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October 18, 2018

Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102

Re: ***S250895*** – *Cotton v. City of San Diego (Geraci)*  
**City's Informal Response to Petition for Review**

Dear Presiding Justice and Associate Justices:

The City of San Diego (City) respectfully submits this informal response to Darryl Cotton's (Petitioner) Petition for Review.

Petitioner seeks relief from an involuntary dismissal after failure to timely file a motion to set aside a default and reinstate Petitioner's appeal. Petitioner claims to not have become aware of a Notice of Default filed on July 6, 2018 in the Lower Court until July 12, 2018 (7/06/18 NOD). (Petition for Review (Pet.), p. 7.) Upon receiving the 7/06/18 NOD, Petitioner contends he spoke to an Appellate Clerk concerning the 7/06/18 NOD and was informed that "the case would be dismissed by the Court of Appeal but, if [Petitioner] amended the Designation [of Record on Appeal] and filed it with a proof of service of same in the Lower Court, he thereafter could a motion in this Court to vacate the dismissal." (Pet., p. 7.) After meeting with the Appellate Clerk, Petitioner met with Clerk De Los Santos of the Lower Court's Appellate Division and was specifically informed his options. Allegedly he was told procedurally he could not designate a transcript for one hearing and elect to prepare a Settled Statement for the remaining hearings. (*Id.*) Petitioner claims he was informed that if he chose to prepare a Settled Statement of Decision he must do so by completing and filing Form APP-014. (*Id.*)

Despite meeting with the Clerks on July 12, 2018, "upon receipt of the 7/06/18 NOD,"<sup>1</sup> apparently, Petitioner strategically chose not to attempt to vacate the default until

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<sup>1</sup> The exact date Petitioner met with the Appellate Clerk or Clerk De Los Santos is not entirely clear from Petitioner's "Relevant Facts and Background." Petitioner states he met with them "upon receipt of the 7/06/18 NOD" which was July 12, 2018, six days before the dismissal was filed.

after dismissal was entered on July 18, 2018. Instead, it appears he chose to attempt to bring a motion to set aside the default and reinstate his appeal before the 30 days ran and the involuntary dismissal became final pursuant to CRC Rule 8.264(b)(1). Petitioner retained Counsel (Mr. Jacob Austin) on August 7, 2018, to represent him in this matter.

Petitioner's Counsel claims to have been busy working on "numerous fronts" to advance Petitioner's litigation which led him to not be able to attempt to file the Motion to Set Aside Default until the last minute and due, in part, to an alleged technical difficulty the Motion was untimely filed on the 31<sup>st</sup> day 14 minutes late, and the dismissal became final divesting the Court of Appeal of Jurisdiction.

Petitioner seeks relief pursuant to Code of Civil Procedure section 473(b), which states "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken."

Petitioner's Counsel contends he was not able to timely file the Motion to Set Aside Default because he was working on many time-sensitive obligations, including the need to for additional discovery in another case in which he represents Petitioner (*Geraci v. Cotton*, Case No. 37-2017-00010073-CU-BC-CTL (Case No. 2017-00010073)). While Petitioner's Counsel contends many of the pressing matters were related to an upcoming trial in Case No. 2017-00010073, pursuant to Petitioner's own motion the trial date was continued on August 2, 2018 (15 days before the Motion to Set Aside Default could timely be filed), to January 25, 2019. While Petitioner claims Case No. 2017-00010073 is "related" to the current matter and based on same facts, the City is not a party to that case, and is completely unaware of any claims regarding deadlines or time commitments related thereto. Accordingly, City cannot address specifics of any of Petitioner's claims concerning time sensitive obligations precluding him from timely filing the Motion to Set Aside, besides looking at the information that is publicly available on the Superior Court's Register of Actions.

However, even assuming the truth of all of Petitioner's claims, Petitioner's apparent strategic decision to attempt to set aside default *after* dismissal and Petitioner's Counsel's claim of being a sole practitioner too busy with Petitioner's "related case" to timely file does not justify relief under Code of Civil Procedure section 473(b). Being busy and experiencing stress in meeting deadlines in the practice of law alone is not excusable neglect or inadvertence. *Ambrose v. Michelin North America, Inc.* (2005) 134 Cal. App. 4th 1350, 1355 (counsel unsuccessfully argued the stresses of a busy practice,

the hurry to meet deadlines and obligations of other pending litigation); *see also Martin v. Taylor*, 267 Cal. App. 2d 112, 117 (1968) (noting the “unusual press of business” is not a legitimate legal excuse, because “[t]o accept this as a legal justification for the failure to comply with the statute would be to discourage diligence in the prosecution of appeals and establish a precedent that might lead to vexatious delays”.)

Based on the facts alleged, assuming all to be true, the Petition for Review should be denied as it does not set forth appropriate legal justification to obtain relief from dismissal under Code of Civil Procedure section 473(b).

Dated: October 18, 2018

MARA W. ELLIOTT, City Attorney

By

  
M. Travis Phelps  
Chief Deputy City Attorney

Attorneys for Respondent and Defendant  
City of San Diego

**IN THE SUPREME COURT  
OF STATE OF CALIFORNIA**

**PROOF OF SERVICE**

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*Cotton v. City of San Diego (Geraci)*

Case No. S250895  
Appellate Case No. D073766  
San Diego Superior Court Case No. 37-2017-00037675-CU-WM-CTL

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California. My business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

On October 18, 2018, I served true copies of the following document(s) described as:

- **CITY OF SAN DIEGO'S INFORMAL RESPONSE TO PETITION FOR REVIEW**

on the interested parties in this action as follows:

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via TrueFiling

Attorney for Plaintiff/Appellant/Petitioner  
DARRYL COTTON

Clerk of San Diego Superior Court  
Hon. Joel Wohlfeil  
330 West Broadway, D-73  
San Diego, CA 92101

via Overnight Delivery

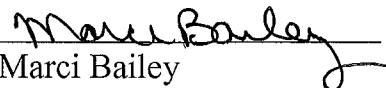
**(BY ELECTRONIC SERVICE)** By transmitting via TrueFiling to the above parties at the email addresses listed above.

**(BY PERSONAL SERVICE)** I provided copies to Nationwide Legal for personal service on this date to be delivered to the office of the addressee(s) listed above.

**(BY OVERNIGHT DELIVERY)** I enclosed said document(s) in a sealed envelope or package provided by Golden State Overnight (GSO) and addressed to the person(s) at the address(es) listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of GSO.

**(BY UNITED STATES MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service and that the correspondence shall be deposited with the United States Postal Service with postage fully prepaid this same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 18 day of October 2018, at San Diego, California.

  
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Marci Bailey