

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

**(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: 10-05-23    TIME: 9 A.M.**

**All those intending to speak at the hearing are requested to appear by video.**

**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.)

**IN PERSON HEARINGS: Courtrooms are again open and all litigants may appear in person** at the Downtown Superior Courthouse located at 191 N. First Street, San Jose.

**VIRTUAL HEARINGS:** You should **appear by video**, unless it is not possible.

**To Join Teams Meeting** -Click on the below link or copy and paste into your internet browser and scroll down to Department 16.

[https://www.scsccourt.org/general\\_info/ra\\_teams/video\\_hearings\\_teams.shtml](https://www.scsccourt.org/general_info/ra_teams/video_hearings_teams.shtml)

**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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3.1312.)**

LINE #	CASE #	CASE TITLE	RULING
<a href="#">LINE 1</a>	20CV373145 Hearing: Demurrer	MAGNOLIADRHOMES LLC, et al vs GUIDANCE LAW, APC, et al	On September 6, 2023, the Court granted terminating sanctions against Defendant Richard Kahn and struck all of his responsive pleadings. Thus, Kahn's demurrer to the TAC is moot. The matter is OFF CALENDAR.
<a href="#">LINE 2</a>	23CV410465 Motion: Quash	Samara Flores Gutierrez vs Magola Shiffer et al	See Tentative Ruling. Court will prepare the final order.
<a href="#">LINE 3</a>	21CV377877 Motion: Compel	John Hilton vs Ascendis Pharma, Inc.	See Tentative Ruling. Plaintiff shall prepare the final order.
<a href="#">LINE 4</a>	19CV343789 Motion: Substitute Party	Richard Pierce et al vs RAINCROSS FUEL & OIL, INC. et al	See Tentative Ruling. Defendant Marsha Fistolera, as trustee and personal representative, shall prepare the final order.
<a href="#">LINE 5</a>	19CV343789 Motion: Order for Trial Setting preference	Richard Pierce et al vs RAINCROSS FUEL & OIL, INC. et al	See Tentative Ruling. Defendant Marsha Fistolera, as trustee and personal representative, shall prepare the final order.
<a href="#">LINE 6</a>	19CV345830 Hearing: Claim of Exemption	Connie Paris et al vs Jennie Alvarez et al	See Tentative Ruling. Judgment Creditor shall submit the final order.

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

<a href="#">LINE 7</a>	23CV417071 Motion: Petition for Release of Mechanics Lien	SMITH AVENUE PROPERTIES, LLC vs RJJ REAL ESTATE CONSULTANTS, LLC	Petitioner shall appear to confirm whether service was proper as it appears no amended notice was filed. But if so, the unopposed petition for release of lien will be granted and Petitioner will be ordered to submit the final order. If service is not proper and Petitioner appears, the motion will be continued to allow for proper service. If Petitioner fails to appear the petition will be taken off calendar.
<a href="#">LINE 8</a>	21CV385012 Motion: Set Aside Default/Judgment	CAPITAL ONE, N.A vs KHOA PHAM	Plaintiff's motion to set aside and vacate default and default judgment and to dismiss with prejudice is GRANTED. Plaintiff shall prepare final order and order of dismissal.
<a href="#">LINE 9</a>			
<a href="#">LINE 10</a>			
<a href="#">LINE 11</a>			
<a href="#">LINE 12</a>			

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## **Calendar Line 2**

**Case Name:** *Gutierrez v. Shiffer, et al.*

**Case No.:** 23CV410465

### **I. Factual and Procedural Background**

Plaintiff Samara Flores Gutierrez (“Plaintiff”) brings this action against defendants Magola Shiffer (“Shiffer”) and Judas Prada (“Prada”)(collectively, “Defendants”).

Plaintiff was employed by Defendants to work as a caretaker for Shiffer. (Complaint, ¶ 15.) Plaintiff worked and lived at Shiffer’s residence in Cupertino, California, from approximately July 28, 2022 to August 19, 2022. (*Ibid.*) On or around August 19, 2022, Defendants terminated Plaintiff. (*Ibid.*) The parties had an oral agreement with Prada whereby Defendants agreed to pay Plaintiff \$1,000 per month to cook dinner for Shiffer and sleep at her home. (Complaint, ¶ 16.)

Prada communicated with Plaintiff multiple times through phone and text to discuss Plaintiff’s employment responsibilities and to later end Plaintiff’s employment. (Complaint, ¶¶ 16, 18, 19, 21, 23-25.) However, Prada resides in Colorado and the relevant events took place in California. (See Complaint, ¶ 4)

On January 25, 2023, Plaintiff filed her Complaint against Defendants, asserting the following causes of action:

- 1) Failure to Pay Wages;
- 2) Failure to Pay Wages on Separation;
- 3) Failure to Maintain Accurate Time Records;
- 4) Failure to Provide Accurate Itemized Wage Statements;
- 5) False Inducement of Employment; and
- 6) Unfair Competition Law.

Currently before the Court is Prada’s motion to quash service of summons of Plaintiff’s complaint for lack of personal jurisdiction. Plaintiff opposes the motion.

### **II. Motion to Quash**

#### **a. Legal Standard**

A defendant may move to quash service of summons on the ground the court lacks personal jurisdiction over him. (Code Civ. Proc., § 418.10, subd. (a)(1).) Although the moving party is the defendant, “the plaintiff has the burden of proving, by a preponderance of the evidence, the factual bases justifying the exercise of jurisdiction.” (*ViaView, Inc. v. Retzlaff* (2016) 1 Cal.App.5th 198, 209-210; see also *Zehia v. Superior Ct.* (2020) 45 Cal.App.5th 543, 552 (*Zehia*).) To carry that burden, “[t]he plaintiff must do more than merely allege jurisdictional facts. It must present evidence sufficient to justify a finding that California may properly exercise jurisdiction over the defendant.” (*In re Automobile Antitrust Cases I and II* (2005) 135 Cal.App.4th 100, 110.) If the plaintiff makes such a showing, “the burden shifts to the defendant to present a compelling case demonstrating that the exercise of jurisdiction by our courts would be unreasonable.” (*Id.* at pp. 110-111.)

## **b. Prada's Evidentiary Objections**

Prada objects to Plaintiff's Declaration, Ex. A, PLTF00001-00003 and 00008-00009 on the grounds Plaintiff failed to have the Spanish-language portions of the text messages translated by a certified translator and for failure to submit a declaration containing a translation of the document. (See Prada's Objections, p. 2, citing Evid. Code, § 753.) The Court first notes that Prada relies on the same text messages, including the messages written in Spanish, in his own declaration in support of his motion to quash. (See e.g., Prada Decl., Exs. 1 & 3.) Further, Prada has not provided a translation of the messages by a certified translator or a declaration containing a translation of the Spanish-language texts. In any event, the Court did not rely on the Spanish-language portions of the text messages in coming to its decision. Accordingly, the Court declines to rule on the objections.

## **c. Personal Jurisdiction Generally**

"Personal jurisdiction may be either general or specific. A nonresident defendant may be subject to general jurisdiction of the forum if [his] contacts in the forum state are 'substantial . . . continuous and systematic' . . . If the nonresident defendant [can] not . . . establish general jurisdiction, [he] still may be subject to the specific jurisdiction of the forum, if the defendant has purposefully availed [himself] of forum benefits . . . and the 'controversy is related to or 'arises out of' a defendant's contacts with the forum.'" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 445-446 [emphasis and internal citations omitted].)

## **d. General Jurisdiction**

"The standard for general jurisdiction is considerably more stringent than that for specific jurisdiction. A defendant is subject to general jurisdiction when [he] has substantial, continuous, and systematic contacts in the forum states, i.e., [his] contacts are so wide-ranging that they take the place of a physical presence in the state. In assessing a defendant's contacts with the forum for purposes of general jurisdiction, we look at the contacts as they existed from the time the alleged conduct occurred to the time of service of summons." (*Strasner v. Touchstone Wireless Repair & Logistics, LP* (2016) 5 Cal.App.5th 215, 222 (*Strasner*); see also *Mansour v. Superior Ct.* (1995) 38 Cal.App.4th 1750, 1758.) For individual defendants, there has been "a dearth of case law" regarding what analysis should be applied in determining general jurisdiction. (*Serafini v. Superior Ct.* (1998) 68 Cal.App.4th 70, 79.) Courts typically describe general jurisdiction relative to an individual as being governed by his domicile. (*Bristol-Myers Squibb Co. v. Superior Ct.* (2017) 582 U.S. 255, 262 ["For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile"]; see also *Daimler AG v. Bauman* (2014) 571 U.S. 117, 137 [stating same].)

Prada asserts that he did not have the requisite substantial, continuous, and systematic contacts with California to confer general jurisdiction because he was not served in California, is not domiciled in California, and has not agreed by contract to be subject to jurisdiction in California. (MTQ, pp. 8:27-9:5.) Prada further contends that his only connection to California is that his mother, Shiffer, lives there and that he merely sent texts to Plaintiff, who was also in California. (*Id.* at p. 9:6-11.)

Here, it is undisputed that Prada is a resident of Colorado. (MTQ, p. 3:6-7; Complaint, ¶ 4.) Therefore, the Court cannot exercise general jurisdiction over Prada based on his

domicile. Thus, the remaining question is whether Prada had contacts with California that are “substantial, continuous, and systematic.” (See *Strasner, supra*, 5 Cal.App.5th at p. 222; see also *Brue v. Al Shabaab* (2020) 54 Cal.App.5th 578, 589 [“[g]eneral jurisdiction exists when the defendant’s contacts with the forum state are so ‘substantial’ or ‘continuous and systematic’ as to make it consistent with traditional notions of fair play and substantial justice”].) However, the “continuous and systematic contacts test is a difficult one to meet, requiring extensive contacts between a defendant and a forum. Even repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding of general jurisdiction.” (*Johnston v. Multidata Sys. Int’l Corp* (5th Cir. 2008) 523 F.3d 602, 609 [internal quotations and citations omitted].)

In opposition, Plaintiff argues that Prada’s contacts were substantial because he contacted her multiple times via text, phone, and FaceTime, communicated terms of employment to her, directed her to contact him, communicated with his California-based brother for purposes of evaluating Plaintiff’s employment, called the Cupertino, California police department to inform them of what was going on between the parties, and negotiated Plaintiff’s payments in California. (Opposition, pp. 6:25-7:2, see also Plaintiff’s Decl., Ex. A.)

In this case, the Court declines to exercise general jurisdiction over Prada. While he may have had substantial contacts with California residents over the span of at least a month, it does not rise to a level of “substantial, continuous, and systematic” contact such that he was “at home” in California. (See e.g., *Walden v. Fiore* (2014) 571 U.S. 277, 285 [“‘contacts’ analysis looks to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons who reside there”]; *Branca v. Bai Brands, LLC* (S.D.Cal. Mar. 7, 2019, No. 3:18-cv-00757-BEN-KSC) 2019 U.S.Dist.LEXIS 37105, at \*44-45 [declining to exercise general jurisdiction and stating “[t]he fact that the Individual Defendants may otherwise own property or frequently travel to California is not entitled any weight. . . . Without facts to support a finding that the Individual Defendants are essentially at home or ‘present’ in California for all purposes, exercising general jurisdiction . . . would be improper”].)

As there is no basis for general jurisdiction, the Court next turns to the issue of specific jurisdiction.

#### **e. Specific Jurisdiction**

“A court may exercise specific jurisdiction over a nonresident defendant only if: (1) the defendant has purposefully availed [himself] of forum benefits; (2) the controversy is related to or ‘arises out of’ the defendant’s contacts with the forum; and (3) the assertion of personal jurisdiction would comport with fair play and substantial justice.” (*Zehia, supra*, 45 Cal.App.5th at p. 552 [internal citations and quotations omitted]; see also *Pavlovich v. Superior Ct.* (2002) 29 Cal.4th 262, 269 (*Pavlovich*).) Plaintiff “bears the burden of establishing that the first two requirements for specific jurisdiction have been met. If [she] does so, the burden shifts to [defendant]” to show California’s exercise of personal jurisdiction would not comport with fair play and substantial justice. (*Greenwell v. Auto-Owners Ins. Co.* (2015) 233 Cal.App.4th 783, 792 [internal quotations omitted].)

##### **1. Purposeful Availment**

“Purposeful availment occurs where a nonresident defendant purposefully [and voluntarily] directs [his] activities at residents of the forum, purposefully derives benefits from

its activities in the forum, creates a substantial connection with the forum, deliberately has engaged in significant activities within the forum, or has created continuing obligations between [himself] and residents of the forum.” (*Preciado v. Freightliner Custom Chassis Corp.* (2023) 87 Cal.App.5th 964, 978 [internal quotations omitted]; see also *Zehia, supra*, 45 Cal.App.5th at p. 553.) “[M]ost courts agree that merely asserting that a defendant knew or should have known that his intentional acts would cause harm in the forum state is not enough to establish jurisdiction[.]” (*Pavlovich, supra*, 29 Cal.4th at p. 270.)

In this case, Prada contends he did not purposefully avail himself of any California benefits because he was not involved in hiring Plaintiff, never controlled her employment terms, and did not terminate her. (MTQ, p. 9:20-22.) Prada asserts that he merely exchanged text messages with Plaintiff, who was working for his mother. (*Id.* at pp. 9:23-10:6, see also Prada Decl., Exs. 1, 3-5.)

In opposition, Plaintiff argues: 1) Prada initiated contact with Plaintiff; 2) continuously communicated with Plaintiff, his mother, and his brother; 3) relied on the Cupertino police department; and 4) participated in Plaintiff’s termination and refusal to provide her compensation. In support of her argument, Plaintiff relies on detailed text exchanges between herself and Prada. (See Plaintiff’s Decl., Ex. A.) In these text exchanges, Prada asks Plaintiff to call him on multiple occasions, discusses the duties she is required to perform for his mother (see e.g., Ex. A, PLTF00002 [“You will have to clean the house, clean the kitchen, wash her clothes. Make her dinner when you get home, on the weekends all the meals”]), requests a photo of Plaintiff’s identification; provides Plaintiff with the Wi-Fi password and tells her to contact him if she has any problems with it; and tells Plaintiff not to return to his mother’s house and stating he “called the Cupertino police department they are aware of the situation.” (Plaintiff’s Decl., Ex. A, PLTF00001-00015.) Thus, Plaintiff has sufficiently established Prada directed his activities at Plaintiff, a resident of California, through texts and phone calls dictating her employment terms, informing a California police department about her, and refusing to pay her after telling her not to return to his mother’s home. (See *In re Stevens* (2004) 119 Cal.App.4th 1228, 1234 [“Electronic communication may establish the necessary minimum contacts in a state to establish jurisdiction over a defendant”]; *Hall v. LaRonde* (1997) 56 Cal.App.4th 1342, 1344 [“the use of electronic mail and the telephone by a party in another state may establish sufficient minimum contacts with California to support personal jurisdiction”]; see also *Zehia, supra*, 45 Cal.App.5th at p. 556 [“Engaging such targeted communications with forum residents has been recognized as one type of conduct that can establish a purposeful availment of the forum’s benefits”].)

## 2. Controversy Related to or Arising Out of Contacts with Forum

“In order for a plaintiff to establish personal jurisdiction, the claims must arise out of or relate to the defendant’s contacts’ with the forum. Or put just a bit differently, there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.” (*Daimler Trucks North America LLC v. Superior Ct.* (2022) 80 Cal.App.5th 946, 956 [internal citations and quotations omitted].)

Prada argues he is not alleged to have engaged in any conduct in California or aimed any conduct at California. (MTQ, pp. 10:22-23, 11:7.) Prada continues that the only connection he is alleged to have with California is that Plaintiff and his mother reside there. (*Id.* at p. 12:3-

4.) In opposition, Plaintiff states that Prada's "California contacts are squarely at issue" including his contacts with Plaintiff, his brother, his mother, and the Cupertino police department as they relate to Plaintiff's employment and subsequent termination as Shiffer's caretaker. (Opposition, p. 10:13-17.) Plaintiff's employment claims are directly related to Prada's contacts with California where he directed Plaintiff to contact him regarding the care for his mother, indicated, through text message, her employment duties, provided her his email to contact about any concerns, and terminated her and directed her not to return to Shiffer's home after calling the Cupertino police department. (See Plaintiff's Decl., Ex. A.) Plaintiff's evidence shows a connection between her employment claims and Prada's contacts with California.

As such, Plaintiff has met her initial burden in the jurisdictional analysis, and the burden shifts to Prada to address whether the exercise of jurisdiction would be consistent with notions of fair play and substantial justice.

### 3. Fair Play and Substantial Justice

"In determining whether the exercise of jurisdiction would be fair and reasonable, so as to satisfy the third requirement for the exercise of specific personal jurisdiction, a court must consider (1) the burden on the defendant of defending an action in the forum, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining relief, (4) the interstate or international judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the states' or nations' shared interest in furthering fundamental substantive social policies. These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." (*Anglo Irish Bank Corp., PLC v. Superior Ct.* (2008) 165 Cal.App.4th 969, 979-980 [internal citations and quotations omitted].)

Prada first argues he would be required to engage counsel for litigation in California, which would be a substantial cost. (MTQ, p. 12:24-25.) The Court is not persuaded by this argument, as Prada is currently being represented by the same law firm, Prada & Associates, which is also representing his mother, defendant Shiffer, in this same case. Next, Prada asserts he would incur travel expenses and his "personal and business life" would be disrupted by any court proceedings. (MTQ, p. 12:25-27.) However, as Plaintiff notes, Prada may attend hearings virtually and, further, his current representation is based in Santa Clara County.<sup>1</sup>

Prada next argues "California has no interest in adjudicating Gutierrez's meritless claim against Prada" as it would "be a drain on judicial economy." (MTQ, p. 13:2-3, 9-11.) Again, the Court is not persuaded by this argument. Plaintiff's claims are based on California employment law and Plaintiff was hired as an employee in California. Thus, California has a great interest in adjudicating her employment claims. (See e.g., *United States ex rel. Wilson v. Bristol-Myers Squibb, Inc.* (D.Mass. June 27, 2013, No. 06-12195-MLW) 2013 U.S. Dist. LEXIS 91137, at \*11 ["the events that generated all of the . . . claims occurred in

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<sup>1</sup> See Motion to Quash, Caption Page indicating Prada & Associates is located in San Jose, California.



California. . . . California has a greater interest . . . in resolving employment and retaliation disputes that occur in California”]; *Future Foam, Inc. v. FXI, Inc.* (C.D.Cal. Apr. 5, 2016, No. SACV 16-312-JLS (RAOx)) 2016 U.S.Dist.LEXIS 204836, at \*27 [“California undoubtedly has an interest in protecting its own residents”]; *Alexis v. Rogers* (S.D.Cal. Feb. 26, 2016, No. 15cv691-CAB-BLM) 2016 U.S.Dist.LEXIS 47031, at \*33 [“California has a strong interest in protecting people who perform work in California”].) Thus, Prada fails to meet his burden in showing the exercise of personal jurisdiction over him would be unreasonable.

Based on the foregoing, the motion to quash service of summons for lack of jurisdiction is DENIED.

### **III. Conclusion and Order**

The motion to quash is DENIED. The Court will prepare the final order.

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### **Calendar Line 3**

**Case Name: John Hilton v. Ascendis Pharma Inc.**

**Case No.: 21CV377877**

Plaintiff John Hilton (Plaintiff) brings this motion to compel against Defendant Ascendis Pharma, Inc. (Defendant), claiming that Defendant has failed to fully comply with its discovery obligations, in that its responses have been incomplete, have failed to provide responses to questions relating to Endocrine Rare Disease Group or relating to HR or other investigations regarding Plaintiff, and have failed to provide communications where Plaintiff was not a party relating to flat pricing or off label use. Plaintiff lists numerous other short falls in the discovery on pages 6-7 of its motion, as well as provides evidence of Defendant's failure to look for relevant documents and information in its reply. Plaintiff now seeks the discovery as well as monetary and issue sanctions for Defendant's willful behavior.

Misuse of the discovery process includes "[d]isobeying a court order to provide discovery." Cal. Code of Civil Proc. (CCP) § 2030.010. If a party fails to obey a court order compelling discovery responses, "the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction." CCP § 2030.290(c), 2031.300(c). Section 2023.030, subdivision (d)(1) expressly authorizes the court to "strick[e] out the pleadings" of any party misusing the discovery process. "Discovery sanctions are intended to remedy discovery abuse, not to punish the offending party. Accordingly, sanctions should be tailored to serve that remedial purpose, should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery, and should be proportionate to the offending party's misconduct." (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223.) Two facts are generally needed before a court orders sanctions: (1) a failure to comply; and (2) the failure must be willful. (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102; see also *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1426 [typical requirement of a prior order "provides some assurance that such a potentially severe sanction will be reserved for those circumstances where the party's discovery obligation is clear and the failure to comply with that obligation is clearly apparent"]; *Moofly Productions, LLC v. Favila* (2020) 46 Cal.App.5th 1, 11 ["[i]n general, a court may not impose issue, evidence, or terminating sanctions unless a party disobeys a court order," citing *New Albertsons*].) Termination sanctions may be imposed by "striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process [and] rendering judgment by default against that party." CCP § 2023.030(d). Terminating sanctions should be lightly granted, but "where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules, the trial court is justified in imposing the ultimate sanction." *Mileikowsky v. Trent Healthsystem* (2005) 128 Cal.App.4th 262, 279-80.

The Court has broad discretion in the selection of the appropriate sanction to be applied under the factual circumstances. (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 991-992.) Sanctions are generally imposed incrementally, with terminating sanctions being a last resort. (*Lopez v. Watchtower Bible & Tract Society of New York Inc.* (2016) 246 Cal.App.4th 566, 604.)

In this case, Defendant does not even contest that it has not fully complied with discovery requests and the Court's prior discovery order. Rather, Defendant states that it

“inadvertently” overlooked Plaintiff’s meet and confer letter and is “willing to work with” Plaintiff to provide the information requested. Decl. of Adams ¶¶ 18-20.

The Court finds that Defendant’s failure to provide all of the required discovery is willful. This is the third motion to compel. Defendant has failed to comply with the Court’s discovery order. Defendant failed to respond to Plaintiff’s request to meet and confer two times – back in March 2022 (Decl. of Adams ¶ 8) and in May 2023 (Decl. of Adams ¶ 18). Despite claiming it is willing to work with Plaintiff to provide the information, it has provided nothing since the motion was filed or since it “discovered” Plaintiff’s meet and confer letter from May 2023. Accordingly, the finds that Defendant has failed to comply again with its discovery obligations, as laid out in Plaintiff’s brief, that there is no substantial justification for its failure to do so, and that its failure to do so is willful.

As such, the Court orders Ascendis to produce all responsive documents and revised responses within 20 days of the final order and to pay \$4,947 in monetary sanctions also within 20 days. The Court also grants one of the evidentiary sanctions requested by Plaintiff and orders the exclusion of documents by Defendant regarding Defendant’s decision to terminate Plaintiff, given Defendant’s failure to produce all such information to date.

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**Calendar lines 4 and 5****Case Name: Richard Pierce, et al v. Raincross Fuel & Oil, Inc. et al****Case No.: 19CV343789**

Plaintiff Richard Pierce (Plaintiff) brings a motion to substitute a party and a motion for trial preference pursuant to CCP § 36.

**SUBSTITUTION OF PARTY**

Plaintiff seeks to substitute Gerry White, the personal representative of the Estate of Marsha Fisterola,<sup>2</sup> as the defendant real party in interest.

**FACTS**

According to the allegations of the complaint, on February 27, 2017, decedent Stacey Pierce (“Decedent”) was a passenger in an aircraft that crashed, killing her and the other passengers aboard. On February 25, 2019, plaintiff Richard Pierce, individually and as successor-in-interest to the Estate of Stacey Pierce, and Brandon Pierce (“Plaintiff”) filed a complaint against multiple defendants. Around November 2020, Plaintiff learned that Larry Fisterola may be liable for the plane crash, as he had inspected and serviced the plane. Mr. Fisterola passed away on March 20, 2018, prior to being named as a Doe defendant. As such, Plaintiff amended his complaint on December 7, 2020, substituting Marsha Fisterola, as trustee of the Larry Fisterola and Marsha Fisterola Family Trust (“Family Trust”), and as personal representative of the Estate of Larry Fisterola as Doe defendants 5 and 6, respectively. Ms. Fisterola filed her answer to the amended complaint on December 21, 2021. She also demurred to the FAC on August 23, 2021.

Ms. Fisterola passed away on May 23, 2022. Her estate opened a probate matter in Sacramento County on April 19, 2023. Plaintiff filed a creditor’s claim in the probate matter which was rejected on May 2, 2023. Plaintiff now seeks to substitute Gerry White as the real defendant in interest in Plaintiff’s FAC.

**ANAYLSIS**

Defendant opposes the instant motion, asserting that Marsha Fisterola was never named as a defendant in her individual capacity, such that her Estate is not a party to the action and cannot be substituted in as claimed by Plaintiff. Defendant further asserts that (1) Ms. Fisterola was never the personal representative of the Estate of Larry Fisterola, as there was no probate opened from Mr. Fisterola; and (2) Ms. Fisterola was not acting as Trustee of the Trust when she was sued under that designation and that because she is now deceased she cannot act as Trustee of the Fisterola Family Trust, nor can her personal representative as there is a Successor Trustee of the Fisterola Family Trust and it is not Gerry White. Because Plaintiff has failed to substitute the true Successor Trustee in the place of Marsha Fisterola as the Trustee, Defendant states that the motion must fail.

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<sup>2</sup> Although the complaint is brought against “Fisterola,” it appears that the correct name is Fisterola (see Decl. of Crowley, Exh. 1 and Defendant’s briefing).

In response, Plaintiff in essence claims that the substitution should be allowed on fairness grounds, as Defendant waived his right to claim that Ms. Fistolera was the wrong party, given that Marsha Fistolera, in her capacities as trustee of the Larry Fisterola and Marsha Fistolera Family Trust, and as personal representative of the Estate of Larry Fistolera, answered the FAC and raised no defense that she was not the proper party. When she demurred to the FAC, she also raised no claim that Plaintiff had named the wrong party. See Demurrer of August 23, 2021. In fact, Defendant did raise a defense as to her capacity as personal representative of the Estate of Larry Fistolera in the twelfth affirmative defense laid out in the answer to the FAC. See Answer of December 22, 2021. The Court agrees that no claim in the answer or the demurrer suggests that she is the wrong part in her capacity as the trustee of the Family Trust.

Plaintiff never sued Marsha Fistolera in her individual capacity, as he acknowledges. Plaintiff also never filed a creditor's claim against the Estate of Larry Fistolera. Nor has Plaintiff laid out how, even if he were able to sue the personal representative for the Estate of Larry Fistolera and even if Marsha Fistolera had been the personal representative of that estate, the person to be substituted in would be the personal representative for the Estate of Marsha Fistolera, rather than the current personal representative for the Estate of the Larry Fistolera. Plaintiff simply asserts that he made a claim "in the Fisterola [sic] Estate probate matter . . ." Memo p4. But it there is a difference between the Estate of Larry Fistolera and the Estate of Marsha Fistolera and simply referring to the "estate" does not cure the problem. Because Gerry White is not the personal representative of the Estate of Larry Fistolera, Plaintiff's motion to substitute Gerry White in as the personal representative the Estate of Marsha Fistolera is denied.

According to the declaration of Gerry White, he is not the Successor Trustee of the Larry and Marsha Fistolera Family Trust, and as such is not the proper person to substitute in for the Trustee. To the extent Plaintiff was attempting to substitute in Gerry White for the Trustee of the Larry and Marsha Fistolera Family Trust, it is also denied. The Court is not making any finding with regard to whether it may be proper to substitute in the Successor Trustee for the Larry and Marsha Fistolera Family Trust.

Plaintiff spends most of the reply arguing about fairness and the failure of Defendant to raise the issue that Marsha Fistolera in her trustee and personal representative capacities was the wrong person. While the Court is sympathetic to this claim, particularly with respect to her capacity as trustee, it is not clear how it solves the problems of Gerry White being neither the personal representative for the Larry Fistolera Estate nor the Successor Trustee for the Family Trust. As such, the motion is DENIED.

## TRIAL PREFERENCE

Plaintiff asks for trial preference, pursuant to CCP § 36. Under § 36(e), the Court may "in its discretion grant a motion for preference that is supported by a showing that satisfies the court that the interests of justice will be served by granting this preference." Plaintiff states that preference is needed so that the case can be heard within the five-year statute and because there were complications and delays stemming from the deaths of both Larry and Marsha Fistolera. As pointed out by the opposing defendants, Marsha Fistolera, as Trustee and Personal Representative, and Corporate Aviation Associates, Inc. dba Corporate Air Technology and Steve Frost, Cal. R. app. 1 Emergency Rule 10 grants an additional six months for the time to

get to trial, meaning that the trial need not begin prior to August 25, 2024. As such, the motion for preference is DENIED.

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**Calendar Line 6****Case Name: Conney Paris et al v. Jennie Alvarez et al****Case No.: 19CV345830**

Judgment Debtor has made a claim for exemption. Debtor has failed to cite any provision or statute which would exempt her income from levy, as she is required to do pursuant to CA Code of Civil Procedure (CCP) § 703.520(b)(5). It is Debtor's burden to show that she is entitled to an exemption. CCP § 703.580(b). Under CCP 706.050, effective September 1, 2023, wage garnishments are capped at 20% of disposable (net) income. In her financial statement, signed under penalty of perjury, Debtor reports that her net monthly income is \$3,230, though this includes \$930 from Social Security. On the same form, she reports that her net monthly income as \$2,100. She lists expenses of \$3,285 and at the same time reports that her total monthly expenses are \$2,625. Even assuming a monthly net income of \$2100, a cap of 20% is \$420 per month. Judgment Creditor, while opposing a total exemption, states that it is willing to accept \$272 per pay period, though it is unknown whether a pay period means biweekly or monthly. Opp. to Claim of Exemption (8/9/23). Given the contradictory information in Debtor's claim, it is difficult to surmise Debtor's true net income or expenses. Debtor has failed to satisfy her burden that she should be wholly exempt from paying her debt. But given Creditor's willingness to accept some exemption and given the cap under CCP 706.050, this Court orders that Debtor pay \$272 each month. Debtor's claim for a total exemption is denied, and Debtor is ordered to pay Creditor a minimum of \$272 each month.

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