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Superior Court of California,
County of San Diego

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Cross-Defendant REBECCA BERRY

**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

**PLAINTIFF/CROSS-DEFENDANTS'
OBJECTIONS TO DEFENDANT CROSS-
COMPLAINANT DARRYL COTTON'S
DECLARATION AND REPLY SEPARATE
STATEMENT FILED CONCURRENTLY
WITH HIS REPLY TO OPPOSITION TO
SUMMARY JUDGMENT, OR
ALTERNATIVELY, SUMMARY
ADJUDICATION; AND DECLARATION OF
SCOTT H. TOOTHACRE**

[IMAGED FILE]

**DATE: May 23, 2019
TIME: 9:00 a.m.
DEPT: C-73**

Filed: March 21, 2017
Trial Date: June 28, 2019

Plaintiff and Cross-Defendant Larry Geraci, by and through counsel, hereby files this objection
to the Declaration of Darryl Cotton and the Reply Separate Statement filed concurrently with his Reply
to Plaintiff's Opposition to Defendant's Motion for Summary Judgment, or, Alternatively, Summary

1 Adjudication.

2 **GROUND FOR OBJECTIONS**

3 **1. Mr. Cotton's Opposition Papers Were Not Served on Plaintiff's Counsel in Violation**
4 **of CCP § 437c(b)(4)**

5 In replying to an opposition to a motion for summary judgment the moving party's declarations
6 or points and authorities in reply to the opposition must be served and filed at least five days before the
7 date set for the hearing (unless the court shortens the period for good cause shown). [CCP §
8 437c(b)(4).] Plaintiff's counsel were never served with Defendant Cotton's Reply papers. Instead,
9 they were downloaded from the Register of Actions on May 21, 2019.

10 **2. No Summary Judgment Reply Separate Statement is Allowed**

11 The summary judgment statute does not provide for a "Reply Separate Statement." Nor are
12 "Exhibits and Evidence in Support of Reply" generally allowed. [*Nazir v. United Airlines, Inc.* (2009)
13 178 Cal.App.4th 243, 249]

14 **3. New Evidence in Reply Papers is Generally Not Allowed**

15 The moving party generally may not rely on additional evidence filed with it reply papers. [*San*
16 *Diego Watercrafts, Inc. v. Wells Fargo Bank N.A.* (2002) 1092 Cal.App.4th 308, 316.] The opposing
17 party must object to avoid a waiver. [*Gafcon, Inc. v. Ponsor & Assocs.* (2002) 98 Cal.App.4th 1388,
18 1426.] The court's consideration of the late-filed evidence over objection may violate the opposing
19 party's due process rights to be fully informed as to the issues it must meet to defeat the motion. [*San*
20 *Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A., supra*, 102 Cal.App.4th at 316]

21 The court has discretion to consider new evidence in reply papers in ruling on a summary
22 judgment motion, provided the other party had notice and an opportunity to respond. [*Plenger v. Alza*
23 *Corp.* (1992) 11 Cal.App.4th 349, 362; *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14
24 Cal.App.5th 438, 449-450.] Here, plaintiff was not provided an opportunity to respond to the new
25 evidence contained within Mr. Cotton's Declaration as the reply papers were never served on plaintiff's
26 counsel.

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2. I make this Declaration on personal knowledge and if asked to testify to the matters contained herein, I could and would do so competently.

4. On May 21, 2019, by looking on the Register of Actions, our office discovered that Reply papers had been filed by Mr. Cotton. Thereafter, one of our paralegals purchase and download the Reply papers.

I swear under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this May 21, 2019 in San Diego, California.

PLAINTIFF/CROSS-DEFENDANTS' OBJECTIONS TO DEFENDANT CROSS-COMPLAINANT DARRYL COTTON'S
DECLARATION AND REPLY SEPARATE STATEMENT FILED WITH HIS REPLY TO OPPOSITION TO SUMMARY
JUDGMENT, OR ALTERNATIVELY, SUMMARY ADJUDICATION; DECLARATION OF SCOTT H. TOOTHACRE