STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NO. 10 CVS 8327

OUT OF THE BOX DEVELOPERS, LLC d/b/a OTB CONSULTING, Plaintiff, v. LOGICBIT CORP., FRANCISCO A. RIVERA, DOAN LAW, LLP, and THE DOAN LAW FIRM, LLP, Defendants.	**MEMORANDUM IN SUPPORT OF MOTION TO MODIFY THE 29 JULY 2013 ORDER AND MOTION FOR LEAVE TO RESPOND TO THE DOAN DEFENDANTS' 17 JULY 2013 MOTION**

Plaintiff Out of the Box Developers, LLC, d/b/a OTB Consulting respectfully requests that the Court modify its 29 July 2013 Order to (1) provide that the amount of the sanctions award bear interest at the legal rate (8%) from the date the 10 July 2013 sanctions Order was entered until the date it is paid in full, and to (2) require payment by Defendants Doan Law LLP and Doan Law Firm LLP (the "Doan Defendants") of the $35,027.16 plus all accrued interest no later than 7 October 2013, the first scheduled day of trial in this case. Plaintiff also seeks leave to formally respond and object on the record to the submission by the "Doan Defendants" of their 17 July 2013 Motion to Set Aside Judgment or Order, or, in the Alternative, Motion for Reconsideration (the "17 July 2013 Motion").[1]

[1] Plaintiff attaches its proposed response to its Motion as Exhibit A. Pursuant to Rule 15.6 of the Business Court Rules, Plaintiff had twenty (20) days after service to oppose the Doan Defendants' Motion. This time has not yet expired.

In their 17 July 2013 Motion, the Doan Defendants argue that the Court-ordered sanction would present a financial burden that would prevent them from continuing to litigate this case. However, the Doan Defendants did not present any affidavit or other evidence that they could not pay $35,027.16 over 30 days while simultaneously mounting a defense. It is axiomatic that arguments by counsel do not constitute evidence. Coleman v. Coleman, 182 N.C. App. 25, 33, 641 S.E.2d 332, 339 (2007). And while the Doan Defendants did not explain how $35,027.16 would impact the financial status of the defendant entities, they otherwise give every impression of being thriving, 12-plus office enterprise. See http://www.doanlaw.com. Previously the Doan Defendants have represented that their entities were enjoying success. (For instance, in his deposition, Mr. James Doan testified that they were "killing it" circa April 2010. See Tr. 49.)

Moreover, even if there were evidence that the sanction award was a financial hardship on the Doan Defendants, such evidence would not automatically counsel in favor of holding the award in abeyance. It is "clearly proper for a court to take a party's financial resources into account when ordering remedial sanctions." See In re Burch Co., Civil Nos. 3:05-CV-240-W, 3:05-CV-241-W, 2006 WL 3247052, at *2 (W.D.N.C. Nov. 6, 2006) (citing Robinson v. Yellow Freight Sys., 132 F.R.D. 424, 429 (W.D.N.C. 1990) (holding dismissal is a proper federal Rule 37 sanction where orderly progression of the litigation has been frustrated by bad faith conduct, and indigence would render monetary sanctions ineffective)). Given that the Court has already found that it was the Doan Defendants' previous dilatory behavior that has frustrated the orderly progression of this lawsuit, it was well within the Court's discretion pursuant to Rule 37 to have stricken the Doan Defendants' pleadings or parts thereof, stayed further proceedings until its Orders were obeyed, dismissed the Doan Defendants' actions, or even to have rendered a

judgment by default against the Doan Defendants. See G.S. §1A-1, Rule 37(b)(2)(c). Indeed, the monetary sanction is less onerous than other remedies that the Court could have awarded.

Yet the Doan Defendants have now requested, in effect, an involuntary and indefinite loan from Plaintiff of the sanctions amount in order to fund both their defense and their numerous counterclaims against Plaintiff.[2] "[I]n circumstances where a litigant claims indigence as a defense to payment of monetary sanctions, the court must consider whether the particular equities of the case favor proceeding on the merits notwithstanding the litigant's inability to mitigate the added financial burden he has placed on his adversary, or alternatively whether the ultimate sanction of terminating the litigation is warranted." See In re Burch Co., 2006 WL 3247052, at *2 Here, the particular equities of this case favor the Doan Defendants paying their discovery sanctions before the parties proceed on the merits.

First, the burden of the Defendants' discovery transgressions should not be borne by Plaintiff, the very party prejudiced by the Doan Defendants' disobedience. It is the Doan Defendants, after all, who have unnecessarily extended the duration of this litigation by many months. Defendants' complaint that they are prejudiced in their defense by the sanctions award ignores the fact that Defendants' actions prejudiced Plaintiff in the prosecution of its claims, that Plaintiff was forced to expend its resources to obtain the discovery it needed, and Plaintiff could not then (and cannot now) delay its expenditures until the case is concluded. For the sanction award to be effective, it should be paid before trial.

[2] By counterclaims the Doan Defendants seek to recover money damages from Plaintiff resulting from claims of trespass to chattel and computer trespass, civil conspiracy, unfair and deceptive trade practices, and abuse of process. The Doan Defendants also allege that they are entitled to punitive damages.

Second, even if there were any evidence to support the Doan Defendants' contention that they are unable to pay the sanction, allowing them to escape Rule 37 sanctions on that basis defies their recognized purpose:

> Even if the Court overlooked the complete lack of any evidentiary foundation for Plaintiff's claim of poverty, it should find that persuasive authority renders said claim immaterial in this context. See, e.g., Jumpp v. Jerkins, Civil No. 08–6268, 2011 WL 5325616, at *4 (D.N.J. Nov. 3, 2011) (unpublished) ("To accept indigence as a reason for not applying a Rule 37 sanction of attorney's fees would undermine the purpose of the rule. Rule 37 sanctions are penalties for violating the discovery rules, and such penalties are meant to deter future conduct and compensate for the collateral damage that, by a party's actions, is levied on a party that must move to enforce the rule. The failure to sanction indigent plaintiffs can only result in incentivizing abuse of the discovery system because they can impose costs upon their opponents without fear of recompense.")

Tilyard v. O'Reilly Auto Parts, Inc., No. 1:11CV236, 2012 WL 5250534, at *6 (M.D.N.C. Oct. 24, 2012).

Third, the Doan Defendants are out-of-state parties with bankruptcy expertise, making collection of a monetary award difficult and expensive. This case is unusual in that the Doan Defendants are sophisticated professional experts in bankruptcy and collection defense. See http://www.doanlaw.com. Plaintiff reasonably anticipates that if the sanctions award were held in abeyance until the judgment is awarded, without the benefit of the continued oversight of this Court, the collections process would be particularly onerous, and the likelihood very low that the sanctions award would ever be collected. By not paying the sanctions now, while this Court holds jurisdiction over the Doan Defendants, a very plausible outcome is that the Doan Defendants will never pay them, and they will have imposed costs upon Plaintiff without fear of recompense. This result could encourage "other parties to other lawsuits [to] feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders." See NHL v. Metro. Hockey Club, Inc., 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976).

For the foregoing reasons, Plaintiff requests that the Court modify its 29 July 2013 Order to (1) provide that the sanction award bears interest at the legal rate from the date of the 10 July 2013 sanctions Order, until paid in full, and to (2) require payment of the $35,027.16 no later than 7 October 2013. This would provide the Doan Defendants, who have not proven their indigency, with well over 60 days from today to secure these funds. This would also allow for the Court to directly enforce its 10 July 2013 Sanctions Order, and for this case to proceed to trial on 7 October 2013.

Respectfully submitted this 31st day of July, 2013.

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CERTIFICATE OF SERVICE

This is to certify that on this 31st day of July, 2013, a copy of the foregoing was electronically filed with the North Carolina Business Court using the Court's electronic filing system, which under Business Court Rule 6.1, will send notification of such filing to the following counsel of record:

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/s/ Jonathan D. Sasser_____
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CERTIFICATE OF COUNSEL REGARDING RULE 15.8

Undersigned counsel for Plaintiff Out of the Box Developers, LLC d/b/a OTB Consulting hereby certifies that the foregoing complies with the requirements of Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court. The basis for this certification is the word count of the word-processing system used to prepare this memorandum.

This the 31st day of July, 2013.

/s/ Jonathan D. Sasser_____
Jonathan D. Sasser