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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

| | | |
|-------------------------|---|---|
| THE PEOPLE OF THE STATE |) | No. BA 069796 |
| OF CALIFORNIA, |) | |
| |) | |
| Plaintiff, |) | Motion for Sanctions for |
| |) | Intentional Destruction of Evidence, |
| v. |) | Refusal to Comply with Court Order |
| |) | |
| SAMMY MARSHALL |) | Hearing Date: December 27, 1995 |
| |) | |
| Defendant. |) | In Department 115, Los Angeles County |
| _____ |) | Superior Court |

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE DISTRICT ATTORNEY OF THE COUNTY OF LOS ANGELES:

Defendant, SAMMY MARSHALL, by and through counsel, hereby moves this Honorable Court for an order providing sanctions against the prosecution for multiple violations of this court's discovery orders. The violations, which are documented in the attached declaration of counsel, include the following acts:

1. **Destruction of Evidence** -- Item #6 of the Court's Discovery Order of August 21, 1995 requires the prosecution to produce copies of computer "image files." These files are digital pictures of the "autorads" that show the DNA test results in this case. The Court's order covers image files that were created at the request of the defense when the autorads in this case were re-scored.

During the discovery hearing on December 1, 1995, Prosecutor Irene Wakabayashi stated that these image files would be disclosed to the defense upon payment of a bill from Genetic Design that covered, inter alia, the cost of re-scoring the autorads. At the conclusion of that hearing, the Court again ordered the prosecution to produce those image files.

The defense paid Genetic Design's bill in early December. Thereafter, on December 18, 1995, the prosecution's expert, Mr. Michael DeGuglielmo of Genetic Design, informed defense counsel that the image files had been erased from the hard drive of Genetic Design's computer where they had been stored. Thus, after demanding and receiving payment for creating the image files, Genetic Design announced that the files could not be delivered because they had been destroyed.

The intentional erasure of the image files is an egregious violation of the Court's orders and an act of extreme bad faith. Mr. DeGuglielmo knew that the image files were the subject of a discovery request (first made in May, 1995) and that the image files were the subject of this Court's orders. He had discussed with defense counsel on several occasions technical issues surrounding the transfer of the files from the hard drive to floppy disks for disclosure to the defense. All parties were aware that a major purpose of having Genetic Design re-score the autorads was to provide defendant's experts copies of

the same image files that were used in the re-scoring. For Genetic Design to destroy the image files under these circumstances is outrageous.

The image files provided a record of the appearance of the autorads at the time of the re-scoring and thereby provided a check against subsequent alteration of the autorads. Destruction of these image files will make such alterations, if they occur (or have occurred), difficult to prove.

More importantly, the image files were crucial to defendant's effort to determine whether Genetic Design engaged in scientific misconduct by "fudging" its results when it re-scored the autorads in this case. As noted in earlier motions, defendant's experts suspect that Genetic Design "fudged" its results when it re-scored the autorads in this case. "Fudging" could have been proven if defendant's experts found it impossible to reproduce Genetic Design's scoring using the same image files. The destruction of those files undermines defendant's effort to prove (or disprove) the suspicions of its experts and thereby compromises his ability to mount an effective defense.¹

2. Demands for Advance Payment of Exorbitant Fees - The prosecution has, to date, produced none of the materials covered by the Court's orders of December 1st. The prosecutor has informed defense counsel that none of these materials will be produced until defendant pays Genetic Design an advance deposit to cover its fees for producing the materials ordered by the court. Mr. Michael DeGuglielmo of Genetic Design has demanded an advance deposit of \$697.55 before he will take any action to comply with

¹ Although new image files can be created by scoring the autorads a third time, the images may not be identical. Just as two photos of the same person, taken at different times, may look a bit different, two computer images of the same autorads, generated at different times, may vary slightly. Thus, Genetic

the Court's discovery orders. Specifically, he has told defense counsel that until he receives this advance deposit, he will take no action to produce any discovery materials and will not allow defendant's expert to visit his laboratory to observe the re-scoring of the autorads.

The Court's orders regarding discovery require that the prosecution produce certain materials. The Court's orders do not require advance payment of fees by the defense as a condition of the prosecution's compliance with the Court's orders. It is outrageous for the prosecution to demand these fees from an indigent defendant, and then refuse to comply with the Court's orders because the defendant has failed to pay the fees in advance. If there are costs associated with compliance with the Court's orders, the prosecution, as proponent of the DNA evidence, should bear those costs. The demand for payment by defendant, in advance, is simply the prosecution's most recent excuse for flouting the Court's discovery orders

DeGuglielmo's fees are exorbitant in any case. For example, he intends to charge defendant \$177. to cover the cost of photocopying the 177 pages of written materials covered by the Court's order. Additionally, he intends to charge at the rate of \$125 per hour for the hour of time he estimates it will take to make the photocopies. Thus, the cost of photocopying 177 pages will be \$302. Whether these fees are charged to the prosecution or to the Court (as ancillary costs of indigent defense), they are ridiculously high.

Design can now attribute any inconsistency between its re-scoring of the autorads and defense experts' scorings to differences in the image files rather than "fudging" during the re-scoring.

Even if defendant must bear some of the costs of discovery, he should not be required to pay those costs in advance without the opportunity to review those materials to ascertain that they are what was requested. The prosecution is demanding that the defense buy a pig in a poke from a lab that has already flim-flammed and cheated the defendant by charging him money to produce image files that it thereafter erased. The prosecution's position is patently unreasonable and plainly violates the Court's orders.

3. Refusal to Comply with Court-Ordered Disclosure of Data Base Diskette -

Item #3 of the Court's Order of August 21, 1995 requires production of copies of "all data that Genetic Design has sent to outside consultants for the purpose of Hardy-Weinberg/linkage studies..." and specifies that "[t]he data is to be provided in the same form that it was provided to outside consultants (i.e., on computer diskettes)." During the discovery hearing of December 1, 1995, prosecutor Wakabayashi asked the Court to modify this order to allow the prosecution to provide the data base in the form of a hard copy (paper) print out. After hearing extensive argument on the issue, the Court denied the motion to modify the order and again ordered the production of the data base in the form of a computer diskette.

Ms. Wakabayashi has informed defense counsel that Genetic Design refuses to comply with the Court's order to produce the data base diskette. Without access to the data base diskette, defendant's experts will be unable to check the accuracy and appropriateness of Genetic Design's statistical computations in this case. Consequently, this direct refusal to comply with the Court's order contravenes defendant's due process rights to a fair trial and his right to effective assistance of counsel.

In light of these serious violations of the Court's orders, defendant respectfully requests that the prosecution be precluded from presenting the results of Genetic Design's DNA test against him at trial.

Dated: December 20, 1995

Respectfully submitted,

William C. Thompson
Attorney for Sammy Marshall