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

10 JOHN GREEN,

Case No. 54321

11 Plaintiff,

MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
MOTION FOR LEAVE TO FILE
CROSS-COMPLAINT

12 vs.

13 MAUDE WHITE and DOES 1 through
14 10, inclusive,

Defendants.
15 _____/

16 MAUDE WHITE,

17 Cross-Complainant,

18 vs.

19 JOHN GREEN and ROES 1 through 10,
20 inclusive,

Cross-Defendants.
21 _____/

22
23 **ARGUMENT**

24 **1. On its face, the proposed cross-complaint is insincere.**

25 Defendant's cross-complaint is a defensive tactic, not a sincere attempt to allege
26 damage. Comparing the complaint and proposed cross-complaint shows that defendant
27 parroted every single allegation in each of plaintiff's six causes of action, swapping the
28

1 respective references to “plaintiff” and “defendant.” The *only* cause of action in the
2 proposed cross-complaint not taken from plaintiff is a seventh cause of action, appearing
3 to allege Penal Code violations, but neither asking for nor claiming any damages. The
4 Penal Code allegations are nowhere explained, seem inappropriate, and appear to be
5 surplusage.

6
7 **2. The grounds for the motion are not supported by the moving papers.**

8 The motion is said to be grounded on “previously unknown facts.” Notice of
9 motion, at 4. Defendant’s only support for that assertion—in fact her only discussion of
10 the subject—lies in Joseph Black’s brief declaration accompanying the moving papers.
11 Declarant Black, one of defendant’s lawyers, states that plaintiff has recorded confidential
12 communications occurring within defendant’s home, and that “a review . . . suggests” that
13 plaintiff is violating conditions, covenants, and restrictions. Since such “facts” are not
14 matters as to which Mr. Black would presumably have any knowledge, his declaration is
15 not competent evidence.

16 A declaration is a substitute for oral testimony, and therefore must conform to the
17 same requirements of competency as would apply to testimony in court. Where the facts
18 stated in a declaration are not matters as to which the declarant would presumably have
19 knowledge, the declaration is not sufficient to show the declarant’s competency. *Snider*
20 *v. Snider* (1962) 200 Cal.App.2d 741, 753-754.

21 Mr. Black fails to show personal knowledge of the facts he alleges. His
22 declaration does not even purport to claim that he has any personal knowledge. Even
23 where a declarant does state that he or she has personal knowledge of the facts stated, the
24 declaration must itself contain facts showing the declarant’s connection with the matters
25 stated, establishing the source of his or her information. Otherwise, the declarant’s
26 statement that he or she has such knowledge is purely a conclusion. See Evid. Code
27 § 702; *Osmond v. EWAP, Inc.* (1984) 153 Cal.App.3d 842, 851.

1 In any case, the Black declaration contains too few facts to warrant granting the
2 motion. It does not identify a single one of the newly discovered facts that defendant says
3 “suggest” that plaintiff did something actionable. It describes no conduct, nor anything
4 about what facts were found, how they were found, or why such facts could not have been
5 discovered until someone reviewed prior discovery responses.

6 Even if it were clear whose opinion is being referenced in Mr. Black’s declaration
7 (i.e., who did the “review” of information that generated the opinion), Mr. Black declares
8 that the motion is based on information discovered after defendant had already filed her
9 answer. Since defendant has not also sought to amend her answer, the proposed
10 crosscomplaint can have nothing to do with the defenses to the complaint to be tried.
11 Thus, despite defendant’s literally copying the words in plaintiff’s complaint, plaintiff’s
12 causes of action are not related to those defendant proposes for the cross-complaint.

13
14 **3. By definition, the proposed new causes of action are “not related” to**
15 **plaintiff’s complaint.**

16 Code of Civil Procedure § 426.10(c) provides:

17 “Related cause of action” means a cause of action which arises out of the
18 same transaction, occurrence, or series of transactions or occurrences as the
19 cause of action which the plaintiff alleges in his complaint.

20 Plaintiff’s complaint seeks remedies for defendant’s conduct in violation of the CC&Rs.
21 The proposed cross-complaint, on the other hand, alleges that plaintiff is violating the
22 CC&Rs as well. The complaint and proposed cross-complaint do not allege the same
23 occurrences, actors, or series of transactions. Whether or not defendant is in violation has
24 no tendency to prove any fact relating to whether or not that is true of plaintiff. Separate
25 causes of action are not “related” under the Code simply because they allege violations of
26 the same body of rules.

1 **4. The potential for prejudice is greater in granting the motion than it is in**
2 **denying it.**

3 In *Clark v. EZN, Inc.* (1997) 57 Cal.App.4th 852, a creditor sued a debtor to
4 enforce loan obligations. The debtor sought leave to cross-complain against the creditor
5 to allege fraud, conversion, and breach of contract. The debtor claimed that the cross-
6 complaint was compulsory. Still, the trial court denied leave to file it. Citing
7 § 426.10(c)'s definition of "related cause of action," the court of appeal explained that,
8 because the proposed cross-complaint was *not* compulsory, the defendant was *immunized*
9 from prejudice resulting from the trial court's denial of leave to file it: "Even if the trial
10 court erroneously denied leave to amend, debtor has not been prejudiced thereby. The
11 order denying leave to file the cross-complaint is without prejudice to Debtor's right to
12 file a separate action." *Id.* at 859.

13 So it is here. Because defendant seeks to allege conduct by plaintiff, just
14 discovered and unrelated to the conduct already at issue herein, there is no need for
15 defendant to bring her allegations within this action. The proposed cross-complaint
16 achieves no economy, because there is no commonality of proof in the two actions.
17 Defendant will not be prejudiced by a denial of the motion because she may file her
18 claims as a separate action. There is no need to interrupt this action or delay trial of this
19 at-issue case by reverting to pleading it. There is no need to risk prejudicing plaintiff by
20 granting the instant motion, when the motion may be safely denied without at all
21 prejudicing defendant.

22
23 **5. The proposed cross-complaint is not compulsory.**

24 Section 428.50(a) provides that a cross-complaint against a plaintiff who filed the
25 original complaint shall be filed "before or at the same time as the answer." To be
26 considered a compulsory cross-complaint, a cause of action alleged to be related to the
27 complaint must have existed at the time of service of defendant's answer. *Crocker Natl.*
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1 *Bank v. Emerald* (1990) 221 Cal.App.3d 852, 864. The Black declaration states
2 affirmatively (at ¶ 3) that the defendant has already filed her answer. Thus, the motion is
3 not brought under § 428.50(a). In accord, § 426.30 provides that, if, at the time of
4 answering a complaint, a party fails to allege in a cross-complaint any related cause of
5 action, “such party may not thereafter in any other action assert against the plaintiff the
6 related cause of action not pleaded.”

7 The critical time period to which § 426.30 looks is that point in time when
8 the complaint has been filed and served against a defendant and the defendant
9 “fails to allege in a cross-complaint any related cause of action which (at the
10 time of serving his answer to the complaint) he has against the plaintiff.”

11 *AL Holding Co. v. O’Brien & Hicks, Inc.* (1999) 75 Cal.App.4th 1310,
12 1313-1314 (holding defendant’s cross-complaint on an open book account
13 barred once its answer to the complaint was filed: “Such is the clear import of
14 the statutory language.”).

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16 **6. The trial court’s discretion is unfettered.**

17 In *Crocker Natl. Bank, supra*, the plaintiff sued on a promissory note; the
18 defendant sought leave to file a cross-complaint alleging breach of fiduciary duties, and
19 an amended answer. The trial court granted leave to file the amended answer, but denied
20 leave to file the cross-complaint. Defendant argued on appeal that the trial court erred in
21 denying leave to cross-complain, because its cross-complaint was compulsory under
22 § 426.30, and leave to file mandatory under § 426.50. The court of appeal disagreed,
23 concluding that the defendant’s attempts to complain of the plaintiff’s post-complaint
24 filing conduct represented a permissive cross-complaint, governed by § 428.50(c), which
25 cannot be filed without leave of court. *Id.* at 863-864. Reiterating that the matter of
26 granting leave to file a permissive cross-complaint is solely within the trial court’s
27 discretion (*id.* at 864), the court considered that leave had not been sought until after
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1 years of litigation, but the moving party had provided no explanation for his delay.

2 Despite the courts' liberal attitude toward requests for leave to cross-complain, a
3 defendant seeking such leave must still meet at least a minimal burden of proof, and
4 establish that filing the cross-complaint would serve the ends of justice. Defendant here
5 claims to have just discovered new facts warranting a cross-complaint against plaintiff.
6 But defendant makes no such showing. Her only supporting declaration contains no
7 facts. Her moving papers are devoid of competent evidence.

8
9 **CONCLUSION**

10 The motion is unnecessary and lacks evidentiary support. The moving party
11 cannot be prejudiced by its denial, but the opposing parties may be prejudiced if it is
12 granted. The motion should be denied.

13 Dated: _____

14 Respectfully submitted,

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17 Attorneys for Plaintiff and Cross-
18 Defendant, JOHN GREEN
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