**TENTATIVE RULINGS**
**LAW & MOTION CALENDAR**
**Wednesday, June 14, 2023 3:00 p.m.**
**Courtroom 19 –Covered by Civil Department for Hon. Oscar A. Pardo**
**3055 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 19 in person or remotely by Zoom, a web conferencing platform. However, appearances by Zoom are STRONGLY encouraged. 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 unless otherwise indicated.**

**TO JOIN ZOOM ONLINE**:

**Department 16 Hearings**
Courtroom 16
Meeting ID: 824-7526-7360
Passcode: 840359
https://us02web.zoom.us/j/82475267360?pwd=M0o4WVRSaysydlU5VWhBZEk1MEhpdz09

TO JOIN "ZOOM" BY PHONE,
By Phone (same meeting ID and password as listed above):
(669) 900-6833 US (San Jose)

**Department 17 Hearings**
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 above):
+1 669 900 6833 US (San Jose)

**Department 18 Hearings**
Meeting ID: 838—5609—8726
Password: 000169
or CLICK HERE
https://us02web.zoom.us/j/83856098726?pwd=WEI3K1BPRCswSk0ZYSs4VUw1OU5ydz09

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 tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument, **YOU MUST NOTIFY** the Judge's Judicial Assistant by telephone at **(707) 521-6602**, and all other opposing parties of your intent to appear, **and whether that appearance is in person or via Zoom**, no later 4:00 p.m. the court day immediately preceding the day of the hearing

**PLEASE NOTE:** The Court's Official Court Reporters are "not available" within the meaning of California Rules of Court, Rule 2.956, for court reporting of civil cases.

**1. MCV- 250197, Looney v. Quiroz**

This matter shall be heard by the Hon. Rene Chouteau in Department 18 of the Sonoma County Superior Court. Any requests for oral argument **will be heard in Department 18 at 3:00 p.m**. The parties are directed to use the Zoom information for Department 18 if they request to appear and wish to do so remotely.

Plaintiff's motion to amend the judgment entered April 2, 2021 is DENIED without prejudice. Plaintiff failed to submit a proposed amended judgment with his moving papers.

**2. MCV-252258, Portfolio Recovery Associates v. Gilligan**

This matter shall be heard by the Hon. Rene Chouteau in Department 18 of the Sonoma County Superior Court. Any requests for oral argument **will be heard in Department 18 at 3:00 p.m**. The parties are directed to use the Zoom information for Department 18 if they request to appear and wish to do so remotely.

Plaintiff Portfolio Recovery Associates, LLC, ("Plaintiff") filed the complaint in this action against defendant Mason Gilligan ("Defendant"), with causes of action for account stated and open book account. This matter is on calendar for Plaintiff's motion pursuant to pursuant to Cal. Code Civ. Proc. ("CCP") § 664.6 and the settlement agreement filed January 4, 2023 (the "Agreement") to enter judgment in the case in the amount of $9,925.34, as Defendant has defaulted on the agreement. There is no opposition to the motion.

However, there is no proof of service in the Court's file indicating the Defendant was ever given notice of the instant hearing date. Therefore, the motion is **DENIED** without prejudice. Should Plaintiff provide a proof of service before the hearing indicating that Defendant was timely served with notice of the hearing as required by CCP § 1005, and Plaintiff appropriately requests to be heard, the motion will be granted.

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

## 3. MCV-256710, Cavalry v. Edward

This matter shall be heard by the Hon. Rene Chouteau in Department 18 of the Sonoma County Superior Court. Any requests for oral argument **will be heard in Department 18 at 3:00 p.m**. The parties are directed to use the Zoom information for Department 18 if they request to appear and wish to do so remotely.

Plaintiff Cavalry SPV I, LLC ("Plaintiff") filed the complaint in this action against defendant Bliss Edwards ("Defendant") for damages based on account stated and open book counts (the "Complaint"). This matter is on calendar for the motion by Plaintiff to deem admitted the matters set forth in its first set of requests for admission, pursuant to Cal. Code Civ. Proc. ("CCP") § 2033.280(b).

CCP § 2033.280(a) provides in relevant part that if a party to whom requests for admission are directed "fails to serve a timely response," the party to whom the requests are directed waives any objection. CCP § 2033.280(b) provides that "[t]he requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted". CCP § 2033.280(c) provides that the court "shall make this order" unless it finds that the party to whom the requests have been directed has served a proposed response in substantial compliance with section 2033.220 before the hearing on the motion.

The Motion is accompanied by proofs of service showing that service of the moving papers was timely made on Defendant. The Motion is unopposed. Plaintiff served the request for admission on February 3, 2023, and Defendant served no response. The Motion is therefore **GRANTED**. The truth of the matters set forth in Plaintiff's First Set of Requests for Admission (Plaintiff's Counsel Decl. Ex. A) are deemed admitted. CCP § 2033.280(b).

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

## 4. SCV-263849, McKelvey v. R&B Custom Builders

This matter shall be heard by the Hon. Bradford DeMeo in Department 17 of the Sonoma County Superior Court. Any requests for oral argument will be heard in Department 17 at 3:00 p.m. The parties are directed to use the Zoom information for Department 17 if they request to appear and wish to do so remotely.

Defendant Timothy Lee Menini, doing business as, MENINI HEATING & AIR CONDITIONING ("Defendant") moves for a determination that the settlement between Defendant and Plaintiffs Matthew McKelvey and Reinan Nulud ("Plaintiffs") was entered into in good faith within the meaning of Code of Civil Procedure ("CCP") sections 877 and 877.6, and moves for an order dismissing with prejudice and/or barring any and all present or future complaints against the Defendant relating to this matter. Defendant's motion is **GRANTED**.

### I. Procedural History

Defendant became involved in this construction defect matter due to its work as a subcontractor on Plaintiffs' home, which experienced water intrusion and damage after Plaintiffs purchased it. (Memorandum of Points and Authorities ["MPA"], 1:10-24.) Defendant's scope of work was to fabricate and install deck/wall flashing, rear deck gutter, and scupper drain assemblies, and to install two rear deck door pans, and also to fabricate and supply "only 100LF of galvanized z-metal flashing. (*Id*. at 2:17-22.) Defendant was named in Plaintiffs' Second Amended Complaint, and also named by general contractor R&B Custom Builders Corp. ("R&B") in its cross-complaint. (*Id*. at 2:1-7.) R&B investigated Plaintiffs claims and allocated $145,000 in damages to Defendant, and Defendant subsequently negotiated settlement with Plaintiffs after multiple arms-length mediation session with Plaintiffs' counsel and Defense counsel on September 11, 2020, March 18, 2021, and November 28, 2022. (*Id*. at 2:7-14.) Plaintiffs and Defendant successfully reached an agreement to settle for $160,000, with Defendant's insurers making the payment to Plaintiffs. (*Id*. at 2:14-15.) The terms of the settlement include a full mutual release and dismissal by Plaintiffs and Defendant for any claims against one another related to this matter, as well as a waiver of all other fees and costs. (*Ibid*.) Defendant now moves for a determination of good faith settlement per CCP sections 877 and 877.6, which determination has been contested to by only one other subcontractor defendant/cross-defendant, Sonoma Valley Plastering, Inc. ("Sonoma Valley")

## II. Analysis

### a. Legal Standard for Determining Good Faith Settlement

According to CCP section 877.6, a "plaintiff or other claimant" can settle with one or more joint tortfeasors or co-obligors without releasing others, provided the settlement is in "good faith." A good-faith settlement discharges the settling defendant from liability to other parties for equitable contribution or comparative indemnity. (*City of Grand Terrace* v. Sup.Ct. (Boyter) (1987) 192 Cal.App.3d 1251, at 1262; See also, *River Garden Farms, Inc. v. Sup.Ct.* (1972) 26 Cal.App.3d 986, at 996.) The determination of good-faith settlement is in the discretion of the trial court. (*Tech-Bilt Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 502.)

There is no precise standard to determine "good faith," but the court must harmonize public policy favoring settlements with public policy favoring equitable sharing of costs among tortfeasors. To this end, *Tech-Bilt Inc.*, supra, 38 Cal.3d 488, requires that the settlement be within the "reasonable range" of settling tortfeasor's share of liability, taking into consideration the facts and circumstances of the particular case and evaluating the settlement on the basis of information available at the time of settlement. The factors include:

1. A rough approximation of the total recovery and settlor's proportionate liability;
2. The amount paid in settlement;
3. A recognition that a settlor should pay less in settlement than if found liable after trial;
4. The allocation of the settlement proceeds among plaintiffs;
5. Settlor's financial condition and insurance policy limits, if any; and
6. Evidence of any collusion, fraud or tortious conduct between the settlor and the plaintiffs aimed at making non-settling parties pay more than their fair share.

If one contests "good faith," the party seeking a good-faith determination must sufficiently demonstrate all the Tech-Bilt factors. (*City of Grand Terrace v. Sup.Ct.* (Boyter) (1987) 192 Cal.App.3d 1251, 1262.) However, the party contesting good faith has the burden of demonstrating that the settlement is so far "out of the ballpark" in relation to the *Tech-Bilt* factors as to be inconsistent with the equitable objectives of the statute. (*Tech-Bilt*, supra, at 499-500; *Widson v. International Harvester Co., Inc.* (1984) 153 Cal.App.3d 45.)

A settlement does not lack "good faith" solely because the settling tortfeasor pays "less than his or her theoretical proportionate or fair share." (*Tech–Bilt*, supra, 38 Cal.3d at 499.) The court must discount a settling tortfeasor's proportional share of liability because a plaintiff's "damages are often speculative, and the probability of legal liability therefor is often uncertain or remote…" (*Ibid*.) "[P]ractical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement." (*Ibid*.) Thus, "[t]he ultimate determinant of good faith is whether the settlement is grossly disproportionate to what a reasonable person at the time of settlement would estimate the settlor's liability to be." (*PacifiCare of CA v. Bright Medical Associates, Inc.* (2011) 198 Cal.App.4th 1451, 1465, citing, *City of Grand Terrace v. Superior Court*, supra 192 Cal.App.3d at 1262.) "[A] 'good faith' settlement does not call for perfect or even nearly perfect apportionment of liability. In order to encourage settlement, it is quite proper for a settling defendant to pay less than his proportionate share of the anticipated damages. What is required is simply that the settlement not be grossly disproportionate to the settlor's fair share." (*Ibid*, citing, *Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 874–875.)

b. Defendant's Motion

Based on the facts described above, Defendant argues that it has sufficiently demonstrated that the *Tech-Bilt* have been met. Defendant claims the following:

1. Defendant claims that a rough approximation of the total damages sought by Plaintiffs was $1,374,345.72, which includes "a cost of repair of approximately $1,078,000.00, loss of use, refinance damages, *Stearman*, additional costs, and interest." (MPA, 5:23-28.) The allocation that Defendant received from R&B was 11% of Plaintiffs' alleged damages. (MPA, 6:1-7.)

2. The amount paid in settlement was $160,000, which represents about 11.64% of the claimed damages which is representative of settlor's proportionate liability as allocated by R&B. (*Ibid*.)

3. Defendant paid in settlement approximately proportion of damages allocated to it based on Defendant's scope of work, and is "appropriate less" than Defendant's exposure if proven liable at the time of trial. (MPA, 7:7-10; 8:5-9.)

4. A lumpsum payment of the $160,000 was paid to the two married Plaintiff homeowners. (MPA, 7:7-10.)

5. Defendant had insurance policies which provided coverage in the event of liability, and the insurers did pay out the $160,000 for settlement. (MPA, 8:23-25.)

6. Defendant states that all negotiations leading up to the settlement were done at arm's length without the intent, or effect, of harming any party to the litigation, and nothing has been shown to demonstrate collusion, fraud, or tortious conduct aimed to injure the interests of non-settling defendants. (MPA, 9:6-8.)

Only one party, Sonoma Valley, has submitted an opposition contesting the good faith of the settlement between Plaintiffs and Defendant. (See generally, Opposition.) The opposition is based on the grounds that a trier of fact could find Defendant's liability greater than 11% allocated by the general contractor R&B for Defendant's proportion owed in damages to Plaintiffs. (Opposition, 3:1-5.) Thus, Sonoma Valley argues that the subject settlement is not established as an approximation of Defendant's proportionate liability, and because the motion does not state how the settlement payments are to be allocated to the homeowners. (*Ibid*.)

Application

Here, Sonoma Valley has the burden of demonstrating that the settlement is so far "out of the ballpark" as to the *Tech-Bilt* factors that they are inconsistent with the equitable objectives of the statute. While the motion does not specifically state how the settlement payments are to be allocated to the homeowners, Defendant does state that a lumpsum payment of $160,000 is to be made for the settlement by Defendant's insurers to Plaintiffs, who per their complaint are a married couple residing in San Francisco County, California. The Court find that this factor is sufficiently met by the payment terms agreed to by Plaintiffs. Sonoma Valley argues that the settlement was not made in good faith because a trier of fact could find Defendant liable for more than the allocated 11%. However, the Court finds that one of the *Tech-Bilt* factors is to recognize exactly that—that a settlor should pay less in settlement than if found liable after trial—so this does not appear to be a sufficient basis to support that the settlement lacked "good faith." Overall, Sonoma Valley has not demonstrated that the amount paid in settlement was grossly disproportionate to Defendant's fair share, and Defendant has otherwise demonstrated that the *Tech-Bilt* factors have been established by the terms of its settlement with Plaintiffs.

## IV. Conclusion

Defendant's motion for determination of good faith settlement is **GRANTED**, per CCP sections 877 and 877.6. Unless oral argument is requested, the Court will sign the proposed order lodged by Defendant granting this motion and dismissal with prejudice.

## 5. SCV-267300, 601 Main Street, LLC v. Frym

This matter shall be heard by the Hon. Bradford DeMeo in Department 17 of the Sonoma County Superior Court. Any requests for oral argument will be heard in Department 17 at 3:00 p.m. The parties are directed to use the Zoom information for Department 17 if they request to appear and wish to do so remotely.

Plaintiff 601 Main Street, LLC (hereinafter "Plaintiff") filed the currently operative complaint against defendant David Frym ("Defendant" or "Cross-Complainant"). Cross-Complainant has in

turn filed a cross-complaint ("Cross-Complaint") against both Plaintiff and Angela DeCarli (together with Plaintiff, "Cross-Defendants"). This matter is on calendar for Cross-Complaint's motion which seeks relief from mistake related to the filing of the first amended cross-complaint ("FACC") pursuant to California Code of Civil Procedure ("CCP") § 473(b). The motion is **DENIED**.

I. Procedural History

On February 25, 2022, the Court granted Defendant David Frym leave to file a First Amended Cross-Complaint. The Court's order provides, "Cross-Complainant shall file the [proposed] First Amended Complaint submitted with the reply within five days of entry of the order on this Motion." The order on the motion was entered on February 25th, therefore the deadline by which Cross-Complainant must have filed the FACC was March 2, 2022. Cross-Complainant filed an erroneous draft of the first amended cross-complaint on March 3, 2022 (the "Erroneous FACC"). On March 22, at Cross-Complainant's request, the clerk's office rejected the Erroneous FACC. Cross-Complainant did not file the FACC until March 29, 2022. Cross-Defendant filed a motion to strike the Erroneous FACC, which was amended on April 19, 2022 to address the replacement of that pleading by the FACC. That matter was set for hearing on August 3, 2022. The Court found that the FACC was tardy in complying with the February 25, 2022 order, and struck the FACC in its tentative ruling. The Order striking the FACC was filed on September 7, 2022. Cross-Complainant filed the instant motion seeking relief from their untimely filing of the FACC on December 30, 2022.

II. Governing Law

> "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken."

CCP § 473 (b).

Under the mandatory relief provision of CCP § 473(b), "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, surprise, or neglect, vacate any . . . (2) resulting default judgment or dismissal entered against his or her client unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." CCP §473(b). Dismissal which is the equivalent of default for the purposes of CCP § 473 (b) is subject to the same analysis. *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 618. "Moreover, because the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default." *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233. Courts will generally indulge all presumptions and resolve all doubts in favor of

orders setting aside defaults and an order setting aside a default under section 473 will not be reversed unless the record clearly shows an abuse of discretion. *Pearson v. Continental Airlines* (1970) 11 Cal.App.3d 613, 619.

III. Relief is Discretionary, and Improper

Cross-Complainant has moved for relief under CCP § 473 (b) based on attorney mistake or neglect. Cross-Complainant asserts that this falls under the mandatory relief provision of CCP § 473 (b). This position is not supported by any statement of law given the particular facts of this case. On August 3, 2022, the Court struck Plaintiff's FACC as untimely filed. However, the striking of this pleading for procedural cause resulted in the Cross-Complainant's original Cross-Complaint becoming the operative pleading. See Court's 5/1/2023 Order on Cross-Defendant's Motion for Fees. The mandatory relief provision of CCP § 473(b) operates to relieve a party from an attorney's mistake, inadvertence, surprise, or neglect by allowing the Court to "vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client". *Ibid*. There is no judgment, default or dismissal here, as the striking of the FACC merely rendered the Cross-Complaint the operative pleading. As such, relief here depends upon the discretionary relief from an order accorded under CCP § 473(b).

This motion is untimely for a variety of reasons depending on the logic followed. First, CCP § 473 (b) allows the Court to "relieve a party or his or her legal representative from a(n) . . . order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." CCP § 473(b). Any application for relief "shall be made within a reasonable time, in no case exceeding six months, after the . . . order, or proceeding was taken." *Ibid*. Here it is unclear what order upon which Cross-Complainant seeks relief. If the order upon which Cross-Complainant seeks relief is their mistake in not complying with the Court's February 25, 2022 order, the Court's jurisdiction over such matters has passed. Even in cases of mandatory relief, the Court's power to set aside is limited to six months under CCP § 473(b). This limit is jurisdictional. *Arega v. Bay Area Rapid Transit Dist.* (2022) 83 Cal.App.5th 308, 316. If Cross-Complainant seeks to be relieved from this order, the Court has no power to do so. If Cross-Complainant seeks relief from the Court's September 7, 2023 order, while such matters are within the Court's jurisdiction, they are still tardy. CCP § 473 (b) requires applications for discretionary relief be made in "a reasonable time". In matters of discretionary relief, the moving party must show diligence in setting aside the order. *Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1185. Diligence is a factual determination by the trial court. *Caldwell v. Methodist Hospital* (1994) 24 Cal.App.4th 1521, 1524. There is no doubt, Cross-Complainant has been lax in pursuit of this matter. Cross-Complainant filed the Erroneous FACC on March 3, 2022. Cross-Complainant realized that the filing was erroneous, informed the court clerk, and the filing was rejected on March 22, 2022. Despite this, Cross-Complainant did not file the FACC until a week later, on March 29, 2022. The motion to strike was amended to target the FACC rather than the Erroneous FACC on April 19, 2022. That motion was granted by order on September 7, 2022, formalizing the tentative ruling issued for hearing on August 3, 2022. The instant motion for relief was filed on December 30, 2022. This means that Cross-Complainant was informed about their procedural infirmity via the motion to strike 256 days before they filed the instant motion, a period of more than eight months. Cross-Complainant was aware that the Court had found a

basis to strike the FACC 150 days prior to filing this motion. Despite this, Cross-Complainant waited 115 days to submit this motion after the formal order striking the FACC was entered (more than the three months asserted on reply). The Declaration of Cory Birnberg filed in support of this motion makes no effort to ascribe diligence to his actions. The delay evidenced here is untenable given the facts.

Cross-Complainant's motion to set aside the order is DENIED.

IV. Conclusion

Based on the foregoing, the motion is **DENIED**.

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

## 6. SCV-267688, Oak Grove Construction v. Kelly

This matter shall be heard by the Hon. Bradford DeMeo in Department 17 of the Sonoma County Superior Court. Any requests for oral argument will be heard in Department 17 at 3:00 p.m. The parties are directed to use the Zoom information for Department 17 if they request to appear and wish to do so remotely.

The Court preliminarily notes that the parties before the Court share a familial connection, and thereby surnames. First names are used for the sake of clarity, and no disrespect is intended.

The underlying action here stems from the complaint filed by Oak Grove Construction, Inc. for alleged professional malpractice on the part of Thomas P. Kelly, Jr. ("Decedent"). Derived from that, Thomas P. Kelly, III ("Cross-Complainant" or "Thomas") filed the presently operative cross-complaint (the "Cross-Complaint") against defendants William B. Kelly ("William") as trustee of the Thomas P. Kelly, Jr. 1999 Dated May 8, 1999 (the "Trust"), and John A. Kelly ("John", together with William, "Cross-Defendants") arising out of Cross-Defendant's alleged mishandling in managing the affairs of the Trust. This matter is on calendar for John's demurrer to all causes of action within the Cross-Complaint pursuant to Cal. Code Civ. Proc. ("CCP") § 430.10(e) for failure to state facts sufficient to constitute a cause of action, and that that there is another action proceeding between the same parties. John's demurrer to Thomas's Cross-Complaint is SUSTAINED as to the first and second causes of action.

I. Procedural and Evidentiary Issues

The Court thanks demurrer facilitator Benjamin Karpilow for his service and assistance. The assertions of both parties that the meet and confer was insufficient shall not result in sanctions, as the demurrer facilitator has represented to the Court that both parties participated in good faith discussions. Contrary to Thomas's argument, this is not a basis upon which to deny the demurrer. See CCP § 430.41(a)(4).

Judicial notice of official acts and court records is statutorily appropriate. See Cal. Evid. Code § 452(c) and (d) (judicial notice of official acts). Yet since judicial notice is a substitute for proof,

it "is always confined to those matters which are relevant to the issue at hand." *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301. Factual findings found within a prior judicial opinion are not an appropriate subject of judicial notice. *Kilroy v. State* (2004) 119 Cal.App.4th 140, 148. Courts may take judicial notice of the existence and legal effect of legally operative documents. *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 754. Courts may take notice of public records, but not take notice of the truth of their contents. *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375. The scope of the judicial notice taken is limited to the action of the executive agency. *Herrera* at 1375. It is not appropriate for the Court to take notice of additional information which is included in the documentation or contentions as to the truth of the contents *Id.* All requests for judicial notice are GRANTED with these limitations.

The Court notes that John has submitted objections 14 pages in length. These objections appear to largely be an opportunity to add several pages of additional briefing on Reply to John's already exceeded 10 page limit (the Reply itself runs on to 11 substantive pages). As such, due to their utilization as excessive briefing, the objections are disregarded.

II. Governing Law

A. Jurisdiction

Once an appeal is filed, the trial court loses subject matter jurisdiction over any matter embraced in or affected by it. *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196-198 ("*Varian*"); see also CCP § 916. While the court lacks subject matter jurisdiction, any judgment or order rendered is void on its face. *Id.* at 196.

B. Standard on Demurrer

A demurrer tests whether the complaint sufficiently states a valid cause of action. (*Hahn v. Merda* (2007) 147 Cal.App.4th 740, 747.) Complaints are read as a whole, in context and are liberally construed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also, *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 601.) In reviewing the sufficiency of a complaint, courts accept as true all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law, or the construction of instruments pleaded, or facts impossible in law. (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43; see also, *South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732.) Matters which may be judicially noticed are also considered. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

C. Breach of Fiduciary Duty

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

of trust."). A trustee's attorney can be liable for participating in a trustee's breach of trust, but the attorney must have actively participated in the breach of trust, and must have received independent financial gain beyond the fees incurred. *Cortese v. Sherwood* (2018) 26 Cal.App.5th 445, 455-456.

D. Fraud by Concealment and Constructive Fraud

"The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638. Fraud may be accomplished though suppression of a fact by one who is bound to disclose it. Civ. Code § 1710 (3). "(T)he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612–613. To establish reliance on fraud, reliance upon the truth of the fraudulent misrepresentation does not have to be a predominant factor, but it must be a substantial factor in the plaintiff's subsequent conduct. *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864. Plaintiffs in fraud by concealment claims must show that if the information had not been omitted, plaintiff would have been aware of it and therefore would have behaved differently. *Id.* The pleading must be adequately specific to show actual reliance on the omission, and that the damages causally resulted therefrom. *Id*. California law "requires a plaintiff to allege specific facts not only showing he or she actually and justifiably relied on the defendant's misrepresentations, but also how the actions he or she took in reliance on the defendant's misrepresentations caused the alleged damages." *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1499.

"'[I]n California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] "Thus 'the policy of liberal construction of the pleadings ... will not ordinarily be invoked to sustain a pleading defective in any material respect.'[Citation.] [¶] This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 993; *see Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166-1167 [" 'the plaintiff must allege the names of the persons who made the representations, ... to whom they spoke, what they said or wrote, and when the representation was made' "]; *see also Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645. In pleading fraud claims, "(e)very element of the cause of action must be alleged in full, factually and specifically." *Id.* at 1249. In general, as with showing fraud, oppression, or malice sufficient to support punitive damages, while plaintiffs must plead facts, with respect to intent and the like, a "general allegation of intent is sufficient." *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616, 632; see *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1060 (in pleading promissory fraud, a general allegation that the promise was made without intent to perform was sufficient); see also *Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 608 (pleading that a hospital

intentionally withheld that a health practitioner was operating without a medical license was sufficient to meet the pleading requirements for intent). Reliance upon the truth of the fraudulent misrepresentation does not have to be a predominant factor, but it must be a substantial factor in the plaintiff's subsequent conduct. *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864. Plaintiffs in fraud by concealment claims must show that if the information had not been omitted, plaintiff would have been aware of it and therefore would have behaved differently. *Id*.

III. Analysis

A. General Considerations for Demurrer

First, to address the jurisdictional argument raise by Thomas, claiming that the filing of John's demurrer before the issuance of remittitur has divested this court of subject matter jurisdiction, Thomas's argument is unavailing. Thomas points out that the instant demurrer was filed April 18, 2023. Remittitur was issued from the First District Court of Appeal on May 10, 2023. However, Thomas provides no authority that the lack of remittitur renders the filing of a demurrer. The stay on appeal only ceases this Court's subject matter jurisdiction over issues embraced or affected on appeal. *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 190. Until remittitur issued, this Court could not rule on John's motion. This does not translate to John's motion being procedurally infirm because it was filed during the stay. This motion is being heard on June 14, 2023. The remittitur has been issued, the stay has dissolved, and this Court has jurisdiction to proceed. No argument provided by Thomas is adequate to show the contrary.

John argues that this Court needs to abate this action in order to be heard before the probate department in the case filed by Thomas against William as Trustee, SPR095583. Probate Code § 17200 provides the Probate Court with exclusive jurisdiction over the internal affairs of a trust. *Estate of Bowles* (2008) 169 Cal.App.4th 684, 696. Simply put, there is a disparity of parties between the cases. This case alleges causes of action against John, over whom the probate petition asserts no jurisdiction and from whom no remedy is sought. Probate Code § 17200 provides that the internal affairs of a trust cover a broad spectrum of issues related to the trust and trustee. Nowhere in that section does this Court find any jurisdiction over the counsel of trustee, which is the basis for Thomas's allegations against John here. John provides no direct authority for dismissal or a stay of this case in favor of one which cannot be found liable. See, e.g.. *Cortese v. Sherwood* (2018) 26 Cal.App.5th 445 (suit against trustee and trustee's attorney for breach of fiduciary duty proceeded in the civil department).

John also argues that this Court is bound by the decision on appeal in finding that there are no damages upon which to predicate Thomas's claims. While the Court of Appeal found that Thomas had not stated a claim for damages, as the Cross-Complaint only alleges that the damages were "based on John's (and William's) actions subjecting assets of the Trust to the Oak Grove claim." See John's Memorandum of Points and Authorities, Exhibit 1 (unpublished decision on appeal in this case, hereinafter the "Slip Opinion"), pg. 21-22. At the time of appeal it was undisputed that "no portion of the settlement was paid 'directly or indirectly' from the Trust". *Id.* at pg. 22. The Court found that Thomas could not support a claim for damages, and therefore could not meet the second prong of the Anti-SLAPP statute. *Ibid.* In determining

whether a plaintiff has met the second prong under the Anti-SLAPP statute, the court considers the pleadings, as well as the evidence presented. *Equilon Enterprises, LLC v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 58-59. Here, Thomas's claims on appeal were restricted to the damages he pled, which only claimed that the Trust would be exposed to liability through the Oak Grove Claim. In this restricted view, The Court found that the Cross-Complaint as pled only measured damages through the Oak Grove Claim, and that it was undisputed that the Oak Grove Claim had not been paid through any trust proceeds. Slip Opinion at pg. 21-22. The Court of Appeal's finding is only binding as to these facts. It does not state that Thomas is incapable of making a claim for damages through the Cross-Complaint.

However, Thomas has not adequately defended the proposition that he fails to state a claim for damages in the Cross-Complaint as pled. Damages are necessary elements both fraud and breach of fiduciary duty causes of action. The Oak Grove Claim (as defined by the Cross-Complaint) has been determined have no damages as elucidated in the record on appeal, but that does not mean Thomas cannot make a claim of damages. This defect potentially capable of remedy through amendment. Therefore, on this basis the demurrer is proper to SUSTAIN with leave to amend.

John's claim that Thomas's own malpractice contributed to the circumstances, and therefore John cannot be found liable, deals in applicable of standards of care for professionals. Whether conduct constitutes malpractice is a question of fact. *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1535. As such, this claim fails at demurrer.

B. Breach of Fiduciary Duty

Thomas alleges breach of fiduciary duty against all defendants, including John. Thomas has made no allegation supporting the contention that John owed him a duty. The facts as pled by Thomas do not establish either an independent duty to Thomas from John, nor a duty to be derived from John's representation of William.

This matter is particularly addressed by *Cortese v. Sherwood* (2018) 26 Cal.App.5th 445 ("*Cortese*"), where the trial court overruled a demurrer to the complaint as to causes of action for breach of fiduciary duty. *Id.* at 452. The Court of Appeal reversed the trial court, finding that the complaint was inadequately pled with regard to the allegations of duty owed by trustee's attorney to trust beneficiary. *Id.* at 460-462. Any duty from the trustee's attorney to a beneficiary is derived from the obligations of the trustee himself. *Id.* at 455. Without the attorney's active participation in the trustee's breach of duty, and independent financial gain, the trustee's fiduciary duties cannot give rise to liability on the part of the attorney. *Id.* at 456. Particularly, the *Cortese* court found that plaintiff had made no allegations that supported a legal duty because there were no allegations within the complaint which elucidated that counsel would receive an independent advantage beyond the fees incurred by trustee. *Id.* at 460-461. This requirement not being met, the court of appeal reversed the trial court, finding that the complaint was inadequately pled. *Id.* at 461.

Here, John accurately notes that any allegation of express misrepresentation is dependent upon claims stricken by the Anti-SLAPP ruling of the Court of Appeal. Thomas does not address the Cross-Complaint's lack of affirmative misrepresentations. Instead, Thomas cites to *Doctors' Co.*

*v. Superior Court* (1989) 49 Cal.3d 39, 48 ("*Doctors' Co.*"), claiming that the attorneys in that case were held liable for actively participating in fraud. *Doctors' Co.* does apply here, but only because Thomas misstates the holding in that case. Thomas quotes *Doctors' Co.*, "The agents were held subject to liability for conspiracy to commit actual fraud since they had a duty to abstain from injuring the plaintiff through express misrepresentation, independent of the insurer's implied covenant of good faith and fair dealing." Opposition Brief, pg. 13:3-5; quoting *Doctors' Co., supra, 49 Cal.3d at* 48. In this segment of the decision, the *Doctors' Co.* court was discussing the prior decision *Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 511 ("*Younan*"). Continuing the discussion of *Younan*, Thomas's quote is immediately followed with, "But (the attorneys in *Younan*) were held not liable for *constructive* fraud since that charge rested on a fiduciary duty of disclosure which was owed plaintiff only by the insurer itself." *Doctors' Co., supra,* 49 Cal.3d at 48. In contrast, the *Doctors' Co*. court found that the complaint there, "fails to state a cause of action because the attorneys and Russell acted solely as the insurer's agents and did not personally share the statutory duty alleged to have been violated." *Id.* at 49. Akin to *Cortese*, the *Doctors' Co.* court found the complaint was inadequately pled, and the demurrer should be sustained.

Here, Thomas's claim for breach of fiduciary duty meets neither of the above exceptions. The legally operative portions of the Cross-Complaint no longer contain facts which delineate affirmative misrepresentations. There are no allegations which allege that John received an independent financial benefit from his representation of William. Therefore, there is no basis to expand William's fiduciary duties to implicate John in their liability. Thomas's conclusory allegation that John owed him a duty is inadequate to establish the duty based on the facts. No duty being owed, Thomas's claims for breach of fiduciary duty against John are inadequately pled. This is potentially capable of remedy through amendment. Therefore, as to the first cause of action, the demurrer is **SUSTAINED** with leave to amend.

C. Fraud

Thomas's claims for fraud lack multiple necessary elements when applied to John.

As is noted above, any claims of affirmative misrepresentation by John have been stricken through the Anti-SLAPP ruling. As such, Thomas's claims depend upon arguments of fraud through concealment. Fraud through concealment requires a duty to disclose (Civ. Code § 1710 (3); *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612–613), a duty which Thomas has not supported through his pleading. John is only alleged to be the attorney for William as Trustee. As is explained above, John owes no duty to Thomas without either allegations of affirmative misrepresentations or independent financial benefit. The Cross-Complaint contains no such allegations. Thomas has inadequately pled a duty to disclose, and therefore there is no claim for concealment.

Second, Thomas pleads no reliance. Thomas asserts that detrimental reliance is not an element of fraud claims, but his own pleadings states that fraud causes of action require "(4) justifiable reliance; and (5) resulting damage. (*Hoffman v. 162 North Wolfe LLC* (2014) 228 Cal.App.4th 1178, 1185-1186)." Opposition, pg. 13:22-23. These factors clearly require that Thomas shows that he relied on the concealed or misrepresented information, and that he suffered some detriment in the form of damages. As such, Thomas's assertion that detrimental reliance is not

part of a fraud claim defies the plain language of the case law. Moreover, as the remaining claims are only fraud by concealment, Thomas must plead that he was unaware of the failure to obtain tail coverage and would not have acted as he did if he had known, and as a result of the concealment or suppression of this fact, he sustained damage. *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612–613. Thomas must allege each element of fraud, factually and specifically to survive demurrer. *Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1249. Here, Thomas makes no effort to elucidate any alternative course of action, and therefore expresses no reliance. Thomas has expressed no damages in the Cross-Complaint based on the record on appeal. Thomas has inadequately pled a duty owed to him by John.

Leave to amend is proper, therefore on this cause of action the demurrer is SUSTAINED with leave to amend.

IV. Conclusion

Therefore, based on the above, the demurrer is SUSTAINED WITH LEAVE TO AMEND. Thomas shall file an amended complaint within 20 days of notice of this order.

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

**7. SCV-268477, Smashmallow v. Tanis Food Tec**

This matter shall be heard by the Hon. Patrick Broderick in Department 16 of the Sonoma County Superior Court. Any requests for oral argument will be heard in Department 16 at 3:00 p.m. The parties are directed to use the Zoom information for Department 16 if they request to appear and wish to do so remotely.

Plaintiff Smashmallow, LLC ("Smash", or "Plaintiff") filed the complaint (the "Complaint") in this action against defendant Tanis Food Tec B.V. ("Tanis", or "Defendant") arising out of a contractual dispute. Defendant has subsequently filed a cross-complaint (the "Cross-Complaint") against Plaintiff.

This matter is on calendar for the motion by Defendant pursuant to Cal. Code Civ. Proc. ("CCP") § 2025.420 for a protective order. The Motion is **DENIED**. The request for sanctions by Plaintiff are GRANTED.

I. Governing Authorities

"California law provides parties with expansive discovery rights." *Lopez v. Watchtower Bible & Tract Society of N.Y., Inc.* (2016) 246 Cal.App.4th 566, 590-591. Specifically, the Code provides that "any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." CCP § 2017.010; see also, *Garamendi v. Golden Eagle Ins. Co*. (2004) 116 Cal.App.4th 694, 712, fn. 8. "For discovery purposes, information is relevant if it 'might reasonably assist a party in evaluating the case, preparing for trial, or

facilitating settlement…" See *Lopez, supra,* 246 Cal.App.4th at 590-591, citing *Garamendi, supra,* 116 Cal.App.4th at 712, fn. 8. "Admissibility is not the test and information[,] unless privileged, is discoverable if it might reasonably lead to admissible evidence." *Id*. "These rules are applied liberally in favor of discovery, and (contrary to popular belief), fishing expeditions are permissible in some cases." *Id.* The scope of discovery is one of reason, logic and common sense. *Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1612. The right to discovery is generally liberally construed. *Williams v. Superior Court* (2017) 3 Cal.5th 531, 540.

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

CCP § 2025.420(a) provides that before, after, or during a deposition, a party, deponent, or other affected natural person or organization may move for a protective order, and that the motion shall be accompanied by a protective order. CCP § 2025.420(b) provides that the Court, "for good cause shown, may make any order that justice requires to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." The protective order may include, but is not limited to, one or more of the following directions: "… (11) That all or certain of the writings or tangible things designated in the deposition notice not be produced, inspected, copied, tested, or sampled, or that conditions be set for the production of electronically stored information designated in the deposition notice." CCP § 2025.420(g) provides: "If the motion for a protective order is denied in whole or in part, the court may order that the deponent provide or permit the discovery against which protection was sought on those terms and conditions that are just."

A party seeking a protective order must show good cause for issuance of the order by a preponderance of evidence. *Stadish v. Sup. Ct.* (1999) 71 Cal.App.4th 1130, 1145 (protective order directed at a document demand). "Generally, a deponent seeking a protective order will be required to show that the burden, expense, or intrusiveness involved in … [the discovery procedure] clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." *Emerson Elec. Co. v. Sup. Ct.* (1997) 16 Cal.4th 1101, 1110 (protective order in connection with deposition).

II. Analysis

Defendant bears the burden of showing good cause for issuance of a protective order as the moving party. *Stadish v. Sup. Ct.* (1999) 71 Cal.App.4th 1130, 1145. Defendant fails to show sufficient burden, expense or intrusiveness to justify granting the motion. *Emerson Elec. Co. v. Sup. Ct.* (1997) 16 Cal.4th 1101, 1110.

Defendant moves for protective order, asserting that the proposed deponent, Koen Verstegen ("Deponent"), has no relevant information to the case, but rather that the request for deposition is

predicated on false pretenses, and Plaintiff intends to obtain evidence which is instead salient to their separate action against Defendant's parent company. Plaintiff asserts that the Deponent is in possession of evidence relevant to discovering Defendant's general business practices, as to date Plaintiff has only performed depositions of Defendant's technical employees.

Defendant provides inadequate basis to find that a protective order is appropriate. Defendant asserts that Deponent has no information which might be admissible, but the right to discovery is liberally construed. Defendant concedes that Deponent is the General Manager and legal representative" for Defendant. See Defendant's Declaration in Support, Exhibit A (Declaration of Koen Verstegen, hereinafter "Verstegen Dec."), ¶ 1. This case revolves around claims not just of the technical failure of the System, but the violations of contracts thereon. See, generally, Complaint. It seems obvious to the Court that Defendant's business processes are relevant to determining several factors related to Defendant's alleged breach of the contract, including the allegations that Defendant breached California's Unfair Competition Law. Defendant alleges that the deposition is a "fishing expedition", but under the discovery act, "fishing expeditions are permissible in some cases." *See Lopez, supra,* 246 Cal.App.4th at 590-591. The Court finds that the deposition is reasonably calculated lead to admissible evidence, and as such Defendant has failed to meet its burden in showing a protective order is necessary.

Defendant's motion for protective order is DENIED.

III. Sanctions

Plaintiff is the prevailing party here and therefore Defendant is not entitled to sanctions under the Discovery Act. Plaintiff's request for sanctions is procedurally defective. Plaintiff requests that the Court grant monetary sanctions in the amount of $2,775. Plaintiff shows that these sanctions are for three hours of attorney work at $625 per hour, and one hour of attorney work at $900 per hour. The time of four hours in opposition is reasonable. However, the request for $625 per hour for a senior associate and $900 per hour for a partner is one which is not supported in this locality, and is far and above what this Court is willing to approve.

Plaintiff offers evidence that these rates have been approved in federal court at the Northern District of California, primarily located in San Francisco[1]. But what other courts have done in other cases is not dispositive to the Court's analysis of the appropriate fees in *this* case. *See Premier Med. Mgmt. Sys., Inc. v. California Ins. Guarantee Assn*. (2008) 163 Cal.App.4th 550, 56 ("Appellants invite us to adopt the 50–hour figure used by the trial court in *Maughan* [*v. Google Tech, Inc.* (2006) 143 Cal.App.4th 1242, 1248-49] as an upper limit for the hours allowed on a section 425.16 motion to strike, apparently on the notion that if 50 hours is right for that case it must be right for this one as well. We decline the invitation as contrary to the guidelines set by the Supreme Court in *Ketchum*."). A court is entitled to rely on its own practical experience in determining what is a proper rate within the community. See *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1009 (*Heritage Pacific Financial*) ["The court may rely on its own knowledge and familiarity with the legal market in

[1] The Court takes permissible judicial notice of the existence of the satellite location for the Northern District of California located here in Santa Rosa. See Evid. Code § 452. This fact alone is insufficient to overcome the Court's substantial experience in these fee issues, and the conclusions drawn thereon.

setting a reasonable hourly rate"]; accord, *569 East County Boulevard LLC v. Backcountry Against the Dump, Inc.* (2016) 6 Cal.App.5th 426, 437 (*569 East County Boulevard*). Plaintiff makes many references to prevailing rates federal court in San Francisco, but the Court concludes that the relevant community in this case is Sonoma County, and does not include the major metropolitan area of San Francisco. *See Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1243 ("a court's use of reasonable rates in the local community, as an integral part of the initial lodestar equation, is one of the means of providing some objectivity to the process of determining reasonable attorney fees"). The rates requested are substantially higher than would be expected in Sonoma County. The Court finds the rate of $525 per hour to be a reasonable rate for the local community for a partner, and $400 per hour for a senior associate given counsel's expressed qualifications. Therefore, the Court orders Defendant to pay $1,725 to Plaintiff within 30 days of notice of this order.

IV. Conclusion.

Defendant's motion for protective order is DENIED, as is their request for sanctions. Plaintiff's request for sanctions is GRANTED in part.

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

**8. SCV-272470, Cyrus 2.0 v. 275 Highway 128, LLC**

This matter shall be heard by the Hon. Patrick Broderick in Department 16 of the Sonoma County Superior Court. Any requests for oral argument will be heard in Department 16 at 3:00 p.m. The parties are directed to use the Zoom information for Department 16 if they request to appear and wish to do so remotely.

Plaintiff, Cyrus 2.0 ("Plaintiff"), has filed the instant action against defendants 275 Highway 128, LLC ("275"), Walden Geyserville, LLC ("Walden", together with 275, "Defendants"), and Does 2-20 with one cause of action for declaratory relief (the "Complaint"). Walden moves to quash service of summons under Code of Civil Procedure ("CCP") § 418.10(a)(1) on the grounds that the Court cannot proceed without Walden, and the Court lacks personal jurisdiction over 275 due to its status as a terminated business entity. Walden has been added as Doe 1 after this motion was filed.

I. Governing Law

The Code of Civil Procedure states that "[a] defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion... [t]o quash service of summons on the ground of lack of jurisdiction of the court over him or her." CCP §418.10(a)(1).) Where the complaint does not name a party, that party has cause to quash service of summons. *Kline v. Beauchamp* (1938) 29 Cal.App.2d 340, 341.

The Court also maintains power under CCP § 581 to dismiss actions. See *Rosencrantz v. Rogers* (1871) 40 Cal. 489, 491 (in applying predecessor to CCP § 474, the failure to plead ignorance of the true name of defendant justified involuntary dismissal). However, insufficiency of the complaint is not a ground for dismissal for non-suit. *Pacific Finance Corp. v. Roffalli* (1929) 98 Cal.App. 198, 201.

II. 275 has not Displayed that Quashing is the Proper Remedy

Walden/275's claims of misjoinder due to the failure to join Walden to the suit are MOOT, as the Complaint has been amended to include Walden as Doe 1. What remains is the contention that 275 is not a proper party to the case due to its terminated status. The Court finds inadequate authority that quashing service is proper here.

It is undisputed that 275 was a business entity, which signed the initial lease agreement (Complaint, Exhibit A, hereinafter the "Lease Agreement") with Plaintiff. Thereafter, Plaintiff and Walden signed an assignment ("Assignment"), which purported to transfer 275's interest in the Lease Agreement to Walden. 275 entered a terminated status with the Secretary of State around this time. Walden asserts that 275 is a defunct entity with no assets. Plaintiff asserts that 275's terminated status does not protect it from suit, and as such it is a proper party to the action under Corp. Code §§ 17707.6-17077.7. Walden asserts that 275 cannot be named because it is a terminated entity, and the relief requested by the Complaint is inapplicable to terminated entities.

The authorities cited by Defendants show that quashing service is proper where the complaint contains some procedural defect, such as failing to comply with requirements under CCP § 474, or serving a party with summons when that party is not named in the complaint. See, e.g., *Kline v. Beauchamp* (1938) 29 Cal.App.2d 340, 342. That is not what is alleged here. Plaintiff has named 275 in the Complaint, and there is no underlying procedural defect evidenced within the case itself. Rather, Defendants aver that the cessation of 275's business renders the Complaint incapable of naming it as a defendant. Defendants offer no authority showing this is the case. The citation to *Earl W. Schott, Inc. v. Kalar* (1993) 20 Cal.App.4th 943, 945 offers no insight in applying motions to quash here, as that matter dealt with whether erroneously naming a business entity affected the default entered. Defendant's assertion that the Assignment renders any case against 275 inapplicable appears to be an attack on the merits of the cause of action, and therefore does not appear to be the analysis properly addressed as a motion to quash.

Additionally, at this stage, Walden has failed to show here that complete relief can be accorded between Cyrus and Walden without the presence of 275. See CCP § 389. 275 is a signatory to the Lease Agreement. 275 claims error in the filing of the Planning Application, and the September 6, 2022 letter bearing the 275 letter head. However, the Court finds that this evidences a interchangeability in the way Walden and 275 have been treated. Indeed, this motion, maintained to quash only service on 275, but brought only by Walden, further reinforces the merits of this interpretation. The motion raises no jurisdictional issue properly addressed by a motion to quash or dismiss.

Therefore, the Court finds both quashing the service of summons and dismissal as to 275 improper. Walden's motion is DENIED.

III. Conclusion

Based on the foregoing, motion to quash is **DENIED**.

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

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