

FERRIS & BRITTON  
A Professional Corporation  
Michael R. Weinstein (SBN 106464)  
Scott H. Toothacre (SBN 146530)  
501 West Broadway, Suite 1450  
San Diego, California 92101  
Telephone: (619) 233-3131  
Fax: (619) 232-9316  
mweinstein@ferrisbritton.com  
stoothacre@ferrisbritton.com

AUSTIN LEGAL GROUP, APC  
3990 Old Town Ave., Ste. A112  
San Diego, CA 92110  
Telephone: (619) 924-9600  
Fax: (619) 881-0045  
gaustin@austinlegalgroup.com

Attorneys for Real Parties in Interest  
LARRY GERACI and REBECCA BERRY

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

DARRYL COTTON, an individual,

Petitioner/Plaintiff,

v.

CITY OF SAN DIEGO, a public entity; and  
DOES 1 through 25,

Respondents/Defendants.

REBECCA BERRY, an individual; LARRY  
GERACE, an individual, and ROES 1 through  
25,

Real Parties In Interest.

Case No. 37-2017-00037675-CU-WM-CTL

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

**EX PARTE APPLICATION BY REAL  
PARTIES IN INTEREST, LARRY  
GERACI AND REBECCA BERRY,  
TO COMPEL THE DEPOSITION OF  
DARRYL COTTON AND TO CONTINUE  
THE HEARING DATE FOR COTTON'S  
MOTION FOR ISSUANCE OF A  
PEREMPTORY WRIT OF MANDATE**

**[IMAGED FILE]**

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

Petition Filed: October 6, 2017  
Hearing Date: January 25, 2018

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on January 9, 2018, at 8:30 a.m., or as soon thereafter as the  
matter may be hearing in Department C-73 of the above-entitled court, located at 330 West Broadway,

San Diego, California 92101, Plaintiff and Cross-Defendant, LARRY GERACI (hereafter "Geraci"), and Cross-Defendant, REBECCA BERRY (hereafter "Berry"), will appear *ex parte* to seek orders (1) to compel the deposition of Darry Cotton (who failed to appear at his properly noticed deposition on January 5, 2018), and (2) to continue the January 25, 2018, hearing on Cotton's motion for issuance of a peremptory writ of mandate for a reasonable period of time to allow the deposition to take place and for sufficient time thereafter for moving parties to file their papers in opposition to the motion for a peremptory writ of mandate.

Pursuant to California Rules of Court, Rule 3.1202(a), so far as is known to moving parties 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<br>Ferris & Britton, APC<br>501 West Broadway, Suite 1450<br>San Diego, CA 92121<br>Telephone: (619) 233-3131<br>Fax: (619) 232-9316 |
| Rebecca Berry  | Michael R. Weinstein<br>Ferris & Britton, APC<br>501 West Broadway, Suite 1450<br>San Diego, CA 92121<br>Telephone: (619) 233-3131<br>Fax: (619) 232-9316 |
| Darryl Cotton  | Darryl Cotton, In Pro Per<br>6176 Federal Boulevard<br>San Diego, CA 92114<br>Telephone: (619) 634-1561 and (619) 266-4004<br>Fax: (619) 229-9387         |

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

1 notice for this application was given by counsel for Geraci and Berry to all parties pursuant to  
2 California Rules of Court, Rule 3.1203(a). (Declaration of Michael R. Weinstein, para. 24.)

3 Dated: January 8, 2018

FERRIS & BRITTON,  
A Professional Corporation

4  
5 By: Michael R. Weinstein  
6 Michael R. Weinstein  
7 Scott H. Toothacre  
8 Attorneys for Real Parties in Interest  
9 LARRY GERACI and REBECCA BERRY  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. RELIEF REQUESTED**

Cotton's motion for issuance of a peremptory writ of mandate (in the instant action, as petitioner) and motion for a preliminary injunction (in the related Geraci v. Cotton lawsuit, as defendant) are both set for hearing on January 25, 2018. That hearing date was set during ex parte proceedings heard in both cases on Thursday, December 7, after the court denied Cotton's ex parte applications seeking the issuance of temporary restraining orders. Geraci and Berry's opposition papers (in the instant action, as Real Parties in Interest, and in the related Geraci v. Cotton lawsuit, as plaintiff/cross-defendants) are due on or before Thursday, January 11, 2018.

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

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

**II. PROCEDURAL BACKGROUND**

On October 6, 2017, after the related Geraci v. Cotton is action had been pending for more than six (6) months, Cotton filed this Petition for Writ of Mandate seeking a writ of mandate *compelling the City of San Diego* to recognize him as the true applicant in place of Berry on the CUP Application submitted by Berry, as Geraci's agent, for a Conditional Use Permit for operation of a medical

1 marijuana dispensary. Cotton thereafter filed a first ex parte application seeking, among other things,  
2 the issuance of an alternative writ of mandate *compelling the City of San Diego* to recognize Cotton as  
3 the true applicant in place of Berry in connection with the subject CUP Application. On October 31,  
4 2017, and on November 2, 2017, the Hon. Judge Edward Sturgeon *denied the ex parte request for*  
5 *issuance of an alternative writ* and transferred the action to Judge Wohlfeil before whom the earlier-  
6 filed Geraci v. Cotton related action was pending. Cotton thereafter filed a second ex parte application  
7 seeking an order shortening time for hearing the matter, which was also denied. The hearing is  
8 currently set for Thursday, January 25, 2018.


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

18 By:   
19 Michael R. Weinstein  
20 Scott H. Toothacre  
21 Attorneys for Real Parties in Interest  
LARRY GERACI and REBECCA BERRY

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**I, Michael R. Weinstein, declare:**

1. I am an attorney with Ferris & Britton, APC, the attorneys for Real Parties in Interest, Larry Geraci and Rebecca Berry, in this action (the “Writ of Mandate Lawsuit”). I have personal knowledge of the facts stated in this declaration. If called as a witness, I would testify competently thereto. I provide this declaration in support of this ex parte application by Geraci and Berry.

2. I also represent Larry Geraci and Rebecca Berry (as Plaintiff and Cross-Defendants) in an earlier lawsuit filed on March 21, 2017, and captioned Larry Geraci v. Darryl Cotton, Case No. 37-2017-00010073-CU-BC-CTL, which is also assigned to Judge Wohlfeil (hereafter the “Geraci Lawsuit”). The Trial Date in the Geraci Lawsuit is May 11, 2018.

3. On January 25, 2018, this court is scheduled to hear two motions: (1) Cotton's motion for preliminary injunction in the instant Geraci Lawsuit; and (2) Cotton's motion for peremptory writ of mandate in the Writ of Mandate Lawsuit.

4. The January 25, 2018, hearing dates were set at ex parte hearings in these related proceedings heard on December 7, 2017, following the Court's denial of temporary restraining orders sought by Cotton in each of those proceedings.

5. At the time of the Thursday, December 7, 2017, ex parte hearings, Darryl Cotton's deposition was scheduled to be taken on Monday, December 11, 2017, pursuant to notice. A true and correct copy of the Sixth Amended Notice of Deposition of Defendant Darryl Cotton that I prepared and caused to be timely served on his attorney at the time, David Demian, is attached as Exhibit 1 to the Notice of Lodgment in Support of Ex Parte Application by Real Parties in Interest, Larry Geraci and Rebecca Berry, to Compel the Deposition of Darryl Cotton and to Continue the Hearing Date on Cotton's Motion for Issuance of a Peremptory Writ of Mandate (hereafter "Geraci/Berry NOL").

6. As set forth below, since December 7, 2017, Darryl Cotton has foiled all attempts to take his deposition. Most recently, he failed to appear at his deposition properly noticed for January 5, 2018, in the Geraci Lawsuit. A true and correct copy of the Seventh Amended Notice of Deposition of Defendant Darryl Cotton that I prepared and caused to be timely served on Mr. Cotton, in pro per, in the Geraci Lawsuit, is attached as Exhibit 2 to the Geraci/Berry NOL.

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

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

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

27           10.      On Tuesday, December 12, 2017, at 7:24 p.m., I received an email from Mr. Cotton in  
28 which he a) requested an extension from December 13<sup>th</sup> to December 29<sup>th</sup> to answer the written

1 discovery, and b) requested that I give him until Monday, December 18<sup>th</sup> to get back to him regarding  
2 which dates would work for his deposition. I responded by email on Wednesday, December 13, 2017,  
3 at 8:01 a.m., granting his requests for an extension until December 29<sup>th</sup> to respond to the pending  
4 written discovery and to have until Monday, December 18<sup>th</sup> to get back to me regarding a date for his  
5 deposition.

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

11 12. I responded immediately by email to Mr. Cotton, copying Mr. Austin, on December 19,  
12 2017, at 9:11 a.m. I told Mr. Cotton that, if he had retained Mr. Austin only in a limited capacity to  
13 assist him with appealing the denial of the three ex parte applications, *then he was still representing*  
14 *himself in all other respects in the two underlying lawsuits and that those underlying actions are*  
15 *ongoing as no appeal has yet been filed and, if and when those appeals are filed, the underlying*  
16 *actions will not automatically be stayed.* I then reminded him that I still needed to take his deposition  
17 and that if he did not advise me by the end of the day which date he would prefer, then I would notice  
18 his deposition for one of the five (5) dates I had previously proposed to him.

19 13. Mr. Cotton did not get back to me with his preferred deposition date. Instead, on  
20 December 19, 2017, at 10:06 a.m., he sent me a scathing email, copied to Mr. Austin, in which he  
21 accused me of blatantly lying to him to put him under intense and undue pressure. Mr. Cotton, now  
22 his own lawyer, cited me to inapplicable case law in The Rutter Group to supporting his incorrect legal  
23 position that his appeals stayed the action. He went on to say: "Do NOT contact me again or I will  
24 contact the California Bar and let them know that you are blatantly lying to me, etc. and he accused me  
25 of being "the worst kind of lawyer [who] will do anything for money," telling me he would not  
26 believe anything I tell him, and stating further: "DO NOT RESPOND. I DO NOT WANT TO HEAR  
27 FROM YOU AS YOU ARE PUTTING ME IN EMOTIONAL AND PHYSICAL DISTRESS. THIS  
28 IS NOT MELODRAMA. THIS IS REAL."



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

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

23           16. On December 20, 2017, at 8:07 a.m., I responded back to attorney Jacob Austin by  
24 email, reminding him that the filing of appeals did not stay the two underlying actions, and stating in  
25 pertinent part: **“I will be happy to communicate through you until you are able to get up to speed,  
26 with one exception: My oppositions to the motion for preliminary injunction and motion for a  
27 peremptory writ of mandate in the underlying actions are due January 11, 2018. I wish to take  
28 Mr. Cotton’s deposition sufficiently in advance of the date the oppositions must be filed. His**

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

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

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

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

21 20. I prepared to take Mr. Cotton’s deposition and on January 5, 2018, at the noticed place  
22 and time, I appeared before a court reporter to take the deposition of Darryl Cotton. Mr. Cotton failed  
23 to appear.

24 21. As described above, since December 8, 2017, I have consistently communicated to both  
25 Mr. Cotton and, later, attorney Jacob Austin, that I needed to take the deposition of Darryl Cotton  
26 sufficiently in advance of the January 11, 2018, due date for my clients’ oppositions to the pending  
27 motion for preliminary injunction in the Geraci Lawsuit and the pending motion for a peremptory writ  
28 of mandate in the Writ of Mandate Lawsuit. I tried to work with both to schedule the deposition but

1 received no cooperation regarding the scheduling. When that did not work, on December 20, 2018, I  
2 properly noticed the deposition for January 5, 2018. But Mr. Cotton has failed to appear.

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

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

14 24. On January 8, 2018, at approximately 8:30 a.m. I gave notice by telephone message to  
15 the Deputy City Attorney, M. Travis Phelps, of the instant ex parte hearing scheduled for January 9,  
16 2018, and the relief that would be requested at that ex parte hearing.

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

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

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26 MICHAEL R. WEINSTEIN