

1  
2 **POSTED ON WEBSITE**  
3 **NOT FOR PUBLICATION**

4 **UNITED STATES BANKRUPTCY COURT**  
5 **EASTERN DISTRICT OF CALIFORNIA**  
6

7 In re: ) Case No. 03-22417-D-13L  
8 )  
8 RAFAEL SANCHEZ and )  
BERTHALISA SANCHEZ, )  
9 )  
Debtors. )  
10 \_\_\_\_\_ )  
11 )  
11 RAFAEL SANCHEZ and ) Adv. Pro. No. 06-2251-D  
BERTHALISA SANCHEZ, )  
12 ) Docket Control Nos. HM-1  
Plaintiffs, ) and WW-10  
13 )  
v. )  
14 )  
WASHINGTON MUTUAL BANK, )  
15 )  
Defendant. )  
16 \_\_\_\_\_ )

17 **This memorandum decision is not approved for publication and may**  
18 **not be cited except when relevant under the doctrine of law of**  
19 **the case or the rules of claim preclusion or issue preclusion.**

19 **MEMORANDUM DECISION**

20 On July 16, 2008, defendant Washington Mutual Bank filed a  
21 Motion to Compel Further Answers to Interrogatories, Set No. 1,  
22 as Docket Control No. HM-1 ("the WAMU Motion"). On August 5,  
23 2008, plaintiffs Rafael Sanchez and Berthalisa Sanchez filed  
24 opposition, and on August 11, 2008, WAMU filed a reply.

25 Also on August 5, 2008, the plaintiffs filed Plaintiffs'  
26 Motion to Compel Responses to Discovery and For Sanctions for  
27 Failure to Comply With Discovery Requests, as Docket Control No.  
28 WW-10 ("the plaintiffs' Motion"). WAMU did not file opposition,

1 but instead, on August 14, 2008, filed a motion to reschedule, in  
2 essence seeking a continuance of the hearing on the plaintiffs'  
3 Motion (among other things). At a hearing held August 26, 2008,  
4 the court denied WAMU's motion to reschedule, to the extent it  
5 sought a continuance of the plaintiffs' Motion. Having  
6 determined that oral argument would not aid the court in  
7 rendering a decision on either the WAMU Motion or the plaintiffs'  
8 Motion, the court has taken both motions as submitted.

9 For the reasons set forth below, the court will deny both  
10 the WAMU Motion and the plaintiffs' Motion.

11 I. Standards for Meet and Confer Certification

12 Federal Rule of Civil Procedure 37(a)(1), made applicable in  
13 bankruptcy adversary proceedings by Federal Rule of Bankruptcy  
14 Procedure 7037, requires that a motion to compel discovery  
15 "include a certification that the movant has in good faith  
16 conferred or attempted to confer with the person or party failing  
17 to make . . . discovery in an effort to obtain it without court  
18 action."

19 The certification requirement was described in Shuffle  
20 Master v. Progressive Games, 170 F.R.D. 166 (D. Nev. 1996) as  
21 comprising two elements:

22 [T]wo components are necessary to constitute a facially  
23 valid motion to compel. First is the actual  
24 *certification* document. The certification must  
25 accurately and specifically convey to the court who,  
26 where, how, and when the respective parties attempted  
27 to personally resolve the discovery dispute. Second is  
28 the *performance*, which also has two elements. The  
moving party performs, according to the federal rule,  
by certifying that he or she has (1) in good faith (2)  
conferred or attempted to confer. Each of these two  
subcomponents must be manifested by the facts of a  
particular case in order for a certification to have  
efficacy and for the discovery motion to be considered.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Shuffle Master, 170 F.R.D. at 170 (emphasis in original).

The court went further: “[A] moving party must include more than a cursory recitation that counsel have been ‘unable to resolve the matter.’” 170 F.R.D. at 171. Instead, counsel must set forth

essential facts sufficient to enable the court to pass a preliminary judgment on the adequacy and sincerity of the good faith conferment between the parties. That is, a certificate must include, *inter alia*, the names of the parties who conferred or attempted to confer, the manner by which they communicated, the dispute at issue, as well as the dates, times, and results of their discussions, if any.

Id.

“[G]ood faith cannot be shown merely through the perfunctory parroting of statutory language on the certificate to secure court intervention; rather [the rule] mandates a genuine attempt to resolve the discovery dispute through non-judicial means.”

Shuffle Master, 170 F.R.D. at 171.

The Shuffle Master court went on to hold that the rule requires “a personal or telephonic consultation during which the parties engage in meaningful negotiations or otherwise provide legal support for their position.” 170 F.R.D. at 172. The court found that the series of facsimile letters transmitted in that case did not satisfy the requirement. Id.

These principles were adopted and applied in the bankruptcy context in Leimbach v. Lane (In re Lane), 302 B.R. 75, 78-79 (Bankr. D. Idaho 2003), in which the court concluded that the motion to compel in that case, supported only by a letter from the moving party’s counsel to his opponent, “[did] not comply

1 with the requirements of the Rule, or meet its policy and  
2 purpose." 302 B.R. at 79, citing Shuffle Master and Ross v.  
3 Citifinancial, Inc., 203 F.R.D. 239, 240 (S.D. Miss. 2001) ["the  
4 requirement of a [meet and confer] certificate cannot be  
5 satisfied by including with the motion copies of correspondence  
6 that discuss the discovery at issue. . . . The Court is unwilling  
7 to decipher letters between counsel to conclude that the  
8 requirement has been met."].

9 The court adopts the standards set forth in Shuffle Master,  
10 and as applied in this case, finds that neither WAMU's Motion nor  
11 the plaintiffs' Motion satisfies Rule 37(a)(1).

## 12 II. The WAMU Motion

13 The WAMU motion is supported by a declaration of David F.  
14 Anderson identifying as true and correct copies of a series of  
15 letters between Mr. Anderson, as counsel for WAMU, and Mark  
16 Wolff, as counsel for the plaintiffs. Copies of the letters are  
17 filed as exhibits. The WAMU Motion itself contains this  
18 perfunctory statement: "Meet and confer letters were thereafter  
19 exchanged. A final meet and confer option was given by [Mr.  
20 Anderson's] letter of June 13, 2008. No further response was  
21 received." WAMU Motion, ¶ 8.

22 As stated by the court in Shuffle Master, there must be an  
23 "actual certification document" that "accurately and specifically  
24 convey[s] to the court who, where, how, and when the respective  
25 parties attempted to personally resolve the discovery dispute."  
26 The court finds no such "actual certification document" in or in  
27 support of the WAMU Motion. There is nothing in Mr. Anderson's  
28 declaration or elsewhere that constitutes a certification that

1 WAMU, as the moving party, in good faith conferred or attempted  
2 to confer with the plaintiffs in an effort to obtain the  
3 requested discovery without court action. The court will not  
4 wade through a lengthy series of letters in order to determine  
5 whether the parties in good faith attempted to resolve their  
6 differences. Because the WAMU Motion does not contain the  
7 necessary Rule 37(a)(1) certification, it will be denied.

8 III. The Plaintiffs' Motion

9 The plaintiffs' Motion contains what on its face appears to  
10 be an actual certification document, in the form of a declaration  
11 of Mark A. Wolff. Mr. Wolff testifies (1) that he has "in good  
12 faith conferred and attempted to confer with WAMU, . . . through  
13 its attorneys Lawrence W. Stevens and David Anderson," (2) that a  
14 particular exhibit is a true and correct copy of his letter to  
15 those gentlemen "confirming and memorializing [their] meet and  
16 confer session held January 29, 2008," (3) that another exhibit  
17 is a true and correct copy of a letter to Mr. Anderson, described  
18 as "the last in a series of correspondence and communications  
19 with WAMU and its attorneys in attempts to obtain discovery  
20 requested," and (4) that after the plaintiffs' earlier motion to  
21 compel, "Plaintiffs and WAMU met at a lengthy meet and confer  
22 session for the purpose of resolving the then pending discovery  
23 disputes."

24 The first of these statements is nothing more than the  
25 "perfunctory parroting of the statutory language." The second  
26 statement refers to a meet and confer session held on January 29,  
27 2008, well in advance of the service of many of the discovery  
28 requests that are the subject of the plaintiffs' present Motion.

1 The third statement merely refers the court to a series of  
2 otherwise unidentified "correspondence and communications." The  
3 fourth statement refers to a meet and confer session pertaining  
4 to a prior discovery motion.

5 These statements do not "accurately and specifically convey  
6 to the court who, where, how, and when the respective parties  
7 attempted to personally resolve the discovery dispute." Shuffle  
8 Master, 170 F.R.D. at 170. On the contrary, the declaration is  
9 entirely insufficient to "enable the court to pass a preliminary  
10 judgment on the adequacy and sincerity of the good faith  
11 conferment." Id. at 171. Thus, the plaintiffs' Motion does not  
12 contain a sufficient Rule 37(a)(1) certification, and it too will  
13 be denied.

14 The court notes that it has previously admonished the  
15 parties in this case that it takes the meet and confer  
16 requirement seriously. Although the decision on the present  
17 motions turns on the inadequacy of the information contained in  
18 the purported certifications, in the event a more detailed  
19 certification is provided in connection with a future motion, the  
20 court will look carefully to determine whether the "performance"  
21 aspect of the requirement has been satisfied. In other words,  
22 the court will look to the certification to determine whether the  
23 moving party in good faith engaged in meaningful negotiations in  
24 a genuine effort to resolve the discovery dispute. It will not  
25 suffice that the parties may have engaged in yet more letter-  
26 writing if it appears that the goal was to further harden the  
27 parties' respective positions rather than to resolve the issues  
28 without the need for court intervention.

1 In short, the court intends to put teeth into the meet and  
2 confer requirement, and will not countenance game-playing or  
3 hiding the ball. The court expects that a truly good faith meet-  
4 and-confer will resolve most of the issues that would otherwise  
5 give rise to a motion to compel. If the court finds that a party  
6 has failed to attempt in good faith to resolve its issues, that  
7 party may expect that sanctions will be imposed. On the other  
8 hand, if a party makes a good faith effort to obtain discovery,  
9 but without success, and if the court grants that party's motion  
10 to compel, the parties may expect that sanctions will be imposed  
11 against the party resisting the discovery.

12 IV. CONCLUSION

13 For the foregoing reasons, the court concludes that neither  
14 the WAMU Motion nor the plaintiffs' Motion contains the requisite  
15 Rule 37(a)(1) certification, and accordingly, both motions will  
16 be denied. The court will issue separate orders.

17 Finally, pursuant to Federal Rule of Civil Procedure  
18 37(a)(5)(B), incorporated herein by Federal Rule of Bankruptcy  
19 Procedure 7037, the court considers whether to award costs to  
20 either party. Because the court will deny the motions of both  
21 parties, the court concludes that awards of attorney's fees would  
22 simply offset each other. Thus, no such awards will be made.

23 Dated: September 8, 2008

24 \_\_\_\_\_/s/  
25 ROBERT S. BARDWIL  
26 United States Bankruptcy Judge  
27  
28