



1 have not shown<sup>1</sup> that limitations on the scope of discovery regarding the representative projects are  
2 still appropriate now that there are only two Defendants and the claims to be tried have survived  
3 summary judgment. It is time to get this case ready for a separate trial on the representative projects  
4 selected by Plaintiffs. In order to adequately prepare for the separate trial, Plaintiffs are entitled to all  
5 discovery relevant to the representative projects, except for any limitations that may *currently* be  
6 warranted by Rules 26(b)(2) or (c) of the Federal Rules of Civil Procedure.

7 “Parties may obtain discovery regarding any matter, not privileged, that is relevant to the  
8 claim or defense of any party....” *See* FED.R.CIV.P. 26(b)(1). With regard to the representative  
9 projects, the kind of financial documents discussed on pages 22, 23, 25 and 177 of the transcript of  
10 Mr. Leao’s November 7, 2007 deposition are clearly relevant to Plaintiff’s claims. Norman Wright’s  
11 company-wide financial information is also relevant to the claims to be tried in the separate trial both  
12 because it encompasses income and expenses related to the representative projects, and because it  
13 will show the extent of Defendant Norman Wright’s profits during the relevant time period.  
14 Defendant Norman Wright’s profits, if extraordinary, can be circumstantial evidence of a conspiracy  
15 to fix—or otherwise artificially inflate<sup>2</sup>—prices. *See, e.g., Estate of Le Baron v. Rohm & Haas Co.*,  
16 441 F.2d 575, 578 (9<sup>th</sup> Cir. 1971) (finding that refusal to permit discovery of defendant’s profit  
17 margins constituted reversible error in price fixing case); *see also, American Tobacco Co. v. United*  
18 *States*, 328 U.S. 781, 804-06 (1946) (recognizing that extraordinary profits during a period of  
19 declining costs followed by reduced prices when new competition made itself felt, constituted  
20 “circumstantial evidence of the existence of a conspiracy”).

21 Plaintiffs have also shown that unredacted salesperson expense reports are within the scope  
22 of discovery. Salesperson expense reports that reflect gratuities are relevant even if the gratuities  
23 were purportedly given in connection with “other” projects. *Any* gratuities to a particular person may

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25 <sup>1</sup> Generally, “[t]he party who resists discovery has the burden to show that discovery  
26 should not be allowed, and has the burden of clarifying, explaining, and supporting its objection.” *See*  
*Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D.Cal. 1998).

27 <sup>2</sup> Defendant Norman Wright argues that *Estate of Le Baron* case is distinguishable on the  
28 facts. However, depending on what other evidence Plaintiff introduces at trial, the underlying rationale  
may well apply equally here. That is a determination to be made at trial, not in the course of a discovery  
motion. While extraordinary profits may not alone prove a conspiracy, they nonetheless can be  
circumstantial evidence of a conspiracy.

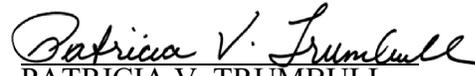
1 well have influenced that person's conduct in connection with projects other than the specific one for  
2 which the gratuity was given, assuming the gratuities are even attributed to specific projects. Thus,  
3 they are within the scope of discovery for the representative projects.

4 Defendants have not shown that protection from producing the foregoing documents is  
5 currently warranted under either Rule 26(b)(2) or (c)).

6 With regard to Plaintiff's request to permit follow-up deposition questions, as Plaintiff points  
7 out, Defendants have not opposed the request. This ruling is without prejudice to Defendants  
8 making any appropriate objections to specific questions.

9 IT IS FURTHER ORDERED that, absent agreement of the parties or further order of the  
10 court otherwise, Defendants shall produce the documents compelled herein no later than February  
11 20, 2009.

12 Dated: 2/5/09

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14 PATRICIA V. TRUMBULL  
United States Magistrate Judge

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