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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL RODMAN, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

SAFEWAY, INC.,

Defendant

Case No.: 3:11-cv-03003 JST (JCS)

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR DISCOVERY SANCTIONS

Date: June 16, 2016
Time: 2:00p.m.
Crtrm.: 9-19th Floor
Judge: Hon. Jon S. Tigar

Complaint filed: June 17, 2011

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on June 16, 2016 at 2:00 p.m. in Courtroom 9 of the United States District Court for the Northern District of California, San Francisco Division, located at 450 Golden Gate Ave., San Francisco, California 94102, the Honorable Jon S. Tigar presiding, Plaintiff, Michael Rodman ("Plaintiff" or "Rodman"), and the certified Class he represents, will move for discovery sanctions against Defendant, Safeway, Inc. ("Safeway") as set forth herein. This Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, and all other pleadings, papers, records and documentary materials filed and deemed to be in filed this action, those matters of which this Court may take judicial notice, upon the Declarations of Steven A. Schwartz ("Schwartz Decl.") and James C. Shah ("Shah Decl.") filed concurrently herewith in support of the Motion[1], and upon the other arguments of counsel made at the hearing on this Motion.

As set forth in the accompanying Memorandum Plaintiff seeks the following sanctions, plus any other sanctions that the Court deems just:

- **Expert Expenses**: $22,500
- **Attorney's Fees:** $846,265
- **Attorneys' Fees Incurred Preparing This Sanctions Motion:** amount TBD after briefing complete
- **Delay Damages to the Class**: Additional 9.49% interest applied for 3 months on the final judgment.
- **Negative Jury Instruction**: Order establishing Plaintiff's entitlement to an appropriate instruction that Safeway engaged in discovery misconduct, with the contours of such an instruction to be determined if necessary after any remand for trial based on the nature and extent of issues to be decided by the jury,

[1] All exhibit ("EX") and paragraph ("¶") references herein are to the Schwartz Declaration, and all emphasis herein has been added, unless otherwise indicated.

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MEMORANDUM OF POINTS AND AUTHORITIES

Safeway should be sanctioned for its repeated failures to produce outcome-determinative discovery from two widely-accessible databases, and misrepresentations regarding its document search efforts. Safeway's misconduct resulted in the Court *denying* Plaintiff's summary judgment motion as to class members who registered prior to 2006, (ECF 331, at 26-29), and also created a bogus fact dispute regarding the operative version of the contract, which was relevant to the Court's analysis of the impact of Safeway's November 2011 amendments to the contract (ECF 237 at 2 note 2; 13-19). These two issues could have affected about two-thirds of the $41.8 million judgment. ¶ 13. After retaining new counsel Safeway ultimately conceded both issues. Nevertheless, Safeway's tardy concessions materially increased Class Counsel's workload, including forcing Class Counsel to prepare for two materially different and unnecessary trials; burdened the Court and distorted one of the Court's decisions, which was rendered on an inaccurate record; and significantly delayed entry of final judgment. Safeway's discovery misconduct also included its refusal to provide markup calculations based on its misrepresentation that it did not perform such calculations in the ordinary course of business. The Federal Rules mandate a severe sanction against Safeway.[2]

I. FACTS

A. Safeway Failed To Timely Produce Outcome Determinative, Responsive Documents Reflecting Pre-2006 Registration Procedures

After four years of litigation, including extensive class certification and summary judgment proceedings, only one issue remained to be tried in this case — whether Class members who registered for the delivery service prior to 2006 had agreed to the same contract as Class members who registered after 2006 (the "Pre-2006 Issue"). Despite several months of discovery devoted to this issue, Safeway claimed in discovery responses and testimony that it had *no* records or knowledge of the registration process or terms prior to 2006. Plaintiff was unable to obtain summary judgment on the Pre-2006

[2] Safeway and its outside counsel each had an independent duty to comply with discovery Rules. The attorney-client privilege limits Plaintiff's insight into their relative culpability. Thus, Plaintiff seeks sanctions against Safeway for its conduct as well as that of its agent, Sheppard Mullin. *See Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. Cal. 2002) ("a client is ordinarily chargeable with his counsel's negligent acts").

Issue by relying on publicly-available documents from the Internet Archive. As a result, Class Counsel was forced to prepare for a trial on the Pre-2006 Issue, with about $10 million hanging in the balance.

Just seven days before trial, however, Safeway produced ten new documents concerning Pre-2006 contract formation, which Safeway's designee and Director of Marketing, Steve Guthrie, had located on a shared computer drive (the "Legacy Drive") accessible from his desktop. These documents were responsive to Plaintiff's earlier discovery requests and transparently relevant, if not dispositive, of the Pre-2006 Issue. As demonstrated below, Guthrie and Safeway knew about the Legacy Drive, and no excuse existed for Safeway's repeated misrepresentations and failure to identify and timely produce responsive documents contained therein. This tardy production led to a postponement of trial and a new round of discovery, which revealed that the evidence was so one-sided that Safeway was forced to concede the issue. That concession should have come much earlier.

The Pre-2006 Issue first arose after the Court granted Plaintiff's motion for summary judgment holding that Safeway breached its contract by charging the markup. ECF 223. Safeway sought reconsideration of the Court's holding with respect to Pre-2006 registrants because Safeway asserted that Plaintiff had not presented evidence of the Pre-2006 contract terms and registration process. ECF 226. The Court granted reconsideration on this issue, noting: "Although Plaintiff subsequently submitted versions of the contract that Plaintiff alleges were posted by Safeway prior to 2006, … those versions of the contract were not placed before the Court by Plaintiff's initial motion for summary judgment and Defendant thus did not have sufficient notice that Plaintiff sought summary judgment that Safeway breached the contract with class members who registered prior to 2006." ECF 236, at 3.

The parties thereafter conducted about three months of additional discovery focused on the Pre-2006 Issue, along with additional discovery related to damages and affirmative defenses.[3]

[3] Safeway never asserted in its answer to the Amended Complaint that Pre-2006 Class members agreed to a different contract (or no contract at all), and prior to reconsideration discovery was not focused on this particular issue. Nevertheless, Plaintiff's prior Document Request Nos. 6 and 9 had sought *all* copies of the terms and conditions without any date limitation. *See* ECF 273-9, at 10-13. Safeway's response represented: "Safeway only began retaining prior versions of its webpages or statements made on its websites (including Terms and Conditions, Special Terms or FAQ's) in June 2011." *Id.* Further, based on Safeway's representations that ESI had to be searched by custodian, in the first round of discovery the parties' ESI search protocol was limited to the files of six custodians identified by

Interrogatories 13 through 15 asked Safeway to identify any differences between Pre- and Post-2006 contract formation, and Document Request 50 sought documents identified or relied on in responding to those Interrogatories. Safeway responded that it was unable to identify any difference because: (a) "Safeway does not have access to the Special Terms [or historical versions of the registration page(s)] in effect between 2001 and 2005"; (b) "Safeway did not find any historical versions of the Special Terms[4] from the period 2001 to 2005 in its files and, therefore, cannot identify the material differences between the processes or procedures used between 2001 and 2005 and those used from 2006 forward"; (c) "Safeway only started retaining in a systematic manner prior versions of its webpages or statements made on its websites (including Special Terms) in June 2011"; and (d) "Safeway cannot tell whether [copies of the terms from 2001-2005 downloaded from the Internet Archive] accurately represent the 'Special Terms' that customers agreed to is part of the registration process….Safeway also cannot tell these pages are from a test page or separate information/help page or possibly posted in error and only available for a limited time." ECF 273-3, at 5-11; *see also* Ex. 1. Safeway further represented that: "None of Safeway's current employees who are responsible for Safeway.com's *marketing or production, which are the departments that would be responsible for revising, updating and posting special terms*, worked for Safeway or the joint venture [with Tesco] between 2001-2005." ECF 273-3, at 5-11. These inaccurate responses were verified by Guthrie and signed by Safeway's outside counsel, Sheppard Mullin.

Similarly, Document Requests 52 and 53 sought production of documents that reference, discuss, or reflect the Special Terms or registration process from 2001 to 2005. Ex. 1, at 8-13. Safeway repeated its objections and refused to search for these documents.[5] *Id*. The parties met and

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Safeway, none of whom worked for the grocery delivery division prior to 2006. *See* ECF 66 (transcript of hearing), at 17:2-17; and ECF 68-1, at 4 (representing necessity to agree on custodians).

[4] The operative contract was labeled "terms and conditions" before 2006 and "Special Terms" beginning sometime after 2006, but otherwise they are substantively identical.

[5] Among other reasons, Safeway objected that the requests were duplicative of prior requests, even though Safeway admitted that the earlier ESI search protocol would not have captured most Pre-2006 documents for the reasons set forth in note 3, above. Ex. 1, at 8-13.

conferred, however, and Safeway agreed to search for Pre-2006 documents. *See* Ex. 2 (March 12, 2015 email). Safeway provided an interim report on its Pre-2006 search efforts on March 18, 2015:

> As for documents [sic] searches relating to Request Nos. 52 and 53, Safeway does not maintain an archive of its electronic files that goes back to 2005. It also does [sic] have an archive dedicated to Grocery Works email addresses or files. If someone who worked for Grocery Works or Safeway.com back in 2001-2005 still works for the company, then they might have files going back that far back on their machine. We are trying to locate such current employees, but as far as we can tell right now none of the people that would have been in a position (*i.e.*, **marketing or production**) that dealt with Special Terms or registration pages are still with the company.

Id. In response, Class Counsel pointed out that Safeway appeared to be overlooking an obvious group of employees who could have relevant knowledge: "We believe it is **also possible that IT employees would have such information**, since they would be the ones who actually maintained webpages, wrote code for registration screens, etc.. Just looking at publicly available information, it looks like Josh Hensley might be a place to start." *Id.*[6]

On April 7, Safeway provided a final report on its effort to locate Pre-2006 documents:

> As for the pre-2006 Special Term and Registration documents, Safeway has not located any responsive documents. As previously reports [sic], Safeway does not maintain an archive of its electronic files that goes back to 2005. It also does [sic] have an archive dedicated to Grocery Works email addresses or files. Thus, to the extent these historical documents even exist they would have to be on individual custodian machines. We had Josh Hensley search his files using the terms Special Terms and registration but he did not locate any responsive documents. He also provided us with a list of names of former Grocery Works employees that might have been involved with the Special Terms and/or registration page back in 2001 to 2005. Safeway used that list to try and locate images of those custodians, but none exist.

Ex. 3. Virtually every word has proven to be false or misleading.

Safeway designated Guthrie to testify concerning the Pre-2006 Issues, including Safeway's steps to locate documents and persons knowledgeable about those topics. Ex. 5, at 6:20-7:8. His deposition occurred after the close of document discovery, just eight days prior to the discovery cutoff.

[6] Plaintiff later deposed Mr. Hensley, who worked for Safeway.com since 2002 and had responsibility for deploying content to the website. Ex. 4, at 7:7-9; 12:23-13:5. He testified that despite making a search, he had "no idea if there are or not" any records, screenshots, printouts, computer records of the pre-2006 registration screen, including whether there were *any* terms and conditions. *Id.* at 19:2-20:12.

When asked what he did to try to locate documents concerning Pre-2006 registration procedures, Guthrie disclosed *for the first time* the existence of the Legacy Drive, which he described as where "we put all of our marketing stuff" along with "files of what ran during certain periods of time, what ran on the site, and there's other areas, some people have their own files on that drive." *Id.* at 37:25-49:22. So there *was* an archive that contained Pre-2006 documents, and it was on a shared drive, not an individual custodian's computer, despite prior representations to the contrary.

Mr. Guthrie also testified, however, that he had "**looked through all** of our files on our legacy shared computer," and that he had spent "hours and hours and days" doing so. *Id.* at 38:15-20; 41:10-42:1. When pressed for more details, Guthrie testified that he performed word searches for "[r]egistration, registration page, terms and conditions, [and] special terms," and that "I also **went into each folder myself** to look for the documents in addition to doing the searches with key words. So the key words was the first step and then **I went into each folder and looked what was in each of the folders on that drive**." *Id*. at 42:2-45:16. Thus, although the existence of the Legacy Drive had not been disclosed previously, Safeway's designee testified that Safeway had thoroughly searched "**all** of our files on our legacy shared computer" and "each folder" over the course of "hours and hours and days." No responsive documents had been located, according to Mr. Guthrie.

The parties then proceeded to the second round of summary judgment. Relying primarily on publicly-available archived webpages, Plaintiff moved for summary judgment for liability as to Pre-2006 Registrants (as well for summary judgment to establish the operative version of the contract, discussed below). ECF 273-2. Plaintiff presented 14 copies of Pre-2006 terms and conditions from the Internet Archive, and further demonstrated that, *inter alia*: (1) Safeway always required customers to register prior to ordering groceries; (2) every relevant copy of the terms located by either party, both pre- and post-2006, had the exact same pricing provisions; and (3) every copy stated, "This Agreement is a legal agreement between you and Safeway, Inc. … [and b]y completing the on-line registration process… [you] agree to these Terms and Conditions." *Id.*

In opposition, Safeway repeated its (mis)representations that it possessed no relevant Pre-2006 documents, and argued that Plaintiff failed to prove that Pre-2006 registrants were required to click a

checkbox or that any contract was linked to the registration process. Safeway asserted, "[n]one of the voluminous discovery Plaintiff took after the Reconsideration Order sheds any light, much less establishes beyond dispute, those key questions [whether the terms were linked to the registration page and agreed to by an affirmative click-box assent]." ECF 290 at 8:16-18.

Based on the July 30, 2015 argument on the summary judgment motions, it appeared almost certain that the Pre-2006 Issues would go to trial (scheduled to begin October 5, 2015). ¶19 & ECF 322, at 62:8-22. Therefore, Plaintiff immediately intensified his trial preparations,[7] with a focus on the Pre-2006 Issue. *Id*. On August 31, 2015, the Court granted Plaintiff's motion for summary judgment on damages and affirmative defenses, but denied his motion as to the Pre-2006 issues, stating "Plaintiff has not introduced evidence establishing that customers who registered prior to 2006 were required to click a box manifesting their agreement to the Terms and Conditions." ECF 331, at 28. The parties quickly adapted their Pre-Conference Statement to reflect a trial solely on Pre-2006 issues, and filed it the next day. ECF 339. From September 1, 2015 forward, Plaintiff's trial preparations solely related to Pre-2006 Issues. ¶ 20. *See* ECF 344-48, 351-52.

In the evening on September 29, 2015, just seven days before trial, Safeway unexpectedly produced ten new documents concerning Pre-2006 contract formation. Safeway's counsel explained: "While preparing for his testimony over the last few days, Steve Guthrie conducted additional searches on what has been referred to as the legacy shared drive," and found the new documents. Ex. 6. Those documents were transparently relevant to Pre-2006 contract formation, which was the sole remaining issue for trial. Several reflected screen shots of the Pre-2006 registration process, demonstrating that registrants were required to check a box agreeing to the terms and conditions. *See e.g.*, Exs 7-8. The documents also revealed the identities of several new witnesses. *See e.g.*, Ex. 9. As a result, the Court continued trial to December 7, 2015, and set an October 8, 2015 deadline for the parties to submit a proposed schedule to complete additional discovery. ECF 373, 374.

[7] During that process Plaintiff discovered the identity of former Safeway.com IT employee Eric Falsken, who submitted a declaration that in 2002 he had worked on the registration check box code. ECF 325-2. The Court denied Plaintiff's request to supplement the summary judgment record (ECF 331), however, and later granted Safeway's request to preclude Mr. Falsken from testifying (ECF 354). After trial was delayed, the Court decided that Mr. Falsken would be permitted to testify. ECF 374.

Safeway once again failed to cooperate, however. Safeway refused Plaintiff's request to meet and confer about document search protocols until the day of the October 8 deadline. *See* ECF 376. Even then Safeway was unable or refused to answer substantive questions about the Legacy Drive or its in-house search capabilities, which it insisted on using to search the Legacy Drive. *Id.* Indeed, Safeway still had not performed a single additional search of the legacy drive *two weeks* after Safeway had produced the documents located by Mr. Guthrie. ECF 379.

Frustrated by Safeway's delay tactics, Plaintiff requested that the Court order Safeway to conduct searches requested by Plaintiff, without regard to whether Safeway could conduct such search in-house or not. *Id.* Safeway balked, claiming that it had only "two computers" available to run searches, and that "[r]unning searches on a networked server that hundreds of people use on a daily basis is a very slow process," and that it is "not feasible to run searches on the higher levels of the file tree as Plaintiff proposes." ECF 380. The Court agreed with Plaintiff, and ordered Safeway to conduct all of the searches that Plaintiff had requested. ECF 383. Five days later, Safeway replaced its counsel, Sheppard Mullin, with new counsel from Reed Smith LLP, and thereafter Safeway successfully conducted and completed the searches Plaintiff proposed. ECF 384.

Safeway produced almost 3,000 new documents from the Legacy Shared Drive. Many reflected that Safeway had no basis to contest the Pre-2006 issue. *See* ¶24, and Exs. 10-15. Plaintiff re-deposed Safeway's designee Guthrie, and also took depositions of three newly-identified witnesses: former Safeway.com President and CEO Mitch Rhodes, former Safeway marketing manager Steven Hoopes, and Safeway website consultant Troy Warr. Safeway also deposed Mr. Falsken.[8]

During re-deposition, Safeway's designee Guthrie made several admissions confirming Safeway's various misstatements and slipshod—if not deliberately venal—conduct regarding the earlier Pre-2006 discovery. He admitted that Safeway had relevant Pre-2006 documents on the shared Legacy Drive, notwithstanding his earlier testimony, Safeway's discovery responses, and statements by

[8] Consistent with his declaration, Falsken confirmed that he worked on the code for the registration page requiring registrants to check a box to agree to the terms in 2002. Ex 16, at 119:13-126:8. He also explained that the "sV071802.1" footer that appears on the terms from 2002-2011 was a July 18, 2002 version date stamp that he added. *Id.*, at 188:14-196:7.

Safeway's counsel that "Safeway does not maintain an archive of its electronic files that goes back to 2005," and "to the extent these historical documents even exist they would have to be on individual custodian machines." Ex. 17, at 343:12-349:3; 357:13-360:18. He could not explain why his prior searches failed to turn up the documents he eventually found before trial, even though some were in clearly labeled folders (*e.g.*, "public/marketing/creative/old site design/site design/registration") that he purportedly manually searched. *Id*. at 392:16-395:14. Even though he found the documents on September 25, 2015, he waited until the afternoon of September 29 to tell Safeway's counsel about them. *Id*. at 397:5-401:7. He also admitted that he received no meaningful assistance from Safeway's in-house or outside counsel or IT personnel for his prior search; had no experience conducting such searches; and kept no record of the searches he made. *Id.* at 349:9-353:20; 382:15-387:13.[9]

Plaintiff then deposed Mr. Rhodes, who was President and CEO of Safeway.com from late 2002-2005.[10] Rhodes not only confirmed that there was a check box requiring customers to agree to the terms and conditions, but also testified that the online grocery terms and conditions came directly from *Safeway, Inc.'s corporate legal department*.[11] Ex. 19, at 128:19-129:12. Class Counsel therefore asked Safeway's counsel if anyone had ever searched Safeway's in-house counsel's files for copies of the Pre-2006 terms. Ex. 21. Safeway never answered that question. ¶ 32. Instead, five days later, Safeway conceded the all the Pre-2006 Issues remaining for trial. ECF 392.

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[9] Incredibly, Guthrie was also unprepared to testify concerning most of the new documents and evidence, notwithstanding this Court's Order for him to be re-deposed as Safeway's designee (ECF 374). He failed to review *any* of the new documents produced as a result of the Court-ordered search protocol; was unaware of Falsken's testimony; and was unaware of an email from former President and CEO Mitch Rhodes that Plaintiff had produced to Safeway weeks before stating: "I am 99.9% confident we had a check box for the terms and conditions and customers could not register without checking the box agreeing to the terms." Ex. 17, at 14:8-16:17; 48:11-54:10; 57:10-58:17; 212:1-17; 268:7-17; *see also* Ex. 18 (Rhodes email). When Plaintiff's counsel painstakingly walked him through some of the documents, Guthrie conceded that, in his *personal opinion*, there probably was a checkbox requirement before 2006, but he refused to concede the issue *as Safeway's designee*. Ex. 17, at 217:19-223:16. He even suggested at trial he might have a more concrete view based on a post-deposition review of the documents and testimony. *Id*. at 56:12-58:17.

[10] Mr. Rhodes was identified as a potential witness by Mr. Warr, a former website consultant listed as the author of one of the highly-relevant documents located by Guthrie. *See* Ex. 9.

[11] Rhodes also authenticated a 2003 Press Release, stating that customers "are guaranteed the same excellent selection of grocery items *and prices found at their local Safeway store*," and testified that Safeway heavily promoted price parity. *See* Ex. 19, at 109:1-113:17; Ex. 20.

Safeway and Reed Smith thereafter conducted a *post-judgment* investigation and discovered yet another shared drive – the Website Developer's Archive – and critical new documents therein. ECF 430, at 2:10-16. These documents independently would have resolved all Pre-2006 issues had they been produced prior to the discovery cutoff. To find them, Reed Smith interviewed only three Safeway IT employees, two of whom, Brendan Cook and Daunte Lopez, have worked for Safeway *since about 2002*. Ex. 22, at 1. Cook located an archived "IT specific directory containing website release code" that was "accessible through a shared drive that was mapped to certain profiles (including Mr. Cook's) within the IT group." *Id.* There, Cook found a "Modification History," which reflects the code and history of iterative changes for Safeway's registration page from June 25, 2003 through July 7, 2011.[12] *See* Ex. 23. This whole process took at most a few days. Ex. 22A. This document, along with two others Cook found,[13] demonstrates that before 2006, not only did all registrants click a box agreeing the terms but also that the terms linked to that page *were the same ones that Plaintiff submitted to the Court on summary judgment, which he located through the Internet Archive*.[14]

It is inexcusable that Safeway did not interview these and other long-time IT employees during discovery, *particularly given that Class Counsel specifically asked Safeway's counsel to speak with IT employees who worked for Safeway.com prior to 2006.* Safeway has offered no explanation why it did not speak with them, or why it could not have identified the shared Website Developer's Archive prior to the close of discovery. At least 32 employees can directly access the Website Developer's Archive from their desktops. Ex. 22B. Moreover, the Modification History document was last updated by Sam

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[12] Sam Chandrasekaran, Safeway's Manager of Ecommerce Development, is listed as the original author of the Modification History. Ex. 23. He worked at Safeway from March 2003 to 2014. Ex. 22B.

[13] The "Helptermsconditions.asp" document reflects "code that was called when the customer would click on the 'Read the Terms and Conditions'" link, and has an October 15, 2001 date. Exs. 22 & 24. The "Terms_frag.htm" document "contains the Special Terms that would have been presented to the customer during registration" from 2006 to 2011. Exs. 22 & 25.

[14] Specifically, the Modification History reflects that clicking the link to the terms would open a scrollable window with the website extension "…superstore/help/htm/helptermsconditions.asp." *See* Ex. 23, at 18-19. *This is the same address as all of the copies of the Pre-2006 terms and conditions Plaintiff submitted to the Court on summary judgment*. *See* ECF 273-29. Safeway had falsely argued in opposition to summary judgment that "the file extension 'helptermsconditions.asp' suggests this folder was specific to the 'Help' page(s) on Safeway's websites," and not the operative contract. ECF 290, at 12 n. 2.

Chandrasekaran *on July 7, 2011* -- ***three weeks <u>after</u> this lawsuit was filed***. Ex. 23. It was also updated six times between in November 200 and January 2010 by two current Safeway Programmer Analysts, Jorel Simbulan and Bill De Cadiz. *Id; see also* Ex. 22B

B. Safeway Failed To Produce Responsive, Outcome-Determinative Documents Concerning the Operative Version of the Contract

Safeway's post-judgment also investigation forced it to concede that it previously submitted the *wrong* version of the operative contract to the Court in connection with summary judgment on liability.[15] Safeway's failure to conduct adequate investigation and timely produce discovery on this issue means the Court was required to make a key summary judgment decision on an inaccurate record. Safeway's misconduct therefore threatens to impair the orderly conduct of the appeal. The Ninth Circuit will be required to evaluate Safeway's appeal on a *different* factual record from the one reflected in this Court's decision, and will not have the benefit of this Court's interpretation of the specific language of the correct operative contract.

As the Court will recall, the parties submitted competing versions of the Special Terms in connection with cross-motions for summary judgment on the breach of contract. The competing versions were identical with respect to pricing provisions but contained significant differences concerning whether amendments made to the Special Terms on November 14, 2011 were effective without notice to Class members. Plaintiff's version ("Version 1") stated that the operative terms were the ones posted at the time of *registration*, and also stated that Safeway would provide notice of material amendments. *See* ECF 237, at 14. Safeway's version ("Version 2") stated that the operative terms were those posted at the time of each *transaction*, and did not state that Safeway would provide notice of material changes.[16] *Id*. The factual dispute was highly relevant. The Court noted: "It becomes very tough for [Safeway] if [Version 1] of the Special Terms was operative…." ECF 219, at 59:10-12.

[15] This was not the first time Safeway submitted the wrong document. Judge White chastised Safeway for submitting the wrong FAQs with its Motion to Dismiss. ECF 38, at 5 n. 1.

[16] Guthrie submitted a declaration in support of Version 2, swearing: "These Exhibits appear to me to be true copies of the Special Terms as they would have appeared on the Safeway.com web site …." ECF 175, at ¶6. On reply Guthrie submitted a second declaration swearing that: "Based on my review of Safeway.com's records, I see no indication that [Plaintiff's Version 1] of the Special Terms was ever posted to the … websites," and "[b]ased on my comparison of [Versions 1 and Versions 2], the

The Court ultimately found it "unnecessary to resolve the factual question of whether Plaintiff or Defendant's version of the Special Terms was operative at any particular moment in time," however, because "[r]egardless of the version of the Special Terms that Class Members viewed when they registered with Safeway.com, it is undisputed that Class Members were not provided with conspicuous notice that changes had been made to the Special Terms at the time those changes were made [and] … class members were therefore not bound by those changes." *Id*. at 13-15, *citing Douglas v. US Dist. Court*, 495 F.3d 1062, 1065 (9th Cir. 2007) and *Ngyuen v. Barnes & Noble*, 763 F.3d 1171, 1173 (9th Cir. 2014). Of course, had Safeway conceded that Version 1 was the operative contract, in addition to ruling in Plaintiff's favor based on the notice required by *Douglass* and *Ngyuen*, the Court might also have interpreted the plain language of Version 1 as an independent basis to rule in Plaintiff's favor.

While the Court found it unnecessary to resolve the factual dispute, Plaintiff believed that the factual dispute could potentially become relevant on appeal or thereafter. Accordingly, on the second round of summary judgment, Plaintiff moved for summary judgment seeking to establish that Version 1 was the operative version. ECF 269-5.

Plaintiff's motion relied on subsequent discovery reflecting that Guthrie's prior declarations supporting Version 2 were misleading. First, Guthrie had subsequently admitted that the copies of Version 2 that Safeway submitted to the Court were *not* posted on the Safeway.com grocery delivery site, but rather were on Safeway's main content site, which is operated separately from the grocery delivery site. ECF 269-5, at 15, 17. Second, when Safeway amended the terms in November 2011 to eliminate the promise of price parity and to add an arbitration clause, Guthrie and outside counsel used Version 1 as the starting point and added the "Cookies" and "Links" paragraphs, which tended to show that Version 1 was the original operative version. ECF 269-5, at 17-19.[17]

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actual version of the Special Terms posted on our web sites in 2010 and most of 2011 is [Version 2]" because Version 1 "is missing several provisions, which we would normally include, such as a discussion of 'Cookies' and 'Links.' I have not been able to find any indication in Safeway's records [] that indicates [Version 1] was ever posted on our websites." ECF 184, at ¶4.

[17] Safeway argued that the copy of Version 1 that it edited might not have been the operative version of the contract, speculating that it might have edited a non-operative version. ECF 290 at 14-15.

Safeway's opposition to the motion attached 37 new copies of Version 2 of the terms *that Safeway had never produced in discovery*, which its counsel located on the Wayback Machine. ECF 293. Unlike prior copies submitted by Safeway, which were posted on the Safeway content site, these new copies reflected that they had been posted somewhere on the eCommerce site at various times between 2006 and 2011. *Id*. While there was no evidence these copies were linked to a registration page, Plaintiff recognized that an arguable issue of fact existed in the record given these previously-unproduced copies and Safeway's misrepresentations, and withdrew his motion on the issue.

Safeway's March 3, 2016, post-judgment concession belatedly confirms that Safeway's arguments concerning Version 1 and 2 were factually wrong. Even the limited information provided by Safeway to date demonstrates that Safeway easily could have and should have identified these witnesses, disclosed the Website Developer's Archive, and produced the documents that led to this concession. To reach the conclusion that Version 1 was the operative contract, Reed Smith interviewed just *three* current Safeway IT employees and reviewed just *three* files to determine that Version 1 was linked to the registration process. Ex. 22. Indeed, one of the three IT employees, Daunte Lopez, was responsible for posting an update to Version 1 of the Special Terms in 2009, as reflected in an email that Plaintiff submitted to the Court on summary judgment to show that Version 1 was the operative version. *See* ECF 186-9. Further, the IT-specific directory was not hidden in some long-forgotten storage closet, but was "accessible through a shared drive that was mapped" to profiles of at least 32 Safeway IT employees including Mr. Cook. Exs. 22, 22B. But for Safeway's earlier discovery abuse, the Version1/Version 2 Issue would have been resolved long ago, along with the Pre-2006 Issue. The discovery was responsive to Plaintiff's interrogatories and document requests discussed above, and Plaintiff specifically requested that Safeway seek information and documents from IT employees.

C. Safeway Engaged In Numerous Discovery Abuses To Obstruct Damages Discovery

Safeway's discovery abuses were not limited to the Pre-2006 Issue or the Version 1/Version 2 issue. They started from the outset.[18] Among the most egregious examples concerned Safeway's obfuscating and needless prolonging damages discovery.

[18] The parties submitted only some of their disputes to the Court, but even these were extensive.

When Safeway implemented the markup in 2010, Safeway.com CFO Mike McCready instructed data analyst Matt Campbell to write a data query (the "Query") to calculate and track the Markup charged on each product delivered. *See* ECF 274-5, at 4. Safeway's designee, Director of Financial Planning and Analysis Frank Marvin, testified in April 2015 that "[t]he intended function of the query was to enable [Safeway's corporate accounting group] … to capture the difference between the online prices and the prices from the store where the product is being picked so that the accounting group could capture that profit accurately and do an intercompany transfer between Safeway and GroceryWorks." ECF 274-15, at 22:18-24:13. The Court ultimately held that Class members are entitled to breach of contract damages in the amount calculated by Safeway's Query. ECF 331, at 15.

When discovery began in 2012, however, Safeway *denied* that it tracked the markup and refused to provide an aggregate markup calculation. Interrogatory No. 3 asked Safeway to state the aggregate price markup charged on a monthly basis. Safeway objected that the interrogatory was "unduly burdensome and oppressive." Ex. 26. Safeway also refused to produce any manuals or software that could be used to calculate the markup. *See* ECF 62, at p. 9, § L. Safeway agreed only to produce the markup schedule (*i.e.*, $.10 for every $1 of price) and over-one hundred million lines of raw transaction data from which Safeway asserted Plaintiff could figure out the aggregate markup himself. *Id*. at p. 4, § B.[19]

The parties submitted this and other discovery disputes to Judge Spero.[20] During the hearing, Safeway falsely represented to Judge Spero concerning markup calculations:

> We don't actually do this on a monthly basis. So it is an actual calculation that they are asking us to do. … They are not asking for an internal document.
> …

[19] As Safeway knew, however, calculating the markup is not as simple as reversing the markup schedule. The Query, which Safeway did not produce until over a year later in October 2013, has eight different equations to calculate the markup, which depend on the type of product, promotions, and the data fields available. ECF 274-8. Campbell explained why a reverse markup process is not ideal for calculating the markup on certain types promotions. *See* ECF 275-4, at p. 5.

[20] In addition to seeking to conceal the Query and markup calculations, Safeway also sought to conceal other critical documents by taking extreme positions before Judge Spero, some examples of which are described more fully in the Declaration of Class Counsel. *See* ¶ 47.

> Why are we doing this calculation … for them that we haven't done and we don't do on a regular basis that they can do themselves?

ECF 79, at 12:22-13:1. This was not true. Safeway's corporate accounting group had been using the Query to calculate the aggregate markup on a weekly basis to make intercompany transfers. Nevertheless, based on Safeway's representation, Judge Spero did not order Safeway to provide the markup calculation: "This is lawyer gamesmanship … you can do this calculation for next to nothing or they can pay their computer expert $1,000,000. … I just don't understand how in the spirit of cooperation you won't do it… I think it's a real mistake, but I'm not going to order it." ECF 79, at 15:6-13.

Although he did not require calculation of the markup, Judge Spero did initially require Safeway to produce any manuals or software that could be used to calculate the markup, which would have included the Query itself. ECF 65. Safeway filed a motion for relief from Judge Spero's Order, however. ECF 67. Judge White neither granted nor denied that motion, but remanded to Judge Spero to conduct a further discovery conference, stating only that "[t]he parties shall keep in mind the exhortation of the Court to limit the scope of initial discovery to the central determinative issues with an eye toward settlement." ECF 69. Judge Spero ordered the parties to submit compromise offers "on the scope of discovery that should be conducted on the central issues in this case and/or is necessary before productive settlement discussions may begin." ECF 70. Plaintiff significantly narrowed his discovery requests, ECF 76, but Safeway steadfastly refused to provide an aggregate markup calculation or produce any manuals or software related to calculating the markup. ECF 76, at 1-2, 4-5.

Further, Safeway made another false statement to Judge Spero. Safeway had earlier produced a database containing millions of lines of raw transaction data, but Plaintiff discovered that Safeway had withheld a data field called "reg_rtl_prc." Plaintiff suspected that field reflected the "regular retail price" of the item and requested it. *See* ECF 76, at 3. Safeway agreed to produce the "reg_rtl_prc" data field, but explained its prior failure to do so as follows:

> Although the list of database fields includes the field "REG_RTL_PRC" (Regular Retail Price), **Safeway.com does not use this data field in its business and was, therefore, unfamiliar with it**. Upon learning this field represents the historical in-store item price, it agreed to produce it.

ECF 76, at 4. In fact, as would only become apparent later, the Query uses the "reg_rtl_prc" field to calculate the markup for *most* items. *See* ECF 274-8.

Plaintiff first learned of the Query through a subsequent interrogatory response in June 2013 (Ex. 27), and then more fully from Campbell's deposition in September 2013 (*see* ECF 274-11).[21] Upon reviewing the Query, it became apparent that, notwithstanding Safeway's representation to Judge Spero that the aggregate markup was a "calculation... that [Plaintiff's Counsel] can do themselves," Safeway *still* had not produced all of the data fields necessary to calculate the markup using the Query. Plaintiff requested these additional fields on October 17, 2013. Ex. 29. Safeway initially refused (*id.*), but finally agreed on May 29, 2014 to produce the missing fields (Ex. 30). But even then there appeared to be missing fields, and Plaintiff's expert, Paul Manning, was unable to match the markup calculations with the amounts reflected on Safeway's Price Zone Impact Spreadsheets (which eCommerce employees used to cross-check the accounting department's Query calculations). ¶ 44.

On December 19, 2014, Plaintiff served Interrogatory 11 and again asked Safeway to provide an aggregate markup calculation. Safeway again refused (Ex. 31), but after more debate and guidance from the Court in response to Safeway's continuing resistance (ECF 235, at 18:17- 23:23), Safeway finally produced the "Query Run," which is simply the results of the Query for all of the individual items in the transaction database. In other words, after *three years* of hard fought discovery, hundreds of hours of attorney time, and several appearances before Judge Spero, *Safeway finally provided the information originally sought in Interrogatory number 3*, which Safeway had been calculating in the regular course of business all along.

II. ARGUMENT

Safeway's discovery misconduct imposed unnecessary burdens on the Court. It also multiplied Class Counsel's lodestar and expenses; created the risk that Plaintiff could have either lost these issues, been forced to proceed to an expensive trial, or settled too cheaply based on perceived risk; forced Class Counsel to prepare for two different trials on a $10 million issue that should have been conceded;

[21] Even after Campbell's deposition, Safeway's counsel resisted producing the Query, stating: "the database query is … numerous pages of computer code that would not make sense to anyone who viewed it." Ex. 28. Safeway eventually capitulated.

threatens the orderly conduct of the appeal; and caused considerable delay in ultimate payment to Class members.

A. Sanctions Are Required Under Rule 16(f)

Safeway should be sanctioned for its failure to locate and produce responsive discovery within the Court-ordered discovery deadline and its related misrepresentations to Plaintiff and the Court. There was no great difficulty involved in locating relevant documents from the Legacy Drive or the Website Developer's Archive, which were directly accessible by dozens of employees. Guthrie eventually found highly-relevant documents from the Legacy Drive with no help from anyone. It only took conversations with three long-standing IT employees to discover the shared IT drive containing the Website Developer's Archive and a few days to locate the dispositive documents. Safeway has no excuse for failing to locate these drives and documents during discovery.

Rule16(f) provides: "On motion or on its own, the court *may* issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney: … fails to obey a scheduling or other pretrial order….*Instead of or in addition to any other sanction*, the court ***must*** order the party, its attorney, or both to pay the reasonable expenses – including attorney's fees – incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust."[22]

There is no bad faith requirement to issue sanctions under Rule 16. *Rahbarian v. Cawley*, 2013 U.S. Dist. LEXIS 171123, *12-13 (E.D. Cal. Dec. 2, 2013). Mere inadvertence is sufficient, and negligence or bad faith impacts only the kind of sanctions to be awarded. *See generally, Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 242-243 (3d Cir. Del. 2007).

Monetary sanctions are mandatory here:[23]

[22] Rule 37(b) provides for sanctions where a party fails to obey a discovery order. The term "order" in Rule 37(b)(2)(A) is interpreted broadly, but Rule 16 is more directly relevant here. Nevertheless, the substance of Rules 16(f) and 37(b) is virtually the same so it makes little difference which is applied.

[23] Safeway's failure to produce these documents was not substantially justified. "Substantial justification is justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request." ECF 354, *quoting Hewitt v. Liberty Mut. Grp., Inc.*, 268 F.R.D. 681, 682 (M.D. Fla. 2010). "Among the factors that may properly guide a district court in determining whether a violation of a discovery deadline is justified or

> For the discovery system to function properly, the costs of resisting discovery must be sufficiently great so that the benefits to be gained from sharp or evasive discovery practices are outweighed by the sanctions imposed when those practices are discovered. It is not enough that an offender belatedly comply with its discovery obligations; '[i]f the only sanction for failing to comply with the discovery rules is having to comply with the discovery rules if you are caught, the diligent are punished and the less than diligent, rewarded.'

Wingnut Films, Ltd. v. Katja Motion Pictures Corp., 2007 U.S. Dist. LEXIS 72953, *42 (C.D. Cal. Sept. 18, 2007); *see also Keithley v. Homestore.Com, Inc.*, 2009 U.S. Dist. LEXIS 2720, 3-4 (N.D. Cal. 2009)(awarding monetary sanctions pursuant to Rule 37(c)(1) for late production of documents resulting from party's failure to meaningfully inquire and search relevant hard drives for the requested information in a timely manner, including costs incurred in securing the production, costs incurred in identifying the missing information, costs incurred in connection with the motion for sanctions, and costs incurred in connection with depositions related to the missing information).

B. Sanctions Are Required Under Rule 26(g)

Several of Safeway's discovery responses also constituted sanctionable violations of Rule 26(g), which requires a litigant to make a reasonable inquiry into the factual basis for its responses to a discovery request. *See Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 555 (N.D. Cal. 1987). Safeway's responses to discovery requests were frequently inaccurate, baseless, false, and unjustified in violation of Rule 26(g). For example, Safeway falsely claimed that it would be "unduly burdensome and oppressive" to calculate the aggregate markup, while its accounting department had been performing markup calculations all along. Safeway also made numerous false and inaccurate statements in response to Interrogatories 13-15 and Document Requests 50, 52, and 53, and in emails

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harmless are: (1) prejudice or surprise to the party against whom the evidence is offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of the trial; and (4) bad faith or willfulness involved in not timely disclosing the evidence." *Lanard Toys Ltd. v. Novelty, Inc.*, 375 F. App'x 705, 713 (9th Cir. 2010). The burden to prove justification is on the party facing sanctions. *Yeti by Molly. Ltd. v. Deckers Outdoor Com.*, 259 F.3d 1101, 1107 (9th Cir. 2001). This Court has held that "disobedient conduct not shown to be outside the control of the litigant is all that is required to demonstrate willfulness, bad faith, or fault." ECF 354, at 4, *quoting Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir. 1993). All of these factors weigh in favor of sanctions.

from its counsel, and testimony, concerning the non-existence of documents reflecting historic copies of term and registration procedures. Those statements were not based on any good faith investigation.

In responding to interrogatories and document requests, "[a] party has an obligation to conduct a reasonable inquiry into the factual basis of its discovery responses." *Nat'l Acad. of Recording Arts & Sciences, Inc.*, 256 F.R.D. at 680; *A. Farber and Partners, Inc.*, 234 F.R.D. at 189; *see also Anderson v. Cryovac, Inc.*, 862 F.2d 910, 929 (1st Cir. 1988) ("Once a proper discovery request has been seasonably propounded, we will not allow a party sentiently to avoid its obligations by filing misleading or evasive responses, or by failing to examine records within its control.").

Rule 26(g) requires that objections to discovery requests must "not [be] interposed for any improper purpose, such as to … cause unnecessary delay, or needlessly increase the costs of litigation." Fed. R. Civ. P. 26(g)(1)(B)(i) and (ii). The rule "imposes an affirmative duty to engage in pretrial discovery in a responsible manner [and] obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection." A lawyer's signature on the responses "certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. Fed. R. Civ. P. 26(g) Advisory Committee Notes to the 1983 Amendments.

As with Rule 16, sanctions are mandatory under Rule 26(g) if a party acts without substantial justification in withholding or objecting to discovery requests, and the rule does not require a finding of bad faith. Fed R. Civ. P. 26(g)(3) (noting that "[i]f a certification violates this rule without substantial justification," the court "*must* impose an appropriate sanction," which may include reasonable expenses and attorneys' fees); *see also Radiation Survivors*, 115 F.R.D. at 555; *Vieste, LLC v. Hill Redwood Dev.*, 2011 U.S. Dist. LEXIS 18834 (N.D. Cal. Feb. 10, 2011). Inadvertence or negligence is not an excuse, as Rule 26(g) does not require an intentional violation. *See Brock v. County of Napa*, 202 U.S. Dist. LEXIS 98578, *16-17 ("we consistently have held that sanctions may be imposed even for

negligent failures to provide discovery") (citations omitted). Numerous courts in this Circuit have held that Rule 26(g) mandates a sanction for misconduct like that committed by Safeway.[24]

C. Sanctions are Warranted Under Rule 37(c)

Sanctions are also warranted pursuant to Rule 37(c) because Safeway failed to timely supplement its discovery responses as required by Rule 26(e). *Knudsen v. City & County of San Francisco*, 2014 U.S. Dist. LEXIS 9860, *9 (N.D. Cal. Jan. 27, 2014)(Tigar, J.). With respect to Rule 37(c), this Court's decision in *Knudsen v. City & County of San Francisco*, 2014 U.S. Dist. LEXIS 9860 (N.D. Cal. Jan. 27, 2014)(Tigar, J.) is instructive. There, this Court held that the plaintiff's numerous requests for the missing information "was sufficient to prompt Defendants to inquire immediately into the adequacy of their document production," but that "Defendants did not conduct any meaningful inquiry until months later, when their preparation of their motion for summary judgment required it." *Id.*at *13. Sanctions for the defendants' violations included the costs of additional discovery related to the documents at issue as well as attorneys' fees and costs incurred in connection with the motion for sanctions. *Id.* at *16-17.

The same is true in the instant case. Here, Plaintiff made several specific requests for markup calculations, which were more than sufficient to prompt Safeway to inquire immediately as to the existence of relevant data. Rather than conduct the required meaningful inquiry, Safeway denied the

[24] *See e.g., Radiation Survivors*, 115 F.R.D at 555 (imposing sanctions for various discovery abuses, including defendants' assertion that certain data requested by plaintiffs was "only obtainable through a manual review of the virtually millions of individual claim files in the various regional offices," when the data was readily available and sortable through two computer databases)*; R & R Sails, Inc. v. Ins. Co.*, 251 F.R.D. 520, 524 (S.D. Cal. 2008)(awarding sanctions pursuant to Rule 26(g) where Defendants had represented that an electronically stored claim log responsive to Plaintiffs' discovery requests did not exist when, in fact, it was revealed at a later deposition that such a log did exist and was maintained in the normal course); *HM Elecs., Inc. v. R.F. Techs., Inc.*, 2015 U.S. Dist. LEXIS 104100 (S.D. Cal. Aug. 7, 2015)(imposing monetary sanctions on Defendants under Rule 26(g) where Defendants' failure to produce certain ESI until after the close of discovery caused Plaintiffs "to expend significant resources hunting down ESI that should have been delivered to Plaintiff years ago"); *Carrillo v. Schneider Logistics, Inc.*, 2012 U.S. Dist. LEXIS 146903, *33 (C.D. Cal. Oct. 5, 2012)(awarding monetary sanctions under Rule 26(g) for defendants' late production of clearly responsive documents that had not been uncovered in defendants initial searches, finding that defendant had "disregarded its obligation to conduct a reasonably diligent search for responsive documents.")

existence of the information and stood on its previous responses. *See also Houston v. Country Coach, Inc.*, 2008 U.S. Dist. LEXIS 119877, 1-2 (N.D. Cal. Apr. 1, 2008)(holding that party's refusal to produce information requested in discovery on the grounds that production was "burdensome and oppressive" was not substantially justified where, just before the pretrial conference, defendants overcame the "burdensome" task of locating the missing documents).

Similarly, Plaintiff served focused interrogatories and document requests seeking information regarding the Pre-2006 contract terms, the Pre-2006 checkbox procedure, and the operative versions of the contract, and also asked pointed questions in communications with counsel and at depositions regarding the sufficiency of Safeway's search and accuracy of Safeway's representations. Plaintiff even specifically asked Safeway's counsel to interview Safeway's IT personnel. Under Reed Smith's guidance, Safeway was able quickly located responsive documents in the Legacy drive and also located the IT archive with little difficulty. *See* Exs. 22, 22A. There is no excuse for Safeway's prior failure to find and produce that information and make proper concessions in response to Plaintiff's requests.[25]

D. Sanctions Are Warranted Under the Court's Inherent Power

The misconduct outlined herein demonstrates that Safeway engaged in a start-to-finish campaign to obstruct, compounded with an ostrich-like attitude to avoid finding the truth. Safeway's misstatements made to the Court concerning markup calculations, missing data fields, the alleged lack of information regarding Pre-2006 contract formation, the manufactured dispute concerning Version 1 and Version 2, and the other misconduct outlined herein warrant sanctions under the Court's inherent power. *Fink v. Gomez*, 239 F.3d 989, 991 (9th Cir. 2001).

The imposition of sanctions under the court's inherent authority is discretionary. *Air Separation, Inc. v. Underwriters at Lloyd's of London*, 45 F.3d 288, 291 (9th Cir. 1995). The court's inherent power extends to a full range of litigation abuses. *Fink*, 239 F.3d at 992, *quoting Chambers v. Nasco, Inc.*, 501

[25] Mr. Guthrie's initial defective search of the Legacy Drive was performed without any help from Safeway's IT department or Safeway's counsel. Counsel had a duty to make sure that search was preformed, correctly by qualified personnel. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 435 (S.D.N.Y. 2004) ("counsel is responsible for coordinating her client's discovery efforts").

U.S. 32, 46-47, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991). Although mere recklessness is insufficient to support sanctions under the court's inherent powers, "recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose" is sufficient. *Id.* at 993-94. Courts have broad fact-finding powers to grant or decline sanctions, warranting great deference. *Smith v. Lenches*, 263 F.3d 972, 978 (9th Cir. 2001).

"[D]isobedient conduct not shown to be outside the control of the litigant is all that is required to demonstrate willfulness, bad faith, or fault." *Henry*, 983 F.2d at 948. A party can demonstrate bad faith by "delaying or disrupting the litigation or hampering enforcement of a court order." *Primus Auto. Fin. Servs. v. Batarse*, 115 F.3d 644, 649 (9th Cir. Cal. 1997), *citing Hutto v. Finney*, 437 U.S. 678, 689 n.14, 57 L. Ed. 2d 522, 98 S. Ct. 2565 (1978). Providing false or incomplete information during a deposition or in a response to a discovery request also constitutes the sort of willfulness, bad faith, or fault required for sanctions under the court's inherent power. *See Arnold v. Cnty. of El Dorado*, 2012 U.S. Dist. LEXIS 112398, 2012 WL 3276979, at *4 (E.D. Cal. Aug. 9, 2012) (finding that plaintiff acted in bad faith by lying at her deposition, warranting dismissal sanctions); *see also Lofton v. Verizon Wireless (VAW) LLC, 308 F.R.D. 276, 287 (N.D. Cal. 2015)*(where party and nonparty responded to plaintiffs' discovery requests with raw data instead of reports its databases were capable of producing to respond to those requests, awarding monetary sanctions to reimburse plaintiffs for the attorneys' fees and consultant fees incurred in order to render the data searchable and responsive to the requests). Particularly relevant here is the fact that Safeway's misconduct occurred over a long period of time with respect to multiple different outcome-determinative issues.

E. <u>The Nature and Amount of Sanctions Sought</u>

Safeway's misconduct has damaged class members, and imposed unnecessary burdens on the Court. This lawsuit was filed 5 years ago. Given the expected 2-year time period for the Ninth Circuit to rule on Safeway's appeal, Class members may not receive refunds until 2018 or later. But for Safeway's misconduct, this Court's final judgment would have been entered long before November 2015, and the appeal resolved much sooner. The Appeal is also more complicated than necessary since the Court was deprived of an accurate record and the ability to consider an alternative basis in deciding

the effectiveness of Safeway's November 2011 amendments to the Special Terms, which Safeway asserts is one of the key issues of its appeal and affects more than half the total damages.

Safeway's conduct also severely damaged Class Counsel, who have litigated this case on a contingent fee basis, have advanced all costs of the litigation, and have foregone other work in order to prosecute this case. As a result of Safeway's misconduct, Class Counsel was forced to waste considerable time on duplicative discovery, damages calculation, summary judgment and other briefing, and intense, all-consuming preparation for two materially-different trials. Safeway's misconduct has also impaired the judicial process.

The Court has broad discretion to tailor the sanctions to be awarded here. *See e.g., Keithley*, 2009 U.S. Dist. LEXIS 2720, *7-8 (awarding 75% of time spent serving follow-up discovery requests arising out of late-produced documents, 50% of fees and costs related to a motion to compel, 75% of costs incurred in motion for sanctions, plus fees and costs incurred in re-taking depositions); *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 244 (3d Cir. 2007) (upholding sanctions award in a case where new documents were produced in the middle of trial for $500,000 in fees incurred to, *inter alia*, review the new documents and alter trial strategy, re-examine witnesses, prepare for and handle three additional days of trial, and to prepare and file a motion for sanctions). Rule 16(f)(2) makes clear that court has the flexibility to award a variety of sanctions "[i]nstead of **or in addition to** any other sanction" such as the mandatory monetary sanctions awarded to a party. The *sui generis* posture of this sanctions motion, where preclusion of evidence or issues would be moot, dictates a flexible and creative approach in issuing sanctions that provide full compensation for the harm incurred. Plaintiff's requested sanctions are as follows:

Unnecessary Expert Expenses: Plaintiff's expert, Paul Manning, billed (and Class Counsel paid out-of-pocket) $22,500 prior to the production of the Query Run, which would have been avoided if Safeway had just provided the Query Run in the first instance. ¶ 52 and Ex. 32. Safeway should reimburse Plaintiff's counsel this amount.

Attorney's Fees on Markup/Database Work Prior to the Query Run: Safeway refused to provide a markup calculation, produced databases with missing fields, and obstructed damages

discovery. Class Counsel's time records reflect a lodestar of $24,862.50 for specific time entries relating to time spent working with database experts, analyzing Safeway's databases, and performing damages calculations prior to the Query Run production.[26] ¶ 54 and Ex. 33.

Attorney's Fees on Pre-2006 and Version 1/2 Issues from March 9, 2015 through August 31, 2015: If Safeway had conducted an adequate investigation, it would have been forced to concede the Pre-2006 Issues in its March 9, 2015 answers to Interrogatories 13-15. Likewise, if Safeway had conducted an adequate investigation with respect to Document requests 50-53, to which it responded on March 9, 2011, it would have been forced to concede both the Pre-2006 and Version1/2 issues long ago. Class Counsel have carefully excerpted from their time records all time spent on Pre-2006 and Version 1/2 issues from March 9, 2015 (the date of Safeway's inadequate and inaccurate discovery responses), through August 31, 2015 (the date of the Court's summary judgment order). Had Safeway conceded these issues in March 2015, as it should have done, Class Counsel would not have incurred this time, which represents a lodestar of $347,628.75. ¶55 & Ex. 34; *see also* Shah Decl. at ¶ 6.

Trial Preparation Time from September 1, 2015 through September 29, 2015 – From September 1, 2015 (the day after the Court's August 31 summary judgment order), through September 29, 2015 (the date Safeway produced new documents), Class Counsel worked solely on preparing for a trial on Pre-2006 Issues based on an inaccurate and incomplete record. Had Safeway complied with its discovery obligations, it would have conceded the Pre-2006 Issue long before. At a minimum, Plaintiff would have handily won summary judgment on the Pre-2006 issue. This wasted time, spent preparing for a roughly $10 million trial solely on the Pre-2006 Issue, totals $266,250. ¶56 & Ex. 35; Shah Decl. at ¶ 7.

Trial Preparation and Discovery Re-do from September 30, 2015 Through Safeway's November 12, 2015 Concession: From September 30, 2015 (the day after Safeway produced the ten new documents Guthrie located) through November 12, 2015 (the date of Safeway's concession of the

[26] This lodestar significantly understates the full cost of Safeway's damages discovery misconduct because it excludes time incurred meeting and conferring, briefing, and arguing damages discovery issues, as well as other time where it is difficult to segregate the time related to solely to markup calculation from numerous other contemporaneous discovery issues.

Pre-2006 Issue), Class Counsel conducted a new round of document discovery and depositions, while simultaneously preparing for trial incorporating the new evidence. If Safeway had conducted an adequate investigation prior to responding to Interrogatories and Documents requests on March 9, 2015, this additional discovery and trial preparation would have been unnecessary. Class Counsel have excerpted their time spent on this discovery and trial preparation tasks, which represents a lodestar of $419,090. ¶57 & Ex. 35; Shah Decl. at ¶8.

Time Spent Preparing This Sanctions Motion: Class Counsel also seek attorneys' fees for time spent preparing this sanctions motion. Class Counsel will provide Safeway with their time spent to completion of this motion within five business days of filing, and will provide a complete and final report to the Court when Class Counsel file their reply brief.

In total, Class Counsel have incurred $1,057,831.25 in lodestar (excluding time spent on this motion) that could have been avoided had Safeway complied with its discovery obligations. Class Counsel recognize that it is not possible to determine with precision what would have happened if Safeway had complied with its discovery obligations. Safeway will likely argue that some of the above work would have been required even if it had not engaged in misconduct. To avoid unnecessary disputes about potential alternate timelines, as well as to forestall petty disputes Safeway may attempt to raise concerning whether the work reflected in individual time records was necessitated by discovery violations, Class Counsel seek 80% of this amount as an appropriate sanction, or $846,265.

Since Class Counsel have litigated this case on contingent fee basis, and since the result of Safeway's misconduct was to increase counsel's costs and prevent counsel from working on other cases, Class Counsel believe it would be appropriate to award these attorneys' fees directly to them. *See e.g.*, *Dixon v. Comm'r*, 2009 U.S. Tax Ct. LEXIS 5, *100-101, 132 T.C. 55, 104-105, 132 T.C. No. 5 (T.C. 2009) (awarding sanctions representing attorneys' fees to be paid directly to counsel, who had taken case on a contingent fee basis).[27] Alternatively, any awarded sanctions can be held in escrow until the conclusion of the litigation, at which time Class Counsel will make a proposal for distribution.

[27] Whether such an award should serve as an offset to any fees awarded pursuant to Rule 23 at the conclusion of the case is an issue than can be deferred and decided in connection with any fee petition.

Delay Damages to the Class: The Court can also award additional interest as a sanction to compensate the Class delay caused by Safeway's misconduct. *See e.g., Eakin v. Continental Illinois Nat'l Bank & Trust Co.*, 1989 U.S. Dist. LEXIS 15166, at *2-5 (N.D. Ill. Dec. 19, 1989) ("interest is an appropriate penalty under Rule 11" for delay damages, even in the absence of any statutory or contractual provision for interest). Safeway's misconduct caused a significant delay in the entry of judgment and ultimate resolution of Safeway's appeal. It is difficult to determine with precision how much sooner the case would have been resolved if Safeway had complied with its discovery obligations, but there is no doubt that it could have been resolved much sooner. Here, the Class is entitled to 10% pre-judgment interest, but the federal post-judgment rate is likely[28] only .51%. Plaintiff submits that the Court should award the difference (*i.e.*, 9.49%) for 3 months (*i.e.*, the three months from the August 31, 2015 summary judgment decision through entry of final judgment on November 30, 2015) as a sanction and to compensate Class members for the unnecessary delay in obtaining a final judgment.[29] ¶ 60.

Negative Jury Instruction: Finally, while Plaintiff fully expects to defeat Safeway's appeal, should Safeway somehow prevail and force a trial on any issue, Plaintiff requests an appropriate instruction so the jury is aware that Safeway engaged in discovery misconduct and can take that into account in evaluating credibility. The contours of such an instruction should be determined after any remand for trial based on the nature and extent of issues to be decided by the jury, but establishing Plaintiff's entitlement to that type of instruction is ripe for determination now.

III. CONCLUSION

Plaintiff respectfully requests the Court sanction Safeway as requested herein.

[28] This Motion is not a proper vehicle to argue whether a higher post-judgment rate applies.

[29] But for the fact that Plaintiff has already obtained a final judgment, Safeway's sanctions could have merited issue preclusion sanctions or perhaps even a default judgment. Safeway should not benefit from the fact that its sanctionable conduct came to light only at the end of the case. Awarding additional interest ensures that Safeway is not benefitted, while providing Class members compensation for delay

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