TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, December 3, 2025, 3:00 p.m.
Courtroom 16 – Hon. Patrick M. Broderick
3035 Cleveland Avenue, Suite 200, Santa Rosa

TO JOIN "ZOOM" ONLINE,
Courtroom 16
Meeting ID: 161-460-6380
Passcode: 840359
https://sonomacourt-org.zoomgov.com/j/1614606380?pwd=NUdpOEZ0RGxnVjBzNnN6dHZ6c0ZQZz09

TO JOIN "ZOOM" BY PHONE,
By Phone (same meeting ID and password as listed above):
(669) 254-5252 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 the Court by telephone at **(707) 521-6723**, and all other opposing parties of your intent to appear by 4:00 p.m. the court day immediately before the day of the hearing.
Parties in motions for claims of exemption are exempt from this requirement.

PLEASE NOTE: The Court WILL NOT provide a court reporter for this calendar. If there are any concerns, please contact the Court at the number provided above.

1. 24CV04150, Dumol-Hebron v. Acclaim Home Care, Inc.

Plaintiff Maria E. Dumol-Hebron ("Plaintiff"), on behalf of herself, the State of California, as a private attorneys general, and on behalf of all others similarly situated, moves for entry of an order approving a settlement pursuant to the Private Attorneys General Act of 2004, California Labor Code § 2698 et seq. ("PAGA"). **The motion is GRANTED.**

This PAGA representative action stems from Defendant Acclaim Home Care, Inc.'s ("Defendant's") alleged violations of Labor Code sections 201, 202, 203, 204, 210, 226, 226.2, 226.3, 226.7, 246, 510, 512, 1174,1185, 1194, 1194.2, 1197, 1197.1, 1198, 1198.5, 1199, 2802, 2804, and California Industrial Welfare Commission ("IWC") Wage Order 4-2001 and/or 5-2001. Plaintiff's first amended complaint contains one cause of action for PAGA penalties.

Any settlement of a PAGA action brought by an aggrieved employee must be approved by the court. (Lab. Code § 2699(1)(2).)

The "Aggrieved Employees" are all individuals who are or were employed by Defendants as non-exempt employees in California during the PAGA Period. The "PAGA Period" is defined as the period from July 25, 2023, through the date the Court enters the Approval Order.

On March 21, 2024, the parties attended an all-day mediation with mediator Chad Anderton. They reached a settlement for $99,000.00. The $99,000.00 is inclusive of payments to the LWDA and Aggrieved Employees, attorneys' fees and litigation costs, Plaintiff's enhancement award, and Settlement Administrator fees.

There are 233 Aggrieved Employees. Plaintiff proposes to split the settlement amount as follows: PAGA Counsel Attorneys' Fees not to exceed $33,000.00; PAGA Counsel Litigation Expenses not to exceed $10,799.13; Settlement Administration Costs, not to exceed $4,000.00; and, PAGA Representative Service Payment to Plaintiff, not to exceed $7,500.00. After payment of the attorneys' fees and costs, Plaintiff's enhancement award, and settlement administrator fees, the remaining funds - i.e., the Net Settlement Amount is approximately $43,700.87. Of that, 35% will be for the PAGA Aggrieved Employee Payment (approximately $15,295.30); and 65% for the LWDA Payment (approximately $28,405.57).

The Settlement Agreement provides for a fair and equitable means of allocating the remaining thirty-five percent (35%), amounting to $14,945.30, of the Net Settlement Amount to the Aggrieved Employees as it is determined by dividing the number of pay periods he or she worked during the PAGA Period by the total aggregate number of pay periods worked by all Aggrieved Employees during the PAGA Period and then multiplying this amount by the PAGA Aggrieved Employee Payment. (Settlement Agreement § 3.2.4.)

Plaintiff argues that the settlement represents an excellent recovery as it is large enough to punish and deter Defendants. Plaintiff also argues that the settlement amount is also fair and reasonable because the issues are hotly contested and there are only 233 Aggrieved Employes in the PAGA covered period. Plaintiff also notes the possibility of this Court exercising its discretion to substantially reduce any PAGA penalties based upon, for example, the Aggrieved Employees' lack of awareness of wage statement violations.

Plaintiff calculates the maximum potential exposure as $652,300.00 and a lower end recovery at $97,845.00. Based upon case law stating that it is reasonable to award just five dollars

per PAGA violation, with the number of pay periods at issue, an appropriate settlement amount could be as low as $32,615.00. (*Carrington v. Starbucks Corp.* (2018) 30 Cal. App. 5th 504, 517.)

Based upon the facts of this case, this Court finds the amounts fair and reasonable. The motion is GRANTED. The Court will sign the proposed order.

2. 25CV00945, Christos v. McCormick-Somerville

Defendant Milena McCormick-Somerville ("Defendant") moves to vacate the unlawful detainer judgment entered in this case on the grounds that she did not have actual notice of the hearing on the motion for judgment on the pleadings due to her mistake, surprise, or excusable neglect; and, as she has a meritorious opposition. This motion was originally on calendar on June 24, 2025. At that time, the motion was continued to allow Defendant to file proof of service of the motion. Proof of service not having been filed, **Defendant's motion is DENIED.**

3. 25CV01338, Sahagun v. Ford Motor Company

On July 31, 2025, Defendant Ford Motor Company ("Ford") filed its motion for a protective order. The hearing was set on this calendar. Subsequent to the filing of the motion, the parties settled and on August 26, 2025, a dismissal of the entire action was filed. Accordingly, the motion is DROPPED as MOOT.

4. 25CV01644, Odetto v. General Motors, LLC.

Defendant General Motors LLC ("GM" or "Defendant") demurs to the complaint filed by Plaintiff Daniel Joseph Odetto and Naomilyn Virginia Odetto ("Plaintiffs") on the grounds that the first through fifth causes of action are time-barred, the fifth cause of action for fraud fails to allege facts sufficient to state a cause of action, and the fraud claim is barred by the economic loss rule and independent tort principle. **The demurrer to the first, second, and third causes of action is OVERRULED. The demurrer to the fourth and fifth causes of action are SUSTAINED with leave to amend.**

Plaintiffs' complaint alleges that on March 5, 2017, Plaintiffs entered into a warranty contract with Defendant GM regarding a 2017 Chevrolet Silverado 1500, vehicle identification

number 3GCUKREC5HG277138 (hereafter "Subject Vehicle"), which was manufactured and/or distributed by Defendant GM. Plaintiffs allege the statute of limitations is tolled as a result of equitable tolling, the discovery rule, equitable estoppel, the repair rule, and/or class action tolling. (Complaint, ¶23.) Plaintiffs allege they discovered the wrongful conduct "shortly before the filing of the complaint." (*Id.*, ¶24.) They allege that defects and nonconformities to warranty manifested themselves within the applicable express warranty period, including but not limited to "transmission defects, engine defects, electrical defects; among other defects and non-conformities." (*Id.*, ¶11.) Plaintiffs allege GM has failed to either promptly replace the Subject Vehicle or to promptly make restitution in accordance with the Song-Beverly Consumer Warranty Act. (*Id.*, ¶15.) Plaintiffs allege causes of action: (1) Violation of Civil Code section 1793.2(d); (2) Violation of Civil Code section 1793.2(b); (3) Violation of Civil Code section 1793.2(a)(3); (4) Breach of the Implied Warranty of Merchantability; and, (5) Fraudulent Inducement – Concealment.

1. Statute of Repose/Limitations – First through Third causes of action

GM argues that Plaintiff's first, second, and third causes of action under the Song-Beverly Consumer Warranty Act are barred by its six-year statute of repose and shortened statute of limitations.

CCP section 871.20 provides: "(a) Notwithstanding any other law, this chapter applies to an action, brought against a manufacturer who has elected under Section 871.29 to proceed under this chapter, seeking restitution or replacement of a motor vehicle pursuant to subdivision (b) or (d) of Section 1793.2, Section 1793.22, or Section 1794 of the Civil Code, or for civil penalties pursuant to subdivision (c) of Section 1794 of the Civil Code, where the request for restitution or replacement is based on noncompliance with the applicable express warranty.

"(b) This chapter does not apply to service contract claims under Section 1794 of the Civil Code or any action seeking remedies that are not restitution or replacement of a motor vehicle." (CCP section 871.20.)

CCP section 871.21 provides: "(a) An action covered by Section 871.20 shall be commenced within one year after the expiration of the applicable express warranty.

"(b) Notwithstanding subdivision (a), an action covered by Section 871.20 shall not be brought later than six years after the date of original delivery of the motor vehicle.

"(c) The time periods prescribed in subdivisions (a) and (b) shall be tolled as follows:

"(1) As provided by tolling requirements prescribed in subdivision (c) of Section 1793.22 of the Civil Code, as applicable.

"(2) For the time the motor vehicle is out of service by reason of repair for any nonconformity.

"(3) For the time period after a pre-suit notice is provided to the manufacturer in accordance with Section 871.24, which time period shall not exceed 60 days." (CCP section 871.21.)

The complaint does not state what date the Subject Vehicle was delivered, just that the warranty was entered into on March 5, 2017, which would appear to be the purchase and delivery date. This action was filed on March 7, 2025, over eight years later. The powertrain warranty covered 5 years or 60,000 miles. The complaint does not state when the Subject Vehicle was in the shop for repairs. It only states that the Subject Vehicle continued to exhibit symptoms of defects following GM's unsuccessful attempts to repair them. (Complaint, ¶24.)

This court may sustain a demurrer based on the statute of limitations or other limitations period only when the facts alleged in the complaint or matters subject to judicial notice disclose clearly and affirmatively that the cause of action is barred. (*Mitchell v State Dep't of Public Health* (2016) 1 Cal. App. 5th 1000, 1007.) It is not enough that the complaint merely shows that the action may be barred. (*SLPR, L.L.C. v. San Diego Unified Port Dist.* (2020) 49 Cal.App.5th 284, 306.) This court must treat the demurrer as admitting all material facts that are properly pleaded and resolution of the statute of limitations issue can involve questions of fact. (*Citizens for a Responsible Caltrans Decision v. Department of Transportation* (2020) 46 Cal.App.5th 1103, 1117.) When the relevant facts are not clear, such that the cause of action might be but is not necessarily time-barred, the court must overrule the demurrer. (*Ibid*.)

While it appears that the first and second causes of action, based upon Civil Code section 1793.2(b) and (d), may very likely be barred, the complaint does not contain sufficient details to show it is barred as a matter of law. While seemingly unlikely, if the Subject Vehicle was in the shop for repairs for a combined total of more than two years and 2 days, the causes of action could still be viable. In addition, GM has not provided authority that a plaintiff must allege the facts establishing tolling of causes of action based upon Civil Code section 1793.2.

Plaintiff's third cause of action is brought under Civil Code section 1793.2(a)(3). CCP section 871.20 does not refer to subsection (a) of Civil Code section 1793.2.

The demurrer to these causes of action is overruled.

2. Fourth Cause of Action – Breach of the Implied Warranty of Merchantability (Civil Code sections 1791.1, 1794, and 1795.5)

GM argues that Plaintiff's fourth cause of action is barred by a four-year statute of limitations for a breach of the implied warranty of merchantability. (*Montoya v. Ford Motor Co.* (2020) 46 Cal.App.5th 493, 495.) "The delayed discovery doctrine does not apply to implied warranty claims. (*See Mandani v. Volkswagen Grp. of Am., Inc.*, No. 17-CV-07287-HSG, 2020 WL 3961975, at *3 (N.D. Cal. July 13, 2020) ("[T]he Northern District of California has repeatedly found the 'delayed discovery rule' inapplicable to implied warranty claims.") (quoting *Garcia v. Ford Motor Co.*, No. 19-cv-00385-JAM-AC, 2019 WL 3297354, at *2–3 (E.D. Cal. July 23, 2019))." (*Nguyen v. Nissan North America, Inc.* (N.D. Cal. 2020) 487 F.Supp.3d 845, 854, fn. 3.)[1]

The *Nguyen* case cites Cal. Commercial Code section 2725. (*Nguyen, supra,* at p. 854.) That court stated: "California law provides that breach of such an express warranty may occur after tender, such as when future performance (such as the repair) is deficient. However, as Plaintiff notes, some courts have gone further by holding that the existence of any *express* warranty also tolls an *implied* warranty claim." (*Id.,* at p. 855.) That court cited *Mandani v. Volkswagen Group of America, Inc.* (N.D. Cal., July 13, 2020, No. 17-CV-07287-HSG) 2020 WL 3961975, at *3: "A future-performance exception, under which 'the cause of action accrues when the breach is or should have been discovered,' Cal. Com. Code § 2725(2), applies only if: (1) the warranty explicitly extends to future performance of the goods; and (2) the breach could not have been discovered before performance."). Plaintiffs' claim is a breach of implied warranty claim, not one for breach of express warranty, and thus does not explicitly extend to future performance, as this Court has recognized since its ruling on the motion to dismiss the SAC." (*Ibid.*)

Here, as in the above cases, Plaintiffs have not alleged a cause of action based upon an express warranty, which supports finding the statute of limitations has run.

However, GM has not discussed the limitations period specifically provided for in Civil Code section 1791.1(c), which provides: "The duration of the implied warranty of merchantability and where present the implied warranty of fitness shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is

[1] "Although not binding, federal district court cases are citable as persuasive authority." (*Aleman v. Airtouch Cellular* (2012) 209 Cal.App.4th 556, 576, fn. 8.)

reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof, the duration of the implied warranty shall be the maximum period prescribed above." But, this would appear to shorten the time for filing an action.

In addition, Plaintiffs' tolling allegations in their complaint are conclusory. Plaintiffs state: "To the extent there are any statutes of limitation applicable to Plaintiffs' claims including, without limitation, the express warranty and implied warranty– the running of the limitation periods have been tolled by, *inter alia*, the following doctrines or rules: equitable tolling, the discovery rule, equitable estoppel, the repair rule, and/or class action tolling (e.g., *the American Pipe rule*) via the filing of *Speerly et al. v. General Motors, LLC*, No. 19-cv- 11044-DML-DRG (E.D. Mich.) (April 10, 2019)." (Complaint, ¶23.) Thereafter, Plaintiffs contradictorily allege: "Plaintiffs discovered Defendant's wrongful conduct alleged herein shortly before the filing of the complaint, as the Vehicle continued to exhibit symptoms of defects following GM's unsuccessful attempts to repair them. However, GM failed to provide restitution pursuant to the Song – Beverly Consumer Warranty Act." On demurrer a court does not accept as true contentions, deductions, or conclusions of law. (*The Travelers Indemnity Co. of Connecticut v. Navigators Specialty Ins. Co.* (2021) 70 Cal.App.5th 341, 359.)

Based upon the foregoing, the demurrer to the fourth cause of action is SUSTAINED.

3. Fifth Cause of Action – Fraudulent Inducement – Concealment

GM argues that this cause of action is barred by its three-year statute of limitations. (CCP § 338(d).) For the same reasons as the fourth cause of action, which are based upon conclusory allegations of tolling and delayed discovery—partially contradicted by an allegation to ongoing repair efforts—the demurrer to this cause of action is SUSTAINED.

4. Leave to amend

GM requests this Court sustain the demurrer without leave to amend. Plaintiffs have not filed opposition and have therefore not requested leave to amend. Despite this, "Unless the complaint shows on its face that it is incapable of amendment, denial of leave to amend constitutes an abuse of discretion, irrespective of whether leave to amend is requested or not." (*McDonald v. Sup.Ct. (Flintkote Co.)* (1986) 180 Cal. App. 3d 297, 303-304.) Specifically, courts should ordinarily grant leave to amend an initial complaint even without a request. (*Tarrar Enterprises,*

Inc. v. Associated Indemnity Corp. (2022) 83 Cal. App. 5th 685, 688-689; *Amy's Kitchen, Inc. v. Fireman's Fund Ins. Co.* (2022) 83 Cal. App. 5th 1062, 1073.)

4. Conclusion and Order

The demurrer to the first, second, and third causes of action is OVERRULED. The demurrer to the fourth and fifth causes of action are SUSTAINED with leave to amend.

GM's counsel is directed to submit a written order to the Court consistent with this ruling.

5. <u>25CV01947, Saad v. Stephens</u>

Per stipulation of parties, hearing is continued to March 11, 2026.

6. <u>MCV-261648, Citibank, N.A. v. Mendoza-De Andrade</u>

APPEARANCES REQUIRED.

7. <u>SCV-267521, The Design Build Company, LLC v. De Arkos</u>

Cross-Defendants The Design Build Company, LLC ("DBC") and its principals, John Currier ("Currier") and Robert Auger ("Auger"), (together "XDs") move for an award of attorney fees and expert fees incurred in defending against the Cross-Complaint filed by Cross-Complainant Eduardo De Arkos ("De Arkos"). XDs request attorneys' fees in the amount of $285,187.50 for DBC, $202,711.00 for Currier, and $175,808.00 for Auger. XDs also seek experts' fees in the amount of $139,921.55, of which each XD seeks reimbursement of one-third of that amount. **The motion is DENIED.**

1. Prevailing Parties

On January 31, 2025, the jury returned a defense verdict in favor of XDs. (See Decl. of Todd Jones, Exhibit A.) Pursuant to Code of Civil Procedure section 1032(a)(4), a prevailing party includes "a defendant in whose favor a dismissal is entered" or "a defendant as against those plaintiffs who do not recover any relief against that defendant." Accordingly, DBC, Currier, and Auger are prevailing parties on De Arkos's cross-complaint.

2. Attorney Fees and Expert Fees

Attorneys' fees are recoverable as costs when authorized by contract, statute, or law. (Code Civ. Proc., § 1033.5, subd. (a)(10).)

Here, XDs seek to recover attorney and expert fees based upon the contract between DBC and De Arkos. (Jones decl., Exhibit B.) Section 12.3 provides: "ATTORNEYS' FEES. In the event either party shall prevail in any legal or equitable action or arbitration proceeding to enforce any term(s) of this Agreement, such party shall be entitled to receive from the other party all court costs, actual attorneys' fees, and all other expenses, including but not limited to expert witness fees, incurred in such litigation and the preparation thereof." (*Ibid*.)

In addition to DBC, Currier and Auger argue that pursuant to Civil Code section 1717, they are also entitled to fees under the contract as prevailing parties in the action. "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Civil Code section 1717(a).)

The subject contract is between DBC and De Arkos. Currier and Auger were also sued for breach of contract as if they were parties to the contract. Where a cause of action based on the contract providing for attorney's fees is joined with other causes of action beyond the contract, the prevailing party may recover attorney's fees under section 1717, but only as they relate to the contract action. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129.)

Pursuant to Civil Code section 1717, XCs may recover attorney fees in defending against causes of action based upon subject contract.

3. Bankruptcy Stay

On August 23, 2021, DBC filed for Chapter 7 bankruptcy. The notice states: "The filing of the case imposed an automatic stay against most collection activities. This means that creditors generally may not take action to collect debts from the debtor or the debtor's property. For example, while the stay is in effect, creditors cannot sue, assert a deficiency, repossess property, or otherwise try to collect from the debtor. Creditors cannot demand repayment from debtors by mail, phone, or otherwise. Creditors who violate the stay can be required to pay actual and punitive damages and attorney's fees."

On November 17, 2021, De Arkos filed a Notice of Entry of Bankruptcy Court Order Lifting and Releasing Automatic Stay and Allowing Cross-Defendant Eduardo De Arkos to Proceed. De Arkos's motion in DBC's bankruptcy case was granted. That court gave De Arkos relief from the stay to pursue this action through judgment.

On March 18, 2025, judgment on DBC's complaint for Breach of Contract, Foreclosure of Mechanic's Lien, Quantum Meruit, and Violation of Prompt Payment Statutes was entered in De Arkos's favor. The matter came on for trial on November 15, 2024. No appearance was made on behalf of DBC. Therefore, judgment was entered for De Arkos. The order specified "Defendant shall recover all allowable Costs and Fees."

De Arkos' motion for attorney fees was denied as a result of the stay pending in the bankruptcy court. De Arkos obtained relief from the stay; however, that relief did not allow De Arkos to seek or recover attorney fees or costs against debtor DBC. The bankruptcy court ordered: "The moving party shall have relief from stay to pursue through judgment the pending state-court litigation identified in the motion. The moving party may also file post-judgment motions, and appeals. But no bill of costs may be filed without leave of this court, no attorney's fees shall be sought or awarded, and no action shall be taken to collect or enforce any judgment, except: (1) from applicable insurance proceeds; or (2) by filing a proof of claim in this court."

De Arkos argues that XDs also did not obtain relief from the stay to pursue attorney fees or expert fees as the bankruptcy court must supervise and approve all collection efforts on behalf of DBC.

XDs argue that they are seeking fees as cross-defendants—not on behalf of DBC as the plaintiff—therefore, they argue the bankruptcy stay is not implicated. They argue that DBC's insurance carrier funded this litigation such that any recovery of attorney fees is not an asset of the bankruptcy trustee.

4. Supplemental Briefing

At the hearing on this motion on November 12, 2025, this Court requested additional briefing on whether the bankruptcy stay is applicable to XDs' attorney fee and expert fee request. Cross-complainant De Arkos and cross-defendant DBC filed supplemental briefs. Cross-defendant Currier attempted to file a supplemental brief but it was rejected for not being filed by counsel of record.

a. 11 USC section 362 – Automatic Stay

11 U.S.C. § 362(a)(1) provides that the automatic stay is applicable only to proceedings "against," the debtor. "Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, *applicable to all entities*, of--

"(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other *action or proceeding against the debtor* that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title." (11 U.S.C.A. § 362(a)(1) [italics added].)

Whether an action or proceeding is "against" the debtor is determined by the posture of the parties at the commencement of the action or proceeding. (*Koolik v. Markowitz* (2d Cir. 1994) 40 F.3d 567, 568.) "[A] counterclaim is "an action or proceeding against the debtor," § 362(a)(1), relief from the stay must be sought." (*In re Merrick* (B.A.P. 9th Cir. 1994) 175 B.R. 333, 337.)

Here, XDs seek to obtain fees in an action brought *against* it by De Arkos pursuant to his cross-complaint. Thus, pursuant to section 362(a), this action was stayed in its entirety—except with respect to the bankruptcy court's order lifting the stay, which was only applicable to De Arko; that order only pertained to De Arkos named as the moving party. As previously determined, the bankruptcy court's order did not lift the stay with respect to the recovery of attorney fees.

b. Actions outside the scope of section 362

DBC incorrectly concludes that no defensive litigation is barred by section 362. Defensive litigation is barred if it impacts the bankruptcy proceeding and estate.

The filing of a petition for bankruptcy operates as an automatic stay of the commencement or continuation of any action against a bankrupt debtor or against the property of a bankrupt estate. (*Boucher v. Shaw* (9th Cir. 2009) 572 F.3d 1087, 1092.) Ordinarily, unless the assets of the bankrupt estate are at stake, the automatic stay does not extend to actions against parties other than the debtor, such as codebtors and sureties. (*U.S. v. Dos Cabezas Corp.* (9th Cir. 1993) 995 F.2d 1486, 1491, citing 11 U.S.C. § 362(a).) For example, the automatic stay is inapplicable to a creditor's cause of action against a bankrupt contractor's surety. (*Id.* at p. 1492.) The ruling is grounded on the distinction between the surety bond and the property of the estate. (*Ibid*.) The

Bankruptcy Code contemplates that creditors will be able to proceed against the guarantors and codebtors notwithstanding the automatic stay. (*Ibid*.)

The cases cited by DBC do not address the exact issue in question here. It is clear from the cases cited that De Arkos, or others, could proceed against co-debtors that are not in bankruptcy or that a defendant does not need to seek relief from the automatic stay in order to defend against a lawsuit commenced by a debtor in bankruptcy. The issue is whether DBC, the subject of the bankruptcy proceeding, and its principals can proceed to obtain a recovery of attorney and expert fees against others, here against De Arkos, without obtaining leave to do so from the bankruptcy court.

In *Boucher, supra*, the court found that the automatic stay did not protect the property of parties such as officers of the debtor because the plaintiff's claim in that case did not seek to reach property of the managers that had been pledged to secure the entity's debt, or that would otherwise impact property of the estate. (*Id.*, at p. 1093.) The plaintiff's claim was not being used as an alternative route to recoup property of the estate, and therefore could not be said to be "related to" the bankruptcy proceeding, such that it would be swept into the bankruptcy court's jurisdiction under 28 U.S.C. § 1334(b). (*Ibid*.) "Neither party has alleged that the estate would be diminished by any judgment in favor of the plaintiff, nor is there any indication in the record that the Castaways [the debtor entity] would be required to *indemnify* the individual managers for legal expenses or any judgment against them in this case." (*Ibid*.) "However, if the liability of the non-debtor party *were* to affect the property of the bankruptcy estate, such as by a requirement that the debtor indemnify the non-debtor or by payment of the liability from a director's and officer's insurance policy, it may be necessary for the plaintiff in such a case to proceed against the non-debtor party through bankruptcy proceedings." (*Ibid*.)

In *In re Minoco Group of Cos*., 799 F.2d 517, 518 (9th Cir.1986) the appellate court affirmed the bankruptcy court's finding that an insurance policy cancellation was automatically stayed because of its impact on the debtor's obligation to indemnify officers and directors.

In *In Matter of S.I. Acquisition, Inc*., 817 F.2d 1142 (5th Cir.1987), cited by *In re Merrick, supra,* 175 B.R. at p. 337, because the alter ego cause of action could be raised against the principals by the corporate debtor itself as well as by the creditor, the cause of action was property of the estate, for the benefit of all creditors. The court therefore held that section 362 stayed the

creditor from prosecution for its own benefit of the cause of action against the non-debtor defendants.

b. Effect on Estate Property

DBC insists that all defense fees and expert costs were funded by AmTrust, not DBC, arguing that DBC's estate property is not impacted. DBC argues that any recovery of attorney fees is not property of the estate; such recovery would not augment or diminish the estate.

Insurance policies purchased and paid for by a debtor are property of the estate. (*In re SN Liquidation, Inc.* (Bankr. D. Del. 2008) 388 B.R. 579, 583–584.) Whether insurance proceeds are property of the estate is a more complicated issue. If there is a risk that indemnity payments to directors and officers will result in insufficient coverage available to the debtor, then the proceeds are property of the estate. (*Id.,* at 584.) The *SN Liquidation* court found the Primary Policy to clearly be in the nature of estate property providing coverage for directors and officers as well as for the debtors. It stated depletion of insurance proceeds which results from indemnification for defense costs would adversely affect the debtors' estate.

"The Court concludes that when a debtor's liability insurance policy provides direct coverage to the debtor the proceeds are property of the estate, because the proceeds are payable to the debtor. Further when the liability insurance policy only provides direct coverage to the directors and officers the proceeds are not property of the estate. However, when there is coverage for the directors and officers and the debtor, the proceeds will be property of the estate if depletion of the proceeds would have an adverse effect on the estate to the extent the policy actually protects the estate's other assets from diminution. Lastly, when the liability policy provides the debtor with indemnification coverage but indemnification either has not occurred, is hypothetical, or speculative, the proceeds are not property of the bankruptcy estate." (*Ibid.,* citing *In re Allied Digital Technologies, Corp.* (Bankr. D. Del. 2004) 306 B.R. 505, 511.)

Here, it appears that AmTrust's payment of attorney fees on behalf of DBC and its principals; i.e., paid to XDs to pay their attorneys, are proceeds of DBC's insurance policy which are property of the bankruptcy estate.

DBC argues: "The decisive issue in determining whether insurance proceeds constitute "estate property" is the presence—or absence—of an indemnification exposure against the debtor. Courts treat insurance proceeds as estate property only where exhausting policy limits would trigger

indemnity claims against the bankruptcy estate. That risk is entirely absent here. DBC faces no indemnification obligation, and AmTrust alone funds the defense. Because payment of these defense costs cannot create liability for the estate or diminish estate assets, the insurance proceeds at issue are not property of the estate, and the automatic stay does not apply." (Supp. Brief, 3:25-26:3.)

The only evidence supporting this statement is that of DBC's counsel, who states in part: "Any fee award issued by this Court will be satisfied exclusively from applicable AmTrust insurance proceeds, in accordance with AmTrust's defense and supplementary payments obligations under the policy." (Jones decl., ¶5.) Mr. Jones states: "No enforcement of any fee award will be sought against DBC's bankruptcy estate or against any property of the estate." (*Id.*, ¶6.) "Cross-Defendants seek enforcement solely against applicable insurance proceeds, consistent with the Bankruptcy Court's October 18, 2021 order." (*Ibid*.) However, the cases cited state insurance proceeds covering a debtor's defense costs are estate assets.

Mr. Jones states that the insurer, AmTrust, has already been reviewing, approving, and paying attorney fees directly to DBC's attorneys. (Jones decl., ¶3.) Mr. Jones states DBC has no liability for attorney fees. In that case, it appears the interested party would be AmTrust, which is not a party to this action. The insurance policy has not been provided. It is unknown whether AmTrust can seek indemnification from DBC or others. Any such liability would be a debt to the estate or would impact the estate.

A stay protects creditors as a group from any one creditor who might otherwise seek to obtain payment on its claims to the others' detriment. (*Boucher*, *supra,* at 1092.) If AmTrust recovers attorney fees outside of the bankruptcy court, it could impact the recovery by other creditors. In other words, XDs are seeking fees based upon DBC's contract with De Arkos, thus fees would be paid to XDs, who would reimburse AmTrust. If attorney fees are paid to DBC, regardless of what DBC has them earmarked for, those would become part of DBC's estate over which the bankruptcy court has jurisdiction. AmTrust would be a creditor. If XDs are not liable for some or all fees and costs, it appears AmTrust's remedy is to bring a subrogation action.

5. Conclusion and Order

Section 362 is applicable to "an action" against DBC, such as De Arkos's cross-complaint. This motion is part of that action. The bankruptcy court's order lifting the stay was only applicable to De Arkos as the moving party on that motion before the bankruptcy court. XDs have not established that the bankruptcy stay does not apply to this motion. Nor have they established that

XDs' recovery of attorney fees and expert fees would not impact the bankruptcy estate. Therefore, **this motion is DENIED**.

De Arkos is directed to submit a written order to the Court consistent with this ruling and in compliance with Cal. Rules of Court, Rule 3.1312.

[END OF TENTATIVE RULINGS.]