TENTATIVE RULINGS
LAW & MOTION CALENDAR
Friday, October 4, 2024, 9:30 a.m.
Courtroom 20 –Hon. Paul J. Lozada
3055 Cleveland Avenue, Santa Rosa

TO JOIN "ZOOM" ONLINE:
Meeting ID: 161-646-8743
Passcode: 026215
https://sonomacourt-org.zoomgov.com/j/1616468743

TO JOIN "ZOOM" BY PHONE:
By Phone (same meeting ID and password as listed above):
(669) 254-5252

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, it will be necessary for you to contact the department's Judicial Assistant by telephone at (707) 521 -6732 by 4:00 p.m. on the day before the hearing. Any party requesting an appearance must notify all other opposing parties of their intent to appear.

1. **23FL00022, Turcott Dissolution**

Motion Change of Venue to Solano County Superior Court DENIED as explained below.

Facts

Petitioner filed the petition for dissolution of marriage without minor child on September 5, 2023. Petitioner asks the court to terminate its ability to award spousal support to either party and seeks determinations of community and separate property, including the residential real property at 312 Hewett St, Santa Rosa (the "House"). Respondent filed his response to the petition on November 21, 2023. The court subsequently entered several orders, including a finding that Petitioner paid Respondent about $134,000 in post-separation support and that the amount is not in dispute.

Motion

In his Request for Order ("RFO") and Motion Change of Venue to Solano County Superior Court, Respondent moves the court to transfer venue of this action to the Superior Court in the County of Solano ("Solano"). He contends that Petitioner's twin sister, Ashley Winter Hendon ("Hendon"), who works in the office of the Sonoma County District Attorney ("DA"), "knows everything about this case, and works in the courthouse where it is being tried." He also currently lives in Solano.

Petitioner opposes this motion. She contends that Hendon's work at the DA has no bearing on this matter at all and that Petitioner has cited no factors under applicable law supporting the transfer of venue.

On September 30, 2024, after Petitioner filed her opposition, Respondent filed two similar, but different, declarations in support of this motion. He claims that he is seeking a change of venue based on issues of health and disability, stating,

> I am requesting a change of venue additionally due to significant health concerns, financial hardships, and the need for accommodations under the Americans with Disabilities Act (ADA). The evidence provided herein demonstrates the complex nature of my medical conditions, the substantial financial disparity between myself and my wife, and the challenges I face in participating in legal proceedings without proper accommodations.

Applicable Law

According to the Family Law Rules of the California Rules of Court, at CRC 5.2(d), and Family Code section 210, provisions applicable to civil actions generally apply to proceedings under the Family Code unless otherwise provided. This includes the rules applicable to civil actions in the California Rules of Court and the Code of Civil Procedure ("CCP"), and specifically the Civil Discovery Act set forth at CCP section 2016.010, et seq. See also, *In re Marriage of Boblitt* (2014) 223 Cal.App. 4th 1004, at 1022.

CCP sections 395 and 396 thus generally apply to actions under the Family Code, specifically actions for marital dissolution, nullity or marriage, legal separation, and support obligations. CCP section 395(a). For marital-dissolution actions, venue is proper in any "county where either the petitioner or respondent has been a resident for three months next preceding the commencement of the proceeding…." CCP section 395(a).

With respect to proceedings under the Family Code, two specific provisions apply to allow the court to make a venue determination based on issues of convenience and justice, but neither is directly applicable to this case. CCP section 397(e) allows the court in a proceeding for dissolution of marriage filed in the county in which the petitioner has been a resident for three months next preceding the commencement of the proceeding, and the respondent at the time of the commencement of the proceeding is a resident of another county in this state, to transfer venue to the county of the respondent's residence when doing so would promote the ends of justice. CCP section 397.5 states that, in proceeding for dissolution or nullity of marriage or legal separation of the parties under the Family Code, where both petitioner and respondent have moved from the county rendering the order, the court may transfer venue to the county in this state where either resides when the order would promote the ends of justice and the convenience of the parties.

The court notes that Respondent has filed only his basic RFO with some attached exhibits of unclear import and has not provided a memorandum of points and authorities or any discussion or analysis of any sort other than the assertion that Hendon works in the office of the DA and thus "knows everything about this case and works in the courthouse where it is being tried."

As Petitioner argues, the assertion which Respondent makes in the actual RFO and moving papers provides no basis for transferring venue. Venue appears to be appropriate in this county and the fact that Hendon, Petitioner's sister, works for the DA has no bearing on this action. An employee of the DA, even if working in the building which also functions as a courthouse, is not an employee of the courts and has no involvement in, or influence over, court proceedings or court functions. Respondent fails to provide anything indicating that Hendon has in some fashion been involved in this action in that or any other way.

As noted above, Respondent filed apparent reply declarations on September 30, 2024, after Petitioner filed her opposition to this motion. He asserts in these an entirely new basis for the motion, set forth above, and cites entirely new evidence. He provides some, albeit unclear evidence regarding health and financial issues which are not specified, and he provides apparent exhibits which he does not authenticate, explain, or discuss. In his original moving papers, he did not raise or mention this new basis, i.e., disability, the need for accommodation, health issues, or financial hardship, as bases for the motion. He likewise did not provide or allude to the new evidence, or any evidence raising such issues, in any way.

Respondent's apparent reply declarations therefore raise entirely new grounds, with entirely new evidence, not raised in the original motion. Respondent failed to give notice of these grounds or the evidence.

Ordinarily, the court may not grant relief, or grant a motion based on grounds, not asserted in the notice of motion. CCP section 1010; CRC 3.1110(a); see *People v. America Sur. Ins. Co.* (1999) 75 Cal.App.4th 719, 726; *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1124; *Kinda v. Carpenter* (2016) 247 Cal.App.4th 1268, 1277-1278. Courts may refuse to consider any new evidence or arguments not raised in the opening papers, such as those raised for the first time in reply papers. See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538; *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010. New matters, including evidence, raised in reply papers may be inappropriate unless the opposing party is given sufficient notice and opportunity to respond. *San Diego Watercrafts, Inc v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316; *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362; *Alliant Ins. Services, Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1307-1308.

Accordingly, Respondent's new papers improperly present new basis and evidence for which Respondent failed to give the required notice and which he could not simply provide in his reply. The court must therefore disregard the new arguments and evidence.

Even if the court were to consider the new arguments and evidence, however, the court would find these insufficient to support the motion. The declarations largely set forth Respondent's substantive claims, such as issues regarding about property and assets in this action, along with his assertions that this is in fact a complex case involving many issues, along with his claim that he requires legal representation and his assertion that this court improperly denied a request for accommodation. Likewise, the documents he provides are unclear and they lack foundation, authentication, or even explanation of their import. The court can discern nothing supporting a transfer of venue, and Respondent's failure to explain the legal bases for the motion compounds this problem.

On the other hand, Petitioner is a resident of this county, Petitioner appears to have been at the time she filed this action, and venue appears on the face of the matters to be proper in this county.

Conclusion

The court DENIES the motion. This is without prejudice to a party again seeking to transfer venue based on a proper motion should the circumstances warrant a transfer of venue. The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing party shall inform the preparing party of objections as to form, if any, or whether the form of order is approved, within five days of receipt

of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

It is SO ORDERED.

2. SFL71223, Diles Dissolution

Motion to Compel Respondent's Deposition, to Produce Documents & Answer Questions GRANTED, and sanctions of $960 awarded to the moving party against Respondent, as explained below.

Facts

Petitioner filed this action for marital dissolution with minor child on August 19, 2015. There are two children born in 2013, both still minors (the "Children"). Judgment was entered May 11, 2015. Little occurred for several years after that, but for the last year the parties have been litigating heavily over issues related to child custody, visitation, and ancillary issues.

On September 5, 2024, the court issued an order appointing attorney Kathleen Smith ("Smith") as minors' counsel for the two Children.

Meanwhile, on June 13, 2024, Petitioner served Respondent with a Notice of Deposition with Request for Production of Documents (the "Notice"), seeking to conduct the deposition on June 26, 2024; the Notice requested Respondent to bring specified documents. Declaration of John E. Johnson ("Johnson Dec."), ¶2, Ex.A. Respondent on June 13, 2024, sent an e-mail stating that she would produce no documents at the deposition because she felt that she required notice of 20 days plus 2 days for e-mail service, that the earliest she would produce documents would be after July 5, and that she would not produce documents on the scheduled date of deposition. Johnson Dec., ¶4, Ex.B. Respondent did not provide a formal objection or state that she would not attend the deposition. Petitioner replied the same day that the request was valid, asked for a response, asked Respondent to inform Petitioner if she would not attend the deposition, and asked Respondent to provide alternative dates for the deposition which she considered proper, but Respondent never responded in any way and she did not appear at the scheduled deposition on June 26, 2024, and never sought a protective order. Johnson Dec., ¶¶5-6. Then, on July 1, 2024, Respondent sent an e-mail agreeing to appear for deposition but, for the first time, stated that she would not answer any questions about Amit Mehta ("Mehta"), who may have a relationship with Respondent. Johnson Dec., ¶7, Ex.D. On July 2, 204, Petitioner sent another meet-and-confer e-mail stating that Petitioner expected the documents to be produced by July 10, 2024, and explaining the relevance of the requested information regarding communications between Respondent and Mehta. Johnson Dec., ¶8, Ex.E. Petitioner served a new deposition notice per the parties' discussions, setting the deposition for July 29, 2024, and demanding the same documents and information on communications as Petitioner had previously requested. Johnson Dec., ¶10, Ex.F. Respondent appeared at the deposition, at which time she objected to producing the requested communications, produced none, and refused to agree to an extension for a motion to compel. Johnson Dec., ¶¶10-11. The deposition was not completed that day and the parties reconvened it on August 6, 2024, but after some preliminary questions about Respondent's knowledge about standardized testing of the Children at school, Respondent answered some questions admitting to having seen Mehta the previous night but refused to answer other questions about her relationship to Mehta or an attorney,

one Himanshu Khatri ("Khatri"), then left the deposition, and did not return. Johnson Dec., ¶¶12-16. Petitioner's attorney attempted in vain to meet and confer with Respondent's attorney after Respondent left the deposition and they could not agree, while Respondent has not agreed to produce any documents or complete the deposition. Johnson Dec., ¶¶17-18.

Motion

In his Request for Order ("RFO") and Motion to Compel Respondent's Deposition, to Produce Documents & Answer Questions, Petitioner moves the court to compel Respondent to attend her deposition and to produce documents and answer question at the deposition.

Petitioner contends that the information regarding Mehta is important because there is evidence, including form the Children, that Mehta is in a relationship of some type with Respondent, and that Mehta may pose a threat to the Children. He also points out that Respondent has waived any objections because she never sent any formal objections at any time, she never objected to the deposition and instead agreed to submit to deposition, and she failed to attend the original deposition without having served an objection or indicating that she would not attend.

Respondent opposes the motion. She contends that the information is not relevant because this is not a sexual-abuse case and involves no claims of abuse by either parent, while she asserts that she properly served a written objection to the production demand at the deposition.

Petitioner replies. He argues that the opposition was served late, he made sufficient efforts to meet and confer, no separate statement was needed because Respondent failed to produce any document in response to the request, while Respondent simply left the deposition before Petitioner could ask any further questions. He also reiterates his position that the information sought is relevant to the Children's safety and thus decisions regarding visitation, while any communications he seeks between Respondent and Khatri are not privileged because they were made in front of others.

Applicable Authority

According to the Family Law Rules of the California Rules of Court, at CRC 5.2(d), and Family Code §210, provisions applicable to civil actions generally apply to proceedings under the Family Code unless otherwise provided. This includes the rules applicable to civil actions in the California Rules of Court and the Code of Civil Procedure ("CCP"), and specifically the Civil Discovery Act set forth at CCP § 2016.010, et seq. See also, *In re Marriage of Boblitt* (2014) 223 Cal.App. 4th 1004, at 1022.

A party may serve another party or party-affiliated witness with a deposition notice for an oral deposition and schedule the deposition to take place at least 10 days after service of the deposition notice. CCP §§2025.240, 2025.280 (deposition notice sufficient for parties and party-affiliated witnesses), 2025.270(a) (timing of deposition). The deposition notice may include a request to produce documents, materials, things, or electronically stored information ("ESI") at the deposition but must specify these with reasonable particularity. CCP section 2025.220(a)(4). A 20-day notice period is required if "the party giving notice of the deposition is a subpoenaing party, and the deponent is a witness commanded by a deposition subpoena to produce personal records of a consumer or employment records of an employee…." CCP §2025.270(c).

The discovery methods of serving a request for production and a deposition notice requiring production are separate and a party may seek information via both depositions and written discovery, even if arguably duplicative. See *Carter v. Sup.Ct.* (1990) 218 Cal.App.3d 994, 997. For example, where a party seeks to obtain documents via both deposition and requests for production, using one method "does not prescribe a waiver of the party's right to use other discovery methods for obtaining the same documents or information." *Carter*, 997.

CCP § 2025.450 states that if a party fails to attend a deposition and produce documents without serving valid objections, the party seeking the deposition may request a court order compelling attendance. This applies where a party, "without having served a valid objection under subdivision (g), fails to appear for examination, or to proceed with it, or to produce... any document or tangible thing described in the deposition notice...." Id. The party moving to compel deposition attendance need only inquire as to what happened, not attempt to meet and confer. CCP §2025.450.

When a deponent fails to answer questions or produce items requested, the examiner may complete or adjourn the deposition. CCP § 2025.480(a). The examiner may then file a motion to compel the deponent to respond and may set the hearing by citing the witness, obtaining an order to show cause ("OSC"), or filing a regular noticed motion. CCP § 2025.480. The moving party must provide a declaration with facts showing a reasonable, good-faith effort to resolve the matter informally. CCP § 2025.480(b). The parties must "attempt to talk the matter over, compare their views, consult and deliberate." *Townsend v. Sup.Ct.* (1998) 61 Cal.App.4th 1431, 1433.

A motion to compel responses to deposition questions or to either compel or quash production of items or things at a deposition must be accompanied by a separate statement setting forth the particular documents or demands at issue, the responses, and the reasons why production should be compelled, unless no response was provided to the requested discovery. CRC 3.1345(a)(4)-(5), (b). The court may also, however, allow the parties to provide a "concise statement" of the items in dispute. CRC 3.1345(b)(2).

With respect to requested *production* at the deposition, a motion to compel deposition must "set forth specific facts showing good cause" justifying the production for inspection of the requested document, ESI or tangible thing, just as with a motion regarding written request for production. CCP §2025.450(b)(1). "Good cause," though, has been liberally construed and a party satisfies it by showing specific facts which indicate that the documents are necessary for effective trial preparation or to prevent surprise at trial. *Associated Brewers Dist.Co. v. Sup.Ct.* (1967) 65 Cal.2d 583, 587.

Any party served with a deposition notice waives any objections to an "error or irregularity" unless the party promptly serves written objections in accord with CCP section 2025.410. An objection to defects or errors in a deposition notice must be served at least 3 days before the deposition date. CCP § 2025.410(a), (b). If a party serves a timely objection, no deposition shall be used against the objecting party if that party does not attend the deposition and the objection was valid. CCP § 2025.410(b). Nonetheless, a party may also make objections to specific production requests or questions at the deposition itself. CCP §2025.460. According to CCP §2025.460(c), "Objections to the competency of the deponent, or to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced are unnecessary and are not waived by failure to make them before or during the deposition."

Timeliness of the Opposition

Petitioner contends that the court must disregard the opposition because Respondent served it late.

Respondent filed the opposition on September 20, 2024, and served it by e-mail that same day. That was nine court days before the hearing, That is essentially proper. CCP §1005(b); CRC 3.1300(a). CCP §1005(b) states, in pertinent part, "All papers opposing a motion so noticed shall be filed with the court and a copy served on each party at least nine court days… before the hearing." The provision adds to the deadline for moving papers when served by various methods but says nothing about electronic service or opposition. However, CCPP §1010.6(a)(3)(B) adds two days to specified periods in general when service is electronic. Petitioner is persuasive, but the court notes that the opposition has no impact on the outcome of this motion.

Meeting and Conferring

Respondent contends that Petitioner failed to demonstrate a proper effort to meet and confer by failing to include any such information in the declaration as opposed to the memorandum of points and authorities. This is unpersuasive. The RFO, signed under penalty of perjury, sets forth a brief factual summary regarding the efforts to meet and confer, and Petitioner sets forth extensive details in the attached Johnson Dec.

Separate Statement

Respondent contends that the court must deny the motion because Petitioner failed to provide a separate statement of items in dispute. Petitioner counters that one is not necessary because Respondent gave no responses.

As set forth above, Respondent is correct that ordinarily a motion to compel responses to questions or production of specific items at deposition requires a separate statement. CRC 3.1345. Petitioner, however, is also correct that no such statement is required where the responding party provided no response to the requested discovery. CRC 3.1345(b).

Petitioner is persuasive. In this instance, Respondent failed to provide any documents requested in the portion of the Notice seeking communications between Respondent and Mehta, while Respondent simply decided to leave the deposition and refused to submit to any further questioning. She therefore did not respond to the portion of the Notice seeking production of the communications and she caused a halt to all questions by simply leaving the deposition and refusing to answer anything at that point, before Petitioner even asked more questions. Moreover, to the extent that anything specific is at issue, the record is clear to the court and the parties that Respondent has basically refused to produce any communications between herself and Mehta, or to answer any questions about her relationship with Mehta and Khatri.

The court also notes that Petitioner provides a copy of the deposition transcript, along with a recitation and discussion of those deposition questions which Petitioner was able to ask. The issues and discovery in dispute are clear, with respect to the discovery in dispute, Respondent has completely refused to provide any documents regarding her communications with Mehta, or any

information about her relationship with Mehta and Khatri. This, combined with the information which Petitioner does provide, means that no separate statement is necessary to provide the requisite clarity of issues, which is the purpose of the requirement for a separate statement. The failure to provide a separate statement therefore does not violate the requirement for one and, as a practical matter, creates no problems or prejudice with respect to this motion.

Objections to Respondent's Opposition Papers

Petitioner objects to statements in Respondent's own declaration provided in opposition. The court notes the defects in the evidence as presented but finds that the objections are, in this motion and context, neither necessary nor appropriate. The court will base its decision on the appropriate, admissible evidence which the court finds persuasive and relevant. The court further adds that the objections, and evidence to which Petitioner objects, do not alter the outcome of this motion.

Respondent's Objections to the Discovery

Respondent contends that she served valid objections. She argues that because Petitioner agreed to a new, later deposition date, that new date continued the deadline for serving an objection as well. This is not persuasive. Respondent had failed to serve any objection to the original deposition Notice and never indicated that she would not attend the deposition, despite an express request from Petitioner on this point, yet she failed to attend the deposition with no explanation.

That said, while Respondent waived any objection to a defect or irregularity in the deposition notice, or to the deposition itself by failing to object or appear at the deposition, as explained above, Respondent did not waive specific objections to categories of questions or requested production, and she did object to those at the deposition.

The parties both discuss the standards for written requests for production pursuant to CCP §2031.010, et seq., but, as noted above, that is a different discovery mechanism. In this instance, Petitioner served a deposition notice which included request to produce certain items or information, and Petitioner moves to compel compliance with that t deposition notice. Petitioner is not seeking to compel responses or production in response to a separate written production request.

Questions Regarding Mehta

As Petitioner contends, however, the requested information regarding Mehta is relevant and there is no basis for shielding it from discovery. Respondent argues, in her objections and in opposition to this motion, that the information is not discoverable because it is not relevant. She claims that it is not relevant because this is not a case in which either parent is accused of sexual misconduct or abuse towards the Children, but that it not dispositive. Respondent's own testimony, including at the deposition, indicates that she has some relationship with Mehta, while Petitioner provides evidence, from the Children and from a dispute involving a domestic violence restraining order against Mehta, that he may potentially pose a risk to the Children.

As Petitioner contends, the welfare of children in an action such as this is a compelling state interest. Fam. Code §3020(a); *Banning v Newdow* (2004) 19 Cal.App.4th 438. Fam. Code §3020 sets forth legislative findings and declarations of policy. Subdivision (a) expressly states, "it is the public policy of this state to ensure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interests of children when making any orders

regarding the physical or legal custody or visitation of children." Respondent admits, that under *Banning* "[t]he welfare of the children is a compelling state interest but claims that "the state has no interest in private communications between two adults that are not concerning the case-involved children, when there has not been any determination as to allegations of a nonparty causing damage and injury to the children." Opposition 7:24-8:3. Petitioner, as noted, has provided some evidence of concern regarding Mehta and evidence indicating that there is a relationship of some sort between Respondent and Mehta. Petitioner has a valid basis for exploring that relationship and Mehta's involvement with the Children in order to determine issues regarding the Children, including custody and visitation. Moreover, Petitioner's questions are not simply about "communications" between Respondent and Mehta but include an overall exploration of their relationship and Mehta's possible physical presence with the Children. Respondent also presents no authority or explanation supporting her contention that the State has no interest in the relationship between two people which may affect the safety of minors involved in an action such as this. She also asserts that the relationship with Mehta does not concern the Children, but that is a factual contention which Petitioner has the right to explore in discovery.

In her opposition, Respondent also claims that her communications with Mehta are "confidential," lumping them in with the communications between her and attorney Khatri. However, there is no "confidentiality" protection or the like with respect to communications between two people absent an applicable privilege, and Respondent cites none.

Respondent also contends that the information is not relevant because Petitioner already "received the Court's approval that Mr. Mehta not be in the presence of the children," but this is not dispositive, either. Respondent herself still challenges this, claiming that it was based on "false allegations" and the deposition testimony, as far as it got, indicates continued relationship. Petitioner has a basis for determining if in fact Mehta is in the presence of the Children, and the circumstances of such interaction.

The court GRANTS the motion as to the questioning regarding Mehta, subject to Respondent's right to raise specific objections as appropriate to specific questions, and as to the request for communications between Respondent and Mehta.

<u>Questions Regarding Khatri</u>

There is at least some basis for Petitioner to obtain information regarding Khatri. Khatri is, or was, Mehta's attorney, and accordingly this touches on the relationship between Respondent and Mehta.

Respondent claims that Petitioner cannot obtain communications between her and Khatri because they are privileged attorney-client communications, but that is not persuasive.

Attorney-client privilege does not cover information other than confidential communications. Evid. Code §§952, 954. Petitioner's questioning was not limited to communications with Khatri, but also about the relationship between Respondent, Khatri, and Mehta. Petitioner has the right to obtain information regarding the nature and bases of the relationship between Respondent, Khatri, and Mehta including whether Khatri at any time has been Respondent's attorney. Respondent has a right to assert attorney-client privilege regarding any communications between her and Khatri if in fact she asserts that Khatri is, or was, her attorney,

and which are communications within an attorney-client relationship. That does not preclude all other discovery regarding that relationship, however. Moreover, attorney-client privilege would not attach to communications which are not confidential attorney-client communications, such as those communications which are not in the context of Respondent as Khatri's client or made in the presence of third parties. Petitioner points out, as detailed particularly in the reply, that evidence indicates that at least some communications between Respondent and Khatri were made in the presence of others, while Petitioner also points out that Respondent has been contradictory about whether Khatri was in fact her attorney at any time.

The court GRANTS the motion as to the questioning regarding Khatri, subject to Respondent's right to raise specific objections as appropriate to specific questions.

Discovery Referee

Respondent alternatively requests appointment of a discovery referee, apparently solely on the basis of preventing harassment and improper questioning.

Where parties do not agree to the appointment of a referee, the court may appoint one on the motion of any party or on its own motion where a referee is "necessary" to hear and determine all discovery disputes. CCP § 639(a)(5); CRC 3.920, 3.921. The order must set forth the exceptional circumstances justifying the appointment; the scope of the reference; the referee's name, etc.; the referee's powers and report requirements; and objection requirements; the fees; and a specific finding regarding the parties' ability to pay. CCP section 639(d); CRC 3.920(c), 3.922.

Such orders are, however, generally improper where only routine discovery matters are at issue and there must be "exceptional circumstances." CRC 3.920(c); see also *Hood v. Sup.Ct.* (1999) 762 Cal.App.4th 446, 449. Courts have thus stated that there is no basis for appointing a referee to resolve uncomplicated or routine disputes. *Tagares v. Sup.Ct.* (1998) 62 Cal.App.4th 94, 104; *Hood, supra*. "Unusual" circumstances warranting an appointment of a discovery referee include multiple issues to resolve; multiple motions being heard simultaneously; there is a long string of discovery motions; there are numerous and voluminous documents to examine, making an inquiry "inordinately time consuming." *Tagares , supra*, 62 Cal.App.4th 105.

Respondent has not brought a motion for appointment of a referee under CRC 3.921 and the court at this time also finds no basis for such an appointment. The discovery matters at issue are not voluminous, complex, or unusual, and there is no indication of harassment or the like. If the court found the latter, in any case, that alone would more properly warranted a protective order than appointment of a referee. The court DENIES the request for referee, without prejudice to a party properly seeking such an appointment on a sufficient showing.

Sanctions

Both parties request monetary sanctions. The court "shall" impose monetary sanctions against the losing party and/or attorney unless it finds that the losing party acted with "substantial justification" or other circumstances make sanctions "unjust." CCP §§ 2023.010, 2023.40,

2025.450(g)(1) (failure to comply with depo notice), 2025.480(j). (failure to answer question or produce items)

In order to obtain sanctions, the moving party must request sanctions in the notice of motion, identify against whom the party seeks the sanctions, and specify the kind of sanctions. CCP § 2023.040. The sanctions are limited to the "reasonable expenses" related to the motion. *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262.

Petitioner's motion is fully persuasive and the court finds that Respondent's position lacks substantial justification. Petitioner is therefore entitled to an award of monetary sanctions against Respondent. The motion does not appear to seek sanctions against Respondent's attorney.

Petitioner's attorney states that he estimates that the fees incurred as of the fling of the motion is $2,000. Johnson Dec.¶19. This appears potentially to be a reasonable amount but Petitioner must provide some specific explanation for the amount. Unless Petitioner provides some specific evidence and explanation for an additional amount, the court will award to Petitioner $960, an amount which clearly is facially reasonable and in this court's view must necessarily have been incurred on this motion. This reflects reasonable fees for three hours at $300 an hour, plus the $60 filing fee. Should Petitioner do so, the court will augment the award of sanctions by an amount which the court finds to be reasonable, should it find Petitioner's evidence and explanation to be sufficient and persuasive.

Subject to the above, the court AWARDS to Petitioner $960 in sanctions against Respondent, for attorney's fees and costs.

Conclusion

The court GRANTS the motion, and awards to Petitioner $960 in sanctions, as explained above. The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing party shall inform the preparing party of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

It is SO ORDERED.

3. **SFL077532, Clark Dissolution**

APPEARANCE REQUIRED. Counsel and parties may appear via Zoom.

4. **SFL080403, County of Sonoma v Stankas**

Other Parent's Motion to Compel Discovery Responses/Sanctions for Failure to Provide Discovery Responses GRANTED. The court AWARDS the moving party monetary sanctions against Respondent in the amount of $1,260.

Other Parent's Motion for Issue and Evidence Sanctions for Failure to Comply with Order Compelling Discovery Responses DENIED without prejudice as explained below.

Facts

Petitioner, County of Sonoma Department of Child Support Services ("Petitioner") filed this action on July 16, 2018, to determine parental obligations regarding minor child ("B") and specifically to obtain an order that the Respondent, father Allen Andrew Stankas ("Respondent") pay child support to the Other Parent, Mother Haylee Sierra DeMartini ("Other Parent" or "DeMartini").

On August 24, 2018, the parties filed a written stipulated judgment regarding parental obligations.

Other Parent, DeMartini, on May 23, 2024, filed a motion to compel responses to Family Law Form Interrogatories and Request for Production of Documents and Things, Set One. The court granted that motion after a hearing on August 2, 2024. The court ordered Respondent to serve objection-free responses within 10 days of receiving the notice of entry of the order and to pay $1,565 in monetary sanctions. On August 7, 2024, Other Parent filed a proof of service showing that she served Respondent with the order granting the motion to compel by mail on August 7, 2024, at Respondent's address of record.

Meanwhile, as set forth in the declaration of Beki Berrey in support of Other Parent's Request for Order ("RFO") regarding discovery filed on August 19, 2024 ("Berrey Dec."), Other Parent on June 3, 2024, served Respondent with Specially Prepared Interrogatories (Set One) ("Special Interrogatories") and Request for Production of Documents and Things, Set Two (RFPs Set 2). Respondent has not responded to these, despite Other Parent sending meet-and-confer letters on July 9, 2024, and August 2, 2024, requesting responses.

Motion

In her RFO filed on August 19, 2024, Other Parent DeMartini brings two motions: 1) Motion to Compel Discovery Responses/Sanctions for Failure to Provide Discovery Responses; 2) Motion for Issue and Evidence Sanctions for Failure to Comply with Order Compelling Discovery Responses. In the first, she moves the court to compel Respondent to provide discovery responses to the Special Interrogatories and RFP Set 2, and she seeks related monetary sanctions. In the second, she moves the court to impose issue or evidentiary sanctions on Respondent for failing to comply with the court's prior discovery order.

There is no opposition.

Applicable Authority

According to the Family Law Rules of the California Rules of Court, at CRC 5.2(d), and Family Code section 210, provisions applicable to civil actions generally apply to proceedings under the Family Code unless otherwise provided. This includes the rules applicable to civil actions in the California Rules of Court and the Code of Civil Procedure ("CCP"), and specifically the Civil Discovery Act set forth at CCP § 2016.010, et seq. See also, *In re Marriage of Boblitt* (2014) 223 Cal.App. 4th 1004, at 1022.

Motion to Compel Responses

Where a party seeks to compel responses under Code of Civil Procedure ("CCP") §§ 2030.290 and 2031.300, the moving party need only demonstrate that the discovery was served, the time has expired, and the responding party failed to provide a timely response. See *Leach v. Sup.Ct.* (1980) 111 Cal.App.3d 902, 905-906. Failure to provide a timely response waives objections, "including one based on privilege or on the protection for work product…." CCP §§ 2030.290, 2031.300. There is no meet-and-confer requirement or a deadline for a motion to compel response where none has been made. CCP §2030.290, 2031.300. Where a party has failed to respond on time to a request for production, the first step is not to compel production but, as with interrogatories, to compel a response. CCP § 2031.300.

The responding party must verify substantive responses. CCP §§ 2030.250, 2031.250, 2033.240. Where a response is unverified, the response is ineffective and is the equivalent of no response at all. See *Appleton v Sup.Ct.* (1988) 206 Cal.App.3d 632, 636.

The moving party has met her burden here, based on the facts set forth above. The court GRANTS this motion.

Sanctions

For compelling responses to interrogatories and production requests, the court shall impose monetary sanctions on the losing party unless that party acted with substantial justification, or other circumstances make sanctions unjust. CCP §§2023.010, 2023.030, 2030.290, 2031.300. A party may seek relief from sanctions for interrogatories, RFAs, or production requests due to mistake, inadvertence, or excusable neglect if it has served responses. CCP §§2030.290(a), 2031.300(a).

In order to obtain sanctions, the moving party must request sanctions in the notice of motion, identify against whom the party seeks the sanctions, and specify the kind of sanctions. CCP § 2023.040. The sanctions are limited to the "reasonable expenses" related to the motion. *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262.

Other Parent requests monetary sanctions of $2,015 for 3.2 hours of attorney time at $375 an hour, plus costs of $65, plus anticipated time of two hours for the hearing. This includes time spent meeting and conferring.

Other Parent is entitled to an award of sanctions here. The time claimed is reasonable but the court may only compensate for time actually and reasonably incurred, not anticipated. The court fee for this motion is also only $60 and there appears to be no basis for the additional $5 claimed. Accordingly, unless the moving party demonstrates additional expenses actually and reasonably incurred, this court AWARDS sanctions for the above amounts actually incurred thus far, $1,200 in attorney's fees and $60 in costs, a total of $1,260.

Motion for Issue and Evidence Sanctions

Where a party "fails to obey" a court order compelling discovery responses, the party commits a misuse of the discovery process and the moving party may seek a number of sanctions. CCP §§2025.450(h), 2030.290, 2031.300, 2023.010, 2023.030. The sanctions include issue sanctions establishing certain facts, evidentiary sanctions regarding parties' evidence, terminating (or "doomsday") sanctions striking pleadings, staying or dismissing actions, or entering defaults, and monetary sanctions for the expenses incurred in the motion and as a result of the failure to obey.

CCP §§2025.450(h), 2030.290, 2031.300, 2033.290, 2023.010, 2023.030. Monetary sanctions are limited to the reasonable expenses of the motion. CCP § 2023.020; *Ghanooni v. Super Shuttle of Los Angeles* (1993) 20 Cal.App.4th 256, 262.

The court has discretion to impose any sanctions as may be just and may impose none or any combination of sanctions that seems warranted. CCP §§2025.450(h), 2030.290, 2031.300, 2033.290, 2023.010, 2023.030. This decision is subject to review only for abuse of discretion. *Sauer v. Sup.Ct.* (1987) 195 Cal.App.3d 213, 228.

The court should consider a variety of factors as set forth in *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796. These include the time elapsed since the discovery was served; whether there were any extensions; the number propounded; the importance of the information; whether the responding party was aware of the duty to respond and had the ability to do so; the amount unanswered; whether responses which were provided were evasive or incomplete; whether the information was difficult to obtain, whether there were prior court orders that the party was unable to obey, whether more time would enable the responding party to reply, and whether less drastic sanctions are sufficient in the circumstances.

The court should also not "stack" sanctions. This means that the court cannot justify a severe sanction for a relatively minor violation by pointing to the offending party's prior "history of delay and avoidance." *Motown Record Corp. v. Sup.Ct.* (1984) 155 Cal.App.3d 482, 491. This is especially true where the offending party has already been sanctioned for the earlier violation. *Id.*

The time since the discovery was first served is about six months. This is a fairly- long time. More importantly, it has also been about two months since the order at issue and about a month and a half since the deadline for compliance. This factor weighs in favor of the sanctions.

The information here is very important and goes to fundamental issues of Respondent's income, ability to work, and general ability to pay child support. This factor supports the requested sanctions.

Respondent appears to have known of the order and certainly the record shows on its face that Other Parent properly served Respondent with the order on August 7, 2024, almost two months ago. This critical factor basically supports the requested sanctions.

Other Parent asserts that Respondent has provided no responses whatsoever but she fails to demonstrate this. The only declaration provided is silent as to Respondent's compliance, or lack thereof, with the prior court order and discusses only the more recent discovery addressed in the motion to compel above. Other Parent's attorney does show that Respondent communicated to Other Parent a feeling that the discovery efforts mean that Other Parent is "wasting everyone' time." Berrey Dec., Ex.C. However, she does not indicate that Respondent failed to comply with the court order, a statement made only in the memorandum of points and authorities.

Based on the evidence provided, the court is unable to grant this motion. The court DENIES it without prejudice to the moving party again seeking this relief on a complete motion with evidence supporting the requested relief.

Conclusion

As explained above, the court GRANTS the motion to compel discovery responses and AWARDS monetary sanctions to the moving party, but the court DENIES without prejudice the motion to impose issue and evidentiary sanctions. The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing party shall inform the preparing party of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

It is SO ORDERED.

5. **SFL092504, Jenkins Dissolution**

Motion to Set Aside Judgment and Section IV(A)(8) of Incorporated MSA pursuant to CCP 473(b) GRANTED as explained below.

Facts

Petitioner filed this action for dissolution of marriage with minor children on December 1, 2022. Respondent filed a notice that he served a preliminary declaration of disclosure and jointly entered into a waiver for final declarations, but did not file a response to the petition. Petitioner filed a request to enter default on June 23, 2023, followed by declaration for default on July 20, 2023. That same day, the court entered a judgment based on a Marital Settlement Agreement ("MSA") signed by both parties.

Respondent filed a Request for Order ("RFO") and motion to Set Aside Judgment and Section IV(A)(8) of Incorporated MSA pursuant to CCP 473(b), moving the court to set aside the judgment and Section IV(A)(8) of the MSA pursuant to CCP §473(b) due to mistake, inadvertence, surprise, or excusable neglect. Petitioner opposed the motion but at the original hearing on April 5, 2024, the parties indicated to the court that there had been some confusion as to whether Respondent was dropping the motion. Petitioner informed the court that Petitioner understood that Respondent had decided to drop the motion, but Respondent stated that he had considered dropping it and in fact attempted to do so, but the paperwork was rejected, after which he changed his mind. The court in the end decided to continue the matter to allow all parties sufficient time to file any further briefing in light of the fact that Respondent had decided not to drop the motion. The motion was continued to June 2024, then to September 20, 2024, and then again, by stipulation, to October 4, 2024.

After the April 2024 hearing, Petitioner's attorneys withdrew, leaving Petitioner self-represented.

Motion

This matter once again has come on calendar for Respondent's Request for Order ("RFO") and motion to Set Aside Judgment and Section IV(A)(8) of Incorporated MSA pursuant to CCP 473(b). He moves the court to set aside the judgment and Section IV(A)(8) of the MSA pursuant to

CCP §473(b) due to mistake, inadvertence, surprise, or excusable neglect. He requests that the court enter a new order with a more equitable provision ordering either that Petitioner pay him his share of the equity in the real property at 310 10th St, Petaluma, CA 94952 (the "Petaluma Property") within 90 days of a court order or that the Petaluma Property be immediately listed for sale with a mutually agreeable listing agent and net proceeds divided equally. He adds that he will deduct from his share the amounts which he owes for car equity and "Grave's Grove" in accord with the MSA. Respondent contends that he agreed to IV(A)(8), specifically a deferred date of payment for his interest, based on his mistaken belief that he would be able to service his share of their "substantial community… debt" without requiring Petitioner to him his share in the Petaluma Property immediately.

Petitioner opposes this motion. In her original opposition papers, she argues that the motion is untimely and that Respondent is guilty of lack of diligence and failure to act reasonably. In her second opposition, she contends that the court should "dismiss" the motion based on the Disentitlement Doctrine because it is clear that Respondent will only accept a decision in his favor and is abusing the principles of equity and justice by failing to comply with the MSA.

Petitioner's Opposition Papers Filed September 19, 2024

When an attorney represented Respondent, her attorney filed an initial opposition to the motion on the merits prior to the first hearing. This addressed substantive issues and evidently predated the confusion over whether Respondent was dropping the motion.

After the court continued the motion, Petitioner on September 19, 2024 filed a second opposition brief and declaration. This was proper, as this court expressly stated that it was continuing the motion to allow the parties a full opportunity to brief the matter and prepare for hearing.

Discussion

According to the Family Law Rules of the California Rules of Court ("CRC") 5.2(d), and Family Code section 210, provisions applicable to civil actions generally apply to proceedings under the Family Code unless otherwise provided. This includes the rules applicable to civil actions in the California Rules of Court and the Code of Civil Procedure ("CCP"), and specifically motions to vacate pursuant to CCP § 473. See, e.g., *In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, at 910-911 (discussing the applicability of CCP § 473 when a party seeks relief from orders in family proceedings).

Specifically in proceedings under the Family Code, in general a property settlement agreement that was merged or incorporated in a final judgment cannot later be modified except pursuant to CCP § 473(b) or Fam.Code § 2120 et seq. See, e.g., *Marriage of Nassimi* (2016) 3 Cal.App.5th 667, 691-692 (property settlement merged into dissolution judgment becomes a final determination of parties' property rights); *Esserman v. Esserman* (1982) 136 Cal.App. 3d 572, 578 (in general, a court may not alter property divisions in an MSA incorporated in a judgment absent circumstances allowing it to set aside the judgment such as based on fraud, duress, or the like).

MSA Section IV(A)(8)

The judgment, as noted above, is based on, and incorporates, the parties' MSA. Section IV(A)(8) is the only provision at issue and is part of the section governing the community interest in

Petaluma real property, section IV(A). This states, in full and with IV(A)(8), the provision at issue, highlighted in bold,

> IV. DIVISION OF COMMUNITY PROPERTY AND DEBTS:
>
> The Parties warrant and declare under penalty of perjury that the assets and liabilities divided in this Agreement constitute all of their community and quasi-community assets and liabilities.
>
> The community property and debts will be divided as follows:
>
> A. CONVEYANCE OF COMMUNITY INTEREST IN PETALUMA REAL ESTATE:
>
> 1. Real Property. As part of the division of our community property, Husband
>
> conveys to Wife all of Husband's rights and interest in the real property located at 310 10th Street, Petaluma, CA 94952 ("Petaluma Property".) This conveyance will become effective when both parties have signed this agreement.
>
> 2. Interspousal Transfer Deed. Husband will deliver to Wife a duly executed and
>
> acknowledged interspousal transfer or grant transfer deed on the Petaluma Property transferring all his rights, title and interest of said property exclusively to Wife within 60 days of signing this agreement.
>
> 3. Lender Liability. Wife is retaining sole possession of the Petaluma Property. As
>
> such, Wife will be solely liable to lenders on any existing loans on the Petaluma property and all such loans are confirmed to Wife as Wife's separate liability and Wife will make all payments as they come due and hold Husband harmless from all loans secured by said property. Wife confirms that Husband shall no longer be liable on the mortgage upon the signing of this agreement.
>
> 4. Overhead. Until sold, the mortgages, property taxes, home insurance, maintenance costs and debts associated with the Petaluma Property and loan by Freedom Mortgage will be paid 100% by Wife.
>
> 5. Taxes. For federal and state income tax purposes, Wife will report the total gain
>
> realized on the future sale of the Petaluma Property, if applicable, and will be responsible for any liability incurred thereon.
>
> 6. No Encumbrances. Neither of us may further encumber the Petaluma Property in any way without the other's written consent
>
> 7. Appraiser. Husband will select an appraiser for the Petaluma Property within 7
>
> days of signing this agreement. If Husband does not select an appraiser in writing within 7 days of signing this agreement, then Wife may select an appraiser. The costs for the appraiser will be paid 50% by Wife and 50% by Husband. Appraisal will be conducted within 6O days of the signing of this agreement.

8. Promissory Note: Husband will obtain a promissory note on the Petaluma

property in the event Wife sells or refinance or 10 years from the date of divorce. The note will be 50% of the equity in the Petaluma Property based on an appraisal yet subject to a balance of monies Husband owes Wife from this agreement including but not limited to the car equity and Grave's Grove. The note will gain a 3% interest per year and an amortization calendar will be filed with the note. The Parties agree the note shall not be sellable to a third party except to the following persons: Eunice Turner or Christ Jenkins. The costs for the title fees to finalize the promissory note will be paid 50% by Wife and 50% by Husband. The promissory note will be finalized with a title company within 10 days of the sale of the Forestville Property.

Respondent's Claims of Mistake, Surprise, or Excusable Neglect

As noted above, Respondent in his declaration attached to the RFO contends that he agreed to IV(A)(8), specifically a deferred date of payment for his interest, based on his mistaken belief that he would be able to service his share of their "substantial community… debt" without requiring Petitioner to him his share in the Petaluma Property immediately. He details the issues, stating that he misunderstood the parties' 2022 tax liability and he relied on Petitioner's compliance with other terms of the MSA but she failed to comply, resulting in fewer proceeds were available to reduce that debt.

Respondent asserts that Petitioner was, pursuant to MSA section IV(B) supposed to "immediately" list for sale their "vacation home," real property at 11723 Summerhome Park Road, Forestville, CA 95436 (the "Forestville Property") and that they agreed on what price they were willing to accept and what minimum price they were required to accept. However, he contends, Petitioner failed to do the listing or prepare the Forestville Property for sale, causing a delay, with the Forestville Property not being listed until September 2023, after the "high season" and resulting in a sale slightly below the agreed minimum listing price.

He also asserts that Petitioner violated MSA Section IV(B)(14), according to which the proceeds form the Forestville Property would be used as set forth in that provision. He notes that it required the proceeds to be distributed for specific items as set forth and in the order set forth, with (e) being fore credit card debts, personal loans and debts in existence at the time of the date of separation, November 2, 2022, and then, (g), $25,000 would be wired to Respondent's personal bank account, and finally (k) any amount left over would go to Respondent. He complains that Petitioner paid off the entirety of the credit card bills, exceeding the amount which was to be covered, and she kept $30,000 for herself instead of distributing the minimum $25,000 which was supposed to go to him.

He further explains that the parties agreed to work with a mediator to resolve issues related to the MSA and during these negotiations they agreed not to take any action regarding the proceeds of the Forestville sale until they met with the mediator on October 30, 2023, but Petitioner distributed the proceeds as explained above before this date regardless.

As a result of the above events, which he did not anticipate, Respondent contends that he is unable to meet the debt burden as anticipated, requiring the funds from the Petaluma Property.

Disentitlement Doctrine

As noted above, in her September 19, 2024 opposition papers, Petitioner contends that the court should rely on the disentitlement doctrine to deny the motion. The court rejects this argument.

Petitioner relies on *In re L.J.* (2013) 216 Cal.App.4th 1125, at 1136-1137, in which the court explained that the "disentitlement doctrine" is not an automatic rule but a discretionary tool of the courts." It described the doctrine and its application, stating,

> " 'The disentitlement doctrine has been applied to deprive a party of the right to present a defense as a result of the litigant's violation of the processes of the court, withholding of evidence, defaulting on court-imposed obligations, disobeying court orders, or other actions justifying a judgment of default. [Citation.] The case for application of the doctrine is most evident where ... the party is a fugitive who refuses to comply with court orders or make an appearance despite being given notice and an opportunity to appear and be heard. [Citation.]' " [Citations.] Though typically applied against fugitives from the courts, disentitlement may also be imposed on a nonfugitive party "who has signaled by his conduct that he will only accept a decision in his favor" and will frustrate any attempt to enforce a judgment against him. [Citations.]
>
> The doctrine is "not an automatic rule but a discretionary tool of the courts that may only be applied when the balance of all equitable concerns leads the court to conclude that it is a proper sanction for a party's flight." [Citation.] "In a noncriminal context, courts routinely decline to disentitle litigants on the basis of contempt, fugitive status, or noncompliance with court orders when the issues raised by the litigant entail interests beyond the personal of the individual petitioner, such as the welfare of minor children...." [Citation.]

The court finds no basis for employing the doctrine in this instance. Respondent has not abused the legal system or court processes and has not demonstrated that he will only accept a decision in his favor, or engaged in any other conduct which would support applying the doctrine. Indeed, he has merely refused to comply with the MSA, on the very bases which he raises in this motion and articulated and considered in this decision. That is not the type of conduct which warrants invoking the doctrine.

Relief Pursuant to CCP §473(b)

CCP §473(b) allows parties to move the court to set aside orders, dismissals, or defaults. This motion must normally be made within a reasonable time, not to exceed 6 months from the date the order was entered. CCP §473(b). The motion must be brought within 6 months and the grounds for seeking the relief do not affect the deadline. *Arambula v. Union Carbide Corp*. (2005) 128 Cal.App.4th 333, 345.

An order to set is discretionary where based on mistake, inadvertence, surprise, or excusable neglect. CCP § 473(b). There is also a policy in favor of hearing cases on their merits and the motion to vacate should be granted if the moving party shows a credible, excusable explanation. *Elston v. City of Turlock* (1985) 38 Cal.3d 227. The provision of this section authorizing court to

relieve party from a judgment or order resulting from mistake, inadvertence, surprise or excusable neglect is remedial in its nature and is to be liberally construed so as to dispose of cases on their merits. *Ramsey Trucking Co. v. Mitchell* (1961) 188 Cal.App.2d Supp. 862.

Petitioner contends that this motion is untimely under CCP §473 because it was filed "just three days prior to the six-month limit." Responsive Points and Authorities ("Oppo") 2:6-8. As her statement admits, Respondent did nonetheless file the motion, if just barely, within the deadline, six months after entry of the judgment. She acknowledges this further, stating that a motion filed so close to the deadline "is not necessarily untimely," but contends that Petitioner's delay was unreasonable and resulted from a lack of diligence. This argument is not persuasive. As explained above, the key events which Respondent cites as the basis for this motion did not start to become clear until September 2023, when the Forestville Property was belatedly listed and subsequently sold for less than the price agreed upon in the MSA, and with the issues regarding distribution of proceeds not clear before the end of October 2023. This brings the issues to within 3-4 months of the filing of this motion. The court also notes that other circumstances here gravitate in favor of leniency as to any slight delay. As discussed further below, moreover, the court notes that it may also consider the requested relief pursuant to its power to set aside a judgment pursuant to Fam. Code § 2120, et seq., for which the six-month deadline does not apply. The court finds the motion to be timely.

Petitioner also contends that Respondent's errors or mistakes were inexcusable and unreasonable. The court finds her arguments unpersuasive.

Petitioner claims that Respondent was responsible for addressing the taxes so should have known better what the issues would be. This argument has validity but the issue is unclear and, in any case, this is only one component of the issues which Respondent raises and, in the court's view, the less important component.

Petitioner notes that in the MSA the parties agreed to terms regarding disclosure of assets and liabilities and waived a claim regarding potential unequal distribution of assets and debts. This is true, but those terms apply as general terms and have no bearing on the specific agreements regarding, among other things, the timeline and details of the sale of the Forestville Property and the distribution of the proceeds from that sale. The provisions on which Respondent relies, and claims Petitioner breached, are very clear and absolute as to what they required, they required sale "immediately" and for a minimum sale price, while they required the proceeds to be distributed as specifically set forth. Waiving a right to challenge an unequal distribution of assets does not affect the parties' agreement that the specific Forestville proceeds would be distribution in the specific manner and amounts as set forth in the provision of the MSA covering those issues and nothing in the MSA indicates otherwise.

Petitioner also argues that she did not breach the MSA in a manner which was material and would support the requested relief. The court, preliminarily, notes that Petitioner does not directly refute the assertions that she did in fact breach the terms of the MSA as Respondent claims, but instead argues that these events did not cause the problems Respondent claims, or that Respondent was otherwise not diligent.

Petitioner contends that the Forestville Property was sold for more than Respondent had earlier listed it in his Schedule of Assets and Debts. This is immaterial. It does not alter the fact that the listing and sale breached the clear and express terms of the MSA and she fails to address

those facts or refute Respondent's claims on those points. It also does not mean that its was unreasonable for Respondent to rely on the terms for sale as agreed or that it was unreasonable or a lack of diligence to rely on the MSA terms. It also does not address the fact that the sale for less than what was agreed, or later than as agreed, do on their face directly affect the issues which Respondent raises now as the basis for needing to alter the terms. The court notes that on the face of the matters, it appears to the court reasonable for either party to rely on the terms of the MSA, and on their compliance, in return for agreeing to the MSA, in inherent aspect of contract formation.

The court also notes that Petitioner does not even address the distribution of proceeds other than to say that Respondent would not negotiate on the payment of the debts. Respondent had no obligation to negotiate since the terms were already agreed to in the MSA. Petitioner fails to address the assertion that she kept $30,000 for herself without distributing at least $25,000 to Respondent as required.

In short, the court finds that Respondent reasonably relied on certain understandings and, most importantly, the agreed terms of the MSA and Petitioner's compliance with those terms, when he entered into the MSA. This was reasonable and the court finds this did not result from lack of diligence or inexcusable conduct. The fact that Petitioner herself unequivocally breached the terms of the MSA as Respondent claims, a fact which she does not directly refute, and that it was this breach which resulted in the situation leading to this motion, underscores the propriety of granting the relief requested.

The court GRANTS the motion on this basis.

<u>Relief Based on Fam.Code §2120, et seq.</u>

Even if the deadline for relief pursuant to CCP section 473(b) had expired, and this court finds that it has not, Respondent would still be able to obtain relief pursuant to Fam. Code § 2120. Section 2121 states, in full,

> (a) In proceedings for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court may, *on any terms that may be just*, relieve a spouse from a judgment, or any part or parts thereof, adjudicating support or division of property, after the six-month time limit of Section 473 of the Code of Civil Procedure has run, based on the grounds, and within the time limits, provided in this chapter.
>
> (b) In all proceedings under this chapter, before granting relief, the court *shall find that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief.*

Section 2122 sets forth the grounds for relief and the limitation of actions. Relevant here, it states that the grounds for relief include,

> (e) As to *stipulated or uncontested judgments* or that part of a judgment stipulated to by the parties, *mistake, either mutual or unilateral, whether mistake of law or mistake of fact*. An action or motion based on mistake shall be brought within one year after the date of entry of judgment.

In ruling under these provisions, "the court shall set aside only those provisions materially affected by the circumstances leading to the court's decision to grant relief. However, the court has discretion to set aside the entire judgment, if necessary, for equitable considerations." Fam.Code §2125.

The relief requested, and bases which Respondent raises in support, also fall within the authority to set aside in Fam. Code § 2122(e) for or mistake. As explained above, the six-month deadline does not apply to relief on this basis and instead it must merely be brought within one year of entry of judgment.

<u>Setting Aside and Modifying a Portion of the Judgment</u>

The court is aware of the additional, potentially problematic, implications of the request to alter the terms of the judgment as opposed to simply vacating the judgment. See, e.g., *Ironridge Global IV, Ltd. v. ScripsAmerica, Inc*. (2015) 238 Cal.App.4th 259, 267 (while a court may refuse to enter judgment upon a stipulation pursuant to CCP §664.6 a court generally may not simply alter the terms of the stipulation); CCP section 473(d); 7 Witkin, Cal.Proc. (6th Ed.2021, March 2024 Update) Judgment §§67-80 (discussing the court's power to amend a judgment and general limitations thereon).

In this instance, however, no party has raised this specific issue as to the potential problems of altering the terms, and the court finds altering the terms of the judgment to be appropriate under these circumstances. The court notes that this is not a motion to enter a judgment upon a stipulation pursuant to CCP §664.6. The MSA became the terms of the judgment when the court entered judgment thereon and, in this instance, the judgment states that the court retains jurisdiction to make orders necessary to carry out this judgment. The court also has authority, limited though it may be, to modify the terms of a judgment.

As discussed above, the court has power to relieve a party from the terms of the judgment pursuant to CCP §473(b) and Fam.Code §2020, et seq., and the court has already determined that it is appropriate to vacate all or part of the judgment in accord with those provisions as set forth above. It must therefore take another step in order to afford meaningful relief and avoid creating additional problems.

The court notes, as set forth above, that pursuant to Fam.Code §2125 it may, and in fact shall, set aside only those provisions materially affected by the circumstances leading to the court's decision to grant relief unless it is necessary to set aside the entire judgment for equitable considerations.

Moreover, the court under CCP § 187 possesses "all the means necessary to carry… into effect" any jurisdiction that it has, it also has the power to amend a judgment even to the extent, for example, of adding additional judgment debtors. *Hall, Goodhue, et al. v. Marconi Conf. Center Board* (1996) 41 Cal.App.4th 1551, 1554-1555; *NEC Electronics v. Hurt* (1989) 208 Cal.App.3d 772, 778.

With respects to judgments regarding property divisions in matters under the Family Code, where the court expressly reserved jurisdiction over property issues, it may not alter the property division per se but it retains power to implement the judgment with regard to the property issues over which jurisdiction was reserved. *In re Marriage of Thorne & Raccina* (2012) 203 Cal.App.4th 492, 500. *Marriage of Bowen* (2001) 91 Cal.App. 4th 1291, 1300. In *Marriage of Janes* (2017) 11 Cal.App.5th 1043, at 1049-1050, where the MSA attached to the judgment reserved jurisdiction

to supervise payments and asset division, the court ruled that the trial could not modify the property division but it could award a nonparticipant spouse gains and losses earned after date of dissolution on the portion of a pension previously awarded to the nonparticipant spouse.

Similarly, the court in *Marriage of Walters* (1990) 220 Cal.App. 3d 1062, at 1069-1070, ruled that a final judgment terminating an interest in a pension did not bar subsequent reinstatement pursuant to the USFSPA, because the trial court expressly reserved jurisdiction over the pension issue in the event of future changes in the law.

In *Hyatt v. Mabie* (1994) 24 Cal.App.4th 541, at 547, the court ruled that the trial court's reservation of jurisdiction over sale of the community residence and division of the proceeds would have entitled wife to request that the property division be adjusted to take into account a newly-discovered encumbrance but for the fact she waived that remedy by instructing the escrowee to pay off the encumbrance from the sale proceeds.

Because part of the judgment as set forth in the MSA has already been effected, specifically the sale of the Forestville Property and partial distribution of those proceeds, the court may not simply vacate the judgment entirely and let the parties fashion a new MSA. The parties have acted in accord with other terms of the judgment which materially and irrevocably alters the situation on which the parties relied and those events cannot now be undone. The requested relief is also specifically and directly related to the breaches which form the basis for vacating the judgment.

The court's reading of the situation does raise the possibility of one alternative approach to afford Respondent relief from Petitioner's breaches: whether Petitioner may now distribute to Respondent the proceeds from the Forestville Property to which he is due. This alternative would not involve potentially problematic issues of altering any terms of the judgment and would instead merely require enforcing the judgment as written.

However, no party mentions this possibility and absent any further showing, the court must reach the conclusion that this is not possibility. Without any request regarding it or notice to the parties, or evidence as to whether it is possible, the court has no basis on which to order Petitioner to distribute those funds. The evidence which has been presented also indicates that the full funds to which Respondent would be entitled under the judgment are no longer available. Petitioner has, for example, used the proceeds to pay more debt than the judgment terms called for.

The result is that the breaches of the judgment require the court to afford some relief to Respondent, but for which the only evident possibility is altering the terms in the manner requested. The requested modification of the terms in this instance does not involve reallocating adjudicated property interests; rather it merely involves enforcing the divisions to which the parties agreed. Respondent does not seek a change in the interests in the Petaluma Property, or any other property reallocation, but merely asks that the court order that Respondent receive his share in the Petaluma Property now, by payment or sale and division, rather than later.

Accordingly, therefore, the court vacates the portion of judgment at issue, the terms of Section IV(A)(8), and enters a new judgment with the same terms as set forth originally, with the exception that Section IV(A)(8) shall state:

> 8. Payment of Husband's Interest: Within 90 days of entry of the modified judgment, Wife is to pay to Husband for his 50% interest in the Petaluma Property in order to buy out his interest, or the Petaluma Property must at that time be immediately listed for sale with a

mutually agreeable listing agent and the net proceeds divided equally in accord with the terms of the Marital Settlement Agreement. In either case, the amounts which Husband owes for car equity and "Grave's Grove" in accord with the judgment terms are to be deducted from the amount paid to Husband for his share of the Petaluma Property.

This does not involve a reallocation of the property interests adjudicated, it comports with the bases for vacating a judgment under CCP §473(b) and Fam.Code §2020, et seq., it is consistent with this court's finding of mistake which has lead to a result both inequitable and different from that for which the parties bargained, and it is within the court's retained jurisdiction to effect the property divisions as agreed upon in a manner which is equitable and comports with the altered circumstances.

Attorney's Fees and Costs

Petitioner asks for an award of attorney's fees and costs as a result of opposing this motion. The court DENIES this request for three reasons. First, it is granting the motion, so the basis which Petitioner claims for the fees are groundless. Second, even if the court were to deny the motion, Petitioner cites to no authority for the requested award, or the basis or standards for making such an award. Third, even if Petitioner were to cite authority supporting her request, absent law compelling a decision to the contrary, the court would deny the request on the basis that the motion is at least well reasoned, demonstrates substantial justification, and is in no way frivolous.

Conclusion

The motion is GRANTED as explained above. The court vacates the judgment as to Section IV(A)(8) and enters a new judgment with that provision altered as set forth above. The court finds it appropriate to consider other possibilities to afford Respondent relief from Petitioner's breaches for the issues which he raises, but thus far the parties have not even any, much less provided evidence or discussion regarding them. Should the parties do so, the court may continue the matter for further briefing unless the parties reach a stipulation regarding these issues. As the matter now stands, however, the court sees no other option but to grant the relief requested.

The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. Opposing party shall inform the preparing party of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the court in accordance with California Rules of Court, Rule 3.1312.

It is SO ORDERED.