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FILED
LOS ANGELES SUPERIOR COURT

FEB 15 2012

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8 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT**

BY FAX

11 **DAVID COPPEDGE**, an individual;
12
13 Plaintiff,

Case No. BC435600

The Honorable Ernest M. Hiroshige, Dept. 54

14 vs.

15 **JET PROPULSION LABORATORY**, form
16 unknown; **CALIFORNIA INSTITUTE OF**
17 **TECHNOLOGY**, form unknown;
18 **GREGORY CHIN**, an Individual; **CLARK**
19 **A. BURGESS**, an Individual; **KEVIN**
20 **KLENK**, an Individual; and **Does 1 through**
21 **25**, inclusive,

PLAINTIFF DAVID COPPEDGE'S
REPLY TO DEFENDANT'S
OPPOSITION TO PLAINTIFF'S
MOTION IN LIMINE NO. 5 TO
PRECLUDE DEFENDANT'S LABOR
ECONOMIST/STATISTICIAN EXPERT
WITNESS FROM TESTIFYING
REGARDING PLAINTIFF'S
MITIGATION; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF

22 Defendants.

FSC: February 24, 2012
HEARING TIME: 9:00 a.m.
DEPT: 54

Trial Date: March 7, 2012

24
25 COMES NOW PLAINTIFF David Coppedge and hereby submits his Reply to Defendant
26 California Institute of Technology's ("JPL's) Opposition to Plaintiff's Motion in Limine No. 5 to
27

1 preclude Defendant's labor economist/statistician expert witness from testifying regarding Plain-
2 tiff's mitigation as follows:

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 **I. PLAINTIFF'S MOTIONS IN LIMINE ARE PROCEDURALLY FAVORED AND**
5 **NOT UNTIMELY**

6 Plaintiff's instant Motion in Limine was not filed in violation of any court order or court
7 rule. Defendant's protest of the instant Motion asserts untimeliness, but that assertion is insuffi-
8 cient. To prevail here, Defendant "must demonstrate not only that the notice was defective, but
9 that he or she was *prejudiced*.... Procedural defects which do not affect the substantial rights of
10 the parties do not constitute reversible error." *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272,
11 1288-1289 (internal quotations and citations omitted).

12
13 All of Plaintiff's Motions in Limine are brought to facilitate the smooth delivery of rele-
14 vant and not unduly prejudicial evidence at trial. Motions in limine avoid problems of trying to
15 "unring the bell," and they "permit more careful consideration of evidentiary issues than would
16 take place in the heat of battle during trial. They minimize sidebar conferences and disruptions
17 during trial, allowing for an uninterrupted flow of evidence. Finally, by resolving potentially crit-
18 ical issues at the outset, they enhance the efficiency of trials and promote settlements." *Kelly v.*
19 *New West Federal Savings* (1996) 49 Cal.App.4th 659, 669 (citations omitted), quoted and fol-
20 lowed by *Mansur v. Ford Motor Co.* (2011) 197 Cal.App.4th 1365, 1386. If Plaintiff's Motions
21 are denied solely on timeliness grounds, then the same objections will be raised during trial any-
22 way. Resolving the evidentiary issues on their merits before trial benefits the court, all parties,
23 and the jury.
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1 **II. JPL HAS NOT SHOWN MR. WARD IS QUALIFIED TO TESTIFY ABOUT**
2 **MITIGATION OF DAMAGES.**

3 Plaintiff's instant Motion supplied evidence showing Defendant's expert, Mr. Ward,
4 might be an economist and statistician, but that he is not qualified to give an opinion that helps
5 the jury decide the mitigation issue.

6 Defendant JPL's opposition brief does not show anything suggesting Ward knows what
7 Coppedge has done or should have done to look for comparable work. JPL does not show Ward
8 is even qualified to testify about a "reasonable" job search. All that Ward offers are statistics
9 drawn from population-wide employment data.
10

11 JPL's Brief on page 4 concedes that Ward cannot and will not offer opinions that usurp
12 the jury's function, i.e., to decide whether Coppedge "is likely to find comparable employment"
13 and whether he "met his duty to mitigate damages." But Ward cannot provide information that
14 shows whether Coppedge can find comparable employment. And Ward is not qualified to testify
15 to what Coppedge should have done to find such employment. JPL's Opposition Brief was JPL's
16 opportunity to explain how Ward is qualified and what his qualified testimony would be. JPL's
17 Brief failed – because the task cannot be done. Ward is a labor/economist/statistician – not an
18 expert on hiring people, job placement, job recruiting, career development or any other occupa-
19 tional specialty centered on finding work.
20

21 **III. JPL'S OPPOSITION BRIEF SELF-CONTRADICTS ON THE CRUCIAL ISSUE;**
22 **THE SELF-CONTRADICTION NULLIFIES JPL'S POSITION.**

23 Defendant JPL's Opposition at pages 2 to 3 bluntly states:

24 "Defendant's expert] Ward is not testifying about whether Coppedge could have obtained
25 a particular job, or even any job."

26 Contradictorily, JPL's Opposition at page 5 states:

27 "Ward's testimony ... is helpful to the jury's determination of whether Coppedge met his
28 duty to mitigate damages."

1 JPL readily concedes its burden is to prove Coppedge's alleged failure (if any) to mitigate
2 damages. (JPL Opp., at p. 5, citing *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d
3 176, 181-182 (1970)). Yet JPL asserts Mr. Ward will *not* be testifying about whether Coppedge
4 could get a job.
5

6 Self-contradiction aimed at securing a litigation advantage is not tolerated in California
7 courts. "Judicial estoppel precludes a party from gaining an advantage by taking one position,
8 and then seeking a second advantage by taking an incompatible position." *MW Erectors, Inc. v.*
9 *Niederhauser Ornamental and Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422 (internal quota-
10 tions omitted; citation omitted).
11

12 Is Mr. Ward going to testify about whether Coppedge could even get a job and thereby
13 mitigate damages? *No*, says JPL: "Rather, Ward is testifying about systems administrator jobs,
14 in general: the average length of time a systems administrator can expect to remain unemployed
15 and whether jobs are available in Coppedge's profession." (JPL Opp., at p. 3.)
16

17 Is JPL's expert going to testify about whether Coppedge has done what he should to get a
18 job? *Yes*, says JPL: "Ward will also offer his expert opinion as a labor economist as to what con-
19 stitutes reasonable diligence in seeking a new job position." (JPL Opp., at p. 4).
20

21 *Except*, JPL says, Ward will *not* be testifying about whether Coppedge was diligent or
22 not: "Ward is [testifying appropriately], while leaving for the jury the questions of whether
23 Coppedge is likely to find comparable employment and whether Coppedge met his duty to miti-
24 gate damages." (JPL Opp., at p. 4).
25

26 Confusion and contradiction render JPL's Opposition ineffective to show the scope and
27 content of Ward's trial testimony. No good reason exists to allow testimony so poorly crafted to
28 be foisted on a jury.

1 **IV. SELF-CONTRADICTION AND ABSENCE OF CONCRETE EVIDENCE**
2 **RENDER WARD'S TESTIMONY INCAPABLE OF SUPPORTING JPL'S**
3 **FAILURE TO MITIGATE AFFIRMATIVE DEFENSE.**

4 JPL's Opposition ties itself into a self-contradictory knot but does not show this Court
5 why Ward's testimony about generalities in the computer profession are somehow relevant to
6 anything concrete about Coppedge's alleged failure to mitigate damages. JPL must show actual
7 data estimating what this Plaintiff, Coppedge, could have received as pay for comparable work.
8 But JPL has not demonstrated how Ward's testimony will go about accomplishing this. Ward is
9 qualified to explain neither what constitutes "comparable work" in Coppedge's case (for a Unix-
10 trained systems administrator with a specific skill set) nor with any exactitude what Coppedge
11 would reasonably have to do to find such work.

12 "The general rule is that the measure of recovery by a wrongfully discharged employee is
13 the amount of salary agreed upon for the period of service, less *the amount which the employer*
14 *affirmatively proves* the employee ... with reasonable effort might have earned from other em-
15 ployment." *Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 409 (*citing*
16 *and quoting Parker, supra*). JPL's summary of Mr. Ward's testimony omits any real data and
17 offers no tangible reason to hope for anything more at trial – especially given the self-
18 contradictions infecting JPL's presentation.

19
20 **V. GENERAL STATISTICS ABOUT COMPUTER INDUSTRY HIRING AND**
21 **SALARY TRENDS, WITHOUT APPLICATION TO COPPEDGE'S SITUATION,**
22 **ARE NOT HELPFUL TO THE JURY AND ARE INSUFFICIENT AS A MATTER**
23 **OF LAW.**

24 JPL's Opposition brief attempts to justify using Ward's testimony to somehow support its
25 affirmative defense (failure to mitigate damages) by saying Ward will testify to broad generali-
26 ties:
27
28

1 “Ward is opining on anticipated unemployment duration, based on government statistics
2 for systems administrators, adjusted for age and geography - an assessment that is further
informed by government and trade publications.”

3 (JPL Opp., 4:8-11; same facts stated also at 3:15-18.)

4 Broad averages and general statistics concerning populations, without more, cannot pre-
5 dict the outcome for any individual. Many courts have rejected attempts to ask a jury to draw a
6 conclusion about an individual based upon historical group data.

7
8 In *Letson v. Liberty Mut. Ins. Co.* (N.D.Ga. 1981) 523 F.Supp. 1221, 1229, the court ex-
9 pressly rejected group data as predictive of an individual’s likely intent:

10 “Group data cannot be inferentially of use to the jury to make an individual’s intent more
11 or less probable. It would require as an initial step in the inference chain the conclusion
12 that the intent of each person making up the group is somehow summarized by the data.
13 This is not the case. Thus, the relationship between the proffered evidence and the conse-
14 quential fact is not one which allows a determination that the group data may properly al-
ter the probability of the plaintiff’s intent. In sum, statistical data is not relevant to resolu-
tion of the issue of plaintiff’s intent.”

15 Statistical evidence can lead juries to speculate when valid logic is absent. *See Drew v.*
16 *William W. Backus Hosp.* (2003) 77 Conn.App. 645, 661 & n.5 (“A jury could speculate as to
17 which group a decedent would fall, but the statistical evidence - without more - does not give a
18 jury a basis to believe that the decedent belongs to either the group that lives, or the group that
19 dies”); *Rhoades v. Department of Labor and Industries* (2008) 143 Wash.App. 832, 844 (holding
20 “[a]ctuarial science can predict the average lifetime of a group of people as a whole, but it cannot
21 determine when any individual person will die”).

22
23 Statistics are typically insufficient evidence to predict an individual’s future – especially
24 when that future depends upon other people’s actions. *See Young v. Com.* (Ky. 2004) 129
25 S.W.3d 343, 345 (“Parole determination is inherently an individualized decision based on the
26 particular facts of the case under consideration and it is therefore difficult, if not impossible, to
27

1 predict by generalized probability statistics”); *Bussey v. Phillips* (S.D.N.Y. 2006) 419 F.Supp.2d
2 569, 583 (“in an individual disparate treatment case ... statistics alone do not suffice to establish
3 discriminatory intent”).

4 Generalized data is not enough to predict a hiring decision. *See Norman-Nunnery v. Mad-*
5 *ison Area Technical College* (7th Cir. 2010) 625 F.3d 422, 432 (“statistical data, although rele-
6 vant, cannot alone meet the ‘more likely than not’ standard for a specific hiring decision about an
7 individual”).

9 A substantial weakness of statistical arguments lies in the failure to connect the generali-
10 ties to validly predict an individual case. *See Antonsen v. Ward* (N.Y. 1991) 77 N.Y.2d 506, 515-
11 516 (in a disability determination case, holding statistical evidence not probative because it was
12 “inconclusive” and “not adequately individualized” to show that the statistical findings applied
13 to the specific individual).

14 JPL’s Opposition brief utterly fails to show that Mr. Ward’s “expert” testimony will be
15 any more than statistical generalities without a valid application to Coppedge’s situation. Mr.
16 Ward’s employment data and broad averages will prove nothing about the difficulties Coppedge
17 has been facing and will face trying to find a comparable job.

18
19 **VI. CONCLUSION**

20 For the reasons set forth in the instant Motion and this Reply, Plaintiff Coppedge respect-
21 fully requests this Court grant Plaintiff’s Motion in Limine No. 5, and thereby preclude Mr.
22 Ward from testifying as an “expert” on the alleged failure to mitigate damages.

23 DATED: February 15, 2012

24 **THE BECKER LAW FIRM**
25 William J
26 By: Becker Jr, Esq
27 WILLIAM J. BECKER, JR., ESQ.
28 Attorneys for Plaintiff, DAVID COPPEDGE

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Date: 2012.02.15 10:19:04 -08'00'