TENTATIVE RULINGS

DEPT W15

JUDGE RICHARD Y. LEE

Date: April 18, 2024

Civil Court Reporters: The Court does not provide court reporters for law and motion hearings. Please see the Court's website for rules and procedures for court reporters obtained by the Parties.

Tentative Rulings: The Court will endeavor to post tentative rulings on the Court's website by 5 p.m. on Wednesday. Do NOT call the Department for a tentative ruling if none is posted. **The Court will NOT entertain a request for continuance or the filing of further documents once a tentative ruling has been posted.**

Submitting on the Tentative Ruling: If ALL counsel intend to submit on the tentative ruling and do not wish oral argument, please advise the Court's clerk or courtroom attendant by calling (657) 622-5915. If all sides submit on the tentative ruling and so advise the Court, the tentative ruling shall become the Court's final ruling and the prevailing party shall give Notice of Ruling and prepare an Order for the Court's signature if appropriate under CRC 3.1312. **Please do not call the Department unless ALL parties submit on the tentative ruling.**

Non-Appearances: If no one appears for the hearing and the Court has not been notified that all parties submit on the tentative ruling, the Court shall determine whether the matter is taken off calendar or whether the tentative ruling shall become the final ruling.

Remote Appearances: Department W15 generally conducts non-evidentiary proceedings, including law and motion, *remotely, by Zoom videoconference*: (1) All counsel and self-represented parties appearing for such hearings **must,** prior to 1:30 p.m. on Thursday, check-in online via the Court's civil video appearance website at https://www.occourts.org/media-relations/civil.html. (2) Participants will then be prompted to join the courtroom's Zoom hearing session. (3) The calendar will be displayed and participants will then be instructed to rename their Zoom name to include their hearing's calendar number. Check-in instructions and an instructional video are available on the court's website. All remote video participants shall comply with the Court's "Guidelines for Remote Appearances" posted online. In compliance with Local Rule 375, parties preferring to be heard in-person, instead of remotely, **shall** provide *notice of in-person appearance* to the court and all other parties five (5) days in advance of the hearing. (See the appropriate Local Form available at https://www.occourts.org/forms/formslocal.html).

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10	Tang vs. First American Specialty Insurance Company 23-01338856	*Off-calendar.*

101	Hale vs. Hyundai Motor America 20-01129492	HMA seeks to have portions of the following items sealed that have been filed under preliminary seal and in redacted form by Plaintiff in this case: 1. ROA# 472, Plaintiff's Reply in support of Plaintiff's Motion to Compel further Deposition of HMA's Person Most Knowledgeable: a. Page 1:16-17, 19-28 b. Page 2:3-9, 12, 16, fn. 1 c. Page 4:10-14. 2. ROA# 474, Supplemental Declaration of Tionna Dolin in support of Plaintiff's reply in support of Plaintiff's Motion to Compel further Deposition of HMA's Person Most Knowledgeable: a. Paragraph 4 – 1:19, 20 – 3:6 b. Paragraph 5 – 3:7-8 c. Paragraph 6 – 3:9-10 d. Exhibit P e. Exhibit Q 3. ROA# 488, Plaintiff's Amended Motion for Terminating Sanctions or Alternatively, for Issue and/or Evidentiary Sanctions a. Page 1:15-16, 19-27 b. Page 2:2-8 c. Page 2, fn. 3 d. Page 6, 13-14, 16-24, 26-28 e. Page 7: 1-2 4. ROA# 486, Amended Declaration of Tionna Dolin in support of Plaintiff's Amended Motion for Terminating Sanctions or Alternatively, for Issue and/or Evidentiary Sanctions a. Paragraph 24 – 5:16, 18, 19 b. Exhibit 16 c. Exhibit 17 d. Paragraph 25 – 5:20, 22-28 e. Paragraph 26 – 6:2, 3-6 5. ROA# 484, Amended Separate Statement in support of Plaintiff's Motion for Terminating Sanctions or Alternatively, for Issue and/or Evidentiary Sanctions a. Page 1:19-20 b. Page 2:1-11, 13-19 c. Page 2, fn. 1 d. Page 3: 12, 17-18, 20-28 e. Page 4: 2-6 f. Page 18:21-22, 24-28 g. Page 19:1-4, 7-10 6. ROA# 523, Plaintiff's Reply in support of Plaintiff's Amended Motion for Terminating Sanctions or Alternatively, for Issue and/or Evidentiary Sanctions a. Page 9:2-9 Because the documents at issue in these motions were each submitted by the parties in connection with a discovery motion, there is no First Amendment right to public access to them. (*Overstock.com v. Goldman Sachs Group, Inc*. (2014) 231 Cal.App.4th 471, 485) Accordingly a request to seal the Documents at Issue is not subject to the Judicial Council's "sealed records rules." (*Id*. at p. 486; Cal. Rules of Court, rule 2.550(a)(3).) The Court instead must weigh the moving parties' requests to seal the documents at issue against the common law right of access to court

		documents. (*Overstock.com v. Goldman Sachs Group, Inc., supra*, 231 Cal.App.4th at p. 485; *Mercury Interactive Corporation v. Klein* (2007) 158 Cal.App.4th 60, 91.) Applying that more lenient standard, the Court finds that good cause exists to seal the documents at issue. The documents submitted herein either include discussions of, quote verbatim, and/or attach documents that were made available to Plaintiff in connection with this action subject to stipulated protective order. [Motion page 3:1-5.] Furthermore, "The information and documents sought to be sealed instead describe and/or reflect confidential communications that HMA had/submitted to NHTSA, a governmental regulatory body, as part of its investigation into non-crash engine fires in certain types of HMA vehicles." [Declaration of Aliviado¶5.] As such, the court finds that designation appropriate and that the information in the documents at issue is properly the subject of the protective order. Therefore, the documents at issue should remain outside of the public purview at this time. (See Overstock.com v. Goldman Sachs Group, Inc., supra, 231 Cal.App.4th at p. 484 [where only common law right of access exists, documents subject to a protective order often remain outside public purview on a "good cause: showing akin to that which supported issuance of the protective order in the first place].) Notably, it is unclear how much more protection the granting of this motion provides, as the documents were already redacted when filed and the case has apparently settled. This order is without prejudice to any person's right to seek to unseal all or part of either or both of the documents at issue in these motions, upon a proper showing. The OSC is continued to June 6, 2024 at 1:30 p.m. *The moving parties are to serve notice of this order on all persons entitled to notice of the motion to seal addressed herein*.

102	Oceanside Health Products LLC vs. Houston Sales Consultants, LLC 23-01354006	*Off-calendar.*
103	Beznos vs. Horizon Construction & Remodeling, Inc. 21-01228661	The unopposed motion by Plaintiff Etan Beznos to compel Defendant Horizon Construction & Remodeling, Inc.'s further responses to request for production of documents, set three is GRANTED. The motion was timely filed. The court finds that Plaintiff has shown good cause for the requested discovery, and Defendant has not justified his objections. Defendant is ordered to produce responsive documents as Defendant agreed to do in response to Request Nos. 11, 49-50, 52-53, 55-60, 62-63, 72-91, 96-105, 107, 109, 112-157, 160-179, 181, 184-187, 194-201, and 209-212 within 30 days' notice of this ruling. Defendant is ordered to provide further written verified responses, without objections and to serve responsive documents to RFP Nos. 8-10, 12-23, 28-51, 64-69, 106, 108, 110-111, 158-159, 180, 182-183, 191, 193, 202-208, 213--237 within 30 days' notice of this ruling. Sanctions of $890.65 (1 hr at $829/hr + $61.65 hearing and reservation fees) are issued against Defendant Horizon Construction & Remodeling, Inc. and its counsel of record Fred Hayes and Rogers, MacLieth & Stolp, LLP, jointly and severally, for failure to make discovery. Sanctions are due and payable to Plaintiff's counsel within 30 days of this order. *Plaintiff to give notice.*
104	Nymox Pharmaceutical Corporation vs. Lanham 23-01358191	Defendant M. Richard Cutler, proceeding in pro per, filed a Motion for Reconsideration, asking the court to reconsider its November 29, 2023 Minute Order vacating Defendant Richard Cutler's motion to quash service of summons, which was filed on November 13, 2023. Defendant argues that the Court erroneously vacated Defendant's Motion to Quash. Plaintiff Nymox Pharmaceutical Corporation opposes the motion, arguing that the Court specifically found that defendant Cutler is subject to the

		Court's personal jurisdiction in its November 17, 2023 Minute Order and that Defendant has not met his burden for reconsideration. A motion for reconsideration must be filed within 10 days of service of notice of entry of the order in question. (Code Civ. Proc., § 1008(a).) However, "the trial court retains the inherent authority to change its decision at any time prior to the entry of judgment." (*Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156, as modified on denial of reh'g (Oct. 26, 1999).) A motion for reconsideration made by a party must be based on new or different facts, circumstances, or law than those before the court at the time of the original ruling. (Code Civ. Proc., § 1008 subd. (a).) The motion must also be accompanied by an affidavit from the moving party that states: (1) what application was previously made; (2) when and to what judge; (3) what order was made; and (4) what new or different facts, circumstances or law are claimed to be shown. (Code Civ. Proc., § 1008 subd. (a).) The burden under section 1008 "is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving party could not, with reasonable diligence, have discovered or produced it at the trial." (*New York Times Co. v. Superior Court* (2005) 135 Cal. App. 4th 206, 212–13.) A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time. (*New York Times Co. v. Superior Court* (2005) 135 Cal. App. 4th 206, 213.) The legislative intent was to restrict motions for reconsideration to circumstances where a party offers the court some fact or circumstance not previously considered, and some valid reason for not offering it earlier. (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500.) The Court determined on November 17, 2023 that it has personal jurisdiction over Defendant Cutler. In its November 16 and 17, 2023 Minute Orders the Court found the following:

		"Plaintiff has produced sufficient evidence for the Court to exercise personal jurisdiction over Defendants. Plaintiff established that Defendants purposefully availed themselves of California's forum benefits. Defendants Lanham and Culter [sic] are California licensed attorneys. Defendants Lanham and Culter [sic] were hired as Plaintiff's attorney and it is their position as Plaintiff's attorney that gave them access to the confidential and privileged information and documents that are now at issue in this lawsuit. In fact, this dispute arises from their roles as California-based professionals providing services to Nymox and direct coordination with Nymox's office in Irvine." (See ROA 64 and 65.) Thus, the operative order finding personal jurisdiction over Defendant Cutler is the November 17, 2023 Minute Order. Defendant failed to file a timely motion for reconsideration as to the Court's November 17, 2023 Minute Order. Even without considering the timing of the motion, Defendant did not present new or different facts, circumstances, or law regarding the court's jurisdiction over defendant than those before the Court at the time of the November 17, 2023 ruling. As such, the Motion is DENIED. *Plaintiff to give notice.*
106	David G. Becker as Trustee of the David George Becker Trust dated 2/20/2020 vs. Steinmann 21-01225793	*Off-calendar.*
107	Toro Mazote vs. Volkswagen Group Of America Inc. 23-01321648	Plaintiffs Eugenia Toro Mazote seeks an order to strike Defendant Volkswagen Group of America, Inc.'s ("Defendant" or "VW") objections and compel further responses to Plaintiffs' Request for Production of Documents, Set One, numbers 1 through 37. Plaintiff filed a standard Lemon Law Case on 4/24/2023. Defendant filed an Answer on 6/1/2023. Eight (8) days later Plaintiff propounded the RPDS, Set one, on 6/9/2023. Defendant responded 7/26/2023. Plaintiff filed

		this Motion to Compel Further Responses to RPDS on 8/23/2023. The Court notes that in recent years, an astounding number of cases have been filed against Defendant Volkswagen Group of America, Inc. in OCSC. These cases involve a tremendous amount of time and resources for the Court, its staff, and research attorneys. For example, in this case, Plaintiff's motion includes a 195 page separate statement and a 174 page Declaration. Defendant's opposition includes a 248 page separate statement and two declarations, one of which is 83 pages. In total, by virtue of this Motion, the Court is required to wade through more than 700 pages of documents (not to mention the arguments pertaining to the multiple RPDS at issue herein). And yet, Counsel have not engaged in the requisite meet and confer. Notably, on 8/22/2023, Defendant's counsel sent a detailed meet and confer letter in response to a meet and confer letter from Plaintiff's counsel, which raised several issues for the first time. Simultaneously with the letter, Defendant produced additional documents, which were subject to a protective order that the parties had recently executed. Rather than responding to this meet and confer letter, Plaintiff's counsel filed the instant motion the very next day, apparently without taking the newly-produced documents into account. [Decl. of Koopersmith ¶9-11, Ex. D-E.] A motion to compel further responses must attach a meet and confer declaration "showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion." (Code Civ. Proc., §§ 2016.040 [re meet and confer declaration], 2031.310(b)(2).) The meet and confer requirement is designed "to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order . . . . 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." (*Stewart v. Colonial Western Agency, Inc*. (2001) 87 Cal.App.4th 1006, 1016 [*quoting*

		Townsend v. Super. Ct. (1998) 61 Cal.App.4th 1431, 1435] [internal quotations and citations omitted].) There must be a serious effort at negotiation and informal resolution. (*Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1294.) Failing to make a "reasonable and good faith attempt" to resolve the issues informally before a motion to compel is filed constitutes a "misuse of the discovery process." Monetary sanctions can be imposed against whichever party is guilty of such conduct, even if that party wins the motion to compel. [CCP §§ 2023.010(i), 2023.020; see CCP § 2023.050—additional sanction of $250 for failure to confer in good faith re document production, and lawyer who is sanctioned under § 2023.050 may be ordered to report sanction to State Bar.] The Court previously continued the hearing on this motion and ordered counsel to review the Court's this Court's Voluntary Stipulation re: Discovery in Song-Beverly Cases. Counsel were ordered to advise whether the motion will still be going forward, at least fourteen days prior to the continued hearing date. Nothing was filed in response to that order. Given the failure of Plaintiff's counsel to meaningfully engage in meet and confer efforts, the Court rules as follows: The motion is continued to October 3, 2024 at 1:30 p.m. in order for lead counsel to meet and confer, in good faith, and either in person, telephonically, or via video conference. Counsel is ordered to file a joint separate statement 15 Court days prior to the continued hearing date detailing the results of the meet and confer, setting forth the RPDS at issue verbatim, responses/objections, and why or why not further responses remain necessary. To the extent either party fails to meet and confer in good faith as required by this Court's order, the Court will consider denying the motion outright, granting the motion outright, and/or sanctioning the offending party/attorney and ordering them to report to the State Bar. *Plaintiff to give notice.*

108	Dempsey vs. VPM Management Inc. 23-01315257	Defendants, Shannon Thorne and Casa Nicolina, L.P. ("Defendants"), move for an order compelling Plaintiff Ashley Dempsey ("Plaintiff"), to serve verified responses to Defendants' Form Interrogatories, Set One and Special Interrogatories, Set One within 5 days, and ordering Plaintiff pay Defendants the sum of $690 as a monetary sanction for reasonable costs and attorney's fees incurred for this motion. Plaintiff has not filed an opposition. Here, the motion is denied, without prejudice, for the same reasons as set forth in the Court's March 7, 2024 and March 28, 2024 Minute Orders on Defendants' motion to deem the truth of the matters in Request for Admissions, Set One, admitted and motion to compel responses to Demand for Production of Documents, Set One. (See ROAs 90 and 94.) On June 21, 2023, Defendants served written discovery by mail on Plaintiff, including the instant Form Interrogatories, Set One and Special Interrogatories, Set One. (Declaration of David W. Tetzlaff, ¶ 4, Exs. A and B.) Responses were due no later than July 26, 2023. (Ibid.) To date, Plaintiff has failed to provide any response to Defendants' discovery requests, despite Defendants' counsel's attempts to meet and confer on August 22, 2023. (Id., ¶¶ 5, 6.) The instant motion was filed on November 28, 2023. (See ROA 55.) However, the Court notes that Defendant Wallace, Richardson, Sontag & Le, LLP filed a Special Motion to Strike pursuant to Code of Civil Procedure section 425.16 on July 21, 2023, before Plaintiff's responses to discovery were due. (See ROA 31.) Moving Defendants fail to address the effect of the filing of the Special Motion to Strike on discovery. "All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section [Code of Civil Procedure section 425.16]. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order the specified discovery be conducted notwithstanding this subdivision."

		(Code Civ. Proc. § 425.16(g).) Such discovery is limited to the issues raised in the special motion to strike. (*Slauson Partnership v. Ochoa* (2003) 112 Cal.App.4th 1005, 1021.) "The language of section 425.16, subdivision (g)'s stay on 'all discovery proceedings' is clear as it pertains to the various fact-finding processes that litigants engage in under the Civil Discovery Act such as the noticing of depositions and the propounding of interrogatories, demands for inspection, requests for admission, and the like. [Citation.]" (*Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1125 [finding that trial court erred in proceeding with discovery motion and issuing a discovery order wile an anti-SLAPP motion was pending].) The "stay on all 'discovery proceedings' as provided in the anti-SLAPP statute applies to discovery motions, including those already pending at the time the special motion to strike is filed." (*Id*., at p. 1128.) The Clerk gave notice of the ruling on the Special Motion to Strike on February 20, 2024. (See ROA 87.) Based on the foregoing, discovery was stayed between July 21, 2023, before the deadline for Plaintiff's responses to the form and special interrogatories, were due, and February 20, 2024. As a result, Plaintiff's responses were no longer due by July 26, 2023, and were not due until after the notice of ruling on the anti-SLAPP motion. Additionally, discovery was stayed at the time this motion was filed on November 28, 2023. Given the circumstances here where the action was stayed at the time responses were due and the instant motion was filed, Defendants do not show that Plaintiff did not timely serve responses to Defendants' Form and Special Interrogatories. The motion is DENIED in its entirety, without prejudice. *Defendants to give notice.*
109	Plunkett vs. Plunkett 23-01331623	The unopposed motion of attorney Roger Buffington of Buffington Law Firm, PC to be relieved as counsel for Defendant Richard Plunkett is CONTINUED to October 3, 2024 at 1:30 p.m. The proofs of service filed in support of the motion and supporting documents do not

		establish service of the moving papers on the client. (Code Civ. Proc., §§ 1005(b); Cal. Rules of Court, rule 3.1362(d).) The proofs of service only reflect that the moving papers were served on Plaintiff. The Code requires that the moving papers be served on the client and all interested parties. Moving attorney shall file a proof of service of the motion and supporting documents no later than 16 court days before the continued hearing date. In the event, that moving attorney can show that service was properly and timely effectuated on the client before the hearing, the motion will be granted. The Case Management Conference is continued to June 6, 2024 at 1:30 p.m. *Moving attorney shall provide notice to client and all interested parties.*
110	Hedayati vs. US Kitchen & Flooring, Inc. 23-01314563	Defendants Hassan Vanaki and Sultan Abasi ("Defendants") filed a Demurrer to the first cause of action for involuntary dissolution, second cause of action for accounting, third cause of action for breach of fiduciary duty, and fourth cause of action for declaratory relief and the imposition of a constructive trust. The court notes that the Demurrer erroneously identifies the operative complaint as the Second Amended Complaint when in fact the operative complaint is the First Amended Complaint. The court also notes that Plaintiff filed two identical oppositions to the Demurrer. In the notice of motion, Defendant argues that Plaintiff lacks standing to bring the action. Defendant also argues that the complaint is uncertain because Plaintiff failed to allege whether the actions are brought on Plaintiff's behalf or on the corporation's behalf and, to the extent that they were brought on the corporation's behalf, Plaintiff has not sufficiently alleged a derivative action. A. AUTHORITY RE DERIVATIVE VERSUS DIRECT CLAIM "[A] derivative suit is one in which the shareholder seeks redress of the wrong to the corporation." (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 793.) "Thus, an action 'is

		derivative, i.e., in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets.'" (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 793 [*citing Jones v. H.F. Ahmanson & Co*. (1969) 1 Cal.3d 93, 106].) "On the other hand, a direct or individual suit by a stockholder 'is a suit to enforce a[ ]right against the corporation which the stockholder possesses as an individual.'" (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 793 [*citing Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 107].) "For example, '[i]f the injury is one to the plaintiff as a stockholder and to him individually, and not to the corporation, as where the action is based on a contract to which he is a party, or on a right belonging severally to him, or on a fraud affecting him directly, it is an individual action.'" (*Schrage v. Schrage* (2021) 69 Cal.App.5th 126, 150, reh'g denied (Oct. 15, 2021), review denied (Jan. 5, 2022).) "The individual wrong necessary to support a suit by a shareholder need not be unique to that plaintiff." (*Ibid*.) "The same injury may affect a substantial number of shareholders." (*Ibid*.) "If the injury is not incidental to an injury to the corporation, an individual cause of action exists." (*Ibid*.) "A direct (as opposed to a derivative) action is maintainable 'only if the damages [are] not incidental to an injury to the corporation.'" (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 793 [*citing Nelson v. Anderson, supra*, 72 Cal.App.4th at p. 124].) "And the two actions are mutually exclusive: i.e., the right of action and recovery belongs to either the shareholders (direct action) or to the corporation (derivative action)." (*Id*., citations omitted.) "An individual cause of action exists only if damages to the shareholders were not incidental to damages to the corporation." (*Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 313.) "Examples of direct shareholder actions include suits brought to compel the

		declaration of a dividend, or the payment of lawfully declared or mandatory dividends, or to enjoin a threatened ultra vires act or enforce shareholder voting rights." (*Ibid*.) *Holistic Supplements, L.L.C. v. Stark* (2021) 61 Cal.App.5th 530, 542 states: "[I]t is settled that one who has suffered injury both as an individual owner of a corporate entity and in an individual capacity is entitled to pursue remedies in both capacities." (*Denevi v. LGCC, LLC* (2004) 121 Cal.App.4th 1211, 1221, 18 Cal.Rptr.3d 276.) The line between personal and derivative claims is drawn according to the injury inflicted: "The claims are derivative where the injury alleged is one inflicted on the corporate entity or on the 'whole body of its stock.' [Citation.] A personal claim, in contrast, asserts a right against the corporation which the shareholder possesses as an individual apart from the corporate entity: 'If the injury is not incidental to an injury to the corporation, an individual cause of action exists.' " (*Id*. at p. 1222, 18 Cal.Rptr.3d 276.) "In determining whether an individual action as opposed to a derivative action lies, a court looks at 'the gravamen of the wrong alleged in the pleadings.'" (*PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 965, 109 Cal.Rptr.2d 436 (*PacLink*).)" Once it is determined that the plaintiff seeks to bring a derivative cause of action, the plaintiff must meet certain procedural hurdles as set forth in Corporations Code section 800. "As a precondition for bringing a derivative action on behalf of the corporation, the shareholder "should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity with his wishes." (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 789.) "The failure to comply with this requirement under section 800(b)(2) leaves a shareholder/plaintiff without standing to bring a derivative claim on behalf of the corporation." (*Id*. at 793.) The "requirement that a shareholder establish that he or she made a suitable demand, unless

excused by extraordinary conditions is to encourage intracorporate resolution of disputes and to protect the managerial freedom of those to whom the responsibility of running the business is delegated." (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 789-790.) "The demand requirement is also intended to prevent the abuse of the derivative suit remedy." (*Id*. 790.)

"Demand typically is deemed futile when a majority of the directors have participated in or approved the alleged wrongdoing, [citation], or are otherwise financially interested in the challenged transactions." (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 790.)

To establish demand futility, "the court must be apprised of facts specific to each director from which it can conclude that that particular director could or could not be expected to fairly evaluate the claims of the shareholder plaintiff." (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 790.) "Thus, the court, in reviewing the allegations to support demand futility, must be able to determine on a director-by-director basis whether or not each possesses independence or disinterest such that he or she may fairly evaluate the challenged transaction." (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 790.)

B. ANALYSIS

Here, the court agrees with Defendant that it is unclear whether the claims are brought as derivative or direct claims. The opposition seems to argue that the causes of action are direct claims and that Plaintiff brought the causes of action against Defendants because they "cut him out from his entitled to payments" and failed to pay Plaintiff "his share of the profits."

However, the allegations in the complaint repeatedly allege injury to the company and the injuries that Plaintiff alleges appear incidental to those of the company as a result of corporate mismanagement. For example, Plaintiff alleges that he seeks to recover "in connection with the systematic corporate mismanagement and intentional disenfranchisement of shareholder MOHAMMAD

		HEDAYATI (HEDAYATI) by the Defendants. Defendants have failed to manage the Company in such a way that will maximize the value for the shareholders, repeatedly taken action to entrench themselves in the Company, and intentionally misled Company shareholders. In doing so, Defendant have breached various fiduciary duties owed to Company shareholders, and thereby damaged Plaintiff." (FAC, ¶ 8.) As the court held in *Schrage v. Schrage*: "[W]here conduct, including mismanagement by corporate officers, causes damage to the corporation, it is the entity that must bring suit; the individual shareholder may not bring an action for indirect personal losses (i.e., decrease in stock value) sustained as a result of the overall harm to the entity." (*Bader v. Anderson, supra*, 179 Cal.App.4th at p. 788, 101 Cal.Rptr.3d 821; *see Heshejin v. Rostami* (2020) 54 Cal.App.5th 984, 994, fn. 10, 268 Cal.Rptr.3d 836 [" ' "a shareholder cannot bring a direct action for damages against management on the theory their alleged wrongdoing decreased the value of his or her stock (e.g., by reducing corporate assets and net worth)" ' "; instead, the " ' "corporation itself must bring such an action, or a derivative suit may be brought on the corporation's behalf" ' "]; *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 651, 32 Cal.Rptr.3d 266 [plaintiff's breach of fiduciary duty claim for corporate mismanagement and diverting corporate assets was derivative]; *PacLink Communications Internat., Inc. v. Superior Court* (2001) 90 Cal.App.4th 958, 964, 109 Cal.Rptr.2d 436 [minority members' fraudulent transfer claim was derivative where the "injury was essentially a diminution in the value of their membership interest in the [limited liability company] occasioned by the loss of the company's assets"]; *Nelson, supra*, 72 Cal.App.4th at pp. 125-126, 84 Cal.Rptr.2d 753 [minority shareholder's breach of fiduciary duty claim alleging the other shareholder of the corporation negligently managed the business was derivative]; Marsh et al., *Marsh's Cal. Corporation Law* (2021 supp.) Derivative Action, § 15.11[A][1] ["The clearest cases [of derivative actions] are those involving situations where the alleged wrongful actions of

		the defendants have reduced the corporate assets and net worth."].)" (*Ibid*.) Plaintiff also alleges that "Company's position in the market, through systematic and routine mismanagement, incompetence and corporate malfeasance, Defendants have stubbornly resisted quality control over materials and jobs to customer satisfaction, thus driving the reputation and financial performance of the company to the ground." (FAC, ¶ 22.) In the first cause of action, Plaintiff alleges that the company and decisions regarding the company's future are "at a deadlock" such that the company should be involuntarily dissolved. (FAC, ¶ 24-27.) As alleged, the accounting cause of action also appears incidental to an injury to the corporation. Plaintiff alleges that an accounting is needed as "a result of the aforementioned circumstances concerning the day-to-day operations of KITCHEN and USKFB," the majority of which deal with mismanagement by corporate officers that causes damage to the corporation and, incidentally, Plaintiff. (FAC, ¶ 29.) Similarly, in Plaintiff's breach of fiduciary duty cause of action, Plaintiff alleges that Defendants have failed to "exercise good business judgment" and "intentionally provid[ed] substandard materials and workmanship for projects" to "disenfranchise shareholders and or directors/officers of KITCHEN and USKFB and entrench themselves as Company management and members of the Companies' board at the expense of the Companies' Shareholders" (FAC, ¶¶ 32-37.) Again, these allegations establish corporate mismanagement that caused injury to the corporation and therefore it appears that Plaintiff's injuries are incidental to the corporations. Plaintiff's fourth cause of action for declaratory relief is also grounded in corporate mismanagement. Given the allegations in the complaint, it appears that Plaintiff must establish standing to bring a derivative cause of action under Corporations Code section 800 by alleging

		Plaintiff made a sufficient demand or that such demand would be futile. As such, the Demurrer is SUSTAINED WITH 30 DAYS LEAVE TO AMEND. The Case Management Conference is continued to July 11, 2024 at 1:30 p.m. *Defendant to give notice*.
111	Jonathan Zelken, M.D., Inc. vs. Incredible Marketing 22-01287133	Defendant Incredible Marketing moves to set aside and/or vacate default judgment. Specifically, Defendant contends that it was never personally served with the Summons or Complaint, nor was it provided notice of service through the California Secretary of State. Defendant also contends that it never received Notice of Entry of Default nor was it aware that a default judgment was entered against it until August 10, 2023 well after judgment was entered by this Court on July 13, 2023. Within two months, Defendant filed the instant motion. In opposition, Plaintiff contends that Defendant had notice of the complaint because counsel for Plaintiff had been emailing defense counsel and that defense counsel was sent copies of the summons and complaint on November 18, 2022 and February 17, 2023. In reviewing the matter, it appears that Defendant has carried its burden of proof. It is undisputed that Defendant was not personally served with the complaint and summons. The assertions set forth by the declarations in support of Defendant's motion are not disputed. As a result, the motion is GRANTED. The judgment is vacated. The default is set aside. Defendant is ordered to file its proposed answer within five court days. The Case Management Conference is continued to May 9, 2024 at 1:30 p.m. *Moving party to give notice.*
112	Beaver vs. Beaver 21-01219362	Defendants Robert Dale Beaver ("Robert") and Mariko C. Beaver (collectively, "Defendants") move for summary judgment on the sole cause of action for breach of contract asserted by

		Plaintiff Steven R. Beaver ("Plaintiff" or "Steven"), on the grounds that the Grant Deed conveying the disputed property is the sole written document evidencing the parties' agreement and no extrinsic or parol evidence should be considered. Plaintiff's evidentiary objections to the Declaration of Robert Dale Beaver are OVERRULED. Plaintiff's request for judicial notice of Orange County Ordinance 2183 and the Court's 04-07-22 minute order is GRANTED. (Evid. Code, § 452(b), (d).) Steven and Robert purchased the Pine Place property in 1988 as joint tenants. Steven subsequently moved out in 1989 or 1990. Robert claims that in 1992, he and Steven agreed that Steven would grant Robert his entire interest in the property in exchange for $10,000.00, which Steven would use for a down payment on another property. (Declaration of Robert Beaver, ¶ 8.) Since 1993, Steven has not paid any for any taxes, mortgages, or improvements related to the property. (Id. ¶ 15.) Steven contends that there was no agreement for payment of $10,000.00 and he, in fact, never received such payment. (Declaration of Steven Beaver, ¶ 2.) He states that he sold his vehicle to use for the down payment of the other property and he did not receive or need any money from Robert for that purchase. (Ibid.) He further states that he would not have walked away from the Pine Place property without knowing that he would receive money in the future upon the sale. (Ibid.) In 2009, Robert asked Steven about his plans for retirement and Steven responded to say that he was planning to use funds from the sale of the Pine Place property when it was sold. (Id. ¶ 4.) Robert never told Steven that he would not receive any proceeds before this dispute arose. (Ibid.) The Grant Deed is dated October 22, 1993 and reads, in pertinent part: "FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged ROBERT DALE BEAVER AND MARIKO C. BEAVER, HUSBAND AND WIFE AND

		STEVEN RAY BEAVER, AN UNMARRIED MAN, ALL AS JOINT TENANTS hereby GRANT(S) to ROBERT DALE BEAVER, A MARRIED MAN AS HIS SOLE AND SEPARATE PROPERTY" Lot 66 of Tract No. 1713 in the City of Costa Mesa. (Defendants' Ex. 1.) The documentary transfer tax is listed as $0.00 with the words "no consideration" handwritten on the Deed. (Ibid.) The FAC alleges that Steven executed the Grant Deed in favor of Robert with the underlying oral condition precedent that upon sale of the property, Plaintiff would be entitled to a pro rata share of the sales profits. (FAC ¶ 5.) Defendants argue that the Grant Deed is the sole writing concerning the agreement between Steven and Robert, its terms are unambiguous, it shows that consideration has been paid and that the property was transferred to Robert as his sole and separate property, and no parol evidence should be considered because the Grant Deed is not reasonably susceptible to Plaintiff's alleged interpretation. Plaintiff argues that he did not receive $10,000.00 as consideration for the conveyance and that, instead, it was the promise for a pro rata share of the future sales profits that constituted consideration. He further argues that the parties did not intend for the Grant Deed to be the final expression of their agreement. "If on its face [a] writing purports to be a complete and final expression of the agreement, parol evidence is excluded." (*Pollyanna Homes, Inc. v. Berney* (1961) 56 Cal.2d 676, 679-680.) Where nothing in the writing "would suggest an intention by the parties to regard [it] as an integration[,]" parol evidence is proper. (*Id*. at p. 680 [holding that parol evidence was not excluded where "nothing in the letters [] would suggest an intention by the parties to regard them as an integration."].) "The crucial issue in determining whether there has been an integration is whether the parties intended their writing to serve as the exclusive embodiment of their agreement. The instrument itself may help to resolve that

		issue." (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225.) "Any such collateral agreement itself must be examined, however, to determine whether the parties intended the subjects of negotiation it deals with to be included in, excluded from, or otherwise affected by the writing. Circumstances at the time of the writing may also aid in the determination of such integration." (*Id*. at p. 226.) "Evidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled." (*Id*. at p. 227.) Here, the Grant Deed has no language suggesting that the parties intended it to be a complete and final expression of their agreement. On its face, the Grant Deed shows no intent by the parties that the Grant Deed serve as the exclusive embodiment of their agreement. Thus, the Court finds that the introduction of parol evidence is proper. Defendants argue that no extrinsic evidence should be admitted because the Grant Deed is plain and unambiguous on its face. "When the meaning of the words used in a contract is disputed, the trial court engages in a three-step process. First, it provisionally receives any proffered extrinsic evidence that is relevant to prove a meaning to which the language of the instrument is reasonably susceptible [Citations.] If, in light of the extrinsic evidence, the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid the court in its role in interpreting the contract. [Citations.] When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126.) "If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury." (*Id*. at p. 1127.) Here, the Grant Deed refers to both "valuable consideration" and "no consideration." The Court finds that the language is reasonably susceptible to the interpretation urged by Plaintiff—that the Grant Deed was not executed in exchange for immediate monetary consideration but, instead, in exchange for the

		oral promise that Plaintiff would receive a share of the sales proceeds—and that the consideration of extrinsic evidence is therefore proper. And, because there is a conflict in the extrinsic evidence with Robert claiming the parties had only agreed to one $10,000.00 payment and Steven claiming that they agreed to split the sales proceeds, the conflict must be resolved by the jury. (*Wolf*, 162 Cal.App.4th at p. 1127.) Lastly, Defendants argue that retention of a 50% property interest is a term that would have certainly been included in writing and reflected in the written instrument between the parties. As the Court previously held in ruling on Defendants' Demurrer to the FAC, Plaintiff is not claiming an interest in real property, but an agreement to share the profits of a real estate transaction. (ROA 39.) Thus, there is no application of the statute of frauds at issue here. (*Dutton v. Interstate Inv. Corp*. (1941) 19 Cal.2d 65, 70.) Further, the Court finds *Apex LLC v. Sharing World, Inc.* (2012) 206 Cal.App.4th 999 to be distinguishable, as that case involved a sales contract subject to the California Uniform Commercial Code, a statutory framework not applicable here. Based on all of the above, the Court finds that Defendants have not met their burden to show that they are entitled to summary judgment as a matter of law. The Court finds the introduction of parol and extrinsic evidence to be proper and that there is a triable issue of material fact as to the scope and intent of parties' agreement. Thus, the Motion for Summary Judgment is DENIED. *Defendants to give notice.*