



California  
Bar  
Examination

Performance Tests  
and  
Selected Answers

July 2006

**TUESDAY AFTERNOON  
JULY 25, 2006**



**California  
Bar  
Examination**

**Performance Test A  
INSTRUCTIONS AND FILE**

**SAVALL DRUGSTORES, INC. v. PHISTER PHARMACEUTICALS CORP.**

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## **SAVALL DRUGSTORES, INC. v. PHISTER PHARMACEUTICALS CORP.**

### **INSTRUCTIONS**

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional States of Columbia and Franklin, two of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

**BLANE, MORA & NIEBAUM, LLP**  
**Attorneys at Law**

**M E M O R A N D U M**

**To:** Applicant  
**From:** Craig Mora  
**Date:** July 25, 2006  
**Re:** **SavAll Drugstores, Inc. v. Phister Pharmaceuticals Corp.**

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Our client, SavAll Drugstores (“SavAll”), a multi-national chain of discount retail drugstores, sued Phister Pharmaceuticals (“Phister”) for Phister’s longstanding anti-competitive practice of refusing to sell its popular cholesterol control drug Serapatrin to SavAll.

Phister has been stonewalling us on discovery. Most recently, we propounded a narrowly drawn request for production of documents requesting Phister to produce all e-mail messages sent and received in the last five years bearing on the subject of sales and pricing of Serapatrin. About six weeks ago we had a hearing before Discovery Commissioner Felicia Moreno on our motion to compel production of the e-mails and Phister’s cross-motion for a protective order seeking either to deny production or shifting the entire cost of production to us.

As ordered in the Commissioner’s *Findings of Fact and Order*, we have taken steps to develop the facts surrounding the discovery issues by deposing Phister’s Chief Technology Officer, Chester Yu, and Phister has deposed SavAll’s computer expert, LaVon Washington.

I want you to prepare our supplemental brief. Our position is that Phister should not be relieved of the obligation to produce the documents and that Phister should pay the costs

of production. I have attached a recent ruling in Columbia, *Zwerin v. United Merchant Bank*, that sets forth the currently applicable rules on production and cost-shifting concerning electronically stored data. I have also attached a later case, *Baldocchi v. Orion Films, Inc.*, which applies the *Zwerin* factors and gives you some guidance on how to *apply* the rules.

Based on Commissioner Moreno's order, Phister has stipulated that it will produce at its own expense all readily available e-mails, i.e., e-mails that Mr. Yu said in his deposition remain on the individual users' hard drives and haven't yet been transferred to storage. Therefore, this first-level category (i.e., "category one") of e-mails is no longer in dispute.

In accordance with the guidelines set forth in Commissioner Moreno's *Order*, please draft a persuasive brief in which you do the following:

1. Summarize in a *short* introductory statement of facts the steps we have taken since the last hearing before the Commissioner and categorize the levels of data storage identified in the depositions; and
2. Argue that (a) Phister's motion for protective order relieving it completely of the obligation to produce the electronically stored data should be denied and (b) that Phister should be required to produce, at its own expense, all the e-mails in the *remaining* categories.

**BLANE, MORA & NIEBAUM, LLP**  
**Attorneys at Law**

**MEMORANDUM**

**To:** All Associate Attorneys

**From:** Executive Committee

**Re:** **Persuasive Briefs**

To clarify the expectations of the firm and to provide guidance to associates, all persuasive briefs, including Briefs in Support of Motions (also called Memoranda of Points and Authorities), whether directed to an appellate court, trial court, arbitration panel, or administrative officer, shall conform to the following guidelines.

All briefs of these documents shall include a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts so stated support our client's position.

Following the Statement of Facts, the argument begins. The firm follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, **IMPROPER:** COLUMBIA HAS PERSONAL JURISDICTION. **PROPER:** DEFENDANT'S RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our client's position should be emphasized, but contrary authority should generally be cited and addressed in the argument. Do not reserve arguments for reply or supplemental briefs.

The associate should not prepare a table of contents, a table of cases, a summary of argument, or the index. These will be prepared, where required, after the draft is approved.

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**IN THE SUPERIOR COURT IN AND FOR THE  
STATE OF COLUMBIA**

**SAVALL DRUGSTORES, INC.,** )

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Plaintiff, )

Case # 413406 FM

)

v. )

**FINDINGS OF FACT AND ORDER**

)

**PHISTER PHARMACEUTICALS CORP.,** )

)

Defendant. )

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\_\_\_\_\_)

This matter came on for hearing on June 6, 2006 on a discovery motion of plaintiff SavAll Drugstores, Inc. ("SavAll") to compel production of documents and a cross-motion of defendant Phister Pharmaceutical Corp. ("Phister") for a protective order relieving it of the obligation of producing the documents or, in the alternative, requiring SavAll to pay all costs of production.

The underlying action is a suit brought by SavAll for injunctive relief and damages arising from the alleged violation by Phister of the Columbia Unfair and Deceptive Trade Practices Act (the "Act"). The conduct complained of is the alleged refusal of Phister to sell its popular cholesterol control drug, Serapatrin, to SavAll during the period of the five years preceding the filing of this action. SavAll alleges that Phister unlawfully attempts to control and fix retail prices in violation of the Act.

1 SavAll propounded the following Request for Production of Documents:

2 Request No. 34: Please produce, either in hard copy or in readable  
3 electronic form, all e-mail messages sent and received by Phister's Sales and  
4 Marketing Department staff to and from other members of said staff regarding  
5 Serapatrin retail prices set or recommended by Phister during the period January  
6 1, 2001 to the present.  
7

8 Phister's objection is that it would be unduly burdensome for it to comply with  
9 SavAll's request for the e-mails. Its assertion of burdensomeness is based on the following  
10 facts. In the past 20 years, Phister, like most modern business entities making the  
11 transition from recording their business transactions in paper media to computerized  
12 methods, has increasingly converted its record-keeping, management reporting, and  
13 interoffice and customer communications systems to electronic media. Throughout that  
14 period, Phister has had a records retention practice of periodically purging the hard drives  
15 on the computers utilized by its employees, including the members of its Sales and  
16 Marketing staff, and preserving all data therefrom which are stored randomly in various  
17 "backup" media such as digital tapes, floppy disks, compact disks ("CDs"), and the like, in  
18 archives. The data are not segregated by type. For example, a particular backup tape or  
19 CD might contain indiscriminately stored e-mails, marketing reports, accounting records,  
20 interoffice memos, and the like. Phister claims that for it to segregate and retrieve e-mails  
21 from five years of such randomly stored data would be extremely costly and consume time  
22 and resources that Phister cannot divert from its business objectives. Additionally, over the  
23 years Phister has gone through an extensive series of modernizations of its computers and  
24 systems. As a consequence, the means of retrieving and reproducing the e-mails from  
25 storage media more than about a year old are no longer available internally. Thus, Phister  
26 asserts that either it should be relieved of the obligation to produce any e-mails except  
27 those that happen to be readily available in hard copy, i.e., in paper form, or SavAll should  
28 be required to pay all costs of retrieving and reproducing the e-mails, including the time and  
29 expense incurred by Phister personnel to review the e-mails for the purpose of redacting  
30 privileged and business-sensitive/confidential information.

1 SavAll responds by saying that Phister’s election to store its documents in electronic  
2 media rather than paper does not alter the usual rule that the burden and cost of production  
3 must be borne by the producing party, i.e., it is no different than if Phister had used paper  
4 memos rather than e-mail. Moreover, there must necessarily be a number of e-mails on  
5 hard drives that have not yet been purged and transferred to archival storage media.  
6 Those can certainly be merely printed out and produced to SavAll. Also, the most recent  
7 archival backups must necessarily be easily retrievable by Phister’s existing computer  
8 equipment and personnel.

9 SavAll is correct in stating that the usual presumption is that the producing party, in  
10 this case Phister, is required to bear the cost of producing the requested documents.  
11 However, Rule 26 of the Columbia Rules of Civil Procedure gives the court broad discretion  
12 to depart from that presumption in part or in whole depending on the circumstances. The  
13 widespread use of computers in the conduct of business, the indiscriminate storage in bulk  
14 form of vast amounts of information, and the repeated advances and obsolescence of the  
15 means of data storage and retrieval have presented unprecedented discovery issues and  
16 require the courts to adopt novel approaches to discovery requests that require production  
17 of stored, archived electronic data.

18 On the record before me, the parties have simply not presented enough information  
19 to rule on all aspects of the cross-motions. However, based on the moving papers and the  
20 arguments presented at the hearing, I can and do make the following findings of fact:

- 21 • This litigation presents important public policy issues having to do with price-  
22 fixing and consumer protection.
- 23 • SavAll’s claim appears to have some merit – it has come into possession of  
24 about 50 pages of e-mails that tend to show efforts by Phister to manipulate  
25 prices of Serapatrin.
- 26 • The disputed request for production (Request No. 34, *supra*) is sufficiently  
27 narrow and specific to overcome any objection that it is vague or overbroad.
- 28 • The amount of money at stake is significant. SavAll is suing for its lost  
29 profits, which it estimates to be in excess of \$120 million over the past five

1 years, to be trebled if SavAll can prove the statutory violation.

- 2 • The effect of the court’s ultimately granting or denying an injunction will affect  
3 the public interest, in that it could affect the price the public will have to pay  
4 for this important drug.
- 5 • Both parties, SavAll and Phister, are large multi-national corporations with  
6 substantial resources.
- 7 • SavAll already has in its possession a number of printed-out e-mails that tend  
8 to bear on its allegations of wrongdoing by Phister. Although it cannot be  
9 ascertained at this stage whether the sources SavAll seeks to discover  
10 contain a “gold mine” of information that might support SavAll’s case, the  
11 materials that SavAll has already discovered suggest that there might be  
12 other similar data embedded in Phister’s stored data.
- 13 • Because Phister is a drug and pharmaceuticals manufacturer, it is required  
14 by the Federal Food and Drug Administration to retain all communications  
15 relating to its sales, marketing, and manufacturing functions for a period of  
16 seven years.
- 17 • The five-year period covered by SavAll’s request is reasonable, given that the  
18 complaint alleges that to be the period of Phister’s alleged misconduct toward  
19 SavAll.
- 20 • Phister has designated Chester Yu, Vice President and Chief Technology  
21 Officer of Phister, as the “person most knowledgeable” about Phister’s  
22 computer systems, record retention policies, and record retrieval  
23 methodologies.
- 24 • LaVon Washington, an independent consultant retained by SavAll, is the  
25 person designated by SavAll as its “person most knowledgeable” on  
26 discovery of electronically stored data.

27 There is no reason to depart from the presumption that Phister must bear the cost  
28 of producing all requested e-mails retrievable from as-yet unpurged hard drives that are in

1 active use. Phister has stipulated that it will do so. I will withhold all rulings on the  
2 remaining issues until the parties have developed further information as prescribed below.

3 In *Zwerin v. United Merchant Bank* (Columbia Court of Appeal, 2002), the court  
4 approved an approach that appears suited as the mechanism for resolving the issues  
5 presented in this case.

6 Accordingly, I make the following ORDER:

7 1. Phister shall produce at its own expense all requested e-mails retrievable  
8 from as-yet unpurged hard drives that are in active use.

9 2. The parties shall develop a factual record based on *Zwerin's* analysis to the  
10 extent applicable and file supplemental briefs arguing in support of their positions. The  
11 most expedient means of developing such a record would be for the parties to take the  
12 depositions of each other's "person most knowledgeable," but I leave it to the parties to  
13 make that determination.

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16 Date: June 16, 2006

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Felicia Moreno  
Superior Court Discovery Commissioner

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1 **A:** Well, I can't say it's the *principal* method, but it is very widespread. It just depends on  
2 the nature of what's being communicated and the nature of the transaction.

3 **Q:** Isn't it correct that Phister prescribes to its wholesale and retail customers the prices  
4 at which its products, particularly Serapatrin, should be sold?

5 **A:** I don't know that "prescribes" is the right word. I know we "suggest" prices.

6 **Q:** Okay, I'll use your word. Does the company use e-mail as a medium of communicating  
7 internally and among its customers its pricing policies and "suggestions" as to prices?

8 **A:** Yes, I'm sure we do.

9 **Q:** In any given day or week or month in the past 5 years, how many e-mails relating to  
10 pricing of Serapatrin are sent and received by company employees and its customers?

11 **A:** You know, I really have no way of knowing. There are thousands of sales, marketing,  
12 and executive employees and customers all over the world, and the number has increased  
13 over the years as we've grown. I think I can safely say that in the past 5 years there are  
14 thousands of such e-mails every month. I can't even guess at how many of them relate to  
15 Serapatrin, but it must be in the hundreds every month. Probably very few of those would  
16 have anything to do with the *pricing* of Serapatrin.

17 **Q:** Does Phister have a policy or practice of printing out these e-mails?

18 **A:** No. We discourage it. However, I'm sure some people print out ones they particularly  
19 want to keep, but we have no way of tracking that. The whole object is to minimize the use  
20 of paper and the expense of maintaining paper files. We can store electronic documents  
21 at virtually no cost, whereas it costs huge amounts of money to process, file, and store  
22 paper documents.

23 **Q:** Aside from retrieving these e-mails electronically, how else can we get them?

24 **A:** I don't really know. I guess we could canvass our sales and marketing employees to  
25 ask for any printed-out ones or canvass our customers for the same thing. But that would  
26 produce questionable results.

27 **Q:** I agree. That would be a waste of time and money. Well, let me ask you this. In the  
28 past 5 years, has Phister had an official record retention policy regarding electronic  
29 documents?

1 **A:** Yes. It's been generally the same for about 10 years, and it works this way. We "back  
2 up" all of our computer transactions and communications at the end of every business day  
3 just in case of an emergency. Then, every 30 days, we do a "sweep" of all the hard drives  
4 in our company-wide computer system and transfer all the data to permanent storage for  
5 our archives.

6 **Q:** So for 30 days, all e-mails that a particular individual staff member sends and receives  
7 stay on the individual user's hard drive, and all you'd need to do is print them out, is that  
8 right?

9 **A:** That's right, unless the individual deletes them for some reason.

10 **Q:** OK. Why do you do "sweep" or "purge" the hard drives every 30 days?

11 **A:** Two reasons. First, to guard against the possibility of a catastrophic systems failure  
12 such as might result from power failures, computer viruses, fires, casualty losses, and so  
13 forth. If need be, we'd be able to reconstruct all the data. Second, to clear old data off the  
14 system and maintain the useable computer capacity we need just to conduct our business.

15 **Q:** Has it ever happened that you've had to reconstruct data from your archives?

16 **A:** Fortunately, not on any significant scale.

17 **Q:** Isn't it true that one of the reasons you have to back up your systems is that the federal  
18 Food and Drug Administration requires you to retain all communications relating to sales,  
19 marketing, and manufacturing functions for 7 years?

20 **A:** Yeah, that's right. But we don't segregate that stuff from all the other backed up data.  
21 We've never been called on by the FDA to retrieve such communications, so I don't know  
22 what we'd do if we needed to.

23 **Q:** What mediums do you use to preserve and store the archived materials, and how far  
24 back do you save them?

25 **A:** We actually still have all the archives for the past 15 years that I know of – they're all  
26 stored in an offsite fireproof vault. It costs virtually nothing to store the disks and tapes, so  
27 we just keep them rather than try to sort through them. As far as the actual storage  
28 mediums are concerned, those have changed over the years along with advancements in  
29 computer science. Of course, for 30 days, before we do our monthly "sweep" the data

1 remain on the individual users' computer hard drives, so that's one storage medium. In  
2 the early days, we used ordinary recording tapes. Then we switched to compact disks,  
3 then to offsite hard drives. It just depended on the degree of sophistication of our system  
4 and capabilities and what business programs we were licensed to use at any given time.

5 **Q:** What about in the past 5 years?

6 **A:** I'm sure we've used some of each storage medium. For the past year, we've been  
7 using the latest SoftPlan Office operating systems and storing our backups on offsite hard  
8 drives. Before that – let me see. I'd say that during 2004 and 2005 we used mainly  
9 compact disks – CDs - and during 2002 and 2003 we used tapes.

10 **Q:** Let's take them one at a time. Is there a single offsite hard drive that contains all the  
11 backup data for 2006 and, if not, how many are there?

12 **A:** Oh, no. There are hundreds of them. When one fills up, we remove it and replace it  
13 with another and store the filled up ones.

14 **Q:** How about the CDs Phister used in 2004 and 2005? How many of those are there?

15 **A:** I'd have to say thousands – they don't hold as much data as the hard drives we're now  
16 using.

17 **Q:** And how many tapes that you used in 2002 and 2003 are there?

18 **A:** Again, I'd have to say thousands.

19 **Q:** Now, you've said that you've never segregated the stored data. What do you mean  
20 by that?

21 **A:** I mean that any given storage device in the archives will contain an unsegregated  
22 mass of data – e-mails, letters, accounting reports, marketing and sales reports, business  
23 plans, and any other kind of business documents you can think of randomly recorded on  
24 the storage medium.

25 **Q:** Would I be correct in assuming that there are computer programs that will allow you to  
26 search each of the storage mediums by document type and content and retrieve only the  
27 e-mails that deal with matters relating to the pricing of Serapatrin?

1 **A:** It would be a lot of work but *possible* to do that with the stored hard drives we've been  
2 using in the past year, but I have serious doubts that we could do it with any of the earlier  
3 storage mediums – at least, not in-house.

4 **Q:** Please explain that.

5 **A:** Well, for the past year, all the data we've stored was initially produced on programs  
6 that are compatible with our current e-mail system and the SoftPlan system. So, it would  
7 be *possible* to run and sort the data and pull out the e-mails.

8 **Q:** Why do you put the emphasis on the word *possible*?

9 **A:** Because it would be a tremendous amount of work and extremely expensive. We don't  
10 have the spare personnel it would require, and if we assigned existing staff to do it we  
11 wouldn't be able to get our normal work done. We'd have to hire extra people. Also, it  
12 would tie up computer capacity that we need for everyday business matters.

13 **Q:** Have you tried to figure out what it would cost to do this?

14 **A:** Yes. It's hard to estimate it with any certainty, but just to retrieve the e-mail data you  
15 want from the hundreds of hard drives we have, assuming everything went smoothly, would  
16 take about 1500 employee-hours. At an average of \$25 an hour, which is about what  
17 qualified people would have to be paid, that would be \$37,500. Then, we'd have to print  
18 them out or transfer them to CDs, have someone read them all to make sure they're  
19 responsive to your request and sort out any confidential or privileged data – maybe another  
20 \$15,000, for a total of just over \$50,000. I suppose we could get a better idea of time and  
21 cost if we ran a sample with a few hard drives and extrapolated from there.

22 **Q:** OK. Couldn't you do the same thing with the CDs and tapes from the earlier years?

23 **A:** Probably not. The farther back in time we go, the less likely it is that we have the  
24 capability of even being able to read the data. What I mean by that is that we've changed  
25 the computer equipment and the software programs that were in use when the data were  
26 initially recorded. We'd have to reacquire the equipment and programs – if that's even  
27 possible anymore – to be able to read and retrieve the data.

28 **Q:** Have you made any estimate of what that would cost?

1 **A:** That's *really* hard to do. As to the CDs we used in 2004 and 2005, the equipment and  
2 software programs are probably still available on the market. I suppose we could lease the  
3 equipment and renew our licenses to the software programs. The rough cost of that would  
4 be about \$25,000 a month, and it would probably take about 6 months -- \$150,000, plus  
5 about \$50,000 in additional personnel costs to do the work. So, for those CDs, a total of  
6 about \$200,000. I suppose we could outsource it and have an outside specialist do the  
7 work, but, even at that, we'd have to supervise and review the production of the materials,  
8 probably at a total cost of \$150,000 to \$175,000. It's cheaper than doing it in-house, but  
9 we have to worry about losing control of the process and the danger of disclosing  
10 confidential business information. That's a major concern of ours, so I don't think we'd be  
11 willing to just turn the materials over without subjecting them to a careful review before we  
12 produce them to SavAll.

13 **Q:** What about the tapes from the earlier years?

14 **A:** That would be just about impossible for us to do because I don't think we could  
15 replicate the equipment and programs necessary to read and retrieve the data. We'd have  
16 to outsource that to outside contractors who specialize in such work. I've gotten a very  
17 rough estimate from an outside contractor -- he gave me the figure of \$250,000 to read,  
18 sort, and reproduce the relevant information.

19 So, adding it all up, it would cost somewhere in the neighborhood of \$500,000 to do what  
20 you're asking us to do. And, what makes that hard to swallow is that there probably isn't  
21 much to be found. I mean, Phister hasn't tried to fix prices like SavAll has accused us of  
22 doing, so you're not going to find much.

23 **Q:** Well, to defend this lawsuit, you're going to have to do exactly what we're asking you  
24 to do -- go through all the data and prove that you haven't fixed prices. Isn't that right?

25 **A:** I don't think so. It's not our job to prove the negative. It's *your* job to prove it, so, as  
26 far as we're concerned, we don't need to go through any of the data for Phister's benefit.  
27 Although I guess it would *marginally* help Phister in defending the case if we were to search  
28 the data and find that there were no responsive e-mails. But we have absolutely no current  
29 *business* need for the data.

1 **MR. MORA:** No further questions.

2 **END OF DEPOSITION**

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1 archival back up. Those can just be downloaded and printed from existing active files – just  
2 like you’d look at your e-mails on your home personal computer. Let’s call that “category  
3 one.”

4 The second category – let’s call it “category two” - of recent data are the data Phister has  
5 transferred to the offsite hard drives in the past year. Phister has all the equipment and  
6 software necessary to read, sort, and pull out the relevant e-mails. So it’s just a matter of  
7 assigning employees to do the job – just like you’d have them go through paper files.

8 **Q:** You agree, don’t you, that even that would be time-consuming and costly and that Mr.  
9 Yu’s estimate of about \$50,000 is about right, maybe even conservative?

10 **A:** Well, using Mr. Yu’s assumptions about the volume of materials and the employee  
11 hours required, I believe \$37,500 for the retrieval work is a bit high, but not by much. The  
12 only part of it that I can’t evaluate is the \$15,000 he says it would cost to review the  
13 materials for privileged and confidential information.

14 **Q:** What about the materials for the earlier years?

15 **A:** Well, they belong in a third category – “category three.”

16 **Q:** Do you agree with Mr. Yu’s estimates regarding category three?

17 **A:** He’s correct about it being harder to do. Based on what I know so far, I think I could  
18 do the CDs for about \$75,000 and the earlier tapes for about \$100,000. I have the people  
19 who are trained to do it and access to the obsolete equipment and software programs.

20 **Q:** So, overall, you think the job could be done for, say, \$200,000 to \$225,000?

21 **A:** That’s right. In fact, I think it would be cheaper for me to do it than if Phister went out  
22 and hired its own contractor.

23 **Q:** Why is that?

24 **A:** Because I’ve been working with SavAll on the problem, and I’ve already got a head  
25 start. Any other contractor would have to go back to square one and incur startup costs  
26 that I’ve already put behind me.

27 **Q:** All right. How would you handle the problem of privileged and confidential information?  
28 I mean, if you’re working for SavAll, you’d be in a conflict situation, wouldn’t you?

1 **A:** I guess so, but if I were ordered by the court or there were an agreement of the parties  
2 not to turn over the materials to SavAll until they'd been reviewed and redacted by Phister,  
3 I'd abide by that.

4 **Q:** How long would it take you to complete the work?

5 **A:** Hard to say. Assuming that Phister took care of the recent data in-house and turned  
6 over all the other archives to me, I could turn it around in about 3 months. That also  
7 assumes that Phister did its review for privileged and confidential data promptly. It might  
8 help to predict this more accurately if whoever did the job could do some trial runs on  
9 limited samples of each of the different kinds of storage mediums.

10 **Q:** What would that accomplish?

11 **A:** Two things, really. First, it would give you a chance to test the equipment and software  
12 to make sure it works. Second, it would allow Phister to extrapolate from the sample and  
13 get an idea of the ultimate volume of e-mails that would come out of it.

14 **Q:** How much would that cost?

15 **A:** It depends on how large a sample we were instructed to run. If we took a month's  
16 worth of the archives for each of the types of storage mediums, I'd guess we could do the  
17 sampling for \$25,000 to \$30,000.

18 **MS. LATHROP:** No further questions.

19 **END OF DEPOSITION**

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**TUESDAY AFTERNOON  
JULY 25, 2006**



**California  
Bar  
Examination**

**Performance Test A  
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## **Zwerin v. United Merchant Bank**

Columbia Court of Appeal (2002)

We accept this interlocutory appeal from a discovery Order issued by Commissioner Marrit Schein, and we endorse what we believe is a good model for resolving the increasingly common pretrial discovery disputes involving the burdens of retrieving and producing electronically stored data.

Laura Zwerin is suing United Merchant Bank (“UMB”) for gender discrimination, harassment over a protracted period of time, and retaliation under the Columbia Civil Rights Act. Her case has *prima facie* merit, and, if she prevails, her damages may be substantial. She has come into possession of a number of e-mails that tend to show she was terminated from her position as Senior Vice President/Asian Equities Sales Department because she filed a complaint of gender discrimination. She contends that additional key evidence is located in various e-mails exchanged among UMB employees and that those e-mails now exist only in backup tapes and other archived media. Zwerin moved to compel UMB to produce all such e-mails at its own expense. UMB objected, asserting that compliance with Zwerin’s motion would cost approximately \$175,000, exclusive of attorney time, and moved for a protective order.

In June 2002, Zwerin served upon UMB a document request demanding that UMB produce “all documents, including without limitation electronic or computerized compilations, concerning any communications by or between UMB employees relating to Plaintiff.” UMB produced about 100 pages of printed e-mails and refused to search for or produce any others on the ground that it would be unduly burdensome for it to have to resort to electronically stored archival data. Zwerin deposed Alan Benny, who, as UMB’s expert, testified as to UMB’s e-mail backup protocols and the cost of restoring and retrieving the relevant data.

In the first instance, the parties agreed that e-mail was an important means of communication at UMB during the relevant time period of 1999 through 2001. Each salesperson in the Asian Equities group sent and received approximately 200 e-mails a day. Given this volume, and, because the Securities and Exchange Commission regulations required UMB to preserve such communications for three years, UMB implemented an elaborate e-mail backup and preservation system. In particular, UMB backed up its e-mails in two distinct ways: on backup tapes and on compact disks.

**The Tapes:** Using an automated backup program, UMB routinely backed up its *internal* e-mail traffic on tapes at various intervals, the monthly backup tapes being the ones that were preserved for three years. According to Benny's testimony, there are 94 extant backup tapes.

To restore e-mails stored on the tapes requires a lengthy and elaborate process, each tape requiring about five days to restore. It could be done faster by an outside vendor specializing in data retrieval, but the cost would be commensurately greater.

**The Compact Disks:** Certain e-mails to and from outside "registered traders" in Asian securities are automatically stored and archived onto a series of compact disks ("CDs"). UMB has retained all the CDs since the system was put into place in mid-1998.

These CDs are easily searchable, and a person with the proper credentials can simply log into the system, search for e-mails using key words (e.g., "Laura" or "Zwerin") and isolate and reproduce responsive e-mails.

Paralleling the federal standards, the discovery processes articulated in the Columbia Rules of Civil Procedure, particularly as applicable here, in Rule 26, are intended to allow the parties to obtain *the fullest possible knowledge of the issues and facts* before trial.

Consistent with this approach, Rule 26(b)(1) provides that the parties may obtain by discovery “*any matter, not privileged, that is relevant to the claim or defense of any party*” in the form of “books, documents, or other tangible things,” including things preserved in electronic rather than paper form.

There is no question that Zwerin is entitled to discover the requested e-mails as long as they are relevant to her claims, which they clearly are. As noted, e-mail constituted a significant means of communication among UMB employees. UMB had admittedly not searched the 94 backup tapes it possesses. Zwerin herself came into possession, other than by discovery from UMB, of over 100 pages of e-mails, several of which bear directly on her claims. These two facts strongly suggest that there are relevant e-mails that reside on UMB’s backup media.

There are, of course, limitations. Rule 26(b)(2) imposes a general limitation on the frequency or extent of discovery. This so-called “proportionality test” confers upon the court broad discretion to restrict discovery that it deems unduly burdensome, cumulative, duplicative, or outweighed by the burden or expense in light of the nature of the litigation.

The usual presumption is that the responding party must bear the expense of complying with the discovery requests. However, Rule 26(c) allows a court to grant protective orders to protect the responding party from undue burden or expense, including orders conditioning discovery on the requesting party’s payment of the costs of discovery.

Any principled approach to the question whether discovery costs should be shifted to the requesting party when it comes to producing electronic evidence must respect the usual presumption that the costs must be borne by the responding party. Electronic evidence is no less discoverable than paper evidence. As large companies increasingly move to

entirely paper-free environments, any approach to discovery that *routinely* departs from the usual presumption will often cripple the ability of plaintiffs to obtain the evidence. Thus, cost shifting should be considered only when electronic discovery imposes a truly undue burden or expense on the responding party.

The case at bar is a perfect illustration of the range of accessibility of electronic data. As explained, UMB maintains e-mail files in three forms: (1) active user e-mail; (2) archived e-mails on compact disks; and (3) backup data stored on tapes. UMB's active user e-mails and those stored on CDs are easily accessible. The 94 available tapes fall into the backup tape category and would require a costly and time-consuming process to search and isolate the documents for production pursuant to Zwerin's request.

Whether production of electronic documents is unduly burdensome or expensive turns primarily on whether they are maintained in an *accessible* or *inaccessible* format, a distinction that corresponds directly to the expense of production. In turn, the question of accessibility or inaccessibility turns largely on the media on which the data are stored.

Deciding disputes regarding the scope and cost of discovery of electronic data requires a two-step approach:

First, it is necessary to understand thoroughly the responding party's computer system, both with respect to the active and stored data. For data that are kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of production. A court should consider shifting *only* when electronic data are relatively inaccessible, such as in backup tapes or obsolete or other very difficult-to-search media.

Second, because the cost shifting analysis is so fact-intensive, it is necessary to determine what data may be found on inaccessible media. As we discuss below, we endorse any measure that will assist the court in evaluating the marginal utility, i.e., how likely it is that the expensive search will produce something worthwhile. Often, proceeding in small increments such as requiring the responding party to bear the expense of running small samples from different chronological parts of the archive will be enlightening on whether the responsive data are present and in what quantity.

The application of these steps is particularly complicated where electronic data are sought because otherwise discoverable evidence is often available only from storage media from which the data are expensive to retrieve.

To make the decision, we rely on a 7-factor test, weighing the factors as we discuss below.

**The 7-Factor Test:**

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

**The Seven Factors Should Not Be Weighted Equally:** Whenever a court applies a multi-factor test, there is a temptation to treat the factors as a checklist, resolving the issue in favor of which column has the most check marks. But when the ultimate question on the issue of cost shifting is whether the request for production imposes an *undue burden* on the responding party, the test cannot be applied mechanically at the risk of losing sight of its purpose.

The order in which the seven factors are listed above suggests their order of importance, i.e., they should normally be weighted in descending order. The first two, and most important factors – (1) the extent to which the request is specifically tailored to discover relevant information, and (2) the availability of such information from other sources – comprise what can be called the “marginal utility analysis.” As the court observed in *McPeck v. Aschcroft*, (USDC, D. Franklin, 2001),

The more likely it is that the backup tape contains the information that is relevant to the claim or defense, the fairer it is that the responding party search at its own expense. The less likely it is, the more unjust it would be to make the responding party search at its own expense. The difference is “at the margin.”

A problem with applying the “marginal utility analysis” is that, at the inception, there is usually an insufficient factual basis for knowing to what extent the information being sought exists in the electronic storage media. Some courts have made an assumption that, unless the requesting party can show that there is a “gold mine” of information to be retrieved, the marginal utility is modest, at best, and they tend for that reason to lean heavily in favor of shifting the cost to the requesting party. However, requiring the requesting party to prove a “gold mine” is contrary to the plain language of Rule 26, which permits broad discovery of *any matter* that is *relevant*. Thus, we agree with the precept of marginal utility, but we reject the “gold mine” approach.

The second group of factors, next in importance, addresses the cost issues, i.e., how expensive will the production be and who can handle the expense? These factors include: (3) the total cost of production compared to the amount in controversy; (4) the total cost of production compared to the resources available to each party; and (5) the relative ability of each party to control costs and its incentive to do so.

The third “group” – (6) the importance of the issues at stake in the litigation – stands alone, and may not often come into play. However, where it does come into play, this factor becomes weightier.

Finally, the last factor – (7) the relative benefits to the parties of obtaining the information – is the least important because it is usually a fair assumption that the response to a discovery request is for the benefit of the requesting party. But in the unusual case, where production will also provide a tangible benefit to the responding party, that fact may weigh *against* shifting the costs.

The case is remanded to the trial court, the Superior Court, for determination of the pending production request in accordance with this opinion.

**Baldocchi v. Orion Films, Inc.**  
Superior Court of Columbia (2004)

Plaintiff, Rina Baldocchi, sued defendant, Orion Films, Inc. (“Orion”) for gender discrimination under the Columbia Civil Rights Act. She prays for special and compensatory damages in the amount of \$100,000 and punitive damages in the amount of \$3,000,000.

In the course of discovery, she filed a sweeping request for production of documents covering a four-year period, including e-mail messages that exist only in electronic form on Orion’s computer system and in its electronically stored archives. Orion produced a substantial volume of paper documents, which it asserts is all it has in readily producible form. Orion then moved for a protective order to relieve itself of the obligation of producing the requested electronically stored documents. The basis for Orion’s motion is that the burden and expense of production far outweighs any possible benefit that Baldocchi will gain from the additional discovery. Orion further contends that, if the additional discovery is ordered, the entire cost should be shifted to plaintiff.

Orion’s computerized records system consists of three levels of accessibility: first, records stored in active files on hard drives that are in daily use and have not yet been transferred to another storage medium; second, records that have recently been transferred to storage on compact disks pursuant to Orion’s records retention policy under which active files are purged every 90 days and transferred to compact disks; and, third, records more than two years old that were transferred to a series of about 100 magnetic recording tapes at a time when Orion was using now obsolete computer and software systems. The second and third categories are archived solely for “disaster recovery” purposes, i.e., in the event of a catastrophic systems failure. Baldocchi successfully demonstrated that the discovery she seeks, although very broad, is generally relevant.

It is not uncommon to shift the expense of production of discovery to the requesting party, especially when the discovery involves electronically stored evidence that may be extremely expensive to retrieve and produce. Rule 26 of the Columbia Rules of Civil Procedure clearly gives the court broad discretion in this regard.

Discovery of data stored electronically poses new and different issues from those applicable to the discovery of traditional paper documents. The Columbia Court of Appeal, in *Zwerin v. United Merchant Bank* (2002), recently dealt with those problems and articulated a 7-factor test for doing so. We apply those factors to the present case in the order and relative weights prescribed by the court in *Zwerin*:

**1. The Extent to Which the Request is Specifically Tailored to Discover Relevant Information:** The less specific the requesting party's demands, the more appropriate it is to shift the cost of production to that party. Where a party multiplies litigation costs by seeking expansive rather than targeted discovery, that party should bear the cost. Here, plaintiff's requests are broad and nebulous, and, if that were the sole determining factor, it would favor shifting the costs to her. However, as the *Zwerin* Court makes clear, the seven factors are to be taken as a whole and assigned relative weights in descending order.

**2. The Availability of Such Information From Other Sources:** Some cases that have denied discovery of electronic evidence or have shifted costs to the requesting party have done so because equivalent information either has already been made available or is accessible in a different format at less expense.

Factors 1 and 2 go hand in hand. They can be best applied using the concept of "marginal utility" articulated in *McPeck v. Ashcroft*, (USDC, D. Franklin, 2001), under which the inquiry is how likely it is that a computerized search of the files will produce relevant information. Here, plaintiff argues that there is a high enough probability that a

broad search of the defendant's e-mails will produce relevant information that the search should not be precluded altogether.

If the plaintiff can show that it is likely that the electronic medium contains certain targeted information and can demonstrate with reasonable certainty that the information is not otherwise readily available, then she has crossed over the margin into the realm where it is just to require the responding party to bear the expense of producing it. On the other hand, if plaintiff's showing is too broad or uncertain or the responding party can show that the information is readily available elsewhere, then plaintiff's request falls below the margin and it would be unjust to require the responding party to bear the expense.

In the instant case, there has been no showing that the electronic records plaintiff seeks from defendant are available other than by a search of defendant's hard drives and backup media. Defendant's representations that it has produced all there is to be found is speculative because defendant has not conducted a search of the electronic files. However, neither has plaintiff shown any reasonable likelihood that the information she seeks can be found on the electronic media to any extent that would make an expensive search of those media worthwhile. Part of the problem is that plaintiff's discovery requests are so broad and sweeping that it is not possible to tell whether a targeted search of the data will produce what she seeks.

In light of these conclusions, it seems just to shift to plaintiff the cost of at least the initial, preliminary searches of the storage CDs and tapes. Of course, the current, unexpurgated data that remain on Orion's active files must be produced at Orion's cost.

The next three factors address the cost issues and are to be considered together.

**3. The Total Cost of Production, Compared to the Amount in Controversy:** This factor deals with the relativity between the dollar value of what plaintiff is attempting to recover and what it will cost to produce the information. There is no bright-line. If the cost

is not extraordinary or out of line with what a responding litigant can expect in the ordinary course of litigation, there is no justification for departing from the presumption that the responding party must bear the cost irrespective of the relationship between the cost and the amount in controversy. However, if the amount of plaintiff's alleged damages is small and the cost of extracting and producing the information is relatively large, then it makes little economic sense to require a defendant to incur a huge expense when the ultimate economic benefit is relatively small. In the present case, we know that the plaintiff's prayer exceeds \$3,000,000, which is a substantial sum. Plaintiff projects that the total cost of production would exceed \$1,000,000, a substantial sum by any standard. Defendant's estimate is \$150,000. The magnitude of this expense in relation to the most special and compensatory damages being sought by plaintiff militates in favor of shifting the cost of production to defendant.

**4. The Total Cost of Production, Compared to the Resources Available to Each Party:** Plaintiff proceeds as an individual against an established major film studio. Although the record does not reflect the extent of each party's financial resources, we can assume that this is not a situation where two functioning, successful business entities are sparring with one another such that this factor would be a wash, or, conversely, where a wealthy plaintiff is pursuing an impoverished defendant. Here, it is safe to assume that defendant can afford whatever the cost might be better than plaintiff. Standing alone, this factor favors shifting the cost to defendant.

**5. The Relative Ability of Each Party to Control Costs and Its Incentive to Do So:** The plaintiff probably has a greater ability, i.e., being sensitive to the cost, plaintiff will be able to calibrate her discovery based on information obtained in the initial sampling (see *infra*). If she is required to pay, she will be in the best position to decide whether further searches will be justified to limit the costs of discovery of the e-mails to a much greater extent than defendant. Of course, this factor alone does not prevent later shifting of the

cost back to defendant if the results of the initial search warrant it. But, as to the initial sampling, this consideration militates slightly in favor of cost shifting.

**6. The Importance of the Issues At Stake in the Litigation:** This factor does not always come into play. In this case, the issue is a straightforward one of whether there has been gender discrimination as to plaintiff, an individual. Although, in a broader context, gender discrimination is an important public policy issue, this case proceeds in the context of well-settled law and will affect only Ms. Baldocchi's interests. It is not an action that will result, for example, in vindication of a broader public interest that would be stifled if plaintiff were prevented by cost considerations from conducting discovery that would expose a widespread wrong. Thus, in this case, this factor is not particularly weighty and tends in favor of shifting the cost to plaintiff, but in the appropriate case it could be extremely important to prevent cost shifting.

**7. The Relative Benefits to the Parties of Obtaining the Information:** If a party maintains electronic data for the purpose of utilizing it in connection with current activities, it may be expected to respond to discovery requests at its own expense. Under such circumstances, the guiding principle is that information that is stored, used, or transmitted in new forms (e.g., electronically) should be available through discovery with the same openness as traditional forms (e.g., paper). A party that expects to be able to access information for business purposes will be obligated to produce that same information in discovery.

Conversely, a party that happens to retain vestigial data for no current business purpose but only for retrieval in case of an emergency or simply because it has neglected to discard the data should not be put to the expense of producing it. Defendant's backup tapes clearly fall into this category. There is no evidence that defendant itself ever searches these tapes for information or even has the means of doing so. Cost shifting is therefore warranted with respect to the backup tapes. Just as a party would not be required to sort through its trash to resurrect discarded paper documents, so it should not be obligated to

pay the cost of retrieving deleted e-mails.

Where the responding party itself benefits from the production, there is less rationale for shifting costs to the requested party. For example, a collateral benefit could result for the responding party's business such as the creation of a computer search program that would also be useful in its regular business activities. Second, the responding party might benefit in the litigation from the review of its own records. Third, the search could create a universe of data that *either* side could use to support its case.

On balance, the relevant factors tip slightly in favor of shifting the cost to plaintiff of conducting at least a preliminary search for the e-mails in this case. The protocols to be followed will be addressed below.

**Privileged and Confidential Documents:** Beyond the cost of isolating and producing the required e-mails, defendant argues that the time and expense of reviewing these documents for privilege and confidentiality would be enormous. Defendant estimates that it would take over six months of work by attorneys and paralegals and the cost would be about \$75,000.

However, the sanctity of defendant's documents can be adequately preserved at little cost by enforcement of a protective order requiring that all documents produced during this litigation be used solely for purposes of the litigation and that, at the end of the case, the documents all be returned to Orion. Moreover, as suggested in the protocol discussed below, defendant's interests can be protected by making provision that the e-mails be for "attorneys' eyes only" during discovery and that disclosure of attorney-client documents, whether intentional or inadvertent, shall not be deemed a waiver of the privilege.

Even with such protections, however, disclosure of privileged documents cannot be compelled if defendant objects. Thus, notwithstanding the recommended precautions, if defendant still chooses to conduct a complete review of the e-mails prior to production, defendant shall do so at its own expense.

**The Protocol to Be Followed:** The parties shall comply with the following protocol. It is a guideline only and may be modified by agreement of the parties as they proceed through discovery.

Initially, plaintiff shall designate one or more experts who shall be responsible for isolating the defendant's e-mails and preparing them for review. The experts shall be bound by the terms of this order as well as any confidentiality order entered in the case. With the assistance and cooperation of the defendant's technical personnel, the plaintiff's experts shall then obtain a log of all hard drive and backup tapes containing e-mails. The plaintiff may choose to review a sample of hard drives and tapes in lieu of all such devices. Plaintiff's counsel shall formulate a search procedure for identifying responsive e-mails and shall notify defendant's counsel of the procedure chosen, including any specific word searches.

A very sensible protocol that was suggested by plaintiff but rejected by defendant was that the parties mutually select a limited representative sample of the hard drives and backup tapes and that defendant, at its own expense, develop the search programs, isolate the responsive e-mails, and produce them to plaintiff. The object would have been to gauge the nature, incidence, and frequency of responsive e-mails and perhaps, by extrapolation, limit the scope of the search. Defendant refused to go along because, under the proposal, it would have had to pay the cost of the sampling. Plaintiff shall develop such sampling protocol in her suggested protocol if she believes it will be helpful. It shall be conducted at plaintiff's expense.

Once an appropriate search method has been established, it shall be implemented by plaintiff's expert. Plaintiff's counsel may then review the documents elicited by the search on an "attorney's eyes only" basis. Once plaintiff's counsel have identified the e-mails they consider material to the litigation, they shall print out and provide those documents to defendant's counsel in hard copy, numbered and logged for later verification. At this point,

plaintiff shall return all hard drives and tapes to defendant. Plaintiff shall bear all costs associated with the production described thus far.

Defendant's counsel shall then have the opportunity to review, at defendant's expense, the documents for claims of privilege and confidentiality. Documents identified as being privileged or confidential shall be retained for attorneys' eyes only until any dispute has been resolved. No waiver of privilege or confidentiality shall result from this procedure. If defendant wishes to delete from the hard drives and tapes the documents that are ultimately determined to be confidential, defendant shall do so at its own expense and shall, also at its own expense, furnish plaintiff with copies of the hard drives and tapes so redacted.

Once the nature, incidence, and frequency of the responsive e-mails are reliably estimated, the parties shall return to this court for further direction on how to proceed and which party shall bear the cost from that point forward.

**Conclusion:** Defendant's motion for relief is denied, and the parties are ordered to proceed in accordance herewith.

## Answer 1 to Question PT-A

1)

### I. STATEMENT OF FACTS

The parties were before Commissioner Moreno on June 6, 2006, and subsequently received her findings of fact and order on June 16, 2006. Since that time, we have deposed defendant's Vice President Chester Yu, indicated to be the person most knowledgeable about Phister's computer systems. Similarly, defendant has deposed our independent consultant LaVon Washington. During these depositions, we have determined that Phister has over the course of the past five years switched its medium for storing and archiving data as the means to do so have modernized. As the various media available have matured and become obsolete, the cost to access and retrieve the information on those media has grown. In addition, Phister began implementing a "paperless office" policy, beginning about ten years ago. This process was fully completed seven years ago, two years prior to the beginning of the period for which documents are sought. As Phister's witness described this policy, it encouraged the use of electronic media to communicate within the firm. Further, the executive, sales, and marketing staff extensively uses e-mail as a method of communicating information on prices and sales of the drug in issue here, Serapatrin.

Since the accessibility of the various e-mails which are sought on discovery varies, consultant Washington has categorized the various media used by Phister over the years, based on Yu's description, as follows:

Category One consists of e-mails that are present on each employee's computer hard disk. These e-mails are tightly integrated with Phister's enterprise-wide management software, and searching these e-mails is very inexpensive. Phister has already agreed to produce the e-mails in category one that conform to SavAll's document request.

Category Two consists of e-mails that are stored on offsite hard disk drives. Every month, Phister performs a "clean sweep" of the computers in their facilities for purposes of efficiency. The contents of each hard drive is archived permanently, and placed in offsite hard disk drives. These hard disk drives are not separated according to content, or individual, or any other metric. Phister simply places all the e-mails in the enterprise together as they come in. Yu has indicated that these hard drives can be searched using computer programs already in existence, since the hard drives from the past year are integrated into the company's office management software, SoftPlan. The estimated cost by Phister to perform searches of these e[-]mails is \$37,500, plus an additional \$15,000 for a privilege screen by the firm's attorneys. Category two includes all e-mails from the past year.

Category Three consists of e-mails that were archived according to the same "clean sweep" policy during the period of 2002 through 2005. From 2002 to 2003 the firm used tapes to permanently archive these files, but in 2004 the firm began using compact discs

instead. All of these media were also moved offsite after they were filled. They cannot be searched using the company's existing data search software, and so if such a program were to be used to search the volumes of data, it would have to be created specifically for this task.

The estimated cost to search these archives by Phister's witness Yu is \$200,000 for the compact discs if done in-house, and \$250,000 for the tapes, which must be outsourced [due] to the unavailability of the machinery and software to access these files. Comparatively, the consultant Washington has indicated that for his firm to accomplish a task like this would cost approximately \$225,000, due to the fact that his firm has access to the hardware and software necessary to access the obsolete storage media.

SavAll asserts that all three categories of data are subject to discovery at Phister's expense. Phister counters that production in categories two and three must be borne by SavAll.

## II. ARGUMENT

A. PHISTER'S MOTION FOR PROTECTIVE ORDER RELIEVING IT COMPLETELY OF THE OBLIGATION TO PRODUCE THE ELECTRONICALLY STORED DATA SHOULD BE DENIED SINCE PRODUCTION OF ELECTRONICALLY STORED DATA IS ALWAYS ALLOWED WHERE IT IS RELEVANT[.]

The first issue presented is whether Phister should be relieved of the obligation to produce electronically stored data based purely on the expense of doing so. This is in conflict with Columbia case law governing whether discovery should be granted with respect to electronically stored data.

The Columbia Court of Appeal addressed the issue of whether discovery should be granted over the producing party's objections that the cost was too great. In Zwerin v. United Merchant Bank, the Court determined that Columbia Rules of Civil Procedure Rule 26 demanded production. The Court stated that: "Rule 26 (b)(1) provides that the parties may obtain by discovery "any matter, not privileged, that is relevant to the claim or defense of any party ... including things preserved in electronic rather than paper form" (italics in original). Accordingly, the threshold inquiry for production depends not on the cost, but rather on the relevance of the production sought. The Court made this clear when it stated that "[t]here is no question that Zwerin is entitled to discover the requested e-mails as long as they are relevant to her claims ... there are, of course, limitations." The limitation described by the court refers to Columbia Rule 26(c), which permits shifting of cost in the discretion of the court. The same approach was applied in Baldocchi v. Orion Films, where the court determined that "Baldocchi successfully demonstrated that the discovery [she] seeks, although very broad, is generally relevant" before denying defendant's motion for a protective order to relieve it of the obligation to produce.

The facts in the present case are sufficient to reach the threshold articulated in Zwerin and Baldocchi. In her findings, Commissioner Moreno stated that "the materials [plaintiff] has

already discovered suggest that there might be other similar data embedded in [defendant's] stored data." In addition, she stated that the specificity and time period sought to be discovered are "reasonable." This supports the finding of relevance necessary to compel discovery. While defendant's employee Yu testified in his deposition that there were "thousands of e[-]mails a month", with "several hundred a month" relating to the drug at issue here, he also testified that he was certain that e-mail was used as a medium to communicate pricing policies, which is extremely relevant to establishing plaintiff's case of anti-competitive practices. This is similar to the court in Zwerin finding discovery appropriate where the defendant generated "200 e-mails a day" over the course of two years. All that is necessary is that plaintiff demonstrate that the discovery sought is relevant, which is met here.

The scope of the discovery quest is extremely similar to that in Zwerin and Baldocchi, being relevant to the plaintiff's case, and should accordingly be granted.

**B. PHISTER SHOULD BE REQUIRED TO PRODUCE AT ITS OWN EXPENSE ALL OTHER E-MAILS SINCE THE UTILITY OF RECOVERY OUTWEIGHS THE BURDEN.**

The next issue is whether the cost should be shifted to plaintiff due to the substantial burden of conducting discovery where there is uncertainty as to the amount of documents which will be produced.

1) PRODUCTION CONDUCTED ON CATEGORY TWO DATA MUST BE AT PHISTER'S EXPENSE SINCE OFF-SITE HARD DRIVES ARE NOT "INACCESSIBLE[.]"

The Court in Zwerin set forth the standard for cost-shifting in discovery cases where the defendant has alleged that discovery would incur great expense due to the obsolescence of the equipment necessary to conduct the search. The standard articulated is that: "A court should consider shifting only when electronic data are relatively inaccessible, such as in backup tapes or obsolete or other very difficult-to-search media." The relevant language is that regarding "obsolete or other very difficult-to-search media" which determines what electronic sources cannot be shifted to the requesting party.

The information stored in "category two", or offsite hard disk drives, does not meet the standard in Zwerin for "inaccessible" media, which the court indicated included "backup tapes or obsolete or other very difficult-to-search media." Indeed, Yu testified that the offsite hard drives are part of the "SoftPlan Office operating system", indicating that it is relatively straightforward to conduct searches on that data. The fact that such a program already exists to search the data contained therein further serves to separate category two from the types of data contemplated by the Court in Zwerin.

Phister may attempt to argue that the fact that the hard drives are offsite contributes significantly to the expense, and that therefore the hard drives should be considered "inaccessible" and fall under the 7-factor test. This does not properly interpret Zwerin's definition of inaccessible. There is no difficulty in searching the category two data, as witness Yu made clear in his deposition - it is possible to perform the search because the

systems and software already exist and are in Phister's possession. The only burden associated with the production is the sheer volume of it, and the time required in terms of man-hours to conduct the search. Had the Zwerin court intended the test for accessibility to turn on the volume of the data, it would have said so. Instead, recognizing the unique problems posed by rapid obsolescence and adoption of new technologies for storing records, the court articulated a standard based on whether the technology was obsolete, or out of date, or such that searching the media posed an undue burden.

Phister having chosen to store its data by throwing the contents of its staff's hard drives together indiscriminately, it cannot now be allowed to state that its own choice not to file data at the time of collection should excuse it of the duty to produce. If it were paper records at issue, and Phister reported that it simply put all of its papers, unlabelled and unsorted, into a large warehouse, it could not then argue that it was too difficult to search the data.

Accordingly, the proper metric for determining accessibility under Zwerin is the availability of the means to search the offsite records, and not the volume of records offsite.

2) PRODUCTION CONDUCTED ON CATEGORY THREE DATA MUST BE AT PHISTER'S EXPENSE SINCE THE 7-FACTOR ZWERIN ANALYSIS DOES NOT INDICATE IT WILL CONSTITUTE AN UNDUE BURDEN[.]

Where the data is relatively inaccessible, the court should apply the 7-factor test set out in Zwerin, considering: i) the extent to which the request is specifically tailored to discovery relevant information, ii) the availability of such information from other sources, iii) the total cost of production, compared to the amount in controversy, iv) the total cost of production compared to resources of the parties, v) the relative ability of each party to control costs and its incentive to do so, vi) the importance of the issues at stake in the litigation, and vii) the relative benefits to the parties of obtaining the information. These factors are each considered in turn, and then balanced to determine whether the burden should be shifted.

i) THE DISCOVERY REQUEST IS NARROWLY TAILORED TO THE DOCUMENTS SOUGHT[.]

The first factor weighs the breadth of the requesting party's description of documents sought. A highly specific request minimized both the number of documents which must be printed and verified, but also minimizes those that must be checked for privilege and demonstrates the producing party's good faith assertion of relevance. A requesting party that cannot adequately articulate what materials it seeks should be compelled to pay the expenses of compliance.

Here, SavAll's requests, as indicated by Commissioner Moreno, "is sufficiently narrow and specific to overcome any objection that is vague or overbroad." Indeed, since the incident is limited to Phister's cholesterol drug Serapatrin, and to those marketing and sales e[-]mails dictating the price, this request is very specific. In Baldocchi the court found that the requests were "expansive rather than targeted," which is simply not the case for

SavAll's request.

ii) THE DATA IS NOT AVAILABLE FROM ANY OTHER SOURCES[.]

The second factor looks to the necessity and utility of obtaining this information from difficult to access backup media as opposed to other means. Where the information sought is available in other formats, it is preferable for the requesting party to obtain discovery from those sources rather than demanding time consuming and expensive searches of out-of-date records. Where there is no other source available, however, the presence of relevant data in offsite archives becomes crucial.

The court in Baldocchi used the approach that if the plaintiff can demonstrate that the electronic media contains certain targeted information, and that the information is not otherwise readily available, then the responding party must bear the expense of production. Where it is uncertain, then the plaintiff should bear the cost.

The court in Baldocchi took the approach that a targeted sample of prior records could be used to demonstrate the existence of relevant information in older records. Further, the court found that where the discovery requests "are so broad and sweeping that it is not possible to tell whether a targeted search of the data will produce what [plaintiff] seeks," then plaintiff should bear that cost.

Here, Phister's witness Yu stated that Phister discourages printing out e-mails, and that there is no reliable way to obtain the contents of those e-mails "aside from retrieving [them] electronically." This is part and parcel of Phister's own paperless office policy, which Yu admits has saved Phister a "huge amounts [sic] of money" over the years.

Therefore, there is no other source to obtain this data from. Similarly, the request is sufficiently specific to not require SavAll to pay for a targeted sample search, as was done in Baldocchi. Here, unlike in that case, the request is highly specific, and a few searches should suffice to determine whether any relevant documents in fact exist. Therefore, Commissioner Moreno's finding that "it cannot be ascertained at this stage whether the sources SavAll seeks to discover contain a 'gold mine' of information that might support SavAll's case will not shift the burden to SavAll. Rather, the fact that SavAll has already discovered substantial documents "suggests that there might be other similar data embedded in Phister's stored data."

Accordingly, this factor favors plaintiff, and there is no need to conduct a targeted search.

iii) THE TOTAL COST OF PRODUCTION IS MINOR COMPARED WITH THE AMOUNT IN CONTROVERSY[.]

The total cost of production looks to whether the document request, as a whole, is disproportionate to the expected recovery by the plaintiff. After all, if plaintiff only filed a claim for \$50,000, and it would cost \$200,000 to comply with discovery, the defendant would prefer to simply pay the plaintiff's claim than undergo a more expensive discovery

process. When the court in Baldocchi applied this test, it found the factor favored plaintiff where the plaintiff made a good faith claim for \$3,000,000, including punitive damages, and the cost of production would be from \$150,000 to \$1,000,000.

Here, SavAll has made a good faith claim for \$120,000,000 in purely compensatory damages. Under Columbia competition law, this figure may be trebled as a punitive measure due to the statutory violation. As the punitive damages were imposed in Baldocchi, the proper measure of SavAll's damages is \$360 million for purposes of compliance with discovery.

The cost of discovery varies by category of data to be retrieved. The calculations by Yu, Phister's witness, stated that the cost to retrieve "category two," or offsite hard drive backups, would be \$37,500, plus an additional \$15,000 for screening by Phister's attorneys. Since category two cannot be shifted to SavAll based on 1, above, only category three should be included. "Category three," or compact discs and tapes, have a cost of approximately \$450,000, which may or may not include the cost of screening by attorneys.

Comparatively, the consultant retained by SavAll testified that the cost for his firm, of which there are many others in competition, would be approximately \$175,000, plus whatever costs are required in order to perform screening. The total cost, even using Phister's own estimates of the cost, are over 500 times smaller than the amount sought in relief. Compare to Baldocchi, where this factor weighed for plaintiff even where the damages figure was only three times higher than the production cost, or twenty times higher, if defendant's figures were believed.

Since the cost of production is minor compared to the amount in controversy, this factor favors SavAll.

iv) THE TOTAL COST OF PRODUCTION IS MINOR COMPARED WITH THE RESOURCES OF BOTH PARTIES[.]

This factor looks to the relative abilities of each side to afford the cost of production based on the financial resources available. Where an individual proceeds against a large corporation, there is a strong presumption that the corporation is better able to shoulder the burden of producing, and should be required to do so as is the norm under the discovery rules in Columbia.

Here, both Phister and SavAll are "large, multi-national corporations with substantial resources," as Commissioner Moreno found. Accordingly, this factor should favor neither side.

v) NEITHER SIDE HAS A GREATER ABILITY OR INCENTIVE TO CONTROL COSTS[.]

This factor looks to which party has a better ability to control costs. The court in Baldocchi

looked at this factor primarily with regards to the initial targeted sampling identified in factor 2, *supra*, and found that since plaintiff was in a better position to decide how much discovery to conduct based on information retrieved there, this factor should favor shifting the burden to the requesting party.

Here, there is no need for a targeted sampling as indicated above. The court in Baldocchi further indicated that if the initial search indicated that there were discoverable materials to be found, then the factor could be shifted back to the defendant. The factor should therefore favor neither party.

vi) THE ISSUE AT STAKE IN THE LITIGATION IS IMPORTANT[.]

Where the issues at stake in the litigation “vindicat[e] a broader public interest that would be stifled if plaintiff were prevented... from conducting discovery,” then the factors militate against shifting and leaving the burden on the producing party.

Here, as Commissioner Moreno found, “the effect of this court’s ultimately granting or denying an injunction will affect the public interest, in that it could affect the price the public will have to pay for this important drug” (*italics added*).

Since there is an important public interest in paying fair prices for important medications, this factor should also favor SavAll.

vii) BOTH PARTIES WILL BENEFIT FROM OBTAINING THIS INFORMATION[.]

Where the producing party has stored documents only for purposes of emergency recovery, and not for ongoing business concerns, the court in Baldocchi stated that this factor leans towards shifting the costs to the requesting party. The court there indicated further that “where the responding party itself benefits from the production,” the fact that the production is most useful to the requesting party is mitigated.

Here, Phister is under a duty to the Food and Drug Administration to store copies of all communications relating to sales, marketing, and manufacturing functions for 7 years. Phister’s technology officer testified in his deposition that “we’ve never been called on by the FDA to retrieve such communications, so I don’t know what we’d do if we needed to.” This indicates that Phister would benefit from doing an in-house search of its documents to separate out those relevant to specific drugs. Further, as in Baldocchi, creating a tool to facilitate such searches would also be a benefit, both for compliance with Phister’s regulatory obligations and for use in this and further litigation.

Accordingly, this factor should tilt in favor of SavAll.

viii) THE BALANCE OF THE 7 FACTORS IN THE ZWERIN TEST FAVOR SAVALL[.]

In considering the disposition of the factors, the Zwerin court indicated that the factors do

not all bear equivalent force. Instead, since the ultimate question is to minimize the undue burden on the responding party, the first two factors are the most important, followed by the next three. Where the sixth factor “does come into play, this factor becomes weightier.” And lastly, the seventh factor is the least important.

Here, the first two factors clearly favor SavAll, due to the very narrow and specific document request and the fact that Phister has adopted a policy by which these materials, stored indiscriminately in offsite warehouses, does not have them available in any other form. Of the next three factors, the cost of discovery relative to the claim for relief favors SavAll, and the rest are neutral. This is true even considering the cost of all of the different “categories” of data storage and the associated costs. The sixth factor, the public interest in resolution of the matter, also favors SavAll, since its interests are aligned here with the public interest in fairly priced medication. The seventh factor, also, favors SavAll.

Accordingly, on the balance of the factors, Phister should be required to pay for all discovery conducted on category three data searches.

3) COSTS OF PERFORMING PRIVILEGE SCREENING ON PHISTER’S DOCUMENTS SHOULD BE BORNE BY PHISTER[.]

Notwithstanding the Zwerin analysis, which dictates that Phister must bear the cost of producing the documents, it bears noting that the Baldocchi court also determined that since defendant’s privilege can be preserved with an adequate protective order, there was no urgent need for screening for attorney-client privilege purposes. Accordingly, if the producing party opted to have full screening performed, rather than using an “attorneys’ eye only” protective order, that producing party should be required to bear the costs.

### III. CONCLUSION

Accordingly, on the balance of the factors, Phister’s motion for a protective order with respect to all categories of data must be denied.

Answer 2 to Question PT-A

1)

**Supplemental Brief In Support of Motion to Compel Production of Documents**

Statement of Facts

Plaintiff SavAll Drugstores, Inc. ("SavAll") sued defendant Phister Pharmaceutical Corp. ("Phister") for violations of Columbia Unfair and Deceptive Trade Practices Act ("the Act") for alleged price fixing of the cholesterol reducing drug "Serapatrin" and refusal to sell the drug to SavAll. After propounding a discovery request to produce all e[-]mail messages sent and received by Phister's Sales and Marketing Department during the previous five years, Phister refused production, and SavAll filed a motion to compel production of documents. In response, Phister filed a motion for a protective order. The court ordered that the factual record be developed to make a ruling on the two motions.

Since the Court's recent ruling, SavAll deposed Mr. Chester Yu, defendant's designated person known knowledgeable about the e[-]mails in question. At the deposition, Mr. Yu stated that defendant has been using electronic media to communicate for the past ten years. Currently, he estimates that the practice of sending e[-]mail is "very widespread," with around hundreds of e-mails related to Serapatrin sent every month. (Yu Depo. 11). Mr. Yu also noted that defendant's employees have "suggested" prices internally and to customers via e[-]mail. (Yu Depo 11). All e[-]mail messages are stored on the personal computer from which they are sent for up to 30 days, after which time, Mr. Yu states, they are backed up by transferring them to electronic archives. (Yu Depo 12). The cost of maintaining these archives is "at virtually no cost." (Yu Depo 11). Mr. Yu stated that the files are backed up for two reasons: one, in case of an emergency, the files can be restored; two, the Food and Drug Administration ("FDA") requires that defendant maintain "all communications relating to sales, marketing, and manufacturing for seven years." (Yu Depo 12).

The storage of the e[-]mails can be placed into three categories according to Mr. Lavon Washington, plaintiff's computer expert, who was also deposed since the initial order. First, there are the e[-]mails that have not yet been transferred to permanent storage and remain on the active hard drives of defendant's system. (Washington Depo 17). Defendant has stipulated to produce these e[-]mails, and their production is no longer in dispute. The second category includes that data which defendant has transferred to its offsite storage hard drives within the last year. Since defendant still has the equipment necessary to read, sort and pull out the relevant e[-]mails, production of these would be relatively simple. (Washington Depo 18). Finally, there is a third category of data, which includes stored data on compact disks ("CD") and tapes. (Washington Depo 18). From 2002 until 2003, defendant used tapes to archive information, and from 2004 until 2005 defendant used the CDs. (Yu Depo 13). Mr. Yu estimates that there are hundreds of offsite hard drives, and thousands of CDs and tapes. (Yu Depo 13). While Mr. Yu predicts

the cost of discovery to exceed \$500,000, Mr. Washington testified that the cost of finding and producing responsive documents would be between \$200,000 and \$225,000. (Washington Depo 18).

DEFENDANT'S MOTION FOR PROTECTIVE ORDER FROM PRODUCING ELECTRONICALLY STORED DATA SHOULD BE DENIED BECAUSE THE INFORMATION IS RELEVANT TO PLAINTIFF'S CLAIM[.]

Rule 26 of the Columbia Rules of Civil Procedure is "intended to allow the parties to obtain the fullest possible knowledge of the issues and facts before trial." Zwerin. Rule 26(b)(1) provides that a party may obtain discovery of "any matter, not privileged, that is relevant to the claim or defense of any party in the form of books, documents, or other tangible things, including things preserved in electronic rather than paper form." Zwerin. Therefore, a party should be entitled to discover e[-]mails as long as they are relevant to a claim.

Here, SavAll contends that defendant has unlawfully attempted to fix the retail price of Serapatrin. Mr. Yu admitted that the practice of sending e[-]mails is very widespread. Moreover, Mr. Yu also admitted that employees of defendant have "suggested" prices to customers. This type of suggestion via e[-]mail is certainly relevant to establishing a claim for price fixing in violation of the Act. Additionally, the e[-]mails that are in the possession of plaintiff "tend to bear on its allegations of wrongdoing by Phister," and there is no reason to believe that the e[-]mails that have yet to be discovered will not contain more relevant information. Therefore, defendant's motion for a protective order should be denied because the information sought is relevant to the claim at issue.

DEFENDANT SHOULD BE REQUIRED TO PRODUCE ALL E[-]MAILS AND SHOULD BEAR THE COST OF PRODUCTION BECAUSE THE INFORMATION IS RELEVANT, NOT AVAILABLE ELSEWHERE, AND BECAUSE IT WOULD BENEFIT DEFENDANT TO PRODUCE IT[.]

Even when material is capable of being discovered, as the e[-]mails at issue here, the Rules of Civil Procedure impose a proportionality test on litigants: the court can restrict discovery that it deems "unduly burdensome" pursuant to Rule 26(b)(2). Moreover, Rule 26(c) allows a court to grant protective orders to protect the responding party from undue burden or expense, including making discovery conditional on the requesting party's payment of the costs of discovery. Zwerin. However, "[a]ny principled approach to the question whether discovery costs should be shifted to the requesting party when it comes to producing electronic evidence must respect the usual presumption that the costs must be borne by the responding party. Electronic evidence is no less discoverable than paper evidence." Zwerin. Therefore, "cost shifting should be considered only when electronic discovery imposes a truly undue burden or expense on the responding party." Zwerin.

DEFENDANT SHOULD BEAR THE BURDEN OF PRODUCING THE E[-]MAILS STORED ON OFFSITE HARD DRIVES BECAUSE IT IS AN ACCESSIBLE STORAGE FORMAT[.]

To determine whether the costs should be shouldered by the requesting party, the Zwerin court made a distinction between that media stored in accessible format, and that stored in inaccessible format. For data that is stored in accessible format, the usual rules of discovery apply: the producing party bears the cost. A court should consider cost shifting only when the format is relatively inaccessible. In Zwerin, the court found that CD's containing e[-]mails that were easily searchable were accessible. A person with proper credentials could log-in and search for e[-]mails using key words to easily isolate and reproduce responsive e[-]mails. Zwerin.

In the current situation, Mr. Yu responded that it would be possible to "run and sort the data and pull out the e-mails" from the off-site hard drives. (Yu Depo 14). He also admitted that there are programs that could be used to do this. Thus, the e[-]mails in the second category, those stored on offsite hard drives, are in accessible format under Zwerin. Therefore, pursuant to the usual presumption that the producing party bear the costs of production, defendant must pay the costs of producing these e[-]mails.

DEFENDANT SHOULD BEAR THE COSTS OF PRODUCING E[-]MAILS FROM  
THE CDS AND TAPES BECAUSE IT IS LIKELY THAT THEY CONTAIN  
RELEVANT EVIDENCE[.]

In Zwerin, the court defined inaccessible media as "backup tapes or obsolete or other very difficult-to-search media." Mr. Yu testified that defendant no longer uses the same computer software nor computer equipment as it did when the information was transferred to the CDs and tapes. (Yu Depo 14-15). In order to read the information contained on those storage devices, Mr. Yu testified that defendant would have to lease equipment and renew licenses to the software programs to read the information on the CDs. (Yu Depo 15). With respect to the tapes, Mr. Yu expected that the company would have to outsource the job to retrieve the data. Thus, the material contained on the CDs and tapes would be considered to be inaccessible media.

In evaluating whether to shift the costs of production of inaccessible media to the requesting party, the Zwerin court articulated a seven factor test: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production compared to the amount in controversy; (4) the total cost of production compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining information. The factors are listed in order of descending importance.

Marginal Utility Analysis Favors Not Shifting the Cost of Production Because  
Plaintiff's Request is Specifically Tailored to Obtain Likely Relevant Information  
Not Available Elsewhere[.]

The Zwerin court noted that the first two factors are the most important and comprise the "marginal utility analysis." "The more likely it is that the backup tape contains the information that is relevant to the claim or defense, the fairer it is that the responding party

search at its own expense.” Zwerin (citing McPeck v. Aschcroft). While some courts have required the requesting party to show that there is a “gold mine” of information to be retrieved, the Zwerin court found this to be “contrary to the plain language of Rule 26, which permits broad discovery of any matter that is relevant.” Thus, “if the plaintiff can show that it is likely that the electronic medium contains certain targeted information and can demonstrate with reasonable certainty that the information is not otherwise readily available, then she has crossed over the margin into the realm where it is just to require the responding party to bear the expense of producing it.” Baldocchi.

Here, the court already found that the request is sufficiently narrow to overcome any objection that it is vague or overbroad. The court also found that the request for e[-]mails within a five year period is reasonable. In contrast to Baldocchi, where the plaintiff’s request was “a sweeping request” for documents relevant to gender discrimination over a four-year period, plaintiff’s claims in the instant case are quite tailored and specific given the nature of the claim. Plaintiff has alleged that defendant has engaged in a continuous scheme to fix the price of Serapatrin over the course of many years and seeks only e[-]mails that relate to Serapatrin. Mr. Yu admitted that the use of e[-]mail was prevalent and the widespread method for communicating with customers over the last five years, and that defendant’s employees had “suggested” prices to these customers. It appears very likely that discovery of e[-]mail from the CDs and backup tapes would yield relevant evidence for plaintiff’s claim. Indeed, as discussed above, the court has also noted that plaintiff has a number of e[-]mails “that tend to bear on its allegations of wrongdoing by Phister.” Therefore, the likelihood that the e[-]mails contained on the CDs and tapes will be relevant to plaintiff’s claim is substantially high.

Moreover, the information is not obtainable elsewhere. Also in sharp contrast to Baldocchi where the plaintiff made no showing that the electronic records were not available elsewhere, Mr. Yu admitted that defendant actually discourages the retention of the e[-]mails in paper form; electronic storage is the only format where the information resides. The only other way to get the information contained in the e[-]mails on the CDs and tapes would be to canvass defendant’s customers and ask for any e[-]mails that they may have. Mr. Yu even conceded that this would “produce questionable results.” (Yu Depo 11). Therefore, the only opportunity that plaintiff has of obtaining the e[-]mails is to retrieve them from the defendant’s electronic storage devices. Since this information is very likely to be relevant to plaintiff’s claim and is not obtainable elsewhere, plaintiff has “crossed over the margin” and it is just to require defendant to bear the costs of production.

#### The Cost of Production Compared to the Amount in Controversy is Slight[.]

As described by the Baldocchi court, this factor “deals with the relativity between the dollar value of what plaintiff is attempting to recover and what it will cost to produce the information.” If the cost “is not extraordinary or out of line with what a responding litigant can expect in the ordinary course of litigation, there is no justification for departing from the presumption that the responding party must bear the cost irrespective of the relationship between the cost and the amount in controversy.”

In his deposition, Mr. Yu contended that the cost of doing the retrieval would be around \$200,000 for the CDs and \$250,000 for outsourcing the tapes. Mr. Washington predicted that he could retrieve the information from the CDs for around \$75,000, and from the tapes for about \$100,000. Mr. Yu expressed concern about “losing control of the process and the danger of disclosing confidential business information.” (Yu Depo 15). However, as stated in Baldocchi, “defendant’s documents can be adequately preserved at little cost by enforcement of a protective order requiring that all documents produced during this litigation be used solely for purposes of the litigation and that, at the end of the case, the documents be returned to [defendant].” Moreover, the court allowed that “disclosure of attorney-client documents[,] whether intentional or inadvertent, shall not be deemed a waiver of the privilege.” Adopting a similar order in this case would greatly reduce the costs of producing the documents. Under such an approach, Mr. Washington’s estimate of \$175,000 should be used.

SavAll is suing for lost profits during the time when it alleges defendant refused to sell its drug to plaintiff and engage in the illegal price fixing. In total, these profits are estimated to be in excess of \$120 million, and which would be trebled if plaintiff proves the statutory violation. A \$175,000 cost compared to a \$360 million recovery is a far cry from the \$1 million cost compared to a \$3 million recovery that the Baldocchi court found to weigh in favor of cost shifting. Given that the proportion of cost to recovery is infinitesimally small in the current case, the court should find this factor weighs against cost-shifting.

#### Defendant is More Than Able to Bear the Costs of Production[.]

The fifth factor evaluates the resources of each party. In Baldocchi, the court hypothesized about a situation where two functioning, successful business entities are sparring with one another such that this factor would be a wash. This describes the current case, and this factor does not favor shifting the costs to plaintiff. Defendant is more than capable of bearing the costs of producing the documents.

#### Neither Party Can Be Sensitive to Costs of Discovery[.]

This factor looks at whether either party would be sensitive to the costs of production, and would be able to calibrate the discovery based on information obtained in the initial sampling. However, because of defendant’s refusal to produce any of these documents, it is not yet currently known how extensive discovery would be. Mr. Washington has estimated that he could run an initial sample of the e[-]mails to generate an idea of what the ultimate volume may be. (Washington Depo 19). The costs would be relatively low to do such a sampling. However, as noted, defendant has refused to comply with the discovery request and should not benefit from its own misconduct. Therefore, this factor does not weigh in favor of shifting costs.

#### The Importance of Plaintiff’s Claim Is Great Because it Impacts the Public at Large[.]

This factor considers the importance of the action to the public. This is an action that will result in “vindication of a broader public interest that would be stifled if plaintiff were

prevented by cost considerations from conducting discovery that would expose a widespread wrong.” Baldocchi. In its preliminary order, the Court has found that the “effect of the court’s ultimately granting or denying an injunction will affect the public interest, in that it could affect the price the public will have to pay for this important drug.” Thus, putting the costs of discovery on plaintiff, and by straying from the normal presumption of cost burdens in discovery, plaintiff may be less likely to [sic] be able to vindicate an important public right. The public at large would benefit from the reduced price of Serapatrin should plaintiff prevail, and this factor thus favors not shifting the costs to plaintiff.

#### Defendant Would Benefit in Obtaining the Information Because of the FDA Regulations[.]

Finally, if “a party maintains electronic data for the purpose of utilizing it in connection with current activities, it may be expected to respond to discovery requests at its own expense.” Baldocchi. “A party that expects to be able to access information for business purposes will be obligated to produce that same information in discovery.” In Baldocchi, the court found that because the information was used solely as a backup for emergency restorations, it was not proper to require the party to bear the costs of production. The court noted that a “collateral benefit could result for the responding party’s business such as the creation of a computer search program that would also be useful in its regular business activities.”

Here, Mr. Yu testified that defendant keeps the information for backup purposes and that it does not use them in its ordinary course of business. Also, he doubted that any information resulting would be useful to defendant in this litigation. However, rather than merely keep the information for defendant’s purpose of backing up, the FDA requires it to keep the information for a period of seven years. Accordingly, defendant will derive a benefit from organizing and devising a program that is capable of searching through the data in the event of an FDA request. This constitutes a business benefit. Moreover, there is the possibility that defendant could turn up information beneficial to itself in this litigation. This factor accordingly weighs in favor of maintaining the traditional presumption.

#### CONCLUSION

As stated above, defendant’s motion for a protective order should be denied because the information sought is relevant and within the permissible range of discovery under the Rules of Civil Procedure. Moreover, defendant should bear the costs of producing the requested documents per the traditional rule regarding burdens of costs because the information sought is likely relevant, the request is narrowly tailored, the e[-]mails are not available elsewhere, the costs of production are slight compared to plaintiff’s recovery, defendant is able to bear such a burden, the public interest favors defendant bearing the burden, and because production would ultimately benefit the defendant.

**THURSDAY AFTERNOON  
JULY 27, 2006**



**California  
Bar  
Examination**

**Performance Test B  
INSTRUCTIONS AND FILE**

## BREENE AND FROST

Instructions.....	i
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### FILE

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## **BREENE AND FROST**

### **INSTRUCTIONS**

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

**LAW OFFICES OF LYNN R. DAWSON**  
5922 Jeanette Drive  
Cordesville, Columbia

**MEMORANDUM**

**To:** Applicant  
**From:** Lynn Dawson  
**Date:** July 27, 2006  
**RE: Breene and Frost**

Our client, Jim Breene, is a patent lawyer who works principally as a consultant to other lawyers in patent litigation. He was retained by the firm of Willing, Mayer & Frost to assist Julia Frost in presenting a patent infringement case on behalf of one of Frost's clients.

Breene and Frost entered into a fee-splitting arrangement pursuant to which, according to Breene, Breene would get 50% of whatever fee Willing, Mayer and Frost received from the litigation. The agreement is enforceable, raising no formation, Statute of Frauds, or subject matter issues.

Recently, Breene received and cashed a check for \$128,000 purportedly tendered in "full satisfaction" of Breene's share of the fees. Breene claims this is far short of the full amount to which he is entitled and seeks our advice concerning what he should do.

Please draft for my signature an opinion letter, following the format and guidelines described in the firm's memorandum on opinion letters, explaining to Breene what options are available to him and which one we recommend to him.

## LAW OFFICES OF LYNN R. DAWSON

5922 Jeanette Drive  
Cordesville, Columbia

### MEMORANDUM

**To:** All Attorneys  
**From:** Executive Committee  
**Re:** **Opinion Letter Guidelines**

Often the firm's attorneys must prepare an opinion letter to communicate its views to a client. An opinion letter should follow this format:

- State the facts that led to the client's need for advice.
- State your understanding of the client's goal or goals.
- Identify options the client has or the actions the client could take to achieve those goals.
- Objectively analyze each of the client's options or possible actions in light of the applicable law and the relevant facts. Be sure to identify the likely success in achieving the client's goals of pursuing each option or action.
- Although you must discuss the law, you should do so as clearly and straightforwardly as possible, in language that allows the client to follow your reasoning and the logic of your conclusions.

1                   **TRANSCRIPT OF INITIAL INTERVIEW WITH CLIENT JAMES BREENE**  
2   **ON JUNE 27, 2006**

3  
4           **Lynn Dawson (“Dawson”)**: Hi Jim. I understand you are here because you need help  
5 obtaining payment in a situation where you have done the work and have yet to be paid?

6           **James Breene (“Breene”)**: Yes. It is a little bit complicated.

7           **Dawson**: No surprise there. Why don't you tell me what happened and where things stand  
8 right now?

9           **Breene**: Sure. I used to be a chemist, but then I went to law school at MidCentral so I  
10 could practice patent law. I passed the patent bar about 6 years ago, and all I do and all  
11 I've ever done is patent law. I don't have much of a clue about other areas, which is why  
12 I need your help.

13           **Dawson**: I understand patent law is its own separate world.

14           **Breene**: Absolutely it is. Most of what I do is pretty technical, and I've been using my  
15 chemistry background for most of it. I'm not with any law firm or any other lawyer. I've  
16 been doing it on my own. Rather than go out and try to get clients, which I didn't know how  
17 to do, I've been getting work on basically a project basis from lawyers, primarily lawyers in  
18 firms that have clients that have patent issues. They hire me to help with the patent work.  
19 I've done most of my work for Willing, Mayer & Frost, especially Julia Frost (“Frost”). I'm  
20 here to see you because I wasn't paid properly for some of the work I did for Frost.

21           **Dawson**: Do you have written agreements with Willing, Mayer & Frost, or with Frost,  
22 concerning the terms for work?

23           **Breene**: No. It is all done orally and fairly informally. They aren't really an intellectual  
24 property firm, but some of their clients end up involved in patent matters once in a while.  
25 So one of the attorneys from the firm calls or drops by my office to see if I'm available for  
26 a particular project. I'm almost always interested in taking the job, as I can use all of the  
27 work I can get. We have an understanding that I will keep track of my hours and that they  
28 will pay me half of the amount that Willing, Mayer & Frost collects from the particular client  
29 for each hour of work I do. So, if they are charging the client \$250 an hour for my work, I'll  
30 get \$125. They pay me when the client pays. If the client doesn't pay and they aren't

1 successful at collecting, I don't get anything, and of course neither do they. The clients are  
2 always informed of the arrangement and must approve it. It actually has been a very good  
3 arrangement for me until this problem arose.

4 **Dawson:** What happened?

5 **Breene:** In the Spring of 2003, a longtime client of Frost's, an inventor by the name of  
6 Russell Hoover, told Frost that he wanted to pursue a patent infringement case against  
7 Hampton Company. At the time, Hoover didn't have any money. So Frost made a  
8 contingency deal with Hoover.

9 **Dawson:** I take it you ended up doing some work on Hoover's case?

10 **Breene:** Yes, and the deal was that I wouldn't get paid on an hourly basis but would get  
11 50% of whatever Frost's firm got from Hoover.

12 **Dawson:** And none of this was put into writing?

13 **Breene:** Right. I ended up doing most of the work on that case, and Hoover knew all  
14 about me and the arrangement. But we didn't write anything down.

15 **Dawson:** Did you keep track of your hours and the tasks for the Hoover case?

16 **Breene:** Not systematically the way I did when I was being paid on an hourly basis. But  
17 I made some general notations, and I could easily piece a lot of it together with my  
18 calendar.

19 **Dawson:** What was the outcome of Hoover's case?

20 **Breene:** Well, it turned out pretty well. The case settled in the middle of the trial. Hampton  
21 Company paid Hoover \$100,000 and agreed to pay future royalties to Hoover.

22 **Dawson:** What did Frost's firm get out of it?

23 **Breene:** Frost got \$50,000 in cash and an agreement that Hoover would make quarterly  
24 payments to Frost equal to 25% of all the future royalties received by Hoover.

25 **Dawson:** Did Frost pay you anything?

26 **Breene:** Yes, I got \$25,000, which is half of what Frost got from the cash settlement.

27 **Dawson:** What about the royalties?

28 **Breene:** I got a check for \$10,000 as my share of the first quarterly royalty payment.

29 **Dawson:** Did the Frost firm explain how they arrived at the \$10,000 figure?

30 **Breene:** Yeah. The check came with an accounting from Hoover showing the total

1 royalties Hoover had received from Hampton Company up to that point.

2 **Dawson:** Have there been any more payments?

3 **Breene:** No, that's why I'm here. About a month after the end of the next quarter — no  
4 check! I called Frost several times before she would actually talk to me.

5 **Dawson:** What did she say?

6 **Breene:** She told me that I'd already received an amount equivalent to the hourly rate  
7 agreement we had used in other cases. But I told her that was not our deal in this case.

8 **Dawson:** What was her response?

9 **Breene:** Well, it was sort of vague. She said, "I never agreed to pay you a windfall."

10 **Dawson:** Has she ever said that your payment from the Hoover case was to be limited to  
11 the old hourly rate arrangement?

12 **Breene:** No. She just said, "You've already received all you deserve."

13 **Dawson:** Did Frost or anyone at the firm ever indicate that you had failed to do the work  
14 adequately?

15 **Breene:** Never. They were complimentary and appreciative. So was their client, Hoover.  
16 And the result seemed quite positive. And no one suggested they weren't paying me  
17 because I didn't do the work properly.

18 **Dawson:** Why do you think they aren't paying you more?

19 **Breene:** Well, Frost has had a lot of money problems, and I've heard that the firm is likely  
20 to disintegrate. So the money may have already been spent, and that might be a reason  
21 I haven't been paid.

22 **Dawson:** OK, I'd like to do some research. I'll get back in touch with you.

23 **END OF TRANSCRIPT**

**LAW OFFICES OF LYNN R. DAWSON**

5922 Jeanette Drive  
Cordesville, Columbia

**MEMORANDUM**

**To:** File  
**From:** Ted Guth, Associate Attorney  
**Date:** July 7, 2006  
**Re:** **Breene v. Frost — Phone call interview with Russell Hoover**

On July 7, 2006 I interviewed Mr. Russell Hoover ("Hoover") by telephone. I introduced myself and told him I was representing James Breene ("Breene"), but did not explain exactly what the nature of the representation was. I asked if he would be willing to answer a few background questions, and he was happy to do so. He said he knew Breene and remembered him from the Hampton matter and that Breene "had been real helpful" and had done "a whole bunch of stuff and spent a lot of time on it." He said he had been fully informed by Frost that Breene had been hired to do work on the Hampton matter.

Without my leading him, he said that his recollection was that Breene was to get half of Frost's share of the royalties. He said, "That's my understanding of how it worked, anyway, and I sure didn't have any problem with it."

When asked how much Frost's percentage was, he said: "Maybe 25%? I think that is what I'm sending to Frost, but you could ask my accountant." (I took the accountant's name and number.) Hoover said the patent has been quite successful and has earned over two million dollars in royalties. I asked for Hoover's prediction of future royalties. He said, "You never know about these things, but \$6 million or \$7 million total is a conservative estimate." Hoover said he had a longtime personal and professional relationship with Frost. He said

that he thought quite highly of Breene's work on the Hampton matter, was "very satisfied with it" and would recommend Breene to others.

**LAW OFFICES OF LYNN R. DAWSON**

5922 Jeanette Drive  
Cordesville, Columbia

**MEMORANDUM**

**To:** File  
**From:** Ted Guth, Associate Attorney  
**Date:** July 16, 2006  
**Re:** **Breene vs. Frost — Evaluation of Breene’s Claim**

I have completed the preliminary evaluation of James Breene's ("Breene") situation, and my research indicates there aren't any issues that would make filing a suit a waste of time. First, I talked with Russell Hoover ("Hoover") and then researched the enforceability of the fee agreement. There is absolutely nothing illegal, impermissible, or unethical about the payment arrangements among Breene, Julia Frost ("Frost") and Hoover.

There isn't anything else from a contracts perspective that makes Breene's deal with Frost unenforceable. There is obvious consideration for the deal. While the agreement isn't in writing, no Statute of Frauds provision requires it to be in writing. The fact that there is no specific dollar amount specified at the time the deal is struck is unremarkable and could not be used as a defense — many deals involve contingent payments of speculative royalties. And Hoover confirmed that the exact amount of the payments are precisely determined by regular accountings (see memo to file July 7, 2006). There isn't any argument that Breene somehow botched the work and thus was in material breach, because Hoover was satisfied and has been paying Frost. Hoover says he's earned \$2 million in royalty payments so far. That means Frost has received \$500,000 and Breene should have received \$250,000 already. So far, Frost has only sent Breene \$10,000 as Breene's share of royalty payments. Thus Breene is due \$240,000.

I checked around, and Breene is correct: Frost's law firm is about to break up. There are some allegations that Frost had some bad real property investments, was spending way too much time concerning those, and wasn't devoting enough time to the firm. Nothing has gone to bankruptcy, but Frost's business assets might very well be tied up for quite a while.

1                                   **TRANSCRIPT OF MEETING WITH CLIENT JAMES BREENE**  
2   **ON JULY 26, 2006**

3  
4       **James Breene (“Breene”)**: I thought I needed to tell you about an unexpected  
5 development, and although I think I'm okay about it, I wondered if I need some advice  
6 concerning what to do. My office received in the mail yesterday a check for \$128,000 from  
7 Julia Frost (“Frost”). It was accompanied by a letter that said it was payment in full. Here's  
8 the letter. (Attached to this memo.) The same language about the payment was written  
9 on the front of the check, and on the back right above the place where the check is  
10 endorsed.

11       **Lynn Dawson (“Dawson”)**: You said your office received it. Have you endorsed and  
12 deposited it yet?

13       **Breene**: It was endorsed and deposited yesterday. I didn't see it or sign it myself. My  
14 secretary endorses and deposits the checks made out to my business. He does it all the  
15 time. But I have asked him to always cross out any full payment or settlement language  
16 and write, in big print, "Endorsed without consent to settlement. James Breene protests  
17 the terms, and by this protest reserves all rights and remedies." He did so with this check,  
18 both on the front and on the back, and then deposited it. I didn't find out about this until I  
19 got to the office this morning and my secretary told me about the check.

20       **Dawson**: We'll need to do some quick research to decide what to do. Let me ask you a  
21 few questions. From what we've found out, it appears that you are entitled to around  
22 \$240,000 as of now. So the \$128,000 check is only a little more than half of what you've  
23 got coming. Frost doesn't have any obvious strong defenses to your claim, although  
24 nothing is certain, and sometimes good defenses show up later. Do you want to keep the  
25 \$128,000 and give up on trying to collect the rest, including likely future royalty payments?

26       **Breene**: I thought about that on the way over here. The answer to your question is no.  
27 I understand nothing is certain and that to succeed I have to prove that Frost made me that  
28 promise about the royalties. But she made it, I did a lot of work, and I'm entitled to get my  
29 percentage.

30       **Dawson**: I understand. If it turns out the only way you can sue for the full amount is to

1 give the \$128,000 back, how would you feel?

2 **Breene:** I don't see why I should have to do that. Frost owes me this money and quite a  
3 bit more. Besides, I'm going to use the money right now. Things have slowed down quite  
4 a bit in chemical patents, and I don't get that much work these days. Right now I'm getting  
5 some home renovation done because of a flood at my house, and I've got a kid in college.  
6 So I'm really short of cash, and I need to use that money now. It came at a good time. So  
7 my preference is to keep it, assuming it wouldn't add a lot of expense and complexity to the  
8 process of suing for the rest of it.

9 **Dawson:** Do you think Frost knew anything about your really needing money now?

10 **Breene:** You mean, did she send it over to try to get an easy, cheap settlement because  
11 I was strapped for money? No. I haven't mentioned my money situation to Frost or anyone  
12 she might hear it from. But I'm a little reluctant to just give it back for another reason. As  
13 I mentioned before, Frost has had a lot of money problems recently. I think I should keep  
14 this. It is part of what she owes me, and if their finances are all messed up it might be a  
15 long time, or never, before I collect fully on this thing. So I don't want to give up on this  
16 payment, and I shouldn't have to. She owes me this and a bunch more.

17 **Dawson:** I do have another question. You must have received quite a few checks from  
18 Frost over the time you worked for her, including the two payments for what you did for  
19 Russell Hoover. Did all of the checks say "payment in full" or something like that?

20 **Breene:** From what my secretary described, this one was different. It had the letter along  
21 with it, and the language was much more complete and directed toward this situation. And  
22 it was on the back as well as the front in big print. According to my secretary there was no  
23 way to miss it.

24 **Dawson:** Okay. For now I think that's all we need to know about this.

25 **END OF TRANSCRIPT**

**WILLING, MAYER AND FROST, PC**

3320 E. 14 St.  
Cordesville, Columbia

July 24, 2006

James Breene  
4446 Luesinger Place  
Cordesville, Columbia

Re: Your Fee - Russell Hoover v. Hampton Company

Dear Mr. Breene:

I am getting tired of arguing with you about the amount of your fee in this matter. I know there is a dispute about it, and I just want to get that behind us.

Enclosed is a check for \$128,000. This check is tendered to you as PAYMENT IN FULL of your fees. Your endorsing and cashing of this check constitutes a FULL AND COMPLETE RELEASE OF ALL CLAIMS you may have against me or this firm for your fees for work done in this matter.

Sincerely,  
Willing, Mayer and Frost, PC

**Julia Frost**

Julia Frost

**THURSDAY AFTERNOON  
JULY 27, 2006**



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## BREENE AND FROST

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**SELECTED PROVISIONS OF THE COLUMBIA COMMERCIAL CODE**

**ARTICLE 1. General Definitions and Principles of Interpretation**

\* \* \*

**§ 1-207. Performance or Acceptance Under Reservation of Rights. (As Amended)**

(1) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest" or the like are sufficient.

(2) Subsection (1) does not apply to an accord and satisfaction.

\* \* \*

**ARTICLE 3 NEGOTIABLE INSTRUMENTS**

\* \* \*

**PART 3. Enforcement of Instruments**

**§ 3-311. Accord and Satisfaction by Use of Instrument. (New)**

(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

(1) The claimant, if an organization, proves that (a) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom

the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (b) the instrument or accompanying communication was not received by that designated person, office, or place.

(2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted.

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

\* \* \*

### **COLUMBIA COMMERCIAL CODE COMMENTS - §1-207 and §3-311**

The amendment to §1-207 and a new section, §3-311, are part of revisions of the Columbia Commercial Code. The enactment of amended §1-207 clarifies that §1-207 of the Columbia Commercial Code does not apply to accord and satisfaction agreements reached by full payment or full satisfaction checks. New §3-311 establishes rules for accord and satisfaction by full payment or full satisfaction checks.

An accord and satisfaction agreement is a contractual method of discharging a debt. The "accord" is the agreement between the parties, while the "satisfaction" is the execution of the agreement. In some situations a person against whom a claim may be asserted attempts an accord and satisfaction of the disputed claim by tendering a check to the claimant for some amount less than the full amount claimed by the claimant, with the check identified as "payment in full." Occasionally in such situations the recipient of the check will cash the check, but strike out or protest the full-payment language, and seek further amounts, arguing that the protest preserved the recipient's ability to seek further amounts.

Columbia case law had concluded that the "reservation of rights" language of §1-207

enables a creditor to endorse and cash a full-satisfaction check, protest the terms, and sue for remaining amounts the creditor believes are due. The purpose of this legislation is to clarify that §1-207 does not permit a creditor to do so. Accordingly, the sole amendment to §1-207 is the addition of subsection (2) stating that §1-207 "does not apply to an accord and satisfaction." Thus words of protest are not evidence that an accord and satisfaction did not take place. Subsection (1) has not been altered, and continues to provide machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute.

A new section, §3-311, was enacted to govern full satisfaction checks. It reiterates that a creditor is generally not permitted to endorse and cash a full-satisfaction check yet sue for more by protesting the terms. Under the new rule of §3-311, combined with amended §1-207, if a claimant endorses and deposits a check that is conspicuously identified as payment in full and is offered in good faith to settle a disputed debt, the claimant may not seek further amounts even if the claimant protests the full-settlement language before depositing the check. The section codifies two common law requirements concerning settlement payment: (1) the settlement payment must be offered as a good faith offer to settle a debt; and (2) the debt to be settled by the payment is either unliquidated or genuinely disputed, so there is consideration for the settlement promise by the creditor. The section also contains limited exceptions concerning inadvertent accord and satisfaction.

\* \* \*

## Mathers v. Vincent

Columbia Court of Appeal (2002)

Jeff Mathers (Mathers) appeals from a trial court decision granting summary judgment to Sandra Vincent (Vincent) in a lawsuit concerning the amount due on a driveway repaving job. The trial court held that because the parties had settled their dispute with an enforceable accord and satisfaction agreement, Mathers's lawsuit must be dismissed on summary judgment. We affirm.

The relevant facts are simple and not in dispute. Mathers paved Vincent's driveway. No specific price was identified in advance. After the driveway was completed, Mathers sent Vincent a bill for \$17,329.25. After a dispute arose concerning the amount due, Vincent sent Mathers a check for \$5,733.20 with the notation "Payment in full — 1150 Powell Taylor Driveway" written both on the memo line on the front of the check and above the endorsement line on the back of the check. After receiving the check Mathers struck through both notations, wrote "Under Protest" below his endorsement, and cashed the check. Mathers subsequently initiated the suit below for the balance due.

Vincent filed a motion for summary judgment contending that the disputed debt between herself and Mathers had been settled by accord and satisfaction as a result of Mathers's acceptance and negotiation of the check, notwithstanding Mathers's obliteration of the "payment in full" notation and his "under protest" endorsement of the instrument. The trial court executed an order granting Vincent summary judgment and dismissed Mathers's suit for the balance due.

Mathers contends that the trial court erred in granting summary judgment on the basis that §1-207 of the Columbia Commercial Code (CCC) and *Ditch Witch Trenching Co.* (1995) authorized Mathers to reserve his rights to pursue the disputed debt by striking through the "paid in full" language and writing "under protest" on the check. We disagree. While *Ditch Witch*, factually on all fours with this case, held that endorsements with protests defeated

accord and satisfaction, subsequent to that decision, the Columbia Legislature overruled the controversial "have-your-cake-and-eat-it-too result" of *Ditch Witch* when it amended the Columbia version of the Uniform Commercial Code in 2000. Consequently, §3-311, and not §1-207, dictates whether Mathers settled his dispute with Vincent when he endorsed and negotiated the check.

Subparagraph (a) of §3-311 contains three requirements for the application of §3-311 to a full satisfaction check. The three requirements state aspects of longstanding common law rules of accord and satisfaction.

First, pursuant to §3-311(a)(i) the check must be a genuine offer in good faith to settle a dispute. Thus it must be viewed as an offer: an objective manifestation of intent to be held to a settlement, viewed from the perspective of the offeree. "Good faith" in subsection (a)(i) means honesty in fact and observance of reasonable commercial standards of fair dealing. The meaning of "fair dealing" will depend upon the facts in the particular case. For example, if a check issuer was taking unfair advantage of the claimant, an accord and satisfaction would not result from payment of the check because of the absence of good faith by issuer. An example of lack of good faith is found in the practice of some business debtors in routinely printing full satisfaction language on their check stocks so that all or a large part of the debts of the debtor are paid by checks bearing the full satisfaction language, whether or not there is any dispute with the creditor. Under such practice the claimant cannot be sure whether a tender in full satisfaction is or is not being made. The requirement of good faith applies to the accord and satisfaction proposal only, however. A debtor can in good faith attempt to settle a dispute with a full payment check even though the debtor's bad faith behavior led to the claim that is disputed. In other words, even if the debtor is in bad faith regarding the underlying agreement, if the dispute in fact exists and the debtor tenders a settlement of the dispute in a genuine effort to settle it, then the tender will be deemed to be in good faith.

Second, §3-311 does not apply to cases in which the debt is a liquidated amount and is not

subject to a bona fide dispute. In this regard Subsection (a)(ii) incorporates into statute the common law rule that accord and satisfaction agreements require consideration. If the debtor gives up an opportunity to assert that there is a bona fide dispute concerning either the proper amount (i.e. the liquidation issue) or whether the amount is owed at all (i.e. the dispute as to whether it is owed issue), that forbearance is consideration for the creditor's promise to settle.

A claim is liquidated if, at the time it arose, it is a readily ascertainable sum certain, that is, the evidence furnishes data that, if believed, makes it possible to compute the amount with exactness without reliance upon opinion or discretion. A bona fide dispute means an honest belief by the debtor that there is a dispute concerning the proper amount of whether the amount is owed. It is not necessary that the debtor's position in the dispute be correct or well-founded. If the claim is liquidated and the debtor does not have an honest belief in the viability of his or her position, then there is no consideration for the creditor's promise not to sue.

Third, the claimant must have received payment from the check. See § 3-311 (a)(iii).

If any one of the three requirements of §3-311(a) is not met, the remainder of §3-311 does not apply, and the claim has not been discharged, as there has been no valid accord and satisfaction agreement resolving the dispute. The burden of proof is on the person seeking enforcement of the accord and satisfaction to prove that the subsection (a) requirements of good faith, unliquidated or bona fide disputed debt, and payment received are met. If that person also proves that, as required by subsection (b), there was a conspicuous statement that the check was offered as payment in full, the claim is discharged unless subsection (c) applies. Normally the statement required by subsection (b) is written on the check. Thus, the canceled check can be used to prove the statement as well as the fact that the claimant obtained payment of the check. Subsection (b) requires a "conspicuous" statement that the instrument was tendered in full satisfaction of the claim. The statement is conspicuous if it is so written that a reasonable person against whom it is to operate

ought to have noticed it. If the claimant can reasonably be expected to examine the check, almost any statement on the check should be noticed and is therefore conspicuous. In cases in which the claimant is an individual the claimant will receive the check and will normally endorse it. Since the statement concerning tender in full satisfaction normally will appear above the space provided for the claimant's endorsement of the check, the claimant "ought to have noticed" the statement.

Subsection (c) of §3-311 contains two exceptions that allow a claimant to avoid an inadvertent accord and satisfaction. Payment of the check might be obtained without notice to the personnel of the claimant concerned with the disputed claim. Subsection (c)(1) allows an organization claimant with very large numbers of customers to protect itself by advising customers by a conspicuous statement that communications regarding disputed debts must be sent to a particular person, office, or place. If the claimant proves that the check was not received at the designated destination the claim is not discharged unless subsection (d) applies. In addition, any claimant, organization or otherwise, may prevent an inadvertent accord and satisfaction by complying with subsection (c)(2). If the claimant discovers that it has obtained payment of a full satisfaction check, it may prevent an accord and satisfaction if, within 90 days of the payment of the check, the claimant tenders repayment of the amount of the check to the person against whom the claim is asserted.

Subsection (d), however, indicates that the exceptions contained in Subsection (c) do not apply if the claimant or an agent of the claimant having direct responsibility with respect to the disputed obligation cashed the check with actual knowledge that it was offered in full satisfaction. Thus if the claimant or her agent is aware that the check was offered in full settlement, the claim is discharged even if the check was not sent to the person, office, or place required by a notice complying with subsection (c)(1) or the claimant tendered repayment of the amount of the check in compliance with subsection (c)(2). A claimant has actual knowledge that a check was tendered in full satisfaction of a claim only when that fact is brought to the attention of an individual having direct responsibility with respect to

the dispute. Subsection (d) does not apply to every agent or employee of the claimant, but only to agents having direct responsibility with respect to the disputed obligation.

Application of §3-311 to the check sent by Vincent to Mathers indicates that the claim against Vincent is discharged. There are no disputed facts concerning whether the three prongs of §3-311(a) are met. The check was offered in good faith to settle the dispute. There are no facts suggesting that Vincent was trying to take advantage of Mathers or routinely puts payment in full language on every check. There was a bona fide dispute concerning how much was owed for the job, and since there had been no specific amount identified in advance, the debt was unliquidated. Vincent received payment when he negotiated the check. The notation "Payment in full—1150 Powell Taylor Driveway" on the front and the back of the check was a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim. Because Mathers crossed out the restrictive language, presumably believing he could thereby negate the language, there can be no argument that he was unaware the check was tendered in full satisfaction of the claim. And in any event, Mathers did not, after cashing the check, tender repayment within ninety days.

Since there are no genuine issues of material fact and Vincent is entitled to judgment as a matter of law, the trial court properly granted summary judgment.

Answer 1 to Question PT-B

1)

July 27, 2006

Dear Mr. Beene:

It was a pleasure meeting you, despite the circumstances. We look forward to helping you with this matter and to achieve the best possible result to suit your needs. This letter contains my opinion of your case after researching the facts and the applicable laws.

**Statement of facts that led you to need our advice**

I understand that you are a very accomplished patent attorney and that you [have] done a lot of work on a case-by-case basis for Willing, Mayer & Frost, especially Ms. Frost. All of your agreements with Willing, Mayer & Frost have been oral and rather informal. Usually, you work on an hourly basis and the firm pays you one half of the amount it receives from the client. In addition, the client is always informed of the arrangement and approve[s] it.

In Spring of 2003, Frost made a contingency deal with Russell Hoover to work on his behalf in a patent infringement case. Based on an oral agreement with Frost, you were entitled to 50% of whatever the firm received from Hoover. You did the majority of the work on the case but did not keep track of your hours.

After the case settled, Hoover received \$100,000 payment right away and the firm forwarded to you your share. Because the firm agreed to a 50% contingency with Hoover and then 25% for all future royalties, you received a check for \$25,000 from the initial payment. Later, you received one quarterly accounting and a payment of \$10,000– the amount owed to you under the agreement.

After that initial payment and the one royalty payment, you received no other payments. When you inquired about future payments, Frost indicated that to pay you any more would give you a windfall. She insisted that the amount already paid was equivalent to your hourly rate.

Then on July 25 of this year, your office received a check for \$128,000 from Frost accompanied by a letter. Written on the check's front and back[,] and on the accompanying letter, was stated that the check was payment in full. This despite the fact that Hoover had already received 2 million dollars – which would entitle you to another \$240,000.

The check was endorsed and deposited by your secretary, who crossed out the payment in full language and wrote: "Enclosed without consent to settlement. James Breene protests the terms, and by this protest reserves all right and remedies."

According to Mr. Hoover, the amount of future royalties he might receive in the settlement could total over 6 million dollars. Assuming you would receive one half of 25% of that, you should be entitled to over one million dollars in future royalty payments.

The other complication in all this is that Willing, Mayer & Frost appears to be on the verge of breaking up[,] which may pose a problem in terms of collecting this and future monies.

### **My understanding of your goals**

You stated to me that you do not want to just keep the \$128,000 and give up trying to recover the other money owed unto you. You did a lot of hard work on the Hoover case and (deservedly) believe you are entitled to the full fruits of your labors. Assuming it does not lead to added expense or complexity to the case, you would like to keep the money.

Further, you are short of cash right now and therefore need the money.

### **Options you may take to achieve your goals**

There are a few options at this stage that you should consider and whose respective benefits and problems I will explain below.

First, you can keep the \$128,000 as payment in full and not pursue this matter any further.

Second, you may keep the \$128,000 and pursue a legal course of action against Willing, Mayer & Frost for the rest of the money you believe that is owed unto you.

Third, you can return the \$128,000 to Willing, Mayer & Frost and legally pursue the entire amount that you believe is rightfully owed to you.

### **Analysis of your options in light of applicable law and relevant facts (and the likelihood of success in achieving your goals through that option)**

#### **1. Keep the \$128,000 as satisfaction of the total amount owed**

##### **a. Analysis**

It is entirely possible for you to keep the \$128,000. In some ways, this would be the easiest course of action. You have already deposited the check, and thus would have immediate access to the money for all of your immediate needs. Further, there would be no expenses from our firm and the final amount you would receive is already known. In addition, it would end your dispute with Willing, Mayer & Frost and you could move on to establishing a relationship with a new firm to take care of your future financial and work needs.

##### **b. Likelihood of success in achieving your goals through this option**

Also, given Willing, Mayer & Frost's precarious financial position, this option guarantees you coming out of this with a good amount of money.

However, this option appears to not satisfy your goals. You told me that you had thought about this option and had rejected it because you feel that you are entitled to your percentage.

## 2. Keep the \$128,000 and pursue legal action against Willing, Mayer & Frost

### a. Analysis

According to the Columbia Commercial Code 1-207, a party may reserve rights and not prejudice rights in a dispute by explicitly reserving those rights.

In your current case, it appears that this is what your secretary did when he cashed the check but struck out the language on it regarding full payment and satisfaction and wrote: "Endorsed without consent to settlement. James Breene protests the terms, and by this protest reserves all rights and remedies."

However, despite the clear language of 1-207, according to the Columbia Commercial Code Comments on 1-207 and 3-311, it does not apply to accord and satisfaction agreements reached by full payment or full satisfaction checks. 3-311 was enacted specifically to govern satisfaction checks. According to the Comments, previous case law had allowed someone in your position to reserve their rights and endorse and cash a full-satisfaction check, protest the terms, and sue for the remaining amount. However 3-311 was designed to clarify the law and prohibit a creditor (such as yourself) from doing so: "Words of protest are not evidence that an accord and satisfaction did not take place."

(There was a case similar to yours called Ditch Witch. Under its holding, any court would find in your favor because of the "protest language" on the check. However, according to the court in Mathers, Ditch Witch was overruled by 3-311.)

Therefore, even though your secretary cashed the check for \$128,000 with clear terms of protest, the Commercial Code will not protect your ability to say that the check was not cashed in satisfaction.

While this appears to defeat your claim, there are three requirements for the application of 3-311(a) to apply to a full satisfaction check.

As the court in Mathers stated, first, "the check must be a genuine offer in good faith to settle a dispute." This lack of good faith is difficult to define. The court in Mathers explained that it could mean that a debtor who regularly writes "full satisfaction" on ALL the checks it sends does not act in good faith.

The court in Mathers stated that even where the debtor (such as Willing, Mayer & Frost) attempts in good faith to settle a dispute that arose out of bad faith acts of the debtor, the

payment is acceptable if it is a genuine effort to settle the matter.

I believe that this language hurts your case against Willing, Mayer & Frost because Frost's letter to you stated "I know there is a dispute." Thus, she acknowledged the genuine existence of a dispute between you two. Since she sent the check in order "to get th[is] behind us" it appears that she intended in good faith to settle the dispute.

The second requirement of a 3-311 satisfaction check according to the Mathers court is that "if the claim is liquidated and the debtor does not have an honest belief in the viability of his or her position, then there is no consideration for the creditor's promise not to sue." The court in Mathers stated that a claim is liquidated if it is a readily ascertainable sum.

In your dispute with Willing, Mayer & Frost, the sum is arguably very ascertainable. You are to get 50% of the amount they receive from Hoover in royalties. According to you and to Hoover (one of my associates spoke with him the other day and he was very complimentary of your work), he agreed to pay Willing, Mayer & Frost 25% of his royalties. And he was aware that you were to get 50% of the money sent to Frost. Thus, it should be quite easy to go through his records and Frost's records to determine the amount paid.

In addition, Hoover told one of my associates that he has already earned 2 million dollars in royalties. Thus, Frost has received \$500,000, which means, you should have received \$250,000 in royalties already instead of the mere \$10,000.

On the other hand, Willing, Mayer & Frost may argue that arriving at a sum is difficult because of the nature of the payments. Because they are being paid quarterly, the figure owed to you is always changing. However, I do not think that a court would have great difficulty figuring out how much is owed you.

Furthermore, Frost did not have an honest belief in the viability of her position when she sent you \$128,000. It appears to be an arbitrary number with no basis for it in reality. Thus, it should not be considered as valid consideration not to sue her.

Thus, I believe that this second requirement for a valid 3-311 satisfaction check will likely not be satisfied by Frost.

According to Mathers, the third and final requirement to satisfy a 3-311 satisfaction is that the claimant receive the check.

In your case, there is no dispute that you received the check – even though it was your secretary who actually received it and cashed it.

According to the Mathers court, if any of these three requirements is not met, then 3-311(a) is not met and 3-311 does not apply. As I stated above, I believe that requirements one and three have likely been met. However, requirement two does not appear to have been met, and that would allow you to prevail in an action against Willing, Mayer & Frost. (At least, it would mean that 3-311 does not bar your claim because the \$128,000 was not a

valid satisfaction.)

Further, according to the Mathers court, the burden of proof is on the party seeking to enforce the accord and satisfaction. That means that Willing, Mayer & Frost would have to prove the three requirements discussed above, and that the check was offered in payment in full.

I do not think that they will have difficulty proving that it was offered as payment in full because of the language on the check's front-side and back-side, as well as the accompanying letter from Frost which stated in ALL CAPS that it was PAYMENT IN FULL.

In addition to the requirements discussed above, 3-311(c) has two exceptions that would allow you to avoid an inadvertent accord and satisfaction. According to Mathers, 3-311(c)(1) allows an organization with a large number of customers to protect itself by stating that disputed debts must be sent to a particular person or office.

Unfortunately, I do not think that 3-311(c)(1) will be of much use to you. You stated that you do most of your work for Willing, Mayer & Frost, and Frost sent the letter and payment directly to you.

The second exception of 3-311 regards returning the money, which I will discuss as your third option.

#### b. Likelihood of success in achieving your goals through this option

I believe that this option may work to achieve your goals. It would allow you to keep the \$128,000 and pursue the other money owed to you. Thus, it would solve your current cash crunch and allow you to receive the full fruits of your work that you believe that you are entitled to. In addition, keeping the money while pursuing other money would not add any expense or complexity to the case (two of your concerns).

Working against you in pursuing this course of action is the cost of litigation, which you know is not cheap. Second, the Columbia Code has been rewritten to make it harder for someone in your position to dispute a satisfaction check. Third, several of the requirements for a legal satisfaction check appear to have been satisfied by Frost's check to you and the accompanying letter. Fourth, according to one of my associates, Willing, Mayer & Frost is about to break up. Thus, it might be a waste of time to pursue a course of action against them when Frost's assets might be tied up for quite a while.

That said, there are several factors that cut in your favor with regards to this approach. First, despite the change in law, the burden of proof will be on Willing, Mayer & Frost to prove that the check was a valid satisfaction. As an attorney, you know that this means we do not have to prove anything. Second, as I stated above, I do believe that one of the requirements of a valid 3-311 satisfaction weighs in your favor. Finally, the amount of money you might recover through this course of action is huge. Based on Hoover's estimates of future royalties, you could collect over a million dollars.

### 3. Return the \$128,000 and then purs[u]e legal action

#### a. Analysis

According to the Mathers court, according to 3-311(c)(2) and 3-311(d) if a claimant discovers that it has obtained payment of a full satisfaction check it may prevent accord and satisfaction if, within 90 days of payment of the check, the claimant tenders repayment of the check to the person against whom the claim is asserted.

Thus, 3-311(c)(2) appears to allow you to return the \$128,000 to Frost and thereby prevent any accord and satisfaction.

However, this option is not available if the claimant or agent of claimant had direct knowledge of the disputed obligation and cashed the check anyway. 3-311 states that a claimant has actual knowledge that a check was tendered in full satisfaction only when that fact is brought to the attention of an individual having direct reproducibility with respect to the dispute.

In your case, it was your secretary who endorsed and deposited the check. And it was your secretary who crossed out the full settlement language and wrote the “under protest” language. Thus, the issue will be determining whether your secretary was an agent with “direct responsibility with respect to the disputed obligation” as the court in Mathers put it.

On the one hand, it would appear that your secretary is not an agent having direct responsibility with respect to the disputed obligation. In fact, in Mathers, it was Mathers himself who crossed out the disputed language – therefore, the court regarded his action of cashing the check a valid satisfaction. Given this example, it would appear that you are the only party actually in direct responsibility with regards to the disputed obligation.

On the other hand, considering how small your operation is, Frost could argue that your secretary had direct responsibility with disputed obligations because you instructed him to always cross out any satisfaction language and write protest language in its place. In addition, your secretary might have been aware of the disputed obligation. Whether this makes him directly responsible is unclear from the applicable law and relevant case.

Given the facts of Mathers, it appears as though you could credibly claim that your secretary did not have direct responsibility with respect to the disputed obligation. Therefore, you would be able to return the \$128,000 to Frost and pursue the full amount.

#### b. Likelihood of success in achieving yours goals through this option

This option seems to be the worst one for achieving your desired aims because it would leave you with no money now and potentially no money in the future. And, considering the fact that Frost is having financial difficulties of her own, it might not be such a wise move to send her a large sum of money that you might never see again.

The legal advantage of this option is that it would demonstrate good faith on your part and it would demonstrate that any seeming accord and satisfaction was inadvertent on your secretary's part. It would then put you in a favorable position to sue William, Mayer & Frost and collect all of the money owed to you.

The disadvantage of this option is that it would leave you with no money now and potentially no money in the future. In addition, there is no guarantee that a court would accept that you complied with 3-311. Thus, you might return the money and a court could determine that Frost already satisfied her debt to you – which is the worst of all outcomes.

### **Conclusions**

You have stated that you are interested in keeping the \$128,000 you have already received and to pursue legal action against Willing, Mayer & Frost. Therefore, I believe that option two is in your best interests and is the one to legally have the best chance of success.

Option one, whereby you keep the money and not sue Frost, would leave you with just the \$128,000 and would not incur any legal bills pursuing a claim against a company on the brink of bankruptcy.

Option three would leave you with nothing now but with the chance to recover a lot more later. The problem with option three is that it is legally questionable to argue that the acceptance of the check was inadvertent. Further, it would only marginally help your case while still pursuing a debtor that is on the verge of bankruptcy.

Option two allows you to keep the money already paid and to pursue more money. Further, should Willing, Mayer & Frost actually break up, it might be possible to attach a lis pendens to its assets or to Frost personally. Although, it may take a while to recover, it will probably be worth it given the large amount of money at stake.

Should you have any questions or concerns, please do not hesitate to call me. I look forward to resolving this matter to your satisfaction.

Sincerely,

## **Answer 2 to PT-B**

Law Offices of Lynn R. Dawson  
5922 Jeanette Drive  
Cordesville, Columbia

Date

Mr. James Breene  
4446 Luesinger Place  
Cordesville, Columbia

Mr. Breene,

I wanted to get back to you as soon as possible regarding your fee dispute with Ms. Frost. I have researched the case law regarding your dispute. Your underlying case is extremely favorable. There are no issues regarding the viability of your fee agreement with Ms. Frost. The agreement is enforceable. There are no formation, Statute of Frauds, or subject matter issues. That being said, in regards to the check and letter sent by Ms. Frost on July 24<sup>th</sup>, you may be facing some potential issues regarding the purported accord and satisfaction that Ms. Frost attempted to render via her check and accompanying letter. As such, I will lay out the facts as I understand them, then I will list the goals that you have indicated you'd like to achieve with regard to the dispute, and then I will identify various options you have regarding this issue and present the accompanying legal consequences of each option. Please consider each option carefully and contact me to discuss which options you would like to pursue.

As I understand the situation, you were retained by Willing, Mayer & Frost to perform work on a patent law infringement case for Russell Hoover. Prior to your work on Mr. Hoover's case, you had previously worked with Willing, Mayer & Frost on a number of occasions. Each time you worked on one of the firm's cases, you generally kept track of your hours worked, and you received half the fee that Willing, Mayer & Frost collected from each client

for the hours you worked. The arrangement was informal and oral. In regards to Hoover's case, the specific fee arrangement set up between Willing, Mayer & Frost and Hoover was a contingency fee arrangement. As such, the arrangement between you and Willing, Mayer & Frost was altered due to the fact that the firm was not billing Mr. Hoover on an hourly basis. Under the terms of your agreement with Hoover, you were to receive 50% of all money Willing, Mayer & Frost collected from Mr. Hoover. Mr. Hoover's case subsequently settled, and under the settlement, Willing, Mayer & Frost received \$50,000 and 25% of all future royalties received by Hoover. You were paid \$25,000 from immediate award per your agreement with Frost. You were only sent one royal check for \$10,000, however, and received no future payment until July 25<sup>th</sup>.

When you spoke to Ms. Frost, she did not deny that you were entitled to royalty payments under your agreement, but stated that you had already received "all you deserve." It seems that Ms. Frost's law firm is about to break up, allegedly due to some investments made by Ms. Frost. At this time, the firm has not declared bankruptcy. Upon contacting Mr. Hoover's accountant, we learned that Frost has received \$500,000 in royalty payments at this time. You are owed \$240,000 in total.

On July 25<sup>th</sup>, you received a check and letter from Ms. Frost. The check was in the amount of \$128,000. The check included language written on the front of the check and above the place where the check is endorsed stating that the check was for the amount paid in full. The writing on the check was very conspicuous. The accompanying letter stated that Ms. Frost was tired of arguing with you about the amount of your fee, that the fee was disputed and that she was tendering a check to you as "PAYMENT IN FULL" of your fees. She also stated that the check constitutes a "FULL AND COMPLETE RELEASE OF ALL CLAIMS" you have against her. Your secretary endorsed and deposited the check, as per his business duties. You were not informed of the endorsement until it had actually been completed. In endorsing the check, your secretary crossed out the "payment in full" language on the check and wrote that you protest the accord terms and reserve the rights and remedies. Prior checks sent by Ms. Frost stated that they constituted payment in full,

but this particular check included more precise and more conspicuous language, as well as the accompanying letter.

As I understand your goals, while you understand that you may have difficulty in collecting the full payment of your fees from Ms. Frost, you prefer to keep the check and sue Ms. Frost on the remaining balance due to you, which is approximately \$112,000. You intend to keep the check, as long as it does not add expense and complexity to the process of suing for the rest of the amount due. From talking to you about this issue, you haven't clearly indicated to me whether you would prefer to return the check outright in order to sue for the entire amount due, or keep the check and forfeit your claim. Though you have expressed a desire to use the money right away, you also seemed very adamant that you would fight to recover you[r] entire sum rather than accept only a small portion of that. I believe[,] then, that should your ability to sue on the entire debt depend on your tendering of the check back to Ms. Frost, you would prefer to do so, rather than keep the check and not sue. I will outline all these options, however, and[,] of course, it is ultimately your decision as to what path you'd like to pursue. I will now identify the options I can see, and analyze each option individually.

### **Optional 1: Retain Possession of the \$128,000 And Sue on the Remaining Debt**

As I understand it, this is your most desirable option. In order to successfully pursue this option, we will need to show that this check is either governed by Section 1-207 of the Columbia Commercial Code or that Section 3-311 of Article 3 of the Columbia Commercial Code does not apply to your particular case.

Under Article 1-207, a party who explicitly reserves his rights using words such as "under protest" or "without prejudice" in response to a manner demanded or offered by another party does not thereby prejudice the rights reserved. Therefore, were Article 1-207 to apply, by crossing out the "payment in full" language and specifying that [you] protest the accord terms and reserve your rights and remedies, your secretary preserved your rights to sue on the remaining debt under 1-207. However, it is almost certain that Article 1-207

does not apply to an accord and satisfaction of the check Ms. Frost sent to you. First, the Amendment to the Article, under 1-207(2) states that this provision does not apply to an accord and satisfaction. Furthermore, the Columbia Commercial Code Comments states that the amendment of 1-207 does not apply to “accord and satisfaction agreements reached by full payment or full satisfaction checks.” It is clear that Ms. Frost’s letter and check sent to you constituted a full satisfaction check. Therefore, it is unlikely that the reservation of rights language in 1-207 will be helpful. Mathers v. Vincent seems to be on point as well. In that case, the Columbia Appeals Court ruled that a check tendered by the plaintiff in full satisfaction of a driveway paving job was not covered by Section 1-207 due to the amendment, and that Section 3-311 was the generally appropriate statute under which to analyze the effect of the accord and satisfaction.

Since it is unlikely that you[r] reservation of rights in accordance with Section 1-207 will be effective, in order for you to retain your rights, we will have to first argue that Section 3-311 does not apply to the accord and satisfaction provision in your case. In order for Section 3-311 to apply, Ms. Frost must show that (i) she acted in good faith by tendering the check to you as full satisfaction of your claim. She must also show that (ii) the amount of the claim was unliquidated or subject to a bona fide dispute. Lastly, she must show that (iii) you obtained payment of the instrument.

**(i) Good Faith Requirement**

In order for Ms. Frost to prove good faith, she must show that the check as a genuine offer in good faith to settle a dispute. She must therefore show that she displayed honesty in fact and observance of reasonable commercial standards of fair dealing in attempting to satisfy your claim with the check. Columbia Courts have held that [by] taking unfair advantage of a claimant, good faith would be absent. In speaking to you, it appears that Ms. Frost’s low-balling you with regards to your fees (by only offering about half of what was owed) was not the product of her attempting to take unfair advantage of your recent lack of business, but rather was likely a result of her own recent business misfortune. Unless we are able to show that she knew about your business slow-down, we will be unlikely to raise an inference of unfair advantage employed by Ms. Frost.

Columbia Courts have also held that good faith may be absent in situations where business debtors routinely print full satisfaction language on their check stocks so that a large part of the debts of the debtor are paid by checks bearing the full satisfaction language. The courts have held that such a practice constitutes bad faith if the claimant cannot be sure whether a tender in full satisfaction is or is not being made. As you indicated, most or all of the checks sent to you by Ms. Frost included routine “payment in full” language on the check stocks. This would normally lead to a presumption of lack of good faith, and is an argument we can make. Unfortunately, given the fact that Ms. Frost included different, more precise and more conspicuous language regarding the full satisfaction of the dispute, and especially since Ms. Frost included a letter specifically stating that the check was being tendered as “PAYMENT IN FULL,” it is unlikely that we would be able to successfully argue that the letter and [sic] did not provide notice as to whether or not the check constituted a payment in full.

Lastly Columbia Courts have held that even if a debtor is in bad faith regarding the underlying agreement, if the debtor complies with the above requirements, good faith will be found. As such, I believe that Ms. Frost will be able to show “good faith” under the requirements of 3-311.

(i) Unliquidated or Subject to Bona Fide Dispute Requirement

Ms. Frost will also have to show that the debt is in an unliquidated amount or that it is not subject to a bona fide dispute. This requirement is based on the idea that a debtor must show that they have rendered consideration by tendering the check in the form of giving up their claim to contest that disputed amount. Here, Ms. Frost must show that she has an honest belief in the viability of her position in order to have rendered consideration under the accord and satisfaction agreement.

Columbia Courts have held that a liquidated claim is a claim that [,] at the time it arose, is a readily ascertainable sum. To be a readily ascertainable sum, we will have to furnish data such that the data makes it possible to compute the exact amount you are owed without reliance upon opinion or discretion. Although it seems that Ms. Frost bears the

burden of proof that the claim is unliquidated, if we can show that at the time your claim arose, there is data available to compute with exactness the amount you were owed by Ms. Frost without reliance upon opinion or discretion, we will be able to show that the debt was a liquidated claim, and thus 3-311 would not apply to Ms. Frost's attempted accord and satisfaction unless Ms. Frost could show that there was a bona fide dispute in regards to the claim. Here, it will likely be possible to convince a court of the exactness of the claim. We have assumed that we can prove [,] without contradiction, the specifics of your agreement with Ms. Frost. Therefore, because calculation of the amount owed can be established by the amount paid by Hoover to Ms. Frost's firm and because calculation of the debt was identified in advance (see Mathers), we can access the necessary data to calculate the exact amount owed depending upon the date the claim arose. Because the data is independent and not subject to opinion or discretion (because it is being produced by a relatively neutral third-party), we will be able to show the exactness of your claim based on data obtainable from Mr. Hoover's accountant's records.

In order to satisfy the second prong, Ms. Frost must show either that the amount was unliquidated or that it was subject to a bona fide dispute. If she proves either, Section 3-311 will apply. If she can prove neither, then there is no consideration for your promise not to sue. In order to show that a bona fide dispute exists, Ms. Frost must show that there is an honest belief by the debtor that there is a dispute concerning the proper amount of whether the amount is owed. Here, in your discussion with Ms. Frost, she claimed that she had compensated you fairly for your hourly work. However, under the terms of your agreement, you were to collect half of the money paid to Willing, Mayer and Frost from Mr. Hoover's royalties. Ms. Frost has not denied the validity of the agreement. In fact, you were sent the first quarter's royalty payment in accordance with the agreement. Assuming that the terms of the agreement itself can be proven, it seems unlikely that Ms. Frost can show that there is a bona fide dispute. She claims that she did not agree to pay you a "windfall," but the terms of the agreement do not address fair value compensation or windfall. They merely give you a right to half of the collection of royalties and fees from Mr. Hoover. Furthermore, [M]s. Frost has not denied the validity of your agreement or asserted that your recovery was to be limited to the old hourly rate arrangement. Ms. Frost claimed

in her letter that a dispute existed, but she has never identified which portion of your agreement was invalid or disputed. Thus, unless we are unable to prove the terms of the agreement, it seems clear that there is no bona fide dispute.

Therefore, I believe that we can show that the debt is both liquidated and not subject to a bona fide dispute. If we are able to show this, Section 3-311 will not apply and under Section 1-207, your reservation of rights will be effective and suit on the remaining balance will be effective.

**(ii) Receipt of Payment Requirement**

Lastly, in order for Section 3-311 to apply, Ms. Frost must show that you received payment from the check. Clearly, she will be able to show this requirement since your secretary has endorsed and deposited the check. Therefore, should the other two requirements be met, 3-311 will apply.

**Additional Requirements**

**3-311 (b)**

Assuming that Ms. Frost can show that the requirements for the application of 3-311 are met under the previously described tests, she must show that there was a conspicuous statement that the check was offered as payment in full. As discussed previously, she will be able to show this due to the writing on the check and the accompanying letter.

As a result of the foregoing analysis, I believe that we will be successful in defeating application of 3-311. Despite the fact that this provision clearly applies to checks tendered as full payment in satisfaction of a debt, Ms. Frost will be unlikely to show that the debt is a liquidated amount or that it is not subject to a bona fide dispute. While she can prove all the other provisions, this requirement bars application of 3-311, and relegates the dispute to judgment under 1-207, which would allow you to reserve the rights by indicating your desire to do so on the check at the time of endorsement. Given that this is your most desirable option and because I believe there is a strong likelihood of success in refuting the claim that 3-311 applies, I believe this would be the best course to follow. It is possible that

this option will fail. In that case, you will be limited to the recovery of the \$128,000, and you will have taken the most complex route to litigation available among your options. This will incur more expense than the other options, but offers the highest reward.

**Option 2: Tender Back the Check to Ms. Frost and Sue on the Entire Debt**

As detailed above, this option would not be an attractive option if the check were to be litigated under Section 1-207, because it is clear that that [sic] provision allows you to reserve your rights to sue while still keeping the tendered amount. However, were a court to find that section 3-311 to [sic] apply, in order to sue on the entire debt, the check must be tendered back to Ms. Frost.

In the previous section, I outlined the requirements for section 3-311 to apply. Under requirement 3-311(a)(iii), Ms. Frost must show that you received payment. If Ms. Frost can show that (and she can) as well as the other requirements under 3-311(a) and (b), the claim will be discharged and you will be forced to take the \$128,000 in full satisfaction.

The only way you will be able to undertake this option (of tendering back the check and suing on the entire debt), would be to show that subsection 3-311(c) applies. This section allows you to avoid a discharge by showing that an inadvertent accord and satisfaction has occurred. In order to show that 3-311(c) applies, you must prove one of the two exceptions is present. If we cannot prove this, then the claim will be discharged. If we can prove one of the exceptions, then we may tender the check back to Ms. Frost and sue on the entire debt.

**3-311(c)(1) – Disputed Debt Communication**

This section allows a claimant to avoid inadvertent accord and satisfaction if the claimant is an organization with a very large number of customers and that organization advises its customers by a conspicuous statement that disputed debts must be sent to a particular person, office or place.

I do not think this exception will apply. First, according to my knowledge of your operations, your business does not have a large amount of customers, as you are a solo practitioner. Additionally, as far as I am aware, you have not notified any of your customers that disputed claims must be sent to a particular person, office or place. It appears that your secretary handles all methods of payment, included disputed claims. As such, this exception will not apply.

#### 3-311(c)(2) – 90-day grace Period

This section allows a claimant to avoid an inadvertent accord and satisfaction by tendering repayment to the person against whom the claim is asserted within 90 days. Therefore, under 3-311(c)(2), if you tender payment back to Ms. Frost w/in 90 days, you will be able to sue on the entire claim unless Section 3-311(d) applies.

#### 3-311(d) – Notice Defeating Exceptions

Because I have established that Section 3-311(c)(1) will not apply as an exception, I will analyze this section according to its application to 3-311(c)(2). 3-311(d) acts to bar an assertion of inadvertent accord and satisfaction when the claimant or agent of the claimant having direct responsibility with respect to the disputed obligation cashes the check with actual knowledge that it was offered in full satisfaction. If this knowledge is established, the claim will be discharged even if the claimant can show an exception to discharge under 3-311(c).

In regards to the application of 3-311(d) to your present case, it appears that the endorsing and cashing of the check will not allow you to retender the payment to Ms. Frost in order to sue on the entire debt if it was done with knowledge by you or if your secretary is an individual having direct responsibility with respect to disputed claims.

#### Whether your secretary Constitutes an Individual with Direct Responsibility

While a judge could find that your secretary possesses such responsibility, I believe that he will not. Subsection (d) does not apply to every one of your agents. While your secretary is in charge of opening your mail and has received instructions allowing him to

endorse checks and contest disputed amounts, it is unlikely that he will be found to have direct responsibility. For instance, your secretary endorses and disputes amounts only at your direction. Furthermore, when doing so, he indicates that “James Breene protests the terms.” This indicates that you are the individual in the firm who is directly responsible with respect to the dispute. On a practical level, this is also supported by the fact that you earn the fees, you are the individual that has the most knowledge with regards to the disputed agreement and the work and time spent on a particular project. Also, the dispute arose in regards to your wages, not the wages of one of your employees. I believe that these facts would show that 3-311(d) would not bar you from the option of retendering the check and suing on the entire amount. According to what you’ve told me, it appears that you would not be charged with knowledge of the accord and satisfaction, because your secretary endorsed and deposited the check before you were aware of its existence.

This option is a risky option. Although I am very confident that we would be able to prove that you are owed \$240,000, it is likely that you will not receive the full amount of payment from Willing, Mayer & Frost due to their financial troubles. If that is the case, you may very well not receive the initial payment tendered by Ms. Frost, and you will incur legal expenses. However, assuming that you will be successful in collecting from Ms. Frost, this option is attractive if we are not able to keep the initial \$128,000 and sue for the rest.

### **Option 3: Retain the Check and Do Not Sue on the Matter**

As indicated above, it is possible that a court would find that the provisions of 3-311 would continue to apply to the disputed accord and satisfaction. Ms. Frost will likely be able to prove all of the elements entitling the dispute to resolution under the provisions of 3-311 except for the requirement under 3-311(a)(ii). If, however, she can show that the claim was unliquidated or subject to bona fide dispute, 3-311 will apply [,] thus [,] your reservation of rights would be ineffective.

Should 3-311 apply, you may be able to tender back the check under 3-311(c) within 90 days and sue for the entire debt. However, it is possible, though unlikely, that Ms. Frost will be able to show that the requirements for inadvertent accord and satisfaction were not

met and that your secretary was an individual having direct responsibility and would thus be charged with knowledge of the accord. In that case, your claim would be barred and you would be relegated to the option of retaining the check without the ability to sue for the rest of the amount due.

As you know, this is the safest option. Though you will not be able to collect the balance of your fees, you will not be incur[ring] much in the way of legal costs. Given that it is uncertain as to whether you can even collect the balance of your fees from Ms. Frost due to her impending insolvency, you may feel that you do not wish to risk frittering away what you've already collected from Ms. Frost for a chance to collect the entire balance. I believe that this option is far inferior to Option #1, which I believe provides a sound case, but depending on your level or [sic] risk tolerance and the state of Ms. Frost's finances, you may prefer this option over retendering and suing for the entire debt (Option #2).

#### **Recommendation**

I would recommend that we attempt to employ Option #1. I believe we have a strong case that Section 3-311 does not apply to your [sic] attempted accord and satisfaction in your case for the reasons stated above. Furthermore, we can file this suit without major costs, and re-evaluate if it is denied on summary judgment. If you do not feel as strongly as I do about this option, I would advise you to retain the check and not sue further, especially if Ms. Frost's finances further deteriorate. This, of course, depends on the state of her business. However, as I stated above, you would retain \$128,000 without incurring legal expenses, which may be more than you can recover under Option #2.

I hope this opinion letter has clarified the likelihood of success of all of these options and that you are better able to assess which routes you would like to pursue. Please keep me informed as to what actions you would like me to take on this matter.

Sincerely,

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Lynn R. Dawson

Attorney at Law

End of Exam