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**SUPERIOR COURT OF CALIFORNIA**  
**COUNTY OF SAN DIEGO, CENTRAL DIVISION**

LARRY GERACI, an individual,

Plaintiff,

v.

DARRYL COTTON, an individual; and DOES 1  
through 10, inclusive,

Defendants.

DARRYL COTTON, an individual,

Cross-Complainant,

v.

LARRY GERACI, an individual, REBECCA  
BERRY, an individual, and DOES 1  
THROUGH 10, INCLUSIVE,

Cross-Defendants.

Case No. 37-2017-00010073-CU-BC-CTL

Judge: Hon. Joel R. Wohlfeil  
Dept.: C-73

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION BY PLAINTIFF/CROSS-  
DEFENDANT LARRY GERACI TO  
COMPEL DEFENDANT/CROSS-  
COMPLAINANT DARRYL COTTON  
(1) TO APPEAR AND TESTIFY AT  
DEPOSITION AND (2) TO RESPOND TO  
WRITTEN DISCOVERY REQUESTS,  
AND FOR SANCTIONS**

**[IMAGED FILE]**

**Hearing Date: March 23, 2018**  
**Hearing Time: 9:00 a.m.**

**Filed: March 21, 2017**  
**Trial Date: May 11, 2018**

1 **I. INTRODUCTION**

2 Plaintiff/Cross-Defendant, LARRY GERACI (“Geraci”), submits these points and authorities in  
3 support of his motion to compel Defendant/Cross-Complainant, DARRYL COTTON, (1) to appear and  
4 testify at deposition, and (2) to respond to written discovery requests by serving verified, written  
5 responses, without any objections or assertions of privilege, to a) Form Interrogatories-General (Set One),  
6 b) Special Interrogatories (Set One), and 3) Requests for Admission (Set One) propounded by Geraci to  
7 Cotton.

8 Larry Geraci also seeks sanctions under Code of Civil Procedure sections 2030.290,  
9 subdivision (c), and 2031.300, subdivision (c). Mr. Cotton has no substantial justification for his willful  
10 failure to comply with his discovery obligations and his conduct warrants the imposition against him of  
11 both a) monetary sanctions in the amount of \$6,687.50<sup>1</sup>, and b) non-monetary sanctions in the form of  
12 barring his testimony at trial; or the striking of his Answer to the Complaint; and/or the striking of his  
13 operative First Amended Cross-Complaint.

14 As detailed in the Declaration of Michael R. Weinstein filed and served concurrently herewith,  
15 Mr. Weinstein met and conferred with Mr. Cotton, provided Mr. Cotton with a now-expired extension to  
16 respond to the written discovery, and allowed Mr. Cotton to select the date of his deposition. (See  
17 Declaration of Michael R. Weinstein in Support of Motion by Plaintiff/Cross-Defendant Larry Geraci to  
18 Compel Defendant/Cross-Complainant Darryl Cotton (1) To Appear and Testify at Deposition and (2) To  
19 Respond to Written Discovery Requests, and for Sanctions, dated February 27, 2018 (hereinafter,  
20 “Weinstein Decl.”) ¶¶ 8-16.)

21 **II. FACTUAL AND PROCEDURAL BACKGROUND**

22 Darryl Cotton has failed twice to appear and testify at deposition—the most recent time in  
23 defiance of this Court’s Order compelling his attendance—and has also failed to serve written responses  
24 to written discovery propounded to him.

25  
26 <sup>1</sup> This amount represents the amount of time and expense the attorneys’ incurred in attending the two non-appearance  
27 depositions and in drafting the instant motion, declarations and supporting documentation, plus a \$500.00 forfeiture pursuant  
28 to Code of Civil Procedure section 1992. (See Declaration of Scott H. Toothacre in Support of Motion by Plaintiff/Cross-  
Defendant Larry Geraci to Compel Defendant/Cross-Complainant Darryl Cotton (1) To Appear and Testify at Deposition and  
(2) To Respond to Written Discovery Requests, and for Sanctions (hereinafter, “Toothacre Decl.”) ¶¶ 8-10.) This amount  
does not account for the time which will be incurred attending the hearing on this motion.



1 That Mr. Cotton has failed to appear and testify at deposition and has failed to serve verified,  
2 written responses to the discovery requests propounded to him is undeniable and inexcusable. The  
3 evidentiary support for these factual assertions is provided and set forth in detail in the Declaration of  
4 Michael R. Weinstein and the documentary evidence authenticated therein and lodged with the  
5 concurrently filed Notice of Lodgment in Support of Motion by Plaintiff/Cross-Defendant Larry Geraci  
6 to Compel Defendant/Cross-Complainant Darryl Cotton (1) To Appear and Testify at Deposition and  
7 (2) To Respond to Written Discovery Requests, and for Sanctions, dated February 27, 2018 (hereinafter,  
8 “Geraci NOL”), all of which are incorporated fully herein by reference so that it need not be repeated *ad*  
9 *nauseum*.

10 In a nutshell:

11 **A. Darryl Cotton has failed twice to appear and testify at deposition.**

12 Mr. Cotton failed to appear at his deposition properly noticed for January 5, 2018. (See Weinstein  
13 Decl. ¶¶ 6-20, page 2, line 22-page 6, line 19, and Exhs. 2-6 to the Geraci NOL.)

14 Thereafter Mr. Geraci brought a motion to compel Mr. Cotton’s deposition, which was opposed,  
15 and following the hearing this Court granted the motion and ordered Mr. Cotton to appear for his  
16 deposition within 20 days. (See Weinstein Decl., ¶¶ 21-23, page 6, line 20-page 7, line 13.) Mr. Cotton  
17 selected the date of February 14, 2018, for his deposition. The deposition was properly noticed for that  
18 date. And again, this time in defiance of the court order, Mr. Cotton failed to appear and testify at his  
19 deposition. (See Weinstein Decl., ¶¶ 24-26, page 7, line 14-page 8, line 2, and Exhs. 7-9 to the Geraci  
20 NOL.)

21 **B. Darryl Cotton has failed to respond to written discovery requests.**

22 Mr. Cotton has failed to serve any responses, let alone timely verified written responses, to written  
23 discovery propounded to him and properly served by mail on November 8, 2017, namely: Form  
24 Interrogatories-General (Set One); Special Interrogatories (Set One); and Requests for Admissions (Set  
25 One). His discovery responses were originally due on December 13, 2017. Mr. Cotton requested and  
26 was granted an extension of time to respond through and including December 29, 2017. Despite being  
27 granted an extension of time, Mr. Cotton has yet to serve any written responses to the outstanding written  
28 discovery that was due on or before December 29, 2017. He has not objected to the requests, has not

sought a protective order, and has not requested a second extension of time in which to respond to the discovery properly served upon him. It has now been two months since the date the written responses were first due. It is apparent that Mr. Cotton has elected to ignore the written discovery requests properly served upon him. (See Weinstein Decl., ¶ 5, page 2, lines 12-21, and Exh. 1 to the Geraci NOL; and ¶ 28, page 8, lines 5-10.)

### **III. ARGUMENT**

#### **A. Failure to Attend Court Ordered Deposition**

As previously noted, Mr. Cotton has thwarted every attempt to appear and have his deposition taken. This conduct eventually resulted in Attorney Weinstein appearing ex parte to request the Court to order Mr. Cotton to appear for his deposition. The Court granted that order; Mr. Weinstein let Mr. Cotton pick the date for the deposition; and yet, Mr. Cotton willfully failed to appear for his deposition. He did not send an email, a text message, make a phone call, or attempt in any way whatsoever to communicate to the parties and counsel that he was going to “no-show” in spite of this Court’s Order.

##### **1. Disobeying Noticed Deposition Subpoena**

California Code of Civil Procedure section 2025.440, subdivision (b), provides: “If a deponent on whom a deposition subpoena has been served fails to attend a deposition or refused to be sworn as a witness, the court may impose on the deponent the sanctions described in Section 2020.240.” California Code of Civil Procedure section 2020.240 provides: “A deponent who disobeys a deposition subpoena in any manner described in subdivision (c) of Section 2020.220 may be punished for contempt under Chapter 7 (commencing with Section 2023.010) without the necessity of a prior order of court directing compliance by the witness. The deponent is also subject to the forfeiture and the payment of damages set forth in Section 1992.”

California Code of Civil Procedure section 1992 provides: “A person failing to appear pursuant to a subpoena *or a court order* also forfeits to the party aggrieved the sum of five hundred dollars (\$500), and all damages that he or she may sustain by the failure of the person to appear pursuant to the subpoena or court order, which forfeiture and damages may be recovered in a civil action.”

As set forth below, plaintiff Geraci is asking the Court to issue an order that defendant Cotton has forfeited the sum of \$500.00 to Mr. Geraci pursuant to California Code of Civil Procedure section 1992.



1 Additionally, plaintiff requests the Court issue an order that Mr. Cotton pay fees and costs of \$6,187.50  
2 as damages that Mr. Geraci has sustained by Mr. Cotton's failure to appear by noticed deposition as  
3 provided in California Code of Civil Procedure section 1992. **The total fees and costs sought by this**  
4 **motion is \$6,687.50.**

5 **2. Disobeying Court-Ordered Deposition**

6 Once a deponent has been ordered to attend a deposition, or to answer questions or to produce  
7 documents at a resumed deposition, *more severe sanctions are available for continued refusal to make*  
8 *discovery*. (Code Civ. Proc., § 2023.030(b)-(d), emphasis added.) "Disobeying a court order to provide  
9 discovery" is itself a "misuse of the discovery process" (Code Civ. Proc., § 2023.010, subd. (g)), for  
10 which a broad range of sanctions is authorized. The court "may make those orders that are just" if a party  
11 fails to obey prior orders. (See, e.g., Code Civ. Proc., §§ 2030.290, subd. (c) (motion to compel answers),  
12 2030.300, subd. (e) (motion to compel further answers).)

13 **B. Failure to Respond to Written Discovery**

14 As noted above, Mr. Cotton completely failed to respond to written discovery requests, namely  
15 form interrogatories and requests for admissions, and has not asked for any additional extensions in which  
16 to reply beyond the first extension granted by Attorney Weinstein.

17 **1. Defendant's Failure to Serve Timely Responses Waived All of His Objections**  
18 **and Assertions of Privilege**

19 Based on Cotton's failure to serve timely responses to Geraci's three sets of written discovery, all  
20 of his objections and assertions of privilege were waived. (Code Civ. Proc., § 2030.290, subd. (a) [failure  
21 to timely respond waives "any objection to the interrogatories, including one based privilege or on the  
22 protection for work product"]; see *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants*  
23 (2007) 148 Cal.App.4th 390, 403-404.) Accordingly, Cotton is now required to provide complete  
24 responses, without objections or assertions of privilege.

25 Not only did Cotton fail to respond to the written discovery in any manner, Cotton failed to timely  
26 request a further extension of the relevant response deadlines. Moreover, Cotton has failed to provide  
27 any excuse for his failure to respond to the written discovery setting forth any reason which might indicate  
28 mistake, inadvertence, or excusable neglect.

1 The Court should grant this motion and order Cotton to serve complete discovery responses to  
2 each of the Form Interrogatories, Special Interrogatories, and Requests for Admission without any  
3 objections or assertions of privilege, and produce all documents responsive to the requests.

4 **C. Sanctions Are Appropriate and Necessary in this Instance**

5 As discussed by our Fourth District Court of Appeal in *Lopez v. Watchtower Bible and Tact*  
6 *Society of New York, Inc.* (2016) 2246 Cal.App.4th 566, California discovery law authorizes a range of  
7 penalties for a party's refusal to obey a discovery order, including monetary sanctions, evidentiary  
8 sanctions, issue sanctions, and terminating sanctions. (Code Civ. Proc., §§ 2023.010, 2023.030; *Los*  
9 *Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390; *Doppes v. Bentley Motors, Inc.* (2009)  
10 174 Cal.App.4th 967, 991.) A court has broad discretion in selecting the appropriate penalty, and the  
11 court's decision will be upheld absent an abuse of discretion. (*Los Defensores, supra*, 223 Cal.App.4th  
12 at p. 390.)

13 Despite this broad discretion, the courts have long recognized that the terminating sanction is a  
14 drastic penalty and should be used sparingly. (See *Newland v. Superior Court* (1995) 40 Cal.App.4th  
15 608, 613–616.) A trial court must be cautious when imposing a terminating sanction because the sanction  
16 eliminates a party's fundamental right to a trial, thus implicating due process rights. (See *Lyons v.*  
17 *Wickhorst* (1986) 42 Cal.3d 911, 916; *Newland, supra*, 40 Cal.App.4th at pp. 613–614.) The trial court  
18 should select a sanction that is “ ‘ tailor[ed] ... to the harm caused by the withheld discovery.” ’ ”  
19 (*Doppes, supra*, 174 Cal.App.4th at p. 992.) “ [S]anctions “should be appropriate to the dereliction, and  
20 should not exceed that which is required to protect the interests of the party entitled to but denied  
21 discovery.” ’ ” (*Ibid.*)

22 The discovery statutes thus “evince an incremental approach to discovery sanctions, starting with  
23 monetary sanctions and ending with the ultimate sanction of termination.” (*Doppes, supra*,  
24 174 Cal.App.4th at p. 992.) Although in extreme cases a court has the authority to order a terminating  
25 sanction as a first measure (see *188 Miranda v. 21st Century Ins. Co.* (2004) 117 Cal.App.4th 913, 928-  
26 929; *Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 10), a terminating sanction should generally not  
27 be imposed until the court has attempted less severe alternatives and found them to be unsuccessful and/or  
28 the record clearly shows lesser sanctions would be ineffective. (See *Van Sickle v. Gilbert* (2011)



1 196 Cal.App.4th 1495, 1516; *Doppes, supra*, 174 Cal.App.4th at p. 992; 605 *Oliveros v. County of Los*  
2 *Angeles* (2004) 120 Cal.App.4th 1389, 1399; *R.S. Creative, Inc. v. Creative Cotton, Ltd.* (1999)  
3 75 Cal.App.4th 486, 496).

4 If a party fails to obey a discovery order, the court may impose whatever sanctions are just,  
5 including:

6 **Issue sanctions-** The court may order that designated facts “shall be taken as established” by the  
7 party adversely affected by the discovery misuse; or it may prohibit the party who committed such misuse  
8 from supporting or opposing designated claims or defenses. (Code Civ. Proc., § 2023, subd. (b).)

9 **Evidence sanctions-** the court may prohibit the party who disobeyed the court order from  
10 introducing designated matters in evidence. (Code Civ. Proc., § 2023.030, subd. (c); *Waicis v. Superior*  
11 *Court* (1990) 226 Cal.App.3d 283, 287.)

12 **Terminating sanctions-** the court may make any of the following orders against the party  
13 disobeying the discovery order:

- 14 • Striking that party’s pleading or parts thereof;
- 15 • Staying further proceedings by that party until the order is obeyed;
- 16 • Dismissing that party’s action, or any part thereof; or
- 17 • Entering default judgment against that party.

18 (Code Civ. Proc., § 2023.030, subd. (d); see *Los Defensores, Inc, supra*, 223 Cal.App.4th 377 at 390-392  
19 – entry of default as terminated sanction justified based on party’s willful failure to comply with order  
20 compelling production of documents identified at deposition.)

21 **1. The Appropriate Sanction in the Instant Case**

22 Recognizing that Mr. Cotton is litigating this case in pro per, Attorney Weinstein has been  
23 extremely lenient, tolerant, and gracious, not only in granting Mr. Cotton a requested extension of time  
24 in which to answer the written discovery, but also in allowing Mr. Cotton to select the date for his court-  
25 ordered deposition.

26 In spite of Attorney Weinstein’s professionalism and generosity in dealing with Mr. Cotton,  
27 Mr. Cotton has elected to thumb his nose, not only at Attorney Weinstein, but at this Court, choosing to  
28 no-show at his court ordered deposition and to continue to ignore written discovery.

1 The impact of Mr. Cotton's actions is neither trivial nor inconsequential. By refusing to have his  
2 deposition taken, Mr. Cotton has substantially impaired plaintiff in preparing his case for trial. Plaintiff  
3 does not know what Mr. Cotton's testimony will be in plaintiff's case-in-chief on the Complaint.  
4 Moreover, Mr. Cotton has filed a Cross-Complaint in this action. Plaintiff also does not know what  
5 Mr. Cotton's testimony will be in his case-in-chief on the Cross-Complaint. Mr. Cotton is the primary  
6 witness on his own behalf and plaintiff has every right to take his deposition, Trial Call is May 11, 2018,  
7 the Trial Readiness Conference is April 27, 2018, and the Discovery Cutoff is April 13, 2018. Plaintiff  
8 has been deprived of the opportunity to "nail-down" Mr. Cotton's version of the events, either by  
9 deposition or written discovery. This has prejudiced plaintiff in his trial preparation and left him with a  
10 significant disadvantage in prosecuting his case and defending the Cross-Complaint.

11 While sanctions are to evince an incremental approach to discovery sanctions, starting with  
12 monetary sanctions and ending with the ultimate sanction of termination. This is a case where the Court  
13 should consider terminating sanctions. (Terminating sanctions have been granted in the first instance in  
14 numerous cases; see *Miranda v. 21<sup>st</sup> Century Insurance Company* (2004) 117 Cal.App.4th 913, refusal  
15 to sign authorizations to obtain medical records after court ordered plaintiff to sign the authorizations –  
16 case dismissed; *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, attorney sued for breach of fiduciary  
17 duties refused to respond, after court order to respond, to special interrogatories and production of  
18 documents – Answer stricken, default entered; and *R.S. Creative, Inc. v. Creative Cotton, LTD.* (1999)  
19 75 Cal.App.4th 486, terminating sanctions imposed against plaintiffs for misuse of discovery and  
20 violations of court orders.)

21 With these principles in mind, plaintiff requests monetary sanctions in the amount of \$6,687.50  
22 (see Toothacre Decl. ¶¶ 8-10) and an order issuing an evidentiary sanction barring Mr. Cotton's testimony  
23 at trial; or a terminating sanction striking Defendant Cotton's Answer to the Complaint herein, and/or an  
24 order striking Defendant Cotton's Cross-Complaint as a result of his intentional refusal to obey an order  
25 of this Court. Such sanctions are reasonable, appropriate, and measured in comparison to Mr. Cotton's  
26 willful disobedience of this Court's order and the substantial prejudice and harm his conduct has caused  
27 to plaintiff.

28 ///



1 **IV. CONCLUSION**

2 Plaintiff respectfully requests the Court again order Mr. Cotton to appear for his deposition and  
3 also to respond, in writing and without objection, to the outstanding written discovery.

4 Additionally, plaintiff requests that this Court impose sanctions as follows:

5 (a) Monetary sanctions in the amount of **\$6,687.50**, consisting of \$500.00 forfeiture pursuant  
6 to Code of Civil Procedure section 1992 and \$6,187.50 as damages incurred in attending two “no-show”  
7 depositions and to compensate for the fees and costs incurred in having to bring this motion to compel  
8 Mr. Cotton’s attendance at his deposition and to compel his response to written discovery;

9 (b) Issue an order striking Mr. Cotton’s Answer to the Geraci Complaint; and/or

10 (c) Issue an order striking Mr. Cotton’s Cross-Complaint.

11 Respectfully submitted,

12 Dated: February 27, 2018

FERRIS & BRITTON,  
A Professional Corporation

13  
14 By: Michael R. Weinstein  
15 Michael R. Weinstein  
16 Scott H. Toothacre  
Attorneys for Plaintiff/Cross-Defendant  
LARRY GERACI