1. RODRIGUEZ v. CUEROS 22CV0790

Respondent's Motion for Attorney Fees and Costs.

Petitioner filed a petition for civil harassment against respondent on June 14, 2022. Petitioner's request for a TRO pending trial was denied on June 15, 2022. At the hearing on the petition on July 29, 2022 the hearing was continued to September 9, 2022 upon stipulation by counsels for the parties. At the hearing on September 9, 2022 the petitioner requested the matter be dropped from the calendar. The court granted the request and dropped the matter. The case was dismissed on September 9, 2022.

On September 20, 2022 respondent filed a motion for costs and an award of attorney fees in the total amount of $5,640 pursuant to the provisions of Civil Code, §§ 527.6(s) and 1032(a)(4). Respondent asserts: as the prevailing party, respondent is entitled to an award of the costs and attorney fees incurred to respond to the petition; the petition for civil harassment restraining order was brought in bad faith; the attorney fees and costs incurred were reasonable; attorney fees incurred to prepare the motion for fees are recoverable; and the motion is timely.

A proof of service declares that petitioner's counsel was served notice of the hearing and the moving papers by mail on September 20, 2022.

Respondent filed a memorandum of costs on September 28, 2022 claiming $120 in costs. A proof of service declares it was served on petitioner's counsel by mail on September 20, 2022.

On October 20, 2022 petitioner's counsel filed a declaration in opposition. Counsel declares: at the time the request for dismissal was entered, counsel ceased to actively represent petitioner; since the dismissal was entered without prejudice, respondent was not the prevailing part as petitioner is still able to refile her moving papers and seek recovery; the respondent attempted to argue for an award of attorney fees when the matters were dropped;

the court informed him that he could not do so; although respondent stated he would file a motion for attorney fees, counsel never agreed to accept service on behalf of petitioner after the case was dropped; to the best of counsel's personal knowledge, petitioner has not been served with the papers; and counsel is unable to contact petitioner and can not file an opposition on petitioners behalf.

Respondent replied to the opposition declaration.

"The prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any." (Code of Civil Procedure, § 527.6(s).)

"(4) "Prevailing party" includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. If any party recovers other than monetary relief and in situations other than as specified, the "prevailing party" shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed, may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034." (Emphasis added.) (Code of Civil Procedure, § 1032(a)(4).)

"Code of Civil Procedure section 527.6, relating to injunctions prohibiting harassment, states in part: "(h) The prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any." The court plainly found respondents to be the prevailing party, since it awarded respondents costs and attorney fees. Did the court err? ¶ We have found no case interpreting the term "prevailing party" as used specifically in section 527.6. We turn for guidance to a more general statute, Code of Civil Procedure section 1032, which states in part: "(a) ... (4) 'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff

nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. *When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court*...." (Emphasis added.) ¶ We believe this general definition of "prevailing party" may be used to illuminate section 527.6, subdivision (h). The emphasized portion of section 1032, which applies to the case at bench, indicates that determination of the prevailing party lies in the trial court's sound discretion. We adopt this interpretation." (Emphasis added.) (Elster v. Friedman (1989) 211 Cal.App.3d 1439, 1443.)

"" 'In the absence of legislative direction in the attorney fees statute, the courts have concluded that a rigid definition of prevailing party should not be used. [Citation.] Rather, prevailing party status should be determined by the trial court based on an evaluation of whether a party prevailed " 'on a practical level,' " and the trial court's decision should be affirmed on appeal absent an abuse of discretion.' [Citation.] 'Among the factors the trial court must consider in determining whether a party prevailed is the extent to which each party has realized its litigation objectives. [Citations.]' [Citation.]" (*Sharif v. Mehusa Inc*. (2015) 241 Cal.App.4th 185, 192, 193 Cal.Rptr.3d 644 (*Sharif*) [when there are two fee shifting statutes in separate causes of action, there can be different prevailing parties].) That standard applies to actions under section 3344 (*Gilbert v. National Enquirer, Inc.* (1997) 55 Cal.App.4th 1273, 1277–1278, 64 Cal.Rptr.2d 659), and it is the standard the trial court applied. ¶ Most cases applying this standard to statutory attorney fee provisions have done so in the context of voluntary dismissals. (*Donner Management Co. v. Schaffer* (2006) 142 Cal.App.4th 1296, 1310–1311, 48 Cal.Rptr.3d 534 (*Donner Management*) [shareholder derivative suit against corporate officer dismissed without prejudice; trial court properly found defendant was prevailing party under statutory fee provision because plaintiff's dismissal was compelled by

corporate decision that maintaining action was not in corporation's best interests]; *Castro v. Superior Court* (2004) 116 Cal.App.4th 1010, 1022–1024, 10 Cal.Rptr.3d 865 (*Castro*) [where lis pendens is voluntarily removed pending hearing on motion to expunge, the party who brought the motion may be entitled to recover statutory attorney fees based on practical considerations that motivated removal of the lien, including the merits of the expungement motion]; *Galan v. Wolfriver Holding Corp.* (2000) 80 Cal.App.4th 1124, 1129–1130, 96 Cal.Rptr.2d 112 [plaintiffs brought action against landlord for substandard housing and parties settled; no abuse of discretion by trial court in determining there was no prevailing party where the settlement did not exonerate the landlord and plaintiffs implicitly determined it was not worth pursuing the matter]; *Gilbert, supra,* 55 Cal.App.4th 1273, 1277–1278, 64 Cal.Rptr.2d 659 [actress voluntarily dismissed section 3344 action without prejudice; trial court did not abuse its discretion by finding no prevailing party because so little discovery had been conducted it was impossible to determine which party prevailed at a practical level].)" (Olive v. General Nutrition Centers, Inc. (2018) 30 Cal.App.5th 804, 824–825.)

Respondent's counsel declares in support of the motion: there is substantial evidence that the petition was filed for an illegitimate purpose and predicated on prefabricated allegations against respondent; the petitioner is being investigated by the Department of Industrial Relations, Labor Department by a Deputy Labor Commissioner under Case number #WC-CM-89828 concerning wage and hour violations by petitioner concerning respondent and others; it appears the respondent was attempting to shield herself from liability concerning wage and hour violations; and while investigating the case, it was determined that petitioner filed a police report against respondent with the Citrus Heights Police, which was determined to be unfounded. (Declaration of Noah Phillips in Support of Motion, paragraphs 7-10.)

Respondent's counsel declares in reply: counsel was present in court when the case was dismissed on September 9, 2022; when counsel asked the court if the issue of attorney fees could be addressed, or if the court preferred a noticed, written motion, the court requested that a noticed motion be filed; the court did not preclude counsel from arguing a motion for attorney fees; and it is misleading for petitioner's counsel to suggest respondent's counsel was somehow prevented from arguing the motion; and petitioner's counsel did not request to be relieved as counsel of record for petitioner at the September 9, 2022 hearing despite being aware that respondent would be filing an attorney fees motion. (Declaration of Noah Phillips in Reply, paragraphs 2 and 3.)

Under the circumstances presented, it appears the court has the discretion to determine who the prevailing party was in this case. Petitioner realized none of petitioner's litigation objectives. The request for TRO pending trial was denied and on the day of trial when respondent was fully prepared to submit evidence that the petition was without merit, petitioner dropped the petition. On a practical level, even though the case was voluntarily dismissed without prejudice, it appears that the respondent prevailed.

Petitioner's counsel remains counsel of record in this case. Petitioner's counsel has not sought leave to withdraw as counsel of record, has not filed a substitution of attorney, and has not provided any information as to petitioner's whereabouts or last known address for service purposes. It appears to the court that petitioner's counsel remains counsel of record for petitioner at this time and, as such, notice of the motion and the moving papers were properly and validly served on petitioner by serving counsel of record. The court is inclined to order petitioner's counsel of record to submit points and authorities for the court's consideration regarding continued representation during post judgment of dismissal proceedings concerning

attorney fees and cost claims, unless counsel is granted leave to withdraw by the court or a substitution of attorney is filed.

Appearances are required by Counsel Daryl J. Lander and respondent's counsel at 8:30 a.m. on Friday, October 28, 2022 in Department Nine,

TENTATIVE RULING # 1: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 28, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

2. DFK WHOLESALE v. HIGH HILL RANCH, LLC PCL-20190640

Plaintiff's Motion for Leave to File Amended Complaint.

Plaintiff moves for leave to amend the complaint to add a request for award of the legal rate of interest on damages from the date the complaint was filed. A proposed amended complaint has been submitted.

The proof of service in the court's file declares that on September 2, 2022 notice of the hearing and copies of the moving papers were served by mail on defense counsel. There was no opposition to the motion in the court's file at the time this ruling was prepared.

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code." (Code of Civil Procedure, § 473(a)(1).)

There is a general policy in this state of great liberality in allowing amendment of pleadings at any stage of the litigation to allow cases to be decided on their merits. (Kittredge Sports Co. v. Superior Court (1989) 213 Cal.App.3d 1045, 1047.) "…it is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (Citations omitted.) If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion.

(Citations omitted.)" (Morgan v. Superior Court (1959) 172 Cal.App.2d 527, 530.) "…absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564, 176 Cal.Rptr. 704.)" (Board of Trustees of Leland Stanford Jr. University v. Superior Court (2007) 149 Cal.App.4th 1154, 1163.)

Absent opposition, it appears appropriate to grant the motion.

TENTATIVE RULING # 2: PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT IS GRANTED. THE AMENDED COMPLAINT IS DEEMED FILED AND SERVED AS OF OCTOBER 28, 2022. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT",

WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 28, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

3. TIPTON v. KUCERA PC-20210086

Petition to Approve Compromise of Disputed Claim of Minor.

The petition states the minor sustained injuries consisting of a laceration to the forehead and abrasion of the right arm and hand in a motor vehicle accident. Petitioner requests the court authorize a compromise of the minor's claim against defendant/respondent in the gross amount of $87,500.

The petition states the minor incurred $53,587.77 in medical expenses for care in the emergency room, follow-up care, and chiropractic care. The petition states that after negotiated reductions, and negotiated insurance lien reductions, there remains $21,191.08 to be paid for medical care expenses from the gross settlement amount There are no copies of the bills substantiating the claimed medical expenses attached to the petition as required by Local Rule 7.10.12A.(6).

The petition states that the minor has fully recovered from the injuries allegedly suffered. There is no current doctor's report concerning the minor's condition and prognosis of recovery as required by Local Rule 7.10.12A.(3).

The minor's attorney requests attorney's fees in the amount of $21,620, which represents approximately 25% of the net settlement after the costs claimed are deducted. The court uses a reasonable fee standard when approving and allowing the amount of attorney's fees payable from money or property paid or to be paid for the benefit of a minor or a person with a disability. (Rules of Court, Rule 7.955(a)(1).) The claimed fee amount appears to be reasonable. The minor's attorney also requests reimbursement for costs in the amount of $550. There are no copies of bills substantiating the claimed costs attached to the petition as required by Local Rule 7.10.12A.(6).

The net settlement is to be used to purchase a single premium annuity to pay the minor the sum of $46,714.65 in 2027.

Pursuant to Rules of Court, Rule 7.952(a) the petitioner and the minor are required to appear at hearings on petitions to approve minor compromises, unless the court dispenses with the requirement upon finding good cause.

TENTATIVE RULING # 3: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 28, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

4. TUCK v. AVILA 22CV0555

Hearing Re: Default Judgment.

Plaintiff filed an action against defendants asserting causes of action for breach of a lease agreement by failure to pay the rent due and owing under the terms of the lease agreement. The complaint alleges that plaintiff sustained damages in the amount of $31,480 and prays for an award of attorney fees and costs according to proof. The subject lease agreement in attached as Exhibit A to the complaint.

The proofs of service of the summons and complaint on defendants declare that defendants Angela Seyler, a.k.a. Angela Wood, and Kevin Avila, a.k.a. Kevin Edward Avila, were served by substituted service at their home by serving Kevin Avila's father, Ted Avila, on May 4, 2022, with follow up mailing to the address by mail on May 5, 2022.

On June 29, 2022 the court entered default against defendants. The proof of service declares that on June 29, 2022 the request to enter default and a clerk's judgment was served on defendants by mail to the address where they were served.

After default the plaintiff may apply to the court for the relief demanded in the complaint, the court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her favor for such sum not exceeding the amount stated in the complaint, in the statement required by Section 425.11, or in the statement provided for by Section 425.115, as appears by such evidence to be just. (Code of Civil Procedure, § 585(b).)

The Third District Court of Appeal has held: "A defendant's failure to answer the complaint has the same effect as admitting the well-pleaded allegations of the complaint, and as to these admissions *no further proof of liability is required.* (§ 431.20, subd. (a); *Kim, supra,* 201 Cal.App.4th at pp. 281–282, 133 Cal.Rptr.3d 774.) Thus, in a default situation such as this, if

the complaint properly states a cause of action, the only additional proof required for the judgment is that needed to establish the amount of damages. (See *Beeman v. Burling, supra,* 216 Cal.App.3d at p. 1597, 265 Cal.Rptr. 719; see also *Ostling v. Loring, supra,* 27 Cal.App.4th at p. 1745, 33 Cal.Rptr.2d 391.) ¶ "The 'well-pleaded allegations' of a complaint refer to ' " 'all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' " ' [Citations.]" (*Kim, supra*, 201 Cal.App.4th at p. 281, 133 Cal.Rptr.3d 774.) A well-pleaded complaint "set[s] forth the ultimate facts constituting the cause of action, not the evidence by which plaintiff proposes to prove those facts." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211–212, 197 Cal.Rptr. 783, 673 P.2d 660, fn. omitted; see also *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550, 67 Cal.Rptr.3d 330, 169 P.3d 559 ["[T]he complaint ordinarily is sufficient if it alleges ultimate rather than evidentiary facts."].) "The complaint delimits the legal theories a plaintiff may pursue and the nature of the evidence which is admissible. [Citation.] 'The court cannot allow a plaintiff to prove different claims or different damages at a default hearing than those pled in the complaint.' [Citation.]" (*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1182, 36 Cal.Rptr.3d 663.) Thus, the plaintiff cannot supplement the general allegations of the complaint by reference to the plaintiff's showing in the summary judgment proceeding. (Cf. *FPI, supra*, 231 Cal.App.3d at pp. 383–384, 282 Cal.Rptr. 508.)" (Carlsen v. Koivumaki (2014) 227 Cal.App.4th 879, 898–899.)

"Plaintiffs in a default judgment proceeding must prove they are entitled to the damages claimed. (Code of Civ.Proc., § 585; *Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560, 33 Cal.Rptr. 415.)" (Barragan v. Banco BCH (1986) 188 Cal.App.3d 283, 302.)

""It is imperative in a default case that the trial court take the time to analyze the complaint at issue and ensure that the judgment sought is not in excess of or inconsistent with it. It is not

in plaintiffs' interest to be conservative in their demands, and without any opposing party to point out the excesses, it is the duty of the court to act as gatekeeper, ensuring that only the appropriate claims get through." (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 868, 121 Cal.Rptr.2d 695 (*Heidary*).)" (Electronic Funds Solutions v. Murphy (2005) 134 Cal.App.4th 1161, 1179.)

"Entry of a defendant's default terminates that defendant's rights to participate in the litigation (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385, 202 Cal.Rptr. 204), and the case ends when default judgment is entered (*Jones v. Interstate Recovery Service, supra,* 160 Cal.App.3d at p. 928, 206 Cal.Rptr. 924)." (Garcia v. Politis (2011) 192 Cal.App.4th 1474, 1479.)

"After the default was entered, defendant was no longer an active party in the litigation and thus was not entitled to any further notices. "The clerk's entry of default cuts off the defendant's right to take further affirmative steps such as filing a pleading or motion, and the defendant is not entitled to notices or service of pleadings or papers." (6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 152, p. 569, italics omitted; see also Code of Civil Proc., § 1010 [no "notice or paper, other than amendments to the pleadings, or amended pleading, need be served"].)" (Sporn v. Home Depot USA, Inc. (2005) 126 Cal.App.4th 1294, 1301.)

The Third District Court of Appeal has held: "A defendant's failure to answer the complaint has the same effect as admitting the well-pleaded allegations of the complaint, and as to these admissions *no further proof of liability is required.* (§ 431.20, subd. (a); *Kim, supra,* 201 Cal.App.4th at pp. 281–282, 133 Cal.Rptr.3d 774.) Thus, in a default situation such as this, if the complaint properly states a cause of action, the only additional proof required for the judgment is that needed to establish the amount of damages. (See *Beeman v. Burling, supra,* 216 Cal.App.3d at p. 1597, 265 Cal.Rptr. 719; see also *Ostling v. Loring, supra,* 27 Cal.App.4th

at p. 1745, 33 Cal.Rptr.2d 391.) ¶ “The ‘well-pleaded allegations' of a complaint refer to ‘ “ ‘all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.’ ” ' [Citations.]” (*Kim, supra*, 201 Cal.App.4th at p. 281, 133 Cal.Rptr.3d 774.) A well-pleaded complaint “set[s] forth the ultimate facts constituting the cause of action, not the evidence by which plaintiff proposes to prove those facts.” (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211–212, 197 Cal.Rptr. 783, 673 P.2d 660, fn. omitted; see also *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550, 67 Cal.Rptr.3d 330, 169 P.3d 559 [“[T]he complaint ordinarily is sufficient if it alleges ultimate rather than evidentiary facts.”].) “The complaint delimits the legal theories a plaintiff may pursue and the nature of the evidence which is admissible. [Citation.] ‘The court cannot allow a plaintiff to prove different claims or different damages at a default hearing than those pled in the complaint.’ [Citation.]” (*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1182, 36 Cal.Rptr.3d 663.) Thus, the plaintiff cannot supplement the general allegations of the complaint by reference to the plaintiff's showing in the summary judgment proceeding. (Cf. *FPI, supra*, 231 Cal.App.3d at pp. 383–384, 282 Cal.Rptr. 508.)” (Carlsen v. Koivumaki (2014) 227 Cal.App.4th 879, 898–899.)

The complaint seeks an award of damages in the amount of $31,480. (Verified Complaint, paragraph 10.a.)

Plaintiff declares: Exhibit A is a true and correct copy of the lease; defendants failed to pay rent when due; and they currently owe $31,480, plus interest, as set forth in the spreadsheet attached as Exhibit B.

The subject lease attached as Exhibit A to plaintiff’s declaration provides in paragraph 36: “On any action or proceeding arising out of this Agreement, the prevailing party between

Landlord and Tenant shall be entitled to reasonable attorney fees, collectively not to exceed $1,000 (or $___________), except as provide in paragraph 35A." (Emphasis added.)

The subject lease attached as Exhibit A to plaintiff's declaration provides in paragraph 35A that the Landlord and Tenant agree to mediate any dispute arising out of this agreement and if any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action. (Emphasis the court's.)

Plaintiffs counsel declares that the itemized list of legal services and amounts incurred for each of the services set forth in the declaration were incurred in this action and costs and attorney's incurred in this litigation amounts to $2,711.66.

The itemized attorney fees add up to $1,152.50, which exceeds the maximum amount of fees recoverable under the express provisions of the attorney fees clause in the subject lease agreement; and plaintiff has not provided any information whatsoever if meditation was requested by plaintiff and refused by defendants, or this action was commenced by plaintiffs without first demanding that defendants mediate the dispute. The plaintiff has not established that he is entitled to attorney fees in any amount.

The verified memorandum of costs included in the request for entry of default judgment itemizes costs that add up to $1,559.16.

Appearances are required to provide additional evidence as to whether this action was commenced by plaintiff without first seeking to mediate the dispute, or defendants refused to mediate after a request has been made.

TENTATIVE RULING # 4: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 28, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR

TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

5. MATTER OF MAYA T. 22CV1314

Petition to Approve Compromise of Disputed Claim of Minor.

The petition states the minor sustained injuries consisting of a cut to the minor's right cheek from a partially exposed nail in the Power House store. Petitioner requests the court authorize a compromise of the minor's claim against defendant/respondent in the gross amount of $65,000.

The petition states the minor incurred $6,719.23 in medical expenses for emergency room treatment, stiches to close the wound, and minor treatment in Hong Kong where the minor lives. There are no copies of the bills substantiating the claimed medical expenses for care in Hong Kong attached to the petition as required by Local Rule 7.10.12A.(6).

The petition states that the minor has fully recovered from the injuries allegedly suffered. The current doctor's report concerning the minor's condition and prognosis of recovery is attached as required by Local Rule 7.10.12A.(3), which states that the minor does have a scar.

The petitioning parent received assistance from counsel who became concerned with the matter at the instance of the respondent's insurance carrier. Therefore, attorney's fees and costs are not claimed.

The entire $65,000 settlement amount is proposed to be paid directly to the petitioning parent in Hong Kong where the parent and minor reside, because they do not live in the U.S., cannot maintain a U.S. bank account without a U.S. address, and parent and minor do not have Social Security numbers.

Pursuant to Rules of Court, Rule 7.952(a) the petitioner and the minor are required to appear at hearings on petitions to approve minor compromises, unless the court dispenses with the requirement upon finding good cause. The minor and parent can appear by VCOURT.

TENTATIVE RULING # 5: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 28, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

6. TURBEN v. ZALUNARDO 22CV0006

(1) Plaintiff's Motion to Compel Defendant Capitol Sand and Gravel to Respond to Requests for Production, Set One.

(2) Plaintiff's Motion to Compel Defendant Capitol Sand and Gravel to Respond to Special Interrogatories, Set One.

(3) Plaintiff's Motion to Deem Admitted Requests for Admission, Set One, Propounded on Defendant Capitol Sand and Gravel.

(4) Plaintiff's Motion to Compel Defendant Zalundaro to Respond to Requests for Production, Set One.

(5) Plaintiff's Motion to Compel Defendant Zalundaro to Respond to Special Interrogatories, Set One.

(6) Plaintiff's Motion to Deem Admitted Requests for Admission, Set One, Propounded on defendant Zalundaro.

TENTATIVE RULING # 6: THESE MATTERS ARE DROPPED FROM THE CALENDAR UPON REQUEST OF THE MOVING PARTY.

7. GRUBER v. BRITTON 22CV0029

Plaintiff's Motion for Leave to File 2nd Amended Complaint.

Plaintiff moves for leave file a 2nd amended complaint to add a cause of action for premises liability and to dismiss the general negligence cause of action. A proposed amended 2nd amended complaint has been submitted as attached to counsel's declaration in support of he motion. Plaintiff asserts that leave to amend should be granted for the following reasons: during plaintiff's June 21, 2022 deposition plaintiff testified that his right foot slid out when his right foot stepped on the 5th step of the stairs, there was nothing on the step to support his foot, and he believed a portion of the carpet was pulled away from the nose of the tread of the stair; the testimony indicates that he stepped on a portion of the carpet that was not directly covering the stair tread; amendment is necessary on order for plaintiff to assert all claims and to fully and finally adjudicate the rights of the parties in a single proceeding; and there is no prejudice due to delay in that no trial date has been set, no expert depositions have been taken by any party, granting the motion will not cause defendant additional costs, and he parties are still engaged in non-expert discovery.

Defendant opposes the motion on the following grounds: plaintiff's licensed engineer inspected the stairway, including the carpet, before the original complaint was filed on January 12, 2022 and 1st amended complaint filed on February 3, 2022; plaintiff was deposed before the motion was filed; there is no good cause justifying amendment of the pleadings, because the engineer's report does not mention any code violation or dangerous condition of the carpet or anything else that would support new theories of liability and as plaintiff was a tenant, he knew or should have known about the condition of the carpet before any of the versions of the complaint were filed; the motion should be denied, because defendant is prejudiced by the

delay; should the motion be granted, the court should condition leave to amend on allowing plaintiff to be re-deposed for not more than 30 minutes to allow discovery concerning the new allegations; and to allow defendant leave to amend the answer as necessary to respond to the new allegations and theories.

Plaintiff replied to the opposition: defendant has not adequately explained how defendant will be prejudiced; discovery remains open; plaintiff would have produced plaintiff for deposition regarding the allegations of the 2nd amended complaint and agrees defendant should have the opportunity to amend defendant's answer; the need for this motion did not become apparent until after plaintiff's deposition was taken; plaintiff's inspector is not a flooring expert; and plaintiff hired a flooring expert to confirm the carpet did not meet flooring standards and was a safety hazard.

"The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code." (Code of Civil Procedure, § 473(a)(1).)

There is a general policy in this state of great liberality in allowing amendment of pleadings at any stage of the litigation to allow cases to be decided on their merits. (Kittredge Sports Co. v. Superior Court (1989) 213 Cal.App.3d 1045, 1047. "…it is a rare case in which 'a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.' (Citations omitted.) If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and

where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. (Citations omitted.)" (Morgan v. Superior Court (1959) 172 Cal.App.2d 527, 530.) "…absent a showing of prejudice to the adverse party, the rule of great liberality in allowing amendment of pleadings will prevail. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564, 176 Cal.Rptr. 704.)" (Board of Trustees of Leland Stanford Jr. University v. Superior Court (2007) 149 Cal.App.4th 1154, 1163.)

It is irrelevant that new legal theories are introduced in the proposed amended pleading as long as the proposed amendments relate to the same general set of facts in the pleading that will be superseded. (Kittredge Sports Co. v. Superior Court (1989) 213 Cal.App.3d 1045, 1048.)

Plaintiff's counsel has submitted an authenticated copy of the subject deposition testimony of plaintiff.

Defense Counsel declares: the engineer's report provides no support for a suggestion that that the carpet played a minor or major role in the subject incident; plaintiff was deposed prior to the suggestion of filing a 2nd amended complaint or specifically alleging a Civil Code violation; plaintiff was wearing flip flops on the stairs when he fell after drinking multiple glasses of beer; and defendant is prejudiced to have not discovered these new contentions during deposition.

This case is less than one year old. The court takes judicial notice that no trial date has ever been set in this action, leaving discovery wide open and the next case management conference is set in December 2022. Defendant has not established that defendant will be prejudiced in any way that will justify refusing plaintiff leave to amend his pleadings so that plaintiff may properly present plaintiff's case.

Plaintiff's Motion for Leave to File 2nd Amended Complaint is granted. The court will next address whether defendant's requested conditions to grant the motion should be ordered.

- Re-Depose Plaintiff

The court will grant leave to amend and impose a condition that defendant is entitled to re-depose plaintiff for a period not to exceed 30 minutes concerning the subject issues and theory newly raised in the 2nd amended complaint.

- Amend Answer

"" 'It is well established that an amendatory pleading supersedes the original one, which ceases to perform any function as a pleading.' " (*Foreman & Clark Corp. v. Fallon, supra,* 3 Cal.3d at p. 884, 92 Cal.Rptr. 162, 479 P.2d 362, quoting *Meyer v. State Board of Equalization* (1954) 42 Cal.2d 376, 384, 267 P.2d 257.) Thus, an amended complaint supersedes all prior complaints. (*Grell v. Laci Le Beau Corp.* (1999) 73 Cal.App.4th 1300, 1307, 87 Cal.Rptr.2d 358; *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, 215, 32 Cal.Rptr.2d 388; 1 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2009) *1131 ¶ 6:704, p. 6–177.) The amended complaint furnishes the sole basis for the cause of action, and the original complaint ceases to have any effect either as a pleading or as a basis for judgment. (*Anmaco, Inc. v. Bohlken* (1993) 13 Cal.App.4th 891, 901, 16 Cal.Rptr.2d 675(State Compensation Ins. Fund v. Superior Court (2010) 184 Cal.App.4th 1124, 1130.)

An original answer can stand as an answer to amended complaint where the amendment does not change the cause of action or where the original plea or answer sets forth a sufficient defense to the complaint as amended. "In *Gray v. Hall* (1928) 203 Cal. 306, 265 p. 246, the court, in a watershed decision, stated as follows:¶ "It has been generally held that where a plaintiff amends his declaration or complaint so as to change the cause of action, or add a new one, it constitutes an abandonment of the original issues, and judgment by default may be

taken against the defendant if he fails to file a new or amended answer or plea within the time allowed therefor, notwithstanding the original answer or plea is still on file. [Citation.] This rule is without application, however, where the amendment is merely as to formal or immaterial matters, and does not change the cause of action; nor does it apply where the original plea or answer set forth a sufficient defense to the declaration or complaint as amended. [Citations.] ¶ "... ¶ "... 'In short, when a complaint is amended after answer, the defendant is not bound to answer *de novo.* He may do so if he chooses; but, if he does not elect to do so, his original answer stands as his answer to the amended complaint; and in such case he will not be in default except as to the additional facts set up in the amended complaint, and not put in issue by the answer....' " (*Id.,* at pp. 311, 313, 265 p. 246.) ¶ The court went on to hold that entry of a default in a case where the original answer can stand as an answer to the amended complaint constitutes error." (Emphasis added.) (Carrasco v. Craft (1985) 164 Cal.App.3d 796, 808–809.) The appellate court concluded after comparing the original and 1st amended complaints filed in the action: "As to defendants Craft and Barton, no new causes of action are stated in the amended complaint. Thus, as a matter of law, defendants' original answer could stand as an answer to the amended complaint and, therefore, it was error to enter the default and default judgment on the basis that the defendants failed to file an answer to the amended complaint." (Carrasco v. Craft (1985) 164 Cal.App.3d 796, 811.)

There is no need to grant leave to amend the answer to respond to the new allegations and theories in the 2nd amended complaint, because defendant has that option once a complaint is amended.

In summary, plaintiff's motion for leave to file 2nd amended complaint is granted subject to the condition that defendant is entitled to re-depose plaintiff for a period not to exceed 30 minutes concerning the subject issues and theory newly raised in the 2nd amended complaint.

TENTATIVE RULING # 7: PLAINTIFF'S MOTION FOR LEAVE TO FILE 2ND AMENDED COMPLAINT IS GRANTED SUBJECT TO THE CONDITION THAT DEFENDANT IS ENTITLED TO RE-DEPOSE PLAINTIFF FOR A PERIOD NOT TO EXCEED 30 MINUTES CONCERNING THE SUBJECT ISSUES AND THEORY NEWLY RAISED IN THE 2ND AMENDED COMPLAINT. PLAINTIFF IS TO FILE AN ORIGINAL, EXECUTED 2ND AMENDED COMPLAINT AS PROPOSED AND SERVE ON DEFENDANT A COPY OF THE EXECUTED 2ND AMENDED COMPLAINT. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN

WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 28, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

8. MILLER v. MOSS PC-20210200

Hearing Re: Default Judgment.

On April 16, 2021 plaintiffs filed an action against defendant asserting causes of action for libel, trade libel and false light. The complaint alleges that defendant sustained special damages in the amount of $250,000 arising from loss of old clients, failure to obtain new clients, loss of good will, and injury to business reputation. (Complaint, paragraphs 15, 26, and 37.)

The proof of service filed on November 24, 2021 declares that on October 28, 2021 a registered process server personally served defendant with the summons, complaint, notice to litigants, and a statement of damages. Default was entered against defendant on December 9, 2021.

Another proof of service of the summons and complaint and statement of damages filed on May 19, 2022 declares that a registered process server served defendant by substituted service at home on January 29, 2022 by serving Rylan Moss, co-occupant, with follow up mailing to the address by mail on February 2, 2022.

Default was entered on June 13, 2022 against defendant and the request for default verified defendant's non-military status. The proof of service declares that on June 13, 2022 notice of request to enter default was served by mail on defendant to the address at which defendant was served.

After default the plaintiff may apply to the court for the relief demanded in the complaint; the court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her favor for such sum not exceeding the amount stated in the complaint, in the statement required

by Section 425.11, or in the statement provided for by Section 425.115, as appears by such evidence to be just. (Code of Civil Procedure, § 585(b).)

If a plaintiff seeks damages for personal injury or wrongful death and a defendant does not request a statement of damages from the plaintiff, the plaintiff shall serve the statement on the defendant before a default may be taken. (Code of Civil Procedure, § 425.11(c).)

The Third District Court of Appeal has held with regard to sufficient allegations of the amount of damages in order to enter a default judgment: "Under *Greenup* and *Schwab,* this is insufficient to give the requisite notice of the amount of damages claimed. In order to meet the notice requirements imposed by due process, a plaintiff must either give notice of the damages claimed in a separate statement of damages or by the allegations of the complaint. To pass constitutional muster, the complaint must either allege a specific dollar amount of damages in the body or prayer or at the very least allege the boilerplate damages are "in an amount that exceeds the jurisdictional requirements" of the superior court. An allegation seeking damages "according to proof" fails to fulfill the mandate of section 425.11 or of due process. After all, a "defendant is entitled to actual notice of the liability to which he or she may be subjected, a reasonable period of time before default may be entered." (*Schwab, supra,* 53 Cal.3d at p. 435, 280 Cal.Rptr. 83, 808 P.2d 226.)" (Parish v. Peters (1991) 1 Cal.App.4th 202, 216.)

"Plaintiffs in a default judgment proceeding must prove they are entitled to the damages claimed. (Code of Civ.Proc., § 585; *Taliaferro v. Hoogs* (1963) 219 Cal.App.2d 559, 560, 33 Cal.Rptr. 415.)" (Barragan v. Banco BCH (1986) 188 Cal.App.3d 283, 302.)

""It is imperative in a default case that the trial court take the time to analyze the complaint at issue and ensure that the judgment sought is not in excess of or inconsistent with it. It is not in plaintiffs' interest to be conservative in their demands, and without any opposing party to point out the excesses, it is the duty of the court to act as gatekeeper, ensuring that only the

appropriate claims get through.” (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 868, 121 Cal.Rptr.2d 695 (*Heidary*).)” (Electronic Funds Solutions v. Murphy (2005) 134 Cal.App.4th 1161, 1179.)

The complaint alleged special damages were sought in the amount of $250,000.

The evidence by declaration of counsel regarding the amount of damages incurred as a result of the alleged statement defendant posted on the internet does not adequately prove that plaintiff suffered $25,000 in emotional distress damages; $15,000 in losses to personal and professional reputation; $50,000 in damages to the law firm’s reputation from the publication; and $25,000 for presumed economic loss to the law firm.

Plaintiff merely declares that when he learned of the publication by defendant he was hurt, very emotionally angry, and concerned about his reputation and that of his law firm. How was this being hurt, very emotionally angry, and concern manifested such that $25,000 is a reasonable amount to compensate him for emotional distress?

Plaintiff also alleges in a conclusory manner that his personal and professional reputation was damaged by the publications in an amount of $15,000; there was an negative effect on the reputation of his law firm in the amount of $50,000; and there were presumed economic damages of $25,000 to his law firm. The only facts stated in support of these conclusions is that he had potential clients and current clients ask him about the false publication by defendant. There is insufficient factual evidence provided to support the conclusions as to the amounts claimed. There is no evidence that the plaintiff and/or his firm’s business suffered a loss of any current or potential clients that asked about the publication or that the firm’s revenues dropped after the published statement by defendant.

Plaintiff is mandated to prove plaintiff is entitled to the damages claimed

TENTATIVE RULING # 8: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 28, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

9. PEOPLE v. RODRIGUEZ PCL-20190512

Petition for Forfeiture.

The People filed a petition for forfeiture of certain funds seized pursuant to the provisions of Health and Safety Code, §§ 11469, et seq. The unverified petition contends: the sum of $2,775 in U.S. Currency was seized by the El Dorado County Sheriff's Office on or about March 28, 2019; such funds are currently in the hands of the El Dorado County District Attorney's Office; the property became subject to forfeiture pursuant to Health and Safety Code, § 11470(f), because that money was a thing of value furnished or intended to be furnished by a person in exchange for a controlled substance, the proceeds was traceable to such an exchange, and the money was used or intended to be used to facilitate a violation of Health and Safety Code, § 11358; the claimant/respondent filed a claim opposing forfeiture in which he contends the funds are his; a criminal case pertaining to the property and related allegations of violations of Health and Safety Code, §§ 11351, 11366, 11352(a), and 11379(a) has been filed under case number P19CRF0095; and claimant was arraigned on May 21, 2019. The People pray for a judgment declaring that the money is forfeited to the State of California.

The People state that they do not waive their right to a jury trial, they intend to try the asset forfeiture case in conjunction with the related criminal trial pursuant to Health and Safety Code, §§ 11488.4(i)(3) and 11488.4(i)(5), and the People intend to conduct civil discovery pursuant to Health and Safety Code, § 11488.5(c)(3).

Claimant/Respondent Rodriguez filed a response to the petition denying the allegations of the unverified petition.

"The following are subject to forfeiture: ¶ * * * (f) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in

exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses, if the exchange, violation, or other conduct which is the basis for the forfeiture occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (Health and Safety Code, § 11470(f).)

"(5) If there is an underlying or related criminal action, and a criminal conviction is required before a judgment of forfeiture may be entered, the issue of forfeiture shall be tried in conjunction therewith. Trial shall be by jury unless waived by all parties. If there is no underlying or related criminal action, the presiding judge of the superior court shall assign the action brought pursuant to this chapter for trial." (Health and Safety Code, § 11488.4(i)(5).)

At the hearing on September 2, 2022 the court was advised that the underlying criminal action was still pending. The hearing was continued to 8:30 a.m. on Friday, October 28, 2022 in Department Nine. The proof of service declares that respondent and respondent's counsel were served notice of the continued hearing by mail on September 6, 2022.

TENTATIVE RULING # 9: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 28, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

10. PEOPLE v. CANALES PCL-20190258

Status of Criminal Case and Trial Readiness Hearing.

At the hearing on August 26, 2022 the court was advised that the criminal case remained pending. The court continued the status of criminal case and trial readiness hearing to September 9, 2022. At the September 9, 2022 hearing the court on its own motion continued the hearing.

The proof of service declares that People served respondent notice of the continued hearing by mail on October 5, 2022.

TENTATIVE RULING # 10: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 28, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

11. PEOPLE v. VACCARO PCL-20210592

Claim Opposing Forfeiture.

Claimant Vaccaro filed a claim opposing forfeiture in response to a notice of administrative proceedings to determine that $6,560.15 is forfeited.

"The following are subject to forfeiture: ¶ * * * (f) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, or securities used or intended to be used to facilitate any violation of Section 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, or 11383 of this code, or Section 182 of the Penal Code, or a felony violation of Section 11366.8 of this code, insofar as the offense involves manufacture, sale, possession for sale, offer for sale, or offer to manufacture, or conspiracy to commit at least one of those offenses, if the exchange, violation, or other conduct which is the basis for the forfeiture occurred within five years of the seizure of the property, or the filing of a petition under this chapter, or the issuance of an order of forfeiture of the property, whichever comes first." (<u>Health and Safety Code</u>, § 11470(f).)

"(j) The Attorney General or the district attorney of the county in which property is subject to forfeiture under Section 11470 may, pursuant to this subdivision, <u>order forfeiture of personal property not exceeding twenty-five thousand dollars ($25,000) in value</u>. The Attorney General or district attorney shall provide notice of proceedings under this subdivision pursuant to subdivisions (c), (d), (e), and (f), including: ¶ (1) A description of the property. ¶ (2) The appraised value of the property. ¶ (3) The date and place of seizure or location of any property not seized but subject to forfeiture. ¶ (4) The violation of law alleged with respect to forfeiture of

the property. ¶ (5) The instructions for filing and serving a claim with the Attorney General or the district attorney pursuant to Section 11488.5 and time limits for filing a claim and claim form. ¶ If no claims are timely filed, the Attorney General or the district attorney shall prepare a written declaration of forfeiture of the subject property to the state and dispose of the property in accordance with Section 11489. A written declaration of forfeiture signed by the Attorney General or district attorney under this subdivision shall be deemed to provide good and sufficient title to the forfeited property. The prosecuting agency ordering forfeiture pursuant to this subdivision shall provide a copy of the declaration of forfeiture to any person listed in the receipt given at the time of seizure and to any person personally served notice of the forfeiture proceedings. ¶ <u>If a claim is timely filed, then the Attorney General or district attorney shall file a petition of forfeiture pursuant to this section within 30 days of the receipt of the claim. The petition of forfeiture shall then proceed pursuant to other provisions of this chapter, except that no additional notice need be given and no additional claim need be fi</u>led." (Emphasis added.) (<u>Health and Safety Code</u>, § 11488.4(j).)

"(c)(1) If a verified claim is filed, the forfeiture proceeding shall be set for hearing on a day not less than 30 days therefrom, and the proceeding shall have priority over other civil cases. Notice of the hearing shall be given in the same manner as provided in Section 11488.4. Such a verified claim or a claim filed pursuant to subdivision (j) of Section 11488.4 shall not be admissible in the proceedings regarding the underlying or related criminal offense set forth in subdivision (a) of Section 11488. ¶ (2) The hearing shall be by jury, unless waived by consent of all parties. ¶ (3) The provisions of the Code of Civil Procedure shall apply to proceedings under this chapter unless otherwise inconsistent with the provisions or procedures set forth in this chapter. However, in proceedings under this chapter, there shall be no joinder of actions, coordination of actions, except for forfeiture proceedings, or cross-complaints, and the issues

shall be limited strictly to the questions related to this chapter." (Health and Safety Code, § 11488.5(c).)

"(d)(1) At the hearing, the state or local governmental entity shall have the burden of establishing, pursuant to subdivision (i) of Section 11488.4, that the owner of any interest in the seized property consented to the use of the property with knowledge that it would be or was used for a purpose for which forfeiture is permitted, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4. ¶ (2) No interest in the seized property shall be affected by a forfeiture decree under this section unless the state or local governmental entity has proven that the owner of that interest consented to the use of the property with knowledge that it would be or was used for the purpose charged. Forfeiture shall be ordered when, at the hearing, the state or local governmental entity has shown that the assets in question are subject to forfeiture pursuant to Section 11470, in accordance with the burden of proof set forth in subdivision (i) of Section 11488.4." (Health and Safety Code, § 11488.5(d).)

"(e) The forfeiture hearing shall be continued upon motion of the prosecution or the defendant until after a verdict of guilty on any criminal charges specified in this chapter and pending against the defendant have been decided. The forfeiture hearing shall be conducted in accordance with Sections 190 to 222.5, inclusive, Sections 224 to 234, inclusive, Section 237, and Sections 607 to 630 of the Code of Civil Procedure if trial by jury, and by Sections 631 to 636, inclusive, of the Code of Civil Procedure, if by the court. Unless the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, the court shall order the seized property released to the person it determines is entitled thereto. ¶ If the court or jury finds that the seized property was used for a purpose for which forfeiture is permitted, but does not find that a person claiming an interest therein, to which the court has determined he or she is entitled, had actual knowledge that the seized property would be or was used for a

purpose for which forfeiture is permitted and consented to that use, the court shall order the seized property released to the claimant." (Health and Safety Code, § 11488.5(e).)

The proof of service declares that on August 9, 2021 the verified claim opposing forfeiture was served by hand by mail to the District Attorney's Office and by email to a deputy public defender and two law firms. The People's petition for was filed on November 4, 2021. The proof of service declares that the petition was served on claimant's counsel by email on November 4, 2021.

Claimant's counsel has stated a jury trial would be requested in this matter.

The September 27, 2022 minute order continuing this hearing to October 28, 2022 was served by the clerk on petitioner's counsel and claimant's/respondent's counsel by email on September 27, 2022.

TENTATIVE RULING # 11: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 28, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

12. PEOPLE v. JAMES P. PMH-202100042

Hearing Re: Petition.

TENTATIVE RULING # 12: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, OCTOBER 28, 2022 IN DEPARTMENT NINE. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances.

13. GREEN v. SNIPES CONSTRUCTION PC-20200191

Cross-Defendant/Cross-Complainant R&R Raingutters, Inc.'s Motion for Determination of Good Faith Settlement.

Cross-Defendant/Cross-Complainant R&R Raingutters, Inc. has agreed to pay $2,103 in settlement of plaintiffs' claims. Cross-Defendant/Cross-Complainant R&R Raingutters, Inc. now moves for a court determination under Code of Civil Procedure, § 877.6 that the settlement is in good faith. The proof of service filed with the court declares that the parties were served notice of the hearing and copies of the moving papers by File and Serve Xpress electronic service on September 22, 2022. There was no opposition to the motion in the court's file at the time this ruling was prepared.

Any party to an action in which it is alleged that two or more parties are joint tortfeasors is entitled to a court hearing on the issue of the good faith of a settlement between the plaintiff and one or more of the alleged tortfeasors. (Code of Civil Procedure, § 877.6(a)(1).)

The application shall indicate the settling parties, and the basis, terms, and amount of the settlement. (Code of Civil Procedure, § 877.6(a)(2).)

The issue of good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing and any counteraffidavits filed in response, or the court may, in its discretion, receive other evidence at the hearing. (Code of Civil Procedure, § 877.6(b).)

A determination by the court that the settlement was made in good faith bars any other joint tortfeasor from bringing any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault. (Code of Civil Procedure, § 877.6(c).)

In Tech-Built v. Woodward-Clyde & Associates (1985) 38 Cal.3rd 448, the California Supreme Court addressed the good faith requirement for settlements under Section 877.6. The policies underlying the requirement, the Court said, "require that a number of factors be taken into account including a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of non-settling defendants." (Tech-Built v. Woodward-Clyde & Associates (1985) 38 Cal.3rd 448, 499.)

However, as noted in City of Grand Terrace v. Superior Court (1987) 192 Cal.App.3rd 1251, the overwhelming majority of applications for a good faith determination are unopposed and a full factual response to all of the Tech-Built factors would be a waste of valuable time and resources. So, when no one objects, a "barebones motion which sets forth the ground of good faith, accompanied by a declaration which sets forth a brief background of the case is sufficient." (City of Grand Terrace v. Superior Court (1987) 192 Cal.App.3rd 1251, 1261.)

In the present case, the Court has reviewed the application of Cross-Defendant/Cross-Complainant R&R Raingutters, Inc. The application, which is not opposed, sets forth the basic statutory elements. Accordingly, the court finds that settlement is in good faith.

TENTATIVE RULING # 13: THE MOTION IS GRANTED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE

TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 28, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

14. CHOY v. RIBEIRO DEVELOPMENT, INC. PC-20120295

(1) Plaintiffs' Motion to Strike Costs.

(2) Defendants' Motion for Attorney Fees.

TENTATIVE RULING # 14: THESE MATTERS ARE CONTINUED TO 8:30 A.M. ON FRIDAY, NOVEMBER 4, 2022 IN DEPARTMENT NINE.

15. SHINGLE SPRINGS BAND OF MIWOK INDIANS v. DAY 22UD0278

Defendant's Motion to Quash Service of the Summons and Complaint.

Plaintiff filed a complaint against defendants for unlawful detainer

Defendant specially appears to move to quash service of the summons and complaint on the following grounds: defendant was unlawfully personally served, because the registered process server violated the requirements of Code of Civil Procedure, § 415.21 regarding gated communities, thereby trespassing on defendant's property when he was personally served the summons, complaint, and other litigation documents.

Plaintiff opposes the motion on the following grounds: defendant was lawfully and properly served by personal service as provided in Code of Civil Procedure, § 415.10; defendant is well aware that Section 415.21 only applies to manned, gated communities and is fully aware that the gate at the subject subdivision is not manned; and since the service was effected by a registered process server, the server's entry onto the property is privileged and not illegal as provided in Penal Code, §§ 602 and 602.8(c)(3).

There was no reply in the court's file at the time this ruling was prepared.

"A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes: ¶ (1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her." (Code of Civil Procedure, § 418.10(a)(1).)

""[C]ompliance with the statutory procedures for service of process is essential to establish personal jurisdiction. [Citation.] Thus, a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void." (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1444, 29 Cal.Rptr.2d 746.) ¶ When a defendant

argues that service of summons did not bring him or her within the trial court's jurisdiction, the plaintiff has "the burden of proving the facts that did give the court jurisdiction, that is the facts requisite to an effective service." (*Coulston v. Cooper* (1966) 245 Cal.App.2d 866, 868, 54 Cal.Rptr. 302.) ¶ "When an issue is tried on affidavits, the rule on appeal is that those affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed." (*Griffith Co. v. San Diego Col. for Women* (1955) 45 Cal.2d 501, 508, 289 P.2d 476.) But we "independently review [the trial court's] statutory interpretations and legal conclusions [citations]." (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1230, 113 Cal.Rptr.3d 147 (*Gorham*).)" (American Express Centurion Bank v. Zara (2011) 199 Cal.App.4th 383, 387.)

"A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of such delivery. ¶ The date upon which personal delivery is made shall be entered on or affixed to the face of the copy of the summons at the time of its delivery. However, service of a summons without such date shall be valid and effective." (Code of Civil Procedure, § 415.10.)

"On a motion to quash service of summons, the plaintiff bears the burden of proving by a preponderance of the evidence that all jurisdictional criteria are met. (*Mihlon v. Superior Court* (1985) 169 Cal.App.3d 703, 710, 215 Cal.Rptr. 442; *Ziller Electronics Lab GmbH v. Superior Court* (1988) 206 Cal.App.3d 1222, 1232, 254 Cal.Rptr. 410 (Ziller).) The burden must be met by competent evidence in affidavits and authenticated documents; an unverified complaint may

not be considered as supplying the necessary facts. (*Ziller*, supra, 206 Cal.App.3d at p. 1233, 254 Cal.Rptr. 410.)" (Nobel Floral, Inc. v. Pasero (2003) 106 Cal.App.4th 654, 657-658.)

"The return of a process server registered pursuant to Chapter 16 (commencing with Section 22350) of Division 8 of the Business and Professions Code upon process or notice establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return." (Evidence Code, § 647.)

"The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate." (Evidence Code, § 604.)

The Third District Court of Appeal has stated: "A presumption affecting the burden of producing evidence requires the ultimate fact to be found from proof of the predicate facts in the absence of other evidence. If contrary evidence is introduced then the presumption has no further effect and the matter must be determined on the evidence presented. (Evid.Code, § 604.)" (In re Heather B. (1992) 9 Cal.App.4th 535, 561.)

The proof of service executed by a register process server declares: defendant was personally served the summons, complaint, mandatory cover sheet, and supplemental allegations on August 29, 2022 at the address of the rented premises in Placerville.

The sole factual evidence submitted by defendant in support of the motion to quash personal service is defendant's declaration wherein defendant declares: defendant opened defendant's front door on August 29, 2022 and an unidentified man on his doorstep handed him an envelope and told defendant that it was legal documents; defendant informed him that

he was trespassing; and at no time did he identify himself as a process server or verify defendant's identity.

The defendant's statements as to the lawfulness of the personal service, that the process serve was trespassing and the strict requirements for service of process are merely opinions and conclusions of law that are not admissible evidence.

Defendant's declaration effectively admits he was personally served the summons and complaint and other litigation documents.

The registered process server declares in opposition: on August 29, 2022 he personally served the summons and complaint on defendant by handing him the documents at the specified address in Placerville; the home is in the middle of a large subdivision; he entered the subdivision via Shingle Springs Drive from Highway 50; there is a gate prior to entering the subdivision; the gate is unmanned; when he arrived at the gate it was in a wide open position and not moving; and he drove through the open gate and through the subdivision directly to the subject property, served the papers on defendant, and left.

"(a) Notwithstanding any other law, any person shall be granted access to a gated community or a covered multifamily dwelling for a reasonable period of time for the sole purpose of performing lawful service of process or service of a subpoena upon displaying a current driver's license or other identification, and one of the following: ¶ (1) A badge or other confirmation that the individual is acting in the individual's capacity as a representative of a county sheriff or marshal, or as an investigator employed by an office of the Attorney General, a county counsel, a city attorney, a district attorney, or a public defender. ¶ (2) Evidence of current registration as a process server pursuant to Chapter 16 (commencing with Section 22350) of Division 8 of the Business and Professions Code or of licensure as a private

investigator pursuant to Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code." (Code of Civil Procedure, § 415.21(a).)

"(b) This section shall only apply to a gated community or a covered multifamily dwelling that is staffed at the time service of process is attempted by a guard or other security personnel assigned to control access to the community or dwelling." (Code of Civil Procedure, § 415.21(b).)

The factual evidence before the court establishes that Section 415.21 does not apply. Therefore, defendant's argument that failure to comply with Section 415.21 rendered the personal service invalid is entirely without merit.

In addition, a registered process server is entitled to enter posted and/or fenced land in order to serve process.

"(a) Any person who without the written permission of the landowner, the owner's agent, or the person in lawful possession of the land, willfully enters any lands under cultivation or enclosed by fence, belonging to, or occupied by, another, or who willfully enters upon uncultivated or unenclosed lands where signs forbidding trespass are displayed at intervals not less than three to the mile along all exterior boundaries and at all roads and trails entering the lands, is guilty of a public offense." (Penal Code, § 602.8(a).)

"(c) Subdivision (a) shall not apply to any of the following: ¶ * * * (3) Any person described in Section 22350 of the Business and Professions Code who is making a lawful service of process." (Penal Code, § 602.8(c)(3).)

Defendant's motion to quash service is denied.

TENTATIVE RULING # 15: DEFENDANT'S MOTION TO QUASH SERVICE IS DENIED. NO HEARING ON THIS MATTER WILL BE HELD (LEWIS V. SUPERIOR COURT (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR

ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 28, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

16. AORAKI HOLDINGS v. LABMOR ENTERPRISES, INC. PC-20190488

(1) Plaintiff's Motion to Compel Defendant Callarick Enterprises, LP to Provide Further Responses to Requests for Production, Set Three, to Impose Monetary and/or Terminating Sanctions, and for an OSC Re: Contempt as to Defendant Callarick Enterprises, LP.

(2) Plaintiff's Motion to Compel Defendant Constantly Growing, LLC to Provide Further Responses to Requests for Production, Set Three, to Impose Monetary and/or Terminating Sanctions, and for an OSC Re: Contempt as to Defendant Constantly Growing, LLC.

(3) Plaintiff's Motion to Compel Defendant Constantly Growing, Inc. to Provide Further Responses to Requests for Production, Set Three, to Impose Monetary and/or Terminating Sanctions, and for an OSC Re: Contempt as to Defendant Constantly Growing, Inc.

(4) Plaintiff's Motion to Compel Defendant Labmor Enterprises, Inc. to Provide Further Responses to Requests for Production, Set Three, to Impose Monetary and/or Terminating Sanctions, and for an OSC Re: Contempt as to Defendant Labmor Enterprises, Inc.

(5) Defendants Labmor Enterprises, Inc.'s and Labbitts' Motion for Leave to File Cross-Complaint.

Requests for OSC Re: Contempt Proceedings Against Defendants Labmor Enterprises, Inc., Callarick Enterprises, LP, Constantly Growing, LLC and Constantly Growing, Inc.

Defendants Labmor Enterprises, Inc., Callarick Enterprises, LP, Constantly Growing, LLC and Constantly Growing, Inc. each oppose the requests to find them in contempt of court for

failure to obey the court's discovery order and the ground that there has been no showing that defendants willfully disobeyed the court order or they acted with lack of diligence in responding to the discovery ordered.

Plaintiff has made no effort whatsoever to comply with the due process requirements for the court to consider holding any of the defendants in contempt. There is no affidavit and OSC proffered to be considered by the court; and no OSC issued and personally served on the defendants prior to the hearing.

"A contempt proceeding is commenced by the filing of an affidavit and a request for an order to show cause. (§ 1211, subds.(a), (b).) [Footnote omitted.] After notice to the opposing party's lawyer, the court (if satisfied with the sufficiency of the affidavit) must sign an order to show cause re contempt in which the date and time for a hearing are set forth. (§ 1212; *Arthur v. Superior Court* (1965) 62 Cal.2d 404, 408, 42 Cal.Rptr. 441, 398 P.2d 777 ['an order to show cause must be issued']; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 1999) § 9:715, p. 9(II)-47.) [Footnote omitted.] The order to show cause acts as a summons to appear in court on a certain day and, as its name suggests, to show cause why a certain thing should not be done. (*Morelli v. Superior Court* (1968) 262 Cal.App.2d 262, 269, 68 Cal.Rptr. 572.) Unless the citee has concealed himself from the court, he must be personally served with the affidavit and the order to show cause; otherwise, the court lacks jurisdiction to proceed. (§ 1015 [in civil actions in which a party is represented by an attorney, 'the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt']; see also § 1016; *Arthur v. Superior Court*, supra, 62 Cal.2d at p. 408, 42 Cal.Rptr. 441, 398 P.2d 777; and see Weil & Brown, supra, § 9:716, p. 9(11)-47.) [Footnote

omitted.]" (Cedars-Sinai Imaging Medical Group v. Superior Court (2000) 83 Cal.App.4th 1281, 1286-1287.)

The issue of holding defendants in contempt is not properly before the court and will not be considered.

Plaintiff's Motion to Compel Defendant Callarick Enterprises, LP to Provide Further Responses to Requests for Production, Set Three, and to Impose Monetary and/or Terminating Sanctions.

On December 17, 2021 the court issued a tentative ruling on several motions to compel discovery propounded on defendants Labmor Enterprises, Inc., Constantly Growing, Inc., Constantly Growing LLC, and Callarick Enterprises, LP. The tentative ruling provided: "**PLAINTIFF'S MOTIONS TO COMPEL DISCOVERY ARE GRANTED. DEFENDANT LABMOR ENTERPRISES, INC. IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CONSTANTLY GROWING, INC. IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CONSTANTLY GROWING, LLC IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CALLARICK ENTERPRISES, LP IS ORDERED TO PROVIDE FURTHER RESPONSES TO INSPECTION DEMANDS, SET**

THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANTS LABMOR ENTERPRISES, INC., CONSTANTLY GROWING, INC., AND CALLARICK ENTERPRISES, LP ARE ORDERED TO PAY MONETARY SANCTIONS TO PLAINTIFF IN THE AMOUNT OF $1,500 EACH WITHIN TEN DAYS." (Emphasis in original.)

On January 12, 2022 the court entered the tentative ruling as the ruling of the court upon stipulation of the parties, except for the payment of monetary sanctions, which the parties agreed to be deemed to have been paid without the need for additional payment. The order further directed that the defendants had ten days to serve their objection free responses. The Tentative Ruling was attached as Exhibit A to the ruling entered by the court.

Plaintiff moves to compel further responses to Requests for Production, Set Three as ordered by the court on January 12, 2022; for terminating sanctions of striking defendant's answer and entering judgment against defendant in the amount of $1,646,539.28; in the alternative, imposing issue sanctions directing that all affirmative defenses asserted by defendant are stricken, defendant is estopped from asserting any defenses to liability in causes of action numbers 1-10 set forth in the complaint, and that the alter ego allegations of the complaint are deemed established such that the acts of this defendant are deemed acts of each of the defendants in this action; and for additional monetary sanctions in the amount of $4,800.

Plaintiff argues: despite having been ordered on January 12, 2022 to produce objection free responses to the requests for production within ten days, documents were not received within ten days and were only received late when a CD was delivered in in an untrackable priority mail envelope in mid-February 2022; defendant Callarick Enterprises, LP's production only included 54 pages of publically available corporate documents; the production did not include

any correspondence between defendant Callarick Enterprises, LP and its counsel despite the court having found objections were waived; it is clear from the circumstances that defendant Callarick Enterprises, LP did not engage in a diligent search and reasonable inquiry, such as not producing any bank statements where its own documents (CE000049) indicated such accounts would be established; and terminating, issue and monetary sanctions are appropriate.

On July 22, 2022 defendant Callarick Enterprises, LP filed an opposition to the motion. Defendant Callarick Enterprises, LP opposes the motion on the following grounds: the meet and confer activities were insufficient; the responses to the requests for production set three and production of documents by defendant Callarick Enterprises, LP were sufficient as at this time defendant Callarick Enterprises, LP has already produced those documents that are in the possession, custody, or control of the defendant; the records at issue appear to be in the possession of a third party entity equally subject to discovery; there is no evidence that defendant Callarick Enterprises, LP is withholding documents under an inappropriate claim of privilege; if plaintiff believes that additional documents exist, the documents can be obtained by subpoena of the third party who possesses and controls those documents; there are no grounds to impose the terminating and issue sanctions sought; and a request for nearly $20,000 in monetary sanctions for four nearly identical discovery motions is not justified in that there is no evidence that defendant Callarick Enterprises, LP made a willful decision to withhold documents or refused to comply with the court's prior order.

Plaintiff filed a reply on July 1, 2022. Plaintiff replied: defendant Callarick Enterprises, LP did not provide a brief in opposition and did not respond to any arguments raised by plaintiff, therefore, this amounts to a non-opposition to the motion; defendant Callarick Enterprises, LP has not complied with the court's discovery order; defense counsel's declaration in opposition

has no evidentiary value and is objectively false; the argument of lack of notice of the tentative ruling procedure in the initial notice of motion lacks merit and was corrected by the amended notice filed and served; and further sanctions are the only way to remedy prejudice and deter abuse.

Non-Opposition

The opposition was timely filed on July 22, 2022 for the purposes of the actual hearing date.

Even assuming for the sake of argument that an opposition was not filed, the court must still rule on the motion on its merits.

Failure to file a written opposition or appear at a discovery motion hearing or the voluntary provision of discovery shall not be deemed an admission that the discovery motion was proper or that sanctions should be awarded. (Rules of Court, Rule 3.1348(b).)

Notice of Tentative Ruling Local Rule

Defendant Callarick Enterprises, LP raised in counsels declaration in opposition that plaintiff has once again failed to provide notice of the court's tentative ruling process as required by Local Rule. This was not raised in the memorandum of points and authorities in opposition to the motion.

The court notes that it has long been held that noncompliance with court rules, to which no penalty was attached, does not prevent the court from hearing and disposing of motions. (See Johnson v. Sun Realty Co. (1934) 138 Cal.App. 296, 299.)

The failure to include the tentative ruling notification language is not grounds to deny the motions under the circumstances before the court.

<u>Meet and Confer Requirements</u>

"It is a central precept to the Civil Discovery Act of 1986 (Code Civ.Proc., § 2016 et seq.) (hereinafter "Discovery Act") that civil discovery be essentially self-executing. (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1111, 1 Cal.Rptr.2d 222.) The Discovery Act requires that, prior to the initiation of a motion to compel, the moving party declare that he or she has made a serious attempt to obtain "an informal resolution of each issue." (§ 2025, subd. (o); *DeBlase v. Superior Court* (1996) 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229.) This rule is designed "to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order...." (*McElhaney v. Cessna Aircraft Co.* (1982) 134 Cal.App.3d 285, 289, 184 Cal.Rptr. 547.) This, in turn, will lessen the burden on the court and reduce the unnecessary expenditure of resources by litigants through promotion of informal, extrajudicial resolution of discovery disputes. (*DeBlase v. Superior Court*, supra, 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229; see also *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1981) 122 Cal.App.3d 326, 330, 175 Cal.Rptr. 888.)" (<u>Townsend v. Superior Court</u> (1998) 61 Cal.App.4th 1431, 1434-1435.) "A determination of whether an attempt at informal resolution is adequate also involves the exercise of discretion. The level of effort at informal resolution which satisfies the 'reasonable and good faith attempt' standard depends upon the circumstances. In a larger, more complex discovery context, a greater effort at informal resolution may be warranted. In a simpler, or more narrowly focused case, a more modest effort may suffice. The history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects for success and other similar factors can be relevant. Judges have broad powers and responsibilities to determine what measures and procedures are appropriate in varying circumstances. (See, e.g., Gov.Code, § 68607 [judge has responsibility to manage litigation]; Code Civ. Proc., § 128, subd. (a)(5) [judge has power

to control conduct of judicial proceeding in furtherance of justice].) Judges also have broad discretion in controlling the course of discovery and in making the various decisions necessitated by discovery proceedings. (Citations omitted.)" (Obregon v. Superior Court (1998) 67 Cal.App.4th 424, 431.) "Although some effort is required in all instances (see, e.g., *Townsend*, supra, 61 Cal.App.4th at p. 1438, 72 Cal.Rptr.2d 333 [no exception based on speculation that prospects for informal resolution may be bleak]), the level of effort that is reasonable is different in different circumstances, and may vary with the prospects for success. These are considerations entrusted to the trial court's discretion and judgment, with due regard for all relevant circumstances." (Obregon, supra at pages 432-433.)

The evidence before the court shows that sufficient meet and confer activities occurred. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraphs 13-16.; and Exhibits G-J.)

Further Responses and Enforcement of Court Discovery Order

"(a) Every court shall have the power to do all of the following: ¶ * * * (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein… (Code of Civil Procedure, § 128(a)(4).)

"A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to photograph, test, or sample any tangible things that are in the possession, custody, or control of the party on whom the demand is made." (Code of Civil Procedure, § 2031.010(c).)

"On receipt of a response to an inspection demand, the party demanding an inspection may move for an order compelling further response to the demand if the demanding party deems that any of the following apply: ¶ (1) A statement of compliance with the demand is incomplete. ¶ (2) A representation of inability to comply is inadequate, incomplete, or evasive. ¶ (3) An

objection in the response is without merit or too general." (Code of Civil Procedure, § 2031.310(a).)

"A motion under subdivision (a) shall comply with both of the following: ¶ (1) The motion shall set forth specific facts showing good cause justifying the discovery sought by the inspection demand. ¶ (2) The motion shall be accompanied by a meet and confer declaration under Section 2016.040." (Code of Civil Procedure, § 2031.310(b).)

"In the more specific context of a request to produce documents, a party who seeks to compel production must show "good cause" for the request (§ 2031, subd. (*l*))—but where, as here, there is no privilege issue or claim of attorney work product, that burden is met simply by a fact-specific showing of relevance. [Footnote omitted.] (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial 2 (Rutter 1996) ¶¶ 8:1495.6 to 8:1495.10, pp. 8H–21 to 8H–22.) That showing was made here. (Part I, *ante.*)" (Glenfed Development Corp. v. Superior Court (1997) 53 Cal.App.4th 1113, 1117.)

It appears that plaintiff's request for further responses are limited to requests for production, set three, numbers 2, 9, 28, and 80. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 14 and Exhibit H.)

Those requests seek production of the following documents: all documents that relate in any way to your business; a list of employees between 2014 and 2019; all documents that identify all banks and/or financial institutions with which you maintained an account between January 1, 2014 to the present; and all documents relating to any communications between you and Labbitt defendants relating to the instant lawsuit. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 4 and Exhibits D-1 and D-2.)

Defendant Callarick Enterprises, LP's response to request number 2 is not included in Exhibit D-2 submitted by plaintiff in support of the motion. (See Declaration of Plaintiff's

Counsel Christopher Strunk, paragraph 4 and Exhibit D-1.) Plaintiff's counsel's correspondence emailed to defense counsel on May 26, 2022 only stated that there were concerns about and a further response to number 2 was expected from the Labmor defendants. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 14 and Exhibit H –May 26, 2022 Meet and Confer Correspondence from Plaintiff's Counsel to Defense Counsel, page 2.) It is unclear whether "Labmor defendants" refers to defendant Callarick Enterprises, LLC. Therefore, under the circumstances presented, the response to request number 2 does not appear to be at issue in this motion against defendant Callarick Enterprises, LP and the request for defendant Callarick Enterprises, LP to provide a further response is denied.

Defendant Callarick Enterprises, LP responded to request number 9 regarding employee lists that after a diligent search and reasonable inquiry it was determined that there are no responsive documents in its possession custody or control and there are no documents that exist; and with respect to request number 80 concerning all documents relating to any communications between you and the Labbitt defendants relating to the instant lawsuit, defendant Callarick Enterprises, LP responded that after a diligent search and reasonable inquiry it was determined that there are no responsive documents in its possession custody, or control and there are no documents that exist. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 4 and Exhibit D-1.) The verification of the responses is not attached to Exhibit D-1.

Verified responses that a diligent search and reasonable inquiry was made that did not uncover any documents in the possession, custody, or control of the respondent and there are no documents that exist must be taken as true in the absence of evidence to the contrary that

such documents should reasonably be in existence and should reasonably be in the possession, custody or control of the respondent.

There is no evidence that the defendant Limited Partnership had any employees working for the partnership, which is reasonably possible if only the partners operated the business. Therefore, there is no evidence to the contrary that such documents should reasonably exist and should reasonably be in defendant's possession, custody, and control. The motion to compel a further response to request number 9 is denied.

Request number 80 sought all documentary communications between defendant Constantly Growing, Inc. and the Labbitt defendants relating to this lawsuit. There is evidence that defendant Callarick Enterprises, LP failed to identify and produce documents from all banks and/or financial institutions with which defendant maintained an account between January 1, 2014 to the present and that defendant's own documents produced (CE000049) indicates such accounts were to be established. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 10 and Exhibit E-4.) Request number 80 does not seek documentary communications between the Labbitt defendants and counsel or defendant Callarick Enterprises, LP and counsel. At best it would indirectly seek counsel communications that are shared between defendant Constantly Growing, Inc. and the Labbitt defendants in a documentary communication between the defendants, which could reasonably not exist. The motion to compel defendant Callarick Enterprises, LP to provide a further response and production concerning request for production, number 80 is denied.

Request number 28 sought all documents that identify all banks and/or financial institutions with which you maintained an account between January 1, 2014 to the present. There is evidence that defendant Callarick Enterprises, LP failed to identify and produce documents from all banks and/or financial institutions with which defendant maintained an account

between January 1, 2014 to the present and that defendant's own documents produced (CE000049) indicates such accounts were to be established. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 10 and Exhibit E-4.) It appears appropriate to compel a further response and production concerning request number 28.

The court found in the motion to compel order that defendants waived all objections, which would include the attorney-client privilege. There was no correspondence between defendant and counsel identified or produced by defendant Callarick Enterprises, LP. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 6.) However, the only request that conceivably includes a request for attorney client communications is request number 2 which is not at issue regarding defendant Callarick Enterprises, LP. Therefore, that fact does not support a claim that certain documents were not produced that should exist in defendant's possession, custody or control.

The remaining evidence of documents that should reasonably be in defendants' possession, custody and control relate to documents concerning Labmor Enterprises, Inc., Constantly Growing, LLC, and Constantly Growing, Inc. (Declaration of Plaintiff's Counsel Christopher Strunk, paragraphs 8-11; and Exhibits E-1, E-2, E-3 and E-4.)

There is a problem that plaintiff's Exhibit D-1 responses of defendant Callarick Enterprises, LP lacks the verification page attached to the Exhibit. The court grants the motion in part and denies it in part as described in the text of the ruling, orders that the responses be verified, and orders defendant Callarick Enterprises, LP provide a further response and production of all documents that identify all banks and/or financial institutions with which defendant maintained an account between January 1, 2014 to the present sought in request number 28.

Sanctions

"Misuses of the discovery process include, but are not limited to, the following: ¶ * * * (g) Disobeying a court order to provide discovery…" (Code of Civil Procedure, § 2023.010(g).)

"To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process: ¶ * * * If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code of Civil Procedure, § 2023.030(a).) The court is not required to find that the evidence establishes that the failure to comply with the court's discovery order was in bad faith. The court is mandated by statute to impose the monetary sanctions unless it makes a finding that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

"'Discovery sanctions "should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." [Citations.] "'The trial court has a wide discretion in granting discovery and ... is granted broad discretionary powers to enforce its orders but its powers are not unlimited.... [¶] The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks, but the court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose punishment. [Citations.]'" [Citations.]' (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 487-488, 282 Cal.Rptr. 530; accord *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35, 9 Cal.Rptr.2d 396.)" (Vallbona v.

Springer (1996) 43 Cal.App.4th 1525, 1545.) "We recognize that terminating sanctions are to be used sparingly, only when the trial court concludes that lesser sanctions would not bring about the compliance of the offending party." (R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal.App.4th 486, 496.) "Discovery sanctions must be tailored in order to remedy the offending party's discovery abuse, should not give the aggrieved party more than what it is entitled to, and should not be used to punish the offending party. We review the trial court's order under the deferential abuse of discretion standard. (*Do It Urself, supra,* 7 Cal.App.4th at p. 35, 9 Cal.Rptr.2d 396.) [Footnote omitted.]" (Karlsson v. Ford Motor Co. (2006) 140 Cal.App.4th 1202, 1217.)

The Third District Court of Appeal has held: "The sanction of dismissal or the rendition of a default judgment against the disobedient party is ordinarily a drastic measure which should be employed with caution. (*Deyo v. Kilbourne*, supra, 84 Cal.App.3d at p. 793, 149 Cal.Rptr. 499.) The sanction of dismissal, where properly employed, is justified on the theory the party's refusal to reveal material evidence tacitly admits his claim or defense is without merit. (Ibid.; *Kahn v. Kahn*, supra, 68 Cal.App.3d at p. 382.)" (Puritan Ins. Co. v. Superior Court (1985) 171 Cal.App.3d 877, 885.)

The court finds that it is not appropriate to impose the drastic measure of termination of the plaintiff's case by striking the answer and entering judgment against defendant in the amount of $1,646,539.28 or impose drastic issue sanctions in the first instance of failure to fully comply with a discovery order. The court is not convinced that lesser sanctions will not bring about compliance. The request for issue and terminating sanctions is denied.

"…If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial

justification or that other circumstances make the imposition of the sanction unjust." (Code of Civil Procedure, § 2023.030(a).)

"Except as provided in subdivision (j), the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust" (Code of Civil Procedure, § 2031.310(h).)

Plaintiff requests monetary sanctions in the amount of $4,830 representing the fees incurred for attorney services to prepare the four motions to compel that appear to be nearly identical and the filing fee of $30. The court finds that it is appropriate to order defendant Callarick Enterprises, LP to pay plaintiff $1,230 in monetary sanctions.

Plaintiff's Motion to Compel Defendant Constantly Growing, LLC to Provide Further Responses to Requests for Production, Set Three, and to Impose Monetary and/or Terminating Sanctions.

On December 17, 2021 the court issued a tentative ruling in several motions to compel discovery propounded on defendants Labmor Enterprises, Inc., Constantly Growing, Inc., Constantly Growing LLC, and Callarick Enterprises, LP. The tentative ruling provided: "**PLAINTIFF'S MOTIONS TO COMPEL DISCOVERY ARE GRANTED. DEFENDANT LABMOR ENTERPRISES, INC. IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CONSTANTLY GROWING, INC. IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL**

INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CONSTANTLY GROWING, LLC IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CALLARICK ENTERPRISES, LP IS ORDERED TO PROVIDE FURTHER RESPONSES TO INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANTS LABMOR ENTERPRISES, INC., CONSTANTLY GROWING, INC., AND CALLARICK ENTERPRISES, LP ARE ORDERED TO PAY MONETARY SANCTIONS TO PLAINTIFF IN THE AMOUNT OF $1,500 EACH WITHIN TEN DAYS." (Emphasis in original.)

On January 12, 2022 the court entered the tentative ruling as the ruling of the court upon stipulation of the arties, except for the payment of monetary sanctions, which the parties agreed to be deemed to have been paid without the need for additional payment. The order further directed that the defendants had ten days to serve their objection free responses. The Tentative Ruling was attached as Exhibit A to the ruling entered by the court.

Plaintiff moves to compel further responses to Requests for Production, Set Three as ordered by the court on January 12, 2022; for terminating sanctions of striking defendant's answer and entering judgment in favor and against defendant in the amount of $1,646,539.28; in the alternative, imposing issue sanctions directing that all affirmative defenses asserted by defendant are stricken, defendant is estopped from asserting any defenses to liability set forth in causes of action numbers 1-10 set forth in the complaint, and that the alter ego allegations

of the complaint are deemed established such that the acts of this defendant are deemed acts of each of the defendant in this action; and for additional monetary sanctions in the amount of $4,800.

Plaintiff argues: despite having been ordered on January 12, 2022 to produce objection free responses to the request for production within ten days, documents were not received within ten days and were only received late when a CD was delivered in in an untrackable priority mail envelope in mid-February 2022; defendant Constantly Growing, LLC's production only included 18 pages of documents retaining redactions; any redactions are de facto repudiation of the court's order; the production did not include any correspondence between defendant Constantly Growing, LLC and its counsel despite the court having found the attorney-client privilege was waived; it is clear from the circumstances that defendant Constantly Growing, LLC did not engage in a diligent search and reasonable inquiry, such as only producing 18 pages of documents retaining redactions; and terminating, issue and monetary sanctions are appropriate.

On July 22, 2022 defendant Constantly Growing, LLC filed an opposition to the motion. Defendant Constantly Growing, LLC opposes the motion on the following grounds: the meet and confer activities were insufficient; the responses to the requests for production set three and production of documents by defendant Constantly Growing, LLC were sufficient as at this time defendant Constantly Growing, LLC has already produced those documents that are in the possession, custody, or control of the defendant; the records at issue appear to be in the possession of a third party entity equally subject to discovery; there is no evidence that defendant Constantly Growing, LLC is withholding documents under an inappropriate claim of privilege; if plaintiff believes that additional documents exist, the documents can be sought by subpoena of the third party who possesses and controls those documents; there are no

grounds to impose the terminating and issue sanctions sought; and a request for nearly $20,000 in monetary sanctions for four nearly identical discovery motions is not justified in that there is no evidence that defendant Constantly Growing, LLC made a willful decision to withhold documents or refused to comply with the court's prior order.

Plaintiff filed a reply on July 1, 2022. Plaintiff replied: defendant Constantly Growing, LLC did not provide a brief in opposition and did not respond to any arguments raised by plaintiff, therefore, this amounts to a non-opposition to the motion; defendant Constantly Growing, LLC has not complied with the court's discovery order; defense counsel's declaration in opposition has no evidentiary value and is objectively false; the argument of lack of notice of the tentative ruling procedure in the initial notice of motion lacks merit and was corrected by the amended notice filed and served; and further sanctions are the only way to remedy prejudice and deter abuse.

Non-Opposition

The opposition was timely filed on July 22, 2022 for the purposes of the actual hearing date.

Even assuming for the sake of argument that an opposition was not filed, the court must still rule on the motion on its merits.

Failure to file a written opposition or appear at a discovery motion hearing or the voluntary provision of discovery shall not be deemed an admission that the discovery motion was proper or that sanctions should be awarded. (Rules of Court, Rule 3.1348(b).)

Notice of Tentative Ruling Local Rule

Defendant Constantly Growing, LLC raised in counsel's declaration in opposition that plaintiff has once again failed to include the notice of the court's tentative ruling process as required by Local Rule. This was not raised in the memorandum of points and authorities in opposition to the motion.

The court notes that it has long been held that noncompliance with court rules, to which no penalty was attached, does not prevent the court from hearing and disposing of motions. (See Johnson v. Sun Realty Co. (1934) 138 Cal.App. 296, 299.)

The failure to include the tentative ruling notification language is not grounds to deny the motions under the circumstances before the court.

Meet and Confer Requirements

"It is a central precept to the Civil Discovery Act of 1986 (Code Civ.Proc., § 2016 et seq.) (hereinafter "Discovery Act") that civil discovery be essentially self-executing. (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1111, 1 Cal.Rptr.2d 222.) The Discovery Act requires that, prior to the initiation of a motion to compel, the moving party declare that he or she has made a serious attempt to obtain "an informal resolution of each issue." (§ 2025, subd. (o); *DeBlase v. Superior Court* (1996) 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229.) This rule is designed "to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order...." (*McElhaney v. Cessna Aircraft Co.* (1982) 134 Cal.App.3d 285, 289, 184 Cal.Rptr. 547.) This, in turn, will lessen the burden on the court and reduce the unnecessary expenditure of resources by litigants through promotion of informal, extrajudicial resolution of discovery disputes. (*DeBlase v. Superior Court*, supra, 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229; see also *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1981) 122 Cal.App.3d 326, 330, 175 Cal.Rptr. 888.)" (Townsend v. Superior Court (1998) 61 Cal.App.4th 1431, 1434-1435.) "A determination of whether an attempt at informal resolution is adequate also involves the exercise of discretion. The level of effort at informal resolution which satisfies the 'reasonable and good faith attempt' standard depends upon the circumstances. In a larger, more complex discovery context, a greater effort at informal resolution may be warranted. In a simpler, or more narrowly focused case, a more modest effort may suffice. The history of the

litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects for success and other similar factors can be relevant. Judges have broad powers and responsibilities to determine what measures and procedures are appropriate in varying circumstances. (See, e.g., Gov.Code, § 68607 [judge has responsibility to manage litigation]; Code Civ. Proc., § 128, subd. (a)(5) [judge has power to control conduct of judicial proceeding in furtherance of justice].) Judges also have broad discretion in controlling the course of discovery and in making the various decisions necessitated by discovery proceedings. (Citations omitted.)" (Obregon v. Superior Court (1998) 67 Cal.App.4th 424, 431.) "Although some effort is required in all instances (see, e.g., *Townsend*, supra, 61 Cal.App.4th at p. 1438, 72 Cal.Rptr.2d 333 [no exception based on speculation that prospects for informal resolution may be bleak]), the level of effort that is reasonable is different in different circumstances, and may vary with the prospects for success. These are considerations entrusted to the trial court's discretion and judgment, with due regard for all relevant circumstances." (Obregon, supra at pages 432-433.)

The evidence before the court shows that sufficient meet and confer activities occurred. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraphs 13-16.; and Exhibits G-J.)

Further Responses and Enforcement of Court Discovery Order

"(a) Every court shall have the power to do all of the following: ¶ * * * (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein… (Code of Civil Procedure, § 128(a)(4).)

"A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to photograph, test, or

sample any tangible things that are in the possession, custody, or control of the party on whom the demand is made." (Code of Civil Procedure, § 2031.010(c).)

"On receipt of a response to an inspection demand, the party demanding an inspection may move for an order compelling further response to the demand if the demanding party deems that any of the following apply: ¶ (1) A statement of compliance with the demand is incomplete. ¶ (2) A representation of inability to comply is inadequate, incomplete, or evasive. ¶ (3) An objection in the response is without merit or too general." (Code of Civil Procedure, § 2031.310(a).)

"A motion under subdivision (a) shall comply with both of the following: ¶ (1) The motion shall set forth specific facts showing good cause justifying the discovery sought by the inspection demand. ¶ (2) The motion shall be accompanied by a meet and confer declaration under Section 2016.040." (Code of Civil Procedure, § 2031.310(b).)

"In the more specific context of a request to produce documents, a party who seeks to compel production must show "good cause" for the request (§ 2031, subd. (*l*))—but where, as here, there is no privilege issue or claim of attorney work product, that burden is met simply by a fact-specific showing of relevance. [Footnote omitted.] (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial 2 (Rutter 1996) ¶¶ 8:1495.6 to 8:1495.10, pp. 8H–21 to 8H–22.) That showing was made here. (Part I, *ante.*)" (Glenfed Development Corp. v. Superior Court (1997) 53 Cal.App.4th 1113, 1117.)

It appears that plaintiff's request for further responses are limited to requests for production, set three, numbers 2, 9, 28, and 80. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 14 and Exhibit H.)

Those requests seek production of the following documents: all documents that in relate in any way to your business; a list of employees between 2014 and 2019; all documents that

identify all banks and/or financial institutions with which defendant maintained an account between January 1, 2014 to the present; and all documents relating to any communications between defendant and the Labbitt defendants relating to the instant lawsuit. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 4 and Exhibit D-3.)

Defendant Constantly Growing, LLC responded to request number 2 seeking all documents that relate in any way to defendant's business that after a diligent search and reasonable inquiry it was determined that there are no responsive documents in its possession custody or control in existence and the entity was dissolved in May 25, 2016. Only 18 pages of documents retaining redactions were produced. (Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 11; and Exhibit E-4.)

Verified responses that a diligent search and reasonable inquiry was made that did not uncover any documents in the possession, custody, or control of the respondent and there are no documents that exist must be taken as true in the absence of evidence to the contrary that such documents should reasonably be in existence and should reasonably be in the possession, custody or control of the respondent.

The requests were propounded on August 18, 2021. The verified response to request number 2 states that the LLC was dissolved on May 25, 2016, over five years before the request for production was propounded. There is no evidence before the court that it would be unreasonable for a dissolved entity to not retain business records for more than five years after dissolution. Therefore, it would appear that a blanket order to respond under oath again and produce documents that defendant previously declared under oath to not exist would not be appropriate under the circumstances.

However, since defendant Constantly Growing, LLC was ordered to provide further responses and production without objection, the redactions of the documents produced are

improper and the court orders that defendant Constantly Growing, LLC provide further production of the redacted documents without any redactions.

Defendant Constantly Growing, LLC responded to request number 9 regarding employee lists that after a diligent search and reasonable inquiry it was determined that there are no responsive documents in its possession custody or control as such documents do not exist; defendant responded to request number 28 seeking all documents that identify all banks and/or financial institutions with which you maintained an account between January 1, 2014 to the present was that after a diligent search and reasonable inquiry it was determined that there are no responsive documents in its possession, custody or control as no such documents exist and the entity was dissolved in May 25, 2016; and with respect to request number 80 concerning all documents relating to any communications between you and the Labbitt defendants relating to the instant lawsuit, defendant Constantly Growing, LLC responded that after a diligent search and reasonable inquiry it was determined that there are no responsive documents in its possession custody or control as no such documents exist and the entity was dissolved in May 25, 2016. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 4 and Exhibit D-3.)

The requests were propounded on August 18, 2021. There is no evidence before the court that it would be unreasonable for a dissolved entity to not retain employee lists, documentation identifying business bank accounts and financial institution accounts, and/or documents relating to any communications between defendant Constantly Growing, LLC and the Labbitt defendants relating to the instant lawsuit for more than five years after dissolution. Therefore, it would appear that a blanket order to respond to request numbers 9, 28, and 80 under oath again and produce documents that defendant previously declared under oath to not exist

would not be appropriate under the circumstances. The motion to compel further responses to requests for production, set three numbers 9, 8, and 80 is denied.

Sanctions

"Misuses of the discovery process include, but are not limited to, the following: ¶ * * * (g) Disobeying a court order to provide discovery…" (Code of Civil Procedure, § 2023.010(g).)

"To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process: ¶ * * * If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code of Civil Procedure, § 2023.030(a).) The court is not required to find that the evidence establishes that the failure to comply with the court's discovery order was in bad faith. The court is mandated by statute to impose the monetary sanctions unless it makes a finding that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

"'Discovery sanctions "should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." [Citations.] "'The trial court has a wide discretion in granting discovery and ... is granted broad discretionary powers to enforce its orders but its powers are not unlimited.... [¶] The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks, but the court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose punishment. [Citations.]'" [Citations.]' (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231

Cal.App.3d 481, 487-488, 282 Cal.Rptr. 530; accord *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35, 9 Cal.Rptr.2d 396.)" (Vallbona v. Springer (1996) 43 Cal.App.4th 1525, 1545.) "We recognize that terminating sanctions are to be used sparingly, only when the trial court concludes that lesser sanctions would not bring about the compliance of the offending party." (R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal.App.4th 486, 496.) "Discovery sanctions must be tailored in order to remedy the offending party's discovery abuse, should not give the aggrieved party more than what it is entitled to, and should not be used to punish the offending party. We review the trial court's order under the deferential abuse of discretion standard. (*Do It Urself, supra,* 7 Cal.App.4th at p. 35, 9 Cal.Rptr.2d 396.) [Footnote omitted.]" (Karlsson v. Ford Motor Co. (2006) 140 Cal.App.4th 1202, 1217.)

The Third District Court of Appeal has held: "The sanction of dismissal or the rendition of a default judgment against the disobedient party is ordinarily a drastic measure which should be employed with caution. (*Deyo v. Kilbourne*, supra, 84 Cal.App.3d at p. 793, 149 Cal.Rptr. 499.) The sanction of dismissal, where properly employed, is justified on the theory the party's refusal to reveal material evidence tacitly admits his claim or defense is without merit. (Ibid.; *Kahn v. Kahn*, supra, 68 Cal.App.3d at p. 382.)" (Puritan Ins. Co. v. Superior Court (1985) 171 Cal.App.3d 877, 885.)

The court finds that it is not appropriate to impose the drastic measure of termination of the plaintiff's case by striking the answer and entering judgment against defendant in the amount of $1,646,539.28 or impose drastic issue sanctions in the first instance of failure to fully comply with a discovery order. The court is not convinced that lesser sanctions will not bring about compliance. The request for issue and terminating sanctions is denied.

"…If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code of Civil Procedure, § 2023.030(a).)

"Except as provided in subdivision (j), the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust" (Code of Civil Procedure, § 2031.310(h).)

Plaintiff requests monetary sanctions in the amount of $4,830 representing the fees incurred for attorney services to prepare the four motions to compel that appear to be nearly identical and the filing fee of $30. The court finds that it is appropriate to order defendant Constantly Growing, LLC to pay plaintiff $1,230 in monetary sanctions.

Plaintiff's Motion to Compel Defendant Constantly Growing, Inc. to Provide Further Responses to Requests for Production, Set Three, and to Impose Monetary and/or Terminating Sanctions.

On December 17, 2021 the court issued a tentative ruling in several motions to compel discovery propounded on defendants Labmor Enterprises, Inc., Constantly Growing, Inc., Constantly Growing LLC, and Callarick Enterprises, LP. The tentative ruling provided: "**PLAINTIFF'S MOTIONS TO COMPEL DISCOVERY ARE GRANTED. DEFENDANT LABMOR ENTERPRISES, INC. IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS**

REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CONSTANTLY GROWING, INC. IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CONSTANTLY GROWING, LLC IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CALLARICK ENTERPRISES, LP IS ORDERED TO PROVIDE FURTHER RESPONSES TO INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANTS LABMOR ENTERPRISES, INC., CONSTANTLY GROWING, INC., AND CALLARICK ENTERPRISES, LP ARE ORDERED TO PAY MONETARY SANCTIONS TO PLAINTIFF IN THE AMOUNT OF $1,500 EACH WITHIN TEN DAYS." (Emphasis in original.)

On January 12, 2022 the court entered the tentative ruling as the ruling of the court upon stipulation of the arties, except for the payment of monetary sanctions, which the parties agreed to be deemed to have been paid without the need for additional payment. The order further directed that the defendants had ten days to serve their objection free responses. The Tentative Ruling was attached as Exhibit A to the ruling entered by the court.

Plaintiff moves to compel further responses to Requests for Production, Set Three as ordered by the court on January 12, 2022; for terminating sanctions of striking defendant's answer and entering judgment in favor and against defendant in the amount of $1,646,539.28; in the alternative, imposing issue sanctions directing that all affirmative defenses asserted by

defendant are stricken, defendant is estopped from asserting any defenses to liability set forth in causes of action numbers 1-10 set forth in the complaint, and that the alter ego allegations of the complaint are deemed established such that the acts of this defendant are deemed acts of each of the defendant in this action; for additional monetary sanctions in the amount of $4,800.

Plaintiff argues: despite having been ordered on January 12, 2022 to produce objection free responses to the request for production within ten days, documents were not received within ten days and were only received late when a CD was delivered in in an untrackable priority mail envelope in mid-February 2022; defendant Constantly Growing, Inc.'s production only included 250 additional pages of documents; the production did not include any correspondence between defendant Constantly Growing, Inc. and its counsel despite the court having found the attorney-client privilege was waived; it is clear from the circumstances that defendant Constantly Growing, Inc. did not engage in a diligent search and reasonable inquiry, such as only producing Capital One year end summaries for the past two years (CGO0000402 – CGI0000428), yet Capital One makes clear that documents are available for the past seven years; and terminating, issue and monetary sanctions are appropriate.

On July 22, 2022 defendant Constantly Growing, Inc. filed an opposition to the motion. Defendant Constantly Growing, Inc. argues in opposition: the meet and confer activities were insufficient; the responses to the requests for production set three and production of documents by defendant Constantly Growing, Inc. were sufficient as at this time defendant Constantly Growing, Inc. has already produced those documents that are in the possession, custody, or control of the defendant; the records at issue appear to be in the possession of a third party entity equally subject to discovery; there is no evidence that defendant Constantly Growing, Inc. is withholding documents under an inappropriate claim of privilege; if plaintiff

believes that additional documents exist, those documents may be sought by subpoena of the third party who possesses and controls those documents; there are no grounds to impose the terminating and issue sanctions sought; and a request for nearly $20,000 in monetary sanctions for four nearly identical discovery motions is not justified in that there is no evidence that defendant Constantly Growing, Inc. made a willful decision to withhold documents or refused to comply with the court's prior order.

Plaintiff filed a reply on July 1, 2022. Plaintiff replied: defendant Constantly Growing, Inc. did not provide a brief in opposition and did not respond to any arguments raised by plaintiff, therefore, this amounts to a non-opposition to the motion; defendant Constantly Growing, Inc. has not complied with the court's discovery order; defense counsel's declaration in opposition has no evidentiary value and is objectively false; the argument of lack of notice of the tentative ruling procedure in the initial notice of motion lacks merit and was corrected by the amended notice filed and served; and further sanctions are the only way to remedy prejudice and deter abuse.

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Notice of Tentative Ruling Local Rule

Defendant Constantly Growing, Inc. raised in counsel's declaration in opposition that plaintiff has once again failed to include the notice of the court's tentative ruling process as

required by Local Rule. This was not raised in the memorandum of points and authorities in opposition to the motion.

The court notes that it has long been held that noncompliance with court rules, to which no penalty was attached, does not prevent the court from hearing and disposing of motions. (See Johnson v. Sun Realty Co. (1934) 138 Cal.App. 296, 299.)

The failure to include the tentative ruling notification language is not grounds to deny the motions under the circumstances before the court.

Meet and Confer Requirements

“It is a central precept to the Civil Discovery Act of 1986 (Code Civ.Proc., § 2016 et seq.) (hereinafter "Discovery Act") that civil discovery be essentially self-executing. (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1111, 1 Cal.Rptr.2d 222.) The Discovery Act requires that, prior to the initiation of a motion to compel, the moving party declare that he or she has made a serious attempt to obtain "an informal resolution of each issue." (§ 2025, subd. (o); *DeBlase v. Superior Court* (1996) 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229.) This rule is designed "to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order...." (*McElhaney v. Cessna Aircraft Co.* (1982) 134 Cal.App.3d 285, 289, 184 Cal.Rptr. 547.) This, in turn, will lessen the burden on the court and reduce the unnecessary expenditure of resources by litigants through promotion of informal, extrajudicial resolution of discovery disputes. (*DeBlase v. Superior Court*, supra, 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229; see also *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1981) 122 Cal.App.3d 326, 330, 175 Cal.Rptr. 888.)” (Townsend v. Superior Court (1998) 61 Cal.App.4th 1431, 1434-1435.) “A determination of whether an attempt at informal resolution is adequate also involves the exercise of discretion. The level of effort at informal resolution which satisfies the ‘reasonable and good faith attempt’ standard depends upon the circumstances. In a larger,

more complex discovery context, a greater effort at informal resolution may be warranted. In a simpler, or more narrowly focused case, a more modest effort may suffice. The history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects for success and other similar factors can be relevant. Judges have broad powers and responsibilities to determine what measures and procedures are appropriate in varying circumstances. (See, e.g., Gov.Code, § 68607 [judge has responsibility to manage litigation]; Code Civ. Proc., § 128, subd. (a)(5) [judge has power to control conduct of judicial proceeding in furtherance of justice].) Judges also have broad discretion in controlling the course of discovery and in making the various decisions necessitated by discovery proceedings. (Citations omitted.)" (Obregon v. Superior Court (1998) 67 Cal.App.4th 424, 431.) "Although some effort is required in all instances (see, e.g., *Townsend*, supra, 61 Cal.App.4th at p. 1438, 72 Cal.Rptr.2d 333 [no exception based on speculation that prospects for informal resolution may be bleak]), the level of effort that is reasonable is different in different circumstances, and may vary with the prospects for success. These are considerations entrusted to the trial court's discretion and judgment, with due regard for all relevant circumstances." (Obregon, supra at pages 432-433.)

The evidence before the court shows that sufficient meet and confer activities occurred. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraphs 13-16.; and Exhibits G-J.)

Further Responses and Enforcement of Court Discovery Order

"(a) Every court shall have the power to do all of the following: ¶ * * * (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein… (Code of Civil Procedure, § 128(a)(4).)

"A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to photograph, test, or sample any tangible things that are in the possession, custody, or control of the party on whom the demand is made." (Code of Civil Procedure, § 2031.010(c).)

"On receipt of a response to an inspection demand, the party demanding an inspection may move for an order compelling further response to the demand if the demanding party deems that any of the following apply: ¶ (1) A statement of compliance with the demand is incomplete. ¶ (2) A representation of inability to comply is inadequate, incomplete, or evasive. ¶ (3) An objection in the response is without merit or too general." (Code of Civil Procedure, § 2031.310(a).)

"A motion under subdivision (a) shall comply with both of the following: ¶ (1) The motion shall set forth specific facts showing good cause justifying the discovery sought by the inspection demand. ¶ (2) The motion shall be accompanied by a meet and confer declaration under Section 2016.040." (Code of Civil Procedure, § 2031.310(b).)

"In the more specific context of a request to produce documents, a party who seeks to compel production must show "good cause" for the request (§ 2031, subd. (*l*))—but where, as here, there is no privilege issue or claim of attorney work product, that burden is met simply by a fact-specific showing of relevance. [Footnote omitted.] (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial 2 (Rutter 1996) ¶¶ 8:1495.6 to 8:1495.10, pp. 8H–21 to 8H–22.) That showing was made here. (Part I, *ante.*)" (Glenfed Development Corp. v. Superior Court (1997) 53 Cal.App.4th 1113, 1117.)

It appears that plaintiff's request for further responses are limited to requests for production, set three, numbers 2, 9, 28, and 80. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 14 and Exhibit H.)

Those requests seek production of the following documents: all documents that relate in any way to your business; a list of employees between 2014 and 2019; all documents that identify all banks and/or financial institutions with which you maintained an account between January 1, 2014 to the present; and all documents relating to any communications between you and the Labbitt defendants relating to the instant lawsuit. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 4 and Exhibit D-2.)

The court initially finds that verified responses that a diligent search and reasonable inquiry was made that did not uncover any documents in the possession, custody, or control of the respondent and there are no documents that exist, or that after a diligent search and reasonable inquiry was unable to find additional documents must be taken as true in the absence of evidence to the contrary that such documents should reasonably be in existence and should reasonably be in the possession, custody or control of the respondent.

Defendant Constantly Growing, Inc. responded to request number 2 seeking all documents that relate in any way to your business: after making a diligent search and reasonable inquiry, responding party is unable to locate any additional responsive documents in their possession, custody or control; defendants have provided all CDFA documents to the requesting party and the CDFA has notified plaintiff directly; and defendant recently revived this entity and other than a certificate of revivor, defendants have previously provided all document pertaining to this entity. (Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 4; and Exhibit D-2.)

Despite the court having found in its discovery order that defendants waived all objections, there is evidence that defendant Constantly Growing, Inc. failed to produce any correspondence between defendant and counsel regarding this litigation. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 6.) It seems unreasonable that the records of

Constantly Growing, Inc., would not include such correspondence even though it was recently revived after being suspended.

In addition, defendant Constantly Growing, Inc. produced Capital One Year End Summaries for only two years, despite documents from Capital One being available for at least seven years. (Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 9 and Exhibit E-3.)

It would appear appropriate to order a further response and production regarding request number 2.

Defendant Constantly Growing, Inc. responded to request number 9 regarding employee lists in the following way: at present, and after a diligent search and reasonable inquiry defendant will produce the list of active and non-active employees. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 4 and Exhibit D-2.) Plaintiff contends that a further response is required, because defendant used the terms "active" and "non-active" employees to evade the requirement to provide a list of past employees between 2014 to 2109. (Plaintiff's Separate Statement of Discovery Reponses in Dispute, Request Number 9.) A reasonable construction of "non-active employees" is former employees. The motion to compel a further response to request number 9 is denied.

Defendant Constantly Growing, Inc. responded to request number 28 seeking all documents that identify all banks and/or financial institutions with which you maintained an account between January 1, 2014 to the present: defendant has conducted a diligent search and made a reasonable inquiry and has determined that there are no responsive documents in its possession custody, or control; and defendant Constantly Growing, Inc. does not have a bank account. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 4 and Exhibit D-2.) Plaintiff contends that a further response is required, because defendant used the statement that it does not have a bank account to evade the requirement to produce all

documents that identify financial institutions or past bank accounts as defendant's not having a bank account in the present, which does not verify that defendant did not have bank accounts or financial institution accounts in the past. (Plaintiff's Separate Statement of Discovery Reponses in Dispute, Request Number 28.)

Defendant Constantly Growing, Inc.'s response is unduly limited to having a bank account in the present day. The response is not fully responsive to the request in that it does not address past bank accounts and past and present financial institution accounts. The motion to compel a further response to request number 28 is granted.

Defendant Constantly Growing, Inc. responded to request number 80 concerning all documents relating to any communications between defendant Constantly Growing, Inc. and the Labbitt defendants relating to the instant lawsuit, defendant Constantly Growing, Inc. in the following way: that defendant has conducted a diligent search and made a reasonable inquiry and has determined that there are no responsive documents in its possession, custody or control; and defendant has provided all CDFA documents to the requesting party and the CDFA as notified plaintiff directly. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 4 and Exhibit D-2.) Plaintiff contends that a further response is required, because defendant did not acknowledge the existence of documentary communications between the Labbitt defendants and counsel. (Plaintiff's Separate Statement of Discovery Reponses in Dispute, Request Number 80.)

The request sought all documentary communications between defendant Constantly Growing, Inc. and the Labbitt defendants relating to this lawsuit. The request does not seek documentary communications between the Labbitt defendants and counsel. At best it would indirectly seek counsel communications that are shared between defendant Constantly Growing, Inc. and the Labbitt defendants in a documentary communication between the

defendants, which could reasonably not exist. The motion to compel defendant Constantly Growing, Inc. to provide a further response and production concerning request for production, number 80 is denied.

Sanctions

"Misuses of the discovery process include, but are not limited to, the following: ¶ * * * (g) Disobeying a court order to provide discovery…" (Code of Civil Procedure, § 2023.010(g).)

"To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process: ¶ * * * If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code of Civil Procedure, § 2023.030(a).) The court is not required to find that the evidence establishes that the failure to comply with the court's discovery order was in bad faith. The court is mandated by statute to impose the monetary sanctions unless it makes a finding that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

"'Discovery sanctions "should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." [Citations.] "'The trial court has a wide discretion in granting discovery and ... is granted broad discretionary powers to enforce its orders but its powers are not unlimited.... [¶] The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks, but the court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose

punishment. [Citations.]'" [Citations.]' (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 487-488, 282 Cal.Rptr. 530; accord *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35, 9 Cal.Rptr.2d 396.)" (Vallbona v. Springer (1996) 43 Cal.App.4th 1525, 1545.) "We recognize that terminating sanctions are to be used sparingly, only when the trial court concludes that lesser sanctions would not bring about the compliance of the offending party." (R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal.App.4th 486, 496.) "Discovery sanctions must be tailored in order to remedy the offending party's discovery abuse, should not give the aggrieved party more than what it is entitled to, and should not be used to punish the offending party. We review the trial court's order under the deferential abuse of discretion standard. (*Do It Urself, supra,* 7 Cal.App.4th at p. 35, 9 Cal.Rptr.2d 396.) [Footnote omitted.]" (Karlsson v. Ford Motor Co. (2006) 140 Cal.App.4th 1202, 1217.)

The Third District Court of Appeal has held: "The sanction of dismissal or the rendition of a default judgment against the disobedient party is ordinarily a drastic measure which should be employed with caution. (*Deyo v. Kilbourne*, supra, 84 Cal.App.3d at p. 793, 149 Cal.Rptr. 499.) The sanction of dismissal, where properly employed, is justified on the theory the party's refusal to reveal material evidence tacitly admits his claim or defense is without merit. (Ibid.; *Kahn v. Kahn*, supra, 68 Cal.App.3d at p. 382.)" (Puritan Ins. Co. v. Superior Court (1985) 171 Cal.App.3d 877, 885.)

The court finds that it is not appropriate to impose the drastic measure of termination of the plaintiff's case by striking the answer and entering judgment against defendant in the amount of $1,646,539.28 or impose drastic issue sanctions in the first instance of failure to fully comply with a discovery order. The court is not convinced that lesser sanctions will not bring about compliance. The request for issue and terminating sanctions is denied.

"…If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code of Civil Procedure, § 2023.030(a).)

"Except as provided in subdivision (j), the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust" (Code of Civil Procedure, § 2031.310(h).)

Plaintiff requests monetary sanctions in the amount of $4,830 representing the fees incurred for attorney services to prepare the four motions to compel that appear to be nearly identical and the filing fee of $30. The court finds that it is appropriate to order defendant Constantly Growing, Inc. to pay plaintiff $1,230 in monetary sanctions.

Plaintiff's Motion to Compel Defendant Labmor Enterprises, Inc. to Provide Further Responses to Requests for Production, Set Three, and to Impose Monetary and/or Terminating Sanctions.

On December 17, 2021 the court issued a tentative ruling in several motions to compel discovery propounded on defendants Labmor Enterprises, Inc., Constantly Growing, Inc., Constantly Growing LLC, and Callarick Enterprises, LP. The tentative ruling provided: "**PLAINTIFF'S MOTIONS TO COMPEL DISCOVERY ARE GRANTED. DEFENDANT LABMOR ENTERPRISES, INC. IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS**

REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CONSTANTLY GROWING, INC. IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CONSTANTLY GROWING, LLC IS ORDERED TO PROVIDE FURTHER RESPONSES TO SPECIAL INTERROGATORIES, SET TWO, CORRECTED INSPECTION DEMANDS, SET TWO AND INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANT CALLARICK ENTERPRISES, LP IS ORDERED TO PROVIDE FURTHER RESPONSES TO INSPECTION DEMANDS, SET THREE AND PRODUCE THE DOCUMENTS REQUESTED WITHOUT OBJECTIONS WITHIN TEN DAYS. DEFENDANTS LABMOR ENTERPRISES, INC., CONSTANTLY GROWING, INC., AND CALLARICK ENTERPRISES, LP ARE ORDERED TO PAY MONETARY SANCTIONS TO PLAINTIFF IN THE AMOUNT OF $1,500 EACH WITHIN TEN DAYS." (Emphasis in original.)

On January 12, 2022 the court entered the tentative ruling as the ruling of the court upon stipulation of the arties, except for the payment of monetary sanctions, which the parties agreed to be deemed to have been paid without the need for additional payment. The order further directed that the defendants had ten days to serve their objection free responses. The Tentative Ruling was attached as Exhibit A to the ruling entered by the court.

Plaintiff moves to compel further responses to Requests for Production, Set Three as ordered by the court on January 12, 2022; for terminating sanctions of striking defendant's answer and entering judgment in favor and against defendant in the amount of $1,646,539.28; in the alternative, imposing issue sanctions directing that all affirmative defenses asserted by

defendant are stricken, defendant is estopped from asserting any defenses to liability set forth in causes of action numbers 1-10 set forth in the complaint, and that the alter ego allegations of the complaint are deemed established such that the acts of this defendant are deemed acts of each of the defendant in this action; for additional monetary sanctions in the amount of $4,800.

Plaintiff argues: despite having been ordered on January 12, 2022 to produce objection free responses to the requests for production within ten days, documents were not received within ten days and were only received late when a CD was delivered in in an untrackable priority mail envelope in mid-February 2022; defendant Labmor Enterprises, Inc.'s production consisted of only 40 additional pages; the production did not include any correspondence between defendant Labmor Enterprises, Inc. and its counsel despite the court having found all objections waived by the court; it is clear from the circumstances that defendant Labmor Enterprises, Inc. did not engage in a diligent search and reasonable inquiry, such as producing tax returns for only 2019 and 2022 with improper redactions (LEI00003000), a handful of balance sheets (LEI0000274 and LEI0000275) that were generated by a computer program and none of the electronic data was provided, previously produced Wells Fargo documents were not updated to remove redactions, and defendant Labmor Enterprises, Inc. had control and access of Wells Fargo Statements back to at least 2016; and terminating, issue and evidence sanctions are appropriate.

On July 22, 2022 defendant Labmor Enterprises, Inc. filed an opposition to the motion. Defendant Labmor Enterprises, Inc. opposes the motion on the following grounds: the meet and confer activities were insufficient; the responses to the requests for production set three and production of documents by defendant Labmor Enterprises, Inc. were sufficient as at this time defendant Labmor Enterprises, Inc. has already produced those documents that are in the

possession, custody, or control of the defendant; the records at issue appear to be in the possession of a third party entity equally subject to discovery; there is no evidence that defendant Labmor Enterprises, Inc. is withholding documents under an inappropriate claim of privilege; if plaintiff believes that additional documents exist, those documents may be sought by subpoena of the third party who possesses and controls those documents; there are no grounds to impose the terminating and issue sanctions sought; and a request for nearly $20,000 in monetary sanctions for four nearly identical discovery motions is not justified in that there is no evidence that defendant Labmor Enterprises, Inc. made a willful decision to withhold documents or refused to comply with the court's prior order.

Plaintiff filed a reply on July 1, 2022. Plaintiff replied: defendant Labmor Enterprises, Inc. did not provide a brief in opposition and did not respond to any arguments raised by plaintiff, therefore, this amounts to a non-opposition to the motion; defendant Labmor Enterprises, Inc. has not complied with the court's discovery order; defense counsel's declaration in opposition has no evidentiary value and is objectively false; the argument of lack of notice of the tentative ruling procedure in the initial notice of motion lacks merit and was corrected by the amended notice filed and served; and further sanctions are the only way to remedy prejudice and deter abuse.

<u>Non-Opposition</u>

The opposition was timely filed on July 22, 2022 for the purposes of the actual hearing date.

Even assuming for the sake of argument that an opposition was not filed, the court must still rule on the motion on its merits.

Failure to file a written opposition or appear at a discovery motion hearing or the voluntary provision of discovery shall not be deemed an admission that the discovery motion was proper or that sanctions should be awarded. (Rules of Court, Rule 3.1348(b).)

Notice of Tentative Ruling Local Rule

Defendant Labmor Enterprises, Inc. raised in counsel's declaration in opposition that plaintiff has once again failed to include the notice of the court's tentative ruling process as required by Local Rule. This was not raised in the memorandum of points and authorities in opposition to the motion.

The court notes that it has long been held that noncompliance with court rules, to which no penalty was attached, does not prevent the court from hearing and disposing of motions. (See Johnson v. Sun Realty Co. (1934) 138 Cal.App. 296, 299.)

The failure to include the tentative ruling notification language is not grounds to deny the motions under the circumstances before the court.

Meet and Confer Requirements

"It is a central precept to the Civil Discovery Act of 1986 (Code Civ.Proc., § 2016 et seq.) (hereinafter "Discovery Act") that civil discovery be essentially self-executing. (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1111, 1 Cal.Rptr.2d 222.) The Discovery Act requires that, prior to the initiation of a motion to compel, the moving party declare that he or she has made a serious attempt to obtain "an informal resolution of each issue." (§ 2025, subd. (o); *DeBlase v. Superior Court* (1996) 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229.) This rule is designed "to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order...." (*McElhaney v. Cessna Aircraft Co.* (1982) 134 Cal.App.3d 285, 289, 184 Cal.Rptr. 547.) This, in turn, will lessen the burden on the court and reduce the unnecessary expenditure of resources by litigants through promotion of informal, extrajudicial resolution of discovery disputes. (*DeBlase v. Superior Court*, supra, 41 Cal.App.4th 1279, 1284, 49 Cal.Rptr.2d 229; see also *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1981) 122 Cal.App.3d 326, 330, 175 Cal.Rptr. 888.)" (Townsend v. Superior Court (1998) 61 Cal.App.4th

1431, 1434-1435.) "A determination of whether an attempt at informal resolution is adequate also involves the exercise of discretion. The level of effort at informal resolution which satisfies the 'reasonable and good faith attempt' standard depends upon the circumstances. In a larger, more complex discovery context, a greater effort at informal resolution may be warranted. In a simpler, or more narrowly focused case, a more modest effort may suffice. The history of the litigation, the nature of the interaction between counsel, the nature of the issues, the type and scope of discovery requested, the prospects for success and other similar factors can be relevant. Judges have broad powers and responsibilities to determine what measures and procedures are appropriate in varying circumstances. (See, e.g., Gov.Code, § 68607 [judge has responsibility to manage litigation]; Code Civ. Proc., § 128, subd. (a)(5) [judge has power to control conduct of judicial proceeding in furtherance of justice].) Judges also have broad discretion in controlling the course of discovery and in making the various decisions necessitated by discovery proceedings. (Citations omitted.)" (Obregon v. Superior Court (1998) 67 Cal.App.4th 424, 431.) "Although some effort is required in all instances (see, e.g., *Townsend*, supra, 61 Cal.App.4th at p. 1438, 72 Cal.Rptr.2d 333 [no exception based on speculation that prospects for informal resolution may be bleak]), the level of effort that is reasonable is different in different circumstances, and may vary with the prospects for success. These are considerations entrusted to the trial court's discretion and judgment, with due regard for all relevant circumstances." (Obregon, supra at pages 432-433.)

The evidence before the court shows that sufficient meet and confer activities occurred. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraphs 13-16.; and Exhibits G-J.)

Further Responses and Enforcement of Court Discovery Order

"(a) Every court shall have the power to do all of the following: ¶ * * * (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein… (Code of Civil Procedure, § 128(a)(4).)

"A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to photograph, test, or sample any tangible things that are in the possession, custody, or control of the party on whom the demand is made." (Code of Civil Procedure, § 2031.010(c).)

"On receipt of a response to an inspection demand, the party demanding an inspection may move for an order compelling further response to the demand if the demanding party deems that any of the following apply: ¶ (1) A statement of compliance with the demand is incomplete. ¶ (2) A representation of inability to comply is inadequate, incomplete, or evasive. ¶ (3) An objection in the response is without merit or too general." (Code of Civil Procedure, § 2031.310(a).)

"A motion under subdivision (a) shall comply with both of the following: ¶ (1) The motion shall set forth specific facts showing good cause justifying the discovery sought by the inspection demand. ¶ (2) The motion shall be accompanied by a meet and confer declaration under Section 2016.040." (Code of Civil Procedure, § 2031.310(b).)

"In the more specific context of a request to produce documents, a party who seeks to compel production must show "good cause" for the request (§ 2031, subd. (*l*))—but where, as here, there is no privilege issue or claim of attorney work product, that burden is met simply by a fact-specific showing of relevance. [Footnote omitted.] (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial 2 (Rutter 1996) ¶¶ 8:1495.6 to 8:1495.10, pp. 8H–21 to 8H–22.)

That showing was made here. (Part I, *ante.*)" (Glenfed Development Corp. v. Superior Court (1997) 53 Cal.App.4th 1113, 1117.)

It appears that plaintiff's request for further responses are limited to requests for production, set three, numbers 2, 9, 28, and 80. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 14 and Exhibit H.)

Those requests seek production of the following documents: all documents that relate in any way to your business; a list of employees between 2014 and 2019; all documents that identify all banks and/or financial institutions with which you maintained an account between January 1, 2014 to the present; and all documents relating to any communications between you and the Labbitt defendants relating to the instant lawsuit. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 4 and Exhibit D-4.)

Defendant Labmor Enterprises, Inc. responded to request number 2 seeking all documents that relate in any way to your business: after making a diligent search and reasonable inquiry, responding party is unable to locate any additional responsive documents in their possession, custody or control; defendants have provided all CDFA documents to the requesting party and the CDFA has notified plaintiff directly; and defendant is producing Profit and Loss Statements for 2016 through 2020, Balance Sheets for 2019 and 2020, and tax returns for 2019 through 2020. (Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 4; and Exhibit D-4.)

Despite the court having found in its discovery order that defendants waived all objections, there is evidence that defendant Labmor Enterprises, Inc. failed to produce any correspondence between defendant and counsel regarding this litigation. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 6.) It seems unreasonable that the records of defendant Labmor Enterprises, Inc. would not include such correspondence.

In addition, there is evidence that defendant Labmor Enterprises, Inc. produced tax returns that were improperly redacted (LEI0000300), a handful of balance sheets (LEI0000274 and LEI0000275) that were generated by a computer program and none of the electronic data was provided; previously produced Wells Fargo documents were not updated to remove redactions, and defendant Labmor Enterprises, Inc. had control and access of Wells Fargo Statements back to at least 2016. (Declaration of Plaintiff's Counsel Christopher Strunk, paragraphs 7 and 8; and Exhibits E-1 and E-2.)

It would appear appropriate to order a further response and production regarding request number 2.

Defendant Labmor Enterprises, Inc. responded to request number 9 regarding employee lists as follows: after a diligent search and reasonable inquiry defendant was unable to locate any additional responsive documents in their possession, custody, or control and no documents exist, because defendant Labmor Enterprises, Inc. has no employees. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 4 and Exhibit D-4.) Plaintiff contends that a further response is required, because defendant stated that defendant Labmor Enterprises, Inc. currently has no employees and attempts to evade the requirement to provide a list of past employees between 2014 to 2019; and stating that no documents exist is limited to defendant's statement of not having any present employees. (Plaintiff's Separate Statement of Discovery Reponses in Dispute, Request Number 9.)

Defendant Labmor Enterprises, Inc. needs to clarify whether it has former employees, which they did not document in any way as being employed by defendant in order to explain defendants assertion as to the lack of employment records of the names of employees, or defendant never had employees during the period of 2014-2019. It appears appropriate to

grant the motion and order defendant Labmor Enterprises, Inc. to provide a further response to request number 9 and perhaps production.

Defendant Labmor Enterprises, Inc. responded to request number 28 seeking all documents that identify all banks and/or financial institutions with which you maintained an account between January 1, 2014 to the present: defendant has conducted a diligent search and made a reasonable inquiry and has determined that there are no responsive documents in its possession custody, or control, there are no other documents that exist other than in this lawsuit, and defendant Labmor Enterprises, Inc. does not have a bank account. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 4 and Exhibit D-4.) Plaintiff contends that a further response is required, because defendant used the term "bank account" to evade the requirement to produce all documents that identify financial institutions or past bank accounts as defendant's not having a bank account in the present does not verify that defendant did not have bank accounts in the past; and in 2020 defendant Labmor Enterprises, Inc. produced a redacted 2016 Wells Fargo Bank statement of Labmor, which must be produced in an unredacted version as the court has ruled that all objections were waived. (Plaintiff's Separate Statement of Discovery Reponses in Dispute, Request Number 28.)

Defendant Labmor Enterprises, Inc.'s response is unduly limited to having a bank account in the present day. The response is not fully responsive to the request in that it does not address past bank accounts and past and present financial institution accounts. In addition, there is evidence of a past bank account and those bank statements must be produced without redactions. (Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 8; and Exhibit E-2.) The motion to compel a further response to request number 28 is granted.

Defendant Labmor Enterprises, Inc. responded to request number 80 concerning all documents relating to any communications between defendant Constantly Growing, Inc. and

the Labbitt defendants relating to the instant lawsuit: defendant has conducted a diligent search and made a reasonable inquiry and has determined that there are no responsive documents in its possession, custody or control. (See Declaration of Plaintiff's Counsel Christopher Strunk, paragraph 4 and Exhibit D-4.) Plaintiff contends that a further response is required, because defendant did not acknowledge the existence of written communications between the Labbitt defendants and counsel. (Plaintiff's Separate Statement of Discovery Reponses in Dispute, Request Number 80.)

The request sought all documentary communication between defendant Labmor Enterprises, Inc. and the Labbitt defendants relating to this lawsuit. The request does not seek documentary communications between the Labbitt defendants and counsel. At best it would indirectly seek counsel communications that are shared between defendant Labmor Enterprises, Inc. and the Labbitt defendants in a documentary communication between the defendants, which could reasonably not exist. The motion to compel defendant Labmor Enterprises, Inc. to provide a further response and production concerning request for production, number 80 is denied.

Sanctions

"Misuses of the discovery process include, but are not limited to, the following: ¶ * * * (g) Disobeying a court order to provide discovery…" (Code of Civil Procedure, § 2023.010(g).)

"To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process: ¶ * * * If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the

imposition of the sanction unjust." (Code of Civil Procedure, § 2023.030(a).) The court is not required to find that the evidence establishes that the failure to comply with the court's discovery order was in bad faith. The court is mandated by statute to impose the monetary sanctions unless it makes a finding that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

"'Discovery sanctions "should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery." [Citations.] "'The trial court has a wide discretion in granting discovery and ... is granted broad discretionary powers to enforce its orders but its powers are not unlimited.... [¶] The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks, but the court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose punishment. [Citations.]'" [Citations.]' (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 487-488, 282 Cal.Rptr. 530; accord *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35, 9 Cal.Rptr.2d 396.)" (Vallbona v. Springer (1996) 43 Cal.App.4th 1525, 1545.) "We recognize that terminating sanctions are to be used sparingly, only when the trial court concludes that lesser sanctions would not bring about the compliance of the offending party." (R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal.App.4th 486, 496.) "Discovery sanctions must be tailored in order to remedy the offending party's discovery abuse, should not give the aggrieved party more than what it is entitled to, and should not be used to punish the offending party. We review the trial court's order under the deferential abuse of discretion standard. (*Do It Urself, supra,* 7 Cal.App.4th at p. 35, 9 Cal.Rptr.2d 396.) [Footnote omitted.]" (Karlsson v. Ford Motor Co. (2006) 140 Cal.App.4th 1202, 1217.)

The Third District Court of Appeal has held: “The sanction of dismissal or the rendition of a default judgment against the disobedient party is ordinarily a drastic measure which should be employed with caution. (*Deyo v. Kilbourne*, supra, 84 Cal.App.3d at p. 793, 149 Cal.Rptr. 499.) The sanction of dismissal, where properly employed, is justified on the theory the party's refusal to reveal material evidence tacitly admits his claim or defense is without merit. (Ibid.; *Kahn v. Kahn*, supra, 68 Cal.App.3d at p. 382.)” (Puritan Ins. Co. v. Superior Court (1985) 171 Cal.App.3d 877, 885.)

The court finds that it is not appropriate to impose the drastic measure of termination of the plaintiff’s case with prejudice or impose drastic evidence and issue sanctions in the first instance of failure to comply with a discovery order. The court is not convinced that lesser sanctions will not bring about compliance. The request for evidence, issue, and terminating sanctions is denied.

“…If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.” (Code of Civil Procedure, § 2023.030(a).)

“Except as provided in subdivision (j), the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust” (Code of Civil Procedure, § 2031.310(h).)

Plaintiff requests monetary sanctions in the amount of $4,830 representing the fees incurred for attorney services to prepare the four motions to compel that appear to be nearly

identical and the filing fee of $30. The court finds that it is appropriate to order defendant Labmor Enterprises, Inc. to pay plaintiff $1,230 in monetary sanctions.

Defendants Labmor Enterprises, Inc.'s and Labbitts' Motion for Leave to File Cross-Complaint.

Defendants Labmor Enterprises, Inc. and Labbitts move for leave to file a cross-complaint against plaintiff asserting causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, accounting, violation of Business and Professions Code, §§ 17200, et seq., and declaratory relief.

Defendants Labmor Enterprises, Inc. and Labbitts assert the following grounds in support of the motion: the cross-complaint is being brought due to the plaintiff's products still in possession of defendants were not approved for sale in California, were barred from sale by various provisions of the Food and Agriculture Code, the products have been quarantined by the State, barred from sale as illegal in California, and any sales agreement between plaintiff and defendants was illegal from its inception and induced by fraud; the motion should be granted pursuant to the provisions of Code of Civil Procedure, §§ 426.50 and 426.80; the motion has been brought in good faith; defendants only became aware of the issue related to the products in September 2021; and plaintiff will not be prejudiced, because the case is still in the discovery stage and the cross-complaint addresses fundamental issues already at issue between the parties.

Plaintiff opposes the motion on the following grounds: the action was filed over three years ago and defendants Labmor Enterprises, Inc. and Labbitts have done nothing but delay the case; the motion for leave to file a cross-complaint lacks merit and should be denied; since the causes of action pled in the cross-complaint arises from the contract between the parties, the cross-complaint is mandatory and pursuant to Code of Civil Procedure, § 426.30(a) should

have been filed at the time of defendants' answer; since the cross-complaint was not filed at the time of defendants' answer, the motion should be denied; the motion was unduly delayed after obtaining knowledge of the facts in August 2021 and stating the products were illegal in responses to interrogatories in November 2021; the delay is inexcusable and not in good faith; the cross-complaint on the contract is barred by the four year statute of limitation as the last payment on defendants' account was in August 2016; granting the motion prejudices plaintiff as discovery must be started all over again and trial is set for December 30, 2022; if the motion is granted, it should be conditioned on payment of $50,000 to plaintiff for its costs of discovery and that defendants pay plaintiff's costs of discovery regarding the cross-complaint; and to the extent that the cross-complaint is not compulsory, there is no prejudice in denying the motion as defendants Labmor Enterprises, Inc. and Labbitts could bring a separate action against plaintiff in another case.

Defendants Labmor Enterprises, Inc. and Labbitts reply: there is no prejudice from continued discovery as the parties have discussed the discovery issues and plaintiff's illegal sales over the past several months and have reached an agreement to continue the trial to March 2023 to address those issues; and the statute of limitations argument lacks merit as the discovery rule postponed accrual of the cause of action.

Statute of Limitation for Breach of Contract

The cross-complaint alleges: that plaintiff withheld from cross-complainants that its products were not registered with the State of California and were not authorized for sale; plaintiff and its employees falsely represented to cross-complainants that the fertilizers and fertilizing materials were safe, properly registered, and approved for sale when the products were illegal to sell in California; the cross-complainants first became aware of the true nature of the products involved in September 2021; plaintiff continued to ship illegal and hazardous products to

California in February 2022; and the contract was breached in several ways, including failure to provide fertilizer products that were legally regulated for sale in California. (Declaration of William Bowen in Support of Motion, Exhibit B – Proposed Cross-Complaint, paragraphs 4, 5, and 26.b.)

A statute of limitations is tolled by fraudulent concealment by the defendant/cross-defendant.

"It appears, in fact, that Yumul seeks to toll the statute of limitations under the doctrine of fraudulent concealment. "[W]hen the defendant is guilty of fraudulent concealment of the cause of action the statute [of limitations] is deemed not to become operative until the aggrieved party discovers the existence of the cause of action." *Unruh-Haxton v. Regents of University of California,* 162 Cal.App.4th 343, 367, 76 Cal.Rptr.3d 146 (2008) (quoting *Pashley v. Pacific Elec. Ry. Co.,* 25 Cal.2d 226, 229, 153 P.2d 325 (1944) (alterations original)). "A defendant's fraud in concealing a cause of action against him will toll the statute of limitations, and that tolling will last as long as a plaintiff's reliance on the misrepresentations is reasonable." *Grisham v. Philip Morris U.S.A., Inc.,* 40 Cal.4th 623, 637, 54 Cal.Rptr.3d 735, 151 P.3d 1151 (2007). ¶ "Absent a fiduciary relationship, nondisclosure is not fraudulent concealment-affirmative deceptive conduct is required." *Long v. Walt Disney Co.,* 116 Cal.App.4th 868, 874, 10 Cal.Rptr.3d 836 (2004). See *Rutledge v. Boston Woven Hose and Rubber Co.,* 576 F.2d 248, 250 (9th Cir.1978) ("Silence or passive conduct of the defendant is not deemed fraudulent, unless the relationship of the parties imposes a duty upon the defendant to make disclosure"); *Lauter v. Anoufrieva,* 642 F.Supp.2d 1060, 1100 (C.D.Cal.2009) (under California law, "[a] plaintiff alleging fraudulent concealment must establish that his failure to have notice of his claim was the result of the affirmative conduct by the defendant"). See also *Keilholtz,* 2009 WL 2905960 at *5 ("[t]he rule of fraudulent concealment is applicable whenever the

defendant intentionally prevents the plaintiff from instituting suit," quoting *Bernson v. Browning-Ferris Indus. of California, Inc.,* 7 Cal.4th 926, 931, 30 Cal.Rptr.2d 440, 873 P.2d 613 (1994)). ¶ "When a plaintiff relies on a theory of fraudulent concealment ... to save a cause of action that otherwise appears on its face to be time-barred, he or she must specifically plead facts which, if proved, would support the theory." *Mills v. Forestex Co.,* 108 Cal.App.4th 625, 641, 134 Cal.Rptr.2d 273 (2003). "In order to establish fraudulent concealment, the complaint must show: (1) when the fraud was discovered; (2) the circumstances under which it was discovered; and (3) that the plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put him on inquiry." *Id.* (quoting *Baker v. Beech Aircraft Corp.,* 39 Cal.App.3d 315, 321, 114 Cal.Rptr. 171 (1974))." (Yumul v. Smart Balance, Inc. (C.D. Cal. 2010) 733 F.Supp.2d 1117, 1131.)

A statute of limitation is also subject to the discovery rule, which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.

"Generally speaking, a cause of action accrues at "the time when the cause of action is complete with all of its elements." (*Norgart, supra,* 21 Cal.4th at p. 397, 87 Cal.Rptr.2d 453, 981 P.2d 79; see *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* 1971) 6 Cal.3d 176, 187, 98 Cal.Rptr. 837, 491 P.2d 421 (*Neel*).) An important exception to the general rule of accrual is the "discovery rule," which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. (*Norgart, supra,* 21 Cal.4th at p. 397, 87 Cal.Rptr.2d 453, 981 P.2d 79; *Neel, supra,* 6 Cal.3d at p. 187, 98 Cal.Rptr. 837, 491 P.2d 421.) ¶ A plaintiff has reason to discover a cause of action when he or she "has reason at least to suspect a factual basis for its elements." (*Norgart, supra,* 21 Cal.4th at p. 398, 87 Cal.Rptr.2d 453, 981 P.2d 79, citing *Jolly, supra,* 44 Cal.3d at p. 1110, 245 Cal.Rptr. 658, 751 P.2d 923; see also *Gutierrez v. Mofid, supra,* 39 Cal.3d at p. 897, 218 Cal.Rptr. 313, 705 P.2d 886 ["the

uniform California rule is that a limitations period dependent on discovery of the cause of action begins to run no later than the time the plaintiff learns, or should have learned, the *facts* essential to his claim"].) Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period. (*Norgart, supra,* 21 Cal.4th at p. 398, fn. 3, 87 Cal.Rptr.2d 453, 981 P.2d 79; *Jolly, supra,* 44 Cal.3d at p. 1112, 245 Cal.Rptr. 658, 751 P.2d 923.) *Norgart* explained that by discussing the discovery rule in terms of a plaintiff's suspicion of "elements" of a cause of action, it was referring to the "generic" elements of wrongdoing, causation, and harm. (*Norgart, supra,* 21 Cal.4th at p. 397, 87 Cal.Rptr.2d 453, 981 P.2d 79.) In so using the term "elements," we do not take a hypertechnical approach to the application of the discovery rule. Rather than examining whether the plaintiffs suspect facts supporting each specific legal element of a particular cause of action, we look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them. ¶ The discovery rule, as described in *Bernson,* allows accrual of the cause of action even if the plaintiff does not have reason to suspect the defendant's identity. (See *Bernson, supra,* 7 Cal.4th at p. 932, 30 Cal.Rptr.2d 440, 873 P.2d 613.) The discovery rule does not delay accrual in that situation because the identity of the defendant is not an element of a cause of action. (See *Norgart, supra,* 21 Cal.4th at p. 399, 87 Cal.Rptr.2d 453, 981 P.2d 79; *Bernson, supra,* 7 Cal.4th at p. 932, 30 Cal.Rptr.2d 440, 873 P.2d 613.) As the court reasoned in *Norgart,* "[i]t follows that failure to discover, or have reason to discover, the identity of the defendant does not postpone the accrual of a cause of action, whereas a like failure concerning the cause of action itself does." (*Norgart, supra,* 21 Cal.4th at p. 399, 87 Cal.Rptr.2d 453, 981 P.2d 79.) In *Norgart,* we distinguished between ignorance of the identity of the defendant and ignorance of the cause of action based on " 'the commonsense assumption that once the plaintiff is aware of' the latter, he 'normally' has

'sufficient opportunity,' within the 'applicable limitations period,' 'to discover the identity' of the former." (*Norgart, supra,* 21 Cal.4th at p. 399, 87 Cal.Rptr.2d 453, 981 P.2d 79, quoting *Bernson, supra,* 7 Cal.4th at p. 932, 30 Cal.Rptr.2d 440, 873 P.2d 613.) ¶ The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury [FN 2.] if they have " ' "information of circumstances to put [them] *on inquiry* " ' " or if they have " ' "*the opportunity to obtain knowledge* from sources open to [their] investigation." ' " (*Gutierrez v. Mofid, supra,* 39 Cal.3d at pp. 896–897, 218 Cal.Rptr. 313, 705 P.2d 886, quoting *Sanchez v. South Hoover Hospital, supra,* 18 Cal.3d at p. 101, 132 Cal.Rptr. 657, 553 P.2d 1129.) In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation. ¶ FN 2. At common law, the term "injury," as used in determining the date of accrual of a cause of action, "means both 'a person's physical condition *and* its "negligent cause." ' " (*Gutierrez v. Mofid, supra,* 39 Cal.3d at p. 896, 218 Cal.Rptr. 313, 705 P.2d 886, quoting *Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 99, 132 Cal.Rptr. 657, 553 P.2d 1129.) Thus, physical injury alone is often insufficient to trigger the statute of limitations." (Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal.4th 797, 806-808.)

The cross-complaint on its face does not show that the breach of contract action against plaintiff for failure to provide products legal for sale in California is necessarily barred by the four year statute of limitations. Under the facts alleged, the cross-complaint sets forth legal tolling of the statute of limitations due to alleged fraudulent concealment by the cross-defendant and postponement of accrual of the cause of action under the discovery rule until August 31, 2021 at the earliest.

The court rejects the argument that the motion should be denied as the breach of contract cause of action is barred by the statute of limitations.

Leave to File Cross-Complaint

"A party shall file a cross-complaint against any of the parties who filed the complaint or cross-complaint against him or her before or at the same time as the answer to the complaint or cross-complaint. ¶ (b) Any other cross-complaint may be filed at any time before the court has set a date for trial. ¶ (c) A party shall obtain leave of court to file any cross-complaint except one filed within the time specified in subdivision (a) or (b). Leave may be granted in the interest of justice at any time during the course of the action." (Code of Civil Procedure, § 428.50.)

"A party who fails to plead a cause of action subject to the requirements of this article, whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend his pleading, or to file a cross-complaint, to assert such cause at any time during the course of the action. The court, after notice to the adverse party, shall grant, upon such terms as may be just to the parties, leave to amend the pleading, or to file the cross-complaint, to assert such cause if the party who failed to plead the cause acted in good faith. This subdivision shall be liberally construed to avoid forfeiture of causes of action." (Code of Civil Procedure, § 426.50.)

"We reject the view that the trial court may "exercise discretion" in the denial of a motion to file a compulsory cross-complaint under section 426.50. ¶ The legislative mandate is clear. A policy of liberal construction of section 426.50 to avoid forfeiture of causes of action is imposed on the trial court. A motion to file a cross-complaint at any time during the course of the action must be granted unless bad faith of the moving party is demonstrated where forfeiture would otherwise result. Factors such as oversight, inadvertence, neglect, mistake or other cause, are

insufficient grounds to deny the motion unless accompanied by bad faith." (Emphasis added.) (Silver Organizations Ltd. v. Frank (1990) 217 Cal.App.3d 94, 98-99.)

A compulsory cross-complaint is one in which the causes of action alleged in the cross-complaint asserted against the plaintiff/cross-complainant arise out of the same transaction, occurrence, or series of transactions or occurrences as the causes of action which the plaintiff/cross-complainant alleges in his or her complaint/cross-complaint. (Code of Civil Procedure, §§ 426.10 and 426.30.)

Defendants Labmor Enterprises, Inc.'s and Labbitts' counsel declares in support of the motion: defendant Labmor was only made aware of potential issues with the fertilizer products in a Notice of Warning from the Department of Food and Agriculture (DFA) dated August 31, 2021; after having received the documents and discussed violations with DFA staff over several months, in April 2022 defendant retained counsel to address concerns they were invited into an illegal contract by plaintiff; after reviewing the pleadings, files and Notice of Warning counsel determined defendants had claims against plaintiff based on its attempt to sell illegal products; true and correct copies of the Notice of Warning documents are attached as Exhibit A; there is no prejudice to plaintiff as the case is still in the discovery stage and the cross-complaint addresses fundamental issues that are already at issue between the parties; and the cross-complaint is directly related to the claims of the underlying complaint and based upon newly acquired facts which should be determined in the case in chief. (Declaration of William Bowen in Support of Motion, paragraphs 2, 3 and 5; and Exhibit A.)

The motion for leave to amend was filed on August 25, 2022.

Defendants Labmor Enterprises, Inc.'s and Labbitts' counsel declares in reply: defense counsels and plaintiff's counsel have met and conferred about the status of discovery and the proposed cross-complaint on several occasions over the last several months; all counsel

agreed that it would be difficult to complete discovery by the December 30, 2022 trial date due to the court's delayed motion calendar impacting pending motions to compel and the motion for leave to file the cross-complaint; all counsel then agreed that the parties would be best served by stipulating to continue the trial for three months to allow time for discovery; and plaintiff's counsel drafted a proposed stipulation and sent it to all counsel with a statement she would appear ex parte to request the continuance. (Declaration of William Bowen in Reply, paragraphs 3-6 and Exhibit A – Proposed Stipulation to Continue Trial to March 20, 2023.)

Defendants Labmor Enterprises, Inc.'s and Labbitts' proposed cross-complaint attached as Exhibit B to the declaration of their counsel seeks damages and other relief allegedly arising from the following: plaintiff's false representations that fertilizers and fertilizing materials defendants Labmor Enterprises, Inc. and Labbitt agreed to purchase and aid in distribution to other customers of plaintiff within California were safe, properly registered, and approved for sale; the truth was that the products were not registered in California and illegal to sell in California; cross-complainants first became aware of the true nature of the products involved in September 2021; and plaintiff continued to ship illegal and hazardous products to California in February 2022. (Declaration of William Bowen in Support of Motion, Exhibit B – Proposed Cross-Complaint, paragraphs 3-5.)

The proposed cross-complaint is a compulsory cross-complaint as the causes of action alleged in the cross-complaint asserted against the plaintiff arise out of the same transaction, occurrence, or series of transactions or occurrences as the causes of action which the plaintiff alleges in the complaint. Plaintiff even concedes in the opposition at page 2, lines 3-7 that the proposed cross-complaint is a compulsory cross-complaint.

Plaintiff only recently filed an amended complaint on August 25, 2022. There does not appear to be any prejudice to plaintiff to allow leave to file the compulsory cross-complaint as

the parties are in the process of obtaining a stipulated continuance of the trial date due to the need to complete discovery and the instant motion for leave to file a cross-complaint and there remains time to try the case within the five year limitation period.

Plaintiff admits it was aware of defendants' claim the subject products were illegal in November 2021 when defendants asserted those facts in responses to discovery. (See Opposition to Motion, page 4, lines 18-19.) This notice to plaintiff was within approximately two to three months after defendants Labmor Enterprises, Inc. and Labbitts found out that fact. Discovery was ongoing and plaintiff should have engaged in further discovery of that issue.

The court finds that the proposed cross-complaint is a compulsory cross-complaint and, under the circumstances presented, the court further finds there was no bad faith. Therefore, the motion must be granted.

Plaintiff's counsel declares in opposition: discovery responses have been exchanged, multiple depositions have gone forward, five defaults have been entered, and nearly a dozen discovery motions have been filed; and $50,000 in discovery costs have been incurred, which nearly all must be done over to address the illegal product allegations. (Declaration of Melissa Badgett in Opposition to Motion, paragraphs 4 and 5.)

Plaintiff requests that as a condition of granting the motion, the court order defendants Labmor Enterprises, Inc. and Labbitts to pay plaintiff $50,000 and all costs for further discovery on the cross-complaint.

The court finds that a claim that nearly all discovery in this action must be done over when a claim the products provided to defendants Labmor Enterprises, Inc. and Labbitts were illegal to sell in California without specific factual evidence of what discovery was accomplished, what discovery was useless and why, and documentary support for the claim of $50,000 is merely an unsupported opinion of counsel that does not justify the court entering an extraordinary

order conditioning granting of the motion on payments of $50,000 and all costs to engage in discovery on the cross-complaint. The request is denied.

Defendants Labmor Enterprises, Inc.'s and Labbitts' motion for leave to file cross-complaint is granted.

TENTATIVE RULING # 16: DEFENDANTS LABMOR ENTERPRISES, INC.'S AND LABBITTS' MOTION FOR LEAVE TO FILE CROSS-COMPLAINT IS GRANTED. DEFENDANTS LABMOR ENTERPRISES, INC.'S AND LABBITTS' ARE TO FILE AN ORIGINAL, EXECUTED CROSS-COMPLAINT AS PROPOSED WITHIN TEN DAYS. THE CROSS-COMPLAINT IS DEEMED SERVED ON THE OTHER PARTIES TO THIS LITIGATION. THE COURT DENIES PLAINTIFF'S MOTIONS TO HOLD DEFENDANTS IN CONTEMPT OF COURT. PLAINTIFF'S MOTION TO COMPEL DEFENDANT CALLARICK ENTERPRISES, LP TO PROVIDE FURTHER RESPONSES TO REQUESTS FOR PRODUCTION, SET THREE, AND TO IMPOSE MONETARY AND/OR TERMINATING SANCTIONS IS GRANTED IN PART AND DENIED IN PART AS DESCRIBED IN THE TEXT OF THE RULING. THE COURT ORDERS THAT THE RESPONSES BE VERIFIED BY DEFENDANT CALLARICK ENTERPRISES, LP AND DEFENDANT CALLARICK ENTERPRISES, LP IS REQUIRED TO PROVIDE A FURTHER RESPONSE AND PRODUCTION CONCERNING DOCUMENTS IDENTIFYING BANK AND FINANCIAL INSTITUTION ACCOUNTS OF DEFENDANT AS SOUGHT IN REQUESTS FOR PRODUCTION, SET THREE, REQUEST NUMBER 28. PLAINTIFF'S MOTION TO COMPEL DEFENDANT CONSTANTLY GROWING, LLC TO PROVIDE FURTHER RESPONSES TO REQUESTS FOR PRODUCTION, SET THREE, AND TO IMPOSE MONETARY AND/OR TERMINATING SANCTIONS IS GRANTED IN PART AND DENIED IN PART AS DESCRIBED IN THE TEXT OF THE RULING. DEFENDANT CONSTANTLY GROWING, LLC

IS ORDERED TO PROVIDE VERIFIED, UNREDACTED COPIES OF THE DOCUMENTS ALREADY PRODUCED WITHIN TEN DAYS. PLAINTIFF'S MOTION TO COMPEL DEFENDANT CONSTANTLY GROWING, INC. TO PROVIDE FURTHER RESPONSES TO REQUESTS FOR PRODUCTION, SET THREE, AND TO IMPOSE MONETARY AND/OR TERMINATING SANCTIONS IS GRANTED IN PART AND DENIED IN PART AS DESCRIBED IN THE TEXT OF THE RULING. DEFENDANT CONSTANTLY GROWING, INC. IS ORDERED TO PROVIDE VERIFIED FURTHER RESPONSES TO REQUESTS FOR PRODUCTION, SET THREE, REQUEST NUMBERS 2 AND 28 AND PRODUCE THE DOCUMENTS REQUESTED. PLAINTIFF'S MOTION TO COMPEL DEFENDANT LABMOR ENTERPRISES, INC. TO PROVIDE FURTHER RESPONSES TO REQUESTS FOR PRODUCTION, SET THREE, AND TO IMPOSE MONETARY AND/OR TERMINATING SANCTIONS IS GRANTED IN PART AND DENIED IN PART AS DESCRIBED IN THE TEXT OF THE RULING. DEFENDANT LABMOR ENTERPRISES, INC. IS ORDERED TO PROVIDE VERIFIED FURTHER RESPONSES TO REQUESTS FOR PRODUCTION, SET THREE, REQUEST NUMBERS 2, 9, AND 28 AND PRODUCE THE DOCUMENTS REQUESTED. ISSUE AND TERMINATING SANCTIONS REQUESTED IN THE MOTIONS TO COMPEL VARIOUS DEFENDANTS TO PROVIDE FURTHER RESPONSES TO REQUESTS FOR PRODUCTION ARE DENIED. THE COURT ORDERS DEFENDANTS CALLARICK ENTERPRISES, LP, CONSTANTLY GROWING, INC., CONSTANTLY GROWING, LLC AND LABMOR ENTERPRISES, INC. TO EACH PAY THE SUM OF $1,230 TO PLAINTIFF AS MONETARY SANCTIONS. NO HEARING ON THESE MATTERS WILL BE HELD (<u>LEWIS V. SUPERIOR COURT</u> (1999) 19 CAL.4TH 1232, 1247.), UNLESS A NOTICE OF INTENT TO APPEAR AND REQUEST FOR ORAL ARGUMENT IS TRANSMITTED ELECTRONICALLY THROUGH THE COURT'S WEBSITE OR BY TELEPHONE TO THE COURT AT (530) 621-

6551 BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. NOTICE TO ALL PARTIES OF AN INTENT TO APPEAR MUST BE MADE BY TELEPHONE OR IN PERSON. PROOF OF SERVICE OF SAID NOTICE MUST BE FILED PRIOR TO OR AT THE HEARING. LONG CAUSE HEARINGS MUST BE REQUESTED BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED AND THE PARTIES ARE TO PROVIDE THE COURT WITH THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. LONG CAUSE ORAL ARGUMENT REQUESTS WILL BE SET FOR HEARING ON ONE OF THE THREE MUTUALLY AGREEABLE DATES ON FRIDAY AFTERNOONS AT 2:30 P.M. THE COURT WILL ADVISE THE PARTIES OF THE LONG CAUSE HEARING DATE AND TIME BY 5:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. PARTIES MAY PERSONALLY APPEAR AT THE HEARING. IF A PARTY OR PARTIES WISH TO APPEAR TELEPHONICALLY THEY MUST APPEAR BY "VCOURT", WHICH MUST BE SCHEDULED AND PAID THROUGH THE COURT WEBSITE AT www.eldorado.courts.ca.gov/online-services/telephonic-appearances. MATTERS IN WHICH THE PARTIES' TOTAL TIME ESTIMATE FOR ARGUMENT IS 15 MINUTES OR LESS WILL BE HEARD ON THE LAW AND MOTION CALENDAR AT 8:30 A.M. ON FRIDAY, OCTOBER 28, 2022 EITHER IN PERSON OR BY VCOURT TELEPHONIC APPEARANCE UNLESS OTHERWISE NOTIFIED BY THE COURT.

17. SCHIRO v. DOWNER 21CV0265

Hearing Re: Default Judgment.

TENTATIVE RULING # 17: THIS MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, NOVEMBER 4, 2022 IN DEPARTMENT NINE.