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FOR THE DISTRICT OF OREGON

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IN THIS ISSUE

USING CONTENTION INTERROGATORIES IN THE DISTRICT OF OREGON [1]

By: Margaret "Gosia" Fonberg, Staff Attorney to the Honorable Thomas M. Coffin

The use of contention interrogatories–interrogatories that seek the facts, witnesses and documents supporting the factual basis for allegations in a complaint–is governed by Rule 33 of the Federal Rules of Civil Procedure. While contention interrogatories can be used effectively in a wide array of lawsuits, they are of primary importance in complex litigation. For example, the defendant in a products liability case is initially presented with little more than an allegation that a particular product was unreasonably dangerous. Interrogatories can be used to expand and elaborate such an allegation. *See, e.g. Taylor v. Fed. Dep. Ins. Corp.*, 132 F.3d 753, 762 (D.C. Cir. 1997) (explaining when a complaint is vague and conclusory, a defendant need not move for dismissal, but rather should send contention interrogatories). *In re Convergent Technologies Sec. Litig.*, 108 F.R.D. 328 (N.D. Cal. 1985), provides examples of four common contention interrogatories: (1) those that begin, "Do you contend thats . . . "; (2) those that ask for all the facts on which a contention is based, which often begin with "Describe in detail . . . "; (3) those that ask a party to take a position and then explain or defend that position with respect to how the law applies to the facts; and (4) those that ask a party to explain the legal position behind a contention. *Id*. at 332.

Despite the utility of contention interrogatories in uncovering the details of a particular claim, practitioners in the District of Oregon have many misconceptions about their use. Often, lawyers respond to contention interrogatories with objections contending that they are not permitted because they "seek a legal conclusion" or "call for the applications of law to fact." Lawyers almost always cite to Local Rule 33-1(d) in support of their objections. Although Local Rule 33-1(d) states that "[b]road general interrogatories, such as those which ask an opposing party to 'state all facts on which a contention is based' or to 'apply law to facts' are not permitted," it is a misconception that the Rule generally prohibits contention interrogatories or every interrogatory that calls for the application of law to fact. This article addresses common misconceptions about contention interrogatories in this District and clarifies other issues concerning contention interrogatories.

1. Contention Interrogatories are Permitted under the Federal Rules.

Rule 33(a)(2) specifically provides that interrogatories may relate to any matter that may be

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[1]Note from the author: This article is based in part on an article by **Kathryn Mary Pratt** in 2007 titled, "Four Things Oregon Lawyers Should Know about Contention Interrogatories." Ms. Pratt generously has allowed the use of that article for this piece.

AN ENDORSEMENT OF THE DISTRICT OF OREGON'S PRO BONO PROGRAM

By: Tim DeJong
Stoll Berne

At least eighteen firms, including mine, have agreed to participate in the District of Oregon's Pro Bono Program. I have had the opportunity to serve as the coordinator of this program for Stoll Berne for several years. There are very good reasons to do pro bono work. The litigants applying for pro bono assistance really need your help, and your participation also provides a service to the Court and our community. I hope that sharing some of my experiences will encourage others to join.

My law practice focuses on complex business and intellectual property litigation. Not exactly the type of "real life" legal issues most people face. The Pro Bono Program has given me perspective by affording me the opportunity to help individuals deal with serious legal problems that affect their daily lives. I have been exposed to areas of the law that are new to me. The cases have been challenging and rewarding. Some of these cases have given me a first-hand and eye-opening understanding of the meaning of "access to justice."

I offer two examples of the pro bono matters assigned to me. One example is probably fairly typical of most participants' experiences. I expect that the other example is very far from typical.

In the "typical" case, I was appointed to represent a homeowner facing foreclosure. I had no prior experience in this area. As a volunteer, you will likely receive cases that are outside of your expertise. Be not afraid! There is nothing like a client faced with losing the roof over his head to motivate you, and you are well equipped to learn new areas of law. Help is available when you need it. I found experienced practitioners at other firms who were happy to guide me when, for example, I needed to advise my client about the reasonableness of the lender's settlement proposals. That you are not an expert may prove to be an advantage. It is sometimes difficult to think outside the box when dealing with issues you have addressed many times. In this case I had no box to hem me in, and I believe my client benefitted from my unorthodox strategy. My client came into my office facing a looming foreclosure sale and, in the end, the foreclosure was cancelled. For perhaps forty hours of my time, I was able to keep a person in his home, and I count that among my most satisfying experiences as a lawyer.

I offer the second example to emphasize that your services provide benefits that extend beyond the immediate needs of your client. I was appointed to defend a convicted child pornographer in a civil action brought by his victim. My now former client is serving a 50-year sentence in a federal penitentiary. These are the types of cases that challenge a lawyer's commitment to the foundations of the legal system. I got off easy when I was able to negotiate a settlement. That settlement avoided much unpleasantness for all involved and very likely would have been impossible without the participation of a pro bono defense lawyer to negotiate on behalf of the prisoner. I feel that my service in this case benefitted not only my client but also the plaintiff, the plaintiff's counsel, the Court and the public.

Please consider joining the Pro Bono Panel. You can find more information on the Court's website at http://ord.uscourts.gov/en/attorneys/pro-bono-service-opportunities, or by contacting the Court's Pro Bono Panel Administrator, Nicole Munoz, at (503) 326-8014.

THE ASHMANSKAS TRIVIA BOX

An FBA tribute to the memory and humor of Magistrate Judge Donald C. Ashmanskas

What organization held regular meetings at which Judge Ash was a consistent attendee (one of the most consistent attendees) over several decades, even though he was not a member?

Answer on page 8.

USING CONTENTION INTERROGATORIES IN THE DISTRICT OF OREGON

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inquired into under Rule 26 and are not objectionable "merely because it asks for an opinion or contention that relates to fact to the application of law to fact." Fed. R. Civ. P. 33(a)(2). The Advisory Committee Notes to the 1970 Amendments to Rule 33 state that "requests for opinions or contentions that call for the application of law to fact . . . can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery" but note that "interrogatories may not extend to issues of 'pure law,' i.e. legal issues unrelated to the facts of the case." See Advisory Committee Notes of the 1970 Amendments Subdivision (b). The 1993 Amendments to Rule 33 noted that Former Rule 33 stated that an interrogatory "is not necessarily objectionable merely because an answer . . . involves an opinion or contention" and that this language seemed to "imply that the interrogatory might be objectionable merely for this reason." Thus, "Amended Rule 33(a)(2) embodies the current meaning of Rule 33 by omitting "'necessarily.'" *See* Advisory Committee Notes of the 1993 Amendments.

Numerous courts have upheld the use of contention interrogatories, so long as the interrogatories are related to the facts of the case or call for responses that contain mixed questions of law and fact. *See e.g.*, *United States v. American Airlines, Inc*., No. CV-05-4254 (CBA)(VVP), 2006 WL 2987913 at *1 (E.D.N.Y. Oct 17, 2006) (finding that an interrogatory seeking all laws and regulations plaintiff alleged that defendant had violated was permissible because "the defendant is entitled to know what normative standards set forth in laws and regulations the plaintiff will rely on to prove its case . . . the plaintiff need not opine as to all regulations that would theoretically be violated by the defendant's conduct, but only those upon which it will rely to prove its case"); *Nestle Foods Corp. v. Aetna Cas. and Sur. Co*., 135 F.R.D. 101, 111 (D.N.J. 1990) (stating that the objective of contention interrogatories is to "ferret out and narrow the issues"); *Leksi, Inc. v. Fed. Ins. Co*., 129 F.R.D. 99, 107 (D.N.J. 1989) (concluding that "[i]nterrogatories seeking to elicit what a party's contentions will be at the time of trial are not objectionable, as responses to these questions will help narrow the issues to be tried"); *Hockley v. Zent, Inc*., 89 F.R.D. 26, 31 (M.D.Pa. 1980) (finding that "there is no doubt that the federal rules allow a litigant to require an opponent to answer interrogatories asking for a delineation of legal theories so long as the question is calculated to serve a 'substantial purpose' in prosecution of the suit, such as a narrowing of issues"); *McClain v. Mack Trucks, Inc*., 85 F.R.D. 53, 59 (E.D.Pa. 1979) (stating that if a contention interrogatory "eliminates unnecessary testimony, avoids wasteful preparation, narrows the issues, leads to relevant evidence or generally expedites fair disposition of the lawsuit and serves any other substantial purpose sanctioned by discovery, the court should require response"); *Scovill Mfg. Co. v. Sunbeam Corp*., 357 F.Supp. 943, 948 (D.C. Del. 1973) (finding that an interrogatory is proper if it "might refine the actual issue of fact"). Additionally, some courts have concluded that contention interrogatories are a more appropriate discovery tool than a 30(b)(6) deposition. *See, TV Interactive Data Corp. v. Sony Corp*.,No. CV-10-475 (MEJ), 2012 WL 1413368 (N.D. Cal. April 23, 2012) (citing *Exxon Research & Eng'g Co. v. United States*, 44 Fed. Cl. 597, 601–02 (1999); *United States v. Taylor*, 166 F.R.D. 356, 362 n.7 (M.D.N.C. 1996)).

Based on the numerous decisions upholding the use of contention interrogatories, parties should not use general, blanket objections such as "seeks a legal conclusion" or "seeks application of the law to fact" in responding to contention interrogatories. In light of the clear authority allowing (and even encouraging) use of contention interrogatories as a discovery tool, judges in the District of Oregon are not likely to uphold such general objections. There are, however, issues that parties should keep in mind when drafting and/or responding to contention interrogatories such as the scope, timing, and construction of contention interrogatories.

2. Scope of Contention Interrogatories.

In discovery disputes, district courts have some discretion regarding the scope of contention interrogatories. There is no bright line rule about what is too broad when it comes to drafting contention interrogatories. Instead, "each interrogatory has to be judged in terms of its scope and in terms of the overall context of the case at the time it is asked." *Roberts v. Heim*, 130 F.R.D. 424, 427 (N.D. Cal. 1989) ("It is not difficult to discern a significant difference between an interrogatory which, for example, asks a plaintiff to 'state all facts upon which you base your contention that defendant is liable in this action' and an interrogatory which asks a plaintiff to 'state all facts upon which you base your contention that defendant was in attendance at the meeting of January 10, 1989'.The latter is a reasonable interrogatory and the former is not. The difficulty is that there is a substantial middle ground between these extremes . . . .")

It is, however, well-settled, that interrogatories that are too general and all-inclusive need not be answered. *Lucero v. Valdez*, 240 F.R.D. 591, 594 (D.N.M. 2007) (finding contention interrogatories which "systematically track all of the allegations in an opposing party's pleadings, and that ask for 'each and every fact' and application of law to fact that supports the party's allegations are an abuse of the discovery process because they are overly broad and unduly burdensome."); *Olson v. City of Bainbridge Island*, No. C08-5513RJB, 2009 WL 1770132 *4 (W.D. Wash. June 18, 2009) (upholding "overly broad"

objection to contention interrogatory which requested "all facts and all evidence" supporting a particular allegation). The District of Oregon's Local Rule 33-1(d) limits overly broad interrogatories, such as those that "ask an opposing party to 'state all facts on which a contention is based' or to 'apply law to facts . . . ." L.R. 33-1(d). In 2003, **Judge Haggerty** found that Local Rule 33-1(d)'s "prohibition against overly broad interrogatories that ask for the general application of law to fact" was not inconsistent with Federal Rule of Civil Procedure 33, which allows a party to pose "an interrogatory that calls for a factual opinion or contention relating to the facts of the case or the application of law to the facts of the case." *EEOC v. U.S. Bakery*, No. CV-03-64 HA, 2003 WL 23538023 at * 2 (Nov. 20, 2003). Judge Haggerty went on to conclude that an interrogatory asking the defendant to "[d]escribe the factual and legal basis for the third affirmative defense identified in defendant's February 17, 2003 Answer to Plaintiff's Complaint that 'the claims are barred in part or fully by applicable statute of limitations" was specific enough that it did not violate L.R. 33-1(d) and ordered defendant to respond to this interrogatory. *Id*. at *2.

In 2008, in an order citing to *EEOC v. U.S. Bakery*, **Judge Acosta** ordered the defendant to respond to plaintiff's contention interrogatories. *Kinnee v. Shack, Inc*., No. CV-07-1463-AC, 2008 WL 1995458 (D.Or. May 06, 2008). One of the interrogatories asked the defendant to "explain fully the nature of the [plaintiff's] misconduct, actions taken by defendant regarding such misconduct, and the persons with knowledge of the misconduct." *Id*. Judge Acosta reasoned that if the defendant "intends to assert that it would have terminated plaintiff's employment for her own misconduct had it known of it, thus barring or limiting her damages even if she proves her harassment or retaliation claims, then inquiry into the basis of that affirmative defense is reasonably calculated to lead to the discovery of relevant evidence." *Id*. at * 2. Thus, the interrogatory is not impermissible and is not barred by L.R. 33-1(d). The other contention interrogatories at issue sought to discover the basis for the defendant's other affirmative defenses, "specifically its sixth affirmative defense, 'Unclean Hands,' and its seventh affirmative defense 'Reasonable Care.'" *Id*. at * 3. Specifically, one interrogatory asked: "Explain each and every act known to defendant which constitutes 'unclean hands.'" *Id*. Judge Acosta concluded that this interrogatory "neither asks [defendant] to state all facts nor apply any law to any facts, as proscribed by Local Rule 33.1(d). Rather, it merely asks [defendant] to explain the basis of its affirmative defense and, therefore, is a permissible interrogatory aimed at discoverable information." *Id*. The last contention interrogatory asked the defendant to "[e]xplain each and every way in which defendant exercised reasonable care . . . ." *Id*. Judge Acosta again concluded that the request sought the defendant's basis for "asserting reasonable care as an affirmative defense" and did "not request every fact or ask [defendant] to apply law to facts." *Id*. Accordingly, Judge Acosta ordered the defendant to answer these interrogatories.

In contrast to *U.S. Bakery* and *Kinnee*, in a 2002 order in *Hudson v. City of Forest Grove*, No. CV-01-817 FR, 2002 WL 31435690 (D.Or. Jan. 2, 2002), **Judge Fry** refused to grant a motion to compel, concluding that interrogatories asking counsel for defendants to elaborate on the statements counsel made in a letter responding to a BOLI complaint were excessively broad. It is worth noting that Judge Fry refused to grant the motion at that "stage in the proceedings," so the timing might have had something to do with the motion's denial.

These three cases are the only three published orders in the District interpreting L.R. 33-1(d). Accordingly, guidance on the line between a permissible contention interrogatory and an overbroad interrogatory prohibited by L.R. 33-1(d) is sparse. It is clear, however, from *U.S. Bakery* and *Kinnee* that a party must answer interrogatories that explain the legal and factual basis upon which it makes certain contentions. Thus, when framing objections to interrogatories pursuant to L.R. 33-1(d), practioners must carefully consider whether the interrogatory "requests every fact" or asks the party to "apply law to facts."

3. Timing of Contention Interrogatories.

Rule 33(a)(2) provides that a "court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time." The 1970 Advisory Committee Notes clarifies that "[s]ince interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the discovery has been completed, the court is expressly authorized to defer an answer [or] delay determination until the pretrial conference . . . ." *See* Advisory Committee Notes of the 1970 Amendments.

In *Convergent Technologies*, Judge Wayne D. Brazil, in a very thoughtful opinion, held that the 1983 amendments to Fed.R.Civ.P. 26(b) compelled his conclusion that the "wisest course is not to preclude entirely the early use of contention interrogatories, but to place a burden of justification on the party who seeks answers to these kinds of questions before substantial documentary or testimonial discovery has been completed . . . . [T]he propounding party must present specific, plausible grounds for believing that securing early answers to its contention questions will materially advance the goals of the Federal Rules of Civil Procedure." 108 F.R.D. at 338–39. More recently, however, Judge Brazil modified his position, noting that contention interrogatories may in certain cases be the most reliable and cost-effective discovery device, which would be less burdensome than depositions at which contention questions are propounded. *McCormick–Morgan, Inc. v. Teledyne Industries, Inc*., 134 F.R.D. 275, 287 (N.D. Cal. 1991) (holding

appropriately framed and timed contention interrogatories rather than depositions in patent infringement action was most appropriate vehicle for establishing infringers' contentions). Additionally, some courts consider that interrogatories seek information regarding central issues in the case, which may be crucial for summary judgment and order that the party answer the interrogatory before dispositive motion briefing is due. *In re H&R Block Mortg. Corp.*, No. CV-06-MD-230 (MDS 1767), 2007 WL 325351 (D. Ind. Jan. 30, 2007).

As with scope, however, there is no bright line rule regarding timing of contention interrogatories. Courts routinely delay compelling responses to contention interrogatories until after significant discovery. *See e.g., Fischer and Porter Co. v. Tolson*, 143 F.R.D. 93, 95 (E.D.Pa. 1992) (stating that "[t]he interests of judicial economy and efficiency for the litigants dictate that 'contention interrogatories are more appropriate after a substantial amount of discovery has been conducted'").

Thus, in preparing and responding to contention interrogatories, parties should be mindful of timing issues and be prepared to justify either the need for responses to interrogatories early in the case or the need to wait until later in the litigation to respond. Further, as evidenced in *McCormick-Morgan, Inc.*, the type of case may be relevant to when contention are most appropriate. 134 F.R.D. at 287.

4. Contention Interrogatories with Multiple Subparts often Count as a Single Interrogatory.

Federal Rule 33 limits a party to twenty-five interrogatories "including all discrete subparts." Parties, however, often argue about what constitutes a "discrete subpart" under the Rule. To avoid bringing an unnecessary motion, parties should carefully read the Advisory Committee Notes on the 1993 Amendments, which provide:

> Parties cannot evade this presumptive limitation through the device of joining as 'subparts' questions that seeks information about discrete separate subjects. However, a question asking about communications of a particular type should be treated as a single interrogatory even though it request that the time, place, persons present, and contents be stated separately for each such communication.

Advisory Committee Notes of the 1993 Amendments. Courts have recognized that resolving the question of whether a subpart to an interrogatory is "discrete" under Rule 33 such that it should be counted separately can be a difficult task, *see, e.g., Banks v. Office of the Senate Sergeant-At-Arms & Doorkeeper*, 222 F.R.D. 7, 10 (D.D.C. 2004) (recognizing that identifying a "discrete subpart" under Rule 33(a) "has proven difficult"), and courts considering this question have applied various tests. For example, some courts have applied a "related question" test, asking whether the particular subparts are "logically or factually subsumed within and necessarily related to the primary question." *Kendall v. GES Exposition Serv.*, 174 F.R.D. 684, 685 (D. Nev. 1997); *Ginn v. Gemini, Inc.*, 137 F.R.D. 320, 322 (D. Nev. 1991). If they are, then the subpart is not "discrete" within the meaning of Rule 33(a). Other courts addressing this question have applied a different "discrete information" standard under which interrogatory subparts which seek discrete pieces of information must be counted separately for purposes of Rule 33(a). *Prochaska & Assocs. v. Merrill Lynch, Pierce, Fenner & Smith*, 155 F.R.D. 189, 191 (D. Neb. 1993) ("if the interrogatories require discrete pieces of information, those interrogatories are to be counted as if the sub-parts were specifically itemized").

The District of Oregon has not addressed which test it would use. However, the "related question test" set forth in *Ginn* is consistent with Rule 33's Advisory Committee's Notes. *See* Fed.R.Civ.P. 33 advisory committee notes to 1993 Amendment (stating that "a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication"). Additionally, while answering interrogatories may be burdensome and that propounding numerous interrogatories may be used as a tool for harassment, an overly restrictive reading of Rule 33's numerical limit would too quickly exhaust the propounding party's supply of interrogatories and unnecessarily limit that party's fact-gathering ability. *Ginn*, 137 F.R.D. at 322. Such a result would be not only inconsistent with both the broad discovery envisioned by the Federal Rules, but also the Rules' purpose of narrowing the factual issues to be resolved at trial and ensuring that all parties to litigation are possessed of relevant facts. *See, e.g., Shelak v. White Motor Co.*, 581 F.2d 1155, 1159 (5th Cir. 1978) (federal discovery rules are designed to narrow and clarify issues and to give parties mutual knowledge of all relevant facts, thereby preventing surprise).

Thus, parties should be aware that not answering interrogatories when the party counts the discrete parts to exceed twenty-five is a dangerous practice because often the party has not accurately classified the interrogatory subparts under the Advisory Note guidelines. Refusing to answer a permissible interrogatory can be a basis for sanctions. Therefore, before refusing to answer, practitioners should carefully consider whether the subparts cause the interrogatories to exceed Rule 33's limits.

PROCEDURAL ASPECTS OF ANTI-SLAPP MOTIONS IN FEDERAL COURT

By: Clifford S. Davidson, Sussman Shank LLP

Suppose you represent a university in New York that has digitized its newspaper archive and made them available online. An Oregon plaintiff has filed suit in the District of Oregon for libel allegedly contained in this archive. He has demanded $1,000,000 in damages.[1]

How might you quickly dispose of this speech-chilling lawsuit?

One option is to file an "anti-SLAPP" motion. Six states in the Ninth Circuit – Oregon, Washington, California, Arizona, Hawai'i and Nevada – have enacted laws to prevent "strategic lawsuits against public participation," commonly known as SLAPPs.[2] Anti-SLAPP laws provide defendants an expedited means to strike causes of action arising from speech or petition at the outset of litigation.[3] Pursuant to this procedure, a plaintiff must demonstrate its prima facie case through competent evidence. If the plaintiff fails to do so, the defendant is awarded attorneys' fees and costs.[4]

Anti-SLAPP statutes also offer a number of other protections, including an automatic stay of discovery and, in some states, immediate appeal of denials of anti-SLAPP motions.[5]

Because anti-SLAPP statutes employ procedural means to protect substantive rights, their application in federal proceedings can be tricky. This article summarizes the Ninth Circuit's treatment of key aspects of anti-SLAPP statutes in federal court.[6]

The *Lockheed* Framework

In 1999, the Ninth Circuit held that anti-SLAPP motions may be filed in federal court. The Ninth Circuit continues to apply the reasoning of that initial case, *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*,[7] in deciding which anti-SLAPP procedures are available to federal litigants.

The *Lockheed* case was a *qui tam* action filed in the Northern District of California. In response to the complaint, Lockheed counterclaimed based on alleged violations of state law. The *qui tam* relators filed an anti-SLAPP motion to strike the counterclaims and requested attorneys' fees. The district court denied the anti-SLAPP motion. It held that two sections of the California anti-SLAPP statute – the section authorizing the motion and the fee-shifting provision – were unavailable in federal court because they directly conflicted with Federal Rules of Civil Procedure 8, 12 and 56.

The Ninth Circuit reversed and remanded. The court determined that the two anti-SLAPP provisions and the Federal Rules "can exist side by side . . . each controlling its own intended sphere of coverage without conflict."[8] The court emphasized that there were "important, substantive state interests furthered by the Anti-SLAPP statute," that the California Legislature had determined that those interests could be protected only through a special procedure, and that the Erie doctrine required the anti-SLAPP procedure be available in federal court to discourage forum-shopping.[9]

Other states share the core aspects of California's anti-SLAPP laws – *i.e.*, the motion to strike and fee award – and the Ninth Circuit has applied *Lockheed* accordingly. For example, it did so in *Northon v. Rule*,[10] when it held that the Oregon anti-SLAPP attorneys' fees provision applies in federal court.

The *Lockheed* court emphasized that it considered only the two core anti-SLAPP provisions. Since *Lockheed*, the Ninth Circuit has applied the *Lockheed* approach to other aspects of the anti-SLAPP procedure. The results are summarized below.

There Is No Automatic Discovery Stay in Federal Court

A key feature of anti-SLAPP laws is the automatic stay of discovery upon filing of an anti-SLAPP motion. The stay was designed to save defendants the expense and burden of responding to discovery necessitated by frivolous lawsuits. However, the stay is unavailable in federal court.

In *Metabolife Int'l v. Wornick*, 264 F.3d 832 (9th Cir. 2001), the Ninth Circuit held that the automatic discovery stay in California's anti-SLAPP law did not apply in federal court. Applying the *Lockheed* analysis, the court determined that because the anti-SLAPP motion resembles a summary judgment motion, the stay directly collided with Rule of Civil Procedure 56, which requires discovery where the "nonmoving party has not had the opportunity to discover information that is essential to its opposition."[11]

In a recent unpublished, unciteable memorandum opinion, *Z.F. v. Ripon Unified Sch. Dist.*,[12] the Ninth Circuit re-articulated the holding of *Metabolife*: "If a defendant makes an anti-SLAPP motion to strike founded on purely legal arguments, then the analysis is made under *Fed. R. Civ. P. 8* and *12* standards; if it is a factual challenge, then the motion must be treated as though it were a motion for summary judgment and discovery must be permitted."[13] The *Z.F.* court held that because the only factual materials referenced in the anti-SLAPP motion were those submitted with the counter-complaint, the trial court had not erred by applying a Rule 12 standard.

Rule 15 Trumps Contrary Anti-SLAPP Provisions

Although anti-SLAPP procedures are designed to facilitate early dismissal of meritless claims, the Ninth Circuit has held that the policies of liberal amendment embodied in Federal Rule 15(a) require courts granting anti-SLAPP motions to dismiss with leave to amend whenever possible. That is because any state law requirement to the contrary directly collides with the federal rule.[14] Moreover, "the purpose of the anti-SLAPP statute, the early dismissal of meritless claims, would still be served if plaintiffs eliminated the offending claims from their original complaint. If the offending claims remain in the first amended complaint, the anti-SLAPP remedies remain available to defendants."[15]

Oregon's anti-SLAPP provision, Or. Rev. Stat. § 31.150, specifies that dismissal must be without prejudice. The Ninth Circuit has held that this requirement does not directly conflict with the Federal Rules and therefore applies in federal court.

Immediate Appealability of Denial of Anti-SLAPP Motions Is Available Under California Law and Possibly Oregon Law

The anti-SLAPP laws of Oregon, California Hawai'i, and Washington provide an immediate right to appeal denial of an anti-SLAPP motion. However, these provisions do not necessarily apply in federal court because a party there generally is entitled only to a single appeal "deferred until final judgment has been entered."[17] The Ninth Circuit has determined that anti-SLAPP denials are immediately appealable only if "the anti-SLAPP law in question functions as a right not to stand trial, i.e., an immunity from suit."[18]

California's anti-SLAPP law is the only statute so far to meet this requirement.[19] In *Batzel v. Smith*,[20] the Ninth Circuit held that the anti-SLAPP statute's legislative history demonstrates the critical role of immediate appeal in protecting the speech and petition rights of Californians. Through the immediate appeal, the California Legislature intended to immunize defendants from trial, rather than liability.[21] The court thus treated the denial of the anti-SLAPP motion as a denial of a claim of immunity, which is appealable as a "final decision" under the collateral order doctrine and 28 U.S.C. § 1291.

In 2009, the Ninth Circuit held that Oregon's anti-SLAPP law did not provide a right to immediate appeal in federal court.[22] At the time, the Oregon statute did not provide for an immediate appeal. However, in 2010, Oregon's anti-SLAPP statute was amended to include that right. The Ninth Circuit has not determined the effect of that amendment, which explicitly states that the purpose of the statute is to "provide a defendant with the right to not proceed to trial."[23]

[1] See *Vanginderen v. Cornell Univ*., No. 08cv736 BTM(JMA), 2009 U.S. Dist. LEXIS 303 (S.D. Cal. Jan. 6, 2009).
[2] Or. Rev. Stat. §§ 31.150-155 (2011); Wash. Rev. Code Ann. §§ 4.24.500-525 (2012); Cal. Code Civ. Proc. § 425.16 (2012); Ariz. Rev. Stat. Ann. §§ 12-751 – 12-752 (2012); Haw. Rev. Stat. §§ 634F-1 – 634F-4 (2012); Nev. Rev. Stat. §§ 41.635-670 (2012). Guam also has an anti-SLAPP law. 7 Guam Code Ann. §§ 17101-17109.
[3] The anti-SLAPP laws of Arizona, Nevada, Guam and Hawai'i apply only to petitioning activities, or to speech related to petitioning activities.
[4] In Washington, if the motion is granted, the plaintiff also must pay a $10,000 penalty to the defendant, as well as punitive damages, in addition to attorneys' fees and costs. In Hawai'i, the plaintiff must pay the greater of actual damages or $5,000, as well as punitive damages, in addition to attorneys' fees and costs.
[5] Some statutes also provide an automatic stay pending appeal.
[6] This article considers only Ninth Circuit cases concerning the anti-SLAPP laws of states in the Ninth Circuit.
[7] 190 F.3d 963, 970-73 (9th Cir. 1999).
[8] *Id*. at 972 (quoting *Walker v. Armco Steel Corp*., 446 U.S. 740, 752 (1980)).
[9] *Id*. at 972-73.
[10] 637 F.3d 937 (9th Cir. 2011).
[11] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 n.5 (1986).
[12] No. 11-15377, 2012 U.S. App. LEXIS 10292 (9th Cir. May 22, 2012).
[13] *Id*. at *3.
[14] *See Verizon Del., Inc. v. Covad Comms. Co*., 377 F.3d 1081, 1091 (9th Cir. 2004).
[15] *Id*.
[16] *Gardner v. Martino*, 563 F.3d 981, 991 (2009).
[17] *Digital Equip. Corp. v. Desktop Direct, Inc*., 511 U.S. 863, 868 (1994).
[18] *Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 800 (2012).
[19] To date, the Ninth Circuit has considered appealability pursuant to the anti-SLAPP laws of California, Oregon and Nevada. *Id*. at *796-97.
[20] 333 F.3d 1018 (2002).
[21] Id. at 1025.
[22] Englert v. MacDonell, 551 F.3d 1099 (9th Cir. 2009).
[23] Or. Rev. Stat. § 31.152(4).

LOCAL TEENS GO "BEHIND THE ROBE"

By: Harold DuCloux, Federal Public Defender – District of Oregon

On October 25, 2012, the Oregon chapter of the Federal Bar Association helped a group of urban teens shatter many of their misconceptions about the criminal justice system with a visit to the federal courthouse. This proved a difficult task in light of television's crude interpretation of our esteemed system. During a debrief with the students, I was quite shocked to learn that, prior to their visit, they believed: judges sought the longest sentences possible, prosecutors had horns, marshals enjoyed brute force, defense attorneys tried to get guilty people free, probation officers ruined your life, and civil attorneys were stuffy. Ouch!

The program, inspired by **Chief Judge Ann Aiken**, was named "Behind the Robe" ("BTR"). BTR was designed to introduce, educate, and explain the functions of the federal court family through direct interaction with various participants in the system. Oregon Chapter Board Members **Gosia Fonberg**, **Harold DuCloux** and **Jolie Russo** and Judge Aiken's Law Clerk **Amber Kinney** planned the program. The students came from the Jefferson High School Middle College Program. The Middle College Program is a relatively new program that gives students who may otherwise not have the opportunity to go to college the ability to do so through advanced studies, college-readiness skills, and financial aid.

We initially invited 16-20 students, but as the buzz of this opportunity spread around Jefferson, we adjusted to allow 30 students. A team of Oregon FBA Board members and U.S. District Court law clerks and externs first met the students in the federal courthouse foyer for a lesson in courthouse security. The court security officers were welcoming and jokingly engaged the students as they were whisked through the metal detectors, leaving smiles on their faces.

Most were thoroughly impressed with the architecture, and one student admired the indoor fountain enough to profess his desire to have one in his future home. We took several group pictures on the stairs leading to the jury room and proceeded to **Judge John V. Acosta's** courtroom for an introduction.

Judge Acosta gave the students a hearty greeting and explained his role in civil and criminal cases. When a student asked Judge Acosta about his most memorable case, he recalled an Air Jordan patent civil case in which he proclaimed his disappointment that Michael Jordan never testified. The students commiserated. At the end of his talk, Judge Acosta reminded the students that, no matter what happens in court, judges are still people.

The students divided into smaller groups and visited the Offices of the U.S. Attorney, Public Defender, Marshal Service, civil attorneys, and Judge Aiken's chambers for thirty minute chats.

The Marshals drew a lot of interest with their stories, guns, and assortment of other toys. However, one student commented about a 'new' clandestine surveillance device: "You just now getting that? I saw that on TV two years ago!" Judge Aiken was also a hit, treating the students to chocolate, cookies, and cake. I had a group of entirely young women, and Judge Aiken's story of her rise to becoming the first woman Chief Judge on the Oregon federal bench left them feeling quite hopeful and empowered.

Assistant Federal Public Defender **Renee Mannes** explained the defense attorney's role in the process and schooled them on the Constitution. A student asked why she represented people whom she knows are guilty, to which Renee responded: "People should not be thrown away for the few worst things they did in their life." The statement was well-received. The stereotype buster award went to **Adrienne Brown** with the U.S. Attorney's office. She engaged the students in a civil rights discussion before revealing that she forces businesses and agencies to comply with laws designed to protect equality and fight discrimination. The students were excited and surprised to learn about this unit of the U.S. Attorney's office. Lastly, **Ali Seals** with Schwabe Williamson and Wyatt and **Tom Johnson** with Perkins Coie cleverly used pop culture references and analogies to explain contracts and copyright law.

The law firm of Perkins Coie generously provided lunch for the students. **Judge Anna Brown** and Judge Aiken joined the students for lunch. The judges led a lively discussion about the role of a judge versus that of a jury. The judges also answered a wide variety of thought-provoking questions posed by the students including challenging questions about civil rights and the death penalty. The most popular question for the judges, which was asked repeatedly throughout the day, was: "Have you ever met the President?"

After lunch, the students sat in on re-entry court with **Judge Marco Hernandez**, where they witnessed the court utilize a team approach to assist felons with their post prison re-entry into society. The students observed participants offer advice, words of encouragement, and support for their team peers about drug and alcohol treatment, long-term sobriety, employment, honesty, and avoiding criminal behavior.

The students wrapped up their day with **Judge Ancer Haggerty**, who went on for some time before revealing that he was a graduate of Jefferson. He described his climb to the federal bench, including a football scholarship at the University of Oregon, a stint in the U.S. Marines, and State Court tenure. Judge Haggerty told the students they should find something they are passionate about and find a way to make that their career.

At the end of the day, the students saw the judicial system in a new light. They walked away feeling a lot more comfortable in their knowledge of the system and the roles that various agencies serve. They recognized that we, like them, were once teenagers with dreams, and that they can accomplish their goals. Most importantly, they realized that "we are all still people."

The Ashmanskas Trivia Answer

The organization that held regular meetings at which Judge Ash was a consistent attendee was the Beaverton School Board.

OREGON FBA PARTNERS WITH OTHER GROUPS TO PRESENT CLE

By: Margaret "Gosia" Fonberg
Staff Attorney to the Honorable Thomas M. Coffin

The Oregon Chapter of the Federal Bar Association, the Oregon State Bar Civil Rights Section and the Oregon Chapter of the National Bar Association partnered together to present the Litigating Section 1983 Civil Rights Cases: Current Issues & Trends CLE on October 19, 2012, at the Hatfield Federal Courthouse. Working together, our three groups put together a dynamic array of speakers and panelists.

Oregon DOJ Senior Assistant A.G. **Ken Crowley** started the morning off with an overview of how to litigate a section 1983 case. Next, **Judges Brown, Clarke** and **Mosman** offered their tips for presenting section 1983 cases to the jury. Especially appreciated were the "Judge Ash tips" offered by Judge Clarke, including Judge Ash's advice about case citation: "I don't know why people think the Ninth Circuit is so special–it's just one of thirteen circuits. If Ninth Circuit case law doesn't favor your client, then cite a circuit that is more hospitable." Next, **Judge Coffin** discussed warrantless searches of electronic devices–such as smart phones–and qualified immunity. That was a perfect segue into **Brandon Mayfield** and Legal Director of the ACLU of Oregon **Kevin Diaz**'s discussion of racial and religious profiling. **Jim Rice** anchored the half-hour before lunch with a discussion near and dear to plaintiffs' attorneys litigating section 1983 cases–attorney fees.

After the lunch break, there was a presentation by a mental health panel, which included Crisis Intervention Training Coordinator and Mental Health Liaison to the Portland Police Bureau Liesbeth Gerritsen, Executive Director of Disability Rights Oregon Bob Joondeph, Manager of Mental Health Services for Multnomah County and Multnomah County Jails Steven Sutton and Mike Gennaco, who is currently involved with the Office of Independent Review that reviews recent Portland Police Bureau shootings. From the mental health panel, we moved on to a rousing discussion between employment attorneys **Paula Barran** and **Dana Sullivan** and criminal defense attorney Janet Hoffman about section 1983 employment issues and how to best protect your client's constitutional rights during employment investigations. Finally, criminal defense attorney **David Angeli** and Assistant U.S. Attorney **Kelly Zusman** gave us the perfect ending to the day with an exciting discussion about recent developments in section 1983 litigation.

The CLE was a success both in terms of registration and attendance, with nearly ninety attendees. Many thanks to the generous sponsorship from Barran Liebman LLP, Schwabe Williamson & Wyatt, PC, Stoel Rives LLP and Miller Nash LLP for making our CLE possible. Also, thanks to Naegelie Court Reporting for recording our CLE and to the volunteers from the OC-FBA, the OSB Civil Rights Section and the OC-NBA who planned and organized the CLE.

OREGON FBA MEMBERS ATTEND NATIONAL CONFERENCE

By: Laura Salerno Owens, Barran Liebman

The Federal Bar Association had its annual conference in San Diego, California, this past fall. The Oregon Chapter was once again distinguished among chapters throughout the nation with a prestigious award. In the spring of 2012, the Oregon Chapter of the FBA co-sponsored a low-cost, two-day CLE aimed at training new lawyers on how to represent homeowners in foreclosure cases. Over 300 people attended the event and it led to a new committee to develop a pro bono project aimed at helping homeowners facing foreclosures. In recognition of its sponsorship of this project, the Oregon Chapter received the Presidential Excellence Award. FBA Board members **Jonathan Mansfield** and **Laura Salerno Owens** accepted the award on the Oregon Chapter's behalf.

The conference also brought together FBA members from across the country and featured dynamic speakers on numerous topics impacting federal practice. The conference began with an interesting Supreme Court Review of the 2011-2012 Term and a Preview of the Upcoming Term by Dean Erwin Chemerinsky. Dean Chemerinsky summarized both the key civil and criminal cases and provided insight and analysis on how the term's cases will shape lower court jurisprudence, spur Congressional action and impact the practice of law in federal court. Another outstanding panel was the Trends in Labor and Employment Law. The panel featured the regional attorney for the EEOC Los Angeles District Office and the regional director for the NLRB, Region 21 Los Angeles, along with management and employee attorneys. The panel discussed the EEOC's and NLRB's new focus on systematic litigation and the private attorneys commented on the increase of whistleblowing and retaliation cases being filed in federal court.

In addition to excellent panels, the conference included a series of social events that allowed attendees to network with one another while enjoying the beautiful city of San Diego. There also was a reception at the U.S.S. Midway Museum. The next evening was the Open Air Fiesta by the San Diego Bay where a mariachi band performed while hundreds of FBA members across the country met and exchanged ideas. The final evening included the Reception and Presidential Installation Banquet which marked the installation of the new national FBA president, Robert J. DeSousa, and featured the presentation of FBA awards.

ANNOUNCEMENTS

Attention All Lawyers: Oregon FBA is Creating a Law School Division!

Remember your law school days? Wouldn't it have been grand to have had a resource to familiarize yourself with the federal courts and federal practitioners so you could hit the ground running upon graduation? The Oregon FBA is embarking on a new mission to create a Law School Dvision of the Oregon FBA. The mission of the Law School Division is to promote the interests of law students within the Oregon FBA and to work with interested law schools and students to create student chapters within law schools. If you are interested in assisting with the Law Student Division's mission, please contact Laura Salerno Owens at lsalerno@barran.com or 503-276-2111.

Save the Date—Oregon FBA New Year Meet and Greet

January 10, 2013 – Please join the Oregon FBA in welcoming the new year at the Hatfield Federal Courthouse from 4-5:30pm. We will have light appetizers, wine, beer, and non-alcoholic beverages. This event is free and no RSVP is necessary – just drop by!

Save the Date—Memorial Service for Judge Skopil

January 28, 2013 – Please join the legal community and general public at a memorial service for Judge Otto Richard Skopil. The service will take place at 3pm at the Pioneer Courthouse. Judges Leavy, Goodwin and Panner are among the expected speakers.

Save the Date—Honoring Senior Judges King, Haggerty, and Hogan

February 4, 2013 – Please join the U.S. District Court of Oregon Historical Society and U.S. District Court of Oregon to celebrate an unveiling of the portraits of Senior Judge Garr M. King and Senior Judge Ancer L. Haggerty and to honor retired Senior Judge Michael R. Hogan's service to the judiciary. The event will take place at 4:00pm in the 16th floor courtroom of the Hatfield Courthouse. Please RSVP by calling 503-326-8150 or emailing carra_sahler@ord.uscourts.gov. Appetizers and refreshments will be served after the short program.

Save the Date—Derrick Bell Lecture Series

February 8, 2013 – The Oregon FBA, University of Oregon Law School, and Portland State University are partnering in the first annual Derrick Bell Lecture Series. Derrick Bell (who passed away on October 5, 2011) was the first and (to date) only African-American dean at a non-historically Black institution. Bell was also the first tenured African-American Professor of Law at Harvard Law School. We have invited Professor Ian Haney Lopez from the University of California Berkeley Law School to deliver the keynote address at noon on February 8, 2013, at Portland State University. It will be a public address including questions and answers. Professor Haney Lopez, a former student of Bell's, teaches race and constitutional law at Berkeley Law. In 2011, Professor Haney Lopez was awarded the Alphonse Fletcher Fellowship, given to scholars "for work that contributes to improving racial equality in American society and furthers the broad social goals of Brown v. Board of Education." Following the public address, the Oregon FBA will host a CLE with Access to Justice credit at the Hatfield Courthouse from 2-4:00pm. Finally, the day will culminate with a reception at the Hatfield Courthouse beginning at 4:30pm. Information and registration details to follow. Please join us on this historic occasion!

Upcoming FBA Luncheons

The FBA monthly lunches take place on the third Thursday of each month at the University Club, 1225 SW Sixth Avenue, Portland, Oregon. We are pleased to host two members of our federal bench at upcoming lunches:

January 17 Magistrate **Judge Thomas M. Coffin**

February 21 District Court of Oregon **Chief Judge Ann Aiken**

May 16 **Judge Elizabeth Perris**

Cost is $18 for FBA members and $20 for non-members. Please make reservations for either a vegetarian or meat lunch entrée by emailing Connie.VanCleave@MillerNash.com. The RSVP deadline is the Tuesday before each lunch.

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Missing Electronic Notices?

Change of Address? We have been sending the electronic notices via our listserv. Although we have made every effort to obtain our members' email addresses, we need your help to keep our list accurate and current. For those members without email, we are providing the electronic notices by fax. If you have an email address or fax number and have not been receiving electronic notices, or if your email address changes, please contact our listmaster: **Chelsea Grimmius**, chelseagrimmius@yahoo.com. For a change in physical address, please notify **Nadine Gartner**, ngartner@stollberne.com, to ensure you continue to receive mailings from the Oregon Chapter of the Federal Bar Association. All address changes will be forwarded to the national Federal Bar Association.

For the District of Oregon *is a quarterly newsletter of the Oregon Chapter of the Federal Bar Association. Editor Nadine A. Gartner, 209 SW Oak Street, Suite 500, Portland, Oregon, 97204, 503-227-1600.*

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New FBA Members Welcome

Membership Eligibility. FBA membership is open to any person admitted to the practice of law before a federal court or a court of record in any of the states, commonwealths, territories, or possessions of the United States or in the District of Columbia, provided you are or have been an officer or employee of the United States or the District of Columbia, or you have a substantial interest or participate in the area of federal law. Foreign Associate Status is open to any person admitted to practice law before a court or administrative tribunal of a country other than the United States. Law Student Associate Status is open to any law student enrolled at an accredited law school. If you wish to join, please visit www.fedbar.org and click on the "Join Now" link.

Call for Submissions/Publication Schedule

For the District of Oregon **welcomes submissions from everyone as well as our regular contributors. The deadlines are March 15, 2013, June 15, 2013, September 15, 2013, and December 15, 2013. We ask only that you inform us in advance if you are preparing a submission. Please direct inquiries to Nadine Gartner at 503-227-1600 or ngartner@stollberne.com.**