TENTATIVE RULINGS
LAW & MOTION CALENDAR
Friday, January 6, 2023, 2:30 p.m.
Courtroom 17 –Hon. Bradford DeMeo
3035 Cleveland Avenue, Santa Rosa

PLEASE NOTE: Masks need not be worn in the courthouse if you are fully vaccinated.

Persons are considered vaccinated two weeks after the final dose in a primary series of vaccinations.

All unvaccinated persons entering any Sonoma County Superior Courthouse, including any remote jury selection location, shall wear a face covering at all times compliant with all California State Health Orders and CAL/OSHA standards which must completely cover both the nose and mouth.

CourtCall is not permitted for this calendar.

If the tentative ruling is accepted, no appearance is necessary via Zoom unless otherwise indicated.

TO JOIN ZOOM ONLINE:

D17 – Law & Motion
Meeting ID: 895 5887 8508
Passcode: 062178
https://us02web.zoom.us/j/89558878508?pwd=L2MySDFXWEtMa1JsdGUxUDFDOVNyZz09

TO JOIN ZOOM BY PHONE:
By Phone (same meeting ID and password as listed for each calendar):
+1 669 900 6833 US (San Jose)

The following tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, YOU MUST notify Judge DeMeo's Judicial Assistant by telephone at **(707) 521-6725**, and all other opposing parties of your intent to appear ***by 4:00 p.m. on Thursday, January 5***. Parties in small claims cases and motions for claims of exemption are exempt from this requirement.

1. MCV-253667, Looney v The 13 Palm Springs

Plaintiff Gary Looney, DBA Collectronics ("Plaintiff"), a debt collector, filed the verified complaint in this action against borrowers Amy Lee Smith and 13 Palm Springs, LLC ("Defendants"). Plaintiffs requested Receiver Michael Brewer be appointed to take control of Defendants liquor license and transfer it. This matter is on calendar for Plaintiff's motion to appoint a receiver, namely Landon McPherson, to seize and sell liquor license number 606003 to satisfy the Judgment.

Appointment of a receiver is generally controlled by CCP §§ 564, *et seq*. A judgment debtor's interest in an alcoholic beverage license is not subject to execution (Cal. Civ. Proc. Code ("CCP") § 699.720(a)(1)), and therefore may be applied to the satisfaction of a money judgment only by appointment of a receiver under CCP § 708.630. CCP § 708.630(b) provides that the Court may appoint a receiver to transfer the debtor's interest in the license, unless the debtor establishes that the amount of delinquent taxes and claims of prior creditors exceed the probable sale price of the license. Generally speaking, a receiver may be appointed to enforce a judgment where the judgment creditor shows that, considering the interests of both the creditor and the judgment debtor, the appointment of a receiver is a reasonable method to obtain the fair and orderly satisfaction of the judgment. CCP § 709.620. The legislative committee notes confirm that it is no longer a prerequisite for the judgment creditor to show that the judgment debtor "refuses to apply property in satisfaction of the judgment," but the committee notes also state that "a receiver may be appointed where a writ of execution would not reach certain property *and other remedies appear inadequate*." (Emphasis added). The availability of other remedies "does not, in and of itself, preclude the use of a receivership. [citation] Rather, a trial court must consider the availability and efficacy of other remedies in determining whether to employ the extraordinary remedy of a receivership." *City & Cty. of San Francisco v. Daley* (1993) 16 Cal.App.4th 734, 745. In making this decision, the court must depend upon competent and admissible evidence submitted by the parties, and not conclusions and hearsay. *McCaslin v. Kenney* (1950) 100 Cal.App.2d 87, 94.

An order to show cause is a citation to a party to appear at a stated time and place to show why the requested relief should not be granted. *Green v. Gordon* (1952) 39 Cal.2d 230, 231. An order to show cause hearing does not shift the burden away from a party moving for appointment of a receiver. *Moore v. Oberg* (1943) 61 Cal.App.2d 216, 221. An order to show cause why a receiver should not be appointed is appropriate where the court has granted appointment of the receiver ex parte, as the court must have a hearing as to why the receiver who has been appointed by ex parte should not be confirmed. Cal. Rule of Court 3.1176.

The judgment debtor was served with the Motion and no opposition was filed. Nevertheless, given the expense of the appointment of a receiver, and that the power to do so is "a delicate one which is to be exercised sparingly and with caution," (*Morand v. Sup. Ct.* (1974) 38 Cal.App.3d 347, 351) even if otherwise proper, the Court will not grant the Motion absent a sufficient factual showing by Plaintiff regarding the availability and efficacy of other remedies to collect on the Judgment. *Id.* at 350 (appointment of receiver "rests wholly within the judicial discretion"). Mere

difficulty in trying to collect a debt is not sufficient basis for the court to appoint a receiver. *Medipro Medical Staffing LLC v. Certified Nursing Registry, Inc.* (2021) 60 Cal.App.5th 622, 628-629.

The supporting Looney Declaration states that there has been no response to post-judgment letters or interrogatories. Looney Decl. ¶ 8-10. Plaintiff claims to have "investigated the Defendants [sic] finances" but claims to have not received any useful information for collecting on the Judgment. Looney Decl. ¶ 6. And similarly, the brief argues that the business cannot be till tapped due to the COVID-19 pandemic, that all other assets are essentially valueless, and that its sole remaining asset is the liquor license and that as a result, the Judgment may never be satisfied absent the appointment of a receiver Looney Decl. ¶¶ 11-12. Plaintiff states that he has been unable to locate any financial assets, and that the business is closed. Looney Decl. ¶¶ 3, 6, & 12.

The evidence provided is largely conclusory or vague, and fails to show the necessity of a receivership. Plaintiff asserts that the Defendant's businesses have no assets of value beyond the liquor license. Plaintiff has not described any method by which he has performed investigation or attempted to elicit information regarding Defendant's assets beyond the discovery he propounded. This is to say nothing of the fact that Plaintiff has not attempted to contact Defendants since before the last receiver was appointed in July 2021. While it is concerning to the Court that Defendant has failed to respond to discovery requests, Plaintiff has taken no action to advance his rights with respect to that matter.

However, the source of the Court's greatest concern is that a receiver has already been appointed in this case and discharged. See Order Granting Receiver's Motion for Approval of Final Report and Discharge, filed 1/5/2022. The discharge of the receiver occurred on the representation that the judgment had been satisfied. See Declaration of Michael Brewer, filed 8/19/2021 ¶ 8. The Receiver also informed the Court that the license has been seized by the Board of Equalization. *Id*. at ¶ 7. Plaintiff has not informed the Court otherwise, and therefore any appointment of a receiver appears to be a pointless exercise in running up costs. Without some new information, the attempt to collect a judgment which has been satisfied is facially specious, and raises substantial concerns regarding malicious prosecution.

Plaintiff requests in the alternative that the Court set a hearing for order to show cause why the receiver should not be appointed. This does not rectify the underlying issue, as the order to show cause does not relieve Plaintiff of his burden to make a showing to the Court that appointment of a receiver is necessary. *Moore v. Oberg* (1943) 61 Cal.App.2d 216, 221. In the context of receiverships, orders to show cause are required where an ex parte has been granted when the judgment creditor has already carried their burden of showing appointment was appropriate. Cal. Rule of Court 3.1178. Plaintiff has not carried his burden here, as he has already been granted the requested relief, and there is evidence before the Court that the Judgment has been satisfied. As noted above, the request is inadequately supported.

Based on the foregoing, the Motion is **DENIED**.

Plaintiff shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

2. MCV-258006, Wells Fargo Bank v Lora

Plaintiff Wells Fargo Bank, N.A. ("Plaintiff") filed the complaint in this action against defendant Enrique A Lora ("Defendant") for damages based on breach of contract and open book counts (the "Complaint"). This matter is on calendar for the motion by Plaintiff to deem admitted the matters set forth in its first set of requests for admission, pursuant to Cal. Code Civ. Proc. ("CCP") § 2033.280(b).

CCP § 2033.280(a) provides in relevant part that if a party to whom requests for admission are directed "fails to serve a timely response," the party to whom the requests are directed waives any objection. CCP § 2033.280(b) provides that "[t]he requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted". CCP § 2033.280(c) provides that the court "shall make this order" unless it finds that the party to whom the requests have been directed has served a proposed response in substantial compliance with section 2033.220 before the hearing on the motion.

The Motion is accompanied by proofs of service showing that service of the moving papers was timely made on Defendant. The Motion is unopposed. Plaintiff served the request for admission on June 7, 2022, and Defendant served no response. The Motion is therefore **GRANTED**. The truth of the matters set forth in Plaintiff's First Set of Requests for Admission (Plaintiff's Counsel Decl. Ex. A) are deemed admitted. CCP § 2033.280(b).

Plaintiff's counsel shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

3. SCV-262700, Prasad v Lucas Wharf

Plaintiffs Asha Prasad, Kevin Lala, and Latchmi Lala ("Plaintiffs") filed the first amended complaint in this action against Lucas Wharf Inc, ("Lucas Wharf") and Tauby Joe Skinner ("Individual Defendant" together with Lucas Wharf "Defendants") with causes arising out of the alleged violent incident occurring on June 24, 2017 (the "FAC"). This matter is on calendar for the motion by Plaintiff to continue trial due to the unavailability of Plaintiffs' counsel, A. Cabral Bonner and Charles Bonner ("Plaintiffs' Counsel").

The Court set the January 13, 2023 trial date in the instant case on March 10, 2022. On June 3, 2022 Plaintiffs' Counsel received confirmation of a trial date for January 9, 2023 in the federal criminal matter of *The United States v. Anita Jackson, M.D.*, case # 5:21-cr-00259 (the "Jackson Case"). Plaintiffs' Counsel moved the court in the Jackson Case for a continuance of trial on November 21, 2022 based on the conflict with the instant case. On December 1, 2022 the federal court denied Plaintiffs' Counsel's motion to continue the trial in the Jackson case. Thereafter, Plaintiffs filed the instant motion on December 15, 2022. The motion is opposed by Defendants

The Rules of Court state that "[t]o ensure the prompt disposition of civil cases, the dates assigned for trial are firm" and "[a]ll parties and their counsel must regard the date set for trial as certain…" Cal. R. Ct. 3.1332(a). "The party must make [a] motion or application [to continue trial] as soon as reasonably practical once the necessity for the continuance is discovered." Cal. R. Ct. 3.1332(b).) Among the ground for a continuance is the unavailability of counsel through "death, illness, or other excusable circumstances". Cal. R. Ct. 3.1332(c)(3); see also *Fejer v. Paonessa* (1951) 104 Cal.App.2d 190, 195 (even one trial counsel among three being familiar with the case cuts against continuing trial so new counsel may become more familiar with the facts). "Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits." Cal. R. Ct. 3.1332(c). "The court may grant a continuance only on an affirmative showing of good cause requiring the continuance…" (*Ibid*.)

Other factors the Court should consider include:

1. The proximity of the trial date;
2. Whether there was any previous continuance, extension of time, or delay of trial due to any party;
3. The length of the continuance requested;
4. The availability of alternative means to address the problem that gave rise to the motion or application for a continuance;
5. The prejudice that parties or witnesses will suffer as a result of the continuance;
6. If the case is entitled to a preferential trial setting, the reasons for that status and whether the need for a continuance outweighs the need to avoid delay;
7. The court's calendar and the impact of granting a continuance on other pending trials;
8. Whether trial counsel is engaged in another trial;
9. Whether all parties have stipulated to a continuance;
10. Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance; and
11. Any other fact or circumstance relevant to the fair determination of the motion or application.

(Cal. R. Ct. 3.1332(d).)

A motion for continuance is a matter for the "sound discretion of the trial court" *Link v. Cater* (1998) 60 Cal.App.4th 1315, 1321.

The trial in this matter has been continued once at the request of Plaintiff, and was reset after trial call on one prior occasion.

This case was filed on June 27, 2018. Plaintiffs request a continuance to October 2023. See Plaintiffs' Memorandum of Points and Authorities, pg. 4:12-13. Plaintiffs offer no alternative trial dates. By the time of Plaintiffs' proposed trial date, this case will have been active in excess of 5 years. A case shall be brought to trial within 5 years. CCP § 583.310. Failure to bring a case

to trial within 5 years shall result in dismissal. CCP § 583.360. Emergency Rule 10 was not effective in tolling this period under CCP § 583.350. *Ables v. A. Ghazale Brothers, Inc.* (2022) 74 Cal.App.5th 823, 827. The impracticality of continuing the trial for a period of 10 months to beyond the 5-year period prescribed by CCP § 583.310 militates toward denial of the motion.

Plaintiffs' Counsel's unavailability is purported to stem from the trial in the Jackson Case. See Cal. R. Ct. 3.1332(d)(8). However, Plaintiffs' request to continue due to the unavailability of counsel must stem from "excusable circumstances". Cal. R. Ct. 3.1332(c)(3). Plaintiffs' Counsel has been dilatory in addressing the schedule conflict. Trial was set for January 13, 2023 in this matter in March of 2022. The Jackson Case confirmed a January 9, 2023 trial date on June 3, 2022. Plaintiffs' Counsel did not move for continuance within the Jackson Case until November 21, 2022. This means that Plaintiffs' Counsel were aware of their conflict for a period in excess of five months before they took any steps to remedy their scheduling conflict. By the time Plaintiffs ex parte motion for continuance was filed in this matter, there were a mere 29 days until the scheduled trial. At the time of this hearing, the trial is set for next week. The consideration of these factors strongly cuts against continuing the trial.

All of the above is to say nothing of the questionable nature of A. Cabral Bonner's Notice of appearance in the Jackson Case being entered less than a month ago. See Plaintiffs' Counsel's Declaration in Support, Exhibit 3 (Notice of Special Appearance was served in that matter on December 15, 2022). The Court assumes that A. Cabral Bonner's entry into the Jackson Case is in good faith, and not a ploy to bolster Plaintiffs' request to continue the trial. However, that speaks further to the lack of timeliness on the part of Plaintiffs' Counsel. A. Cabral Bonner's lack of involvement in the Jackson Case, in addition to his obvious involvement here (see Plaintiffs' Motion for Summary Judgment filed 7/20/2022, signed by A. Cabral Bonner), means Plaintiffs have a clear path forward that does not implicate either this Court's trial timelines, nor a failure to pursue this case diligently, as defined by CCP § 583.310.

The contentions regarding keeping discovery open do not appear salient to the Court, as CCP § 599 has expired, and any continuance of trial has no impact on the closure of discovery. Nor are any contentions regarding the actions of the defendant in the Jackson Case relevant.

Therefore, based on the above, the Court finds that the need for continuance does not stem from excusable circumstances. Plaintiffs' motion to continue trial is **DENIED**.

Individual Defendant shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

4. SCV-267961, Berkshire Hathaway Homestate Insurance v American Home Energy

Attorney Jeffrey Windsor's motion to be relieved as counsel for Defendant Homeenergy, Inc., is **GRANTED.**

5. SCV-268652, Piner Place v Lonestar Investments

Plaintiffs Piner Place, LLC and 965 Solutions, LLC (together "Plaintiffs") filed the First Amended Complaint ("FAC") in this action against defendants Lonestar Investments, LLC ("Lonestar"), Joseph Reiter ("Reiter", together with Lonestar, "Defendants"), California Trustee Services, and Does 1-100, for intentional misrepresentation, material violation of Civil Code 2924.17, cancellation of promissory note due to void transaction, cancellation of promissory note due to voidable transaction, cancellation of membership interest due to void transaction, quiet title claims, and declaratory relief. This matter is on calendar for the motion by Plaintiffs to compel inspection directed at the document requests set forth in Plaintiffs' second request for production of documents (the "RPODs"). The Motion to compel inspection is **GRANTED**. Reiter shall pay $313.60 in sanctions to Plaintiffs within 30 days' notice of the Court's ruling.

I. Governing Law

Regarding RPODs, a party to whom a document demand is directed must respond to each item in the demand with an agreement to comply, a representation of inability to comply, or an objection. CCP § 2031.210(a). If only part of an item or category demanded is objectionable, the response must contain an agreement to comply with the remainder, or a representation of the inability to comply. CCP § 2031.240(c)(1). If a responding party is not able to comply with a particular request, that party "shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand." CCP § 2031.230. "This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party" and "[t]he statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item." *Id.*
Where no response was served to a DFI or RPOD, there is no time requirement in moving to compel, nor any requirement to show good cause for the production requested. *See* CCP § 2031.300; *see also* Cal. Prac. Guide Civ. Pro. Before Trial Ch. 8H-8, Enforcing Demand: §§ 8:1484, 8:1487; contra CCP § 2031.310 (b-c) (a motion to compel further shall set forth good cause for the demand and shall be filed within 45 days of service of the unsatisfactory response).

There is no requirement to meet and confer prior to filing a motion to compel where there has been no response to discovery requests. *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 906; *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 405. Sanctions are mandatory under the CCP for discovery abuses, absent substantial justification. If a party fails serve a timely response, the court shall impose sanctions unless it finds that the party subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. CCP §§ 2031.300(c). The purpose of monetary sanctions is to mitigate the effects of the necessity of discovery motions and responses on the prevailing party. There is no requirement that the failure to comply with discovery be willful for the court to impose monetary sanctions. *Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 878.

The court shall impose additional monetary sanctions of $250 payable to the requesting party if it finds that the responding party failed to respond to a document request or inspection demand in good faith. CCP § 2023.050 (a)(1). However, an unrepresented natural person who does not have the representation of counsel is entitled to a rebuttable presumption of good faith which can only be overcome by a showing of clear and convincing evidence. CCP § 2023.050 (e).

II. Motion to Compel

Plaintiffs have served the RPODs on July 14, 2022. Reiter has provided no responses to date. There is no opposition filed to this motion. Plaintiffs are entitled to discovery responses, and Reiter has provided no explanation for their failure to respond. Therefore, the motion to compel production of documents is GRANTED. Reiter is to produce the requested documents within 30 days of notice of the court's ruling.

CCP § 2031.300(c) provides that a monetary sanction "shall" be imposed against the party losing a motion to compel responses unless the court finds "substantial justification" for that party's position or other circumstances making sanctions "unjust." Plaintiff seeks $313.60, representing 0.5 attorney hours at $475/hour, and $76.10 in court fees and filing costs. Dollar Decl. ¶ 5. The Plaintiff's request for monetary sanctions is **GRANTED**. The Court finds that a total of 0.5 hours is appropriate at $475 per hour. Plaintiffs also seek additional $250 in sanctions for Reiter's failure to participate in the discovery process in good faith under CCP § 2023.050. However, Plaintiffs provide no evidence of the failure to participate in good faith other than Plaintiff's failure to respond. Reiter is entitled to a presumption of good faith as a self-represented litigant. See CCP § 2023.050 (e). The Court does not find that absent other evidence showing some willfulness on the part of Reiter. This results in total attorneys' fees sanctions of $237.50 plus $76.10 of filing fees, for a total sanctions award in the amount of $313.60. Defendants shall pay this amount to Plaintiffs within 30 days' notice of the Court's ruling.

III. Conclusion

Based on the foregoing, Plaintiffs' motion to compel is **GRANTED**. Defendants are to produce the requested documents within 30 days of notice of the court's ruling. Reiter shall pay $313.60 in sanctions to Plaintiffs within 30 days' notice of the Court's ruling.

Plaintiffs' counsel shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

6. SCV-270981, Bacigalupi v Ketcham Estate

Petitioner John C. Bacigalupi ("Petitioner") filed the petition (the "Petition") in this action against the Ketcham Estate, LLC ("Respondent") to confirm the arbitration award entered January 24, 2022 (the "Arbitration Award"). This matter is now on calendar for Plaintiffs' motion and petition to confirm the arbitration award pursuant to Cal. Code Civ. Proc. ("CCP") § 1285 *et. seq*.

Petitioner has submitted subsequent evidence showing the notice of the arbitration provided to Respondent, and that the Respondent was served with a demand according to the JAMS processes. See Petition Exhibit 4b, 12. Respondent was made aware of the arbitration through this process and failed to participate. Respondent has entered no motion to vacate the arbitration award in the time required by statue. CCP § 1288.2. Therefore, it is outside the Court's power to vacate the arbitration award, even if Respondent appeared.

Based on the above, the Petition is **GRANTED**.

Petitioner's counsel shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b), and a [proposed] judgment.

7. SCV-270292, Schmid v County of Sonoma

Plaintiff Frear Stephen Schmid and Astrid Schmid (together "Plaintiffs"), filed the presently operative complaint (the "Complaint") against defendant County of Sonoma (the "County" or "Defendant"), arising initially out of the County's refusal to grant Plaintiffs a building code exemption. This matter is on calendar for County's demurrer to all causes of action within the Complaint pursuant to Cal. Code Civ. Proc. ("CCP") § 430.10(e) for failure to state facts sufficient to constitute a cause of action, and for issue preclusion under collateral estoppel. The Demurrer is **SUSTAINED without leave to amend.**

I. Legal Standards

A demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. CCP § 430.30(a). In the event a demurrer is sustained, leave to amend should be granted where the complaint's defect can be cured by amendment. *The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 852.

At demurrer, all facts properly pleaded are treated as admitted, but contentions, deductions and conclusions of fact or law are disregarded. *Serrano v. Priest* (1971) 5 Cal.3d 584, 591. Similarly, opinions, speculation, or allegations contrary to law or facts which are judicially noticed are also disregarded. *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 702. Generally, the pleadings "must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts." *Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal. App. 3d 1371, 1390; *FPI Develop., Inc. v. Nakashima* (1991) 231 Cal. App. 3d 367, 384. Each evidentiary fact that might eventually form part of a party's proof does not need to be alleged. *C.A. v. William S. Hart Union High School Dist*. (2012) 53 Cal. 4th 861, 872. Conclusory pleadings are permissible and appropriate where supported by properly pleaded facts. *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6. "The distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree." *Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 473. Leave to amend should generally be granted liberally where there

is some reasonable possibility that a party may cure the defect through amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.

Collateral estoppel applies when "[t]he prior judgment ... operates in a second suit ... based on a different cause of action ... as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action. *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797 (internal quotations and citations omitted).

> Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. (Citation.) Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (Citation.) The party asserting collateral estoppel bears the burden of establishing these requirements.

Lucido v. Superior Court (1990) 51 Cal.3d 335, 341 (internal citations omitted)

Collateral estoppel is dependent on the previous determination of identical issues as those alleged in the current case. *Id.* at 342. The "identical issue" requirement addresses whether "identical factual allegations" are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same. *Ibid.* The prior adjudication of identical factual issues in a federal case is a basis for application of collateral estoppel at demurrer. *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 506, fn.1.

Writ proceedings are governed by CCP § 1094.5. In such proceedings, the trial court's review "shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." CCP § 1094.5(b). An abuse of discretion can occur three different ways: (1) "the respondent has not proceeded in the manner required by law," (2) the "decision is not supported by the findings," or (3) "the findings are not supported by the evidence." *Ibid.* An application for a Writ of Mandate is subject to the general rules of pleading applicable to civil actions. *Gong v. City of Fremont* (1967) 250 Cal.App.2d 568, 573. Accordingly, the petition must plead facts that establish a right to relief under CCP § 1094.5. *Id.*

II. Request for Judicial Notice

Judicial notice of official acts and court records is statutorily appropriate. See Cal. Evid. Code § 452(c) and (d) (judicial notice of official acts). Yet since judicial notice is a substitute for proof, it "is always confined to those matters which are relevant to the issue at hand." *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301.

The County filed a Request for Judicial Notice ("RFJN") which seeks judicial notice of documents within this case and within the prior federal case. The request is proper and unopposed, therefore it is GRANTED.

III. Demurrer

"On a demurrer a court's function is limited to testing the legal sufficiency of the complaint. [Citation.] 'A demurrer is simply not the appropriate procedure for determining the truth of disputed facts.' [Citation.] The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable. [Citation.]"). *Bounds v. Sup. Ct.* (2014) 229 Cal.App.4th 468, 477-478.

Plaintiffs filed 19-cv-00883-SK case in the Northern District of California federal court (the "Federal Case") alleging that the County's denial of Plaintiffs' agricultural exemption building permit was arbitrary and capricious, under causes of action: 1) 42 USC 1982; 2) violation of rights under California law; and 3) writ of mandamus under CCP § 1094.5. See County's RFJD Exhibit 1. The federal court granted the County's motion for summary judgment. See County's RFJD Exhibit 3. This judgment was entered and affirmed by the 9th Circuit. See County's RFJD Exhibit 4. Plaintiffs thereafter filed the instant case in state court.

It is clear based on the complaint in the Federal Case and the Complaint here that the factual allegations are the same. As was noted in *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 507, previous litigation of the same issues in a federal court case allows the assertion of collateral estoppel by the County here. However, collateral estoppel applies to previously litigated issues, not causes of action. The Court therefore proceeds to the causes of action with these issues decided.

Even exempting any arguments of collateral estoppel, Plaintiffs have not presented any salient argument relating to the most key issue in the case. Plaintiffs appear to be under the impression the County Code § 7-7 obligates the County to approve work which was completed prior to the request for permit, sight unseen. There is no part of County Code 7-7 which applies to work already completed at the time of request. County Code § 7-7 allows for an applicant to submit a written application for exemption from the County "(p)rior to the erection, construction, conversion, enlargement or major alteration of any building or structure situated on agricultural land, or prior to the moving of any building or structure onto said land subject to exemption." *Id.* at 7-7(b). Thereafter, "(w)hen the structure or repairs, alterations, additions, or remodels is completed, an inspection must be performed by permit resource management division staff." *Id.* at 7-7(d).

Here, the County alleged that Plaintiffs completed unpermitted work in 2000. Complaint ¶ 4. Plaintiffs sought an exemption based on that allegation under County Code § 7-7. Plaintiffs' request for the exemption is after completion of the work which gives rise to the need for exemption. Plaintiffs do not dispute that work was completed prior to the request for exemption being filed. Complaint ¶ 5. This means that Plaintiffs' request for exemption does not fall under the procedures delineated in County Code § 7-7. County Code § 7-7 provides a process for

permission, not the forgiveness that Plaintiffs seem to seek for their undisputed violation of permitting requirements. Plaintiffs' conclusory statement that they "fully complied with the ag exempt requirements" (see Complaint ¶ 15) are facially at odds with their own pleading and the plain language of County Code § 7-7. Plaintiffs concede a fairly key point to this effect, as "(t)he timing of the inspection, as clearly provided by Section 7-7(d) is logically necessary after the issuance of the exemption because until the exempted activity is completed, the inspector cannot determine if it complies with Section 7-7(d)." Plaintiffs do not allege that there is any work or activity which needs to be completed at this time. There is no provision of County Code § 7-7 which requires the County to issue any pre-inspection exemption for work already completed at the time of application. In fact, there does not appear to be a procedure at all wherein the County is required to provide an agricultural exemption for work already completed at the time of application under County Code § 7-7. Therefore, based on the allegations within the Complaint, Plaintiffs' position is foundationally flawed. Plaintiffs have failed to plead a factual controversy in regards to County Code § 7-7, and their right thereon to an exemption. This finding is further supported by the findings within the Federal Case.

Plaintiffs arguments make no effort to elucidate the applicability of CCP § 1822.50 beyond the facial issue of an inspection. Plaintiffs' facts do not meet the requirements of any case provided in support of their contention that CCP § 1822.50 applies. There is no case provided which applies CCP § 1822.50 to an exemption permit which is requested by the property owner. Plaintiffs' repeated concessions that the County is entitled to an inspection after issuance of the exemption further cut against this argument. See Complaint ¶¶ 18, 28. Any application of CCP § 1822.50 to County Code § 7-7 appears inapposite. Should the County need to inspect the building in order to prove any affirmative case, the remedy of CCP § 1822.50 is available to them (*see Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 992), but here Plaintiffs have attempted to avail themselves of a benefit which they concede requires an inspection. See Complaint ¶ 18 ("Plaintiffs conceded and did not dispute that, after the issuance of the ag exempt permit, the County would be entitled at a time arranged with plaintiffs").

Plaintiffs' claims regarding a failure of due process also fall short. Plaintiffs point out that they are entitled to due process in all adjudicatory actions. *Saleeby v. State Bar of California* (1985) 39 Cal.3d 547, 563-64. This is true, however, "(t)he requirements of due process, as has long been reiterated, are not inflexible." *Id.* at 563. "A formal hearing, with full rights of confrontation and cross-examination is not necessarily required." *Ibid.* All that is required is a meaningful opportunity to be heard. *Ibid.* None of Plaintiffs' alleged facts lay a foundation for a factual dispute between the parties. "(P)laintiffs were prevented from eliciting testimony evidence that would demonstrate the inspection was not required or permitted by code and that it was not necessary for any legitimate purpose, that the PRMD knew such an inspection required an inspection warrant, that plaintiffs had complied with all the prerequisites for the exemption, that the proposed inspection had no limitation as to scope, that inspection may have be converted into an instrument which serve the very different needs of law enforcement." Complaint ¶ 20. Plaintiffs have presumably plead all facts here necessary to support this claim, and any such facts are treated as true for demurrer. *Serrano v. Priest* (1971) 5 Cal.3d 584, 591. However, as is extensively addressed above, Plaintiffs are simply mistaken in their reading of the County Code § 7-7. County Code § 7-7 specifically states that the inspection does not serve law enforcement. See County Code § 7-7 (d) ("The sole purpose of this inspection shall be to insure that the

structure is complete and is being used for the use stated on the application for exemption."). Furthermore, the Federal Case found multiple facts which determine whether Plaintiffs' due process rights have been violated. See County's RFJN Exhibit 3, pg. 9:1-10:3. The application of the adjudication of issues to California's due process requirements does not change the result from the Federal Case. Plaintiffs were offered a meaningful opportunity to be heard through the entire exemption process. They were entitled to present evidence at multiple points. County's RFJN Exhibit 3, pg. 9:3-7. The hearing before the appeals board was lengthy and allowed the Plaintiffs to be heard regarding their concerns. *Id.* at 9:2-4. Plaintiffs have provided no authority showing the due process requirements under California law are so different as to justify a different result from the Federal Case. The findings of the federal court applied to California law do not justify a different outcome.

Based on the above, there is no merit to Plaintiffs' underlying claims, and therefore no basis for injunctive relief, both based on the inability to plead a cause of action and collateral estoppel. Therefore, as to the first cause of action, the demurrer is **SUSTAINED without leave to amend.**

The Federal Case makes no effort to address the estoppel cause of action, instead rejecting those Plaintiffs provide no support for the contention that the County is not generally subject to claims of estoppel. Rather, Plaintiffs attempt to argue distinguishing characteristics of their particular claims. As is noted above, Plaintiffs' conclusions are erroneous in their reading of County Code § 7-7. Assuming the accuracy of Plaintiffs' allegations (see Complaint ¶ 28 ["County agents informed plaintiffs that no inspect of the pre-existing barn would be required for the issuance of the permit']), the inspection required for issuance of an exemption after completion of the work is a matter of important public interest. See, e.g., *Pettitt v. City of Fresno* (1973) 34 Cal.App.3d 813, 822 (zoning laws constitute an area of "vital public interest"). Therefore, the estoppel cause of action is not adequately pled, and cannot be corrected through amendment. Therefore, as to the second cause of action, the demurrer is **SUSTAINED without leave to amend.**

Plaintiffs cause of action for administrative writ also fails. As is addressed above, Plaintiffs have failed to plead facts which show that any of the requirements for issuance of writ under CCP § 1094.5. Plaintiffs' claims in regards to County Code § 7-7 are foundationally flawed. Plaintiffs were granted adequate opportunity to be heard. Therefore, the Complaint does not contain a viable cause of action for administrative writ. Therefore, as to the third cause of action, the demurrer is **SUSTAINED without leave to amend.**

IV. Conclusion

Based on the foregoing, the Demurrer is **SUSTAINED without leave to amend**.

The County's counsel shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

8. SCV-271360, Salopek v Williams

APPEARANCES REQUIRED

9. SCV-271643, Kubota Credit Corporation v Coleman

Plaintiff Kubota Credit Corporation, USA ("Plaintiff") filed the complaint in this action against defendants buyer Toby James Coleman dba Coleman's Custom ("Defendant"), seeking possession of personal property and for breach of contract and common counts, arising out of a commercial/agricultural retail installment contract for the sale of a Kubota KX0404R1TP Excavator (VIN KBCDZ15CCL3J38161), Kubota SCV75-2 CTL (VIN KBCDZ052CVL1A8004), Kubota K7872A Bucket, Kubota K7875A Bucket, Land Pride AP HD68LLC Bucket (VIN 1488812) (the "Equipment"). This matter is on calendar for Plaintiff's Application for Writ of Possession after hearing pursuant to Cal. Code Civ. Proc. ("CCP") §§ 512.010 et seq. directed at Defendant. The file contains proofs of service by substituted service on Defendant, which show service of the Complaint and the moving papers, and no opposition has been filed. The Application is **GRANTED once Plaintiff posts an undertaking of $22,686.70**.

To obtain a writ of possession under the statutory remedy set forth in CCP § 512.010 et seq., plaintiffs must meet certain procedural requirements and make a showing under the applicable substantive law that they have the right to immediate possession of tangible personal property, and that the property is being wrongfully withheld by defendant. CCP § 512.010; *Englert v. IVAC Corp*. (1979) 92 Cal.App.3d 178, 184. A plaintiff must show by declaration that it has the right to immediate possession of tangible personal property and that the property is being wrongfully withheld by the defendant (CCP § 512.010) and that the claim is "probably valid" (CCP § 512.040(b)).The court shall not issue the writ unless the plaintiff posts a bond of at least twice the value of the defendant's interest in the property. CCP § 515.010. The levying officer will deliver the undertaking to defendant (together with a copy of the writ and of the order for issuance of the writ) upon seizure of the property. CCP § 514.020(a). If the court finds that defendant has *no* interest in the property, no undertaking is required. CCP § 515.010(b). In that event, the writ must state the amount of any counterbond the defendant must post to prevent the plaintiff from taking or regaining possession. CCP § 515.010(b).

The Steen Declaration establishes that pursuant to the sales agreement (Steen Decl. ¶ 5 & Ex. A (the "Agreement")) Defendant acquired the Equipment and Plaintiff acquired a security interest in the Equipment (Agreement ¶ 4), which Plaintiff perfected. Steen Decl. Ex. B. The Agreement's Payment Schedule requires monthly payments on the eighteenth day of each month. It further provides that upon Defendant's default (which includes the failure to make any payment when due) Plaintiff may declare the entire balance due immediately and may repossess the collateral, which collateral includes the Equipment. Agreement ¶¶ 8, 9. The Steen Declaration establishes that Defendant failed to make the payment due on 5/18/22 and has failed to make all subsequent payments. Steen Decl. ¶ 7.

The foregoing establishes Plaintiff's right to a writ of possession. Furthermore, the Application meets the applicable procedural requirements in that it specifies the property and its location. Plaintiff asserts in his memorandum of points and authorities that Defendant has no equity in the Equipment. See Plaintiff's Memorandum, pg. 4:9. However, in the Steen Declaration, Plaintiff

has demonstrated that the estimated market value ($105,190.63) is more than the balance owing ($93,842.28), and Defendant has equity in the amount of $11,348.35 in the Equipment. Steen Decl. ¶ 9 & Ex. C. As such that the bond requirement is not waived as requested by Plaintiff, and posting of a bond is mandatory prior to the issuance of a writ of possession. CCP § 515.010(a) (bond required "in an amount not less than twice the value of the defendant's interest in the property" and "[t]he value of the defendant's interest in the property is determined by the market value of the property less the amount due and owing on any conditional sales contract or security agreement and all liens and encumbrances on the property, and any other factors necessary to determine the defendant's interest in the property.") Therefore, Plaintiff must post a bond of $22,696.70 before the Court can issue the requested writ.

Plaintiff shall post an undertaking within 30 days' notice of this order. Plaintiff's application is **GRANTED** upon the posting of Plaintiff's undertaking.

Plaintiff's counsel shall submit a written order to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b), along with a [proposed] Order for Writ of Possession (CD-120), and a [proposed] Writ of Possession (CD-130). The Court will sign the order and writ upon Plaintiff's posting of the required bond.