SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
JUDICIAL OFFICER: EDWARD G WEIL
HEARING DATE: 04/24/2025

The tentative ruling will become the Court's ruling unless by 4:00 p.m. of the court day preceding the hearing, counsel or self-represented parties email or call the department rendering the decision to request argument and to specify the issues to be argued. Calling counsel or self-represented parties requesting argument must advise all other affected counsel and self-represented parties by no later than 4:00 p.m. of their decision to appear and of the issues to be argued**.** Failure to timely advise the Court and counsel or self-represented parties will preclude any party from arguing the matter. (*Local Rule* 3.43(2).)

Note: In order to minimize the risk of miscommunication, parties are to provide an **EMAIL NOTIFICATION TO THE DEPARTMENT OF THE REQUEST TO ARGUE AND SPECIFICATION OF ISSUES TO BE ARGUED**. Dept. 39's email address is: dept39@contracosta.courts.ca.gov. Warning: this email address is not to be used for any communication with the department except as expressly and specifically authorized by the court. Any emails received in contravention of this order will be disregarded by the court and may subject the offending party to sanctions.

Submission of Orders After Hearing in Department 39 Cases

The prevailing party must prepare an order after hearing in accordance with CRC 3.1312. If the tentative ruling becomes the Court's ruling, a copy of the Court's tentative ruling **must be attached to the proposed order** when submitted to the Court for issuance of the order.

Courtroom Clerk's Calendar

1. 8:31 AM CASE NUMBER: MSC21-01804
CASE NAME: LILIAM URRUTIA VS. QSR WEST DEVELOPMENT ONE, INC. A CALIFORNIA CORPORATION
HEARING IN RE: COMPLIANCE HEARING
FILED BY:
TENTATIVE RULING:
The Settlement Administrator's declaration shows that the settlement terms have been implemented, including the conveyance of the proceeds of uncashed settlement checks to the State Controller. In the event that the Controller directs the Settlement Administrator to retain the funds for some period of time, the Settlement Administrator shall comply with the Controller's direction. The Settlement Administrator may disburse the remaining 10% of attorney's fees to plaintiff's counsel. No further proceedings are contemplated.

2. 9:00 AM CASE NUMBER: MSC22-00052
CASE NAME: SHADELANDS PARK LLC CALIFORNIA LIMITED LIABILITY COMPANY VS. LOWNEY ARCHITECTURE UNKNOWN BUSINESS ENTITY
HEARING ON SUMMARY MOTION
FILED BY: SHADELANDS PARK LLC CALIFORNIA LIMITED LIABILITY COMPANY
TENTATIVE RULING:

Plaintiff and Cross-Defendant Shadelands Park, LLC's motion for summary adjudication as to Lowney Architecture's cross-complaint causes of action one and four is **granted.**

Previously, this motion was continued because notice of the hearing date was not served at least 75 days before the hearing. At the hearing on January 17, 2025, the Court continued this motion to April 25, 2025, which is 98 days later and more than the statutorily required notice. (Code of Civil Procedure section 437c(a)(2) [75-day notice required in 2024, 81-day notice required in 2025].) Lowney's attorney appeared at the January 17, 2025, hearing. (Minute Order 1/17/25.) On January 21, 2025, Shadelands filed and served a new notice with the April 25 hearing date. (Updated Notice 1/21/25.) Later, this case was transferred to the complex department and this motion was reset for April 24, 2025, in Department 39. (Notice of Case Reassignment 3/17/25.) Lowney did not file an opposition to this motion based upon the new hearing date.

Plaintiff/ Cross-Defendant Shadelands seeks summary adjudication as to causes of action one and four in Lowney's cross-complaint. Lowney's cross-complaint alleges that it entered into a contract with Shadelands on April 11, 2013. (Cross-Comp. ¶ 8.) In the first cause of action for breach of contract, Lowney claims that Shadelands breached their contract by failing to make timely payments and that Lowney is owed $415,000. (Cross-Comp. ¶¶13, 16.) In the second and third causes of action, Lowney seeks indemnity and contribution against unnamed parties, "JOES 6-25". In the fourth cause of action for declaratory relief, Lowney alleges that they are entitled to equitable indemnity, apportionment and/or contribution and damages for breach of contract, negligence, indemnity and contribution. (Cross-Comp. ¶26.) The only allegations in the cross-complaint as to Shadelands are for the breach of contract claim and do not include negligence, indemnity and contribution.

Lowney alleges that the complaint in this case was filed on January 14, 2022, and there was COVID-19 tolling from April 6 to October 1, 2020. (Cross-Comp. ¶¶7, 11.) Shadelands evidence shows on September 27, 2016, Lowney suspended its work because of a dispute over fees due by Shadelands. (Grady dec. ¶8 and ex. C.) Lowney and Shadelands discussed the payment issue in November 2016 without resolving the dispute. (Grady dec. ¶¶9-10 and ex. D.) Shadelands' position regarding the disputed payments has remained unchanged since then. (Grady dec. ¶10.)

There is a four-year statute of limitations for breach of contract. (Code of Civil Procedure section 337(a).) Shadelands argues that the claim accrued in November 2016 when it was clear that there was a dispute about payment. Under this analysis, and taking into consideration COVID tolling, the statute of limitations ran in May 2021. While the statute of limitations for the cross-complaint is tolled from the filing of the original complaint (see, *California-American Water Co. v. Marina Coast Water Dist.* (2016) 2 Cal.App.5th 748, 763), the original complaint was not filed until January 2022.

Thus, Shadelands has shown that the statute of limitations on the unpaid fees expired before the complaint was filed and that Lowney's cross-complaint for unpaid fees is barred by the four-year statute of limitations. Having filed no opposition, Lowney has not presented any evidence that would create a triable issue of material fact.

The declaratory relief claim as to Shadelands relates to the breach of contract claim. Shadelands argues that since the breach of contract claim is barred by the statute of limitations, there is no justiciable dispute remaining to support the declaratory relief claim and therefore the declaratory relief claim is moot. The Court agrees with this argument.

Shadelands' requests for judicial notice are denied as unnecessary. These documents are already part of the Court's file in this case.

Law & Motion

3. 9:00 AM CASE NUMBER: C22-00777
CASE NAME: CATHEY VS. REED
***HEARING ON MOTION IN RE: TO SET ASIDE NOTICE OF SETTLEMENT**
FILED BY: CATHEY, CYNTHIA PATRICIA LYNN
****TENTATIVE RULING:****
Plaintiff finally achieved service of the motion on Tenecia Matthews on April 4, 2025. Since this was the first notice Matthews received of the motion, it was required to be served 16 court days before the hearing. It was served 14 court days before the motion. Moreover, the proof of service indicates only that the notice of continuance was served, not the original motion. Accordingly, the motion is again continued to permit proper service, of both the original motion and the new hearing date. The new hearing date will be July 3, 2025, 9:00 a.m.

4. 9:00 AM CASE NUMBER: C22-01841
CASE NAME: ANTHONY SERVICE VS. VOLKSWAGEN GROUP OF AMERICA, INC
***HEARING ON MOTION IN RE: COMPLIANCE HEARING**
FILED BY:
****TENTATIVE RULING:****

Hearing required to discuss necessary changes to the schedule, given the delays caused by the appeal of the settlement. (The remittitur was issued 11/19/24.)

5. 9:00 AM CASE NUMBER: C23-01128
CASE NAME: STATE FARM GENERAL INSURANCE COMPANY AS SUBROGEE OF ITS INSURED DAVID HENNIGAN VS. CITY OF PITTSBURG
***HEARING ON MOTION IN RE: GOOD FAITH SETTLEMENT BTWN ISCO AND STATE FARM GENERAL INSURANCE COMPANY**
FILED BY: ISCO INDUSTRIES, INC.
****TENTATIVE RULING:****

Defendant ISCO Industries, Inc. [ISCO] brings this Motion for Determination of Good Faith Settlement

[Motion]. The Motion is opposed by City of Pittsburg [City].

For the following reasons, the Motion is **granted**.

Background

This case arises from a subrogation claim by Plaintiff State Farm General Insurance Company against Defendants City of Pittsburg, Terracon Pipelines, Inc. [Terracon], and movant ISCO relative to a water loss that occurred on December 27, 2021 and affected Plaintiff's insured's property in Pittsburgh, CA.

Each of the parties to this action, including the City, entered into a settlement agreement to resolve and dismiss Plaintiff's claims, which agreement was fully executed and effective as of October 31, 2024. (Declaration of [Decl.] K. Sager, ¶ 11, Exhibit D [Settlement Agreement].) The Plaintiff's Complaint was dismissed in its entirety and with prejudice on August 13, 2024. The City's Cross-Complaint remains pending. The City contends that its Cross-Complaint was not resolved by the settlement agreement, and, thus, the Motion should be denied. The City asserts: "As of January 22, 2025, the City had incurred out of pocket expenses of $227,517.00. … The unreimbursed attorneys' fees incurred by the City as of January 22, 2025 are $35,391.24, and continue to accrue." (Decl. of A. Miller, ¶¶ 2, 3.)

As the City points out, the terms of the settlement agreement specified: "This AGREEMENT does not release, compromise, or give up any claims by the City of Pittsburg made in its Cross-Complaint by City of Pittsburg filed in the ACTION against Terracon Constructors, Inc. and ISCO, Industries, Inc. and Roes 1 through 50." (Decl. K. Sager, ¶ 11, Exhibit D at § 1.) The settlement agreement included payment by ISCO and Terracon to fully resolve Plaintiff's claims; no payment was required of the City. (*Id*., § 4.) The settlement agreement also states: "The SETTLING PARTIES stipulate and agree to the "good faith" of the settlement described in this AGREEMENT as that term is used in California Code of Civil Procedure §877.6." (Id., § 5 C.) With respect to this Motion, the settlement agreement states: "The SETTLING PARTIES acknowledge and agree that each PARTY will bear its own costs, expenses, attorneys' fees and expert fees … connected with the ACTION but excluding the claims in the CITY Cross-Complaint." (Id., § 5. E.) Finally, the settlement agreement, provides that "Each PARTY has executed this AGREEMENT with full knowledge of its terms." (Id., § 5. A.)

The City's Cross-Complaint alleges the following claims against ISCO: the First Cause of Action for Partial Indemnity, the Second Cause of Action for Total Indemnity, the Third Cause of Action for Equitable Indemnity, the Fourth Cause of Action for Apportionment, the Fifth Cause of Action for Contribution, and the Seventh Cause of Action for Declaratory Relief. (City Cross-Complaint filed 09/11/2023; see also Decl. K. Sager, ¶ 5, Ex. B.) The Sixth Cause of action for Express Indemnity is not stated against ISCO. (*Ibid*.)

The City's declaratory relief claim posits the following as controversies:

> (a) the amount and/or percentage of negligence or liability based on the conduct of Cross-Defendants, and each of them, which contributed to Plaintiff's damages, if any, be declared,

and;

(b) Cross-Defendants, and each of them should be liable to Cross-Complainant on a full, equitable indemnity basis and on a comparative basis so that the damages, if any, sustained by plaintiff, ay be distributed in accordance with relative fault.

(*Id*., ¶ 27.) The City seeks the following remedies for its declaratory relief claim:

1. For a declaration of the respective rights, duties, liabilities and obligations of the Plaintiff, Cross-Complainant, and all Cross-Defendants, and each of them;

2. For a declaration that Cross-Defendants are obligated to defend and indemnify CrossComplainant concerning the claims of Plaintiff in the main action herein;

3. For general damages according to proof.

(*Id*., 10:1-6.)

Similarly, Terracon alleges causes of action for Total Equitable Indemnity, Comparative Fault and Partial Indemnity, and Declaratory Relief against ISCO. (Terracon First Amended Cross-Complaint filed 10/23/2023; see also Decl. K. Sager, ¶ 5, Ex. C.) Terracon does not oppose this Motion.

Standard

Code of Civ. Proc. [CCP] § 877 provides that where a release or dismissal is given in good faith to a co-tortfeasor, "[i]t shall discharge the party to whom it is given from all liability for any contribution to any other parties." CCP § 877.6 sets forth the procedure for the court's determination of a good faith settlement and provides that any claims for equitable indemnity or contribution are barred where a settlement is found to be in good faith. This bar includes disguised claims for indemnity or contribution, including direct claims that seek only to recover derivative damages. (*Norco Delivery Service, Inc. v. Owens-Corning Fiberglass, Inc*. (1998) 64 Cal.App.4th 955, 964.)

"[T]he provisions of [CCP] sections 877 and 877.6 … have two major goals: the equitable sharing of costs among the parties at fault and the encouragement of settlements." (*Tech-Bilt, Inc. v. Woodward-Clyde & Assoc*. (1985) 38 Cal.3d 488, 499 498-499 [*Tech-Bilt*].) "[T]he general equitable principle of contribution law … frowns on unfair settlements, including those which are so poorly related to the value of the case as to impose a potentially disproportionate cost on the defendant ultimately selected for suit.'" (*Ibid*.) Trial courts have "broad discretion in determining whether a settlement was entered in good faith and within the *Tech-Bilt* ballpark." (*Norco Delivery Service, Inc.*, supra, 64 Cal.App.4th at 962.) "[B]ad faith is not established by a showing that a settling defendant paid less than his theoretical proportionate or fair share." (*Tech-Bilt*, *supra*, 38 Cal.3d at 491.)

Tech-Bilt sets out six non-exclusive factors to evaluate whether a settlement is in good faith: (1) a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, (2) the amount paid in settlement, (3) allocation of settlement proceeds among plaintiffs, (4) recognition that

a settlor should pay less in settlement than he would if he were found liable after a trial, (5) the financial condition and insurance limits of settling defendants, and, (6) the existence of fraud, collusion, or tortious conduct aimed to injure the interests of non-settling defendants. (*Tech-Bilt*, *supra*, 38 Cal.3d at 499.)

The key question is whether "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 499-500.) The party asserting the lack of good faith ... has the burden of proof on that issue." (*Id*. at 499.)

Additionally, with respect to interpretation of the terms of the parties' settlement agreement, California law holds that the language of a contract shall govern its interpretation, where such language is clear and not absurd. (Civil Code §1638.) An interpretation that would make the instrument extraordinary, harsh, unjust, inequitable, or which would result in absurdity, must be avoided. (Civil Code §1643.) Further, where a contract expresses that it is final and complete expression of the parties' agreement, it cannot be contradicted by extrinsic, or parol, evidence. (CCP §1856.)

Analysis

Each of the City's causes of action against ISCO seek equitable relief arising from the claims and damages alleged in the Complaint. (City Cross-Complaint, ¶¶ 6, 12, 15, 17, 19, 27.) Further, the City's Cross-Complaint does not allege negligence or express indemnity against ISCO or state a basis on which the City recover attorney's fees from ISCO. The City's Cross-Complaint does not state a claim against ISCO for damages incurred by the City.

The City expressly agreed and stipulated as part of the settlement agreement that the settlement was in "good faith" as that term is used in CCP § 877.6. This language is clear and not absurd, and, thus, governs this court's interpretation of such term. To now find that the settlement is in bad faith, and outside the ballpark of ISCO's exposure for Plaintiff's claims, would directly contradict this express stipulation of the parties at the time of settlement and result in an unjust and absurd interpretation of this provision. Moreover, the settlement entered into by all parties to this litigation included the agreed upon amount to be paid by ISCO and Terracon to fully resolve the Plaintiff's claims, and resulted in a dismissal with prejudice of the Plaintiff's Complaint.

Although the settlement agreement provides that it does not apply to the City's Cross-Complaint or its attorney's fees, this provision must be read in conjunction with the parties' express stipulation that the settlement is in good faith. Accordingly, the carve-out of the City's Cross-Complaint preserves those cross-claims not subject to being barred pursuant to CCP § 877.6, such as the City's claims against Terracon based on express indemnity. To interpret these provisions otherwise would render the good faith settlement stipulation wholly ineffective.

Accordingly, this court affirms the parties' stipulation as expressly stated in the settlement agreement and finds that the settlement by ISCO was in good faith.

Each of the claims against ISCO are claims for equitable comparative contribution, or partial or

comparative indemnity, based on comparative negligence or comparative fault, and, thus, barred by CCP § 877.6 (c), pursuant to the parties' agreement that the settlement is in good faith and this court's finding herein that the settlement is in good faith. Accordingly, pursuant to CCP § 877.6, the claims against ISCO are hereby dismissed.

Objections

Here, the settlement agreement states and, thus, the parties agreed at the time of settlement that the settlement was in good faith. As such, this court does not need to look to extrinsic evidence regarding theories of liability or the basis for fault. Thus, as the court must only rule on those objections that are material to the Motion at hand, this court does not address the objections to evidence raised by the City.

6. 9:00 AM CASE NUMBER: C23-02749
CASE NAME: NANCY MELLO VS. STEVEN BEYLER
***HEARING ON MOTION IN RE: RENEWED MTN TO SET ASIDE DEFAULT OF BEYLER AND PCS CONSTRUCTION INC.**
FILED BY: BEYLER, STEVEN ROBERT
****TENTATIVE RULING:****

Defendants Steven Robert Beyler [Steve Beyler], Cindy Anne Beyler [Cindy Beyler], and PCS Construction Inc. [PCS] bring a Renewed Motion to Set Aside Default [Renewed Motion]. The Renewed Motion is opposed by Plaintiffs Nancy E. Mello and Dennis R. Mello [Plaintiffs].

For the following reasons, the Renewed Motion is **denied**.

Background

Defendants bring this Renewed Motion pursuant to Code of Civ. Proc. [CCP] §§ 473 (b) and 1008 (b) seeking essentially a re-do of their previous Motion to Set Aside Default filed August 13, 2024 [Original Motion]. (See Defendants' Notice of Motion and Motion to Set Aside Default filed 08/13/2024 and supporting documents.) Defendants bring their Renewed Motion on the stated basis that (1) Defendants are entitled to the Court's discretional relief pursuant to CCP § 473 (b) based on excusable neglect and (2) Defendants request that the court exercise its inherent power to reconsider its previous interim orders on its own motion and grant the Renewed Motion to Set Aside Entry of Default. (See Defendants' Notice of Renewed Motion filed 01/16/2025 at 2:10-14.)

Defendants essentially seek a rehearing on their Motion to Set Aside Default which was decided on November 21, 2024, pursuant to the court's uncontested tentative ruling. (See Order After Hearing filed 01/21/2025.) Defendants contend that their Renewed Motion is "based on 'new facts and circumstance' with a satisfactory explanation for not having presented the new or different information earlier. (See Defendants' Notice of Renewed Motion filed 01/16/2025 at 2:2-9.) In contrast to the Original Motion, which attached a proposed Answer, the Renewed Motion attaches a Demurrer and Motion to Strike that Defendants seek to file in response to the Complaint. (See

Declaration of P. Kim filed 01/16/2025, ¶ 5, Exhibit 3.)

In support of their Renewed Motion Defendants submit the declaration of Cindy Beyler, which was missing from the original application, and a new declaration of Steven Beyler, as well as the declarations of two of Defendants' counsel. The Beylers' new declarations include details of each of their physical description, which are used to contradict the descriptions in the proofs of personal service for each. (See Declaration of S. Beyler filed 01/16/2025, ¶ 19; Declaration of C. Beyler filed 01/16/2025, ¶ 15; Proof of Service on S. Beyler filed 05/24/2024, ¶ 5; Proof of Service on C. Beyler filed 05/24/2024, ¶ 5.) Essentially, the Beylers contend that they were not personally served and, thus, that service was not properly effectuated.

Defendants' Motion argues that "[t]he new or different facts are those that arose during the Court's determination of the earlier Motion to Set Aside of which Defendants with reasonable diligence could not have known earlier, nor anticipated." (See Defendants' Memorandum of Points and Authorities [MPA] in support of [iso] Renewed Motion at 13:9-16.) The Court's decision on Defendants' Original Motion was based on the absence of a declaration by Cindy Beyer to contradict or refute the statements by the process server in the proof of personal service, which the court held to constitute a "lack of candor." (See Order After Hearing filed 01/21/2025.) The ruling on the Original Motion found that Cindy Beyer was the person who was personally served, and that Steve Beyer was served by substitute service through Cindy Beyer. (*Ibid*.) This court held that Steve Beyer's statements regarding a lack of personal service were hearsay. (*Ibid*.) Defendants did not contest the tentative ruling on the Original Motion or request to present additional evidence to support the Original Motion. (*Ibid*.)

Standard

Renewed Motion

CCP § 1008 provides:

> (a) When an application for an order has been made … and refused in whole or in part, or granted, or granted conditionally, … any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter … . The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown.
>
> (b) A party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. For a failure to comply with this subdivision, any order made on a subsequent application may be revoked or set aside on ex parte motion.

Thus, a motion for reconsideration or a renewal of prior motion must be based on "new or different facts, circumstances, or law." (CCP § 1008, subds. (a), (b).) The motion must also include an affidavit stating "what new or different facts, circumstances, or law are claimed to be shown." (*Ibid*.) Where the motion is based on "different" facts or law, as opposed to "new" facts or law, the moving party must also provide a satisfactory explanation as to why he did not present those facts, circumstances or law in the first motion. (*Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1197-1201.) Failure to provide such an explanation bars relief. (*Ibid*.)

> [T]o permit a party to satisfy section 1008's requirement of showing "'new or different' facts" simply by offering "anything not previously 'presented' to the court" would have "[t]he miserable result … [of] defeat[ing] the Legislature's stated goal of reducing the number of reconsideration motions and would remove an important incentive for parties to efficiently marshall their evidence." (*Garcia v. Hejmadi*, supra, 58 Cal.App.4th at pp. 688–689; see California Correctional Peace Officers Assn. v. Virga, supra, 181 Cal.App.4th at p. 47, fn. 15 [same].)

(*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 836, fn. 3.) "'[U]nless the requirements of section … 1008 are satisfied, any action to reconsider a prior interim order must formally begin with the court on its own motion.' (*Le Francois*, at p. 1108; see id. at p. 1107, fn. 5.)" (*Id*. at 844.) While CCP § 1008 limits the parties' ability to file repetitive motions, it does not limit the court's ability, on its own motion, to reconsider its prior interim orders so it may correct its own errors. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107.)

Set Aside Default

With respect to authority to set aside a default, CCP § 473, subpart (b) provides that "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." However, "application for this relief … shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken." (CCP § 473 (b).) Additionally, CCP § 473, subpart (b) provides relief where default is entered by mistake of counsel. Further, CCP § 473, subpart (d) provides for relief "on motion of either party after notice to the other party, [to] set aside any void judgment or order." Additionally, CCP § 128 (a)(8) provides: "Every court shall have the power to … amend and control its process and orders so as to make them conform to law and justice." Defendants Renewed Motion is based only on CCP § 473 (b).

Analysis

First, with respect to the basis to renew the Original Motion pursuant to CCP § 1008, the court does not find Defendants presented any new or different facts that could not have been presented at the time of the Original Motion. Defendants acknowledge the Proofs of Service for Cindy Beyler and Steve Beyler in their Original Motion, and each were filed with the court on May 24, 2024 prior to Defendants' filing Original Motion on August 13, 2024. (See MPA iso Original Motion at 3:17-19.) Defendants contend that the new evidence is this court's ruling on the Original Motion, but this

Court's ruling is not a new or different fact supporting relief under CCP § 473 (b), and, thus, is not a basis for renewal of this Motion.

The key issue is that Defendants now present a declaration of Cindy Beyler and a further declaration of Steven Beyler that include additional facts to refute the presumption that personal service was effectuated as declared in the proof of service. However, Defendants have not shown that this information constitutes new or different facts that were not available to support their Original Motion. Defendants' declarations do not address the reason that such matters were not provided in the Original Motion. Accordingly, Defendants have not met the requirements to renew the Original Motion.

Second, with respect to the request that this court reconsider its prior ruling on its own motion. The proof of service shows personal service on Mr. Beyler. As such, this court withdraws its prior findings based on the assumption that Mr. Beyler was served via substitute service. This court finds that the prior ruling erroneously held that that Mr. Beyler's declaration was "cursory," and that it erroneously held that "Plaintiffs do not claim to have personally served Steven himself."

However, if Defendants contend that they were not personally served, then there is no basis to contend that they did not answer based on neglect or mistake. Instead, the contention is that service was not effectuated. As such, the basis for setting aside the default would be under CCP § 473 (d) as void. Similarly, even if this court had authority to consider the declaration of Cindy Beyler on this Renewed Motion, the result would be the same. Defendants have not made a showing of neglect or mistake. The argument by Defendants is that they were not personally served. If they were not personally served, then there cannot have been a mistake as service was not effectuated. If the argument is that service was not effectuated then the issue is whether the default is void, not whether there was a mistake by Defendants. (Compare CCP § 473, subparts (b) and (d).)

As such, there may be grounds to seek to set aside the default as void, but there has not been a showing of mistake, nor has there been a showing of new or different facts that were not available at the time of the Original Motion.

For such reasons, this Renewed Motion, brought pursuant to CCP §§ 473 (b) and 1008 is denied without prejudice to any future motion to set aside default on other statutory basis, as appropriate and where supported by law.

7. 9:00 AM CASE NUMBER: C23-02810
CASE NAME: EVERHART, LLC VS. DAVID LANGON
***HEARING ON MOTION IN RE: DISCHARGE, DEPOSIT AND DISMISSAL**
FILED BY: AMERICAN CONTRACTOR'S INDEMNITY COMPANY
****TENTATIVE RULING:****

Before the Court is a motion by defendant and cross-complainant American Contractors Indemnity Company ("ACIC" or "Surety") for order of discharge, for deposit, and for dismissal of ACIC. For the reasons set forth, the motion is **granted in its entirety.** ACIC shall prepare and lodge a proposed order in accordance with the applicable Local Civil Rules.

Background

Plaintiff Everhart, LLC is the owner of an approximate 25-acre parcel of real property commonly known as 1077 Jacobsen Lane in Petaluma. Everhart alleges it contracted with David Langon Construction, Inc. and its principal David Langon to build "a boarding facility along with barns and a riding area **as well as construct a custom home with a detached guest home.** ('Cain Decl.", ¶4.)" (Opp. to Mot. p. 2, ll. 12-15 [emphasis in original].) (*See also* Cain Decl. Exh. A [Construction Contract, Exh. A describing component of the project as "Build a new Four-bedroom single story custom home" (emphasis added)].) American Contractors Indemnity Company ("ACIC" or "Surety") provided a Contractor's License Bond, bond number SC6365111 (the "Bond") for David Langon as principal of his construction company in the amount of $25,000 pursuant to the Business & Professions Code.

Everhart alleges the Langon defendants breached their obligations under the Construction Contract, asserting numerous causes of action against them. Everhart also sued ACIC as Surety on the Bond in its 11th cause of action of the complaint. ACIC filed a cross-complaint for interpleader pursuant to Code of Civil Procedure section 386, naming David Langon and Everhart as cross-defendants based on their conflicting demands on the Bond.

ACIC contends it is a mere stakeholder in the action based on its issuance of the Bond. (Code Civ. Proc. § 386.5.) ACIC moves the Court for an order allowing it to deposit the sum of $7,500 with the Clerk of the Court as the portion of the Bond which Plaintiff's claims may reach under applicable law. ACIC also asks that it be dismissed without prejudice from the action, that the parties be enjoined from initiating or continuing any proceedings against ACIC on the Bond, and that its obligations under the Bond be declared discharged. Only Plaintiff Everhart opposes the motion, and the opposition is made solely on the ground that the amount of the deposit from the Bond proceeds should be the full amount of the Bond ($25,000) rather than $7,500 as stated in the motion.

Applicable Law on Contractor's Bond under the Business & Professions Code

Business & Professions Code section 7071.6(a) conditions a contractor's maintenance of its license on the contractor-licensee posting a $25,000 bond. Subsection (b) of that statute describes the liability of a surety on the licensee's bond: "Excluding the claims brought by the beneficiaries specified in subdivision (a) of Section 7071.5, the aggregate liability of a surety on claims brought against a bond required by this section shall not exceed the sum of seven thousand five hundred dollars ($7,500). The bond proceeds in excess of seven thousand five hundred dollars ($7,500) shall be reserved exclusively for the claims of the beneficiaries specified in **subdivision (a) of Section 7071.5**. However, nothing in this section shall be construed so as to prevent any beneficiary specified in subdivision (a) of Section 7071.5 from claiming or recovering the full measure of the bond required by this section." (Bus. & Prof. Code § 7071.6(b) [emphasis added].)

Business & Professions Code section 7071.5 provides in pertinent part that the required Contractor's License Bond is for the benefit of the following parties damaged by the contractor-licensee, among others specified in the statute: "**(a)** A homeowner contracting for **home improvement upon the homeowner's personal family residence**," and "(b) A property owner contracting for the construction of a single-family dwelling" so long as the dwelling is not intended for sale or offered for sale when the party was damaged. (Bus. & Prof. Code § 7071.5(a) and (b) [emphasis added].)

Analysis

The foregoing statutes provide the proceeds of the Bond in excess of $7,500 are reserved exclusively for payment of a homeowner damaged by a licensee who contracted to perform a "home

improvement" on "the homeowner's personal family residence." (Bus. & Prof. Code § 7071.5(a).) The Construction Contract, confirmed by the Cain Declaration, indicates Everhart contracted for the "construction of a new single-family residence" and that the remodel on an existing single family residence on the property was part of the "Boarding Facility," not the "homeowner's personal family residence." (Cain Decl. ¶ 4 [defendants were "to build a custom residence (a new five-bedroom single story home . . .) and boarding facility, as well as remodel an existing home" (emphasis added)], and Exh. A [Construction Contract Exh. A.) The amount of the Bond above $7,500 is not available to pay damages to a property owner "contracting for the construction of a single-family residence" (§ 7071.5(b)), which is what Everhart and Cain concede Everhart contracted for. (*See also* Bus. & Prof. Code §§ 7151(a) [defining home improvement] and 7151.2 [defining home improvement contract].)

If the Court considers the reply pleadings filed by the Langon Defendants, those pleadings further support the Court's statutory analysis based on the facts as stated in the Cain Declaration and Everhart Opposition. The Langon Reply Declaration explains in detail that the remodel of the existing home and ADU on the property were part of the commercial project for the equestrian boarding facilities, consistent with the terms of the Construction Contract attached to the Cain Declaration. (Langon Reply Decl. ¶¶ 5, 10.) The Langon Reply Declaration also confirms what Cain has admitted, specifically that the residence proposed to be built by the Langon Defendants was a new residence. (Langon Reply Decl. ¶¶ 10-16.) As such, the construction is subject to the provisions of Business & Professions Code section 7071.5(b), not section 7071.5(a) for which the balance of the Bond in excess of $7,500 is reserved pursuant to section 7071.6(b).

Relief Sought Is Proper

Plaintiff Everhart does not contest any of the other relief sought in the motion. The Court finds the requests for relief proper for the reasons stated in the moving papers supported by the Hayes Declaration and pursuant to Code of Civil Procedure sections 386 and 386.5.

Langon Reply Request for Judicial Notice

The Court denies the Langon request for judicial notice of the Statement of Information for Everhart because it is irrelevant to the Court's determination of the motion. (*See Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [judicial notice denied where "the requests present no issue for which judicial notice of these items is necessary, helpful, or relevant"]; *Appel v. Superior Court* (2013) 214 Cal.App.4th 329, 342, fn. 6 [judicial notice denied where materials are not "relevant or necessary" to the court's analysis].)

8. 9:00 AM CASE NUMBER: C23-03307
CASE NAME: PAWNEE LEASING CORPORATION VS. SARFARAZ DHILLON
***HEARING ON MOTION IN RE: SET ASIDE THE DENIALOF DEFAULT JUDGMENT IN THE INTEREST OF JUSTICE**
FILED BY:
****TENTATIVE RULING:****

Before the Court is Defendant Sarfaraz Singh Dhillon (“Defendant” or “Dhillon”)’s “Motion to Set Aside Denial of Default Judgment.” Defendant is in pro per. The Motion is opposed by Plaintiff Pawnee Leasing Corporation.

Brief Factual and Procedural Background

Plaintiff Pawnee Leasing Corporation filed a verified complaint for (1) breach of contract, (2) open book, (3) account stated, and (4) breach of guarantee against Defendant Kut Global, a corporation, and Defendant Sarfaraz Singh Dhillon, an individual. The Complaint related to an Equipment Finance Agreement between TF Group, Inc. and Kut Global, where Dhillon executed a Guaranty. TF Group, Inc. later assigned the Equipment Finance Agreement and Guaranty to Plaintiff Pawnee Leasing Corporation.

Key dates:

- On December 18, 2023, Plaintiff filed the instant case.
- On January 11, 2024, Defendants Kut Global and Dhillon were personally served with the Summons and Complaint. They did not file any Answer.
- On April 8, 2024, Plaintiff mailed to the Defendants a Request to Enter Judgment. The Defendants did not respond.
- On April 8, 2024, a default was entered against the Defendants.
- On April 19, 2024, a Judgment was entered in favor of the Plaintiff and against the Defendants in the sum of $48,224.71.
- On May 24, 2024, Plaintiff served on the Defendants a Notice of Entry of Judgment or Order.
- On June 26, 2024 Defendant Dhillon filed an appeal of the April 19, 2024 Judgment.
- On September 25, 2024 Defendant filed his original motion to set aside default and default judgment.
- On October 14, 20214 the Court denied Defendant's claim of exemption without prejudice.
- On December 5, 2024 the Court denied Defendant's motion for default and default judgment on the grounds that Dhillon had filed an appeal from judgment which deprived the Court of jurisdiction to grant a motion for relief under CCP § 473(b). The Court did not comment on the substance of Defendant's grounds for relief.
- April 16, 2025 the First District Court of Appeal granted Dhillon's request for dismissal.

Legal Standard

Defendant moves to set aside the default judgment pursuant, in part, to California Code of Civil Procedure section 473 (b). Code of Civil Procedure 473 (b) provides, in relevant part:

> The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted,

> and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.

When moving to set aside a default under CCP §473 (b), the moving party has the burden of proof. (*In re Marriage of Kieturakis* (2006) 138 Cal.App.4th 56, 88.) However, section 473 is often applied liberally when a party in default moves promptly to seek relief and the party opposing the motion will not suffer prejudice if relief is granted. (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233.) "In such situations, 'very slight evidence will be required to justify a court in setting aside the default.'" (*Ibid. quoting Bailey v. Taaffe* (1866) 29 Cal.423, 424.) "Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails." (*Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 24, quoting *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 235 [emphasis added].) "Moreover, because the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default." (*Ibid.*)

Analysis

When a party seeks relief from a default, "[a]pplication for this relief … shall be made within a reasonable time, in no case exceeding six months, after the … order … was taken." (CCP § 473(b).)

Timing here is not an issue; Defendant filed his original motion on September 25, 2024, less than six months after default was entered on April 8, 2024 and default judgment was entered on April 19, 2024.

In his original motion, Defendant stated that he failed to file a timely response to the original complaint because he is "a self-represent[ed] litigant with no legal background." While Plaintiff contends that this reason is inadequate, the Court cannot conclude that it is invalid. Furthermore, Plaintiff has not identified any prejudice that it would suffer if the Motion is granted.

The Court is inclined to grant the Motion. However, the procedural requirements of this motion have not been met. Code of Civil Procedure section 473(b) states:

> Application for [relief from default] shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken.

Dhillon must submit a proposed answer. It shall be attached to a declaration by Mr. Dhillon which states, under penalty of perjury, (1) his reasons for not filing the answer sooner, and (2) that the attached exhibit is his proposed answer.

Accordingly, so long as Defendant submits his proposed answer, as mentioned above, the Court intends to grant the motion. No sanctions are awarded.

9. 9:00 AM CASE NUMBER: C23-03307
CASE NAME: PAWNEE LEASING CORPORATION VS. SARFARAZ DHILLON
***HEARING ON MOTION IN RE: MOTION TO STAY ENFORCMENT OF JUDGMENT PENDING APPEAL FILED BY:**
****TENTATIVE RULING:****

Denied as **moot**. Defendant has dismissed his appeal.

10. 9:00 AM CASE NUMBER: C24-02005
CASE NAME: AMY BROWNELL VS. SAN FRANCISCO EMPLOYEES' RETIREMENT SYSTEM
***HEARING ON MOTION IN RE: TO TRANSFER VENUE**
FILED BY: SAN FRANCISCO EMPLOYEES' RETIREMENT SYSTEM
TENTATIVE RULING:

Defendant, San Francisco Employees' Retirement System's motion for a change of venue to San Francisco County is **granted**, as discussed below.

Background

Plaintiff, Amy Brownell, filed this action on July 31, 2024, alleging she is a former employee of the City and County of San Francisco, and during her employment, was a member of the San Francisco Employees' Retirement System ("defendant") that participated in a Qualified Defined Benefit Plan created by the City and County of San Francisco for its employees to provide an employment benefit retirement plan. (Complaint, 2:15-24.) Plaintiff alleges that during her employment, she was married to George Ramstad (who died on December 19, 2021), and that marriage resulted in a dissolution judgment entered by the Superior Court, County of San Benito, on or about October 31, 2016. (Complaint, 2:26-3:15.)

Plaintiff contends that the computation of her retirement benefit amount is wrong. She contends that, based on her having repaid any *Gilmore* Debt incurred via payments to her former spouse, she is entitled to receive "'Whole' plan benefits, without reduction for any *Gilmore* Debt." (Complaint, 4:1-6.)

A proof of service was filed in August and defendant's default was entered on October 24, 2024. On November 22, 2024, the Court signed and filed a stipulation and order to set aside the default. On December 20, 2024, defendant filed a general denial in response to the complaint. As its second affirmative defense, defendant stated, "Plaintiff is barred from pursuing its claims in Contra Consta County Superior Court because venue is improper." On January 31, 2025, defendant brought this motion to transfer venue to the County of San Francisco.

The motion argues that venue rules require this case to proceed in the county where defendant resides. In support of the motion, defendant submits a request for judicial notice and a declaration by counsel stating defendant attempted to resolve the transfer informally, but plaintiff refused.

Plaintiff opposes the motion, arguing that this is an action for breach of contract and breach of fiduciary duty, so venue is based on rules related to breach of contract (Code of Civil Procedure, § 395.5). Plaintiff also bases her opposition on defendant's alleged lack of diligence in bringing this motion.

Defendant replies that the complaint itself does not contain any cause of action for breach of

contract (only declaratory relief and breach of fiduciary duty), and that such cause of action would be improper if it were alleged since retirement benefits are statutory. Accordingly, defendant argues the default venue rule (Code of Civil Procedure, § 395) governs, mandating that an action be brought where the defendant resides. Defendant provides a declaration on reply explaining the default circumstances in this case (improper service), challenging the opposition's attack on defendant's diligence in bringing this motion.

Request for Judicial Notice

In support of the motion, defendant requests judicial notice of a stipulation and order filed on February 17, 2017 in San Benito Superior Court, Case No. FL-15-00402 (plaintiff's family law case). The request is **granted**. (Evid. Code, § 452 (e) [judicial notice appropriate for "[r]ecords of any court of this state"].)

Standard

Venue is determined based on the complaint on file at the time the motion to change venue is made. (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 482.)

On timely motion, a court must order a transfer of an action "when the court designated in the complaint is not the proper court." (Code Civ. Proc., §§ 396b(a), 397(a).) A defendant is entitled to have an action tried in the county of his or her residence unless the action falls within some exception to the general venue rule. (*Brown v. Superior Court, supra,* 37 Cal.3d at 483.) Code of Civil Procedure, section 395 codifies this rule and provides that the trial of the action shall be in the county of the defendant's residence, "[except] as otherwise provided by law." (Code Civ. Proc., § 395 (a).)

The burden is on the moving party to establish facts justifying the transfer. (*Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 928-929.) Absent "an affirmative showing to the contrary, the presumption is that the county in which the title of the action shows that it is brought is, prima facie, the proper county for the commencement and trial of the action." (*Id*. at 928.)

Discussion

It is not clear whether a cause of action for breach of contract could be properly alleged. The case cited by defendant, *Cal Fire Local 2881 v. California Public Employees' Retirement System* (2019) 6 Cal.5th 965, did not directly involve retirement benefits. The California Supreme Court in that case contrasted the purchase of "additional retirement service credit," the elimination of which was at issue in that case, to retirement benefits, which are a "vested right" that *could* implicate constitutional protection under the contract clause. (*Id*. at 970, 977-979; see also *Alameda County Deputy Sheriff's Assn. v. Alameda County Employees' Retirement Assn.* (2020) 9 Cal.5th 1032, 1054 ["county employees have no express contractual right to the calculation of their pension benefits in a manner inconsistent with the terms of the PEPRA amendment"].)

The determination, however, does not appear necessary. Defendant correctly asserts that no cause of action in the complaint refers to a breach of contract. As a result, plaintiff may not invoke venue rules explicitly based on breach of contract, and the default venue rule applies. \

The Court further finds that the delay here is not unreasonable given that service was

improper. The motion was filed by defendant less than six weeks after it filed its answer. It appears undisputed that this venue is not that in which defendant resides.

Code of Civil Procedure, § 396b (a) mandates that a court must grant a motion to transfer if it appears that the action was not commenced in the proper court. While the statute refers to the defendant making such motion "at the time he or she answers," the trial court may still entertain such a motion after the answer is filed. (See *Walt Disney Parks & Resorts U.S., Inc. v. Superior Court* (2018) 21 Cal.App.5th 872, 878 [discussing time limit for filing a motion for change of venue, and holding there was no waiver].) Whether mandatory or discretionary, the Court finds that defendant has not waived its right to move for a transfer of venue, and that such transfer is appropriate in this case.

11. 9:00 AM CASE NUMBER: C24-02966
CASE NAME: YUE REN VS. GAUTAM PATIL
***HEARING ON MOTION IN RE: FOR LEAVE TO CROSS COMPLAINT AND EXTENSION OF TIME (CONTINUED FROM 3/27/25)**
FILED BY: PATIL, GAUTAM
****TENTATIVE RULING:****

The Court in its Tentative Ruling for the 3/27/25 stated that it was inclined to grant leave to file a cross complaint. The Court continued the matter to allow the moving party time to file an attached proposed cross complaint to their motion. Currently, the Court has not received any filing from the moving party. The Court will **deny the moving party's motion without prejudice** to allow the possibility of re-filing the motion with an attached proposed cross-complaint as required by the Rules of Court. (Cal. Rules of Court, rule 3.1324(a).)

12. 9:00 AM CASE NUMBER: C24-03209
CASE NAME: JENISE HAMBLIN VS. DOES 1 THROUGH 50 INCLUSIVE
HEARING ON DEMURRER TO: ANSWER
FILED BY: HAMBLIN, JENISE KAY
****TENTATIVE RULING:****

Before the Court is Plaintiff Jenise Kay Hamblin's Demurrer to Defendant Hernanadez Angeles' Answer.

Plaintiff demurs to Defendants first, third, fourth, sixth, seventh, and eight affirmative defenses, all on the grounds that "fails to state sufficient facts and is uncertain."

For the following reasons, the Demurrer is **sustained in part and overruled in part**, as outlined below. Defendant's request for sanctions is **denied**.

Legal Standard

The standard for a demurrer to an answer is whether the answer states facts sufficient to constitute a defense. (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 732.) A defendant must set forth the "essential facts" of the affirmative defense, "sufficient to acquaint [plaintiff] with the nature, source and extent" of the defense. (*Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal.App.4th 592, 608.)

Code of Civil Procedure § 431.30(b) provides that an answer to a complaint shall contain:

(1) The general or specific denial of the material allegations of the complaint controverted by the defendant.

(2) A statement of any new matter constituting a defense.

"The phrase 'new matter' refers to something relied on by a defendant which is not put in issue by the plaintiff. Thus, where matters are not responsive to essential allegations of the complaint, they must be raised in the answer as 'new matter.'" (*State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725, internal citations omitted.) A new matter is one in which the defendant has the burden of proof. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 239.)

"Such 'new matter' is also known as 'an affirmative defense.' [citation] Affirmative defenses must not be pled as 'terse legal conclusions,' but rather … as facts 'averred as carefully and with as much detail as the facts which constitute the cause of action and are alleged in the complaint.'" (*Department of Finance v. City of Merced* (2019) 33 Cal.App.5th 286, 294 quoting *Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 812-13.); see also, *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384 [same]; *South Shore Land Co., supra,* 226 Cal.App.2d at 732 ["Generally speaking, the determination whether an answer states a defense is governed by the same principles which are applicable in determining if a complaint states a cause of action."].)

For the purposes of the ruling on demurrer, *i.e.*, to test the sufficiency of the answer, it admits all facts well pleaded in the answer, including denials. (*Miller & Lux v. San Joaquin Light & Power Corp*. (1932) 120 Cal.App. 589, 600, [demurrer "admitted the truth of all issuable facts pleaded in the answer and eliminated all allegations in the amended complaint denied by the answer"]; *Warren v. Harootunian* (1961) 189 Cal.App.2d 546, 548.) A failure to demur specially is a waiver of defects of form. (*Allerton v. King* (1929) 96 Cal.App. 230, 233, 235.)

Even where a defense is defectively pled, it may be allowed if the defendant's pleading gives sufficient notice to enable the plaintiff to prepare to meet the defense, in part because un-pled defenses are waived. (See *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 240.) "The determination of the sufficiency of the answer requires an examination of the complaint because its adequacy is with reference to the complaint it purports to answer." (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 733.)

Timeliness

Defendant first argues that the Demurrer is untimely. A party has 10 days after service of the answer to file a demurrer thereto. (Cal. Code Civ. Proc. § 430.40 (b).) Defendant asserts that he filed and served his answer on January 10, 2025 – without citation to any evidence supporting this statement. Counsel does indicate in his declaration that a copy of the answer is "[w]ithin the Court's file," but does not attach a copy for the Court's reference.

In reviewing the Court's files, the Answer was filed on January 13, 2025, not January 10. The Answer does indicate that it was served on January 10, however. Based on the January 10 service date, Defendant contends any demurrer was due on or before January 20. Defendant's calculations are incorrect. To begin with, January 20, 2025, was a Court holiday. As such, the earliest the demurrer would be due is January 21. (Cal. Code Civ. Proc. § 12a (a).)

While the Answer was filed on January 13, 2025, it shows that it was served electronically on January 10. When documents are served electronically the time respond thereto is increased "by two court

days." (Cal. Code Civ. Proc. § 1010.6 (a)(3)(B).) Thus, the due date moves forward two more days to January 23, 2025 – the date it was filed.

"Even assuming for argument's sake that the demurrer was filed late, the trial court nevertheless [has] discretion to entertain it." (*McAllister v. County of Monterey* (2007) 147 Cal.App4th 253, 281.) "There is no absolute right to have a pleading stricken for lack of timeliness in filing where no question of jurisdiction is involved….'" (*Ibid.*) "As provided by statute: 'The court may, in furtherance of justice, and on any terms as may be proper, … enlarge the time for answer or demurrer.'" (*Id.* at 282 quoting Cal. Code Civ. Proc. § 473, subd. (a)(1).)

Defendant's request that the demurrer be denied as untimely is **denied**.

Analysis

The basis of Plaintiff's demurrer is essentially that the Answer does not provide sufficient facts to support several of the affirmative defenses.

Instead of putting this matter before the Court, Plaintiff's counsel could have easily served Form Interrogatory No. 15.1 on Defendants. That Interrogatory states:

> **Identify each** denial of a material allegation and each special or **affirmative defense in your pleadings and for each**:
>
> (a) **state all facts upon which you base the** denial or special or **affirmative defense**;
>
> (b) state the names, ADDRESSES, and telephone numbers of all PERSONS who have knowledge of those facts; and
>
> (c) identify all DOCUMENTS and other tangible things that support your denial or special or affirmative defense, and state the name, ADDRESS, and telephone number of the PERSON who has each DOCUMENT. (emphasis added.)

If Plaintiff believed that there was no factual basis for the asserted affirmative defenses, it could have required Defendant to provide the facts, as well as identify the person(s) and document(s) that support each affirmative defense. This is a more efficient method for addressing these issues, instead of burdening the Court with a motion which, even if granted, will give Defendant an opportunity to amend to reassert, thereby soliciting another round of demurrer.

As the Rutter Guide helpfully explains in a Practice Pointer:

> A demurrer can be used to eliminate 'boilerplate' affirmative defenses that often appear in answers (e.g., 'waiver,' 'estoppel,' 'unclean hands,' etc.). ***But such demurrers are very rare, probably because they are not worth the cost when the same result can be achieved by serving requests for admission or standard form interrogatories seeking the bases for the affirmative defenses***. (Weil & Brown et al., Cal. Prac. Guide: Civ. Proc. Before Trial (The Rutter Group 2020) ¶ 7:35.1, p. 7(I)-20 (emphasis added).)

While the Court believes that properly propounded Form Interrogatory No. 15.1 is an appropriate means of settling conclusory pleaded affirmative defenses and that the Court's and the litigant's time would be better served by such an approach, the *Quantification Settlement* and *Department of Finance* cases cited above indisputably state:

> Affirmative defenses must not be pled as 'terse legal conclusions,' but rather … as facts 'averred as carefully and with as much detail as the facts which constitute the cause of action and are alleged in the complaint.'"

While the Court is inclined to agree with the proposition that pleading standards are lenient particularly with respect to affirmative defenses, the above authority supports the proposition that at least some non-conclusory facts must be alleged with respect to each properly asserted affirmative defense.

Plaintiff's moving papers lay out each of the affirmative defenses and explain the factual deficiencies in each.

In opposition, Defendant argues that each of the affirmative defenses was asserted "in an abundance of caution," and:

> No facts have been revealed thus far, by either party, that would render this affirmative defense inapplicable. Discovery regarding this specific issue is ongoing, including but not limited to Plaintiff's deposition scheduled for May 14, 2025.

Defendant cites no law supporting his argument that he can assert affirmative defenses without supporting facts and that such defenses are properly asserted until such time as facts are discovered rendering them inapplicable. The authority cited above establishes this is not the case.

While it is true that since affirmative defenses are necessarily asserted at the beginning of the case that they cannot always be pleaded in great detail – the defendant must allege *some* facts to support each affirmative defense. (*Department of Finance,* supra, 33 Cal.App.5th at 294; *Quantification Settlement Agreement Cases,* supra*,* 201 Cal.App.4th at 812-13; *South Shore Land Co.,* supra*,* 226 Cal.App.2d at 732.)

First Affirmative Defense:

Statute of limitations: Defendant agrees to withdraw this Affirmative Defense. As such, the demurrer is **sustained**.

Third Affirmative Defense:

This affirmative defense alleges: "That at the alleged time and place in question, each and every Plaintiff so negligently and carelessly acted as to proximately cause and contribute to the happening of the accident complained of, and whatever injury or damage, if any, each and every Plaintiff claims to have sustained therefrom." The Court **overrules** the Demurrer as to this affirmative defense because this defense is an affirmative denial of Plaintiffs' claims and is sufficiently alleged. (CCP § 430.31(b)(1).)

Fourth Affirmative Defense:

This affirmative defense alleges: "That if any Plaintiff sustained any injuries and/or damages as a result of the accident complained of herein, then such Plaintiff proximately caused, aggravated and/or failed to take proper action to mitigate and/or reduce any such injuries and/or damages." The Court **overrules** the Demurrer as to this affirmative defense because this defense is an affirmative denial of

Plaintiffs' claims and is sufficiently alleged. (CCP § 430.31(b)(1).)

Sixth Affirmative Defense:

This affirmative defense alleges: "That if it should be found that any answering party herein is in any manner legally responsible for injuries or damages sustained by any Plaintiff, such injuries or damages were proximately caused or contributed to by others, whether made parties to this action or not, and any judgment that might be rendered against any answering party herein shall be reduced by that degree of contributory negligence." The Court **sustains** the Demurrer as to this affirmative defense because there are no facts alleged in support of this conclusion. Consequently, it is uncertain and fails to state facts sufficient to constitute a defense.

Seventh Affirmative Defense:

This affirmative defense alleges: "That if any Plaintiff sustained any injury or damage as alleged, each Defendant is informed and believes that, by virtue of the nature of each Plaintiff's activities, each Plaintiff had actual knowledge of the risk of harm causing the injury or damage alleged and assumed the risk of that harm by their participation. Any recovery by any Plaintiff is therefore barred on the grounds that each Defendant owed no legal duty to protect each Plaintiff from harm." The Court **overrules** the Demurrer as to this affirmative defense because this defense is a strictly legal argument. No facts need be pled to support this defense.

Eighth Affirmative Defense:

This affirmative defense alleges: "That each Defendant is informed and believes and thereon alleges that at all relevant times Plaintiff is barred from recovering non-economic damages pursuant to California Code Sections 3333.3 and 3333.4 and California Vehicle Code Sections 16020(a), 23152, and 23153." The Court **sustains** the Demurrer as to this affirmative defense because there are no facts alleged in support of this conclusion. Each of the asserted code sections contain factual grounds to be applicable, which will need to be proven by Defendant.

For example, Civil Code section 3333.3 states: "In any action for damages based on negligence, a person may not recover any damages if the plaintiff's injuries were in any way proximately caused by the plaintiff's commission of any felony, or immediate flight therefrom, and the plaintiff has been duly convicted of that felony." Defendant will have the burden of proof to establish that the accident occurred during the commission of a felony and Plaintiff was convicted of that felony. As such, Defendant must allege facts supporting this claim. (*Harris*, supra, 56 Cal.4th at 239.)

Defendant's Request for Sanctions

Defendant seeks sanctions under California Code of Civil Procedure section 128.5. The request is **denied** for several reasons. First, as outlined above, the demurrer was sustained in part. As such, it was not frivolous. Second, section 128.5 specifically states that a "motion for sanctions under this section ***shall be made separately*** from other motions or request …." (Cal. Code Civ. Proc. §128.5 (f)(1)(A).) Defendant's request is contained within their opposition in violation of this requirement. Third, a party seeking sanctions under section 128.5 "must follow a two-step procedure." (Transcon Financial, Inc. v. Reid & Hellyer, APC (2022) 81 Cal.App.5th 547, 550.)

"First, the 'moving party must serve on the offending party a motion for sanctions.'" (*Transcon Financial, Inc.*, supra, 81 Cal.App.5th at 550 quoting *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 698.) Service of the sanctions motion triggers the 21-day safe harbor period during which the moving party may not file the motion. (*Ibid*.) That is because the offending party may avoid sanctions by withdrawing the challenged pleading during the 21-day period. (*Ibid*.) Second, if the offending party does not withdraw the challenged motion during that period, then the moving party may file the sanctions motion. (*Ibid*.)

The "law requires strict compliance with the safe harbor provisions." (*Transcon Financial, Inc.*, supra, 81 Cal.App.5th at 551.) "Failure to comply with the safe harbor provisions precludes an award of sanctions." (*Ibid.*)

Defendant failed to follow this required procedure. As such, Defendants request for sanctions must be **denied**.

Summary and Conclusion

Defendant's request to deny the demurrer as untimely is **denied**. Plaintiff's demurrer is **overruled as to third, fifth, and seventh** causes of action. Plaintiff's demurrer is **sustained** as to the **first, sixth, and eighth** affirmative defenses. Defendant's request for sanctions is **denied**.

13. 9:00 AM CASE NUMBER: MSC20-01334
CASE NAME: DASIA SEABROOKS VS CAR DEALER PROMOTIONS
***HEARING ON MOTION IN RE: FINAL APPROVAL**
FILED BY:
****TENTATIVE RULING:****

Plaintiff Dasia Seabrooks moves for final approval of her class action settlement with defendants Car Dealer Promotions, Inc. and Total Customer Connect, Inc. The motion is **granted**.

A. **Background and Settlement Terms**

Defendants are in the business of working with car dealerships for promotions and marketing. Plaintiff was employed there as a customer service representative from July 2016 to February 2017 and in January 2019.

The original complaint was filed on July 8, 2020, as a class action. There are no PAGA claims in this case.

The settlement would create a gross settlement fund of $275,000. The class representative payment to the plaintiff would be $7,500. Attorney's fees would be $96,250 (35% of the settlement). Litigation costs would not exceed $16,000. The settlement administrator's costs are estimated at $8,000. The net amount paid directly to the class members would be about $147,250. The fund is non-reversionary. There are an estimated 402 class members. Based on the estimated class size, the average net payment for each class member is approximately $366. The individual payments will vary considerably, however, because of the allocation formula prorating payments

according to the number of weeks worked during the relevant time.

The entire settlement amount will be deposited with the settlement administrator within 30 days after the effective date of the settlement.

The proposed settlement would certify a class of all current and former non-exempt employees employed at Defendants' California facilities between July 8, 2016 and final approval.

The class members will not be required to file a claim. Class members may object or opt out of the settlement. Funds would be apportioned to class members based on the number of workweeks worked during the class period.

A list of class members will be provided to the settlement administrator within 14 days after preliminary approval. The administrator will use skip tracing as necessary. Various prescribed follow-up steps will be taken with respect to mail that is returned as undeliverable. Settlement checks not cashed within 180 days will be cancelled, and the funds will be directed to the State Controller's unclaimed property fund. After preliminary approval, the settlement administrator mailed notice to 406 class members. 41 notices were returned as undeliverable. Phoenix performed a skip-trace on them, and located 36 updated addresses. After remailing, only 5 notices were again returned. In response, no objections were received. No requests to opt out were received.

The settlement contains release language covering all claims and causes of action, alleged or which could have reasonably been alleged based on the allegations in the operative pleading, including a number of specified claims. Under recent appellate authority, the limitation to those claims with the "same factual predicate" as those alleged in the complaint is critical. (*Amaro v. Anaheim Arena Mgmt., LLC* (2021) 69 Cal.App.5th 521, 537 ("A court cannot release claims that are outside the scope of the allegations of the complaint.") "Put another way, a release of claims that goes beyond the scope of the allegations in the operative complaint' is impermissible." (*Id*., quoting *Marshall v. Northrop Grumman Corp*. (C.D. Cal.2020) 469 F.Supp.3d 942, 949.)

Formal discovery was undertaken, resulting in the production of substantial documents. The matter settled after arms-length negotiations, which included a session with an experienced mediator.

Counsel also has provided an analysis of the case, and how the settlement compares to the potential value of the case, after allowing for various risks and contingencies. For example, much of plaintiff's allegations centers on possible off-the-clock work, including missed or skipped meal breaks and rest breaks. Defendant, however, pointed out that its formal policies prohibit off-the-clock work, and asserted that it would have had no knowledge of employees beginning work before punching in or continuing after punching out. Further, it argued that it was required to make meal and rest breaks available, but not required to ensure that they be taken, so long as no employer policy prevented or discouraged taking such breaks. As to unreimbursed employee expenses (such as cell phone use, mileage, and masks), plaintiff would have been called on to show that such expenses were in fact incurred, were reasonably necessary to job performance, and were

unreimbursed. Furthermore, the fact-intensive character of such claims would have presented a serious obstacle to class certification.

B. **Legal Standards**

The primary determination to be made is whether the proposed settlement is "fair, reasonable, and adequate," under *Dunk v. Ford Motor Co*. (1996) 48 Cal.App.4th 1794, 1801, including "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the state of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction … to the proposed settlement." (See also *Amaro*, 69 Cal.App.5th 521.)

California law provides some general guidance concerning judicial approval of any settlement. First, public policy generally favors settlement. (*Neary v. Regents of University of California* (1992) 3 Cal.4th 273.) Nonetheless, the court should not approve an agreement contrary to law or public policy. (*Bechtel Corp. v. Superior Court* (1973) 33 Cal.App.3d 405, 412; *Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1127.) Moreover, "The court cannot surrender its duty to see that the judgment to be entered is a just one, nor is the court to act as a mere puppet in the matter." (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658, 664.) As a result, courts have specifically noted that *Neary* does not always apply, because "Where the rights of the public are implicated, the additional safeguard of judicial review, though more cumbersome to the settlement process, serves a salutatory purpose." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 48, 63.)

The settlement agreement includes an escalator provision, to be triggered in the event that the number of covered employees or work weeks turns out to be materially higher than now estimated. Based on the Court's review of the record, the clause was not triggered. (In granting preliminary approval, the Court noted that because the settlement was already more than two years past the time it was negotiated, and the proposed class definition extends out to final approval, there was a significant risk that the class size used in negotiations may no longer accurately reflect the full size of the class to be settled. Apparently, that did not turn out to be the case, because the original estimate was 402 class members, and the final number turned out to be 406 members.

C. **Attorney Fees and other Costs**

Plaintiff seeks 35% of the total settlement amount ($96,250), as fees, relying on the "common fund" theory. Even a proper common fund-based fee award, however, should be reviewed through a lodestar cross-check. In *Lafitte v. Robert Half International* (2016) 1 Cal.5th 480, 503, the Supreme Court endorsed the use of a lodestar cross-check as a way to determine whether the percentage allocated is reasonable. It stated: "If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Id*., at 505.) At the time of preliminary approval, the Court directed counsel to prepare a lodestar figure. Counsel estimate that they spent 284.70

hours on the case, which at a blended rate of $800 per hour, creates a lodestar of $227,760, which is more than twice the actual award, equaling an implied multiplier of 0.42. Without necessarily endorsing the $800 per hour blended rate, it is clear that the amount does not need to be adjusted. The attorney fee of $96,250 is approved.

Similarly, litigation and administration costs and the requested representative payment of $7,500 for the plaintiff will now be analyzed. Litigation costs of $14,213.94 are reasonable and approved. The settlement administration expenses of $8,000 are reasonable and are approved.

Criteria for evaluation of representative payment requests are discussed in *Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th 785, 804-07. Plaintiff has submitted a declaration indicating that she worked 40 hours on the matter. Based on the criteria of *Clark,* the Court approves the amount of $7,500.

D. **Discussion and Conclusion**

The Court finds that the settlement is fair, reasonable, and adequate and grants the motion for approval.

Counsel are directed to prepare an order reflecting this tentative ruling, the other findings in the previously submitted proposed order. Other dates in the scheduled notice process should track as appropriate to the hearing date. The ultimate judgment must provide for a compliance hearing after the settlement has been completely implemented. Plaintiffs' counsel are to submit a compliance statement one week before the compliance hearing date. Five percent of the attorney's fees are to be withheld by the claims administrator pending satisfactory compliance as found by the Court.

14. 9:00 AM CASE NUMBER: MSC21-01128
CASE NAME: MOSS VS. KIMBALL
HEARING ON SUMMARY MOTION JUDGMENT OR IN ALT ADJUDICATION
FILED BY: ANNE KIMBALL, CAMILLE VERA
TENTATIVE RULING:

Defendant Camille Kimball's motion for summary judgment or alternatively summary adjudication is **denied.**

Here, Defendant Camille Kimball is alleged to have killed the decedents in a car accident on June 7, 2020. Defendant Laura Kimball was also sued in connection with the accident, but was later dismissed from this case. Plaintiffs are the heirs of the decedents. Plaintiffs sued for wrongful death and survival claims in 2021 and later filed a first amended complaint. In September 2023, Defendants requested leave to amend their answer to include an affirmative defense for accord and satisfaction, alleging that there is a valid settlement agreement between Plaintiffs and Defendants' insurance company. Defendants' request was granted on the condition that Plaintiffs would be allowed to depose Defendant Camille Kimball on the issues raised in this defense.

Defendant requests summary judgment or alternatively summary adjudication of the following

issues: (1) Defendant accepted and substantially complied with Plaintiffs' Pre-Litigation Time Limited Policy Limits Demand to the extent possible, thereby constituting a valid and enforceable settlement agreement and (2) There was no impropriety or bad faith on the part of defendant and/or her insurer in handling of Plaintiffs' Pre-Litigation Time Limited Policy Limits Demand.

As to the second issue, whether Defendant or her insurer acted in bad faith in handling of the pre-litigation demand, Plaintiffs argue that this issue is not a defense to the claims alleged here. A motion for summary adjudication can be brought as to "one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty". (Code of Civil Procedure section 437c(f)(1).) Plaintiffs' complaint does not include a claim for insurance bad faith nor does Defendant's amended answer include a defense of good faith. Defendant has not shown that this issue is a cause of action or defense in this case. Furthermore, the cases cited by Defendant involve lawsuits against an insurance company and here, Defendant's insurance company is not a party to this case. Therefore, Defendant's motion for summary adjudication as to the bad faith issue is denied as it is not an issue appropriate for summary adjudication.

As to the first issue, Defendant's affirmative defense is for accord and satisfaction. "Defenses of release or accord and satisfaction may be decided by summary judgment. (*Thompson v. Williams* (1989) 211 Cal.App.3d 566, 571.)" "A defendant asserting the defense of accord and satisfaction must establish '(1) that there was a "bona fide dispute" between the parties, (2) that the debtor made it clear that acceptance of what he tendered was subject to the condition that it was to be in full satisfaction of the creditor's unliquidated claim, and (3) that the creditor clearly understood when accepting what was tendered that the debtor intended such remittance to constitute payment in full of the particular claim in issue.' [Citation.]" (*Id.* at 571.)

Although the affirmative defense is for accord and satisfaction, Defendant's moving papers focus on showing that the parties entered into a binding settlement agreement. Since the affirmative defense for accord and satisfaction includes allegations of a valid settlement agreement, the Court will address this argument as it was fairly raised by the affirmative defense. The elements for formation of a contract are (1) Parties capable of contracting; (2) Their consent; (3) A lawful object; and (4) A sufficient cause or consideration. (Civil Code 1550.) For mutual assent, "' the test is what a reasonable person in the position of the parties would have thought it meant.' " (*Guzman v. Visalia Cmty. Bank* (1999), 71 Cal. App. 4th 1370, 1376-1377.

Here, Plaintiffs' attorney sent a settlement demand letter to Defendant's insurance company (Progressive) on August 12, 2020. The letter was in response to a policy limits tender from Progressive. The letter demanded numerous items, including a signed declaration from Camille Kimball that, among other requirements, lists all applicable insurance coverage and confirms she was not working at the time of the accident. The demand letter also required actual delivery of the settlement check. The letter stated that "Time is of the essence for acceptance of this demand. This offer expires on or before August 21, 2020 at 5:00 p.m. Acceptance requires that you fully comply with this demand and that you specifically perform each and every condition set forth herein, before the offer expires." (Defendant's ex. A.)

On August 19, 2020, Defendant's attorney responded. The letter stated that they were working on meeting all of the demands, but needed more time. The letter explained that Kimball was incarcerated and due to COVID-19 restrictions she is not allowed any form of contact so the attorney mailed the requested declaration to Kimball, but was unsure when she would receive it. The letter also

stated that they could not issue the settlement drafts until they receive the signed settlement agreement and get the name of one of the decedents' minor children. (Defendant's ex. B.)

On August 21, 2020 at 10:56 a.m., Plaintiffs responded with the information needed to issue the settlement check, but also stated that they would not grant any extensions. (Defendant's ex. C.) Also on August 21, 2020, Defendant again requested an extension for the declaration signed by Kimball and explained that they did not receive the information for the settlement check until this morning and are sending out the settlement checks by overnight mail. (Defendant's ex. D.) Plaintiffs responded at 3:54 p.m. that they were not granting any extensions and the offer expires at 5:00 p.m. (Defendant's ex. E.)

The attorneys exchanged several letters after August 21, 2020, where Defendant explained why they had not met the deadline and were still working towards the requests. Ultimately, the parties did not resolve their dispute regarding the August 21 deadline. (Defendant's exs. F to J.)

" 'A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts. [Citation.]' [Citation.]" (*Sully-Miller Contracting Co. v. Gledson/Cashman Construction, Inc.* (2002) 103 Cal.App.4th 30, 36.) " 'A unilateral contract is one in which a promise is given in exchange for some act, forbearance or thing; there is only one promisor.' (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 105, p. 148.)" (*People v. Mohammed* (2008) 162 Cal.App.4th 920, 933; see also Civil Code section 1584.)

Here, Plaintiff's August 12 demand letter was an offer for a unilateral contract. In order to accept the contract, Defendant (or her insurer Progressive) needed to perform all the conditions required to accept the contract. It is undisputed that Defendant did not do all the required conditions by the deadline. Thus, Defendant did not accept the offer and there was no contract formed between the parties. Defendant has not met his initial burden of showing that the parties entered into a valid contract. Furthermore, since the parties did not enter into a valid contract, the Court need not decide whether Defendant substantially complied with the terms or if its timely performance was otherwise excused.

Defendant cites to *CSAA Ins. Exchange v. Hodroj* (2021) 72 Cal.App.5th 272 to support its argument. But there the injured party sent a settlement demand for policy limits, with certain conditions, and the insurance company met those conditions. Thus, in *Hodroj*, the court found there was a valid settlement agreement. The court also found that the insurance company's request for a written release beyond the terms of the settlement was a counteroffer, which did not negate the initial settlement agreement. (*Id*. at 275-277.) Here, the facts show that Plaintiffs sent a demand letter, which stated that acceptance could only be done by complying with all the demands on the strict timeline. Defendant's insurance company was unable to meet all the demands. Here no contract was ever formed.

Defendant argues that they acted reasonably in trying to reach Camille while she was incarcerated, but required a little bit more time. Whether or not Defendant's insurance company acted reasonably is an issue that is not presently before the Court. There is no bad faith claim pending in this case and as such the Court cannot issue an advisory opinion on whether Defendant's insurer acted within good faith in August 2020.

Defendants also argue that a new law, Civil Code 999.1, et seq., supports their position. Civil Code section 999.1, et seq. sets out various requirements for a time limited demand to a insurance company and provides that the failure to substantially comply with the requirements "shall not be

considered to be a reasonable offer to settle the claims against the tortfeasor for an amount within the insurance policy limits for purposes of any lawsuit alleging extracontractual damages against the tortfeasor's liability insurer." (Civil Code section 999.4(a).) These offers must also stay open for at least 30 days. (Civil Code section 999.1(a).) Defendants acknowledge, however, that this law was not in effect at the time of the claimed settlement.

Defendant's requests for judicial notice are granted as to exhibits A through P as statements made by government agencies. Exhibits Q through T are denied as unnecessary as these documents are already part of this case.

Both parties filed objections to evidence where they objected to the other sides facts included in their corresponding separate statement of material facts. Objections should be made to evidence and not facts in the separate statement. (California Rules of Court, rule 3.1354.) Finally, the Court declines to rule on the parties' objections because they are not material to the Court's decision on this motion. (Code of Civil Procedure section 437c(q).)

The Court also strikes Plaintiffs' sur-reply as not permitted by the code. *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 449 holds that the Court may consider new evidence in the reply. The court also stated that when there is new evidence submitted in reply, the opposing party could "ask the trial court for permission to submit responsive evidence or to file a sur-reply". (*Id*. at 449.) Here, Plaintiffs did not appear ex parte and request permission to file a sur-reply. That would have allowed the Court to consider whether a sur-reply was necessary and continuing the hearing date if necessary.

15. 9:00 AM CASE NUMBER: MSN14-1889
CASE NAME: JOHN SRAMEK VS. ROBERT JACOBSEN
***HEARING ON MOTION IN RE: TO DENY RENEWAL OF JUDGMENT**
FILED BY: JACOBSEN, ROBERT E.
****TENTATIVE RULING:****

Before the Court is a motion by defendant and judgment debtor Robert Jacobsen "to deny renewal, or vacate renewal, of judgment if already renewed." For the reasons set forth, the motion is **denied**.

Background

Jacobsen is a debtor under a judgment entered on October 28, 2011 in the United States Bankruptcy Court for the Eastern District of Texas ("Texas judgment"). The Texas judgment was entered in the amount of $1,735,208.20, plus "prejudgment interest thereon from and after July 20, 2007, through the date of this Judgment at the applicable contractual rate of 7% per annum (i.e. $410.90 per diem)" and with post-judgment interest at the then-applicable federal post-judgment rate of .12 percent. (Mot. Exh. A.) After appeals, the judgment was affirmed on April 7, 2014.

Judgment creditors/plaintiffs John Sramek, and Bernadette Sramek, individually and as trustee of their revocable living trust ("Plaintiffs" or "Srameks") applied for registration of the Texas judgment as a sister state judgment in this Court. Judgment was entered on December 19, 2014 in the amount of $2,377,058.10, which includes prejudgment interest allowed in the Texas Judgment, post-judgment interest at the post-judgment federal rate of .12 percent until the date of the application for entry of the sister state judgment ($2,376,623.10), plus a $435 filing fee in this Court. (Mot. Exh. B; Opp. p. 2,

ll. 4-9 [explaining mathematical calculation].) Jacobsen did not contest entry of the sister state judgment, including the amount.

On October 28, 2024, Plaintiffs filed and served an application for renewal of the judgment and a notice of renewal of the judgment. Jacobsen filed a motion to deny renewal of the judgment, or vacate the renewal of the judgment, on January 21, 2025.

Law Applicable to Vacating Renewed Judgment

Code of Civil Procedure section 683.170 sets forth the procedure for vacating a renewed judgment. In pertinent part, it provides that renewal of a judgment " may be vacated on any ground that would be a defense to an action on the judgment, including the ground that the amount of the renewed judgment as entered pursuant to this article is incorrect," and that the judgment debtor may apply to vacate the judgment by noticed motion "not later than 60 days after service of the notice of renewal pursuant to Section 683.160." (Code Civ. Proc. § 683.170(a) and (b).) As to the relief available on the motion, the statute also provides: "(c) Upon the hearing of the motion, the renewal may be ordered vacated upon any ground provided in subdivision (a), and another and different renewal may be entered, including, but not limited to, the renewal of the judgment in a different amount if the decision of the court is that the judgment creditor is entitled to renewal in a different amount." (Code Civ. Proc. § 683.170(c) [emphasis added].)

Grounds Asserted for Vacating Renewed Judgment and Analysis

Preliminarily, the Court observes that Jacobsen's motion was untimely as it was filed on January 21, 2025, approximately 85 days after the service of the notice of renewal on October 28, 2024. (Code Civ. Proc. § 685.170(b).) Jacobsen did not seek relief from default for his untimely filing under Code of Civil Procedure section 473(b) or other applicable law. Jacobsen states he received the notice of renewed judgment on December 23, 2024 when it was forwarded to him, which was within the 60-day deadline, extended by five days for service by mail, for a timely motion to vacate.

Nevertheless, considering the motion on its merits, for the reasons set forth, Jacobsen has not met his burden of demonstrating by a preponderance of the evidence a ground for vacating the renewed judgment or for entering a renewed judgment in a different amount. (*American Contractors Indemnity Co. v. Hernandez* (2022) 73 Cal.App.5th 845, 848 [it is moving party's "burden to prove by a preponderance of the evidence that he was entitled to vacate the renewal of judgment under Code of Civil Procedure, section 683.170. [Citations omitted.]"].)

A. Alleged Improper Service

Jacobsen contests the service of the application for and notice of renewal of the judgment on two grounds. First, he argues that an attorney cannot serve pleadings in the action. The attorney is not a party and can serve papers in the case. (*See, e.g.*, Code Civ. Proc. § 414.10 {service of summons "by any person who is at least 18 years of age and not a party to the action."]; Code Civ. Proc. § 1013b(a)(2) [Proof of electronic service may be made by a certificate stating name of person making the service and that "the person is an active member of the State Bar of California."].)

Second, Jacobsen contends service was invalid as not made at his current address. The proofs of service show Jacobsen was served at an address on Crooked Mile; he does not dispute that was his address until he apparently moved sometime between 2022 and 2024. (*See* Pl. RJN Exh. 1 [Notice of Change of Address filed by Jacobsen 3/7/2024 in MSC23-00624].) The Court's records do not reflect that Jacobsen filed and served any change of address notice in this action.

"An attorney or self-represented party whose mailing address, telephone number, fax number, or e-

mail address . . . changes while an action is pending must serve on all parties and file a written notice of the change." (Cal. R. Ct, Rule 2.200 [emphasis added].) " '[T]he "person to be served" has the burden of notifying the court of any change of address, and failure so to do does not enable him to claim improper notice.' [Citation omitted.] Even under the more lenient section 473, subdivision (b), "[w]hen a default is the result of one party flouting [the California Rules of Court] or failing to exercise diligence to ascertain what the law requires of them, trial courts . . . should not … grant that party relief from default.' [Citation omitted.]" (*Kramer v. Traditional Escrow, Inc.* (2020) 56 Cal.App.5th 13, 31.) Jacobsen was apparently well aware of his duty to file a change of address notice in civil actions when his service address changed. (Pl. RJN Exh. 1.) Jacobsen is not excused from compliance with applicable law, procedures, and rules merely because he is a self-represented litigant. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985; *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284-1285.)

Jacobsen argues Plaintiffs' counsel "should have known" his new address based on filings in the family law court, MSD20-03656 ("Family Law Action"). Plaintiffs' counsel filed a notice of lien in the Family Law Action on behalf of the Srameks in February 2022. (Mot. Exh. D.) The lien notice was served on Jacobsen in February 2022 at the Crooked Mile address, which should have alerted Jacobsen that Plaintiffs' counsel was unaware of any new address. (Mot. Exh. D.) The proofs of service filed in the Family Law Action do not show that Plaintiffs or their counsel were served with any of those proofs of service showing the new address for Jacobson on Mt. Diablo Street. (Mot. Exh. E, F.)

B. Alleged Miscalculation of Judgment Amount

Jacobsen disputes the amount of the renewed judgment. Jacobsen's calculations ignore the provision of the Texas judgment granting Plaintiffs prejudgment interest at 7% per annum for over four years "from and after July 20, 2007, through the date of" the judgment, October 28, 2011, which accounts for over $641,000 added to the principal amount stated in the Texas judgment. (Mot. Exh. A; Opp. p. 2, ll. 4-9.) The evidence shows Plaintiffs applied the post-judgment federal rate of interest on the judgment amount after it was entered in Texas until they filed their application for entry of the sister state judgment in this Court on December 19, 2014. (Mot. Exh. B.)

The California post-judgment rate of interest on the sister state judgment was and remains 10% per annum. (Code Civ. Proc. § 685.010(a)(1).) Under California law, when a sister state judgment is entered, post-judgment interest on the sister state judgment accrues at the post-judgment rate of interest applicable to California judgments. (Code Civ. Proc. §§ 1710.25(b).) (*See also* Code Civ. Proc. § 1710.35 ["Except as otherwise provided in this chapter, a judgment entered pursuant to this chapter shall have the same effect as an original money judgment of the court and may be enforced or satisfied in like manner."].) Though the Court finds no error in the amount of the original or renewed judgment, any such error would not mean the original or renewed judgment is "void" as Jacobsen contends, just that judgment in a different amount should be entered. (Code Civ. Proc. § 685.170(c).)

C. Memorandum of Costs to Recover Interest

Jacobsen contends that Plaintiffs were required to file a memorandum of costs to recover post-judgment interest. He does not contend that the renewed judgment included any attorneys' fees or other costs of enforcement. On its face, it only includes additional accrued interest from the date of the initial sister state judgment. (Mot. Exh. G [costs after judgment and fee for renewal listed as "0"].) Interest is not a "cost of enforcing the judgment" to which the memorandum of costs provision applies. (Code Civ. Proc. § 685.070(a)(1)-(6).) The application for renewal of judgment form has a provision for including accrued post-judgment interest on the unsatisfied balance of the judgment. (Mot. Exh. G.)

Conclusion

Jacobsen has not met his burden of demonstrating any of the grounds for vacating the renewed judgment are meritorious or warrant relief on the motion.

Plaintiffs' Request for Judicial Notice

The Court **grants** Plaintiffs' unopposed request for judicial notice of Jacobsen's filed notice of change of address in Case No. MSC23-00624. (Pl. RJN Exh. 1.)

16. 9:00 AM CASE NUMBER: N23-0409
CASE NAME: ALEXANDRA PADILLA VS. BRIAN DEMAIN
***HEARING ON MOTION IN RE: TERMINATING, ISSUE, EVIDENCE, AND/OR MONETARY SANCTIONS AGAINST PLAINTIFF FOR FAILURE TO OBEY COURT ORDER**
FILED BY: DEMAIN, BRIAN KEITH
****TENTATIVE RULING:****

Defendants Brian Demain and Howard Davis move for discovery sanctions against Plaintiff Alexandra Padilla, for failure to respond to a request for production of documents and interrogatories, and failure to comply with a motion to compel. They seek monetary sanctions, as well as terminating sanctions, and issue or evidence sanctions.

They are joined in their motion by defendant Howard Orthopedics, Inc. ("HOI.") HOI moves to join in the motion, claiming that it was equally prejudiced by plaintiff's failure to provide discovery responses.

The specific discovery in question is Request for Production of Documents, Set 1 and Form and Special Interrogatories, sets 1. Plaintiff, represented by the second of four different law firms at the time, did not respond timely to the request, but requested and obtained more than one extension, but no responses were provided within the new deadlines. A third counsel substituted into the case on her behalf, and that counsel negotiated further extensions. When the responses finally were served, they were objections only. Shortly after that, a fourth counsel substituted in on plaintiff's behalf. Another extension was negotiated. No further responses were served, and Demain and Davis filed a motion to compel further responses. While the motion was pending, plaintiff's counsel substituted out, and plaintiff became self-represented. On November 21, 2024, the Court granted the motions to compel further responses, and awarded sanctions of $1,395 on each of the two one motion, payable within 30 days. (The Court initially set the response date for December 19, 2024, and January 2, 2025, but on request of plaintiff, ordered it to be January 10, 2025, and January 17, 2025.) Plaintiff did not file further responses as ordered by the Court, either within the deadline set by the Court, or to this day.

In response to the motion, plaintiff filed a declaration entitled "Objection to Hearing April 24, 2025. The lengthy declaration first lays out the history of the dispute that led to the suit. She describes her changes of attorneys, which she attributes primarily to being unable to afford the fees and looking for someone more affordable. But she also claims that counsel did not keep her fully informed about the status of discovery. She had a dispute with one firm about the payment of fees.

She offers a variety of other information explaining the situation: her email and physical mail were compromised, as were her bank records. Her mail was opened. Her computer files were erased. Her husband almost died due to a medical error. Another family member ended up in the hospital (causing her to miss the January 27, 2025, deposition). A family member was killed in a plane crash. She further states that she is working on the discovery and will reschedule her deposition.

The discovery in question was voluminous. Strict insistence on short deadlines would have been unreasonable. But counsel for defendants granted numerous extensions.

The next step would be an order compelling further responses. Already done. The next step after that would be monetary sanctions. Also already done.

The Court also has ample authority under Code of Civil Procedure section 2023.030(a) to require plaintiff to pay reasonable expenses, including attorney's fees, incurred as a result of plaintiff's misuses of the discovery process and failure to abide by the court's order. HOI attests that it has incurred attorney's fees of $2,340 in preparing a joinder to the motion. The Court finds that the joinder, while granted, was not necessary, and declines to enter a sanction award for the cost of preparing it. Demain and Davis request attorney's fees of $6,187.50 for their time spent on this motion. The Court finds that amount is reasonable and awards it.

The Demain and Davis motion to compel further responses to the Requests for Production of Documents and Special and Form Interrogatories is granted. Responses, without objection, are to be served no later than June 2, 2025. Attorney's fees of $6,187.50 are awarded to be paid by the same date.

The remaining question is whether the various reasons offered by way of excuse are sufficient to preclude the issuance of terminating or evidentiary or issue sanctions. All things considered, the Court declines to enter an evidentiary sanction or a dismissal, for the time being. The Court is giving plaintiff one final chance, with the understanding that failure to comply with the Court's order likely will result in dismissal.

17. 9:00 AM CASE NUMBER: N23-0409
CASE NAME: ALEXANDRA PADILLA VS. BRIAN DEMAIN
***HEARING ON MOTION IN RE: JOINDER IN DEFENDANTS' MOTION FOR TERMINATING, ISSUE, EVIDENCE, AND/OR MONETARY SANCTIONS AGAINST PLAINTIFF FOR FAILURE TO OBEY COURT ORDER**
FILED BY: HOWARD ORTHOPEDICS, INC., A CALIFORNIA CORPORATION
****TENTATIVE RULING:****

See line 16.