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Toby Harris, In Pro Per

4
5 IN THE SUPERIOR COURT OF ARIZONA
6 IN AND FOR THE COUNTY OF MARICOPA

7 BOB PARSONS AND RENEE PARSONS,

8 Plaintiff,

9 vs.

10 TOBY HARRIS

11 Defendant

Case No.: CV2023-002276

MOTION FOR LEAVE TO FILE MOTION FOR
SANCTIONS

12
13 **MOTION FOR LEAVE TO FILE MOTION FOR SANCTIONS**

14
15 Defendant respectfully moves for leave to file the attached Motion for Sanctions,
16 submitted as Exhibit A. Leave is requested solely pursuant to the Court's
17 December 20, 2023 vexatious-litigant order, which requires that any proposed
18 filing be submitted as an exhibit to a Motion for Leave.
19

20
21
22 The attached Motion for Sanctions seeks sanctions based on procedural,
23 structural, and record-based defects that have arisen in this matter, including
24
25 issues previously preserved in the record. The request for leave does not seek to
26 argue the merits of the sanctions motion; it seeks only permission to file it so that
27
28 the Court may consider the issues raised in the attached motion.

MOTION

1 WHEREFORE, Defendant respectfully requests that the Court:
2

3 1. Grant leave to file the attached Motion for Sanctions; and
4

5 2. Deem the attached motion filed as of the date leave is granted.
6

7
8 Respectfully submitted,

9 /s/ Toby Harris

10 Toby Harris, Pro Per
11

12 5/28/2026

13 served by Turbo Court to
14

15 Jackie Pakula, Sally Odegard and Stephen Hopkins

16 5/28/2026
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EXHIBIT A

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7 BOB PARSONS AND RENEE PARSONS,

8 Plaintiff,

9 vs.

10 TOBY HARRIS

11 Defendant

Case No.: CV2023-002276

**DEFENDANT’S UNIFIED MOTION FOR
SANCTIONS, ADVERSE INFERENCE,
ATTORNEY DISCIPLINE, AND REFERRAL FOR
MISCONDUCT**

12
13 **DEFENDANT’S UNIFIED MOTION FOR SANCTIONS, ADVERSE**
14 **INFERENCE, ATTORNEY DISCIPLINE, AND REFERRAL FOR**
15 **MISCONDUCT**

16
17 Defendant respectfully moves for (1) sanctions under Rule 37, (2)
18 attorney-discipline sanctions under ER 3.3, 3.4, and 8.4, and (3) referral to the
19 State Bar of Arizona and appropriate authorities for review of conduct reflected
20 in the record. This unified motion consolidates all related issues because the
21 misconduct arises from the same nucleus of operative facts.
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MOTION

1 I. INTRODUCTION

2
3 The record reflects a coordinated pattern of litigation misconduct: counsel
4 represented that PXG possessed “thousands of pages” of responsive documents
5 too voluminous to produce, later claimed that “there may not be any documents at
6 all,” misled the lower negligence standard despite binding authority
7 requiring actual malice, and offered an implausible explanation for missing a
8 filing deadline by asserting an inability to read a court calendar. During this same
9 period, the documents previously acknowledged to exist disappeared.

10
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12
13 Arizona law recognizes that the destruction of thousands of documents during
14 litigation cannot be accidental; the volume alone creates a presumption of
15 intentional spoliation. Because Plaintiff Parsons owns PXG, works in the same
16 office, and had practical control over PXG’s records, the destruction is imputed to
17 him under Rule 37.

18
19
20
21 These misrepresentations and omissions did not merely distort discovery. They
22 resulted in the issuance and multi-year enforcement of a prior restraint on
23 Defendant’s speech — a form of relief the Supreme Court has described as “the
24 most serious and least tolerable infringement” on First Amendment rights.
25 Counsel also asserted that Defendant had “waived” constitutional rights that
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27
28

1 legally cannot be waived without a hearing, colloquy, and judicial findings.
2 Because the injunction was issued on a record corrupted by attorney misconduct,
3 sanctions, adverse inference, and referral are warranted.
4

5 6 II. FACTUAL BACKGROUND 7

8 A. Counsel admitted PXG possessed “hundred of thousands of pages” of
9 responsive documents. See, EXHIBIT A pg2. line 14-16 “Further these requests
10 are unduly burdensome as it would call for the production of potentially hundreds
11 of thousands of pages of documents.”
12

13 Attorney Odegard represented that PXG held “thousands of pages” of responsive
14 materials and that the volume was “too large to produce.” This was an affirmative
15 admission of existence, relevance, and possession.
16
17

18 B. Counsel later claimed “if any even exist.” See, Exhibit B Pg. 2 line 10-12 “Even
19 attempting to look for such documents (if any even exist) at a company the size of
20 PXG would be extrodinarily time consuming and burdensome.”
21
22

23 Attorney Pakula subsequently stated that “there may not be any documents at all.”
24 If both statements are taken as true — as the court must assume when evaluating the
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1 record — then the record itself establishes that documents known to exist were later
2 destroyed.¹
3

4 For purposes of this motion, these statements are taken as accurate as pleaded.
5 Attorney Odegard represented that PXG possessed “thousands of pages” of
6 responsive documents too voluminous to produce, while Attorney Pakula later
7 stated that “there may not be any documents at all.” When both statements are
8 accepted as true, they necessarily acknowledge that documents known to exist at
9 the time of Odegard’s representation later disappeared. This constitutes an
10 admission of massive document destruction of a scale too large to be accidental
11 under Arizona law.
12
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16
17
18 C. Parsons had control over PXG’s documents.

19 Parsons owns PXG, works in the same office, and exercises practical authority
20 over PXG’s operations. Under the control doctrine, a party has “control” over
21 documents when they have the legal right or practical ability to obtain them. Thus,
22 PXG’s destruction of documents is imputed to Parsons.
23
24

25
26 ¹ Consequently, any single document showing a financial relationship between PXG and Ping would have
27 established a financial relationship between Parsons and Judge Gates, and provided proof of a bought ruling in the underlying
28 matter, and show that public corruption is the source of the two tier justice in AZ,

1 D. Counsel misled the lower negligence standard.

2
3 Despite binding constitutional authority requiring actual malice for public-figure
4 claims, counsel pleaded and argued the lower negligence standard. This
5 constitutes a misrepresentation of controlling law.
6

7
8 E. Counsel offered an implausible “calendar error” explanation for missing a
9 deadline.

10
11 Counsel claimed they missed a filing deadline because they “could not read a
12 court calendar.” Given the sophistication of counsel and the surrounding record
13 of evidence destruction, this explanation is inconsistent with the circumstances.
14

15
16 F. Counsel falsely asserted that Defendant “waived” constitutional rights.

17 Counsel repeatedly claimed that Defendant “waived” constitutional rights,
18 including First Amendment protections, despite the absence of any hearing,
19 colloquy, or judicial findings required to establish a valid waiver. No such waiver
20 exists.
21

22
23 G. Prior criminal-referral motion was miscaptioned and is not operative.

24
25 A prior attempt to submit a criminal-referral motion was misled as having been
26 filed by “Plaintiff” rather than “Defendant.” Because the filing was not properly
27
28

1 attributed, it was never properly before the Court. Any order striking that
2 miscaptioned filing carries no preclusive effect.
3

4 This motion is the first properly captioned, properly attributed, and procedurally
5 valid request for referral.
6

7 8 III. RULE 37 SANCTIONS ARE WARRANTED

9
10 A. Arizona law presumes intentional spoliation when large volumes of documents
11 disappear.
12

13 When thousands of pages acknowledged to exist later vanish during litigation,
14 courts treat the destruction as intentional. The volume alone precludes any
15 inference of accident.
16

17 B. The destruction occurred after subpoena service.
18

19 Documents were known to exist when the subpoena was issued. Their
20 disappearance thereafter constitutes spoliation.
21

22 C. Parsons had control over the documents.
23

24 Because Parsons owns PXG and works in the same office, he had the practical
25 ability to obtain the documents. The destruction is therefore imputed to him.
26

27 D. Appropriate Rule 37 remedies include:
28

- 1 • Adverse inference
- 2
- 3 • Reopening prior rulings
- 4
- 5 • Vacating any injunction
- 6
- 7 • Restoring Defendant’s ability to engage in protected speech
- 8
- 9 • Any other relief the Court deems appropriate

10 IV. ATTORNEY SANCTIONS ARE WARRANTED UNDER ER 3.3, 3.4, AND
11
12 8.4

13
14 A. Contradictory statements regarding document existence.

15 Counsel’s statements that PXG had “thousands of pages” and later “no
16 documents at all” cannot both be accurate. This contradiction concerns material
17 facts central to discovery obligations.
18

19
20 B. Misleading the governing legal standard.

21
22 Counsel failed to disclose controlling authority requiring actual malice and
23 instead argued negligence. This implicates ER 3.3(a)(1) and (a)(2).
24

25 C. Implausible procedural explanations.
26
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28

1 The “calendar error” explanation is inconsistent with the sophistication of counsel
2 and the surrounding record of evidence disappearance.
3

4 D. False claims of waiver of constitutional rights.
5

6 Counsel asserted that Defendant “waived” constitutional rights that legally cannot
7 be waived without a hearing, colloquy, and judicial findings. No such waiver
8 occurred.
9

10 E. These actions constitute misconduct under ER 3.3, 3.4, and 8.4.
11

12 Sanctions may include:
13

- 14 • Monetary penalties
- 15
- 16 • Referral to the State Bar
- 17
- 18 • Any other discipline the Court finds appropriate
19

20 V. REFERRAL TO THE STATE BAR FOR ATTORNEY MISCONDUCT 21

22 Defendant respectfully requests that the Court refer Plaintiffs’ counsel to the
23 State Bar of Arizona for review of conduct that implicates ER 3.3, ER 3.4, and
24 ER 8.4. The Court is not asked to make findings of ethical violations; only to
25 transmit the record for review.
26

27
28 A. Contradictory statements warrant disciplinary review.

1 The “thousands of pages” admission followed by “no documents at all” is a
2 material contradiction appropriate for State Bar evaluation.
3

4 B. Disappearance of thousands of pages raises disciplinary concerns.
5

6 The State Bar is the proper body to determine whether counsel contributed to,
7 concealed, or failed to prevent the destruction of subpoenaed evidence.
8

9 C. Misrepresentation of controlling law is independently sanctionable.
10

11 Failure to disclose binding authority requiring actual malice is a matter for
12 disciplinary review.
13

14 D. False claims of waiver of constitutional rights.
15

16 Asserting a waiver that legally cannot exist without a hearing is a
17 misrepresentation of constitutional law and the record.
18

19 E. Implausible procedural explanations support referral.
20

21 The “calendar error” explanation, when viewed alongside the disappearance of
22 documents, warrants investigation.
23

24 F. Referral promotes the integrity of the judicial process.
25

26 Courts play a critical role in ensuring potential ethical violations are reviewed by
27 the appropriate disciplinary authority.
28

1 VI. REFERRAL FOR POTENTIAL CRIMINAL VIOLATIONS

2
3 The disappearance of thousands of subpoenaed documents, combined with
4 contradictory statements and misrepresentations to the Court, raises issues
5 potentially implicating statutes concerning evidence tampering or obstruction.
6

7 The Court is not asked to determine criminal liability, only to transmit the record
8 to the appropriate authorities.
9

10 VII. ATTORNEY MISREPRESENTATIONS RESULTED IN A MULTI-YEAR
11 PRIOR RESTRAINT
12

13
14 The misconduct described above directly resulted in the issuance and multi-year
15 enforcement of a prior restraint on Defendant’s speech. A prior restraint is “the
16 most serious and least tolerable infringement” on First Amendment rights, and
17 courts may not impose or maintain such restraints without strict adherence to
18 constitutional standards.
19
20

21
22 Counsel’s misrepresentations prevented the Court from receiving accurate
23 information regarding:
24

- 25 1. The existence of thousands of pages of responsive documents,
- 26
- 27 2. The subsequent disappearance of those documents,
- 28

- 1 3. The controlling actual-malice standard,
- 2
- 3 4. Plaintiff Parsons' control over PXG and its records, and
- 4
- 5 5. The absence of any valid waiver of constitutional rights.
- 6

7 Because the injunction was issued on a record distorted by attorney misconduct,
8 its continued enforcement constitutes an ongoing constitutional injury. This
9 elevates the need for sanctions, adverse inference, and referral.
10

11 VIII. REQUESTED RELIEF

12 Defendant respectfully requests that the Court:

- 13
- 14
- 15 1. Impose Rule 37 sanctions, including adverse inference and reopening of
- 16 prior rulings.
- 17
- 18 2. Vacate any injunction or order issued on a record affected by spoliation.
- 19
- 20 3. Impose attorney sanctions under ER 3.3, 3.4, and 8.4.
- 21
- 22 4. Refer the matter to the State Bar of Arizona.
- 23
- 24 5. Refer the matter to appropriate authorities for review of potential criminal
- 25 violations.
- 26
- 27 6. Grant any other relief the Court deems just and proper.
- 28

1 IX. CONCLUSION

2
3 The record reflects a unified pattern of misrepresentation, spoliation, false claims
4 of waiver, and procedural misconduct. Sanctions and referral are appropriate.
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8 Respectfully submitted,

9
10 /s/ Toby Harris

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12 Toby Harris, Pro Per

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14 served by Turbo Court to

15 Jackie Pakula, Sally Odegard and Stephen Hopkins
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EXHIBIT A

MOTION

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8 Attorneys for Plaintiffs Robert and Renee
9 Parsons

10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
11 **IN AND FOR THE COUNTY OF MARICOPA**

12 ROBERT PARSONS and RENEE
13 PARSONS, husband and wife,

14 Plaintiffs,

15 v.

16 TOBY HARRIS and JANE DOE HARRIS,
17 husband and wife; JOHN and JANE DOES
18 1 – 10; ABC CORPORATIONS 1 – 10;
19 and XYZ PARTNERSHIPS 1 – 10,

20 Defendants.

Case No.: CV2023-002276

21 **PLAINTIFFS' RESPONSE TO**
22 **DEFENDANT'S FIRST REQUEST**
23 **FOR PRODUCTION OF**
24 **DOCUMENTS**

25 *(Assigned to the*
26 *Honorable Katherine Cooper)*

27 Plaintiffs Robert Parsons and Renee Parsons, by and through undersigned counsel
28 and pursuant to Ariz.R.Civ.P., Rule 34, submit their Response to Defendant's First Request
for Production of Documents. As discovery is ongoing and incomplete, Plaintiffs reserve
the right to amend and/or supplement these responses, in part, or in their entirety, at any
time.

GENERAL OBJECTIONS

Plaintiffs generally object to Defendant's requests for production of documents as
beyond the scope of legitimate discovery under the Arizona Rules of Civil Procedure. Of
note, there are no counterclaims in this case, and the only claims made are by Mr. and Mrs.
Parsons for defamation. As set forth in the Motion for Partial Summary Judgment filed on
behalf of Mr. and Mrs. Parsons, Defendant has admitted to publishing the statements at issue
as statements of fact. Defendant has already indicated in the Answer and testified in his
deposition that the sole support for his statements are the three documents provided with the

1 Answer, which makes the overly broad and burdensome requests beyond the scope of
2 legitimate discovery. Without waiving any such objections, Mr. and Mrs. Parsons respond
3 to Defendant's specific requests as follows:

4 **REQUESTS FOR PRODUCTION OF DOCUMENTS**

5 1. Any and all documents showing any financial transactions from:
6 Manufacturing, trademark, royalty payments, shipping, consulting, outsourcing, white label,
7 joint ventures, partnerships, general payments, between PXG and PING/KARSTEN
8 MANUFACTURING and or its agents, and any companies created by the entities for
9 purpose of golf product and equipment manufacturing, from the inception of the PXG
10 business to the present date.

11 **RESPONSE:**

12 **Mr. and Mrs. Parsons object to this request as PXG is not a party to this suit**
13 **and Plaintiffs object to all requests for PXG documentation of any sort. These**
14 **documents are not in the possession of Plaintiffs. Further these requests are unduly**
15 **burdensome as it would call for production of potentially hundreds of thousands of**
16 **pages of documents. These requests are not proportional to the needs of the case, and**
17 **the burden of attempting to produce this voluminous information outweighs any**
18 **benefit to its production. Additionally, information regarding PXG, a global sports**
19 **equipment company, is publicly available. Additionally, Defendant requests**
20 **potentially proprietary documentation and those protected by patents and/or**
21 **trademarks.**

22 2. Any and all documents, signed by PING/ KARSTEN MANUFACTURING
23 attorney Bill Gates in the possession of PXG and any of its agents. From PXG inception to
24 present.

25 **RESPONSE:**

26 **Mr. and Mrs. Parsons object to this request as PXG is not a party to this suit**
27 **and Plaintiffs object to all requests for PXG documentation of any sort. These**
28 **documents are not in the possession of Plaintiffs. Further these requests are unduly**

1 **burdensome. This request is not proportional to the needs of the case, and the burden**
2 **of attempting to produce this voluminous information outweighs any benefit to its**
3 **production. Additionally, information regarding PXG, a global sports equipment**
4 **company, is publicly available. Additionally, Defendant requests potentially**
5 **proprietary documentation and those protected by patents and/or trademarks.**

6 3. Any and all documents showing names, addresses, contact info, total
7 investment of current shareholders of PXG. And any prospectuses, brochures, pitch decks
8 used for investment presentations. From PXG inception to present.

9 **RESPONSE:**

10 **Mr. and Mrs. Parsons object to this request as as PXG is not a party to this suit**
11 **and Plaintiffs object to all requests for PXG documentation of any sort. These**
12 **documents are not in the possession of Plaintiffs. Further these requests are unduly**
13 **burdensome. This request is not proportional to the needs of the case, and the burden**
14 **of attempting to produce this voluminous information outweighs any benefit to its**
15 **production. Additionally, information regarding PXG, a global sports equipment**
16 **company, is publicly available. Additionally, Defendant requests potentially**
17 **proprietary documentation and those protected by patents and/or trademarks.**

18 4. Any and all documents, as a layman and not drawing any legal conclusion,
19 produce any documents that your attorneys provided you encouraging you to engage in fraud
20 on the Court that are non priveleged statements (ex. Backdating documents, perjury, taking
21 guaranteed earnings from employees, leaving the case pending in post civil judgment,
22 striking down Defendants constitutional rights to free access to the courts by submitting a
23 vexatious litigant argument after litigating for years, Filing defamation lawsuit to cover up
24 prior fraud on Court, Serving wrong documents and filing a affidavit saying they were the
25 correct ones, etc.) Without any such documents, the culpability for any criminal intent would
26 be solely on Bob Parsons, provide documents showing your attorneys mislead you, that you
27 got bad legal advice from your legal counsel, that your attorneys had to bend to rules to
28 prevail and you went along with it because they are the experts. Produce any documents

1 from Burns Barton or your current attorneys, since boycottpxg.com raises issues from the
2 prior litigation it is not out of scope. Time frame From filing of CV2010-01619 to present.

3 **RESPONSE:**

4 **Mr. and Mrs. Parsons object to this request as PXG is not a party to this suit**
5 **and Plaintiffs object to all requests for PXG documentation of any sort. These**
6 **documents are not in the possession of Plaintiffs. Further these requests are unduly**
7 **burdensome, and vague, ambiguous, and unintelligible. Additionally, this request is**
8 **not proportional to the needs of the case, and the burden of attempting to produce this**
9 **voluminous information outweighs any benefit to its production. Additionally,**
10 **information regarding PXG, a global sports equipment company, is publicly available.**
11 **Moreover, this request relates to a previous lawsuit that has been closed for some time.**
12 **That lawsuit brought by Defendant was dismissed, and the Judgment against**
13 **Defendant affirmed by the Court of Appeals. As set forth in Mr. and Mrs. Parsons**
14 **opposition to the motion to consolidate filed by Defendant, the issues in the two cases**
15 **are wholly unrelated, and Defendant may not now re-litigate the issues in the prior**
16 **case, such as his previous designation as a vexatious litigant. Additionally, Defendant**
17 **requests potentially proprietary documentation and those protected by patents and/or**
18 **trademarks.**

19 5. Any and all documents, non privileged statements which mention
20 boycottpxg.com and or Toby Harris.

21 **RESPONSE:**

22 **Mr. and Mrs. Parsons object to this request as unduly burdensome, vague and**
23 **ambiguous. This request is not proportional to the needs of the case. Moreover, this**
24 **information is wholly irrelevant to whether Defendant published defamatory**
25 **information about Mr. or Mrs. Parsons. Further, it requests documents protected by**
26 **attorney/client privilege and work product.**

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DATED this 19th day of September, 2023.

HOLLOWAY ODEGARD & KELLY, P.C.

By /s/ Sally A. Odegard
Sally A. Odegard
Stephen M. Hopkins
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COPY of the foregoing emailed
this same day to:

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Defendant *Pro Per*

By: /s/ K. Buensalido

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EXHIBIT B

MOTION

1 Jacqueline Pakula, Esq. (#036739)
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4 Scottsdale, AZ 85260
5 (480) 398-2550 (T)
6 (480) 750-4988 (F)

7 *Attorney for PXG Worldwide, Inc.*

CLERK OF THE
SUPERIOR COURT
***** FILED *****
T. VARELA, DEPUTY CLERK
2025 FEB 20 AM 11:08

8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF MARICOPA**

10 ROBERT PARSONS and RENEE
11 PARSONS, husband and wife,

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14 TOBY HARRIS and JANE DOE HARRIS,
15 husband and wife; JOHN and JANE DOES
16 1 – 10; ABC CORPORATIONS 1 – 10;
17 and XYZ PARTNERSHIPS 1 – 10,

18 Defendants.

Case No.: CV2023-002276

**REPLY IN SUPPORT OF
MOTION TO EXTEND TIME TO
QUASH SUBPOENA**

*(Assigned to the Honorable
Scott Minder)*

19 Non-party PXG Worldwide, Inc. (“PXG”), hereby submits its Reply in support of its
20 previously filed Motion to Extend Time to File Its Motion to Quash Subpoena. This Reply
21 is supported by the accompanying Memorandum of Points and Authorities incorporated by
22 this reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. DEFENDANT’S SUBPOENA DID NOT COMPLY WITH THE RULES

23 Defendant’s argument that his subpoena was compliant with the rules is nonsense.
24 PXG readily concedes that the “boilerplate” part of the subpoena is simply a Court form,
25 and PXG’s objections did not relate in any way to the form of the subpoena.

26 As set forth in PXG’s Motion To Extend, Defendant failed to comply with Rule 45
27 because he never provided notice of his intent to send a subpoena as clearly required by the
28 Rule.

1 Defendant's mailing certificate was false; the subpoena indicated it had been sent to
2 counsel for Mr. and Mrs. Parsons on the date the subpoena was issued but this was not the
3 case.

4 Defendant has never made a good faith attempt to limit the inappropriate and overly
5 broad categories of information sought as required before seeking Court intervention.

6 Most significantly, the abusive and harassing nature of the various requests itself is
7 inconsistent with Rule 45, as it clearly seeks trade secret and confidential commercial
8 information and any attempt to respond would subject PXG to tremendous expense. For
9 example, Defendant sought "all" documents signed by PING Golf attorney Bill Gates in
10 possession of PXG or "any of its agents" from "inception to present."¹ Even attempting to
11 look for such documents (if any even exist) at a company the size of PXG would be
12 extraordinarily time consuming and burdensome. Likewise, Defendant has sought "total
13 manufacturing proceeds and expenditures" and "profits and loss statements" from
14 "inception to current years." This is a request for confidential commercial information,
15 which PXG considers to be trade secret. And none of the information requested in the
16 subpoena relates to Mr. and Mrs. Parsons's damages for defamation.

17 It should be noted and stressed that the Honorable Katherine Cooper already granted
18 PXG's Motion to Quash on that basis. There is nothing in the Court of Appeals'
19 Memorandum Decision that somehow precludes this Court from quashing the subpoena on
20 its own motion. That is certainly consistent with the Court's obligations to protect non-
21 parties to a lawsuit from needless burden and expense. It is also consistent with Rule 1 of
22 the Arizona Rules of Civil Procedure, which provides that when interpreting the rules such
23 interpretation should be "to secure the just, speedy, and inexpensive determination of every
24 action and proceeding."

25 ///

27 ¹ Defendant's theory is apparently that the Honorable Pamela Gates accepted a bribe from
28 Mr. and Mrs. Parsons, which is what led Judge Gates to rule against Defendant in a prior
and unrelated case, and to declare him a vexatious litigant in that case.

1 **II. THE SLIGHT DELAY IN MOVING TO QUASH THE SUBPOENA WAS**
2 **DUE TO "EXCUSABLE NEGLIGENCE"**

3 PXG has more than amply demonstrated "excusable neglect" for providing its
4 Motion to Quash more than fourteen days after it was served. Defendant has cited no case,
5 from any jurisdiction, that supports his opposition to having the Motion to Quash decided
6 on its merits.

7 "Excusable neglect" is not specifically defined by Rule 6 of the Arizona Rules of
8 Civil Procedure and the term is used in various contexts throughout the rules, such as a Rule
9 60 motion for relief from a judgment, or a Rule 38.1 motion to reinstate. A review of the
10 case law and other legal authority indicates that it is a fact specific inquiry in which context
11 matters.

12 As stated in 49 C.J.S. Judgments, § 558:

13 In considering excusable neglect a court must consider the facts and circumstances
14 in each particular case, and the determination is equitable one, taking account of all
relevant circumstances.

15 While the term "excusable neglect" has been defined, according to some authority it
16 has no fixed meaning, and cannot be determined by fixed rules or standards. In order
17 to excuse a default and open or set aside a default judgment on the ground of
excusable neglect such neglect must be determined on a case-by-case basis. Thus,
the court must consider the facts and circumstances in each particular case.

18 When deciding whether or not a default judgment may be set aside because of
19 excusable neglect, the court must consider the unique factual background of each
20 case. The determination is at bottom an equitable one, taking account of all relevant
21 circumstances surrounding the party's omission, including the length of delay and its
potential impact on judicial proceedings, the reason for the delay, including whether
22 it was within the reasonable control of the movant, and whether the movant acted in
good faith.

23 To the same effect is 47 Am. Jur.2d Judgments § 662:

24 The term "excusable neglect" refers to neglect of a nature that would cause a
25 reasonably prudent person under similar circumstances to act similarly. It requires a
26 party to show that the neglect was occasioned by some extenuating circumstances of
sufficient significance to render it excusable. Excusable neglect may be found when
27 a default was attributable to an honest mistake that is compatible with due diligence
or reasonable prudence. Excusable neglect implies good faith and some reasonable
28 basis for noncompliance with the rules. What constitutes excusable neglect depends

1 upon what, under all the surrounding circumstances, may be reasonably expected of
2 a party in paying proper attention to his or her case. Factors to be considered include:

- 3 • (1) the danger of prejudice;
- 4 • (2) the length of the delay and its potential impact on judicial proceedings;
- 5 • (3) the reason for the delay, including whether it was within the reasonable
control of the movant; and
- 6 • (4) whether the movant acted in good faith.

7 In this case, there is absolutely no prejudice whatsoever to Defendant from a slight
8 delay in providing objections. Indeed, Defendant has not even attempted to argue prejudice,
9 preferring instead to simply ignore this key component that should guide the decision in this
10 matter.

11 Likewise, the delay was minimal, as the Motion to Quash was only slightly tardy.
12 And as set forth in PXG's Motion, the objections were actually provided before the time set
13 for compliance in the subpoena.

14 The reason for the slight delay was a mis-calendaring of a deadline, not an uncommon
15 occurrence. PXG provided the subpoena to outside counsel and began addressing its
16 objections immediately after service. PXG relied upon counsel, and that reliance was
17 reasonable. As this Court is well aware the Arizona Rules of Civil Procedure are almost
18 identical to the Federal Rules of Civil Procedure. One of the notable differences is in the
19 Rule 45 timeframe to provide objections. A mis-calendaring of a deadline for that reason is
20 certainly the type of "honest mistake" that is compatible with due diligence.

21 Of course, in examining this issue the Court's determination is an equitable one,
22 keeping in mind the overriding principle well-established in Arizona law—courts "prefer to
23 decide each case upon its merits rather than to dismiss summarily on procedure grounds."

24 *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, (App. 1984).

25 Arizona law is if anything more liberal in finding excusable neglect than the so-called
26 "black letter law" cited above. The case cited in the Memorandum Decision, *City of Phoenix*
27 *v. Geyler*, 144 Ariz. 232, 697 P.2d 1073 (1985), is instructive. In *Geyler*, the Arizona
28

1 Supreme Court overturned a judgment entered in a condemnation action.² The secretary for
2 the defendant mis-calendared the time to file a Rule 52 motion to alter or amend the
3 judgment. Since the Rule 52 motion was not timely, it did not operate to extend the time to
4 take an appeal. The Arizona Supreme Court granted the request to have the judgment re-
5 entered so that an appeal could be taken. As stated in *Geyler*:

6 The standard for determining whether conduct is “excusable” is whether the neglect
7 or inadvertence is such as might be the act of a reasonably prudent person under the
8 same circumstances. *Coconino Pulp v. Marvin*, 83 Ariz. at 120, 317 P.2d at 552.
9 Many cases have been decided since *Coconino Pulp*, and we do not intend to review
10 them all. We recently indicated that clerical and secretarial errors in office procedures
11 are “unavoidable and ... [often] excusable.” *Daou v. Harris*, 139 Ariz. 353, 360, 678
12 P.2d 934, 941 (1984). We noted again that the “test of what is excusable is whether
13 the neglect or inadvertence” is of the type that might be “the act of a reasonably
14 prudent person.” *Id.* at 359, 678 P.2d at 940. If there is a trend in the Rule 60(c)(1)
15 cases and those decided under the identical federal rule, it is that diligence is the final
16 arbiter of whether mistake or neglect is excusable. *Rodgers v. Watt*, 722 F.2d at 459-
17 60; see generally *Daou v. Harris, supra*; *Smith v. Jackson Tool and Die*, 426 F.2d 5
18 (5th Cir.1970); *Calkins, The Emerging Due Diligence Standard for Filing Delayed*
19 *Notice of Appeal in Federal Courts*, 19 Willamette L.J. 609 (1983).

144 Ariz. at 331-32, 697 P.2d at 1081-82.

17 The reason for the delay in objecting in this case was not due to any lack of diligence,
18 but was rather the inadvertence of a reasonably prudent person. To reiterate, PXG provided
19 its legitimate objections before the return date of the subpoena.

20 The *Coconino Pulp* case cited by *Geyler*, but conspicuous by its absence from
21 Defendant’s Response, is also on point. *Coconino Pulp* involved a default judgment entered
22 against Coconino Pulp and Paper Company. The time to provide an answer was not properly
23 calendared by the firm’s secretary, and a default judgment was entered. The Court of
24 Appeals in overturning the default judgment noted that equitable principles dictate a “fair

26 ² In the case of a default judgment there is a countervailing policy consideration relating
27 the finality of judgments. By contrast, with respect to the motion to quash the subpoena
28 there are no countervailing policy arguments that support Defendant’s position regarding
waiver.

1 ORIGINAL of the foregoing *e-filed* via
2 TurboCourt this 20th day of February, 2025,
and copies electronically transmitted to:

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