TENTATIVE RULINGS: CIVIL LAW & MOTION

Wednesday, July 24, 2024 at 3:00 p.m.
Courtroom 18 –Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

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.

CourtCall is not permitted for this calendar.

If the tentative ruling does not require appearances, and is accepted, no appearance is necessary.

Any party who wishes to be heard in response or opposition to the Court's tentative ruling **MUST NOTIFY** the Court's Judicial Assistant by telephone at **(707) 521-6723** and **MUST NOTIFY all other parties of their intent to appear, the issue(s) to be addressed or argued and whether the appearance will be in person or by Zoom**. Notifications must be completed no later than 4:00 p.m. on the court (business) day immediately before the day of the hearing.

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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.

1-2. SCV-273665, Emory v. AGAP Santa Rosa GP, LLC

Defendant's Motion for Summary Adjudication

Defendant's motion for summary adjudication is DENIED. Plaintiff's request for judicial notice is GRANTED. Plaintiff's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Background:

Plaintiff alleges in her complaint against Defendant that Plaintiff had been storing her personal belongings with A1 Storage Co., LLP since 2004. A1 Storage Co., LLP was doing business as Extra Space Storage and was ultimately sold to Defendant AGAP Santa Rosa GP, LLC dba Storage King USA in August of 2022. (Undisputed Material Fact ("UMF"), 2-4.) Plaintiff alleges in her complaint that in December of 2022 an employee of Defendant broke into Plaintiff's storage unit and stole all of Plaintiff's

possessions therein. Plaintiff also alleges that Defendant secreted the break-in from Plaintiff until March 27, 2023. As a result, Plaintiff alleges over $50,000 in damages and that she is entitled to her reasonable attorney's fees and costs.

Defendant claims that, when it took ownership of the storage facility, it sent a Welcome Letter and Rental Agreement Contract (hereafter "Welcome Letter") to all existing tenants which would go into effect on November 1, 2022, whether or not a signed copy was returned by the tenant. (UMF, 3-4.) Defendant does not specify the exact date the letter was sent to Plaintiff. As alleged by Defendant, the terms of the new rental agreement would limit Plaintiff's recovery to $5,000 and bar her from seeking attorney's fees and costs. (UMF, 6-9.) Defendant seeks summary adjudication of the purported limit on Plaintiff's recovery and bar to attorney's fees.

Analysis:

I. Standards on Summary Adjudication

A party moving for summary adjudication of a cause of action must prove that the cause of action has no merit and summary adjudication may only be granted if it completely disposes of the cause of action. (CCP § 437c(f)(1).) "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action." (CCP § 437c(p)(2).) "Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (*Ibid.*)

"From commencement to conclusion," the moving party bears the burden of persuasion and production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "There is no obligation on the opposing party…to establish anything by affidavit unless and until the moving party has by affidavit stated facts establishing every element…necessary to sustain a judgment in his favor." (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.) Defendants can meet their burden by showing a cause of action has no merit by showing that one or more elements of the cause of action "cannot be established." (See CCP § 437c(p)(2).) Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or defense. (*Aguilar, supra*, 25 Cal.4th at p. 849.)

II. Defendant Has Failed to Show the Lack of Merit of Plaintiff's Damages Claim or Prayer for Attorney's Fees

Defendant asserts several facts in its memorandum that are not included in its separate statement

nor corroborated by evidence. The Court will not consider these facts. For example, Defendant alleges that Plaintiff made rental payments subsequent to the delivery of the Welcome Letter and was in communication with Defendant regarding delinquent payments. There are no facts alleged in the separate statement regarding Plaintiff's payments or communications with Defendant and no evidence provided supporting these allegations. Another example is Defendant asserts that Plaintiff requested the Welcome Letter be re-printed and re-sent on February 9, 2023. There is nothing to this effect in the separate statement and no evidence to corroborate that Plaintiff made this request.

Rather, Defendant's separate statement does not specify the exact date the Welcome Letter was originally sent to Plaintiff. It simply states that "as of August 26, 2022" Defendant assumed ownership "a Welcome Letter…was sent to all existing tenants, including Plaintiff." (UMF, 3.) Exhibit B to the Compendium of Exhibits is provided to support this undisputed material fact. Exhibit B is the "Welcome Letter" sent to Plaintiff. The document states that the "Notice Date" is February 8, 2023. This is 2 months after Plaintiff's alleged damages were incurred (in December of 2022). There is no other copy of the Welcome Letter that would suggest that an earlier notice was sent.

The February 8, 2023 Welcome Letter provides a retroactive effective date for the new lease agreement of November 1, 2022. Thus, if the welcome letter was not sent until February, Plaintiff would not have had the opportunity to opt out of the new lease agreement by removing her storage items prior to it going into effect. There is no evidence provided whatsoever that Plaintiff expressly agreed to the terms of the new lease agreement. The Rental Agreement Contract provided in Exhibit C is not signed by either party. There is also no evidence provided that Plaintiff impliedly agreed to the contract in any other way. Defendant has not provided evidence that Plaintiff continued to store her belongings in the storage unit after receiving the Welcome Letter in February nor that she continued to pay for the storage unit after that time. Again, Defendant makes vague assertions regarding continued payments by Plaintiff in the memorandum, but these assertions are not evidence and will not be considered by the Court. Furthermore, they are contradicted by Defendant's assertions regarding delinquent payments by Plaintiff.

Defendant has failed to show that the Rental Agreement Contract was agreed to by Plaintiff. Accordingly, Defendant cannot show at this juncture whether Plaintiff's damages are limited to $5,000 or whether she is barred from requesting attorney's fees and costs. Since Defendant failed to meet its burden on this motion, the burden of proof never shifted to Plaintiff.

Defendant's Motion to Strike Punitive Damages

Defendant's motion to strike is GRANTED with leave to amend. Defendant's counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

The Court exercises its discretion to consider Plaintiff's late filed opposition because it was only one day late and Plaintiff's counsel has represented that the delay was due to administrative issues.

Analysis:

I. Defendant's Motion is Untimely

CCP § 435(b)(1) provides, "Any party, *within the time allowed to respond to a pleading* may serve and file a notice of motion to strike the whole or any part thereof, but this time limitation shall not apply to motions specified in subdivision (e)." (Emphasis added.) The motions specified in subdivision (e) refer to motions for judgment on the pleadings, which Defendant has not filed. The time for Defendant to respond to Plaintiff's Complaint has long passed and Defendant has in fact responded to the Complaint with an Answer and subsequent Amended Answer. Accordingly, this motion to strike is untimely.

II. The Allegations of Punitive Damages Are Stricken in the Court's Discretion

CCP § 436 provides, "The court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper:"

(a) Strike out any irrelevant, false, or improper matter inserted in any pleading.

(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.

Accordingly, even though Defendant's motion is untimely, the Court may still strike the punitive damages claims in the Court's discretion.

Punitive damages may be stricken where the facts alleged do not rise to the level of "malice, fraud or oppression" required to support a punitive damages award. (*Turman v. Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63.) "'Malice' is defined in the statute as conduct 'intended by the defendant to cause injury to plaintiff, or despicable conduct that is carried on by the defendant with a willful and conscious disregard for the rights or safety of others.'" (*Ibid*., citing Civ. Code, § 3294.) "'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294.)

Here, Plaintiff has not alleged any facts that show malicious, fraudulent, or oppressive conduct by Defendant. Accordingly, her punitive damages claims are unsupported and should be stricken in the Court's discretion. The following paragraphs of Plaintiff's complaint shall be stricken: 13, 18, 22, 27, and 30. Leave to amend is granted.

3. 23CV00844, Shotsberger v. Bartolomei

Defendants' motion to quash deposition subpoenas is DENIED. Plaintiffs' request for judicial notice is GRANTED. Plaintiffs' objections to the new evidence submitted for the first time in reply are

SUSTAINED. "The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537, 161.) Plaintiffs' counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

Background:

Plaintiffs assert two causes of action for breach of contract against Defendants. Plaintiffs allege in the complaint that Plaintiff Steven Shotsberger entered into a written contract on behalf of the entity Dart Hospital Holdings, LLC, for which he is the managing member, with Defendant Bartolomei Tommervik Bartolomei Properties, LLC dba Farmhouse Inn (hereinafter "Farmhouse"), through its managing partner, Defendant Joe Bartolomei. The contract was entitled "Consulting Services Agreement" and was for professional services. Pursuant to this agreement, Plaintiff Shotsberger and the Defendants secured the financial consideration owed under the agreement into a Promissory Note in which the Defendants as payor would pay all sums owed under the agreement to Plaintiff Shotsberger, the payee. Plaintiffs allege that Defendants failed to make timely payments under the Promissory Note, which breached the agreement and triggered an escalation clause, making all amounts owed due. Plaintiff also alleges that Defendants sold an interest in Farmhouse to a third party, which also triggered the escalation clause within the Promissory Note. Plaintiffs allege that Defendants failed to comply with the escalation clause by failing to pay all amounts due within a timely manner, despite multiple demands by Plaintiffs. Defendants instead made partial payments of the remaining amount due.

Evolve Hospitality Group, LLC (hereafter "Evolve") also through its managing member Plaintiff Shotsberger, entered into a separate written contract with Farmhouse for the professional service of assisting Farmhouse in attracting and obtaining a new lender, buyer or partner through an executed Consulting Fee Agreement, dated July 15, 2022. This agreement was also executed by Defendant Joe Bartolomei on behalf of Farmhouse. The parties communicated through email identifying specific potential owners, investors or lenders, which would trigger the amount of payment owed under the Consultation Fee Agreement to Evolve Hospitality Group, LLC from the Defendants. Defendants obtained a lender, owner, or partner as articulated within the Consulting Fee Agreement and whose identity, as Plaintiff alleges, was expressly identified as a qualifying lender, owner or partner within the emails between parties. This triggered payment of $75,000 from the Defendants to Plaintiff Evolve through any escrow proceedings entered into by the Defendants. Defendants failed to pay the amount through escrow, despite Plaintiffs' demands.

Defendants filed identical answers asserting the following affirmative defenses: failure to state a cause of action, failure to mitigate damages, excuse of performance, lack of consideration, waiver and

estoppel, Civil Code § 1473, unconscionability/unjust enrichment, invalid contract, lack of damages, no breach of contract, and accord and satisfaction.

Procedural Deficiencies:

This motion is procedurally defective in several ways. First, Defendants have filed one motion to quash five subpoenas. This is inappropriate given that each subpoena should be reviewed on its own merit. Moreover, Defendants have not provided argument for why each individual subpoena should be quashed. They have simply argued that they should all be quashed because they are all inappropriate.

The motion is further defective because there is no declaration submitted in support of it. The subpoenas complained of are not provided to the Court in any way. They are neither provided as attachments to any declaration nor attached to the motion or filed separately (though the latter two would be inappropriate presentations of evidence). Defendants attached other documents to their memorandum; however, none of these attachments are the subpoenas themselves and none are supported by evidentiary foundation through a declaration. Exhibit C to the memorandum is merely an attachment to presumably one of the subpoenas, which is unidentified. It is impossible for the Court to rule on this motion without being able to review the content of the subpoenas. Defendants attempt to provide more information regarding the content of the subpoenas for the first time in their reply. However, the reply does not specify which subpoena makes which request to which entity.

Furthermore, Defendants have failed to file a separate statement as required by California Rules of Court, Rule 3.1345(a)(5). Pursuant to that rule, a motion to quash the production of documents at a deposition "must be accompanied by a separate statement." A separate statement "provides all the information necessary to understand each discovery request and all the responses to it that are at issue." (Rule 3.1345(c).) "The separate statement must be full and complete so that no person is required to review any other document in order to determine the full request and the full response." (*Ibid.*)

Merit of the Motion:

Even if the Court were to exercise its discretion to consider the motion despite all the procedural deficiencies, Defendants have not identified in the memorandum what documents each subpoena seeks nor any specifics about the content of each individual subpoena. As stated above, Defendants attempt to provide specifics regarding the documents requested for the first time in reply, but they do not explain which entity each of these requests are made to. Defendants seek for the Court to quash these subpoenas based solely on the identity of the entities to which they were sent and Defendants general statements regarding what the subpoenas seek as a whole. This is entirely insufficient to support such a motion. Furthermore, Defendants have failed to show through compelling legal argument or supporting evidence that any of the subpoenas are unreasonable, oppressive, or unreasonably violate the defendants' privacy

rights. The motion is denied.

Sanctions:

> Plaintiffs have requested the Court impose sanctions against Defendants. CCP § 1987.2 provides, …the court may in its discretion award the amount of the reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees, if the court finds the motion was made or opposed in bad faith or without substantial justification…

The Court finds that this motion was brought without substantial justification given its lack of evidentiary and legal support. Accordingly, Plaintiffs are awarded their reasonable attorney's fees incurred in opposing the motion. Plaintiff requests $7,500. Plaintiff did not provide the Court with a breakdown of hourly rate and number of hours spent on the motion. The Court finds $7,500 unreasonable. The Court finds $3,500 reasonable for this motion. Defendants shall pay Plaintiffs $3,500.

4. SCV-266518, DeJohn Construction, Inc. v. Smith

Defendants' Motion to Dismiss Action to Foreclose, To Expunge Mechanic's Lien, And for Sanctions, is GRANTED in part and DENIED in part. The request to expunge the mechanics lien is GRANTED. The request to dismiss is GRANTED only as to Plaintiffs' First Cause of Action for Foreclosure on Mechanic's Lien and DENIED as to all other causes of action alleged by Plaintiffs. The requests for attorney's fees and for sanctions are DENIED without prejudice because there has been no declaration submitted providing foundation for the factual assertions made in the memorandum of points and authorities. There is no admissible evidence in the record on which to base an award of attorney's fees or sanctions. Defendants' counsel shall submit a written order consistent with this tentative ruling. Due to the lack of opposition, compliance with Rule 3.1312 is excused.

Analysis:

According to *Lambert v. Superior Court* (1991) 228 Cal.App.3d 383, a property owner against whose property a mechanic's lien has been recorded and against whom an enforcement action has commenced, may file a motion to have the mechanic's lien examined by the Court. "On such motion, the claimant [Plaintiff] bears the burden of establishing the 'probable validity' of the claim underlying the lien or stop notice." (*Cal Sierra Construction, Inc. v. Comerica Bank* (2012) 206 Cal.App.4th 841, 845.) "If the claimant fails to meet the burden, the lien and stop notice may be released in whole or in part." (*Ibid*.)

By failing to oppose this motion, Plaintiffs have failed to show the probable validity of the mechanic's lien, as is their burden. Accordingly, the mechanic's lien shall be released in whole. Since the mechanic's lien has been released, there is no longer any legal basis for Plaintiffs' First Cause of Action

to foreclose on the mechanic's lien. As such, the first cause of action is DISMISSED with prejudice. It is unclear from Defendants' motion whether they are requesting dismissal as to all causes of action asserted by Plaintiffs. In so far as this is their request, the request is denied as to all other causes of action because Defendants have not provided a compelling basis for dismissal of the remaining causes of action.

5. SCV-269940, Lucio v. Epidendio

Defendant's counsel's motion to be relieved as counsel is CONTINUED to August 14, 2024. This motion fails to comply with Cal. Rules of Court, Rule 3.1362 because Counsel did not lodge a proposed order with the moving papers as required by subdivision (e). Furthermore, the proof of service does not specify that a proposed order was served with the moving papers, as required by subdivision (d). Counsel shall submit to the Court an *Order Granting Attorney's Motion to Be Relieved as Counsel--Civil* (form MC-053) which complies with Rule 3.1362(e). Counsel shall also file a proof of service showing that the proposed order was served upon the client and other parties. Counsel shall file the documents not later than 5 court days prior to the next hearing date.

6-7. SCV-258938, Pochari v. Bodega Harbour Homeowners

This is a joint ruling on Defendants' Ex Parte Application for Order for (1) Sale of Dwelling and (2) for Issuance of an Order to Show Cause; on Plaintiffs' January 29, 2024 Ex Parte Application to Vacate or Modify Judgment; and on Plaintiffs' April 29, 2024 Motion to Vacate or Modify Judgment.

Defendants' ex parte motion and Plaintiffs' ex parte motion were set for hearing on Department 19's March 19, 2024 law and motion calendar. Prior to ruling on the ex parte motions, the Honorable Oscar A. Pardo recused from the case and the case was reassigned to Department 18. Defendants' ex parte motion was re-scheduled to July 3, 2024. Plaintiffs' ex parte motion was not given a new hearing date on the Department 18 calendar. Accordingly, it has not been ruled on. However, after the case was reassigned to Department 18, Plaintiffs filed a renewed Motion to Vacate or Modify Judgment that was scheduled for hearing on July 24, 2024. Defendants' ex parte motion for sale of dwelling was continued to be heard concurrently with Plaintiffs' motion to vacate. Plaintiffs' April 29, 2024 motion raises identical arguments as those previously raised by Plaintiffs in their various briefs submitted relating to the pending motions.

The Court issues the following ruling as to all motions that are before it. Plaintiffs' motions to vacate the judgment are DENIED. Defendants' motion for order of sale of dwelling is GRANTED. Defendants' request for attorney's fees and costs is GRANTED in the amount of $31,245.08. All requests

for judicial notice are GRANTED. Defendants' counsel shall submit a written order consistent with this tentative ruling and in compliance with Rule 3.1312.

I. Background

A. Procedural History

Plaintiffs Catherine Pochari and Thomas Pochari ("Plaintiffs") filed a third amended complaint ("TAC") on August 18, 2017, against Defendants Bodega Harbour Homeowners Association and Kemper Sports Management (individually referred to as "BHHOA" and "Kemper" respectively, and collectively referred to as "Defendants"). On March 1, 2017, Defendants filed a cross-complaint against Plaintiffs. The gravamen of these actions was Plaintiffs remodeling of their single-family residence (the "Property") which Defendants contend was not done in conformity with BHHOA's covenants, conditions, and restrictions.

On April 12, 2018, the Parties reached a settlement which was then placed on the record in court. The general settlement terms were (1) assurances by Plaintiffs of compliance with BHHOA's Review Committee's requirements for the Property remodel, (2) completion of the remodel within one year, (3) the Court's continued jurisdiction to enforce the settlement pursuant to CCP §664.6, (4) a mutual release of all claims pursuant to Civil Code §1542, (5) Plaintiffs' payment of $15,000 in attorney's fees to BHHOA, payable in $250 monthly installments over the next 5 years at 5% interest, and (6) a waiver by BHHOA of $36,000 in fines imposed on Plaintiffs' prior to litigation, so long as the Plaintiffs complied with every other term of the agreement. (Plaintiffs' Ex Parte App. at 1:18-25; 2:19-25; Ex. 1 at 4:17-5:28: 6:6; 10:12-24). Although the parties discussed a non-disparagement clause it was not consented to in open court. The parties effectively agreed to continue negotiating the non-disparagement clause and reduce it to writing. After the Mandatory Settlement Conference, the parties continued to negotiate, a non-disparagement agreement was circulated, but was never executed.

On August 27, 2020, Defendants filed a Motion to Enforce Judgment (CCP §664.6), which was supported in part by the declarations of Anna Taylor and Rian Jones, Esq. (Plaintiffs' Ex Parte App – Exhibits 1-3). Mr. Jones declaration identified two letters he sent to Plaintiffs on June 27, 2019, and December 26, 2019. The letters describe Plaintiffs' breach of the agreement as being the nonpayment of the $250 monthly installments applicable to the $15,000 attorneys fee debt. The last letter also requested that Plaintiffs engage in dispute resolution as is required by Civil Code §5935. Plaintiffs acknowledge making only 10 payments and then withholding the remainder as an offset against BHHOA for previously paid application fees and unidentified expenses. (Plaintiffs' Ex Parte App. 12:17-23). This withholding as an offset was not a term of the settlement agreement. Plaintiffs also contend that failure to timely proceed with their remodeling project or remove scaffolding were not conditions of the agreement, therefore, not

breaches. (Plaintiffs' Ex Parte App. at 12:7-17). Plaintiffs also contend that as an exercise of their right to free speech they were free to make statements against Defendants and doing so was certainly not a breach since there was never an executed non-disparagement agreement.

On October 21, 2020, the Court held a hearing on Defendant's Motion to Enforce Judgment, it received oral arguments, and took the matter under submission. The Court then issued a Judgement after hearing in which it granted Defendants' motion and awarded Defendants $58,498.91 in damages. Of this amount $36,000 constituted the reinstatement of fines, which the Court determined Defendants were entitled to due to Plaintiffs' breach, and an additional $22,498.91 in attorney's fees and costs associated with the motion to enforce. (Plaintiffs Ex Parte App. - Exhibit 1). It should be noted that the Court excised Paragraph 3-C of the Judgment pertaining to purported disparaging comments made by Plaintiffs. This excised paragraph is not part of the Judgment signed by the Court on October 23, 2020. (Plaintiffs Ex Parte App. - Exhibit 1).

B. Defendants' Ex Parte Application for Order of Sale and for OSC

Defendants filed an ex parte application December 14, 2023, requesting (1) an order for sale of dwelling, and (2) issuance of an order to show cause pursuant to CCP §704.740 - §704.850. Defendants now seek to enforce the Judgement and recover their damages through the sale of Plaintiffs' Property, located at 21108 Hummingbird Court, Bodega Bay, CA 94923. On December 18, 2023, the Court issued an Order to Show Cause requiring Plaintiffs to appear and show cause why the Property should not be sold, and the Court placed the motion for hearing on its law and motion calendar.

Defendants perfected the Judgement by recording the document at the Sonoma County Recorder's Office on November 23, 2020. (Defendants Ex Partes App. -Ex. A). An Abstract of Judgment was also recorded on December 11, 2020. (Defendants Ex Partes App. -Ex. B). On September 5, 2023, Defendants had the Sonoma County Sheriff's Department serve a Notice of Levy for the Enforcement of the Judgment on Plaintiffs. (Defendants Ex Partes App. -Ex. D). Defendants then timely filed the present application pursuant to CCP §704.750(a).

Sonoma County Assessor's records do not indicate the Property qualifies as a homeowner's exemption. (Defendants Ex Partes App. -Ex. M). Sonoma County Recorder's Office similarly indicates that a Homestead Declaration on the Property has not been recorded. (Defendants Ex Partes App. -Ex. E). Defendants argue that for the Property to qualify as a "Homestead" under CCP §704.710, the judgment debtor and/or their spouse (1) must reside on the property on the date the creditor's lien is attached, and (2) they must reside on the property continuously until the date of the court's determination as a homestead. CCP §704.710(c). Defendants contended that Plaintiffs cannot comply with these

requirements especially when the Sonoma County Permit Office has posted a "red tag" notice on the Property since May 20, 2023, prohibiting occupancy. (Defendants Ex Parte App. – Ex. G).

In seeking the sale, Defendants obtained a report from First American Title Company which indicates there are no other liens or encumbrances on the Property other than the Judgment. (Defendants Ex Partes App. – Ex. E). Defendants also have obtained a "drive-by" appraisal of the Property which has provided a value of $825,000. (Defendants' Ex Partes App. – Ex. F). Defendants are also requesting recovery of attorney's fees and costs to be added to the judgment creditor Judgment.

In opposition, Plaintiffs argue the Judgment entered is void per the arguments set forth in their separate *ex parte* application to vacate the judgment. Though they claim the Property is their permanent residence, Plaintiffs clarify they do not reside there now due to ongoing repairs. They state an intent to return to the Property and cite that this is one of the two essential factors in determining residence for homestead purposes, namely physical occupancy and intent to live there per *In re Dodge* (Bankr. E.D.Cal. 1992) 132 B.R. 602. Plaintiffs believe they are entitled to a homestead exemption of $600,000.00. CCP §704.730 requires that a homestead exemption ought to be the greater of either the countywide median sale price for the home (not more than $600,000), or otherwise $300,000. Plaintiffs take issue with the appraisal claiming it is not sufficiently supported by factual foundation.

In reply, Defendants' position is that the Judgment is enforceable. Defendants also argue that Plaintiffs' intent to return to the Property is not conclusive to qualify for a homestead exemption without conduct supporting such intent. *In re McKee* (9th Cir. 2024) 90 F.4th 1244. Defendants point to a pending county "red tag" notice and order for abatement on the Property since 2023. Plaintiffs are required to correct existing violations either by demolishing the Property with a permit or obtaining all required permits and verifications necessary to legalize the construction done on it. Plaintiffs have done neither. Defendants argue that Plaintiffs have not provided sufficient evidence supporting their intent to return to the Property. Defendants also disagree that Plaintiffs were forced to temporarily vacate their residence due to safety concerns because Plaintiffs caused the issues that made their residence uninhabitable.

C. Plaintiffs' Ex Parte Application

Plaintiffs also filed an ex parte application on January 29, 2024, requesting that the court vacate a void judgment (CCP §473(d)), or in the alternative, modify said judgment (CCP §664.6). Plaintiffs contend the Judgment should be void because it is predicated solely on the infringement of Plaintiffs' exercise of free speech. Plaintiffs argue that the Court lacked subject matter jurisdiction because the Judgment was entered based on an "alleged violation of the generic non-disparagement clause." (Plaintiffs Ex Parte App. at 6:25). Plaintiffs argue that the non-disparagement clause is void because it infringes

upon the First Amendment of the United States Constitution. (Plaintiffs Ex Parte App. at 7:2-13). Plaintiffs also argue that they engaged in protected speech pursuant to CCP §425.16 and Civil Code §47(b). Finally, Plaintiffs argue they have paid the $15,000 amount in full, and the Judgment's reinstatement of the $36,000 in fines constitutes improper, illegal, and unconscionable liquidated damages. (Plaintiffs' Ex Parte App. at 11:27-12:17; 13:21-22).

Defendants in opposition argue that Plaintiffs' challenge to the Judgment is untimely under CCP §473(d). Defendants concede that although CCP §473(d) has no stated deadline for filing a motion challenging the judgment, courts have applied the two-year statute of limitations found in CCP §473.5(a) applicable to the entry of a default judgment. *David B. v. Superior Court* (1994) 21 Cal. App. 4th, 110, 119). Defendants argue that the Judgment is neither void nor voidable. Defendants also argue that the non-disparagement clause played no role in the issuance of the Judgment. Defendants claim not all speech is protected, and in this distinction, they should not be precluded from enforcing their Governing Documents against Plaintiffs' use of offensive language. Finally, Defendants argue that the reinstatement of the $36,000 fine does not operate as liquidated damages but simply the enforcement of a settlement condition which Plaintiffs were fully aware of, and consented to, as part of the Settlement Agreement.

In reply, Plaintiffs argue that the Court exceeded its jurisdiction in granting Defendants' Motion to Enforce the Settlement because the grounds upon which the judgment was entered—the late payments—where not specifically stated as a basis for the motion in the Notice of Motion nor argued in the memorandum of points and authorities in support of the motion. The Court notes that the notice of motion states that the motion is based on Plaintiffs "breaches of the terms of the Settlement Agreement." Plaintiffs also argue that a void judgment may be set aside at any time pursuant to CCP § 473(d).

D. Plaintiffs' April 29, 2024 Motion to Vacate or Modify Judgment

On April 29, 2024, Plaintiffs filed a renewed Motion to Vacate or Modify Judgment, which raises identical arguments as those already raised by Plaintiffs in their Ex Parte Application for the same relief, their reply brief to Defendants' opposition to Plaintiffs' Ex Parte Application and in their two opposition briefs to Defendants' Ex Parte Application.

On July 15, 2024, Plaintiffs submitted a reply to Defendants' opposition to Plaintiffs' Motion to Vacate. However, Defendants did not file an opposition to this renewed motion. Therefore, the Court will not consider Plaintiffs' July 15th reply. This is especially so since Plaintiffs filed an unauthorized second opposition to Defendants' Ex Parte Application on May 13, 2024, but the Court has exercised its discretion to consider the second opposition nonetheless.

The Court notes that Defendants did file an opposition to Plaintiffs' Ex Parte Application on February 29, 2024 and Plaintiffs filed a reply to that opposition on March 8, 2024. Therefore, that motion

is already fully briefed. If Plaintiffs' July 15th reply was in reply to Defendants' February 29th opposition, it is improper because Plaintiffs already submitted a reply brief to that opposition.

II. Analysis

A. Plaintiffs' Motions to Vacate or Modify Judgment

In general, a motion to set aside a void default judgment may be filed at any time. (*OC Interior Servs., LLC v. Nationstar Mtg., LLC* (2017) 7 Cal.App.5th 1318, 1327; *Dhawan v. Biring* (2015) 241 Cal.App.4th 963, 973–975.) However, a judge has no statutory authority under CCP § 473(d) to set aside a judgment that is not void. (*Cruz v. Fagor Am., Inc.* (2007) 146 Cal.App.4th 488, 495-496.) A judgment that is voidable, but not void, cannot be set aside under CCP § 473(d), but can only be set aside under CCP § 473(b), which requires compliance with the 6-month time limit provided by that subdivision. (*Lee v. An* (2008) 168 Cal.App.4th 558, 563–566.) CCP § 473(d) provides that a judge "may" set aside any void judgment, which typically affords judicial discretion.

When a court has jurisdiction over the defendant and the action but acts in excess of its defined power by failing to follow proper procedure, any resulting default judgment is voidable, not void. (*Johnson v. E-Z Ins. Brokerage, Inc.* (2009) 175 Cal.App.4th 86, 98–99 [by awarding terminating sanctions on ex parte basis, judge at most failed to follow proper procedure, and resulting default judgment was voidable, not void]; *Lee v. An, supra,* 168 Cal.App.4th at pp. 564–566 [subsequent default judgment voidable, not void, when judge imposed terminating sanction against defendant for failure to appear at case management conference].) Relief from a voidable default judgment may only be sought under CCP § 473(b) within 6 months after entry of the default and not under CCP § 473(d) after the 6-month period expires. (*Id*. at pp. 563–566.)

Here, Plaintiffs argue the Judgment is void because the purported breach of the Settlement Agreement was based solely on Plaintiffs' exercise of their First Amendment right. (Citing Civ. Code § 47(b), CCP § 425.16, and CCP § 473(d).) Plaintiffs' argument relies exclusively on dissecting the declaration of Anna Taylor, BHHOA's General Manager, which was submitted in support of Defendants' Motion to Enforce Judgment. (Plaintiffs' Ex Parte App. - Ex. 2.) Plaintiffs highlight portions of that declaration that reference (1) a letter that Plaintiffs sent to BHHOA discussing fees, dues, and claims for offsets, (2) comments made by Plaintiffs on the social media site Nextdoor.com, where Thomas Pochari claims BHHOA was spying on his family; and (3) potential contacts that Plaintiffs may have had with the California Attorney General, County Counsel, the Sonoma County Board of Supervisors, and the State Bar of California regarding their interactions with Defendants and issues involved in the lawsuit. (Plaintiffs' Ex Parte App. at 3:12- 5:3; Ex. 2.) Plaintiffs contend that the Judgment is void because the Court relied on allegations of violations of a nonexistent or unenforceable generic disparagement clause.

The Court finds Plaintiffs' arguments to be without merit. First, the Court notes that the Judgment contains an excision of Paragraph 3-C. This is the only paragraph in the Judgment that (prior to the excision) identified Plaintiffs' purportedly disparaging statements and sought to enjoin Plaintiffs' conduct. Hon. Richard Henderson, who heard and decided the Motion to Enforce Settlement, specifically struck this language from the final Judgment. Thus, in issuing the Judgment, the Court did not rely on Plaintiffs' statements or on the cited portions of Ms. Taylor's declaration. This is also clearly stated by the Court in the October 23, 2020 Order After Hearing. On the contrary, the material breach underlying the Judgment was Plaintiffs' failure to timely submit $250 monthly payments to BHHOA, as agreed upon in the Settlement Agreement. These facts alone are dispositive of Plaintiffs' claim that the Judgment is void. Moreover, a Judgment that may only be voidable cannot be set aside under CCP § 473(d) but can only be set aside under CCP § 473(b) by complying with the 6-month time limit of that section. (*Lee v. An*, *supra*, 168 Cal.App.4th at pp. 563–566.) Plaintiffs did not argue that the Judgment is voidable, as distinct from void, but even if they had, the request would be barred by the statute of limitations set forth in CCP § 473(b).

Plaintiffs also argue that the Court acted in excess of its jurisdiction because it granted Defendants' motion to enforce the settlement based on a breach of the settlement agreement that was not raised in Defendants' moving papers. However, Defendants' notice of motion challenges all of Plaintiffs' "breaches of the terms of the Settlement." Plaintiffs have provided no authority requiring that each individual alleged breach be outlined in the notice of motion. Though the memorandum of points and authorities does not specifically complain of late payments, the terms of the Settlement Agreement providing for the $250 monthly payments is outlined in the memorandum and the memorandum requests relief based on all of Plaintiffs' breaches. The declarations in support of the motion provide foundation for the existence of the breach upon which the motion was granted. (See 8/27/20 Decl. of Rain W. Jones, ¶ 16-17, Exhs. 6-7.) Finally, Plaintiffs have not provided the Court with a transcript of the hearing on Defendants' motion. Therefore, it is impossible for the Court to know what arguments were considered at the hearing such that the Court took the matter under submission. There is nothing from the record provided by Plaintiffs that indicates that a Due Process violation occurred.

Finally, Plaintiffs argue that the Judgment was entered in excess of the Court's jurisdiction because the Judgment's reinstatement of the $36,000 in fines constitutes improper liquidated damages, which constitutes an illegal penalty. (Citing *Ridgely v. Topa Thrift Loan Assn.* (1998) 17 Cal.4th 970, 977; Civ. Code § 1671(b).)

A provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the

circumstances existing at the time the contract was made. (Civ. Code § 1671(b).) Furthermore, "a provision in a contract liquidating damages for the breach of the contract is void except that the parties to such a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." (Civ. Code § 1671(d).)

In *Ridgely, supra,* our Supreme Court examined the relationship between late payments on a loan installment plan measured against the unpaid principal of the loan. (*Id*. at p. 977.) The *Ridgley* court found that when the late payment is not reasonably calculated to merely compensate the injured lender then it must be deemed punitive and therefore void.

The Court finds that Plaintiffs' argument on this point is factually flawed and without merit. The first flaw is Plaintiffs assumption that the $36,000 was a penalty and constituted liquidated damages. *Ridgely* involved a single installment-loan contract; here, in contrast, the parties engaged in settlement discussions on various distinct issues of liability and damages. For example, Defendants' request for $15,000 in attorney's fees was a distinctly different damages item than the $36,000 in HOA fines which Plaintiffs had accrued prior to settlement. Each is a separate and distinct damage item that served as consideration for the settlement, not liquidated damages. Plaintiffs could have contested the $36,000 in fines, but they ultimately accepted the amount as one of the material terms of the Settlement Agreement. Second, the *Ridgley* court deemed the late fee unreasonable because it had no rational relationship to the harm that the lender experienced by not receiving a timely payment. That analysis does not apply here because the $36,000 fine amount had value that was supported by independent evidence. Plaintiffs understood that waiver of the fine would be to their benefit assuming they complied with all other settlement terms. They also understood that Defendants were entitled to recover all compensatory damages in the event of a breach. As such, the $36,000 was not liquidated damages but the recovery of compensatory damages that Defendants agreed to waive only if Plaintiffs complied with all other settlement terms.

Based on the foregoing, both of Plaintiffs' motions seeking to vacate or modify the judgment are DENIED.

B. <u>Defendants' Motion for Order of Sale of Dwelling</u>

Except as otherwise provided by law, all property that is subject to enforcement of a money judgment is subject to levy under a writ of execution to satisfy a money judgment. (CCP § 699.710.) Before a judgment debtor's dwelling may be sold at an execution sale, the judgment creditor must obtain a court order for sale after a noticed hearing to determine whether the dwelling is subject to a homestead exemption and ensure debtor is paid the amount of the exemption if the property is sold. (CCP §

704.740.) Real property subject to enforcement of a money judgment is also subject to levy under a writ of execution to satisfy a money judgment. (CCP § 699.710(a)(1).) Within 20 days after receiving notice that the property was levied upon, the judgment creditor must apply for a court order for the sale of the dwelling. (CCP § 704.750.)

i. Homestead Exemption

A "homestead," for purposes of the exemption, is the principal dwelling in which the judgment debtor or the debtor's spouse resided on the date the judgment creditor's lien attached to the dwelling and in which the debtor spouse resided continuously thereafter until the date on which the court determined that the dwelling was a homestead. (CCP § 704.710(c).) An exemption for property described in any statute as exempt "may be claimed within the time and in the manner prescribed in the applicable enforcement procedure." (CCP § 703.030(a).) These provisions are intended to preclude a judgment debtor from moving into a dwelling after creation of a judgment lien or after levy in order to create an exemption. (Legislative Com. Comment (Senate) to CCP § 704.710; see also *California Coastal Com. v. Allen* (2008) 167 Cal.App.4th 322, 329 [judgment debtor who leased property to tenant did not meet residency requirement for homestead exemption].

"Homestead," by definition, means "the principal dwelling (1) in which the judgment debtor or the judgment debtor's spouse resided on the date the judgment creditor's lien attached to the dwelling, *and* (2) in which the judgment debtor or the judgment debtor's spouse resided continuously thereafter until the date of the court determination that the dwelling is a homestead." (CCP § 704.710(c), emphasis supplied.)

Defendants contend that there is good cause for ordering the sale of the Property per CCP § 699.710. Plaintiffs' Property has been duly levied upon by the writ of execution issued by the Clerk of the Court. (Defendants' Ex Parte App. - Ex. D.) Defendants argue the Property does not qualify as a homestead because Plaintiffs have not continuously lived there after May 30, 2023, when the Sonoma County Permit and Resource Management Office ("County") placed a "red tag" on it declaring it unsafe and prohibiting occupation or entrance. (CCP § 704.710(c); Defendants' Ex Parte App. – Ex. G; Decl. of Tyra Harrington ("Harrington Decl.") – Ex. 2.) The Court agrees. Plaintiffs' arguments that the Judgment is void was discussed above, and the Court's findings also apply in full to this analysis. In terms of the homestead exemption, Plaintiffs acknowledge that they are not currently living at the Property and have not done so since May 30, 2023. (Plaintiff's Opp. at 3:10-14; Decl. of Thomas

Pochari at ¶2.) Though the Property is not their permanent residence, Plaintiffs represent that they intend to return to it.

"'The question whether a person has changed his residence from one place to another must depend largely upon his intention.'" (*Michelman v. Frye* (1965) 238 Cal.App.2d 698, 704; *Moss v. Warner* (1858) 10 Cal. 296.) Even if a person does not physically occupy the residence, the homestead exemption may nonetheless apply if the person demonstrates an intent to return. (*Ibid*.) However, bare statements regarding an intent to return are not sufficient to establish intent in this circumstance. (*In re McKee* (9th Cir. 2024) 90 F.4th 1244, 1248.)

"Moss and *Michelman* merely stand for the unremarkable proposition that a debtor *may* claim California's homestead exemption even when it is impossible for her to return home." (*Id*. at 1249.) "But neither case shows that 'impossibility' alone *entitles* her to the exemption, regardless of intent to return to the home." (*Ibid*. Emphasis in original.)

> In contrast, both *Moss* and *Michelman* noted objective evidence reflecting the claimant's intent to return to the homestead. Mrs. Warner established "no permanent place of residence," and instead lived an itinerant lifestyle, drifting through San Diego. [Citation.] Mrs. Frye "left most of her clothing and furnishings and all of the furniture at the family home" and "at no time changed her voting address." [Citation.] These are the same indicia that courts have looked to in other cases to determine the debtor's entitlement to homestead: for example, whether the debtor (1) left his personal belongings at the homestead, [citation]; (2) retained the homestead's address on his driver's license, [citation]; or (3) regularly visited the property, [citation]. In short, whenever debtors claim California's automatic homestead exemption—in circumstances of "impossibility" or not—we assess "whether the debtors demonstrated, rather than merely claimed, their intent to return to their home after the absence."

(*In re McKee*, *supra*, at 1249.)

The Court first notes that the Property has been "red tagged" as uninhabitable since May 30, 2023. Second, on June 20, 2023, the County informed Plaintiffs that electrical services to the Property would be disconnected due to the hazards from exposed energized electrical conductors. Plaintiffs were also informed that to reoccupy the Property they must (1) secure the building permit to address the hazardous electrical conditions, (2) submit construction drawings for the electrical work, and (3) cease all other work until this issue is addressed. (Defendants' Ex Parte App. – Harrington Decl. - Ex. 4.) On August 8, 2023, County issued a "Notice of Abatement" to Plaintiffs informing that they must correct all prior violations outlined in County's Notices of May 25, 2023, and May 31, 2023. (Defendants' Ex Parte App. – Harrington Decl. - Ex. 5.) On August 14, 2023, the County issued a "Notice of Abatement Proceedings" against Plaintiffs and the Property. (Defendants' Ex Parte App. – Harrington Decl. - Ex. 6.)

Plaintiffs originally submitted bare statement of an intent to return to Property, unsupported by conduct evidencing such an intent. Plaintiffs filed their second opposition to Defendants' motion on May 13, 2024 in which Plaintiffs represent that they have submitted electrical plans to the County to start the process of obtaining a building permit. While this demonstrates that the Plaintiffs are taking steps to make the property habitable, it is not sufficient to establish their intent the return to the property. Plaintiffs have not provided any information regarding their current living situation such as whether they are renting in a month-to-month lease or living in a home they own, they have not explained what happened to their personal property and furnishings after leaving or how often they visit the property. They have not explained where they are registered to vote, where their vehicle is registered, what address is listed with the DMV, nor any other information that would show their intent to keep the property as their residence. Besides Plaintiffs' own statements, there is no evidence provided to suggest that Plaintiffs are not simply fixing the issues with the property to sell it or rent it. The Court finds that Plaintiffs have not established that they intend to return to the property and that a homestead exemption applies to the Property.

In seeking the sale, Defendants obtained a report from First American Title Company that indicates there are no liens or encumbrances on the Property other than the Judgment. (Defendants' Ex Parte App. – Ex. E.) Defendants also have obtained a "drive-by" appraisal of the Property indicating that the Property is worth $825,000. (Defendants' Ex Parte App. – Ex. F.) For their part, Plaintiffs provided their own evidence based on appraisal provided by Rocket Homes, an online real estate website.

Since the Court has determined that the homestead exemption does not apply, the proper procedure for sale is governed by CCP § 701.510 et. seq. (see also CCP § 704.708 (b).) First, the Court will appoint a qualified appraiser to assist in determining the fair market value of the Property. (CCP § 704.708(d).) Defendants as judgment creditors are also ordered to comply with all notice, advertisement, and sale requirements outlined in CCP § 701.520 through CCP § 701.680 involving the sale of the Property.

ii. Attorney's Fees and Costs

Code of Civil Procedure § 685.040 provides in relevant part:

> The judgment creditor is entitled to the reasonable and necessary costs of enforcing a judgment. Attorney's fees incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law. Attorney's fees incurred in enforcing a judgment are included as costs collectible under this title if the underlying judgment includes an award of attorney's fees to the judgment creditor pursuant to subparagraph (A) of paragraph (10) of subdivision (a) of Section 1033.5. The underlying judgment granted Defendants attorney's fees pursuant to Civil Code § 5975(c), which provides, "In an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorney's fees and costs."

Furthermore, Civil Code § 704.840 provides, (a) Except as provided in subdivision (b), the judgment creditor is entitled to recover reasonable costs incurred in a proceeding under this article." Since the Court has found that the homestead exemption does not apply, subdivision (b) is inapplicable.

Accordingly, Defendants are entitled to recover attorney's fees and costs. Defendants originally requested $15,695.00 and provided foundation for this request in the December 14, 2024 Declaration of Joyce J. Kapsal, paragraphs 18-24. Ms. Kapsal represents that the amount requested is based on $350 per hour for attorneys and $150 per hour for paralegals. It is submitted that attorneys spent 23 hours on the motion and paralegals spent 31 hours. This equates to $12,980. It is also submitted that Defendants incurred costs in the amount of $2,715.

Defendants subsequently amended their request for fees in their March 1, 2024 reply brief, seeking $31,245.08 based on additional work and costs incurred on the opposition. The March 1, 2024 Declaration of Joyce J. Kapsal provides foundation for the additional fees requested, including billing records. The increase is based on the same hourly rates. However, the evidence supporting the increased fees request was submitted for the first time in reply.

The general rule of motion practice is that new evidence is not permitted with reply papers. The inclusion of additional evidentiary matters with the reply should only be allowed in the exceptional case and if permitted, the other party should be given the opportunity to respond. Although this principle is most prominent in the context of summary judgment motions, which is not surprising given the evidentiary nature of such motions, the same rule has been recognized and noted in other contexts as well. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1536–1537; *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 241.) Nevertheless, where "supplemental" evidence submitted for the first time with a reply brief raises no new theories or arguments, it is within the court's discretion to consider it. (*RGC Gaslamp, LLC v. Ehmcke Sheet Metal Co., Inc.* (2020) 56 Cal.App.5th 413, 431 [exception to the general rule where new evidence offered on reply was supplemental to evidence submitted in the moving papers and not "brand new"].)

Although the Court would normally decline to consider additional evidence submitted in reply, this case presents an unusual circumstance where Plaintiffs filed an additional opposition brief after the motion was fully briefed. Therefore, Plaintiffs had an opportunity to respond to the new evidence regarding fees that was submitted for the first time in reply by Defendants. Accordingly, the Court will consider the evidence presented in support of Defendants' March 1, 2024 reply.

However, on May 17, 2024, Defendants submitted a second reply in response to Plaintiffs' second opposition, in which Defendants submit even further evidence requesting an additional increase in the

fees and costs. Because Plaintiffs have not had an opportunity to respond to that new evidence, the Court will not consider the evidence submitted regarding fees and costs in Defendants' May 17, 2024 reply.

Accordingly, Defendants have provided foundation for $31,245.08 in fees and costs. The Court finds the hourly rates and the number of hours incurred on this motion to be reasonable. The Court finds the amount of costs requested to be reasonable. Accordingly, $31,245.08 shall be awarded for attorney's fees and costs.

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Defendants' requests to present oral testimony are **DENIED**. If Defendants contest that aspect of this tentative ruling and persuade the Court to grant the requests, the Court will continue the hearing to a later date to take the testimony.

The Court's rulings on Defendant's evidentiary objections are as set forth below. Both parties' requests for judicial notice are **GRANTED.** Defendants' motions to set aside the attachment orders are **DENIED**.

I. Background

In this breach of contract action, three cannabis growers, Ravioli LLC, Spaghetti LLC, and Tortellini LLC (respectively "Ravioli," "Spaghetti," and "Tortellini"; collectively "Plaintiffs" or "Cross-defendants") are suing a buyer, Master Bango Inc. ("Bango") and its principal Ronald Ferraro (collectively "Defendants" or "Cross-complainants") for breach of a Bulk Flower Purchase Agreement ("Agreement") entered into on February 16, 2021. (Exh. A to RJN Exh. 2.) The Agreement identifies Bango as the buyer of 6,702 pounds of assorted strains of cannabis flowers. It identifies the seller as "Pasta Farm." Plaintiffs are identified as the "Entit[ies]" associated with several cannabis strains; the principal question raised by the instant motion is whether they are parties to the Agreement.

The operative First Amended Complaint ("FAC"), filed on June 15, 2023, alleges three individual causes of action, one on behalf of each plaintiff, for breach of contract; three more, again one per plaintiff, for common counts (goods sold and delivered); and causes of action on behalf of all plaintiffs for unfair competition under Business and Professions Code § 17200 *et seq.*, and promissory fraud. On October 11, 2022, Defendants filed a cross-complaint against Plaintiffs alleging breach of contract, breach of warranties, tortious interference with prospective business relations, and unjust enrichment (the "Cross-complaint").

On October 2, 2023, Plaintiffs jointly filed a single application for a prejudgment Writ of Attachment and Right to Attach Order (hereafter "attachment order") against Bango to secure their ability to collect on an eventual judgment. On November 30, the Court denied the application without prejudice

on procedural grounds: because it was unaccompanied by supporting affidavits, and because the omnibus application on behalf of all three Plaintiffs was "inapposite to CCP § 483.015(a)(1) and procedural due process principles." On December 11, 2023, each Plaintiff moved individually ex parte for an attachment order. The Court granted the orders the same day. (They were subsequently revised to correct a clerical error.) On December 18, Defendants moved ex parte to set aside the orders; the motion was denied the same day.

This matter is on calendar for Defendants' three separate motions to set aside the attachment orders granted to each Plaintiff.

II. Governing law

"Attachment is an ancillary or provisional remedy to aid in the collection of a money demand by seizure of property in advance of trial and judgment." (*Kemp Brothers Construction Inc. v. Titan Electric Corp. (*2007) 146 Cal.App.4th 1474, 1476.) "California's Attachment Law . . . is purely statutory and is strictly construed." (*Ibid.*) The court "shall issue a right to attach order" if it finds that "(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; and (4) the amount to be secured by the attachment is greater than zero." (CCP § 484.090(a).)

A claim is one upon which an attachment may issue if it is: (1) a claim for money based upon a contract, express or implied; (2) of a fixed or readily ascertainable amount not less than $500; (3) either unsecured or secured by personal property, not real property (including fixtures); and (4) a commercial claim. (CCP §483.010.)

"A claim has 'probable validity' where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim." (CCP § 481.190; see also *Santa Clara Waste Water Co. v. Allied World Nat'l Assur. Co.* (2017) 18 Cal.App.5th 881, 885.) In determining probable validity, the court "must consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation." (*Loeb & Loeb v. Beverly Glen Music* (1985) 166 Cal.App.3d 1110, 1120; see also *Goldstein v. Barak Construction* (2008) 164 Cal.App.4th 845, 852-853.)

Claims must be for a "fixed or readily ascertainable amount not less than $500." (CCP § 483.010.) To demonstrate that a claim is readily ascertainable, "the contract sued on must furnish a standard by which the amount due may be clearly ascertained and there must exist a basis upon which the damages can be determined by proof." (*Force v. Hart* (1928) 205 Cal. 670, 673.) The damages sought need not be liquidated, but must be measurable by reference to the contract itself. (*Kemp Bros. Const., Inc. v. Titan Elec. Corp*. (2007) 146 Cal.App.4th 1474, 1481, n. 5.) However, "[i]t is not necessary that the amount

for which the defendant may be liable should appear on the face of the contract by or from which liability is to be determined. It often happens that the amount due under a contract does not appear from the contract itself." (*Bringas v. Sullivan* (1954) 126 Cal.App.2d 693, 699.) The amount may be shown by affidavit. (*Dunn v. Mackey* (1889) 80 Cal. 104, 107.)

A party may move for relief from an attachment order by requesting either that it be set aside or that the amount to be secured be reduced. (CCP § 485.240(a).) "[A]lthough in a motion under section 485.240 the defendant is the moving party, the plaintiff nevertheless continues to have the burden of proving (1) that his claim is one upon which an attachment may be issued and (2) the probable validity of such claim, the same burden he must meet under section 484.090." (*Loeb & Loeb, supra,* 166 Cal.App.3d at p. 1116.) "The court's determinations shall be made upon the basis of the pleadings and other papers in the record; but, upon good cause shown, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of such additional evidence or points and authorities." (CCP § 485.240(d).)

III. Evidentiary objections

The Court rules as follows on Defendant's objections to various declarations submitted by Plaintiffs. These rulings are confined to the Court's consideration of the instant motions. In that context only, the Court will not consider any evidence to which it sustains an objection.

A. Declaration of Henry Johnson re. leave to amend

Objections 1-2: OVERRULED.

Objections 3-5: SUSTAINED on the basis of irrelevance.

B. Declaration of Samual Edwards re. leave to amend

Objections 1-5: OVERRULED.

Objection 6: Sustained on the basis that it is an improper conclusion.

Objections 7-8: OVERRULED.

Objection 9-10: SUSTAINED on the basis of irrelevance.

C. Declarations of Henry Johnson re. attachment orders

Objections 1-3: OVERRULED.

Objection 4: SUSTAINED on the basis of irrelevance.

IV. Judicial notice

Plaintiffs' requests for judicial notice of documents in the Court's file in this matter are GRANTED pursuant to Evid. Code § 452(d)(1).

Defendants' requests for judicial notice of the articles of organization and statements of information filed with the California Secretary of State regarding Plaintiffs and other related corporate entities are GRANTED pursuant to Evid. Code § 452(c).

V. Analysis

Because the Court required Plaintiffs to apply individually for the attachment orders, Defendants have addressed them in three separate motions. However, the papers for those motions are nearly identical in all respects, and therefore the legal analysis is the same. The lone distinction raised as to Ravioli will be addressed separately.

A. CCP § 1008 is in inapplicable.

Plaintiffs' argument that the instant motion is effectively a motion for reconsideration under CCP § 1008 is unavailing. In its November 30, 2023 order, the Court denied Plaintiffs' omnibus motion for attachment orders on the basis of procedural deficiencies in the application. Contrary to Plaintiffs' position, this did not constitute a ruling on the merits that can be reconsidered under CCP § 1008. Even if it did, the Court is not persuaded that a generalized statute such as CCP § 1008 overrides the specific statutory provisions regarding set-asides of attachment orders. (CCP § 485.240; see, e.g., *Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310 ["more specific provisions take precedence over more general ones"].)

B. Spaghetti and Tortellini have shown that they are likely to succeed on the merits.

Defendants do not attempt to refute the factual circumstances underlying the attachment orders, for example by proffering evidence of lack of indebtedness. Rather, Defendants posit that Ravioli, Spaghetti, and Tortellini have failed to show a probability of prevailing on their causes of action. Defendants argue that the Agreement proves that Plaintiffs' breach of contract causes of action will fail because they are not alleged against the party identified as "Seller" in the Agreement, "Pasta Farms," and that the common count causes of action will therefore also fail.

1. Plaintiffs have shown that the contract causes of action may be sustainable.

The Court takes judicial notice that the Secretary of State's corporation lookup website shows Pasta Farm, LLC to be a duly constituted business entity. Defendants' core argument is that that is the "Seller" party to the Agreement. However, in his Declaration in Opposition to the Motion for Leave to Amend, Samual Edwards states that "Pasta Farms" was also a colloquialism used to refer generically to Ravioli, Spaghetti, and Tortellini and other associated cannabis-selling entities with pasta-themed names. That is evidence Plaintiffs can elicit in support of their breach of contract claims. Based on that evidence, a jury would be entitled to conclude that the identification of the "Seller" party to the Agreement as "Pasta Farm" was intended by everyone concerned to indicate that the individual LLCs identified in the

Agreement as the sources of the various strains of cannabis were parties to it. The Court is not presently sitting as a trier of fact, and is not prepared to rule that a trier of fact is so unlikely to be persuaded that Plaintiffs were contracting parties that the attachment orders are unjustified.

In addition, Plaintiffs argue that Defendants' Cross-complaint effectively admits that Plaintiffs are parties to the Agreement. The Cross-complaint names Ravioli, Spaghetti, and Tortellini as cross-defendants and alleges that "Pursuant to the parties' agreement, Cross-Complainant agreed to purchase 6,702 pounds of cannabis from Cross-Defendants." (Cross-complaint, ¶ 11.) As the Agreement specifies precisely that amount of cannabis, Plaintiffs interpret this as a judicial admission that Defendants entered into the Agreement with the three Cross-defendants, i.e. with Plaintiffs. Defendants explain that "as the Agreement itself reveals, that allegation was a mistake – a mistake Master Bango seeks to remedy by means of the motion for leave to file a first amended cross-complaint filed concurrently herewith." Defendants presumably refer to their motion for leave to file an amended cross-complaint filed on April 9, 2024, but Defendants withdrew that motion on June 24.

"A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case. [Citations.] This principle has particular force when the admission hurts the conceder's case." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 48.) The fact that Defendants have treated Plaintiffs as parties to the Agreement in documents filed with the Court could very well persuade a trier of fact that Defendants intended the Agreement to be between Bango and Plaintiffs.

Even if, arguendo, the claims were invalid due to being alleged against "Pasta Farms," "[a] motion to discharge an attachment on the ground that the complaint does not state a cause of action should be granted only if the complaint shows on its face both that the pleader has no cause of action and that the defect cannot be cured by amendment." (*Peninsula Properties Co. v. Santa Cruz County* (1950) 34 Cal.2d 626, 629.) Defendants have not shown that the purported defects in the FAC cannot be remedied by amendment.

2. Plaintiffs' common counts causes of action are likely to succeed on the merits.

More importantly, Plaintiffs, in addition to their contract causes of action, have alleged common counts causes of action. That is, they have alleged that they have delivered goods to Defendants and that defendants have not paid for them. "The common count is a general pleading that seeks recovery of money without specifying the nature of the claim." (5 Witkin, Cal. Procedure, Pleading § 1115.) It "alleges in substance that the defendant became indebted to the plaintiff in a certain stated sum, for some consideration such as money had and received by the defendant for the use of the plaintiff, or for goods, wares and merchandise sold and delivered by plaintiff to defendant, or for work and labor performed by

plaintiff; and that no part of the sum has been paid." (*Id.*, § 565, internal quotation marks omitted.) "[T]he only essential allegations are (1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment." (*Ibid.*) The existence of an enforceable contract between the parties is not an element of the cause of action; the plaintiff need only establish "that he or she was acting pursuant to either an express or implied request for services from the defendant and that the services rendered were intended to and did benefit the defendant." (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 794.)

Defendants argue that because the contract claims are doomed to failure, the common count causes of action must inevitably also fail because they are "nothing more than an alternative way of seeking the same recovery" as the contract claims. The first problem with that argument is that Defendants do not identify any problems specific to the common counts causes of action themselves that would render them unsustainable in the absence of the contract claims. Again, an attachment order should be set aside on the grounds that the complaint does not state a cause of action only if the defect cannot be cured by amendment. (*Peninsula Properties, supra,* 34 Cal.2d at p. 629.) If the only defect in the common count claims is that there are also contract claims, it can be easily cured by amending the complaint to remove the latter.

Defendants cite several cases for the proposition that "if a common count is nothing more than an alternative way of seeking the same recovery, based on the same facts, as is sought under a specific cause of action, then, if the specific cause of action cannot be established, the common count necessarily fails." (Reply memo at pp. 6-7.) For example, *McBride v. Boughton* (2004) 123 Cal.App.4th 379 holds that "[w]hen a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*Id.* at p. 394.) Here, however, the common count claims are not based on the same facts as the contract claims. The contract claims rest on the allegation that the Agreement is a legally enforceable express written contract between Plaintiffs and Bango. (See CACI no. 302 [elements of contract formation], 303 [elements of breach].) The common count claims are based on the allegations that when Plaintiffs delivered cannabis flowers to Defendants, they were acting pursuant to Defendants' implied request for them to do so, and that Defendants benefitted from having the flowers. (*Ochs, supra,* 115 Cal.App.4th at p. 794; see CACI no. 371 [elements of common count for goods and services rendered].) That is, the common count claims are based on the allegation that "a contract that is either 'implied in fact' or 'implied in law'" existed between Plaintiffs and Bango. (*Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 109.) The existence of an express contract is a different fact from the existence of an implied one.

None of the authorities cited by Defendant is to the contrary because none of them addresses the situation where an implied contract is alleged as a theory of recovery alternative to an express one. For example, *McBride, supra*, concerns a putative father who, after paying substantial amounts in child support, learned that he was not the child's biological father. (*McBride, supra,* 123 Cal.App.4th at pp. 382-385.) He sued the mother and her husband under theories of unjust enrichment and common counts. (*Id.* at p. 384.) The reviewing court held that the unjust enrichment count failed as a matter of public policy. (*Id.* at pp. 389-390.) It also held that the common count claim failed because the unjust enrichment one did. (*Id.* at p. 394.) But the reason both counts failed was that because public policy favors "sending the message to unmarried putative fathers that they should verify their paternity at an early stage if there is any doubt about the matter," the defendant was simply not indebted to the plaintiff at all under *any* theory of recovery. (*Id.* at p. 391.) *McBride* holds that "in the present case, McBride's common count must stand or fall with his first cause of action" (*id.* at p. 394), but it does not stand for the far more general proposition for which Defendant cites it, that in *every* case a common count must stand or fall with any other cause of action seeking the same damages.

The other authorities cited by Defendant are also distinguishable on their facts. In *Fruns v. Albertsworth* (1945) 71 Cal.App.2d 318, neither the contract nor the common count cause of action was viable because the defendants had not received anything of value from the plaintiff. (*Id.* at p. 321.) Similarly, *Hays v. Temple* (1937) 23 Cal.App.2d 690 holds that the plaintiff (a Hollywood producer) could not recover funds paid to the defendants (Shirley Temple's parents) by Twentieth Century Fox under either his written contract with the defendants, to which Fox was not a party, or under a common count theory. Again, the rationale is that the defendants were not indebted to the plaintiff at all because they had received nothing of value from him. Neither *Fruns* nor *Hays* addresses the situation where the defendant has undeniably received something of value from the plaintiff but has not paid for it.

Defendants appear to be simultaneously arguing that the conduct constituting the "requested, by words or conduct" element of the common count claims was Plaintiffs entering into the Agreement, and that Plaintiffs never entered into the Agreement. Defendants cannot have it both ways. If Plaintiffs were parties to the Agreement, the contract causes of action are sustainable. If they were not, they nevertheless *did* deliver cannabis flowers to Defendants, unquestionably in the expectation of getting paid for them. Those facts imply the existence of an implied-in-fact contract, separate from the Agreement, which in turn supports the common count claims. (See *Lloyd v. Williams* (1964) 227 Cal.App.2d 646, 649 [existence of implied contract "essential to an action on a common count"].)

The question presently before the Court is not whether Plaintiffs have proven their claims; all that is required at this stage is "a sufficient prima facie showing of facts to sustain a favorable judgment."

(*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.) Plaintiffs have supported their contract and common count claims with allegations sufficient to meet that standard. Defendants' arguments do not persuade the Court that Plaintiffs' likelihood of success on the merits is too low to justify the attachment orders. Accordingly, set-aside of the orders is improper.

C. Ravioli has shown that it is likely to succeed on the merits.

In its application for the attachment order, Ravioli stated that under its bulk cannabis purchase contract with Bango, "Ravioli sold 600 pounds of finished cannabis flower in the strain known as 'Alien OG'" to Bango, and that "long after accepting the product, Bango refused to pay." However, Defendants note that the Agreement at the heart of this action does not provide that Bango will buy Alien OG from Ravioli. Rather, it specifies that 600 pounds of Alien OG will be sold by a different entity, Fettucine LLC, for $570,000. Therefore, Defendants argue, Ravioli cannot show that it breached its contractual duty to pay for the Alien OG shipment because it *had* no such contractual duty, and therefore it has an insufficient likelihood of prevailing in the litigation to justify the attachment order, and therefore the set-aside motion must be granted as to Ravioli. Ravioli has not addressed this argument in its opposition.

In their Memorandum in Support of the Writ of Attachment, Defendants explain in a footnote that this was a clerical error: "Due to a drafting error in the Contract, a different Pasta Farm LLC was misidentified as the purveyor of Alien OG, but every subsequent document, including shipping manifests, invoices, and Master Bango's communications, correctly refers to Ravioli LLC as the seller of the Alien OG product." (Memorandum in Support of Writ of Attachment, pg. 1, fn. 1.) Unverified assertions in court memoranda are, of course, not evidence. However, the Court is persuaded of the footnote's accuracy by several things that *are* evidence. The most important is Bango's verified response to a request for admission propounded by Ravioli, served on Ravioli's counsel on April 30, 2024:

> **REQUEST FOR ADMISSION NO. 45**
>
> Admit that on March 16, 2021, in the California Cannabis Track and Trace account for YOUR License number . . . , YOU accepted . . . 600 pounds of Alien OG (flower) *from Plaintiff Ravioli LLC* . . . .
>
> **RESPONSE TO REQUEST FOR ADMISSION NO. 45**
>
> Admit.

(Johnson Dec., Exh. E, p. 3, emphasis supplied.) This admission establishes that Bango received 600 pounds of Alien OG from Ravioli, the exact amount of that strain specified in the Agreement, one month after the Agreement's effective date. That strongly suggests that the delivery was made pursuant to either the Agreement or to an implied-in-fact contract between Bango and Ravioli made at the same time as the Agreement.

The Court also notes an invoice attached to the declaration of Maureen Lynch, the accounting manager for Plaintiffs and presumably for other related pasta-denominated entities. (Oppo RJN, Exh. 6.) Page PF000704 of Exhibit A to that declaration is an invoice to Bango for a total amount of $570,000 for 600 pounds of "Alien OG Full Flower" shipped on March 26, 2021. The invoice number is "**RAV**031021"; the "RAV" prefix suggests that the selling entity was **Rav**ioli. That supposition is confirmed by the invoice on page PF000705 for 100 pounds of Girl Scout Cookies shipped on the same day, numbered "**SPA**031021," which is consistent with the provision of the Agreement regarding the sale of 600 pounds of Girl Scout Cookies by **Spa**ghetti. The invoice on the following page, PF000706, is for 200 pounds of Kosher Kush and is numbered "**TOR**031021," which is consistent with the provision in the Agreement that **Tor**tellini will provide the Kosher Kush.

Based on the "RAV" prefix on the invoice for the Alien OG and Bango's unqualified verified admission that it received 600 pounds of Alien OG from Ravioli, the Court concludes that the fact that the Agreement says that Fettucine LLC, rather than Ravioli, was to supply the Alien OG does not significantly diminish Ravioli's likelihood of prevailing, and is therefore not a basis for setting aside the attachment order applicable to Ravioli. In all other respects, the analysis regarding Ravioli is identical to the analysis regarding Spaghetti and Tortellini.

D. Defendants' arguments regarding procedural deficiencies

The procedural deficiencies argued by Defendants as to the writ are immaterial. As Plaintiffs point out, the remedy for service defects in the attachment order does not "affect the attachment lien created by the levy." (CCP § 488.120.) Defendants make several arguments about the undertaking, but the fact remains that the proper amount of the undertaking was deposited with the Court before the attachment orders were issued. While Defendants provide authority showing that Plaintiff's execution of the attachment order did not comport with the applicable statutes, they provide none, and the Court is aware of none, holding that the appropriate remedy is to set aside the attachment order.

VI. Oral testimony

Defendants have requested that Samual Edwards, the Chief Operating Officer of the Pasta Farm Group, and Peter Simon, its CEO and also Plaintiffs' lead counsel, give oral evidence at the hearing on the instant motion. The requests were timely filed on June 18. (Cal. Rules of Court, rule 3.1306(b).) Defendants estimate that the presentation of oral evidence will take two hours.

CCP § 485.240(c) provides that at a hearing on a motion to set aside an attachment order, "upon good cause shown, the court may receive and consider . . . additional evidence, oral or documentary . . . ." Thus, the Court has the discretion to grant Defendants' request, but must first find good cause for the oral testimony.

The Court finds that good cause is lacking. The point of the proposed oral testimony, according to Defendants' request, is to explore the issue of whether the Agreement was between Bango and Plaintiffs, as Plaintiffs contend, or between Bango and an entity called "Pasta Farm" that is different from any of the Plaintiffs, as Defendants contend. Defendants seemingly wish to provide the Court with a preview of the evidence they intend to present at trial.

The Court does not need such a preview. Again, the Court is not presently sitting as a trier of fact, and evidence supporting the determination that a party is likely to prevail at trial does not need to rise to proof by a preponderance of the evidence of that party's claim. (See, e.g., *Gerbosi v. Gaims et al.* (2011) 193 Cal.App.4th 435, 444 ["reasonable probability of prevailing" distinguished from "prevailing by a preponderance of the evidence"]; *Mattson, supra,* 40 Cal.App.4th at p. 548 [only prima facie showing required].) The factual underpinnings of all parties' arguments are thoroughly established by the declarations filed with their moving papers. The Court has considered the parties' filings and finds that they provide adequate support for the conclusions set forth above.

VII. Conclusion

All three Defendants' motions to set aside the attachment orders are DENIED. Defendants' requests for oral testimony are DENIED.

11-12. SCV-265779, Bright v. Sutter Bay Hospitals

Defendants' Motion for Independent Medical Examination of Plaintiff

Defendant Sutter Bay Hospitals' ("Defendant") motion to conduct an independent medical examination ("IME") of Plaintiff is **DENIED.**

I. Governing law

A mental or physical examination, other than a defense physical examination in personal injury cases, may be conducted only upon a court order issued after notice and hearing, and for "good cause shown. (CCP § 2032.320(a); see *Conservatorship of G.H.* (2014) 227 Cal.App.4th 1435, 1441.) Notice and hearing are deemed essential to protect against unreasonable examinations and to safeguard the examinee's bodily and mental privacy and other constitutional rights. (*Reuter v. Superior Court* (1979) 93 CA3d 332, 343.)

The notice of motion must "specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the person or persons who will perform the examination." (CCP § 2032.310(b).)

II. Background

This medical malpractice action arises out of complications of Plaintiff's birth on June 18, 2016 at Sutter Santa Rosa Regional Hospital. Plaintiff allegedly suffered severe and permanent birth injuries, including cerebral palsy. The original complaint was filed in Alameda County on April 12, 2019 against Defendant, Dr. Matthew Pride, and Dr. Edna Prieto. Venue was changed to Sonoma County on November 7, 2019.

On June 20, 2024, Defendant moved ex parte for an independent neuropsychological examination of Plaintiff. (The June 13 filing by Defendant was after the deadline for department 18 ex parte applications, so the matter was reviewed on June 20.) Defendant noted that "Neuropsychological testing was completed by plaintiff's 'treating' provider, Dr. Natalie Wager on the following dates: March 12, March 17, April 13, and April 19, 2024," and that their own neuropsychologial expert, Dr. Ubogy, "questioned the validity and nature of the battery of neuropsychological tests that were performed." Plaintiff opposed the motion, primarily on the basis that "Dr. Wager is not a retained expert," but rather "a neutral treater [whose] testing was not done for purposes of litigation but rather as part of [Plaintiff]'s treatment, diagnosis, and medical care."

The motion was heard on July 10, 2024. At that hearing, counsel for Plaintiff represented that he intended to use evidence from Dr. Wager's examination at trial. Since Plaintiff intended to use the evidence of Dr. Wager's examination at trial, the Court was receptive to Defendant's request. The Court continued that matter to July 19. The minute order from the July 10 hearing indicates that the Court issued the following order:

> Counsel [for Defendant] shall submit a proposal to the plaintiffs' counsel outlining specifically requested tests, testing dates, locations, and times.
>
> Counsel shall meet and confer re: examination proposal.
>
> Counsel shall outline any unresolved issues in a declaration no later than Tuesday, July 16, 2024, with courtesy copies provided by mail.
>
> Counsel shall contact the Court's judicial assistant if all disputes are resolved by counsel; in that event, the hearing on Friday, July 19, 2024 will be dropped.

III. Discussion

On July 16, 2024, Plaintiff submitted a supplemental brief stating that "Defendants have still failed to provide any proposed dates to complete the neuropsych examination. This is in direct violation of the Court's order to provide proposed testing and dates to complete testing by last Friday." The Court agrees. As noted above, the Court specifically ordered Defendant's counsel to identify "requested tests, *testing dates*, locations, and times." The requirement of specific dates is not just the Court's preference, it

is also the law: "time, place, [and] manner" of the proposed IME are required by statute to be specified in the notice of motion. (CCP § 2032.310(b).) The Court has attempted to be flexible on this motion because of Plaintiff's representation that they intend to use Dr. Wager's findings at trial, its flexibility cannot extend to ordering an IME on an unspecified date two weeks before trial.

Plaintiff also pointed out that Defendant has not "provided any declaration from its expert explaining why additional testing is warranted or necessary." Absent such a declaration, the only rationale before the Court for Defendant's request for an IME is the comment that its expert, Dr. Ubogy, "questioned the nature and validity" of the tests performed by Dr. Wager. Even if this statement had been made under penalty of perjury, which it was not, it would still be hearsay, and even if it were in a declaration by Dr. Ubogy and therefore not hearsay, it would still be too general to justify an IME order. *Why* does Dr. Ubogy question the nature and validity? Which specific tests does he believe were invalid? Is it the tests themselves that were invalid, the manner in which they were administered, or the interpretation of the results? In the latter case, could he simply re-interpret the results without re-administering the tests, and if not, why not? What additional tests does he propose to administer, and what information will they provide that was not provided by the tests Dr. Wager administered? These questions, and many more, remain unanswered by the bare assertion that Dr. Ubogy had some questions about the testing that has already been performed.

The Court notes that Defendant first filed their ex parte request on June 13, 2024. Plaintiff filed their objection on June 20, 2024. It has been more than one month since Defendant first made their request for this IME and yet Defendant still has not provided the details required by the statute.

An "opposing party may not require [the plaintiff] to undergo psychiatric testing solely on the basis of speculation that something of interest may surface." (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 840.) Defendant has not provided any basis for the Court to find that the proposed IME is for any other purpose. Defendant may seek to elicit testimony from Dr. Ubogy at trial regarding his issues with Dr. Wager's testing, but Defendant has not shown good cause for an order permitting additional testing at this late date. (CCP § 2032.320(a).)

IV. Conclusion

Defendant has failed to make a showing of good cause. The motion is DENIED.

Defendant Sutter Bay Hospital's Motion for Determination of Good Faith Settlement

Defendant Sutter Bay Hospitals' ("Defendant") unopposed application for determination of good faith settlement is **GRANTED**. The Court will sign the proposed order lodged by Defendant, with an appropriate correction to the name of the judge.

I. Governing law

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." (CCP § 877.6.) A good-faith settlement discharges the settling defendant from liability to other parties for equitable contribution or comparative indemnity.

The amount of the settlement and whether it is grossly disproportionate to potential liability is the "ultimate determinant of good faith." (*City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1262; see also *River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986, 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. The settlement be within the "reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries," 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. (*Tech-Bilt, supra,* 38 Cal.3d at p. 499) The factors include:

1) A rough approximation of the total recovery and settlor's proportionate liability;
2) The amount paid in settlement;
3) The allocation of settlement proceeds;
4) A recognition that a settlor should pay less in settlement than if found liable after trial;
5) The allocation of the settlement proceeds among plaintiffs;
6) Settlor's financial condition and insurance policy limits, if any; and
7) 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.

(*Ibid.*)

"Although an offer of settlement must bear some relationship to one's proportionate liability, bad faith is not 'established by a showing that a settling defendant paid less than his theoretical proportionate or fair share.' [Citation.]'" (*N. Cnty. Contractor's Assn. v. Touchstone Ins. Servs.* (1994) 27 Cal.App.4th 1085, 1090.) "In other words, "a 'good faith' settlement does not call for perfect or even nearly perfect apportionment of liability." [Citation.] All that is necessary is that there be a 'rough approximation' between a settling tortfeasor's offer of settlement and his proportionate liability." (*Id*. at pp. 1090-1091.) "The challenger must prove 'the settlement is so far 'out of the ballpark' in relation to these factors as to be inconsistent with the equitable objectives of the statute.'" (*Id*. at p. 1091.)

II. Background

This medical malpractice action arises out of complications of Plaintiff's birth on June 18, 2016, at Sutter Santa Rosa Regional Hospital. Plaintiff suffered severe and permanent birth injuries, including cerebral palsy. The original complaint was filed in Alameda County on April 12, 2019, against Defendant, Dr. Matthew Pride, and Dr. Edna Prieto. Venue was changed to Sonoma County on November 7, 2019.

Dr. Richard Chang was added as a defendant by Doe substitution on October 21, 2020, but dismissed on October 10, 2022. Dr. Pride's medical group, Sutter Medical Group of the Redwoods, was added by Doe substitution on June 30, 2021.

On May 14, 2024, the Court approved a $200,000 settlement between Plaintiff and Defendant. This matter comes on calendar for Defendant's motion for determination of good faith settlement.

Trial is set for August 2, 2024. The only remaining defendants are Dr. Pride and Sutter Medical Group of the Redwoods.

III. Analysis

The settlement agreement provides, in summary, that Defendant will pay $200,000 to Plaintiff in exchange for dismissal with prejudice of both Defendant and Dr. Prieto. (Petition for Approval of Compromise of Claim ("Petition"), ¶ 10(c).) The agreement is contingent on this Court's finding of good faith pursuant to CCP § 877.6(a)(2). (Seibert Dec., ¶ 22.) The parties understand that such a finding will preclude contribution or indemnity claims by the non-settling parties against Defendant. (CCP § 877.6(c).) (Seibert Dec., Exh. A, ¶ 4.)

Defendant's counsel declares that the settlement "was reached at arms-length and in good faith, and was not intended to injure any of the other parties involved in this lawsuit." (Seibert Dec., ¶ 26.) The settlement was arrived at through negotiations conducted with mediator Craig Needham. (Seibert Dec., ¶ 15.) The amount, though considerably lower than Plaintiff's claimed medical expenses of $660,962.25 (Petition, ¶ 12), is not "grossly disproportionate" to the liability a jury would likely have apportioned to Defendant at trial. There is no evidence that the settlement involves collusion or fraud aimed at making other defendants pay more than their fair share; that point is borne out by the fact that counsel for the only remaining defendants have stipulated to the good faith settlement. (Seibert Dec., Exh. A, p. 2.) The settlement appears to the Court to comport with the *Tech-Bilt* factors listed above.

IV. Conclusion

For the reason set forth above, the Court finds that the settlement was reached in good faith.