

2003 WL 25315384 (Cal.Superior) (Trial Order)  
Superior Court of California.  
Alameda County

CALIFORNIANS FOR DISABILITY RIG, Plaintiff/Petitioner(s),  
v.  
MERVYN'S CALIFORNIA, INC., Defendant/Respondent(s).

No. 2002051738.  
July 14, 2003.

Motion to Strike Granted

**Order**

Disability Rights Advocates, Attn: Paradise, Laurence W., 449 Fifteenth Street, Suite 303, Oakland, CA 94612.

Morrison & Foerster LLP, Attn: McElhinney, Harold J., 425 Market Street, San Francisco, CA 94105-2482.

Judge Ronald M. Sabraw.

The Motion to Strike filed for Mervyn's California, Inc. was set for hearing on 07/09/2003 at 02:00 PM in Department 22 before the Honorable Ronald M. Sabraw. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

**IT IS HEREBY ORDERED THAT:**

The tentative ruling is affirmed as follows: Motion of Defendant to strike (1) portions of Declaration of Jonathan Adler (2) Portions of Declaration of Barry Atwood, and (3) Supplemental Report of Jonathan Adler is GRANTED.

In a case management order dated September 24, 2002, the Court set deadlines of March 3, 2003, for the expert disclosures and April 17, 2003, for the conclusion of expert depositions. The CMC order did not set a date by which Defendant had to file dispositive motions.

Plaintiffs timely disclosed their experts and Defendant deposed those experts. After the expert depositions, Defendant filed a motion for summary judgment. Plaintiff then advised Defendant that Plaintiff's experts would conduct further investigation and prepare supplemental reports. Plaintiff invited Defendant to monitor the investigations, to review the supplemental reports, and to take supplemental depositions. Plaintiff did not move to supplement its expert reports under CCP 2034(k).

The Court grants the motion because Plaintiff had a duty under the order of September 24, 2002, to produce its expert reports and have its experts prepared for deposition by certain dates. The statutory framework requires that experts be prepared by certain dates so that expert testimony is not a moving target at the time of trial. If supplementation is required, then a party can move to supplement under CCP 2034(k). If expert reports could be supplemented at the will of the parties, then the provision for supplementation with court approval under 2030(k) would be surplusage. As noted in the briefing, Plaintiff could have moved to amend the case management order, could have moved for leave to amend expert reports under 2034(k), or could have sought 437c(h), but did not do so.

The Court notes that in the absence of a court order setting an advanced expert disclosure deadline, a party has no obligation to disclose its experts prior to a motion for summary judgment. *Kennedy v. Modesto City Hospital* (1990) 221 Cal. App. 3d 575, 585. In addition, C.C.P. 2034(j) nominally applies only to the use of experts at trial, not in pre-trial motions. This order to strike certain evidence is, therefore, based on the order of September 24, 2002, and the application of the policies in C.C.P. 2034 (j) and (k)

Motion to strike GRANTED for purposes of the motion for summary judgment. The Court makes no order regarding whether Plaintiff can supplement its expert reports under 2034(k) or whether the evidence is admissible at trial.

Dated: 07/14/2003

<<signature>>

Judge Ronald M. Sabraw

**ADDITIONAL ADDRESSEES**

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