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13
14 SUPERIOR COURT OF CALIFORNIA
15 COUNTY OF SAN DIEGO

16 Coordination Proceeding Special Title (Rule 1550(b))) JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4095
17 FIREARM CASE) San Francisco Superior Court No. 303753
18 Including actions:) Los Angeles Superior Court No. BC210894
19 <i>People, et al. v. Arcadia Machine & Tool, Inc., et al.</i>) Los Angeles Superior Court No. BC214794
20 <i>People, et al. v. Arcadia Machine & Tool, Inc., et al.</i>) PLAINTIFFS' OPPOSITION TO THE TRADE ASSOCIATIONS' <i>EX PARTE</i> APPLICATION FOR AN ORDER IMPOSING ISSUE AND EVIDENCE SANCTIONS AGAINST PLAINTIFFS
21 <i>People, et al. v. Arcadia Machine & Tool, Inc., et al.</i>) DATE: July 12, 2002
22 <i>People, et al. v. Arcadia Machine & Tool, Inc., et al.</i>) TIME: 8:30 a.m.
23 _____) DEPT: 65
) Hon. Vincent P. DiFiglia

6/28/02

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21	<i>Civil Procedure Before Trial</i> , §8:1151.1 (2001)	9

1 **I. INTRODUCTION**

2 There are fundamental differences in the parties' interpretation of the Court's May 21, 2002
3 Order ("Order") and its effect. One difference concerns the right to provide supplemental
4 information after plaintiffs supplemented their responses pursuant to the Court's Order. According
5 to the trade associations, once plaintiffs supplemented their responses pursuant to the Court's Order,
6 plaintiffs were barred from further supplementing their responses. Plaintiffs do not believe that the
7 Court's Order prevents plaintiffs from providing further supplemental responses. For example,
8 liaison counsel for plaintiffs received documents on June 5, 2002, which were responsive to the trade
9 associations' requests. As a result, after plaintiffs Bates-stamped the documents, plaintiffs produced
10 the documents to the trade associations on June 13, 2002, and filed a supplemental response to
11 incorporate these documents within their responses. The trade associations claim that by providing
12 such supplemental information after the Court's Order, plaintiffs have abused the discovery process
13 and that the Court should take the rare and severe step of imposing evidence and issue sanctions
14 against plaintiffs. The trade associations take this position even though they stated to the Court: "*If*
15 *they get additional information in the future, let them supplement. I have no problem with that.*"
16 Declaration of Ex Kano S. Sams II in Support of Plaintiffs' Opposition to the Trade Associations'
17 *Ex Parte* Application ("Sams Decl."), Ex. A at 496.

18 The trade associations also contend that the Court found every single response by plaintiffs
19 to be deficient and every single objection they raised to a request to be improper. Accordingly, the
20 trade associations claim that plaintiffs were required to withdraw all of their objections to the trade
21 associations' discovery requests. Plaintiffs contend that, as stated during the hearing, the Court dealt
22 with the trade associations' discovery broadly and did not address the responses and objections for
23 each specific discovery request. The Court requested plaintiffs to supplement those responses which
24 incorporated previous responses and to state that plaintiffs had provided then-known information:
25 "THE COURT: I think they have given that information, haven't they, except in those instances
26 where they have incorporated?" Sams Decl., Ex. A at 500. Plaintiffs maintain that the trade
27 associations have unreasonably construed the Court's Order to mean that the Court found all of
28 plaintiffs' responses deficient and all of plaintiffs' objections improper, even though the Court did

1 not address the trade associations' requests specifically. As a result, the trade associations claim that
2 plaintiffs "flagrantly disobeyed the Court's Order" and now seek evidence and issue sanctions against
3 plaintiffs.

4 **II. ARGUMENT**

5 **A. The Trade Associations Failed to Meet and Confer in Good Faith with** 6 **Plaintiffs**

7 Section 2023 of the California Code of Civil Procedure provides that "[m]isuses of the
8 discovery process include, but are not limited to, the following: ... [f]ailing to confer in person, by
9 telephone, or by letter with an opposing party or attorney *in a reasonable and good faith attempt*
10 *to resolve informally any dispute concerning discovery*" (emphasis added). Courts have
11 declared that "[i]n a larger, more complex discovery context, a greater effort at informal resolution
12 may be warranted." *Obregon v. Superior Court*, 67 Cal. App. 4th 424, 431 (1998).

13 The trade associations have misused the discovery process by failing to confer with plaintiffs
14 in a reasonable and good faith attempt to resolve these discovery disputes. On May 31, 2002,
15 counsel for plaintiffs conferred by telephone with counsel for the trade associations. During the
16 telephone call and in a subsequent letter, counsel for plaintiffs requested counsel for the trade
17 associations for authority to support several of the positions they asserted. Sams Decl., Ex. B. *The*
18 *trade associations failed to respond to plaintiffs' June 6, 2002 letter before filing their motion for*
19 *sanctions*. Sams Decl., Ex. C. Thus, the trade associations have failed to meet-and-confer in good
20 faith with plaintiffs. See *Volkswagenwerk Aktiengesellschaft v. Superior Court*, 122 Cal. App. 3d
21 326, 333 (1981) ("It is clear from the facts before the trial court on the motion to compel that
22 [defendant] made no reasonable effort to settle the disputed issues before moving to compel.")

23 Moreover, the trade associations' motion contains issues which they have never raised with
24 plaintiffs during meet-and-confer discussions. For instance, the trade associations claim that
25 plaintiffs used exhibits during depositions on June 18-19 that defendants had not seen. Defendant
26 Trade Associations' *Ex Parte* Application for Order Imposing Issue and Evidence Sanctions Against
27 Plaintiffs ("Motion") at 3. The trade associations never met-and-conferred with plaintiffs regarding
28 this issue before filing their motion to compel. Sams Decl, ¶2. Rather than attempt to resolve these

1 matters informally, the trade associations filed their motion without meeting-and-conferring in good
2 faith with plaintiffs. *Townsend v. Superior Court*, 61 Cal. App. 4th 1431, 1439 (1998) (reversing
3 a trial court's order imposing sanctions where the moving party failed to meet-and-confer in good
4 faith).¹

5 **B. Plaintiffs Have Complied with the Court's Order**

6 **1. Plaintiffs Produced a Privilege Log in Response to the Court's Order**

7 On May 10, 2002, plaintiffs served a privilege log to the trade associations. The trade
8 associations do not dispute that plaintiffs served them with a privilege log. Motion at 5.

9 **2. Plaintiffs Produced All of Plaintiffs' Non-Privileged Documents that Are Responsive to the Discovery Requests**

10 Also on May 10, 2002, plaintiffs filed a pleading indicating that they had produced non-
11 privileged documents that are responsive to the discovery requests. There are three issues which the
12 trade associations raise with respect to plaintiffs' document production: (1) on June 13, 2002,
13 plaintiffs produced later-acquired documents and supplemented their responses accordingly; (2)
14 plaintiffs produced documents on May 3, 2002 in response to requests by manufacturing defendants
15 and the trade association defendants without segregating the documents for each defendant; and (3)
16 plaintiffs have not reproduced documents produced to plaintiffs by the defendants.

17 **a. Plaintiffs' June 13, 2000 Production**

18 First, the trade associations complain that plaintiffs produced additional documents to them
19 on June 13, 2002. As counsel for plaintiffs indicated to the trade associations, liaison counsel
20 received these documents on June 5, 2002. Sams Decl., Ex. D. As soon as counsel for plaintiffs
21 Bates stamped the documents, plaintiffs produced them to the trade associations and supplemented
22 their responses to incorporate these documents. Sams Decl., Ex. E.

23 A major thrust of the trade associations' motion is that plaintiffs disobeyed the Court's Order
24 by supplementing their responses after plaintiffs' initial supplementation on May 10, 2002.
25 Importantly, the trade associations' position in their motion contradicts their position taken in Court:
26

27
28 ¹ Despite the trade associations' failure to meet-and-confer with plaintiffs regarding this issue, plaintiffs have sent the documents in question. PLTF 2000001-2001520.

1 *"If they get additional information in the future, let them supplement. I have no problem with*
2 *that."* Sams Decl., Ex. A at 496. In effect, the trade associations assert that the Court set May 10,
3 2002 as the discovery cut-off date for the trade associations and that plaintiffs were forever barred
4 from producing later-acquired information or further supplementing their responses. Plaintiffs,
5 however, do not believe that the Court intended May 10, 2002 to serve as the discovery cut-off date
6 for the trade associations. Accordingly, plaintiffs maintain that they were entitled to produce later-
7 acquired documents and to supplement their responses after May 10, 2002. C.C.P. §2030(m)
8 ("Without leave of court, a party may serve an amended answer to any interrogatory that contains
9 information subsequently discovered, inadvertently omitted, or mistakenly stated in the initial
10 interrogatory.").

11 **b. Plaintiffs' May 3, 2002 Production**

12 On May 3, 2002, plaintiffs produced several documents to the manufacturing defendants
13 which were responsive to the requests which they propounded. After the hearing on the trade
14 associations' previous motion, plaintiffs reviewed the documents which they had already produced
15 to defendants and discovered that the May 3 production included documents that were responsive
16 to both the manufacturing defendants' requests and the trade associations' requests. As a result, on
17 May 10, plaintiffs referred to the Bates range of their May 3 production to supplement plaintiffs'
18 responses to the trade associations' requests.

19 The trade associations initially complained that plaintiffs had produced a set of the
20 documents only to liaison counsel for the manufacturing defendants and not to counsel for the trade
21 associations. Although the parties in the case have typically produced only one set of documents to
22 the other side, plaintiffs, at their own expense, copied the May 3 production and produced a second
23 set of the documents to the trade associations on June 7, 2002.

24 The trade associations then complained that plaintiffs had not segregated the documents by
25 defendant and had referred to the Bates numbers for the entire production rather than isolate the
26 Bates numbers for documents relating to the trade associations. During the meet-and-confer
27 discussion, plaintiffs informed the trade associations that the document production in this case has
28 not occurred in the manner they requested.

1 For instance, plaintiffs have produced thousands of incident reports, each of which refers to
2 a firearm manufactured by a different defendant. Plaintiffs have produced such reports to defendants
3 collectively and plaintiffs are unaware of any authority which would require them to segregate each
4 incident report by defendant and to produce them individually to each of the manufacturing
5 defendants. Moreover, to plaintiffs' knowledge, no other defendant has complained that plaintiffs
6 have included its incident reports in the same box as other defendant's incident reports without
7 segregating them by defendant. Since document production has not occurred in this fashion,
8 plaintiffs requested the trade associations provide authority for their position so that plaintiffs could
9 consider their viewpoint. Sams Decl., Ex. B. The trade associations never responded to plaintiffs'
10 request before filing their motion. Sams Decl., Ex. C.

11 **c. Documents Produced to Plaintiffs by the Defendants**

12 Contrary to the trade associations' claims, plaintiffs have produced all of their documents to
13 defendants. Defendants therefore have copies of all documents with Bates-stamps associated with
14 the plaintiffs.

15 The only documents which remain at issue are documents produced to plaintiffs by the
16 defendants. Indeed, most of the documents which plaintiffs cite in response to the trade associations'
17 requests are documents which the trade associations produced to plaintiffs. Plaintiffs believe that
18 the Court did not intend plaintiffs to produce to the trade associations the same documents which
19 the trade associations produced to plaintiffs. If the Court did intend for plaintiffs to produce such
20 documents, plaintiffs respectfully request clarification on this issue. In the same vein, plaintiffs
21 believe that the Court did not intend plaintiffs to produce documents which the trade associations'
22 co-defendants produced to plaintiffs since the trade associations have access to such documents.
23 C.C.P. §2031(f)(1). If the Court did intend such a production, plaintiffs respectfully request
24 clarification on this issue as well.

25 **3. Plaintiffs Provided a Supplemental Response to State that**
26 **Responsive, Non-Privileged Documents Had Been Produced**

27 As the trade associations concede, on May 10, 2002, plaintiffs filed a supplemental response
28 to indicate that responsive-non privileged documents had been produced. Motion at 5.

1 4. **Plaintiffs Provided Supplemental Responses to the Trade**
2 **Associations' Written Interrogatories, Including Form**
3 **Interrogatory No. 17.1**

4 After the hearing on May 3, 2002, the trade associations prepared a proposed order which
5 included language regarding the trade associations' Form Interrogatory 17.1 to which plaintiffs
6 objected. After plaintiffs received the Court's Order dated May 21, plaintiffs prepared a
7 supplemental response to Form Interrogatory 17.1, stating that they had no additional names or facts
8 to add to their responses.²

9 The trade associations claim that plaintiffs have violated the Court's Order by failing to
10 include more names and facts within their responses, even though plaintiffs have no additional
11 names or facts to provide: "Plaintiffs did not supplement facts or witnesses in response to the
12 Associations' Form Interrogatory No. 17.1" Motion at 6. The trade associations have not
13 explained how plaintiffs are supposed to provide more names and facts when they have no additional
14 names or facts to provide.

15 C. **The Trade Associations Are Not Entitled to Evidence or Issue**
16 **Sanctions**

17 1. **The Trade Associations Have Not Filed a Proper Separate**
18 **Statement**

19 Rule 335 of the California Rules of Court provides that "motions that require a separate
20 statement include ... a motion for issue or evidentiary sanctions." C.R.C. 335(a). Rule 335 further
21 provides:

22 A separate statement is a separate document filed and served with the
23 discovery motion that sets forth all the information necessary to understand each
24 discovery request and all the responses to it that are at issue. *The separate statement*
25 *shall be full and complete so that no person is required to review any other*
26 *document in order to determine the full request and the full response.* Material
27 shall not be incorporated into the separate statement by reference.

28 C.R.C. 335(c) (emphasis added). Rule 335 requires parties to include, among other things, "the text
of the request, interrogatory, question, or inspection demand;" "the text of each response, answer,

² After plaintiffs re-reviewed the trade associations' documents to prepare for the deposition of Robert Delfay, plaintiffs supplemented their response to Form Interrogatory 17.1 after discovering additional documents which supported plaintiffs' claims. When plaintiffs realized that they had not included the text of the requests which related to their response for Form Interrogatory 17.1, plaintiffs amended their responses on their own accord pursuant to C.C.P. §2030(m) to incorporate the text of the requests.

1 or objection, and any further responses or answers;" "a statement of the factual and legal reasons for
2 compelling further responses, answers, or production as to each matter in dispute." C.R.C. 335(c).
3 Moreover, this Court ordered that "the parties are directed to submit a separate statement as required
4 by Rule 335 on all discovery motions unless this Court orders otherwise." Sams Decl., Ex. F.

5 The trade associations have not complied with Rule 335. The trade associations' separate
6 statement does not include the trade associations' requests nor does it include plaintiffs' full and
7 complete responses. Additionally, the trade associations did not provide reasons for their motion
8 as to each matter in dispute. The trade associations did not include any of plaintiffs' original
9 responses and did not include either the requests or the responses for the discovery related to their
10 issue sanctions. For example, the trade associations included some of the requests for their motion
11 in footnotes in their memorandum, not within their separate statement. Motion at 15-20.
12 Additionally, within the footnotes in their motion, the trade associations did not include plaintiffs'
13 full responses to such requests; instead they selectively included only portions of plaintiffs'
14 responses. *Id.* The trade associations are not entitled to seek harsh issue and evidence sanctions
15 based upon plaintiffs' responses and then purposely omit entire sections of plaintiffs' responses or
16 not include them at all. Since the trade associations have not complied with Rule 335 and this
17 Court's Order regarding separate statements, their motion must be denied.

18 **2. Plaintiffs Acted with Substantial Justification**

19 Regardless of the Court's ruling on this motion, the Court should find that plaintiffs have
20 acted with substantial justification. As demonstrated below, for example, the trade associations are
21 seeking to impose sanctions based upon issues which were rejected or not addressed by the Court.
22 Additionally, although defendants claim that plaintiffs had no right to supplement their responses
23 after the supplementation pursuant to the Court's Order, California law holds otherwise. C.C.P.
24 §2030(m). For these reasons and the others identified herein, the Court should find that plaintiffs
25 acted with substantial justification.
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1 **D. The Trade Associations Are Raising Issues Rejected by the Court to**
2 **Claim that Plaintiffs Have Not Complied**

3 The trade associations claim in general terms that plaintiffs have failed to comply with the
4 Court's Order. For many of the issues which the trade associations contend are violations of the
5 Court's Order, however, the Court did not agree with the trade associations. For instance, the trade
6 associations assert the following:

7 In fact, Plaintiffs flagrantly disobeyed the Court's Order. Plaintiffs made not one iota
8 of a substantive change to their evasive cut-and-paste responses to interrogatories.

9 Motion at 2. The Court, however, did not conclude that plaintiffs' responses were deficient on this
10 basis:

11 As far as the cut and pasted is concerned, if he indicates the same answer, same
12 people to Interrogatory 68 as to Interrogatory 92, but that 92 is separately answered,
13 that is sufficient.

14 Sams Decl., Ex. A at 499. Thus, the trade associations claim that plaintiffs have disobeyed the
15 Court's Order with respect to responses they purport are "cut and pasted," but the Court specifically
16 stated that as long as plaintiffs separately answered each interrogatory, the responses were sufficient.

17 **E. The Trade Associations Are Raising Issues Not Covered by the Court**
18 **to Claim that Plaintiffs Have Not Complied**

19 During the hearing on May 3, 2002, counsel for the trade associations requested the Court
20 to view their motion in broad terms rather than request-by-request:

21 THE COURT: Counsel, the first question is: can we paint with broad strokes
22 with this, or do we really have to look at each one of those,
23 because - -

24 MR. MAYBERRY: Broad strokes, your honor,

25 Sams Decl., Ex. A at 487. Accordingly, the Court did not address the trade associations' requests
26 and plaintiffs' responses specifically and did not make rulings regarding specific requests. The trade
27 associations nevertheless claim that the Court specifically found each of plaintiffs' responses to be
28 deficient and each of plaintiffs' objections to be improper.

1 **1. The Trade Associations' Requests Relating to Collusion with**
2 **Manufacturers**

3 First, the trade associations have not included "the text of the request," "the text of each
4 response" or "a statement of the factual and legal reasons for compelling further responses" within
5 their separate statement as required by California Rule of Court 335(c) and by this Court's previous
6 Order. Sams Decl., Ex. F. Failure to comply with Rule 335 constitutes grounds for denial of the
7 motion. Robert I. Weil & Ira A. Brown, Jr., *Civil Procedure Before Trial*, §8:1151.1, p. 8F-57
8 (2001).

9 Second, plaintiffs do not dispute that the information provided with respect to collusion is
10 the information of which plaintiffs were aware at the time of the response. Plaintiffs contend,
11 however, that they are entitled to amend the response based upon any subsequently discovered or
12 inadvertently omitted information pursuant to C.C.P. §2030(m).

13 **2. The Trade Associations' Requests Regarding Deceptive or**
14 **Misleading Communications**

15 The trade associations claim that plaintiffs violated the Court's Order by failing to abandon
16 their objections to requests for admission numbers 39 to 47 regarding the identity of persons who
17 have been misled or deceived by defendants' actions.

18 Again, the trade associations failed to include any of these requests within their separate
19 statement as required by Rule 335. Moreover, this Court did not address each of the trade
20 associations' discovery requests and did not find that plaintiffs' objections to requests for admission
21 39 to 47 to be improper. Sams Decl., Ex. A. Thus, the trade associations are again asserting that the
22 Court found all of plaintiffs' responses deficient and all of plaintiffs' objections improper when the
23 Court did not do so.

24 While the trade associations claim – without any authority at all – that plaintiffs' objections
25 are improper, plaintiffs, on the other hand, provided support for their objections. Under the
26 California Business and Profession Code, plaintiffs are not required to identify individuals who were
27 actually deceived to establish a violation. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1266-
28 67 (1992); *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 211
 (1983). Moreover, plaintiffs objected to providing the personal information of individuals on the

1 grounds that providing such information invades their right to privacy. As one court noted, "the first
2 question is whether the private information sought to be discovered is directly relevant to the issues
3 of the instant litigation. It is not enough the information may lead to relevant evidence." *Binder v.*
4 *Superior Court*, 196 Cal. App. 3d 893, 901 (1987) (citation omitted). Since such information is not
5 directly relevant since plaintiffs do not need to establish actual reliance, plaintiffs raised valid
6 objections to these requests.

7 **3. The Trade Associations' Requests Relating to Plaintiffs'**
8 **Nuisance Cause of Action**

9 The trade associations claim that "[p]laintiffs' responses to interrogatories seeking the basis
10 for their allegations that the Trade Associations created a public nuisance in the State of California
11 frequently cite only what the Plaintiffs believe the Associations did not do." Motion at 16. On this
12 purported basis, the trade associations claim that "[p]laintiffs should be bound to litigate those claims
13 solely on the basis of asserted inaction." *Id.*

14 First, the trade associations once again have not included the requests and responses in their
15 separate statement for this issue. Second, the trade associations' claim is simply not true. Indeed,
16 in the very next paragraph, the trade associations concede that plaintiffs base their claims against the
17 trade associations on both omissions and affirmative acts, including the trade associations' lobbying
18 activities. Motion at 17. Thus, it is plainly incorrect that plaintiffs' claims are based only upon "what
19 the Plaintiffs believe the Associations did not do."³

20 The trade associations do not provide any support for their assertion that plaintiffs should be
21 precluded from presenting certain evidence based upon plaintiffs' responses to these interrogatories.
22 Apparently, the trade associations believe that since they disagree with plaintiffs' responses, plaintiffs
23 should be sanctioned. For example, plaintiffs responded to several of the trade associations'
24 responses by stating that their participation in Boy Scout and YMCA programs – as well as their
25 encouragement to the firearms industry to "use the schools" to recruit new members – has created
26 a public nuisance by encouraging minors to use firearms. The trade association complain that

27 ³ The trade associations claim that plaintiffs responded to requests regarding lobbying without
28 including factual information. Motion at 17. This statement is also untrue. Again, the trade
associations did not include the text of the request or of plaintiffs' responses within their separate
statement to provide such information to the Court.

1 plaintiffs' responses are "outrageous" and "incredible." The trade associations cannot seek extreme
2 sanctions of evidence and issue preclusion simply because they claim that plaintiffs' responses are
3 "outrageous" and "incredible." *Holguin v. Superior Court*, 22 Cal. App. 3d 812, 821-22 (1972)
4 (holding that a party is not entitled to seek a motion to compel for different answers just because the
5 party believes the answers are not true).

6 **4. The Trade Associations' Requests Relating to Violations of the**
7 **Business & Professions Code**

8 The trade associations requested information from plaintiffs regarding unlawful conduct in
9 which the trade associations have engaged. For example, in the request used by the trade
10 associations as an example, the trade associations requested that if plaintiffs contended that lobbying
11 on legislation was unlawful, to state all facts which supported their beliefs. Plaintiffs responded by
12 stating that they were unaware of any law prohibiting lobbying on legislation⁴.

13 Through their motion, the trade associations claim that even though they failed to define
14 "unlawful" within their requests, they forgot to include "unfair," "deceptive," "fraudulent" and other
15 terms and that plaintiffs should have known that the trade associations meant to include these other
16 terms in their requests. During the May 31 meet-and-confer discussion, plaintiffs stated that they
17 are willing to respond to further requests in which the trade associations request information related
18 to "unfair," "deceptive," "fraudulent" or any other conduct they desire, but that the requests the trade
19 associations posed dealt with "unlawful" conduct and, accordingly, plaintiffs' response dealt with
20 unlawful conduct. Since plaintiffs adequately responded to these requests, the trade associations
21 have not demonstrated that plaintiffs' responses are deficient, much less that severe evidence and
22 issue sanctions are warranted.
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28 ⁴ Again, the trade associations failed to comply with Rule 335 and have not included the text
of the requests and responses for these requests in their separate statement.

1 **III. CONCLUSION**

2 For the foregoing reasons, the trade associations' motion should be denied.

3 DATED: June 28, 2002

Respectfully submitted,

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