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They said it didn't exist

CHALLENGING A DEFENDANT'S "DILIGENT SEARCH AND REASONABLE INQUIRY" AFTER *HIGGINSON*

We've all seen this response: "After a diligent search and reasonable inquiry, Responding Party is unable to comply because responsive documents have never existed." It's code compliant. It's verified. It appears to leave the requesting party with nowhere to go. And a court would not compel a party to produce what they apparently don't have. After all, the responding party provided a verified, code-compliant "never existed" response.

But what if the response is wrong? What if the defendant searched the wrong people, the wrong systems, or the wrong words? Or what if their word searches were framed so narrowly that a responsive document could sit in its database but never generate through the "search." If you have records outside the defendant's production suggesting that the supposedly nonexistent documents in fact exist, *Higginson v. Kia Motors America, Inc.* (2026) 118 Cal.App.5th 316 is your go-to case.

The *Higginson* decision should change the way plaintiffs' lawyers approach an inability-to-comply response. A defendant's statutory response that it conducted a "diligent search and reasonable inquiry" should not be taken at face value only because the response tracks the language of the code. A facially code-compliant response does not make the underlying search reasonable or complete. Especially when circumstances suggest otherwise, the response should not mark the end of discovery. It may be where the real discovery begins.

Section 2031.230 is just the beginning

The first step in reviewing discovery responses is determining if defendant's responses are "code compliant." All discovery responses should be reviewed for complete and code-compliant responses. It's important to review them as soon as they are received as opposed to waiting right before a deposition. That way, a meet-and-confer can be done within the 45-day window or an extension requested as soon as possible to resolve any potential issues.

Code of Civil Procedure section 2031.230 governs a party's inability to comply. The response must affirm that a diligent search and reasonable inquiry was made, specify whether the inability results from destruction, loss, misplacement, the item never having existed, or the item no longer being in the possession, custody, or control of the responding party. The response must also state the name and address of any person or organization known or believed by that party to have possessed that item.

The initial response matters. A response that just says "no documents exist" does not pass the first test of compliance. The statute requires the responding party to explain and commit to the actual reason for nonproduction. However, even when a party does, section 2031.230 only tells a responding party what its written response must include; it does not make the underlying search reasonable merely because the response says so. *Higginson* makes this distinction.

Section 2031.230 does not insulate the method by which the responding party reached its conclusion. That's when *Higginson* comes in. *Higginson* confirms why the requesting party must examine what the responding party actually did before representing that the documents never existed.

The search that returned a defense verdict

Higginson sued Kia, alleging a defect in his 2013 Kia Soul. Documents were requested seeking Kia's internal investigations and communications with government agencies about those alleged engine defects. After initial boilerplate objections, meet-and-confer efforts, and proposed search terms, the Court ultimately compelled responses without objections under a court-approved definition of "engine defects." Kia then served verified responses stating that responsive documents "never existed."

Kia's verifier even confirmed her search efforts through testimony and

she confirmed that she did not ask any follow-up questions when the respective department reported no responsive documents. However, there was an obvious problem. Higginson's counsel had seen extrinsic documents suggesting correspondence between Kia and the National Highway Traffic Safety Administration (NHTSA). These documents were responsive to Higginson's request, yet Kia had not produced them.

The records were important to prove Higginson's fraud allegations. Without the requested documents, there was no evidence to present a fraud theory. Instead, the trial court attempted to address the nonproduction with a special jury instruction permitting an adverse inference if the jury found Kia's responses intentionally false. The Court further excluded the NHTSA correspondence showing that Defendant's discovery responses were false. So, when the jury asked what was false about Kia's discovery responses and what documents had been withheld, the Court could not answer. The jury returned a defense verdict.

The Court of Appeal held that withholding responsive documents was an irregularity in the proceedings that deprived a consumer of a fair trial under Code of Civil Procedure section 657, subd. (1).

What *Higginson* does and does not hold

Even though *Higginson* is a powerful case for plaintiffs' attorneys, it should not be overstated. The court did determine that Kia's search was negligent and that the record suggested something worse. (*Higginson, supra*, 118 Cal.App.5th at p. 357.) It did not find Kia acted willfully, nor did the court hold that terminating sanctions were mandatory.

California uses an incremental approach to discovery sanctions. A sanction must be tailored to cure the harm caused by the misuse and more severe relief is disfavored when a lesser sanction will work. (*Doppes v. Bentley Motors, Inc.* (2009)

174 Cal.App.4th 967, 992.) *Higginson* followed this framework, holding that the trial court acted within its discretion when it initially declined terminating sanctions and attempted a lesser remedy.

The real problem came later. Plaintiff was still deprived of the evidence needed at trial. The question to answer when deciding if the production is critical is answering whether Defendant's discovery misuse creates an "evidentiary vacuum," and that a potential remedy will not fill it. In *Higginson*, the trial court attempted a lesser remedy by instructing the jury that Kia had falsely stated no records existed and permitting an adverse inference.

The problem, though, was that the jury was left in the dark. The court simultaneously excluded the NHTSA correspondence exposing the cover-up. *Higginson* now answers what happens when an inadequate discovery remedy triggers a defense verdict. The proper remedy is a new trial and mandatory monetary sanctions to cover the plaintiff's wasted fees when a defense verdict is secured inside a discovery-induced vacuum.

Although California's incremental approach still stands, *Higginson* teaches us a defendant cannot use it as a license to hide evidence, gamble on a useless jury instruction, and keep a tainted defense verdict.

Do not wait for the defense verdict

No plaintiff's attorney wants to spend years litigating a case, lose at trial inside an evidentiary vacuum, then depend on an appeal to obtain the discovery that should have been produced in the first place. *Higginson* can be cited and used through meet-and-confers before that happens. All that is needed to question the existence of a document is a concrete reason:

- A produced email referring to an attachment that is missing
- A policy, regulation, contract, or retention schedule requiring a record to be created or preserved
- A witness describing reports or records that were routinely prepared
- A regulator, vendor, insurer, former employee, or litigant possessing correspondence or records the defendant says never existed
- A production implausibly small

given the defendant's size, the relevant time period, or the frequency of the event at issue

- A response blurring the distinction between "never existed," "no longer exists," "not found," and "not within our possession, custody, or control"
- A defendant refusing to identify the custodians, repositories, date ranges, or search methods used
- Or simply a response that makes little sense given the defendant's ordinary business operations

Once you have this, the question turns from whether the defendant produced responsive documents to whether the defendant used a reasonable method to find them.

That shift should occur early. A defective search can affect every later stage of the case. It can prevent you from identifying key witnesses, asking the right deposition questions, opposing summary judgment, preparing experts, and getting a case ready for mediation. Not to mention, any additional discovery those documents could have generated.

Treat "never existed" as a factual representation

There's a difference between "we could not locate the document" and "the documents never existed." The latter is an affirmative representation about historical fact. Before accepting it, ask what foundation supports that conclusion. A failed search result does not equate to the document never existing. The record may have been deleted, archived, transferred to a third-party administrator, stored under a different name, or maintained in a system the searcher did not search. This distinction should be raised immediately during the meet-and-confer process.

Meet-and-confer about how the search was performed

Higginson makes clear that a requesting party should not limit the meet-and-confer efforts to whether the response recites the language of section 2031.230. By relying on *Higginson*, a requesting party should ask for enough information to determine whether the conclusion rests on a reasonable search.

Depending on the case, the questions may include:

- Who directed and performed

the search?

- Which custodians, employees, and departments were consulted?
- What instructions were given to them?
- Which email accounts, databases, shared drives, local drives, archives, and physical files were searched?
- What date range was used?
- What search terms were used?
- Were the terms applied conjunctively or disjunctively?
- Were synonyms, abbreviations, former terminology, and product numbers included?
- Were attachments searched?
- Were the files of former employees included?
- Did the search return no results, or were results reviewed and deemed nonresponsive?
- Who made the responsiveness decisions?
- Were documents excluded based on an interpretation of the request not disclosed in the written response?

It is still important to justify your forensic examination. First, identify the objective circumstances suggesting the document exists or that the search was incomplete. Second, pick your battles. The inquiry should remain proportional to the importance of the requested records and the reason for doubting the responses. Where documents are central to notice, defect, causation, corporate knowledge, or punitive conduct, "we searched and found nothing" should not end the meet-and-confer efforts.

Preserve the motion deadline while investigating

Your search inquiry does not suspend the deadline to move to compel. Notice of a motion to compel further responses must be given within 45 days after service of the verified responses or supplemental verified responses, unless the parties agree in writing to a later date. (Code Civ. Proc., § 2031.310, subd. (c).) If the deadline passes without a written extension, the requesting party waives the right to compel a further response.

Request a written extension early, preferably in the same meet-and-confer inquiring about how the search was done.

Your investigation may well consume or exceed the statutory period. You should identify a specific date and ask defense counsel to agree and confirm.

Use written discovery to identify the search chain

If the defense won't explain its search process informally, targeted written discovery can identify the search. Special interrogatories may ask:

- Identify each person who participated in the search.
- Identify each person consulted to determine whether responsive documents existed.
- Identify each custodian whose records were searched.
- Identify each department or business unit contacted.
- Identify each electronic or physical repository searched.
- Identify the date ranges, search terms, and filters used.
- Identify the person who selected or approved the search criteria.
- State whether potentially responsive results were found but deemed nonresponsive.
- State the facts supporting the representation that the documents never existed.

The interrogatories by themselves may invite a legitimate burden objection. Instead, focus each interrogatory asking how the defendant reached its representation that documents responsive to Request for Production Nos. 12, 16, and 21 “never existed.” That is more focused and more difficult to evade with an overbroad and burdensome objection. Additionally, any objections as to privileged records are not valid. You aren't seeking counsel's mental impressions, conclusions, opinions, or legal theories; instead, you are discovering underlying facts: who searched, where they searched, and what criteria they used.

Depose the verifier, but also find the person who actually searched

Deposing the person who verified the responses is only the beginning. The verifier ultimately committed the responding party to the representation that a diligent search and reasonable inquiry were made. But they themselves did not actually do the search. If the identity of the searcher is not established through

written discovery, depose the verifier, narrow in on which departments or custodians actually did the search, then notice the appropriate witness.

You want to ask what repositories were searched, what search terms, date limitations, and filters were used, and the witness's efforts to locate documents held by agents, vendors, insurers, subsidiaries, or former employees.

Look outside the defendant's production

In *Higginson*, the NHTSA supplied the strongest challenge to a “never existed” response. Someone had already received the supposedly nonexistent document. In a personal-injury action, the source may be Cal/OSHA, OSHA, DMV, FMCSA, a licensing agency, a local public entity, a contractor, an insurer, a third-party administrator, a maintenance company, a former employee, or counsel in prior litigation. Even the defendant's own public website, safety manual, or job description may show that the document is in existence.

Finding this outside evidence serves two purposes. First, it establishes the existence of the document itself. Second, and most importantly, it can impeach the claimed adequacy of the search.

Give the court more than suspicion

Unfortunately, suspicion is not enough for a motion to compel. You must give the court concrete contradiction and a proposed cure.

Begin with the response itself. As discussed above, identify whether it first complies with section 2031.230. Then present the outside evidence. That evidence may show the needed document exists, or it may be the very document you need. Explain that to the court. Further explain to the court what the missing document could prove. In *Higginson*, the withheld document was needed to prove Higginson's fraud allegations. It may even be needed to prove punitive damages.

Next, ask for a remedy. Depending on the circumstances, you may seek the following:

1. Further verified responses stating the true reason for an inability to comply;
2. Identification of custodians, repositories, systems, date ranges, and search methods used;

3. A supplemental search using court-ordered criteria;
4. Monetary sanctions;
5. A continuance or mistrial;
6. Or terminating sanctions when lesser sanctions cannot cure the discovery misuse.

If the misconduct continues up to trial, and a defense verdict is reached, move for a new trial citing *Higginson* and section 657(1), arguing irregularity in the proceedings.

The approach for the next “does not exist” response

1. Read the response itself. Does it comply with section 2031.230? And what is the exact reason the document does not exist – never existed, was destroyed, lost, not found, or outside their possession, custody, or control.
2. Do you have contrary evidence? Sometimes it's internal; other times you may need to search for extrinsic evidence. You may even have it already before receiving verified responses.
3. Meet-and-confer. The easiest approach is to work with opposing counsel on their search efforts. Ask the questions. Find out how the search was done and whether it was done properly.
4. Conduct additional discovery. Immediately propound further written discovery, depose the verifier, or if already known, depose the searcher.
5. Prepare a motion to compel. Present your evidence, connect the missing material to your need to have it, and seek an effective remedy.

Sometimes the real discovery begins when the “diligent search and reasonable inquiry” is claimed.



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