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Defendant and Cross-Complainant *pro se*

SUPERIOR COURT OF THE STATE 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. BC429217

DEFENDANT AND CROSS-COMPLAINANT'S APPENDIX NO. IV OF EXHIBITS [K-Z] AND REQUEST FOR JUDICIAL NOTICE FILED AS PART OF THE UNVERIFIED ANSWER AND VERIFIED COMPULSARY CROSS-COMPLAINT HEREIN.

Action filed: January 5, 2010

[Filed concurrently with Reply in Support of Request to file Compulsory Cross-Complaint by Judicial Council of California Form MC-701 (C.C.P. §391.7) and Exhibits A-J therewith.]

EXHIBIT Q

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

GRAHAM E. BERRY, Plaintiff, vs. ROBERT J. CIPRIANO, et al., Defendants. AND RELATED CASES.	Case No. BC 184355 PETITION TO FIND GRAHAM E. BERRY TO BE A VEXATIOUS LITIGANT C.C.P. §391 *et seq.* DATE: June 16, 1999 TIME: 8:30 a.m. DEPT: 35

TO RESPONDENT GRAHAM E. BERRY:

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Please take notice that on June 16, 1999, the named petitioners will appear at

8:30 a.m., in Department 35, Los Angeles Superior Court, 111 N. Hill St., Los Angeles, CA, and will at such time seek a ruling that Graham E. Berry is a "vexatious litigant" as such term is defined in C.C.P. §391.

This motion is supported by the accompanying memorandum of points and authorities and such evidence and argument as may be presented at the time of the hearing on this motion.

Dated: May 14, 1999

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE, LLP

/S/

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Respondent Graham E. Berry, an attorney acting as a *pro se* litigant, and while representing a client, has filed numerous frivolous actions against the Churches of Scientology, their members, employees and counsel within the past two years. All of these actions have been dismissed either by judicial action or by voluntary dismissal by Berry, but only after the expenditure of substantial costs and attorneys' fees by the defendants. Unfortunately, although the defendants have been awarded substantial cost judgments and been awarded a variety of sanctions, Berry has boasted that he will file bankruptcy and avoid payment of those obligations. He also threatens further *pro se* suits.

Berry is the very definition of a vexatious litigant, having filed these actions only to harass, harm and attempt to silence the defendants in each case. He has been sanctioned on no less than 7 different occasions by 5 different judges for abusive acts against petitioners and related Scientology parties — including most recently, a sanctions ruling in the Central District of California for "bad faith" litigation tactics and the filing of unreasonable and vexatious pleadings.[1]

Berry has now threatened to file yet another new action against petitioners and other persons and entities associated with the Church of Scientology, asserting the same claims that he has already voluntarily dismissed. Under any standard, particularly the objective standard set forth in C.C.P. §391, Berry is clearly a "vexatious litigant" and should be required to obtain leave of court prior to the filing of any new action and the attendant bonding of any claim judicially deemed colorable.

---

[1] While that federal sanctions ruling involved Berry's representation of a client against the very defendants Berry has been harassing through his *pro se* actions, his conduct is the same whether as lawyer or litigant. *See* pp. 12-13.

II. STANDARDS FOR DETERMINATION OF VEXATIOUS LITIGANT

California Code of Civil Procedure, Section 391(b), defines "vexatious litigant" as any one of four different types, three of which apply to Graham Berry:

> (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person ...
>
> * * *
>
> (3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.
>
> (4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

Section 391.7 authorizes the filing of a motion with the presiding judge where future litigation is threatened by a vexatious litigant. If the Court finds that the proposed plaintiff is a vexatious litigant, he must seek and obtain leave of the Court prior to the filing of any new complaint, which leave will only be given if the proposed new action has merit and is not filed for purposes of harassment.

III. BERRY IS A VEXATIOUS LITIGANT

A. Berry's Background of Harassment and Threats

For several years, attorney Graham Berry has harbored a consuming animus against the Scientology religion, resulting in his filing of several frivolous *pro se* actions.

Berry's obsessive enmity toward Scientology first surfaced in the early 1990's when he was a member of Lewis, D'Amato, Brisbois and Bisgaard and defended a defamation action brought by the Church of Scientology International. *Church of Scientology International v. Geertz*, No. CV 91-6426, C.D.Cal.

Berry attempted to extort a "settlement" of the *Geertz* case, in which he purported to represent numerous claimants who would settle a host of imaginary claims, both asserted

and unasserted. With one exception, Berry represented none of the persons for whom he sought settlement, most of whom were "expert" consultants hired by Berry to file declarations for his defense. Berry stated that he would forbear from attacking the Church's religious beliefs and practices as a defense to the defamation claim, if paid some $70 million for settlement of his "expert's" claims:

> [I]t seems to us that your client has a very narrow window in which to solve a lot of problems with money. It is similar to a major corporation with a lot of toxic waste which can be controlled with money. This toxic waste is not going away. It has a cash value. Your client can either get on with its future of trying to go religious mainstream or continue to drag in the past.

(Ex. A.)

Berry's litigation conduct caused problems with his relationship with his law firm. Berry testified that he quit the Lewis D'Amato firm because the firm would not permit him to bring a series of lawsuits against the Church. (Ex. B, pp. 1188-1192.)

Berry thereafter moved to the firm of Musick, Peeler & Garrett, but ran into similar trouble there. Again, Berry found an unsympathetic ear when it came to his compulsive conduct respecting Scientology and left that firm soon afterwards because it too would not accede to his desires to file lawsuits against the Church and its members. (Ex. C, pp. 1227-1230.) Berry publicly stated on the Internet with respect to his disputes with the Musick Peeler firm and his pejorative attitude toward the Scientology religion:

> [If the Church] does drive me out of my law firm and into full-time handling of contingency cases against the Cult then we can revive — properly handled and pleaded this time — THE CLASS ACTION!!!!! That will be the grand-daddy of all law suits against the cult — with world-wide publicity and press coverage.

(Ex. D.)

Thus, leading up to the filing of the many frivolous *pro se* cases he had brought on his own behalf, Berry has made no secret of his malice as evidenced by his numerous public postings to the Internet, which were often scatological and plainly the product of an animus-

driven rather than a claims-motivated litigant. Berry also made public his desire to harm the Church through the solicitation of litigation. In one instance, in an initial interview with a person Berry was hoping to represent, who was then represented by an attorney who often represented the Church, Berry was asked his agenda in such *pro bono* representation. He responded:

> Anything that is a black eye for [the Church attorney] and Scientology is a good deed as far as I am concerned.
>
> * * *
>
> So my agenda, my agenda basically is to bite Scientology in the butt and to cause it as much grief as possible.

(Ex. E, pp. 16, 17, conversation recorded by and publicly filed by Berry.)

Berry carried out his stated agenda, seeking to "cause as much grief as possible" to the Church, its staff, its members, its counsel and persons associated with it, through the series of frivolous *pro se* lawsuits described below — all of which were dismissed by the Court or voluntarily dismissed by Berry.

B. Actions Objectively Qualifying Berry As a Vexatious Litigant

1. *Berry v. Cipriano, et al.*, BC 184355, L.A.C.S.C.

Berry filed this complaint *pro se* on January 16, 1998, and amended it on May 6, 1998. (Ex. F, Amended Complaint.) The Amended Complaint alleges that Cipriano, a former business associate of Berry's from the 1980's, conspired with an investigator retained by the Church of Scientology for the purpose of defaming Berry by publishing statements regarding Berry's homosexual pedophilia and his history of giving drugs to minors. After the complaint was filed, Berry sent an e-mail threat to Mr. Cipriano, stating in part, that if he did not recant his sworn declaration, that Berry would:

- damage Mr. Cipriano's "career and aspirations" when Berry uses his media contacts — which he claims to be "among the best in the city" — to generate "city and entertainment industry wide publicity" of the proceedings (Ex. G, p. 1);
- that Berry expects "a grand jury to be convened here" shortly and asks Mr. Cipriano, "Do you really want to be swept up in all of this?" (*Id.*, p. 2);

- the warning that "[t]his is your only opportunity to get out of this with your reputation, dignity and future intact." (*Id.*, p. 2);
- a warning that Mr. Cipriano's "financial future, ability to do business in Hollywood, and honor are now in your own hands." (*Id.*, p. 2); and
- the threat that unless he recanted his declaration, Mr. Cipriano faces "the expensive and inconvenient long haul — about 2 years, through trial, judgment, attachment, lien and collection. *If you survive as a free man that long!*" (*Id.*, p. 2 (emphasis supplied)).

Mr. Cipriano declined to accede to Berry's extortive and untrue threats and the action was litigated in Superior Court before the Honorable Alexander H. Williams, III. Berry associated his newly-formed law firm into the case, Berry, Lewis, Scali & Stojkovic, but Berry remained in the case as his own attorney *pro se* and informed the court that he was his own "lead counsel." (Ex. H.) In early May 1998, Berry filed an incoherent complaint in federal court — one the federal judge who ultimately sanctioned him under Fed. R. Civ. P. 11 and 28 U.S.C. §1927 characterized as "a rambling tale of irrelevancies."[2]

On May 23, 1998, two weeks after amending the *Cipriano* complaint, and receiving criticism on an Internet discussion group regarding his new federal suit, Berry publicly stated with respect to his new firm and the purpose for its creation:

> So you are all buying into the cult's baying that I am crazy. Well, you are going to all think I am a lot crazier before this is all over. *Setting up my own law firm was intended to permit me to be an unguided missile on the cult's radar screens.*

---

[2] *Pattinson v. Miscavige, et al.*, No. 98-3985 CAS, C.D.Cal. Although purportedly filed on behalf of a client, the complaint contained *35 paragraphs identical to the allegations Berry made on behalf of himself* in *Berry v. Miscavige,* No. BC 196402, addressed below. That case sought relief against many Churches of Scientology and Scientologists (Mr. Miscavige is the ecclesiastical leader of the Scientology religion), as well as President Clinton, Secretary of State Madeline Albright, National Security Advisor Sandy Berger, and other Cabinet members, on the obtuse claim that these officials were somehow liable for the Clinton Administration's criticism of Germany for denying rights to Scientologists. (Ex. I.) Immediately after filing, Berry provided the complaint to the tabloids — the only organs willing to publish the lurid assertions made by plaintiff. (Ex. J.) Even then, it was only by naming actor John Travolta (a Scientologist) as one of the numerous defendants that Berry was able to get press coverage.

(Ex. K) (emphasis supplied).

By December 1998, even the partners in Berry's new law firm had, just like all his prior partners and firms, all they could take of Berry, and his new partners filed a motion to withdraw. In support of the motion to withdraw, one of Berry's then-partners stated in part that "my professional and personal relationship with Mr. Berry has deteriorated to such an extent that I find it an odious thing to be in his presence any more than is absolutely necessary" (Ex. L), and strongly inferred that Berry had made discovery misrepresentations requiring them to disassociate from Berry. (Ex. M.) The motion to withdraw was granted on January 11, 1999. Berry continued to litigate the action *pro se,* and then voluntarily dismissed the case in February 1999. (Ex. N.)

2. *Berry v. Barton, et al.*, BC 186168, L.A.C.S.C.

This action was filed by Berry *pro se* in February 1998, and amended on or about May 3, 1998. (Ex. O.) It was deemed related to the *Cipriano* case by virtue of overlapping claims, and was also assigned to Judge Williams.

One of the several parties sued in the case was Isadore Chait, a Scientologist whom Berry admitted he did not know, but sued only because Mr. Chait was allegedly a member of a religious rights advocacy group with whom Berry claimed to have a dispute. (Ex. P.)

Berry was sanctioned several times in the *Barton* action for numerous discovery abuses. First, Berry obstructed his own deposition by asserting frivolous objections, providing evasive answers to questions, and making lengthy, irrelevant and gratuitous responses to questions. Berry was so evasive that over 200 times questions had to be repeated before he would directly respond. Berry asserted more than 390 objections to questions, and over 100 refusals to respond to questions and walked out of his deposition shortly after the beginning of the third day. (Ex. Q, ¶2, Declaration of Kendrick L. Moxon ("Moxon Decl.").) Among the objections were those asserting Fifth Amendment grounds for refusing to testify about the truth or falsity of the alleged defamatory statements put at

issue by his own complaint. (*Id.*, ¶2.) A motion to compel was filed with the discovery Referee, retired California Supreme Court Justice David Eagleson, who recommended that Berry respond to nearly every question which the motion addressed and that Berry cease his obstruction and evasion and answer the questions. (Ex. R.) Justice Eagleson also recommended monetary sanctions arising out of Berry's misconduct, noting:

> I very seldom give sanctions — very seldom — but this is outrageous counsel. Outrageous.

(Ex. S, Hearing, p. 18.)

Judge Williams approved the Recommendation and entered an Order dated November 3, 1998, sanctioning Berry $2,000.00. (Ex. T, p. 3:16-18.) Berry was also separately sanctioned $500.00 for refusal to respond to Mr. Chait's Requests to Admit. (*Id.*, p. 3:27-28.) The limited discovery then undertaken demonstrated that the allegations of libel were frivolous, because the alleged defamatory statements were accurate and truthful. Berry thus sought to amend the case to moot the discovery and avoid disclosure of his conduct which he put at issue.

Thereafter, Berry was further sanctioned $2,523.00 for refusing to respond to form interrogatories. (Ex. U.) Ultimately, the action was dismissed as to defendant Chait as a sanction for Berry's failure to comply with the Court's discovery Order. (Ex. V.)

Berry then filed voluntarily dismissals as to the other parties in the *Barton* case during the pendency of four additional motions by various defendants to compel discovery, and costs were awarded against him as to the parties who sought costs. (Ex. W.) However, Berry informed defense counsel that the costs were of no moment as far as he was concerned, because he intended to file for bankruptcy and thereby discharge the debt. (Ex. X, Declaration of Barbara A. Reeves ("Reeves Decl.").)

3. *Berry v. Miscavige*, BC 193590, L.A.C.S.C.

Berry filed this action *pro se* on July 1, 1998. It named as the lead defendant, David Miscavige, the worldwide ecclesiastical leader of the Scientology religion. The suit named as other defendants the Church of Scientology International, many Church members, and investigators allegedly retained by the Church's counsel. As with the *Cipriano* and *Barton* cases, this action asserted a conspiracy by the Church, its members, counsel, investigators and staff to defame Berry and cause him emotional distress. (Ex. Y.)

Berry voluntarily dismissed the case on August 24, 1998 for tactical reasons known best to Berry. (Ex. Z.)

4. *Berry v. Miscavige*, BC 196402, L.A.C.S.C.

This complaint was nearly identical to BC 193590 addressed immediately above. As with the previous *Berry v. Miscavige* suit, it was filed by Berry's then law firm, but he was listed as his own counsel, and acted as his own "lead counsel." It was filed on August 24, 1998, the same day BC 193590 was dismissed, and was amended on September 25, 1998. (Ex. AA.) At Berry's request, the case was low numbered to Judge Williams who was presiding over the *Cipriano* and *Barton* actions at the time.

As with the *Barton, Cipriano* and first *Miscavige* cases, after the withdrawal from the case of his former firm, Berry continued to litigate the three consolidated actions as a *pro se* litigant. Berry also voluntarily dismissed this lawsuit in February 1999 during the pendency of discovery demands upon him and the pendency of several motions for discovery sanctions against him in the related cases. (Ex. BB.)

5. *Berry v. Rosen*, BS 051330, L.A.C.S.C.

This *pro se* lawsuit arose out of the cases described above. The defendant, Samuel D. Rosen, is a partner in the New York office of Paul, Hastings, Janofsky & Walker LLP who, along with his partner, Barbara A. Reeves, appeared for defendant Glenn Barton (a Scientologist) in case number BC 186168. Berry attempted to prevent Mr. Rosen from

questioning him at a deposition by filing an objection to Mr. Rosen's appearance *pro hac vice* in the *Barton* case. (Ex. Q, ¶ 3, Moxon Decl.) The Court overruled Berry's objection and allowed the *pro hac vice* appearance. Berry immediately walked out of the courtroom and filed a new *pro se* action for an *ex parte* restraining order against Mr. Rosen, asserting that he was afraid Mr. Rosen would assault him and demanding that he be ordered to remain 100 yards away from Berry — an order which, had it been granted, would have precluded Mr. Rosen from taking Berry's deposition. (*Id.*) Berry's May 26, 1998 TRO application did not disclose that his deposition was scheduled to be taken by Mr. Rosen that very day or that the purpose of the *ex parte* application was to make it physically impossible for Mr. Rosen to take that deposition.

Nevertheless, the *ex parte* TRO was denied by the Honorable William Beverly, thus thwarting the sham purpose of Berry's action. (*Id.*) Berry then voluntarily dismissed the case against Mr. Rosen with prejudice two weeks later, on June 8, 1998. (Ex. CC.) Judge Beverly then awarded Mr. Rosen attorneys' fees and costs arising out of the harassing filing. (Ex. DD.)

C. Berry Meets the Objective Standards of a Vexatious Litigant Under CCP §391(b)(1)

In accordance with the definitional criteria of §391(a), "In the immediately preceding seven-year period [Berry] has commenced, prosecuted or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to [Berry]."

But for the dismissal of the claim against Chait as a discovery sanction, each of the actions listed above was dismissed voluntarily by Berry, albeit only after substantial costs were incurred. The law is clear and unequivocal that voluntary dismissal constitutes an action "finally determined against the person" under section 391:

Plaintiff's contention that a voluntarily dismissed action cannot be

> counted for purposes of the vexatious litigant statute is contrary to the underlying intent of that legislation.
>
> * * *
>
> An action which is ultimately dismissed by the plaintiff, with or without prejudice, is nevertheless a burden on the target of the litigation and the judicial system, albeit less of a burden than if the matter had proceeded to trial. A party who repeatedly files baseless actions only to dismiss them is no less vexatious than the party who follows the actions through to completion.

Tokerud v. Capitolbank Sac. (1995) 38 Cal.App.4th 775, 779, 45 Cal.Rptr.2d 345, 347.

Because Berry meets the objective criteria of a vexatious litigant under §391(b)(1), the Court need look no further in making a finding of such status.

D. Berry's Stated Intentions and Conduct Warrant A Finding That He Is Vexatious Litigant

Notwithstanding the objective evidence of filing a series of frivolous *pro se* actions, Berry has also demonstrated his vexatious intent, also qualifying him as a vexatious litigant under §391(b).

First, Berry has lost essentially every motion filed by any party in each of the cases. Listed in the appended Moxon Declaration are 9 motions Berry filed in these actions which he lost, and 32 motions required to be filed against Berry in which the various defendants prevailed. These actions were expensive, onerous and burdensome to the defendants because they were often voluminous and filled with Berry's vitriolic assertions against counsel and the parties. Indeed, this Court has occasionally referred to Berry's filings as "telephone books," as they were often 3, 4, 5 or even 6 inches thick. Berry also filed several lengthy motions which he later withdrew. (Ex. Q, Moxon Decl.)

Second, Berry's public commentary indicates that his intent was malicious. For example, the *Miscavige* lawsuits were threatened by Berry for several months prior to filing. Berry wrote a number of public messages to a Scientology discussion group on the Internet in which he manifested a fanatical crusade to harass and annoy ecclesiastical Church management, and in particular, Mr. Miscavige. In one jeering message in November 1997,

Berry makes his intention clear by entitling the public message, "Red Rag to [David Miscavige's] Bull," and stating in part:

> I am not mad – I am getting even – one by one – revenge is sweet, already. I have always warned the [Church] what I was going to do in advance and then I have gone ahead and done it. Nothing has changed.

(Ex. EE.)

In another of his Internet postings entitled, "Graham Berry's New Agenda," dated September 5, 1997, Berry threatened filing these actions and bragged that he had cost the Church a great deal of money and that he had been responsible for negative press about the Church. Consistent with his fixation in many public Internet postings, Berry closes his threatening message stating, "Best wishes to the ... targeted [David Miscavige]." (Ex. FF.) Even though Berry testified in deposition that he has never met Mr. Miscavige, never talked to him and never had any dealings with him whatsoever, he obsessively writes about him and threatens him, referring to him as the "common foe" ("However, each of us shares a common foe (DM") and publicly asserts that all of his prior activities "will look like a storm in teacup ... as we open up new fronts of action ... Each of us, whoever we are, play an indispensable role in the battle against the current management of the Church. Very soon we shall prevail and [David Miscavige] will be in either prison or Peru." (Ex. GG.)

Berry's obsession with, and his enmity toward, Mr. Miscavige is as transparent as it is relentless. For example, in one of his postings, Berry refers to Mr. Miscavige as a "very small, asthmatic dwarf" when Berry threatens and promises to pursue Mr. Miscavige with a fanatic's unique hatred, stating: "I now have nothing left to lose but my life. That makes me one very dangerous and determined adversary." (Ex. EE). That same, rambling posting also reflects another of Berry's fixations — with Scientologists who are celebrities — by his references to TC (actor Tom Cruise) and JT (actor John Travolta).

Berry's devotion to legal process as a vehicle of vengeance was frequently repeated both on the Internet and in correspondence, asserting not that his litigation sought

compensation for some alleged tort, but rather, that he was utilizing litigation and the ability to attract media attention through litigation as a means for harassment. In a February 1996 letter to the Secretary of the Church of Scientology International, Berry stated, in language which reveals his ulterior, improper intentions:

> The Complaint, [...] is already over 100 pages long and growing. Its' [sic] filing and subsequent worldwide publication will produce an insoluble 'flap' for Scientology.
>
> * * *
>
> [T]he media (especially the law media) considers my experience to be a mega-story.
>
> * * *
>
> After this, it only gets progressively worse for you, the Scientology organization, the various other co-conspirators *and their law firms and families.*

(Ex. HH, p. 4, fn.6, p. 6, fn.12 and p. 10, respectively) (emphasis supplied.)

By filing these actions and making numerous threats relating to them, Berry cost the defendants a great deal of time and money defending them. His threats to "families" is utterly indefensible. Berry, accordingly, also qualifies as a vexatious litigant pursuant to C.C.P. §391(3).

E. Berry Has Been Found by a Federal Court To Be a Vexatious Litigant

Berry also qualifies as a vexatious litigant pursuant to C.C.P. §391(b)(4), which alternatively defines a vexatious litigant as one who:

> Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transactions, or occurrence.

The federal equivalent to C.C.P. §391, is 28 U.S.C. §1927, which states:

> Any attorney or other person ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys fees reasonably incurred because of such conduct.

The statute makes specific reference to the actions of a litigator (attorney or *pro se*) as sanctionable when undertaken "vexatiously." A motion for sanctions was brought against

Berry pursuant to both Rule 11, Fed. R. Civ. P. and 28 U.S.C. §1927 in the *Pattinson* case (see footnote 1, above) for the filing of frivolous and bad faith pleadings against the Church and one its counsel, Kendrick Moxon. United States District Judge Christina A. Snyder granted the motion by Order dated April 16, 1999. After reciting the tortured history of Berry's harassment and frivolous pleadings, and noting that a section 1927 sanction requires a finding of subjective bad faith (Ex. II, Order at 3), Judge Snyder found:

> In the present case, the Court finds that the claims alleged against Moxon were asserted in bad faith, and resulted in an unnecessary multiplication of the proceedings for Moxon. Each of the successive amended complaints in this action fails to state facts supporting a basis for liability against Moxon, an attorney who has previously represented Scientology organizations.

(*Id.*)

Judge Snyder also found that Berry's conduct warranted the imposition of sanctions under Fed. R. Civ. P. 11 (*id.*, at 5-6), the federal equivalent of C.C.P. §128.7.

IV. A PRE-FILING FINDING OF BERRY'S STATUS IS NECESSARY

As noted above, Berry has threatened that he will "shortly" re-file the above referenced consolidated *Miscavige* and *Barton* cases, thus dragging petitioners and other parties back into court for further frivolous proceedings. While all persons have rights to file litigation, that right is not unfettered:

> [T]he general right of persons to file lawsuits – even suits against the government – does not confer the right to clog the court system and impair everyone else's right to seek justice. As has been pointed out: "The constant suer for himself becomes a serious problem to others than the defendant he dogs. By clogging court calendars, he causes real detriment to those who have legitimate controversies to be determined and to the taxpayers who must provide the courts."

Wolfgram v. Wells Fargo Bank (1997) 53 Cal.App.4th 43, 56-57, 61 Cal.Rptr.2d 694, 703, citing *Taliaferro v. Hoogs* (1965) 237 Cal.App.2d 73, 74, 46 Cal.Rptr. 643.

The California legislature has provided courts and persons hounded by a vexatious litigant a means to ensure that litigation is at least facially meritorious before future litigation

recently dismissed or were dismissed as a sanction.

Berry is in need of restraint. Accordingly, he should be denominated as a vexatious litigant, and be required to obtain leave of court prior to the filing of any new action. Without this relief, the history of Berry's conduct promises to repeat itself over and over.

Dated: May 14, 1999

Respectfully submitted,

ORRICK, HERRINGTON & SUTCLIFFE, LLP

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EXHIBIT R

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Plaintiff Pro Se

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

GRAHAM E. BERRY, Plaintiff, vs. ROBERT J. CIPRIANO Defendant.	Case No.: BC 184 355 BC 186 168 BC 196 402 **OPPOSITION TO PETITION TO FIND GRAHAM E. BERRY TO BE A VEXATIOUS LITIGANT; REQUEST FOR SANCTIONS** **DATE:** June 16, 1999 **TIME:** 8:30 a.m. **DEPT:** 35

TO THE HONORABLE COURT HEREIN:

Respondent hereby files his Opposition to Petition to Find Graham E. Berry to be a Vexatious Litigant.

This opposition is supported by the attached memorandum of points and authorities, the concurrently filed declaration of Graham E. Berry and supporting cases, all of the pleadings, files and records in L.A.S.C. Case numbers (BC 184355 (Cipriano), BC 186168 (Barton), BC 193590 (Miscavige), BC 196402 (Miscavige), BC 051330 (Rosen), and upon such evidence and argument as may be presented at the time of the hearing on the Petition.

Dated: June 9, 1999

Respectfully submitted,

LAW OFFICES OF GRAHAM E. BERRY

Graham E. Berry

GRAHAM E. BERRY

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Memorandum of Points and Authorities

I. INTRODUCTION

It is truly ironic that Church of Scientology ("COS"), widely acknowledged to be the most vexatious and aggressive litigant in the land, should file the Petition herein. Clearly it does so in bad faith and for the sole purpose to force Respondent to incur the expense of opposition; to prevent his discharge in a bankruptcy that the Church's own scorched earth litigation has forced him into; and to create a procedural hurdle to an action that is among the most meritorious conceivable.

Having insisted Respondent dismiss Berry v. Miscavige as a pre-condition to settlement discussions, and having applied its "fair game" policies and practices to "overwhelm" respondent with abusive discovery, the Scientology litigation juggernaut now fallaciously argues that "overwhelming" Respondent into a discovery default, and, into voluntarily dismissing parties without prejudice, somehow means that the actions had no factual or legal merit. It does not. Indeed, law of the case is to the contrary.

II. FACTUAL SUMMARY

Respondent has defended litigants against COS since 1991. Nationally, there are only four attorneys left in the nation still courageous enough to take cases against COS. The only plaintiffs' cases Respondent has filed against COS are the Pattinson and Berry cases filed in 1998. Respondent

has prevailed in seven of the 11 COS cases he has defended. (Berry Decl. paras 4-22-26, 28). COS has applied its" Fair Game Policies and Practices" against Respondent for the single purpose of "utterly destroying him. Consequently, in 1998, Respondent filed the "Berry Complaints." The Berry complaints involved egregious tortious conduct by Petitioners. (see Berry Decl. paras 18, 25-26,29,32-34, 40,46, 54-55, 67068, 81-89. CCP 1714 decl.; Ist Amended Complaint, Berry v. Miscavige, pp 46-78.)

Petitioners ferociously defended the Berry case, filing an unsuccessful demurrer, CCP 425.16 motion; disqualifying prior courts and conducting abusive discovery intended to drive respondent into a discovery default. Yet, they failed to provide proper discovery or any depositions themselves. They also improperly removed to Federal court [since remanded], all in accordance with their "COS Fair Game" tactics. After Petitioners obtained an involuntary dismissal because of Respondent's inability to respond to nearly 2000 improper modified form interrogatories, they demanded that respondent voluntarily dismiss Berry v. Miscavige as a pre-condition to bogus settlement negotiations. Thereafter, they continued to engage in the "fair gaming" of Respondent and filed the instant Petition, replete with material misrepresentations of fact and law for bad faith reasons (Berry Decl. paras 32-37, 40,46,55,61-62, 64-68).

III. ARGUMENT

A. The Applicable Law

Respondent is not a vexatious litigant within the meaning of CCP Section 391. Under CCP Section 391(b), to find another party a vexatious litigation, the moving party must show that the supposed vexatious litigant commenced over five cases in a seven years, which were found adverse to him; or, (2) repeatedly filed frivolous pleadings solely to cause unnecessary delay; based on the same facts and were based on the same facts, transaction, or occurrence.

1. Final determination: Under Tokerud v. Capitolbank Sacramento 38 Cal.App.4 775, 45 Cal.Rptr. 2d 345, a unilateral voluntary dismissal of an action creates a rebuttable prima facie showing of final determination under 391(b)(1). A plaintiff may rebut this showing by contrary proof. When a plaintiff has accomplished the object of the litigation and voluntarily dismisses the action... the voluntary dismissal is not to be considered a "final determination." Likewise, where the dismissal leaves some doubt regarding the defendant's liability, such as where a voluntary dismissal is part of a negotiated settlement, the dismissal will not be deemed favorable to the defendant. Id, citing Villa v. Cole, 4Cal.App.4 1327, 6 Cal.Rptr.2d 644 (1992).

2. Intended to cause unnecessary delay: In order to show a respondent is a vexatious litigant according to 391

(b)(3) respondent must repeatedly engage in unmeritorious legal tactics with the intent to cause unnecessary delay.

In re Luckett illustrates such unmeritorious legal tactics; the Court of Appeal in the case declared Luckett a vexatious litigant after 43 separate appellate actions were finally determined against him. In re Luckett Cal.App.3d 107,109, 283 Cal.Rptr. 312-314. Once Luckett was denied a petition for review by the Supreme Court, he filed 25 petitions for a writ of mandate. These were simply copies of the original motion in which he crossed out "motion" and scribbled in "writ of mandate." In many of Luckett's motions, he cluttered the record with "extraneous correspondence and news clippings which [had] no bearing on any legal issue presented. Following the law, the Court declared him a vexatious litigant.

A major consideration weighed by courts in determining whether to find a plaintiff a vexatious litigant is the constitutionally guaranteed right to petition for grievances. Wolfgram v. Wells Fargo Bank 53 Cal App.4th 43, 61 Cal.Rptr.2d 694 (1997). "The right to petition for redress of grievances is the right to complain about and complain to the government." Wolfgram at 699. "Only once the constant suer for himself becomes a serious problem to others, "[B]y clogging court calendars, [causing] real detriment to those who have legitimate controversies to be determined and to the taxpayers who must provide the

courts," is the right to suit outweighed by the rights of the public." Taliaferro v. Hoogs 237 Cal.App.2d,73, 74, 46 Cal.Rptr. 643 (1965).

3. Substantially similar facts, transaction or occurrence: Petitioners clearly mislead the court when they argue that the very limited 'bad faith" finding in Pattinson constitutes Respondent a vexatious litigant within the meaning of CCP Section 391(b)(4). In Pattinson, the Court found bad faith in connection with only one of the numerous parties in a case not involving "substantially similar facts, transactions, or occurrences.

B. There Are Not Five CCP Section 391(b)(i)(i) Cases

Petitioners' misleadingly argue that there are five Berry cases within the meaning of C.C.P. Section 391(b)(i). (Petition, pp.4:14-9:15). There are only two. The Cipriano, Barton and Miscavige cases are really one case which were filed separately due to the unfolding events of early 1998. (Berry Dec. paras 30-35). The Court recognized that the Cipriano, Barton and Miscavige cases were really one case; deeming them related and then consolidating them. There is only one and not two Miscavige cases despite two Superior Court case numbers and one Federal Court case number. Contrary to Petitioner's assertion, the Rosen case, (in which Respondent merely asked for a restraining order) did not arise out of the Cipriano, Barton and Berry cases. It arose out of R.T.C. v Henson ("Henson I"). (Berry Decl .)

As more fully described in the **Supporting Berry Declaration, Exh. J, para 40**, the defamatory statements were allegedly made by the Cipriano defendants, published by the CRG (Barton) defendants and further disseminated by the Miscavige defendants. Convicted felon Cipriano could not be located until January 1998. He was then immediately served. CRG, an unincorporated association, could not be located until February 1998. It was then immediately served. Both cases were then amended. Miscavige was then filed just before the expiration of the statute of limitations against the Lewis, D'Amato defendants. (**Berry Decl. paras 57-59**).

However, because the Miscavige complaint alleged a conspiracy between attorneys and clients, arguably within the procedural requirement of Civil Code Section 1714.10, it was dismissed and refiled without the attorney-client conspiracy allegations. After amendment it was ordered "related" to the Cipriano and Berry cases and consolidated for all purposes. As stated above, The Miscavige defendants then improperly removed it to Federal Court, which did not "remand" it back until shortly before the Miscavige defendants demanded it be voluntarily dismissed (without prejudice) as a pre-condition to settlement negotiations. (**Berry Decl. para 57-59**). The Court, relying on C.R.C. 804 (b)'s, criteria (same parties, similar claims, facts, property, transaction or event, questions of fact and law) found Cipriano, Barton and Miscavige to be related, and

accordingly, sua sponte, consolidated them: thus proving that they are all one case. "When actions involving a common question of law or fact are pending before the court...it may order all the actions consolidated...". C.C.P. Section 1048(a). Moreover, the Cipriano, Barton and Miscavige portions of the Berry case, had the sequence of events been otherwise, [hidden defendants] could have been filed as one under the joinder rules. C.C.P. Sections 378, 379, 389.

As such, if the Court abides by the prior Court's ruling and disregards the misleading arguments of Petitioner regarding the number of lawsuits filed, it must conclude that there are really only two cases--Cipriano/Barton/Miscavige and Rosen--a fact which Petitioner is well aware of. Clearly this does not meet the mandatory threshold requirement of five cases pursuant to C.C.P. 391(b)(i)(i).

C. Petitioners' Character Attack on Berry is Inflammatory, Misleading and Irrelevant

As more fully set forth in the Berry Declaration, Respondents' have utilized the litigation immunity privilege as both a sword and a shield to make defamatory statements against Berry--none of which have any relevancy to the charge that he is a vexatious litigant. Even Berry's exercise of free speech in Internet discussion forums is twisted to infer his intent to abuse the court system

However, evidence of a supposed vexatious litigant's general character is not relevant to CCP Section 391. In Roston v. Edwards 127 Cal.App.3rd 842, 179 Cal Rptr. 830 (1982), petitioners in two separate trial actions presented evidence of Roston's frequent appearances in federal and state courts. In each trial action, Roston was found a vexatious litigant pursuant to CCP 391. The appeals court reversed, noting: "...defendants, in their zeal to present a portrait of plaintiff Roston (and his enterprises) that would enhance their position, made reference to a multitude of cases which were inappropriate for consideration by the trial court...in many the plaintiff Roston prevailed; in many he was the party defendant...While we will not gratuitously speculate why such cases were presented to the court, it seems obvious the reason was not to support the motion...The presentation of such matter, if designedly done, is certainly to be discouraged. One might mistake it for an attempt to inflame the court against a party to the action." Roston at 832, 847.

Similar to the petitioners in Roston, who asserted that because Roston had previously been named as a defendant in several suits, he should be deemed a vexatious litigant, Petitioners here assert that Berry's commitment defending a suit against COS somehow proves he is a vexatious litigant. The case which Petitioner refers to as establishing Berry's "consuming animus" is the Church of Scientology

International v.Fishman and Geertz which was voluntarily dismissed by the church on the eve of trial. Berry's client, Geertz, was awarded costs as a result. A lawyer for a prevailing party is not a vexatious litigant in the present case any more than in the Roston case.

In much the same way that petitioners in Roston tried to use actions where Roston was a defendant to depict Roston as a vexatious litigant, petitioners here assert that Berry is shown to be a vexatious litigant because "32 motions [were] required to be filed against Berry." (Petition at 10). The aggressively litigious actions of Petitioner do not establish that Berry is a vexatious litigant. Berry certainly did not request or force, or otherwise "require" anything of petitioners. However, what it does say about Petitioners is something the Court should consider in ruling on this motion.

Going beyond the conduct of petitioners in Roston, Petitioners in the present case also improperly introduce evidence from activities outside the courtroom to attempt to show Berry to be a vexatious litigant pursuant to CCP 391. (Petition at 3,11,12.) At one point they characterize Berry's "obsession" and "enmity" toward Scientology Officer David Miscavige as evidence of Berry's alleged vexatiousness. The petition does not, because it can not, show any credible facts of how Berry's feelings for Miscavige somehow establish the Berry's prior claims are

without merit. Finally, even if Petitioners could prove their scurrilous allegations against Berry, that extraneous evidence is just that--extraneous--and certainly no legal or factual basis to prove that Berry intends to abuse the court system by frivolous legal tactics in the future. Clearly, Petitioner's personal attacks on Berry were made with covert intent to so prejudice this Court that it would base its ruling on hate and prejudice rather than law. However, the law clearly provides this Court with the means to ending Petitioners' perverse use of this forum to further inflict pain upon Respondent.

D. The Berry Cases Berry Cases Are Meritorious Within the Meaning of Tokerud.

1. The fact that the Berry cases are meritorious is the law of the case: In May 1998, the Court denied Petitioner's C.C.P. Section 425.16 special motion to strike, determining that "plaintiff has established that there is a probability that the plaintiff will prevail upon the claim." (Berry Decl. Exh 39). This is law of the case and should alone be sufficient basis to deny the instant Petition.

2. Substantial monies were paid in settlement of portions of the Berry case: Dr. Krim, a defendant in Cipriano settled for $75,000.00; Robert F. Lewis, Esq., and Lewis, D'Amato, Brisbois & Bisgaard, ("Lewis D'Amato") defendants in Miscavige settled in the five figure amount; Russell Shaw, a defendant in the Barton settled by agreeing

to cease posting derogatory statements about respondent in the Internet; Wilbur J. Long, a defendant in Cipriano settled by agreeing to execute a declaration denying that he made the statements attributed to him by Mr. Moxon's "chief investigator, Ingram, as did Dr. Krim. (Berry Decl. para 51.) Accordingly, Petitioners' argument that Berry's prior actions were meritless are false.

3. Petitioners retained expensive counsel and lost their only case-dispositive motion:

Petitioner's contend that the three portions of the Berry case are without merit. However, the fact remains that they retained at least 15 attorneys; some from New York and Washington D.C; some charging as much as $450 an hour. Such a litigation "overkill" would seem unnecessary to resolve a case that Petitioners' claim is without merit. With all that high priced lawyering, it's quite baffling how they got both the facts and the law wrong. One can easily conclude that the true purpose of this Petition is to further defame Berry and hinder his ability to prosecute his actions. Finally, Petitioners' brought only one dispositive motion--a demurrer--which they lost. Instead Petitioners engaged in "discovery of the world." (Berry Decl.41, 57 Exh. K).

4. Petitioners' insisted that the Miscavige portion of the Berry case be dismissed as part of settlement negotiations: As explained in the supporting Berry

Declaration, paras 45, 53-59,70, the Miscavige portion of the Berry cases was voluntarily dismissed, without prejudice, in February 1999, in order to comply with COS's non-negotiable condition of the Miscavige defendants' (including Petitioner's (CSI) offer to settlement and agree to a tolling agreement. (Berry Decl.57-59,70). Accordingly, it is incredulous that Petitioners' now claim that this case clearly lacked merit because it was voluntarily dismissed. (Petition, p. 8:17-21). As made clear by Tokerud, "[V]oluntary dismissal is only prima facie proof the litigation was "determined adversely to the plaintiff. Plaintiff may rebut this showing by contrary proof." Tokerud at 780.

Following the voluntary dismissal Petitioner, C.S.I. demanded, Scientology did not participate in any meaningful settlement negotiations despite its attorney's (Ms. Reeves) assurances to the contrary. It becomes apparent that their true agenda was to engineer a contrived basis for the instant and fallacious Petition herein.

In Tokerud, the court specifically held that "[O]nly where the [voluntary, unilateral] dismissal leaves some doubt regarding the defendants' liability, as where the dismissal is part of a negotiated settlement, will the dismissal not be deemed a termination favorable to the defendant." Pursuant to case law, Petitioners' argument is meritless.

E. The Berry Case Is Not Substantially Similar to Pattinson

Petitioner contends that respondent is a vexatious litigant under C.C.P. Section 391 (b)(4) because the Berry and Pattinson cases are "based upon the same or substantially similar facts, transaction or occurrence" and respondent has been sanctioned (in an undetermined amount) in connection with maintaining the Pattinson case in Federal Court as to one of a number of defendants. (Petition, p.12:16-13-13, p 5., l 2.) Petitioner CSI, and others, are currently seeking that the Pattinson state court case, (LASC Case No. BC 2043364) be transferred to this court because it is related to the Berry case. (Berry Decl., para 76). Fatally, Petitioners make no effort to demonstrate the factual basis for their bald unsupported contention regarding the Berry and Pattinson case and thus should be disregarded. Indeed, they cannot for reasons set forth in Berry Declaration, Exhibit 76. Furthermore, even a cursory review of the Pattinson First and Third Amended Federal Court complaints, and the State Court complaint, reveals that there is no substantial similarity between the two cases. In these circumstances, Petitioners fail to satisfy the mandatory second prong of C.C.P. Section 391(b)(1) on which they rely.

F. The Petition is Filed in Bad Faith

Mr. Moxon, and certain of his other Scientology Office of Special Affairs attorneys, have previously been determined by the Ninth Circuit Court of Appeals to be "playing fast and loose with the judicial system," ... "resisting discovery, making misrepresentations," "broken promises" and "lies" to the court, "viewing litigation as war." These findings were the basis of a $2.9 award of attorneys' fees to opposing party. Religious Technology Center v. Wollersheim, USDC CDCa CV-85-7197 AWT. (Berry Decl. Exh.Q)

Similarly, in Church of Scientology v. Wollersheim 42 Cal. App4th,628, 49 Cal. Rptr. 620 (1966) the 2nd district held that the Church had employed "every means, regardless of merit, to frustrate or undermine Wollersheim's petition [to seek recourse in the courts] activity. Id, 648, and that the Church's aggressive litigation conduct could be reviewed for Constitutional implications. Id. at 649.

Petitioners seek to curb respondents' legal rights and deny him due process. Id at 647-648. The instant Petition is a blatant bad faith attempt to frustrate respondent's refiling the Miscavige portion of the Berry case and filing a cross-complaint in the Hurtado case; arguably prevent respondent from discharging cost awards in a bankruptcy caused largely by Petitioners' application of their fair game policies and practices to "utterly destroy" respondent; and to use an adverse finding herein to further

attack him on the worldwide web, the media, in numerous court filings and in yet more complaints to the New York and California State Bars.

Respondent has demonstrated that the Petition is replete with misleading and incorrect factual and legal assertions. Furthermore, Petitioner CSI's insistence that respondent voluntarily dismiss the Miscavige case as part of the tolling agreement, in connection with a negotiated settlement, becomes all to clear that it was a ruse to provide a fallacious basis for the instant petition.

IV. CONCLUSION

Petitioners have misapplied applicable law, misrepresented relevant facts, failed to disclose other relevant facts and perverted the spirit of litigation immunity and the very purpose of this forum in order to personally attack and discredit Respondent without impunity. In the interests of justice--and common decency--the Petition should be denied.

Dated: June 9, 1999

Respectfully submitted,

LAW OFFICES OF GRAHAM E. BERRY

Graham E. Berry

Graham E. Berry, Respondent

EXHIBIT S

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

GRAHAM E. BERRY, Plaintiff, vs. ROBERT J. CIPRIANO, et al., Defendants. AND RELATED CASES.	Case No. BC 184355 REPLY MEMORANDUM IN SUPPORT OF PETITION TO FIND GRAHAM E. BERRY TO BE A VEXATIOUS LITIGANT Date: June 16, 1999 Time: 8:30 a.m. Dept: 35

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In response to the showing that he is a textbook vexatious litigant, Mr. Berry has filed an opposition that confirms that dispositive fact. In his 9 ½ inch thick, 21 pound opposition, Mr. Berry takes no responsibility for the burdens and expenses his conduct has created for the Court and the targets of his wrath. Everything that he has done to make himself the model of the *pro se* litigant section 391 was designed to restrain is, in Mr. Berry's view, someone else's fault.

He blames the defendants and their counsel for the trouble, expense and work brought about by the frivolous actions he filed, subsequently dismissed or which were dismissed by the Court. He blames this Court, Justice Eagleson, and Judge Snyder for the sanctions he has earned on all seven occasions. He blames the threats he made to "ruin" one defendant and to harm the families of other defendants and their counsel on his anticipation of the end of litigation. He blames alcohol abuse, coupled with his admitted drug use, for his scurrilous public commentary directed at the defendants and their counsel over several years. He asserts that the Court should not be "mislead" into believing that 5 separate cases he filed and dismissed were not *really* 5 separate actions because *he* considers them to be part of the same litigation program. He even argues that a recent finding in federal court that he vexatiously filed a complaint against some of these same parties in bad faith, should not be held against him.

The only relief requested by this motion is for an order that compels Mr. Berry to use the court system responsibly. All that order would require is that he establish a basis for proceeding with any new *pro se* action before he is allowed to do so. The need for judicial imposition of such a restraint is manifest because Mr. Berry — by his actions and his insistence that he has no responsibility for anything he has done — has demonstrated that the restraints of judgment, responsibility, and self-control that guide other lawyers and

litigants are beyond him and that he does not recognize that fact. That is precisely why the vexatious litigant statute exists, and that is precisely why it applies to Mr. Berry.

II. MR. BERRY QUALIFIES AS A VEXATIOUS LITIGANT PURSUANT TO C.C.P. SECTION 391(b)(1)

Mr. Berry asserts that he has not "... commenced, prosecuted, or maintained in propria persona at least five litigations ... that have been finally determined adversely" to him because, he argues, "At most there are four cases, and in reality, only two."

This argument is predicated first on the fact that Berry filed one *Berry v. Miscavige* case, improperly naming attorneys as parties, and then dismissed, changing the defendants and the allegations and re-filing the *Miscavige* action. The case was filed as an entirely new case with a different caption and different case number before a different court — precisely as many vexatious litigants in applicable authorities have done. The two *Berry v. Miscavige* cases are two different cases regardless of whether or not Mr. Berry "considered" them to be one single case. In an objective count of the number of cases applicable under §391(b)(1), the vexatious litigant's state of mind is simply not relevant.

Secondly, Mr. Berry argues that because three of the cases were "low-numbered," and subsequently *administratively* consolidated by the Court, the Court should consider them to be a single case. The cases were administratively consolidated by the Court for case management purposes, but were filed separately, had separate file numbers, were treated separately through their pendency, and never consolidated for all purposes. There is no legal loophole in the vexatious litigant statute for cases consolidated for administrative reasons. Section 391(b)(1) sets forth an entirely objective standard: five cases, within seven years; adversely determined. No authority is provided by Mr. Berry to the contrary because none exists.

Mr. Berry's argument merely demonstrates that he is precisely the litigant the statute addresses. He contends that a litigant may file any number of similar or even identical

actions against *different defendants*, lose or dismiss them all, be sanctioned repeatedly, inflict hundreds of thousands of dollars in defense expenses and yet never be held responsible for the vexation and harassment his conduct creates. However, the purpose of the statute was to *prevent* the filing of repeated, meritless actions, not to *encourage* such filings by providing a judicially-created exception for multiple filings of similar frivolous actions.

Indeed, Berry admitted that he sued many defendants here without possessing evidence of any activity by them directed to Berry. Mr. Berry testified, as to Mr. Chait, for example, that he never knew Mr. Chait or had any dealings with him whatsoever and sued him because of his membership in a religious rights advocacy group. (Ex. A, Berry Depo., May 28, 1998, p. 20.)

Mr. Berry also argues that voluntary dismissals, such as he filed, create only a "rebuttable prima facie showing of a final determination under 391(b)(1)" (Opposition at 3), which presumption he seeks to rebut by claiming there was a settlement with some defendants. It is true that there was a settlement with one party in one of the cases (*Berry v. Cipriano*), Matilde Krim, through an insurance carrier that cut her losses for defense, but she never appeared in any hearing in this case. The settlement was early in the case, long before extensive costs were incurred by the parties required by Berry to actually engage in litigation. None of the parties to the instant motion settled with Berry; nor did the 23 parties Berry voluntarily dismissed; nor did Mr. Chait, who was dismissed as a sanction against Mr. Berry for his refusal to comply with Court ordered discovery.[1] Certainly a party may not

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[1] Mr. Berry asserts that one of the Cipriano defendants, Wilbur Long, "settled" by executing a declaration that his public statements were inaccurate. This is false. There was no such settlement and thus no evidence of the alleged settlement has been submitted. Berry also claims that Russell Shaw "settled" with him by agreeing to cease making derogatory postings about him on the Internet. This is also false. There was no such agreement, and indeed, Berry states otherwise in the Opposition by asserting that Mr. Shaw's web page was removed following a settlement in another unrelated case in which

(continued...)

escape vexatious litigant status because he sued so many defendants that one of them succumbed to the harassment and consented to settlement by her insurance company to avoid further and greater expense.

Mr. Berry's inference that the dismissals he filed against the numerous other "Scientology" parties, including the movants herein, was a required part of some settlement is pure fiction and is irrelevant. Mr. Berry dismissed against most of the defendants on his own, and as to several, he said he would dismiss if the statute of limitations for re-filing was tolled for two weeks. Mr. Berry apparently *hoped,* for reasons beyond comprehension, that once he dismissed the cases, the parties he sued would "settle" with him by paying him not to re-file. However, whatever Mr. Berry had in his mind and whatever strategic objectives he hoped to achieve by dismissal are irrelevant — there was no such settlement.[2] Berry also did not re-file any of the cases, so even under his scenario, he received no benefit or relief for his dismissals.

Thus, the objective standard of the statute has been met: five cases, within seven years, and no favorable outcomes.

III. MR. BERRY QUALIFIES AS A VEXATIOUS LITIGANT PURSUANT TO C.C.P. SECTION 391(b)(3)

The second independent basis for a finding that Mr. Berry is a vexatious litigant, is C.C.P. §391(b)(3), which permits a subjective analysis of the litigant's conduct by

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[1](...continued)
neither Mr. Shaw nor any of the defendants herein was a party. (See Berry Declaration, ¶54.)

[2] Mr. Berry's reliance on *Tokerud v. Capitolbank Sacramento* (1995) 38 Cal.App.4th 775, 45 Cal.Rptr.2d 345 is misplaced. In *Tokerud*, the Court noted that dismissal upon receiving the relief requested can avert a vexatious litigant finding. However, the plaintiff in *Tokerud* did not receive the relief he sought and was found to be a vexatious litigant. The same is true here. Mr. Berry sued in libel claiming statements about him were false. He then amended his pleadings several times to *drop* those very claims when discovery revealed that the central facts were accurate.

alternatively defining a vexatious litigant as one who, "while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay."

In response, Mr. Berry provides the same genus and species of argument frequently and unsuccessfully provided in the prior activities of this case: all Scientologists are bad; all of their counsel are bad; Berry is a victim; he is the target of litigation harassment forcing him to take positions that were unsupportable; and if he has any failings, someone else is to blame. Mr. Berry's refusal to take responsibility for anything that happens in his life and his persistent identification of himself as a victim who does no wrong, gives both meaning and context to the need for a finding that he is a vexatious litigant.

Such a finding eliminates no rights of a party; it merely establishes a procedure such that future litigation brought by the vexatious litigant is subject to a screening process by the presiding judge to determine if it is more of the same vexatious litigation previously filed or if the new action has potential merit. In short, some measure of restraint is imposed upon the vexatious litigant who has demonstrated an inability to restrain himself, so that future defendants and future jurists are not subjected to repeated harassment.

Mr. Berry sees fit to blame everyone but himself for his conduct, and has filed an opposition which scandalizes a plethora of targets of his wrath. Movants have no intention of or interest in responding to the many derogatory assertions by Mr. Berry. They are uniformly self-serving, false, contorted or out of context. They are also irrelevant to the issue at hand. The object of this motion, and the statute under which it is brought, is to impose restraint on Mr. Berry in the future because he failed to exercise responsibility for his acts in the past. Mr. Berry's opposition is essentially an admission that he feels no responsibility for anything he has done and a promise to continue.

Since he regards his conduct as the fault of the Courts, the defendants, and their

lawyers, he argues that he should remain free to sue and dismiss, obstruct discovery, make public threats, and use the Courts as an instrument of vengeance instead of a means of justice. His opposition to this motion eloquently establishes why it should be granted.[3].

IV. MR. BERRY QUALIFIES AS A VEXATIOUS LITIGANT PURSUANT TO C.C.P. SECTION 391(b)(4)

The final independent basis to find Mr. Berry to be a vexatious litigant is C.C.P. §391(b)(4), because he "has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence."

Mr. Berry's sole argument why this finding by United States District Judge Christina A. Snyder should not be considered is because the movants allegedly provided no evidence that the federal case was "based upon the same or substantially similar facts, transaction, or occurrence." (Opposition at 13.) This assertion is false. Footnote 2 of the motion specifically states that in the case of *Pattinson v. Miscavige, et al.*, No. 98-3985 CAS, C.D.Cal., *35 paragraphs* are *identical* to the allegations Berry made on behalf of himself in *Berry v. Miscavige*, No. BC 196402. Copies of the pages with identical allegations of fact and law from the *Pattinson* case are attached hereto at Exhibit 1, and a chart showing the matching paragraphs between the two cases is attached and authenticated as Exhibit 2 to the declaration of Kendrick Moxon, which declaration is set forth as Exhibit C herein.

While in the *Pattinson* case Mr. Berry also sued other parties in addition to Mr. Miscavige and other Scientologists and Churches of Scientology, both cases contain the same frivolous and outlandish assertions of fact regarding Scientology that Berry peppers through all of his many complaints and most of his motion papers. The applicability of the

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[3] Mr. Berry this past week filed for Chapter 7 bankruptcy, serving the petition on Messrs. Chait and Barton as his creditors to attempt to discharge the costs awarded to them in this action. (Ex. B.) Thus, the statutory remedies for minimal compensation due to a defendant who is put to the time, trouble and expense of the prior litigation herein, have been thwarted by the proposed Chapter 7 discharge.

vexatious finding in federal court is not subject to reasonable dispute, and thus provides an independent basis for a vexatious litigant finding for the purposes of California State courts.

V. CONCLUSION

Mr. Berry is a vexatious litigant by objective statutory definition and by the clear subjective import of his actions and his own words. His opposition to this motion is little more than a confirmation that the relief sought is necessary to preserve the rights of the movants and the orderly administration of the courts. Rather than responding to the motion, he again displays his determination to do things his way, issuing vicious attacks on counsel and the parties, seeking to excuse his failings by blaming the defendants he sued and the Courts which sanctioned him, and seeking to excuse his conduct by claiming that alcohol, the defendants, and their lawyers made him do it.

Accordingly, this motion should be granted, and Graham E. Berry should be deemed a vexatious litigant under section 391.

Dated: June 14, 1999

Respectfully submitted,

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