

these Defendants strictly deny, then the Defendants would request a continuance on the hearing on Plaintiffs' Motion to Compel and Motion for Contempt and Sanctions.

II.

PLAINTIFFS' FACTS ARE CONTROVERTED

2.1 Plaintiffs set forth a statement of facts in Plaintiffs' Motion which the Defendants believe is misleading to the Court. Obviously, the parties have a sharp dispute as to the facts in this case including, but not limited to, the events leading up to the accident in question and the allegations regarding BRADLEY W. BARKLEY's alleged falsification of his driver logs.

2.2 The Plaintiffs fail to provide the Court with reference to the testimony of the only independent witness to this accident who alleges that a collision ensued between the vehicle operated by the deceased and the vehicle operated by Intervenor MARGARITA LOPEZ prior to any collision ensuing between the vehicle operated by BRADLEY W. BARKLEY and the other vehicles involved in the collision in question. The testimony of this independent witness, Alvin Mowles, is support by the testimony of BRADLEY W. BARKLEY.

2.3 Plaintiffs also allege that BRADLEY W. BARKLEY falsified his driver logs on the day of the incident for the reason that he received and/or sent e-mails and purchased food at a dining establishment located on the premises where he was sleeping in his tractor-trailer. The receipt and sending of an e-mail while he is identified in his driver's logs as being in the sleeper berth is no different than receiving a telephone call while sleeping at a home. Further, the purchase of food while you are designated as in the sleeper berth is no different than obtaining food and/or drink from the kitchen and going back to bed while you are sleeping such events do not constitute falsification of driver's logs.

RESPONSE TO MOTION TO COMPEL

3.1 Plaintiffs Request for Production No. 1, 2, 3, 5, and 6, ask for all documentation, training manuals, safety manuals and other documentation regarding the use of the QUALCOMM Messaging System which was used by drivers for WERNER ENTERPRISES, INC. in October 2001. The Defendant has objected to the production of that documentation as proprietary and trade secrets information. Specifically, there is a confidentiality agreement entered into between QUALCOMM and WERNER ENTERPRISES, INC. regarding the distribution of said information. The Defendant would show that it would be violating its agreement with QUALCOMM if it produces any such documents. Further, the specific software and programs implemented by WERNER ENTERPRISES, INC. constitute proprietary and trade secret privilege under Rule 507 of the Texas Rules of Civil Evidence. Specifically, the QUALCOMM data, the storage of said data, and the implementation of the QUALCOMM program by WERNER ENTERPRISES, INC., is a formula, pattern, device and compilation of information which is used in WERNER ENTERPRISES, INC.'s business and presents an opportunity to obtain an advantage over competitors who do not have the information or do not know how to properly use it. See the Affidavit of Mike Heglin attached hereto as **Exhibit "A"**.

3.2 The Defendant is in the process of obtaining the documents requested by the Plaintiffs in Request for Production No. 4, 7 and 8.

3.3 In Request for Production No. 9, the Plaintiffs request the production of all QUALCOMM messages and GPS data for each tractor operating out of the Gene Autry/Ardmore terminal from January 1, 2001 to July, 2001. In that terminal from January 2001 through July 2001, there were approximately 68 tractor-trailers which operated on a daily basis. The Plaintiffs are

entering into a fishing expedition to obtain all of this information, and the Defendant would show that the production of these documents would be unduly burdensome and require extreme labor and expense. See Affidavit of Mike Heglin attached hereto as **Exhibit "A"**. To the extent that the Defendant must produce these documents, the Defendant would ask that the Court award necessary and reasonable expenses to the Defendant associated with the production of said documents.

3.4 In Request for Production No. 10, the Plaintiffs request certified documents showing the Defendant's net worth for the fiscal years 2000, 2001 and the Defendant's current net worth. Pursuant to Texas law, Defendant WERNER ENTERPRISES, INC. would show that it is only required to produce some documentation to support its net worth. Specifically, Defendant will agree to produce those annual reports for the years requested by the Plaintiffs.

3.5 Request for Production No. 11, inquires into the original and/or amended petition from lawsuits in which there have been allegations that a WERNER ENTERPRISES, INC. tractor-trailer rear-ended a vehicle causing injury and/or death, a driver allegedly operated a QUALCOMM while driving or allegations that the vehicle's brakes were out of adjustment. Defendant would show that this again is a fishing expedition on the part of the Plaintiffs. Further, the actions involving other WERNER ENTERPRISES, INC. drivers and alleged rear-end collisions is not relevant to the present litigation. The Defendant would show that WERNER ENTERPRISES, INC. has 7,940 number of trucks currently operating. In June of 2002, WERNER ENTERPRISES, INC.'s tractor-trailers traveling approximately 90,780,000 miles. This Request for Production does not limit the inquiry to any period time nor does it limit the inquiry to the driver in question. The Defendants would show that obtaining and producing these documents would be unduly burdensome and the production of these documents would require extreme labor and expenses. See Affidavit of Mike Heglin attached hereto as **Exhibit "A"**. To the extent that the Defendant must produce these

documents, the Defendant would ask that the Court award necessary and reasonable expenses to the Defendant associated with the production of said documents.

IX.

RESPONSE TO PLAINTIFFS' MOTION FOR SANCTIONS AND MOTION FOR CONTEMPT

4.1 The Court entered a Temporary Restraining Order on December 21, 2001. Part of that Temporary Restraining Order stated that the Defendant was not to remove any of the contents from the vehicle in question. The Defendant not only kept all documents in the vehicle in question, but copies of all of those documents have been produced to Plaintiffs' counsel. There were no log books in the vehicle in question. Driver logs are automatically transferred to the computer in Omaha, Nebraska as the information is entered by the driver. All logs are retained for six (6) months and then automatically purged from the computer system. When an accident occurs a request is sent to retain the logs for seven (7) days. This is the Werner policy. In the present litigation, the Defendant made an independent request to obtain additional logs, and was able to produce those logs for an eleven (11) day period of time prior to the incident in question. The remaining logs were over six (6) months old and automatically purged from the system. See Affidavit of Mike Heglin attached hereto as **Exhibit "A"**.

4.2 Defendant WERNER ENTERPRISES, INC. would show that at no time has it intentionally violated the Court's Restraining Order. The driver logs were not paper logs. The logs were generated and transmitted by the QUALCOMM system to the WERNER ENTERPRISES, INC. home terminal where they were kept on computer storage. The language in the Temporary Restraining Order specifically refers to any documents contained in the tractor in question in addition to those computer systems on the tractor. The Defendant has wholly adhered and followed

the Restraining Order as it is worded. To the extent that the spirit of the Restraining Order has been violated, the Defendant would show that it did not do so intentionally, and has made every reasonable effort to obtain as many driver logs for Defendant BRADLEY W. BARKLEY as possible. Accordingly, sanctions should not be levied against this Defendant. See Affidavit of Mike Heglin attached hereto as **Exhibit "A"**.

WHEREFORE, PREMISES CONSIDERED, Defendants WERNER ENTERPRISES, INC. and BRADLEY W. BARKLEY, respectively request that upon final hearing hereof, that Plaintiffs' relief be denied, and for such other and further relief, both at law and in equity, to which Defendants may show themselves justly entitled and for which they will ever pray.

Respectfully submitted,

STRADLEY & WRIGHT, P.C.

By: _____

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**ATTORNEYS FOR DEFENDANTS
WERNER ENTERPRISES, INC. AND
BRADLEY BARKLEY**

CERTIFICATE OF CONFERENCE

A conference was held with Plaintiffs' counsel on July 24, 2002, regarding Defendants' Motion for Continuance. An agreement could not be reached. Therefore, this Motion is submitted to the Court for determination.



Andrew T. Fifield

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record, pursuant to the Texas Rules of Civil Procedure via hand-delivery, facsimile transmission and/or certified mail, on July 25, 2002.



Andrew T. Fifield

“4. When an accident is reported, it is the policy at Werner Enterprises, Inc. that a memorandum and/or e-mail request be sent which requests the logs for a seven day period of time leading up to the accident in question. In the present case, the logs were obtained for a seven day period of time prior to the accident. I then obtained an additional request for more driver’s logs for Bradley Barkley. When I requested the additional logs, we were able to obtain the logs for eleven total days before the accident in question. The six month purging process had already erased those logs which were older than eleven days before the accident. At no time did I or anyone at Werner Enterprises, Inc. ever intentionally purge or destroy Mr. Barkley’s driver logs.

“5. It is my understanding that the Plaintiffs are asking for all operating manuals, training manuals and safety manuals relating to the Omni TRACS system and QUALCOMM System. Werner Enterprises, Inc. and QUALCOMM entered into a confidentiality agreement in which neither party is to disclose information regarding the equipment, software or technical documentation. Werner is subject to prohibitions under Paragraph 8 of the applicable Werner/QualComm agreement which states:

Confidentiality of Agreement and Information. Both parties agree that all data received by QUALCOMM regarding Customer’s business and operations including the text and the position location information contained in messages and position location reports generated from using the Service, constitutes Customer’s confidential and proprietary information. Customer agrees that the terms of this Agreement, including but not limited to, the pricing contained herein, and any information obtained from examination of the Equipment or Software or any technical documentation furnished by QUALCOMM hereunder (whether or not marked with a confidential or proprietary data legend) shall be deemed to be QUALCOMM’s confidential or proprietary information. Neither party shall, except as necessary for the performance of this Agreement, duplicate, use or disclose to any third person (including an affiliated company) any such confidential or proprietary information, without the prior written approval of the disclosing party, except as to any such disclosures which are required by law or regulation. Upon the termination or earlier cancellation of this Agreement, each party shall promptly return to the other party all confidential or proprietary information received. If the parties have executed a separate Non-Disclosure Agreement for the protection of confidential or proprietary information, the terms and conditions of such Non-Disclosure Agreement shall take precedence over this Section to the extent inconsistent herewith.

“6. It is my understanding that the Plaintiff has requested all QUALCOMM messages and GPS data for each tractor operating out of the Gene Atry/Ardmore Terminal from January 2001 until July 2001.

During that period of time, there were sixty-eight trucks operating per day on an average out of the Gene Autry/Ardmore Terminal. Those trucks were running seven days a week. Obtaining and producing all of the QUALCOMM messages and GPS data for all of those trucks for the period of time from January 2001 until July 2001 would be unduly burdensome and require extensive labor and expense.

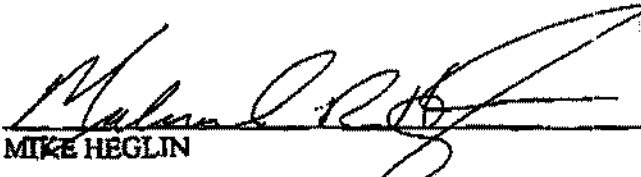
“7. It is my understanding that the Plaintiffs have requested all petitions from lawsuits involving Werner Enterprises, Inc. in which there have been allegations regarding a rear-end collision causing injury or death, a driver allegedly operating a QUALCOMM while driving, or allegations that the vehicle’s brakes were out of adjustment. It is my understanding that the Plaintiff has not limited the time period or the location of said incidents. Werner Enterprises, Inc. currently operates approximately 7,940 tractor-trailers. In June of 2002, Werner Enterprises, Inc.’s tractor-trailers traveled approximately 90,780,000 miles. The following would be involved in order to obtain the information and documents requested by Plaintiff in this case:

- (a) The search for litigation files wherein Plaintiffs have made such allegations would require the obtaining of both open and closed claim files, the manual searching for plaintiff complaints, and the review of these complaints. Once complaints containing such allegations had been located, then it would be necessary to pull these complaints out of file binders and copy them.
- (b) We currently have 169 open litigated claim files, and have had approximately 492 closed litigated accident files for cases filed in the last six (6) years.
- (c) In order to perform the work described above, it would take at least an average of thirty-five (35) minutes staff time for each open file and nine-five (95) minutes staff time for each closed file. For each file, whether open or closed, fifteen (15) minutes of the staff time would be adjuster time, and the remainder clerical time. Clerical staff would need to locate the files (including retrieval of closed files from storage, and to perform other related clerical time, including compiling the data). Adjuster time would be necessary to search the file for relevant documents from which information could be compiled.
- (d) Adjusters make on the average of \$40,000 per year (including the cost of benefits, etc.) or \$19.23 per hour. Clerical staff makes on the average of \$10 per hour (including the cost of benefits, etc.)
- (e) Therefore, the basic cost to the company for retrieving the files, finding the documents containing the data, and compiling the data can be calculated as follows:

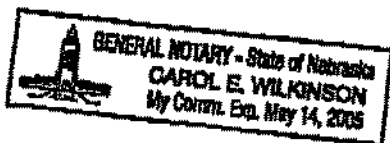
NUMBER OF FILES	CLERICAL AND/OR ADJUSTER TIME	TOTAL MINUTES	TOTAL HOURS	RATE	COST
169 Open	20" Clerical	3380	56.30	\$10.00	\$ 563.33
	15" Adjuster	2515	42.25	\$19.23	812.47
492 Closed	80" Clerical	39360	656	\$10.00	6,560.00
	15" Adjuster			\$19.23	2,365.29
				TOTAL COST	\$10,301.49

- (f) The above figure is for the best case scenario. The above figures were calculated assuming that all files can be promptly located, and that the files in storage have been accurately identified, and the pleadings section of the file be promptly located. In addition, because these staff personnel will not be able to perform their regular duties, some overtime will likely be necessary. Realistically, the above figure should therefore be increased by at least thirty-three percent (33%) to take into account most accurately what the true cost would be.
- (g) It is therefore my opinion, based on all the foregoing, that it would cost at least \$10,301.49 to complete the searching for and compiling of information as set forth above. This does not take into account the burden on the company in the form of lost production on day-to-day functions."

Further, Affiant sayeth not.


 MIKE HEGLIN

SUBSCRIBED AND SWORN TO BEFORE ME on this 25th day of July, 2002, to certify which witness my hand and official seal of office.




 Notary Public, State of Nebraska