

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 16

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 07-11-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

- (1) Court by calling (408) 808-6856 and
- (2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.

https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. **You may make an online reservation to reserve a date** before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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| LINE # | CASE # | CASE TITLE | RULING |
|------------------------|---------------------------------|--|--|
| LINE 1 | 21CV384705 Hearing: Demurrer | Varick Partners, LLC vs Rana Rekhi et al | See Tentative Ruling. Parties are ordered to appear at the hearing. |
| LINE 2 | 21CV387639 Motion: Stay | Elizabeth Chung vs Altva Capital Management Limited et al | See Tentative Ruling. Defendant David Chung shall submit the final order within 10 days. |
| LINE 3 | 21CV387639 Motion: Stay | Elizabeth Chung vs Altva Capital Management Limited et al | See Tentative Ruling. Defendant David Chung shall submit the final order within 10 days. |
| LINE 4 | 23CV425126 Motion: Quash | Debasish Roy, by Abhisek Roy Power of Attorney et al vs Qi Xiang et al | The motion is MOOT and off calendar. |

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| | | | |
|------------------------|--|---|--|
| LINE 5 | 22CV397029 Motion: Summary Judgment/Adjudication | Louis Carrasco vs Mary Carrasco | <p>Plaintiff moves for summary judgment. The “party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact...” (<i>Aguilar, supra</i>, 25 Cal.4th at p. 850; see Evid. Code, § 110.) If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); see <i>Aguilar, supra</i>, 25 Cal.4th at p. 850.).</p> <p>Here, Plaintiff meets his burden. Defendant has failed to file an opposition. The failure to file a written opposition “creates an inference that the motion or demurrer is meritorious.” <i>Sexton v. Superior Court</i> (1997) 58 Cal.App.4th 1403, 1410. The motion is GRANTED. Plaintiff shall submit the final order within 10 days.</p> |
| LINE 6 | 20CV368334 Motion: Compel | Anthony Canciamilla et al vs Rumit Kotak | See Tentative Ruling. Plaintiff shall submit the final order. |
| LINE 7 | 23CV414580 Motion: Compel | Jessica Timoteo et al vs Toyota Motor Sales, U.S.A., Inc | Off Calendar |

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

| | | | |
|-------------------------|--|--|--|
| LINE 8 | 23CV424997 Motion for appointment of counsel | Tyghe Mullin vs Judith Calado et al | See Tentative Ruling. The Court will issue the final order. |
| LINE 9 | 23CV424997 Hearing: OSC Dismissal Failure to Appear | Tyghe Mullin vs Judith Calado et al | Off Calendar. |
| LINE 10 | | | |
| LINE 11 | | | |
| LINE 12 | | | |
| LINE 13 | | | |
| LINE 14 | | | |
| LINE 15 | | | |
| LINE 16 | | | |
| LINE 17 | | | |

Calendar Line 1

Case Name: *Varick Partners, LLC v. Rekhi, et al.*

Case No.: 21CV384705

This is an action for fraud. According to the first amended complaint (“FAC”), defendant Mark Gibbs (“Gibbs”) approached members of plaintiff Varick Partners, LLC (“Plaintiff”) regarding an acquisition of Rekhi Brothers d/b/a Wine Globe, and made certain misrepresentations regarding the company’s sales, profits, tax returns and ability to legally ship its goods. (See FAC, ¶¶ 6-14.) Gibbs was employment by Plaintiff to manage day-to-day operations; however, Gibbs concealed the actual financial condition of the company, failed to provide essential information for the company, including its banking information and financial operations reports, attempted to withhold critical business information from Plaintiff, provided financials from a convicted felon, and improperly leveraged Wine Globe assets. (See FAC, ¶¶ 16-18.) As a result of these actions, Plaintiff removed Gibbs from any profit sharing, but Gibbs engaged in further concealment and provision of false information regarding the company’s viability, operations, accounting and legality. (See FAC, ¶¶ 19-21.) Gibbs ultimately began withholding payments to their shipping company, FedEx, despite having sufficient funds to pay it, to further enrich himself. (See FAC, ¶¶ 22-25.) Gibbs also violated the terms of the shipping contract with FedEx that led to the cancellation of the contract and an investigation by the Ohio Attorney General for improper shipment of spirits. (See FAC, ¶ 26.) After an investigation by Plaintiff, Gibbs admitted that the company could no longer ship its products to several states, thereby limiting the value of the company. (See FAC, ¶¶ 28-31.) UPS also investigated Gibbs for the shipment of the company’s products and likewise terminated the contract. (See FAC, ¶ 32.) Plaintiff terminated Gibbs; however, Gibbs has since accessed the company’s property, taken assets and told Plaintiff’s landlord that its other members were trespassing. (See FAC, ¶¶ 36-42.)

On June 25, 2021, Plaintiff filed the complaint against defendants Yellowwood Capital, Inc., Rana Rekhi and Gibbs. Gibbs failed to respond and default was entered against Gibbs on December 21, 2021. On October 6, 2022, Plaintiff filed the FAC. On October 23, 2023, Gibbs filed a motion for sanctions against Plaintiff and its counsel; on March 13, 2024, the Court filed its order that stated:

On October 23, 2023, Defendant Mark Gibbs filed a motion for sanctions against Plaintiffs. A default was entered against Defendant Gibbs on Dec. 21, 2021. “After the default was entered, defendant was no longer an active party in the litigation and thus was not entitled to any further notices. ‘The clerk’s entry of default cuts off the defendant’s right to take further affirmative steps such as filing a pleading or motion, and the defendant is not entitled to notices or service of pleadings or papers.’” *Sporn v. Home Depot USA, Inc.*, 126 Cal.App.4th 1294, 1301 (citation omitted). As such, the motion is DENIED.

(March 13, 2024 order re: Gibbs’ motion for sanctions, p.2:2-8.)

On February 29, 2024, Gibbs filed a motion to vacate the default and default judgment. On April 2, 2024, Gibbs filed a demurrer to the FAC. On April 9, 2024, the Court heard the motion to vacate the default and default judgment and adopted the tentative ruling denying the

motion. The Court's May 3, 2024 order denying Gibbs' motion to vacate the default and default judgment, stated that "Defendant admits that his motion is untimely, as any motion to set aside the default should have been filed no later than May 21, 2022—nearly two years ago" and that "Defendant's claims of fraud and mistake relate to the underlying case, not to why he was not able to file an answer or responsive pleading in the case... [a]ll of the issues he now raises go to the merits of his case, but they have no bearing on why he failed to file a responsive pleading." (May 3, 2024 order re: denial of Gibbs' motion to vacate the default and default judgment, pp. 2:12-28, 3:1-28, 4:1-2.)

On April 16, 2024, Gibbs filed a motion for reconsideration of the order denying his motion to vacate the default and default judgment. On July 2, 2024, the Court denied the motion for reconsideration, stating that "Defendant has failed to set out any new facts or law, as required for a motion for reconsideration under CCP 1008... [and] Defendant has failed to address the untimeliness of his original motion or any of the bases for the Court's original decision."

Gibbs' instant demurrer to the FAC argues that the first through tenth causes of action fail to state facts sufficient to constitute a cause of action against Gibbs. In opposition, Plaintiff argues that Gibbs' demurrer "is untimely, improper, and has no merit... [because] Mr. Gibbs filed this Demurrer while he was in default and [it] should have been rejected by the Clerk." (Pl.'s opposition to demurrer, p.2:1-10.)

Plaintiff's argument that Gibbs' demurrer to the FAC should have been rejected by the Clerk

While it is true that Gibbs would not be able to file any motion with regards to the initial complaint on which default was entered, "where, after the default of a defendant has been entered, a complaint is amended in matter of substance as distinguished from mere matter of form, the amendment opens the default, and unless the amended pleading be served on the defaulting defendant, no judgment can properly be entered on the default." (*Leo v. Dunlap* (1968) 260 Cal.App.2d 24, 27; see also *Sass v. Cohen* (2020) 10 Cal.5th 861, 880 (stating that "amending complaints in this fashion would open the default and give defendants another opportunity to respond"); see also *Brown v. Pacific Tel. & Tel. Co.* (1980) 105 Cal.App.3d 482, 486 (stating that "if, after a defendant's default has been entered, a plaintiff amends his complaint in some substantial manner, he 'opens the default' and defendant may then plead in timely fashion to the new complaint"); see also *Freshman v. Super. Ct. (Kreuger)* (1985) 173 Cal.App.3d 223, 234 (stating that "even if a default has been entered default is considered as waived if the plaintiff later amends his complaint in a significant fashion"); see also *Weakly-Hoyt v. Foster* (2014) 230 Cal.App.4th 928, 934, fn. 2 (stating that "[w]hen, after a defendant's default has been entered, the plaintiff amends the complaint in a matter of substance, the amendment opens the default, it must be served on the defendant, and the defendant is entitled to an opportunity to respond... [t]his rule does not apply when the amendment is one of form, or one that is immaterial as far as the defaulting defendant is concerned").)

The causes of action of the initial complaint are the same as those of the FAC; however, it is unclear whether there are differences in substance as to Gibbs. In its opposition, Plaintiff does not make any argument that the FAC is one of form or is immaterial as to Gibbs. Nor does Gibbs make any argument that the FAC waived the default because it is significantly different from the original complaint.

Because neither party has addressed the question of whether the default is waived by the filing of the First Amended Complaint, a question that must be answered before proceeding to the merits of the demurrer, the Court orders the parties to submit further briefing on this discrete question. Parties are ordered to the hearing to discuss a briefing schedule and new hearing date. If Plaintiff fails to appear, the Court will forego the further briefing and address the demurrer on the merits without further hearing. Should Defendant Gibbs fail to appear at the hearing, the Court will assume the default is not waived by the filing of the FAC.

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Calendar Lines 2 and 3

Case Name: *Elizabeth Chung et al. v. Altva Capital Management Limited et al.*

Case No.: 21CV387639

I. Background

The initial action was brought by plaintiff Elizabeth Chung (“Elizabeth”)¹ (individually and derivatively on behalf of Bend Capital LLC (“Bend”)),² against David Chung (“David”) and Altva Capital Management Limited (“Altva”), among others. Altva has since filed a cross-action against David, Elizabeth, and Bend.

Elizabeth hired Mikael A. Abye (“Abye”) to represent Bend in the cross-action. David then filed a motion to disqualify Abye from representing Bend, claiming Elizabeth had no right to hire Abye without his consent under Paragraph 6.1 of Bend’s Operating Agreement. On November 9, 2023, the Court (Hon. Zepeda) issued its order disqualifying Abye. The Court was persuaded by David’s argument that he had a right to vote on or consent to Abye’s representation of Bend, which was not an action taken by Elizabeth within the ordinary course of business.

On November 29, 2023, Elizabeth filed a notice of appeal of the Court’s November 9 order. On December 4, 2023, Bend and Abye filed a notice of appeal of the order. On April 22, 2024, the Sixth District Court of Appeal dismissed Abye and Bend’s appeal for failing to timely procure the record on appeal. Thus, any argument pertaining to their appeal is now moot and will not be addressed by the Court below.

On February 26, 2024, Altva filed a motion to stay this action pending the appeals. On July 3, 2024, David filed a motion to stay the action pending the appeals. Elizabeth filed a single opposition to both motions. Altva and David have both filed replies.

II. Motion to Stay

“Trial courts generally have the inherent power to stay proceedings in the interests of justice and to promote judicial efficiency.” (*Freiberg v. City of Mission Viejo* (1995) 33 Cal.App.4th 1484, 1489.) Additionally, “the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.” (Code Civ. Proc., § 916, subd. (a).)

III. David Chung’s Motion to Stay

David moves to stay the entire action pending the appeal of the Court’s order disqualifying Elizabeth and Bend’s former counsel, Mikael A. Abye. The motion is brought

¹ As the parties share a surname, the Court will refer to them by their first names for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

² Elizabeth and David are both 50% managing members of Bend.

pursuant to Code of Civil Procedure sections 916, subdivision (a) and 128, subdivision (a),³ and Article VI, section 1 of the Constitution of the State of California.

a. Request for Judicial Notice

In support of his motion, David requests the Court take judicial notice of the following documents:

- 1) Court’s November 9, 2023 Order Disqualifying Mikael A. Abye. The request is GRANTED. (See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].)
- 2) Altva’s FAXC, filed July 31, 2023. The request is DENIED. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 (*Jordache*) [declining to take judicial notice of materials not “necessary, helpful, or relevant”].)
- 3) Elizabeth’s Request for Order Confirming YTL LLP and Toby Brown or Other Relief, filed on March 7, 2024 (Case No. 19FL000037). The request is DENIED. (See *Jordache, supra*, at p. 748, fn. 6.)

b. Analysis

In support of his motion, David argues: 1) the disqualification claim is meritorious; and 2) he will be severely prejudiced if the Court stays the order but not the entire action. As David notes in his reply, Elizabeth’s opposition does not respond to any of the legal issues raised by his motion.⁴ Thus, the Court may treat David’s motion as unopposed and meritorious. (*Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is “equivalent to a concession”]; *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal. App. 4th 507, 529 [failure to challenge a contention in a brief results in the concession of that argument].) With that said, even if the opposition addressed the merits of the motion, the Court finds David’s arguments to be persuasive.

Merits of Disqualification Claim

David argues that this Court found the motion to disqualify Abye to be meritorious and that substantial evidence exists to support the disqualification claim, justifying a stay of the action pending resolution of the appeal. (Motion, p. 7:20-22, citing *Reed v. Superior Court* (2001) 92 Cal.App.4th 448, 455 (*Reed*).)

In *Reed*, the Second District Court of Appeal explained that “the question whether . . . trial should be stayed pending an appeal from an unsuccessful motion to disqualify counsel

³ Code of Civil Procedure section 128, subdivision (a) describes powers of the court as to the conduct of proceedings.

⁴ Elizabeth also requests the Court temporarily stay the case for 90 days based on issues in a family law matter and to “ensure a complete record for the summary judgment motion that Elizabeth Chung will be filing on the basis of the forensic evidence.” (Opposition, p. 5:16-21.) The Court does not find this argument persuasive.

rests in the discretion of the trial and appellate courts.” (*Reed, supra*, 92 Cal.App.4th at p. 455.) The Court continued that “a reasonably persuasive showing that the claim of disqualification likely has merit will probably persuade the appellate court to stay the underlying proceedings pending resolution of the disqualification issue. Courts of Appeal understand that prejudice occurs if the trial is not stayed pending an appeal of an arguably meritorious claim of disqualification.” (*Ibid.* [internal citations omitted].) The Appellate Court also noted that in some cases, “the claim of disqualification will be insubstantial or even frivolous. To hold that an appeal from an order denying disqualification automatically stays the trial proceedings would encourage the use of such motions and appeals merely to delay the trial.” (*Id.* at p. 456.) The Court does not find that to be the case here.

In this case, Abye was disqualified after the Court examined Bend’s Operating Agreement, stating: “the court understands that Bend must be managed by the Members, and a vote of the Members is required to approve or carry an action. If there is a dispute between the two Members, final determination shall be made by a vote of a majority and a majority vote is required to approve or carry an action. . . . This court finds that hiring an attorney to represent Bend i[n] a lawsuit is an action which is within the scope of managing Bend, and therefore, the action approving and hiring counsel Abye to represent Bend required both David and Elizabeth’s vote.” (RJN, Ex. 1 [Court’s Order, p. 4:6-18].) Based on this, the Court determined that David had a right to vote on or consent to Abye’s representation of Bend and that because the Members did not vote on the issue, the motion to disqualify Abye was granted.

“A trial court’s ruling on a disqualification motion is reviewed under the deferential abuse of discretion standard. In exercising its discretion, the trial court must make a reasoned judgment that complies with applicable legal principles and policies. The order is subject to reversal on when there is no reasonable basis for the trial court’s discretion.” (*McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1121 [internal citations and quotations omitted].) “The trial court’s order is presumed correct; all intendments and presumptions are indulged to support it; conflicts in the declarations must be resolved in favor of the prevailing party, and the trial court’s resolution of any factual disputes arising from the evidence is conclusive.” (*Ibid.* [internal citations and quotations omitted].)

Based on the foregoing, there was a reasonable basis for the Court’s disqualification order. Moreover, it is clear from the Order itself that the proceedings in this case will be impacted by the issue of Bend’s representation. (See RJN, Ex. 1 [Court’s Order at pp. 4:20-5:3]; see also *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 888, citing *Meehan v. Hopps* (1955) 45 Cal.2d 213, 216-217 [“[t]he matter of disqualification of counsel is unquestionably collateral to the merits of the case”].) As the Court notes in its November Order, Elizabeth and David “have adverse opinions” as to whether Bend owes on a loan on the family home and Elizabeth is personally suing David over that issue. . . . Obviously, each party wants to control how Bend interprets, fights or confirms any loan on the family home. . . .” (See RJN, Ex. 1, pp. 4-5.) Altva is now attempting to enforce the loan on the family home through its cross-action against David, Elizabeth, and Bend. Thus, Bend’s representation and David’s right to decide in that representation is impacted by the appeal. Further, Abye continues to appear at hearings in this matter, despite the disqualification, including a Case Management Conference on July 2, 2024. (See Minute Order, July 2, 2024.)⁵

⁵ *Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 752 [“the court may take judicial notice on its own volition”].)

Thus, the Court will exercise its discretion to stay the trial proceedings pending the outcome of the appeal.

Accordingly, David's motion to stay is GRANTED and the Court need not address the remaining arguments.

IV. Altva's Motion to Stay

Altva raises similar arguments and relies on the same authority as David in its own motion to stay. Further, Elizabeth filed a single opposition to both motions and thus, she does not address the arguments raised by Altva, and the Court may treat the motion as unopposed. Given the above ruling, the Court likewise GRANTS Altva's motion to stay the action pending Elizabeth's appeal.

V. Conclusion and Order

David's motion to stay is GRANTED. Altva's motion to stay pending the appeal is GRANTED. David shall submit the final order within 10 days.

All upcoming court dates, including October and November discovery motions, are vacated. Within 10 days after the appeal proceedings have concluded, the parties are ordered to schedule a status conference with the Court. (The conference need not take place within 10 days of the conclusion of the appeal, but it needs to be scheduled within that time.)

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Calendar Line 6

Case Name: *Anthony Canciamilla et al v. Rumit Kotak et al.*

Case No.: 20CV368334

Facts

Plaintiffs Anthony Canciamilla and Maria Canciamilla (“Plaintiffs”) bring this action against defendant Rumit Kotak (“Defendant”).

Since 2011, Plaintiffs have owned and resided at the real property located on Hillcrest Drive in San Jose (“the Canciamilla Property”). (First Amended Complaint (“FAC”), ¶ 7.) In 2018, Defendant purchased the adjacent property (“the Kotak Property”). (*Id.* at ¶ 8.)

Thereafter, Defendant began performing construction on his property without permits as required by the City of San Jose (“the City”). (See FAC, ¶¶ 14, 26, 50, 56.) This construction altered the water runoff patterns and significantly increased the volume and concentrated flow of water from the Kotak Property onto the Canciamilla Property. (*Id.* at ¶¶ 19, 20, 63.) Prior to any construction, water runoff was released to a separate lot or to the street. (*Id.* at ¶ 11.) This water runoff resulted in flooding of the Plaintiffs’ yard, basement, and under their home. (*Id.* at ¶¶ 30, 34, 52.) Additionally, the water runoff washed out the support for Plaintiffs’ raised pool and patio and has caused the pool area and patio to crack and pull away from their home. (*Id.* at ¶ 34.) Further, while Defendant was re-grading his property, he stored tools against Plaintiffs’ fence causing a section of the fence to fall over. (*Id.* at ¶ 45.)

Through counsel, Plaintiffs informed Defendant of the harm he was causing. (FAC, ¶ 56.) They requested that Defendant cease construction until he could get the proper permits and put in place safeguards for the construction. (*Ibid.*) Plaintiffs also requested that Defendant repair the destroyed fence; however, Defendant conditioned the repairs on the Plaintiffs contributing to the cost. (*Ibid.*) Defendant declined to make any changes to his construction or conduct and has continued the unpermitted construction despite being aware of the damage the construction and waterflow is causing to Plaintiffs. (*Ibid.*)

On July 3, 2023, Plaintiffs filed their verified FAC, asserting the following causes of action against Defendant:

- 1) Trespass;
- 2) Private nuisance;
- 3) Negligence;
- 4) Injunctive relief;
- 5) Abandonment of easement;
- 6) Declaratory relief; and
- 7) Quiet title.

On April 2, 2024, Plaintiffs filed a motion to compel further responses to Plaintiffs' request for production of documents ("RPDs") and for sanctions.⁶ Defendant opposes the motion.

Motion to Compel RPDs

Plaintiffs move to compel further responses to RPD Nos. 2-28, asserting Defendant served deficient and incomplete responses and that the responses are not code-compliant.

Defendant appears to concede that his responses were not code-compliant, stating: "To the extent the Court require the responses to be amended for strict compliance with the Code of Civil Procedure, responding party will do so" and further, Defendant "agrees to prepare a privilege log setting forth these objections more fully." (Opposition, p. 3:1-2, 23-34.)

It appears to the Court that it would have been more efficient for Defendant to file code-compliant responses to begin with and to supply an appropriate privilege log to Plaintiffs. (See Code Civ. Proc., § 2031.240, subd. (c)(1);⁷ Code Civ. Proc., § 2031.280, subd. (a);⁸ see also Santa Clara County Bar Association Code of Professionalism, § 10.)

Accordingly, the motion to compel is GRANTED. As Defendant makes no attempt to justify his objections in his opposition papers, his objections, other than those based on privilege are overruled. (See *Fairmont Ins. Co. v. Super. Ct.* (2000) 22 Cal.4th 245, 255 [burden is on objecting party to justify objections]; *Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1129 [boilerplate privilege objections are sufficient and court may not overrule privilege objection unless it receives sufficient information to decide whether it has merit].)

Plaintiffs' Request for Monetary Sanctions

The Court shall impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to a demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (Code Civ. Proc., § 2031.310, subd. (h).)

Here, Plaintiffs have made a code-compliant request for monetary sanctions.⁹ Plaintiffs are entitled to a monetary sanction as Defendant was not substantially justified in opposing the

⁶ Plaintiff requests judicial notice of the FAC, Verified Answer, and the Cross-Complaint in this matter. The request is DENIED. (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 748, fn. 6 [declining to take judicial notice of materials not "necessary, helpful, or relevant"].)

⁷ Code of Civil Procedure section 2031.240, subdivision (c)(1) states: "If an objection is based on a claim of privilege or a claim that the information sought is protected work product, the response shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log."

⁸ Code of Civil Procedure section 2031.280, subdivision (a) states: Any documents or category of documents produced in response to a demand for inspection, copying, testing, or sampling shall be identified with the specific request number to which the documents respond.

⁹ In his opposition, Defendant argues that Plaintiff's counsel's declaration fails to state the amount of time spent on the motion or her hourly rate. (Opposition, p. 3:26-27.) However, page 4 of the Shaw Declaration includes three paragraphs stating this exact information.

motion nor are there circumstances that make imposing the sanction unjust. Plaintiffs seek a total of \$7,420 for the drafting of the papers in support of the motion to compel. The amount is based on 10.7 hours drafting the papers at a billable rate of \$440. Additionally, Ms. Shaw's colleague spent 4.8 hours drafting portions of the motion at a billable rate of \$565. (See Shaw Decl., p. 4, ¶¶ 13-15.) Additionally, in Ms. Shaw's declaration in support of Plaintiff's Reply, she requests an additional \$5,544 for 12.6 hours drafting the reply papers, for a total of \$12,940. After a review of the submitted papers, the Court finds \$12,940 to be excessive. Accordingly, the Court will reduce the amount of monetary sanctions and award \$2,325 (4 hours @ \$440/hour + 1 hour @ \$565/hour).

Conclusion and Order

The motion to compel further responses to RPD Nos. 2-28 is GRANTED. Defendant shall serve verified, code-compliant further responses and produce all non-privileged responsive documents within 15 calendar days of receipt of the final order. To the extent that any responsive documents are privileged, Defendant shall provide an appropriate privilege log with the necessary information regarding each withheld document including date, author, and recipients so that Plaintiffs may evaluate any claims of privilege.

The request for monetary sanctions is GRANTED, in part. Defendant and his counsel, jointly and severally, shall pay \$2,325 to Plaintiffs' counsel within 15 calendar days of receipt of the final order.

Plaintiffs shall prepare the final Order.

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Moreover, the initial notice of motion filed March 18, 2024 states the name of the individuals to be sanctioned: defendant and his counsel, jointly and severally.

Calendar Line 8

Case Name: Tyghe Mullin v. Judith Calado et al.

Case No.: 23CV424957

Plaintiff Tyghe Mullin requests the appointment of counsel. He is indigent and incarcerated. He has brought a complaint against the Defendants for filing a false police report which he claims resulted in his arrest, at which time he allegedly suffered physical injuries, and his imprisonment.

The court has the discretionary authority to appoint counsel for indigent prisoners for civil lawsuits to afford them meaningful access to the courts. *Smith v. Ogbuehi* (2019) 38 Cal.App.5th 453, 465; Penal Code § 2601(d). Measures available to the court to ensure meaningful access include (1) deferral of the action until the prisoner is released; (2) appointment of counsel for the prisoner; (3) transfer of the prisoner to court to attend hearings or the trial; (4) utilization of depositions in lieu of personal appearances; (5) holding of trial in prison; (6) conducting status and settlement conferences and other motions by phone or video; (7) propounding of written discovery; and (8) use of closed circuit television other modern electronic media; or other “innovative, imaginative procedures.” *Id.* at 467.

There is a three-step inquiry that the court should consider in determining how to exercise its discretion. The court must consider the applicant’s indigency, whether his interests are actually at stake, and what other means can be used to provide meaningful access. *Apollo v. Gyaami* (2008) 167 Cal. App. 4th 1468, 1485-87. Here, it appears that Plaintiff is both incarcerated and indigent. It is not clear that his interests are actually at stake, as his claim is based on a police report made by defendants, a generally protected activity. Finally, the Court may have other means to protect Plaintiff’s access to the court, other than appointing counsel. For example, the Court can and will make use of remote technology to allow Plaintiff the ability to attend court while he is incarcerated. Other possible of ways to accommodate Plaintiff include staying the action until his release and/or allowing for the propounding of written discovery. It is not clear at this point that Plaintiff’s ability to obtain meaningful access to the courts is being prevented from his incarcerated, indigent status.

As such, the Court denies the appointment of counsel at this time. Should it appear that the Court is unable to provide meaningful access to Plaintiff because of his incarcerated and indigent status, then the Court may reconsider its ruling. The motion is DENIED without prejudice.