

<b>1.</b>	<b>PC20200294</b>	<b>ALL ABOUT EQUINE</b>
<b>Motion for Protective Order and Reasonable Costs and Expenses</b>		

By minute order on August 6, 2024, the Court set this Motion for August 23, 2024. Any opposition was to be filed by August 16, 2024, and any reply was to be filed by August 21, 2024. No opposition was filed.

On July 12, 2024, Plaintiff All About Equine Animal Rescue, Inc. (“Plaintiff” or “AAE”) propounded a Demand for Inspection of Real Property—Set One (the “Demand”) on Defendants Maynard K. Byrd, Debra L. Byrd, Alexander Neal Byrd, Laura Anne Byrd (Rodarte), and Joshua Lee Rodarte (the “Byrds”); and on Defendants Terry Wilson and Dawn Wilson (the “Wilson”) (collectively, “Defendants”). (Declaration of Taylor P. Call [“Call Decl.”], ¶ 2.) AAE also propounded a Demand on Defendants Roger Saunders and Trisha Saunders (the “Saunders”). (Call Decl., ¶ 2.) AAE demands that it be permitted to enter and inspect, measure, survey, and photograph the real property commonly known as El Dorado County Assessor’s Parcel Number 071-051-057 (the “Byrd Property”), the real property commonly known as El Dorado County Assessor’s Parcel Number 071-051-058 (the “Wilson Property”), the real property commonly known as El Dorado County Assessor’s Parcel Number 071-051-061 (the “Saunders Property”), and any operation, structure, or improvement thereon, on August 14, 2024. (Call Decl., ¶ 2.)

Defendants argue that this means that AAE and its agents would be permitted to enter Defendants’ homes and take pictures. Counsel for the parties attempted to meet and confer but an agreement could not be reached. Defendants request that inspection be made only on the condition that AAE not be permitted to enter any of Defendants’ homes and/or structures, private driveways, or easements to which AAE does not have access.

“The court, for good cause shown, may make any order that justice requires to protect any party or other person from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.” (Code Civ. Proc. [hereinafter “CCP”] § 2031.060(b).) The protective order may include directions that the inspection be made only on specified terms and conditions. (CCP § 2031.060 (b)(4).) Furthermore, the “court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.” (CCP § 2017.020(a).)

Defendants argue that they have good cause for a protective order and that the right of privacy is implicitly guaranteed in the United States Constitution. (See, e.g., *Griswold v. Connecticut* (1965) 381 U.S. 479.) Additionally, “Article I, section 1 of the California Constitution (added Nov. 5, 1974) provides in pertinent part that all people are by nature free and independent and have inalienable rights, among which is pursuing and obtaining privacy. . . . The constitutional provision is self-executing and needs no legislation to create a legal and

enforceable right of privacy for every Californian.” (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1013-1014.) Defendants further argue that the California constitutional right of privacy may be invoked against intrusions by private entities. (See, e.g., *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992.) Defendants argue that they have a right of privacy in their own homes and permitting AAE and its agents to enter Defendants’ structures and/or homes for inspection would intrude upon that right of privacy. Defendants claim that the broad scope of AAE’s demand would allow AAE and its agents to enter Defendants’ homes and take pictures, which would also impose an unwarranted annoyance, embarrassment, oppression, and undue burden on Defendants.

Defendants requested that the inspection be limited to what can be seen from the roadways, but AAE’s counsel declined, asserting that it may be necessary to confirm Defendants’ residence on the subject properties. (Call Decl., ¶ 3.) The Court agrees that an inspection of the interior of any of Defendants’ homes and/or structures is not relevant and will not lead to admissible evidence.

Defendants request sanctions for misuse of the discovery process by AAE’s attorney. The Court *may* impose a monetary sanction ordering that one engaging in the misuse of the discovery process, an attorney advising that conduct, and/or one unsuccessfully asserting that another has misused the discovery process pay the reasonable expenses, including attorneys’ fees, incurred by anyone as a result of the conduct. (CCP § 2023.030(a).)

Misuses of the discovery process include “[p]ersisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery”; and “[e]mploying a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.” (CCP § 2023.010.) Defendants request that AAE be ordered to pay Defendants’ reasonable expenses, including attorneys’ fees incurred as a result of AAE’s alleged misuse of the discovery process. The declaration accompanying the Motion does not address the amount of claimed expenses.

While the Court finds that inspection of the interior of any of Defendants’ homes and/or structures is not relevant and will not lead to admissible evidence, it cannot agree that AAE was misusing the discovery process.

On August 19, 2024, the court granted AAE’s request for an order shortening time for a motion currently set on August 30, 2024. The court indicated it would discuss the status of that motion as well as the ongoing coordination of the case at the August 23, 2024 hearing. Therefore, the court orders the parties to appear on those issues.

**TENTATIVE RULING #1:**

**1. DEFENDANTS’ REQUEST FOR PROTECTIVE ORDER IS GRANTED.**

2. **SANCTIONS AGAINST AAE ARE DENIED.**
3. **PARTIES ARE ORDERED TO APPEAR REGARDING STATUS OF THE MOTION SET TO BE HEARD ON AUGUST 30, 2024 AND REGARDING THE COORDINATION OF THE CASE.**

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<b>2.</b>	<b>22CV0830</b>	<b>BANK OF AMERICA v. ROBERTSON</b>
<b>Motion to Deem Matters Admitted</b>		

On January 24, 2023, Defendant served a Request for Admissions (RFA”) on Plaintiff as part of discovery in this lawsuit. Responses to the RFA were due on March 3, 2023.<sup>1</sup> Plaintiff has not yet responded to this discovery. Plaintiff followed up with Defendant on April 8, 2024. Defendant has filed this motion seeking to have the matters specified in the RFA deemed admitted and served notice of the motion on Plaintiff by mail on July 2, 2024. There is no opposition by Plaintiff.

Code of Civil Procedure § 2033.280 addresses the failure to respond to requests for admissions:

If a party to whom requests for admission are directed fails to serve a timely response, the following rules apply:

(a) The party to whom the requests for admission are directed waives any objection to the requests, including one based on privilege or on the protection for work product under Chapter 4 (commencing with Section 2018.010). The court, on motion, may relieve that party from this waiver on its determination that both of the following conditions are satisfied:

(1) The party has subsequently served a response that is in substantial compliance with Sections 2033.210, 2033.220, and 2033.230.

(2) The party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

(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, as well as for a monetary sanction under Chapter 7 (commencing with Section 2023.010).

(c) The court shall make this order, unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Section 2033.220. It is mandatory that the court impose a monetary sanction under Chapter 7

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<sup>1</sup> With the exception of unlawful detainer actions, “[w]ithin 30 days after service of requests for admission, the party to whom the requests are directed shall serve the original of the response to them on the requesting party, and a copy of the response on all other parties who have appeared, unless on motion of the requesting party the court has shortened the time for response, or unless on motion of the responding party the court has extended the time for response.” Code of Civil Procedure § 2033.250(a).

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(commencing with Section 2023.010) on the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitated this motion.

As sanctions are mandatory, the court orders Defendant to pay Plaintiff \$150 as a sanction by September 20, 2024.

**TENTATIVE RULING #2:**

**MOTION IS GRANTED. THE COURT ORDERS DEFENDANT TO PAY PLAINTIFF \$150 AS A SANCTION BY SEPTEMBER 20, 2024.**

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<b>3.</b>	<b>24CV1470</b>	<b>BRAY FAMILY TRUST v. ZIEGELHOFFER</b>
<b>Petition for Notice of Abandonment</b>		

This Petition relies upon Civil Code §798.61 regarding the procedures for declaring a mobile home abandoned. Petitioner owns a mobile home park (“park”). Defendant owns a mobile home which is located at the park. In February 2024, a storm caused a tree to break and strike Defendant’s mobile home. On February 7, 2024, Housing and Community Development condemned the mobile home. On April 10, 2024, the park’s insurance policy refused the claim for damages due to an acts of God exemption. On April 12, 2024, Defendant ceased making his monthly rent payments and has not been residing in his mobile home. The mobile home is not permanently affixed to the land.

On June 5, 2024, Petitioner issued a 30-day Notice of Belief of Abandonment pursuant to Civil Code §798.61(b). Petition, Exhibits 1 and 2. Defendant has not responded to any communication attempts from the park or counsel, since March 2024.

On July 10, 2024, Petitioner filed this Petition pursuant to Civil Code §798.61(c). The statute requires copies of the Petition to be served on the homeowner/registered owner, and upon any known person having a lien or security interest of record. The notice shall be mailed by registered or certified mail with a return receipt requested. There is no proof of service showing service of the Petition on Defendant or on the county tax collector.

The Petition contains the language required by Civil Code §798.61(c)(2)(A) and (D), but lacks language regarding (B) and (C).

(A) Declare in the petition that the management will dispose of the abandoned mobilehome, and therefore will not seek a tax clearance certificate as set forth in Section 5832 of the Revenue and Taxation Code.

(B) Declare in the petition whether the management intends to sell the contents of the abandoned mobilehome before its disposal. (The Petition is silent, so it is assumed that no sale of the contents will occur.)

(C) Notify the county tax collector in the county in which the mobilehome park is located of the declaration that management will dispose of the abandoned mobilehome by sending a copy of the petition by first class mail.

(D) Declare in the petition that management intends to file a notice of disposal with the Department of Housing and Community Development and complete the disposal process consistent with the requirements of subdivision (f).

Once these requirements regarding the contents of the Petition are met, §798.61(d)(3) provides that: “A default may be entered by the court clerk upon request of the petitioner, and a

default judgment shall be thereupon entered, if no responsive pleading is filed within 15 days after service of the petition by mail.

Within 10 days following a judgment of abandonment, §798.61(e)(1)(B) requires Petitioner to post and mail a notice of intent to dispose of the abandoned mobile home and its contents, and announcing the date of disposal, in the same manner as provided for the notice of determination of abandonment under §798.61(b), as well as to the county tax collection. Section 798.61(f)(1)(C) also requires such notice be provided to the Department of Housing and Community Development within 30 days of the judgment of abandonment.

**TENTATIVE RULING #3:**

**ABSENT OBJECTION THE PETITION IS GRANTED AS REQUESTED, CONDITIONAL UPON PETITIONER FILING A PROOF OF SERVICES SHOWING SERVICE OF THE PETITION UPON DEFENDANT AND THE COUNTY TAX COLLECTOR.**

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4.	24CV1465	MATTER OF J.G. WENTWORTH
Approval of Transfer of Payment Rights		

Prior to approving a petition for the transfer of payment rights, this court is required to make a number of express written findings pursuant to Cal. Insurance Code § 10139.5, including the following:

1. That the transfer is in the best interests of the Payee, taking into account the welfare and support of Payee's dependents.
2. That the Payee has been advised in writing by the Petitioner to seek independent professional advice) and has either received that advice or knowingly waived in writing the opportunity to receive that advice. This finding is supported by Exhibits B and E to the Petition. *See also*, Petition at p. 4.
3. That the transferee has complied with the notification requirements and does not contravene any applicable statute or the order of any court or government authority. The required disclosure statement was provided at least ten days prior to the execution of the transfer agreement, as required by Cal. Ins. Code § 10136 – the disclosure statement was signed July 1, 2024 (Exhibit B) and the purchase contract was signed July 11, 2024 (amended Exhibit A).
4. That the transfer does not contravene any applicable statute or the order of any court or government authority. In this case, the Petition (which is verified by a Vice President of J.G. Wentworth) at page 8 represents that Payee has no court-ordered child support obligations.

In addition to the express written findings required by the applicable statutes, Cal. Ins. Code § 10139.5(b) requires the court to determine whether, based on the totality of the circumstances and considering the payee's age, mental capacity, legal knowledge, and apparent maturity level, the proposed transfer is fair and reasonable, and in the payee's best interests. The court may deny or defer ruling on the petition if the court believes that the payee does not fully understand the proposed transaction, and/or that the payee should obtain independent legal or financial advice regarding the transaction.

The Petition submitted generally contains the information required by the Insurance Code for court approval of this transaction. There is a declaration by the Payee, which supports that this is in her best interest. She has no minor children and therefore no child support obligations. She is widowed and has no income aside from SSI.

All of the information required by the statutes was included in the Petition through a declaration by the payee herself.



**TENTATIVE RULING #4:**

**ABSENT OBJECTION, PETITION IS GRANTED AS REQUESTED.**

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5.	24CV0998	PERDICHIZZI v. MOUNTAIN DEMOCRAT
Leave to File Amended Complaint		

Plaintiff moves for leave to amend the Complaint to “add additional allegations supporting her causes of action, clarify and correct existing allegations, and clarify her legal theories.” A proposed amended complaint has not been submitted. No declaration has been submitted with the motion.

There is no proof of service on file with the court, but Defendant has filed an opposition. Defendant points out the deficiencies of the motion, in that there is no proposed amended pleading and there is no supporting declaration filed by Plaintiff.

Plaintiff filed a Complaint on May 15, 2024, related to a newspaper article published about her. On June 14, 2024, Defendants filed a motion to strike the complaint (“anti-SLAPP Motion”) which is set to be heard on August 30, 2024. On July 29, 2024, Plaintiff filed the instant motion.

California Rules of Court, Rule 3.1324 provides:

**(a) Contents of motion**

A motion to amend a pleading before trial must:

- (1) Include a copy of the proposed amendment or amended pleading, which must be serially numbered to differentiate it from previous pleadings or amendments;
- (2) State what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located; and
- (3) State what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located.

**(b) Supporting declaration**

A separate declaration must accompany the motion and must specify:

- (1) The effect of the amendment;
- (2) Why the amendment is necessary and proper;
- (3) When the facts giving rise to the amended allegations were discovered; and

(4) The reasons why the request for amendment was not made earlier.

It is proper to deny leave to amend a pleading when the proposed amendment or amended pleading is insufficient to state a cause of action or defense. (*Congleton v. National Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 62; and 5 Witkin, California Procedure, (5<sup>th</sup> ed. 2008) Pleading, § 1198, page 630.)

The Third District Court of Appeal has stated: "...leave to amend may be denied where permitting an amendment would be futile (*Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460, 1468, [78 Cal.Rptr.3d 483]), e.g., where the amendment does not state a cause of action. (See *Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230, [31 Cal.Rptr.2d 525]; *Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 489, [229 Cal.Rptr. 324, 723 P.2d 64] [leave to amend should be denied where no liability exists under substantive law].)" (*Singh v. Lipworth* (2014) 227 Cal.App.4th 813, 828.)

Here, no proposed amendment has been included, nor has any supporting declaration been filed.

**TENTATIVE RULING #5:**

**MOTION IS DENIED.**

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<b>6.</b>	<b>23CV1110</b>	<b>WINN v. CHARITABLE SOLUTIONS</b>
<b>Judgment on the Pleadings</b>		

Before the court is defendant Safari Ross as Successor Trustee of the Carl Ross Trust and Angie Ross as Trustee of the Angie Ross Marital Trust's (collectively, the "Ross Defendants") unopposed motion for judgment on the pleadings on the grounds that each cause of action in the Second Amended Complaint ("SAC") fails to state facts sufficient to constitute a cause of action as to the Ross Defendants, is barred by the statute of limitations, and is uncertain.

The moving defendants attempted to meet and confer with plaintiff prior to filing the instant motion, as required under Code of Civil Procedure section 439, subdivision (a).

### **1. Background**

The SAC alleges that plaintiff is the assignee of a real property purchase agreement (the "Contract") for a vacant property consisting of a 71-lot subdivision (the "Property"). (SAC, ¶¶ 1, 8.) The Contract was entered into by Matthew Priess (plaintiff's assignor) and the Carl Ross Trust on December 10, 2016. (SAC, ¶ 8.) The Contract was assigned to plaintiff on May 30, 2017. (SAC, ¶ 8.)

Prior to the initial closing date in 2019, plaintiff allegedly discovered some issues that prevented closing. (SAC, ¶ 9.) In September 2020, Mr. Ross passed away. (SAC, ¶ 11.) Defendant Safari Ross allegedly took over the Trust's obligations under the Contract. (SAC, ¶ 11.) Plaintiff alleges that, at no time, did Mr. Ross or the Carl Ross Trust ever serve a Notice to Perform under the Contract, which is a pre-condition to terminate the Contract. (SAC, ¶ 10.)

In July 2023, despite full knowledge of plaintiff's right to close on the purchase of the Property, Defendants Yes 2 Ventures, Inc. and Safari Wineries, Inc. (collectively, the "Corporate Defendants") allegedly purchased the property from the Carl Ross Trust. (SAC, ¶ 13.) The Corporate Defendants then allegedly granted 19 of the 71 lots to the Grantees and five of the 71 lots to the Angie Ross Marital Trust. (SAC, ¶ 3.)

Plaintiff's SAC alleges causes of action for (1) declaratory judgment; (2) cancellation of instrument; and (3) breach of contract. Plaintiff seeks a declaratory judgment as to all defendants of her right to close on the sale of the Property and that the Corporate Defendants are not bona fide purchasers. She further seeks cancellation of the deeds for the Property to the Corporate Defendants, the Grantees, and the Marital Trust. Finally, the SAC includes a cause of action for breach of contract.

## 2. Request for Judicial Notice

Pursuant to Evidence Code section 452, subdivision (d), the court grants defendants' unopposed request for judicial notice of Exhibit A (plaintiff's SAC).

The court declines to take judicial notice of Exhibit C (excerpts from plaintiff's deposition taken November 9, 2023). Defendants do not provide the court with any citation to authority that authorizes judicial notice of the deposition excerpts.

## 3. Legal Principles

A motion for judgment on the pleadings is appropriate when the operative complaint "does not state facts sufficient to constitute a cause of action..." (Code Civ. Proc., § 438, subs. (c)(1)(B)(ii) & (c)(3)(B)(ii).) A motion brought on this basis is equivalent to a demurrer (*People ex rel. Harris v. Pac Anchor Transportation* (2014) 59 Cal.4th 772, 777), such that the court's task is to examine the complaint's allegations and any judicially noticed documents in order to assess whether the pled causes of action are legally viable. (*Ibid.*; *Barajas v. Sativa L.A. County Water Dist.* (2023) 91 Cal.App.5th 1213, 1224.)

## 4. Discussion

### 4.1. Defendant Angie Ross as Trustee of the Angie Ross Marital Trust

The moving defendants claim there are no material allegations as to defendant Angie Ross. (Mtn. at 5:10.) The SAC merely alleges that five of the 71 lots were transferred to defendant Angie Ross as Trustee of the Angie Ross Marital Trust. (SAC, ¶ 3.)

As to this defendant, the court grants the motion for judgment on the pleadings as to the declaratory judgment and breach of contract causes of action. There is no allegation that defendant Angie Ross breached the Contract. Because plaintiff has had a previous chance to amend the challenged pleading (after the court sustained the Ross Defendants' demurrer to plaintiff's First Amended Complaint) and has been unable to do so, the court denies leave to amend. (*Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 878.)

As discussed below, due to the lack of an assignment agreement attached to the SAC, the court grants the motion as to the second cause of action for cancellation of instrument, finding insufficient factual support for the allegations in this complaint. The motion is granted without leave to amend following the same analysis discussed below.

### 4.2. Defendant Safari Ross as Successor Trustee of the Carl Ross Trust

The moving defendants claim that the SAC fails to identify or allege the terms of the Contract, arguing that the Contract attached to the SAC is illegible. While the Contract attached to the SAC is difficult to read, the court does not find it illegible, especially considering the fact that it is printed on a standard California Association of Realtors form and the text of the standard form can be used to assist the reader. Therefore, the court rejects this argument by the moving defendants as to the issue of the Contract.

However, as to the written assignment, the court finds that this purported agreement is not attached to the SAC and therefore not properly before the court. As such, its alleged terms, including the extent to which they exist, is uncertain.

Similarly, while the court rejects any statute of frauds argument as to the Contract attached to the SAC, the court agrees with this argument as to the written assignment which is not attached to the SAC. This same issue was raised in the demurrer to the FAC. As Plaintiff has failed to adequately address this issue, despite time to cure this defect, the court grants the motion without leave to amend.

As the court is granting the motion without leave to amend, the court finds it need not address the statute of limitations argument.

**TENTATIVE RULING #6:**

**THE MOTION IS GRANTED WITHOUT LEAVE TO AMEND.**

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**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.**

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August 23, 2024

Dept. 9

Tentative Rulings

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

7.	23CV2042	WELLS FARGO BANK v. MURRAY HOLDINGS
Motion to Stay		

This case involves claims by plaintiff Wells Fargo (“Plaintiff”) against defendant Adam Michael Murry (“Murray”) and various entities he is affiliated with, alleging that Murray fraudulently stole millions of dollars from Plaintiff while engaged in a “check kiting scheme.” Defendants Adam Murray, Murray Holdings, PCI Holdings, and AM Development (“Defendants”) opened numerous deposit accounts with Plaintiff in 2023 and allegedly engaged in a check kiting scheme that required Plaintiff to cover at least \$11 million of the overdraft of Defendants’ deposit accounts.

Defendants bring this Motion requesting that the Court issue an order to stay all proceedings in the civil action pending determination of the criminal action involving the same facts or, in the alternative, issue an order to stay discovery directed at Defendants and the Motion for Summary Adjudication pending the determination of the potential criminal case.

The parties have been aware of a potential federal criminal investigation into Murray arising out of the same allegations as those within the Complaint. Defendants note that since a deposition of Murray would implicate his Fifth Amendment rights, Plaintiff agreed not to depose Murray. In May of 2024, Murray received notice from the U.S. Department of Justice notifying him that he is under a grand jury investigation, which includes violations for bank fraud and money laundering. Murray has been notified that charges against him may be filed following the grand jury investigation. Defendants argue that the civil complaint and the criminal investigation involve the same and intertwined issues.

Further, in June of 2024, Plaintiff filed a Motion for Summary Adjudication, which is scheduled for September 13, 2024, and focuses on arguments that Murray improperly stole money from Wells Fargo – the same subject as the criminal investigation and grand jury proceedings. Plaintiff also served a new deposition notice.

Defendants request the Court to stay all proceedings until the grand jury investigation ends, since the civil matter arises from the same facts as the potential parallel criminal action. If the Court decides not to stay the entire proceeding, Defendants request a stay of the Motion of Summary Adjudication and stay of discovery until the conclusion of the criminal case against Murray.

### **Argument**

#### **Discretion to Stay the Case**

Defendants argue that a court has discretion to stay discovery, motions or an entire civil matter where there is a pending criminal matter involving the same facts and legal issues. In *Pacers, Inc. v. Sup. Ct.* (1984) 162 Cal.App.3d 686, the dispute involved whether to allow civil



depositions to move forward, when the party may be facing criminal charges although no criminal charges had been brought yet. *Pacers* like some of the other cases cited, states that “the court should weigh the parties’ competing interests with a view toward accommodating the interests of both parties, if possible.” *Id.* at 690. The court reasoned that allowing the prosecutors to monitor the civil proceedings in the hope of obtaining incriminating testimony through civil discovery would undermine the Fifth Amendment privilege and violate concepts of fundamental fairness, and that while postponing discovery would cause inconvenience and delay, protecting a party’s constitutional rights is “paramount.” *Id.* However, in *Pacers* the court was only considering a stay until the statute of limitations on criminal charges had run, and not until the conclusion of criminal proceedings.

Plaintiff opposes Defendant’s contention that the entire civil stay should be stayed indefinitely. As Plaintiff points out and the Court notes above, *Pacers* involved a limited stay (one year) until the statute of limitations had passed; in this case, Plaintiff argues that Defendants are asking for an indefinite stay until the criminal proceedings have concluded. Plaintiff cites *Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 427, stating that a blanket discovery stay was rejected. However, that case is different from the present. Not only does it involve sexual assault of a minor as opposed to financial crimes against a bank, but there, the accused failed to show that privileged information was sought at deposition and his argument that his testimony might be used in a future prosecution was insufficient. Further, the criminal statute of limitations had already expired in that case. Plaintiff also cites *Fuller v. Sup. Ct.* (2001) 87 Cal.App.4th 299, but in that case the criminal investigations were closed, although the statute had not yet run, and charges could still be brought. The court stated that the depositions should proceed, that petitioners had a right to invoke the privilege and then the court would be in a better position to exercise its discretion. The court was going to revisit a stay after the depositions.

Plaintiff does not successfully convince the Court that in this case, a stay is not warranted.

### **Stay of Proceedings is the Only Available Measure**

Defendants argue that a stay of the proceedings is the only available remedy to prevent injustice and not create substantial prejudice to Murray’s rights. Defendants argue that a court may decide to stay civil proceedings when the interests of justice require it.

In *Keating v. Office of Thrift Supervision* (9th Cir. 1995) 45 F.3d 322, 324, the court provides factors for the court to consider when deciding whether to stay civil proceedings when there is a parallel criminal proceeding. *See also, Avant! Corp. v. Sup. Ct.* (2000) 79 Cal.App.4th 876 (adopting use of the factors and reasoning that a corporation has no Fifth Amendment rights).

The decision whether to stay civil proceedings in the face of a parallel criminal proceeding should be made “in light of the particular circumstances and competing interests involved in the case.” [citation]. This means the decisionmaker should consider “the extent to which the defendant's fifth amendment rights are implicated.” In addition, the decisionmaker should generally consider the following factors: (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation. [citation]

### **Fifth Amendment Protection May Not be Denied**

Defendants argue that Murray is entitled to the Fifth Amendment privilege against self-incrimination, and that they are not even able to oppose Plaintiff's pending Motion for Summary Adjudication (“MSA”) without abandoning the privilege. The California Court of Appeal for the Third District recognizes that “when both civil and criminal proceeding arise out of the same or related transactions, an objecting party is generally entitled to a stay of discovery in the civil action until disposition of the criminal matter... [This] is based on Fifth Amendment principles as well as the inherent fairness of compelling disclosure of a criminal defendant's evidence and defenses before trial. Under these circumstances, the prosecution should not be able to obtain, through the medium of the civil proceedings, information to which it was not entitled under the criminal discovery rules...[t]o allow the prosecutors to monitor the civil proceedings hoping to obtain incriminating testimony from petitioners through civil discovery would not only undermine the Fifth Amendment privilege but would also violate concepts of fundamental fairness.” (*Fisher v. Gibson* (2001) 90 Cal.App.4th 275, 284.)

Plaintiff responds and argues that Defendants have not provided evidence showing that Murray's privilege against self-incrimination has been implicated. Plaintiff cites to *Blackburn*, which was distinguished above, as well as to dicta in *Fuller*.

Plaintiff argues that Murray is the sole Defendant who is the subject of the grand jury investigation and the only Defendant who can invoke the privilege against self-incrimination, as business entities do not have the same privilege. Plaintiff cites to *Avant*, but in that case, the case involved a corporation and that corporation's employees, who were able to be separated from the discovery. In this case, Murray is the agent who would be responding to the discovery, not merely an employee who could be separated from the responses. Even *United States v. Kordel* seems distinguishable from this case because Murray is so intertwined with the corporate entities and there is sufficient overlap between the civil and criminal proceedings.

Plaintiff argues that Defendants have not met their burden in establishing that Murray's privilege against self-incrimination is implicated, and that the *Avant* factors do not weigh in favor of granting the stay. These include: 1) the interest of the plaintiff in proceeding with the litigation, or any particular aspect of it, and the potential prejudice of a delay; 2) the burden which any particular aspect of the proceedings may impose on the defendants; 3) the convenience of the court in the management of its cases and efficient use of judicial resources; 4) interest of persons not parties to the civil litigation; and 5) the interest of the public in the pending civil and criminal litigation. *Avant*, 79 Cal.App.4th at 885.

The Court does not dispute that Plaintiff has an interest in proceeding with the litigation; however, the potential prejudice of a delay seems minimal. The actions which gave rise to this case happened in 2023. The burden that any aspect of the proceedings may impose on the Defendants seems great. There is Murray as an individual and as an agent for the corporate entities, facing a civil lawsuit and criminal proceedings, where both arise from the same facts and purported actions. The convenience of the court in management of cases and efficient use of judicial resources also weighs in favor of the stay; otherwise, it is anticipated that every step of this proceeding is going to be met with the same opposition which will require Court review. The interest of persons not parties to the civil litigation in proceeding with discovery seems minimal in this particular case.

#### **Case not Greatly Prejudiced by Delay**

Defendants argue that Plaintiff is a bank, and that their case relies heavily on documents rather than testimony, so a delay will not affect witness memory. In *Avant*, the court stated that a stay of the litigation until the criminal proceeding concluded would increase the danger of prejudice because there may be a loss of evidence, witnesses may not recall specific facts, or parties could die. *Avant! Corp.* at 887. Plaintiffs argue that documents could be destroyed, and witnesses' memories could fade. However, Defendants assert that Plaintiff has already obtained sufficient documents in order to proceed with filing the MSA. Defendants claim that Plaintiff will not be prejudiced because it can file its dispositive motion and have a hearing on that motion after the criminal matter is resolved, whereas Defendants would be severely prejudiced if a stay is not granted and would be forced in defending a civil action during the criminal proceeding.

#### **TENTATIVE RULING #7:**

- 1. STAY AS TO DEFENDANTS IS GRANTED FOR ONE YEAR, AT WHICH TIME THE COURT WILL RE-EVALUATE BASED ON THE STATUS OF THE CRIMINAL PROCEEDINGS.**
- 2. DISCOVERY PROPOUNDED ON THIRD PARTIES MAY PROCEED.**

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**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.**

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<b>8.</b>	<b>23CV0940</b>	<b>SMILEY v. SMILEY</b>
<b>Motion for Summary Adjudication</b>		

On June 3, 2024, Cross-Defendant Elizabeth Smiley filed a Motion for Summary Adjudication as to David Smiley's Cross Complaint. Cross-Complainant filed and served David Smiley's Opposition to Plaintiff's Motion for Summary Judgment, and all other opposing documents, on August 9, 2024. Included in his opposing documents was a Request for Judicial Notice.

### **Request for Judicial Notice**

Cross-Complainant requests the court take judicial notice of the judgment of legal separation in *Marriage of Smiley*, Sac. Sup. Ct. Case No. 800944, entered on August 16, 1984. He attached a copy of the subject document to his request.

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 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 "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States."

Section 452 provides that the court "may" take judicial notice of the matters listed therein, while Section 453 provides a caveat that the court "shall" take judicial notice of any matter "specified in Section 452 if a party requests it and: (a) Gives each adverse party sufficient notice of the request...to enable such adverse party to prepare to meet the request; and (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter." Cal. Evid. Code § 453.

Cross-Complainant has requested judicial notice of records of Sacramento Superior Court, therefore the request falls within the purview of Section 452. Furthermore, Cross-Complainant has given each party sufficient notice of his request and provided the court with sufficient information to enable it to take judicial notice of the judgment. Therefore, Cross-Complainant's Request for Judicial Notice is granted.

### **Motion for Summary Adjudication**

Cross-Defendant brings her motion seeking summary adjudication of Cross-Complainant's fourth cause of action for "accounting and reimbursement of excess withdrawals from bank account." This cause of action is in reference to funds that were in two joint bank accounts at Safe Credit Union. While Cross-Defendant notes there is no such recognized cause of action, she states that Cross-Complainant not only intended for Cross-Defendant to have and

use the money but he specifically told her she could spend it and has never asked for it to be returned.

According to Cross-Complainant, there are four material facts that remain in dispute: (1) Whether Cross-Complainant told Cross-Defendant that she could use the money in the joint accounts and keep it without any right to reimbursement; (2) Whether Cross-Defendant has a right to keep the money she took from the joint accounts; (3) How much money she took from the accounts; and (4) How much money Cross-Complainant is entitled to receive in return. Cross-Complainant admits that he left the money in the account for Cross-Defendant to use, but he argues that he did not intend for it to be a gift and he expected to be repaid.

A motion for summary adjudication shall be granted if there is no triable issue as to any material fact and the papers submitted show that the moving party is entitled to judgment as a matter of law as to one or more causes of action or claims for damages. Cal. Civ. Pro. § 437c(f)(1). A defendant moving for summary adjudication need only show that one or more elements of the cause of action cannot be established. *Aguilar v. Atlantic Richfield Co.*, (2001) 25 Cal.4<sup>th</sup> 826, 849. This can be done in one of two ways, either by affirmatively presenting evidence that would require a trier of fact *not* to find any underlying material fact more likely than not; or by simply pointing out “that the plaintiff does not possess and cannot reasonably obtain, evidence that *would* allow such a trier of fact to find any underlying material fact more likely than not.” *Id.* at 845; *Brantly v. Pisaro*, 42 Cal. App. 4<sup>th</sup> 1591, 1601 (1996).

The moving party bears the burden of making a prima facie case for summary adjudication. *White v. Smule, Inc.*, 75 Cal. App. 5<sup>th</sup> 346 (2022). In other words, the party moving for summary judgment or adjudication must show that it is entitled to judgment as a matter of law. *Doe v. Good Samaritan Hospital*, 23 Cal. App. 5<sup>th</sup> 653, 661 (2018). Where there is any doubt as to granting the motion, the motion must be denied. *Bunzel v. Am. Academy of Ortho. Surgeons*, 107 Cal. App. 3d 165 (1980).

The issue presented is whether Cross-Defendant wrongfully took, and kept, the money from the Safe Credit Union accounts. The California Civil Code Maxims of Jurisprudence state, in no uncertain terms, “[h]e who consents to an act is not wronged by it.” Cal. Civ. Code § 3515. In keeping with that maxim, “[t]o constitute ‘conversion’ nonconsent to possession and disposition of the property by defendant is indispensable, and if the owner expressly or impliedly assents to or ratifies the taking of his property, he cannot recover as for a conversion.” *French v. Smith Booth Usher Co.*, 56 Cal. App. 2d 23, 27-28 (1942).

Conversion occurs when one exercises the wrongful dominion over the property of another. *Sheley v. Harrop*, 9 Cal. App. 5<sup>th</sup> 1147 (2017). Here, Cross-Complainant is effectively making a claim for conversion where he is alleging Cross-Defendant wrongfully spent money from their joint account. That said, by Cross-Complainant’s own admission, no such conversion occurred because he consented to Cross-Defendant’s taking of the money (Depo. David Smiley,

pg. 149:2-149:13) and he never asked her to repay the money. (Depo. David Smiley, pg. 150:25-151:4). Cross-Complainant argues that he did not intend for the money to be a gift. However, while his declaration repeatedly reiterates his intent to be paid back, nowhere in his declaration does he actually state that he informed Cross-Defendant of that intention. (David Smiley's Dec'l in Support of Opposition to Elizabeth Smiley's Motion for Summary Adjudication). Given Cross-Complainant's own testimony, it is clear that he cannot establish the indispensable element of conversion which is nonconsent.

In addition to the claim for reimbursement (conversion) the fourth cause of action also includes a claim for an accounting. Yet, where there is no right to reimbursement, there can be no right to an accounting. "A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and *that some balance is due the plaintiff* that can only be ascertained by an accounting. *Brea v. McGlashan*, 3 Cal. App. 2d 454, 460 (1934) (emphasis added).

The present matter involves Cross-Complainant's separate property money, that he put into an account for Cross-Defendant, told Cross-Defendant that she could spend the money, and never asked for the money back. There is no evidence before the court that Cross-Complainant ever actually *informed* Cross-Defendant that that money was intended to be paid back. Without the crucial element, that "some balance is due the plaintiff," Cross-Complainant cannot make his claim for an accounting.

For the foregoing reasons, Cross-Defendant's Motion for Summary Adjudication of the fourth cause of action is granted.

**TENTATIVE RULING #8:**

- 1. CROSS-COMPLAINANT'S REQUEST FOR JUDICIAL NOTICE IS GRANTED.**
- 2. CROSS-DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION IS GRANTED.**

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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.**