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3 It reflects the law as of the date we completed it. Because the law may have changed since that time, please use it
solely to evaluate the scope and quality of our work.

4 If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email info@quojure.com.

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6 Attorney for Plaintiff

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF REDWOOD

10 MARY JONES,

Case No.:

11 Plaintiff,

**Ex Parte Application for Relief under
Code of Civil Procedure § 473(b) from
Denial of Motion to Quash Subpoenas;
Points and Authorities; Declaration of
Louise Lawyer; [Proposed] Order**

12 vs.

13 DEFCO, LLC, et al.,

14 Defendants.

15 _____/

16
17 Plaintiff Mary Jones moves this Court ex parte for an order granting discretionary
18 relief under Code of Civil Procedure § 473(b) from the Court's order denying plaintiff's
19 motion dated _____, to quash subpoenas for the production of psychiatric and
20 psychotherapy records, or, in the alternative, if the court finds that the facts do not
21 support discretionary relief, for an order granting mandatory relief based on the attached
22 attorney affidavit of fault in the form of the declaration of plaintiff's counsel, Louise
23 Lawyer, as set forth in § 473(b).

24 Dated:

25 _____
Louise Lawyer
26 Attorney for Plaintiff

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2

3 **1. This matter should be heard ex parte.**

4 Defendant is vigorously pursuing its demand that plaintiff’s psychotherapists
5 comply with its subpoenas and turn over plaintiff’s confidential mental health records. As
6 the matter now stands, those subpoenas are outstanding and the psychotherapists could
7 comply with them at any time. Once that sensitive personal information is disclosed to
8 defendants and their counsel, plaintiff will be irreparably harmed, since there will be no
9 way to unring the bell. It is essential, therefore, that this matter be heard as quickly as
10 possible, rather than waiting the several months it may take to have the matter heard on
11 formal noticed motion.

12

13 **2. Plaintiff is entitled to relief under Code of Civil Procedure § 473(b).**

14 A party may apply for an order granting relief from default under § 473(b) “upon
15 any such terms as may be just . . . from a judgment, dismissal, order or other proceeding
16 taken against him or her through his or her mistake, inadvertence, surprise or excusable
17 neglect.” Relief may be granted for any step taken in a case whether by the court or by one
18 of the parties. *Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1105. Granting relief is either
19 discretionary, based on the court’s examination of the facts and circumstances
20 surrounding the default, or mandatory, if the attorney for the party seeking relief files an
21 “affidavit of fault.” Code Civ. Proc. § 473(b).

22 In this case, plaintiff and her counsel seek relief from the order entered _____,
23 refusing to quash subpoenas duces tecum directed to plaintiff’s psychotherapists because
24 plaintiff’s motion to quash did not include a separate statement as required under
25 California Rules of Court, Rule 3.1345(a). This relief should be granted on the grounds
26 that plaintiff’s counsel failed to grasp that the phrase “in a deposition” could refer also to
27 production of documents without the giving of oral deposition testimony. The facts are

1 set forth in the attached declaration of Louise Lawyer, plaintiff’s counsel.

2 Plaintiff seeks discretionary relief or, in the alternative, mandatory relief from the
3 default. Under § 473(b) relief is mandatory on the filing of the attorney affidavit of fault
4 even if the attorney’s neglect is “inexcusable.” *Beeman v. Burling* (1990) 216 Cal.App.3d
5 1586, 1604. Here, the error relates in part to counsel’s lack of knowledge that a separate
6 statement was required in connection with the motion to quash subpoenas for production
7 of documents.

8
9 **3. The factual basis for granting relief**

10 As set forth in more detail in counsel’s declaration, the events that led to the
11 default are as follows:

12 Defendant served on plaintiff’s psychotherapists subpoenas for the production of
13 business records, seeking plaintiff’s confidential mental health records. Such information
14 is privileged. Evid. Code § 1014. The psychotherapist-patient privilege is an aspect of the
15 patient’s constitutional right to privacy. *Roe v. Superior Court* (1991) 229 Cal.App.3d 832,
16 837; Cal. Const., Art. 1, § 1.

17 But because plaintiff’s complaint included claims for emotional distress damages,
18 defendant was entitled to inquire about her emotional health. Plaintiff adamantly opposed
19 the release of that information, and instead agreed to dismiss her claims for emotional
20 distress damages if defendant would withdraw the subpoenas. Plaintiff did dismiss those
21 claims, but defendant reneged on its agreement to withdraw the subpoenas, and continues
22 to insist that the psychotherapists produce their records.

23 Plaintiff moved to quash the subpoenas, but through counsel’s misunderstanding
24 the motion was incomplete because it lacked the separate statement required under
25 California Rules of Court, Rule 3.1345(a). Although defendant did not raise this defect in
26 its papers, and neither defendant nor the court mentioned it at the hearing, the court
27 denied plaintiff’s motion to quash because of that deficiency in the moving papers.

1 **CONCLUSION**

2 Plaintiff’s ex parte motion for relief under Code of Civil Procedure § 473 should be
3 granted on a discretionary basis because the inconvenience of a missing separate
4 statement is far outweighed by the irreparable harm that will result if plaintiff’s
5 psychiatric and psychotherapy records are disclosed to opposing counsel and to
6 defendants. In the alternative, because plaintiff’s attorney has filed her “attorney affidavit
7 of fault,” relief is mandatory.

8 The matter should be resolved ex parte to avoid the irreparable harm that will
9 result if plaintiff’s mental health records are divulged before this matter can be heard on
10 noticed motion.

11
12 Respectfully submitted,

13
14 _____
15 LOUISE LAWYER
16 Attorney for Plaintiff

17 **DECLARATION OF LOUISE LAWYER**

18 I, Louise Lawyer, declare as follows:

19 I am an attorney licensed to practice in the State of California, and the attorney of
20 record for plaintiff Mary Jones in this action. I have personal knowledge of the facts set
21 forth below.

22 1. The details of the underlying motion to quash deposition subpoenas for the
23 production of business records that defendant served on plaintiff’s psychotherapists are
24 contained in my declaration dated _____, in support of that motion. Briefly, the
25 parties had agreed that defendant would withdraw its subpoenas on plaintiff’s
26 psychotherapists in return for plaintiff’s dismissal of her claims for emotional distress
27

1 damages, but even after plaintiff did dismiss those claims defendant continued to insist
2 that it was entitled to her mental health records.

3 2. When I was preparing the motion to quash the subpoenas, I read the
4 requirements of California Rules of Court, Rule 3.1345(a), which calls for a separate
5 statement in connection with certain discovery motions. The only one that might have
6 applied was Rule 3.1345(a)(5), a motion “to quash the production of documents or
7 tangible things *at a deposition*.” (Emphasis added.) Since the records sought to be
8 produced here were simply to be copied and produced to defendants’ counsel, and not in
9 connection with a deposition at which oral testimony was to be taken, I mistakenly
10 thought that the separate statement was not required.

11 3. I accept full responsibility for my failure to include a separate statement
12 with plaintiff’s motion to quash subpoenas. A proposed separate statement is attached as
13 Exhibit A.

14 4. This matter should be heard and decided ex parte because of the risk that
15 plaintiff’s confidential mental health records may be divulged to defendants and their
16 counsel before the matter can be heard on a formal, noticed motion. My client has
17 repeatedly insisted to me that she does not want the records released. Yet defendant’s
18 counsel wrote to me on _____, saying: “We intend to vigorously pursue
19 compliance with the subpoenas.”

20 5. Based on this declaration, and my acknowledgment of responsibility for
21 plaintiff’s incomplete motion to quash subpoenas, I am requesting that, under Code of
22 Civil Procedure § 473(b), the court grant relief from its order entered _____, and
23 that the court grant plaintiff’s motion to quash deposition subpoenas for the production of
24 business records, filed _____.

25 6. On _____, at _____ a.m. **{**NOTE: before 10 a.m.!**}**, I notified
26 defendants’ counsel when and where this application would be made. **{OR spell out**
27 **unsuccessful efforts to reach opposing counsel.}**

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

3
4 Dated:

Louise Lawyer

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6
7 **[PROPOSED] ORDER GRANTING PLAINTIFF’S EX PARTE**
8 **APPLICATION FOR RELIEF UNDER CODE OF CIVIL PROCEDURE**
9 **§ 473(b) FROM DENIAL OF MOTION TO QUASH SUBPOENAS**

10 Application having been made by plaintiff Mary Jones for relief under Code of
11 Civil Procedure § 473(b) from the court’s order denying her motion to quash deposition
12 subpoenas for the production of business records, dated _____, and good cause
13 appearing therefor,

14 **IT IS ORDERED** that plaintiff’s motion, now being complete with the addition of
15 the separate statement required under California Rules of Court, Rule 3.1345(a)(5), is
16 **GRANTED**, and the deposition subpoenas for production of business records served by
17 defendant on plaintiff’s psychotherapists, [redacted], are hereby **QUASHED**.

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19 Dated:

Judge of the Superior Court

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Attorney for Plaintiff

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF REDWOOD**

MARY JONES,

Plaintiff,

vs.

DEFECO, LLC, et al.,

Defendants.

Case No.:

SEPARATE STATEMENT RE
MOTION TO QUASH DEPOSITION
SUBPOENAS FOR THE
PRODUCTION OF BUSINESS
RECORDS
[CRC, Rule 3.1345(a)(5)]

_____ /

Inspection demand No 1:

THE PEOPLE OF THE STATE OF CALIFORNIA TO: *[redacted]*:

1. You are ordered to produce the business records described in item 3, as follows:

To *[redacted]*, on _____ at 10:00 am, Location: *[redacted]* by delivering a true, legible, and durable copy of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.

2. The records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or

1 copying them, and postage, if any, are recoverable as set forth in Evidence Code
2 § 1563(b). The records shall be accompanied by an affidavit of the custodian or other
3 qualified witness pursuant to Evidence Code section 1561.

4 3. The records to be produced are described as follows: All records and documents
5 pertaining to Mary Jones, including medical records relating to treatment rendered to
6 Mary Jones and any notes, files, records relating thereto.

7 4. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A
8 CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF
9 CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR
10 AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR
11 AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR
12 EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED
13 TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.

14 DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS A
15 CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF
16 FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR
17 FAILURE TO OBEY.

18 Date issued: _____

19 **Response, answer, or objection:**

20 The motion [for order quashing deposition subpoena for production of business
21 records] will be made on the ground that there is no good cause for production of the
22 documents sought. In that Plaintiff has dismissed her claims for emotional distress and
23 the records sought are those of Plaintiff's psychotherapists. Thus, since there are no
24 claims for emotional distress damages, there is no need to subpoena the records of
25 Plaintiff's psychotherapists.

26 **Factual and legal reasons for compelling further responses, answers, or production:**

27 Not applicable.

1 **Definitions, instructions, and other matters required to understand each request:**

2 Not applicable.

3 **Dependencies on responses given to another discovery request:**

4 None.

5 **Relevant pleadings, other documents in the file, or other items of discovery:**

6 The complaint contained claims for emotional distress damages. These claims
7 were dismissed on _____, rendering the mental health information sought by
8 defendants' subpoenas irrelevant. Further details concerning the procedural history and
9 correspondence of counsel are contained in the Declaration of Louise Lawyer in support
10 of motion to quash deposition subpoenas for business records, dated _____. Briefly,
11 defendants' counsel agreed to withdraw the subpoenas if the claims for emotional distress
12 damages were dismissed, but following their dismissal counsel continued, and continues,
13 to insist that such information be disclosed by plaintiff's psychotherapists.

14

15 **Inspection demand No. 2:**

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17 *[A second demand, identical to the first, has been redacted.]*

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20 Dated:

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LOUISE LAWYER
Attorney for Plaintiff Mary Jones

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