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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO

10 ANNA ALABURDA, JILL BALLARD,
DANIELA LOOMIS, AND NIKKI
11 NGUYEN, on behalf of themselves and all
others similarly situated,

12 Plaintiffs,

13 v.

14 THOMAS JEFFERSON SCHOOL OF
LAW, and DOES 1 through 100,
15

16 Defendants.
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CASE NO. 37-2011-00091898-CU-FR-CTL

**DEFENDANT'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR SANCTIONS; DEFENDANT'S
REQUEST FOR SANCTIONS**

Date:	November 9, 2012
Time:	10:30 a.m.
Dept:	66
Judge:	Hon. Joel M. Pressman
Complaint Filed:	May 26, 2011
Trial Date:	None Set

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1 **I.**

2 **INTRODUCTION**

3 With dispositive motions pending that may result in the dismissal of their case, and
4 recognizing that other courts across the country have dismissed identical cases at the pleading
5 stage, plaintiffs have concocted a phony e-discovery dispute.

6 The critical facts here are that Thomas Jefferson School of Law (TJSL) produced
7 documents to plaintiffs' counsel promptly, *on each occasion in a format consistent with plaintiffs'*
8 *requests*. This is evident in the written correspondence. Plaintiffs' contention to the contrary is
9 disingenuous and demonstrably false.

10 Similarly, the contention that TJSL or its counsel manipulated metadata is specious and in
11 bad faith. As explained below, the questioned metadata is all accurate and the reasons for the
12 purported metadata "anomalies" have previously been explained to plaintiffs' counsel, in writing,
13 without rebuttal. The fact that plaintiffs' counsel now raises these issues to this Court, and then
14 completely fails to even mention the explanations provided on these issues months ago, clearly
15 reveals the true purpose of this motion – to throw mud (however insubstantial) at TJSL just before
16 its summary judgment motion and demurrer are due to be heard.

17 Plaintiffs' gamesmanship should not be rewarded. The correspondence between counsel
18 makes it evident that TJSL's actions in discovery were transparent, diligent and in good faith. All
19 of the rhetoric plaintiffs can muster cannot create a legitimate issue because none exists.

20 **II.**

21 **STATEMENT OF FACTS**

22 **A. The Disputed Spreadsheet Files.**

23 Plaintiffs' motion centers around 23 files used to track TJSL students' post-graduation
24 contact information and employment from 2005-2010. However, plaintiffs misrepresent what
25 these files are. They are *not* the final statistics presented to the National Association of Law
26 Placement ("NALP"), *U.S. News & World Report*, or any other third parties. They are simply
27 internal working documents that TJSL uses to facilitate its data collection efforts. Moreover, they
28 are only used during part of the data collection process as they are displaced every year when

1 TJSJ opens the required software program TJSJ actually uses to report its graduate statistics to
2 the third parties. (Declaration of Beverly Bracker [“Bracker Decl.”] ¶2.) As such, the
3 spreadsheets are only various drafts of working papers and only show a snapshot of some of the
4 data that TJSJ had during the process of gathering employment data for submission. (*Id.*;
5 Deposition of Mary E. Kransberger at 29:10 – 30:16.)¹ The actual final data submissions, as
6 maintained by NALP, have been produced to plaintiffs.² (Declaration of Karin Sherr [“Sherr
7 Decl.”] ¶2.)

8 **B. TJSJ Produced the Requested Spreadsheet Files in the Requested Format.**

9 Plaintiffs’ entire motion is based on a fallacy—that plaintiffs requested the disputed
10 spreadsheets in native format long before TJSJ produced them. However, as the following
11 chronology makes clear, TJSJ satisfied its discovery obligations by producing the spreadsheets in
12 a manner entirely consistent with plaintiffs’ requests at each step.

13 **1. TJSJ Produced Hard Copies and PDF Versions of the Disputed Spreadsheets**
14 **Before Plaintiffs Ever Requested Electronic Versions.**

15 As plaintiffs observe in their motion, plaintiffs initially propounded discovery requests
16 seeking documents identified in special interrogatory responses, which includes the disputed
17 spreadsheet files. (Sherr Decl. ¶3, Exh. A.) *Nowhere in those requests did plaintiffs request the*
18 *disputed spreadsheets in native format, or even electronic format.* (*Id.*) Accordingly, on
19 November 4, 2011, TJSJ produced printouts of the disputed spreadsheets redacted of the
20 students’ last names and contact information. (*Id.* ¶4.) The printouts were simply that—hard
21 copy, paper printouts. TJSJ never represented that these paper copies somehow constituted the

22 _____
23 ¹ Relevant portions of deposition testimony are included as exhibits to the declaration of Karin K. Sherr
filed in support of this motion, and will be cited as “Declarant page:line.”

24 ² Plaintiffs claim that these files “are significant because Defendant claims to have shredded all of the
25 source data – other than Excel files – that it used to calculate its employment figures for the Classes of
26 2002-2008.” (Motion at 1:28-2:2.) However, while it is true that TJSJ did not retain source data (e.g.,
27 the actual, individual surveys that it gave to each student), it had no reason to do so prior to this litigation.
At that time, there was no pending litigation, and TJSJ had already compiled and submitted its final
28 employment data for each of these class years. Anyone wishing to scrutinize TJSJ’s data submissions
can do so by referring to the actual final data submissions.

1 original, native spreadsheet files, and plaintiffs did not object to receiving the files as printouts.
2 (*Id.*)

3 After receiving the printed spreadsheets, plaintiffs did *not* request electronic versions. To
4 the contrary, on December 19, 2011, plaintiffs' counsel sent a letter specifically requesting that
5 TJSL print "*hard copies* of the spreadsheets on larger paper" because the font was too small to
6 read. (*Id.* ¶5, Exh. B [emphasis supplied].) On January 6, 2012, TJSL produced the requested
7 "hard copies" of the spreadsheets on larger paper. (*Id.* ¶6.)

8 Following TJSL's paper production of the spreadsheets on larger paper, plaintiffs *again*
9 did not request any electronic versions of the spreadsheets. (*Id.*) Rather, in mid-January, 2012,
10 plaintiffs requested unredacted versions of the same documents that TJSL produced on November
11 4, 2011 (and again on January 6, 2012 in larger format). (*Id.*) After meeting and conferring on
12 this issue, TJSL agreed to produce these documents in unredacted form. (*Id.* ¶7.) TJSL produced
13 the documents on January 30, 2012, in the form of a PDF file burned onto a disc. (*Id.*) TJSL
14 chose the PDF format to allow plaintiffs to print on whatever size paper they wished, thereby
15 avoiding the issues regarding the readability of the documents. (*Id.*, Exh. C (email 1/30/12)
16 [email from TJSL's counsel to plaintiffs' counsel explaining, "Also enclosed in the box is a CD
17 with the unredacted spreadsheets on them. We had a hard time printing them in larger font, so
18 maybe you will have better luck."].)

19 *At no time did TJSL ever represent that these PDF files were the original Microsoft Word*
20 *or Excel files in native form, nor did TJSL characterize the PDF as an "electronic" production.*
21 (*Id.* ¶8.) To the contrary, anyone viewing the PDF would immediately recognize that TJSL's
22 production was just another version of the same spreadsheets produced in hard copy, but without
23 the redactions.

24 **2. When Plaintiffs Requested Electronic Versions, TJSL Complied and** 25 **Produced Them As CSV Files.**

26 In early February 2012, plaintiffs, *for the first time*, requested the spreadsheets in
27 electronic format. (*Id.* ¶9.) On February 14, 2012, TJSL produced a CD containing the disputed
28 files in comma-separated-value ("CSV") format. (*Id.*) TJSL chose this format for two reasons.

1 First, the CSV format can be used with virtually any program (e.g., Microsoft Excel,
2 Ringtail, Concordance, Summation, etc.) so that plaintiffs retained the ability to conduct searches
3 or manipulate the data as they chose, which TJSL believed was plaintiffs’ primary concern with
4 receiving the paper and PDF productions. (Deposition of James Cooper 81:5-12 [explaining that
5 one reason to convert Excel spreadsheets to CSV format is so that the data will “play nice with
6 other programs.”]; Declaration of Curtis Johnson [“Johnson Decl.”] ¶ 12.)

7 Second, the CSV format allowed TJSL to avoid producing metadata protected by the
8 attorney-client privilege and work product doctrines. Specifically, the disputed spreadsheets
9 contained metadata showing when TJSL’s counsel received the spreadsheets from TJSL, and the
10 actions by TJSL’s lawyers and their staff in preparing these files for production to plaintiffs. A
11 CSV production avoided disclosing this privileged, work product information. (*Id.*) Furthermore,
12 as of February 14, 2012, plaintiffs had *never* requested metadata, nor given any indication that
13 they wished to access the metadata on the spreadsheets. (Sherr Decl. ¶10.)

14 Contrary to plaintiffs’ allegations, TJSL never attempted to “pass off” the CSV files as
15 original native files; nor could it have, considering that each CSV file is specifically labeled with
16 the extension, “.csv,” as opposed to “.xls” for Excel files. (Declaration of Alecia Turner [“Turner
17 Decl.”] ¶ 2.) Accordingly, plaintiffs’ contention that “[u]pon receipt of the CSV files, Plaintiffs
18 believed that those files were, in fact, the original Excel files” is absurd on its face.

19 **3. When Plaintiffs Requested that They be Given the Excel Versions with**
20 **Metadata, TJSL Complied, and Produced the Spreadsheets in the Format**
21 **(CDs) Specifically Agreed to by Plaintiffs.**

22 On March 27, 2012, plaintiffs complained about receiving CSV files and insisted that
23 TJSL produce the disputed spreadsheets in their native Excel format. (Sherr Decl. ¶11, Exh. D.)
24 After TJSL raised concerns regarding producing privileged metadata, plaintiffs agreed that TJSL
25 would not waive any privilege by producing these files.³ (Sherr Decl. ¶12, Exh. E.) Given this

26 ³ Ironically, it is that same privileged information that plaintiffs are using to now accuse TJSL of
27 “altering” metadata. Of course, this metadata does not indicate that TJSL ever “manipulated” or
28 “destroyed” any information on these spreadsheets. To the contrary, it reflects only TJSL’s actions in
(footnote continued on next page)

1 agreement, TJS� proposed to produce the spreadsheets on a compact disc. (*Id.*) Plaintiffs
2 specifically agreed to this form of production, and on April 2, 2012, TJS� produced the compact
3 disc per this agreement. (*Id.*)

4 **4. When Plaintiffs Insisted on Receiving the Same Spreadsheets on a Zip Drive,**
5 **TJS� Again Complied And Produced the Requested Zip Drive.**

6 Plaintiffs first identified inconsistencies in TJS�’s spreadsheet productions in a letter
7 dated May 18, 2012. (*Id.* ¶13.) Plaintiffs followed up on May 25, 2012, and provided specific
8 examples of the inconsistencies. (*Id.*) For every inconsistency that plaintiffs identified, TJS�
9 explained the reason for it in a June 7, 2012 letter, making clear that TJS� never attempted to hide
10 or manipulate any data. (*Id.*) On July 31, 2012, plaintiffs again complained of “irregularities” in
11 the metadata. At plaintiffs’ request, TJS� offered to produce a zip drive similar to the one
12 provided to TJS�’s counsel from TJS�, which would be loaded directly from TJS�’s server.
13 Plaintiffs’ counsel agreed, and TJS� produced the requested zip drive on August 6, 2012.
14 (Bracker Decl. ¶4; Sherr Decl. ¶14.)

15 Based on the above, it is evident that at each step of the process, TJS�’s productions were
16 in accord with the agreement of plaintiffs’ counsel. TJS� had legitimate reasons for the manner
17 of production at each step, and was straight-forward and forthcoming about its actions at every
18 stage.

19 **C. TJS� Did Not Alter Any Metadata.**

20 **1. TJS� Did Not Alter Metadata in the PDF file Produced on January 30, 2012.**

21 Plaintiffs falsely accuse TJS� of manipulating the metadata for the PDF file produced on
22 January 30, 2012. Specifically, plaintiffs observe that this file lists “RRauber” as author. Their
23 forensics expert then offers two theories for how this might have happened:

24 [B]ased on the fact that Ms. Rauber stopped working at TJS� in 2006 (citation), the only

25 _____
(footnote continued from previous page)

26 loading the files and burning them onto a disc for production, as requested by plaintiffs’ counsel.
27 (Declaration of Hanh Nguyen [“Nguyen Decl.”] ¶ 3; Johnson Decl. ¶ 11.)

1 way that Ms. Rauber’s name could appear as the PDF file’s author would be: if someone,
2 on January 26, 2012, used Ms. Rauber’s computer to create the document, if the computer
3 was in existence; or if someone falsely inserted her name into the metadata. (Motion at
4 6:12-15.)

5 Despite the touted credentials of plaintiffs’ expert, neither theory is correct. In fact, the
6 explanation is quite simple. For the 2005 class year, TJSL maintains the original graduating class
7 data as three Microsoft Word documents, and not as Excel files. (Bracker Decl. ¶5.) Rebecca
8 Rauber, a former TJSL employee, is listed as the author for these Word files. (Nguyen Decl.
9 ¶¶2,4.) When these files were converted to PDF format, then merged with the other PDF files in
10 the January 30, 2012, document production, this author designation carried over to the entire PDF.
11 (*Id.*; Johnson Decl. ¶ 16.) Thus, plaintiffs’ claim that TJSL “tampered with” the PDF metadata by
12 surreptitiously “adding” Ms. Rauber’s name is simply false.

13 Plaintiffs also note that the metadata for the PDF file shows a creation date of January 26,
14 2012. (Motion at 6:1-2.) This is not surprising. As described above, the PDF was created (by a
15 paralegal to TJSL’s counsel) to enable plaintiffs to print the unredacted documents in whatever
16 size paper as they chose. Naturally, the metadata for the PDF will reflect this creation.

17 **2. TJSL Did Not Alter Metadata in the Excel files Produced on April 2, 2012 or**
18 **August 6, 2012.**

19 As noted above, TJSL initially produced paper and CSV files to avoid attorney-client
20 privilege/work product information in the metadata (*i.e.*, showing when TJSL’s counsel received
21 the disputed files from TJSL, and when TJSL’s counsel prepared those spreadsheets for
22 production by burning them onto a disc). After meeting and conferring on this issue, plaintiffs
23 agreed to accept the disputed spreadsheets as Excel files subject to the condition that TJSL would
24 not waive attorney-client privilege. Now, many months later, plaintiffs accuse TJSL of “altering”
25 metadata because the produced spreadsheet files show the very metadata that TJSL expressed
26 concern about producing—namely, metadata showing its counsel’s actions in preparing the
27 spreadsheets for production.

28 Finally, plaintiffs correctly observe that several of the Excel files show a creation date of
September 20, 2006. (Motion at 8:14-15.) TJSL provided an explanation for this fact months

1 ago. Plaintiffs disingenuously fail to provide this information to the Court. As previously
2 explained to plaintiffs' counsel, in writing (as well as during the deposition of TJSJ's former
3 Chief Information Officer, James Cooper), on September 20, 2006, TJSJ suffered a system-wide
4 hard drive failure. The hard drive failure required TJSJ to rebuild its hard drive from backup
5 tapes. As a result, when the spreadsheets that existed before September 20, 2006 were restored
6 from the backup tape, they showed a creation date of September 20, 2006. Plaintiffs' decision to
7 not disclose this fact, which they have known of for months, demonstrates their lack of credibility
8 in raising these issues.⁴

9 **D. The Cited "Inconsistencies" Between the Produced Versions of the Spreadsheets Are**
10 **Not Evidence of Spoliation.**

11 As noted above, TJSJ produced different versions of the disputed spreadsheets, each time
12 in response to *plaintiffs'* requests for the files in a different format. There are some
13 inconsistencies between the produced versions, which plaintiffs first raised in their May 18, 2012,
14 and May 25, 2012, meet and confer letters. However, TJSJ explained the reason for every
15 inconsistency in its June 7, 2012 response letter, making clear that TJSJ never attempted to hide
16 or manipulate any data. (Sherr Decl. ¶13, Exh. F.) TJSJ's response explained that the minor
17 inconsistencies were the result of printing errors, formatting issues and the like. (*Id.*) Plaintiffs
18 appeared satisfied by TJSJ's explanation and never responded to this letter. (*Id.*)

19 Now, over four months later, plaintiffs bring this motion as if TJSJ never offered any
20 explanation for the cited inconsistencies. Notably, plaintiffs do not mention any *specific*
21 inconsistencies that they allege are evidence of spoliation. Instead, plaintiffs resort to broad
22 characterizations that Defendant "failed to produce the same information, as it previously
23 claimed." (Motion at 9:28-10:1.) However, the only distinctions plaintiffs cite (despite the

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25 ⁴ Plaintiffs also claim that four of the 20 files were created at the same date, July 19, 2009. (Motion at
26 8:16-17.) This is the first time plaintiffs have raised this issue; it was not included in any meet and confer
27 letters, and TJSJ has not had adequate time to research why these files show this creation date.
28 Nevertheless, TJSJ will provide a supplemental declaration from its own forensics expert which will
undoubtedly dispel any notion that TJSJ improperly manipulated the metadata on these files.

1 hundreds of hours they allegedly spent reviewing these documents) are differences in file, page
2 and character counts. (See Motion at 2:8-12.) *Notably, nowhere do they claim that any of the*
3 *substantive data is different.*

4 Plaintiffs try to gloss over the lack of any specifics with a proclamation from their
5 “expert” that “productions that purportedly originate from the same source do not differ this
6 drastically in terms of size and character count.” (Motion at 9:24-25.) This is false. Below is an
7 explanation for each of the differences cited by plaintiffs:

- 8 • The CSV production included 48 files, whereas the April 2, 2012 spreadsheet
9 production included 20 files. The reason for this difference is that each CSV file
10 represents a unique worksheet within each spreadsheet. Because some
11 spreadsheets contain multiple worksheets, the CSV production necessarily
12 included more files than the spreadsheets.
- 13 • The August 6, 2012 file included three Word files not included in the April 2, 2012
14 production. These Word files reflected TJSL’s data for the 2005 class year, and
15 were in fact produced in hard copy format on November 4, 2011, and as part of the
16 PDF produced on January 27, 2012. These files were not produced on April 2,
17 2012, in electronic format because plaintiffs had specifically requested only the
18 native versions of the Microsoft Excel files, and these were Word files, not Excel
19 files. At any rate, TJSL had no incentive to withhold the electronic versions of
20 these Word files, and produced them as part of the August 6, 2012 production in
21 which plaintiffs asked TJSL to recreate the zip drive that its custodian provided to
22 counsel. (Sherr Decl. ¶14.)
- 23 • There are differences in page counts across the productions. The page-count
24 distinctions result from differences in formatting, *not* content. For example, some
25 spreadsheets were formatted to print to one page, whereas others were not. As a
26 result, the page count is higher for the format limited to just one page, even though
27 the spreadsheets are identical in every other respect. (Nguyen Decl. ¶3; Johnson
28 Decl. ¶¶13-15.)

- 1 • There are differences in character counts across the productions. The distinction in
2 character counts identified by plaintiffs is simply the result of the above formatting
3 differences and the fact that different programs (PDF, CSV, Excel) generate
4 different character counts. (Johnson Decl. ¶¶13,14.)

5 Obviously unable to identify *any substantive* differences in the versions of the
6 spreadsheets that TJSJL produced, plaintiffs must resort to broad and baseless allegations of
7 tampering based on superficial distinctions. The Court should condemn such tactics.

8 **III.**

9 **TJSJL COMPLIED WITH ITS DISCOVERY OBLIGATIONS BY PRODUCING THE**
10 **REQUESTED SPREADSHEET FILES IN THE AGREED-UPON FORMAT**

11 It is well-settled that parties responding to discovery need only respond to what is
12 requested. (*See, e.g., Brown v. Superior Court* (1985) 168 Cal.App.3d 489, 495, n.5 [A party
13 cannot be compelled to produce documents that have not been requested].) Parties are obligated
14 to produce documents only in “reasonably usable” form. (Civ. Proc. Code § 2031.280(d).)
15 California courts have not offered any guidance on what does or does not constitute a “reasonably
16 usable” form, however treatises weighing in on the issue agree on two basic principles: (1) a
17 “reasonably usable form” could be just about anything, from hard copies to PDFs, depending on
18 the circumstances; and (2) the only sure way a requesting party can expect to obtain documents in
19 a particular format is to ask that documents be produced specifically in that format. (See Overly
20 on Electronic Evidence in California § 3:5 (2012-2013 ed.) [“The reasonably usable form . . . may
21 not be the most advantageous form for the demanding party. Requesting documents in ‘computer
22 readable form,’ where available, will result in the production of the material on disk or magnetic
23 tape.”]; Goelz & Watts, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2011),
24 Section 8:1472.5-6, 8:1445.6 [“Although the statute is not explicit, ‘reasonably usable form’
25 presumably means the ESI must be produced in a form that a party can access and read, which in
26 some cases may be a paper printout The demanding party can ensure that the ESI will be
27 ‘usable’ on its computer by specifying the form of production in its discovery demand.”].)

28 Here, as noted above, TJSJL at all times complied with plaintiffs’ document request by

1 producing the requested files in the requested format:

- 2 1. TJSL initially produced the spreadsheets on printed paper. Plaintiffs did not object
3 or claim that the printed spreadsheets were not “usable.”
- 4 2. When plaintiffs requested the disputed spreadsheets to be printed on larger paper,
5 TJSL complied and produced them on larger paper.
- 6 3. When plaintiffs requested electronic versions of the spreadsheets (without
7 requesting any metadata), TJSL complied by producing them in electronically-
8 searchable CSV format.
- 9 4. When plaintiffs requested the native Excel files, TJSL again complied by burning
10 those files onto a disc, which plaintiffs specifically agreed would be sufficient.
- 11 5. When plaintiffs requested the same files in the form of a zip drive, TJSL again
12 complied and produced the files on a zip drive.

13 In short, this motion seeks sanctions against TJSL for doing precisely what plaintiffs requested
14 every step of the way. Notably, plaintiffs never filed any motion to compel, nor do plaintiffs
15 suggest that TJSL continues to withhold any requested information.

16 Not surprisingly, these facts fall far short of what California courts recognize as
17 sanctionable conduct. This is perhaps why plaintiffs resort to unpublished, non-authoritative
18 federal and non-California cases to support their sanctions request. But even citing inappropriate
19 cases does not save plaintiffs, who must also misrepresent the cases’ holdings in order to mete out
20 an argument. For example, in *L.H. v. Schwarzenegger* 2008 WL 2073958 (E.D. Cal., May 14,
21 2008), sanctions were awarded against defendants only *after* the plaintiffs had been forced to file
22 three motions to compel and requests for sanctions, only *after* defendants ignored a specific court
23 order to produce documents in a searchable format, and only *after* defendants inexcusably
24 dragged their feet until the discovery cutoff (causing serious prejudice to plaintiffs). (*Id.* at *1.)
25 This deliberately abusive and damaging conduct in no way resembles the circumstances here.

26 Plaintiffs’ citation to *AccessData Corp. v. ALSTE Technologies GmbH*, 2010 WL 318477
27 (D. Utah, Jan. 21, 2010) is even more astonishing because that case has nothing to do with
28 sanctions at all. Instead, that ruling was on a motion to compel, in which the plaintiff requested
electronic versions of documents that previously had been produced in a non-searchable PDF
format. (*Id.* at *6.) The *AccessData* court ordered the defendant to produce these files in a

1 searchable format. In other words, the *AccessData* court simply ordered the defendant to produce
2 *exactly* what TJSJL has already voluntarily produced to plaintiffs here.

3 Despite casting their net far and wide to include non-precedential cases, plaintiffs have
4 shown precisely why sanctions are *not* warranted here. TJSJL willingly produced exactly what
5 plaintiffs asked for *without* forcing court intervention (even if it did take plaintiffs a few tries to
6 articulate exactly what they wanted). The demand for sanctions under these circumstances is
7 unsupportable – a fact that was surely evident to plaintiffs even before filing this motion.

8 IV.

9 PLAINTIFFS' ALLEGATIONS OF "SPOILIATION" ARE BASELESS

10 A. TJSJL Did Not "Alter" Any Metadata.

11 For all its bluster and rhetoric, plaintiffs' argument that "Defendant Engaged in Spoliation
12 by Deleting and Altering the Metadata of its Documents" alleges only three purported examples
13 of alteration of metadata: (1) the "creation" of a PDF file that TJSJL produced *before* plaintiffs
14 had requested any electronic spreadsheets, in response to a request for unredacted spreadsheet
15 printouts; (2) the fact that "RRauber" was listed as author of a PDF file; (3) the supposed
16 "alteration" of the Excel files because they show metadata reflecting the fact that a paralegal from
17 TJSJL's outside counsel's office burned the requested spreadsheets onto a compact disc for
18 production, as agreed to by plaintiffs. (See Motion at 11:11-12:22.) Each of these allegations is
19 specious.

20 First, as explained, the PDF file was created before plaintiffs requested electronic versions
21 of any of the disputed files, when TJSJL was producing documents in printed format (without
22 objection from plaintiffs). Although TJSJL could have printed the unredacted files as it had
23 previously done, TJSJL produced them as a PDF so that plaintiffs could print them on whatever
24 paper they chose and could magnify the files as needed. Certainly, TJSJL never passed off as the
25 original native Excel files, nor altered or destroyed any metadata on the native files. Second, the
26 reason that "RRauber" is listed as author of the PDF is simply because she was the author of the
27 2005 Word documents that, when converted to PDF and combined with the PDFs from the other
28 years, caused her name to be listed as "author" for the entire PDF. Again, this does not amount to

1 “altering” metadata on the original source documents. Finally, the mere fact that the produced
2 spreadsheets show activity by counsel for TJSL does not reveal *anything* improper. In fact, the
3 metadata simply shows that counsel complied with plaintiffs’ requests by burning the requested
4 files onto a disc. Plaintiffs’ attempts to ascribe ill motives to TJSL for doing exactly what they
5 requested should be condemned.

6 **B. One Deleted Email Does Not Constitute Spoliation.**

7 TJSL has produced over 84,000 pages of emails in this case, and has reviewed over
8 157,000 more, to find the emails responsive to plaintiffs’ requests. (Nguyen Decl. ¶4.) Of these
9 many thousands of emails, plaintiffs have identified one email—*one*—that was not retained in
10 *both* “sent” form as well as “received” form in the mailbox of custodian Beverly Bracker. The
11 email invited the graduating class of December 2011 to attend an upcoming program on
12 conducting a job search. (Bracker Decl. ¶6, Exh. A.) Plaintiffs do not dispute, because they
13 cannot, that the entirety of this email was, in fact, produced. Their complaint is that it was only
14 produced from Bracker’s received file, and not both from her sent and her received mailboxes.

15 Plaintiffs’ cited prejudice to only receiving the email from the received mailbox is that
16 they do not know to whom it was sent. However, plaintiffs have never asked, formally or
17 informally, for Ms. Bracker to identify to whom she sent the email or from whom any responses
18 were received. If they had, Ms. Bracker would confirm that she sent the October 10, 2011, email
19 to the entirety of the graduating class of December 2011, received email responses back from five
20 students, and 45 students attended the job training program advertised in the email. (Bracker
21 Decl. ¶7.) Additionally, there is no evidence that Ms. Bracker deleted the email with an intent to
22 willfully suppress evidence, nor would there have been any logical reason to do so.

23 The undisputed fact is that Ms. Bracker sends out many emails of this variety to graduated
24 students, all of which have been produced, and plaintiffs have many examples of emails
25 demonstrating to whom she sends such emails. She apparently did delete this one email from her
26 sent mailbox, but retained it via several responses in her received mailbox. Thus, it is clear that
27 there was no intent to destroy evidence in this case.

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V.

PLAINTIFFS FAILED TO “MEET AND CONFER” IN GOOD FAITH

Plaintiffs first raised “spoliation” allegations on May 18, 2012. As with this motion, that letter was replete with wild and unsubstantiated allegations of metadata manipulation and evidence destruction. After TJSL’s counsel requested specific examples of the offending inconsistencies, plaintiffs provided a May 25, 2012 follow-up letter. (Sherr Decl. ¶13.) TJSL then provided a detailed explanation for each and every one of those examples in its June 7, 2012 response letter – none of which supported plaintiffs’ charges of evidence tampering. (*Id.*; Exh. F.) TJSL also invited plaintiffs to identify any other specific examples of inconsistencies. Since that date, plaintiffs never responded to TJSL’s letter, identified any other inconsistencies, nor asked any follow-up questions. (*Id.*) In essence, plaintiffs raised allegations, learned that they were specious, then filed this motion anyway – as a transparent attempt to distract this Court’s attention from the pending motion for summary judgment and the demurrer to Plaintiffs’ Fourth Amended Complaint. Their actions are not consistent with their obligations to meet and confer in good faith.

VI.

PLAINTIFFS, AND NOT DEFENDANT, SHOULD BE SANCTIONED

TJSL has engaged in good faith discovery efforts, having responded and produced the requested spreadsheets no less than four times—in every format requested by plaintiffs. Moreover, as detailed above, there is absolutely zero evidence of any spoliation or manipulation of metadata. If plaintiffs’ counsel had simply called and inquired about any of the issues they now raise, numerous wasted hours of their and their expert’s time could have been avoided. Thus, sanctions against TJSL are not warranted.

Sanctions are warranted, instead, against plaintiffs and plaintiffs’ counsel of record. Plaintiffs and their counsel have demonstrated a consistent pattern of misuse of discovery with their overbroad discovery requests, lack of good faith in engaging in the meet and confer process,

1 and now this meritless motion, which has been brought without substantial justification.⁵ TJSL
2 has already explained in detail to plaintiffs’ counsel why plaintiffs’ accusations of spoliation and
3 manipulation are misplaced, and has offered explanations for why it produced the spreadsheets in
4 the formats it did. Yet, plaintiffs persisted in filing a motion, causing TJSL to incur the expense
5 of retaining its own rebuttal expert and preparing the instant Opposition.

6 California Code of Civil Procedure section 2023.010(h) permits this Court to impose
7 monetary sanction against plaintiffs and their attorney for making a motion without substantial
8 justification. Moreover, TJSL has diligently participated in the meet and confer process in hopes
9 of resolving any outstanding discovery issues without the necessity of a motion. Plaintiffs,
10 however, did not identify any further outstanding issues with respect to the spreadsheets. As
11 stated in California Code of Civil Procedure section 2023.020:

12 Notwithstanding the outcome of the particular discovery motion,
13 the court *shall impose a monetary sanction* ordering that any party
14 or attorney who fails to confer as required pay the reasonable
15 expenses, including attorney’s fees, incurred by anyone as a result
16 of that conduct.

15 (Civ. Proc. Code §2023.020 [emphasis supplied].)

16 Accordingly, the Court should impose a monetary sanction of plaintiffs and/or their
17 counsel reflecting the reasonable expenses TJSL incurred in defending this motion.

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23 ⁵ Plaintiffs’ motion appears intended simply to poison the waters and generate undue publicity, as
24 evidenced by their reference to a declaration by Karen Grant. Ms. Grant is an ex-employee of TJSL who
25 claims that six years ago her former supervisor (who departed TJSL in 2007) instructed her to classify
26 students as “employed” in cases where those students were employed at some point post-graduation, but
27 were not employed on a specific reporting date. She does not specify how often this change in
28 employment actually occurred. Ms. Grant has not yet been deposed and plaintiffs have produced no
evidence substantiating her claims. At any rate, Ms. Grant’s declaration is wholly irrelevant to the issues
raised in this Motion.

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VII.
CONCLUSION

As is clear from the foregoing, plaintiffs' sanctions motion is a transparent attempt to cast a shadow over TJSL by fabricating an e-discovery dispute out of whole cloth. Plaintiffs should be sanctioned for such conduct.

Dated: October 30, 2012

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