09-08-23
Dept. 9
Tentative Rulings

**1. ALLIANCE ONE v. JODAR VINEYARDS ET AL PC20210494**

**Order of Examination Hearing**

A default judgment against multiple Defendants was entered on March 11, 2022. A Writ of Execution was issued on March 17, 2022, reflecting a total judgment amount of $458,337.35 against four Defendants: Jodar Vineyards & Winery, Inc., Mark Woolridge, Teneral Cellars, Inc. and Atherstone Foods, Inc. dba Glass Onion Catering.

Orders to Appear for Examination as to Defendants Mark Woolridge and Jodar Vineyards & Winery, Inc. were issued by the court on August 14, 2023.

Code of Civil Procedure § 708.110(d) requires personal service on a judgment debtor not less than ten days before the date set for the examination.

There is no proof of service of either of the Orders on file with the court.

**TENTATIVE RULING #1: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, SEPTEMBER 8, 2023, IN DEPARTMENT NINE.**

**NO HEARING ON THIS MATTER WILL BE HELD UNLESS A 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. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).**

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**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 BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.**

**2. ARNAUT v. THORNE, ET AL PC20170230**

**Order to Show Cause - Contempt**

This case originated as a compromise of minors' claim. According to the Declaration of Peter Tieman, dated and filed on May 20, 2022, the Order approving the compromise of minors' claim, dated July 31, 2020, became impossible to implement because the selected location at which the funds were to be deposited into a blocked account was closed due to COVID. Further, the Plaintiffs moved to Texas in 2020. A Guardian ad Litem for the two minors was appointed on April 28, 2022.

According to the Declaration of Carmen Olmedo, dated June 2, 2023, and filed on June 6, 2023, there was a delay caused by the need to get the minors' social security numbers, which was accomplished on June 2, 2023, and with that information the declarant anticipated being able to open the minors' bank accounts within 60 days.

At the hearing on June 9, 2023, Plaintiff indicated that the parties were working toward resolution and requested a continuance.

**TENTATIVE RULING #2: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, SEPTEMBER 8, 2023, IN DEPARTMENT NINE.**

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**TO APPEAR BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.**

**3. CANALE v. TYRELL 23CV0288**

**Motion to Dismiss Complaint**

Following a hearing on May 26, 2023, this court ordered that Defendant's demurrer was sustained with leave to amend within ten days of the proof of service of the Order. On June 5, 2023, this court entered the Order. Defendant mailed and emailed notice of the Order to Plaintiff on June 8, 2023. Declaration of Shahid Manzoor, dated July 20, 2023, Exhibit 1.

On July 27, 2023, Defendant filed this motion to dismiss the Complaint because no amended Complaint has been filed since the June 8, 2023, Order was served on Plaintiff.

**TENTATIVE RULING #3: ABSENT OBJECTION, THIS MOTION IS GRANTED AS REQUESTED.**

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**4. HERNANDEZ v. NAKABAYASHI 23CV0992**

**Compromise Minor's Claim**

**TENTATIVE RULING # 4: AT THE REQUEST OF THE PARTIES, THE MATTER IS CONTINUED TO 8:30 A.M. ON FRIDAY, OCTOBER 13, 2023, IN DEPARTMENT NINE.**

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**5. BROWN v. BROWN, ET AL 22CV1598**

**(1) Appointment of Receiver**
**(2) Preliminary Injunction**

According to the Complaint filed on November 8, 2022, the parties to this action are brothers, the sole co-owners and founders of Defendant Brown Building, LLC (the "Company"). The company was formed in 2012 to hold real property assets that the two brothers inherited and owned as tenants in common until the formation of the Company. Complaint at ¶¶5-7; Declaration of E. Brown, dated July 13, 2023 ("E. Brown Declaration") at ¶5-6. The Company was formed in order to protect the real property assets from personal liability resulting from a car accident. Complaint at ¶8; E. Brown Declaration at ¶7. Plaintiff alleges that the process of forming the Company was accomplished by duress because of this imminent threat of loss, that he was not represented by an attorney to evaluate the proposed agreement to form the Company, and the executed agreement forming the LLC ("Operating Agreement") largely gave Defendant sole control of the Company's management. Complaint at ¶¶9-11; E. Brown Declaration at ¶¶9-10.

Since 2012, the Company has been operated pursuant to that 2012 agreement. Complaint at ¶¶13-17. As a result, Plaintiff alleges, the interest of the Company attributed to each partner has diverged from a former 50-50 ownership interest, such that in an accounting performed in 2020, Defendant's interest was stated as $363,982, and Plaintiff's interest was stated at $123,038. In 2021, Defendant's interest was stated as $450,388, and Plaintiff's interest was stated at $127,495. Complaint at ¶18; E. Brown Declaration at ¶12. Defendant attributes the difference to Plaintiff's lack of capital contributions to the business, as well as Plaintiff's continuing receipt of monthly disbursements (*see* E. Brown Declaration at ¶4), while Defendant allegedly ceased taking disbursements from the Company when the Company was not doing well. E. Brown Declaration at ¶¶3-4.

On October 31, 2018, a property located at 3892 Durock Road, which included a house and a shop, was purchased with Company funds. Declaration of Jeff Brown, ("J. Brown Declaration") dated August 25, 2023, at ¶¶14, 16. The acquisition was financed by the seller, and according to Defendant, title to the property was put into his individual name as a condition of that financing. J. Brown Declaration at ¶15. On August 8, 2023, just after Plaintiff's motion to appoint a receiver was filed, Defendant Brown transferred the property out of his name as an individual and into the name of the Company. J. Brown Declaration, Exhibit B. While there are records of Company assets being spent on improvement of the 3892 Durock Road property, Plaintiff alleges that Defendant has used it as his personal residence. E. Brown Declaration at ¶14.

The Complaint alleges breach of contract, fraud, breach of fiduciary duties and conversion, and requests appointment of a receiver. Defendant has filed a Cross-Complaint alleging defamation.

Plaintiff alleges that:

- Defendant has collected rents from Company properties and converted them to personal use. E. Brown Declaration at ¶15.
- Defendant has failed to hold regular Company meetings as required under the Operating Agreement; E. Brown Declaration at ¶17.
- Defendant has failed to respond to requests for information from Plaintiff and Plaintiff's accountant. E. Brown Declaration at ¶¶18-19.

The review conducted by Nicky Chiuchiarelli, dated July 12, 2023 ("Chiuchiarelli Declaration") an accountant retained by Plaintiff, indicated that Defendant may not have been fully responsive to requests for information, and questions were raised without being resolved, such as "what may have been potential capital contributions rather than revenue being properly accounted for, or if there were capital contributions that may have been made outside of the LLC's bank account." Declaration of N. Chiuchiarelli, dated July 12, 2023 ("Chiuchiarelli Declaration") at ¶5.

On July 17, 2023, Plaintiff filed a motion to appoint a limited purpose receiver to take control of, manage, operate and maintain, and to develop a plan to remediate the current state of the Company pending determination of the current litigation.

Plaintiff further requests a preliminary injunction to prevent harm to or waste of the company's assets pending the appointment of a receiver and to prevent interference with the receiver's duties during the pendency of the litigation.

Plaintiff contends that continued unilateral management of the company by Defendant will result in irreparable harm to the Company and waste of its assets.

Receivership

Code of Civil Procedure § 564(b)(1) authorizes a court to appoint a receiver "[i]n an action . . . between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds of the property or fund, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured."

Code of Civil Procedure § 564(b)(9) further authorizes appointment of a receiver "[i]n all other cases where necessary to preserve the property or rights of any party."

Plaintiff acknowledges that the other two commercial properties "have been rented at full capacity for most of the time we have owned them." E. Brown Declaration at ¶3. *See also* J. Brown Declaration at ¶10. The business income has been sufficient to provide Plaintiff with "a monthly check in the amount of $2,500.00 per month which is supposed to come out of the Company's monthly profit." E. Brown Declaration at ¶4. Defendant states that "all cash payments that were received by [the Company] were deposited into the Company account." J. Brown Declaration at ¶17.

From the face of these declarations the court cannot conclude that the assets of the Company are "in danger of being lost, removed, or materially injured." Given that Plaintiff has continued to receive monthly disbursements from Company assets, and that title to the 3892 Durock Road property has been placed in the Company's name, the court does not at this stage perceive a necessity to impose the drastic measure of a receivership in order to preserve the property rights of any party.

Plaintiff's motion for the creation of a receivership is dismissed without prejudice, leaving the Plaintiff with the option of renewing the motion if the process of discovery reveals additional facts that would better support the need for the appointment of a receiver.

Preliminary Injunction

Plaintiff requests a preliminary injunction to prevent Defendant from interfering in the activities of the receiver, disposing of or diverting any Company assets, concealing or destroying any Company records, or taking any action that would compromise the interests of the Plaintiff in the Company.

Code of Civil Procedure 526(a)(2) authorizes a court to grant an injunction "[w]hen it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action**."**

A preliminary injunction may be granted upon a verified complaint or upon affidavits which show that sufficient grounds exist for the issuance of such an injunction. Code of Civil Procedure § 527(a). "The applicant must demonstrate a real threat of immediate and irreparable injury . . . due to the inadequacy of legal remedies." (Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal.App.3d 131, 138. (Citations omitted.) "The plaintiff bears the burden of presenting facts establishing the requisite reasonable probability." Fleishman v. Superior Court (2002) 102 Cal.App.4th 350, 356.

In deciding whether to issue a preliminary injunction, two factors must be weighed: the likelihood of the moving party ultimately prevailing on the merits and the relative interim harm to the parties from the issuance of a preliminary injunction. Butt v. State of California (1992) 4 Cal.4th 668, 677-678. "The latter factor involves consideration of such things as the inadequacy

of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo." Abrams v. St. John's Hosp. & Health Ctr., (1994) 25 Cal. App. 4th 628, 636. "If the threshold requirement of irreparable injury is established, then we must examine two interrelated factors to determine whether the trial court's decision to issue a preliminary injunction should be upheld: "(1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." Costa Mesa City Employees' Assn. v. City of Costa Mesa, (2012) 209 Cal. App. 4th 298, 306.

"The determination whether to grant a preliminary injunction generally rests in the sound discretion of the trial court. (Citation omitted.)" (Abrams v. St. John's Hospital & Health Center (1994) 25 Cal.App.4th 628, 636. "It is said: '"To issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion, and rarely, if ever, should (it) be exercised in a doubtful case. . . ."'" Ancora-Citronelle Corp. v. Green (1974) 41 Cal.App.3d 146, 148 (citations omitted).

There are two declarations submitted in support of issuing an injunction. One is the Chiuchiarelli Declaration, documenting Plaintiff's attempt to review the Company's records and to reconcile the capital accounts. That Declaration indicates that Defendant has not been forthcoming in the production of Company records, that he has used company assets for personal expenses, and that additional information is needed in order for Plaintiff to reconcile company accounts. Plaintiff also submitted a supporting Declaration, which alleges that Defendant has not deposited all Company assets in Company accounts, that he is using Company property as a personal residence, that he has not responded to Plaintiff's requests for information or inquiries. These allegations are contradicted in the Declaration filed by Defendant.

Even if Plaintiff's allegations were uncontroverted, past conduct that has given rise to the litigation does not necessarily indicate an imminent need for judicial intervention to prevent disposal of Company assets, destruction of Company records or actions pending the outcome of litigation that would harm Plaintiff's interests. Plaintiff has adequate remedies through the course of litigation to compensate him for any unlawful actions or breaches of fiduciary duties by Defendant. The Company's assets consist primarily of real properties and collected rents, which can be traced through discovery and accounted for. If they cannot be accounted for, or if Company assets were improperly used for Defendant's personal benefit, these pecuniary losses can be reimbursed through the imposition of damages. Misuse of discovery can be remedied through sanctions, up to an including issue sanctions, evidence sanctions and termination sanctions if Defendant willfully fails to produce relevant Company

records. At this early stage it cannot be said that either party is likely to prevail on the merits. Accordingly, Plaintiff's request for a preliminary injunction is denied.

**TENTATIVE RULING 5:**

**(1) PLAINTIFF'S REQUEST FOR APPOINTMENT OF A RECEIVER IS DENIED WITHOUT PREJUDICE.**
**(2) PLAINTIFF'S REQUEST FOR A PRELIMINARY INJUNCTION IS DENIED.**

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**6. FRISCHMEYER v. STORY PC20150409**

**Order of Examination Hearing**

On August 16, 2023, Plaintiff filed an Affidavit of Reasonable Diligence, indicating that between June 27 and July 5, 2023, Plaintiff located Defendant's residence and a process server appeared there on five occasions to attempt personal service but there was no answer at the door even though there were indications that someone was at home.

**TENTATIVE RULING #7: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, SEPTEMBER 8, 2023, IN DEPARTMENT NINE.**

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**7. NAME CHANGE OF HAMES 23CV0645**

**Petition for Name Change**

Petitioner filed a Petition for Change of Name on April 28, 2023.

Proof of publication was filed on June 26, 2023, as required by Code of Civil Procedure § 1277(a).

A background check has been filed with the court as required by Code of Civil Procedure § 1279.5(f).

**TENTATIVE RULING #7: ABSENT OBJECTION, THIS MOTION IS GRANTED AS REQUESTED.**

**NO HEARING ON THIS MATTER WILL BE HELD UNLESS A 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. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).**

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**8. PENNYMAC LOAN SERVICES LLC v. ROSS 23UD0186**

**Motion to Establish Admissions**

Plaintiff filed this unlawful detainer action on June 5, 2023, and the Summons was also filed with the court on June 5, 2023. There is no proof of service of the Summons and Complaint on file with the court. Defendant filed an Answer on June 14, 2023.

On June 21, 2023, Plaintiff served Defendant with Request for Admissions (Set One) via overnight delivery service. Declaration of Brian Thomley dated July 3, 2023, at ¶2.

Pursuant to the statutory response time for unlawful detainer actions set forth in Code of Civil Procedure § 2033.250(b), plus two days based on service by overnight delivery service, Code of Civil Procedure § 1013(c), Defendant had a response deadline of June 28, 2023.

On July 13, 2023 Plaintiff filed this motion and supporting declaration to deem the facts admitted that are set forth in the Request for Admissions (Set One), in accordance with Code of Civil Procedure § 2033.280(b) ("If a party to whom requests for admission are directed fails to serve a timely response, . . . : (b) The requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted . . . .")

No opposition to the motion has been filed.

**TENTATIVE RULING #8: ABSENT DEFENDANT'S SERVICE OF A RESPONSE TO PLAINTIFF'S REQUESTS FOR ADMISSIONS (SET ONE), PRIOR TO THE TIME SET FOR HEARING OF THE MOTION, THE MOTION TO DEEM FACTS ADMITTED IS GRANTED.**

**NO HEARING ON THIS MATTER WILL BE HELD UNLESS A 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. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).**

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**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 BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.**

**9. PEOPLE OF THE STATE OF CALIFORNIA v. HARRIS PC20200368**

**Petition for Forfeiture**

On August 3, 2020 the People filed a petition for forfeiture of cash in the total amount of $285,347.90; such funds are currently in the hands of the El Dorado County District Attorney's Office; and 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 People pray for judgment declaring that the money is forfeited to the State of California.

Claimant Harris filed a Judicial Council Form MC-200 claim opposing forfeiture in response to a notice of petition.

Both parties waived further notice of hearing at the petition for forfeiture hearings that were held on June 2, 2023 and July 7, 2023.

**TENTATIVE RULING #9: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, SEPTEMBER 8, 2023, IN DEPARTMENT NINE.**

**NO HEARING ON THIS MATTER WILL BE HELD UNLESS A 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. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).**

**NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY 4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; EL DORADO COUNTY LOCAL RULE 8.05.07. 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 BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.**

**10. PEOPLE OF THE STATE OF CALIFORNIA v. MACEIUNAS 22CV0482**

**Petition for Forfeiture**

On March 15, 2022, the People filed a petition for forfeiture of cash in the amount of $27,000.00 seized by the El Dorado County Sheriff's Department. According to The People, the property became subject to forfeiture pursuant to Health and Safety Code § 11470(f). Claimant Maceiunas filed a Judicial Council Form MC-200 claim opposing forfeiture in response to a notice of petition, along with a proof of service dated May 12, 2022.

Pursuant to Section 11470(f), items which are subject to forfeiture include all moneys and other items of value which are furnished or intended to be furnished in exchange for a controlled substance or which are used or intended to be used to facilitate a violation of a number of enumerated Penal and Health and Safety Code sections. Health & Safety § 11470(f). "[C]onduct which is the basis for the forfeiture [must have] 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 & Safety § 11470(f). "Any person claiming an interest in the property seized pursuant to Section 11488 may… within 30 days after receipt of actual notice, file with the superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized … a claim, verified in accordance with Section 446 of the Code of Civil Procedure, stating his or her interest in the property." Health and Safety Code, § 11488.5(a)(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." Health & Safety §11488.5(c).

It appears that all procedural matters have been complied with. There is no reference to a pending criminal trial in the file. Accordingly, the parties are ordered to appear to select trial dates.

**TENTATIVE RULING #10: APPEARANCES ARE REQUIRED AT 8:30 A.M. ON FRIDAY, SEPTEMBER 8, 2023, IN DEPARTMENT NINE.**

**NO HEARING ON THIS MATTER WILL BE HELD UNLESS A 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. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).**

**NOTICE TO ALL PARTIES OF A REQUEST FOR ORAL ARGUMENT AND THE GROUNDS UPON WHICH ARGUMENT IS BEING REQUESTED MUST BE MADE BY TELEPHONE OR IN PERSON BY**

**4:00 P.M. ON THE DAY THE TENTATIVE RULING IS ISSUED. CAL. RULE CT. 3.1308; EL DORADO COUNTY LOCAL RULE 8.05.07. 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 BY ZOOM PLEASE CONTACT THE COURT AT (530) 621-5867 AND MEETING INFORMATION WILL BE PROVIDED.**

**11. NAPOLEON v. UNITED SERVICES AUTOMOBILE ASSOC. PC20210289**

**Demurrer to Second Amended Complaint**

This matter arises from a policy of life insurance issued by USAA Life Insurance Company ("USAA Life") to Plaintiff's husband, George Napoleon, who passed away due to injuries suffered in a fire that occurred at his and Plaintiff's home. Plaintiff made a claim for insurance benefits which USAA Life refused to pay until the conclusion of investigations as to the cause of the fire. USAA Life has since paid the benefits.

Plaintiff has sued Defendant United Services Automobile Assoc. ("USAA"), the parent company of USAA Life, for breach of the implied covenant of good faith and fair dealing on a based on (1) alter ego and (2) joint venture theories of liability. Plaintiff's First Amended Complaint ("FAC") was filed on January 17, 2023.

Following a hearing on May 19, 2023, in an Order dated June 12, 2023, the court sustained Defendant's demurrer to the FAC and granted Plaintiff leave to amend within ten days. Plaintiff filed a Second Amended Complaint ("SAC") on June 5, 2023.

Request for Judicial Notice

Pursuant to Evidence Code § 452(h) and (c), Defendant requests judicial notice of two facts: 1) that USAA Life is authorized to transact life and disability insurance in the State of California, and 2) that USAA is not authorized to transact life and disability insurance in the State of California.

Judicial notice is a mechanism which allows the court to take into consideration matters which are presumed to be indisputably true. California Evidence Code Sections 451, 452, and 453 collectively govern the circumstances in which judicial notice of a matter may be taken. While Section 451 provides a comprehensive list of matters that must be judicially noticed, Section 452 sets forth matters which *may* be judicially noticed, including "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" Evidence Code § 452(h). A trial court is required to take judicial notice of any matter listed in section 452 if a party requests it and gives the other party sufficient notice to prepare to meet the request. Evidence Code § 453.

According to publicly available information from the Department of Insurance, the facts for which judicial notice is requested relate to authorizations to conduct business which are official acts of the California Department of Insurance, are facts that are not reasonably subject

to dispute and are easily verifiable by searching the California Department of Insurance website. As such, Defendant's request for judicial notice of these facts is granted.

Standard on Demurrer

A demurrer raises only issues of law, not fact, regarding the form and content of the pleadings of the opposing party. Code of Civil Procedure §§ 422.10 and 589. It is not the function of the demurrer to challenge the truthfulness of the complaint, instead, for the purposes of testing the sufficiency of the cause of action, the demurrer admits the truth of all material facts in the pleading but not contentions, deductions or conclusions of fact or law. Aubry v. Tri-City Hosp. Dist, 2 Cal. 4th 962, 966-967 (1992); Serrano v. Priest ,5 Cal. 3d 584 (1971); Adelman v. Associated Int'l Ins. Co., 90 Cal. App. 4th 352, 359 (2001). A demurrer can only challenge defects that appear on the face of the pleading and other matters that are judicially noticeable, the challenging party cannot make allegations of fact to the contrary. Blank v. Kirwan, 39 Cal. 3d 311, 318 (1985); Donabedian v. Mercury Ins. Co., 116 Cal. App. 4th 968 (2004); Harboring Villas Homeowners Assn. v. Sup. Ct., 63 Cal. App. 4th 426 (1998). For that reason, "[t]he hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable." Fremont Indemnity Co. v. Fremont General Corp., 148 Cal. App. 4th 97, 114 (2007).

Failure to plead the ultimate facts supporting a cause of action subjects the complaint to a demurrer. Cal. Civ. Pro. § 430.10(e); Berger v. Cal. Ins. Guar. Ass'n, 128 Cal. App. 4th 989, 1006 (2005). "To determine whether a cause of action is stated, the appropriate question is whether, upon a consideration of all the facts alleged, it appears that the plaintiff is entitled to any judicial relief against the defendant, notwithstanding that the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged." Elliot v. City of Pacific Grove, 54 Cal. App. 3d 53, 56. Otherwise stated, the demurrer is to be overruled if the allegations of the complaint are sufficient to state a cause of action under any legal theory. Brousseau v. Jarrett, 73 Cal. App. 3d 864 (1977); see also Nguyen v. Scott, 206 Cal. App. 3d 725 (1988).

Good Faith and Fair Dealing

The crux of Plaintiff's FAC is a claim for bad faith. Because a claim for bad faith is premised on the fact that every contract carries with it an implied covenant of good faith and fair dealing, there must be a contractual relationship between the parties to subject one to liability for bad faith. See Waller v. Truck Ins. Exchange, Inc., 11 Cal. 4th 1 (1995). Accordingly, to survive Defendant's demurrer, Plaintiff must show that the SAC adequately establishes some basis upon which USAA Life's parent company can be held liable for the contractual relations of

its subsidiary. Plaintiff sets forth two arguments in this regard: (1) alter ego liability; and (2) joint venture liability.

*Alter Ego Liability*

> "Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations. [Citations] A corporate identity may be disregarded – the 'corporate veil' pierced – where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citations]. Under the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation…[Citations]. In California, two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations]…No one characteristic governs, but the courts must look at all circumstances to determine whether the doctrine should be applied. [Citations] Alter ego is an extreme remedy, sparingly used."

Sonora Diamond Corp. v. Sup. Ct., 83 Cal. App. 4th 523, 538-539 (2000).

A central issue in the current case is whether the corporate form has been used "to perpetuate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, . . ." Id.

For example, the case of Hacker v. Fabe involved retaliatory litigation, the destruction of evidentiary records and transferring of corporate assets to avoid liability to the Plaintiff. Hacker v. Fabe, 92 Cal. App. 5th 1267 (2023). Hub City Solid Waste Servs., Inc. v. City of Compton, 186 Cal. App. 4th 1114 (2010) involved public corruption, a shell corporation and undercapitalization of the corporation caused by diversion of corporate assets for personal expenses of its founder.

In its Tentative Ruling opinion issued on April 7, 2023 in relation to Defendant's demurrer to the FAC, on the issue of alter ego liability the court stated that it did not need to reach the issue of unity of interest and joint control between the two corporations because it found Plaintiff's FAC to be deficient for failing to establish that there will be an inequitable result if USAA is not held liable for USAA Life's alleged wrongful conduct. The court held, "there are no facts alleged to establish fraud and while the delayed insurance payment may be found to be unjust, there are no facts to support that USAA Life was created solely for the purpose of committing bad faith against its insureds without thereafter being held accountable."

Plaintiff's Second Amended Complaint ("SAC") reproduced many of the allegations from the FAC showing a unity of interest between USAA and USAA Life from the FAC. The SAC added allegations in Paragraphs 43-58 that related to Plaintiff's understanding based on Defendants' commercial representations that the two corporations were interchangeable with respect to their customer interfaces and their response to, processing and payment of Plaintiff's insurance claim. The SAC omitted the allegation in Paragraph 37 of the FAC, that USAA Life had the ability to borrow up to $900 million, a statement taken from USAA Life's Management Discussion Analysis in its 2021 financial statements, and upon which this court relied in its Tentative Ruling sustaining the demurrer to the FAC.

In paragraph 56, the SAC alleges that USAA "controlled and actively contributed to the misconduct that resulted in the 27-month delay of the payment of [Plaintiff's] benefits . . . . [T]his unjust delay and misconduct breached the implied covenant of good faith and fair dealing. Consequently, injustice and/or fraud will result if [USAA] is not liable for the harm it directly caused [Plaintiff] by delaying payment [of the policy benefits]."

The SAC does not cure the deficiencies of the FAC with respect to alter ego liability. The additional allegations reciting Plaintiff's reasonable belief that USAA and USAA Life were essentially interchangeable from the perspective of the consumer do not establish any bad faith on the part of USAA. As this court stated in its Tentative Ruling on demurrer to the FAC, "while the delayed insurance payment may be found to be unjust, there are no facts to support that USAA Life was created solely for the purpose of committing bad faith against its insureds without thereafter being held accountable."

The SAC alleges that undercapitalization of USAA Life represents inequity and injustice because USAA Life's obligations are paid from bank accounts held by USAA "which allows it to manipulate USAA Life's assets to minimize the potential liabilities of the USAA enterprise and take advantage of subscribers, like [Plaintiff]." SAC at ¶57.

> Alter ego doctrine does not guard every unsatisfied creditor of a corporation, but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form, and difficulty in enforcing a judgment or collecting a debt does not satisfy this standard.

Sonora Diamond Corp. v. Superior Ct., 83 Cal. App. 4th 523, 99 Cal. Rptr. 2d 824 (2000).

If Plaintiff prevails in this lawsuit against USAA Life it will be for the damages she alleges that suffered as a result of a 27-month delay in the payment of her insurance claim. Her claim has been paid in full. There is no basis for speculating that if she wins a damage award it would not be paid, albeit through financial institutions and accounts that may be shared with USAA Life's parent company. There are no allegations of intentional misconduct designed to avoid liability, such as hiding assets from judgment or destroying evidentiary records.

"In short, there is nothing to indicate that plaintiffs, if successful against the corporation, will not be able to collect on any judgment against the corporation. Absent such evidence, plaintiffs cannot show that the result will be inequitable, and have not stated the second element of an alter ego claim." Leek v. Cooper, 194 Cal. App. 4th 399, 417–18 (2011).

*Joint Venture*

Plaintiff argues Defendant's liability on the basis that it was a joint venture with USAA Life and all members of a joint venture are liable for the torts committed by any one member in connection with the venture. *See* Grant v. Weatherholt, 123 Cal. App. 2d 34 (1954). This theory relies on the fact that members of a joint venture are agents of one another and are therefore able to act on behalf of each other. Id. Thus, to establish liability, one must establish agency between the parties in furtherance of a business enterprise, not simply the ownership of one party over the other.

A joint venture requires joint ownership, joint control and shared profits of some business enterprise. *See* Scottsdale Ins. Co. v. Essex Ins. Co., 98 Cal. App. 4th 86, 91 (2002). "A joint venture has been defined in various ways but most frequently perhaps as an association of two or more persons who combine their property, skill or knowledge to carry out a single business enterprise for profit." Holtz v. United Plumbing & Heating Co., 49 Cal. 2d 501, 506 (1957).

The facts at hand are quite simple. USAA Life is a subsidiary of USAA. Once USAA Life incorporated it became its own separate entity operating its own business enterprise, selling and providing life insurance. USAA Life and USAA did not enter into a separate business enterprise in which they each had an ownership interest. Instead, the ownership is linear, not triangular. Defendant owns USAA Life. USAA Life conducts business of providing life insurance. In other words, Plaintiff's argument is missing the joint part of a joint enterprise.

Plaintiff is correct that the parent-wholly owned subsidiary relationship does not conclusively establish that there is no joint venture. Both parties cite the case of N. Nat. Gas Co. v. Superior Ct., 64 Cal. App. 3d 983 (1976) to support their positions, a case in which a wholly owned subsidiary was found to have been created for the purpose of establishing a joint venture with the parent company. In that case, however, the court's finding of a joint venture was based upon "uncontradicted evidence before the trial court that [the subsidiary] had been specially organized to carry out a joint venture association with [the parent company]," including the "inducements and representations" made by a corporate officer to the Plaintiff that were "tantamount to a representation that [the parent company] would be liable for [the subsidiary's] debts . . . ." By contract, the SAC alleges that a joint venture between USAA Life and USAA is "implied" by the features of the parent-subsidiary relationship. SAC at ¶59.

Conversely, the fact that USAA is the sole shareholder of USAA Life and in that capacity may exercise control over, share resources with, and participate in the business activities of USAA Life is not sufficient to establish that the two companies have entered into a joint venture to conduct a separate business enterprise.

**TENTATIVE RULING #11:**

**(1) DEFENDANT'S REQUEST FOR JUDICIAL NOTICE IS GRANTED.**
**(2) DEFENDANT'S DEMURRER IS SUSTAINED WITH LEAVE TO AMEND WITHIN TEN DAYS.**

**NO HEARING ON THIS MATTER WILL BE HELD UNLESS A 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. CAL. RULE CT. 3.1308; LOCAL RULE 8.05.07; SEE ALSO LEWIS V. SUPERIOR COURT, 19 CAL.4TH 1232, 1247 (1999).**

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