

Exhibit A

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11 GALLO GLASS COMPANY

EXHIBIT A

8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

11 LARRY BOECKEN, JR.,

12 Plaintiff,

13 vs.

14 GALLO GLASS COMPANY, and DOES
15 1 through 50, inclusive,

16 Defendants.

CASE NO. 1:05-CV-90 OWW

**DEFENDANT GALLO GLASS
COMPANY'S FIRST AMENDED ANSWER
TO PLAINTIFF'S COMPLAINT AND
DEMAND FOR JURY TRIAL**

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19 COMES NOW Defendant GALLO GLASS COMPANY and answers Plaintiff Complaint
20 on file herein by admitting, denying or alleging as follows:

21 **GENERAL ALLEGATIONS**

22 1. In answer to paragraph 1 of Plaintiff's Complaint, to the extent it contains legal
23 conclusions, no admission or denial is required. Except as so limited, GALLO GLASS
24 COMPANY denies each and every allegation contained therein.

25 2. In answer to paragraph 2 of Plaintiff's Complaint, to the extent it contains legal
26 conclusions, no admission or denial is required. Except as so limited, GALLO GLASS
27 COMPANY denies each and every allegation contained therein.
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1 3. In answer to paragraph 3 of Plaintiff's Complaint, GALLO GLASS COMPANY
2 admits that GALLO GLASS COMPANY is a corporation duly organized and existing under the
3 laws of Nevada and is authorized to and is doing business in Modesto, County of Stanislaus,
4 California. Except as so limited, GALLO GLASS COMPANY denies each and every allegation
5 contained therein.

6 4. In answer to paragraph 4 of Plaintiff's Complaint, GALLO GLASS COMPANY
7 admits that Plaintiff LARRY BOECKEN, JR., was at all times material herein employed by
8 Defendant GALLO GLASS COMPANY in Modesto, County of Stanislaus, California. GALLO
9 GLASS COMPANY denies all remaining allegations contained therein.

10 5. In answer to paragraph 5 of Plaintiff's Complaint, GALLO GLASS COMPANY
11 admits the allegations contained therein.

12 6. In answer to paragraph 6 of Plaintiff's Complaint, GALLO GLASS COMPANY
13 admits that Plaintiff was hired and employed by Defendant GALLO GLASS COMPANY in
14 Modesto, County of Stanislaus, California, but denies that he was employed for a period in excess
15 of fourteen (14) years.

16 7. In answer to paragraph 7 of Plaintiff's Complaint, to the extent that it contains
17 legal conclusions, no admission or denial is required. GALLO GLASS COMPANY admits that
18 on or about November 4, 2003, it interviewed Plaintiff in the presence of Plaintiff's union
19 representative about suspected fraudulent use of FMLA leave. GALLO GLASS COMPANY also
20 admits that there was a second meeting with Plaintiff and his union representative on or about
21 November 17, 2003, wherein Plaintiff was informed that he would be terminated for fraudulent
22 use of FMLA leave. GALLO GLASS COMPANY also admits that it was in possession of a
23 videotape evidencing Plaintiff's fraudulent use of FMLA leave. Except as expressly admitted,
24 GALLO GLASS COMPANY denies the remaining allegations contained therein.

25 8. In answer to paragraph 8 of Plaintiff's Complaint, GALLO GLASS COMPANY
26 denies each and every allegation contained therein.

27 9. In answer to paragraph 9 of Plaintiff's Complaint, GALLO GLASS COMPANY
28 admits that Plaintiff was terminated from his employment at GALLO GLASS COMPANY for

1 fraudulent use of FMLA leave. GALLO GLASS COMPANY is without specific knowledge or
2 information to admit or deny the remaining allegations contained therein and therefore, denies
3 same.

4 10. In answer to paragraph 10 of Plaintiff's Complaint, GALLO GLASS COMPANY
5 is without specific knowledge or information to admit or deny the allegations contained therein
6 and, therefore, denies same.

7 **FIRST CAUSE OF ACTION**

8 **(Violation of FMLA)**

9 11. In answer in paragraph 11 of Plaintiff's Complaint, GALLO GLASS COMPANY
10 incorporates herein by reference, as if fully set forth herein, each and every admission, denial and
11 limitation in paragraphs 1 through 10, inclusive, of this Answer.

12 12. In answer to paragraph 12 of Plaintiff's Complaint, to the extent that it contains
13 legal conclusions, no admission or denial is required. Except as so limited, GALLO GLASS
14 COMPANY denies each and every allegation contained therein.

15 13. In answer to paragraph 13 of Plaintiffs Complaint, GALLO GLASS COMPANY
16 denies each and every allegation contained therein.

17 14. In answer to paragraph 14 of Plaintiff's Complaint, GALLO GLASS COMPANY
18 denies each and every allegation contained therein.

19 15. In answer to paragraph 15 of Plaintiff's Complaint, GALLO GLASS COMPANY
20 denies each and every allegation contained therein and specifically denies that Plaintiff has been
21 caused to suffer damage as a result of GALLO GLASS COMPANY'S action in any amount.

22 16. In answer to paragraph 16 of Plaintiff's Complaint, GALLO GLASS COMPANY
23 denies each and every allegation contained therein and specifically denies that Plaintiff has been
24 caused to suffer damage in any amount as a result of GALLO GLASS COMPANY'S actions.

25 17. In answer to paragraph 17 of Plaintiff's Complaint, GALLO GLASS COMPANY
26 is without specific knowledge or information to admit or deny the allegations contained therein
27 and, therefore, denies same.
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1 26. In answer to paragraph 26 of Plaintiff's Complaint, to the extent it contains legal
2 conclusions, no admission or denial is required. Except as so limited, GALLO GLASS
3 COMPANY denies each and every allegation contained therein.

4 27. In answer to paragraph 27 of Plaintiff's Complaint, GALLO GLASS COMPANY
5 denies each and every allegation contained therein.

6 28. In answer to paragraph 28 of Plaintiff's Complaint, GALLO GLASS COMPANY
7 denies each and every allegation contained therein and specifically denies that Plaintiff has been
8 caused to suffer damage in any amount as a result of GALLO GLASS COMPANY's actions.

9 29. In answer to paragraph 29 of Plaintiff's Complaint, GALLO GLASS COMPANY
10 denies each and every allegation contained therein and specifically denies that Plaintiff has been
11 caused to suffer damage in any amount as a result of GALLO GLASS COMPANY's actions.

12 30. In answer to paragraph 30 of Plaintiff's Complaint, GALLO GLASS COMPANY
13 denies each and every allegation contained therein.

14 **FIRST AFFIRMATIVE DEFENSE**

15 31. As and for a First Affirmative Defense, Defendant GALLO GLASS COMPANY
16 asserts that Plaintiff's Complaint and each and every cause of action therein stated, fails to state a
17 claim upon which relief may be granted against Defendant GALLO CLASS COMPANY.

18 **SECOND AFFIRMATIVE DEFENSE,**

19 32. As and for a Second Affirmative Defense, Defendant GALLO GLASS
20 COMPANY asserts that if and to the extent allegations in Plaintiff's Complaint attempt to enlarge
21 upon the facts and contentions set forth in Plaintiff's claim filed with the Department of Fair
22 Employment and Housing, the Complaint fails to state a claim upon which relief can be granted
23 due to Plaintiff's failure to exhaust his administrative remedies.

24 **THIRD AFFIRMATIVE DEFENSE**

25 33. As and for a Third Affirmative Defense, Defendant GALLO GLASS COMPANY
26 asserts that at all times mentioned herein, Defendant acted in good faith and with a reasonable
27 belief as to the legalities of the things and matters attributed to Defendant GALLO GLASS
28 COMPANY, including, but not limited to, a good faith reasonable belief that Plaintiff had

1 fraudulently used FMLA leave, and that as a consequence thereof, no liability should be imposed
2 on Defendant GALLO GLASS COMPANY.

3 **FOURTH AFFIRMATIVE DEFENSE**

4 34. As and for a Fourth Affirmative Defense, Defendant GALLO GLASS COMPANY
5 expressly denies that any actions affecting the terms and/or conditions of Plaintiff's employment
6 were motivated by Plaintiff's sexual orientation or perceived sexual orientation. However, if it
7 should be found that Plaintiff's sexual orientation or perceived sexual orientation was a
8 motivating factor for any employment action, which is expressly denied, Defendant GALLO
9 GLASS COMPANY submits that it would have taken the same employment action in the absence
10 of consideration of Plaintiff's sexual orientation or perceived sexual orientation.

11 **FIFTH AFFIRMATIVE DEFENSE**

12 35. As and for a Fifth Affirmative Defense, Defendant GALLO GLASS COMPANY
13 alleges that all acts of Defendant GALLO GLASS COMPANY affecting the terms and/or
14 conditions of Plaintiff's employment were done in good faith and motivated by legitimate, non-
15 retaliatory, non-discriminative reasons and/or as a result of business necessity.

16 **SIXTH AFFIRMATIVE DEFENSE**

17 36. As and for a Sixth Affirmative Defense, Defendant GALLO GLASS COMPANY
18 asserts that Plaintiff's damages, if any, should be reduced by Plaintiff's interim earnings.

19 **SEVENTH AFFIRMATIVE DEFENSE**

20 37. As and for a Seventh Affirmative Defense, Defendant GALLO GLASS
21 COMPANY asserts that any award of back pay on behalf of Plaintiff should be denied or abated
22 for any period or periods Plaintiff was unable to work.

23 **EIGHTH AFFIRMATIVE DEFENSE**

24 38. As and for an Eighth Affirmative Defense, Defendant GALLO GLASS
25 COMPANY asserts that all or part of Plaintiff's damages are barred by the Doctrine of After
26 Acquired Evidence and Plaintiff's damages should be reduced accordingly.

1 **NINTH AFFIRMATIVE DEFENSE**

2 39. As and for a Ninth Affirmative Defense, Defendant GALLO GLASS COMPANY
3 asserts that all times herein mentioned Plaintiff was an “at-will” employee subject to termination,
4 with or without cause, and with or without notice.

5 **TENTH AFFIRMATIVE DEFENSE**

6 40. As and for a Tenth Affirmative Defense, Defendant GALLO GLASS COMPANY
7 expressly denies than any actions affecting the terms and/or conditions of Plaintiff’s employment
8 were on account of any protected status under state or federal law, specifically including but not
9 limited to California Fair Employment and Housing Act.

10 **ELEVENTH AFFIRMATIVE DEFENSE**

11 41. As and for an Eleventh Affirmative Defense, Defendant GALLO GLASS
12 COMPANY alleges that the punitive damages sought by Plaintiff are a violation of the Due
13 Process and Equal Protection Clauses of United States and California Constitutions.

14 **TWELFTH AFFIRMATIVE DEFENSE**

15 42. As and for a Twelfth Affirmative Defense, Defendant GALLO GLASS
16 COMPANY asserts that Plaintiff lacks standing to pursue his claims before this Court. This
17 lawsuit was filed in November 2004. On August 21, 2008, Plaintiff filed a Voluntary Petition for
18 bankruptcy under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for
19 the Eastern District of California, Case No. 08-15050-B-7. This lawsuit and the claims therein
20 were not listed in Plaintiff’s sworn Statement of Financial Affairs, filed with the United States
21 Bankruptcy Court or any other filing with the Bankruptcy Court while his Petition was pending.
22 On or about December 30, 2008, the United States Bankruptcy Court granted Plaintiff a discharge
23 under section 727 of title 11, United States Code. Plaintiff’s claims are the property of the
24 bankruptcy estate, and Plaintiff has no standing to pursue them in this Court.

25 **THIRTEENTH AFFIRMATIVE DEFENSE**

26 43. As for a Thirteenth Affirmative Defense, Defendant GALLO GLASS COMPANY
27 asserts that Plaintiff’s claims are barred by the doctrine of judicial estoppel. This lawsuit was
28 filed in November 2004. On August 21, 2008, Plaintiff filed a Voluntary Petition for bankruptcy

1 under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern
2 District of California, Case No. 08-15050-B-7. This lawsuit and the claims therein were not
3 listed in Plaintiff's sworn Statement of Financial Affairs, filed with the United States Bankruptcy
4 Court or any other filing with the Bankruptcy Court while his Petition was pending. On or about
5 December 30, 2008, the United States Bankruptcy Court granted Plaintiff a discharge under
6 section 727 of title 11, United States Code. Plaintiff is judicially estopped from pursuing all
7 claims, including all claims asserted in this lawsuit, that he failed to disclose to the Bankruptcy
8 Court before it granted him a discharge under section 727.

9
10 WHEREFORE, Defendant GALLO GLASS COMPANY prays judgment as follows:

- 11 1. That the Complaint of Plaintiff against Defendant herein be dismissed;
- 12 2. That Plaintiff take nothing by reason of the Complaint;
- 13 3. That Plaintiff be granted no relief in this action;
- 14 4. That Defendant have judgment against Plaintiffs;
- 15 6. That Defendant recover costs of suit incurred herein;
- 16 5. That Defendant recover reasonable attorneys' fees; and,
- 17 7. For such other relief as the Court may deem just and proper.

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19 Dated: May 20, 2011

NANCY L. ABELL
PAUL, HASTINGS, JANOFKY & WALKER LLP

21 By: /s/ Nancy L. Abell
22 NANCY L. ABELL

23 Attorneys for Defendant
24 GALLO GLASS COMPANY
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DEMAND FOR JURY TRIAL

Defendant GALLO GLASS COMPANY hereby demands a trial by jury in the
aforementioned action.

Dated: May 20, 2011

NANCY L. ABELL
PAUL, HASTINGS, JANOFSKY & WALKER LLP

By: /s/ Nancy L. Abell
NANCY L. ABELL

Attorneys for Defendant
GALLO GLASS COMPANY