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FILED IN UNITED STATES DISTRICT  
COURT, DISTRICT OF UTAH

MAR 19 2004

MARKUS B. ZIMMER, CLERK  
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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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World Wide Association of Specialty Programs, a Utah Corporation,	:	<b>SUBSTITUTE REDACTED PLEADING</b>
	)	(Memorandum In Opposition to Plaintiff's
	:	Motion for Sanctions and Order of Deposition)
Plaintiff,	)	
	:	
v.	)	
	:	
PURE, Inc., PURE Foundation, Inc.	:	Case Number:2:02-cv-00010PGC
Sue Scheff, and Does I through 10,	)	
	:	
Defendants.	)	Judge Paul G. Cassell

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COME NOW the Defendants above named and hereby file the following substitute redacted pleading for in place of the Memorandum in Opposition to Plaintiff's Motion for Sanctions and Order of Deposition with Exhibits A through E. The redacted pleading is attached hereto as Exhibit "1"

This document was originally filed with the court on February 17, 2004.

The docket number of the original pleading is 143.

143

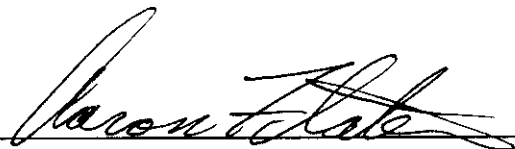
DATED this 19<sup>th</sup> day of March, 2004.

  
C. Richard Henriksen, Jr.  
Aaron W. Flater  
Attorneys for Defendant

**CERTIFICATE OF MAILING**

I hereby certify that on the 19 day of March, 2004, a true and correct copy of the foregoing **SUBSTITUTE REDACTED PLEADING MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS AND ORDER OF DEPOSITION WITH EXHIBITS A THROUGH E** was hand delivered, to the following:

Fred Silvester  
Spencer Siebers  
Silvester & Conroy L.c.  
230 South 5<sup>th</sup> East, Suite 590  
Salt Lake City, Utah 84102



**EXHIBIT “1”**

2-17-04

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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World Wide Association of Specialty Programs, a Utah Corporation,	)	<b>MEMORANDUM IN OPPOSITION</b>
	:	<b>TO PLAINTIFF'S MOTION FOR</b>
Plaintiff,	)	<b>SANCTIONS AND ORDER OF</b>
	:	<b>DEPOSITION</b>
v.	)	
	:	
PURE, Inc., PURE Foundation, Inc.	)	Case Number:2:02-cv-00010PGC
Sue Scheff, and Does I through 10,	)	
	:	Judge Paul G. Cassell
Defendants.	)	

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COME NOW the Defendants, by and through counsel of record, and hereby respectfully submit this Memorandum In Opposition to Plaintiff's Motion for Sanctions and Order of Deposition.

**STATEMENT OF FACTS**

1. In July of 2003 the court ordered that although the Plaintiff could take a second deposition of Sue Scheff, they would have to do so at a time and place that was convenient to her.

2. The parties arranged a tentative schedule for depositions, which included taking two (2) depositions in Florida on January 22, 2004 and three (3) depositions the next day in South Carolina. (See December 31, 2003 letter, attached as Exhibit "A")

3. The Defendants became aware that, in violation of the mutual protective order entered previously in this case, the Plaintiff's had distributed copies of Sue Scheff's and Jeff Berryman's deposition to third parties, including the individual C.B. , and that Jeff Berryman's deposition was offered on the internet to anyone who would like a copy. Upon discovering this information, Defendants counsel sent Plaintiff's counsel a letter insisting that the Plaintiff's stop misusing and distributing to third parties the information obtained in discovery. (See December 23, 2003 letter, attached as Exhibit "B")

4. This letter explained that unless the Plaintiff would agree to keep the deposition of Sue Scheff confidential and not to disseminate it to anyone then Sue Scheff would not agree her deposition until she had an opportunity to seek a protective order from the court.

5. Plaintiff's counsel, Spencer Siebers, then had a telephone conference with defense counsel on January 8, 2004, C. Richard Henriksen, Jr. regarding the deposition of Sue Scheff. During this telephone conference the attorneys agreed that the deposition

of Sue Scheff would be for attorneys only and would not be disseminated to anyone, including parties, until the court decided the Defendants Motion for Preliminary Injunction and Motion to Seal the Court Record. (See Affidavit of C. Richard Henriksen, Jr. at 2 and 3, attached as Exhibit "C")

6. Defendants counsel sent a letter to Plaintiff's counsel memorializing the agreement and requesting that Plaintiff's counsel sign a stipulation before traveling and attending the deposition of Sue Scheff. (See letter dated January 19, 2004 and attached stipulation, attached as Exhibit "D")

7. The following day Defendants counsel, Aaron W. Flater, attempted to call Plaintiff's counsel to discuss the letter and stipulation. In that telephone conversation the assistant for Plaintiff's counsel stated that although he was out of the office at the time of the call, he would return later that afternoon. She also confirmed that Mr. Silvester was in the office the previous day, when the first letter and stipulation were sent. Mr. Silvester's assistant also indicated that she would have Mr. Silvester call when he returned that afternoon.

8. Defendants' counsel called later again that same afternoon but Mr. Silvester had not yet returned to the office. Defendants' counsel then faxed another letter with another copy of the stipulation to his office, which stated that the stipulation would need to be signed before conducting the deposition of Sue Scheff and that because Plaintiff's

counsel had not objected to the stipulation that the Defendants were operating under the assumption that the Plaintiff agreed to it and would sign it prior to the deposition.

9. Plaintiff's counsel made no response to these letters or telephone calls before the attorneys left to Florida for the scheduled depositions.

10. When the attorneys for the parties spoke at the scheduled place of the deposition, Mr. Henriksen asked Mr. Silvester if he was ok with the stipulation and the agreement. Mr. Silvester agreed that this stipulation was fine. (See Affidavit of C. Richard Henriksen, Jr. at 6, attached as Exhibit "C")

11. After the parties sat down to begin the deposition, Plaintiff's counsel then refused to sign the stipulation.

12. Because of the Plaintiff's past distribution of her prior deposition in violation of the mutual protective order the Defendant, Sue Scheff, refused to have her deposition taken unless the stipulation was signed, therefore the deposition did not go forward. The parties did conduct the deposition of Lynne Pretzfield in Florida and the following day conducted the depositions of Elaine Davis, Joyce Slocum and Lauren Staudt in South Carolina.

### **ARGUMENT**

- I. **SUE SCHEFF PROPERLY APPEARED AT HER DEPOSITION READY AND WILLING TO ANSWER QUESTIONS.**

There is no dispute that Sue Scheff appeared at the set location for her deposition. Sue Scheff was prepared and willing to go forward with her deposition on the day it was scheduled with the understanding that the deposition would not be available to anyone other than attorneys for the parties, until the court had an opportunity to rule on the Defendants motion for an injunction and to seal court record. The Plaintiff attempts to equate Sue Scheff's refusal to testify as a non appearance. This is not an appropriate equation. Sue Scheff did appear and was willing to testify but her willingness to testify was conditioned upon the prior agreement between counsel that the deposition would be for attorneys only until the court had an opportunity to rule on her motion. The deposition transcript of the attempted deposition of Sue Scheff makes it perfectly clear that Sue Scheff was willing to go forward with her deposition as long as the stipulation was signed. (See draft of deposition transcript page 5 lines 8 through page 8 line 3, page 20 line 16 through page 21 line 16, attached as Exhibit "E")

Sue Scheff gave proper notice of the conditions that would need to be imposed before she would consent to her deposition. Sue Scheff notified the Plaintiff in December, nearly a month before her deposition, that unless the parties could reach an agreement regarding protection of the confidential information that would be discussed in Sue Scheff's deposition, she would seek a protective order from the court. The attorneys for the parties did confer and reach an agreement in regards to the deposition that the deposition would be for attorneys only until the judge had an opportunity to rule on the Defendants prior



motion for an injunction and motion to seal the court record. (See Affidavit of C. Richard Henriksen, Jr., attached as Exhibit "C") Not only was there a letter and an agreement between the attorneys, the Defendant also confirmed the agreement in a letter and provided a written stipulation to the Plaintiff asking him to sign and return it before the deposition could proceed. The Plaintiff's attorney admitted that he had the opportunity to read this Stipulation before traveling to Florida for the deposition but that he failed to do so. (See draft of deposition transcript, page 4 line 14 through page 5 line 7, attached as Exhibit "E") Therefore the Plaintiff had sufficient notice of the conditions under which the Defendant would agree to have her deposition taken. The Plaintiff had agreed to these conditions but then failed to sign the Stipulation or agree that information from the deposition would not be provided to their client. Plaintiff's refusal to sign the Stipulation and abide by the agreement that was previously reached is unjustified in that if Plaintiff's counsel wanted to confer with his client about the information in the deposition he could do so after the court has entered an order protecting the disclosure of this confidential and sensitive information.

**II. SUE SCHEFF'S FAILURE TO SEEK A PROTECTIVE ORDER WAS JUSTIFIED BY THE AGREEMENT OF THE ATTORNEYS REGARDING THE PROTECTION OF THE INFORMATION IN HER DEPOSITION.**

Long before her deposition, Sue Scheff indicated that she would seek a protective order unless the attorneys could reach an agreement to protect the information in her deposition. This agreement was reached between the attorneys and therefore Sue Scheff

agreed to continue with the previously scheduled deposition without seeking a protective order. It was not until the morning of the deposition that the Plaintiff stated that it would not agree to limit the information disclosed in the deposition of Sue Scheff to attorneys only and not to be distributed to any third parties including the Plaintiff and its officers, directors or employees. Thus Sue Scheff's refusal to testify even absent a pending motion for a protective order is justified because she relied on the previous agreement between the attorneys. If not for that previous agreement, Sue Scheff would have sought a protective order to restrict the dissemination of information disclosed in her deposition. Furthermore as Plaintiff has acknowledged the Defendants did have a pending motion for preliminary injunction and motion to seal the court records which would have the same effect as a motion for protective order, by protecting information disclosed in discovery.

**III. THERE WAS ADEQUATE JUSTIFICATION FOR SUE SCHEFF TO REFUSE TO PROCEED WITH HER DEPOSITION.**

In reliance on the prior agreement between the attorneys for the protection of information that would be discussed in her deposition. Sue Scheff spent a substantial amount of time, effort and cost in preparing for her deposition. Sue was ready, willing and able to proceed with her deposition so long as her deposition and the information contained in that deposition would not be given to anyone other than the attorneys in this case. There is adequate justification for these conditions as will be discussed below.

**A. The Plaintiff's Refusal To Sign The Stipulation Justifies Sue Scheff's Refusal To Testify At Her Deposition.**

Many weeks before the deposition of Sue Scheff, in a letter dated December 31, 2003, Defendants' made it clear that the depositions would not go forward unless Plaintiff's counsel would agree not to disseminate the deposition. The Plaintiff suggests that the Defendants did not propose this agreement until January 19, 2004. This however is not accurate. The discussion regarding the protection of the information was held on January 8, 2004 weeks before the deposition, and the letter and Stipulation dated January 19, 2004 were simply a written memorialization of the prior agreement between the attorneys. Yet even at that time, three days prior to the deposition, if the Plaintiff was not going to agree to the Stipulation he had opportunity to notify Defendants' counsel before everyone incurred the substantial cost of traveling to Florida for the deposition. The Plaintiff was notably silent even after two letters asking him to respond with any objections to the Stipulation. The Defendants' received no objections to these letters or the Stipulation and was entitled to assume as set forth in Defendants letters that if the Plaintiff did not object the Defendants would assume that Plaintiff agreed to sign the Stipulation. Based on the prior agreement of the parties and the lack of response to the letters and Stipulation, Defendants counsel traveled to Florida and spent the day prior to the deposition of Sue Scheff with Sue to assist her in preparing for her deposition. The Plaintiff persistently complains that Sue Scheff failed to file a Motion for Protective Order, however the reason there was no protective order filed is that Sue Scheff relied upon the prior agreement between the attorneys.

**B. Plaintiff's Prior Actions Justify Sue Scheff's Refusal To Testify At Her Deposition.**

In its Motion for Sanctions, the Plaintiff suggests that there were two reasons that Sue Scheff refused to testify at her deposition. One is the agreement between the attorneys that the deposition would be for attorneys only and the other is that the Plaintiff had misused the transcript of Sue's previous deposition. It is accurate to say that those are reasons that Sue Scheff refused to testify but it is inaccurate to say that those are the only reasons. In the deposition of Sue Scheff, Mr. Henriksen also stated the objection that the Plaintiff intended to use documents it obtained from C.B. with which to question Sue Scheff even though the Plaintiff has not provided these documents to the Defendants. (See draft of deposition transcript page 16 line 1 through 16, attached as Exhibit "E") In fact the Defendants have a motion currently pending seeking the disclosure of this information, which the Plaintiff purchased from C.B., a witness who is hostile to Sue Scheff. It is interesting that C.B. was initially listed as a witness by Sue Scheff and was previously very friendly to Sue Scheff. C.B. is now apparently cooperating with the Plaintiff and turned over her computer to the Plaintiff in exchange for \$12,500.00. Despite this new found alliance, the Plaintiff has never identified C.B. as an individual who would be a witness for the Plaintiff, instead they seem content to use discovery as a method of setting traps for the Defendant by refusing to produce documents that they have obtained and then using them at later times, when it is convenient to them.

This type of discovery ambush is not appropriate and those documents should be produced before Sue Scheff can be questioned about them.

The Plaintiff's other actions related to C.B. also justify Sue Scheff's refusal to testify at her deposition. As was stated previously in Defendants Motion for Preliminary Injunction and Motion to Seal Court Record, C.B. was provided with a copy of Sue Scheff's deposition by either the Plaintiff or its attorneys. C.B. then began using information from the deposition in a derogatory manner and offered to provide a transcript of the deposition for posting on the internet. Because of these inappropriate behaviors, Sue Scheff was compelled to bring a lawsuit against C.B. asking for an injunction to prevent her from disseminating this highly sensitive and confidential information. That lawsuit is currently pending in a Florida court. The Plaintiff has not suggested any reasons why C.B. needed to have the deposition transcript of Sue Scheff. Her only apparent purpose and use for the deposition is to disparage the Defendant. It can not be suggested that the deposition was necessary in order to help C.B. prepare for her own deposition because Plaintiff admitted that it gave C.B. a copy of Sue Scheff's deposition transcript after C.B. deposition had already taken place. Not only is such a distribution in violation of the court's prior mutual protective order but it also demonstrates the Plaintiff's eagerness to use information obtained in discovery to disparage the Defendants and allow others to do so.

Finally this conduct is not limited to third party witnesses. The Plaintiff itself and its employees and officers have inappropriately misused the court documents and offered deposition transcripts to anyone interested. This is also more fully detailed in the Defendants Motion for Preliminary Injunction and Motion to Seal Court Record, but for purposes of this motion it is sufficient to explain that Robert Litchfield admitted in his deposition that he purchased internet websites for the purpose of putting information on those websites about the Defendants, including Sue Scheff. On this website the deposition of Jeff Berryman is offered to anyone who requests it by E-mailing Kenneth Kay at WWASP. These actions underscore the need for the Defendant to be protected not only from the actions of other third parties but from the actions of the Plaintiff's themselves. Therefore Sue Scheff was justified in requesting that her deposition be limited to attorneys only and that the information disclosed in her deposition not be disclosed to parties until the court had a chance to rule on the Defendants Motion for Preliminary Injunction.

**C. Case Law Supports The Protection Of Confidential And Sensitive Information Disclosed In Discovery.**

Despite the existence of a prior Mutual Protective Order limiting the disclosure of information revealed in this case and the Plaintiff's own refusal to produce numerous documents based on claims of confidentiality and privacy, the Plaintiff claims an absolute right to use discovery in any way it sees fit. In support of its contention, the Plaintiff lists a string cite of cases. Although the Defendants acknowledge that under some conditions

parties are free to disclose information revealed in discovery, this is a right that has been restricted by the courts. In the most authoritative of the cases cited by the Plaintiff Seattle Times v. Rhinehart the United States Supreme Court held that "a litigant has no first amendment right of access to information made available only for purposes of trying his suit." Seattle Times v. Rhinehart 467 US 20, 32 (1984) The court went on to state that pretrial discovery has a significant potential for abuse and that discovery may seriously implicate privacy interests of litigants and third parties and therefore the government has a substantial interest in preventing this sort of abuse of its processes. Seattle Times v. Rhinehart 467 US at 34, 35.

In all of the cases cited by the Plaintiff, the courts recognize that protective orders are often appropriate to restrict the use or misuse of information obtained in discovery. As has been previously discussed, this case implicates the privacy of not only of the litigants themselves but also of the non-party witnesses and other individuals because these other individuals can not appropriately protect themselves as parties in this litigation, the court and the parties both have duties to protect and prevent the dissemination of this information.

The Defendants acknowledge that they have used selected portions of the transcript of Sue Scheff's prior deposition in support of motions and memorandum that have been filed with this court. The use of a small portion of a deposition in supporting a memorandum does not give the Plaintiff free license to make public the entire transcript

of the deposition of Sue Scheff. Furthermore the Defendants acknowledge that the pleadings in this case do contain sensitive, confidential and private information and for that reason have asked the court file and court record to protect the rights of the litigants and other third parties.

Finally the Plaintiff claims that it did not violate the prior protective order by giving C.B. a transcript of Sue Scheff's deposition because it instructed C.B. not to violate the protective order. The Plaintiff ignores the fact that the distribution of the deposition to C.B. in and of itself was a violation of this protective order.

**IV. THE PLAINTIFF'S CLAIMS FOR COSTS ARE NOT JUSTIFIED AND NO AWARD SHOULD BE MADE.**

The Plaintiff in this case is seeking reimbursement for any and all costs associated with traveling to Florida for the deposition of Sue Scheff. These costs should not and can not be justifiably charged to Sue Scheff. Not only did the parties plan the deposition of Sue Scheff but they also took the deposition of Lynne Pretzfield in Florida, on the same day as the deposition of Sue Scheff, and the depositions of Elaine Davis, Lauren Staudt and Joyce Slocum in South Carolina on the following day. Even if the deposition of Sue Scheff had not taken place, the parties would have incurred costs related to preparing for and traveling to these depositions. Furthermore at the deposition of Sue Scheff, Spencer Siebers, the attorney for the Plaintiff stated that he was already in Florida for purposes of going on a cruise. Additionally any time spent preparing for the deposition of Sue Scheff



is not time wasted and the same preparation can be used and applied later for use in motion and at trial. The Plaintiff has previously conducted a full seven (7) hour deposition of Sue Scheff. If the Plaintiff had used its time effectively at this first deposition there would not be a need for a second deposition and because the Plaintiff did not cooperate with regards to protecting the information that would be discussed and disclosed in Sue Scheff's deposition, the court should order that the Plaintiff's are not allowed to take another deposition of Sue Scheff.

#### **CONCLUSION**

The Defendant, Sue Scheff, took appropriate steps to notify the Plaintiff well before her deposition that she would not agree to that deposition unless the parties could reach such an agreement to protect the information that would be disclosed in that deposition. An agreement was made and Sue Scheff relied upon that agreement and therefore did not seek a protective order from the court. She should not now be punished for her reliance on her the agreement between the attorneys, to the contrary as a sanction for the Plaintiff's failure to notify the Defendants of its objection to the stipulation that Sue Scheff's deposition would be for attorneys only, the Plaintiff should not be allowed to take another deposition of Sue Scheff.

DATED this 17<sup>th</sup> day of February, 2004.




Aaron W. Flater  
for Henriksen & Henriksen P.C.  
Attorney for Defendants

**CERTIFICATE OF MAILING**

I hereby certify that on this 17<sup>th</sup> day of February, 2004, a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS AND ORDER OF DEPOSITION**, was mailed postage prepaid, to the following:

Fred R. Silvester  
Dennis J. Conroy  
Spencer Siebers  
SILVESTER & CONROY, L.C.  
Attorneys for Plaintiff  
230 South 500 East, Suite 590  
Salt Lake City, Utah 84102



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