TENTATIVE RULINGS

FOR: September 4, 2020

If you do not see a tentative ruling for a scheduled matter, then attendance at the hearing is required.

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If you have cases scheduled in both courtrooms at the same time, first log-in to the Zoom session for the department that has your quickest matter(s), and upon check-in, ask the clerk to email the clerk in the other department to advise that you will be late to the other Zoom session.

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CIVIL LAW & MOTION CALENDAR – Hon. Victoria Wood, Dept. A (Historic Courthouse) at 8:30 a.m.

Marilyn J. Tudal-Fidge v. Cerruti Cellars, Inc. **17CV001382**

MOTION FOR AWARD OF ATTORNEY'S FEES PURSUANT TO SETTLEMENT AGREEMENT

TENTATIVE RULING: Plaintiff/defendant/cross-defendant Marilyn J. Tudal-Fidge (as successor trustee of the Alma Tudal Survivor's Trust), plaintiff/defendant Tudal Winery, LLC, defendant Marilyn J. Tudal-Fidge, and defendant Janet Tudal Baltas' motion for an award of attorney's fees and costs pursuant to the settlement agreement is GRANTED in the amount of $17,884.45 ($17,700 attorney's fees + $184.45 costs). (McCoy Decl., Ex. A [settlement agreement], ¶¶ 8-9.) The moving parties submitted evidence of their attorney's hourly rate and the hours worked in response to defendants John Tudal and Cerruti Cellars, Inc.'s ex parte application to set aside the judgment, which resulted in two hearings, the filing of various

documents, and evidentiary objections until the Court's order was filed on June 24, 2020. (*Id.*, ¶¶ 5-6, Ex. B [billing sheet].) The opposing parties filed a one-page opposition generally stating the fees sought are excessive and grossly disproportionate to the work product produced. No opposing evidence was presented. With no contrary evidence, and after a review of the billing entries and based on its own knowledge of the proceedings that occurred before it, the Court adopts as reasonable the hourly rate and hours worked to apply the lodestar to reach the amount awarded plus costs.

Mindy Marquez, MD v. Bay Area Surgical Specialists, Inc. **20CV000293**

PLAINTIFF'S PETITION FOR ORDER COMPELLING ARBITRATION OF DEFENDANT'S CROSS-COMPLAINT

APPEARANCE REQUIRED to provide the Court with clarification as to whether there needs to be an additional stipulation/order to bifurcate issues and adjudicate the declaratory relief claims first (and a time frame set for doing so), stay the remaining claims and stay the motion to compel arbitration as to any remaining claims.

Silverado Napa Holdings, LLC v. John L. Miller, *et al*. **20CV000632**

DEFENDANTS' MOTION FOR A PROTECTIVE ORDER STAYING DISCOVERY

TENTATIVE RULING: The motion is GRANTED in part. All discovery in the action is temporarily STAYED pending the hearing on Defendants' demurrers. The Court orders that further hearing on this motion be CONTINUED to September 30, 2020, at 8:30 a.m. in Dept. A.

The notice of motion does not provide notice of the Court's tentative ruling system as required by Local Rule 2.9. Moving party/counsel is directed to contact the opposing party/ies forthwith and advise of Local Rule 2.9 and the Court's tentative ruling procedure. Notwithstanding the procedures set forth in Local Rule 2.9, the moving party/counsel shall appear at the hearing, by Zoom, unless it is confirmed that no party requests oral argument.

A. Background

Defendants John L. Miller, Oakmont Investments LLC, the Miller Alaska Trust, Tim Wall, TKW Resort Holdings LLC, Ken Leister, and Double Bar Five Investments LLC move the Court for a protective order staying all discovery in the action pending resolution of Defendants' demurrers to the Complaint, and until such time as Plaintiff establishes its standing to assert derivative shareholder claims.

Silverado Resort Investment Group, LLC (SRIG) is a Delaware limited liability company and owner of the Silverado Resort and Spa (Resort). Plaintiff Silverado Napa Holding, LLC (SNH), Defendant TKW Resort Holdings LLC (TKW) and Defendant the Miller Alaska Trust (Miller Trust) are each voting members of SRIG. Defendant DoubleBar Five Investments, LLC (Double Bar Five) is a non-voting member of SRIG.

Pursuant to SRIG's Operating Agreement, management of the company is vested in a board consisting of three managers (Board). (Greenwood-Meinert Decl. at ¶¶2-3, Exh. A at §4.1, Exh. B at §4.1.) The parties are in accord that Tim Wall and Roger Kent are managers and thus, members of the Board. (See Support Memo at 7:17-18.) Defendants contend that John L. Miller is the third manager. (See *Ibid*.) Through the Complaint, Plaintiff seeks a declaratory judgment that Mr. Miller's acts "as a Manager…on issues presented to the Voting Members of SRIG or SRIG's Board of Managers after the transfer took place in 2012 constitute *ultra vires* acts that are without force and effect as to any matters involving the Members or Managers of SRIG or SRSG." (Complaint at ¶66, subd. (d).)

B. Legal Analysis

In certain shareholder-derivative actions brought pursuant to Delaware law, a plaintiff is not entitled to conduct discovery until the pleadings are at issue. Even a basic understanding of this point of Delaware's procedural law, however, requires a fairly substantial review of that law's approach to shareholder derivative suits.

Two types of actions are available to a shareholder: "a direct action filed by the shareholder individually (or on behalf of a class of shareholders to which he or she belongs) for injury to his or her interest as a shareholder," or a "derivative action filed on behalf of the corporation for injury to the corporation for which it has failed or refused to sue." (See *Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 311-312, quoting Friedman, Cal. Practice Guide: Corporations (The Rutter Group 2004) ¶ 6:598, p. 6-127.) "The two actions are mutually exclusive: *i.e.*, the right of action and recovery belongs either to the shareholders (direct action) or to the corporation (derivative action)." (*Id.* at 312.) "When the claim is derivative, the 'shareholder is merely a nominal plaintiff [e]ven though the corporation is joined as a nominal defendant, it is the real party in interest to which any recovery usually belongs. (Citation omitted.)" (*Ibid*.)

"'A basic principle of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation. The exercise of this managerial power is tempered by fundamental fiduciary obligations owed by the directors to the corporation and its shareholders.' The decision to bring a law suit or to refrain from litigating a claim on behalf of a corporation is a decision concerning the management of the corporation. Consequently, such decisions are part of the responsibility of the board of directors.'" (*Bezirdjian v. O'Reilly* (2010) 183 Cal.App.4th 316, 322, quoting *Spiegel v. Buntrock* (Del. 1990) 571 A.2d 767, 772–773.)

"'Because the shareholders' ability to institute an action on behalf of the corporation inherently impinges upon the directors' power to manage the affairs of the corporation the law imposes certain prerequisites on a stockholder's right to sue derivatively. [Delaware] Chancery Court Rule 23.1 requires that shareholders seeking to assert a claim on behalf of the corporation must first exhaust intracorporate remedies by making a demand on the directors to obtain the action desired, or to plead with particularity why demand is excused. [¶] The purpose of pre-suit demand is to assure that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation, to decide whether to invest the resources of the corporation in

litigation, and to control any litigation which does occur.'" (*Bezirdjian v. O'Reilly*, *supra*, 183 Cal.App.4th at 322, quoting *Spiegel v. Buntrock, supra*, 571 A.2d at 773.)

Delaware Chancery Court Rule 23.1 (Rule 23.1) also requires a Plaintiff bringing a derivative suit to "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort." (Delaware Chancery Court Rule 23.1, subd. (a).) Finally, "Directors are presumed to act in a manner that is faithful to their fiduciary duties. A plaintiff who seeks to overcome that presumption must do so at the pleading stage before the company or its officers and directors are asked to respond to discovery requests." (*Jones v. Martinez* (2014) 230 Cal.App.4th 1248, 1254.)

Where such a Rule 23.1 demand is made and refused by the company's governing board, a plaintiff (challenging the board's decision to refuse the demand) is not entitled to discovery prior to responding to a motion to dismiss (or demurrer) based on Rule 23.1. (See *Levine v. Smith* (Del. 1991) 591 A.2d 194, 210, overruled on other grounds by *Brehm v. Eisner* (Del. 2000) 746 A.2d 244, 253.)

The parties appear to agree, for purposes of the present motion, that because SRIG is a Delaware limited liability company, any derivative claims brought by Plaintiff on behalf of SRIG are governed by the substantive laws of the State of Delaware. (See Support Memo at 11:13-15; Opposition at 11:10-14.)

It is clear from the Complaint that at least some of the claims are derivative. The introductory paragraph of the Complaint states, "Plaintiff…brings this action individually, and derivatively on behalf of Nominal Defendant Silverado Resort Investment Group, LLC…." (Complaint at 2:2-4.)

However, the parties disagree, here, about the extent to which the claims presented through the Complaint are derivative (or direct). Defendants assert that, "[t]he Complaint is based primarily on allegations the Defendants breached fiduciary duties, aided and abetted those breaches and/or engaged in fraud by causing SRIG to do or not do certain things to SRIG's detriment" and that "[c]laims based on such allegations are derivative claims for purported harm to SRIG…which Plaintiff may pursue only after it satisfies Delaware's demand requirement." (Support Memo at 12:2-5.) Plaintiff disagrees stating emphatically that the "Complaint alleges direct claims for declaratory relief, judgment, breach of contract, fraud and negligent misrepresentation, among others." (Opposition at 5:9-10.)

Following a detailed review of the Complaint, the Court finds that, pursuant to the analysis articulated in *Tooley*, 845 A.2d at 1033, while not all of the claims alleged in the Complaint are derivative, all of the Counts advanced therein contain derivative claims.

Count 1 seeks a declaratory judgment relating to the purported transfer of the interests of Defendant and original Member Oakmont Investments, LLC (Oakmont) to the Miller Alaska Trust. Specifically, Plaintiff seeks a declaration as to the effect of such transfer on various *Defendants'* rights to participate in the management (as either a Member or Manager) of SRIG's

operations. The direct beneficiary of such declaration of rights would be SRIG. The Count is, therefore, derivative. (*Tooley, supra*, 845 A.2d at 1033.)

Count 2 seeks a declaratory judgment relating to certain distributions and/or compensation paid from SRIG to Defendants. (See Complaint at ¶70.) Again, the direct beneficiary of such declaration of rights would be SRIG. The Count is, therefore, derivative. (*Tooley, supra*, 845 A.2d at 1033.)

The Court is unable to conclude that either Count 3 for Fraud or Count 4 for Negligent Misrepresentation alleges facts sufficient to state a direct claim. The keystone allegation underlying both Counts is that Oakmont "with…Mr. Miller's knowledge and consent transferred its membership interest in SRIG to the Miller Alaska Trust in 2012 without disclosing the transfer or obtaining the approval of SNH or TKW." (Complaint at ¶¶72, 78.) Plaintiff further alleges that, thereafter, Defendants "falsely represented" and/or "misrepresented" "to SRIG, SNH, Mr. Kent and other [parties] that Oakmont was and remained the lawful owner of the SRIG membership…." (*Id*. at ¶¶74, 79.) Finally, Plaintiff alleges that it "reasonably relied on the accuracy of the representations by [Defendants] Oakmont and Mr. Miller and *has been damaged* in an amount to be proven at trial." (*Id*. at ¶¶75, 81, emphasis added.)

While Plaintiff alleges, in conclusory terms that it was damaged by this alleged fraud, the Court can find no discussion anywhere in the 49-page complaint of the nature of that alleged damage. The only other discussion on point is the allegation that "Mr. Miller's actions and non-disclosure have placed the company at risk with its Members, creditor and other third-parties." (Complaint at ¶53.) While that allegation is somewhat abstract (and somewhat vague), it suggests that the "damage" stemming from the non-disclosure of the alleged Oakmont transfer relates to the interests of SRIG (the *company*) and not to Plaintiff's individual interests.

Ultimately, the Court is unable from these allegations to deduce what "[t]he stockholder's claimed direct injury" – allegedly stemming from the fraudulent misrepresentation – is, if any. (*Tooley, supra*, 845 A.2d at 1039.) In this context, the Court cannot conclude that such injury "is independent of any alleged injury to the corporation." (*Ibid*.) Particularly in light of the clearly derivative nature of the majority of the claims asserted by Plaintiff, the Court does not find allegations in the Complaint which "demonstrate that the duty breached [as to either Counts 3 or 4] was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." (*Ibid*.)

Each of the specific allegations of wrongdoing in Count 5 would, if true, be to the detriment of SRIG. (*Id*. at ¶85; see also ¶86 ["Wall's extensive breaches of fiduciary duty have benefitted and unjustly enriched himself…to the detriment of SRIG…"].) "The aforementioned conduct was done with the intention of depriving SRIG of its property or legal rights or otherwise causing injury to it, and was despicable conduct with a complete and total disregard for the rights of SRIG." (*Id*. at ¶87.) The Count is, therefore, derivative. (*Tooley, supra*, 845 A.2d at 1033.)

Each of the specific allegations in Count 6 would, if true, be to the detriment of SRIG's wholly owned subsidiary (and management company) Silverado Resort Services Group, LLC

(SRSG). (*Id*. at ¶28, 90; see also ¶91 ["Wall's extensive breaches of fiduciary duty have benefitted and unjustly enriched himself…to the detriment of SRIG and SRSG…"].) "The aforementioned conduct was done with the intention of depriving SRIG and SRSG of its property or legal rights or otherwise causing injury to it, and was despicable conduct with a complete and total disregard for the rights of SRIG and SRSG." (*Id*. at ¶92.) The Count is, therefore, derivative. (*Tooley, supra*, 845 A.2d at 1033.)

Each of the specific allegations in Count 7 would, if true, be to the detriment of SRIG. (*Id*. at ¶95; see also ¶96 ["Miller's extensive breaches of fiduciary duty have benefitted and unjustly enriched himself…to the detriment of SRIG…"].) "The aforementioned conduct was done with the intention of depriving SRIG of its property or legal rights or otherwise causing injury to it, and was despicable conduct with a complete and total disregard for the rights of SRIG." (*Id*. at ¶97.) The Count is, therefore, derivative. (*Tooley*, *supra*, 845 A.2d at 1033.)

Each of the specific allegations in Count 8 would, if true, be to the detriment of SRIG. (*Id*. at ¶100; see also ¶101 ["Oakmont's, Miller Alaska Truist's and TKW's extensive breaches of fiduciary duty have benefitted and unjustly enriched themselves and their principals…to the detriment of SRIG…"].) "The aforementioned conduct was done with the intention of depriving SRIG of its property or legal rights or otherwise causing injury to it, and was despicable conduct with a complete and total disregard for the rights of SRIG." (*Id*. at ¶102.) The Count is, therefore, derivative. (*Tooley*, *supra*, 845 A.2d at 1033.)

Each of Counts 9 through 11 allege that each Defendant aided and abetted every other defendant in breaching their fiduciary duties as alleged in Counts 5 through 8. (*Id*. at ¶¶103-117.) Each of these Counts are, based on the reasoning set forth herein above, derivative. (*Tooley*, *supra*, 845 A.2d at 1033.)

Count 12 "asserts a waste claim to cover…misconduct" that caused "harm to the Company" based on breach of Defendants' fiduciary duties that "require them to place the interests of SRIG and/or SRSG above their own interests and/or the interests of SRIG's Managers." (*Id*. at ¶119.) The Count is, therefore, derivative. (*Tooley*, *supra*, 845 A.2d at 1033.)

Count 13 alleges that Defendants "are acting in concert to unjustly retain SRIG's money and property." (*Id*. at ¶122.) The Count is, therefore, derivative. (*Tooley*, *supra*, 845 A.2d at 1033.)

Count 14 alleges that Defendants breached the SRIG Operating Agreement in several specific ways. Among these, Plaintiff alleges that Defendants breached Section 4.1, which provides that "all voting Members and their appointed Managers have equal rights and authority, and none has greater authority than another," "by withholding documents and material information about SRIG and the Resort from SHN and Mr. Kent." (Complaint at ¶127.) Plaintiff further alleges that Defendant's breached section 4.3 of the Operating agreement, which provides that "any Manager or any other person designated by the Board of Managers may execute any and all documents which requires the approval of the Voting Members as set forth in Section 4.2, only if such document has been approved by the Voting Members in accordance with Section 4.2."

The Court finds that both of the foregoing allegations makes a claim that Defendants actions have violated the rights afforded by the Operating Agreement to Plaintiff as a Member of the Company. Plaintiff would not be required to prove any harm to the Company in order to prevail on the foregoing claims. As such, the foregoing claims in Count 14 are direct, and not derivative claims. (*Tooley*, *supra*, 845 A.2d at 1033.)

However, each of the other claims of breach alleged through Count 14 appear to be derivative: Each alleges that the Defendants Wall and Miller breached provisions of the Operating Agreement restricting the managers and the company from taking certain actions absent unanimous consent of the voting members: paying any salary or other compensation; incurring or guaranteeing indebtedness; and/or making or agreeing to make an expenditure in excess of $100,000. (See Complaint at ¶128.) In order to prevail on these claims, Plaintiff would need to prove that the actions were undertaken in the name of SRIG without appropriate approval. The Court finds that it is SRIG that would suffer direct harm from such unauthorized action in its name. Any harm to Plaintiff would be derivative thereto. For these reasons, these claims under Count 14 are derivative. (*Tooley*, *supra*, 845 A.2d at 1033.)

Finally, Count 15 alleges that Defendants Messrs. Miller and Wall engaged in a series of misrepresentations relating to: their dedication of time "managing the Resort's business and financials;" the Resort's profitability; the nature of Mr. Kent's approval of a Unanimous Written Consent. (*Id*. at ¶131, 134.) Plaintiff alleges that the misrepresentations were undertaken "with the intention of depriving SNH of its property or legal rights or otherwise causing injury to it." (*Id*. at ¶136.) However, the nature of the alleged misrepresentations reveals that SRIG would directly suffer any harm stemming from the alleged misrepresentations, with any harm to SNH being derivative thereof. Put another way, SNH cannot prevail on this claim without showing harm to SRIG from the alleged acts. The Count is, therefore, derivative. (*Tooley*, *supra*, 845 A.2d at 1033.)

Because each of the Counts asserts derivative claims, if Plaintiff has made a Rule 23.1 demand on the Board, and if the Board has refused that demand, then Plaintiff would not be entitled to discovery until after the pleadings are at issue. (See *Levine v. Smith*, *supra*, 591 A.2d at 210.) Plaintiff has alleged making such demand. (See Complaint at ¶61.)

Plaintiff does not, however, allege any response from the Board to the demand. It appears that no response has yet been forthcoming. Through their moving papers, Defendants assert that "the Board is acting on [Plaintiff's] Demand." (See Support Memo at 15:2.) Plaintiff argues that SRIG's failure to respond must be viewed as a tacit approval of his lawsuit. (Opposition at 11:14-15.) He asserts that SRIG failed even to answer or demur to the Complaint and notes its default was entered in the matter on August 21, 2020. Defendants counter that SRIG did not respond to the Complaint because it was not properly served in the matter. (Reply at 7:4-5.) Defendants also argue that once a demand is made, the demanding party must afford the company a sufficient time to act on the demand. (Reply at 6:3-8.) Defendants cite to Delaware caselaw holding that, under certain circumstances a four-month-long investigation into a demand may be reasonable. (*Id*. citing *Abbey v. Computer & Communications Technology Corp*. (Del. Ch. 1983) 457 A.2d 368, 375.) Defendants note that, in this case, Plaintiff filed the instant action

some 7 days after the date on which it alleges having made his demand on the Board. (See Complaint, filed July 13, 2020, at ¶61.)

Ultimately, the Court concludes that the question of *whether* Delaware law operates to stay discovery pending resolution of the pleading stage of the action depends on the resolution of these issues (regarding lack of response to the demand). The Court anticipates that each will be squarely addressed in the context of Defendants' demurrers to the Complaint. However, the Court recognizes that permitting Plaintiff to conduct unlimited discovery at this point may permit Plaintiff to perform an end-run around on Delaware's discovery prohibition.

"As a general matter, the trial court is empowered to exercise superintendency over discovery." (*Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 952; see also *People v. Super. Ct. (Cheek*) (2001) 94 Cal.App.4th 980, 991, Code Civ. Proc. §§2019.020, subd. (b), 2031.060, subd. (b), 2025.420, subd. (b), and 2030.090, subd. (b), 2030.080, subd. (b).)

In light of the foregoing, the Court exercises its authority to oversee the discovery process and orders all discovery in the matter stayed, pending hearing on Defendants' demurrers. This matter is CONTINUED to September 30, 2020, at 8:30 a.m. in Dept. A.

CIVIL LAW & MOTION CALENDAR – Hon. Monique Langhorne, Dept. B (Historic Courthouse) at 8:30 a.m.

Marc Golick, et al. v. State of California, et al. **19CV000350**

MOTION TO COMPEL FURTHER PRODUCTION OF DOCUMENTS

TENTATIVE RULING: Plaintiffs Marc Golick and Makena Golick (collectively, the "Golicks") move for an order compelling further responses and documents responsive to request for production of documents (set one) number 30 from defendant Napa County Sheriff's Office ("NCSD") and to strike privilege objections in the privilege log served in conjunction with said discovery. Request number 30 seeks copies of the NCSD's policies, procedures, and training for use of force from 2009 to the present. (Podrobinok Decl., Ex. 1 at p. 8.) The NCSD opposes.

A. Statement of Facts

In 2018, Albert Wong entered a building at the Veteran's Home of California in Yountville armed with a loaded semi-automatic weapon and dressed in tactical gear. (Third Amended Compl., ¶¶ 59, 66-67.) The combat veteran entered a room and allowed certain staff members and veterans to leave. (*Id*., ¶ 70.) Decedents were required to remain. (*Ibid*.) Deputy Steve Lombardi was the first to respond to the active shooter situation. (*Id*., ¶ 71.) The deputy partially opened a closed door, saw Wong, and stepped back from the door to allow it to close. (*Id*., ¶ 72.) Contrary to his training, Deputy Lombardi then "fired impulsively and indiscriminately through the closed metal door . . . with no view of his target or anyone else in the room." (*Ibid*.) Wong returned fire from inside the room, then shot and killed three victims before killing himself. (*Ibid*.)

B. Discovery Dispute

On June 17, 2019, the Golicks served the NCSD with request for production of documents (set one). (Podrobinok Decl., ¶ 22.) The NCSD's initial unverified response to request number 30 from August 2019 stated: "Documents responsive to this request have been identified and will be produced in [a] supplement to the production made with these responses." (*Id*., Ex. 2.) The Podrobinok declaration did not attach the entire set of responses to allow the Court to determine whether general or opening objections were presented prior to the discovery responses, but the declaration states under penalty of perjury that the "NCSD did not object to the requests at issue[.]" (*Id*., ¶ 23.)

The NCSD served an amended unverified response to request number 30 in January 2020 providing: "After a reasonable search and diligent inquiry and the use of force from 2016 to 2019 attached Bates CON (Golick) 5268 to 5435). The policies proceeding are no longer in possession of responding party." (*Id*., Ex. 3.) The Podrobinok declaration again did not attach the entire set of responses to allow the Court to determine whether general or opening objections were presented or maintained from the initial responses, but the declaration states under penalty of perjury that as to request number 30, "there was no objection to this category." (*Id*., ¶ 24.)

In its second amended response to request number 30, served on February 28, 2020, the NCSD interposed the "official records" objection under Evidence Code section 1040, subdivision (b)(2), for the first time and produced documents.[1] (*Id*., Ex. 4.)

On May 11, 2020, the NCSD submitted its first privilege log. (*Id*., ¶ 27.) The log was updated in June 2020. (*Id*., Ex. 8.) The privilege log identifies three documents that are the object of this motion: (1) 2017 tactical response memo for NCSD deputies responding to an armed attacker; (2) 2018 PowerPoint presentation (50 slides) used in training NCSD deputies for an active shooter situation; and (3) 15-minute training video for NCSD deputies for responding to an active shooter given a year prior to the incident in this case. (*Ibid*.)

On June 25, 2020, Undersheriff John Crawford from the NCSD executed a verification for the discovery responses and production. (Robinson Decl., ¶ 18, Ex. O.)

C. Timeliness

The NCSD contends the motion to compel is untimely due to the filing of its second amended responses on February 28, 2020. A motion to compel further responses and documents must be served within 45 days (extended if served by mail, overnight delivery, fax or electronically) after service of a verified response. (Code Civ. Proc., § 2031.310, subd. (c); *id*., § 1010.6, subd. (a)(4) [extension of two court days for electronic service].) Otherwise, the

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[1] The NCSD's opposition skips any mention of the August 2019 initial responses and January 2020 amended responses and instead goes straight to the second amended responses served on February 28, 2020. (Opp. at p. 3:1.) The supporting Robinson declaration does the same by merely attaching the second amended responses from February 28, 2020, as Exhibit A.

demanding party waives the right to compel any further response. (*Id*., § 2031.310, subd. (c); see *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 745.) The 45-day time limit is mandatory and "jurisdictional," i.e., the Court has no authority to grant a late motion. (See *Sexton v. Super. Ct.* (1997) 58 Cal.App.4th 1403, 1410 ["We do not believe the 45-day limitation is 'jurisdictional' in the fundamental sense, but is only 'jurisdictional' in the sense that it renders the court without authority to rule on motions to compel other than to deny them."].) The authority the NCSD raises does not limit the verification requirement even if responses contained objections as the statute is clear that *verified* responses trigger the start of the 45-day time limit in which to move for further responses and document production.

In the case at bar, the NCSD served its second amended responses to the document requests, including request number 30, on February 28, 2020, with general objections, responses, and document production. (Robinson Decl., ¶ 4., Ex. A.) The second amended responses were not verified as they were only signed, not under oath, by the NCSD's attorney. (See Code Civ. Proc., § 2031.250, subds. (a) ["The party to whom the demand . . . is directed shall sign the response under oath unless the response contains only objections."], (b) ["If that party is a . . . governmental agency, one of its officers or agents shall sign the response under oath on behalf of that party."].)[2] A verification was not executed until June 25, 2020, after Undersheriff John Crawford from the NCSD signed under penalty of perjury.[3] (Robinson Decl., ¶ 18, Ex. O.) The verification was served electronically via email on that same day at 3:43 p.m. (Podrobinok Decl., Ex. 6.) The current motion was served on August 10 and filed on August 11, 2020. The motion, therefore, is timely as it just falls within the 45-day window within which to serve when including the extension for electronic service.

D. Waiver of Objections

The Golicks argue the NCSD waived all objections by failing to serve original verifications with its August 2019 initial responses, and by agreeing to produce all documents requested in request number 30. The NCSD counters that it "cannot waive a privilege because no viable claim was filed[,]" citing the Rutter Guide at § 8:76.1, which quotes from *Wellpoint Health Networks, Inc. v. Super. Ct.* (1997) 59 Cal.App.4th 110, 129.

The subsection raised in the Rutter Guide is entitled, "Where demurrer sustained and no amended pleading filed." (Weil & Brown, Cal. Practice Guide: Civil Proc. Before Trial (Rutter Group 2020) at § 8:76.1.) The subsection goes on to explain that "[r]elevancy may be impossible to determine where a demurrer has been sustained to an earlier pleading and before an amended pleading has been filed from which to determine a party's claims or defenses." (*Ibid*.) The next subsection provides: "Discovery of privileged information was sought on the basis that the privilege had been *waived*. Discovery could not be compelled where there was 'no viable claim on file' because a demurrer had been sustained to the earlier complaint and no

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[2] The amended responses served on June 22, 2020, were not verified, but did not concern request number 30. (Robinson Decl., ¶ 16, Ex. M.)

[3] Exhibit O to the Robinson declaration does not contain a proof of service to show by what means the verification was served. Likewise, the verification attached as Exhibit 5 to the Podrobinok does not contain a proof of service. (Podrobinok Decl., ¶ 26, Ex. 5.) The proof of service, consisting of an email, is attached as Exhibit 6.

amended complaint had been filed: 'Put simply, prior to any finding on the question of waiver, [plaintiff] must file an acceptable complaint.' [Citation]." (*Id*., § 8:76.2.) The Rutter Guide's guidance does not apply here as the Golicks have a third amended complaint on file, which allows a determination of relevance and waiver. The Court does not read *Wellpoint Health Networks, supra*, 59 Cal.App.4th at p. 129, as limiting a decision on a waiver issue to only after a pleading has survived a demurrer.

Turning to the waiver issue, the Court agrees with the Golicks that the NCSD waived all objections. The NCSD's initial response to request number 30 was unverified and raised no objections. (Podrobinok Decl., ¶ 23, Ex. 2.) It was not until its second amended responses from February 28, 2020, that the NCSD first raised the official records objection under Evidence Code section 1040, subdivision (b)(2). (*Id*., Ex. 4.) An unverified response is equivalent to no response at all. (*Appleton v. Super. Ct.* (1988) 206 Cal.App.3d 632, 635-36.) Failing to respond waives all objections, including claims of privilege. (Code Civ. Proc., § 2031.300, subd. (a).) Parties cannot add late objections after service of initial discovery responses. The NCSD's objections, therefore, have been waived.

E. The Discovery Request

Assuming waiver does not apply, the Court reaches the merits of the motion. The propounding party may file a motion to compel further responses to document requests if it deems that an objection is without merit or too general. (Code Civ. Proc., § 2031.310, subd. (a).)

1. Good Cause

A motion to compel further responses and production of documents responsive to document requests must "set forth specific facts showing good cause justifying the discovery sought by the demand." (*Id*., § 2031.310, subd. (b)(1).) The moving party establishes good cause by showing: (1) relevance to the subject matter of the case; and (2) specific facts justifying discovery. (*Kirkland v. Super. Ct.* (2002) 95 Cal.App.4th 92, 98.)

The Golicks directly set forth facts showing good cause justifying the discovery sought by the demand. The Golicks allege Deputy Lombardi acted against his training. In order to plead claims against the NCSD and Deputy Lombardi, the Golicks need the information from the training materials used to instruct Deputy Lombardi and other deputies in an active shooter situation to show Deputy Lombardi's use of deadly force was unreasonable under the totality of the circumstances. Discovery relating to these training materials could support the Golicks' claims that Deputy Lombardi acted unreasonably. Accordingly, good cause exists for the requested discovery.

2. Objections

According to the separate statement, the NCSD raised privacy, relevance, and "Official Information; Official Privilege" as objections to the discovery demand.

Generally, a party asserting objections to discovery requests must justify or defend the objections or the objections will be overruled. (*Fairmont Ins. Co. v. Super. Ct.* (2000) 22 Cal.4th 245, 254-55.) Since the NCSD did not defend its privacy objection in its opposition, the objection is not substantiated, and is overruled. (*Ibid*.)

The relevance objection is overruled. The Golicks demonstrate good cause, as noted, which shows the information requested is relevant.

The NCSD objects to producing the 2017 tactical response memo, 2018 PowerPoint presentation, and 15-minute training video on the ground the of the official records objection under Evidence Code section 1040, subdivision (b)(2). As to an official records objection, courts weigh the need in the interest of justice against the public interest in confidentiality. (Evid. Code, § 1040, subd. (b) ["A public entity has a privilege to refuse to disclose official information . . . ."); *Haggerty v. Super. Ct.* (2004) 117 Cal.App.4th 1079, 1092.) Put differently, Evidence Code section 1040, subdivision (b)(2), is a conditional privilege as to which the court must sustain the privilege only if a necessity for preserving the public interest in confidentiality of the information outweighs the necessity for disclosure in the interest of justice or the particular party's interest in obtaining the information. (*Los Angeles Unified Sch. Dist. v. Trustees of the So. Cal. IBEW-NECA Pension Plan* (2010) 187 Cal.App.4th 621, 631-32.) The Court acknowledges the NCSD's position that it could be dangerous to the lives of the public and law enforcement if this information is disclosed and located by another potential active shooter researching the NCSD's procedures and policies to how it responds to such a situation as occurred at the Veteran's Home. However, the secrecy does not outweigh the need for disclosure of this relevant evidence, as noted, especially when it is the subject to a stipulated protective order and will have other court-ordered precautions imposed. The objection is overruled, but because the information is confidential, the materials will be subject to the limitations detailed in the conclusion.

F. Conclusion

The Golicks' motion to compel further responses and documents responsive to request for production of documents (set one) number 30 is GRANTED. The NCSD shall serve verified code-compliant further responses, without objections, and documents within 10 calendar days of service of notice of entry of order. Because the documents and information are confidential, the Golicks' use is subject to the following conditions in addition to any requirements set forth in the stipulated protective order: (1) the materials shall be for attorney's eyes only, except that the items may be shown to retained experts and consultants as necessary to enable them to prepare their case; (2) the materials shall not be reproduced, except as necessary to file copies with the Court; (3) if the Golicks file copies of any of the items, they shall lodge them under seal pursuant to California Rules of Court, rules 2.550 and 2.551; (4) the documents shall be returned to the NCSD in their entirety within 30 calendar days of the resolution of this lawsuit; and (5) the Golicks shall use the materials only in connection with the instant litigation.

Donald Loeber, et al. v. Napa County, et al. **19CV000359**

MOTION TO COMPEL FURTHER PRODUCTION OF DOCUMENTS

TENTATIVE RULING: Plaintiffs Donald Loeber and Marie Loeber (collectively, the "Loebers") move for an order compelling further documents responsive to request for production of documents (set one) numbers 45, 47-49, and 67-68 from defendants Napa County and the Napa County Sheriff's Office ("NCSD"). These requests seek copies of protocols, training materials, policies advising personnel and deputies on how to address active shooters and hostage situations (request numbers 45, 47-49, and 68), and defendant Deputy Steve Lombardi's personnel file (request number 68). For request numbers 45, 47-49, and 68, three documents identified in a privilege log are the object of this motion: (1) 2017 tactical response memo for NCSD deputies responding to an armed attacker; (2) 2018 PowerPoint presentation (50 slides) used in training NCSD deputies for an active shooter situation; and (3) 15-minute training video for NCSD deputies for responding to an active shooter given a year prior to the incident in this case. Defendants oppose.

A. Statement of Facts

In 2018, Albert Wong entered a building at the Veteran's Home of California in Yountville armed with a loaded semi-automatic weapon and dressed in tactical gear. (Third Amended Compl., ¶¶ 53-54, 58.) The combat veteran entered a room and allowed certain staff members and veterans to leave. (*Id*., ¶¶ 58-59.) Decedents were required to remain. (*Id*., ¶ 58) Deputy Steve Lombardi was the first to respond to the active shooter situation. (*Id*., ¶ 59.) The deputy partially opened a closed door, saw Wong, and stepped back from the door to allow it to close. (*Id*., ¶ 60.) Deputy Lombardi then fired through the closed door into the room. (*Ibid*.) Wong returned fire from inside the room, then shot and killed three victims before killing himself. (*Ibid*.)

B. Discovery Dispute

On June 17, 2019, the Loebers served defendants with request for production of documents (set one). (Righthand Decl., ¶ 5, Ex. B.) Defendants' initial unverified responses were signed by defense counsel on February 28, 2020. (*Id*., ¶ 6, Ex. C.) The initial responses contained general objections, objections tied to specific requests, and responses. (*Id*., Ex. C.) Defendants created a privilege log, dated June 3, 2020. (*Id*., ¶ 7, Ex. D.) On June 25, 2020, Undersheriff John Crawford from the NCSD executed a verification for the discovery responses and production. (*Id*., ¶ 9, Ex. F.)

C. Timeliness

Defendants contend the motion to compel is untimely due to the filing of its initial responses on February 28, 2020. A motion to compel further responses and documents must be served within 45 days (extended if served by mail, overnight delivery, fax or electronically) after service of a verified response. (Code Civ. Proc., § 2031.310, subd. (c); *id*., § 1010.6, subd. (a)(4) [extension of two court days for electronic service].) Otherwise, the demanding party waives the

right to compel any further response. (*Id*., § 2031.310, subd. (c); see *Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 745.) The 45-day time limit is mandatory and "jurisdictional," i.e., the Court has no authority to grant a late motion. (See *Sexton v. Super. Ct.* (1997) 58 Cal.App.4th 1403, 1410 ["We do not believe the 45-day limitation is 'jurisdictional' in the fundamental sense, but is only 'jurisdictional' in the sense that it renders the court without authority to rule on motions to compel other than to deny them."].) The authority defendants raise does not limit the verification requirement even if responses contained objections as the statute is clear that *verified* responses trigger the start of the 45-day time limit in which to move for further document production.

In the case at bar, it is presumed (as there is no signed proof of service) defendants served their initial responses to the document requests on February 28, 2020, with general objections, specific objections, responses, and document production. (Righthand Decl., ¶ 5., Ex. B.) The initial responses were not verified as they were only signed, not under oath, by defendants' attorney. (See Code Civ. Proc., § 2031.250, subds. (a) ["The party to whom the demand . . . is directed shall sign the response under oath unless the response contains only objections."], (b) ["If that party is a . . . governmental agency, one of its officers or agents shall sign the response under oath on behalf of that party."].) A verification was not executed until June 25, 2020, after Undersheriff John Crawford from the NCSD signed under penalty of perjury. (Righthand Decl., ¶ 9, Ex. F.) There is no proof of service as to when the verification was served on the Loebers. It is presumed the verification was sent via email on June 25, 2020. The current motion was served on August 10, 2020, and filed the same day. The motion, therefore, is timely as it just falls within the 45-day window within which to serve when including the extension for electronic service.

D. Waiver of Objections

The Loebers argue defendants waived all objections by failing to serve verifications with its February 28, 2020 initial responses. The argument fails. Where initial responses contain both responses and objections, the portion containing the objections need not be under oath. (*Food 4 Less Supermarkets, Inc. v. Super. Ct.* (1995) 40 Cal.App.4th 651, 657.) There is no waiver of the stated objections.[4] (*Ibid*.)

E. The Discovery Requests

[4] Defendants' assertion under the Rutter Guide at § 8:76.1, which quotes from *Wellpoint Health Networks, Inc. v. Super. Ct.* (1997) 59 Cal.App.4th 110, 129, falls flat. The subsection raised in the Rutter Guide is entitled, "Where demurrer sustained and no amended pleading filed." (Weil & Brown, Cal. Practice Guide: Civil Proc. Before Trial (Rutter Group 2020) at § 8:76.1.) The subsection goes on to explain that "[r]elevancy may be impossible to determine where a demurrer has been sustained to an earlier pleading and before an amended pleading has been filed from which to determine a party's claims or defenses." (*Ibid*.) The next subsection provides: "Discovery of privileged information was sought on the basis that the privilege had been *waived*. Discovery could not be compelled where there was 'no viable claim on file' because a demurrer had been sustained to the earlier complaint and no amended complaint had been filed: 'Put simply, prior to any finding on the question of waiver, [plaintiff] must file an acceptable complaint.' [Citation]." (*Id*., § 8:76.2.) The Rutter Guide's guidance does not apply here as the Loebers have a third amended complaint on file, which allows a determination of relevance and waiver. The Court does not read *Wellpoint Health Networks, supra*, 59 Cal.App.4th at p. 129, as limiting a decision on a waiver issue to only after a pleading has survived a demurrer.

1. Request Numbers 45, 47-49, and 68

The propounding party may file a motion to compel further responses to document requests if it deems that an objection is without merit or too general. (Code Civ. Proc., § 2031.310, subd. (a).)

a. Good Cause

A motion to compel further responses and production of documents responsive to document requests must "set forth specific facts showing good cause justifying the discovery sought by the demand." (*Id*., § 2031.310, subd. (b)(1).) The moving party establishes good cause by showing: (1) relevance to the subject matter of the case; and (2) specific facts justifying discovery. (*Kirkland v. Super. Ct.* (2002) 95 Cal.App.4th 92, 98.)

The Loebers directly set forth facts showing good cause justifying the discovery sought by the demands. The withheld materials could show whether Deputy Lombardi followed his training, whether communication protocol was followed, and whether he was properly trained. This discovery all relates to the issue of reasonable use of deadly force. Accordingly, good cause exists for the requested discovery.

b. Objections

According to the separate statement, defendants raised privacy, relevance, and "official information; official privilege" as objections to request numbers 45, 47-49, and 68.

Generally, a party asserting objections to discovery requests must justify or defend the objections or the objections will be overruled. (*Fairmont Ins. Co. v. Super. Ct.* (2000) 22 Cal.4th 245, 254-55.) Since defendants did not defend their privacy objection in their opposition, the objection is not substantiated, and is overruled. (*Ibid*.)

The relevance objection is overruled. The Loebers demonstrate good cause, as noted, which shows the information requested is relevant.

Defendants object to producing the 2017 tactical response memo, 2018 PowerPoint presentation, and 15-minute training video on the ground the of the official records objection under Evidence Code section 1040, subdivision (b)(2). As to an official records objection, courts weigh the need in the interest of justice against the public interest in confidentiality. (Evid. Code, § 1040, subd. (b) ["A public entity has a privilege to refuse to disclose official information . . . ."); *Haggerty v. Super. Ct.* (2004) 117 Cal.App.4th 1079, 1092.) Put differently, Evidence Code section 1040, subdivision (b)(2), is a conditional privilege as to which the court must sustain the privilege only if a necessity for preserving the public interest in confidentiality of the information outweighs the necessity for disclosure in the interest of justice or the particular party's interest in obtaining the information. (*Los Angeles Unified Sch. Dist. v. Trustees of the So. Cal. IBEW-NECA Pension Plan* (2010) 187 Cal.App.4th 621, 631-32.) The Court acknowledges defendants' position that it could be dangerous to the lives of the public and law enforcement if this information is disclosed and located by another potential active shooter

researching the NCSD's procedures and policies to how it responds to a situation as occurred at the Veteran's Home. However, the secrecy does not outweigh the need for disclosure of this relevant evidence, as noted, especially when it is the subject to a stipulated protective order and will have other court-ordered precautions imposed. The objection is overruled, but because the information is confidential, the materials will be subject to the limitations detailed in the conclusion.

2. Request Number 67

As to request number 67 seeking the deputy's personnel records, defendants object based on the protections from Evidence Code section 1043. "'In 1978, the California Legislature codified the privileges and procedures surrounding what had come to be known as "*Pitchess* motions" . . . through the enactment of Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045.'" (*Riverside Cnty. Sheriff's Dep't v. Stiglitz* (2014) 60 Cal.4th 624, 630, quoting *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81.) "Those sections create a statutory scheme making these records confidential and subject to discovery only through the procedure set out in the Evidence Code." (*Ibid*.) Section 1043, subdivision (d), is clear that "[n]o hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section . . . ." Despite the Loebers contention that this motion qualifies as a *Pitchess* motion, they did not bring this motion under the Penal Code or Evidence Code as the notice of motion is restricted to provisions falling under the Discovery Act. Nor have defendants waived the requirements. The objection is sustained.

F. Conclusion

The Loebers' motion to compel further documents responsive to request for production of documents (set one) numbers 45, 47-49, and 67-68 is GRANTED IN PART AND DENIED IN PART. The motion is granted as to request numbers 45, 47-49, and 68. Defendants shall serve verified code-compliant further document production without objections other than those based on the attorney-client privilege and/or work product doctrine within 10 calendar days of service of notice of entry of order. Because the documents and information are confidential, the Loebers' use is subject to the following conditions in addition to any requirements set forth in the stipulated protective order: (1) the materials shall be for attorney's eyes only, except that the items may be shown to retained experts and consultants as necessary to enable them to prepare their case; (2) the materials shall not be reproduced, except as necessary to file copies with the Court; (3) if the Loebers file copies of any of the items, they shall lodge them under seal pursuant to California Rules of Court, rules 2.550 and 2.551; (4) the documents shall be returned to defendants in their entirety within 30 calendar days of the resolution of this lawsuit; and (5) the Loebers shall use the materials only in connection with the instant litigation.

The motion is denied as to request number 67 pertaining to Deputy Lombardi's personnel records.

Plaintiffs Marc Golick and Makena Golick's request for joinder to the motion is DENIED. The Golicks filed their own motion to compel based on their discovery requests.