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Cal. Civ. Proc. Code § 638 Discovery Referee

FILED
SAN MATEO COUNTY

SEP 18 2019

Clerk of the Superior Court
By M. E. [Signature]
DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA MATEO

AMBER LAUREL BAPTISTE,

Plaintiff,

v.

MICHAEL GOGUEN,

Defendant.

CASE NO.: CIV 537691

DISCOVERY REFEREE ORDER NO. 30
GRANTING DEFENDANT AND CROSS-
COMPLAINANT MICHAEL GOGUEN'S
MOTION FOR TERMINATING
SANCTIONS

AND RELATED CROSS-ACTION

CIV537691
ORD
Order
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FILE VIA FAX

On August 19, 2019, Defendant and Counter-Claimant Michael L. Goguen ("Goguen" or "Defendant") filed a motion for terminating sanctions against Plaintiff and Cross-Defendant Amber Baptiste ("Baptiste" or "Plaintiff"). Baptiste did not file an opposition to the motion. A hearing on the motion was held on September 11, 2019. Counsel appeared on behalf of Goguen. Baptiste did not appear at the hearing. Having considered Goguen's papers, the arguments of counsel, and the record of the proceedings before the undersigned, the referee orders as follows:

I. Background

A. Baptiste's Complaint

On March 8, 2016, Baptiste filed a verified complaint (the "Complaint") against Goguen for breach of a May 2014 Settlement Agreement between Baptiste and Goguen wherein Goguen agreed to pay Baptiste \$40 million dollars. The Complaint begins by alleging that Goguen abused

1 Baptiste sexually, physically and emotionally for over 13 years (2001-2013). Complaint, ¶ 1.
2 Baptiste alleges that Goguen raped her repeatedly and infected her with HPV in 2011 (and that
3 she never tested positive for HPV prior to 2011). *Id.*, ¶¶ 21, 25. In June 2012, Goguen allegedly
4 sodomized her and left her bleeding and nearly hemorrhaging to death on the floor of the hotel
5 room. *Id.*, ¶ 24. Thereafter, Ms. Baptiste retained an attorney. *Id.*, ¶ 26.

6 In or around February 2014, Baptiste's attorney sent Goguen a draft complaint for
7 personal injury and a demand letter for mediation. Complaint, ¶ 26. "When Mr. Goguen received
8 the draft complaint, he instructed Ms. Baptiste to fire her attorney, convincing her that the
9 attorney was a criminal who victimized his clients, would take her money, and would never leave
10 her alone." *Id.*, ¶ 27. "Mr. Goguen told Ms. Baptiste that he would not negotiate with her while
11 she retained her attorney and insisted that he and his lawyers would act as her attorneys." *Id.*
12 "Afraid of Mr. Goguen's threats, Ms. Baptiste complied with Mr. Goguen's demands and fired
13 her attorney." *Id.* Thereafter, Baptiste and Goguen entered into the Settlement Agreement. *Id.*,
14 ¶ 30. In June 2014, Goguen made the first \$10 million payment due to Baptiste under the
15 Settlement Agreement. *Id.*, ¶ 33. On December 19, 2015, Goguen refused to make the second
16 payment, asserting that the Settlement Agreement had been procured by extortion. *Id.*, ¶ 34.

17 At the time she filed the Complaint in March 2016, Baptiste was represented by the Glaser
18 Weil law firm. Doolittle January 2019 Decl., ¶ 2. Glaser Weil's motion to withdraw as counsel
19 was granted on July 25, 2016. On September 9, 2016, the Law Offices of Bisnar Chase
20 substituted into this case as Baptiste's counsel. *Id.*, ¶ 3. In January 2017, Bisnar Chase stated that
21 they intended to move to be relieved as counsel. *Id.* On January 24, 2017, the Sherman Law
22 Group substituted into the case, replacing Bisnar Chase as Baptiste's counsel of record. *Id.*, ¶ 4.

23 ***B. Goguen's Counterclaim***

24 On January 6, 2017, Goguen filed a second amended counterclaim against Baptiste and
25 Every Girl Counts ("EGC"). Thereafter, Goguen filed a third amended counterclaim against
26 Baptiste and EGC (hereinafter, the "Counterclaim"). The Counterclaim alleges causes of action
27 for: (1) extortion; (2) fraudulent inducement – HPV; (3) fraudulent inducement – sexual history;

1 (4) declaratory relief re validity of the Settlement Agreement; (5) breach of the Settlement
2 Agreement; (6) rescission of the Settlement Agreement; (7) restraining order pursuant to Cal. Civ.
3 Proc. Code section 527.6; (8) violation of the California Invasion of Privacy Act (Penal Code §
4 632); (9) fraudulent inducement - charitable contribution; and (10) breach of fiduciary duty.

5 Goguen alleges that in January 2014, Baptiste threatened to falsely and publicly accuse
6 him of "violent rape and intentionally spreading a sexually transmitted disease, among other
7 horrible conduct," unless Goguen acquiesced to her demand for a \$40 million payment.
8 Counterclaim, ¶ 28. Starting in January 2014, Baptiste began making demands of Goguen in
9 writing, wherein she: (1) falsely accused Goguen of raping her and causing her severe physical
10 injury; (2) falsely claimed that she was then infected with the HPV virus and that Goguen had
11 transmitted the virus to her; (3) threatened that her false allegations will be "disclosed publicly"
12 and "provided to the press" unless Goguen demonstrated his "generosity;" (4) threatened to
13 disclose her allegations to Goguen's other past sexual partners; (5) threatened to involve
14 Goguen's wife and to investigate her medical history; and (6) threatened disclosure of the false
15 allegations to "the public." *Id.*, ¶ 29. Goguen alleges that Baptiste initially communicated her
16 extortionate threats through a lawyer, who demanded that Goguen pay forty million dollars in
17 exchange for a promise that Baptiste not make false and inflammatory allegations of rape and
18 sexual assault against Goguen. *Id.*, ¶ 36. Once it became clear that her demands against Goguen
19 were working, however, and that Goguen was willing to pay money in response to the threats,
20 Baptiste fired her lawyer. *Id.*

21 *C. Baptiste's Injury and Subsequent Events in the Litigation*¹

22 In August 2017, Baptiste fractured her elbow when she fell out of bed. Surgery was
23 performed in Canada. On August 9, 2017, Baptiste's counsel at the time (Richard Sherman) called
24 Goguen's counsel to inform them that Baptiste would not be appearing for her deposition as
25

26 ¹ The following section of this order is largely taken from Discovery Referee Order No. 26, issued on April 30, 2019,
27 regarding Goguen's first motion for terminating sanctions. Citations to supporting evidence found in the prior order
28 have been removed to streamline the current order.

1 representative of [Cross-Defendant Every Girl Counts ("EGC")] (noticed for two days later and
2 previously moved repeatedly at Baptiste's insistence) because she had "night terrors" the night
3 before "that caused her to fall out of bed" and break her arm. Goguen's counsel found Baptiste's
4 claimed injury questionable, given that she elected to participate in a third-party deposition the
5 very day she suffered her injury, and asked counsel for Baptiste to provide medical records
6 "corroborating her claimed injuries." The parties then agreed to move her deposition to
7 September 5, 2017.

8 On August 16, 2017, Baptiste's counsel advised Goguen's counsel that the deposition
9 could not go forward, as Baptiste was still in the hospital and "is not expected to leave
10 until the 28th at the earliest," and "she may be in the hospital longer." Goguen's counsel again
11 asked to "see medical records" to support Baptiste's inability to appear at the deposition.
12 Nonetheless, Baptiste attended the depositions of Walter Canas, Lyla Peter, Bryan Alexander, and
13 Bryan Nash telephonically in August and September 2017. Baptiste attended a hearing by
14 telephone on February 12, 2018.

15 In March 2018, Goguen was still attempting to schedule Baptiste's deposition. On March
16 21, 2018, Baptiste's counsel informed Goguen's counsel that Baptiste was "having some
17 significant medical problems with her arm." Baptiste attended a hearing in person before the
18 referee on March 23, 2018. On March 23, 2018, Baptiste or her counsel propounded a
19 supplemental request for production and a supplemental interrogatory. On March 26, 2018,
20 Goguen propounded requests for production (set 13) seeking, *inter alia*, production of Baptiste's
21 medical records regarding her injury. To date, Baptiste has not responded to these requests. On
22 March 29, 2018, Baptiste or her counsel propounded a set of requests for production.

23 The parties then set April 6, 2018 for EGC's deposition. It was apparently understood that
24 Baptiste would be EGC's designee. Baptiste, however, did not appear for the deposition. Minutes
25 before the deposition was to commence, Baptiste gave notice that she would not be attending,
26 claiming "night terrors." Baptiste's counsel represented that he would obtain "a detailed doctor's
27 note" if Baptiste's issues persisted.

1 On April 23, 2018, Baptiste appeared for deposition and answered questions. Baptiste
2 testified that she could not immediately make responsive materials in her storage facility available
3 for inspection because of her elbow. When asked whether any of her medications impaired her
4 memory, she stated "I don't know that I've had that experience." On May 1, 2018, Baptiste
5 attended the deposition of her former attorney, Rivers Morrell ("Morrell"). .

6 On May 14, 2018, the Sherman Law Group filed a motion to be relieved as counsel, citing
7 "irreconcilable differences" and "a complete breakdown in communications." "To accommodate
8 the withdrawal and to give Baptiste adequate time to retain replacement counsel if she chose,
9 Goguen agreed to: (1) numerous discovery extensions; (2) a continuance of Goguen's pending
10 motion for sanctions; (3) a trial continuance; and (4) a 60-day stay of discovery deadlines and
11 motion practice. Goguen also agreed to two continuances of Baptiste's Motion for Summary
12 Adjudication to accommodate Mr. Sherman's withdrawal." At the hearing on Mr. Sherman's
13 motion to be relieved as counsel, Baptiste represented that she would be proceeding in pro per.
14 On June 13, 2018, the Court granted Mr. Sherman's motion to be relieved as counsel.

15 In June 2018, after the Sherman firm's stopped representing Baptiste, Baptiste sent
16 Goguen's counsel a number of emails. In addition to making extensive allegations against
17 Goguen and his counsel, the emails blame Goguen for her alleged injury and claim that she could
18 not produce responsive materials because "I have a broken arm because I suffer from nightmares
19 stemming from the Rape, the PTSD and the Night terrors." The following week, and with only
20 two-hours' notice on the date when she was supposed to arrive at Goguen's counsel's office to
21 make certain records available for inspection, Baptiste cancelled, stating that "I have broken
22 bones in my body so I feel its best we not meet. . . . I don't know what will happen if I am alone
23 in your office."

24 On August 10, 2018, Goguen filed a motion to compel Baptiste to comply with her
25 statements of compliance served in response to Goguen's requests for production of documents
26 (set one) requests 1-22, 27-29, 32-34, 36-47, 49-54, and 57-59. On the same day, Goguen filed a
27 separate motion to compel Baptiste to make available for inspection all paintings she

1 commissioned using funds Goguen donated to be used exclusively for charitable purposes.

2 Baptiste's oppositions to the motions were supported by a declaration from Baptiste, wherein she
3 declared that:

4
5 2. At the time of my deposition [in April 2018], I believed that I was in possession of
6 various documents that were inquired of by counsel for the Defendant. At that time, I
7 believed the documents to have been packed away and placed in my locked storage unit in
8 Los Angeles, California, with my furnishings and other personal effects.

9 3. I have since returned to my storage facility and searched my storage unit in an effort to
10 locate some paintings that Defendant sought to inspect, as well as the documents that were
11 requested in Defendant's Document Production Requests numbered 1-22, 27-29, 32-34,
12 36-47, 49-54. In spite of my best efforts to locate the documents at my storage facility, and
13 after a diligent search where I believed the documents to be located, I was unable to locate
14 them and believe the documents to have either been lost or unintentionally discarded when
15 I moved out of my home.

16 4. At the time of my deposition, I believed I had placed the documents in my storage
17 facility. Since I was unable to locate them at that facility, I believe the documents to have
18 been lost or unintentionally discarded and am unaware as to who may be in possession of
19 the documents, if they exist at all at this time.

20 ...

21 2. At the time of my deposition, I believed that the paintings I had commissioned for
22 Every Girl Counts, were professionally packed and placed in storage in my storage facility
23 in Los Angeles. I have not seen the paintings since I was forced to move out of my home
24 at the time of entering into a Release and Personal Injury Settlement Agreement with
25 Michael Goguen, which he prepared from a Release he obtained from his attorney.

26 3. I have since returned to my storage facility and searched my storage unit to locate
27 the painting in order to comply with the order of the JAMS referee. My most recent effort
28 was on Sunday, October 8, 2018, when I went to the storage facility to conduct a further
29 search in an effort to locate the paintings.

30 4. I previously provided a digital copy of the paintings to Defendant's counsel,
31 which I was able to secure from the artists.

32 5. I believed I had placed the paintings in my storage facility until I discovered that
33 none of the paintings were there when I searched for them. I do not have any information
34 or idea as to who may be in possession of my paintings.

35 See Discovery Order 26 at 9, 11.

1 In August 2018, Goguen served upon Baptiste special interrogatories and requests for
2 production concerning, *inter alia*, Baptiste's elbow injury. Van Dalsem Decl., Ex. J (special
3 interrogatories (Set 11) no. No. 72); K (request for production (Set 15) request no. 150). Baptiste
4 did not respond to these interrogatories and provided only objections to the request for
5 production. *Id.*, Ex. L.

6 On or about August 28, 2018, Paoli & Purdy, PC filed a substitution of attorney for
7 Baptiste. Doolittle January 2019 Decl., ¶ 6.

8 On September 12, 2018, Goguen's counsel sent a letter to Baptiste's counsel stating that
9 Goguen had noticed the inspection of the originals of the documents Baptiste claims to have
10 received from Dr. Belhassen, a doctor in France who Baptiste claims treated her after Goguen
11 allegedly forcibly sodomized her in July 2012, that Baptiste had previously agreed to make the
12 documents available for inspection but failed to produce the documents. A subsequent email
13 asked Baptiste's counsel to confirm that the originals would be made available for inspection at a
14 September 19, 2018 hearing at JAM Silicon Valley. In response, Baptiste's counsel stated that it
15 was his understanding that Baptiste "will be bringing the original with her." Baptiste did not
16 appear for the hearing and did not produce the originals. At the hearing, the referee ordered
17 Baptiste to produce the original document for inspection on October 18, 2018. On October 2,
18 2018, Baptiste's then-new counsel advised Goguen's counsel that, "I think we may have to hold
19 off on Ms. Baptiste's deposition because there is a strong possibility that she will be undergoing
20 surgery on her arm in the very near future." Goguen's counsel once again requested "proof of
21 medical treatment." Baptiste, however, failed to bring the Belhassen record for inspection and did
22 not appear for the October 18, 2018 hearing.

23 On October 16, 2018, Goguen filed an application for particularized expedited discovery.
24 The application sought an order requiring Baptiste to: (1) serve verified, code-compliant
25 responses to Goguen's Seventeenth Request for Production (regarding Baptiste's storage
26 facilities); (2) serve verified, code-compliant responses to Goguen's Thirteenth Set of Special
27 Interrogatories (regarding Baptiste's storage facilities and her government issued identification);

1 (3) immediately secure and preserve any and all materials and tangible things in any storage
2 facility she maintains and provide a declaration under oath and subject to a penalty of perjury,
3 describing the efforts she has taken to do so; (4) provide the foregoing by October 25, 2018; and
4 (5) sit for a further deposition on October 29, 2018 for the limited purpose of explaining the
5 circumstances surrounding her alleged spoliation of evidence.

6 On October 26, 2018, Goguen's motion to compel a further responses to two of Goguen's
7 requests for production (requests 119 and 120) was granted, and Baptiste was ordered to produce,
8 with 7 days of the order code-compliant written responses to the requests and all documents
9 responsive to the requests 119 and 120. *See* Discovery Referee Order No. 14. Baptiste failed to
10 produce any documents in response to this order.

11 On October 26, 2018, Goguen's motion to compel further responses to requests for
12 production (set one) and Goguen's motion to compel inspection of the paintings were granted. *See*
13 Discovery Referee Order 15. The order provides in part that:

14
15 Within 7 days of receipt of this order, Baptiste shall: (1) conduct a further
16 reasonable search for the paintings; (2) provide Goguen with an amended response to
17 requests 16-18 in the deposition notice, without objections, that complies with Cal. Civ.
18 Proc. Code sections 2031.210-2031.230; (3) produce the responsive paintings for
19 inspection; and (4) if she fails to produce all responsive paintings, provide a declaration
under oath and subject to a penalty of perjury describing in detail when and where she
stored them and the efforts she took to locate the paintings in response to Goguen's
discovery requests, and stating that after a diligent search, she was not able to locate them.

20 ...

21 Based upon the record presented, with respect to document requests 1-22, 27-29,
22 32-34, 36-47, 49-54, and 57-59, Baptiste agreed to produce all responsive, non-privileged
documents, if any, within Responding Party's possession, custody, or control. The record
further reflects that Baptiste has failed to produce anything in response to these requests.
23 ... [¶] ... Within 7 days of receipt of this order, Baptiste shall: (1) conduct a further
24 reasonable search for the responsive documents; (2) provide Goguen with an amended
response to these requests, that complies with Cal. Civ. Proc. Code sections 2031.210-
25 2031.230; (3) produce all documents responsive to the requests at issue; and (4) if she fails
to produce all responsive documents, provide a declaration under oath and subject to a
26 penalty of perjury describing in detail the efforts she took to locate these materials, and
27 stating that after a diligent search, she was not able to locate responsive documents.

1 Discovery Referee Order 15 at 9, 10. Since the issuance of the above-order, Baptiste has not
2 provided any further response to the requests or produced any responsive documents.

3 On October 26, 2018, Goguen's motion to compel Baptiste to appear for two additional
4 seven-hour deposition sessions was granted. *See* Discovery Referee Order 17. The motion had
5 been made on the grounds Baptiste: (1) Baptiste improperly withheld responsive documents or
6 encouraged third parties to withhold documents until after Baptiste's last deposition; (2) Baptiste
7 continued to defame Goguen to law enforcement and in national press outlets; (3) Baptiste
8 refused to provide non-evasive answers to proper deposition questions; and (4) Goguen received
9 withheld materials after the conclusion her prior depositions.

10 On October 29, 2018, Baptiste or her counsel issued a subpoena to depose Goguen's
11 counsel. On November 6, 2018, Goguen's motion to compel Baptiste to respond to his thirteenth
12 and fourteenth sets of requests for production, tenth and eleventh sets of special interrogatories,
13 fifth set of requests for admission, and sixth and seventh sets of form interrogatories was granted,
14 and Baptiste was ordered to provide Goguen with "code-compliant responses to the foregoing
15 discovery requests, without objections, and all documents responsive to the document requests"
16 by November 13, 2018. Baptiste failed to provide any responses or documents by the deadline or
17 at any time thereafter.

18 On November 6, 2016, the referee also issued Discovery Referee Order No. 19, granting
19 Goguen's motion for particularized expedited discovery. The parties thereafter stipulate (and the
20 referee entered an order) that Baptiste would appear for the deposition at 9:00 a.m. on November
21 30. Baptiste failed to serve any responses or documents in response to Discovery Referee Order
22 19, and failed to appear for the November 30 deposition. Baptiste's counsel appeared at the
23 deposition and stated that Baptiste was "not feeling well" and has "difficulty in getting up early."
24 On November 16 and 26, 2018, and December 10, 2018, Baptiste or her counsel issued seven
25 subpoenas to third parties seeking deposition testimony and documents.

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1 represent her on these claims that she has been unable to remain focused and assist with
2 discovery efforts in two of the three claims (the third is currently stayed).

3 3. . . . In spite of my efforts, I have been unable to secure the assistance of Ms. Baptiste in
4 engaging in discovery, prosecution, and/or defense of this and the other litigations she is a
5 party to, for which Paoli & Purdy, PC, has been retained as her counsel. It is my opinion
6 and observation, that Ms. Baptiste had become increasingly unavailable to assist with her
7 claims since retaining Paoli & Purdy, PC, and I believe it is due to what I had just learned
8 about her inability to tolerate pain and use/dependency of prescribed narcotic medications
9 from her physicians.

10 4. On December 4, 2018, I accompanied Ms. Baptiste to an orthopedic surgeon's
11 office for examination and evaluation of her left elbow. . . . I received the report from Dr.
12 Eberly several days following the examination and determined that Dr. Eberly included
13 his findings on the medical record that Ms. Baptiste had become dependent on
14 prescription narcotic medications.

15 6. I was unaware of the reasons I was unable to secure the assistance of Plaintiff,
16 Amber Baptiste from the onset of my undertaking representations of her claims and
17 defenses. It was not until I received the report from Dr. Eberly, who was seeing her for an
18 examination and evaluation of her left elbow for surgical intervention, that I realized the
19 extent of her dependency on narcotic medications and its effect on her ability to engage in
20 the litigation process.

21 Paoli December 19, 2018 Decl., ¶¶ 2-4, 6.

22 Dr. Vance Eberly is a physician licensed to practice medicine in California, with a
23 specialty in orthopedic surgery. Eberly Decl., ¶ 1. Dr. Eberly examined Baptiste on December 4,
24 2018. *Id.*, Ex. 2. Dr. Eberly declares that:

25 3. . . . I took x-rays of her left elbow and confirmed that she suffered a left elbow
26 supracondylar fracture nonunion and a left elbow medial epicondyle fracture malunion
27 resulting in chronic left elbow pain. I further observed that her mental status had been
28 compromised as she attempted to report the history of her injury and symptoms to me
during my evaluation of her fractured elbow. Upon further examination, I determined that
she has been treating with a variety of medications . . .

4. It is my opinion, within a reasonable degree of medical certainty, that as a result
of the chronic pain she has been experiencing since fracturing her elbow, Amber Laurel
Baptiste has a serious narcotic medication dependency, which renders her incompetent to
remain sufficiently cognitive and able to answer questions accurately. As a result of her
dependency on narcotic medication, subjecting Ms. Baptiste to oral or written litigation
discovery would be the equivalent of expecting an individual who would be legally

1 intoxicated on alcohol to respond in a coherent manner to question presented to her. Given
2 her present condition on increasing narcotic medication for chronic pain, I do not find her
3 to be capable to assisting with her lawyers in the civil litigation, at this time, as she cannot
4 appreciate the significance of her role in the lawsuit due to her regiment of narcotic
5 medication and the dependency she has developed to combat her chronic pain.

6 5. It is my further opinion, within a reasonable degree of medical certainty, that Ms.
7 Baptiste is incompetent, and unable to participate in litigation discovery to the extent she
8 must remain on the mixture of pain medications and, Ambien to assist her sleep. I have
9 referred her to [a doctor] for a surgical consultation of the left elbow fracture nonunion for
10 the hardware removal, nonunion takedown and ORIF. I further recommended that she
11 seek treatment from a pain management physician and attempt to taper the amount of
12 medication use, and instructed her not to drive until she is able to undergo revision surgery
13 and become weaned from taking narcotic medication.

14 Eberly Decl., ¶¶ 3-5.

15 ***Goguen's Reply to the Terminating Sanctions Motion***

16 Goguen's reply to Baptiste's opposition was supported by, *inter alia*, a declaration from
17 Dr. Suzanne Dupee, an expert in forensic psychiatry, who declares that Dr. Eberly's opinions in
18 this case "exceed his expertise as an orthopedic surgeon" and that "a forensic psychiatric
19 evaluation is the only method to determine a litigant's competency." Dupee Decl., ¶¶ 3, 6.

20 ***Order Continuing the Hearing on the Motion for Terminating Sanctions***

21 The first hearing regarding Goguen's motion for terminating sanctions was held on
22 January 4, 2019. After the hearing, the referee issued an order continuing the hearing on the
23 motion. *See* Discovery Referee Order 23. The order found that "a ruling on the merits of
24 Goguen's motion is inappropriate at the present time," and ordered the parties to "meet and confer
25 regarding the competency issues asserted by both sides, resolution of such issues, the extent of the
26 asserted lack of competency to each of the discovery failures or claims at issue in the motion,
27 Baptiste's compliance with her outstanding discovery obligations (i.e., the subject matter of the
28 present motion) and the timing therefore, and the manner in which discovery shall proceed in this
matter, including a plan for a hearing on the merits of the present motion." *Id.* at 3.

1 On January 16, 2019, after completion of the required meet and confer discussions,
2 Goguen's counsel issued an amended notice of his first motion for terminating sanctions, setting
3 February 1, 2019 as the date for the further hearing.

4 ***Baptiste's Motion to Stay Discovery***

5 On January 16, 2019, Baptiste filed a motion to stay discovery until April 30, 2019 to
6 enable Baptiste to resolve a number of medical issues. The motion was supported by a declaration
7 from her counsel and Dr. Eberly's prior declaration. The motion to stay was set for hearing on
8 February 12, 2019. On January 18, 2019, the Superior Court issued a tentative ruling granting Mr.
9 Paoli's motion to be relieved as counsel and denying Baptiste's motion to amend. On January 29,
10 2019, Goguen filed an opposition to the motion to stay discovery.

11 Pursuant to a request for continuance by Baptiste, the hearing on Goguen's motion for
12 terminating sanctions was reset for February 12, 2019. On February 11, 2019, Baptiste filed a
13 declaration in support of her opposition to the motion for terminating sanctions that addressed her
14 medical issues. Baptiste's lengthy declaration states, *inter alia*, that: (1) she is very ill, and
15 describes her medical issues; (2) she needs at least two additional surgeries, and is waiting to be
16 scheduled for the surgeries; (3) she takes 14 medications per day and cannot think clearly about
17 her case; (4) the case has been delayed due to the actions of Goguen's counsel; (5) she has (or
18 had) problems with her current and former counsel; (6) the history of her problems with Goguen
19 and his attorneys; (7) she is too ill to respond to Goguen's burdensome discovery; (8) if required,
20 she can seek further declarations from her medical care providers, but asks that the declaration be
21 submitted only to the referee; and (9) she fears Goguen's counsel will interfere with her medical
22 care, and wonders if the court will appoint a lawyer for her. Baptiste February 11, 2019 Decl.,
23 ¶¶ 1-26.

24 ***Order Granting Stay of Discovery***

25 The hearing on the motion to stay discovery and the continued motion for terminating
26 sanctions was conducted on February 12, 2019. At the conclusion of the hearing, the referee
27 granted a 60-day stay of discovery (to April 12, 2019) and made number of additional orders. On

February 28, 2019, the referee issued a written order granting the stay, which provides, in pertinent part, that:

1. All discovery, other than as set forth in this order, shall be stayed until April 12, 2019.
2. [Baptiste] shall comply with all outstanding discovery orders [by] no later than April 9, 2019.
3. [Baptiste] shall produce all medical records and corroborating documentation associated with the claims made in the Declarations of Amber Laurel Baptiste dated February 11, 2019, William M. Paoli dated January 15, 2019, and Vance Eberly, M.D., dated December 17, 2018, as soon as practicable, and no later than April 1, 2019.
4. The hearing on Goguen's motion for terminating sanctions and Goguen's motion to compel Baptiste to respond to requests for production (set 15), requests for production (set 16), special interrogatories (set 12) and form interrogatory (set 6) and for monetary sanctions is continued to April 12, 2019, at 10:00 a.m., at JAMS San Jose.
5. Should Baptiste be hospitalized prior to April 12, 2019, Baptiste either directly (should she become a pro se litigant), or through her counsel, shall immediately give notice to Goguen's counsel and JAMS by appropriate service of notice and by providing medical records documenting the dates of and reasons for such hospitalization. [Baptiste] shall not seek to have any ex parte communications with Discovery Referee regarding her hospitalization or any other topic.
6. Should Baptiste become a pro se litigant, all communications between Baptiste and Goguen's counsel shall either be a) in writing or b) in the presence of a court reporter who shall transcribe all such communications. Each of the parties shall provide the other with reasonable notice prior to any communication whereby a court reporter is required.

Discovery Referee Order No. 24 at 3-4.

March-April 2019

On March 13, 2019, counsel for Goguen sent a letter to Baptiste's counsel requesting that Baptiste submit to medical examinations by a forensic psychiatrist and an orthopedic surgeon

1 regarding the allegations made in connection with her opposition to Goguen's motion for
2 terminating sanctions. Baptiste, through counsel, refused to submit to any medical examinations.

3 On April 11, 2019, Goguen filed a status report in support of the motion for terminating
4 sanctions. The report was supported by declarations from Mr. Van Dalsem and Canadian counsel
5 for Goguen, Mr. Beddoes. Mr. Van Dalsem declared that as of April 11, 2019, Baptiste: (1) had
6 not produced a single medical record or other corroborating documentation associated with the
7 claims made in her January 11, 2019 declaration, the Paoli January 15, 2019 declaration and/or
8 the December 2018 declaration of Dr. Eberly, M.D.; (2) had not complied with any outstanding
9 discovery orders, in whole or part; and (3) had not provided notice that she has been hospitalized,
10 nor had she served any medical records indicating the same. Van Dalsem April 11, 2019 Decl.,
11 ¶¶ 13-15.

12 On April 12, 2019, a further hearing was held regarding the motion for terminating
13 sanctions. Counsel for Goguen and Baptiste appeared in person at the hearing, and Baptiste
14 appeared telephonically. Baptiste spoke on her own behalf, making extensive, occasionally
15 bizarre allegations against Goguen and his counsel, and noting her current medical problems
16 ("PTSD," broken arm, metal poisoning or toxicity, and her daily medical issues (fever, vomiting)
17 and an inability to drive). Thereafter, Baptiste's counsel, Mr. Paoli, spoke with respect to his
18 concerns regarding Baptiste's state of mind and ability to competently participate in the litigation.
19 Mr. Paoli also noted his inability to obtain Baptiste's medical records due to Baptiste's inability to
20 understand why she must provide the documents.

21 ***Discovery Referee No. 26***

22 On April 30, 2019, the referee issued Discovery Referee Order No. 26, denying Goguen's
23 first motion for terminating sanctions, and extending the stay on discovery. The order found, *inter*
24 *alia*, that: (1) Baptiste had failed to comply with five orders issued by the referee between
25 October 18, 2018 and November 6, 2018 and failed to comply with stay on discovery order; (2)
26 Baptiste provided Goguen with false responses to interrogatories 35 and 36 and two additional
27 discovery requests. However, the order further provides that:

1 Based upon the record presented, Goguen has failed to establish that terminating
2 sanctions are an appropriate remedy for Baptiste's failure to comply with six court orders
3 between October and November 2018 and her false discovery responses. In 2016, Baptiste
4 elected to sue Goguen for breach of contract. In response, Goguen has asserted significant
5 claims against her. Unless and until Baptiste elects to withdraw her Complaint and
6 Goguen drops his counterclaims against her, Baptiste must comply with her discovery
7 obligations, and must comply with the court's discovery orders. Whether Baptiste trusts
8 Goguen or Goguen's counsel has no bearing on her obligations in this litigation. Similarly,
9 Baptiste's apparent belief that certain discovery responses or documents are not relevant
10 to the litigation is misplaced. The inconsistencies in Baptiste's discovery responses
11 warrant the additional discovery at issue in this motion (and other recent motions by
12 Goguen).

13 Baptiste's repeated failure to comply with the referee's orders, and her submission
14 of false discovery responses, is unacceptable litigation conduct. In the ordinary civil case,
15 Baptiste's failure to comply with six orders, along with evidence of false discovery
16 responses, would warrant very significant sanctions (i.e., narrow issue and or evidentiary
17 sanctions as opposed to the requested terminating sanctions). However, even assuming
18 this was an ordinary case, Goguen's motion does not seek such sanctions, and does not
19 provide a basis (e.g., the impact of Baptiste's various specific failures on his claims) for
20 the referee to award more limited evidentiary and/or issue sanctions.

21 The issues presented by the present motion, however, are not ordinary. The record
22 presented with respect to Baptiste's competency and ability to respond to discovery and/or
23 assist her counsel in the litigation compels the conclusion that the requested sanctions are
24 not warranted at the present time. The evidence shows that the issue of Baptiste's
25 competence has adversely affected this litigation since August 2017. Based upon the
26 incomplete record presented, Baptiste's failures to comply with the orders in question
27 post-date her elbow injury and appear to be connected to Baptiste's medical problems.
28 While it is true that Baptiste, or more specifically her counsel, have propounded and
pursued discovery on her behalf, at the end of the day this fact does not make Baptiste
competent for purposes of the litigation. The record reflects that Baptiste's medical
problems are playing a significant role in her failure to comply with her discovery
obligations.

While Baptiste's medical problems are unfortunate, the time has come for clarity
with respect to these problems, and one would hope, Baptiste undertaking the efforts
necessary to address her problems. The record is clear that Baptiste has inserted her
medical problems into this litigation. Given her failure to comply with the outstanding
discovery orders due to claimed competency issues, discovery from Baptiste is warranted
regarding her medical problems, and the impact of any such problems on her ability to
respond to discovery and the court's orders. Such discovery would include discovery
directed at Baptiste's medical records and an independent medical examination of Baptiste
(pursuant to a discovery request or stipulation of the parties, or if necessary, order of the
court). Irrespective of the source of Baptiste's medical problems, irrespective of her view

1 of Goguen and her counsel, and irrespective of her beliefs regarding the litigation, Baptiste
2 must take the actions necessary to enable her to pursue her claims and defend against
3 Goguen's claims without further delay or excuse. Baptiste's continued failure to comply
4 with her discovery obligations and court orders likely will result in the failure of her
5 claims and a significant judgment against her.

6 Accordingly, for the reasons noted, Goguen's motion for terminating sanctions is
7 DENIED. This denial is without prejudice to Goguen's ability to bring a motion seeking
8 lesser sanctions for the failures to comply at issue in this motion. However, any such
9 sanctions motion or further motion to compel written discovery responses (with the
10 exception noted below) may not be filed prior to a resolution of the issue of Baptiste's
11 competence by the parties, the court or the referee. Moreover, outside of a request for an
12 independent medical examination pursuant to the Discovery Act (and if necessary, motion
13 practice related thereto) and Baptiste's compliance with existing orders, the stay on
14 discovery in this action is hereby extended indefinitely. Given Baptiste's discovery
15 misconduct to date, Baptiste may not conduct further discovery until she provides the
16 required discovery (i.e., the further responses required by the prior orders and discovery
17 regarding her medical problems) to Goguen. Between now and June 17, 2019, the referee
18 expects Baptiste to meaningfully address her medical issues so as to allow her to take the
19 actions necessary to participate fully in this litigation, comply with the outstanding
20 discovery orders and produce documents regarding her medical problems. Failure to
21 comply with foregoing will result in the lifting of the stay on the discovery motions that
22 may be asserted by Goguen. In sum, this is Baptiste's final opportunity to resolve (or
23 make significant efforts towards resolution) of her failures to comply with the referee's
24 prior orders. The parties shall submit, on June 17, 2019, briefs and declarations regarding
25 the actions undertaken, and after consideration of these briefs, the referee will issue a
26 further order regarding the stay on discovery and discovery motions.

27 Order No. 26 at 48-50.

28 ***Goguen's Motion for Order Compelling Baptiste to Submit to Medical Examinations***

On May 23, 2019, Goguen a motion for order compelling Baptiste to submit to mental and
physical medical examinations. The notice of motion set forth the specific tests and examinations
that would be performed by each doctor, the time for and location of the examinations, and the
need for x-rays and a urine sample for a non-invasive 10-panel drug screen. The motion was made
pursuant to California Code of Civil Procedure sections 2032.310, 2032.320, 2032.020, and
2032.530 on the grounds that Baptiste has placed her mental and physical condition in
controversy in this case, and that good cause exists to order Baptiste to submit to mental and

1 physical examinations as set forth in the motion and is supported by declarations for her counsel,
2 Mr. Van Dalsem, and the two doctors who would be performing the examinations.

3 The declaration of Mr. Van Dalsem, Goguen's counsel, provided, *inter alia*, that: (1)
4 Goguen's counsel's attempts to get Baptiste to submit to medical examinations by a forensic
5 psychiatrist and an orthopedic surgeon regarding the allegations made in connection with her
6 opposition to Mr. Goguen's Motion for Terminating Sanctions were unsuccessful; (2) as of May
7 23, 2019, "Ms. Baptiste has not produced a single medical record from a treating physician or
8 other corroborating documentation associated with the claims made in connection with her
9 opposition to Mr. Goguen's Motion for Terminating Sanctions;" (3) Ms. Baptiste "has not
10 complied with any outstanding discovery orders, in whole or part, as ordered by Discovery Order
11 No. 24;" (4) "Ms. Baptiste has not provided notice that she has been hospitalized or undergone
12 surgery, nor has she served any medical records indicating the same, as ordered by Discovery
13 Order No. 24;" and (5) counsel for Mr. Goguen will pre-pay for a non-invasive urinalysis 10-
14 panel drug screen. Van Dalsem May 23, 2019 Decl., ¶¶ 2-5, 8-11.

15 The second declaration, from Dr. Dupee, an expert in forensic psychiatry, set forth the
16 purpose of her examination, and the examination to be conduct. Dupee May 23, 2019 Decl., ¶¶ 4-
17 12. The final declaration from Dr. Stetson, an orthopedic surgeon who works regularly with
18 patients with elbow injuries, set forth the purpose of his examination and the examination he
19 would conduct. Stetson Decl., ¶¶ 6-9.

20 ***Baptiste's June 13, 2019 Declaration***

21 On June 6, 2018, Baptiste's counsel's motion to be relieved as counsel was granted and
22 filed by the court. On June 13, 2019, Baptiste submitted a declaration in opposition to the present
23 motion, wherein she declares, *inter alia*, that: (1) she is "extremely sick and bed ridden on most
24 days," and has "multiple medical problems which I am working to find the source of the various
25 break downs in my health;" (2) "I have been undergoing medical care and treatment for my left
26 elbow. I am currently scheduled to undergo surgery on July 2, 2019, to remove broken drill bits
27 and numerous pins that were placed in my elbow;" (3) "I am also advised that following the

1 surgery, I will require the assistance of a care giver. As such, I am told that I should make
2 arrangements to reside in an assisted living facility for a period of thirty days following the
3 surgery,” and “I will be incapable of engaging in the litigation during that period of time, but
4 expect to be released from the facility and capable of engaging in the litigation following my
5 discharge from the assisted living facility;” and (4) the requested examinations are not permitted
6 by Cal. Civ. Proc. Code sections 2032.220 and 2032.320. *See* Baptiste June 13, 2019 Decl., ¶¶ 1-
7 2, 4-7.

8 ***Discovery Referee Order No. 27***

9 On June 17, 2019, the referee issued Discovery Order 27, granting Goguen’s motion for
10 court-ordered independent medical examination of Baptiste. After reviewing the relevant law
11 regarding independent medical examinations, the order states:

12
13 Based upon the record presented, good cause exists for a physical examination and
14 a mental examination of Baptiste. Over the best two years in this litigation, Baptiste has
15 firmly placed her mental and physical condition in controversy in the action. While this
16 case does not fit the typical situation in which an examination is required, there can be no
17 doubt that Baptiste’s has put her injuries and mental condition at issue in this lawsuit.
18 Baptiste has repeatedly placed her physical and mental problems (allegedly caused by
19 Goguen) at issue in response to Goguen’s attempts to obtain discovery and court orders.
20 Baptiste’s asserted competency and medical issues have essentially ground this litigation
21 to a halt. The evidence presented with respect to the type of mental and physical
22 examinations needed, and the doctors in question, likewise establish good cause for the
23 requested examinations. In sum, the requested examinations are necessary to the
24 resolution of the action, or at a minimum, the completion of discovery. Given the
25 procedure Baptiste will be undergoing on July 2, 2019, the examinations shall take no
26 earlier than August 5, 2019, and no later than August 30, 2019.

27
28 Accordingly, Goguen’s motion for court-ordered independent medical examination
of Plaintiff and Cross-Defendant Amber Baptiste is GRANTED, and the referee orders as
follows:

1. Plaintiff shall submit to a mental examination conducted by Suzanne Dupée,
M.D., regarding the conditions, injuries, symptoms, and diagnoses described in the
December 19, 2018 Declaration of William Paoli, the December 17, 2018
Declaration of Vance Eberly, and the February 11, 2019 Declaration of Amber
Baptiste Declarations. The examination shall take place at 1148 Manhattan
Avenue, Suite 9, Manhattan Beach, California 90266, between August 5 and

1 August 30, 2019. The examination shall occur on a date during this period chosen
2 by Goguen's counsel, and shall commence at 9:00 a.m. If Baptiste does not appear
3 by 10:00 a.m., the examination will be cancelled and Baptiste will be found to
4 have failed to appear. The examination will consist of an interview, not to exceed
5 four hours, as well as completion of the following tests, the time estimate for
6 which is an additional three to four hours total: the MMPI-2 (Minnesota
7 Multiphasic Personality Inventory-2), the Personality Assessment Inventory
8 ("PAI"), the Trauma Symptom Inventory-2 ("TSI2"), the Detailed Assessment of
9 Post-Traumatic Stress ("DAPS"), the Macarthur Confidence Assessment Tool
10 ("MCAT") and the Test of Malingered Memory ("TOMM"). Baptiste shall also
11 submit to a 10-panel drug screen requiring a non-invasive urine sample. The drug
12 screen shall be conducted the day prior to Plaintiff's mental examination, at the
13 following location: DMG & Associates, Inc. 2511 South Barrington Ave., 2nd
14 Floor, Los Angeles, CA 90064.

15 2. Plaintiff shall submit to an orthopedic examination conducted by Dr. William
16 Stetson, M.D. The examination shall take place at 191 South Buena Vista Street,
17 Suite 470, Burbank, CA 91505, between August 5 and August 30, 2019. The
18 examination shall occur on a date during this period chosen by Goguen's counsel,
19 and shall commence at 2:00 p.m. If Baptiste does not appear by 3:00 p.m., the
20 examination will be cancelled and Baptiste will be found to have failed to appear.
21 The scope of the examination will be those conditions, injuries, symptoms, and
22 diagnoses described in the December 19, 2018 Declaration of William Paoli, the
23 December 17, 2018 Declaration of Vance Eberly, and the February 11, 2019
24 Declaration of Amber Baptiste. The examination will consist of an in-person
25 interview and a physical examination using standard orthopedic methods not to
26 exceed two hours. Furthermore, unless Baptiste submits to counsel for Goguen by
27 August 2, 2019, X-rays of her arm taken after April 15, 2019, Dr. Stetson shall be
28 permitted to X-ray Baptiste.

19 3. Plaintiff is ordered to comply with the examinations and all procedures attendant
20 thereto, including pre-examination protocols that are customary and explained to
21 Plaintiff by the examining doctors and/or their staff, and to provide truthful and
22 accurate responses to the examining doctors and staff. Each of these examinations
23 may be audio recorded at the request of either party. The results of the
24 examinations shall be available to the Court no later than September 6, 2019.
25 Plaintiff is also ordered to meet and confer in good faith with Goguen's counsel
26 before June 28, 2019 to expeditiously schedule the examinations on the dates set
27 forth above, or, by mutual agreement of the parties, on alternative dates.

28 Discovery Referee Order 27 at 18-20.

Goguen Status Report and Communications Between Counsel for Goguen and Baptiste

1 On June 18, 2019, Goguen filed the status report required by Order No. 26, which is
2 supported by a declaration from Goguen's counsel. The supporting declaration noted that Ms.
3 Baptiste has not provided to Goguen any discovery in connection with any of the outstanding
4 discovery orders and had not produced to Mr. Goguen any medical records regarding her
5 purported medical issues. Doolittle June 2019 Decl., ¶¶ 2-3. Goguen's brief requests, in light of
6 the October 15, 2019 trial date, that the discovery stay be lifted in two stages: (1) the stay on
7 discovery be lifted on August 5, 2019, pursuant to a statement in Baptiste's June 13 declaration;
8 and (2) from now until August 5, 2019, Goguen requests that the stay be partially lifted to permit
9 him to proceed with written and third party discovery.

10 Baptiste did not submit a status update as required by Order No. 26.

11 On June 25, 2019, counsel for Goguen emailed Baptiste. Van Dalsem August 2019 Decl.,

12 ¶ 5, Ex. D. The email states:

13 Pursuant to Discovery Order No. 27, Mr. Goguen has scheduled the following
14 examinations:

- 15 • An Orthopedic Examination by Dr. Stetson to take place on August 5 at 3 pm at
16 191 South Buena Vista Street, Suite 470, Burbank, CA 91505;
- 17 • A Mental Examination by Dr. Dupée to take place on August 8 at 9 am at 1148
18 Manhattan Avenue, Suite 9, Manhattan Beach, CA 90266; and
- 19 • A 10- panel drug screen on August 7 at 9:15 am at DMG & Associates, Inc. 2511
20 South Barrington Ave., 2nd Floor, Los Angeles, CA 90064.

21 We have attached a copy of Discovery Order No. 27 and direct your attention to it and
22 your obligations thereunder.

23 *Id.*, Ex. D.

24 On June 26, 2019, Baptiste sent a responsive email to counsel for Goguen Van Dalsem
25 Decl., Ex. D. Baptiste's email provides that:

26 I will be filling a Writ because this is all outside of the course of discovery in a breach of
27 contract and if the man who repeatedly raped me and caused irreparable damage to my
28 mind and body and continues to hire men to stalk me i am going to file suit for the
additional injuries he caused me by breaching the contract that he and his lawyers wrote
and forced me into. He asked me to forever extinguish my rights and then continued to
caused me harm and distress for an additional 5 years. A Writ of mandamus will be filed

1 because there is no law that permits for the defendant to extract bodily fluids and my very
2 DNA or examine my body parts that are not even part of the breach of contract. Even in a
3 personal injury case a defendant cannot just take mental examinations of a plaintiff unless
4 they have specify sought damages for brain damage.

5 You cannot just go along making up laws as we go. I will be hospitalized and undergoing
6 more than one major surgery this summer so no I cannot commit to these dates that the
7 man that raped me has appointed for him to further harass me with invasive testing that is
8 not even permitted under California state law and I will take it all the way to the supreme
9 court.

10 Even if I were to under go those examinations i could not tell you today if I would be
11 available on those dates and times as I don't know when I will be well and able to be
12 released from the hospital. So it is very unfair for you to schedule these illegal
13 examinations of my person when I have stated I will be hospitalized and undergoing
14 surgery again. I have been ill for a very long time and medical treatment had been delayed
15 because of the harassment of your firm and all other people hired by the man who raped
16 me to harass me follow me, break onto peoples properties, harassment elderly people,
17 harassment and instilling fear into Young mothers with small children and cancer patients.
18 Your firm and your client have abused this process for over 5 years. I need medical care. I
19 intend to seek the care I need and I will proceed with the case when able. I have no choice.
20 You firms unwarranted witness tampering and tampering with my lawyers that never stops
21 will all be brought to the courts attention as well.

22 *Id.*, Ex. D. In response on June 27, counsel for Goguen emailed Baptiste again, stating, *inter alia*,
23 that, "You have not told us you are unavailable on the dates we selected, so they will be
24 confirmed, and you will be expected to appear as ordered." *Id.*, Ex. D. Baptiste did not respond to
25 the June 27 email confirming the dates, "never proposed any alternative dates, and never
26 provided any further information regarding the scheduling of her purported surgery." Van Dalsem
27 Decl., ¶ 5. Moreover, while Baptiste stated she would be filing a writ challenging the order
28 requiring her to appear for the examinations, Baptiste has not done so. *Id.*

Discovery Referee Order No. 28

On July 10, 2019, the referee issued Discovery Referee Order 28. The order provides in
pertinent part that:

Goguen's request that the stay on discovery be partially lifted to permit him to
proceed with written and third party discovery is GRANTED IN PART AND DENIED IN
PART. The stay is lifted with respect to third party discovery. The stay, however, shall

1 remain with respect to all discovery directed to (and or propounded by) Baptiste and
2 Every Girl Counts. The parties shall provide the referee with further updates, at the
3 appropriate time, regarding the scheduling of the examinations, the occurrence of the
4 examinations, and Baptiste's compliance with the referee's prior orders.

5 ***Baptiste Fails to Appear to the Court-Ordered Medical Examinations***

6 On August 5, Dr. William Stetson's office informed counsel for Goguen that Baptiste
7 failed to appear for her orthopedic examination scheduled for that day. Van Dalsem Decl., ¶ 6.
8 On August 7, the drug testing lab, DMG & Associates, informed counsel for Goguen that Baptiste
9 had failed to appear for her scheduled 10-panel drug screen scheduled for that day. *Id.*, ¶ 7.
10 On August 8, Dr. Suzanne Dupée informed counsel for Goguen that Baptiste had failed to appear
11 for her mental examination scheduled for that day. *Id.*, ¶ 9. Due to Baptiste's failure to appear,
12 Goguen has been billed for fees by the lab and doctors totaling \$5,180. *Id.*, ¶¶ 7, 8, 10, Exs. E, F.

13 Since April 30, 2019, when Discovery Order No. 26 was issued, "Baptiste has not
14 provided Mr. Goguen with any responses to any of the outstanding discovery." Van Dalsem
15 Decl., ¶ 14.

16 Despite claiming she cannot participate in the litigation process for all of 2019, Baptiste
17 continues to make posts on Twitter wherein she makes a number of assertions about Goguen,
18 including that he is "serial rapist," "pedophile," "known sex offender" and "human trafficker."
19 See Van Dalsem Decl., ¶ 15, Ex. J. The Twitter posts include posts on each of the days that she
20 was supposed to appear for her medical examinations or at the lab. See *Id.*, Ex. J.

21 ***The Present Motion***

22 On August 19, 2019, Goguen filed the present motion for terminating sanctions against
23 Baptiste, specifically, an order dismissing Baptiste's complaint. The motion is made pursuant to
24 California Code of Civil Procedure sections 581, 583.150, 2023.010 et seq., 2025.450, 2025.480,
25 2030.300, and 2031.310, and the Court's inherent power to impose sanctions for "failure to
26 comply with Discovery Order 27, which required Baptiste to undergo Independent Medical
27 Examinations, and certain provisions of Discovery Order 26, which required her to comply with
28 numerous other orders and to produce documents related to her purported medical condition."

1 The motion asserts that “combined with Baptiste’s repeated failures to comply with her discovery
2 obligations, including her continuing violations of other Court orders, Baptiste’s actions have
3 irreparably prejudiced Goguen, made it impossible to complete discovery, made it impossible for
4 Goguen to defend himself, and made it impossible to conduct a trial in this action.” The motion is
5 supported by declaration from Goguen’s counsel, Mr. Van Dalsem, who declares, *inter alia*, that
6 “Baptiste has refused to participate in discovery in this matter since approximately July 2018,
7 when discussions regarding a further deposition of Ms. Baptiste broke down.” Van Dalsem Decl.,
8 ¶ 19.

9 The motion was served upon Baptiste on August 19, 2019. Baptiste did not file an
10 opposition to the motion. On September 4, 2019, Goguen filed a reply to his motion, supported by
11 a further declaration from Mr. Van Dalsem. Baptiste did not appear at the September 11, 2019
12 hearing on the motion.

13 Discussion

14 Goguen contends that the referee has an ample record on which to issue terminating
15 sanctions. Goguen asserts that: (1) “Baptiste has misused the discovery process by willfully
16 violating Court orders, falsifying an excuse to her repeated discovery violations with her
17 purported elbow injury and resulting drug dependency, and then refusing to appear for Court-
18 ordered examinations aimed at determining the validity of those very excuses;” (2) the referee
19 provided Baptiste with a “final opportunity” to cure her outstanding violations in Order 26, but
20 Baptiste failed to do so; and (3) her recent failures are preceded by a long, documented history of
21 discovery abuses which the imposition of monetary, evidentiary, and issue sanctions has done
22 nothing to curb. Goguen further contends that: (a) terminating sanctions are proper given
23 Baptiste’s refusal to participate in court-ordered independent medical examinations; (b) no lesser
24 sanction will protect Goguen’s interests in the litigation; and (c) Baptiste’s claimed incompetency,
25 which she has not proven as required by California Criminal Jury Instruction 4.10, provides no
26 excuse to avoid terminating sanctions.

1 One of the purposes of the discovery rules is to “enhance the truth-seeking function of the
2 litigation process.” *Juarez v. Boy Scouts of Am., Inc.* (2000) 81 Cal.App.4th 377, 389 (citation
3 omitted). “Those who interfere with the truth-seeking function of the trial court strike at the very
4 heart of the justice system.” *In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 110. “The
5 courts will not tolerate such interference.” *Id.*

6 The court, after notice to any affected party, and after opportunity for hearing, may impose
7 sanctions “against anyone engaging in conduct that is a misuse of the discovery process.” Cal.
8 Civ. Proc. Code § 2023.030.² Section 2023.010 addresses conduct subject to sanctions, and
9 provides that misuses of the discovery process include:

- 10
11 (d) Failing to respond or to submit to an authorized method of discovery.
12 (e) Making, without substantial justification, an unmeritorious objection to discovery.
13 (f) Making an evasive response to discovery.
14 (g) Disobeying a court order to provide discovery.
15 (h) Making or opposing, unsuccessfully and without substantial justification, a motion to
16 compel or to limit discovery.

17 Section 2023.030 describes the types of sanctions that a court may impose, including
18 monetary, issue, evidence, terminating, and contempt sanctions. § 2023.030(a)-(e).) Section
19 2023.030 authorizes a court to impose the specified types of sanctions “to the extent authorized
20 by the chapter governing any particular discovery method or any other provision of this title.”
21 § 2023.030. If a party fails to obey an order compelling further response [or an order compelling
22 compliance], the court may make those orders that are just, including the imposition of an issue
23 sanction, an evidence sanction, or a terminating sanction . . .” §§ 2030.300(e)[motion to compel
24 further responses to interrogatories] 2031.310(i) [documents] and 2025.480(k). “In lieu of or in
25 addition to that sanction, the court may impose a monetary sanction.” *Id.* “The statutory
26 requirement that there must be a failure to obey an order compelling discovery before the court
27 may impose a nonmonetary sanction for misuse of the discovery process provides some assurance

28 ² Unless otherwise noted, all further statutory references are to the Code of Civil Procedure.

1 that such a potentially severe sanction will be reserved for those circumstances where the party's
2 discovery obligation is clear and the failure to comply with that obligation is clearly apparent."
3 *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1423.

4 "Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be
5 a failure to comply ... and (2) the failure must be willful." *Liberty Mut. Fire Ins. Co. v. LcL*
6 *Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102 (citation omitted).

7 "The purpose of discovery sanctions is not to provide a weapon for punishment, forfeiture
8 and the avoidance of a trial on the merits, but to prevent abuse of the discovery process and
9 correct the problem presented." *McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 210
10 (citations and quotations omitted). "One of the principal purposes of the Discovery Act ... is to
11 enable a party to obtain evidence in the control of his adversary in order to further the efficient,
12 economical disposition of cases according to right and justice on the merits." *Id.* (citation
13 omitted). "In exercising its broad discretion to sanction discovery abuses, the trial court may
14 impose any sanction authorized by statute that will enable the party seeking discovery to obtain
15 the objects of the discovery sought." *In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 109
16 (citation omitted). "A discovery sanction may not place the party seeking discovery in a better
17 position than it would have been in if the desired discovery had been provided and had been
18 favorable." *Id.* "Discovery sanctions should be appropriate to the dereliction and should not
19 exceed that which is required to protect the interests of the party entitled to but denied discovery."
20 *Vallbona v. Springer* (1996) 43 Cal. App. 4th 1525, 1545 (citations omitted).

21 "A decision to order terminating sanctions should not be made lightly." *Mileikowsky v.*
22 *Tenet Healthsystem* (2005) 128 Cal.App. 4th 262, 279. "But where a violation is willful, preceded
23 by a history of abuse, and the evidence shows that less severe sanctions would not produce
24 compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction."
25 *Id.* at 279-280. "Courts have the inherent authority to dismiss a case as a sanction." *Crawford v.*
26 *JPMorgan Chase Bank, N.A.* (2016) 242 Cal.App.4th 1265, 1271. "The authority should be
27

1 exercised only in extreme situations, such as where the conduct was clear and deliberate and no
2 lesser sanction would remedy the situation.” *Id.*

3 The instant action was filed by Baptiste in March 2016. While Baptiste fractured her
4 elbow in August 2017, and this injury may be affecting her to this day, the history of this case
5 shows that Baptiste participated in the discovery process through approximately July 2018. In
6 August 2018 and thereafter, Goguen propounded discovery directed to relevant issues. Thereafter,
7 however, the record reflects that Baptiste has essentially stopped responding to discovery and
8 stopped complying with the referee’s discovery orders. During October 2018, her counsel
9 represented that Baptiste’s deposition may have to be continued due to a possible surgery on her
10 arm. On October 18, 2018, Baptiste violated the referee’s oral order to produce specific medical
11 records (regarding her treatment for the alleged 2012 rape) at a hearing.

12 On October 26, 2018, a number of discovery orders were issued by the referee. Baptiste
13 was ordered to produce documents in response to two document requests (concerning bank
14 records and her travel history). *See* Discovery Referee Order 14. Baptiste was ordered conduct a
15 further reasonable search for specific paintings, provide Goguen with an amended response to
16 requests 16-18 in a deposition notice, produce the responsive paintings for inspection or provide a
17 declaration describing in detail when and where she stored them and the efforts she took to locate
18 the paintings in response to Goguen’s discovery requests. *See* Discovery Referee Order 15.
19 Baptiste was ordered to conduct a further search for documents responsive to document requests
20 1-22, 27-29, 32-34, 36-47, 49-54, and 57-59 (which Baptiste had previously responded to by
21 agreeing to produce all responsive, non-privileged documents), provide amended responses to
22 these requests, and produce responsive documents or provide a declaration regarding her search
23 for these documents. *See Id.* These document requests were directed to Baptiste’s
24 communications and interactions with or relating to Goguen, the Settlement Agreement,
25 Baptiste’s alleged extortion, Baptiste’s HPV infection, other diseases, Baptiste’s related
26 gynecological care, Baptiste’s alleged marriage fraud and illegal presence in the United States,
27 Baptiste’s allegation that she is a victim of human trafficking, injuries allegedly caused by

1 Goguen, Baptiste's charity EGC, other allegations in Baptiste's Complaint, and documents related
2 to Baptiste's interrogatory responses. *See Id.* Baptiste was also ordered to appear for two
3 additional days of deposition testimony. *See* Discovery Referee Order 17. To date, however,
4 Baptiste has failed to comply with each of the foregoing orders.

5 On November 6, 2018, Goguen's motion to compel Baptiste to respond to his thirteenth
6 and fourteenth sets of requests for production, tenth and eleventh sets of special interrogatories,
7 fifth set of requests for admission, and sixth and seventh sets of form interrogatories was granted,
8 and Baptiste was ordered to provide Goguen with "code-compliant responses to the foregoing
9 discovery requests, without objections, and all documents responsive to the document requests"
10 by November 13, 2018. *See* Discovery Referee Order 20. These discovery requests, generally,
11 were directed at Baptiste's medical records relevant to Baptiste's claims, and her communications
12 with counsel prior to and after execution of the Settlement Agreement, Baptiste's ability to enter
13 the United States, and regarding numerous accusations made by Baptiste to Goguen's counsel
14 about Goguen in June/July 2018. *Id.* On November 8, 2018, Goguen's motion to compel
15 expedited responses to discovery regarding her storage facilities and government-issued
16 identification, and to compel a further deposition of Baptiste regarding the loss of evidence was
17 granted. Baptiste, however, has failed to comply with either November 2018 order.

18 In response to the foregoing, Goguen filed his first motion for terminating sanctions, based
19 in part on the foregoing violations. The referee continued the hearing on the motion due to the
20 competency issues raised by Baptiste's counsel, and required the parties to try to resolve such
21 issues. *See* Discovery Referee Order 23. On January 16, 2019, Baptiste filed a motion to stay
22 discovery until April 30, 2019 to enable Baptiste to resolve a number of medical issues. On
23 February 12, 2019, the referee granted the requested stay on discovery and continued Goguen's
24 first motion for terminating sanctions until April 12, 2019. *See* Discovery Referee Order 24. The
25 order, however, required Baptiste to: (1) shall comply with all outstanding discovery orders by no
26 later than April 9, 2019; and (2) produce all medical records and corroborating documentation
27 associated with the competency claims made by Baptiste, her counsel and her document in

1 December 2018 and January 2019. Baptiste, however, did comply with all outstanding discovery
2 orders by April 12, 2019, and she did not produce (and has not produced) the specified medical
3 records. No evidence has been presented to suggest that Baptiste used the 60-day stay to
4 resolve her medical issues.

5 On April 12, 2019, at the further hearing on Goguen's first motion for terminating
6 sanctions, Baptiste and her counsel again raised her medical problems and/or competency in
7 response to Goguen's motion. On April 30, 2019, the referee issued an order denying Goguen's
8 first motion for terminating sanctions. *See* Discovery Referee Order 26. While the order found
9 that Baptiste had failed to comply with the foregoing orders, and provided false responses to four
10 discovery requests, the motion was denied on a number of grounds, including the record
11 presented with respect to Baptiste's ability to respond to discovery and/or assist her counsel. *Id.*
12 The order nonetheless informed Baptiste that due to her failure to comply with the outstanding
13 discovery orders based upon claimed competency issues, discovery from Baptiste was warranted
14 regarding her medical problems, and the impact of any such problems on her ability to respond to
15 discovery and the court's orders. *Id.* The order further noted that "Baptiste must take the actions
16 necessary to enable her to pursue her claims and defend against Goguen's claims without further
17 delay or excuse," and that "Baptiste's continued failure to comply with her discovery obligations
18 and court orders likely will result in the failure of her claims and a significant judgment against
19 her. The order further: (1) stayed Baptiste's right to conduct discovery until she complied with the
20 referee's prior orders; (2) required both sides to submit a brief regarding Baptiste's efforts to fully
21 participate in the litigation by June 17, 2019; and (3) warned Baptiste that the order reflected her
22 "final opportunity to resolve (or make significant efforts towards resolution) of her failures to
23 comply with the referee's prior orders." *Id.* Baptiste, however, did not comply with the prior
24 orders in response to Discovery Referee Order 26.

25 In June 2019, Baptiste submitted a declaration noting her continued medical problems,
26 that she was scheduled for surgery on her elbow on July 2, 2019, and that she would be incapable
27

1 of engaging in litigation as a result of the surgery for 30 days. However, Baptiste did not provide
2 any corroborating evidence with respect to the surgery or need for rest.

3 On June 17, 2019, Goguen's motion for court-ordered mental and physical examinations
4 of Baptiste was granted. *See* Discovery Referee Order 27. Due to her assertion that she would
5 have surgery on July 2, would need to rest for thirty days thereafter, the referee required that the
6 examinations occur between August 5 and August 30, 2019. *Id.* Thereafter, Goguen's counsel
7 informed Baptiste of the days of the examinations and drug screening, which were all within the
8 permitted time window. Baptiste, however, indicated to Goguen's counsel that she would not
9 appear, did not agree with the legality of the order compelling her to submit to medical
10 examinations, and that she needed medical care. Baptiste, however, has not filed a writ and has
11 not submitted a requested that Discovery Referee Order 27 be stayed. Thereafter, Baptiste failed
12 to appear for either the mental or physical examination, and did not appear for the drug screening.
13 In response, Goguen filed the presented. Baptiste did not file an opposition to the motion, and did
14 not appear at the hearing on the motion.

15 Based upon the foregoing, Baptiste has failed to comply with numerous discovery orders
16 since October 2018, including the April 30, 2019 and June 17, 2019 orders. The record presented
17 further establishes that Baptiste's failures were willful. Baptiste appears to believe that the
18 information responsive to the discovery at issue is either not relevant, or with respect to the
19 medical examinations, not permitted by law. While Baptiste is free to believe what she wants to
20 believe, the orders are binding on Baptiste, and her failure to comply with the orders is
21 unacceptable. The referee has given Baptiste numerous opportunities, despite her failures to
22 comply with the orders, to rectify her failures to provide discovery or to establish her inability to
23 proceed with the litigation. Unfortunately, Baptiste has done neither, and the record presented
24 does not support a conclusion that Baptiste will do so in the future. Baptiste's failure to comply
25 with the referee's orders has resulted in Goguen being unable to obtain, since approximately June
26 2018, relevant discovery regarding the parties' claims in the litigation. Baptiste's failure to
27 comply with the relevant orders therefore has significantly prejudiced Goguen's ability to prepare

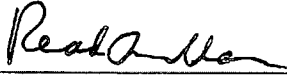
1 for trial. In light of Baptiste's continued failure to comply with the referee's orders, the referee
2 finds that the requested dismissal sanction is justified. The referee is not persuaded that any
3 further orders or lesser sanctions would result in Baptiste's compliance with her discovery
4 obligations.

5 Accordingly, Goguen's motion to terminating sanctions against Baptiste, and for an order
6 dismissing Baptiste's complaint, is GRANTED.

7 Counsel for Goguen shall file this order with the Court, serve opposing counsel and the
8 court with filed-endorsed copies and post a filed-endorsed copy of the order on Case Anywhere.

9
10 IT IS SO ORDERED.

11 Dated: September 12, 2019

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13 _____
14 Hon. Read Ambler (Ret.)
15 Cal. Civ. Proc. Code § 638 Referee
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PROOF OF SERVICE BY E-Mail

Re: Baptiste, Amber Laurel, et al. vs. Goguen, Michael
Reference No. 1110021344

I, Jason Clark, not a party to the within action, hereby declare that on September 12, 2019, I served the attached Discovery Referee Order No. 30 Granting Defendant and Cross-Complainant Michael Gougen's Motion for Terminating Sanctions on the parties in the within action by electronic mail at San Jose, CALIFORNIA, addressed as follows:

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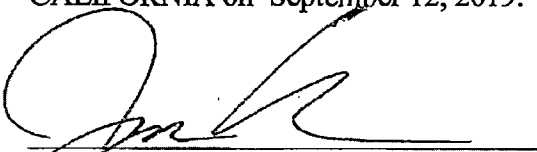
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Amber Laurel Baptiste
Every Girl Counts, LLC

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Jose,

CALIFORNIA on September 12, 2019.

A handwritten signature in black ink, appearing to read 'Jason Clark', written over a horizontal line.

Jason Clark

JAMS

JClark@jamsadr.com