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9 **ARIZONA SUPERIOR COURT**
10 **MARICOPA COUNTY**

11 AMERICAN OVERSIGHT) No. CV2021-008265
12 Plaintiff,) CV2021-000180-001
13 v.) (Consolidated)
14 KAREN FANN, et al.) **PLAINTIFF AMERICAN**
15 Defendants, and) **OVERSIGHT’S RESPONSE TO**
16 CYBER NINJAS, INC.,) **CYBER NINJAS INC.’S OBJECTION**
17 Real Party in Interest.) **AND MOTION TO RECONSIDER**
18) (Assigned to the Hon. Michael W. Kemp)

18 PHOENIX NEWSPAPER, INC., an Arizona)
19 corporation, et. al.,)
20 Plaintiffs,)
21 v.)
22 ARIZONA STATE SENATE, et al.,)
23 Defendants, and)
24 CYBER NINJAS, INC.,)
25 Real Party in Interest)
26)

1 American Oversight hereby responds to the Objection and Motion to Reconsider filed
2 by Cyber Ninjas, Inc. on January 20, 2022 (“Objection”). Cyber Ninjas’ Objection challenges
3 that portion of the January 18, 2022 Order re Deposition of Douglas Logan and Representative
4 of Cyber Ninjas, Inc. (“Order”) in which the Court entered a \$1,000 sanction against Cyber
5 Ninjas and its counsel.

6 The portion of the Order at issue reads as follows:

7 IT IS FURTHER ORDERED, pursuant to Rule 26(d) & (h), Rule 30(g) and Rule
8 37(a)(5) of the Arizona Rules of Civil Procedure, that Mr. Logan and Cyber
9 Ninjas, Inc, jointly and severally, shall pay \$1,000 to Plaintiff American Oversight
10 for its attorneys’ fees and costs incurred in connection with the Motion to Compel,
as well as the failure to appear for the January 5, 2022 deposition.

11 Cyber Ninjas’ Objection does not mention Rule 26(d) & (h), Rule 30(g) or Rule 37 of
12 the Arizona Rules of Civil Procedure. Instead, Cyber Ninjas objects to the fee award on five
13 grounds:

14 Fees should be not be awarded against CNI because (1) the deposition notice for
15 January 5th violated Rule 26(f), which provides that a party may not seek
16 discovery from any source before it serves its initial disclosure statement, “[u]nless
17 the court orders otherwise for good cause”; (2) to date, Plaintiff has not served an
18 initial disclosure statement, and as of January 5th the Court had not ordered a
19 deposition; (3) there was no meet-and-confer pursuant to Rules 26(i) and 7.1(h) on
20 the subject of setting another deposition prior to Plaintiff’s Motion to Compel; and
21 (4) CNI notified Plaintiff more than 24 hours in advance of the deposition that
22 nobody would be appearing and so there should be no deposition costs. CNI also
advised Plaintiff that the deposition notice violated Rule 26(f) before Plaintiff
motioned this Court to set another deposition. Finally, to the extent it could be
argued that Rule 26(f) does not apply because this is a special action: there is in
fact no discovery allowed in a special action absent a court order; and again, the
Court did not order any deposition on January 5th.

23 Each of these objections is without merit but, more significantly, all of them come too
24 far too late.

25 Rule 37(f) expressly states that failure to appear for a deposition is not excused on the
26 ground that the deposition is objectionable unless the party failing to appear files a motion for

1 protective order prior to the start of the deposition. Rule 37(f) provides (emphasis added):

2 (f) Party's Failure to Attend Its Own Deposition . . .

3 (1) *Generally.*

4 (A) Motion; Grounds for Sanctions. **The court** where the action is pending **may,**
5 on motion, **order sanctions if:**

6 (i) **a party or a party's officer,** director, or managing agent—or a person
7 **designated under Rule 30(b)(6) or 31(b)(4)—fails, after being served with**
8 **proper notice, to appear for his or her deposition;** or . . .

8 * * *

9 (2) *Unacceptable Excuse for Failing to Act.* **A failure described in Rule**
10 **37(f)(1)(A) is not excused or mitigated on the ground that the discovery**
11 **sought was objectionable, unless the party failing to act has a pending motion**
12 **for a protective order under Rule 26(c).**

13 (3) *Types of Sanctions.* Sanctions may include any of the orders listed in Rule
14 37(b)(2)(A)(i) through (vii). Instead of or in addition to these sanctions, the court
15 may require the party failing to act, the attorney advising that party, or both, to pay
16 the reasonable expenses—including attorney's fees—caused by the failure, unless
17 the failure was substantially justified or other circumstances make an award of
18 expenses unjust.

16 It is undisputed that Cyber Ninjas and its counsel received the January 5, 2022
17 deposition notice on December 16, 2021. *See* Ex. 1 to Emergency Motion to Compel
18 Deposition of Cyber Ninjas, Inc. and Douglas Logan Motion for Sanctions (filed 01/10/22). It
19 is also undisputed that Cyber Ninjas did not file a motion for protective order in the 20-day
20 time period that elapsed after it received the deposition notice but before the deposition was
21 scheduled to take place. Cyber Ninjas did not even voice any of these objections informally
22 prior to the January 5 deposition date. Instead, on January 3, counsel for Cyber Ninjas simply
23 advised, with no explanation as to why, “that CNI is not appearing for any deposition on
24 Wednesday.”¹ *See* Ex. 3 to Emergency Motion to Compel (filed 01/10/22).

25 ¹ The first time Cyber Ninjas informally articulated any basis for not appearing at the
26 deposition was on the afternoon of January 5, after the deposition was supposed to have
occurred. *See* Ex. 4 to Emergency Motion to Compel (filed 01/10/22). This belated objection

1 On these undisputed facts, and pursuant to Rule 37(f), Cyber Ninjas and its counsel
2 waived the arguments that are set out in its Objection and for that reason the Objection should
3 be denied. Indeed, the \$1,000 sanction entered in these circumstances was not only justified,
4 but modest given Cyber Ninjas' failure to appear. *See Copper State Bank v. Saggio*, 139 Ariz.
5 438, 440–41 (App.1983) (default entered after defendants failed to appear at their depositions);
6 *American Title & Trust Co. v. Hughes*, 4 Ariz. App. 341, 343–44 (1966) (answer stricken after
7 officer of defendant failed to appear at his deposition).

8 Although irrelevant in light Cyber Ninja's waiver, we briefly address its substantive
9 arguments. The first two grounds for the belated Objection are that American Oversight has
10 not yet served a Rule 26.1 disclosure statement and Rule 26(f) precludes discovery prior to
11 service of an initial disclosure statement. But this is a special action proceeding, Rule 26.1
12 disclosure statements are not ordinarily served in special action proceedings, and neither the
13 Senate nor American Oversight have served disclosure statements in this case. That is not a
14 basis for failing to appear at the deposition.

15 Cyber Ninjas next argues (at 1) that that “there was no meet-and-confer pursuant to
16 Rules 26(i) and 7.1(h) on the subject of setting another deposition prior to Plaintiff's Motion to
17 Compel.” We do not understand this belated objection, as counsel for American Oversight
18 conferred with counsel for Cyber Ninjas prior to filing the Emergency Motion to Compel and
19 went so far as to invoke the expedited discovery resolution procedures under Rule 26(f). *See*
20 *Ex. 4 to Emergency Motion to Compel* (filed 01/10/22).

21 Cyber Ninjas also notes that its counsel notified American Oversight “more than 24
22 hours in advance of the deposition that nobody would be appearing and so there should be no
23 deposition costs.” Objection at 1. But that is irrelevant, because the sanction was ordered in
24 connection the expense associated with filing the Emergency Motion to Compel, as well as the

25 _____
26 is precisely what the rule is intended to prevent—unnecessary delay in resolving discovery
issues.

1 pre-filing communications relating to the deposition (which are largely attached as exhibits to
2 the Emergency Motion to Compel.

3 Last, Cyber Ninjas argues that because this is a special action there can be no discovery
4 absent a court order. Rule 4(f) of the Special Action Rules of Procedure provides: “(f) **Trial.**
5 If a triable issue of fact is raised in an action under this Rule, it shall be tried subject to special
6 orders concerning discovery.” But American Oversight has not sought a trial in this matter,
7 and the provision for “special orders concerning discovery” in such circumstances has no
8 application. Moreover, this belated objection illustrates the consequences of Cyber Ninja’s
9 waiver. Had it apprised American Oversight of this argument prior to the January 5 deposition
10 date, American Oversight could have promptly sought resolution from the Court. Or Cyber
11 Ninjas could (and should) have filed its own Motion for Protective Order, as required by Rule
12 37, and the matter could have been promptly resolved in December or early January. Instead,
13 it failed to timely articulate any basis for its failure to appear, thereby causing unnecessary
14 expense and substantial delay.

15 Cyber Ninjas’ Objection should be denied.

16 RESPECTFULLY SUBMITTED this 7th day of February, 2022.

17 **COPPERSMITH BROCKELMAN PLC**

18 By: /s/ Keith Beauchamp

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