

10/15/09.

File

#25

ADD.

Gene Forte
688 Birch Court
Los Banos, California, 93635
Telephone: (209) 829-1116
Facsimile: (209) 829-1952

In Propria Persona /Plaintiff

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MERCED

EUGENE FORTE

Plaintiff,

vs.

TOMMY JONES, et al.

Defendants.

Case No. CU150880

NOTICE OF MOTION AND MOTION TO COMPEL COMPLIANCE WITH DEPOSITION SUBPOENA; REQUEST FOR ORDER AWARDING MONETARY SANCTIONS AGAINST CHARLES GUEST IN THE SUM OF \$981;

MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF EUGENE FORTE IN SUPPORT THEREOF; [PROPOSED] ORDER

**DATE: November 6, 2008
TIME: 8:15 a.m.
DEPT: TBD**

TO CHARLES GUEST, HIS ATTORNEY, AND ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 6, 2008, at 8:15am or as soon thereafter as the matter may be heard in a department of the above-entitled court, located at 627 W. 21st Street, Merced, California, 95340, Plaintiff Eugene Forte will move the court for an order compelling a

1 nonparty witness, to answer questions and produce documents pursuant to a deposition subpoena
2 properly served on the witness on, August 5, 2008.

3 Notice is additionally given that plaintiff will request that the Court award monetary and/or
4 contempt sanctions, as well as forfeiture and damages pursuant to C.C.P. §1992 (for non-
5 compliance of subpoena), against Charles Guest and/or his counsel, Mr. Phillip McMurray, and in
6 favor of plaintiff in the sum of \$981 for willful misuse of the discovery process which includes
7 unreasonable refusal to comply with the deposition subpoena by not appearing for deposition and
8 not producing the relevant documents specified in the deposition subpoena, as well as necessitating
9 this motion, and incurring minimum costs at deposition for the payment of the court reporter and
10 videographer.

11 This motion will be, and is hereby, made pursuant to C.C.P. § 1987.1 and C.C.P. §§
12 2020.010 et seq. and C.C.P. § 2025.480. This motion is further based upon this notice, the attached
13 Memorandum of Points and Authorities, the Declaration of Eugene Forte filed herewith; upon the
14 records and files in this action; and upon such further evidence and argument as may be presented
15 prior to or at the time of hearing on the motion.

16
17 Dated: October 14, 2008

Respectfully Submitted,


Eugene Forte, In Propria Persona

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I.

3 INTRODUCTION

4 This complaint was filed on December 18, 2008 alleging a cause of action for defamation.
5 In summary, the allegations are that defendant Tommy Jones (“Jones”), sued as an individual who
6 is also the Mayor of Los Banos, defamed Plaintiff Forte (“Forte”), by stating maliciously that he
7 knew for a fact that Forte was a dangerous member of the Ku Klux Klan, not only to plaintiff in a
8 loud voice in a public place, but directly to a third party witness.

9 A first amended complaint was filed on September 16, 2008 adding a cause of action for
10 intentional infliction of emotional distress as a result of subsequent actions by Jones which include
11 further defamatory statements to the public as to the character of Forte, (i.e., Forte “lynched” Jones
12 with words, Forte is a liar, only writes garbage, and has no value as a person) as well as cutting
13 short Forte’s right to speak for five minutes at the city council meeting on May 7, 2008 and having
14 the Chief of Police Gallagher physically and forcibly push and shove Forte out of the building.
15 These acts were televised repeatedly.

16 Discovery has begun and is ongoing.

17 On August 5, 2008, plaintiff, served a deposition subpoena on Charles Guest (“Guest”),
18 requesting attendance of the witness at deposition pursuant to C.C.P. §§ 1985, et seq. and C.C.P. §§
19 2020.010 et seq. (See Exhibit 1 to the Declaration of Eugene Forte, filed herewith.) As shown by
20 the proof of service attached to Exhibit 1, the deposition subpoena was served by personal service
21 in accordance with C.C.P. § 2020.220(c), and service was effected a sufficient time in advance of
22 the deposition to provide the deponent a reasonable opportunity to locate and produce the
23 documents and things requested by the subpoena. (C.C.P. § 2020.220(a).) Payment of the required
24 witness fees was to be made at the commencement of the deposition. Guest failed to appear.

25 The deponent is a material witness in this case. His testimony and the production of the
26 records and other tangible things specified in the deposition subpoena are necessary for plaintiff, to
27 prepare his case and to avoid surprise at trial, in that Guest operates a website called
28 www.ourlosbanos.com on which anonymous posters on his chat forums have shown hostility to

1 Forte. Forte believes that Guest's testimony will lead to discoverable evidence regarding the
2 allegations in the first amended complaint including the names of the anonymous posters who Forte
3 suspects may either be Jones himself, his relatives, and/or his friends and associates who has been
4 repeating defamatory statements and spreading ill will towards Forte as a result of Jones'
5 defamation of Forte.

6 On September 4, 2008, the witness did not appear at the time and place designated in the
7 deposition subpoena. Pursuant to C.C.P. § 1987.1 and C.C.P. § 2025.480, the court, upon a proper
8 showing, is authorized to compel compliance with the deposition subpoena and order the witness to
9 attend and answer proper deposition questions and to produce the documents requested in the
10 deposition subpoena.

11 II.

12 SERVICE OF A PROPER AND TIMELY DEPOSITION SUBPOENA IS EFFECTIVE TO
13 REQUIRE THE ATTENDANCE AND TESTIMONY OF THE DEPONENT AND
14 PRODUCTION OF DOCUMENTS AT DEPOSITION

15 "Any party may obtain discovery...by taking in California the oral deposition of any person,
16 including any party to the action. The person deposed may be a natural person, an organization such
17 as a public or private corporation, a partnership, an association, or a governmental agency." (C.C.P.
18 § 2025.010.)

19 "Except as provided in subdivision (a) of Section 2025.280 [party affiliated witness], the
20 process by which a nonparty is required to provide discovery is a deposition subpoena."
21 C.C.P. § 2020.010(b).

22 "A deposition subpoena may command any of the following: ...(c) The attendance and the
23 testimony of the deponent, as well as the production of business records, other documents, and
24 tangible things under Article 5 (commencing with Section 2020.510)."
25 C.C.P. § 2020.020. (See also C.C.P. § 2020.220(c).)

26 C.C.P. § 2020.510 sets forth the requirements of a subpoena commanding the attendance
27 and the testimony of the deponent, as well as the production of business records, documents and
28 tangible things at deposition. The subpoena must "[c]omply with the requirements of Section

1 2020.310 [contents of subpoena]." (C.C.P. § 2020.510(a)(1).) The subpoena must "[d]esignate the
2 business records, documents, and tangible things to be produced either specifically describing each
3 individual item or by reasonably particularizing each category of item." C.C.P. § 2020.510(a)(2).

4 As shown by the Deposition Subpoena served on August 5, 2008, plaintiff has complied
5 with all of the requirements of C.C.P. § 2020.310 and C.C.P. § 2020.510.

6 "It is established that a litigant has the right to take a proper deposition, and to receive
7 responsive answers to proper questions...for the purposes of discovery or for use as evidence, or for
8 both purposes." Beverly Hills Nat. Bank & Trust Co. v. Superior Court In and For Los Angeles
9 County, 195 Cal. App. 2d 861, 864-65, 16 Cal. Rptr. 236 (2d Dist. 1961) citing I. E. S. Corp. v.
10 Superior Court of Los Angeles County, 44 Cal. 2d 559, 283 P.2d 700 (1955) and Tatkin v. Superior
11 Court In and For Los Angeles County, 160 Cal. App. 2d 745, 326 P.2d 201 (2d Dist. 1958).

12 "[A] deponent may be examined regarding any matter, not privileged, which is relevant to
13 the subject matter involved in the pending action, whether it relates to the claim or defense of the
14 examining party, or to the claim or defense of any other party." Kramer v. Superior Court of Los
15 Angeles County, 237 Cal. App. 2d 753, 756, 47 Cal. Rptr. 317 (2d Dist. 1965). C.C.P. § 2017.010
16 provides that "any party may obtain discovery...that is relevant..., if the matter either is itself
17 admissible in evidence or appears reasonably calculated to lead to the discovery of admissible
18 evidence."

19 "The statute authorizing the taking of depositions to be used in pending trials should be
20 liberally construed to the end that a litigant in a pending action may be afforded a reasonable
21 opportunity to procure available testimony in support of his cause." Moran v. Superior Court in and
22 for Sacramento County, 38 Cal. App. 2d 328, 334, 100 P.2d 1096 (3d Dist. 1940).

23 As set forth in the Declaration of Eugene Forte, witness Charles Guest disobeyed a court
24 issued subpoena by refusing to appear at deposition and refusing to produce any documents
25 requested.

26 III.

27 THE COURT MAY ORDER A NONPARTY DEPONENT TO ANSWER QUESTIONS AND
28 PRODUCE DOCUMENTS AT DEPOSITION

1 "When a subpoena requires the attendance of a witness or the production of books,
2 documents or other things...at the taking of a deposition, the court, upon motion reasonably made
3 by the [subpoenaing] party...or upon the court's own motion after giving counsel notice and an
4 opportunity to be heard, may make an order...directing compliance with it upon such terms or
5 conditions as the court shall declare..."

6 C.C.P. § 1987.1.

7 "If a deponent fails to answer any question or to produce any document or tangible thing
8 under the deponent's control that is specified in the deposition notice or a deposition subpoena, the
9 party seeking discovery may move the court for an order compelling that answer or production."

10 C.C.P. § 2025.480(a) (emph. added.) (See also Kramer v. Superior Court of Los Angeles County,
11 237 Cal. App. 2d 753, 47 Cal. Rptr. 317 (2d Dist. 1965).)

12 "If the court determines that the answer or production sought is subject to discovery, it shall
13 order that the answer be given or the production be made on the resumption of the deposition."

14 C.C.P. § 2025.480(e).

15 IV.

16 MOVING PARTY HAS COMPLIED WITH THE PROCEDURAL REQUIREMENTS FOR
17 MAKING THIS MOTION

18 A. Timing and Meet and Confer Requirements .

19 C.C.P. § 2025.480(b) provides that a motion to compel answers and production of
20 documents at deposition "...shall be made no later than 60 days after the completion of the record
21 of the deposition, and shall be accompanied by a meet and confer declaration under Section
22 2016.040." C.C.P. § 2016.040 states that "[a] meet and confer declaration in support of a motion
23 shall state facts showing a reasonable and good faith attempt at an informal resolution of each issue
24 presented by the motion."

25 As set forth in the Declaration of Eugene Forte, the record of the deposition which
26 commenced on September 4, 2008 indicates non-appearance. Thus, this motion has been properly
27 made within 60 days after the completion of the record.

1 As further shown by the Declaration of Eugene Forte, Forte communicated to Guest that he
2 expected him to appear according to the deposition subpoena and that he would not stipulate to
3 limiting his deposition in response to Guest requesting such. Forte received a letter from Mr.
4 Phillip McMurray dated August 27, 2008 stating that he was Guest's attorney, and requesting
5 rescheduling of the deposition due to a conflict in his schedule and the desire to have more time to
6 review the facts and circumstances of this case. He also provided three dates for rescheduling, but
7 stated that these dates were contingent on Mr. Benjamin Ratliff, defendant Jones' attorney being
8 available.

9 Forte responded that on all three dates, he was in deposition, two of which were with Mr.
10 Ratliff, however, Forte would consider re-scheduling the deposition under the condition that Mr.
11 Guest produce all of the documents requested by 4:00pm of September 3, 2008 at Mr. Forte's office
12 at 688 Birch Court, Los Banos, California, 93635. Mr. McMurray answered back that he and Guest
13 would not be at the deposition primarily because he was unavailable. Forte responded that Guest
14 was timely served with the subpoena, Mr. McMurray works for a law firm with multiple attorneys,
15 and that Forte would be seeking sanctions if Guest did not appear or did not produce documents.

16 B. Notice and Lodging Requirements .

17 C.C.P. § 2025.480(c) requires that "[n]otice of this motion shall be given to all parties and to
18 the deponent either orally at the examination, or by subsequent service in writing. If the notice of
19 the motion is given orally, the deposition officer shall direct the deponent to attend a session of the
20 court at the time specified in the notice."

21 "A written notice and all moving papers *supporting a motion to compel an answer to a*
22 *deposition question or to compel production of a document or tangible thing from a nonparty*
23 *deponent* must be personally served on the nonparty deponent unless the nonparty deponent agrees
24 to accept service by mail at an address specified on the deposition record."

25 Cal. Rules of Court, rule 3.1025 (emph. added).

26 As shown by the proof of service of the moving papers herein, this motion has been duly
27 served by personal service upon counsel, Mr. McMurray, for the nonparty deponent Charles Guest.

V.

MONETARY SANCTIONS SHOULD BE AWARDED TO PLAINTIFF AGAINST CHARLES
GUEST AND/OR HIS COUNSEL

"The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct... If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." C.C.P. § 2023.030(a).

"Misuses of the discovery process include...(d) Failing to respond or to submit to an authorized method of discovery...(g) Disobeying a court order to provide discovery...(h) Making or opposing, unsuccessfully and without substantial justification, a motion to compel...discovery." C.C.P. § 2023.010.

C.C.P. § 1987.2 provides: "In making an order pursuant to a motion made under...Section 1987.1 [motion for order compelling compliance with deposition subpoena], the court may in its discretion award the amount of the reasonable expenses incurred in making...the motion, including reasonable attorneys' fees, if the court finds the motion was...opposed in bad faith or without substantial justification..."

C.C.P. § 2025.480(f) provides for monetary sanctions against any party, person, or attorney who unsuccessfully opposes a motion to compel an answer or production (unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust).

In addition, C.C.P. § 2020.240 provides that "[a] deponent who disobeys a deposition subpoena in any manner described in subdivision (c) of Section 2020.220 may be punished for contempt under Chapter 7 (commencing with Section 2023.010) without the necessity of a prior order of court directing compliance by the witness." (C.C.P. § 2023.030(e) provides for a contempt sanction for misuse of the discovery process.)

C.C.P. § 2020.240 states:

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2 “2020.240. A deponent who disobeys a deposition subpoena in any
3 manner described in subdivision (c) of Section 2020.220 may be
4 punished for contempt under Chapter 7 (commencing with Section
5 2023.010) without the necessity of a prior order of court directing
6 compliance by the witness. The deponent is also subject to the
7 forfeiture and the payment of damages set forth in Section 1992.”

8 and C.C.P. § 1992 states:

9 “1992. *A person failing to appear pursuant to a subpoena or a court
10 order also forfeits to the party aggrieved the sum of five hundred
11 dollars (\$500), and all damages that he or she may sustain by the
12 failure of the person to appear pursuant to the subpoena or court
13 order, which forfeiture and damages may be recovered in a civil action.*”

14 The deponent's failure to appear for deposition, and his failure to produce documents,
15 constitute misuses of the discovery process and provide grounds for an award of expenses and
16 attorneys' fees against the witness and his counsel. As stated in the Declaration of Eugene Forte,
17 plaintiff has incurred expenses and fees as a result of the witness's and his counsel's conduct as
18 described herein, in the sum of \$481, in addition to the \$500 pursuant to Section 1992. (See
19 Declaration, para.#16-19.)

20 C.C.P. § 2023.030(a) and (e) states:

21 “(a) The court may impose a monetary sanction ordering that one
22 engaging in the misuse of the discovery process, or any attorney
23 advising that conduct, or both pay the reasonable expenses, including
24 attorney's fees, incurred by anyone as a result of that conduct.

25 (e) The court may impose a contempt sanction by an order treating
26 *the misuse of the discovery process as a contempt of court.*”

27 VI.

28 CONCLUSION

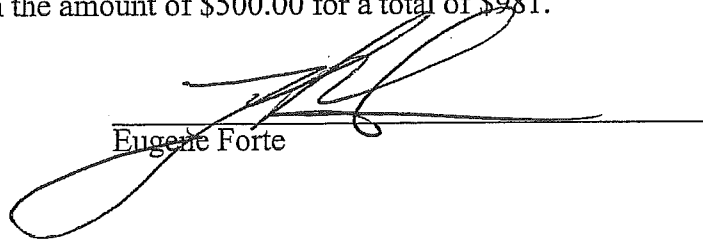
As shown in this Memorandum, in the Declaration of Eugene Forte, and exhibits attached
thereto, the witness, Charles Guest, has refused to comply with the deposition subpoena, which was
timely served, by reason of his failure to appear at deposition, and by reason of his failure to
produce the relevant documents and things commanded by the deposition subpoena. He has done
so also in conjunction with his attorney.

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In view of the above facts and authorities, plaintiff respectfully requests that the Court issue an Order directing Charles Guest to appear for deposition and to produce all documents specified in the deposition subpoena, commencing at 9:00 a.m. on November 10, 2008 or no later than November 21, 2008 to be continued until completed.

Plaintiff respectfully submits that the court should award monetary and/or contempt sanctions against Charles Guest and his counsel, Mr. McMurray, and in favor of plaintiff Forte for the incurred costs of \$481, and forfeiture in the amount of \$500.00 for a total of \$981.

DATED: October 14, 2008


Eugene Forte

DECLARATION OF EUGENE FORTE

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1. I, Eugene Forte, declare the following:
2. I am the plaintiff representing myself in propria persona. This declaration is submitted in support of my Motion to Compel nonparty witness, Charles Guest, to comply with a deposition subpoena properly served on August 5, 2008, by directing the witness to appear for deposition to answer questions and produce relevant documents specified in the deposition subpoena. The following facts are within my personal knowledge and, if called as a witness herein, I can and will competently testify thereto.
3. On August 5, 2008 , I served a deposition subpoena on Charles Guest, requesting attendance of the witness at deposition pursuant to C.C.P. §§ 1985 et seq. and C.C.P. §§ 2020.010 et seq. (A true and correct copy of the deposition subpoena is attached hereto as Exhibit 1.) As shown by the proof of service attached to Exhibit 1, the deposition subpoena was served by personal service in accordance with C.C.P. § 2020.220(c), and service was effected a sufficient time in advance of the deposition to provide the deponent a reasonable opportunity to locate and produce the documents and things requested by the subpoena. (C.C.P. § 2020.220(a).) Payment of the required witness fees was going to be made at the commencement of the deposition. (C.C.P. § 2020.230(a).)
4. The deponent is a material witness in this case. His testimony and the production of the records and other tangible things specified in the deposition subpoena are necessary for my preparation in my case and to avoid surprise at trial, in that Guest operates a website called www.ourlosbanos.com on which supposedly anonymous posters on his chat forums have shown hostility to me. I believe that Guest’s testimony will lead to discoverable evidence regarding the allegations in the first amended complaint including the names of the anonymous posters who I suspect may either be Jones himself, his relatives, and/or his friends and associates who has been repeating defamatory statements and spreading ill will towards me as a result of Jones’ defamation of me.

1 5. Notice of this motion was given to all parties and the deponent in accordance with C.C.P. §
2 2025.480(c). As shown by the attached proof of service of the moving papers herein, this motion
3 has been duly served by personal service upon the nonparty deponent.

4 6. As the result of Charles Guest's failure to comply with the deposition subpoena by failing to
5 appear and by failing to produce the documents and things required by the deposition notice, I have
6 had to write letters and make phone calls in attempts to resolve these issues. I have also been
7 compelled to make the instant motion.

8 7. The deposition, as indicated on the subpoena (Exhibit 1) was scheduled for September 4,
9 1008.

10 8. On August 22, 2008, I received an email from Charles Guest, of which a true and correct
11 copy is attached as Exhibit 2 (bottom half of page), requesting a stipulation to strictly limit the
12 scope of the subpoena.

13 9. On that same day of August 22, 2008, I responded to Mr. Guest by reply email, of which a
14 true and correct copy is attached as Exhibit 2 (upper half of page), and did not stipulate to his
15 request.

16 10. Attached as Exhibit 3 is a true and correct copy of a letter from Mr. Phillip McMurray, new
17 counsel to Mr. Guest, to myself dated August 27, 2008 requesting a rescheduling of the deposition.

18 11. Attached as Exhibit 4 is a true and correct copy of a letter from Mr. Phillip McMurray to
19 myself dated August 29, 2008 informing me that he could not make it to the deposition of
20 September 4, 2008, and therefore Mr. Guest will not be there either.

21 12. Mr. Guest had a full 30 days to prepare for deposition and to produce documents, including
22 retaining an attorney that could appear on September 4, 2008.

23 13. Attached as Exhibit 5 is a true and correct copy of an email from Mr. McMurray to myself
24 and my reply on September 2, 2008 at approximately 5:33 pm. Mr. McMurray requested to have
25 the deposition rescheduled, and I refused based upon the timely service of the subpoena. I notified
26 him that if Mr. Guest was not at the deposition, I would seek an order for contempt against the both
27 of them.

1 14. Attached as Exhibit 6 is a true and correct copy of an email I received from Mr. McMurray
2 on September 3, 2008 at approximately 12:17pm, and my reply. Mr. McMurray offered the dates
3 of September 29, 2008, September 30, 2008, and October 3, 2008 (contingent on the availability of
4 Mr. Ratliff), to which I replied that I would consider rescheduling the deposition if Mr. Guest
5 produced all the documents requested by 4:00pm that day, September 3, 2008 at my office. I told
6 him that if he does not produce the documents, then I expected him to be present at the deposition.

7 15. Attached as Exhibit 7 is a true and correct copy of an email I received from Mr. McMurray
8 on September 3, 2008 at approximately 3:39 pm and my reply. Mr. McMurray cited case law
9 stating that it was actionable conduct to purposefully schedule a conflicting proceeding without
10 good cause. In summary, I replied that the case law did not apply, that he was disrupting my
11 discovery, that the dates he offered were dates I was in deposition already (two of which were with
12 Mr. Ratliff), and that it appeared that he was working with Mr. Ratliff. I informed him that I would
13 be at the deposition with the court reporter and videographer, and if Mr. Guest did not show, I
14 would seek sanctions against both Mr. Guest and Mr. McMurray.

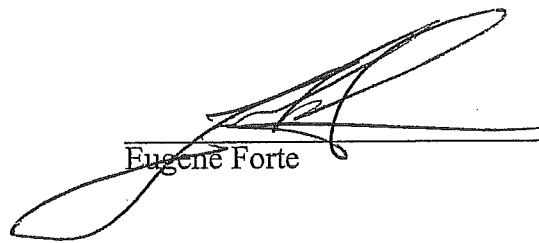
15 16. On September 4, 2008, Mr. Guest did not show up for his subpoenaed deposition. I incurred
16 the following costs and fees due to his non-appearance: \$96 for the court reporter, \$40 in gas to
17 travel back and forth to Modesto where the deposition was held, \$155 for the videographer and
18 DVD, and \$24 for three hours of my time which I believe I should be compensated at \$8.00
19 (minimum wage) per hour, for a total of \$315 for damages due to non-appearance.

20 17. In all, I have also expended approximately 8 hours in pursuit of this matter, including
21 drafting of this motion. I expect to spend another 4 hours drafting any reply that might be
22 necessitated and appearing at the hearing of this motion. My time is worth at least a minimum of
23 \$8/ hour. In addition, I have paid a \$40 filing fee, and will expend \$30 for gas round trip.
24 Therefore, I request that Charles Guest and/or his counsel be ordered to pay monetary sanctions to
25 myself in the sum of \$166.

26 18. I am entitled to \$500 pursuant to Section 1992 for forfeiture and non-appearance.
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1 19. Mr. Guest's non-compliance with the deposition subpoena served to him on August 5, 2008
2 has cost me a total of \$481, and I am also entitled to an additional \$500 for forfeiture for a total sum
3 of \$981.

4 I declare under penalty of perjury under the laws of the State of California that the foregoing
5 is true and correct and that this declaration was executed on October 14, 2008 at Los Banos,
6 California.

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Eugene Forte

Exhibit "1"

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Eugene Forte 688 Birch Court Los Banos, CA 93635 TELEPHONE NO.: _____ FAX NO. (Optional): _____ E-MAIL ADDRESS (Optional): <u>geneforte@badgerflats.com</u> ATTORNEY FOR (Name): <u>In Propria Persona</u>	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF <u>Merced</u> STREET ADDRESS: <u>627 West 21st Street</u> MAILING ADDRESS: CITY AND ZIP CODE: <u>Merced, 95340</u> BRANCH NAME: <u>Merced</u>	
PETITIONER: <u>Eugene Forte</u> RESPONDENT: <u>Tommy Jones</u>	
DEPOSITION SUBPOENA FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS	CASE NUMBER: <p style="text-align: center; font-size: 1.2em;">CU150880</p>

THE PEOPLE OF THE STATE OF CALIFORNIA, TO (name, address, and telephone number of deponent, if known):
 Charles Guest, address unknown, (owner of losbanos.com)

1. YOU ARE ORDERED TO APPEAR IN PERSON TO TESTIFY AS A WITNESS in this action at the following date, time, and place:

Date: <u>Sept. 4, 2008</u>	Time: <u>9:00 am</u>	Address: <u>Al Cala & Assoc, 1601 I Street, #410, Modesto, CA</u>
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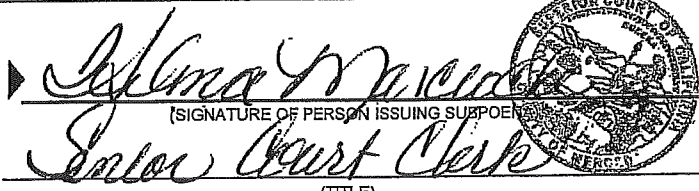
- a. As a deponent who is not a natural person, you are ordered to designate one or more persons to testify on your behalf as to the matters described in item 4. (Code Civ. Proc., § 2025.220(a)(6)).
 - b. You are ordered to produce the documents and things described in item 3.
 - c. This deposition will be recorded stenographically through the instant visual display of testimony, and by audiotape videotape
 - d. This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).
2. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
3. The documents and things to be produced and any testing or sampling being sought are described as follows:
 See Attachment 3.
- Continued on Attachment 3.
4. If the witness is a representative of a business or other entity, the matters upon which the witness is to be examined are described as follows:

 Continued on Attachment 4.
5. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.
6. At the deposition, you will be asked questions under oath. Questions and answers are recorded stenographically at the deposition; later they are transcribed for possible use at trial. You may read the written record and change any incorrect answers before you sign the deposition. You are entitled to receive witness fees and mileage actually traveled both ways. The money must be paid, at the option of the party giving notice of the deposition, either with service of this subpoena or at the time of the deposition.

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

Date issued: JUL 28 2008

_____ HELEN MARCIOCHI _____
 (TYPE OR PRINT NAME)


 (SIGNATURE OF PERSON ISSUING SUBPOENA)
Senior Court Clerk
 (TITLE)

ATTACHMENT 3

Unless expressly excluded by the terms of the particular request, the following definitions shall be considered a part of each and every request herein:

DEFINITIONS AND INSTRUCTION

1. "You" or "Your" (whether or not capitalized or underlined in the text of this request) means the deponent specified in this Deposition Subpoena, and any other persons acting on behalf of said responding parties, including without limitation, attorneys, accountants, bankers, brokers, representatives, agents, employees, and advisors.
2. If you are a corporation, association, sole proprietorship, partnership, joint venture, or public entity, "you" includes your divisions, departments, subsidiaries, affiliates, predecessors, present or former officers, directors, shareholders, partners, owners, employees, agents and all persons acting or purporting to act on your behalf. If you are an individual, "you" includes your employees, agents, representatives, and all persons acting or purporting to act on your behalf.
3. "Document" means the original (as defined in California Evidence Code section 255) of any written, printed, typed, drawn, recorded, graphic or photographic matter of any kind or nature however produced or reproduced, whether sent or received or either, including all drafts and copies bearing notations, marks, or matter not found on the original, including, but not limited to, all writings (as defined in California Evidence Code section 250), contracts, agreements, representations, warranties, certificates, opinions, tapes, letters or other forms of correspondence or communications, including, but not limited to, envelopes, notes, telegrams, cables, telex messages, reports, notes, notations and memoranda of or related to telephone conversations or conferences, memoranda, reports, notes, transcripts, studies, analyses, evaluations, test results, books, tapes, records, journals, ledgers, invoices, statements, accounts, lists, comparisons, questionnaires, surveys, summaries, desk calendars, appointment books, diaries, articles, press releases, magazines, newspapers, booklets, circulars, bulletins, notices, all meetings, photographs, microfilms, tapes or other records, punch cards, magnetic tapes, discs, drums, print-outs and other data compilations from which information can be obtained (translated, if necessary, through detection or decoding devices into usable form).
4. "All documents" means every document as above-defined known to you and every such document which can be located or discovered by reasonably diligent efforts. Any documents partially relating to matters herein shall also be produced. All designated documents are to include all attachments and enclosures.
5. The terms "refer," "relating," or "pertaining to" any given subject as used herein means, in whole or in part, constituting, containing, embodying, reflecting, identifying, stating or referring to the given subject.
6. "Identify" in the case of a "document" means the date, title, subject matter, e.g., contract, letter, tape recording, etc. its title, if any, and parties to each such document (together with

any other information reasonably necessary to enable the undersigned to identify the document in a notice calling for its production), together with name, address, and telephone number of the person presently having custody thereof.

DOCUMENTS FOR WHICH PRIVILEGE IS CLAIMED

For each document requested herein which you contend is privileged, provide the following information:

- A. The place, approximate date and manner of preparing the document;
- B. The name, position and/or title of the sender and the name and title of each of the recipients of the document;
- C. The name and position of each person or persons (other than clerical or stenographic assistants) participating in the preparation of the document;
- D. The name and position of each person or persons to whom the contents of the document have heretofore been communicated by copy, exhibition, reading, reference or substantial summarization;
- E. A statement of the basis upon which the privilege is claimed, and whether or not the subject matter of the contents of the document is limited to the legal advice or information provided for the purpose of legal advice; and
- F. The number of the request to which the document is responsive.

ITEMS TO BE PRODUCED FOR INSPECTION

REQUEST NUMBER:

1. All written communications or recordings between yourself and any parties (Eugene Forte or Tommy Jones) named in this case, without limitation as to whether transmitted by internet e-mail, by postal service, by hand delivery, or otherwise, whether maintained in hard paper copy or maintained on computer storage devices;
2. All notes or notations or recordings which memorialize communications between yourself and the parties named in this case, whether maintained in hard paper copy or maintained on computer storage devices;
3. All written communications or recordings between yourself and any other person or entity including, but not limited to, Tom Faria, Joe Sousa, Michael Villalta, Steve Rath, Anna Brooks, Charles Guest, Jerry O'Banion, William Vaughn, Michael McAdams, Chet Guintini, any anonymous members/posters of ourlosbanos.com, Greg Hostetler, Gene Lieb of the Los Banos Enterprise, and Minerva Perez of the Los Banos Enterprise regarding Plaintiff Forte without limitation as to whether transmitted by internet e-mail, by postal service, by hand delivery, or otherwise, whether maintained in hard paper copy or maintained on computer storage devices;
4. All notes or notations or recordings which memorialize communications between yourself and any other person or entity including, but not limited to, Tom Faria, Joe Sousa, Michael Villalta, Steve Rath, Anna Brooks, Charles Guest, Jerry O'Banion, William Vaughn, Michael McAdams, Chet Guintini, any anonymous members/posters of ourlosbanos.com, Greg Hostetler, Gene Lieb of the Los Banos Enterprise, and Minerva Perez of the Los Banos Enterprise regarding Plaintiff Forte without limitation as to whether transmitted by internet

e-mail, by postal service, by hand delivery, or otherwise, whether maintained in hard paper copy or maintained on computer storage devices.

5. All diaries maintained by you between the time period of October 2006 to May 1, 2008, whether maintained in hard paper copy or maintained on computer storage devices;
6. All calendaring systems and/or daytimers maintained by you since October 2006 to May 1, 2008, whether maintained in hard paper copy or maintained on computer storage devices;
7. Any documents, tapes, other tangible things or copies of such of the file that you have retained or have in your possession relating to Plaintiff Forte, whether maintained in hard paper copy, tapes, or computer storage devices;
8. Any and all telephone bills, long distance carrier bills which include your home telephone number, home business number, cell phone number and fax numbers for the period between October 2006 and May 1, 2008 which show telephone calls regarding Plaintiff Forte including, but not limited to those made to or received from Tom Faria, Joe Sousa, Michael Villalta, Steve Rath, Anna Brooks, Charles Guest, Jerry O'Banion, any anonymous members/posters of ourlosbanos.com, Greg Hostetler, Gene Lieb of the Los Banos Enterprise, and Minerva Perez of the Los Banos Enterprise.
9. Any and all deposition transcripts taken of you and settlement agreements pertaining to the case of Tommy Jones vs. The Los Banos Police Department and the City of Los Banos, et al.
10. Any and all documents pertaining to any gifts, loans, etc. between Tommy Jones and Mr. Greg Hostetler.
11. Any and all evidence you have within your possession, or that you know exists, that establishes that plaintiff is a dangerous member of the Ku Klux Klan.

<i>Attorney or Party without Attorney:</i> EUGENE FORTE 688 BIRCH CT Los Banos, CA 93635 Telephone No: 209-829-1116				<i>For Court Use Only</i>	
<i>Attorney for:</i> Plaintiff					
<i>Ref. No. or File No.:</i>					
<i>Insert name of Court, and Judicial District and Branch Court:</i> MERCED COUNTY SUPERIOR COURT					
<i>Plaintiff:</i> FORTE <i>Defendant:</i> JONES					
PROOF OF SERVICE DEPOSITION SUBPOENA		<i>Hearing Date:</i> Thu, Sep. 04, 2008	<i>Time:</i> 9:00AM	<i>Dept/Div:</i>	<i>Case Number:</i> CU150880

1. At the time of service I was at least 18 years of age and not a party to this action.
2. I served copies of the Deposition Subpoena- Personal Appearance and Production of Documents and things
3. a. *Party served:* CHARLES GUEST
b. *Person served:* party in item 3.a. (CAU, M, 45, REDDISH, 5'7", 160LBS)
4. *Address where the party was served:* 2144 ARROYO CT
Los Banos, CA 93635
5. *I served the party:*
 - a. **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on: Tue., Aug. 05, 2008 (2) at: 9:50AM
 - b. *I received this subpoena for service on:* Friday, August 01, 2008
6. *Witness fees were not demanded or paid.*
7. **Person Who Served Papers:**
 - a. James Wyatt
 - b. **WYATT'S LEGAL SERVICE**
P. O. BOX 2560, Registration # 98
Los Banos, CA 93635
 - c. (209)826-0225
 - d. *The Fee for Service was:* \$50.00
Recoverable Cost Per CCP 1033.5(a)(4)(B)
 - e. I am: (3) registered California process server
 - (i) Owner
 - (ii) *Registration No.:* 98
 - (iii) *County:* Merced
 - (iv) *Expiration Date:* Thu, Jan. 01, 2009

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

Date: Tue, Aug. 05, 2008



(James Wyatt)

Exhibit "2"

Re: [Gene Forte Communication] Regarding Your Subpoena

Subject: Re: [Gene Forte Communication] Regarding Your Subpoena

From: Gene Forte <geneforte@sbcglobal.net>

Date: Fri, 22 Aug 2008 12:40:09 -0700

To: tenarius@memorableplaces.com

Mr. Guest:

You can state your reasons at the deposition or seek whatever legal remedies you believe you have available.

I look forward to receiving all documents requested.

See you at the deposition

Thanks.

Gene Forte

tenarius@memorableplaces.com wrote:

Mr. Charles Guest
2144 Arroyo Crt.
Los Banos, CA 93635

August 22, 2008

Mr. Gene Forte
688 Birch Court
Los Banos, CA 93635

Dear Mr. Forte:

This is an attempt to negotiate a resolution of a discovery dispute.

You have subpoenaed most of the records for OurLosBanos.com web site, and some of my own private records.

I believe you have asked for records to which you are not entitled including personal communications between me and private individuals and communications between me and my friends. I think that all of your requests are overbroad and not calculated to lead to admissible evidence. Accordingly, I request that you agree to strictly limit the scope of your subpoena. If I do not hear back from you by Tuesday, August 26, I will have no choice but to seek a protective order from the Court to restrict the inquiry to the alleged defamation incident and limit the deposition to one hour. Please contact me at your earliest opportunity.

Very Truly Yours,

Charles Guest

Exhibit "3"

LAW OFFICES OF
LINNEMAN, BURGESS, TELLES, VAN ATTA, VIERRA,
RATHMANN, WHITEHURST & KEENE

EUGENE J. VIERRA
DIANE V. RATHMANN
ALFRED L. WHITEHURST
THOMAS J. KEENE

PHILLIP R. McMURRAY

JAMES E. LINNEMAN, OF COUNSEL

L. M. LINNEMAN (1902-1983)
JOSEPH B. BURGESS (1902-1990)
JAY H. WARD (1942-1995)
C. E. VAN ATTA (1919-1997)
JESS P. TELLES, JR. (1920-2004)

654 K STREET
P. O. BOX 1364
LOS BANOS, CA 93635
(209) 826-4911
FAX (209) 826-4766

1820 MARGUERITE STREET
P. O. BOX 156
DOS PALOS, CA 93620
(209) 392-2141
FAX (209) 392-3964

312 WEST 19TH STREET
P. O. BOX 2263
MERCED, CA 95344
(209) 723-2137
FAX (209) 723-0899

August 27, 2008

Reply to our:
Los Banos office

Eugene Forte
688 Birch Court
Los Banos, CA 93635

Re: Eugene Forte v. Tommy Jones
Our Client: Charles Guest
Merced County Court Case No.: 150880

Dear Mr. Forte:

Please be advised that this office has recently been retained by Mr. Charles Guest. Our representation of Mr. Guest relates to the complaint that you have filed against Tommy Jones, mayor of Los Banos, for defamation.

It has come to my attention that you have scheduled the deposition of Mr. Guest for September 4, 2008 at 9:00am. I am unfortunately unavailable on that date because of previously scheduled commitments. Because I am unavailable to represent Mr. Guest at this deposition, I am requesting that this deposition be rescheduled to a later date. Also, because we have just recently been retained, I believe that rescheduling the deposition is appropriate to allow me more time to review the facts and circumstances of this case.

Please call my office at your earliest convenience to confirm that you are willing to reschedule Mr. Guest's deposition. Your courtesy in this matter is appreciated.

Very truly yours,

LINNEMAN, BURGESS, TELLES, VAN ATTA, VIERRA,
RATHMANN, WHITEHURST & KEENE

By

Phillip McMurray



PRM

Cc: Charles Guest

Exhibit "4"

LAW OFFICES OF
LINNEMAN, BURGESS, TELLES, VAN ATTA, VIERRA,
RATHMANN, WHITEHURST & KEENE

EUGENE J. VIERRA
DIANE V. RATHMANN
ALFRED L. WHITEHURST
THOMAS J. KEENE

PHILLIP R. McMURRAY

JAMES E. LINNEMAN, OF COUNSEL

L. M. LINNEMAN (1902-1983)
JOSEPH B. BURGESS (1902-1990)
JAY H. WARD (1942-1995)
C. E. VAN ATTA (1919-1997)
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(209) 392-2141
FAX (209) 392-3964

312 WEST 19TH STREET
P. O. BOX 2263
MERCED, CA 95344
(209) 723-2137
FAX (209) 723-0899

August 29, 2008

Reply to our:
Los Banos office

Eugene Forte
688 Birch Court
Los Banos, CA 93635

Re: Eugene Forte v. Tommy Jones
Our Client: Charles Guest
Merced County Court Case No.: 150880

Dear Mr. Forte:

Please let this letter serve as a follow up to my 8/27/08 letter to you regarding the deposition of Mr. Guest that you have scheduled for September 4, 2008 at 9:00am. My previous letter asked you to agree to reschedule the deposition since we have just recently been retained and I am not unavailable on that particular date. I have not heard from you, and must follow up with you in light of the timeline we are dealing with here.

Applicable caselaw provides that scheduling a deposition at a time when opposing counsel is not available is not permitted. I am more than happy to make myself and Mr. Guest available for deposition, but I am not able to be there on September 4, therefore please be advised that Mr. Guest will not be there either.

It is important that you call my office as soon as possible to confirm that you are willing to reschedule Mr. Guest's deposition. Your courtesy in this matter is appreciated.

Very truly yours,

LINNEMAN, BURGESS, TELLES, VAN ATTA, VIERRA,
RATHMANN, WHITEHURST & KEENE

By

Phillip McMurray



PRM

Cc: Charles Guest
Benjamin Ratliff, attorney for Tommy Jones

Exhibit "5"

Response to your email with typos corrected/Forte v. Jones

Subject: Response to your email with typos corrected/Forte v. Jones

From: Gene Forte <geneforte@badgerflats.com>

Date: Tue, 02 Sep 2008 17:33:35 -0700

To: "Phillip R. McMurray" <pmcmurray@linnemanlaw.com>

Phillip R. McMurray wrote:

Dear Mr. Forte,

Please let this e-mail serve as a follow up to my 2 previous letters. My letters to you were dated 8/27/08 and 8/29/08.

I am writing you this to confirm that you are willing to reschedule the deposition of Mr. Guest, relating to your lawsuit against Tommy Jones. Our office has just recently been retained, and I am unavailable to participate in the deposition on 9/4/08, which is this Thursday. I will therefore not be attending the deposition as scheduled. Mr. Guest will also not be present. Please call my office immediately to confirm.

Very truly,

Phillip R. McMurray
Linneman Law Offices

209-826-4911

Dear Mr. McMurray:

I have received one letter from you. I regret that I am not able to accommodate your request to move the deposition of Mr. Guest.

Mr. Guest was served his deposition subpoena on August 5th, 2008, in plenty of time for him to retain counsel in advance of his deposition.

His waiting until the 11th hour is nothing but a stall tactic orchestrated by an individual that ducked service and refused to communicate with me about deposition dates when respectfully requested to do so on many occasions.

You had your remedies to pursue, i.e., motion to quash deposition and production of documents etc., but did not.

Therefore if Mr. Guest is not at his scheduled deposition I will seek an order for contempt requesting sanctions against both you and he.

A final note, you certainly have a telephone and could have called me instead of waiting until August 27 and 29th, 2008 to send me snail mail (obviously you also had my email but did not attempt to correspond with me in such way until TODAY at 4:28PM September 2nd, 2008).

The deposition is on for September 4th, 2008, and Mr. Guest will be held liable for any costs incurred if he does not appear.

Thank you.

Gene Forte

Exhibit "6"

Re: Forte v. Tommy Jones

Subject: Re: Forte v. Tommy Jones

From: Gene Forte <geneforte@badgerflats.com>

Date: Wed, 03 Sep 2008 12:17:27 -0700

To: "Phillip R. McMurray" <pmcmurray@linnemanlaw.com>

Phillip R. McMurray wrote:

Mr. Forte, thank you for your quick response, although I am disappointed that you are not willing to accomodate my request to reschedule the deposition. As I have informed you, I am unable to be present for the deposition as scheduled. Mr. Guest will therefore not be present either.

Mr. Guest and I continue to be willing to reschedule, and can suggest the following dates of availability: 9/29/08, 9/30/08 or 10/3/08. My agreement to these dates is contingent upon the availability of Mr. Jones attorney, Mr. Benjamin Ratliff, on those dates as well.

Very truly,

Phillip R. McMurray
Linneman Law Offices

Mr. McMurray:

There is no legally justifiable reason why you and Mr. Guest waited since his being served his subpoena on August 5th, 2008 to contact me.

I will only consider re-scheduling the deposition under one condition.

If you have Mr. Guest produce all of the documents requested by 4:00PM today at my office of 688 Birch Court, Los Banos, I will agree to re-schedule the deposition (but not at the whims of Mr. Ratliff).

It is my schedule that Mr. Guest and you need to adhere to. You can extend Mr. Ratliff comity on your own time, not mine, from me he deserves none.

If I do not have all of the documents requested of Mr. Guest to me by 4:00PM today I then expect Mr. Guest to be present with you, or without you tomorrow.

If he is not there I will seek sanctions against both you and he.

Thanks.

Gene Forte

Exhibit "7"

Re: Forte v. Tommy Jones

Subject: Re: Forte v. Tommy Jones
From: Gene Forte <geneforte@badgerflats.com>
Date: Wed, 03 Sep 2008 15:39:50 -0700
To: "Phillip R. McMurray" <pmcmurray@linnemanlaw.com>

Phillip R. McMurray wrote:

Mr. Forte, neither I, nor Mr. Guest will attend the deposition scheduled for tomorrow, Sept. 4. The primary reason, as I have informed you, is that I am unavailable. You are, of course, free to take whatever action you see fit. However, under applicable case law, including *Tenderloin Housing Clinic v. Sparks*, 8 Cal.App.4th 299 (1992); it is sanctionable conduct to purposefully schedule a conflicting proceeding without good cause.

I remain available to choose a mutually agreeable date for the deposition of Mr. Guest. This is intended as a good faith attempt to informally resolve a discovery dispute.

Very truly,

Phillip R. McMurray
Linneman Law Offices
209-826-4911 - Los Banos office
209-392-2141 - Dos Palos office

Quoting Gene Forte <geneforte@badgerflats.com>:

> Phillip R. McMurray wrote:

>>

>> Mr. Forte, thank you for your quick response, although I am >> disappointed that you are not willing to accomodate my request to >> reschedule the deposition. As I have informed you, I am unable to >> be present for the deposition as scheduled. Mr. Guest will >> therefore not be present either. Mr. Guest and I continue to be >> willing to reschedule, and can suggest the following dates of >> availability: 9/29/08, 9/30/08 or 10/3/08. My agreement to these >> dates is contingent upon the availability of Mr. Jones attorney, >> Mr. Benjamin Ratliff, on those dates as well.

>>

>> Very truly,

>>

>> Phillip R. McMurray
>> Linneman Law Offices

>>

> Mr. McMurray:

>

> There is no legally justifiable reason why you and Mr. Guest waited
> since his being served his subpoena on August 5th, 2008 to contact me.

>

> I will only consider re-scheduling the deposition under one condition.

>

> If you have Mr. Guest produce all of the documents requested by 4:00PM
> today at my office of 688 Birch Court, Los Banos, I will agree to
> re-schedule the deposition (but not at the whims of Mr. Ratliff). It is
> my schedule that Mr. Guest and you need to adhere to. You can extend
> Mr. Ratliff comity on your own time, not mine, from me he deserves
> none.

>

> If I do not have all of the documents requested of Mr. Guest to me by
> 4:00PM today I then expect Mr. Guest to be present with you, or without
> you tomorrow.

>

> If he is not there I will seek sanctions against both you and he.

>

1 Gene Forte
2 688 Birch Court
3 Los Banos, California, 93635
4 Telephone: (209) 829-1116
5 Facsimile: (209) 829-1952

6 In Propria Persona /Plaintiff

7 SUPERIOR COURT OF CALIFORNIA

8 COUNTY OF MERCED

9
10 EUGENE FORTE

Case No. CU150880

11
12 Plaintiff,

13 vs.

***[PROPOSED] ORDER DIRECTING
COMPLIANCE WITH DEPOSITION
SUBPOENA***

14
15 TOMMY JONES, et al.

[C.C.P. § 1987.1, §2020.01, §2025.48]

16 Defendants.
17
18
19

20 This matter came on regularly before the Court for hearing on November 6, 2008. Eugene
21 Forte appeared as plaintiff in propria persona, and Mr. Phillip McMurray appeared for non-party
22 Charles Guest.

23 The Court, having reviewed the moving and opposing papers on plaintiff's Motion to
24 Compel Compliance with deposition subpoena; and oral argument of counsel having been received
25 by the Court, the Court Orders as follows:

26 The Court finds, adjudges and orders as follows:
27
28

