CONTRA COSTA SUPERIOR COURT

MARTINEZ, CALIFORNIA
DEPARTMENT: 09
HEARING DATE: 04/11/18

1. TIME: 9:00 CASE#: MSC15-01701
CASE NAME: REED VS. SCHULER
HEARING ON MOTION FOR TERMINATING SANCTIONS
FILED BY HERB SCHULER, et al.
**** TENTATIVE RULING: ****

Granted – no timely opposition was filed to this motion. This case consists of consolidated matters filed in 2015: *Reed v. Schuler*, *Reed v. Stone*, and Cross-complaints, arising out of allegations of failure to pay attorney fees, attorney malpractice, settling cases by attorney without client consent, conversion of settlement funds, fraud, breach of fiduciary duty and other similar claims. Answers and Cross-complaints were filed on 6/17/16, and discovery was served on 7/13/16 by the Schulers, Stones and Turners ("clients") to Reed ("attorney"), consisting of requests for admission, interrogatories and requests for production of documents.

The first Motion to Compel was filed on 9/16/16 because attorney had provided no responses to the discovery requests. Attorney responded to the motion to compel that the motion had been improperly noticed and it was re-served on 9/26/16. On 11/3/16, attorney responded to the requests for admission, but not to the interrogatories and request for production. At the hearing on the discovery motions on 11/9/16, the Court determined that because of the complexity and time-consuming nature of the discovery issues to appoint a Discovery Referee under CCP 639, and suggested Hon. Richard Flier, (Ret.) who was not acceptable to one of the attorneys. Subsequently, an Order appointing Attorney Dwight Bishop was served, but an objection to his appointment was made and finally on 4/4/17 Attorney Damien Morozumi was appointed to serve as the CCP 639 Discovery Referee.

Attorney again raised the issue that he had not received the discovery motions, and clients' attorney was requested to again send them to attorney, and the discovery referee set the matters for hearing on 5/31/17. After hearing, attorney agreed to provide answers to the discovery requests by 6/23/17 which was to become the Court's order and that the request for sanctions would be heard thereafter. On 6/8/17, discovery referee's recommendations were made the Court's Order.

By 7/7/17 attorney had not answered the discovery, and discovery referee scheduled yet another hearing on the discovery responses and sanctions request which was set for hearing on 8/7/17. Attorney filed no opposition to the motions, but appeared at the hearing with a criminal attorney who informed discovery referee that he learned on 7/3/17 that criminal charges had been filed against him arising out of the facts underlying these consolidated cases and that he at that point was asserting 5th Amendment reasons for not responding to the discovery. The discovery referee granted clients' motion for sanctions, and pointed out that at the time the attorney was ordered to answer the discovery, he had not asserted his 5th Amendment rights and that apparently no criminal charges had been filed or were known to attorney at that time, i.e. 5/31/17, followed by the Court's Order of 6/8/17. The discovery referee's recommended Order was made the Court's Order on 8/14/17.

Neither the Court's Order of 6/8/17 relating to answering the discovery nor the 8/14/17 order relating to sanctions has been complied with to this date. On 12/14/17 clients filed a motion for issue and terminating sanctions which was denied because of improper service, followed by a

new motion for terminating sanctions, which is now before the Court, and is **granted** pursuant to CCP 2023.010, 2030.290 and 2023.030.

The discovery requests pending since 7/13/16, were never objected to nor were any responses made, the motions to compel and the present motion for terminating sanctions have never been responded to and the Court's orders have never been complied with. No request for a protective order or other relief has been sought by attorney. No stay has been sought pending the outcome of the criminal case. The discovery remains unanswered and the sanctions remain unpaid to this date, despite Court Orders.

This conduct by attorney represents egregious, willful, deliberate and unwarranted abuse of the discovery process, including the total disregard of two Orders, all of which warrant the terminating sanctions requested and granted herein. See *Van Sickle v. Gilbert,* (2011) 196 Cal.app.4th 1495; *Crawford v. JP Morgan,* (2015) 242 Cal.App.4th 1265; *Lopez v. Watchtower,* (2016) 246 Cal.App.4th 566. It appears from attorney's past conduct that any lesser sanction would be an exercise in futility.

Clients' RJN 1 through 4 were unopposed and are **granted.**

2. TIME: 9:00 CASE#: MSC15-01795
CASE NAME: PATERSON VS. DELTA BAY GROUP
HEARING ON MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION FILED BY SCOTT CLARE
**** TENTATIVE RULING: ****

Note: The Cross Complaint filed by Crystalyn Carol Hoffman on September 22, 2016 was just amended on April 5, 2018 to add a new party Cross-Defendant, Jeff Nelson. Mr. Nelson by his attorney, Marianne F. Skipper, on April 9, 2018 filed his Answer to the Cross-Complaint and a CCP 170.6 challenge to Judge Judith Craddick, which is timely. Therefore, the case will be reassigned to a new judge and notice will be mailed to all parties/counsel.

In the meantime, the motion for summary judgment/adjudication of Defendant Clare as to Plaintiff's complaint has been reviewed and the following tentative ruling posted. Neither this motion nor the tentative ruling appear to affect new Cross-Defendant Jeff Nelson. However**, if any party** wishes to have the tentative ruling set aside and decided by the new judge, that party can notify all parties and the Clerk of D9 by 4PM on 4/10/18. If no one objects to the tentative ruling, it will become the Court's Order.

Tentative Ruling: The motion is **denied** without prejudice. If the agency issue were sufficiently flagged in the pleadings, as it appears to have been in paragraphs 18, 38, and 43, defendant Clare has not met his initial burden to show that Chicago Title Company did not have a sufficient relationship with Clare to charge him with what Chicago learned about the Operating Agreement entered as of November 18, 2011.

The issues have not been sufficiently framed to permit the court to reach a proper ruling on the issues as they became clarified during the course of discovery when the parties learned which version of the Operating Agreement was in effect when the significant events occurred. On or before April 25, 2018, plaintiffs shall file a Second Amended Complaint making the following changes from the First Amended Complaint: (1) dropping the claims they promised to drop at page 6, lines 20-26 of their Opposition; (2) making clear that the Operating Agreement on which they are relying is not Exhibit A to the First Amended Complaint but rather the Operating Agreement effective as of November 18, 2011 that they submitted as Exhibit 12 in their Opposition to this motion.

3. TIME: 9:00 CASE#: MSC16-01225
CASE NAME: MOSLOWITZ VS. ELLIS LAKE HOA
HEARING ON MOTION TO COMPEL RESPONSES TO INTERROGATORIES
FILED BY ELLIS LAKE HOMEOWNERS ASSOCIATION
**** TENTATIVE RULING: ****

Hearing continued to 5/16/18 by stipulation.

4. TIME: 9:00 CASE#: MSC16-01455
CASE NAME: ORTIZ VS. S.A. FRESH
HEARING ON MOTION FOR JUDGMENT ON THE PLEADINGS
FILED BY S.A. FRESH ENVIRONMENT, SCHLOMO ABARGEL
**** TENTATIVE RULING: ****

Hearing dropped as moot. A dismissal of the Ortiz Cross-Complaint has been filed.

5. TIME: 9:00 CASE#: MSC17-00245
CASE NAME: YESENIA CHAVEZ VS. SEKK INVESTMENTS
HEARING ON MOTION TO COMPEL WRITTEN DISCOVERY RESPONSES
FILED BY SEKK INVESTMENTS DIANE LLC
**** TENTATIVE RULING: ****

The motion to compel discovery as to the Navarro plaintiffs is **granted**, as follows:

1. The requests for admission are deemed admitted, and the answers to interrogatories shall be verified within 15 days. Although the discovery has apparently been responded to by the Navarro plaintiffs' former attorney, no verifications have been provided.

2. In addition, for the Navarro plaintiffs' failure to comply by providing verified responses, sanctions in the amount of $1,320.00 payable to Defendant's attorneys are awarded against the Navarro plaintiffs, to be paid within 30 days from the date of this hearing. Although the motion was originally brought as to all plaintiffs, defendant's attorney acknowledges that the verified discovery requests have been complied with other than by the Navarro plaintiffs.

6. TIME: 9:00 CASE#: MSC17-01561
CASE NAME: DANH VS. WALKER
HEARING ON MOTION TO STRIKE PUNITIVE DAMAGES
FILED BY MICHELLE WALKER, SHALEAH WALKER
**** TENTATIVE RULING: ****

Defendants Michelle and Shaleah Walker's motion to strike **is granted with leave to amend**. The allegations in the complaint fail to rise to the level of malice, oppression, or fraud to support a punitive damages claim under Civil Code § 3294.

The Court notes that the moving party failed to file a meet-and-confer declaration in compliance with CCP § 435.5. It has the same meet-and-confer requirements as CCP § 430.41 provides for demurrers. The new statute became effective on January 1, 2018. Here, the motion to strike was filed on February 27, 2018. Given the relative "newness" of the statute and there being no objection from the opposing party, the Court will "excuse" compliance this once. However, future motions to strike must comply with CCP § 435.5 or risk being continued or dropped from calendar.

As to the merits, Civil Code § 3294 provides in pertinent part: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Section 3294 defines malice, oppression and fraud as follows:

> (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
>
> (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
>
> (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Pursuant to CCP § 436, Defendants move to strike the prayer for exemplary damages and the punitive damages allegations on the ground Plaintiffs have not pled sufficient facts showing entitlement to exemplary damages against Defendants. A motion to strike may be used to attack claims for damages that are not supported by the cause of action pleaded. The motion to strike may lie where the facts alleged do not rise to the level of "malice, fraud or oppression" required to support a punitive damages award. (See *Turman v. Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63.)

"In order to survive a motion to strike an allegation of punitive damages, the ultimate facts showing an entitlement to such relief must be pled by a plaintiff. [Citations.]" (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.)

Here, Plaintiffs allege Defendant Michelle Walker was driving on the highway when she attempted to change lanes, lost control of her vehicle and collided with Plaintiffs. Defendant, driving under the influence of alcohol, was traveling with her grandson, when the accident occurred. After the collision, Defendant attempted to flee the scene of the accident, carrying her grandson. Defendant was arrested for driving under the influence, hit and run, and child endangerment. Plaintiffs further allege Defendant Michelle Walker knew that through drinking alcohol and driving a motor vehicle, her driving skills were so severely degraded that she was impaired and a danger to others on the roadway. Plaintiffs allege such conduct was despicable and done with a conscious disregard for the safety of others. (Complaint, Exemplary Damages Attachment.)

For cases involving unintentional torts such as this, Plaintiffs must allege facts showing "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." A conscious disregard of the safety of others may constitute malice within the meaning of section 3294 of the Civil Code. "In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences." (*Taylor v. Superior Court of Los Angeles County* (1979) 24 Cal.3d 890, 895-896.)

The terms "despicable" and "wilful" were added by amendment in 1987 to Civil Code § 3294. The statute does not define "despicable conduct," but courts have given definition to the term. Our Supreme Court stated,

> The terms "despicable" and "wilful" were added by amendment in 1987 to Civil Code § 3294. However, the statute's reference to "despicable" conduct seems to represent a new substantive limitation on punitive damage awards. Used in its ordinary sense, the adjective "despicable" is a powerful term that refers to circumstances that are "base," "vile," or "contemptible." (4 Oxford English Dict. (2d ed. 1989) p. 529.) As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, "malice" requires more than a "willful and conscious" disregard of the plaintiffs' interests. The additional component of "despicable conduct" must be found.

(*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.)

The Court finds no cases decided after the 1987 amendments to Civil Code § 3294 involving defendants driving under the influence of alcohol and the application of the "despicable conduct" requirement for imposition of punitive damages. At any rate, the case decided before the amendment involved specific facts where defendants' wrongful conduct included more than mere intoxication while driving. In *Taylor v. Superior Court of Los Angeles County* (1979) 24 Cal.3d 890, the defendant was an alcoholic with numerous prior drunk driving arrests and

convictions and had caused another serious automobile accident. He had a pending criminal drunk driving charge against him and was drinking at the time of the accident.

In *Dawes* v. *Superior Court* (1980) 111 Cal. App. 3d 82, the defendant drove while intoxicated, ran a stop sign, zigzagged in and out of traffic at speeds in excess of 65 miles per hour in a 35-mile-per-hour zone, in the presence of many pedestrians, and hit pedestrian who was a 13-year-old minor.

In *Peterson v. Superior Court* (1982) 31 Cal.3d 147, after consuming alcohol, the defendant drove with plaintiff in the vehicle at speeds in excess of 100 miles per hour. He stopped and consumed more alcohol and resumed driving. He lost control of the vehicle and injured the plaintiff.

Here, Plaintiffs alleged Defendant, although she had been drinking and knew she was impaired, disregarded the rights and safety of other and drove. She attempted to make a lane change when she lost control of the vehicle. Plaintiffs have not alleged the additional component of "despicable conduct." As such, Plaintiffs have not alleged facts where an inference of actual malice can be reasonably inferred. Other than driving under the influence, Plaintiffs have not alleged any aggravating circumstances warranting the imposition of punitive damages.

As to Defendant Shaleah Walker, the owner of the vehicle driven by Michelle, Plaintiffs allege Shaleah was the "employer/principal managing agent" of Michelle Walker. Plaintiffs alleged Defendant Shaleah had advance notice that Michelle was unfit to drive and yet gave permission to use her vehicle. Plaintiffs allege Shaleah's conduct constituted a conscious disregard for the rights and safety of others using the roadways.

First, although Plaintiffs checked the box on the Judicial Council form indicating that Shaleah Walker was Michelle Walker's employer, there are no specific facts alleged showing an employer-employee relationship. It can reasonably be inferred that Michelle was simply spending time with her grandson.

For the sake of argument, even if an employment situation existed, Plaintiffs have not alleged facts sufficient to support punitive damages against Shaleah. "California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723.

There are no allegations that Shaleah knew Michelle was unfit when she was "hired" or facts showing Shaleah "retained" Michelle after becoming aware Michelle was unfit. Instead, Plaintiffs allege, "At the time of the collision Shaleah Walker had advance notice that Michelle Walker was unfit to drive intoxicated…" From these allegations, it

cannot be reasonably inferred that Shaleah Walker consciously disregarded the probable injury to others by "hiring" Michelle.

Plaintiffs failed to allege specific facts to support entitlement to punitive damages. The motion to strike is therefore granted with leave to amend.

7. TIME: 9:00 CASE#: MSC18-00015
CASE NAME: SMITH VS. DAMAX TRANSPORTATION
HEARING ON DEMURRER TO COMPLAINT
FILED BY SERGHEI TULEI
**** TENTATIVE RULING: ****

The hearing on the demurrer is **continued** by the court to May 9, 2018 at 9 a.m. On or before April 25, 2018, defendant Tulei must file the declaration required by CCP § 430.41 (a)(3). CCP § 430.41 requires that a defendant meet and confer in person or by telephone with the plaintiff or the plaintiff's attorney before filing a demurrer and must file a declaration showing compliance. There is no provision which states that the requirement does not apply if the plaintiff opposes the demurrer on the merits or one party or the other believes that meeting and conferring would be fruitless. Throughout the life of a case, adversaries have to talk to one another about various things and reach agreement, where possible. Even a fruitless initial meet and confer may set the stage for subsequent productive ones.

8. TIME: 9:00 CASE#: MSC18-00535
CASE NAME: ALL N ONE PEST VS. MARIA TALACONA
HEARING ON OSC RE: PRELIMINARY INJUNCTION
**** TENTATIVE RULING: ****

No opposition has been filed to the request for preliminary injunction. It is, therefore, **granted** as requested in the moving papers. This relief is conditioned on plaintiff's posting an undertaking in the initial sum of $5,000, on or before May 1, 2018. (Code Civ. Proc., § 529. See, *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 10.)

9. TIME: 9:00 CASE#: MSL13-01083
CASE NAME: PERSOLVE VS. BARNES
HEARING ON MOTION FOR RECONSIDERATION OF RULING
FILED BY PERSOLVE, LLC
**** TENTATIVE RULING: ****

Continued by the Court to June 13, 2018, at 9:00 a.m., in Department 9. No later than June 4, 2018, Defendant is to provide a further declaration tracing the source of the funds which were deposited in account ending #3017. The statement from Chase Bank Savings previously provided shows no deposits and simply contains a beginning balance. The declaration/statement is sought to determine that the funds came from an exempt source.

The Court will issue a tentative ruling on whether the prior ruling is reconsidered or not. Both the Clerk and the Judge in Department 9 recall that the parties were instructed to go outside the Courtroom to discuss a resolution of the issue and then to return to the Courtroom to further discuss the matter with the Court at the end of the calendar if they could not resolve it. The judgment debtors returned, but attorney for judgment creditor did not.

10. TIME: 9:00 CASE#: MSL17-04247
CASE NAME: KURIHARA VS. RAMIREZ
HEARING ON MOTION FOR ORDER SETTING ASIDE DEFAULT
FILED BY RYAN JOSEPH RAMIREZ
**** TENTATIVE RULING: ****

The motion is **granted,** pursuant to CCP 473(b). The complaint was filed on 10/20/17, first amended complaint was filed on 12/5/17, Defendant was sub-served on 12/6/17, default was entered on 1/17/18 and the motion to set aside the default was filed and served on 2/20/18. Defendant retained an attorney who requested Plaintiff to set aside the default, but he was unwilling to do so. Based on California case and statutory law, relief from default is ordinarily granted when the Defendant moves promptly to set it aside (in less than 6 months), and where there is virtually no prejudice to the plaintiff as appears to be the case here. Moreover, there is a strong public policy for cases to be decided on their merit, rather than by default. Defendant shall immediately file his answer which is attached to his motion to set aside, and shall also pay the amount of $500.00 to Plaintiff's attorney as fees pursuant to CCP 473(c)(1)(A).

11. TIME: 9:00 CASE#: MSN18-0485
CASE NAME: RE RILEY BRANDT
HEARING ON MINOR'S COMPROMISE
**** TENTATIVE RULING: ****

Hearing dropped at the request of counsel for Petitioner as an amended petition needs to be filed.

12. TIME: 1:30 CASE#: MSC13-00521
CASE NAME: BOWLES & VERNA LLP VS. MICHAEL A. CLEVENGER
HEARING ON ORDER OF EXAMINATION AS TO MICHAEL A. CLEVENGER
**** TENTATIVE RULING: ****

Appearances required.

13. TIME: 1:30 CASE#: MSC18-00581
CASE NAME: NAJJAR VS. GOLDSTEIN
HEARING ON OSC RE: PRELIMINARY INJUNCTION
SET BY PLAINTIFF
**** TENTATIVE RULING: ****

Plaintiff George Najjar's Order to Show Cause Re: Preliminary Injunction is **granted in part and denied in part.** It **is granted in this respect**: Defendants Alex Goldstein individually and doing business as Strike First Nutrition and New U Life, Inc., their officers, agents, servants, representatives, employees and all persons acting under, or in concert with them, are enjoined and restrained from the following acts, during the pendency of this lawsuit: (1) from selling, transferring, encumbering, conveying or otherwise disposing of any assets of New U Life; (2) from dissolving New U Life, and (3) from using any other entity, such as Strike First Nutrition, to sell New U Life's HGH Gel and testosterone related products. (4) Defendants shall keep and maintain complete and accurate books and records of account and preserve all documents of New U Life transactions, including but not limited to, all emails to and from New U Life (including Plaintiff's emails), sales, receipts, expenditures, etc.

Plaintiff George Najjar's Order to Show Cause Re: Preliminary injunction is otherwise **denied as follows:** The court does not order Plaintiff to be reinstated as the Founder and CEO of New U Life. His name will remain omitted from the website, and he will not have access to his New U Life email account. However, that account is to remain frozen in time, so as to be accessible to Plaintiff in discovery. At this juncture, the court is not ordering any proceeds from

the sale of HGH Gel and testosterone by New U Life to be placed in any bank account, joint or separate.

The court has come to these conclusions by applying the test for a preliminary injunction, set out in Jamison v. Dept. of Transportation (2016) 4 Cal.App.5th 356, 361. "The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or . . . should not be restrained from exercising the right claimed by him or her." See SB Liberty, LLC v. Isla Verde Ass'n, Inc. (2013) 217 Cal.App.4th 272, 280; Continental Baking Co. v. Katz (1968) 68 Cal.2d 512, 528.

> In deciding whether to issue a preliminary injunction, a trial court must evaluate two independent factors: (1) the likelihood that the party seeking the injunction will ultimately prevail on the merits of his claim, and (2) the balance of harm presented, *i.e.,* the comparative consequences of the issuance and nonissuance of the injunction. The trial court's determination must be guided by a "mix" of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. However, a trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim.

See Jamison, supra, 4 Cal.App.5th at 361-362.

LIKELIHOOD OF PREVAILING ON THE MERITS

Is there a reasonable probability that Plaintiff will prevail on the merits? See Robbins v. Superior Court (1985) 38 Cal.3d 199, 205. At this point, the answer is, no. This is a partnership dispute, with two partners. Both have submitted declarations, attesting to radically different version of events and what is owed the other. There is no clear probability of success established by either party at this juncture.

IRREPARABLE HARM

Both parties claim "irreparable harm." Plaintiff relies on Fretz v. Burke (1967) 247 Cal.App.2d 741 for his argument that he should be paid 50% of New U Life's revenues, right now. Plaintiffs in Fretz were limited partners in an oil corporation. The general partner was defendant Burke, who owned the entire corporation. Plaintiffs sought dissolution of the partnership, alleging acts of breach of fiduciary duty by the general partner. Defendant/general partner had continued to make distributions to all partners besides plaintiffs, during the dispute. The portion otherwise distributable to plaintiffs was held in a suspense account by the general partner. Id. at 743.

The trial court ordered defendant to pay plaintiffs their respective shares of profit in the corporation and to pay plaintiffs their proportionate shares of all future profits in the company. Id. at 744. Defendant appealed.

The Court of Appeal affirmed the trial court's decision. Defendant argued that the injunction did not maintain the *status quo* but only coerced defendant into performing an act in advance of trial, which upon trial might not have been decreed. The Court explained:

> In the case before us, the order granting the preliminary injunction does not decide in whole or in part the merits of the controversy. It merely prevents defendant from putting funds which belong to plaintiffs into a suspense account, purportedly as security for possible costs, a security which the law does not allow him. The relief obtained by plaintiffs by the injunction is collateral to the relief which they seek by the action itself. We regard the order granting the injunction as preserving the *status quo*, namely, the procedure for disbursing profits as it had existed before commencement of this action. The *status quo* does not necessarily refer to inaction. It may encompass the continuing of regular and usual procedures.

Id. at 746.

Fretz does not apply to this case. The court is not simply maintaining the *status quo* by distributing 50% of the profits from New U Life to Najjar. The distribution is not ancillary to the dispute; here, it IS the dispute. The threshold issue is the entire controversy: what were the terms of the parties' verbal partnership agreement and did Najjar meet those terms or did Goldstein breach their agreement. Najjar contends that their verbal agreement to become partners and his 1,500 hours of effort in creating the distribution network, *inter alia*, as all that was required of him. Goldstein flatly denies this. Goldstein contends that Najjar was expected to bring in between $250,000 and $500,000 in investments; after almost a year, he had not brought a single investor to New U Life, and he had lied about significant details from his past. Najjar also resigned from New U Life, Inc.; Goldstein denies firing him, scrubbing the website clean of any reference to him or defaming him in any way.

Moreover, even if Najjar was found to be an owner of New U Life, having fulfilled the terms of the verbal partnership agreement, he is not entitled to 50% of any disbursements. Goldstein testified that no disbursements have ever been paid to *any* shareholders, and no shares in New U Life were even issued. Also, if Najjar's version of events is the one believed by a jury, Najjar can be awarded money damages. To be forced to pay now, either Najjar directly or set aside funds to an account prior to trial, would cripple New U Life, according to Goldstein. Any revenues made at this juncture are put back into the company to enable them to fund further orders and pay its employees. The court finds that the best thing for both parties is to keep New U Life a viable concern, so that if Najjar prevails, he will have a remedy.

Najjar contends that Goldstein will simply siphon off all proceeds from the sale of HGH Gel and related products. Or, he will dissolve the company and leave the country. However, there is no evidence for either of these situations, and the court has granted Plaintiff's request for injunction in part to avoid these possibilities.

Plaintiff also contends that he will suffer irreparable harm unless he is returned to the website as a co-founder and is able to retrieve his New U Life email address. There is a significant dispute about whether Plaintiff has any ownership in New U Life, to begin with. The

court is not inclined to order what would be essentially specific performance and make these two individuals work together. See Voorhies v. Greene (1983) 139 Cal.App.3d 989.

In Voorhies, a former law partner was voted out of the corporation by appellants, former law partners, and locked out. Respondent was granted an injunction by the trial court which provided him access and use of the office premises, maintained his status as an employee of the firm, directed that he have available the corporate books and records, client case files, and otherwise reinstated all conditions of his employment agreement. Id. 992-994.

The Court of Appeal reversed the trial court's order as to access to the office and client files of the corporation, continued employment by the corporation and participation in corporate management. Id. 998. The Court held that because there was an adequate remedy at law if the contract provisions were invoked, and because an injunction should not issue to transfer possession of real or personal property held under an ostensibly extant contract, no basis for injunctive relief existed to restore respondent to possession or use of the premises, equipment or client files. Id. at 995-998.

Moreover, Goldstein argues that Najjar was never on the website, and this is confirmed by the Director of Operations, Rogers. Goldstein says, he will be injured by any connection to Najjar since he is known in the health and wellness community for selling tainted products (lead) at Boresha. In Reply, however, Najjar submits the declarations of his attorney (Peyman Rad), Marcelles Brown, his wife, Vera Najjar and Youssef Sawiris, who all attest to the fact that Najjar's biography and profile as the "Co-Founder" existed on the New U Life Website.

As for the email address, there is no need for Najjar to access that as he is no longer working for New U Life. Specific performance in this situation (joint partnership) is not a satisfactory resolution. If Plaintiff's claims prove to be true, his relief would be monetary.

EQUITABLE CONSIDERATIONS FOR INJUNCTIONS

Defendant stresses the equitable considerations for injunctions, namely, that a legal remedy must be inadequate. CCP Section 526(a) lists many of the traditional equity considerations and requirements regarding granting injunctions. Inadequacy of the legal remedy is listed only fourth and fifth: (4) when pecuniary compensation would not afford adequate relief; and (5) where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. But the placement should not be misread. Injunctions will rarely be granted where a suit for damages provides an adequate remedy. See Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal.App.2d 300, 307; Pacific Decision Sciences Corp. v. Superior Court (2004) 121 Cal.App.4th 1100, 1110.

Here, there is no reason why money damages would not be an adequate remedy at law for the claims made by Najjar; thus, the equitable considerations strongly favor denying Plaintiff's request for preliminary injunction.

Defendants' request for judicial notice is denied as to Exhibit A and granted as to Exhibit B. See Evid. Code Section 452(c)

In Reply, Najjar objects to evidence submitted by Goldstein in opposition to his application for preliminary injunction. The evidentiary objections are ruled on as follows:

Declaration of Alex Goldstein

A. Goldstein Decl., paragraph 10, page 3, line 14: Overruled
A. Goldstein Decl., paragraph 15, page 4, lines 18-19: Overruled
A. Goldstein Decl., paragraph 18, page 5, lines 2-4 and Exhibit A: Overruled
A. Goldstein Decl., paragraph 14, page 4, lines 16-18: Overruled
A. Goldstein Decl., paragraph 19, page 5, lines 5-7: Overruled

Declaration of Ryan Rogers

Rogers Decl., paragraph 3, page 2, lines 6-12: Sustained – foundation, hearsay
Rogers Decl., paragraph 4, page 2, lines 13-16: Sustained – hearsay
Rogers Decl., page 2, lines 26-28: Overruled

Declaration of David Goldstein

D. Goldstein, paragraph 2, page 1, lines 24-26 and Exhibit A: Overruled

14. [deleted]

ADD-ON

15. TIME: 9:00 CASE#: MSC15-01701
CASE NAME: REED VS. SCHULER
HEARING ON MOTION FOR ORDER COMPELLING ATTENDANCE OF S. MCLETCHIE FILED BY WILLIAM J. REED
**** TENTATIVE RULING: ****

Denied as moot. See Line 1.

16. TIME: 9:00 CASE#: MSC18-00015
CASE NAME: SMITH VS. DAMAX TRANSPORTATION
HEARING ON MOTION TO STRIKE DAMAX TRANS ENTIRE ANSWER TO COMPLAINT FILED BY JAMES MARSON SMITH
**** TENTATIVE RULING: ****

The hearing on plaintiff's motion to strike the corporate defendant's answer is **continued** by the Court to May 9, 2018 at 9:00 a.m. Effective January 1, 2018, the requirement to meet and confer before filing a demurrer was extended to apply to motions to strike as well. (See CCP §435.5.) On or before April 25, 2018, plaintiff must file the declaration required by CCP § 435.5 (a)(3).

Before the next hearing, defendant should read the case of *CLD Construction, Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1145, which makes clear that, unlike a natural person, a corporation may not represent itself in court proceedings or represent itself through a non-attorney officer. Should an attorney fail to file a Notice of Appearance on behalf of Damax before the next hearing, plaintiff's motion will likely be granted and the Answer be stricken. Damax will then have to file an Answer all over again, this time through a licensed attorney.

17. TIME: 9:00 CASE#: MSC18-00015
CASE NAME: SMITH VS. DAMAX TRANSPORTATION
SPECIAL SET HEARING ON FEE WAIVER
SET BY DEPT. 9
**** TENTATIVE RULING: ****

Denied. Fee waivers are not available for corporations or businesses – only individuals.