TENTATIVE RULINGS: CIVIL LAW & MOTION

Friday, August 23, 2024 at **8:30 a.m.**
Courtroom 18 –Hon. Christopher M. Honigsberg
Civil and Family Law Courthouse
3055 Cleveland Avenue
Santa Rosa, California 95403

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

CourtCall is not permitted for this calendar.

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

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

TO JOIN "ZOOM" ONLINE **Department 18 :**
https://sonomacourt.org.zoomgov.com/j/1607394368?pwd=aW1JTWlIL3NBeE9LVHU2NVVpQlVRUT09

Meeting ID: **160—739—4368**
Password: **000169**

To Join Department 18 "Zoom" By Phone:
Call: +1 669 254-5252 6833 US
Enter Meeting ID: **160—739—4368**
And Password: 000169

Unless notification of an appearance has been given as provided above, the tentative ruling shall become the ruling of the Court the day of the hearing at the beginning of the calendar.

1. 24CV02293, Rasmussen v. Rasmussen

Defendant's demurrer is **OVERRULED**. Plaintiff's counsel is directed to prepare and submit a written order consistent with this ruling and compliant with California Rules of Court, rule 3.1312(b).

Defendant is ordered to appear in person in Department 18 on October 11, 2024 at 8:30 a.m. to show cause why she should not be held in contempt and disqualified for citing multiple nonexistent cases in this demurrer.

I. Background

This is an action for partition by sale of the 15-acre property at 4893 Bodega Avenue in Petaluma (the "Property"). Plaintiff owns a 1/6 interest in the Property, and is the trustee of one trust, the Evelyn E. Rasmussen Revocable Living Trust, that owns a 1/2 interest and of another, the Kincaid 2021 Revocable Trust, that owns a 1/6 interest. Defendant, Plaintiff's daughter, owns the remaining 1/6 interest in the

Property. Plaintiff wishes to partition the Property by sale; that is, by selling it and dividing the proceeds among the owners in proportion to their ownership share. Defendant favors partitioning it in kind; that is, subdividing it with each owner receiving a proportionate share of the Property itself.

This matter comes on calendar for hearing on Defendants' general demurrer to the entire complaint.

II. Demurrer

A. Governing law

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

However, those accepted-as-true facts are the *only* facts the court may consider. This principle is often expressed as "we do not go beyond the four corners of the complaint." (*Thorburn v. Department of Corrections* (1998) 66 Cal.App.4th 1284, 1287-1288.)

B. Discussion

Defendant has made some points that might be good ones if they appeared in a motion for summary judgment. However, demurrer is different. At this stage, the court's review is limited to whether the text within the "four corners of the complaint" states a cause of action. (*Thorburn, supra,* 66 Cal.App.4th at pp. 1287-1288.) For purposes of that review, the Court takes all factual allegations in the complaint as true. (*Rakestraw, supra,* 81 Cal.App.4th at p. 43.) They may or may not actually *be* true; that is to be resolved later. For now, all that matters is whether the allegations in the complaint, if true, would satisfy all the elements of the causes of action pleaded in the complaint.

It is also worth noting at the outset that under California pleading standards, complaints must plead ultimate facts, as distinct from evidentiary facts or legal conclusions. While there is no bright-line rule distinguishing these three types of allegations, the leading treatise on California pre-trial procedure provides an excellent illustrative example:

> **Example**: A complaint in a personal injury case alleges that: (1) defendant drove his car immediately after having consumed a fifth of vodka; (2) defendant drove

> while under the influence of alcohol; and (3) defendant drove in violation of California drunk driving law.
>
> Allegation "(1)" is technically objectionable as "evidentiary" matter; "(3)" is a "legal conclusion"; while "(2)" is the ultimate fact.

(Rutter Group, *Civil Procedure Before Trial* § 6:125.) Allegations at the level of generality of (2) are all that is needed, and indeed all that is allowed; allegations at the level of specificity of (1) are neither required nor appropriate.

That said, the Court will turn to Defendant's arguments.

1. Failure to join necessary parties

Defendant argues that "the beneficiaries of the Kincaid Trust are necessary parties not joined in this action." (MPA at p. 6.) The sole authority cited in this section of the memorandum is *Ferreira v. Ferreira* (1973) 9 Cal.3d 824, 830, in which, Defendant avers, "the court noted the importance of including all parties with an interest in the property to ensure an equitable distribution." *Ferreira* notes no such thing; it is a child custody case that has nothing to do with equitable distribution of property. (See section III, *infra.*) It certainly does not support Defendant's point that the action is defective because the complaint does not allege that all necessary parties have been joined.

It is true that joinder of all necessary parties is required in any lawsuit (CCP § 389), but plaintiffs do not need to explicitly plead that this requirement has been fulfilled. More importantly, Defendant provides no authority for her argument that beneficiaries of a trust that owns a piece of property are necessary parties in a litigation over that property. *Owners* are necessary parties: "In a suit for partition it is indispensable that all cotenants who have not united in the complaint be made parties defendant. [Citations.] If one of the co-owners is not bound by the decree in partition, the purpose of the suit fails of accomplishment . . . ." (*Solomon v. Redona* (1921) 52 Cal.App. 300, 305.) But the beneficiaries of the Kincaid Trust are not co-owners. (See, e.g., *Allen v. Sutter County Board of Equalization* (1983) 139 Cal.App.3d 887, 890 [creation of trust places legal title in trustee].)

2. Plaintiff's breach of fiduciary duty

Defendant argues that by seeking to partition the Property by sale, Plaintiff is breaching his fiduciary duty to the beneficiaries of the trusts of which he is a trustee. (MPA at p. 7.) Specifically, Defendant argues that Plaintiff is violating his fiduciary duties to the beneficiaries by failing to distribute the trust assets to them within a reasonable time after the settlor's death "and instead litigating for a sale." (MPA at p. 8.) Two of the cases Defendant cites in connection with these arguments, *Harmon v. Harmon* (2001) 24 Cal.4th 259 and *Estate of Green* (1955) 135 Cal.App.2d 495, do not exist. (See section III, *infra.*)

The Court agrees that Plaintiff has a fiduciary duty to the trust beneficiaries, and that he may not use trust assets for his own benefit to their detriment. In the first place, however, it is up to the beneficiaries to litigate that issue. If the beneficiaries believe that Plaintiff is violating his fiduciary duties, they can take legal action against him. (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1134.) Defendant is not a beneficiary and therefore has no standing to do so. (Prob. Code § 17200(a) [only trustee or beneficiary may petition court concerning internal affairs of trust].)

Even if Defendant had standing to raise Plaintiff's purported breach of fiduciary duty, which she does not, and even if a plaintiff's breach of fiduciary duty were grounds for demurrer, which it is not, Defendant does not identify any specific language in the complaint that demonstrates that Plaintiff is breaching his duties to the trust beneficiaries. On the contrary, the complaint alleges that Plaintiff "and the beneficiaries of the Trusts have all agreed to sell the Bodega Property..." and that "neither [Plaintiff] nor any of the beneficiaries of the Trusts objected to the sale of the Bodega Property on the open market." (Complaint, ¶¶ 12, 15.) Defendant apparently disagrees, but again, at the demurrer stage the Court must accept all factual assertions in the complaint as true. The complaint also acknowledges that Plaintiff "owes a fiduciary duty to the beneficiaries of the Trusts to distribute all assets of the Trusts," and alleges that if the Property is not sold, Plaintiff "has no effective means of distributing [it] to the beneficiaries…" (Complaint, ¶ 21.) Thus, the allegations of the complaint, which are the only things at issue in a demurrer, support the conclusion that Plaintiff is acting in the best interests of the beneficiaries.

As to Defendant's timely distribution argument, it is true that trustees must distribute trust assets within certain timeframes, some of which are triggered by the settlor's death. (Prob. Code § 16061.7.) However, that point is immaterial for at least two reasons. First, the complaint does not say when the settlor died, so it is impossible to determine how prompt Plaintiff has or has not been. (The demurrer also does not say when the settlor died, but it would make no difference if it did because of the "four corners" rule quoted above.) Second, and far more importantly, it appears from the complaint that the principal reason Plaintiff has not yet distributed the trust assets to the beneficiaries has been that Defendant has refused to cooperate with him in selling the Property. (Complaint, ¶¶ 12-17.) The Court, as it must, accepts these allegations as true for the purposes of the instant demurrer. On that basis, the Court finds that Defendant is estopped from arguing that Plaintiff has unduly delayed distributing the assets at this stage of the litigation.

3. **Failure to state a cause of action**

Defendant argues that "Plaintiff's complaint fails to state a claim upon which relief can be granted." (MPA at p. 7.) Defendant does not identify any specific deficiency but argues only that the failure arises from "Plaintiff's reliance on conclusory statements without factual support." Defendant

cites for this proposition to *Kerrigan v. O'Meara* (1926) 71 Cal.App. 346. No such case exists. (See section III, *infra.*)

In any event, as discussed above, what Defendant characterizes as "conclusory allegations" are better known as "ultimate facts." A complaint need only state what the plaintiff proposes to prove; it does not need to detail the evidence that will constitute that proof. CCP § 872.230 lists the allegations that must appear in a complaint for partition. All of them are properly alleged in the complaint:

(a) "A description of the property that is the subject of the action." See Complaint, ¶ 1.

(b) "All interests the plaintiff has or claims in the property." See Complaint, ¶¶ 5-7, 9.

(c) "All interests of record or actually known to the plaintiff that persons other than the plaintiff have or claim in the property." See Complaint, ¶ 8.

(d) "The estate as to which partition is sought and a prayer for partition of the interests therein." See Complaint, Prayer, ¶ 2.

(e) "Where the plaintiff seeks sale of the property, an allegation of the facts justifying such relief in ordinary and concise language." See Complaint, ¶ 20 and further discussion in the following section.

4. Failure to state facts sufficient to support partition by sale rather than in kind

To begin with, Defendant has cited numerous authorities (unaccountably including an opinion of the Connecticut Supreme Court) for the proposition that partition in kind is favored over partition by sale. Even if that is true, it does not mean that partition by sale is not available. On the contrary, it is explicitly authorized by statute. (CCP § 872.820.) Therefore, the fact that a complaint seeks that particular remedy is of no moment in the context of a demurrer.

Defendant argues that "Plaintiff's motion fails to allege specific facts demonstrating that partition in kind would be impractical or would result in great prejudice to the parties." (MPA at pp. 4-5.) That is not true. The complaint (which is not a motion) alleges that "[t]he Bodega Property is comprised of a single-family residence and pastureland that must be sold together to obtain the highest value. Physical division of the residence is impracticable and would substantially diminish the value of each Party's interest." (Complaint, ¶ 20.) These are ultimate facts, as discussed above. Defendant dismisses them as "conclusory allegations" unaccompanied by a factual basis, but any such factual basis would consist of evidentiary facts, which do not belong in a complaint.

Plaintiff alleges, in other words, that partition by sale would be to the trust beneficiaries' advantage (and of course to his own) because the undivided Property is worth more than the combined value of any six lots into which the Property could be subdivided. Defendant rejects that rationale,

asserting that "mere inconvenience or financial disadvantage is not sufficient to justify a partition by sale." (MPA at p. 5.) For that proposition, Defendant cites to *Dino v. Pelliccioni* (1962) 200 Cal.App.2d 163, 170. That citation, however, is for *Kramer v. State Board of Accountancy* (1962) 200 Cal.App.2d 163. (See section III, *infra.*) Defendant also cites to *Dieden v. Schmidt* (2002) 104 Cal.App.4th 645, which involves a judgment creditor's rights as against co-tenants; the word "partition" does not appear in the opinion. The final authority cited in this section, *Pine v. Tiedt* (1965) 232 Cal.App.2d 733, does relate to the partition of property, but addresses a situation where a number of co-tenants explicitly waived their right of partition. It is inapposite here.

Thus, Defendant has provided no authority for her suggestion that the potential diminution in value of the subdivided Property to which Defendant alludes (Complaint, ¶ 20) is not a factor that the Court may consider in determining whether partition by sale is appropriate. *Cummings v. Dessel* (2017) 13 Cal.App.5th 589 suggests the exact opposite: "in many modern transactions, sale of the property is preferable to physical division since the value of the divided parcels frequently will not equal the value of the whole parcel before division." (*Id.* at p. 597.)

5. Filing of the lawsuit in bad faith

Defendant argues that "Plaintiff's failure to allege any attempt at negotiation or settlement demonstrates bad faith and an intention to misuse the judicial process." (MPA at p. 8.) Defendant's only attempt to provide authority for the proposition that filing a lawsuit in bad faith is grounds for demurrer is her assertion that "[i]n *Erlich v. Superior Court* (1965) 63 Cal.2d 551, 556, the court emphasized the necessity of good faith negotiation efforts before seeking judicial intervention." *Erlich* does not stand for that proposition. (See section III, *infra.*) There is no question that negotiating and attempting settlement are desirable precursors to the filing of any civil lawsuit, but they are not required.

More importantly in the context of a demurrer, Defendant has not provided any reason to conclude that an attempt at negotiation or settlement must be alleged in a complaint for partition by sale. But even if there were such a requirement, the complaint *does* allege that Plaintiff has attempted to negotiate with Defendant. The "General Allegations" section of the complaint, ¶¶ 12-17, describes those attempts in detail. The negotiations did not go the way Defendant wanted them to, but that does not mean they did not occur.

Finally, Defendant argues that "Plaintiff's use of litigation appears to be a strategic maneuver to force a sale rather than a genuine effort to resolve the co-ownership issue equitably." (MPA at p. 9.) It is certainly a maneuver to force a sale, but that describes any action for partition by sale. Very few lawsuits are genuine efforts to resolve anything equitably; they are more commonly what happens after such efforts fail, and that appears to be the situation here. Defendant concludes this section of her argument by citing to *Albertson v. Raboff* (1956) 46 Cal.2d 374, 381 for the proposition that "[a]buse of the legal

process for purposes other than those intended by law is indicative of bad faith." *Albertson* does not stand for that proposition. (See section III, *infra.*)

III. Invalid authority

As noted in the previous section, Defendant has cited to a number of cases for propositions they do not support, and to a number of other cases that simply do not exist at all. The mis-cited cases are:

Ferreira v. Ferreira (1973) 9 Cal.3d 824, 830 (MPA at p. 6): mis-cited for the proposition that "the court noted the importance of including all parties with an interest in the property to ensure an equitable distribution." The case's caption appears appropriate for a partition case, but it in fact is a child custody case involving an out-of-state custody order and a dismissal on the grounds of forum non conveniens. It bears no relation to the equitable distribution of property or the joinder of parties.

Erlich v. Superior Court (1965) 63 Cal.2d 551 (MPA at p. 8): mis-cited for proposition that "the court emphasized the necessity of good faith negotiation efforts before seeking judicial intervention." *Erlich* addresses the question of whether a court must enjoin a collection action by a judgment creditor if the judgment debtor asserts a claim against the creditor; it says nothing about good faith negotiation efforts being a prerequisite to the filing of a lawsuit.

Albertson v. Raboff (1956) 46 Cal.2d 374 (MPA at p. 9): mis-cited for proposition that "[a]buse of the legal process for purposes other than those intended by law is indicative of bad faith." *Albertson* addresses the question of whether the filing of a lis pendens is subject to the litigation privilege for purposes of an action for slander of title. Neither the word "abuse" nor the phrase "bad faith" appears in the opinion.

The nonexistent cases are:

Dino v. Pelliccioni (1962) 200 Cal.App.2d 163 (MPA at p. 5). The citation is for *Kramer v. State Board of Accountancy* (1962) 200 Cal.App.2d 163, a case related to a disciplinary action against a licensed accountant. It has nothing to do with partition of property.

Harmon v. Harmon (2001) 24 Cal.4th 259 (MPA at p. 8). The citation is for a page in the middle of *People v. Ayala* (2000) 24 Cal.4th 243, a criminal case.

*Estate of Green (*1955) 135 Cal.App.2d 495 (MPA p. 8). The citation is for a page in the middle of *Staggs v. Atchison, Topeka & Santa Fe Railway* (1955) 135 Cal.App.2d 492, a personal injury case.

Kerrigan v. O'Meara (1926) 71 Cal.App. 346 (MPA at p. 8). The citation is for a page in the middle of *People v. Albrexstondare* (1925) 71 Cal.App. 339. There is a Montana case with that caption, *Kerrigan v. O'Meara* (1924) 71 Mont. 1, but it concerns when a statute of limitations begins to run against enforcement of a constructive trust; it has no application here.

The Court does not know where Defendant got these citations, but cannot help noticing their resemblance to the nonexistent case law cited in the well-publicized case *Mata v. Avianca* (S.D.N.Y.

2023) 678 F.Supp.3d 443, in which the plaintiff's attorney was sanctioned for "submit[ing] non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT." (*Id.* at p. 448.) This sort of thing has, unfortunately, become somewhat common since those tools became widely available. (See, *Iovino v. Michael Stapleton Associates* (W.D.Va. 2024) no. 5:21-cv-00064, ECF no. 177 at pp. 13-15 [attorney OSC re. sanctions after citing two nonexistent cases and two cases for quotations that do not appear in them]; *Grant v. City of Long Beach* (2024) 96 F.4th 1255 [appeal dismissed because appellants mis-cited multiple cases, and cited to two nonexistent cases, in opening brief].) The Court's suspicion that something similar has occurred here is heightened by the fact that, while the Court has been unable to discover a case called *Dino v. Pelliccioni*, it has discovered an Italian soccer player named Dino Pelliccioni. That is exactly the sort of error to which large-language-model artificial intelligence software is prone.

Despite the fact that Defendant is representing herself in this matter, she is a licensed attorney. She described herself as such, and identified her law firm, in the caption of the instant demurrer. (see California Rules of Professional Conduct , rule 8.4, comment [1]) Therefore, she took an oath in which she solemnly swore or affirmed that "[a]s an officer of the court, I will strive to conduct myself at all times with dignity, courtesy and integrity." While the Court takes no position on the use of artificial intelligence software as a general matter, it feels strongly that doing that and then filing the result without checking the citations for accuracy demonstrates a marked lack of integrity. It also violates California Rules of Professional Conduct, rules 3.3(a)(2) (duty of candor to the tribunal) and 8.4(c) (conduct involving reckless or intentional misrepresentation), and Bus. & Prof. Code § 6068(d), "seek[ing] to mislead the judge or any judicial officer by an artifice." The word "artifice" is particularly apt in this context.

IV. Conclusion

The demurrer is overruled.

Defendant is ordered to appear in person in Department 18 on October 11, 2024 at 8:30 a.m. to show cause why the Court should not impose any or all of the following sanctions:

- An order of contempt pursuant to CCP § 128
- An order of contempt pursuant to CCP § 1209
- A fine of up to $1,000 pursuant to CCP § 1218
- Disqualification of Defendant to represent herself in propria persona in this matter, and of her law firm to represent her, pursuant to CCP § 128(a)(5) (see *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 585)
- A report to the State Bar of any contempt order pursuant to Bus. & Prof. Code

§6086.7(a)(1)

- A report to the State Bar for a violation(s) of the Rules of Professional Conduct.

2. SCV226091, Zeppenfeld v. Gordon

The motion is **DENIED.** If Plaintiff chooses to file an amended Application for and Renewal of Judgment nunc pro tunc for April 16, 2015, the clerk is directed to accept such a filing. Plaintiff's counsel shall submit a written order consistent with this ruling and compliant with California Rules of Court, rule 3.1312.

I. Background

Following a trial that ended in March 2005, Plaintiffs obtained a verdict against Martin Reilley ("Martin" or "Defendant") for fraud and negligent misrepresentation. Judgment in the amount of $621,336.26 was entered in favor of Plaintiffs against Martin – but crucially, not against Martin's wife Mary Beth Reilley ("Mary Beth").

On April 20, 2015, Plaintiffs filed an Application for and Renewal of Judgment (the "2015 Renewal"; Brook Dec., Exh. 1, pp. 3-4). The 2015 Renewal incorrectly names both Reilleys as judgment debtors, rather than just Martin, and misspells Martin's surname as "Reiley." Those errors are at the heart of the current dispute.

On October 17, 2023, Defendant moved to vacate the 2015 Renewal on four grounds: that it purported to renew a nonexistent judgment because it listed Mary Beth as a judgment debtor; that it misspelled Martin's surname; that the specified amount of the judgment was incorrect; and that it was not properly served. The motion was heard on February 16, 2024. On March 7, the Court "order[ed] the Renewal of Judgment filed on April 20, 2015 to be vacated and a new, corrected renewal to be entered in its place." The corrected renewal was to differ from the one entered in 2015 only in that it omitted Mary Beth as a judgment debtor and corrected the spelling of Martin's surname from "Reiley" to "Reilley." The Court denied the motion in all other respects.

On April 11, 2024, Plaintiffs filed a Notice of Renewal of Judgment ("Notice of Renewal") reflecting that the sole judgment debtor is Martin Reilley, so spelled. The matter comes on calendar for hearing for Defendant's motion to expunge the Notice of Renewal.

II. Judicial notice

Plaintiff's request for judicial notice ("RJN") of three documents filed in this matter is granted pursuant to Evid. Code § 452(h).

III. Analysis

A. The Court's March 7 order created an amended renewal. The Notice of Renewal properly gave Defendant notice of it.

The Notice of Renewal is, as the name implies, a notice. Specifically, it is the notice that a judgment creditor is required to serve on a judgment debtor after a judgment is renewed. (CCP § 683.160(a).) It is not in itself a renewal; it is a notification of a renewal that has already occurred. The question, then, is whether, when Plaintiffs filed the Notice of Renewal, there was any renewal to give notice of.

Defendant argues that there was not. Defendant's position is that once the Court vacated the 2015 Renewal, there was no renewal at all; that Plaintiff needed to take some action to create an amended renewal before he had any basis for filing and serving a notice of renewal; and that because Plaintiff did not take such action, the Notice of Renewal is effectively a notice of the 2015 Renewal that the Court vacated. Therefore, Defendant argues, the Notice of Renewal must be expunged.

Plaintiff's position, in contrast, appears to be that the March 7 order was self-executing; that is, that when the Court "order[ed] . . . a new, corrected renewal to be entered," that order *created* the new and corrected renewal. Therefore, Plaintiff argues, he did not need to take any action other than to notify Defendant that this has happened, and he did that.

The core of the disagreement is the question of whether the Court's March 7 order created an amended renewal or whether, instead, it ordered Plaintiff to apply for one. The order was based on CCP § 683.170(c), which provides that when a renewal of judgment is determined to be defective, "the renewal may be ordered vacated . . . and another and different renewal may be entered . . . ." The Court acknowledges that this language, and therefore the language of the order based on it, is ambiguous in that "may be entered" could mean either "may be entered by the court" or "may be entered by the judgment creditor." This appears to be an issue of first impression; the Court is not aware of any authority that resolves this ambiguity.

In the Court's view, the better interpretation is that its order, couched in the very language of the statute itself, created the amended renewal. The other interpretation, that the Court ordered Plaintiff to enter an amended renewal, leads to the conclusion that if Plaintiff had failed to do so the Court could hold him in contempt, which seems absurd given that Plaintiff would only be harming himself by failing to renew the judgment. But the point that the Court finds most persuasive is that there is simply no reason for a court, once having decided that a renewal needs to be modified, to order someone else to modify it rather than simply doing so itself. For all of these reasons, the Court finds that an amended renewal existed as soon as it published its March 7 order.

Therefore, the Notice of Renewal properly gave Defendant notice of that court-ordered renewal. As Defendant correctly points out, California Rules of Court, rule 3.1900 provides that "[a] copy of the application for renewal of judgment must be . . . attached to the notice of renewal of judgment." Plaintiff met this requirement by attaching the original application for the supplanted renewal, together with the Court's order supplanting it, explaining its reasons for doing so, and describing how it was to be amended. That is, the Court interprets "application" in this context to mean "the filings that set forth the basis for the renewal." The combination of the original application and the Court's order can leave Defendant in no possible doubt about the basis for the court-ordered amended renewal.

All that being said however, the Court is aware that Plaintiff's ability to enforce the judgment is contingent on proper service of a notice of renewal. Although "there is no specified time period within which the renewal of judgment must be served on the judgment debtor, . . . the judgment creditor may not initiate any enforcement proceedings unless and until the judgment debtor has been served with the notice of renewal." (*Goldman v. Simpson* (2008) 160 Cal.App.4th 255, 263, fn. 4.) If Defendant contests the enforcement proceedings on the basis that the notice was not properly served because there was no renewal to give notice of, or because it erroneously gave notice of the vacated 2015 Renewal, this Court will find, as it now finds, that the notice was properly served. However, because the question of whether the March 7 order created the amended renewal is one of first impression, it is conceivable that some other court, for example the Court of Appeal, might read CCP § 683.170(c) differently. Therefore, if Plaintiff chooses (as he has suggested in his opposition memorandum) to file a corrected Application for and Renewal of Judgment nunc pro tunc for April 16, 2015, the Court will direct the clerk to accept such a filing. Plaintiff may then serve Defendant with a new notice of renewal to which a copy of that application is attached. Again, the Court does not believe this is necessary, but understands that Plaintiff may wish to do it out of an excess of caution.

B. The issue of Plaintiff's attorney's registration as assignee of record is unripe for adjudication and unrelated to the instant motion.

"An assignee of a judgment is not entitled to enforce the judgment under this title unless an acknowledgment of assignment of judgment to that assignee has been filed or the assignee has otherwise become an assignee of record under Section 673." (CCP § 681.020.) Defendants assert that Plaintiffs' attorney Ira James Harris has not complied with this statute. (MPA at p. 4.) It is not entirely clear why Defendants assert that, since Mr. Harris has not, thus far, attempted to enforce the judgment. If, when Mr. Harris does so attempt, Defendants feel that he has not properly registered with the Court as assignee of record, Defendants may raise the issue at that time.

IV. Conclusion

The motion is denied.

3. SCV-268365 Mogalian v. Addington

This matter is on calendar for Defendant's motion to take the deposition of Plaintiff. The motion is **GRANTED**. The Court will sign the proposed order attached to Defendant's moving papers.

I. Judicial notice

On its own motion, the Court takes judicial notice of all filings in the instant case and in case number SCV-264723, *Addington v. Ridgeway Distribution* ("*Addington*"). (Evid. Code § 452(d)(1).)

II. Background

Plaintiff filed the original complaint in this litigation on May 6, 2021. The complaint alleges 14 causes of action, including two for fraud and one for breach of fiduciary duty.

On May 3, 2023, trial commenced in *Addington*, in which Defendant in the instant case was the plaintiff and cross-defendant. The trial resulted in a judgment against Defendant in the amount of $2,580,000. That case is presently on appeal. (DCA case no. A170151.)

Plaintiff herein attended the *Addington* trial. Based on the testimony he heard there, he determined that he had a cause of action against Defendant for fraud by omission. Therefore, Plaintiff moved on July 10, 2023 for leave to file a First Amended Complaint ("FAC"). The motion was granted on November 1, 2023; the operative FAC was filed on November 2. It differs from the original complaint only in that it adds a fifteenth cause of action for fraud by omission, which alleges that Plaintiff defrauded Defendant by failing to disclose the litigation, pending at the time the parties entered into the business arrangement at issue in the instant case, that culminated in the *Addington* trial

On January 29, 2024, Plaintiff filed an ex parte application to reopen discovery. On February 1, 2024, the Court granted the motion, ordering that "discovery be reopened for both the plaintiffs and defendants."

On April 23, 2024, Plaintiff moved for release of certified copies of the exhibits in *Addington.* The Court granted the motion on June 25, 2024.

On April 29, 2024, Defendant noticed Plaintiff's deposition for May 26, 2023. Plaintiff's counsel responded the following day that Plaintiff would not attend the deposition because he had already been deposed on May 26, 2023. Defendant was met with a similar response when he noticed the deposition for June 19, 2024. On June 20, Defendant emailed Plaintiff's counsel "Please provide a time and date for the deposition or I will ask the court to intervene." Defendant filed the instant motion on July 8.

III. Governing law

As a general rule, each party can take one and only one deposition of any other party to the action, or of anyone else. (CCP § 2025.610(a); *Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 254.)

However, "for good cause shown, the court may grant leave to take a subsequent deposition." (CCP § 2025.610(b).)

IV. Discussion

Defendant offers two independent rationales for a finding of good cause to take the deposition: first, that he has not previously taken Plaintiff's deposition; second, that a subsequent deposition is justified by the addition of the new cause of action for fraud by omission to the FAC. For the reasons that follow, the Court disagrees with the first rationale but agrees with the second.

A. The previous deposition was taken on behalf of all defendants in this matter, including Defendant personally.

As Defendant concedes, there is no question that Plaintiff has already been deposed. The deposition took place on May 26, 2023. (Mogalian Dec., Exh. A.) Attorney Peter Craigie conducted the deposition; attorney Michael Angeloff represented Plaintiff. (*Id.* at p. 4.) Nevertheless, Defendant argues that "Plaintiff has not been deposed directly by Defendant, David P. Addington." It is not clear whether Defendant's point is that he personally, as distinct from Mr. Craigie, did not conduct the deposition, or whether it is related to his contention that "Plaintiff's deposition was conducted by Peter Craigie on behalf of limited liability company defendants, California CHAMP, LLC, C&C Storage Solutions, LLC and Piner Partners, GP with three LLC General Partners."

It makes no difference, because Defendant is wrong either way. Mr. Craigie has consistently identified his firm as "Attorneys for Defendants David P. Addington, California Champ, LLC and C&C Storage Solutions, LLC." (See, e.g., Order Continuing the Date of Trial filed on November 16, 2022; Defendants' Trial Brief filed on June 12, 2023.) Nothing in the deposition transcript, and nothing Defendant has argued, suggests that Mr. Craigie was representing two of his clients but not the third one at the May 26, 2023 deposition. And given the inescapable reality that Mr. Craigie was representing Defendant, that was functionally equivalent to Defendant conducting the deposition himself.

The addition of the new cause of action constitutes good cause for a subsequent deposition.

Plaintiff argues that the new fifteenth cause of action for fraud by omission is not *really* a new cause of action. Rather, Plaintiff declares, it was added to the complaint "for hyper-technical compliance as in fact I had already pled fraud." (Mogalian Dec., ¶ 8.) In his motion for leave to add the new cause of action, Plaintiff explained:

> It is contended quite frankly that the matter of concealment of material facts has already been raised within the context of the current complaint. This amendment however, is done to potentially counter any specific complaint of the defense that they have not been on notice of the specificities of a fraud by omission claim.

(Plaintiff's MPA in support of amendment, filed July 10, 2023.) In his declaration accompanying the same motion, Plaintiff's counsel declares:

> It is contended that the Plaintiff has in fact pled, based upon an examination of the totality of the pleadings herein, that a fraud for omission has been established particularly as it relates to the breach of fiduciary obligation. However, Plaintiff has now become aware of the specifics of said fraud by omission and in fact contends unequivocally that now the defense will be aware of this and will be unable to argue that they have not been apprised of the specificity of the omissions.

(Michael J. Angeloff's Declaration in support of amendment, filed July 10, 2023, ¶ 5.) What Plaintiff appears to be saying here, in effect, is "we have effectively already pled the fraud by omission cause of action. We just wanted to plead it again because we were concerned that we had pled it in a way that would enable Plaintiff to successfully argue that we didn't plead it." The line between pleading something in that fashion and not pleading it at all is a very fine one indeed.

Plaintiff does not point out the specific paragraphs in the complaint that, in his view, amount to pleading the fraud by omission cause of action; he merely refers generally to the causes of action for fraud and for breach of fiduciary duty. There are two causes of action for fraud: the first and the fifth. The first alleges that Defendant made "specific, unequivocal, and clear representations . . . that CALIFORNIA CHAMP had a value of a minimum of five million dollars and that another company had effectuated an evaluation of said company and rendered a valuation of ten million dollars." (FAC, ¶ 14.) The fifth makes similar allegations regarding a different company, C&C Solutions: a "clear representation [was] made by ADDINGTON that C&C had a value of a minimum of five million dollars and that another differing company had effectuated an evaluation of said company and rendered a valuation of ten million dollars." (FAC, ¶ 58.) Both of these are about fraud by affirmative, specific, unequivocal misrepresentations; they have nothing to do with fraud by omission.

Plaintiff also pled a cause of action, the thirteenth, for breach of fiduciary duty, in which he alleges that Defendant breached his fiduciary duty by "failure to disclose disbursement of funds, failure to disclose the business' eviction from its tenancy place of business, concealment of cash transactions, failure to provide right of first option, failure to provide accounting, failure to provide documentation reflecting actual captial [sic] contribution, mismanagement of cash accounts, absconding and failure to reveal additional cash accounts, and other items as further set forth herein." (FAC, ¶ 116.)

The fifteenth cause of action for fraud by omission does not strike the Court as duplicating any of those previously alleged. It alleges "that a fiduciary relationship existed between Plaintiff and Defendant" (FAC, ¶ 122), which duplicates a similar allegation in the thirteenth cause of action (FAC, ¶ 115), but there the resemblance ends. The new cause of action alleges that due to that relationship, Plaintiff was

"entitled to fiduciary levels of disclosure from the Defendant" regarding "numerous issues that ultimately did result in litigation which actually took place in this court specifically in [the *Addington* case]." (FAC, ¶¶ 122, 124.) Plaintiff alleges that as the result of being "a witness in the gallery of said trial," he "bec[a]me aware that there were threats of litigation as early as 2017," but "[n]o disputes were disclosed to [him], at any time, prior to [his] purchase of [his] interest in California Champ, LLC." (FAC, ¶¶ 125, 126.) That is a far cry from the list of things that Plaintiff alleges in the thirteenth cause of action (FAC, ¶ 116); none of those items have anything to do with failing to disclose pending litigation. It is an even farther cry from the direct misrepresentation of the value of two companies alleged in the first and fifth causes of action.

Plaintiff would like to have it both ways: it was necessary to add the fifteenth cause of action so that Defendant would be properly on notice that he was being sued for failing to disclose the potential litigation that led to *Addington*, and also it wasn't necessary to add it because everything in it had already been pled elsewhere in the FAC. The Court agrees with the first half and disagrees with the second. The fifteenth cause of action alleges a factual basis for fraud liability that had not been previously pled. It is therefore a new cause of action. Because the Court disagrees with Plaintiff's premise that "there are no new facts," it also disagrees with Plaintiff's conclusion that therefore, "there is no good cause to allow a second or subsequent deposition." (Oppo at p. 5.)

B. Defendant's goal in taking the new deposition is not to determine the contents of the exhibits from *Addington*, but rather to determine how Plaintiff intends to use them at trial.

Plaintiff argues that Defendant knows perfectly well what is contained in the *Addington* exhibits that were released by the Court's order on June 25, and suggests that rather than take the proposed deposition, he "should simply think back and ask himself what happened at the trial." (Oppo at p. 5.) Plaintiff adds that "[t]he exhibits are equally available to Mr. Addington as the court has ordered their release." (*Ibid.*) Therefore, Plaintiff concludes, "[t]here is no new good cause to conduct this deposition." (*Ibid.*)

That would be a reasonable argument if Defendant were moving to compel production of the documents referred to, but he is not. Defendant has never suggested that his objective is to discover the contents of the documents. His objective is to "pin[] down the Plaintiff's claims" and to "determine how these documents are related to the Plaintiff's claims." (MPA at p. 4.) That is, he would like to know, at a minimum, which of the documents Plaintiff proposes to introduce at trial, and what Plaintiff will try to prove by doing so. It is reasonable for him to want to achieve that objective by asking Plaintiff about it. A deposition is the appropriate mechanism for that.

V. Conclusion

The motion is **GRANTED**.

4. SCV-271112, Sol Rise Farms v. Bartlett

The Court awards Cross-complainant $501.36 in fees and costs. The Court will adopt and sign the proposed order submitted with Cross-complainant's motion.

I. Background

Cross-defendants filed the initial complaint against Cross-complainant in this matter on July 1, 2022. On July 20, 2023, Cross-complainant filed the operative First Amended Cross-Complaint ("FACC") against Cross-defendants. Cross-defendants did not respond. Default was entered against Cross-defendants, with respect to the FACC, on October 10, 2023.

On March 26, 2024, Cross-defendants moved to vacate the defaults. The Court granted the motion on June 7, 2024. In its order, the Court "authorize[d] the Cross-Complainant to file a motion for attorney fees and costs related to the taking of the default." Cross-complainant filed the instant motion on June 21.

II. Governing law

The standard for calculating attorney fee awards under California law "ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate… The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided. [Citation.] Such an approach anchors the trial court's analysis to an objective determination of the value of the attorney's services, ensuring that the amount awarded is not arbitrary." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.)

In calculating the lodestar, "The reasonable hourly rate is that prevailing in the community for similar work." (*PLCM Group, supra,* 22 Cal.4th at p. 1095.) "The general rule is '[t]he relevant "community" is that where the court is located,' unless the party claiming fees demonstrates that hiring local counsel was impracticable or local counsel was not available." (*Marshall v. Webster* (2020) 54 Cal.App.5th 275, 285-286; see also *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 72 ["fee awards generally should be based on reasonable local hourly rates"]; *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 398-399 [different rule where plaintiff demonstrated inability to hire local counsel].)

"[T]he trial court has broad authority to determine the amount of a reasonable fee." (*PLCM Group, supra,* 22 Cal.4th at p. 1095.) "The determination of what constitutes reasonable attorney fees is

committed to the discretion of the trial court. [Citation.] The experienced trial judge is the best judge of the value of professional services rendered in his or her court." (*Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1240.)

III. Analysis

In its opposition, Cross-defendant notes that the Court's order granting the motion to vacate the defaults authorized Cross-complainant "to file a motion for attorney fees and costs *related to the taking of the default*," emphasis supplied. Cross-defendant's point is that the Court did *not* authorize Cross-complainant to seek attorney fees for preparing the motion for attorney fees. The Court agrees, and will award fees only for the time spent on seeking defaults against Cross-defendants.

Cross-complainant's counsel declares that she, another attorney in her firm, and a paralegal in her firm have incurred the following fees in connection with the requests for entry of default (Young Dec., ¶¶ 3-10):

- Attorney Katy Young: Billing rate $595/hour. 0.3 hours, total fee $178.50.
- Attorney Courtney Chu: Billing rate $445/hour. 0.9 hours, total fee $400.50.
- Paralegal Katey Carlin: Billing rate $250/hour. 1.9 hours, total fee $475.00.

The Court also agrees with Cross-defendant's point that the amount of time claimed is unreasonable. The requests for default consist of two Judicial Council CIV-100 forms, one for defendant Jeffrey Cook and the other for defendant Joshua Brooks. While the Court is willing to accept that Ms. Young took 18 minutes to review and sign these documents, it is not clear to the Court why it took 54 minutes of a senior associate's time plus an hour and 54 minutes of a paralegal's time to prepare them. Notably, although Ms. Young's declaration reflects fees of $1,054 in connection with the default, the fee request in Cross-complainant's MPA says that "[t]he total amount of attorney's fees incurred in taking Cross-Defendants' default is $965." (MPA at p. 2.) The difference, $89, is 0.2 times $445, so the Court speculates that the $965 figure was computed on the basis that Ms. Chu spent 0.7 hours, not 0.9, on the default motion. The Court finds even that time unreasonable, given that the bulk of the work was almost certainly done by the paralegal. The Court will award fees on the basis of 0.5 hours of Ms. Chu's time and one hour of Ms. Carlin's.

Regarding the billing rates, the MPA states that the rates are "reasonable for [attorneys] in the San Francisco Bay Area" with comparable experience. While that may be partially true, the San Francisco Bay Area is a big place, and it contains several sub-areas, such as the city of San Francisco where Cross-Complainant's counsel practices, where attorney billing rates are significantly higher than in other areas. As noted above, the relevant community for determination of reasonable rates is the one where the court

is located. (*Marshall, supra,* 54 Cal.App.5th at pp. 285-286.) The Court is located in Sonoma County, and it will award fees on the basis of reasonable rates here. The Court finds that a reasonable rate for a managing partner is $450/hour; for an associate with ten years' experience, $400/hour; and for a paralegal, $150/hour.

Accordingly, the Court awards $485 in attorney's fees, consisting of $135 for 0.3 hours of Ms. Young's time at $450/hour, $200 for 0.5 hours of Ms. Chu's time at $400/hour, and $150 for 1.0 hours of Ms. Carlin's time at $150/hour. The Court also awards costs in the amount of $16.36.

IV. Conclusion

The Court awards Cross-complainant $501.36 in fees and costs.