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Defendant *pro se*

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Attorney for cross-complainant

CONFORMED COPY
OF ORIGINAL FILED
Superior Court of California
County of Los Angeles
MAR 18 2010
John A. Clarke, Executive Officer/Clerk
By RUGENA LUBBZ, Deputy

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

CENTRAL DISTRICT

KENDRICK MOXON

Plaintiff,

v.

GRAHAM BERRY,

Defendants.

GRAHAM E. BERRY, an individual;

Cross-Complainant,

v.

KENDRICK L. MOXON, an individual;

Cross-Defendant.

Case No. BC 429217

Assigned to Hon. Rolf M. Treu, Dept. 58

CROSS-DEFENDANT'S OPPOSITION TO REQUEST FOR FINDING OF CONTEMPT

Date: No hearing scheduled
Dept: 58

Action filed: January 5, 2010

Trial Date: None

Unlimited jurisdiction in equity

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Mr. Moxon either misrepresents the contents of the cross-complaint herein or he has failed to read it properly. If he had read it properly he should have "noted" that in the prayer for relief (page 62) only two substantive orders are sought: (a) that the *Pattinson v. CSI* order be set aside; and (b) that the *Berry v. Cipriano* vexatious litigant order be set aside. Furthermore, if Mr. Moxon had read the cross-complaint properly he should have also "noted" that it was signed by attorney Barry Van Sickle, Esq., as counsel for the cross-complainant. Mr. Berry is now a represented party and beyond the "*in propria persona*" radius of Code Civ. Proc. §391.7.

II. APPLICABLE LAW

Cross-defendant Moxon relies exclusively upon Code Civ. Proc. § 391.7 (a)-(c) for the relief he seeks by way of orders for contempt and a bond of $198,000.00, to be entered into by cross-complainant Berry before he can proceed to equity herein. However, the procedures set forth in Code Civ. Proc. § 391.7 (a)-(c) are expressly applicable to "*in propria persona*" litigants only. The verified compulsory cross-complaint herein was filed on March 9, 2010, after being signed by Barry Van Sickle, Esq. as attorney for cross-defendant Berry.

Furthermore, cross-defendant Mr. Moxon provides absolutely no authority to support his argument that vexatious litigants who are represented by an attorney must also comply with the pre-filing and bonding requirements of Code Civ. Proc. § 391.7 (a)-(b). Ironically, in light of the *ad hominem* attacks upon Mr. Berry in the pending request, it appears that it is cross-defendant Mr. Moxon who acts frivolously here.

III. ARGUMENT

A. There is no "pending opposition" to any "request for leave to file action."

Cross-complainant Berry, then acting *pro se*, filed his Request and Order to file New Litigation (Judicial Council Form MC-701) and three supporting Appendices of Exhibits on February 16, 2010. Cross-defendant Moxon, also acting *pro se*, filed an Opposition and Request for Contempt on October 23, 2010. Cross-complainant Berry also filed his Revised Reply on October 23, 2010. Exhibit A hereto. On October 25, 2010 the court faxed it's denial of cross-

complainant's Request to file New Litigation and allowed cross-complainant Berry to file a noticed motion for the same relief. Exhibit B hereto. Consequently, cross-complainant Berry submits that the judgment roll herein discloses no "pending Opposition to … Request for leave ."

B. There is no "Amended Cross-complaint."

On March 9, 2010, and acting *pro se*, Mr. Berry filed a First Amended Answer herein. At the same time, and represented by very experienced counsel Barry Van Sickle, Mr. Berry filed a Verified Compulsory complaint. No where in the cross-complaint filed on March 9, 2010 is it described as an "amended" cross-complaint. Because Mr. Berry is represented by counsel on the cross-complaint he is not acting "*in propria persona,*" and he therefore does not require a pre-filing order as incorrectly contended by Mr. Moxon.

C. There is no record of any "stay" herein.

Mr. Moxon contends that "because [he] notified the Court and the clerk on February 22, 2010 of the alleged failure to obtain court leave of court prior to "[timely] filing a responsive compulsory cross-complaint and request for permission to file new litigation," … "the "action was automatically stayed." However, the judgment roll herein reflects no judicial recognition of that; and there are multiple actions by different judges since that mooted contention.

D. Cross-defendant ignores the facts and there is no request for re-litigation.

Cross-defendant Mr. Moxon ignores the facts when he repeatedly chants that "the cross-complaint seeks to re-litigate before this Court, five different lawsuits … . " However, if cross-defendant Mr. Moxon had actually read the verified compulsory cross-complaint, and comprehended its contents, he would have "noted" that the prayer for relief, in connection with the cross-complaint, seeks only: **(1)** to set aside the *Pattinson v. CSI* sanctions order upon the grounds of extrinsic crime and fraud; and **(2)** to set aside the vexatious litigant ruling upon the grounds of extrinsic crime and fraud and because it can be seen to be void from the face of the underlying judgment roll.

The grounds and evidence for the two "set aside" orders requested by cross-complainant Berry, *inter alia*, are set forth in paragraphs 98-100 of the cross-complaint. Indeed, as suggested on page 10:14 -11:2 of the attached Exhibit A, defendant and cross-complainant Berry

are now prepared to move immediately to the filing of a motion for summary judgment and/or summary adjudication based primarily upon the evidence and documents already before this court in the form of Appendices No. I-IV (Exhibits A-Z).

More-over, defendant and cross-complainant Berry would, in principle, stipulate to a stay of all litigation herein pending the filing and determination of a motion for summary judgment and/or summary adjudication of issues by the defendant and cross-complainant. If the cross-complaint is as frivolous as Mr. Moxon's *ad hominine* attack alleges, he can easily deal with it then by way of successful opposition and judgment.

E. There is no basis for contempt or a bond.

On page 11:11-25 of the Revised Reply to Request to file New Litigation, attached hereto as Exhibit A, cross-complainant Berry denies that there is any reasonable basis for a contempt order herein and further contends that there is now no statutory basis for any bond, because he is not "*in propria persona*" in connection with the cross-complaint filed herein by Barry Van Sickle, Esq. on March 9, 2010.

IV. CONCLUSION

For the foregoing reasons, plaintiff and cross-defendant Moxon's Request for Contempt and Bond orders should be denied.

DATED: March 16, 2010

Barry Van Sickle

Attorney for cross-complainant

Exhibit A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/25/10			DEPT. 78
HONORABLE WILLIAM F. FAHEY	JUDGE	K. SILVY	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
G. YOUNG, CA	Deputy Sheriff	NONE	Reporter

8:00 am BC429217

KENDRICK MOXON — Plaintiff Counsel: NO APPEARANCE

VS

GRAHAM BERRY — Defendant Counsel:

NATURE OF PROCEEDINGS:

COURT ORDER:

In Chambers:

The Court is in receipt of "Request and Order to file new litigation by vexatious litigant".

The request is DENIED. Defendant may file a noticed motion.

Notice to defendant.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 02-25-10 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 02-25-10

MINUTES ENTERED
02/25/10
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 02/25/10			DEPT. 78
HONORABLE WILLIAM F. FAHEY	JUDGE	K. SILVY	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
G. YOUNG, CA	Deputy Sheriff	NONE	Reporter

8:00 am BC429217

KENDRICK MOXON — Plaintiff Counsel — NO APPEARANCE

VS

GRAHAM BERRY — Defendant Counsel

NATURE OF PROCEEDINGS:

John A. Clarke, Executive Officer/Clerk

By: Kim Silvy
Kim Silvy

Graham Berry
ATTORNEY AT LAW
3384 Mc Laughlin Ave.
Los Angeles, Ca. 90066-2005

MINUTES ENTERED
02/25/10
COUNTY CLERK

Exhibit B

GRAHAM E. BERRY, Bar No.128503
Attorney at Law
3384 McLaughlin Avenue
Los Angeles, California 90066-2005
Telephone: (310) 745-3771
Facsimile: (310) 745-3771
Email: grahamberry@ca.rr.com

Defendant and Cross-Complainant *pro se*

CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

FEB 23 2010

John A. Clarke, Executive Officer/Clerk

By _____, Deputy
PAUL SANCHEZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CENTRAL DISTRICT

KENDRICK MOXON Plaintiff, v. **GRAHAM BERRY**, Defendants.	Case No. BC429217 **DEFENDANT AND CROSS-COMPLAINANT'S *REVISED* REPLY IN SUPPORT OF REQUEST TO FILE NEW LITIGATION AND REBUTTAL EXHIBITS.**
GRAHAM E. BERRY, an individual; Cross-Complainant, v. **KENDRICK L. MOXON**, an individual; Cross-Defendant.	Action filed: January 5, 2010

COMES NOW the defendant and cross-complainant **GRAHAM E. BERRY** and submits his ***Revised*** [1] Reply and Rebuttal exhibits in response to the opposition of Kendrick L. Moxon received late Saturday afternoon February 20, 2010. Over 20,000 people (and more every day) are now following this matter and reading the documents. One commentator provided a pertinent response to Mr. Moxon's *res judicata* arguments.

> "Yes, Mr. Berry is a vexatious litigant per the court's decisions, but it provides no manner of *critical thinking or devil's advocacy* to simply beat that drum over and over. Failure to take into account the series of events in which the vexations litigant decision was obtained is *willful ignorance*. Willful ignorance that solely benefits [Mr. Moxon's] intended behavior of continually insulting Graham Berry."

www.whyweprotest.net (Moxon v. Berry/Berry v. Moxon).

In addition, this case is to be highlighted on an Australian Sixty Minutes type show which recorded the footage last week in Los Angeles, and it will soon be part of a major German documentary which was recorded in Los Angeles two weeks ago. The wrongful conduct that was the basis of the three consolidated Berry cases, and the wrongful conduct that occurred during the three consolidated Berry cases, continues to this day with Mr. Moxon taking regular judgment debtors examination of him and using the underlying rulings for filings in unrelated matters, and publications around the world, to smear and discredit him. Had Mr. Moxon not obtained and published the May 5, 1994 declaration of Robert Cipriano, Mr. Berry's professional and personal; life would not have been destroyed and this saga would not have happened. App. IV, Ex. A & B, Z. Mr. Moxon began the "investigation" of Mr. Berry following Berry's win in the *Fishman-Geertz* case (Appendix IV, Exhibits A & B, Appendix III, Exhibit F, page 1). At that time, Mr. Berry had recently finished successfully representing the United States District Court Disciplinary

[1] On February 23, 2010 Mr. Moxon called Mr. Berry and advised him that the opposition under reply had not been filed until the 22nd, that a new opposition had been filed that corrected typos and added an authenticating declaration. That is incorrect. Mr. Berry files this revised reply primarily addressing the additional material. This filing is 2/23/10.

Committee as lead counsel before the three judge federal panel (with a former U.S. Attorney General as opposing counsel) in the *U.S. District Court Standing Committee on Discipline v. Stephen Yagman* proceeding. Mr. Berry later argued the appeal to the Ninth Circuit in the first ever televised proceeding from that court. Accordingly, Mr. Moxon's wild and wide allegations may merit some closer scrutiny.

The opposition is long on shrill accusations of "baseless allegations" that are "frivolous on their face." (Opposition, p.4:20, p. 6:20). However, the cross-complaint is verified and it includes supporting and unassailable deposition testimony, declarations and other materials which have never reviewed by a court in the context alleged by Mr. Moxon. The amazing *Hurtado*, *Apodaca* and *Cipriano* material in Appendix No. 1, the brief of Edith Matthai, Esq., is merely one example. NEVER HAS MR. MOXON DENIED ANY OF THIS AND HE DOES NOT DO SO HEREIN. HIS ONLY ARGUMENTS ARE RES JUDICATA AND LACHES. However, it is all PUFFERY. See Declaration of Federal Judge James M. Ideman (Appendix 4, Exhibit Y, p. 279:19. This is a classic case for the relief requested by cross-complainant. In that regard it is interesting to note that **Mr. Moxon and his New York co-counsel had the vexatious litigant proceedings temporarily sealed and wanted Judge Williams to permanently seal the entire vexatious litigant proceedings** and order Mr. Berry to file a copy of the vexatious litigant ruling in every court in which he appeared whether as counsel of record or *pro se*. App. No. 4, Ex. T, pp. 191: 20- 196: 9. Interestingly, it is implicit in Mr. Moxon's allegations and argument that the Cipriano, Hurtado and Apodaca matters had a <u>full</u> hearing in other courts that a reasonable judge would not be outraged that they had occurred at the hands of an officer of the court (the plaintiff and cross-defendant). <u>How can Mr. Moxon even suggest that a reasonable fully informed jurist would tolerate the matters set forth in the four volumes of exhibits hereto, particularly what Mr. Moxon did with Cipriano, Hurtado and Apodaca (Appendix No. I – III)?</u> In addition, Mr. Moxon has never denied

the now apparent major monetary links, at the very least, between Judge William's then fiancée and now wife, Mr. Moxon, other counsel and the main defendants in the underlying *Berry* matters now at issue herein. Appendix IV, Exhibit V. See also, Append. No. 1, Exhibit A, pp. 2-15.

Few lawyers would have shamelessly solicited the representation of clients (Cipriano, Hurtado and Cipriano) and let alone in a case where that lawyer (Mr. Moxon) was to be a principal defendant and percipient witness, avoid ever having to respond to the original allegations, obtain court orders with demonstrable crime and fraud, spend the next ten years destroying and harassing Mr. Berry into near suicide with those orders, shamelessly appear in this court and ignore all that crime and fraud, and then shamelessly request this court to again deprive Mr. Berry of a hearing, and to ironically demand that it be Mr. Berry who be found in contempt and prevented from being heard on his verified claims without a prohibitive bond; and then claim that it is he (Mr. Moxon) who is the victim! No wonder so many people around the world are now watching this travesty to see if our justice system can still right its own wrongs, after failing so miserably in the underlying matters. No wonder documentaries are being made, book proposals solicited and movies suggested about this scandalous saga. The magnitude of the underlying attorney crime and fraud, and the enormous cover-up that followed, is like none other in the case books, and it can no longer be ignored. See Exhibits A-Z.

I. THE EVIDENCE AND THE FACTS HAVE NEVER BEEN DENIED BY MOXON

Most significantly, plaintiff and cross-defendant Kendrick L. Moxon ("Mr. Moxon") has never denied, at least under oath, any of the testimony set forth in the four appendices of testimony submitted with the responsive pleading and application herein. He cannot do so without invoking Fifth Amendment protection! However, Mr. Moxon did conduct a withering, embarrassing and self-incriminating cross-examination of his own former client Cipriano and his fifty documents (many signed by Mr. Moxon himself) [see Appendix I, II and III (Exhibit E)] during the *Hurtado*

case, before he dismissed it on the eve of a formal crime-fraud ruling by the judge. (Appendix 1, pages 4-12, Robie & Matthai [Edith Matthai, Esq.] law firm brief re privilege and the crime-fraud exception regarding some of the very same evidence herein). These matters have never faced a court since Mr. Moxon voluntarily dismissed the *Hurtado* state court case on the eve of a ruling that Mr. Moxon had engaged in the very same crime and fraud that is alleged in the proposed cross-complaint herein.

Furthermore, Mr. Moxon never appealed the denial of his Code Civ. Proc. §425.16 motion by Hon. Ernest Hiroshige who found that Mr. Berry, in the related, consolidated *Berry v. Cipriano, Berry v. Barton, Berry v. Miscavige, Moxon, Ingram, Rinder* cases, had "established a probability that he would prevail on [his] claims [later ruled to be vexatious by Judge Alexander Williams, III (now retired)]." Code. Civ. Proc. §425.16 (3). Not one of the Code Civ. Proc. §391.7 statutory requirements were satisfied. More-over, there were substantial settlements by several non-Scientology parties named in the *Berry v. Cipriano* case (Appendix IV, Exhibit R, pp.80-81). Finally, for present purposes, and as observed by former California Supreme Court Justice David N. Eagleson observed, Mr. Berry was represented by counsel for most of the underlying litigation in which he was deemed vexatious by Judge Williams. Appendix IV, Ex. O, p. 22-25. No lawyer who has objectively viewed the vexatious litigant papers and hearing can understand the staggering unjust result and why the judge would even be discussing sealing the proceedings from public view and requiring Mr. Berry to do things so totally beyond the scope and interpretation of the statute (C.C.P. §391.7), which provides little opportunity for relief, review and/or correction. This may explain why Mr. Moxon and his co-counsel had the proceedings sealed and fought to keep them sealed. Appendix No. 4, Exhibit T, pp. 191: 20- 196: 9.

Instead of appealing his unsuccessful SLAPP suit motion, Mr. Moxon had the three related and consolidated *Berry* cases transferred to another judge (upon a Code Civ. Proc. §176.6

peremptory challenge) because Judge Hiroshige was allegedly prejudiced against his clients (and himself who was to be named as a principal defendant after a Code Civ. Proc. §1714.10 motion). The three *Berry* cases were: *Cipriano* against the non-Scientology parties who provided the defamatory material; *Barton* against those who published the defamatory material; and *Miscavige/Ingram/Moxon/Rinder* against those who procured the defamatory material]. Interestingly, Cipriano has testified that Mr. Moxon informed him that "Judge Hiroshige was lame" and that the Berry cases were being transferred to a judge who was "friendly" to Scientology. Mr. Moxon has always argued that the three cases were identical, as was *Pattinson*, and the three *Berry* cases were consolidated for all purposes. Appendix No. 4, Ex. S, pp. 92:4-7:2. As a result of the preemptory challenge to Judge Hiroshige, the *Berry* cases were re-assigned to Hon. Alexander Williams, III where they were later consolidated for all purposes. Appendix No. 2, Exhibit M.

Judge Williams accepted the misrepresentations of Mr. Moxon and his New York co-counsel that there was discovery priority in California and because defendant Robert Cipriano (through Mr. Moxon) had served his deposition of Mr. Berry first, Mr. Berry could take no deposition discovery at all until his deposition was concluded by Mr. Moxon. Since then Mr. Moxon has taken nearly twenty days of Mr. Berry's deposition and examination but Mr. Berry has not been permitted as much as one second of **any** deposition discovery (and virtually no document discovery) throughout the entire history of the three consolidated *Berry* cases now involved herein. See generally, Appendix IV, Ex. P. Subsequently, and just before the vexatious litigant hearing, it was revealed that the fiancée of Judge Williams was employed as a translator by the Church of Scientology International which was a party in the litigation, it is/was one of Mr. Moxon's clients, it pays most of Mr. Moxon's income, and it is the actual physical location of Mr. Moxon's own office. More than this, it now appears that the Judge's then fiancée (and now second wife) was the

fifty per cent proprietor of a large translation services company providing services in over ninety different languages to the Church of Scientology International and its affiliates. When challenged on this, Judge Williams refused to recuse himself (to refer the recusal motion to another judge), a resulting writ was denied, and the subsequent appeal papers disappeared from the files. Appendix IV, Exhibit V.

Although the cross-complaint herein satisfies the "meritorious case" requirement, as also evidenced by Judge Hiroshige's denial of Mr. Moxon's initial "SLAPP" motion, in this particular matter there is no meritorious case requirement in connection with the requested review of the vexatious litigant ruling at issue herein; because there is "an exception from the meritorious case requirement when the judgment was rendered by a judge who was disqualified from hearing in the case by reason of a financial interest in or bias [Code Civ. Proc. §§170.1-170.5]." California Forms of Pleading and Practice Annotated, Chapter 489, Relief from Judgments and Orders, §§489.166, 489.264 [1]. Appendix IV, Ex. V. On the basis of this summary alone it should be apparent that the vexatious litigant ruling is void from the face of the judgment roll itself and that there was much irregularity associated with it. For example, see Appendix IV, Exhibits K-V.

II. THE PRE-FILING ARGUMENT IS SPECIOUS

The opposition demands Mr. Berry be found in contempt and required to post a bond of at least $100,000.00 in order to be heard herein; because he did not obtain prior leave of the court pursuant to Code Civ. Proc. §391.7. However, Mr. Moxon served Mr. Berry with a complaint that required a responsive pleading within thirty days. A pre-filing motion, accompanied by the completed papers, would have required two to three months of moving, opposition, reply and hearing procedure (or *ex parte* applications and motions on shortened notice supporting by pleadings and exhibits not then ready). Applicable law required Mr. Berry to assert any related

claims against Mr. Moxon in a compulsory cross-complaint. Accordingly, Mr. Berry filed the pre-filing request (Judicial Council Form MC 701 and Exhibits A-J) with the responsive pleading; an unverified answer and verified cross-complaint. Mr. Moxon should not be permitted to benefit from this procedural Catch-22. "Equity looks to substance over form."

III. THE OPPOSITION IGNORES THE APPLICABLE LAW

Mr. Moxon's opposition to Mr. Berry's responsive pleading and request to file new litigation totally ignores the entire body of applicable equity and case-law. See generally, California Judges Bench Book, Civil Proceedings, After Trial, §§ 142-347, West's California Jurisprudence 3D, Volume 40A Judgments, §280, *et. seq.,* California Forms of Pleading and Practice Annotated, Chapter 489, Relief from Judgments and Orders. Stated most succinctly, Mr. Moxon's opposition ignores the following matters of black letter law:

A. This Court has inherent jurisdiction to grant the equitable relief requested.

"Equitable relief from a judgment may be obtained either by a separate suit" [and] "does not have to be tried by the court that rendered the judgment." West's California Jurisprudence 3D, Volume 40A Judgments, §301. "California courts may set aside the void orders of federal courts. West's California Jurisprudence 3D, Volume 40A Judgments, §§301, 305 (citing *Sato v. Hall* (1923) 191 Cal. 510). The answer and cross-complaint filed herein are, *inter alia*: (1) a collateral attack upon the validity of the vexatious litigant ruling which is void upon the face of the record [e.g. *Bennet v. Hibernia Bank* (1956) 47 Cal. 2d 540, 554, and (2) an independent action in equity to have the requested judgments/orders declared void on the ground of extrinsic fraud or mistake [e.g. *Estate of Sanders* (1985) 40 Cal. 3d 607, 614, *Sullins v. State Bar of California* (1975) 15 Cal. 3d 609, *Westphal v. Westphal* (1942) 20 Cal. 2d 393, 397, *Smith v. Jones* (1917) 174 Cal. 513, 517-518, *Russell v. Dopp* (1995) 36 Cal. App. 4th 765, 774-779. The concept of "extrinsic

fraud" and "extrinsic mistake" are given a very broad meaning by the courts. California Forms of Pleading and Practice Annotated, Chapter 489, Relief from Judgments and Orders,§§70.483. For example, in *Caldwell v. Taylor* (1933) 218 Cal. 471, 479, the Supreme Court held that "extrinsic fraud" is that fraud practiced by an opposing party which prevents the unsuccessful party from presenting all of his or her case to the court.

B. <u>There is no statute of limitations in proceedings of this nature.</u>

"A collateral attack on a judgment or order void on its face may be made at any time." West's California Jurisprudence 3D, Volume 40A Judgments, §314 (citing *Falahati v. Kondo* (2005) 127 Cal. App. 4th 823, *Schwab v. Southern California Gas Co.* (2004) 114 Cal.App. 4th 1308. Similarly, a judgment or order procured through extrinsic fraud or mistake [particularly by an officer of the court] may be set aside by collateral attack at anytime. *Harkins v. Fielder* (1957) 150 Cal.App. 2d 528-535-536. See also, California Forms of Pleading and Practice Annotated, Chapter 489, Relief from Judgments and Orders, §489.200. Indeed, "the courts have ruled that equity must allow [a] separate action regardless of any earlier opportunity to move for the same relief in which the judgment was entered" and the "making of a prior motion for relief may not bar a subsequent action in equity." California Forms of Pleading and Practice Annotated, Chapter 489, Relief from Judgments and Orders, §489.266. Laches and prejudice are not grounds for objection. West's California Jurisprudence 3D, Volume 40A Judgments, §314 (citations omitted). All appropriate remedies are available. *Caldwell v. Taylor* (1933) 218 Cal. 471, 475, *Brink v. Taylor* (1984) 155 Cal.App.3d 218, 222.

C. <u>Res Judicata and Collateral Estoppel are not applicable in proceedings of this nature.</u>

"The doctrine of *res judicata* is inapplicable to void judgments." West's California Jurisprudence 3D, Volume 40A Judgments, §305 (citing (*Rochin v. Pat Johnson Manufacturing*

Co., (1998) 67 Cal. App. 4th 1228, as modified on rehearing). " See also, California Forms of Pleading and Practice Annotated, Chapter 489, Relief from Judgments and Orders, §489.223. An order denying a motion to vacate a judgment, if it gives rise to a void judgment, is itself void and appealable." West's California Jurisprudence 3D, Volume 40A Judgments, §305 (citation omitted).

D. Discovery may be taken in proceedings of this nature.

In a proceeding of this nature, where an independent action in equity has been asserted to set aside a judgment or order, the plaintiff/cross-complainant "would be entitled to bring unwilling witnesses to court by subpoena and to take their depositions." California Forms of Pleading and Practice Annotated, Chapter 489, Relief from Judgments and Orders, §489.266.

IV. DISCOVERY OR DISPOSITIVE MOTION?

The deposition notice served herein upon Mr. Moxon was done in the same way as Mr. Moxon's own pattern and practice of serving a deposition notice and document demand before even appearing or answering, and then claiming that no other party can conduct depositions until his are all finished. Mr. Moxon has advised Mr. Berry, in writing, that he will totally ignore the deposition notice and document demand without seeking any judicial relief. Notwithstanding, Mr. Berry believes that he has sufficient deposition testimony, declaration testimony, and admissible exhibits, with which to proceed immediately to the filing of a motion for summary judgment on both the complaint and cross-complaint. Fifty per cent of that material is already before the court in the four appendices of exhibits. Accordingly, defendant and cross-complainant proposes that the court stay all further proceedings and permit him to file a motion for summary judgment. This is a substantial task and defendant and cross-complainant requests until July 9, 2010 in order to do so (before he attends his Dad's 85th birthday in New Zealand). If the motion for summary

judgment is unsuccessful then the court could tailor a case management order in respect of any discovery the parties may desire at that time.

V. THE OPPOSITION CONCEDES THAT THE CASES ARE INTERTWINED

The opposition does not dispute the allegations of judicial estoppel arising from Mr. Moxon's repeated assertions (in papers and arguments) in the federal and state courts that Mr. Berry should be sanctioned and deemed vexatious for life because the *Pattinson* and *Berry* cases were related. For example, see Appendix IV, Ex. Q, p.64-65, Appendix IV, Ex. R, p.92-93, Appendix IV, Ex. T.

VI. THERE IS NO BASIS FOR CONTEMPT OR A BOND

Defendant and cross-complainant opposes the request for contempt sanctions ironically made by plaintiff and cross-defendant. Furthermore, and as a direct result of the Cipriano, Hurtado and Apodaca matters solicited and suborned by the plaintiff and cross-defendant, the defendant and cross-complainant has lost his career, condo, car, retirement, all property, and survives largely upon donations from outraged citizens. To the extent the defendant and cross-complainant handles any legal matters he usually does so *pro bono* and has absolutely no office assistance of any nature. Much of his life is spent under the surveillance of Mr. Moxon's private investigators. In any event, should the request to file the cross-complaint be denied there are other attorneys ready and willing to moot Mr. Moxon's chicanery by entering their appearance as defendant and cross complainant's counsel of record herein. However, that should not be necessary as a matter of both law and equity.

//

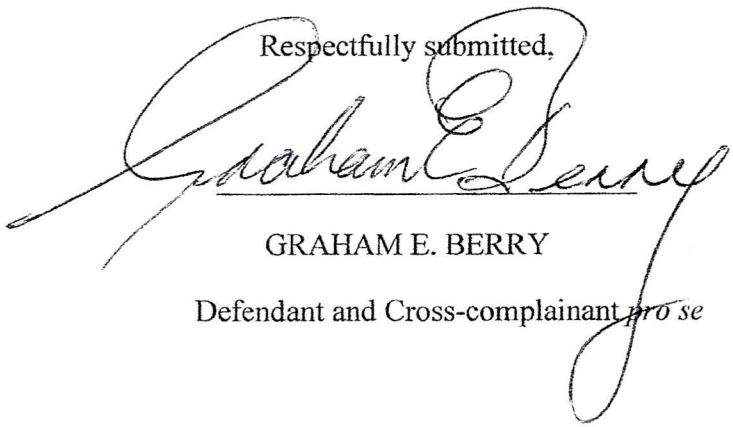
//

VII. CONCLUSION

The defendant and cross-complainant should now be permitted to proceed with an immediate motion for summary judgment as requested herein. That will provide the court with a better basis with which to adjudge the arguments made in the opposition under reply. For the foregoing reasons, the pending Judicial Form MC-701 (C.C.P. §391.7) should be approved and the cross-defendant's opposition and other requests denied.

Dated: February 23, 2010

Respectfully submitted,



GRAHAM E. BERRY

Defendant and Cross-complainant *pro se*

PROOF OF SERVICE BY HAND

STATE OF CALIFORNIA) ss.:
)
COUNTY OF LOS ANGELES)

MOXON V. BERRY BC42917

I am employed in the County of Los Angeles, State of California. I am over the age of 18. My business address is 3384 McLaughlin Avenue, Los Angeles, CA 90066. I am an officer of the court herein.

CROSS-DEFENDANT'S OPPOSITION TO REQUEST FOR FINDING OF CONTEMPT

On March 17, 2010, I personally served on interested parties in said action the within:

by placing a true copy thereof in sealed envelope(s) addressed as stated below and by delivering the envelope (s) by hand to the offices of the addressee (s).

Kendrick L. Moxon, Esq,
Moxon & Kobrin
3055 Wilshire Boulevard, Suite 900
Los Angeles, CA 90010

Telephone: (213) 487-4468
Facsimile: (213) 487-5385
Email: kmoxon@earthlink.net

Executed on March 17, 2010 at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Graham E. Berry
(Type or print name)

Graham E. Berry
(Signature)