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Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

N.D.,

Plaintiff,

vs.

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a New York corporation; KENNETH L. APANA, Individually; and Does 1 through 100, inclusive,

Defendants.

CIVIL NO. 1CCV-20-0000390
(Non-Motor Vehicle Tort)

PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S RULE 37 MOTION TO HOLD THE DEFENDANTS IN CONTEMPT FOR FAILURE TO COMPLY WITH THE COURT'S ORDER AND FOR THE IMPOSITION OF SANCTIONS INCLUDING THE ENTRY OF JUDGMENT

[caption continued on next page]

Hearing:

Date : *April 26, 2022*
Time : *9:00 a.m.*
Judge : *Honorable Dean E. Ochiai*

Trial: June 20, 2022
Judge: Honorable Dean E. Ochiai

MAKAHA, HAWAII CONGREGATION OF JEHOVAH'S WITNESSES, a Hawaii non-profit unincorporated religious organization, a.k.a. MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES and KINGDOM HALL, MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES; and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., a New York corporation, Crossclaimants, vs. KENNETH L. APANA, Individually, Crossclaim Defendant.	**ON THE ISSUE OF LIABILITY PURSUANT TO RULE 37(b)(2)(B) AND FOR THE ADDITIONAL SANCTION OF REVOCATION OF PRO HAC VICE STATUS OF JOEL TAYLOR; AND CERTIFICATE OF SERVICE**

PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S HRCP RULE 37 MOTION TO HOLD DEFEDANTS IN CONTEMPT FOR FAILURE TO COMPLY WITH THE COURT'S ORDER AND FOR IMPOSITION OF SANCTIONS INCLUDING THE ENTRY OF JUDGMENT ON THE ISSUE OF LIABILITY PURSUANT TO RULE 37(b)(2)(B) AND FOR THE ADDITIONAL SANCTION OF REVOCATION OF PRO HAC VICE STATUS OF JOEL TAYLOR

I. INTRODUCTION

Forty-five days ago, the Court ruled from the bench that Defendants were required to produce, with absolutely no redactment whatsoever, the discovery that Plaintiff requested produced in her motion to compel, filed November 23, 2021. Instead of obeying the Court's order to produce unredacted discovery by March 9, 2022, Defendants produced to Plaintiff discovery that was *still partially redacted*. Such disregard of an unambiguous order can only be understood as a delay tactic intended to harass Plaintiff and inconvenience her attorneys. Plaintiff's Rule 37 Motion ("Motion,") requests sanctions against Defendants and their counsel as penalty for the drain on time and resources that Defendants' defiance has caused, especially given that this appears to be a tactic for both Watchtower and Mr. Taylor. Defendants' opposition to the Motion ("Opposition,") refuses any responsibility for its continuous and

months-long delay scheme and instead attempts to recharacterize both the law and reality. It is unsuccessful on both fronts.

II. ARGUMENT

A. THE PLAIN LANGUAGE OF THE COURT'S ORDER WAS VIOLATED

For all its bluster, Defendants' Opposition fails for a simple reason: It argues that the Court's Order does not say what it says. As articulated in Plaintiff's Rule 37 Motion, the Order states that Defendants must produce all contested documents to Plaintiff "by March 9, 2022 at 4:30 p.m. HST **with no redactions**." (emphasis added) (Opp. Exh. B.) This language is clear and unambiguous. "With no redactions" means with no redactions.

However, trapped between plain language and their own bitter recalcitrance, Defendants argue that "with no redactions," means that *some* redactions are obviously acceptable. (Opp. 4-5.) In order to reach this absurd conclusion, Defendants attempt to relitigate the redaction issue, blame Plaintiffs for not attaching an Order available to all parties because it is posted to the docket, and mine Plaintiff's Motion to Compel for evidence as if that motion were a court order. (*Id.*) Sadly, Plaintiff's motions do not bind Defendants; the Court's Orders do. There can be no question that Defendants are in violation of the Order which states discovery must be produced "**with no redactions**."

To make things worse for Defendants, the hearing transcript attached as Exhibit H to the Opposition only makes Plaintiff's point. The transcript memorializes that the Court ordered from the bench that "[t]he documents being sought shall be produced in total **with absolutely no redactment whatsoever**." (emphasis added) (Opp. Exh. H, 9:2-3.) The Court also stated that "the documents provided in camera **remove everything that had been redacted in the production** to the plaintiffs." (emphasis added) (*Id.* at 8:13-15.) This is not rocket science. The

Court's orders require neither a J.D. nor years of legal practice in order to understand—though Defendants' counsel all have the benefit of both. It is disingenuous for Defendants to pretend that the issue of all redactions was not before the Court when Mr. Taylor raised "a separate privilege unrelated to Rule 506" at the hearing and the Court spoke in clear language in response. (*Id.* at 9:25.) The Court reviewed the documents *in camera* and ordered them produced without redaction.

Moreover, litigants have options when courts order them to do things they do not want to do. Defendants could have requested clarification from the Court, filed for reconsideration, or—as was suggested after the Court ruled from the bench before issuing the written Order (*see* Opp. Exh. G)—pursued appellate options. But Defendants chose to do none of the above. Instead, they opted for open defiance of their legal obligations. Plaintiff's only option in the face of this noncompliance was to file a motion requesting sanctions for both Defendants and their counsel. Short of breaking into the Watchtower document storage location, there is no other way for Plaintiff to access the information the Court has ordered she be allowed to access.

B. PLAINTIFF APPROPRIATELY MET AND CONFERRED WITH DEFENDANTS

Defendants' distortion of truth does not end with their baseless contentions about what the Court's Order dictates. In a stunning act of projection, the Opposition accuses *Plaintiff's counsel* of bad faith by arguing that Mr. Davis violated HRCP Rule 37(b)(2)(B), which requires that counsel meet and confer in good faith before filing a motion. (Opp. 6-7.)

However, the evidence Defendants supply to smear Plaintiff's counsel actually demonstrates Plaintiff's compliance with Rules 37(b)(2)(B) and 37(d). Defendants do not dispute "[t]here was a phone call" between Mr. Davis and Mr. Hunt on March 31, 2022. (Opp.

1; Hunt Decl. ¶¶ 8-9.) Defendants admit that during that phone call, counsel discussed Defendants' redaction to the contested discovery. (Opp. 6; Hunt Decl. ¶¶ 8-9.) In that phone call, Mr. Davis contended that Defendants' discovery redaction was improper, and in response, Mr. Hunt told Mr. Davis that he "would review the Motion to Compel to confirm [his] recollection and be back in touch." (Hunt Decl. ¶ 9.) In his follow-up email, Mr. Hunt confirmed his position that the redactions were appropriate. (Opp. Exh. D.) Mr. Davis confirmed receipt of Mr. Hunt's position and began preparations to file the Motion. (*Id.*)

That process is exactly what HRCP Rule 37(b)(2)(B) requires. Mr. Davis contacted Mr. Hunt by telephone to discuss the discovery matter. Mr. Davis then articulate Plaintiff's position that Defendants' redactions were unwarranted and improper. Mr. Hunt confirmed—in writing—that Defendants' position was that the redactions were acceptable despite the existence of a Court order to the contrary. After confirming with Mr. Hunt that Defendants did not intend to produce the unredacted documentation that this Court ordered produced, Plaintiff filed the Rule 37 Motion. It would be an absurd reading of the rules in order to suggest, as Defendants do, that Plaintiff was required to apprise Mr. Hunt of every legal theory behind her pending Rule 37 Motion before filing it or do anything other than initiate a "meet and confer" where her position was made clear by her attorney. The parties have different positions on whether "with no redactions" actually means "with no redactions." Mr. Hunt had the opportunity between the phone call and his follow-up email to assess his position and determine whether his clients have an obligation to produce unredacted documents. There has already been a motion to compel and a Court order on the subject. A second motion to compel would be absurd, in addition to being a further drain on judicial resources. Mr. Hunt surely understood that a "meet and confer" about improper discovery redactions was in preparation for a motion for sanctions. It is difficult to

even imagine what else a phone call meet and confer between opposing parties' counsel might be.

C. DEFENDANTS DO NOT UNDERSTAND DUE PROCESS

All parties agree that courts must provide attorneys with notice and a meaningful opportunity to respond before stripping them of *pro hac vice* status. However, Defendants contort *Bank of Hawaii v. Kunimoto*, 91 Hawai'i 372, 984 P.2d 1198 (1999) and *Pacific Harbor Capital v. Carnival Airlines*, 210 F.3d 1112 (9th Cir. 2000) to suggest that the Due Process Clause requires the Court give Mr. Taylor a second or third chance to abuse the discovery process before reprimanding him in any way. This is not what the law demands.

Indeed, Defendants either ignorantly or intentionally misrepresent the key point of *Pacific Harbor*. In that case, the district court "issued sanctions sua sponte"—Plaintiff did not even request that Defendants' counsel be stripped of *pro hac vice* status—and the court did not allow sanctioned attorneys to "offer explanations for their conduct." 210 F.3d at 1120. However, the Ninth Circuit found that the court's sanctions comported with the requirements of due process because "appellants subsequently filed a motion for reconsideration of the sanctions and supported their motion with argument, affidavits, and other exhibits. . . . Thus, appellants were given the opportunity to fully brief the issue, to respond to the court's findings, and to demonstrate that their conduct was not undertaken in bad faith." (*Id.*)

If the Court has any misgivings about sanctioning Mr. Taylor, Plaintiff invites use of the exact same procedure used by the district court in *Pacific Harbor*: sanctions followed by a motion for reconsideration. The motion for reconsideration satisfies the Constitutional requirements outlined by *Pacific Harbor*. And of this Court were inclined to go beyond the

process blessed by the federal court of appeals, a show cause hearing would also be appropriate here.

D. PARALLELS TO THE MONTANA CASE CANNOT BE IGNORED

Defendants' Opposition has shockingly little to say about the Montana Order other than a claim that Plaintiff misapprehends it. (*See* Opp. 8.) This is likely because the parallels between this case and the Montana case, *Nunez v. Watchtower*, are impossible to ignore. While Defendants claim that the issue in *Nunez* was "whether Watchtower had waived an existing privilege, not whether the privilege existed," the issue in the sanctions order attached to Plaintiff's Motion as Exhibit B is the repeated misbehavior of Mr. Taylor and his client Watchtower. In *Nunez*, Watchtower withheld discoverable documents that it claimed were unrelated to plaintiff Alexis Nunez's sexual abuse. (*See* Mot. Exh. B 3.) However, these documents were highly relevant to Nunez's sexual abuse, and counsel for Watchtower—Mr. Taylor—knew they were relevant. (*Id.*) After the court ordered Watchtower to produce the relevant documents, it disregarded the order and produced something else instead. (*Id.* 4.) At the same time, Watchtower (through Mr. Taylor) produced a modified privilege log which attempted to designate documents relevant to Nunez's abuse as covered by attorney-client privilege. (*Id.*)

This is exactly what is happening here. After losing the argument on clergy privilege, Defendants seek through their noncompliance the opportunity to relitigate their redaction processes. And just as Mr. Taylor pretended to be "confused" by the Montana court's order in *Nunez*, he and Mr. Hunt now argue that "**with no redactions,**" "[t]he documents being sought shall be produced in total **with absolutely no redactment whatsoever,**" and "the documents provided in camera **remove everything that had been redacted in the production** to the

plaintiffs" must mean something other than their ordinary meaning. No reasonable attorney could be confused by such clear language. Accordingly, the only possible inference given the repetitive nature of this conduct is that it is some kind of litigation strategy.

Finally, in discussing the standards for attorney disclosure under Supreme Court Rule 1.9(b)(2), Defendants attempt to shift the target. (Opp. 7.) They claim that Watchtower as an entity was sanctioned in Montana, but not Mr. Taylor as an attorney—even though Mr. Taylor is discussed by name repeatedly in the Montana Order. (*Id.* at 9.) This rhetorical move attempts to obfuscate the fact that both Watchtower and Mr. Taylor are involved in what appears to be a pattern of disregarding court orders to produce discovery relevant to child sex abuse cases against the Jehovah's Witnesses. Ultimately, both Watchtower and Mr. Taylor are responsible for these repeated obstructions of the administration of justice, which is why Plaintiff has moved to sanction them both. Whether the Court places blame on Mr. Taylor or his client is not Plaintiff's primary concern. The core of Plaintiff's Rule 37 Motion is that both Mr. Taylor and Watchtower are doing something which they are not entitled to do; they are flouting a court order which mandates they turn over discovery "with no redactions." Working in concert, Mr. Taylor and Watchtower have done this exact thing before—and faced penalty for it. However, this penalty clearly was not enough to discourage future bad behavior. Plaintiff seeks relief that goes beyond what did not work the first time.

III. CONCLUSION

Plaintiff filed her Motion in order to shine a light on Defendants' ongoing refusal to furnish her with the unredacted discovery she is entitled to access. And though Plaintiff

continues to believe the sanctions requested in the Motion are appropriate, any lesser sanction—including monetary penalties—may also assist in achieving compliance with the Court's Order.

DATED: Honolulu, Hawai'i. April 21, 2022.

/s/ Matthew C. Winter
MARK S. DAVIS
LORETTA A. SHEEHAN
MATTHEW C. WINTER
Attorneys for Plaintiff

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Crossclaimants,

vs.

KENNETH L. APANA, Individually,

Crossclaim Defendant.

CIVIL NO. 1CCV-20-0000390
(Non-Motor Vehicle Tort)

CERTIFICATE OF SERVICE

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I hereby certify that, on the date below, a true and correct copy of the foregoing document was duly served on the following persons electronically through the Judiciary Electronic Filing and Service System (JEFS):

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MAKAHA CONGREGATION OF JEHOVAH'S WITNESSES, HAWAII; and WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC.

I further certify that, on the date below, a true and correct copy of the foregoing document was duly served on the following person by depositing same in the U.S. Mail, postage prepaid, addressed as follows:

KENNETH APANA
P. O. Box 331
Kailua-Kona, HI 96745

Defendant

DATED: Honolulu, Hawai'i. April 21, 2022.

/s/ Matthew C. Winter
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MATTHEW C. WINTER

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