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May 27, 2020

REPLY TO TEANECK

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Via Electronic Filing

Honorable Bruce J. Kaplan, J.S.C.
Middlesex County Superior Court
56 Paterson Street
New Brunswick, New Jersey 08903

**Re: Thomas, Elma -v- BJ's Wholesale
File No.: 32446
Docket No: MID-L-5518-19**

Dear Judge Kaplan:

The undersigned represents the Plaintiff, Elma Thomas, with regard to the above referenced matter. There is presently a Motion to Compel Plaintiff to provide Discovery and Appear for a Virtual Deposition returnable before Your Honor on June 5, 2020. Kindly accept this letter in lieu of more formal certification in opposition to Defendants' Motion. Plaintiff hereby requests oral argument.

I. Virtual Deposition of the Plaintiff

Defendant's counsel in his moving papers is a bit disingenuous in his recitation of the facts with regard to the Plaintiff's deposition. First, Defendant's counsel argues that the April 16, 2020 deposition of the Plaintiff was noticed to be done virtually and attaches his deposition notice as Exhibit B to the Motion. It should be noted that the deposition notice **was not** for a virtual

deposition it was for an in person deposition, and it should also be noted that the notice was sent on March 5, 2020, which prior to the pandemic and prior to the Stay at Home Order being issued by Governor Murphy (See Exhibit B of Defendant's moving papers). Secondly, contrary to Defendant's counsel's assertion in his moving papers, Plaintiff's counsel did not unilaterally cancel the Plaintiff's deposition on April 10, 2020, but instead advised counsel on April 3, 2020, via e-mail in response to his April 2, 2020 e-mail (wherein for the **first time** he requests that the deposition be conducted virtually), that we did not think that would be practicable or feasible for this particular client to go forward with a virtual deposition due to **both tech and accent issues**. (See Plaintiff's Counsel's E-Mail dated April 3, 2020, attached hereto as Exhibit A). Furthermore, on May 7, 2020, the undersigned spoke to Defendant's counsel and again reiterated the concerns we had with regard to conducting depositions virtually on this case, and explained that even with a "flight pack" a virtual deposition would not be practicable in this case. For a multitude of reasons, even with a "flight pack" and test run from the court reporter, a virtual deposition in this matter is completely not feasible or practicable, and will only cause unnecessary stress, annoyance, oppression and undue burden upon the Plaintiff.

Plaintiff in this matter is a seventy-two year old Jamaican woman with a heavy accent, who has absolutely no knowledge of any technology, no knowledge or access to the internet, no audio or visual knowledge, no e-mail, no printer, etc. She is "old school" and in no way technologically inclined nor does she live with anyone who can help her. Additionally, Defendant's counsel argues that this is a routine premise case wherein he estimates that there will only be one exhibit at the deposition which is the two page incident report. Defendant's counsel's assertions fails to recognize the fact that it is not that simple and in order to properly prepare the Plaintiff, we will have to go through more than just the incident report with her in order to properly prepare her for the deposition which obviously cannot be revealed in detail in order to preserve the attorney-client privilege. Additionally, with a "flight pack" controlled by the court reporter we will not be able to do a test run or speak to her virtually prior to the deposition to again properly prepare her and

make her comfortable with the whole virtual deposition process. Therefore, pursuant to R.4:10-3 Plaintiff should not be forced to undergo a virtual deposition as for the reasons stated above, it will clearly cause annoyance, oppression undue burden and prejudice upon the Plaintiff.

Plaintiff is ready and willing to appear for a deposition; however, for the reasons stated above she is not able to appear virtually. To date, the Stay at Home Order remains in place through June 15, 2020; however, we have entered phase one of re-opening here in New Jersey and if things go well, we are hoping to be back in the office soon. Regardless, the above clearly are exceptional circumstances beyond our control. Furthermore, it should be noted that the current discovery end date of June 17, 2020 noted in Defendant's moving papers was the initial discovery end date and has already been extended for the initial 60 days, to its current date of August 16, 2020, and pursuant to the court rules, can be extended further via motion for good cause. Accordingly, there would be no prejudice to the Defendant in conducting the deposition in person when it is safe to do so. To the contrary, Plaintiff will be greatly prejudiced as she would not be able to be virtually prepared by her counsel (this office) for the reasons mentioned above, and a virtual deposition would cause unnecessary stress, oppression, annoyance and undue burden.

II. PLAINTIFF'S OUTSTANDING MEDICAL AUTHORIZATIONS

With regard to the outstanding medical authorizations being requested by Defendant's counsel in his moving papers, it should be noted that Plaintiff is not objecting to the request for the authorizations and has not refused to provide the authorizations. To the contrary, in my phone call to Defendant's counsel on May 7, 2020, and in my case manager, Kristen Colucci's e-mail to Defendant's counsel of May 14, 2020, we explained to Defendant's counsel that we just needed additional time as we could not forward the authorizations to Plaintiff electronically as she had no means of being able to print them or receive them and that same had to be mailed to her. We asked for additional time due to the fact that mail is very slow due to the pandemic and safety/sanitary measures being taken with mail due to the virus, including letting mail sit for some time prior to it being opened or handled. (See e-mail dated May 14, 2020, and e-mail dated May 28, 2020, attached

hereto as Exhibit B). Defendant's counsel responded on May 14, 2020 "Sure thing . . . if you need more time just let us know." (See Exhibit B). Instead of giving us additional time as we had requested and he agreed to, he filed the instant motion the next day, on May 15, 2020. In the follow up e-mail on May 28, 2020, in response to their e-mail of the same day, we again indicated that we had sent the authorizations via mail and would forward them upon our receipt of same in the mail. Additionally, we noted that we had contacted our client and she advised us that she mailed them to us on Tuesday, May 26, 2020, so we were hoping to get them back shortly. (See Exhibit B). Accordingly, Plaintiff is not refusing to provide said authorizations and Defendant's motion to compel same should be denied.

III. PLAINTIFF'S OUTSTANDING ANSWERS TO DISCOVERY

Contrary to Defendant's assertion, Plaintiff is not refusing to provide medical bill and lien information. To the contrary, in my conversation with Defendant's counsel on May 7, 2020, I advised him that we provided all of the medical bills we had to date with the Answers to Interrogatories and put TBS on the ones we did not have. I advised that we had requested the medical bills we did not have; however we had not received same and would provide them upon our receipt of same. (See fax requesting the medical bills, attached hereto as Exhibit C). Furthermore, I advised Defendant's counsel that Plaintiff was Medicare eligible and we were still awaiting a conditional payment from them and would forward same upon our receipt. I asked for additional time to provide same as I did not have them in my possession which Defendant's counsel granted; however, again, rather than affording the additional time as requested, he filed the within motion.

Plaintiff is not refusing to provide this information and has provided the information that we do have to date. Obviously, we cannot provide what we do not have until we receive it and we cannot control when the medical facilities will forward us said bills or when Medicare/CMS will forward us a conditional payment. Additionally, discovery is still ongoing so there is time to provide said documents to Defendant's counsel and we plan on doing so. Accordingly, Plaintiff

should not be compelled to provide something that she does not yet have and will provide same upon our receipt and in accordance with the Rules of Court and discovery. As indicated to Defendant's counsel in our previous conversations, we definitely will not have this information within 10 days, and cannot control or determine when the facilities will send us this information. However, we have never "refused" to provide this information.

For all of the foregoing reasons, Defendants' Motion to Compel Discovery and Virtual Deposition should be denied in its entirety. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment. Due to the COVID-19 health emergency, the undersigned is currently working from home as is all staff of the law office. Accordingly, a courtesy copy of this opposition could not be provided in accordance with the Rules of Court. Counsel apologizes for any inconveniences caused by its current inability to provide courtesy copies.

Respectfully submitted,
DAVIS, SAPERSTEIN & SALOMON, P.C.



PATRICIA Z. BOGUSLAWSKI, ESQ.
For the Firm

PZB/nb

cc: John M McConnell, Esq./ Goldberg Segalla LLP (*Via Electronic Filing*)