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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

Coordination Proceedings Special Title (rule 1550(b)), FIREARMS CASES Including actions: *People, et al. v. Arcadia Machine & Tool, et al.; San Francisco Superior Court No. 303753* *People, et al. v. Arcadia Machine & Tool, Inc., et al.; Los Angeles Superior Court No. BC 210894* *People, et al. v. Arcadia Machine & Tool, Inc., et al.; Los Angeles Superior Court No. BC 214794*	JCCP NO. 4095 **NOTICE OF LODGMENT OF NON-CALIFORNIA AUTHORITY IN SUPPORT OF COLT'S MANUFACTURING CO., INC.'S <u>EX PARTE</u> MOTION FOR A PROTECTIVE ORDER RE: DOCUMENT PRODUCTION BY COLT** Date: December 19, 2000 Time: 8:30 a.m. Place: Dept. 65 Judge: Vincent P. DiFiglia

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Colt's Manufacturing Co., Inc. hereby lodges with this Court the following non-California authorities in support of its ex parte motion for a protective order re: document production by Colt.

12/12/0

EXHIBIT	DESCRIPTION
A	Huddleston v. R.J. Reynolds Tobacco Co., No. 1:98-CV-1865-TWT (N.D. Ga. 1999)
B	Caruso v. Coleman Co., 157 F.R.D. 344 (E.D. Pa. 1994)
C	In re Bank of Louisiana/Kenwin Shops, Inc., No. 1999 WL 1105169 (E.D. La.)
D	In re Norplant Contraceptive Products Liability Litigation, 1995 WL 116134 (E.D. Tex.)
E	Lestelle v. Asbestos Claims Management Corp., 755 So.2d 873 (La. 2000)
F	Mid-America Facilities, Inc. v. Argonaut Ins. Co., 78 F.R.D. 497 (1978)
G	Niagara Duplicator Co. v. Shackleford, 160 F.2d 25 (1947)
H	Weil & Brown, California Practice Guide: Civil Procedure Before Trial (The Rutter Group.)
I	Hogan, James E. and Gregory S. Weber, California Civil Discovery, (Bancroft - Whitney)

Wright & L'Estrange
Attorneys for Defendant Colt's Manufacturing Co., Inc.

Dated: December 12, 2000

By: _____
Robert C. Wright

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES HUDDLESTON as the REPRESENTATIVE of ELIZABETH IRENE HUDDLESTON, deceased, and as the Executor of the WILL and ESTATE OF ELIZABETH IRENE HUDDLESTON,

Plaintiff,

v.

R.J. REYNOLDS TOBACCO COMPANY,

Defendant.

CIVIL ACTION
FILE NUMBER: 1:98-CV-1865-TWT

ORDER

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE having come before the Court on Plaintiff's Motion to Compel Production of Documents, the Court having considered Plaintiff's Motion to Compel, Defendant's opposition thereto, and having heard argument of counsel, it is hereby ORDERED that:

1) Plaintiff's Motion to Compel is DENIED.

2) Given the volume of responsive documents and the number of "smoking and health" lawsuits pending against Defendant, it is unreasonable to require Defendant to produce every document in each such lawsuit given that responsive documents are available both at a central location at the Minnesota Depository and on the Internet website at "www.tobaccoresolution.com." Defendant has fulfilled its burden to produce documents under Federal Rule of Civil Procedure 34 by producing documents to the Minnesota Depository and the Internet website, and thus making those documents available to Plaintiff.

3) Traveling to Minnesota to review documents at the Depository is no more costly or burdensome on Plaintiff than going to Defendant's headquarters in North Carolina to review documents, and does not justify the unnecessary expense on Defendant to produce the documents in North Carolina when they are available in a central location at the Minnesota Depository, or on the Internet website at "www.tobaccoresolution.com." Similarly, Plaintiff's alleged lack of computer literacy is not a sufficient reason to justify the extraordinary burden and unnecessary expense on Defendant of producing the documents to Plaintiff in North Carolina when they are available in a central location at the Minnesota Depository or on the Internet website at "www.tobaccoresolution.com."

4) It is FURTHER ORDERED that, because Defendant produced responsive documents to the Minnesota Depository and the Internet website, as described more fully in Defendant's written response, Defendant's obligation to produce documents in response to Plaintiff's Request for Production, and pursuant to Fed. R. Civ. P. 34, is hereby fulfilled. Plaintiff shall not be entitled to any other response on behalf of Defendant.

SO ORDERED this 15 day of June, 1999.

Thomas W. Thrash

THOMAS W. THRASH, JR.
UNITED STATES DISTRICT JUDGE

clude that dismissal is our only proper course here.

Defendants ignore Rule 17's relation back provision, which states that "ratification, joinder, or substitution *shall* have the same effect as if the action had been commenced in the name of the real party in interest." Fed. R.Civ.P. 17(a) (emphasis added). In *United States Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 960 (3d Cir.1988), our Court of Appeals implied that, as long as the other requirements of Rule 17(a) are met, this mandatory relation-back provision protects the real party in interest from an expired statute of limitations as long as the named plaintiff filed within the limitations period.[8] In *Powell*, the real party in interest served ratification agreements on the defendants. *Id.* at 960. The Third Circuit concluded that "the effect of service of the Rule 17(a) ratification agreements was as if [the insurance companies] had been parties *from the beginning of the action.*" *Id.* (emphasis added). As long as Dr. Green has met the threshold qualifications of Rule 17(a) and is entitled to the benefit of substitution (as we conclude he is), then it becomes irrelevant that the limitations period has passed with respect to Metropolitan.

We conclude that Dr. Green should receive the benefit of Rule 17, and so will allow Metropolitan to substitute itself for him in this action.

II. *Defendants' Summary Judgment Motion*

Since we hold that the real party in interest will now be the plaintiff in this action, defendants' summary judgment motion must be denied as moot.

8. Defendants concede that Dr. Green commenced suit "[o]n the last day before the statute of limitations expired." *Reply Brief in Support of Defendants' Motion for Summary Judgment* at 2.

Lynn CARUSO, Administratrix of the Estate of Gustave Caruso, Deceased and Lynn Caruso, Individually

v.

The COLEMAN COMPANY, et al.

Joseph SCHWARZMAN, Administrator of the Estate of Richard Schwarzman, Deceased and Joseph Schwarzman, Individually

v.

The COLEMAN COMPANY, et al.

Civ. A. Nos. 93-CV-6733, 94-CV-2779.

United States District Court, E.D. Pennsylvania.

Sept. 9, 1994.

Amended Order Filed Sept. 19, 1994.

Administrators of estates of deceased campers brought motions to strike insufficient answers, compel complete answers and sanction camping goods manufacturer in products liability case. The District Court, Naythons, United States Magistrate Judge, held that: (1) postaccident incidents involving same or similar products or products with same or similar internal parts specifications were discoverable; (2) financial data was discoverable without prior proof of prima facie case on punitive damages; (3) requested discovery of all labels, warnings and instructions was unduly burdensome such that manufacturer would be permitted to answer by specifying relevant records and allowing opportunity to examine them; and (4) sanctions would be denied, given lack of clear "winner" or "loser" on discovery motions.

Motions granted in part and denied in part.

1. Federal Civil Procedure ⇐1272.1

Relevancy is to be broadly construed for discovery purposes and is not limited to precise issues set out in pleadings or to merits of case; discovery requests may be deemed rel-

evant if there is any possibility that information may be relevant to general subject matter of action. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

2. **Federal Civil Procedure** ⇐1272.1

In products liability suit arising from carbon monoxide poisoning of two campers, information concerning any postaccident incidents regarding camping goods manufacturer's propane lantern and fuel cylinder, or products with same or similar internal parts specifications, was discoverable. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

3. **Federal Civil Procedure** ⇐1272.1

Information regarding damages is as discoverable as information which pertains to liability. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

4. **Damages** ⇐181

Under Pennsylvania law, jury may consider defendant's net worth in weighing award of punitive damages.

5. **Federal Civil Procedure** ⇐1503, 1588

Financial data, including manufacturer's total sales revenue and its financial statements, was relevant to and thus discoverable on issue of punitive damages in products liability case without prior proof of prima facie case on punitive damages. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

6. **Federal Civil Procedure** ⇐1531, 1631

Manufacturer's total sales revenue and its financial statements, although discoverable on issue of punitive damages, would not be matter of public record; data was to be filed as impounded document. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

7. **Federal Civil Procedure** ⇐1624

When volume of material sought would make copying and transporting burdensome and oppressive to producing party, or where distance between parties is great, court may decline to order production and may instead order that requesting party inspect documents at convenience of party in possession of documents.

8. **Federal Civil Procedure** ⇐1634

Camping goods manufacturer would be permitted to answer discovery requests by specifying relevant records and allowing plaintiffs opportunity to examine them, given burden of producing and copying all labels, mailings, warnings and instructions, and drafts thereof, which were supplied with manufacturer's propane cylinders and lanterns sold from 1970 through 1992.

9. **Federal Civil Procedure** ⇐1278

Plaintiffs in products liability case would not be granted sanctions against camping goods manufacturer for reasonable expenses, including attorney fees, incurred in bringing discovery motion where neither party was overall "winner" or "loser" and it could not be said that manufacturer was not substantially justified in its discovery objections. Fed.Rules Civ.Proc.Rule 37(a)(4), (c)(1), 28 U.S.C.A.

Richard M. Ochroch, Leslie J. Castaldi, Ochroch and Blum, P.C., Philadelphia, PA, for Lynn Caruso.

Edward B. Joseph, Goldfein & Joseph, Philadelphia, PA, for Coleman Co., Inc.

Donald M. Davis, Michael J. Burns, Margolis, Edelstein and Scherlis, Philadelphia, PA, Joel K. Goldman, Herbert C. Donovan, Husch and Eppenberger, Kansas City, MO, for Turner Inc. in No. 93–CV–6733.

Richard M. Ochroch, Leonard B. Edelstein, Edelstein & Martin, Philadelphia, PA, for Joseph Schwarzman.

Donald M. Davis, Margolis, Edelstein, Scherlis, Sarowitz & Kraemer, Philadelphia, PA, Joel K. Goldman, Husch and Eppenberger, Kansas City, MO, for Turner Inc. in No. 94–CV–2779.

MEMORANDUM AND ORDER

NAYTHONS, United States Magistrate Judge.

Presently before the Court is Plaintiffs' Joint Motion to Strike Insufficient Answers and Objections, to Compel Complete Answers and Production of Documents, and for Sanctions Against Defendant, The Coleman

Company, Inc. The Defendant has filed an Answering Memorandum of Law in opposition to Plaintiffs' motion, and Plaintiffs filed a Reply in response to Defendant's Answer.

Plaintiffs have filed this action claiming products liability and negligence based on the deaths of plaintiffs' decedents, Gustave Caruso and Richard Schwarzman. On November 30, 1992, the two decedents were discovered inside a camping trailer, along with a propane-fueled lantern and propane cylinders manufactured and sold by defendant, the Coleman Company, Inc. [hereinafter "defendant"], and a propane-fueled heater manufactured and sold by defendant, Turner, a Division of Cooper Industries. Both the lantern and heater were in the "on" position and the propane cylinders were empty when the bodies were discovered. According to the Coroner's Report and the Post Mortem Report, the decedents died of carbon monoxide poisoning.

Separate complaints were filed by plaintiffs, and on July 14, 1994, the Honorable James McGirr Kelly entered a stipulation consolidating the two cases. Both plaintiffs jointly submitted the present Motion and Memorandum of Law on July 22, 1994. On August 25, 1994, Judge Kelly referred this Motion to this Magistrate Judge for disposition.

In their motion, plaintiffs seek this Court to strike defendant's insufficient answers and objections to plaintiffs' Interrogatories—Set I, Nos. 7(d), 7(f), 8(f), 12(d), 13(d), 16–18, 20, 23–25, 27–29, 30(b)–(e), 31, 32(b)–(e), 34, 35, 39, 40, 42, 43, 50, 51, 54, and 56, and plaintiffs' First Request for Production of Documents, Nos. 7, 10, 11, 17–25, 27, 28, 30, 31, 33, 34, 37, 38, 40–46, 48, 50–53, and 58; and compel defendant to provide complete and responsive answers to these discovery requests.[1] In addition, plaintiffs request permission to redepose defendant's corporate designee, Randy May, at defendant's expense, after plaintiffs have received defendant's complete answers to discovery. Finally, plaintiffs request sanctions be entered against defendant pursuant to Fed.R.Civ.P. 37(c)(1) for reasonable expenses, including attorneys' fees, in preparing this Motion. Plaintiffs argue that defendant's many objections to their discovery requests of irrelevance, vagueness, broadness and privilege are really attempts to "stonewall" plaintiffs' proper discovery requests. *See* Plaintiffs' Memorandum at 5.

Prior to responding to plaintiffs' motion, defendants agreed to produce additional answers to plaintiffs' Interrogatories—Set I, Nos. 7(d), 7(f), 8(f), 12(d), 13(d), 20, 23–25, 27, 29, 31, 50, 51, 54 and 56, and agreed to identify and make available to plaintiffs Documents Nos. 7, 28, 30, 31, 33, 34, 41, 42, 45, 46, 50, 51, 52, 53 and 58. If defendant has not already complied with this agreement, then this Court orders that the answers and the information be produced to plaintiffs within ten (10) days of this order.

Defendant, however, contends that plaintiffs' other discovery requests seek irrelevant information and should be denied by this Court. The remaining requests consist of three groupings. First, information regarding investigations and determinations made by defendant *after* the incident on November 30, 1992. Second, information concerning defendant's financial statements and total sales revenue for the years 1987 through 1992. Third, the burdensomeness of producing all labels, mailings, warnings and instructions, including drafts thereof, which were supplied with or on defendant's propane cylinders and lanterns, including the models involved in this incident, sold in the United States and Canada from 1970 through November, 1992.

I. *Investigations and Determinations Made by Defendant After the Incident on November 30, 1992*

The gravamen of plaintiffs' case against defendant is that defendant provided grossly

1. Plaintiffs state in their reply memorandum that Document Requests 15 and 16 were inadvertently omitted from their Motion. These requests seek all labels and warnings on Coleman propane lanterns and cylinders sold in the United States from 1970 through November 30, 1992. Requests Nos. 15 and 16 are almost identical to Nos. 17 and 18, except Nos. 17 and 18 seek information from sales in Canada. Therefore, since the requests were inadvertently omitted and defendant does not object, I will accept them as part of the original motion. *See* Defendant's letter dated August 31, 1994.

inadequate warnings on the lantern and propane cylinders involved in this incident. Specifically, the label on the lantern indicated that "Adequate ventilation must be provided," and the warning on the cylinders indicated that "All burning appliances consume oxygen. Ample ventilation must be provided to avoid endangering your life." According to plaintiffs, neither of these warnings clearly warn victims of the danger of carbon monoxide poisoning or death. As a result, their discovery requests attempt to determine if defendant was aware of this danger, and whether the terms "adequate ventilation" and "ample ventilation" are ambiguous, causing injury and death to other victims. *See* Plaintiffs' Memorandum at 4. Defendants argue that discovery of information known or determinations made by the defendant *after the date of the accident* are not discoverable by the plaintiffs, citing *Bowman v. General Motors Corp.*, 64 F.R.D. 62, 68 (E.D.Pa. 1974).

[1] The liberal language of Fed.R.Civ.P. 26(b)(1) provides that discovery need not be confined to matters of admissible evidence but may encompass that which "appears reasonably calculated to lead to the discovery of admissible evidence." As a result, relevancy is to be broadly construed for discovery purposes and is not limited to the precise issues set out in the pleadings or to the merits of the case. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). Rather, discovery requests may be deemed relevant if there is any possibility that the information may be relevant to the general subject matter of the action. *Buffington v. Gillette Co.*, 101 F.R.D. 400 (W.D.Okla.1980). *See also Stabilus v. Haynsworth, Baldwin, Johnson & Graves*, 144 F.R.D. 258, 265 (E.D.Pa.1992).

[2] Defendant cites *Bowman* for its conclusion that all information formulated after the accident at issue is non-discoverable. The issue in *Bowman* was whether information was discoverable regarding testing and changes in design after the manufacture date of the allegedly defective automobile. The *Bowman* Court allowed discovery of such testing, but limited discovery to pre-accident information since plaintiff was seeking *changes* in the manufacturing of the automobile involved in the accident in order to prove knowledge of dangerous characteristics and the feasibility of correcting them. 64 F.R.D. at 68–69. Although information after the accident at issue is not discoverable under the basis of notice, *see Julander v. Ford Motor Co.*, 488 F.2d 839, 846 (10th Cir.1973), subsequent accidents are discoverable and sometimes admissible to prove causation. *Id. See also Kramer v. Boeing Co.*, 126 F.R.D. 690, 695 (D.Minn.1989) (other similar accidents, whether prior to or after the accident at issue, are often discoverable in products liability actions); *Uitts v. General Motors Corp.*, 58 F.R.D. 450 (E.D.Pa.1972) (discovery permitted concerning accidents subsequent to the accident in dispute where subsequent accidents involved identical equipment and relevant to prove causation).

The Court in *Julander* held that such evidence should be carefully examined before being *admitted into evidence* as bearing similarities to the circumstances surrounding the accident at issue. *Id.* citing *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602, 608–609 (3d Cir.1958) (emphasis added). Notably, all the complaints regarding other accidents, both prior and subsequent to the accident at issue in *Julander*, were turned over in the discovery proceedings. 488 F.2d at 845.

At present, some of plaintiffs' requests are too broadly written to include all prior or subsequent incidents, tests or determinations involving carbon monoxide poisoning from any Coleman camping appliance or equipment. Therefore, defendant will be required to answer and produce information, if such information exists, of any *post-accident* incidents regarding the same models, Model 5152B700 LP lantern and 5102–712 LP fuel cylinder, or products with the same or similar internal parts specifications as the subject products.[2] *See* Interrogatories Nos. 28, 30(b)–(e), 32(b)–(e), 34, 35, 39, 40, 42 and 43; and Document Requests 19, 20, 21, 22, 30, 43,

2. Defendant has agreed to produce information regarding pre-accident determinations and tests. *See* Defendant's Answer at 6. Pre-accident determinations and tests may include all propane equipment as it is relevant to notice of the danger of propane. *See Julander, supra.*

44, 47, 48 and 51 (to the extent that Nos. 30 and 51 involve information after November 30, 1992).

II. *Discovery of Defendant's Financial Statements and Sales Revenue*

Plaintiffs seek to discover information concerning defendant's total sales revenue for the years 1987 through 1992. Plaintiffs also seek defendant's financial statements for the years 1990–1992. Plaintiffs argue that the information is relevant to the issue of punitive damages, and defendant's motive for not providing adequate warnings of the danger posed by its propane-fueled camping products. Defendant argues that the information is irrelevant except to prepare plaintiffs for their punitive damage claims. Therefore, defendant objects that the discovery requests are premature since plaintiffs have not demonstrated to the Court that there is a real possibility that punitive damages will be at issue. Defendant argues that mere allegations of conduct on the part of a defendant that may warrant an award of punitive damages will not enable a plaintiff to obtain financial information of a defendant through pre-trial discovery. Defendant relies on *Cavalier Clothes, Inc. v. Major Coat Co.*, No. 89–3325, 1991 WL 125179, at *4, 1991 U.S.Dist. LEXIS 8861, at *13 (E.D.Pa. June 26, 1991) and *Chenoweth v. Schaaf*, 98 F.R.D. 587, 589 (W.D.Pa.1983) for this standard. However, this Court does not find *Cavalier* and *Chenoweth* controlling in the instant action.

[3, 4] The law is well settled that information regarding damages is as discoverable as information which pertains to liability. *Security Ins. Co. v. Meyer Trading Co.*, No. 86–4522, 1987 WL 8207, at *1, 1987 U.S.Dist. LEXIS 14066, at *2 (E.D.Pa. March 20, 1987) (citations omitted). In addition, under Pennsylvania law, a jury may consider a defendant's net worth in weighing an award for punitive damages. *E.J. Lavino & Co. v. Universal Health Servs.*, No. 89–2717, 1991 WL 275767, at *1, 1991 U.S.Dist. LEXIS 18505, at *2 (E.D.Pa. December 19, 1991), *citing Kirkbride v. Lisbon Contractors, Inc.* 521 Pa. 97, 555 A.2d 800 (1989). The court in *Cavalier*, cited by defendant, concluded that a prima facie case of defendants' liability for punitive damages was required before discovery of financial documents would be permitted. 1991 WL 125179, at *4 1991 U.S.Dist. LEXIS 8861, at *13. It based this conclusion on the case of *Vivino v. Everlast Sporting Goods Mfg. Co.*, No. 87–1161, 1987 WL 17571, 1987 U.S.Dist. LEXIS 8730 (E.D.Pa. September 28, 1987). However, the *Vivino* case did not specifically require that a prima facie showing of punitive damages be shown by plaintiff. The court only pointed out that the plaintiffs sought punitive damages and had made allegations in support of their contention that defendant's conduct was sufficiently outrageous to warrant such damages. It further stated that "the legal sufficiency of those allegations [was] not [ ] before the court," but noted them "in passing" as evidence that the request for punitive damages was genuine and not based merely on pretext. *Id.* at **1–2.

[5] Contrary to the *Cavalier* decision and defendant's position, when punitive damages are alleged, the weight of authority requires that a defendant disclose his financial condition in pretrial discovery *without* requiring a prima facie showing of punitive damages to justify the discovery. *Clark v. Pennsylvania*, No. 93–1365, 1994 WL 396478, at *2–3, 1994 U.S.Dist. LEXIS 10180, at *6–7 (E.D.Pa. July 21, 1994) (emphasis added), *citing E.J. Lavino*, 1991 WL 275767, at *1, 1991 U.S.Dist. LEXIS 18505, at *2–3 and *Security Ins. Co.*, 1987 WL 17571, at *1, 1987 U.S.Dist. LEXIS 14066, at *2 (no prima facie showing in punitive damages is required to justify discovery).

In addition, defendant's reliance on the earlier case of *Chenoweth* is misleading.[3] No

3. In *Chenoweth*, the court held that "merely claiming the defendant's conduct was outrageous in terms that are conclusive will not suffice" for discovery of financial information for a punitive damages claim. 98 F.R.D. at 589. The court noted that the plaintiff's claim for punitive damages arose solely from its allegations that the defendants has been negligent and that their actions were careless, reckless, wanton and grossly negligent. From these conclusive statements, the court concluded that it was unable to say that there was "a real possibility that puni-

court within the Third Circuit has subsequently followed *Chenoweth*. In addition, courts out of the First and Tenth Circuits have criticized the holding in *Chenoweth*. *See CEH, Inc. v. FV "Seafarer"*, 153 F.R.D. 491 (D.R.I.1994); *Mid Continent Cabinetry, Inc. v. George Koch Sons, Inc.*, 130 F.R.D. 149, 152 (D.Kan.1990). In *Mid Continent Cabinetry*, the District Court of Kansas disagreed with the holding in *Chenoweth*, and held that a plaintiff need not establish a prima facie case on the issue of punitive damages before pretrial discovery of defendant's financial information. 130 F.R.D. at 152. The Court held that the prima facie requirement applies to the admissibility of evidence regarding financial status not its discoverability. *Id.* The Court reasoned that since relevancy governs the standard of discoverability and the very purpose of discovery is to locate evidence, it would be difficult and illogical to require plaintiff to show entitlement to punitive damages before the completion of discovery. *Id.*

[6] This Court follows the above reasoning and the Eastern District of Pennsylvania cases of *Clark*, *Lavino*, and *Security Ins.* in holding that the information sought by plaintiffs is discoverable. However, the Court does not deem that such data should be made a matter of public record. *See Security Ins. Co.*, 1987 WL 17571, at *2, 1987 U.S.Dist. LEXIS 14066, at *4. Therefore, plaintiffs' motion to compel Interrogatory Nos. 16, 17, and 18; and Documents Requests Nos. 23, 24, 25 and 27 is granted, but when such data is filed, it should be filed as an impounded document.

III. *The Burdensome and Oppressiveness of Plaintiffs' Discovery Requests of all Labels, Warnings and Instructions*

The remaining discovery requests seek all labels, mailings, warnings and instructions, including drafts thereof, which were supplied with or on defendant's propane cylinders and lanterns sold in the United States and Canada from 1970 through November 1992. *See* Document Requests Nos. 15, 16, 17 and 18. In addition, plaintiffs specifically request all documents referring to the design of the packaging, labels, markings, instructions, and warnings, including drafts thereof, supplied with or on the propane cylinders and lantern involved in the present incident. *See* Document Request Nos. 10 and 11. Defendant claims that the present requests are unduly burdensome and oppressive, and will entail a review of between fifteen and twenty thousand documents and blueprints. Defendant also provides an affidavit to the Court indicating that in the ordinary course of business, all documents and blueprints produced are commingled and are not filed in numerical order by model number. *See* Defendant's Memorandum at 11, Exhibit "G".

[7] The lack of an adequate filing system has not excused a party from producing requested documents. 4A Moore's Federal Practice § 34.19[2] *citing Baxter Travenol Laboratories, Inc. v. LeMay*, 93 F.R.D. 379 (S.D.Ohio 1981) (court held party's unwieldy record-keeping system was not an adequate excuse to frustrate discovery and discovery was not burdensome where party alleged that needed to review "thousands of documents" at a cost of "hundreds of manhours"). However, when the volume of material sought would make copying and transporting burdensome and oppressive to the producing party, or where the distance between the parties is great, the court may decline to order production and may instead order that the requesting party inspect the documents at the convenience of the party in possession of the documents. *Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am.*, 651 F.2d 877, 883 (3d Cir.1981), *aff'd sub. nom., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492, *cert. denied* 457 U.S. 1105, 102 S.Ct. 2902, 73 L.Ed.2d 1312 (1982).

As indicated by defendant, the court in *Bowman* faced similar circumstances in which the defendant was required to produce blueprints, drawings, diagrams, overlays and

tive damages will be at issue." *Id.* at 589–90. Therefore, the court denied plaintiff's motion to compel defendants' financial records. *Id.*

supporting data, correspondence and various manuals, reports, tests and photographs of the 1966 Toronado fuel storage system and nearby parts from 1967 to 1970. The court allowed the discovery but stated that "a large part of the burden will have to be borne by the plaintiff [the requesting party]," requiring the plaintiff to sift through voluminous documents and other material. The court stated that the defendant's burden should be limited to answering the questions and identifying the documents required and providing plaintiffs with reasonable access to such documents. 64 F.R.D. at 68–69 n. 6.

[8] In the present case, plaintiffs are entitled to the documents. Therefore, since I will allow plaintiffs to redepose Mr. Randy May in Kansas, and the burden of producing and copying the documents requested are unduly burdensome and oppressive to the defendant, the defendant may answer by specifying the relevant records and allowing an opportunity to examine them. *Compagnie des Bauxites*, 651 F.2d at 883. Defendant will not be put to the expense of making copies for the plaintiffs. *Pappas v. Loew's Inc.*, 13 F.R.D. 471 (M.D.Pa.1953).

IV. *Plaintiffs' Request for Sanctions*

[9] Finally, plaintiffs have requested sanctions pursuant to Fed.R.Civ.P. 37(c)(1) for reasonable expenses, including attorneys' fees in preparing the Motion. In addition, plaintiffs request that the sanctions should include the deposition of Mr. May at defendant's cost. Fed.R.Civ.P. 37(a)(4) authorizes a court to grant reasonable expenses to the moving party if a discovery-related motion is granted or to the non-movant if the motion is denied. In fact, this provision requires that expenses be awarded to the prevailing party unless the conduct of the losing party is found to have been "substantially justified." Rule 37(a)(4), *Notes to Advisory Committee Rules*, 1970 Amendment. In this case, the Court's decision was mixed and neither party was an overall "winner" or "loser". Moreover, it does not appear to this Court that defendant was *not* substantially justified in its objections. Therefore, the Court will not at this time grant sanctions against defendant. *See Willemijn Houdstermaatschaapij BV v. Apollo Computer*, 707 F.Supp. 1429, 1450 (D.Del.1989). Nor will defendant have to make payment for the second deposition of Mr. May.

In light of the foregoing, the joint motion to compel and for sanctions will be granted in part and denied in part.

An appropriate order follows.

AMENDED ORDER

AND NOW, this 19th day of September, 1994, this Court's order filed September 9, 1994, is amended as follows:

IT IS HEREBY ORDERED that the Plaintiffs' Joint Motion to Strike Insufficient Answers and Objections, to Compel Complete Answers and Production of Documents, and for Sanctions Against Defendant, is GRANTED IN PART and DENIED IN PART and that Defendant is ORDERED to produce to Plaintiffs within ten (10) days:

1. Full and Complete answers to Plaintiffs' Interrogatories Nos. 7(d), 7(f), 8(f), 12(d), 13(d), 20, 23–25, 27, 29, 31, 50, 51, 54 and 56; and all documents responsive to Plaintiffs' Requests Nos. 7, 28, 30, 31, 33, 34, 37, 38, 41, 42, 45, 46, 50, 51, 52, 53 and 58, if Defendant has not already complied with these requests.

2. Consistent with the opinion filed September 9, 1994, Defendant is ORDERED to produce to Plaintiffs within ten (10) days, Full and Complete answers to Plaintiffs' Interrogatories Nos. 28, 30(b)–(e), 32(b)–(e), 34, 35, 39, 40, 42 and 43; and all documents responsive to Plaintiffs' Requests Nos. 19, 20, 21, 22, 30, 40, 43, 44, 47, 48 and 51 (to the extent that Nos. 30 and 51 involve information after November 30, 1992), limited to same or similar models; Full and Complete answers to Plaintiffs' Interrogatories Nos. 16, 17 and 18; and all documents responsive to Plaintiffs' Requests Nos. 23, 24, 25 and 27, but when such data is filed, it should be filed as an impounded document; All documents responsive to Plaintiffs' Requests Nos. 10, 11, 15, 16, 17 and 18.

3. Plaintiffs will be granted leave to redepose Mr. Randy May, defendant's corporate designee, in Wichita, Kansas or Kansas City,

Missouri, within ten (10) days after receipt by plaintiffs of defendant's answers to discovery and after plaintiffs have had the opportunity to review documents in defendant's possession.

4. Plaintiffs motion for sanctions is Denied.

REPUBLIC ENVIRONMENTAL SYSTEMS, INC.

v.

REICHHOLD CHEMICALS, INC.

Civ. A. No. 93-6092.

United States District Court,
E.D. Pennsylvania.

Sept. 14, 1994.

Hazardous waste treatment facility filed action against source of waste, asserting fraud, negligent misrepresentation, and breach of contract. Waste source filed motion to compel discovery. The District Court, Joyner, J., held that: (1) documents regarding all environmental investigations of facility by government during limited time frame were sufficiently relevant to require facility to comply with request for production of documents, and (2) facility would be required to answer interrogatory requesting dates of particular actions taken by facility, or indicate which specific documents already produced by facility contained dates.

Motion to compel discovery granted.

See also: 154 F.R.D. 130.

1. **Federal Civil Procedure** ⇐1269.1

Party opposing discovery has burden to raise objection, then party seeking discovery must demonstrate relevancy of requested information, after which burden switches back to party opposing discovery to show why discovery should not be permitted.

2. **Federal Civil Procedure** ⇐1272.1

Relevancy of information sought to be discovered is broadly construed and determined in relation to facts and circumstances of each case, and thus court should tend toward permitting discovery if there is doubt about relevance.

3. **Federal Civil Procedure** ⇐1588

Documents regarding all environmental investigations of hazardous waste treatment facility by government authorities during limited time frame were sufficiently relevant to fraud and breach of contract action brought by facility against source of waste to require facility to comply with discovery request for production of documents, in light of suggestion that documents could produce evidence on lost profits of facility or evidence of habit of facility shifting blame for environmental problems. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

4. **Federal Civil Procedure** ⇐1534

Hazardous waste treatment facility would be required to answer interrogatory requesting dates of particular actions taken by facility, or indicate which specific documents already produced by facility contained requested dates; facility could not merely give blanket assertion that requested dates were available in previously produced documents.

Robert C. Clothier, III, Joseph A. Tate and Arthur S. Gabinet, Dechert Price & Rhoads, Philadelphia, PA, for plaintiff.

Mark J. Oberstaedt and Robert T. Egan, Archer & Greiner, Philadelphia, PA, for defendant.

MEMORANDUM

JOYNER, District Judge.

Presently before the Court is Defendant's Motion to Compel Production of Documents and More Specific Answers to Interrogatories. For the following reasons, Defendant's Motion is granted.

Only the Westlaw citation is currently available.

United States District Court, E.D. Louisiana.

In re: BANK OF LOUISIANA/KENWIN SHOPS, INC. Contract Litigation

No. CIV. A. 1193.

Dec. 2, 1999.

MOTION: MOTION OF KENWIN SHOPS, INC., DONALD WEINER AND D & A FUNDING CORPORATION TO ENFORCE PREVIOUS DISCOVERY ORDERS, GRANT DEFAULT AND DISMISS BANK OF LOUISIANA'S CLAIMS

SHUSHAN, Magistrate J.

GRANTED IN PART AND DENIED IN PART.

*1 Before the court is the motion of defendants, Kenwin Shops, Inc., Donald Weiner and D & A Funding Corporation (defendants), for the court to enforce its previous discovery orders, particularly the July 27, 1999 order (rec.doc. 317) in which the undersigned Magistrate Judge reviewed defendants' motion to compel discovery and for sanctions and granted the motion in part. In that ruling, I found that most of the disputed discovery had been the subject of up to five (5) prior orders of the court and that Bank of Louisiana (BOL) should be sanctioned. BOL objected to the July 27, 1999 ruling, and the objections were overruled by the district court on November 22, 1999 (rec.doc. 491). [FN1] This case is set for trial on December 6, 1999.

FN1. BOL opposed the instant motion by pointing out that the July 27 ruling was not final and was then pending on objections to the district court.

Rule 37(b)(2)(C) permits a district court to strike pleadings, dismiss a complaint or render a default judgment where "a party fails to obey an order to provide or permit discovery." Fed.R.Civ.P. 37(b)(2)(C). A "court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." Chambers v. NASCO, Inc., 501 U.S. 32, 50, 111 S.Ct. 2123, 2136 (1991). Because of the severity of the sanction, dismissal with prejudice typically is appropriate only if the refusal to comply results from willfulness or bad faith and is accompanied by a clear record of delay or contumacious conduct. Woodson v. Surgitek, Inc., 57 F.3d 1406, 1417 (5th Cir.1995). In the ordinary case there is another requirement, that the conduct be attributable to the client rather than the attorney. Further, the misconduct must substantially prejudice the opposing party. Id.; Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744 (5th Cir.1987).

The Fifth Circuit has noted that dismissal with prejudice is an "extreme sanction that deprives the litigant of the opportunity to pursue his claim." Woodson, 57 F.3d at 1418 (quoting Callip v. Harris County Child Welfare Dept., 757 F.2d 1513, 1519 (5th Cir.1985)). Finally, the district court is bound to impose the least severe sanction available. Carroll v. Jaques Admiralty Law Firm, 110 F.3d 290 (5th Cir.1997). See, Gonzalez v. Trinity Marine Group, Inc., 117 F.3d 894, 898 (5th Cir.1997).

Defendants complain of non-production of documents on the part of BOL which was ordered in July. They are as follows:

1) Profit reports for the merchant participants in the BOL charge card program.

2) The financial reports accompanying the various committee meeting minutes, delinquency report and minutes for the meetings of the Management Committee.

3) Card Pac management reports from January, 1994 through August, 1995.

4) A listing of "forced sales" and/or a "matching report" as to such sales.

5) Production of material relating to the FDIC.

6) A certification relative to the search for the computer tape containing collection histories prior to February, 1996.

*2 7) BOL's adjustor performance reports or certification regarding the search efforts for such reports.

8) A listing of Kenwin accounts which BOL re-aged.

9) A listing of code keys for various computer reports generated for BOL's computer reports.

10) Documentation related to problems, delays or complaints regarding BOL's computer conversion after January 1, 1995.

11) Delinquency reports on BOL's charge card portfolio or a certification regarding search efforts.

12) A listing of accounts on which BOL gave a credit limit increase.

13) Documents related to BOL's audit of its computer conversion.

14) Documents related to the processing of Visa/ MasterCard and other charge cards at Kenwin stores.

15) An identification of all Kenwin employees contacted by BOL since the litigation began along with a description of facts gained and production of all documents prepared by those contacts, along with a privilege log listing of all documents withheld from production based on privilege.

16) All records of any promise or provision of anything of value to any former Kenwin employee contacted in the course of this litigation.

17) A statement as to whether anything of value was given to any present or former Kenwin employee, shareholder, officer or director to participate or to continue in the BOL charge card program.

18) Production of copies of all subpoenas served relative to the litigation and a description of all documents produced as a result of the return of such subpoenas.

I believe at this juncture it would be more prejudicial to defendants for me to make a recommendation relative to exclusion of evidence based on BOL's seventeen (17) failures to comply with previous orders of this court than not to do so. [FN2] However, some of the information sought should be produced to defendants prior to trial. [FN3] Therefore, by no later than 5:00 p.m. on Thursday, December 2, 1999, BOL is to provide the information set forth in paragraphs 15, 16 and 17 above (and as ordered in the July 27 ruling at pages 6 and 7). The remaining items do not appear to be matters which are of central importance to the defense of BOL's claims or the prosecution of Kenwin's counterclaims, but I do recommend that the district court consider the lack of discovery with regard to these documents when evidentiary objections are made at trial.

FN2. Should I make such a recommendation, BOL would have ten (10) days to object while the case goes to trial in four (4) working days.

FN3. That is not to imply that all of the 17 items should not have been produced by BOL during the normal course of discovery or as a result of prior orders of the court. They should have been; that is an established fact.

In addition, it appears that further sanctions should be imposed against BOL and perhaps its counsel for the repeated refusal to comply with prior discovery orders. Indeed, BOL's two (2) page response to the instant motion asserts no argument regarding its efforts to comply with the July order or grounds for its non-compliance.

It is therefore ordered that BOL and Henry Klein show cause on Wednesday, January 19, 2000 at 9:00 a.m. why monetary sanctions, an award of costs and attorney's fees should not be imposed and a recommendation regarding contempt of court should not be made for failure to comply with this court's earlier orders, pursuant to Fed.R.Civ.P. 11; 37(b)(2); and 28 U.S.C. § 1927. Further, all briefs and affidavits are to be submitted no later than January 10, 2000. If the parties intend to call witnesses at the hearing, they are to declare their intent and submit their witness lists with a statement of the expected testimony as well as their exhibit lists by January 10, 2000.

***3** Insofar as the motion seeks a recommendation of dismissal of BOL's claims, it is denied.

END OF DOCUMENT

Only the Westlaw citation is currently available.

United States District Court, E.D. Texas, Beaumont Division.

In re NORPLANT CONTRACEPTIVE PRODUCTS LIABILITY LITIGATION.

MDL No. 1038.

Feb. 22, 1995.

PRACTICE AND PROCEDURE ORDER NO. 2

SCHELL, District Judge.

***1** On January 25, 1995, an initial pretrial conference was held pursuant to Rule 16, at which time the parties were ordered to meet and confer on February 6, 1995, to discuss scheduling, discovery, and other pending matters. The parties having conferred and submitted a proposed joint order reflecting their points of agreement and disagreement, and the Court having heard argument at a further conference on February 15, 1995, the court now enters this Order, which is applicable to all cases that have been or are subsequently filed in, removed to, or transferred to this Court as part of the Norplant Contraceptive Products Liability Litigation.

1. ORGANIZATION OF PLAINTIFFS' COUNSEL

(a) Designation of Plaintiffs' Liaison Counsel. Plaintiffs' Liaison Co- Counsel shall be:
Mr. Chris Parks
Mr. Carl Parker
Parker & Parks, L.L.P.
One Plaza Square
Port Arthur, TX 77642

(b) Designation of Plaintiffs' Steering Committee. The Plaintiffs' Steering Committee shall be comprised of:
Janet Abaray
Waite, Schneider, Bayless & Chesley
1513 Central Trust Tower
Fourth and Vine Streets
Cincinnati, OH 45202
Daniel E. Becnel, Jr.
Becnel, Landry & Becnel
P.O. Drawer H
Reserve, LA 70084
Turner W. Branch
Branch Law Firm
2025 Rio Grande Blvd., N.W.
Albuquerque, NM 87104
Roger P. Brosnahan
Brosnahan, Joseph, Lockhart & Suggs
700 Pillsbury Center
200 South 6th Street
Minneapolis, MN 55402
Elizabeth Cabraser
William B. Hirsch
Lieff, Cabraser & Heimann
275 Battery Street
30th Floor
San Francisco, CA 94111-3339
Harold D. Dampier
Dampier & Watson
Americana Building
Suite 10001
811 Dallas
Houston, TX 77002
Michael Gallagher
Fisher, Gallagher & Lewis
1st Interstate Bank Plaza
70th Floor
1000 Louisiana
Houston, TX 77002
Mark B. Hutton
Michaud, Hutton, Fisher & Anderson
8100 East 22nd Street, North
Building 1200
Wichita, KS 67226
Jewel N. Klein
Holstein, Mack & Klein
300 South Wacker Drive
Suite 3200
Chicago, IL 60606
Arnold Levin
Levin, Fishbein, Sedran & Berman
320 Walnut Street, Suite 600
Philadelphia, PA 19106
Dianne M. Nast
Kohn, Nast & Graf, P.C.
1101 Market Street, Suite 2400
Philadelphia, PA 19107
Chris Parks
Carl Parker
Parker & Parks, L.L.P.
One Plaza Square
Port Arthur, TX 77642
Thomas D. Rogers

Ness, Motley, Loadholt, Richardson & Poole
174 East Bay Street, Suite 100
Charleston, SC 29401
Sybil Shainwald
Law Offices of Sybil
Shainwald, P.C.
20 Exchange Place, 45th Floor
New York, NY 10005
Arthur Sherman
Sherman, Dan & Portugal
9454 Wilshire Blvd.
Beverly Hills, CA 90210
Michael L. Slack
Slack & Davis, L.L.P.
Suite 2110
8911 Capital of Texas Highway
Austin, TX 78759
Jonathan H. Waller
Springmeyer & Waller
2140 Eleventh Avenue South
Suite 422
The Park Building
Birmingham, AL 35205
Michael L. Williams
Williams & Troutwine
1001 S.W. Fifth Avenue
Suite 1900
Portland, OR 97204
Charles S. Zimmerman
Zimmerman Reed
5200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4123

(c) Designation of Co-Chairs of Plaintiffs' Steering Committee. The co- chairs of the Plaintiffs' Steering Committee shall be:
Turner W. Branch
Branch Law Firm
2025 Rio Grande Blvd., N.W.
Albuquerque, N.M. 87104
Roger P. Brosnahan
Brosnahan, Joseph, Lockhart & Suggs
700 Pillsbury Center
200 South 6th Street
Minneapolis, MN 55402

(d) Responsibilities of Plaintiffs' Liaison Counsel. Plaintiffs' liaison counsel shall have the following responsibilities:

(i) To file petitions for the coordination and transfer of tag-along cases;

(ii) To maintain and distribute to the Court, to counsel for plaintiffs and counsel for defendants, an up-to-date service list;

(iii) To receive orders and notices from the Court on behalf of all parties within the Liaison Group and to be responsible for the preparation and transmittal of copies of such orders and notices to the parties in the Liaison Group;

(iv) To maintain complete files of copies of all documents served upon them and to make such files available to parties within their Liaison Group upon request; and

(v) To receive orders and notices from the Judicial Panel on Multidistrict Litigation pursuant to Rule 8(e) of the Panel's Rules of Procedure on behalf of all parties within their Liaison Group and to prepare and transmit copies of such orders and notices to the parties in their Liaison Group.

***2** (e) Responsibilities of Plaintiffs' Steering Committee. The Co-chairs of the Plaintiffs' Steering Committee and Liaison Counsel shall, after such consultation with the Plaintiffs' Steering Committee as may be appropriate, have the following responsibilities:

(i) To determine, after such consultation with other plaintiffs' counsel as may be appropriate, the position of the plaintiffs on all matters arising during the pretrial proceedings; and to present such positions to the Court and opposing parties in briefs, oral argument or in such other fashion as may be appropriate, personally or by a designee;

(ii) To coordinate the litigation and conduct discovery on behalf of plaintiffs consistent with the requirements of Fed.R.Civ.P. 26(g), including the preparation of joint interrogatories and requests for production of documents and the examination of witnesses in depositions;

(iii) To initiate or conduct settlement negotiations on behalf of plaintiffs, but without authority to enter binding agreements except to the extent expressly authorized;

(iv) To delegate responsibilities for specific tasks to

co-counsel in a manner to assure that pretrial preparation for the plaintiffs is conducted effectively, efficiently and economically;

(v) To monitor the activities of co-counsel to assure that schedules are met and unnecessary expenditures of time and expenses are avoided;

(vi) To call meetings of co-counsel for the purpose of coordinating discovery, presentations at pretrial conferences, and other pretrial activities;

(vii) To appoint and supervise the activities of plaintiffs' subcommittees; and

(viii) To perform such duties as may be incidental to proper coordination of plaintiffs' pretrial activities or authorized by further order of the Court.

2. ORGANIZATION OF DEFENDANTS' COUNSEL

(a) Designation of Defendants' Liaison Counsel. Liaison Counsel for the American Home Products Defendants, Leiras Oy, the Dow Corning and Dow Chemical Defendants shall be:
F. Lane Heard III
Williams & Connolly
725 12th Street, N.W.
Washington, D.C. 20005

(b) Responsibilities of Defendants' Liaison Counsel. Defendants' Liaison Counsel shall have the following responsibilities:

(i) To maintain and distribute to the Court, to counsel for plaintiffs and counsel for defendants, an up-to-date service list;

(ii) To receive orders and notices from the Court on behalf of all parties within the Liaison Group and to be responsible for the preparation and transmittal of copies of such orders and notices to the parties in the Liaison Group;

(iii) To maintain complete files of copies of all documents served upon them and to make such files available to parties within their Liaison Group upon request; and

(iv) To receive orders and notices from the Judicial Panel on Multidistrict Litigation pursuant to Rule 8(e) of the Panel's Rules of Procedure on behalf of all parties within their Liaison Group and to prepare and transmit copies of such orders and notices to the parties in their Liaison Group.

3. MODIFICATIONS TO THE LOCAL RULES

***3** In addition to the waiver of Rule 2 of the Local Rules of the Eastern District of Texas and General Order 93-12, as ordered by the Court in Practice and Procedure Order No. 1, the Civil Justice Expense and Delay Reduction Plan of the U.S. District Court for the Eastern District of Texas will not apply to MDL 1038 cases.

4. CONFIDENTIALITY ORDER

All documents produced in this litigation will be subject to the Confidentiality Order attached as Exhibit A.

5. MASTER COMPLAINT

The Plaintiffs' Steering Committee shall file with this Court an Amended and Consolidated Class Action Complaint on February 24, 1995. The Defendants named in the Master Complaint shall file their answers, or otherwise respond, on or before March 24, 1995.

6. SCHEDULE FOR CLASS CERTIFICATION DETERMINATION

The issue of class certification shall be prepared for an early hearing pursuant to the schedule set forth below. Except as provided in paragraph 7, the parties shall not conduct discovery related to the merits of the litigation until decision of the class certification issue or further order of this Court.

1.	Plaintiffs file Consolidated Motion for Class Certification	March 8
2.	Plaintiffs produce medical records "pertaining to Norplant" [FN1] for the 5 class representatives named in the amended class action complaint plus 8 class representatives (as named in pending class action complaints) designated by Defendants	March 8

3.	Depositions of 13 class representatives commence (depositions will be limited to one-half day per witness and limited to class issues)	March 22
4.	Depositions, if any, of defendants' witnesses (limited in number to 4 and limited to one-half day per witness and limited to class issues) commence	March 22
5.	Depositions of class representatives end	April 21
6.	Depositions, if any, of defendants' witnesses end	April 21
7.	Defendants file Opposition to Class Certification	May 22
8.	Plaintiffs' Reply	June 22
9.	Defendants' Sur-reply	June 30
10.	Hearing	To be set by Court

7. SCHEDULE FOR DISCOVERY ON THE MERITS

Merits-based document discovery shall be limited to the following pending decision of the class certification issue and conducted according to the following schedule:

(a) The American Home Products defendants will produce on March 1 the more than fifty volumes that make up the New Drug Application ("NDA") files for Norplant, including the applications filed by the Population Council and Wyeth- Ayerst.

(b) The American Home Products defendants will produce on April 3 the Investigational New Drug application, the amendments to the NDA applications, the Drug Experience Reports filed with the FDA, and Wyeth-Ayerst's correspondence with the FDA relating to the NDA.

(c) The American Home Products defendants will produce on May 1 the approximately 120,000 pages of documents gathered from the files of the approximately 85 employees deemed most likely to have documents relating to the approval and marketing of Norplant. Plaintiffs will produce on that date, for each of the 13 class representatives to be deposed (as provided in paragraph 6) all hospital records for a period of five years and all physician records for a period of ten years. Plaintiffs reserve the right to object to the relevance for class certification purposes of any pre-Norplant implantation records.

***4** (d) On March 15, defendants will identify the approximately 85 employees referred to in subparagraph (c) above. After March 15, plaintiffs may serve interrogatories limited to the identification of additional individuals with knowledge of relevant facts and the location of documents.

(e) On April 1, plaintiffs may file document requests, to which defendants will file written responses on May 1. Production of documents will be made at a time agreed to by the parties or ordered by the Court.

(f) Document requests shall be filed by the Plaintiffs' Steering Committee on a consolidated basis for the class action and individual plaintiffs. To the extent practicable, defendants shall use their

best efforts to file document requests on a consolidated basis for all defendants.

(g) The Court will hold a discovery conference following determination of the class certification issue to establish a schedule for further discovery and to set deadlines for amending pleadings and adding parties.

8. DOCUMENT DEPOSITORIES

(a) The documents to be produced by defendants pursuant to this Order and Rule 34 requests will be deposited in a depository to be located at the offices of Williams & Connolly or other location in Washington, D.C. The documents in the depository will be made available to the litigants in MDL 1038 as well as litigants in related state court actions for a reasonable copying charge and subject to the confidentiality order referenced in paragraph 4.

(b) The documents selected from those produced by defendants pursuant to this Order and Rule 34 requests, together with other litigation materials, will be deposited by plaintiffs in a plaintiffs' depository to be located in either Houston or New Orleans. The materials in this depository will be available to plaintiffs in federal and state actions on terms and conditions to be agreed upon among the plaintiffs.

(c) The documents produced by plaintiffs will be produced directly to defendants, will be subject to the attached confidentiality order, and will not be placed in any depository.

EXHIBIT A
CONFIDENTIALITY ORDER

To expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, protect adequately material entitled to be kept confidential, and insure that protection is afforded only to material so entitled, it is, pursuant to the court's authority under Fed.R.Civ.P. 26(c), ORDERED:

1. Non-disclosure of Stamped Confidential Documents.

(a) Except with the prior written consent of the party or other person originally designating a document to be stamped as a confidential document, or as hereinafter provided under this order, no stamped confidential document may be disclosed to any person.

(b) A "stamped confidential document" means any document which bears the legend (or which shall otherwise have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN MDL 1038, UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TEXAS" to signify that it contains information believed to be subject to protection under Fed.R.Civ.P. 26(c)(7). [For purposes of this order, the term "document" means all written, recorded, or graphic material, whether produced or created by a party or another person, whether produced pursuant to Rule 34, subpoena, by agreement, or otherwise. Interrogatory answers, responses to requests for admission, deposition transcripts and exhibits, pleadings, motions, affidavits, and briefs that quote, summarize, or contain materials entitled to protection may be accorded status as a stamped confidential document, but, to the extent feasible, shall be prepared in such a manner that the confidential information is bound separately from that not entitled to protection.]

*5 2. Permissible Disclosures. Notwithstanding paragraph 1, stamped confidential documents may be disclosed to counsel for the parties in this action who are actively engaged in the conduct of this litigation; to the partners, associates, secretaries, paralegal assistants, and employees of such an attorney to the extent reasonably necessary to render professional services in the litigation; to persons with prior knowledge of the documents or the confidential information contained therein, and their agents; and to court officials involved in this litigation (including court reporters, persons operating video recording equipment at depositions, and any special master appointed by the court). Subject to the provisions of subparagraph (d), such documents may also be disclosed--

(a) to any person designated by the court in the interest of justice, upon such terms as the court may deem proper;

(b) to persons noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify; to outside consultants or experts retained for the purpose of assisting counsel in the litigation; to employees of parties involved solely in one or more aspects of

organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with these actions, including the performance of such duties in relation to a computerized litigation support system; and to employees of third-party contractors performing one or more of these functions; provided, however, that in all such cases the individual to whom disclosure is to be made has signed and filed with the court a form (except in the case of outside consultants or experts retained for the purpose of assisting counsel in this litigation such form may be filed under seal) containing--

(1) a recital that the signatory has read and understands this order;

(2) a recital that the signatory understands that unauthorized disclosures of the stamped confidential documents constitute contempt of court; and

(3) a statement that the signatory consents to the exercise of personal jurisdiction by this court; and

***6** (c) to any attorney representing a plaintiff in litigation against American Home Products Corporation, Wyeth Laboratories Inc., or Wyeth-Ayerst Laboratories regarding Norplant; provided, however, that in all such cases the individual to whom disclosure is to be made has signed and filed with the court a form containing--

(1) a recital that the signatory has read and understands this order;

(2) a recital that the signatory understands that unauthorized disclosures of the stamped confidential documents constitute contempt of court; and

(3) a statement that the signatory consents to the exercise of personal jurisdiction by this court.

(d) Before disclosing a stamped confidential document to any person listed in subparagraph (a), (b) or (c) who is a competitor (or an employee of a competitor) of the party that so designated the document, the party wishing to make such disclosure shall give at least ten days' advance notice in writing to the counsel who designated such information as confidential, stating the names and addresses of the person(s) to whom the disclosure will be made. If, within the ten day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the court has denied such motion. The court will deny the motion unless the objecting party shows good cause why the proposed disclosure should not be permitted.

3. Declassification. A party (or aggrieved entity permitted by the court to intervene for such purpose) may apply to the court for a ruling that a document (or category of documents) stamped as confidential is not entitled to such status and protection. The party or other person that designated the document as confidential shall be given notice of the application and an opportunity to respond. To maintain confidential status, the proponent of confidentiality must show by a preponderance of the evidence that there is good cause for the document to have such protection.

4. Confidential Information in Depositions.

(a) A deponent may during the deposition be shown, and examined about, stamped confidential documents if the deponent already knows the confidential information contained therein or of the provisions of paragraph 2(d) are complied with. Deponents shall not retain or copy portions of the transcript of their depositions that contain confidential information not provided by them or the entities they represent unless they sign the form prescribed in paragraphs 2(b) and (c). A deponent who is not a party or a representative of a party shall be furnished a copy of this order before being examined about, or asked to produce, potentially confidential documents.

(b) Parties (and deponents) may, within 15 days after receiving a deposition, designate pages of the transcript (and exhibits thereto) as confidential. Confidential information within the deposition transcript may be designated by underlining the portions of the pages that are confidential and marking such pages with the following legend: "Confidential--Subject to protection pursuant to Court Order." Until expiration of the 15 day period, the entire deposition will be treated as subject to protection against disclosure under this order. If no party or deponent timely designates confidential information in a deposition, then none of the transcript or its exhibits will be treated as confidential; if a timely designation is made, the confidential portions and exhibits shall be filed under seal separate from the portions and exhibits not so marked.

***7** 5. Confidential Information at Trial. Subject to the Federal Rules of Evidence, stamped confidential documents and other confidential information may be offered in evidence at trial or any court hearing,

provided that the proponent of the evidence gives five days' advance notice to counsel for the party or other person that designated the information as confidential. Any party may move the court for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The court will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information at the trial.

6. Subpoena by Other Courts or Agencies. If another court or an administrative agency subpoenas or orders production of stamped confidential documents which a party has obtained under the terms of this order, such party shall promptly notify the party or other person who designated the document as confidential of the pendency of such subpoena or order.

7. Filing. Stamped confidential documents need not be filed with the Clerk except when required in connection with motions under Fed.R.Civ.P. 12 or 56 or other matters pending before the court. If filed, they shall be filed under seal and shall remain sealed which in the office of the Clerk so long as they retain their status as stamped confidential documents.

8. Client Consultation. Nothing in this order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of stamped confidential documents; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 2(b) and (d).

9. Use. Persons obtaining access to stamped confidential documents under this order shall use the information only for preparation and trial of this litigation (including appeals and retrials), and shall not use such information for any other purpose, including business, governmental, commercial, or administrative or judicial proceedings. [For purposes of this paragraph, the term "this litigation" includes other related litigation in which the producing person or company is a party.]

10. Non-Termination. The provisions of this order shall not terminate at the conclusion of these actions. Within 120 days after final conclusion of all aspects of this or any related litigation, stamped confidential documents and all copies of same (other than exhibits of record) shall be returned to the party or person which produced such documents or, at the option of the producer (if it retains at least one copy of the same), destroyed. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the party who produced the documents not more than 150 days after final termination of this litigation.

***8** 11. Modification Permitted. Nothing in this order shall prevent any party or other person from seeking modification of this order or from objecting to discovery that it believes to be otherwise improper.

12. Inadvertent or Unintentional Disclosure. Any inadvertent or unintentional disclosure of confidential and proprietary material will not be construed as a waiver, in whole or in part, of (1) defendants' claims of confidentiality either as to the specific information inadvertently or unintentionally disclosed or as to any other confidential material disclosed prior to or after that date, or (2) defendants' right to designate said material as confidential material pursuant to this Protective Order. This Protective Order does not in any way deprive plaintiffs of their right to contest defendants' claims to protection for confidential, proprietary and trade secret information. Nor does this Protective Order in any way deprive defendants of their right to claim such information should be protected from disclosure. Production of documents pursuant to this Protective Order shall not be construed as a waiver of any sort by either plaintiffs or defendants, other than a claim of attorney-client privilege.

13. Responsibility of Attorneys. The attorneys of record are responsible for employing reasonable measures to control, consistent with this order, duplication of, access to, and distribution of copies of stamped confidential documents. Parties shall not duplicate any stamped confidential document except working copies and for filing in court under seal.

FN1. The medical records "pertaining to Norplant" shall include all records pertaining to the implantation and removal of Norplant (including informational material about Norplant received, read

or viewed by plaintiffs and consent forms) and all records pertaining to complications and injuries alleged to have been caused by Norplant.

END OF DOCUMENT

*755 So. 2d 873, *; 2000 La. LEXIS 502, **

ROSEMARY ROSSELJONG LESTELLE, ET AL. v. ASBESTOS CLAIMS MANAGEMENT CORPORATION, ET AL.

No. 00-CC-0007

SUPREME COURT OF LOUISIANA

00-0007 (La. 02/25/00);

755 So. 2d 873; 2000 La. LEXIS 502

February 25, 2000, Decided

SUBSEQUENT HISTORY: [**1] Reported in Table Case Format at: 2000 La. LEXIS 967.

JUDGES: Lemmon, J., not on panel. Rule IV, Part II, § 3.

OPINION:

[*874] [Pg 1] PER CURIAM *

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

* Lemmon, J., not on panel. Rule IV, Part II, § 3.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Plaintiffs, the surviving spouse and children of Frank, Lestelle, Sr., filed the instant suit against multiple defendants, including CBS Corporation ("CBS"), alleging Mr. Lestelle died of exposure to asbestos.

During discovery, plaintiffs noticed the corporate deposition of CBS and issued a subpoena duces tecum for the production of thousands of pages of documents. n1 CBS proposed that due to the extraordinary number of documents potentially responsive to the request, plaintiffs' counsel should view and copy the documents at the CBS document repository in Pittsburgh, Pennsylvania. n2 However, plaintiffs' attorney insisted the production take place at his office in New Orleans.

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n1 CBS indicates the documents occupy a total of 247 boxes. [**2]

n2 As a result of its involvement in asbestos litigation in various jurisdictions throughout the United States, CBS contends that it compiled all documents relevant to the asbestos litigation, indexed and "Bates" numbered the documents, and segregated them in its corporate repository in Pittsburgh.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

CBS filed a motion to quash the deposition and subpoena on grounds that the document

requests were excessively broad. Alternatively, it asked to be allowed to provide plaintiffs' counsel access to the documents in Pittsburgh, Pennsylvania.

[Pg 2] Plaintiffs filed a motion to compel and sought costs and attorneys' fees against CBS. The district court ordered CBS to produce the documents, and ordered it to pay plaintiffs $ 500.00 in attorneys' fees as a sanction.

CBS applied for supervisory writs, seeking review of the award of $ 500.00 in attorneys' fees and the trial court's ruling requiring production of the documents at any place other than the Pittsburgh repository. The court of appeal denied the writ. This application followed.

Under the unique facts of this case, we find the district court abused [**3] its discretion in compelling CBS to transport the documents to the office of plaintiffs' counsel in New Orleans. The offer by CBS to make these documents available to plaintiffs' counsel at its document repository in Pittsburgh, Pennsylvania represents a reasonable accommodation which will serve the interests of both parties.

Accordingly, the writ is granted. The judgment of the district court, insofar as it requires CBS to produce the documents at the office of plaintiffs' counsel, is reversed. CBS is ordered to provide plaintiffs' counsel with access to the documents, as provided in the district court's order, at its document repository in Pittsburgh, Pennsylvania. In light of our ruling on this issue, that portion of the district court's judgment assessing attorney fees against CBS is vacated and set aside. The case is remanded to the district court for further proceedings.

III

In view of the disposition of Arthur Andersen's motion, plaintiff's motion to compel Arthur Andersen to respond to its interrogatories is granted.

So ordered.

MID-AMERICA FACILITIES, INC., and J. Roger Motherway, Plaintiffs,

v.

ARGONAUT INSURANCE COMPANY, Defendant.

Civ. A. No. 76-C-707.

United States District Court,
E. D. Wisconsin.

April 19, 1978.

In an action for amounts allegedly owing under a contract, for tortious interference with the contract, for defamation, for breach of duty to act in good faith under the contract, and for negligence, plaintiffs moved to compel discovery with respect to certain interrogatories to defendant. The District Court, Reynolds, Chief Judge, held, inter alia, that plaintiffs would themselves be compelled to obtain desired information from business records which the interrogated party would furnish.

Motion to compel discovery denied.

1. Federal Civil Procedure ⇐1534

Where defendant, in response to interrogatories, offered to make business records available to plaintiffs so as to allow plaintiffs to ascertain for themselves the information requested, plaintiffs would be required to do so despite fact that it might take approximately 30 days to go through such records to obtain such information. Fed.Rules Civ.Proc. rule 33(c), 28 U.S.C.A.

2. Federal Civil Procedure ⇐1631

Where defendant in civil suit was California corporation, but plaintiffs elected to sue in Wisconsin, and volume of business records sought by plaintiffs in pretrial discovery was substantial, it was not unreasonable to require plaintiffs to examine such business records in place where records were located, i. e., California.

3. Federal Civil Procedure ⇐1483

Where defendant in civil action objected to interrogatories posed by plaintiffs on ground that they involved opinion or conclusion that related to fact or application of law to fact, and that answers should therefore be deferred until discovery had been completed, motion for order deferring response to such interrogatories was unnecessary. Fed.Rules Civ.Proc. rules 33(a), 37, 28 U.S.C.A.

4. Federal Civil Procedure ⇐1532

Where interrogatories in civil action called for mixed response of law and fact, answers would not be required until discovery had been completed. Fed.Rules Civ. Proc. rules 33(a), 37, 28 U.S.C.A.

5. Federal Civil Procedure ⇐1503

Interrogatories posed in civil action were overbroad to extent that they requested substantial number of documents relating to defendant's financial condition over seven-year period for sole purpose of determining defendant's present financial status for purposes of punitive damages claim and to extent they related not only to dealings which plaintiffs had with defendant but also to dealings which other companies had with it. Fed.Rules Civ.Proc. rules 26, 34, 28 U.S.C.A.

Brian J. Henderson, Milwaukee, Wis., for plaintiffs.

George E. Garvey, Milwaukee, Wis., H. C. Wheeler, Chicago, Ill., for defendant.

DECISION AND ORDER

REYNOLDS, Chief Judge.

This is an action for amounts allegedly owing under a contract entered into be-

tween the parties to this action in June 1974, which contract was terminated in November 1975, for tortious interference with contract, for defamation, for breach of duty to act in good faith under the contract, and for negligence. The plaintiffs Mid-America Facilities, Inc., and J. Roger Motherway have moved the court to compel discovery with respect to their interrogatories to defendant Argonaut Insurance Company numbered 4, 6, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 and paragraphs numbered 1, 10, 12, 14, 16, 18(c–j), and 19 of their first request for the production of documents. For the reasons hereinafter stated, the motion will be denied.

[1] In response to interrogatories numbered 4, 6, 10, 13, 14, 17, and 22, the defendant offered to make available to plaintiffs the records which will enable them to ascertain for themselves the information requested. Under the circumstances, the Court finds that this was an appropriate response. Rule 33(c) of the Federal Rules of Civil Procedure provides that when an answer to an interrogatory may be ascertained from the business records of the party on whom the interrogatory is served and the burden of ascertaining the answer is substantially the same for both parties, the party on whom the interrogatory is served may, as an alternative to answering, make the records available. Plaintiffs allege that they were informed that it would take them approximately thirty days to go through the records to obtain the desired information, and that consequently it would be unduly burdensome to require them to do so. However, there is no indication that it would not take the defendant a substantially equivalent amount of time. The Court is of the opinion that where the burden is substantially equal, the moving party ought to be required to bear such burden.

[2] As to plaintiffs' argument that the location of the records in California increases their burden and that defendant ought to be required to transport the records to Milwaukee, the Court is of the opinion that as defendant is a California corporation and plaintiffs have elected to sue in Wisconsin and the volume of records is substantial, it is not unreasonable to require the plaintiffs to examine the records in the place where the records are located, i. e., California.

The defendant has objected to interrogatories numbered 12, 16, 18, 19, 20, and 21 on the grounds that they call for a conclusion of law or, in the alternative, that they involve an opinion or conclusion that relates to fact or the application of law to fact, and that therefore the answers should be deferred until discovery has been completed. Plaintiffs argue that as defendant has failed to move the court for an order deferring its response, the request should be denied.

[3, 4] Rule 33(a) of the Federal Rules of Civil Procedure does not require that the objecting party request the court by motion to permit a deferred response. Rather, it sets forth an objection on that basis as a proper response to an interrogatory and places the burden on the party serving the interrogatories to proceed under Rule 37 for an order compelling discovery. The Court finds that the interrogatories objected to on this basis ask for a mixed response of law and fact, and that those interrogatories need not be answered until discovery has been completed.

[5] The defendant has objected to paragraphs numbered 1, 10, 12, 14, 16, 18(c–j), and 19 on the ground that while they may request production of some relevant documentation, or some that are designed to lead to the discovery of admissible evidence, they are significantly overbroad. The Court finds that the objection should be sustained. Paragraphs 1 and 10, for example, request a substantial number of documents relating to defendant's financial condition over a seven-year period for the sole purpose of determining defendant's present financial status for purposes of the punitive damages claim. Paragraphs 12, 14, 16, 18(c–j), and 19 request production of documents which relate not only to the dealings which plaintiffs had with the defendant, but also to the dealings which other companies had with the defendant. The docu-

ments in the latter category are, as plaintiffs concede, in no way relevant to the present action, and the Court finds that plaintiffs should be required to narrow the scope of their request so as to conform to the guidelines set forth in Rule 26 of the Federal Rules of Civil Procedure. Defendant has indicated that if plaintiffs do so, it will comply with their request and will produce the documents requested in California. As with the documents which defendant has offered to make available to the plaintiffs for purposes of answering certain of the interrogatories, unless plaintiffs can show that the burden imposed on them in going to California will substantially outweigh the burden on the defendant in bringing the documents to Milwaukee, defendant will have sufficiently complied with Rule 34 if it makes the documents available in California.

For the foregoing reasons,

IT IS ORDERED that the motion of the plaintiffs Mid-America Facilities, Inc., and J. Roger Motherway to compel discovery is denied.

IT IS FURTHER ORDERED that the requests of both parties for their reasonable expenses in regard to the motion to compel discovery are denied.

Joseph PORCELLI, Plaintiff,

v.

JOSEPH SCHLITZ BREWING COMPANY, a corporation, William T. Timpone and Thomas R. Roupas, Defendants.

Civ. A. No. 72-C-238.

United States District Court,
E. D. Wisconsin.

April 19, 1978.

Plaintiff moved pursuant to federal rule of civil procedure to have set aside order for fraud upon the court or, in the alternative, for order directing further depositions of defendants by the plaintiff to determine whether or not there had been fraud or misrepresentation by the defendants or their witnesses constituting fraud upon the court. The District Court, Reynolds, Chief Judge, held that: (1) it was not the proper forum in which to bring the motion, since the challenged order had been entered by the Court of Appeals for the Seventh Circuit, and (2) even if two of defendants and two of defendants' witnesses had furnished false testimony at their depositions and court subsequently relied in part on such testimony in granting defendants' motion for summary judgment, that would not constitute fraud upon the court such as would warrant setting aside judgment.

Motion denied.

1. Federal Civil Procedure ⇐2641

Motion for relief from court order on ground of fraud upon the court should be addressed to court which entered the order. Fed.Rules Civ.Proc. rule 60(b), 28 U.S.C.A.

2. Federal Civil Procedure ⇐2641

United States District Court for Eastern District of Wisconsin was not proper forum in which to bring motion to set aside prior order for fraud upon the court, where prior order had been entered by Court of Appeals for the Seventh Circuit. Fed.Rules Civ.Proc. rule 60(b), 28 U.S.C.A.

3. Federal Civil Procedure ⇐2654

Within federal rule providing that court may set aside judgment for fraud upon the court, "fraud upon the court" embraces only that fraud which does, or attempts to, defile court itself, or is fraud perpetrated by officers of court so that judicial machinery cannot perform in usual manner its impartial task of adjudging cases. Fed.Rules Civ.Proc. rule 60(b), 28 U.S.C.A.

to the property itself. Schlein and his wife never made any sort of conveyance to the Millers, who entered into possession with knowledge of the facts concerning the title. If the rights of the latter were invaded, their only remedy is against the Schleins personally, not against the real estate.

[3] With respect to the contention that counsel fees should not have been awarded, it is enough to say that the fraud discovered by the trial justice is amply substantiated by the proof, as are his other findings. We regard the fraud revealed by the record as gross in nature, practiced wilfully and oppressively upon untutored trusting victims who were long ignorant of their rights and but vaguely conscious of their wrongs. In such circumstances, it was proper to award counsel fees, under the rule concerning punitive damages stated in 8 R.C.L. 585, which we quoted with approval in Ballard v. Spruill, 64 App.D.C. 60, 74 F.2d 464, 466:

"To warrant the allowance of such damages the act complained of must not only be unlawful but must also partake somewhat of a criminal or wanton nature. And so it is an almost universally recognized rule that such damages may be recovered in cases, and only in such cases where the wrongful action complained of is characterized by some such circumstances of aggravation as willfulness, wantonness, malice, oppression, brutality, insult, recklessness, gross negligence, or gross fraud on the part of the defendant."

In permitting the appellees to recover counsel fees, in addition to other elements of damages, the District Court's decree serves simply to make them whole—to allow them again to have their property together with the rents therefrom since it was fraudulently taken from them. The decree also correctly demonstrates that the ancient law which said "Unto a stranger thou mayest lend upon usury" is no longer in effect.

We have examined the remaining contentions of the appellants and deem them as devoid of merit as those discussed herein.

Affirmed.

NIAGARA DUPLICATOR CO., Inc., v. SHACKLEFORD.

No. 9228.

United States Court of Appeals
District of Columbia.

Argued Jan. 15, 1947.

Decided Feb. 24, 1947.

Federal civil procedure ⇐1624

Where principal offices of corporate defendant were in San Francisco and records pertaining to business of Washington, D. C., branch could not be segregated or moved without disrupting defendant's business, order requiring defendant to make copies of certain books and records and to permit inspection of originals for purposes of verification was an abuse of discretion, and all that plaintiff was entitled to, was an order requiring the production of the books and records at defendant's San Francisco office for inspection of plaintiff and taking of copies by him. Federal Rules of Civil Procedure, rule 34, 28 U.S.C.A. following section 723c.

Appeal from the District Court of the United States for the District of Columbia.

Action by Malcolm Shackleford against Niagara Duplicator Co., Inc., for an accounting. From an order directing the defendant to make copies or photostat copies of certain books of account and records and to permit examination of original books of account and records for purposes of verification, the defendant appeals.

Reversed, and remanded for further proceedings in conformity with opinion.

Mr. Ellis B. Miller, of Washington, D. C., with whom Mr. Milton W. King, of Washington, D. C., was on the brief, for appellant. Mr. Bernard I. Nordlinger, of Washington, D. C., also entered an appearance for appellant.

Mr. Lester Wood, of Washington, D. C., for appellee.

Before EDGERTON, CLARK, and WILBUR K. MILLER, Associate Justices.

CLARK, Associate Justice.

This is a special appeal from an order of the District Court directing appellant to make copies or photostat copies of certain books of account and records, and to permit inspection and examination of the same books of account and records for purposes of verification. The order was issued pursuant to appellee's motion under Rule 34, Federal Rules of Civil Procedure,[1] for production of books of account and records filed in an action commenced by appellee for an accounting and money adjustment under an agreement between appellant and appellee.

Appellant is a California Corporation engaged in manufacturing machines with its principal offices located in San Francisco, California. From March 9, 1942 to March 15, 1945 appellant maintained a branch office in Washington, D. C., during the greater part of which period from March 9, 1942 to December 24, 1944, appellee, under an agreement between the parties, acted as branch manager. Appellee was to receive, in addition to a fixed compensation, a per cent share of the Branch's net profits to be distributed to him within a designated time. Not being satisfied with the statements rendered by appellant as to the business done by the Washington Branch and the profits due him under the agreement, appellee commenced the action for the accounting which resulted in the order appealed from.

Appellant offers three grounds of attack: (1) The order is burdensome, unreasonable, oppressive and costly. (2) The order is an abuse of discretion on the part of the trial judge. (3) The motion on which the order was based does not comply with Rule 34, Federal Rules of Civil Procedure.

Since we are of opinion that the order complained of is invalid because it imposes an unreasonable and oppressive burden on appellant and that the trial court exceeded the bounds of judicial discretion in making it, we do not here deal with the third ground alleged.

Rule 34 provides, in part, as follows: "Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; * * * The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

Appellant has at all times throughout the hearing below expressed a willingness to have its books and records made available to appellee or his representative. The books and records pertinent to appellee's motion are, however, part of the general books of account of appellant used in connection with its entire business and are located in San Francisco, California. The unreasonableness of compelling appellant to produce all of these books and records in Washington, D. C. was recognized by the trial court at the hearing below upon appellant's affidavit that it was impossible to segregate the records pertaining to the Washington Branch without materially and seriously interfering with the conduct of its general business operations.[2] The requirement that appellant copy or photostat "all entries contained in its books of account and records relating to all and any business done" by its Washington Branch Office seems to us to be equally unreasonable in view of the terms of Rule 34 which places the burden of inspecting and copying on the moving party. Rule 34 states that the court "may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, etc.", and "The order shall specify the time, place, and manner of making the inspection and taking the copies and

[1] 28 U.S.C.A. following Section 723c.

[2] See Bank of America Nat. Trust & Savings Ass'n. v. Douglas, 70 App.D.C. 221, 227, 105 F.2d 100, 106, 123 A.L.R. 1266; Sonken-Galamba Corp. v. Atchison, T. & S. F. R. Co., D.C., 30 F.Supp. 936.

photographs and may prescribe such terms and conditions as are just." We do not believe that the last clause "and may prescribe such terms and conditions as are just" operates to allow the court to cast on the producing party the burden and expense of making the copies or photostats. Under such circumstances as are found here the reasonable solution would seem to be to have the order requiring the production of the books and records specify appellant's office in San Francisco, California as the place of making the inspection and taking the copies.[3]

Reversed and remanded for further proceedings in accordance with this opinion.

LELAND v. KLIGMAN.

No. 9290.

United States Court of Appeals
District of Columbia.

Argued Jan. 21, 1947.

Decided Feb. 24, 1947.

Specific performance ⇐10(1)

Vendor could not be excused from performing contract for the sale of realty on the ground that another had a possible interest in the realty involved, where purchaser was willing to take whatever title vendor had.

Appeal from the District Court of the United States for the District of Columbia.

Action by Esther Kligman against Martha E. Leland for specific performance of a contract for the sale of real estate. Judgment for plaintiff, and defendant appeals.

Affirmed.

Mr. Lowell H. Ewing, of Washington, D. C., with whom Mr. Walter F. Woodward, of Washington, D. C., was on the brief, for appellant.

Mr. Dan Piver, of Washington, D. C., with whom Mr. Joseph Sitnick, of Washington, D. C., was on the brief, for appellee.

Before EDGERTON and CLARK and WILBUR K. MILLER, Associate Justices.

CLARK, Associate Justice.

This is an appeal from a District Court judgment for specific performance of a contract for the conveyance of real estate entered into between appellant, defendant below, as seller and appellee, plaintiff below, as purchaser. The judgment was entered pursuant to plaintiff's motion for judgment on the pleadings. Appellant, while technically challenging this judgment for purposes of this appeal, does not seriously do so, but contends that the court erred in overruling her motion to vacate the judgment for specific performance presented on the ground that newly discovered evidence made it impossible for her to perform.

It is clear that the court was correct in entering the judgment on the pleadings since appellant, in her answer to the complaint for specific performance, admitted the ownership of the real estate, the contract for sale and her willingness to perform, but asked only for a reasonable time in which to perform because of interfering circumstances.

The new evidence on which the motion to vacate was founded consisted of a discovery by the title company handling the transaction that appellant had derived her title from Nelson Sylvester, to whom the property had been conveyed by appellant's brother, Theodore W. Leland, who had title only in capacity as Trustee under the will of appellant's mother, Annie Leland, which will read: "In trust to permit the said land and premises to be used and occupied as a family home by the said Martha E. Leland, Paul Leland and himself, until otherwise hereinafter directed. And in further trust, when my said family shall find it inexpedient or undesirable to longer use said land and premises as their home and all three of them shall so declare in writ-

[3] Cf. Cartwright v. Greenpoint Basin & Const. Co., D.C., 2 F.R.D. 338.

California Practice Guide

CIVIL PROCEDURE BEFORE TRIAL

Chapter 8, Discovery

JUDGE ROBERT I. WEIL (Ret.)
Los Angeles Superior Court

JUDGE IRA A. BROWN, JR. (Ret.)
San Francisco Superior Court

SUPERVISING EDITOR
Justice William F. Rylaarsdam, Calif. Court of Appeal, 4th App. Dist.

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Justice John Zebrowski (Ret.), Calif. Court of Appeal

2000

CONTINUING LEGAL EDUCATION TRG™ PROGRAMS AND PUBLICATIONS

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(a) [8:1448] **Burden of production as determinative factor:** Absent agreement, courts usually look to whatever burden is involved in producing the evidence. I.e., the more voluminous the records, the more likely inspection will be ordered where the records are usually kept.

(b) [8:1449] **Conditions may be imposed:** Where necessary, the court may make whatever orders are required to assure the evidence is not harmed or changed during the course of inspection (particularly important where tangible evidence is involved). [See CCP §2031(e), ¶*8:1452*]

(c) [8:1450] **Date for inspection vs. date response due:** The date designated in the demand for inspection must be *at least 30 days* after the demand is served (5 days in unlawful detainer actions). [CCP §2031(c)(2)] (Extended for service by mail, overnight delivery or fax per CCP §1013, ¶*9:87 ff.*; see CCP §2019(e).)

The party on whom the demand is served must also *respond* to the demand, stating whether it will comply with the demand for inspection on the date demanded. That response is due *within 30 days* after the demand is served (even if the date for production is later). [CCP §2031(h); *see* ¶*8:1459*]

[8:1450.1] ***PRACTICE POINTER:*** When drafting CCP §2031 demands, consider designating an inspection date at least 60 days later (unless some urgency or discovery order requires earlier inspection). This provides opportunity to review the responding party's response (30 days later), to attempt to resolve any objections, and to have a motion to compel heard before the inspection date.

e. [8:1451] **Service of demand:** Copies of the CCP §2031 demand must be served on the party to whom it is directed and on all other parties who have appeared in the action. [CCP §2031(d)]

5. [8:1452] **Protective Orders:** Instead of responding to the demand, the party to whom it is directed may seek a protective order (e.g., against overbreadth). So may anyone else affected by the demand (e.g., a third person whose privacy would be infringed by disclosure of the documents). [CCP §2031(f)]

CALIFORNIA CIVIL DISCOVERY

VOLUME 1

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federal cases that have considered the propriety of conducting informal interviews during a discovery inspection have disagreed.[98]

The *Volkswagenwerk* case[99] is the only reported California opinion on the question. There the trial court had allowed counsel for the plaintiff in a products liability case not only to enter the defendant's plant but also to interview its employees. It even directed the defendant to tell its employees to submit to the interviews. The appellate court, however, ruled that discovery under former Section 2031 did not extend to compelled informal interviews.[1]

§ 6.10 Situs of Production

Using long-standing statutory language,[2] Section 2031 simply requires that the demanding party "[s]pecify a reasonable place for making the inspection, copying, and performing any related activity."[3]

Normal Practice: The dearth of case law on the topic suggests that the selection of an appropriate place for the production and copying of documents usually presents no problem. Doubtless, the vast majority of document productions occurs at the office of the attorney for either the demanding or the responding party. However, the records may be voluminous or needed in daily business operations. In such cases, the responding party's office is the better place for the inspection.[4] Where the responding party needs the records for its daily operations,

98. Compare New York State Ass'n for Retarded Children v Carey (1983, CA2 NY) 706 F2d 956, 960-961 [order permitting interviewing of inmates, staff members, and employees of state mental institution upheld] and Morales v Turman (1972, ED Tex) 59 FRD 157, 159 [interviews with inmates and staff of youth correctional facility permitted] with Belcher v Bassett Furniture Industries, Inc. (1978, CA4 Va) 588 F2d 904 [order permitting interviews with supervisors and employees of factory assembly line set aside as "improvident"].

99. Volkswagenwerk A.G. v Superior Court (1981) 123 Cal App 3d 840, 176 Cal Rptr 874.

1. 123 Cal App 3d at 849, 176 Cal Rptr at 879.

2. Former CCP § 2031, Appendix B, contains substantially similar language. The Discovery Commission proposed giving the responding party the right to choose either its attorney's office or the demanded item's situs as the place for discovery. See Proposed California Civil Discovery Act of 1986, § 2031(c) & (f)(1), Appendix C.

3. CCP § 2031(c)(4).

4. See, e.g., Caruso v Coleman Co. (1994, ED Pa) 157 FRD 344, 349-350 [defendant allowed to make documents available to plaintiff at place convenient to defendant]; Ber-

an inspection of the original may never occur. A photocopy of the records will usually satisfy counsel for the demanding party.[5]

Out-of-Forum Items: Sometimes the item demanded for inspection is located far from the forum. Controversies sometimes arise over whether the responding party must transport the item to the forum, or whether the demanding party must journey to its location.

—Within the United States: In deciding which of these two places—the forum or the situs of the item—is the "reasonable" one for a discovery inspection, the courts are more ready to give the choice to defendants, whether they are a demanding or a responding party. For example, in two federal cases litigated in the eastern United States,[6] the plaintiffs sought voluminous records located in California. Each trial judge refused to order the defendants to bring the records to the forum. Although neither mentioned the matter, it seems more than a coincidence that the party seeking the production was a plaintiff.[7] Similarly when a defendant insists on inspecting an item at the forum, the out-of-state plaintiff must bring it there.[8]

—Items Abroad: Where records are located in a foreign country, however, American courts are inclined to order their production at the forum.[9] This occurs even where the records are those of a foreign defendant.[10]

Surrender of Item for Testing: The place of production will often

cow v Kidder, Peabody & Co. (1965, SD NY) 39 FRD 357; Harris v Sunset Oil Co. (1941, WD Wash) 2 FRD 93.

Compare Krypton Broadcasting of Jacksonville, Inc. v MGM-Pathe Communications Co. (1993, Fla App) 629 So2d 852, 855-856 [if demanding party wishes records to be brought to its offices, absent unusual circumstances, it must pay cost of transporting the records].

5. See Financial Holding Corp. v Garnac Grain Co. (1991, WD Mo) 1991 WL 221129, 3 [unless party expressly requests production of document originals, production of copies is sufficient].

6. Lundberg v Welles (1950, SD NY) 93 F Supp 359; Niagara Duplicator Co. v Shackleford (1947, CADC) 160 F2d 25.

7. See also Mid-America Facilities, Inc. v Argonaut Ins. Co. (1978, ED Wis) 78 FRD 497, 499.

8. Monks v Hurley (1939, D Mass) 28 F Supp 600.

9. See, e.g., La Chemise Lacoste v General Mills, Inc. (1971, D Del) 53 FRD 596, 604, affd (CA3 Del) 487 F2d 312 [plaintiff ordered to bring records from France, especially since no showing as to their bulk or cost of shipping them was made by the responding party]; Bernstein v N.V. Nederlandsche-Amerikaansche Stoomvart Maatschappij (1953, SD NY) 15 FRD 32, 35 [third-party plaintiff required to bring records from Holland for inspection by third-party defendant].

10. See Compagnie des Bauxites de Guinea v Insurance Co. of North America (1981, CA3 Pa) 651 F2d 877, 883-884; Arthur Andersen & Co. v Finesilver (1976, CA10

become a substantial issue where the party seeking discovery wants to test an item.[11] To conduct such testing, the demanding party, or its expert, may need to obtain physical possession of the item involved. The former statute spoke only of "copying or photographing"[12] a document or object produced for inspection. Other courts, interpreting similar language in their discovery provisions, have disagreed over their authority to order the responding party to surrender the item produced. On the one hand, some courts have concluded:

> "Produce" is defined [by the dictionary] as "to bring forward; lead forth; offer to view or notice; exhibit; show". . . . It is not a synonym for "turn over" or "give." The rule contemplates that the possession, custody and control shall remain in the party producing, and the moving party shall have the opportunity to inspect, copy or photograph. The rule does not contemplate that the moving party shall receive the possession, custody or control of the thing produced.[13]

On the other hand, one state trial court directed a products liability plaintiff to deliver the allegedly defective product to the defendant's expert for testing.[14]

—Within California: Current Section 2031 expands the activities the demanding party may carry out once an item is produced. Unlike its predecessor, it explicitly permits the demanding party to test or sample the item.[15] To facilitate such testing or sampling, the trial court can order the responding party to transfer possession of the item for testing within California. Where it orders such a transfer, the court should impose conditions to safeguard the item and to restrict the length of time it is surrendered. If the demanding party loses or destroys the

Colo) 546 F2d 338; Securities & Exchange Comm. v Minas de Artemisa, S.A. (1945, CA9 Ariz) 150 F2d 215.

For a discussion of the extent to which the Hague Convention or the concept of international comity affects the court's discretion to order a foreign party to bring its records to the forum, see § 4.3.

11. For a discussion of the extent to which an item produced for inspection may be tested, see § 6.8.

12. Former CCP § 2031(a), Appendix B.

13. State ex rel. Emge v Corcoran (1971, Mo App) 468 SW2d 724, 725-726 [a party may not be compelled to deliver its books and records to another party].

14. Nasoff v Hills Supermarket, Inc. (1963, Misc) 243 NYS2d 64.

For a discussion of the extent to which tests may conducted on an item produced for inspection, see § 6.8.

15. CCP § 2031(a)(2).

item, the court could mitigate any prejudice to the responding party by an "evidence" or an "issue" sanction.[16]

—Outside California: Where the demanding party seeks to test the item outside California, the court should be extremely cautious before ordering the responding party to surrender it. The few courts in other states that have considered the matter have found it an abuse of discretion to require a party to surrender an item for shipment outside the trial court's subpoena power, whether to another state[17] or to another nation.[18]

§ 6.11 Protective Orders

Role of Protective Orders: The recipient of an inspection demand may challenge it on the ground that it is not in the required form,[19] or that the items sought are irrelevant[20] or privileged[21] or protected work product.[22] The appropriate way to raise these issues is to include an "objection"[23] in the written "response" to the demand.[24] A protective order is best reserved for resisting inspection demands that are in proper form and, at least arguably, within the scope of allowable discovery, yet nonetheless warrant intervention by the trial court. Section 2031 authorizes the trial court to override or adjust a facially proper inspection demand where its operation in a particular case would cause "unwarranted annoyance, embarrassment, or oppression, or undue

16. Compare Puritan Insurance Co. v Superior Court (1985) 171 Cal App 3d 877, 217 Cal Rptr 602.

For a discussion of "evidence" and "issue" sanctions, see § 15.5.

17. See, e.g., State ex rel. State Farm Mut. Auto. Ins. Co. v Rickhoff (1974, Mo App) 509 SW2d 485 [shipment of carburetor from Missouri to defendant's plant in Michigan refused].

18. Wilson v Naifeh (1975, Okla) 539 P2d 390 [shipment of bicycle from Oklahoma to defendant's plant in Mexico refused]; Equitable Life Assur. Soc. v MacMahon (1949, Mich) 37 NW2d 769 [shipment of allegedly forged change-of-beneficiary form to a questioned document expert in Canada refused].

19. For a discussion of the format for an inspection demand, see § 6.3.

20. For coverage of the criterion for relevance in a discovery context, see Chapter 11.

21. For coverage of the concept of privilege in the discovery context, see Chapter 12.

22. For coverage of the work-product protection, see Chapter 13.

23. CCP § 2031(f)(3).

24. CCP § 2031(f).

For a discussion of the "response" to an inspection demand, see § 6.12.

LIST OF DOCUMENTS SERVED

1. **NOTICE OF HEARING ON DEFENDANT MANUFACTURERS' *EX PARTE* MOTION TO COMPEL PLAINTIFFS TO DISCLOSE (1) ACCIDENTAL DISCHARGE AND SUICIDE INCIDENTS AND (2) PLAINTIFFS' APPROVAL AND USE OF SPECIFIC FIREARMS;**

2. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF *EX PARTE* MOTION FOR ORDER COMPELLING PLAINTIFFS TO DISCLOSE (1) ACCIDENTAL DISCHARGE AND SUICIDE INCIDENTS AND (2) PLAINTIFFS' APPROVAL AND USE OF SPECIFIC FIREARMS;**

3. **DECLARATION OF LAWRENCE J. KOUNS IN SUPPORT OF *EX PARTE* MOTION TO COMPEL PLAINTIFFS TO DISCLOSE (1) ACCIDENTAL DISCHARGE AND SUICIDE INCIDENTS AND (2) PLAINTIFFS' APPROVAL AND USE OF SPECIFIC FIREARMS;**

4. **NOTICE OF LODGMENT IN SUPPORT OF *EX PARTE* MOTION FOR ORDER COMPELLING PLAINTIFFS TO DISCLOSE (1) ACCIDENTAL DISCHARGE AND SUICIDE INCIDENTS AND (2) PLAINTIFFS' APPROVAL AND USE OF SPECIFIC FIREARMS; and**

5. **[PROPOSED] ORDER GRANTING DEFENDANT MANUFACTURERS' MOTION TO COMPEL PLAINTIFFS TO DISCLOSE (1) ACCIDENTAL DISCHARGE AND SUICIDE INCIDENTS AND (2) PLAINTIFFS' APPROVAL AND USE OF SPECIFIC FIREARMS.**