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ALAMEDA COUNTY

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11 LAVON GODFREY and GARY GILBERT

12 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 IN AND FOR THE COUNTY OF ALAMEDA

14 LAVON GODFREY and GARY GILBERT, on)
15 behalf of themselves and all others similarly)
16 situated,)

17 Plaintiffs,

18 v.

19 OAKLAND PORT SERVICES CORP. d/b/a)
20 AB TRUCKING, and DOES 1 through 20,)
21 inclusive,)

22 Defendants.

Case No. RG 08-379099

PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS OPPOSITION TO
DEFENDANT'S MOTION TO COMPEL
FURTHER ANSWERS TO
INTERROGATORIES AND FOR
SANCTIONS

Date: February 11, 2010
Time: 2:00 p.m.
Dept.: 20
Judge: Freedman

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23 **I. INTRODUCTION**

24 This motion is an abuse of the discovery process. Defendant argues that the motion was
25 necessary (1) to compel further answers and (2) to secure verifications to Plaintiffs' responses.

26 Neither of these arguments has any merit. Plaintiffs have no further information that
27 Defendant does not already possess or control; there is no new additional information that may be
28 gained by this motion. Plaintiffs have already produced the verifications Defendant seeks, without
any changes to the underlying responses. Therefore, the verification issue is moot.

Defendant is deliberately attempting to delay this litigation and class certification by trying
to create a discovery battle when there is none. Defendant's motion is unnecessary and an

1 unacceptable drain on the resources of the court and the parties. The Court should deny
2 Defendant's motion.

3 **II. STATEMENT OF FACTS**

4 This lawsuit was filed against Defendant on March 28, 2008. (Declaration of Lisl R.
5 Duncan in Supp. of Plaintiff's Opposition to Defendant's Motion to Compel ("Duncan Decl."), ¶
6 2.) Defendant was aware as of June 2009 that Plaintiffs intended to file for class certification, and,
7 further, was aware Plaintiffs intended to do so in late December 2009 or early January 2010. (*Id.*)
8 One-and-a-half years after the filing of this lawsuit, Defendant propounded its first set of form
9 interrogatories on September 8, 2009. (Duncan Decl., ¶ 3.)

10 Defendant granted an extension of the time in which Plaintiffs could respond to its
11 discovery requests resulting in a new deadline of October 22, 2009. (Duncan Decl., ¶ 4.) This
12 agreement was confirmed in writing by letter dated September 30, 2009. (See Duncan Decl., ¶ 4
13 and Ex. A.) Plaintiffs mailed their responses to the form interrogatories on October 22, 2009.
14 (Duncan Decl., ¶ 4.) At that time, Plaintiffs indicated that verification would follow shortly.
15 (Duncan Decl., ¶ 5.) Mr. Gilbert's verification was mailed on November 20, 2009. (Duncan Decl.,
16 ¶ 6, Ex. B.) Due to an error, Ms. Godfrey's verification was not mailed until December 15, 2009.
17 (Duncan Decl., ¶ 7, 9, Ex. C.) There were no errata or addendum to the form interrogatories served
18 with the verifications. (Duncan Decl., ¶ 17.)

19 Defendant mischaracterizes Plaintiffs' responses as "untimely." The parties made an
20 agreement whereby Defendant granted Plaintiffs an additional two weeks to respond, or October
21 22, 2009. Defendant did not specify it wanted to *receive* the documents by this date in granting the
22 extension. (See Duncan Decl., ¶ 4, Ex. A) Plaintiffs mailed discovery responses on October 22,
23 2009 having had no reason to believe that Defendant would argue that the commonly accepted
24 practice and time-honored "mailbox rule" would not apply. (See *Pierson v. John Hancock Mut.*
25 *Life Ins. Co.* (1968) 262 Cal.App.2d 86, 88-89; see also *Lucero v. City of Los Angeles* (1989) 208
26 Cal.App.3d 664; *Palo Alto Town & Country Village, Inc. v. Bbtc Company* (1974) 11 Cal.3d 494,
27 501; *State of California v. Agostini* (1956) 139 Cal.App.2d 909, 915; *Ivey v. Kern County Land Co.*

1 (1896) 115 Cal. 196, 200-201.). Further, the timing of verifications was discussed between
2 counsel and Defendant implicitly agreed the responses and the verifications were timely. (Duncan
3 Decl., ¶ 12.)

4 Plaintiff's counsel and Defendant's counsel discussed on more than one occasion whether
5 or not Defendant had received Plaintiff Godfrey's verifications as there was some question as to
6 whether or not they had been received. Counsel discussed this issue over the telephone and again
7 at the second day of Plaintiff Godfrey's deposition on December 7, 2009. (See Duncan Decl., ¶ 7.)
8 As the parties ultimately concluded that Defendant did not have the verifications, Plaintiff
9 Godfrey's verification was sent to Defendant on December 15, 2009. (See Duncan Decl., ¶ 9.)
10 Plaintiff's counsel specifically told Defendant over the telephone that this error was inadvertent
11 and due to her mistake. (See Duncan Decl., ¶ 7.)

12 On December 14, 2009 Defendant sent a meet and confer letter to each Plaintiff. (See
13 Duncan Decl., ¶ 8.) The two letters were identical as to interrogatories and requests that had been
14 propounded for both Plaintiffs. (See Declaration of Jay Ian Aboudi, Exhibits A and B.) These
15 letters made absolutely no mention of form interrogatory No. 2.11.

16 On December 23, 2009, each Plaintiff sent a meet and confer letter responding to
17 Defendant's letters of December 14. (See Duncan Decl., ¶ 10.)

18 On or about December 31, 2009, counsel for Defendant and Plaintiffs spoke over the
19 telephone and discussed Defendant's letters of December 14 and Plaintiff's letters of December 23.
20 (See Duncan Decl., ¶ 12.) The parties did not discuss Plaintiff's response to form interrogatory
21 No. 2.11, as Defendant did not bring up this interrogatory in its December 14 letter as being at
22 issue.

23 On January 5, 2009, Plaintiff served supplemental responses on Defendant, including
24 responses to form interrogatories in response to the meet and confer letters and telephone
25 conversation. (See Duncan Decl., ¶ 13.) The supplemental responses provided additional
26 information and clarified several points. For instance, Plaintiff agreed to clarify the definition of
27 "AB Trucking management." Plaintiff's supplemental responses state:

28

1 For purposes of this interrogatory and all others for which this definition is
2 applicable, Plaintiff clarifies her meaning of "AB Trucking management" or
3 those individuals employed by AB Trucking in a supervisory or managerial
4 capacity, including those in charge of payroll. Plaintiff intends this response
5 to mean these individuals would have knowledge of the fact of Plaintiff's
6 employment with AB Trucking. These individuals would have varying
7 knowledge of a variety of different aspects of Plaintiff's employment.
8 Based on Plaintiff's personal knowledge, AB Trucking management would
9 include: William Aboudi, Trina, Cynthia, Jovi Aboudi and Beth. There may
10 be other individuals employed as AB Trucking management that fall outside
11 the scope of Plaintiff's personal knowledge who have knowledge of the
12 underlying facts of this lawsuit.

13 (Duncan Decl., ¶ 13, Exs. F and G.)

14 Based on the parties' telephone conversation, it was Plaintiffs' understanding that
15 Defendant and Plaintiff had reached an agreement that this definition of the term would sufficiently
16 clarify Plaintiff's responses. (See Duncan Decl., ¶ 13.)

17 Plaintiffs specifically raised the issue of the timing of the verifications for the supplemental
18 responses with Defendant. (See Duncan Decl., ¶ 14.) Plaintiffs agreed to submit supplemental
19 discovery responses within the limited time period of two working days from the meet and confer
20 telephone conversation of December 31. Plaintiffs followed up with Defendant requesting that it
21 accept the verification forms in the amount of time it would take for mailing of the forms and
22 receipt of the returned forms as this was part of the agreement on extending Defendant's deadline
23 to file a motion (Duncan Decl., ¶ 12.) Plaintiff Gilbert's verification to the supplemental responses
24 was mailed on January 13, 2010. (Duncan Decl., ¶ 15.) Plaintiff Godfrey's verification to the
25 supplemental responses was mailed on January 19, 2010. (Duncan Decl., ¶ 16.)

26 As of January 15, 2010, Defendant had the verifications of both Plaintiffs for the original
27 and supplemental responses to form interrogatories.

28 Nonetheless, on January 19, 2010, Defendant filed this motion to compel further responses
from Plaintiff Godfrey to three form interrogatories, and from Plaintiff Gilbert to two
interrogatories. (Duncan Decl., ¶ 18.)

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1 **III. THE MOTION IS IMPROPER**

2 Defendant's motion is procedurally and factually improper. Defendant has brought one
3 motion to compel directed at two separate Plaintiffs, who each served their own discovery
4 responses. While Plaintiffs' responses may be similar, there are differences in the interrogatories
5 propounded on each and one of the three form interrogatories at issue in this motion was only
6 propounded on Plaintiff Godfrey. Additionally, Defendant may argue that different legal theories
7 apply to each Plaintiff making it unclear if responses are blurred all together and making the
8 process more susceptible to distortion. Plaintiffs responded to Defendant's single separate
9 statement rather than attempting to separate out the arguments directed at each Plaintiff.

10 **A. THE COURT SHOULD DENY DEFENDANT'S MOTION BECAUSE**
11 **DEFENDANT FAILED TO ADEQUATELY MEET AND CONFER WITH**
12 **PLAINTIFFS**

13 The Court should deny Defendant's motion to compel because Defendant failed to meet
14 and confer over all the interrogatories in question before filing the motion. Failure to meet and
15 confer before filing a motion to compel is a "misuse of the discovery process" and merits
16 sanctions. (CCP §§ 2023.010(i), 2023.030(a) and 2030.300(b).) Before filing a motion to compel,
17 the moving party must declare that it has made a "serious attempt" to obtain an informal resolution
18 of each issue. (See *Townsend v. Superior Court* (1998) 61 Cal.App.4th 1431, 1435.) The purpose
19 of the meet and confer rule is "to encourage the parties to work out their differences informally so
20 as to avoid the necessity for a formal order." (*Id.* [citation omitted.])

21 AB Trucking failed entirely to meet and confer on the first interrogatory set forth in this
22 motion, and it chose to ignore the agreement the parties made during the meet and confer process
23 regarding clarification of the definition of "AB Trucking management," which Plaintiffs' set forth
24 in their supplemental responses. Defendant's actions show blatant disregard for its obligation to
25 work out differences informally and to make a "serious effort" to meet and confer in lieu of
26 bringing a motion to compel.

27 Defendant has violated the letter and spirit of the Discovery Act. If anyone should be
28 sanctioned because of this motion it is Defendant or its counsel. (CCP §§ 2023.030(a).)

1 Therefore, the Court should deny the motion and sanction Defendant, or its counsel, if sanctions
2 must be imposed.

3 **B. DEFENDANT'S MOTION IS MOOT AS TO PLAINTIFFS' VERIFICATIONS**

4 In its motion, Defendant argues Plaintiffs' responses were unverified. However, Plaintiffs
5 have already provided the verifications Defendant seeks. (See Duncan Decl., ¶ 6, 9, 16, 16, Exs. B,
6 C, H, I.) Because Defendant already has the verifications that it seeks, the motion should be
7 denied as moot as to the verifications. See *Villa v. Cole* (1992) 4 Cal.App.4th 1327, 1333 [noting
8 that motion to compel interrogatories was denied as moot where opposition to motion contained
9 answers to interrogatories at issue.]

10 Defendant is aware that it possesses all Plaintiffs' verifications. Defendant's counsel
11 should not be rewarded for needlessly leaving the motion on calendar.

12 **C. PLAINTIFFS' RESPONSES ARE ADEQUATE**

13 Defendant appears not to consider the fact that there is no information to be gained by this
14 motion. Rather, it seeks to further delay this litigation and push Plaintiffs for information that it
15 already possesses; information that has always been *more* readily available to Defendant as
16 Plaintiffs' former employer. Defendant chose to file this needless motion notwithstanding the time
17 and the resources of the Court and Plaintiffs that it would consume. The Court should deny
18 Defendant's motion.

19 1. **Plaintiffs are not obligated to obtain information equally available to the**
20 **propounding party**

21 Plaintiffs' responses are adequate and sufficiently compliant based on each Plaintiff's
22 personal knowledge.

23 a) **Form Interrogatory No. 2.11**

24 Plaintiffs' responses were adequate and sufficiently compliant. Both Plaintiffs answered
25 the interrogatory in the affirmative. Defendant points out for the first time in this motion to compel
26 that Plaintiffs' responses do not directly address subsection (b) of the interrogatory by listing job
27 duties. However, Defendant, as Plaintiffs' employer, is fully aware of those job duties, as it was

1 that employer who prescribed them. (See CCP § 2030.220(c).) There is no duty to make an
2 inquiry outside of personal knowledge where the information is equally available to the
3 propounding party. (*Id.*) Further, Defendant has had Plaintiffs' class certification motion for over
4 40 days. (Duncan Decl., ¶ 11). This motion sets forth a thorough description of Plaintiffs' job
5 duties asserted for purposes of class certification. Additionally, Plaintiffs described their job duties
6 at length in deposition. Defendant's motion to compel on this point is frivolous because Defendant
7 already possesses knowledge of the information sought; in fact Defendant has greater knowledge
8 of Plaintiffs' job duties as the entity that designed and controlled those duties.

9 Plaintiffs have no additional information to provide in response to this interrogatory that
10 has not already been provided to Defendant.

11 **b) Form Interrogatory No. 12.1**

12 Plaintiffs' responses were adequate and sufficiently compliant, again, primarily because
13 Defendant seeks information outside of Plaintiffs' personal knowledge that is more readily
14 available to Defendant. Additionally, there is no additional information Plaintiffs can provide in
15 response to this interrogatory that has not already been provided to Defendant.

16 In its motion, Defendant argues that the two named Plaintiffs, "should have identified each
17 other." However, Defendant's argument is flawed and would violate CCP § 2030.220(c) because
18 Plaintiff Gilbert and Plaintiff Godfrey did not work at AB Trucking at the same time. They have
19 never met. Neither Plaintiff has personal knowledge that the other was aware of the violations
20 occurring during the course of the other's employment.

21 Plaintiffs do not have an obligation to obtain this information because the information is
22 *more* available to Defendant. As the employer, Defendant controls the information that shows the
23 identities of AB Trucking employees, management or otherwise: "If the responding party does not
24 have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state,
25 but shall make a reasonable and good faith effort to obtain the information by inquiry . . . *except*
26 *where the information is equally available to the propounding party.*" (CCP § 2030.220(c)
27 [emphasis added].) Furthermore, courts have held that there is "no principle of discovery law

1 which thus compels a party not only to prepare his opponent's case, but also to stipulate away his
2 own. (See *Lindgren v. Superior Court*, (1965) 237 Cal.App.2d 743, 747-748; *Ryan v. Superior*
3 *Court*, (1960) 186 Cal.App.2d 813, 819.)” *Holguin v. Superior Court*, (1972) 22 Cal.App.3d 812,
4 821.) Plaintiffs have complied with their duties and have responded to the best of their individual
5 knowledge.

6 Plaintiffs have no personal knowledge of potential witnesses outside of those they have
7 each identified at deposition. Plaintiffs have no personal knowledge of whether other employees
8 employed by Defendant during the statutory period have knowledge of these facts. Plaintiffs are
9 under no obligation, nor is it likely Defendant would wish them to, make assumptions about what
10 other employees knew or did not know from “witnessing” the “INCIDENT,” which has, in
11 essence, been interpreted to mean the “statutory period.”

12 Moreover, Plaintiffs fully clarified the definition of AB Trucking management in its
13 supplemental responses, including giving individual names of Defendant’s own management. (See
14 *Duncan Decl.*, ¶ 13, Exs. F and G.)

15 **c) Form Interrogatory No. 207.2**

16 This interrogatory only applies to Plaintiff Godfrey. While the court in *Deyo v. Kilbourne*
17 (1978) 86 Cal.App.3d 771, may have articulated that a “See my deposition” answer alone is not
18 proper, the parties went beyond that here by discussing this very issue in the meet and confer
19 process. Customary practice in litigation confirms that parties may make reasonable agreements to
20 preserve the resources of both parties and the court. In fact, as described above, the parties are
21 obligated to engage in informal resolution when they can. Plaintiff’s response states, and
22 Plaintiff’s counsel clarified through the meet and confer process, that the only complaints Plaintiff
23 made to her employer were those testified to under oath at deposition. Plaintiff was not attempting
24 to hide or obfuscate responsive information from Defendant, but rather, make an agreement to
25 streamline the discovery process. In a relatively small case that has been delayed nearly two years,
26 in Plaintiff’s perception primarily due to Defendant’s delay tactics, Plaintiff’s response was
27 adequate and sufficiently responsive under the circumstances.

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1 Additionally, Plaintiff addressed this issue in her meet and confer letter of Dec. 23:

2 Plaintiffs acted based on common practices when they directed Defendant to
3 Plaintiff's responsive answers given in deposition. It is unreasonable to
4 insist both parties' waste time and resources by re-answering questions
5 Defendant admits were previously asked and answered at deposition. It has
6 been well over 30 days since Plaintiff's deposition and, as you know, the
7 deposition transcript is only available to be signed and modified within 30
8 days following the deposition. The presumption is that if the deponent does
9 not sign it, then the testimony is accepted as it is. (See CCP § 2025.530.)
10 As a result, Defendant may rely upon the testimony given.

11 (See Duncan Decl., ¶ 12., Ex. D and E.)

12 As is true for all other interrogatories at issue in this motion, Plaintiff has no additional
13 information to provide in response to this interrogatory that has not already been brought to
14 Defendant.

15 **IV. PLAINTIFF SHOULD NOT BE SANCTIONED**

16 Plaintiffs have provided Defendant with the information requested. Defendant has all
17 responsive information sought by this motion, either because Plaintiffs have already provided it, or
18 because it already possesses the information in its control. The motion was thus needless and
19 improper, and constitutes a misuse of the discovery process on Defendant, or its counsel's, part. If
20 any party should be sanctioned, it should be Defendant or its counsel. (See CCP §§ 2023.010(i),
21 2023.030(a).)

22 **V. PLAINTIFF INCURRED \$1,862.50 IN ATTORNEYS' FEES TO OPPOSE THIS**
23 **MOTION**

24 As noted in the declaration of Lisl R. Duncan, Plaintiffs have already incurred a total of at
25 least \$1,862.50 in attorneys' fees to oppose Defendant's unnecessary motion to compel. (See
26 Duncan Decl., ¶ 19.) This expense should be considered in weighing a possible sanction against
27 Defendant.

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VI. CONCLUSION

Defendant filed this motion to compel information that it already possesses and, about which it failed to meet and confer. Defendant also has all the verifications it seeks. The Court should deny Defendant's motion in its entirety and sanction Defendant, if anyone, for bringing a needless motion without properly meeting and conferring first.

Dated: January 29, 2010

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: _____

DAVID A. ROSENFELD
CAREN P. SENCER
LISL R. DUNCAN
Attorneys for Plaintiffs

118212/558990

PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On January 29, 2010, I served upon the following parties in this action:

Michael A. Broad
166 Santa Clara Ave
Oakland, CA 94610

Jay Ian Aboudi
General Counsel
Oakland Port Services Corporation
11 Burma Road
Oakland, CA 94607

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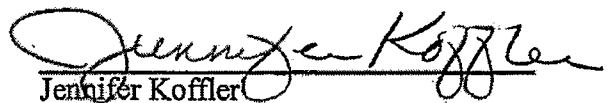
PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS OPPOSITION TO DEFENDANT'S MOTION TO COMPEL FURTHER ANSWERS TO INTERROGATORIES AND FOR SANCTIONS

BY MAIL I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing, said practice being that in the ordinary course of business, mail is deposited in the United States Postal Service the same day as it is placed for collection.

BY OVERNIGHT DELIVERY SERVICE I placed a true copy of each document listed herein in a sealed envelope, addressed as indicated herein, and placed the same for collection by Overnight Delivery Service by following the ordinary business practices of Weinberg, Roger & Rosenfeld, Alameda, California. I am readily familiar with the practice of Weinberg, Roger & Rosenfeld for collection and processing of Overnight Delivery Service correspondence, said practice being that in the ordinary course of business, Overnight Delivery Service correspondence is deposited at the Overnight Delivery Service offices for next day delivery the same day as Overnight Delivery Service correspondence is placed for collection.

BY E-MAIL I caused to be transmitted each document listed herein via the e-mail address(es) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on January 29, 2010.


Jennifer Koffler

118212/555975