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**PARTIES/ATTORNEYS**

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| Plaintiff | Salvador A Portillo   | Nathan Kingery, Esq.<br><br>Wilshire Law Firm                                    |
| Defendant | McMogul Inc. and Marcos Salazar<br>(erroneously sued as Marcos Rubio) | Caroline Ann Molloy, Esq.<br>Jennifer A. Hall, Esq.<br><br>Resnick & Louis, P.C. |

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**TENTATIVE RULING**

As to the request for a protective order related to the inadvertently disclosed material, the court is unable to rule without reviewing Defendants' Translation and thus orders defendants to file it. The court orders that the Defendants' Translation shall be provisionally sealed pending court review, and that the cover sheet refer to this order provisionally sealing the document in its caption.

The court orders the matter to be continued to April 16, 2025, at 8:30 a.m. Defendants must file a provisionally sealed copy of Defendants' Translation by March 26, 2025. No further briefing is permitted unless the court is persuaded there is good cause for permitting it. Once the court reviews the document, it will rule on whether an inadvertent disclosure exists that warrants a protective order.

As to the request for a protective order related to the discovery propounded January 2, 2025, the motion is denied to the extent a protective order is sought over discovery propounded on January 3, 2025 that is unrelated to Defendants' Translation. The court reserves the issue whether a protective order will issue over discovery that is related until April 16, 2025.

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See [Remote Appearance \(Zoom\) Information | Superior Court of California | County of Santa Barbara](#).)

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Plaintiff Salvador Portillo (plaintiff or Portillo) alleges that he was employed as a maintenance technician by defendant McMogul, Inc. (McMogul) beginning

January 29, 2021. He became ill on or around August 23, 2022, and was placed on medical leave until on or around September 23, 2022. In September 2022, plaintiff began experiencing vertigo, and his medical leave was extended. On or around October 23, 2022, Portillo contacted his supervisor, Marcos Salazar (erroneously sued as Marcos Rubio), to verify his return to work on or about November 2, 2022, indicating he may need accommodations because his vertigo could still affect him. Salazar told Portillo that he would need a medical note clearing him to return to work without any restrictions. On November 28, 2022, Portillo provided a doctor's note clearing him to return to work "without restrictions." When Portillo communicated his release to Salazar, he was terminated.

On September 14, 2023, plaintiff filed a complaint against defendants asserting the following causes of action: (1) discrimination based on physical disability; (2) failure to accommodate; (3) failure to engage in good faith interactive process; (4) age discrimination; (5) harassment; (6) intentional infliction of emotional distress; (7) negligent hiring; (8) failure to prevent discriminatory practices; (8) retaliation; (9) Fair Employment & Housing Act Retaliation; (10) Failure to Provide California Family Rights Act Leave; (11) Interference with California Family Rights Act Leave; (12) Retaliation for Requesting/Taking California Family Rights Act Leave; (13) Failure to Pay Meal Break Compensation; (14) Failure to Pay Rest Break Compensation; (15) Failure to Comply with Employment Wage Statement and Record Provisions; (16) Statutory Waiting Time Penalties; (17) Wrongful Termination in Violation of Public; and (18) Unlawful Business Practices.

On January 3, 2025, plaintiff propounded the following discovery to defendants Marcos Salazar and McMogul:

| To Marcos Salazar                             | To McMogul, Inc                                 |
|---|---|
| Requests for Admissions, Set Two              | Requests for Admissions, Set Three              |
| Requests for Production of Documents, Set Two | Requests for Production of Documents, Set Three |
| Special Interrogatories, Set Two              | Special Interrogatories, Set Three              |
| Form Interrogatories, Set Two                 | Form Interrogatories, Set Three                 |

Defendants move for a protective order on the basis that the discovery is burdensome and oppressive. Defendants also move for protection of an inadvertently produced document that is protected by attorney work product.

Opposition and reply have been filed. All documents have been reviewed by the court.

*Protective Order: Inadvertent Production*

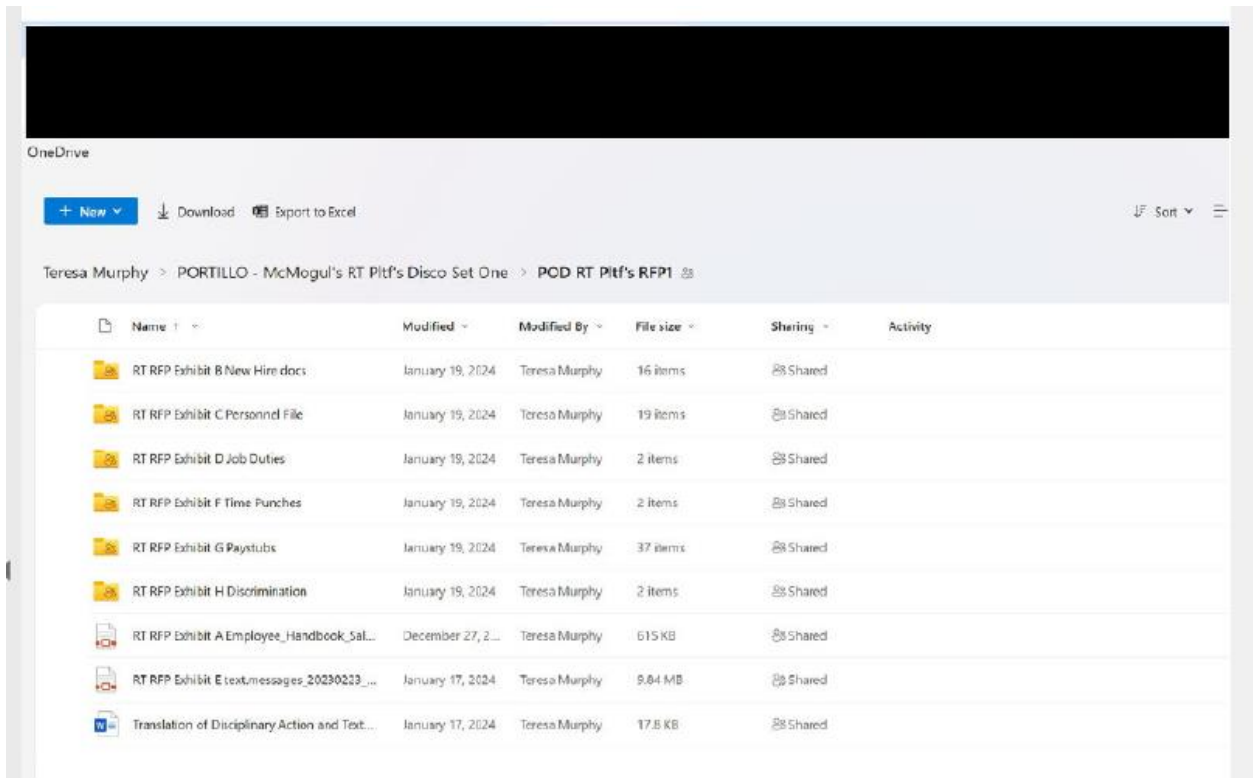
Defendant Salazar was plaintiff's supervisor at defendant McMogul. Portillo speaks, reads and writes only in Spanish and Mr. Salazar speaks, reads and writes in English and Spanish. When Portillo became ill, he kept Salazar apprised of his return-to-work plan via text message. On October 23, 2022, Portillo texted, stating that he would return to work on November 2, 2022. Salazar stated that he would need a doctor's note clearing Portillo to return to work without any restrictions. On November 2, 2022, Portillo texted Salazar to clarify where he would be working. Salazar again stated he was waiting for a doctor's note clearing Portillo to return to work without restrictions. On November 21, 2022, Portillo stated he would be ready by Wednesday and would bring the note then. Salazar stated he needed the note first. On November 22, 2022, Portillo sent a picture of a doctor's note via text. Salazar stated the note had been cut off and requested it be re-sent. Portillo complied. Having gotten no response, Portillo sent the note again on November 24, 2022, twice. On November 28, 2022, Salazar replied and advised Portillo that he needed to fill the maintenance position; that Portillo was eligible to reapply when the doctor clears him to work; and that his last day was Sunday, August 21, 2022. On November 30, 2022, Portillo sent Salazar another letter from his doctor stating he was ready to work without restrictions. Salazar stated he didn't receive a letter clearing Portillo to work without restrictions and once Portillo had it, he could reapply for the job. Portillo insisted the note stated he could work without restrictions; Salazar responded that he had to follow the doctor's guidance; Portillo maintained the note included no restrictions; Salazar stated: "The way that letter is written implies restrictions. Good afternoon." (Kingery Decl., ¶4, Exh. 2.)

As noted, these text messages were in Spanish. Portillo had them translated on or about January 9, 2024. (Kingery Decl., Exh. 2, Translator's Affidavit.) Defendants also independently had them translated. Defendants' translation (Defendants' Translation) is the subject of this inadvertent disclosure.

In January 2024, defendants prepared a response to plaintiff's first set of requests for document production. They produced responsive documents by providing plaintiff with a link to a shared drive, which was organized as follows<sup>1</sup>:

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<sup>1</sup> This reproduction is of poor quality, as was the screenshot provided in the declaration.



(Kingery Decl., ¶ 36, Exh. 13.)

Defendants' Translation is the Word document at the bottom of the file list named "Translation of Disciplinary Action and Text." *This document does not appear to have been provided for the court's review.* According to attorney Kingery's description, it is identical to plaintiff's own translation (attached to Kingery's declaration at Exhibit 2), *but* omits the November 30, 2022 exchange in which Portillo provides the doctor's note that released him for work without restriction.<sup>2</sup> (Kingery Decl., ¶ 4.) According to Kingery, this "by obvious standards, show[s] that Mr. Salazar deleted the two texts and acted as if he did not receive them" and that "Defendant had perjured itself in prior Responses and the texts were detrimental to Defendants' defenses." (Kingery Decl., ¶ 5-6.)

On January 3, 2025, Portillo propounded discovery as listed above. In that set of discovery, Portillo asked for admissions, documents, and answers to questions related to Defendants' Translation. At this point, defendants realized that they had inadvertently produced Defendants' Translation. Attorney Hall sent a letter by email identifying it as protected by attorney work product and demanding that Kingery destroy any copies of Defendants' Translation, refrain from referring to it in this matter, and withdraw the discovery requests identified above, to ameliorate the inadvertent disclosure. Kingery rejected the claim that Defendants' Translation

<sup>2</sup> This was attached to the text in a picture format and was unreadable when it was enlarged on the screen.

was protected and declined to comply. (Kingery Decl., Exhs. 4, 5, and 6.)<sup>3</sup> The instant motion was filed on February 11, 2025.

If a party has inadvertently disclosed a document, it may resort to the court for guidance with the benefit of protective orders. (*State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 656–657.)<sup>4</sup>

The Legislature has declared that it is state policy to “[p]reserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases.” (§ 2018.020, subd. (a).) In addition, the Legislature declared its intent to “[p]revent attorneys from taking undue advantage of their adversary's industry and efforts.” (Code Civ. Proc., § 2018.020, subd. (b).)

Thus, the Legislature protected attorney work product under California Code of Civil Procedure section 2018.030, which provides, “(a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances. [¶] (b) The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.”

Work product protection covers “derivative” materials—i.e., materials created by or derived from an attorney's work on behalf of a client that reflect the attorney's evaluation or interpretation of the law or the facts. “Nonderivative” materials are those that are only evidentiary in character and are not protected even if attorney “work” went into obtaining the materials. (See *Mack v. Sup.Ct. (State of Calif.)* (1968) 259 Cal.App.2d 7, 10.) The protection extends to an attorney's written notes about a witness's statements. (*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 814.) In addition, the “work product” of an attorney's employees or agents (investigators, researchers, etc.) is treated as the “work product” of the attorney. (See *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 647-648 (disapproved on other grounds by *Coito v. Sup.Ct. (State of Calif.)* (2012) 54 Cal.4th 480, 499.)

Here, defendants argue that Defendant's Translation “is attorney work product because it was contained and related to Defense counsel's impressions, conclusions, opinions, and legal theories of this claim. The document in question was prepared

<sup>3</sup> Plaintiff submitted redacted copies of the correspondence “to protect work product.” (Hall Decl. ¶ 25-27, Exhs. FF, GG, and HH.) However, the proper procedure would be to request an order to seal the documents pursuant to California Rules of Court, rule 2.550 and 2.551. The court need not order submission of unredacted versions because plaintiff has provided them in his submission.

<sup>4</sup> Another potential remedy is disqualification of the attorney in receipt of the protected document. (*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 819.) No such relief has been requested here.

for use in Defendants’ defense.” (Motion, p. 15, ll. 18-20.)<sup>5</sup> Defendants’ Translation has not been produced for the court to review. The court is unable to rule without reviewing Defendants’ Translation and thus orders defendants to produce it. The court orders that the Defendants’ Translation shall be provisionally sealed pending court review, and that the cover sheet refer to this order provisionally sealing the document in its caption.

The court preliminarily observes that a translation of a text message conversation between the two parties by itself is unlikely to qualify for work product protection. A translation of what one party said to the other does not reflect an attorney's impressions, conclusions, opinions, or legal research or theories. Thus, any such conversation is evidentiary in character and as such, is nonderivative and not protected. (See *People v. Aquino* (Sept. 10 2008, H031818) 2008 WL 4152967 \*1, \*6 [nonpub. opn.] (stating that “[b]y definition, a translation merely clarifies or interprets existing evidence... [and] did not constitute new evidence”).) Nor is the fact that the document was prepared for use in defendants’ defense convincing. Again, such document must reflect an attorney's impressions, conclusions, opinions, or legal research or theories. Absent such a showing, a simple translation is likely to be nothing more than evidence.

The court orders the matter to be continued to April 16, 2025, at 8:30 a.m. Defendants must file provisionally sealed copy of Defendants’ Translation by March 26, 2025. No further briefing is permitted unless the court is persuaded there is good cause for permitting it.

Once the court reviews the document, it will rule on whether an inadvertent disclosure exists that warrants a protective order.

### Protective Order: Discovery

A trial court “shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.” (Code Civ. Proc., §§ 2017.020, subd. (a).)

When interrogatories, inspection demands, or requests for admissions have been propounded, the responding party, and any other party or affected natural person or organization may promptly move for a protective order. (Code Civ. Proc., §§ 2030.090, subd. (a) [interrogatories]; 2031.060 [inspection demands]; 2033.080 [requests for admissions].) “The court, for good cause shown, may make any order that justice requires to protect any party or other natural person or organization

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<sup>5</sup> This assertion is not contained in attorney Hall’s declaration. Matters set forth in points and authorities are not evidence. (*Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 590; see *Brehm Cmtys. v. Superior Court* (2001) 88 Cal.App.4th 730, 735.)

from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.” (*Id.*, §§ 2030.090, subd. (b); 2030.090, subd. (b); 2033.080, subd. (b).) A protective order may include the direction that response is not necessary to some or all of the requests or that response be made only on specified terms and conditions. (*Id.*, §§ 2030.090, subd. (b); 2031.060, subd. (b); 2033.080, subd. (b).)

The court shall restrict the frequency or extent of use of a discovery method if it determines either of the following:

- (1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.
- (2) The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(Code Civ. Proc., § 2019.030, subd. (a).)

The party opposing discovery has an obligation to supply the basis for this determination. An ‘objection based upon burden must be sustained by evidence showing the quantum of work required.’” (*Williams v. Superior Court* (2017) 3 Cal.5th 531, 549 [response to interrogatories]; *W. Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, 417.)

Here, defendants have submitted the declaration of attorney Hall to support the quantum of work required by the past discovery requests. In it, she details the discovery to which they have responded to date and assert that they are “even providing third further responses in many instances, to all five hundred and thirty-one (531) . . . discovery requests.” (Hall Decl., ¶ 13.) She states that “[i]n responding just to Plaintiff’s August 8, 2024, two hundred seventeen (217) discovery requests, from August 2024 through the date of this Motion, Defendants’ counsel and billing staff spent more than one hundred seventy-five (175) hours preparing responses related discovery meet and confer demands.” (Hall Decl., ¶ 15.) She asserts that there are only 20 documents relevant to the case and there are no witnesses other than the parties themselves and plaintiff’s treating physician. (Hall Decl., ¶ 15.) The parties are cooperating with plaintiff and voluntarily obtaining and disclosing Salazar’s cell phone records. (*Id.*) They have agreed to a schedule of depositions and to a medical records subpoena. (Hall Decl., ¶ 17.)

Defendants thus argue that the latest discovery, consisting of an additional 131 requests, consists of a misuse of discovery process and warrants a protective order. Notably they do not analyze the text of the latest discovery requests or argue that the “discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive” (Code Civ. Proc. § 2019.030, subd. (a)(1)), or that the “selected method of discovery

is unduly burdensome or expensive.” Defendants have provided no risk-utility analysis, such as an assessment of the case value vs. the costs and disruption of normal business likely to result from compliance. Although defendants have produced 425 pages of exhibits attached to attorney Hall’s declaration,<sup>6</sup> they do not identify where the court might find duplicative or cumulative requests.<sup>7</sup> To the extent defendants intended this to be an argument that the “selected method of discovery is unduly burdensome or expensive,” the argument has not been quantified in terms of expense. (*Quantum Cooking Concepts, Inc. v. LV Assocs., Inc.* (2011) 197 Cal. App. 4th 927, 934—“Rule 3.1113 rests on a policy-based allocation of resources, preventing the trial court from being cast as a tacit advocate for the moving party’s theories by freeing it from any obligation to comb the record and the law for factual and legal support that a party has failed to identify or provide.”)

Instead, it appears that defendants argue, essentially, that enough is enough, and the court should impose a limit on discovery based solely on how many hours defendants have already spent in responding to prior requests. This is insufficient. Burden alone is not a ground for objection, it also requires annoyance, expense, embarrassment or oppression. (*W. Pico Furniture Co. of Los Angeles v. Super. Ct. (“West Pico”)* (1961) 56 Cal.2d 407, 417-418.) Some burden is inherent in all demands for discovery. The objection of burden is valid only when that burden results in injustice. (*Id.*) The fact that a response may be expensive and burdensome does not justify a refusal to answer. (*Alpine Mut. Water Co. v. Super Ct.* (1968) 259 Cal.App.2d 45, 51 & n.4, 52, 55—expense of appraising 1,170 houses for \$5,000 to \$11,000 in 1968 dollars to respond to interrogatories not justification to find request was unduly burdensome.)

The motion is denied to the extent a protective order is sought over discovery propounded on January 3, 2025 that is unrelated to Defendants’ Translation. The court reserves the issue whether a protective order will issue over discovery that is related until April 16, 2025.

The court recognizes this ruling is unlikely to fully resolve the discovery issue. The court expressly does not by this ruling intend to resolve any arguments whether further response to any of the discovery for which a protective order was sought should be compelled.

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<sup>6</sup> The exhibits span from Exhibit A – Exhibit HH and are comprised of the discovery propounded on defendant McMogul and the discovery propounded on defendant Salazar, including the January 3 discovery for which a protective order is sought, plaintiff’s declarations to support propounding special interrogatories and admissions in excess of that permitted by Code, and meet and confer correspondence.

<sup>7</sup> Plaintiff has produced over 500 pages of exhibits attached to the declaration of attorney Kingery.