TENTATIVE RULINGS: CIVIL LAW & MOTION

Wednesday, April 23, 2025 at 3:00 p.m.
Courtroom 18 – Hon. Kenneth G. English
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

The tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument, **YOU MUST NOTIFY** the Judge's Judicial Assistant by telephone at **(707) 521-6604**, and all other opposing parties of your intent to appear, **and whether that appearance is in person or via Zoom**, no later 4:00 p.m. the court day immediately preceding the day of the hearing.

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

TO JOIN ZOOM ONLINE:

Department 18:
Meeting ID: **160—739—4368**
Password: **000169**
https://sonomacourtorg.zoomgov.com/j/1607394368?pwd=aW1JTWlIL3NBeE9LVHU2NVVpQlVRUT09

TO JOIN ZOOM BY PHONE:
By Phone (same meeting ID and password as listed for each calendar):
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Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1. 24CV0505, Looney v. Eden on Brand Inc., a California Corporation: Motion to Compel Post Judgment Discovery

Plaintiff's unopposed motion to compel answers to post judgment discovery is **GRANTED**. Plaintiff's request for monetary sanctions is **GRANTED** in the amount of $60.00. Defendant is ordered to pay Plaintiff $60.00 within 30 days of service of the Court's order on this motion. Defendant is also ordered to respond to Plaintiff's discovery requests within 30 days of service of the order on this motion. Because Defendant failed to timely respond to Plaintiff's discovery requests, objections to such discovery are waived. (CCP § 2031.300.) If no hearing is requested, the Court will sign the proposed order lodged with the moving papers.

2. 24CV07542, Accelerated Inventory Management LLC v. Lazzaro: Motion to Compel Arbitration

Defendant's unopposed motion to compel arbitration is **GRANTED**. Defendant's request to stay this litigation pending the outcome of the arbitration is **GRANTED**.

Defendant shall submit a written order consistent with this ruling. Due to the lack of opposition, compliance with Rule 3.1312 is excused.

Plaintiff, Accelerated Inventory Management, LLC purchased a loan that was issued to Defendant, Christopher Lazzaro, by a third-party entity, Lending Club Bank. Defendant alleges that Plaintiff is bound by a voluntary, mutual, and enforceable agreement to arbitrate its claims by means of the loan agreement entered into by Defendant and the original lender.

Defendant argues that the arbitration agreement was agreed to by Defendant and Lending Club Bank and is incorporated into the Loan Agreement and Promissory Note that is the basis of Plaintiff's claims. The Loan Agreement and Promissory Note refers to additional terms outlined in a Borrower Agreement, stating, "This note is subject to the Arbitration Agreement in the Borrower Agreement between the Lender and the Borrower." Section 16 of the Borrower Agreement mandates arbitration, stating, in part:

> "YOU AND WE ACKNOWLEDGE THAT WE AND YOU HAVE A RIGHT TO LITIGATE CLAIMS IN COURT BEFORE A JUDGE OR JURY, BUT WILL NOT HAVE THAT RIGHT IF EITHER WE OR YOU ELECTS TO HAVE A DISPUTE DECIDED THROUGH ARBITRATION PURSUANT TO THIS ARBITRATION AGREEMENT. YOU AND WE NEVERTHELESS HEREBY KNOWINGLY AND VOLUNTARILY WAIVE OUR RIGHTS TO LITIGATE CLAIMS IN A COURT BEFORE A JUDGE OR JURY UPON ELECTION OF ARBITRATION BY EITHER YOU OR US."

The Borrower Agreement also specifies, "Either you or we may, at either's sole election, require that the sole and exclusive forum for resolution of a Claim be final and binding arbitration pursuant to this Section 16 ("Arbitration Agreement"), unless you opt out as provided in Section 16(b) below." Defendant did not opt out of the arbitration agreement. The agreement also provides a definition of the word "claim."

The Borrower Agreement, Section 16(g) states that the Arbitration Agreement shall survive "any transfer or assignment of any loan or Loan Agreements or any other promissory note(s)…." Accordingly, Defendant argues that the arbitration agreement is enforceable against Plaintiff.

"The party seeking to compel arbitration has the initial burden to plead and prove the existence of a valid arbitration agreement that applies to the dispute. Once that burden is satisfied, the party opposing arbitration must prove any defense to the agreement's enforcement, such as unconscionability." (Dennison v. Rosland Cap. LLC (2020) 47 Cal.App.5th 204, 209.)

The Loan Agreement and Promissory Note provide that the lender could assign all of its right, title and interest (or any portion thereof) in the Note to any other third party. It provides that the Note is subject to the Arbitration Agreement in the Borrower Agreement between Lender and Borrower. The Borrower Agreement provides "We may sell, assign, or transfer this Borrower Agreement and the Loan Agreement, or any of our rights under this Borrower Agreement or the Loan Agreement, in whole or in part at any time." It also provides, "This Arbitration Agreement shall survive…(iii)

any transfer or assignment of any loan or Loan Agreement(s) or any other promissory note(s) which you owe, or any amounts owed on such loans or notes, to any other person or entity."

Plaintiff's claims against Defendant arise out of this loan agreement transferred to Plaintiff by the original lender. Defendant has shown that a valid arbitration agreement exists that applies to this dispute. Defendant has shown that the agreement is enforceable against Plaintiff, though not a signatory to the agreement. By failing to oppose this motion, Plaintiff has failed to meet the shifted burden to prove any defense to enforcement.

3. & 4. 24CV07852, Hagemann v. Miller: Demurrer and Motion to Strike

This is a joint ruling on Defendant Rob Disharoon's unopposed demurrer to Plaintiff's Complaint and Defendant Disharoon's unopposed motion to strike portions of the Complaint. Defendant's demurrer to the Complaint is **SUSTAINED** in full. Due to the sustaining of the demurrer as to all causes of action alleged against this defendant, Defendant's motion to strike is **MOOT**. Leave to amend is **GRANTED**. Plaintiff may amend within 10 days of notice of entry of an order on these motions. (Cal. Rules of Court, Rule 3.1320(g).) Defendant's request for judicial notice is **GRANTED**.

Defendant's counsel shall submit a written order consistent with this ruling. Due to the lack of opposition, compliance with Rule 3.1312 is excused.

Plaintiff filed a Complaint against his sister, Catherine Greeson ("Cathy"), Cathy's alleged former attorney, Rob Disharoon (moving party), and her alleged current attorney, Karin Beam, claiming that he is one of the beneficiaries to a trust agreement and should have received $2,875,000 more than the distributions he has received under the Stanley G. Hagemann and Phyllis J. Hagemann Trust Agreement. He alleges that the estate was subject to fraudulent and inequitable distribution. He also alleges that his siblings conspired against him to exclude him from the administration of the estate and from his fair share of distributions. He alleges that the Superior Court Judge who heard the probate action, The Honorable Nancy Shaffer, the court reporter, and the current and former attorneys representing Cathy are "compromised" and involved in altering the official record of the sole court hearing held on November 5, 2014. Moving Defendant, Rob Disharoon, is alleged to have retired. Plaintiff alleges that Cathy retained attorney Karin Beam on October 7, 2013 after Defendant Disharoon's retirement.

Plaintiff Has Failed to Comply with Civil Code § 1714.10

> California Civil Code § 1714.10(a) provides, in part,
>
> No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action.

In order to obtain the Court's approval of such pleading, the plaintiff must first file a petition with the Court to allow the pleading to be filed. The Court's approval will be granted only if the Court

determines that the party has established a reasonable probability of prevailing in the action. (Civ. Code, § 1714.10(a).) "Failure to obtain a court order where required by subdivision (a) shall be a defense to any action for civil conspiracy filed in violation thereof," which the attorney must raise upon the attorney's first appearance by demurrer or motion to strike. (Civ. Code, § 1714.10(b).)

Here, all of Plaintiff's allegations against this defendant arise out of an underlying theme of conspiracy. Plaintiff's allegations against this Defendant arise out of the theory that he worked together with Cathy Greeson and Karin Beam to gain a financial advantage over him. Thus, while civil conspiracy was not raised as a cause of action, it is the underlying theory for creating liability for this defendant. As stated in *Cortese v. Sherwood* (2018) 26 Cal.App.5th 445, 455, "a cause of action can still fall 'within the initial scope of section 1714.10 ... without regard to the labels attached to the cause[ ] of action or whether the word 'conspiracy'—having no talismanic significance—appears in them.'" That is the case with each of the causes of action alleged against this defendant. Plaintiff does not make factual allegations on independent wrongs by this defendant. Rather, the factual allegations that exist in the complaint involve conspiracy behavior. Accordingly, Plaintiff would have needed to petition the Court and obtain Court approval upon a showing of a likelihood of prevailing in the action prior to filing his Complaint against this Defendant. Plaintiff did not do so.

Plaintiff Fails to State Facts Sufficient to Constitute a Cause of Action Against this Defendant

As an initial matter, the Complaint is in violation of California Rules of Court, Rule 2.112, because it fails to identify which parties to whom each cause of action is directed. Assuming Plaintiff is alleging each cause of action against all defendants, Plaintiff has failed to state facts sufficient to raise a claim against the moving defendant.

a. Breach of Fiduciary Duty

"The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 395.)

Here, Plaintiff alleges "Plaintiffs sister, Cathy, and her attorneys, Rob Disharoon and Karin Beam, assumed fiduciary roles in the management and distribution of the trust estate. Their obligations were to act in the best interests of all beneficiaries, including Plaintiff, without self-interest, conflict of interest, or favoritism." (Complaint, ¶ 28.) Plaintiff does not allege that a fiduciary relationship existed between himself and Defendant Disharoon. Furthermore, the Complaint does not allege that Cathy was the trustee of the estate. The Complaint requires the Court to make an assumption of this fact. Even assuming Cathy is alleged to be the trustee of the estate, the Complaint alleges that Defendant Disharoon ceased representing her as early as 2017 when he retired and Defendant Beam took over for him. Nonetheless, even considering this hypothetical situation of his representation of Cathy as the trustee of the estate, Plaintiff has failed to allege how his fiduciary duty to Cathy as his client extended to the beneficiaries of the estate. "[T]he attorney for the trustee of a trust is not, by virtue of this relationship, also the attorney for the beneficiaries of the trust. The attorney represents only the trustee." (*Wells Fargo Bank v. Superior Ct.* (2000) 22 Cal.4th 201, 208.) Plaintiff has failed to allege any facts that would support his suggestion that Defendant Disharoon owed a fiduciary duty to him as a beneficiary of the estate. Likewise, Plaintiff has failed to allege any facts specific to Defendant Disharoon that would support his allegations of breach.

b. Fraud

The general elements of fraud are "misrepresentation, knowledge of falsity, intent to induce reliance on the misrepresentation, justifiable reliance on the misrepresentation, and resulting damages." (*Reeder v. Specialized Loan Servicing LLC* (2020) 52 Cal.App.5th 795, 803, citing *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) "To withstand demurrer, facts constituting every element of fraud must be alleged with particularity." (*Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 35.) "This particularity requirement necessitates pleading *facts* which 'show how, when, where, to whom, and by what means the representations were tendered.'" (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.)

Plaintiff has not alleged any of the elements of his fraud cause of action with particularity. Plaintiff makes general allegations regarding misrepresentations by grouping together all Defendants when describing the alleged conduct. Plaintiff's allegations are insufficient to support a fraud cause of action. This is especially so relating to Defendant Disharoon who is alleged to be "implicated" in the fraudulent activities carried out by Cathy and Karin Beam by means of his former representation of Cathy. Plaintiff alleges "Before his retirement, Rob Disharoon was responsible for overseeing the administration of the estate. His knowledge of the estate's transactions and subsequent failure to correct or disclose the misrepresentations made by Cathy further implicates him in the fraudulent activities." (Complaint, ¶ 51.) Not only is such fact not plead with specificity, it would also not be sufficient on its own to form a basis for general fraud allegations against Defendant Disharoon.

c. Conversion

"Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion are the plaintiff's ownership or right to possession of the property at the time of the conversion; the defendant's conversion by a wrongful act or disposition of property rights; and damages." (*Oakdale Vill. Grp. v. Fong* (1996) 43 Cal.App.4th 539, 543–44.)

Here, while Plaintiff generally groups Defendant Disharoon together with the other defendants when alleging "Defendants…wrongfully took control of Plaintiff's rightful share of the estate…," the more specific factual allegations supporting this cause of action contradict this general allegation that Defendant Disharoon was involved in the taking. The Complaint alleges "Cathy and Karin Beam misappropriated the $2,875,000 designated for Plaintiff by using these funds for unauthorized purposes…" (Complaint, ¶ 69.) Plaintiff generally alleges that this misappropriation was conducted "with the support of Rob Disharoon," but fails to allege any facts to support this conclusory allegation that Defendant Disharoon was involved in the taking.

d. Unjust Enrichment

"[T]here is no cause of action in California for unjust enrichment. 'The phrase "Unjust Enrichment" does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so.' Unjust enrichment is 'a general principle, underlying various legal doctrines and remedies,' rather than a remedy itself. (*Melchior v. New Line Prods., Inc.* (2003) 106 Cal.App.4th 779, 793.) "[A]n unjust enrichment claim is grounded in equitable principles of restitution." (*Sepanossian v. Nat'l Ready Mix Co., Inc.* (2023) 97 Cal.App.5th 192, 207.) "A person is enriched if he or she receives a benefit at another's expense." (*Hirsch v. Bank of Am.* (2003) 107 Cal.App.4th 708, 722.)

Here, Plaintiff has failed to allege the theory upon which he is entitled to restitution. Even if he had, Plaintiff has failed to allege facts supporting his allegation that Defendant Disharoon obtained a benefit at Plaintiff's expense. Plaintiff makes conclusory allegations that Defendant Disharoon was unjustly enriched by the defendant's wrongful conduct. However, Plaintiff fails to articulate facts of any wrongful conduct on behalf of Defendant Disharoon that would support his claim for restitution.

It is Not Apparent that Plaintiff's Claims Are Barred by the Statutes of Limitations

Defendant argues that each of Plaintiff's claims are barred by the applicable statute of limitations. A demurrer on the ground of the bar of the statute of limitations will not lie where the action *may be*, but is not necessarily, barred. (*Childs v. State of California* (1983) 144 Cal.App.3d 155, 161.) It must appear *affirmatively* that the right of action is necessarily barred. (*Ibid*.) "[W]e consider the pleading of 'on or about' June 10, 1980, sufficient to withstand a general demurrer, as it reveals only that plaintiff's action *may* be barred." (*Ibid*. See also *Moseley v. Abrams* (1985) 170 Cal.App.3d 355, 359-360 [where Plaintiff broadly alleged "on or about July of 1977", the Court found that a demurrer could not be sustained on the basis of the statute of limitations].)

Here, while it appears from the allegations that Plaintiff's claims *may be* barred since he refers only to conduct occurring in 2014, 2017 and "some years ago," it is not entirely apparent from the allegations that the causes of action are time-barred. As explained above, the Complaint is severely deficient in facts. As such, it is not apparent when the conduct complained of is alleged to have taken place nor when the injury complaint of is alleged to have occurred. There are not sufficient facts to establish when Plaintiff might have reasonably discovered the injury. The judicially noticed documents do not conclusively establish this either. Accordingly, even though it may appear so, it cannot be said with certainty at this juncture that Plaintiff's claims are time-barred.

Leave to Amend

It is an abuse of discretion for the court to deny leave to amend where there is any reasonable possibility that plaintiff can state a good cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The burden is on the plaintiff to show in what manner plaintiff can amend the complaint, and how that amendment will change the legal effect of the pleading. (*Ibid*.)

Here, though Plaintiff has failed to oppose this motion and, thus, has failed to meet his burden to show how the defects of the pleading can be cured by amendment, the Court will grant leave to amend since it is not entirely apparent that the complaint cannot be amended to state a good cause of action. However, as stated above, the Plaintiff must obtain the Court's approval pursuant to Civil Code § 1714.10 prior to filing the claims alleged against the moving defendant. Accordingly, if such a petition is not filed prior to the expiration of the time for amending this pleading, the Plaintiff will be acting outside of this Court's leave for amending. If a petition under Civil Code § 1714.10 is filed before the expiration of the time for amending this pleading, the time for amending the pleading shall be tolled during the time that the petition is pending before the Court.

5. 24CV05242, Looney v. Notato, LLC: Motion to Appoint Receiver

Plaintiff's motion to appoint a receiver to seize and sell the judgment debtor's liquor license is **DENIED**. Plaintiff has failed to show that the extraordinary remedy of appointing a receiver is

warranted in this matter.

Due to the lack of opposition, the Court's minute order shall constitute the order of the Court.

CCP § 708.630(b) provides that the Court may appoint a receiver to transfer the debtor's interest in the license, unless the debtor establishes that the amount of delinquent taxes and claims of prior creditors exceed the probable sale price of the license. A receiver may be appointed to enforce a judgment where the judgment creditor shows that, considering the interests of both the creditor and the judgment debtor, the appointment of a receiver is a reasonable method to obtain the fair and orderly satisfaction of the judgment. (CCP § 708.620.) The legislative committee notes state that "a receiver may be appointed where a writ of execution would not reach certain property *and other remedies appear inadequate*." (Emphasis added).

The availability of other remedies "does not, in and of itself, preclude the use of a receivership. [citation] Rather, a trial court must consider the availability and efficacy of other remedies in determining whether to employ the extraordinary remedy of a receivership." (*City & Cty. of San Francisco v. Daley* (1993) 16 Cal.App.4th 734, 745.) In making this decision, the court must depend upon competent and admissible evidence submitted by the parties, and not conclusions and hearsay. (*McCaslin v. Kenney* (1950) 100 Cal.App.2d 87, 94.)

"California rigidly adheres to the principle that the power to appoint a receiver is a delicate one which is to be exercised sparingly and with caution." (*Morand v. Superior Ct.* (1974) 38 Cal.App.3d 347, 351.) "It is said by the state's courts that the appointment of a receiver is 'an extraordinary and harsh,' and 'delicate,' and 'drastic,' remedy to be used 'cautiously and only where less onerous remedies would be inadequate or unavailable…'" (*Ibid*.)

Accordingly, even if otherwise proper, this Court would not grant such a motion absent a sufficient factual showing by Plaintiff regarding the availability and efficacy of other remedies to collect on the Judgment. (*Id.* at 350 [appointment of receiver "rests wholly within the judicial discretion"].) Mere difficulty in trying to collect a debt is not sufficient basis for the court to appoint a receiver. (*Medipro Medical Staffing LLC v. Certified Nursing Registry, Inc.* (2021) 60 Cal.App.5th 622, 628-629.) The *Medipro* Court explained, "Medipro's evidentiary showing demonstrated that it had, at most, encountered some difficulty in its initial efforts to collect on its money judgment. If this was sufficient to constitute the 'necessity' required to justify the 'extraordinary' remedy of the appointment of a receiver to take over a judgment debtor's business, it is difficult to see how the appointment of receivers would not become a routine part of the collection of judgments—a result at odds with the solid wall of precedent holding to the contrary."

Here, Plaintiff represents that he has investigated Defendants' finances and has not found a bank or deposit account in their name. According to a web search, the business is still open. (Looney Decl. ¶ 7.) Plaintiff states that he sent a letter to Defendants requesting the judgment be paid and that he served post-judgment discovery upon them, to which he has received no response. Plaintiff sent another letter after receiving no responses to his discovery and received no response to the letter. According to Plaintiff, the Sheriff will not sell liquor inventory and the value of restaurant equipment and fixtures is depressed. Thus, there is no other option but to appoint a receiver to seize and sell the liquor license to satisfy the judgment.

However, Plaintiff has not made a sufficient factual showing that appointing a receiver to seize and

sell the liquor license is necessary. Plaintiff has failed to show the absence of alternate remedies, or if alternate remedies exist, their inadequacy. Rather, as in *Medipro, supra,* Plaintiff has only shown that he has encountered some difficulties in his initial efforts to collect the judgment. While Plaintiff states in his declaration that he investigated Defendant's finances, there is no explanation regarding the depth of this investigation. The Court is not convinced that there exist no bank accounts linked to a business that is purportedly still open. Furthermore, while Plaintiff represents that he propounded post-judgment discovery, such discovery was not attached to this motion, so the Court is unable to ascertain if it requested adequate information to assist Plaintiff in collecting the judgment. Also, Plaintiff has never moved to compel answers to the post-judgment discovery. Finally, Plaintiff's representations regarding the depressed value of restaurant equipment and fixtures are not supported by foundation. Mere difficulties in collecting the judgment are insufficient grounds for appointing a receiver. Plaintiff has failed to meet his burden of proving that a receiver is necessary in this matter.

Plaintiff requests in the alternative that the Court issue an order to show cause why the receiver should not be appointed. Doing so would not relieve Plaintiff of his burden to make a showing to the Court that appointment of a receiver is necessary. (*Moore v. Oberg* (1943) 61 Cal.App.2d 216, 221.) Plaintiff has not carried his burden here nor cited any authority supporting the issuance of an order to show cause. The alternative request is denied.

6. 25CV00622, Summit State Bank v. Reynoso: Application for Right to Attach Order and Writ of Attachment

Plaintiff's unopposed application for a Right to Attach Order and Writ of Attachment is **GRANTED** pursuant to CCP § 483.010. Prior to issuance of the Writ of Attachment, Plaintiff shall post an undertaking in the amount of $10,000, as required by CCP § 489.220.

Plaintiff's counsel shall submit a written order consistent with this ruling. Due to the lack of opposition, compliance with Rule 3.1312 is excused.

According to CCP § 483.010, an attachment may be issued in an action on a claim for money so long as (a) the claims are based on an express contract in a readily ascertainable amount; (b) the claims are not secured by real property; and (c) with respect to a natural person, the claims are commercial in nature. When the defendant is a corporation, all corporate property is subject to attachment. (CCP § 487.010.) Where the defendant is a natural person, all of their interests in real property, their accounts receivable, chattel paper, general intangibles arising out of the conduct by the defendant of a trade, business, or profession, equipment, farm products, inventory, final money judgments arising out of the conduct by the defendant of a trade, business, or profession, money on the premises where a trade, business, or profession is conducted by the defendant, negotiable documents of title, instruments, securities, and minerals or the like are subject to attachment.

At the hearing on an application for a right to attach order and writ of attachment, "the court shall consider the showing made by the parties appearing and shall issue a right to attach order, which shall state the amount to be secured by the attachment determined by the court…if it finds all of the following:

(1) The claim upon which the attachment is based is one upon which an attachment may be issued.
(2) The plaintiff has established the probable validity of the claim upon which the attachment is based.
(3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.
(4) The amount to be secured by the attachment is greater than zero.

(CCP § 484.090(a).)

Here, the Court finds that the plaintiff has satisfied each of these elements. Plaintiff's claims arise out of a loan agreement between Plaintiff and Defendants. The business entity defendants are the borrowers under the loan and the natural person defendants are the guarantors under the loan. The loan amount was for $500,000. Plaintiff alleges Defendants still owe $327,017.55 under the loan. Accordingly, Plaintiff's claims are described in CCP § 483.010(a). Plaintiff submits that Plaintiff's claims were never secured by real property as no deed of trust was ever executed in connection with the Note or Guarantees. Thus, Plaintiff's claims satisfy CCP § 483.010(b). Furthermore, Plaintiff's claims are commercial in nature against all defendants, business entity or natural person. The loan at issue is a Small Business Administration Loan. Thus, Plaintiff's claims satisfy CCP §483.010(c). As such, the requirement of CCP §484.090(a)(1) has been satisfied.

The Court also finds that Plaintiff has established the probable validity of its claims upon which the attachment is based. Plaintiff's claims against these defendants involve breach of contract. Plaintiff has shown the existence of a contract between these parties, the terms of the contract, has demonstrated Plaintiff's performance and Defendants' nonperformance, and has calculated Plaintiff's current damages as a result of the defendant's breach. The attachment is being sought solely for the purpose of recovery on Plaintiff's claims and the amount to be secured is greater than zero. Accordingly, Plaintiff has made the required showing under CCP § 484.090 for the issuance of a right to attach order.

Pursuant to CCP § 489.210, "Before issuance of a writ of attachment…the plaintiff shall file an undertaking to pay the defendant any amount the defendant may recover for any wrongful attachment by the plaintiff in the action." Pursuant to CCP § 489.220, "the amount of an undertaking filed pursuant to this article shall be ten thousand dollars ($10,000)."

7. **MCV-262329, Onemain Financial Group, LLC. V. Senn:** Motion to Vacate Judgment

Plaintiff's request to vacate the judgment in this action is **DENIED**. Due to the lack of opposition, the Court's minute order shall constitute the order of the Court.

Plaintiff moves the Court pursuant to CCP § 473(d) to set aside the judgment entered August 8, 2024 in Plaintiff's favor on the basis that Plaintiff has learned that the defendant, against whom default judgment was entered, died on November 17, 2023, several months before the judgment was entered. Plaintiff argues that this makes the judgment void. However, since the defendant died after he was served with process (September 18, 2023), and thus after the Court acquired personal jurisdiction over him, his subsequent death would make the judgment voidable, not void. (*Woolley v. Seijo* (1964) 224 Cal.App.2d 615, 620-621.) "W]here a party dies subsequent to the commencement of the action and after the court has acquired personal jurisdiction over him, the

entry of judgment against him is a 'mere irregularity' which renders the judgment voidable…" (*Ibid*.)

CCP § 473(d) does not allow the Court to set aside a voidable judgment. It must be void. "'A trial court has no statutory power under section 473, subdivision (d) to set aside a judgment that is not void.'…As we explain, the judgment in this case was not void, but voidable, and thus not subject to being set aside beyond the six-month time limit of section 473." (*Lee v. An* (2008) 168 Cal.App.4th 558, 564.) The same is true here. The judgment is voidable, not void, and the six-month time limit of section 473 has passed.

Pursuant to CCP § 473(b), relief under that code section *shall* be sought within six months "after the judgment, dismissal, order, or proceeding was taken." After six months have elapsed, the Court no longer has jurisdiction over the matter. "This six-month time limitation is jurisdictional; the court has no power to grant relief under section 473 once the time has lapsed." (*Austin v. Los Angeles Unified Sch. Dist.* (2016) 244 Cal.App.4th 918, 928.) The judgment in this matter was entered on August 8, 2024. Six months from that date would have been February 8, 2025. Since February 8, 2025 was a weekend, the motion would have needed to be filed the very next business day, which was February 10, 2025. This motion was filed February 11, 2025, one day past the statutory deadline. Since the six-month deadline of CCP § 473 is jurisdictional and not discretionary, this Court has no power to hear this motion despite its tardiness. "[W]hen a statute authorizes a prescribed procedure and the court acts contrary to the authority conferred, the court exceeds its jurisdiction." (*Lee v. An, supra*, at 564.)

8. <u>SCV-269513, Castro Meacham, III:</u> Motion for Judgment on the Pleadings

Plaintiff's motion for judgment on the pleadings against Defendant Spurgeon Painting is **DENIED**.

Defendant's counsel shall submit a written order consistent with this ruling and in compliance with Rule 3.1312.

A plaintiff is entitled to judgment on the pleadings if "the complaint states facts sufficient to constitute a cause or causes of action against the defendant and the answer does not state facts sufficient to constitute a defense to the complaint." (CCP § 438(c)(1)(A).) "The grounds for a motion for judgment on the pleadings must appear on the face of the challenged complaint or be based on facts which the court may judicially notice." (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 911.) Where the motion is based on matters the court may judicially notice, such matters must be specified in the notice of motion or supporting points and authorities. (CCP § 438(d).)

As an initial matter, the Court notes that Plaintiff has not made a formal request for judicial notice in relation to this motion. Plaintiff simply states in her memorandum that the Court has "already" taken judicial notice of the TAC in its previous order. This does not constitute a request for judicial notice and does not comply with the Rules of Court for doing so. Since there is no formal request for judicial notice of the TAC before this Court, the Court has not taken judicial notice of it.

Plaintiff moves for judgment on the pleadings as to the entire Amended Answer to the Third Amended Complaint ("TAC") filed by Defendant Spurgeon Painting, Inc. Plaintiff argues that judgment on the pleadings is proper because Defendant's affirmative defenses contradict

admissions Defendant made in its discovery responses and because the affirmative defenses are not supported by sufficient factual allegations.

Regarding Plaintiff's first argument about Defendant's admissions, Plaintiff is referring to Defendant's responses to her requests for admissions, which she attached to her TAC. Plaintiff argues that a party may not avoid a motion for judgment on the pleadings by omitting or contradicting facts previously admitted, citing *Alameda County Waste Mgmt. Auth. v. Waste Connections US, Inc.* (2021) 67 Cal.App.5th 1162 with no pin cite. The *Alameda* Court states, "'a court may take judicial notice of admissions or inconsistent statements by [a party] in earlier pleadings in the same lawsuit" and "may *disregard conflicting factual allegations* in the [challenged pleading].'" (*Id*. at 1174. Italics in original.) Defendant's discovery responses are not "earlier pleadings," since they were not filed in Court by Defendant. While Plaintiff's TAC is an "earlier pleading," the allegations of the TAC would not constitute conflicting factual allegations *made by Defendant*, since the allegations of the TAC constitute factual allegations *made by Plaintiff*.

Moreover, as explained by this Court in its September 24, 2024 order on Plaintiff's motion to strike Defendant's Answer to the TAC, exhibits to a complaint do not constitute factual allegations in their own right. Furthermore, as previously explained by the Court, the Court takes judicial notice only of the *existence* of documents, not of the truth of any statements or allegations contained in them. So, even if the Court did take judicial notice of the TAC, which attaches to it Defendant's discovery responses, this does not mean that Plaintiff has established the truth of any of the alleged evidentiary facts within them. Even if the Court took as true the contents of the attachments to the TAC (which would be improper on this motion), such would not function to contradict Defendant's allegations in its amended answer to the TAC because the statements would not constitute conflicting factual allegations *made by Defendant* in an earlier *pleading* filed *by Defendant*.

Plaintiff, in pointing to Defendant's discovery responses attached to her TAC, essentially seeks for this Court to consider the truth of the admissions made in discovery by Defendant. Discovery responses constitute evidence that is not generally judicially noticeable. It is improper for a Court to consider such evidence when deciding a motion for judgment on the pleadings. (*Panterra GP, Inc. v. Superior Court of Kern County, supra*, 74 Cal.App.5th 711.) "It is for a finder of fact to consider all the evidence to determine whether the complaint's allegations are true." (*Id*. at 712.) "Resolving such a factual/evidentiary stalemate at the pleadings stage would be to prematurely determine the proper interpretation of the evidence. (*Id*. at 713. Internal quotations omitted.) Accordingly, this argument made by Plaintiff is unpersuasive.

Next, Plaintiff argues that each of Defendant's affirmative defenses lacks sufficient factual allegations, stating that Defendant "failed to specify any facts" supporting its affirmative defenses. Plaintiff argues that CCP § 431.30 requires Defendant to plead facts with particularity. This argument is inaccurate. CCP § 431.30 includes no such requirement. The pleading requirement for answers is the same as for complaints, that the party plead the "ultimate facts," rather than evidentiary facts or legal conclusions. (*Thomas v. Regents of University of California* (2023) 97 Cal.App.5th 587, 610-611.) "To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action…" (*C.A. v. William S. Hart Union High Sch. Dist.* (2012) 53 Cal.4th 861, 872.) In the inverse, an answer need only allege facts sufficient to state an affirmative defense. A motion for judgment on the pleadings "should be denied if the defendant's pleadings raise a material issue or set up affirmative matter constituting a defense; for purposes of ruling on the motion, the

trial court must treat all of the *defendant's* allegations as being true." (*Allstate Ins. Co. v. Kim W.* (1984) 160 Cal.App.3d 326, 331. Italics in original.)

Here, Defendant has alleged the ultimate facts supporting each of its affirmative defenses. For example, the First Affirmative Defense (Failure to Mitigate), Defendant alleges that Plaintiff failed to take reasonable efforts to mitigate her alleged damages. This is an ultimate fact that is sufficient to state an affirmative defense for failure to mitigate. As another example, Plaintiff specifically complains of the Fourth and Fifth Affirmative Defenses in her memorandum. In the Fourth Affirmative Defense (Legitimate Business Purpose), Defendant alleges Plaintiff was unable to perform her job duties, as such activities were proper, fair and legitimate business activities and/or undertaken for business-related reasons and were neither discriminatory, arbitrary, capricious, nor unlawful. These facts constitute ultimate facts that are sufficient to state an affirmative defense for Legitimate Business Purpose. For the Fifth Affirmative Defense (Good Faith), Defendant alleges that all of the conduct which Plaintiff complains of was a just and proper exercise of management discretion undertaken for fair and honest reason and regulated by good faith under the conditions then existing, that Plaintiff was unable to perform her job duties. Again, these constitute ultimate facts that are sufficient to state an affirmative defense for Good Faith. The Court finds that Defendant's answer states sufficient facts to support the affirmative defenses raised.

9. <u>24CV00705, Anthony v. Whitmire:</u> Motion for Sanctions

This matter previously came on for hearing on March 28, 2025. Prior to the hearing, the Court issued a tentative ruling on Defendant's motion for sanctions, granting it in part. Based on Plaintiff's representations at the hearing that he had difficulties serving his discovery responses, the Court granted a continuance and issued orders requiring the parties to meet and confer on the issue of discovery prior to the next hearing. The Court also ordered Plaintiff to comply with the Court's October 8, 2025 and October 16, 2024 orders.

Counsel for defendant has since filed a declaration confirming that the parties met and conferred on the issues required by the Court. Counsel represents that Plaintiff stated he does not intend to comply with the Court's orders. Indeed, Plaintiff has not demonstrated compliance. Therefore, the Court issues the following ruling on Defendant's motion for sanctions.

Moving Defendant Robert Whitmire's ("Defendant") motion for terminating sanctions is **DENIED**. Defendant's motion for monetary sanctions and evidence preclusion is **GRANTED**. Plaintiff Michael Anthony ("Plaintiff") has **10 days** from entry of this Order to pay a total of $6,679.70 in sanctions and provide verified, objection-free responses to Defendant or else the Court will order evidence preclusion as the issues stated below.

<u>Procedural History</u>

On April 8, 2024, Defendant Robert Whitmire served Plaintiff with Form Interrogatories, Set One and Request for Production of Documents, Set One. (Declaration of Stella Erlach, ¶ 6.) Defendant then moved to compel further responses to Form Interrogatories, Set One and RFPD, Set One on June 25, 2024. (See Defendant's Motions to Compel Further Responses, filed June 25, 2024.) After a hearing for Defendant's motions to compel further responses on October 2, 2024 where no Parties appeared, on October 8, 2024, the Court granted Defendant's motion to compel further responses and sanctions, compelling Plaintiff to provide objection-free responses to Form Interrogatories, Set

One and RFPD, Set One and to pay $3,000 in sanctions both within 30 days of service of the Order. (See Court's Order Granting Motion to Compel, filed October 8, 2024.) Defendant served the October 8, 2024, Order on Plaintiff on October 12, 2024. (Declaration of Stella Erlach, ¶ 5, Exhibit 1.) After receiving no response from Plaintiff, Defendant's counsel sent Plaintiff a letter on November 20, 2024 extending Plaintiff's compliance with the discovery requests until November 30, 2024 and that if Plaintiff did not respond, Defendant would request additional sanctions. (Declaration of Stella Erlach Regarding Meet and Confer, ¶¶ 4–5, Exhibit 1.) Plaintiff has not produced any responses to the discovery requests to date. (Declaration of Stella Erlach Regarding Meet and Confer, ¶ 6.) Defendant contends that Plaintiff's refusal to comply with the Court's October 8, 2024, Order is an abuse of the discovery process and requests terminating sanctions or monetary sanctions with issue preclusion or evidence preclusion sanctions in the alternative. The Court continued this matter from March 21, 2025 to March 28, 2025 to allow Plaintiff to review the tentative ruling and for the Court to review Plaintiff's Opposition.

Governing Law

Regarding evidentiary and issue sanctions, once a party or witness has been ordered to attend a deposition, or to answer discovery, or to produce documents, more severe sanctions are available for continued refusal to make discovery. (Code of Civil Procedure ["C.C.P."] §§ 2023.010, 2031.310(i).) Such sanctions include issue sanctions (C.C.P. section 2023.030(b)) and evidentiary sanctions (C.C.P. sections 2023.030(b)–(c)). "The penalty should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery. Where a motion to compel has previously been granted, the sanction should not operate in such a fashion as to put the prevailing party in a better position than he would have had if he had obtained the discovery sought and it had been completely favorable to his cause." (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793.) The purpose of discovery sanctions is not to punish an offending party for discovery abuses, but rather to undo the harm imposed by misuse of discovery. (*McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 210.)

Terminating sanctions for discovery abuses are to be used sparingly because of the drastic effect of their application and are generally the last resort. (*Lopez v. Watchtower Bible & Tract Soc'y of New York, Inc.* (2016) 246 Cal.App.4th 566, 604 [internal citations omitted].) The discovery statutes outline an incremental approach to sanctions that starts with monetary sanctions and ends with the ultimate sanction of termination. (*Ibid.*) A terminating sanction should not generally be imposed until the court has "attempted less severe alternatives and found them to be unsuccessful and/or the record clearly shows lesser sanctions would be ineffective." (*Ibid.*) A trial court "must be cautious when imposing a terminating sanction because the sanction eliminates a party's fundamental right to a trial, thus implicating due process rights." (*Ibid.*)

Terminating Sanctions

Here, terminating sanctions are not appropriate. While Plaintiff has not responded to Defendant's discovery requests or complied with the Court's October 8, 2024 Order, the Court has not exhausted less severe alternatives. Plaintiff filed other motions in this case as of October 2, 2024 and filed an untimely Opposition to this motion. Furthermore, Defendant has only communicated with Plaintiff once via written letter attempting to obtain these discovery responses after the Court's October 8, 2024 Order. Therefore, Defendant's request for terminating sanctions is **DENIED**.

Monetary Sanctions with Evidence Preclusion

However, due to Plaintiff's noncompliance with Defendant's discovery requests propounded on April 4, 2024 and the Court's October 8, 2024 Order, monetary sanctions with evidence preclusion is warranted. Pursuant to California Rules of Court, Rule 3.1300(d), the Court may refuse to consider late filed papers. Plaintiff filed his Opposition labeled as an "answer" 9 days late, but the Court will consider Plaintiff's untimely Opposition. However, Plaintiff does not raise any articulable argument in opposition to Defendant's motion for terminating/evidentiary sanctions or provide any explanation as to Plaintiff's failure to respond the discovery and lack of compliance with the Court's October 8, 2024 Order. Thus, monetary sanctions with evidence preclusion is appropriate.

Defendant requests $4,017.10 in sanctions in connection with this motion for the following: 5.5 hours of legal work at $600 per hour ($3,300), $79.70 for Court e-filing charges, 1.0 hour for drafting a reply brief and appearing at the hearing, and an additional $37.40 for e-filing charges. (Declaration of Stella Erlach, ¶ 23.)

Defendant attended the hearing but did not file a reply brief and thus did not incur additional e-filing charges. The Court will deduct $337.40 for these anticipatory fees from the requested amount. As Plaintiff's non-compliance necessitated this motion, the Court **GRANTS** sanctions against Plaintiff for $3,679.70 in connection with this motion.

Plaintiff has **10 days** from entry of this Order to provide verified, objection-free responses to Defendant's discovery requests and to pay $6,679.70 in sanctions ($3,000 now past-due from the October 8, 2024 Order and $3,679.40 for this motion). If Plaintiff fails to provide verified, objection-free responses and pay $6,679.70 within 10 days, the Court precludes evidence as to the following issues as requested by Defendant:

1. Plaintiff's claims of personal injury, emotional distress, health deterioration, and depression;

2. Plaintiff's claims of damages and loss from thefts of vehicles, parts, and equipment;

3. Plaintiff's claims of loss of income from his used parts business; and,

4. Plaintiff's claims Defendant Robert Whitmire is responsible for his adult son's thefts.

Plaintiff will file a Notice of Compliance upon serving discovery responses and paying the required sanctions. Thus, Defendant's motion for evidentiary preclusion is **GRANTED**.

Conclusion

Defendant's motion for terminating sanctions is **DENIED**. Defendant's motion for monetary sanctions and evidence preclusion is **GRANTED**. Plaintiff has **10 days** from entry of Order to comply with the previous orders regarding compelling discovery before the Court orders evidence preclusion as outlined above. Defendant shall submit a written order on its motion to the Court consistent with this tentative ruling and in compliance with Rule of Court 3.1312(a) and (b).

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