THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

BEFORE THE COURT-APPOINTED REFEREE
IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY
DISPUTED CLAIMS DOCKET

In Re Liquidator Number:	**2009-HICIL-44**
Proof of Claim Number:	**CLMN711647**
Policy or Contract Number:	**GL-1692617**
Claimant Name:	**Abedowale O. Osijo**
Insured or Reinsured Name:	**Housing Resources Management**
Date of Loss:	**October 7, 1988**

EXHIBITS TO LIQUIDATOR'S SECTION 15 SUBMISSION

Document **Exhibit**

PROOF OF CLAIM
The Home Insurance Company,
Merrimack County Superior Court, State of New Hampshire 03-E-0106
Read Carefully Before Completing This Form
Please print or type

FOR LIQUIDATOR'S USE ONLY
DATE PROOF OF CLAIM RECEIVED

RECEIVED
JAN 16 2007
HICIL

CLMN 711647

The Deadline for Filing this Form is June 13, 2004.

You should file this Proof of Claim form if you have an actual or potential claim against The Home Insurance Company of any of its former subsidiaries* ("The Home") even if the amount of the claim is presently uncertain. To have your claim considered by the Liquidator, this Proof of Claim must be postmarked no later than June 13, 2004. Failure to timely return this completed form will likely result in the DENIAL OF YOUR CLAIM. You are advised to retain a copy of this completed form for your records.

1. Claimant's Name: ADEBOWALE O. OSIJO
2. Claimant's Address: 9015 EAST PONTIAC WAY
APT. 203 FRESNO CA 93726
3. Claimant's Telephone Number: (559) 273-5765
Fax Number: (559) 221-0585
Email address: adebowalesijo@hotmail.com
4. Claimant's Social Security Number, Tax ID Number or Employer ID Number: 405-19-5923

If your name, address, e-mail address, or telephone number set forth above are incorrect, or if they change, you must notify the Liquidator so she can advise you of new information.

5. Claim is submitted by (check one):
a) ____Policyholder or former policyholder
b) X Third Party Claimant making a claim against a person insured by The Home
c) ____Employee or former employee
d) ____Broker or Agent
e) ____General Creditor, Reinsurer, or Reinsured
f) ____State or Local Government Entity
g) ____Other; describe: _____

Describe in detail the nature of your claim. You may attach a separate page if desired. Attach relevant documentation in support of your claim, such as copies of outstanding invoices, contracts, or other supporting documentation.
Please see the attached Summons and Complaint

6. Indicate the total dollar amount of your claim. If the amount of your claim is unknown, write the word "unknown", BUT be sure to attach sufficient documentation to allow for determination of the claim amount.
$3,000,000 (if amount is unknown, write the word "unknown").

7. If you have any security backing up your claim, describe the nature and amount of such security. Attach relevant documentation.

8. If The Home has made any payments towards the amount of the claim, describe the amount of such payments and the dates paid: $172,508 in 1993, through Georgia Ann Nickell-Langsam, a California Attorney

9. Is there any setoff, counterclaim, or other defense which should be deducted by The Home from your claim?
Yes, see 8 above.

10. Do you claim a priority for your claim? If so, why: Yes, personal injury

11. Print the name, address and telephone number of the person who has completed this form.
Name: Adebowale O. Osijo, MBA
Address: 9015 East Pontiac Way # 203
Fresno CA 93726
Phone Number (559) 273-5765
Email address adebowalesijo@hotmail.com

* The Home Indemnity Company, The Home Insurance Company of Indiana, City Insurance Company, Home Lloyds Insurance Company of Texas, The Home Insurance Company of Illinois, and The Home Insurance Company of Wisconsin.

CF2

12. If represented by legal counsel, please supply the following information:
    a. Name of attorney: Plaintiff In Pro Per
    b. Name of law firm: _____
    c. Address of law firm: _____
    d. Attorney's telephone: _____
    e. Attorney's fax number: _____
    f. Attorney's email address: _____

13. If using a judgment against The Home as the basis for this claim:
    a. Amount of judgment _____
    b. Date of judgment _____
    c. Name of case _____
    d. Name and location of court Superior Court of Fresno County
    e. Court docket or index number (if any) 07-CECG-00073

14. If you are completing this Proof of Claim as a Third Party Claimant against an insured of The Home, you must conditionally release your claim against the insured by signing the following, as required by N.H. Rev. Stat. Ann. § 402-C:40 I:

I, Adebowale O. Osijo (insert claimant's name), in consideration of the right to bring a claim against The Home, on behalf of myself, my officers, directors, employees, successors, heirs, assigns, administrators, executors, and personal representatives hereby release and discharge N/A (insert name of defendant(s) insured by The Home), and his/her/its officers, directors, employees, successors, heirs, assigns, administrators, executors, and personal representatives, from liability on the cause(es) of action that forms the basis for my claim against The Home in the amount of the limit of the applicable policy provided by The Home; provided, however, that this release shall be void if the insurance coverage provided by The Home is avoided by the Liquidator.

Claimant's signature _____ Date 01-11-07

15. All claimants must complete the following:

I, Adebowale O. Osijo (insert individual claimant's name or name of person completing this form for a legal entity) subscribe and affirm as true, under the penalty of perjury as follows: that I have read the foregoing proof of claim and know the contents thereof, that this claim in the amount of Three Million dollars ($3,000,000) against The Home is justly owed, except as stated in item 9 above, and that the matters set forth in this Proof of Claim are true to the best of my knowledge and belief. I also certify that no part of this claim has been sold or assigned to a third party.

Any person who knowingly files a statement of claim containing any false or misleading information is subject to criminal and civil penalties.

Claimant's signature _____ Date 01-11-07

16. Send this completed Proof of Claim Form, postmarked by June 13, 2008, to:

The Home Insurance Company in Liquidation
P.O. Box 1720
Manchester, New Hampshire 03105-1720

You should complete and send this form if you believe you have an actual or potential claim against The Home even if the amount of the claim is presently uncertain.

PROOF OF CLAIM
The Home Insurance Company,
Merrimack County Superior Court, State of New Hampshire 03-E-0106
Read Carefully Before Completing This Form
Please print or type

FOR LIQUIDATOR'S USE ONLY
DATE PROOF OF CLAIM RECEIVED
SCANNED
JAN 15 2007
RECEIVED
JAN 12 2007
HICIL

Clmn 711647

The Deadline for Filing this Form is June 13, 2004.

You should file this Proof of Claim form if you have an actual or potential claim against The Home Insurance Company of any of its former subsidiaries* ("The Home") even if the amount of the claim is presently uncertain. To have your claim considered by the Liquidator, this Proof of Claim must be postmarked no later than June 13, 2004. Failure to timely return this completed form will likely result in the DENIAL OF YOUR CLAIM. You are advised to retain a copy of this completed form for your records.

1. Claimant's Name: Adebowale O. Osijo, MBA.
2. Claimant's Address: 2015 East Pontiac Way, Suite 203
Fresno, California 93726-3979

If your name, address, e-mail address, or telephone number set forth above are incorrect, or if they change, you must notify the Liquidator so she can advise you of new information.

3. Claimant's Telephone Number: (559) 273-5765
Fax Number: (559) 221-0585
Email address: adebowaleosijo@hotmail.com

4. Claimant's Social Security Number, Tax ID Number or Employer ID Number: 405-19-5923

5. Claim is submitted by (check one):
a) ___ Policyholder or former policyholder
b) X Third Party Claimant making a claim against a person insured by The Home
c) ___ Employee or former employee
d) ___ Broker or Agent
e) ___ General Creditor, Reinsurer, or Reinsured
f) ___ State or Local Government Entity
g) ___ Other; describe: _____

Describe in detail the nature of your claim. You may attach a separate page if desired. Attach relevant documentation in support of your claim, such as copies of outstanding invoices, contracts, or other supporting documentation.

Please see the attached

6. Indicate the total dollar amount of your claim. If the amount of your claim is unknown, write the word "unknown". BUT be sure to attach sufficient documentation to allow for determination of the claim amount.

$ 3,000,000 (If amount is unknown, write the word "unknown").

7. If you have any security backing up your claim, describe the nature and amount of such security. Attach relevant documentation.

8. If The Home has made any payments towards the amount of the claim, describe the amount of such payments and the dates paid: Yes, $122500

9. Is there any setoff, counterclaim, or other defense which should be deducted by The Home from your claim?
Yes, $122,500

10. Do you claim a priority for your claim? If so, why: Yes, Personal injury

11. Print the name, address and telephone number of the person who has completed this form.
Name: Adebowale O. Osijo, MBA.
Address: 2015 East Pontiac Way, Suite 203
Fresno, California 93726-3978
Phone Number ( ) (559) 273-5765
Email address adebowaleosijo@hotmail.com

* The Home Indemnity Company, The Home Insurance Company of Indiana, City Insurance Company, Home Lloyds Insurance Company of Texas, The Home Insurance Company of Illinois, and The Home Insurance Company of Wisconsin.

12. If represented by legal counsel, please supply the following information:
    a. Name of attorney: _____
    b. Name of law firm: _____
    c. Address of law firm: _____
    d. Attorney's telephone: _____
    e. Attorney's fax number: _____
    f. Attorney's email address: _____

13. If using a judgment against The Home as the basis for this claim:
    a. Amount of judgment _____
    b. Date of judgment _____
    c. Name of case _____
    d. Name and location of court _____
    e. Court docket or index number (if any) _____

14. If you are completing this Proof of Claim as a Third Party Claimant against an Insured of The Home, you must conditionally release your claim against the Insured by signing the following, as required by N.H. Rev. Stat. Ann. § 402-C:40 I:

I, Adebowale O. Osijo (insert claimant's name), in consideration of the right to bring a claim against The Home, on behalf of myself, my officers, directors, employees, successors, heirs, assigns, administrators, executors, and personal representatives hereby release and discharge HOME (insert name of defendant(s) insured by The Home), and his/her/its officers, directors, employees, successors, heirs, assigns, administrators, executors, and personal representatives, from liability on the cause(es) of action that forms the basis for my claim against The Home in the amount of the limit of the applicable policy provided by The Home; provided, however, that this release shall be void if the insurance coverage provided by The Home is avoided by the Liquidator.

Claimant's Signature _____ Date 01-05-07

15. All claimants must complete the following:

I, Adebowale O. Osijo (insert individual claimant's name or name of person completing this form for a legal entity) subscribe and affirm as true, under the penalty of perjury as follows: that I have read the foregoing proof of claim and know the contents thereof, that this claim in the amount of Three Million dollars ($ 3,000,000) against The Home is justly owed, except as stated in item 9 above, and that the matters set forth in this Proof of Claim are true to the best of my knowledge and belief. I also certify that no part of this claim has been sold or assigned to a third party.

Any person who knowingly files a statement of claim containing any false or misleading information is subject to criminal and civil penalties.

Claimant's Signature _____ Date 01-05-06

16. Send this completed Proof of Claim Form, postmarked by June 13, 2006, to:

The Home Insurance Company in Liquidation
P.O. Box 1720
Manchester, New Hampshire 03105-1720

You should complete and send this form if you believe you have an actual or potential claim against The Home even if the amount of the claim is presently uncertain.

Adebowale O. Osijo, MBA.
2015 East Pontiac Way, Suite 203
Fresno, California 93726-3978
Telephone: 559-221-0585

Plaintiff In Propria Persona

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

CIVIL UNLIMITED DIVISION

ADEBOWALE O. OSIJO, MBA., Plaintiff, vs. ROGER A. SEVIGNEY, (Sued as the Commissioner of Insurance for the State of New Hampshire, and, in place of The Home Insurance Companies and Risk Enterprise Management, Ltd.); BURNHAM BROWN, (A Professional Law Corporation, sued in its corporate capacity, and in place of DAVID RAYMOND PINELLI, deceased); GEORGIA ANN MICHELL-LANGSAM, (An Attorney, sued in her individual capacity); and Does 1 through 10, Defendant.	Case No.: 04-CECG-02628-DSB **PROPOSED VERIFIED SECOND AMENDED COMPLAINT IN EQUITY TO:** **1) NULLIFY SETTLEMENT AGREEMENT & SET ASIDE ENFORCEMENT ORDER BASED ON WHOLLY UNAUTHORIZED ACTS OF ATTORNEY;** **2) NULLIFY ATTORNEY FEE RETAINER AGREEMENT BASED ON UNAUTHORIZED ACTS OF ATTORNEY & FOR AN ORDER OF DISGORGEMENT OF CLIENT'S MISAPPROPRIATED FUNDS; and** **3) SET ASIDE FRESNO COUNTY SUPERIOR COURT JUDGMENT IN CASE NO. 02-CECG-00002**

FIRST CAUSE OF ACTION
(Nullify Settlement Agreement & Set Aside Enforcement Order Based On Wholly Unauthorized Acts Of Attorney)

1. Plaintiff Adebowale O. Osijo, MBA., complains and thereafter alleges that at all times material herein, Georgia Ann Michell-Langsam, the personal injury attorney in a matter before the Alameda County Superior Court, titled: Osijo v Housing

Resources Management, Inc., Acorn I, Ltd., Acorn II, Ltd and Prostaff Security Services, Inc., Case No. 649881-6, without Plaintiff's informed knowledge and written authorization, initiated and stipulated with the Defendants' attorneys in the same personal injury case, (David Raymond Pinelli, deceased, and the then Law Offices of Larson & Burnham, now Burnham Brown), subject to the said Defendants' counsels' choice and payment of a private judge that the Alameda County Superior Court ordered the personal injury action to a private judge, (Judge Victor Mario Campilongo, retired) in a binding private mediation, at a place in San Francisco, California, called Judicial Arbitration and Mediation Services, (JAMS). Georgia Ann Michell-Langsam did not obtain Plaintiff's authorization before she stipulated his (Plaintiff's) substantive rights to a judicial trial, in accordance with the provisions of the *California Constitution, Article 1, Section 16*, be submitted to a private judge in a binding private mediation. If Plaintiff was informed and apprised by Georgia Ann Michell-Langsam of the stipulated order for the removal of his personal injury case to a private mediation in San Francisco, he will never ever have gone, and she will have been fired immediately.

2. Plaintiff complains and thereafter alleges that at all times material herein, the stipulated order of the Alameda County Superior Court for the removal of the aforementioned personal injury case to a private judge, for a binding private mediation is invalid for an indefinite period of time because Georgia Ann Michell-Langsam wholly lacked authority to initiate and stipulate that the personal injury action be removed to private mediation, without the Plaintiff's knowledge or consent. The resulting "Voluntary Settlement Agreement,", is invalid for an indefinite period of time because Georgia Ann Michell-Langsam wholly lacked authority to initiate and stipulate that the personal injury matter be removed to the authority a private judge, in a binding arbitration, without the Plaintiff's knowledge or consent. The order/judgment of the

Alameda County Superior Court, which enforced the purported "Settlement Agreement," as the final judgment of the said personal injury action is also invalid, and remains invalid, indefinitely, because it was based on the wholly unauthorized actions of Attorney Georgia Ann Michell-Langsam in the said personal injury case.

3. Plaintiff complains and thereafter alleges that at all times material herein, that as a client, his informed knowledge and written authorization, were required and mandatory as a matter of constitutional right in the State of California before Georgia Ann Michell-Langsam, as an attorney, can initiate a stipulated order for the removal of his action from the competent jurisdiction in the Alameda County Superior Court to the jurisdiction of a private judge, in a private mediation proceeding. Plaintiff was completely kept in the dark throughout the entire stipulation process by Georgia Ann Michell-Langsam.

4. Plaintiff complains, and, thereafter alleges that at all time material herein that he, either by implication or expression, did not, has not, and, will not ratify, the removal of his substantive rights in the aforementioned personal injury action from the jurisdiction of the Superior Court of Alameda County to that of a private judge in a private mediation. Plaintiff has and had obdurately refused to accept the purported "Voluntary Settlement Agreement," as valid, since July 25, 1991, and until eternity. He fired Georgia Ann Michell-Langsam as the Plaintiff's attorney in the personal injury action on September 13, 1991, when it became obvious that she had exceeded, and was exceeding her authority as the Plaintiff's attorney.

5. Plaintiff further complains, and, thereafter alleges that at all times material herein, that he, either by implication or expression, did not waive, has never waived, and will not waive his constitutional right to the judicial trial of his causes in the

personal injury action, in a competent jurisdiction in the State of California, and according to the California laws.

7. Plaintiff complains, and thereafter alleges that at all times material herein, Georgia Ann Michell-Langsam consummated the purported the "Voluntary Settlement Agreement," in a conscious disregard of the Plaintiff's challenge to the validity of the purported "Voluntary Settlement Agreement," and his request that the personal injury matter be taken to a jury trial. She, on Monday, July 30, 1991, collected a check issued by The Home Insurance Companies, in the value of $250,000, from David Raymond Pinelli and the Burnham Brown, without his knowledge or consent. She cashed the check, without the Plaintiff's knowledge and consent, and immediately misappropriated $127,500 to herself and for her own use and purposes, again, without the Plaintiff's knowledge or consent. She kept the balance of $122,500 for another two and a half years, again, without the Plaintiff's knowledge or consent, and in an apparent attempt to ruse Plaintiff into ratifying her unauthorized conduct. The exact words of David Pinelli to Georgia Ann Michell-Langsam in writing was " maybe we can pacify Wale with an immediate cash of $75,000."

8. Plaintiff complains and thereafter alleges that at all times material herein, that he terminated Georgia Ann Michell-Langsam on September 13, 1991, when it became obvious that she has usurped all his substantive rights in the said personal injury action in favor of enforcing the purported "Voluntary Settlement Agreement," to the express knowledge of David Raymond Pinelli and David Kizer, and in the open courtroom of the Alameda County Superior Court, Department 17. She simply ignored her termination as the Plaintiff's attorney. She, on September 23, 1991, executed a stipulated judgment with David Raymond Pinelli and David Kizer, which the Alameda County Superior Court executed and filed on October 10, 1991.

9. Plaintiff complains and thereafter alleges that at all times material herein, he is and was a tax accountant, in the City and County of Fresno, California, with a mailing address at 2015 East Pontiac Way, Suite 203, Fresno, California 93726-3978.

10. Plaintiff complains and alleges thereafter that at all times material herein, Defendant Roger A. Sevigney is the current Insurance Commissioner in and for the State of New Hampshire, with his mailing address at 56 Old Suncook Road, Concord, New Hampshire 03301. He is sued in place of The Home Insurance Companies, which is in a receivership process in the State of New Hampshire, and Risk Enterprise Management, Ltd. Plaintiff has no been statutorily notified of The Home Insurance been being placed into a receivership, nor was he served with the statutory claim form by the State of New Hampshire Insurance Commissioner, to use in filing claims with it and the California Insurance Guarantee Association.

11. Plaintiff complains, and thereafter alleges that at all times material herein, Defendant Burnham Brown is and was a successor-in-interest to Larson & Burnham, a professional corporation, duly licensed in the State of California. Its registered office and address is at 1901 Harrison Street, 11th Floor, Oakland, California 94604. Its mailing address is Post Office Box 119, Oakland, California 94604-0119. Burnham Brown was hired by The Home Insurance Companies, to represent Defendants Housing Resources Management, Inc., Acorn I, Ltd., and Acorn II, Ltd., in the aforementioned personal injury action. It is sued in place of David Raymond Pinelli.

12. Plaintiff complains, and therefore alleges that at all times material herein, Defendant Georgia Ann Michell-Langsam is and was an attorney, duly licensed to practice law in the State of California. She is now a sole legal practitioner, with her law office located at 1850 Mount Diablo Boulevard, Suite 605, Walnut Creek, California. She was hired on April 12, 1990, to represent the Plaintiff in the aforementioned personal

injury action, on a contingency fee basis. She is sued in her individual capacity and as an attorney.

13. Plaintiff complains and thereafter alleges that he does not know the true names and identities of Does 1 through 10, and therefore, reserves the right to amend this complaint to include them as Defendants, when their true names and identities are known.

WHEREFORE, Plaintiff prays for the followings:

A. That the purported "Voluntary Settlement Agreement" entered as the final judgment of the underlying, be declared a nullity and void, on the ground that Georgia Ann Michell-Langsam did not have authority to bind Plaintiff to the private mediation proceeding.

B. That the order which enforced the purported "Voluntary Settlement Agreement," be declared a nullity and void, on the ground that the Court lacked authority to bind Plaintiff with the unauthorized acts of an attorney;

C. That the Court accesses and awards the Plaintiff's damages from the personal injury case according to proof, against all the Defendants herein, jointly and or severally;

D. That the Court awards the Plaintiff punitive damages, subject to proof, against all the Defendants herein, jointly and or severally;

E. That the Court accesses and awards the Plaintiff damages and relief that it deems fit and just, against all the Defendants herein, jointly and or severally.

SECOND CAUSE OF ACTION

(Nullify Attorney Fee Retainer Based On Unauthorized Acts Of Attorney & For An Order Of Disgorgement Of Client's Misappropriated Funds)

14. Plaintiff incorporates the allegations of the First Cause of Action into this Second Cause of Action as if plead, separately and independently.

15. Plaintiff complains, and thereafter alleges that at all times material herein that Georgia Ann Michell-Langsam, without the Plaintiff's authority, consummated the purported "Voluntary Settlement Agreement," aforementioned personal injury case, by collecting a check issued by The Home Insurance Companies, in the amount of $250,000, from David Raymond Pineli, on Monday, July 30, 1991. She executed a Compromise and Release that was provided by David Raymond Pinelli, for and on behalf of the Plaintiff. She executed a dismissal with prejudice of the personal injury action and submitted these documents to David Raymond Pinelli. She thereafter cashed the check and over a period of two years misappropriated $127,500 to herself and for her own use and purposes, without the Plaintiff's knowledge or consent. The remaining $122,500 was ordered released to the Plaintiff by the Contra Costa County Superior Court, on her application, approximately two and a half years later.

16. Plaintiff complains and thereafter alleges that at all times material herein, his authority as a client is required and mandatory, as a matter of constitutional right before an attorney can consummate his personal injury action. Plaintiff did not ratify, has not ratified and will not ratify Georgia Ann Michell-Langsam's consummation of the aforementioned personal injury case. Plaintiff did not waive, has not waived and will not waive Georgia Ann Michell-Langsam's consummation of the aforementioned personal injury action.

17. Plaintiff complains and thereafter alleges that at all times material herein, Georgia Ann Michell-Langsam represented him with an actual conflict, in the personal injury action, which she stipulated with the State Bar of California, upon the his complaint against her, in *In the Matter of Georgia A. Michell-Langsam*, Case No. 92-0-11751-JG

WHEREFORE, Plaintiff prays for the followings:

A. That the Court declares the attorney fee retainer agreement between Plaintiff and Georgia Ann Michell-Langsam be declared a nullity and void, on the ground that violated the professional ethical requirements of the California State Bar, Rule 3-310 (A&B).

B. That the Court issues an order for the disgorgement of $127,500, together with interest, compounded at 10 percent annual interest rate, from June 30, 1991, that Georgia Ann Michell-Langsam misappropriated to herself and for her own use, without authority of the Plaintiff.

THIRD CAUSE OF ACTION
(To Set Aside Judgment)

18. Plaintiff incorporates the complaints and allegations of the First and Second Causes of Action into this Third Cause of Action as if separately and independently pled.

19. Plaintiff, has, since 1991, knocked every legal door in the State of California, including but not limited to the State Bar of California, Alameda County Superior Court, Contra Costa County Superior Court, the Fresno County Superior Court, the First District Court of Appeals, the Fifth District Court of Appeals, the Federal District Court in Los Angeles, the Federal District Court in Fresno, the Federal Court of Appeals for the Ninth Circuit, the California Supreme Court and the United

States Supreme Court, under any possible legal theory, all in an effort to show that Attorney Georgia Ann Michell-Langsam, without authority, usurped his substantive rights to a jury trial and consummated the personal injury action. Georgia Ann Michell-Langsam, in turn used the malicious prosecution lawsuits to try and dissuade the Plaintiff from challenging the Alameda County Superior Court's authority to order the personal injury action to a private judge in a binding private arbitration, under the aegis of the JAMS. The first judgment for malicious prosecution by the Contra Costa County Superior Court was vacated by the First District Court of Appeal on the ground that it will be unjust to find that Plaintiff prosecuted a malicious prosecution action, after the same Court found that Georgia Ann Michell-Langsam "wrongfully misappropriated" his funds in her trust. Undaunted by the appellate ruling, Georgia Ann Michell-Langsam, again, successfully prosecuted another malicious prosecution case in the Fresno County Superior Court, titled: Michell-Langsam v Adebowale O. Osijo, Case No. 02-CECG-00002, again, in a conscious attempt to "dissuade" the Plaintiff from challenging her authority to stipulate to the removal of the aforementioned personal injury action to a private judge in a binding private arbitration at JAMS.

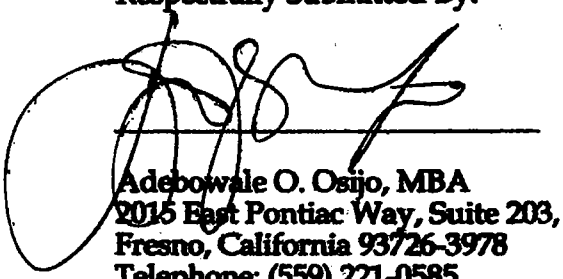
20. Plaintiff complains and thereafter alleges that at all times material herein, the Fresno County Superior Court does not have the authority to issue a judgment or order with the intention of dissuading the Plaintiff from challenging Georgia Ann Michell-Langsam's authority to usurp Plaintiff's substantive rights and consummate the aforementioned personal injury case.

WHEREFORE, Plaintiff prays that the judgment of the Fresno County Superior Court in the matter of Michell-Langsam v Adebowale O. Osijo, Case No. 02-CECG-00002, be declared void and a nullity, on the ground that the Fresno County Superior Court does not have the authority to issue a judgment, with the sole intention of trying

to dissuade Plaintiff from challenging Georgia Ann Michell-Langsam's authority to usurp Plaintiff's substantive rights and consummate the aforementioned personal injury case.

Dated this 26th day of December, in the year 2006.

Respectfully Submitted By:



Adebowale O. Osijo, MBA
2015 East Pontiac Way, Suite 203,
Fresno, California 93726-3978
Telephone: (559) 221-0585
Plaintiff In Propria Persona

CF15

Adebowale O. Osijo, MBA.
2015 East Pontiac Way, Suite 203
Fresno, California 93726-3978
Telephone: (559) 273-5765
Facsimile: (559) 221-0585

November 30, 2008

Mr. George Ertle
Ms. Mary Actor
The Home Insurance Company In Liquidation
59 Maiden Lane
New York, New York 10038

Re: POC No.: CLMN711647
POC Claimant: Adebowale O. Osijo
Amount Claimed: $3,000,000

Dear Ms. Actor:

1. Acknowledgment
This will acknowledge with thanks, the receipt of your letter in the above entitled matter, dated November 14, 2008.

2. Service Of Petition For Writ Of Certiorari
Please find attached hereto, a copy of my Petition for Writ of Certiorari to the California Court of Appeal, First District, Division II. It is filed in the United States Supreme Court. Please consider The Home Insurance Company In Liquidation served.

3. Memorialization Of My Discussions With Mr. Ertle & Ms. Actor
A. My Discussions With Mr. Ertle On October 29, 2008
Mr. George Ertle, an attorney from The Home Insurance Company in Liquidation, called me on October 29, 2008, at approximately 11:15 a.m., (Pacific Time), to suggest that I should withdraw my claim in the above entitled matter because I have exhausted my appellate rights in vain, and that The Home Insurance Company had satisfied the judgment of $250,000, in the matter of Osijo v Housing Resources Management, Inc., et al., Case No. C-649881, in the Alameda County Superior Court, in the State of California. My responses were that: 1) If can produce a copy of the check or checks, issued by The Home Insurance Company, to satisfy the judgment of this action, with my signature on it; or 2) if can produce a

copy of any document, in which I authorized Georgia Ann Michell-Langsam to cash the aforementioned check, and dispose of the settlement proceeds to herself, for her own immediate use and purposes, without my knowledge or consent or; 3) if he can produce a copy of an Order, issued by the Alameda County Superior Court, which authorized Georgia Ann Michell-Langsam to cash the settlement check and dispose of the settlement proceeds to herself, for her own use and purposes, without my knowledge or consent, or: 4) if he can produce the copy of a lien, filed in the aforementioned personal injury action by Georgia Ann Michell-Langsam, and adjudicated by the Alameda County Superior Court, in a separate and independent action, I will gladly withdraw the above entitled claim and walk out of this claim, without looking back. My counter offer still stands and I am still awaiting his responses.

B. My Discussions With Ms. Mary Actor

Ms. Mary Actor, a Senior Claims Manager, The Home Insurance Company in Liquidation, called me on November 14, 2008, in response to my repeated calls to The Home Insurance Company In Liquidation in Concord, New Hampshire, and to Mr. Ertle. She suggested that because the Fresno County Superior Court, in the State of California, had dismissed a case titled: Osijo v California Insurance Guarantee Association, Case No. 07-CECG-000693, I therefore, do not have a viable claim against The Home Insurance Company in Liquidation. My responses were that the Presiding Judge, Alameda County Superior Court, California, authorized the aforementioned personal injury matter to continue unencumbered by my being later declared a vexatious litigant. My claim against The Home Insurance Company in Liquidation is in this personal injury action. Its insured is Housing Resources Management, Inc. I certainly and positively did not file any claim against Ganong & Michell, in The Home Insurance Company in Liquidation, jointly and or severally, with anyone or entity.

4. Unavailability & Conclusion

I will not be available for this claim proceeding between December 15, 2008 and January 15, 2009, for personal reasons. I therefore look forward to your Notice of Determination in this matter in the very near future. I will respond accordingly, and the Court will adjudicate, for the due process to complete its course. Please acknowledge receipt of this letter.

Very Truly Yours,

Adebowale O. Osijo, MBA.

THE HOME INSURANCE COMPANY IN LIQUIDATION
P.O. Box 1720
Manchester, New Hampshire 03105-1720
Tel: (800) 347-0014

Date: 3/25/2009 Class: II

Adebowale O. Osijo MBA
2015 East Pontiac Way
Suite 203
Fresno, CA 93726-3979

RE: NOTICE OF DETERMINATION
Proof of Claim No.: CLMN711647-01

Determination Summary

Gross Amount of Claim	: $ 3,000,000.00
Amount Allowed by Liquidation	: $ 0

Explanation: Your proof of claim as a third party claimant relates to a personal injury action against Home Insurance Company insured Housing Resources Management, Ltd., Inc and others. This claim, arising out of a 1988 incident in which you were shot by assailants, was settled at a voluntary settlement conference on July 25, 1991 before Judicial Arbitration and Mediation Services. Home paid $250,000 to the trust account of your then attorney. The Alameda County Superior Court enforced this settlement by Order signed October 10, 1991 and the California First District Court of Appeal affirmed July 16, 1992. In May 2007 you filed a motion to set aside the enforcement order and nullify the settlement agreement which the Alameda County Superior Court denied on June 21, 2007. The Court of Appeal affirmed the Court's Order on July 8, 2008 and the California Supreme Court denied your Petition for Review on September 17, 2008. As the 1991 settlement of your action against Housing Resources has been upheld, there will be no allowance on your proof of claim.

Dear Claimant :

The purpose of this letter is to provide you with a determination set forth above of claims you have presented to The Home Insurance Company in Liquidation ("The Home"), under the Proof(s) of Claim specified above. The Home expects to present notice of this determination to the Superior Court for Merrimack County, New Hampshire (the "Court") for approval in accordance with New Hampshire Revised Statute, RSA 402-C:45. Read this Notice of Determination carefully as it sets forth your rights and obligations in detail.

The Home has now made a Determination on the claims as set forth above in accordance with The Home Claim Procedures (the "Procedures")* approved by the Court. If the claim has been allowed, in whole or in part, it has been assigned a Class II priority as a "policy related claim" pursuant to the Order of Distribution set forth in RSA 402-C:44 and will be placed in line for payment as directed by the Court from the assets of The Home. The first $50 of the amount allowed on each claim in this class shall be deducted from the amount distributed as specified in RSA 402-C:44.

You may have other claims against The Home for which you may receive other Notices of Determination. You will have a separate right to dispute each Notice of Determination. If your claim has been allowed in whole or in part, this Notice of Determination does not mean that your claim will immediately be paid, or that it will be paid in full or at all. Pursuant to order of the Court, The Home may make distributions of its assets as a percentage of all allowed claims in a particular priority class in The Home estate as approved by the Court. The amount of the final payment for allowed claims will be determined by the final ratio of assets to liabilities and the applicable priority. Please be advised that the final percentage of payment you receive from The Home, at the time The Home estate is finally closed, is the total payment amount that you will be entitled to for this claim.

The Liquidator does not expect there to be assets sufficient to make a distribution to creditors in classes below Class II.

Any and all distributions of assets may be affected and/or reduced by any payments you have received on this claim from any other sources not listed on the Notice of Distribution. Any such distributions by The Home are based on The Home's knowledge and/or understanding of the amounts you have received in settlement and/or reimbursement of this claim from all other sources at the time of the allowance or thereafter. Should The Home subsequently become aware of prior recoveries from other sources The Home has the right to reduce its future distribution payments to you to the extent of such other recoveries or to seek and obtain repayment from you with respect to any previous distributions that were made to you.

Further, if you seek or receive any future payment from any other source on this claim after you receive a distribution payment from The Home you must notify The Home at the address below and The Home has the right to recover from you the distribution payments in whole or in part, to the extent of any such other future recoveries.

As a condition to receipt of any distributions, The Home shall be entitled to any rights to subrogation you may have against any third party and you shall be deemed to have assigned to The Home such rights upon receipt of any distributions. You shall also be obliged to reimburse The Home for any legal fees or other costs associated with The Home recovering from you any distribution payments to which you are not entitled.

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*A copy of the January 19, 2005 Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company in Liquidation may be obtained from the website of the Office of the Liquidation Clerk for The Home Insurance Company in Liquidation and US International Reinsurance Company in Liquidation, www.hicilclerk.org

The following instructions apply to this Notice of Determination:

Claim Allowed

1. If this claim has been allowed in whole or in part and you agree with the determination, sign and date the enclosed Acknowledgment of Receipt of the Notice of Determination and mail the completed Acknowledgment to The Home.

Claim Disallowed

2. A. If all or part of your claim has been disallowed or you wish to dispute the determination or creditor classification for any reason, you may file a Request for Review with the Liquidator. The Request for Review is the first of two steps in the process of disputing a claim determination. The Request for Review must be received by The Home within thirty (30) days from the date of this Notice of Determination.

   REQUEST FOR REVIEW FILING REQUIREMENTS:

   (a) Sign and return the attached Acknowledgment of Receipt form.

   (b) On a separate page, state specifically the reasons(s) you believe that the determination is in error and how it should be modified. Please note the Proof of Claim number on that page and sign the page.

   (c) Mail the Request for Review to:
   The Home Insurance Company in Liquidation
   P.O. Box 1720
   Manchester, NH 03105-1720

   You should keep a copy of this Notice of Determination, Acknowledgment of Receipt and Request for Review, then mail the Original Request for Review to us by U.S. Certified Mail.

   (d) The Request for Review must be received by The Home within thirty (30) days from the date of this Notice of Determination. The Request for Review must be in writing.

   (e) The Liquidator will inform you of the outcome of the review and issue to you a Notice of Redetermination.

IF A REQUEST FOR REVIEW IS NOT FILED WITH THE HOME WITHIN THE THIRTY (30) DAY PERIOD, YOU MAY NONETHELESS DIRECTLY FILE AN OBJECTION WITH THE COURT WITHIN SIXTY (60) DAYS FROM THE MAILING OF THIS NOTICE. You do not have to file the Request for Review as a prerequisite to dispute the Notice of Determination. Please see Section 2B (below) for the Objections to Denial of Claims.

B. If your claim is disallowed in whole or in part, you may file an Objection with the Court at

Office of the Clerk, Merrimack County Superior Court
163 N. Main Street, P.O. Box 2880
Concord, New Hampshire 03301-2880
Attention: The Home Docket No. 03-E-0106

within sixty (60) days from the mailing of the Notice of Determination and bypass the Request for Review procedures as noted in Section 2A (above). If the Request for Review is timely filed, as outlined in Section 2A, the Liquidator will inform you of the outcome of the review and issue to you a Notice of Redetermination. If the redetermination is to disallow the claim, you may still file an Objection with the Court. You have sixty (60) days from the mailing of the Notice of Redetermination to file your Objection. Please also sign and return the Acknowledgment of Receipt form and mail a copy of the Objection to the Liquidator.

IF YOU DO NOT FILE AN OBJECTION WITH THE COURT WITHIN EITHER SIXTY (60) DAYS FROM THE MAILING OF THIS NOTICE OF DETERMINATION OR SIXTY (60) DAYS FROM THE MAILING OF ANY NOTICE OF REDETERMINATION, YOU MAY NOT FURTHER OBJECT TO THE DETERMINATION.

A timely filed Objection will be treated as a Disputed Claim and will be referred to the Liquidation Clerk's Office for adjudication by a Referee in accordance with the Procedures.

3. You must notify The Home of any changes in your mailing address. This will ensure your participation in future distributions, as applicable. For purposes of keeping The Home informed of your current address, please notify us at the address given on the letterhead above.

Sincerely yours,

Peter Bengelsdorf, Special Deputy Liquidator
For Roger A. Sevigny, Liquidator
of The Home Insurance Company in Liquidation

If you wish to speak to someone regarding this Notice of Determination, please contact:

Mary Actor
Senior Manager
Home Insurance Company in Liquidation

Phone : 212-530-4005

THE HOME INSURANCE COMPANY IN LIQUIDATION
P.O. Box 1720
Manchester, New Hampshire 03105-1720
Tel: (800) 347-0014

POC #: CLMN711647-01

Amount Allowed: $ 0

Adebowale O. Osijo MBA
2015 East Pontiac Way
Suite 203
Fresno, CA 93726-3979

ACKNOWLEDGMENT OF RECEIPT

I hereby acknowledge receipt of the Notice of Determination as a Class II Creditor claim and confirm that I understand the content thereof. I further acknowledge and confirm that I understand the Instructions regarding the Notice of Determination of my Claim against The Home Insurance Company in Liquidation and in that regard advise as follows:

(Check off all applicable items.)
_____ I agree to the determination.

_____ I reject the determination and want to file a Request for Review (specific reasons must be included along with return of the signed Acknowledgment).

_____ I reject the determination and intend to file a separate Objection with the Court, without filing a Request for Review.

_____ I have not assigned any part of this claim.

_____ I have not made any other recoveries with respect to this claim.

_____ I have not sought and do not intend to seek any other recoveries with respect to this claim.

_____ I have made recovery from others with respect to this claim (full details must be included with this Acknowledgement).

_____ I have sought or intend to seek recovery from others with respect to this claim (full details must be included with this Acknowledgement).

I request that The Home mail further correspondence to:

_____ Same name as above.
New name _____

_____ Same address as above
New address _____
_____

This Acknowledgment of Receipt must be completed, signed and returned to The Home in order to be eligible for distributions from The Home estate as directed by the Court.

Signature: _____

Printed Name: _____

Title:_____

Date: _____

GL-1 69 21 98	LINE	PREMIUM	COMM. RATE		INSPECTION		SEE CODING SLIP
C P—PERSONAL C—COMMERCIAL	GENERAL LIABILITY	2,304,683.00	8.1 %	☒ YES ☐ NO APPROVAL	CREDIT REPORT ORDERED	1 O—AGENCY 1—F.O.	
	CIGA	$ 512.15	0.0 %		☐ WAIVED		

GENERAL LIABILITY

03-01-88icr

GL—1 69 26 17

Insurance is provided by the Stock Company designated by ☒ and hereinafter called the Company.

☒ CITY INSURANCE COMPANY (F)
Short Hills, N.J.

☐ THE HOME INSURANCE COMPANY (A)
Manchester, N.H.

☐ THE HOME INSURANCE COMPANY OF INDIANA (K)
Indianapolis, Ind.

☐ THE HOME INDEMNITY COMPANY (E)
Manchester, N.H.

Market Code 4000

GL—1 69 26 17

DECLARATIONS

H 34819 F Ed. 9-82

Item 1. Named Insured and Address

NATIONAL INVESTMENT DEVELOPMENT
CORPORATION, ET AL
(PER ENDORSEMENT #2)
11812 SAN VICENTE BOULEVARD
LOS ANGELES, CALIFORNIA 90049

PRODUCER

K.C. STIBOR & ASSOCIATES
12121 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90025

Item 2. Policy Period:
From 12-31-87 to 02-01-88
12:01 A.M., standard time at the address of the named insured as stated herein.

55939 Producer No.

055 OPC

The named insured is:
☐ Individual ☐ Partnership ☒ Corporation ☐ Joint Venture ☐ Other:

Business of the named insured is: (ENTER BELOW)
PROPERTY OWNER & MANAGEMENT

Audit Period: Annual, unless otherwise stated. (ENTER BELOW)

Item 3. The insurance afforded is only with respect to the Coverage Part(s) indicated below by specific premium charge(s) and attached to and forming a part of this policy.

Coverage Parts	Form Number	†Advance Premiums
Comprehensive General Liability Insurance	H21013F	$ 2,304,683.
Premises Medical Payments Insurance		$
Contractual Liability Insurance		$
Completed Operations and Products Liability Insurance		$
Manufacturers' and Contractors' Liability Insurance		$
Owners', Landlords' and Tenants' Liability Insurance		$
Personal Injury Liability Insurance		$
Owner's and Contractor's Protective Liability Insurance		$
Storekeeper's Insurance		$
Other		$
BROAD FORM COMPREHENSIVE GENERAL LIABILITY ENDORSEMENT	L6111	INCLUDED
EMPLOYEE BENEFITS LIABILITY ENDORSEMENT	H22799F	INCLUDED
ELEVATOR COLLISION INSURANCE	L9282	INCLUDED

If Policy Period is more than one year premium is payable	Effective Date††	1st Anniversary††	2nd Anniversary††	TOTAL ADVANCE PREMIUM	$ 2,304,683.

CIGA $512.15

Endorsements attached to policy

PER ENDORSEMENT #1

Countersigned by ____________________
Authorized Representative

[illegible]

CF25

H33135 Rev. 4/81 DR [illegible] COMPANY COPY (F/O)

AGE PART

INSURANCE HOME COMPANIES

COMPREHENSIVE GENERAL LIABILITY INSURANCE

For attachment to Policy No. GL-1 69 26 17, to complete said policy.

ADDITIONAL DECLARATIONS

Location of all premises owned by, rented to or controlled by the **named insured** (ENTER "SAME" IF SAME LOCATION AS ADDRESS SHOWN IN ITEM 1 OF DECLARATIONS)

AS PER COMPANY RECORDS

Interest of **named insured** in such premises (CHECK BELOW)

☐ Owner ☐ General Lessee ☐ Tenant ☐ Other _____

Part occupied by **named insured** (ENTER BELOW)

The following discloses all hazards insured hereunder known to exist at the effective date of this policy, unless otherwise stated herein.

SCHEDULE

The insurance afforded is only with respect to such of the following Coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such Coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

Coverages	Limits of Liability	
	Each occurrence	Aggregate
A—Bodily Injury Liability	$ AS PER ,000	$ ENDT. ,000
B—Property Damage Liability	$ 16106 ,000	$,000

Description of Hazards and Subline	Terr. Code	Class Code	P. B. Code	Exposure Basis	Rates B.I.	Rates P.D.	Advance Premiums Bodily Injury	Advance Premiums Property Damage
Premises - Operations AS PER COMPOSITE RATING PLAN PREMIUM ENDORSEMENT #3							INCLUDED IN COMPOSITE RATE	
Escalators (Number at Premises) NONE AT INCEPTION								
Independent Contractors - Subline 315 INCLUDED IN COMPOSITE RATE								
Completed Operations – Products Subline 316 INCLUDED IN COMPOSITE RATE							INCLUDED IN COMPOSITE PREMIUM	
Form numbers of endorsements at issue					TOTALS		$	$
							$	$
							Total Advance Premium	$ INCLUDED

PB Codes: a-Area; f-Frontage; m-Admissions; p-Payroll; r-Receipts; t-Other.
A-Unit Mos.; B-Entire; C-Per 100; D-Per 1,000; E-Per 10,000; F-Per 1,000,000; G-Not Req.

COMPANY COPY (F/O)

General Purpose Endorsement

Comm.	8.1
Date Prepared	Endorsement No.
11-10-88icr	12

Issued By

- ☐ The Home Insurance Company
- ☒ City Insurance Company
- ☐
- ☐ The Home Indemnity Company
- ☐ The Home Insurance Company of Indiana

Policy Number	Certificate Number	Named Insured
GL-1 69 26 17		NATIONAL INVESTMENT DEVELOPMENT CORP.

Producer	Producer No. - OPC
R.C. STIBOR & ASSOCIATES	55839-055

Policy Period:	Inception (Month-Day-Year)	Expiration (Month-Day-Year)	Effective Date and Time of Endorsement
	12-31-87	02-01-89	08-09-88

It is agreed that this policy is hereby amended as indicated. All other terms and conditions of this policy remain unchange

IN CONSIDERATION OF PREMIUM CHARGED, IT IS AGREED THAT THE FOLLOWING LOCATIONS ARE ADDED:

LOCATION #206 - ACORN I APARTMENTS
821 FILBERT STREET
OAKLAND, CALIFORNIA

LOCATION #207 - ACORN II APARTMENTS
821 FILBERT STREET
OAKLAND, CALIFORNIA

☐ Continued on Page 2

Additional Premium	Total Additional Premium	Pro Rata Of	Additional Premium Due at Endorsement Effective Date: $36,447.
Return Premium	Total Return Premium	Pro Rata or Short Rate of	Return Premium Due at Endorsement Effective Date

Premium Adjustments if the Premium is Payable in Installments or Cycle Billing:

Dates Due	Present Installment	Increase	Decrease	Revised Installment
	$	$	$	$
	$	$	$	$
	$	$	$	$
	$	$	$	$
	$	$	$	$
	$	$	$	$
	$	$	$	$
	$	$	$	$
	$	$	$	$
	$	$	$	$
	$	$	$	$
	$	$	$	$

Signature of Authorized Representative

B. R. Stibor

CF27

The Home Insurance Companies

Non-Premium Endorsement

Date Prepared	Endorsement No.
03-01-88icr	2

Issued by

☐ The Home Insurance Company ☒ City Insurance Company ☐

☐ The Home Indemnity Company ☐ The Home Insurance Company of Indiana

Policy Number	Certificate Number	Named Insured
GL-1 69 26 17		NATIONAL INVESTMENT DEVELOPMENT CORP., ET AL

Producer	Producer No. - OPC
R.C. STIBOR & ASSOCIATES	55839-055

Policy Period:	Inception (Month-Day-Year)	Expiration (Month-Day-Year)	Effective Date and Time of Endorsement
	12-31-87	02-01-89	12-31-87

It is agreed that this policy is hereby amended as indicated. All other terms and conditions of this policy remain unchanged.

NAMED INSURED ENDORSEMENT

NATIONAL INVESTMENT DEVELOPMENT CORPORATION

ASSOCIATED FINANCIAL CORPORATION

WILSHIRE INVESTMENT, INC.

NATIONAL PALISADES CORPORATION

MANAGEMENT ASSISTANCE GROUP, INC.

AFC - MANAGEMENT ASSISTANCE GROUP, INC.

NATIONAL DEVELOPMENT SERVICES CORPORATION

AFC CAPITAL CORPORATION

OAKDALE CORPORATION

CENTURY PACIFIC INVESTMENT CORPORATION

CENTURY PACIFIC HOUSING CORPORATION

PARTNERSHIP PLACEMENT, INC.

PARTNERSHIP INVESTORS SERVICES, INC.

HOUSING RESOURCES MANAGEMENT, INC.

HOUSING RESOURCES SERVICES, INC.

PARTNERSHIP SECURITIES, INC.

NIDC PARTNERSHIP MANAGEMENT, INC.

NIDC GOVERNMENT HOUSING CORP.

GENNESSEE RIVER HOUSES CORP.

NIDC ASSET MANAGEMENT

NIDC MANAGERS, INC.

NIDC CAPITAL MANAGEMENT

NIDC HOUSING CORPORATION

NIDC HC CORP.

STEPHEN D. MOSES

Signature of Authorized Representative

CF28

Non-Premium Endorsement

Date Prepared	Endorsement No.
03-01-88icr	1

Issued by

☐ The Home Insurance Company ☒ City Insurance Company ☐

☐ The Home Indemnity Company ☐ The Home Insurance Company of Indiana

Policy Number	Certificate Number	Named Insured
GL-1 69 26 17		NATIONAL INVESTMENT DEVELOPMENT CORP., ET AL

Producer	Producer No. - OPC
R.C. STIBOR & ASSOCIATES	55839-055

Policy Period:	Inception (Month-Day-Year)	Expiration (Month-Day-Year)	Effective Date and Time of Endorsement
	12-31-87	02-01-89	12-31-87

It is agreed that this policy is hereby amended as indicated. All other terms and conditions of this policy remain unchanged.

SCHEDULE OF COVERAGE PARTS AND ENDORSEMENTS

COVERAGE PARTS

FORM NUMBERS	TITLE
H33313F	GENERAL LIABILITY DECLARATIONS
H21013F	COMPREHENSIVE GENERAL LIABILITY DECLARATIONS PAGE

ENDORSEMENTS

NUMBER	FORM NUMBERS	TITLE
2	H22300FH	NAMED INSURED ENDORSEMENT
3	H22300FH	COMPOSITE RATING PLAN PREMIUM ENDORSEMENT
4	H22799F	ADDITIONAL DECLARATIONS - EMPLOYEE BENEFITS LIABILITY ENDORSEMENT
5	L6111	BROAD FORM COMPREHENSIVE GENERAL LIABILITY ENDORSEMENT
6	L6108	AMENDMENT - LIMITS OF LIABILITY
7	H36074F	ABSOLUTE POLLUTION EXCLUSION
8	H22300FH	SIXTY DAY CANCELLATION ENDORSEMENT
9	L9282	ELEVATOR COLLISION INSURANCE
10	L6178	AMENDATORY ENDORSEMENT
11	L9235	AMENDATORY ENDORSEMENT - ADDITIONAL DEFINITION

Signature of Authorized Representative

Non-Premium Endorsement

Date Prepared	Endorsement No.
03-01-88icr	2

Issued by

☐ The Home Insurance Company ☒ City Insurance Company ☐

☐ The Home Indemnity Company ☐ The Home Insurance Company of Indiana

Policy Number	Certificate Number	Named Insured
GL-1 69 26 17		NATIONAL INVESTMENT DEVELOPMENT CORP., ET AL

Producer	Producer No. - OPC
R.C. STIBOR & ASSOCIATES	55839-055

Policy Period:	Inception (Month-Day-Year)	Expiration (Month-Day-Year)	Effective Date and Time of Endorsement
	12-31-87	02-01-89	12-31-87

It is agreed that this policy is hereby amended as indicated. All other terms and conditions of this policy remain unchanged.

NAMED INSURED ENDORSEMENT - (CONTINUED)

DEANE E. ROSS

A. BRUCE ROZET

LOUIS A. CICALESE

AND ANY AND ALL ALLIED, AFFILIATED AND ASSOCIATED COMPANIES, CORPORATIONS OR PARTNERSHIPS IN WHICH THE ABOVE INSUREDS HAVE AN OWNERSHIP INTEREST AS ARE NOW OR MAY HEREIN AFTER BE CONSTITUTED.

A LIST OF THESE ENTITIES TO BE KEPT ON FILE WITH THE COMPANY.

Signature of Authorized Representative

CF30

Non-Premium Endorsement

Date Prepared	Endorsement No.
03-01-88icr	3

Issued by

☐ The Home Insurance Company ☒ City Insurance Company ☐

☐ The Home Indemnity Company ☐ The Home Insurance Company of Indiana

Policy Number	Certificate Number	Named Insured
GL-1 69 26 17		NATIONAL INVESTMENT DEVELOPMENT CORP., ET AL

Producer	Producer No. - OPC
R.C. STIBOR & ASSOCIATES	55839-055

Policy Period:	Inception (Month-Day-Year)	Expiration (Month-Day-Year)	Effective Date and Time of Endorsement
	12-31-87	02-01-89	12-31-87

It is agreed that this policy is hereby amended as indicated. All other terms and conditions of this policy remain unchanged.

COMPOSITE RATING PLAN PREMIUM ENDORSEMENT

IT IS HEREBY AGREED THAT THE PREMIUM FOR THE POLICY TO WHICH THIS ENDORSEMENT IS ATTACHED SHALL BE COMPUTED UPON A COMPOSITE BASIS IN ACCORDANCE WITH THE COMPANY'S RULES, RATES, RATING PLANS, PREMIUM AND MINIMUM PREMIUMS AND THE OTHER TERMS OF THE POLICY NOT INCONSISTENT HEREWITH.

COMPREHENSIVE GENERAL LIABILITY

WHEN USED AS A PREMIUM BASIS: PER $100. OF TOTAL INSURABLE VALUE

TOTAL INSURABLE VALUE	RATE	ANNUAL PREMIUM
1,033,305,000	.205	$2,118,275.
PRO-RATA EXTENSION TO 02-01-89		1.088
	TOTAL	$2,304,683.

Signature of Authorized Representative

CF31

ADDITIONAL DECLARATIONS
EMPLOYEE BENEFITS LIABILITY ENDORSEMENT

END. #4

H22799
Ed.5-7

Insured	NATIONAL INVESTMENT DEVELOPMENT CORP., ET AL
Policy No.	GL-1 69 26 17

COVERAGE	LIMITS OF LIABILITY	DEDUCTIBLE
Employee Benefits Liability Insurance	$ 1,000,000. Each Claim $ 1,000,000 Aggregate	$ 1,000. Each Claim

PREMIUM COMPUTATION		
ESTIMATED NUMBER OF EMPLOYEES	RATE PER EMPLOYEE	ADVANCE PREMIUM
	First 5,000 Next 5,000 Over 10,000	$ INCLUDED $ INCLUDED $ INCLUDED
	TOTAL ADVANCE PREMIUM *	$ INCLUDED

* If coverage is provided subsequent to policy inception, attach to a change endorsement.

In consideration of the payment of the premium, this Company agrees with the Insured named in the Declarations to afford the coverage set forth herein and on pages 2 and 3. The other terms, conditions and limits of liability in other sections of the policy to which this endorsement is attached shall not apply to insurance afforded hereunder.

Insuring Agreements

1. **Employee Benefits Liability:**

   This Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of any claim made against the Insured due to any negligent act, error or omission of the Insured, or any other person for whose acts the Insured is legally liable, in the administration of the Insured's Employee Benefits Programs, as defined herein, and this Company shall have the right and duty to defend any suit against the Insured seeking damages on account of such negligent act, error or omission, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient; but this Company shall not be obligated to defend any suit after the applicable limit of this Company's liability has been exhausted by payment of judgments or settlements.

2. **Supplementary Payments:** This Company will pay, in addition to the applicable limits of liability:

   (a) all expenses incurred by this Company, all costs taxed against the Insured in any suit defended by this Company and all interest on the entire amount of any judgment therein which accrues after the entry of judgment and before this Company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of this Company's liability thereon;

   (b) premiums on appeal bonds required in any such suit and premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, but without any obligation to apply or furnish any such bonds;

   (c) reasonable expenses incurred by the Insured at this Company's request including actual loss of wages or salary (but not loss of other income) not to exceed $25 per day because of his attendance at hearings or trials at such request.

Definitions

1. **Definition of "Insured":** With respect to the insurance afforded by this endorsement the unqualified word "Insured" includes the Named Insured; provided that (a) if the Named Insured is designated as an individual, the insurance applies only to the conduct of a business of which he is the sole

proprietor and (b) the unqualified word "Insured" also includes the following:

(i) if the Named Insured is or includes a partnership or joint venture, any partner or member thereof but only with respect to his liability as such;

(ii) any executive officer, director or stockholder of the Named Insured while acting within the scope of his duties as such;

(iii) any full-time, salaried employee, provided such employee is authorized to act in the administration of the Named Insured's Employee Benefits Programs.

2. **"Employee Benefits Programs":** The term "Employee Benefits Programs" means (a) group life insurance, group accident or health insurance, profit sharing plans, pension plans, employee stock subscription plans, workmen's compensation, unemployment insurance, social security benefits, disability benefits, and (b) any other similar employee benefits instituted after the effective date of this endorsement, provided this Company is notified within thirty days after the institution of such benefits.

3. **"Administration":** The unqualified word "administration" wherever used shall mean:

(a) Interpreting the Employee Benefits Programs;

(b) Handling of records in connection with the Employee Benefits Programs;

(c) Effective enrollment, termination or cancellation of employees under the Employee Benefits Programs; provided all such acts are authorized by the Named Insured.

Exclusions

1. This endorsement does not apply to:

(a) any claim based upon or attributable to any dishonest, fraudulent, criminal or malicious act, libel, slander, discrimination, or humiliation;

(b) bodily injury to or sickness, disease or death, of any person, or to injury to any tangible property, including the loss of use thereof;

(c) any claim for failure of performance of contract by an insurer;

(d) any claim based upon the Insured's failure to comply with any law concerning workmen's compensation, unemployment insurance, social security or disability benefits;

(e) any claim based upon:

(i) advice given by an Insured t an employee to participate o not to participate in any Em ployee Benefit Plans;

(ii) the appointment of, or th failure to appoint, any in vestment manager, administra tor, trustee, actuary, advisor counsel, accountant, custodian or consultant;

(iii) any investment activity, in cluding but not limited to, th management, administration o disposition of assets of an Employee Benefit Program.

2. This endorsement does not provide coverage for any claim to the extent that recovery could not have been attained upon such claim in an action at law prior to the effective date of the Employee Retirement Income Security Act of 1974 (ERISA).

Conditions

1. **Application of this Endorsement:** This endorsement applies to damages which occur within the United States of America, its territories or possessions or Canada provided claim or suit is brought against the Insured during the endorsement period, and the Insured at the effective date of this endorsement had no knowledge or could not have reasonably foreseen any circumstances which might result in a claim or suit.

2. **Limits of Liability:** Regardless of the number of (a) Insureds under this policy (b) persons who sustain damage, or (c) claims made or suits brought for such damage; the limit of liability stated in the Additional Declarations as applicable to "each claim" is the limit of this Company's liability for all damages incurred on account of any claim covered hereunder; the limit of liability stated in the Additional Declarations as "aggregate" is, subject to the above provision respecting each claim, the total limit of this Company's liability for all claims covered hereunder and occurring during each annual period this endorsement is in force.

3. **Premium:** The premium stated in the Additional Declarations is an estimated premium only. Upon termination of each annual period of this endorsement the Insured, on request, will furnish this Company a statement of the total number of employees at the end of the period and the earned premium shall be computed on the average of the number of employees at the beginning and the end of such period in accordance with the rates specified in the Additional Declarations. If the earned premium thus computed exceeds the estimated premium paid, the insured shall pay the excess to this Company; if less, this Company shall return to the Insured the unearned portion paid by such Insured.

4. **Insured's Duties in the Event of Occurrence, Claim or Suit:**

   (a) In the event of an occurrence which may result in a claim, written notice containing particulars sufficient to identify the Insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, shall be given by or for the Insured to this Company or any of its authorized agents as soon as practicable.

   (b) If claim is made or suit is brought against the Insured, the Insured shall immediately forward to this Company every demand, notice, summons or other process received by him or his representative.

   (c) The Insured shall cooperate with this Company and, upon this Company's request, shall attend hearings and trials, assist in making settlements, in the conduct of suits, in securing and giving evidence and obtaining the attendance of witnesses. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense.

5. **Deductible:** The deductible amount indicated in the Additional Declarations shall be subtracted from the total amount of all sums which this Company is obligated to pay or incur on behalf of the Insured on account of each claim. This Company shall be liable only for the difference between such deductible amount and the limit of this Company's liability for each claim as stated in the Additional Declarations. The terms of this endorsement including those with respect to notice of claim or suit and this Company's right to investigate and negotiate any such claim or suit, apply irrespective of the application of the deductible amount.

6. **Action Against Company:** No action shall lie against this Company, unless, as a condition precedent thereto, the Insured shall have fully complied with all of the terms of this endorsement, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company.

   Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this endorsement to the extent of the insurance afforded by this endorsement. No person or organization shall have any right under this endorsement to join this Company as a party to any action against the Insured to determine the Insured's liability, nor shall this Company be impleaded by the Insured or his legal representative. Bankruptcy or insolvency of the Insured or of the Insured's estate shall not relieve this Company of any of its obligations hereunder.

7. **Subrogation:** In the event of any payment under this endorsement, this Company shall be subrogated to all the Insured's rights of recovery therefor against any person or organization and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights.

8. **Changes:** Notice to any agent or knowledge possessed by an agent or by another person shall not affect a waiver or a change in any part of this endorsement or estop this Company from asserting any right under the terms of this endorsement; nor shall the terms stated herein be waived or changed, except by endorsement issued to effect such change.

9. **Assignment:** Assignment of interest under this endorsement shall not bind this Company until its consent is endorsed hereon; if, however, the Named Insured shall die, this endorsement shall cover the Named Insured's legal representative as Named Insured; provided that notice of cancellation addressed to the Insured named in the Additional Declarations and mailed to the address shown in this endorsement shall be sufficient notice to effect cancellation of this endorsement.

10. **Other Insurance:** If the Insured has other insurance against a loss covered by this endorsement, this Company shall not be liable under this endorsement for a greater proportion of such loss than the limit of liability stated in the Additional Declarations bears to the total limit of liability of all valid and collectible insurance against such loss. However, with respect to negligent acts, errors or omissions which occur prior to the effective date of this endorsement, the insurance hereunder shall apply only as excess insurance over any other valid and collectible insurance and shall then apply only in the amount by which the applicable limit of liability of this endorsement exceeds the sum of the applicable limits of liability of all such other insurance.

11. **Additional Declarations:** By acceptance of this endorsement the Insured agrees that the statements in the Additional Declarations are his agreements and representations, that this endorsement is issued in reliance upon the truth of such representations and that this endorsement embodies all agreements existing between himself and this Company or any of its agents relating to this insurance.

12. **Conformity with Sta..ce:** Terms of this endorsement which are in conflict with the statutes of the State wherein this endorsement is issued are hereby amended to conform to such statutes.

13. **Cancellation:** This endorsement may be cancelled by the Named Insured by surrender thereof to this Company or any of its authorized agents or by mailing to this Company written notice stating when thereafter the cancellation shall be effective. This endorsement may be cancelled by this Company by mailing to the Named Insured at the addres shown in the Additional Declaration written notice stating when not les than ten days thereafter such cancel lation shall be effective. The mailin of notice as afroesaid shall be suffi cient proof of notice. The time of th surrender or the effective date an hour of cancellation stated in the no tice shall become the end of th endorsement period. Delivery of suc written notice either by the Named In sured or by this Company shall b equivalent to mailing.

THE HOME INSURANCE COMPANIES

(The Attaching Clause need be completed only when this endorsement is issued subsequent to preparation of the policy.)

Liability

L61
(Ed.5-8

GL 04 04 (Ed. 05 81)

Broad Form Comprehensive General Liability Endorsement END. #5

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:

COMPREHENSIVE GENERAL LIABILITY INSURANCE

This endorsement, effective 12-31-87 ,forms a part of policy No. GL-1 69 26 17

(12:01 A.M., standard time)

issued to NATIONAL INVESTMENT DEVELOPMENT CORP., ET AL

by CITY INSURANCE COMPANY

Authorized Representative

SCHEDULE

Personal Injury and Advertising Injury Liability

Aggregate Limit shall be the per occurrence bodily injury liability limit unless otherwise indicated herein.

Limit of Liability $_____Aggregate

Limit of Liability - Premises Medical Payments Coverage:

$1,000 each person unless otherwise indicated herein $_____each person.

Limit of Liability - Fire Legal Liability Coverage:

$50,000 per occurrence unless otherwise indicated herein: $_____per occurrence.

Advance Premium	Premium Basis
$ INCLUDED IN COMPOSITE RATE	_____% OF THE TOTAL COMPREHENSIVE GENERAL LIABILITY BODILY INJURY AND PROPERTY DAMAGE PREMIUM AS OTHERWISE DETERMINED
$ INCLUDED	**MINIMUM PREMIUM**

I. CONTRACTUAL LIABILITY COVERAGE

(A) The definition of **incidental contract** is extended to include any oral or written contract or agreement relating to the conduct of the **named insured's** business.

(B) The insurance afforded with respect to liability assumed under an **incidental contract** is subject to the following additional exclusions:

(1) to **bodily injury** or **property damage** for which the **insured** has assumed liability under any **incidental contract**, if such injury or damage occurred prior to the execution of the **incidental contract**;

(2) if the **insured** is an architect, engineer or surveyor, to **bodily injury** or **property damage** arising out of the rendering of or the failure to render professional services by such **insured**, including

(a) the preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications, and

(b) supervisory, inspection or engineering services;

(3) if the indemnitee of the **insured** is an architect, engineer or surveyor, to the liability of the indemnitee, his agents or employees, arising out of

(a) the preparation or approval of or the failure to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications, or

(b) the giving of or the failure to give directions or instructions by the indemnitee, his agents or employees, provided such giving or failure to give is the primary cause of the **bodily injury** or **property damage**;

(4) to any obligation for which the **insured** may be held liable in an action on a contract by a third party beneficiary for **bodily injury** or **property damage** arising out of a project for a public authority; but this exclusion does not apply to an action by the public authority or any other person or organization engaged in the project;

(5) to **bodily injury** or **property damage** arising out of construction or demolition operations, within 50 feet of any railroad property, and affecting any railroad bridge or trestle, tracks, road beds, tunnel, underpass or crossing; but this exclusion does not apply to sidetrack agreements.

(C) The following exclusions applicable to Coverages A (Bodily Injury) and B (Property Damage) do not apply to this Contractual Liability Coverage: (b), (c) (2), (d) and (e).

(D) The following additional condition applies:

Arbitration

The company shall be entitled to exercise all of the **insured's** rights in the choice of arbitrators and in the conduct of any arbitration proceeding.

II. PERSONAL INJURY AND ADVERTISING INJURY LIABILITY COVERAGE

(A) The company will pay on behalf of the **insured** all sums which the **insured** shall become legally obligated to pay as damages because of **personal injury** or **advertising injury** to which this insurance applies, sustained by any person or organization and arising out of the conduct of the **named insured's business**, within the **policy territory**, and the company shall have the right and duty to defend any suit against the **insured** seeking damages on account of such injury, even if any of the allegations o the suit are groundless, false or fraudu lent, and may make such investigation an settlement of any claim or suit as it deem expedient, but the company shall not b obligated to pay any claim or judgment or t defend any suit after the applicable limi of the company's liability has bee exhausted by payment of judgments or settle ments.

(B) This insurance does not apply:

(1) to liability assumed by the **insure** under any contract or agreement;

(2) to **personal injury** or **advertising injury** arising out of the wilful violation of a penal statute or ordinance committed by or with the knowledge or consent of the **insured**;

(3) to **personal injury** or **advertising injury** arising out of a publication or utterance of a libel or slander, or a publication or utterance in violation of an individual's right of privacy, if the first injurious publication or utterance of the same or similar material by or on behalf of the **named insured** was made prior to the effective date of this insurance;

(4) to **personal injury** or **advertising injury** arising out of libel or slander or the publication or utterance of defamatory or disparaging material concerning any person or organization or goods, products or services, or in violation of an individual's right of privacy, made by or at the direction of the **insured** with knowledge of the falsity thereof;

(5) to **personal injury** or **advertising injury** arising out of the conduct of any partnership or joint venture of which the **insured** is a partner or member and which is not designated in the declarations of the policy as a **named insured**;

(6) to **advertising injury** arising out of

(a) failure of performance of contract, but this exclusion does not apply to the unauthorized appropriation of ideas based upon alleged breach of implied contract, or

(b) infringement of trademark, service mark or trade name, other than titles or slogans, by use thereof on or in connection with goods, products or services sold, offered for sale or advertised, or

(c) incorrect description or mistake in advertised price of goods, products or services sold, offered for sale or advertised;

(7) with respect to **advertising injury**

(a) to any **insured** in the business of advertising, broadcasting, publishing or telecasting, or

(b) to any injury arising out of any act committed by the **insured** with actual malice.

(C) **Limits of Liability**

Regardless of the number of (1) **insureds** hereunder, (2) persons or organizations who sustain injury or damage, or (3) claims made or suits brought on account of **personal injury** or **advertising injury**, the total limit of the company's liability under this coverage for all damages shall not exceed the limit of liability stated in this endorsement as "aggregate".

(D) **Additional Definitions**

"**Advertising Injury**" means injury arising out of an offense committed during the policy period occurring in the course of the **named insured's** advertising activities, if such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title or slogan.

"**Personal Injury**" means injury arising out of one or more of the following offenses committed during the policy period:

1. false arrest, detention, imprisonment, or malicious prosecution;

2. wrongful entry or eviction or other invasion of the right of private occupancy;

3. a publication or utterance

(a) of a libel or slander or other defamatory or disparaging material, or

(b) in violation of an individual's right of privacy;

except publications or utterances in the course of or related to advertising, broadcasting, publishing or telecasting activities conducted by or on behalf of the **named insured** shall not be deemed **personal injury.**

III. PREMISES MEDICAL PAYMENTS COVERAGE

The company will pay to or for each person who sustains **bodily injury** caused by accident all reasonable **medical expense** incurred within one year from the date of the accident on account of such **bodily injury**, provided such **bodily injury** arises out of (a) a condition in the **insured premises** or (b) operations with respect to which the **named insured** is afforded coverage for **bodily injury** liability under the policy.

This insurance does not apply:

(A) to **bodily injury**

(1) arising out of the ownership, maintenance, operation, use, loading o unloading of

(a) any **automobile** or aircraft owne or operated by or rented or loane to any **insured**, or

(b) any other **automobile** or aircraf operated by any person in the cours of his employment by any **insured**;

but this exclusion does not apply t the parking of an **automobile** on th **insured premises**, if such **automo bile** is not owned by or rented o loaned to any **insured**;

(2) arising out of

(a) the ownership, maintenance operation, use, loading or unload ing of any **mobile equipment** whil being used in any prearranged o organized racing, speed or demoli tion contest or in any stuntin activity or in practice or prepara tion for any such contest or activ ity, or

(b) the operation or use of an snowmobile or trailer designed fo use therewith;

(i) owned or operated by or rente or loaned to any **insured**, or

(ii) operated by any person in th course of his employment by an **insured**;

(3) arising out of the ownership, maintenance, operation, use, loading o unloading of

(a) any watercraft owned or operate by or rented or loaned to an **insured**, or

(b) any other watercraft operated b any person in the course of his employment by any **insured**;

but this exclusion does not apply t watercraft while ashore on th **insured premises**;

(4) arising out of and in the course o the transportation of **mobile equipment** by an **automobile** owned or operated by o rented or loaned to the **named insured**;

(B) to **bodily injury**

(1) included within the **completed operations hazard** or the **products hazard**;

(2) arising out of operations performe for the **named insured** by independen contractors other than

(a) maintenance and repair of th **insured premises**, or

(b) structural alterations at suc premises which do not involve chang-

ing the size of or moving buildings or other structures;

(3) resulting from the selling, serving or giving of any alcoholic beverage

(a) in violation of any statute, ordinance or regulation,

(b) to a minor,

(c) to a person under the influence of alcohol, or

(d) which causes or contributes to the intoxication of any person, if the **named insured** is a person or organization engaged in the business of manufacturing, distributing, selling or serving alcoholic beverages, or if not so engaged, is an owner or lessor of premises used for such purposes, but only part (a) of this exclusion (B) (3) applies when the **named insured** is such an owner or lessor;

(4) due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing;

(C) to **bodily injury**

(1) to the **named insured**, any partner thereof, any tenant or other person regularly residing on the **insured premises** or any employee of any of the foregoing if the **bodily injury** arises out of and in the course of his employment therewith;

(2) to any other tenant if the **bodily injury** occurs on that part of the **insured premises** rented from the **named insured** or to any employee of such a tenant if the **bodily injury** occurs on the tenant's part of the **insured premises** and arises out of and in the course of his employment for the tenant;

(3) to any person while engaged in maintenance and repair of the **insured premises** or alteration, demolition or new construction at such premises;

(4) to any person if any benefits for such **bodily injury** are payable or required to be provided under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;

(5) to any person practicing, instructing or participating in any physical training, sport, athletic activity or contest whether on a formal or informal basis;

(6) if the **named insured** is a club, to any member of the **named insured**;

(7) if the **named insured** is a hotel, motel, or tourist court, to any guest of the **named insured**;

(D) to any **medical expense** for services by the **named insured**, any employee thereof or any person or organization under contract to the **named insured** to provide such services.

LIMITS OF LIABILITY

The limit of liability for Premises Medical Payments Coverage is $1,000 each person unless otherwise stated in the schedule of this endorsement. The limit of liability applicable to "each person" is the limit of the company's liability for all **medical expense** for **bodily injury** to any one person as the result of any one accident; but subject to the above provision respecting "each person", the total liability of the company under Premises Medical Payments Coverage for all **medical expense** for **bodily injury** to two or more persons as the result of any one accident shall not exceed the limit of **bodily injury** liability stated in the policy as applicable to "each **occurrence**".

When more than one **medical payments** coverage afforded by the policy applies to the loss, the company shall not be liable for more than the amount of the highest applicable limit of liability.

ADDITIONAL DEFINITIONS

When used herein:

"**insured premises**" means all premises owned by or rented to the **named insured** with respect to which the **named insured** is afforded coverage for **bodily injury** liability under this policy, and includes the ways immediately adjoining on land;

"**medical expense**" means expenses for necessary medical, surgical, x-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services.

ADDITIONAL CONDITION

Medical Reports; Proof and Payment of Claim

As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require. The company may pay the injured person or any person or organization rendering the services and the payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute an admission of liability of any person or, except hereunder, of the company.

IV. HOST LIQUOR LAW LIABILITY COVERAGE

Exclusion (h) does not apply with respect to liability of the **insured** or his indemnitee arising out of the giving or serving of alcoholic beverages at functions incidental to the **named insured's** business, provided the **named insured** is not engaged in the

business of manufacturing, distributing, selling or serving of alcoholic beverages.

V. FIRE LEGAL LIABILITY COVERAGE - REAL PROPERTY

With respect to property damage to structures or portions thereof rented to or leased to the named insured, including fixtures permanently attached thereto, if such property damage arises out of fire

(A) All of the exclusions of the policy, other than the Nuclear Energy Liability Exclusion (Broad Form), are deleted and replaced by the following:

This insurance does not apply to liability assumed by the insured under any contract or agreement.

(B) The limit of property damage liability as respects this Fire Legal Liability Coverage - Real Property is $50,000 each occurrence unless otherwise stated in the Schedule of this endorsement.

(C) The Fire Legal Liability Coverage - Real Property shall be excess insurance over any valid and collectible property insurance (including any deductible portion thereof), available to the insured, such as, but not limited to, Fire, Extended Coverage, Builder's Risk Coverage or Installation Risk Coverage, and the Other Insurance Condition of the policy is amended accordingly.

VI. BROAD FORM PROPERTY DAMAGE LIABILITY COVERAGE (Including Completed Operations)

The insurance for property damage liability applies, subject to the following additional provisions:

(A.) Exclusions (k) and (o) are replaced by the following:

(1) to property owned or occupied by or rented to the insured, or, except with respect to the use of elevators, to property held by the insured for sale or entrusted to the insured for storage or safekeeping;

(2) except with respect to liability under a written sidetrack agreement or the use of elevators

(a) to property while on premises owned by or rented to the insured for the purpose of having operations performed on such property by or on behalf of the insured,

(b) to tools or equipment while being used by the insured in performing his operations,

(c) to property in the custody of the insured which is to be installed, erected or used in construction by the insured,

(d) to that particular part of any property, not on premises owned by or rented to the insured,

(i) upon which operations ar being performed by or on behal of the insured at the time c the property damage arising ou of such operations, or

(ii) out of which any propert damage arises, or

(iii) the restoration, repai or replacement of which has bee made or is necessary by reaso of faulty workmanship thereo by or on behalf of the insured;

(3) with respect to the completed oper ations hazard and with respect to an classification stated in the policy o in the company's manual as "includin completed operations", to property dam age to work performed by the name insured arising out of such work or an portion thereof, or out of such materi als, parts or equipment furnished i connection therewith.

(B.) The Broad Form Property Damage Liabil ity Coverage shall be excess insurance ove any valid and collectible property insuranc (including any deductible portion thereof available to the insured, such as, but no limited to, Fire, Extended Coverage, Build er's Risk Coverage or Installation Risk Cov erage, and the Other Insurance Condition o the policy is amended accordingly.

VII. INCIDENTAL MEDICAL MALPRACTICE LIABILITY COVERAGE

The definition of bodily injury is amende to include Incidental Medical Malpractic Injury.

Incidental Medical Malpractice Injury mean injury arising out of the rendering of o failure to render, during the policy period, the following services:

(A) medical, surgical, dental, x-ray o nursing service or treatment or the furnishing of food or beverages in connection therewith; or

(B) the furnishing or dispensing of drugs o medical, dental or surgical supplies o appliances.

This coverage does not apply to:

(1) expenses incurred by the insured fo first-aid to others at the time of a accident and the "Supplementary Payments" provision and the "Insured's Duties in the Event of Occurrence, Clai or Suit" Condition are amended accordingly;

(2) any insured engaged in the business or occupation of providing any of the services described under VII (A) and (B) above;

(3) injury caused by any indemnitee i such indemnitee is engaged in the business or occupation of providing any of

the services described under VII (A) and (B) above.

VIII. NON-OWNED WATERCRAFT LIABILITY COVERAGE (under 26 feet in length)

Exclusion (e) does not apply to any watercraft under 26 feet in length provided such watercraft is neither owned by the **named insured** nor being used to carry persons or property for a charge.

Where the **insured** is, irrespective of this coverage, covered or protected against any loss or claim which would otherwise have been paid by the company under this endorsement, there shall be no contribution or participation by this company on the basis of excess, contributing, deficiency, concurrent, or double insurance or otherwise.

IX. LIMITED WORLDWIDE LIABILITY COVERAGE

The definition of **policy territory** is amended to include the following:

4. Anywhere in the world with respect to **bodily injury, property damage, personal injury** or **advertising injury** arising out of the activities of any **insured** permanently domiciled in the United States of America though temporarily outside the United States of America, its territories and possessions or Canada, provided the original suit for damages because of any such injury or damage is brought within the United States of America, its territories or possessions or Canada.

Such insurance as is afforded by paragraph 4. above shall not apply:

(a) to **bodily injury** or **property damage** included within the **completed operations hazard** or the **products hazard**;

(b) to Premises Medical Payments Coverage.

X. ADDITIONAL PERSONS INSURED

As respects **bodily injury, property damage** and **personal injury** and **advertising injury** coverages, under the provision "Persons Insured", the following are added as **insureds**:

(A) Spouse - Partnership - If the **named insured** is a partnership, the spouse of a partner but only with respect to the conduct of the business of the **named insured**;

(B) Employee - Any employee (other tha executive officers) of the **named insure** while acting within the scope of hi duties as such, but the insuranc afforded to such employee does no apply:

(1) to **bodily injury** or **persona injury** to another employee of th **named insured** arising out of or i the course of his employment;

(2) to **personal injury** or **advertis ing injury** to the **named insured** or if the **named insured** is a partner ship or joint venture, any partne or member thereof, or the spouse o any of the foregoing;

(3) to **property damage** to propert owned, occupied or used by, rente to, in the care, custody or contro of or over which physical control i being exercised for any purpose b another employee of the name **insured**, or by the **named insured** or, if the **named insured** is a partnership or joint venture, by any partner or member thereof or by th spouse of any of the foregoing.

XI. EXTENDED BODILY INJURY COVERAGE

The definition of **occurrence** includes an intentional act by or at the direction o the **insured** which results in **bodily injury**, if such injury arises solely from the use o reasonable force for the purpose of protecting persons or property.

XII. AUTOMATIC COVERAGE - NEWLY ACQUIRED ORGANIZATIONS (90 DAYS)

The word **insured** shall include as name **insured** any organization which is acquire or formed by the **named insured** and over which the **named insured** maintains ownership or majority interest, other than a joint venture, provided this insurance does not apply to **bodily injury, property damage, personal injury** or **advertising injury** with respect to which such new organization under this policy is also an **insured** under any other similar liability or indemnity policy or would be an **insured** under any such policy but for exhaustion of its limits of liability. The insurance afforded hereby shall terminate 90 days from the date any such organization is acquired or formed by the **named insured**.

THE HOME INSURANCE COMPANIES

(The Attaching Clause need be completed only when this endorsement is issued subsequent to preparation of the policy.)

L610
(Ed.3-81

GL 99 17 (Ed. 03 81)

Amendment - Limits Of Liability END. #6

(Single Limit)

(Individual Coverage Aggregate Limit)

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:

COMPREHENSIVE GENERAL LIABILITY INSURANCE

COMPLETED OPERATIONS AND PRODUCTS LIABILITY INSURANCE

CONTRACTUAL LIABILITY INSURANCE

MANUFACTURERS' AND CONTRACTORS' LIABILITY INSURANCE

OWNERS' AND CONTRACTORS' PROTECTIVE LIABILITY INSURANCE

OWNERS', LANDLORDS' AND TENANTS' LIABILITY INSURANCE

This endorsement, effective 12-31-87 , forms a part of policy No. GL-1 69 26 17
(12:01 A.M., standard time)

issued to NATIONAL INVESTMENT DEVELOPMENT CORP., ET AL

by CITY INSURANCE COMPANY

Authorized Representative

SCHEDULE

Coverages	Limits of Liability
Bodily Injury Liability and Property Damage Liability	$ 1,000,000. each occurrence $ 1,000,000. aggregate

It is agreed that the provisions of the policy captioned "LIMITS OF LIABILITY" relating t Bodily Injury Liability and Property Damage Liability are amended to read as follows:

LIMITS OF LIABILITY

Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain bodily injury or property damage, or (3) claims made or suits brought on account of bodily injury or property damage, the company's liability is limited as follows:

Bodily Injury Liability and Property Damage Liability:

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a) The limit of liability stated in the Schedule of this endorsement as applicable to "each **occurrence**" is the total limit of the company's liability for all damages including damages for care and loss of services because of **bodily injury** and **property damage** sustained by one or more persons or organizations as a result of any one **occurrence**, provided that with respect to any **occurrence** for which notice of this policy is given in lieu of security or when this policy is certified as proof of financial responsibility under the provisions of the Motor Vehicle Financial Responsibility Law of any state or province such limit of liability shall be applied to provide the separate limits required by such law for Bodily Injury Liability and Property Damage Liability to the extent of the coverage required by such law, but the separate application of such limit shall not increase the total limit of the company's liability.

b) Subject to the above provision respecting "each **occurrence**", the total liability of the company for all damages because of all **bodily injury** and **property damage** which occurs during each annual period while this policy is in force commencing from its effective date and which is described in any of the numbered subparagraphs below shall not exceed the limit of liability stated in the Schedule of this endorsement as "aggregate":

PD

1) all **property damage** arising out of premises or operations rated on a remuneration basis or Contractor's equipment rated on a receipts basis, including **property damage** for which liability is assumed under any **incidental contract** relating to such premises or operations, but excluding **property damage** included in subparagraph (2) below;

2) all **property damage** arising out of and occurring in the course of operations performed for the **named insured** by independent contractors and general supervision thereof by the **named insured**, including any such **property damage** for which liability is assumed under any **incidental contract** relating to such operations, but this subparagraph (2) does not include **property damage** arising out of maintenance or repairs at premises owned by or rented to the **named insured** or structural alterations at such premises which do not involve changing the size of or moving buildings or other structures;

3) if Products - Completed Operations Insurance is afforded, all **bodily injury** and **property damage** included within the completed operations hazard and all **bodily injury** and **property damage** included within the **products hazard**;

4) if Contractual Liability Insurance is afforded, all **property damage** for which liability is assumed under any contract to which the Contractual Liability Insurance applies.

Such aggregate limit shall apply separately:

i) to the **property damage** described in subparagraphs (1) and (2) and separately with respect to each project away from premises owned by or rented to the **named insured**;

ii) to the sum of the **damages** for all **bodily injury** and **property damage** described in subparagraph (3); and

iii) to the **property damage** described in subparagraph (4) and separately with respect to each project away from premises owned by or rented to the **named insured**.

c) For the purpose of determining the limit of the company's liability, all **bodily injury** and **property damage** arising out of continuous or repeated exposure to substantially the same general condition shall be considered as arising out of one **occurrence**.

THE HOME INSURANCE COMPANIES

Absolute Pollution Exclusion

H36074 F
Ed. 11-84

END. #7

GL-1 69 26 17

The undersigned authorized representative recognizes that this policy contains an absolute pollution exclusion and understands the terms of this exclusion which reads as follows:

Pollution Exclusion

It is agreed that exclusion (F) is replaced by the following:

(F) to **bodily injury** or **property damage** arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water.

Named Insured

NATIONAL INVESTMENT DEVELOPMENT CORP., ET AL

Signature and Title	Authorized Representative	Date

CF44

FIELD OFFICE COPY

Non-Premium Endorsement

Date Prepared	Endorsement No.
03-01-88icr	8

Issued by

☐ The Home Insurance Company ☒ City Insurance Company ☐

☐ The Home Indemnity Company ☐ The Home Insurance Company of Indiana

Policy Number	Certificate Number	Named Insured
GL-1 69 26 17		NATIONAL INVESTMENT DEVELOPMENT CORP., ET AL

Producer	Producer No. - OPC
R.C. STIBOR & ASSOCIATES	55839-055

Policy Period:	Inception (Month-Day-Year)	Expiration (Month-Day-Year)	Effective Date and Time of Endorsement
	12-31-87	02-01-89	12-31-87

It is agreed that this policy is hereby amended as indicated. All other terms and conditions of this policy remain unchanged.

SIXTY DAY CANCELLATION ENDORSEMENT

IT IS HEREBY AGREED THAT IN THE EVENT OF CANCELLATION OF THIS POLICY, BY THE COMPANY, SIXTY (60) DAYS PRIOR WRITTEN NOTICE OF SUCH CANCELLATION WILL BE SENT TO THE NAMED INSURED AT THE ADDRESS SHOWN IN THE DECLARATIONS, UNLESS SUCH CANCELLATION IS DUE TO NON-PAYMENT OF PREMIUM BY THE INSURED, IN WHICH CASE TEN (10) DAYS PRIOR WRITTEN NOTICE OF CANCELLATION WILL BE SENT.

Signature of Authorized Representative

CF45

COVERAGE PART

ELEVATOR COLLISION INSURANCE

L 9282
(Ed. 1-73)

END. #9

For attachment to Policy No. GL-1 69 26 17, to complete said policy.

SCHEDULE

The insurance afforded is only with respect to the following Coverage as indicated by specific premium charge. The limit of the company's liability against such Coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

Coverage	Limits of Liability
Q — Elevator Collision	25 thousand dollars each **elevator collision**

Designation of Elevators	Number of Elevators	Rate per Elevator	Premium
INCLUDED IN COMPOSITE RATE		$	$
Form numbers of endorsements attached at issue			$
		Total Premium	$ INCLUDED

I. COVERAGE Q—ELEVATOR COLLISION

The company will pay for **loss**

(1) to any **elevator** designated in the schedule for this insurance, or

(2) to any other property owned, occupied or used by, or rented to, or in the care, custody or control of the **named insured** or as to which the **named insured** is for any purpose exercising physical control,

caused by an **elevator collision.**

Exclusions

This insurance does not apply to any **loss:**

(a) caused by an **elevator collision** arising out of fire or caused by fire arising out of an **elevator collision;**

(b) caused by an **elevator collision** arising out of the breaking, burning out or disrupting of any electrical machine not located within the car of the **elevator;**

(c) due to war, whether or not declared, civil war, insurrection, rebellion or revolution or to any act or condition incident to any of the foregoing;

(d) with respect to which insurance is afforded by the policy under the Property Damage Liability Coverage or the Contractual Property Damage Liability Coverage.

II. LIMITS OF LIABILITY

The limit of the company's liability for all **loss** as the result of any one accident shall not exceed the limit of liability stated in the schedule as applicable to "each **elevator collision**", nor what it would cost at the time of **loss** to repair or replace the property with other of like kind and quality. The company may pay for the **loss** in money or may repair or replace the property and may settle any claim for **loss** of property either with the **named insured** or the owner thereof. Any property so paid for or replaced shall, at the option of the company, become the property of the company. The above limit of liability applies separately to each **elevator** designated in the declaration or schedule for this insurance.

III. ADDITIONAL DEFINITIONS

"**elevator collision**" means the collision of any part of an **elevator** designated in the schedule for this insurance, or of anything carried thereon, with another part of such **elevator** or with another object;

"**loss**" means direct and accidental injury or destruction.

IV. APPLICATION OF INSURANCE

This insurance applies only to collisions which occur during the policy period.

V. NAMED INSURED'S DUTIES WHEN LOSS OCCURS; ACTION AGAINST COMPANY

The conditions of the policy designated "Insured's Duties in the Event of Occurrence, Claim or Suit" and "Action Against Company" are replaced by the following:

4. Named Insured's Duties When Loss Occurs

Upon knowledge of **loss** which may give rise to a claim for **loss**, the **named insured** shall:

(a) give notice thereof as soon as practicable to the company or any of its authorized agents, and

(b) file detailed proof of loss, duly sworn to, with the company within 60 days after the occurrence of **loss.**

Upon the company's request, the **named insured** and every claimant hereunder shall submit to examination by the company, subscribe to the same, under oath if required, and produce for the company's examination all pertinent records, all at such reasonable times and places as the company shall designate, and shall cooperate with the company in all matters pertaining to **loss** or claims with respect thereto.

The **named insured** shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense. The company agrees to reimburse the **named insured** for any expense incurred at its request.

5. Action Against Company

No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy nor until 60 days after the required proofs of **loss** have been filed with the company, nor at all unless commenced within two years from the date when the **named insured** has first knowledge of the **loss.** If any limitation of time for notice of **loss** or any legal proceeding herein contained is shorter than that permitted to be fixed by agreement under any statute controlling the construction of this insurance, the shortest permissible statutory limitation of time shall govern and shall supersede the time limitation herein stated.

VI. APPRAISAL

If the **named insured** and the company fail to agree as to the amount of **loss**, each shall, on the written demand of either made within 60 days after receipt of proof of **loss** by the company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, on the request of the **named insured** or the company such umpire shall be selected by a judge of a court of record in the county and state in which the appraisal is pending. The appraisers shall then appraise the **loss**, stating separately the actual cash value at time of **loss** and the amount of the **loss**, and failing to agree shall submit their differences to the umpire. An award in writing by the umpire and any or both appraisers, or by both appraisers, shall determine the amount of **loss.** The **named insured** and the company shall each pay his or its chosen appraiser and shall bear equally the expenses of the umpire and the other expenses of appraisal.

The company shall not be held to have waived any of its rights by any act relating to appraisal.

AMENDED DEFINITION

It is agreed that when used in reference to this insurance "**elevator**" means any hoisting or lowering device to connect floors or landings, whether or not in service, and all appliances thereof including any car, platform, shaft, hoistway, stairway, runway, power equipment and machinery, or any hydraulic or mechanical hoist used for raising or lowering **automobiles** for lubricating and servicing or for dumping material from trucks; but does not include a hoist without a platform outside a building if without mechanical power or if not attached to building walls, or a hod or material hoist used in alteration, construction or demolition operations, or an inclined conveyor used exclusively for carrying property or a dumbwaiter used exclusively for carrying property and having a compartment height not exceeding four feet.

THE HOME INSURANCE COMPANIES

HOME 1853

L6178
Ed.04-84

AMENDATORY ENDORSEMENT

END. #10

GL 00 32 (Ed. 04-84)

This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:

Comprehensive General Liability Insurance
Manufacturers' and Contractors' Liability Insurance
Owners', Landlords' and Tenants' Liability Insurance
Owners' and Contractors' Protective Liability Insurance
Storekeeper's Insurance
SMP Liability Insurance

(The following "attaching clause" need be completed only when this endorsement is issued subsequent to preparation of the policy.)

This endorsement, effective on 12-31-87 (Date) at 12:01 A.M. standard time,

forms a part of Policy No. GL-1 69 26 17

of the CITY INSURANCE COMPANY (Name of Insurance Company)

issued to NATIONAL INVESTMENT DEVELOPMENT CORP., ET AL

Authorized Representative

It is agreed that the exclusion relating to **bodily injury** to any employee of the **insured** is deleted and replaced by the following:

This insurance does not apply:

(i) to **bodily injury** to any employee of the **insured** arising out of and in the course of his employment by the **insured** for which the **insured** may be held liable as an employer or in any other capacity;

(ii) to any obligation of the **insured** to indemnity or contribute with another because of damages arising out of the **bodily injury**; or

(iii) to **bodily injury** sustained by the spouse, child, parent, brother, or sister of an employee of the **insured** as a consequence of **bodily injury** to such employee arising out of and in the course of his employment by the **insured**;

This exclusion applies to all claims and suits by any person or organization for damages because of such **bodily injury** including damages for care and loss of services.

This exclusion does not apply to liability assumed by the **insured** under an **incidental contract**.

CF47

THE HOME INSURANCE COMPANIES

HOME 1853

AMENDATORY ENDORSEMENT - ADDITIONAL DEFINITION

L9235
Ed.7-78

GL 00 19 (Ed. 7-78)

END. #11

(The Attaching Clause need be completed only when this endorsement is issued subsequent to preparation of the policy.)

This endorsement, effective 12-31-87 12:01 A.M., standard time

forms a part of policy No. GL-1 69 26 17

issued to NATIONAL INVESTMENT DEVELOPMENT CORP., ET AL

by CITY INSURANCE COMPANY

Authorized Representative

It is agreed that the following definition is added:

"loading or unloading", with respect to an **automobile**, means the handling of property after it is moved from the place where it is accepted for movement into or onto an **automobile** or while it is in or on an **automobile** or while it is being moved from an **automobile** to the place where it is finally delivered, but "loading or unloading" does not include the movement of property by means of a mechanical device (other than a hand truck) not attached to the **automobile**.

WILLIAM M. KOLIN, ESQ.
PAUL ANTHONY ELIZONDO, ESQ.
KING, SHAPIRO, MITTELMAN & KOLIN
1999 Harrison Street, Suite 1600
Oakland, California 94612
(415) 273-8833

Attorneys for Plaintiff
WALE O. OSIJO

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

WALE O. OSIJO,

Plaintiff,

v.

HOUSING RESOURCES MANAGEMENT, INC., a California Corporation; PROSTAFF SECURITY SERVICE, INC., a California Corporation; ACORN I LIMITED, a California Limited Partnership; ACORN II LIMITED, a California Limited Partnership; and DOES 1 through 30, inclusive,

Defendants.
_____/

NO. 649881-6

SECOND AMENDED COMPLAINT

Plaintiff alleges and complains as follows:

FIRST CAUSE OF ACTION
(Negligence)

1. Defendant HOUSING RESOURCES MANAGEMENT, INC. (hereinafter referred to as "HRM"), is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of California with its principal place of business in the City of Oakland, County of Alameda, California.

2. Defendant PROSTAFF SECURITY SERVICE, INC. (hereinafter

referred to as "PROSTAFF"), is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of California with its principal place of business in the City and County of San Francisco, California.

3. Defendant ACORN I LIMITED (hereinafter referred to as "ACORN I") is and at all times herein mentioned was a California limited partnership duly organized and existing under the laws of the State of California with its principal place of business in the City of Oakland, County of Alameda, California.

4. Defendant ACORN II LIMITED (hereinafter referred to as "ACORN II") is and at all times herein mentioned was a California limited partnership duly organized and existing under the laws of the State of California with its principal place of business in the City of Oakland, County of Alameda, California.

5. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as DOES 1 through 30, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and based thereon, alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged and that plaintiff's injuries as herein alleged were proximately caused by such negligence.

6. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants and in the course of doing the things herein alleged was acting

within the course and scope of such agency and employment.

7. At all times mentioned herein, defendants ACORN I and ACORN II and each of them owned, maintained, controlled, managed, and operated the premises known as ACORN APARTMENTS (hereinafter referred to as "ACORN"), located at 834 Adeline Street, Oakland, California.

8. At all times mentioned herein, defendant HRM was a management company which maintained, controlled, and managed the premises known as ACORN, located at 834 Adeline Street, Oakland, California.

9. On or about July 23, 1987, defendant PROSTAFF and defendants ACORN I and ACORN II entered into a contract whereby defendant PROSTAFF was to provide security services at the ACORN premises. This contract was entered into by ACORN I and ACORN II, through its authorized agent, defendant HRM and was in effect on October 7, 1988.

10. Prior to entering into said contract, defendants ACORN I, ACORN II, and HRM negligently failed to investigate and/or ascertain the reputation, competence, and responsibility level of defendant PROSTAFF SECURITY SERVICE, INC. with respect to providing security services.

11. At all times mentioned herein, defendant PROSTAFF was a security guard company hired by defendants ACORN I, ACORN II, and HRM to provide security services at ACORN and under the control and supervision of defendants and each of them.

12. At all times herein mentioned, defendants, and each of them, negligently failed to train, supervise, and control employees of PROSTAFF to prevent them from verbally and

physically assaulting residents and visitors at ACORN. Furthermore, defendants, and each of them, failed to train, supervise, and monitor employees of PROSTAFF to assure that they would not verbally and physically assault residents and visitors at ACORN. That defendants, and each of them, took no steps to prevent employees of PROSTAFF to prevent them from stealing the personal property of residents and of other persons present at ACORN prior to and during plaintiff's hiring on August 9, 1988.

13. From August 9, 1988 through October 7, 1988 plaintiff worked as a security guard in the employ of defendants, and each of them, at ACORN.

14. At the aforementioned time and place, defendants, and each of them, negligently failed to train, supervise, control, and hire security guards for PROSTAFF in that during the aforementioned time, employees of PROSTAFF, other than plaintiff, physically and verbally assaulted residents and other persons at ACORN; stole personal property from residents and other persons at ACORN which defendants, and each of them, knew, or in the exercise of reasonable care should have known, constituted a dangerous condition and unreasonable risk of harm to plaintiff in that plaintiff as an employee of defendant PROSTAFF was subject to violent reprisals at the hands of those who had been assaulted by employees of PROSTAFF, and all of the defendants herein. That on numerous occasions prior to October 7, 1988 employees of PROSTAFF physically beat several residents or visitors to ACORN and/or stole money from them. That on October 7, 1988 at approximately 11:00 a.m., one Sean Garth was taken into the security office and severely beaten by

employees of PROSTAFF. That thereafter that same day, employees of PROSTAFF proceeded to beat Sean Garth's automobile with a baseball bat, whereupon Sean Garth told said employees of said PROSTAFF, "I am going to come back and shoot up the place." That when plaintiff reported to work at ACORN that day, October 7, 1988, at 4:00 p.m. he was not informed by any defendant or agent or employee of any defendant of this altercation, nor of the threat made by Sean Garth to come back and shoot up the place. That contrary to PROSTAFF'S rules and regulations, plaintiff was working alone in the security office for a number of hours before Sean Garth actually did return. That at approximately 8:00 p.m. on October 7, 1988, Sean Garth did return as promised and proceeded to fire approximately 50 rounds from a high velocity assault rifle into the ACORN security office, at least 14 of which struck plaintiff WALE O. OSIJO causing him serious injury.

15. Defendants, and each of them, negligently failed to take steps to make the working conditions at ACORN safe for plaintiff or to warn plaintiff of the impending assault which Sean Garth had advised PROSTAFF of earlier in the day, all of which caused plaintiff to be shot 14 times and to suffer the injuries and damages herein described.

16. As a proximate result of the negligence of defendants and each of them, plaintiff was hurt and injured in his health, strength, activities, sustaining injury to his nervous system and person, all of which have caused and continue to cause plaintiff great mental physical and nervous pain and suffering. Plaintiff is informed and believes and thereon alleges that such

injuries will result and have resulted in permanent disability to him. As a result of such injuries, plaintiff has suffered general damages in amount according to proof.

17. As a further proximate result of the negligence of defendants, and each of them, plaintiff has incurred and will continue incur medical and related expenses in an amount according to proof.

18. As a further proximate result of the negligence of defendants, and each of them, plaintiff's earning capacity has been greatly impaired, both in the past and in the present, and in an amount according to proof.

19. As a further proximate result of the negligence of defendants, and each of them, plaintiff's personal property including clothing was destroyed, all to plaintiff's damage in an amount according to proof.

SECOND CAUSE OF ACTION
(Conscious Disregard)

20. Plaintiff realleges paragraphs 1 through 19, inclusive, of the First Cause of Action and incorporates them by reference as if fully set forth herein.

21. At all times herein, defendants, and each of them, knew or should have known that Sean Garth had promised to return and shoot up the place, and that the conditions then known to them, and each of them, indicated a likelihood that Sean Garth would follow through with his threat of attack and shoot up the place, including employees of PROSTAFF such as plaintiff. Notwithstanding this knowledge, defendants, and each of them, in willful and conscious disregard of plaintiff's safety in not

advising him of the threatened attack by Sean Garth, gave plaintiff to believe that the premises at which he worked were safe at all times, and defendants did so in order to advance their pecuniary interest in leasing and/or providing security services at ACORN.

22. Defendants, and each of them, also knew, or in the exercise of ordinary care should have known, that employees of PROSTAFF, prior to the attack of October 7, 1988, were routinely brutalizing residents and others on the premises of ACORN as well as stealing personal property from residents and others on the premises and that such acts thereby subjected innocent employees of PROSTAFF such as plaintiff to violent reprisals.

23. Defendants, and each of them, acted or failed to act with oppression, malice, and in conscious disregard for the rights of plaintiff, thereby entitling plaintiff to exemplary and punitive damages in an amount according to proof.

24. As a result of the acts and omissions of defendants, and each of them, plaintiff sustained severe personal injury, property damage, and severe emotional distress in an amount according to proof, in excess of the jurisdictional minimum of this court.

25. As a result of the acts and omissions of defendants and each of them, plaintiff was hurt and injured in his health, strength, activities, sustaining injury to his nervous system and person, all of which have caused and continue to cause plaintiff great mental physical and nervous pain and suffering. Plaintiff is informed and believes and thereon alleges that such injuries will result and have resulted in permanent disability

to him. As a result of such injuries, plaintiff has suffered general damages in amount according to proof.

26. As a result of the acts and omissions of defendants, and each of them, plaintiff has incurred and will continue incur medical and related expenses in an amount according to proof.

27. As a result of the acts and omissions of defendants, and each of them, plaintiff's earning capacity has been greatly impaired, both in the past and in the present, and in an amount according to proof.

28. As a result of the acts and omissions of defendants, and each of them, plaintiff's personal property including clothing was destroyed, all to plaintiff's damage in an amount according to proof.

WHEREFORE, plaintiff prays as follows:

1. For general and special damages in the amount of Three Million Dollars ($3,000,000.00);

2. For punitive damages according to proof;

3. For costs of suit incurred herein; and

4. For such other and further relief as the court deems just and proper.

DATED: June 22, 1989.

KING, SHAPIRO, MITTELMAN & KOLIN

WILLIAM M. KOLIN
PAUL ANTHONY ELIZONDO
Attorneys for Plaintiff WALE O. OSIJO

PROOF OF SERVICE BY MAIL (CCP §§ 1013(a) - 2015.5)

I am employed in the County of Alameda, State of California. I am over the age of 18 years and not a party to the within action; my business address is 1999 Harrison Street, Suite 1600, Oakland, California 94612.

On June 22, 1989 I served the attached

SECOND AMENDED COMPLAINT

on the parties to said matter by depositing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California, addressed as follows:

David R. Pinelli, Esq.
Moore, Clifford, Wolfe,
Larson & Trutner
P.O. Box 119
Oakland, CA 94604

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Oakland, California, on June 22, 1989.

Janet Rodriguez

Janet Rodriguez

DAVID R. PINELLI
LARSON, BURNHAM & TRUTNER
A Professional Corporation
P. O. Box 119
Oakland, CA 94604
Telephone: (415) 444-6800

Attorneys for Defendant
HOUSING RESOURCES MANAGEMENT, INC.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

WALE O. OSIJO,

Plaintiff,

vs.

HOUSING RESOURCES MANAGEMENT, INC., a California corporation; PROSTAFF SECURITY SERVICE, INC., a California corporation; ACORN I LIMITED, a California limited partnership; ACORN II LIMITED, a California limited partnership; and DOES 1 through 30, inclusive,

Defendants.
_____/

NO. 649881-6

ANSWER TO SECOND AMENDED COMPLAINT

Defendant Housing Resources Management, Inc., answering the complaint of plaintiff Wale O. Osijo, denies generally and specifically, each and every, all and singular, the allegations of said complaint, and each cause of action thereof, and further denies that plaintiff has been damaged in any sum or sums or at all.

WHEREFORE, this answering defendant prays for judgment as hereinafter set forth.

FIRST AFFIRMATIVE DEFENSE

The complaint does not state facts sufficient to constitute a cause of action against this defendant.

SECOND AFFIRMATIVE DEFENSE

The complaint fails to state facts sufficient to state any claim upon which an award of punitive damages can be made.

THIRD AFFIRMATIVE DEFENSE

Plaintiff was himself careless and negligent in the matters alleged, and this carelessness and negligence caused or contributed to the damages alleged.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff himself voluntarily and unreasonably encountered the danger, known to him, which is alleged as a basis for the complaint, knew of and appreciated the risks involved, and expressly, voluntarily and knowingly assumed the risks of said injuries, proximately causing or contributing to the damages alleged.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff, his agents, employees, servants and representatives were careless and negligent in the matters alleged, thereby causing or contributing to the damages alleged.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff was partially, if not wholly, negligent or otherwise at fault on his own part and should be barred from recovery of that portion of the damages directly attributable to his proportionate share of the negligence or fault, pursuant to

the doctrine of comparative negligence.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff, his agents, employees, servants and representatives were partially, if not wholly, negligent or otherwise at fault on their own part pursuant to the doctrine of comparative negligence, and should be barred from recovery of that portion of the damages directly attributable to their proportionate share of the negligence or fault.

EIGHTH AFFIRMATIVE DEFENSE

The damages sustained by plaintiff, if any, were caused, in whole or in part, by the negligence or fault of others for which this defendant is not liable or responsible.

NINTH AFFIRMATIVE DEFENSE

This defendant alleges that plaintiff assumed whatever risk or hazard, if any, that existed at the time and place of the alleged accident set forth in plaintiff's complaint, and said assumption of risk or hazard is imputed to said plaintiff.

TENTH AFFIRMATIVE DEFENSE

At the time and place of the happening of the incident alleged in the complaint, plaintiff was employed by various employers, the names of which are presently unknown to the defendant, and was working within the course and scope of his employment and/or employments. Plaintiff and his employer and/or employers were subject to provisions of the Worker's Compensation Act of the State of California, and certain sums have been or will be paid to or on behalf of plaintiff under the

applicable provisions of the Labor Code of the State of California. Plaintiff's employer and/or employers and each of them, were negligent or otherwise at fault and this negligence or fault proximately contributed to or caused the injuries to plaintiff, and, any award made to plaintiff herein must be reduced by the payments to him made on behalf of his employer or employer's worker's compensation insurance carrier.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff acknowledged, ratified, consented to and acquiesced in the alleged acts or omission, if any, of this defendant, thus barring plaintiff's recovery.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's complaint, and each cause of action therein, is barred by the doctrine of unclean hands.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff failed to mitigate his damages.

FOURTEENTH AFFIRMATIVE DEFENSE

Any and all conduct of which plaintiff complains was a just and proper exercise of management discretion undertaken for a fair and honest reason and regulated by good faith under the conditions then existing.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff, by his actions, knew of and appreciated the risks involved, and voluntarily and reasonably assumed the risks of said injuries, proximately causing or contributing to the damages alleged.

SIXTEENTH AFFIRMATIVE DEFENSE

There is a defect or misjoinder of parties pursuant to Code of Civil Procedure section 430.10(d). Specifically, plaintiff failed to join all parties necessary for final determination of this action.

SEVENTEENTH AFFIRMATIVE DEFENSE

The damages sustained by plaintiff, if any, were caused in whole or in part by the wilful misconduct of said plaintiff for which this defendant is not liable nor responsible.

WHEREFORE, this answering defendant prays for judgment as follows:

1. That plaintiff take nothing by reason of the complaint on file herein;

2. For reasonable attorney fees;

3. For costs of suit incurred herein; and

4. For such other and further relief as the court deems just and proper.

DATED: June 28, 1989.

LARSON, BURNHAM & TRUTNER

By _____
David R. Pinelli
Attorneys for Defendant
HOUSING RESOURCES MANAGEMENT, INC.

Wale O. Osijo v. Housing Resources Management, Inc, et al.
Alameda County Superior Court
North County Branch
No. 649884-6

AFFIDAVIT OF SERVICE BY MAIL
[Code Civ. Proc. Sections 1013a(1), 2015.5]

The undersigned, at Oakland, California, certifies to be true, under penalty of perjury:

That she is a citizen of the United States, is employed in Alameda County, California, is over 18 years of age, and is not a party to the within action or proceeding;

That her business address is 300 Lakeside Drive, California 94612 (mailing address: Post Office Box 119, Oakland, California 94604);

That she served a copy (or copies) of the attached:

ANSWER TO SECOND AMENDED COMPLAINT

by placing said copy(ies) sealed in separate envelopes addressed as follows:

Wale O. Osijo
3949 North Clark Avenue, Apt. N
Fresno, California 93726
Telephone: 209/228-1054
Counsel In Pro Per for Plaintiff WALE O. OSIJO

Hanno Powell, Esq.
KIMBLE, McMICHAEL & UPTON
5260 North Palm, Suite 221
Fresno, California 93704
Telephone: 209/435-5500

William M. Kolin, Esq.
Paul Anthony Elizondo, Esq.
KING, SHAPIRO, MITTELMAN & KOLIN
1999 Harrison Street, Suite 1600
Oakland, California 94612
Telephone: 415/273-8833
Counsel for Plaintiff WALE O. OSIJO

with postage thereon fully prepaid, and thereafter depositing same in the United States Mail at Oakland, Alameda County, California;

That there is delivery service by United States Mail at the place(s) so addressed, or regular communication by United States Mail between the place of mailing and the place(s) so addressed;

That the date of deposit in the mail and the date of the execution of this affidavit was

June 27, 1989.

Stephanie McWilliams

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

Wale O. Osijo, Plaintiff, -v- Housing Resources Management, Inc., et al., Defendants.	No. 649881-6 SETTLEMENT AGREEMENT

The above-referenced action came for a voluntary settlement conference on July 25, 1991 at the offices of Judicial Arbitration and Mediation Services in San Francisco, the Honorable Victor Campilongo, presiding. Plaintiff, Wale O. Osijo, was present, represented by his attorney, Georgia Ann Michell; defendants Housing Resources Management, Inc. and Filbert I & II, Ltd. were represented by attorney David R. Pinelli along with Don Fraga, his adjuster from Home Insurance; Intervenor, Department of Industrial Relations was represented by attorney, David Kizer; defendant Prostaff Security was represented by attorney David Van Dam.

The parties having discussed the matter and good cause appearing therefore, without admission of liability enter into the following global settlement of the above-entitled matter as follows:

1. In exchange for payment of the sum of $250,000.00 from

EXHIBIT B

CF65

defendants Filbert I & II, Ltd. and Housing Resources Management, Inc. to plaintiff, Wale O. Osijo, plaintiff shall release, dismiss with prejudice, defend and hold harmless and indemnify all defendants from all liability of whatever nature and kind including but not limited to any and all liens, known and unknown which arise or may arise and/or attorney fees, from the instant action except as hereinafter specifically provided for.

2. Intervenor, Department of Industrial Relations, hereby agrees to compromise their lien and dismiss their complaint in intervention with prejudice, in exchange for the sum of $10,000.00 from plaintiff, Wale O. Osijo, and assignment of $30,000.00 in the chose of action held by defendant, Prostaff Security and its owners and operators against Filbert I & II, Ltd., limited partnerships.

3. Cross-complainants Housing Resources Management, Inc. and Filbert I & II, Ltd. agree to dismiss their cross-complaint filed in this action with prejudice.

4. Intervenor Department of Industrial Relations further agrees to not oppose and to withdraw any opposition previously filed in the companion workers compensation action filed by plaintiff, Wale O. Osijo, for commutation of permanent disability benefits. It is understood that this is not a guarantee that the workers compensation appeals board will grant said motion, only that said motion shall be unopposed.

5. With respect to the potential lien of Highlands Hospital for medical services and care rendered in 1988 to plaintiff in the approximate amount of $33,000.00, which was a disputed subject of the award in the workers compensation case referenced above, intervenor, Department of Industrial Relations and plaintiff agree

that in addition to the compensation contained in paragraph 24, above, intervenor agrees to pay 60% of the negotiated (if any) sum due to Highlands and shall waive its right to a credit against plaintiff's damages recovered against defendants in the settlement amount of $250,000.00 as provided for in Labor Code § 3732 et seq. for the amount of the Highland lien, if any.

6. Defendants Housing Resources Management, Inc. and Filbert I & II, Ltd. hereby agree to pay Judicial Arbitration and Mediation Service for the cost of the settlement conference held on July 25, 1991. They further agree to waive collection of the award of $500.00 sanctions imposed in their favor as against attorney Georgia Ann Michell.

7. The parties hereto agree and further stipulate that the within settlement agreement shall satisfy the requirements of an settlement agreement on the record per CCP §664.

The undersigned sign this agreement with the full power and authority to bind their respective clients thereto.

Dated: July-25-1991

Wale O. Osijo

Dated: July 25, 1991

Georgia Ann Michell

Dated: 7/25/91

David R. Pinelli

Dated: 7/25/91

David A. Kizer

Dated: 7/26/91

David Van Dam

The above stated settlement is approved and accepted this date as set forth above.

Dated: 7-25-91

Hon. Victor Campilongo,
Judge Retired

THE HOME INSURANCE COMPANIES
Customer Service Comes First

99 219

Claim Number: 703-L-686417-207 GL
Policy Number: 1692617
Issue Date: 07/26/91
Insured Name: HOUSING RESOURCES

2 295 13

703

51990219

Pay to the Order of: TRUST ACCOUNT OF GANONG & MICHELL AS TRUSTEES FOR WALE O.OBIDO

$****250,000.00

In payment of: FULL & FINAL SETTLEMENT

10/07/92

DAVE PINELLI,ESQ
P.O. BOX 119
OAKLAND CA 94604

⑈51990219⑈ ⑆011903675⑆ 1833⑈ ⑇0025000000⑇

BANK OF WALNUT CREEK
GANONG, MICHELL &
RHOADS
(Attorneys at Law)
Trust Account

0002

JL - 0 91

[redacted]

GREGORY D. BROWN, ESQ.
DAVID R. PINELLI, ESQ.
LARSON & BURNHAM
A Professional Corporation
Post Office Box 119
Oakland, California 94604
Telephone: (510) 444-6800

Attorneys for Defendants
HOUSING RESOURCES MANAGEMENT, INC.,
FILBERT I, LTD. and FILBERT II, LTD.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA - NORTHERN DIVISION

WALE O. OSIJO,

Plaintiff,

v.

HOUSING RESOURCES MANAGEMENT, INC. and PROSTAFF SECURITY SERVICES, INC.,

Defendants.

No. 649881-6

ORDER ON DEFENDANTS' MOTION FOR ENFORCEMENT OF SETTLEMENT

Defendants HOUSING RESOURCES MANAGEMENT, INC., FILBERT I, LTD. and FILBERT II, LTD.'s motion for enforcement of settlement came on regularly for hearing by this court on September 5, 1991, David R. Pinelli appearing for the defendants, Georgia Ann Michell appearing for plaintiff, WALE O. OSIJO, and David A. Kizer appearing for intervenor, DIRECTOR OF INDUSTRIAL RELATIONS.

After hearing oral argument of counsel and oral argument from plaintiff Mr. Osijo, and after reviewing all the papers filed in this action, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

Defendants' motion for enforcement of settlement is granted.

DONE IN OPEN COURT this 5th day of September, 1991, and presented and signed on 10-10-, 1991.

JOHN SUTTER

THE HONORABLE JOHN SUTTER
JUDGE OF THE SUPERIOR COURT

Approved as to form.

DATED: 9/23/91, 1991

GEORGIA ANN MICHELL, ESQ.
ATTORNEYS FOR PLAINTIFF
WALE O. OSIJO

DATED: 10/7/91, 1991

DAVID A. KIZER, ESQ.
ATTORNEYS FOR PLAINTIFF-IN-INTERVENTION DIRECTOR OF INDUSTRIAL RELATIONS

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COPY

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

WALE O. OSIJO,

Plaintiff/Appellant,

v.

HOUSING RESOURCES MANAGEMENT, INC., et al.,

Defendant/Respondent.

DIRECTOR OF THE DEPARTMENT OF INDUSTRIAL RELATIONS as Administrator, etc.

Intervener/Respondent.

A055045

Alameda Superior Court No. 649881-6

THE COURT:*

The trial court entered judgment in this action pursuant to a settlement agreement signed by appellant and the other parties to the litigation. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Appellant, who was working as a security guard, was seriously injured when he was shot repeatedly by an assailant armed with a semi-automatic weapon, while appellant was on duty

* Kline, P.J., Smith, J., and Peterson, J.

CF71

in the security office at the Acorn housing projects in Oakland. He brought this action to recover for his injuries.

The assailant responsible for appellant's injuries is in prison and judgment proof. Appellant's employer, the security guard company, is insolvent and had no insurance. The only solvent bystander appellant could sue were the owners of the Acorn projects, on a type of premises liability theory. (Actually, the owners are insolvent, too; but they did have insurance which would be applicable.)

Appellant had special damages in the form of medical bills of about $40,000. He had lost wages for a nine-month period of about $20,000. He has some residual physical limitations--for instance, he cannot stand for prolonged periods. The nature of any other cognizable damages or future loss of income remained quite speculative. In fact, appellant's income, in his new career as an accountant, is much greater now than it was at the time of the injury. Appellant wanted between $500,000 and $2.5 million to settle his case.

Pursuant to an agreement of counsel, a settlement conference was held under the auspices of the Judicial Arbitration and Mediation Service (JAMS). The settlement conference was presided over by a retired judge of the San Francisco Superior Court who has a long record of distinguished service in the management of litigation.

The negotiations were difficult, apparently, because appellant's demands were unreasonable. The retired judge and

appellant's counsel explained to appellant that the two most culpable defendants, the assailant and appellant's employer, had no money to pay any judgment appellant might receive. They also pointed out that, while appellant could expect to establish special damages of about $40,000 and lost wages of $20,000 at trial, the nature of any additional damages would be uncertain. Further, a jury was unlikely to think that the owner of the Acorn projects was liable in these circumstances, since there would be little an owner of property could have done which would have prevented the assailant's attack on appellant and his fellow security guards.

Ultimately, the case settled for $250,000, which appears to be a quite generous and fair settlement to appellant considering the problems with his claims. All parties, including appellant, executed the necessary settlement documents. Appellant and his counsel went out for a celebratory dinner at a lavish restaurant; appellant was in good spirits about the settlement and thanked his counsel for her help in achieving a favorable result. He repeatedly stated his satisfaction at the settlement.

The next day, appellant notified his counsel that he had decided he did not like the settlement after all, and wanted out of it. However, after hearing oral argument and considering the relevant evidence, the trial court entered judgment pursuant to the terms of the agreement.

II. DISCUSSION

We affirm. The trial court properly entered judgment pursuant to Code of Civil Procedure section 664.6.[1/] Entry of such judgment was in accord with the terms of the written settlement agreement, which was knowingly entered into and signed by appellant; and entry of judgment was, therefore, proper despite the fact that appellant afterward had second thoughts about the deal: "In this case a binding enforceable settlement agreement was entered into by the parties." (Gallo v. Getz (1988) 205 Cal.App.3d 329, 334.)

Appellant makes a number of arguments on appeal which are totally lacking in merit. His principal claim is that he can get out of the settlement agreement he signed, because the settlement negotiations were presided over by a retired judge who is no longer an active member of the State Bar. The person who presides over settlement negotiations, however, need not be a member of the State Bar and need not have any legal training. This function may be performed by any person, including a minister, a businessperson, an arbitrator, or a friend of the parties. Moreover, we fail to see any fault in the retired judge's handling of these difficult negotiations. Specifically,

---

1/ Code of Civil Procedure section 664.6 provides: "If parties to pending litigation stipulate, in writing or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." All the prerequisites stated in the statute were met here.

his advice to appellant to accept the $250,000 offer appears to be entirely sound. Further, another well-respected and active trial judge, Judge Sutter, heard evidence and entered judgment pursuant to the settlement agreement.

Appellant makes a number of unsupported allegations regarding his counsel and opposing counsel, which we reject also. We agree that counsel for all parties were trying to achieve a settlement under trying circumstances, but that does not establish that the settlement was not fair or, more importantly, that appellant's will was so overborne that he can get out of the deal now.

Appellant makes other insinuations which lack support in the record and are frivolous. They do not merit discussion. We reject them.2/

III. DISPOSITION

The judgment is affirmed.

2/ In reaching these conclusions, we do not find it necessary to consider any matter contained in the amicus brief which appellant's counsel in the settlement negotiations sought to file. We, therefore, decline to accept the document for filing.

Meagher

GREGORY D. BROWN, State Bar No. 065318
DAVID R. PINELLI, State Bar No. 118293
NANCY K. McDONALD, State Bar No. 146168
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Attorneys for Defendants
HOUSING RESOURCES MANAGEMENT, INC.,
FILBERT I, LTD. and FILBERT II, LTD.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

NORTHERN DIVISION

WALE O. OSIJO,

Plaintiffs,

v.

HOUSING RESOURCES MANAGEMENT, INC., and PROSTAFF SECURITY SERVICES, INC.,

Defendants.

No. 649881-6

JUDGMENT
[C.C.P. § 664.6]

Judgment is hereby entered pursuant to the Court's order of October 10, 1991 (Exhibit A), enforcing the settlement provisions set forth in the settlement agreement attached as Exhibit B hereto.

DATED: 11-3-92

JOHN SUTTER
The Honorable John Sutter

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

DEPT. 18

Date: 9-5-91 Hon. JOHN SUTTER , Judge Donnia Center , Deputy Clerk
, Deputy Sheriff Shirley Walker , Reporter

O. Osijo

Plaintiff

vs.

ing Resources Management, Inc. Et. Al.

Defendant

Counsel appearing for Plaintiff: Georgia Ann Michell, Esq.

Counsel appearing for Defendant: David Larson, Esq.
David A. Kizer, Esq.

NATURE OF PROCEEDINGS: Decision on Submitted Matter ACTION No. 649881-6

The above entitled matter comes on calendar having been argued and submitted earlier this day.

The Court now rules as follows:

The tentative ruling is affirmed. Defendant's Motion for Enforcement of Settlement is granted.

Copies of this minute order are mailed to.

Georgia Ann Michell, Esq.
Ganong and Michell
500 Ygnacio Valley Rd., #360
Walnut Creek, CA. 94596

and

Wale Osijo
4516 E. Belmont Ave.
Fresno, Ca. 93702

David Pinelli, Esq.
David Larson
Larson and Burnham
P.O. Box 119
Oakland, CA. 94604

David A. Kizer, Esq.
400 Oyster Pt. Blvd. Wing C #505
So. San Francisco, CA. 94080

By: Donnia Center
Clerk, Department 18
On: 9-5-1991

RECEIVED
SEP 10 1991
Larson & Burnham

EXHIBIT A

CF77

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

Wale O. Osijo, Plaintiff, -v- Housing Resources Management, Inc., et al., Defendants.	No. 649881-6 SETTLEMENT AGREEMENT

The above-referenced action came for a voluntary settlement conference on July 25, 1991 at the offices of Judicial Arbitration and Mediation Services in San Francisco, the Honorable Victor Campilongo, presiding. Plaintiff, Wale O. Osijo, was present, represented by his attorney, Georgia Ann Michell; defendants Housing Resources Management, Inc. and Filbert I & II, Ltd. were represented by attorney David R. Pinelli along with Don Fraga, his adjuster from Home Insurance; Intervenor, Department of Industrial Relations was represented by attorney, David Kizer; defendant Prostaff Security was represented by attorney David Van Dam.

The parties having discussed the matter and good cause appearing therefore, without admission of liability enter into the following global settlement of the above-entitled matter as follows:

1. In exchange for payment of the sum of $250,000.00 from

EXHIBIT B

defendants Filbert I & II, Ltd. and Housing Resources Management, Inc. to plaintiff, Wale O. Osijo, plaintiff shall release, dismiss with prejudice, defend and hold harmless and indemnify all defendants from all liability of whatever nature and kind including but not limited to any and all liens, known and unknown which arise or may arise and/or attorney fees, from the instant action except as hereinafter specifically provided for.

2. Intervenor, Department of Industrial Relations, hereby agrees to compromise their lien and dismiss their complaint in intervention with prejudice, in exchange for the sum of $10,000.00 from plaintiff, Wale O. Osijo, and assignment of $30,000.00 in the chose of action held by defendant, Prostaff Security and its owners and operators against Filbert I & II, Ltd., limited partnerships.

3. Cross-complainants Housing Resources Management, Inc. and Filbert I & II, Ltd. agree to dismiss their cross-complaint filed in this action with prejudice.

4. Intervenor Department of Industrial Relations further agrees to not oppose and to withdraw any opposition previously filed in the companion workers compensation action filed by plaintiff, Wale O. Osijo, for commutation of permanent disability benefits. It is understood that this is not a guarantee that the workers compensation appeals board will grant said motion, only that said motion shall be unopposed.

5. With respect to the potential lien of Highlands Hospital for medical services and care rendered in 1988 to plaintiff in the approximate amount of $33,000.00, which was a disputed subject of the award in the workers compensation case referenced above, intervenor, Department of Industrial Relations and plaintiff agree

that in addition to the compensation contained in paragraph 2+4, above, intervenor agrees to pay 60% of the negotiated (if any) sum due to Highlands and shall waive its right to a credit against plaintiff's damages recovered against defendants in the settlement amount of $250,000.00 as provided for in Labor Code § 3732 et seq. for the amount of the Highland lien, if any.

6. Defendants Housing Resources Management, Inc. and Filbert I & II, Ltd. hereby agree to pay Judicial Arbitration and Mediation Service for the cost of the settlement conference held on July 25, 1991. They further agree to waive collection of the award of $500.00 sanctions imposed in their favor as against attorney Georgia Ann Michell.

7. The parties hereto agree and further stipulate that the within settlement agreement shall satisfy the requirements of an settlement agreement on the record per CCP §664.

The undersigned sign this agreement with the full power and authority to bind their respective clients thereto.

Dated: July-25-1991

Wale O. Osijo

Dated: July 25, 1991

Georgia Ann Michell

Dated: 7/25/91

David R. Pinelli

Dated: 7/25/91

David A. Kizer

Dated: 7/26/91

David Van Dam

The above stated settlement is approved and accepted this date as set forth above.

Dated: 7-25-91

Hon. Victor Campilongo,
Judge Retired

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

WALE O. OSIJO,

Plaintiff/Appellant,

v.

GANONG AND MICHELL et al.,

Defendant/Appellant.

A068661

Contra Costa Superior Court No. C92-05352

THE COURT:[1]

Wale O. Osijo (Osijo) brought this malpractice action concerning the representation he received from his former attorney, Georgia Ann Michell-Langsam (Michell), and other attorney defendants. Osijo's malpractice action against Michell resulted from his dissatisfaction with her representation of him in connection with a settlement agreement he signed in previous litigation while he was represented by Michell.

The trial court (Hon. James R. Trembath) granted summary judgment against the bulk of Osijo's malpractice claims, but found that Michell had wrongly misappropriated more than $12,000 in settlement proceeds which should have gone to Osijo. Michell also alleged in an amended cross-complaint that the termination of appellant's initial malpractice claims against her, other than the misappropriation claim, entitled her to damages for malicious prosecution. The matter of the cross-complaint and Osijo's remaining claims for breach of fiduciary duty proceeded to trial. The Honorable Barbara Zuniga granted a motion for a judgment against Osijo at the close of his evidence on the claim of breach of fiduciary duty. Also at the time of trial, it was brought to the

[1] Before Peterson, P.J.; King, J.; and Haning, J.

attention of Judge Zuniga that Osijo had not filed an answer to Michell's amended cross-complaint. The matter of the cross-complaint then proceeded as a default hearing, over appellant's objections. Judge Zuniga granted a judgment for prior litigation costs of more than $27,000 to Michell as damages for malicious prosecution. Osijo brought an appeal from this judgment; and Ganong and Michell, John F. Ganong (Ganong), and Michell brought a cross-appeal from the trial court's prior ruling that Michell had wrongly misappropriated more than $12,000 from Osijo's settlement proceeds.

We affirm Judge Trembath's ruling on summary adjudication, that Michell wrongly misappropriated more than $12,000 from Osijo's settlement proceeds. We also affirm his rulings granting summary adjudication against Osijo's other malpractice claims concerning his representation by Michell. We conclude we must reverse Judge Zuniga's ruling granting a motion for judgment against Osijo's claim of breach of fiduciary duty. We must also vacate the judgment for $27,000 against Osijo as damages for malicious prosecution. The record shows Osijo has already prevailed in part against Michell in this malpractice action, on the issue of misappropriation of settlement proceeds, although he did not prevail on other factual allegations of malpractice concerning the same settlement. More important, the action was and is still pending. This does not establish there was a previous action which was brought by Osijo without probable cause and which was finally terminated in Michell's favor, as is required for the separate tort of malicious prosecution. We, therefore, remand for further proceedings consistent with the views expressed in this opinion.

I. FACTS AND PROCEDURAL HISTORY

We summarize the relevant facts as briefly as possible. In 1989, Osijo filed a previous action entitled Osijo v. Housing Resources Management, Inc. (Super. Ct. Alameda County, No. 649881-6) (personal injury action). In this personal injury action, Osijo alleged he had been employed as a security guard at the Acorn Apartments, a housing project in Oakland, California when he was shot more than 15 times in his lower

body by assailants armed with high velocity rifles. This attack was carried out by the assailants in retaliation for physical and verbal abuse they suffered at the hands of other security guards earlier in the day. The lawsuit alleged that Osijo's injuries and damages resulted from the negligent failure of the defendants to warn him of the danger. These defendants included Osijo's employer, a security company, and the managers and owners of the housing complex he was guarding.

All the defendants were apparently insolvent or judgment proof. However, there was an applicable insurance policy issued by the Home Insurance Companies (Home), and Home retained the law firm of Larson and Burnham (the Larson firm) to defend Osijo's action.

Osijo had more than one attorney representing him at various times in the personal injury action; eventually in 1990, he retained Michell to represent him, executing a written retainer agreement. Under the terms of this written agreement, Michell was to be paid 40 percent of any settlement or damages award at trial, and 45 percent of any recovery if she was required to defend the damages award on appeal.

The action was eventually settled by Michell, the Larson firm, and Osijo. However, Osijo contended the settlement was improperly secured. This court (Division Two) affirmed an order of the trial court enforcing the settlement, over Osijo's objections. Under the terms of the settlement, the settling defendants paid $250,000 to Osijo and his counsel, Michell. Michell, however, took for herself 45 percent of the settlement proceeds or $112,500, not the 40 percent or $100,000 authorized by the written agreement for any settlement.

Osijo brought this action against Michell for malpractice, contending she had intentionally concealed from him facts relating to the settlement. According to Osijo's theory in the trial court, Michell concealed from him the fact that his damages could be much greater than the settlement amount, and also that she had an undisclosed conflict of interest as a result of her ties to Home and its retained law firm, the Larson firm, which was

by then defending Michell in another malpractice action. Osijo also contended Michell had committed malpractice and violated the terms of the written retainer agreement by taking too much of the settlement proceeds. Michell, in turn, filed a cross-complaint in the same action for malicious prosecution, contending Osijo wrongly sued her for malpractice.

Judge Trembath resolved certain matters on summary judgment or summary adjudication. He ruled Michell had violated the terms of the retainer agreement, because she "wrongfully appropriated" $12,500 too much from the recovery. He also granted summary judgment against Osijo's other claims of malpractice against Michell. Thereafter, Michell amended her cross-complaint to allege that the claims upon which summary adjudication were granted had been terminated in her favor, allowing her to pursue Osijo for malicious prosecution as a result of those claims.

We summarize the final state of Osijo's pleadings, as they stood at the time the matter went to trial, since the record before us is in a state of some confusion. Osijo, acting in propria persona, had brought a variety of malpractice claims and related claims of misconduct against his former attorney Michell, all relating to the same settlement. He had contended in this action that Michell's conduct in taking $12,500 from the settlement proceeds constituted a breach of contract and "misappropriation of . . . funds," a claim upon which he prevailed on summary adjudication before Judge Trembath. Osijo had also contended the same conduct constituted a breach of fiduciary duty; Judge Trembath did not make a dispositive ruling on this cause of action, which remained for trial.

In earlier pleadings, Osijo had also contended Michell's conduct constituted an undisclosed conflict of interest and "Antagonism and Refusal to Respect Discharge of Attorney," claims upon which Judge Trembath had granted summary adjudication against Osijo. Osijo had also previously complained to the State Bar about Michell's conduct; the State Bar initially declined to investigate, and instructed Osijo that he could only force the State Bar to begin an investigation by filing an original petition for such action with our Supreme Court, which Osijo did. Our Supreme Court denied Osijo's petition, but Osijo's

efforts did apparently result in further action by the State Bar, which allegedly did later investigate Michell, thereby causing her damage as a result of Osijo's claims, according to Michell's cross-complaint (filed in this same underlying action) for malicious prosecution.

Osijo's remaining claim for breach of fiduciary duty and the cross-complaint filed by Michell against Osijo proceeded to trial before Judge Zuniga. Judge Zuniga granted a motion for a judgment under Code of Civil Procedure[2] section 631.8 at the close of Osijo's evidence. Judge Zuniga also held Osijo was in default for not filing an amended answer to Michell's amended cross-complaint, and the trial proceeded as a default hearing. Judge Zuniga held Osijo's proceedings were "legally untenable" and awarded costs of defense to Michell for malicious prosecution of $27,729.05.

Osijo filed a timely appeal, and Michell filed a partial appeal from the previous ruling that she had wrongly misappropriated $12,500 from Osijo's settlement proceeds. We will discuss certain facts in greater depth later in this opinion, as they become relevant to specific legal issues.

II. DISCUSSION

We affirm the ruling that Michell wrongfully appropriated $12,500 in Osijo's settlement proceeds, contrary to the terms of the written retainer agreement. We affirm the summary judgment against Osijo's other claims for legal malpractice. However, we conclude we must reverse the trial court's granting of a motion for judgment under section 631.8 at the close of his evidence. We must also vacate the ruling in Michell's favor for malicious prosecution, because there was no showing she prevailed in this action or that this proceeding was brought without probable cause so as to justify a malicious prosecution award.

A. Wrongfully Appropriated Settlement Proceeds

---

2 Unless otherwise indicated, all subsequent statutory references are to the Code of Civil Procedure.

The written retainer agreement between Michell and Osijo provided that if the matter were settled or resolved at trial, Michell would be entitled to recover 40 percent of the proceeds of the settlement or award. If the award were appealed by the defendants and successfully upheld, Michell would receive 45 percent of the proceeds. The precise wording of the relevant sentence in the fee clause of the written retainer agreement is as follows: "The fee shall consist of 40 % of the gross amount of recovery had by way of settlement or judgment and 45 % of the gross amount of recovery if the case is taken to appeal."

Osijo's case was resolved by settlement; and therefore, under the terms of the written retainer agreement, Michell's fee should have been 40 percent, or $100,000, of the $250,000 settlement, not the $112,500 which Michell subtracted from the settlement before turning the remainder over to Osijo. Michell does not contend otherwise, if the terms of the original written retainer agreement are applied.

However, Michell contends the terms of the original retainer agreement were later modified by the parties. At some point, Michell threatened to withdraw from the case unless Osijo rehired a worker's compensation attorney, Gary Snyder, whom she recommended he retain; and in a letter dated August 24, 1990, Osijo offered to pay Michell 45 percent of any recovery if she remained on the case without forcing him to rehire Snyder.

Significantly, Michell did not accept this offer that she would recover 45 percent of any proceeds if she did not force Osijo to rehire Snyder. By a letter dated September 13, 1990, she apparently rejected this offer: "This letter is to inform you that you must rehire Gary Snyder or I will get out of the case." There is also no other evidence in the record which shows the parties ever agreed on a 45 percent fee.

We apply de novo review to the trial court's orders granting summary judgment or summary adjudication, independently interpreting the language of the retainer agreement. (See *Perkins* v. *Howard* (1991) 232 Cal.App.4th 708, 712-713.) We find

nothing in the retainer agreement or the record which supports Michell's claims that she was entitled to 45 percent of the proceeds of the settlement.

Michell implicitly concedes she has no such entitlement under the terms of the written retainer agreement, but she contends she accepted Osijo's later offer of a 45 percent share by her performance, because she did, in fact, continue to represent Osijo. However, this was something she was already obligated to do by the written terms of the retainer agreement, and the written retainer agreement which she had previously presented to Osijo for his signature was never modified in writing to increase her fee. The retainer agreement states as follows: "This agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them or an oral agreement to the extent that the parties carry it out." Here there is obviously no "instrument in writing signed by both" Michell and Osijo, nor is there any evidence of "an oral agreement to the extent that the parties carry it out." Michell rejected Osijo's written offer by a letter in writing. There is also no evidence of an "oral agreement" on the new 45 percent fee which Michell and Osijo accepted by performance. The trial court properly granted summary adjudication on this point, finding that Michell's fee under the written retainer agreement was 40 percent, and that she "wrongfully appropriated" the additional $12,500 she subtracted from Osijo's settlement proceeds.

This case is governed by the provisions of Business and Professions Code section 6147, which provides in pertinent part: "(a) . . . The contract [for legal services] shall be in writing and shall include, but is not limited to, all of the following: [¶] (1) A statement of the contingency fee rate that the client and attorney have agreed upon." These provisions were enacted by the Legislature in order to protect clients and avoid fee disputes by having clear written agreements as to fees. (See *Alderman* v. *Hamilton* (1988) 205 Cal.App.3d 1033, 1036-1038 (*Alderman*).)

Here the original written fee agreement met the requirements of Business and Professions Code section 6147, but the subsequent exchange of letters between Osijo and

Michell did not. The original fee agreement also contained restrictions on subsequent modifications which were not satisfied by the subsequent exchange of letters in this case. We agree with the trial court that Michell's attempt to create an entitlement to a 45 percent fee from these sources violated Business and Professions Code section 6147 and the provisions of the original fee agreement. (See *Alderman, supra*, 205 Cal.App.3d at p. 1037.)

The trial court properly granted summary adjudication on this issue, finding that Michell wrongfully appropriated $12,500 of the settlement proceeds when she attempted to disregard the provisions of the parties' written fee agreement.

B. Osijo's Other Malpractice Claims Against Michell

Judge Trembath granted summary judgment against Osijo's other claims of malpractice. We affirm.

1. Nondisclosure

Osijo contends Michell had an undisclosed conflict of interest in representing him, because the defense of his personal injury action was under the control of Home, by and through its attorneys, the Larson firm; and Michell herself was insured against malpractice by Home and was defended in a later malpractice action by the Larson firm. We agree these circumstances would reasonably excite suspicion; and in other contexts, very serious questions might be raised about the need for disclosure to a client of these facts. (See *Jeffry* v. *Pounds* (1977) 67 Cal.App.3d 6, 10-12; *Stanley* v. *Richmond* (1995) 35 Cal.App.4th 1070, 1087-1088 (opn. of Phelan, J.) (*Stanley*).) However, in the context of the present case, we are limited by the record made below, which shows without contradiction that Osijo's representation by Michell had concluded before she was sued by another party for malpractice and was defended by the Larson firm in that matter. Consequently, the record before us shows Michell would have had nothing to disclose to Osijo during the time of her representation of him concerning the Larson firm or any claims made against her Home policy.

Osijo urges that Michell nevertheless had a duty to disclose the fact that her malpractice insurer, Home, was also controlling the defense in Osijo's personal injury litigation. However, the evidence before us shows Michell did not know that the insurer controlling the defense of Osijo's personal injury action was Home until this was disclosed in discovery in March 1991, long after she assumed representation of Osijo. Further, we decline on this record to impose a duty upon counsel to disclose to clients the identity of counsel's insurer, when there are presently no claims made or pending against the policy in question which would create a conflict of interest. No such claims were filed until long after Michell ceased representing Osijo. Further, the subject matter of the Osijo personal injury action had nothing to do with any unasserted claims for malpractice against Michell, and our Supreme Court has recently observed that the rules against attorney conflicts of interest are directed to situations in which a link between the subject matters of two representations or financial ties would give an attorney an incentive to compromise a client's claim at a discount; and we see no such incentive on the facts of record here, prior to the assertion of a claim against Michell which might be covered by her Home policy and have some substantial relationship to Osijo's case. (See *Santa Clara County Counsel Attys. Assn.* v. *Woodside* (1994) 7 Cal.4th 525, 546-547; *Flatt* v. *Superior Court* (1994) 9 Cal.4th 275, 283 (*Flatt*).) Consequently, we agree with the trial court that summary judgment on this claim was proper.[3]

2. Summary Judgment Against Other Claims of Malpractice

Osijo also asserted Michell was liable to him on a cause of action which he described as "Antagonism and Refusal to Respect Discharge of Attorney." The trial court properly granted summary judgment against this cause of action based upon the applicable one-year statute of limitations.

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3 The case would be different if the evidence showed there was an actual conflict between Michell's duty to Osijo and her own later defense by Home and the Larson firm. We affirm the summary judgment on the narrow ground that the evidence of record does not demonstrate that such an actual conflict existed during the period Michell represented Osijo.

The relevant statute of limitations is the one-year statute, section 340.6, which requires that such an action against an attorney be brought within one year of the date when the plaintiff discovers the facts constituting the wrongful act or omission. The evidence before the trial court showed Osijo did not assert this particular claim within the applicable one-year time period.

Osijo first asserted this cause of action in March 1993. All of the acts complained of, however, occurred during the period of Osijo's representation by Michell, which ended in February 1992; and he was necessarily aware of those facts and the "Antagonism" they caused to him at the time they occurred. For instance, Osijo complains that Michell attempted to file an amicus curiae brief in this court (Division Two) in January 1992 which sought to enforce the terms of the settlement he was trying to avoid. We agree with Osijo that the filing of a brief contrary to the interests of a former client raises very serious ethical questions; for this reason, this court refused to accept the brief in question for filing. In any event, Osijo necessarily learned of the attempted filing of the brief at the time it occurred, since a copy of the brief was served on him. For purposes of section 340.6, he knew of the acts complained of at the latest in January 1992, but did not bring this cause of action within one year as he was required to do.[4]

Osijo also contends the trial court erred in granting summary judgment to Ganong, who he alleged was Michell's law partner. However, no independent acts by Ganong were alleged, and his liability on these claims could only have been derivative as a result of Michell's actions. Since we affirm the summary judgment against Osijo on these claims, the trial court properly entered summary judgment in favor of Ganong as well. Further, it appears Ganong had retired some years previously and played no role in these events.

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4 We affirm summary judgment against this cause of action solely on the basis of the statute of limitations, and not on any other ground. It is apparent that if not for the bar of the statute of limitations, very serious questions might be raised which would have precluded summary judgment. (See *Flatt, supra*, 9 Cal.4th at pp. 282-285.)

C. The Motion for Judgment on the Fiduciary Duty Claim

After Osijo presented evidence at the court trial in favor of his claim of breach of fiduciary duty, Judge Zuniga granted a motion for judgment on this claim under section 631.8. Michell contends we are required to affirm this action granting a judgment under section 631.8 at the close of evidence in a court trial if the judgment is supported by substantial evidence, citing *Rodde* v. *Continental Ins. Companies* (1979) 89 Cal.App.3d 420, 423-424. However, more recent authority from our Supreme Court makes clear that where, as here, the underlying facts concerning such matters as the appropriation of client funds are no longer subject to dispute, and the only question is the legal one of whether such action constitutes a breach of fiduciary duty, we exercise de novo review. (*Locklin* v. *City of Lafayette* (1994) 7 Cal.4th 327, 369-371 (*Locklin*).)

We conclude we must reverse under either standard. Judge Trembath had previously found Michell had "wrongfully appropriated" to herself $12,500 in settlement proceeds which belonged to Osijo. The wrongful appropriation of client funds is a clear breach of the fiduciary duty owed by an attorney to a client. Judge Zuniga's ruling to the contrary is not supported by substantial evidence and was legally erroneous. (See *Locklin*, *supra*, 7 Cal.4th at pp. 369-371.)

The misappropriation of client funds held in trust by an attorney clearly constitutes a "breach of trust" in violation of the attorney's fiduciary duties. (*Copren* v. *State Bar* (1944) 25 Cal.2d 129, 134-135; *Baca* v. *State Bar* (1990) 52 Cal.3d 294, 304-305; see also *Mirabito* v. *Liccardo* (1992) 4 Cal.App.4th 41, 44-46 [Actions by an attorney which violate the rules of professional conduct may also constitute a breach of fiduciary duty.].) Here Michell cashed a settlement check without her client's knowledge or consent at a time when her right to any fee was still disputed, and used $100,000 for her own immediate purposes. She then later "wrongfully appropriated" an additional $12,500 held in trust for her client, again without her client's knowledge or consent, and apparently spent that money as well. We are, therefore, astounded by the trial court's ruling that

Michell did not violate any fiduciary duty owed to her client. This ruling is simply not supported by substantial evidence, and is legally erroneous. (See *Locklin, supra*, 7 Cal.4th at pp. 369-370.)

The trial court apparently reached this result because it observed that Osijo had not adduced any expert testimony that an attorney who has "wrongfully appropriated" client funds has breached a fiduciary duty. There is no need for expert testimony, however, as to obvious propositions. (See *People* v. *Johnson* (1993) 19 Cal.App.4th 778, 789-790.) This is especially true as to a question of law in a court trial, where the trial court is, or should be, already an expert in the law. Expert testimony is not required to show attorney malfeasance where the facts are so clear as to obviate the need for expert testimony. (*Stanley, supra*, 35 Cal.App.4th at p. 1093 [A judgment for nonsuit based upon the absence of expert testimony regarding attorney duties was reversed.]; accord, *Goebel* v. *Lauderdale* (1989) 214 Cal.App.3d 1502, 1508-1509.)

The judgment in favor of Michell on the cause of action for breach of fiduciary duties must be reversed.

D. Malicious Prosecution

Judge Zuniga also granted Michell damages for malicious prosecution, finding this action was not legally tenable. However, it is well established that a malicious prosecution action cannot be brought until a previous action has been terminated in favor of the defendant, and Michell obviously had not prevailed in this action, which was and is still pending. In fact, it appears Osijo has already prevailed in part in the action, and his other claims on which he did not prevail would not justify damages for malicious prosecution in any event. We, therefore, vacate the award of damages for malicious prosecution.

As our Supreme Court has repeatedly observed, it is "hornbook law" that damages may not be awarded for malicious prosecution of a prior action, unless the prior action is terminated in favor of the defendant. (See *Babb* v. *Superior Court* (1971) 3

Cal.3d 841, 845-847; *Lackner* v. *LaCroix* (1979) 25 Cal.3d 747, 749; *Sheldon Appel Co.* v. *Albert & Oliker* (1989) 47 Cal.3d 863, 871.) This court (Division Five) has also repeatedly observed that malicious prosecution actions may not be pursued unless the prior action has been favorably terminated. (*Walsh* v. *Bronson* (1988) 200 Cal.App.3d 259, 263-264 (opn. of Haning, J.); *Green* v. *Uccelli* (1989) 207 Cal.App.3d 1112, 1121 (*Green*) (opn. of King, J.) ["Clearly there has been no favorable termination of the underlying . . . action . . . , since [an] appeal from the court's judgment is pending before this court."].) Here, the malpractice action Osijo brought against Michell has not even terminated; it is still pending; further, Osijo has prevailed in part in this malpractice action.

Judge Zuniga did not find, and could not have found, that this action had terminated in favor of Michell. We are, therefore, mystified by the award of damages to Michell for malicious prosecution; there is no legal basis for such an award in any action which is still pending and in which Michell has not prevailed. (See *Jenkins* v. *Pope* (1990) 217 Cal.App.3d 1292, 1297-1301; *Eells* v. *Rosenblum* (1995) 36 Cal.App.4th 1848, 1854 (*Eells*).)[5]

Michell apparently now concedes the damages for malicious prosecution could not be based on the fact that Osijo filed certain pleadings in an action which is still pending, even though this was the trial court's articulated basis for its damages award on

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5 In light of this legal conclusion, we find it unnecessary to more explicitly address the trial court's conclusion that Osijo was in default for failure to answer Michell's amended cross-complaint for malicious prosecution, although this ruling also appears erroneous. No such cross-complaint could properly be filed while the underlying action was still pending; and in fact, Osijo not only answered the first cross-complaint with an answer that he could have been allowed to orally amend at trial so as to apply to the amended cross-complaint, he also prevailed in part in the prior action, which was still pending. The prerequisite for a judgment in Michell's favor for malicious prosecution was, therefore, simply lacking, and the trial court erred in entering judgment against Osijo on this cause of action in any event. (See *Green, supra*, 207 Cal.App.3d at p. 1121 [No malicious prosecution action may be brought while the previous action is still pending.]; *Rose* v. *Lawton* (1963) 215 Cal.App.2d 18, 20-21 [Even after default in the trial court, legal defects in a cause of action as pleaded may be raised on appeal.]; cf. *Paramount General Hospital Co.* v. *Jay* (1989) 213 Cal.App.3d 360, 368-369 [A favorable termination of the *severable* causes of an action must occur prior to the bringing of a malicious prosecution action.].) Here there is no favorable termination and only a single cause of action for legal malpractice, enunciated on related legal theories, concerning the same settlement.

the malicious prosecution action. At oral argument, Michell contended, instead, that the malicious prosecution damages could be based on the fact Osijo filed a complaint with the California Supreme Court regarding Michell, which the Supreme Court declined to hear. Michell now implies that the final disposition of that complaint could be used to uphold the damages award for malicious prosecution. However, the trial court did not base its damage calculation on the Supreme Court complaint alone, as Michell implies. The trial court clearly awarded damages for the "initial filings" in this action, which was improper.

Further, Michell apparently had no cognizable damages from the filing of the Supreme Court complaint, as review of the record makes clear. Osijo filed a complaint with the State Bar regarding Michell. The State Bar initially declined to investigate the matter, and told Osijo he would have to file a complaint with our Supreme Court in order to appeal the State Bar's decision not to investigate. Osijo did so. The Supreme Court in its discretion dismissed that complaint, which did not raise issues of statewide application; but this dismissal, while final, does not reflect on the merits of the dispute so as to allow us to conclude the matter had been favorably terminated or was brought without probable cause. (See *Eells, supra*, 36 Cal.App.4th at pp. 1854-1855.)

Moreover, even if as Michell suggests the filing of that complaint damaged her because it led to a renewed State Bar investigation, it is also well established that the filing of a State Bar complaint by a client does not result in cognizable damages to an attorney, because those damages simply result from the actions of the State Bar acting as an arm of the Supreme Court. (See *Stanwyck* v. *Horne* (1983) 146 Cal.App.3d 450, 460-461.) Finally, this is a case in which Osijo prevailed on his claims that Michell did, in fact, wrongly misappropriate client funds. It would be unjust to award an attorney damages in an action for malicious prosecution brought in such circumstances.

The trial court's judgment in Michell's favor for malicious prosecution must be vacated.

III. DISPOSITION

The trial court's order of summary adjudication in favor of Osijo regarding wrongful appropriation of settlement proceeds is affirmed. The trial court's order granting summary judgment against Osijo's other claims for nondisclosure and "Antagonism" are also affirmed. The trial court's order granting judgment against Osijo on his cause of action for breach of fiduciary duty is reversed. The judgment against Osijo for malicious prosecution is vacated. The matter is remanded for further proceedings consistent with the views expressed in this opinion. Costs on appeal are awarded to Osijo.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

WALE O. OSIJO,

Plaintiff/Appellant,

v.

GANONG AND MICHELL et al.,

Defendant/Respondent.

A077882

Contra Costa Superior Court No. C92-05352

THE COURT:[1]

After we remanded this case to the trial court for further proceedings, the trial court awarded appellant Wale O. Osijo damages of $12,500 plus interest on his claims against his former attorney, respondent Georgia Ann Michell-Langsam (Michell). Appellant now contends the trial court erred by not awarding him additional damages, as punitive damages or emotional distress damages, for Michell's wrongful appropriation of $12,500 in settlement proceeds. The trial court ruled that the evidence before it at the time of trial did not warrant an award of such damages. We find the trial court's rulings to be supported by substantial evidence, and affirm.

I. FACTUAL AND PROCEDURAL HISTORY

We have seen this case before. In *Osijo* v. *Ganong and Michell* (Apr. 12, 1996) A068661, we affirmed in part, reversed in part, and remanded this matter to the trial court for further proceedings. We discuss those prior proceedings in greater detail in the next part of this opinion.

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1 Before Peterson, P.J.; Haning, J.; and Jones, J.

The proceedings on remand included, in relevant part, an additional court trial on the question of Osijo's right to damages for Michell's wrongful appropriation of $12,500 in settlement proceeds, which she should have paid to Osijo. The trial court, after hearing the matter, entered an order awarding Osijo $12,500 plus interest. The trial court found no evidence in support of Osijo's claims for punitive damages or emotional distress damages and, therefore, declined to award such damages.

II. DISCUSSION

We affirm the trial court's rulings.

A. No Punitive Damages

The trial court awarded Osijo the $12,500 wrongfully appropriated by Michell, together with interest. Osijo contends the trial court should have awarded him punitive damages. However, the trial court ruled on this issue as follows: "Assuming the First Cause of Action contained in Plaintiff's Third Amended Complaint supports a claim for punitive damages, plaintiff failed to satisfy his burden of proof and establish by clear and convincing evidence that Georgia Ann Michell acted maliciously, oppressively, or fraudulently in the withdrawal of the disputed $12,500.[00] in attorney's fees from the plaintiff's portion of the settlement monies at issue. Plaintiff failed to establish any malice towards plaintiff by defendant, a malignant heart or a desire by defendant to hurt plaintiff. It is clear from the evidence presented to the court that defendant believed, albeit mistakenly, that she was entitled to a 45% attorney fee from the settlement."

This ruling is supported by substantial evidence and, therefore, is binding upon us on appeal. (See *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614 (*Mix*); *Bowers* v. *Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

The evidence of record in this and the prior litigation between the parties showed the following. In 1989, Osijo filed a previous action, Osijo v. Housing Resources Management, Inc. (Super. Ct. Alameda County, No. 649881-6) (personal injury action). In the personal injury action, Osijo alleged he had been employed as a security guard at the

Acorn Apartments, a housing project in Oakland, California when he was shot more than 15 times in his lower body by assailants armed with high velocity rifles. This attack was carried out by the assailants in retaliation for physical and verbal abuse they suffered at the hands of other security guards earlier in the day. The lawsuit alleged that Osijo's injuries and damages resulted from the negligent failure of the defendants to warn him of the danger. These defendants included Osijo's employer, a security company, and the managers and owners of the housing complex he was guarding. All the defendants were apparently insolvent or judgment proof. However, there was an applicable insurance policy issued by Home Insurance Companies (Home), and Home retained the law firm of Larson and Burnham (the Larson firm) to defend Osijo's action.

Osijo had more than one attorney representing him at various times in the personal injury action. Eventually, in 1990, he retained Michell to represent him, executing a written retainer agreement. Under the terms of this written agreement, Michell was to be paid 40 percent of any settlement or damages award at trial, and 45 percent of any recovery if she was required to defend the damages award on appeal.

The action was eventually settled by Michell, the Larson firm, and Osijo. However, Osijo contended the settlement was improperly arrived at; on appeal, Division Two of the First Appellate District affirmed an order of the trial court enforcing the settlement, over Osijo's objections. Under the terms of the settlement, the settling defendants paid $250,000 to Osijo and his counsel, Michell. Michell, however, took for herself 45 percent of the settlement proceeds, or $112,500, not the 40 percent or $100,000 authorized by the written agreement for any settlement.

Osijo brought this action against Michell for malpractice, contending she had intentionally concealed from him facts relating to the settlement. According to Osijo's theory in the trial court, Michell concealed from him the fact that his damages could be much greater than the settlement amount, and that she also had an undisclosed conflict of interest as a result of her ties to Home's retained law firm, the Larson firm, which was by

then defending Michell in another malpractice action. Osijo also contended Michell had committed malpractice and violated the terms of the written retainer agreement by taking an extra 5 percent of the settlement proceeds, or $12,500. Michell, in turn, filed a cross-complaint in the same action for malicious prosecution, contending Osijo wrongly sued her for malpractice.

Judge Trembath resolved certain matters on summary judgment or summary adjudication. He ruled Michell had violated the terms of the retainer agreement, because she "wrongfully appropriated" $12,500 too much from the recovery. He also granted summary judgment against Osijo's other claims of malpractice against Michell. Thereafter, Michell amended her cross-complaint to allege that the claims upon which summary adjudication were granted had been terminated in her favor, allowing her to pursue Osijo for malicious prosecution as a result of those claims. Osijo's remaining claim for breach of fiduciary duty and the cross-complaint filed by Michell against Osijo proceeded to trial before Judge Zuniga. Judge Zuniga granted a motion for a judgment under Code of Civil Procedure section 631.8 at the close of Osijo's evidence. Judge Zuniga also held Osijo was in default for not filing an amended answer to Michell's amended cross-complaint, and the trial proceeded as a default hearing. Judge Zuniga held Osijo's proceedings were "legally untenable" and awarded costs of defense to Michell for malicious prosecution of $27,729.05.

Osijo filed a timely appeal, and Michell filed a partial appeal from the previous ruling that she had wrongly misappropriated $12,500 from Osijo's settlement proceeds. We affirmed Judge Trembath's ruling that Michell had wrongly appropriated the $12,500, and affirmed his rulings in other respects. We also reversed the rulings by Judge Zuniga, and remanded the matter for further proceedings.

On remand, Michell testified she had committed an innocent mistake in paying herself the extra $12,500, based upon a letter from Osijo which seemed to offer her that extra fee if she stayed on the case without forcing him to rehire his separate worker's

compensation attorney. Osijo argued that it could be inferred Michell acted with malice, although he did not present any specific evidence in this regard. The trial court ruled, based upon this evidence, that punitive damages were not warranted: "I think that Mr. Osijo, the plaintiff, has not carried his burden of proof in this case of showing by clear and convincing evidence that he is entitled to an award of punitive damages against the defendant because of her conduct. [¶] Now, her conduct under the rules applicable to attorneys was not appropriate conduct. I don't think anyone would disagree with that. The appellate court has ruled this was not appropriate, the manner in which she disbursed the funds. But to say that she has [acted] with malice . . . towards you, Mr. Osijo, in a desire to hurt you, that she has taken the money out I don't think reflects the state of the evidence."

This ruling is supported by substantial evidence. (*Mix, supra*, 14 Cal.3d at p. 614.) While the trial court could, perhaps, have inferred malice from these facts, it certainly was not required to do so. This is especially true because Osijo presented no specific evidence supporting his claim for punitive damages; the only evidence before the court was that Michell did not intend to violate Osijo's rights and simply acted negligently. We might have some doubts on this point, given the long animosity between Michell and Osijo documented in the record of the prior appeals, but we certainly cannot say the trial court's ruling was unsupported by substantial evidence. (*Ibid.*; see also *Stevens* v. *Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1658 ["Whether to award punitive damages and how much to award were issues for the . . . trial court . . . . All presumptions favor the correctness of the verdict and judgment."].) Punitive damages are not granted as a matter of right, and are reserved for a limited number of cases in which "it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice . . . ." (Civ. Code, § 3294, subd. (a).) The trial court in effect found these predicates had not been proven to its satisfaction by clear and convincing evidence. We cannot say the trial court abused its discretion, nor can we say its conclusion is not supported by substantial evidence of lack of oppression, fraud, or malice.

B. No Emotional Distress Damages

The trial court also ruled that Osijo had not proven any damages for emotional distress as a result of Michell's wrongful appropriation of the $12,500. Once again, the trial court's ruling is supported by substantial evidence. Osijo did not present any medical evidence, such as doctor or hospital bills, psychiatric testimony, and so on, to support his claimed $500,000 in emotional distress damages. As the trial court ruled: "Your request for $500,000 for emotional distress I don't believe is supported by the [pleadings]. . . . But even assuming that it is pled, this is not a case in which you are entitled to receive emotional distress damages. [¶] You do say here taking the money subjected you to humiliation, but I'm not sure what you mean by that. Humiliation before whom, by whom, or what you meant by that. [¶] . . . [¶] There will be no award of any additional moneys. The evidence is just not clear enough for me to award you other compensatory or other actual damages. You have not carried your burden of proof . . . ."

We can find no reversible error. Osijo presented no evidence as to any particular type or amount of emotional distress damages, beyond his clearly unsupportable claim in arguments or briefs that he should be paid $500,000 in emotional distress damages because of the delay in receiving the additional $12,500 due to him under the parties' contract. This delay in receiving money due under a contract, without more, was insufficient to support a claim for emotional distress. (See, e.g., *Kruse* v. *Bank of America* (1988) 202 Cal.App.3d 38, 67-68 [There was an insufficient showing of emotional distress damages, where a bank merely asserted its contractual rights to foreclose on the plaintiff's property.]; *Trerice* v. *Blue Cross of California* (1989) 209 Cal.App.3d 878, 883-885 [There was insufficient evidence of emotional distress damages, where the plaintiff's termination benefits package was less favorable than the one she had been promised.].) We affirm the

trial court's ruling on the grounds that Osijo did not carry his burden of proof as to emotional distress damages.[2]

C. Dismissal of John Ganong as a Party

During prior proceedings, Judge Trembath granted summary judgment in favor of Michell's former law partner John Ganong, who was apparently not personally involved in these events. We affirmed this ruling on appeal. This ruling constituted the law of the case; and it was binding during further proceedings, such as those in the trial court on remand. (See *People* v. *Stanley* (1995) 10 Cal.4th 764, 786-787.) Despite this, Osijo tried to proceed again against Ganong in the trial court on remand. The trial court properly refused to allow Osijo to proceed further against a party who had previously been dismissed by an order of summary judgment, which order was subsequently affirmed on appeal.[3]

D. Costs

Osijo contends the trial court abused its discretion in ruling that (1) Osijo was entitled to costs as a prevailing party, but (2) the unverified costs memorandum Osijo prepared was insufficient to show that the claimed costs of $131,500 were justified.

It is very doubtful, indeed, that we have proper appellate jurisdiction over this issue, since Osijo did not file a separate appeal from the trial court's order on costs. Nevertheless, in order to ensure that nothing is overlooked, we note that we would find no abuse of discretion by the trial court in any event. Osijo's request for claimed costs in the exorbitant sum of $131,500 was clearly insufficient under Code of Civil Procedure section

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2 We, therefore, need not address Michell's contentions that damages for emotional distress may not be awarded for a "negligent" breach of fiduciary duty. (See *Flyer's Body Shop Profit Sharing Plan* v. *Ticor Title Ins. Co.* (1986) 185 Cal.App.3d 1149, 1154-1155.) The trial court correctly concluded no damages were proven in any event.

3 Osijo also makes contentions relating to the Alameda County Superior Court's approval of the settlement of his prior personal injury action, which he claims should not have any res judicata effect on his malpractice claims against Michell. These contentions are unintelligible. The basis for the Contra Costa trial court's ruling under review here was that Osijo did not prove any additional damages from Michell's wrongful appropriation of $12,500. Our affirmance of that ruling is unaffected by the res judicata effect, if any, of the prior disputed settlement.

1033.5, which allows the recovery of such items as jury fees, expert witness fees, and so on, none of which costs were apparently incurred by Osijo in this court trial. We find no abuse of discretion in the trial court's order concerning costs, given Osijo's failure to properly claim and itemize his request for allowable costs. (See *Hydratec, Inc.* v. *Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 Cal.App.3d 924, 927-929.)

III. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ADEBOWALE O. OSIJO, Plaintiff and Appellant, v. THE HOME INSURANCE COMPANY et al., Defendants and Respondents.	F042329 (Super. Ct. No. 02-CECG-00266) Fresno County
ADEBOWALE O. OSIJO, Plaintiff and Appellant, v. RISK ENTERPRISE MANAGEMENT LTD. et al., Defendants and Respondents.	F043325 (Super. Ct. No. 02-CECG-00266) Fresno County

APPEAL from a judgment of the Superior Court of Fresno County. Stephen J. Kane, Judge.

Adebowale O. Osijo, in pro. per., for Plaintiff and Appellant.

Greenan, Peffer, Sallander & Lally, James S. Greenan, John P. Makin, and Erin D. Lopez for Defendants and Respondents The Home Insurance Company and Risk Enterprise Management Ltd.

Murphy, Pearson, Bradley & Feeney and Aaron K. McClellan for Defendants and Respondents Murphy, Pearson, Bradley & Feeney, James A. Murphy, and Antoinette W. Farrell.

Burnham Brown, Robert J. Lyman and Jennifer R. Thomas for Defendant and Respondent Burnham Brown.

Michell-Langsam and Georgia Ann Michell, in pro. per., for Defendant and Respondent Georgia Ann Michell.

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Plaintiff and appellant Abedowale O. Osijo (plaintiff) settled a personal injury action in 1991. Since that time, plaintiff has filed numerous lawsuits against the insurers and attorneys involved in that case and subsequent litigation. In this action, plaintiff, in pro. per., filed suit against defendants and respondents The Home Insurance Company (Home); Risk Enterprise Management Ltd. (REM); Burnham Brown; Georgia Ann Michell-Langsam (Michell); and Murphy, Pearson, Bradley & Feeney (MPBF), James A. Murphy and Antoinette W. Farrell (collectively, the MPBF parties) for fraud and invasion of privacy.

In resolving the issues through several demurrers, motions for summary adjudication, and a bench trial, the court found the claims barred by the statute of limitations and the litigation privilege. We affirm.

PROCEDURAL AND FACTUAL HISTORIES

This case is a procedural and factual maze with litigation in both the state and federal trial and appellate courts spanning over 15 years. We do our best to summarize it here.

In 1988, plaintiff was shot several times while he was working as a security guard at a housing project in Oakland, California. In 1989, plaintiff filed a personal injury action against Housing Resources Management, Inc., and his employer, the security guard company, among others. (See *Osijo v. Housing Resources Management, Inc., et*

al., Super. Ct. Alameda County, 1991, No. 649881-6.) Plaintiff retained Michell to represent him. All the defendants were apparently insolvent or judgment proof, but there was an applicable insurance policy—Housing Resources Management, Inc., was insured under a Home general commercial liability policy. Home retained the law firms of Larson & Burnham and MPBF to defend. In July 1991, the matter settled for $250,000. However, the following day, plaintiff notified his counsel that he wanted out of the agreement. The trial court nonetheless entered judgment pursuant to the terms of the settlement. Plaintiff appealed, and the First District Court of Appeal affirmed the judgment. The California Supreme Court denied plaintiff's petition for review. (See *Osijo v. Housing Resources Management, Inc., et al.* (July 16, 1992, A055045) [nonpub. opn.], review den. Sept. 30, 1992, S028364.)

Thereafter, plaintiff filed a legal malpractice action against Michell, her law firm and several other attorneys. Plaintiff alleged his attorneys failed to disclose a prior relationship with Home and Larson & Burnham—specifically that they were insured by Home for legal malpractice and that Larson & Burnham was representing them in another professional negligence action. Plaintiff alleged his attorneys set up a bogus settlement conference, "tricked" and "snookered" him into signing the settlement agreement, and took too much of the settlement proceeds. (See *Osijo v. Ganong and Michell, et al.*, Super. Ct. Contra Costa County, 1994, No. C92-05352.) The defendants filed a cross-complaint against plaintiff for malicious prosecution and abuse of process. Michell was originally defended by Burnham Brown (the successor to Larson & Burnham), but was later defended by the MPBF parties. The malpractice claim went to trial in 1994 and was decided against plaintiff. The defendants were awarded in excess of $27,000 on the cross-complaint.

Plaintiff appealed, and the First District Court of Appeal affirmed the judgment with respect to the malpractice claim, but reversed and remanded on the breach of fiduciary duty claim. The court vacated the judgment on the malicious prosecution

claim. (See *Osijo v. Ganong and Michell, et al.* (Apr. 12, 1996, A068661) [nonpub. opn.].) The trial court subsequently awarded plaintiff $12,500 against Michell. The First District Court of Appeal affirmed that judgment. (*Osijo v. Ganong and Michell, et al.* (Feb. 2, 1998, A077882) [nonpub. opn.].)

In March 1998, plaintiff filed suit in district court, alleging various claims for civil rights violations against Home; Home's successor and manager of its claims and liabilities, REM; Michell; several of Michell's associates; an attorney with Larson & Burnham; several attorneys with MPBF; and employees of the Internal Revenue Service. Plaintiff alleged that certain of the attorney defendants maliciously instituted a tax collection proceeding against plaintiff and submitted plaintiff's entire file to employees of the Internal Revenue Service. Among the myriad allegations, plaintiff also asserted that Michell conspired with Home's attorney to settle the original personal injury action. Plaintiff sought damages in excess of $3 million. The district court granted numerous motions to dismiss filed by the private parties and entered judgment in favor of the United States on plaintiff's civil rights claims.[1] (See *Osijo v. United States of America, et al.* (C.D.Cal. Mar. 5, 1999, No. CV 98-1880-CAS (BQR)) 1999 WL 358686.) The Ninth Circuit Court of Appeals affirmed. (See *Osijo v. Weiner, et al.* (9th Cir. 2000) 232 F.3d 895, 2000 WL 1047109.) The United States Supreme Court denied plaintiff's petition for a writ of certiorari. (See *Osijo v. Weiner, et al.* (2001) 531 U.S. 1150.)

On April 12, 2001, plaintiff filed another action against Home; REM; Michell; Michell's law firm and several of its attorneys; Burnham Brown; the MPBF parties; and the federal employees in the district court action, along with two government attorneys. Plaintiff asserted claims for deprivation of access to court, invasion of privacy and fraud based on allegations that the defendant attorneys conspired to release his legal and

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[1]The district court did find in favor of plaintiff on his claim that the Internal Revenue Service failed to issue a notice of deficiency to his "last known address."

medical files to the Internal Revenue Service, and Home conspired to obtain a fraudulent judgment in the personal injury action. This time, plaintiff sought damages in excess of $10 million. (See *Osijo v. Robbins, et al.*, Super. Ct. Fresno County, 2001, No. 01CECG01279.) The case was removed to district court. Pursuant to plaintiff's request, the federal claims were dismissed with prejudice. The remaining claims were dismissed without prejudice to their being litigated in state court. (See *Osijo v. Robbins, et al.* (E.D.Cal. Sept. 4, 2001, No. CV F 01-5496 AWI LJO).)

On January 25, 2002, plaintiff filed the instant action against Home; REM; Burnham Brown; Michell; Michell's law firm and former attorneys; and the MPBF parties. Plaintiff alleged two claims: 1) extrinsic fraud in his underlying personal injury action, and 2) deprivation of privacy rights and interests in legal and medical files.

On April 16, 2002, the trial court sustained without leave to amend the demurrer of the MPBF parties to the first cause of action, but overruled it as to the second cause of action. The court also sustained without leave to amend the demurrer of Michell, her firm and attorneys to the first cause of action, but overruled it as to the second cause of action. The court found that the first cause of action for fraud was barred by the litigation privilege. The court overruled the demurrers of REM and Burnham Brown in their entirety.

On October 7, 2002, the trial court granted Home's motion for summary judgment. The court found Home met its burden of establishing that the first cause of action was barred by the litigation privilege and both the first and second causes of action were barred by the applicable statute of limitations. The court denied REM's motion for summary judgment, finding it failed to show it did not exist during the time of the alleged disclosure of legal and medical records. REM did not move in the alternative for summary adjudication.

On November 15, 2002, the trial court granted the MPBF parties' summary adjudication as to the second cause of action, concluding it was barred by the applicable

statute of limitations. The court also granted Burnham Brown's motion for summary adjudication as to the first cause of action, finding it was barred by the litigation privilege and the applicable statute of limitations. The court treated Burnham Brown's motion for summary adjudication of the second cause of action as a motion for judgment on the pleadings. The court reasoned that plaintiff's allegations against Burnham Brown failed to state a valid claim for invasion of privacy because, as defense counsel in the personal injury action, Burnham Brown had a right to obtain plaintiff's medical information. The motion for judgment on the pleadings was granted with 10 days' leave to amend. The court later sustained Burnham Brown's demurrer to the second cause of action without leave to amend, finding plaintiff failed to allege any new facts to cure the defect.

Following a court trial on the affirmative defenses, judgment was entered in favor of the remaining defendants, including REM and Michell. The court found that the evidence established that 1) plaintiff had actual knowledge in 1993 of facts upon which his suspicions of fraud were based and 2) plaintiff was aware that the defendants turned over his legal and medical files to the Internal Revenue Service in 1997. Thus, the court concluded that both the fraud and invasion of privacy claims were barred by the applicable statutes of limitation. The court denied plaintiff's motion for a new trial.

Plaintiff appealed. We granted Home and REM's motion to consolidate the two separate appeals filed by plaintiff.

DISCUSSION

Plaintiff claims error by the trial court in finding his fraud claim barred by the litigation privilege and both the fraud and invasion-of-privacy claims barred by the applicable statute of limitations. Before reaching the merits, we first address Home and REM's motions to dismiss the appeal.

I. Motions to dismiss

Home and REM filed motions to dismiss the appeal on the ground Home has been declared insolvent, pursuant to a New Hampshire liquidation order, and all actions and

proceedings against Home and REM, arising from its actions on behalf of Home, must be abated. Home and REM maintain that California's recognition of the legal doctrines of full faith and credit and judicial comity support dismissal of the appeal.

Home and REM cite to an Order of Liquidation, issued on June 13, 2003, by the New Hampshire Superior Court in an action in which Home was declared insolvent.[2] The Commissioner of Insurance for the State of New Hampshire was appointed liquidator and was vested with the full powers and authority under New Hampshire's Insurers Rehabilitation and Liquidation Act (37 N.H. Rev. Stat. § 402-C). (See *In the Matter of the Rehabilitation of The Home Insurance Company*, Super. Ct. New Hampshire, 2003, No. 03-E-0106.) Pursuant to New Hampshire's Insurers Rehabilitation and Liquidation Act, the court's liquidation order further provided as follows:

> "(m) All actions and all proceedings against ... Home whether in this state or elsewhere shall be abated in accordance with RSA 402-C:28 and RSA 402-C:5, except to the extent the Liquidator sees fit and obtains leave to intervene;
>
> "(n) To the full extent of the jurisdiction of the Court and the comity to which the orders of the Court are entitled, all persons are hereby permanently enjoined and restrained from any of the following actions:
>
> "(1) commencing or continuing any judicial, administrative, or other action or proceeding against ... Home or the Liquidator;
>
> "(2) commencing or continuing any judicial, administrative, or other action or proceeding against ... Home's ... or the Liquidator's present or former directors, officers, employees, agents, representatives, or consultants, including, without limitation, [REM] and each of its officers, directors and employees, arising from their actions on behalf of ... Home ... or the Liquidator;

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[2]Pursuant to Evidence Code sections 452 and 459, we grant Home and REM's requests for judicial notice filed in support of their motions to dismiss. Plaintiff filed a June 20, 2003, request for judicial notice in opposition to Home's motion to stay the proceedings. Because we denied Home's motion, it is not necessary to grant plaintiff's request. It is therefore denied.

"(3) enforcing any judgment against ... Home or its property ...."

The allegations in plaintiff's complaint against REM indisputably arise from REM's actions on behalf of Home. Plaintiff alleges that REM is Home's successor and manager of its claims and liabilities. According to plaintiff's complaint, "[REM] has and had managed the existing risks and liabilities of ... Home.... since January 1995.... Home ... funded, provided and controlled the defense of, and offered to settle the ... subsequent legal malpractice action through [REM] ...." All of the allegations against REM relate to its actions on behalf of or in connection with Home.

The federal constitutional mandate of full faith and credit does not apply here. (U.S. Const., art. IV, § 1 [full faith and credit must be given "in each State to the public Acts, Records, and Judicial Proceedings of every other State"]; 28 U.S.C. § 1738; *Underwriters Assur. Co. v. N. C. Guaranty Assn.* (1982) 455 U.S. 691, 704 [judgment of state court should hold same credit, validity and effect in every other court of United States]; *Capital Trust, Inc. v. Tri-National Development Corp.* (2002) 103 Cal.App.4th 824, 826 [judgments of sister states given full faith and credit if rendering state had fundamental jurisdiction of matter and all parties were provided reasonable notice and opportunity to be heard].) First, plaintiff was not a party to the New Hampshire insolvency proceeding and thus had no notice of the action and no opportunity to be heard. (See *Underwriters Assur. Co. v. N. C. Guaranty Assn.*, *supra*, 455 U.S. at p. 705 [if another state court had no jurisdiction over subject matter or relevant parties, full faith and credit need not be given]; accord *Bank of America v. Jennett* (1999) 77 Cal.App.4th 104, 113; see also 2 Witkin Cal. Procedure (4th ed. 1996) Jurisdiction, § 232 p. 793 [court with personal jurisdiction over defendant may enjoin him from instituting lawsuit elsewhere]; cf. *Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 Cal.4th 697, 704-705 [forum court's power to restrain proceedings in sister state should be used sparingly].)

Second, the liquidation order was not a final adjudication of plaintiff's claim or a determination of his rights with regard to Home or REM. (See *Underwriters Assur. Co. v. N. C. Guaranty Assn.*, *supra*, 455 U.S. at pp. 703-704 [concept of full faith and credit created in recognition of risk of relitigation of same issue]; *Morris v. Jones* (1947) 329 U.S. 545, 554 [holding petitioner's claim may not be relitigated in state proceeding where nature and amount of claim conclusively determined by judgment in another state].) The order simply declared Home insolvent and set up a plan for distributing the company's remaining assets. Plaintiff makes no challenge here to the validity of the insolvency finding or the appropriateness of the plan.

Thus, we are not required to give full faith and credit to the abatement provision of the liquidation order. We therefore examine the permissive doctrine of comity.

Comity is founded upon the principle of governmental reciprocity—recognizing that the laws of one state have no force beyond its territorial limits, but the laws of one state are frequently permitted by the courtesy of another to operate in the latter for the promotion of justice. (*Advanced Bionics Corp. v. Medtronic, Inc.*, *supra*, 29 Cal.4th at p. 707.) """"This courtesy, or comity, is established, not only from motives of respect for the laws and institutions of the foreign [jurisdictions], but from considerations of mutual utility and advantage.'" ....' [Citations.]" (*Ibid.*; see also *State of Oregon v. Superior Court* (1994) 24 Cal.App.4th 1550, 1562, disapproved on other grounds in *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 465, fn. 8.)

The discretionary doctrine of comity may be appropriately applied here. Although California is not compelled by its own laws, or by the federal Constitution, to give full faith and credit to the abatement provision of the New Hampshire liquidation order, public policy considerations and the similarities between Hew Hampshire's Insurers Rehabilitation and Liquidation Act and California's own laws regarding insolvent insurers supports our decision to give the New Hampshire order effect in California. California's Insurance Code grants this state's insurance commissioner, acting as the

liquidator of an insolvent insurer, the very same authority to "prevent" by an appropriate order "[t]he institution or prosecution of any actions or proceedings" against the insurer. (Ins. Code, § 1020.) Insurance Code "[s]ection 1020 reflects a legislative intent to preserve an insolvent insurer's assets for orderly disposition by the commissioner." (*Webster v. Superior Court* (1988) 46 Cal.3d 338, 344, fn. omitted.) Implicit in Insurance Code section 1020 is an understanding that all claims against the insurer will be processed in a single forum, which will further the orderly disposition of the insurer's net assets. This state has a strong public interest in the orderly administration of insolvencies in the insurance business, regardless of the administering state, in order to protect policyholders, creditors and the public. (*Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 515; Ins. Code, § 1064.3, subd. (b).)

In sum, given California's adoption of statutes which acknowledge and promote the principle that claims against an insolvent insurer should be adjudicated and resolved in a single forum, and given the existence of equivalent New Hampshire legislation, we find it appropriate to apply the principle of comity to the New Hampshire liquidation order. The appeal is dismissed with respect to Home and REM. (See *In re Stephanie M.* (1994) 7 Cal.4th 295, 314 [extension or denial of comity is discretionary].)[3]

We turn then to the claims pertaining to the remaining parties, Burnham Brown, Michell, and the MPBF parties.

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[3]In one-paragraph arguments with no citation to legal authority, plaintiff contends that the motions to dismiss should be denied because 1) it is the responsibility of the court-appointed liquidator to file a motion, and 2) REM is not in liquidation through receivership. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; see also *People v. Stanley* (1995) 10 Cal.4th 764, 793; *Akins v. State of California* (1998) 61 Cal.App.4th 1, 50 [waiver of contention by failure to cite any legal authority].)

II. Applicable standards of review

We briefly set forth the applicable standards for reviewing the various claims at issue. "In reviewing a judgment of dismissal after a demurrer is sustained without leave to amend, we must assume the truth of all facts properly pleaded by the plaintiff ... , as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.)

> "'A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports.' [Citation.]" (*Simon v. Walt Disney World Co.* (2004) 114 Cal.App.4th 1162, 1168.)

Finally, a challenge to the sufficiency of the evidence at trial is reviewed under the substantial evidence rule. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.)

III. Fraud claim

The trial court sustained the demurrers of Michell and the MPBF parties without leave to amend on the fraud cause of action, finding the claim barred by the litigation privilege. The court also granted Burnham Brown summary adjudication on this claim based on the same ground.

Plaintiff's fraud cause of action is premised on the alleged fraudulent communications made by Michell, Burnham Brown, and the MPBF parties in connection with the initial personal injury action and subsequent malpractice action. Plaintiff alleged as follows:

> "[Home] hired [MPBF] to represent [Michell], prosecute the defense of, and offered to settle the ... subsequent legal malpractice action. [Home] hired [MPBF] to file and prosecute a sham and frivolous cross-complaint for malicious prosecution and abuse of process against the [p]laintiff, and offered to dismiss the sham and frivolous cross-complaint in exchange for the [p]laintiff's settlement of the ... subsequent legal malpractice action. [¶] ... [¶]

" ... Plaintiff categorically and affirmatively alleges that [Home] and [REM] hired [the MPBF parties] to expressly and/or impliedly perpetrate fraud on the Courts in the [State] of California. [Home] and [REM] expressly and/or impliedly instructed [the MPBF parties] to withhold and/or conceal the involvement of [Home] in the funding and control of the defense of the ... subsequent legal malpractice action, from the California Court of Appeals, First District, Division V, in order to obtain a judgment in favor of [Home] and [REM]. [Home] and [REM] expressly and/or impliedly instructed [the MPBF parties] to put [Michell] on the witness stand to falsely and fraudulently testify under Oath that she had 'mistakenly misappropriated' 5 percent of the $250,000 that [Home] paid her to settle the ... underlying personal injury action, in order to withhold and/or conceal the fact that [Michell] represented the [p]laintiff with an actual conflict of interest in the ... underlying personal injury action....

" ... Plaintiff categorically and affirmatively alleges that [Home] hired ... Burnham & Brown ... to expressly and/or impliedly perpetrate fraud on the Courts in the State of California. [Home] expressly and/or impliedly instructed them to falsely and fraudulently plead to the Superior Court of Alameda County ... that it fairly obtained a legally binding agreement to settle the ... underlying personal injury action from the [p]laintiff and his attorneys....

" ... Plaintiff categorically and affirmatively alleges that [Home], ... Burnham & Brown, ... and [Michell], conspired to sabotage [p]laintiff's future appeal of the enforcement order, and/or any subsequent legal malpractice action against [Michell]. [Michell], as the [p]laintiff's attorney was to motion the Superior Court of Alameda County for the removal of the case to a 'Voluntary Settlement Conference,' in a place in San Francisco called the 'Judicial Arbitration and Mediation Service,' without the [p]laintiff's knowledge or consent."

Civil Code section 47, subdivision (b), provides that a privileged publication or broadcast is one made "[i]n any ... judicial proceeding ...." The litigation privilege "applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of litigation; and (4) that have some connection or logical relation to the action." (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212; see also *Drum v. Bleau, Fox & Associates* (2003) 107 Cal.App.4th 1009, 1024-1027 [privilege protects communication, not conduct].) The privilege is given broad application. (*Silberg v. Anderson, supra*, 50 Cal.3d at pp. 211-

212.) It is absolute and extends to all torts other than malicious prosecution. (*Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1302.) The privilege applies to an insurer and its attorneys in judicial proceedings. (*Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 24; *Doctors' Co. Ins. Services v. Superior Court* (1990) 225 Cal.App.3d 1284, 1295-1296.)

Here, as recognized by the trial court, the statements at issue alleged by plaintiff in his fraud claim were indisputably communications in a judicial proceeding, by litigants or their attorneys, to achieve the objects of litigation, and the communications had some connection to the action. The communications were made by and between the MPBF parties, Burnham Brown, and Michell in their respective capacities as counsel or party in the personal injury and malpractice actions. Thus, the litigation privilege bars any claim based on the alleged misrepresentations of those parties related to the previous litigation.

Plaintiff attempts to circumvent the litigation privilege by labeling his claim "extrinsic" fraud. (*Home Ins. Co. v. Zurich Ins. Co.*, *supra*, 96 Cal.App.4th at p. 26 [litigation privilege does not apply to equitable action to set aside settlement agreement based on extrinsic fraud]; see also *Silberg v. Anderson*, *supra*, 50 Cal.3d at p. 214.)

> "'Fraud is extrinsic where the defrauded party was deprived of the opportunity to present his or her claim or defense to the court, that is, where he or she was kept in ignorance or in some other manner, other than from his or her own conduct, fraudulently prevented from fully participating in the proceeding.' [Citation.]
>
> "'Any fraud is intrinsic if a party has been given notice of the action and has not been prevented from participating therein, that is, if he or she had the opportunity to present his or her case and to protect himself or herself from any mistake or fraud of his or her adversary, but unreasonably neglected to do so. [¶] ... Generally, the introduction of perjured testimony or false documents, or the concealment or suppression of material evidence is deemed intrinsic fraud." (*Home Ins. Co. v. Zurich Ins. Co.*, *supra*, 96 Cal.App.4th at pp. 26-27.)

Despite plaintiff's label, the fraud alleged in the complaint—prosecution of a sham cross-complaint, concealment of Home's involvement in the defense of the malpractice

action, instruction to witnesses to fraudulently testify, and removal of a case to a settlement conference—is not extrinsic fraud. It did not prevent plaintiff from presenting his case in court. And plaintiff has presented no evidence to suggest he could amend his complaint to support a claim for extrinsic fraud.

Thus, the trial court properly sustained the demurrers of Michell and the MPBF parties without leave to amend. The court also properly granted Burnham Brown summary adjudication.[4]

IV. Invasion of privacy claim

The trial court sustained Burnham Brown's demurrer on the invasion of privacy claim on the ground plaintiff failed to state a valid cause of action. The court granted the MPBF parties summary adjudication, finding the claim barred by the applicable statute of limitations. With respect to Michell, the court also found, following a bench trial, that the claim was barred by the statute of limitations.

Plaintiff alleged as follows with respect to his invasion of privacy claim:

> "[I]n the course and causes of the ... legal malpractice action, [Home] and [REM] expressly and/or impliedly instructed James A. Murphy, Antoinette W. Farrell, [and] [Michell] ... to turn over copies of [p]laintiff's legal and medical files to Edward M. Robbins, Jr., an Assistant United States Attorney ... ; Mark A. Weiner, an attorney in the employ of the Internal Revenue Service ... ; Penny Childers, a Supervisor in the Internal Revenue Service ... ; Barbara Salisbury, an Income Tax Examiner in the employ of the Internal Revenue Service ... ; and other unknown employees of the Internal Revenue Service. The employees of the Internal Revenue Services rummaged through and disseminated every page in the files for evidence or evidences of taxable income, without the [p]laintiff's knowledge or consent .... The employees of the Internal Revenue Service

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[4]As a result of our conclusion, it is not necessary to address the additional contention that the fraud claim is barred by the statute of limitations. However, we find incontrovertible evidence in the record that plaintiff was aware of his fraud complaint back in August 1993. His claim would therefore be barred by the statute of limitations as well.

> in turn used the information they obtained from the [p]laintiff's psychiatry and psychological examinations, evaluations and reports to physically and verbally abuse ... him as a mad man, with a potential for violence.... Penny Childers felt threatened by the [p]laintiff. She believed he is a sorcerer and a magician because he is an African and based on what [Home] and [REM] expressly and/or impliedly instructed all the [d]efendants ... to tell them in the Internal Revenue Service that [p]laintiff is associated and/or affiliated with a group called the 'Nigerian hit squad....'
>
> " ... Plaintiff alleges that all the [d]efendants fraudulently obtained [p]laintiff's legal and medical files. [Michell] represented the [p]laintiff with an actual conflict of interest in the underlying personal injury action. She turned over [p]laintiff's legal and medical files to [Home] and [REM], through [MPBF], in the ... legal malpractice case.... Burnham & Brown ... obtained [p]laintiff's legal and medical files in the ... personal injury case from [Michell], without [p]laintiff's knowledge or consent. [Home] [and] ... Burnham & Brown ... used the information they obtained from the [p]laintiff's legal and medical files to plan their defense of the ... subsequent legal malpractice action."

We dispense initially with the issue related to Burnham Brown. In granting Burnham Brown judgment on the pleadings with respect to the invasion-of-privacy claim, the trial court noted:

> "[P]laintiff has apparently alleged that Burnham [Brown] obtained plaintiff's legal and medical records in the personal injury action and used them against him in the malpractice action. [Citation.] However, these allegations fail to state a claim for invasion of privacy since Burnham [Brown] was defense counsel in the personal injury action, and, therefore, had a right to obtain plaintiff's medical information as part of their defense. Thus, plaintiff's allegations against Burnham [Brown] do not state a valid claim for invasion of privacy."

The court gave plaintiff 10 days' leave to amend his complaint, but he failed to allege any new facts. We agree with the trial court. Burnham Brown was entitled to plaintiff's medical files in defense of the personal injury case and to plaintiff's legal files in defense of the malpractice case. Plaintiff has set forth no facts to otherwise state a valid claim against Burnham Brown for invasion of privacy. (See *Saliter v. Pierce*

Brothers Mortuaries (1978) 81 Cal.App.3d 292, 299-300.) We therefore proceed on the claim as it relates to Michell and the MPBF parties.

At the time plaintiff filed his complaint, the applicable statute of limitations for a claim of invasion of privacy was one year, as set forth in former Code of Civil Procedure section 340, subdivision (3). (*Cain v. State Farm Mut. Auto. Ins. Co.* (1976) 62 Cal.App.3d 310, 313.) The 2002 Legislature amended Code of Civil Procedure section 340, subdivision (3), and redesignated it as Code of Civil Procedure section 340, subdivision (c). As amended, the one-year statute of limitations no longer applies to personal injury actions. Those actions are now governed by a two-year statute of limitations set forth in Code of Civil Procedure section 335.1. However, the statute was made retroactive only to personal injury or wrongful death actions brought by victims of the September 11, 2001, terrorist attacks. (Sen. Bill No. 688 (2001-2002 Reg. Sess.) § 1; 3 Witkin, Cal. Procedure (2004 supp.) Actions, § 545A, pp. 142-143.) In this case, the distinction is immaterial, since plaintiff failed to file his action within even the two-year statute of limitations.

Under the "rule of discovery," the cause of action does not accrue until the plaintiff knows or should know all material facts essential to show the elements of the cause of action. (*Cain v. State Farm Mut. Auto. Ins. Co.*, *supra*, 62 Cal.App.3d at pp. 314-315.) Here, the statute commenced upon plaintiff's discovery of the alleged invasion of privacy—disclosure of his legal and medical files to the Internal Revenue Service. (*Ibid.*)

Plaintiff's March 1998 complaint in district court alleged that the defendants, including Michell and MPBF attorneys James A. Murphy and Antoinette W. Farrell, submitted plaintiff's "entire file" to the Internal Revenue Service. In addition, plaintiff's first amended complaint in that action, filed July 7, 1998, alleged that plaintiff first discovered that the defendants, including Michell and MPBF attorneys James A. Murphy and Antoinette W. Farrell, submitted his entire file to the Internal Revenue Service during

his September 26, 1997, trial for unreported income tax. In his opening brief in this appeal, plaintiff admits he knew of the disclosure of his legal and medical files in October 1997.

Plaintiff's pleadings in the federal action constitute admissions that he was aware of the alleged invasion of privacy no later than March 1998. (See *Barr v. ACandS, Inc.* (1997) 57 Cal.App.4th 1038, 1055-1056, overruled on other grounds by *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1147; *Magnolia Square Homeowners Assn. v. Safeco Ins. Co.* (1990) 221 Cal.App.3d 1049, 1061.) Unequivocal admissions in pleadings are treated as "judicial admissions"—they are conclusive and cannot be contradicted by the pleader. (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271 [admission of fact in pleading treated as judicial admission]; *Heater v. Southwood Psychiatric Center* (1996) 42 Cal.App.4th 1068, 1079-1080, fn. 10; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) ¶¶ 10:20.1, 10:147, pp. 10-6, 10-53.)

As recognized by the trial court, since plaintiff has already admitted in his original and first amended complaints in the district court action that he knew of the alleged invasion of privacy no later than March 1998, his claim is now barred. Plaintiff did not file the instant complaint until January 2002, well beyond the statute of limitations. Notably, during the trial on this issue, plaintiff admitted on numerous occasions that he knew about the disclosure of his legal and medical files back in 1997, 1998 and 1999.

Citing to 28 United States Code section 1367(d), plaintiff argues that the statute of limitations was tolled while his district court case was pending. Where at least one federal claim is involved, district courts have supplemental jurisdiction over other state claims that are so related to the federal claim that they form part of the same case or controversy. (28 U.S.C. § 1367(a).) However, a district court may decline to exercise supplemental jurisdiction if, among other things, it has dismissed all claims over which it had original jurisdiction. (28 U.S.C. § 1367(c); see also *Kendrick v. City of Eureka*

(2000) 82 Cal.App.4th 364, 368.) When a state law claim is dismissed under such circumstances, the limitations period is tolled for a period of 30 days after the dismissal unless state law provides for a longer tolling period. (28 U.S.C. § 1367(d).) "[T]he tolling provision of 28 United States Code section 1367(d) includes the time during which a federal appeal with the Court of Appeals is pursued, and the 30-day grace period commences once the judgment of dismissal is affirmed by that court. This tolling is not extended by the later filing of a petition for writ of certiorari with the United States Supreme Court." (*Kendrick v. City of Eureka, supra*, 82 Cal.App.4th at p. 369.)

Plaintiff acknowledges that there is no California case law providing for a longer tolling period. (See *Kendrick v. City of Eureka, supra*, 82 Cal.App.4th at p. 369, fn. 2 [California has no statute providing for longer tolling period, although decisional law arguably provides for equitable tolling in extraordinary circumstances]; but see *Bonifield v. County of Nevada* (2001) 94 Cal.App.4th 298, 303-304 [days left in statute of limitations period at time federal claim filed begin to run after tolling ceases, i.e., on 31st day after federal claim dismissed].) Plaintiff clearly filed this action well beyond the tolling period. The Ninth Circuit Court of Appeals decision was filed in July 2000. Plaintiff did not file this action until January 2002. But more fundamentally, we note that plaintiff's original case, filed in state court on April 12, 2001, and subsequently removed to district court, also would have been untimely as beyond the original one-year statute of limitations.

Thus, the trial court properly found in favor of Burnham Brown, Michell, and the MPBF parties on plaintiff's claim for invasion of privacy. As a result of our conclusion, we reject plaintiff's contention that the judgment is void.

DISPOSITION

The appeal against Home and REM is dismissed. The judgment is affirmed with respect to the remaining respondents. Plaintiff's request for sanctions is denied. Costs are awarded to respondents.

Wiseman, J.

WE CONCUR:

Vartabedian, Acting P.J.

Cornell, J.

COURT OF APPEAL FIFTH APPELLATE DISTRICT STATE OF CALIFORNIA

The foregoing instrument is a true and correct copy of the original on file in this court.
Dated: DEC 23 2004
KAY FRAUENHOLTZ
CLERK/ADMINISTRATOR OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIFTH APPELLATE DISTRICT
By _____, Deputy

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ADEBOWALE O. OSIJO,

Plaintiff and Appellant,

v.

ROGER A. SEVIGNY, as Insurance Commissioner etc., et al.,

Defendants and Respondents.

F049063

(Super. Ct. No. 04-CECG-02628)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Adebowale O. Osijo, in pro. per., for Plaintiff and Appellant.

Greenan, Peffer, Sallander & Lally, James S. Greenan and Enoch Wang for Defendant and Respondent Roger A. Sevigny.

Burnham Brown, Robert M. Bodzin and Jennifer R. Thomas for Defendant and Respondent Burnham Brown.

Georgia Ann Michell-Langsam, for Defendants and Respondents Michell-Langsam and Georgia Ann Michell-Langsam.

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This is the latest in a series of lawsuits brought by plaintiff Adebowale O. Osijo in connection with a personal injury claim settled in 1991. Plaintiff became dissatisfied with

the settlement agreement the day after it was executed and has sought its invalidation ever since. In this case, he sued Georgia Ann Michell-Langsam (Michell-Langsam), the attorney who represented him in the settlement, Burnham Brown, the law firm that represented the insurer funding the settlement, and the Insurance Commissioner of the State of New Hampshire (currently Roger A. Sevigny), who is the liquidator of that now-insolvent insurer. The trial court dismissed Burnham Brown on res judicata grounds; plaintiff had sued the firm unsuccessfully in previous actions. The court also dismissed the Insurance Commissioner. It relied on the doctrine of comity and took account of the liquidation proceedings in New Hampshire, in which an order abating other litigation had issued. Finally, as to Michell-Langsam, the court quashed service of summons and vacated a default entered against her, ruling that she had never been properly served. We perceive no error and affirm these dispositions.

FACTUAL AND PROCEDURAL HISTORIES

A longer account of the underlying facts may be found in our unpublished opinion affirming the judgment in one of plaintiff's previous cases, *Osijo v. Home Insurance Company* (Sept. 7, 2004, F042329, F043325), and the First District Court of Appeal's unpublished opinions in *Osijo v. Housing Resources Management, Inc.* (Jul. 16, 1992, A055045) and *Osijo v. Ganong and Michell* (Apr. 12, 1996, A068661). A shorter version will suffice for purposes of this appeal.

In 1988, plaintiff was working as a security guard at an apartment complex in Oakland. While on duty, he was shot multiple times by an assailant or assailants with semi-automatic rifles. Plaintiff sued the owners of the apartment complex and his employer, a security guard company. Among other things, his complaint alleged that the assailants had a confrontation with other security guards at the complex earlier in the day and that no one had warned plaintiff about them. The company was insolvent and uninsured, but the apartment complex owners, though also insolvent, had insurance. After a mediation held under the auspices of the Judicial Arbitration and Mediation

Service (JAMS), the parties executed a settlement agreement on July 25, 1991, under which plaintiff and his counsel received $250,000. In these proceedings, plaintiff was represented by Michell-Langsam. The insurer, Home Insurance of America (Home), was represented by a law firm called Larson and Burnham, now known as Burnham Brown.

On July 26, 1991, the day after he signed the settlement agreement, plaintiff became dissatisfied and informed Michell-Langsam that he wanted to withdraw from it. The owners of the apartment complex filed a motion to enforce the agreement. The superior court heard plaintiff's objections and granted the motion to enforce in spite of them. The Court of Appeal affirmed, rejecting plaintiff's principal claim that the agreement was unenforceable because the JAMS mediator was not a current member of the State Bar.

In the succeeding years, plaintiff filed a series of lawsuits against Michell-Langsam, Burnham Brown, Home, and a variety of other parties. In the first of these, plaintiff recovered $12,500 against Michell-Langsam for withholding as fees more of the settlement proceeds than her retainer agreement permitted. There is no indication in the record that plaintiff recovered anything in any of the other cases. In a malicious prosecution action in Fresno County Superior Court (*Michell v. Osijo* (Super. Ct. Fresno County, 2004, No. 02 CE CG 00003)), Michell-Langsam obtained a judgment against plaintiff of more than $165,000 based on his actions in two previous cases.

Acting in propria persona, plaintiff filed the operative first amended complaint in this case on September 16, 2004. The first cause of action is titled "Void Judgment." It alleges that the order enforcing the settlement agreement is void because of an attorney conflict of interest. Home was both the insurer of the apartment complex and Michell-Langsam's malpractice insurer. Burnham Brown represented Home in plaintiff's original personal injury case and defended Michell-Langsam in plaintiff's malpractice suit against her. Plaintiff claims that Michell-Langsam connived with Burnham Brown to settle the personal injury case, receiving her contingent fee, and in return providing Burnham

Brown with confidential information about plaintiff, presumably for use against him in the malpractice case (which, however, was not filed until later). According to the complaint, these allegations show that the superior court lacked jurisdiction to enforce the settlement agreement and that plaintiff was deprived of his due process rights under the Fourteenth Amendment.

The second cause of action is titled "Void Settlement Agreement." It asserts that the settlement agreement is unenforceable because of the conflict of interest alleged in the first cause of action. The third cause of action, "Void Subsequent Judgments," asserts that various judgments and orders of various courts are void because they gave effect to or declined to invalidate the allegedly void settlement agreement and the judgment enforcing it. The fourth cause of action, "Disgorgement of Misappropriated Funds," claims that Michell-Langsam should be compelled to return the contingent fee she collected when the personal injury case settled.

Burnham Brown demurred, arguing that plaintiff's effort to invalidate the settlement was barred by the doctrine of res judicata because it was an attempt to relitigate claims that had been decided against plaintiff in prior actions. The trial court agreed, sustained the demurrer without leave to amend, and entered a judgment of dismissal in favor of Burnham Brown.

The Insurance Commissioner moved to dismiss the action on several grounds, including an argument that, under the doctrine of comity, the court should dismiss plaintiff's claims because proceedings to liquidate the insolvent insurer had been instituted in a New Hampshire state court. These are the same liquidation proceedings we discussed in our opinion in *Osijo v. Home Insurance Company, supra,* F042329, F043325. The insurer was declared insolvent in an action in New Hampshire Superior Court. That court issued an order of liquidation on June 13, 2003, appointing the Insurance Commissioner as liquidator, abating all other actions and proceedings against the insurer and requiring all claims against it to be processed via the liquidation. (*Osijo v.*

Home Insurance Company, supra, at p. 8.) The trial court granted the motion. It stated that it was relying on grounds of inconvenient forum, but in substance its order dismisses the action for reasons of comity. Subsequently, the court entered a judgment of dismissal in favor of the Insurance Commissioner.

Michell-Langsam moved to quash service of summons and to vacate a default that had been entered by the clerk. The trial court ruled that Michell-Langsam was never properly served and granted the motion.

Plaintiff appeals from these rulings. Additional factual and procedural details will be set forth in our discussion below.

DISCUSSION

I. Burnham Brown and res judicata

Plaintiff contends that the trial court erred in sustaining Burnham Brown's demurrer. We recently restated the pertinent standard of review:

> "In an appeal from a judgment dismissing an action after a general demurrer is sustained without leave to amend, our Supreme Court has imposed the following standard of review. 'The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed "if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]' [Citations.]" (*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 603.)

We hold that the trial court was correct in sustaining the demurrer without leave to amend on res judicata grounds.

The doctrine of res judicata is divided into two parts. The first part, called claim preclusion (or res judicata), bars a party to an action in which final judgment has been

obtained from bringing a new action against the same opposing party and seeking a recovery based on the same cause of action as that relied on in the first action. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897 (*Mycogen*).) "Cause of action" in this context does not mean "legal theory." It means "primary right," a concept we discuss further below. (*Id.* at p. 904; *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.) Claim preclusion only applies if the parties to the new action are identical with or in privity with the parties to the prior action. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828-829; *Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 951.) Privity exists if the party to the new action is "'" ... so identified in interest with [a party to the prior action] that he represents the same legal right."'" (*Armstrong v. Armstrong, supra,* at p. 951.)

The second part, called issue preclusion or collateral estoppel, bars a party from relitigating in a new action an issue that was actually litigated and decided in a prior action. (*Mycogen, supra,* 28 Cal.4th at p. 896; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) A party in the new action may advance collateral estoppel as a defense against a party who previously litigated the same issue in a prior action even if the party advancing collateral estoppel was a stranger to the prior action. (*Vandenberg v. Superior Court, supra,* 21 Cal.4th at pp. 828-829; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 812-813; *Vanguard Recording Society, Inc. v. Fantasy Records, Inc.* (1972) 24 Cal.App.3d 410, 417.)

The difference between a primary right, which may not be reasserted under claim preclusion, and an issue, which may not be relitigated under issue preclusion, is important. A primary right may include several issues, none of which may be raised again if claim preclusion applies, even those that were not raised in the prior action. (*Mycogen, supra,* 28 Cal.4th at p. 904; *Slater v. Blackwood, supra,* 15 Cal.3d at p. 795.) An attempt to raise in the new action an issue that is within the primary right advanced in the prior action but not actually litigated in that action is called "'claim splitting,'" and is not permitted under claim preclusion. (*Mycogen, supra,* at pp. 900, 903; *Crowley v.*

Katleman (1994) 8 Cal.4th 666, 681.) Under issue preclusion, by contrast, a party is barred from raising an issue only if it was actually litigated and decided in the prior action. (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 346.)

In this case, so far as the claims against Burnham Brown are concerned, there is identity of parties. Osijo unsuccessfully sued Burnham Brown in a previous case, a decision we affirmed in *Osijo v. Home Insurance Company, supra,* F042329, F043325. Therefore we proceed to analyze the case under claim preclusion.

Claim preclusion bars a lawsuit if (1) it advances the same cause of action that was advanced in a prior action; (2) the prior action resulted in a final judgment on the merits; and (3) the parties to the present action are the same as, or in privity with, the parties to the prior action. (*Busick v. Workmen's Comp. Appeals Bd.* (1972) 7 Cal.3d 967, 974; *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 556.) Here, the parties are the same, as we have just said, and there is no doubt that the previous case resulted in a final judgment on the merits. The only question is whether Osijo advances the same cause of action here as he advanced previously.

Under California law, for res judicata purposes, a single cause of action arises from the invasion of a single primary right. (*Slater v. Blackwood, supra,* 15 Cal.3d at p. 795.) "[T]he primary right is simply the plaintiff's right to be free from the particular injury suffered." (*Crowley v. Katleman, supra,* 8 Cal.4th at pp. 681-682.) Multiple legal theories and multiple remedies can be based on a single injury, and a failure to assert any of the available theories or claim any of the available remedies in an action based on the injury means those theories and remedies are barred by claim preclusion in subsequent litigation. (*Mycogen, supra,* 28 Cal.4th at pp. 904-906, 907 [judgment granting specific performance of breached license agreement barred later action for damages for breach of same agreement]; *Slater v. Blackwood, supra,* 15 Cal.3d at p. 795.) On the other hand, the fact that the two lawsuits are premised on the same set of facts does not necessarily mean they assert the same primary right. (See *Agarwal v. Johnson* (1979) 25 Cal.3d 932,

954-955 [prior judgment for employer in racial discrimination suit brought under federal civil rights law was not res judicata with respect to employee's subsequent suit, based on same termination of employment, for defamation and intentional infliction of emotional distress], overruled on other grounds by *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563.)

The complaint in this case is based on an injury that was asserted in the prior action. In that case, plaintiff sued Burnham Brown, Michell-Langsam, Home, and several other parties. He alleged that Burnham Brown committed fraud in obtaining the settlement in the original personal injury action and violated his privacy rights with respect to his legal and medical files. (*Osijo v. Home Insurance Company, supra,* F042329, F043325, at p. 5.) The trial court granted Burnham Brown's motion for summary adjudication on the fraud claim, finding it was barred by the litigation privilege and the statute of limitations. It also granted judgment on the pleadings on the privacy-rights claim, ruling that, because Burnham Brown was entitled to the information in the files as defense counsel in the original lawsuit, the claim failed to state a cause of action. After plaintiff amended his complaint in an attempt to allege the privacy claim adequately, the trial court sustained Burnham Brown's demurrer without leave to amend. (*Id.* at p. 6.)

Defendant relies on the same primary right in the present case. The legal theories are different—previously he asserted fraud and now he asserts an attorney conflict of interest—but the injury he claims is the same: that his agreement to settle the personal injury case was obtained improperly through the misconduct of his counsel and opposing counsel. His attempt to litigate the same primary right a second time in a second lawsuit under a different legal theory constitutes claim splitting and is barred by the doctrine of claim preclusion.

In arguing against the trial court's conclusions in this case, plaintiff relies on the principle that a void judgment has no res judicata effect in subsequent litigation (*Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1100;

Rochin v. Pat Johnson Manufacturing Co. (1998) 67 Cal.App.4th 1228, 1239-1240) and may be attacked at anytime by way of an independent action in equity (*Rochin, supra,* 67 Cal.App.4th at p. 1239). His argument may be summarized as follows: (1) In this case, the trial court relied on the judgments in his previous cases, including the one reviewed by this court, *Osijo v. Home Insurance Company, supra,* F042329, F043325, when it ruled that the present action was barred by res judicata. (2) The previous judgments in turn relied on the original order enforcing the settlement agreement. (3) The order enforcing the settlement agreement is void. (4) A void judgment cannot be the basis of a ruling barring a lawsuit under res judicata principles. Therefore (5), the present suit cannot be barred on res judicata grounds.

This argument is incorrect for at least two reasons. First, although the case we previously reviewed rejected plaintiff's request to invalidate the judgment enforcing the settlement agreement, it did not *rely on* that judgment. Burnham Brown did not win there because that prior judgment existed. Instead, the trial court granted summary adjudication on plaintiff's fraud claim based on the litigation privilege and the statute of limitations and granted judgment on the pleadings on plaintiff's invasion-of-privacy claim because Burnham Brown was entitled to the records in question. We agreed. In other words, plaintiff lost in the previous case not merely because the judgment enforcing the settlement agreement was already on the books, but because the legal theories plaintiff advanced in attacking that judgment lacked merit. When the trial court barred the present action based on res judicata, consequently, its decision was based only on the judgment we previously reviewed in *Osijo v. Home Insurance Company, supra,* F042329, F043325, and not on the judgment enforcing the settlement agreement.

To put the same point another way, plaintiff had and took an opportunity to litigate his claim against Burnham Brown that the judgment enforcing the settlement agreement should be invalidated in *Osijo v. Home Insurance Company, supra,* F042329, F043325. His claims did not prevail and, under res judicata, he is not entitled to another try.

Plaintiff appears to believe that the judgment in *Osijo v. Home Insurance Company, supra,* F042329, F043325, can act as a bar to the present suit only if our opinion in that case "upheld the validity of the underlying personal injury judgment ...." He criticizes the trial court for not telling him, when he asked, on what page our opinion did this. There is no such requirement, however. As we have said, the point is that plaintiff's claims against Burnham Brown were decided on their merits in the previous case and he is not entitled to relitigate them under a new legal theory.

Second, the claims plaintiff advances in the present case cannot show that the judgment enforcing the settlement agreement is void in any event. According to Witkin, the exception to res judicata for void judgments applies where the judgment is "wholly void for lack of jurisdiction of the subject matter or person, and perhaps for excess of jurisdiction, or where it is obtained by extrinsic fraud." (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 286, p. 828.) Plaintiff says the judgment enforcing the settlement is void because of the alleged conflict of interest and because the judgment was executed by means of a rubber-stamp replica of the judge's signature rather than an actual signature. Neither claim can establish that the judgment is void.

First, even if plaintiff's suit against Burnham Brown were not barred in its entirety by claim preclusion, his conflict-of-interest claim would be barred by issue preclusion and for that reason could not be used to show that the judgment enforcing the settlement agreement is void. Plaintiff litigated the same claim to a final judgment in his malpractice suit against Michell-Langsam, *Osijo v. Ganong and Michell, supra,* A068661. There, plaintiff contended that a conflict existed because Michell-Langsam's malpractice insurer was Home, to which plaintiff was adverse in the personal injury suit, and whose counsel, Larson and Burnham (now Burnham Brown), later also defended Michell-Langsam against plaintiff. The trial court granted summary adjudication on this issue. The Court of Appeal affirmed, observing that, during Michell-Langsam's representation of plaintiff, plaintiff had not yet asserted a malpractice claim against Michell-Langsam or her insurer,

so a conflict of interest could not yet have been created. The court also stated that there was no evidence in the record of an actual conflict between Michell-Langsam's "duty to Osijo and her own later defense by Home and the Larson firm." (*Osijo v. Ganong and Michell, supra,* at p. 9 & fn. 3.) Plaintiff further contended that Michell-Langsam had a conflict of interest with him arising from her desire to proceed with the settlement after he told her he wanted out. (Michell-Langsam went so far as to attempt to file an amicus brief against plaintiff in the Court of Appeal when plaintiff appealed from the judgment enforcing the settlement agreement.) The Court of Appeal upheld summary adjudication for Michell-Langsam on this claim based on the statute of limitations. (*Id.* at pp. 9-10.) In asserting that the judgment enforcing the settlement agreement is void because of the same alleged conflicts, plaintiff attempts to relitigate against Burnham Brown an issue he has already unsuccessfully litigated to a final judgment in the malpractice case against Michell-Langsam. Under issue preclusion, he is not entitled to do this.

Second, there is nothing wrong with a judge instructing his staff to use a rubber stamp to indicate his approval of judgments and other documents instead of signing them himself by hand. The practice is commonplace. It does not constitute "forgery" and does not need to be approved by local rule, as plaintiff contends. Plaintiff does not claim the rubber stamp was used without the judge's permission.

Plaintiff also argues that the judge in question, Judge Sutter, was the wrong judge to execute the settlement agreement. He cites *Williams v. Superior Court* (1939) 14 Cal.2d 656, 662 for the proposition that when a case has been assigned to one department and not reassigned, other departments lack jurisdiction to "'interfere with the exercise of the power of the department to which the proceeding has been so assigned.'" Plaintiff says the "personal injury case was not assigned to Judge Sutter and Department 18, nor, was it the Law & Motions Department of the Alameda County Superior Court. The Law & Motion Department was Department 19, with Judge Dawn Girard, presiding, which was not unavailable to entertain the motion to enforce. The case was assigned to

Department 12, with Judge Demetrios Agretelis, presiding, which was not unavailable to entertain the motion to enforce." These claims are not accompanied by any citations to the record. Our own examination of the record on appeal has revealed nothing indicating that the matter was not properly before Judge Sutter or that the judgment interfered with any act of any other department.

Finally, at oral argument, plaintiff called our attention to *In re Marriage of Deffner* (2006) 143 Cal.App.4th 662, a copy of which he had provided to us before. *Deffner* does not alter our analysis. In it, the Court of Appeal affirmed a trial court's decision to set aside its own judgment approving a marital settlement agreement because the judgment was obtained, in part, by the husband's attorney's filing of papers in which he claimed to be the wife's attorney. The Court of Appeal held that this constituted a fraud upon the trial court and justified setting the judgment aside even though that action otherwise would have been time-barred. We do not disagree that a judgment can be set aside under circumstances of that kind. *Deffner* does not support plaintiff's position here for the two reasons we have just stated: (1) the trial court's res judicata ruling did not depend on the judgment enforcing the settlement agreement; and (2) even if it did, plaintiff's arguments do not establish that that judgment is void.

For all these reasons, we conclude that Burnham Brown's demurrer was properly sustained as to all causes of action without leave to amend. The judgment we reviewed and affirmed in *Osijo v. Home Insurance Company, supra,* F042329, F043325, bars the present action against Burnham Brown.

II. The Insurance Commissioner and comity

The Insurance Commissioner's motion to dismiss made several arguments: the trial court lacked personal jurisdiction over the Commissioner; the doctrine of comity required the court to give effect to a liquidation order entered in a New Hampshire state court, abating all other litigation advancing claims against Home and its successors; reciprocity provisions of the California Insurance Code required the court to defer to the

New Hampshire liquidation proceedings; and the full faith and credit clause of the federal Constitution required the court to enforce the New Hampshire liquidation order. The Insurance Commissioner added an alternative claim that the action should be stayed or dismissed on forum non conveniens grounds.

In granting the motion, the trial court stated that it was relying on the ground of inconvenient forum. It explained, however, that the doctrine of comity and the reciprocity provisions of the Insurance Code were what made the alternate forum in New Hampshire appropriate.

Plaintiff responded to the ruling by filing a document he called a motion to vacate judgment. This motion argued that the court's order granting the motion to dismiss was "a nullity and prima facie void" because it "either wittingly or unwittingly .... gave effect to the underlying prima facie void judgment" that enforced the settlement agreement. The judgment enforcing the settlement agreement was void, plaintiff argued, because of the alleged conflict of interest and the rubber stamp. The trial court denied the motion.

Plaintiff states that his appeal is from the denial of his motion to vacate and contends that the motion should have been granted because the liquidation proceedings in New Hampshire do not constitute an appropriate alternative forum. We will treat the appeal as if it is from both the order denying the motion to vacate the dismissal and the dismissal itself.

The motion to vacate was properly denied. Plaintiff's claims cannot show that the judgment enforcing the settlement agreement is void. His contention that a rubber stamp of the judge's signature should not have been used on the judgment is without merit for the reasons we have already stated. Issue preclusion bars relitigation of the conflict-of-interest claim here just as it bars relitigation of that claim against Burnham Brown. Further, even if the judgment enforcing the settlement agreement were void, we agree with the trial court's conclusion that its dismissal of plaintiff's claim against the Insurance Commissioner did not give effect to the judgment enforcing the settlement agreement.

The judgment enforcing the settlement agreement is not rendered effective, or affected in any other way, by an order directing that a claim against the Insurance Commissioner should be brought in the New Hampshire liquidation proceedings. Plaintiff's view seems to be that any ruling denying him relief against any party gives effect to the judgment enforcing the settlement agreement, but this is not so.

The motion to dismiss was granted, according to the trial court's order, on grounds of inconvenient forum, but the real substance of the court's ruling was that dismissal was justified by the doctrine of comity. The court reasoned:

> "Deferring to the New Hampshire court's jurisdiction and giving effect to its liquidation order (which abates all actions against Home and its liquidator) under principles of comity would promote California's interests in preserving the insolvent insurer's assets for orderly disposition, and eliminating the risk of conflicting rulings, piecemeal litigation of claims, and unequal treatment of claimants."

We applied the same reasoning in *Osijo v. Home Insurance Company, supra,* F042329, F043325, in which plaintiff asserted a claim against Home and a successor company. We explained that comity is a doctrine under which the laws of one state are permitted by the courtesy of another to operate in the latter for the promotion of justice and for mutual utility and advantage. (*Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 Cal.4th 697, 707.) The doctrine was applicable in that case, even though California law and the full faith and credit clause did not compel deference to the New Hampshire liquidation order, because the principles underlying California's own insolvent-insurer liquidation scheme supported discretionary deference to the operation of a similar scheme in another state. We observed that under section 1020 of the Insurance Code, our state's Insurance Commissioner may institute proceedings to dispose of the assets of an insolvent insurer and may cause the abatement of all other claims and proceedings against the insurer. The purpose of this, we further stated, is to ensure the orderly disposition of the insurer's assets and protect policyholders, creditors, and the public. Since the New Hampshire scheme serves the same purposes, we granted Home's motion to dismiss

plaintiff's appeal. (*Osijo v. Home Insurance Company, supra,* F042329, F043325, at pp. 9-10.)

Precisely the same rationale justifies affirming the trial court's disposition in this case. Plaintiff cannot avoid the application of the comity doctrine by merely substituting the Insurance Commissioner for Home and its successor. The only conceivable reason for naming the Insurance Commissioner as a defendant is to attempt to obtain an order against the Commissioner dealing with a claim against the insolvent insurer's assets. Deference to the New Hampshire order therefore is as appropriate here as it was in the previous case.

Seizing upon the trial court's inconvenient-forum language, plaintiff asserts that a dismissal on those grounds was not proper because the New Hampshire liquidation proceedings did not constitute a suitable alternative forum. A court deciding a motion to dismiss on forum non conveniens grounds must first determine whether the alternative forum proposed by the moving party is a "'suitable'" place for trial. (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751.) This threshold requirement is satisfied if the defendant is subject to or agrees to submit to the jurisdiction of the alternative forum, the statute of limitations has not expired in the alternative forum or the defendant agrees not to rely on it, and some remedy is available in the alternative forum. (*Id.* at pp. 752, 753; *Roulier v. Cannondale* (2002) 101 Cal.App.4th 1180, 1186.) The court's determination on this issue is reviewed de novo. (*Roulier v. Cannondale, supra,* at p. 1186.) Plaintiff says the liquidation proceedings do not provide a suitable forum because they cannot decide whether the judgment enforcing the settlement agreement is void or not and do not have jurisdiction to enter a judgment against the Insurance Commissioner.

Plaintiff is in error. The purpose of the liquidation proceedings is to adjudicate claims against the insolvent insurer and distribute its assets. As we have said, plaintiff's only possible purpose in naming the Insurance Commissioner as a party is to assert a claim against the insolvent insurer. The liquidation proceedings were instituted for the

purpose of deciding these claims. The assertion that making a claim in the liquidation proceedings will not result in a judgment against the Insurance Commissioner is thus irrelevant. Further, as plaintiff has not made any claim in this case that would entitle him to an order invalidating the judgment enforcing the settlement agreement, the fact that plaintiff would be unlikely to obtain that relief in the liquidation proceedings does not show that they would be an inferior forum for him.

For all these reasons, we affirm the trial court's judgment of dismissal of plaintiff's claims against the Insurance Commissioner and its denial of plaintiff's motion to vacate that judgment. The court applied the law correctly.

III. Michell-Langsam, service of summons, and default[1]

Finding that Michell-Langsam was never properly served with the summons and complaint, the trial court granted her motion to (1) vacate a default the clerk had entered against her and (2) quash service of summons. In reviewing the order quashing service of summons, we decide whether the trial court's factual findings were supported by substantial evidence and determine independently the ultimate question of whether service was sufficient to secure personal jurisdiction over defendant. (See *F. Hoffman-La Roche, Ltd. v. Superior Court* (2005) 130 Cal.App.4th 782, 795; *In re Automobile Antitrust Cases I & II* (2005) 135 Cal.App.4th 100, 111.) We review the order granting relief from default for abuse of discretion. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474,

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[1]Plaintiff has pending a request for judicial notice of a Stipulation in Lieu of Discipline entered into between Georgia Ann Michell-Langsam and the State Bar in connection with a complaint plaintiff made against her. Georgia Ann Michell-Langsam opposed the request, arguing that the stipulation is confidential. Judicial notice of this document is not required under Evidence Code section 451 and we need not decide whether it is subject to permissive judicial notice under Evidence Code section 452. We have reviewed the document and conclude that it would have no effect on the outcome of this appeal if noticed, and we deny the request on that ground.

Plaintiff also requests that we take judicial notice of the Appellate Court's opinion in *Osijo v. Ganong and Michell, supra,* A068661. The request is granted.

478.) Because plaintiff did not submit a statutorily adequate proof of service, we affirm the order quashing service of summons. We affirm the order vacating Michell-Langsam's default because of plaintiff's failure to prove service in the manner required by statute.

A summons may be served on an individual defendant by delivering it to the defendant personally or to a person authorized by the defendant to receive it. A copy of the complaint must be included. (Code Civ. Proc., §§ 415.10, 416.90.) If the summons and complaint cannot with reasonable diligence be delivered to an individual defendant personally, they may be served by leaving them at the defendant's usual place of business in the presence of a person 18 years of age or older and apparently in charge, telling that person what they are, and then mailing them to the same place. (Code Civ. Proc., § 415.20, subd. (b).) This procedure is known as substitute service. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2006) ¶ 4:193, p. 4-29 (rev. #1, 2006).) Two or three unsuccessful attempts at personal service at the defendant's usual place of business typically constitute sufficient diligence to justify resorting to substitute service. (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1182; *Espindola v. Nunez* (1988) 199 Cal.App.3d 1389, 1392; Weil & Brown, *supra*, ¶ 4:198, p. 4-30.) Although a defendant is under no duty to respond to a defectively served summons—even a defendant with actual knowledge of the lawsuit (*Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808; *Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1466)—substantial compliance with the service-of-summons statutes is sufficient to defeat a motion attacking a judgment based on improper service. (*Gibble v. Car-Lene Research, Inc.* (1998) 67 Cal.App.4th 295, 313.)

In this case, plaintiff described his efforts to serve Michell-Langsam in a declaration he filed in support of his motion for a default judgment against her. He traveled with a companion, Jhoe Ajayi, from Fresno to Michell-Langsam's Walnut Creek office on September 13, 2004. Carmelita Torres, the receptionist, told Ajayi that Michell-

Langsam was not in the office and that she, Torres, was not authorized to receive service of process. Ajayi gave Torres two copies of the summons and original complaint and then mailed additional copies to the office.

On October 18, 2004, plaintiff sent a registered process server, Roman Edwards, to Michell-Langsam's office. Edwards delivered the summons and a second amended complaint to a person at the office and subsequently mailed the documents to the office. The second amended complaint was subsequently stricken because it was filed without leave.

On June 29, 2005, plaintiff again traveled to Michell-Langsam's office, this time with a companion named Eugene Maduakor. Again Torres said she was not authorized to accept service of process and that Michell-Langsam was out of the office. Soon, Jean Michell, Michell-Langsam's mother and office manager, appeared. Maduakor gave two copies of the summons, original complaint, and first amended complaint to Jean Michell and then mailed additional copies to the office. Plaintiff filed a proof of substitute service based on these facts in the superior court.

Plaintiff does not claim that Michell-Langsam was ever served personally, so if service was effected, it either was via substitute service after reasonably diligent efforts at personal service or was upon a person actually authorized by Michell-Langsam to receive it. We address these two possibilities in turn.

Plaintiff did not submit an adequate proof of service to show substitute service after reasonably diligent attempts at personal service. Code of Civil Procedure section 417.10, subdivision (a), provides that proof of service of a summons shall be made "by the affidavit of the person making such service showing the time, place, and manner of service and facts showing that such service was made in accordance with this chapter." The only proof of service of summons included in the appellate record is one executed by Eugene Maduakor for the service of June 29, 2005. To show that substitute service was made in accordance with statute, it is necessary to show that reasonably

diligent attempts were made at effecting personal service. In Maduakor's proof of service, a box is checked saying, "I attach a declaration of diligence station actions taken first to attempt personal service." No such declaration by Maduakor is attached to the copy in the appellate record. Plaintiff's own declaration describes the prior attempts we have summarized, but that declaration is not a permitted form of proof under the statute. The affidavit must be that "of the person making [the] service" (Code Civ. Proc., § 417.10, subd. (a)), and service must be made by a person who is "not a party to the action" (Code Civ. Proc., § 414.10).

The record contains conflicting evidence on the subject of whether service was ever made on a person actually authorized to receive it. Plaintiff's declaration states that Carmelita Torres said that Jean Michell was authorized to receive service of process. Jean Michell's declaration states that Michell-Langsam never authorized her to receive service of process on Michell-Langsam's behalf. Michell-Langsam's declaration states that no one in her office is authorized to accept service of process on her behalf. The trial court implicitly resolved this factual issue in favor of Michell-Langsam and its finding is supported by substantial evidence. We would, therefore, be bound to uphold that finding even absent the problem regarding the form of proof.

Plaintiff argues that the court had personal jurisdiction over Michell-Langsam even if she was never properly served because she made a general appearance in the case by filing a case management statement. He contends that filing this document constituted "participat[ing] in an action in some manner which recognizes the authority of the court to proceed," and therefore is a general appearance. (*Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1756.) We disagree. In *Mansour*, the Court of Appeal held that two parties made a general appearance when their attorneys attended and actively participated in a case management evaluation conference and prepared a case management statement that stated the discovery they planned to take. At the time of the conference, one party's attorney had already conducted nonjurisdictional discovery. The

other party's attorney suggested the date for which the mandatory settlement conference was set. (*Id.* at p. 1757.) Here, by contrast, there is no allegation that a case management conference took place, and Michell-Langsam's case management statement indicated that no discovery was anticipated. Significantly, her case management statement also stated that she was never personally served. Michell-Langsam listed dates on which she would not be available for trial; stated an estimated length of trial; asserted that alternative dispute resolution would be a waste of time and that a settlement conference would not be fruitful; and expressed her intention to move to set aside any default that might have been entered against her. We conclude that, on the whole, Michell-Langsam's case management statement did not raise "'any [nonjurisdictional] question, or [ask] for any relief which can only be granted upon the hypothesis that the court has jurisdiction of [her] person,'" and therefore did not constitute a general appearance. (*California Overseas Bank v. French American Banking Corp.* (1984) 154 Cal.App.3d 179, 184.)

Plaintiff also argues that the court had personal jurisdiction over Michell-Langsam because she had actual notice of the lawsuit. Actual notice does not confer personal jurisdiction, however. A defendant is under no duty to respond to a defectively served summons, even a defendant with actual knowledge of the lawsuit, as we have said. (*Ruttenberg v. Ruttenberg, supra*, 53 Cal.App.4th at p. 808; *Kappel v. Bartlett, supra*, 200 Cal.App.3d at p. 1466.)

Apart from the question of whether Michell-Langsam was properly served as an individual, the parties dispute whether the Law Offices of Michell-Langsam has been properly served. We agree with the trial court's ruling that because the Law Offices of Michell-Langsam is a fictitious business name, not a corporate entity, it cannot be a party to the lawsuit. (See *Pinkerton's, Inc. v. Superior Court* (1996) 49 Cal.App.4th 1342, 1348.) Plaintiff argues that Michell-Langsam is estopped from asserting that the Law Offices of Michell-Langsam cannot be sued because she once filed a document in another case in which she purported to appear on behalf of herself and the Law Offices of

Michell-Langsam. We agree with the trial court's conclusion that the document saying Michell-Langsam was appearing on behalf of herself and the Law Offices of Michell-Langsam did not constitute the assertion of any position about the status of the Law Offices of Michell-Langsam and therefore does not estop the assertion of any position.

Because the summons was not properly served, the trial court was also correct to set aside the default. A court may set aside a void judgment or order at any time. (Code Civ. Proc., § 473, subd. (d); see also Weil & Brown, *supra*, ¶ 5:485, p. 5-113.) Proper service is necessary to establish personal jurisdiction, so a default judgment entered in the absence of proper service is void. (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 544.) It follows that a default entered by the clerk is also void due to lack of personal jurisdiction if entered in the absence of proper service.

Plaintiff argues that the trial court should not have entertained Michell-Langsam's motion to set aside the default because she made it as part of her motion to quash service of summons but did not mention it in the caption of the notice of that motion. He says this means the motion to quash was the only noticed motion and that Michell-Langsam was not entitled to make it, or any other motion, except a motion to set aside the default, so long as the default was in effect. (See *Devlin v. Kearney Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385-386.) He also argues that the motion to set aside the default was defective because Michell-Langsam did not attach a copy of the "answer, motion or other pleading proposed to be filed in the action" should the default be set aside and the defendant granted leave to defend the action. (Code Civ. Proc., § 473.5, subd. (b).)

Plaintiff is mistaken. Michell-Langsam's motion included both a request to set aside the default and a request to quash service of summons. It was an appropriate vehicle to accomplish both ends. The trial court had discretion to entertain both parts of the motion even though only the request to quash service of summons was mentioned in the caption of the notice of motion; the notice of motion and the brief in support of it

were served together and the latter discussed both requests. The requirement to attach an answer, motion, or other pleading proposed to be filed did not apply because Michell-Langsam was not seeking leave to defend the action. She was only seeking to show that personal jurisdiction over her was not established.

Finally, plaintiff argues that the court should not have denied the request for entry of judgment that he made after the clerk entered Michell-Langsam's default. In light of our conclusion that Michell-Langsam was not properly served, this argument is moot. Any default judgment the court entered would have been void due to lack of personal jurisdiction.

DISPOSITION

The judgments dismissing Burnham Brown and the Insurance Commissioner and the orders quashing service of summons on Michell-Langsam, vacating the default taken against her, and denying plaintiff's request for entry of default judgment are affirmed. Plaintiff's request for judicial notice filed July 25, 2006, is denied with respect to the stipulation in lieu of judgment. The request is granted with respect to the Appellate Court's opinion in *Osijo v. Ganong and Michell, supra,* A068661.

Burnham Brown and the Insurance Commissioner shall recover their costs on appeal. Plaintiff and Michell-Langsam shall bear their own costs.

Wiseman, J.

WE CONCUR:

Harris, Acting P.J.

Cornell, J.

Adebowale O. Osijo, MBA.
2015 East Pontiac Way, Suite 203
Fresno, California 93726-3978
Telephone: 559-221-0585

Plaintiff In Propria Persona

MAY 29 2007

HIOIL

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

CIVIL UNLIMITED DIVISION

ADEBOWALE O. OSIJO,

Plaintiff,

vs.,

HOUSING RESOURCES MANAGEMENT, INC., PROSTAFF SECURITY SERVICE, INC., ACORN I, LTD., (A California Limited Liability Partnership and ACORN II, LTD, (A California Limited Liability Partnership),

Defendants.

Case No.: 649881-6

Notice of Motion to Set Aside Enforcement Order and to Nullify "Settlement Agreement."

Hearing Date:	June 21, 2007
Hearing Time:	9:00 a.m.
Courtroom:	Department 31
Hearing Judge:	Hon. W. Smith
Reservation No.	712336

TO: DEFENDANTS HOUSING RESOURCES MANAGEMENT, INC., PROSTAFF SECURITY SERVICES, INC., ACORN I, LTD., ACORN II, LTD, AND THEIR ATTORNEYS OF RECORD; AND OTHER PARTIES OF INTEREST, NAMELY: GEORGIA ANN MICHELL-LANGSAM, THE HOME INSURANCE COMPANY IN LIQUIDATION IN THE STATE OF NEW HAMPSHIRE AND THE CALIFORNIA INSURANCE GUARANTEE ASSOCIATION:

. . . . .

. . . . .

Notice of Motion

YOU AND EACH AND EVERYONE OF YOU are hereby notified that Plaintiff, Adebowale O. Osijo, MBA., do, and hereby moves the above entitled Court, located at 201 13th Street, Oakland, California 94612, at the above stated date, time, in the above stated Courtroom, and before the above named Judge, for an order to set aside the Order on Defendants' Motion to Enforce "Settlement Agreement," as the judgment in this action, and for an order to nullify the "Settlement Agreement."

Grounds for the Motion

1. **There Is A Change In Intervening Law Which Is Retroactive**

Levy v Superior Court (1995) 10 Cal.4th 578, is a change in the intervening law, from the time the purported "Settlement Agreement," was enforced on the Plaintiff and entered as the final judgment of this action, on October 10, 1991 to the time this motion is moved. The California Supreme Court ruled in *Levy supra* that *California Code of Civil Procedure, Section 664.6* required that parties in a pending litigation personally sign a settlement agreement in order to be enforceable, not attorneys, who are not parties in the action. The change in intervening law is retroactive, as held by the California Fifth District Court of Appeal in *Davidson v Fresno County Superior Court* (1999) 70 Cal.App.4th 514. Finally, the holding by the California First District Court of Appeal in *Harris v Rudin, Richman &* Appel (1999) 74 Cal.App.4th 299 is that both the party trying to enforce the settlement agreement and the party against who the settlement is being enforced must have signed the agreement for it to be enforceable.

The "Settlement Agreement," which was entered as the final judgment of this action is null and void because it was not personally signed by any of the Defendants in this action. It was instead, signed by the Defendants' attorneys, namely: David Raymond Pinelli (deceased), of the then law office of Larson & Burnham, as attorneys for Defendants Housing Resources Management, Inc., Acorn I, Ltd., and Acorn II, Ltd.;

David Van Dam, of the then law offices of Welton & VanDam, as attorneys for Defendant Prostaff Security Service, Inc.,; and David Kizer, as attorney for the Complainant in Intervention, the California Department of Industrial Relations, Uninsured Employers Fund, who are not parties in this action.

2. **Fresno County Superior Court's Ruling That Enforcement Order Is Void**

The Fresno County Superior Court, in its Order on Defendant Michell-Langsam's Motion to Declare Plaintiff a Vexatious Litigant, filed on May 10, 2007, in the matter of Osijo v Burnham Brown & Georgia Ann Michell-Langsam, Case No. 07-CECG-00073, ruled that the Alameda County Superior Court's Order on Defendants' Motion to Enforce Settlement Agreement, in the matter of Osijo v Housing Resources Management, Inc., Prostaff Security Services, Inc., Acorn I, Ltd and Acorn II, Ltd., Case No. 649881-6, filed on October 10, 1991, is void because it was based on a void settlement agreement. Fresno County Superior Court however, lacked the authority to invalidate the judgment because it did not issue the order. The ruling that the Alameda County Superior Court order is void is money in the bank for this motion.

Bases of Motion

Notice is further given that this motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities and the Request for Judicial Notice, and, on any evidentiary matter that the Court may entertain at the hearing of this motion.

Dated this 18th day of May, in the year 2007.

Respectfully Submitted By:

_____

Adebowale O. Osijo, MBA.
Plaintiff In Propria Persona

PROOF OF SERVICE BY MAIL

I, Jhoe F. Ajayi declare the followings:

I. I am not a party in this action nor do I have any interest in its outcome. I am over the age of eighteen years. I am a resident of the City and County of Fresno, California. I serve the following documents by certified mail:

NOTICE OF MOTION TO VACATE JUDGMENT, ENFORCEMENT ORDER AND TO NULLIFY SETTLEMENT AGREEMENT

On the following persons:

Burnham Brown
A Professional Corporation
Post Office Box 119
1901 Harrison Street, 11th Floor
Oakland, California 94604-0119
Defendants' Attorney for HRM Acorn I, Ltd and Acorn II, Ltd.

Georgia Ann Michell-Langsam
1850 Mount Diablo Boulevard, Suite 605
Walnut Creek, California 94596
Former Plaintiff's Attorney

Ann Miley
California Department of Industrial Relations Uninsured Employers Fund
770 L Street, Suite 850
Sacramento, California95814
Attorney for California Department Of Industrial Relations, Uninsured Employers Fund

David J. Van dam
Law Office of David J. Van Dam
22 Battery Street, Suite 333
San Francisco, California 94111
Attorney for Prostaff Security Service

California Insurance Guarantee Assn.
Post Office Box 29066
Glendale, California 91209

The Home Insurance Co. In Liquidation
Post Office Box 1720
Manchester New Hampshire 03101-1720

by placing these documents in envelopes with first class stamps affixed on them. I thereafter sealed the envelopes and deposited them with the United States Postal Service for delivery at the respective addresses.

II. I declare under the penalty of perjury and according to the laws in the State of California that the foregoing is true and correct. This declaration is executed in the City and County of Fresno, California, this 18th day of May, in the year 2007.

_____

Jhoe F. Ajayi
2015 East Pontiac Way, Suite 203
Fresno, California 93726-3978
Telephone: (559) 221-0585

WALE O OSIJO
2015 East Pontiac Way, Suite 203
Fresno, CA 93726-____

CITY OF OAKLAND

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

OSIJO Plaintiff/Petitioner(s) VS. CITY OF OAKLAND Defendant/Respondent(s) (Abbreviated Title)	No. C-649881 Order Motion to Vacate/Set Aside Denied

The Motion to Vacate/Set Aside was set for hearing on 06/21/2007 at 09:00 AM in Department 31 before the Honorable Judith Ford. The Tentative Ruling was published and was contested.

WALE O OSIJO appearing in pro per.CITY OF OAKLAND not appearing.HOUSING RESOURCES MANAGEMENT not appearing.PROSTAFF SECURITY SERVICES INC not appearing.ACORN I LIMITED not appearing.ACORN II LIMITED not appearing.
Georgia Ann Mitchell not appearing.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The Motion of Plaintiff Adebowale O. Osijo ("Plaintiff") to Set Aside Enforcement Order and to Nullify "Settlement Agreement" is ruled on as follows:

Preliminarily, the Court notes that Plaintiff is a vexatious litigant and his name appears on the vexatious litigant list prepared and maintained by the Administrative Office of the Courts. Ordinarily, this means that Plaintiff must seek a prefiling Order if Plaintiff intends to file new litigation. However, as stated in the Court's Order dated June 15, 2007, this case preceded the Order declaring Plaintiff a vexatious litigant, therefore the instant matter is not new litigation which requires a prefiling order.

Next, the Court notes that the Opposition brief by Georgia Ann Mitchell was untimely filed and served per CCP 1005(b). For this reason, the Court has not considered Ms. Mitchell's Opposition. (See CRC 3.1300 (d).)

Lastly, the instant motion seems to be an untimely motion for reconsideration. Thus, Plaintiff's Motion is DENIED for failure to comply with the requirements of CCP 1008. Moreover, Plaintiff has failed to explain why his request for relief is not a veiled motion for reconsideration and why the facts and legal issues related to the relief sought should be considered by the Court notwithstanding Plaintiff's failure to comply with CCP 1008 requirements.

Plaintiff's Request for Judicial Notice is GRANTED. However, the court cannot accept as true the facts contained within those court documents.

Dated: 06/21/2007

Judith D. Ford
facsimile
Judge Judith Ford

Filed 7/8/08 Osijo v. Housing Resources Management

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ADEBOWALE O. OSIJO, Plaintiff and Appellant, v. HOUSING RESOURCES MANAGEMENT, INC., et al., Defendants and Respondents.	A118833 (Alameda County Super. Ct. No. C-649881)

INTRODUCTION

Plaintiff Adebowale O. Osijo appeals in propria persona from an order of the Alameda County Superior Court, denying his motion to set aside a judgment entered in 1991, enforcing a settlement agreement that was fully performed long ago. Appellant contends that the trial court erred in refusing to set aside the judgment enforcing the settlement and in refusing to nullify the settlement agreement. He argues that the judgment enforcing the settlement was a void order because the settlement agreement was not signed by the party defendants, but rather by their attorneys and, therefore, pursuant to *Levy v. Superior Court* (1995) 10 Cal.4th 578, 583 (*Levy*), the court was without jurisdiction to order enforcement via the summary enforcement procedure of Code of Civil Procedure section 664.6.[1] We shall affirm the order denying the motion.

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[1] All statutory references are to the Code of Civil Procedure, unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

Numerous unpublished appellate opinions have discussed the facts underlying this case and subsequent actions filed by appellant.[2] In 2006, the Fifth Appellate District summarized the various actions to that point as follows: "In 1988, plaintiff was working as a security guard at an apartment complex in Oakland. While on duty, he was shot multiple times by an assailant or assailants with semi-automatic rifles. Plaintiff sued the owners of the apartment complex and his employer, a security guard company. . . . The company was insolvent and uninsured, but the apartment complex owners, though also insolvent, had insurance. After a mediation held under the auspices of the Judicial Arbitration and Mediation Service (JAMS), the parties [*sic* [3]] executed a settlement agreement on July 25, 1991, under which plaintiff and his counsel received $250,000. In these proceedings, plaintiff was represented by [attorney Georgia Ann] Michell-Langsam. The insurer, Home Insurance of America (Home), was represented by a law firm called Larson and Burnham, now known as Burnham Brown.

"On July 26, 1991, the day after he signed the settlement agreement, plaintiff became dissatisfied and informed Michell-Langsam that he wanted to withdraw from it. The owners of the apartment complex filed a motion to enforce the agreement. The [Alameda County Superior Court] heard plaintiff's objections and granted the motion to enforce in spite of them. The Court of Appeal [this court in 1992, in *Osijo v. Housing Resources Management, Inc., supra* (A055045) [nonpub opn.]] affirmed, rejecting

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[2] Some of those cases include: *Osijo v. Housing Resources Management, Inc.* (Jul. 16, 1992, A055045) (First App. Dist); *Osijo v. Ganong and Michell* (Apr. 12, 1996, A068661) (First App. Dist); *Osijo v. Ganong and Michell* (Feb 2, 1998, A077882) (First App. Dist); *Osijo v. United States of America, et al.* (C.D.Cal. Mar. 5, 1999, No. CV 98-1880-CAS (BQR) 1999 WL 358686), affirmed by *Osijo v. Weiner et al.* (9th Cir. 2000) 232 F.3d 895; *Osijo v. Home Insurance Company* (Sept. 7, 2004, F042329, F043325) (Fifth App. Dist.); and *Osijo v. Sevigny* (Dec. 12, 2006, F049063) (Fifth App. Dist.).

[3] The signatories to the settlement agreement were appellant and his attorney, the attorney for the insolvent and uninsured defendant security company Prostaff Security Services, the attorney for the insolvent defendant apartment owners and their insurance company, and the attorney for intervenor Department of Industrial Relations.

plaintiff's principal claim that the agreement was unenforceable because the JAMS mediator was not a current member of the State Bar." (*Osijo v. Sevigny, supra,* 2006 WL 361643 at p. *1.)

In affirming the order enforcing the judgment, we related that plaintiff "had special damages in the form of medical bills of about $40,000. He had lost wages for a nine-month period of about $20,000. He has some residual physical limitations—for instance, he cannot stand for prolonged periods. The nature of any other cognizable damages or future loss of income remained quite speculative. In fact, appellant's income, in his new career as an accountant, is much greater now than it was at the time of his injury. Appellant wanted between $500,000 and $2.5 million to settle his case." (*Osijo v. Housing Resources Management, Inc., supra,* (A055045), at p. 2.) We also observed that "[u]ltimately, the case settled for $250,000, which appears to be a quite generous and fair settlement to appellant considering the problems with his claims." (*Id.* at p. 3.)

A $250,000 settlement check from Home was deposited into the client trust account of plaintiff's counsel. Under the terms of the settlement, the settling defendants paid $250,000 to Osijo and his counsel. Michell-Langsam, however, took for herself 45 percent of the settlement proceeds, or $112,500, not the 40 percent or $100,000 authorized by the written agreement for any settlement. (*Osijo v. Gagnon & Michell, supra* (A077882) [nonpub.opn.], at p. 3.)

"In the succeeding years, plaintiff filed a series of lawsuits against Michell-Langsam, Burnham Brown, Home, and a variety of other parties. In the first of these, plaintiff recovered $12,500 against Michell-Langsam for withholding as fees more of the settlement proceeds than her retainer agreement permitted. There is no indication in the record that plaintiff recovered anything in any of the other cases. In a malicious prosecution action in Fresno County Superior Court (*Michell v. Osijo* (Super. Ct. Fresno County, 2004, No. 02 CE CG 00003)), Michell-Langsam obtained a judgment against plaintiff of more than $165,000 based on his actions in two previous cases." (*Osijo v. Sevigny, supra,* 2006 WL 3616431, at p. *2.)

In the appeal *Osijo v. Sevigny, supra,* 2006 WL 3616431, the Fifth Appellate District rejected appellant's claim that the order enforcing the settlement agreement was void because of an attorney conflict of interest and because the judgment was executed by means of a rubber-stamp replica of the judge's signature rather than the actual signature. Appellant also argued that various judgments and orders of various courts were also void because they gave effect to or declined to invalidate the allegedly void settlement agreement and the judgment enforcing it. (*Id.* at pp.*2, *6.)

Thereafter, Michell-Langsam moved in the Fresno County Superior Court to declare plaintiff to be a vexatious litigant. (§ 391, subd. (b)(2).) In an order filed May 10, 2007, the superior court denied the motion, opining that a trio of cases, *Levy, supra,* 10 Cal.4th 578, *Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299 (*Harris*), and *Davidson v. Superior Court* (1999) 70 Cal.App.4th 514 (*Davidson*), "suggest that the judgment enforcing the settlement agreement could be void." The Fresno court determined that it was without jurisdiction to determine whether the judgment was void, but stated it would "not provide a roadblock to plaintiff's efforts to set the judgment aside in a court of competent jurisdiction."

In the order denying Michell-Langsam's vexatious litigant motion, the Fresno court recognized that "[p]laintiff may be repeatedly relitigating an action he has lost." However, the court opined that "it is possible that he should not have lost the original action." The superior court referenced *Levy, supra,* 10 Cal.4th 578, holding that the term "parties" in section 664.6 meant that the litigants themselves, not merely their attorneys, must assent to the settlement agreement before it can be enforced under that section; *Harris, supra,* 74 Cal.App.4th 299, holding that the reference to "parties" meant, that pursuant to *Levy,* both the party trying to enforce the settlement agreement and the party against whom the settlement agreement was being enforced must have signed the agreement for it to be enforceable under the expedited procedure of section 664.6; and *Davidson, supra,* 70 Cal.App.4th 514, holding that a 1987 judgment confirming a settlement was in excess of the court's jurisdiction and could not support a contempt

order since the settlement was signed by the parties' attorney, but not by the parties themselves.

On June 27, 2007, the Fresno County Superior Court denied Michell-Langsam's motion to reconsider her vexatious litigant motion. We note the same court did declare plaintiff a vexatious litigant as to defendant Burnham Brown in an order filed June 12, 2007, at the same time it sustained Burnham Brown's demurrer to a complaint filed by plaintiff against Burnham Brown, Michell-Langsam and others.

On May 18, 2007, plaintiff moved the Alameda County Superior Court to set aside the enforcement order and to nullify the settlement agreement, arguing that the 1991 judgment enforcing the settlement agreement was "void" pursuant to *Levy, supra,* 10 Cal.4th 578 and its progeny. The Alameda County Superior Court heard the motion on June 21, 2007 and denied it. As a preliminary matter, the Alameda court recognized that plaintiff had been declared a vexatious litigant, and that his name appears on the vexatious litigant list prepared and maintained by the Administrative Office of the Courts. However, because the case preceded the order declaring him a vexatious litigant, the matter was not new litigation requiring a prefiling order. Ruling on the motion to vacate the judgment, the court concluded that the "instant motion seems to be an untimely motion for reconsideration." It denied the motion on the grounds that plaintiff had failed to explain why his request for relief was not a veiled motion for reconsideration and that he had failed to comply with the requirements of section 1008 for such motions. This timely appeal followed.

No respondent's brief has been filed in this appeal. We have received letters from various persons served by appellant including: David J. Van Dam, purportedly served as counsel for Prostaff Security Services; Larson & Burnham, purportedly served as attorneys for defendants owners of the property; and California Insurance Guarantee Association (CIGA), purportedly for Home Insurance Company in Liquidation and for defendant Housing Resources Management, Inc. These persons and entities advised us

that they do not now (and in some cases never have) represented parties to this action and would not be filing briefs.[4]

DISCUSSION

Appellant does not address the superior court's determination that he had made an untimely motion for reconsideration (§ 1008.) Rather, he argues that the judgment enforcing the settlement agreement was void because the Alameda County Superior Court lacked subject matter jurisdiction to enforce it under the summary procedures of section 664.6, because defendants had not personally signed the agreement. He further contends that because the judgment enforcing the settlement agreement was void, he may attack it at any time, citing *Davidson, supra,* 70 Cal.App.4th 514. We disagree with his premise that the judgment was void for lack of subject matter jurisdiction and we find *Davidson* distinguishable.

A. Levy and *Davidson*

In *Levy, supra,* 10 Cal.4th 578, the court resolved a conflict among the districts when it held that a written settlement agreement is not enforceable under the section 664.6 summary procedures for enforcement of a settlement agreement, unless it is signed personally by the litigant. (*Id.* at p. 580.) The court did not find the settlement agreement itself was void or unenforceable, and expressly noted that alternative nonsummary means of enforcement, such as a motion for summary judgment, a separate suit in equity, or an

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[4] Van Dam relates that neither he nor his current law firm represents Prostaff, that his firm never represented Prostaff, and that he last represented Prostaff in 1991 when the case was resolved through mediation. At the time Prostaff was uninsured, insolvent, had ceased to do business and has not been active since.

Burnham Brown states they have received correspondence in connection with this matter and advises they do not represent any of the defendants in this lawsuit and that attorney David Pinelli (who took part in the settlement negotiations as counsel for the owners and insurer) has been deceased for many years.

Counsel for CIGA states they are not and have never been a party to the lawsuit, that they do not represent or stand in the shoes of Home Ins. Co in Liquidation or defendant Housing Resources Management, Inc., but that plaintiff continues to improperly serve them.

amendment to the pleadings, may exist. (*Id.* at p. 586, fn. 5.) *Levy* upheld the trial court's denial of the section 664.6 motion to enforce the settlement agreement, as plaintiff had refused to sign it. (*Id.* at pp. 580-581.) *Levy* has been held to apply retroactively. (*Johnson v. Department of Corrections* (1995) 38 Cal.App.4th 1700, 1709; *Burckhard v. Del Monte Corp.* (1996) 48 Cal.App.4th 1912, 1916-1917, fn. 4.)

In *Davidson, supra,* 70 Cal.App.4th 514, the City of Mendota filed a civil action seeking to prohibit the petitioners from operating a junkyard on their property. The parties purportedly reached a settlement requiring petitioners to stop their junkyard activities. A "Stipulation for Settlement and Entry of Order" was signed by the petitioners' attorney and the city attorney, but not by the petitioners. It was presented ex parte to a judge, who signed a judgment confirming the settlement in 1987. (*Id.* at pp. 516, 518.) The petitioners later contended their attorney never had authority to bind them. (*Id.* at p. 516.) The city initiated contempt proceedings against petitioners in late 1991 for failing to comply with the stipulated settlement and petitioners moved to vacate the stipulated order, arguing, among other things that since it was not signed by them nor approved in open court, it was not binding. (*Id.* at pp. 516, 518-519.) The contempt proceeding and the motion to rescind were separated for hearing; the rescission motion was denied and the appellate court affirmed, noting that the authorized signature of an attorney could bind the client to a written settlement agreement. Thereafter, the petitioners sought to set the matter for jury trial to decide the issue whether their attorney had authority to bind them. This motion was denied and another appeal was dismissed as an attempt to appeal a nonappealable order. (*Id.* at p. 517.) The City of Mendota again initiated contempt proceedings. Petitioners were found in contempt and sentenced to five days in jail. Petitioners filed a petition for writ of habeas corpus, requesting a stay. The appellate court issued the order to show cause and stayed the contempt order.

Relying upon *Levy, supra,* 10 Cal.4th 578, the appellate court held "the *judgment* obtained by the City of Mendota behind the purported settlement agreement is void for purposes of enforcement in contempt proceedings premised on its violation." (*Davidson, supra,* 70 Cal.App.4th at p. 517.) "The bottom line: the contempt order issued against

the petitioners is invalid since it is not premised on a valid judgment." (*Id.* at p. 518.) The court annulled the judgment of contempt and issued a permanent writ of mandate to vacate the void 1987 stipulated order. (*Ibid.*) The court identified "the underlying principle that '[a]n order of contempt cannot stand if the underlying order is invalid.' (*In re Misener* [(1985)] 38 Cal. 3d [543,] 558.)" (*Davidson*, at p. 529.) The court recognized well-settled California authority " 'that "the violation of an order in excess of jurisdiction of the issuing court cannot produce a valid judgment of contempt [citations], and that the 'jurisdiction' in question extends beyond mere subject matter or personal jurisdiction . . . ." Rather, " 'any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis,* are in excess of jurisdiction.' " [Citation.]' " (*Id.* at p. 529.) The *Davidson* court took no position on whether the stipulated settlement agreement was valid or legally enforceable. (*Ibid.*) "We only hold the present judgment, i.e., the 1987 stipulated order, which was obtained in an unauthorized manner, is void for purposes of enforcement in contempt proceedings premised on its violation." (*Ibid.*, fn. omitted.) The court expressly noted that in California, courts " 'apply the rule that in the contempt proceeding, the contemner may, for the first time, collaterally challenge the validity of the order he or she is charged with violating. [Citations.]' " (*Id.* at pp. 529-530, fn. 2.)

In reaching its determination, the *Davidson* court rejected the claim that law of the case applied to the claim that the petitioners' then attorney was not authorized to enter into the stipulated settlement, recognizing that the intervening change in the law wrought by *Levy* was "reason to ignore the doctrine because it is simply a procedural rule. [Citation.]" (*Davidson, supra*, 70 Cal.App.4th at p. 530.)[5] *Davidson* also relied on

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[5] "The doctrine of law of the case applies to later proceedings in the same case. [Citation.] The doctrines of res judicata and collateral estoppel apply to later litigation to give conclusive effect to a former judgment or an issue determined in a former proceeding. [Citation.]" (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701-702.)

authority that " 'the doctrine of the law of the case should not be adhered to when its application results in a manifestly unjust decision. [Citations.]' " (*Id.* at p. 530.) Observing that because the 1987 stipulated order was invalid under *Levy,* and the viability of the contempt finding depended on the viability of that stipulated order, the court stated that "the procedural doctrine of law of the case must bow to the substantive rights of petitioners, especially given the quasi-criminal nature of the matter. [Citations.]" (*Id.* at p. 531.)

B. Finality

As related above, in 1992, we affirmed the order enforcing the settlement agreement in *Osijo v. Housing Resources Management, Inc., supra,* (A055045). The California Supreme Court denied plaintiff's petition for review on September 30, 1992, and the remittitur issued on October 26, 1992. The case is final. Once the remittitur issues, the lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, even in the event of an intervening change in the law. (See *Griset v. Fair Political Practices Com., supra,* 25 Cal.4th at pp. 701-702.)

"A motion to vacate or set aside the judgment, if made after the statutory time has elapsed for direct attack by motion, or if made on grounds or procedure not authorized by statutes governing direct attack, is a collateral attack. [Citations.]" (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court § 8, p. 516.)

A collateral attack on a judgment for an error committed in the exercise of the court's jurisdiction is not permitted. (*Aerojet-General Corp. v. American Excess Ins. Co.* (2002) 97 Cal.App.4th 387, 398; 8 Witkin, Cal. Procedure (2007 supp.) Attack on Judgment in Trial Court, § 6, p. 189.) "Except in the case of extrinsic fraud, '[a] judgment on the merits that is not void on its face and [thus] subject to collateral attack is protected by the doctrine of res judicata after the time for ordinary direct attack has passed.' ([8 Witkin, Cal. Procedure, *supra,* Attack on Judgment in Trial Court, § 214,] at p. 718.)" (*Aerojet-General Corp,* at p. 398, fn. 3.)

Moreover, plaintiff is simply wrong when he asserts that the court acted without subject matter jurisdiction. Subject matter jurisdiction and personal jurisdiction are

jurisdiction in the fundamental sense. (See 2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 323, pp. 899-900; *id.*, § 328, pp. 908-909.) The court had the authority to hear the section 664.6 motion and to decide it. "In ruling upon [a section 664.6] motion, trial courts are empowered to resolve all underlying factual disputes and 'ultimately determine whether the parties reached a binding mutual accord as to material terms.' [Citations.]" (Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2007) ¶ 4:534.)

A judgment by a court lacking in jurisdiction of the *subject matter* is subject to collateral attack, as is a judgment by a court lacking jurisdiction of the *person.* (2 Witkin, Cal. Procedure, *supra,* Jurisdiction, § 323, p. 899.) However, the question whether an act *in excess of jurisdiction* by a court that had both subject matter and personal jurisdiction is subject to collateral attack cannot be answered authoritatively, "for the cases are in conflict in their holdings, and the opinions have produced no clear statement of principles. This is partly due, perhaps, to the difficulty encountered in distinguishing total absence of jurisdiction from excess of jurisdiction, and also to the practical fact that some acts in excess of jurisdiction are more serious and objectionable than others." (*Ibid.*)

As our Supreme Court explained in *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653: "The term 'jurisdiction,' 'used continuously in a variety of situations, has so many different meanings that no single statement can be entirely satisfactory as a definition.' (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 287 (*Abelleira*).) Essentially, jurisdictional errors are of two types. 'Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.' (*Id.* at p. 288.) When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and 'thus vulnerable to direct or collateral attack at any time.' (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 119 (*Barquis*).)" (*People v. American Contractors Indemnity Co.,* at p. 660.)

"However, 'in its ordinary usage the phrase "lack of jurisdiction" is not limited to these fundamental situations.' (*Abelleira, supra,* 17 Cal.2d at p. 288.) It may also 'be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.' (*Ibid.*) ' "[W]hen a statute authorizes [a] prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction." ' (*Id.* at p. 290.) When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. [Citations.] That is, its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside by 'principles of estoppel, disfavor of collateral attack or res judicata.' [Citation.] Errors which are merely in excess of jurisdiction should be challenged directly, for example by motion to vacate the judgment, or on appeal, and are generally not subject to collateral attack once the judgment is final unless 'unusual circumstances were present which prevented an earlier and more appropriate attack.' (*Pacific Mut. Life Ins. Co. v. McConnell* (1955) 44 Cal.2d 715, 727 [general rule is that a 'final judgment or order is res judicata' and not subject to collateral attack 'even though contrary to statute where the court has jurisdiction in the fundamental sense, i.e., of the subject matter and the parties']; 2 Witkin, Cal. Procedure[, *supra,*] Jurisdiction, § 323, p. 899.)" (*People v. American Contractors Indemnity Co., supra,* 33 Cal.4th at p. 661.)

Witkin identifies one reason for the rule: "If there is jurisdiction of the subject matter and the parties, one who complains of the act is usually before the court. He has an opportunity to object, or to have the judgment or order reviewed by the usual methods of direct attack, such as new trial or appeal. He may also in many situations use the extraordinary writs . . . to directly attack and prevent or annul the unauthorized act. . . . [¶] . . . [A]cts merely in excess of jurisdiction, by a court having jurisdiction of the subject matter and parties, should not be subject to collateral attack unless exceptional circumstances precluded an earlier and more appropriate attack. [Citations.] [¶] The contrary view, that a judgment or order in excess of jurisdiction is as completely void as

one made by a court lacking subject matter jurisdiction, is artificial and dangerous. If uniformly followed it would mean that any judgment or order which might be prevented by prohibition or annulled on certiorari would be subject to collateral attack. . . . To open up this vast field of departures from authorized procedure to collateral attack is neither necessary nor desirable." (2 Witkin, Cal. Procedure, *supra,* Jurisdiction, § 323, pp. 899-900.) Expanding on this discussion, Witkin observes that "[t]he theory that acts beyond a court's authority are void and always subject to collateral attack . . . was abandoned in a series of cases beginning with *Pacific Mut. Life Ins. Co. v. McConnell*[, *supra,* 44 Cal.2d 715] . . . ." (2 Witkin, Cal. Procedure, *supra,* Jurisdiction, § 328, p. 907.) Consequently, "[a] judgment enforcing a contract is res judicata even though the defense of illegality is raised in the subsequent litigation." (*Ibid.*)

However, "[i]n exceptional situations collateral attack is allowed, despite subject matter jurisdiction, where the judgment is contrary to statute: (1) '[W]here unusual circumstances were present which prevented an earlier and more appropriate attack' [citation]. (2) Where a *contempt adjudication* is based on violation of an injunction or other equitable order made contrary to statute. [Citation.] 'The decisions do not use the term, but the attack in such cases might be considered to be collateral, and the proceedings apparently fall in a special category because they are penal in nature.' [Citation.]" (2 Witkin, Cal. Procedure, *supra,* Jurisdiction, § 328, pp. 907-908, italics added.)

This latter contempt adjudication exception is precisely the situation faced by the court in *Davidson, supra,* 70 Cal.App.4th 514. Indeed, the appellate court did not hold that the trial court lacked subject matter jurisdiction or jurisdiction in the fundamental sense. It specifically stated that "the 1987 stipulated order was *in excess of the court's jurisdiction* because it was not entered in compliance with section 664.6 or some other settlement enforcement mechanism. Thus, it is void and cannot be the basis of a valid contempt order. . . . We only hold the present judgment, i.e., the 1987 stipulated order, which was obtained in an unauthorized manner, is void for purposes of enforcement in contempt proceedings premised on its violation." (*Davidson,* at p. 529, fn. omitted,

italics added.) Clearly, the court applied the well-recognized exception to res judicata, allowing collateral attack on the contempt citation.

Levy, supra, 10 Cal.4th 578, which itself arose in the context of a petition for writ of mandate from the trial court's denial of expedited enforcement of a settlement agreement pursuant to section 664.6, has been applied primarily in cases on direct appeal from a court order enforcing or refusing to enforce a settlement agreement pursuant to section 664.6. (See e.g., *Gauss v. GAF Corp.* (2002) 103 Cal.App.4th 1110, 1115-1123; *Harris, supra,* 74 Cal.App.4th 299, 302-306; *Williams v. Saunders* (1997) 55 Cal.App.4th 1158, 1160, 1162-1164; *Burckhard v. Del Monte Corp., supra,* 48 Cal.App.4th 1912, 1914-1915; *Robertson v. Chen* (1996) 44 Cal.App.4th 1290, 1292-1293; *Cortez v. Kenneally* (1996) 44 Cal.App.4th 523, 524-525, 528-530; *Johnson v. Department. of Corrections, supra,* 38 Cal.App.4th 1700, 1704-1710.)

Unlike petitioners in *Davidson, supra,* 70 Cal.App.4th 514, plaintiff is not raising the alleged invalidity of the enforcement order as a defense to a contempt order. Although he has challenged the enforcement order and settlement agreement in numerous ways, until recently he never raised *Levy* or the failure of defendants to personally sign the settlement agreement as a basis for any challenge. The parties have fully performed under the terms of the settlement agreement. Plaintiff has not offered to return any settlement funds he has received. At this point, every former party defendant in the original action is insolvent, and even the insurer is in liquidation. Unlike *Davidson,* we cannot say here that " ' " 'adherence to the previous decision would result in defeating a just cause . . . .' " ' " (See *Davidson, supra,* at p. 530, italics omitted.) It would be unjust and inequitable to allow appellant to unwind more than a decade of decisions in the circumstances presented by this case.[6]

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[6] Such equitable considerations are highly relevant here. We note that in the direct appeal in *Johnson v. Department of Corrections,* the Court of Appeal rejected the defendants' argument that equity weighed against retrospective application of section 664.6 because defendants had already tendered $83,000 to the plaintiff. However, plaintiff refused to accept the money and the trial court had not permitted the plaintiff's

DISPOSITION

The order denying appellant's motion to set aside the judgment is affirmed.

Kline, P.J.

We concur:

Haerle, J.

Richman, J.

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attorney to withdraw the money from the client trust account until the dispute between plaintiff and the attorney was resolved. The appellate court observed that since the funds could be returned to defendants, defendants would not be harmed in any way by retroactive application of *Levy*. (*Johnson v. Department of Corrections, supra*, 38 Cal.App.4th at p. 1710.) In the instant case, it does not appear that the funds could be effectively returned and plaintiff has not sought to do so in any event.