SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 12/04/24 TIME: 1:30 P.M. DEPT: H CASE NO: CV2203781

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER: CLERK: ALINA ANDRES

PLAINTIFF: MILENA FIORE and DEFENDANT: LG ELECTRONICS USA, INC., ET AL	

NATURE OF PROCEEDINGS: MOTION – COMPEL ; DISCOVERY FACILITATOR PROGRAM

RULING

On September 9, 2024, Defendant ASI Select Insurance Co. ("Defendant") filed a motion for terminating or evidentiary sanctions against Plaintiff, and an order for additional monetary sanctions related to a prior discovery order entered on July 10, 2024. However, Defendant appealed that order on September 9, 2024.

Additionally, on November 4, 2024, Matthew Mani was appointed as Discovery Facilitator for the motion. Neither party filed Declaration of Non-Resolution as required in local rule MCR Civ 2.13H. The court reminds the parties that compliance with MCR Civ 2.13H not only includes the timely filing of the Declaration of Non-Resolution by each party five court days prior to the hearing, but also requires that "[t]he Declaration shall not exceed three pages and ***shall briefly summarize the remaining disputed issues and each party's contentions***." (MCR Civ 2.13H(1), emphasis added.)

Appearances required.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

The Zoom appearance information for December, 2024 is as follows:
Zoom link for Courtroom H CIVIL 160 781 1385 passcode 082614
Meeting ID: 160 781 1385
Passcode: 082614

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 12/04/24 TIME: 1:30 P.M. DEPT: H CASE NO: CV2300174

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER: CLERK: ALINA ANDRES

PLAINTIFF: NICHOLAS M. JAMES and DEFENDANT: FAITH DOROTHY WATERS	

NATURE OF PROCEEDINGS: MOTION – LEAVE

RULING

The Court grants Plaintiff Nicholas M. James' ("Plaintiff") motion for leave to file a first amended complaint. Plaintiff has properly complied with and satisfied the requirements of California Rules of Court, rule 3.1324. The amended complaint shall be filed within 30 days of entry of this order.

Factual Background

Plaintiff Nicholas M. James ("Plaintiff") is one of two children of decedent Nicholas D. James ("decedent"). Plaintiff alleges decedent's sister, Defendant Faith Dorothy Waters aka Faith James Waters ("Defendant") improperly procured a power of attorney and wrote and cashed checks to herself without disclosing same. On January 24, 2023, filed his Complaint against Defendant asserting causes of action for financial elder abuse, fraud, conversion, breach of fiduciary duty, constructive trust, rescission and restitution, intentional and negligent interference with expected inheritance, breach of contract, accounting, and declaratory relief. Presently before the Court is Plaintiff's motion for leave to file a first amended complaint ("FAC").

Legal Standard

Under Code of Civil Procedure section 473, subdivision (a)(1), the Court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading or proceeding. As judicial policy favors resolution of all disputed matters in the same lawsuit, courts liberally permit amendments of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939.) Denial is rarely justified. "If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause

of action or a meritorious defense, it is not only error but an abuse of discretion. [Citations]." (*Morgan v. Superior Court* (1959) 172 Cal.App.2d 527, 530.)

Generally, courts allow the amendment and then let the parties test the legal sufficiency in other appropriate proceedings such as a demurrer. (See *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048, and *Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 760.)

While California law holds that this leave is to be granted liberally to accomplish substantial justice for both parties (*Hirsa v. Superior Court* (1981) 118 Cal.App.3d 486, 488-489), a party requesting leave to amend must also comply with California Rules of Court, rule 3.1324. Compliance with the Rules of Court is satisfied by including a copy of the proposed amended pleading, detailing what changes will be made from the previous pleading by stating what allegations are to be deleted or added as compared to the previous pleading including page, paragraph and line number, and attaching a declaration by plaintiff's counsel, as to: (1) the effect of the amendment; (2) why the amendment is necessary and proper; (3) when the facts giving rise to the amended allegations were discovered; and (4) why the request was not made earlier. As long as no prejudice to the defendant is shown, the liberal policy regarding the amendment prevails. (*Mesler v. Bragg Mgt. Co.* (1985) 39 Cal.3d 290, 297.)

Discussion

Plaintiff seeks leave to amend to add his sister, decedent's other child, Tristan Scaglione ("Scaglione"), as plaintiff, clarify allegations for consistency and remove causes of action. Defendant opposes the motion for leave on the ground Plaintiff's delay in seeking to add Scaglione is inexcusable and the Court should deem the motion as untimely, and deny leave to amend. However, a mere showing of unreasonable delay by the plaintiff without any showing of resulting prejudice to defendant is an insufficient ground to justify denial of the plaintiff's motion. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565.) Prejudice exists where the amendment would require delaying the trial, resulting loss of critical evidence or added costs of preparation, and an increased burden of discovery, inter alia. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-488.) Defendant has not identified any such prejudice outside of the general burdens of litigation.

Moreover, Plaintiff has satisfied the requirements of California Rules of Court, rule 3.1324. Plaintiff has provided a copy of the proposed FAC. (See Declaration of Kathleen C. Miller, Exh. A; see also Cal. Rules of Court, rule 3.1324(a); *Dye v. Caterpillar, Inc.* (2011) 195 Cal.App.4th 1366, 1380.) Plaintiff further includes a declaration specifying why the amendment is now necessary, when facts giving rise to the amendment were discovered, and why the request was not made earlier. (Cal. Rules of Court, rule 3.1324(b); Miller Decl., ¶¶17-21.)

Finally, Defendant argues in short measure that Plaintiff failed to provide sufficient notice of hearing. While Plaintiff concedes same in its reply, Defendant's opposition on the merits is a waiver of the defects. (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 7; *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 697.)

Accordingly, the Court grants the motion for leave to amend as proposed.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 12/04/24 TIME: 1:30 P.M. DEPT: H CASE NO: CV0002302

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER: CLERK: ALINA ANDRES

PLAINTIFF: CHRIS B. BARGER and DEFENDANT: ANDREW LANDIES, ET AL	

NATURE OF PROCEEDINGS: DEMURRER

RULING

The demurrer of Chris B. Barger and Myrna Barger to the cross-complaint of Andrew W. Landies and Kristina J. Landies is overruled.

As an initial matter, the court notes that the opposing brief was filed one day late, and it exceeds 10 pages in length but does not include a table of contents and table of authorities as required by California Rule of Court 3.1113(f). The court has considered the opposition but admonishes counsel to comply with the California Rules of Court in the future.

In the case of easements by prescription, implication and necessity, trial courts exercise discretion in fashioning the boundaries and, in the case of easements by necessity, the location of easements. (See *Kytasty v. Godwin* (1980) 102 Cal.App.3d 762, 771-772, *Applegate v. Ota* (1983) 146 Cal.App.3d 702, 711-712, and *Hinrichs v. Melton* (2017) 11 Cal.App.5th 516, 528.) A legal description is a written description which refers to a map or metes and bounds. (See *Gale v. Superior Court* (2004) 122 Cal.App.4th 1388, 1397, fn. 6.) The Bargers cite no authority showing that a party seeking an easement by prescription, implication and/or necessity must have a map prepared (and potentially recorded) or hire a surveyor to prepare a metes and bounds description of an easement which the court has not yet determined exists and may end up being different from what the Landies seek if the court determines an easement does in fact exist. Here, the complaint sets forth the legal description and street address of the Barger Property and the Landies incorporate that description into the cross-complaint. (See complaint ¶1 and ex. A, and cross-complaint ¶5 and fn. 1.) The Landies then allege that, prior to the subdivision of the property, the well supplied water to the Cash residence which was on what is now the Landies property. In 1982, Lester Cash submitted an application to the California State Water Resources Control Board for a permit to formalize Cash's exclusive rights to utilize water from the well. "In support of the Application, Lester Cash submitted a Map ('Map') showing the location of the Well on the Original Property (on what is now known as Parcel 4 and the Barger Property), the

location of a clearly visible pump to draw water from the Well, which pump is located on what is now known as Lot 3 and the Landies Property, and piping to deliver the water from the Well to what is now known as the Landies Property. Accordingly, a Map was created and stamped reflecting this. A copy of the Map is attached hereto as Exhibit 'A' and is incorporated by reference." (¶6.) These allegations and the map attached as exhibit A provide a sufficient legal description of the property as required by Code of Civil Procedure section 761.020.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 12/04/24 TIME: 1:30 P.M. DEPT: H CASE NO: CV0002382

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER: CLERK: ALINA ANDRES

PLAINTIFF: SUSAN DAVIA and DEFENDANT: WALGREEN CO., ET AL	

NATURE OF PROCEEDINGS: MOTION – SET ASIDE/VACATE

RULING

Defendant Walgreen Co.'s motion to set aside entries of default is denied.

Procedural Background

Plaintiff filed her Complaint on March 28, 2024, alleging that Defendants failed to warn consumers about an unsafe chemical, DEHP, in a Walgreens brand brow kit in violation of Proposition 65. On April 16, 2024, Plaintiff filed a proof of service reflecting service of the Summons and Complaint on Walgreen Co. On April 26, 2024, Plaintiff filed proofs of service reflecting service of the Summons and Complaint on Walgreen Boots Alliance, Inc. and Walgreens.com, Inc. On May 29, 2024, Plaintiff requested, and the clerk entered, default as to all three defendants. On September 4, 2024, Defendant Walgreen Co. filed a motion to set aside all three defaults.[1]

Standard

"The court may, upon any terms as may be just, relieve a party . . . from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. (Code Civ. Proc. § 473(b).) The moving party burden of showing that relief under Section 473 is warranted. (*Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1410; *Kendall v. Barker* (1988) 197 Cal.App.3d 619, 623-624.)

"Surprise" within the context of Section 473 means "'some condition or situation in which a party to cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against.'" (*Credit Managers Assn. v. National Independent Business Alliance* (1984) 162 Cal. App.3rd 1166, 1173 [citation omitted].) "Excusable neglect" exists "'if a reasonably prudent person in similar circumstances might have

[1] Defendant Walgreen Co. states that the other two named Defendants, Walgreen Boots Alliance, Inc. and Walgreens.com, Inc., are incorrectly named entities.

made the same error.'" (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1128 [citation omitted].)

Discussion

Defendant argues that the defaults should be set aside because Plaintiff's filing of the lawsuit was a surprise in light of the information provided to Plaintiff that her claims lacked merit. Alternatively, Defendant argues that the failure to respond constitutes excusable neglect because the defendants were trying to informally resolve the dispute before and at the time Plaintiff requested the defaults.

Specifically, Defendant argues that Plaintiff has been informed repeatedly by both Defendant and the California Department of Justice ("CDOJ") that her allegations are without merit. Months before Plaintiff requested entry of the defaults, Defendant provided Plaintiff with three sets of test data for the product which resulted in a non-detect test for the presence of DEHP. (Declaration of Alecia E. Cotton ("Cotton Decl."), Exh. A.) Further, the CDOJ informed Plaintiff in a letter dated April 17, 2024, that she "failed to provide sufficient information to indicate that there was a credible basis to conclude that there is merit to each element of the action" and that her 60-day notice did not give her "the authority to file suit in the public interest". (Cotton Decl., Exh. B.) Defendant's counsel requested that Plaintiff comply with the Attorney General's position and withdraw her 60-day notice and file a request to dismiss all defendants in this case. (Cotton Decl., Exhs. C, D and G.) Instead of dismissing the case in light of the test results and CDOJ letter, Plaintiff caused Defendants' defaults to be entered.

Plaintiff argues that Defendant has failed to show either surprise or excusable neglect. Plaintiff's counsel states that before filing the lawsuit, he provided defense counsel with a Confidential Investigation Summary, including product purchase information, photographs and positive DEHP concentration testing reference. He also provided her with the actual laboratory test result documentation demonstrating a high concentration of DEHP in a portion of the exemplar product kit. (Declaration of Gregory Sheffer ("Sheffer Decl."), ¶5.) Despite receiving this evidence, defense counsel continued to dispute the merits of Plaintiff's claims and requested that she dismiss the case. On April 30, 2024, Plaintiff's counsel informed defense counsel that his client disputed the "no merit" opinion in correspondence with the Attorney General's office and would "not be withdrawing her Complaint or Notice against Walgreens . . . ." (*Id.*, ¶9 and Exh. B.) On May 15, 2024, he advised defense counsel: "Please accept this email as courtesy notice that, absent immediate filing of an Answer by each named Walgreens defendant, Davia will secure entry of default against each such defendant without further notice." (*Id.*, ¶11 and Exh. B.) He warned defense counsel again on May 23, 2024, stating: "I advised over a week ago that Davia would seek entry of default without further notice . . . I am hoping to provide your clients and firm every opportunity to avoid default, but it does not seem there is any point in further delay. Please be advised Davia intends to file her requests for entry of default against each Walgreens defendant next week." (*Id.*, ¶13 and Exh. B.) Plaintiff filed requests for entry of default the following week. (*Id.*, ¶14.) Plaintiff's counsel states that his office has received "no merit" letters from the Attorney General's office regarding other products, that those cases were prosecuted in court without the Attorney General's intervention, and that both cases resulted in court-approved settlements. Further, the Attorney General has not contacted him in an attempt to further dissuade Plaintiff from prosecuting this case despite defense counsel's request that the Attorney General become involved. (*Id.*, ¶17.)

Defendant's motion is denied. Defense counsel was advised that Plaintiff disagreed with Defendants' position and was warned twice that defaults would be requested if Defendants did not file a responsive pleading. There was no surprise in light of these warnings and Defendants' neglect in failing to file responsive pleadings was not excusable.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 12/04/24 TIME: 1:30 P.M. DEPT: H CASE NO: CV0002578

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER: CLERK: ALINA ANDRES

PLAINTIFF: SUSAN MCINTOSH, AN INDIVIDUAL, ET AL and DEFENDANT: TIMOTHY ISAAC, AN INDIVIDUAL	

NATURE OF PROCEEDINGS: MOTION – COMPEL; DISCOVERY FACILITATOR PROGRAM

RULING

On September 4, 2024, Plaintiffs filed a motion to compel deposition of Defendant Timothy Isaac ("Defendant") and for monetary sanctions. Defendant filed a late opposition, claiming that the motion is moot because Defendant agreed to appear at his deposition on December 2, 2024. Additionally, on September 6, 2024, attorney Gregory Sheffer was appointed to preside as Discovery Facilitator for the motion. Neither party filed Declaration of Non-Resolution as required in local rule MCR Civ 2.13H. The court reminds the parties that compliance with MCR Civ 2.13H not only includes the timely filing of the Declaration of Non-Resolution by each party five court days prior to the hearing, but also requires that "[t]he Declaration shall not exceed three pages and ***shall briefly summarize the remaining disputed issues and each party's contentions***." (MCR Civ 2.13H(1), emphasis added.)

In light of the above, the court assumes the parties have resolved this matter with the assistance of the facilitator. If either party wishes for the court to hear this motion, they must file a Declaration of Non-Resolution as set forth above. Upon the filing of the Declaration, the parties may apply ex parte for an expedited hearing date.

All parties must comply with Marin County Superior Court Local Rules, Rule 2.10(B) to contest the tentative decision. Parties who request oral argument are required to appear in person or remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 2.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 2.11.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 12/04/24 TIME: 1:30 P.M. DEPT: H CASE NO: CV0002589

PRESIDING: HON. SHEILA S. LICHTBLAU

REPORTER: CLERK: ALINA ANDRES

PLAINTIFF: JYOTI ELIAS and DEFENDANT: BETTER ROOTER, INC., ET AL	

NATURE OF PROCEEDINGS: 1) MOTION – COMPEL; DISCOVERY FACILITATOR PROGRAM
2) MOTION – INTERROGATORIES; DISCOVERY FACILITATOR PROGRAM
3) MOTION – ADMISSIONS; DISCOVERY FACILITATOR PROGRAM; PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS

RULING

On September 9, 2024, Defendant Better Rooter , Inc. ("Defendant") filed a motion to deem the truth of matters specified in requests for admissions admitted, and for monetary sanctions against Plaintiff in the sum of $1,187.50. No Opposition or Reply was filed.

On October 29, 2024, Gautam Jagannath was appointed to serve as Discovery Facilitator regarding this motion as well as other related discovery motions. Neither party filed Declaration of Non-Resolution as required in local rule MCR Civ 2.13H. The court reminds the parties that compliance with MCR Civ 2.13H not only includes the timely filing of the Declaration of Non-Resolution by each party five court days prior to the hearing, but also requires that "[t]he Declaration shall not exceed three pages and ***shall briefly summarize the remaining disputed issues and each party's contentions***." (MCR Civ 2.13H(1), emphasis added.)

In light of the above, the court assumes the parties have resolved this matter with the assistance of the facilitator. If either party wishes for the court to hear this motion, they must file a Declaration of Non-Resolution as set forth above. Upon the filing of the Declaration, the parties may apply ex parte for an expedited hearing date.

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