

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VESTA FIRE INSURANCE CORP.,)	
)	2:04-cv-0296-GEB-PAN
Plaintiff,)	
)	
v.)	
)	<u>FINAL PRETRIAL ORDER</u>
INSURANCE VENTURES, INC.; PAUL)	
MCNEECE ROESSER; ROLAND CLARK)	
COLTON; STEPHANIE FRANCIS SMITH;)	
CARL FRANK; and LAW OFFICES OF)	
COLTON & ROESSER,)	
)	
Defendants.)	
)	
AND RELATED COUNTER-CLAIM AND)	
THIRD-PARTY COMPLAINT)	
)	

On March 10, 2006, the parties were notified that the final pretrial conference then scheduled for March 13, 2006, was vacated because this Order would issue.

I. JURY/NON-JURY

All issues shall be tried to a jury.

II. DISPUTED EVIDENTIARY ISSUES

The parties Joint Pretrial Statement ("JPS") lists matters for which the "parties anticipate disputes concerning the admissibility of evidence" (JPS at 10.) Some of the

1 matters in the "Disputed Evidentiary Issues" section of the JPS are
2 too vague to disclose the nature of the dispute. Moreover, the
3 section contains matters that should have been raised during law
4 and motion. Therefore, the Court will not entertain any motions in
5 limine from the parties. Instead, the parties shall fully brief
6 bona fide anticipated evidentiary issues in their respective trial
7 briefs. L.R. 16-285(a).

8 III. FACTUAL, LEGAL AND/OR EQUITABLE CONTENTIONS

9 A. The Final Pretrial Order supersedes the pleadings
10 and controls the facts and claims which may be presented at trial.
11 Any legal theory of relief or affirmative defense asserted in the
12 pleadings but not preserved for trial in this section of the Final
13 Pretrial Order cannot be raised during the trial. Therefore, to
14 preserve an issue for trial, and to be entitled to jury
15 instructions on that issue, the issue shall be identified and
16 preserved in this section of the Order. Failure to do so
17 dismisses, waives or abandons that issue, claim or defense.
18 Hotel Emp., et al. Health Tr. v. Elks Lodge 1450, 827 F.2d 1324,
19 1329 (9th Cir. 1987) ("Issues not preserved in the pretrial order
20 are eliminated from the action.").

21 B. The following issues are preserved for trial provided
22 jury instructions are submitted as required by section "XI" of this
23 Order:

24 Vesta's Claims

25 1. Vesta's first claim alleges IV, Carl Frank,
26 Roland Colton, Stephanie Smith, and Paul Roesser breached their
27 fiduciary duties to Vesta as follows:
28

1 a. Carl Frank, Roland Colton, Stephanie
2 Smith, and Paul Roesser breached their fiduciary duties by failing
3 to notify Vesta of the following material facts:

4 (1) That IV was operated and controlled by
5 Roland Colton ("Colton"), a convicted felon who was prohibited by
6 federal law from engaging in the business of insurance without the
7 express written permission of the State insurance regulators;

8 (2) That Vesta's premiums were going to be
9 deposited into a commingled account controlled and directed by
10 Colton;

11 (3) That Colton was the subject of a
12 multi-million dollar bankruptcy at the time he was exercising
13 control of Vesta's fiduciary trust account;

14 (4) That IV was secretly owned and
15 operated by Colton, his partner, and their family members;

16 (5) That Colton was a convicted felon who
17 had previously been held by a court to be the "alter ego" of
18 another failed insurance company which had defaulted on its
19 obligations, resulting in judgments against him;

20 (6) That Colton was a convicted felon who
21 controlled IV, and routinely served as "corporate counsel" to a
22 number of Colton-created insurance agencies and companies over
23 which he exercised complete financial and administrative control;

24 (7) That the felony for which Colton had
25 been previously convicted was one of "financial dishonesty" and
26 related to the filing of a false tax return;

27 (8) That Vesta's policyholders' premium
28 trust funds were being used to pay outstanding obligations that IV

1 owed to Explorer/ICW, the insurer whose program preceded Vesta's
2 program; and

3 (9) That IV was acting in ways contrary
4 to Vesta's interests as outlined in sub-section "b" below.

5 b. IV breached its fiduciary duties to Vesta
6 by:

7 (1) Using Vesta's funds to pay
8 Explorer/ICW;

9 (2) Using Vesta's funds to secure a
10 letter of credit for the benefit of Explorer/ICW;

11 (3) Failing to account for Vesta's
12 policyholder premium funds;

13 (4) Failing to disclose to Vesta that it
14 had commingled Vesta's premiums and transferred Vesta funds to
15 Explorer/ICW;

16 (5) Failing to provide Vesta's staff with
17 signature authority on Vesta accounts;

18 (6) Failing to establish a separate trust
19 fund account for Vesta's premiums;

20 (7) Failing to follow Vesta's
21 instructions not to sell homeowner's policies in contravention of
22 Vesta's underwriting guidelines;

23 (8) Commingling Vesta's policyholder
24 premium trust funds with ICW/Explorer premiums; and

25 (9) Failing to inform Vesta as to how its
26 policyholder premium trust funds were being utilized.

27 2. Vesta's second claim alleges IV breached its
28 contract with Vesta by:

1 a. Commingling the funds of Vesta and
2 Explorer/ICW;

3 b. Failing to secure a security bond;

4 c. Improperly paying itself commissions;

5 d. Selling insurance policies in
6 contravention of Vesta's instructions;

7 e. Failing and refusing to provide Vesta with
8 a full, complete and accurate accounting of its policyholders'
9 premiums;

10 f. Failing and refusing to remit to Vesta in
11 excess of \$2,570,093 in policyholder premiums held in trust for
12 Vesta's benefit;

13 g. Failing and refusing to comply with all
14 relevant laws regulating the insurance business as required under
15 Section 3.11 of the Agreement; and

16 h. Paying Explorer/ICW with Vesta's funds.

17 3. Vesta's third claim alleges IV breached the
18 implied duty of good faith and fair dealing owed to Vesta by
19 committing every action identified in sub-section "2" above, and by
20 refusing to properly account for and remit to Vesta policyholder
21 premiums held in trust by IV when requested to do so by Vesta.

22 4. Vesta's fourth claim alleges that IV, Carl
23 Frank, Roland Colton, Stephanie Smith, and Paul Roesser violated
24 their statutory duties codified in California Insurance Code
25 sections 1733 and 1734 by diverting Vesta's policyholder premium
26 funds for their own purpose.

1 5. Vesta's fifth claim alleges that IV, Roland
2 Colton, Paul Roesser, and the Law Offices of Colton & Roesser
3 wrongfully converted \$2,570,093 of Vesta's funds.

4 6. Vesta's sixth claim alleges Defendants
5 committed fraud by inducing Vesta to enter into the agreement
6 without disclosing the following material facts:

7 a. That IV was operated and controlled by
8 Colton, a convicted felon who was prohibited by federal law from
9 engaging in the business of insurance without the express written
10 permission of the State insurance regulators;

11 b. That Vesta's premiums were going to be
12 deposited into a commingled account controlled and directed by
13 Colton;

14 c. That Colton was the subject of a
15 multi-million dollar bankruptcy at the time he was exercising
16 control of Vesta's fiduciary trust account;

17 d. That IV was secretly owned and operated by
18 Colton, his partner, and their family members;

19 e. That Colton was a convicted felon who had
20 previously been held by a court to be the "alter ego" of another
21 failed insurance company which had defaulted on its obligations,
22 resulting in judgments against him; and

23 f. That Colton was a convicted felon who
24 controlled IV, and routinely served as "corporate counsel" to a
25 number of Colton-created insurance agencies and companies over
26 which he exercised complete financial and administrative control.

1 7. Vesta's seventh claim alleges IV agreed in
2 writing that it was indebted to Vesta in the amount of \$2,570,093;
3 and therefore, IV owes that amount as an account stated.

4 For the above claims Vesta seeks actual, special, and
5 punitive damages. Vesta also seeks attorney's fees and costs,
6 recovery of fees paid to IV, prejudgment interest, and its costs to
7 trace improperly diverted funds. Finally, Vesta requests that a
8 constructive trust be imposed on assets of Defendants which were
9 purchased or improved with Vesta's funds.

10 IV's Claim¹

11 1. IV's claim for relief alleges Vesta owes IV
12 various sums of money under the terms of the Agreement. IV seeks
13 an accounting of all these funds, and recovery of any amount found
14 to be owed.

15 Affirmative Defenses

16 The defenses asserted in the parties' Joint Pretrial
17 Statement have not been preserved because they do not constitute
18 affirmative defenses. Zivkovic v. Southern Cal. Edison Co., 302
19 F.3d 1080, 1088 (9th Cir. 2002) ("A defense which demonstrates that
20 plaintiff has not met [his] burden of proof is not an affirmative
21 defense. . . . [A] defense which points out a defect in the
22 plaintiff's prima facie case is not an affirmative defense.").

23
24 ¹ On February 28, 2006, IV filed a motion to amend its
25 counter-claim and third-party complaint. The Rule 16 Scheduling
26 Order established December 21, 2005, as the last day for hearing
27 law and motion matters. (Order filed Sept. 29, 2005.) Since IV's
28 motion is brought after the law and motion deadline, it is denied
as untimely. However, the Court notes IV's desire, evinced in its
motion to amend and in the JPS, to only prosecute its claim for
accounting. Therefore, only that claim, as presented in the JPS,
is preserved for trial.

1 C. In addition to the matters set forth in Local Rule
2 16-285, the parties shall brief the following points of law in
3 their trial briefs:

4 1. The elements, standards, and burdens of proof as
5 to each of party's causes of action, including citations of
6 authority in support thereof.

7 2. The elements, standards, and burdens of proof
8 as to each of party's defenses, including citations of authority in
9 support thereof.

10 Notwithstanding Local Rule 16-285, trial briefs shall be
11 filed with the Court no later than April 5, 2006. A joint or
12 partial joint trial brief is permitted. All legal positions
13 briefed in the trial brief shall be supported with case and
14 applicable statutory authority. See Local Rule 16-285. If
15 separate or partial separate trial briefs are submitted, responding
16 briefs, if any, shall be filed with the Court no later than five
17 (5) court days prior to trial. The trial brief(s) must include "a
18 summary of points of law, including reasonably anticipated disputes
19 concerning admissibility of evidence, legal arguments, and
20 citations of authority in support thereof." Local Rule 16-
21 285(a) (3).

22 IV. WITNESSES

23 A. Vesta expects to call as witnesses, either in person
24 or by deposition, some or all of the persons listed in Exhibit C of
25 the parties' Joint Pretrial Statement.

26 B. Defendants expect to call as witnesses, either in
27 person or by deposition, some or all of the persons listed in
28 Exhibit D of the parties' Joint Pretrial Statement.

1 C. Each party may call a witness designated by the
2 other.

3 D. No person, other than those named on these witness
4 lists, will be permitted to testify unless:

5 (1) The party offering the witness demonstrates that
6 the witness is for the purpose of rebutting evidence which could
7 not reasonably be anticipated at the pretrial conference; or

8 (2) The witness was discovered after the pretrial
9 conference and the proffering party makes the showing required in
10 sub-section "E", below.

11 E. If a witness is discovered after the pretrial
12 conference, counsel for the party offering the witness shall
13 promptly inform the Court and opposing parties of the existence of
14 the unlisted witness so that the Court may consider at trial
15 whether the witness shall be permitted to testify. The witness
16 will be not be permitted to testify unless:

17 (1) The witness could not reasonably have been
18 discovered prior to pretrial;

19 (2) The Court and opposing counsel were promptly
20 notified upon discovery of the witness;

21 (3) If time permitted, counsel offered the witness
22 for deposition; and

23 (4) If time did not permit, a reasonable summary of
24 the witness' testimony was provided to opposing counsel.

25 V. EXHIBITS

26 A. Vesta intends to offer in evidence the exhibits
27 described in Exhibit E of the parties' Joint Pretrial Statement.

1 B. Defendants intend to offer in evidence the exhibits
2 described in Exhibit F of the parties' Joint Pretrial Statement.

3 C. No other exhibits will be permitted to be introduced
4 unless:

5 (1) The party seeking to use the unlisted exhibit
6 demonstrates that the exhibit is being used to rebut evidence which
7 could not reasonably have been anticipated at the pretrial
8 conference; or

9 (2) The unlisted exhibit was discovered after the
10 pretrial conference and the offering party makes the showing
11 required in sub-section "D", below.

12 D. Any party proposing to introduce an exhibit which was
13 discovered after the pretrial conference shall promptly notify the
14 Court and opposing counsel of the existence of such exhibit. The
15 Court will not permit any such exhibit to be introduced unless it
16 finds:

17 (1) That the exhibit could not reasonably have been
18 discovered prior to the pretrial conference;

19 (2) The Court and counsel were promptly informed of
20 the exhibit's existence; and

21 (3) That the offering party has delivered a copy of
22 the exhibit to opposing counsel, or, if the exhibit may not be
23 copied, that the offering counsel has made the exhibit reasonably
24 available for inspection by opposing counsel.

25 E. Vesta's exhibits shall be numbered and marked with
26 colored stickers provided by the Court while Defendants' exhibits
27 shall be designated by alphabetical letter also marked with colored
28

1 stickers provided by the Court. To obtain stickers, parties should
2 contact the Clerk of Court at (916) 930-4000.

3 Counsel shall produce all exhibits to the Clerk's Office
4 on the Friday before the before trial date, no later than 4:00 p.m.
5 At that time, the parties shall also furnish the Court with a copy
6 of each exhibit, unless the exhibit is physically incapable of
7 being reproduced. Failure to produce exhibits as ordered could
8 result in waiver of the right to offer those exhibits. Each party
9 submitting exhibits shall furnish a list to the Court, the
10 courtroom deputy and opposing counsel itemizing the exhibits.

11 VI. FURTHER PREPARATION FOR USE OF DISCOVERY DOCUMENTS²

12 A. It is the duty of counsel to ensure that any
13 depositions which are to be used at trial for any purpose shall
14 have been filed with the clerk, and counsel are cautioned that a
15 failure to discharge this duty may result in preclusion of the use
16 of the unfiled depositions or in the imposition of such other
17 sanctions as the Court deems appropriate.

18 B. No later than twenty (20) court days before the trial
19 commencement date, counsel for each party shall serve on the other
20 parties a statement designating all answers to interrogatories and
21 all portions of depositions (except for passages to be used solely
22 for refreshing recollection, impeachment or rebuttal). No later
23 than ten (10) court days before the trial commencement date,
24

25 ² Counsel for the parties are required to meet and confer
26 on whether it is appropriate to submit any documents to the judge
27 prior to trial. If the parties decide this is appropriate, they
28 shall reflect their agreement in a stipulation which has attached
thereto whatever documents they agree can be considered by the
judge before trial. The stipulation should be filed and submitted
to the judge's chambers at the parties' earliest convenience.

1 counter-designations of other portions of these discovery documents
2 may be served. No later than five (5) court days before trial, the
3 parties shall file and serve any preserved evidentiary objections
4 to any designated discovery, or said objections are waived.

5 VII. FURTHER DISCOVERY OR MOTIONS

6 Pursuant to the Court's Pretrial Scheduling Order, all
7 discovery and law and motion was to have been completed prior to
8 the date of the final pretrial conference. That order is
9 confirmed. The parties are, of course, free to conduct any
10 additional discovery they desire pursuant to informal agreement.
11 However, any such agreement will not be enforceable in this Court.

12 VIII. SETTLEMENT NEGOTIATIONS

13 No settlement conference is scheduled in this matter.
14 This does not preclude the parties from asking the assigned
15 magistrate judge whether he nevertheless will serve as a settlement
16 judge.

17 IX. AGREED STATEMENT

18 The parties shall submit a short, jointly-prepared
19 statement concerning the nature of this case that can be read to
20 the jury at the commencement of trial. The statement shall be
21 provided to the Court no later than ten (10) court days before the
22 commencement of trial. If the parties fail to do this, they may be
23 required to give their respective opening statements before voir
24 dire. Separate statements shall be submitted if agreement is not
25 reached.

26 X. SEPARATE TRIAL OF ISSUES

27 The trial will be conducted in two phases: liability and
28 punitive damages. If the jury finds punitive damages are

1 recoverable in the liability phase, trial on the amount of punitive
2 damages will immediately occur. During the first phase of the
3 trial, the jury will be given a liability instruction on punitive
4 damages along with the other closing instructions and a verdict
5 form which will include the question whether punitive damages
6 should be awarded. If the answer is yes, the second phase of the
7 trial would then occur with the presentation of financial condition
8 evidence pertinent to the amount of punitive damages, following
9 which the parties would present closing argument on that issue and
10 a second phase jury instruction would be given to the jury on the
11 issue. The jury would then deliberate on the issue and fill in a
12 punitive damages verdict form.

13 XI. JURY INSTRUCTIONS, VOIR DIRE, AND VERDICT FORMS

14 A. The parties are to prepare jury instructions, in the
15 manner specified in paragraph B below. Counsel shall tailor all
16 general instructions to the facts and issues in suit.

17 B. Counsel are directed to confer and to attempt to
18 agree upon a joint set of jury instructions. All instructions,
19 both general and specific, shall be submitted in the exact
20 numerical order counsel desires them given to the jury and shall be
21 tailored to the facts and issues in suit.

22 The joint set of instructions shall be filed with the
23 court clerk fifteen (15) court days prior to the date of the trial
24 and shall be identified as the "Jury Instructions Without
25 Objection." See L.R. 51-163(b). As to instructions on which there
26 is dispute, the parties shall adhere to the following procedure:

27 1) the party offering the disputed instruction(s) shall submit the
28 instruction(s) as its package of proposed jury instructions, shall

1 submit a brief memorandum in support of the proposed instruction(s)
2 and shall number the disputed instruction in a manner that shows
3 where each disputed instruction should be placed in the tendered
4 agreed upon instructions. The contested instruction(s) and
5 memorandum in support shall be filed with the joint set of
6 instructions fifteen (15) court days prior to the date of the
7 trial; 2) the party opposed to the contested instruction(s) shall
8 submit a brief memorandum succinctly stating the legal basis of the
9 objection(s); 3) the memoranda in opposition to the contested
10 instruction(s) shall be filed ten (10) court days prior to the date
11 of the trial.

12 C. All instructions shall be, to the extent possible,
13 concise, understandable, and neutral statements of law. They shall
14 be prepared in accordance with Local Rule 51-163. Ninth Circuit
15 Pattern Instructions are preferred.

16 D. It is the parties' responsibility to ensure that
17 jury instructions are submitted on all issues preserved for trial
18 in accordance with the schedule set forth above. Pursuant to Local
19 Rule 51-163, instructions not presented in accordance with this
20 Order will be refused unless it is shown either (1) that the
21 necessity for the request arose in the course of trial; the
22 instructions could not reasonably have been anticipated prior to
23 trial from the Final Pretrial Order; and the request for such
24 additional instructions is presented to the Court as promptly as
25 possible; or (2) that the refusal to give such instructions would
26 constitute manifest injustice under Rule 16(e).

27 Likewise, any objections to proposed instructions not
28 made in accordance with this Order will be overruled as untimely

1 unless it is shown either (1) that the grounds therefor arose in
2 the course of trial and the intention to make such objections is
3 communicated to the Court as promptly as possible, or (2) that the
4 giving of such instructions would constitute plain error.

5 E. Most of the examination of prospective jurors is
6 conducted by the Court. The parties are directed to meet and
7 confer and attempt to agree upon a joint set of proposed voir dire
8 questions. These questions shall include any voir dire questions
9 supplied by the Court that the parties believe are necessary. The
10 joint set of voir dire questions shall be filed with the Court
11 fifteen (15) court days prior to the date of the trial. Parties
12 may also submit proposed voir dire questions which are disputed.
13 Disputed voir dire questions shall be filed with the Court fifteen
14 (15) court days prior to the date of the trial and shall be
15 accompanied by an explanation as to the need for the question and
16 supporting case authority when available. The opposing party shall
17 respond with reasons for the opposition and any supporting case
18 authority no later than ten (10) court days prior to the date of
19 trial. Each side is granted fifteen (15) minutes to conduct voir
20 dire following the Court's examination of prospective jurors.

21 F. The parties shall file a joint verdict form
22 concurrently with proposed jury instructions fifteen (15) court
23 days prior to the commencement of trial. See L.R. 51-163(e). A
24 special verdict or interrogatories shall be included for all
25 factual disputes submitted to the jury that must be resolved before
26 questions of law can be decided, and for any other issue on which
27 specific responses are desired. The verdict form shall be prepared
28 in accordance with Local Rule 51-163(e). At the same time, where

1 disagreements exist, the parties shall explain the disagreement and
2 submit points and authorities supporting their respective
3 positions.

4 At the time of electronically filing the jury
5 instructions and verdict form, counsel shall also submit a copy of
6 the sanitized joint jury instructions, the sanitized disputed jury
7 instructions, and the joint verdict form to the Court by email to
8 geborders@caed.uscourts.gov in accordance with L.R. 51-163(b)(1).

9 G. The failure of one or more of the parties to
10 participate in the preparation of joint jury instructions, proposed
11 voir dire questions, or verdict form does not excuse the other
12 parties from their obligation to timely file these documents with
13 the Court in accordance with this Order. In the event that a party
14 fails to participate as ordered, the party timely submitting these
15 documents shall include a declaration explaining why it was unable
16 to obtain the cooperation of the other party or parties.

17 XII. USE OF STRUCK JURY SELECTION SYSTEM

18 Eight (8) jurors will be impaneled. The "struck jury"
19 system will be used to select the jury.³ At the beginning of the
20 voir dire process, eighteen prospective jurors, randomly selected
21
22

23
24 ³ As explained in United States v. Blouin, 666 F.2d 796,
25 798 (2d Cir. 1981), "the goal of the 'struck jury' system is to
26 whittle down an initially selected group . . . [to the amount of
27 jurors] who will serve as the petit jury." The selected group
28 consists of the jurors who will hear the case, plus the number of
jurors required to enable the parties to use the combined number of
peremptory challenges allotted to both sides for striking jurors
from the group. Typically extra jurors are included in the select
group in the event the minimum amount of jurors required for the
"struck system" is reduced "for cause" or some other reason.

1 by the Jury Administrator, will be seated for voir dire.⁴ The
2 order of the jurors' random selection is reflected by the order in
3 which they will be seated. The first randomly selected juror will
4 be in jury seat number one, which is at the extreme right-hand side
5 of the jury box in the top row as the jury box is viewed from the
6 well of the courtroom. The eighth juror will be in the eighth
7 seat. The ninth selected juror will occupy the seat located at the
8 extreme right-hand side of the jury box in the bottom row. The
9 fifteenth seat will be in the left-hand side of that row. Three
10 chairs will be placed in front of the jury box. The sixteenth
11 juror will occupy the seat on the right and the eighteenth juror
12 will occupy the seat on the left. The first eight (8) jurors on a
13 list, which shall be given to counsel, will constitute the petit
14 jury unless one or more of those eight (8) is excused for some
15 reason. Assuming that the first and fifth jurors on the list are
16 excused, the second listed juror becomes the first, and the other
17 jurors' numbers are changed accordingly, with the ninth juror on
18 the list becoming seventh on the list; however, the jurors continue
19 to be identified by their original numbers.

20 Following the voir dire questioning, each side will
21 exercise its three allowed peremptory strikes.⁵ A copy of the
22 "strike sheet" which will be used is attached to this Order.
23 Generally, the potential jurors are given a break for the amount of
24 time the parties estimate it will take them to exercise peremptory

25
26 ⁴ More could be seated.

27 ⁵ During the questioning, the attached Query Re Excuse
28 Potential Jurors form could be given to the parties to determine if
a particular juror should be excused. The attached for cause form
will also be used.

strikes. Therefore, before the striking process begins, the parties are requested to provide an estimate of how long it will take to exercise their peremptory strikes so the potential jurors can be allowed to take a break for that amount of time. Peremptory strikes will be exercised silently, by passing the strike sheet between the parties, with the Plaintiff going first. To use a strike, write the seat number of the juror above the line where the strike is required to be designated.⁶ A party who does not use a strike waives any further right to exercise that strike and is required to reflect this waiver by writing the word "pass" on the strike sheet where the strike was supposed to have been exercised.

XIII. ATTORNEY'S FEES

The parties are referred to Local Rule 54-293 concerning the post-trial procedure for seeking an award of attorney's fees.

XIV. JURY INSTRUCTION AND VERDICT FORM CONFERENCE

A jury instruction and verdict form conference will be scheduled if necessary. See Local Rule 51-163(f). The attorney who will try the case for each party shall attend the conference. The purpose of the conferences is to finalize these matters, to the extent possible, before trial. The possibility of conferences being scheduled does not relieve the parties from their obligation to comply with all provisions of this Order.

⁶ For example, assuming Plaintiff elects to strike the juror in seat number 6, that strike will be exercised and then the strike sheet is give to defense counsel. Assuming defense counsel then strikes the juror in seat 4, the first line of the strike sheet will appear as follows:

Plaintiff	1 <u>6</u>	Defendant	1 <u>4</u>
-----------	------------	-----------	------------

Defense counsel would then give the strike sheet back to Plaintiff so she could exercise her second strike.

XV. TRIAL DATE

Trial to a jury is set for April 25, 2006.⁷ A trial day will commence at 9:00 a.m. and will adjourn at approximately 4:30 p.m. At the first phase of the trial, each side has twenty (20) minutes within which to make an opening statement to the jury and seventy-five (75) minutes within which to make a closing argument. If trial proceeds to the second phase, each side has twenty (20) minutes within which to make a closing argument on the punitive damage issue. Counsel are to call Shani Furstenau, Courtroom Deputy, at (916) 930-4114, one week prior to trial to ascertain the status of the trial date.

XVI. COMMUNICATION WITH JURY

The Court intends to communicate the following to the jury just before it retires to deliberate:

1. Is the United States Marshal's representative present who will take charge of the jury?
2. Deputy Clerk, please give the oath to the United States Marshal's representative.
3. The jury may take breaks at will, **without advance permission**, under the general supervision of the United States Marshal's representative.
4. The jury may go to lunch when they desire, **without advance permission**, under the general supervision of the United States Marshal's representative. When the jury leaves for lunch, **the United States**

⁷ The parties are required to meet and confer about the length of the trial and to file a document no later than twenty (20) court days before trial in which the length of trial is estimated.

1 **Marshal's representative shall tell my courtroom**
2 **deputy clerk** so that I, my staff, the lawyers, and
3 the parties can be relieved from standby status.
4 This allows those on standby status to go to lunch
5 at the same time the jury has lunch.

6 5. The jury is authorized to adjourn for the evening
7 **without advance permission**, and without having to
8 return to this courtroom to be excused by me in
9 front of the parties, but **the United States**
10 **Marshal's representative shall tell my deputy**
11 **courtroom clerk** when the jury adjourns so that the
12 judge, the judge's staff, the lawyers, and the
13 parties can be relieved from standby status.

14 6. When deliberations are continued the day after
15 evening adjournment, jurors are permitted to proceed
16 directly to the jury deliberation room. But jurors
17 are to wait until all jurors are present before
18 resuming deliberations.

19 7. We desire you to deliberate between the hours of
20 9:00 a.m. and 4:30 p.m., as necessary. However, you
21 may deliberate for a shorter or longer period if you
22 desire, provided all of you are in agreement.
23 Otherwise, you should let me know about the
24 disagreement.

25 8. If you have a cell phone and/or a device with a
26 wireless internet connection, you must give it to
27 the United States Marshal's representative before
28 you go into the jury deliberation room so that we

1 can be assured that there is no interference with
2 your deliberations. That representative will return
3 it when you leave the jury deliberation room.

4 9. The United States Marshal's representative will
5 maintain a post outside the jury deliberation room
6 to protect the jury from outside influences or
7 visitors. That representative shall not communicate
8 with you about the case or the court system because
9 such conversations could be misconstrued as a
10 communication that seeks to influence the jury.
11 Stay in the jury room until all jurors are ready to
12 leave for a break or lunch.

13 10. Please escort all jurors to the deliberation room.

14 ////

15 ////

16 ////

17 ////

18 ////

19 ////

20 ////

21 ////

22 ////

23 ////

24 ////

25 ////

26 ////

27 ////

28 ////

XVII. OBJECTIONS TO PRETRIAL ORDER

Any party may, within ten (10) court days after the date this Order is filed, file and serve written objections to any part of this Order. Any objection must specify the requested correction, addition, and/or deletion. Any response to an objection must be filed and served within ten (10) court days after the objection is filed. A final pretrial order may only be modified upon a showing of manifest injustice.

FAILURE TO COMPLY WITH ALL PROVISIONS OF THIS ORDER MAY BE GROUNDS FOR THE IMPOSITION OF SANCTIONS ON ANY AND ALL COUNSEL AS WELL AS ANY PARTY OR PARTIES WHO CAUSE NON-COMPLIANCE WITH THIS ORDER.

IT IS SO ORDERED.

Dated: March 10, 2006

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge

STRIKE SHEET

Plaintiff 1_____

2_____

3_____

Defendants 1_____

2_____

3_____

Query re Excuse Potential Juror

Do you Agree that Juror No. _____ should be excused for the reason stated by the juror or for any other reason? (Check applicable box below)

Plaintiff's Attorney

Defendants'
Attorney

RESPONSE:

☐☐☐☐

Yes

No

Yes

No

Whether Jurors Present During Exercise of Peremptory Challenges

Can the jury be excused for the amount of time it will take to exercise peremptory challenges? (Set forth response in box below)

	Plaintiff's Attorney		Defendants' Attorney	
RESPONSE:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Yes	No	Yes	No

How long do you estimate it will take you to exercise peremptory challenges? (Set forth minutes in box below)

	Plaintiff's Attorney	Defendants' Attorney
MINUTES:	<input type="text"/>	<input type="text"/>

FOR CAUSE DOCUMENT
Plaintiff's Counsel

If you have challenges for cause, state the seat number of the juror involved and a brief explanation of the reason for the challenge.

Seat _____

Explanation: _____

Seat _____

Explanation: _____

Seat _____

Explanation: _____

Seat _____

Explanation: _____

List seat numbers of other for cause challenges: _____, _____,

_____, _____, _____, _____, _____, _____, _____, _____, _____, _____.

CHECK THIS BOX IF YOU HAVE NO CHALLENGES FOR CAUSE:

☐

Signed: _____

FOR CAUSE DOCUMENT
Defendants' Counsel

If you have challenges for cause, state the seat number of the juror involved and a brief explanation of the reason for the challenge.

Seat _____

Explanation: _____

Seat _____

Explanation: _____

Seat _____

Explanation: _____

Seat _____

Explanation: _____

List seat numbers of other for cause challenges: _____, _____,

_____, _____, _____, _____, _____, _____, _____, _____, _____, _____.

CHECK THIS BOX IF YOU HAVE NO CHALLENGES FOR CAUSE:

☐

Signed: _____