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THE CALIFORNIA CARS INITIATIVE, INC.  
10 and FELIX KRAMER and  
Third Party DAVE BAGSHAW  
11

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION  
15

16 CALCAR, INC., a California corporation; and  
17 AMERICAN CALCAR, INC., a Delaware  
corporation,

18 Plaintiffs,

19 v.

20 THE CALIFORNIA CARS INITIATIVE, INC., an  
unknown business entity; and FELIX KRAMER, an  
21 individual,

22 Defendants.  
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Case No. 3:08-MC-80083 MHP (WDBx)

Underlying Civil Action Pending in U.S.  
District Court for the Central District of  
California (Civil Action Case No.  
SACV07-00723)

**THIRD PARTY DAVE BAGSHAW'S  
OPPOSITION TO PLAINTIFFS'  
MOTION TO SHORTEN TIME**

**Honorable Wayne D. Brazil**

1 Third party Dave Bagshaw (hereinafter “Mr. Bagshaw”) opposes Plaintiffs Calcar Inc. and  
2 American Calcar Inc.’s Motion to Shorten Time to Respond to a Motion to Compel Mr. Bagshaw to  
3 appear for a deposition.<sup>1</sup> Plaintiffs’ motion should be denied because:

4 (1) there is no pressing need to expedite the schedule of the underlying motion and any  
5 alleged inconvenience to Plaintiffs is the result of Plaintiffs’ own conduct;

6 (2) despite the Certificate of Service asserting service on June 26, Plaintiffs did not serve the  
7 underlying motion until June 30, 2008, leaving Mr. Bagshaw only four business days to respond to a ten  
8 (10) page motion with seven (7) exhibits during a period when Mr. Bagshaw is out of town on a  
9 previously-scheduled family vacation as well as only three (3) court days to respond to Plaintiffs’  
10 motion to shorten time supported by two (2) declarations and eight (8) exhibits filed more than twenty  
11 (20) days after Mr. Bagshaw served objections indicating that he would not appear;

12 (3) Plaintiffs’ underlying motion lacks merit in that Mr. Bagshaw was not properly served  
13 with the subpoena as no witness or mileage fees were provided; and

14 (4) further, a deposition of Mr. Bagshaw would be unduly burdensome and oppressive as  
15 Mr. Bagshaw lacks any relevant information and/or any minimal alleged relevance is outweighed by the  
16 burden on Mr. Bagshaw, especially when considered in light of Plaintiffs’ counsel’s conduct generally  
17 and at prior depositions.

18 **I. BACKGROUND**

19 Mr. Bagshaw is the former CEO of Shutterfly, Inc. (the well known picture sharing website) and  
20 also formerly held senior positions with Silicon Graphics, Excite@Home, and @ Home Networks.

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23 <sup>1</sup> If the Court should choose to shorten time or go forward with the hearing on August 6, Mr.  
24 Bagshaw requests that the hearing date be moved to the next available dates thereafter. Counsel for Mr.  
25 Bagshaw will be out of town on previously-scheduled travel on July 9 and August 6. Counsel for  
26 Bagshaw would be available during the weeks of July 14 or August 11. As shown in Exhibit A to the  
27 Ormé Declaration, after waiting 21 days after Mr. Bagshaw’s service of objections, on June 26,  
28 Plaintiffs’ counsel sent Mr. Bagshaw’s counsel an email with proposed dates regarding shortening of  
time and demanding a response within four hours. Plaintiffs’ counsel sent this email knowing that Mr.  
Bagshaw’s counsel was occupied attending to a deposition that Plaintiffs had scheduled for that same  
day.

1 Defendant The California Cars Initiative (TCCI) is a non-profit advocacy group dedicated to  
2 promoting plug-in electric hybrid vehicles (PHEVs). TCCI sells no products or services. For  
3 approximately five months in 2006-07, Mr. Bagshaw volunteered some of his time to TCCI. Mr.  
4 Bagshaw has not been a TCCI volunteer since early-mid 2007.

5 The underlying case was filed in June 2007 (after Mr. Bagshaw was no longer a volunteer for  
6 TCCI) and concerns Plaintiffs' allegations of trademark infringement by TCCI. Plaintiffs sell  
7 manuals/guides that may be placed in new cars using the names "Quick Tips" or "Startup Tips." These  
8 items are totally unrelated to PHEVs. In an effort to avoid discovery of Plaintiffs' financial information,  
9 Plaintiffs have dropped any claim to damages and now assert that they only seek an injunction against  
10 non-profit TCCI.

11 The discovery deadline was scheduled for April 8, 2008. While the deadline for written  
12 discovery closed on April 8, on April 7 and May 15, the Court issued orders extending the deadline for  
13 taking depositions to June 30, 2008. Plaintiffs made no effort to seek Mr. Bagshaw's deposition until  
14 May 23, 2008, after the original close of discovery, nearly one year after the case was filed, and  
15 approximately one month before the revised close of deposition discovery. On May 27, 2008, a process  
16 server served Mr. Bagshaw with a subpoena but failed to serve witness or mileage fees.<sup>2</sup> Though he  
17 had no duty to do so, on June 5, 2008, Mr. Bagshaw served objections to the subpoena – noting the  
18 failure to serve witness and mileage fees. On June 12 (a week later), Plaintiffs responded by letter  
19 demanding that Mr. Bagshaw appear on June 17. A meet and confer was held on June 19 where counsel  
20 for Mr. Bagshaw repeated Mr. Bagshaw's objections to the subpoena. On June 23, Plaintiffs' counsel  
21 sent an email asserting that Plaintiffs will "seek sanctions." (*See* Exhibit E to Bleeker Declaration at p.  
22 1.) Mr. Bagshaw's counsel responded on June 24, indicating that Mr. Bagshaw stood on his objections.

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24  
25 <sup>2</sup> Plaintiffs' motion represents: "On May 23, 2008, Calcar served Bagshaw with a subpoena  
26 issued from this Court and a check for witness fees and mileage for deposition testimony to occur on  
27 June 17, 2008." (Mot. at 2 (citing Exhibits A and B to the Bleeker Declaration).) Even as set forth in  
28 the exhibits to Plaintiffs' motion, that statement is incorrect. On May 23, Plaintiffs signed the subpoena  
served on Mr. Bagshaw but the subpoena – minus witness and mileage fees – was not served until May  
27. (*See* Exhibit A to the Bleeker Declaration (noting alleged service on May 27).)

1 On June 26, Plaintiffs filed a motion to compel Mr. Bagshaw to appear for deposition as well as  
2 the instant motion to shorten time. While the motion to compel includes a Certificate of Service  
3 executed by Plaintiffs' assistant, Betty Venuti, asserting that the motion was served by email on June 26  
4 on counsel for Mr. Bagshaw (Mr. James Pistorino) as well as counsel for TCCI (Mr. William  
5 Rooklidge), the motion was not served on either Mr. Bagshaw's or defendant's counsel. On June 30,  
6 Plaintiffs' counsel (Mr. Warren Bleeker) responded to an inquiry regarding service of the motion to  
7 compel conceding that the motion was not served as stated in the Certificate of Service and serving a  
8 copy of the motion for the first time. (*See* Pistorino Declaration, filed concurrently herewith, at Ex. A.)  
9 As of this writing, the incorrect Certificate of Service has not been corrected by Plaintiffs.

10 Plaintiffs have been engaged in a campaign of harassing volunteers and donors to TCCI. For  
11 example, Google was a donor to TCCI and Plaintiffs previously sought to compel Google to appear for  
12 a FED. R. CIV. P. 30(b)(6) deposition. On May 14, 2008, this Court denied Plaintiffs' motion compel  
13 and granted Google's motion for protective order finding Plaintiffs' relevance arguments  
14 "extraordinarily thin." (*See* Dkt. No. 29 at 2.)

15 **A. There Is No Pressing Need To Expedite The Schedule Of The Underlying Motion**  
16 **And Any Alleged Inconvenience Is The Result Of Plaintiffs' Own Conduct**

17 As noted above, Plaintiffs made no effort to serve Mr. Bagshaw with a subpoena until May 27,  
18 2008, nearly a year after the underlying suit was filed and after the original discovery deadline. On June  
19 5, Mr. Bagshaw notified Plaintiffs that service was improper (because no witness or mileage fees were  
20 provided) yet Plaintiffs made no effort to properly serve Mr. Bagshaw and waited a week to even  
21 respond. After Mr. Bagshaw did not appear and repeated his objections on June 19, Plaintiffs waited yet  
22 another week before filing the present motion.

23 Trial in the underlying matter is set for August 21. Accordingly, the motion to compel could be  
24 heard on August 6 (or another appropriate date) and a deposition conducted thereafter if necessary, well  
25 in advance of trial.

1           **B.       Shortening The Schedule Would Not Provide Mr. Bagshaw Adequate Time To**  
2           **Respond**

3           As noted above, Mr. Bagshaw is currently on a family vacation from which he will not return  
4 until after the July 4th holiday. Further, as noted above, Plaintiffs' counsel was on notice for weeks that  
5 Mr. Bagshaw objected to the subpoena. Having waited weeks to file the present motion, Plaintiffs'  
6 counsel seeks to provide Mr. Bagshaw just three court days from service of the motion to shorten time  
7 to respond. That is not adequate time for Mr. Bagshaw to properly respond.

8           **C.       The Subpoena Is Invalid Because No Witness Or Mileage Fees Were Tendered**

9           It is elemental that a subpoena is invalid if witness and mileage fees are not tendered  
10 simultaneously with the alleged service of the subpoena. *See* 9 Moore's Federal Practice § 45.21[2][a];  
11 *CF & I Steel Corp. v. Mitsui & Co. (U.S.A.)*, 713 F.2d 494, 496 (9th Cir. 1983).

12           In the present case, Mr. Bagshaw was not served with witness and mileage fees and, thus, the  
13 subpoena is invalid. (*See* Bagshaw Declaration, filed concurrently herewith, at ¶ 5.)

14           While Plaintiffs have provided a proof of service from the process server asserting that witness  
15 and mileage fees were tendered, in fact, none were. This would not be the first time in this case that a  
16 proof of service from a process server turned out to be incorrect. Indeed, previously, Plaintiffs provided  
17 a proof of service from a process server asserting that personal service occurred at ~3:00am at an office  
18 of the University of California at Berkeley and that witness and mileage fees were tendered. Plaintiffs  
19 chose not to pursue the matter when the subpoenaed party pointed out that the office was not open at  
20 ~3:00am, the person allegedly served was not present then, and that no witness or mileage fees were  
21 provided in any of the materials that were served at a different time. (*See* Pistorino Decl. Ex. B.)  
22 Indeed, as noted above, it is undisputed that the Certificate of Service on the underlying motion to  
23 compel is not factually correct.

24           Mr. Bagshaw stands by his statement that witness and mileage fees were not served by the  
25 process server.

1           **D.     A Deposition Of Mr. Bagshaw Would Be Unduly Burdensome And Oppressive**

2           As noted above, Mr. Bagshaw was a volunteer for TCCI for a brief period between December  
3 2006 and early-mid May 2007.

4           Plaintiffs have failed to identify any relevant information that Mr. Bagshaw might have.  
5 Plaintiffs assert that Mr. Bagshaw might have information regarding “Bagshaw’s knowledge of and role  
6 in promoting products similar to plaintiffs,” “marketing channels used by TCCI to sell its goods,” and  
7 “planned expansion of TCCI product lines.” (Mot. at 4.) As TCCI has no products, Mr. Bagshaw has  
8 no information on any of these topics. Likewise, Plaintiffs’ claim that Mr. Bagshaw might have  
9 information on “incidents of actual confusion” is both entirely speculative and incorrect. Mr. Bagshaw  
10 has no such information. A deposition seeking information that Mr. Bagshaw does not have about  
11 TCCI products which do not exist would be unduly burdensome and oppressive. Plaintiffs have already  
12 deposed TCCI’s founder (Felix Kramer) and another TCCI’ volunteer (Ron Gremban), both of whom  
13 had never heard of Plaintiffs before this suit and denied that TCCI had products.

14           A deposition would also be unduly burdensome and oppressive given Plaintiffs’ conduct during  
15 the case generally and at the recent deposition of TCCI volunteer Ron Gremban.

16           There, the following exchanges occurred:

17           MR. BLEEKER: Q. What type of computer program was it?

18           MR. PISTORINO: Objection; vague.

19           THE WITNESS: What do you mean by "type"?

20           MR. BLEEKER: Q. You don't know what the word "type" means?

21           MR. PISTORINO: And actually let the record reflect that Mr. Bleeker just laughed at the  
22 witness. Mr. Bleeker, really, that's just unprofessional. I ask you not to do that again, please.

23           MR. BLEEKER: Well, Mr. Pistorino, you know, I've given you a little bit of leeway, but  
24 you've been -- your speaking objections are fairly out of line, and you're going to cause this  
25 deposition to go way longer than it should go by objecting to every question, and Mr.  
26 Gremban is -- he is a -- he has a degree from Cal Tech in engineering. He seems like a very  
27 intelligent man. And so based on your instructions, any time you give the objection "vague  
28 and ambiguous," then clearly Mr. Gremban is claiming not to understand certain words such  
as "education" and "type," which are simple words used in everyday conversation, and given  
Mr. Gremban's technical background, and his degree from Cal Tech, and his obvious  
intelligence, I assume he does know what these words mean. I was not laughing at Mr.  
Gremban, but I was laughing at your approach to stonewall this deposition for some reason  
and make it last a lot longer than it should last.

