TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, February 7, 2024 3:00 p.m.
Courtroom 19 –Hon. Oscar A. Pardo
3055 Cleveland Avenue, Santa Rosa

The 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, **YOU MUST NOTIFY** the Judge's Judicial Assistant by telephone at **(707) 521-6602**, and all other opposing parties of your intent to appear, **and whether that appearance is in person or via Zoom**, no later 4:00 p.m. the court day immediately preceding the day of the hearing.

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

TO JOIN ZOOM ONLINE:

Department 19 Hearings
MeetingID: 160-421-7577
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1. SCV-263245, Parmlee v. Perryman

Plaintiff Steven P. Parmalee ("Plaintiff") initiated this action and filed the complaint ("Complaint") against defendant Jerome E. Perryman ("Defendant"). This matter is on calendar for the motion by Plaintiff for terminating sanctions due to Defendant's refusal to produce discovery responses after orders were made compelling responses on April 3, 2019. The Motion is **DENIED**. The request for monetary sanctions is GRANTED.

I. Governing Law

Once an order regarding discovery has been made, it is irrelevant on future hearings enforcing the order whether that order was erroneous, as the appropriate relief would be to appeal the erroneous order, not to ignore the efforts to enforce it. *In re Marriage of Niklas* (1989) 211 Cal.App.3d 28, 35-36.

CCP § 2025.450(g)(1) provides that a monetary sanction "shall" be imposed against the party losing a motion to compel deposition unless the court finds "substantial justification" for that party's position or other circumstances making sanctions "unjust." Further monetary sanctions

are available for any violation of a lawful court order, up to $1,500 per violation. CCP § 177.5; See also *Caldwell v. Samuels Jewelers* (1990) 222 Cal.App.3d 970, 977-979. Regarding evidentiary and issue sanctions, once a party or witness has been ordered to attend a deposition, or to answer discovery, or to produce documents, more severe sanctions are available for continued refusal to make discovery. CCP §§ 2023.010, 2031.310(i). Such sanctions include issue sanctions (CCP § 2023.030(b)) and evidentiary sanctions (CCP §§ 2023.030(b), (c)). "The penalty should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery. Where a motion to compel has previously been granted, the sanction should not operate in such a fashion as to put the prevailing party in a better position than he would have had if he had obtained the discovery sought and it had been completely favorable to his cause." *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793. The purpose of discovery sanctions is not to punish an offending party for discovery abuses, but rather to undo the harm imposed by misuse of discovery. *McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 210.

When parties disobey discovery orders, a number of factors are relevant to the court's determination of the appropriate remedy, including:

> 1) the time which has elapsed since [discovery was] served, 2) whether the party served was previously given a voluntary extension of time, 3) the [amount of discovery] propounded, 4) whether the [responses] sought information which was difficult to obtain, 5) whether the answers supplied were evasive and incomplete, 6) the number of [requests] which remained [unfulfilled], 7) whether the [requests] which remain [unfulfilled] are material to a particular claim or defense, 8) whether the answering party has acted in good faith, and with reasonable diligence, 9) the existence of prior orders compelling discovery and the answering party's response thereto, 10) whether the party was unable to comply with the previous order of the court, 11) whether an order allowing more time to answer would enable the answering party to supply the necessary information, and, 12) whether a sanction short of dismissal or default would be appropriate to the dereliction.

Deyo v. Kilbourne (1978) 84 Cal.App.3d 771, 796–797.

II. Analysis

The Court issued orders compelling inspection of documents and answering interrogatories on April 3, 2019 (the "April 2019 Order"). The April 2019 Order also deemed as admitted fifteen (15) request for admissions, including one regarding the genuineness of a indebtedness note executed between the parties. The Court then ordered Defendant to produce documents and respond to interrogatories. On May 14, 2019, a Notice of Bankruptcy regarding Defendant's bankruptcy case was filed, staying this case during the pendency of that action. A notice of termination of stay, and remand of this case, was filed with the Court on July 26, 2023. Thereafter, a Notice of Entry of Order of the April 2019 Order was served and filed on September 26, 2023. Plaintiff received no responses as required by the April 2019 Order. See

Glaubiger Declaration, ¶ 8. This motion followed on November 16, 2023, requesting Defendant's answer be struck for failure to produce responses.

Plaintiff moves for terminating sanctions for Defendant's failure to provide the ordered responses to interrogatories and requests for production of documents. Frankly, Plaintiff has not shown that the discovery not produced would not be a result more favorable than the production of the requested documents or the substance of the requests already deemed admitted. See *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796–797. Any of the documents produced or interrogatories answered cannot exceed the relief already accorded for Defendant's failure to answer the discovery. It appears to the Court that the admissions themselves accomplish the same result as the requested motion relief. To strike Defendant's answer in this posture would be punitive, rather than seeking to redress the harm of failing to produce responses. *McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 210. As a result, striking the answer is inappropriate.

Nonetheless, the failure to produce the ordered discovery is obvious discovery abuse, and justifies monetary sanctions. Plaintiffs seek $2,671 in monetary sanctions, representing 6.5 hours (2.5 hours actually expended, and 4 further hours expected) at $400/hr, plus $71 in filing fees. Glaubiger Decl. ¶ 10. Only 2.5 hours of attorney time and the filing fees are not speculative. Only actual costs incurred are allowable under CCP § 2023.030. Therefore, monetary sanctions of $1,071 are appropriate and GRANTED. Defendant shall pay $1,071 in monetary sanctions to Plaintiff within 30 days of notice of this order.

III. Conclusion

Based on the foregoing, the Plaintiff's motion is **DENIED**. Plaintiffs' request for monetary sanctions are **GRANTED**. Defendant shall pay $1,071 in monetary sanctions to Plaintiff within 30 days of notice of this order.

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

2. SCV-269538, Austin v. Smith

Plaintiff Christopher D. Austin ("Plaintiff"), filed the presently operative Second Amended Complaint (the "SAC") against defendant Karin A. Smith ("Defendant"), arising out of Defendant's alleged misdeeds in managing the Estate of Daniel E. Austin (the "Estate").

This matter is on calendar for the motion by Defendant for summary judgment of the SAC or in the alternative adjudication pursuant to Cal. Code Civ. Proc. ("CCP") § 437(c). Summary judgment is GRANTED.

I. Evidentiary and Pleading Issues

The Court takes permissive judicial notice under Evidence Code § 452 of the docket and record within SPR-090698 (the "Probate Case").

Plaintiff has filed his opposition five days late (despite his averment that it is only a single day late). Plaintiff has offered explanation of his tardy filing due to medical issues through an unsworn email, which has no sender or recipient information, attached to a filing, signed January 25, 2024. The purported email avers that the documents will be filed and served "later today". Per the proof of service attached, this did not occur, rather the service did not occur to Defendant until January 28, 2024, and the documents were not filed with the Court until January 29, 2024. This is so untimely as to make the Court disregard the filing, despite Plaintiff's purported medical issues (if such considerations were adequately supported by an unsworn filing).

II. Underlying Facts

Plaintiff's remaining cause of action against Defendant is for breach of fiduciary duty. Defendant's Separate Statement of Undisputed Material Fact ("DUMF"), ¶ 1. Plaintiff's father passed away, and Defendant was appointed by the Probate Court in SPR-090698 to administer the resulting Estate. DUMF ¶¶ 2-4. In the process of administering the Estate, Defendant was contacted by Sonoma County Code Enforcement regarding possible code violations on the real property within the Estate. DUMF ¶ 8. Defendant allowed the County to inspect the property on August 18, 2018, resulting in citations issued against the Estate for the code violations. DUMF ¶ 9. On February 7, 2020, Defendant was fully discharged by the Court in the Probate Case, and "(a)ll acts transactions, sales, and investment of (Defendant) (were) ratified, approved and confirmed." See DUMF ¶ 7; Smith Decl., Ex. 14. Plaintiff filed no objection to the discharge and ratification of the acts of Defendant within the Probate Case. DUMF ¶ 14.

III. The Burdens on Summary Judgment and Adjudication

A. Generally

Summary adjudication "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CCP § 437c(c). A moving defendant meets its initial burden to show that one or more elements of a cause of action "cannot be established" (CCP § 437c(p)(2)) by presenting evidence that, if uncontradicted, would constitute a preponderance of evidence that an essential element of the plaintiff's case cannot be established. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851; *Kids Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879. Alternatively, a defendant may show that there is a "complete defense" to a cause of action. CCP § 437c(p)(2). To show a complete defense, a defendant must present admissible evidence of each essential element of the defense upon which it bears the burden of proof at trial. *See, e.g. Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289. A defendant cannot base its "showing" on the plaintiff's lack of evidence to disprove its claimed defense. *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 472.

A moving party does not meet its initial burden if some "reasonable inference" can be drawn from the moving party's own evidence which creates a triable issue of material fact. *See, e.g. Conn v. National Can Corp*. (1981) 124 Cal.App.3d 630, 637; *Binder v. Aetna Life Ins. Co*. (1999) 75 Cal.App.4th 832, 840. If the moving defendant does not meet its initial burden, the plaintiff has no evidentiary burden. CCP § 437c(p)(2).

If a defendant meets its initial burden to show a "complete defense," the burden shifts to the plaintiff to provide sufficient evidence to raise a triable issue of fact as to the defense asserted. CCP § 437c(p)(2). *Consumer Cause, Inc.*, 91 Cal.App.4th at 468. An issue of fact exists if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." *Aguilar,* 25 Cal.4th at 845.

"(T)he pleadings determine the scope of relevant issues on a summary judgment motion." *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74. "(T)he burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint;* that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." *Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493 (emphasis in original). Where the deficiency is with the complaint, and not the evidence presented, the legal effect of a motion for summary judgment is the same as that of a motion for judgment on the pleadings. *American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1117.

B. Breach of Fiduciary Duty

"The elements of a claim for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) its breach, and (3) damage proximately caused by that breach." (*Mendoza v. Cont'l Sales Co.* (2006) 140 Cal.App.4th 1395, 1405; *Gutierrez v. Girargi* (2011) 194 Cal.App.4th 925, 932.) Executors and administrators owe a fiduciary duty to preserve the assets of an estate. *Estate of Effron* (1981) 117 Cal.App.3d 915, 928. Estate administrators owe a duty to protect the interest of estate beneficiaries. *In re Guzzetta's Estate* (1950) 97 Cal.App.2d 169, 172; *accord*. *Estate of Effron* (1981) 117 Cal.App.3d 915, 928; *Estate of Bowles* (2008) 169 Cal.App.4th 684, 691 ("[A] trust beneficiary can bring a proceeding against a trustee for breach of trust.").

Probate Code § 7250 (a) provides: "When a judgment or order made pursuant to the provisions of this code concerning the administration of the decedent's estate becomes final, it releases the personal representative and the sureties from all claims of the heirs or devisees and of any persons affected thereby based upon any act or omission directly authorized, approved, or confirmed in the judgment or order. For the purposes of this section, 'order' includes an order settling an account of the personal representative, whether an interim or final account." Such a release does not apply when "the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment as to any material fact", by omission or otherwise. Probate Code § 7250 (c).

C. Litigation Privilege

The litigation privilege of CC section 47(b), bars a civil action for damages for communications made "[i]n any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to [statutes governing writs of mandate]."

IV. Analysis

Defendant makes several arguments regarding summary judgment. Particularly, the Court finds Defendant's contention that the ratification and discharge of the probate court in the underlying case as dispositive evidence that there was no breach of Defendant's fiduciary duty. As was previously covered by the Court in the rulings on Demurrer, the duty owed by Defendant was to the Estate, and thereby if Defendant breached no duty to the estate, there is no breach of fiduciary duty alleged. In the Probate Case, the Court has discharged and ratified the actions of the Defendant. All acts of the Defendant were "ratified, approved and confirmed". DUMF ¶ 7. There is no evidence of fraud that would implicate Probate Code § 7250 (c). Therefore, the discharge prevents Defendant from being liable for acts against the Estate. Prob. Code § 7250 (a). As a result, Defendant has presented evidence that Plaintiff cannot prove an element of his cause of action. Defendant has shifted the burden on summary judgment.

Plaintiff has presented no timely opposition to the motion. As such the shifted burden has not been met. Arguendo, even if the Court were to weigh the Plaintiff's opposition, Plaintiff presents no admissible evidence rebutting this showing. Plaintiff attempts to aver that Probate Code § 7250 (c) applies, however Plaintiff presents no evidence of fraud in the showing made to the Court in the Probate Case. The exception under Prob. Code § 7250(c) only applies when "the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment as to any material fact". Plaintiff's other arguments related to tenancy rights are neither contained within the SAC (and therefore are properly disregarded), nor material to the stated cause of action for breach of fiduciary duty. *Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493. As such, even were the opposition considered, Plaintiff had not met the shifted burden as to this complete defense.

Therefore, the Motion is GRANTED.

V. Conclusion

Based on the foregoing, the motion for summary judgment is **GRANTED**.

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

3. SCV-271287, Holly & Associates, Inc. v. Novich

Plaintiff Holly & Associates, Inc. ("Plaintiff"), filed the First Amended Complaint (the "FAC") against defendants Lee Novich and Renee Novich as trustees of the Novich Family Trust ("Defendants"), as well as Does 1-20, arising out of alleged breach of contract. Defendants have in turn filed a cross complaint against Plaintiff, Janver C. Holly, Richard Holly, Justin Hunter (all together, the "Hollys"[1]), ten subcontractors, and eight surety companies and insurers, relating to breach of contract, construction defects, and negligence (the "DXC"). The Hollys have

[1] While the Court notes cross-defendant Justin Hunter does not have the surname Holly, his presence is inherently related to his association with Plaintiff, Holly & Associates, and therefore he is included here for ease of reference. No disrespect is intended.

thereafter filed a cross-complaint for indemnity and breach of contract against the ten subcontractors named in the DXC, along with eleven more subcontractors not named therein (the "HXC").

This matter is on calendar for the motion by the Hollys to designate the case complex under Cal. Rules of Court ("CRC"), Rule 3.400(a).

I. Background:

Plaintiff filed the underlying FAC in this case alleging that Defendants failed to pay all amounts due under a construction contract on a four million dollar single family home. On October 24, 2023, Defendants in turn filed a Cross-Complaint, the DXC, alleging negligence, breach of contract and construction defects. The DXC names twenty-two parties, including the Hollys, ten subcontractors, and eight surety companies and insurers. The DXC alleges that the construction defects include defects in the Grading, Drainage, Asphalt, Framing, Plumbing, Windows + Glass, Doors, Window Shades + Door Screens, Stucco + Plaster, Roofing, Garage Doors, Electrical + Lighting, Drywall, Tiles, and Concrete. See DXC ¶ 7. The Hollys have thereafter filed the HXC, naming the ten subcontractors named in the DXC, and eleven additional subcontractors alleging both breach of contract and indemnity as related to the construction defect claims contained in the DXC. On November 28, 2023, the Hollys brought the instant motion to designate the case as complex under Cal. Rule of Court 3.400 due to the construction defect claims contained in the DXC. Defendants have filed an opposition.

II. Governing Law

"A 'complex case' is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel." CRC Rule 3.400(a). "With or without a hearing, the court may decide on its own motion, or on a noticed motion by any party, that a civil action is a complex case…" CRC, Rule 3.403(b). "In deciding whether an action is a complex case under (a), the court must consider, among other things, whether the action is likely to involve:

> (1) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
>
> (2) Management of a large number of witnesses or a substantial amount of documentary evidence;
>
> (3) Management of a large number of separately represented parties;
>
> (4) Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
>
> (5) Substantial postjudgment judicial supervision.

CRC, Rule 3.400(b).

An action is provisionally a complex case if it involves construction defect claims involving many parties or structures. CRC, Rule 3.400(c)(2). Notwithstanding this, "an action is not provisionally complex if the court has significant experience in resolving like claims involving similar facts and the management of those claims has become routine." CRC, Rule 3.400(d). If the case was not originally designated or counterdesignated as "complex" but is later determined by the court to be "complex," the fees must be paid within 10 calendar days of the court order. Failure to pay has the same effect as failure to pay a filing fee. See Gov. Code § 70616(a), (g).

III. Analysis

Two factors support designation of the case as complex. The Court will first address whether the case meets the standard for provisional designation as complex. The Court does note that this case only involves a single home and surrounds, but that is not the exclusive measure for provisional designation under CRC Rule 3.400 (c)(2). Even just the DXC, filed by Defendants themselves, adds eighteen parties beyond the Hollys to the case to litigate the various construction defects that Defendants believe are pertinent to their claims. The HXC adds a further eleven parties not currently named in the DXC. Defendants aver that the eleven additional parties named in the HXC are "likely to be dismissed". Unfortunately, that is not the present posture of this case and therefore this argument is unpersuasive. There is certainly not sufficient evidence presented to the Court for the likelihood of appearance of these parties to be taken for granted. The probability of there being more than fifteen separately represented parties in the case is high. Similarly, Defendants' averment that the case only relates to breach of contract is also unpersuasive given that construction defects are an explicit allegation within the DXC. See DXC ¶¶ 7, 27, & 30. As such, the case meets the standards for provisional designation under CRC Rule 3.400 (c)(2).

Second, the Court looks to the factors under CRC Rule 3.400 (b). First, as is covered above, the case will involve management of a large number of separately represented parties. See CRC Rule 3.400 (b)(3). Second, based on the number of parties, the allegations of construction defects, and the showing by the Hollys that there is extensive documentary evidence which may be at issue, the case is likely to implicate substantial amounts of documentary evidence and written discovery. The Hollys aver that the documents associated with the work exceed 10,000 pages. Even less than a third of the documents are relevant, this means document productions will reach the thousands of pages, not considering the presence of the subcontractors. It is difficult to ascertain how far the need for documents reaches, given that Defendants allege that the construction defects are implicated in the Grading, Drainage, Asphalt, Framing, Plumbing, Windows + Glass, Doors, Window Shades + Door Screens, Stucco + Plaster, Roofing, Garage Doors, Electrical + Lighting, Drywall, Tiles, and Concrete. See DXC ¶ 7. Therefore, the second factor under CRC Rule 3.400 (b) also supports complex designation. At this stage and given the numerous litigants involved, the Court is also contemplating moderate to extensive motion practice associated with discovery and other pre-trial issues. CRC Rule 3.400(b)(1). The Court cannot conclusively state that the anticipated motions will "raise difficult or novel legal issues" but the potential volume may render management of the case impracticable for the Court. These

factors support the conclusion that the provisional designation is an accurate assessment of the case.

Therefore, the Hollys' motion to designate the case complex is GRANTED. The Court sets a Case Management Conference for the purpose of determining the case management order. The Court continues the currently set March 14, 2024, Case Management Conference to April 4, 2024 at 3:00 pm. The Court notes that the Hollys' motion is accompanied by a proposed Case Management Order ("CMO"). The parties are ordered to meet and confer regarding possible stipulation or limited agreement on the terms of a Case Management Order. Any stipulation regarding the CMO should be submitted to the Court by March 26, 2024.

Coordinating the exchange of both discovery demands and motions is likely to substantially reduce the burden on both the parties and the Court. Defendants do not object to a stay of discovery. Particularly, given the probability of appointment of a referee, until such time that a case management order is in place, allowing discovery appears premature. Therefore, Holly's request for protective order is GRANTED until such time that there is a case management order providing a discovery schedule.

On this note, the Court acknowledges the Hollys' request for a special master to be appointed. With the Court having made the designation that the case is complex, appointment of a referee to add both efficiency and attention to the case appears appropriate. The Court believes that the appointment of a referee under CCP § 638 would be the most efficient route should the parties be able to reach a stipulation regarding the identity and scope of the referee. Should the parties not be able to stipulate, the Court will thereafter make a determination of its power to appoint a referee under CCP § 639. The Court intends to examine both whether appointment of a referee is proper for discovery purposes and for facilitating settlement conferences. *Lu v. Superior Court* (1997) 55 Cal.App.4th 1264, 1270-1271. The Court notes Defendants' contention regarding the cost of a referee, but there is no evidence offered that Defendants are indigent or cannot afford a proper allocation of the fees involved. Indeed, given the amounts at issue, speedy resolution of the case through settlement conferences with a referee may drastically reduce the costs involved for all parties. Therefore, this aspect of the motion is CONTINUED to the Case Management Conference on April 4, 2024, at 3:00 pm.

IV. Conclusion.

The Hollys' motion to designate the case complex is GRANTED. The Court sets a Case Management Conference on April 4, 2024 at 3:00 pm. The parties are ordered to meet and confer regarding possible stipulation or limited agreement on the terms of a Case Management Order. Any stipulation regarding the case management order should be submitted to the Court by March 26, 2024. Holly's request for protective order is GRANTED until such time that there is a case management order providing a discovery schedule.

The request to appoint a referee is CONTINUED to the Case Management Conference on April 4, 2024 at 3:00 pm. The parties are ordered to meet and confer regarding a referee.

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

4. SCV-273199, Mendez v. Bello

Plaintiffs, Richard Mendez ("Mendez"), Natasha Khallouf ("Khallouf") and Sean Musgrove ("Musgrove, together with Mendez and Khallouf, referenced collectively as "Plaintiffs"), filed the operative first amended complaint ("FAC") against defendants Tony Bello, trustee of the Tony Bellow Living Trust Date 06/26/1997 ("Bello"), PLM Loan Management Services Inc. ("PLM", together with Bello, referenced collectively as "Defendants"), and Does 1-25 regarding the property commonly known as 6972 Sain Helena Road, Santa Rosa, California, with causes of action for: 1) wrongful foreclosure; 2) cancellation of instrument; 3) quiet title; 4) violation of Civ. Code § 2924f; 5) violation of Civ. Code § 2923.5; and 6) violation of Business and Professions Code § 17200 et. seq. This matter is on calendar for Defendant Bello's motion to compel responses to form interrogatories ("FIs") pursuant to CCP § 2030.290, from Plaintiff Musgrove. The motion is GRANTED.

I. Relevant Law

Regarding the FIs, a party responding to an interrogatory must provide a response that is "as complete and straightforward as the information reasonably available to the responding party permits" and "[i]f an interrogatory cannot be answered completely, it shall be answered to the extent possible." Code Civ. Proc. ("CCP") §2030.220(a)-(b). "If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party." CCP §2030.220(c).

If a party fails serve a timely response to interrogatories, the court shall impose sanctions unless it finds that the party subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. CCP §2030.290(c). Code of Civil Procedure §2030.290 provides that if a party to whom interrogatories were directed fails to serve timely responses, the responding party waives all objections, including those based on privilege and work product protection, and the propounding party may move for an order compelling responses. CCP §2030.290(a)-(b); see also, *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 404. All that the moving party needs to show in its motion is that a set of interrogatories was properly served, that the time to respond has expired, and that no response has been provided. See, *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 905-906.

There is no requirement to meet and confer prior to filing a motion to compel where there has been no response to discovery requests. *Leach v. Superior Court* (1980) 111 Cal.App.3d 902, 906; *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 405. Sanctions are mandatory under the CCP for discovery abuses, absent substantial justification. CCP §§ 2031.300(c) & 2033.280(c). The purpose of monetary sanctions is to mitigate the effects of the necessity of discovery motions and responses on the prevailing

party. There is no requirement that the failure to comply with discovery be willful for the court to impose monetary sanctions. *Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 878.

II. Analysis

The Motion is accompanied by a proof of service showing that service of the moving papers was timely made on Plaintiff Musgrove. There is also a proof of service associated to the initial service of FIs indicating that they were served on August 8, 2023. See Declaration Steven Olson, Exhibit 1. Bello sent two meet and confer letters to Musgrove, which garnered no response. Musgrove has not provided responses to discovery, nor an opposition to this motion. The failure to respond to Bello's requests or substantively oppose the motion leaves the Court without discretion on the issue.

Based on the foregoing, Bello's motion to compel is **GRANTED**. Musgrove shall produce responses, without objections, to the FIs within 30 days of notice of this order.

CCP § 2031.300 (c) provides that a monetary sanction "shall" be imposed against the party losing a motion to compel responses to RPODs. The purpose of monetary sanctions is to mitigate the effects of the necessity of discovery motions and responses on the prevailing party. Bello seeks $2,000.00, representing a mix of attorney work and paralegal work $500/hr and $175/hr respectively, plus $60 in filing fees. Olson Declaration ¶ 5. Bello requests time for both costs of legal services already performed at the time the motion was filed, and legal services costs Bello expects to incur for the hearing which has not yet occurred. This is improper, as discovery sanctions are only allowable for costs both reasonable and actual. The hour spent preparing for the hearing is speculative and therefore denied. The costs otherwise provided appear both reasonable and actual and are therefore granted.

Therefore, the Court finds total sanctions award in the amount of $1,500.00 to be the appropriate amount. Plaintiff Musgrove is to pay $1,500.00 to Defendant Bello within 30 days of notice of this order.

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

5-6. SCV-273299, Bella Creek LLC, v. Wahidi Enterprises Inc.

Plaintiff Bella Creek LLC ("Plaintiff"), filed the complaint (the "Complaint") against defendants M.R. Christensen Construction, Inc. ("Christensen"), Gypsum Technologies Inc. ("Gypsum"), S.R. Iron, Inc. ("SR Iron"), West Coast Builders ("West Coast"), Wahidi Enterprises, Inc. ("Wahidi"), Absolute Urethane ("Absolute"), John Morris Heating ("Morris"), VanSandt Plastering, Inc. ("VanSandt"), Eno Glass, Inc. ("Eno") (all together "Defendants"), as well as Does 1-40, arising out of alleged breach of contract and construction defects. Cross-complaints from Wahidi, Eno, and SR Iron have each followed.

This matter is on calendar for a motion by the Plaintiff to designate the matter complex under Cal. Rule of Court ("CRC") Rule 3.400. The Court has also continued the Case Management Conference ("CMC") from February 1, 2024, to the instant date. The parties are ORDERED TO APPEAR on the issue of the CMC. The Court's tentative decision on the issue of complex case designation follows.

I. Background:

Plaintiff filed the Complaint in this case alleging construction defects in construction of a multi-unit apartment complex. Defendants are the general contractor and subcontractors who participated in construction of the complex under the construction contract.

II. Governing Law

"A 'complex case' is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel." Cal. Rules of Court "CRC," Rule 3.400(a). "With or without a hearing, the court may decide on its own motion, or on a noticed motion by any party, that a civil action is a complex case…" CRC, Rule 3.403(b). "In deciding whether an action is a complex case under (a), the court must consider, among other things, whether the action is likely to involve:

> (1) Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
>
> (2) Management of a large number of witnesses or a substantial amount of documentary evidence;
>
> (3) Management of a large number of separately represented parties;
>
> (4) Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
>
> (5) Substantial postjudgment judicial supervision.

CRC, Rule 3.400(b).

An action is provisionally a complex case if it involves construction defect claims involving many parties or structures. CRC, Rule 3.400(c)(2). Notwithstanding this, "an action is not provisionally complex if the court has significant experience in resolving like claims involving similar facts and the management of those claims has become routine." CRC, Rule 3.400(d). If the case was not originally designated or counterdesignated as "complex" but is later determined by the court to be "complex," the fees must be paid within 10 calendar days of the court order. Failure to pay has the same effect as failure to pay a filing fee. See Gov. Code § 70616(a), (g).

III. Analysis

Plaintiff has moved the Court for the complex case designation, and Defendants have filed no opposition. Indeed, there appears to be a stipulation to a referee under CCP § 638 by some portion of the parties. However, the Court still turns to the substance of the complex case designation analysis.

First, the Court notes that the case meets the provisional designation under CRC Rule 3.400 (c)(2). The allegations here revolve around construction defects in an apartment complex which constitutes a large number of units, and there are nine defendants named in the Complaint alone. As such, the case meets the provisional designation factor under CRC 3.400(c)(2).

Provisional designation being proper, the Court looks to the factors under CRC Rule 3.400 (b). First, as is covered above, the case involves a large number of parties. Second, the subject property involves multiple living units, likely increasing the number of witnesses necessary to present the case. Plaintiff avers in addition that the case will involve substantial documentary evidence. Both these factors therefore support complex case designation.

Therefore, the Plaintiff's motion to designate the case complex is GRANTED. No proposed case management order has been submitted. The Court intends to continue the matter to a CMC for the purpose of determining the case management order. The Court sets a CMC on March 14, 2024, at 3:00 pm. The parties are ordered to meet and confer regarding possible stipulation or limited agreement on the terms of a Case Management Order. Any stipulation regarding the case management order should be submitted to the Court by March 5, 2024.

The Court notes that Plaintiff has requested a special master be appointed and refers the Court to the stipulation being circulated. The Court will address this further at the hearing, but as a preliminary matter, the Court would intend to hear from each party as to the position on stipulation to a referee under CCP § 638. Therefore, on this issue the parties are ORDERED TO APPEAR. While the Court notes that Plaintiff's stipulation would be capable of appointing a referee by agreement under CCP § 638, any appointment by the Court would require the substantially more detailed analysis under CCP § 639. The Court will hear from the parties at the hearing, and if necessary, will further address the appointment of a referee at the CMC set for March 14, 2024.

IV. Conclusion.

The Plaintiff's motion to designate the case complex is GRANTED. The Court sets a Case Management Conference on March 14, 2024, at 3:00 pm. The parties are ordered to meet and confer regarding possible stipulation or limited agreement on the terms of a Case Management Order. Any stipulation regarding the case management order should be submitted to the Court by March 26, 2024. On the request to appoint a referee the parties are ORDERED TO APPEAR.

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

7. SCV-273509, Gutierrez Ortega v. American Honda Motor Co, Inc.

Plaintiffs Pedro Gutierrez Ortega and Yolanda Rivera Gonzalez ("Plaintiffs") initiated this action and filed the complaint ("Complaint") against defendants American Honda Motor Co., Inc. ("Defendant") and Does 1 through 10, for alleged defects in a 2020 Honda Accord Hybrid, VIN 1HGCV3F98LA000348 (the "Vehicle"). The Complaint contains causes of action for: 1) breach of express warranty under the Song-Beverly Consumer Warranty Act, Civ. Code § 1790 et seq. (the "Act"); 2) breach of implied warranty under the Act; and 3) violation of §1793.2 under the Act. This matter is on calendar for the motion by Plaintiffs to compel further production directed at the document requests set forth in Plaintiffs' first demand for inspection (the "RPODs"). The Motion is **GRANTED**.

I. Governing Law

Regarding RPODs, a party to whom a document demand is directed must respond to each item in the demand with an agreement to comply, a representation of inability to comply, or an objection. CCP § 2031.210(a). If only part of an item or category demanded is objectionable, the response must contain an agreement to comply with the remainder, or a representation of the inability to comply. CCP § 2031.240(c)(1). If a responding party is not able to comply with a particular request, that party "shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand." CCP § 2031.230. "This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party" and "[t]he statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item." *Id.*

Upon receipt of a response to a request for production, the propounding party may move for an order compelling further response if the propounding party deems that a statement of compliance with the demand is incomplete; a representation of inability to comply is inadequate, incomplete, or evasive; or an objection in the response is without merit or too general. CCP § 2031.310(a). A motion to compel further responses to a request for production of documents must "set forth specific facts showing 'good cause' justifying the discovery sought by the demand." CCP §2031.310(b)(1).

Absent a claim of privilege or attorney work product, the party who seeks to compel production has met his burden of showing 'good cause' simply by showing that the requested documents are relevant to the case, *i.e.*, that it is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence under CCP § 2017.010. *See also Kirkland v. Sup. Ct.* (2002) 95 Cal.App.4th 92, 98. Once good cause is shown, the burden shifts to the responding party to justify its objections. *See Coy v. Superior Court of Contra Costa County* (1962) 58 Cal.2d 210, 220-221.

The right to discovery is generally liberally construed. *Williams v. Superior Court* (2017) 3 Cal.5th 531, 540. Good cause can be met through showing specific facts of the case and the

relevance of the requested information. *Associated Brewers Distributing Co. v. Superior Court of Los Angeles County* (1967) 65 Cal.2d 583, 586–587. "(T)he good cause which must be shown should be such that will satisfy an impartial tribunal that the request may be granted without abuse of the inherent rights of the adversary. There is no requirement, or necessity, for a further showing." *Greyhound Corp. v. Superior Court In and For Merced County* (1961) 56 Cal.2d 355, 388. As the right to discovery is liberally construed, so too is good cause. *Id* at 377-378.

II. Analysis

First, as to meet and confer issues, the Court notes that Plaintiff sent two letters regarding meet and confer efforts before receiving any response from Defendant. Motion, Declaration of Gregory Sogoyan "Sogoyan Decl." – Ex. 5; Ex. 6. Plaintiffs' first letter unfortunately addresses in rote fashion the objections raised by Defendants' responses. Sogoyan Decl. – Ex. 5. However, it does invite Defendant to continue the meet and confer process either by letter or in a telephonic conference. Defendant failed to respond. Plaintiffs' second letter also appears rote but once again invites Defendant to engage in the meet and confer process. Sogoyan Decl. – Ex. 6. Based on these overtures, the Court is satisfied that Plaintiffs at minimum tried to engage Defendant in the meet confer process prior to filing the present motion.

The Court also notes that the case was assigned to its Discovery Facilitator Program, with the continued intent of securing an informal resolution to this dispute. While Defendant was entitled to object under Local Rule 4.14 to this assignment within 5 days of receipt of the notice, it failed to do so. Defendant's failure to timely object further frustrated informal resolution efforts. Despite this, in the interests of progress, the Court finds the meet and confer efforts were adequate. Analysis proceeds to the merits.

A. RPOD ¶¶ 1-6, 9-11, 13-14

Defendant avers that they have produced all documents not subject to objection, and therefore there is no legal basis to overrule the remaining objections. However, Defendant concedes that it has not produced any documents that are subject to the objections. Defendant has provided no information to either Plaintiffs or the Court as to what documents have been withheld subject to these objections. Defendant is both entitled to make objections, and withhold those documents subject to objection while producing all unobjectionable relevant documents. See CCP § 2031.220. However, that does not mean that Plaintiffs cannot move to have meritless objections overruled, and compel production of documents which were responsive and previously withheld. CCP § 2031.310 (a)(3). Defendant provides no authority stating that their partial production somehow obviates any need to produce documents withheld under unsupported objections. Moreover, Defendant also fails to identify those documents which it has withheld based on an objection or privilege. The Court has no information to determine what documents have been withheld and whether any asserted objection is applicable to the same. Any document for which a privilege is being asserted warrants the provision of a privilege log. CCP §2031.240(c)(1). Defendant has provided nothing in that respect.

As to Defendant's claims that Plaintiff's response to the objections were boilerplate, this argument is ill received. Defendant asserts that each production request was "vague, ambiguous,

overly broad, unduly burdensome, harassing, and as asking for information that is not relevant to the subject matter of this litigation and not reasonably calculated to lead to the discovery of admissible evidence." For example, any contention that documents relating to repair orders *for the Vehicle* is not relevant or likely to lead to admissible evidence is so baseless, that the most benevolent interpretation is that it was a boilerplate objection. See DSS RPOD ¶ 4. Defendant makes no effort to support its boilerplate objections, and as such they are overruled.

Defendant further objects that the requested information is unduly burdensome. Objections for undue burden must include types or categories of information that are not reasonably accessible. CCP § 2031.210(d). Trial courts retain broad discretion and authority to manage discovery issues, including determining whether a discovery request causes undue burden. *Toshiba America Electronic Components v. Superior Court* (2004) 124 Cal.App.4th 762, 773. Here Defendant claims undue burden, but has not sufficiently shown that the information requested is not reasonably accessible to meet the Court's expectation for undue burden. Indeed, no evidence is proffered for what the burden would be in making the requested production.

Defendant similarly avers that each production is vague, ambiguous and overly broad. Simply put, Defendants make no persuasive argument that any of these objections apply. The requests are each adequately specific, identifiable and reasonable in scope. Defendant's contention that commonly understood words and phrases such as "evidencing and/or describing" are vague, ambiguous and overly broad is not supported.

Therefore, as to RPOD ¶¶ 1-6, 9-11, 13-14, the motion to compel is GRANTED.

B. RPOD ¶¶ 7-8, 12, 15-29, 31

The Court similarly finds Defendant's averment that the statement of <u>inability to comply</u> because the requests are "vague, ambiguous, and overly broad" is also without merit. Propounding party has a right to receive a full and complete responses that

> exempts unsupported objections. A response that contains a representation of an inability to comply based on meritless objections is an incomplete and confusing response. Therefore, compelling responses free of the meritless objections is appropriate. If Defendant in fact has no responsive documents to a particular category and is unaware of the same ever existing, it should simply just say this.

Therefore, as to RPOD ¶¶ 7-8, 12, 15-29, 31, the motion to compel is GRANTED.

C. RPOD ¶ 30

Defendant's position that only Plaintiffs' vehicle is relevant to any aspect of the case ignores the second aspect of claims under the Act. In order to recover for damages Plaintiffs' burden is to prove a defect in the Vehicle. For this purpose, information about other vehicles matching the make and model of the one at issue in this case has probative value. However, this is not the end of a showing under the Act. Thereafter, the Plaintiffs may be entitled to enhanced damages if

they can establish that Defendant's failure to comply with its obligations under the Act was willful. See Civ. Code § 1794 (c). In this capacity, a showing that Defendant was aware of repeated issues across vehicles matching the make and model of the Vehicle may have substantial probative value. See, e.g., *Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138, 144. Such allegations are present in the Complaint and therefore the discovery requested is likely to lead to admissible evidence.

Defendant's objection that the term "SUBSTANTIALLY SIMILAR" complaints is inadequately defined is unpersuasive. Plaintiff particularly defines this, within RPOD ¶ 30, as a "similar customer complaint that would be the same nature of the reported system, malfunction, trouble code, Technical Service Bulletin Recommendation, dashboard indicator light, or other manifestation of a repair problem, as description listed in any warranty summary or repair order for the SUBJECT VEHICLE." The definition provided clearly delineates the relevant documents, and does not appear either overbroad or incapable of being properly understood. Defendant provides no persuasive reason why the request is objectionable.

Based on the foregoing, Plaintiffs' motion to compel is as to RPOD ¶ 30 is **GRANTED**.

III. Conclusion

Based on the foregoing, Plaintiffs' motion to compel is **GRANTED**. Defendant is to produce the requested documents within 30 days of notice of the court's ruling. No request for sanctions were made by Plaintiff, therefore, the Court will not impose any.

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

****This is the end of the Tentative Rulings.*****