

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-020757

04/20/2012

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT
L. Nixon
Deputy

GOLDWATER INSTITUTE

CARRIE ANN SITREN

v.

CITY OF GLENDALE, et al.

NICHOLAS C DIPIAZZA

JUDGE ROBERT MYERS

RULING

The Court has considered the City of Glendale's Objections to Special Master Report No.1, Goldwater Institute's Response, and the Reply.

Glendale complains that the Special Master's Report #1 is not in the form of an Order as stated in the Order of Appointment. The Court notes that Rule 53(h) provides that "A party may file objections to—or a motion to adopt or modify—the master's final order, report, or recommendations...." The Court finds that submission of an Order or Report is acceptable.

The Court believes that Report #1 fairly sets forth factual finding and orders, however, to minimize interpretation disputes between counsel, the Court is requesting the Master to delineate specific factual finding in any subsequent Report or Order.

In its ruling on Glendale's Motion to Reconsider, the Court found the submission of a document log consistent with the early history of this case and the holding of *Judicial Watch*.

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Rule 30(b)6 Witness Designation

Rule 30(b) Ariz. R. Civ. P. provides that a “governmental agency” named as a deponent may designate an individual to testify on its behalf in response to the matters described in the deposition notice.

Rule 30(b). Notice of Examination; General Requirements; Special Notice; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone

* * * *

(6) A party may in the party's notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, **or other persons who consent to testify on its behalf**, and may set forth, for each person designated, the matters on which that person will testify. **The persons so designated shall testify as to matters known or reasonably available to the organization.** This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(bold added)

While the Rule does not require the deponent to be an employee at any level, the designated deponent must be prepared to respond to questions concerning the subject matter of notice as assigned. In *Groat v. Equity American Ins. Co.*, 180 Ariz. 342, 347 (App. 1994), the Court cautioned:

Providing an uninformed warm body for a Rule 30 deposition approximates providing no one at all. *Gulf Homes, Inc. v. Beron*, 141 Ariz. 624, 688 P.2d 632 (1984), concludes that when a deponent does not answer legitimate questions asked at a deposition, the conduct is the same as if he did not attend at all, allowing the court to impose sanctions pursuant to Rule 37(d). *Id.* at 626, 688 P.2d at 634. *Gulf Homes* noted that the president of the defendant corporation was advised of the subject matter of the questions before the deposition and had the opportunity to prepare for the questions. *Id.* at 629, 688 P.2d at 637. The deponent, however, responded “I don't know” to most of the questions. *Id.* at 626, 688 P.2d at 634. The supreme court agreed with the trial court's finding that his

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evasion was tantamount to failure to appear, and it affirmed the entry of default judgment in favor of the plaintiffs. *Id.* at 629, 688 P.2d at 637.

The record is undisputed that Ms. Iafrate is outside legal counsel for Glendale and represents the City in other matters. Ms. Iafrate is not legal counsel in this case. The Court believes that she is not an expert in the traditional sense because she is not rendering expert opinions. Rather, Ms. Iafrate is an independent contractor retained to investigate the subject matter described in the Rule 30(b)6 Notice. Under these circumstances, she is not protected by the attorney-client privilege¹ and Goldwater has the right to review her file to ascertain, *inter alia*, the foundation for the information she provided at the deposition.

IT IS THEREFORE ORDERED that Ms. Iafrate produce to Goldwater her file prepared in conjunction with her Rule 30(b)6 designation.

The Court believes that it is also appropriate for Glendale to identify the individuals Ms. Iafrate interviewed in order to test the foundation for her responses.² This is in addition to the production of her file.

In light of these further disclosures, Goldwater may retake Ms. Iafrate's deposition. The Master's procedure for addressing any objections is appropriate.

IT IS ORDERED affirming the Special Master's Order as outlined above.

Alleged Evasive Answers

IT IS FURTHER ORDERED that in advance of the follow-up deposition of Ms. Iafrate, Goldwater shall consult with Glendale to address any prior deposition answers Goldwater believes are evasive. The parties shall agree on a resolution, *e.g.* ask again, rephrased question. To the extent the parties cannot agree on a solution, Goldwater shall present a page and line designation to the Special Master to rule on the question and answer.

Additional Rule 30(b)6 Witness Depositions

In light of the above rulings, the Court will stay Glendale's production of additional Rule 30(b) witnesses at this time. In the event the testimony of Ms. Iafrate is uninformed or the deposition is unproductive, the Special Master has the discretion to have individuals who work

¹ See, *Upjohn Co. v. U.S.*, 449 U.S. 383, 392 (1981)

² Typically, foundation is provided by the individual's experience with the company, its practices, and record management systems.

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for Glendale, and who have responsive knowledge, to appear and respond to the categories of the Notice.³

Marketing Material

IT IS ORDERED affirming the Special Master's Order regarding the Marketing Material described in his report.

Logs

IT IS ORDERED affirming the Special Master's Order regarding the form and completion date of the logs.

Duplicates

A rule of reason shall attach to the production of duplicate material. The parties shall create a protocol for duplicates. For example, if duplicates are located in different areas or files, should only one copy of the document be provided or is location important so multiple copies are acceptable? If there is handwriting on a document, should the document be provided again? If there are draft documents or edited documents, should each version be produced?

IT IS ORDERED that the burden for developing a document duplication protocol rests on both parties. In the event the parties cannot develop a procedure that allows for the production of responsive material, the Special Master will resolve the issue and consider sanctions against any unreasonable party.

IT IS FURTHER ORDERED that the timeframes provided by the Special Master still apply and *start from the filing date of this ruling*.

IT IS FURTHER ORDERED striking the Supplemental filings of the parties.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.

³ Glendale does not dispute that these individuals exist. Glendale notes that the disruption, cost, and inefficiency associated with this approach.