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Caldwell v. Cometto Clerk's Record v. 2 Dckt. 37157

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LAW CLERK

Vol 2 of 4

IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID L. CALDWELL and KATHY C. CALDWELL, husband
and wife; LAWRENCE L. SEILER and THERESA L. SEILER,
husband and wife; PATRICIA ST. ANGELO,

Plaintiffs/Appellants/Cross-Respondents,

vs.

THOMAS W. COMETTO and LORI M. COMETTO,
husband and wife; and DOES 1-5,

Defendants/Respondents/Cross-Appellants.

Appealed from the District Court of the First Judicial
District of the State of Idaho, in and for Bonner County

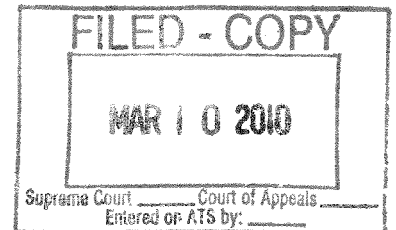
HON. CHARLES W. HOSACK
District Judge

ARTHUR B. MACOMBER
Attorney for Appellants/Cross-Respondents

BRENT FEATHERSTON
Attorney for Respondents/Cross-Appellants

SEE AUGMENTATION RECORD

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MADETT
CLERK DISTRICT COURT

as
CLERK

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**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, AND IN AND FOR THE COUNTY OF BONNER**

DAVID L. CALDWELL and KATHY)
C. CALDWELL, husband and wife;)
LAWRENCE L. SEILER AND)
THERESA L. SEILER, husband and)
wife; PATRICIA ST. ANGELO;)
Plaintiffs)

Case No: CV-07-01744

vs.

**PLAINTIFFS' OBJECTION TO
DEFENDANTS' MOTION TO
COMPEL, AND NOTICE OF
MOTION AND MOTION FOR
PROTECTIVE ORDER**

THOMAS W. COMETTO and LORI)
M. COMETTO, husband and wife; and)
DOES 1-5,)
Defendants.)

Hearing Date: June 3, 2008
Hearing Time: 3:30 p.m.
KOOTENAI COUNTY COURTHOUSE
Judge Hosack

Pursuant to I.R.C.P. 7(b)(3)(E) and 26(c)(2), Plaintiffs DAVID L. CALDWELL and KATHY C. CALDWELL, et al., by and through their attorney of record, Arthur B. Macomber, hereby timely serve Plaintiffs' Objection to Defendants' Motion to Compel and a Notice of Motion and Motion for Protective Order with proof of service by certificate.

INTRODUCTION

On April 1, 2008, Defendants served on Plaintiffs' counsel by U.S. Mail Defendants' twenty-one (21) page First Set of Interrogatories, Requests for Admissions and Requests for Production of Documents. Plaintiffs' response was due thirty (30) days later on May 1, 2008. Defendants' Requests included demand for Plaintiffs' personal contact

information, when Defendants know Plaintiffs have legal representation and that the relationship between the parties is contentious at best and potentially violent at worst, with this Court issuing injunction on May 8, 2008 to prevent certain abrasive interactions.

Due to the voluminous Requests, Plaintiffs' Answers were not completed and sent to Defendants' counsel until May 2, 2008. Inadvertently, Plaintiffs' Answers were mailed without Plaintiffs' counsel's signature. Plaintiffs' counsel had corresponded with Defendants' counsel by email on May 1, giving the status of Plaintiffs' Answers, and providing some thoughts as to how to approach settlement, see Exhibit "A," which thoughts have been ignored by Defendants' counsel.

On May 9, 2008, Defendants' counsel sent Plaintiffs' counsel a six (6) page letter detailing Defendants' counsel's objections to Plaintiffs' Answers, which included a two (2) page copy of the reasoning behind the 1993 Amendments to the Federal Rules of Civil Procedure, and which letter demanded "complete and unabridged answers" by Friday, May 16, 2008, see Exhibit "B." Defendants' counsel did not attempt to meet and confer in good faith, but only made a one-week demand for compliance with his terms.

On May 15, 2008, Plaintiffs' counsel responded to the May 9 letter, see Exhibit "C," agreeing that said letter raised "issues that deserve addressing" and requesting another week until May 23 to respond. As of this filing, Plaintiffs have been unable to complete their responses to Defendants' Requests.

On May 19, instead of responding to Plaintiffs' counsel's request for a single week's additional time, Defendants' counsel decided to file a Motion to Compel, based on his personal belief that Plaintiffs' counsel's time was better spent responding to the May 9 letter's demand rather than Plaintiffs' counsel's creation of a Motion to Compel Defendants' Responses that were due on or about February 4, following two genuine attempts by Plaintiffs' counsel to meet and confer.

ARGUMENT

Plaintiffs' argument and request for protective order is based on 1) the lack of a genuine meet and confer attempt by Defendants, 2) interpretation of the I.R.C.P. 33, and

the extent it mirrors the Federal Rule of Civil Procedure (F.R.C.P.) 33, and 3) the unreasonable danger and potential for harassment and onerous expense should this Court not grant Plaintiffs' proposed Motion for Protective Order.

1) **Defendants did not make a good faith effort to confer with Plaintiffs' counsel.**

I.R.C.P. 37(a)(2) requires a party motioning to compel answers to "include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action."

In this case, Defendants' counsel's letter dated May 9 did not include any attempt to confer with opposing counsel to solve the issues to avoid court action. Defendants' counsel simply demanded compliance with an arbitrary seven (7) day response to his six (6) page letter, and ignored Plaintiffs' counsel's letter dated May 15.

Further, on May 16, Plaintiffs' counsel left a telephone message at Defendants' counsel's office orally reiterating Plaintiffs' request for the additional week to address the items and concerns raised in the six (6) page letter. Defendants' counsel's May 9 letter made neither a request for a telephone call, nor a suggestion that a telephone call would be proper or desirable. Defendants' counsel's sole response to Plaintiffs' counsel's entreaties was the filing of a Motion to Compel when Plaintiffs' counsel did not comply with Defendants' counsel's arbitrary seven-day demand. This type of behavior is neither envisioned or expected by civil counsel under any rules governing counsel's behavior in Idaho, and, on that basis, should be grounds for this Court to deny Defendants' Motion. What is envisioned is that counsel has "in good faith conferred or attempted to confer with the party not making the disclosure, "and that did not happen in this case. Defendant's Motion to Compel should be denied.

2) **Neither the I.R.C.P. 33 nor interpretation of Federal Rule of Civil Procedure**

(F.R.C.P.) 33 allow the numerous subparts Defendants have tendered.

I.R.C.P. 33 states, in pertinent part:

(3) Number of Interrogatories. No party shall serve upon any other single party to an action more than forty (40) interrogatories, in which sub-parts of interrogatories shall count as separate interrogatories, without first obtaining a stipulation of such party to additional

interrogatories or obtaining an order of the court upon a showing of good cause granting leave to serve a specific number of additional interrogatories.

This rule clearly states that subparts “shall count as separate interrogatories.” Defendants’ Request for Interrogatories has twenty-one (21) numbered Interrogatories, but those questions, including subparts, total fifty-six questions pursuant to I.R.C.P. 33. There has been no stipulation between the parties nor any leave of Court to serve additional interrogatories as Rule 33 requires. Thus, Defendants Motion to Compel, even if it is granted in part, should not be granted to force Plaintiffs to answer the sixteen questions/subparts over the total of forty that are allowed. Further, Defendants Motion to Compel should not be granted at all, because Defendants chose to proffer questions without following the Rule: no Stipulation was offered to Plaintiffs, and Defendants did not approach this Court for leave to tender more than the Rule allows.

Defendants’ counsel sent Plaintiffs’ counsel a letter dated May 9, in which Defendants raise some courts’ finding of parallelism in interpretation between I.R.C.P. 33 and F.R.C.P. 33, which letter implies that the plain language of the Idaho rule related to the counting of interrogatory subparts should be nullified by some other courts’ interpretation of the counting of subparts under the federal rule.

The Idaho State Supreme Court has recognized that “[I.R.C.P.] Rule 33[is] patterned after Federal Rule [of Civil Procedure] 33 . . .” (*Straley v. Idaho Nuclear Corp.*, 94 Idaho 917, 923 (1972) (Confirms rule that interrogatory to corporation is not properly addressed to an employee of the corporation).). However, patterns notwithstanding, no Idaho case was found for the proposition Defendants’ counsel implies in his May 9 letter that the F.R.C.P. 33 interpretation related to subparts applies to interpretation of I.R.C.P. 33. Further, no federal district court, ninth circuit, or bankruptcy cases searched for in Casemaker using the search terms “Idaho” plus “33” plus “Federal Rule of Civil Procedure 33” plus or without “9th Circuit” found any case supporting Defendants’ claim. Finally, Defendants’ counsel’s May 9 letter itself does not disclose any case that support counsel’s implied proposition that any federal or Idaho court has ruled that interpretation of the

federal rule 33 has overruled the plain language of Idaho's rule related to the counting of subparts.

If this Court found it desirable to nullify the Idaho rule as opposing counsel suggests, two controlling federal decisions address the counting of interrogatory subparts support Plaintiff's claim that Defendants have proffered more than the forty allowed by Idaho rule. Both cases are attached for this Court's review at Exhibits "D" and "E."

The *Swackhammer* case discusses the language of the federal rule 33, which includes the terms "discrete subparts." (*Swackhammer v. Sprint Corp. PCS*, 225 F.R.D. 658, 664-665 (D.Kan.,2004).) As did Defendants' counsel's May 9 letter, the *Swackhammer* court cited to the 1993 Advisory Committee Notes to F.R.C.P. 33. *Swackhammer* cited to a previous case that observed "an interrogatory containing subparts directed at eliciting details concerning a 'common theme' should generally be considered a single question." (*Williams v. Board of County Commissioners of the Unified Government of Wyandotte County and Kansas City, Kansas*, 192 F.R.D. 698, 701 (D.Kan.2000).) Unfortunately, *Swackhammer* did not elucidate upon the definition of a "common theme."

The 2006 *Pogue* case discusses interrogatory subparts in the context of the federal *Trevino* case. (*U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 235 F.R.D. 521, 527 (D.D.C.,2006).) In *Pogue*, Judge Lambreth states, "[w]hat case law there is on the subject supports the common sense conclusion that an interrogatory may only contain multiple parts that 'are logically or factually subsumed within and necessarily related to the primary question.'" (*Id.*, citing *Trevino v. ACB American, Inc.*, 232 F.R.D. 612, 614 (N.D.Cal.2006).) *Pogue* noted, "in *Trevino*, the Court held that when a party sought information about litigation filed by the opposing party, it was proper to ask in one interrogatory for the court, caption, civil number and result." (*Id.*) Interestingly, and directly on point to Defendants' Interrogatory numbered five, *Pogue* noted the *Trevino* court ruled "an interrogatory to be impermissibly compound when it asked for identification of expert witnesses, specific opinions that would be given during the testimony, and the grounds for each of the expert's opinions." (*Id.*)

Therefore, even if this Court grants some portion of Defendants' Motion to Compel, it should adhere to the stricter I.R.C.P. 33 and count all fifty-six subparts as interrogatories so that Plaintiffs are only liable to answer forty and strike sixteen. If it uses the F.R.C.P. 33 Advisory Committee notes and related cases cited above it should rule at least that Defendants' Interrogatory number five is impermissibly compound under the *Trevino* ruling, and evaluate the other interrogatories using the *Trevino* and *Pogue* standards.

3) Plaintiffs' will suffer unreasonable danger and potential for harassment should this Court not grant Plaintiffs' proposed Protective Order related to Interrogatories 1-4; and Court should grant Plaintiffs' Motion for Protective Order herein argued to bar deposition requiring onerous and expensive travel by Plaintiffs Seiler and St. Angelo.

I.R.C.P. 26(c) states in pertinent part:

... for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; [and] (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery . . ."

On May 12, 2008, Defendants mailed Plaintiffs' counsel Notices of Intent to take the depositions of all Plaintiffs, including the Seilers and Patricia St. Angelo, who live out of Idaho. On May 16, 2008, Plaintiffs submitted to this Court a Motion to Compel answers to interrogatories that were requested of Defendants January 4, 2008. As of the date of this filing, Plaintiffs' Counsel has not requested a Protective Order related to the depositions due to concerns about being able to timely respond to Defendants' six-page May 9 letter demanding Plaintiffs alter their previously submitted Answers to Defendants' Interrogatories. Since consideration of Defendants' counsel's letter necessitates Plaintiffs address the subject of protective orders, Plaintiffs herein submits its Motion for Protective Order as to both Defendants' Interrogatories and Notices of Intent for depositions.

As to the interrogatories, Defendants have the right to ask for information "regarding any matter, not privileged, which is relevant to the subject matter involved in

the pending action . . .” (I.R.C.P. 26(b)(1).) By interrogatories one through four, Defendants request Plaintiffs’ personal contact information. Since Plaintiffs have legal counsel to which all Defendants’ requests must be tendered, Defendants have no need for Plaintiffs’ personal contact information. Further, Plaintiffs’ personal contact information is not relevant to any matters before this Court, because Plaintiffs’ names and property ownership are already established and Plaintiffs’ personal contact information is irrelevant to any cause of action or defense of any party. Thus, Defendants’ requests for Plaintiffs’ personal contact information is outside the scope of discovery pursuant to I.R.C.P. 26.

Pursuant to I.R.C.P. 26(c), Plaintiffs should be protected against providing their personal contact information, because it would likely lead to “annoyance [or] embarrassment” from Defendants. This Court has enjoined Defendants against aggressive and violent behaviors, and provision of Plaintiffs’ personal contact information would encourage Defendants to annoy and harass Plaintiffs. Further, Plaintiffs are concerned that Defendants would use the information against Plaintiffs to embarrass Plaintiffs in the community through misuse of that information. Plaintiffs feel threatened by Defendants. Plaintiffs thus request this Court grant Plaintiffs’ protective order against sharing their personal contact information with Defendants.

As to the out-of-state deponents, I.R.C.P. 26(c) allows a protection order to be granted where the discovery would subject the opposing party to “undue burden or expense, [and discovery can be limited by a court’s order to include] . . . one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; [and] (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery . . .”

Here, Defendants have noticed depositions of out-of-state Plaintiffs Seilers and St. Angelo to take place in Sandpoint, Idaho on June 19, 2008. The Notices were served with Subpoenas Duces Tecum for Plaintiffs to bring certain documents:

1. Please produce true and accurate copies of all records, documents or other materials relative to your purchase or acquisition of the real

property alleged in the Plaintiffs' Request for Declaratory Judgment to Quiet Title and Injunction filed October 17, 2007. You are to produce true and accurate copies of all title reports, closing statements, preliminary title reports, opinion letters, appraisals, deeds, mortgages, deeds of trust, promissory notes, maps, diagrams, schematics, aerial photos, plat maps, records of survey, correspondence or other tangible materials or documents of any sort relative to the Plaintiffs' purchase or acquisition of the real property which is alleged in Plaintiffs' Request for Declaratory Judgment to Quiet Title and Injunction filed October 17, 2007, to be the dominant estate and served by the easement across Defendant Comettos' property.

2. Any and all documents, photographs, diagrams, maps, sketches, or other records or tangible items relating to the claims alleged in Plaintiffs' Request for Declaratory Judgment to Quiet Title and Injunction filed October 17, 2007.

Plaintiffs object to both the deposition and the demands for certain documents in discovery and hereby request this Court grant Plaintiffs proposed Order submitted herewith barring such discovery.

First, Plaintiffs are willing to stipulate that they purchased the property with knowledge of the Easement Agreement and remain subject to its terms, such as this Court might deem said terms to be in its Declaratory Judgment, along with other easements of record.

Second, Plaintiffs Seiler and St. Angelo reside in Indiana and Louisiana respectively and it would be an undue burden and great expense for them to travel to North Idaho to be deposed about issues readily available and provable by other methods. (*Cosgrove v. Merrel Dow Pharmaceuticals, Inc.*, 117 Idaho 470, 474-475 (1989) (Court affirms trial court's prevention of depositions "taken already accomplish that purpose.")) Further, Plaintiffs Seiler will be in Europe on a previously scheduled journey between June 9, 2008 and June 20, 2008. The burden of cancelling the European journey in favor of a trip to North Idaho where said trip would have dubious contribution to the advancement of this case would be an onerous and expensive requirement.

Specifically, by stipulating to having knowledge of the Easement Agreement at issue upon purchase of their property, Plaintiffs Seilers and St. Angelo remove the need for physically copying and carrying the requested documents to North Idaho. Further,

Defendants previously requested these documents in their second Request for Production of Documents, so the request is duplicative. Finally, Plaintiffs' Caldwell have more than adequate knowledge related to the use of the easement, the blockages, and cross-ditching that Defendants have used to prevent or inhibit use of the easement access road by Plaintiffs and will share that information at their local deposition. As to these issues, Plaintiffs Caldwell are more than able to represent each and every issue for this Court's consideration without the Seilers and Ms. St. Angelo appearing personally in Defendants' counsel's office in Sandpoint for deposition.

Third, Plaintiff St. Angelo has visited the lands only once or twice during her ownership and joined other plaintiffs to bring these claims only in defense of her title to the easement and to quiet title related to Comettos' encroachments on Plaintiffs' easements because she is a dominant tenement of the easement at issue. There is no information Plaintiff St. Angelo could contribute to the resolution of this case that is unavailable from local sources. (*Id.*)

As to Plaintiffs Seiler, they too are infrequent visitors. Mr. and Ms. Seiler would testify to the same concerns that Plaintiffs Caldwell would, including their personal experiences with Comettos' inhibition of the easement's use by the placement of boulders and cross-ditching that inhibited Seilers' travel during their visits. However, Defendants could discover these facts through judicious use of other methods of discovery without having the Seilers travel to North Idaho to bring Defendants' counsel any documents or testimony.

Fourth, Plaintiff Kathleen Caldwell is traveling to Alaska on a previously scheduled journey from June 5, 2008 through June 19, 2008 and thus will not be available for deposition on June 17, 2008.

Therefore, where I.R.C.P. 26(c) allows "(1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired

into, or that the scope of the discovery be limited to certain matters; . . . Plaintiffs request this Court issue a protective order barring multi-state discovery by Defendants, or discovery by written questions only so that Plaintiffs Seiler and St. Angelo may avoid onerous travel. Finally, Plaintiffs request this Court order Defendants' counsel to set up mutually amenable dates for deposition, instead of unilaterally deciding the dates without consultation with Plaintiffs' counsel.

4. **Sanctions are inappropriate against Plaintiffs or Plaintiffs counsel, because no discovery order has been issued, let alone violated.**

Sanctions for discovery abuse are allowed pursuant to I.R.C.P. 37, when a court has issued an order requiring discovery processes be followed and a party or their counsel fail to so follow. Here, Defendants request sanctions in their Motion to Compel, prior to the Court ordering anything. Thus, the request for sanctions in Defendants Motion to Compel is premature and unwarranted. Plaintiffs respectfully request this Court refuse to award sanctions prior to Plaintiffs proven failure to abide with this Court's Order.


CONCLUSION AND PRAYER

Plaintiffs pray and respectfully request this Court:

1. **Deny** Defendants' Motion to Compel, based on Defendants lack of any good faith conferral with Plaintiffs;
2. **Deny** or reform Defendants' Motion to Compel, related to Plaintiffs' alleged lack of response to Interrogatories numbered over forty;
3. **Grant** Plaintiffs' Protective Order barring Defendants' requests for Plaintiffs' personal contact information based on the unreasonable danger and potential for harassment and embarrassment of Plaintiffs;
4. **Grant** Plaintiffs' Protective Order to bar Defendants' deposition of Seilers and St. Angelo and quash the subpoena duces tecum for out-of-state Plaintiffs Seilers and St. Angelo, based on the lack of need of their information and the onerous burden and expense of travel to North Idaho;

5. **Deny or quash** Defendants' deposition of Kathleen Caldwell pending a mutually agreeable date for said deposition;
6. **Deny** Defendants' request for sanctions, as this Court has not issued any order related to discovery abuse in this case.

DATED this 27th day of May, 2008.



Arthur B. Macomber
Attorney at Law

Arthur B. Macomber

From: Arthur B. Macomber [art@macomberlaw.com]
Sent: Thursday, May 01, 2008 2:15 PM
To: Brent Featherston (Atty)
Subject: Caldwell v Cometto: Meet and Confer

Brent,

We had some discovery Requests from Cometto that I think were due today or tomorrow. David Caldwell is coming in tomorrow to make a final review and sign them, so we should have them back to you then.

I sent you a meet and confer letter dated April 16 related to your client's Answers to our Request for Answer to Interrogatories, which I believe were insufficient, but I have received no response. Please respond by next Tuesday, May 6, or I will need to file a Motion to Compel.

To further the case, it seems to me that the easement road is not a proxy for a dispute amongst neighbors, but that the Easement Agreement did not sufficiently spell out the rights and obligations of the parties, and that disputes will continue to occur, unless you and I can get our clients to firm up those rights and obligations in writing. I am thinking here of culverts, cross-ditching, and other maintenance, including snow storage, which were conditions and circumstances known to the parties when the Easement Agreement was signed but which were not accounted for in the final judgment of the prior cases. As the easement runs with the land, the disputes will continue to trouble future owners, and we are now in a position to construct a solution and avoid these problems. Certainly Mr. Caldwell is not interested in having a dispute with your client over a road, of all things.

Also, I think you will agree it is clear that Judge Michaud's 1998 judgment did not clarify those rights and obligations sufficiently in his acceptance of the stipulated Agreement as is required under Idaho law regarding a final judgment of a land dispute, and that this led directly to the current dispute. I envision more disputes should we not be able to resolve the issues at hand. I think the addition of new language to a reformed easement would assist our clients so that they may all live in peace regarding maintenance and roadwork. As to the thirty foot width, I think that could be culled out of the equation to be handled as a separate issue, along with the quiet title issues related to Cometto's encroachment by his storage of personal items near the roadway that block or prevent full use of the easement by my clients, and his continued alteration of the road itself. If you believe that a reformed easement document would assist us in solving this case, please let me know.

Best regards,
Arthur B. Macomber
Attorney at Law
Coeur d'Alene, Idaho
In-state: 208-664-4700
Toll-free Domestic U.S.: 866-511-1500
Facsimile: 208-664-9933
www.macomberlaw.com

cc: Clients

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*The Offices of:***Featherston Law Firm chtd.***Caldwell
Cometto*

May 9, 2008

Daniel P. Featherston
 Brent C. Featherston*
 Jeremy P. Featherston
 Stephen T. Snedden
 Sandra J. Wruck
 Attorneys at Law

Via Facsimile No. (208) 664-9933

Arthur B. Macomber, Esq.
 408 East Sherman Avenue, Suite 215
 P.O. Box 5203
 Coeur d'Alene, Idaho 83814

Re: Caldwell, et al. v. Cometto - Plaintiffs' Responses to Defendants' First Set of Interrogatories, Requests for Admissions and Requests for Production of Documents

Dear Mr. Macomber:

I have reviewed the Plaintiffs' Responses to Defendants' First Set of Interrogatories, Requests for Admissions and Requests for Production of Documents. The responses are incomplete. You raise objections that are not founded in fact or in law, or supported by rule. The purpose of this correspondence is to provide you with one week to amend the responses and provide adequate responses as required by court rule. Thereafter, my clients will be proceeding with a Motion to Compel and Request for Sanctions pursuant to rule.

I will address the answers by reference to the enumerated requests as follows:

Interrogatory No. 1 - The interrogatory requests that you identify by full name, address and telephone number those parties who are assisting in the answering of the interrogatories. It is incumbent, therefore, in response to that interrogatory, for you to identify exactly who was involved in formulating the responses to Defendants' First Set of Interrogatories, Requests for Admissions and Requests for Production of Documents. As you are well aware, you represent in this matter five (5) different individuals who are named parties. The interrogatory requests you to identify which parties participated in the answers, as well as any agents, representatives, family members or others who may have been delegated the role or duty of answering the interrogatories.

Objections must be based upon the Idaho Rules of Civil Procedure or Idaho Rules of Evidence. You have cited neither and have refused to respond to the question on the basis of "State Bar Ethics Rules" without explanation. That answer is both non-responsive and fails to state an objection to justify the non-response.

Interrogatory No. 2 asks you to identify the names, addresses and telephone numbers of individuals who have knowledge of the facts of this case applicable to both damages, liability or the relief sought in your pleadings. I presume from your earlier position stated in court proceedings that you or your clients must know the factual basis for your clients' claims and the relief you are seeking. As a result, you are obligated under that response to provide the identity of the individuals known to you who have facts or information beneficial or detrimental to your clients' claims.

* Licensed Idaho & Washington

113 S. Second Avenue • Sandpoint, Idaho 83864 • (208) 263-6866 • Fax (208) 263-0400

- 240 -

Exhibit "B"

Arthur B. Macomber, Esq.
May 9, 2008
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Your response cites that the request is unduly burdensome and overly broad. If that were a legitimate objection, then by your logic, applicable parties could never determine who may have facts or information relevant to the claims or relief being sought. You have not raised a legitimate objection and it is incumbent upon you to provide a complete list of those individuals with knowledge of the facts supporting both liability and/or damages or relief sought in your pleadings.

Interrogatory Nos. 3, 4, 5 and 6 ask the Plaintiffs to specifically identify witnesses to be called at trial and the substance of their anticipated testimony, identify expert witnesses and the substance and/or basis for their testimony and to identify exhibits, documents or articles which may be introduced or utilized as exhibits or in support of testimony at trial.

To all four interrogatories, your response raises an objection citing that the court's Uniform Pretrial Order and asserting that you are not required to provide answers to these interrogatories until those Pretrial Order deadlines are reached.

There is no basis for this objection. The Uniform Pretrial Order does not override or dictate the schedule upon which discovery is completed or answers as to be provided to discovery. This "objection" is not based on the Civil Rules or Rules of Evidence and it is quite simply frivolous since any practicing attorney should be well aware the process of discovery should and does occur months prior to trial, not days. Please provide complete and thorough responses to all of the above-identified interrogatories.

You have additionally raised in response to Interrogatory No. 5 that there are multiple subparts that you are counting as a 10-part interrogatory. I have been over this issue previously, and the courts have consistently ruled otherwise. Please be aware and refer your attention to Rule 33 of the Federal Rules of Civil Procedure, which mirrors I.R.C.P. Rule 33. In 1993 the Federal Rules Committee Notes reflect that revisions were made to Rule 33 adding the limitation on interrogatories as seen in Federal Rule 33 and I.R.C.P. 33. In doing so, the Committee noted as follows:

Parties cannot evade this presumptive limitation to the device of joining as subparts questions that seek information about discrete, separate subjects. However, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons, present, and contents be stated separately for each such communication.

Please note that this rule and the committee notes are equally applicable to the interrogatories and specifically Interrogatory No. 5, which asks you and your clients to identify experts by their name and address, expertise, the substance of any testing or analysis performed by them, etc. It is clear that these subparts are all integrally related to the main interrogatory. These are subparts which are integrally related to each other and are, therefore, not discrete, separate subjects.

Arthur B. Macomber, Esq.
May 9, 2008
Page 3

Interrogatory No. 7, with regard to your objection as a two-part interrogatory, please see the preceding section. Further, you have provided no answer to the Interrogatory except by referencing the pleadings filed with the Court. This is an inadequate response. The interrogatory requests specific information. Please answer it as your clients are required to by rule.

Interrogatory No. 8. - With regard to the multiple subpart objection, please see the preceding discussion. Further, you have raised an objection that it calls for a legal conclusion and have referred to the pleadings filed with the court. That latter response is not responsive to the interrogatory, which calls for a specific answer.

As to the objection that the interrogatory inquires as to legal conclusions, a party is entitled to pose interrogatories which probe the factual and legal basis for the opposing party's claims. Furthermore, Interrogatory No. 8, does not request your clients to respond with a legal conclusion. The interrogatory as phrased requests your clients to identify on what legal premise or right or recorded easement or agreement they base any claims of impaired, interfered with or encroached upon easement rights and then to identify the manner in which their rights have been impaired, interfered with or encroached upon in subparts (b) and (c). In other words, the request as phrased does not call for a legal conclusion but merely probes the factual basis of your clients' claims. Your response is inadequate.

Interrogatory No. 9 - With regard to the multiple subparts' objection, please refer to the discussion above.

Interrogatory No. 10 - Your objection asserts that the interrogatory calls for a legal conclusion. Again, you have misconstrued the interrogatory, which asks that your client identify all of the facts and circumstances or legal basis upon which they assert in paragraph 17 of their Complaint that the Comettos have in manner violated Idaho Code § 55-313. Please provide a complete and adequate response without reservation of objections.

Interrogatory No. 11 asserts multiple subparts. Please refer to the preceding discussion. Answer to Interrogatory No. 11 subpart (a) purportedly asserts attorney work product. Please refer carefully to subpart (a) of the interrogatory as propounded. It again asks for your clients to set forth the facts and circumstances upon which they base their allegation that the Defendants did not comply with Idaho Code § 55-313. The interrogatory as phrased does not request or inquire into work product and the objection is not well founded.

Subpart (b) you appear to again assert a work product or attorney client privilege. Please refer carefully to subpart (b) which asks for your clients to articulate the basis for their claims the Comettos did not comply with Idaho Code § 55-313 specifically in light of the Plaintiffs' consent and acceptance to the relocated easement under signature contained in Instrument No. 570303. Nothing in that interrogatory requests for counsel's thought process or assessment of the case. It specifically asks for the Plaintiffs to respond by articulating in what manner the Defendants have violated Idaho law and to articulate facts

Arthur B. Macomber, Esq.
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Page 4

and circumstances to substantiate their claim. Please respond and provide adequate answers to the interrogatory.

Interrogatory No. 11(c) you have refused to answer and provided no objection recognized by court rule. Your objection seems to be that it would create too much work for you or your clients to respond. That, of course, is not recognized by court rules or the Rules of Evidence as an objection or basis for not responding. Furthermore, to the extent your objection is based upon the Court's Uniform Pretrial Order, please refer to the discussion above in which it is clear that the Court's Uniform Pretrial Order does not dictate or override the Rules of Civil Procedure and discovery protocol. Interrogatory No. 11(d) you have refused to respond stating that it is unduly burdensome and oppressive and have argued that it is the Defendants' obligation to have knowledge of these facts, not the Plaintiffs'. Again, this is not a basis for objection and an appropriate response is required under the rules.

Interrogatory Nos. 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21 you have again raised subparts and the forty (40) interrogatory limitation as a basis for objecting to the interrogatories. Please refer to the discussion above and the Rules Committee Notes. Each of those respective interrogatories inquire into separate subject matters for which the subparts ask you to break out your responses to the subject matter. They are not multiple interrogatories contained within one enumerated request. As a result, you have failed to respond in a timely fashion to Interrogatories 12 through 21, inclusive, with any basis for objection.

Additionally, to the extent that you have raised objections asserting attorney-client privilege, attorney work product or an objection that Plaintiffs are asked to reach a legal conclusion in response to Interrogatories 12 through 21, please refer carefully to each interrogatory. They are drafted in such a manner as to call for your clients, the Plaintiffs, to identify all facts and circumstances upon which they base their claims and upon which the assertions contained in their petition filed with the Court are based. They are not interrogatories which inquire into your thought processes, as their counsel, nor do they inquire into attorney-client privilege. You have failed to identify either such privilege or the manner in which it is invaded by the interrogatories as phrased.

Additionally, each interrogatory is drafted so as to request articulation by your clients of the factual basis of their claims and assertions as set forth in the petition filed with the Court. They do not ask the Plaintiffs to reach or opine as to any legal conclusion. Therefore, that is not a legitimate objection to the interrogatories as phrased. Please provide complete and adequate answers without reservation of objections as stated in your answers to date.

Please note that your clients were also asked to respond to several Requests for Admissions. In response to Request for Admission Nos. 4, 5 and 6, your clients have failed to answer citing that they lack sufficient information to admit or deny the truth of the admission. Please note that L.R.C.P. Rule 36(a) provides that as to each matter to which an admission is requested, your clients are required to set forth separately an answer admitting or denying the truth of the facts asserted in the request. Specifically, the rule provides in pertinent part as follows:

Arthur B. Macomber, Esq.
May 9, 2008
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The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.

LR.C.P. 36(a)(2007)

Your clients have failed to admit or deny Requests for Admission Nos. 4, 5, and 6, and have failed to comply with Rule 36(a) by setting forth a legitimate basis for failing to answer and stating the reasonable inquiry made by you or your clients. Therefore, these Requests for Admissions are hereafter deemed admitted. You will note that the rule requires an adequate and complete response to be provided within thirty (30) days. Those thirty (30) days have elapsed and the Requests for Admission Nos. 4, 5 and 6 are by operation of rule deemed admitted.

Request for Production No. 1 called for you to produce all documents and materials anticipated to be presented at trial or upon which you based or referred to in preparation of your answers to the set of discovery. You have objected to it and claim an attorney work product doctrine, which has no application under these circumstances. Your clients are required to produce the documents they intend to present at trial. Further, you have asserted that you are not required until fourteen (14) days prior to trial under the Court's Uniform Pretrial Order to produce documents. This, again, is not a basis for objection. Please amend your answer and provide the documents immediately.

Request for Production No. 2 - This request asks each of the Plaintiffs to produce materials, documents and records related to their purchase and/or acquisition and depiction of the properties which they claim are served by the easement which is directly at issue in this litigation. Your response is to object claiming that that is a burdensome and oppressive request and irrelevant to the actions. Again, I suggest that you look carefully at how the Rules of Evidence and Civil Procedure apply to discovery. My clients are entitled to discovery matters which are not only relevant, but matters which may not be admissible but could lead to relevant and admissible testimony or evidence. Furthermore, I cannot image anything more relevant to the litigation at hand concerning your clients' claim of easement rights across my clients' properties than to be able to review the Plaintiffs' records, title reports, closing statements and other documents concerning their purchase and acquisition of the real property which is claimed to be the dominant estate served by the easement. It is not an extremely broad request. It is very specific and gives numerous examples. Please read the request again and respond accordingly.

Arthur B. Macomber, Esq.
May 9, 2008
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Request for Production No. 3 is a specific request related to identification and production of expert witness testimony, their reports, opinions, and supporting documentation. You have not responded at all to the request as phrased.

Request for Production No. 4 inquires into written or recorded statements of witnesses and cross references Interrogatories Nos. 3 and 4. You have objected claiming that this is a premature request. You have not provided a foundation or factual or legal basis for that objection. It is puzzling that Plaintiffs are still trying to determine what their case is based upon seven (7) months after filing this lawsuit, but that is not a basis for objection or non-response to discovery. You are required by rule to provide that information and the Defendants are entitled to it in order to prepare for trial in early September.

Request for production No. 5 asks you to produce specific documents pertaining to or supporting your answers to the Interrogatories. You have not provided specific or complete answers and they are required.

Finally, Mr. Macomber, you have failed to sign the answers to discovery, though your client did appear to sign them before a notary public. This is a direct violation of several Rules of Civil Procedure. Specifically, all objections must be signed by counsel and as well all answers to discovery must be signed by counsel of record. See I.R.C.P. 26(f)(2007). Please note that subsection (2) provides that a certification made in violation of Rule 26(f) requires the Court to impose a sanction upon that party or counsel, including fees incurred. You must comply with the rule in order to avoid that sanction.

Given the utter disregard on your and your clients' part to the Idaho Rules of Civil Procedure, I have no other choice but to request that you provide complete and unabridged answers to the discovery and each subpart of the discovery by Friday, May 16, 2008. Thereafter, I will proceed with a Motion to Compel and request sanctions.

Thank you for your attention to this matter.

Sincerely,

FEATHERSTON LAW FIRM, CHTD.


BRENT C. FEATHERSTON
Attorney at Law

BCF/clis

Enclosure

cc: Mr. and Mrs. Tom Cometto

1993 Amendments

Purpose of Revision. The purpose of this revision is to reduce the frequency and increase the efficiency of interrogatory practice. The revision is based on experience with local rules. For ease of reference, subdivision (a) is divided into two subdivisions and the remaining subdivisions renumbered.

Subdivision (a). Revision of this subdivision limits interrogatory practice. Because Rule 26(a)(1)-(3) requires disclosure of much of the information previously obtained by this form of discovery, there should be less occasion to use it. Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable. Moreover, because the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries.

Each party is allowed to serve 25 interrogatories upon any other party, but must secure leave of court (or a stipulation from the opposing party) to serve a larger number. Parties cannot evade this presumptive limitation through the device of joining as "subparts" questions that seek information about discrete separate subjects. However, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.

As with the number of depositions authorized by Rule 30, leave to serve additional interrogatories is to be allowed when consistent with Rule 26(b)(2). The aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device. In many cases it will be appropriate for the court to permit a larger number of interrogatories in the scheduling order entered under Rule 16(b).

Unless leave of court is obtained, interrogatories may not be served prior to the meeting of the parties under Rule 26(f).

When a case with outstanding interrogatories exceeding the number permitted by this rule is removed to federal court, the interrogating party must seek leave allowing the additional interrogatories, specify which twenty-five are to be answered, or resubmit interrogatories that comply with the rule. Moreover, under Rule 26(d), the time for response would be measured from the date of the parties' meeting under Rule 26(f). See Rule 81(c), providing that these rules govern procedures after removal.

Subdivision (b). A separate subdivision is made of the former second paragraph of subdivision (a). Language is added to paragraph (1) of this subdivision to emphasize the duty of the responding party to provide full answers to the extent not objectionable. If, for example, an interrogatory seeking information about numerous facilities or products is deemed objectionable, but an interrogatory seeking information about a lesser number of



May 15, 2008

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Brent C. Featherston
Featherston Law Firm, Chtd.
113 South Second Avenue
Sandpoint, ID 83864

Re: Caldwell v. Cometto: Your letter dated May 9 on Plaintiff's Responses

Dear Mr. Featherston,

I am in receipt of your letter dated May 9 in which you demand I respond to multiple objections to my client's Answers to Interrogatories.

Your six-page letter raises several issues that deserve addressing, and I have been researching the answers you require. Because of the numerous subparts to your Request for Answers to Interrogatories, Requests for Admissions, and Requests for Production of Documents, I would like another week to respond to your concerns.

I appreciate your consideration.

If you agree to this minor extension, please sign below and return this to my office my facsimile.

Thank you for your understanding.

Sincerely,

Arthur B. Macomber
Attorney at Law

Cc: David Caldwell, et al.

I agree to this extension of time until May 23.

Brent Featherston, Defendant's Counsel

P.O. Box 5203
408 E. Sherman Avenue, Suite 215
Coeur d'Alene, Idaho 83814
Phone: (208) 664-4700
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Fax

To: Brent C. Featherston

From: Arthur B. Macomber
Law Office of Arthur B. Macomber
408 E. Sherman Avenue, Ste. 215
Coeur d'Alene, Idaho 83814

Fax: 1-208-263-0400

Date: May 15, 2008

Time: 5:30 a.m. PST

Phone: 1-208-263-6866


Pages: Two, including this cover sheet

Matter #: Caldwell v. Cometto

CC:

Re: Request for Extension of Time

Urgent For Review Please File with the Court Please Reply
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Arthur B. Macomber
Attorney for Plaintiffs

- 248 -

Please call 208-664-4700 if there were any problems with this transmission.

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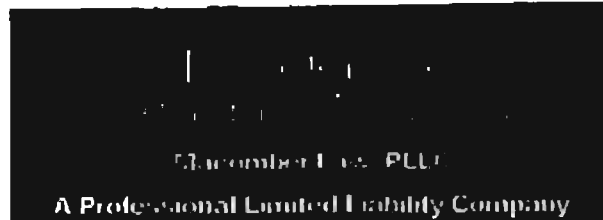
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Request for Extension of Time

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Urgent For Review Please File with the Court Please Reply

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Arthur B. Macomber
Attorney for Plaintiffs

for night

Westlaw

225 F.R.D. 658
225 F.R.D. 658, 60 Fed.R.Serv.3d 945
(Cite as: 225 F.R.D. 658)

P Swackhammer v. Sprint Corp. PCS
D.Kan.,2004.

United States District Court,D. Kansas.
Dena SWACKHAMMER, Plaintiff,
v.
SPRINT CORPORATION PCS, Defendant.
No. 03-2548-CM-DJW.

Dec. 13, 2004.


Background: In an employment discrimination action, former executive filed motion to compel employer to respond to certain interrogatories and to produce three documents identified in employer's amended privilege log.

Holdings: The District Court, Waxse, United States Magistrate Judge, held that:

- (1) interrogatory seeking information from employer regarding other executives terminated in the last five years for having engaged in conduct similar to alleged conduct of former executive was not overbroad;
- (2) those subparts of interrogatories which related to a common theme would not count as separate interrogatories for purposes of scheduling order's numerical limit, while those subparts which were not related to a common theme would be counted as separate interrogatories; and
- (3) as narrowed to written discipline of certain executives, former executive's interrogatory seeking information from employer regarding those executives who had been disciplined but not terminated for certain specified actions enumerated in subparts of the interrogatory was not overbroad.

Order in accordance with opinion.

West Headnotes

[1] Federal Civil Procedure 170A  1483

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)1 In General
170Ak1483 k. Objections and Grounds

for Refusal. Most Cited Cases
In most circumstances, where a moving party fails to address an objection in its motion to compel answers to interrogatories, court will allow the objection to stand, even though the party asserting the objection failed to address it or raise it in its response to the motion to compel; however, the objection must have some merit on its face before the court will uphold it.

[2] Federal Civil Procedure 170A  1483

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)1 In General
170Ak1483 k. Objections and Grounds


for Refusal. Most Cited Cases
Unless an interrogatory is overly broad on its face, the party resisting discovery has the burden to support its overbreadth objection, including any objection to the temporal scope of the request.

[3] Federal Civil Procedure 170A  1502

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1502 k. Grounds of Claim or Defense. Most Cited Cases

In employment discrimination action, former executive's interrogatory seeking information from employer regarding other executives terminated in the last five years for having engaged in conduct similar to alleged conduct of former executive was

not overbroad; request was limited to executives and to violations similar to those that former executive allegedly committed, and was limited in its temporal scope.

[4] Federal Civil Procedure 170A  1271

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1271 k. Proceedings to Obtain. Most Cited Cases
Party objecting to discovery as vague or ambiguous has the burden to show such vagueness or ambiguity.

[5] Federal Civil Procedure 170A  1531

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)3 Answers; Failure to Answer
170Ak1531 k. In General. Most Cited Cases
A party responding to discovery requests should exercise reason and common sense to attribute ordinary definitions to terms and phrases utilized in interrogatories.

[6] Federal Civil Procedure 170A  1502

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1502 k. Grounds of Claim or Defense. Most Cited Cases
In employment discrimination action, former executive's interrogatory seeking information from employer regarding other executives terminated in the last five years for having engaged in conduct similar to alleged conduct of former executive was not vague or ambiguous; interrogatory used the very same language that employer used in its Equal Employment Opportunity Commission (EEOC) position statement.

[7] Federal Civil Procedure 170A  1488.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)1 In General
170Ak1488 Number, Form and Importance
170Ak1488.1 k. In General. Most Cited Cases
Those subparts of interrogatory which related to a common theme would not count as separate interrogatories for purposes of scheduling order's numerical limit, while those subparts which were not related to a common theme would be counted as separate interrogatories. Fed.Rules Civ.Proc.Rule 33(a), 28 U.S.C.A.

[8] Federal Civil Procedure 170A  1483

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)1 In General
170Ak1483 k. Objections and Grounds for Refusal. Most Cited Cases
Failure to timely assert an objection to an interrogatory results in waiver of the objection. Fed.Rules Civ.Proc.Rule 33(b)(4), 28 U.S.C.A.

[9] Federal Civil Procedure 170A  1502

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1502 k. Grounds of Claim or Defense. Most Cited Cases
As narrowed to written discipline of certain executives, former executive's interrogatory seeking information from employer regarding those executives who had been disciplined but not terminated for certain specified actions enumerated in subparts of the interrogatory was not overbroad.

[10] Federal Civil Procedure 170A



1501

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1501 k. In General. Most Cited

Cases

In ruling on an undue burden objection to interrogatory, court must keep in mind that discovery should be allowed unless the claimed hardship is unreasonable in the light of the benefits to be secured from the discovery.

[11] Federal Civil Procedure 170A



1483

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)1 In General
170Ak1483 k. Objections and Grounds

for Refusal. Most Cited Cases

Party objecting to interrogatory on grounds of undue burden must provide an affidavit or other evidentiary proof of the time or expense involved.

[12] Federal Civil Procedure 170A



1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1278 k. Failure to Respond;
Sanctions. Most Cited Cases

Before court may impose discovery sanctions, the non-moving party must be afforded the opportunity to be heard, but an actual hearing is not necessary, and court may consider the issue of sanctions on written submissions; written submission requirement is met where the moving party requests sanctions in its motion or supporting brief and the opposing party is given the opportunity to submit a brief in response. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

[13] Federal Civil Procedure 170A



1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1278 k. Failure to Respond;

Sanctions. Most Cited Cases

To the extent possible, discovery sanctions should be imposed only upon the person or entity responsible for the sanctionable conduct; sanctioning of a party, as opposed to the party's counsel, requires specific findings that the party was aware of the wrongdoing. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

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Amy Rush, Sharon A. Coberly, Sonnenschein, Nath & Rosenthal, Kansas City, MO, for Defendant.

MEMORANDUM AND ORDER

WAXSE, United States Magistrate Judge.

Pending before the Court is Plaintiff's Motion to Compel (doc. 67). Plaintiff seeks to compel Defendant to respond to certain interrogatories and to produce three documents identified in Defendant's Amended Privilege Log that Plaintiff contends are not privileged. Plaintiff indicates in her reply brief that all issues relating to the Amended Privilege Log have been resolved. The Court will therefore address only the interrogatory answers.

I. Introduction

This is an employment discrimination action brought pursuant to Title VII of the Civil Rights Act of 1964, as amended. Plaintiff asserts claims for gender discrimination, alleging that while she was employed as Vice-President of Defendant's Strategic Business Unit, she was subject to disparate treatment.^{EN1} Plaintiff also alleges that she was terminated from her employment with Defendant in October 2002 because of her gender.^{EN2} She claims that other similarly situated vice-presidents of Defendant were not terminated even though they violated the same policies that she allegedly violated.^{EN3}

FN1. Complaint (doc. 1), ¶¶ 10, 11.

FN2. *Id.*, ¶ 22.

FN3. *Id.*, ¶¶ 20, 21.

II. Plaintiff's First Interrogatories

Plaintiff moves to compel answers to Plaintiff's First Interrogatory Nos. 4 and 5. Defendant responded to these interrogatories on April 9, 2004. Then, on May 11, 2004, Defendant provided supplemental responses. The supplemental responses are at issue in this Motion to Compel.

A. Defendant's "General Objections"

Before turning to the specific responses and objections made by Defendant, the Court must address Defendant's "General Objections." Defendant asserted five "General Objections" to each of the First Interrogatories. It also asserted specific objections to each individual interrogatory. One of Defendant's "General Objections" was overbreadth. Defendant reasserted that particular objection in its individual responses to First Interrogatory Nos. 4 and 5. With the exception of the overbreadth objection, Defendant's General Objections are not discussed by either party in their briefs.

[1] In most circumstances, where a moving party fails to address an objection in its motion to compel, the Court will allow the objection to stand, even though the party asserting the objection failed to address it or raise it in its response to the motion to compel.^{FN4} The objection, however, must have some merit on its face before the Court will uphold it.

FN4. See *Sonnino v. Univ. of Kan. Hosp. Auth.*, 221 F.R.D. 661, 671 n. 37 (D.Kan.2004). The party filing the motion to compel has the initial burden to address each objection in its motion to compel. *Id.* By doing so, the moving party brings the objection "into play" and places the burden on the objecting party to support its objection when it responds to the motion to compel. *Id.* If, however, the moving party fails to address a particular objection in its motion to compel, "the objecting party need

not raise it, and the objection will stand." *Id.*

Here, the first four General Objections are meritless on their face. In each, Defendant states that it "objects to this Interrogatory to the extent that" The Court recently summarized its position on such objections as follows:

This Court has on several occasions disapproved of the practice of asserting a general objection "to the extent" it may apply to particular requests for discovery. This Court has characterized these types of objections^{*661} as worthless for anything beyond delay of the discovery. Such objections are considered mere hypothetical or contingent possibilities, where the objecting party makes no meaningful effort to show the application of any such theoretical objection to any request for discovery. Thus, this Court has deemed such ostensible objections waived or [has] declined to consider them as objections.^{EN5}

FN5. *Id.* at 666-67 (internal quotations and citations omitted).

Thus, even though Plaintiff failed to address General Objections No. 1-4 in her Motion to Compel, those objections are meritless and will not be allowed to stand.

The remaining General Objection is Objection No. 5, which states: "Sprint objects to this Interrogatory on the grounds that it is overly broad, burdensome and harassing." Neither party addresses the burdensome and harassing General Objections in their briefs.^{FN6} Accordingly, the Court must allow these objections to stand if they have any merit on their face. The Court, however, does not find that these objections have merit, as there is nothing facially harassing or burdensome about the interrogatories at issue. The Court, therefore, will not allow these General Objections to stand.

FN6. As noted, above, Defendant did reassert its overbreadth objection in response to First Interrogatory Nos. 4 and 5, and the parties have fully briefed that objection. The Court will therefore address that specific objection in its discussion below.

(doc. 71) at p. 3, n. 2 (emphasis added).

The Court will now turn to the specific objections and responses made by Defendant to First Interrogatory Nos. 4 and 5.

B. Plaintiff's First Interrogatory No. 4

This interrogatory provides as follows:

The June 12, 2003 Letter states that "Sprint has consistently terminated executives found to have engaged in similar conduct with vendors." In the last five years, have you *not* terminated a Sprint executive who "engaged in similar conduct with vendors?" If so, identify:

- a. The name and gender of the executive;
- b. State the specific section of Sprint's Principles of Business Conduct the conduct violated.

The June 12, 2003 letter referred to in this interrogatory is a letter Defendant sent to the Equal Employment Opportunity Commission ("EEOC") responding to the allegations asserted by Plaintiff in her EEOC charge ("Defendant's EEOC Position Statement").

Defendant objected to this interrogatory on grounds that it is vague, ambiguous, and overly broad. Defendant went on to state, however, that "without waiving these objections ... [Defendant] has consistently terminated executives found to have engaged in improper conduct with vendors."

Before the Court analyzes Defendants' objections, the Court will address Defendants' representation that it intends to provide a "corrected" answer to this interrogatory. In its response to the Motion to Compel Defendant indicates that it erroneously answered that it has consistently terminated executives for engaging in "improper conduct with vendors." Defendant indicates that it plans to immediately serve a corrected response, restating its objections but stating that without waiving those objections, Defendant "has consistently terminated executives found to have engaged in similar conduct." ^{FN7}

FN7. Def.'s Resp. to Pl.'s Mot. to Compel

Regardless of how Defendant phrases this sentence, it is still an incomplete and non-responsive answer. The interrogatory asks for a "yes" or "no" answer, and if the question is answered in the affirmative, Defendant is asked to provide additional information. Defendant's response, regardless of which terms it uses, does not fully respond to the questions asked.

The Court will now proceed to analyze the merits of Defendant's objections to this interrogatory.

1. Overbreadth objection

[2][3] Unless an interrogatory is overly broad on its face, the party resisting discovery has the burden to support its overbreadth objection.^{FN8} This includes any objection*662 to the temporal scope of the request.^{FN9} The Court does not find this interrogatory overly broad on its face. It is limited to executives and to violations similar to those that Plaintiff allegedly committed. Moreover, it is limited in its temporal scope. It covers only a five-year time period, i.e., the five years preceding Defendant's response. Although the Complaint does not specify the time period during which the alleged discrimination took place, it does allege that Plaintiff's discriminatory termination occurred in October 2002. Thus, the interrogatory would extend to approximately three years before, and two years after, the claimed discriminatory termination. Discovery requests covering similar time periods have been upheld in employment discrimination cases as reasonable and not overly broad.^{FN10} Furthermore, it is well established that the scope of discovery is particularly broad in employment discrimination cases^{FN11} and is not to be "narrowly circumscribed."^{FN12}

FN8. Hammond v. Lowe's Home Ctrs., Inc., 216 F.R.D. 666, 672 (D.Kan.2003); McCoo v. Denny's, Inc., 192 F.R.D. 675, 686 (D.Kan.2000) (citations omitted).

FN9. McCoo, 192 F.R.D. at 686 (citing Daneshvar v. Graphic Tech., Inc., No. 97-2304-JWL, 1998 WL 726091, at *1 (D.Kan. Oct. 9, 1998)).

FN10. See, e.g., Owens v. Sprint/United Mgmt. Co., 221 F.R.D. 649, 655-56 (D.Kan.2004) (allowing discovery into period two and one-half years prior to the alleged discrimination); Garrett v. Sprint PCS, No. 00-2583-KHV, 2002 WL 181364, at *3 (D.Kan. Jan.31, 2002) (allowing discovery into three-year period prior to the alleged discrimination to the present); Equal Empl. Opportunity Comm'n v. Kansas City S. Ry., 195 F.R.D. 678, 680 (D.Kan.2000) (allowing discovery into four years prior to and one year after alleged discrimination); Raddatz v. Standard Register Co., 177 F.R.D. 446, 448 (D.Minn.1997) (allowing discovery into two-year period after termination).

FN11. Gomez v. Martin Marietta Corp., 50 F.3d 1511, 1520 (10th Cir.1995) (citing Scales v. J.C. Bradford & Co., 925 F.2d 901, 906 (6th Cir.1991)).

FN12. Id. (citing Rich v. Martin Marietta Corp., 522 F.2d 333, 343-44 (10th Cir.1975)).

As the interrogatory is not overly broad on its face, Defendant has the burden to demonstrate it is overbroad. Defendant, however, does not explain why it contends it is overbroad. In fact, Defendant does not even address its overbreadth objection in its response to the Motion to Compel. Accordingly, the Court will overrule Defendant's overbreadth objection.

2. Vague and ambiguous objection

Although Defendant does not expressly identify the language in this interrogatory that it finds vague and ambiguous, the Court assumes from the arguments Defendant makes in its response to the Motion to Compel that it considers the terms "consistently terminated" and "similar conduct" to be vague and ambiguous.

[4][5] The party objecting to discovery as vague or ambiguous has the burden to show such vagueness or ambiguity.^{FN12} A party responding to discovery requests "should exercise reason and common sense to attribute ordinary definitions to terms and phrases

utilized in interrogatories."^{FN14}

FN13. McCoo, 192 F.R.D. at 694 (citing Pulsecard, Inc. v. Discover Card Servs., Inc., 168 F.R.D. 295, 310 (D.Kan.1996)).

FN14. Id.

[6] The Court does not find that Defendant has met its burden to show how this interrogatory is vague or ambiguous. Plaintiff is simply asking whether, in the last five years, Defendant has ever failed to terminate an executive who engaged in conduct similar to the conduct for which Defendant asserts it terminated Plaintiff. The Court finds nothing vague or ambiguous about such an inquiry.

Furthermore, the interrogatory uses the very same very same language that Defendant used in its EEOC Position Statement. There, Defendant stated: "[Plaintiff] claims the decision to terminate her employment was based on her sex. She is wrong. *Sprint has consistently terminated executives found to have engaged in similar conduct with vendors.*"^{FN15} The Court agrees with Plaintiff that it is disingenuous for Defendant to claim it does not understand this language when it is the very same language that Defendant used in its formal response to Plaintiff's EEOC charge.

FN15. Def.'s EEOC Position Statement, attached as Ex. 7 to Pl.'s Mot. to Compel (doc. 67) (emphasis added).

*663 Finally, Defendant states in its response to the Motion to Compel that "[i]t is Sprint's belief and Sprint's position in this case that all executives 'found to have engaged in similar conduct with vendors,' have been terminated."^{FN16} If Defendant is able to make such a representation in its brief, then it is clearly able to understand and answer this interrogatory. In light of the above, the Court overrules Defendant's vague and ambiguous objection to First Interrogatory No. 4.

FN16. Def.'s Resp. to Pl.'s Mot. to Compel (doc. 71) at p. 3.

To summarize, the Court overrules Defendant's objections to First Interrogatory No. 4 and finds

Defendant's answer that it has "consistently terminated executives" to be non-responsive and incomplete. Accordingly, the Court will grant the Motion to Compel as to this interrogatory. Defendant shall serve, without objections, a full and complete amended answer to this interrogatory within *twenty (20) days* of the date of filing of this Order.

C. Plaintiff's First Interrogatory No. 5

This interrogatory provides as follows:

The June 12, 2003 Letter states that "Sprint has consistently terminated executives found to have engaged in similar conduct with vendors." In the last five years, have you taken an adverse employment action *other than termination* against a Sprint executive who "engaged in similar conduct with vendors?" For each executive against whom an adverse employment action other than termination has been taken for "engag[ing] in similar conduct with vendors," state:

- a. The name and gender of the executive;
- b. The specific section of Sprint's Principles of Business Conduct the conduct violated.
- c. The date on which the conduct occurred;
- d. The adverse employment action taken.

Defendant asserted the same overly broad, vague, and ambiguous objections to this interrogatory that it made to First Interrogatory No. 4. It also made the same statement, that, without waiving those objections, Defendant "has consistently terminated executives found to have engaged in improper conduct with vendors."

The parties raise arguments similar to those raised above with respect to First Interrogatory No. 4. For the same reasons set forth above, the Court overrules Defendant's objections to this interrogatory and finds Defendant's response that it has consistently terminated executives who have engaged in improper conduct with vendors (or similar conduct) to be incomplete and non-responsive. The Court therefore grants the Motion to Compel as to this interrogatory. Defendant shall serve, without objections, a full and

complete amended answer to this interrogatory within *twenty (20) days* of the date of filing of this Order.

III. Plaintiff's Fourth Interrogatory No. 8

The only interrogatory at issue in the Fourth Set of Plaintiff's interrogatories is No. 8, which asks Defendant to identify those executives who have been disciplined but not terminated for certain specified actions enumerated in subparts (a) through (e) of the interrogatory. For example, subpart (a) asks Defendant to identify executives who have been disciplined but not terminated for failing to act when the executive had knowledge that a subordinate had provided confidential bid information to a vendor. Subpart (b) asks Defendant to identify executives disciplined but not terminated for soliciting and/or encouraging vendor-paid gifts and entertainment.

Defendant objected to answering this interrogatory on the basis that it is overly broad and unduly burdensome. It also objected on the basis that Plaintiff had exceeded the maximum number of interrogatories allowed by the Scheduling Order. These objections were timely asserted with Defendant's responses, on August 8, 2004.^{FN17} More than two weeks later, on August 26, 2004, defense counsel sent Plaintiff's counsel a letter and for the first time asserted a relevancy objection. The letter was sent after the *664 thirty-day deadline for responding to the interrogatories had passed.

FN17. See Certificate of Service (doc. 63).

1. Objection that Plaintiff has exceeded the maximum number of interrogatories

Defendant objected to Plaintiff's Fourth Interrogatory No. 8 and all other interrogatories in the Fourth Set, except for Fourth Interrogatory No. 1, on the basis that Plaintiff had exceeded the maximum of thirty-five interrogatories, the limit set forth in the Scheduling Order. During the parties' attempts to resolve this discovery dispute, Plaintiff agreed to withdraw Fourth Interrogatory Nos. 9, 10, and 12. She also agreed to withdraw subpart (a) to Fourth Interrogatory 12 and all subparts to Fourth Interrogatory No. 13. In turn, Defendant agreed to answer Fourth Interrogatory Nos. 2-7, subpart (b) to Fourth Interrogatory No. 11, and Interrogatory No.

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13 (as revised without its subparts). Defendant, however, still objects to responding to Fourth Interrogatory No. 8 on the basis that Plaintiff has exceeded the maximum number allowed. Thus, the Court must decide whether the total number of interrogatories in the First, Second, and Third Sets, in addition to Fourth Interrogatory Nos. 1-7, 11(b), and 13 (as revised, with no subparts), exceed s the maximum, such that Defendant should be relieved of the obligation to answer Fourth Interrogatory No. 8.

Paragraph II.d. the Scheduling Order provides that each party may not propound more than thirty-five interrogatories, inclusive of subparts, to any other party.^{FN18} In addition, Federal Rule of Civil Procedure 33(a), by its express terms, makes it clear that each interrogatory served, including any "discrete subparts," is to be counted against the numerical limit of interrogatories to be served.^{FN19} Rule 33(a) does not define the term "discrete subparts," and courts have struggled to interpret the term's meaning.

FN18. See Scheduling Order (doc. 13), ¶ II.c.

FN19. Fed.R.Civ.P. 33(a) ("Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts, to be answered by the party served.")

In *Williams v. Board of County Commissioners of the Unified Government of Wyandotte County and Kansas City, Kansas*,^{FN20} this Court addressed how the number of interrogatories is calculated, as follows:

FN20. 192 F.R.D. 698, 701 (D.Kan.2000).

Interrogatories often contain subparts. Some are explicit and separately numbered or lettered, while others are implicit and not separately numbered or lettered. Extensive use of subparts, whether explicit or implicit, could defeat the purposes of the numerical limit contained in Rule 33(a), or in a scheduling order, by rendering it meaningless unless each subpart counts as a separate interrogatory. On the other hand, if all subparts count as separate interrogatories, the use of interrogatories might be unduly restricted or requests for increases in the

numerical limit might become automatic.^{FN21}

FN21. *Id.*

The Court noted that the Advisory Committee had addressed this issue in amending Rule 33 and had provided the following guidance as to when subparts should and should not count as separate interrogatories:

Each party is allowed to serve 25 interrogatories upon any other party, but must secure leave of court (or stipulation from the opposing party) to serve a larger number. Parties cannot evade this presumptive limitation through the device of joining as "subparts" questions that seek information about discrete separate subjects. However, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.^{FN22}

FN22. *Id.* (quoting Advisory Committee Note, 146 F.R.D. 401, 675-76 (Fed.1993)).

Finally, the Court observed that an interrogatory containing subparts directed at eliciting details concerning a "common theme" should generally be considered a single question.^{FN23} On the other hand, an interrogatory *665 which contains subparts that inquire into discrete areas should, in most cases, be counted as more than one interrogatory.^{FN24}

FN23. *Id.* (quoting 8A Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure, § 2168.1 at 261 (2d ed.1994)).

FN24. *Id.* (quoting Wright, Miller & Marcus, *supra*).

[7] With these standards in mind, the Court must determine whether the interrogatories in dispute exceed the numerical limit. The Court finds that, with the exception of Fourth Interrogatory No. 7, the subparts of the interrogatories at issue all relate to a common theme. The subparts in Fourth Interrogatory No. 7 do not relate to a common theme, and should be considered three separate interrogatories. Thus, without taking into consideration Fourth

Interrogatory No. 8, the Court finds that Plaintiff has propounded only nineteen interrogatories. Turning to the disputed Fourth Interrogatory No. 8, the Court finds that it contains five subparts that are not related to a common theme, and that it should therefore be counted as five separate interrogatories. This brings the total of interrogatories to twenty-four, well within the maximum number of thirty-five. The Court therefore overrules this objection to Fourth Interrogatory No. 8.

2. Relevancy objection

As noted above, Defendant did not assert its relevancy objection with its initial responses and waited until several weeks after the deadline for responding to assert the objection. Plaintiff argues that Defendant has waived the objection by not timely asserting it. Defendant concedes that its relevancy objection was not asserted until after the deadline, but argues that it was not required to timely assert the objection because it had already asserted its objection that Plaintiff had exceeded the number of interrogatories allowed. Defendant argues that it was not required to provide all of its objections "up front."

[8] The Court disagrees with Defendant, and holds that Defendant has waived its relevancy objection. It is well settled that the failure to timely assert an objection to an interrogatory results in waiver of the objection. Federal Rule of Civil Procedure 33(b)(1) provides that "[t]he party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories." ^{FN21} Subsection (b)(4) of the Rule further provides that "[a]ny ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown." ^{FN26} The Rule makes no exception for untimely objections merely because a timely objection to the number of interrogatories has been lodged. Accordingly, the Court deems Defendant's relevancy objection waived, and therefore overrules it.

FN25.Fed.R.Civ.P. 33(b)(3).

FN26.Fed.R.Civ.P. 33(b)(4).

3. Overbreadth objection

[9] Defendant argues that Fourth Interrogatory No. 8 is overbroad because it seeks identification of *all* Sprint executives in every department and for an unlimited time period. In her reply brief, Plaintiff agrees to limit the interrogatory to written discipline of Sprint PCS employees in "grade E16 through the president" and to the time period 1998 to the present. Defendant does not demonstrate how the interrogatory-as narrowed by Plaintiff-continues to be overly broad. Plaintiff's more narrowly tailored version of the interrogatory appears reasonable on its face, and Defendant fails to meet its burden to show how the interrogatory is objectionable.^{FN27} The Court will therefore overrule Defendant's overbreadth objection.

FN27. See *Hammond v. Lowe's Home Ctrs., Inc.*, 216 F.R.D. 666, 672 (D.Kan.2003) (unless interrogatory is overly broad on its face, objecting party has the burden to support its overbreadth objection).

4. Undue burden objection

In support of its undue burden objection, Defendant asserts that it does not organize its investigative files according to the specific conduct identified in subparts (a) through (e) of this interrogatory or according to the rank of the employee being investigated. Defendant contends that in order to answer this interrogatory it would be forced "to spend significant time manually culling through all its investigative and Human Resource files, which number in the thousands, to identify *666 first any individuals who had been investigated for each alleged category of conduct and then to spend more time reviewing separate personnel files in another department to determine whether the individual was a Sprint executive and, if so, the outcome of the investigation."^{FN28}

FN28. Def.'s Resp. to Pl.'s Mot. to Compel (doc. 71) at p. 6.

[10][11] In ruling on an undue burden objection, the Court must keep in mind that discovery should be allowed unless the claimed hardship is unreasonable in the light of the benefits to be secured from the discovery.^{FN22} As the party asserting this objection, Defendant has the burden to show not only undue

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burden or expense, but that the burden or expense is unreasonable in light of the benefits to be secured from the discovery.^{FN30} This burden typically imposes an obligation on the objecting party to provide an affidavit or other evidentiary proof of the time or expense involved.^{FN31}

FN29.Hammond, 216 F.R.D. at 674; Snowden by and through Victor v. Connaught Labs., Ltd., 137 F.R.D. 325, 332-33 (D.Kan.1991).

FN30.Hammond, 216 F.R.D. at 674.

FN31.Waddell & Reed Fin., Inc. v. Torchmark Corp., 222 F.R.D. 450, 454 (D.Kan.2004); Sommino v. Univ. of Kan. Hosp. Auth., 220 F.R.D. 633, 653 (D.Kan.2004).

Here, Defendant submits no affidavit or evidentiary proof of the burden involved in answering this interrogatory. Nor does it provide an estimate of the time that it would take Defendant to review its investigative and Human Resources files; Defendant merely alleges that it would be required to spend "significant time" reviewing the files. The Court cannot find that Defendant has met its burden of showing how responding to this interrogatory would cause undue burden. The Court therefore overrules Defendant's undue burden objection.

In light of the above, the Court grants the Motion to Compel with respect to Fourth Interrogatory No. 8, as narrowed by Plaintiff. As narrowed, it shall apply only to written discipline of Sprint PCS employees in "grade E16 through the president" and to the time period 1998 to the present. Defendant shall serve, without objections, a full and complete amended answer to this narrowed version of the interrogatory within *twenty (20) days* of the date of filing of this Order.

IV. Sanctions

The Court will now consider the issues of sanctions. Although Plaintiff does not request sanctions in her motion, the Court finds that an award might be appropriate here, as the Court is granting the Motion to Compel.

Federal Rule of Civil Procedure 37(a)(4) governs the imposition of sanctions in connection with motions to compel. Subsection (a)(4)(A) provides that when a motion to compel is granted, "the court *shall*, after affording an opportunity to be heard, require the party ... whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion including attorney's fees, unless the court finds that ... the opposing party's ... response or objection was substantially justified, or that other circumstances make an award of expenses unjust."^{FN32}

FN32.Fed.R.Civ.P. 37(a)(4)(A) (emphasis added).

[12] The Court has granted the Motion to Compel as to First Interrogatory Nos. 4 and 5. It has also granted the Motion as to Fourth Interrogatory No. 8, taking into account Plaintiff's agreement to narrow the interrogatory. Thus, the Court finds that an award of sanctions pursuant to Rule 34(a)(4)(A) may be appropriate here. Before the Court may make any such award, however, the non-moving party must be afforded the "opportunity to be heard."^{FN33} An actual hearing is not necessary, however, and the Court may consider the issue of sanctions "on written submissions."^{FN34} The "written *667 submission" requirement is met where the moving party requests sanctions in its motion or supporting brief and the opposing party is given the opportunity to submit a brief in response.^{FN35}

FN33.McCoo v. Denny's, Inc., 192 F.R.D. 675, 697 (D.Kan.2000) (citing Fed.R.Civ.P. 37(a)(4)); Fears v. Wal-Mart Stores, Inc., No. 99-2515-JWL, 2000 WL 1679418, at *6 (D.Kan. Oct. 13, 2000).

FN34.Fears, 2000 WL 1679418 at *6 (citing Advisory Committee Note to the 1993 Amendments to Rule 37(a)(4)).

FN35.Id.

[13] Here, Plaintiff did not request sanctions in her motion. Thus, Defendant has not been given sufficient "opportunity to be heard," and the Court

will decline to impose sanctions at this time. To satisfy the "written submissions" rule, the Court will direct Defendant and/or its counsel to show cause, in writing, within *thirty (30) days* of the date of filing of this Memorandum and Order, why the Court should not require either or both of them ^{FN36} to pay the reasonable expenses and attorney fees incurred by Plaintiff in making the Motion to Compel. Plaintiff shall have *eleven (11) days* thereafter to file a response thereto, if she so chooses. In the event the Court determines that sanctions should be imposed, the Court will issue an order setting forth a schedule for the filing of an affidavit reflecting the amount of fees and expenses that Plaintiff has incurred, and for the filing of any related briefs.

FN36. To the extent possible, sanctions should be imposed only upon the person or entity responsible for the sanctionable conduct. McCoo, 192 F.R.D. at 697. The sanctioning of a party, as opposed to the party's counsel, "requires specific findings that the party was aware of the wrongdoing." *Id.* At present, the Court has no evidence that Defendant itself was responsible for the objections and responses at issue. However, if Defendant or its attorneys wish to provide the Court with any information in this regard, Defendant and/or its counsel may do so in the pleading(s) provided to the Court pursuant to the briefing schedule set forth herein. The Court will defer ruling on this issue until it has received the parties' briefs.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Compel (doc. 67) with respect to Plaintiff's Interrogatories is granted as set forth herein.

IT IS FURTHER ORDERED that Defendant shall, within *twenty (20) days* of the date of this Memorandum and Order, serve amended responses to Plaintiff's interrogatories as set forth herein.

IT IS FURTHER ORDERED that Plaintiff's Motion to Compel (doc. 67) is moot with respect to issues relating to Defendant's Amended Privilege Log.

IT IS FURTHER ORDERED that Defendant and/or its counsel shall show cause, in writing, within *thirty (30) days* of the date of filing of this Memorandum

and Order, why the Court should not require either or both of them to pay the reasonable expenses and attorney fees incurred by Plaintiff in making the Motion to Compel.

IT IS SO ORDERED.

D.Kan.,2004.
Swackhammer v. Sprint Corp. PCS
225 F.R.D. 658, 60 Fed.R.Serv.3d 945

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Westlaw.

235 F.R.D. 521
235 F.R.D. 521
(Cite as: 235 F.R.D. 521)

Page 1

HU.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.
D.D.C., 2006.

United States District Court, District of Columbia.
UNITED STATES ex rel. A. Scott POGUE, Plaintiff.

v.
DIABETES TREATMENT CENTERS OF AMERICA, INC., et al., Defendants.
Civil Action No. 99-3298 (RCL).
Part of Misc. No. 01-50 (RCL).

June 2, 2006.

Background: In qui tam action against a healthcare corporation charged with violating laws governing billing for Medicare procedures, and group of physicians, defendants moved to compel discovery.

Holdings: The District Court, Lamberth, J., held that:
(1) relator was precluded from challenging defendant's interrogatories on basis of privilege because of his failure to file a privilege log;
(2) interrogatories could not properly seek identification of documents and facts supporting a contention in same interrogatory;
(3) relator could not answer the interrogatory by interpreting the question to state a narrower contention;
(4) no valid basis existed for compelling federal agency to comply with subpoena; and
(5) physician defendants' motion to compel answers to interrogatories and responses to requests for production of documents would be denied because they failed to confer with opposing counsel in an attempt to resolve the dispute before filing a non-dispositive motion.

Motions granted in part and denied in part.

West Headnotes

[1] Witnesses 410  221

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k221 k. Waiver of Objections. Most Cited Cases
In qui tam action, relator was precluded from challenging defendant's interrogatories on basis of privilege because of his failure to file a privilege log. Fed.Rules Civ.Proc.Rule 26(b)(5), 28 U.S.C.A.

[2] Federal Civil Procedure 170A  1483

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)1 In General
170Ak1483 k. Objections and Grounds for Refusal. Most Cited Cases
A party objecting to an interrogatory on grounds of undue burden must explain in detail how the interrogatory is burdensome.

[3] Federal Civil Procedure 170A  1488.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)1 In General
170Ak1488 Number, Form and Importance
170Ak1488.1 k. In General. Most Cited Cases

An interrogatory may properly seek identification of documents and facts supporting a contention, but it may not do so in a single interrogatory.

[4] Federal Civil Procedure 170A  1515

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)2 Scope

170Ak1514 Privileged Matters

170Ak1515 k. Results of

Investigation or of Preparation for Litigation or Trial.

Most Cited Cases

In qui tam action, relator could not rely on the work product doctrine to withhold a response to the interrogatories where he failed to describe the withheld documents or information in detail sufficient to allow other parties to assess the applicability of the privilege.

[5] Federal Civil Procedure 170A  **1534**

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)3 Answers; Failure to Answer

170Ak1534 k. Sufficiency. Most Cited

Cases

One-sentence restatement of the allegation that disclosure would violate work-product privilege was inadequate to satisfy rule's directive that interrogatories be answered separately and fully in writing. Fed.Rules Civ.Proc.Rule 33(b)(1), 28 U.S.C.A.

[6] Federal Civil Procedure 170A  **1503**

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)2 Scope

170Ak1503 k. Relevancy and

Materiality. Most Cited Cases

Interrogatory asking relator to identify any medical director that he contends was compensated according to referrals, to describe how the compensation varied, and to state all facts and identify all documents supporting his contention that the compensation varied sought relevant information in qui tam action against a healthcare corporation charged with violating laws governing billing for Medicare procedures. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

[7] Federal Civil Procedure 170A  **1534**

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)3 Answers; Failure to Answer

170Ak1534 k. Sufficiency. Most Cited

Cases

In qui tam action, relator could not answer the interrogatory by interpreting the question to state a narrower contention; relator had to either affirm or deny the contention.

[8] Federal Civil Procedure 170A

 **1488.1**

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)1 In General

170Ak1488 Number, Form and

Importance

170Ak1488.1 k. In General. Most

Cited Cases

An interrogatory may only contain multiple parts that are logically or factually subsumed within and necessarily related to the primary question. Fed.Rules Civ.Proc.Rule 33(a), 28 U.S.C.A.

[9] Witnesses 410  **5**

410 Witnesses

410I In General

410k3 Persons Who May Be Required to Appear and Testify

410k5 k. Privileges and Exemptions. Most Cited Cases

United States was not a "person" required to respond to third-party discovery subpoena. Fed.Rules Civ.Proc.Rule 45, 28 U.S.C.A.

[10] Witnesses 410  **16**

410 Witnesses

410I In General

410k16 k. Subpoena Duces Tecum. Most

Cited Cases

Government could not be compelled to comply with the subpoena in qui tam action where it was not a party and was not a real party in interest because it elected not to intervene.

[11] Administrative Law and Procedure 15A



657.1

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(A) In General

15Ak657 Nature and Form of Remedy

15Ak657.1 k. In General. Most Cited

Cases

Any dispute that federal agency's response to the subpoena was not in conformity with its own regulations must be brought under the Administrative Procedure Act (APA). 5 U.S.C.A. § 701 et seq.

[12] Federal Civil Procedure 170A



1537.1

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(D) Written Interrogatories to Parties

170AX(D)3 Answers; Failure to Answer

170Ak1537 Failure to Answer;

Sanctions

170Ak1537.1 k. In General. Most

Cited Cases

Federal Civil Procedure 170A



1636.1

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)5 Compliance; Failure to

Comply

170Ak1636 Failure to Comply;

Sanctions

170Ak1636.1 k. In General. Most

Cited Cases

Defendants' motion to compel answers to interrogatories and responses to requests for production of documents would be denied because they failed to confer with opposing counsel in an attempt to resolve the dispute before filing a non-dispositive motion; fact that defendants complied with the rules three years earlier did not satisfy the prerequisite for their current motion. Fed.Rules Civ.Proc.Rule 37(a)(2)(B), 28 U.S.C.A.

*522 Don P. McKenna, Hare, Wynn, Newell & Newton, Birmingham, AL, for A. Scott Pogue, United States Ex Rel.

Bryan E. Larson, Base, Berry & Sims, P.L.C., Nashville, TN, John R. Hellow, Mark S. Hardiman, Hooper, Lundy & Bookman, Inc., Los Angeles, CA, for Diabetes Treatment Centers of America, Inc.

John G. Despriet, Smith, Gambrell & Russell, L.L.P., Atlanta, GA, for American Healthcorp, Inc., West Paces Medical Center, Paul C. Davidson, Dr., Bruce W. Bode, Dr., Judson G. Black, Dr., Robert D. Steed, Dr., Anthony E. Karpas, Dr.

MEMORANDUM OPINION

LAMBERTH, District Judge.

This matter comes before the Court on several discovery disputes among the parties. First, defendant Diabetes Treatment Centers of America, Inc. ("DTCA") filed, on November 1, 2005, a motion [1105] and an accompanying memorandum of law to compel Relator to provide full and complete answers to its Second Set of Interrogatories. Relator filed an opposition [1111] on November 14, 2005, and DTCA filed a reply [1118] on December 1, 2005. Relator thereafter filed, on December 16, 2005, a supplemental response and opposition [1124] to DTCA's Second Set of Interrogatories, along with an unopposed motion requesting leave to do so.

Second, on November 21, 2005, DTCA filed a motion [84] and an accompanying memorandum of law to compel the United States Department of Health and Human Services ("HHS") to comply with subpoena for documents and testimony. The United States filed its opposition [94] on December 20, 2005, after filing an unopposed motion [93, 1128] for leave to file an opposition in excess of ten pages and a motion [1117] for leave to late file. DTCA filed its reply [1134] on January 9, 2006, after filing a motion

[1132] for extension of time to file its reply, and a motion [1133] for leave to file an opposition in excess of ten pages.

Third, several defendant physicians (the "Atlanta Physicians") jointly filed, on November 21, 2005, a motion [82] to compel Relator to answer interrogatories and respond to requests for production of documents. Relator sought and was granted an extension of time for filing his opposition [95], which he subsequently filed on December 29, 2005. Defendants the Atlanta Physicians filed a reply [96] on January 13, 2006.

Upon a thorough review of each party's filings, the applicable law and the entire record herein, this Court has determined that the motions [93, 1117, 1124, 1128, 1132, 1133] for leave to file motions in excess of ten pages, for leave to late file, and for leave to file a supplemental opposition shall be GRANTED; DTCA's motion [1105] to compel Relator to provide full and complete answers*523 to its Second Set of Interrogatories shall be GRANTED in part and DENIED in part; DTCA's motion [84] to compel HHS to comply with subpoena for documents and testimony shall be DENIED; defendants the Atlanta Physicians' motion [82] to compel Relator to answer interrogatories and respond to requests for production of documents shall be DENIED.

I. BACKGROUND

This *qui tam* action has been pending for many years. Currently before the Court are two discovery disputes between the parties. Defendant DTCA, a healthcare corporation charged with violating laws governing billing for Medicare procedures, complains that Relator has improperly objected to DTCA's second set of interrogatories. It also alleges that HHS' refusal to provide documents and testimony is improper. Relator and HHS argue that their respective responses to the discovery requests were appropriate.

II. DISCUSSION

A. DTCA's Motion [1105] to Compel Relator to Answer Interrogatories

DTCA served its second set of interrogatories on Relator after the parties agreed that defendant would

be permitted ten additional interrogatories. These ten interrogatories sought information about the following: DTCA employees who are suspected of having paid kickbacks, DTCA's treatment of those employees, the physicians who were suspected of receiving kickbacks, the allegation that HHS would have denied the claims had it known of the kickbacks and related actions, the claims that were submitted, and the basis for the Relator's contention that DTCA knowingly violated the False Claims Act. Relator served his responses to the interrogatories on April 11, 2005. DTCA, finding the responses to be inadequate, subsequently wrote Relator three letters in an attempt to resolve the dispute over the interrogatories. Relator did not respond, prompting DTCA to file the instant motion to compel.

After the motion, opposition and reply were filed, Relator filed and served on DTCA a set of supplemental responses which provide further answers to the interrogatories. Since DTCA has not indicated to the Court that it seeks to withdraw its motion to compel in light of the additional responses, this Court shall consider the merits of the motion.

1. General Objections

Relator objects to the interrogatories on several grounds. Generally, he objects that all of the interrogatories are overly broad "contention interrogatories," and that compliance would impose an unreasonable burden. (Relator's Opp'n [1111] 3-7.) DTCA contends that the interrogatories are of reasonable breadth and do not impose an undue burden on Relator. (DTCA's Mem. Supp. [1106] 2-3.) Relator's "boilerplate objections" that the interrogatories were overly broad and unduly burdensome, DTCA argues, fail to justify his refusal to answer them. (*Id.*)

[1][2] As to the general objection on the basis of privilege, this Court notes that Relator has foreclosed any challenge to the interrogatories on this ground because of his failure to file a privilege log as required by Fed.R.Civ.P. 26(b)(5), which requires a description of the withheld information or documents that would enable other parties to assess whether the privilege applies.^{FN1} See, e.g., Lohrenz v. Donnelly, 187 F.R.D. 1, 6-7 (D.D.C.1999) (Lamberth, J.) (denying plaintiff's assertion of privilege because of her failure to provide a privilege log as required by

the Federal Rules of Civil Procedure). Accordingly, Relator's blanket objections on the basis of privilege shall be rejected. As to the general objection on the grounds of undue burden, this Court notes the well-documented rule that a party objecting to an interrogatory on this basis must explain in detail how the interrogatory is burdensome. *524 See, e.g., Alexander v. FBI, 192 F.R.D. 50, 53 (D.D.C.2000) (Lamberth, J.) (citing Lohrenz, 187 F.R.D. at 4). Where Relator fails to address specifically how compliance with the interrogatory would burden him, his objections on the ground of undue burden shall be rejected.

FNI Federal Rule of Civil Procedure 26(b)(5) reads:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

The specific objections shall be considered next. In addition to his general objections, Relator objects to each interrogatory on various grounds, including privilege, timeliness, compound form, and as exceeding the total number of allowed interrogatories. DTCA disputes each objection. This Court finds that the interrogatories are deficient in form but not substance; accordingly, the motion to compel shall be denied, but defendant will not be prevented from seeking much of the same information in interrogatories subdivided by this Court. This Court shall discuss each interrogatory in turn.

2. Interrogatory No. 26

Interrogatory No. 26 requests that Relator identify each DTCA medical director that he contends received illegal kickbacks or who was prohibited from referring to DTCA-affiliated hospitals, and requests that Relator "state all facts and identify all

documents supporting" his contentions. Relator contends that No. 26 has been answered by his statement that he has "alleged this corporate-run nationwide scheme implicates every hospital and medical director arrangement" (Relator's Opp'n [1111] 7), could be answered by DTCA itself (*id.* at 7 n. 4) and seeks protected work product (*id.* at 7-8). DTCA argues that Relator's vague theory merely restates the allegations in the complaint and as such is not a sufficient response to the interrogatory. (DTCA's Mem. Supp. [1106] 5-6.) DTCA also argues that the facts underlying Relator's allegations cannot infringe on privilege, and in any event, Relator cannot successfully assert the privilege because he failed to provide a privilege log as required by Federal Rule of Civil Procedure 26(b)(5). (*Id.* at 4-5.)

[3] This Court finds no legitimate problem with the information sought by No. 26. It does find, however, that the compound form of the interrogatory is improper. Contrary to Relator's objections, the interrogatory may properly seek identification of documents and facts supporting a contention, but it may not do so in a single interrogatory.

[4][5] It bears noting, as discussed *supra* Part A.1, that Relator may not rely on the work product doctrine to withhold a response to the interrogatories: he fails to describe the withheld documents or information in detail sufficient to allow other parties to assess the applicability of the privilege. Similarly, Relator cannot rely on his statement that he has answered the interrogatory with his one-sentence restatement of the allegation. This vague statement is wholly inadequate to satisfy Rule 33's directive that interrogatories "shall be answered separately and fully in writing." FED. R. CIV. P. 33(b)(1). Further, Relator's contentions that this interrogatory impermissibly seeks legal arguments or requires Relator to identify which documents he has selected in preparation for trial are unpersuasive. Relator fails to carry his burden of showing that the interrogatory is burdensome or inappropriate, in part because the cases Relator cites in support of his arguments are not analogous to the circumstances giving rise to the instant dispute. Notwithstanding this deficiency, however, Relator will not be compelled to respond to this interrogatory in its compound form.

3. Interrogatory No. 27

This interrogatory asks what facts and documents support the contention that DTCA was aware of the illegal conduct of the medical directors identified in the answer to No. 26. It directs Relator to identify each person who knew, and to explain how they knew, of the violations. Relator objects to this interrogatory only on the grounds already discussed, *i.e.*, that it is overly broad and burdensome and that it seeks attorney work product. (Relator's Opp'n [1111] 8.) For the reasons already discussed, those arguments are rejected. This Court does find, however, that this interrogatory is also impermissibly compound. While the information it seeks is appropriate, the form of the interrogatory is not. Relator will not be compelled to provide an answer to the interrogatory as it is currently phrased.

***5254. Interrogatory No. 28**

[6] This interrogatory asks Relator to identify any medical director that he contends was compensated according to referrals, to describe how the compensation varied, and to state all facts and identify all documents supporting his contention that the compensation varied. Relator objects to this interrogatory, in addition to the general objections, on the grounds that it does not seek relevant information because he need not prove that compensation varied according to referral volume; rather, he need only show that the directors were compensated with the intent to induce referrals. (Relator's Opp'n [1111] 8-9.) This Court finds that the interrogatory inquires into relevant matters, or into matters that may lead to relevant evidence. Whether and how compensation was tied to referrals is certainly relevant to the intent that may be inferred therefrom. Accordingly, under the broad standard for relevance in Federal Rule of Civil Procedure 26(b)(1), its topic is proper.^{FN2} Once again, however, this Court finds that the interrogatory is of an impermissible compound form. Relator will not be compelled to provide an answer to the interrogatory as it is currently phrased.

FN2. Federal Rule of Civil Procedure 26(b)(1) reads:

In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of

any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(I), (ii), and (iii).

5. Interrogatory No. 29

This interrogatory requests that Relator identify all medical directors who he contends were required by DTCA to admit patients to hospitals affiliated with DTCA and to state all facts and identify all documents supporting his contention. Relator objects to this interrogatory on the basis of relevance, and for the general objections of burden, overbreadth and attorney work product. (Relator's Opp'n [1111] 9.) As with No. 28, this Court finds that the interrogatory seeks relevant information. Relator appears to suggest that this Court should employ a *per se* rule that defendant may never inquire into evidence that it committed acts beyond the minimum needed to show a violation of the law. This Court finds no basis for such a narrow reading of relevance. As with the other interrogatories, however, this Court finds that the compound form of the interrogatory is inappropriate. Relator will not be compelled to provide an answer to the interrogatory as it is currently phrased.

6. Interrogatory No. 30

This interrogatory seeks identification of medical directors that Relator contends DTCA subjected to adverse employment action because of the number of referrals they made to DTCA affiliated hospitals. As to each director, it seeks all facts and documents supporting Relator's contention that the adverse employment action was taken, as well as a description of the action taken. Relator argues that this interrogatory seeks information that is equally available to defendants, and objects to it on the general grounds of burden, overbreadth and work product. (Relator's Opp'n [1111] 9-10.) This Court finds that the subject of the interrogatory is proper, but that once again its compound form is

inappropriate. Relator will not be compelled to provide an answer to the interrogatory as it is currently phrased.

7. Interrogatory No. 31

This interrogatory seeks information relating to medical directors who have stated that they were given specific benefits in exchange for referrals, and asks Relator to state all facts and identify all documents in support of their contentions. Relator objects to this interrogatory on the grounds that it seeks information protected as work product, and that it is overbroad and imposes an undue burden. This Court finds that, as discussed *supra* Part A.1, Relator cannot rely on claims of privilege. This Court does find, however, that the interrogatory is impermissibly compound and that its request that *526 Relator identify facts and documents in support of the contention of a third party, the medical directors, is not appropriate. It is unreasonable to expect Relator to defend the contentions of another. Relator will not be compelled to provide an answer to the interrogatory as it is currently phrased.

8. Interrogatory No. 32

This interrogatory asks Relator to state all facts that support the contention that HHS would have denied claims and excluded hospitals from participation in federal programs if it had known the circumstances under which the claims were brought. Relator argues that his three-page answer to this interrogatory was sufficient, a claim that DTCA disputes. This Court finds that Relator has sufficiently answered this interrogatory. His citations of statements that the United States conditioned payments and continued participation in Medicare on compliance with the law provides a sufficient answer to the interrogatory. Any dissatisfaction with the response likely results from defendant's decision to phrase the interrogatory in such broad terms. If Relator asserts that his response contains all the facts he knows that support his contention as phrased by defendant, he has fulfilled his obligation.

9. Interrogatory No. 33

[7] This interrogatory asks Relator to identify any services that were falsely billed to Medicare that he contends were medically unnecessary and to identify

the evidence supporting that contention. Relator argues that this interrogatory is irrelevant because it seeks proof of acts that are not elements of the claims asserted, that his answer was sufficient, that it is unduly broad and burdensome, and that it would require medical expert testimony, which has not yet been exchanged. (Relator's Opp'n [1111] 11-13.) This Court finds that the interrogatory seeks information that is relevant or may lead to relevant information. Whether medically unnecessary services were provided in relation to the allegedly false claims may shed light on the benefits received as a result of the false claims and on defendant's intent in submitting those claims. Additionally, Relator's answer is not sufficient. Relator must either affirm or deny the contention; he may not answer the interrogatory by interpreting the question to state a narrower contention. As it has with other interrogatories, however, this Court does find that the compound form of the interrogatory is inappropriate. Relator will not be compelled to provide an answer to the interrogatory as it is currently phrased.

10. Interrogatory No. 34

This interrogatory asks Relator to identify any physician who received illegal compensation for recommendations or referrals to DTCA-affiliated hospitals and asks Relator to state all facts that show such an arrangement violated a federal law. Relator objects that the interrogatory is overbroad, would impose an undue burden and is premature given the parties' discussions. This Court finds that the interrogatory is proper except for its compound format. Relator will not be compelled to provide an answer to the interrogatory as it is currently phrased.

11. Interrogatory No. 35

This interrogatory seeks all facts and evidence supporting Relator's contention that DTCA caused false claims to be submitted, including identification of the persons who knew of the illegal act and a description of how the illegality relieved the federal government's obligation to pay the claim. Relator contends that this interrogatory seeks irrelevant evidence, is overly broad and unduly burdensome and would require disclosure of his work product. This Court finds that the subject matter of the interrogatory is proper, although the compound form is not. Relator will not be compelled to provide an

answer to the interrogatory as it is currently phrased.

12. Conclusion as to Specific Objections

As discussed above, this Court finds that all of the interrogatories—with the exception of No. 32, which this Court found to have been sufficiently answered, and No. 31 to the extent it seeks support for the contentions of another—are appropriate in substance but not in form. Federal Rule of Civil Procedure 33(a) allows a party to submit interrogatories that contain “discrete subparts,” but does not allow parties to combine multiple interrogatories*527 into one. See CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND RICHARD L. MARCUS, 8A FEDERAL PRACTICE AND PROCEDURE, RULE 33 (1994) (“Parties cannot evade th[e] presumptive limitation [of 25 interrogatories] through the device of joining as ‘subparts’ questions that seek information about discrete separate subjects.”)

[8] What case law there is on the subject supports the common sense conclusion that an interrogatory may only contain multiple parts that “are logically or factually subsumed within and necessarily related to the primary question.” Trevino v. ACB American, Inc., 232 F.R.D. 612, 614 (N.D. Cal. 2006). For example, in Trevino, the Court held that when a party sought information about litigation filed by the opposing party, it was proper to ask in one interrogatory for the court, caption, civil number and result. *Id.* Cf. also WRIGHT ET AL., 8A FEDERAL PRACTICE AND PROCEDURE, RULE 33 (“[A] question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.”) By contrast, Trevino found an interrogatory to be impermissibly compound when it asked for identification of expert witnesses, specific opinions that would be given during the testimony, and the grounds for each of the expert’s opinions. Trevino, 232 F.R.D. at 614.

In the instant case, this Court finds that Nos. 26-31 and 33-35 are impermissibly compound because each requires separate responses to individual subparts that are not so related that they may be considered one interrogatory. For example, No. 27 requests all facts supporting Relator’s contention that DTCA was aware of the illegal conduct of the medical directors

identified in the answer to No. 26; asks Relator to identify each person who knew, and to explain how they knew, of the violations. Finally, it requests that Relator identify all documents that support the contention as to each medical director. This single interrogatory is more accurately counted as three separate interrogatories. It is inappropriate, in a case involving such wide-ranging discovery, for defendant to propound interrogatories that require extensive research to answer each sub-part of each interrogatory, thereby extending the number of interrogatories it may require his opponent to answer. Almost every interrogatory in Nos. 26-31 and 33-35 must be counted as at least three, and in several cases four, resulting in a total of more than thirty interrogatories. This Court has subdivided the nine objectionable interrogatories into a list of thirty-one interrogatories, ^{FN3} each of which must be considered a separate interrogatory. The parties, as Relator points out, agreed to only ten additional interrogatories, and this Court already found that Relator sufficiently answered No. 32 and that Relator may not be compelled to answer that portion of No. 31 that seeks support for others’ contentions. Accordingly, were defendant permitted to resubmit its interrogatories in a form consistent with this Memorandum Opinion, it would be entitled to submit nine interrogatories.

^{FN3} The interrogatories, as subdivided by this Court, are attached to this Memorandum Opinion as an Appendix.

If it chooses to do so, defendant may select nine of the interrogatories (as subdivided by this Court) and serve those nine interrogatories on Relator within ten days from this date. Defendant is also encouraged to review Relator’s supplemental responses with an eye toward minimizing the number of additional inquiries it might have. In accordance with the foregoing, defendant’s motion to compel must be GRANTED in part as to compelling Relator to answer nine of the subdivided interrogatories, but DENIED in part as to the remainder of the motion.

B. DTCA’s Motion [84] to Compel HHS to Comply with Subpoena

The subject of DTCA’s motion is a subpoena that DTCA served on HHS in the summer of 2004. The subpoena calls for documents and testimony relating

to HHS' policy and practice of considering, in determining whether to pay a claim, whether it was submitted in violation of the laws that defendant is alleged to have violated. (DTCA's Mem. Supp. [85] 1-2.) HHS refused to comply with the subpoena on grounds of relevance, *528 undue burden, waiver, and failure to comply with procedural requirements. (Govt.'s Opp'n [94] Ex. A.) Defendant did not pursue enforcement of the subpoena for nearly a year while the parties engaged in settlement discussions. (DTCA's Mem. Supp. [85] 3.) When, in the fall of 2005, they failed to reach a settlement, DTCA renewed its request that HHS comply with the subpoena. (*Id.*) HHS refused, citing the same objections. (Govt.'s Opp'n [94] 3-4.)

While the parties argue objections relating to matters as varied as timeliness, privilege, proper procedure, undue burden, materiality, this Court finds that the jurisdictional issue is dispositive. Defendant's motion must be denied because it has provided no valid basis on which to compel a federal agency to comply with a subpoena.

[9][10] This Court must have authority to compel discovery. The most likely source are the Federal Rules of Civil Procedure. As the Government notes, however, Federal Rule of Civil Procedure 45 cannot provide a basis for granting defendant's motion to compel because the United States is not a "person" within the meaning of that rule. *See U.S. ex. rel. Taylor v. Gabelli*, 233 F.R.D. 174, 175-76 (D.D.C.2005) (Leon, J.) (holding that the presumption that Rule 45 does not apply to the federal government can only be overcome by affirmative evidence); *Lerner v. District of Columbia*, 2005 WL 2375175, at *4 (D.D.C.2005) (Kessler, J.) (holding that the same conclusion is compelled by this Circuit's reasoning in an analogous case). Similarly, the Government cannot be compelled to comply with the subpoena as a party to the action, because it is not a real party in interest when, as in this case, it has elected not to intervene. *See Gabelli*, 233 F.R.D. at 174-75 (finding no basis for "the proposition that the federal government is a real party in interest to a *qui tam* action when it elects not to intervene").

[11] The other possible basis for compelling discovery is the agency's own regulations governing such matters, which HHS has promulgated at 45

C.F.R. pt. 2. Any dispute that the agency's response to the subpoena was not in conformity with its own regulations must be brought under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("APA"). *See Yousuf v. Samantar*, 2005 WL 1523385, at *4 n. 10 (D.D.C.2005) (Walton, J.) (noting that a district court cannot review an agency's compliance with its regulations until the agency has issued a final decision and an action is filed under the APA challenging that decision) (citing *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 278 (4th Cir.1999)). In the instant case, HHS has not yet issued a final decision. (Govt.'s Opp'n [94] 5.) As DTCA noted, the discovery request was suspended for nearly a year while the parties engaged in settlement negotiations. When those fell through, HHS renewed its consideration of the request. (*Id.* at 5 n. 3.)

DTCA makes several alternative arguments, all of which must fail. First, DTCA argues that Rule 45 applies in this case because HHS states in its own regulations that Rule 45 governs, and because HHS has waived any objection to the subpoena by violating its own regulations in two respects. (DTCA's Mem. Supp. [85] 9-10.) HHS maintains that its actions were justified under its regulations until it made certain findings. (Govt.'s Opp'n [94] 7.) Second, DTCA argues that the subpoena seeking testimony should be viewed separately from its subpoena for documents. (DTCA's Mem. Supp. [85] 9-10.) It contends that even if the request for documents cannot be compelled under Rule 45, the request for testimony nonetheless can be compelled pursuant to Rule 30(b)(6). (*Id.*) HHS argues that Rule 30(b)(6) is inapplicable because the Government is a non-party. (Govt.'s Opp'n [94] 7.) Third, DTCA asserts that HHS has waived procedural objections to the subpoena by consenting to the application of the Federal Rules of Civil Procedure when it requested that this case be transferred as part of the multi-district litigation. (DTCA's Mem. Supp. [85] 10.)

This Court finds all of DTCA's arguments to be without merit. Since this Court has found that HHS may respond to the subpoena pursuant to its own regulations rather than the Federal Rule of Civil Procedure, any challenge to its response must be brought pursuant to the APA. DTCA does not point this Court to any other basis upon which it may exercise jurisdiction to review agency action. In light of this finding, the *529 Court need not consider the

other arguments raised by HHS and defendants.

In light of the foregoing, this Court finds that DTCA's motion to compel must be denied. HHS must be provided an opportunity to respond in conformance with its own regulations, and if DTCA is dissatisfied with the response or lack of response,^{FN4} the proper vehicle for any challenge to the agency's action is the APA. To insure that this Court does not lose control of the timing of discovery in this case, counsel would be well-advised to file any action under the APA as a related case to insure that it will be assigned to the undersigned judge. See L. CIV. R. 40.5.

^{FN4}. It should be noted that HHS renewed its consideration of the request in late October 2005, more than seven months prior to this date. The unusual delay in HHS' decision under its regulations perhaps is attributable to its waiting for this Court's decision. This Court expects HHS to promptly decide what it will produce in response to the subpoena.

C. The Atlanta Physicians' Motion [82] to Compel Relator to Answer Interrogatories and to Respond to Requests for Production of Documents

Defendants the Atlanta Physicians move this Court for an order compelling Relator to respond to the sets of interrogatories and requests for production of documents they have propounded throughout the pendency of this action. They also request that this Court award the costs of bringing the motion. They complain that Relator's objections were improper (Atlanta Physicians' Mot. [83] 5-10), and that, when Relator did provide answers, they were insufficient (*id.* at 3-5). Relator's counters that, as a preliminary matter, defendants the Atlanta Physicians' motion must be denied because they failed to comply with the federal and local rules requiring a meeting prior to filing a non-dispositive motion. (Relator's Opp'n [95] 1-5.) Relator also notes that he has supplemented his responses since the Atlanta Physicians filed their motion, and argues that their failure to object to his supplemented responses renders their motion moot. (*Id.* at 5-10.)

[12] This Court finds that defendants the Atlanta Physicians' motion to compel must be denied because

they failed to confer with opposing counsel in an attempt to resolve the dispute before filing a non-dispositive motion. As Relator notes, such is required by both the Federal Rules of Civil Procedure as well as by the Local Rules of this Court. FED. R. CIV. P. 37(a)(2)(B) (noting that motions to compel discovery "must include certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make that discovery in an effort to secure the information or material without court action"); L. CIV. R. 7(m) (directing that counsel, before filing any non-dispositive motion in a civil case, "must discuss the anticipated motion with opposing counsel ... in a good faith effort to determine whether there is any opposition" and "to narrow the areas of disagreement"). The obligation to confer may not be satisfied by perfunctory action, but requires a good faith effort to resolve the non-dispositive disputes that occur in the course of litigation. As such, failure to comply with the conference requirement is sufficient basis to deny a motion to compel.

That defendants the Atlanta Physicians complied with the rules three years ago does not satisfy the prerequisite for their current motion. During those three years, either party's stance with regard to the dispute may have evolved, particularly in light of the fact that additional discovery was in progress. The purposes of the rules-to encourage informal resolution to such disputes, or at least to reduce or narrow the issues the Court will consider-are not well-served by defendants' making no effort to confer in the period reasonably prior to filing the motion. It is a waste of this Court's time and resources to adjudicate a dispute that could have been resolved by the parties themselves. See, e.g., Pulsecard, Inc. v. Discover Card Servs., Inc., 168 F.R.D. 295, 302 (D.Kan.1996). Defendants present this Court with no persuasive reason that compliance with the rules should be excused in this case.

While this Court declines to set forth any bright-line rule as to how much time may elapse between conferring and filing the motion, it is clear to this Court that the extensive length of time that elapsed in this case does not show a good faith attempt to confer. *530 See, e.g., Ridge Chrysler Jeep L.L.C. v. Daimler Chrysler Servs. North Am., L.L.C., 2004 WL 3021842, at *4 (N.D.Ill.2004) (holding that one letter sent a year prior to the filing of a motion to

compel was insufficient to satisfy the requirement to confer). Defendants the Atlanta Physicians' motion must be denied for failure to comply with the requirement that a movant confer with opposing counsel in a good faith effort to resolve or narrow the dispute prior to filing a motion to compel.

III. CONCLUSION

For the foregoing reasons, all motions [93, 1117, 1124, 1128, 1132, 1133] for leave to file motions in excess of ten pages, for leave to late file, and for leave to file a supplemental opposition shall be GRANTED; DTCA's motion [1105] to compel Relator to provide full and complete answers to its Second Set of Interrogatories shall be GRANTED in part and DENIED in part; DTCA's motion [84] to compel HHS to comply with subpoena for documents and testimony shall be DENIED; defendants the Atlanta Physicians' motion [82] to compel Relator to answer interrogatories and respond to requests for production of documents shall be DENIED.

A separate Order shall issue this date.

APPENDIX

Subdivided Interrogatories

26.1. Please identify any DTCA medical director to whom you contend DTCA paid illegal kickbacks to induce patient referrals in violation of the Anti-Kickback Statute or whom you allege was prohibited by the Stark Laws from making referrals to any hospital where DTCA had a diabetes treatment center.

26.2. For each medical director identified in the response to Interrogatory No. 26. 1, please state all facts supporting such contention which respect to that medical director.

26.3. For each medical director identified in the answer to Interrogatory No. 26.1, please identify all documents supporting such contention which respect to that medical director.

26.4. For each medical director identified in the response to Interrogatory No. 26. 1, please identify the period of time which you contend DTCA paid

that medical director illegal kickbacks in violation of the Anti-Kickback Statute or was prohibited by the Stark Laws from referring patients to any hospital where DTCA had a diabetes treatment center.

27.1. For each medical director identified in the response to Interrogatory No. 26.1, please identify each person who possessed the knowledge required to show that DTCA had knowledge of violations of the Anti-Kickback Statutes or referrals prohibited under the Stark Laws.

27.2. For each medical director identified in the response to Interrogatory No. 27. 1, please state how each person obtained the requisite knowledge.

27.3. For each medical director identified in the response to Interrogatory No. 27. 1, please identify all documents that support your contention that each medical director possessed the requisite knowledge.

28.1. Please identify any medical director whose compensation you contend was based on or varied according to his or her volume of referrals.

28.2. For each medical director identified in the response to Interrogatory No. 28.1, please state all facts supporting such contention.

28.3. For each medical director identified in the response to Interrogatory No. 28.1, please identify all documents supporting such contention.

28.4. For each medical director identified in the response to Interrogatory No. 28.1, please describe the manner in which compensation varied according to referral volume.

29.1. Please identify any medical director whom DTCA required to admit his or her patients to the hospital *531 where DTCA had a diabetes treatment center.

29.2. For each medical director identified in the response to Interrogatory No. 29. 1, please state all facts supporting such contention.

29.3. For each medical director identified in the response to Interrogatory No. 29. 1, please identify all documents supporting such contention.

30.1. Please identify any medical director who was terminated, whose contract was not renewed, whose compensation was lowered, or against whom DTCA took any form of adverse action based on that medical director's number of referrals.

30.2. For each medical director identified in the response to Interrogatory No. 30.1, please specify any adverse action taken against that medical director.

30.3. For each medical director identified in the response to Interrogatory No. 30.1, please state all facts supporting such contention.

30.4. For each medical director identified in the response to Interrogatory No. 30.1, please identify all documents supporting such contention.

31.1. Please identify any medical director who contends or has stated that he or she was paid by DTCA for referrals.

31.2. Please identify any medical director who contends or has stated that he or she was paid more than fair market value for the services performed by that medical director.

31.3. Please identify any medical director who contends or has stated that he or she was not required to perform services by DTCA.

31.4. Please identify any medical director who contends or has stated that he or she was required to provide nominal services by DTCA.

33.1. Please identify any services billed to Medicare on allegedly false claims which you contend were medically unnecessary.

33.2. For each of the services identified in the response to Interrogatory No. 33.1, please state all facts supporting such contention.

33.3. For each of the services identified in the response to Interrogatory No. 33.1, please identify all evidence supporting such contention.

34.1. Please identify any physician whom you contend was illegally compensated for recommending or arranging for other physicians to refer patients to a hospital where DTCA had a diabetes treatment center.

34.2. For each of the physicians identified in the response to Interrogatory No. 34.1, please state all facts supporting such contention.

35.1. Please identify each claim that you contend violates the False Claims Act.

35.2. For each claim identified in the response to Interrogatory No. 35.1, please identify each person whom you contend harbored the requisite knowledge that the conduct engaged in was illegal.

35.3. For each claim identified in the response to Interrogatory No. 35.1, please identify those, the illegality of which, you contend negated the hospital's right to payment by a federal program.

35.4. For each claim identified in the response to Interrogatory No. 35.1, please identify all evidence supporting the contention that DTCA caused the claim to be submitted with the knowledge required under the False Claims Act.

ORDER

Upon consideration of the parties' motions [93, 1117, 1124, 1128, 1132, 1133] for leave to file motions in excess of ten pages, for leave to late file, and for leave to file a supplemental opposition; DTCA's motion [1105] to compel Relator to provide full and complete answers to its Second Set of Interrogatories; DTCA's motion [84] to compel HHS to comply with subpoena for documents and testimony; defendants the Atlanta Physicians' *532 motion [82] to compel Relator to answer interrogatories and respond to requests for production of documents; and the applicable law and the entire record herein, it is hereby

ORDERED that all motions [93, 1117, 1124, 1128, 1132, 1133] for leave to file motions in excess of ten pages, for leave to late file, and for leave to file a supplemental opposition are GRANTED; it is further

ORDERED that DTCA's motion [1105] to compel Relator to provide full and complete answers to its Second Set of Interrogatories is GRANTED in part and DENIED in part; it is GRANTED insofar as DTCA may, within ten days from this date, serve upon Relator nine interrogatories chosen from the list subdivided by this Court and provided in the Appendix to the accompanying Memorandum Opinion; it is DENIED as to all other relief; it is further

ORDERED that DTCA's motion [84] to compel HHS to comply with subpoena for documents and testimony is DENIED; it is further

ORDERED that defendants the Atlanta Physicians' motion [82] to compel Relator to answer interrogatories and respond to requests for production of documents is DENIED.

SO ORDERED.

D.D.C., 2006.
U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.
235 F.R.D. 521

END OF DOCUMENT

CERTIFICATE OF SERVICE

I am familiar with my firm's capability to hand-deliver and deliver by facsimile documents and its practice of placing its daily mail, with first-class postage prepaid thereon, in a designated area for deposit in a U.S. mailbox in the City of Coeur d'Alene, Idaho, after the close of the day's business. On the date shown below, I served:

**PLAINTIFFS' OBJECTION TO DEFENDANTS'
MOTION TO COMPEL, AND NOTICE OF MOTION
AND MOTION FOR PROTECTIVE ORDER**

Brent C. Featherston
FEATHERSTON LAW FIRM
113 South Second Ave
Sandpoint, ID 83864
Telephone: (208) 263-6866
Facsimile: (208) 263-0400
Counsel to Defendants Cometto


Bonner County Civil Clerk
Personal Service

Judge Hosack
Kootenai County Civil Clerk

By personally delivering a true copy of thereof to Courts at the address(es) set forth herein above on the 27th day of May, 2008.

By personally faxing a true copy thereof to Counselor Featherston at the facsimile telephone number for that party.

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 27th day of May, 2008.



Judy Parmer
Paralegal to Arthur B. Macomber

Arthur B. Macomber, Attorney at Law
 408 E. Sherman Avenue, Suite 215
 Coeur d'Alene, ID 83814
 Telephone: 208-664-4700
 Facsimile: 208-664-9933
 State Bar No. 7370
Attorney for Plaintiffs

STATE OF IDAHO
 COUNTY OF BONNER
 FIRST JUDICIAL DISTRICT

2008 MAY 27 P 4: 49

MARIE SCOTT
 CLERK DISTRICT COURT

MS
 DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

DAVID L. CALDWELL and KATHY)
 C. CALDWELL, husband and wife;)
 LAWRENCE L. SEILER AND)
 THERESA L. SEILER, husband and)
 wife; PATRICIA ST. ANGELO;)
 Plaintiffs,)

Case No: **CV 2007-01744**

vs.)

**AFFIDAVIT IN SUPPORT
 PLAINTIFFS' OBJECTION TO
 DEFENDANTS' MOTION TO
 COMPEL, AND NOTICE OF MOTION
 AND MOTION FOR PROTECTION
 ORDER**


THOMAS W. COMETTO and LORI)
 M. COMETTO, husband and wife; and)
 DOES 1-5,)
 Defendants.)

I, ARTHUR B. MACOMBER, being first duly sworn on oath depose and state that:

1. I am over the age of eighteen (18) and am competent to testify to these matters;
2. I am a licensed Idaho attorney carrying State Bar No. 7370;
3. I am counsel for Plaintiffs Caldwell, et al., in this lawsuit;
4. I aver Plaintiff Seilers' permanent resident is in Indiana and that they only visit their North Idaho property once (1) or twice (2) a year;
5. I aver on May 27, 2008, Theresa Seiler called my office and informed me they will be traveling to Europe between June 9, 2008 and June 20, 2008;

6. I aver Plaintiff St. Angelo's permanent resident is in Louisiana and only visit her North Idaho property less than once (1) a year;
7. On May 27, 2008, I spoke to David Caldwell, who told me Plaintiff Kathy Caldwell will be in Alaska from June 5, 2008 through June 19, 2008 and will not be able to appear for deposition on June 17, 2008;
8. I aver on May 12, 2008, my office received Notices of Intent to Take Oral Deposition and to appear in Sandpoint, Idaho on June 19, 2008. I firmly believe the information that is contained by Seiler and St. Angelo is duplicative of Plaintiff David Caldwell's information that will be provided at the deposition on June 17, 2008; therefore deposing Seiler and St. Angelo would be onerest and undue burdensome due to the expense involved;
9. I aver that this Affidavit is served on opposing counsel and this Court.

DATED this 27th day of May, 2008



Arthur B. Macomber
Attorney at Law

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of May, 2008, at or about 3:29 p.m., I caused to be served a true and correct copy of the foregoing:

AFFIDAVIT IN SUPPORT OF OBJECTION TO DEFENDANTS' MOTION TO COMPEL ANSWERS TO INTERROGATORIES SET ONE

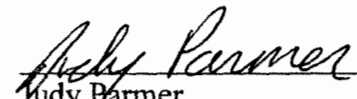
by facsimile service to:

Brent C. Featherston
Featherston Law Firm, Chtd.
113 South Second Ave
Sandpoint, ID 83864
Facsimile: 208-263-0400
Counsel for Defendants Cometto

Bonner County Civil Clerk (*Hand delivered*)
Facsimile: 208-263-0896

Judge Hosack
Kootenai County Civil Clerk
Facsimile: 446-1138

DATED this 27th day of May, 2008



Judy Parmer
Paralegal to Arthur B. Macomber

Court Minutes:

Session: HOSACK060308P
Session Date: 06/03/2008
Judge: Hosack, Charles
Reporter: Schaller, Joann

Division: DIST
Session Time: 15:22

Courtroom: Courtroom10

Clerk(s): Rohrbach, Shari

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0004

Case number: BonCV07-1744

Plaintiff: Cometto, Thomas

Plaintiff Attorney: ~~Amos, Paul~~ *Orther Macomber*

Defendant: Caldwell, David

Pers. Attorney: Featherston, Brent

Co-Defendant(s):

State Attorney:

Public Defender:

06/03/2008

16:05:50

Recording Started:

16:05:50

Case called

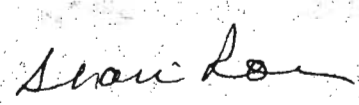
16:06:00

Judge: Hosack, Charles

Calls, Mr Featherston present by phone, Mr Macomber present in person.

16:08:08

There are a number of cross motions, Pl are



16:09:10 compelling answers, and DF for failure to respond, and then motions re: protective orders regarding depositions. Does that include everything?

16:09:35

16:09:49 **Plaintiff Attorney:**
Mr Macomber for PL

16:10:22 **Pers. Attorney: Featherston, Brent**
I've indicated that if his clients are not available for depositions I can reschedule. Macomber is taking the position I should not be able to depositions other PL. On Macomber Motion to Compel: we did provide amended answers about 2 weeks ago.

16:10:59

16:11:21

16:12:16

16:13:01 **Plaintiff Attorney:**

16:13:35

16:13:50 Ask continuance of 2 weeks, I'll commit to getting answers by tomorrow.

16:14:22 **Playback started**

16:14:36 **Judge: Hosack, Charles**
Counsel agree that there is a set of answers filed by the Comettos. Grant PL motion to continue, and you can renounce it if necessary.

16:15:27

16:15:39 RE: the depositions, the dates set for the depositions was just done. Parties can get together on dates. Won't rule regarding the depositions yet, if they are pursuing a claim in Idaho then they have an obligation to come and pursue it.

16:16:48

16:17:47

16:18:00 For Sidler and St Angelo: I don't know if they have anything to add, comments.

16:18:23

16:20:16 If they have nothing to add & have to come to Idaho then Cometto pay the cost.

16:20:35 **Pers. Attorney: Featherston, Brent**
Address motion to compel and to how interrogatories are laid out, as a single interrogatory or subparts. Comments re: Fed Rules

16:22:48

16:24:06 Committee. PL have claimed the protection of the number limit of 40, and stopped answering. PL also states
16:24:42 that they will disclose witnesses according to the pretrial order. Comments.
16:29:02 We're entitled to know who is answering the questions, to know regarding
16:29:36 other party plaintiffs. This case arises from litigation from over ten years
16:30:47 ago. I asked counsel to spell out what was not litigated ten years ago. I've
16:31:14 asked for factual basis and damages sought. DF have a right to know what the
16:33:14 theory under 55-313 is.

16:33:35 **Plaintiff Attorney:**
Today Mr Caldwell came in and notarized his responses. I have answers to the
16:34:05 interrog, and they are different from the answers before. I've also done
16:34:22 quite a bit of investigation. May help for the court to rule on the subpart
16:35:01 issue, and allow me to provide information to you. PL has asked the court to
16:36:13 protect some financial information.

16:36:20 **Pers. Attorney: Featherston, Brent**
Comments, we appreciate the Sept trial date. Now we're in the hearing and I'm
16:37:42 being told there are answers ready which makes it difficult to comply with
16:38:19 MSJ deadlines.

16:38:48 **Other: Macomber, Mr**
I've struggled to keep up with the filings, comments. The 2000 easement
16:40:03 agreement does not reference any other or prior easement agreement, that may
16:40:19 be a second easement on Cometto property, comments. I've requested a title
16:42:24 company to review this, comments re: easements.

16:43:02 **Judge: Hosack, Charles**
There may be other issues in this litigation, he needs more time.
16:43:42 Will advise the parties of the issues to be

litigated. Will grant Mr Macomber
16:45:00 additional time to get information to Mr
Featherston.

16:45:23 **Other: Macomber, Mr**
I'm trying to address the width of the easement.

16:45:36 **Judge: Hosack, Charles**
Lets get the dates first. Will give until the
end of the week to serve the
16:45:57 responses with supporting documentation to
Featherston. Will address the
16:47:19 issue of subparts, regarding the issue of
identifying witnesses, that has
16:47:39 been ruled to be invasive. The pretrial order
calls for disclosure before
16:48:12 trial. If interrog asks regarding a person who
has knowledge then you disclose
16:49:00 that person. RE: #1, if Sidler and St Angelo
answer then they need to say.
16:52:10 RE: #7 and 8 I'm not sure of the roadway or when
it was built. Not a
16:54:24 sufficient easement.

16:54:32 **Other: Macomber, Mr**
The new road was put in and in the earlier case
the PL complained about the
16:54:48 new road. The parties then created the easement
agreement.

16:55:16 **Pers. Attorney: Featherston, Brent**
The roadway is within the 30 feet easement. The
easement agreement is a
16:55:47 product of ten years ago. Was a prescriptive
right to the neighbors beyond.
16:56:31 Michaud said the road was adequate and meets 55.
13. The easement lies within
16:57:40 the thirty feet. I think PL thinks they should
have the whole 30 feet and not
16:58:18 just the roadway within the 30 feet.

16:58:35 **Judge: Hosack, Charles**
This roadway is the same roadway as was on the
ground when Judge Michaud
16:59:11 visited.

16:59:21 **Other: Macomber, Mr**
PL agree the road hasn't moved. One issue is the
width of the easement
16:59:40 itself. The Black Diamond survey shows the North
leg of the road is not
17:00:01 within the 30 feet. And what is the easement,
there were prior 60 foot
17:00:26 easements. Should it be only the width of the
roadway, 14 feet, or 30 foot
17:00:47 width or is it unaddressed.

17:01:30 **Pers. Attorney: Featherston, Brent**

17:02:02 **Judge: Hosack, Charles**
There is case law that says the Court needs a
survey and can order a survey
17:02:29 and parties would pay for it. Then we'd have a
defined area. Without that
17:03:20 survey I don't see how the court can resolve
anything. Will pose that, Bethel
17:04:43 v. VanStone case. There is no indication about
the roadway except that it is
17:07:24 there.

17:07:45 **Pers. Attorney: Featherston, Brent**
The easement agreement was a settlement
agreement after the judge made some
17:08:03 preliminary comments.

17:08:15 **Other: Macomber, Mr**
Judge Michaud did issue an order with a final
easement attached.

17:08:33 **Judge: Hosack, Charles**
If the trial court doesn't express the easement
with clarify the Supreme
17:08:56 Court will send it back.
17:09:32 You may want to talk to your parties about a
survey. That is why my rulings
17:10:29 won't go any further. Will leave the trial date
set for now. For filing of
17:12:25 other motions, MSJ, will grant additional time.

17:13:35 **Other: Macomber, Mr**
The other issue is for the court to clairfy -

17:13:53 basically a quiet title action.
The DF make alternations.

17:14:06 **Judge: Hosack, Charles**
That is within the scope of what I just
discussed.

17:16:16 If Mr Featherston wants to prepare an Order you
can.

17:16:32 **Pers. Attorney: Featherston, Brent**
We should have discovery by Fri and we'll go
from there.

17:17:57 **Judge: Hosack, Charles**
Comments.

17:18:17 **Other: Macomber, Mr**
Request a ruling on the PL request re: financial
information.

17:19:26 **Pers. Attorney: Featherston, Brent**
We ask for all the documents relating to the
closing, no objection to
17:19:55 redacting SSN. We have a right to know what
documents changed hands, title
17:20:20 report, informatin is exchanged, what did the PL
know at the time of
17:21:04 purchase.

17:21:08 **Other: Macomber, Mr**
Agree with that, I'll redact.

17:22:22 **Judge: Hosack, Charles**
Mr Featherston prepare an Order.

17:23:04 Stop recording

ORIGINAL

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2008 AUG 12 P 4:21

MARIE SCOTT
CLERK DISTRICT COURT
MS
DEPUTY

FEATHERSTON LAW FIRM, CHTD.
BRENT C. FEATHERSTON, ISB No.: 4602
Attorneys at Law
113 South Second Avenue
Sandpoint, ID 83864
(208) 263-6866
(208) 263-0400 (Fax)

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

DAVID L. CALDWELL, KATHLEEN C.)
CALDWELL, LAWRENCE L. SEILER,)
THERESA L. SEILER, and PATRICIA)
ST. ANGELO,)

Plaintiffs,)

vs.)

THOMAS W. COMETTO and LORI M.)
COMETTO,)

Defendants.)

Case No. CV 2007-01744

**MOTION TO COMPEL
PLAINTIFFS' ATTENDANCE
AT DEPOSITION, MOTION TO
SHORTEN TIME, MOTION FOR
SANCTIONS and NOTICE OF
HEARING**

COMES NOW the undersigned counsel for and on behalf of the Defendants,
THOMAS W. COMETTO and LORI M. COMETTO, and moves this Court to enter an order
compelling Plaintiffs' attendance at deposition on August 19, 2008, for the reasons set forth as
follows:

On May 5, 2008, this Court issued a Scheduling Order, Notice of Trial and Pretrial
Order setting the same for trial to commence September 3 and 4, 2008.

The Defendants previously scheduled the depositions of David Caldwell, Kathy
Caldwell and the Plaintiffs Seiler and St. Angelo for June 17th and 19th.

**MOTION TO COMPEL PLAINTIFFS' ATTENDANCE AT DEPOSITION,
MOTION TO SHORTEN TIME, MOTION FOR SANCTIONS
and NOTICE OF HEARING - 1**

Featherston Law Firm ctd

*Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Wruck
Stephen T. Snedden
Attorneys at Law*

*113 S. Second Ave.
Sandpoint, Idaho 83864
(208) 263-6866
Fax (208) 263-0400*

** Licensed in
Idaho & Washington*

The Plaintiffs refused to attend the depositions claiming, through their counsel, their unavailability and that the Plaintiffs Seiler and St. Angelo had no evidence relevant to the case. The Plaintiffs filed a Motion for Protective Order and in response to Defendants' Motion to Compel on pending written discovery issues. Those motions were heard before the Court on June 3rd. (See Plaintiffs' Objection to Defendants' Motion to Compel and Notice of Motion and Motion for Protective Order dated May 27, 2008.)

Thereafter, the Defendants voluntarily vacated the depositions of the Plaintiffs on condition that the Plaintiffs would cooperate in rescheduling the same.

Defendants' counsel was engaged in jury trial beginning June 23, 2008, for a period of two weeks. The jury verdict was returned July 9th in Donnelly v. Rimar Construction, Bonner County Case No. CV-2006-00445.

Upon completion of jury trial, Defendants' counsel reviewed several letters and disclosures from Plaintiffs' counsel dated June 30th, July 11th and July 26th setting forth Plaintiffs' claim(s) of new evidence and/or legal theories Plaintiffs assert are relevant.

The undersigned counsel for Defendants wrote to opposing counsel on August 8, 2008, requesting cooperation from Plaintiffs and their counsel in the rescheduling of the depositions of Mr. and Mrs. Caldwell previously vacated by their request and Motion for Protective Order.

On Monday, August 11, 2008, I received a response from the Plaintiffs' counsel refusing to cooperate or make his clients available for deposition in any manner or at any time.

Counsel provides no authority for refusing to appear for depositions.

**MOTION TO COMPEL PLAINTIFFS' ATTENDANCE AT DEPOSITION,
MOTION TO SHORTEN TIME, MOTION FOR SANCTIONS
and NOTICE OF HEARING - 2**

Featherston Law Firm d/c

*Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Wruck
Stephen T. Snedden
Attorneys at Law*

*113 S. Second Ave.
Sandpoint, Idaho 83864
(208) 263-6866
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Idaho & Washington*

As now should be abundantly clear, the Plaintiffs and/or their counsel are intentionally obstructing the Defendants' attempts to prepare this matter for trial, first hiding behind the travel schedules and trial calendar of Plaintiffs and their counsel and, when cooperation was provided by Defendants on those issues, then asserting excuses for not appearing at deposition through counsel's August 11th letter.

The Depositions of Mr. and Mrs. Caldwell have been rescheduled for August 19, 2008. Pursuant to I.R.C.P. Rule 37(a), this Court should enter an order compelling the Plaintiffs, David and Kathleen Caldwell, to appear at Defendants' counsel's office for deposition.

Further, pursuant to Rule 37 of the Idaho Rules of Civil Procedure, it is requested that this Court enter an award of sanctions against the Plaintiffs in the form of attorneys' fees under I.R.C.P. 37(a)(4) and for the Plaintiffs' clearly frivolous conduct and obstreperous attempts to frustrate the discovery and trial preparation process.

DATED this 12th day of August, 2008.

FEATHERSTON LAW FIRM, CHFD.

By 

BRENT C. FEATHERSTON
Attorney for Defendants

**MOTION TO SHORTEN TIME
and MOTION FOR SANCTIONS**

The Defendants' Motion to Compel Plaintiffs' Attendance at Deposition is scheduled for hearing on August 15, 2008, at 10:30 a.m. Pursuant to I.R.C.P. 7(b)(3) this Motion and Notice of Hearing is to be served no later than fourteen (14) days prior to the time specified for

**MOTION TO COMPEL PLAINTIFFS' ATTENDANCE AT DEPOSITION,
MOTION TO SHORTEN TIME, MOTION FOR SANCTIONS
and NOTICE OF HEARING - 3**

Featherston Law Firm ctd.

*Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Wruck
Stephen T. Snedden
Attorneys at Law*

*113 S. Second Ave.
Sandpoint, Idaho 83864
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Fax (208) 263-0400*

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Idaho & Washington*

hearing. Due to the actions of the Plaintiffs Caldwell, and in order to protect the Defendants, this matter must be heard immediately. Pursuant to I.R.C.P. Rule 6(b) and 7(b), this Court may alter the time prescribed.

There is no prejudice to the Plaintiffs by altering the time period prescribed by Rule and allowing the Motion to Compel Plaintiffs' Attendance at Deposition to proceed on short notice as opposed to a fourteen (14) day notice.

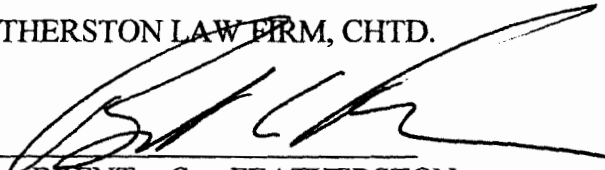
The Court is asked to take judicial notice of the file herein and to shorten time for hearing on the Defendants' Motion to Compel Plaintiffs' Attendance at Deposition for the reasons set forth in the Affidavit of Counsel and as may be presented at hearing on this Motion.

The undersigned further gives notice of intent to present further evidence and testimony at hearing.

DATED this 12th day of August, 2008.

FEATHERSTON LAW FIRM, CHTD.

By


BRENT C. FEATHERSTON
Attorney for Defendants

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that the undersigned, as attorney for the above-named Defendants, will call for telephonic hearing at the Kootenai County Courthouse, in Coeur d'Alene, Idaho before the Honorable Charles Hosack, the Defendants' Motion to Compel Plaintiffs' Attendance at Deposition, Motion to Shorten Time and Motion for Sanctions on August 15, 2008, at 10:30 a.m., or as soon thereafter as counsel may be heard.

**MOTION TO COMPEL PLAINTIFFS' ATTENDANCE AT DEPOSITION,
MOTION TO SHORTEN TIME, MOTION FOR SANCTIONS
and NOTICE OF HEARING - 4**

Featherston Law Firm and

*Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Whuck
Stephen T. Snedden
Attorneys at Law*

*113 S. Second Ave.
Sandpoint, Idaho 83864
(208) 263-6866
Fax (208) 263-0400*

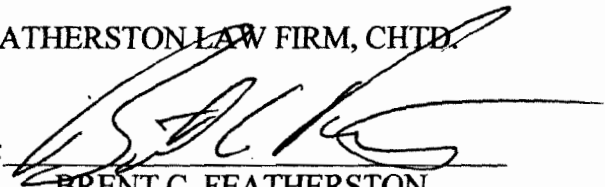
** Licensed in
Idaho & Washington*

Should opposing counsel desire to appear telephonically, you are directed to notify the undersigned prior to hearing and Defendants' counsel will arrange for your telephonic appearance.

DATED this 12th day of August, 2008.

FEATHERSTON LAW FIRM, CHTD.

By:



BRENT C. FEATHERSTON
Attorney for Defendants

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of August, 2008, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Arthur B. Macomber, Esq.
408 E. Sherman Avenue, Suite 215
P.O. Box 5203
Coeur d'Alene, Idaho 83814

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile No. (208) 664-9933
- Other: _____

Hon. Charles Hosack
District Court Judge
P.O. Box 9000
Coeur d'Alene, Idaho 83816

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile No. (208) 446-1138
- Other: _____

By: 

Featherston Law Firm d/b/a

Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Wruck
Stephen T. Snedden
Attorneys at Law

113 S. Second Ave.
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MOTION TO COMPEL PLAINTIFFS' ATTENDANCE AT DEPOSITION,
MOTION TO SHORTEN TIME, MOTION FOR SANCTIONS
and NOTICE OF HEARING - 5

* Licensed in
Idaho & Washington

ORIGINAL

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2008 AUG 12 P 4: 21

MARIE SCOTT
CLERK DISTRICT COURT

MS
DEPUTY

FEATHERSTON LAW FIRM, CHTD.
BRENT C. FEATHERSTON, ISB No.: 4602
Attorneys at Law
113 South Second Avenue
Sandpoint, ID 83864
(208) 263-6866
(208) 263-0400 (Fax)

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

DAVID L. CALDWELL, KATHLEEN C.)
CALDWELL, LAWRENCE L. SEILER,)
THERESA L. SEILER, and PATRICIA)
ST. ANGELO,)

Plaintiffs,)

vs.)

THOMAS W. COMETTO and LORI M.)
COMETTO,)

Defendants.)

Case No. CV 2007-01744

**AFFIDAVIT OF COUNSEL
IN SUPPORT OF DEFENDANTS'
MOTION TO COMPEL
PLAINTIFFS' ATTENDANCE
AT DEPOSITION**

STATE OF IDAHO)
) ss:
County of Bonner)

I, BRENT C. FEATHERSTON, being first duly sworn upon oath, depose and state as follows:

I am over the age of 18 and competent to testify to the matters contained herein.

I am legal counsel in the above-entitled matter representing the Defendants, Thomas W. and Lori M. Cometto. I am familiar with the facts set forth herein and they are based upon personal knowledge.

This summer has presented one of the busiest trial calendars I have experienced in 16 years of litigation practice. I represented a Defendant/Counterclaimant in a two-week jury trial which commenced June 23rd and jury verdict was returned July 9th.

**AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS'
MOTION TO COMPEL PLAINTIFFS' ATTENDANCE
AT DEPOSITION - 1**

Featherston Law Firm ctd

*Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Wruck
Stephen T. Sneider
Attorneys at Law*

*113 S. Second Ave.
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Idaho & Washington*

- 289 -

Similarly, I was scheduled for trial in a 2-day criminal matter the week of July 28th and in a 4-day bench trial before a different District Judge the same week of July 28th. Both cases ended up being vacated for different reasons.

I previously scheduled the depositions of Mr. and Mrs. Caldwell for June 17th and 19th, as it was the only time available in my schedule. In response I received the Plaintiffs' Motion for a Protective Order asserting that Mrs. was unavailable in Alaska for several weeks and Mr. Caldwell's deposition should not be taken on the 17th because Mr. Macomber was unavailable, in trial, and the other Plaintiffs, Seiler and St. Angelo, were unavailable as they reside out of state and it was Plaintiffs' counsel's position that they had no personal knowledge of facts which would be relevant to the litigation.

In an attempt to accommodate the travel schedule and trial calendar of Plaintiffs and their counsel, I vacated those depositions.

Upon completion of the two-week jury trial, I found several letters from counsel dated June 30th, July 11th and, subsequent to trial, a letter dated July 26th. Each letter was lengthy and attached numerous documents in reference to legal theories that the Plaintiffs deemed relevant. This was in addition to approximately three (3) inches of discovery provided in response to the earlier Motion to Compel heard June 3rd. After reviewing all of this material and, while also preparing for trial scheduled the week of July 28th, I determined that there was not a likely settlement to this litigation and sent counsel a letter dated August 8, 2008, by facsimile, which is attached hereto and incorporated herein by reference as Exhibit "A". In response to Exhibit "A", I received counsel's letter dated August 11th, which is attached hereto and incorporated herein by reference as Exhibit "

**AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS'
MOTION TO COMPEL PLAINTIFFS' ATTENDANCE
AT DEPOSITION - 2**

Featherston Law Firm *and*

Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Wruck
Stephen T. Snedden
Attorneys at Law

113 S. Second Ave.
Sandpoint, Idaho 83864
(208) 263-6866
Fax (208) 263-0400

* Licensed in
Idaho & Washington

B". It is clear the Plaintiffs refuse to appear for deposition testimony though it is not clear the basis for such refusal.

This matter is set for trial to commence September 3 and the Defendants intend to proceed to trial. Defendants and undersigned counsel request that this Court order the attendance of Mr. David Caldwell and Mrs. Kathleen Caldwell to present deposition testimony on August 19, 2008.

The undersigned counsel is also scheduled for two (2) District Court trials to commence the week of August 25th: a 2-day criminal trial and a 4-day civil proceeding. It is anticipated by counsel that at least one (1) of those matters will proceed to trial during that week as scheduled.

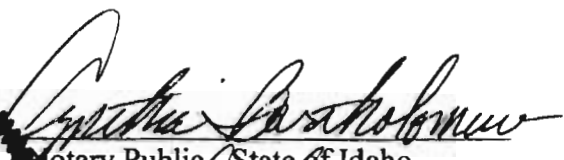
Further your Affiant sayeth naught.

DATED this 12th day of August, 2008.


BRENT C. FEATHERSTON

SUBSCRIBED AND SWORN to before me, a Notary Public, on this 12th day of August, 2008, by Brent C. Featherston.




Notary Public - State of Idaho

Residing at Cocatalla, ID

Commission expires: 8-15-2014

Featherston Law Firm cllc

Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Wruck
Stephen T. Snedden
Attorneys at Law

113 S. Second Ave.
Sandpoint, Idaho 83864
(208) 263-6866
Fax (208) 263-0400

* Licensed in
Idaho & Washington

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS'
MOTION TO COMPEL PLAINTIFFS' ATTENDANCE
AT DEPOSITION - 3

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 2008, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Arthur B. Macomber, Esq.
408 E. Sherman Avenue, Suite 215
P.O. Box 5203
Coeur d'Alene, Idaho 83814

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile No. (208) 664-9933
- Other: _____

Hon. Charles Hosack
District Court Judge
P.O. Box 9000
Coeur d'Alene, Idaho 83816

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile No. (208) 446-1138
- Other: _____

By *[Signature]*

Featherston Law Firm

Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Wruck
Stephen T. Snedden
Attorneys at Law

113 S. Second Ave.
Sandpoint, Idaho 83864
(208) 263-6866
Fax (208) 263-0400

**AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS'
MOTION TO COMPEL PLAINTIFFS' ATTENDANCE
AT DEPOSITION - 4**

* Licensed in
Idaho & Washington

Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Stephen T. Snedden
Sandra J. Wruck
Attorneys at Law

August 8, 2008

Via Facsimile No. (208) 664-9933

Arthur B. Macomber, Esq.
408 East Sherman Avenue, Suite 215
P.O. Box 5203
Coeur d'Alene, Idaho 83814

Re: Caldwell, et al. v. Cometto

Dear Mr. Macomber:

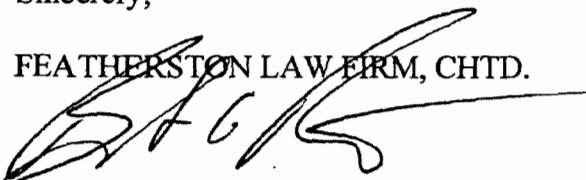
I am advised this morning that my clients have remarked with flagging and bright or florescent paint the approximate location of the underground waterline across Mr. Caldwell's 10-acre property. Please note that the marking is approximate and the actual waterline may lie underground as much as two (2) feet on either side of the markings.

Additionally, I would like to take the deposition of Mr. and Mrs. Caldwell. Hopefully, they are now available. My available dates include next Thursday and Friday, August 14th and 15th, or August 19th or 21st. Please advise as to which of those dates are preferable. I will notice the depositions at our office and arrange for a court reporter. Please get back to me on this by the end of the day next Monday, August 11th.

Thank you for your attention to this matter.

Sincerely,

FEATHERSTON LAW FIRM, CHTD.



BRENT C. FEATHERSTON
Attorney at Law

BCF/clb

cc: Mr. and Mrs. Tom Cometto (via email) ✓

EXHIBIT A



Law Office of Arthur B. Macomber

August 11, 2008

Sent by Facsimile ONLY

Brent C. Featherston
Featherston Law Firm, Chtd.
113 South Second Avenue
Sandpoint, ID 83864

408 East Sherman Avenue, Suite 215
Post Office Box 5203
Coeur d'Alene, Idaho 83814
Telephone: 208-664-4700
Toll-free: 866-511-1500
Fax: 208-664-9933
Email: art@macomberlaw.com
Web: www.macomberlaw.com

Re: Request for Caldwell depositions

Dear Mr. Featherston,


I am not sure what information pertinent to relevant evidence for this case could be gleaned from depositions of my clients, David and Kathy Caldwell, at this late date twenty-three (23) days from trial. However, if it were possible to comply with the Court's pre-trial scheduling order and the Idaho Rules of Civil Procedure this close to trial without undue burden we would surely attempt to accommodate this late request, because my clients are very motivated to finish with this case.

However, Idaho Rule of Civil Procedure number 30(e), allows my clients to make alterations to deposed testimony within thirty (30) days of the full transcript being submitted to them. My clients do not waive this provision. They feel it is proper to abide by that certain period to ascertain the accuracy of testimony, due to the testimony being held against the deponent. Even if we held a deposition on the earliest date you suggest, August 14, and even if the transcriptionist submitted the testimony to me for my clients the following Monday, August 18, my clients would have barely sixteen (16) days to consider the testimony given and whether they should make changes to it. This would not be fair at all.

Even if they could do so within that amount of time, the impact on my trial preparation would put them, and possibly you and your clients at great risk due to the lack of time for consideration of the deposed testimony prior to trial. Since the trial schedule calls for submission of certain materials to the Court during that time frame, it would be impossible to meet the Court's scheduling order for pre-trial motions, disclosure of witnesses, submission of trial briefs, any proposed findings of fact and conclusions of law, and motions *in limine* related to witnesses and exhibits if it became necessary to await confirmation of my clients' testimony for even the sixteen (16) days. The deposed testimony would have to be taken into account when creating those required submissions, which would be almost impossible to do in the time you suggest. These conditions make deposition an undue burden to my clients' interests that we must decline presently. My clients' testimony, should it be provided, will have to come out at trial.

My clients are very interested in your clients' reaction to my letter offering settlement through a new easement agreement and my clients' proposed new route. We believe addressing those items substantively would lead to genuine progress. I hope your clients address these substantive issues now.

Sincerely,


Arthur B. Macomber
Attorney at Law

Cc: Plaintiffs

EXHIBIT B

Arthur B. Macomber, Attorney at Law
 408 E. Sherman Avenue, Suite 215
 Coeur d'Alene, ID 83814
 Telephone: 208-664-4700
 Facsimile: 208-664-9933
 State Bar No. 7370
Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

DAVID L. CALDWELL and KATHY)
 C. CALDWELL, husband and wife;)
 LAWRENCE L. SEILER AND)
 THERESA L. SEILER, husband and)
 wife; PATRICIA ST. ANGELO;)
 Plaintiffs,)

Case No: CV-2007-01744

vs.)

**PROPOSED ORDER TO DENY
 DEFENDANTS' MOTION TO
 COMPEL PLAINTIFFS'
 ATTENDANCE AT DEPOSITION,
 MOTION TO SHORTEN TIME,
 MOTION FOR SANCTIONS**

THOMAS W. COMETTO and LORI)
 M. COMETTO, husband and wife; and)
 DOES 1-5,)
 Defendants.)

ORDER

The motion of Defendants THOMAS W. COMETTO and LORI M. COMETTO, husband and wife, to Compel Plaintiffs' Attendance at Deposition, Motion to Shorten Time, Motion for Sanctions, against DAVID L. CALDWELL and KATHY C. CALDWELL, et al., came on regularly for hearing before the Court on **August 15, 2008**

at 10:30 a.m., the Honorable Hosack, Judge of the District Court presiding. Arthur B.

Macomber appeared for Plaintiffs. Brent Featherston appeared for Defendants.

IT IS HEREBY ORDERED that Defendants' motion be, and hereby is DENIED

IT IS HEREBY ORDERED that Defendants' request for sanctions be, and hereby
is DENIED.

ENTERED this ____ day of _____, 2008.

Charles Hosack, District Judge

CERTIFICATE OF SERVICE

I certify that I on the ____ day of _____, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Arthur B. Macomber
Law Office of Arthur B. Macomber
408 E. Sherman Avenue, Ste 215
Coeur d'Alene, ID 83814
FAX: 208-664-9933
Attorney for Plaintiffs

	Mailed Postage Prepaid
	Interoffice Mail
	Facsimile

Brent C. Featherston
Featherston Law Firm, Chtd.
Attorneys and Counselors at Law
113 South Second Ave.
Sandpoint, ID 83864
FAX: 208-263-0400
Attorney for Defendants

	Mailed Postage Prepaid
	Interoffice Mail
	Facsimile

BY: _____
District Court Clerk

Court Minutes:

Session: HOSACK081508A
Session Date: 08/15/2008
Judge: Hosack, Charles
Reporter: Schaller, Joann

Division: DIST
Session Time: 10:00

Courtroom: Courtroom9

Clerk(s): Rohrbach, Shari

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0003

Case number: BONCV07-1744
Plaintiff: Caldwell, David
Plaintiff Attorney:
Defendant: Cometto, Thomas
Pers. Attorney:
Co-Defendant(s):
State Attorney:
Public Defender:

08/15/2008

10:48:01

Recording Started:

10:48:01

Case called

10:50:47

Judge: Hosack, Charles
Calls, Mr Featherston present by phone. DF
motion to compel PL to appear at

10:51:21

depos.

10:51:24 **Add Ins: Featherston, Brent**
Correct.

10:51:30 **Judge: Hosack, Charles**
I have copies that counsel have set to chambers.

10:51:46 **Add Ins: Featherston, Brent**
The issue is our attempt to take Caldwell
deposition. Trial notice issued May

10:52:28 5. On May 12 we sent out notice for the depos
about 6 wks prior. On the 28th

10:52:53 we received a motion for protective order. PL
were unable to attend so I

10:53:37 voluntarily vacated those depos knowing they'd
need to be reset. Now the

10:54:03 response is that they don't have to attend a
depos. There is no court rule

10:54:29 alleged, and there is no cutoff date for depos.
It seems as though the PL don

10:55:05 't want to do discovery. We're ready to go to
trial. PL filed an objection

10:55:43 saying that I have not applied appropriate effort
in the past, the facts I've

10:56:06 recited are the exact opposite. I've never had
this happen.

10:56:47 We're asking the Court to order the Caldwells to
appear with documents.

10:57:07 **Add Ins: Macomber, Art**
PL does not complain about the shortening of
time, but object to motion and

10:57:41 sanctions. It is an undue burden at this point
to make a depo date this close

10:58:02 to trial. It appears that counsel had control
over this and chose not to.

10:58:24 For a period of 22 days we heard nothing. There
is alot to go over in this

10:59:36 case. Id Constitution and due process. Rule
30(e) accords a certain amount of

11:00:06 time to review testimony. PL do not waive this
right. I've been doing a

11:00:39 thorough search of deeds at Bonner courthouse.
Those Deeds will require

11:01:22 interpretation by the Court. RE: sanctions, the
PL cherish the trial date.

11:02:20 We

11:02:25 We want to see the Sept trial go forward. We are
not engaging in frivolous
11:03:21 conduct. Information can be obtained at trial.

11:04:11 **Judge: Hosack, Charles**
In terms of sanctions - the court will not do
sanctions. Rules provide for
11:04:30 depositions, Caldwells are residents of the
county and available for depo. I
11:04:54 don't find a reason for them to not appear. The
Court set this on short
11:05:09 notice on the request of all parties to move
this along. But that won't solve
11:05:32 the problems these people have. The depos need
to be scheduled and taken
11:06:01 prior to the court trial.

11:06:15 **Add Ins: Featherston, Brent**
I'm asking for the 19th and there's been no
objection to the date. I'd ask
11:06:38 for a very specific Order.

11:07:01 **Judge: Hosack, Charles**
If counsel can't agree on a date, the Court will
assign a date.

11:07:34 **Add Ins: Macomber, Art**
I'd request we move forward with the Comettos on
the 21st.

11:08:20 **Add Ins: Featherston, Brent**
There's been no request for the Comettos, I'd
have to check the date with
11:08:42 them.

11:08:48 **Judge: Hosack, Charles**
I'm sure counsel can work it out. If they're not
available for depo then they
11:09:17 don't testify at trial. Sounds like there is no
obj to the 19th so prepare
11:09:37 and Order. I don't want to have to listen to
this again re: the Comettos dep.

11:10:35 Grant the Order for the 19th for the Caldwells.
11:11:29 Discussion on trial date and if this can be done
in two days. It doesn't
11:11:54 appear the parties are in agreement on what they

11:12:10 want the court to be looking
at. These are general comments, this is a court
trial, there was a reference
11:12:28 made to jury trial but this is a court trial.
11:13:57 It helps to do a property view, which is one
reason I scheduled this before
11:14:14 the snow hit. We'll revisit all that as we get
closer to trial.
11:16:04 **Stop recording**

ORIGINAL

FEATHERSTON LAW FIRM, CHTD.
BRENT C. FEATHERSTON, ISB No.: 4602
Attorneys at Law
113 South Second Avenue
Sandpoint, ID 83864
(208) 263-6866
(208) 263-0400 (Fax)

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2008 AUG 27 P 4: 34

MARIE SCOTT
CLERK DISTRICT COURT
MS
DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER**

DAVID L. CALDWELL, KATHLEEN C.)
CALDWELL, LAWRENCE L. SEILER,)
THERESA L. SEILER, and PATRICIA)
ST. ANGELO,)
Plaintiffs,)

Case No. CV 2007-01744

**MOTION FOR ORDER
TO TAKE JUDICIAL
NOTICE**

vs.)

THOMAS W. COMETTO and LORI M.)
COMETTO,)
Defendants.)

COMES NOW the undersigned counsel for and on behalf of the Defendants, Thomas Cometto and Lori Cometto, and moves this Court for an Order to take judicial notice of the court proceedings and court file and all exhibits, transcripts and/or testimony contained in Bonner County Case No. CV-97-1057, Campbell v. Cometto, and Bonner County Case No. CV-98-867, Crum v. Cometto.

This Motion is made pursuant to Idaho case law, court rule and, specifically, Idaho Rules of Evidence, Rule 201.

The Defendants and moving party, specifically ask this Court to take judicial notice of the Judgments of dismissal in both cases, certified copies of which are attached hereto and incorporated herein by reference as Exhibits "A" and "B", respectively.

Featherston Law Firm ckd
Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Wruck
Stephen T. Snedden
Attorneys at Law

113 S. Second Ave.
Sandpoint, Idaho 83864
(208) 263-6866
Fax (208) 263-0400

MOTION FOR ORDER TO TAKE JUDICIAL NOTICE - 1

* Licensed in
Idaho & Washington

DATED this 27th day of August, 2008.

FEATHERSTON LAW FIRM, CHTD.

By: 

BRENT C. FEATHERSTON
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of August, 2008, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Arthur B. Macomber, Esq.
408 E. Sherman Avenue, Suite 215
P.O. Box 5203
Coeur d'Alene, Idaho 83814

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile No. (208) 664-9933
- Other: _____

Hon. Charles Hosack
District Court Judge
P.O. Box 9000
Coeur d'Alene, Idaho 83816

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile No. (208) 446-1138
- Other: _____

By: 

Featherston Law Firm ctd

*Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Wruck
Stephen T. Snedden
Attorneys at Law*

*113 S. Second Ave.
Sandpoint, Idaho 83864
(208) 263-6866
Fax (208) 263-0400*

** Licensed in
Idaho & Washington*

MOTION FOR ORDER TO TAKE JUDICIAL NOTICE - 2

GARY A. FINNEY
 FINNEY & FINNEY, P.A.
 Attorneys at Law
 Old Power House Building
 120 East Lake Street, Suite 317
 Sandpoint, Idaho 83864
 Tel: 208-263-7712
 Fax: 208-263-8211
 ISB No. 1356

STATE OF IDAHO)
 County of Bonner)
 FILED 09/20/00
 AT 4:00 O'Clock PM
 CLERK, DISTRICT COURT
 JM
 Deputy

Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

JERRY L. CAMPBELL and)	Case No. CV-97-01057
JUDITH E. CAMPBELL,)	
Co-Trustees of the Jerry L.)	JUDGMENT
Campbell Family Trust, dated)	
January 27, 1993,)	
)	
Plaintiffs,)	
)	
v.)	
)	
THOMAS V. COMETTO and LORI M.)	
COMETTO, husband and wife,)	
)	
Defendants.)	
)	
)	

Based upon the Stipulation of the Plaintiffs and
 Defendants, by and through their respective counsel of record,
 the Court does hereby,


ORDER, ADJUDGE, AND DECREE that,

1. Judgment is entered that the relief granted to the
 parties hereto is as set forth in the Easement Agreement,

attached hereto and incorporated herein, without fees or costs to either party; and

2. This is a final judgment in this action.

Dated this 20 day of September, 2000.



JAMES R. MICHAUD
District Judge

CLERK'S RULE 77 (d) MAILING

I hereby certify that a true and correct copy, with the clerk's filing stamp thereon, showing the date of filing, of the foregoing JUDGMENT, was served by U.S. Mail, postage prepaid, this 22 day of September, 2000, and was addressed as follows:

Gary A. Finney
Finney & Finney, P.A.
Attorneys at Law
Old Power House Building
120 E. Lake Street, Suite 317
Sandpoint, ID 83864

Brent C. Featherston
Attorney at Law
Featherston Law Firm
113 South Second Avenue
Sandpoint, ID 83864

By: 

Clerk of Court

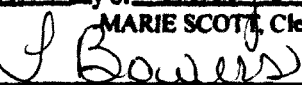
STATE OF IDAHO

County of Bonner

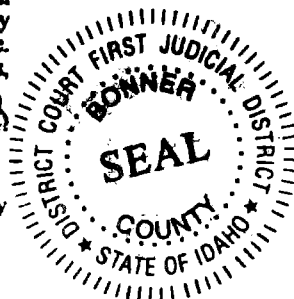
I, Marie Scott, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, do hereby certify that the foregoing instrument is a true and correct copy of the original thereof now on file in this office. Witness my hand and seal of said Court on this,

the 27 day of August 20 00

MARIE SCOTT, Clerk

By: 

Deputy



EASEMENT AGREEMENT

FOR VALUABLE CONSIDERATION, the receipt of which is hereby acknowledged, this Easement Agreement (the "Agreement") is entered into effective March 1, 1999, by and between THOMAS W. and LORI M. COMETTO, husband and wife, (the "Comettos"), the JERRY L. CAMPBELL FAMILY TRUST, dated January 27, 1993, ("Campbell"), the CRUM REVOCABLE TRUST ("Crum"), ARLEN L. LEMEN ("Lemen"), and KATHLEEN C. CALDWELL ("Caldwell").

1. The Comettos are the owners of the following real property (referred to herein as the "Cometto Property"):

The Northeast Quarter of the Southeast Quarter of the Northwest Quarter of Section 24, Township 59 North, Range 1 East, Boise Meridian, Bonner County, Idaho; _

EXCEPT the East 200 Feet thereof.

AND the West 200 Feet of the Southeast Quarter of the Southeast Quarter of the Northwest quarter of Section 24, Township 59 North, Range 1 East, Boise Meridian, Bonner County, Idaho.

2. Campbell, whose mailing address is P.O. Box 457, Cayuga, Texas, 75832 is the owner of the following real property (referred to herein as the "Campbell Property"):

The East 200 feet of the Northeast Quarter of the Southeast Quarter of the Northwest Quarter in Section 24, Township 59 North, Range 1 East, Boise Meridian, Bonner County, Idaho, AND

The Southeast Quarter of the Southeast Quarter of the Northwest Quarter of Section 24, Township 59 North, Range 1 East Boise Meridian, Bonner County, Idaho; EXCEPT the West 200 feet.

3. Crum, whose mailing address is c/o David E. and Bonnie K. Crum, S. 1937 Mt. Vernon Road, Spokane, Washington 99203, is the owner of the following real property (referred to herein as the "Crum Property"):

The Southwest Quarter of the Southwest Quarter of Section 19, Township 59 North, Range 2 East, Boise Meridian, Bonner County, Idaho.

4. Lemen, Whose mailing address is 78244 E. Robertson Road, Nashville, Indiana 47448 is the owner of the following real property (referred to herein as the "Lemen Property"):

Featherston Law Firm
Daniel P. Featherston
Kathleen C. Featherston
Attorneys at Law
113 S. Second Ave.
Idaho Springs, Idaho 83864
(208) 263-6866
Fax (208) 263-0400

Licensed in
Idaho & Washington

In Section 19, Township 59 North, Range 2 East, Boise Meridian, Bonner County, Idaho, that part of the East Half of the Southwest Quarter of said Section 19, lying South of the centerline of Strawberry Creek, and including that part of the West Half of the Southeast Quarter of said Section 19, lying South of the centerline of Strawberry Creek.

5. Caldwell, whose mailing address is P.O. Box 1004, Barrow, Ak. 99723, is the owner of the following real property (referred to herein as "Caldwell Property"):

The land referred to in this policy is situated in the State of Idaho, and is described as follows: County of Bonner

That part of the West Half of the Southeast Quarter of Section 19, Township 59 North, Range 2 East, Boise Meridian, Bonner County, Idaho, lying South of the centerline of Strawberry Creek, and the East 300 feet of the East half of the Southwest Quarter of Section 19, Township 59 North, Range 2 East, Boise Meridian, Bonner County, Idaho, lying South of the centerline of Strawberry Creek.

6. The Cometos hereby make, convey and grant to **Campbell, Crum, Lemen, and Caldwell**, an easement over and across the Cometto Property, for the benefit of their respective properties. The Cometto Easement is located on the existing roadway which traverses the Cometto Property to the North of the "abandoned access Road," as depicted in Exhibit A attached hereto, which easement is believed to lie within the West thirty (30) feet, the North thirty (30) feet, and the East thirty (30) feet of the Cometto Property. The Grantees or their successors or assigns shall not make any substantial modification to said easement without prior written consent of the Grantors or their successors or assigns.

7. Campbell hereby makes, conveys and grants to **Cometto, Crum, Leman and Caldwell**, an easement thirty (30) feet in width over and across the Campbell Property (the "Campbell Easement"), for the benefit of their respective properties. The Campbell Easement is located on the existing roadway which traverses the Campbell Property. Campbell hereby affirms, makes, conveys and grants to Cometto an existing easement for access to maintain, repair, replace, or improve the existing domestic water system in Strawberry Creek, and the accompanying water transmission line on, over, and across the above-described property owned by Campbell.

8. Crum hereby makes, conveys and grants to **Lemen and Caldwell**, an easement over and across the Crum Property, (the "Crum Easement"), for the benefit of their respective properties. The Crum Easement is located on the existing roadway which traverses the Crum Property.

Featherston Law Firm
Daniel P. Featherston
Christine C. Featherston
Attorneys at Law
13 S. Second Ave.
Boise, Idaho 83864
(208) 263-6866
fax (208) 263-0400

Licensed in
Idaho & Washington

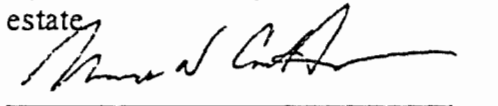
9. Lemen hereby makes, conveys and grants to Caldwell, an easement over and across the Lemen Property, (the "Lemen Easement"), for the benefit of the Caldwell property. The Lemen Easement is located on the existing roadway which traverses the Lemen Property.

10. The parties hereto do hereby grant an easement for underground utility transmission lines over and across the existing easement for ingress and egress, as described above. The undersigned acknowledges there is no present utilities, but do grant an easement for such use at such time as utilities are available to the above described properties.

11. All easements granted in this Agreement are appurtenant to and shall run with the respective properties, and shall be binding upon and inure to the benefit of the successors, licensees, and transferees entitled thereof, including, without limitation, any transferees of a portion of the respective properties as a result of the subdivision of any such property.

12. In the event that any dispute arises regarding the interpretation, application, breach or enforcement of the provision of this Agreement, then the prevailing party in such dispute shall be entitled to recover their attorney fees and costs incurred, including attorney fees and costs incurred on appeal.

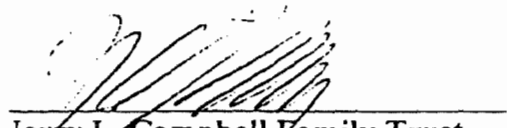
13. The parties hereto agree to perpetually hold harmless the fee holders of the servient estate for any damages (property or personal) sustained by them, or their guests or agents while using the above described and granted easements on or across the servient estate.

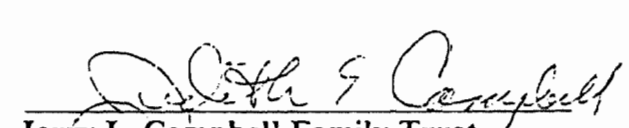

THOMAS W. COMETTO

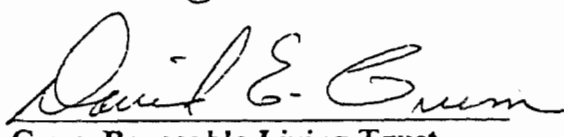
Dated: December 28, 1999

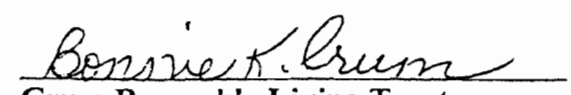

LORI M. COMETTO

Dated: December 28, 1999


Jerry L. Campbell Family Trust
By: Jerry L. Campbell
Its Co-Trustee
Dated: April 14, 2000


Jerry L. Campbell Family Trust
By: Judith E. Campbell
Its Co-Trustee
Dated: April 14, 2000


Crum Revocable Living Trust
By: David W. Crum
Its: Co-Trustee
Dated: Jan 19, 2000


Crum Revocable Living Trust
By: Bonnie K. Crum
Its: Co-Trustee
Dated: Jan. 19, 2000

Featherston Law Firm
Daniel T. Featherston
Robert C. Featherston
Attorneys at Law
113 S. Second Ave.
Lapoint, Idaho 83864
(208) 263-6866
Fax (208) 263-0400

*Licensed in
Idaho & Washington

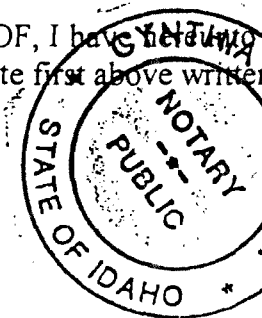
Arlan L. Lemen
 Arlan L. Lemen
 Dated: 9/8/2000

Kathleen C. Caldwell
 Kathleen C. Caldwell
 Dated: 1-31-00

STATE OF IDAHO)
) : SS
 County of Bonner)

On this 20th day of Dec., 1999, before me *Cynthia Krueger*, a Notary Public in and for said State, personally appeared **THOMAS W. and LORI M. COMETTO**, husband and wife, known or identified to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Cynthia Krueger
 Notary Public - State of Idaho
 Residing at Sandpoint, ID
 My Commission expires: 8-15-2002

STATE OF TEXAS)
) : SS
 County of)

On this 18 day of April, ²⁰⁰⁰ 1999, before me *Cindy L. Grimes*, Notary Public in and for said State, personally appeared **JERRY L. CAMPBELL and JUDITH E. CAMPBELL, CO-TRUSTEES OF THE JERRY L. CAMPBELL FAMILY TRUST**, dated January 27, 1993, known or identified to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same as trustees on behalf of the Trust, and that the Trust executed the foregoing instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Cindy L. Grimes
 NOTARY PUBLIC - STATE OF TEXAS
 Residing at Lewisville, Texas
 My Commission expires: 3-16-2002

Featherston Law Firm
 Daniel P. Featherston
 Brent C. Featherston
 Attorneys at Law
 113 S. Second Ave.
 Sandpoint, Idaho 83864
 (208) 263-6866
 Fax (208) 263-0400
 *Licensed in
 Idaho & Washington

284

WASHINGTON
 STATE OF ~~IDAHO~~)
 : SS
 County of Spokane)

On this 19th day of January, ²⁰⁰⁰1999, before me Marcia A. Kenney
 Notary Public in and for said State, personally appeared **DAVID W. CRUM and BONNIE
 K. CRUM, CO-TRUSTEES OF THE CRUM REVOCABLE LIVING TRUST**, known
 or identified to me to be the persons whose names are subscribed to the foregoing
 instrument, and acknowledged to me that they executed the same as trustees on behalf of the
 Trust, and that the Trust executed the foregoing instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal
 the day and year in this certificate first above written.

Marcia A. Kenney
 NOTARY PUBLIC-State of ~~Idaho~~ WASHINGTON
 Residing at Spokane
 My Commission expires: 11/28/02

Indiana
 STATE OF ~~IDAHO~~)
 : SS
 County of Monroe)
Donner

On this 8th day of Sept, ²⁰⁰⁰1999, before me Frank A. Barnhart, a Notary
 Public in and for said State, personally appeared **ARLEN L. LEMAN**, known or identified
 to me to be the person whose name is subscribed to the within instrument, and
 acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal
 the day and year in this certificate first above written.

Frank A. Barnhart
 Notary Public - State of ~~Idaho~~
 Residing at 2258 E Cape Cod Dr
 My Commission expires: 11/1/07
Bloomington, IN 47401
Frank A. Barnhart
 Attorney # 2579-53

Featherston Law Firm
 Daniel P. Featherston
 Brent C. Featherston
 Attorneys at Law
 113 S. Second Ave.
 Sandpoint, Idaho 83864
 (208) 263-6866
 Fax (208) 263-0400

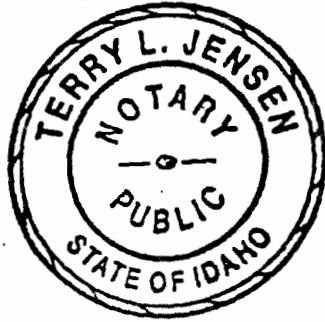
*Licensed in
 Idaho & Washington

Rjt

STATE OF IDAHO)
 : SS
County of Bonner)

On this 31st day of January, 1999, before me TERRY JENSEN, a Notary Public in and for said State, personally appeared KATHLEEN C. CAMPBELL, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



T. L. Jensen
Notary Public - State of Idaho
Residing at SANDPOINT
My Commission expires Oct. 14, 2000

Featherston Law Firm
Daniel P. Featherston
Trent C. Featherston
Attorneys at Law
113 S. Second Ave.
Sandpoint, Idaho 83864
(208) 263-6866
Fax (208) 263-0400

*Licensed in
Idaho & Washington

SOUTH FORK GROUSE CREEK

ACCESS ROAD

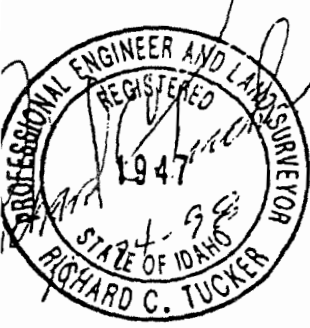
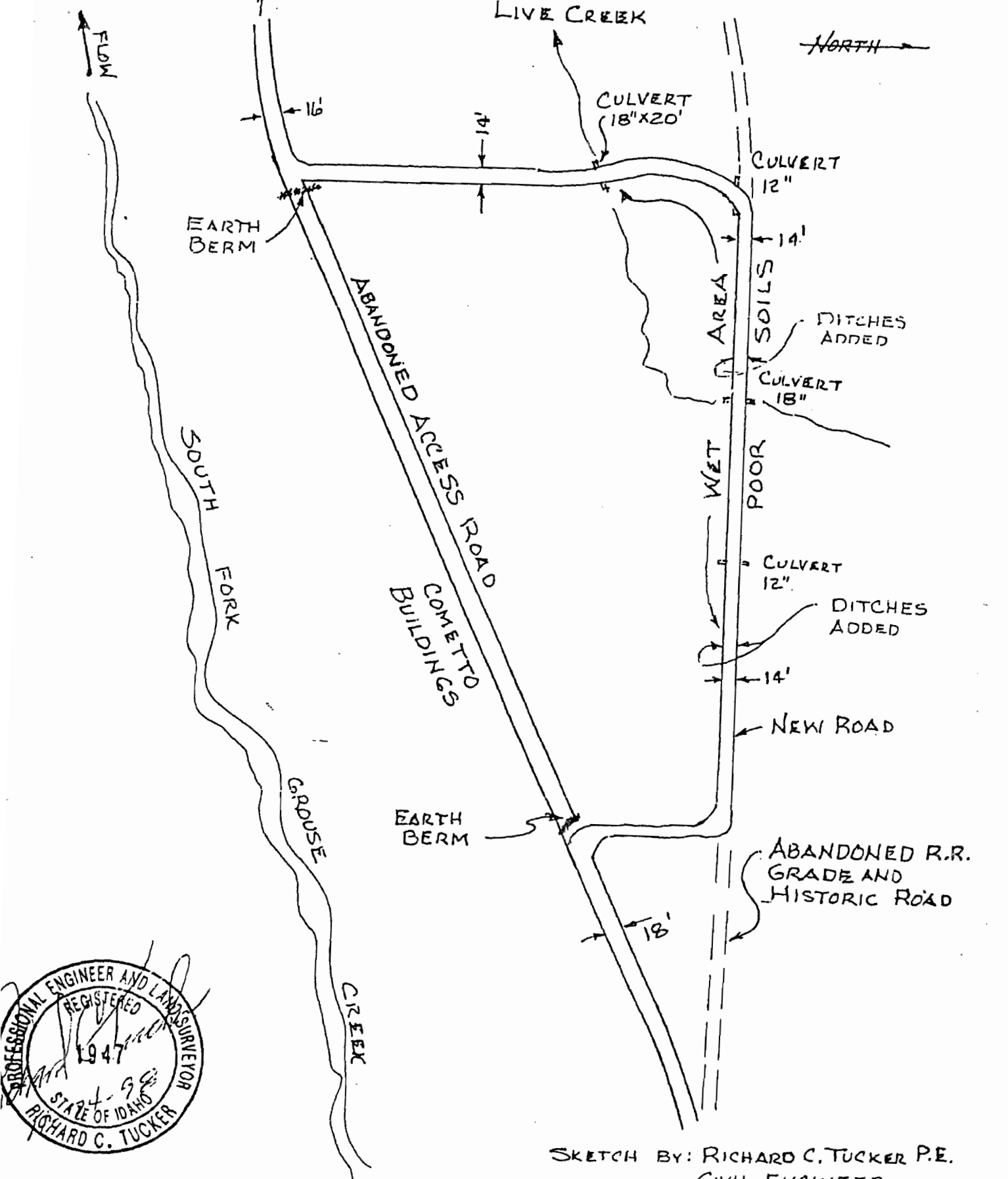
11-10-98
REVISION

TO BRIDGE
& SANDPOINT

LIVE CREEK

NORTH

FLOW



SKETCH BY: RICHARD C. TUCKER P.E.
CIVIL ENGINEER
SANDPOINT, IDAHO

- 3/2 -
APPROX. SCALE

Terry Jensen--ISB No. 1939
Attorney at Law
517 North Fourth Avenue
Sandpoint, Idaho 83864
(208) 265-9564
(208) 263-8425 (FAX)
Attorney for Plaintiff

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DISTRICT

2000 DEC -5 A 9 18

MARIE SCOTT
CLERK DISTRICT COURT
DEPUTY *JM*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

DAVID E. CRUM and BONNIE K.)
CRUM, Trustees of the David E.)
Crum and Bonnie K. Crum Revocable)
Living Trust,)

Case No. CV-98-00867

Plaintiffs)

JUDGMENT

v.)

THOMAS V. COMETTO and LORI)
M. COMETTO, husband and wife,)

Defendants)

Based on the stipulation of the Plaintiffs and Defendants, by and through their
respective counsel of record, the Court does hereby

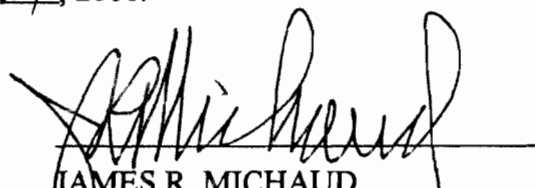
ORDER, ADJUDGE AND DECREE that

1) Judgment is entered that the relief granted to the parties hereto is as set
forth in the Easement Agreement attached and incorporated to the Judgment entered on
the 20th day of September, 2000, in Bonner County, Idaho, Case No. CV-97-01057,
(*Campbell vs. Cometto*) and which judgment was recorded September 22, 2000, as
Instrument No. 570339, records of Bonner County, Idaho.

2) Neither party is awarded court costs or attorney fees.

2) This is a final judgment in this action.

Dated this 4 day of December, 2000.


JAMES R. MICHAUD
District Judge

CLERK'S CERTIFICATE OF MAILING

IT IS HEREBY CERTIFIED that the undersigned is the Clerk of the above entitled Court; that on the 5 day of December, 2000, the undersigned enclosed a conformed copy of the Judgment dated the 4 day of December, 2000, issued by the above entitled Court in the above entitled action, in an envelope addressed to:

Terry Jensen
Attorney at Law
218 Cedar St., Suite 203
P.O. Box 1382
Sandpoint, ID 83864

Brent C. Featherston
Attorney at Law
Featherston Law Firm
113 South Second Avenue
Sandpoint, ID 83864

which are the present and last known addresses of the parties reported to the undersigned by the parties, placed the necessary postage thereon, and deposited the same in the U.S. Post Office at Sandpoint, Idaho.

DATED at Sandpoint, Idaho, this 5 day of December, 2000.

MARIE SCOTT, Clerk

By: Jeanne Mollenkopf
Deputy Clerk

STATE OF IDAHO

County of Bonner

I, Marie Scott, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, do hereby certify that the foregoing instrument is a true and correct copy of the original thereof now on file in this office. Witness my hand and seal of said Court on this

the 27 day of August, 2008

MARIE SCOTT, Clerk

By: J Bowers
Deputy



Terry Jensen--ISB No. 1939
 Attorney at Law
 517 North Fourth Avenue
 Sandpoint, Idaho 83864
 (208) 265-9564
 (208) 263-8425 (FAX)
 Attorney for Plaintiff

STATE OF IDAHO
 COUNTY OF BONNER
 FIRST JUDICIAL DISTRICT

2000 NOV -8 A 10: 01

MARIE SCOTT
 CLERK DISTRICT COURT
 _____ JM
 DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

DAVID E. CRUM and BONNIE K.)	
CRUM, Trustees of the David E.)	Case No. CV-98-00867
Crum and Bonnie K. Crum Revocable)	
Living Trust,)	STIPULATION FOR
Plaintiffs)	ENTRY OF JUDGMENT
v.)	
THOMAS V. COMETTO and LORI)	
M. COMETTO, husband and wife,)	
Defendants)	

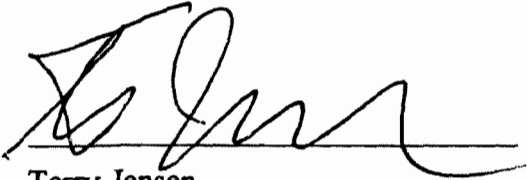
Come now the Plaintiffs and Defendants, by and through their respective counsel of record, and stipulate as follows:

1) The parties have resolved any and all pending disputes between them which settlement has been submitted as an Easement Agreement and has been entered as a Judgment in Bonner County Case No. CV-97-01057, Campbell v. Cometto. The above named parties in this action do hereby incorporate by reference that Stipulation and Judgment with the attached Easement Agreement.

2) Court costs and attorney fees shall be borne by the respective parties.

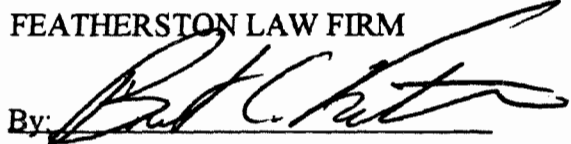
3) The parties stipulate that final judgment in this action be entered in conformity with that Judgment entered in the above mentioned case.

Dated this 6th day of NOVEMBER, 2000.



Terry Jensen
Attorney for Plaintiffs/
Counter Defendants

FEATHERSTON LAW FIRM



Brent C. Featherston
Attorney for Defendants/
Counter Claimants

STATE OF IDAHO

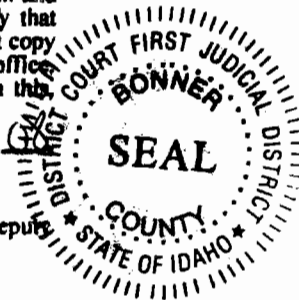
County of Bonner

I, Marie Scott, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, do hereby certify that the foregoing instrument is a true and correct copy of the original thereof now on file in this office. Witness my hand and seal of said Court on this

the 27 day of August, 2000

MARIE SCOTT, Clerk

By J Bowers Deputy



ORIGINAL

FEATHERSTON LAW FIRM, CHTD.
BRENT C. FEATHERSTON, ISB No.: 4602
Attorneys at Law
113 South Second Avenue
Sandpoint, ID 83864
(208) 263-6866
(208) 263-0400 (Fax)

STATE OF IDAHO
COUNTY OF BONNER
FIRST JUDICIAL DIST.

2008 AUG 27 P 4: 34

MARIE SCOTT
CLERK DISTRICT COURT

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

DAVID L. CALDWELL, KATHLEEN C.)
CALDWELL, LAWRENCE L. SEILER,)
THERESA L. SEILER, and PATRICIA)
ST. ANGELO,)

Plaintiffs,)

vs.)

THOMAS W. COMETTO and LORI M.)
COMETTO,)

Defendants.)

Case No. CV 2007-01744

**MOTION TO EXCLUDE
TESTIMONY AND/OR
MOTION IN LIMINE**

COMES NOW the undersigned counsel for and on behalf of the Defendants, Thomas Cometto and Lori Cometto, and moves this Court to exclude any "expert" testimony from Black Diamond Engineering and/or Joel Petty, which pertains to, encompasses or relates to the practice of professional land surveying as defined in Idaho Code § 54-1202.

This Motion is based upon the Idaho Rules of Civil Procedure, Idaho Rules of Evidence and Idaho case law. Specifically, the Defendants Cometto object to any admission of testimony or any witness who is not competent and/or licensed to testify to the matters which require licensure under Idaho's Professional Engineers and Surveyors Licensure Act found in Title 54, Chapter 12 of the Idaho Code.

Featherston Law Firm c/c

Daniel P. Featherston
Brent C. Featherston*
Jeremy P. Featherston
Sandra J. Wruck
Stephen T. Snedden
Attorneys at Law

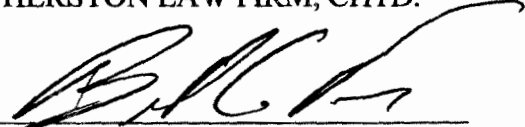
113 S. Second Ave.
Sandpoint, Idaho 83864
(208) 263-6866
Fax (208) 263-0400

MOTION TO EXCLUDE TESTIMONY AND/OR MOTION IN LIMINE - 1

DATED this 27th day of August, 2008.

FEATHERSTON LAW FIRM, CHTD.

By:



BRENT C. FEATHERSTON
Attorney for Defendants

CERTIFICATE OF SERVICE

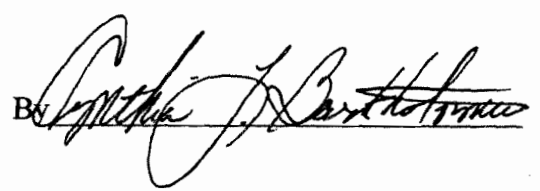
I hereby certify that on the 27th day of August, 2008, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Arthur B. Macomber, Esq.
408 E. Sherman Avenue, Suite 215
P.O. Box 5203
Coeur d'Alene, Idaho 83814

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile No. (208) 664-9933
- Other: _____

Hon. Charles Hosack
District Court Judge
P.O. Box 9000
Coeur d'Alene, Idaho 83816

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile No. (208) 446-1138
- Other: _____

By: 

Featherston Law Firm ctd

Daniel P. Featherston
Brent C. Featherston*
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MOTION TO EXCLUDE TESTIMONY AND/OR MOTION IN LIMINE - 2

2008 AUG 27 P 2:42

MARIE SCOTT
CLERK DISTRICT COURT
[Signature]
DEPUTY

Arthur B. Macomber
Attorney at Law
408 E. Sherman Avenue, Suite 215
Coeur d'Alene, ID 83814
Telephone: 208-664-4700
Facsimile: 208-664-9933
State Bar #7370
Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, AND IN AND FOR THE COUNTY OF BONNER**

DAVID L. CALDWELL and KATHY)
C. CALDWELL, husband and wife;)
LAWRENCE L. SEILER AND)
THERESA L. SEILER, husband and)
wife; PATRICIA ST. ANGELO;)
Plaintiffs,)
v.)
THOMAS W. COMETTO and LORI)
M. COMETTO, husband and wife; and)
DOES 1-5,)
Defendants.)

Case No: CV-07-1744

**PLAINTIFFS' MOTION TO
AMEND THE PLEADINGS TO
CONFORM WITH EVIDENCE,
PURSUANT TO I.R.C.P. 15(b)**

ATTN: Judge Hosack

Pursuant to Idaho Civil Procedure Rule 15(b), Plaintiffs DAVID L. CALDWELL and KATHY C. CALDWELL, et al., by and through their attorney of record, Arthur B. Macomber, hereby motions this Court to allow plaintiffs to make minor emendation of their pleadings to conform to evidence to be presented at trial.

STATEMENT OF FACTS

Plaintiffs filed this action on October 17, 2007 requesting declaratory relief pursuant to Idaho Code section 10-1201, et seq. to quiet title to plaintiffs' easement

interests and injunction against defendants regarding "interpretation and validity of an Easement Agreement." (Plaintiffs' Compl., pp. 1-2, Oct. 17, 2007.)

On the filing date, plaintiffs believed that a second easement of unspecified width existed across defendants' land for the benefit of plaintiffs Caldwell that was appurtenant to Caldwell's parcel adjacent to the Cometto land, but a request for declaratory judgment for these particular plaintiffs related to this particular interest were not specified in the pleadings except in general terms requesting declaratory judgment to quiet title.

Plaintiffs did not specify the existence of this second easement on the filing date of October 17, 2007, because they had no proof of it. Plaintiffs' belief regarding a second easement were suggested by the Easement Agreement itself, which did not expressly mention it was abrogating, extinguishing, or abandoning any of the dominant tenement's existing easement interests, but that document only appeared to create a new easement due to its granting language. Conversely, due to the onset of winter, plaintiffs felt a declaratory judgment could immediately relieve the onus of the various obstructions to their use of the easement placed by defendants if plaintiffs filed this action prior to the winter of 2007-2008.

During discovery, plaintiffs Caldwell gathered recorded and unrecorded deeds suggesting that the Agreement did not expressly terminate or abandon the existing easement, and that existing deeds on record in Bonner County gave the Comettos constructive notice of an easement with a greater width, sixty-feet, than was specified in the Easement Agreement, thus raising questions about that Agreement's validity at terminating plaintiffs' interests in the original sixty-foot easement.

Finally, plaintiffs' complaint did not expressly cite Idaho Code section 6-401, et seq. when they pleaded for this Court to quiet title to their interests in the Cometto property.

///

ARGUMENT

Plaintiffs bring this Motion precisely because defendants' counsel has objected to certain discovery exhibits and questions by deposing plaintiffs' counsel by claiming that some questions were "outside" of the pleadings and therefore irrelevant. Plaintiffs do not believe defendants' counsel's objections have grounding in law. Thus, plaintiffs do not by this motion expressly request this Court recognize plaintiffs' *addition* of new claims or remedies pursuant to I.R.C.P. 15(b), or that "transactions or occurrences or events" have caused plaintiffs to supplement their pleadings. (I.R.C.P. 15(d).) Plaintiffs argue that plaintiffs' Complaint sufficiently gives proper notice of issues to be decided in a request for a quiet title action, which action is not restricted to this Court's adjudication of the Easement Agreement alone, because "interpretation and validity" of that Agreement requires this Court to verify, as plaintiffs argue, that the Easement Agreement did not include language sufficient to extinguish or abandon the constructively-noticed easement evidenced by prior deed.

Pursuant to Idaho Code section 6-401, et seq., an action to quiet title is an action to determine and settle interests in land, and not interests in documents. Thus, plaintiffs Complaint requesting declaratory judgment to quiet title was a request to quiet title in lands, not to quiet title in the Easement Agreement at issue, which Agreement is only evidence of an interest in land, not such interest itself.

Thus, plaintiffs argue herein that the issues raised by their request to this court to quiet title were adequately pleaded. First, plaintiffs bring this Motion to have this Court confirm that plaintiff pleadings sufficiently raise the issue, amongst other things, of the validity and sufficiency of the Easement Agreement to extinguish plaintiffs' interests in a second easement existing prior to creation of the Easement Agreement. Second, plaintiffs bring this Motion to request this Court authorize any minor emendation of plaintiffs' pleadings that will cure any deficiency in the language used in those pleadings. Soecifically, plaintiffs request this Court authorize minor emendation of plaintiffs'

pleadings to recognize that this declaratory judgment action to quiet title is pursuant to Idaho Code section 6-401, et seq., and is an action to quiet title in plaintiffs' interest in land, not in a document evidencing such interest.

Plaintiffs note that I.R.C.P. 15(b) only applies to "issues not raised by the pleading." Defendants objected to certain exhibits and questions during deposition by stating that said exhibits and questions were "beyond the scope of the pleadings." Plaintiffs believe by using language requesting declaratory relief to quiet title questioning the "interpretation and validity" of the Easement Agreement that the issue of multiple easements has been adequately pleaded for this Court to hear such evidence at trial.

In requesting such "interpretation and validity," plaintiffs' quiet title action will show that existing deeds provided constructive notice of a sixty-foot easement benefiting plaintiffs Caldwell across Cometto's land, and that the Easement Agreement at issue was not a valid method to extinguish or abandon that sixty-foot easement. Plaintiffs will argue at trial that the Easement Agreement at issue was not a valid method to extinguish or abandon plaintiffs Caldwell's interests in the sixty-foot easement, because it did not expressly extinguish or abandon it according to law, among other defects. Plaintiffs will submit a trial brief on this applicable law for the Court's review.

The provisions of Idaho Code section 6-401, et seq. also apply to quiet title to any of plaintiffs' interest determined by this Court to exist due to the deeds expressly granting easement to the Caldwell property adjacent to Cometto's property, and plaintiffs hereby request the Court allow emendation to add that the provisions of Idaho Code section 6-401 apply to this action.

It appears to plaintiffs, and they shall argue at trial, that the Easement Agreement was created under the mistaken belief that the only easement on Comettos' property was a prescriptive easement, and that no express easements by deed existed.

Finally, on July 11, 2008, plaintiffs' counsel sent defendants' counsel a list of deeds it felt were evidence of the previously existing sixty-foot easement along with legal


argument of their contents and language, but has received no reply to that substantive evidence to date. Further, at deposition of defendant Tom Cometto on August 22, 2008, several deeds were introduced as exhibits and Mr. Cometto's knowledge of them was plumbed.

Since either of these dates, defendants' counsel has not addressed the validity of either those deeds or the validity of the Easement Agreement at extinguishing or abandoning the sixty-foot easement. Therefore, with more than one and one-half months time to contemplate the evidence and respond to plaintiffs' counsel, plaintiffs do not believe any prejudice or detriment to defendants will be created by this Court's granting this Motion to find this action includes a determination of the validity of the Easement Agreement, the existence of a sixty-foot easement, and a final quieting of title to plaintiffs interests in Cometto's lands.

CONCLUSION

Plaintiffs have pleaded their request for this Court to grant declaratory judgment as to the "interpretation and validity" of an Easement Agreement to quiet title. Declaring how that Agreement actually affected existing easements is a determination of its validity in accomplishing those ends. During deposition, defendants' counsel objected to certain exhibits that are properly recorded deeds and to questions about those deeds stating they were "outside the pleadings." Plaintiffs do not believe this is a valid objection to said exhibits and questions, and hereby request this Court grant plaintiffs' Motion to amend or recognize their pleadings to include a request for declaratory judgment to quiet title to ALL plaintiffs' interests in defendants' property.

DATED this 27th day of August, 2008.



Arthur B. Macomber
Attorney at Law

CERTIFICATE OF SERVICE

I am familiar with my firm's capability to hand-deliver and deliver by facsimile documents and its practice of placing its daily mail, with first-class postage prepaid thereon, in a designated area for deposit in a U.S. mailbox in the City of Coeur d'Alene, Idaho, after the close of the day's business. On the date shown below, I served:

**PLAINTIFFS' MOTION TO AMEND
THE PLEADINGS TO CONFORM WITH EVIDENCE,
PURSUANT TO R.C.P. 15(b)**

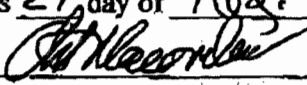
FRATHERSTON LAW FIRM,
Brent C. Featherston
115 South Second Ave
Sandpoint, ID 83864
Telephone: (208) 263-6866
Facsimile: (208) 263-0400

By personally placing a true copy in a first-class U.S. Mailbox in Coeur d'Alene Idaho addressed to the address(es) set forth herein above on the _____ day of _____, 20____.

By personally delivering a true copy of thereof to the person(s) at the address(es) set forth herein above on the _____ day of _____, 20____.

By personally faxing a true copy thereof to the person(s) at the facsimile telephone number for that party.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 27th day of Aug., 2008.


Arthur B. Macomber
Attorney at Law

Court Minutes:

Session: HOSACK090208A
Session Date: 09/02/2008
Judge: Hosack, Charles
Reporter: Schaller, Joann

Division: DIST
Session Time: 09:12

Courtroom: Courtroom9

Clerk(s): Rohrbach, Shari

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0001

Case number: BONCV07-1744
Plaintiff: Caldwell etal, David
Plaintiff Attorney:
Defendant: Cometto etal, Thomas
Pers. Attorney:
Co-Defendant(s):
State Attorney:
Public Defender:
Additional audio and annotations can be found in case:

3 files
385 pages
Caldwell
Cometto trial

09/02/2008

10:26:30

Recording Started:

10:26:30

Case called

10:26:36

Judge: Hosack, Charles
Calls, parties present and ready to proceed.
Bonner case. Court Trial. By

10:26:58

agreement of counsel we are starting the trial
in Kootenai County.

10:28:22

This is a dispute over an easement. The easement

in question is dated 3-1-99
10:28:39 between Comettos and various other parties. In
addition to the easement
10:29:16 agreement, the width, there is also a motion to
amend the pleading for an
10:29:48 express easement. The Court's understanding is
that there are express
10:30:27 easements burdening the property.

10:30:39 **Add Ins: Macomber, Arthur**
The Motion to Amend the Pleadings are minor. we
needed to make it clear to
10:31:17 the court and parties that we are looking for
quiet title action. And to have
10:31:49 the court discuss how that easement agreements
affects the parties today, as
10:32:17 well as last year and so on. And what the PL
believe is a 60 foot easement in
10:33:11 addition to the easement agreement at issue. How
is the PL allowed to act
10:33:42 under the agreements? What was the intention of
the parties?

10:34:29 **Judge: Hosack, Charles**
RE: the quiet title and nuisance issues is
integral to what the court needs
10:34:56 to address. A survey is needed, and that quiets
title, and that will include
10:35:37 reasonable use of the roadway. A nuisance will
have to be removed to allow
10:36:05 use as determined by the survey. RE: the express
easement, it is the courts'
10:36:29 intent to reserve ruling, and then bifurcate the
ruling on the motion to
10:36:50 amend and any rulings thereafter. RE: the
express easement, that will be
10:38:34 reserved and all parties will have a right to
address that issue.

10:39:23 There were other pending motions, do counsel
wish to address on the record?

10:40:05 **Add Ins: Featherston, Brent**
The issue is simple, Black Diamond or Joel Petty
are not licensed surveyors.
10:40:54 Idaho Code prohibits testimony that would fall
under license requirements. IC

10:41:21 54-1202-9.

10:42:22 **Add Ins: Macomber, Arthur**
IC 54-1227, says: reads. The site survey in 2007
was for the purposes of

10:43:11 evaluating the road. Ask the motion be denied.

10:44:28 **Judge: Hosack, Charles**
Motions in Limine are more easily understood
within the testimony given. At

10:44:54 this time grant the motion as to the map, may be
illustrative though.

10:46:04 **Add Ins: Featherston, Brent**
I asked the court to take judicial notice of two
prior cases filed over this

10:46:24 roadway. Both cases, 97 and 98, were filed by PL
who are predasessors in

10:47:32 interest. Explains prior cases.

10:49:56 **Judge: Hosack, Charles**
Was there a survey in either file? How did the
judge make a finding?

10:50:14 **Add Ins: Featherston, Brent**
I don't believe so. The pleading expressly state
that the Comettos are

10:50:36 responsible for the road, reads from prayer for
relief in current case.

10:51:35 Argues

10:52:40 **Judge: Hosack, Charles**
The case to be tried today is that there was a
road in 1999, I don't expect

10:53:02 anyone to agree to where the road is. The
parties who obtained the use of the

10:53:23 road then, the parties disagree on everything.
The Court will find where the

10:54:05 road was, the width, and the shoulder.

10:55:33 I'm not going to take judicial notice of the
files.

10:56:54 **Add Ins: Macomber, Arthur**
Opening statements. Caldwell's live at the very
end of this road, Seilers and

10:57:20 St. Angelo live east of the Cometto. Caldwell's

10:58:05 own 2 pieces of property,
section 19 at the end of the road. Second piece
is in section 24, adjacent to
10:58:29 Cometto, and call the 10 acre property. Kathy
has signed various drafts. The
10:59:45 original road was a jeep trail from 1965. In 1999
Caldwell moved to section
11:00:46 19 property. In 2003, Caldwells approached
Campbell to ask if the road could
11:01:27 be relocated. Comettos had no disagreement back
in 1997 and 98. Thereafter
11:02:07 Lori said no to the road. Comettos put up a
fence to block entry to the
11:02:45 easement. Spring 2004 Caldwells received a
letter from Finney, attorney for
11:03:25 Campbell, that Caldwell had right of first
refusal to a property, and then
11:03:53 eventually bought that parcel. The 2004 deed
does reference the easement
11:04:14 agreement. In Aug and Oct the Comettos were
asked if the road could be
11:04:34 punched through to get rid of two corners and
allow Comettos to use more of
11:05:17 their property, and address the interest of
their childrens safety. Caldwell
11:05:42 began to make changes on his property. In Nov
2004 there were letters saying
11:06:51 that everyone but Campbells wanted to get rid of
the turns in the road. This
11:07:39 road trespasses onto the McGee property. Use is
impinged, and no storage for
11:09:17 the amounts of the snow. The Comettos are
building a pole barn in an area for
11:11:33 snow storage.
11:14:29 We will not bring evidence as to the express
easement that Caldwell believe
11:14:47 exist, due to bifurcated ruling.

11:17:31 **Stop recording**

11:23:33

Recording Started:

11:23:33

Record
Cometto etal, Thomas

11:23:35 **Judge: Hosack, Charles**
Back on the record.

11:23:43 **Add Ins: Featherston, Brent**
Opening statement.

11:28:21 Many items on the Cometto property has been there for many years.

11:33:02 **The** prior easement agreement was 4 different parties attempts to resolve,

11:33:23 including Mrs Caldwell. Exh A, the Tucker drawing shows the 14 foot easement.

11:34:53 Cometto position is that you have an easement confined to the roadway, where

11:36:27 it's been for years, with 14 foot easement width. Nothing was discussed or

11:37:03 contemplated about snow storage. That has never been an issue.

11:38:02 **The** easement was in place in 1999-2000 and the PL signed onto that.

11:40:59 **Stop recording**
(On Recess)

11:44:29
Recording Started:

11:44:29 **Record**
Cometto etal, Thomas

11:44:31 **Judge: Hosack, Charles**
Parties are ready to proceed with evidence.

11:44:47 **Add Ins: Macomber, Arthur**
Call Kathy Caldwell

11:45:16 **Other: Caldwell, Kathy**
Sworn by clerk. I'm a veterenarian, since 1987.

11:46:56 Moved to Idaho in 1999. We live on Section 19.

11:48:11 The property was purchased for my brother. My brother is Steve Cooney. It was more straight forward if my

11:49:37 name was on the paperwork, he would make payments back to me. Steve and wife

11:50:07 Marlene moved onto the property the fall of 1998. The property is 8 miles

11:51:56 from power line, we're off the grid. We have to

11:52:14 provide our own electricy,
and road maintaince. Our property has a hydro-
11:52:57 electric system. And a stream
fed filtering water system. Before purchase I
11:53:24 did not check roads, nor did my
brother. He did tell me there was an easement
11:53:57 issue under litigation
regarding the Cometto property. He felt that
11:54:12 everybody was mad at each other
and it would go to court adn then he'd be able
11:54:30 to talk to Comettos and have
the road issue calm down.
11:54:53 I left the paperwork and details to my brother.
I had some knowledge about
11:55:56 the roadway. The first time I saw the property
was spring 1998. The road
11:57:05 already had the 90 degree turns. The dirt berm
was there. It was 3-4 feet
11:58:20 high. You could see across the berm and the old
roadway and how it traveled
11:58:46 up to their house and on to the next property.
The realator pointed out the
11:59:06 road and the new road. Describes roadway. There
are trees along the whole
12:00:50 width of the road. I don't recall a gate. The
road was rough, rock on the
12:02:13 roadway.
12:02:34 **Judge: Hosack, Charles**
Maybe this is a good place to break. Will take
noon recess.
12:03:25 Question re: 30 feet of easement agreement.
12:03:40 **Add Ins: Featherston, Brent**
The north leg of the roadway is not within 30
feet, explains.
12:04:06 **Stop recording**
13:28:47
Recording Started:
13:28:47 **Record**
Cometto etal, Thomas
13:28:50 **Judge: Hosack, Charles**

Back in session, Ms Caldwell retake the stand and still under oath.

- 13:29:23 **Add Ins: Macomber, Arthur**
Parties will stip to 1 and 2.
- 13:29:54 **Add Ins: Featherston, Brent**
Correct.
- 13:29:57 **Judge: Hosack, Charles**
Admit 1 and 2.
- 13:30:21 **Add Ins: Macomber, Arthur**
and stip to 25,26,27
- 13:30:26
- 13:30:31 **Add Ins: Featherston, Brent**
Correct
- 13:30:33 **Judge: Hosack, Charles**
Admit 25
- 13:30:57 **Add Ins: Macomber, Arthur**
photos have language on them.
- 13:31:14 **Add Ins: Featherston, Brent**
Correct, if court disregards the language, but otherwise stip. to photos.
- 13:31:30 **Judge: Hosack, Charles**
Admit 28-34 by stip subject to striking the labeling.
- 13:33:40 **Other: Caldwell, Kathy**
Exh 28, picture of west end of Cometto property, facing south, taken Aug
- 13:35:37 2007. I had not signed the papers for the property when I visited with the
- 13:36:12 realator. Describes the berm that was present at the time of viewing with the
- 13:37:44 realator. I do not recall a gate. The rock configuration occurred during
- 13:38:56 summer of 2007. I saw the Cometto family building that. I don't know whose
- 13:39:28 property the gate is on. Today the Comettos have started construction of a

13:40:57 pole building right behind the rock wall. That
area had been a nice place for
13:42:28 us to push snow in the wintertime. Everyone I've
ever seen has walked on the
13:43:45 road. Exh 29, photo, describes fence panels and
items in photo.
13:47:33 We had our 10 acres surveyed when we bought. To
my knowledge that survey is
13:47:59 recorded at Bonner Co.
13:50:17 Exh 30, photo was taken Aug 2007.

13:51:26 **Add Ins: Featherston, Brent**
Obj.

13:51:28 **Judge: Hosack, Charles**
O/R.

13:51:32 **Other: Caldwell, Kathy**
Comettos were watching us take pictures,
comments were made. This boulder
13:52:38 shown is slightly on the Cometto property. I
know that from our survey,
13:53:03 trees were marked. We know where our boundary
lines are. There are survey
13:53:22 marks on the ground, and trees were marked.
Describes problems with the
13:54:26 corner shown in exh 30. It turns to a mud-bog,
no drainage anymore. The dirt
13:54:57 berm prevented water from running downhill. It
pools now. If it were pooling
13:56:22 like it did before it would pool on the
Comettos. It pools on our ten acres
13:56:39 now. Trench is there to harass and slow our cars
down. We've had problems
13:59:39 driving. We had to bring in gravel one year.
Describes exh 31, this photo was
14:01:38 taken approx Aug 2007.
14:02:31 Exh 31 - 34 were taken in Aug 2007. There were
five trenches, describes.
14:07:28 The trenches are still there today. The trenches
were put in last summer.
14:08:51 Comettos put them in. I was with my husband when
he asked about the trenches.
14:09:11 They basically refused to answer, they said
because your neighbor is driving
14:09:33 too fast. The only neighbor was Seilers. Nothing

14:11:10 Is posted on the road. Exh
25, Is the easement agreement. I know a copy of
this was sent to me in Jan
14:11:45 2000. My signature is on the last page, dated 1-
31-00. I do not remember the
14:13:29 last page with the drawing - when I signed it.
The Tucker sketch.

14:14:25 **Add Ins: Featherston, Brent**
Obj.

14:14:27 **Judge: Hosack, Charles**
I'll let it stand.

14:14:33 **Other: Caldwell, Kathy**
I did see prior drafts of this agreement. I
believed I was to settle a
14:16:28 dispute about a roadway and easement going
through the Cometto property. When
14:17:03 I signed I was not involved in any dispute. Exh
24, I've seen these papers
14:18:02 before, in 1999, just after we moved in. My name
is not among the names on
14:18:40 the letter, brother Steve had a copy of the
letter.

14:18:55 **Add Ins: Featherston, Brent**
Obj.

14:18:57 **Judge: Hosack, Charles**
Sustain

14:19:05 **Other: Caldwell, Kathy**
I found the letter in his stuff.

14:19:37 **Add Ins: Featherston, Brent**
Obj.

14:19:42 **Judge: Hosack, Charles**
Document is not admitted, sustain.

14:19:50 **Other: Caldwell, Kathy**
When I arrived at the property, I had a
discussion about what was going on.
14:20:12 He had a file and pulled out this letter.

- 14:20:42 **Add Ins: Featherston, Brent**
Obj.
- 14:20:45 **Judge: Hosack, Charles**
Sustain
- 14:21:11 **Other: Caldwell, Kathy**
Exh 24 says easement agreement, six pages.
- 14:21:56 **There** is no sketch attached.
- 14:22:04 **Add Ins: Macomber, Arthur**
Move to admit #24.
- 14:22:17 **Judge: Hosack, Charles**
Relevance?
- 14:22:23 **Add Ins: Macomber, Arthur**
It's a draft of what she viewed prior to the
final. She had a certain intent
- 14:23:01 when she signed easement agreement based on
prior drafts.
- 14:23:14 **Add Ins: Featherston, Brent**
We have the copy she signed. Beyond that it is
irrelevant.
- 14:24:34 **Judge: Hosack, Charles**
Comments re: ambiguity, and parole evidence.
What is the ambiguity?
- 14:25:00 **Add Ins: Macomber, Arthur**
Will question the witness re: ambiguity.
- 14:25:18 **Other: Caldwell, Kathy**
Exh 25, para 6 is different from previous
drafts. I thought I was signing a
- 14:26:43 30 foot easement over Cometto property. I knew
there were two roadways and
- 14:27:20 they were trying not to use one. So which
existing roadway was this talking
- 14:27:43 about.
- 14:28:06 **Add Ins: Featherston, Brent**
Obj.
- 14:28:08 **Judge: Hosack, Charles**

It's been asked and answered.

- 14:28:25 **Other: Caldwell, Kathy**
The whole description was not clear to me. Para 7 states a width of 30 feet.
- 14:30:11 To me, the language says they are giving us a legal right to travel across
- 14:30:31 their property. To me it says you can take trucks, logging, whatever to
- 14:31:43 benefit our property. The existing roadways, to me, means the current path
- 14:32:21 people are traveling on.
- 14:32:40 **Add Ins: Featherston, Brent**
The intent is the decision the court will have to make.
- 14:32:57 **Add Ins: Macomber, Arthur**
Comments.
- 14:33:03 **Judge: Hosack, Charles**
Sustain as to the form of the question.
- 14:33:12 **Other: Caldwell, Kathy**
Para 6-9,
- 14:33:39 **Add Ins: Featherston, Brent**
Obj.
- 14:34:59 **Judge: Hosack, Charles**
Comments. Sustain obj.
- 14:35:28 **General:**
- 14:35:31 **Other: Caldwell, Kathy**
When I signed this I only scanned the document. It was placed before me
- 14:35:54 saying the litigation was settled, and to sign. I assumed I was signing
- 14:36:11 something similar to the third draft. It was presented to me as we're done,
- 14:36:32 just sign off, and I did. Exh 25, para 5 describes our parcel of land, in
- 14:37:18 section 19. Para 2 is the ten acres adjacent to Cometto.

14:37:57 **Add Ins: Macomber, Arthur**
Move to admit 25 and 24.

14:38:10 **Add Ins: Featherston, Brent**
Stip to 25. And as to #24, same objection as before.

14:38:42 **Judge: Hosack, Charles**
25 admitted by stip. Sustain the obj on 24.

14:39:00 **Other: Caldwell, Kathy**
Exh 27, is the warranty deed drawn up when we purchased the ten acres next to

14:40:49 **Comettos. Reads language from exh 25 and 27. For**
exh 25 I had scanned the

14:45:19 **document. I looked at this, saw all the property**
descriptions, I saw where

14:45:50 **easement was made, and I went and signed it. I**
thought I was signing off on

14:46:30 **an agreement that was giving us thirty feet.**

14:47:06 **Add Ins: Featherston, Brent**
Obj.

14:48:37 **Judge: Hosack, Charles**
Reviews exh.

14:48:44 **Add Ins: Featherston, Brent**
It is draft created by other counsel, it is not signed, and not the same

14:49:13 **document.**

14:49:47 **Add Ins: Macomber, Arthur**
The drafts were altered radically by defendant or defendants counsel.

14:50:06 **Add Ins: Featherston, Brent**
There is no evidence, comments.

14:50:18 **Judge: Hosack, Charles**
She's already testified to her intent, and 30 foot width. Will admit for

14:50:46 **construing amibiuity.**

14:51:02 **Take a short break.**

14:51:11 **Stop recording**

(On Recess)

- 15:03:57 Recording Started:
- 15:03:57 **Record**
Cometto etal, Thomas
- 15:04:00 **Judge: Hosack, Charles**
Back on the record.
- 15:04:09 **Other: Caldwell, Kathy**
Exh 25 is the easement agreement. Mr Finney is a
lawyer, I did not have an
- 15:05:08 atty. He was the attorney for Comettos. I think
Featherston was Comettos
- 15:06:19 attorney, Finney was representing Campbell.
- 15:08:08 **Judge: Hosack, Charles**
Is the map made for illustrative, part of
exhibit 27?
- 15:08:11 **Add Ins: Featherston, Brent**
I stipulated to exh 27 only, it could be
admitted as a separate exhibit.
- 15:08:13 **Judge: Hosack, Charles**
- 15:08:14 **Other: Caldwell, Kathy**
Exh 26 , easement agreement has my signature on
it. But it did not have the
- 15:10:09 map on it when I signed it.
- 15:10:17 I
- 15:10:55 **Add Ins: Featherston, Brent**
Obj.
- 15:11:09 **Judge: Hosack, Charles**
For the moment O/R.
- 15:11:17 **Other: Caldwell, Kathy**
In 2003, we had spent a couple winters there. It
looked like we would make
- 15:11:55 that our residence and we started to look at
improving the road conditions.

- 15:12:45 My vehicle was parked 6-7 miles down, since the road was not maintained at
15:13:03 that point. Sometimes logging would open the road in order to meet their
15:13:29 needs. We used snowmobiles to get home. As the kids got bigger, we upgraded
15:14:45 to track system, explains. Then husband started snow plowing work. Then we
15:15:17 used other equipment. Kids are now 15 and 16 years old.
15:17:54 In summer 2003,
15:18:14 **Add Ins: Featherston, Brent**
obj.
15:18:17 **Judge: Hosack, Charles**
O/R as to how the question was asked.
15:18:36 **Other: Caldwell, Kathy**
In 2003 I contacted Campbells. We had talked about ways to improve the road.
15:19:11 I asked Jerry Campbell if he objected to putting the road on the abandoned
15:19:28 railroad road.
15:19:32 **Add Ins: Featherston, Brent**
Obj.
15:19:52 **Other: Caldwell, Kathy**
Exh 25, explains where road would be. When we moved to the property the road
15:20:53 already had the turns in the road.
15:21:01 **Add Ins: Featherston, Brent**
Obj.
15:21:04 **Judge: Hosack, Charles**
Sustain
15:21:07 **Other: Caldwell, Kathy**
I had understood the last two corners were put in
15:22:00 **Add Ins: Macomber, Arthur**
Comments

- 15:22:04 **Other: Caldwell, Kathy**
I asked Campbell if it was OK to put the road
through on the abandoned road.
- 15:22:33
- 15:22:52 **Add Ins: Featherston, Brent**
Obj
- 15:22:56 **Judge: Hosack, Charles**
O/R
- 15:23:03 **Other: Caldwell, Kathy**
We have not implemented that solution. We did
speak with Comettos about
- 15:23:43 putting the road in, that was summer 2003. We
asked Tommy, we said we have
- 15:24:11 permission from others to put the road in
- 15:24:33 **Add Ins: Featherston, Brent**
Rule 408, comments.
- 15:25:13 **Add Ins: Macomber, Arthur**
Caldwells tried to work with their neighbors,
comments.
- 15:26:33 **Judge: Hosack, Charles**
Whatever the offer was was not accepted or we
wouldn't be here. I don't see
- 15:26:50 any relevance.
- 15:27:39 **Other: Caldwell, Kathy**
Exh 29, the fence was probably taken out in 2004
or 2005 snowfall. Snow took
- 15:28:57 the rails down. We received a letter from Finney
law firm that said we had
- 15:29:34 first right of refusal to purchase a property,
that was in July 2004.
- 15:30:17 **Add Ins: Featherston, Brent**
obj.
- 15:30:18 **Judge: Hosack, Charles**
sustain
- 15:30:22 **Other: Caldwell, Kathy**
After I got the letter I contacted a realator to

15:30:42 get an idea of property,
then contacted Finney. That was the same
15:31:11 realator as before. We were hoping
that being in control of that property it would
15:31:31 take the Cometos and
Campbell out. Last winter Cometos had wood and
15:32:31 snow that blocked the road.
One night the gate was closed and chained. I got
15:32:58 through after I got it open
and left it open. I talked to Mrs Cometto after
15:33:56 I had purchased the ten
acres. We approached Lori several times to try
15:34:32 to discuss improving the road.
She promised to call us, and promised he'd call.
15:34:56 No communication. That was
right after we bought the ten acres. In 2004 we
15:35:32 approached Finney law firm to
discuss our rights of the easement. I knew the
15:36:03 Finneys had been Campbells
attorney and were familiar with the property.

15:36:20 **Add Ins: Featherston, Brent**
Obj.

15:36:40 **Judge: Hosack, Charles**
Would seem to call for hearsay, and possibly
privileged communication.

15:36:59 **Add Ins: Macomber, Arthur**
Comments.

15:37:12 **Judge: Hosack, Charles**
Sustain.

15:38:01 **Other: Caldwell, Kathy**
Comettos have continued to rebuild the fence and
15:38:50 put rocks with the boulder.
The trenches were all put in, in 2007, that
15:39:35 impedes travel. The flatbed
trailer is where the red truck was. The primary
15:39:54 problem is in the winter for
snow storage. But now we're trying to bring in
15:40:19 steel beams over 40 feet long,
and need a wide swing radius. Our attempts to
15:40:47 communicate with Cometos have
been greeted with shouting, get off our

- property, harassing statements.
15:41:32 They're not willing to entertain how this affects us.
- 15:41:51 **Add Ins: Featherston, Brent**
Obj.
- 15:41:57 **Add Ins: Macomber, Arthur**
Comments.
- 15:42:40 **Judge: Hosack, Charles**
Rephrase the question.
- 15:42:46 **Other: Caldwell, Kathy**
Mrs Cometto never made any comment to me directly about things on the
- 15:43:21 easement. I've never asked her to move things along the easement. I've never
- 15:44:04 asked why the earth berm was put there. I've never asked why the pole barn is
- 15:44:22 being built there.
- 15:45:03 **Stop recording**
(On Recess)
- 15:50:43
Recording Started:
- 15:50:43 **Record**
Cometto etal, Thomas
- 15:50:44 **Judge: Hosack, Charles**
Recess.
- 15:50:51 **Stop recording**
-

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

COURT MINUTES

JUDGE: CHARLES HOSACK
REPORTER: JOANN SCHALLER
CLERK: MISSY SECK
DIVISION: DISTRICT

CASE NO. CV-2007-1744
DATE: SEPT 3, 2008 TIME: 9:00 AM
CD # 08-136

DAVID L. CALDWELL ET AL.

VS THOMAS WILLIAM COMETTO ET AL.

Plaintiff / Petitioner

Defendant / Respondent

Atty: ARTHUR MACOMBER

Atty: BRENT FEATHERSTON

SUBJECT OF PROCEEDINGS
CHARGE

COURT TRIAL – DAY TWO

INDEX	SPEAKER	PHASE OF CASE
1236	J	Calls Case
		Present: PLAINTIFFS DAVID CALDWELL AND KATHY CALDWELL, ARTHUR MACOMBER; LORI COMETTO, BRENT FEATHERSTON
		<i>(THIS TRIAL STARTED DAY ONE IN COEUR D'ALENE, WITNESS KATHY CALDWELL SWORN IN AND CURRENTLY ON THE STAND)</i>
	J	STILL PROCEEDING WITH MS. CALDWELL ON THE STAND
	AM	YES.
	J	YOU ARE STILL UNDER OATH MS. CALDWELL
	AM	DIRECT
	KC	UNDERSTAND I AM STILL UNDER OATH. AS YOU ENTER COMETTO PROPERTY, THE PROPERTY HAD DETERIORATED. FIRST TIME WE CAME THROUGH THERE, 3 INCH MINUS WAS DOWN. THOSE HAVE ALL DISAPPEARED AND WORKED INTO SOIL. SERIES OF TRENCHES IN ROAD. MAKES TRAVEL HARD. VEGETATION IN ROADWAY. OVERALL ROUGHER TRAVEL THROUGH THAT AREA. WE DO A LOT OF MAINTENANCE UP TO THAT PROPERTY AND PAST THAT PROPERTY. THAT ROAD HAS NEVER BEEN FINISHED. WAITING FOR IT SO WE CAN PROPERLY MAINTAIN IT. HAVE SPOKEN TO COMETTOS ABOUT THAT. THEY HAVE DENIED US TO BRING IN GRAVEL. WE DO TRY TO RESPECT OTHER PROPERTY OWNERS. WE DON'T WANT TO OVERSTEP THEIR BOUNDARIES
1240	KC	HAVE ONLY DONE SNOWPLOWING THROUGH THAT ROADWAY. I'VE NEVER BUILT A ROAD BUT HAVE ASSISTED MY HUSBAND. ALSO, THE TUCKER REPORT SAID THE ROAD WAS NOT FINISHED. THIS WAS DONE PRIOR TO US MOVING TO THE PROPERTY. I HAVE A COPY OF THAT REPORT. THAT REPORT CREATED
	BF	OBJECTION – HEAR SAY
	J	FOUNDATION, OVERRULED.
	KC	THE REPORT I SAW WAS ATTACHED TO REPORT TUCKER PREPARED.
	BF	OBJECTION – HERE SAY, IRRELEVANT
	J	OVERRULED.
	KC	THE COMETTOS HAVE CREATED QUITE A HAZARD.
	BF	OBJECTION – NON RESPONSIVE
	KC	I DO HAVE KNOWLEDGE THEY HAVE BLOCKED GUESTS OF OURS. AUGUST OF 2007. STEVE AND SUE PHELPS. THEY WERE ATTEMPTING.
	BF	OBJECTION – FOUNDATION
	J	OVERRULED

	KC	THEY WERE TRYING TO COME UP TO OUR PROPERTY
	BF	OBJECTION - MAY I ASK QUESTIONS IN LIEU OF OBJECTION
	J	YOU MAY
	BF	QUESTIONS
	KC	YES, PHELPS TOLD ME DIRECTLY.
	BF	OBJECTION - HERE WAY
	J	RESTATE THE QUESTION IF YOU WISH
	KC	YES, WE WERE EXPECTING THE PHELPS AND THEY DIDN'T SHOW UP.
	BF	OBJECTION - STILL CIRCUMVENTING THE RULES OF HERE SAY
1246	J	I WILL LET IT - EXPLAINS.
	AM	CONTINUES
	KC	HAVE EXPECTED OTHER VISITORS AND THEY HAVE NOT SHOWN UP. HAS HAPPENED AT LEAST TWICE. I AM A PRACTICING VET. SOMETIMES BRING ANIMALS TO MY HOME. TIMES VARY. EXPLAINS. WE KEEP ANIMALS AT OUR HOME. HORSES, DOGS AND CATS RIGHT NOW. THEY NEED MEDICAL CARE AT OUR HOME. VARIETY OF CONDITIONS. ONE HORSE HAS FOUNDER. EXPLAINS. I CAN DO ALL THE CARE EXCEPT THE TRIMMING. I HIRE A PROFESSIONAL FERRIER TO DO THE TRIMMING. HAD ONE COME UP ONCE, IN AUGUST, 2007. HE CAME THAT DAY IN AN EXTREMELY AGITATED STATE AND PROVIDED THE CARE.
	BF	OBJECTION - NON RESPONSIVE
	J	OVERRULED.
	KC	EVERY BUCKET OF NAILS HAD BEEN UPTURNED.
	BF	THIS IS ALL HERE SAY - OBJECTION.
	AM	I'LL RE-PHRASE
	KC	I VIEWED THE FERRIER'S VEHICLE. IT WAS A COMPLETE SHAMBLES OF HIS GEAR. I TRIED TO SORT OUT AND FIND THE NECESSARY SUPPLIES TO TREAT MY MARE THAT DAY. HE TOLD ME WHERE THE DAMAGES HAPPENED TO HIS TRUCK. THIS FERRIER WILL NOT COME TO MY PROPERTY TO DO THIS MARE'S TOE CLIPPING.
	BF	OBJECTION - RELEVANCE
	AM	ARGUMENT.
1251	J	OVERRULED.
	KC	MARE NEEDS TO BE TRIMMED EVERY 4 WEEKS IN ORDER TO REALIGN THE BONE. I HAD TO MOVE HER TO A RENTED BARN WHEN HE REFUSED TO RETURN. \$150/MONTH FOR BARN. SHE'LL BE IN TREATMENT FOR ANOTHER YEAR AND BEEN THERE SINCE AUGUST, 2007.
	KC	RECALL YESTERDAY'S TESTIMONY. SPOKE WITH COMETTO'S YESTERDAY
	BF	ASKED AND ANSWERED.
	J	DIDN'T WE COVER THIS YESTERDAY.
	AM	THERE'S SOMETHING NEW
	J	LET'S GO TO SOMETHING NEW
	KC	HER CONCERN ABOUT THE RE-ROUTE - THAT CONVERSATION HAPPENED AFTER TOMMY....
	BF	OBJECTION - WHAT THEY AGREED AND NOT AGREED FOR NEW EXIT ON EAST BOUNDARY...NO THEORY.
	J	RIGHT AT THE MOMENT IT'S GROUNDHOG'S DAY.
	AM	NOT WHAT SHE SAID BUT FOR HER STATE OF MIND IN TALKING TO MS. COMETTO'S AND HER INTENT.
	BF	OBJECTION - RELEVANCE
	J	AND I WILL SUSTAIN.
	AM	CONTINUES DIRECT
1255	KC	WE HAVE OFFERED TO PAY FOR IMPROVEMENTS TO THE ROAD. MORE THAN WHAT WE WOULD BE OBLIGATED.
	BF	OBJECTION
	J	WILL LET THE ANSWER STAND.

	KC	WHAT I BELIEVE AN EASEMENT IS
	BF	OBJECTION – NON-RESPONSIVE AND QUESTION CALLS FOR A LEGAL CONCLUSION
	J	I'LL OVERRULED. OBJECTION NOTED.
	KC	THAT IT IS A WIDTH CLEAR OF ENCUMBRANCES. FOR US TO BRING LARGE TRUCKS IN, WE NEED THAT AREA CLEARED "THE EASEMENT" SO AS NOT TO DAMAGE ANYTHING.
	AM	HANDS WITNESS COPY OF EXHIBIT 25
	KC	IN PARAGRAPH 6, WHAT IS THE MEANING OF BENEFIT FOR RESPECTIVE PARTIES. WHO DOES THAT REFER TO. IF I HAVE AN EASEMENT AND PUT STUFF IN IT, I BENEFIT FROM STORAGE. WHAT IS THE BENEFIT AND WHO BENEFITS HOW FROM THAT. THAT'S WHAT IS UNCLEAR TO ME.
100	BF	OBJECTION
	J	OVERRULED.
	KC	THE STEEL BEAMS ARE SALVAGED FROM MONTANA. THEY ARE WAITING FOR US. CONSTRUCT BRIDGE ACROSS CREEK AND CONTINUE WITH CONSTRUCTION OF CABIN ON THAT SITE. LENGTH OF THEM VARY. THEY ARE ONLY A FOOT TO 2 ½ IN HEIGHT. WE WILL HAVE TO HIRE IT PROFESSIONALLY TO TRANSPORT. A TRAILER WOULD BE AT LEAST 60 FEET AND THEY ARE EXTREMELY HEAVY. CAN'T MAKE FIRST TURN AT COMETTOS. DESCRIBES TURN.
	AM	SHOWN A COPY OF EXHIBIT 28
	KC	THERE ARE TWO HOLDING UP THE MAN GATE. ONE POST CAN BE LIFTED OUT. BEAMS STILL CANNOT MAKE THE TURN. EXPLAINS. WHEN SIGNING THE EASEMENT AGREEMENT, DON'T SEE A PROVISION ABOUT WEATHER.
	BF	OBJECTION
	J	SUSTAINED.
	AM	CONTINUES
106	KC	DOCUMENT DOESN'T STATE WE ARE ABANDONING ANY RIGHTS, NOR DOES THE SKETCH. SEE ABANDONED ACCESS, BUT NOT WHERE WE ARE ABANDONING. HAVE HIRED A LICENSED CIVIL ENGINEER IN AUGUST 2007 TO REVIEW MY CONCERNS. BLACK DIAMOND ENGINEERING. JOEL PETTY WAS PRIMARY
	BF	OBJECTION – IF HE IS CALLED WOULD BE HIS TESTIMONY. IT WOULD BE HERE SAY
	AM	ARGUMENT.
	J	OVERRULED.
	KC	MY HUSBAND CALLED AND WENT INTO SEVERAL FIRMS TO EVALUATE THEIR EXPERTISE. BLACK DIAMOND CAME OUT IN AUGUST AND SEPTEMBER 2007. THEY VISITED AT LEAST 3 TIMES. I DIDN'T ACCOMPANY THEM ALL THREE TIMES. JUST SAW THEM WHEN I DROVE PAST ON WAY HOME. DIDN'T SEE THEM ON THIRD VISIT. BLACK DIAMOND DID A REPORT AND TOLD ME WHAT THEY SAID
110	KC	DID SEE THE REPORT.
	AM	SHOW WITNESS ORIGINAL EXHIBIT 35
	KC	APPEARS TO BE THE SAME ONE. I WENT THROUGH QUITE A BIT OF IT. AFTER READING IT...
	BF	WHAT SHE FELT?
	AM	LET ME REPHRASE
	KC	I READ MOST OF THE REPORT.
	BF	OBJECTION – RELEVANCE
	J	OVERRULED.
	KC	I FELT.
	BF	OBJECTION – HERE SAY
	J	SUSTAINED.
112	AM	MAY I HAVE A MOMENT TO MAKE SURE I AM CLOSE TO BEING FINISHED.
	J	ALL RIGHT.

113	AM	CONTINUES
	KC	HAVE WITNESSED CHILDREN ON THEIR PROPERTY AND ON OUR 10 ACRES. I KNOW THEY ARE COMETTO CHILDREN. HAVE SEEN THEM A NUMBER OF TIMES OVER THE YEARS. KNOW THEM BY SITE. HAVE SEEN THEM ON THE EASEMENT. NEVER CONCERNED I WOULD HIT THEM. ONLY TRAVEL ABOUT 10 MPH. HAVE SEEN THEM ON OUR 10 ACRES. ONE INSTANCE IN OCTOBER, 2007. THEY WERE RUNNING FROM OUR PROPERTY TO GET BACK TO COMETTO PROPERTY. TOMMY WAS WORKING ON THE PROPERTY. I ASKED HIM TO PLEASE NOT HAVE HIS KIDS TRESPASS ON OUR PROPERTY. HE SAID HE DIDN'T KNOW THEY WERE THERE. SHORTLY AFTER WE POSTED NO TRESPASSING SIGNS. THEY WERE FACING THE COMETTOS PROPERTY, NOW THEY ARE GONE
	BF	OBJECTION RELEVANCE
	AM	GOES TOWARDS TRESPASS ON THEIR PROPERTY.
	J	I AM WELL AWARE THE PARTIES DON'T GET ALONG. WE DON'T NEED TO GET INTO THIS
	AM	NOTHING FURTHER
116	BF	CROSS
	KC	FIRST VISITING IN 1998. ROAD WAS CONFIGURED THEN AS IT IS TODAY, APPROXIMATELY. TURNS WERE THE SAME. I AM ON THE PAPERWORK. I NEVER MEASURED THE WIDTH OF THE ROAD
	AM	THAT IS VAGUE
	J	OVERRULED - IT'S CROSS
	KC	I DON'T KNOW HOW TO ANSWER THAT. I NEVER MEASURED THE ROAD. PRIOR TO BUYING THE PROPERTY IN 1998. MY BROTHER MOVED THEIR PRIOR TO THAT. CAMPBELLS OWNED IT PRIOR.
	AM	OBJECTION HERE SAY
	J	OVERRULED.
	KC	NO WAY TO KNOW IF THEY WERE OPERATING COMMERCIAL BUSINESS.
	AM	I DON'T THINK SHE HAS TESTIFIED TO THAT
	J	OVERRULED.
	KC	IN SUMMER OF 1999 I STARTING RUNNING MY VETERINARY BUSINESS FROM HOME. MY HUSBAND RUNS A VETERINARY SUPPORT SERVICE.
	AM	DON'T KNOW HOW THIS IS RELEVANT. SOME SIZE OF VEHICLE FOR THIS BUSINESS, THEN IT MAY BE RELEVANT. NOT SURE WHERE COUNSEL IS GOING
	J	OVERRULED.
	BF	PLEASE ANSWER
	KC	YES HE DOES, CREMATES ANIMALS ON SITE.
	AM	I DON'T SEE WHERE THIS IS RELEVANT.
	J	THE IDENTITY OF THE CUSTOMERS
	BF	I DON'T INTENT TO IDENTIFY. SCOPE AND BREATH OF EASEMENT. COMMERCIAL USE OF EASEMENT FOR BOTH, SHOULD BE ABLE TO INQUIRE. EXPLAINS. THIS WAS AN EASEMENT INFREQUENTLY USED PRIOR.
	J	HAVE ESTABLISHED FREQUENCY
	BF	WILL MOVE ON. CONTINUES CROSS
123	KC	HAVE STARTED LOGGING ON 10 ACRES. HAVE STARTING CLEARING AND BUILT BRIDGE ACROSS CREEK. LOCATION OF ROAD HAS NOT CHANGED IN 9 YEARS WE HAVE BEEN THERE. LARGE TREES ADJACENT TO ROAD BUT ON IN ROAD. FIRST 4 YEARS, WE SNOWMOBILED IN AND OUT. NO ONE WAS PLOWING THOSE YEARS. AWARE COMETTOS WERE GONE ONE WINTER, BUT I RECALL THEY WERE THERE ON SITE OTHER 3 WINTERS. I KNOW LLOYD WALLACE WOULD PLOW THE PROPERTY, HE OWNED PRIOR TO CAMPBELLS.
	AM	CLARIFY - WHICH PROPERTY WAS WALLACE.
	J	IF IT IS AN OBJECTION IT IS OVERRULED.
	BF	CONTINUES CROSS

127	KC	ONE TIME WE HAD TO OPEN GATE, BUT NOT LOCKED, JUST HAD TO UNWRAP CHAIN.
	BF	HANDS WITNESS EXHIBITS 28 THROUGH 30. BEGINS WITH 28
	KC	EXHIBIT 28. AWARE 16 FEET OF CLEARANCE. I DON'T THINK I CAN LIFT THAT CENTER POST OUT. I'VE NEVER LIFTED IT.
	AM	THIS IS SPECULATION
	KC	I WAS THERE WHEN IT WAS MEASURED. I DON'T KNOW IF IT IS 20 FEET. I DIDN'T MEASURE THE MAN GATE.
	KC	EXHIBIT 29. VEHICLE WAS FARTHER BACK AT ONE POINT.
	KC	EXHIBIT 30. THAT RED BUILDING WENT IN APPROXIMATELY JULY 2005. IT IS OFF THE TIRE MARKS.
	BF	I DON'T SEE ANY TIRE MARKS
	KC	I SEE DIRT. THERE ARE SOME ROCKS. THERE IS A LIGHTER AREA. PICKUP, TRAILER AND COMETTOS ARE OUTSIDE THE LIGHTER ARE WHERE WE TRAVEL WITH OUR CARS.
	KC	BACK AT EXHIBIT 29. THERE IS MORE VEGETATION. BACK AT EXHIBIT 28, I SEE SUNLIGHT SHINING OFF THE DIRT. DON'T SEE ANY LIGHT COLORED GRAVEL. SEE VEGETATION. CLEAR IN PHOTO WHERE YOU CAN DRIVE.
	BF	SEE EXHIBIT 25.
134	KC	I SEE THE SKETCH. SEE THE CREEK THAT CROSSES OUR PROPERTY AND THEIRS. SEE ARROW TO BRIDGE AND SANDPOINT. IT IS NOT THE SAME EARTH BIRM. I WAS NOT PRESENT WHEN THIS SKETCH WAS DRAWN. SEE MARKINGS FOR ABANDONED RAILROAD GRADE. CAN SEE IT ON SITE AND IN 1999.
	AM	OBJECTION - ON WHAT SHE BELIEVES.
	BF	I THINK SHE CAN ANSWER FROM HER OWN OBSERVATION
	J	RESTATE THE QUESTION
136	BF	RE-CROSS
	KC	SAME PROBLEM WITH THIS DRAWING I HAD BEFORE. THERE ARE NO BOUNDARY LINES. EXPLAINS. NOTHING TO TELL ME WHERE THIS ROAD IS. ON THE GROUND, THE ROAD IS APPROXIMATELY CLOSELY IN THE SAME LOCATION. I CAN'T TELL YOU IT IS EXACTLY. I CAN TELL YOU IT HAS DECREASED IN WIDTH BECAUSE LOSS OF WORK, VEGETATION COMING IN, MATERIAL BEING REMOVED. THE COMETTOS HAVE RE-OPENED THE OLD ROAD AND GOING IN ON THE "ABANDONED" ROAD. IT IS THE ABANDONED ACCESS. NOT THE ROAD WE USED IN 1999. WE WERE ALL USING THE NEW EASEMENT, SO YES, THEY HAVE CHANGED THE EASEMENT. THE WEST END OF THE MAP WHERE EARTH BIRM IS.
	BF	FOCUS ONLY ON THE ROAD ON EASEMENT.
	AM	I THINK IT IS ANSWERED.
	J	I THINK IT HAS. MAYBE YOU DON'T LIKE HER ANSWER.
139	BF	CONTINUES CROSS
	AM	BEYOND SCOPE
	J	OVERRULED
	KC	YES HE DROVE THE GRAVEL TRUCK ON THE ROAD. I KNOW THE TRAILER IS 30 FEET. I DON'T KNOW ABOUT MY HUSBAND'S EQUIPMENT, ASK HIM. HAD SOME PROFESSIONAL LOGGING ON THE 10 ACRES. LOGS SOLD. GOT A CHECK. LOGS HAULED OUT ACROSS THIS ROAD.
	AM	THERE IS NO FOUNDATION
	J	LET'S GET TO A QUESTION FIRST
	BF	CONTINUES CROSS
143	KC	MY HUSBAND HAS DRIVEN OTHER HEAVY EQUIPMENT ON THIS ROAD. WE HAVE TWO USES FOR THOSE BEAMS. HAVE NEVER TALKED TO COMETTOS ABOUT THIS. THEY WON'T TALK TO US. I DON'T KNOW WHAT THE WIDTH OF THE ROAD WAS. AFTER JOEL PETTY MEASURED.
	BF	I'M NOT ASKING WHAT MR. PETTY KNOWS.
	KC	I KNOW IT'S 12 TO 14 FEET IN SPOTS.

	BF	CONTINUES CROSS
145	KC	THEY HAVE BLOCKED OUR ACCESS TO OUR HOME. I MIS-STATED EARLIER THEN ON MY PART.
	AM	OBJECTION - BEYOND SCOPE
	J	OVERRULED.
	KC	SNOW AND LOGS, FIREWOOD WAS LAST WINTER. THERE WAS SEVERAL TIMES. LARGE TREES IN THE ROADWAY.
	BF	ALL QUESTIONS I HAVE.
	J	ANY RE-DIRECT
147	AM	RE-DIRECT
	KC	THERE ARE SIGNIFICANT CHANGES TO THE ROAD. ROCKS, BIRMS, SUCH. TESTIFIED I BRING ANIMALS TO THE HOME. THIS MARE WAS A PERSONAL CASE TO ME. HAVE NOT TOLD MY CUSTOMERS THAT MY PLACE IS FOR LONG TERMS CARE.
	KC	LOOKS AT EXHIBIT 24. TRUCK WAS PULLED CLOSED TO ROADWAY. BEST GUESS OF TIMEFRAME WAS AROUND PRE-FAB FENCE PANELS WENT IN, SUMMER OF 2004. EXHIBIT 30, RECALL BEING ASKED IF BUILDING IS IN ROADWAY.
	BF	JUDGE THIS IS BEYOND THE SCOPE
	AM	THIS IS.
	BF	IF I CAN FINISH. THIS IS NEW
	J	HARDLY NEW. DAY OF TESTIMONY OF ROADWAYS. OVERRULED, BUT AT SOME POINT REPEATING IN DIFFERENT FASHION IS NOT PROBATIVE.
152	KC	DESCRIBES INTERPRETATION OF A ROADWAY. SHOULD BE 30 FEET.
	AM	THANK YOU.
	BF	ONE QUESTION - YOU WANT TO TRAVEL OFF THE ROADWAY TO MAKE A TURN
	KC	IF IT IS WITHIN THE 30 FEET TO MAKE THE TURN. YES.
	J	WE WILL TAKE SHORT STRETCH BREAK
154		BREAK/PASS
204		BACK ON THE RECORD
	J	MR. MACOMBER
	AM	CALL DAVID CALDWELL - DIRECT
	SWORN	DAVID CALDWELL
	AM	DIRECT
	DC	HAVE LIVED ON PROPERTY FOR APPROXIMATELY 10 YEARS. MOVED THERE WITH MY WIFE. DESCRIBES LEVEL OF EDUCATION. HAVE DONE ROAD WORK ON AND OFF ALL MY LIFE. HEARD MY WIFE'S TESTIMONY. AGREE THAT ROAD WAS NOT FINISHED. MRS. COMETTO'S ADMITTED.
	BF	OBJECTION, NON-RESPONSIVE.
	J	OVERRULED.
	DC	SHE SAID IN ABOUT FALL OF 2003. LACK OF PROCESSED MATERIAL ON TOP COAT. DESCRIBES. RECALL MY WIFE'S TESTIMONY THAT WE DON'T MAINTAIN. RELUCTANT TO BEGIN MAINTENANCE UNTIL IT IS FINISHED.
	BF	OBJECTION - FOUNDATION AND QUALIFICATIONS ON SURVEY PRACTICE.
	J	OVERRULE FOR TIME BEING
	DC	ROAD DOES NOT LIE AS IN EASEMENT AGREEMENT. EXPLAINS. NORTH TRAVERSE LEG IS NO WHERE NEAR NORTH BOUNDARY. TO MAINTAIN THE ROAD IF CIRCUMSTANCES APPROPRIATE, I WOULD ADD CRUSHED AND SOMETIMES BLADE IT. THREE PROBLEMS I MENTIONED BEFORE.
	BF	OBJECTION - QUALIFICATIONS
	AM	WITHDRAWN
	AM	CONTINUES DIRECT
210	BF	THAT IS A HYPOTHETICAL AND NO FACTS
	J	OVERRULED
	DC	I WOULD HAVE TO TRESPASS ON NEIGHBORING PROPERTY, NEIL MCGHEE

		TO PERFORM THOSE MAINTENANCES. WE HAVE 2 TRUCKS AND VAN. TWO FLATBED TRAILERS; 2 DUMP TRUCKS, BELLY DUMP, END DUMP; ALSO HAVE A SUBURBAN I USE ONLY TO PLOW. I HAVE 5 PIECES OF EQUIPMENT THAT CAN PLOW. DESCRIBES. HAVE A LARGE BACKHOE AND SNOW BLOWER. THIS BLOWER IS LARGER, THAT CLEARS RUNWAYS AT AIRPORTS. IT'S POTENTIAL RANGE IS 30 TO 35 FEET. CAN ADJUST THAT. DESCRIBES SECOND SIDE WING ON SNOW PLOW VEHICLE. MOST EXPERIENCE IN SNOW PLOW EQUIPMENT. HAVE ALSO BUILT ROADS. EVERYTHING FROM GRAVEL TO PAVEMENT.
215	DC	DID NOT HAVE EXPERIENCE WITH ALL THESE VEHICLES BEFORE PROPERTY. AFTER 3 YEARS OF SNOWMOBILE COMMUTING, FOUND IT WAS DIFFICULT AND EXPENSIVE. THE MAN THAT BUILT THE HOUSE.....
	BF	OBJECTION - HERE WAY
	J	NOT SURE WHAT THE ANSWER WILL BE. OVERRULED.
	DC	BECAME ACQUAINTED WITH MR. WALLACE. WE ARRIVED IN 1999. SPENT THREE YEARS ON SNOWMOBILES. 2003 IS WHEN WE STARTED USING SNOW PLOWING. MY WIFE DOESN'T HAVE EXPERIENCE WITH THE EQUIPMENT. TO MY KNOWLEDGE, NO ONE ELSE HAS PLOWED THIS ROAD AS A MATTER OF COURSE, OTHER THAN ONE TIME BY A NEIGHBOR. SNOW PLOW ALL THE WAY DOWN TO WHERE THE COUNTY MAINTAINS. 8 AND 2/10 MILES FROM MY HOUSE. FOREST SERVICE REQUIRES I LEAVE 2-3 INCHES ON THE SURFACE. HAVE PERMIT FROM THEM. DESCRIBES. 10 FEET ISN'T UNCOMMON. HIGHER THAN A PASSENGER VEHICLE. DESCRIBES MOVING SNOW.
	BF	OBJECTION - AS TO RELEVANCE
	J	OVERRULED.
	DC	SNOW DEPTH MAKES DETERMINATION OF WHICH EQUIPMENT I USE. WITH SNOW PLOWS YOU HAVE TO DEPOSIT IT ALONG THE ROADWAY AS YOUR PROGRESS. IN MOST YEARS HAVE BEEN ABLE TO MAINTAIN PASSENGER VEHICLE WIDTH. ONLY TIME I FAILED TO KEEP IT PLOWED WAS LAST WINTER. I HAD TO USE THE SNOW BLOWER BUT I WAS UNABLE TO NEGOTIATE THE TURNS BECAUSE OF BIRMS AND ROCKS PLACED ALONG SIDE OF ROAD.
	AM	SHOWS WITNESS EXHIBIT 30
223	DC	THAT'S THE FIRST TURN AS YOU'RE OUTBOUND ARRIVING AT COMETTO. JUST PAST THAT ROCK, YOU WOULD DEPOSIT THE SNOW ON THE OUTSIDE OF THE TURN RADIUS. SNOW ACCUMULATION MAKE IT DIFFICULT FOR SNOW DEPOSITS. EXPLAINS. CAN ONLY PUT SNOW ON ONE SIDE. EXPLAINS. IT'S NOT LIMITED TO A CERTAIN AMOUNT OF DEPTH. SNOW BLOWER IS VERY COMPLEX AND EXPENSIVE. USE AS LAST RESORT. THERE IS NOT ENOUGH ROOM ON THE LEFT SIDE OF THE ROAD TO DEPOSIT SNOW IN A NORMAL YEAR. AVERAGE DATE TO USE HEAVIER EQUIPMENT BY MID JANUARY.
	AM	SHOWN EXHIBIT 29
	DC	WAS THERE WHEN THIS WAS TAKEN. THAT WOULD BE NUMBER 2 TURN. BRIGHT OBJECT IS A WOODEN FENCE PANEL. WAS INSTALLED APPROXIMATELY OCTOBER, 2004. I WAS NOT PLOWING BEFORE THEN. WAS PUT IN JUST BEFORE PLOWING. TRUCK WAS PRETTY MUCH THERE, BUT WAS MOVED FORWARD AFTER FENCE STILES PUT IN. TRUCK
	BF	OBJECTION - NON-RESPONSIVE
	DC	DO YOU MEAN RUNNING SURFACE OR ROADWAY
	BF	OBJECTION
	J	OVERRULED
	AM	RUNNING SURFACE.
	DC	THE TRUCK IS WHERE I WOULD PUT SNOW. IT IMPEDES THE PLOW ITSELF. INCLUDING THE SIDE-WING, 25 FEET WIDE, BUT NOT FROM CENTER OF TRUCK. EXPLAINS. I CAN MEASURE HOW FAR IT STICKS OUT FROM THE

		TRUCK. TOTAL WIDTH OF A PASS VARIES. HAVE HIT THINGS ON THE SIDE OF THE ROAD WHEN PLOWING.
	AM	EXHIBITS 28, 29 AND 30.
	DC	EXHIBIT 28, HAVE PLOWED IN THAT AREA. I THINK I HAVE CLIPPED THIS TREE ON EXHIBIT 30 WITH SIDE-WING AND SOME BRUSH. THE NEW ROCKWALL, YOU CAN'T SEE IT, EXHIBIT 28 SHOWS ROCK WALL. HAVE HIT IT. ACTUALLY HIT IT WITH THE BLOWER AND DAMAGED THE MACHINE, IN FEBRUARY OR MARCH OF THIS LAST YEAR.
236	DC	DESCRIBES LOCATION OF ROCK WALL. DESCRIBES DAMAGE TO BLOWER.
	BF	JUDGE – AT THIS POINT THERE IS NOT CLAIM FOR DAMAGES, THIS IS AN EASEMENT.
	J	OVERRULED. DETAILED EXPLANATION ON HOW THE MACHINE WORKS WILL BE LOST.
	AM	WON'T PURSUE
239	DC	HAVE SEEN EASEMENT AGREEMENT BEFORE AND SKETCH, EXHIBIT 24. THE EARTH BIRM HAS CHANGED. DESCRIBES NEW LOCATION OF EARTH BIRM. SNOW IS TO BE DEPOSITED ON OUTSIDE OF TURN. ON EXHIBIT 28, THE BIRM PROHIBITS ME FROM DEPOSITING SNOW AS I HAD DONE BEFORE. DESCRIBES SNOW PLOWING THAT AREA. ALMOST EVERYTHING DISAPPEARS WHEN IT SNOWS.
	BF	OBJECTION – ASKED AND ANSWERED.
	J	OVERRULED
	DC	OVER 10 FEET OF SNOW IN ACCUMULATION. I MAY HAVE HIT THE MAN GATE WITHOUT KNOWING IT. NOT INTENTIONALLY.
	BF	OBJECTION – HERE SAY.
	J	WILL LET THE ANSWER STAND.
	DC	I DID KNOCK IT OVER WITH THE BELLY DUMP. DESCRIBES. THE TRACTOR ITSELF IN COMBINATION IS APPROXIMATELY 48 FEET LONG. I DON'T KNOW FOR SURE IF IT IS OVER 45 FEET LONG. SOMETIMES THAT GATE IS THERE AND I CAN MISS IT. I ONLY HIT THE GATE ONCE. WASN'T THE FIRST TIME I BROUGHT THE BELLY DUMP IN. IT'S SO CLOSE TO NOT HIT THAT GATE. IF I MISS, IT'S ONLY 1 OR 2 INCHES. ONE INSTANCE WHERE IT SCRAPED ALONG THE TRAILER AND THEN CLIPPED THE TIRE. ON THE OTHER SIDE I HAVE ONLY INCHES OF CLEARANCE ON OTHER SIDE. EXPLAINS NOT STOPPING ON THAT CORNER.
247	DC	THERE IS A SERIES OF TREES THAT HINDER PLOWING, AS WELL AS PERSONAL OBJECTS. THE TREES ARE RIGHT ALONG SIDE THE ROAD TO A COUPLE OF FEET. SOME OF THE TREES ARE SUBSTANTIAL. RANGE BETWEEN 10 INCHES AND 2 FEET. DIAMETER. THERE ARE MORE THAN HALF DOZEN ON ONE SIDE AND 18 SOUTH. THICKER ON WEST THAN ON EAST. THEY ARE ALMOST CONTINUOUS. HAVE DAMAGED MY SIDE-WING WITH THOSE TREES. CONSIDER MYSELF A SAFE AND GOOD DRIVER. SNOW PLOWING IS TOUGHER ON TIGHT RADIUS TURNS. I THINK THERE ARE PERSONAL PROPERTY LEFT.
	BF	OBJECTION – SPECULATION
	AM	RE-PHASE.
252	DC	THEY PILE THINGS UP. OLD VEHICLES, OLD TRAILERS, BUILDING MATERIALS. PERSONAL PROPERTY IS MOVED AROUND. THIS IS THE COMETTO'S PROPERTY. THEY CAN STORE PROPERTY ON THEIR OWN PROPERTY.
	BF	OBJECTION – WHAT IS THE RELEVANCE OF THE QUESTION. STORAGE OF PROPERTY OF OUTSIDE OF THE EASEMENT.
	J	I'M NOT SURE BUT WILL OVERRULE.
253	DC	MY OBJECTION TO IT IS WHEN THEY LEAVE IT THERE AND THEY BECOME TRAPS THERE WHEN IT SNOWS. I'VE GOTTEN STUCK IN MY EQUIPMENT. BETWEEN TURN 2 AND 3. HAVE DROPPED A WHEEL IN A DITCH. HAVE DRIVEN A TIRE INTO A CULVERT. SAME TURN.
255	DC	HAVE TALKED TO THE COMETTOS ABOUT THESE, OR TRIED TO. IT WAS A

		ONE WAY CONVERSATION.
	BF	OBJECTION – SPECULATION
	J	OVERRULED.
	DC	PERSONAL PROPERTY WAS NOT MOVED DUE TO CONVERSATION. PLOWING TO CONTINUE IS IMPORTANT FOR COMFORT TO MY FAMILY.
	AM	THAT'S ALL I HAVE
	BF	CROSS
259	DC	HANDED DEFENDANT'S EXHIBIT E. DESCRIBES ONE PLOW VEHICLE. THAT IS THE ONE WITH THE WING. FOURTH PAGE IN.
	AM	FOUNDATION IS NOT LAID
	J	NO ONE HAS OFFERED THEM YET.
	DC	THAT IS MY PLOW TRUCK. I'M TRYING TO PLACE THE PHOTO. APPEARS FRONT IN SNOW BANK AND BACK IN WOOD RAILING. THAT WOULD BE BRIDGE , GOT STUCK TRYING TO PLOW COMING IN. QUITE A DISTANCE FROM COMETTO PROPERTY. ABOUT A QUARTER MILE.
302	DC	MOST PLOW EQUIPMENT HAS BEEN ACQUIRED IN LAST 5 YEARS. ACTUALLY THIS LAST WINTER WAS MY SIXTH SEASON. AT LEAST 2 OR 3 YEARS I WAS NOT PLOWING.
	DC	IN EXHIBITS 28, 29 AND 30, ASSUMING ROADWAY DEFINITION IS SAME, I ASSUME I CAN STORE SNOW THERE. TRAVEL SURFACE MOSTLY FREE OF VEGETATION. IN 1999 TRAVEL SURFACE IS ROUGHLY SAME LOCATION. YOU ASKED ME THIS IN DEPOSITION. THE TRAVEL SURFACE IN SAME LOCATION AS BEFORE. IT IS APPROXIMATELY 14 FEET BUT IT VARIES. AN AVERAGE OF 14 FEET HAS BEEN DISCUSSED AND I WOULD AGREE. HAD NO REASON TO MEASURE IN 1999. CAN'T SAY FOR SURE. NO OBSERVABLE CHANGE AS LONG AS YOU UNDERSTAND MY QUALIFICATIONS. THE TREES ALONG THE COMETTO PROPERTY VARY IN SIZE. SOME OF TREE'S TRUNKS COME RIGHT OUT OF THE GROUND RIGHT ON THE TIRE TRACKS.
309	DC	LOOKING AT EXHIBITS 29 AND 30. ROOFING METAL. SAME YELLOW TRUCK, OFF THE ROADWAY. TREE AND SNOW PLOW IS OFF THE ROAD. I DON'T WANT TO GO THERE ABOUT THE ROCKS. DEPENDS ON THE VEHICLE YOU ARE DRIVING. I BELIEVE THE WIDTH OF THE ROADWAY SHOULD BE DEFINED A CLEAR DEFINITION OF A VARIETY OF VEHICLES.
	DC	EXHIBIT 25. ASSUME YOU ARE REFERRING TO THE COMETTO'S PORTION. THERE IS A 30 FOOT REFERENCE, BUT IT IS VAGUE IF THAT DEFINES THE WIDTH OF THE EASEMENT. I SEE NO REFERENCE TO TUCKER SKETCH.
312	BF	READS FROM EXHIBIT
	DC	MY MISTAKE AND TUCKER SKETCH IS ATTACHED AS EXHIBIT 1. ON THIS SKETCH IT IS DEPICTED AS A 14 FOOT ROADWAY.
	BF	NOTHING FURTHER
313	AM	RE-DIRECT
	DC	MY PLOW GOT STUCK AT THAT LOCATION BECAUSE A FLOOD HAD DEPOSITED DEBRIS AT BRIDGE AND ABOVE. SNOW BUILT UP AND MADE IT WORSE. THAT'S THE SIDE OF THE SIDE WING. THE WING GOT INVOLVED WITH THE SNAG. STARTED THE PLOW MOVING TO THE SIDE OF IT'S TRACK AND IT'S OUTSIDE TIRE GOT ON ICE. THE MORE I TRIED TO GET OFF SNAG, I FINALLY GOT STUCK. NEXT MORNING GOT BULL DOZER AND JACK STANDS AND DUG MYSELF OUTSIDE
	AM	WHY ARE YOU DOING ALL THIS EXTRA WORK
	BF	BEYOND SCOPE
	J	IF YOU WANT TO BELABOR.
	AM	I DON'T. WILL MOVE ON.
316	DC	EXHIBIT 25. BEAMS CAN BE BROUGHT ON STANDARD ROADWAYS WITHOUT OVERSIZED
	AM	NOTHING FURTHER
	BF	NO QUESTIONS
318		OFF THE RECORD FOR A MOMENT.

322		BACK ON THE RECORD
	J	OFF THE RECORD DISCUSSION REGARDING PLAINTIFFS EXHIBIT 35. COUNSEL, WHO WISHES TO PUT IT ON THE RECORD.
	BF	WITH REGARD TO EXHIBIT 35, PREVIOUSLY STATED MY OBJECTIONS CONCERNING PRACTICE OF PROFESSIONAL LAND SURVEYING. ADDENDUMS, PAGES 1 AND 2. THEY REPRESENT PRACTICE PROFESSIONAL LAND SURVEYING, WE HAVE OBJECTION, BUT FOR ILLUSTRATIVE PURPOSES, WE WOULD STIPULATE TO THE REPORT. MR. PETTY'S INTERPRETATION IS A LEGAL CONCLUSION THE COURT NEEDS TO DETERMINE. FROM FOUNDATIONAL STANDPOINT TO STANDPOINT OF CONTENT EITHER IRRELEVANT OR LEGAL CONCLUSIONS. WILL STIPULATE TO THE ADMISSION.
	J	SO THEN, EXHIBIT 35 CAN BE ADMITTED, SUBJECT TO COURT'S RULING THAT SURVEY WOULD BE TREATED AS A MAP. IN STIPULATING TO REPORT, DEFENSE IS RESERVING OBJECTIONS TO WEIGHT TO ANY IRRELEVANT MATERIAL AND LEGAL CONCLUSIONS, BUT NO OBJECTION TO THE REPORT TO ITSELF.
	BF	CORRECT.
	AM	WE WOULD ACCEPT THE STIPULATION AS STATED.
	J	IF THE COURT DECIDES SOME OF THE MATERIAL IS IRRELEVANT WHETHER THERE IS AN OBJECTION OR NOT. HE IS RESERVING HIS OBJECTION. HE IS JUST IDENTIFYING HIS OBJECTIONS.
	AM	IF YOU DO DECIDE SOME PORTIONS ARE IRRELEVANT, WOULD YOU DETAIL IN FINDINGS OF FACT?
	J	ABSOLUTELY NOT. MY GOD, I HAVE WORK TO DO.
	AM	I UNDERSTAND THAT.
	J	YOU ARE NOT GOING TO KNOW. I'M NOT GOING THROUGH A 30 PAGE REPORT AND TELL YOU WHAT IS RELEVANT AND NOT.
	J	SO IT IS ADMITTED.
	BF	DOES THAT CONCLUDE PLAINTIFF'S CASE
	J	INQUIRES TO COUNSEL.
327	AM	MAY CALL LORI COMETTO TOMORROW. NOT READY TO REST.
	BF	CAN I GET SOME DIRECTION ON WHICH PARTY. I THINK HE IS RIGHT, HE SENT A FAX. I THINK THE COURT HAS SEEN THAT MR. COMETTO HAS NOT BEEN PRESENT.
	AM	LET'S JUST MAKE IT LORI COMETTO AND I WON'T MAKE MR. COMETTO AS A PLAINTIFF'S WITNESS.
	J	WILL BE TAKING THIS UP IN COEUR D'ALENE TOMORROW MORNING WITH WITNESSES TO BE CALLED. TOMORROW MORNING AT 9 AM.
	J	COURT IS IN RECESS
329		END

Court Minutes:

Session: HOSACK111708P
Session Date: 11/17/2008
Judge: Hosack, Charles
Reporter: Schaller, Joann

Division: DIST
Session Time: 08:18

Courtroom: Courtroom10

Clerk(s): Mollett, Charmaine

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Charmaine Mollett

Case ID: 0001

Case number: CV2007-1744BON
Plaintiff: CALDWELL, DAVID & KATHY
Plaintiff Attorney:
Defendant: COMETTO, THOMAS & LORI
Pers. Attorney:
Co-Defendant(s):
State Attorney:
Public Defender:

11/17/2008

15:14:17

Recording Started:

15:14:17

Case called

15:14:27

Judge: Hosack, Charles
MOTION TO ENGAGE SURVEYOR. MR. FEATHERSTONE
CALLED IN. TELEPHONIC HEARING.

15:15:25

MR. MCCOMBER FOR THE DEFENDANT. DEF PRESENT.
DISPUTE BETWEEN THE PARTIES ON H

15:16:56

HOW THE COST IS GOING TO BE SPLIT.

15:17:35 **Other: FEATHERSTONE, MR.**
DON'T WANT TO GET IN A DISPUTE LATER OVER THE
COSTS. MR. PROVOKE THE

15:18:04 CHEAPEST.

15:18:21 **Other: MCCOMBER, MR.**
MR. PROVOKE TOOK THE WORD ESTIMATE OUT OF THE
LANGUAGE.

15:18:57 **Other: FEATHERSTONE, MR.**
HE AGREED TO CAP THE ESTIMATE AT \$3200.00. DON'T
HAVE AN ESTIMATE YET. I HAVE

15:19:28 USED MR. PROVOKE BEFORE.

15:19:41 **Judge: Hosack, Charles**
WE COULD ORDER MR. PROVOKE NOT TO GO OVER THE
\$3200.00. YOUR FAMILIAR WITH

15:20:41 THE FIRM. THE ATTORNEYS NEED TO AGREE TO THE
ESTIMATE OF NOT TO EXCEED

15:21:14 \$3200.00. CAN GET A COURT ORDER IF NECESSARY.
THE SURVEY TALKS ABOUT DOING A

15:21:50 CENTERLINE SURVEY. NONE OF THIS LITIGATION WILL
GET RESOLVED UNTIL WE GET A

15:22:19 SURVEY OF THE CENTER LINE. THAT'S AN ABSOLUTE
MINIMUM. MY NOTES AND MY REVIEW

15:23:06 IS THAT THE WIDTH OF THE TRAVELWAY VARIES.
SOMETIMES THE TRAVELWAY IS UP TO

15:23:45 16 FEET. SOMETIMES 14 AND 12 FEET. THE EDGES OF
THE TRAVELWAY WERE SURVEYED.

15:24:37 IT'S DUMPING SNOW. IF I JUST GET A CENTERLINE.
TRAVELWAY IS INSIDE THE

15:25:20 ROADWAY. NOT SURE HOW I'D DEAL WITH THAT. IF YOU
APPEAL WEATHER YOU HAVE A

15:25:53 DEFINITE. DON'T WANT TO BURDEN THE PARTIES WITH
THE EXTRA EXPENSE OF GETTING

15:26:44 AN EFFICIENT SURVEY. WON'T GO ANY FURTHER THAT
THAT. IT'S JUST A CENTERLINE

15:27:16 SURVEY. HAS VARYING WITHS OF THE TRAVEL WAY.

15:27:55 **Other: MCCOMBER, MR.**
I NEED TO CLARIFY WITH MR. PROVOKE WHAT THE
SURVEY WILL BE. ON BEHAVE OF THE

15:28:25 PLTS. MAY NEED A SECOND SURVEY. DON'T KNOW IF
I'VE CLARIFIED WITH MR. PROVOLT

15:29:22 THE CENTERLINE.

15:29:34 **Other: FEATHERSTONE, MR.**
THE NORTHWEST TRAVERSE WAS OBTAINED BY MR.
PROVOLT. YOU HAVE THE ESTIMATES.

15:30:14 **THE OTHER QUOTES SAY THEY'RE TRYING TO LOCATE**
THE EDGES OF THE TRAVEL WAY. ONE

15:30:46 **ESTIMATE WAS \$3400.00 TO \$3600.000 . THE ROAD**
NEEDS TO BE SURVEYED BY

15:31:58 **CENTERLINE AND EDGE OF ROAD. PERHAPS WE NEED TO**
GO BACK TO THE DRAWING BOARD.

15:32:27

15:32:35 **Judge: Hosack, Charles**
I THINK THE COURT AND THE PARTIES WOULD BE
BETTER OFF WITH ONLY A CENTERLINE

15:33:13 **SURVEY. IF THE PARTIES WANT TO RUN THE RISK.**
BOTH COUNCILS AGREED TO CHECK

15:33:52 **THEIR SURVEYORS.**

15:34:04 **Other: FEATHERSTONE, MR.**
I WAS ASKING FOR BOTH THE CENTERLINE AND THE
EDGE OF ROAD. WE NEED TO DEAL

15:34:32 **WITH THOSE TWO ESTIMATES.**

15:35:01 **Judge: Hosack, Charles**
DON'T FEEL ITS TOO PREMATURE.

15:35:21 **Add Ins: DF - B. FEATHERSTON**
THINK IT WOULD BE FAIR THAT THE COURT DECIDES ON
THE COSTS. THINK THE

15:36:01 **DEFENDANT SHOULD PAY THE COSTS. SHOULD BE PRO**
RATED BETWEEN THE PARTIES.

15:36:26 **Judge: Hosack, Charles**
WOULD BE HELPFULL IF THE COSTS WERE SPLIT.

15:36:51 **Add Ins: PL - A. MACOMBER**
IF IT WAS DONE PROPERLY 10 YEARS AGO WE WOULDN'T
BE HERE TODAY. NOW WERE HERE

15:37:27 **FOR A NEW SURVEYOR. THERE'S 4 PARTIES THAT ARE**
INVOLVED. PLTS PROCURED THE

15:37:58 **BLACK DIAMOND SURVEY. DEF'S NEED TO DO WHAT THEY**
SAID THEY'D DO WITH THE

15:38:32 **EASEMENT. IF THE BLACK DIAMOND REPORT IS**
ACCURATE I THINK THE PLTS SHOULDN'T

15:39:04 **HAVE TO PAY THE COSTS OF THE SURVEY.**

15:39:15 **Judge: Hosack, Charles**
NEED TO GET TO A FINAL JUDGMENT. CERTAINLY SOME
MERIT AND CERTAIN LOGIC TO
15:39:49 THE 4 PROPERTIES THAT ARE EFFECTED BY THIS
EASEMENT. SOMETHING COULD HAVE
15:40:21 BEEN DONE 10 YEARS AGO. ORDER THAT THE SURVEY
COSTS BE SPLIT. CAN SPLIT 3/4'S
15:41:15 TO 1/4TH. CAN DIVIDE IT UP. WE WILL HAVE EQUAL
SHARING ON THE COSTS. MAYBE
15:41:53 OTHER ISSUES. MAY HAVE TO HAVE ADDITIONAL
SURVEYS. FAIREST WAY TO PROCEED IS
15:42:42 A 50/50 BASIS.

15:42:58 **Add Ins: DF - B. FEATHERSTON**
THE PARTIES NEED TO ENGAGE ONE OF THESE 3
SURVEYORS. WE SHOULD HAVE BOTH
15:43:35 CENTERLINE AND THE SURVEY OF THE EDGES.

15:43:55 **Judge: Hosack, Charles**
NEED TO FINE ONE THAT WILL HAVE A REASONABLE
RATE FOR THE PARTIES.

15:44:27 **Add Ins: PL - A. MACOMBER**
THAT SHOULD DO IT.

15:44:34 **Judge: Hosack, Charles**
GET THE SURVEYOR OUT ON THE GROUND.

15:44:59 **Stop recording**

ORIGINAL

FEATHERSTON LAW FIRM, CHTD.
BRENT C. FEATHERSTON, ISB No.: 4602
Attorneys at Law
113 South Second Avenue
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(208) 263-6866
(208) 263-0400 (Fax)

2008 DEC -4 P 12:27

STATE OF IDAHO
COUNTY OF BONNER
CLERK OF DISTRICT COURT
ap

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

DAVID L. CALDWELL, KATHLEEN C.)
CALDWELL, LAWRENCE L. SEILER,)
THERESA L. SEILER, and PATRICIA)
ST. ANGELO,)

Case No. CV 2007-01744

Plaintiffs,

ORDER RE SURVEY

vs.

THOMAS W. COMETTO and LORI M.)
COMETTO,)

Defendants.

This matter came before the Court on Monday, November 17, 2008 at 3:00 p.m. The Plaintiffs were present represented by their counsel, Arthur Macomber. The Defendants, Mr. and Mrs. Cometto, were represented telephonically by their counsel, Brent C. Featherston. Upon stipulation and/or good cause appearing therefore,

IT IS HEREBY ORDERED as follows:

I. The parties, through counsel, stipulated on the record that the survey to be performed should identify the centerline as well as the travel surface of the existing roadway across the Cometto property.

Featherston Law Firm and
Daniel P. Featherston
Brent C. Featherston
Jeremy P. Featherston
Sandra J. Whick
Stephen T. Smedley
Attorneys at Law

113 S. Second Ave.
Sandpoint, Idaho 83864
(208) 263-6866
Fax (208) 263-0400

ORDER RE SURVEY - 1

2. As to the cost of the survey, the Court enters an interlocutory order requiring that Plaintiffs and Defendants share the survey costs equally, Plaintiffs obligated to one-half (1/2) and Defendants obligated to one-half (1/2). The Court notes that this is an interlocutory order and these costs may be adjusted by subsequent Court Order pursuant to Idaho Rules of Civil Procedure.

3. Upon completion of the survey, either party, through their counsel, or the surveyor himself may submit the drawings, survey and/or other data directly to the Court for inclusion in the Court's Findings of Fact and Conclusions of Law.

IT IS SO ORDERED this 5 day of December, 2008.


 HON. CHARLES HOSACK

CERTIFICATE OF SERVICE

I hereby certify that on the 5 day of December 2008, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

Arthur B. Macomber, Esq.
 408 E. Sherman Avenue, Suite 215
 P.O. Box 5203
 Coeur d'Alene, Idaho 83814

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile No. (208) 664-9933
- Other: _____

Brent C. Featherston, Esq.
 FEATHERSTON LAW FIRM, CHTD.
 113 S. Second Avenue
 Sandpoint, ID 83864

- U.S. Mail, Postage Prepaid
- Overnight Mail
- Hand delivered
- Facsimile No. (208) 263-0400
- Other: _____

Featherston Law Firm and
 Daniel P. Featherston
 Brent C. Featherston
 Jeremy P. Featherston
 Sandra J. Whisk
 Stephen T. Snedden
 Attorneys at Law

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 Sandpoint, Idaho 83864
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 Fax (208) 263-0400

By A. Phillips
 Deputy Clerk

ORDER RE SURVEY - 2

Arthur B. Macomber
 Attorney at Law
 408 E. Sherman Avenue, Suite 215
 Coeur d'Alene, ID 83814
 Telephone: 208-664-4700
 Facsimile: 208-664-9933
 State Bar #7370
Attorney for Plaintiffs

STATE OF IDAHO
 COUNTY OF BONNER
 FIRST JUDICIAL DIST.

2008 DEC 19 P 4:26

MARIE SCOTT
 CLERK DISTRICT COURT
 DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, AND IN AND FOR THE COUNTY OF BONNER**

DAVID L. CALDWELL and KATHY)
 C. CALDWELL, husband and wife;)
 LAWRENCE L. SEILER AND)
 THERESA L. SEILER, husband and)
 wife; PATRICIA ST. ANGELO;)
 Plaintiffs)

Case No: CV-07-01744

vs.

THOMAS W. COMETTO and LORI)
 M. COMETTO, husband and wife; and)
 DOES 1-5,)
 Defendants.)

**NOTICE OF HEARING AND
 MOTION TO COMPEL
 COMPLIANCE WITH JUDICIAL
 ORDER**
 Hearing Date: February 3, 2008
 Hearing Time: 3:30 p.m.
 KOOTENAI COUNTY COURTHOUSE
 Judge Hosack

Pursuant to I.R.C.P. 37(a)(2), Plaintiffs DAVID L CALDWELL and KATHY C. CALDWELL, et al., by and through their attorney of record, Arthur B. Macomber, hereby serve the Court with notice of service of and provide proof of service by certificate of Plaintiffs' Motion to Compel Compliance with Judicial Order.

STATEMENT OF FACTS

On October 23, 2008, Judge Hosack signed an Order Requiring Survey across the Cometto property for the purpose of a Final Judgment in this case.

On or about November 19, 2008, Dan Provolt began the survey.

On December 3, 2008, Brent Featherston sent an email to Dan Provolt stating Lori Cometto would have the money there in a few days. (Macomber Aff. ¶ 4.)

On December 5, 2008, Comettos applied to the Bonner County Building and Planning Department for a building permit to construct a building at the west entrance of the Cometto property. (Parmer Aff. ¶ 4.)

On December 9, 2008, Arthur B. Macomber, Plaintiffs' counsel, sent an email to Brent Featherston, Defendants' counsel, requesting the Comettos stop the construction of the building until the judge has issued the Final Judgment. (Macomber Aff. ¶ 5.)

On December 18, 2008, Arthur B. Macomber, Plaintiffs' counsel, received an email from Dan Provolt stating the Comettos have not submitted final payment for the survey. (Id. at ¶ 6.)

ARGUMENT

“If a party fails to obey an order . . . the Court in which the action is pending may make such orders in regard to the failure as are just . . .” (I.R.C.P. Rule 37(b)(2).)

If a person doesn't abide by an Order of the court to provide a licensed survey through purposeful delay, they submit themselves to censure or sanction by the Court. Here, Comettos' rushed to construct the building on their property rather than pay the surveyor to comply with the Judge's Order. (Parmer Aff. ¶ 4.)

The area the Comettos are using to construct the building is the area used formerly for snow storage. (Caldwell Aff. ¶ 4.) It is possibly within the width of the easement the Judge may apply after the Judge receives the survey; which is being held up due to the Comettos failure to pay the remainder of the survey costs.

CONCLUSION

The Comettos have failed to pay their portion of the survey costs as ordered by this Court. Once the surveyor receives the remaining Eight Hundred Dollars and Zero

Cents (\$800.00) from the Cometos, he will finalize the survey documents and record it at the Recorders Office so the Court may issue a final judgment.

Instead of paying for the remainder of the surveying costs, Cometos have hired a builder to construct a building on the west entrance of the Cometto property. The construction of this building may interfere with the easement as recorded on the survey that is not yet complete due to the Cometos lack of payment. The construction of this building is taking up a valuable snow storage area, which was present prior to Cometos beginning the building.

WHEREFORE, Plaintiffs, DAVID L. CALDWELL and KATHY C.

CALDWELL, et al., pray this Court issue an Order as proposed herewith that:

1. Within three (3) days of this Order, the Cometos must pay Eight Hundred Dollars and Zero Cents (\$800.00) to Dan Provolt;
2. Awards sanctions in an appropriate amount, see proposed order, against the Cometos for failure to comply with the Judge's Order, pursuant to I.R.C.P. Rule 37(e); and
3. Award Plaintiffs reasonable attorney fees in connection with obtaining this order, pursuant to I.R.C.P. 37(a)(4).

DATED this 19th day of December, 2008.



Arthur B. Macomber
Attorney at Law

CERTIFICATE OF SERVICE

I am familiar with my firm's capability to hand-deliver and deliver by facsimile documents and its practice of placing its daily mail, with first-class postage prepaid thereon, in a designated area for deposit in a U.S. mailbox in the City of Coeur d'Alene, Idaho, after the close of the day's business. On the date shown below, I served:

NOTICE OF HEARING AND MOTION TO COMPEL COMPLIANCE WITH JUDICIAL ORDER

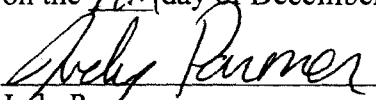
Brent C. Featherston
FEATHERSTON LAW FIRM
113 South Second Ave
Sandpoint, ID 83864
(208) 263-6866
(208) 263-0400 (FAX)

Bonner County Civil Clerk
Facsimile: 208-263-0896

Judge Hosack
Kootenai County Civil Clerk
Facsimile: 446-1138

X By personally delivering a true copy of thereof to the person(s) at the address(es) set forth herein above on the 19th day of Dec, 2008.

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 19th day of December, 2008.



Judy Parmer
Paralegal to Arthur B. Macomber

2009 JAN 20 P 4: 36

MARIE SEED
CLERK DISTRICT COURT
MS
DEPUTY

Arthur B. Macomber
Attorney at Law
408 E. Sherman Avenue, Suite 215
Coeur d'Alene, ID 83814
Telephone: 208-664-4700
Facsimile: 208-664-9933
State Bar #7370
Attorney for Plaintiffs

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, AND IN AND FOR THE COUNTY OF BONNER**

DAVID L. CALDWELL and KATHY)
C. CALDWELL, husband and wife;)
LAWRENCE L. SEILER AND)
THERESA L. SEILER, husband and)
wife; PATRICIA ST. ANGELO;)
Plaintiffs)

Case No: CV-07-01744

vs.)

**AMENDED NOTICE OF HEARING
AND MOTION TO COMPEL
COMPLIANCE WITH JUDICIAL
ORDER**

THOMAS W. COMETTO and LORI)
M. COMETTO, husband and wife; and)
DOES 1-5,)
Defendants.)

Hearing Date: February 3, 2008
Hearing Time: 3:30 p.m.

KOOTENAI COUNTY COURTHOUSE
Judge Hosack

Pursuant to I.R.C.P. 37(e), Plaintiffs DAVID L CALDWELL and KATHY C. CALDWELL, et al., by and through their attorney of record, Arthur B. Macomber, hereby serve the Court and opposing counsel with AMENDED notice of service of and provide proof of service by certificate of Plaintiffs' AMENDED Motion to Compel Compliance with Judicial Order. Prior Affidavits submitted with the original Notice and Motion are to be used, in addition to the new information herein below and the new Proposed Order submitted herewith.

STATEMENT OF FACTS

On October 23, 2008, Judge Hosack signed an Order Requiring Survey across the Cometto property for the purpose of a Final Judgment in this case.

easement the Judge may apply after the Judge receives the survey or reviews the deeds in part two of this bifurcated trial; which was hindered due to the Comettos failure to timely pay the remainder of the survey costs.

CONCLUSION

The Comettos failed to pay their portion of the survey costs as ordered by this Court until they had constructed improvements that may impede or infringe upon this Court's decision as to the easement width.

Instead of paying for the remainder of the surveying costs pursuant to this Court's Order, Comettos quickly hired a builder and assisted it in the construction of a building on the west entrance of the Cometto property. The construction of this building was for the purpose of interfering with this Court's decision regarding the easement width, thus Defendants' bad faith toward this Court's Survey Order should result in the granting of Plaintiff's Motion and the Order proposed herewith, and other sanctions such as contempt this Court believes are required against Defendants.

WHEREFORE, Plaintiffs, DAVID L. CALDWELL and KATHY C. CALDWELL, et al., pray this Court issue an Order as proposed herewith that:

1. Pursuant to this Court's December 5, 2008 Order Re: Survey at paragraph 2, Defendants be required to pay Plaintiffs Sixteen Hundred Dollars and Zero Cents (\$1,600.00) within thirty (30) days of this Order to compensate Plaintiffs for Defendants' bad faith delay in the submission of the Court-ordered survey, which delay was due to Defendants' decision to build improvements during said delay period within the boundaries of the potential right-of-way in lieu of timely payment of survey costs;
2. Plaintiffs be awarded damages in an amount to be determined to compensate Plaintiffs for costs incurred by Defendants' delay of the survey, including costs related to lodging the Caldwell family in Sandpoint during the 2008-2009 winter

that were necessary because of Plaintiffs' inability to plow the unknown and unsurveyed easement width due to Defendants' purposeful delay in payment of said survey, which removed this Court's ability to rule on the easement width before the winter snows commenced;

3. Defendants be charged with one hundred percent of the future liability for costs to alter the road location and reconstruction pursuant to current Bonner County Private Road Standards due to a) Defendants' decision to build improvements that removed snow storage areas during the pendency of this Court's decision on the easement width, and b) correction of the location of the easement road now located upon neighboring property, which prevents Plaintiffs from maintaining said easement on said neighboring property due to a requirement Plaintiffs trespass to so maintain;

4. Award Plaintiffs sanctions to be paid by Defendants in an amount of _____, which is designed to assure prompt compliance with future Court Orders, pursuant to I.R.C.P. 37(e);

5. Award Plaintiff reasonable attorney fees in connection with obtaining this order, pursuant to I.R.C.P. 37(a)(4), in an amount to be determined.

6. Find Defendants in contempt of this Court for untimely payment of the ordered survey costs in preference of constructing building improvements within the potential right-of-way;

7. Other remedy or sanction this Court deems sufficient and proper.

DATED this 20th day of January, 2009.



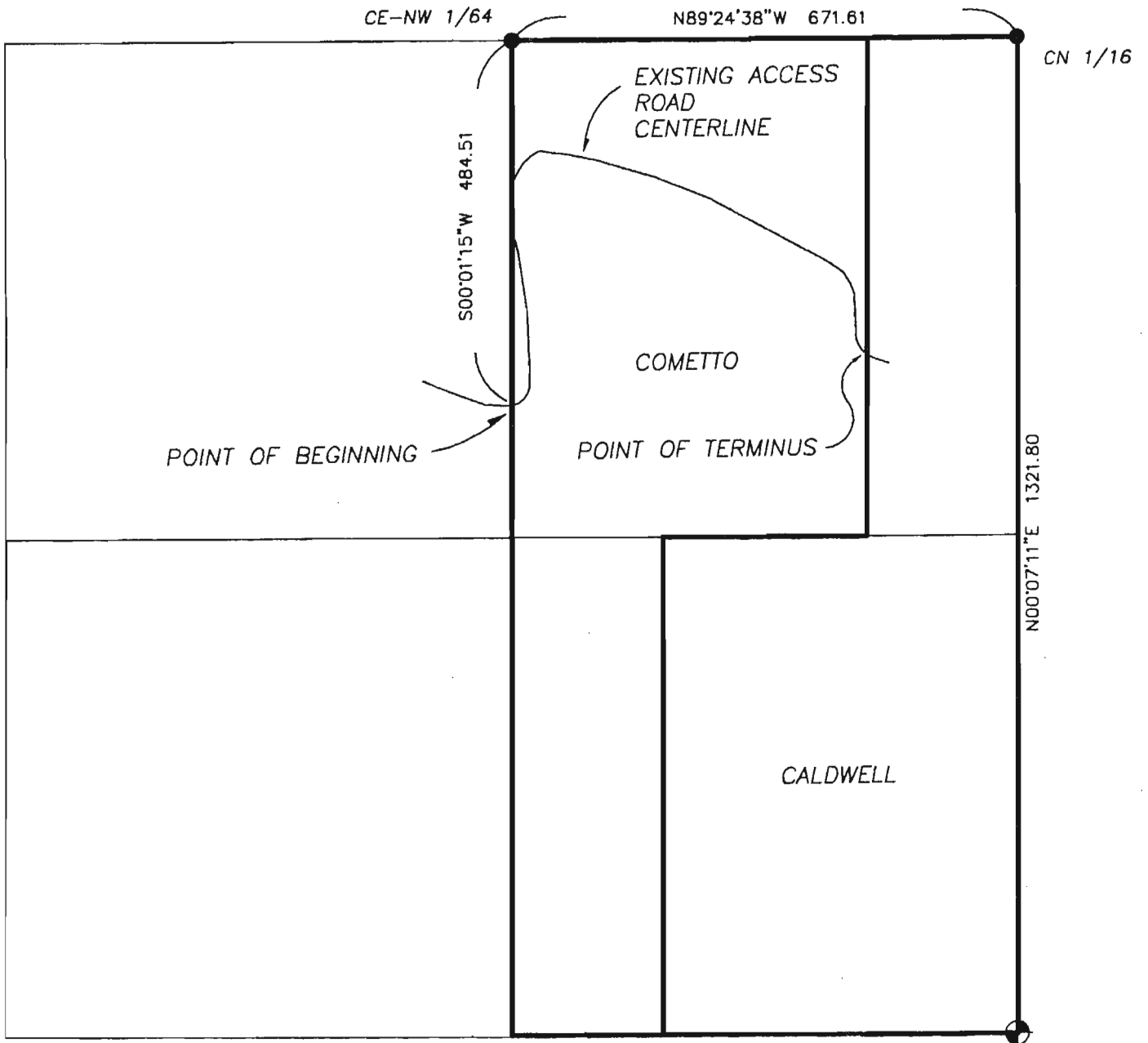
Arthur B. Macomber
Attorney at Law

EXHIBIT

SE1/4 - NW1/4 SEC. 24, T. 59 N., R. 1 E.
BOISE MERIDIAN, BONNER COUNTY, IDAHO



NOT TO SCALE
TRUE NORTH



CE 1/4
Exhibit A-1

LEGAL DESCRIPTION
EXISTING ACCESS ROAD OVER COMETTO PROPERTY

A STRIP OF LAND _____ FEET WIDE, LOCATED IN A PORTION OF THE NORTHWEST QUARTER OF SECTION 24, TOWNSHIP 59 NORTH, RANGE 1 EAST, BOISE MERIDIAN, BONNER COUNTY, IDAHO, THE CENTERLINE OF WHICH IS MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHEAST CORNER OF SAID NORTHWEST QUARTER (THE C1/4 CORNER), SAID POINT BEING MARKED BY A BRASS CAP PER CP&F FILED 06/27/1978;

THENCE ALONG THE EAST LINE OF SAID NORTHWEST QUARTER, NORTH 00°07'11" EAST, 1321.80 FEET TO THE CN 1/16 CORNER, SAID POINT BEING MARKED BY A 5/8" DIA. REBAR;

THENCE NORTH 89°24'38" WEST, 671.61 FEET TO THE NORTHWEST CORNER OF THE NORTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SAID NORTHWEST QUARTER (CE-NW 1/64 CORNER), SAID POINT BEING MARKED BY A 5/8" DIA. REBAR WITH A PLASTIC CAP BY PE 1947;

THENCE ALONG THE WEST LINE OF SAID NORTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SAID NORTHWEST QUARTER, SOUTH 00°01'15" WEST, 484.51 FEET TO AN INTERSECTION WITH THE CENTERLINE OF A ROAD, SAID POINT BEING A POINT OF NON-TANGENT CURVATURE AND THE TRUE POINT OF BEGINNING;

THENCE ALONG SAID CENTERLINE THE FOLLOWING FIFTEEN (15) COURSES:
ALONG A CURVE TURNING TO THE LEFT WITH AN ARC LENGTH OF 45.79 FEET, WITH A RADIUS OF 29.83 FEET, (THE CHORD OF WHICH BEARS NORTH 34°20'42" EAST, 41.43 FEET);
NORTH 02°20'27" WEST, 88.17 FEET;
NORTH 08°24'28" WEST, 83.96 FEET;
NORTH 13°42'19" WEST, 25.38 FEET;
NORTH 02°29'24" WEST, 41.78 FEET;
ALONG A CURVE TURNING TO THE RIGHT WITH AN ARC LENGTH OF 79.31 FEET, WITH A RADIUS OF 66.30 FEET, (THE CHORD OF WHICH BEARS NORTH 28°28'45" EAST, 74.66 FEET);
SOUTH 81°00'39" EAST, 40.45 FEET;
SOUTH 78°27'13" EAST, 36.67 FEET;
SOUTH 72°56'53" EAST, 80.96 FEET;
SOUTH 68°17'32" EAST, 80.83 FEET;
SOUTH 61°12'42" EAST, 171.15 FEET;
SOUTH 55°42'19" EAST, 31.13 FEET;
ALONG A CURVE TURNING TO THE RIGHT WITH AN ARC LENGTH OF 32.42 FEET, WITH A RADIUS OF 74.45 FEET, (THE CHORD OF WHICH BEARS SOUTH 26°50'14" EAST, 32.16 FEET);
SOUTH 02°33'13" EAST, 59.40 FEET;
ALONG A CURVE TURNING TO THE LEFT WITH AN ARC LENGTH OF 26.68 FEET, WITH A RADIUS OF 39.77 FEET, (THE CHORD OF WHICH BEARS SOUTH 33°18'05" EAST, 26.18 FEET)
TO AN INTERSECTION WITH THE EAST LINE OF SAID NORTHEAST QUARTER OF THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 24, SAID POINT BEING THE POINT OF TERMINUS.

FILENAME 976LGL1.doc



CERTIFICATE OF SERVICE

I am familiar with my firm's capability to hand-deliver and deliver by facsimile documents and its practice of placing its daily mail, with first-class postage prepaid thereon, in a designated area for deposit in a U.S. mailbox in the City of Coeur d'Alene, Idaho, after the close of the day's business. On the date shown below, I served:

NOTICE OF HEARING AND MOTION TO COMPEL COMPLIANCE WITH JUDICIAL ORDER

Brent C. Featherston
FEATHERSTON LAW FIRM
113 South Second Ave
Sandpoint, ID 83864
(208) 263-6866
(208) 263-0400 (FAX)

Bonner County Civil Clerk
Facsimile: 208-263-0896

Judge Hosack
Kootenai County Civil Clerk
Facsimile: 446-1138

X By personally delivering a true copy of thereof to the person(s) at the address(es) set forth herein above on the 20th day of Jan, 2008/9

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 20th day of January, 2009.

Judy Parmer
Judy Parmer
Paralegal to Arthur B. Macomber

Court Minutes:

Session: HOSACK020309P
Session Date: 02/03/2009
Judge: Hosack, Charles
Reporter: Schaller, Joann

Division: DIST
Session Time: 15:25

Courtroom: Courtroom9

Clerk(s): Rohrbach, Shari

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0002

Case number: BONCV07-1744
Plaintiff: Caldwell, David
Plaintiff Attorney:
Defendant: Cometto, Thomas
Pers. Attorney:
Co-Defendant(s):
State Attorney:
Public Defender:

02/03/2009

16:22:36

Recording Started:

16:22:36

Case called

16:22:44

Judge: Hosack, Charles
Calls, Motion to Compel Compliance with Judicial
Order. Mr Featherston

16:23:21

present by phone.



- 16:23:36 I have what purports to be a survey that has been paid for and recorded, it
- 16:23:55 has a center line. The order talked about the edges for the travel way. The
- 16:24:34 legal description seems to be for a center line. Has surveying been paid for?
- 16:24:50 **Add Ins: Macomber, Arthur**
The survey was paid for. It looks like center and edges, but on the graphic
- 16:25:20 **Add Ins: Featherston, Brent**
I've reviewed - there should be a large scale, larger map, and legal
- 16:25:56 description which calls out the center line of the existing roadway.
- 16:26:36 **Judge: Hosack, Charles**
Reads from Order.
- 16:27:52 **Add Ins: Featherston, Brent**
Width varies, comments. For today, we have a record of surveying, legal
- 16:28:21 description of center line. If more specific legal description is needed - the
- 16:28:36 width varies from point to point along the road.
- 16:28:59 **Judge: Hosack, Charles**
When I was private practice we had a left and right hand side of the
- 16:29:25 travelway. I had concerns of the cost of that. Are there calls?
- 16:30:41 **Add Ins: Featherston, Brent**
I think the center line would be used in a final judgment, and the width is
- 16:30:58 as depicted on the diagram, or as recorded. I think we have the information
- 16:31:43 we asked surveyor for. Map identifies the travel surface.
- 16:32:50 **Judge: Hosack, Charles**
Comments regarding travel way and the width of it. Could obstructions be
- 16:34:20 identified in the future? That is my question.

16:34:39 **Add Ins: Featherston, Brent**
In part your ruling would determine that, I think Mr Provo could identify

16:35:39 that information without going back into the field.

16:36:28 **Judge: Hosack, Charles**
Could he stake out the width on the Cometto property in the future?

16:36:56 **Add Ins: Macomber, Arthur**

16:37:01 **Add Ins: Featherston, Brent**
I think so.

16:37:18 **Add Ins: Macomber, Arthur**
If the legal is used as a template for the court ruling.

16:38:07 **Add Ins: Featherston, Brent**
I can inquire of Provolt, with a conference call with Mr Macomber. He may

16:38:37 not have shot every variance.

16:39:06 **Judge: Hosack, Charles**
For today, let's assume that what we're looking at - with additional data

16:39:20 from Provolt, and using what we've got, a surveyor could stake out the lines

16:39:49 on Exh A3, to show the edges of the travelway
Let's assume that is where we

16:41:15 are for now, the edges could be physically be staked if the parties wanted to

16:41:41 do that. Where are we now?

16:41:50 **Add Ins: Macomber, Arthur**
This has been bifurcated, to figure the width of the survey and then to look

16:42:09 at the deeds to determine widths, and maybe a second easement. The PL are

16:42:33 asking the court to look at this and see how long this took and make a

16:42:59 ruling. There is issue of PL being able to get to their house year round.

16:44:54 Also, the DF began to build a building,

16:45:35 comments. That building could be in
an easement. We're asking the court to determine
16:45:55 a spite road has been
created. We Motion for the survey costs to be
paid by def based on bad faith.
16:46:54 There have been new costs, they didn't know
where to pile the snow so they
16:47:42 had to move the family into Sandpoint. Also ask
the road be reconstructed to
16:48:05 the Bonner County road standard. Also motion for
sanctions, and PL request
16:48:57 atty fees for bringing this motion. There was a
press to get this survey
16:49:36 done.

16:49:40 **Judge: Hosack, Charles**
It's kind of a cart before the horse situation.
I understand the argument
16:50:12 having been to the site. But whether the
building is actually an obstruction
16:50:29 or not, is still premature. The Court has to
work with the survey first. I do
16:51:51 n't know what the decision will be as to the
width yet, so that is premature.
16:52:25

16:52:27 **Add Ins: Macomber, Arthur**
We don't have any idea if the building is in or
out. What we're looking for
16:52:48 today is recognition of DF actions.

16:53:18 **Add Ins: Featherston, Brent**
Will I have a chance to respond?

16:53:25 **Judge: Hosack, Charles**
Since you're going to win the argument I suggest
you don't. Let Mr Macomber
16:53:48 make his record.

16:53:53 **Add Ins: Macomber, Arthur**
Comments.

16:53:57 **Judge: Hosack, Charles**
Costs can always be addressed at the conclusion.
Motions to compel compliance
16:54:19 will be denied as they're are premature, without

16:54:45 prejudice. Has the survey been recorded?

16:54:49 **Add Ins: Macomber, Arthur**
To my knowledge the survey has not been recorded in the recorder's office.

16:55:13 I can check on that.

16:55:16 **Judge: Hosack, Charles**
Somebody needs to file a notice of the recorded survey, then we know when the order was actually complied with. Mr Featherston go forward with that. At

16:55:45 this time I'm going forward with the assumption the road can be staked. But

16:56:48 you can clear that with surveyor.

16:57:04

16:57:41 **Add Ins: Macomber, Arthur**
Maybe showing where the widths are before its filed with the court would be best.

16:58:42

16:58:44 **Judge: Hosack, Charles**
Make the clarification before the formal filing.

16:59:07 **Add Ins: Featherston, Brent**
He did pinning.

16:59:17 **Judge: Hosack, Charles**
I'll ask counsel to get further data.

16:59:43 At this point the court would consider the survey that has been provided,

17:00:11 I'll return to doing the Memo Opinion which is foscused on the width and the

17:00:41 indemnity issue. Then the mainance issue. Is matter now submitted to the

17:01:45 Court?

17:01:48 **Add Ins: Featherston, Brent**
Yes.

17:01:51 **Add Ins: Macomber, Arthur**
Yes.

17:02:31 **Judge: Hosack, Charles**
Can counsel get back to the court within 14 days

17:02:51 to confirm the court can
rely on the survey with the lines being
stakeable. Get the notice filed, then
17:03:42 it is formally submitted.

17:04:26 **Add Ins: Macomber, Arthur**
He probably wants your ruling before he records
with the county.

17:04:44 **Judge: Hosack, Charles**
Recording is up to the surveyor. I don't
determine.

17:06:40 **Stop recording**
