

**TUESDAY AFTERNOON
JULY 25, 2006**

**California
Bar
Examination**

**Performance Test A
INSTRUCTIONS AND FILE**

SAVALL DRUGSTORES, INC. v. PHISTER PHARMACEUTICALS CORP.

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SAVALL DRUGSTORES, INC. v. PHISTER PHARMACEUTICALS CORP.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional States of Columbia and Franklin, two of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

BLANE, MORA & NIEBAUM, LLP
Attorneys at Law

M E M O R A N D U M

To: Applicant
From: Craig Mora
Date: July 25, 2006
Re: SavAll Drugstores, Inc. v. Phister Pharmaceuticals Corp.

Our client, SavAll Drugstores ("SavAll"), a multi-national chain of discount retail drugstores, sued Phister Pharmaceuticals ("Phister") for Phister's longstanding anti-competitive practice of refusing to sell its popular cholesterol control drug Serapatrin to SavAll.

Phister has been stonewalling us on discovery. Most recently, we propounded a narrowly drawn request for production of documents requesting Phister to produce all e-mail messages sent and received in the last five years bearing on the subject of sales and pricing of Serapatrin. About six weeks ago we had a hearing before Discovery Commissioner Felicia Moreno on our motion to compel production of the e-mails and Phister's cross-motion for a protective order seeking either to deny production or shifting the entire cost of production to us.

As ordered in the Commissioner's *Findings of Fact and Order*, we have taken steps to develop the facts surrounding the discovery issues by deposing Phister's Chief Technology Officer, Chester Yu, and Phister has deposed SavAll's computer expert, LaVon Washington.

I want you to prepare our supplemental brief. Our position is that Phister should not be relieved of the obligation to produce the documents and that Phister should pay the costs

of production. I have attached a recent ruling in Columbia, *Zwerin v. United Merchant Bank*, that sets forth the currently applicable rules on production and cost-shifting concerning electronically stored data. I have also attached a later case, *Baldocchi v. Orion Films, Inc.*, which applies the *Zwerin* factors and gives you some guidance on how to apply the rules.

Based on Commissioner Moreno's order, Phister has stipulated that it will produce at its own expense all readily available e-mails, i.e., e-mails that Mr. Yu said in his deposition remain on the individual users' hard drives and haven't yet been transferred to storage. Therefore, this first-level category (i.e., "category one") of e-mails is no longer in dispute.

In accordance with the guidelines set forth in Commissioner Moreno's *Order*, please draft a persuasive brief in which you do the following:

1. Summarize in a *short* introductory statement of facts the steps we have taken since the last hearing before the Commissioner and categorize the levels of data storage identified in the depositions; and
2. Argue that (a) Phister's motion for protective order relieving it completely of the obligation to produce the electronically stored data should be denied and (b) that Phister should be required to produce, at its own expense, all the e-mails in the *remaining* categories.

BLANE, MORA & NIEBAUM, LLP
Attorneys at Law

MEMORANDUM

To: All Associate Attorneys
From: Executive Committee
Re: **Persuasive Briefs**

To clarify the expectations of the firm and to provide guidance to associates, all persuasive briefs, including Briefs in Support of Motions (also called Memoranda of Points and Authorities), whether directed to an appellate court, trial court, arbitration panel, or administrative officer, shall conform to the following guidelines.

All briefs of these documents shall include a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts so stated support our client's position.

Following the Statement of Facts, the argument begins. The firm follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, **IMPROPER:** COLUMBIA HAS PERSONAL JURISDICTION. **PROPER:** DEFENDANT'S RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our client's position should be emphasized, but contrary authority should generally be cited and addressed in the argument. Do not reserve arguments for reply or supplemental briefs.

The associate should not prepare a table of contents, a table of cases, a summary of argument, or the index. These will be prepared, where required, after the draft is approved.

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**IN THE SUPERIOR COURT IN AND FOR THE
STATE OF COLUMBIA**

SAVALL DRUGSTORES, INC.,)
)
Plaintiff,) Case # 413406 FM
)
v.)
) **FINDINGS OF FACT AND ORDER**
)
PHISTER PHARMACEUTICALS CORP.,)
)
Defendant.)
_____)

This matter came on for hearing on June 6, 2006 on a discovery motion of plaintiff SavAll Drugstores, Inc. ("SavAll") to compel production of documents and a cross-motion of defendant Phister Pharmaceutical Corp. ("Phister") for a protective order relieving it of the obligation of producing the documents or, in the alternative, requiring SavAll to pay all costs of production.

The underlying action is a suit brought by SavAll for injunctive relief and damages arising from the alleged violation by Phister of the Columbia Unfair and Deceptive Trade Practices Act (the "Act"). The conduct complained of is the alleged refusal of Phister to sell its popular cholesterol control drug, Serapatrin, to SavAll during the period of the five years preceding the filing of this action. SavAll alleges that Phister unlawfully attempts to control and fix retail prices in violation of the Act.

1 SavAll propounded the following Request for Production of Documents:

2 Request No. 34: Please produce, either in hard copy or in readable
3 electronic form, all e-mail messages sent and received by Phister's Sales and
4 Marketing Department staff to and from other members of said staff regarding
5 Serapatrin retail prices set or recommended by Phister during the period January
6 1, 2001 to the present.
7

8 Phister's objection is that it would be unduly burdensome for it to comply with
9 SavAll's request for the e-mails. Its assertion of burdensomeness is based on the following
10 facts. In the past 20 years, Phister, like most modern business entities making the
11 transition from recording their business transactions in paper media to computerized
12 methods, has increasingly converted its record-keeping, management reporting, and
13 interoffice and customer communications systems to electronic media. Throughout that
14 period, Phister has had a records retention practice of periodically purging the hard drives
15 on the computers utilized by its employees, including the members of its Sales and
16 Marketing staff, and preserving all data therefrom which are stored randomly in various
17 "backup" media such as digital tapes, floppy disks, compact disks ("CDs"), and the like, in
18 archives. The data are not segregated by type. For example, a particular backup tape or
19 CD might contain indiscriminately stored e-mails, marketing reports, accounting records,
20 interoffice memos, and the like. Phister claims that for it to segregate and retrieve e-mails
21 from five years of such randomly stored data would be extremely costly and consume time
22 and resources that Phister cannot divert from its business objectives. Additionally, over the
23 years Phister has gone through an extensive series of modernizations of its computers and
24 systems. As a consequence, the means of retrieving and reproducing the e-mails from
25 storage media more than about a year old are no longer available internally. Thus, Phister
26 asserts that either it should be relieved of the obligation to produce any e-mails except
27 those that happen to be readily available in hard copy, i.e., in paper form, or SavAll should
28 be required to pay all costs of retrieving and reproducing the e-mails, including the time and
29 expense incurred by Phister personnel to review the e-mails for the purpose of redacting
30 privileged and business-sensitive/confidential information.

1 SavAll responds by saying that Phister's election to store its documents in electronic
2 media rather than paper does not alter the usual rule that the burden and cost of production
3 must be borne by the producing party, i.e., it is no different than if Phister had used paper
4 memos rather than e-mail. Moreover, there must necessarily be a number of e-mails on
5 hard drives that have not yet been purged and transferred to archival storage media.
6 Those can certainly be merely printed out and produced to SavAll. Also, the most recent
7 archival backups must necessarily be easily retrievable by Phister's existing computer
8 equipment and personnel.

9 SavAll is correct in stating that the usual presumption is that the producing party, in
10 this case Phister, is required to bear the cost of producing the requested documents.
11 However, Rule 26 of the Columbia Rules of Civil Procedure gives the court broad discretion
12 to depart from that presumption in part or in whole depending on the circumstances. The
13 widespread use of computers in the conduct of business, the indiscriminate storage in bulk
14 form of vast amounts of information, and the repeated advances and obsolescence of the
15 means of data storage and retrieval have presented unprecedented discovery issues and
16 require the courts to adopt novel approaches to discovery requests that require production
17 of stored, archived electronic data.

18 On the record before me, the parties have simply not presented enough information
19 to rule on all aspects of the cross-motions. However, based on the moving papers and the
20 arguments presented at the hearing, I can and do make the following findings of fact:

- 21 • This litigation presents important public policy issues having to do with price-
22 fixing and consumer protection.
- 23 • SavAll's claim appears to have some merit – it has come into possession of
24 about 50 pages of e-mails that tend to show efforts by Phister to manipulate
25 prices of Serapatrin.
- 26 • The disputed request for production (Request No. 34, *supra*) is sufficiently
27 narrow and specific to overcome any objection that it is vague or overbroad.
- 28 • The amount of money at stake is significant. SavAll is suing for its lost
29 profits, which it estimates to be in excess of \$120 million over the past five

- 1 years, to be trebled if SavAll can prove the statutory violation.
- 2 • The effect of the court's ultimately granting or denying an injunction will affect
 - 3 the public interest, in that it could affect the price the public will have to pay
 - 4 for this important drug.
 - 5 • Both parties, SavAll and Phister, are large multi-national corporations with
 - 6 substantial resources.
 - 7 • SavAll already has in its possession a number of printed-out e-mails that tend
 - 8 to bear on its allegations of wrongdoing by Phister. Although it cannot be
 - 9 ascertained at this stage whether the sources SavAll seeks to discover
 - 10 contain a "gold mine" of information that might support SavAll's case, the
 - 11 materials that SavAll has already discovered suggest that there might be
 - 12 other similar data embedded in Phister's stored data.
 - 13 • Because Phister is a drug and pharmaceuticals manufacturer, it is required
 - 14 by the Federal Food and Drug Administration to retain all communications
 - 15 relating to its sales, marketing, and manufacturing functions for a period of
 - 16 seven years.
 - 17 • The five-year period covered by SavAll's request is reasonable, given that the
 - 18 complaint alleges that to be the period of Phister's alleged misconduct toward
 - 19 SavAll.
 - 20 • Phister has designated Chester Yu, Vice President and Chief Technology
 - 21 Officer of Phister, as the "person most knowledgeable" about Phister's
 - 22 computer systems, record retention policies, and record retrieval
 - 23 methodologies.
 - 24 • LaVon Washington, an independent consultant retained by SavAll, is the
 - 25 person designated by SavAll as its "person most knowledgeable" on
 - 26 discovery of electronically stored data.

27 There is no reason to depart from the presumption that Phister must bear the cost
28 of producing all requested e-mails retrievable from as-yet unpurged hard drives that are in

1 active use. Phister has stipulated that it will do so. I will withhold all rulings on the
2 remaining issues until the parties have developed further information as prescribed below.

3 In *Zwerin v. United Merchant Bank* (Columbia Court of Appeal, 2002), the court
4 approved an approach that appears suited as the mechanism for resolving the issues
5 presented in this case.

6 Accordingly, I make the following ORDER:

7 1. Phister shall produce at its own expense all requested e-mails retrievable
8 from as-yet unpurged hard drives that are in active use.

9 2. The parties shall develop a factual record based on *Zwerin's* analysis to the
10 extent applicable and file supplemental briefs arguing in support of their positions. The
11 most expedient means of developing such a record would be for the parties to take the
12 depositions of each other's "person most knowledgeable," but I leave it to the parties to
13 make that determination.

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16 Date: June 16, 2006

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Felicia Moreno
Superior Court Discovery Commissioner

1 **A:** Yes. It's been generally the same for about 10 years, and it works this way. We "back
2 up" all of our computer transactions and communications at the end of every business day
3 just in case of an emergency. Then, every 30 days, we do a "sweep" of all the hard drives
4 in our company-wide computer system and transfer all the data to permanent storage for
5 our archives.

6 **Q:** So for 30 days, all e-mails that a particular individual staff member sends and receives
7 stay on the individual user's hard drive, and all you'd need to do is print them out, is that
8 right?

9 **A:** That's right, unless the individual deletes them for some reason.

10 **Q:** OK. Why do you do "sweep" or "purge" the hard drives every 30 days?

11 **A:** Two reasons. First, to guard against the possibility of a catastrophic systems failure
12 such as might result from power failures, computer viruses, fires, casualty losses, and so
13 forth. If need be, we'd be able to reconstruct all the data. Second, to clear old data off the
14 system and maintain the useable computer capacity we need just to conduct our business.

15 **Q:** Has it ever happened that you've had to reconstruct data from your archives?

16 **A:** Fortunately, not on any significant scale.

17 **Q:** Isn't it true that one of the reasons you have to back up your systems is that the federal
18 Food and Drug Administration requires you to retain all communications relating to sales,
19 marketing, and manufacturing functions for 7 years?

20 **A:** Yeah, that's right. But we don't segregate that stuff from all the other backed up data.
21 We've never been called on by the FDA to retrieve such communications, so I don't know
22 what we'd do if we needed to.

23 **Q:** What mediums do you use to preserve and store the archived materials, and how far
24 back do you save them?

25 **A:** We actually still have all the archives for the past 15 years that I know of – they're all
26 stored in an offsite fireproof vault. It costs virtually nothing to store the disks and tapes, so
27 we just keep them rather than try to sort through them. As far as the actual storage
28 mediums are concerned, those have changed over the years along with advancements in
29 computer science. Of course, for 30 days, before we do our monthly "sweep" the data

1 remain on the individual users' computer hard drives, so that's one storage medium. In
2 the early days, we used ordinary recording tapes. Then we switched to compact disks,
3 then to offsite hard drives. It just depended on the degree of sophistication of our system
4 and capabilities and what business programs we were licensed to use at any given time.

5 **Q:** What about in the past 5 years?

6 **A:** I'm sure we've used some of each storage medium. For the past year, we've been
7 using the latest SoftPlan Office operating systems and storing our backups on offsite hard
8 drives. Before that – let me see. I'd say that during 2004 and 2005 we used mainly
9 compact disks – CDs - and during 2002 and 2003 we used tapes.

10 **Q:** Let's take them one at a time. Is there a single offsite hard drive that contains all the
11 backup data for 2006 and, if not, how many are there?

12 **A:** Oh, no. There are hundreds of them. When one fills up, we remove it and replace it
13 with another and store the filled up ones.

14 **Q:** How about the CDs Phister used in 2004 and 2005? How many of those are there?

15 **A:** I'd have to say thousands – they don't hold as much data as the hard drives we're now
16 using.

17 **Q:** And how many tapes that you used in 2002 and 2003 are there?

18 **A:** Again, I'd have to say thousands.

19 **Q:** Now, you've said that you've never segregated the stored data. What do you mean
20 by that?

21 **A:** I mean that any given storage device in the archives will contain an unsegregated
22 mass of data – e-mails, letters, accounting reports, marketing and sales reports, business
23 plans, and any other kind of business documents you can think of randomly recorded on
24 the storage medium.

25 **Q:** Would I be correct in assuming that there are computer programs that will allow you to
26 search each of the storage mediums by document type and content and retrieve only the
27 e-mails that deal with matters relating to the pricing of Serapatrin?

1 **A:** It would be a lot of work but *possible* to do that with the stored hard drives we've been
2 using in the past year, but I have serious doubts that we could do it with any of the earlier
3 storage mediums – at least, not in-house.

4 **Q:** Please explain that.

5 **A:** Well, for the past year, all the data we've stored was initially produced on programs
6 that are compatible with our current e-mail system and the SoftPlan system. So, it would
7 be *possible* to run and sort the data and pull out the e-mails.

8 **Q:** Why do you put the emphasis on the word *possible*?

9 **A:** Because it would be a tremendous amount of work and extremely expensive. We don't
10 have the spare personnel it would require, and if we assigned existing staff to do it we
11 wouldn't be able to get our normal work done. We'd have to hire extra people. Also, it
12 would tie up computer capacity that we need for everyday business matters.

13 **Q:** Have you tried to figure out what it would cost to do this?

14 **A:** Yes. It's hard to estimate it with any certainty, but just to retrieve the e-mail data you
15 want from the hundreds of hard drives we have, assuming everything went smoothly, would
16 take about 1500 employee-hours. At an average of \$25 an hour, which is about what
17 qualified people would have to be paid, that would be \$37,500. Then, we'd have to print
18 them out or transfer them to CDs, have someone read them all to make sure they're
19 responsive to your request and sort out any confidential or privileged data – maybe another
20 \$15,000, for a total of just over \$50,000. I suppose we could get a better idea of time and
21 cost if we ran a sample with a few hard drives and extrapolated from there.

22 **Q:** OK. Couldn't you do the same thing with the CDs and tapes from the earlier years?

23 **A:** Probably not. The farther back in time we go, the less likely it is that we have the
24 capability of even being able to read the data. What I mean by that is that we've changed
25 the computer equipment and the software programs that were in use when the data were
26 initially recorded. We'd have to reacquire the equipment and programs – if that's even
27 possible anymore – to be able to read and retrieve the data.

28 **Q:** Have you made any estimate of what that would cost?

1 **A:** That's *really* hard to do. As to the CDs we used in 2004 and 2005, the equipment and
2 software programs are probably still available on the market. I suppose we could lease the
3 equipment and renew our licenses to the software programs. The rough cost of that would
4 be about \$25,000 a month, and it would probably take about 6 months -- \$150,000, plus
5 about \$50,000 in additional personnel costs to do the work. So, for those CDs, a total of
6 about \$200,000. I suppose we could outsource it and have an outside specialist do the
7 work, but, even at that, we'd have to supervise and review the production of the materials,
8 probably at a total cost of \$150,000 to \$175,000. It's cheaper than doing it in-house, but
9 we have to worry about losing control of the process and the danger of disclosing
10 confidential business information. That's a major concern of ours, so I don't think we'd be
11 willing to just turn the materials over without subjecting them to a careful review before we
12 produce them to SavAll.

13 **Q:** What about the tapes from the earlier years?

14 **A:** That would be just about impossible for us to do because I don't think we could
15 replicate the equipment and programs necessary to read and retrieve the data. We'd have
16 to outsource that to outside contractors who specialize in such work. I've gotten a very
17 rough estimate from an outside contractor – he gave me the figure of \$250,000 to read,
18 sort, and reproduce the relevant information.

19 So, adding it all up, it would cost somewhere in the neighborhood of \$500,000 to do what
20 you're asking us to do. And, what makes that hard to swallow is that there probably isn't
21 much to be found. I mean, Phister hasn't tried to fix prices like SavAll has accused us of
22 doing, so you're not going to find much.

23 **Q:** Well, to defend this lawsuit, you're going to have to do exactly what we're asking you
24 to do – go through all the data and prove that you haven't fixed prices. Isn't that right?

25 **A:** I don't think so. It's not our job to prove the negative. It's *your* job to prove it, so, as
26 far as we're concerned, we don't need to go through any of the data for Phister's benefit.
27 Although I guess it would *marginally* help Phister in defending the case if we were to search
28 the data and find that there were no responsive e-mails. But we have absolutely no current
29 *business* need for the data.

1 **MR. MORA:** No further questions.

2 **END OF DEPOSITION**

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28 **EXCERPT OF TRANSCRIPT OF DEPOSITION OF LAVON WASHINGTON**

29 * * *

1 **MS. LAUREN LATHROP [Attorney for Defendant Phister Pharmaceuticals Corp.]:**

2 Mr. Washington, can you please explain the capacity in which you've been retained by
3 SavAll Drugstores, Inc. ("SavAll") in this lawsuit?

4 **LAVON WASHINGTON:** Yes. I am the principal owner of a consulting firm called
5 Innovative Computer Solutions. We specialize in retrieval and reproduction of electronically
6 stored data. SavAll has retained my firm to assist it in pretrial discovery in its suit against
7 Phister.

8 **Q:** Are there companies other than yours that do that kind of work?

9 **A:** Oh, yes. We have lots of competition.

10 **Q:** You were present during the deposition of Chester Yu, Phister's Chief Technology
11 Officer, weren't you, and you have read the transcript of his deposition, haven't you?

12 **A:** Yes.

13 **Q:** Do you understand Mr. Yu's testimony to the effect that Phister has experienced
14 successive changes in the computer equipment, software programs, and data storage
15 mediums it has utilized over the years?

16 **A:** Yes. What he said is fairly typical of the transitions the business community has gone
17 through in recent years. Computer science has changed at an accelerated pace, and it's
18 likely to continue.

19 **Q:** You agree, don't you, that the task of identifying and reproducing for the past 5 years
20 the e-mails that SavAll has requested is virtually impossible?

21 **A:** No, not at all. It won't be easy, but it is certainly technologically possible. That's what
22 my company does. We do it all the time. I agree that it gets more difficult the farther back
23 in time you go. But, as to Phister's most recent data, it's relatively easy.

24 **Q:** What do you mean, "Phister's most recent data?"

25 **A:** There are two categories of recent data. First, there are the e-mails that haven't yet
26 been transferred to permanent storage and are still on the active hard drives of Phister's
27 system. That is, the accumulated e-mails for the last 30 days since the last general
28 archival back up. Those can just be downloaded and printed from existing active files – just

1 like you'd look at your e-mails on your home personal computer. Let's call that "category
2 one."
3 The second category – let's call it "category two" - of recent data are the data Phister has
4 transferred to the offsite hard drives in the past year. Phister has all the equipment and
5 software necessary to read, sort, and pull out the relevant e-mails. So it's just a matter of
6 assigning employees to do the job – just like you'd have them go through paper files.
7 **Q:** You agree, don't you, that even that would be time-consuming and costly and that Mr.
8 Yu's estimate of about \$50,000 is about right, maybe even conservative?
9 **A:** Well, using Mr. Yu's assumptions about the volume of materials and the employee
10 hours required, I believe \$37,500 for the retrieval work is a bit high, but not by much. The
11 only part of it that I can't evaluate is the \$15,000 he says it would cost to review the
12 materials for privileged and confidential information.
13 **Q:** What about the materials for the earlier years?
14 **A:** Well, they belong in a third category – "category three."
15 **Q:** Do you agree with Mr. Yu's estimates regarding category three?
16 **A:** He's correct about it being harder to do. Based on what I know so far, I think I could
17 do the CDs for about \$75,000 and the earlier tapes for about \$100,000. I have the people
18 who are trained to do it and access to the obsolete equipment and software programs.
19 **Q:** So, overall, you think the job could be done for, say, \$200,000 to \$225,000?
20 **A:** That's right. In fact, I think it would be cheaper for me to do it than if Phister went out
21 and hired its own contractor.
22 **Q:** Why is that?
23 **A:** Because I've been working with SavAll on the problem, and I've already got a head
24 start. Any other contractor would have to go back to square one and incur startup costs
25 that I've already put behind me.
26 **Q:** All right. How would you handle the problem of privileged and confidential information?
27 I mean, if you're working for SavAll, you'd be in a conflict situation, wouldn't you?

1 **A:** I guess so, but if I were ordered by the court or there were an agreement of the parties
2 not to turn over the materials to SavAll until they'd been reviewed and redacted by Phister,
3 I'd abide by that.
4 **Q:** How long would it take you to complete the work?
5 **A:** Hard to say. Assuming that Phister took care of the recent data in-house and turned
6 over all the other archives to me, I could turn it around in about 3 months. That also
7 assumes that Phister did its review for privileged and confidential data promptly. It might
8 help to predict this more accurately if whoever did the job could do some trial runs on
9 limited samples of each of the different kinds of storage mediums.
10 **Q:** What would that accomplish?
11 **A:** Two things, really. First, it would give you a chance to test the equipment and software
12 to make sure it works. Second, it would allow Phister to extrapolate from the sample and
13 get an idea of the ultimate volume of e-mails that would come out of it.
14 **Q:** How much would that cost?
15 **A:** It depends on how large a sample we were instructed to run. If we took a month's
16 worth of the archives for each of the types of storage mediums, I'd guess we could do the
17 sampling for \$25,000 to \$30,000.
18 **MS. LATHROP:** No further questions.
19 **END OF DEPOSITION**
20 _____

**TUESDAY AFTERNOON
JULY 25, 2006**

**California
Bar
Examination**

**Performance Test A
LIBRARY**

SAVALL DRUGSTORES, INC. v. PHISTER PHARMACEUTICALS CORP.

LIBRARY

Zwerin v. United Merchant Bank (Columbia Court of Appeal, 2002)..... 1

Baldocchi v. Orion Films, Inc. (Superior Court of Columbia, 2004)..... 8

Zwerin v. United Merchant Bank
Columbia Court of Appeal (2002)

We accept this interlocutory appeal from a discovery Order issued by Commissioner Marrit Schein, and we endorse what we believe is a good model for resolving the increasingly common pretrial discovery disputes involving the burdens of retrieving and producing electronically stored data.

Laura Zwerin is suing United Merchant Bank ("UMB") for gender discrimination, harassment over a protracted period of time, and retaliation under the Columbia Civil Rights Act. Her case has *prima facie* merit, and, if she prevails, her damages may be substantial. She has come into possession of a number of e-mails that tend to show she was terminated from her position as Senior Vice President/Asian Equities Sales Department because she filed a complaint of gender discrimination. She contends that additional key evidence is located in various e-mails exchanged among UMB employees and that those e-mails now exist only in backup tapes and other archived media. Zwerin moved to compel UMB to produce all such e-mails at its own expense. UMB objected, asserting that compliance with Zwerin's motion would cost approximately \$175,000, exclusive of attorney time, and moved for a protective order.

In June 2002, Zwerin served upon UMB a document request demanding that UMB produce "all documents, including without limitation electronic or computerized compilations, concerning any communications by or between UMB employees relating to Plaintiff." UMB produced about 100 pages of printed e-mails and refused to search for or produce any others on the ground that it would be unduly burdensome for it to have to resort to electronically stored archival data. Zwerin deposed Alan Benny, who, as UMB's expert, testified as to UMB's e-mail backup protocols and the cost of restoring and retrieving the relevant data.

In the first instance, the parties agreed that e-mail was an important means of communication at UMB during the relevant time period of 1999 through 2001. Each salesperson in the Asian Equities group sent and received approximately 200 e-mails a day. Given this volume, and, because the Securities and Exchange Commission regulations required UMB to preserve such communications for three years, UMB implemented an elaborate e-mail backup and preservation system. In particular, UMB backed up its e-mails in two distinct ways: on backup tapes and on compact disks.

The Tapes: Using an automated backup program, UMB routinely backed up its *internal* e-mail traffic on tapes at various intervals, the monthly backup tapes being the ones that were preserved for three years. According to Benny's testimony, there are 94 extant backup tapes.

To restore e-mails stored on the tapes requires a lengthy and elaborate process, each tape requiring about five days to restore. It could be done faster by an outside vendor specializing in data retrieval, but the cost would be commensurately greater.

The Compact Disks: Certain e-mails to and from outside "registered traders" in Asian securities are automatically stored and archived onto a series of compact disks ("CDs"). UMB has retained all the CDs since the system was put into place in mid-1998.

These CDs are easily searchable, and a person with the proper credentials can simply log into the system, search for e-mails using key words (e.g., "Laura" or "Zwerin") and isolate and reproduce responsive e-mails.

Paralleling the federal standards, the discovery processes articulated in the Columbia Rules of Civil Procedure, particularly as applicable here, in Rule 26, are intended to allow the parties to obtain *the fullest possible knowledge of the issues and facts* before trial. Consistent with this approach, Rule 26(b)(1) provides that the parties may obtain

by discovery “*any matter*, not privileged, that is *relevant to the claim or defense* of any party” in the form of “books, documents, or other tangible things,” including things preserved in electronic rather than paper form.

There is no question that Zwerin is entitled to discover the requested e-mails as long as they are relevant to her claims, which they clearly are. As noted, e-mail constituted a significant means of communication among UMB employees. UMB had admittedly not searched the 94 backup tapes it possesses. Zwerin herself came into possession, other than by discovery from UMB, of over 100 pages of e-mails, several of which bear directly on her claims. These two facts strongly suggest that there are relevant e-mails that reside on UMB’s backup media.

There are, of course, limitations. Rule 26(b)(2) imposes a general limitation on the frequency or extent of discovery. This so-called “proportionality test” confers upon the court broad discretion to restrict discovery that it deems unduly burdensome, cumulative, duplicative, or outweighed by the burden or expense in light of the nature of the litigation.

The usual presumption is that the responding party must bear the expense of complying with the discovery requests. However, Rule 26(c) allows a court to grant protective orders to protect the responding party from undue burden or expense, including orders conditioning discovery on the requesting party’s payment of the costs of discovery.

Any principled approach to the question whether discovery costs should be shifted to the requesting party when it comes to producing electronic evidence must respect the usual presumption that the costs must be borne by the responding party. Electronic evidence is no less discoverable than paper evidence. As large companies increasingly

move to entirely paper-free environments, any approach to discovery that *routinely* departs from the usual presumption will often cripple the ability of plaintiffs to obtain the evidence. Thus, cost shifting should be considered only when electronic discovery imposes a truly undue burden or expense on the responding party.

The case at bar is a perfect illustration of the range of accessibility of electronic data. As explained, UMB maintains e-mail files in three forms: (1) active user e-mail; (2) archived e-mails on compact disks; and (3) backup data stored on tapes. UMB’s active user e-mails and those stored on CDs are easily accessible. The 94 available tapes fall into the backup tape category and would require a costly and time-consuming process to search and isolate the documents for production pursuant to Zwerin’s request.

Whether production of electronic documents is unduly burdensome or expensive turns primarily on whether they are maintained in an *accessible or inaccessible* format, a distinction that corresponds directly to the expense of production. In turn, the question of accessibility or inaccessibility turns largely on the media on which the data are stored.

Deciding disputes regarding the scope and cost of discovery of electronic data requires a two-step approach:

First, it is necessary to understand thoroughly the responding party’s computer system, both with respect to the active and stored data. For data that are kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of production. A court should consider shifting *only* when electronic data are relatively inaccessible, such as in backup tapes or obsolete or other very difficult-to-search media.

Second, because the cost shifting analysis is so fact-intensive, it is necessary to determine what data may be found on inaccessible media. As we discuss below, we endorse any measure that will assist the court in evaluating the marginal utility, i.e., how likely it is that the expensive search will produce something worthwhile. Often, proceeding in small increments such as requiring the responding party to bear the expense of running small samples from different chronological parts of the archive will be enlightening on whether the responsive data are present and in what quantity.

The application of these steps is particularly complicated where electronic data are sought because otherwise discoverable evidence is often available only from storage media from which the data are expensive to retrieve.

To make the decision, we rely on a 7-factor test, weighing the factors as we discuss below.

The 7-Factor Test:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

The Seven Factors Should Not Be Weighted Equally: Whenever a court applies a multi-factor test, there is a temptation to treat the factors as a checklist, resolving the issue in favor of which column has the most check marks. But when the ultimate question on the issue of cost shifting is whether the request for production imposes an *undue burden* on the responding party, the test cannot be applied mechanically at the risk of losing sight of its purpose.

The order in which the seven factors are listed above suggests their order of importance, i.e., they should normally be weighted in descending order. The first two, and most important factors – (1) the extent to which the request is specifically tailored to discover relevant information, and (2) the availability of such information from other sources – comprise what can be called the “marginal utility analysis.” As the court observed in *McPeck v. Aschcroft*, (USDC, D. Franklin, 2001),

The more likely it is that the backup tape contains the information that is relevant to the claim or defense, the fairer it is that the responding party search at its own expense. The less likely it is, the more unjust it would be to make the responding party search at its own expense. The difference is “at the margin.”

A problem with applying the “marginal utility analysis” is that, at the inception, there is usually an insufficient factual basis for knowing to what extent the information being sought exists in the electronic storage media. Some courts have made an assumption that, unless the requesting party can show that there is a “gold mine” of information to be retrieved, the marginal utility is modest, at best, and they tend for that reason to lean heavily in favor of shifting the cost to the requesting party. However, requiring the requesting party to prove a “gold mine” is contrary to the plain language of Rule 26, which permits broad discovery of *any matter* that is *relevant*. Thus, we agree with the precept of marginal utility, but we reject the “gold mine” approach.

The second group of factors, next in importance, addresses the cost issues, i.e., how expensive will the production be and who can handle the expense? These factors include: (3) the total cost of production compared to the amount in controversy; (4) the total cost of production compared to the resources available to each party; and (5) the relative ability of each party to control costs and its incentive to do so.

The third “group” – (6) the importance of the issues at stake in the litigation – stands alone, and may not often come into play. However, where it does come into play, this factor becomes weightier.

Finally, the last factor – (7) the relative benefits to the parties of obtaining the information – is the least important because it is usually a fair assumption that the response to a discovery request is for the benefit of the requesting party. But in the unusual case, where production will also provide a tangible benefit to the responding party, that fact may weigh *against* shifting the costs.

The case is remanded to the trial court, the Superior Court, for determination of the pending production request in accordance with this opinion.

Baldocchi v. Orion Films, Inc.
Superior Court of Columbia (2004)

Plaintiff, Rina Baldocchi, sued defendant, Orion Films, Inc. (“Orion”) for gender discrimination under the Columbia Civil Rights Act. She prays for special and compensatory damages in the amount of \$100,000 and punitive damages in the amount of \$3,000,000.

In the course of discovery, she filed a sweeping request for production of documents covering a four-year period, including e-mail messages that exist only in electronic form on Orion’s computer system and in its electronically stored archives. Orion produced a substantial volume of paper documents, which it asserts is all it has in readily producible form. Orion then moved for a protective order to relieve itself of the obligation of producing the requested electronically stored documents. The basis for Orion’s motion is that the burden and expense of production far outweighs any possible benefit that Baldocchi will gain from the additional discovery. Orion further contends that, if the additional discovery is ordered, the entire cost should be shifted to plaintiff.

Orion’s computerized records system consists of three levels of accessibility: first, records stored in active files on hard drives that are in daily use and have not yet been transferred to another storage medium; second, records that have recently been transferred to storage on compact disks pursuant to Orion’s records retention policy under which active files are purged every 90 days and transferred to compact disks; and, third, records more than two years old that were transferred to a series of about 100 magnetic recording tapes at a time when Orion was using now obsolete computer and software systems. The second and third categories are archived solely for “disaster recovery” purposes, i.e., in the event of a catastrophic systems failure. Baldocchi successfully demonstrated that the discovery she seeks, although very broad, is generally relevant.

It is not uncommon to shift the expense of production of discovery to the requesting party, especially when the discovery involves electronically stored evidence that may be extremely expensive to retrieve and produce. Rule 26 of the Columbia Rules of Civil Procedure clearly gives the court broad discretion in this regard.

Discovery of data stored electronically poses new and different issues from those applicable to the discovery of traditional paper documents. The Columbia Court of Appeal, in *Zwerin v. United Merchant Bank* (2002), recently dealt with those problems and articulated a 7-factor test for doing so. We apply those factors to the present case in the order and relative weights prescribed by the court in *Zwerin*:

1. The Extent to Which the Request is Specifically Tailored to Discover Relevant Information:

The less specific the requesting party's demands, the more appropriate it is to shift the cost of production to that party. Where a party multiplies litigation costs by seeking expansive rather than targeted discovery, that party should bear the cost. Here, plaintiff's requests are broad and nebulous, and, if that were the sole determining factor, it would favor shifting the costs to her. However, as the *Zwerin* Court makes clear, the seven factors are to be taken as a whole and assigned relative weights in descending order.

2. The Availability of Such Information From Other Sources: Some cases that have denied discovery of electronic evidence or have shifted costs to the requesting party have done so because equivalent information either has already been made available or is accessible in a different format at less expense.

Factors 1 and 2 go hand in hand. They can be best applied using the concept of "marginal utility" articulated in *McPeck v. Ashcroft*, (USDC, D. Franklin, 2001), under which the inquiry is how likely it is that a computerized search of the files will produce relevant information. Here, plaintiff argues that there is a high enough probability that a

broad search of the defendant's e-mails will produce relevant information that the search should not be precluded altogether.

If the plaintiff can show that it is likely that the electronic medium contains certain targeted information and can demonstrate with reasonable certainty that the information is not otherwise readily available, then she has crossed over the margin into the realm where it is just to require the responding party to bear the expense of producing it. On the other hand, if plaintiff's showing is too broad or uncertain or the responding party can show that the information is readily available elsewhere, then plaintiff's request falls below the margin and it would be unjust to require the responding party to bear the expense.

In the instant case, there has been no showing that the electronic records plaintiff seeks from defendant are available other than by a search of defendant's hard drives and backup media. Defendant's representations that it has produced all there is to be found is speculative because defendant has not conducted a search of the electronic files. However, neither has plaintiff shown any reasonable likelihood that the information she seeks can be found on the electronic media to any extent that would make an expensive search of those media worthwhile. Part of the problem is that plaintiff's discovery requests are so broad and sweeping that it is not possible to tell whether a targeted search of the data will produce what she seeks.

In light of these conclusions, it seems just to shift to plaintiff the cost of at least the initial, preliminary searches of the storage CDs and tapes. Of course, the current, unexpurgated data that remain on Orion's active files must be produced at Orion's cost.

The next three factors address the cost issues and are to be considered together.

3. The Total Cost of Production, Compared to the Amount in Controversy: This factor deals with the relativity between the dollar value of what plaintiff is attempting to

recover and what it will cost to produce the information. There is no bright-line. If the cost is not extraordinary or out of line with what a responding litigant can expect in the ordinary course of litigation, there is no justification for departing from the presumption that the responding party must bear the cost irrespective of the relationship between the cost and the amount in controversy. However, if the amount of plaintiff's alleged damages is small and the cost of extracting and producing the information is relatively large, then it makes little economic sense to require a defendant to incur a huge expense when the ultimate economic benefit is relatively small. In the present case, we know that the plaintiff's prayer exceeds \$3,000,000, which is a substantial sum. Plaintiff projects that the total cost of production would exceed \$1,000,000, a substantial sum by any standard. Defendant's estimate is \$150,000. The magnitude of this expense in relation to the most special and compensatory damages being sought by plaintiff militates in favor of shifting the cost of production to defendant.

4. The Total Cost of Production, Compared to the Resources Available to Each Party: Plaintiff proceeds as an individual against an established major film studio. Although the record does not reflect the extent of each party's financial resources, we can assume that this is not a situation where two functioning, successful business entities are sparring with one another such that this factor would be a wash, or, conversely, where a wealthy plaintiff is pursuing an impoverished defendant. Here, it is safe to assume that defendant can afford whatever the cost might be better than plaintiff. Standing alone, this factor favors shifting the cost to defendant.

5. The Relative Ability of Each Party to Control Costs and Its Incentive to Do So: The plaintiff probably has a greater ability, i.e., being sensitive to the cost, plaintiff will be able to calibrate her discovery based on information obtained in the initial sampling (*see infra*). If she is required to pay, she will be in the best position to decide whether further searches will be justified to limit the costs of discovery of the e-mails to a much greater extent than defendant. Of course, this factor alone does not prevent later

shifting of the cost back to defendant if the results of the initial search warrant it. But, as to the initial sampling, this consideration militates slightly in favor of cost shifting.

6. The Importance of the Issues At Stake in the Litigation: This factor does not always come into play. In this case, the issue is a straightforward one of whether there has been gender discrimination as to plaintiff, an individual. Although, in a broader context, gender discrimination is an important public policy issue, this case proceeds in the context of well-settled law and will affect only Ms. Baldocchi's interests. It is not an action that will result, for example, in vindication of a broader public interest that would be stifled if plaintiff were prevented by cost considerations from conducting discovery that would expose a widespread wrong. Thus, in this case, this factor is not particularly weighty and tends in favor of shifting the cost to plaintiff, but in the appropriate case it could be extremely important to prevent cost shifting.

7. The Relative Benefits to the Parties of Obtaining the Information: If a party maintains electronic data for the purpose of utilizing it in connection with current activities, it may be expected to respond to discovery requests at its own expense. Under such circumstances, the guiding principle is that information that is stored, used, or transmitted in new forms (e.g., electronically) should be available through discovery with the same openness as traditional forms (e.g., paper). A party that expects to be able to access information for business purposes will be obligated to produce that same information in discovery.

Conversely, a party that happens to retain vestigial data for no current business purpose but only for retrieval in case of an emergency or simply because it has neglected to discard the data should not be put to the expense of producing it. Defendant's backup tapes clearly fall into this category. There is no evidence that defendant itself ever searches these tapes for information or even has the means of doing so. Cost shifting is therefore warranted with respect to the backup tapes. Just as

a party would not be required to sort through its trash to resurrect discarded paper documents, so it should not be obligated to pay the cost of retrieving deleted e-mails.

Where the responding party itself benefits from the production, there is less rationale for shifting costs to the requested party. For example, a collateral benefit could result for the responding party's business such as the creation of a computer search program that would also be useful in its regular business activities. Second, the responding party might benefit in the litigation from the review of its own records. Third, the search could create a universe of data that *either* side could use to support its case.

On balance, the relevant factors tip slightly in favor of shifting the cost to plaintiff of conducting at least a preliminary search for the e-mails in this case. The protocols to be followed will be addressed below.

Privileged and Confidential Documents: Beyond the cost of isolating and producing the required e-mails, defendant argues that the time and expense of reviewing these documents for privilege and confidentiality would be enormous. Defendant estimates that it would take over six months of work by attorneys and paralegals and the cost would be about \$75,000.

However, the sanctity of defendant's documents can be adequately preserved at little cost by enforcement of a protective order requiring that all documents produced during this litigation be used solely for purposes of the litigation and that, at the end of the case, the documents all be returned to Orion. Moreover, as suggested in the protocol discussed below, defendant's interests can be protected by making provision that the e-mails be for "attorneys' eyes only" during discovery and that disclosure of attorney-client documents, whether intentional or inadvertent, shall not be deemed a waiver of the privilege.

Even with such protections, however, disclosure of privileged documents cannot be compelled if defendant objects. Thus, notwithstanding the recommended precautions, if defendant still chooses to conduct a complete review of the e-mails prior to production, defendant shall do so at its own expense.

The Protocol to Be Followed: The parties shall comply with the following protocol. It is a guideline only and may be modified by agreement of the parties as they proceed through discovery.

Initially, plaintiff shall designate one or more experts who shall be responsible for isolating the defendant's e-mails and preparing them for review. The experts shall be bound by the terms of this order as well as any confidentiality order entered in the case. With the assistance and cooperation of the defendant's technical personnel, the plaintiff's experts shall then obtain a log of all hard drive and backup tapes containing e-mails. The plaintiff may choose to review a sample of hard drives and tapes in lieu of all such devices.

Plaintiff's counsel shall formulate a search procedure for identifying responsive e-mails and shall notify defendant's counsel of the procedure chosen, including any specific word searches.

A very sensible protocol that was suggested by plaintiff but rejected by defendant was that the parties mutually select a limited representative sample of the hard drives and backup tapes and that defendant, at its own expense, develop the search programs, isolate the responsive e-mails, and produce them to plaintiff. The object would have been to gauge the nature, incidence, and frequency of responsive e-mails and perhaps, by extrapolation, limit the scope of the search. Defendant refused to go along because, under the proposal, it would have had to pay the cost of the sampling. Plaintiff shall develop such sampling protocol in her suggested protocol if she believes it will be helpful. It shall be conducted at plaintiff's expense.

Once an appropriate search method has been established, it shall be implemented by plaintiff's expert. Plaintiff's counsel may then review the documents elicited by the search on an "attorney's eyes only" basis. Once plaintiff's counsel have identified the e-mails they consider material to the litigation, they shall print out and provide those documents to defendant's counsel in hard copy, numbered and logged for later verification. At this point, plaintiff shall return all hard drives and tapes to defendant. Plaintiff shall bear all costs associated with the production described thus far.

Defendant's counsel shall then have the opportunity to review, at defendant's expense, the documents for claims of privilege and confidentiality. Documents identified as being privileged or confidential shall be retained for attorneys' eyes only until any dispute has been resolved. No waiver of privilege or confidentiality shall result from this procedure. If defendant wishes to delete from the hard drives and tapes the documents that are ultimately determined to be confidential, defendant shall do so at its own expense and shall, also at its own expense, furnish plaintiff with copies of the hard drives and tapes so redacted.

Once the nature, incidence, and frequency of the responsive e-mails are reliably estimated, the parties shall return to this court for further direction on how to proceed and which party shall bear the cost from that point forward.

Conclusion: Defendant's motion for relief is denied, and the parties are ordered to proceed in accordance herewith.