Frederick W. Lee Bar No: 201516 1 Eric M. Sasahara Bar No: 188883 5821 Beach Boulevard CENTRAL JUSTICE CENTER Buena Park, California 90621 NOV 05 2008 Phone: (714) 739-1234 (714) 739-5870 Fax: ALAN CARLSON, Clerk of the Court Attorneys for Defendant BY R. LUCEY ERIC J. PARK 6 SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF ORANGE, CENTRAL JUSTICE CENTER 9 10 CASE NO: 30-2008 00103341 BRIAN FARMER, 11 Assigned for all purposes to Plaintiff, 12 Hon. Sheila Fell, Judge Dept: C22 13 VS. OPPOSITION TO MOTION TO 14 ERIC J. PARK, an individual, COMPEL RESPONSES TO REQUEST and DOES 1 through 10 inclusive, FOR INSPECTION AND 15 PRODUCTION OF DOCUMENTS Defendants. [Code Civ. Proc. § 2031.010 et seq.] 16 Date: November 19, 2008 17 Time: 10:00 a.m. Dept: C22 18 Defendant ERIC J. PARK hereby opposes the Motion to Compel Responses to Request 19 for Inspection and Production of Documents filed by Plaintiff BRIAN FARMER in this matter, 20 as follows: 21 Introduction 22 This case involves Requests for Production of Documents purportedly served by mail on 23 July 14, 2008. For whatever reason, the Request was never received by counsel for Defendant. In addition, it had first been discovered on the weekend of July 4, 2008, that the custodian of the 25 requested records, a Mr. Thomas Mamelson, had died with the records in his home office, and 26 his body had been decomposing for some time prior to discovery. In all likelihood Plaintiff 27 knew of these events at the time the Requests were supposedly mailed. 28

BRIAN FARMER vs. ERIC J. PARK

OPPOSITION TO MOTION TO COMPEL RESPONSES

OCSC Case No. 30-2008 00103341

Counsel for Defendant was not made aware that Requests for Production of Documents had been purportedly mailed in July, until counsel for Plaintiff sent a fax on August 21, 2008. On August 26, 2008, counsel for Defendant requested and first received a copy of the Requests for Production of Documents by email. Defendant ERIC J. PARK was also unaware of the Requests until that date. In the following week, counsel for Defendant was also first made aware that the custodian of the records had previously died.

The records had been removed by Mr. Park from the scene of the death by mid-July. However, due to their proximity to the decomposing body, Mr. Park had been advised by the Orange County Coroners office that the papers and records potentially constituted a bio-hazard and would need to be handled appropriately. Although the records had been organized and stored in file cabinets by the custodian, the exigency of the death scene and handling required that the documents be placed in and removed in plastic bags. Masks and gloves were required for this process.

Mr. Park retained the records in the plastic bags in his garage until the first of September, when the request of Plaintiff first became known. Due to the potential bio-hazard concern, the records could not be turned over to defense counsel. For the past several weeks, Mr. Park has exposed the papers to air and sanitizing spray according to the Coroners directions.

Both Plaintiff and his counsel are aware the production request encompasses all of the possible business records maintained by the company for a period of over fifteen years. The remaining records have now been partially sorted by Mr. Park, and comprise 17 bankers boxes of materials. Some of the records may have been seized by the police officials investigating the death scene. Up to 7 boxes comprise records that would really be pertinent, that is business records, bank statements, billings, receipts, and payments to the business.

Defense counsel has finalized the response to the production request (Exhibit "A"), and is prepared make all the remaining records available to Plaintiff and his counsel.

For all of the foregoing reasons, it is submitted that this is not an instance of any abuse of the discovery process by Defendant or defense counsel. Sanctions would thus not be appropriate.

28 //

////

## WHETHER OR NOT THE REQUESTS WERE ACTUALLY MAILED, SUCH WERE NOT ACTUALLY RECEIVED BY DEFENSE COUNSEL.

It is undisputed that counsel for Plaintiff has provided a proof of service by mail. Although a letter properly mailed is presumably received, the mail does not represent an infallible method of delivery in all instances. Letters become lost. Mistakes can be made.

To start with, the timing of the Requests are somewhat suspicious in the first place. Second, the Request for Production does not have any printed date anywhere on the document. When inquiry was first made, counsel for Plaintiff did not have any print copy of the Request for Production; rather he furnished only an electronic copy by email. The electronic copy indicated that no print copy had been made since April 25, 2008. If such is true, then counsel could have been mistaken as to whether or not he actually mailed the item.

In any event, counsel for Plaintiff should have afforded a reasonably time to comply with the request before he made the motion to compel. Here, counsel for Plaintiff asserts:

Mr. Homsey called the next day and left a voice message with Mr. Ryan's office, stating that the Requests were fine and that both written responses would be E-mailed on Friday August 29, 2008, and that the documents would be provided on that day as well.

The assertion lacks proof and credibility. There is no proof that counsel for Defendant promised to provide all the documents within three (3) days of first finding out about the Requests. Second, the exigent circumstances in relation to the death of the custodian made it completely unreasonable for defense counsel to have both completed a response without objections, and provide Plaintiff with copies of all of the subject documents by his deadline of Friday, August 29, 2008.

Rather, it appears that counsel for Plaintiff had no genuine interest in amicably resolving the dispute, and simply filed the present motion without concern as to whether or not his Requests had been received.

8

1213

14

15 16

17

18 19

2021

22

2324

2526

27

28

## THERE HAS BEEN NO ABUSE OF THE DISCOVERY PROCESS IN THIS INSTANCE.

Misuse of discovery process may be cause for sanctions. To the extent authorized by a section governing a particular discovery method or other provisions of the Civil Discovery Act, and after notice to affected parties, persons, or attorneys and an opportunity for hearing, trial courts may impose sanctions against anyone engaging in conduct that is a misuse of the discovery process. [Code Civ. Proc., § 2023.030]

Misuses of discovery under the act include, but are not limited to the following: [Code Civ. Proc., § 2023.010]

(1) persisting, over objection and without substantial justification, in attempts to obtain information or materials that are outside the scope of permissible discovery;

(2) using a discovery method in a way that does not comply with specified procedures:

(3) employing a discovery method in a way or to an extent that causes unwarranted annoyance, embarrassment, oppression, or undue burden and expense;

(4) failing to respond or submit to an authorized discovery method;

(5) making, without substantial justification, an objection to discovery that is unmeritorious;

(6) making an evasive response to discovery;(7) disobeying a court order to provide discovery;

(8) making or opposing, unsuccessfully and without substantial justification, a

motion to compel or limit discovery; and

(9) failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable, good-faith effort to informally resolve any discovery dispute, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that such an attempt has been made.

Plaintiff has not demonstrated any evasiveness or misuse of discovery processes by Defendant or his counsel here.

II

## MONETARY SANCTIONS ARE NOT WARRANTED AGAINST DEFENDANT OR HIS COUNSEL.

Courts may impose monetary sanctions ordering one engaging in misuse, an attorney advising such conduct, or both, to pay reasonable expenses, including attorney's fees, incurred by anyone as a result of the conduct. (Code Civ. Proc., § 2023.030, subd. (a).)

IIII

The purpose of discovery sanctions is not to provide a weapon for punishment, forfeiture, or avoidance of trial on the merits. Rather, the sanctions are designed to prevent abuses in the discovery process and to correct the problem presented in a specific case. The penalty imposed should not exceed that which is required to protect the interest of the party entitled to, but denied, discovery. The sanction should not operate to put the prevailing party in a better position than that party would have been in if he or she had obtained the discovery sought and it had been completely favorable to the party's case. (*McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 210-216, 31 Cal.Rptr.2d 292.)

Discovery sanctions should be appropriate to the dereliction and should not exceed that which is required to protect the interests of the party entitled to but denied discovery. The court may not impose sanctions which are designated not to accomplish the objects of discovery but to impose punishment. (*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545, 51 Cal.Rptr. 2d 311.)

#### Conclusion

For the foregoing reasons, it is respectfully requested that the motion be denied.

Dated: November 5, 2008

FREDERICK W. LEE, Attorney for Defendant ERIC J. PARK

1/1/

I, ERIC J. PARK, declare:

I am the defendant in this action, and make this declaration in opposition to Plaintiff's motion to compel responses to discovery.

- 1. The subject business of this lawsuit, AUTOPEDIA, INC., involves a single website that promotes automotive information for consumers. For the past several years, the entirety of the business has been conducted by myself with a single assistant, a Mr. Thomas Mamelson. He operated the business from his home office where he maintained all of the records of the business, and programmed the website. Normally, I was in contact with him by email or telephone.
- 2. In late June 2008, I became aware that Mr. Mamelson had been out of contact for more than a week, which was highly unusual. I was unable to reach him by any means, and went to his home on the weekend of July 4, 2008. I was able to persuade his landlady of the unusual situation. When we entered the premises we discovered that Mr. Mamelson, had died and his body had been decomposing for some time prior to our discovery. We reported the death to the authorities who investigated the scene.
- 3. I have reason to believe that in all likelihood Plaintiff learned of these events shortly thereafter, because Mr. Farmer had been friends with Mr. Mamelson, and had they had seen each other almost daily at one time.
- 4. After obtaining permission from the family, I was first able to remove my business records from the scene of the death by mid-July. However, due to their proximity to the decomposing body, I had been advised by the Orange County Coroners office that the papers and records potentially constituted a bio-hazard and would need to be handled appropriately. There was a malodorous smell to everything at the premises. Although the records had been organized and stored in file cabinets by the custodian, the exigency of the death scene and handling required that the documents be placed in and removed in plastic bags. Masks and gloves were required for this process.

- I was unaware of the need for any records in this litigation until late August, when I made my counsel aware of the death of Mr. Mamelson. I had retained the records in the plastic bags in my garage until the first of September, when the request of Plaintiff first became known. Due to the potential bio-hazard concern, the records could not be turned over to my counsel. For the past several weeks, I have exposed the papers to air and sanitizing spray according to the Coroners directions. This has been a very difficult and time consuming process requiring masks and gloves.
- 6. The production request encompasses all of the possible business records maintained by my company for a period of over fifteen years. The remaining records have now been partially sorted, and comprise 17 bankers boxes of materials. Some of the records may have been seized by the police officials investigating the death scene. Up to 7 boxes comprise records that would really be pertinent, that is business records, bank statements, billings, receipts, and payments to the business. Except for the complications of the death scene, I have always been willing to make the records available.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 5<sup>th</sup> day of November 2008 at Buena Park, California.

Eric J. Park

I, FREDERICK W. LEE, declare:

I am an attorney for ERIC J. PARK, defendant in this action, and make this declaration in opposition to Plaintiff's motion to compel responses to discovery.

- 1. This case involves Requests for Production of Documents purportedly served by mail on July 14, 2008. For whatever reason, the Request was never received by my office. In addition, it had first been discovered on the weekend of July 4, 2008, that the custodian of the requested records, a Mr. Thomas Mamelson, had died with the records in his home office, and his body had been decomposing for some time prior to discovery. In all likelihood Plaintiff knew of these events at the time the Requests were supposedly mailed.
- 2. I was not made aware that Requests for Production of Documents had been purportedly mailed in July, until counsel for Plaintiff sent a fax on August 21, 2008. On August 26, 2008, my office requested and first received a copy of the Requests for Production of Documents by email. Defendant ERIC J. PARK was also unaware of the Requests until that date. In the following week, I was also first made aware that the custodian of the records had previously died.
- 3. Both Plaintiff and his counsel are aware the production request encompasses all of the possible business records maintained by the company for a period of over fifteen years. The remaining records have now been partially sorted by Mr. Park, and comprise 17 bankers boxes of materials. Some of the records may have been seized by the police officials investigating the death scene. Up to 7 boxes comprise records that would really be pertinent, that is business records, bank statements, billings, receipts, and payments to the business.
- 4. Now that Mr. Park has been able to reorganize the records, I have finalized the response to the production request (Exhibit "A"), and am prepared make all the remaining records available to Plaintiff and his counsel.
- 5. I attempted to resolve these issues with Mr. Ryan (see Exhibit "B" for example), but he has instead persisted in moving forward with his motion despite my attempts at an informal resolution.

- 6. The exigent circumstances in relation to the death of the custodian made it completely unreasonable for my office to have both completed a response without objections, and provide Plaintiff with copies of all of the subject documents by his deadline of Friday, August 29, 2008.
- 7. For all of the foregoing reasons, it is submitted that this is not an instance of any abuse of the discovery process by Defendant or my office. Sanctions would thus not be appropriate.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 5<sup>th</sup> day of November 2008 at Buena Park, California.

FREDERICK W. LEE

## EXHIBIT

1 2 3 4 5	Frederick W. Lee Bar No: 2015 Eric M. Sasahara Bar No: 1888 5821 Beach Boulevard Buena Park, California 90621 Phone: (714) 739-1234 Fax: (714) 739-5870  Attorneys for Defendant ERIC J. PARK	
7 8	SUPERIOR COL	IRT OF THE STATE OF CALIFORNIA
9	COUNTY OF ORANGE, CENTRAL JUSTICE CENTER	
10		un (32, 32, 12, 12, 12, 12, 12, 12, 12, 12, 12, 1
11	BRIAN FARMER,	) CASE NO: 30-2008 00103341
12	Plaintiff,	) Assigned for all purposes to
13	vs.	Hon. Sheila Fell, Judge Dept: C22
14	ERIC J. PARK, an individual, and DOES 1 through 10 inclusive,	RESPONSES TO REQUEST FOR INSPECTION AND PRODUCTION OF
15	Defendants.	) DOCUMENTS PROPOUNDED BY BRIAN FARMER TO DEFENDANT
16		) ERIC J. PARK [Code Civ. Proc. § 2031.010 et seq.]
17		
18 19	PROPOUNDING PARTY:	Plaintiff BRIAN FARMER
20	RESPONDING PARTY:	Defendant ERIC J. PARK
21	SET NUMBER:	One (1) [Request for Production]
22		
23		
24	1111	
25	1111	
26		
27		
28		
		1

BRIAN FARMER vs. ERIC J. PARK

OCSC Case No. 30-2008 00103341

RESPONSES TO REQUEST FOR INSPECTION AND PRODUCTION OF DOCUMENTS

#### **RESPONSE TO REQUEST NO. 1:** 2 Responding party will produce the requested documents. **RESPONSE TO REQUEST NO. 2:** 3 Responding party will produce the requested documents. 4 **RESPONSE TO REQUEST NO. 3:** 5 Responding party will produce the requested documents. 6 **RESPONSE TO REQUEST NO. 4:** 7 Responding party will produce the requested documents. 8 **RESPONSE TO REQUEST NO. 5:** 9 Responding party will produce the requested documents. 10 **RESPONSE TO REQUEST NO. 6:** 11 12 Responding party will produce the requested documents. **RESPONSE TO REQUEST NO. 7:** 13 14 Responding party will produce the requested documents. **RESPONSE TO REQUEST NO. 8:** 15 Responding party will produce the requested documents. 16 **RESPONSE TO REQUEST NO. 9:** 17 18 Responding party will produce the requested documents. RESPONSE TO REQUEST NO. 10: 19 Responding party will produce the requested documents. 20 **RESPONSE TO REQUEST NO. 11:** 21 Responding party will produce the requested documents. 22 **RESPONSE TO REQUEST NO. 12:** 23 Responding party will produce the requested documents. 24 25 **RESPONSE TO REQUEST NO. 13:** Responding party will produce the requested documents. 26 **RESPONSE TO REQUEST NO. 14:** 27

Responding party will produce the requested documents.

28

#### **RESPONSE TO REQUEST NO. 15:** Responding party will produce the requested documents. 2 3 **RESPONSE TO REQUEST NO. 16:** 4 Responding party will produce the requested documents. **RESPONSE TO REQUEST NO. 17:** 5 6 Responding party will produce the requested documents. **RESPONSE TO REQUEST NO. 18:** Responding party will produce the requested documents. 8 **RESPONSE TO REQUEST NO. 19:** 9 Responding party will produce the requested documents. 10 **RESPONSE TO REQUEST NO. 20:** 11 Responding party will produce the requested documents. 12 **RESPONSE TO REQUEST NO. 21:** 13 Responding party will produce the requested documents. 14 **RESPONSE TO REQUEST NO. 22:** 15 Responding party will produce the requested documents. 16 17 **RESPONSE TO REQUEST NO. 23:** Responding party will produce the requested documents. 18 **RESPONSE TO REQUEST NO. 24:** 19 20 Responding party will produce the requested documents. **RESPONSE TO REQUEST NO. 25:** 21 Responding party will produce the requested documents. 22 23 **RESPONSE TO REQUEST NO. 26:** Responding party will produce the requested documents. 24 25 **RESPONSE TO REQUEST NO. 27:** 26 Responding party will produce the requested documents. 27 RESPONSE TO REQUEST NO. 28: 28 Responding party will produce the requested documents.

1	RESPONSE TO REQUEST NO. 29:		
2	Responding party will produce the requested documents.		
3	RESPONSE TO REQUEST NO. 30:		
4	Responding party will produce the requested documents.		
5	RESPONSE TO REQUEST NO. 31:		
6	Responding party will produce the requested documents.		
7	RESPONSE TO REQUEST NO. 32:		
8	Responding party will produce the requested documents.		
9	RESPONSE TO REQUEST NO. 33:		
10	Responding party is partially unable to comply with the particular demand for inspection, ever		
11	though a diligent search and a reasonable inquiry has been made in an effort to comply with tha		
12	demand. This inability to comply is because portions of the particular item or category is no		
13	longer in the possession, custody, or control of the responding party. Responding party wil		
14	produce the requested documents to the extent such still exist.		
15	RESPONSE TO REQUEST NO. 34:		
16	Responding party is partially unable to comply with the particular demand for inspection, even		
17	though a diligent search and a reasonable inquiry has been made in an effort to comply with tha		
18	demand. This inability to comply is because portions of the particular item or category is no		
19	longer in the possession, custody, or control of the responding party. Responding party wil		
20	produce the requested documents to the extent such still exist.		
21	RESPONSE TO REQUEST NO. 35:		
22	Responding party will produce the requested documents.		
23	RESPONSE TO REQUEST NO. 36:		
24	Responding party will produce the requested documents.		
25	Dated: November 5, 2008		
26	FREDERICK W. LEE,		
27	Attorney for Defendant ERIC J. PARK		
20	ENIC J. FANN		

BRIAN FARMER vs. ERIC J. PARK
OCSC Case No. 30-2008 00103341
RESPONSES TO REQUEST FOR INSPECTION AND PRODUCTION OF DOCUMENTS

#### VERIFICATION

I, Eric J. Park, am a party Defendant in the above-entitled action. I have read the foregoing RESPONSES TO REQUEST FOR INSPECTION AND PRODUCTION OF DOCUMENTS and know the contents thereof.

The matters stated in the foregoing document are true to my own knowledge, except as to those matters which are stated on information and belief, and as to those matters I believe them to be true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 5, 2008, at Buena Park, California.

**ERIC J. PARK** 

#### PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

On November 5, 2008, I served the within documents described as:

§ 1013a(3) Code Civ. Proc. REVISED 1/1/88

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is: 5821 Beach Boulevard, Buena Park,

2

1

3

4 5

6

7

8

10

11

12 13

14

15

17

18

19 20

21

22 23

24

25

26 27

28

DOCUMENTS PROPOUNDED BY BRIAN FARMER TO DEFENDANT ERIC J. PARK [Code Civ. Proc. § 2031.010 et seq.]

RESPONSES TO REQUEST FOR INSPECTION AND PRODUCTION OF

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

James F. Ryan Attorney at Law 8667 Via Mallorca, Suite 72

California 90621.

La Jolla, California 92037

XX BY MAIL: I deposited such envelope, with postage thereon fully prepaid, in the mail at Buena Park, California.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Buena Park, California, in the ordinary course of business. I am aware that on motion of the parties served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

BY PERSONAL SERVICE: I caused to be delivered such envelope by hand to the offices of the addressees.

**BY FAX:** I caused a copy to be transmitted by facsimile to:.

XX (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on November 5, 2008, at Buena Park, California.

# EXHIBIT D

### FREDERICK W. LEE

#### 5821 Beach Boulevard

5821 Beach Boulevara
Buena Park, California 90621
Phone: (714) 739-1234
Fax: (714) 739-5870

Frederick W. Lee Steven Johnson

September 2, 2008

SENT VIA U.S. MAIL

James F. Ryan Attorney at Law 8667 Via Mallorca, Suite 72 La Jolla, California 92037

Re:

Farmer vs. Park

Orange County Superior Court, case no. 30-2008 00103341

Dear Mr. Ryan:

This will confirm our receipt of your Request for Inspection and Production of Documents in this matter by email on August 26, 2008. As you are aware, we recently relocated our offices and have been in the process of reorganizing for the past few weeks. Although we have now been able to make a thorough search for the original request, it appears that it was never received. Although we are unable to contest the validity of your proof of service, it does appear that the request is calculated to be highly burdensome in several respects. As you are aware the request encompasses all of the possible records maintained by the company for a period of over ten years. We are also advised by Mr. Park that the custodian of the records in Huntington Beach had recently died, and that it was still being ascertained what records remained after the authorities had investigated the scene. Whether or not Mr. Farmer was aware of the situation before you initiated the request is unknown to us. Lastly, the attorney in charge of the corporate records, Dennis Ickes, is located outside of California. For the above reasons, it was not reasonable for us to have both completed a response without objections, and provide you with copies of all of the subject documents by your deadline of last Friday, August 29, 2008. We will endeavor to complete a response within the next few days, and thereafter provide all available records as expeditiously as possible.

Thank you for your attention.

FREDERICK W. LE

Attorney at/Law

#### PROOF OF SERVICE

§ 1013a(3) Code Civ. Proc. REVISED 1/1/88

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is: 5821 Beach Boulevard, Buena Park,

2

3

4

6

5

7

8

10

11

12

13

15

16

17 18

19

20

21 22

23

24

25

26 27

28

OPPOSITION TO MOTION TO COMPEL RESPONSES TO REQUEST FOR INSPECTION AND PRODUCTION OF DOCUMENTS

[Code Civ. Proc. § 2031.010 et seq.]

STATE OF CALIFORNIA, COUNTY OF ORANGE

On November 5, 2008. I served the within documents described as:

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

James F. Ryan Attorney at Law 8667 Via Mallorca, Suite 72 La Jolla, California 92037

California 90621.

XX BY MAIL: I deposited such envelope, with postage thereon fully prepaid, in the mail at Buena Park, California.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Buena Park, California, in the ordinary course of business. I am aware that on motion of the parties served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

BY PERSONAL SERVICE: I caused to be delivered such envelope by hand to the offices of the addressees.

**BY FAX:** I caused a copy to be transmitted by facsimile to: .

XX (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

Executed on November 5, 2008, at Buena Park, California.

10.