

1 **LESOWITZ GEBELIN LLP**
2 Steven T. Gebelin, Esq. (Bar No. 261507)
3 steven@lawbylg.com
4 8383 Wilshire Blvd., Suite 800
5 Beverly Hills, CA 90211
6 Telephone: (310) 341-3072
7 Facsimile: (310) 341-3070

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David W. Slayton,
Executive Officer/Clerk of Court,
By J. Hernandez, Deputy Clerk

8 Attorneys for Plaintiff Jose DeCastro

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES, SANTA MONICA COURTHOUSE**

11 JOSE DECASTRO,

12 Plaintiff,

13 V.

14 KATHERINE PETER; DANIEL
15 CLEMENT; MICHAEL PIERATTINI;
16 DAVID OMO JR.; and DOES 1 TO 30,
17 inclusive,

18 Defendants.

Case No.: 23SMCV00538

Assigned for all Purposes to
Hon. H. Jay Ford III, Department O

**PLAINTIFF JOSE DECASTRO'S
OPPOSITION TO DEFENDANT MICHAEL
PIERATTINI'S MOTION FOR SANCTIONS,
INCLUDING A REQUEST FOR
MONETARY SANCTIONS AGAINST
PLAINTIFF IN THE SUM OF \$4,560.00**

Date: January 23, 2025
Time: 8:30 A.M.
Dept: O

1 **I. Introduction.**

2 Defendant Michael Pierattini’s requests for terminating and monetary sanctions are ill-
3 timed and poorly taken. Plaintiff Jose DeCastro was wrongly incarcerated in Nevada at the time
4 the underlying orders requiring supplemental responses were issued. Despite (actually, likely
5 aided by) Plaintiff’s incarceration, Defendant sought summary judgment and received a ruling in
6 his favor on all but one claim against him without the aid of the written discovery underlying this
7 motion. Moreover Plaintiff’s counsel and Defendant’s counsel were in the middle of discussing
8 discovery issues when this motion was filed without warning. Critically, **Plaintiff has provided**
9 **the required supplemental responses**, such that issuing terminating sanctions is not necessary to
10 correct the prior discovery failure and such heavy sanction would be contrary to controlling law.
11 Additionally, Plaintiff’s failure to supplement his responses earlier was justified in light of both
12 the summary judgment motion practice and discussion amongst counsel such that imposing further
13 monetary sanctions against him would be unjust, and there is no basis to award sanctions against
14 his attorney. While this Court can issue appropriate orders in light of the state of discovery,
15 terminating sanctions cannot be imposed and monetary sanctions would be unjust. The motion
16 should be denied.

17 **II. Relevant Factual Background.**

18 The underlying discovery orders requiring DeCastro to supplement his responses to
19 Defendant’s written discovery within 30 days, were issued as a Specially Prepared Order
20 pertaining to the (1) Form Interrogatories on April 4, 2024 and also as a Minute Order on May 2,
21 2024 pertaining to the (2) Special Interrogatories, (3) Requests for Admission, and (4) Requests
22 for Production¹. *See* Gebelin Decl. ¶ 3, DeCastro Decl. ¶ 4. At the time of those orders, Mr.
23 DeCastro was wrongfully imprisoned in Nevada, for the period from March 2024 to July 2024.
24 DeCastro Decl. ¶¶ 2-4. DeCastro’s incarceration in Nevada continued beyond the end of the 30
25

26
27 ¹ Defendants’ motion also references a monetary sanction issued against Plaintiff in connection
28 with an unsuccessful motion he brought seeking reconsideration of a discovery sanction
previously imposed against him. *See, e.g.* Motion at 5:11-12. That order did not change or
impose additional discovery obligations on Plaintiff.

1 days periods within which he would have been required to supplement the written discovery
2 responses. *Id.* During his incarceration Mr. DeCastro did not see or have copies of the orders
3 requiring supplemental discovery. *Id.* ¶ 7.

4 Also while Mr. DeCastro was wrongfully imprisoned, Defendant filed a Motion for
5 Summary Judgment addressing all causes of action against Pieratinni. That motion was filed
6 without the benefit of the ordered supplemental discovery responses from DeCastro. The
7 summary judgment motion was eventually granted as to all causes of action except Plaintiff's
8 cause of action based on violations of his right of publicity. Plaintiff's opposition was quickly
9 prepared in the short time following his release from prison.

10 In addition to needing to spend substantial time to reestablish his occupation and income
11 after his release from wrongful imprisonment, Plaintiff suffers from PTSD and otherwise suffered
12 from significant mental stress, fatigue, and confusion preventing him from participating in and
13 focusing on the litigation of this case at the level that he would have ordinarily provided.
14 DeCastro Decl. ¶ 8.

15 Following the motion practice on Pieratinni's summary judgment motion, Plaintiff's newly
16 hired counsel and defendant's counsel corresponded about rescheduling DeCastro's deposition
17 (which Defendant had twice rescheduled or cancelled) and discussing the outstanding discovery
18 issues in order to make sure Defendant had the discovery needed to defend the case. Gebelin
19 Decl. ¶ 6, Ex. 1. After Defendant's counsel cancelled a scheduled call and did not respond to a
20 request to set a new time for it, this motion was filed without warning. *Id.*, ¶ 6.

21 Despite this motion being filed without warning, Plaintiff has served supplemental
22 responses to the written discovery requests as ordered and produced documents. Gebelin Decl. ¶
23 7. Those supplemental responses have been completed to the best of Plaintiff's ability. DeCastro
24 Decl. ¶ 9.

25 **III. Legal Standard.**

26 For alleged discovery violations, "terminating sanctions are to be used sparingly, only
27 when the trial court concludes that lesser sanctions would not bring about the compliance of the
28 offending party." *R.S. Creative, Inc. v. Creative Cotton, Ltd.*, 75 Cal. App. 4th 486, 496 (1999).

1 A “terminating sanction should generally not be imposed until the court has attempted less severe
2 alternatives and found them to be unsuccessful and/or the record clearly shows lesser sanctions
3 would be ineffective.” *Lopez v. Watchtower Bible & Tract Soc’y of New York, Inc.*, 246 Cal. App.
4 4th 566, 604 (2016). “In exercising this discretion, a variety of factors may be relevant, including,
5 1) the time which has elapsed since interrogatories were served, 2) whether the party served was
6 previously given a voluntary extension of time, 3) the number of interrogatories propounded, 4)
7 whether the unanswered questions sought information which was difficult to obtain, 5) whether
8 the answers supplied were evasive and incomplete, 6) the number of questions which remained
9 unanswered, 7) whether the questions which remain unanswered are material to a particular claim
10 or defense, 8) whether the answering party has acted in good faith, and with reasonable diligence,
11 9) the existence of prior orders compelling discovery and the answering party’s response thereto,
12 10) whether the party was unable to comply with the previous order of the court, 11) whether an
13 order allowing more time to answer would enable the answering party to supply the necessary
14 information, and, 12) whether a sanction short of dismissal or default would be appropriate to the
15 dereliction.” *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 796–97 (Ct. App. 1978)

16 A “terminating sanction issued solely because of a failure to pay a monetary discovery
17 sanction is never justified.” *Newland v. Superior Ct.*, 40 Cal. App. 4th 608, 615 (1995), as
18 modified (Dec. 6, 1995).

19 Monetary sanctions may only be imposed against a party’s attorney when they have been
20 found to be affirmatively “advising” abuse of the discovery process. Cal. Civ. Proc. Code §
21 2023.030 (a).

22 Furthermore, even where “a monetary sanction is authorized” the Court need not impose
23 sanctions where “the one subject to the sanction acted with substantial justification or that other
24 circumstances make the imposition of the sanction unjust.” Cal. Civ. Proc. Code § 2023.030 (a).

25 **IV. Argument.**

26 A. *This Court Must Not Dismiss Plaintiff’s Remaining Claim Against Pieratinni.*

27 Because of the severe nature of a terminating sanction, it is unlawful in situations where
28 the discovery violation can be cured by a lesser sanction. Here, the discovery issue has been cured

1 without imposition of any further sanctions- Plaintiff has complied with the orders and provided
2 supplemental responses, even to discovery requests that are no longer relevant to pending claims
3 against Mr. Pieratinni. The responses provided were complete to the best of the ability of Mr.
4 DeCastro, and Plaintiff was seeking to comply with the orders prior to this motion being filed
5 without warning.

6 While Pieratinni may need additional time to complete his discovery based on the late
7 receipt of these supplemental responses, the sole remaining claim must not be dismissed when the
8 supplemental discovery responses (both relating to the remaining cause of action and even those
9 dismissed) have been served. To the extent that any monetary sanctions are outstanding, Mr.
10 Pieratinni is free to seek to enforce those awards as judgment, but not to have Mr. DeCastro's
11 claims dismissed. *See, e.g. Newland v. Superior Ct.*, 40 Cal. App. 4th 608, 615 (1995), as
12 modified (Dec. 6, 1995) ("a terminating sanction issued solely because of a failure to pay a
13 monetary discovery sanction is never justified").

14 *B. No Monetary Sanctions Should Issue.*

15 As detailed above, DeCastro was unable to timely comply with the orders requiring
16 supplemental discovery because he did not see them while he was wrongfully incarcerated and did
17 not have the ability to prepare the supplemental responses. *See, e.g. DeCastro Decl.* ¶ 7. Since his
18 release, in addition to restoring his life, he has suffered from PTSD and other mental maladies
19 preventing him from focusing on this litigation as he would have otherwise done. *Id.* ¶ 8. Despite
20 those issues, DeCastro provided supplemental responses as ordered to the best of his ability. *Id.*
21 ¶9. If those weren't enough of an explanation, DeCastro's counsel was in the process of
22 conferring with opposing counsel on the discovery Defendant believed was necessary to proceed
23 with the case when opposing counsel unilaterally cancelled a scheduled teleconference and instead
24 filed this motion without warning. This gamesmanship should not be rewarded, and no monetary
25 sanctions should issue.

26 *C. No Monetary Sanctions May Be Imposed Against Plaintiff's Counsel*

27 In addition to the above reasons why no monetary sanctions would be appropriate or just in
28 these circumstances, there is absolutely no basis for Defendant's request for an award of monetary

1 sanctions against Plaintiff's counsel. Mr. Gebelin did not advise Mr. DeCastro to commit any
2 discovery misconduct at issue; instead he attempted to work with Defendant's counsel to resolve
3 the outstanding discovery issues and accommodate Mr. Katrinak's schedule for a deposition of
4 Mr. DeCastro. As such, no sanctions can be awarded against Mr. Gebelin.

5 **V. Conclusion.**

6 For the foregoing reasons, it would be against the controlling law for this Court to impose
7 terminating sanctions against Mr. DeCastro in light of his provision of complete supplemental
8 discovery responses as previously ordered. Nor were Mr. DeCastro's delays prior to the filing of
9 this motion without justification, such that the imposition of monetary sanctions in this instance
10 would be unjust and improper. Finally, no monetary sanctions may issue against Mr. Gebelin as
11 he did not advise any discovery violation or abuse on the orders issued before he appeared as
12 counsel. While other remedies may be available, neither the monetary or terminating sanctions
13 sought in this motion are appropriate.

14
15 DATED: January 10, 2025

LESOWITZ GEBELIN LLP

16 By:

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18 Steven T. Gebelin

19 Attorneys for Plaintiff Jose DeCastro
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

DeCastro v. Peter, et al., Los Angeles County Superior Court Case No 23SMCV00538

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 8383 Wilshire Blvd., Suite 800, Beverly Hills, CA 90211.

On January 22, 2025, I served the following document(s) on the interested parties in this action:
OPPOSITION TO DEFENDANT MICHAEL PIERATTINI'S MOTION FOR SANCTIONS, INCLUDING A REQUEST FOR MONETARY SANCTIONS AGAINST PLAINTIFF IN THE SUM OF \$4,560.00

by placing true copies thereof enclosed in sealed envelopes addressed as follows:

R. Paul Katrinak, State Bar No. 164057
LAW OFFICES OF R. PAUL KATRINAK
9663 Santa Monica Blvd., 458
Beverly Hills, California 90210
Telephone: (310) 990-4348
Facsimile: (310) 921-5398
katrinaklaw@gmail.com
Attorneys for Defendant
Michael Pierattini

(BY E-MAIL) Pursuant to CCP § 1010.6, based on the named party's electronic filing in this case being deemed assent to electronic service under the local rules, I sent such document to the individual(s) identified at the email address referenced above.

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

Executed on January 22, 2025, at Los Angeles, California.



Steven T. Gebelin