

CAUSE NO. xxxxx

XXXXX XXXXX,  
Plaintiff

IN THE COUNTY COURT AT LAW

V.

NO. x

XXXXX XXXXX  
Defendant

XXXXX COUNTY, TEXAS

**PLAINTIFF’S RESPONSE TO DEFENDANT’S  
MOTION TO RECUSE**

COMES NOW, Plaintiff, **XXXXX XXXXX**, and submits this his Plaintiff’s Response to Defendant’s Motion To Recuse, and pursuant thereto would respectfully show the Court as follows:

**FACTUAL AND PROCEDURAL BACKGROUND**

On September 1, 2006, a purported *pro se* Defendant’s Original Answer (Exhibit Q), was filed which was later found to be filed by someone other than Defendant and stricken from the record.

On October 2, 2006, Defendant filed a single, global objection to Plaintiff’s Request for Disclosure and failed to otherwise respond to said request. (Exhibit T)

On October 2, 2006, Defendant filed a single, global objection to Plaintiff’s Request for Production and failed to otherwise respond to said request. (Exhibit V)

On October 2, 2006, Defendant filed a single, global objection to Plaintiff’s Interrogatories and failed to otherwise respond to said request. (Exhibit U).

On July 31, 2008, Plaintiff filed Plaintiff’s Motion to Compel and for Sanctions seeking to compel Defendant to answer Plaintiff’s Interrogatories, Request for Production, and Request for Disclosure. (Exhibit H)

On September 24, 2008, Plaintiff gave Defendant notice that Plaintiff's Motion to Compel and for Sanctions would be heard on October 9, 2008. (Exhibit O)

On September 24, 2008, Plaintiff subpoenaed Defendant to appear in Court on October 9, 2008. (Exhibit Y)

On September 24, 2008, Plaintiff noticed Defendant's deposition to be taken on October 10, 2008. (Exhibit Z)

On September 29, 2008, Defendant filed a Motion to Quash the Deposition of Defendant. (Exhibit G)

On October 8, 2008, Defendant filed a Motion for Continuance seeking to avoid the hearing set for October 9, 2008, of Plaintiff's Motion to Compel and for Sanctions. (Exhibit F)

On October 9, 2008, the Court denied Defendant's Motion for Continuance because of a lack of notice and because it failed to comply with the Texas Rules of Civil Procedure and the XXXX County Local Rules (Exhibit F). The Court heard and denied Defendant's Motion to Quash Notice of Deposition and Motion for Protective Order and ordered the Defendant to appear for deposition as noticed on October 10, 2008 (Exhibit G). The Court heard and granted Plaintiff's Motion to Compel and for Sanctions ordering the Defendant to fully and completely answer Plaintiff's Interrogatories by October 23, 2008 (Exhibit H). No sanctions were ordered.

On October 9, 2008, Defendant filed a Motion for Rehearing which was denied by the Court without a hearing (Exhibit I).

On October 10, 2008, Defendant failed to appear for her deposition as ordered by the Court on October 9, 2008.

On October 14, 2008, the Court heard and granted Plaintiff's Motion to Compel the Deposition of Defendant, Xxxxx Xxxxx, and for Sanctions, and ordered the Defendant for the second time to appear for deposition on October 30, 2008. Defendant was further ordered to pay \$2,500.00 in sanctions by October 29, 2008, at 12:00 noon.(Exhibit J)

On October 23, 2008, Defendant failed to in any manner respond to Plaintiff's Interrogatories as ordered by the Court on October 9, 2008.

On October 29, 2008, the Defendant paid the \$2,500.00 in sanctions but on October 30, 2008, the Defendant failed for the second time to appear for deposition as ordered by the Court on October 14, 2008.

On November 3, 2008, Defendant served Defendant's Supplemental Responses to Plaintiff's Interrogatories to Defendant Xxxxx Xxxxx, lodging new objections in violation of the Court's order and only partially answering said Interrogatories in violation of the Court's October 9, 2008, order to fully and completely answer said interrogatories (Exhibit K).

On November 5, 2008, the Court heard and granted Plaintiff's Second Motion to Compel the Deposition of Defendant, Xxxxx Xxxxx, for Sanctions, and for Contempt and ordered the Defendant for the third time to appear for deposition on November 11, 2008, and ordered the Defendant to pay sanctions in the amount of \$1,562.50 by November 15, 2008. (Exhibit L). The Court also heard and granted Plaintiff's Second Motion to Compel Defendant's Answer's to Plaintiff's Interrogatories and ordered Defendant for the second time to fully and completely answer Plaintiff's Interrogatories by November 15, 2008, and ordered Defendant to pay sanctions in the amount of \$2,000.00 by November 15, 2008.(Exhibit M).

On November 11, 2008, Defendant failed for the third time to appear for deposition as ordered by the Court on November 5, 2008.

On November 11, 2008, Defendant served Defendant's Second Amended Original Answer and Counterclaim asserting new claims and causes of action for the first time (Exhibit N).

On November 15, 2008, Defendant failed to fully and completely answer Plaintiff's Interrogatories to Defendant and pay sanctions as ordered by the Court on November 5, 2008, as more fully set forth in Exhibits L and M.

On December 1, 2008, the Court heard Defendant's Motion for Rehearing; Defendant's Motion to Reconsider Plaintiff's Motion to Compel the Deposition of Defendant, Xxxxx Xxxxx, and for Sanctions; Plaintiff's Motion to Quash and for Protective Order Regarding Plaintiff's Motion to Quash and for Protective Order Regarding Defendant's Notice of Intention to Take the Oral Deposition of Xxxxx Xxxxx, M.S.; Plaintiff's Third Motion to Compel the Deposition of the Defendant, for Sanctions, and for Contempt; and Plaintiff's Third Motion to Compel Defendant's Answers to Interrogatories, for Sanctions, and for Contempt.

The Court denied the Defendant's Motion for Rehearing; Defendant's Motion to Reconsider Plaintiff's Motion to Compel the Deposition of Defendant, Xxxxx Xxxxx, and for Sanctions; and Plaintiff's Motion to Quash and for Protective Order Regarding Plaintiff's Motion to Quash and for Protective Order Regarding Defendant's Notice of Intention to Take the Oral Deposition of Xxxxx Xxxxx, M.S.

The Court granted Plaintiff's Third Motion to Compel the Deposition of the Defendant, for Sanctions, and for Contempt; and Plaintiff's Third Motion to Compel Defendant's Answers to Interrogatories, for Sanctions, and for Contempt, and in connection therewith the Court struck

Defendant's pleadings and on December 18, 2008, entered the Final Judgment which is attached hereto as Exhibit A2 and incorporated herein by reference as if set forth verbatim.

On January 27, 2008, Plaintiff filed Plaintiff's Statement Regarding Defendant's Failure to Pay Attorney's Fees as Sanctions reporting that Defendant continued to be in violation of four separate Court Orders ordering Defendant to pay sanctions. Said notice is attached hereto as Exhibit B2 and incorporated herein by reference as if set forth verbatim.

### ARGUMENT AND AUTHORITIES

#### I.

##### The Trial Court Properly Denied Defendant's Motion for Continuance

On October 8, 2008, Defendant filed and served upon Plaintiff Defendant's Motion for Continuance seeking to continue the hearing on October 9, 2008, of Plaintiff's Motion to Compel and for Sanctions, Defendant's Motion for Appointment of Xxxxx Xxxxx as ANext Friend, and Defendant's Motion to Quash and Motion for Protective Order (Exhibit F). Defendant's Motion for Continuance did not contain a Certificate of Conference.

By letter dated September 29, 2008, Defendant canceled the hearing on Defendant's Motion to Appoint Xxxxx Xxxxx as ANext Friend. Defendant agreed on the record on October 9, 2008, to proceed with the hearing on Defendant's Motion to Quash and Motion for Protective Order.

Absent a clear abuse of discretion the trial court's order denying a Motion for Continuance will not be disturbed. *BMC Software Belgium, N.V. v Marchand*, 8383 S.W. 3<sup>d</sup> 789, 800 (Tex.2002). The Trial Court reasonably rejected the Defendant's argument that it had not had sufficient time to prepare for the hearings in this matter. The Plaintiff's Motion to Compel and for Sanctions was filed on July 31, 2008, and had been pending for a period of time in excess of two months. By letter

dated September 24, 2008, Defendant received notice that Plaintiff's Motion to Compel and for Sanctions was to be heard on October 9, 2008. Furthermore, Defendant received a courtesy reminder of the hearing by letter dated October 8, 2008.

Texas Rule of Civil Procedure 21 requires that, "An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon all other parties not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court." (Exhibit C) Defendant's Motion for Continuance was filed and served on Plaintiff on October 8, 2008, less than 24 hours before the scheduled hearings on October 9, 2008. The Trial Court properly denied Defendant's Motion for Continuance which was not in compliance with Texas Rule of Civil Procedure 21.

Xxxxx County Local Rule 2.1 requires that a motion for continuance contain a Certificate of Conference (Exhibit D). Defendant's Motion for Continuance did not contain a Certificate of Conference. Xxxxx County Local Rule 2.8(1) requires that all motions for continuance must be filed in writing with the Court at least seven days prior to the hearing (Exhibit E). Defendant's Motion for Continuance was filed one day prior to the hearing. The Trial Court properly denied Defendant's Motion for Continuance which failed to comply with Xxxxx County Local Rules 2.1 and 2.8(1).

## II.

### The Trial Court Properly Heard Plaintiff's Motion to Compel and for Sanctions

Defendant complains that she did not receive timely notice of hearing regarding Plaintiff's Motion to Compel and for Sanctions. Plaintiff's Motion to Compel and for Sanctions was filed and served upon Defendant on or about July 31, 2008 (Exhibit H). By letter dated September 24, 2008, Plaintiff advised Defendant that if Defendant's answers to Plaintiff's discovery were not received by

October 1, a hearing on Plaintiff's Motion to Compel and for Sanctions would be had on October 9, 2008 (Exhibit O). The Defendant failed to in any manner respond to Plaintiff's Interrogatories and on October 1, 2008, or shortly thereafter, the Court set Plaintiff's Motion to Compel and for Sanctions for hearing on October 9, 2008. By letter dated October 8, 2008, Plaintiff sent a courtesy reminder to Defendant of the hearing on October 9, 2008, of Plaintiff's Motion to Compel and for Sanctions (Exhibit P). The Trial Court reasonably found that Defendant had adequate notice of the hearing on Plaintiff's Motion to Compel and for Sanctions and appropriately proceeded.

### III.

The Trial Court Appropriately Acted Within its Discretion in  
Determining That Defendant Was Capable of Engaging in Discovery  
and Ordering Defendant to Answer Plaintiff's Interrogatories and Appear for Deposition

Defendant alleges that Defendant suffered a series of strokes with the last stroke occurring in February of 2006, resulting in Defendant being incapable of managing this litigation, traveling, or appearing for deposition or court proceedings. Defendant has introduced a very conclusory affidavit signed a Dr. Xxxxx Xxxxx which sxxxxx in summary fashion that Defendant suffers from Avascular cognitive impairment and is thus unable to travel or appear for deposition or trial. However, the balance of the credible evidence before the Trial Court indicates that Defendant is competent to manage this litigation, travel and/or give her testimony.

Attached hereto as Exhibit C2 and incorporated herein by reference as if set forth verbatim is the Affidavit of Xxxxx Xxxxx, M.D. Dr. Xxxxx is a well-respected, Board Certified neurologist. Dr. Xxxxx has practiced neurology for 36 years and has diagnosed and treated thousands of stroke patients. Dr. Xxxxx explains in his affidavit that a diagnosis of vascular cognitive impairment may cause Defendant to be unable to recall certain details or events from the past but would not prevent

Defendant from appearing and answering questions to the best of her ability. Dr. Xxxxx further recounts his experience with depositions and testimony at trial and opines that Defendant is medically, mentally, and physically capable of testifying at deposition or trial.

Also attached hereto is as Exhibit D2 and incorporated herein by reference as if set forth verbatim is the Affidavit of Xxxxx Xxxxx dated January 14, 2009. The affidavit recounts various conversations and interactions with Defendant over a five-year period including two conversations which took place in 2006, after the time of Defendant's last reported stroke. The Affidavit of Xxxxx Xxxxx documents Defendant's continued ability to speak clxxxxxy, consistently remember details over an extended period of time, communicate regarding complex matters, make decisions, and manage her legal affairs.

Since the time of Defendant's last alleged stroke in February of 2006, Defendant has:

1. Filed Defendant's *pro se* Defendant's Original Answer on or about September 1, 2006 (Exhibit Q);
2. Filed Defendant's *pro se* Defendant's Amended Answer and Affirmative Defense on or about October 17, 2006 (Exhibit R);
3. Executed a General Power of Attorney dated August 23, 2006 (Exhibit S);
4. Filed Defendant's *pro se* Defendant's Original Response to Plaintiff's Request for Disclosure on or about October 2, 2006 (Exhibit T);
5. Filed Defendant's *pro se* Defendant's Original Response to Plaintiff's Interrogatories on or about October 2, 2006 (Exhibit U);
6. Filed Defendant's *pro se* Defendant's Original Response to Plaintiff's Request for Production on or about October 2, 2006 (Exhibit V);
7. Filed Defendant's *pro se* Defendant's Original Response to Plaintiff's Request for Admissions on or about October 2, 2006 (Exhibit W);
8. Filed Defendant Xxxxx Xxxxx' Motion for Appointment of Xxxxx Xxxxx as her ANext Friend, on or about September 4, 2008 which motion was

personally verified by Defendant on or about August 26, 2008 (Exhibit X)

9. Served Defendant's Request for Disclosure to Plaintiff on September 30, 2008. (Exhibit E2)
10. Served Defendant's First Interrogatories Plaintiff on September 30, 2008. (Exhibit F2)
11. Served Defendant's Request for Production to Plaintiff on September 30, 2008. (Exhibit G2)
12. Filed sworn Defendant's Supplemental Responses to Plaintiff's Interrogatories to Defendant Xxxxx Xxxxx, which responses were personally sworn to by Xxxxx Xxxxx on or about November 3, 2008 (Exhibit M); and
13. Filed Defendant's Second Amended Original Answer and Counterclaim on November 11, 2008, raising new issues and asserting new causes of action seeking affirmative relief. (Exhibit N).

These are not the actions of someone who is incompetent, incapable of managing their legal affairs, incapable of managing this litigation, or incapable of engaging in discovery.

On October 14, 2008, at the hearing on Plaintiff's Motion to Compel and for Sanctions, Mr. Xxxxx Xxxxx, the son of Defendant, was called to testify. After being duly sworn, Mr. Xxxxx testified that:

1. Defendant gets around with a cane;
2. Defendant goes to visit relatives from time to time;
3. Defendant goes to the store and picks out her own groceries;
4. Defendant keeps her own bank account and balances her own checkbook with some monitoring;
5. He is not denying Defendant's competency;
6. He has taken Defendant to visit relatives in Dallas;
7. Defendant's daughter, Xxxxx Xxxxx, has taken Defendant back and forth from Dallas in the last two years ; and

8. Defendant travels two to three times a year since her last stroke.

Apparently Defendant continues to actually do the types of things which Defendant would have the Court believe she is incapable of doing.

During a discovery hearing in this cause Plaintiff offered to withdraw its request for the Defendant's deposition if the Defendant would stipulate on the record that Defendant was not going to testify in this cause. Counsel for Defendant flatly refused to so stipulate. Apparently not even counsel for Defendant believes his own assertions that Defendant is unable to testify.

Based upon the credible evidence before the Trial Court the Trial Court appropriately determined that Defendant was capable of engaging in discovery, traveling and appearing for deposition and ordered Defendant to respond to Plaintiff's Interrogatories and to appear for deposition. The Trial Court's conclusion that Defendant was competent to manage this litigation, travel, and give her testimony, was validated on November 3, 2008, when Defendant served her Defendant's Supplemental Responses to Plaintiff's Interrogatories to Defendant, Xxxxx Xxxxx. (Exhibit K) In her untimely responses Defendant continued to violate the Court's Order by filing new objections and filed only partial responses but proved that she was capable of engaging in discovery. Again on November 11, 2008, Defendant proved her ability to manage this litigation by going on the offensive and filing Defendant's Second Amended Original Answer and Counterclaim asserting a complex counterclaim which raised new issues and causes of action for the first time and seeking affirmative relief. (Exhibit N)

#### IV.

#### The Trial Court Appropriately Acted Within its Discretion in Sanctioning Defendant, Striking Defendant's Pleadings, and Entering a Default Judgment Against Defendant

As long as sanctions imposed for failure to comply with discovery are within the authority vested in the trial court, they will not be overturned unless they constitute a clear abuse of discretion.... The trial court's discretion in this area is broad.... To establish a clear abuse of discretion, a party must show that the trial court's action was arbitrary or unreasonable in light of all the circumstances of the case. *Cole v. Huntsville Memorial Hospital*, 920 S.W.2d 364, 374 (Tex.App. 1st Dist. 1996, writ denied 1996, reh. den. 1996), cert. den., (520 U.S. 1143) (1997).

The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, it is a question of whether the court acted without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238 (Tex. 1986), cert. den., 476 U.S. 1159 (1986). Another way of stating the test is whether the act was arbitrary or unreasonable. *Downer*, 701 S.W. 2d at 242; *Xxxxxson v. Cesna Aircraft Company*, 665 S.W. 2d 439, 443 (Tex. 1984).

In *Downer*, 701 S.W.2d at 238, the Defendant's employees failed to appear for agreed depositions on two occasions. The trial court struck the Defendant's answer as a sanction for discovery abuse. The Texas Supreme Court held that the trial court had authority under the rules regarding failure of a party to appear for an oral deposition to strike the answer of the defendant and that the trial court correctly imposed the discovery sanction of striking the Defendant's answer. *Downer*, 701 S.W.2d at 238.

The dismissal of a suit for the failure of a party to appear for deposition constitutes a sanction directed against the abuse and toward remedying the harm. *Siegel v. Xxxxx*, 836 S.W.2d 193 (Tex.App.B San Antonio 1992, *no writ*).

The Defendant was subpoenaed to appear in Court on October 9, 2008. However, the Defendant neither challenged the subpoena nor appeared as required by the subpoena. During the hearing on October 9, 2008, the Court ordered the Defendant to appear for deposition on October 10, 2008, as previously noticed. On October 10, 2008, the Defendant failed to appear for her court-ordered deposition. On October 14, 2008, the Court ordered Defendant for a second time to appear for deposition on October 30, 2008, and ordered Defendant to pay sanctions in the amount of \$2,500.00 for her failure to appear at the court-ordered deposition on October 10, 2008. The Defendant paid the \$2,500.00 sanction but failed to appear for a second time for her court-ordered deposition on October 30, 2008. On November 5, 2008, the Court ordered Defendant for the third time to appear for deposition on November 11, 2008, and ordered Defendant to pay \$1,562.50 in sanctions on or before November 15, 2008, as sanctions for Defendant's failure to appear for deposition on October 30, 2008. Defendant failed to pay the sanctions or appear for deposition as ordered. On December 1, 2008, the Court sanctioned Defendant \$1,500.00 for Defendant's failure to appear for deposition on November 11, 2008. The Defendant has failed to pay these court ordered sanctions.

In *City of Houston v. Arney*, 680 S.W.2d 867 (Tex.App.B Houston [1<sup>st</sup> Dist.] 1984, *no writ*), the defendant failed to answer the plaintiff's interrogatories. In response to a motion to compel the trial court ordered the defendant to answer plaintiff's interrogatories within a specified time. When the defendant failed to answer the interrogatories as ordered the plaintiff filed a motion to strike the

Defendant's pleadings. The trial court struck the Defendant's pleadings and entered a default judgment against defendant. On appeal the Houston Court of Appeals held that the trial court could strike the Defendant's answer as a sanction for the failure of the defendant to comply with the court's order to answer the plaintiff's interrogatories even though the defendant filed answers to the interrogatories on the day of the sanctions hearing.

On October 2, 2006, Defendant filed a single, global objection to Plaintiff's Interrogatories and failed to make any further response. Two years later, on October 9, 2008, the Court ordered Defendant to fully and completely respond to Plaintiff's Interrogatories on or before October 23, 2008, without sanctions. Defendant failed to in any manner comply with the Court's October 9, 2008, Order. On November 3, 2008, the Defendant lodged new objections to Plaintiff's Interrogatories and only partially answered Plaintiff's Interrogatories in direct violation of the Court's order of October 9, 2008. On November 5, 2008, the Court ordered the Defendant for a second time to fully and completely answer Plaintiff's Interrogatories on or before November 15, 2008, and ordered the Defendant to pay sanctions in the amount of \$2,000.00 on or before November 15, 2008, for Defendant's violation of the Court's order dated October 9, 2008. The November 15, 2008, deadline came and went without any further interrogatory answers or the payment of the sanctions by Defendant.

On November 24, 2008, the Defendant filed cursory amended responses to Plaintiff's Interrogatories incorporating her prior, overruled objections, but failed to pay the sanctions as ordered. On December 1, 2008, the Court sanctioned the Defendant \$1,500.00 for failing to fully and completely respond to Plaintiff's Interrogatories by the November 14, 2008, deadline as ordered by the Court on November 5, 2008. Defendant has never paid the sanctions and they remain

outstanding. The Court was thus wholly unsuccessful in its attempts to use lesser sanctions to curtail the Defendant's discovery abuses and compel the Defendant's compliance with the Court's orders.

The record must reflect that the court considered the availability of lesser sanctions. *Cole*, 920 S.W.2d at 375; *Otis Elevator Company v. Parmelee*, 850 S.W.2d 179, 181 (Tex. 1993).

Five times the Defendant has been ordered to pay sanctions by the Court. The Defendant paid the first of these sanctions and has refused to pay the four subsequent sanctions. The Defendant simply ignored a subpoena to appear in Court on October 9, 2008. The Defendant has three times refused to appear for Court-ordered depositions. Defendant has twice been compelled to answer Plaintiff's Interrogatories and has twice violated the terms and deadlines set forth in said Orders. Defendant has lodged prohibited objections to Plaintiff's Request for Disclosure and has engaged in a calculated course of contempt, discovery abuse, and delay tactics over a period of time exceeding two years.

Plaintiff disputes that Defendant is infirm and the number and/or extent of her alleged strokes. Plaintiff further disputes that Defendant suffers from a slur in her speech or has any significant limitation of the use of her right hand or body generally as regards this litigation. To the contrary, the credible evidence indicates that Defendant is quite capable of traveling, managing her affairs including this litigation, and appearing to testify, when she so desires.

Defendant's inconsistent conduct in this regard is similar to Defendant's assertions that she is incapable of traveling and/or managing her legal affairs while she continues to travel and manage her legal affairs.

The Defendant has engaged in a conscious, calculated course of discovery abuse and delay

which justifies the death penalty sanction. The Defendant's lodging of specifically prohibited objections to Plaintiff's Request for Disclosure, refusal to answer Plaintiff's Interrogatories as ordered, refusal to pay sanctions as ordered on four occasions, failure to appear as subpoenaed, and refusal to appear for deposition as ordered on three occasions constitutes flagrant bad faith and a callous disregard for the rules of discovery and this Court's orders. The Defendant's continued refusal to comply with this Court's lesser sanctions left the Court with no choice but to employ the death penalty sanction.

#### V.

##### ADVERSE RULINGS DO NOT JUSTIFY RECUSAL

The Defendant has repeatedly taken untenable positions unsupported by any competent or credible evidence and has understandably received adverse rulings from the Court. Defendant now alleges that these adverse rulings somehow entitle the Defendant to have the Court recused.

“Adverse rulings, however, do not provide ground for recusal.” *Stein v. Frank*, 575 S.W.2d 399,401(Tex.Civ.App.—Dallas 1978, no writ).

#### VI.

##### DEFENDANT MISREPRESENTS THE COURT'S STATEMENTS

Defendant continues to misrepresent statements made by the Court. On October 9, 2008, during the hearing on Motion for Continuance and Motion to Compel, the Court observed, “This is the day the Appellate Courts forgive anything and everything.” The Court recognized what every Texas judge and litigator knows . . . that Texas appellate courts are extremely forgiving of discovery violations and abuses by defendants. (Exhibit H2 at page 36.) The Court

further expressed its concern for the possible alleged condition of the Defendant even though the Court noted that defense counsel had not met their burden of proof in establishing that the alleged condition actually existed. (Exhibit H2 at page 37.)

There is nothing in the record that suggests that the Court has been anything but fair and objective in connection with this matter. Indeed, on October 14, 2008, during the hearing on Motion to Compel and Sanctions, the Court bent over backwards to accommodate Defendant and her counsel to the point of offering suggestions and guidance to defense counsel as to how they might meet their burden of proof. The Court further discussed possible ways that the Court might accommodate the Defendant's unsupported allegations all of which were rejected by Defendant. (Exhibit I2 at pages 57-60.) The Court again expressed concern for the Defendant's wellbeing even though the Court noted that there was no testimony as to the Defendant's condition. (Exhibit I2 at page 62.)

On November 5, 2008, at the hearing on Motion for Continuance, Motion to Compel and Motion for Sanctions, the Court commented that the Court had reviewed the Defendant's medical records and that it appeared that the Defendant had some physical problems but no mental problems. The Court further observed that it was the Court's repeated impression that defense counsel was simply trying to repeatedly delay the matter until the named Defendant passed away. (Exhibit J2)

On December 1, 2008, the Court noted that the Court had exercised "tremendous restraint on those Motions to Compel." The Court further noted that in regard to the deposition of the Defendant that the Court had "ordered it and ordered and ordered it." (Exhibit K2)

The Defendant has neither set forth allegations nor presented evidence which meets the requirements for recusal. If Defendant is entitled to a recusal then any Defendant which receives an adverse ruling is entitled to recuse the Court that ruled against it. The Defendant's actions in filing the Motion to Recuse appear to be motivated by the Defendant's clxxxxxy exhibited desire for delay.

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that Defendant's Motion to Recuse be in all things denied.

RESPECTFULLY SUBMITTED,

---

XXXXX XXXXX  
State Bar Number 03022500

LAW OFFICE OF XXXXX XXXXX  
100 E. Ferguson, Suite 1016  
Tyler, Texas 75702  
Phone (903) 593-7355  
Fax (903) 593-2817

Attorney for the Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been forwarded to Mr. XXXXX XXXXX and/or Ms. XXXXX XXXXX, attorneys for Defendant, by certified mail, return receipt requested, on this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

---

XXXXX XXXXX



**AFFIDAVIT OF XXXXX XXXXX**

STATE OF TEXAS            '  
COUNTY OF XXXXX        '

BEFORE ME, the undersigned authority, on this day personally appeared Xxxxx Xxxxx, known to me to be the person whose signature appears below and stated under oath as follows:

My name is Xxxxx Xxxxx. I am at least eighteen years of age; I have never been convicted of a felony; and I am competent to make this Affidavit. I have personal knowledge of the facts and matters set forth in the Response of Plaintiff to Defendant’s Petition for Writ of Mandamus and they are true and correct.

Attached to the Response of Plaintiff to Defendant’s Petition for Writ of Mandamus are true and correct copies of the following documents:

- Exhibit A      Affidavit of Xxxxx Xxxxx
- Exhibit B      *BMC Software Belgium, N.V. v Marchand*, 8383 S.W. 3<sup>d</sup> 789, 800 (Tex.2002)
- Exhibit C      Texas Rule of Civil Procedure 21
- Exhibit D      Xxxxx County Local Rule 2.1
- Exhibit E      Xxxxx County Local Rule 2.8(1)
- Exhibit F      Defendant’s Motion for Continuance and Order
- Exhibit G      Defendant’s Motion to Quash Notice of Deposition of Defendant, Xxxxx Xxxxx, and Motion for Protective Order and Order
- Exhibit H      Plaintiff’s Motion to Compel and for Sanctions and Order
- Exhibit I      Defendant’s Motion for Rehearing and Order
- Exhibit J      Plaintiff’s Motion to Compel the Deposition of Defendant, Xxxxx Xxxxx, and for Sanctions and Order
- Exhibit K      Defendant’s Supplemental Responses to Plaintiff’s Interrogatories

Exhibit L	Plaintiff's Second Motion to Compel the Deposition of Defendant, for Sanctions, and for Contempt and Order
Exhibit M	Plaintiff's Second Motion to Compel Defendant's Answers to Plaintiff's Interrogatories, for Sanctions, and for Contempt and Order
Exhibit N	Defendant's Second Amended Original Answer and Counterclaim
Exhibit O	Letter Dated September 24, 2008
Exhibit P	Letter Dated October 8, 2008
Exhibit Q	Defendant's Original Answer
Exhibit R	Defendant's Amended Answer and Affirmative Defense
Exhibit S	General Power of Attorney
Exhibit T	Defendant's Original Response to Plaintiff's Request for Disclosure
Exhibit U	Defendant's Original Response to Plaintiff's Interrogatories
Exhibit V	Defendant's Original Response to Plaintiff's Request for Production
Exhibit W	Defendant's Original Response to Plaintiff's Request for Admissions
Exhibit X	Defendant XXXXX XXXXX' Motion for Appointment of XXXXX XXXXX as Her ANext Friend
Exhibit Y	Subpoena
Exhibit Z	Plaintiff's Notice of Intention to Take the Oral Deposition of Defendant, XXXXX XXXXX
Exhibit A2	Final Judgment
Exhibit B2	Plaintiff's Statement Regarding Defendant's Failure to Pay Attorney's Fees as Sanctions
Exhibit C2	Affidavit of XXXXX XXXXX, M.D.
Exhibit D2	Affidavit of XXXXX XXXXX
Exhibit E2	Defendant's Request for Disclosure to Plaintiff

- Exhibit F2 Defendant's Interrogatories to Plaintiff
- Exhibit G2 Defendant's Request for Production to Plaintiff
- Exhibit H2 Hearing On Motion For Continuance And Motion To Compel on October 9, 2008
- Exhibit I2 Hearing On Motion To Compel And Sanctions on October 14, 2008
- Exhibit J2 Hearing On Motion For Continuance, Motion To Compel And Motion For Sanctions on November 5, 2008
- Exhibit K2 Court's Ruling on December 1, 2008

---

XXXXXX XXXXX

SWORN TO AND SUBSCRIBED BEFORE ME by the said XXXXX XXXXX on this day of \_\_\_\_\_, 20\_\_\_\_, to certify which witness my hand and seal of office.

---

Notary Public, State of Texas