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File
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August 22, 2008

VIA U.S. MAIL AND EMAIL

Mr. Eugene Forte
688 Birch Court
Los Banos, CA 93635

RE: Depositions of Anna Brooks, Mike Villalta, Tom Faria, Steve Rath, Steve Hammond / Forte v. Jones, Merced Co. Superior Court Case No. 150880

Dear Mr. Forte:

I have not heard from you since my letter to you of August 8, 2008, responding to your comments regarding the production of documents by Joe Sousa at his deposition on July 30, 2008. If you have any further questions, please contact me in writing so as to satisfy your obligation to meet and confer regarding any discovery dispute, should any remain.

I have also not heard from you regarding new dates for the deposition of Tom Faria. I note that you have subpoenaed Los Banos City Council Member Mike Villalta for deposition on September 2, 2008, at 1:00 p.m., City Manager Steve Rath and City Council Member Anna Brooks for deposition on September 3, 2008, at 9:00 a.m. and 1:00 p.m., respectively and Planning Commissioner Steve Hammond for deposition on September 4, 2008, at 1:00 p.m. As City Attorney I will be appearing at each of the depositions to represent the witnesses in their capacity as City officials.

The verified complaint you filed identified unspecified city officials as witnesses to the alleged defamatory statements by Mr. Jones to you on May 5, 2007, while present at the Los Banos May Day parade, which is the subject of your action. You also alleged that your notice of claim based on that incident had been presented to and denied by the City of Los Banos. You have included in your subpoena a request for production of records, many of which are likely to include City documents, some of which may be privileged and confidential. Because these events and documents involve the witnesses serving in their capacity as City officials, the City has found it appropriate for me to be present. The City has no position and no interest whatsoever with regard to the merits (or lack thereof) of your case against Mr. Jones personally, and my presence should not be construed as favoring either party.

That being said, the City and the witnesses have the right not to be subjected to discovery procedures that may cause unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. (Code Civ. Proc. §§ 2017.020, 2023.010 (a),(b) & (c); 2025.420.) The permissible scope of discovery is, "any matter, not privileged, that is relevant to the subject

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matter involved in the pending action . . . if the matter either is *itself admissible in evidence* or appears reasonably calculated *to lead to the discovery of relevant evidence.*" (Code Civ. Proc. §2017.010.) Based on the questions asked during your deposition of Mr. Sousa, which began at 10:00 a.m. and did not conclude until 8:00 p.m., it appears you have a very expansive view of what evidence is admissible or that could reasonably lead to the discovery of relevant evidence in your case. Recognizing that reasonable people may disagree about what evidence is relevant in a particular case, I am writing in accordance with my obligation to meet and confer with you in an attempt to establish some ground rules for future depositions of the City officials whom you have subpoenaed.

Your verified complaint states a single cause of action for defamation. The legal elements of defamation are set forth in Civil Code, §§ 44 – 48.8. Your specific allegations are that Mr. Jones orally uttered to you in the presence of others and the general public the allegedly false statement that he knows for a fact that you are a member of the Ku Klux Klan, and that you are dangerous. Because it involves an oral utterance, the type of defamation involved is slander, which must fall within one of the five categories set forth in Civil Code § 46, and not be privileged. The statements you attribute to Mr. Jones do not include that you have committed a crime, that you have an infectious, contagious or loathsome disease or that you are impotent or unchaste. It therefore remains the possibility that you may establish that the statement tends directly to injure you with respect to your office, profession, trade or business, either because you do not meet the requirements of your trade or profession or that the statement would have a natural tendency to lessen the profits of your trade or possession. Alternatively, you must prove that the natural consequence of the allegedly false statement causes you actual damages.

Accordingly, relevant evidence consists of testimony or documents tending to prove or disprove the facts: 1) What did Mr. Jones say? 2) Did persons other than yourself hear him say it? 3) Did Mr. Jones know the statement was false, or have reckless disregard for whether or not the statement may be false? 4) Is the statement in fact false? 5) Was the statement made in a context in which, even if false, was privileged? 6) Did the statement cause you an actual loss of reputation, shame, mortification or hurt feelings, or lessen the profits of your trade or profession? 7) Would a reasonable person feel shame, mortification or hurt feelings as a result of the allegedly false statement being made in public, or did the statement intentionally address a particular vulnerability or sensitivity you may have of which Mr. Jones was aware?

A witness may be asked to express an opinion concerning the general reputation of a party or another witness for truth and honesty in the community. Evidence of specific instances of conduct relevant only as tending to prove a character trait for purposes of attacking or supporting the credibility of a witness is inadmissible. (Evidence Code § 787.) For this reason, questions about specific instances in which Mr. Jones may or may not have been honest or truthful other

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than the alleged defamatory statements are not within the permissible scope of discovery. To be admissible, a witness's testimony must be based on their own personal knowledge, and not speculation, rumor, hearsay or gossip in the community.

Inquiries into Mr. Jones' prior arrest record, suit against the City and subsequent settlement, the recall campaign you have initiated against Mr. Jones, your complaint against Mr. Jones to the Fair Political Practices Commission for alleged violations of disclosure or conflict of interest statutes resulting from investments, gifts or loans to or by a public official, the incident at the City council meeting of May 7, 2008, and general inquiries regarding matters of City policy or a City Council person's personal thoughts about their deliberative process in reaching a decision on how to vote on a particular matter – all of which may be of personal interest to you or about which you may want to ask public officials to comment for purposes of publication in *The Badger Flats Gazette*, but they are not relevant admissible evidence, nor are they likely to lead to the discovery of admissible evidence in proof or defense of your defamation action. I would estimate that during the ten-hour span of your deposition of Mr. Sousa, the total time spent eliciting relevant admissible evidence, or that might be reasonably calculated to lead to the discovery of admissible evidence was about forty minutes.

I respectfully request that you stipulate to limit your questions for all future depositions of City officials to the seven areas of fact that are relevant to your action for defamation or to Mr. Jones' affirmative defenses, that are outlined above. I also request that you stipulate to avoid the topics outlined in the preceding two paragraphs that are clearly not relevant or likely to lead to relevant admissible evidence concerning your cause of action for defamation. By confining your questioning to these areas you will save your own time and money in deposition reporter fees, and avoid unwarranted annoyance, embarrassment, or oppression, or undue burden and expense of the deponents. Lastly, I request that you agree to limit deposition time to no more than two hours per witness. If a relevant area of inquiry is established within that time frame, I will either agree to extend the deposition, continue it for a specific area of questioning at a future mutually acceptable date and time, or stipulate to the witness responding to additional deposition by written questions. If we are unable to agree on how to proceed at the end of two hours, either party may apply to the court for an order for additional discovery or a protective order, to be heard on short notice. I can provide you with a draft stipulation upon request.

I do not believe that stipulation to these terms will in any way meaningfully inhibit your right to conduct discovery or adversely affect the prosecution of your case. My intent is to focus the depositions on the issues relevant to your case. Please reply to this proposal in writing by no later than next Tuesday, August 26, or sooner if at all possible. If we are unable to reach agreement by the 26th, I am prepared to file an *ex parte* application by next Friday to stay the depositions until after a motion for a protective order can be heard on the regular noticed motion calendar.

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It is my understanding that you may need to reschedule the depositions anyway because you may be in trial on another matter in Monterey County Superior Court and Mr. Ratliff may be in trial in Kings County Superior Court. If so, I would be happy to work with you to reschedule the depositions. If we are unable to reach agreement on a stipulation along the lines of that proposed above, we can also provide enough time for a mutually convenient date for a hearing on my motion for a protective order. Finally, I understand that you have filed a motion to amend your complaint and it would seem that until that motion is decided that the depositions currently scheduled should be continued in any event.

Your anticipated courtesy and cooperation in reaching agreement is appreciated.

Sincerely,



WILLIAM A. VAUGHN

WAV/dma