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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, and THE PORT OF SEATTLE, Respondents.	PCHB No. 01-160 PORT OF SEATTLE'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND RESPONSE TO SUBPOENAS DUCES TECUM

I. RELIEF SOUGHT

The Port of Seattle ("Port"), by and through its counsel of record, moves the Board for an order:

1. Compelling the Airport Communities Coalition ("ACC") to produce all responsive documents sought by the Port in its requests for production, and to comply with the subpoenas duces tecum that the Port has issued with respect to ACC's expert witnesses;

2. Continuing the depositions of all ACC expert witnesses based on ACC's failure to produce documents so that the Port may depose ACC's witnesses in light of ACC's document production; and

3. For an order denying the submittal of any testimony from a witness for whom ACC has not produced documents and who has not been made available for deposition following production of all responsive documents.

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II. BACKGROUND FACTS

The Port propounded its first set of Interrogatories and Requests for Production on November 9, 2001. A copy of those discovery requests is attached to the Third Declaration of Steven G. Jones ("Third Jones Dec.") as Exhibit A. ACC served the Port with its responses and objections to the Port's discovery requests on December 10, 2001. A copy of ACC's objections and responses is attached to the Third Jones Dec. as Exhibit B.

In its Requests, the Port asked for "all documents relied on or reviewed to form the basis of the opinions, facts, or other testimony referenced in the preceding interrogatory" [which asked for a summary of the facts and opinions to which ACC's experts were expected to testify]. *See* Port's Request for Production No. 2, Third Jones Dec., Ex. A at 8.

In its responses, ACC refused to produce, or even identify, a single document. ACC explained its refusal as follows:

> The documents relied upon or reviewed by ACC's experts are referenced in the comments and declarations of ACC's experts and are in the public domain. *See* the documents identified in response to Interrogatory No. 4, which have already been provided to the Port. The Port continues to revise and release information relating to the Third Runway Project. ACC's experts are continuing to review documents. As a result, the facts and opinions to which ACC's experts are expected to testify continue to be developed.

Third Jones Dec., Ex. B at 12.

Prior to receipt of ACC's objections and responses, counsel for the Port, Steven Jones, telephoned counsel for ACC, Michael Witek, to inquire if it was possible to negotiate an agreed scope of discovery regarding the production of documents relating to experts. Third Jones Dec., ¶3. Mr. Witek responded to this inquiry with a request that the Port defer until after ACC had served its objections and responses to the Port's discovery requests, as he believed that those responses might form a basis a stipulation regarding document production with respect to experts. *Id.*

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Accordingly, after ACC served its objections and responses to the Port's discovery requests on December 10, a conference call was scheduled to attempt to negotiate a mutually agreeable scope of discovery with respect to documents. That call took place on December 12, 2001. Steven Jones, Roger Pearce and Gillis Reavis participated in the call on behalf of the Port. Michael Witek and Kevin Stock participated on behalf of the ACC. Third Jones Dec., ¶4.

During that call, ACC advanced a position that would have significantly limited the range of document production. After some negotiation, the parties reached a tentative agreement on this issue and the Port agreed to prepare a proposed stipulation that reflected the parties' negotiations. The Port transmitted a proposed stipulation to ACC for its review on December 14, 2001. Third Jones Dec., ¶5. Following transmittal of the stipulation, counsel for the Port made repeated inquiries regarding ACC's response to the stipulation so that it could be finalized and documents produced in anticipation of the currently scheduled depositions. In response to those inquiries, ACC's counsel stated that the stipulation was under review by ACC and a response would be forthcoming as soon as all of ACC's lawyers had submitted their comments. Third Jones Dec., ¶6.

Finally, on January 7, 2002, more than three weeks after the Port submitted the stipulation to ACC, ACC responded to the Port's stipulation. In the Port's view, ACC so significantly revised the stipulation that it no longer reflects the original agreement struck during the December 12 conference call. Third Jones Dec., ¶7.

Meanwhile, ACC has yet to produce a *single* document in response to the Port's discovery requests. It is now two full months since those requests were propounded, and ACC has not produced *any* material in response to the Port's requests. Depositions of ACC's expert witnesses will commence next week and will continue through the discovery cutoff, and the Port has not had the benefit of any documents from ACC in preparing for those depositions.

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III. EVIDENCE RELIED UPON

The Port relies upon CR 26(b)(5), CR 26(b)(1), CR 33, 34 and 37, the Third Declaration of Steven G. Jones and the documents attached to that declaration, and the pleadings and files in this case.

IV. ARGUMENT

A. ACC Is Obligated Under CR 26(b)(5) to Produce All Documents That Have Been Reviewed by its Expert Witnesses.

Washington Civil Rules 33 and 34[1] require parties responding to interrogatories and requests for production of documents to do so within 30 days of service of those discovery requests. These rules are particularly important in light of CR 26(b)(5)'s requirements that a party provide appropriate discovery regarding its expert witnesses. The Port served its first set of interrogatories and requests for production of documents on ACC on November 9, 2001. Responsive documents were due for production along with ACC's objections and responses on December 10, 2001.

But instead of producing any documents with respect to its testifying experts, ACC asserted that all such documents were in the public domain. This position is entirely at odds with the provisions of CR 26(b)(5), which requires ACC to produce all information regarding its testifying experts as would be discoverable under CR 26(b)(1), including all information "reasonably calculated to lead to the discovery of admissible evidence."

ACC has been stonewalling the Port for the better part of the past month, stating that it was working on a stipulation for document discovery. Meanwhile, time for the completion of discovery has been slipping past, and the Port has been forced to prepare for the depositions of ACC's expert witnesses without the benefit of any document production whatsoever. Even after ACC is compelled to produce documents, it will be necessary to continue almost all of the

[1] Copies of CRs 26, 33 and 34 are attached for the Board's reference to this motion.

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depositions of ACC's witnesses so that questions regarding those expert's documents can be asked by the Port – because those documents have yet to be produced by ACC. Now that the Board has entered its order staying the §401 Certification, the Port can only assume that ACC's stonewalling tactics are deliberately calculated to delay the March 18 hearing date in this action.

The Port is not seeking anything different from what ACC's own counsel has demanded. On January 4, 2002, Rachel Paschal Osborn notified counsel that, because she hadn't been able to review documents that were produced at the deposition of Kelly Whiting, she intended to inquire of Mr. Whiting regarding those documents at his continued deposition.[2] Yet in the case of ACC's experts, ACC is refusing to produce *anything* at *any time*.

In *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 686 P.2d 1102 (1984), *aff'd on other grounds*, 104 Wn.2d 613, 707 P.2d 685 (1985), then Chief Judge Durham wrote:

> The Supreme Court has noted that the aim of the liberal federal discovery rules is to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682, 78 S.Ct. 983, 986-87, 2 L.Ed.2d 1077 (1958). The availability of liberal discovery means that civil trials no longer need be carried on in the dark. The way is now clear ... for the parties to obtain the fullest possible knowledge of the issues and facts before trial. *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 388-89, 91 L.Ed. 451 (1947).

Gammon, 38 Wn. App. at 280. In *Gammon*, the Court of Appeals sanctioned a party that failed to disclose pertinent information pertaining to the safety record of a certain type of equipment, indicating that a unilateral decision by a party on the relevance of data within the scope of a discovery request was inappropriate.

This is precisely the decision that ACC has made – unilaterally deciding that none of the documents its experts have relied upon, no draft declarations, no exchanges of information between experts or between experts and counsel is discoverable. The courts have made clear that

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[2] Consistent with the Board's Prehearing Order, because Mr. Whiting was to review the Port's revised Low Flow Mitigation Plan, Mr. Whiting's deposition was to be continued solely with respect to that issue in February 2002. Ms. Osborn has asserted that she will be expanding the scope of that continued deposition, based on her review of Mr. Whiting's documents.

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such a position is untenable, particularly when advanced with respect to designated testifying expert witnesses. *Boring v. Keller*, 97 F.R.D. 404 (D. Colo. 1983) (tangible materials provided to expert by counsel are discoverable if they form the basis for an opinion); *William Penn Life Assurance Co. v. Brown Transfer and Storage Co.*, 141 F.R.D. 142 (W.D. Mo. 1990) (expert witness compelled to answer deposition questions regarding information orally provided the expert by counsel).

When the court in *Boring* was presented with this same issue, it stated that, "If [a party] is prevented from examining the documents" [which had been supplied to experts], "[that party] will not have the opportunity to impeach the expert witness at cross-examination. The documents will remain undiscoverable, and this will frustrate the purpose of F.R. Civ. P. 26(b)(4)." 97 F.R.D. at 408.

In the case of *In re Firestorm*, Justice Talmadge wrote a separate opinion specifically to emphasize Washington's long history of "condemning gamesmanship in civil discovery." *In re Firestorm*, 129 Wn.2d 130, 150-51, 916 P.2d 411 (1996) (Talmadge, J., concurring). Justice Talmadge summarized the import of the Washington cases as follows:

> The policy of these cases is plain. Washington courts will not tolerate efforts by counsel to hide behind the letter of discovery rules while ignoring their spirit. The purpose of civil discovery is to disclose to the opposing party all information that is relevant, potentially relevant or reasonably calculated to lead to discovery of admissible evidence in the trial at hand. CR 26(b)(1). Counsel and parties may not unilaterally decide to withhold properly requested information on the ground it is not relevant or admissible.

In re Firestorm, 129 Wn.2d at 152 (Talmadge, J., concurring).

ACC's refusal to produce documents so as to make it difficult or impossible to depose expert witnesses is consistent with ACC's pattern since the Board's entry of the stay of taking any step likely to delay the hearing on the merits in this matter. At the first pre-hearing conference, ACC's counsel stated that it was critical that the hearing go forward in March 2002. Since the stay has been granted, ACC has taken positions designed to assure that the hearing cannot take

place as scheduled. The Board should not countenance such action, particularly when the Civil Rules and the decisions construing those rules are so clear in condemning ACC's conduct.

V. CONCLUSION

In response to the Port's discovery requests, ACC has refused to produce any documents whatsoever. CR 26(b)(1), (5), CR 33 and CR 34 are specific that documents must be produced, particularly documents relied upon by designated expert witnesses in forming the bases for their conclusion. The Port asks that the Board compel ACC to comply with its discovery obligations.

Respectfully submitted this 16th day of January, 2002.

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5. DEPOSITIONS AND DISCOVERY (Rules 26–37)

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

(2) *Insurance Agreements.* A party may obtain discovery and production of: (i) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and (ii) any documents affecting coverage (such as denying coverage, extending

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coverage, or reserving rights) from or on behalf of such person to the covered person or the covered person's representative. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Structured Settlements and Awards.* In a case where a settlement or final award provides for all or part of the recovery to be paid in the future, a party entitled to such payments may obtain disclosure of the actual cost to the defendant of making such payments. This disclosure may be obtained during settlement negotiations upon written demand by a party entitled to such payments. If disclosure of cost is demanded, the defendant may withdraw the offer of a structured settlement at any time before the offer is accepted.

(4) *Trial Preparation: Materials.* Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this section, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. (ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.

(B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(5)(A)(ii) and (b)(5)(B) of this rule; and (ii) with respect to discovery obtained under subsection (b)(5)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subsection (b)(5)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) *Discovery From Treating Health Care Providers.* The party seeking discovery from a treating health care provider shall pay a reasonable fee for the reasonable time spent in responding to the discovery. If no agreement for the amount of the fee is reached in advance, absent an order to the contrary under section (c), the discovery shall occur and the health care provider or any party may later seek an order setting the amount of the fee to be paid by the party who sought the discovery. This subsection shall not apply to the provision of records under RCW 70.02 or any similar statute, nor to discovery authorized under any rules for criminal matters.

(7) *Treaties or Conventions.* If the methods of discovery provided by applicable treaty or convention are inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party may employ the discovery methods described in these rules to supplement the discovery method provided by such treaty or convention.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the

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time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that the contents of a deposition not be disclosed or be disclosed only in a designated way; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

(f) Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

(g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

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If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Use of Discovery Materials. A party filing discovery materials on order of the court or for use in a proceeding or trial shall file only those portions upon which the party relies and may file a copy in lieu of the original.

(i) Motions; Conference of Counsel Required. The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.

(j) Access to Discovery Materials Under RCW 4.24.

(1) *In General.* For purposes of this rule, "discovery materials" means depositions, answers to interrogatories, documents or electronic data produced and physically exchanged in response to requests for production, and admissions pursuant to rules 26–37.

(2) *Motion.* The motion for access to discovery materials under the provisions of RCW 4.24 shall be filed in the court that heard the action in which the discovery took place. The person seeking access shall serve a copy of the motion on every party to the action, and on nonparties if ordered by the court.

(3) *Decision.* The provisions of RCW 4.24 shall determine whether the motion for access to discovery materials should be granted.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; December 28, 1990; September 1, 1992; September 17, 1993; September 1, 1995.]

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RULE 33. INTERROGATORIES TO PARTIES

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party.

Interrogatories shall be so arranged that after each separate question there shall appear a blank space reasonably calculated to enable the answering party to place the written response. In the event the responding party either chooses to place the response on a separate page or pages or must do so in order to complete the response, the responding party shall clearly denote the number of the question to which the response relates, including the subpart thereof if applicable. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or any party may move for an order under rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under rule 26(b), and the answers may be used to the extent permitted by the Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

An interrogatory otherwise proper is not objectionable merely because the propounding party may have other access to the requested information or has the burden of proof on the subject matter of the interrogatory at trial.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; October 29, 1993.]

RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or the court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objections shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; September 1, 1997.]