. 8; Ex. 10 at ¶¶ 5-7; Ex. 24.) At the time he made these representations, Minkow possessed but did not produce documents responsive to Plaintiffs' requests and this Court's Orders that would have disclosed Sachs's identity and connection to this lawsuit. (Ex. 200; Ex. 202.)

**Fact No. 72:** Minkow produced only a "draft" version of the November 30, 2008 engagement agreement between himself and Mr. Marsch. (Ex. 2.) Minkow possessed, but did not produce, the signed November 30, 2008 engagement agreement between Minkow and Marsch that had been initialed by Minkow, Marsch, and Sachs. (Ex. 200.)

**Fact No. 73:** The signed and initialed November 30, 2008 engagement agreement is responsive to Plaintiffs' requests, should have been produced pursuant to this Court's June 15 and July 9, 2009 Orders, and was wrongfully withheld by Minkow. (Ex. 10 at ¶¶ 5-7; Ex. 8; Ex. 16; Ex. 20.)

**Fact No. 74:** The November 30, 2008 engagement agreement is materially different from the draft Minkow produced. The amount of fees to which Minkow was entitled for his investigation of Lennar is significantly higher ($1,000,000 versus $125,000) than in the draft agreement Minkow produced. Unlike the draft agreement Minkow produced, the new version is signed by Marsch and initialed by Jeffrey Sachs. (Ex. 200; Ex. 2.)

**Fact No. 75:** At the August 26, 2010 hearing, Minkow testified that he "never thought that [Ex. 202)] was to be included because I had already disclosed that I was getting paid by Mr. Marsch to do investigative services and nuances were irrelevant." (Aug. 26, 2010 Sanctions Hrg. Tr. at 88:17-90:2.) This testimony is not credible and again demonstrates Minkow's contemptuous disregard for the rules of litigation and his belief that he, not the Court, determines what is relevant.

## III. OTHER FALSE TESTIMONY

### A. Trades in Lennar Stock

**Fact No. 76:** Minkow was hired by Marsch no later than November 2008 to investigate Lennar. (Ex. 7; Ex. 2.)

**Fact No. 77:** In December 2008, Minkow engaged in a securities transaction in which he purchased put options in Lennar Corporation's stock. Minkow profited approximately $1,500 from this transaction. (Ex. 7; Aug. 26, 2010 Sanctions Hrg. Tr. at 190:14-192:18.)

**Fact No. 78:** At his April 7, 2009 deposition, Minkow testified in no uncertain terms

that he never engaged in any trading of Lennar securities "ever." This testimony was false. (Ex. 5 at 95:6-20, 106:5-11; Aug. 26, 2010 Sanctions Hrg. Tr. at 192:19-193:8.)

**Fact No. 79:** Minkow's subsequent testimony that he had forgotten about his trade in Lennar Corporation stock in December 2008 is not credible. (Aug. 26, 2010 Sanctions Hrg. Tr. at 193:2-194:23.)

**Fact No. 80:** At the August 26, 2010 hearing, this Court asked Minkow repeatedly whether he traded in Lennar securities after his April 2009 testimony. Minkow was evasive and testified that he did not remember. (Aug. 26, 2010 Sanctions Hrg. Tr. at 189:23-199:18.) This testimony is not credible.

**Fact No. 81:** On May 7, 2010, Minkow wrote an email to a man named Bill Lobdell, in which he referred to "disaster" Lennar trades he and Lobdell had made. (Ex. 264.)

**Fact No. 82:** At the August 26, 2010 hearing, Minkow testified that that he did not know what Lennar trades he and Lobdell had made. (Aug. 26, 2010 Sanctions Hrg. Tr. at 204:18-206:11.) This testimony is not credible.

## B. Communications with Guy Ficco

**Fact No. 83:** On March 22, 2009, Minkow wrote an email to investigator Paul Palladino, in which he stated: "[W]e had Terry check for overseas bank accounts on Stuart Miller and Jaffe and both came back positive . . . . Our criminal IRS contact, Guy Ficco, confirmed (only after I sent him the information in exchange) that these guys never check the F-bars on any of their tax returns ever. They are finished." (Ex. 9 at FDI 1367.)

**Fact No. 84:** Internal Revenue Code sec. 7213(a)(4) states that it is a felony "to offer any item of material value in exchange for any return or return information (as defined in section 6103(b) and to receive in result of such solicitation any such return or return information."

**Fact No. 85:** On April 8, 2009, just three weeks after sending the email to Palladino, Minkow falsely testified at his deposition that while he spoke to Special Agent Ficco about "offshore stuff," he did not mention or identify Mr. Miller or Mr. Jaffe by name. (Ex. 5 at 467:22-468:17.)

**Fact No. 86:** At his December 18, 2009 deposition, Minkow testified that (a) he did not ask Special Agent Ficco to check Mr. Jaffe's or Mr. Miller's tax returns; (b) he could not recall whether Special Agent Ficco provided information about Mr. Jaffe's tax returns; and (c) Special Agent Ficco "doesn't give information my way." (Ex. 194 (Minkow December 18, 2009 Depo.) at 198:20-25; 199:24-200:3; 200:9-12.) This testimony is suspect.

**Fact No. 87:** On January 12, 2010, Minkow signed verified Amended Responses to Interrogatories stating that he does not recall whether Special Agent Ficco told him information about Mr. Miller's and Mr. Jaffe's tax returns. (Ex. 73.) This testimony is not credible.

**Fact No. 88:** Minkow offered this improbable testimony to obscure the fact that he improperly obtained personal, confidential tax information regarding Mr. Miller and Mr. Jaffe from Special Agent Ficco. (Aug. 26, 2010 Sanctions Hrg. Tr. at 47:7-16; Ex. 9 at FDI 1367; Ex. 5 at 467:22-468:17.)

### C. San Diego Community Bible Church's Payment of Minkow's Agents

**Fact No. 89:** The evidence showed Minkow likely used San Diego Community Bible Church funds to pay consultants of the Minkow Defendants for work performed in connection with their investigation of Lennar. (Ex. 13.)

**Fact No. 90:** On October 29, 2009, Plaintiffs served a subpoena for deposition *duces tecum* on the Custodian of Records of San Diego Community Bible Church seeking records of all payments from San Diego Community Bible Church to consultants for work performed on behalf of the Minkow Defendants. (Ex. 6.)

**Fact No. 91:** In his October 30, 2009 affidavit to the Court, Minkow testified: "[W]hen I want to make a purchase with a certain credit card through PayPal, that purchase may, in fact show up as received from Community Bible Church when in fact it was sent from my personal funds tied to my personal credit cards." (Ex. 24.)

**Fact No. 92:** This testimony was discredited. Exhibit 13 shows that $2,500 of funds from the San Diego Community Bible Church, not Minkow, was used to pay a Minkow consultant. (Ex. 13.)

**Fact No. 93:** On December 8, 2009, Minkow admitted, through his counsel, he had used San Diego Community Bible Church funds to pay one of his consultants. Minkow made this admission only after being confronted with Exhibit 13. (Ex. 64.)

**Fact No. 94:** Minkow's testimony was intended to mislead Plaintiffs and the Court into believing that the San Diego Community Bible Church was not involved in the payment of Minkow's investigators for work performed regarding Lennar. (Ex. 24.)

## IV. PERVASIVENESS OF MINKOW'S MISCONDUCT

**Fact No. 95:** Minkow's withholding and destruction of evidence, concealment of witnesses, and false testimony constituted a fraud on the Court.

**Fact No. 96:** Minkow has displayed no regard for the Court's Orders, his testimonial

oaths, the administration of justice, or his obligations as a litigant.

**Fact No. 97:** Minkow had ample opportunity to correct his misconduct and avoid sanctions. Minkow chose not to do so.

**Fact No. 98:** Minkow has wrongfully acted as though it is his right, not that of the Court, to determine what documents are relevant, what issues are material, and what information the Plaintiffs, the Court, and even his own lawyers should and should not know.

**Fact No. 99:** Minkow has displayed no appreciation of, or remorse for, the burden and expense that his withholding and destruction of evidence, concealment of witnesses, false testimony, and other misconduct have caused Plaintiffs and the Court.

**Fact No. 100:** The Court finds that the likelihood Minkow would comply with his discovery obligations or the Court's Orders in the future is unlikely.

## CONCLUSIONS OF LAW

Based on the Court's findings of fact above, the Court makes the following conclusions of law:

This Court Has Authority to Enter a Default against Minkow for Perpetrating Frauds on This Court

1. A trial court has the inherent authority to enter terminating sanctions, including dismissal and default, where a party has perpetrated a fraud on the court. *Figgie Int'l, Inc. v. Alderman*, 698 So. 2d 563, 567 (Fla. 3d DCA 1997); *Babe Elias Builders, Inc. v. Pernick*, 765 So. 2d 119, 120-21 (Fla. 3d DCA 2000); *Ramey v. Haverty Furniture Companies, Inc.*, 993 So. 2d 1014, 1018 (Fla. 2d DCA 2008); *Tramel v. Bass*, 672 So. 2d 78, 83-84 (Fla. 1st DCA 1996); *Morgan v. Campbell*, 816 So. 2d 251, 253 (Fla. 2d DCA 2002); *Bass v. City of Pembroke Pines*, 991 So. 2d 1008, 1011 (Fla. 4th DCA 2008); *Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998) ("[t]he trial court has the inherent authority, within the exercise of sound judicial discretion, to [enter terminating sanctions] when a [party] has perpetrated a fraud on the court, or where a party refuses to comply with court orders").

2. "A 'fraud on the court' occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." *Ramey v. Haverty Furniture Companies, Inc.*, 993 So. 2d 1014, 1018 (Fla. 2d DCA 2008) (*quoting Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989)).

3. Pursuant to Rule 1.380(b)(2)(C), Fla. R. Civ. P., courts can enter "[a]n order striking out pleadings . . . , or dismissing the action . . . , or rendering a judgment by default" against a party who "fails to obey an order to provide or permit discovery." *Mercer v. Raine*, 443 So.2d 944, 946 (Fla. 1983) ("Florida Rule of Civil Procedure 1.380 clearly authorizes the sanctions imposed by the trial court [striking answer and entering default against defendant] for the defendant's failure to comply with the court's order.") The Court can also "require the party failing to obey the order to pay the reasonable expenses caused by the failure, which may include attorneys' fees . . . ." Fla. R. Civ. P. 1.380(b)(2)(C).

4. Striking pleadings or entering a default for noncompliance with discovery obligations is a severe sanction which should be employed only in extreme circumstances. *Figgie Int'l, Inc. v. Alderman*, 698 So. 2d 563, 564 (Fla. 3d DCA 1997); *Mercer v. Raine*, 443 So. 2d 944, 946 (Fla. 1983). The Supreme Court of this state set the following standard for entering default against a litigant under Rule 1.380: "deliberate and contumacious disregard of the court's authority will justify application of this severest of sanctions, as will bad faith, willful disregard or gross indifference to an order of the court, or conduct which evidences a deliberate callousness." *Mercer v. Raine*, 443 So. 2d 944, 946 (Fla. 1983); *Figgie Int'l, Inc.*, 698 So. 2d at 564 (*citing Commonwealth Fed. Sav. & Loan Ass'n v. Tubero*, 569 So. 2d 1271 (Fla. 1990)).

5. The egregious abuses by Minkow in this case constitute a fraud on the Court and the Plaintiffs in litigating this case, and warrants entry of default. Minkow's misconduct includes: (a) failing to preserve, withholding, and destroying evidence; (b) willfully defying orders of this Court; and (c) knowingly making false statements in sworn affidavits, in sworn testimony, and in written submissions to the Court. Any one act in these categories constitutes a fraud on the Court and would be sanctionable. Minkow has repeatedly engaged in misconduct falling into each of these categories. Such repetitive conduct clearly evinces "deliberate callousness" to the integrity of the process. *See Mercer v. Raine*, 443 So. 2d 944, 946 (Fla. 1983) (holding that default is appropriate based on "conduct which evinces deliberate callousness" to the integrity of the judicial process).

6. Minkow's failure to produce, failure to preserve, and destruction of evidence compel the sanction of default. *See Figgie Int'l, Inc.*, 698 So. 2d at 566 (Fla. 3d DCA 1997) (default judgment is appropriate where a party destroys or fails to preserve relevant documents).

7. Minkow was obligated to preserve relevant materials and produce documents responsive to Lennar's discovery requests. Such production was required by the normal operation of discovery rules and also by orders of this Court. Minkow's failure to produce responsive documents, without any justification, constitutes a gross indifference for the authority and orders of this Court, and more generally, the administration of justice. The sanction of default is warranted. *See* Fla. R. Civ. P. 1.380; *Mercer v. Raine*, 443 So. 2d 944, 946 (Fla. 1983); *See Qantum Communs. Corp. v. Star Broad., Inc.*, 473 F.Supp. 2d 1249, 1273-78 (S.D. Fla. 2007).

8. Plaintiffs have been severely and irrevocably prejudiced by Minkow's failure to preserve and produce key documents. Lennar was forced to expend a great effort and money to

uncover the existence of a small number of those documents and obtain them from Minkow and/or third parties. The documents uncovered to date that Minkow failed to produce, directly relate to the central issues of this case. Those documents are likely not all of the documents that Minkow failed to preserve and produce. It is clear that Minkow had the present ability to produce many of the materials requested but chose not to. *See: Gomez-Bonilla v Apollo Ship Chandlers, Inc.*, 650 So. 2d 116 (Fla. 3d DCA 1995).

9. The evidence demonstrated Minkow falsely testified repeatedly under oath; in deposition, affidavits, and during his testimony before this Court during the evidentiary hearing, about material facts so as to warrant the imposition of the sanction of default. *See Long v. Swofford*, 805 So. 2d 882, 884 (Fla. 3d DCA 2001) ("plaintiff's false or misleading statement given under oath concerning issues central to her case amounted to fraud," and as a result, the court has a duty to enter appropriate terminating sanctions); *Savino v. Florida Drive In Theatre Mgmt.*, 697 So. 2d 1011, 1012 (Fla. 4th DCA 1997) (terminating sanctions are appropriate where a party blatantly "lied about matters which went to the heart of his claim" as such "repeated fabrications undermined the integrity of his entire action") ; *See Cox v. Burke*, 706 So. 2d 43, 46 (Fla. 5th DCA 1998) (accord); *Figgie Int'l, Inc.*, 698 So. 2d at 567-68 (accord); *O'Vahey v. Miller*, 644 So. 2d 550 (Fla. 3d DCA 1994) (accord); *Ramey v. Haverty Furniture Cos., Inc.*, 993 So. 2d 1014, 1020 (Fla. 2d DCA 2008) (accord); *McKnight v. Evancheck*, 907 So. 2d 699, 700 (Fla. 4th DCA 2005) (accord); *Metro. Dade County v. Martinsen*, 736 So. 2d 794, 795-96 (Fla. 3d DCA 1999) (accord); *Morgan v. Campbell*, 816 So. 2d 251, 253 (Fla. 2d DCA 2002) (accord); *Mendez v. Blanco*, 665 So. 2d 1149, 1150 (Fla. 3d DCA 1996) (accord).

10. In addition, Minkow also concealed the identity of key witnesses in this case. This misconduct likewise justifies entry of default. *See Bass v. City of Pembroke Pines*, 991 So.

2d 1008, 1011 (Fla. 4th DCA 2008) (dismissing an action for fraud on the court based on plaintiff's failure to disclose the identities of certain medical providers, her prior treatment for migraine headaches, and failure to give a plausible explanation for her omissions).

11. Plaintiffs' evidence was compelling. Minkow's evidence, and particularly his testimony, was not credible. Despite the yeoman's job of attempting to defend Mr. Minkow's activities by argument of his counsel, the evidence showed, and the Court finds that Minkow's misconduct was willful, tactical, egregious and inexcusable and that such misconduct has permeated the entirety of this litigation. As this Court advised at the hearing, it is not for Mr. Minkow to unilaterally decide what is relevant, what is to be produced or not, what is to be retained or not, etc. Mr. Minkow does not have the luxury of being the Judge and jury.

12. The Plaintiffs have twice moved, over a period of months, for sanctions against the Defendants. This is not an instance of accumulating enough evidence of misconduct to allege a pattern. Mr. Minkow's actions have been continuous and on-going and the Court has found that the actions were not mistakes or mere inconsistencies in testimony or otherwise.

13. The Third District Court of Appeal stated in pertinent part:

> [T]his Court has recognized the principle "that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve [their] ends." *Haono v Murphy*, 723 So. 2d 892, 895 (Fla. 3d DCA1998)(citing *Carter v Carter*, 88 So. 2d 153, 157 (Fla. 1956)("[i]t is offensive to our sense of right that a wrongdoer be allowed to exploit his wrongs to the injury of another and to the profit of himself."). *Cabrezio v Fortune International Realty*, 760 So. 2d 228 (Fla. 3d DCA 2000).

14. At present, this matter pends on Plaintiffs' Fourth Amended Complaint to which the Minkow Defendants have yet to file an answer. Entry of default against Barry Minkow is warranted and necessary. *See Qantum Communs. Corp. v. Star Broad., Inc.*, 473 F.Supp. 2d

1249, 1273-78 (S.D. Fla. 2007); *see also Kranz v. Levan*, 602 So. 2d 668 (Fla. 3d DCA 1992); *Williams v. Miami-Dade County Pub. Health Trust*, 17 So. 3d 859 (Fla. 3d DCA 2009).

15. However, there has been no such evidence presented as to Fraud Discovery Institute, Inc., as the evidence presented, and the misconduct which has been found, was done by Minkow himself and the evidence does not show the corporation to have committed the same actions as Mr. Minkow, individually.

16. It is well established that striking pleadings as a sanction for alleged discovery violations, which is all that can be charged to FDI, is to be used only when less punitive and more reasonable alternatives are effective. *Bieling v E. F. Hutton & Co.*, 522 So. 2d 878 (Fla. 2d DCA 1988). The Court finds that striking FDI's pleadings in this case is not justified and Plaintiffs have failed to demonstrate an inability to prove their claims without the purported evidence withheld or disposed of by Mr. Minkow.

17. Clearly, however, Plaintiffs have suffered prejudice at the hands of both Defendants inasmuch as Mr. Minkow is FDI. Plaintiff may be able to produce some evidence through the testimony of third parties not provided by Minkow or FDI, however, the evidence available will clearly not be as helpful as the direct evidence contained in the withheld, deleted and/or destroyed documentation itself. It has deprived Plaintiffs of evidence which could have, or would have, addressed some of its claims directly.

18. Because the evidence showed the actions were taken individually by Mr. Minkow, the Court finds a lesser sanction against FDI, as a result of the actions of its corporate representative, director, officer, or otherwise, Barry Minkow, is appropriate.

19. When it has been established that a party has intentionally withheld, destroyed, or failed to retain documentation when it was on notice to do so, the fact finder may draw an

inference that the missing evidence was unfavorable to the party responsible for its failure to be produced. *See Aldrich v. Roche Biomedical Laboratories, Inc.*, 737 So. 2d 1124, 1125 (Fla. 4th DCA 1993); *see also, Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987)(jury may infer from a finding of intentional interference with a party's access to medical records that the records would have contained indications of negligence). Then it is proper for the Court to give an adverse inference jury instruction. *Amlan, Inc. v Destroit Diesel Corp.*, 651 So. 2d 701 (Fla. 4th DCA 1995). As a result of the prejudice suffered by Plaintiffs because of Minkow's withholding or disposal or failure to retain such materials after he and FDI were on notice to do so, and had a duty to preserve same, such adverse inference instruction is warranted.

20. The Court further finds an award of substantial monetary sanctions is appropriate to compensate Lennar for the expenses incurred in connection with these Defendants' misconduct. *See Bitterman v. Bitterman,* 714 So.2d 356, 365 (Fla. 1998) (trial court has inherent authority to award attorneys fees against party for bad faith conduct in litigation); Fla. R. Civ. P. 1.380(b)(2); *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008) (awarding attorneys' fees where plaintiff intentionally withheld scores responsive, material documents, which prevented defendant from correcting plaintiff's false statements and countering plaintiff's misleading arguments).

21. After considerable reflection, the Court finds that Minkow's misconduct was so egregious and pervasive including misrepresentations made with regard to his misconduct, that there is no remedy short of default that could restore Lennar and protect the integrity of the judicial process.

22. Based on overwhelming evidence, and the Court's own assessment of Minkow's credibility, the Court finds that Mr. Minkow repeatedly falsely testified in sworn testimony given

at the evidentiary hearing, affidavits submitted to this Court, in verified discovery responses, and in depositions taken as part of this proceeding (including the depositions incorporated into this case by agreement of Minkow's counsel). The false statements were calculated to deceive Lennar and the Court and to gain an unfair advantage.

23. It has also become clear, through the evidence received and through testimony, that Mr. Minkow has been dishonest with his own attorneys. Counsel for Minkow have made representations to the Court based on the false information provided to them by Minkow. Even under the threat of default, Minkow misrepresented the truth to his attorneys for two weeks regarding his treatment in an emergency room.

24. The Court rejects the series of excuses Minkow presented as to why he did not preserve and timely produce documents responsive to Lennar's discovery requests and the Court's Orders. Nor is the Court persuaded by Minkow's explanation that the deficiencies with his production resulted merely from inadvertence, inattention, negligence, or distraction by other work. Minkow's concealment of information and documents was intentional. Minkow alone decided what information to reveal and which of his records to produce. Those were not Minkow's decisions to make.

25. While an image of Minkow's current computer might exist, Minkow has presented no credible evidence that all materials relevant to this proceeding survived long enough to be captured by that image. Nor has there been a representation made to the Court that Mr. Minkow has made an effort to produce those images, even to date. Although *some* records relevant to this proceeding may conceivably be found on the image, that is nearly beside the point. Minkow has unfairly and irrevocably tipped the scales of justice in his favor by intentionally deleting records that are plainly responsive to Lennar's requests and the Court's

Orders, including emails between Minkow and key witnesses like Tracy Coenen and Terry Gilbeau—witnesses who did not preserve their own records of such communications.

26. Had Minkow preserved the Hewlett Packard computer he used to create, and communicate about, the most relevant documents in this case, a forensic analysis *might* have been able to restore the documents he destroyed. But Minkow jettisoned the Hewlett Packard computer, despite the pendency of this lawsuit, and Minkow admitted that the transfer of his email archives from the Hewlett Packard to the new computer was "incomplete." (Aug. 26, 2010 Sanctions Hrg. Tr. at 203:9-12.) The resulting prejudice to Lennar is irremediable.

27. In addition to past harm, the Court does not believe Minkow will comply fully with his discovery obligations or with Orders of this Court. Indeed, even when faced with a sanctions motion, Minkow continued to equivocate in affidavits and during testimony before this Court.

28. Courts throughout this state have repeatedly held that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve her ends. *Rosenthal v. Rodriguez*, 750 So.2d 703, 704 (Fla. 3d DCA 2000).

29. This case is readily distinguishable from *Beauchamp v. Collins*, 500 So. 2d 294 (Fla. 3d DCA 1986), where the Court of Appeal concluded that terminating sanctions were not appropriate. In *Beauchamp*, "the record [was] devoid of any indication that there was bad faith noncompliance with discovery or court orders," there was no allegation, much less proof, of a fraud on the court; no indication that the non-moving party testified falsely in affidavits, at depositions, or to the Court; and the moving party suffered no prejudice because it received every document to which it was entitled and the misconduct did not delay trial. *Id.* at 295.

30. For these reasons, the Court rejects Minkow's argument that monetary sanctions and a jury instruction regarding "Mr. Minkow's dilatory and attempted deceptive discovery practices" would be adequate relief. Those sanctions are appropriate for FDI.

Terminating Sanctions Are Appropriate To Protect the Integrity of the Judicial Process

31. This Court has authority to enter default judgment against Minkow to protect the integrity of the court. *See Morgan v. Campbell*, 816 So. 2d 251, 253 (Fla. 2d DCA 2002) ("no litigant has a right to trifle with the courts"); *Baker v. Myers Tractor Services, Inc.*, 765 So. 2d 149, 150 (Fla. 1st DCA 2000) ("knowingly and intentionally conceal[ing key information] in an attempt to gain unfair advantage . . . . is a serious affront to the administration of justice. Honesty is not a luxury to be invoked at the convenience of a litigant. Instead, complete candor must be demanded in order to preserve the ability of this court to effectively administer justice"); *Savino v. Florida Drive In Theatre Mgmt.*, 697 So. 2d 1011, 1012 (Fla. 4th DCA 1997) (accord); *Ramey v. Haverty Furniture Cos., Inc.*, 993 So. 2d 1014, 1020 (Fla. 2d DCA 2008) (accord).

32. "The integrity of the civil litigation process depends on truthful disclosure of facts. A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way." *Cox v. Burke*, 706 So. 2d 43, 47 (Fla. 5th DCA 1998) (holding that terminating sanctions are proper where a party gives many false or misleading responses to discovery and/or false sworn testimony that "either appear calculated to evade or stymy discovery on issues central to [the] case"). The Court finds the guidance by the court in *Cox* particularly instructive. By way of example, Minkow withheld documents and the identities of witnesses, forcing Lennar to bear the burden of finding witnesses that Minkow concealed and uncovering documents Minkow

unequivocally represented did not exist. There is no place in the judicial system for such gamesmanship.

33. Minkow' corruption of the litigation process represents a substantial threat to orderly administration of justice. When confronted by such a threat, there is no choice but to take decisive action to fully protect the institution of justice, its processes and its litigants from future abuse. *See Ramey*, 993 So. 2d at 1020-21 (perjury regarding central issues tampers with administration of justice, injures opposing litigant, and "is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society"); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944)).

34. Through his own deliberate misconduct, Minkow has forfeited his right to participate in these proceedings. *Metro. Dade County v. Martinsen,* 736 So. 2d 794, 795 (Fla. 3d DCA 1999) ("[b]ecause the record clearly establish[ed] that plaintiff engaged in serious misconduct, we [the court] hold that she has forfeited her right to proceed"); *Rosenthal v. Rodriguez*, 750 So.2d 703, 704 (Fla. 3d DCA 2000) ("[c]ourts throughout this state have repeatedly held that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to achieve her ends."); *Ramey v. Haverty Furniture Cos., Inc.*, 993 So. 2d 1014, 1020 (Fla. 2d DCA 2008) (accord).

**ORDER OF THE COURT**

Based on the foregoing findings of fact and conclusions of law the Plaintiffs' Motions for Sanctions are **GRANTED** and, it is

**ORDERED** AND **ADJUDGED** as follows:

**A.** Default. A Default shall be entered against Defendant Barry Minkow in favor of Lennar on all claims in Lennar's Fourth Amended Complaint.

**B.** Adverse Inference Instruction as to FDI: At the time of trial, the Court will instruct the jury that it may find that the withheld or missing evidence contained evidence which was unfavorable to FDI.

**C.** Attorneys' Fees and Costs.

1. Defendants Barry Minkow and the Fraud Discovery Institute, LLC are hereby ordered to reimburse Lennar for its attorneys' fees and costs incurred in connection with Lennar's extensive efforts to secure evidence and discovery, including but not limited to the fees incurred by Lennar to investigate and uncover the Minkow Defendants' fraud on the Court, to investigate and overcome their obstruction and abuse of the discovery process, to pursue and oppose motions related to discovery, to identify, discover, and pursue witnesses and documents concealed by the Minkow Defendants, and to prosecute motions for sanctions.

2. Within 60 days of the date of this Order, Lennar shall file and serve on counsel for the Minkow Defendants a statement identifying the fees and costs incurred.

3. The Court will conduct a separate hearing, upon proper notice, to determine the amount of such fees and costs incurred by Lennar.

**DONE** and **ORDERED** in Chambers at Miami-Dade County, Florida, this 27th day of December, 2010.

Gill S. Freeman

GILL S. FREEMAN
CIRCUIT COURT JUDGE

Conformed Copy

DEC 27 2010

Gill S. Freeman
Circuit Court Judge

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent *via emails* (w/o CD of exhibits) *and U.S. Mail* (with CD of exhibits) upon:

- **Alvin E. Entin, Esq.**, Entin & Della Fera, P.A., Auto Nation Tower, 110 S.E. 6th Street, Suite 1970, Ft. Lauderdale, Florida 33301;

- **Joshua Entin, Esq.**, Rosen, Switkes & Entin, P.L. 407 Lincoln Rd., PH-SE, Miami Beach, Florida 33139, this 6th day of July, 2010;

- **Michelle B. Barker, Esq.** B/R Law Group, LLP, Northern Trust Building, 4370 La Jolla Village Drive, Suite 670, San Diego, CA 92122;

- **Scott M. Dimond, Esq.**, Dimond, Kaplan & Rothstein, P.A., offices at Grand Bay Plaza, 2665 South Bayshore Drive, PH-2B, Miami, Florida 33133;

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