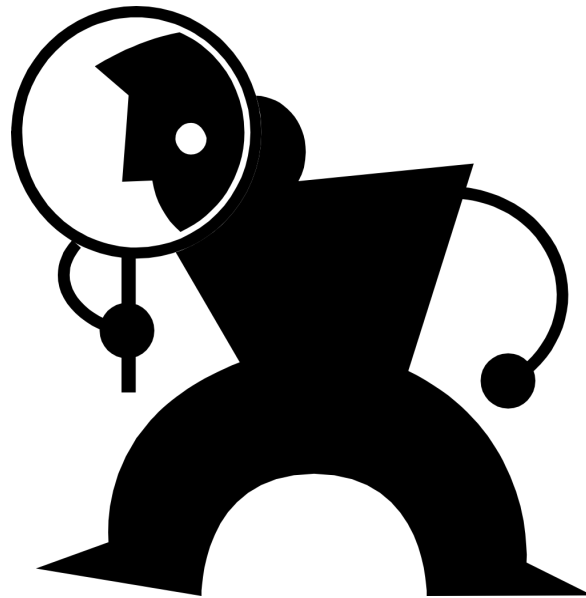


# DISCOVERY



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# **PURPOSE OF DISCOVERY**

**PURPOSE OF DISCOVERY RULES:** The purpose of the discovery rules is to “enhance the truth-seeking function of the litigation process and eliminate trial strategies that focus on gamesmanship and surprise.” ( *Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1254.) In other words, the discovery process is designed to “ ‘make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.’ ” ( *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376.)

“An important aspect of legitimate discovery from a defendant's point of view is the ascertainment, in advance of trial, of the specific components of plaintiff's case so that appropriate preparations can be made to meet them. It is impossible to discover this other than from the plaintiff.” ( *Karz v. Karl* (1982) 137 Cal.App.3d 637, 650.) *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 389.

A foundational purpose of the Civil Discovery Act is to avoid gamesmanship in litigation. ( *Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1107). *Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, 739.

The “expansive scope of discovery” ( *Emerson Electric Co. v. Superior Court* (1997) 16 Cal. 4th 1101, 1108) is a deliberate attempt to “take the ‘game’ element out of trial preparation” and to “do away ‘with the sporting theory of litigation-namely, surprise at the trial.’ ” ( *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376); see also *Garamendi v. Golden Eagle Ins. Co.* (2004) 116 Cal.App.4th 694, 712, fn. 8 [discovery process is “designed to eliminate the element of surprise”].) One key legislative purpose of the discovery statutes is “to educate the parties concerning their claims and defenses so as to encourage settlements and to expedite and facilitate trial.” ( *Emerson*, at p. 1107.) The discovery procedures are also “designed to minimize the opportunities for fabrication and forgetfulness.” ( *Glenfed Development Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1119, 62 Cal.Rptr.2d 195.) Consistent with these purposes, our Supreme Court has often stated that discovery statutes are to be construed broadly in favor of disclosure, so as to uphold the right to discovery whenever possible. ( *Greyhound*, at pp. 377-378; *Emerson*, at pp. 1107-1108.) “Matters sought are properly discoverable if they will aid in a party's preparation for trial.” *Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 987.) *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1249.

In general, “any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.” (§ 2017.010.) *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 402.

Discovery is not a game of cat and mouse, “where each side tries, as do Tom and Jerry, to sandbag the other.” ( *Zellerino v. Brown* (1991) 235 Cal.App.3d1097, 1115.) Its goal “is to enable a party to obtain evidence in the control of his adversary in order to further the efficient, economical disposition of cases according to right and justice *on the merits*. *McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 210.

## DISCOVERY SUMMARY

**INTERROGATORIES** [CCP §2030.010 – 2030.410] (1) *Catanese v. Superior Court* (1996) 46 Cal.App.4th 1159 ] – Interrogatories that are not “full and complete in and of itself” are improper. Interrogatories that compel a responding party to go back to numerous volumes of deposition testimony and answer questions as to whether any of the questions asked during the 8 days of deposition testimony were untrue, were improper were not “full and complete in and of itself”. (2) *Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255 – It is improper to ask legal contention interrogatory questions at a deposition. Questions such as “state all facts”, “list all witnesses”, and “identify all documents” that support a particular contention are not proper in a deposition. (3) *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214 – Judicial Council Interrogatory No. 12.2 and 12.3 are improper interrogatories as they compel a party and counsel to reveal identification of witnesses who have been interviewed by counsel or agents and thus reveals work product privileged material and discloses trial strategy. Further, it would be a violation of the work product privilege to require a list of witnesses interviewed. It is proper, however, to discover what statements witnesses have voluntarily prepared and obtained by counsel without counsel efforts. (4) *Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 293. Interrogatories may seek existence of documents in possession of opponent, which may include request for description of document. The contents may be privileged but the existence is not. A party may object to the information in the document by clearly stating the objection and the particular privilege involved. An adequate response must include a description of the document. (5) *Biles v. Exxon Mobile Corp.* (2004) 124 CA4th 1315 -- No duty to update interrogatory responses unless asked to in supplemental interrogatories. Sanctions may only be imposed when party disobeys court order and failure to respond was willful. Sanctions may not be imposed for punishment.

**DEPOSITIONS** [CCP §2025.010-2025.620] (1) *Emerson Electric Co. vs. Superior Court* (1997) 16 Cal.4th 1101 – deposition shall proceed “as permitted at trial under the provisions of the Evidence Code...”; this includes physical demonstrations and reenactments. (2) Objections at depositions limited. *Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006; *Code of Civil Procedure §2025.460*. (3) **Objections To Deposition:** No later than **3 calendar** days prior to deposition scheduled date. *CCP §2025.410(a)*. Motion to compel witness refused to answer — 60 days after transcript completed. *CCP §2025.480(b)*

**REQUEST FOR ADMISSIONS** [CCP §2033.010] *Wilcox v. Birthwhistle* (2000) 21 Cal.4th 973 -- permits the withdrawal or amendment of requests for admissions, even if they were deemed admitted by a previous court order for failing to timely respond. [NOTE: Unlike other discovery procedures, *sanctions are mandatory* pursuant to *CCP § 2033.280(c)*, as against

party who fails to serve timely responses to requests for admissions when opposing party files motion to compel, even if responses are received before hearing date.] A party to whom the requests for admissions are directed has 30 days to respond to the requests. (*Code Civ. Proc.*, § 2033.250.) Under *Code of Civil Procedure* §2033.280, the party requesting admissions may move for an order that the matters specified in the requests be deemed admitted. The party also may seek a monetary sanction. (*Code Civ. Proc.*, § 2033.280.)

**IDENTITIES OF EMPLOYEES:** There is generally *no* protection for the identity, addresses and phone numbers of percipient witnesses, even if they are employees of defendant, unless there is danger to witness. [*Puerto v. Sup.Ct. (Wild Oats Markets, Inc.)* (2008) 158 CA4th 1242, 1251-1252].

**MOTIONS TO COMPEL:** A. **Unsatisfactory Responses:** Must be brought no later than 45 days after unsatisfactory responses are served, extended five (5) days by mail. *CCP* §2030.300[c] [Interrogatories]; *CCP*§2033.290[c] [Requests for Admissions]; *CCP*§2031.310[c] [Requests for Production]. **Separate Statement:** -- *California Rules of Court, Rule 3.1020* (applying to motions to quash, compel answers to deposition questions, interrogatories, demands to produce, requests for admissions, medical examinations, sanctions. Statement must be full and complete, no reference to any other document or discovery; must include discovery in dispute, dispute, and factual/legal need for further response. [“A separate statement is not required when no response has been provided]. *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 C.A.4th 390,

**CLAIM OF PRIVILEGE** A party cannot claim that matters are privileged and then attempt to claim loss of earnings based upon those same documents without affording the opposition an opportunity to review the documents. The proponent of the claim must give up the privilege to pursue the claim. *Steiney & Co. v. California Electric Supply Co.* (2000) 79 Cal.App.4th 285. Court can't create privilege not recognized by statute. *University of So. Calif. v. Sup.Ct. (Comeau)* (1996) 45 CA4th 1283, 1290. **5<sup>th</sup> Amendment:** *Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1045, a party may not assert a blanket refusal to respond to discovery simply because of the possibility of criminal charges or the possibility of criminal prosecution. *Fisher v. Gibson* (2001) 90 Cal.App.4th 275, 285-286 -- “...A party is not entitled to decide for him or herself whether the privilege against self-incrimination may be invoked. Court must make particularized finding on the record as to whether privilege applies to specific question. *Brown v. Superior Court* (1986) 180 Cal.App.3d 701, 708 - privilege waived when not timely asserted.

**INDEPENDENT MEDICAL EXAM** [CCP §2032.210-2032.650] (1) *Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878. Mental examinations are not authorized for the purpose of “testing a person’s credibility”. (2) *Kennedy v. Superior Court* (1998) 64 Cal.App.4th 674. Once designated as an IME doctor and examination performed, doctor cannot be withdrawn, and opposition is allowed to examine doctor; there is no "work product privilege" to any reports or opinions of IME doctor! Dr. must prepare report. (3) *Golfland Entertainment Centers, Inc. v. Superior Court* (2003) 108 Cal.App.4th 739, 747; I.M.E. is not another deposition; facts of accident to be given to doctor. Mother not allowed to be present at minor

mental examination. (4) *Carpenter v. Superior Court* (2006) 141 Cal.App.4th 249 Trial court's order in personal injury action, requiring plaintiff to submit to a mental examination, failed to comply with statutory requirement that the court “specify the diagnostic tests and procedures of the examination,” thereby requiring that the order be vacated

**DEMANDS TO PRODUCE [CCP §2031.010]** (1) *Calcor Space Facility, Inc. v. Superior Court* (1977) 53 Cal.App.4th 216, 221 – must describe documents to be produced with reasonable particularity, generalized demands are not appropriate. Discovery must be designed to facilitate litigation, not as a weapon. (2) *Scottsdale Insurance Co. v. Superior Court* (1997) 59 Cal.App.4th 263 – Under *Code of Civil Procedure* §2031.300(a) The failure to specifically enumerate an objection in the initial response to the demand to produce documents [such as “attorney-client privilege”] operates as a waiver, even if the waiver was inadvertent.

**DISCLOSURE OF INSURANCE POLICY LIMITS:** Prior to the filing of a lawsuit or pre-litigation procedure [such as a petition to perpetuate evidence, etc.] an insurer may not disclose the policy limits of an insurance policy without the consent of the insured, as the insured has a right of privacy to such information. See, Insurance Code §791, et. seq. *Griffith v. State Farm Mut. Auto. Ins. Co.* (1991) 230 Cal.App.3d 59, 70. Once a lawsuit has been filed, a party may obtain the existence and contents of any agreement or policy of insurance, the identity of the carrier and the nature and limits of coverage, and whether that insurance carrier is disputing the agreement’s coverage of the claim involved. Code of Civil Procedure §2017.210.

**SANCTIONS [C.C.P. §2023.030]** (A) Meet and confer -- *Obregon v. Superior* (1998) 67 Cal.App.4th 424. Upheld trial court ruling that inadequate efforts to meet and confer by the plaintiff were made before the filing of the motion to compel further responses to discovery. After the trial court has made this determination, sanctions are mandatory. (B) In Pro Per -- *Argaman v. Ratan* (1999) 73 Cal.App.4th 1173 -- Sanctions in the form of attorneys' fees are not recoverable by a litigant representing him or herself. (C) Range of Sanctions - Court Discretion: *Juarez v. Boy Scouts* (2000) 81 Cal.App.4th 377 -- Sanctions available under §2023.030 are potent and include monetary, contempt, issue, evidence and/or terminating sanctions. From a defendant's perspective, discovery is vital to ascertain, in advance of trial, the specific components of the plaintiff's case to prepare to meet them. It is impossible to discover this other from plaintiff. Also, mandatory if party fails to meet and confer. CCP § 2023.020. See also: CCP § 2016.0.4. NOTE: *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 405 [court had authority to impose monetary sanctions when discovery responses were served late and after defendants had filed a motion to compel. Defendant need not file a motion for further response].

**WAIVES OBJECTIONS:** A party that fails to serve a timely response to the discovery request waives “any objection” to the request, “including one based on privilege” or the protection of attorney work product. ( §§ 2030.290 (a)[interrogatories]; 2031.300(a)[demands to produce], Code of Civil Procedure §2033.280(a) [requests for admissions].) The trial court may relieve the party of its waiver, but that party must first demonstrate that (a) it subsequently served a response to the demand; (b) its response “is in substantial compliance” with the statutory provisions governing the form and content of the response; and (c) “[t]he party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.” ( §§ 2030.290, subd. (a)(1)-(2); 2031.300, subd. (a)(1)-(2).) The propounding party can move the trial court for an order compelling a party to respond to the discovery request.

( §§ 2030.290, subd. (b); 2031.300, subd. (b).) *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007)148 Cal.App.4th 390, 403-404 [sanctions may be imposed even if discovery responses received before hearing].

**DISCOVERY CUT-OFF**: CCP § 2024.020 imposes two separate “cut-offs” on the “right” to conduct and enforce discovery: Discovery proceedings must be *completed* (date a depo begins and, as to other discovery, date responses are due) *30 days before the date initially set for trial*; and discovery motions must be *heard no later than 15 days before the date initially set for trial* (15– and 10–day pretrial cut-offs, respectively, as to experts designated in a § 2034.210 et seq. expert witness exchange). Continuance of the trial date will *not automatically “reopen”* these deadlines. (A cut-off date falling on a weekend or holiday is extended to the *next successive court day*.) [CCP § 2024.020]. Discovery is cut off to any case ordered to Arbitration within **fifteen (15)** days prior to the Arbitration, with the exception of expert demands. **CRC 3.822(b)**. Discovery is not cut off, however, for any case which the parties stipulate to proceed with judicial arbitration. *McMillan v. Superior Court* (1983) 146 Cal.App.3d 1014.

**ECONOMIC LITIGATION**: While "Economic Litigation" interrogatories may be used in unlimited and limited jurisdiction cases, all **discovery** [interrogatories, requests for admissions, demands for inspection, etc.] is limited to a **total of 35** requests in limited jurisdiction actions, including one (1) deposition [**C.C.P. §94**]. Additional discovery requires a court order [**C.C.P. §95**]. **NOTE: Judicial Council interrogatories count towards 35 discovery requests.** An **expert** designation or demand for designation may be utilized in limited cases [**Code of Civil Procedure §2034.010**] but only for the exchange of the identity of experts, not for taking of depositions. In Unlimited Jurisdiction cases, parties limited to 35 interrogatories or requests for admissions unless accompanied by declaration of necessity. Judicial Council form interrogatories do not count towards 35.

## **MOTION FOR PROTECTIVE ORDER**

- (a) *Depositions*: C.C.P. 2025.420;
- (b) *Interrogatories*: C.C.P. 2030.090;
- (c) *Inspections of documents and things*: C.C.P. 2031.060;
- (d) *Requests for admissions*: C.C.P. 2033.080;
- (e) *Exchanges of expert witness information*: C.C.P. 2034.250;
- (f) *Physical examinations*: C.C.P. 2032.510.

A responding party may move for a protective order to challenge a discovery demand. To prevail, it bears the burden (§ 2019.030, subd. (b)) to demonstrate that the “discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive” (§ 2019.030, subd. (a)(1)), or that the “selected method of discovery is unduly burdensome or expensive.” (§§ 2019.030, subd. (a)

(2); 2030.090 [motion for protective order on interrogatories]; 2031.060 [motion for protective order on inspection demands].)

The responding party must also demonstrate that it made “a reasonable and good faith attempt at an informal resolution of each issue presented” by the motion for a protective order. (§§ 2016.040; 2019.030, subd. (b); 2030.090, subd. (a); 2031.060, subd. (a).) This is sometimes referred to as an obligation to “meet and confer.” (§ 2016.040.) *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 402.

A party moving for a protective order must include with the notice of motion a declaration stating facts showing a reasonable, good-faith attempt at an informal resolution of all issues presented in the motion. [Code Civ. Proc., §§ 2030.090, subd. (a), 2016.040].

## **DISCOVERY OVERVIEW**

See: *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 405-406 [court had authority to impose monetary sanctions when discovery responses were served late and after defendants had filed a motion to compel. Defendant need not file a motion for further response. LATE RESPONSES ARE LEGALLY INVALID]:

### **DISCOVERY LIBERALLY ALLOWED:**

The Civil Discovery Act provides litigants with the right to broad discovery. In general, “any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.” (§ 2017.010.) “In establishing the statutory methods of obtaining discovery, it was the intent of the Legislature that discovery be allowed whenever consistent with justice and public policy. [Citation.] The statutory provisions must be liberally construed in favor of discovery and the courts must not extend the statutory limitations upon discovery beyond the limits expressed by the Legislature.” ( *Irvington-Moore, Inc. v. Superior Court* (1993) 14 Cal.App.4th 733, 738-739.) Civil discovery is intended to operate with a minimum of judicial intervention. “[I]t is a ‘central precept’ of the Civil Discovery Act ... that discovery ‘be essentially self-executing[.]’ ” ( *Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 434, quoting *Townsend v. Superior Court* (1998) 61 Cal.App.4th 1431, 1434.)

### **MODIFY DISCOVERY PROCEDURES:**

Generally, the parties may modify the statutory discovery procedures by written stipulation (§ 2016.030), and, unless restricted by the trial court, are free to utilize any of the prescribed discovery methods during the action in any sequence (§§ 2019.010, 2019.020). Neither a propounding party's demands nor a responding party's responses are filed with the trial court. (See, e.g., §§ 2030.280, subd. (a), 2031.290, subd. (a)). Accordingly, the trial court does not

usually consider either the propriety of a party's discovery demand or the adequacy of a party's response unless a dispute arises.

### **PROTECTIVE ORDER:**

When discovery disputes arise as to interrogatories and document requests, the trial court may intervene in the discovery process in three circumstances. First, a responding party may move for a protective order to challenge a discovery demand. To prevail, it bears the burden (§ 2019.030, subd. (b)) to demonstrate that the “discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive” (§ 2019.030, subd. (a)(1)), or that the “selected method of discovery is unduly burdensome or expensive.” (§§ 2019.030, subd. (a)(2); 2030.090 [motion for protective order on interrogatories]; 2031.060 [motion for protective order on inspection demands].) The responding party must also demonstrate that it made “a reasonable and good faith attempt at an informal resolution of each issue presented” by the motion for a protective order. (§§ 2016.040; 2019.030, subd. (b); 2030.090, subd. (a); 2031.060, subd. (a).) This is sometimes referred to as an obligation to “meet and confer.” (§ 2016.040.)

### **MOTION TO COMPEL FURTHER RESPONSES:**

Section 2030.300. subdivision (a) provides: “On receipt of a response to interrogatories, the propounding party may move for an order compelling a further response if the propounding party deems that any of the following apply: (1) An answer to a particular interrogatory is evasive or incomplete.; (2) An exercise of the option to produce documents under Section 2030.230 is unwarranted or the required specification of those documents is inadequate; (3) An objection to an interrogatory is without merit or too general.” If a party is not satisfied with the response served by a responding party, the propounding party may move the court to compel further responses. (§§ 2030.300 [interrogatories]; 2031.310 [inspection demands].) The propounding party must demonstrate that the responses were incomplete, inadequate or evasive, or that the responding party asserted objections that are either without merit or too general. ( §§ 2030.300, subd. (a)(1)-(3); 2031.310, subd. (a)(1)-(3).) The propounding party must bring its motion to compel further responses within 45 days of the service of the response ( §§ 2030.300, subd. (c); § 2031.310, subd. (c)), and must demonstrate that it complied with its obligation to “meet and confer.” (§§ 2016.040; 2030.300, subd. (b); 2031.310, subd. (b)(2).) (Also required is a separate statement as specified in Cal. Rules of Court, rule 3.1020.) In addition, a party moving to compel further responses to an inspection demand must establish “good cause justifying the discovery sought by the inspection demand.” (§ 2031.310, subd. (b) (1).)

### **UNTIMELY RESPONSES WAIVES OBJECTIONS:**

Third, the trial court may intervene when a party “fails to serve a timely response[.]” (§§ 2030.290 [interrogatories]; 2031.300 [inspection demands].) A party that fails to serve a timely response to the discovery request waives “any objection” to the request, “including one based on privilege” or the protection of attorney work product. ( §§ 2030.290, subd. (a); 2031.300, subd. (a).) The trial court may relieve the party of its waiver, but that party must first demonstrate that (a) it subsequently served a response to the demand; (b) its response “is in substantial compliance” with the statutory provisions governing the form and content of the

response; and (c) “[t]he party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.” ( §§ 2030.290, subd. (a)(1)-(2); 2031.300, subd. (a)(1)-(2).) The propounding party can move the trial court for an order compelling a party to respond to the discovery request. ( §§ 2030.290, subd. (b); 2031.300, subd. (b).)

### **MOTION TO COMPEL RESPONSES:**

Unlike a motion to compel *further* responses, a motion to compel responses is not subject to a 45-day time limit, and the propounding party does not have to demonstrate either good cause or that it satisfied a “meet and confer” requirement. (See generally, Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) ¶¶ 8:1137 to 8:1144, pp. 8F-59 to 8F-60, ¶¶ 8:1483 to 8:1489, pp. 8H-29 to 8H-30 (Weil & Brown); see also Cal. Rules of Court, rule 3.1020(b) [“A separate statement is not required when no response has been provided to the request for discovery”].) Section 2030.290 provides: “If a party to whom interrogatories are directed fails to serve a timely response, the following rules apply: “(a) The party to whom the interrogatories are directed waives any right to exercise the option to produce writings under Section 2030.230, as well as any objection to the interrogatories, including one based on privilege or on the protection for work product under Chapter 4 (commencing with Section 2018.010). The court, on motion, may relieve that party from this waiver on its determination that both of the following conditions are satisfied: “(1) The party has subsequently served a response that is in substantial compliance with Sections 2030.210, 2030.220, 2030.230, and 2030.240. “(2) The party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect. “(b) The party propounding the interrogatories may move for an order compelling response to the interrogatories.

### **OBJECTIONS WAIVED:**

The trial court may intervene when a party “fails to serve a timely response[.]” (§§ 2030.290 [interrogatories]; 2031.300 [inspection demands].)

A party that fails to serve a timely response to the discovery request waives “any objection” to the request, “including one based on privilege” or the protection of attorney work product. ( §§ 2030.290, subd. (a); 2031.300, subd. (a).)

The trial court may relieve the party of its waiver, but that party must first demonstrate that (a) it subsequently served a response to the demand; (b) its response “is in substantial compliance” with the statutory provisions governing the form and content of the response; and (c) “[t]he party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.” ( §§ 2030.290, subd. (a)(1)-(2); 2031.300, subd. (a)(1)-(2).)

The propounding party can move the trial court for an order compelling a party to respond to the discovery request. ( §§ 2030.290, subd. (b); 2031.300, subd. (b).)

### **NO SEPARATE STATEMENT OR 45-DAY RULE:**

Unlike a motion to compel *further* responses, a motion to compel responses is not subject to a 45-day time limit, and the propounding party does not have to demonstrate either good cause or that it satisfied a “meet and confer” requirement. (See generally, Weil & Brown, Cal.

Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) ¶¶ 8:1137 to 8:1144, pp. 8F-59 to 8F-60, ¶¶ 8:1483 to 8:1489, pp. 8H-29 to 8H-30 (Weil & Brown); see also Cal. Rules of Court, rule 3.1020(b) [“A separate statement is not required when no response has been provided to the request for discovery”].) *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 403-404.

### **SANCTIONS:**

If a party fails to serve a timely response, and the propounding party moves for and obtains a court order compelling a response, the trial court must impose a monetary sanction against the delinquent party unless that party acted with “substantial justification” or the sanction would otherwise be unjust. (§§ 2030.290, subd. (c); 2031.300, subd. (c).) In addition, if that party subsequently disobeys the court's order compelling a response, the trial court may then “make those orders that are just,” including the imposition of an issue sanction, an evidence sanction, or a terminating sanction. “In lieu or in addition” to any of those sanctions, the trial court “may impose a monetary sanction under” section 2023.030. (§§ 2030.290, subd. (c); 2031.300, subd. (c).) Section 2023.030 authorizes a trial court to impose a monetary sanction against any party or attorney, or both, who has engaged in misuse of the discovery process. Misuses of the discovery process include, among other things, failing to respond or to submit to an authorized method of discovery; making, without substantial justification, an unmeritorious objection to discovery; making an evasive response to discovery; and disobeying a court order to provide discovery. (§ 2023.010.) *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 404-405.

### **PRIVILEGE OF WITNESS STATEMENTS/ACCIDENT REPORTS**

A written statement prepared by a nonparty percipient witness, given to a party, is not privileged merely because the party later gives it to his or her attorney. The statement is not a communication *between lawyer and client*. [See *Greyhound Corp. v. Superior Ct.* (1961) 56 C2d 355, 395-399]. The identities of witnesses are not subject to the attorney-client and work product privileges. ( *Aerojet-General Corp. v. Transport Indemnity Insurance* (1993) 18 Cal.App.4th 996, 1004; *City of Long Beach v. Superior Court* (1976) 64 Cal.App.3d 65, 73). *Huffy Corp. v. Superior Court* (2003) 112 Cal.App.4th 97, 109.

In *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 217, the appellate court held the trial court in compelling further response to interrogatory 12.2. Compelled production of a list of potential witnesses interviewed by opposing counsel would necessarily reflect counsel's evaluation of the case by revealing which witnesses or persons who claimed knowledge of the incident (already identified by defendants' response to interrogatory 12.1) counsel deemed important enough to interview. (Cf. *City of Long Beach v. Superior Court* (1976) 64 Cal.App.3d 65, 73 [compelled production of list of witnesses to be called at trial impermissibly reveals counsel's evaluation of the strengths and weaknesses of his case. A list of the potential witnesses interviewed by defendants' counsel which interviews counsel recorded in notes or otherwise would constitute qualified work product because it would tend to reveal counsel's evaluation of the case by identifying the persons who claimed knowledge of the incident from whom counsel deemed it important to obtain statements.

Moreover, any such notes or recorded statements taken by defendants' counsel would be protected by the absolute work product privilege because they would reveal counsel's "impressions, conclusions, opinions, or legal research or theories"]. On the other hand, a list of potential witnesses who turned over to counsel their independently prepared statements would have no tendency to reveal counsel's evaluation of the case. Such a list would therefore not constitute qualified work product.

Moreover, unlike interview notes prepared by counsel, statements written or recorded independently by witnesses neither reflect an attorney's evaluation of the case nor constitute derivative material, and therefore are neither absolute nor qualified work product.

The Legislature has protected attorney work product under California Code of Civil Procedure section 2018.030, which provides, "(a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances. [¶] (b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." *Rico v. Mitsubishi Motors* . (2007) 42 Cal.4th 807, 814.

The Legislature has declared that it is state policy to "[p]reserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases." (§ 2018.020, subd. (a).) In addition, the Legislature declared its intent to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., § 2018.020, subd. (b).)

Thus, the codified work product doctrine absolutely protects from discovery writings that contain an "attorney's impressions, conclusions, opinions, or legal research or theories." (§ 2018.030, subd. (a); see *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 120.) The protection extends to an attorney's written notes about a witness's statements. (See *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 649); see also *Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 135.)

"[A]ny such notes or recorded statements taken by defendants' counsel would be protected by the absolute work product privilege because they would reveal counsel's 'impressions, conclusions, opinions, or legal research or theories' within the meaning of [the work product doctrine]." (*Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 217.) When a witness's statement and the attorney's impressions are inextricably intertwined, the work product doctrine provides that absolute protection is afforded to all of the attorney's notes. (*Rodriguez, supra*, 87 Cal.App.3d at p. 648.) *Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 814.

## **ACCIDENT REPORTS AND STATEMENTS MADE TO AN INSURER**

Two defendants in a personal injury action challenge a court order requiring disclosure of statements they made to an insurance claims representative. They contend that these statements are covered by the attorney-client privilege because they were made in contemplation of litigation and were directed to an agent of their attorney. They discount the fact that when the statements were given litigation had not yet begun and no attorney had been assigned to handle the case. The appellate court agrees that such statements are protected by the attorney-client

privilege – even though no litigation had yet commenced and the matter had not been assigned to a specific attorney for the insurance carrier. *Soltani-Rastegar v. Superior Court* (1989) 208 Cal.App.3d 424. See *Sierra Vista Hosp. v. Superior Court* (1967) 248 C.A.2d 359, 367 [after plaintiff patient suffered alleged negligent injury in defendant's hospital, defendant's administrator directed its nursing head to investigate and transmit information to insurer for use of its attorney; report was labeled "confidential," it was not shown to anyone else, and no copies were kept by hospital]; *Payless Drug Stores v. Superior Court* (1976) 54 C.A.3d 988, 991 [Evidence to the effect that the report in question was prepared by an employee of the corporate employer on the date of the accident on a preprinted form furnished by the insurance carrier headed 'Public Liability Accident--Report Every Accident Immediately to Harbor Insurance Company' is sufficient to establish that the reports are protected by the attorney-client privilege].

#### **STATEMENTS MADE TO ATTORNEY**

Substantial evidence supported finding that client waived lawyer-client privilege concerning videotaped interview by expressly consenting to disclosure of videotape, and by failing to claim privilege when client had legal standing and opportunity to claim privilege; client executed verified response to request for production, while represented by three attorneys, which stated that opposing party was welcome to copy of video in earlier discovery responses. *Hiott v. Superior Court* (1993) 16 Cal.App.4th 712.

### **MOTION TO COMPEL CLAIM OF 5<sup>TH</sup> AMENDMENT**

TO AND YOUR COUNSEL OF RECORD

PLEASE TAKE NOTE that on the date and time and in the department set forth of the Court located at 400 Civic Center Plaza, Pomona, California, Defendants will move the Court for an order to compel FOOTHILL and ROBINS to provide forthwith without objections responses to Form Interrogatories and Demands for Productions [EXHIBIT "A"], to which such party/parties have failed and refused to provide timely responses and for costs in the amount of \$40.00 and sanctions and attorney's fees in the amount of \$600.00, as against Plaintiff and Plaintiff's counsel of record.

This Motion is based upon the fact that such party/parties have failed and refused to provide any responses to discovery propounded upon them, and after an extension was granted, there have yet to be provided appropriate responses.

This Motion is further based upon the provisions of Code of Civil Procedure §2023.010(d), §2030.290, §2031.300, §2023.030, and upon this Notice, and upon the following Memorandum of Points and Authorities and the declaration of JAMES GRAFTON RANDALL, ESQ.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL RESPONSES TO DEMANDS FOR PRODUCTION AND SPECIAL INTERROGATORIES**

1. **FACTS**

The subject multi-vehicle fatality collision occurred on the eastbound I-210 (Foothill) Freeway. One vehicle was a Foothill Transit bus, which had no passengers. California Highway Patrol (“CHP”) identified the cause of the accident as being the bus driver Harriet Robins driving at an unsafe speed for the conditions in violation of Vehicle Code, Section 22350. The case was referred to the City Attorney for a potential California Penal Code, Section 192(c)(2), misdemeanor vehicular manslaughter charge.

The collision was preceded by a two-vehicle collision involving a 1996 Chevy Cavalier driven by Jesutito Soriano and a 1998 Honda Accord driven by Eduardo Rangel and owned by Simon Quintino. The cause of this accident was identified as being Mr. Rangel driving at an unsafe speed for the conditions in violation of Vehicle Code, §22350. While the drivers of the Chevy and Honda were off to the side of the freeway, they became involved in the above-referenced multi-vehicle fatality collision.

2. **DISCOVERY PROPOUNDED:**

Form Interrogatories and Demands for Productions were served upon FOOTHILL TRANSIT and its driver, HARRIET ROBINS, on June 3, 2010. An extension was granted to August 11, 2010. To date no responses have been provided and no objections have been preserved.

3. **FAILURE TO PRESERVE OBJECTIONS WAIVES THEM:**

As the Court of Appeal provided in *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007)148 Cal.App.4th 390, 403-404, a party that fails to serve a timely response to the discovery request waives “any objection” to the request, “including one based on privilege” or the protection of attorney work product. ( §§ 2030.290, subd. (a) Interrogatories; 2031.300, subd. (a) [Demands for Production].)

4. **A COURT MAY INTERVENE WHEN A PARTY FAILS TO SERVE A TIMELY RESPONSE TO DISCOVERY. NO SEPARATE STATEMENT IS REQUIRED WHEN THERE HAS BEEN NO RESPONSE SERVED:**

As the Court of Appeal provided in *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007)148 Cal.App.4th 390, 403-404, The trial court may intervene when a party “fails to serve a timely response[.]” (§§ 2030.290 [interrogatories]; §2031.300 [inspection demands].) Unlike a motion to compel *further* responses, a motion to compel responses is not subject to a 45-day time limit, and the propounding party does not have to demonstrate either good cause or that it satisfied a “meet and confer” requirement. (See generally, Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) ¶¶ 8:1137 to 8:1144, pp. 8F-59 to 8F-60, ¶¶ 8:1483 to 8:1489, pp. 8H-29 to 8H-30 (Weil & Brown); see also Cal. Rules of Court, rule 3.1020(b) [“A separate statement is not required when no response has been provided to the request for discovery”].)

5. **FAILING TO RESPOND TO DISCOVERY IS AN ABUSE OF THE DISCOVERY PROCESS FOR WHICH SANCTIONS SHALL BE IMPOSED:**

As the Court of Appeal provided in *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007)148 Cal.App.4th 390, 403-404:

1. If a party fails to serve a timely response, and the propounding party moves for and obtains a court order compelling a response, the trial court must impose a monetary sanction against the delinquent party unless that party acted with “substantial justification” or the sanction would otherwise be unjust. (§§ 2030.290, subd. (c); 2031.300, subd. (c).)
2. Section 2023.030 authorizes a trial court to impose a monetary sanction against any party or attorney, or both, who has engaged in misuse of the discovery process. Misuses of the discovery process include, among other things, failing to respond or to submit to an authorized method of discovery; making, without substantial justification, an unmeritorious objection to discovery; making an evasive response to discovery (2023.010.).

1. **A PARTY SIMPLY CANNOT REFUSE TO RESPOND TO DISCOVERY SIMPLY BECAUSE THERE MAY BE CRIMINAL CHARGES PENDING OR CONSIDERED:**

Although such a claim has not been asserted in writing nor has any such privilege been timely asserted in response to the discovery propounded, it is believed that perhaps HARRIET ROBINS, the bus driver accused with reckless operation of the bus and causing this incident, is believed to be claiming a 5th Amendment claim of self-incrimination. A party cannot make the determination him/her or itself based on a purported claim of “5<sup>th</sup> Amendment privilege to engage in a blanket refusal to answer discovery simply because criminal; charges may be pending, are being considered or possibly have a chance of being prosecuted.

As the court held in *Fisher v. Gibson* (2001) 90 Cal.App.4th 275, 285-286.

“...A party is not entitled to decide for him or herself whether the privilege against self-incrimination may be invoked. ' "Rather, this question is for the court to decide after conducting 'a particularized inquiry, deciding, in connection with each specific area that the questioning party seeks to explore, whether or not the privilege is well founded.' [Citation.] [Citations.] [Citation.] This principle applies in both civil and criminal proceedings, and under both the federal and state Constitutions. [Citations.] Only after the party claiming the privilege objects with specificity to the information sought can the court make a determination about whether the privilege may be invoked. [Citation.] [¶] Consequently, a civil defendant does not have the absolute right to invoke the privilege against self-incrimination. [Citation.]" (Fuller v. Superior Court, supra, 87 Cal.App.4th at pp. 305-306, first italics added, fn. Omitted.)

In other words: "A witness cannot arbitrarily refuse to testify. There must exist in fact a real danger that the answer would have a tendency to be incriminating. Insofar as possible the trial court must determine if such real danger exists. If the witness swears under oath that the answer might tend to incriminate him, he should be allowed great latitude and the court should sustain his claim of privilege unless it is clear that the answer could have no tendency to incriminate. [Citations.]" (*In re Leavitt* (1959) 174 Cal.App.2d 535, 537-538.) As stated by another court in the context of a discovery dispute: "It is clear that the [civil defendants facing parallel criminal prosecution] may not invoke a blanket privilege against self-incrimination with respect to the whole deposition. [Citations.] The trial court must be given the opportunity to determine whether particular questions posed in the depositions would elicit answers that 'support a conviction' or that 'furnish a link in the chain of evidence needed to prosecute the witness' [citation], and which may thus be subject to constitutional protection." (*Fuller v. Superior Court*, supra, 87 Cal.App.4th at p. 308).

In this instant matter, if there was any claim of "5<sup>th</sup> Amendment" to preclude self-incrimination, such a right has been waived as HARRIET ROBINS and FOOTHILL TRANSIT have refused to date to assert such a privilege in a timely manner, and as such, the privilege is waived. *Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1045.

As the court in points out.

The party must make a particularized objection to each question posed so that the Court may examine each objection to each question individually and the Court must thereafter make a particularized finding on the record as to whether the privilege claim is valid as to each question or document.

### **CONCLUSION:**

It is therefore requested that the Court order FOOTHILL TRANSIT and HARRIET ROBINS to provide responses to the Form Interrogatories and Demands for Productions propounded upon them forthwith, and further, the Court impose costs and sanctions against such parties in the amount of \$640.00.

### **DECLARATION OF JAMES GRAFTON RANDALL, ESQ.**

I, JAMES GRAFTON RANDALL, ESQ. state and declare under penalty of perjury and with my own personal knowledge, as follows:

1. That I am an attorney licensed to practice law before all of the courts of this State and before the United States Supreme Court;
2. That attached hereto as EXHIBIT "A", is a true and accurate copy of the Form Interrogatories and Demands for Production that were served on the party/parties on June 3, 2010;

3. That an extension was requested and provided to counsel for TRANSIT, until August 11, 2010, to provide responses.
4. That no responses have been received to either the Requests for Productions nor the Form Interrogatories, nor has there been filed any motion for a protective order;
5. That I have incurred 3 hours in preparing this Motion and based upon known travel times I expect to spend an hour traveling to, appearing at, and traveling from the motion to deem the requests for admissions admitted. That while we are in house counsel we are still entitled to attorney's fees for sanctions, based upon what is reasonable for similar attorneys who are not in house counsel. I.e., see: *PLCM Group v. Drexler* (2000) 22 Cal. 4th 1084; that a reasonable fee is \$150.00, based on what comparable attorneys charge for an hourly rate;
6. That the cost for filing this Motion is \$40.00.

Declared this 9<sup>th</sup> day of September, 2010, at Los Angeles, California, under the laws of the State of California.

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JAMES GRAFTON RANDALL, ESQ.

## **MOTION TO COMPEL RESPONSES TO INTERROGATORIES**

TO PLAINTIFF BINH THAI TRAN AND YOUR COUNSEL OF RECORD:

PLEASE TAKE NOTE that on the date and time and in the department set forth of the Court located at 300 East Walnut, Pasadena, California, Defendant COFFEE HOUSE will move the Court for an order granting Defendant COFFEE HOUSE's motion to Compel responses to Form Interrogatories and Special Interrogatories, Set No. 1 propounded to Plaintiff BINH THAI TRAN, and for costs in the amount of \$40.00 and sanctions and attorney's fees in the amount of \$450.00, as against Plaintiff and Plaintiff's counsel of record.

This Motion is based upon the fact that Plaintiff provided responses to Defendant's Form Interrogatories and Special Interrogatories, Set #1,, but provided no verification. Responses to Requests for Admissions which are not verified are deemed as no responses at all. ( *Appleton v. Superior Court* (1988) 206 Cal.App.3d 632.)

This Motion is further based upon the provisions of Code of Civil Procedure §2023.010(d), §2023.030, §2030.290, upon this Notice, and upon the following Memorandum of Points and Authorities and the declaration of JAMES GRAFTON RANDALL, ESQ.

### **WHEN A PARTY FAILS TO VERIFY DISCOVERY RESPONSES THEY ARE DEEMED AS NO RESPONSES AT ALL AND A MOTION TO COMPEL RESPONSES IS APPROPRIATE AND THE COURT SHALL ORDER SANCTIONS**

#### **1. SUMMARY OF CASE AND BASIS OF MOTION:**

In this action Plaintiffs allege Defendant COFFEE HOUSE was in some manner negligent when unknown and masked gunmen came into their restaurant and shot several people, including the Plaintiffs. Defendant COFFEE HOUSE propounded various discovery upon the Plaintiffs, including Plaintiff BINH THAI TRAN.

Plaintiffs' counsel served the responses to the Defendant's Judicial Council Interrogatories and Requests for Admissions of the Plaintiffs. Plaintiffs DAN CAO and FRANKY LONG provided purported verifications with their responses.

However, Plaintiff BINH THAI TRAN has provide no verifications to any of the discovery propounded, including the Judicial Council Form Interrogatories and the Special Interrogatories, Set No. 1 [See EXHIBIT "A"].

By this Motion Defendant COFFEE HOUSE seeks an order to compel Plaintiff to provide full and complete responses to the Interrogatories and without objections, as they have been waived [See, Code of Civil Procedure §2030.290(a)].

#### **2. WHERE A PARTY HAS NOT SERVED TIMELY RESPONSES THAT ARE IN SUBSTANTIAL COMPLIANCE WITH THE PROVISIONS OF THE DISCOVERY ACT, A MOTION TO COMPEL IS APPROPRIATE AND SANCTIONS SHALL BE IMPOSED. THE COURT IS NOT DIVESTED OF JURISDICTION TO ENTERTAIN THE MOTION SIMPLY BECAUSE THE PARTY SUBSEQUENTLY SERVES TARDY RESPONSES:**

As the Court of Appeal provided in *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007)148 Cal.App.4th 390, 403-404:

1. The trial court may intervene when a party “fails to serve a timely response[.]” (§§ 2030.290 [interrogatories]; §2031.300 [inspection demands].)
2. A party that fails to serve a timely response to the discovery request waives “any objection” to the request, “including one based on privilege” or the protection of attorney work product. ( §§ 2030.290, subd. (a); 2031.300, subd. (a).)
3. The trial court may relieve the party of its waiver, but that party must first demonstrate that (a) it subsequently served a response to the demand; (b) its response “is in substantial compliance” with the statutory provisions governing the form and content of the response; and (c) “[t]he party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.” ( §§ 2030.290, subd. (a)(1)-(2); 2031.300, subd. (a)(1)-(2).)
4. The propounding party can move the trial court for an order compelling a party to respond to the discovery request. ( §§ 2030.290, subd. (b); 2031.300, subd. (b).)
5. Unlike a motion to compel *further* responses, a motion to compel responses is not subject to a 45-day time limit, and the propounding party does not have to demonstrate either good cause or that it satisfied a “meet and confer” requirement. (See generally, Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) ¶¶ 8:1137 to 8:1144, pp. 8F-59 to 8F-60, ¶¶ 8:1483 to 8:1489, pp. 8H-29 to 8H-30 (Weil & Brown); see also Cal. Rules of Court, rule 3.1020(b) [“A separate statement is not required when no response has been provided to the request for discovery”].)
6. If a party fails to serve a timely response, and the propounding party moves for and obtains a court order compelling a response, the trial court must impose a monetary sanction against the delinquent party unless that party acted with “substantial justification” or the sanction would otherwise be unjust. (§§ 2030.290, subd. (c); 2031.300, subd. (c).)
7. Section 2023.030 authorizes a trial court to impose a monetary sanction against any party or attorney, or both, who has engaged in misuse of the discovery process. Misuses of the discovery process include, among other things, failing to respond or to submit to an authorized method of discovery; making, without substantial justification, an unmeritorious objection to discovery; making an evasive response to discovery (2023.010.).
8. Section 2030.210, subdivision (a) requires a responding party to respond “separately to each interrogatory.” Accordingly, a responding party generally may *not* respond to interrogatories just by asserting its “inability to respond.” (See § 2030.220 [responding party who “does not have personal knowledge sufficient to respond fully” to interrogatory may so state, but must “make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations,” unless the information is “equally available to the propounding party”].)

## CONCLUSION

In this instant case, Plaintiff BINH THAI TRAN failed to provide any verifications to the Form Interrogatories and the Special Interrogatories. Defendant COFFEE HOUSE respectfully requests this Court to grant this Motion to Compel responses to the interrogatories, without objections, and to further issue an order compelling the Plaintiff and/or counsel to pay costs and sanctions in the amount of \$490.00.

### MOTION TO COMPEL SIGNED AUTHORIZATIONS FOR RELEASE OF MEDICAL RECORDS:

TO PLAINTIFF(S) AND YOUR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on the date and time and in the department set forth hereinabove, Defendant(s) will move the Court for an order to compel the Plaintiff to sign authorizations to allow the defense to obtain the records of \_\_\_\_\_ . Defendants have tried to resolve this matter informally without success and request this Court's intervention to obtain the necessary signed verifications. This Motion will be based upon this Notice, the attached Memorandum of Points and Authorities, the Declaration of \_\_\_\_\_ , and the inherent authority of this Court as provided in Code of Civil Procedure Section 128.

### MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL SIGNED AUTHORIZATIONS

1. STATEMENT OF FACTS:

2. THE MEDICAL RECORDS SOUGHT ARE RELEVANT TO THIS ACTION AND PLAINTIFF HAS CONTROL OF THE DOCUMENT BY REFUSING TO SIGN THE AUTHORIZATIONS TO ALLOW THE DEFENDANTS TO OBTAIN COPIES OF THEM

Discovery and documents may be obtained of a party who has possession, custody or control of such documents and other things. For example see: Code of Civil Procedure Section 2031.010.

While Plaintiff may not have physical possession of the employment records sought, he clearly has control over them, for "by either granting or withholding [his] consent, [he] may determine who shall have access to them. See: *Smith v. Maryland Casualty Co.*, 42 F.R.D. 587, 589 (E.D. La. 1967)).

Accordingly, courts have "almost universally h [e]ld, explicitly or implicitly, that Rule 34, along with Rule 37, empowers federal courts to compel parties to sign written authorizations consenting to the production of various documents." *Id.* (citations omitted). See also *United States, ex rel. Woodard v. Tynan*, 776 F.2d 250, 252 (10th Cir. 1985) (court has power to compel party to sign documentation authorizing the release of discoverable documents in the possession of non-parties); *Grove v. Aetna Casualty & Suretyship Co.*, 855 F. Supp. 113, 116 (W.D. Penn. 1993) (finding "ample" case law support for requiring signed authorizations

pursuant to Fed. R. Civ. P. 26 and 34 “as well as for judicial imposition of sanctions upon parties who frivolously refuse to provide such authorizations”).

Federal cases are *persuasive*: The Civil Discovery Act of 1986 was intended to bring California law closer to the discovery provisions of the Federal Rules of Civil Procedure. (*Emerson Elec. Co. v. Superior Court* (1997) 16 C.4th 1101, 1108.) Because of the similarity of California and federal discovery law, federal decisions have historically been considered persuasive absent contrary California decisions. These decisions should be considered even more persuasive following the 1986 Act. (*Liberty Mut. Ins. Co. v. Superior Court* (1992) 10 C.A.4th 1282, 1288). 2 Witkin, Cal. Evid. 4th (2000) Discovery, § 8, p. 862, Chapter X. Discovery.

See also: *Smith v. Logansport Community Sch. Corp.*, 139 F.R.D. 637, 649 (N.D. Ind. 1991) (citing *Brown v. Eli Lilly & Co.*, 131 F.R.D. 176, 178 (D. Neb. 1988)); *Fleming v. Gardner*, 84 F.R.D. 217 (E.D. Tenn. 1978); *Lammers v. Conrad*, 601 F. Supp. 1543, 1548 (E.D. Wis. 1985) (precluding plaintiff from prosecuting claims for personal injuries because of refusal to sign written medical authorizations); *Granberg v. Ashland County*, 590 F. Supp. 1005, 1011-12 (W.D. Wis. 1984)(imposing sanctions on party refusing to sign medical authorizations); *Occhino v. Lannon*, 150 F.R.D. 613, 615 n.1 (D. Minn. 1993)(compelling plaintiff to sign written medical authorization form).

In *Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913, 929, the court dismissed the claimant’s uninsured motorist proceeding due to the refusal of the claimant to sign medical authorizations as ordered by the court. Unable to obtain plaintiff’s authorization for release of her records, defendant filed an “application to commence discovery in underinsured motorist matter” in the superior court, together with a motion to compel compliance with the subpoenas for medical records. The “compliance” defendant requested was an order compelling plaintiff to sign the authorizations for release of her medical records from Kaiser Pasadena and Kaiser Hollywood-Sunset.

“For nearly a year before the dismissal, defendant had attempted to obtain evidence that would have assisted the determination whether plaintiff’s dizziness and vertigo were caused by the accident, or whether the symptoms were manifestations of a preexisting condition. Repeated attempts to obtain voluntary cooperation were rebuffed. Defendant sought the assistance of the court, and the court ordered plaintiff to cooperate by signing the authorizations for release of the requested records. After the order was made, plaintiff failed to obey the order, and two months later announced, through counsel, she would not sign the authorizations. Thus, the evidence established that plaintiff flatly refused to obey a court order. This was not an inadvertent failure to respond to discovery, or a mere late service of a discovery response. It was defiant disobedience of the court’s order”.

### **CONCLUSION:**

Defendants have attempted without success to obtain the signed authorizations and thus seek the assistance of this Court to issue an appropriate order for the Plaintiff to sign the authorization(s) allowing Defendants to obtain the records of \_\_\_\_\_.

These records will only be used for the purposes of this litigation and will only reviewed by defense counsel and staff and experts retained by the Defendants. The records will be returned to Plaintiff or counsel upon request at the conclusion of this litigation.

## RELIEF FOR REQUESTS FOR ADMISSIONS

Statute which permits an admission to be withdrawn or amended if admission was result of mistake, inadvertence, or excusable neglect, and party who obtained admission will not be substantially prejudiced, applies to all admissions, and thus permits withdrawal not only of admissions contained in an actual response, but also admissions deemed admitted based on a failure to respond. *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983.

A party may obtain relief from an admission made in response to a request for admission by leave of court, upon a determination that the admission was the result of mistake, inadvertence, or excusable neglect, and that the party who obtained the admission will not be substantially prejudiced in maintaining that party's action or defense on the merits. (see also Code Civ. Proc., § 2033.300, subs. (a), (b).) *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 983; *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1420 ["The absence of substantial prejudice is an important factor to consider."]

The trial court's discretion in ruling on a motion to withdraw or amend an admission is not unlimited, but must be exercised in conformity with the spirit of the law and in a manner that serves the interests of justice. Because the law strongly favors trial and disposition on the merits, any doubts in applying section 2033.300 must be resolved in favor of the party seeking relief. Accordingly, the court's discretion to deny a motion under the statute is limited to circumstances where it is clear that the mistake, inadvertence, or neglect was inexcusable, or where it is clear that the withdrawal or amendment would substantially prejudice the party who obtained the admission in maintaining that party's action or defense on the merits. *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1420-1421.

Because the statutory language "mistake, inadvertence, or excusable neglect" in Code of Civil Procedure section 2033.300 is the same language found in Code of Civil Procedure section 473, subdivision (d), permitting a court to relieve a party of a judgment or order taken against him through mistake, inadvertence, or excusable neglect, the terms have been interpreted to have the same meaning. (*New Albertsons, Inc. v. Superior Court, supra*, 168 Cal.App.4th at pp. 1418-1419.)

CCP § 2033.300 is designed to eliminate undeserved windfalls obtained through requests for admission and to further the policy favoring resolution of lawsuits on the merits. Therefore, any doubts must be resolved in favor of the party seeking relief. [*New Albertsons, Inc. v. Superior Court, supra*, 168 CA4th at 1420.]

An order denying discretionary relief under section 473 is more carefully scrutinized on appeal than an order permitting trial on the merits. (*Rodriguez v. Henard* (2009) 174 Cal.App.4th 529, 535).

## **12 MOST FREQUENTLY ASKED QUESTIONS ABOUT I.M.E.'S**

1. **CAN A DEFENDANT DEMAND THAT PLAINTIFF ATTEND MORE THAN ONE EXAMINATION?** Yes – but only with a stipulation with Plaintiff’s counsel or a Court order. The Code allows for one (1) *physical* examination without a stipulation or court order. On the other hand, a mental examination can only be allowed with a stipulation or court order. (See: *Shapiro v. Superior Court* (1990) 224 C.A.3d 1249, 1254 -- while the code does provide for “a” or “an” examination, limiting defendant to one examination of plaintiff was error, where neurologist and neuropsychologist testified that additional psychiatric examination was needed. As Shapiro notes, federal decisions have authorized multiple examinations based upon “good cause” – including cases that have allowed up to five (5) separate examinations of different medical specialties based on the injuries claimed].)

2.

3. **DOES THE DEMAND FOR THE I.M.E. [OR, DOES A NOTICED MOTION] REQUIRE A LISTING OF THE SPECIFIC DIAGNOSTIC TESTS/PROCEDURES**

NO. Specific diagnostic tests and procedures are not required to be stated in a notice of motion to compel a physical or mental examination [§ 2032.310 – a motion to compel a mental examination or examination then the one examination allowed only requires that it “specify the time, place, manner, conditions, scope and nature of the examination, as well as the identity and specialty, if any, of the physician who will perform the examination.]

Nor is it required in the demand that the diagnostic tests and procedures be enumerated [§2032.220(c) only requires that the demand “shall specify the time, place, manner, conditions, scope and nature of the examination, as well as the identity and the specialty, if any, of the physician who will perform the examination” be set forth].

*However*, §2032.320 requires the trial court, in granting a second physical examination or an initial mental examination, to list diagnostic tests and procedures to be employed in the mental examination in the order [“An order granting a physical or mental examination shall specify the person or persons who may perform the examination, as well as the time, place, manner, *diagnostic tests and procedures*, conditions, scope, and nature of the examination.” (§ 2032.320, subd. (d)). (*Carpenter v. Superior Court* (2006) 141 Cal.App.4th 249, 269.)

3. **DOES AN I.M.E. DOCTOR HAVE TO PREPARE A REPORT?** YES. Even if the defense does not intend to use the I.M.E. doctor at trial, once the Plaintiff has attended the examination, the doctor has to prepare the report. see *Kennedy v. Superior Court* (1998) 64 C.A.4th 674, 678 [examined party is entitled, on request, to detailed report containing specified information, even if examining physician did not prepare one].

4. **MAY THE EXAMINATION BE VIDEOTAPED?** No. See: *Ramirez v. MacAdam* (1993) 13 C.A.4th 1638, 1641 [videotaping of examinations is not authorized].

5. **MAY THE EXAMINATION BE RECORDED BY AUDIO DEVICES?** Yes. A *physical* examination may be recorded stenographically and/or by audio technology any words spoken

to or by the examinee during any phase of the examination. §2032.510(a). As to a *mental* examination, it may only be recorded by audio technology. Further, the entire examination may be audio-recorded and there is no requirement that one other than the doctor or the examinee be present to record the examination. *Golfland Entertainment Centers v. Superior Court* (2003) 108 C.A.4th 739, 750.

**6. IS A DOCTOR ALLOWED TO TAKE A HISTORY AS PART OF THE EXAMINATION?**

Yes -- but a doctor cannot ask questions about liability that have already been disclosed in Plaintiff's deposition or answers to discovery. Further, a doctor performing an examination may ask questions that call for a narrative response. However, questions as to liability that have already been provided in a deposition or to another doctor shall not be asked again. See *Golfland Entertainment Centers v. Superior Court* (2003) 108 C.A.4th 739, 745. Further, see: *Sharff v. Superior Court* (1955) 44 Cal.2d 508, 511, the California Supreme Court held it was permissible for the examining doctor to ask questions and inquire into matters necessary for the examination. In fact, the Court stated: "The doctor should, of course, be free to ask such questions as may be necessary to enable him to formulate an intelligent opinion regarding the nature and extent of the plaintiff's injuries...". See also: *Krasnow v. Bender* (1979) 78 Ill.2d 42, 397 N.E.2d 1381 [a medical history was a necessary and integral part of the physical examination. Further, the court held that it was clear as a matter of common practice and common understanding that a medical history is part of every medical examination.

A refusal to allow the taking of a medical history in the performance of a physical examination as part of the discovery process is an unreasonable interference with the medical examination for which sanctions are justified]. And, see: *Simon v. Castille* (1965) 174 So.2d 660, the court held when the discovery procedures provided for the physical examination of the plaintiff, the term "physical examination" also allowed for the examining physician to take a history from the plaintiff during the examination.

**7. WHO MAY ATTEND THE EXAMINATIONS?** Only an attorney may attend a *physical* examination or a designated representative [provided that notice of the designated representative attending the examination and the identity of the attendee, shall be provided in writing prior to the examination to the defense counsel]. §2032.510(a), (c).

As to a *mental examination*, no attorneys, parents, representatives or others are allowed to attend the examination. *Golfland Entertainment Centers v. Superior Court* (2003) 108 C.A. 4th 739, 745; §2032.530. Likewise, no one is allowed to accompany the examinee to the examination, including spouses, or family members. *Long v. Hauser* (1975) 52 Cal.App.3d 490. However, see: *Vinson v. Superior Court* (1987) 43 C.3d 833, a sexual harassment case, the court approved *Edwards v. Superior Court* [infra] but noted that "trial courts retain the power to permit the presence of counsel or to take other prophylactic measures when needed." (43 C.3d 846.)

As to the "observer" who monitors the examination, he/she may attend but may not disrupt the examination in any manner. §2032.510(b).

8. **MAY AN EXAMINATION LAST MULTIPLE HOURS?** Yes. The Supreme Court held in *Edwards v. Superior Court* (1976) 16 C.3d 905 that the trial court did not commit an abuse of discretion in ordering an examination of 4 hours in duration [4 sessions of approximately 50 minutes each].

9. **IF AN EXAMINATION IS ONLY ALLOWED AS TO “CONDITIONS IN CONTROVERSY”, WHAT IS A “CONDITION IN CONTROVERSY?”**

It must be noted that nowhere in C.C.P. §2032.010, et. seq., does it provide that the examination must be limited to “conditions in controversy”, although common sense would dictate that this would be the limit of the examination.

As to limiting the examination to the "examinee's conditions which are in controversy", the body is an intricate and complex, interrelated system which cannot simply be isolated to an inquiry into one single body part. For example, as the court describes a "back injury" in *Peter Kiewit Sons v. Industrial Accident Commission* (1965) 234 Cal.App.2d 831, 839-840: "Back disabilities in particular shout loudly for expert advice. No human ailment has produced more medicolegal headaches than the aching back. This delicately articulated structure or nodulated bones, cushioned by cartilaginous bodies and gelatinous material, interlaced by the complex and sensitive fibers of the cerebrospinal nervous system and held in array by strands and cords of muscular and ligamentous tissue, is vulnerable to a vast and bewildering variety of traumatic, pathological, deteriorative ailments and neurotic manifestations, singly and in diverse combinations."

The examiner shall examine those portions of the examinee's body that are medically necessary to be examined for the injuries complained of.

10. **DOES THE PLAINTIFF HAVE TO TURN OVER TO THE DEFENSE ANY REPORTS OF DOCTORS WHO HAVE EXAMINED THE PLAINTIFF WITHOUT A FORMAL DEMAND FOR THEM?** Yes. By demanding reports of the examining doctor, the examinee waives any right to claim privilege to any of the reports of doctors who have examined the plaintiff and must not only turn over all reports of such doctors in the past but any doctor who will examine the Plaintiff in the future. Plaintiff shall turn over to the defense at the time of compliance by the defense copies of all past reports of the plaintiff's doctors who have examined plaintiff. §2032.620.

11. **CAN THE DEFENSE “DE-DESIGNATE” THE I.M.E. DOCTOR AND KEEP HIM/HER FROM TESTIFYING?** No. *Kennedy v. Superior Court* (1998) 64 C.A.4th 674, 678, 679 [examining physician may be deposed even if physician has been withdrawn as expert and redesignated “consultant”; ordinarily party may “hide” expert from deposition by this means, but when expert is also examining physician specific terms of §2032, including waiver of work product protections, control].

12. **CAN AN ATTORNEY ATTEND A MENTAL EXAMINATION [OR SIT NEARBY AND LISTEN TO IT]?** NO. California law (in particular *Edwards v. Superior Court* (1976) 16 Cal.3d 905, 911) does not generally permit the attendance of counsel at the examination

itself. Court rejected Plaintiff's claim that "based upon the circumstances" (which were not specified), the court should protect plaintiff's privacy rights during the examination by allowing his counsel to be present nearby and to listen as the examination progressed. *Toyota Motor Sales, U.S.A., Inc. v. Superior Court* (2010) 189 Cal.App.4th 1391, 1394.

## MULTIPLE I.M.E's

Once defendant has conducted its *single* physical exam of a personal injury plaintiff by demand (CCP § 2032.220(a), above), no further exams of plaintiff may be obtained by defendant as of right. All subsequent exams (e.g., for a second opinion or for a different type of test) require a court order for "good cause" shown. [CCP §§ 2023.310(a), 2032.320 (a)]. By the same token, while there is no statutory limit on the number of court-ordered exams, multiple examinations should not be ordered routinely; "the good cause requirement will check the potential harassment of plaintiffs by repetitive examinations." [See *Shapira v. Super.Ct. (Sylvestri)* (1990) 224 CA3d 1249, 1255, 274 CR 516, 520—trial court erred in limiting D to one mental exam of P without considering whether good cause existed for second exam].

Nowhere does the Legislature specifically limit the number of available examinations, either mental or physical. The authoritative discovery commentators agree that multiple defense examinations are permitted on the necessary showing of good cause. (2 Civil Discovery Practice in California (Cont.Ed.Bar 1988) § 10.13, p. 617 [multiple examinations "are not expressly restricted by [section] 2032" and are allowed for good cause]; Weil & Brown, *Civil Procedure Before Trial* (1990) §§ 8:1557, 8:1558, p. 81-14.) "Although Section 2032(a), which creates this discovery tool, refers to 'a' compulsory medical examination, this use of the singular article has never been taken to imply that only one such examination may be authorized. Moreover, the limitation of the use of the ... 'demand' procedure to 'one' physical examination indicates that a party may obtain more than one by making a motion therefor under Section 2032(d)." (1 Hogan, *Modern California Discovery* (4th ed.1988) § 8.8, pp. 470-471, fns. omitted.)

Professor Hogan notes that analogous federal decisions have reached the same result, and have upheld multiple examinations by medical specialists in different fields pertinent to a plaintiff's injury. (1 Hogan, *op. cit. supra*, at pp. 471-472, citing *inter alia Marshall v. Peters* (S.D.Ohio 1962) 31 F.R.D. 238, 239 [orthopedist and cardiologist]; *Little v. Howey* (W.D.Mo.1963) 32 F.R.D. 322-323 [orthopedist and neurosurgeon].) He also cites a Delaware decision in which a trial court found good cause for five separate defense medical examinations-including those by a gynecologist, a neurologist, and a psychiatrist-of a plaintiff alleging injuries sustained from carbon disulphide poisoning. (*Bowing v. Delaware Rayon Co.* (1937) 38 Del. 206, 190 A. 567, cited at 1 Hogan, *op. cit. supra*, at p. 472: 'The alleged injurious results are so varied in their nature that examinations by specialists in several branches of medical science may well be required if the purpose of the statute is to be given effect.' The court ordered examination by a general practitioner, a neurologist, a psychiatrist, a gynecologist, and a specialist in genito-urinary diseases) *Shapira v. Superior Court* (1990) 224 Cal.App.3d 1249, 1255.

Examples of circumstances in which courts have held sufficient cause existed to justify second examinations include the following: (1) separate injuries calling for examination by distinct medical specialties, *Marshall v. Peters*, 31 F.R.D. 238 (D.C.Ohio 1962); (2) where a physician requires assistance of other consultants before he can render a diagnosis, *Little v. Howey*, 32 F.R.D. 322 (W.D.Mo.1963); (3) where the first examination was not adequate or complete, *Mayer v. Illinois Northern Ry.*, 324 F.2d 154 (7th Cir.1963); *Strasser v. Prudential Ins. Co.*, 1 F.R.D. 125 (W.D.Ky. 1939); and (4) where a substantial time lag occurred between the initial examination and trial, *Lewis v. Neighbors Constr. Co.*, 49 F.R.D. 308 (W.D.Mo.1969); *Vopelak v. Williams*, 42 F.R.D. 387 (D.C.Ohio 1967). See also *Moore, supra*, at 135 (collecting cases involving second examinations). *Peters v. Nelson* 153 F.R.D. 635, 638 (N.D.Iowa,1994).

Orthopedics and neurology are two separate fields of medicine and both examinations may be ordered. *Sauer v. Burlington Northern Railroad Co*, 169 F.R.D. 120 (D.Minn.1996). In *Sauer*, the plaintiff maintained that "since he had submitted to a neurological examination at the defendant's

insistence, he should not be required to \* \* \* undergo an orthopedic examination." Id at 122. The court rejected the plaintiff's argument stating that "where the re-examination will draw upon the expertise of a *different*, but medically appropriate discipline, we can find no basis upon which the plaintiff may validly object." Id at 124 (emphasis added).

## **MOTION TO COMPEL I.M.E. AND MRI/BLOOD TESTS**

TO PLAINTIFF AND YOUR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on the date and time and in the department hereinabove set forth, Defendant(s) \_\_\_\_\_, will move the Court for the following order:

1. Defendant(s) seek an order from this Court to compel the Plaintiff to attend a physical examination on the \_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ o'clock, at the offices of Dr. \_\_\_\_\_, located at \_\_\_\_\_, and at such time and place to order Plaintiff to produce and allow the medical examiner to draw one single vial of blood for the purpose of determining the exposure of the Plaintiff to any alleged toxins due to alleged mold exposure and any allergic reactions. Further, Defendant(s) seek an order to compel the Plaintiff to undergo an MRI of the head and brain.

As Defendant(s) provide with the attached Declaration of Dr. \_\_\_\_\_, this blood test is relatively painless, will require the brief insertion of a relatively small needle, will take a matter of seconds to withdraw the necessary blood and is absolutely vital and necessary to assist the medical examiner in his opinion as to whether or not the Plaintiff has suffered allergic reactions and symptoms due to the claim of mold exposure. Further, the defense has been advised that the Plaintiff's own medical examiners have requested that Plaintiff provide the same blood test and sample that Defendants are requesting Plaintiff to undergo.

In addition, Plaintiff's counsel has indicated that previous MRI films/scans taken by Plaintiff's physicians are missing. Plaintiff is claiming a serious brain injury, and as Dr. \_\_\_\_\_ provides, the MRI is absolutely essential to ascertain whether in fact Plaintiff did suffer brain injury. Further, as Dr. \_\_\_\_\_ provides the MRI is non-invasive, not painful and is medically safe.

This Motion is based on this Notice, the following Memorandum of Points and Authorities, the attached Declarations, and upon the provisions of Code of Civil Procedure §2032.020, et. seq., and upon such matters that may be argued at the time of the hearing of this motion.

### **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO COMPEL I.M.E. AND BLOOD SAMPLE**

**FACTS:** This case arises from allegations that Plaintiff was exposed to "mold" on the premises of the Defendants and suffered physical injuries as a result thereof.

**BASIS OF MOTION:** Defendants seek to have Plaintiff examined and to have the Plaintiff undergo a blood test. As provided in the attached Declaration of Dr. \_\_\_\_\_, this is a very simple blood test, one vial of blood will be withdrawn and a very small needle will be used to withdraw the blood. This is essentially a painless procedure and will be very brief. Further, this blood test is absolutely essential to detect whether or not Plaintiff has

suffered from any allergic reactions due to her claim of exposure to “mold” and such procedures cannot be ascertained or duplicated in any other manner.

Further, Plaintiff’s counsel has advised the defense that a brain MRI scan taken by Plaintiff’s doctors is no longer available. As Dr. \_\_\_\_\_ provides, this MRI is absolutely essential to ascertain whether Plaintiff suffered any brain injury and it is a medically safe procedure and will be performed in accordance with accepted medical protocols and procedures.

While it is true that a physical exam by demand cannot include any "diagnostic test or procedure that is painful, protracted, or intrusive, the courts have held that a simple blood test and an MRI is not intrusive nor painful and is permissible. For example, see:

1. ***Cruz v. Super.Ct. (Advanced OBGYN Med. Group)*** (2004) 121 CA4th 646, 652, -- drawing of blood for test not "painful, protracted, or intrusive" absent unusual circumstances [“there is no evidence that obtaining blood from mother would be other than a routine procedure...”. Court held it was proper to order mother (and guardian ad litem) of infant to submit to a blood test to determine whether the genetic condition of the minor and his mother caused or contributed to the injuries. Statute authorizing the physical examination of an agent of any party, the term “agent” was sufficiently broad to include mother]
2. ***Abex Corp. v. Super.Ct. (Crouson)*** (1989) 209 CA3d 755--wart biopsy under local anesthetic not "painful, protracted, or intrusive".

Also see:

1. An MRI may be ordered by the Court when the need has been established. An MRI, blood testing, x-rays and skin tests are acceptable testing procedures to determine the nature and extent of the plaintiff’s injuries and are safe, painless and non-invasive. ***Lapera v. Shafron*** (1990) 159 A.D.2d 614, 552 N.Y.S.2d 668.
2. In slip and fall case, plaintiff may be ordered to provide blood sample to defense medical examiner who provides that it is necessary as part of his examination of the plaintiff in this case where plaintiff complains of “joint complaints” and the blood test is required to ascertain if such complaints are due to other causes [such as gout, rheumatoid arthritis, etc.] ***Evens v. Denny’s, Inc.*** (1985) 129 Misc.2d 767, 494 N.Y.S. 2d 67.
3. Despite protests that Plaintiff did not want to be exposed to any more x-rays, court ordered plaintiff to undergo x-rays and MRI and to provide history to examining doctors. ***Tarte v. United States*** (2008) 249 F.R.D. 856.
4. Child would be ordered to undergo MRI under anesthesiology. Defendant’s experts established that the procedure would be safe – and previous MRI scans were unreadable as the minor did not hold still. ***Pena v. Troup*** (1995) 163 F.R.D. 352.
- 5.

#### **CONCLUSION:**

As Dr. \_\_\_\_\_ provides, this is a relatively painless procedure which should take a matter of a few seconds. A small needle will be inserted and a vial of blood will be withdrawn. This test is absolutely essential to allow the examining doctor to determine whether Plaintiff was exposed to any allergens as a result of the alleged mold exposure.

Further, the MRI is essential to determine whether the Plaintiff suffered a brain injury and in light of the fact that the original films/scans cannot be located, Defendants must be allowed to obtain an MRI to ascertain whether there is in fact any such damage.

## **DEFENSE REPLY TO PLAINTIFF'S OBJECTION TO I.M.E.**

In Reply to the Plaintiff's response to the Defendant's demand for an I.M.E., Defendants state as follows:

**MEET AND CONFER:** Plaintiff's counsel is requested to contact defense counsel at ( ) \_\_\_\_\_ to meet and confer and discuss any of the conditions or objections or response of the Defendants as set forth herein so that an amicable resolution may be arrived at. Failure of plaintiff to appear at the IME will result in a motion to compel and a request for costs and sanctions.

**PRESENCE OF ATTORNEY OR AUTHORIZED REPRESENTATIVE:** The examinee may be accompanied by an attorney or authorized representative. There shall be, however, no authorized representative present at the examination unless the authorization for such representative is in writing and provided to the defense counsel and the identity of the observer must be set forth in writing and provided to defense counsel. *C.C.P. §2032.510(c)*. Further, the examination shall not be interfered with nor shall the examinee be permitted to ask the representative or attorney to answer questions or provide information to the examiner. This is an examination of the examinee only, and if the examinee's counsel disrupts the examination by telling the examinee how to answer questions, for example, the examiner may suspend the examination. *C.C.P. §2032.510(b), (e); California Practice Guide, Civil Procedure Before Trial*, ¶8:1592, pp. 8I-24-8I-25.

**AUDIO RECORDATION OF THE EXAMINATION:** There is no objection to the audio recording or court reporting of the examination *only as to any words spoken to or by the examinee*, as long as such audio recording or court reporting is not intrusive and does not in any manner interrupt the examination. *Code of Civil Procedure §2032.510(a)*. Copies of the audio-tapes/transcripts are hereby demanded to be produced to defense counsel within thirty (30) days of the date of the examination. If this is a mental examination, the *entire examination* must be recorded on audio tape, not just portions of it. *Golfland Entertainment Centers v. Superior Court* (2003) 108 Cal.App.4th 739, 750; *Code of Civil Procedure §2032.50*.

**OTHERS PRESENT AT EXAMINATION:** There will be no others attending the physical examination other than the doctor, his or her necessary staff and assistants required to perform the examination or complete the procedures and the plaintiff and plaintiff's attorney or properly authorized and designated representative observer.

**OTHERS PRESENT MENTAL EXAMINATION:** If this is a mental examination, no attorney or observer is allowed to be present. *Golfland Entertainment Centers v. Superior Court* (2003) 108 Cal.App.4th 739, 747-748; *Code of Civil Procedure §2032.530*. Likewise, no one is allowed to accompany the examinee to the examination, including spouses, or family members. *Long v. Hauser* (1975) 52 Cal.App.3d 490.

**TIME OF EXAMINATION:** Defendant has no objection with the demand for the examination to start within thirty (30) minutes of the scheduled time. Defendant will advise the I.M.E. doctor of these time limits. Defendant demands that plaintiff's counsel or staff contact defense counsel to meet and confer and resolve any complications which may arise over the

issue of the time limits for the examination before making a unilateral decision to walk out of the examination.

**X-RAYS:** X-rays of the plaintiff taken previously for this incident must be made available to the defendant's counsel in sufficient time prior to the examination for the doctor to have an opportunity to review such films. Further x-rays may be required based upon a showing of good cause [such as, if the x-rays are incomplete, too old or not of good quality], but will not be taken without notifying plaintiff's counsel first. A "generalized fear" to have x-rays taken may not be the basis for refusing to have x-rays taken. Nor can plaintiff complain of x-rays if he or she is willing to have the same x-rays taken by her own physician. *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 259.

**PAINFUL TESTS:** There will be no urine and/or blood tests or any other test which is "painful or invasive" [*Code of Civil Procedure §2032.220(a)(1)*], other than the examinee may be asked to perform certain procedures or movements such as bending or raising a limb or moving a certain body part which may in fact result in examinee's expressions of pain. The examinee is required to advise the doctor if any procedure or request results in pain.

**"CONDITIONS IN CONTROVERSY":** As to limiting the examination to the "examinee's conditions which are in controversy", the body is an intricate and complex, interrelated system which cannot simply be isolated to an inquiry into one single body part. For example, as the court describes a "back injury" in *Peter Kiewit Sons v. Industrial Accident Commission* (1965) 234 Cal.App.2d 831, 839-840: "Back disabilities in particular shout loudly for expert advice. No human ailment has produced more medicolegal headaches than the aching back. This delicately articulated structure or nodulated bones, cushioned by cartilaginous bodies and gelatinous material, interlaced by the complex and sensitive fibers of the cerebrospinal nervous system and held in array by strands and cords of muscular and ligamentous tissue, is vulnerable to a vast and bewildering variety of traumatic, pathological, deteriorative ailments and neurotic manifestations, singly and in diverse combinations." The examiner shall examine those portions of the examinee's body that are medically necessary to be examined for the injuries complained of.

**COPY OF CONDITIONS TO DOCTOR:** The examining doctor will be advised of the final agreed upon conditions of the examination.

**COMPLETION OF FORMS:** The examinee will be requested to sign in upon arrival at the examining doctor's office. **This is a requirement of the examining doctor and cannot be waived. All federal and state laws as to the privacy of the examinee will be adhered to.**

**DEMAND FOR MEDICAL REPORTS:** The appropriate report of the IME physician will be provided as required pursuant to the provisions of *Code of Civil Procedure §2032.610(a)* and within thirty days of the date of the examination. If the examinee makes such a demand, all privileges including work product have been waived, and the examinee is required to produce to the defense counsel **promptly** copies of all reports of any medical experts of the examinee presently existing *and in the future* and further, the examinee is required **promptly** to make the names available to the defendants of all doctors who have examined or may examine the examinee in the future *Code of Civil Procedure §2032.630*. Failure to provide such reports and

names will result in a motion to exclude such doctor's opinions at trial and a request for sanctions. *Code of Civil Procedure §2032.650*.

**HISTORY:** A full and complete history is a vital and integral part of the physical examination. Since a report of the examination, including the history, is required [*Code of Civil Procedure §2032.610(a)*], the examiner will obtain the necessary and relevant medical history required to allow the examiner sufficient information to be able to provide a meaningful diagnoses, prognoses and conclusions.

An examining doctor is allowed to ask such questions "that were necessary to the formation of an opinion about the diagnoses and prognosis of the [examinee's] condition." *Golfland Entertainment Centers v. Superior Court* (2003) 108 Cal.App.4th 739, 745-746 [allowing for history to be taken but not questions as to liability which were available in depositions and other discovery; it is permissible to allow questions asking for narrative responses].

In *Sharff v. Superior Court* (1955) 44 Cal.2d 508, 511, the California Supreme Court held that the plaintiff has a right to have his or her attorney present as a doctor performing the examination pursuant to the provisions of *Code of Civil Procedure §2032* will be asking questions and inquiring into matters necessary for the examination. In fact, the Court stated: "The doctor should, of course, be free to ask such questions as may be necessary to enable him to formulate an intelligent opinion regarding the nature and extent of the plaintiff's injuries...".

In *Krasnow v. Bender* (1979) 78 Ill.2d 42, 397 N.E.2d 1381, the court held that the refusal by plaintiff's counsel to allow a plaintiff to provide a medical history during a physical examination as part of the discovery process was sufficient grounds for the imposition of sanctions as against the attorney. As the court provided in *Krasnow*, a medical history was a necessary and integral part of the physical examination. Further, the court held that it was clear as a matter of common practice and common understanding that a medical history is part of every medical examination.

A refusal to allow the taking of a medical history in the performance of a physical examination as part of the discovery process is an unreasonable interference with the medical examination for which sanctions are justified.

Further, the court in *Krasnow* held that the history would be ordered even if other medical records containing plaintiff's medical histories were to be made available to the examining physician. The availability of other medical records does not justify a blanket refusal to give a medical history. In addition, possible further developments after the date of the prior histories would require further inquiries and a new and additional medical history. Nor could plaintiff refuse to give a history because a nurse took a history.

In *Simon v. Castille* (1965) 174 So.2d 660, the court held when the discovery procedures provided for the physical examination of the plaintiff, the term "physical examination" also allowed for the examining physician to take a history from the plaintiff during the examination. The court held that a medical history was a necessary and integral part of the medical examination; that a medical history prepared by the plaintiff's attorney, or any other person, may not be sufficient for a doctor's purpose in evaluating the patient's physical condition. In order to give his or her professional opinion, the examining doctor must be allowed to elicit his or her own medical history, because, due to differences in training, experience and background,

the author of such a previously prepared medical history may omit facts which are of vital significance to the examining physician. Finally, the court held no doctor should be required to give his [or her] professional diagnosis and opinion as to a person's physical condition, without the right to elicit the medical history he [or she] deems necessary for that purpose.

**SPECIFICS OF THE EXAMINATION:** There is no requirement in §2032 that every single question, test, or procedure required to perform the examination be enumerated. This would be an impossibility in the first place, and the nature of the tests or procedures required by the physician would not be determinative until the time of the examination and the observation of the plaintiff. The examination may consist of appropriate orthopedic procedures and/or manipulations of the body.

[Orthopedic] Further, the examining doctor may request the plaintiff to engage in a variety of possible orthopedic tests, including, but not limited to straight leg raising [prone/supine], range of motion, heel-to-toe, squat or duckwalk, Goldthwait test, Trendelenburg, circumferential measurements, vascular examination, neurological examination, hand-grip, testing for impingement sign, ascertainment of stability, get up on and off of the examining table/bench, walk, move the affected limb(s) for ascertainment of pain and range of movements, pelvic tilt, toetomouth test, Lewin's sign, Adam's position, Lewin's Test, Nibor's Sign, chest expansion.

Further, the patient may be required to perform the Standing Sign-of-Four, Kemp's Sign or test, Lasegue's Test, Soto-Hall Test, Gower's Sign, Mill's Test, Kernig's test, Fabere-Patrick's Test, Braggard's Test, Bilateral Leg Lowering, Gaeblesen's test, Kernig's Sign, Hibb's test, Yeoman's test, Spinous percussion Test, Rust's Syndrome, Nachlas' test, Ober's test, Mennell's Sign, Costoclavicular Test, Hyperabduction test, Jackson's Maneuver, Foramina Compression test, Burn's test, Flip test, Libman's test, Eden's Test, Wright's Test, Plantar Flexion test, Flexed Hip test, Seated Forward bend test, and appropriate sensation testing.

**NOTE:** If the examination is a “mental examination” then a Court order is required [unless Plaintiff consents] and more specificity is required as to the nature of the tests and examination to be performed. The same is true when the Court orders an examination. For example, see *Carpenter v. Superior Court* (2006) 141 Cal.App.4th 249, 269 [C.C.P. §2032.320 requires the trial court to list by name the diagnostic tests and procedures to be employed in the mental examination. §2032.320 means what it says -- that the proposed diagnostic tests and procedures must be specified. §2032.320 requires not just specification of the manner, conditions and scope of the examination, but also specification of the “diagnostic tests and procedures”]. It is mandatory that you consult with your doctor, neurologist and/or psychologist, etc., to obtain a proposed list of possible tests, examinations and procedures. Further, if demanded, the defense is required to provide copies of the proposed tests and the plaintiff’s responses after the examination – subject to a protective order that they be used for this case only, to be destroyed or returned after the resolution of the case, and/or they be provided only to plaintiff’s attorney or psychologists or experts. It is therefore important that we not only propose a protective order should such material be requested – **but we should consider requesting the same information from Plaintiff’s counsel.**

**CANCELLATION FEES:** Any fees charged by the examining doctor will be sought in a motion to compel if the plaintiff fails to appear and/or as costs in this suit.

## **EXPERT DEPOSITIONS**

Some tips and suggestions in taking an expert's deposition. Of course, every case is different and the approach one takes must be geared to the specific facts of the case and the background, training and expertise of the expert on the particular subject.

**1. DOCUMENTS REQUESTED TO BE PRODUCED:** At the minimum request the following documents from an expert for his or her deposition:

1. Any and all reports, notes, memos, work sheets, and supporting data utilized in conjunction with the formulation of deponent's opinion in this case and/or reviewed by him or her in investigating and reviewing this case;
2. Any and all writings or recordings which reflect any of deponent's opinions in regard to this case;
3. Any and all correspondence in regard to this matter including, but not limited to, any correspondence to or from the hiring attorney and his or her firm;
4. Any and all business records which reflect time and effort on this matter, including but not limited to, invoices, hourly or daily charges, time sheets and ledgers;
5. If deponent has reviewed outside source material such as books or articles or other written materials which pertain to the subject matter of this litigation and relates to his or her investigation in this matter, then he or she is hereby requested to produce such material;
6. Any and all diagrams, sketches or demonstrative illustrations that the expert has created or relied upon in working on this matter, whether in draft or final form.
7. Any all video animations or visual recreations illustrating or pertaining to any of the expert's opinions pertaining to this matter.
8. The deponent's complete "file" in this matter.
9. The expert's Curriculum vitae [it would be advisable to obtain this prior to the deposition and analyze it for the deposition as to the expert's education, experience, organizations and memberships, prior testimony or conferences or seminars participated in or conducted by the expert].

**2. IF THE EXPERT MADE A REPORT:**

Take their report - dissect it into its major statements - the ones that form the basis for the key opinions - ask three questions - what does this mean in lay terms - why do you say this [e.g. what is the basis in fact and theory for the statement] and is that all you have to say about this point? As long as you carefully and thoroughly explore the innards of these three questions for each key point, the rest of the deposition is frosting on the cake.

**3. FIVE (5) SIMPLE QUESTIONS:**

1. Who engaged you in this case.
2. What they ask you to do?
3. What did you do?
4. What conclusions, opinions did you reach and what do you intend to testify to at trial?

5. Were there any other test- analysis or things you could have done or would have liked to?

**4. BASIS OF OPINIONS:**

1. What was your assignment in this case?
2. What are the areas about which you expect to testify?
3. What opinion(s) do you hold in regard to that topic?
4. Why do you hold that opinion?
5. What material in your file supports that opinion?
6. Did you rely on anything outside of your file as a basis for that opinion?
7. What aspect of your education [or background or training] qualifies you to offer that opinion?
8. Have you prepared (or will you prepare) any exhibits pertaining to this opinion?
9. What is the significance of this document from your file?
10. Is there any additional work that you intend to do before trial on this topic?
11. Are there other areas pertaining to this matter that we haven't discussed that you have prepared opinions on?
12. What assumptions did you make?
13. What is the factual basis for this opinion, and how do these facts lead to your conclusion?
14. What information have you relied on that was provided by counsel or your client?
15. What other work would you have liked to have performed?
16. What tests or experiments were performed and for what purpose?
17. What experiments or recreations are planned in the future?
18. Are you familiar with the experts [the other side] has retained? What is your opinion as to their expertise on this subject?

**5. BIAS QUESTIONS:**

1. The expert's education, background and training need to be explored, with particular emphasis on the exact subject matter at hand. Bias questions include how much this particular witness has charged for his or her work on the matter, his or her history with the firm that has retained him or her, and the level of their involvement in legal matters in general.
2. The expert's propensity to testify primarily for one side or the other (for example, plaintiff or defendant, police officer or citizen, etc.).
3. The expert's history with the retaining attorney's firm. Also, the history of the expert with the retaining lawyer, regardless of what firm he or she was employed with at the time, can provide useful information.
4. The expert's fee, and how is it paid.
5. Also inquire the percentage of expert's income from litigation matters.
- 6.

**6. END OF DEPOSITION:** Always inquire whether there are any other major areas of testimony that the expert has prepared for trial that has yet to be discussed. Also, inquire

whether the expert has any more opinions relating to the litigation at hand. In response to any such objection or vague response, make it clear on the record that the deposition is your only opportunity to learn this person's opinions, and that the purpose of the deposition is to prevent surprise at trial. Be sure to state on the record that if any further testing, research, investigation or examination is done by the expert or he or she is provided with any more information other than what he or she was provided for this deposition and he/she intends to offer any further opinions at trial that you are to be notified immediately or any further opinions will be excluded at trial.

## **OBJECTIONS TO EXPERT DEPOSITION NOTICE**

PLEASE TAKE NOTICE that Defendants hereby object to the Notice of Deposition and Demand for Documents for the depositions of the following experts on the grounds set forth herein below:

### **OBJECTIONS:**

1. Plaintiff and counsel have unilaterally set dates for depositions without ascertaining whether or not the dates and times are appropriate for the experts or for defense counsel. They are not. Please contact: CATALINA GABRIEL (213) 615-2602 to arrange dates and times.
2. The experts notice will produce their entire file as to this matter. The expert, however, will not produce lists of matters or documents containing matters related to other cases, such as other cases the expert may have provided consultation work for or expert testimony for as these matters are publicly known and/or available. Nor will the expert provide a list or documentation of any amounts earned by the expert or consultant work and/or for which "side" of litigation. The expert will testify orally as to any such income earned for expert/consulting work for a period of three (3) years prior to this matter in a general manner without providing specific amounts.

See: *Stony Brook I Homeowners Ass'n v. Superior Court* (2000) 84 Cal.App.4th 691 and *Allen v. Superior Court* (1984) 151 Cal.App.3d 447. "To show bias or prejudice, real party need not learn the details of his billing and accounting or the specifics of his prior testimony and depositions. As petitioner points out, publications which index the testimony of medical units are available to real party. Exact information as to number of cases and amounts of compensation paid to medical experts is unnecessary for the purpose of showing a bias." (*Allen v. Superior Court, supra*, 151 Cal.App.3d at p. 453, *Stony Brook I Homeowners Ass'n v. Superior Court*, 84 Cal.App.4th 691, 699 – an expert is not required to provide detailed lists or documents establishing financial matters, a numerical estimate of defense- and plaintiff-related medical-legal work, including exams, reports and deposition and court testimony, and a numerical estimate of the amount of income generated from said defense- and plaintiff-related litigation for a three-year period is sufficient).

## DEMAND FOR EXPERT DESIGNATION

### DEMAND FOR EXPERTS:

PLEASE TAKE NOTICE that [PARTY] hereby demands in accordance with the provisions of Chapter 18 of the Civil Discovery Act (*Code of Civil Procedure* §§ 2016.010 et seq., and in particular, *Code of Civil Procedure* §§2034.010, et. Seq.] that you provide within twenty (20) days of this Demand or fifty (50) days prior to trial [*C.C.P. §2034.220*], whichever is later:

1. 1. A list of all experts you intend to call at trial, whether retained or non-retained, including the information as required by *Code of Civil Procedure* §2034.260. This includes: A list setting forth the name and address of each person you expect to call at trial to offer expert opinions, or a statement that you do not intend to call such witnesses [*C.C.P. §2034.260(b)(1,(2))*]. A declaration by each witness retained for the purposes of forming and expressing an opinion, signed by counsel designating party, including a brief statement of the expert's qualifications; a brief narrative of the general substance of the testimonial the expert is expected to give; a representation that the expert has agreed to testify and is sufficiently familiar with the pending matter to provide meaningful deposition testimony concerning the opinions he is expected to offer at trial; and further, a statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney. [*C.C.P. §2034.260(b),(c)*].
2. Copies of all reports and other writings as that term is defined by California *Evidence Code* §250, made by each designated expert in the course of preparing that expert's opinion, as provided for by *Code of Civil Procedure* §2034.210(c) These reports are to be exchanged at the same time as the witness list [*C.C.P. 2034.270*].
3. **All parties served with this Demand are to simultaneously exchange the requested information set forth herein [*C.C.P. §2034.260(a)*].**

### RESPONSE TO DEMAND FOR EXPERTS

COMES NOW Defendant, who designates the following experts for trial:  
Non-retained experts – None.

Retained experts:

A. Joseph Vehicle, Ph.D. accident reconstruction. Dr. Vehicle is familiar with the issues and facts of this case and is prepared to offer testimony and to provide a meaningful deposition testimony. Dr. Vehicle will offer opinions as to the force and nature of the impact, the manner of the accident occurring, including impact speeds, G-forces, and braking, and whether or not injuries may be expected to occur from this accident. Dr. Vehicle charges \$400.00 per hour for deposition testimony and \$500.00 for Trial testimony; his curriculum vitae is attached hereto.

B. Jerry Doctor, M.D. Dr. Doctor performed the I.M.E., and is familiar with the issues in this case and will provide meaningful trial and deposition testimony in this case and is expected to testify regarding opinions as to plaintiff's claim of injuries and future medical treatment and/or surgery as a result of this accident. Dr. Doctor charges \$650.00 per hour for deposition testimony and \$850.00 per hour for Trial testimony; his curriculum vitae is attached hereto.

Declared under penalty of perjury this \_\_\_ day of \_\_\_ at \_\_\_\_\_, California.

## **EXPERTS DESIGNATIONS AND DEPOSITIONS**

1. **No subpoena necessary for retained experts:** If the expert has been *retained to testify* ('retained by a party for the purpose of forming and expressing an opinion'), no subpoena is necessary. Service of a proper deposition notice, accompanied by an expert witness fee, obligates the party designating such expert to produce him or her for deposition. [**CCP § 2034.460(a)**].
  
2. **When to pay expert deposition fee:** The expert witness fee may be tendered *either* on service of the deposition notice, or at *commencement* of the expert's deposition. (In either case, the fee is delivered to the *attorney* for the party designating the expert.) [**CCP § 2034.450(a)**].
  
3. **No fee paid for travel/preparation time:** No fee for travel time or preparation; are the responsibility of the *party designating* the expert. [**CCP § 2034.440**].
  
4. **May charge more for deposition than usual fees:** It is not unreasonable for an expert to charge more for deposition testimony and court appearances than for ordinary services and consultation: 'The process of giving formal testimony under oath is an obviously more stressful and tense activity than consulting with your client in his office.' [**Rancho Bernardo Develop. Co. v. Superior Court** (1992) 2 CA4th 358, 362].
  
5. **May charge only for time in deposition:** An expert may not charge a daily fee unless required to attend a deposition for a full day, or unless the deposing party required the expert *to be available* for a full day and the expert necessarily had to forego all business he or she would have otherwise conducted that day; from time deposition set to commence until it is concluded. [**CCP § 2034.430(e); Gov't Code §68092.5**].
  
6. **Exclude opinions not offered in deposition:** See **Jones v. Moore** (2000) 80 Cal.App.4th 557 -- When an expert deponent testifies as to specific opinions and affirmatively states those are the only opinions he intends to offer at trial, it would be grossly unfair and prejudicial to permit the expert to offer additional opinions at trial." (**Jones v. Moore, supra**, 80 Cal.App. 4th at pp. 564-565.)
  
7. **Supplemental Designation:** A supplemental designation of experts may not add new experts on matters in original designation. **Code of Civil Procedure §2034.280(a)**. Party may not wait until other parties have designated to see what experts they designate to then add new experts. See: **Fairfax v. Lords** (2006) 138 Cal.App.4th 1019.
  
8. **Exclude Expert Opinions:** On the objection of any party who has made a timely and complete compliance with the designation requirements, the court shall exclude from evidence the opinions of any expert that is offered by a party who has unreasonably failed to

(1) list that expert as a witness; (2) submit an expert witness declaration; (3) produce reports and writings of that expert as required pursuant to the code; and, (4) make that expert available for a deposition. *Code of Civil Procedure §2034.300*.

#### **9. Court May Exclude Testimony of Witness Not Designated in Expert Exchange**

**Declaration:** See: *DePalma v. Rodriguez* (2007) 151 Cal.App.4<sup>th</sup> 159 [although a party is required to disclose the substance of the facts and of the opinions to which the designated expert will testify, he/she is not required to disclose the specific facts and opinions; this an “elaboration” of the matters provided in the designation is admissible at trial].

### **DEPOSITION QUESTIONS AND PROCEDURE**

**BEGINNING INSTRUCTIONS:** Good [morning/afternoon]. My name is \_\_\_\_\_ and on behalf of [defendant/plaintiff we are here in this [place] to take your deposition. Have you ever had your deposition taken before? A deposition is a proceeding wherein we are allowed by law to ask you oral questions, with your counsel present, about the lawsuit. The [man/lady] using this peculiar-looking machine is a court reporter; his/her job is to take down everything we say here today, all of my questions; all of your responses; and, any objections or comments the attorneys may make. Everything said will be taken down by this court reporter, and typed up into a booklet form for you to review a few days or weeks from now. It is important to keep in mind that everything you say here today will be under oath and is as if your testimony was given in a courtroom with a judge and jury present. If you have any questions about this proceeding or any of my questions today, please let me know. When we are finished here today, I am going to assume that unless you have told me otherwise you have understood my questions and the process involved here in taking your deposition. Finally, I need to admonish you that now is the time to tell me your best knowledge and recollection as to the questions I want to ask you. If, at time of trial, I ask you why did you say something at the deposition [for example, "the light was red"] and now at deposition you state something else [i.e., the light was "green"], I or someone else could point out this inconsistency to the jury, and it might prove embarrassing to you or have the jury question your credibility. Do you understand?

#### **BACKGROUND:**

1. State your full and complete name.
2. State your present residence address.
3. State your marital status.
4. State your educational background, highest level of education achieved.
5. Have you ever been convicted of a felony?

#### **EMPLOYMENT:**

1. What is your present occupation?
2. What was your occupation at the time of the incident alleged in the lawsuit?
3. If you are claiming any loss of earnings or wages, would you please tell me how many hours you claim you have lost to date? Why?
4. What was your hourly/weekly/monthly wage at the time of this incident? What is it now?
5. What is it that you cannot do now at your employment that you were able to do before the incident? Other than employment, is there anything else you cannot do now that you feel you were able to do before the incident? What?

6. If you have returned to work, when?

**INJURIES:**

1. State every body part you sustained injury to, starting with the top of the head and going down to the bottom of your feet, and the nature of the injury.
2. State the names of all medical providers you have seen for examination, treatment, or consultation from the first medical provider to the last.
3. When was the [last time] [first time] you saw any medical care provider for any injury claimed? Who did you see and for what?
4. Do you have any future appointments for medical care [or has anyone told you will need future medical care/surgery/attention]? Who? For what?

**FACTS OF INCIDENT:**

**Auto:**

1. What type of vehicle were you in when the accident occurred?
2. What direction/what road were you on at the time of the incident?
3. Were you wearing seatbelts? What type?
4. Describe the sensation of the impact if you can; was it mild, severe, moderate? How did your body move upon impact? Where were you located in vehicle?
5. Were police on the scene/called to the scene?
6. How many impacts did you feel to your automobile? Where on your automobile was the impact? Were you moving/stopped at impact?
7. Describe the property damage to your vehicle or to any other vehicle.

**Premises:**

1. Describe the condition causing you to fall.
2. How many times have you been in the area of the fall prior, within 50 feet, to the date of your fall?
3. Describe the lighting conditions within 50 feet of the area of the fall.
4. Describe how you fell, from the moment you first felt a sensation of falling until end.
5. What type of shoes were you wearing?
6. Were you wearing glasses?
7. Had you ever made any complaints about any conditions in the area of the fall, within 50 feet? To whom were these complaints made; what was said?
8. How tall are you/How much do you weigh?

**Food Poisoning:**

1. What food items did you purchase/consume from defendants?
2. How much of it did you eat?
3. Describe to me anything unusual about the food item [smell, appearance, taste] -- and how much had you consumed prior to noticing something unusual?
4. When did you first feel symptoms of not feeling well?
5. What symptoms did you have?
6. What happened to the food item you consumed/purchased -- did you consume it all or save

some?

7. Did you make any complaints to the place you bought/consumed the food item?
8. Are you aware of any other person who ate the same item you ate or consumed?
9. Are you aware of any other persons who also got sick from consuming the food item?

**Dog:**

1. If you were on defendant's property when you were bitten, why?
2. Where were you when you first noticed the dog?
3. What was the dog doing when you first noticed it?
4. Did the dog bite you [I.e., a portion of body in between dog's jaw]? Where?
5. Describe the sounds you heard made by the dog prior to it biting you.
6. What did you do, if anything, to avoid the dog?

**CLOSING ADMONISHMENT:** The deposition shall be sent to counsel when it is prepared and the deponent shall have \_\_ days to read and review the deposition and sign it under penalty of perjury. If the deposition is not so signed, a certified copy can be used for all purposes at the time of the trial or otherwise. I will be notified of any changes in the deposition with \_\_\_ days after receipt of the deposition. Thank you.

**GUIDELINES FOR CONDUCTING DEPOSITIONS**

Before, during or after a deposition, any party may promptly move for a protective order. The court, for good cause shown, may make any order that justice requires to protect any party, deponent, or any other natural person from unwarranted annoyance, embarrassment, oppression or undue burden or expense. *Code of Civil Procedure 2025.420.*

A deposition may not be video-taped or audio-taped unless proper notice has been given by the party noticing the deposition or any other party three (3) days prior to the deposition. If the notice is made 3 days prior to the deposition it must be personally served. *C.C.P. 2025.330(c).*

At a deposition, questions may relate to “any matter, not privileged, that is relevant to the subject matter if admissible or reasonably calculated to lead to the discovery of admissible evidence. (*Code Civ. Proc., § 2017.010; Kalaba v. Gray* (2002) 95 Cal.App.4th 1416, 1417.)

Grounds for objection to questions at deposition are limited, and generally do not excuse the deponent from answering. It is improper to instruct a witness not to answer a question on any ground other than privilege. ( *Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1015.)

Local superior court rules limit objections to those that are “well founded and necessary for the protection of a client's interest.” ( *Super. Ct. L.A. County, Local Rules, rule 7.12(e)(7).*)

Counsel should avoid coaching the deponent, direct a deponent to refuse to answer a question unless the questions seek privileged information or are “manifestly irrelevant” or “calculated to harass.” ( *Super. Ct. L.A. County, Local Rules, rule 7.12(e)(8) and (9).*)

Counsel should avoid self-serving speeches and should not engage in conduct that would not be allowed in the presence of a judicial officer. ( *Super. Ct. L.A. County, Local Rules, rule 7.12(e)(10) and (11).*)

Violations of such rules may be sanctioned as abuses of the discovery process under *Code of Civil Procedure 2023.010, 2023.030.*

**NO OBJECTIONS SUGGESTING AN ANSWER TO DEPONENT** "In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer." *Damaj v. Farmers Ins. Co., Inc.*, 164 F.R.D. 559, 560 (N.D.Okl.,1995) [Court granted Plaintiff's Motion entitled "PLAINTIFF'S MOTION FOR ORDER DIRECTING COUNSEL TO CEASE OBSTRUCTIONIST TACTICS DURING ORAL DEPOSITIONS", and imposed the following restrictions on the deposition:

1. At the beginning of the deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness's own counsel, for clarification, definition, or explanation of any words, questions or documents presented during the course of the deposition. The witness shall abide by these instructions;

2. All objections, except those which would be waived if not made at the deposition under *F.R.Civ.P. 32(d)(3)(B)*, and those necessary to assert a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion pursuant to *F.R.Civ.P. 30(d)*, shall be preserved. Therefore, those objections need not and shall not be made during the course of depositions.

3. Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel's statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more. If the form of the question is objectionable, counsel should say nothing other than "object to the form of the question". Should deposing counsel desire clarification of the precise basis of the objection, that inquiry shall be made outside the presence of the witness.

4. Deposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and the witness's counsel do not have the right to discuss documents privately before the witness answers questions about them."

**NO RIGHT TO CONFER WITH DEPONENT** An attorney and his or her counsel do not have a right to confer during the deposition nor may the attorney act as the deponent's intermediary, interpreting questions and deciding what questions the deponent may answer. As the court held in *Hall v. Clifton Precision, a Div. of Litton Systems, Inc.* 150 F.R.D. 525, 528 (E.D.Pa.1993) a deposition is to be conducted according to the same rules as a trial. During trial an attorney is not allowed to continually converse with and engage in discussions with the client. California follows the same procedures as to depositions – they are to be taken in accordance with the rules governing the examination of a witness at trial . See: *Code of Civil Procedure 2025.330(d)*; and, *Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1106: "Examination and cross-examination of the deponent shall proceed as permitted at trial under the provisions of the Evidence Code."

**DOCUMENTS USED TO REFRESH MEMORY ARE TO BE PRODUCED:** If a deponent testified that he or she used certain documents [photographs,, etc.] to prepare for the deposition and refresh his or her recollection about the elements, such documents are to be produced upon demand by the party taking the deposition. *Evidence Code §771*.

**NO "RAMBO TACTICS" INTENDED TO PREVENT MEANINGFUL QUESTIONS AND ANSWERS:** It is well settled that in the course of a deposition, an attorney is prohibited



(1) \_\_\_ If checked, the deposition will be recorded by video or audio technology. *Code of Civil Procedure §2025.340, §2025.620*. No other party may videotape this deposition unless proper notice is provided as set forth in *Code of Civil Procedure §2025.330(c)*.

(2) \_\_\_ If checked, the deposing party intends to use the video recorded deposition of the expert at trial in lieu of live testimony. *Code of Civil Procedure §§2025.220(a)(6); 2025.620*.

(3) \_\_\_ If checked, the deposition will be stenographically recorded by a machine using instantaneous (or "real time") transcription [with an instant display of the question and answer]. *Code of Civil Procedure §2025.220(a)(5)*.

(4) \_\_\_ If checked, this deposition notice requires the deponent to produce "consumer records" and/or "employment records" as defined in *Code of Civil Procedure §§1985.3, 1985.6*, and as set forth in the accompanying subpoena.

(5) \_\_\_ If checked, this deposition is being taken of an expert, pursuant to *Code of Civil Procedure §2034.410*, et. seq. Documents and other matters demanded to be produced at this deposition are identified in the attached, EXHIBIT "A". The expert's fee: \_\_\_ is hereby provided/ \_\_\_ will be provided at the deposition.

(6) \_\_\_ If checked, this deposition notice commands the presence of the person most qualified to testify [*Code of Civil Procedure §2025.230*] as to the following matters:

\_\_\_\_\_

(7) \_\_\_ If checked, the deponent is requested to appear at the deposition with originals of the following documents [*Code of Civil Procedure §2025.220(a)(4)*]:

\_\_\_\_\_

**INTERPRETER:** Further, please take notice that if the deponent cannot communicate with ease in the English language, counsel for the deponent [or the deponent] must notify counsel noticing this deposition within five (5) days of receipt of this Deposition notice of the need for an interpreter and the dialect and language the deponent deems necessary for the deposition.

DATE: \_\_\_\_\_

Attorney

#### **EXHIBIT "A"**

1. \_\_\_ All records and other writings you reviewed or expect to review in this case;
2. \_\_\_ All correspondence and other written communications by the deponent concerning this case written to or received from any person or entity;
3. \_\_\_ All reports, notes and other writings prepared by the deponent or at his/her request regarding this case;
4. \_\_\_ All time sheets, records, billings and other writings that reflect the amount of time the deponent spent on any matter related to this case;
5. \_\_\_ All bills, invoices and other writings that reflect the amount the deponent billed, or will bill in the future, to defense counsel or anyone else for work done with regard to this case;
6. \_\_\_ All records, documents and other things showing each contact the deponent had with anyone involved in this case;
7. \_\_\_ The entire file(s) maintained by deponent in regard to this case;
8. \_\_\_ A current copy of the deponent's curriculum vitae;

9. \_\_All charts and any materials or documents which embrace, embody or reflect the deponent's opinions and/or conclusions concerning the subject matter of this case;
10. \_\_If the deponent has testified within the last four (4) years in any Federal action, whether it be trial or arbitration, a copy of the statement required by F.R.C.V. Rule 26, to include: **(i)** a complete statement of all opinions the witness will express and the basis and reasons for them; **(ii)** the data or other information considered by the witness in forming them;**(iii)** any exhibits that will be used to summarize or support them; **(iv)** the witness's qualifications, including a list of all publications authored in the previous 10 years; **(v)** a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and, **(vi)** a statement of the compensation to be paid for the study and testimony in the case.
11. \_\_A listing of all cases the deponent has been consulted by or retained by Plaintiff or any counsel representing Plaintiff in the last three (3) years;
12. \_\_All models, blow-ups, computer re-enactments and other demonstrative evidence the expert intends to use at trial to illustrate, explain, and/or demonstrate the expert's testimony;
13. \_\_Any and all videos, films, and photographs taken by the deponent and/or at the deponent's directive regarding this case;
14. \_\_Copies of any and all depositions, medical records, consultation reports or medical reports of any kind you have reviewed concerning anything about this case;
15. \_\_Any and all tests and/or experiments including field notes and all raw data of any type that you performed and/or participated in and which were conducted in connection with this lawsuit.
16. \_\_A copy of the CD's, program manuals and software and any other writing for any computerized molding programs, computer simulations, computer analysis, and/or computerized accident reconstruction. All documents and writings necessary to operate such programs, including any codes, keys and input and output directions must be provided;
17. \_\_Copies of all books, articles, treatises, "peer reviewed" materials and other such writings authored, in whole or in part, by this deponent on every matter and subject this deponent has authored.
18. \_\_Copies of all notice, advertisements and promotional material this expert has utilized, distributed and/or otherwise caused to be disseminated to others within the last three (3) years.
19. Other: \_\_\_\_\_  
\_\_\_\_\_

**NOTICE OF DEPOSITION OF PERSON MOST QUALIFIED**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

**PLEASE TAKE NOTICE** that the deposition on oral examination of the Person Most Qualified from: \_\_\_\_\_

concerning the following issues:

- 1.
- 2.

Said deposition will be taken before any certified court reporter in and for the State of California on \_\_\_\_\_ at the following location:

\_\_\_\_\_ and pursuant to the provisions of California *Code of Civil Procedure* § 2025.220 et seq. Said deposition to continue from day to day, Sundays and holidays excepted, until completed. Pursuant to California *Code of Civil Procedure* § 2025.220(5), this deposition may be videotaped.

NOTICE IS FURTHER GIVEN that if an interpreter is required to translate testimony, written notice of same must be given at least five (5) working days before the deposition date, and the specific language and/or dialect thereby designated.

### **NOTICE OF DEPOSITION NON-RETAINED EXPERT**

TO: ALL PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant, \_\_\_\_\_ by and through his attorneys, will take the deposition of \_\_\_\_\_ on \_\_\_\_\_, at \_\_\_\_\_, upon oral examination before a Notary Public of the State of California, authorized to administer oaths who may be present at said time and place, pursuant to the attached deposition subpoena. If for any reason the taking of said deposition is not completed on said date, the deposition will continue from day to day until completed.

NOTICE IS FURTHER GIVEN that the deponent/non-retained expert, is required to bring the following documents at the time of his/her deposition, pursuant to California *Code of Civil Procedure* §§ 2025.220 and 2034.430:

- 1). All correspondence exchanged with Plaintiffs, Plaintiffs' representatives, agents, or attorneys, and any other individual or company relative to this matter;
- 2). All correspondence with attorneys representing Plaintiffs;
- 3). All medical records in said expert's possession regarding their care and treatment of Plaintiffs;
- 4). All other medical records concerning care and treatment rendered to Plaintiffs, in said physician's possession;
- 5). All billing records pertaining to care treatment rendered by said physician to Plaintiffs;

NOTE: IF SUCH INFORMATION IS NOT PRODUCED AT THE DEPOSITION, it will be continued and deponent will be ordered to return with the items requested.

### **UNINSURED MOTORIST ARBITRATION DISCOVERY**

1. **SUBPOENAS:** Insurance Code section 11580.2, subdivision (f) specifically authorizes the use of subpoenas and other discovery devices in litigating uninsured motorist claim disputes through contractual arbitration by stating in relevant part: "*The arbitration shall be deemed to be a proceeding and the hearing before the arbitrator shall be deemed to be the trial of an issue therein for purposes of issuance of a subpoena by an attorney of a party to the arbitration under Section 1985 of the Code of Civil*

- Procedure.* Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure shall be applicable to these determinations, and all rights, remedies, obligations, liabilities and procedures set forth in Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure shall be available to both the insured and the insurer at any time after the accident, both before and after the commencement of arbitration.” (Italics added.) *Mallard v. Progressive Choice Ins. Co.* (2010) 188 Cal.App.4th 531 [ subpoena for mental records permissible when claimant alleged “shock” and “nervous anxiety” and “impairment of earning capacity”].
2. **SUPERIOR COURT EXCLUSIVE JURISDICTION:** (See *Miranda v. 21st Century Ins. Co.* (2004) 117 C.A.4th 913, 920 [superior court has exclusive jurisdiction of discovery disputes in uninsured motorist arbitrations ].
  3. **DEPOSITIONS:** A deposition pursuant to Chapter 9 (commencing with Section 2025.010) of Title 4 of Part 4 of the Code of Civil Procedure may be taken without leave of court, except that leave of court, granted with or without notice and for good cause shown, must be obtained if the notice of the taking of the deposition is served by either party within 20 days after the accident §11580.2(f)(3). **NOTICE OF DEPOSITION NOT REQUIRED.**
  4. **INTERROGATORIES:** Interrogatories under Chapter 13 (commencing with Section 2030.010) of Title 4 of Part 4 of the Code of Civil Procedure and requests for admission under Chapter 16 (commencing with Section 2033.010) of Title 4 of Part 4 of the Code of Civil Procedure may be served by either the insured or the insurer upon the other at any time more than 20 days after the accident without leave of court. Ins.Code § 11580.2(f)(6).
  5. **WAGE LOSS/L.M.E.:** (o) If an insured has failed to provide an insurer with wage loss information or medical treatment record releases within 15 days of the insurer's request or has failed to submit to a medical examination arranged by the insurer within 20 days of the insurer's request, the insurer may, at any time prior to 30 days before the actual arbitration proceedings commence, request, and the insured shall furnish, wage loss information or medical treatment record releases, and the insurer may require the insured, except during periods of hospitalization, to make himself or herself available for a medical examination. The wage loss information or medical treatment record releases shall be submitted by the insured within 10 days of request and the medical examination shall be arranged by the insurer no sooner than 10 days after request, unless the insured agrees to an earlier examination date, and not later than 20 days after the request. If the insured fails to comply with the requirements of this subdivision, the actual arbitration proceedings shall be stayed for at least 30 days following compliance by the insured. The proceedings shall be scheduled as soon as practicable following expiration of the 30-day period [§11580.2(o)].
  - 6.

**SPECIAL INTERROGATORIES, SET # \_\_\_\_\_**

## INTERROGATORIES

1. \_\_\_\_\_ State all facts in support of your contention that the party propounding these interrogatories had any responsibility for the INCIDENT (“INCIDENT” shall refer to the multi-vehicle collision, which is the subject of the current lawsuit.)
2. State all facts in support of your contention that you did not have any responsibility for the INCIDENT.
3. \_\_\_\_\_ State all facts in support of your contention that PERSONS other than the party propounding these interrogatories had some responsibility for the INCIDENT.
4. \_\_\_\_\_ Describe in detail the nature of any damages you claim you sustained as a result of this INCIDENT.
5. \_\_\_\_\_ State each and every fact in support of your contention that the party propounding these interrogatories has any responsibility for any damages claimed in this INCIDENT.
6. \_\_\_\_\_ Describe in complete detail any and all WRITINGS (“WRITING” means a writing as that term is defined in Evidence Code §250), to support your claim that the party propounding these interrogatories is responsible for any damages you claim in this INCIDENT.
7. \_\_\_\_\_ Describe in complete detail any and all WRITINGS to support your claim that the party propounding these interrogatories has any responsibility for this INCIDENT.
8. \_\_\_\_\_ If you contend that any PERSON (“PERSON” includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.) involved in the INCIDENT violated any statute, regulation, code or standard, which violation was a cause of the INCIDENT, state each and every fact in support of such contention.
9. \_\_\_\_\_ State how the INCIDENT occurred.
10. \_\_\_\_\_ State the license plate, make and model of the vehicle you were operating or a passenger of at the time of the INCIDENT.
11. \_\_\_\_\_ Describe each and every injury or illness you relate to the INCIDENT.
12. \_\_\_\_\_ Describe your present complaints about each injury related to the INCIDENT.
13. \_\_\_\_\_ Identify all PERSONS having information in support of you contention that the party propounding these interrogatories had any responsibility for the INCIDENT.
14. \_\_\_\_\_ Identify all PERSONS having information in support of you contention that the party propounding these interrogatories had any responsibility for any damages you claim to have sustained in the INCIDENT.

No special interrogatory shall contain definitions, preface or instructions unless such matters have been approved by the Judicial Council [in the “Form” Interrogatories]. Each interrogatory shall be “full and complete” and shall not contain subparts, or be compound, conjunctive or disjunctive [however, if the parts contain the same subject the interrogatory is not improper if it contains and “and” or “or”]. Special Interrogatories are limited to a total of 35 [unless accompanied by a “Declaration of Necessity”]. See: ***Code of Civil Procedure §2030.060; Clement v. Alegre*** (2009) 177 Cal.App.4<sup>th</sup> 1277 [not improper to have interrogatories refer back to other interrogatories. For example, not improper to have 19 questions all of which branch off of 5 questions: “6. Describe in particularity all economic damages you claim to have sustained as a result of any alleged fraudulent conduct of defendant”. Question No. 8 asks

plaintiffs: “As to each item of damage identified in interrogatory No. 6, please state the date such damages were incurred.”]

## **DEMANDS FOR PRODUCTION**

TO AND YOUR COUNSEL OF RECORD:

You are hereby requested to produce the following Documents on \_\_\_\_\_, at the offices for Defendant’s counsel. You may comply by mailing your responses and documents so that they are in defense counsel’s office on: \_\_\_\_\_.

1. A color copy of your driver’s license;
2. A copy of all writings [as that term is defined by Evidence Code §250]:
  - A. That supports your claim as to loss of wages, earnings, employment;
  - B. That supports any claim as to past medical expenses [to include hospital records, doctor’s reports, ambulance expenses, laboratory results, x-rays, CTs, etc.];
  - C. That supports your claim as to property damage;
  - D. That supports your claim as to future medical expenses [to include hospital records, doctor’s reports, ambulance expenses, laboratory results, x-rays, CTs, etc.];
  - E. That supports your claim as to past pain and suffering;
  - F. That supports your claim as to future pain and suffering;
  - G. That shows, depicts or otherwise establishes the area of the incident alleged as the accident site and within 50 feet in diameter;
  - H. That shows, depicts or otherwise establishes any damage to all vehicles involved in the accident;
  - I. That shows, establishes and/or depicts any injuries sustained by you;
  - J. That establishes, depicts and/or shows you in the hospital;
  - K. That establishes, depicts or shows any object, device or matter that you claim caused your injuries;
  - L. That establishes any liability of the Defendant(s);
  - M. That establishes any liability of others;
  - N. That establishes that you were not negligent;
  - O. That contains statements of any witnesses;
  - P. That contains police reports or reports of any governmental agency pertaining to the incident;

## **REQUESTS FOR ADMISSIONS:**

1. ADMIT you presently have no facts to support the allegations of Paragraph \_\_\_ of your Complaint.
2. ADMIT that you are the sole proximate cause of the damages claimed by you in the Complaint.
3. ADMIT that none of the allegations contained in plaintiff’s complaint are true.

4. ADMIT that you have no facts to dispute the affirmative defenses as alleged in the Answer on file herein of the propounding party(s).
5. ADMIT that you have no facts to support the contention that \_\_\_\_\_.

**NOTE:** there is no duty to update responses. Responses are as to present tense, I.e., at the time of the response. See: *Burch v. Gombos* (2000) 82 Cal.App.4th 352, 359. Unlike interrogatory responses, RFA responses may only be amended or withdrawn by leave of court after noticed motion. *Code of Civil Procedure §2033.300(a),(b)*. Limited to 35 RFA's unless they pertain to documents then there is no limit. *Code of Civil Procedure §2033.030(a),(c)*. **USE WITH JUDICIAL COUNCIL INTERROGATORY 17.1**

### **REQUESTS FOR ADMISSIONS AND COSTS OF PROOF**

**STATUTE:** Code of Civil Procedure section 2033.420, subdivision (a) provides, in pertinent part, “If a party fails to admit the ... truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves the ... truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees.” The trial court must make the order unless, among other things, “[t]he party failing to make the admission had reasonable ground to believe that that party would prevail on the matter.” (Code Civ. Proc., § 2033.420, subd. (b)(3).)

**PURPOSE OF RFA'S:** “The primary purpose of requests for admissions is to set at rest triable issues so that they will not have to be tried; they are aimed at expediting trial. [Citation.] The basis for imposing sanctions ... is directly related to that purpose. Unlike other discovery sanctions, an award of expenses ... is not a penalty. Instead, it is designed to reimburse reasonable expenses incurred by a party in proving the truth of a requested admission ... [citations] such that trial would have been expedited or shortened if the request had been admitted.” ( *Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 509; see also *Wimberly, infra*, 56 Cal.App.4th at p. 634, ‘requests for admissions are conceived for the purpose of setting to rest triable issues in the interest of expediting trial.’ ”). *Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 865.

**ONLY AGAINST PARTY – NOT ATTORNEY:** Attorneys were *intentionally* not subjected to the burden of costs of proof. *In re Estate of Manuel* (2010) 187 Cal.App.4th 400, 403-404.

**ONLY EXPENSES INCURRED IN ACTUALLY PROVING THE MATTER:** Only those expenses incurred in actually proving the matter are recoverable pursuant to section 2033.420. (§ 2033.420, subd. (a); see also *Wagy v. Brown* (1994) 24 Cal.App.4th 1.) Expenses are recoverable only where the party requesting the admission ‘proves ... the truth of that matter,’ not where that party merely prepares to do so. Plaintiff is not entitled to attorney fees under the statute and the trial court erred in awarding them.” ( *Id.* at p. 6, *italics added*; accord *Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 737 [trial court's awarding all of a party's litigation costs from the date of service of party's requests for admissions “was far more than reasonable compensation under the circumstances”].)

**GOOD FAITH BELIEF:** In evaluating whether a “good reason” exists for denying a request to admit, “a court may properly consider whether at the time the denial was made the party

making the denial held a reasonably entertained good faith belief that the party would prevail on the issue at trial.” *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1276.

**COSTS AND SUMMARY JUDGMENT:** costs under CCP §2033.420 are available following a successful motion for summary judgment. *Barnett v. Penske Truck Leasing* (2001) 90 Cal.App.4th 494, 499.

**NO COSTS FOR OBJECTIONS:** Plaintiff not entitled to denial costs where responding party objected and plaintiff did not move for further responses. *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 635-636.

### **DISCOVERY AND MOTIONS FOR SUMMARY JUDGMENT**

It can not be stressed how important careful discovery is to a case. *While the Judicial Council has approved form interrogatories that are useful, they are never sufficient in a premises liability case nor in a negligent security case.* Nor is it ever sufficient just to do a deposition and form interrogatories.

A moving party Defendant *must* 'support' the 'motion' with evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' (Code Civ. Proc., § 437c, subd. (b).) *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 889.

If a motion for summary judgment is contemplated -- special interrogatories and requests for admissions must ALWAYS be done [you can also do Requests for Admissions along with Judicial Council Interrogatory 17.1]. **“State all facts” interrogatories are a must in premises liability cases** – “State all facts in support of your contention that defendant was negligent”. “State all facts in support of your contention that more lighting would have prevented this incident? One cannot ask a deponent “state all fact” questions during a deposition.

In a negligent security case, for example, the moving party must eliminate all possible burdens – such as whether a high burden matter as security guards were necessary or required or a minimal burden was created [such as replacing a pane of glass]. Focusing only on the high burden items such as requiring the hiring of security guards will more than likely cause a fatal omission that will subject the motion for summary judgment to defeat. See: *Barber v. Chang* (2007) 151 Cal.App.4th 1456, 1469: Defendant’s motion for summary judgment was denied. Defendant failed to address measures less burdensome than hiring security guards and thus he did not refute Barber's broadly pleaded theory of recovery. Chang therefore failed to carry his initial burden. “[A] party may plead negligence ... in general terms.” (*Singer v. Superior Court* (1960) 54 Cal.2d 318, 323.) If, in crafting his motion for summary judgment, defendant desired a more definite statement of the security measures Barber believed Chang neglected, interrogatories and other discovery mechanisms were at his disposal.

See also *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 187 -- Defendant moving for summary judgment has not satisfied threshold burden where she “did not appear to attempt to negate these foundational facts or to show that the foundational facts could not be established. And [defendant] ... for whatever reason apparently did not employ discovery tactics-such as legitimately founded state-all-facts interrogatories-more likely in these circumstances to lead to a well-founded conclusion that the [plaintiffs] could not establish their

case”]. *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 892 [Mere fact that deponent refused to answer question at deposition does not mean that there was insufficient evidence to establish triable issue of fact; moving party had obligation to file a motion to compel deponent to answer question first].

Factually devoid interrogatory responses to interrogatories, however, may be sufficient to shift the moving party’s burden and establish Plaintiff has no evidence. In *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, in response to an interrogatory requesting all facts that would support a particular element of a claim, the plaintiffs stated that they “believed” that a certain series of events occurred. (*Id.* at p. 578.) This court held that such a response satisfied the defendant’s initial burden of establishing that the plaintiffs could not establish an element of their claim. (*Id.* at pp. 590, 592-593.) *Gaggero v. Yura* 108 Cal.App.4th 884, 892.

A party may not rely on its own discovery responses in its own favor on summary judgment.” (See *Great American Ins. Companies v. Gordon Trucking, Inc.* (2008) 165 Cal.App.4th 445, 450.)

## **SUBPOENAS**

**DEPOSITION SUBPOENA:** A deposition subpoena may simply require the production of business records for inspection and copying without personal attendance by anyone at a deposition. (See CCP § 2020.410(d). The subpoena must require compliance by the custodian of records on a specific date no sooner than 20 days after the subpoena’s issuance, or 15 days after service, whichever is later. (CCP § 2020.410(c))

**SERVICE ON ALL PARTIES:** A copy of any business records subpoena must be served on all other parties who have appeared in the action, and the copy of the subpoena serves as the notice of deposition. (CCP §§ 2025.220(b), 2025.240(a)) The subpoenaing attorney may arrange for copying of the records by either hiring a registered professional photocopier (see Bus & Prof C §§ 22450 et seq.) or otherwise assuming responsibility for the copying. (CCP § 2020.420; Evid C § 1560(e).)

**REQUESTING COPIES:** If the other parties wish to obtain copies of the records, they may so advise whoever is doing the photocopying. (CCP § 2020.440) When an attorney issuing a subpoena has assumed responsibility for inspecting and copying the records, it is the responsibility of the attorney’s representative to deliver any copy of the records as directed in the subpoena. (Evid C § 1560(e))

**PERSONAL RECORDS OF CONSUMER:** When personal records of a consumer are subpoenaed, the records may not be produced until at least 20 days after the subpoena is issued. (CCP § 2025.270(c)). Special rules apply to subpoenas seeking personal records of a consumer (see CCP § 1985.3 or employment records of an employee (see CCP § 1985.6). Service of the notice of deposition and deposition subpoena must be effected on both the witness asked to produce consumer records and the consumer whose records may be subject to disclosure. (CCP §§ 2020.410(d), 2025.240(b)) Furthermore, a deposing party must provide

notice to the consumer of his or her right to object to disclosure of the personal records sought. (CCP §§ 2025.240(b)(2), 1985.3(e))

**ATTORNEY MAY SIGN SUBPOENA:** An attorney for any party may sign and issue a business records deposition subpoena. (CCP § 2020.210(b)) The Judicial Council subpoena form must be used. (CRC, Rule 1.31)

**SERVICE OF SUBPOENA ON DISTRICT ATTORNEY:** A business records subpoena must be directed to the custodian of records or some other person qualified to authenticate the records. (CCP § 2020.410(c); see See: *Cooley v. Superior Court* (2006) 140 Cal.App.4th 1039 [subpoena may not be issued to District Attorney’s office to obtain records in a civil matter as the District Attorney can not provide affidavit that the records provided are “business records” as many of the records were not prepared by the District Attorney’s Office. Custodian of records is not merely person in possession of records, but must also be able to attest to various attributes of the records relevant to their authenticity and trustworthiness].)

**IDENTIFY RECORDS SPECIFICALLY:** The subpoena must identify the records to be produced by either: (1) specifically describing each individual item; or (2) reasonably particularizing each category. (CCP § 2020.410(a); see *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 222 [noting this procedure should not be used to determine whether documents exist]) Upon producing the subpoenaed records, the custodian of records or other qualified person must provide an affidavit authenticating the copies and the records. (See Evid C § 1561)

**REASONABLE COSTS:** A business records custodian is entitled to be paid the reasonable costs incurred in producing the subpoenaed documents. (See CCP § 2020.230); Evid C § 1563(b)(2), (6).)

## **DECLARATION FOR ADDITIONAL DISCOVERY**

I, \_\_\_\_\_, declare:

1. I am (a party to this action or proceeding appearing in propria persona)(presently the attorney for \_\_\_\_\_, a party to this action or proceeding).
2. I am propounding to \_\_\_\_\_ the attached set of requests for admission/interrogatories.
3. This set of requests for admission/interrogatories will cause the total number of requests propounded to the party to whom they are directed to exceed the number of requests permitted by §2033.030 [RFA’S]/§2030.030 [Interrogatories].
4. I have previously propounded a total of \_\_\_\_\_ requests for admission/interrogatories to this party.
5. This set of requests for admission/interrogatories contains a total of \_\_\_\_\_ requests.

6. I am familiar with the issues and the previous discovery conducted by all of the parties in this case.

7. I have personally examined each of the requests for admission/interrogatories in this set.

8. This number of requests for admission is warranted under §2033.040/§2030.040 because \_\_\_\_\_. (Here state the reasons why the complexity or the quantity of issues in the instant lawsuit warrant this number of requests for admission.)

9. None of the requests/interrogatories in this set of requests/interrogatories is being propounded for any improper purpose, such as to harass the party, or the attorney for the party, to whom it is directed, or to cause unnecessary delay or needless increase in the cost of litigation.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct, and that this declaration was executed on \_\_\_\_\_.

---

The responding party may challenge the “declaration of necessity” by motion for protective order, on the ground the number of RFAs/Interrogatories is unwarranted. [CCP §2033.040(a)/§2030.040(a)]. Such motion places the burden *on the propounding party* to justify the number of RFAs/Interrogatories served. [CCP § 2033.040(b)/§2030.040(b)]. If not accompanied by declaration of additional discovery, responding party may only need answer first 35 [C.C.P. §2030.030(c)/§2033.030(b)].

## **DISCOVERY MISUSE**

Code of Civil Procedure §2023.010, defines “discovery misuse” as follows:

Misuses of the discovery process include, but are not limited to, the following:

(a) Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery.

(b) Using a discovery method in a manner that does not comply with its specified procedures.

(c) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.

(d) Failing to respond or to submit to an authorized method of discovery.

(e) Making, without substantial justification, an unmeritorious objection to discovery.

(f) Making an evasive response to discovery.

(g) Disobeying a court order to provide discovery.

(h) Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery.

(i) Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that an attempt at informal resolution has been made.

Other Conduct:

(1) “**Stonewalling**”: In *Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611, the defendants responded to the plaintiff’s contention interrogatories with stock answers that it was “ ‘compiling the information requested’ ” and would provide more data when the compilation was finished. (*Id.* at p. 1614.) The plaintiff objected to the evasive response and also propounded other discovery requests, which defendants either ignored or objected to. The trial court granted the plaintiff’s motion to compel, but when the defendants “continued with their gamesmanship,” the court granted a motion to strike the answer. (*Id.* at p. 1615.) The *Collisson* court rejected the argument that striking the answer was too drastic a sanction because defendants had only made their “first effort” at drafting responses. (*Collisson, supra*, 21 Cal.App.4th at p. 1618.) “The point that defendants fail to acknowledge is that, while this may have been their first effort to respond, it was not plaintiff’s first effort at receiving straightforward responses. Defendants chose to ignore the many attempts, both formal and informal, made by plaintiff to secure fair responses from them. Accordingly, we find no abuse of discretion by the trial court.” (*Ibid.*) *Collisson* did not involve “concealment,” but rather a pure case of stonewalling. *Liberty Mut. Fire Ins. Co. v. LcL Adm’rs, Inc.* (2008) 163 Cal.App. 4th 1093, 1103-1104.

(2) **Answering Discovery on Behalf of A Known Suspended Corporation**: Participating in discovery on behalf of a suspended corporation, knowing that the corporation is suspended, and having reason to know or suspect that such suspension disabled the corporation from participating in the litigation, qualifies as conduct abusive of the discovery process and, thus, is sanctionable. *Palm Valley Homeowners Ass’n, Inc. v. Design MTC* (2000) 85 Cal.App.4th 553.

(3) **Failure to Meet and Confer**: The Discovery Act requires that, prior to the initiation of a motion to compel, the moving party declare that he or she has made a serious attempt to obtain an informal resolution of each issue. *Clement v. Alegre* (2009) 177 Cal. App. 4th 1277, 1293.

## **DISCOVERY PENDING DEMURRER**

Discovery is not stayed [absent the court granting a motion for a protective order] simply because a demurrer is pending.

Deficiencies in the pleadings generally do not affect either party’s right to conduct discovery. Thus, for example, discovery may continue after a demurrer has been sustained with leave to amend, although no amended complaint has yet been filed—i.e., no valid complaint need be on file. [*Budget Finance Plan v. Sup.Ct. (McDowell)* (1973) 34 CA3d 794, 797].

Pleading deficiencies generally do not affect either party’s right to conduct discovery (*Budget Finance Plan v. Superior Court* (1973) 34 Cal.App.3d 794, 797, 798, 110 Cal.Rptr. 302) and this right (and corresponding obligation to respond) is particularly important to a plaintiff in need of discovery to amend its complaint (*Union Mutual Life Ins. Co. v. Superior Court* (1978) 80 Cal.App.3d 1, 12). *Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 Cal.App. 3d 1429, 1436.

Plaintiffs are entitled to discovery as a matter of right and California Courts construe the Discovery Act broadly to enforce this right. The right to discovery does not depend on the status of the pleadings and there is no authority for postponing discovery until a Demurrer is heard. In fact, California authority specifically holds that discovery is not to be stayed merely because a party files a Demurrer. [ *Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429, 1436].

## **STAY ON DISCOVERY AND “S.L.A.P.P.” MOTIONS**

C.C.P. §425.16, subdivision (g) states: “All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, *on noticed motion* and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.”

It is well settled that a trial court lacks the inherent power to grant relief from the discovery stay imposed by section 425.16(g) in the absence of a noticed motion. ( *Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1129.)

To obtain discovery under the statute while a special motion to strike is pending, in addition to good cause, a plaintiff must specify what additional facts he expects to discover. ( *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 247).

Although discovery is stayed until the notice of entry of the order ruling on the motion, discovery may be conducted if good cause is shown, and such discovery is limited to the issues raised in the special motion to strike.” ( *Slauson Partnership v. Ochoa* (2003) 112 Cal.App.4th 1005, 1021). *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 871 [further acknowledging the general rule that plaintiff may not amend or move to amend the complaint once the “S.L.A.P.P” motion has been filed].

## **MOTION TO COMPEL NON-PARTY DEPOSITION/SANCTIONS**

TO DEPONENT A NON-PARTY WITNESS, AND YOUR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on the date and time and in the department above set forth of the Court located at \_\_\_\_\_, Defendant will move the Court for the following:

1. An order compelling the deposition of CARLA [C.C.P. 1987.1];
2. An order to show cause why CARLA should not be held in contempt [C.C.P. §§2020.240, §1991.1 and/or an order to show cause re: An Order To Comply;
3. An order imposing monetary sanctions in the amount of \$40.00 for the filing fee and \$600.00 in attorneys’ fees for a total of \$690.00 as against CARLA LEWIS [C.C.P. §2023.030, 2023.010].

This Motion is based upon this Notice, the following Memorandum of Points and Authorities, the declaration of James Grafton Randall, Esq., and Code of Civil Procedure §2020.240, §1987.1, §1987.2, §1991.1, §1987.2, §2023.010, §2023.030, and upon the following grounds:

[ ] was personally served a subpoena on October 28, 2010, to appear on November 2, 2010, for a deposition [EXHIBIT “A”]. This was a continued date of the deposition originally set on October 19, 2010 [EXHIBIT “B”]. CARLA did not appear for her deposition [See” “Certificate of Non-Appearance, EXHIBIT “C”].

[ ] is a necessary, percipient and relevant witness to the events of this matter.

### **MEMORANDUM OF POINTS AND AUTHORITIES:**

#### **1. STATEMENT OF CASE:**

Plaintiff alleges she was caused to fall down a stairway on Defendants’ property. It was pouring down rain at the time and Plaintiff concedes that her vision was impaired by rain blowing in her face and by the large umbrella she was holding.

#### **2. BASIS FOR MOTION:**

[ ] was personally served a subpoena on October 28, 2010, to appear on November 2, 2010, for a deposition [EXHIBIT “A”]. This was a continued date of the deposition originally set on October 19, 2010 [EXHIBIT “B”]. [ ] did not appear for her deposition [See” “Certificate of Non-Appearance, EXHIBIT “C”].

Defendant is of the opinion based upon discovery responses and investigation that [ ] is a critical percipient or relevant witness in this matter and her deposition is necessary for the defense of this matter.

#### **3. WHEN A NON-PARTY WITNESS HAS BEEN SUBPOENAED FOR A DEPOSITION AND FAILS TO APPEAR THE COURT MAY IMPOSE MONETARY SANCTIONS AND ISSUE AN ORDER OF CONTEMPT. A SUBPOENA IS A LAWFUL COURT ORDER:**

A non-party within the State of California may be subject to a deposition. Code of Civil Procedure §2020.010, §2025.010, et. seq.

A non-party witness who has been subpoenaed for a deposition may be subject to an order to show cause re: contempt and subject to contempt proceedings for a failure to appear at the noticed deposition. C.C.P. §2020.240, §2023.030(c), 1991.1. See also: *Lund v. Superior Court* (1964) 61 Cal.2d 698, 713.

An order compelling compliance with the subpoena may also be issued for a failure to appear or attend the deposition, and monetary sanctions may be assessed. C.C.P. §1987.1.

A nonparty deponent who violates a subpoena may be punished under section 2023. (§ 2020, subd. (h).) Section 2023 provides for monetary sanctions based on misuse of the discovery process (§ 2023, subs.(a), (b)(1)), including the failure to respond or submit to authorized methods of discovery (§ 2023, subd. (a)(4)), making, without substantial justification, an unmeritorious objection to discovery (§ 2023, subd. (a)(5)), and making an evasive response to discovery. (§ 2023, subd. (a)(6).) *Sears, Roebuck and Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 Cal.App.4th 1342, 1350.<sup>1</sup>

Under present law, any person may be subject to monetary sanctions against anyone engaging in discovery abused or a misuse of the discovery process. Code of Civil Procedure §2023.010(d),(g), §2023.030(a).

In addition, monetary sanctions may be imposed if an opposition to a motion to compel is opposed in bad faith or without substantial justification. C.C.P. §1987.2.

Further, a non-party who fails to appear for a deposition pursuant to a properly served deposition “also forfeits to the aggrieved person the sum of five hundred dollars (\$500.00) and all damages that the party serving the subpoena may or she may sustain for the failure of the person to appear, which damages or forfeiture may be recovered in a civil action. Code of Civil §§1992.

#### **CONCLUSION:**

It is therefore respectfully requested that this Court issue appropriate orders as follows:

1. An order compelling the deposition of CARLA [C.C.P. 1987.1];
2. An order to show cause why CARLA should not be held in contempt [C.C.P. §§2020.240, §1991.1 and/or an order to show cause re: An Order To Comply;
3. An order imposing monetary sanctions in the amount of \$40.00 for the filing fee and \$600.00 in attorneys’ fees for a total of \$690.00 as against CARLA [C.C.P. §1987.2, §2023.030, 2023.010].

Dated: \_\_\_\_\_

#### **DECLARATION OF JAMES GRAFTON RANDALL, ESQ.**

I, JAMES GRAFTON RANDALL, ESQ. state and declare under penalty of perjury and with my own personal knowledge, as follows:

1. That I am an attorney licensed to practice law before all of the courts of this State and before the United States Supreme Court;

<sup>1</sup> Section 2020 has since been renumbered as sections 2020.010 through 2020.510. Section 2023 has since been renumbered as sections 2023.010 through 2023.040.

2. [ ] was personally served a subpoena on October 28, 2010, to appear on November 2, 2010, for a deposition [true copy attached as EXHIBIT "A"]. This was a continued date of the deposition originally set on October 19, 2010 [EXHIBIT "B", true copy attached]. [ ] did not appear for her deposition [See "Certificate of Non-Appearance, EXHIBIT "C", true copy attached].
3. That I have incurred 2 hours in preparing this Motion and based upon known travel times I expect to spend an hour traveling to, appearing at, and traveling from the motion to deem the requests for admissions admitted, for a total of 4 hours. That while we are in house counsel we are still entitled to attorney's fees for sanctions, based upon what is reasonable for similar attorneys who are not in house counsel. I.e., see: *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084; that a reasonable fee is \$150.00, based on what comparable attorneys charge for an hourly rate;
4. That the cost for filing this Motion is \$40.00.

Declared this [ ] day of [ ], 20\_\_\_\_, at \_\_\_\_\_, California.

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## **MOTION TO DEEM RFA'S ADMITTED AND FOR SANCTIONS**

TO PLAINTIFF AND YOUR COUNSEL OF RECORD:

PLEASE TAKE NOTE that on the date and time and in the department set forth of the Court located at Walnut, Pasadena, California, Defendant HOUSE will move the Court for an order to deem the following Requests for Admissions s, set No. 1 propounded to Plaintiff BINH admitted and for costs in the amount of \$40.00 and sanctions and attorney's fees in the amount of \$450.00, as against Plaintiff and Plaintiff's counsel of record.

This Motion is based upon the fact that Plaintiff provided responses to Defendant's Requests for Admission, but provided no verification. Responses to Requests for Admissions which are not verified are deemed as no responses at all. (*Appleton v. Superior Court* (1988) 206 Cal.App.3d 632.)

This Motion is further based upon the provisions of Code of Civil Procedure §2023.010(d), §2033.280, upon this Notice, and upon the following Memorandum of Points and Authorities and the declaration of JAMES GRAFTON RANDALL, ESQ.

### **WHEN A PARTY FAILS TO VERIFY DISCOVERY RESPONSES THEY ARE DEEMED AS NO RESPONSES AT ALL AND A MOTION TO DEEM REQUESTS FOR ADMISSIONS ADMITTED IS APPROPRIATE AND SANCTIONS ARE MANDATORY:**

#### **1. SUMMARY OF CASE:**

In this action Plaintiffs allege Defendant HOUSE was in some manner negligent when unknown and masked gunmen came into their restaurant and shot several people, including the Plaintiffs. Defendant HOUSE propounded various discovery upon the Plaintiffs, including Plaintiff BINH. Plaintiff BINH has provided no verifications to any of the discovery propounded, including the Requests for Admissions [See EXHIBIT "A"].

#### **2. A FAILURE TO PROVIDE A VERIFICATION WITH RESPONSES TO REQUESTS FOR ADMISSIONS IS TANTAMOUNT TO PROVIDING NO RESPONSE AT ALL. THE PROPOUNDING PARTY MAY MOVE THAT ANY MATTERS SPECIFIED IN THE REQUESTS BE DEEMED ADMITTED AND IT IS MANDATORY THAT THE COURT IMPOSE SANCTIONS AS AGAINST A PARTY AND/OR ATTORNEY OR BOTH WHOSE FAILURE TO SERVE A PROPER RESPONSE NECESSITATED THE MOTION:**

Any party may obtain discovery by a written request that the other party admit "the truth of specified matters of fact, opinion relating to fact, or application of law to fact. A request for admission may relate to a matter that is in controversy between the parties." [§ 2033.010].) Within 30 days after service of the requests for admissions, the party to whom the requests are directed "shall respond in writing *under oath* separately to each request." [§ 2033.210].)

The requirement that the responses be made under oath is also repeated in § 2033.240]. “Unsworn responses are tantamount to no responses at all.” ( *Appleton v. Superior Court* (1988) 206 Cal.App.3d 632, 636.)

If a party fails to file a timely response to requests for admission, “[t]he requesting party may move for an order that the ... truth of any matters specified in the requests be deemed admitted, as well as for a monetary sanction.... [¶] The court shall make this order, unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with [§ 2033.220].

It is mandatory that the court impose a monetary sanction ... on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion.” [§ 2033.280, subd. (b), (c) ].)

### **CONCLUSION:**

Plaintiff and his counsel have provided no excused for not providing verification for the responses to the requests for Admissions pounded upon the Plaintiff.

The responses provided are not verified. They are deemed as no response at all and sanctions, as provided for pursuant to Code of Civil Procedure §233.280(c) are mandatory – even if the verification is provided prior to the hearing date of the motion.

It is therefore respectfully requested that this Court grant this motion, deem the requests for admissions admitted and impose costs and sanctions as against Plaintiff BINH THAI TRAN and his counsel in the amount of \$490.00.

### **DECLARATION OF JAMES GRAFTON RANDALL, ESQ.**

I, JAMES GRAFTON RANDALL, ESQ. state and declare under penalty of perjury and with my own personal knowledge, as follows:

1. That I am an attorney licensed to practice law before all of the courts of this State and before the United States Supreme Court;
2. That attached hereto is a true and accurate copy of the Plaintiff BINH responses to Defendants Requests for Admissions. These responses are not verified;
3. That I have incurred 2 hours in preparing this Motion and based upon known travel times I expect to spend an hour traveling to, appearing at, and traveling from the motion to deem the requests for admissions admitted. That while we are in house counsel we are still entitled to attorney’s fees for sanctions, based upon what is reasonable for similar attorneys who are not in house counsel. I.e., see: *PLCM Group v. Drexler* (2000) 22 Cal. 4th 1084; that a reasonable fee is \$150.00, based on what comparable attorneys charge for an hourly rate;
4. That the cost for filing this Motion is \$40.00.

Declared this ( ) day of ( ) 20\_\_\_\_, at Los Angeles, California, under the laws of the State of California.

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## **MEET AND CONFER INTERROGATORIES AND DEMANDS**

Dear :

We have received and reviewed your client, , responses to our client's Demand for Production of documents, Special Interrogatories and Form Interrogatories.

This letter is intended to be a "meet and confer" letter with the hope that we can avoid a motion to compel further responses and a request for costs and sanctions and a waste of the Court's valuable time.

### **1. PURPOSE OF DISCOVERY:**

The purpose of the discovery rules is to "enhance the truth-seeking function of the litigation process and eliminate trial strategies that focus on gamesmanship and surprise." ( *Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1254.) In other words, the discovery process is designed to " 'make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.' " ( *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376.) The purpose of the discovery statutes is to enable a party to obtain evidence under the control of his adversary in order to further the efficient and economical disposition of a lawsuit. *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793. A foundational purpose of the Civil Discovery Act is to avoid gamesmanship in litigation. (*Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1107). *Murillo v. Superior Court* (2006) 143 Cal.App.4th 730, 739.

**2. MISUSE OF THE DISCOVERY PROCESS:** A "misuse" of the Discovery Act includes, but is not limited to, "making an evasive response to discovery". Code of Civil Procedure §2023(f). Sanctions may be imposed for the abuse and/or misuse of the Discovery Act. C.C.P. §2033.030. Code of Civil Procedure §2023.030(a) provides in relevant part, "[t]he court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both[,] pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct." Section 2023.010 describes certain conduct-including failing to respond to an authorized method of discovery, making unmeritorious objections to discovery, and providing evasive responses to discovery-as misuses of the discovery process. The list is not exclusive. (§ 2023.010 ["[m]isuses of the discovery process include, but are not limited to, the following: ...".])

**3. VERIFICATIONS:** All of the verifications to the discovery responses are improper and should be deemed by the Court to be as if there was no verification at all [thus waiving objections]. None of the verifications are dated as to the date the Plaintiff verified the responses and the location as to where the Declarant was when the responses were purportedly “verified”. This raises the issue that the verifications were more than likely “signed” prior to receiving the responses, with the date and place to be filled in later by counsel. This is indeed improper. See: *Drociak v. State Bar* (1991) 52 C.3d 1085, 1091, 1092 [use of client's presigned verification in answering interrogatories].

**4. FORM INTERROGATORIES:**

1. **Interrogatory No. 12.3:** This interrogatory requests the names, addresses, etc. of any persons who may have provided a recorded or written statement about the incident, and if so, identify each such person. While it is true that the courts have held that the identity of those persons who may have provided a statement at the request of an attorney who may have interviewed such a witness may be privileged as “work product”, this is not the case for persons who may have voluntarily provided statements to a litigant’s attorney. On the other hand, a list of potential witnesses who turned over to counsel their independently prepared statements would have no tendency to reveal counsel’s evaluation of the case. Such a list would therefore not constitute qualified work product. Moreover, unlike interview notes prepared by counsel, statements written or recorded independently by witnesses neither reflect an attorney's evaluation of the case nor constitute derivative material, and therefore are neither absolute nor qualified work product. *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 217-218. Therefore, it is improper to not answer this interrogatory at least to the extent that a person or witness may have voluntarily turned over a statement without being first identified and interviewed by a party’s counsel. If only part of an interrogatory is objectionable, the remainder of the interrogatory shall be answered. Code of Civil Procedure §2030.240(a).
2. Interrogatory answers to Form Interrogatories 12.1 and 15.1 were incomplete and evasive, and clearly merited the issuance of an order compelling further answers and an award of monetary sanctions where they directed plaintiffs to look in the “medical records” to determine the identities of individuals with knowledge of the incident, or who had information supporting the affirmative defenses. *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 334.
3. **Interrogatory No. 14.1:** This interrogatory requests whether or not any party violated a statute, regulation, code, etc., and whether you contend that such violation was a proximate cause of the incident. The response provided was: “Objection. This interrogatory requires Responding Party to draw a legal conclusion as to the legal effect and ramifications of Defendant’s negligent conduct. Accordingly, no response is provided.”

- A. This response is improper. First of all, this is a Judicial Council approved interrogatory.
- B. Secondly, an interrogatory may relate to whether another party is making a certain contention, or to the facts, witnesses and writings on which a contention is based, and an interrogatory is not objectionable because an answer to it involves an opinion or contention that relates to fact or the application of law to fact, or would be based on information obtained or legal theories developed in anticipation of litigation or in preparation for trial. Code of Civil Procedure §2030.010(b).
- C. Thirdly, the response is simply nonsensical. It simply requests whether Plaintiff contends the Defendant(s) violated a statute, etc., and whether such violation was a proximate cause of this incident. This is a very simple interrogatory and there is no legal basis for refusing to answer it.

#### **5. SPECIAL INTERROGATORIES:**

Defendant(s) propounded 17 very simple and straight-forward special interrogatories – nearly every one of them were objected to with specious and frivolous objections.

**SPECIAL INTERROGATORY NO. 1:** “State each and every fact in support of your contention that the propounding defendant caused or contributed to DECEDENT’S death”.

**RESPONSE:** Plaintiff responded with a 21-line Objection based on everything from “attorney work product privilege” to the question being “premature”, to it asks for a “legal opinion”, to plaintiff is not required to “prepare Defendant’s case”, to “see attached reports”.

A party in California courts may be required through discovery to disclose not only the evidentiary facts underlying his affirmative defenses (*Singer v. Superior Court of Contra Costa County*, Supra, 54 Cal.2d 318, 323--325 (defendant required to disclose the facts underlying his allegations of contributory negligence and assumption of risk)) and denials (*Durst v. Superior Court of Los Angeles County*, 218 Cal.App.2d 460, 464--465 (defendant required to disclose the facts underlying his denial that plaintiff had been injured or disabled)) but also whether or not he makes a particular contention, either as to the facts or as to the possible issues in the case. (*Universal Underwriters Ins. Co. v. Superior Court for Los Angeles County*, Supra, 250 Cal.App.2d 722, 728; see also *Sheets v. Superior Court In and For Los Angeles County*, 257 Cal.App.2d 1, 13.) A plaintiff, of course is subject to analogous requirements. *Burke v. Superior Court of Sacramento County* (1969) 71 Cal.2d 276, 281-282.

That is all Defendants are requesting facts in support of the claims that somehow these Defendants caused the DECEDENT’S demise.

As provided in Cal. Prac. Guide Civ. Pro. Before Trial Ch. 8F-3, §8:990: “Contention” interrogatories are one of the most formidable discovery tools because they can force disclosure of your adversary's case! They are most effective when used in conjunction with “back-up” interrogatories asking: “State *all facts upon which you base* the contention that ... (e.g., plaintiff was comparatively at fault). If you make no such contention, you need not answer this interrogatory.”

There is no doubt that a defendant is entitled to discover by appropriate interrogatories the facts, if any, presently known to the plaintiff upon which he bases the allegations of his complaint and upon which he presently relies to prove his case. Nor does it matter what language is used if it can fairly be said that that is the purpose and intent of the interrogatories. ***If that is the case, the plaintiff must state those facts fully, regardless of the source of his information. Sheets v. Superior Court In and For Los Angeles County*** (1967) 257 Cal.App. 2d 1, 8-9 [Emphasis added].

Further, it is not a proper objection to an interrogatory that the information sought may be known to the party propounding the interrogatory. There is no rule or authority which authorizes refusal to answer an interrogatory simply upon the ground that the answer is known to the party seeking the information. ***Singer v. Superior Court of Contra Costa County*** (1960) 54 Cal.2d 318, 324.

Nor is it a proper response to request the propounding party to refer to reports or other parties responses to discovery or “see Traffic Collision Report...”. I.e., see: ***Deyo v. Kilbourne*** (1978) 84 Cal.App.3d 771, 784.

**SPECIAL INTERROGATORY NO. 2:** “State each and every fact in support of your contention that the propounding defendant did not do what they should have to have avoided the accident which is the subject of this action.”

**RESPONSE:** Once again, the simple interrogatory is met with a frivolous and specious multiple-line objection which is the same as the objection provided to Interrogatory No. 1.

**NEED FOR FURTHER RESPONSE:** As previously provided, the propounding party is entitled to the facts in support of Plaintiff’s contention that in some manner this propounding party caused or contributed to the accident or did not do what Plaintiff contends it should have done to have avoided this accident. It is not a complicated interrogatory and does not request attorney-client or work product privileged information.

“An important aspect of legitimate discovery from a defendant's point of view is the ascertainment, in advance of trial, of the specific components of plaintiff's case so that appropriate preparations can be made to meet them. It is impossible to discover this other than from the plaintiff.” ( ***Karz v. Karl*** (1982) 137 Cal.App.3d 637, 650.) ***Juarez v. Boy Scouts of America, Inc.*** (2000) 81 Cal.App.4th 377, 389.

**SPECIAL INTERROGATORY NO. 3:** State each and every fact in support of your contention that that the propounding defendant(s) violated any Vehicle Code section that caused or contributed to DECEDENT’s death.”

**RESPONSE:** Once again Plaintiff responded with the same 26-line frivolous response and objection as previously referred to. Defendant is entitled to know what facts, if there are any, Plaintiff may have to support any contention that Defendant violated any section of the Vehicle Code that may have caused or contributed to the accident.

Plaintiff cannot merely file a lawsuit without any legal basis, provide line after line of repeated objections, and refer the propounding party to various reports and then state “discovery is still continuing”. This does not provide the Defendant with any legal or factual basis for the lawsuit and instead engages in a game of “cat and mouse” where “each side tries, as do Tom and Jerry, to sandbag the other”. *Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1115.

Matters sought are properly discoverable if they will aid in a party’s preparation for trial. *Forthman v. Boyer* (2002) 97 Cal.App.4<sup>th</sup> 977, 987.

Defendant(s) must be able to ascertain whether or not Plaintiff has any facts to support a contention that Defendant(s) in some manner violated a vehicle code provision that caused or contributed to the accident.

One key legislative purpose of the discovery procedures is to educate the parties concerning their claims and defenses so as to encourage settlements and to expedite and facilitate trial. *Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4<sup>th</sup> 1101, 1107.

**SPECIAL INTERROGATORY NO. 16:** “State each and every fact in support of your contention that any negligence of DECEDENT, if any, was not a cause or contributing factor to the accident which is the subject of this action.”

**RESPONSE:** Once again, Plaintiff submits a 21-line objection ranging from it calls for attorney-client information, work product privilege, seeks expert information, seeks Plaintiff’s counsel’s impressions or evaluation and investigation, it is “premature”, calls for a legal opinion, the depositions of all of the witnesses have not yet been taken, Plaintiff was not present at the time of the accident, see discovery responses, see the Complaint of the Responding Party, etc., etc., etc.

Parties, like witnesses, are required to state the truth, the whole truth, and nothing but the truth in answering written interrogatories. Where the question is specific and explicit, an answer which supplies only a portion of the information sought is wholly insufficient. Likewise, a party may not provide deftly worded conclusionary answers designed to evade a series of explicit questions. *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783.

Insofar as the interrogatories may require the opinion or conclusion of the witness, such alleged incompetency, of itself, is not a proper objection. But the interrogatories herein do not call for opinions or conclusions; they ask only for the *facts* upon which defendant relies for its denials.

Questions relating to the facts underlying the contentions of the parties are proper and should be answered. A party is entitled to such information; that requests limited to facts presently known to a defendant upon which it predicates its defenses are not uncertain, do not call for opinions, and are not too broad or oppressive. *Durst v. Superior Court of Los Angeles County* (1963) 218 Cal.App.2d 460, 464-465.

## **6. REQUESTS FOR PRODUCTION OF DOCUMENTS:**

Preliminarily let me point out that a response of “plaintiff will produce the requested documents” is improper. The demand specifically states that the production date was to be \_\_\_\_\_ and the place of production was set forth at the defense counsel’s office [See: C.C.P. §2031.030(c)(2)]. Please provide these requested documents immediately. Failure to provide the documents by \_\_\_\_\_ will result in a motion to compel with a request for sanctions. The motion will not be taken off calendar once filed unless and until the requested sanctions are paid.

**5. Copies of all witness statements:** Written statements given independently by percipient witnesses are deemed "evidentiary" and thus not work product. [*Nacht & Lewis Architects, Inc. v. Super.Ct.* (1996) 47 CA4th 214, 217-218; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 CA3d 626, 647. See also: written statements of the independent witnesses are not protected by attorney-client or work product privileges. *Greyhound Corp. v. Superior Court In and For Merced County* (1961) 56 Cal.2d 355, 402. Please produce these statements within five (5) days of this letter.

I look forward to discussing these issues with you at your earliest opportunity.

Sincerely,

## **JUDICIAL COUNCIL INTERROGATORIES OBJECTIONS**

As to Judicial Council Interrogatory No. 12.2, simply because it was formulated by the Judicial Council does not prevent it from being challenged.

As the court held in *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 217: “We agree the respondent court erred in compelling further response to interrogatory 12.2. Compelled production of a list of potential witnesses interviewed by opposing counsel would necessarily reflect counsel's evaluation of the case by revealing which witnesses or persons who claimed knowledge of the incident (already identified by defendants' response to interrogatory 12.1) counsel deemed important enough to interview.”

As the court further held in *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 217: “A list of the potential witnesses interviewed by defendants' counsel which interviews counsel recorded in notes or otherwise would constitute qualified work

product because it would tend to reveal counsel's evaluation of the case by identifying the persons who claimed knowledge of the incident from whom counsel deemed it important to obtain statements. Moreover, any such notes or recorded statements taken by defendants' counsel would be protected by the absolute work product privilege because they would reveal counsel's "impressions, conclusions, opinions, or legal research or theories" within the meaning of Code of Civil Procedure §2018, subdivision (c). ( *People v. Boehm* (1969) 270 Cal.App.2d 13, 21-22)."

Interrogatory No. 12.3 presents a problem which the court addressed in *Nacht & Lewis Architects, Inc. v. Superior Court*. No. 12.3 provides, in part: "Have **YOU OR ANYONE ACTING ON YOUR BEHALF** obtained a written or recorded statement from any individual concerning the **INCIDENT**? If so, for each statement state [name/address/telephone number of individual from whom statement was obtained; who obtained the statement; date it was obtained and who has the original copy]. A list of the potential witnesses interviewed by defendants' counsel which interviews counsel recorded in notes or otherwise would constitute qualified work product because it would tend to reveal counsel's evaluation of the case by identifying the persons who claimed knowledge of the incident from whom counsel deemed it important to obtain statements. On the other hand, a list of potential witnesses who turned over to counsel their independently prepared statements would have no tendency to reveal counsel's evaluation of the case. Such a list would therefore not constitute qualified work product.

Responses to Interrogatory 12.3 should be provided only to the extent the court determines counsel obtained an independently written or recorded statement from one or more of the employees interviewed by counsel. *Nacht & Lewis Architects, Inc. v. Superior Court*, supra, 47 Cal.App.4<sup>th</sup> at 217-218.

When an attorney consults with but chooses not to call an expert, the choice not to call the expert may reveal counsel's impressions regarding who would be favorable and who would be unfavorable. The identity of such experts need not be disclosed until counsel determines to designate them in accordance with the provisions of C.C.P. §2034.010. See: *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4<sup>th</sup> 214, 217.

## ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is contained in Evidence Code section 950 et seq., and in general allows the client "to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer..." (Evid.Code, § 954.) The attorney-client privilege covers all forms of communication, including the transmission of specific documents ( *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 600), so a party should not ordinarily formulate a discovery request seeking "all documents transmitted to responding party's attorney." At the same time, documents prepared independently by a party, including witness statements, do not become privileged communications or work product merely because they are turned over to counsel. (See *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47

Cal.App.4th 214). *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 119

“[U]nder the Evidence Code, the attorney-client privilege applies to confidential communications within the scope of the attorney-client relationship even if the communication does not relate to pending litigation; the privilege applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened. [Citations.]” (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371). *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 119-120.

Further, the attorney-client privilege applies to statements made by insureds to their insurance carrier even before an attorney has been retained or litigation commenced. See: *Soltani-Rastegar v. Superior Court* (1989) 208 Cal.App.3d 424.

An accident report made by an employee on a pre-printed form used by a corporation’s insurance carrier is protected by the attorney-client privilege, even if no litigation was commenced or an attorney retained. *Payless Drug Store v. Superior Court* (1976) 54 Cal.App. 3d 988, 991.

See also *Smith v. Superior Court* (1961) 189 Cal.App.2d 6, 12 [“Even if the names and addresses of the witnesses were known only to the attorneys, they would have to be disclosed on a proper interrogatory addressed to the party.”]; *Aerojet-General Corp. v. Transport Indemnity Insurance* (1993) 18 Cal.App.4th 996, 1004 [attorney-client privilege cannot be used to shield facts underlying communications that are otherwise subject to discovery, such as the identity of potential witnesses].)

# DISCOVERY WORK PRODUCT PRIVILEGE

## I. WORK PRODUCT PRIVILEGES AND PROTECTIONS

The attorney work product doctrine is codified in Code of Civil Procedure §2018, which provides in relevant part: “(a) It is the policy of the state to: (1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; and (2) to prevent attorneys from taking undue advantage of their adversary's industry and efforts. [¶] (b) Subject to subdivision (c), the work product of an attorney is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice. [¶] (c) *Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.*” (Emphasis added.)

Section 2018's stated purpose and the underlying reasons for its creation emphasize the need to “limit[ ] discovery so that ‘the stupid or lazy practitioner may not take undue advantage of his adversary's efforts....’ *Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 133.

1. **ABSOLUTE**: Core work product, i.e., material solely reflecting an attorney's “ ‘impressions, conclusions, opinions, or legal research or theories,’ ” is entitled to absolute protection from discovery. ( *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 382, fn. 19.) The codified work product doctrine absolutely protects from discovery writings that contain an “attorney's impressions, conclusions, opinions, or legal research or theories.” (§ 2018.030, subd. (a); see *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 120. The protection extends to an attorney's written notes about a witness's statements. (See *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 649); see also *Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 135. “[A]ny such notes or recorded statements taken by defendants' counsel would be protected by the absolute work product privilege because they would reveal counsel's ‘impressions, conclusions, opinions, or legal research or theories’ within the meaning of [the work product doctrine].” *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 217.
2. **QUALIFIED**: Qualified protection exists for work product which is an amalgamation of factual information and attorney thoughts, impressions, conclusions. ( *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 217.) Such derivative material would include charts and diagrams, audit reports, compilations of entries in documents, records and other databases, appraisals, opinions, and reports of experts employed as non-testifying consultants. Derivative work product will be ordered disclosed if denial of discovery would unfairly prejudice the other party or result in an injustice. (Code Civ. Proc., § 2018, subd. (b); *BP Alaska Exploration, Inc. v. Superior Court, supra*, 199 Cal.App.3d at p. 1250.) The party seeking disclosure must demonstrate good cause, which involves a balancing of the need for disclosure against the purposes served by the work-product doctrine. ( *National Steel Products Co. v. Superior Court* (1985) 164 Cal.App.3d 476, 490.)
3. **NO PRIVILEGE**: Lastly, purely factual material receives no work product protection. *Nacht & Lewis Architects, Inc. v. Superior Court, supra*, at pp. 217-218; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 647-648.

**NOTE**: Photos or films reflecting counsel's strategies and tactics in preparation for trial should be treated as “qualified work product” (e.g., a video or surveillance film impeaching plaintiff's claim of disabling injury). It would be basically unfair to allow the other side free access to such material. That party should have to show a special need for discovery and inability to obtain similar information, etc. [See *Suezaki v. Sup.Ct. (Crawford)* (1962) 58 C2d 166, 177-178 (decided before attorney “work product” received statutory protection).] Indeed, certain photos or films “reflecting” counsel's

"impressions, conclusions (or) theories" may be "writings" entitled to absolute protection (e.g., photos taken from a particular angle or viewpoint, photographic enlargements, that show counsel's theory of liability). 2 Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2009) ¶ 8:235, p. 8C-69.