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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

YSIDRO LIMON, SR.,

Plaintiff,

v.

AMCORD, INC., et al.,

Defendants.

ASBESTOS
No. CGC-15-276378

Hon. Cynthia Ming-mei Lee
Dept. 15

SPECIALLY APPEARING AND [PROPOSED] INTERVENOR GREAT AMERICAN INSURANCE COMPANY'S REPLY IN SUPPORT OF ITS MOTION TO VACATE AND SET ASIDE DEFAULT AND DEFAULT JUDGMENT, OR ALTERNATIVELY, MOTION FOR LEAVE TO FILE COMPLAINT-IN-INTERVENTION

Date: September 16, 2021
Time: 9:30 a.m.
Dept.: 503

Action Filed: January 2, 2015
Trial Date: None

Specially Appearing and [Proposed] Intervenor Great American Insurance Company ("Great American"), in its capacity as a liability insurer for Defendant C.F. Bolster Company ("CF Bolster"), submits this Reply in support of its Motion to Vacate and Set Aside Default and Default Judgment; Or, Alternatively, Motion for Leave to File Complaint-in-Intervention.

I. SUMMARY OF ARGUMENT

Plaintiff concedes that: (1) Great American has satisfied its burden of proof to obtain equitable relief from the Default and Default Judgment against CF Bolster under *Rappleyea v. Campbell*, 8 Cal.4th 975, 981 (1994) [Opp., pg. 2:14-17, 4:7-8, 17-19]; (2) the Default Judgment against CF Bolster should be vacated and set aside as to Great American and is not actionable as to Great American under Insurance Code section 11580(b)(2) [Opp., pgs. 1:6-7, 2:3-4]; (3) Great American is not bound by the Default entered against defendant CF Bolster and it is not enforceable against Great American [Opp., pg. 4:18-20]; and (4) Great American can intervene at this time to present CF Bolster's defenses to liability and damages. [Opp., pgs. 6:2, 10:20-22] Plaintiff also acknowledges that *Mechling v. Asbestos Defendants*, 29 Cal.App.5th 1241, 1244, 1249 (2018), authorizes this Court to vacate and set aside the Default and Default Judgment as **against CF Bolster**, upon Great American's Motion to Vacate. [Opp., pg. 5:1-2]

The fundamental dispute herein concerns the scope of the relief to be provided by the Court, i.e. whether the Default and Default Judgment should be vacated in their entirety so as to allow CF Bolster to file an Answer to assert its defenses, or whether Great American should intervene to assert those same defenses on CF Bolster's behalf, while Plaintiff retains the right to obtain multiple recoveries based on **different judgments** for the **same injury** purportedly caused by CF Bolster. Plaintiff's concerns about collectability of the jury verdict are **legally irrelevant** to whether the Default and Default Judgment should be vacated. Similarly, Plaintiff's arguments regarding standing and coverage are **legally irrelevant** to determining the appropriate scope of relief, and directly contravene California authorities. Furthermore, keeping the Default and Default Judgment in place does not benefit Plaintiff because should the jury verdict exceed Great American's coverage obligations or policy limits, Plaintiff's remedy is to **enforce the unpaid portion of the judgment resulting from the jury verdict** against any other responsible entities,

not to resurrect and enforce the old "competing" Default Judgment. Because Plaintiff has not identified a single legitimate purpose to be served by keeping the Default or Default Judgment in place as to CF Bolster, the complete relief sought by Great American should be granted in its entirety.

II. GREAT AMERICAN AND CF BOLSTER ARE ENTITLED TO COMPLETE, EQUITABLE RELIEF FROM THE DEFAULT AND DEFAULT JUDGMENT

Preliminarily, there is no merit to Plaintiff's assertion that case law supports vacating solely the Default Judgment. To the contrary, the trial court's decision to set aside the **default** entered against the defendant/insured, upon the **insurer's** motion to vacate, was affirmed by the Court of Appeal in *Mechling, supra,* 29 Cal.App.5th at 1249, the most recent published decision directly on point. In *Mechling*, like here, the **insurer** moved to set aside both the defaults and the default judgments on equitable grounds, despite the fact that the defaults were entered against the insured alone, and are not actionable or binding on the insurer. *Id.* at 1244. The trial court granted the insurer's motion for complete relief, and the appellate court affirmed. *Id.* at 1249.

Plaintiff impermissibly attempts to use his Opposition as a sword and shield by challenging Great American to show the right to equitable relief as to CF Bolster, and simultaneously asserting, without authority, that any attempt to do so should be stricken. [Opp., pg. 6:25-7:5] However, Great American explicitly argued for relief as to CF Bolster in its Motion to Vacate, not for the first time in its Reply. [Notice, pg. 2:15-19; Motion, pgs. 6:20-7:10, 17:20-25 ["C.F. Bolster never received **actual notice** of this Action when the summons and complaint were served on the Secretary of State"]; Exh. O] Nonetheless, to the extent required, Great American has established that CF Bolster has: a meritorious defense; a satisfactory excuse for not presenting a defense initially; and, diligence in seeking relief. *Rappleyea, supra*, 8 Cal.4th 975, 982. Because "the law strongly favors trial and disposition on the merits," only "very slight evidence will be required to justify a court in setting aside the default." *Elston v. City of Turlock*, 38 Cal.3d 227, 233 (1985); *see also, Mechling, supra,* 29 Cal.App.5th at 1246.

First, CF Bolster has meritorious defenses to liability and damages, as identified in the Motion to Vacate and [proposed] Answer. [Motion, pgs. 11:18 – 14:19; Exh. O]

Second, CF Bolster has a satisfactory excuse for not appearing and presenting a defense at the outset of this action: it did not receive actual notice of this action by virtue of service on the Secretary of State. Plaintiff was permitted to serve the Secretary of State precisely because by the time Plaintiff filed this action, CF Bolster had been dissolved for nearly two decades, and no officer, director or other person subject to service of process could be located **by Plaintiff**. [Exhs. A-E] As a result, **Plaintiff** cannot dispute that by the time he served the Secretary of State, there was no principal of CF Bolster to have received notice of this action. Under theses specific facts, service on the Secretary of State did not factually or legally result in "actual notice" of the lawsuit to CF Bolster. *See Tunis v. Barrow*, 184 Cal.App.3d 1069, 1979 (1986) ["actual notice" requirement is met only where the corporation *actually receives* notice of the summons and complaint, whether from the plaintiffs or the Secretary of State; notice is not imputed]. *See also* Code Civ. Proc. §473.5(a) [authorizing relief from default/default judgment when service of a summons has not resulted in actual notice to a party in time to defend action].

Plaintiff conflates the authority granted by the Court to serve the Secretary of State (which is not at issue) with the question of whether such service resulted in actual notice of this action to CF Bolster, for purposes of obtaining relief from default. In this case, because service of the summons and complaint did not result – and legally and factually could not have resulted -- in actual notice of the action to CF Bolster (through any principal), the authorities cited in the Motion to Vacate concerning lack of notice apply equally to CF Bolster. [Motion, pgs. 14:20-16:8] As a result, the second prong of the *Rappleyea* test is satisfied.

Plaintiff's argument that relief is not available to a party who *has* been given notice is misplaced because CF Bolster did not receive actual notice of this action through any former principal. Additionally, *Kulchar v. Kulchar,* 1 Cal.3d 467 (1969), is inapplicable because that case involved a divorce decree against a person, not a default or default judgment against a dissolved corporation that could not have known of the action against it. *Cruz v. Fagor America, Inc.*, 146 Cal.App.4th 488 (2006), is distinguishable because the defendant was an active corporation, not a dissolved corporation, and the court's decision centered on whether the active corporation delayed in seeking relief, which is not at issue here. *Tunis, supra,* 184 Cal.App.3d 1069, is factually

distinguishable on the point relied on by Plaintiff because therein living corporate officers filed declarations that did not establish lack of notice from the Secretary of State. *Tunis* does not hold that service on the Secretary of State is imputed to find actual notice on a dissolved entity with no living officers or directors. And, here, it is undisputed that CF Bolster had no available principals at the time of service, thus, CF Bolster could not have known of this action in time to defend itself. *Koski v. U-Haul Co.*, 213 Cal.App.2d 640 (1963) is readily distinguishable as that defendant was an active corporation that moved to set aside the default and default judgment on statutory grounds, but did not satisfy the statutory time limitation, not applicable here.

Third, Great American, as an insurer for CF Bolster, acted diligently to obtain relief for itself **and for and on behalf of CF Bolster,** once Great American was notified of this action, the Default and the Default Judgment. In other words, Great American's Motion to Vacate requests that the Default and Default Judgment be vacated and set aside as to both itself and CF Bolster. [Notice, pg. 2:15-19; Motion, pgs. 6:20-7:10, 17:20-25] Because Great American diligently moved for relief **as to CF Bolster**, the third prong of the *Rappleyea* criteria is satisfied.

The Opposition fails to raise a single **legally relevant** argument against the Court granting complete relief. There can be no genuine dispute that Great American has standing to set aside the Default and Default Judgment entered against CF Bolster in their entirety (not solely as to Great American). [Opp. pgs. 1:20-26, 3:1-2, 6:2-5, 18-24] Great American's agreement to defend CF Bolster under reservation of rights is the very act that gives it standing to vacate the Default and Default Judgment in their entirety (including as against CF Bolster). *See Gray v. Begley*, 182 Cal.App.4th 1509, 1523–1524 (2010) [insurer has standing when defending insured under reservation of rights; mere assertion of a right to later dispute coverage while a defense is provided has no impact]; *Western Heritage Ins. Co. v. Superior Court*, 199 Cal.App.4th 1196, 1204 (2011) [court expressly rejected argument that because insurer was defending under reservation of rights, it lacks standing to set aside default judgment]; *Mechling, supra*, 29 Cal.App.5th at 1244, 1249 [court of appeal affirmed trial court's order granting **insurer's** motion to vacate both the defaults and default judgments against insured: "The orders setting aside the defaults and default judgments are affirmed"]. Plaintiff has not offer any contrary authority indicating that an insurer's reservation of

rights to later dispute coverage or enforce policy limits negates standing to vacate a default or default judgment, or somehow precludes an insurer from defending its dissolved corporate insured directly.

Additionally, there can be no genuine dispute that once the Default is vacated, the dissolved CF Bolster may defend this action, in its own name, through defense counsel retained by Great American. Indeed, Great American is **required** to defend CF Bolster, through appointed defense counsel, who may file an Answer on CF Bolster's behalf. *See Penasquitos, Inc. v. Superior Court*, 53 Cal.3d 1180, 1190, 1192 (1991) [liability insurer is not excused from defending or indemnifying its dissolved corporate insured]; *Westoil Terminals Co. v. Harbor Ins. Co.*, 73 Cal.App.4th 634, 642 (1999) ["if the [dissolved] corporation has liability insurance coverage, its dissolution provides no reason to excuse the insurer from defending the action and indemnifying those injured by the pre-dissolution activities of its insured"]. Moreover, the right to select defense counsel and to control the defense and any settlement belongs solely to the insurer. *Swanson v. State Farm General Ins. Co*., 219 Cal.App.4th 1153, 1162 (2013) [when an insurer undertakes defense of its insured, it hires defense counsel who represents the interests of both the insurer and the insured in defending the insured; the insurer has the right to control defense and any settlement of the third party action]; *Safeco Ins. Co. v. Superior Court*, 71 Cal.App.4th 782, 787 (1999) [insurer alone has right to control the defense of the claim]; *James 3 Corp. v. Truck Ins. Exchange*, 91 Cal.App.4th 1093, 1103 (2001) [accord]. As a result, Great American's **right and duty** to defend CF Bolster directly through its selected defense counsel does not hinge on CF Bolster's corporate status, or CF Bolster's former principals' "authorizing" Great American to do what the insurance policies and law require.

Finally, there is no merit to Plaintiff's contention that Great American cannot defend CF Bolster directly (but can intervene) because its former principals are unavailable. To the contrary, the California court of appeal has made clear that dissolved corporations without officers and directors may act and defend lawsuits **through their insurers**. *See Melendrez v. Superior Court*, 215 Cal.App.4th 1343, 1351 (2013) [dissolved corporation without officers or directors may be defended through its insurers and insurer-appointed defense counsel]. Moreover, *Favila v. Katten*

Muchin Rosenman LLP, 188 Cal.App.4th 189, 213 (2010), relied on by Plaintiffs, does not stand for the proposition that a dissolved corporation whose officers passed cannot defend itself; rather, the decision cites *Penasquitos* for the proposition that a dissolved corporation continues to exist after dissolution for the purpose of defending actions against it. Accordingly, whether CF Bolster has available former principals has **no legal relevance** to this Motion to Vacate.

III. SETTING ASIDE THE DEFAULT AND DEFAULT JUDGMENT IN THEIR ENTIRETY IS REQUIRED TO PROTECT GREAT AMERICAN AND CF BOLSTER FROM MULTIPLE JUDGMENTS FOR THE SAME INJURY

As in *Mechling*, Great American seeks vacation of the Default and Default Judgment, based on the Court's inherent equitable power to grant complete relief. Complete relief from the Default and Default Judgment is required to protect both Great American and CF Bolster from exposure to multiple judgments **for the same injury**. Great American seeks complete relief not only to protect itself, but also to protect CF Bolster against multiple judgments, as required under California law. *See, e.g. Comunale v. Traders & General Ins. Co.*, 50 Cal.2d 654, 659 (1958) [insurer "must take into account the interest of the insured and give it at least as much consideration as it does to its own interest"]; *Wilson v. 21st Century Ins. Co*., 42 Cal.4th 713, 720 (2007) ["an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests"].

Plaintiff fights to keep the Default and Default Judgment in place because he intends to resurrect and enforce the old Default Judgment (or any new default judgment generated from the Default) against any allegedly responsible persons or entities, *after a jury trial results in a judgment on the merits.* [Opp., pgs. 9:2-24, 10:11-17 [expressing intent to enforce old Default Judgment against CF Bolster and alter-egos regardless of jury verdict or if verdict exceeds Great American's policy limits or coverage obligations]; Exh. S to Motion: "Nothing in this order prohibits plaintiff from seeking judgment or enforcement of a judgment against any person or entity other than [the moving party insurer]"]. However, should any part of the jury verdict exceed Great American's coverage obligations or policy limits, **Plaintiff's remedy is to seek to collect the unpaid portion of the judgment resulting from the jury verdict against any other responsible entities, <u>not</u> to resurrect and enforce the old "competing" Default Judgment.**

Therefore, none of Plaintiff's argument for keeping the Default and Default Judgment "alive" is valid.

Plaintiff's "what if" concerns about collectability of the jury verdict have **no legal bearing** on whether the Default and Default Judgment should be set aside in their entirety. Likewise, Plaintiff's coverage arguments are **legally irrelevant** to whether the Default and Default Judgment should be set aside in their entirety. It is axiomatic that whether an insurer has any coverage defenses is not a proper consideration in any tort action, nor this Motion. *Western Heritage, supra,* 199 Cal.App.4th at 1212 [coverage defenses are not at issue in a tort case, nor insurer's motion to intervene]; *DeWitt v. Monterey Ins. Co*., 204 Cal.App.4th 233, 246 (2012) [coverage is not adjudicated in tort action, and must be determined in subsequent action]; *Gray, supra,*, 182 Cal.App.4th at 1523–1524 [assertion of a right to later dispute coverage while a defense is provided has no impact on standing]. Plaintiff has not identified a single case holding that an insurer's reservation of rights bars it from defending its insured directly, or precludes it from obtaining complete relief from a default or default judgment.

Nonetheless, Plaintiff's argument that the existing Default Judgment is needed for full recovery because Great American's coverage obligations extend only to the years for which its policies were in effect directly contravenes the "all sums" language of all general liability policies. *See State of California v. Continental Ins. Co*., 55 Cal.4th 186, 199 (2012) [the "all sums" language of CGL policies compels insurers to pay "all sums which the Insured shall become obligated to pay ... for damages ..." and is not limited to "sums or damage during the policy period"]; *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co*., 45 Cal.App.4th 1, 49 (1996) [in asbestos bodily injury case, court held that each insurer on risk is liable for full extent of the loss up to the policy's limits, but may later seek contribution from other insurers based upon the policy limits and the years of coverage].

Moreover, there is no merit Plaintiff's unsupported assertion that Great American "should be obligated" to withdraw its reservation of rights to defend CF Bolster directly. [Opp., pg. 6:22-24] Again, that the defense is being provided under reservation of rights is **legally irrelevant** to whether the Default should be vacated to allow CF Bolster to Answer the Complaint, through

defense counsel. *See Gray, supra,* 182 Cal.App.4th at 1523–1524; *Penasquitos, supra,* 53 Cal.3d at 1190, 1192; *Westoil, supra,* 73 Cal.App.4th at 642; *Swanson, supra,* 219 Cal.App.4th at 1162; *Melendrez, supra,* 215 Cal.App.4th at 1351.

Equity and fairness dictate vacating the Default and Default Judgment in their entirety to protect CF Bolster and Great American against exposure to multiple judgments for the same injury. Vacating the Default Judgment will prevent it from being enforced against CF Bolster, former shareholders, alleged alter-ego companies and other insurers **after** the jury returns a lesser verdict or defense verdict in a trial on the merits, or regardless of the outcome of the jury trial. Similarly, the Default must be set aside to preclude it from being used to generate a new default judgment which can be enforced against CF Bolster, shareholders, alter-egos – or even Great American – despite Plaintiff pursuing recovery against CF Bolster through the defense provided by Great American, for the same injury. *Airline Transport Carriers, Inc. v. Batchelor,* 102 Cal.App.2d 241, 245 (1951), aptly demonstrates the danger of leaving a default in place. Therein, like here, a default and default judgment were entered against the *defendant*. The trial court vacated the judgment but not the underlying default. The plaintiff simply obtained a new default judgment based on the default that was left in place. The appellate court found that both should be set aside, recognizing that it is "an idle act" to set aside only the judgment because a default left in place could be used to generate a new default judgment. Similarly, in *Jade K. v. Viguri,* 210 Cal.App.3d 1459, 1470 (1989), the appellate court recognized that intervention by the insurer was not sufficient relief, and that the trial court should have also granted the motion to vacate the default judgment.[1]

Vacating the Default and Default Judgment in their entirety is necessary for settlement because any settlement must include a release of all claims against CF Bolster, consistent with an insurer's obligation under California law. *See Murphy v. Allstate Ins. Co.*, 17 Cal.3d 937, 941 (1976) [insurer's duty to settle is to protect insured from exposure in excess of coverage]; *Strauss v. Farmers Ins. Exchange,* 26 Cal.App.4th 1017, 1021 (1994) [insurer may reject settlement offer

[1] The insurer in *Jade K.* had already intervened and thus did not appeal denial of the motion to vacate the default.

that does not include a complete release of its insured]; *Coe v. State Farm Mutual Auto. Ins. Co.*, 66 Cal.App.3d 981, 994 (1977) [insurer in bad faith for settling at policy limit without obtaining release of all insureds]; *Strauss, supra,* 6 Cal.App.4th at 1021 [insurer's settlement of claim against insured includes release of all claims against insured].

If Plaintiff enforces the Default Judgment, or any new default judgment generated from the Default, against CF Bolster's shareholders or alter-egos, Great American would face additional exposure and protracted coverage litigation should they **claim** to be insureds under the Policies. Likewise, CF Bolster would face additional exposure for the same injury when Plaintiff seeks to collect the Default Judgment or any new default judgment against it, despite the jury determining the extent of liability and damages in the trial on the merits. As Plaintiff acknowledges, CF Bolster's other insurers may pursue claims for equitable indemnity and contribution if Great American's payment of the jury verdict is less than the Default Judgment. [Opp., pg. 10:1-6] *See generally, Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal.App.4th 1279, 1289 (1998) [insurer who pays the loss is entitled to equitable contribution from the other insurers]. Regardless of the outcome of theses second generation lawsuits, they will be costly. There is simply no legitimate benefit to keeping the Default or Default Judgment in place.

However, if the Court determines that the Default or Default Judgment should remain in place, Great American seeks an Order grounded on equity and fairness that would offer protection to Great American and CF Bolster, and specifying that: (a) Plaintiff cannot seek recovery for the same injury attributed to CF Bolster by seeking to enforce the Default Judgment against any person or entity, including CF Bolster, its former shareholders or alter-egos, or its other insurers; and, (b) Plaintiff cannot seek recovery for the same injury attributed to CF Bolster by using the Default to generate new default judgment, then seeking to enforce the new default judgment against any person or entity, including CF Bolster, its former shareholders or alter-egos, or its other insurers.

IV. GREAT AMERICAN AGREES TO INTERVENE SHOULD THE COURT DENY ITS MOTION TO VACATE

In the alternative, Great American moves to intervene in this action on behalf of CF

Bolster, in order to litigate CF Bolster's defenses to liability and damages. [Notice, pgs. 2:26 – 3:4; Motion, pgs. 18:26 – 19:21; Exh. T: Complaint-in-Intervention] Plaintiff does not dispute Great American's right to intervene. [2] [Opp., pg. 10:20-22]

However, without making a noticed motion or serving discovery, Plaintiff requests that Great American be ordered to produce all policies issued to CF Bolster, in violation of the limitations of Code Civil Procedure section 2017.210. Also, in this case, Great American responded to Plaintiff's Notice Letter, identifying all insurance policies issued to CF Bolster, quoting the applicable policy language, and notifying Plaintiff of the agreement to defend under the primary policies under reservation of rights. Although Plaintiff already all information to which he is entitled, nothing precludes him from propounding discovery as allowed under the Code. But, there is no authority holding that Great American must produce those insurance policies in order to defend CF Bolster directly, or to intervene.

V. CONCLUSION

Based on the above, Great American's Motion to Vacate the Default and Default Judgment, in their entirety, should be granted, and CF Bolster permitted to file an Answer.

DATED: September 7, 2021

BERKES CRANE ROBINSON & SEAL LLP

By: *Laurie S. Julien*
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[2] Great American believes that the proposed Complaint-in-Intervention is the procedural mechanism to intervene. But, if the Court determines that an Answer-in-Intervention is the proper procedural mechanism to intervene, Great American agrees to file an Answer-in-Intervention within ten (10) days of the Court's Order.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 515 South Figueroa Street, Suite 1500, Los Angeles, CA 90071.

On September 7, 2021, I served true copies of the following document(s) described as **SPECIALLY APPEARING AND [PROPOSED] INTERVENOR GREAT AMERICAN INSURANCE COMPANY'S REPLY IN SUPPORT OF ITS MOTION TO VACATE AND SET ASIDE DEFAULT AND DEFAULT JUDGMENT, OR ALTERNATIVELY, MOTION FOR LEAVE TO FILE COMPLAINT-IN-INTERVENTION** on the interested parties in this action.

BY ELECTRONIC SERVICE: I electronically served the document(s) described above via File & ServeXpress, on the recipients designated on the Transaction Receipt located on the File & ServeXPress website (https://secure.fileandservexpress.com) pursuant to the Court Order establishing the case website and authorizing service of documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 7, 2021, at Los Angeles, California.

Mattie Jones-Gill

Mattie Jones-Gill