2d Civil No. B187258

[Service on Attorney General (Consumer Law Section) and Los Angeles County District Attorney required by Bus. & Prof. Code, § 17209]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PACIFIC HEALTH CARE CONSULTANTS, et al.

Defendants and Appellants,

vs.

SINAIKO HEALTHCARE CONSULTING, INC.

Plaintiff and Respondent.

Appeal from Los Angeles County Superior Court, No. BC325513
Honorable Mary Murphy

RESPONDENT'S BRIEF

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: **B187258**

Case Name: **SINAIKO HEALTHCARE CONSULTING, INC., et al. v. PACIFIC HEALTHCARE CONSULTANTS, INC., et al.**

Please check the applicable box:

☐ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 14.5(d)(3).

■ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. Sinaiko Healthcare Consulting, Inc.	Party, respondent
2. Pacific Healthcare Consultants	Party, appellant
3. Bryan J. Kirchwehm	Party, appellant
4. Zepplin Corporation	Party, appellant
5. Steven Mark Klugman	Counsel, appellant

Please attach additional sheets with Entity or Person Information if necessary.

_____
Signature of Attorney/Party Submitting Form

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State Bar No: **109374**
Party Represented: **Defendant and Petitioner County of Los Angeles**

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INTRODUCTION

This is an appeal of a routine and eminently justified monetary discovery sanction. The trial court was well within its powers and did not abuse its discretion. It awarded modest monetary sanctions (just under $9,000) under Code of Civil Procedure sections 2023.010 and 2023.030 for appellants' failure to comply with its explicit discovery order.

This is an easy case. Plaintiff requested proper discovery. The trial court ordered responses without any objections. Appellants, having failed to timely respond to discovery in the first instance, continued to play games. The trial court acted well within its broad discretion in imposing the monetary sanctions at issue here.

Appellants' claims on appeal border on frivolous. They claim that they do not "control" (and therefore did not have to produce) documents potentially containing third parties' trade secrets. Even were that true—a debatable point—the relevant discovery statute requires production of documents within a party's "possession, custody, *or* control." Appellants admitttedly possessed the documents at issue. That is enough. They were ordered to produce *without objection.* Refusing to produce and asserting the supposed trade secret rights of others is not producing without objection. Neither is withholding documents that may have been produced by others. The blatant refusal to comply with the trial court's document production order alone justifies the monetary sanctions.

Appellants also urge that their untimely (and undoubtedly obstructionist) interrogatory responses (that no response would be

forthcoming because a demurrer was pending) precluded the trial court from ordering them to make full responses without another, different motion, a motion to compel further answers. Again, the governing statute is otherwise. It deems objections waived by the failure to *timely* respond. It allows a motion to compel responses whenever "a party to whom interrogatories are directed fails to serve a *timely* response." An objection-filled, *untimely* response after receiving a motion to compel, as here, does not require a second motion to obtain an order compelling responses without objection. Again, appellants' refusal to provide interrogatory responses without objection, as ordered, alone suffices to justify the monetary sanctions.

Finally, appellants argue that they cannot be sanctioned for violating an explicit court order unless the other party first "meets and confers" on their violation. There is no such requirement. And, if there were, it was met in this case.

The trial court was not required to put up with appellants' disingenuous and obstreperous discovery conduct. It was entitled to enforce compliance with its order. The monetary sanctions order should be affirmed.

STATEMENT OF THE CASE

A. The Complaint.

Plaintiff and respondent Sinaiko Healthcare Consulting ("Sinaiko") sued appellants and defendants Pacific Healthcare Consultants, Bryan J. Kirchwehm, and Zepplin Corporation (collectively "defendants") alleging that defendants breached a contract with Sinaiko and used Sinaiko's trade secrets to steal customers from Sinaiko, customers that they were supposed to be servicing as Sinaiko's agent. (1 CT 8-30.)

Defendants had acted as Sinaiko's agent in providing healthcare valuation analyses to various clients. (1 CT 10-13.) The gravamen of the complaint is that defendants billed Sinaiko for providing such analyses to clients which, in fact, may not have been provided and, at the same time, used Sinaiko's trade secrets to covertly steal Sinaiko's clients. (1 CT 13-25.)

B. Defendants' Failure To Timely Respond To The Initial Discovery Requests.

On February 14, 2005, Sinaiko served two separate items of discovery on *each* of the three defendants: (1) a set of form interrogatories (1 CT 79, 109, 139) and (2) a first request for production of documents (1 CT 88, 118, 148).[1]

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[1] A timeline of the relevant discovery and discovery motions and orders is attached as Attachment A (and incorporated within the word

(continued...)

Among other things, the interrogatories (form interrogatories nos. 50.1 to 50.6) sought to explore the substance of the breach of contract claim, including obtaining identification of relevant documents. (E.g., 1 CT 86, 116, 146.) The document requests sought, among other things, (1) "all work papers, notes, analyses, [for] . . . or any other information which form" opinions or advisory or financial services provided to, or at the request of, Sinaiko; and (2) "[a]ny and all documents which comprise, . . . evidence, . . . relate or pertain to" communications with or services to clients for whom defendants provided services, either on Sinaiko's behalf or independent of defendants' relationship with Sinaiko. (1 CT 92-93, 122-123, 152-153.)

No responses were forthcoming by the March 21, 2005 deadline and, accordingly, Sinaiko's counsel wrote defendants' counsel on March 24, 2005, requesting responses (without objection) by March 30, 2005. (1 CT 77, 99.)

C. The Motions To Compel And Defendants' Belated, Perfunctory Responses To The Interrogatories, But Not The Document Requests.

March 30 came and went and still there were no responses. (1 CT 77.) Accordingly, the next day, March 31, 2005, Sinaiko personally served three separate motions to compel without objection (one for each defendant)

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[1] (...continued)
count).

responses to both the form interrogatories and the document requests. (1 CT 68-69.) Because March 31, 2005, was a court holiday (Cesar Chavez Day), the motions were filed on April 1, 2005. (1 CT 70, 100, 130.)

The same day, March 31, 2005, *after having received the motions to compel* (2 CT 234), all three defendants faxed supposed responses to the form interrogatories (2 CT 241-259). The responses were all verified by defendant Kirchwehm. (2 CT 245, 250, 257.) Other than party information, the responses provided no substantive information, but instead objected that a demurrer was pending and asserted that as a result no information could be provided. (2 CT 243-244, 247-249, 254-256.)[2] No response was provided to the document requests. (See 2 CT 208.)

Defendants filed no oppositions to the motions to compel. (See 2 CT 208.) Sinaiko's counsel, nonetheless, brought to the trial court's attention, by way of a reply filed before hearing, that defendants, after receiving the motions, had faxed untimely, perfunctory and deficient responses to the form interrogatories, responses that provided no substantive information. (2 CT 208; RT 2.)

D. The Trial Court Orders Further Responses, Without Objection, To Both Interrogatories And Document Requests.

[2] Defendants' counsel claimed that Sinaiko's counsel orally agreed to take the motions to compel off calendar in return for the belated, evasive interrogatory responses. Sinaiko's counsel categorically denied any such agreement. (2 CT 301-302.)

Defendants did not bother to show up at the hearing on the motions to compel. (See 2 CT 211.) The trial court granted the motions in their entirety and ordered each of the defendants to "respond without objection and produce all documents within 20 days" and awarded monetary sanctions against defendants and their counsel. (2 CT 211-212.) Sinaiko served written notice of the order that same day. (2 CT 216.)

The next day, the trial court overruled defendants' demurrer, their ostensible basis for refusing to provide any substantive response to the form interrogatories. (2 CT 213.)

E. Defendants' Continuing Failure To Respond To Discovery As Ordered, i.e., Without Objection.

Rather than file the responses as ordered, defendants filed a motion for reconsideration and for relief from default under Code of Civil Procedure section 473, subdivision (b). (2 CT 223.) Based on their pending reconsideration motion, defendants obtained, ex parte, a last-minute almost one-month delay in the response date ordered. (2 CT 357.) At the hearing on their reconsideration motion, defendants withdrew it, taking it *off calendar*. (3 CT 451; RT 48, 51-53.)

In the meantime, defendants served document production responses. Those responses, however, remained obstructionist, objecting that various documents were privileged on trade secrets and other grounds. (2 CT 314-353.)

The parties then stipulated to, and the trial court entered, a protective order for confidential documents, including *any* documents which a party in good faith considered to contain "trade secrets, proprietary or commercially sensitive information, confidential business, financial or private information" protectible under applicable law. (3 CT 452, 459.)

Nonetheless, the defendants continued to fail to respond to discovery as ordered. Defendants *never* provided substantive responses to the form interrogatories or indeed *any* response beyond their tardy objection that a demurrer had been pending. (3 CT 505 ¶ 11.)

Defendants produced documents that, according to them, "may or may not be responsive to any and all of [the] requests for production of documents." (4 CT 610.) They objected, however that "the identities of and all documents related to any of its clients independent of Sinaiko . . . constitute it's [sic] own trade secrets and proprietary information, as well as potentially privileged information that responding party claims on it's [sic] clients [sic] behalf at this time." "Responding party further asserts the confidentiality and trade secrets privileges held by its unnamed clients." (4 CT 779, 780-781.) Defendants refused to produce such documents, providing a "privilege log" as to them that included various "Healthcare valuation analyses." (4 CT 620.)

Defendants also refused to produce their copies of any documents that had been produced by a third party, DaVita Corporation, pursuant to a subpoena. (4 CT 779-781.)

F. The Sanctions Motion And Order.

Sinaiko's counsel twice wrote to defendants pointing out that the responses failed to comply with the court's order and demanding that they respond fully, without objection. (4 CT 624, 632.) Nonetheless, full compliance was not forthcoming.

Accordingly, Sinaiko moved for terminating sanctions or, in the alternative, evidentiary, issue, or monetary sanctions. (3 CT 478; see also 3 CT 461.) Again, defendants filed no timely opposition. (See 5 CT 834-836.) Rather, defendants obtained court leave to file a last-minute opposition. (5 CT 838; 6 CT 1000.) In connection with that opposition, Bryan Kirchwehm, individually a defendant and the principal of the other defendants (he had verified the untimely perfunctory interrogatory responses on behalf of all defendants), declared under oath that he had produced only those documents that, in his view, "were not privileged." (5 CT 844.) Specifically, he acknowledged that he "possess[ed] copies of [his] clients' records." (*Ibid*.) He re-interpreted the court's order as not "intended to reach documents that were subject to a privilege held by third parties" and asserted that he "did not feel free to produce property belonging to my clients in the absence of a direct court order to do so." (5 CT 845.) Fairly read, the declaration *admits* that defendants have within their possession and custody substantial, responsive documents that had not been produced based on a claim of privilege. (See AOB 48 ["Defendants' Response That They Would Not Produce Documents *In Their*

Possession . . . Was Not A Violation Of The Trial Court's Order," emphasis added].)

At argument on the motion, defendants' counsel again made clear that defendants were withholding documents in their possession based on a claim of privilege. In defendants' view, "We have an obligation to produce all documents in our possession and control. We do not have control over the documents in question. They belong to the clients. . . . We do not believe that the court ordered us to provide other people's documents. We waived our right to assert our privilege, not the clients' privilege." (6 CT 1129-1130.)

The trial court rejected that argument. (6 CT 1117-1122; RT 85-90.) It also rejected defendants' argument that after being *ordered* by the court to respond without objection, the court could not impose sanctions unless Sinaiko first met and conferred with defendants about their failure to comply with the court order. (6 CT 1124-1125.) The trial court found that defendants had failed to comply with its prior order as regards both interrogatories 50.1 through 50.6 and as to document requests 2 through 22. (6 CT 1149, 1163.) The trial court then entered evidentiary and monetary sanctions of $8,786.36 against defendants and their counsel.[3] (*Ibid*.)

[3] Only the monetary sanctions are at issue on this appeal. Appellants do not challenge the amount of monetary sanctions, only their imposition.

G. Notice Of Appeal And Statement Of Appealability.

Sinaiko served its notice of ruling on September 8, 2005; defendants and their counsel jointly filed a timely notice of appeal on November 7, 2005. (6 CT 1160, 1175.)

Monetary discovery sanctions exceeding $5,000, as here, are appealable. (Code Civ. Proc., § 904.1, subd. (a)(12).) No other aspect of sanctions is appealable.

ARGUMENT

THE TRIAL COURT WAS WELL WITHIN ITS DISCRETION IN IMPOSING MONETARY SANCTIONS

A. The Trial Court Was Well Within Its Discretion In Concluding That Defendants Were Obstructing Discovery.

Sinaiko sought monetary sanctions under Code of Civil Procedure section 2023.030. (4 CT 646.)[4] Subdivision (a) of that section empowers trial courts to "impose a monetary sanction . . . [against] one engaging in the misuse of the discovery process." "Misuses of the discovery process" include "[m]aking, without substantial justification, an unmeritorious objection to discovery; [m]aking an evasive response to discovery; [and] [d]isobeying a court order to provide discovery." (Code Civ. Proc., § 2023.010, subds. (e), (f), (g).)

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[4] Defendants assert that sanctions were also sought under Code of Civil Procedure sections 2030.300's and 2031.310's provisions for compelling further responses. Although those sections were mentioned generally in the notice, no mention was made of compelling further responses and it is clear that the sanctions were only sought, and only awarded, under section 2023.030's provisions for monetary, evidentiary, issue, and terminating samctions. (See 4 CT 645-646 [individual sanction requests enumerated only pursuant to section 2023.030]; 6 CT 1138; RT 106 [defendants successfully argue that no order compelling further discovery could be issued because only monetary and other sanctions were sought].) In any event, if the monetary sanctions are appropriate under section 2023.030, that they might also have been sought, correctly or not, under some other statute is irrelevant.

This Court "review[s] the trial court's [monetary discovery sanctions] ruling under the abuse of discretion standard, resolving all evidentiary conflicts in favor of that ruling." (*Sears, Roebuck and Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 Cal.App.4th 1342, 1350; see *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 487-488, overruled on other grounds by *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4.) "The trial judge's application of discretion in discovery matters is presumed correct, and the complaining party must show how and why the court's action constitutes an abuse of discretion in light of the particular circumstances involved." (*Obregon v. Superior Court* (1998) 67 Cal.App.4th 424, 432.) "The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action. [Citations.]" (*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545; accord *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal.App.4th 486, 496; *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36, citations and internal quotations omitted.)

Here, the factual record more than allowed the trial court to conclude that there was conscious obstruction of the discovery process. Sinaiko served basic discovery—form interrogatories and document requests. Defendants did not respond to *either* the discovery or to counsel's follow-up letter. Only *after* defendants received motions to compel did they provide half-hearted and evasive interrogatory responses. Those responses were insufficient on their face, merely declining to provide any substantive

information about the case by objecting on the improper ground that a demurrer was pending.

There was no effort to respond to the document request. Defendants did not oppose the motions to compel as to either the interrogatories or the documents requests. The trial court issued an unequivocal order requiring responses to all of the discovery *without objection*. Defendants delayed with a motion for reconsideration which they then abandoned at the hearing.

They *never* provided interrogatory responses without objection, as they had been ordered to do. They admittedly withheld documents in their possession asserting newly formulated privilege and trade secret objections. (See AOB 48.) They did so even though they had a stipulated order protecting trade secrets. The trial court could well rationally conclude that obstreperousness, not any inadvertence, was the reason for the disobedience of its order.

The trial court's monetary sanctions must be affirmed if supported on any ground. (See, e.g., *R&B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 352.) As we now discuss, any of the defendants' several discovery defalcations more than justified the modest monetary sanctions award here. None of the defendants' purported excuses holds water.

B. Defendants' Admitted Failure To Produce Documents Without Objection, Standing Alone, More Than Justifies The Sanctions.

The defendants undeniably failed to fully respond to the document requests without objection and to "produce *all* documents" as ordered. (2 CT 211-212, emphasis added.) This direct disobedience of the trial court's express order, without more, justifies the monetary sanction award.

There is no dispute that defendants failed to produce all documents. They admitted that the documents that they did produce "may *or may not* be responsive to any and all" of the document requests. (4 CT 610, emphasis added.) They concede that they did not produce other documents that they possessed, asserting supposed third parties' trade secrets. (4 CT 779-781; see AOB 48 ["Defendants' Response (Was) That They Would Not Produce Documents *In Their Possession* . . .," emphasis added].) They also admit that they did not produce other documents, documents pertaining to DaVita Corporation. (4 CT 779-781.)[5] Defendants, thus, both obfuscated as to whether what they produced, in fact, was responsive and simultaneously failed to produce documents which undoubtedly were responsive.

Defendants proffer two excuses for their failure. Neither works.

[5] Defendants' assertion that they were sanctioned for failing to produce documents that did not exist (AOB 51), thus, is belied by their own admissions.

1. Defendants were properly required, but indisputably failed, to produce third parties' documents which were admittedly within their possession and custody.

First, as to third party documents in their possession, defendants now claim on appeal that such documents need not be produced because they somehow are not in their control. (AOB 48-51.) Initially, defendants said that they were withholding such documents on the grounds that they were "privileged" and "confidential." (4 CT 620, 779, 785.) On appeal, they now contend that the "privilege log" that they produced to that effect was "inartfully labeled." (AOB 12; see 4 CT 620.) They claim that the real issue is possession, custody, or control. (AOB 48-51.)

By contrast, in opposing the sanctions motion, defendant Kirchwehm (the principal of the other defendants) declared, under oath, that he withheld the documents in question because he did not believe that the court's order "was intended to reach documents that were subject to a privilege held by third parties" and that he "did not feel free to produce property belonging to my clients in the absence of a direct court order to do so." (5 CT 844-845.)

Defendants' position has evolved on appeal (and at argument on the sanctions motion) to a claim that documents subject to a third party's trade secrets or privilege claim are somehow not in the defendants' control. (AOB 48-51.) The reason for this evolution is obvious. The trial court's order directed defendants to produce "all documents" and to do so "without objection." It simply is not tenable to assert that in light of such an

unequivocal order the defendants were free to interpose privilege or trade secret objections, whether on their own behalf or on behalf of third parties. Certainly the trial court was in the best place to know what it intended in its own unqualified order. The claimed trade secret objection was particularly disingenuous as defendants acknowledge that there was already in place a stipulated order protecting trade secrets, an order that applied no matter to whom those trade secrets might belong.

Defendants cite no authority for their new proposition that documents containing information pertaining to third parties somehow are not in their control and therefore not subject to a request to produce. In fact, there is no such authority.

In any event, the discovery statutes require production of documents in a party's "possession, custody *or* control." (E.g., Code Civ. Proc., §§ 2031.010; 2031.220, 2031.230, emphasis added.) "The phrase 'possession, custody or control' is in the disjunctive and only one of the numerated requirements need be met." (*Cumis Ins. Society, Inc. v. South-Coast Bank* (N.D.Ind. 1985) 610 F.Supp. 193, 196 [where party has document in its possession, "control" prong is irrelevant]; accord *Mullen v. Mullen* (D. Alaska 1953) 14 F.R.D. 142, 143 [same re tax return of third party]; *Rockett v. John J. Casale, Inc.* (S.D.N.Y. 1947) 7 F.R.D. 575 [third parties' documents in responding party's possession must be produced].)[6]

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[6] California's discovery statutes use the identical "possession, custody, or control" language as Federal Rule of Civil Procedure 34. California's discovery statutes are patterned after the federal rules. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 375; *Schmier v.*

(continued...)

A party's "ability [to produce documents] is not affected by [a third-party] source's retention of ownership or its unilaterally imposed restrictions on disclosure"; "[l]egal ownership is not determinative of whether a party has custody, possession, or control of a document for purposes of" discovery rules. (*Resolution Trust Corporation v. Deloitte & Touche* (D. Colo. 1992) 145 F.R.D. 108, 110 & fn. 3.)

Defendant Kirchwehm's declaration made clear that he had additional documents in his possession and custody. If defendants' world view were correct, then businesses would never have to turn over records of their dealings with customers, and attorneys would not have to turn over documents they hold for their clients. But that is not the law. (See *Unger v. Los Angeles Transit Lines* (1960) 180 Cal.App.2d 172 [names of witnesses turned over to insurance defense counsel are within party's possession, custody, or control and subject to discovery].)

Certainly, where no protective order is in place (there was one here), a party might *object* to discovery of materials in its possession and custody on grounds of a third party's privacy interest or the like. (Cf. *Board of Trustees of Leland Stanford Jr. University v. Superior Court of Santa Clara County* (1981) 119 Cal.App.3d 516.) But when the party has waived any such objection and been ordered to produce documents without objection, it

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[6] (...continued)
Supreme Court (2000) 78 Cal.App.4th 703, 709.) Accordingly, "federal case law can provide helpful precedent," especially where identical language is employed by the federal rule and the California statute. (*Brown v. Superior Court* (1986) 180 Cal.App.3d 701, 711; see *Bailey v. Superior Court* (1977) 19 Cal.3d 970, 976 fn. 5; *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 171-172 & fn. 12.)

cannot then create some fiction that it does not "control" documents that, in fact, are in its possession and custody. Rather, where a responding party claims a lack of possession, custody, or control of documents, that party must specifically identify who does have possession, custody, or control of the document. (Code Civ. Proc., § 2031.230 ["The statement (that the responding party cannot comply) shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item"].) Defendants never did so. Rather they *admitted* possession and custody. That suffices to require production.

On appeal, defendants may not have wholly abandoned their privilege arguments, however. They assert in passing, without citing any authority, that in failing to respond to the document request, they only waived their own privileges, such that they were free to raise objections to production and to decline to produce documents based on privileges held by others. (AOB 50; see *In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164 [argument without citation of authorities is waived].) But the trial court ordered production of *all* documents *without objection*, not without objection except objections raised on behalf of others. Regardless whether *third parties'* rights to object may have been waived by defendants' conduct, *defendants* undoubtedly waived their right to object on the behalf of others.

The trial court ordered defendants to produce *all* documents, not all documents other than documents that they had obtained from third parties.

Defendants admittedly did not do so. The trial court was well within its discretion in concluding that defendants consciously violated its order.

2. Defendants admitted withholding of documents on the ground that they might also have been produced by others both violated the trial court's discovery order and was otherwise improper.

Second, defendants admit that they did not produce their copies of documents relating to a third party, DaVita Corporation. (AOB 47 ["Admittedly, Defendants' response stated that there were some documents that it [sic] was not producing," specifically those relating to DaVita Corporation]; 4 CT 779-781.) Again, the trial court's order was that defendants produce *all* documents, not just those documents that defendants unilaterally judged reasonable to produce. Defendants were to produce without objection or excuse.

In any event, an objection that a requesting party may already have a document in its possession is not valid. (*Walt Disney Co. v. DeFabiis* (C.D. Cal. 1996) 168 F.R.D. 281, 284.) There are ample reasons why a party may need documents produced by multiple sources. Sinaiko needed to see which documents, in fact, had been in defendants' possession; it needed production by defendants to authenticate various documents; and it needed to compare the documents that it received from defendants with those that it might receive by subpoena from third parties (including, for example,

whether there were notations on the documents, whether particular documents were missing, etc.).

The bottom line was that the trial court had *ordered* defendants to produce *all* responsive documents. Defendants do not and cannot argue that the trial court's order was an abuse of discretion. They did not even oppose the motion to compel. (See *Laguna Auto Body v. Farmers Ins. Exchange*, *supra*, 231 Cal.App.3d at p. 489 [failure to oppose motion to compel leads to presumption that the responding party has no meritorious arguments].) They could not months later seek to reinterpret the court's order simply because they thought it inconvenient. Their obligation was to comply with the order as written, not unilaterally to invent reasons to justify their admitted failure to comply.

C. Defendants' Tardy And Obstructionist Interrogatory Responses Did Not Preclude The Trial Court From Ordering Them To Respond Without Objection Or To Sanction Them For Not Doing So.

The failures to comply with the court's order regarding document production, standing alone, more than suffice to justify the monetary sanctions imposed. But even if those failures did not, the defendants' failure to respond to the form interrogatories as ordered would independently justify the monetary sanctions.

There is no dispute that defendants did not timely respond to the form interrogatories propounded to them. They did not respond at all until

after they received motions to compel. The responses that they then provided were obstructionist and patently defective, objecting that they need not answer because a demurrer was pending. The trial court granted the unopposed motions to compel and unequivocally ordered defendants to answer the interrogatories *without objections*. They never did. They never provided *any* interrogatory answers beyond the untimely, evasive responses they gave upon receiving the motions to compel.

They now argue on appeal that they are entitled to game the system. They assert that a party can wait until a motion to compel is served, send out a patently defective response before the court hears the motion, and thereby make a nullity of the trial court's ensuing order that the party answer without objection. (AOB 21-35.) The statutory scheme permits no such game playing.

Where "a party to whom interrogatories are directed fails to serve a *timely* response," (a) "[t]he party to whom the interrogatories are directed *waives* any right to exercise the option to produce writings [in lieu of responding to the interrogatories], as well as *any* objection to the interrogatories, including one based on privilege or on the protection for work product" and (b) "[t]he party propounding the interrogatories may move for an order compelling response to the interrogatories." (Code Civ. Proc., § 2030.290 subds. (a), (b), emphasis added.) Thus, the failure to serve a *timely* response is the statutory trigger allowing a party to seek, and a court to make, an order compelling responses without objection. Dilatory responses, especially ones with no substantive content but that simply

object or are evasive, do not deprive a party the right to seek, or a court the right to order, full responses *without objection*.[7]

Arguably, a responding party's untimely but full and complete pre-order responses might suffice to comply with the later order. But if so, the responding party proceeds at its own risk in assuming that its prior responses comply with the later order. Certainly, they did not here. Here, on the substantive form interrogatories 50.1 through 50.6, defendants provided *no* information, but simply threw up an unwarranted roadblock, asserting that they need not answer because a demurrer was pending.

Defendants claim that their responses were not objections. No fair reading of the defendants' responses to form interrogatories numbers 50.1 to 50.6 is that they were "without objection." The responses undoubtedly objected that no response could be made because of pending demurrers. There are only three ways to respond to an interrogatory: "(1) An answer containing the information sought to be discovered[,] (2) An exercise of the party's option to produce writings[, or] (3) An objection to the particular interrogatory." (Code Civ. Proc., § 2030.210, subd. (a).) Defendants' tardy responses were neither of the first two; they necessarily were an objection.

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[7] Defendants make much of the fact that, although they did not serve their perfunctory responses until after they were served with motions to compel, they did so before those motions, in fact, were filed. (E.g., AOB 27.) The difference between service and filing dates resulted from the court's Cesar Chavez holiday. But for the purposes of defendants' argument, this fact makes no difference. The operative trigger for allowing a party to file a motion is a failure to timely respond. The statute nowhere refers to the date on which a motion is either served or filed.

Such an objection is undeniably improper. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1990) 223 Cal.App.3d 1429, 1436, fn. 3 [pleading deficiencies are no basis for refusing to respond to discovery]; *Budget Finance Plan v. Superior Court* (1973) 34 Cal.App.3d 794, 797-798 [same].) Whatever else may be said about them, the perfunctory and untimely responses that defendants served were not "without objection" as the court's order required. On their face, the responses objected to providing information until a demurrer was ruled upon. Having been ordered to provide responses without objection, defendants did not do so even after their demurrers were overruled.

Under defendants' world view, a responding party can fail to provide any responses whatsoever and then, when the propounding party serves or files a motion to compel, negate that motion by serving patently inadequate or evasive non-responses. Then, according to the defendants, the propounding party has to withdraw its motion (eating the expense), meet and confer anew, and bring another motion, this time to compel further answers. Presumably, the obstinate responding party could then serve another set of supplemented, but still inadequate, responses, and the process would have to start all over again. A dilatory party could stretch things out *ad infinitum* without a court ever being able to compel answers even though the responding party long ago waived objections.

The discovery scheme does not contemplate such delay and roadblocks. Rather, "[i]t would be unjust to require respondent to file another motion to compel further answers when the responses given were

patently defective and merely served to further delay discovery." (*Laguna Auto Body v. Farmers Ins. Exchange*, *supra*, 231 Cal.App.3d at p. 489.)

If a party fails to serve a *timely* response, the trial court is entitled to (and in the normal circumstance should) compel responses without objection. If a responding party wishes to stand on some previously served responses, it does so at its own risk. Those responses need to satisfy the court's order. If they do not, the party is in violation of the order and subject to the full panoply of sanctions available under Code of Civil Procedure section 2023.010, et seq.

Deyo v. Kilbourne (1978) 84 Cal.App.3d 771, relied on by defendants (AOB 29-31) is not to the contrary. First, *Deyo* was decided under a prior statutory scheme. The present statutory scheme makes abundantly clear that, if a party fails to comply with a court discovery order, the full panoply of sanctions under Code of Civil Procedure 2023.010, et seq., is available. Second, the facts in *Deyo* are significantly different. There, when the responding party failed to answer, the court issued an order directing the party merely to *answer* the interrogatories. The party complied. It answered the interrogatories. But the court's order here directed the defendants to *respond without objection.* (2 CT 211-212.) The only response the defendants *ever* served to form interrogatories 50.1 through 50.6 was an *objection* that a demurrer (by now long overruled) was pending. Those responses did not begin to comply with the trial court's express order. On its facts, therefore, *Deyo* is inapplicable to the present circumstance.

In a variation on the same theme, defendants assert that, in light of their tardy, evasive interrogatory responses, the trial court's order directing them to respond to the interrogatories *without objection* was ambiguous, and their failure to do so was not willful. Hardly. The trial court's order was unequivocal: The motions were granted; defendants were ordered to "respond without objection." (2 CT 211-212.) Sinaiko gave defendants written notice of their obligation to do so. (2 CT 216-217.) There was no ambiguity in the trial court's order. If defendants had any question about their obligation, they could have sought clarification from the court. They did not do so. Rather, they sought reconsideration relying, in part, on their tardy interrogatory responses, misleadingly asserting that those responses had been "without objection." (2 CT 226, 229.) They then abandoned that motion. (3 CT 451; RT 48, 52-53.)

Defendants *knew* that they had been ordered to respond to the interrogatories without objection. They *knew* that their prior, tardy responses might be viewed as inadequate. They *knew* that they provided no further responses other than to have objected that no response was necessary because a long-since-overruled demurrer had once been pending. That more than suffices to establish a willful discovery order violation. For purposes of discovery sanctions, a "'wilful failure' does not necessarily include a wrongful intent to disobey the rule. A conscious or intentional failure to act, as distinguished from an accidental or involuntary non-compliance, is sufficient to invoke the penalty." (*Snyder v. Superior Court* (1970) 9 Cal.App.3d 579, 587, citations and internal quotation marks

omitted [failure to appear at deposition based on advice of counsel was "wilful"].) There was no accidental or involuntary failure to comply. Defendants and their counsel knew that the tardy, evasive responses that they had provided might well not suffice as responses "without objection." Defendants' insistence on standing on their tardy, evasive responses was a "calculated risk" and, therefore, "wilful." (*Ibid*.)

The trial court ordered defendants to respond to the interrogatories without objection. It was well within its powers in doing so. The defendants' tardy responses did not "contain[] the information sought to be discovered" and, therefore, were not "without objection." The defendants acted at their own risk in standing on their prior obstructionist responses. They cannot now complain that they should not be subject to monetary sanctions for having done so.

D. Sinaiko Was Not Required To "Meet And Confer" Before Seeking Sanctions For Violations Of A Court Order; To The Extent Sinaiko Was So Required, It Did So.

Defendants' final argument is to claim that the trial court could not sanction them because, they assert, Sinaiko had to "meet and confer" before seeking sanctions based on their continuing violations of *the court's* order compelling their full responses. (AOB 35-40.) Not so. The "meet and confer" requirements apply only to motions to compel compliance with party-initiated discovery. Those requirements do not apply to a party's disobedience of a court order.

The discovery statutes are structured so that in making a *motion to compel further responses*, a party must provide a declaration as to having "met and conferred." (E.g., Code Civ. Proc., §§ 2030.300, subds. (a), (b), 2031.310, subds. (a), (b)(2).) The very same statutes, in separate subdivisions, then direct that "[i]f a party then fails to obey an order compelling further response . . ., the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or . . . in addition to that sanction, . . . a monetary sanction" under Code of Civil Procedure section 2023.010. (Code Civ. Proc., §§ 2030.300, subd. (e); 2031.310, subd. (e).) No mention of any meet and confer process is made in those separate order-violation subdivisions.

On their face, the statutes impose the meet and confer requirement only as to a motion to compel further responses, but *not* in connection with a motion for sanctions for failure to obey a court order compelling such further responses.

Where a qualification is present in one part of a statute, but not in another, the strong presumption is that the Legislature intended the qualification to apply only to the one portion of the statute where it was expressly stated. "Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117.)

The Legislature expressly required a meet and confer process before bringing a motion to compel further responses. No such requirement is

imposed in the same statutory scheme for motions seeking sanctions for disobeying a court order. Such a requirement cannot be inferred. It must be assumed that the Legislature knew what it was doing in expressly requiring a meet and confer process for one type of motion but not for another.

And that makes sense. Where a motion to compel is concerned, what is at issue is a party-drafted demand, a demand that has not been reviewed by a court. Once an order has been issued, the party's obligation is to comply with it, period. A party may be sanctioned for failing to comply with even an erroneous discovery order so long as the order was within court's jurisdiction. (*In re Marriage of Niklas* (1989) 211 Cal.App.3d 28, 34-35, per George, J.)

Even were there a meet and confer requirement for sanctions motions premised on disobedience of court orders, the requirement is not jurisdictional. Not all statutory directives are jurisdictional. (E.g., *In re Aontae D.* (1994) 25 Cal.App.4th 167, 171-172 [statute directing that stipulation to referee be in writing is not jurisdictional].) Generally, statutory directives as to when or the manner in which something is to be done are *not* jurisdictional, absent a contrary legislative intent. (E.g. *Edwards v. Steele* (1979) 25 Cal.3d 406, 410 ["We have held that, generally, requirements relating to the time within which an act must be done are directory rather than mandatory or jurisdictional, unless a contrary intent is clearly expressed. (Citations)"]; *Californians for Population Stabilization v. Hewlett-Packard Co.* (1997) 58 Cal.App.4th 273, 284 [statutory requirement that notice of appeal in Bus. & Prof. Code § 17200

cases be served on district attorney not jurisdictional], disapproved on another ground in *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 171; *In re Aontae D.*, *supra*, 25 Cal.App.4th at pp. 171-172 [statutory requirement that stipulation as to referee be in writing not jurisdictional].)

Here, there is no indication that the Legislature intended to deny trial courts the jurisdiction to impose sanctions for violation of court orders if the *parties* had not adequately met and conferred as to violation of those orders. To the contrary, jurisdiction to enforce their own orders is one of the inherent powers of courts. (E.g., Code Civ. Proc., §§ 128, subd. (a)(4) [every court has the power to compel obedience to its orders], 1209, subds. (a)(3), (5); *In re San Francisco Chronicle* (1934) 1 Cal.2d 630, 634 [courts have inherent power to punish for contempt, whether of a direct or constructive nature, and the other branches of government cannot constitutionally infringe on that power].) The Legislature cannot be deemed to have intended to deprive courts of such an inherent power. (See *Le Francois v. Goel* (2005) 35 Cal.4th 1094 [statute limiting parties' motions for reconsideration cannot be read as limiting courts' inherent right to reconsider].) The trial court therefore could properly enter the sanctions order regardless of any meet and confer requirement that might bind a *party* seeking such sanctions.

Finally, even were there a jurisdictional meet and confer requirement, it was met here. Sinaiko's counsel wrote to defendants' counsel on June 28, 2005 and on July 5, 2005, regarding the deficiencies in

defendants' responses. (3 CT 474, 506; 4 CT 603-606, 608.) Sinaiko's counsel also spoke with defendants' counsel, a conversation that generated the "privilege log" of withheld documents. (3 CT 475, 507; 4 CT 620.) The trial court was entitled to consider this an adequate meet and confer, especially in light of defendants' history of delay and nonresponsiveness.

CONCLUSION

Defendants undoubtedly obstructed discovery. Their late, equivocal, and less than full responses did not comply with the court's order that they respond "without objection." The trial court was not required to endure the disobedience of its order. It properly imposed monetary sanctions. Its sanctions order should be affirmed.

DATED: November 1, 2006

Respectfully submitted,

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ATTACHMENT A

Timeline Of Relevant Discovery

DATE	EVENT	COMMENT
Feb. 14, 2005	Discovery Served Form Interrogatories (1 CT 87, 117, 147) First Request for Production of Documents (1 CT 94, 124, 154)	
Mar. 21	Discovery Due	None provided
Mar. 24	Letter from counsel demanding responses, without objection, before March 30 (1 CT 99, 129, 159)	
Mar. 31	Motions to compel served	
Mar. 31	After receiving motions to compel, defendants serve purported interrogatory responses (2 CT 241, 246, 252)	The responses provide no substantive information, but rather assert that, because a demurrer was pending, no such responses would be provided (2 CT 243-244, 247-249, 254-256)
Apr. 26	Hearing and order on motions to compel (RT 1-5) Order requires responses *without objection* and production of documents within 20 days (2 CT 211)	No opposition filed (2 CT 225-226)
Apr. 26	Notice of Ruling served (2 CT 216-218)	
Apr. 27	Demurrer overruled (2 CT 213-215, 219-222)	
May 6	Defendants move for reconsideration (2 CT 225)	

DATE	EVENT	COMMENT
May 13	First responses to production served (2 CT 313)	
May 17	Defendants obtain, ex parte, extension of response date to June 13 (2 CT 357)	
June 6	Parties stipulate to protective order re confidential materials, including trade secrets (3 CT 457)	
June 13	Hearing on reconsideration motion; Defendants take motion off calendar (3 CT 451)	
June 28	Plaintiff, by letter, points out deficiencies in document production responses (4 CT 603-606)	
July 5	Further responses to production; defendants produce 10,000 pages of undifferentiated documents that "may or may not" be responsive, while continuing to state trade secret and privilege objections (4 CT 610) After conversation with Sinaiko's counsel, defendants' counsel produces "privilege log" of withheld documents (3 CT 507; 4 CT 620)	
July 5	Plaintiff, by letter, again complains that the production does not comply with the court's order (4 CT 632-633)	
Aug. 11	Sinaiko personally serves motion for terminating, issue, evidentiary, and monetary sanctions pursuant to court order (4 CT 643)	
Aug. 29	Defendant asks ex parte, and trial court allows, filing of late opposition (5 CT 838)	

DATE	EVENT	COMMENT
Sep. 2	Hearing on motion. Trial court imposes monetary sanctions (RT 85; 6 CT 1083)	
Sep. 8	Notice of entry served (6 CT 1086)	
Nov. 7	Notice of appeal (6 CT 1175)	