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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN DIEGO

11
12 **Christine N. Grab,**
13
14 Plaintiff,
15
16 **v.**
17 **The California Franchise Tax Board,**
18
19 Defendant.

Case No. 37-2020-00005100-CL-BT-CTL

**DEFENDANT FRANCHISE TAX
BOARD'S OPPOSITION TO
PLAINTIFF'S MOTION FOR ORDER
COMPELLING FURTHER RESPONSE
TO DEMAND FOR DOCUMENTS**

Date: May 28, 2021
Time: 9:00 a.m.
Dept: C67
Judge: The Honorable Eddie C.
Sturgeon
Trial Date: March 4, 2022
Action Filed: January 29, 2020

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff Christine N. Grab filed this instant action against Defendant California Franchise Tax Board (FTB), seeking an income tax refund for the 2011, 2013 and 2014 tax years. Unsatisfied with the FTB's responses to her first set of requests for production of documents (Requests), Plaintiff filed a motion for an order compelling further production of documents (the Motion). The Court should deny Plaintiff's Motion for several reasons. First, Plaintiff seeks documents that have been previously produced by the FTB. Independent of this litigation, the FTB has responded to 16 Public Records Act (PRA) and 4 Information Practices Act (IPA) requests from Plaintiff. The FTB also produced documents during Plaintiff's appeal of the denial of her claim for refund before the Office of Tax Appeals (OTA). Furthermore, in response to Plaintiff's second set of requests for production of documents, in which she requested all documents FTB produced as part of its ordinary business practices (which included the tax years in dispute here), the FTB produced approximately 856 pages of documents. Thus, the FTB has produced all responsive documents relating to the disputed tax years.

Second, Plaintiff failed to make a reasonable and good faith effort to resolve the discovery dispute by using the proper discovery methods to obtain the requested information. Plaintiff failed to propound the correct method of discovery by improperly requesting responses to questions (not documents) in her production requests. When the FTB attempted to meet and confer with her on this issue, she failed to meaningfully address these errors. In addition, Plaintiff also refused to provide more clarity regarding her vague and confusing requests even though the FTB had difficulty understanding some of them. As such, Plaintiff's Motion should be denied. Alternatively, if the motion is granted, any motion for sanctions requested by Plaintiff should be denied.

FTB has not produced what I asked for - different docs + ones 2011, 2013, 2014
I did! They responded to NOTHING

1 **STATEMENT OF FACTS**

2 **I. PLAINTIFF’S PRA AND IPA REQUESTS.**

3 Independent of this litigation, Plaintiff has submitted 4 IPA and 16 PRA requests.
4 (Declaration of Grace LeBleu (LeBleu Declaration), ¶¶ 4, 5.) The FTB has produced voluminous
5 documents in relation to these requests, which included information relating to the tax years in
6 dispute here. The FTB produced some of the following documents in response to Plaintiff’s IPA
7 requests: (1) updated exhibits it had previously produced in its brief for the OTA hearing in
8 Plaintiff’s refund claim; (2) all comment history for Plaintiff and her husband, Eric Grab; (3)
9 account transcripts; (4) returns list; (5) correspondence lists; and (6) collection account
10 transcripts. (LeBleu Declaration, Ex. A and B.)

11 In response to Plaintiff’s 16 PRA requests, the FTB also produced some of the following
12 documents: (1) a copy of Taxpayer Bill of Rights responses from 2008 through 2017; (2) records
13 regarding estimated tax and due date for filing returns and extension of time for filing; (3) FTB
14 Policy File 3028 on Customer Contacts; (4) FTB Policy File 9300 on Monetary Adjustments to
15 the Accounts of Receivable Systems; (5) FTB Processing Time Frames; and (6) FTB Principles,
16 Values, and Goals. (LeBleu Declaration, Ex. D - R.) Additionally, in a good faith effort to comply
17 with the discovery process, the FTB also provided a courtesy copy of the same documents it had
18 provided to Plaintiff in her IPA and PRA requests when FTB responded to Plaintiff’s requests for
19 production of documents, set number two. (LeBleu Declaration, ¶ 6.)

20 **II. PLAINTIFF’S ACTION.**

21 On January 29, 2020, Plaintiff filed a complaint for refund of personal income tax against
22 the FTB for the 2011, 2013 and 2014 tax years. Plaintiff alleges that the FTB improperly assessed
23 demand penalties for the tax years at issue, claiming that she and her husband, Eric Grab, “had
24 overpaid the estimated taxes as determined by the FTB’s own estimates prior to the due dates.”
25 (Complaint, p. 3, lines 9-10.) Plaintiff alleges that the demand notices were improperly issued
26 since they had made estimated tax payment. (Complaint, p. 4.) Plaintiff also alleges that the FTB
27 improperly imposed the 2011 collection cost recovery fee of \$170 because of the “improper
28 withholding of the credit elect payment.” (Complaint, p. 16, lines 17-19.)

Send
same
info over
& over

1 Plaintiff admits that she did not timely file her 2011 joint return. (Complaint, p. 7, lines 22-
2 28.) Plaintiff admits that she did not timely file her 2013 joint return. (Complaint, pp. 19, 21.)
3 Plaintiff further admits that she did not timely file her 2014 joint return. (Complaint, p. 21.)

4 **III. PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS.**

5 On October 1, 2020, Plaintiff served her Requests via email. (Declaration of Anna
6 Barsegyan (Barsegyan Declaration), ¶ 2.) Plaintiff also requested explanations and responses in
7 some of her requests (Request Numbers 2B, 4A, 4B, 4C, 4D, 4E, and 6A) although her own
8 directions provided that she was "requesting all of the documents" be sent "via fax within 30
9 days." (*Ibid.*) The FTB served its responses to Plaintiff's Requests on November 3, 2020, and also
10 produced responsive documents (*Ibid.*; Declaration of Christine N. Grab in Support of Motion for
11 Order Compelling Further Response to Demand for Documents (Grab Declaration), Ex. 40 and
12 41.)

13 On or about November 18, 2020, Plaintiff emailed FTB counsel stating that "I guess my
14 next step is to file a Motion to Compel Further Discovery", however, "I guess we are supposed to
15 do another meet and confer first, and I have to document a good faith effort at an informal
16 resolution of each issue prior to filing my motion." (Barsegyan Declaration, Ex. B.) On
17 November 20, 2020, FTB counsel responded to Plaintiff's email suggesting that she provide her
18 requests in writing for a more meaningful meet and confer conversation. (*Ibid.*) Plaintiff replied
19 that she would provide her dispute to FTB counsel by November 30, 2020, and that they would
20 meet and confer afterwards. (*Ibid.*) On November 30, 2020, prior to any meaningful meet and
21 confer communications between the parties, Plaintiff emailed FTB counsel a draft motion to
22 compel. (Barsegyan Declaration, Ex. C.) The next day, Plaintiff emailed FTB counsel additional
23 objections that she would "incorporate" into the "rough draft of the motion to compel that I sent
24 you yesterday." (Barsegyan Declaration, Ex. D.) Plaintiff further stated that "I may file this
25 motion reserving the right to request additional information regarding how the interest was
26 calculated." (Barsegyan Declaration, Ex. D.)

27 On December 7, 2020, without propounding any additional discovery in compliance with
28 the Civil Discovery Act, Plaintiff requested information and/or documents from the FTB.

That was
the meet
& confer.
Altered
final
significantly

1 (Barsegyan Declaration, Ex. E.) After review of Plaintiff's discovery dispute, FTB counsel
2 drafted and emailed a meet and confer response letter to her on December 7, 2020 addressing the
3 following issues:

4 1. **Requests 1A-1I, 2A:** The FTB indicated that it had produced all documents
5 responsive to Plaintiff's request, and did not have further documents to produce. (Barsegyan,
6 Declaration, Ex. F at p. 1.)

7 2. **Request 2B:** Plaintiff did not request a production of a manual or policy in her
8 document request served on Plaintiff on October 1, 2020, (Barsegyan Declaration, Ex. A.), but
9 requested one in her discovery dispute. Additionally, since Plaintiff's request was not for
10 production of documents, the FTB invited Plaintiff to submit a proper request under the Civil
11 Discovery Act. (Barsegyan Declaration, Ex. F at p. 2.) Plaintiff never did so prior to filing this
12 Motion.

13 3. **Requests 4A-4E:** Since Plaintiff's requests were not for production of documents, the
14 FTB invited Plaintiff to submit proper requests under the Civil Discovery Act. (Barsegyan
15 Declaration, Ex. F at p. 2.). Plaintiff never did so prior to filing this Motion.

16 4. **Requests 5A-5B:** The FTB requested additional information from Plaintiff in order to
17 determine if it had responsive documents to her requests. (Barsegyan, Declaration, Ex. F at p. 2.)
18 Plaintiff did not subsequently provide any information which would assist the FTB in making this
19 determination.

20 5. **Request 6A:** Since Plaintiff's request was not for production of documents, the FTB
21 invited Plaintiff to submit a proper request under the Civil Discovery Act. (Barsegyan
22 Declaration, Ex. F at p. 2.) Plaintiff never did so prior to filing this Motion.

23 Less than two hours after FTB counsel mailed the meet and confer response letter, Plaintiff
24 sent an email stating "I think we have to talk on the telephone before I file the motion, don't we?
25 Please let me know when you are available to talk. I would like to file the motion this week."
26 (Barsegyan Declaration, Ex. G.) FTB counsel further attempted to resolve the discovery dispute
27 with regards to Requests 5A and 5B, by requesting that Plaintiff provide the document she was
28 referring to in these requests during the parties' email exchanges. (Barsegyan Declaration, Ex. H.)

*This was her
deceptive
statement*

*Motions
have
deadlines*

*Already
provided*

LIE

1 However, the documents emailed by Plaintiff did not include the payment amounts she described
2 in her requests. (Barsegyan Declaration, Ex. H.) When FTB counsel pointed that out to get
3 additional clarification about these requests, Plaintiff accused FTB of engaging in “something
4 illegal. (*Ibid.*) Shortly thereafter, Plaintiff filed this instant Motion.

5 Soon after Plaintiff filed the Motion, she served upon the FTB a second set of requests for
6 production of documents on January 7, 2021. (Barsegyan Declaration, ¶ 10.). In her second
7 production request, Plaintiff requested a complete set of all documents produced as part of
8 ordinary business practices for several tax years, including but not limited to, the disputed tax
9 years in this action. (*Ibid.*) In response to Plaintiff’s request, the FTB served initial and amended
10 responses to her production request, providing approximately 856 pages worth of documents by
11 March 17, 2021. (Barsegyan Declaration, ¶ 11.)

12 **CALIFORNIA LAW ON IMPOSITION OF DEMAND PENALTIES AND A**
13 **COLLECTION COST RECOVERY FEE.**

14 Revenue and Taxation Code section 19133¹ provides that if a “taxpayer fails or refuses to
15 furnish any information requested in writing” by the FTB or “fails to make and file a return” upon
16 demand by the FTB, then the FTB may impose a penalty of 25 percent of the amount of tax
17 determined pursuant to section 19087 or of any deficiency assessed by the Franchise Tax Board
18 concerning the assessment of which the information or return was required, unless the failure is
19 due to reasonable cause and not willful neglect. California Code of Regulations, title 18, section
20 19133, subdivision (b)(1), provides that for individuals, the demand penalty will only be imposed
21 if, among other requirements, “the taxpayer fails to timely respond to a current Demand for Tax
22 Return in the manner prescribed.” (Emphasis added.) The demand penalty is computed without
23 regard to payments and withholding credits. (*Appeal of Scott* (83-SBE-094) 1983 WL 15480.) It
24 is designed to penalize a taxpayer for failing to respond to a Demand, not for failing to pay the
25 proper tax due. (*Appeal of Hublou* (77-SBE-102) 1977 WL 4093.) To establish reasonable cause,
26 a taxpayer must show that the failure to respond to a demand occurred despite the exercise of
27 ordinary business care. (*Appeal of Bieneman* (82-SBE-148) 192 WL 11825.) The taxpayer’s

28 ¹ Unless otherwise provided, all future statutory references will be to the Revenue and
Taxation Code.

only years
in dispute -
not all

deception -
no mention
of 19087

deception -
conflicted
2 separate
issues

HEART OF CASE WITHHOLDING -
NO MENTION of withholding

"Lost Payments"

1 reason for failing to respond must be such that an ordinarily intelligent and prudent
2 businessperson would have acted similarly under the circumstances. (*Appeal of Malakoff* (83-
3 SBE-140) 1983 WL 15525.)

4 In addition, the FTB shall impose a collection cost recovery pursuant to section 19254,
5 subdivision (a)(1) if a person fails to pay an amount of tax, interest, penalty, or other liability due,
6 and the FTB has mailed a notice for payment that advises that continued failure to pay may result
7 in collection action. The statute does not provide any exception for reasonable cause. (*Appeal of*
8 *Myers* (2001-SBE-001) 2001 WL 37126924.)

Per Hubbard Paid it in full on 4-15-11

9 **ARGUMENT**

10 **I. PLAINTIFF'S MOTION TO COMPEL IS MERITLESS.**

11 **A. Plaintiff Cannot Show Good Cause for Her Motion Because FTB Produced All Responsive Documents.**

12 One of the requirements for a motion to compel further responses to a document demand is
13 that the motion must set forth specific facts showing good cause justifying the discovery sought
14 by the demand. (Code Civ. Proc. § 2031.310, subd. (b)(1).) Plaintiff cannot show good cause
15 because the FTB produced all documents responsive to her Requests. Plaintiff has submitted 4
16 IPA and 16 PRA requests in which the FTB has responded and produced documents. (LeBleu
17 Declaration, ¶¶ 4, 5.) In addition, in Plaintiff's second set of production requests, she requested "a
18 complete set of all documents FTB produced as part of ordinary business practices" for both
19 Plaintiff and her husband, which included the disputed tax years in this action. (Barsegyan
20 Declaration, ¶ 10.) In response to Plaintiff's second production request, the FTB produced
21 approximately 856 pages of documents. (Barsegyan Declaration, ¶ 11.) Since the FTB already
22 produced all documents created as part of its ordinary business practices, which encompasses the
23 documents requested in the first production request, the FTB has no further documents to
24 produce. (LeBleu Declaration, ¶ 7.) Any objection that Plaintiff may have with the accuracy of
25 the information on the documents (although the documents are accurate) is a separate issue, and
26 does not support the granting of her Motion.
27
28

NO info on dates payments applied or accounting irregularities

1 **B. FTB's Objections are Proper.**

2 **1. Plaintiff's Requests Are Not Relevant and Are Not Reasonably**
3 **Calculated to Lead to the Discovery of Admissible Evidence.**

4 The primary issues in this case are whether the FTB properly imposed demand penalties for
5 the 2011, 2013 and 2014 tax years, and a collection cost recovery fee for 2011. As stated above,
6 California law is unambiguous regarding the imposition of demand penalties – the FTB may
7 impose a penalty of 25 percent of the amount of tax assessed if a taxpayer fails or refuses to
8 furnish any information requested in writing or fails or refuses to make and file a return upon
9 notice and demand by the FTB, unless the failure is due to reasonable cause and not willful
10 neglect. (Rev. & Tax. Code § 19133.) The demand penalty may be imposed if the taxpayer fails
11 to timely respond to a current Demand for Tax Return in the manner prescribed. (Cal. Code
12 Regs., tit. 18, § 19133, subd. (b)(1).) Here, Plaintiff failed to timely and properly respond to the
13 FTB's Demand for Tax Return for the disputed tax years. Since the demand penalty is computed
14 without regard to payments and withholding credits, Plaintiff's requests for any information
15 relating to these payments are not relevant nor reasonably calculated to lead to the discovery of
16 admissible evidence. Neither are Plaintiff's requests for interest information relevant or
17 reasonably calculated to lead to the discovery admissible evidence. Plaintiff is under the
18 impression that any payments or withholding credits made reducing the tax liability will prevent
19 demand penalties from being issued under California law. She is mistaken. The demand penalty is
20 designed to penalize a taxpayer for failing to respond to a Demand, not for failing to pay the
21 proper tax due. (*Appeal of Hublou* (77-SBE-102) 1977 WL 4093.) Plaintiff even admits in her
22 complaint that she failed to timely file her 2011, 2013 and 2014 returns.

23 Plaintiff's Requests are also not relevant or reasonably calculated to lead to the discovery of
24 admissible evidence pertaining to the FTB's imposition of the collection cost recovery fee. This
25 fee is imposed if the Plaintiff fails to make payment after the FTB has mailed a notice for
26 payment that advises that continued failure to pay may result in collection action. (Rev. & Tax.
27 Code § 19254, subd. (a)(1).) Plaintiff's Requests, which seek information on the location of her
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FALSE
Statement
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False
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Ms. Hubbard stated paid in full on
4-15-2011.

1 payments and interest information, have no bearing on the imposition of the collection cost
2 recovery fee.

3 Despite the fact that Plaintiff's Requests are not relevant nor reasonably calculated to lead
4 to the discovery of admissible evidence, in a good faith effort to comply with the discovery
5 process, the FTB produced documents responsive to Plaintiff's Requests. The FTB did not UT
6 withhold any documents on the basis of privilege, although it did properly redact some personal
7 and proprietary information. (LeBleu Declaration, ¶ 7.) Accordingly, the Court should deny the
8 Motion.

9 **2. Plaintiff Used Improper Discovery Methods.**

10 Plaintiff served the Requests, and in her instructions, only demanded that the FTB produce
11 certain documents within 30 days. However, Plaintiff improperly requested explanations to her
12 questions in Request Numbers 2B, 4A-4E, and 6A. The FTB properly objected to these requests
13 since they were not requests for production of documents. In meet and confer communications
14 with Plaintiff, FTB counsel addressed this issue with Plaintiff to no avail. (Barsegyan
15 Declaration, ¶ 6.) If it was Plaintiff's attempt to propound special interrogatories, Plaintiff failed
16 to comply with Code of Civil Procedure section 2030.060. Furthermore, Plaintiff's Motion is to
17 compel further production of documents. Plaintiff has not filed a motion to compel further
18 responses to her interrogatories. Any order to respond to her requests which are not for the
19 production of documents would be improper.

20 **3. FTB's Vague and Ambiguous Objections Are Proper.**

21 The FTB properly raised objections that Plaintiff's Requests were vague and ambiguous.
22 (Request Nos. 2A, 2B, 4A, 4B, 4C, 4E, 5A, 5B.) In several of Plaintiff's Requests, Plaintiff
23 referred to "Exhibit H", but failed to describe the exhibit with reasonable particularity or attach
24 the Exhibit so that the FTB would be better able to understand these requests. It became
25 particularly confusing during the meet and confer process when FTB counsel requested that
26 Plaintiff provide the documents she was referring to so that the FTB would be able to determine if
27 it had any documents responsive to Request Numbers 5A and 5B. (Barsegyan Declaration, Ex.
28 H.) However, the documents emailed by Plaintiff did not refer to the payment information she

1 was seeking in these requests, so the FTB was unable to move forward with reaching a resolution
2 on this dispute. (*Ibid.*) Plaintiff never attempted to engage in any meaningful discussions with
3 FTB counsel to resolve her objections.

4 **II. ALTERNATIVELY, PLAINTIFF HAS FAILED TO SHOW THAT SHE MADE A**
5 **REASONABLE AND GOOD FAITH EFFORT TO RESOLVE THE MOTION TO COMPEL**
6 **PRIOR TO ITS FILING.**

7 The motion to compel further responses must be accompanied by a declaration showing a
8 “reasonable and good faith attempt” to resolve issues outside of the court. (Code Civ. Proc. §§
9 2016.040, 2031.310, subd. (b)(2).) To establish good cause, the burden is on the moving party to
10 show both: (1) relevance to the subject matter; and (2) specific facts justifying discovery.
11 (*Glenfed Development Corp. Superior Court* (1997) Cal.App.4th 1113, 1117.) As discussed
12 above, Plaintiff cannot show that the documents sought are relevant to the determination of
13 whether the FTB properly imposed the demand penalties and collection cost recovery fee.

14 Additionally, since the FTB has already produced all responsive documents in a good faith effort
15 to comply with the discovery process, the issue is moot and does not warrant an issuance of a
16 court order.

17 Furthermore, the meet and confer statute requires that there be a serious effort at
18 negotiation and informal resolution. (*Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1294.)
19 Attempting informal resolution means more than the mere attempt by the discovery proponent to
20 persuade the objector of the error of his ways, and a reasonable and good faith attempt at informal
21 resolution entails something more than bickering with opposing counsel. (*Ibid.*)

22 Plaintiff has done nothing to prevent court intervention in this discovery matter. In fact,
23 Plaintiff drafted her motion to compel before any attempts at meaningful meet and confer
24 communications to resolve the discovery dispute. (Barsegyan Declaration, Ex. C and D.) When
25 FTB counsel emailed the meet and confer response letter to Plaintiff, Plaintiff responded that
26 same day affirming her intention to file a motion to compel without addressing the issues raised
27 in the letter. (Barsegyan Declaration, Ex. G.) It was never Plaintiff’s intention to make a
28 reasonable and good faith attempt at informal resolution before filing the Motion.

LIES

But did not submit

1 In sum, Plaintiff did not have a legitimate basis for filing the Motion, and cannot show a
2 reasonable and good faith attempt at an informal resolution of the issues presented in the Motion.
3 Accordingly, the Court should deny Plaintiff's Motion.

4 **III. EVEN IF PLAINTIFF'S MOTION IS GRANTED, SANCTIONS ARE NOT WARRANTED.**

5 If a motion to compel is granted, the court shall order the party to whom the discovery was
6 directed to pay the propounding party's reasonable expenses in enforcing discovery "unless it
7 finds that the one subject to the sanction acted with substantial justification or that other
8 circumstances make the imposition of the sanction unjust." (Code Civ. Proc. § 2023.030, subd.
9 (a).)

Privity

10 "[T]he phrase 'substantial justification' has been understood to mean that a justification is
11 clearly reasonable because it is well-grounded in both law and fact." (*Doe v. U.S. Swimming, Inc.*
12 (2011) 200 Cal.App.4th 1424, 1434.) Here, the FTB's objections to Plaintiff's document demand
13 and opposition to the Motion are plainly justified. First, and foremost, the FTB has already UE
14 produced all documents responsive to Plaintiff's requests. Independent of this action, the FTB
15 has responded to 4 IPA and 16 PRA requests from Plaintiff. (LeBleu Declaration, ¶¶ 4 and 5.)
16 There is substantial justification for FTB's prior production objections and refusal to produce
17 some or all of the documents it previously produced. The FTB also subsequently produced
18 approximately 856 pages ^{repeat} of documents in response to Plaintiff's second set of document requests.
19 (LeBleu Declaration, ¶ 6.) There are no further documents to produce responsive to Plaintiff's
20 requests in this Motion. (*Ibid.*) Therefore, the Court should deny any sanctions if Plaintiff's
21 Motion is granted.

2 docs withheld

*lie
all
other
years
& info on
accurate
dates*

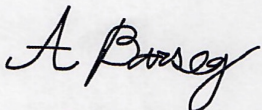
22 **CONCLUSION**

23 For the reasons stated above, Plaintiff's Motion should be denied. Alternatively, if the
24 Motion is granted, any request for sanctions by Plaintiff should be denied.

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1 Dated: May 17, 2021

Respectfully Submitted,
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