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7 Attorneys for Plaintiff/Cross-Defendant LARRY GERACI and
Cross-Defendant REBECCA BERRY

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

10 LARRY GERACI, an individual,

11 Plaintiff,

12 v.

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

15 Defendants.

16 DARRYL COTTON, an individual,

17 Cross-Complainant,

18 v.

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

21 Cross-Defendants.
22

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

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

**EX PARTE APPLICATION BY
PLAINTIFF AND CROSS-DEFENDANT,
LARRY GERACI, AND CROSS-
DEFENDANT, REBECCA BERRY,
TO COMPEL THE DEPOSITION OF
DARRYL COTTON AND TO CONTINUE
THE HEARING DATE FOR COTTON'S
MOTION FOR PRELIMINARY
INJUNCTION**

[IMAGED FILE]

DATE: January 9, 2017
TIME: 8:30 a.m.
DEPT: C-73

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

23 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

24 PLEASE TAKE NOTICE THAT on January 9, 2018, at 8:30 a.m., or as soon thereafter as the
25 matter may be hearing in Department C-73 of the above-entitled court, located at 330 West Broadway,
26 San Diego, California 92101, Plaintiff and Cross-Defendant, LARRY GERACI (hereafter "Geraci"),
27 and Cross-Defendant, REBECCA BERRY (hereafter "Berry"), will appear *ex parte* to seek orders (1)
28 to compel the deposition of Darryl Cotton (who failed to appear at his properly noticed deposition on

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**EX PARTE APPLICATION BY PLAINTIFF AND CROSS-DEFENDANT, LARRY GERACI, AND CROSS-
DEFENDANT, REBECCA BERRY, TO COMPEL THE DEPOSITION OF DARRYL COTTON AND TO
CONTINUE THE HEARING DATE FOR COTTON'S MOTION FOR PRELIMINARY INJUNCTION**

1 January 5, 2018), and (2) to continue the January 25, 2018, hearing on Cotton's preliminary injunction
2 motion for a reasonable period of time to allow the deposition to take place and for sufficient time
3 thereafter for moving parties to file their papers in opposition to the motion for preliminary injunction.

4 Pursuant to California Rules of Court, Rule 3.1202(a), so far as is known to moving parties
5 Geraci and Berry, the names addresses and telephone numbers of attorneys and parties in this case are:

<u>Parties</u>	<u>Attorneys</u>
Larry Geraci	Michael R. Weinstein Ferris & Britton, APC 501 West Broadway, Suite 1450 San Diego, CA 92121 Telephone: (619) 233-3131 Fax: (619) 232-9316
Rebecca Berry	Michael R. Weinstein Ferris & Britton, APC 501 West Broadway, Suite 1450 San Diego, CA 92121 Telephone: (619) 233-3131 Fax: (619) 232-9316
Darryl Cotton	Darryl Cotton, In Pro Per 6176 Federal Boulevard San Diego, CA 92114 Telephone: (619) 634-1561 and (619) 266-4004 Fax: (619) 229-9387

17 This application is made pursuant to California Code of Civil Procedure § 2025.450 and
18 California Rules of Court, Rules 3.1200 to 3.1207. It is based on the attached supporting Memorandum
19 of Points and Authorities, Declaration of Michael R. Weinstein, the concurrently served Notice of
20 Lodgment in Support of *Ex Parte* Application, and on all pleadings, papers and records in this action,
21 and/or such further oral or documentary evidence or argument presented before or at the hearing.
22 Timely notice for this application was given by counsel for Geraci and Berry to all parties pursuant to
23 California Rules of Court, Rule 3.1203(a). (Declaration of Michael R. Weinstein, para. 24.)

24 Dated: January 8, 2018

FERRIS & BRITTON,
A Professional Corporation

26 By: Michael R. Weinstein
27 Michael R. Weinstein
28 Scott H. Toothacre
Attorneys for
Plaintiff and Cross-Defendant LARRY GERACI and
Cross-Defendant REBECCA BERRY

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. RELIEF REQUESTED**

3 Cotton's motion for preliminary injunction (in the instant action, as defendant) and motion for
4 peremptory writ of mandate (in the related writ proceeding, as petitioner) are both set for hearing on
5 January 25, 2018. That hearing date was set during ex parte proceedings heard in both cases on
6 Thursday, December 7, following the Court's denial of Cotton's ex parte applications seeking the
7 issuance of temporary restraining orders. Geraci and Berry's opposition papers (in the instant action, as
8 plaintiff/cross-defendants, and in the related writ proceeding, as Real Parties in Interest) must be served
9 and filed on or before Thursday, January 11, 2018.

10 At the time of the December 7, 2017, ex parte hearings, the deposition of Darryl Cotton was
11 scheduled for Monday, December 11, 2017, well in advance of both the January 11, 2018, due date for
12 opposition papers and the January 25, 2018, hearing dates. For reasons discussed in detail in the
13 Declaration of Michael R. Weinstein, Geraci/Berry's attempts to take Darryl Cotton's deposition
14 sufficiently in advance of the pending hearing dates have been foiled by Mr. Cotton. Most recently, on
15 January 5, 2018, Darryl Cotton, now self-represented, failed to appear at his properly noticed
16 deposition, thus depriving Geraci/Berry of his deposition testimony for potential use in their opposition
17 papers due January 11, 2018.

18 For that reason, Geraci/Berry seek an order (1) to compel the deposition of Darry Cotton (who
19 failed to appear at his properly noticed deposition on January 5, 2018), and (2) to continue the January
20 25, 2018, hearing on Cotton's preliminary injunction motion for a reasonable period of time to allow
21 the deposition to take place and for sufficient time thereafter for Geraci/Berry to file their papers in
22 opposition to the motion for preliminary injunction (and their opposition to the motion for a peremptory
23 writ of mandate in the related writ proceeding).

24 **II. PROCEDURAL BACKGROUND**

25 On March 21, 2017, Larry Geraci filed the instant action against Darryl Cotton asserting causes
26 of action for breach of contract and specific performance of a written agreement entered into between
27 them on November 2, 2016, for the purchase and sale from Cotton to Geraci of the Property (the "Nov
28 2nd Written Agreement"). Cotton has cross-complained against Geraci and Berry; his operative

1 Second Amended Cross-Complaint, dated August 25, 2017, asserts damage claims against Geraci for
2 breach of contract, intentional misrepresentation, negligent misrepresentation; false promise
3 (promissory fraud) as well as a declaratory relief claim against both Geraci and Berry. Neither Geraci,
4 in his complaint, nor Cotton, in his cross-complaint, seek any injunctive relief. This action is set for
5 trial on May 11, 2018, and the central issue in that case is the validity and enforceability of the Nov
6 2nd Written Agreement. That is also the central issue in the related writ of mandate proceeding that is
7 the subject of the concurrently filed ex parte application seeking the same ex parte relief as sought
8 herein.

9 **III. FACTUAL SUPPORT FOR RELIEF REQUESTED**

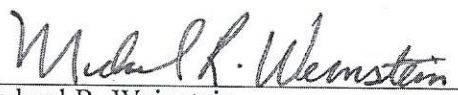
10 See the attached Declaration of Michael R. Weinstein, incorporated herein as though fully set
11 forth. In the declaration, Mr. Weinstein sets forth in detail facts demonstrating the efforts made to take
12 the deposition of Darryl Cotton in time for use in the upcoming opposition papers due January 11,
13 2018, and how those efforts were foiled by Mr. Cotton, including but not limited to his failure to appear
14 at his properly noticed deposition on January 5, 2018.

15 For the reasons stated herein, this Court should grant this ex parte application.

16 Dated: January 8, 2018

FERRIS & BRITTON,
A Professional Corporation

19 By:


Michael R. Weinstein
Scott H. Toothacre
Attorneys for
Plaintiff and Cross-Defendant LARRY GERACI and
Cross-Defendant REBECCA BERRY

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1 2018. A true and correct copy of the Seventh Amended Notice of Deposition of Defendant Darryl
2 Cotton that I prepared and caused to be timely served on Mr. Cotton, in pro per, is attached as Exhibit
3 2 to the Geraci/Berry NOL.

4 8. During the morning of December 8, 2017, I received a call from Mr. Cotton's then-
5 attorney, David Demian, informing me that he had been terminated and would no longer be
6 representing Mr. Cotton. I asked him about whether Mr. Cotton intended to appear at his previously
7 noticed deposition scheduled for Monday, December 11, 2017. Mr. Demian told me he would talk
8 with Mr. Cotton and let me know. Later that day around noon I received a confirming email from Mr.
9 Demian attaching copies of the Substitution of Attorney forms he would be filing in which Mr. Cotton
10 would be substituting in pro per in place of Mr. Demian. Mr. Demian also stated, "This also confirms
11 that Mr. Cotton is seeking new counsel and is unable to attend deposition on Monday." It further
12 stated, "Please contact Mr. Cotton directly in the interim with issues as he seeks new counsel. A true
13 and correct copy of Mr. Demian's December 11th email is attached as Exhibit C to the Geraci/Berry
14 NOL.

15 9. On December 11, 2017, I received a telephone message from an associate of Mr. Cotton
16 providing notice of an ex parte hearing scheduled by Mr. Cotton for the next day. Later that day I
17 received an email directly from Mr. Cotton informing me that he decided to replace his legal counsel
18 (which I knew already) and that he would be representing himself at the December 12, 2017, ex parte
19 hearing. At the December 12th ex parte hearing I appeared on behalf of my clients and Mr. Cotton
20 appeared, in pro per, to represent himself. The Court denied Mr. Cotton's ex parte application for
21 reconsideration of the prior rulings denying his requests for temporary restraining orders.

22 10. Later that morning, on December 12, 2017, I emailed Mr. Cotton regarding discovery
23 issues and other matters. I reminded him that he had written discovery responses due on or before
24 December 13, 2017. I told him I still need to take his deposition and to do so sufficiently in advance
25 of the January 11, 2018, date my clients' opposition papers were due on his pending motion for
26 preliminary injunction and pending motion for issuance of a peremptory writ of mandate. I provided
27 him with five (5) available dates for his deposition, the last of which was January 5, 2018, and asked
28 that he advise me of the date he chose by 5 p.m. on December 14, 2017, or I would notice his

1 deposition for one of those dates.

2 11. On Tuesday, December 12, 2017, at 7:24 p.m., I received an email from Mr. Cotton in
3 which he a) requested an extension from December 13th to December 29th to answer the written
4 discovery, and b) requested that I give him until Monday, December 18th to get back to him regarding
5 which dates would work for his deposition. I responded by email on Wednesday, December 13, 2017,
6 at 8:01 a.m., granting his requests for an extension until December 29th to respond to the pending
7 written discovery and to have until Monday, December 18th to get back to me regarding a date for his
8 deposition.

9 12. Mr. Cotton did not get back to me by December 18th regarding a date for his deposition.
10 On Tuesday, December 19, 2017, at 8:47 a.m. he emailed me, informing me that he had decided to
11 appeal the denial of his three ex parte applications and had engaged an attorney, Jacob Austin, "in a
12 limited capacity to help me on my appeal. Please direct all future correspondence solely to Jacob
13 directly from here onward." Mr. Austin was copied on the email.

14 13. I responded immediately by email to Mr. Cotton, copying Mr. Austin, on December 19,
15 2017, at 9:11 a.m. I told Mr. Cotton that, if he had retained Mr. Austin only in a limited capacity to
16 assist him with appealing the denial of the three ex parte applications, *then he was still representing*
17 *himself in all other respects in the two underlying lawsuits and that those underlying actions are*
18 *ongoing as no appeal has yet been filed and, if and when those appeals are filed, the underlying*
19 *actions will not automatically be stayed.* I then reminded him that I still needed to take his deposition
20 and that if he did not advise me by the end of the day which date he would prefer, then I would notice
21 his deposition for one of the five (5) dates I had previously proposed to him.

22 14. Mr. Cotton did not get back to me with his preferred deposition date. Instead, on
23 December 19, 2017, at 10:06 a.m., he sent me a scathing email, copied to Mr. Austin, in which he
24 accused me of blatantly lying to him to put him under intense and undue pressure. Mr. Cotton, now
25 his own lawyer, cited me to inapplicable case law in The Rutter Group to supporting his incorrect legal
26 position that his appeals stayed the action. He went on to say: "Do NOT contact me again or I will
27 contact the California Bar and let them know that you are blatantly lying to me, etc. and he accused me
28 of being "the worst kind of lawyer [who] will do anything for money," telling me he would not

1 believe anything I tell him, and stating further: "DO NOT RESPOND. I DO NOT WANT TO HEAR
2 FROM YOU AS YOU ARE PUTTING ME IN EMOTIONAL AND PHYSICAL DISTRESS. THIS
3 IS NOT MELODRAMA. THIS IS REAL."

4 15. I immediately responded by email on December 19, 2017, at 11:49 a.m. directed (this
5 time) solely to attorney Jacob Austin, asking that he call or email me immediately to discuss this
6 matter and advising him I believed his client, Mr. Cotton, was terribly misinformed. First, I asked Mr.
7 Austin to confirm whether he represented Mr. Cotton and, if so, whether his representation was limited
8 to the "appeal" of the denial of his three ex parte applications or, if contrary to what Mr. Cotton had
9 said, he was going to be representing him in the two underlying actions and, if the latter, to please
10 immediately serve and file signed Substitution of Attorney forms. Second, I cited him to case
11 authority that the appeal from a denial of a temporary restraining order does not result in an automatic
12 stay, and pointing out that Mr. Cotton was citing to inapplicable authority dealing with appeals from
13 the granting of a temporary restraining order which does result in an automatic stay. I also asked
14 whether he had contrary authority to support Mr. Cotton's assertion regarding the automatic stay and,
15 if so, to please provide me with that authority as soon as possible. I finished by stating, **"If you agree
16 there is no automatic stay, please advise Mr. Cotton immediately. I need to be able to deal with
17 the attorney in the underlying action. If that is you, then that would be great—just appear by
18 filing your Substitution and I will deal only with you. If that is not you, then I will deal directly
19 with Mr. Cotton."**

20 16. Later that evening on December 19, 2017, at 8:35 p.m., I received an email response
21 from Mr. Jacob Austin in which he stated, **"I am only assisting Mr. Cotton in a limited capacity on
22 his appeal. I will not be representing him in the two underlying actions.** Having said that, I would
23 appreciate the professional courtesy if you would communicate through me until I get caught up to
24 speed on what has happened in the two underlying matters and the *ex parte* motions that are the basis
25 of his appeal."

26 17. On December 20, 2017, at 8:07 a.m., I responded back to attorney Jacob Austin by
27 email, reminding him that the filing of appeals did not stay the two underlying actions, and stating in
28 pertinent part: **"I will be happy to communicate through you until you are able to get up to speed,**

1 with one exception: My oppositions to the motion for preliminary injunction and motion for a
2 peremptory writ of mandate in the underlying actions are due January 11, 2018. I wish to take
3 Mr. Cotton's deposition sufficiently in advance of the date the oppositions must be filed. His
4 deposition was set for December 4th but was taken off calendar the Friday before after I was
5 notified he would be unavailable to attend and was terminating his prior attorney and
6 substituting in as counsel. On December 12th I provided him with several available dates and he
7 has refused so far to pick one. (Attached is a copy of my December 12th email to Mr.
8 Cotton.) So I have no choice but to immediately notice his deposition for one of those dates,
9 which will be January 5th. (In addition, Mr. Cotton also has discovery responses due for which
10 I granting him an extension through December 29th.) As Mr. Cotton still represents himself in
11 the underlying actions I am required to serve all pleadings on him, including the deposition
12 notice, which I will be mailing today. I will provide you with a courtesy copy so you can give him
13 a heads up."

14 18. True and correct copies of each of the ten (10) emails referenced in paragraphs 9
15 through 17 above are set forth in the email thread attached as Exhibit D to the Geraci/Berry NOL.

16 19. On December 20, 2017, I prepared and caused to be served by mail a Seventh Amended
17 Notice of Deposition of Defendant Darryl Cotton, noticing his deposition for January 5, 2018. As
18 noted above, a true and correct copy of the Seventh Amended Notice of Deposition of Defendant
19 Darryl Cotton is attached as Exhibit 2 to the Geraci/Berry NOL. I also emailed a courtesy copy of the
20 deposition notice to attorney Jacob Austin that same day.

21 20. I never received any response from either Darryl Cotton or attorney Jacob Austin after
22 December 20, 2017, and I also never received any communication from them about the January 5,
23 2018, deposition.

24 21. I prepared to take Mr. Cotton's deposition and on January 5, 2018, at the noticed place
25 and time, I appeared before a court reporter to take the deposition of Darryl Cotton. Mr. Cotton failed
26 to appear.

27 22. As described above, since December 8, 2017, I have consistently communicated to both
28 Mr. Cotton and, later, attorney Jacob Austin, that I needed to take the deposition of Darryl Cotton

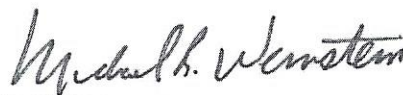
1 sufficiently in advance of the January 11, 2018, due date for my clients' oppositions to the pending
2 motion for preliminary injunction in the Geraci Lawsuit and the pending motion for a peremptory writ
3 of mandate in the Writ of Mandate Lawsuit. I tried to work with both to schedule the deposition but
4 received no cooperation regarding the scheduling. When that did not work, on December 20, 2018, I
5 properly noticed the deposition for January 5, 2018. But Mr. Cotton has failed to appear.

6 23. As a result, my clients' submit they are entitled to an order compelling the deposition of
7 Mr. Cotton as soon as possible and to a continuance of the pending hearings on January 25, 2018, to a
8 date that will allow the deposition to be taken sufficiently in advance of when the opposition papers
9 will be due in connection with the new hearing dates for those motions.

10 24. As required by C.C.P. § 2025.450(b)(2) and *Leko v. Cornerstone Building Inspection*
11 *Service* (2001) 86 Cal.App.4th 1109, 1124, by email dated January 6, 2018, at 12:58 p.m., from myself
12 to Darryl Cotton, with a copy to attorney Jacob Austin, I inquired of Mr. Cotton as to the reasons for
13 his non-appearance at the properly noticed deposition on January 5, 2018. I also providing written
14 notice of the instant ex parte hearing scheduled for January 9, 2018, and the relief that would be
15 requested at that ex parte hearing. A true and correct copy of my January 6, 2018, email providing
16 notice of this ex parte hearing is attached as Exhibit E to the Geraci/Berry NOL.

17 25. By email dated January 8, 2018, prior to 10 a.m., further notice of this ex parte hearing
18 was given to Darryl Cotton by service of a) my letter to Darryl Cotton dated January 8, 2018, attached
19 as Exhibit F to the Geraci/Berry NOL, and of b) a complete copy of the moving papers for this ex parte
20 application. An executed Proof of Service has been concurrently filed herewith.

21 I declare under penalty of perjury under the laws of the State of California that the foregoing is
22 true and correct. Executed this 8th day of January, 2018, in San Diego, California.

23
24 

25 MICHAEL R. WEINSTEIN
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