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VIA ECF

September 29, 2017

The Honorable William Alsup
U.S. District Judge
San Francisco Courthouse, Courtroom 8 - 19th Floor
450 Golden Gate Avenue
San Francisco, California 94102

Re: *United States Postal Service v. City of Berkeley*, No. C 16-04815 WHA

Dear Judge Alsup:

The United States Postal Service, through undersigned counsel, writes pursuant to Paragraph 25 of the Court's Supplemental Order to Order Setting Initial Case Management Conference, ECF No. 10 ("the Court's Supplemental Order"), to seek relief from the City's failure to comply with that Order and Fed. R. Civ. P. 30 with respect to the September 27, 2017 30(b)(6) deposition of City employee Dionne Early, who was designated to testify as to Deposition Topic 4.¹ See Ex. 1 at 2. As described herein, it became immediately clear at the beginning of the deposition that Ms. Early was not competent to testify as to that topic. Moreover, defense counsel's own conduct violated this Court's Supplemental Order and Fed. R. Civ. P. 30. Consequently, the Postal Service was prejudiced, in that it was prevented from obtaining deposition testimony to which it is entitled.

Deposition Topic 4 calls for information about "The City's negotiations or agreements with its own tenants, renters or lessees in properties subject to the [Overlay]." See Ex. 1 at 2. Ms. Early, however, was not able even to confirm the current tenants in the subject properties. See Ex. 2 at 36:2-10. As to a document produced by the City that appeared to be an agreement with a current tenant, Ms. Early testified "I don't think I've seen this specific document, I think, beyond the cover page." *Id.* at 38:13-21. Another document from the City's production appeared to be a 3-page staff report regarding license agreements for the City's tenants in a

¹ A copy of Revised Exhibit 1 to Plaintiff's Notice to Take Deposition Pursuant to Fed. R. Civ. P. 30(b)(6), is attached hereto as Exhibit 1. Exhibit 1 enumerates ten topics as to which the Postal Service seeks testimony pursuant to Fed. R. Civ. P. 30(b)(6). Beyond Deposition Topic 4, the City has refused to produce testimony responsive to the Postal Service's Deposition Notice. The parties conferred, and agreed to defer testimony regarding those topics subsumed by the motion for a protective order currently pending before the Court. As to the other topics in Exhibit 1, the City has chosen to rest on its objections and refused to produce witnesses.

property subject to the Overlay; Ms. Early appeared to be unfamiliar with that document as well. *Id.* at 34:15–35:9.

Ms. Early’s unfamiliarity with the documents described above is particularly troubling because the City had provided those materials to the Postal Service as part of a production of only 16 documents days earlier, representing them to be “a complete set of the current leases and licenses” for the City’s tenants in the properties subject to the Overlay. Without the assistance of the documents, the testimony Ms. Early could provide based on her personal knowledge was quite limited as she had begun her work at the City in 2016. *Id.* at 12:9–10; *see also id.* at 23:1–23:10 (“Q: How long has the City used that building . . . in the manner that you described[,] approximately? A: As long as I’ve worked for the City. I don’t – I can’t speak to before that.”).²

While the Postal Service recognizes that this Court does not require a party to educate a witness as to a topic if an organization cannot reasonably locate a witness to testify based on personal knowledge, Supp. Order at ¶ 23(c), here the City’s designated witness identified a more knowledgeable person whom the City failed to produce. *See Ex. 2* at 41:4-12 (testifying that a Mr. Paul Buddenhagen was more knowledgeable on these subjects); *see also id.* at 44:6–45:10 (explaining that if a tenant’s use of the City’s property changed, that would be the responsibility of a different City department, and Ms. Early could not testify about that). Under this Court’s Supplemental Order, “[d]eponents and their counsel must make a good faith effort to prepare for depositions and to refresh witness memories on important matters in the suit.” Supp. Order ¶ 20. Defense counsel clearly failed to do so.³

Moreover, throughout the deposition, defense counsel’s conduct violated Fed. R. Civ. P. 30(d)(1) and Paragraph 19 of this Court’s Supplemental Order. Specifically, defense counsel interrupted the deposition with inappropriate speaking objections and impermissible coaching. *See, e.g., Ex. 2* at 34:15–20 (Q: “Is this a fair and accurate copy of the staff report?” Counsel: “I object. The question is vague and ambiguous. What do mean, is it a fair and accurate copy? Did someone alter it or what?”); *id.* at 44:6–25 (Q: “To the extent a use within the overlay district changed, would that require licensing from the City?” Counsel: “Objection. No foundation. You know, you haven’t established a foundation that any use has changed, and also, it calls for a legal conclusion. Go ahead and answer.” A: “Can you ask the question again?” [question read back at undersigned counsel’s request] Mr. Schwartz: “Can you read my objection back please? I’m not sure I made a complete objection. [question read back again] Mr. Schwartz: Same objection.”); *id.* at 34:15–35:9. Even after undersigned counsel noted that the Federal Rules and this Court’s Supplemental Order prohibit speaking objections, *see id.* at 47:5–48:25, the disruptions continued. *See, e.g., id.* at 49:11–19; *id.* at 50:2–23.

² Although Ms. Early did provide some testimony regarding the timeframe preceding her arrival at the City in 2016, her statements about the limitations of her knowledge undermined any evidentiary value such testimony might have had.

³ In light of the nature of this issue, counsel decided not to contact the Court pursuant to Paragraph 24 of the Supplemental Order.

Accordingly, the Postal Service respectfully requests that the Court order: 1) that the Postal Service may depose a witness or witnesses responsive to its 30(b)(6) Notice after the currently-scheduled close of discovery (September 29, 2017); 2) that, in accordance with Fed. R. Civ. P. 30(b)(6) and the Court's Supplemental Order, the City be ordered to produce a witness competent to testify as to the subjects enumerated in the Postal Service's Revised Exhibit 1 to its Notice of Deposition, with the exception of Deposition Topics 1 and 2;⁴ 3) that the time expended at the September 27, 2017 deposition not count against the 7-hour deposition to which the Postal Service is entitled; and 4) that, as sanctions for defense counsel's obstructionist behavior, he be ordered to reimburse the Postal Service for the costs expended in connection with the September 27, 2017 deposition, including but not limited to, counsel's travel expenses.

We thank the Court for its consideration of this submission.

Respectfully submitted,

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⁴ As to Deposition Topics 1 and 2, which are implicated by the City's pending Motion for Protective Order, the Postal Service respectfully requests that it be permitted to depose the City's designee should the Court determine after the hearing on October 11, 2017 that those are permissible areas of inquiry.