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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

04/20/2018 at 11:35:00 PM

Clerk of the Superior Court
By E- Filing, Deputy Clerk

Defendant/Cross-Complainant *In Propria Persona*

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO - CENTRAL DIVISION

LARRY GERACI, an individual,

Plaintiff,

vs.

DARRYL COTTON, an individual; and
DOES 1-10, Inclusive,

Defendants.

CASE NO. 37-2017-00010073-CU-BC-CTL

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
MOTION BY PLAINTIFF AND CROSS-
DEFENDANT, LARRY GERACI AND
CROSS-DEFENDANT, REBECCA BERRY
FOR MONETARY AND ESCALATING/
TERMINATING SANCTIONS AGAINST
DEFENDANT/CROSS-COMPLAINANT
DARRYL COTTON**

DARRYL COTTON, an individual,

Cross-Complainant,

vs.

LARRY GERACI, an individual, REBECCA
BERRY, an individual; and DOES 1 through 10,
Inclusive,

Cross-Defendants.

Date: April 27, 2018

Time: 10:45 a.m.

Dept: C-73

Judge: The Honorable Joel R. Wohlfeil

Complaint Filed: March 21, 2017

Trial Date: May 11, 2018

[IMAGED FILE]

For the reasons set forth herein, Defendant/Cross-Complainant Darryl Cotton ("Cotton") respectfully requests that this Court deny the motion by Plaintiff Larry Geraci ("Geraci") and Cross-Defendant Rebecca Berry ("Berry") for additional monetary sanctions and escalating/terminating

1 sanctions, and grant a mutual 90-day continuance of both the discovery cutoff date and, by necessity, the
2 trial date scheduled for May 11, 2018.

3 INTRODUCTION

4 To begin, I had no intention to abuse the discovery process. Until this point in time, I felt that all
5 of my actions were justifiable because I believed my arguments were so strong that I would have already
6 won on the merits of all the pleadings and motions which have been submitted by all sides to date, such
7 that further discovery would be moot. I especially had faith that my Motion to Expunge the *Lis Pendens*
8 heard on April 13, 2018 would highlight to this Court the fact that this case was exceedingly strong in
9 my favor and had even hoped against all odds that Your Honor would agree and even *sua sponte* dismiss
10 this case in my favor after seeing a short and to-the-point summary of what I believe to be ALL the facts
11 and circumstances leading to this case. I was mistaken.

12 The fact that Plaintiff is using my failures to participate in discovery boggles my mind considering
13 how much information has been provided so far. I have not been in a good state of mind, whatever the
14 truth is legally determined to ultimately be, I sincerely believe that this entire action is a fraudulent sham
15 and constitutes a malicious prosecution. BUT, even though this is my belief, I am willing to concede
16 where I am wrong and I now understand that I must follow all the procedures and discovery to eventually
17 get to the truth. My Independent Psychiatric Assessment "IPA" from Dr. Ploesser, supports my position
18 on this – I sincerely believe this is a fraudulent action. I have nothing to hide and, if the Court has not
19 yet been persuaded in my favor, I look forward to whatever else may be provided. Granted, I think
20 *everything* has been on full display since my Amended Answer and Cross-Compliant (clearly Geraci
21 would *greatly* benefit from its exclusion) and everything in between, but if Your Honor believes there
22 may be a "smoking gun" hidden somewhere, I have full faith that whatever unknowns exist, the truth
23 must come to light.

24 Since I am not an attorney, at this point I only can assume that I am overlooking or misinterpreting
25 case law and statutes. I did not believe any further discovery was necessary or appropriate in light of the
26 pending appellate matters.¹

27
28 ¹ I am also working on an appeal from the issuance of a preliminary injunction which I believe also automatically stayed this action.

1 Mr. Austin, the attorney who assisted me with the Motion to Expunge the *Lis Pendens* heard by
2 this Court on April 13, 2018 has agreed to help me navigate and complete the discovery which has been
3 propounded to me. (See Declaration of Jacob P. Austin ("JPA Decl.") at ¶¶2,5.)

4 At great expense to his time schedule, Mr. Austin has agreed to help me on a *pro bono* basis to
5 get the discovery completed if I am given 90 days to complete my discovery responses (JPA Decl. ¶¶5,
6 6). He is not a civil litigator and I am asking a lot of him to change gears and assist me, but he understands
7 my plight and wishes to aid the Court and even opposing counsel by ensuring that I complete discovery
8 and do so to the best of our mutual abilities. I intend to begin preparing responses to discovery as soon
9 as possible with the assistance of Mr. Austin.

10 I beg to court to forgive my mistaken interpretations. I have not been myself the past few months
11 — I have been having increased medical problems and an exponentially increased level of stress due to
12 this litigation. (See again "IPA" from Dr. Ploesser.) For the first time in almost two years I had a
13 recurrence of a nocturnal seizure which, combined with my transient ischemic attack (TIA) last
14 December, I am also very concerned for my health and well-being. Furthermore, I am under increased
15 levels of financial stress; I am falling behind in obligations and debts, this litigation is crushing me as it
16 is.

17 ARGUMENT

18 The purpose of discovery is "not 'to provide a weapon of punishment, forfeiture and the avoidance
19 of a trial on the merits.'" (*Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 303.) While
20 it is recognized that under appropriate situations a trial court has the power to sanction a party who refuses
21 or otherwise fails to provide discovery, the particular sanction imposed "must not be the result of an
22 arbitrary selection." (*Thomas v. Luong* (1986) 187 Cal.App.3d 76, 81.)

23 The *Thomas* case involved a personal injury action where the defendant failed to answer form
24 interrogatories or appear for deposition. The trial court granted plaintiffs' motion and struck defendant's
25 answer, then entered a default and imposed monetary sanctions. The appellate court reversed, describing
26 the trial court's order as the "ultimate sanction," which "should be sparingly used." (*Ibid.*) In exercising
27 sanction power under discovery statutes, a trial court must keep a "fundamental precept" fairly in mind.
28 (*Ibid.*) As such, "[t]he penalty should be appropriate to the dereliction, and should not exceed that which

1 is required to protect the interests of the party entitled to but denied discovery [so that a] sanction should
2 not operate in such a fashion as to put the prevailing party in a better position than he would have had if
3 he had obtained the discovery sought and it had been completely favorable to his cause.'" (*Wilson v.*
4 *Jefferson* (1985) 163 Cal.App.3d 952, 958, quoting *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793.)

5 In exercising discretion, a variety of factors are relevant, *inter alia*: "whether a sanction short of
6 [the ultimate sanction] would be appropriate to the dereliction." (*Deyo, supra*, at 797.) The sanction, if
7 any, to be imposed "should not deprive a party of [presenting its case] if the discriminating imposition of
8 a lesser sanction will serve to protect the legitimate interests of the party harmed by the failure to provide
9 discovery." (*Thomas v. Luong, supra*, at 81.)

10 Terminating sanctions would in all likelihood deprive me of the right to fully defend myself and
11 would undoubtedly cause even more disruption and chaos to this Court as I struggle with evidence and
12 procedural issues which are so easily navigated by my adversaries which would aggravate the court, any
13 potential jury and waste more time giving Mr. Weinstein countless opportunities to show off his skill at
14 litigation gamesmanship. I do not want to waste this Court's time and expend the last of its patience. I
15 am diligently seeking full-time counsel to represent me on a *pro bono* or contingency basis and, in the
16 interest of judicial economy, I ask that Plaintiff not be allowed this opportunity to aid me in making a
17 bigger mess to exhaust this Court with my lack of legal education and experience.

18 **Imposing the Sanction of Default or Dismissal is Unjust When the Imposition**
19 **of a Lesser Sanction Would Be More Appropriate.**

20 I am not an attorney. I have no funds. I have consistently been trying to respond to motions and
21 win my case on the evidence, and do not know how to undertake discovery. I do not understand the
22 purpose or nature of the discovery which I have to answer. I did not know what it was and, when I finally
23 looked at it, I did not understand its point or purpose when communications between plaintiff and myself
24 have been clearly delineated and submitted by both parties as emails and texts between myself, Larry
25 Geraci and attachments to emails from his attorney, Gina Austin. *To me, that is the full world of discovery*
26 but, if I have to answer more questions, I am not opposed to doing so; I merely did not realize how the
27 Court may potentially view this particular issue. I perhaps wrongly felt the repetitive nature of Plaintiff's
28 requests seemed vexatious by definition.

1 The imposition of a termination sanction of default or dismissal inflicts a drastic and unjust
2 punishment upon a party when a less drastic sanction, such as a monetary sanction or a stay of the action,
3 would be more appropriate given the circumstances of the pending action [*see Thomas v. Luong, supra*,
4 at 82]. A lesser sanction of monetary fines, while crippling, can be dealt with. Such sanctions will
5 impose upon me the seriousness and necessity of following Court orders.

6 As stated above, I fully intend to finish all discovery.

7 Terminating sanctions go beyond what is needed to impose upon me the seriousness and severity
8 of my mistake and will likely deny me any right to defend the case at trial or to present evidence upon
9 issues of fact and would deprive me of the due process of law.

10 Imposing terminating sanctions will give the plaintiff more than he could have hoped for from
11 deposing me and getting answers to the interrogatories.

12 Harm to plaintiff is minimal if we are to continue the case out longer. The subject of this litigation
13 – my property – is still under consideration for a Conditional Use Permit ("CUP") and, since this CUP is
14 a condition precedent, continuation of the case on its merits is not prejudiced in the slightest.

15 I know this is inconvenient for the Court to change dates but, after all of our back-and-forth
16 *ex parte* requests from both sides, it has been impossible for me to compete with Plaintiff and his
17 attorneys out-gunning me at every single turn. It now seems apparent to me that it may be in the interest
18 of judicial economy to ensure *both parties* be given additional time to mutually complete discovery.

19 The sanctions available to the court under Code of Civil Procedure section 2023.030
20 should only be imposed in appropriate circumstances. The court should not impose a
21 drastic sanction when the failure to comply with the court's discovery order is due to a
22 party's inability to comply, rather than a willful, bad faith refusal to comply with the order
23 [*see Puritan Ins. Co. v. Superior Court* (1985) 171 Cal.App.3d 877, 885, 217 Cal.Rptr.
602 (sanction of dismissal is inappropriate when noncompliance results from inability
rather than willful or bad faith refusal to comply)].

24 Despite the general rule which allows for matters to be deemed admitted for a party's failure to
25 timely respond to a request for admission, a strong policy favors determination on the merits. *See New*
26 *Albertsons, Inc. v. Superior Court* (2008) 168 Cal. App. 4th 1403, reh'g denied (Jan. 5, 2009), review
27 denied; *Elston v. City of Turlock* (1985) 38 Cal. 3d 227, superseded by statute as stated in *Tackett v. City*
28 *of Huntington Beach* (1994) 22 Cal.App.4th 60. When a matter is deemed admitted, no contradictory

evidence may be introduced to the court. *See Murillo v. Superior Court* (2006) 143 Cal. App. 4th 730. "Section 2033.300 eliminates undeserved windfalls obtained through requests for admission and furthers the policy favoring the resolution of lawsuits on the merits." *See New Albertsons, Inc, supra*.

This case should be decided on the merits, I have believed that since day one even though I am greatly surprised I have not yet won this case on the merits. I humbly and sadly admit it is more likely the result of my lack of resources and legal knowledge (most specifically rules of civil procedure with which I am doing my best to understand and comply) that I am not holding the stronger position at this time.

If this Court can provide me more time, I will rectify the discovery situation and both sides can fairly and fully litigate this case on the merits and avoid a windfall that is disfavored by public policy.

CONCLUSION

While I believe Plaintiff is merely trying to obfuscate the fact he admitted what he *waited months to claim to be a "final contract"* (see Plaintiff's Complaint March 21, 2017 and compare to ALL communications from November 2016 to March 21, 2017 where *not one single reference* to the document is again made in ANY context) was not the final contract **contemporaneously** with the November 2nd writing, and I feel he is abusing the judiciary system and unjustly leveraging litigation tactics as a tool of oppression against me. I respect this Court and will comply with discovery orders.

I am 57 years old and I have people and loved ones depending on me. Please, if not for me, believe me when I say that, if I lose my property, I have no other means by which to have gainful employment and provide for my loved ones and the people who depend on me. (Declaration of Darryl Cotton at ¶13.)

I am willing to take ownership and responsibility for miscalculations related to my belief that all relevant evidence had been amply provided on multiple occasions, as well as my apparent miscalculation on appellate issues (and stays in general). Whether there is an actual need for Plaintiff to ask for more than what has been presented in all pleading to date is a bigger question than I realized it to be, and I trust that Your Honor can straighten out our path. I do not have 32 years of practicing law under my belt, nor do I have a sizable and respected law firm with support staff to assist me. I have less than six months of a crash course into more issues than I could have ever imagined; but, if the court agrees with Plaintiff's

1 counsel that I am in the wrong, I ask that sanctions be limited to extensions of timeframes and monetary
2 sanctions only, because if a jury is denied the ability to hear ALL FACTS related to what really happened
3 and what was agreed upon by Geraci and myself, then justice cannot be provided to either party.

4 Please do not let this case be prejudiced and decided by my procedural ignorance and failures
5 when a jury deserves to hear all sides and facts related to the entirety of the underlying facts and events.
6 Mr. Austin has agreed to assist me completely with all discovery requests on a *pro bono* basis.

7 In light of the above, I request that this Court deny additional monetary sanctions, deny
8 escalating/terminating sanctions but GRANT a MUTUAL 90-day continuance of the discovery cutoff
9 date and, by necessity, the trial date for the reasons set forth above.

10
11 DATED: April 20, 2018

/s/Darryl Cotton
DARRYL COTTON
Defendant/Cross-Complainant *In Propria Persona*

ROA 207.3
2 pages

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Inclusive,

Cross-Defendants.

CASE NO. 37-2017-00010073-CU-BC-CTL

**DECLARATION OF JACOB P. AUSTIN IN
SUPPORT OF DARRYL COTTON'S
OPPOSITION TO MOTION BY
PLAINTIFF/CROSS- DEFENDANT LARRY
GERACI AND CROSS-DEFENDANT
REBECCA BERRY FOR MONETARY AND
ESCALATING/TERMINATING
SANCTIONS AGAINST DEFENDANT AND
CROSS-COMPLAINANT DARRYL
COTTON**

[IMAGED FILE]

Date: April 27, 2018

Time: 10:45 a.m.

Dept: C-73

Judge: The Honorable Joel R. Wohlfeil

Filed: March 21, 2017

Trial Date: May 11, 2018

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1 I, Jacob P. Austin, declare:

2 1. I am an attorney admitted to practice law before the courts of this State. I have personal
3 knowledge of the facts stated in this declaration.

4 2. I worked with Mr. Cotton on a limited basis in an attempt to expunge a Notice of Pendency
5 of Action.

6 3. I think this case initiated by Plaintiff and Cross-Defendant, Larry Geraci, lacks probable
7 cause.

8 4. Mr. Cotton has not been himself in recent months. As can be seen from his previously
9 submitted Independent Psychiatric Assessment by Dr. Ploesser, Mr. Cotton appears to be showing
10 symptoms of Post Traumatic Stress Disorder. I have personally seen Mr. Cotton many times and I am
11 concerned for his well-being.

12 5. For the above reasons I have agreed to help Mr. Cotton complete (and propound) all his
13 discovery requirements on a *pro bono* basis.

14 6. I will need 90 days to help Mr. Cotton work through all aspects of the discovery.

15 7. In the interest of justice, please allow Mr. Cotton, with my assistance, to complete the
16 discovery requested and not impose severe terminating sanctions which would result in a default loss to
17 Mr. Cotton

18 I declare under penalty of perjury under the laws of the state of California that the foregoing is
19 true and correct, and that this declaration was executed on April 20, 2018, in San Diego, California.

20
21 
JACOB P. AUSTIN

ROA 207.2
3 pages

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Defendant/Cross-Complainant *In Propria Persona*

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Cross-Complainant,

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LARRY GERACI, an individual, REBECCA
BERRY, an individual; and DOES 1 through 10,
Inclusive,

Cross-Defendants.

CASE NO. 37-2017-00010073-CU-BC-CTL

DECLARATION OF DARRYL COTTON IN
SUPPORT OF OPPOSITION TO MOTION
BY PLAINTIFF/CROSS-DEFENDANT
LARRY GERACI AND CROSS-
DEFENDANT REBECCA BERRY FOR
MONETARY AND ESCALATING/
TERMINATING SANCTIONS AGAINST
DEFENDANT/CROSS-COMPLAINANT
DARRYL COTTON

[IMAGED FILE]

Date: April 27, 2018

Time: 10:45 a.m.

Dept: C-73

Judge: The Honorable Joel R. Wohlfeil

Complaint Filed: March 21, 2017

Trial Date: May 11, 2018

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1 I, Darryl Cotton, declare:

2 1. I am over the age of eighteen years, the Defendant am Cross-Complainant in the above-
3 entitled action and I have personal knowledge of the facts stated in this declaration.

4 2. At no point have I tried to abuse the discovery process throughout these lengthy litigation
5 proceedings. I have always felt that this case lacked probable cause and that I was justified in my actions
6 because I believed my arguments were so strong that I would have already won on the merits of all the
7 pleadings and motions which have been submitted by all sides to date, such that further discovery would
8 be moot.

9 3. I especially had faith that the motion to Expunge the *Lis Pendens* heard on April 13, 2018
10 would highlight to the Court that this case was exceedingly strong in my favor, and even hoped against
11 all odds that Your Honor would agree and even dismiss this case *sua sponte* in my favor after seeing a
12 short and to-the-point summary of what I believe to be ALL facts and circumstances leading to this case.
13 I was mistaken.

14 4. I believe that Geraci and Weinstein using my failure to participate in discovery is
15 unreasonable considering how much information has been provided so far. I have not been in a good
16 state of mind. Whatever the truth is legally determined to ultimately be, I sincerely believe that this entire
17 action is a fraudulent sham and constitutes a malicious prosecution. BUT, even though this is my belief,
18 I am willing to concede where I am wrong and I now understand that I must follow all the procedures
19 and discovery to eventually get to the truth.

20 5. My Independent Psychiatric Assessment "IPA" from Dr. Ploesser, supports my position
21 on this – I sincerely believe this is a fraudulent action. I have nothing to hide and, if the Court has not
22 yet been persuaded in my favor, I look forward to whatever else may be provided.

23 6. I think *everything* has been on full display since my Amended Answer and Cross-
24 Compliant (clearly Geraci would *greatly* benefit from its exclusion) and everything in between but, if
25 Your Honor believes there may be a "smoking gun" hidden somewhere, I have full faith that whatever
26 unknowns exist, the truth must come to light.

27 ///

28 ///

1 7. I am not an attorney. I can only assume at this point I am overlooking or misinterpreting
2 case law and statutes. I never believed further discovery to be necessary or appropriate with pending
3 Appellate matters.¹

4 8. Mr. Austin, the attorney who assisted me with the Motion to Expunge the *Lis Pendens*
5 heard by this Court April 13, 2018 has agreed to help me navigate and complete the discovery which has
6 been requested of me.

7 9. Mr. Austin, at great expense to his time schedule, has agreed to help me complete the
8 discovery on a *pro bono* basis if I am given 90 days to do so. He is not a civil litigator and I am asking
9 a lot of him to change gears and assist me, but he understands my plight and wishes to aid the Court and
10 even opposing counsel by ensuring I complete discovery and do so to the best of our mutual abilities.

11 10. I beg to court to forgive my mistaken interpretations. I have not been myself the past few
12 months. I have been having increased medical problems and an exponentially increased level of stress
13 due to this litigation. (See again "IPA" from Dr. Ploesser.) For the first time in almost two years I had a
14 recurrence of a nocturnal seizure which, combined with my transient ischemic attack (TIA) last
15 December, I am also concerned for my health and well-being.

16 11. I am facing severe financial distress.

17 12. I am falling behind in obligations and debts, this litigation is crushing me as it is.

18 13. I am 57 years old and I have people and loved ones depending on me. Please, if not for
19 me, believe me when I say that, if I lose my property, I have no other means by which to have gainful
20 employment and provide for my loved ones and the people who depend on me.

21 I declare under penalty of perjury under the laws of the state of California that the foregoing is
22 true and correct, and that this declaration was executed on April 20, 2018 at San Diego, California.

23
24 DATED: April 20, 2018

/s/ Darryl Cotton

DARRYL COTTON

25
26
27
28 ¹ I am also working on an appeal from the issuance of a preliminary injunction that I believe also automatically stayed this action.