TENTATIVE RULINGS
LAW & MOTION CALENDAR
Wednesday, March 1, 2023, 3:00 p.m.
Courtroom 17 –Hon. Bradford DeMeo
3035 Cleveland Avenue, Santa Rosa

PLEASE NOTE: In accordance with the Order of the Presiding Judge, a party or representative of a party may appear in Department 17 in person or remotely by Zoom, a web conferencing platform. Whether a party or their representative will be appearing in person or by Zoom must be part of the notification given to the Court and other parties as stated below.

CourtCall is not permitted for this calendar.

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

TO JOIN ZOOM ONLINE:

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

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

The following tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, **YOU MUST NOTIFY** Judge DeMeo's Judicial Assistant by telephone at **(707) 521-6725**, and all other opposing parties of your intent to appear, and **whether that appearance is in person or via Zoom**, by ***4:00 p.m. the court day immediately preceding the day of the hearing.***

1-3. SCV-256168, Matteri v Shear Builders

Defendant SBI's Motion for Mistrial is DENIED as explained herein.

Plaintiff's Motion for Partial Directed Verdict or, Alternatively, Motion for Judgment on the Pleadings, as to Matters in Phase II and Phase III of Trial Precluded from Reconsideration by Conclusive Findings in Phase I of Trial is GRANTED in part and

DENIED in part as explained herein. To the extent that it is denied, it is denied without prejudice as explained herein.

Plaintiff's Request for an Order to Show Cause re Contempt for Failure to Comply with this Court's Financial Condition Discovery Order DENIED without prejudice as explained herein.

Facts and History

This is a companion case to the prior SCV-254172, in which Plaintiff/Cross-Defendant/Cross-Complainant Ron Matteri ("Plaintiff") to this action sought to inspect the records of Defendant/Cross-Complainant Shear Builders, Inc. ("SBI"). Alleging that he and Defendants Rod Matteri ("Rod") and Jeff Knepper ("Knepper") (collectively, "the Individual Defendants") each own 1/3 of the shares of Defendant SBI and are directors. Plaintiff complains that there has been no regular meeting of the board of directors, SBI has been suffering losses, after he complained of losses Defendants locked him out of the business premises, withheld his cheques from SBI, terminated his employment, and transferred funds to a new account.

Plaintiff has asserted causes of action for involuntary dissolution and breach of written, oral, and implied contracts for money he allegedly loaned as well as his employment terms and money owed him as employment compensation in the form of salary or bonuses, conversion of real property in Idaho ("the Idaho Property"), and accounting and inspection of records. The operative version of Plaintiffs' complaint is his First Amended Complaint ("FAC").

Defendant/Cross-Complainant SBI filed its own cross-complaint against Plaintiff for 1) breach of a written buy-sell agreement ("the Buy-Sell Agreement") according to which Plaintiff was supposed to sell his shares of SBI to SBI if the later chose, claiming that it chose to buy but Plaintiff then refused to sell as agreed; 2) breach of fiduciary duty by using corporate information and trade secrets to his personal gain, inducing SBI employees to join a competitor, etc.; 3) breach of the written employment agreement (the Employment Agreement) by failing to work, as required, "full time using his best efforts for" SBI; and 4) conversion of various personal property, including water tanks, soil, money, and a truck.

Defendant/Cross-Complainant Rod filed his own cross-complaint against Plaintiff for negligence, assault, battery, and intentional infliction of emotional distress ("IIED"), claiming that Plaintiff, when driving his car, tried to hit or run over Rod, or at least threaten Rod with such injury.

Plaintiff then filed his own cross-complaint on April 15, 2015 against SBI for indemnification of all expenses and liabilities in enforcing his claims and defending against SBI's cross-complaint, along with a declaration of the indemnification rights and duties.

SBI invoked California Corporations Code section 2000 and an appraisal was ordered per orders entered on December 20, 2016 and January 25, 2017. An appraisal was conducted and on December 19, 2018 the Court issued an order confirming the appraisal award. The matter was split into five phases of trial.

After several years of intensive litigation, the matter went to a partial trial on January 28, 2022. After the 23rd day of the trial on May 19, 2022, the court took the matter under submission.

The court on June 9, 2022 issued a tentative decision on the first phase of the court trial. SBI filed a request for statement of decision on June 24, 2022, commencing a protracted dispute over the statement of decision and interlocutory judgment. On July 28, 2022, the court issued a statement of decision and an interlocutory judgment. The court found in favor of Plaintiff on his seventh cause of action, against the Individual Defendants for $148,899.00 plus additional damages which an accounting may determine regarding the Idaho Joint Venture; found in favor of Plaintiff on his ninth cause of action, against the Individual Defendants in the amount of $3,639,214.00; found in favor of Plaintiff on SBI's first cause of action; and found in favor of Plaintiff on his prayer for punitive damages for his seventh and ninth causes of actions, against all Defendants, in an amount to be determined.

Motions

SBI moves the court to declare a mistrial as to the entire Phase 1 trial. The Individual Defendants agree and join the motion. They contend that the court must declare a mistrial because Judge Wick, who tried the Phase 1 trial, has retired and is unavailable to act as trier of fact for the punitive damages and accounting aspects of Phase 1, or on all other phases requiring weighing of evidence and issues of credibility. They argue that under Civil Code ("CC") section 3295(d), the trier of fact who made findings of oppression, fraud, or malice sufficient to support punitive damages must also consider the evidence for determining the amount of punitive damages. They also argue that, in addition, the court must declare a mistrial because a party is entitled to have all portions of a bifurcated trial heard by the same judge and trier of fact.

Plaintiff opposes this motion. He argues that Defendants waived the right to seek the relief requested, the bifurcation order to which Defendants agreed, and which they themselves promoted, already mandates different triers of fact for different phases, and the CC section 3295(d) does not support their position.

Plaintiff himself moves for a partial directed verdict based on Code of Civil Procedure ("CCP") section 630 or, alternatively, a judgment on the pleadings against Defendants as to certain issues of Phase 2 and 3 on the basis that they were conclusively decided during Phase 1. He relies on the principles of collateral estoppel, res judicata, and judicial estoppel.

Defendants oppose this motion. They argue that the motion is procedurally and substantively deficient.

Finally, Plaintiff seeks an order to show cause ("OSC") why Defendants should not be found to be in contempt for failure to comply with financial discovery sought for the punitive damages.

Defendants also oppose the request for OSC, arguing that they have attempted to comply with discovery and the order on discovery is unclear, while the dispute over the issue of a mistrial relieves them of the underlying obligation at issue.

The moving parties have also filed reply papers in support of their respective motions.

Motion for Mistrial

Disentitlement Doctrine

Preliminarily, Plaintiff argues that SBI has lost its entitlement to bring this motion because it has refused to obey the court's legal orders and is in contempt. This is not persuasive here because the nature of the dispute, as discussed below, calls into question the very obligation to obey the orders which Defendants here challenge.

CC section 3295(d)

CC section 3295 governs evidence supporting the amount of punitive damages, including admissibility, protective orders, and the timing of both discovery and presentation of such evidence. Subdivision (d) addresses bifurcation of consideration of evidence supporting the amount of punitive damages and requires the court, upon a defendant's application, to allow admission and consideration of such evidence only after the trier of fact returns a verdict awarding punitive damages to the plaintiff. It states, in full,

> The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud.

Among other things, it therefore states that the evidence for determining the amount of punitive damages "*shall* be presented to the *same trier of fact* that found… one or more defendants guilty of malice, oppression, or fraud." Emphasis added.

CC section 3295 "was enacted to protect against the premature disclosure of a defendant's financial condition when punitive damages are sought." *Torres v. Automobile Club of Southern California* (1997) 15 Cal. 4th 771, 777; see also *Medo v. Sup.Ct.* (1988) 205 Cal.App.3d 64, at 67 (cited and relied on in *Torres*). As the Supreme Court explained in *Torres,* subsequent amendments to section 3295 added, among others, subdivision (d), providing rules for bifurcating trial.

The court in *Medo*, at 68, rejected the argument that the evidence of profit and financial condition for determining the amount of punitive damages only needs to be presented to the

same trier of fact which made the underlying determination of oppression, fraud, or malice. It ruled that the trier of fact must also be the same one which made the underlying determination of liability. It stated that the language of subdivision (d) 'shows that profit and financial condition evidence must be presented to the same trier of fact which had already made the two preliminary findings of liability and malice, oppression or fraud."' It explained, "[p]Punitive damages are not simply recoverable in the abstract. They must be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case*." Emphasis original.

City of El Monte v. Sup.Ct. (1994) 29 Cal.App.4th 272, 276-277, relying on *Medo*, similarly ruled that a trial court, having discharged a jury after determination of liability and oppression, fraud, or malice but before determination of punitive damages, abused its discretion in setting the case for trial before a second jury. It ruled under CC section 3295(d), evidence of financial condition must be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud, with no room for discretion unless the defendant agrees otherwise.

In *Torres v. Automobile Club of Southern California* (1997) 15 Cal.4th 771, the Supreme Court also addressed an aspect of the last sentence of section 3295(d), regarding the "same trier of fact," stating, at 777, "[t]he question here is whether the last sentence of section 3295(d) entitles a defendant to a new trial on all issues, including liability and compensatory damages, following the reversal of an award of punitive damages." It explained, at 777, that the restrictions and requirements for bifurcation, including the language in subdivision (d), 'safeguard defendants in two ways: "[t]he pretrial discovery limits ensure that defendants are not coerced into settling suits solely to avoid unwarranted intrusions into their private financial affairs, while the evidentiary restrictions minimize potential prejudice to the defense in front of a jury." [Citation.]' Regarding the last sentence, the court described the arguments in front of it, stating, at 778,

> [i]n the Auto Club's views, this provision means that the issues of liability, compensatory damages and the amount of punitive damages must always be decided by the same trier of fact, and that therefore such issues may never be decided by different juries. Construed in this manner, section 3295(d) effectively grants defendants the unqualified right to a complete retrial whenever the punitive damages portion of a judgment is reversed. Conversely, Torres argues that the "same-trier-of-fact" requirement simply defines and limits a new statutory right of bifurcation by clarifying that defendants are not entitled to have two separate juries resolve the issues when bifurcation is ordered. According to Torres, section 3295(d) does not entitle defendants to a new trial on liability and compensatory damages if only the punitive damages portion of a judgment is reversed.

Regarding the policies, purposes, and effect of the "same trier of fact" requirement, the Supreme Court in *Torres* stated, at 778-779 and with emphasis added,

> By requiring that the bifurcated issues be submitted to a single trier of fact, section 3295(d) *promotes judicial economy and avoids delay*.

> This reading of section 3295(d) is entirely consistent with the underlying purpose of the statutory scheme. As explained earlier, the restrictions set forth at section 3295 serve to safeguard defendants against the premature disclosure, both in discovery and at trial, of their profits and financial condition. But *disclosing such matters threatens no prejudice once a bifurcated trial has been held and the issues of liability, compensatory damages and malice, oppression, or fraud have been resolved against the defense* by both the trier of fact and the appellate court. *It is therefore unnecessary to construe the same-trier-of-fact restriction to apply to retrials in order to give full effect to the statute's protective purpose*.

It added, at 779, "we found nothing from which to infer a legislative intent to afford defendants a right to a complete retrial whenever punitive damages are reversed on appeal" and that, "[i]If anything, the legislative history confirms the view that the provision… is intended simply as a *restriction* upon a *defendant's right* to a bifurcation of the issues." Otherwise, however, the court did not need to reach the full meaning or application of subdivision (d) or the analysis in *Medo* or *City of El Monte* and it expressly avoided addressing such issues, stating, at 780-781, "[w]e need not and do not express an opinion on whether [*Medo* and *City of El Monte*], correctly determined the effect of the same-trier-of-fact restriction in the context of an improperly discharged jury. Even if we assume for purposes of argument that those decisions are correct, the… Legislature did not clearly express an intent to upset settled law regarding the power of appellate courts to affirm the liability and compensatory damage aspects of a judgment while ordering a retrial limited to punitive damages."

Plaintiff relies on *Barmas, Inc. v. Superior Court* (2001) 92 Cal.App.4th 372, where the appellate court affirmed the trial court's decision to order a retrial before a new jury of only the issues related to punitive damages, specifically whether defendant was guilty of malice and, if necessary, the punitive damages. The jury had deadlocked in the punitive damages phase on the issue of whether defendant was guilty of malice. The trial court ordered a limited retrial of the issue of malice, and if necessary, punitive damages, but not the underlying issue of liability. Defendant opposed the motion for retrial based on CC section 3295(d)'s language regarding the "same trier of fact." The appellate court denied defendant's petition, holding that the "same trier of fact" requirement was intended to promote judicial economy. It found that the Legislature did not intend to abrogate CCP section 616 or the power of trial courts to order partial retrials. It also held that the trial court did not err in ordering a retrial of the issues of malice and, if necessary, punitive damages, before a different jury. The court relied on *Torres*, explaining that although "the *Torres* case… involved a different scenario than the instant case, i.e., the reversal on appeal of an excessive punitive damages award, much of the court's reasoning for approving a retrial limited to punitive damages supports the partial retrial ordered by the trial court in this case." *Barmas*, 375. It further explained, at 375-376, that "the Legislature was concerned about a *defendant* getting a second bite at the apple by impaneling a second jury… after one jury had found against the defendant in the first phase…. This is not an issue when a partial retrial is required, whether… ordered by the appellate court (as in *Torres*), or by the trial court (as in this case)." Emphasis added. The court continued that just as the Supreme Court found in *Torres* that nothing in the legislative history indicated an intent to strip appellate courts of their authority, nothing indicates an intent to strip trial courts of their authority. It also noted that in *Torres*, the Supreme Court allowed a retrial of punitive damages without retrying whether the

conduct was found to be malicious and the court indicated that it would be proper to require retrial of the malice determination in addition to the punitive damages themselves if doing otherwise would deprive the defendant of a fair trial given the different knowledge of the different juries and the possibility that the second jury would be basing the damages on conduct which the original jury did not find warranted punitive damages. *Barmas*, 376-377, fn.1.

Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, involved a situation similar to that in Torres, and the question of whether, following an appeal regarding the amount of punitive damages, a retrial was required of only the amount of the punitive damages, or the underlying liability. Relying on *Torres* and *Barmas*, it ruled that retrial before a new jury was required for *only* the final phase determining the amount of punitive damages, and added, "[w]e are aware of no requirement that the jury in the new trial must be informed of which particular acts the first jury determined to be oppressive, fraudulent, or malicious…." *Bullock*, 671.

In an older decision predating CC section 3295(d), *Sharp v. Automobile Club of So. Cal.* (1964) 225 Cal.App.2d 648, the court, 654, held that an order granting a new trial as a result of excessive punitive damages must be limited to the amount of punitive damages. It accordingly reversed the order to the extent it granted a new trial on other issues. Explaining that the findings of liability for punitive damages were found to be proper, it rejected the argument that in such a situation it was "not proper to try the issue of amount of punitive damages separate and apart from the facts which are claimed to justify it, and that to separate the two will amount to the denial of a fair trial."

Defendant's view of CC section 3295(d) is arguably consistent with the plain meaning of the language, but the language does not compel that interpretation. The uncertainty is particularly evident with respect to the issue of whether to require mistrial, or new trial, of the underlying determination of liability, as opposed to whether Defendants were guilty of oppression, fraud, or malice. To the extent that the *Medo* court's interpretation of the language goes that far, it is not an unreasonable interpretation, but the language does not clearly mean that, and the language, reasoning, and analysis of the underlying purposes presented by the Supreme Court in *Torres* as well as by the courts in *Barmas* and *Bullock* compels a different conclusion.

Defendants' application of this subdivision, as the courts in *Torres*, *Barmas*, and *Bullock* indicated, clearly does not promote the policies of preventing prejudice or shielding a defendant from premature or gratuitous disclosure of sensitive information. As the court in *Barmas* noted, once a trier of fact has determined liability, or even whether there was oppression, fraud, or malice, the threat of prejudice from disclosure of the information for determining the amount of punitive damages has already passed. Likewise, requiring the same trier of fact to hear both phases also does not in any way shield a defendant from unnecessary disclosure or dissemination of sensitive financial or other information once the original trier of fact is no longer available. Either way, whether a new trier of fact simply hears the evidence for the amount of punitive damages or hears all of the underlying evidence as well, a new trier of fact will be exposed to the information.

The court is persuaded by the analysis in *Barmas* that the "same trier of fact" language actually promotes only a policy of judicial economy, and that this is the policy and purpose

behind its inclusion in the statute. The implications and inferences behind the language and analysis of *Torres*, which expressly skirted these issues, further supports this interpretation. The ultimate analysis and conclusions of these decisions, even though in the context of different procedural context, also applies to this context equally as well.

Moreover, it is clear that granting a mistrial of any portion of Phase 1 would be directly contrary to judicial economy. Given that the Supreme Court in *Torres*, as explained above, expressly stated that the relevant language in section 3295(d) is to promote judicial economy, it would be improper for this court to contravene that policy directly by ordering a mistrial under these circumstances, based on language which is intended to promote judicial economy.

The court finds that CC section 3295(d) does not support a motion for mistrial of any portion of Phase 1.

European Beverage and the "Same Judge" Rule

Defendants also contend that even without CC section 3295(d), the change in judges requires a mistrial because a party is entitled to have the same judge try all portions of a bifurcated trial that depend on weighing evidence and issues of credibility, pursuant to *European Beverage, Inc. v. Superior Court* (1996) 43 Cal.App.4th 1211.

In *European Beverage*, a matter went to trial before one judge who bifurcated the issues, ordering the equitable issues of accounting and constructive trust to be tried first in a court trial. The judge made findings at the end of the first phase and directed a special master to conduct an accounting of the net worth of the corporation and inquire into any diversion of assets to petitioners. The special master issued the report but the original judge then became unavailable and the matter was going to be transferred to a new judge to try the remaining issues. Petitioners filed a petition for writ of mandate with the court of appeal, requesting the court to quash the transfer or declare a mistrial. The appellate court granted the petition, explaining, '[t]he law has long been settled that in a civil action "[a] party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence, where the matter is tried without a jury, and from the jury that hears the evidence, where it is tried with a jury. He cannot be compelled to accept a decision upon the facts from another judge or another jury." [Citation.]' The court also explained, at 1214-1215, "[w]here there has been an interlocutory judgment rendered by one judge, and that judge then becomes unavailable to decide the remainder of the case, a successor judge is obliged to hear the evidence and make his or her own decision on all issues, including those that had been tried before the first judge, unless the parties stipulate otherwise. [Citation.] This is because an interlocutory judgment is subject to modification at any time prior to entry of a final judgment. (Ibid.) It is considered a denial of due process for a new judge to render a final judgment without having heard all of the evidence. [Citation.]"

In the above statement, *European Beverage* relied in part on *In re Marriage of Colombo* (1987) 197 Cal.App.3d 572, at 581, which stated, 'As a general rule, unless the decision of the trial court has been entered in the minutes and the judge who heard or tried the case is unavailable, the final judgment in any case tried without a jury "must be rendered by the judge

who tried the case; it would be a denial of due process for a new judge to render a decision without having heard all of the evidence." [Citation.]'

Plaintiff notes that the *European Beverage* decision was also based on the decision in *Guardianship of Sullivan* (1904) 143 Cal. 462, at 467, where all of the evidence was presented to one judge, all of the arguments took place before a second, and the actual decision was made by a third, "who had never heard either evidence or argument."

European Beverage appears to take a broader and more absolute approach than the *Colombo* and *Sullivan* decisions on which it was based. The court noes that *European Beverage* appears to be currently controlling but also notes that the decision on the face of the matters expands the principles from the prior cases significantly beyond the application in those cases.

Plaintiff also points out that the instant matter differs from the situations addressed in *European Beverage* and *Sullivan* and in a manner that makes their reasoning inapplicable. He notes that *European Beverage* and *Sullivan* addressed situations where there was a single type of trier of fact, either a judge or jury, and thus it was possible to have a single trier of fact make the decisions. He explains that in this case, the different phases were already ordered to have different triers of fact with a bench trial, then two jury-trial phases, and then two more bench-trial phases. See Third Order re Bifurcation of Equitable Claims and Defenses and Trial of This Entire Matter, filed July 5, 2019 ("Third Order"). As set forth in the court's Third Order, Phase 1 was a bench trial without a jury, Phases 2 and 3 are to be before a jury, and Phases 4 and 5 are to be a bench trial without a jury. He further notes that Defendant SBI not only agreed to this, but promoted it in its Motion to Address Order of Proof and Bifurcation/Severance filed on July 18, 2017, at page 1. SBI there requested a bench trial for part of the issues and a jury trial for part. Plaintiff notes that bifurcation of trial with a bench trial for one phase and a jury trial for another is not impermissible and correctly cites *Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit Dist*. (1978) 80 Cal.App.3d 863, at 868, as an example of one case involving such a mechanism. Moreover, the two remaining phases to be tried without a jury are on entirely separate pleadings and issues from those addressed in Phase 1. Phase 4 is limited exclusively to Plaintiff's Cross-Complaint for declaratory relief and indemnity and while Phase 5 is reserved only for any noticed request for attorneys' fees and costs. In the court's view, the different phases will not even result in the different judge or other trier of fact making a decision without having heard the relevant evidence and arguments.

Plaintiff has also cited the unpublished decision of *Khorshidi v Javaheri* 2021 Cal.App.Unpub. LEXIS 5090 *58, in which the court found that the one-judge rule was not violated where the different judges each heard the evidence for, and made decisions on that evidence regarding, separate, distinct issues which were "sufficiently severable." Given that this is unpublished, it is clearly not controlling authority and certainly this court may not rely on it to any extent that it actually conflicts with *European Beverage*. Nonetheless, the reasoning in the decision appears to be a reasonable and appropriate application of the principle and it may provide additional insight into interpreting the application of the principles set forth in *European Beverage* and the decisions on which it was based.

Plaintiff also relies on California Rule of Court ("CRC") 3.1591, which states that separate trial of an issue is appropriate so long as statements of decision are issued as to the individual trial phases. Plaintiff correctly notes that in this instance Judge Wick issued a Statement of Decision and interlocutory judgment on the Phase 1 trial and the issues therein. CRC 3.1591(b) expressly allows different judges to hear and decide different phases of a bifurcated trial, stating, "If the other issues are tried by a different judge or judges, each judge must perform all acts required by rule 3.1590 as to the issues tried by that judge and the judge trying the final issue must prepare the proposed judgment." Of course, this only applies if it is permissible to have different judges or triers of fact hear the different phases and does not, in of itself allow for different judges or triers of fact. It does, however, set forth the requirements for having a different judge decide different phases and, in this case, Phase 1 complies with CRC 3.1591.

Waiver

Plaintiff also argues that Defendants waived the right to request a mistrial on any basis. In part, this is based on Defendant's agreement to having different triers of fact hear different phases of the trial and in part it is based on Plaintiff's claim the Defendants unreasonably delayed in seeking this relief.

Plaintiff correctly points out that the decisions addressing waiver under either CC section 3295(d) or the "same judge" rule as set forth in *European Beverage* make it clear that a party may waive the right to seek a mistrial on these bases. The court in *Medo* held that the defendant had actually waived the protections of CC section 3295(d) because defendant remained silent when the trial court made the order for separate juries and it raised the issue only later. The court in *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, at 1242, likewise stated that "the mandatory effect of section 3295, subdivision (d), like many other rights, may be lost by a defendant who fails to act promptly to preserve its protection." Similarly, the court in *European Beverage*, at 1215, citing *Medo*, also noted that a party may waive the right requiring a single judge to hear all of the issues of a bifurcated trial. The *European Beverage* court, at footnote 1, also cited *In re Horton* (1991) 54 Cal.3d 82, at 98-100, for the proposition that "Participation without objection in a subsequent phase of a bifurcated trial before a different judge may constitute waiver of this right."

Plaintiff points out that Defendants remained silent in this very issue from the time they first learned of Judge Wick's decision to retire after Phase 1 on April 27, 2022, during the pendency of that trial, remained silent during the numerous following days of trial and testimony by witnesses on all sides, remained silent through closing argument and the conclusion of the trial, remained silent when Judge Wick explained his retirement to the parties after closing arguments on May 19, 2022, continued to remain silent through the official retirement after July 29, 2022, remained silent through the press release announcing Judge Wick's retirement, in which he clearly and expressly stated, with all original emphasis, "**My last day with the court will be July 29, 2022**." See Van Aelstyn Dec., Ex.F. As shown in Van Aelstyn Dec., Ex.H, the reporter's transcript of proceedings of September 22, 2022, at 7: 15-8:1, 10:10-21, and 11:24-12:16, Defendants were silent about this issue when the court informed them that Judge Wick was not returning and of the resulting change in the judge and invited them to make comments

on the status of the proceedings. They mentioned other issues but otherwise made nothing that could possibly be construed as touching on this problem and added that they had nothing further. Moreover Plaintiff notes, after he served financial discovery requests on Defendants on August 2, 2022, Defendants responded with various objections which conspicuously lacked any objection on the basis that they did not need to produce the information due to the requirements of CC section 3295(d) and the change in the trier of fact. See Van Aelstyn Dec., Exs. K-V. Defendants also partly complied with the Statement of Decision by paying a retainer to a CPA who was to analyze the financial information. They otherwise failed to comply with the 90-day deadline which the Statement of Decision set forth, but in so going, they again raised numerous explanations except for the requirements of section 3295(d) or the need for a mistrial due to the change in the judge.

Defendants' reply papers do not dispute the above facts or history of Judge Wick's retirement but instead claim that they did not truly understand it until the hearing before this court on September 22, 2022. They do not dispute having been aware of the retirement as Plaintiff presents but argue that they were not aware of the full import or certainty of the retirement until September 22, 2022. In his declaration, SBI's attorney Donovan explains, at ¶2, that prior to September 22, 2022, he "had assumed that Judge Wick had remained employed by the Superior Court to finish out various cases." In short, Defendants ignore their long knowledge of the impending retirement, and admit that they failed to do anything merely because of an assumption without any credible basis. This court finds no basis for rejecting a finding of waiver simply because it was arguably only absolutely certain prior to September 22, 2022 that Judge Wick would not be available, in light of Defendants' mere assumption. The credibility of this assumption, moreover, flies in the face of the fact that Judge Wick had earlier expressly notified all that his "last day with the court will be July 29, 2022," a statement that leaves no room for interpretation. At the very least, moreover, Defendants had ample warning of this issue and yet remained absolutely and repeatedly silent on it, despite numerous opportunities and reasons why they should, and could, have raised it.

With respect to waiver of the right to seek a mistrial generally, the court in *Horn v. Atchison, Topeka & Santa Fe Ry. Co.* (1964) 61 Cal.2d 602, at 610, ruled that a party's motion for mistrial was too late because the party waited without objection until after the opposing counsel had committed the alleged improprieties. The party did not bring the motion until after the improprieties during trial were concluded and only sought the relief after, despite knowing the bases for it and having had opportunity to raise the issues. The court expressly held this delay to constitute a waiver.

Plaintiff persuasively argues that, in accord with *Horn*, Defendants could, and should, have moved for a mistrial before the conclusion of the Phase 1 trial since they already knew, during that trial, that Judge Wick was going to retire after the Phase 1 trial. Instead, they waited until after he had rendered his statement of decision and judgment. In fact, for months afterwards, they did not raise this issue in any manner whatsoever, despite opportunity, numerous proceedings in which they could have raised it, and the court's request for their comments on the situation. They actually filed their motion only after Plaintiff had filed his motion for partial directed verdict based on the Phase 1 trial.

Defendants' unreasonable delay combined with their agreement to having different triers of fact from the very start unequivocally demonstrates waiver of their right to seek a mistrial on the bases raised. Defendants themselves suggested having a bifurcated trial with different triers of fact with a judge for some phases and a jury for others, and they have clearly accepted the court's Third Order, issued in July 2019, expressly setting the different phases before these different triers of fact. Moreover, despite knowing about one month before the end of the Phase 1 trial that Judge Wick was going to retire after the Phase 1 trial, they failed to raise the issue at any time during that trial, when they could have stopped the waste of court and the parties' resources in proceeding with a trial which Defendants presumably knew would be rendered null and void. They did not even move for mistrial, or once make any reference to this issue in any way, once the trial was over, unlike the party in *Horn* who at least sought a mistrial upon conclusion of the trial. Again, the court in *Horn* found that delay sufficient to demonstrate waiver. Instead, they continued to wait. Defendants did not even raise this issue in any way at the time the court issued the Statement of Decision and judgment, two months after the trial's conclusion, but continued to remain silent. Again, during subsequent proceedings and discovery, Defendants for three more months continued to remain utterly silent about this issue, even though they had numerous opportunities and reasons for raising it: instead of claiming that a mistrial or similar relief was necessary, or referring in any way to the bases for this motion or the issue of a changed judge at all, they actually took at least one step toward complying with the Statement of Decision; during discovery into the financial and related information which Plaintiff sought for punitive damages, they responded with objections notably lacking these issues; and when this court asked the parties directly, at the hearing of September 22, 2022, to comment on the procedural posture of this case in light of Judge Wick's retirement, they continued to remain silent for another month, until after Plaintiff filed his motion for directed verdict or judgment on the pleadings.

The court therefore finds for the reasons set forth above that Defendants waived the right to seek a mistrial or any other relief on the bases raised in this motion.

Conclusion: Motion for Mistrial

The court, accordingly, DENIES the motion for mistrial.

Plaintiff's Motion for Partial Directed Verdict

Plaintiff moves for a partial directed verdict or, alternatively, a judgment on the pleadings against Defendants as to certain issues of Phase 2 and 3 on the basis that they were conclusively decided during Phase 1. He relies on the principles of collateral estoppel, res judicata, and judicial estoppel.

The Statement of Decision and Partial Judgment for Phase 1

As noted above, in the statement of decision and interlocutory judgment after the Phase 1 trial, the court found in favor of Plaintiff on his seventh cause of action, against the Individual Defendants for $148,899.00 plus additional damages which an accounting may determine regarding the Idaho Joint Venture; found in favor of Plaintiff on his ninth cause of action, against

the Individual Defendants in the amount of $3,639,214.00; found in favor of Plaintiff on SBI's first cause of action; and found in Plaintiff's favor his claim for punitive damages based on oppression, fraud, or malice.

Plaintiff's seventh cause of action in his FAC, filed on September 22, 2016, is for "Breach of Fiduciary Duty/Accounting" and in it Plaintiff alleges that the Individual Defendants owed him a fiduciary duty which they breached by conversion of checks and revenues due to Plaintiff regarding the Idaho Property, refusing to provide accounting or records or documents, or other information on the Idaho Property, and denying Plaintiff's status as a co-owner of the Idaho Property. He adds that the denial of his interest required him to initiate an action to quiet title which resulted in a judgment finding him to be a one-third owner of that property.

Plaintiff's ninth cause of action is for "Breach of Fiduciary Duty/Accounting" regarding all Defendants' alleged breaches toward Plaintiff as a shareholder by paying the Individual Defendants excessive salaries and bonuses paid the wives of the Individual Defendants even though they provided no work or services, provided the Individual Defendants with profit sharing contributions and credit cards for personal uses, all without required approval of shareholders or the board.

SBI's First Amended Cross-Complaint ("FACC") of February 22, 2017, alleges a first cause of action for Plaintiff's alleged breach of fiduciary duty during his tenure as president of SBI. It alleges that he obtained and shared with SBI's competitor confidential record and trade secrets, induced SBI employees to join the competitor, and used SBI accounts, credit cards, and goods for personal expenditures and uses.

The Statement of Decision ("also referred to as "SOD") filed on July 28, 2022 is 48 pages long and sets forth the court's findings and conclusions in detail.

Procedural Issues

Defendants argue that the motion is procedurally defective. They argue that there is no separate notice of motion and Plaintiff fails to pinpoint the specific relief sought or grounds, or specify which pleadings are at issue in the request for the court to consider his motion a motion for judgment on the pleadings.

These arguments are unpersuasive. Plaintiff filed a notice of the hearing in addition to the original motion and Defendants clearly have notice of, and understand Plaintiff's arguments and requested relief, while the motion has been briefed with more than sufficient notice and opportunity. Plaintiff is sufficiently clear about what he seeks and the pleadings at issue, stating that in the alternative view of this motion as one for judgment on the pleadings, that the determinations in Phase 1 "would eliminate prima facie elements of defendants' causes of action as plead, making them ripe for a judgment on the pleadings." To the extent that the court finds any of Plaintiff's requests or arguments insufficiently clear for the court to understand or determine if it may grant the relief requested, this will result in the court denying the motion. The alleged lack of clarity is not a basis for finding the motion fatally procedurally defective and it does not bar the court from considering the merits. Moreover, while the court finds that

Plaintiff has, as detailed below, presented specific issues and pleadings as the subject of this motion, as presented they may be overly broad and or impossible to find adjudicated, problems which affect the court's ability to grant this motion as to any such items, but which do not prevent the court from considering the merits.

Judicial Notice

Plaintiff requests the court to take judicial notice of the Statement of Decision of July 28, 2022. This document is judicially noticeable. The court GRANTS the request.

Directed Verdict

As Plaintiff notes, CCP section 630 governs motions for directed verdict. It states, in pertinent part,

> (a) Unless the court specified an earlier time for making a motion for directed verdict, after all parties have completed the presentation of all of their evidence in a trial by jury, any party may, without waiving his or her right to trial by jury in the event the motion is not granted, move for an order directing entry of a verdict in its favor.
> (b) If it appears that the evidence presented supports the granting of the motion as to some, but not all, of the issues involved in the action, the court shall grant the motion as to those issues and the action shall proceed on any remaining issues. Despite the granting of such a motion, no final judgment shall be entered prior to the termination of the action, but the final judgment, in addition to any matter determined in the trial, shall reflect the verdict ordered by the court as determined by the motion for directed verdict.

The court finds the motion for directed verdict to be properly before the court.

Judgment on the Pleadings

A motion for judgment on the pleadings is basically the same as a general demurrer but is brought after the time to bring a demurrer has expired. CCP section 438; *Lance Camper Mfg. Corp. v. Republic Indem. Co. of America* (1996) 44 Cal.App.4th 194, 198. The grounds are thus limited to lack of subject-matter jurisdiction or failure to state facts sufficient to constitute a cause of action. CCP section 438(c). Lack of subject- matter jurisdiction will lie only where the face of the complaint demonstrates that the court is not competent to act and lacks the power to grant the relief requested. *Buss v. J.O. Martin Co.* (1966) 241 Cal.App.2d 123, 133; *Holiday Matinee, Inc. v. Rambus, Inc*. (2004) 118 Cal.App.4th 1413, 1421.

However, despite the limitations on a statutory motion for judgment on the pleadings, a non-statutory motion for judgment on the pleadings may be made at any time since grounds for general demurrer are never waived. CCP section 430.80; *Stoops v Abbassi* (2002) 100 Cal. App. 4th 644, 650; *Sofias v. Bank of America* (1985) 172 Cal. App. 3d 583, 586. Thus, the motion may be made "at any time prior to the trial or at the trial itself." *Stoops, supra*.

Defendants argue that the time for bringing this motion has passed but, as explained above, the non-statutory motion for judgment on the pleadings may be brought at any time up through, and during, the trial.

Regardless of whether the motion is unclear or unpersuasive, as Defendants also claim, the court finds that Plaintiff has properly raised a motion for judgment on the pleadings for the court to consider.

What Plaintiff Asks The Court to Determine

Plaintiff sets forth specific causes of action or defenses, issues, which he asks the court to adjudicate based on the Phase 1 decision. He asks the court to adjudicate 1) his 2nd cause of action for breach of contract, 2) 6th cause of action for conversion of the Idaho joint venture account, 3) SBI's 3rd cause of action of conversion of water tanks and soil, 4) SBI's 4th and 5th causes of action for intentional interference with contract and prospective economic relations; 5) Rod's 1st cause of action for negligence, 2nd cause of action for assault, and 3rd cause of action for battery; 6) Rod's 4th cause of action for IIED; 7) the "Driveway Incident" as a defense; 8) Plaintiff's "work ethic" as a defense; 9) Plaintiffs alleged plan to buy-in to Wheeler Zamaroni ("WZ") and related breaches of fiduciary duty; 10) allegations that Ron previously took money; and 11) several specified elements of Plaintiff's 4th, 5th, and 10th causes of action.

Plaintiff's 2nd cause of action for breach of contract

Plaintiff argues that the court must adjudicate his 2nd cause of action because the court in Phase 1 found that Defendants failed to repay him for two $100,000 loans to SBI. The court in fact made this express finding as part of its determination regarding his 9th cause of action, finding, at 20:15-20,

> All Defendants failed to repay Plaintiff for two $100,000 loans made by him to SBI. The evidence demonstrates that the defendants conflated the $100,000 loan from Carole Mascherini made to Ron for SBI with a separate and distinct $100,000 loan from Ron made to SBI. That SBI may have intended to pay back Ms. Mascherini the $100,000 that Ron owed her, and in fact much later from 2017 – 2021 did pay Ms. Mascherini, does not justify SBI's conversion of $100,000 SBI owed to Ron. This is especially so given that this was done while the defendants were attempting to squeeze-out Ron to get him to accept less than full value for his 1/3rd shares in violation of the Buy-Sell Agreement.

Plaintiff's 2nd cause of action for breach of contract against SBI alleges that SBI breached loan agreements because it "became indebted to [Plaintiff] for loans made to [SBI] and earned but unpaid salary or bonuses. The allegations are unclear about the amount of money, the numbers of loans, or the amount owed to Plaintiff.

The Phase 1 ruling does not as a matter of law dispose of this cause of action. Plaintiff may be able to present an appropriate motion, at the appropriate time, regarding the specific

loans on which the court made findings, but the findings are not alone sufficient to adjudicate this cause of action. The court DENIES the motion as to this item.

Plaintiff's 6th cause of action for conversion of the Idaho joint venture account

Plaintiff seeks adjudication of his 6th cause of action. Plaintiff's 6th cause of action seeks compensation for conversion of specified funds, specifically monthly checks of $1,166.66 to Plaintiff from February 2013 on for rent from the Idaho Property. Plaintiff seeks adjudication based on the Phase 1 findings supporting the adjudication in Plaintiff's favor of his 7th cause of action for breach of fiduciary duty. These findings are that Defendants' conduct from January 2013 through to the sale of the Idaho property constituted flagrant violations of their fiduciary duties as a matter of law. (SOD 9:8-10).

> As indicated herein, Rod and Jeff were fiduciaries to Ron as partners in the Idaho rental property joint venture… Rod and Jeff's conduct individually and collectively constituted flagrant violations of their fiduciary duties to Ron as partners of Ron in the Idaho joint venture." (Id. at 17:6-9)

The court ruled, more specifically, that Defendants' conduct in this regard included,

> Conversion of monthly rent checks made payable to Ron, each for $1,666.66, from February 2013 to August 2017. Concealment of the new accounts opened by Rod and Jeff for the deposit of rents and the payment of expenses. (Id. at 17:17-20.)
>
> As part of their squeeze-out, … Rod and Jeff continuously breached their majority partner fiduciary duties that they owed to Ron as their minority partner in the joint venture (JV) for the Idaho rental property. (Id. at 35:19-21)
>
> From the date the Idaho rental property was purchased in November of 2006 through to January of 2013, excess rental income over expenses exceeded $100,000. The JV property was sold in August 2017. Fifty-six (56) months passed during the time between February of 2013 and August of 2017: 56 months for which Ron received no revenue, despite the rental property's proven record as a profit-generating investment. …the evidence shows they took joint venture money, converted his monthly rent checks, ... Defendants assert that the monthly SBI rental checks were not converted, because they had always been put into the joint account. However, the key distinction is that after January 2013, Ron's monthly check was deposited in an account that he was not named on. (Id. at 36:1- 16)
>
> This Court finds that Rod and Jeff, as majority partners of the Idaho rental property joint venture, breached their fiduciary duty to Ron as the minority partner. Therefore, Ron is entitled to recover damages of $ 148,899, equaling 55 months of his converted $1,666.66 SBI rental payments plus interest… (Id. at 37:15-18)
>
> These findings fully and completely dispose of Plaintiff's 6th cause of action, the court having already ruled that Plaintiff is entitled to the very, and specific, relief requested in

his 6th cause of action and that this is because Defendants' conduct amounts to exactly what Plaintiff alleges in his 6th cause of action: conversion of the monthly checks of $1,166.66 each.

The court GRANTS the motion on this item.

SBI's 3rd cause of action of conversion of water tanks and soil

Plaintiff seeks adjudication of SBI's 3rd cause of action for conversion of two 500-gallon water tanks, an "unknown quantity of soil," and funds of at least 5,000 for sale of product belonging to SBI.

Plaintiff notes that the court granted his motion in limine No.2 to exclude evidence of marijuana cultivation pending an Evidence Code section 402 hearing which it required Defendants to present and prevail on during Phase 1. He points out that Defendants did neither. He also argues that these allegations are linked to the first cause of action which has already been decided, the court has discretion to exclude the evidence because its probative value is outweighed by undue consumption of time or undue prejudice.

Plaintiff is not persuasive on this point. Although Defendants have lost the right to present any evidence of marijuana cultivation, this does not necessarily prevent them from providing evidence that Plaintiff took the items at issue, as long as they do not make any reference to marijuana cultivation. The other factors are similarly unpersuasive.

The court DENIES the motion on this point.

SBI's 4th and 5th causes of action for intentional interference with contract and prospective economic relations

Plaintiff argues that SBI's 4th and 5th causes of action, based on allegations that Plaintiff went to work for SBI's competitor, WZ, and then induced specific named employees and unspecified customers of SBI to change their employment or business relations from SBI to WZ.

The Phase 1 decision, as set forth on SOD pages 20-21, 27-28, 30, and 44-45, and as set forth in Plaintiff's memorandum at pages 20-21, is explicit and detailed regarding these points, but it is limited to the allegations regarding employees. The court made no findings whatsoever regarding soliciting customers to change their business from SBI to WZ. However, it expressly found that Plaintiff did not breach any duty to SBI or its shareholders by soliciting employees to leave SBI and join WZ, the employees at issue did not change employment as a result of Plaintiff's conduct, nothing that Plaintiff did regarding the employees was a breach of any duty, Plaintiff did not improperly try to induce employees to leave SBI and join WZ, no evidence supports Defendants' "version of events" on these issues, Plaintiff was not "involved in any way with the taking, using, or conveying of any SBI information, if indeed any was taken by anyone, that SBI lost any jobs as a result of it, or that Wheeler Zamaroni gained those jobs because of it…Cross Defendant SBI is therefore not entitled to a recovery of any damages, including punitive damages as to these claims."

The Phase 1 findings are conclusive to any cause of action against Plaintiff for allegedly inducing any employees to leave SBI and join WZ, or improperly being involved in any such actions or decisions, or being liable for anything related thereto. The court therefore GRANTS the motion with respect to the causes of action based on Plaintiff's alleged involvement in the move of some employees from SBI to WZ. The causes of action are necessarily adjudicated in Plaintiff's favor as to claims regarding involvement in the move of the employees. This does not affect the claims regarding the customers.

Rod's 1st cause of action for negligence, 2nd cause of action for assault, 3rd cause of action for battery, and 4th cause of action for IIED

Plaintiff argues that these causes of action are all based on the "Driveway Incident," when, Defendants claim, Plaintiff tried to run over or strike Rod with his automobile. Plaintiff is correct. See Ex.J.

Plaintiff contends that the parties provided the evidence and argument regarding this incident, and this court adjudicated this issue. Although the causes of action based on this incident were not themselves at issue in Phase 1, Defendants in fact presented their evidence and arguments regarding it at Phase 1, evidently as part of their defense to Plaintiffs' causes of action at issue. The court expressly found that Defendants' evidence failed to demonstrate that the Driveway Incident even occurred as they alleged, stating,

> There has been ample evidence from both sides regarding the February 28, 2013, "Driveway Incident." Ron and his wife, Connie Matteri, credibly testified that there was no contact between the vehicle and Rod. The defense versions of the incident, all in evidence via excerpts read from depositions of Rod and Jeff, trial testimony of Rod, Jeff, and Rod's wife, Kristine Matteri, communications from their counsel, Rod's declaration and defense discovery responses, were inconsistent and contradictory regarding fundamental facts, and when taken as a whole, lacked credibility and were unpersuasive. Further, the undisputed testimony demonstrates that there was no pain, no bruise, no mark, no doctor visit, no medication, no photographs or video of any injury, no police report, no investigation, no insurance report, no psychological counseling and no restraining order. This Court finds that defendants have not met their burden to prove that Ron struck Rod with his vehicle, or that the "driveway incident," as alleged, occurred. (Exhibit A at 31:3-16.)

Given that the parties fully presented their evidence and arguments on this entire alleged incident, and that the court has determined that Defendants failed to demonstrate that Plaintiff in fact engaged in the conduct at issue or that the incident, "as alleged, occurred," Defendants can no longer relitigate this issue at trial. With the factual issues disposed of in favor of Plaintiff, and given that Rod's three causes of action are based entirely on this alleged conduct, Rod's causes of action 1-4 must necessarily be disposed of, as a matter of law, in favor of Plaintiff.

The court GRANTS the motion as to these.

The "Driveway Incident" as a defense

Plaintiff also seeks adjudication regarding the Driveway Incident as a defense. Defendants, as noted, raised it as a defense to Plaintiff's causes of action in the Phase 1 trial and the court disposed of it fully in Plaintiff's favor. Specifically, Plaintiff's complaint alleges that Defendants fabricated the Driveway Incident as a pretext for terminating Plaintiff while Defendants deny this.

Because of the court's determinations regarding the Driveway Incident, which included an express determination rejecting it as a basis for any defense, the court finds that in fact Defendants are unable to claim that this occurred as a defense or as valid justification for terminating Plaintiff.

Plaintiff's "work ethic" as a defense

Defendants also claim as a defense or basis for their decisions that Plaintiff had a poor work ethic or did not work hard enough. They raised this defense at Phase 1, where they presented their arguments and evidence supporting it. This court fully and specifically found that the evidence demonstrated the contrary, that Plaintiff in fact worked hard enough so that this did not constitute a defense, stating, as detailed at SOD 31-33, that all of the evidence showed that Plaintiff was a hard worker, had a good work ethic, and worked hard, and that Defendants presented no evidence to support their claims other than three letters from SBI's former, now-deceased, counsel, which this court found actually supported Plaintiff's assertions that he was concerned that he was not being properly paid for the work he was putting in. Again, the court's decision rejected not only the assertion that Plaintiff failed to work hard enough or lacked a good work ethic, but also rejected a defense based on the assertion.

The court GRANTS the motion as to this issue as a defense.

Plaintiffs alleged plan to buy into Wheeler Zamaroni ("WZ") and related breaches of fiduciary duty as a defense

Plaintiff asks the court to adjudicate any defense based on his alleged breaches of duties due to his relations with WZ. He seeks a broader application of the Phase 1 ruling on his alleged relations with WZ than the Phase 1 ruling supports. As noted above, the ruling was limited to the solicitation of employees and use of information and did not touch on claims that he solicited SBI customers to go to WZ. Moreover, the court's findings that Plaintiff engaged in such wrongdoing do not in this instance necessarily preclude, as a matter of law, a defense based on the belief that he had engaged in such conduct. While it may be appropriate, if the court were to so find based on an appropriate motion, to bar evidence that Plaintiff actually engaged in such misconduct, Defendants may still be able to present evidence that they reasonably thought that he had. This court merely found that Plaintiff had not in fact engaged in such wrongdoing, defeating SBI's cause of action based on it, but this is not the same as finding that Defendants did not reasonably believe Plaintiff to have engaged in such conduct or finding that such belief could not act as a defense or justification for their decisions. Moreover, the fact that Plaintiff did

not solicit employees or take information does not preclude a possibility that he did otherwise in fact engaged in the other alleged misconduct with WZ.

The court DENIES the motion as to this issue.

Allegations that Ron previously took money as a defense

Plaintiff notes that Defendants may rely for a defense on a claim that Plaintiff took money from SBI, and that the court has already rejected their claim that he did. The court expressly found that Defendants failed to demonstrate that Plaintiff took the money as alleged, stating,

> This Court finds that the Defendants did not meet their burden to prove their allegation that Ron took $140,000 from SBI funds. This Court also finds that Defendants did not meet their burden to prove their allegation that Ron attempted to take any JV funds from the joint account. (Exhibit A at 30:25-31:2)

The court rejected this claim as a defense.

The court GRANTS the motion on this point.

Specified elements of Plaintiff's 4th, 5th, and 10th causes of action

Plaintiff seeks a ruling regarding Defendants' alleged attempts to "squeeze out" Plaintiff. This is a multifaceted issue, and although it may seem vaguely defined, the court in the SOD did in fact make a finding that the Individual Defendants' 'actions constituted a classic "squeeze out" to take [Plaintiff's] remaining' share of SBI, and it listed the actions which it determined amounted to breaches and misconduct which were part of the squeeze out. SOD 43:1-7. Throughout the SOD, it further made findings and provided explanation regarding each of those actions listed.

However, although it may be possible for Plaintiff to bring a different motion or seek this relief later, regarding this issue, the court finds no basis for granting a directed verdict or motion for judgment on the pleadings at this stage based on the court's decision as to this issue. Exactly what Plaintiff wants the court to determine or adjudicate is not clear, or is the apparent effect of any such determination. Moreover, Plaintiff has not here sought to dispose of any defense or cause of action, which would be the subject of a directed verdict or motion for judgment on the pleadings. For example, a motion for judgment on the pleadings, as explained above, must be based on the contention that pleadings fail to state a valid cause of action or defense; simply finding that there was a "squeeze out" does not do this. The court DENIES the motion on this issue.

Plaintiff next seeks adjudication of Defendants' "breach" regarding his "Three Termination Causes." Plaintiff's motion does not make it precisely clear what he wants determined or adjudicated, or how, while he cites positions of the SOD which do not establish

that the court actually found a "breach" element of remaining causes of action. This issue suffers from the same basis problems regarding the "squeeze out" above. The court must at this time DENY this motion as to this issue.

Plaintiff also seeks a determination that pursuant to his employment contract, he was to receive a salary identical to Rod's and Jeff's. Again, at this stage, the court cannot find a basis for granting a directed verdict or motion for judgment on the pleadings as to this issue, essentially for the reasons articulated regarding the "squeeze out" issue. The court must at this time DENY this motion as to this issue.

Finally, the same basic problems afflict the request to find that damages will be determined by the duration of Plaintiff's contract. The court must at this time DENY this motion as to this issue.

Conclusion: Motion for Directed Verdict or Judgment on the Pleadings

The court GRANTS the motion IN PART and DENIES the motion IN PART, as specified above. To the extent that this court grants the motion as to any item or issue or cause of action, the court grants the motion as both a directed verdict and a motion for judgment on the pleadings. As noted above, both are properly before the court and this court has granted the motion only as to issues which may properly be the subject of both types of motion. Therefore, should one of the motions be found improper as a basis for the decision, the ruling is still effective via the other basis.

To the extent that the court denies this motion, the court does so without prejudice to Plaintiffs later presenting an appropriate motion, whether as a motion for directed verdict, or motion for judgment on the pleadings, or in any other form of motion or on any other basis, as to the conclusive or binding effect of the Phase 1 decision. For example, although the court has found that the Phase 1 ruling as to Defendants' failure to repay Plaintiff for two loans each of $100,000 is insufficient to grant a motion for directed verdict or judgment on the pleadings as to Plaintiff's second cause of action, this is only because the Phase 1 determination does not clearly dispose of that cause of action as a matter of law. Plaintiff may potentially, however, bring a motion regarding the conclusive effect of the finding that "All Defendants failed to repay Plaintiff for two $100,000 loans made by him to SBI," in a more limited capacity or in conjunction with other determinations at an appropriate time. To the extent that it is denying this motion on any point, the court is solely ruling that the Plaintiff is not entitled to the specific relief requested, as phrased and presented, at this time.

Motion for OSC re: Contempt

Finally, Plaintiff seeks an OSC why Defendants should not be found to be in contempt for failure to comply with financial discovery sought for the punitive damages.

The court may impose a punishment for contempt to compel obedience to its judgments and orders. CCP sections 128, 178, 187, 1209, et seq.

CCP section 1209 sets forth the conduct constituting contempt and includes, inter alia, (a)(5), "[d]isobedience of any lawful judgment, order, or process of the court."

When conduct amounting to contempt does not occur in the presence of the court, the proper procedure is to issue a warrant of attachment to bring the person charged to answer or grant a warrant of commitment upon notice or order to show cause ("OSC"). CCP section 1211, 1212. The court must investigate the charge, hear any answer, and allow examination of witnesses. CCP section 1217. The court must find that there has been a valid order, respondent actually knew of the order, respondent had the ability to comply, and respondent willfully refused to comply. *Conn v. Sup.Ct*. (1987) 196 Cal.App.3d 774, 784. A contempt proceeding is quasi-criminal and thus the respondent has some rights of a criminal defendant, including a presumption of innocence and right to live testimony. *People v. Gonzalez* (1996) 12 Cal.4th 804, 816; CCP section 1217. For this reason, in a contempt proceeding, 'every "i" must be dotted and every "t" crossed.' *Cedars-Sinai Imaging Med. Group v. Sup.Ct.* (2000) 83 Cal.App.4th 1281, 1287. The court may not find the respondent in contempt in the respondent's absence unless the court finds that the absence is voluntary. *Farace v. Sup.Ct*. (1983) 148 Cal.App.3d 915, 918.

The court must find sufficient proof of proper service and notice in accord with that required for service of a summons and complaint. *Cedars-Sinai Imaging Med. Group v. Sup.Ct.* (2000) 83 Cal.App.4th 1281, 1287-1288. Appearance at the hearing of the party charged with contempt may be "a valid substitute," but only if that party voluntarily appears and contests the substance of the charge without contesting adequacy of service and notice. *Ibid*.

The court will issue an OSC, which sets the hearing on the contempt proceedings, upon a sufficient affidavit and the OSC ordinarily must be served as required for service of summons and complaint. *Cedars-Sinai Imaging Med. Group v. Sup.Ct.* (2000) 83 Cal.App.4th 1281, 1286-1287; *In re Koehler* (2010) 181 Cal.App.4th 1153, 1169.

At this point, the court finds insufficient basis for finding Defendants to be in contempt. This is primarily because of the dispute over whether there must be a mistrial and thus whether the order which Plaintiff complains they have breached is, or will remain, in effect.

The court DENIES the motion, without prejudice to Plaintiff in the future again seeking this or other appropriate relief for the alleged conduct at issue should he demonstrate proper basis for it.

Conclusion

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 counsel shall inform the preparing counsel 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.

4-5. SCV-268652, Piner Place v Lonestar Investments

Motion for Terminating Sanctions or, in the Alternative, for Issue and/or Evidence Sanctions GRANTED in part, DENIED in part. The court GRANTS the motion as to

evidentiary and issue sanctions, as explained below, regarding the promissory note and deed of trust, and monetary sanctions of $2,832.25. The court DENIES the motion, without prejudice, in all other respects.

Motion to Compel Production Deposition of Defendant Joseph B. Reiter and Production of Documents and for Sanctions Against Joseph B. Reiter GRANTED in full, as set forth below, along with monetary sanctions of $1,121.10 for fees and costs plus $250 based on CCP section 2023.050.

Facts and Procedural History

In their First Amended Complaint ("FAC"), Plaintiffs allege that Michael Adams ("Adams") and Dustin Gibbens ("Gibbens") are managers of, and owners of a beneficial interest in, Plaintiffs' Piner Place, LLC ("Piner") and 965 Solutions, LLC ("Solutions"), Piner owns real property at 965 Piner Place, Santa Rosa ("the Property"), and Defendants are improperly attempting to foreclose on a deed of trust ("DOT") recorded against the Property solely based on the fraudulent activities of Defendant Joseph B. Reiter ("Reiter"). They claim that after Adams invested his own property in Piner, including cash, Reiter, a business associate of Adams, advised Adams that the latter should, based on legal advice, form and transfer his assets to Defendant Lonestar Investments, LLC ("Lonestar"), with Reiter providing the paperwork and explaining to Adams that Adams was sole owner, member, and manager of Lonestar; Reiter advised Adams that, to protect himself, Adams should also record the DOT against the Property and the DOT was created and recorded securing Adams's investment against the Property in favor of Lonestar. However, Plaintiffs complain, they later discovered that in fact Reiter is owner and manager of Lonestar, Defendants falsely claim that the DOT secures a loan from Lonestar to Piner ("the Loan"), Defendants falsely claim that Plaintiffs have failed to pay amounts owed on the Loan, and Defendants recorded a notice of default ("NOD") and instituted foreclosure proceedings against the Property.

Plaintiffs obtained, upon an ex parte application, a temporary restraining order ("TRO") and order to show cause re: preliminary injunction ("OSC") preventing Defendants from conducting or attempting a foreclosure sale of the Property and doing or engaging in any acts in furtherance of the foreclosure on the DOT.

On December 21, 2022, the court granted Plaintiff's motion to compel response to demand for inspection.

Motions

This matter has now come on calendar for two motions which Plaintiffs have filed regarding discovery.

In their Motion for Terminating Sanctions or, in the Alternative, for Issue and/or Evidence Sanctions, Plaintiffs request such sanctions pursuant to Code of Civil Procedure ("CCP") sections 2023.010, 2023.030, 2031.300(c), and 2031.320(c). They argue that Defendants have abused the discovery process by refusing to produce the original promissory note ("Note") and deed of trust ("DOT") for inspection or paying the required $1,590 in

sanctions within 30 days of the ruling, failing to respond to a request seeking production of the original amendment to the Operating Agreement ("OA"), failed to respond or produce documents for request for production ("RFP") set 2, and failed to appear for deposition.

In their Motion to Compel Production Deposition of Defendant Joseph B. Reiter and Production of Documents and for Sanctions Against Joseph B. Reiter, Plaintiffs move the court to compel Reiter to attend his deposition and produce documents requested on the basis that Reiter failed to appear in compliance with the deposition notice.

Plaintiffs have filed statements that they have received no opposition to either motion.

Motion for 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, 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 §§2030.290, 2031.300, 2033.290, 2023.010, 2023.030. Monetary sanctions are limited to the reasonable expenses of the motion. CCP section 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 §§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 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.*

Terminating or Similar Sanctions without
Refusal to Comply with Court Order

Notably, Plaintiffs in part seek to impose terminating sanctions even though Defendants had not yet refused, or even simply failed, to comply with a court discovery order. They filed before the hearings on their motions to compel regarding the request seeking production of the original amendment to the OA, RFP set 2, or for deposition. Although the first two of these have now been heard and resulted in discovery orders, that was not the case when Plaintiffs filed this motion. The last motion, regarding the deposition, has still not been heard and is set for hearing with this motion. The motion is thus premature regarding, and cannot be based on, any possible or potential violation of a court orders regarding these.

As noted above, however, terminating, issue, or evidentiary sanctions are *only* available *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, 2030.300, 2031.300, 2031.310, 2023.010, 2023.030.

Nonetheless, the first discovery item at issue which Plaintiffs list, the order to produce the original Note and deed of trust DOT, was the subject of a motion to compel which this court granted on March 16, 2022. The court granted Plaintiffs' motion to compel production in response to the first set of RFPs. The court ordered Defendants to produce the documents and pay sanctions of $1,590 within 30 days of the notice of the court's ruling. The final entered order was served on Defendants on March 21, 2022. The motion is properly based on this failure to comply.

Application of the Factors

The time since the discovery was first served is well over one year and the order on discovery was entered almost one year ago. This is a long time. This factor supports sanctions.

The information here seems very important but as noted above the only discovery supporting this motion is far more limited than the full range of discovery which Plaintiffs discuss. The evidence at issue, the Note and DOT, are of central importance to the parties' claims regarding the property. This factor supports sanctions but not to the full extent requested.

The order was served on Defendants almost a year ago, and the parties have engaged in litigation since, including Defendants.

Defendants have provided nothing to any of the discovery at issue and have not yet opposed these motions, so appear unlikely to comply. This factor strongly weighs in favor of sanctions at this point.

Terminating, Issue, and Evidentiary Sanctions Requested

Plaintiffs ask the court to strike Reiter's answer, and bar a range of testimony and evidence. Most of this, which is exceedingly broad, is based on the full range of discovery

which Plaintiffs mention, but as noted above only one motion and order of those identified may support the motion for sanctions. It is limited to the production of the Note and DOT, critical, but not clearly supporting the full range of sanctions sought. At this time, the court finds no basis for terminating sanctions or striking the answer, or for the full range of evidentiary sanctions sought.

The court GRANTS the motion as to a more limited range of evidentiary sanctions barring Defendants from producing any documentary evidence, testimony, or any other kind of evidence, regarding the Note and DOT. The court also GRANTS the motion as to Defendants presenting any evidence or argument regarding the issue of the Note or DOT. The court DENIES the motion as to all other sanctions, but without prejudice to Plaintiffs seeking them in the future based on other failures to comply with additional discovery orders.

Monetary Sanctions

Plaintiffs also seek monetary sanctions of $2,832.25 for 5.8 hours at $475 an hour, plus the $60 filing fee and e-filing fee of $16.25. Dollar Dec., ¶29. These are reasonable. The court GRANTS the motion as to these.

Motion to Compel Deposition

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.

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).

Plaintiffs demonstrate that they made many efforts to coordinate a deposition date with Reiter and his attorney, with Plaintiffs renoticing the deposition several times based on Reiter and his attorney either failing to provide agreeable dates, or subsequently stating that the dates set in the notices would not work. Dollar Dec., ¶¶2-8. Eventually, after receiving no cooperation and no alternative dates from Reiter, Plaintiffs noticed the deposition for September 20, 2022, and Plaintiffs received no objection, but Reiter sent an e-mail the day before the deposition stating that he would not appear "due to a family situation," refusing to provide any other information, and taking a truculent manner generally. Dollar Dec., ¶¶8-16. Plaintiff informed Reiter that they would proceed and Reiter did not appear for the deposition. Ibid.

The court GRANTS the motion. Reiter is ordered to comply without objection to Plaintiffs' subsequent deposition notice for this deposition.

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.

Plaintiffs seek monetary sanctions of $1,121.10 for fees and costs plus $250 pursuant to CCP section 2023.050. The latter states, in pertinent part,

> (a) Notwithstanding any other law, and in addition to any other sanctions imposed pursuant to this chapter, a court shall impose a two hundred- and fifty-dollar ($250) sanction, payable to the requesting party, upon a party, person, or attorney if, upon reviewing a request for a sanction made pursuant to Section 2023.040, the court finds any of the following:
> (1) The party, person, or attorney did not respond in good faith to a request for the production of documents made pursuant to Section 2020.010, 2020.410, 2020.510, or 2025.210, or to an inspection demand made pursuant to Section 2031.010.

The fees and costs include 2.2 hours at $475, for $1,045, plus $76.10 in costs. Dollar Dec., ¶18. These are reasonable. The court GRANTS this request.

Conclusion

The court GRANTS both motions as set forth 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 counsel shall inform the preparing counsel 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.

6. SCV-268750, Illinois Midwest Insurance Agency v Martinez

Motion for Order Setting Aside and Vacating Entry of Default GRANTED, based solely upon attorney affidavit of fault. The court awards to Plaintiff attorneys' fees of $2,835, plus the $75.70 in costs. The court DENIES the motion on all other bases. The proposed answer

is deemed filed, but Defendant must file a separate copy no later than 5 days after service of the entry of this order.

Facts

Plaintiff alleges that Defendant intentionally struck and injured Antonio Perez ("Perez"), employee of Plaintiff's insured, Katz House of Color, Inc. ("Katz") and that Plaintiff therefore paid funds to Perez under the workers' compensation insurance policy which it provided to Katz. Plaintiff seeks to recover the money owed from the alleged wrongdoer, Defendant.

Plaintiff filed a proof of substituted service on Defendant on March 24, 2022. This shows that Plaintiff served Defendant by substituted service on December 9, 2021 at 6697 Old Redwood Hwy, Apt 39 in Windsor, CA. When Defendant failed to answer, Plaintiff obtained a default against Defendant on August 3, 2022. It includes a declaration of diligence for attempted personal service and declaration of mailing.

Motion

Defendant moves the court to vacate the default based on Code of Civil Procedure ("CCP") section 473(b) as a result of the fact that the default was the result of mistake, inadvertence, surprise or neglect of Defendant's attorney and because of improper service under CCP section 473(d).

Plaintiff opposes the motion, asserting that the only basis for relief is attorney fault and requesting recovery of attorneys' fees and costs.

Defendant has filed a reply, arguing that the fees and costs sought are unreasonable.

CCP section 473(b)

Code of Civil Procedure ("CCP") §473(b) allows plaintiffs and defendants to set aside 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. According to CCP § 473(d), the court may also correct clerical mistakes or set aside any void judgment or order.

The motion "shall be accompanied by a copy of the answer or other pleading proposed to be filed… otherwise the application shall not be granted…" CCP section 473(b).

An order setting aside the default is discretionary where based on mistake, inadvertence, surprise, or excusable neglect. Id. There is also a policy in favor of hearing cases on their merits and the motion to vacate should be granted if Defendants show a credible, excusable explanation. *Elston v. City of Turlock* (1985) 38 Cal.3d 227. The provision should be liberally construed in order to afford relief. See, e.g., *Goodson v. Bogerts, Inc*. (1967) 252 Cal.App.2d 32; Hansen *v. Hansen* (1961) 190 Cal.App.2d 327; *Reed v. Williamson* (1960) 185 Cal.App.2d 244.

CCP section 473(b) states that "the court *shall*, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, or neglect, vacate" any resulting default or, default judgment, or dismissal. Emphasis added. The provision is clear that this is mandatory "unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." Ibid. On granting a motion based upon an attorney affidavit of fault, the "court shall… direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties." CCP section 473(b). The court also *may* impose sanctions. CCP section 473(c)(1). However, relief from default may not be conditional on payment of the fees, costs, or sanctions. CCP section 473(c)(2).

The attorney's neglect, as the statute indicates, need not be excusable. *Billings v. Health Plan of America* (1990) 225 Cal.App.3d 250, 256. In fact, the court is not concerned with the reasons for the attorney's error. *Ibid*. This rule also applies to orders "equivalent" to a default where, for example, a plaintiff seeks to set aside a dismissal. *Graham v. Beers* (1994) 30 Cal.App.4th 1656, 1660.

This relief is available even where the attorney's negligence was only one factor. *Milton v. Perceptual Develop. Corp.* (1997) 53 Cal.App.4th 861, 867. However, courts have been split on whether the provision applies only where the client is completely innocent, or if it can apply where both the client and attorney caused the default, etc. See *Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1248 (relief mandatory only where client totally innocent); *Benedict v. Danner Press* (2001) 87 Cal.App.4th 923, 930-932 (relief mandatory where client and attorney partly at fault but client only negligent).

The only exception to the obligation to set aside thus seems to be where the court finds that the attorney was not in fact at fault, such as where the attorney is covering up for the client. See *Todd v. Thrifty Corp.* (1995) 34 Cal.App.4th 986, 991.

Defendant's attorney, Richard Freemen, Jr. ("Freeman") submits a declaration of fault stating that Defendant first contacted him for representation regarding this case in August 2021, shortly after Plaintiff had filed it but before Plaintiff had served the summons and complaint. Freeman subsequently contacted Plaintiff and advised Plaintiff that he would be representing Defendant, after which Plaintiff forwarded an acknowledgment of receipt of the summons and complaint to Freeman but he was not authorized execute it. Freeman states that he was subsequently involved in much unrelated legal business, having only sporadic contact with Defendant and not diligently following up with his client or Plaintiff or checking on the case status. He adds that he had received a CMC statement from Plaintiff in April 2022 claiming that Defendant had been served but Defendant denied being served and Freeman failed to seek clarification from Plaintiff. He then received a request for entry of default but by the time he tried to file an answer, default had been entered.

Freeman adds that he contacted Plaintiff after the default in an effort to resolve the matter without a need for this motion, explaining the error. Plaintiff refused the offer.

Freeman's declaration demonstrates sufficient, if inexcusable, attorney fault. He also attaches a copy of the proposed answer.

The court GRANTS the motion on this basis.

Fees and Costs

As noted above, Plaintiff is entitled to, and in fact requests, attorneys' fees and costs related to this relief. Plaintiff requests attorneys' fees of $6,030 and costs of $75.70. O'Herin Dec. The fees are based on 11.4 hours at $450 an hour, and this includes 1.7 preparing the request for default, 1.8 hours communicating with the client regarding the entry of default and proposed stipulation to vacate default, 2.8 hours analyzing the motion, 5.1 hours preparing the opposition. Plaintiff seeks an additional 2 hours anticipated for the hearing.

Overall, the time spent is reasonable except for the avoidable time spent on the opposition and the anticipated time for the hearing. Given the affidavit of fault, with mandatory relief, which Plaintiff does not even oppose, the time spent on the opposition and hearing is not reasonable. The court awards to Plaintiff attorneys' fees for 6.3 hours, at $450 an hour, $2,835, plus the $75.70 in costs.

Clerical Error

Defendant also argues that the court may set aside a default improperly entered as a result of clerical error. He refers to an improper proof of service but only vaguely, and provides no explanation, evidence, or even factual assertions regarding this basis. Nothing indicates what the clerical error might even have been. The court DENIES the motion on this basis.

Defective Service

A judgment may be set aside where void CCP section 473(d). Such an order may apply where there is lack of actual or constructive notice and no valid service. *Lovato v. Santa Fe Int'l Corp.* (1984) 151 Cal.App.3d 549, 553 (void for lack of notice where discovery requests served only on defendant's attorney, who had been suspended by state bar and lacked authority to represent party); *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 313 (lack of proper service renders judgment void). Where the judgment is void, the moving party need not show a meritorious defense. CCP section 473(d); *Peralta v. Heights Medical Center, Inc.* (1988) 485 U.S. 80, 86-87. However, where the motion is based on lack of, or improper, service, where there has been actual notice, substantial compliance with the service requirements will defeat a motion to vacate. *Gibble, supra.*

Service may be proper where a party tries to avoid service and the process server identifies himself or herself, states that the party is being served, and leaves the papers as close as possible to the party. *Trujillo v Trujillo* (1945) 71 Cal.App.2d 257, 260.

There is generally no deadline for bringing a motion to set aside default that is void, or where it is clear from the record that default should not have been entered. *Rochin v. Pat*

Johnson Mfg. Co. (1998) 67 Cal.App.4th 11228, 1239; *Plotitsa v. Sup.Ct.* (1983) 140 Cal.App.3d 755, 761.

Where service of summons and complaint is simply improper or does not give the defendant or cross-defendant actual notice in time to defend the action, but judgment otherwise appears facially valid, the court may grant relief from a default or default judgment on that basis. CCP section 473.5. Such a motion must be brought within the earlier of 2 years from entry, or 180 days after the party receives written notice, pursuant to CCP section 473.5. *Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1121-1122; *Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 300, n.3.

The moving party "shall serve and file with the notice a copy of the answer, motion, or other pleading proposed to be filed in the action." CCP section 473.5(b). In contrast to a motion under CCP section 473(b), however, this requirement lacks the language stating, "otherwise the application shall not be granted."

The motion claims "improper service" but as with the argument regarding clerical error provides no explanation, evidence, or even factual assertions regarding this basis. The court DENIES the motion on this basis. The proof of service is valid on its face and appears to show proper service, while Defendant makes no effort to explain how or why it was not proper or whether it did not give Defendant notice.

Conclusion

The court **GRANTS the motion solely based on attorney affidavit of fault and awards Plaintiff the fees and costs noted above**. Defendant 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 counsel shall inform the preparing counsel 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.