UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

C.A. No. 20–55181

Adam Bereki,

Plaintiff–Appellant,

v.

Karen and Gary Humphreys,

Defendants–Appellees.

BRIEF IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL AND PERMISSION TO PROCEED IN FORMA PAUPERIS FOR THE APPELLANT

Appeal from the Judgment of the United States District Court

For the Central District of California

Case No. 8:19–CV–02050

(Consuelo Bland Marshall)

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In Propria Persona

CORPORATE DISCLOSURE STATEMENT

There are no public corporations involved in this case.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 USC §1331. Appellant appeals from a judgment entered on February 6, 2020, granting Defendants' Motion to Dismiss on Plaintiffs' First Amended Verified Complaint, denying all of Appellants claims *with* prejudice. Appellant timely filed a Notice of Appeal on February 6, 2020. This Court has appellate jurisdiction under 28 USC §1291.

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I. INTRODUCTION

This brief in support of my request for the appointment of counsel and to proceed in forma pauperis is based upon a plethora of rather unusual and complex issues that are also the core issues I will be presenting on appeal. I feel these issues must be addressed at this juncture in order for this Court to understand the true nature of my requests and either grant or deny them lawfully.

In a purported "civil disgorgement" action in California Superior Court I was fined $930,000 for allegedly performing remodel construction work without a contractor's license. The Court subsequently denied my right to the Eighth Amendment's protections against excessive, cruel, and unusual punishment because I allegedly wasn't being punished.

Despite the civil context and procedure in which the trial and appeal in this case took place, I believe the case against me was in fact purely penal and not civil because the proceedings were not actually remedial, non–punitive "disgorgement". A cause of action for disgorgement requires there to be evidence I profited $930,000 and *this evidence does not exist anywhere on the record.*

I provided a sworn declaration and submitted the certified records of the to the District Court to prove this evidence was never presented and is not on the record. I did not profit $930,000.

Without this evidence of profits or an injury in fact or other remedial elements required in a civil claim, the action is no longer remedial or non-punitive. It is the same as if the Court arbitrarily fined someone nearly a million dollars for not having a professional license which results in a purely penal action requiring counsel and all of the heightened protections of criminal proceedings which were denied to me.

As a result, I believe I have a right to the assistance of counsel and that this right has been denied at each stage of the proceedings against me, including most recently in the Central District.

It is very simple to examine the record and see this evidence that I profited $930,000 is not there. Moreover, a $930,000 fine is 46 times my qualifying net worth and 186 times the comparable criminal monetary penalty. This penalty will force me into bankruptcy and divest me of my entire qualifying life estate. It is unconstitutional and has resulted in a heinous miscarriage of justice.

II. STATE COURT PROCEDURAL HISTORY & OVERVIEW

The cause of action named in the "civil" complaint in the Superior Court of California against me as alleged by Appellee's, "the Humphreys", was for "disgorgement of funds paid" pursuant to Business

and Professions Code section §7031(b). Exhibit [AA][1] (Exhibit [K] part 2 of 4, Dkt.21, p.744–747). I will address section §7031 after a brief discussion concerning the nature of a disgorgement action.

Under California law, disgorgement is a very specific type of action based upon the law of unjust enrichment and California's public policy whereby "no one can take advantage of his own wrong". Cal. Civ. Code §3517.

An explanation of California's public policy relating to a cause of action for disgorgement is detailed in the case of *Meister v. Mensinger*, 230 Cal. App. 4th, 381 (2014) which adopts portions of and is derived from Restatement (Third) of Restitution and Unjust Enrichment, section §51, hereafter "§51". See also *County of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 542 (2007) and *Kokesh v. SEC*, 581 U.S ____ (2017).

Disgorgement is a type of restitution whose object ("is to eliminate **profit** from wrongdoing, [by a "conscious wrongdoer"] while avoiding, so far as possible, the imposition of a penalty"). §51(3).

The key point here – and one that will be repeatedly emphasized – is that disgorgement only applies to **profits**, not the general forfeiture of

[1] Exhibits double lettered have been annexed hereto. Any other document references are for identification on the Central District Court's docket.

an entire transaction. ("Disgorgement is remedial and not punitive. The court's power to order disgorgement ***only*** extends to the amount with interest by which the defendant **profited** from this wrongdoing. **Any further sum would constitute a penalty assessment.**") *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir.1978) (emphasis added).

In the case of a bank robbery, the amount of restitution (or amount to be "disgorged") is very simple and straightforward. It equates to the exact amount the robber stole or was unjustly enriched by his theft from the bank. In a robbery case, disgorgement operates as a general forfeiture but *only* after the exact amount stolen has been evidenced. Any amount the robber ordered to pay beyond the amount stolen would constitute a penalty.

In civil, remedial, disgorgement cases, such as those involving the performance of services without a license, disgorgement operates quite differently and requires a specific accounting to make a factual determination of ***profits*** illegally obtained. ("The remedial nature of disgorgement serves to limit its application. Because *disgorgement may not be used punitively,* a court's equitable power is restricted to property causally related to the wrongdoing. For this reason, [a Plaintiff is] *required* to distinguish between legally and illegally obtained profits"). *U.S. v. Philip Morris USA,* 310 F.Supp.2d 58, 62-63 (D.C. 2004).

A disgorgement action in an unlicensed contractor case, such as the instant case, does *not* result in a general forfeiture like a bank robbery. In most cases, the unlicensed contractor returns value by performing the work requested by the consumer. This value must be acknowledged and accounted for as an offset to establish the amount the unlicensed contractor profited.

Here's an example: suppose an unlicensed contractor is hired to build a custom home for $500,000. He spends $425,000 in materials and sub–contractor labor to complete the project. This results in a net profit of $75,000. A civil cause of action for disgorgement would *only* apply to the amount the unlicensed contractor profited, or $75,000. It would *not* result in a general forfeiture of the entire amount of the contract, $500,000.

Ordering a general forfeiture causing the unlicensed contractor to forfeit the entire amount of the contract for $500,000 would result in at least a $425,000 penalty to the contractor (assuming evidence were presented he profited $75,000). This is because the unlicensed contractor performed on the contract and was not unjustly enriched by building the custom home that was delivered to the homeowner, returning $425,000 in value.

The Supreme Court of Arizona, following the 7th Circuit, held the following in a disgorgement case:

> "[A] rule of total disgorgement regardless of any benefit conferred on the victim...may lead to absurd or troubling results." *Town of Gilbert Prosecutor's Office v. Downie*, 218 Ariz. 466, p.24 (2008).
>
> "We find no significant difference between returning cash, one form of value, and returning other forms of value, such as permits, chattels, services, or other property. See United States v. Shepard, 269 F.3d at 884, 887-88 (7th Cir. 2001). "Loss" is a concept rooted in value, not solely in the exchange of money." *Id.* p.25.
>
> "In Shepard for example, the defendant embezzled funds from a hospital patient under the guise of making improvements to the patient's home. [Id. p.885]. The Seventh Circuit concluded that the starting point for determining restitution was the amount embezzled from the victim. Id. at 887. From this amount, the court subtracted expenditures made on improvements to the victim's home. Id. at 887-88. The court concluded that such expenditures did not differ "in principle from taking the money from one of [the victim's] bank accounts and depositing it in another." *Id.* p.17.

Restatement §51 specifically addresses these nuances of civil, remedial, <u>*non-punitive*</u> disgorgement as well:

> ("…the defendant is entitled to a deduction for all marginal costs incurred in producing the revenues that are subject to disgorgement. Denial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction that the law of restitution normally attempts to avoid"). §51, Comment (h). See also *Kokesh,* supra.

> Under the laws of unjust enrichment, a claim for disgorgement ("does not impose a general forfeiture: defendant's liability in restitution is not the whole of the gain from a tainted transaction, but the amount of the gain that is attributable to the underlying wrong"). §51 Comment (i).

III. NO EVIDENCE WAS PRESENTED I PROFITED $930,000 AS REQUIRED BY A CAUSE OF ACTION FOR DISGORGEMENT

During the "trial" in my case ***an accounting was never conducted to determine the profits I made (if any)***. Instead, the trial Court took the entire amount of the contract for work performed ($930,000) and ordered it be forfeited to the Humphreys under the guise and label of a civil, non-punitive action for "disgorgement".

In other words, the Court fined me $930,000, labeled it "disgorgement" and then refused to apply the Eighth Amendment's protections.

> ("Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute"). *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 47 (1991).

The following is the sworn testimony of both Karen and Gary Humphreys on this issue:

> "Between April 13, 2012 and July 31, 2013, in addition to the down payment of $15,000, my [wife or husband] and I made sixteen **progress payments** to either Adam Bereki or Spartan [my licensed construction company] in the total amount of $833,000.00. A true and correct copy of each of the wire transfer receipts and/or checks representing the progress payments made to Mr. Bereki and Spartan for the **work performed** on our condominium unit is attached hereto as Exhibits "B" through "Q"." See Exhibit [AC] line 21. (Exhibit [K] Part 1 of 4, Dkt. Unk.[2] pp.250–293).

While the $833,000 is incorrect (the Humphreys actually paid $848,000) it is clear the money they paid is for "**progress payments**" for "**the work performed**" and **NOT MY PROFITS**.

The Humphreys presented no evidence of any profits I made at trial. They only presented the amount they paid, $848,000, which is undisputed. See Exhibit [AD] (Exhibit [C] p.208, Dkt.11) a spreadsheet created by the Humphreys or their agents admitted at trial evidencing the $848,000 they paid.

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[2] The District Court appears to have made a clerical error pertaining to the filing of the Clerks Transcript. I filed the transcript (Exhibit [K]) in four parts and they appear to be changed and out of order on the District Court's docket. Because Karen and Gary Humphreys make the same declaration and attach the same supporting documents, I have included only one copy of their declaration as Exhibit [AC].

The result is that the trial Court judgment is a fine and not disgorgement.

There has therefore been no judicial determinations of my rights as I was not given an opportunity to meet and oppose evidence that does not exist. ("A sentence of a court, pronounced against a party without …giving him an opportunity to be heard [such as not allowing him to meet and oppose the evidence against him], is not a judicial determination of his rights and is not entitled to respect in any other tribunal"). *Windsor v. McVeigh*, 93 U.S. 274 (1876).

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("As relevant here, Magna Carta required that economic sanctions "be proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood"). *Timbs v. Indiana, 586 U.S.* ____ 688 (2019) citing *BFI v. Kelco Disposal Inc.* , 492 U. S. 257, 271 (1989).

("If the amount of the forfeiture is grossly disproportional to the gravity of defendant's offense it is unconstitutional"). *United States v. $132,245.00 In U.S. Currency*, 764 F.3d 1055, 1057-58 (9th Cir. 2014).

IV. THE FOURTH DISTRICT COURT OF APPEAL UPHELD THE TRIAL COURT'S RULING BASED ON SUBSTANTIAL EVIDENCE THAT DOES NOT EXIST

Despite there being no evidence I profited $930,000, the Fourth District Court of Appeal of California, hereafter "FDCA" – all justices concurring – upheld the trial Court's judgment finding there was substantial evidence I profited $930,000 when no such evidence exists. The FDCA makes no mention in its Opinion where it obtained the substantial evidence it relied upon to uphold the trial Court's judgment for "disgorgement".

The FDCA also found there was no merit to *any* of the aforementioned legal arguments I've shared here and on appeal. ("Bereki challenges the disgorgement on a variety of constitutional, legal, and factual grounds. We find no merit in his contentions, and therefore affirm the judgment"). *Humphreys v. Bereki*, 2018 Cal. App. Unpub. Lexis 7469, "Opinion", p. 2. Exhibit [AE].

V. BUSINESS & PROFESSIONS CODE SECTION §7031 IMPOSES A PENAL FORFEITURE NOT AN EQUITABLE REMEDY

Coming to the analysis Business and Professions Code section §7031(b):

> "(b) Except as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract."

I'm sure you noticed the word "disgorgement" is not mentioned anywhere in section §7031.

Please also examine the California Civil Jury Instructions, CACI, section §4560 relating to §7031 actions:

> 4560. Recovery of Payments to Unlicensed Contractor (Bus. & Prof. Code, § 7031(b):
>
> [Name of plaintiff] claims that [name of defendant] did not have a valid contractor's license during all times when [name of defendant] was performing services for [name of plaintiff] under their contract.
>
> To establish this claim, [name of plaintiff] must prove all of the following:
>
> 1. That there was a contract between [name of plaintiff] and [nameof defendant] under which [name of defendant] was required to perform services for [name of plaintiff];
>
> 2. That a valid contractor's license was required to perform these services; and

> 3. That [name of plaintiff] paid [name of defendant] for contractor services that [name of defendant] performed as required by the contract;

The word "disgorgement" is not used here either. Nor are any of the elements required of a cause of action for civil, remedial, equitable, non–punitive disgorgement such as an accounting for profits, offsets for benefits conferred, or strict tracing. Despite this, the Humphreys first cause of action was for "disgorgement" (Exhibit [AA]), the trial Court's Minute Order reflects a judgment for "disgorgement", Exhibit [AB] (Exhibit [A] Dkt. 10,11, p.203a–203c), and the FDCA's Opinion repeatedly affirms the trial Court's judgment for "disgorgement". See *Opinion.*

Section §7031 does <u>*not*</u> authorize a cause of action for disgorgement unless the word "compensation" in "recover all compensation paid" strictly means **profits**. California's Courts, including the FDCA have explicitly said it does <u>*not*</u> mean profits, but instead, the entire amount paid by the customer <u>*without*</u> offsets or reductions for the value of materials or services provided:

> The recovery of all compensation paid means ("…without reductions or offsets for the value of material or services provided") *White v. Cridlebraugh*, 178 Cal. App. 4th 506, 520 (2009).

("[f]ull disgorgement is required; offsets and reductions for labor and materials received are not permitted"). *Opinion*, p.11.

Since 1957 the California Supreme Court has also held ("[c]ourts may not resort to equitable considerations, such as [set off or] unjust enrichment, in defiance of [§7031]"). *Lewis & Queen v. N. M. Ball Sons,* 48 Cal. 2d 141, 152 (CA Sup. Ct. 1957). §7031 actions cannot possibly be in equity as held by the FDCA if equitable considerations are denied. *Opinion,* p.14.

The denial of equitable remedies in §7031 cases is a clear and unequivocal violation of the principles of equity jurisprudence. ("Where there is a legal right to relief under certain facts and the existence of such facts is not questioned ***a court having jurisdiction has no discretion to refuse the relief*** [Citations]"). *O'Connell v. Superior Court of San Francisco*, 74 Cal. App. 350, 353, (1925). ("[T]he equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence. Even when sitting as a court in equity, we have no authority to craft a "nuclear weapon" of the law like the one advocated here"). *Grupo Mexicano De Dessarollo v. Alliance Bond Fund*, 527 U.S. 308, 333 (1999). ("To accord a type of relief that has never been available before – and especially a type of relief that has been specifically disclaimed by longstanding judicial precedent – is to invoke a "default rule," not of flexibility but of omnipotence"). *Id.* p. 322.

By denying reductions for offsets or benefits conferred, §7031 strictly imposes a penalty for violation of the statute.

In one of the rare instances in which a §7031 case made it outside of California's Courts, Judge Karlton of the Eastern District found ("this statute [referring to §7031] provides a heavy **penalty** indeed for failure to obtain a license"). *American Sheet Metal, Inc. v. Emkay Engineering Co.*, 478 F.Supp. 809, 814 (1979).

The amount of the forfeiture penalty applied by California Courts in §7031 cases is arbitrary and different in every case. In many cases the penalty – in addition to being the amount paid for work by the consumer – also equates to the amount of value returned to the consumer by the unlicensed contractor pursuant to the contract. See *Twenty Nine Palms v. Bardos*, 210 Cal. App. 4th 1435 (2014) where the forfeiture was $917,043.09; or *Judicial Council of California v. Jacobs Facilities, Inc.,* 239 Cal. App. 4th 882 (2015), the forfeiture, $22.7 million.

The forfeiture imposed in §7031 cases is also not in any way based upon evidence of a concrete injury in fact[3] or damages to a Plaintiff.

[3] There is no requirement under §7031 for a Plaintiff to prove any damages whatsoever. See §7031(b), CACI §4560(3) and *Opinion*, p.11 ("[i]njury is not a cause of action under the statute"). In fact, the Humphreys specifically filed a Motion for Severance before trial to completely severe their alleged claims for damages from their claim for disgorgement. (Exhibit [K] Dkt.22 p.780).

Under California law, "any provision by which money or property is to be forfeited without regard to the actual damage suffered calls for a penalty..." *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.,* 232 Cal. App. 4th 1332, 1357 (2015).

VI. IN FURTHER PUNISHMENT, MY COMPANY'S LICENSE WAS ALSO SUSPENDED AND I WAS DENIED THE ABILITY TO OBTAIN A LICENSE IN MY OWN NAME WITHOUT A JUDICIAL HEARING RESULTING IN A FURTHER DEPRIVATION OF LIBERTY

The $930,000 fine is only part of the punishment imposed upon me. Pursuant to Business and Professions Code section §7071.17, I have also been held in constructive custody whereby until the $930,000 fine is paid or I file bankruptcy, neither I nor my company can legally perform construction work in California. ("The portion of the act which authorizes the [Registrar of Contractors] to forfeit the license of a [contractor] and take it away from him is highly penal in its nature"). *Schomig v. Keiser*, 189 Cal. 596, 598 (Sup. Ct. 1922). (". . . [B]y taking away his opportunity to earn a living, you can drain the blood from his veins without even scratching his skin.") *Flemming v. Nestor,* 363 U.S. 603, 629 (1960) (Justice Black Dissenting).

Pursuant to §7071.17, this license forfeiture occurs by the Contractors State License Board without any hearing whatsoever, let alone a judicial hearing resulting in a further violation of due process and the imposition of punishment without a judicial hearing.

I have been affirmatively restrained from working in my profession to support myself for more than two years as result of the unlawful "judgments". In addition to losing hundreds of thousands of dollars in income, I consequently cannot afford an attorney to represent me.

Furthermore, neither the trial nor appellate Courts made any documented effort whatsoever to determine the effect this judgment and the subsequent suspension of license would have upon me financially or otherwise as minimally required even in *civil* punitive damage award proceedings. Here there was no recognition, let alone acknowledgement of punishment whatsoever. ("[E]vidence of financial condition is critical to whether a punitive damages award serves the purpose of punishment and deterrence without destroying the defendant financially"). *Adams v Murakami,* 54 Cal. 3d 105, 117-118 (Sup. Ct. 1991). ("The purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not destroy.") *Rufo v. Simpson*, 86 Cal. App. 4th 573, 620 (2001).

A judgment for $930,000 is about 46 times my qualifying net worth.

VII. THIS COURT HAS HELD THAT IN PERSONAM FORFEITURES ARE PENAL AND REQUIRE THE HEIGHTENED PROTECTIONS OF CRIMINAL PROCEEDINGS WHICH WERE DENIED

("And so in my opinion, the forfeiture is required here, and that is disgorgement"). (Exhibit [J], p.29, Dkt. 11– Reporters transcript of trial Court's discussion of the forfeiture to be imposed).

In further support of why the forfeiture and subsequent license denial/suspension imposed upon me is purely penal, this Court held in *United States v. Seifuddin*, 820 F.2d 1074, 1076-7 (9th Cir. 1987) that ("the classical distinction between civil and criminal forfeiture was founded upon whether the penalty assessed was against the person or against the thing. Forfeiture against the person operated *in personam* and required a conviction before the property could be wrested from the defendant. [Citations]. Such forfeitures were regarded as criminal in nature because they were penal; they primarily sought to punish. Forfeiture against the thing was *in rem* and the forfeiture was based upon the unlawful use of the *res*, irrespective of its owner's culpability. These forfeitures were regarded as civil; their purpose was remedial. [Citations]").

Applying this distinction to the *in personam* forfeiture for allegedly violating §7031 here leads to the conclusion that the forfeiture is criminal

in nature. I was subjected forfeit $930,000 because I was 'convicted' of the substantive offense of violating Business and Professions Code sections §7031(a)[4] and (b).

Continuing from *Seifuddin*, ("if the forfeiture [is] criminal, the criminal forfeiture statutes and the rules of criminal procedure should have been followed").

The rules of criminal procedure were clearly not followed by the State trial or appellate Courts of the District Court divesting them of both in *personam* and subject matter jurisdiction.

Pursuant to Cal. Penal Code section §949: "[t]he first pleading on the part of the people in the superior court in a felony case is the indictment, information, or the complaint in any case certified to the superior court under Section 859a. The first pleading on the part of the people in a misdemeanor or infraction case is the complaint except as otherwise provided by law". No indictment, information, or complaint on behalf of the People of California was ever filed also depriving the trial

[4] The trial Court also dismissed Spartan's claim for approx. $82,000 in unpaid labor and materials against the Humphreys as part of its finding that I was the unlicensed contractor on the project. This $82,000 is not reflected on the Court's judgment order. The $82,000 plus the $848,000 the Humphreys paid to me and Spartan equates to the $930,000 I've referenced. See the trial Court's Minute Order and Judgment, Exhibit [AB] (Exhibit [A] Dkt. 11, pp. 203a-203c.) and (Exhibit [D] Dkt. 11, p.211).

and appellate Courts of both in personam and subject matter jurisdiction. See especially *Buis v. State*, 1990 OK CR 28:

> ("We recognize the district court, in our unified court system, is a court of general jurisdiction and is constitutionally endowed with "unlimited original jurisdiction of all justiciable matters, except as otherwise provided in this Article,"... However, this "unlimited original jurisdiction of all justiciable matters" can only be exercised by the district court through the filing of pleadings which are sufficient to invoke the power of the court to act. [p4]. The requirement for a verified information to confer subject matter jurisdiction on the court and empower the court to act has been applied to both courts of record and not of record. [p8]. ...[V]erification of the information is more than merely a "guaranty of good faith" of the prosecution. It, in fact, is required to vest the district court with subject matter jurisdiction, which in turn empowers the court to act. Only by the filing of an information which complies with this mandatory statutory requirement can the district court obtain subject matter jurisdiction in the first instance which then empowers the court to adjudicate the matters presented to it"). [p10].

Cal. Penal Code section §1382 requires that the: "[c]ourt shall order the action to be dismissed... when a person has been held to answer for a public offense and an information is not filed against that person within 15 days".

VIII. THE DISTRICT COURT DENIED MY REQUEST FOR COUNSEL, DISMISSED MY COMPLAINT WITH PREJUDICE, AND DECLARED THIS APPEAL "FRIVOLOUS", REVOKING IN FORMA PAUPERIS STATUS, WHILE ACTING WITHOUT IN PERSONAM OR SUBJECT MATTER JURISDICTION

There being no available forum in California to obtain relief because the procedure for handling §7031 cases as evidenced *is* California's statewide anti–constitutional public policy, I filed a verified complaint in the Central District to vacate the void judgment and to challenge the constitutionality of the State statutes involved.

I also filed a request for the appointment of counsel. Dkt. 7. This request was supported by my First Amended Verified Complaint (Dkt.11) where I provided extensive argument and competent sworn testimony regarding authenticated evidence demonstrating how the State Court judgment is void for the plethora of violations of substantive due process violations cited above (and others) and that I was ultimately subjected to purely penal proceedings while being deprived of all of the heightened protections both the California Constitution and the Constitution for the United States require. I was never told the true nature and cause of the accusations against me to prepare for a meaningful and substantive defense at trial or on appeal. I was never informed I had the right to the

assistance of counsel[5]; nor given an opportunity to confront all of my accusers. I also never made a voluntary, knowing, or intelligent waiver of any right to a trial by jury and there was no jury trial.

While I understand the verified complaint I filed in the Central District Court was, on its face, civil, the cases that transpired in the California State "Courts" at "trial" and on "appeal" were clearly not. As a result, I had a right to counsel at each stage of the State Court proceedings and therefore in the Central District Court as well. Nevertheless, the Central District Court denied my request Exhibit [AH] (Dkt. 8) thereby depriving the Court of jurisdiction to further exercise the judicial power of the United States in this case.

> ("[C]ompliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's

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[5] As secured by Article 1 Sections 15, of the California Constitution, and the Sixth Amendment as incorporated by the 14th Amendment. See *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) ("a provision of the Bill of Rights which is fundamental and essential to a fair trial is made obligatory upon the states by the Fourteenth Amendment"). ("The assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty"). *Id.* 343. ("[The 6th Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious"). *Zerbst, infra p*p.463-4.

> authority to deprive an accused of his life or liberty[6]. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, U.S. Const. amend. VI stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938).

See also 18 USC §3006A– Adequate Representation of Defendants:

> (1) "Representation shall be provided for any financially eligible person who– (A) is charged with a felony or class A misdemeanor; (H) is entitled to appointment of counsel under the sixth Amendment to the Constitution; [or] (I) faces loss of liberty in a case and Federal law requires the appointment of counsel…"
> (2) Whenever the United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who– (A) is charged with a Class B or C misdemeanor, or an infraction for which a sentence to confinement is authorized…"

Furthermore, as previously mentioned, the complete and total financial destruction of a litigant without notifying him of the true nature and cause of the accusation; without due process requiring that each element of the offense be proven by competent sworn testimony regarding authenticated evidence; without notifying him of this right to the

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[6] ("[T]he right to liberty embraces the right of man "to exercise his faculties and to follow a lawful vocation for the support of life.") *Powell v. Pennsylvania*, 127 U.S. 678, 695 (1889).

appointment of counsel; without obtaining a voluntary, knowing, and intelligent waiver of right to trial by jury; and by denying him the right to gainful employment in his profession indefinitely and without any hearing whatsoever, let alone a judicial hearing, is so harsh, excessive, cruel, and unusual, it is strictly forbidden by the 4th, 5th, 6th, 7th, 8th, and 14th Amendments, representing a deprivation of nearly the entire Bill of Rights.

Even assuming the District Court had jurisdiction, it then had a mandatory, *non–discretionary*[7] duty to investigate the sworn testimony and authenticated evidence supporting the allegations in my complaint to ensure that I was given a full, fair, and impartial trial and appeal, which, as will be evidenced, it failed to do. ("The requirement of determining whether the party against whom an estoppel is asserted

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[7] ("The act required by the law to be done…is a precise, definite act, purely ministerial; …about which… [there is] no discretion whatever. There is no room for the exercise of any discretion, official or otherwise: all that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act.") *Kendall v. United States*, 37 U.S. 524, 613 614 (1838). ("Whether the act [is] judicial or not is to be determined by its character, and <u>not</u> by the character of the agent. A test as to the character of an act is found in the power of a writ of mandamus to enforce its performance in a particular way… If the act be a judicial one, the writ can only require the judge to proceed in the discharge of his duty with reference to it; the manner of performance cannot be dictated"). *Ex Parte Va.*, 100 U.S. 339, 348 (1879).

[has] had a full and fair opportunity to litigate is a most significant safeguard"). *Blonder-Tongue Labs v. University of Illinois Found*, 402 U.S. 313, 329 (1971). ([C]ollateral estoppel cannot apply when the party did not have a "full and fair opportunity" to litigate that issue in the earlier case). *Allen v. McCurry*, 449 U.S. 90, 95 (1980).

Among the issues I presented were that there was no evidence presented at trial: (1) that I made any profits whatsoever; (2) that I was a "conscious wrongdoer" as required by Restatement §51; (3) that I performed any work on the project; or (4) that I ever possessed the $930,000 to be "disgorged" as required by strict tracing in equitable actions (FAC Dkt. 11 pp. 50, line 25 – 53 line 12).

It is impossible to have had a full and fair opportunity to litigate if I was adjudged by both the State trial and appellate Courts upon evidence that doesn't exist and I was never given an opportunity to meet.

The District Court – as evidenced by its Order, Exhibit [AF] (Dkt. 31), failed to perform[8] an analysis of the aforementioned specific central

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[8] To be clear, the Court did perform a limited analysis of other issues. What I'm specifically referring to is that the Court **did not** make a finding of whether the evidence I profited $930,000 existed on the record to substantiate a claim for disgorgement. I submitted sworn testimony and evidence to the record that it did not exist. See *Verified* First Amended Complaint pp.70-71 Dkt. 11, and Declaration in Support of Opposition to Defendants Motion to Dismiss, Dkt. 18, pp. 18–23. The Court was required to address this issue of my claim. Based on its Order, the Court subsequently performed no analysis and made no findings pertaining to the punitive nature of the State Court judgment. On the other hand, it could also be acknowledged that because the Court upheld the validity of the State Court judgments, that in fact an analysis was conducted. This however, would result in the Court committing the

and critical issues and consequently held the State Court judgements valid and entitled to full faith and credit. Based upon this, the Court denied my claims with prejudice pursuant to the Humphreys filing of a Motion to Dismiss pursuant to FRCP, Rules 12(b)(1),(6), and (7), (Dkt. 9) citing the Rooker–Feldman and collateral estoppel doctrines. This not only directly conflicts with the Supremacy Clause of the Constitution (Article 6, Section 2), the US Supreme Court has made it clear for more than a century that judgments rendered in violation of due process are void and not entitled to full faith and credit elsewhere. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) citing *Pennoyer v. Neff*, 95 U.S. 714, 732-3 (1877). The Court's Order further results in a violation of Article 1, Section 9 – a Bill of Attainder – by sustaining the unconstitutional punishment, keeping me affirmatively restrained in constructive custody and unable to work in my profession while denying me a judicial hearing. See *Windsor*, supra. for the requirements of a *judicial* determination of the rights of the parties and *Buchman*, infra.

Pursuant to a subsequent "Referral Notice" filed by the Clerk of this Court on February 24, 2020 (Dkt. 34), the District Court declared this appeal "frivolous" and subsequently denied the previously approved petition to proceed in forma pauperis, Exhibit [AG] (Dkt. 35), in the District Court (Dkt. 5).

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same due process violations as the State Courts, resulting in a yet another void judgment resulting from lack of *in personam* and subject matter jurisdiction.

I understand the Rooker–Feldman doctrine bars losing parties ("from seeking what in substance would be appellate review of the state judgment in a United States district court"). *Johnson v. DeGrandy*, 512 U.S. 997, 1006-07 (1994). And that ("[t]he purpose of the doctrine is to protect state judgments from collateral attack"). *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir 2001). But there has not been a valid, judicial determination of my rights in State Court at trial or on appeal and judgments rendered in violation of due process are void and not entitled to full faith and credit elsewhere. *Woodson*, supra.

The Rooker–Feldman and collateral estoppel doctrines have never been held to apply to judgments where a State Court judgment was void because the Court violated due process and lacked *in personam* and subject matter jurisdiction and the District Court cites no authority to the contrary.

> ("A Court of California does not have jurisdiction to render judgment which violates …the Constitution for the United States"). *County of Ventura v. Tillet*, 133 Cal. App. 3d 105, 110 (1982); Cal. Code of Civil Procedure §410.10 ("A State of the United States may not exercise jurisdiction through its Courts when to do so constitutes a violation of any clause of the Constitution of the United States"). Restatement (First) of Conflict Laws §429– What Constitutes a Valid Judgment, Comment e.
>
> ("If a defendant were convicted and punished for an act that the law does not make criminal, there can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional

circumstances that justify collateral relief"). *United States v. Stoneman*, 870 F.2d 102, 104 (3d. Cir. 1989).

IX. ANALSYSIS OF THE DISTRICT COURT'S ORDER

The District Court acknowledged my verified complaint alleges ("the superior and appellate Court entered and affirmed the judgment… without supporting evidence and erred in holding disgorgement pursuant to …§7031 is an equitable remedy rather than a penalty, thereby "resulting in a void judgment." (FAC p.82,90.)"). *Order,* p6. lines 9-11.

These are not just undefined "legal errors", as the District Court suggests. (*Order*, p.6, line 8 and p7. line 27). These are structural jurisdictional errors effecting my substantive rights[9] that render the trial itself invalid resulting in a void judgment[10]. ("A judgment is void if the court that rendered it lacked jurisdiction of the subject matter, or of the

[9] Resulting in a violation of the 4th, 5th, 5th, 7th, 8th, and 14th Amendments, Article 1, Section 10, and Article 4, Section 4 of the Constitution for the united States and Article 1, Sections 1, 9, 13, 14, 15, 16, 19, and 29 of the California Constitution of 1879.

[10] ("A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless"). *Bennett v. Wilson*, 122 Cal. 509, 513-14 (Sup. Ct. 1898). ("A void judgment is a judgment which results from proceedings which did not satisfy the requirements essential to a valid judgment"). Restatement (First) of Judgments §117– Equitable Relief from Void Judgments.

parties, or acted in a manner inconsistent with due process"). *Klugh v. United States*, 620 F. Supp 892, 901 (1985).

> ("Just as "[c]onviction upon a charge not made would be sheer denial of due process," so is it a violation of due process to convict and punish a man without evidence of his guilt"). *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960).
>
> ("Substantive errors which result in a person's charge and conviction for something not a crime are fundamental. …A person [who is] charged …[without] evidence that did not show a violation [and was thereby] punished for something not a crime …is entitled to collateral review)". *Stoneman*, supra. ("…[t]he total deprivation of the right to counsel at trial [*Gideon* v. *Wainwright*, 372 U.S. 335 (1963) and a trial and appeal by judges who are not impartial] *Tumey* v. *Ohio*, 273 U.S. 510 (1927), are structural defects in the constitution of the trial mechanism. …The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial. [T]hese constitutional deprivations …[are a] structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose* v. *Clark*, 478 U.S., at 577-578 (citation omitted)"). *Ariz v. Fulminante*, 499 U.S. 279, 309, 310 (1991).

The United States Supreme Court has made it repeatedly clear District Courts can entertain independent actions that attack State Court judgments as void: *Atchison, T & S.F. Ry. Co. v. Wells*, 265 U.S.

101, 103 (1924) (1 year post Rooker); *Simon v. Southern Railway Co.*, 236 U.S. 115, 122 (1915) (pre Rooker); *United States v. Bigford*, 365 F.3d 859, 865 (10th Cir. 2004) citing *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604, 608–9 (1990); *Williams v. Life Sav. & Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986).

District Courts can also entertain independent actions to vacate void judgments when such claims are also authorized by State law: *Fontana Empire Ctr., LLC v. City of Fontana*, 307 F.3d 987, 993, 995 (9th Cir. 2002); *Simon v. Southern Railway Co.*, 236 U.S. 115, 122-3 (1915); *Wells Fargo & Co. v. Taylor*, 254 U.S. 175, 189 (1920); *Davis v. Bayless,* 70 F.3d 367, 376 (5th Cir. 1995). California law supports such actions: *Rochin v. Pat Johnson Manufacturing Co.,* 67 Cal. App.4th 1228, 1239 (1998); Cal. Code of Civil Proc. §1916. See also Article 4, Section 1 which *only* applies to *judicial* proceedings.

The US Supreme Court has also held in connection with Article 6, Section 2 that *any* other rules or legislative enactments cannot be used as a means to abrogate rights secured by the Constitution: *Miranda v. Arizona,* 384 U.S. 436, 491 (1966). This would include Business and Professions Codes §7031(a) and (b) and §7071.17 as well as the Rooker–Feldman and collateral estoppel doctrines.

Another exception to the Rooker–Feldman doctrine involves extrinsic fraud. ("…[T]he Rooker–Feldman doctrine does not apply where

the plaintiff alleges extrinsic fraud on a state court and seeks to set aside a state court judgment by that fraud. [Citations]"). *Order*, p6, lines 18-20.

It is extrinsic fraud and fraud on the Court for a judge to declare evidence exists on the record of a case to substantiate a claim when that evidence does not exist. Here, the trial Court judge and all three appellate justices found there was evidence: (1) that I profited $930,000 (see fn.4); (2) that I was a "conscious wrongdoer"; (3) that I performed the work on the project; and (4) that I had been in possession of the $930,000 when this evidence is nowhere on the record. In support of my sworn testimony evidencing this claim, I submitted both the clerk's and reporter's transcripts of trial to substantiate that this evidence did not exist anywhere on the record. See fn. 8.

Additionally, it is extrinsic fraud and fraud on the Court to hold a trial under the guise of a "civil remedial disgorgement" action in "equity", when the proceedings were altogether foreign to any jurisdiction and unacknowledged by the Constitution and State or Federal law whatsoever.

The Humphreys and their counsel, William Bissell, are also acutely aware that the evidence I profited $930,000 is not on the trial Court's record. The Humphreys never even stated a claim for disgorgement:

> ("Allegations that the defendant is a wrongdoer, and that the defendant's business is profitable, do not state a claim in

> unjust enrichment. By contrast, a claimant who is prepared to show a causal connection between defendant's wrongdoing and a measurable increase in the defendant's net assets will satisfy the burden of proof as ordinarily understood"). §51, Comment (i).

Mr. Bissell is a bar licensed attorney and officer of the Court. He has taken a sworn oath to support the Constitution and has a duty to maintain the cases confided him only as are consistent with truth and appear legal and just. See Business and Professions Code section §6067 and §6068. Why has he not informed the Court of these obvious and heinous substantive jurisdictional errors instead of conspiring with his clients to continue to fraudulently enforce them?

The United States Supreme Court has also repeatedly affirmed the power of Federal District Courts to set aside or enjoin State Court judgments procured by fraud. *Kougasian v. TMSL*, Inc. 359 F.3d 1136, 1141 (9th Cir. 2004); *Barrow v. Hunton,* 99 U.S. 80, 83 (1878); *Marshall v. Holmes*, 141 U.S. 589, 601 (1891). A Court sitting in equity reviewing a judgment for fraud is <u>not</u> acting as a Court of review and therefore not conducting a "de facto appeal". *McDaniel v. Taylor*, 196 U.S. 415, 422-3 (1905).

Despite this abundance of authority to the contrary, the District Court concluded ("…the extrinsic fraud exception to the Rooker–Feldman doctrine does not apply. [Citation].") *Order,* p.7 lines 4–5.

Finally, the complete failure of California's system as evidenced in and of itself precludes the application of any abstention or preclusion doctrines, including Rooker–Feldman, because the use thereof would, as happened here, ("deprive [a] Plaintiff of any forum, state or federal, where he has a reasonable opportunity to present his federal constitutional claims, [as required by] due process"). *Simes v. Huckabee*, 354 F.3d 823, 828 (8th Cir., 2004) citing *Wood v. Orange County*, 715 F.2d 1543, 1547 (11th Cir., 1983).

Defendants in §7031 cases have no access to a judicial constitutional State Court to not only have a fair and impartial trial on the merits, but also because California's "Courts" are not acting as a check and balance to the legislative branch as constitutionally required. The FDCA admitted this in *Rambeau v. Barker*, 2010 Cal. App.4th (2010) Unpub. Lexis 5610 p.16 when it declared ("[a]s a judicial body, we are not permitted to second-guess these policy choices") referring to the policies pertaining to §7031. The FDCA reaffirmed this in the instant case despite me squarely raising the constitutionality of §7031 on appeal. *Opinion,* p. 13:

> ("[T]he choice among competing policy considerations in enacting laws is a legislative function" (*Coastside Fishing Club v. California Resources Agency*, 158 Cal.App.4th 1183, 1203 (2008)), and absent a constitutional prohibition, we may not interfere or question the wisdom of the policies embodied in the statute. (*Marine Forests Society v. California Coastal Com.,* 36 Cal.4th 1, 25 (2005)); [Citations]").

The issue of appellate review is core to the republican and tripartite form of California's government and has been repeatedly addressed by the United States Supreme Court since the inception of this Country:

> ("Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final and conclusive. If it passes an act ostensibly for the public health and thereby destroys or takes away the property of a citizen, and interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may, in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law." And the court concluded an extended consideration of the subject by declaring that, when a health law is challenged in the courts as unconstitutional, on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the court must be able to see that it has in fact some relation to the public health, that the public health is the end aimed at, and that it is appropriate and adapted to that end; …If the courts could not in such cases examine into the real character of the act, but must accept the declaration of the legislature as conclusive, the most valued rights of the citizen would be subject to the arbitrary control of a temporary majority of such bodies, instead of being protected by the guarantees of the Constitution"). *Powell v. Pennsylvania,* 127 U.S. 678, 696-7 (1888).

It was also contemporaneously addressed in *Van Horne's Lessee v. Dorrance*, 2 U.S. 304, 309 (1795), by Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. 264, 384 & 404 (1821), and in *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803) one of the most infamous US Supreme Court cases of all time, declaring it "the very essence of judicial duty":

> "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on."

There is no evidence, nor could there rationally be any evidence that financially destroying me and restraining me from earning a living in my profession serves the public health, safety, morality, or welfare, especially after I had already passed[11] the State's licensing exam and was determined to be a "qualifying individual" for a general contractor's license. My alleged "crime" here is simply not paying a licensing fee and that has no connection whatsoever to the aforementioned lawful exercise of California's police powers to destroy me financially under the guise of "protecting the public".

See also *Bauers v. Heisel*, 361 F.2d 581, 588 (3d. Circuit 1966):

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[11] FAC pp.74–78 Dkt. 11.The entirety of my First Amended Verified Complaint and Declarations in Support (Dkt. 18) are incorporated and fully set forth herein.

> ("Article 4, § 4 of the United States Constitution provides: "The United States shall guarantee to every State in this Union a Republican Form of Government * * *." The framers of the Constitution clearly evinced their belief that a separate and independent judiciary is an indispensable element of a republican form of government. See The Federalist, pp. 236, 303-305, 488 et seq., 494 et seq").

Even if I had profited $930,000, would a $930,000 "disgorgement" award be constitutional in this situation for failure to obtain a license in my own name given the fact I was licensed as Spartan's qualifying individual and responsible managing officer?

Courts have repeatedly held disgorgement is remedial, equitable, and non–punitive, and in the case of a bank robber who stole something, surely this is the case. But it can't possibly apply in a situation such as this when the comparable criminal penalty is a fine *up to* $5,000. This is the very analysis the FDCA was constitutionally required to perform pertaining to California's public policy but refused to. ("We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution"). *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

Despite all of the foregoing exceptions to the Rooker–Feldman and collateral estoppel doctrines and absent any lawful authority, the District Court concluded ("Plaintiff's action is barred pursuant to the Rooker–Feldman doctrine because Plaintiff seeks relief from the state court judgement and alleges legal errors by the state trial and appellate court.

See *Bell v City of Boise*, 709 F.3d 890, 897 (9th Cir. 2013)"). *Order* p7, lines 25-28.

CONCLUSION

("The fundamental conception of a court of justice is condemnation only after notice and hearing. No one may be deprived of anything which is his to enjoy until he shall have been divested thereof by and according to law. Under the constitutional guaranties no right of an individual, valuable to him pecuniarily or otherwise can be justly taken away without its being done conformably to the principles of justice which afford due process of law, unless the law constitutionally otherwise provides. Due process of law does not mean according to the whim, caprice, or will of a judge [citations]; it means according to law. It excludes all arbitrary dealings with persons or property. It shuts out all interference not according to established principles of justice, one of them being the right and opportunity for a hearing: to cross-examine, to meet opposing evidence, and to oppose with evidence"). (Citations). *Estate of Buchman,* 123 Cal. App. 2d 546, 559 (1954).

The District Court acted without *in personam* and subject matter jurisdiction to deny my right to counsel and to a judicial hearing. The Court had no authority to deny my valid, substantive claims, to find this

appeal “frivolous” and subsequently deny my Motion to proceed informa pauperis.

This Court should: (1) approve my Motion For Appointment of Counsel and appoint competent, learned counsel to assist me in this appeal; and (2) approve my Motion For Permission To Proceeed in Forma Pauperis.

Alternatively, this Brief can be interpreted as and converted into a Petition for Writ of Mandamus and/or Non–Statutory Petition for Writ of Federal Habeas Corpus if the Court sees fit.

DECLARATION

This Court should refer to my First Amended Verified Complaint (Dkt. 18) and especially my Declaration in Opposition of Defendants Motion to Dismiss (Dkt.11) for the extensive Declarations I made under penalty of perjury pertaining to the facts presented herein.

I declare under penalty of perjury under the laws of the United States of the America that the Exhibits annexed hereto are true and correct copies of the actual documents referred to.

Sincerely,

/s/ Adam Bereki
In propria persona
March 16, 2020

DECLARATION

This Court should refer to my First Amended Verified Complaint (Dkt. 18) and especially my Declaration in Opposition of Defendants Motion to Dismiss (Dkt.11) for the extensive Declarations I made under penalty of perjury pertaining to the facts presented herein.

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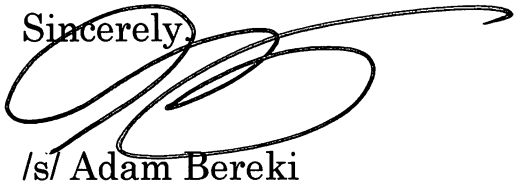
Sincerely,



/s/ Adam Bereki

In propria persona

March 16, 2020

Exhibit [AA]

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14 Corporate Plaza Drive, Suite 120
Newport Beach, CA 92660
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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF ORANGE- CENTRAL JUSTICE CENTER

THE SPARTAN ASSOCIATES, INC.

Plaintiff,

Vs

GARY HUMPHREYS, an individual; KAREN HUMPHREYS, an individual and DOES 1 THROUGH 25, inclusive

Defendants

GARY HUMPHREYS, an individual and KAREN HUMPHREYS, an individual;

Cross-complainants,

vs.

ADAM BEREKI an individual; THE SPARTAN ASSOCIATES, INC., a California corporation; SURETEC INSURANCE COMPANY, a Texas corporation and ROES 1 THROUGH 25, inclusive,

Cross-defendants.

Case No.: 30-2015-00805807

FIRST AMNEDED CROSS COMPLAINT FOR DAMAGES FOR NEGLIGENCE, FRAUD, ALTER EGO, PENALTY, ATTORNEY FEES, DISGORGMENT AND RECOVERY AGAINST CONTRACTORS LICENSE BOND

Judge: Hon. David Chaffee
Dept: C-20

Complaint Filed: August 21, 2015

Trial Date: Jan. 17, 2017

For causes of action against cross-defendants, cross-complainants allege as follows:

FIRST CAUSE OF ACTION
(As Against Cross-Defendant Adam Bereki an individual, and Roes 1 through 15 Inclusive, and Each of Them, for Disgorgement of Funds Paid.)

1. Cross-complainants Gary Humphreys and Karen Humphreys are now, and at all times herein mentioned were, individuals residing in the County of Contra Costa, State of California.

2. Cross-Complainants are informed and believe and thereon allege that cross-defendant Adam Bereki (Bereki) is now and at all times herein mentioned was an individual residing in the city of Costa Mesa, Orange County, California.

3. Cross-Complainants are informed and believe and thereon allege that cross-defendant The Spartan Associates, Inc. (Spartan) is now and at all times herein mentioned was a California corporation with its principal place of business in the city of Costa Mesa, Orange County, California and at all times herein mentioned was 100% owned by cross-defendant Bereki.

4. Cross-Complainants are informed and believe and thereon allege that cross-defendant Suretec Insurance Company is now and at all times herein mentioned was a Texas corporation, authorized to do business in the state of California and doing business in the County of Orange, State of California as a surety on undertakings and bonds.

5. The true names and capacities of the cross-defendants herein named as Roes 1 through 25 inclusive are unknown to cross-complainants who therefore sue said cross-defendants by fictitious names and will ask leave of Court to amend this cross-complaint to show their true names and capacities when they have been ascertained.

6. Cross-complainants are informed and believe and thereon allege that at all times herein mentioned each and every cross-defendant was acting as either the alter ego, agent, surety or employee of each of the other cross-defendants and at all times herein mentioned was acting within the scope, purpose and authority of that agency, suretyship and/or employment and with the full knowledge, permission and consent of each of the other cross-defendants and in concert therewith.

7. In or about April 2012, in the city of Newport Beach, Orange County, California, cross-complainants and cross-defendant Bereki entered into an oral agreement whereby cross-defendant agreed to perform home improvement construction work in the nature of a residential remodel on cross-complainant's vacation residence located at 436 Via Lido Nord, Newport Beach, California, and in return for which cross-complainants agreed to pay cross-defendants for actual construction costs incurred (estimated by cross-defendant Bereki at $143,000.00) together with a construction management fee of $500.00 per work day for the two and a half months which cross-defendant estimated the project would take. Cross-Complainants are further informed and believe and thereon allege that at some point

following the parties entry into the oral contract, as alleged above, cross-defendant unilaterally attempted to substitute his corporation, cross-defendant The Spartan Associates, Inc. as the contractor on the project. Cross-defendant Bereki performed the last of his services on the project on or about August 31, 2013.

8. Cross-complainants are informed and believe and thereon allege that cross-defendant Adam Bereki, both at the time the contract with cross-complainants was entered into, and at all times during his performance on the Project, was unlicensed as a contractor in contravention with the requirements of the California Contractor's License laws. That accordingly and pursuant to the terms of the Contractor's License Laws and specifically the provisions of Business and Professions Code §7031 (b), cross-complainants are entitled to recover from cross-defendant Bereki all sums paid by cross-complainants to said cross-defendant, which sums total $848,000.00.

SECOND CAUSE OF ACTION
(As Against Cross-Defendants Adam Bereki an individual, The Spartan Associates, Inc., a California corporation and Roes 1 through 15 Inclusive, and Each of Them, for Damages for Negligence.)

9. Cross-complainants incorporate herein by reference with the same force and effect as though set forth in full here-at paragraphs 1 through 8 of their first cause of action.

10. Cross-complainants have performed all conditions, covenants and promises required by them on their part to be performed in accordance with the terms and conditions of

Exhibit [AB]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MINUTE ORDER

DATE: 03/28/2017 TIME: 09:30:00 AM DEPT: C20

JUDICIAL OFFICER PRESIDING: David Chaffee
CLERK: Cora Bolisay
REPORTER/ERM: Khoung Kelvin Do
BAILIFF/COURT ATTENDANT: Michelle Gallegos

CASE NO: **30-2015-00805807-CU-CO-CJC** CASE INIT.DATE: 08/21/2015
CASE TITLE: **THE SPARTAN ASSOCIATES, INC. vs. HUMPHREYS**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Contract - Other

EVENT ID/DOCUMENT ID: 72559889

EVENT TYPE: Jury Trial

APPEARANCES
J. Scott Russo, from Russo & Duckworth LLP, present for Cross - Defendant,Plaintiff(s).
William G. Bissell, from Law Offices of William G. Bissell, present for Defendant,Cross - Complainant(s).
KAREN HUMPHREYS, Defendant is present.
GARY HUMPHREYS, Defendant is present.
Adam Bereki, self represented Cross - Defendant, present.

2nd day of trial

At 9:55 a.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

At 9:57 a.m. Mr. William G. Bissell presents closing argument on behalf of Cross-Complainants/Defendants, Karen & Gary Humphreys.

At 10:12 a.m. Mr. J. Scott Russo presents closing argument on behalf of Cross-Defendant, The Spartan Associates, Inc..

Mr. Adam Bereki waived closing argument.

At 10:19 a.m. Court declares a recess.

At 10:52 a.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

Having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, the Court finds and determines that Mr. Adam Bereki is the contractor and he does not possess contractor's license.

The Court finds judgment for the Cross Complainants, Gary & Karen Humphreys (First Cause of Action,

for Disgorgement of Funds Paid) and against cross-defendant, Adam Bereki.

The Court invites counsels to meet and discuss the plan for the remaining cause of actions and the complaint.

At 11:19 a.m. Court declares a recess.

At 11:37 a.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

Legal discussions held with regards to remaining cross-complaint cause of actions and the complaint as set forth on the record.

Counsels are to resume discussions during lunch hour and report to the Court at 1:45 p.m.

At 11:47 p.m. Court declares a recess.

At 1:48 p.m. Court reconvenes with plaintiff(s), defendant(s) and counsel present as noted above.

Counsels reached an agreement as set forth on the record.

Mr. J. Scott Russo presents an offer of proof on plaintiff's complaint that if called Mr. Adam Bereki would be the witness and the testimony would be that Plaintiff, Spartan Associates had rendered goods and services to the defendants. The fair market value for the services and goods of $82,821.53 to be backed up by invoices and testimony about the reasonable value of those services that would be the first cause of action Quantum Merit. For the 2nd cause of action, go and in hand that it was an open book accounting was rendered to the defendants that they were given the accountings and the sum was $82,821.53 that was still due.

Based on Mr. Russo's offer of proof, the Court understand that those claims are based upon the view of plaintiff Spartan Associates, Inc. was the general contractor on the project. The Court finds that Spartan Associates does not have standing as determined earlier today that Mr.Bereki was the purported general contractor on the contract. Spartan Associates, Inc. may have been apparently substituted but it is certainly not with the permission or agreement of the defendants. Based on that, the **Court finds judgment for the defendants on the complaint.**

The parties have discussed, agreed and stipulates on the record as follows: The entirety of remaining causes of action on the First Amended Cross-Complaint will be dismissed without prejudice. If judgment on the first cause of action becomes final, the dismissal without prejudice will be converted to dismissal with prejudice. Pending judgment on the first cause of action becoming final, the statute of limitations on the re-filing of an action of the dismissed causes of action is waived. If a new action is filed on the dismissed causes of action , discovery deemed completed and will not be re-opened and the newly filed case will be consolidated with the remanded case for trial.

Pursuant to Mr. Bissell's Motion, **the Court orders the remaining causes of action, negligence, fraud, alter ego, penalty, attorney's fees and recovery against the Contractor's license bond be dismissed without prejudice. The judgment on the First Amended Cross Complaint is on the 1st cause of action for discouragement only.**

The Court directs Mr. William G. Bissell to prepare the judgment.

At 2:03 p.m. **Pursuant to oral stipulation set forth on the record, exhibits are released and returned to the submitting parties/counsels for maintenance, custody and safekeeping pending any post-verdict or appeal proceedings. All identification tags and other identifying markings are to remain in place pending this period.**

At 2:05 p.m. The Court is adjourned in this matter.

JUD-100

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address)
William Bissell SBN 93527
14 Corporate Plaza Drive, Suite 120
Newport Beach, CA 92660
TELEPHONE NO.: (949) 719-1159 FAX NO. (Optional)
E-MAIL ADDRESS (Optional): wbissell@wgb-law.com
ATTORNEY FOR (Name): Gary Humphreys & Karen Humphreys

FOR COURT USE ONLY

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
APR 20 2017
DAVID H. YAMASAKI, Clerk of the Court
BY: DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
STREET ADDRESS: 700 Civic Center Drive West
MAILING ADDRESS:
CITY AND ZIP CODE: Santa Ana, CA 92701
BRANCH NAME: Central Justice Center

PLAINTIFF: The Spartan Associates, Inc.

DEFENDANT: Gary Humphreys, Karen Humphreys et al

CASE NUMBER
2015-00805807

Judge David Chaffee

JUDGMENT

☐ By Clerk ☐ By Default ☑ After Court Trial
☑ By Court ☐ On Stipulation ☐ Defendant Did Not Appear at Trial

JUDGMENT

1 ☐ **BY DEFAULT**
- a. Defendant was properly served with a copy of the summons and complaint.
- b. Defendant failed to answer the complaint or appear and defend the action within the time allowed by law.
- c. Defendant's default was entered by the clerk upon plaintiff's application
- d. ☐ **Clerk's Judgment** (Code Civ. Proc., § 585(a)) Defendant was sued only on a contract or judgment of a court of this state for the recovery of money
- e. ☐ **Court Judgment** (Code Civ. Proc., § 585(b)). The court considered
  - (1) ☐ plaintiff's testimony and other evidence
  - (2) ☐ plaintiff's written declaration (Code Civ. Proc., § 585(d)).

2. ☐ **ON STIPULATION**
- a. Plaintiff and defendant agreed (stipulated) that a judgment be entered in this case. The court approved the stipulated judgment and
- b ☐ the signed written stipulation was filed in the case
- c. ☐ the stipulation was stated in open court ☐ the stipulation was stated on the record.

3. ☑ **AFTER COURT TRIAL.** The jury was waived. The court considered the evidence.
- a. The case was tried on *(date and time)*: March 27, 2017 at 9.00 a.m.
  before *(name of judicial officer)*: The Honorable David Chaffee
- b. Appearances by:

☑ Plaintiff *(name each)*
(1) The Spartan Associates, Inc.
(2)
☐ Continued on Attachment 3b

☑ Plaintiff's attorney *(name each)*:
(1) J. Scott Russo esq.
(2)

☑ Defendant *(name each)*:
(1) Gary Humphreys
(2) Karen Humphreys
☑ Continued on Attachment 3b.

☐ Defendant 's attorney *(name each)*:
(1) William Bissell esq.
(2) William Bissell esq.

- c. ☐ Defendant did not appear at trial. Defendant was properly served with notice of trial.
- d. ☑ A statement of decision (Code Civ. Proc., § 632) ☑ was not ☐ was requested.

Form Approved for Optional Use
Judicial Council of California
JUD-100 [New January 1, 2002]

JUDGMENT

Code of Civil Procedure, §§ 585, 664.6

PLAINTIFF The Spartan Associates, Inc.	CASE NUMBER 2015-00805807
DEFENDANT Gary Humphreys, Karen Humphreys et al	

JUDGMENT IS ENTERED AS FOLLOWS BY: ☑ THE COURT ☐ THE CLERK

4 ☐ **Stipulated Judgment.** Judgment is entered according to the stipulation of the parties

5. **Parties.** Judgment is

a ☐ for plaintiff *(name each)*

and against defendant *(names)*:

☐ Continued on Attachment 5a.

b. ☑ for defendant *(name each)*.
Gary Humphreys & Karen Humphreys

c ☑ for cross-complainant *(name each)*.
Gary Humphreys & Karen Humphreys
and against cross-defendant *(name each)*:
Adam Bereki

☐ Continued on Attachment 5c.

d ☐ for cross-defendant *(name each)*:

6 **Amount.**

a. ☐ Defendant named in item 5a above must pay plaintiff on the complaint:

(1) ☐	Damages	$
(2) ☐	Prejudgment interest at the annual rate of %	$
(3) ☐	Attorney fees	$
(4) ☐	Costs	$
(5) ☐	Other *(specify)*:	$
(6)	TOTAL	$

b. ☑ Plaintiff to receive nothing from defendant named in item 5b.
☑ Defendant named in item 5b to recover costs $
☐ and attorney fees $

c ☑ Cross-defendant named in item 5c above must pay cross-complainant on the cross-complaint:

(1) ☑	Damages	$ 848,000.00
(2) ☐	Prejudgment interest at the annual rate of %	$
(3) ☐	Attorney fees	$
(4) ☑	Costs	$
(5) ☐	Other *(specify)*:	$
(6)	TOTAL	$

d ☐ Cross-complainant to receive nothing from cross-defendant named in item 5d.
☐ Cross-defendant named in item 5d to recover costs $
☐ and attorney fees $

7 ☑ Other *(specify)*:
Causes of action two through eight of the first amended cross-complaint are dismissed without prejudice subject to a stipulation by the parties and entered on the record.

Date: APR 2 0 2017

☐ JUDICIAL OFFICER
DAVID R. CHAFFEE

Date ☐ Clerk, by _____, Deputy

(SEAL)

CLERK'S CERTIFICATE *(Optional)*

I certify that this is a true copy of the original judgment on file in the court

Date:

Clerk, by _____, Deputy

Exhibit [AC]

WILLIAM G. BISSELL, ESQ. State Bar #93527
14 Corporate Plaza Drive, Ste. 120
Newport Beach, CA 92660
Telephone: (949) 719-1159

Attorney for Gary Humphreys &
Karen Humphreys

SUPERIOR COURT FOR THE STATE OF CALIFORNIA,

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

THE SPARTAN ASSOCIATES, INC. a California corporation,

Plaintiff,

vs.

GARY HUMPHREYS, an individual; KAREN HUMPHREYS, an individual and DOES 1 through 25, inclusive,

Defendants,

AND RELATED CROSS-ACTION

Case No.30-2015-00805807

DECLARATION OF GARY HUMPHREYS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, OR ALTERNATIVELY, SUMMARY ADJUDICATION

Unlimited Civil

Judge: David Chaffee
Dept. C-20

Date: May 20, 2016
Time: 9:30 a.m.
Dept: C-20

Complaint Filed:
August 21,2015

//

//

I, Gary Humphreys, declare:

1. I am over the age of eighteen, I have personal knowledge of the matters set forth in this declaration and if called upon to testify, I could and would competently testify to the following.

2. In April of 2012 my wife Karen Humphreys and I were the owners of Unit C, one of three condominium units comprising a residential condominium project located at 436 Via Lido Nord in Newport Beach, California.

3. Unit C of the condominium project located at 436 Via Lido Nord, Newport Beach California, was acquired by my wife and I to be used as a vacation home for ourselves and our family and that remained our intended purpose of the ownership of the condominium unit in April of 2012.

4. At no time prior to April of 2012, or thereafter, have either I, or, to my knowledge, my wife, been in the business of real estate development or real estate investment, or has ever worked in the construction industry.

5. In April of 2012, my wife and I entered into an oral agreement with Adam Bereki for remodeling work to be performed by Mr. Bereki on our 436 Via Lido Nord Newport Beach condominium unit. Although I was initially under the impression that our agreement was with Mr. Bereki individually, we were later requested by Mr. Bereki to make our checks for progress payments for the work to be performed by Mr. Bereki payable to The Spartan Associates, Inc.

6. It was my understanding that the work contemplated by the agreement we had entered into with Mr. Bereki and/or his corporation The Spartan Associates, Inc. (Spartan) would cost us well in excess of $500.00. This understanding was based in part on a an initial estimate we had been given by Mr. Bereki on April 5, 2012 in the amount of $143,000.00.

7. The agreement my wife and I entered into with Mr. Bereki for the remodel of our condominium unit in April of 2012 (the "Agreement") was not signed and dated by either my

wife or myself, or by Adam Bereki either individually or on behalf of Spartan.

8. The Agreement contained no notice that my wife and I as the owners of the unit had the right to require Mr. Bereki and/or Spartan to post a performance and payment bond for the work of improvement.

9. The Agreement did not contain or disclose the contractor's license number for either Adam Bereki, Spartan, or any other person or entity.

10. The Agreement did not contain any notice that my wife and I, as the owners of the unit, were entitled to receive a completely filled in and signed copy of the contract before any construction work on the unit may be started.

11. The Agreement did not have a heading "Contract Price" followed by the amount of the contract.

12. The Agreement did not have a heading "Description of The Project and Description of the Significant Materials to be Used and Equipment to be Installed."

13. The Agreement did not include a schedule of progress payments with specific reference to the amount of each progress payment and the amount of work or services to be performed and any materials and equipment to be supplied in connection with each progress payment.

14. The Agreement did not contain a heading "Approximate Start Date" followed by a statement describing what constitutes substantial commencement of the work and an approximate date for that commencement.

15. The Agreement did not contain a heading "Approximate Completion Date" followed by a date for the approximate completion of the work on our condominium unit.

16.The Agreement did not contain a heading " Note About Extra Work and Change Orders" followed by a statement that an extra work or change order is not enforceable against a buyer unless the change order sets forth:

a) the scope of work encompassed by the order;

b) the amount to be added or subtracted from the contract; and

c) the effect the order will make in the progress payments or the completion date.

17. The Agreement did not contain a statement that if a down payment is to be charged, it may not exceed *the lesser of* $1,000 or 10 percent of the contract price.

18. On or about April 13, 2012 Adam Bereki, either individually or on behalf of Spartan, requested a down payment from my wife and me in the amount of $15,000 as an advance for work yet to be performed by Mr. Bereki and/or Spartan on our condominium unit.

19. On about April 13, 2012, at Adam Bereki's request, my wife and I issued our check number 1077 payable to Adam Bereki, in the amount of $15,000 as an advance for work yet to be performed by Mr. Bereki and/or Spartan on our condominium unit. A true and correct copy of our check Number 1077 payable to Mr. Bereki is attached as Exhibit "A" hereto.

20. In or about April 2012, Adam Bereki, either individually or as Spartan began the remodeling work on the our condominium unit.

21. Between April 13, 2012 and July 31, 2013, in addition to the down payment of $15,000, my wife and I made sixteen separate progress payments to either Adam Bereki or Spartan in the total amount of $833,000.00. A true and correct copy of each of the wire transfer receipts and/or checks representing the progress payments made to Mr. Bereki and Spartan for the work performed on our condominium unit is attached here to as Exhibits "B" through " Q".

22. Each progress payment my wife and I made to either Mr. Bereki individually or to Spartan for work performed on our condominium unit was made at the request of Adam Bereki acting either individually or on behalf of Spartan.

23. No request from Mr. Bereki to me for a progress payment, was accompanied by a written change order signed by Mr Bereki either individually or on behalf of Spartan describing the scope of any extra work or change, the cost to be added to or subtracted from the contract, or the effect the change would have on a schedule of progress payments.

24. The method of payment to Mr. Bereki and/or Spartan under the agreement for our condominium remodel project was a "cost plus" arrangement in that we were to pay Mr. Bereki and/or Spartan the actual cost of labor and materials used on the project plus a contractors fee of $500.00 per day.

25. On about August 28, 2013 my wife and I terminated Mr. Bereki and Spartan from our condominium remodeling project .

26. At the time my wife and I terminated Mr. Bereki and Spartan from our condominium remodeling project, the project had not been completed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 11th Day of February 2016, at Moraga, California.

Gary Humphreys

06

CHASE

4/24/12

(L)

4/24/12 * 08:05 AM CARD# 8052
11 W Macarthur Ste F1, Santa Ana CA
ATM CA9390

Sequence# 4386

Check Dep to Chk Acct 9920	$15,000.00
Available Balance	$20,682.88
Present Balance	$35,682.88

(*)

Deposit performed at this ATM after 8:00 p ill be considered deposited on the next business day.

NOTICE OF DELAYED DEPOSIT AVAILABILITY

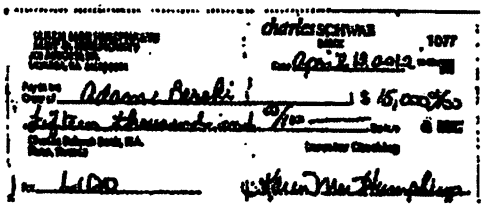
Amount delayed	$14,000.00
Date funds will be available	04/26/2012

Further review may result in delayed availability of this deposit.

Accepted Checks:

Check #1	$15,000.00
Total Checks	$15,000.00

Check #1 Amount: $15,000.00



Part of the check image has been obscured for security reasons.

Get Chase Instant Action Alerts (sm)

Get a text message when your checking balance is low.
Transfer funds with a text to help avoid fees.
Visit Chase.com/FreeAlerts to learn more.

JPMorgan Chase Bank, N.A. Member FDIC

EXHIBIT A

5/21/12

(L)

CHASE

05/21/12 08:02 AM CARD# 8052
2781 W Macarthur Ste F1, Santa Ana CA
ATM CA9390

Sequence# 1827

Check Dep to Chk Acct 9920	$15,000.00
Available Balance	$11,106.89
Present Balance	$25,906.89

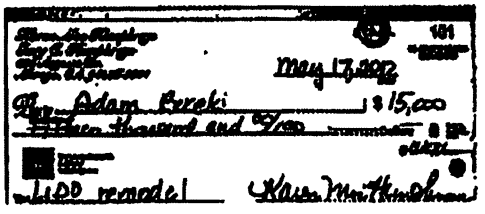
(*)

Deposits performed at this ATM after 8:00 pm will be considered deposited on the next business day.

Further review may result in delayed availability of this deposit.

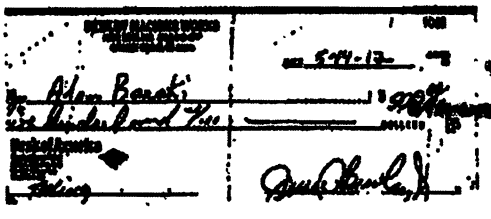
Accepted Checks:	
Check #1	$15,000.00
Total Checks	$15,000.00

Check #1 Amount: $15,000.00



Part of the check image has been obscured for security reasons.

Rejected Items
Item #1
Reject Reason: Item is unreadable at the ATM. Please visit any Chase branch for help.



Part of the item image has been obscured for security reasons.

Get Chase Instant Action Alerts (sm)

Get a text message when your checking balance is low.
Transfer funds with a text to help avoid fees.
Visit Chase.com/FreeAlerts to learn more.

EXHIBIT B

EXHIBIT "B"

Wire Transfer Services
Outgoing Wire Transfer Request

WELLS FARGO

A customer or team member, with the customer present, completes this form when requesting to send a wire. Outgoing wires can only be sent for Wells Fargo customers. Retain the original copy and provide a copy to the customer ensuring you give the customer the Agreement for Outgoing Wire Transfer Request (page 2 when form is accessed on-line & preprinted on the back of printed forms). Note: Wells Fargo Wire Transfer Services will route wires based on correspondent banking relationships. See back (page 2) for explanations of the Mexican CLABE account, the SWIFT BIC, the International Routing Code (IRC) and the International Bank Account Number (IBAN). *Required information is noted with an asterisk.

*Today's Date: June 8, 2012

*Send Date (If next day submit wire after 4:30 CT. Store must hold if other than today or next day date.): June 8, 2012

1. Originator's Information

*Customer's Name: Karen Moe Humphreys

*Phone Number: 925 376 4488

*Customer's Physical Address, City, State, Zip Code: 505 Augusta Dr. Moraga, CA 94556

*Transfer from [redacted] (Must be checking, savings, market rate, wholesale checking account or 10-digit command account)

*U.S. Dollar Wire Amount: 40,000

International Wire only: When sending in foreign currency, please ensure the beneficiary's account accepts the designated currency.

Funds to be sent in foreign currency: ☐ Yes ☒ No | Foreign Currency Type/Name (SVT/SVP will default to FX unless specified otherwise) | *Currency Code (if known) | *Foreign Currency Amount

2. Beneficiary/Recipient Information (This is the ultimate recipient of the wire transfer funds.)

*Beneficiary/Recipient Name: Adam Bereki

*Beneficiary Account [redacted] Bank Account Number (IBAN) where applicable:

Beneficiary's Physical Address, City, State, Zip Code (A physical address is required for foreign wires.)

Information for the Beneficiary (invoice number, purchase order number, etc.): Humphreys

Beneficiary Phone Number: 949 241 6693

3. Beneficiary Bank Information (This is the financial institution where the beneficiary maintains their account.)

*Beneficiary Bank RTN or SWIFT Bank Identifier Code (SWIFT BIC): 322271627

*International Routing Code (IRC)

*Beneficiary Bank Name: JP Morgan Chase Bank NA

Beneficiary Bank Address, City, State, Zip Code & Country (optional information)

Information for Beneficiary Bank (wires to Mexican banks require the CLABE account number in the Beneficiary Instructions to ensure correct payment.)

4. Intermediary Bank Information (This is a financial institution that the wire must pass through before reaching the final beneficiary bank.) This section is optional and not required for all wires. Please note that routing may be altered depending on Wells Fargo Bank's correspondent relationships.

Optional: *Intermediary Beneficiary Bank RTN or SWIFT BIC | International Routing Code (IRC)

*Intermediary Bank Name | *Intermediary Bank Account No.

Intermediary Bank Address, City, State, Zip, Country (optional information)

Information for Intermediary Bank

5. Wire Fee & Customer Signature (Additional fees from intermediary and beneficiary banks may be charged to international transactions - see Fees section on page 2 of this form.)

Wire Fee Amount (the Transfer From Account will be charged the fee.) The region that houses the account being debited determines the fee amount. Use the fee information available through Teamworks and/or the Banker's Guide. Do not use SVT/SVP for fee when the account is not in your region. Additional fees may apply (see page 2 of this form). Contact WBR Store Support for questions regarding Command Fees.

*AU where the Originator's account is located: 2558

*Fee Amount: $ 30

My signature here indicates agreement to all of the information on this Outgoing Wire Transfer Request and to the terms and conditions on the second page of this request. Wells Fargo is authorized to rely on the information on this Request in making the requested funds transfer.

X [signature] Karen Moe Humphreys

*Date: June 8, 2012

6. Wells Fargo Use Only – Wells Fargo Approval – Following MUST be completed for ALL outgoing wires.

International Wire Foreign Currency Information

Rate | Contract No. (required when $100,000 or more U.S.$) | FX Trader Contact

[redacted] | *Name on ID used by customer: Karen Moe Humphreys | Method used to verify business acct. transaction authority

[redacted] | *2nd ID type, number issued by State/Country & Expiration Date: PIN ver

*Initiated By and AU#: X [signature] AU258 | *First Approval: X | Second Approval, if applicable: X

7. Wires In Process (WIP)

*When Customer's account is not debited, the WIP Account is funded by:

☐ Paid by Check ☐ Paid Cash ☐ Paid through account other than checking, savings, MRA, TBS or Hogan. Reference Acct #:

Tax ID Type–Type & No. are required when customer's account is not debited. | Tax ID No. (If non-citizen provide Alien ID #, Passport # & Country)

☐ Social Security ☐ TIN ☐ Non-U.S. Citizen without TIN ☐ Employer ID

8. Customer Not Present

Verification of Originator (Telephone, Fax, or written requests)

Reason customer cannot come into Wells Fargo | Caller's location ☐ Company ☐ Home ☐ Other: | Caller's immediate phone number

Confirmation of Request (Team member other than the initiator calls customer for confirmation)

Phone # to call to verify request | Time of call to customer | Source used ☐ Wells Fargo Records ☐ Telephone Directory ☐ Other: | Token verified? ☐ Yes ☐ No

Name of person placing call | Customer Contact Name | Customer ☐ Approved the transfer ☐ Denied the transfer

Telephone, Fax, or Written Request (Approval obtained by Private Banking Mgr., Business Banking Mgr., Retail - next level of authority above Store Management)

Approver's Printed Name | Approver's Signature X | Date

EXHIBIT C

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EXHIBIT "C"

Wire Transfer Services
Outgoing Wire Transfer Request

WELLS FARGO

A customer or team member, with the customer present, completes this form when requesting to send a wire. Outgoing wires can only be sent for Wells Fargo customers. Retain the original copy and provide a copy to the customer ensuring you give the customer the Agreement for Outgoing Wire Transfer Request (page 2 when form is accessed on-line & preprinted on the back of printed forms). Note: Wells Fargo Wire Transfer Services will route wires based on correspondent banking relationships. See back (page 2) for explanations of the Mexican CLABE account, the SWIFT BIC, the International Routing Code (IRC) and the International Bank Account Number (IBAN) *Required information is noted with an asterisk.

*Today's Date: June 22, 2012

*Send Date (If next day submit wire after 4:30 (T. Store must hold if other than today or next day date.): June 22, 2012

1. Originator's Information

*Customer's Name: Karen Moe Humphreys

*Phone Number: 925 376 4488

*Customer's Physical Address, City, State, Zip Code: 505 AUGUSTA DR MORAGA CA 94556

*Transfer from Wells [redacted] rate, wholesale checking account or 10-digit command account)

*U.S. Dollar Wire Amount: 30,000

International Wire only: When sending in foreign currency, please ensure the beneficiary's account accepts the designated currency.

Funds to be sent in foreign currency: ☐ Yes ☑ No

Foreign Currency Type/Name (SVT/SVP will default to FX unless specified otherwise)

*Currency Code (if known)

*Foreign Currency Amount

2. Beneficiary/Recipient Information (This is the ultimate recipient of the wire transfer funds)

*Beneficiary/Recipient Name: ADAM BEREKI

*Beneficiary Account Number, [redacted] Account Number (IBAN) where applicable:

Beneficiary's Physical Address, City, State, Zip Code (A physical address is required for foreign wires.)

Information for the Beneficiary (invoice number, purchase order number, etc.): HUMPHREYS

Beneficiary Phone Number: 949 241 6693

3. Beneficiary Bank Information (This is the financial institution where the beneficiary maintains their account.)

*Beneficiary Bank RTN or SWIFT Bank Identifier Code (SWIFT BIC): 322271627

*International Routing Code (IRC)

*Beneficiary Bank Name: JP MORGAN CHASE BANK NA

Beneficiary Bank Address/City, State, Zip Code & Country (optional information)

Information for Beneficiary Bank (wires to Mexican banks require the CLABE account number in the Beneficiary Instructions to ensure correct payment.)

4. Intermediary Bank Information (This is a financial institution that the wire must pass through before reaching the final beneficiary bank.) This section is optional and not required for all wires. Please note that routing may be altered depending on Wells Fargo Bank's correspondent relationships.

Optional: *Intermediary Beneficiary Bank RTN or SWIFT BIC

International Routing Code (IRC)

*Intermediary Bank Name

*Intermediary Bank Account No.

Intermediary Bank Address, City, State, Zip, Country (optional information)

Information for Intermediary Bank

5. Wire Fee & Customer Signature (Additional fees from intermediary and beneficiary banks may be charged to International transactions - see Fees Section on page 2 of this form.)

Wire Fee Amount (the Transfer From Account will be charged the fee.) The region that houses the account being debited determines the fee amount. Use the fee information available through Teamworks and/or the Banker's Guide. Do not use SVT/SVP for fee when the account is not in your region. Additional fees may apply (see page 2 of this form). Contact WBR Store Support for questions regarding Command Fees.

*AU where the Originator's account is located: 00258

*Fee Amount: $ 30.00

My signature here indicates agreement to all of the information on this Outgoing Wire Transfer Request and to the terms and conditions on the second page of this request. Wells Fargo is authorized to rely on the information on this Request in making the requested funds transfer.

X Karen Moe Humphreys

*Date: June 22, 2012

6. Wells Fargo Use Only – Wells Fargo Approval – Following MUST be completed for ALL outgoing wires.

International Wire Foreign Currency Information

Rate

Contract No. (required when $100,000 or more U.S.$)

FX Trader Contact

[redacted]

*Name on ID used by customer: KAREN MOE HUMPHREYS

Method used to verify business acct. transaction authority

[redacted] Expiration Date: 01-27-2013

*2nd ID type, number, issued by State/Country & Expiration Date: PIN VERIFICATION

*Initiated by and AU#: X [signature] 00258

*First Approval: X

Second Approval, if applicable: X

7. Wires in Process (WIP)

*When Customer's account is not debited, the WIP Account is funded by:

☐ Paid by Check ☐ Paid Cash ☐ Paid through account other than checking, savings, MRA, TRS or Hogan Reference Acct #:

Tax ID Type–Type & No. are required when customer's account is not debited.

Tax ID No. (If non-citizen provide Alien ID #, Passport # & Country)

☐ Social Security ☐ TIN ☐ Non-U.S. Citizen without TIN ☐ Employer ID

8. Customer Not Present

Verification of Originator (Telephone, Fax, or written request)

Reason customer cannot come into Wells Fargo

Caller's location: ☐ Company ☐ Home ☐ Other

Caller's immediate phone number

Confirmation of Request (Team member other than the initiator calls customer for confirmation)

Phone # to call to verify request

Time of call to customer

Source used: ☐ Wells Fargo Records ☐ Telephone Directory ☐ Other:

Token verified? Yes No

Name of person placing call

Customer Contact Name

Customer: ☐ Approved the transfer ☐ Denied the transfer

Telephone, Fax, or Written Request (Approval obtained by Private Banking Mgr., Business Banking Mgr., Retail - next level of authority above Store Management)

Approver's Printed Name

Approver's Signature: X

Date

EXHIBIT D

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EXHIBIT "D"

Wells Fargo® Preferred Checking

Activity summary

Balance on 7/1	[redacted]
Deposits/Additions	67,285.00
Withdrawals/Subtractions	- 67,285.67
Balance on 7/31	$2.32

Account number: 63
KAREN MOE HUMPH
Wells Fargo Bank, N.A
Questions about your
Worksheet to balance
Statement Policies on
end of this statement.

Interest you've earned

Interest paid on 7/31	$0.00
Average collected balance this month	$720.67
Annual percentage yield earned	0.00%
Interest paid this year	$0.44

Transaction history

Date	Description	Check No.	Deposits/ Additions
Beginning balance on 7/1			
7/16	Online Transfer Ref #lbec4W66ND From Checking Xxxxxx1518 On 07/16/12		8,000.00
7/16	Online Transfer Ref #lbec4W66Vq From Checking Xxxxxx1323 On 07/16/12		7,255.00
7/16	Online Transfer Ref #lbec4W66RV From Checking Xxxxxx1419 On 07/16/12		7,000.00
7/17	Wire Trans Svc Charge - Sequence: 120717084835 Srf# 0000258199921162 Trn#120717084835 Rfb#		
7/17	WT Fed#07068 First Hawaiian Ban /Ftr/Bnf=Reflecting You, Inc. Srf# 0000258199921162 Trn#120717084835 Rfb#		
7/19	Online Transfer Ref #lbec4Wvj5 From Checking Via Mobile		45,030.00
7/19	Wire Trans Svc Charge - Sequence: 120719125627 Srf# 0000256201915762 Trn#120719125627 Rfb#		
7/19	WT Fed#02540 Jpmorgan Chase Ban /Ftr/Bnf=Spartan Construction Srf# 0000256201915762 Trn#120719125627 Rfb#		
Ending balance on 7/31			
Totals			$67,285.00

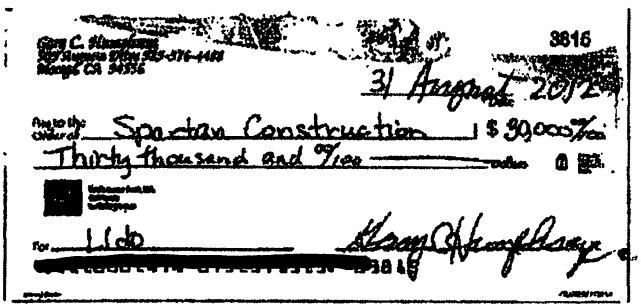
$30 Wire Transfer Fee

EXHIBIT E

Wells Fargo Online®

View Check Copy

Check Number	Date Posted	Check Amount	Account Number
3815	09/19/12	$30,000.00	WELLS FARGO GOLD PACKAGE CHECKING XXXXXX1323



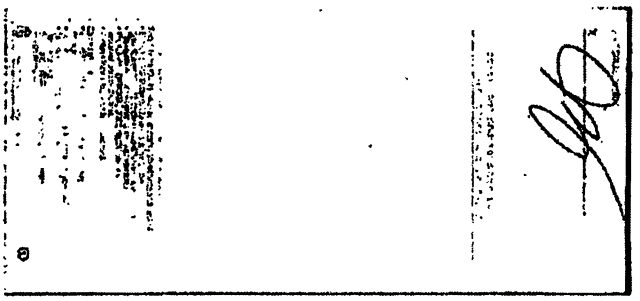
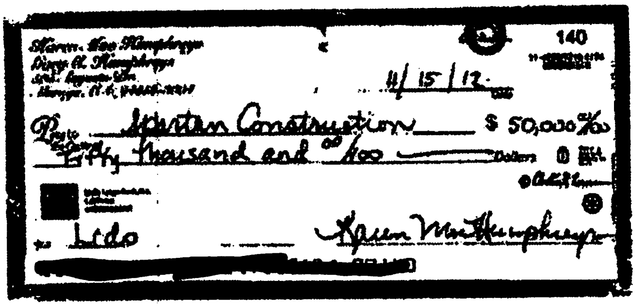


EXHIBIT "F"

Wells Fargo Online®

View Check Copy

Check Number	Date Posted	Check Amount	Account Number
140	11/19/12	$50,000.00	PMA PRIME CHECKING ACCOUNT XXXXXX1518



140

11/15/12

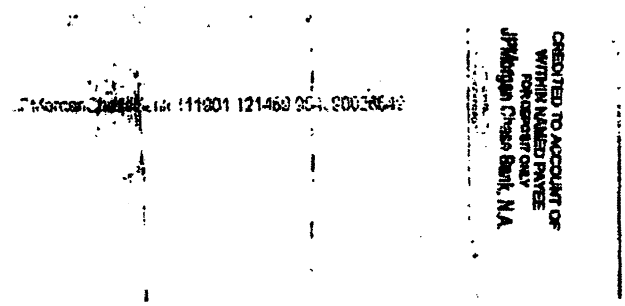
Pay to the Order of Spartan Construction $ 50,000 00/100

Fifty thousand and 00/100 Dollars

For Lido

Karen Mae Humphrey

[redacted]



CREDITED TO ACCOUNT OF
WITHIN NAMED PAYEE
FOR DEPOSIT ONLY
JPMorgan Chase Bank, N.A.

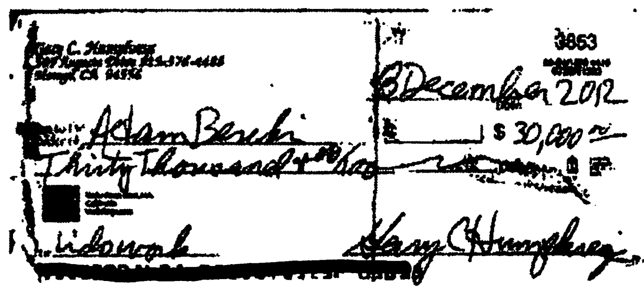
G

EXHIBIT "G"

Wells Fargo Online®

View Check Copy

Check Number	Date Posted	Check Amount	Account Number
3853	12/14/12	$30,000.00	WELLS FARGO GOLD PACKAGE CHECKING XXXXXX1323



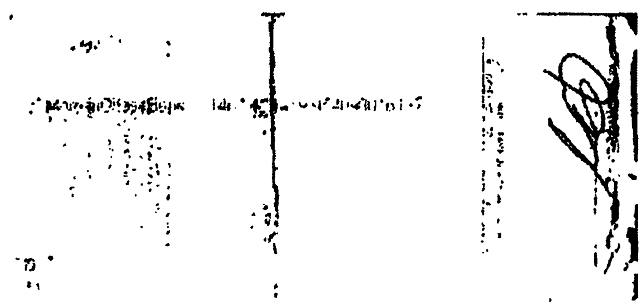
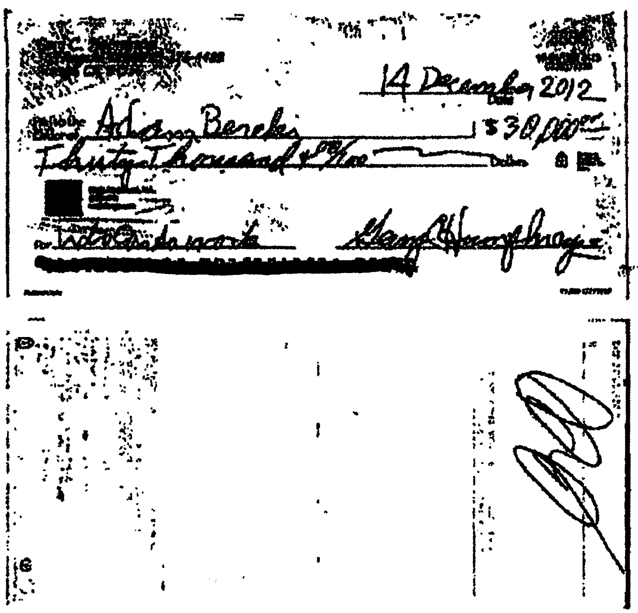


EXHIBIT "H"

Wells Fargo Online®

View Check Copy

Check Number	Date Posted	Check Amount	Account Number
3850	12/20/12	$30,000.00	WELLS FARGO GOLD PACKAGE CHECKING XXXXXX1323



14 December 2012

Pay to the order of Adam Berek $30,000.00

Thirty Thousand & 00/100 Dollars

[redacted]

Wells Fargo Online®

View Check Copy

Check Number	Date Posted	Check Amount	Account Number
3860	01/14/13	$28,000.00	WELLS FARGO GOLD PACKAGE CHECKING XXXXXX1323

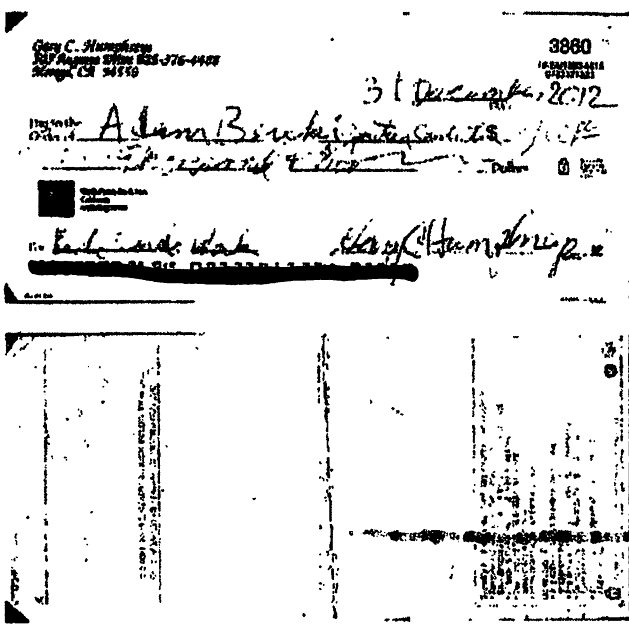


EXHIBIT "J"

[redacted]

16657

HUMPHREYS & ASSOCIATES, INC.
[redacted]

Wells Fargo Bank, N.A.
California
16-24-1220

PAY *EIGHTY THOUSAND AND XX / 100

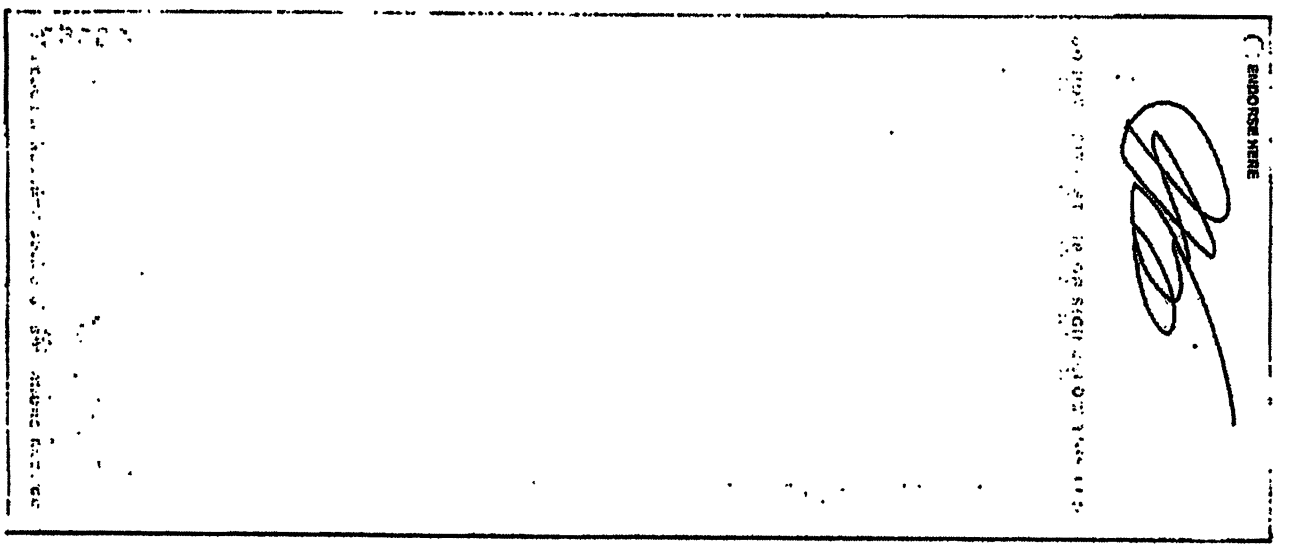
DATE 01/21/2013 CHECK AMOUNT $80,000.00

TO THE ORDER OF Spartan Associates, Inc

HUMPHREYS & ASSOCIATES, INC.

GENERAL ACCOUNT [redacted]

[redacted]



[redacted]

Amount: 80,000.00
Check #: 16657
Posting Date: 01/22/2013
As of Date: 01/22/2013

Account Name: HUMPHREYS & ASSOCIATES, I
[redacted]
Routing Number: 121042882
Type Code/Description: 479/CHECK PAID
Item Sequence Number: 8515259436

EXHIBIT "K"

[redacted]

[redacted]

16693

HUMPHREYS & ASSOCIATES, INC.
[redacted]

Wells Fargo Bank, N.A.
California
16-24-1220

PAY *SIXTY THOUSAND AND XX / 100

DATE 02/14/2013

CHECK AMOUNT $60,000.00

TO THE ORDER OF Spartan Associates, Inc

HUMPHREYS & ASSOCIATES, INC.

GENERAL ACCOUNT [redacted]
AUTHORIZED SIGNATURE

[redacted]

JPMorganChaseBank 021501 121469 9540900041913

[redacted]

Amount: 60,000.00
Check #: 16693
Posting Date: 02/15/2013
As of Date: 02/15/2013

Account Name: HUMPHREYS & ASSOCIATES, I
[redacted]
Routing Number: 121042882
Type Code/Description: 475/CHECK PAID
Item Sequence Number: 8416825747

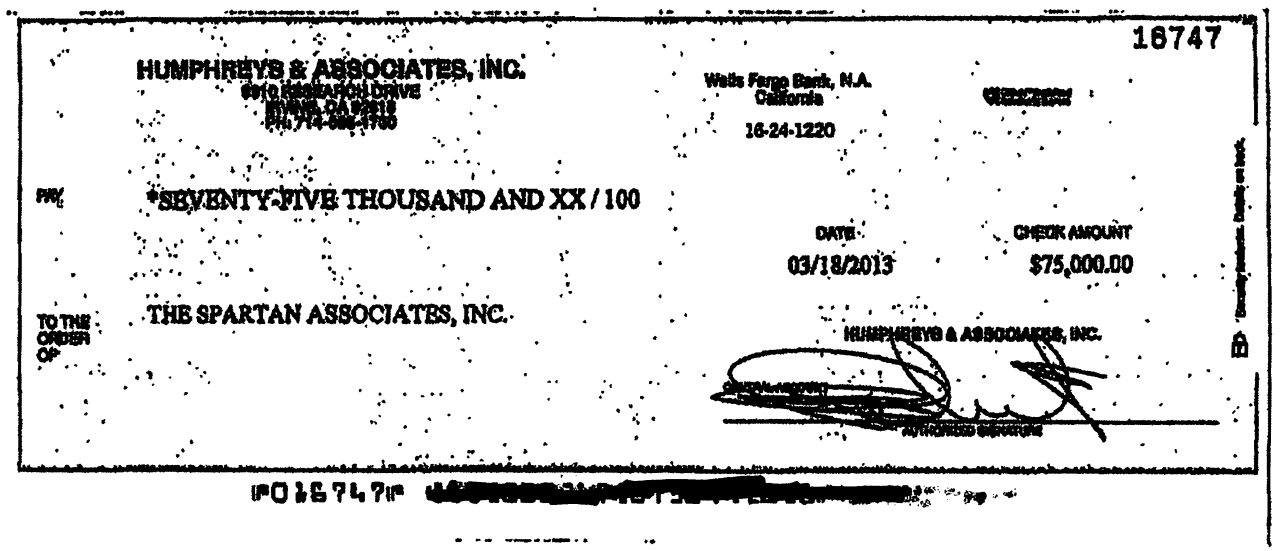
Additional Item Details: 0000692 +000600028193912

CHECK

[redacted] L

EXHIBIT "L"

[redacted]



16747

HUMPHREYS & ASSOCIATES, INC.
[redacted]

Wells Fargo Bank, N.A.
California

16-24-1220

PAY *SEVENTY-FIVE THOUSAND AND XX / 100

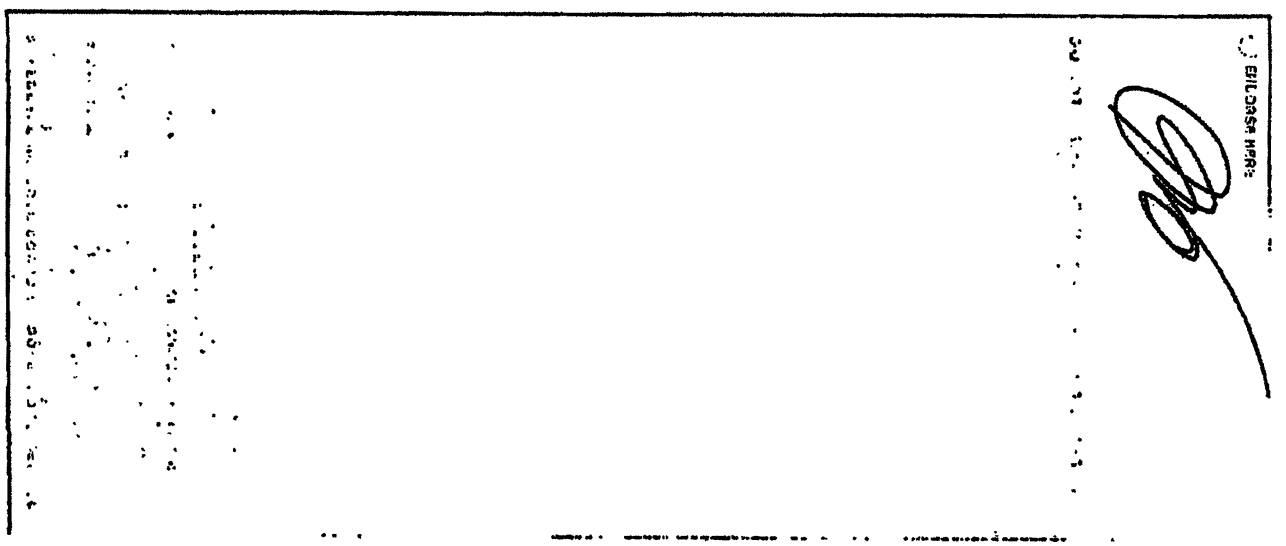
DATE 03/18/2013

CHECK AMOUNT $75,000.00

TO THE ORDER OF THE SPARTAN ASSOCIATES, INC.

HUMPHREYS & ASSOCIATES, INC.

[redacted]



[redacted]

Amount: 75,000.00
Check #: 16747
Posting Date: 03/19/2013
As of Date: 03/19/2013

Account Name: HUMPHREYS & ASSOCIATES, I
[redacted]
Routing Number: 121042882
Type Code/Description: 475/CHECK PAID
Item Sequence Number: 8513649107

Additional Item Details: 0000001 +000000008073720
CHECK

EXHIBIT "M"

[redacted]

16784

HUMPHREYS & ASSOCIATES, INC.
9910 RESEARCH DRIVE
IRVINE, CA 92618
PH. 714-668-1780

Wells Fargo Bank, N.A.
California
16-24-1220

[redacted]

PAY *NINETY-FIVE THOUSAND AND XX / 100

DATE 04/15/2013

CHECK AMOUNT $95,000.00

TO THE ORDER OF THE SPARTAN ASSOCIATES, INC.

HUMPHREYS & ASSOCIATES, INC.

[redacted]

AUTHORIZED SIGNATURE

[redacted]

JPMorganChaseBank: 041502 121469 954090035970

[redacted]

Amount: 95,000.00
Check #: 16784
Posting Date: 04/16/2013
As of Date: 04/15/2013

[redacted]

Account Name: HUMPHREYS & ASSOCIATES, I
[redacted]
Routing Number: 121042882
Type Code/Description: 475/CHECK PAID
Item Sequence Number: 5716884969

Additional Item Details: 9000902 +000000111603574

CHECK

EXHIBIT "N"

[redacted]

16819

HUMPHREYS & ASSOCIATES, INC.
[redacted]
Irvine, CA 92618
PH. 714-[redacted]-1790

Wells Fargo Bank, N.A.
California
16-24-1220

PAY *NINETY-FIVE THOUSAND AND XX/100

DATE 05/24/2013

CHECK AMOUNT $95,000.00

TO THE ORDER OF SPARTAN ASSOCIATES, INC.

HUMPHREYS & ASSOCIATES, INC.

GENERAL ACCOUNT

AUTHORIZED SIGNATURE

Security Features Details on Back.

[redacted]

[redacted]

Amount: 95,000.00
Check #: 16819
Posting Date: 05/28/2013
As of Date: 05/28/2013

[redacted]

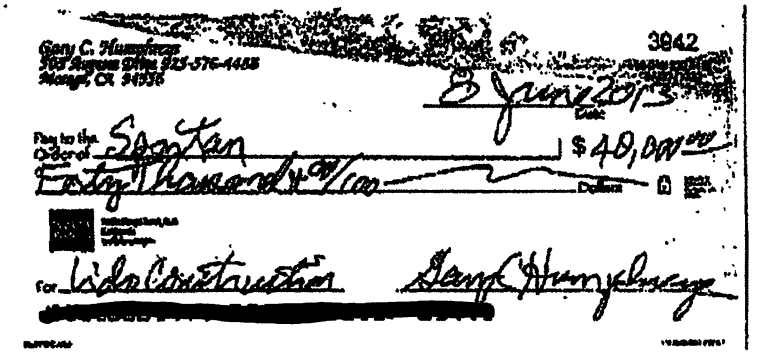
Account Name: HUMPHREYS & ASSOCIATES, I
[redacted]
Routing Number: 121042882
Type Code/Description: 475/CHECK PAID
Item Sequence Number: 8210688271

Additional Item Details: 0000001 +000000067322889
CHECK

Wells Fargo Online®

View Check Copy

Check Number	Date Posted	Check Amount	Account Number
3942	06/14/13	$40,000.00	WELLS FARGO GOLD PACKAGE CHECKING XXXXXX1323



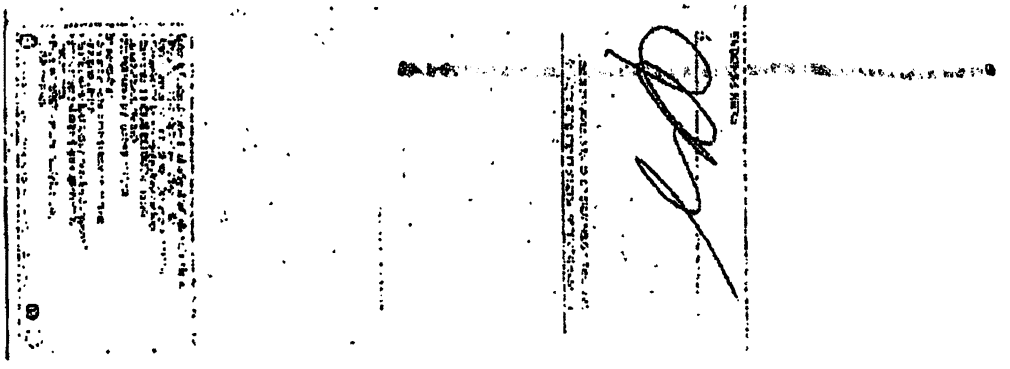


EXHIBIT "P"

[redacted]

16904

HUMPHREYS & ASSOCIATES, INC.
9910 RESEARCH DRIVE
IRVINE, CA 92618
PH. 714-585-1730

Wells Fargo Bank, N.A.
California
16-24-1220

PAY *NINETY THOUSAND AND XX / 100

DATE 07/31/2013

CHECK AMOUNT $90,000.00

TO THE ORDER OF The Spartan Associates, Inc.

HUMPHREYS & ASSOCIATES, INC.

GENERAL ACCOUNT

AUTHORIZED SIGNATURE

Security features. Details on back.

[redacted]

[redacted]

Amount: 90,000.00
Check #: 16904
Posting Date: 08/01/2013
As of Date: 08/01/2013

Additional Item Details: 0000002 +000000055928248
CHECK

Account Name: HUMPHREYS & ASSOCIATES, I
[redacted]
Routing Number: 121042882
Description: CHECK PAID
Item Sequence Number: 8818376142

EXHIBIT "Q"

Q

Exhibit [AD]

Extract of Checks/Wire Transfers from Humphreys to Bereki/Spartan

Check#/Wire Transfer	Date	Amount	Payee	Running Total
1. 1077	Apr. 13, 2012	$15,000	Adam Bereki	$15,000
2. 101	May 17, 2012	$15,000	Adam Bereki	$30,000
3. Wells WT	June 8, 2012	$40,000	Adam Bereki	$70,000
4. Wells WT	June22, 2012	$30,000	Adam Bereki	$100,000
5. Wells WT	July 19, 2012	$45,000	Spartan Const.	$145,000
6. 3815	Aug. 31, 2012	$30,000	Spartan Const.	$175,000
7. 140	Nov. 15, 2012	$50,000	Spartan Const.	$225,000
8. 3853	Dec. 8, 2012	$30,000	Adam Bereki	$255,000
9. 3856	Dec. 14, 2012	$30,000	Adam Bereki	$285,000
10. 3860	Dec. 31, 2012	$28,000	Adam Bereki	$313,000
11. 16657	Jan. 21, 2013	$80,000	Spartan Associates	$393,000
12. 16693	Feb. 14, 2013	$60,000	Spartan Associates	$453,000
13. 16747	Mar. 18, 2013	$75,000	Spartan Associates	$528,000
14. 16784	Apr. 15, 203	$95,000	Spartan Associates	$623,000
15. 16819	May 24, 2013	$95,000	Spartan Associates	$718,000
16. 3942	June 8, 2013	$40,000	Spartan	~~$758,000~~
17. 16904	July 31, 2013	$90,000	Spartan Associates	$848,000

Exhibit [AE]

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GARY HUMPHREYS et al., Cross-complainants and Respondents. v. ADAM BEREKI, Cross-defendant and Appellant,	G055075 (Super. Ct. No. 30-2015-00805807) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed.

Adam Bereki, in pro. per., for Plaintiff and Appellant.

William G. Bissell for Defendants and Respondents.

* * *

This case involves the purported general contractor for a condominium remodel project, Adam Bereki, on one side, and the condominium owners, Gary and Karen Humphreys (the Humphreys), on the other. After the Humphreys terminated Bereki's involvement, a now defunct corporation formerly owned by Bereki, Spartan Associates, Inc. (Spartan Associates), sued Humphreys, claiming they still owed approximately $83,000 for work on the project. The Humphreys denied the allegations and cross-complained against Bereki and Spartan Associates. Among the remedies they sought was disgorgement of all payments made for the project, pursuant to Business and Professions Code section 7031, subdivision (b)[1], due to Bereki's alleged failure to possess a required contractor's license.

Following a bifurcated bench trial on the disgorgement cause of action, the trial court found in favor of the Humphreys and ordered Bereki to repay them all monies received in relation to the remodel work — $848,000. Its ruling and a stipulation by the parties disposed of the remainder of the case and Bereki appealed. He challenges the disgorgement on a variety of constitutional, legal, and factual grounds. We find no merit in his contentions and, therefore affirm the judgment.

I

FACTS

The Humphreys own a condominium on Lido Isle in the City of Newport Beach. It was originally two separate units. The couple hired Bereki to do some remodeling which would, among other things, turn the two units into a single unit. After an on-site walkthrough, the Humphreys exchanged e-mails with Bereki to confirm the scope of the project. In one of his e-mails, Bereki stated he and his partner would perform the work for a specified rate.

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[1] All further statutory references are to the Business and Professions Code unless otherwise indicated.

The Humphreys agreed to the proposed scope and rates, and also inquired whether a written contract was necessary. Bereki responded that it was not; their "'words/commitment [was] enough.'" To start the project, Bereki asked the Humphreys for a $15,000 check deposit payable to him, personally.

Several months into the remodel the Humphreys, at Bereki's request, started making their progress payments to Spartan Associates instead of paying Bereki directly as an individual. Bereki never gave them an explanation for the change or what, if any, involvement Spartan Associates had in the project, but the accountings he sent included the name "Spartan Associates."

After approximately a year and a half, the Humphreys terminated Bereki's involvement and later hired a different general contractor to complete the project.

Believing the Humphreys still owed approximately $82,800 for materials used in the remodel and labor performed, Spartan Associates sued to recover that amount. The Humphreys generally denied the allegations in the complaint, and filed a cross-complaint against Bereki, Spartan Associates, and a surety company. Among the allegations were causes of action for negligence, intentional misrepresentation, and negligent misrepresentation. The trial court later granted them leave to amend the cross-complaint to include a cause of action for disgorgement of funds paid to an unlicensed contractor, pursuant to section 7031, subdivision (b).

At the Humphreys' request, the trial court bifurcated the disgorgement claim from the remainder of the claims in the cross-complaint, and it held a trial on that issue first. During the course of the two-day bench trial on the disgorgement cause of action, the court heard testimony from the Humphreys and Bereki.

Karen Humphreys testified it was her understanding, based on the initial e-mails exchanged with Bereki, that she and her husband were contracting with Bereki and his partner to do the work. They wanted a licensed contractor to do the work and obtain all the necessary permits, and she "took [Bereki] at his word that he had a license."

She also testified there was no mention of Spartan Associates until months after the project began and insisted they never entered into a contract with Spartan Associates.

Gary Humphreys concurred with his wife's testimony about the remodel details, the series of events that transpired between them and Bereki, and the agreement he believed they entered into with Bereki. In addition, he confirmed Bereki told him he was a licensed contractor and stated he would not have hired him if he knew it was otherwise.

In contrast, Bereki testified the contract for the couple's remodel project was between the Humphreys and Spartan Associates. He nevertheless acknowledged his initial e-mail communications to the Humphreys made no mention of Spartan Associates, including the one which set forth the proposed scope of work and hourly rates. When asked about contractor's licenses, he admitted he never possessed one as an individual or as a joint venture with his partner. Spartan Associates, however, did have a contractor's license at the time of the project.

As for the work done for the Humphreys, Bereki testified he believed Spartan Associates performed all of it. He testified that the three city permits for the project were all obtained by, and issued to, Spartan Associates. Additionally, he produced contracts with subcontractors who performed aspects of the remodel work. The majority of these contracts were between the given subcontractor and Spartan Associates.[2]

The trial court found in favor of the Humphreys on the disgorgement cause of action based on its determination that Bereki, not Spartan Associates, was the

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[2] Bereki filed an unopposed motion to augment the record on appeal with certain exhibits admitted in the trial court. We deny the request because the exhibits already are "deemed part of the record" by Court Rule. (Cal. Rule of Court, rule 8.122(a)(3).) We have considered the copies of the exhibits he provided in conjunction with our review of this appeal.

contractor who performed all the remodel work. As a result, the court also found in favor of the Humphreys on Spartan Associates's complaint. The remainder of the cross-complaint was dismissed without prejudice at the Humphreys' request.

II

DISCUSSION

Bereki challenges the portion of the judgment disgorging all compensation paid to him for his work on the Humphreys' remodel project.[3] Though articulated in various ways, his arguments boil down to the following: (1) disgorgement under section 7031, subdivision (b), is unconstitutional or, alternatively, criminal in nature; (2) the trial court erred in ordering disgorgement because Spartan Associates, not Bereki, performed the work and Spartan Associates held a contractor's license; (3) even assuming Bereki performed the work, the state's contractor licensing requirement does not apply to him as a "natural person"; (4) there was insufficient evidence to support disgorgement, including no evidence of injury due to Bereki's failure to be individually licensed; (5) the court should have offset the disgorgement amount by the value the Humphreys received through the remodel work; (6) it was improper to order full disgorgement because certain payments were not made from the Humphreys' personal accounts; and (7) the court

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[3] Bereki appears to also challenge a postjudgment sanctions order the trial court issued based on Bereki's motion to compel a response to a demand for a bill of particulars filed after entry of judgment. The sanctions order is not encompassed by his earlier appeal from the judgment. And although such a postjudgment order is separately appealable (Code Civ. Proc., § 904.1, subds. (a)(2) & (b)), Bereki did not file another appeal. Accordingly, the issue is not before us. (*Silver v. Pacific American Fish Co., Inc.* (2010) 190 Cal.App.4th 688, 693 [court without jurisdiction to review postjudgment order from which no appeal is taken].)

erroneously failed to provide a written statement of decision.[4] We find no merit to any of these contentions.

A. Disgorgement Remedy Under Section 7031

Relying heavily on *White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 517 (*White*), the decision in *Alatriste v. Cesar's Exterior Designs, Inc.* (2010) 183 Cal.App.4th 656, 664-666 (*Alatriste*) aptly summarizes the nature, purpose and scope of the litigation prohibition and the disgorgement remedy provided in section 7031, subdivisions (a) and (b).

"Section 7031[, subdivision] (b) is part of the Contractors' State License Law (§ 7000 et seq.), which 'is a comprehensive legislative scheme governing the construction business in California. [This statutory scheme] provides that contractors performing construction work must be licensed unless exempt. [Citation.] "The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. [Citations.]"

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[4] After briefing was complete, Bereki filed a motion asking that we take judicial notice of a plethora of items, among which are the federal Constitution and other foundational documents for this country, federal and state statutes, and a variety of case law. To begin, "[r]equests for judicial notice should not be used to 'circumvent [ ]' appellate rules and procedures, including the normal briefing process." (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1064, overruled on another point as stated in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257.) Further, "[a] request for judicial notice of published material is unnecessary. Citation to the material is sufficient." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 45, fn. 9.) We therefore deny Bereki's request as unnecessary to the extent it included such materials. As for the remaining items, we likewise deny the request because we find them not properly the subject of a request for judicial notice and/or irrelevant to resolution of the matters before us. (Evid. Code, §§ 451, 452; *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1089, fn. 4 [appellate court will not take judicial notice of irrelevant material].)

[Citation.] The [laws] are designed to protect the public from incompetent or dishonest providers of building and construction services. [Citation.]' [Citation.]

"This statutory scheme encourages licensure by subjecting unlicensed contractors to criminal penalties and civil remedies. [Citation.] The civil remedies 'affect the unlicensed contractor's right to receive or retain compensation for unlicensed work.' (*Ibid.*) The hiring party is entitled to enforce these remedies through a defensive 'shield' or an affirmative 'sword.' [Citation.]

"The *shield*, contained in section 7031[, subdivision] (a), was enacted more than 70 years ago, and provides that a party has a complete defense to claims for compensation made by a contractor who performed work without a license, unless the contractor meets the requirements of the statutory substantial compliance doctrine. [Citation.] Section 7031[, subdivision] (e), the substantial compliance exception, provides relief only in very narrow specified circumstances, and '*shall not apply* . . . where the [unlicensed contractor] has never been a duly licensed contractor in this state." [Citation.]

"The California Supreme Court has long given a broad, literal interpretation to section 7031[, subdivision] (a)'s shield provision. [Citation.] The court has held that [it] applies even when the person for whom the work was performed *knew* the contractor was unlicensed. [Citation.] . . . . [It] explained that '"'Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties*, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .'"' [Citation.] '"Because of the strength and clarity of this policy [citation]," the bar of section 7031 [, subdivision] (a) applies "[r]egardless of the equities."' [Citations.]

"In 2001, the Legislature amended section 7031 to add a *sword* remedy to the hiring party's litigation arsenal. This sword remedy, contained in section

7031[,subdivision] (b), currently reads: 'Except as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract.' [¶] By adding this remedy, the Legislature sought to further section 7031[,subdivision] (a)'s policy of deterring violations of licensing requirements by 'allow[ing] persons who utilize unlicensed contractors to recover compensation paid to the contractor for performing unlicensed work. [Citation.]' [Citation.]" (*Alatriste, supra*, 183 Cal.App.4th at pp. 664-666, fns. omitted.)

Based on the statutory language and legislative history, both *Alatriste* and *White* "concluded that the Legislature intended that courts interpret sections 7031[, subdivision] (a) and 7031[, subdivision] (b) in a consistent manner, resulting in the same remedy regardless of whether the unlicensed contractor is the plaintiff or the defendant." (*Alatriste, supra*, 183 Cal.App.4th at p. 666, citing *White, supra*, 178 Cal.App.4th at pp. 519-520.) These principles are well-settled under the law.

Bereki contends the disgorgement remedy is penal in nature and, therefore, a contractor defending against such a claim must be afforded all criminal rights and protections. Not so. Disgorgement is a civil consequence — "an equitable remedy" — for performing work without a required contractor's license. (*S.E.C. v. Huffman* (5th Cir. 1993) 996 F.2d 800, 802 (*S.E.C.*); see *Walker v. Appellate Division of Superior Court* (2017) 14 Cal.App.5th 651, 657 [§ 7031 contemplates civil proceedings].) The Legislature created a separate criminal penalty. Specifically, section 7028 provides that acting or operating in the capacity of a contractor without a required license is a criminal misdemeanor subject to jail time, or fines, and restitution. (§ 7028, subds. (a)-(c), (h).)

For similar reasons, Bereki's attempt to characterize disgorgement as an award of unconstitutional punitive damages is unavailing. As an equitable remedy, disgorgement is not punishment and, therefore, it does not implicate the excessive fines

clause of the Eighth Amendment to the United States Constitution. (*S.E.C., supra*, 996 F.2d at p. 802; see *U.S. v. Philip Morris USA* (D.C. 2004) 310 F.Supp.2d 58, 62-63.)

B. Contractor Licensing Requirement

Before turning to application of section 7031, subdivision (b), we address Bereki's claim that he, in his individual capacity, did not need a contractor's license. His argument is twofold, one part legal and the other part factual. We reject both.

As for the legal argument, Bereki asserts that licensing requirements only apply to "fictitious" persons, not "natural" persons such as himself. He cites no authority for his unique interpretation of the relevant statutes. And, the statutes provide otherwise. Contractors who are required to obtain a license include "[a]ny person . . . who . . . undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid to construct any . . . home improvement project, or part thereof." (§ 7026.1, subd. (a)(2).) In turn, "'[p]erson'" is defined to include "an individual[,]" as well as a variety of types of business entities and associations. (§ 7025, subd. (b).) "In ordinary usage[,] the word 'individual' denotes a natural person not a group, association or other artificial entity. (See Webster's Third New Internat. Dict. (2002 ed.) p. 1152 [giving a primary definition of 'individual' as 'a single human being as contrasted with a social group or institution'].)" (*City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 623, disapproved of on other grounds in *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 416.) There is nothing in the statutes that indicates a different, specialized meaning. (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238 ["In examining the language, the courts should give to the words of the statute their ordinary, everyday meaning [citations] unless, of course, the statute itself specifically defines those words to give them a special meaning"].)

Bereki's factual attack concerns the trial court's conclusion that he, not Spartan Associates, was the contractor who performed the remodel work for the Humphreys. Though he implores us to engage in de novo review of this issue, it is a factual determination which we review for substantial evidence. (*Escamilla v. Deppartment of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514.) There is ample evidence in the record supporting the court's conclusion.[5]

Both of the Humphreys testified that on the first day they met Bereki for a walkthrough of the site, he informed them that he and his partner would act as the general contractor for the project. Bereki followed up with a written proposal and estimate, which he sent to the couple from his personal e-mail address. When they inquired whether he had a contractor's license, he assured them he did, and when they asked him to whom they should make out their payment checks, he told them to put them in his name.

At no time during this series of events did Bereki ever mention Spartan Associates. Notably, Bereki did not apply to the State Board of Equalization to register Spartan as an employer until roughly three months after the remodel work began. Then, about four months into the project, he introduced the corporation into the mix by asking the Humphreys, without any explanation, to make future payments to Spartan Associates.

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5 Bereki filed a motion asking us to consider additional evidence not presented in the trial court, among which are two declarations, an e-mail correspondence and a letter. He believes the documents are relevant to establishing the identity of the contracting parties. We deny the motion as "[i]t has long been the general rule and understanding that 'an appeal reviews the correctness of a judgment as of the time of its rendition, *upon a record of matters which were before the trial court for its consideration.*'" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405, italics added.) Circumstances warranting an exception to this rule are very rare and we do not find them extant here, particularly in light of the conflicting evidence weighed by the trial court. (See *Diaz v. Professional Community Management, Inc.* (2017) 16 Cal.App.5th 1190, 1213 ["'The power to take evidence in the Court of Appeal is never used where there is conflicting evidence in the record and substantial evidence supports the trial court's findings.'"].)

Based on what transpired, the couple believed they contracted with Bereki, in his individual capacity, to complete the remodel work.

While Bereki claims the Humphreys lied when they testified at trial because some of their factual statements purportedly contradicted those they made at the summary judgment stage, our role is not to resolve factual disputes or to judge the credibility of witnesses. (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518.) The trial court bore that responsibility in this case, and our review of the record reveals substantial evidence to support its conclusion that Bereki, not Spartan Associates, was the contractor for the job.

C. Disgorgement Remedy Under Section 7031

Separate from his general attacks on section 7031, subdivision (b), Bereki challenges its application under the specific facts of this case. He first asserts disgorgement is an improper remedy because it gives the Humphreys a double benefit — the remodel improvements and the money they otherwise would have paid for them. In the context of the statute at issue, however, courts have uniformly rejected such an argument and required disgorgement, even though this remedy often produces harsh results. (See, e.g., *Alatriste, supra*, 183 Cal.App.4th at pp. 672-673; *White, supra*, 178 Cal.App.4th at pp. 520-521; see also *Jeff Tracy, Inc. v. City of Pico Rivera* (2015) 240 Cal.App.4th 510, 521.) Full disgorgement is required; offsets and reductions for labor and materials received are not permitted.

Equally meritless is Bereki's contention that there was no justiciable claim under the statute because there was no evidence the Humphreys were injured by his lack of a contractor's license. Bereki cites no authority for that novel proposition. Injury is not an element of a cause of action under the statute. The disgorgement consequence is not remedial in nature. Similar to the licensing requirement, it is a proactive measure

intended to decrease the likelihood of harm due to "incompetent or dishonest providers of building and construction services." (*White, supra*, 178 Cal.App.4th at pp. 517.)

We also are not persuaded by Bereki's objection to the amount the court ordered him to repay to the Humphreys. He highlights evidence showing that some of the payment checks came from Gary Humphreys' corporation, and he argues the Humphreys are not entitled to those amounts given they did not pay them in the first instance. While we do not necessarily see eye-to-eye with Bereki's legal reasoning, we need not reach the legal aspect of his argument due to the trial court's factual findings.

The trial court, relying on Gary Humphreys' uncontradicted testimony, found that the contested payments ultimately were attributable to Gary Humphrey himself. Substantial evidence supports this conclusion. The Humphreys testified that the business is an S corporation, and at the relevant time Gary Humphreys was the sole shareholder and an employee. Gary Humphreys explained he was traveling often for business during the remodel, including at times when Bereki insisted on needing money "'right away.'" To facilitate the payments, Gary Humphreys had persons in his corporation with signing authority write checks from the corporate account. The amounts paid on the Humphreys behalf were then accounted for through a reduction in the regular income Gary Humphreys received from the corporation. He paid income taxes on those amounts because they were included in the figures listed on his annual W-2 form.

Under these circumstances, we find ample evidence to support the trial court's factual finding that although certain payments to Bereki were made from the Humphreys' business account, they ultimately were accounted for in a way that ensured they were personal payments from the Humphreys, as individuals. Accordingly, the Humphreys were entitled to "all compensation paid." (§ 7031, subd. (b).)

We recognize that the provisions of section 7031, including the disgorgement remedy, are harsh and may be perceived as unfair. As courts have explained, however, they stem from policy decisions made by the Legislature.

(*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 423; *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995; *Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 151; see *Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 896; *Alatriste, supra*, 183 Cal.App.4th at p. 672.) "[T]he choice among competing policy considerations in enacting laws is a legislative function" (*Coastside Fishing Club v. California Resources Agency* (2008) 158 Cal.App.4th 1183, 1203), and absent a constitutional prohibition, we may not interfere or question the wisdom of the policies embodied in the statute. (*Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 25; *Alatriste, supra*, 183 Cal.App.4th at p. 672.)

D. Statement of Decision

Though he admits he did not timely request a statement of decision, Bereki claims the trial court should have nevertheless provided one after he made an untimely request. To the contrary, "[n]o statement of decision is required if the parties fail to request one." (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970; see also Code Civ. Proc., § 632.) The trial court's denial was proper. (See *In re Marriage of Steinberg* (1977) 66 Cal.App.3d 815, 822 [upholding court's refusal to make findings of fact and conclusions of law due to party's failure to timely request them].)

III

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

GOETHALS, J.

Exhibit [AF]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Adam Bereki,

Plaintiff,

v.

Gary Humphreys;

Karen Humphreys,

Defendants.

Case No.: CV 19-2050-CBM-ADS(x)

ORDER RE: DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT PURSUANT TO RULE 12(B)(1), (6) & (7) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND REQUEST FOR JUDICIAL NOTICE [JS-6]

The matter before the Court is Defendants Gary Humphreys and Karen Humphreys' (collectively, "Defendants'" or "The Humphreys'") "Motion to Dismiss the First Amended Complaint Pursuant to Rule 12(b)(1), (6), & (7) of the Federal Rules of Civil Procedure and Request for Judicial Notice." (Dkt. No. 9 (the "Motion").)[1]

I. BACKGROUND

This action arises from a state court judgment in favor of Defendants and

[1] Following the hearing on the Motion, Plaintiff filed a document entitled "Additional Authorities and Corrected Testimony To Be Considered By the Court re: Defendants Motion to Dismiss Filed 11/19/19," which has been reviewed by the Court. (Dkt. No. 30 (hereinafter, "Additional Authorities").)

against Plaintiff in connection with remodeling work performed by Plaintiff. On April 20, 2017, following a bench trial, the Superior Court, County of Orange, entered judgment in favor of The Humphreys and against Plaintiff in the amount of $848,000 (plus costs).[2] (FAC Exs. D, G.) The Superior Court found Plaintiff (as opposed to his company Spartan Associates) was the contractor who performed the remodel work for The Humphreys, and found Plaintiff was not a licensed contractor. Accordingly, the superior court awarded The Humphreys disgorgement of all compensation paid by The Humphreys to Plaintiff for the remodel work pursuant to Cal. Bus. & Prof. Code § 7031.[3] Plaintiff appealed the state court judgment. The California Court of Appeals affirmed the judgment in favor of The Humphreys. Plaintiff's request for review by the California Supreme Court was denied, and Plaintiff's writ for certiorari with the United States Supreme Court was also denied.

Plaintiff then commenced this action on October 28, 2019. On November 8, 2019, Plaintiff filed a First Amended Complaint ("FAC") as a matter of right naming only The Humphreys as defendants. (Dkt. No. 11.) The FAC alleges this action is "an Independent Action in Equity to relieve a party from a judgment, order or proceeding pursuant to FRCP Rule 60(d)" (FAC at p.13), and that this action "is a direct attack on the jurisdiction of the California trial and appellate Courts in case numbers – 30-2015-00805897, and G055075" (*id.* at p.17).

II. STATEMENT OF THE LAW

A. Fed. R. Civ. Proc. 12(b)(1)

On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction,

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[2] While the superior court judgment reflects judgment entered against Plaintiff in the amount of $848,000, the FAC alleges Plaintiff was "fined $930,000 for allegedly doing remodel construction work without a contractor's license." (FAC at p.16.)

[3] California Business & Professions Code § 7031 provides: "[A] person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract."

the party asserting jurisdiction bears the burden of proving jurisdiction exists. *Sopak v. Northern Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995). A motion under Rule 12(b)(1) may challenge the court's jurisdiction facially, based on the legal sufficiency of the claim, or factually, based on the legal sufficiency of the jurisdictional facts. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Where the Rule 12(b)(1) motion attacks the complaint on its face, the court considers the complaint's allegations to be true, and draws all reasonable inferences in the plaintiff's favor. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009) (citation omitted). Where the Rule 12(b)(1) motion challenges the substance of jurisdictional allegations, the court does not presume the factual allegations to be true, and may consider evidence such as affidavits and testimony to resolve factual disputes regarding jurisdiction. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

B. Fed. R. Civ. Proc. 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Dismissal of a complaint can be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To survive a motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663, (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A formulaic recitation of the elements of a cause of action will not suffice. *Twombly*, 550 U.S. at 555. To conform to Federal Rule of Civil Procedure 8, the plaintiff must make more than "an unadorned, the-defendant-harmed me" accusation. *Iqbal*, 556 U.S. at 678. Labels and conclusions are insufficient to meet the Plaintiff's obligation to provide the grounds of his or her entitlement to relief. *Twombly*, 550 U.S. at 555. "Factual allegations must be

enough to raise a right to relief above the speculative level." *Id.* If a complaint cannot be cured by additional factual allegations, dismissal without leave to amend is proper. *Id.* On a motion to dismiss for failure to state a claim, courts accept as true all well-pleaded allegations of material fact and construes them in a light most favorable to the non-moving party. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031–32 (9th Cir. 2008). A court may only consider the allegations contained in the pleadings, exhibits attached to or referenced in the complaint, and matters properly subject to judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

C. Fed. R. Civ. Proc. 12(b)(7)

Rule 12(b)(7) permits a party to move to dismiss the case for "failure to join a party under Rule 19." Fed. R. Civ. Proc. 12(b)(7). Rule 19 requires "[a] person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction" to be joined as a party if:

> **(A)** in that person's absence, the court cannot accord complete relief among existing parties; or
>
> **(B)** that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > **(i)** as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > **(ii)** leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19. If "a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. Proc. 19(b).

III. DISCUSSION

A. Request for Judicial Notice

Defendants request that the Court take judicial notice of the following:

1. Judgment entered against Plaintiff in Orange County Superior Court, Case No. 30-2015-00805807 (Ex. A);
2. Plaintiff's opening brief filed with the California Court of Appeals appealing the superior court judgment (Ex. B);
3. California Court of Appeals' opinion affirming superior court judgment (Ex. C);
4. Plaintiff's Petition for Review Filed with the Supreme Court of California, Case No. S252954 (Ex. D);
5. California Supreme Court's denial of Plaintiff's Petition for Review (Ex. E);
6. Plaintiff's Petition for Writ of Certiorari filed with the United States Supreme Court, Case No. 18-1416 (Ex. F); and
7. United State Supreme Court's denial of Plaintiff's Petition for Writ of Certiorari (Ex. G).[4]

(Hereinafter, "RJN".) The Court grants Defendants' request for judicial notice because the accuracy of Exhibits A-G can be "readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201.

B. Rooker-Feldman Doctrine

Defendants move to dismiss the FAC for lack of subject matter jurisdiction pursuant to the Rooker-Feldman doctrine. The Rooker-Feldman doctrine bars losing parties "from seeking what in substance would be appellate review of the state judgment in a United States district court." *Johnson v. De Grandy*, 512 U.S. 997, 1006-07 (1994). "The purpose of the doctrine is to protect state judgments from collateral federal attack." *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001). For the *Rooker–Feldman* "to apply, a plaintiff must seek not only to set aside a state court judgment; he or she must also allege a legal error by the state court as the basis for that relief." *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004).

Here, Plaintiff seeks relief from the superior court judgment pursuant to Fed. R. Civ. P. 60(d) (FAC at p.13), and an order from this Court (1) vacating the

[4] Plaintiff did not oppose Defendants' request for judicial notice.

judgment entered against Plaintiff in the superior court action and (2) ordering the superior court to remove the property lien based on the judgment entered against Plaintiff in the superior court action (*id.*, Prayer for Relief). The FAC also alleges the instant federal action "is a direct attack on the jurisdiction of the California trial and appellate Courts in case numbers – 30-2015-00805897, and G055075." (*Id.* at p.17.) Therefore, Plaintiff seeks relief from the state court judgment affirmed by the California Court of Appeals.

The FAC also alleges a legal error by the superior court and California Court of Appeals on the ground that the superior court and appellate court entered and affirmed the judgment against Plaintiff without supporting evidence, and erred in holding disgorgement pursuant to Cal. Bus. & Proc. § 7031 is an equitable remedy rather than a penalty, thereby "resulting in a void judgment." (FAC at p.82, 90.)

(1) Extrinsic Fraud on the Court

Where the federal plaintiff does not complain of a legal injury caused by a state court judgment, but rather of a legal injury caused by an adverse party, Rooker-Feldman does not bar jurisdiction. *Noel v. Hall*, 341 F.3d 1148, 1163 (9th Cir. 2003). Therefore, the Rooker-Feldman doctrine does not apply where the plaintiff alleges extrinsic fraud on a state court and seeks to set aside a state court judgment obtained by that fraud. *Kougasian*, 359 F.3d at 1141.

Plaintiff contends this action is not barred because this Court has the power to set aside or enjoin state-court judgments procured by fraud. The FAC alleges Defendants committed "fraud in the procurement of jurisdiction" in the superior court action because Defendants took one position during summary judgment (i.e., that they had contracted with Spartan (Plaintiff's company) to perform the work) and then took a contrary position during trial (i.e., that they believed they contracted with Plaintiff to perform the work). (FAC at 94-97.) Such alleged conduct does not constitute "extrinsic" fraud on the court since such evidence was

presented by Defendants before the superior court, nor constitute a legal injury caused by Defendants. Rather, the FAC alleges the superior court erred in entering judgment despite Defendants taking contrary positions throughout the state court litigation. Therefore, the extrinsic fraud exception to the Rooker-Feldman doctrine does not apply. *Kougasian*, 359 F.3d at 1141.

(2) Constitutional Challenge

Plaintiff also argues the Rooker-Feldman doctrine does not bar this action because the FAC raises a constitutional challenge to California Business & Professions Code §§ 7071.17 and 7031. While the FAC raises a "facial" and "as applied" challenge to the constitutionality of Sections §§ 7071.17 and 7031, the relief sought by Plaintiff is an order vacating or voiding the state court judgment. Moreover, the basis for Plaintiff's constitutional challenge is that the Superior Court and California Court of Appeals lacked subject matter jurisdiction to enter and affirm the judgment against Plaintiff because (1) there is no evidence supporting the judgment; and (2) disgorgement pursuant to Cal. Bus. & Prof. Code § 7031 is a penalty and an excessive fine, and therefore unconstitutional. The California Court of Appeals, however, found there was evidence supporting the Superior Court's judgment and held disgorgement pursuant to Cal. Bus. & Prof. Code § 7031 is an equitable remedy, not a penalty or fine. (RJN, Ex. C.) Thus, despite purporting to raise a "constitutional" challenge in his FAC, Plaintiff seeks relief from the state court judgment in this action and asserts legal errors by the Superior Court and California Court of Appeals. Therefore, the Rooker-Feldman doctrine applies to bar Plaintiff's instant action.

* * *

Accordingly, the Court finds Plaintiff's action is barred pursuant to the Rooker-Feldman doctrine because Plaintiff seeks relief from the state court judgment and alleges legal errors by the state trial and appellate court. *See Bell v. City of Boise*, 709 F.3d 890, 897 (9th Cir. 2013).

C. Res Judicata / Collateral Estoppel

Defendants also move to dismiss the FAC as barred by the res judicata / collateral estoppel doctrines.[5]

Issue preclusion, or collateral estoppel, bars relitigation of issues that have been adjudicated in a prior action. *DKN Holdings LLC*, 61 Cal. 4th at 824. Pursuant to the doctrine of collateral estoppel, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *see also* 28 U.S.C. § 1738. Under California law, collateral estoppel/issue preclusion applies: "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." *DKN Holdings LLC*, 61 Cal. 4th at 825.

Here, the FAC alleges the superior court lacked jurisdiction and violated Plaintiff's due process rights because there was no evidence supporting the judgment. The FAC, however, alleges Plaintiff challenged the jurisdiction of the superior court in a motion to vacate the judgment, which was denied. (FAC at 97-98.)

Plaintiff appealed the state court judgment. In his appeal, Plaintiff argued the Superior Court committed due process violations and lacked subject matter jurisdiction, and argued Cal. Bus. & Prof. Code § 7031 was unconstitutional because it is penal in nature. (RJN, Ex. B.) The California Court of Appeals affirmed the Superior Court's judgment, and found Plaintiff's arguments on appeal had "no merit." (*Id.* Ex. C; *see also* FAC at p.19 (alleging California Court of Appeal held the superior court judgment against Plaintiff was a "non-punitive"

[5] "Res judicata" refers to claim preclusion. *Henrichs v. Valley View Dev.*, 474 F.3d 609, 615 (9th Cir. 2007) Since the claims asserted by Plaintiff in this action were not asserted in the state court action, res judicata would not apply to bar Plaintiff's claims here.

"equitable remedy").)

Plaintiff filed a petition for review with the California Supreme Court wherein Plaintiff argued the superior court and California Court of Appeals lacked jurisdiction and violated Plaintiff's due process rights, and argued Cal. Bus. & Prof. Code §§ 7031 and 7071.17 were unconstitutional and authorize imposition of penalties. (RJN, Ex. D.) The California Supreme Court denied Plaintiff's petition for review. (*Id.* Ex. E.) On April 23, 2019, Plaintiff filed a petition for writ of certiorari with the United States Supreme Court, which was denied. (*Id.* Exs. F, G.)

Therefore, the issues raised by Plaintiff in this federal action regarding the Superior Court and California Court of Appeal's lack of jurisdiction and violation of Plaintiff's due process rights, the unconstitutionality of Cal. Bus. & Prof. Code §§ 7031 and 7071.17, Plaintiff's contention that disgorgement pursuant to Cal. Bus. & Prof. Code § 7031 is a penalty/fine rather than an equitable remedy, and the lack of evidence supporting the Superior Court's judgment and California Court of Appeals decision affirming the judgment, were actually litigated by Plaintiff in the state court action and necessarily decided in a final judgment. *See DKN Holdings LLC*, 61 Cal. 4th at 825; *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1132 (9th Cir. 2019).

Thus, even if the instant action was not barred pursuant to the Rooker-Feldman doctrine, the Court finds Plaintiff is collaterally estopped from bringing this action. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 750 (9th Cir. 2006).

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IV. CONCLUSION

Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss, and dismisses the action with prejudice because Plaintiff is collaterally stopped from bringing this action.[6] The Court also finds this action is barred pursuant to the Rooker-Feldman doctrine.[7]

IT IS SO ORDERED.

DATED: February 6, 2020.

CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

[6] Because Plaintiff's claims are barred on collateral estoppel grounds, leave to amend would be futile. *See Tait v. Asset Acceptance, LLC*, 2013 WL 3811767 (C.D. Cal. July 22, 2013).

[7] Defendants also move to dismiss the FAC on the ground Plaintiff fails to join the superior court and California Court of Appeals which are "indispensable parties." Because the Court dismisses this action pursuant to the Rooker-Feldman doctrine, and finds collateral estoppel would bar Plaintiff from bringing this action, it does not reach the issue of whether the superior court and California Court of Appeals are indispensable parties.

Exhibit [AG]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Adam Bereki,

Plaintiff,

v.

Gary Humphreys;

Karen Humphreys,

Defendants.

Case No.: CV 19-2050-CBM-ADS(x)

ORDER RE: NINTH CIRCUIT'S REFERRAL AND REVOCATION OF PLAINTIFF'S IN FORMA PAUPERIS STATUS [34]

Plaintiff filed the Complaint in this action on October 28, 2019. (Dkt. No. 1.) On October 31, 2019, the Court granted Plaintiff's Request to Proceed in Forma Pauperis. (Dkt. No. 5.) On February 6, 2020, this Court issued an order granting Defendants' Motion to Dismiss, and dismissed the action with prejudice because Plaintiff is collaterally estopped from bringing this action and the action is barred pursuant to the Rooker-Feldman doctrine. (Dkt. No. 31 (the "Order").)

Plaintiff filed a notice of appeal of the Order on February 10, 2020. (Dkt. No. 32.) On February 24, 2020, the Ninth Circuit referred the matter to this Court "for the limited purpose of determining whether in forma pauperis status should continue for this appeal or whether the appeal is frivolous or taken in bad faith."

(Dkt. No. 34.)

The Court finds Plaintiff's in forma pauperis status should not continue for the appeal because Plaintiff's appeal of the Order is frivolous. Therefore, the Court revokes Plaintiff's in forma pauperis status. *See* 28 U.S.C. § 1915(a)(3) ("An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."); *Hooker v. Am. Airlines*, 302 F.3d 1091, 1092 (9th Cir. 2002) (revocation of in forma pauperis status is appropriate where the district court finds the appeal to be frivolous).

The clerk of this Court shall provide notice to the Ninth Circuit and the parties of this Order.

IT IS SO ORDERED.

DATED: February 27, 2020.

CONSUELO B. MARSHALL
UNITED STATES DISTRICT JUDGE

CC: 9TH COA

Exhibit [AH]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 19-2050-CBM-(ADSx)	Date	November 12, 2019

Title	*Bereki v. Humphreys et al.*

Present: The Honorable	CONSUELO B. MARSHALL, UNITED STATES DISTRICT JUDGE

YOLANDA SKIPPER	NOT REPORTED
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff:	Attorneys Present for Defendants:
NONE PRESENT	NONE PRESENT

Proceedings: **IN CHAMBERS- ORDER RE: REQUEST FOR ASSISTANCE OF COUNSEL**

The matter before the Court is Plaintiff's Request for Assistance of Counsel (the "Request").

The Request is **DENIED** because the Court does not appoint counsel in civil cases.

The Court, however, advises Plaintiff that the Central District of California offers Pro Se Clinics in Los Angeles, Riverside, and Santa Ana to provide information and guidance to *pro se* litigants, such as Plaintiff, who are not represented by counsel. Below is information regarding the Pro Se Clinics:

Los Angeles Federal Pro Se Clinic
The Edward Roybal R. Federal Building and U.S. Courthouse
255 East Temple Street, Suite 170 (Terrace Level)
Los Angeles, CA 90012
Hours (by appointment only): Mondays, Wednesdays, and Fridays, 9:30 am - 12:00 pm and 2:00 pm - 4:00 pm
To make an appointment, contact Public Counsel at 213-385-2977, Ext. 270.

Riverside Joint Federal Pro Se Clinic
George E. Brown Federal Building
3420 Twelfth Street, Room 125
Riverside, CA 92501
Hours: Tuesdays and Thursdays, 10:00 am – 2:00 pm

Santa Ana Federal Pro Se Clinic
Ronald Reagan Federal Building and United States Courthouse
411 W. 4th Street, Room 1055 (first floor)
Santa Ana, CA 92701
Hours: Tuesdays, 1:00 pm – 4:00 pm; Thursdays, 10:00 am – 12:00 pm and 1:30 pm – 3:30 pm

Plaintiff can find more information about the Pro Se Clinics, including contact information, at http://prose.cacd.uscourts.gov/federal-pro-se-clinics.

IT IS SO ORDERED.