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7 LEONARD COHEN INVESTMENTS, LLC

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES –CENTRAL DISTRICT**

11 LEONARD NORMAN COHEN, an individual;
12 LEONARD COHEN INVESTMENTS, LLC, a
13 Delaware Limited Liability Company,

14 Plaintiffs,

15 v.

16 KELLEY LYNCH, an individual; RICHARD A.
17 WESTIN, an individual; DOES 1 through 50,
18 inclusive,

19 Defendants.

CASE NO.: BC338322
RELATED CASE NO.: BC341120
Assigned to the Hon. Robert L. Hess;
Dept. 24

**PLAINTIFFS' POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT'S
MOTION TO SET ASIDE JULY 13, 2015
RENEWAL OF JUDGMENT**

Hearing Date: October 6, 2015
Time: 8:30 A.M.
Dept.: 24
Complaint filed: August 15, 2005

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21
22
23 TO THE COURT AND DEFENDANT AND MOVING PARTY IN PRO PER:

24 Plaintiffs Leonard Norman Cohen and Leonard Cohen Investments, LLC hereby oppose
25 Defendant Kelley Lynch's Motion to Set Aside Renewal of Judgment filed with this Court on July
26 28, 2015 ("July 2015 Motion"). The Opposition is based on the attached Points and Authorities,
27 the Court file in this matter, and upon such evidence as may be introduced at the hearing.
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 I. INTRODUCTION AND SUMMARY OF ARGUMENT

4 Lynch moves pursuant to California Code of Civil Procedure (“CCP”) §683.170 to vacate
5 Plaintiffs’ July 13, 2015 Renewal of Judgment (“July 2015 Motion”) by reprising arguments
6 previously raised and denied in her Motion to Vacate and/or Modify Default Judgment Entered
7 May 15, 2006 filed with the Court August 9, 2013 (“August 2013 Motion”) and in her Motion for
8 Terminating and Other Sanctions filed on March 17, 2015 (“March 2015 Motion”). First, Lynch
9 reprises the argument from two previously denied motions that she was not served the summons
10 and complaint and concludes that because, according to her, the May 15, 2006 Default Judgment
11 is void for lack of service, the July 13, 2015 Renewal of Judgment must also be void. Second,
12 Lynch reprises the argument from the prior motions that extrinsic fraud prevented her from
13 presenting her case to the Court. Third, Lynch renews her challenge to the January 17, 2014
14 Order denying her August 2013 Motion with prejudice and conclusorily declares the January 17,
15 2014 Order “void” because “it gives effect to a void judgment.” Finally, Lynch attempts to
16 reframe arguments contained in the 66-page “Case History” in her August 2013 Motion to argue
17 that Cohen lacked standing to bring suit against Lynch because Cohen should have brought his
18 claims against Lynch as derivative claims on behalf of Cohen’s corporate entities.

19
20 Lynch’s July 2015 Motion should be denied for five reasons. First, Lynch has waived
21 further jurisdictional challenges because she has, through her motion practice, made a general
22 appearance in this action and thus submitted to the Court’s jurisdiction and forfeited further right
23 to contest jurisdiction. Second, this Court has previously determined by its order of January 17,
24 2014 that Plaintiffs’ service of the summons and complaint on Lynch was proper and that Lynch
25 had not demonstrated extrinsic fraud as to the Proof of Service of the summons and complaint.
26 Third, without meeting the statutory requirements of CCP §1008, Lynch again improperly asserts
27 that the January 17, 2014 Order denying her 2013 Motion is “void” because it gives “effect to a
28 void judgment.” Motion, p. 12. Fourth, this Court has previously determined that Lynch has not

1 demonstrated extrinsic fraud which prevented her from presenting her case to the Court and that
2 Lynch had not been diligent in seeking relief from the May 15, 2006 Default Judgment. Finally,
3 Lynch's argument that Cohen lacked standing to bring suit against Lynch lacks merit because she
4 improperly seeks to recharacterize the claims of Cohen's Complaint. Cohen properly asserted
5 claims in his individual capacity against Lynch in her individual capacity as his personal manager
6 for breaches of fiduciary duty, breach of contract, fraud and conversion.

7 **II. THE JULY 13, 2015 RENEWAL OF THE JUDGMENT WAS TIMELY AND**
8 **FULLY COMPLIED WITH STATUTORY REQUIREMENTS**

9 Under CCP §683.020, a money judgment is enforceable for 10 years from the date
10 entered. CCP §§683.020, 683.130(a); Iloff v. Dustrud, 107 Cal. App. 4th 1201, 1207 (Cal. Ct. App.
11 4th 2003). To obtain a renewal of the judgment, the judgment creditor must file an application for
12 renewal with the clerk of the court that entered the judgment before the expiration of the 10-year
13 period of enforceability. CCP §683.130(a), §683.140. Upon the filing of the application, the
14 court clerk shall enter the renewal of the judgment in the court records. CCP §683.150(a).
15 Renewal of a judgment is a ministerial act performed by a court clerk upon receipt of an
16 application for renewal. Fidelity Creditor Service, Inc. v. Browne, 89 Cal.App.4th 195, 198 (Cal.
17 Ct. App. 2nd 2001); Goldman v. Simpson, 160 Cal. App. 4th 255, 262 (Cal. Ct. App. 2nd 2008). No
18 court order or new judgment is required. Id. "[R]enewal does not create a new judgment or
19 modify the present judgment. Renewal merely extends the enforceability of the judgment."
20 Jonathan Neil & Associates, Inc. v. Jones, 138 Cal.App.4th 1481, 1489 (Cal. Ct. App. 5th 2006).
21 The judgment creditor must serve notice of the renewal on the judgment debtor, who then has 30
22 days after service to make a motion to vacate or modify the renewal. CCP §683.160(a),
23 §683.170(b). A trial court has continuing jurisdiction, derived from its jurisdiction at the time of
24 the original judgment, to enter the renewal. Goldman, 160 Cal. App. 4th at 263; CCP §410.50(b).
25 At the hearing on the motion, the renewal may be vacated, or a different renewal entered, if the
26 court determines that the amount of the judgment as renewed is incorrect. CCP §683.170(c); In Re
27 Marriage of Thompson, 41 Cal. App. 4th 1049, 1058 (Cal. Ct. App. 5th 1996).

1 Plaintiffs' Default Judgment in the amount of \$7,341,345 was entered against Lynch on
2 May 15, 2006. On July 10, 2015 Plaintiffs served Lynch via overnight express mail delivery their
3 Memorandum of Costs After Judgment, Acknowledgement of Credit, and Declaration of Accrued
4 Interest on mandatory Judicial Council form MC-012, claiming \$6,717,808.80 in accrued
5 postjudgment interest. Plaintiffs filed the MC-012, together with the Application for Renewal of
6 Judgment (Form EJ-190) and Notice of Renewal of Judgment (Form EJ-195) on July 13, 2015.
7 The clerk of the court issued the renewal of judgment on July 13, 2015 ("July 13, 2015 Renewal
8 of Judgment"). The Notice of Renewal and Renewal of Judgment were then served upon Lynch
9 on July 14, 2015 via overnight express mail delivery. CCP §683.160(a). Plaintiffs filed a Proof of
10 Service of the Notice of Renewal and Renewal of Judgment with the Court on July 22, 2015.

11 On July 28, 2015, Lynch filed a Motion to Set Aside the July 13, 2015 Renewal of
12 Judgment pursuant to CCP §683.170. Despite the fact that Plaintiffs had not claimed any
13 postjudgment costs, only statutory accrued postjudgment interest, Lynch also filed a Motion to
14 Tax Costs pursuant to CCP §685.070. That same day, Lynch also filed a Notice of Appeal of the
15 June 23, 2015 Order denying her March 2015 Motion. During the pendency of Lynch's appeal of
16 the June 23, 2015 Order, the Court retains jurisdiction concerning both the July 13, 2015 Renewal
17 of Judgment and Lynch's July 2015 Motion to vacate the renewal. Jonathan Neil & Assoc., 138
18 Cal. App. 4th at 1488-89 (rejecting appellant's contention that the trial court loses jurisdiction to
19 renew the judgment while an appeal is pending.)

20 **III. LYNCH HAS MADE A GENERAL APPEARANCE AND HAS FORFEITED**
21 **RIGHT TO FURTHER CONTEST THIS COURT'S JURISDICTION**

22 **A. California Law Governing General Appearance**

23 Lynch has through her successive motions practice in seeking equitable relief from the
24 May 15, 2006 Default Judgment, made a general appearance in this action. Procedurally, Lynch
25 has failed to properly preserve her jurisdictional objection.

26 It has long been the rule in California that "a party waives any objection to the court's
27 exercise of personal jurisdiction when the party makes a general appearance in the action." Air
28 Machine Com SRL v. Superior Court, 186 Cal. App. 4th 414, 419 (Cal. Ct. App. 4th 2010). A

1 general appearance operates as a consent to jurisdiction of the person..." Dial 800 v. Fesbinder,
2 118 Cal. App. 4th 32, 52 (Cal. Ct. App. 2nd 2004). A general appearance by a party is equivalent to
3 personal service of summons on such party. CCP §410.50(a); Fireman's Fund Ins. Co. v. Sparks
4 Construction, Inc., 114 Cal. App. 4th 1135, 1145 (Cal. Ct. App. 2nd 2004). A defendant appears in
5 an action when the defendant answers, demurs, files a notice of motion to strike...gives the
6 plaintiff written notice of appearance, or when an attorney gives notice of appearance for the
7 defendant. CCP §1014. The statutory list of acts constituting an appearance under CCP §1014 is
8 not exclusive; rather the term may apply to various acts which, under all of the circumstances, are
9 deemed to confer jurisdiction of the person. Air Machine, 186 Cal. App. 4th at 420; Hamilton v.
10 Asbestos Corp., 22 Cal. 4th 1127, 1147 (Cal. 2000). The Code of Civil Procedure also provides
11 that a defendant makes a general appearance when a motion to quash service of the summons and
12 complaint is denied. CCP §418.10(e)(1). Unlike federal court practice, the distinction between
13 special and general appearances continues to be recognized in California. Air Machine, 186 Cal.
14 App. 4th at 427. If the defendant raises an issue for resolution or seeks relief available only if the
15 court has jurisdiction over the defendant, then the appearance is a general one. Factor Health
16 Management v. Superior Court, 132 Cal. App. 4th 246, 250 (Cal. Ct. App. 2nd 2005); Roy v.
17 Superior Court, 127 Cal. App. 4th 337, 341 (Cal. Ct. App. 4th 2005)(if a defendant invokes the
18 authority of the court on his/her behalf, or affirmatively seeks relief, the defendant concedes to the
19 jurisdiction of the court.). The appearance will be considered general in nature if defendant acts in
20 a manner showing a purpose of obtaining any ruling or order of the court going to the merits of the
21 case. Dial 800, 118 Cal. App. 4th at 52-53; California Overseas Bank v. French American Banking
22 Corp., 154 Cal. App. 3d 179, 184 (Cal. Ct. App. 2nd 1984); Carpenter v. Mohammed, 227 Cal.
23 App. 2nd 584 (Cal. Ct App. 4th 1964).

24 **B. Lynch Has Made a General Appearance in This Action**

25 Lynch has through her motions practice appeared generally through the following actions:
26 (1) moving to quash service of the summons and complaint in her August 2013 Motion, the denial
27 of which constitutes a general appearance; (2) filing a proposed answer to seek leave to defend on
28 the merits after denial of the motion to quash; (3) seeking affirmative relief from the Court which

1 is inconsistent with making a special appearance solely to contest jurisdiction; and (4) extensively
2 addressing/contesting merits of the underlying complaint.

3 In her August 2013 Motion, Lynch moved to quash the service of the summons and
4 complaint while simultaneously seeking equitable relief from the default judgment on the grounds
5 of extrinsic fraud due to an allegedly false proof of service. Aug. 2013 Motion, Notice of Motion,
6 p. 2. (“Defendant moves to quash service of summons and complaint, and vacate the default
7 judgment, on the ground that she was not served and the court lacks jurisdiction.”) While not
8 expressly citing to CCP §418.10(a)(1) in her August 2013 Motion, that code section provides that
9 the denial of a motion to quash results in a general appearance. CCP §418.10(e)(1)¹; State Farm
10 General Ins. Co. v. JT’s Frames, Inc., 181 Cal. App. 4th 429, 440 (Cal. Ct. App. 2nd 2010).

11 CCP §418.10(e)(3) allows a defendant to include a motion to quash along with an answer.
12 CCP §418.10(e)(3). While referenced in her August 2013 Motion, Lynch failed to attach the
13 proposed answer. (RT 1/17/14 at 7:23-25). Subsequently, after her motion to quash was denied,
14 Lynch filed a proposed answer with her March 2015 Motion (p. 1, lines 19-21; Exh. 1) which
15 sought “terminating sanctions” to dismiss Plaintiffs’ complaint as well as equitable relief from the
16 May 15, 2006 Default Judgment on the basis of alleged “fraud on the Court.” She also filed a
17 proposed answer with the July 2015 Motion (p. 10, lines 3-5; Exh. F). An answer on the merits is
18 an appearance as is expressly made clear by CCP §1014. Roy, 127 Cal. App. 4th at 341; Fireman’s
19 Fund, 114 Cal. App. 4th at 1145.

20 In the March 2015 Motion Lynch sought affirmative relief from the Court when requesting
21 “clarification” of the May 15, 2006 Default Judgment, sought correction of purported “clerical
22 errors”, and sought an order to “overturn” the settlement agreement between Cohen and co-

23 _____
24 ¹ CCP §418.10(e)(1) provides that “notwithstanding Section 1014, no act by a party who makes a motion under this
25 section, including filing an answer, demurrer, or motion to strike constitutes an appearance, unless the court denies the
26 motion made under this section. If the court denies the motion made under this section, the defendant or cross-
27 defendant is not deemed to have generally appeared until entry of the order denying the motion.” While no formal
28 order was entered following the January 17, 2014 hearing due to Defendant’s re-incarceration on a collateral matter,
Plaintiffs’ counsel served Lynch a Notice of Ruling by email and overnight mail on January 23, 2014, which attached
a copy of the Proposed Order. Lynch acknowledged receipt of the Notice of Ruling and Proposed Order at the June
23, 2015 hearing. RT 6/23/15 at 9:2-11. Lynch was served Notice of Entry of the June 23, 2015 Order denying her
motion for reconsideration by Plaintiffs’ counsel on June 25, 2015. Lynch filed a Notice of Appeal of the June 23,
2015 Order denying her March 2015 Motion on July 28, 2015.

1 defendant Richard Westin. March 2015 Motion, pp. 13-15; Exh.11; Proposed Order, Vol. IV.
2 What is more, Lynch recognized the Court's jurisdiction when she argued: "The trial court has
3 continuing jurisdiction to effectuate its prior judgments, either by summarily ordering compliance
4 with a clear judgment or by interpreting an ambiguous judgment and entering orders to effectuate
5 the judgment as interpreted." Id. at 15.

6 In Dial 800 v. Fesbinder, the trial court found a general appearance was made when the
7 wholly owned company and its owner requested that the trial court determine their rights under a
8 purchase and trust agreements contract, as well as an operating agreement, which was a request for
9 affirmative relief. Dial 800, 118 Cal. App. 4th at 54. In Carpenter v. Mohammed, the defendant
10 was found to have made a general appearance in challenging default judgment by arguing merits
11 and obtaining a court order that the judgment be modified. Carpenter, 227 Cal. App. 2nd at 585-
12 586. By requesting "Clarification of Ambiguous Judgment" and seeking to "overturn" the
13 settlement agreement between Cohen and co-defendant Westin, while also asking the Court to
14 vacate the May 15, 2006 Default Judgment on equitable grounds, Lynch sought affirmative relief
15 from the Court inconsistent with specially appearing solely to contest jurisdiction.

16 Lynch has also waived jurisdictional objections and submitted to the jurisdiction of the
17 Court by contesting the merits of the case and raising other than jurisdictional objections.
18 Fireman's Fund, 114 Cal. App. 4th at 1145. In California Overseas Bank v. French American
19 Banking Corporation, an appellate court held that the defendant banking corporation waived its
20 jurisdictional objection and made a general appearance when its counsel discussed merits of the
21 case at a hearing on plaintiff's application for a temporary restraining order. California Overseas
22 Bank, 154 Cal. App. 3d at 184. Lynch has in both prior motions extensively addressed the merits
23 of the underlying action. She did so in a 66-page "Case History" submitted with her August 2013
24 Motion and in her 109-page declaration and associated exhibits submitted with her March 2015
25 Motion. March 2015 Motion, Lynch Decl., Exh. 4.

26 Lynch has, through her motion practice and by her own conduct in seeking affirmative
27 relief from the Court, made a general appearance and has forfeited the right to make further
28 jurisdictional objections.

1 **IV. LYNCH HAS NOT DEMONSTRATED ANY VALID GROUNDS FOR VACATING**
2 **THE JULY 13, 2015 RENEWAL OF JUDGMENT**

3 **A. Legal Standards to Vacate Renewal of Judgment Under CCP §683.170**

4 CCP §683.170 provides that “the renewal of a judgment pursuant to this article may be
5 vacated on any ground that would be a defense to an action on the judgment, including the ground
6 that the amount of the renewed judgment as entered pursuant to this article is incorrect.” CCP
7 §683.170(a). The defenses available to a judgment debtor in the statutory procedure are the same
8 as an independent action on the judgment. Goldman, 160 Cal. App. 4th at 261. In an independent
9 action on the judgment, the debtor may challenge the judgment in “accordance with the rules and
10 principles governing collateral attack.” Goldman, 160 Cal. App. 4th at 261-262. Such a collateral
11 attack challenges the jurisdiction of the court to enter the original judgment. Id. Nonjurisdictional
12 errors are inappropriate targets in this context. Id. The judgment debtor bears the burden of
13 proving, by a preponderance of the evidence, that he or she is entitled to vacation of renewal of
14 judgment under section 683.170. Fidelity, 89 Cal. App. 4th at 199.

15 **B. The Court Has Previously Determined That Plaintiffs’ Service of the Summons**
16 **and Complaint on Lynch Was Proper In Denying Lynch’s August 2013 Motion**

17 In making a statutory motion under CCP §683.170(a) to vacate a renewal of judgment, the
18 judgment debtor may contend that the court lacked personal jurisdiction at the time of the initial
19 judgment. Goldman, 160 Cal. App. 4th at 262; Fidelity, 89 Cal. App. 4th at 202.

20 In her recitation of procedural history, Lynch acknowledges that her August 2013 Motion
21 based upon the grounds of extrinsic fraud due to an allegedly false proof of service of the
22 summons and complaint was “denied with prejudice” and that the Court found that “Lynch did not
23 carry the burden of persuasion that the proof of service was false.” July 2015 Motion, p. 1, lines
24 17-22; Jan. 17, 2014 Minute Order.

25 Fourteen months later, in March 2015, Lynch sought reconsideration of the denial of her
26 August 2013 Motion by filing an 1,100 page motion styled as a “Motion for Terminating and
27 Other Sanctions” which alleged that the “default judgment (and the January 17, 2014 denial of
28 Lynch’s Motion to Vacate) was procured through fraud on the court (and other egregious

1 misconduct)” and continued to allege that the Court had failed to obtain personal jurisdiction over
2 her because of an allegedly false proof of service. March 2015 Motion, p. 1, lines 16-19. Despite
3 the motion’s spurious title, Lynch sought an order seeking the same relief [vacating the May 15,
4 2006 Default Judgment] as her August 2013 Motion. Plaintiffs opposed Lynch’s March 2015
5 Motion on the grounds that Lynch’s March 2015 Motion did not meet the statutory requirements
6 of CCP §1008 and that she had not demonstrated fraud upon the Court because Lynch alleged
7 claims of intrinsic, not extrinsic fraud. Plaintiffs’ Opp. To March 2015 Motion, pp. 3-7. The
8 Court denied the March 2015 Motion with prejudice finding that the motion was not a proper
9 motion for reconsideration under CCP §1008 because she had not shown any new facts or law that
10 could not have been presented in her August 2013 Motion and had not demonstrated extrinsic
11 fraud. (RT 6/23/15 at 4:12-17; RT 6/23/15 at 17:6-15).

12 Notwithstanding that the Court has already adjudicated jurisdictional issues in January
13 2014, Lynch continues to argue in her July 2015 Motion that the Court lacks personal jurisdiction
14 and that the May 15, 2006 Default Judgment and the July 13, 2015 Renewal of Judgment are void:

15 Lynch was never served with the summons and complaint and the December 5, 2005
16 default judgment, May 15, 2006 judgment (and imposition of constructive trust), together
17 with the July 13, 2015 renewal of that judgment are void for lack of jurisdiction. July 2015
Motion p. 4, lines 9-14.

18 To support her argument, Lynch relies on the same authorities and quotes verbatim from her
19 August 2013 Motion in her July 2015 Motion. Compare July 2015 Motion, p. 12, lines 3-16, with
20 August 2013 Motion, p. 12, lines 5-19.²

21 As with her March 2015 Motion, Lynch’s July 2015 Motion improperly seeks
22 reconsideration of the Court’s January 17, 2014 Order without meeting the statutory requirements
23 of CCP §1008. Put simply, Lynch reprises the same grounds raised in prior motions that the May
24 15, 2006 Default Judgment should be vacated as grounds for vacating the July 13, 2015 Renewal

25 ² Lynch also cites to Fidelity Creditor Service, Inc. v. Browne. July 2015 Motion, pp. 4-5. Fidelity is readily
26 distinguishable, however, because Fidelity, the assignee of the creditor’s account, *conceded* that Browne was never
27 properly served the summons and complaint. Fidelity, 89 Cal. App. 4th at 199. In contrast, Plaintiffs proffered
28 substantial evidence that the substituted service of the summons and complaint on Lynch at her residence was validly
effectuated on August 24, 2005. See Plaintiffs’ Opposition to Defendant’s August 2013 Motion.

1 of Judgment. Lynch is, in effect, by way of a motion to vacate the renewal of judgment under
2 CCP §683.170 (a procedural device directed at vacating the renewed judgment, not the underlying
3 default judgment), improperly seeking the proverbial “third bite at the apple” to attempt to vacate
4 the May 15, 2006 Default Judgment without demonstrating any “new or different facts,
5 circumstances or law” that she could not have shown in August 2013. CCP §1008; Even Zohar
6 Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC, 61 Cal. 4th 830, 840 (Cal.
7 2015)(Section 1008 expressly applies to all applications for orders the court has previously
8 refused.) Because service of the summons and complaint has been found to have been proper and,
9 as discussed in Section III.B, *supra*, Lynch has generally appeared in this action, Lynch cannot
10 assert lack of service of the summons and complaint as a valid ground to vacate the July 13, 2015
11 Renewal of Judgment.

12 **C. The Court Has Previously Determined That Lynch Has Not Demonstrated**
13 **Extrinsic Fraud and That Lynch Had Not Been Diligent In Seeking Relief From May**
14 **15, 2006 Default Judgment**

15 Lynch’s August 2013 Motion argued that the registered process server’s allegedly false
16 proof of service of the summons and complaint constituted extrinsic fraud. Aug. 2013 Motion, pp.
17 14-15. The only extrinsic evidence that Lynch submitted to support her claim was her own
18 *unsigned* declaration and the declaration of her son, Rutger Penick. *Id.*; (RT 1/17/14 at 10:1-4; RT
19 6/23/15 at 3:14-19). The Court found that Lynch had not met her burden of proof to overcome the
20 presumption of validity of the affidavit of service by a registered process server under Cal. Evid.
21 Code §647. (RT 1/17/14 at 9:24-28; RT 6/23/15 at 5-6:1-10).

22 Lynch also alleged extrinsic fraud as a basis for vacating the May 15, 2006 Default
23 Judgment in her March 2015 Motion. March 2015 Motion, pp. 1, lines 16-17. In an apparent
24 attempt to overcome the evidentiary deficiencies in her August 2013 Motion, Lynch submitted
25 additional declarations from her son, her mother, Joan Lynch, her housemate Paulette Brandt and
26 several friends (Surkhang, Ronge and Meade). March 2015 Motion, Exhs. 5-10. Plaintiffs
27 objected to these declarations on many grounds, including on the basis of the declarant’s lack of
28 knowledge of service of the summons and complaint, hearsay and that the declarations had not

1 been signed by the declarant as required under CCP §2015.5. *See* Plaintiffs’ Evid. Objections,
2 June 19, 2015. In addition to relying on the same declarations submitted with her March 2015
3 Motion, Lynch now proffers with her July 2015 Motion additional declarations from her son, her
4 housemate, and herself. July 2015 Motion, Exhs. A-E.³ These declarations, based on the
5 declarant’s declared “personal knowledge” by definition provide nothing “new” and Lynch fails to
6 explain why she did not marshal all her evidence in August 2013. Zohar, 61 Cal. 4th at 836 fn 3.

7 At the June 23, 2015 hearing on Lynch’s March 2015 Motion, the Court stated: “[a]nd
8 your claims that you were not served with summons and complaint were raised and denied in
9 January 2014. You have not demonstrated to my satisfaction that there was extrinsic fraud, and
10 there is no basis for – no basis shown to...set aside the Default Judgment.” (RT 6/23/15 at 17:6-
11 15). The Court also stated: “You had a full and fair opportunity to present *all your arguments, all*
12 *your evidence*, in 2013...I denied the motion [the August 2013 Motion] with prejudice.” (Id. at
13 8:23-28). (emphasis supplied).

14 In her July 2015 Motion, Lynch again alleges extrinsic fraud prevented her from
15 presenting her claims to the Court, but once again fails to meet her burden of proof. July 2015
16 Motion, pp. 9-11. Extrinsic fraud is a defense to the enforcement of a judgment. Tom Thumb
17 Glove Co. v. Han, 78 Cal. App. 3d 1, 8 (Cal. Ct. App. 4th 1978)(denying defendant’s motion to
18 vacate entry of sister state judgment that defendant alleged had been obtained by extrinsic fraud
19 because defendant’s declarations were not credible and therefore he had failed to sustain his
20 burden of proof); Fidelity, 89 Cal. App. 4th at 203. On page 10 of her brief, Lynch raises the same
21 claims previously raised in her August 2013 Motion, none of which are sufficient to demonstrate
22 extrinsic fraud.⁴ See Plaintiffs’ Opp. To August 2013 Motion, pp. 16-23. Fundamentally, Lynch
23 has not demonstrated how any of these purported acts on the part of Plaintiffs prevented her from
24

25 ³ Lynch’s declaration is her sixth, Brandt’s her fifth, and Penick’s his third filed by Lynch since August 2013.

26 ⁴ Lynch alleges that Cohen has used “fraudulent restraining orders” to “discredit” her; (2) that Plaintiffs’ “willful
27 failure to serve” the summons and complaint was all part of a “carefully crafted scheme to defraud not only Lynch but
28 her from “defending herself properly” and obtaining legal representation. July 2015 Motion, p. 10, lines 17-28.
Compare Aug. 2013 Motion p. 7 (“lawsuit as retaliation”); “Case History” p. 6 (“fraudulent restraining orders”).

1 presenting her claim or defense to the original action. Sporn, 126 Cal. App. 4th at 1300 (“The
2 essence of extrinsic fraud is one party's preventing the other from having his day in court.”).

3 Finally, Lynch cannot overcome the Court’s finding that she had not demonstrated
4 diligence in waiting nearly three and half years (from her “discovery” of the complaint online in
5 April 2010 to August 2013) to set aside the May 15, 2006 Default Judgment. (RT 1/17/14 at
6 13:24-26; RT 6/23/15 at 4:21-25). Lynch cites to Stiles v. Wallis for the necessary elements to set
7 aside a judgment based on extrinsic fraud or mistake. July 2015 Motion, p. 9. Lynch conclusorily
8 states: “Lynch satisfied all three elements.” Id. at p.12. Lynch acknowledges in her procedural
9 history, however, that in denying her August 2013 Motion “the Court concluded that Lynch failed
10 to demonstrate extrinsic fraud” and that “she did not act diligently after discovering the Complaint
11 in April 2010.” July 2015 Motion, p. 1, lines 21-22. Notably, the Stiles court found that the
12 defendant was not diligent in waiting *20 months* before taking action to set aside the judgment.
13 Stiles v. Wallis, 147 Cal. App. 3d 1143, 1150 (Cal. Ct. App. 2nd 1983). Lynch waited nearly seven
14 years to move to set aside the May 15, 2006 Default Judgment and *40 months* after she admitted
15 she “discovered” the complaint online in April 2010. (RT 1/17/14 at 13:19-26).

16 **D. Lynch’s Argument that Cohen Lacked Standing to Bring Suit or Enter**
17 **Judgment Against Lynch Lacks Merit**

18 1. Cohen’s Complaint Against Lynch Was For Fraud, Breach of Contract and
19 Breaches of Fiduciary Duties for Injuries to Him Individually, Not Derivatively on
20 Behalf of Corporate Entities

21 Lynch’s argument that Cohen did not have standing to bring suit or enter judgment against
22 Lynch in his individual capacity is specious because her argument is based upon her improper
23 recharacterization of Cohen’s claims in the Complaint. July 2015 Motion, pp. 13-14. Lynch cites
24 to no authority by which a judgment debtor in a motion to vacate the renewal of a judgment
25 brought pursuant to CCP §683.170, may wholly *recharacterize* and restate the valid claims of the
underlying complaint to argue that the plaintiff lacked standing to obtain the original judgment.

26 Lynch attempts to assert as grounds for vacating the renewal of judgment that claims
27 properly brought by Cohen in his individual capacity against Lynch in her individual capacity as
28 his personal manager *should have been brought* derivatively on behalf of the corporate entities

1 which were set up by co-defendant Richard Westin solely for Cohen's benefit. The two cases
2 cited by Lynch, Shenberg v. DeGarmo and Sutter v. General Petroleum Corporation do not
3 support her proposition that she may at this procedural juncture challenge the claims of the
4 underlying Complaint and are wholly inapposite and unavailing because the procedural posture of
5 both cited cases involved timely appeals taken from a judgment of dismissal after sustaining the
6 defendants' demurrers to the plaintiff's complaints. July 2015 Motion, pp. 13-14.

7 Lynch mischaracterizes the actual claims of Cohen's Complaint and seeks to *restate* them
8 to suit her nefarious purposes.⁵ The gravamen of Cohen's claims against Lynch was that she
9 breached fiduciary duties owed to Cohen personally by virtue of her employment as his personal
10 manager, not as an officer or director of his corporate entities. In the Complaint, Cohen alleged:
11 "Cohen fired Lynch upon his discovery that she had been siphoning monies from his personal
12 bank and investment accounts substantially in excess of the 15% management compensation to
13 which she was entitled. A preliminary analysis shows that Lynch has wrongfully taken
14 approximately over \$5 million of Cohen's earnings over approximately seven years." Complaint
15 ¶3. Cohen also alleged that in addition to misappropriating funds from the various corporate
16 entities that co-defendant Richard Westin set up for Cohen's benefit, Lynch also wrongfully took
17 funds from Cohen's personal bank accounts at City National Bank and other trust accounts in
18 which Lynch had no ownership interest. Complaint ¶¶13,36,112. Cohen alleged in the Complaint
19 that Lynch had also wrongfully misappropriated funds from Plaintiff Leonard Cohen Investments,
20 LLC, an entity in which she acknowledges she had no ownership interest. Complaint ¶¶87, 98;
21 Motion to Tax Costs, p. 6, lines 21-23; August 2013 Motion, Case History, p. 63.

22 The gravamen of Cohen's complaint against Cohen's former attorney Richard Westin was
23 that Westin had improperly formed the corporate entities that were set up for Cohen's benefit and
24

25 ⁵ In a transparent attempt to recharacterize the claims in the Complaint, Lynch now argues "since the corporate assets
26 were not Leonard Cohen's personal assets, his claim actually *appears to conclude* that Lynch's alleged conduct
27 destroyed or depreciated the value of his stock." July 2015 Motion, p. 13, lines 24-26. (emphasis supplied). As such,
28 Lynch asserts that Cohen's claims against Lynch were derivative claims and should have been "brought derivatively
in the name of the corporation." *Id.* July 2015 Motion, p. 13, lines 15-16. Lynch argues that because Cohen did not
bring his claims derivatively on behalf of the various corporate entities that were set up for Cohen's benefit, including
Traditional Holdings, LLC, which was indisputably set up solely for Cohen's retirement purposes (Complaint ¶49),
Cohen lacked standing to sue Lynch in his individual capacity. July 2015 Motion, p. 13.

1 that he breached his fiduciary duties to Cohen by not monitoring the financial conditions of those
2 entities, failed to maintain the corporate entities in good standing, and that he had improperly
3 given 99.5% ownership and essentially unfettered control over Traditional Holdings, LLC
4 (“THLLC”) to Lynch, the retirement vehicle established solely for Cohen’s, not Lynch’s benefit.
5 Complaint ¶¶18, 51-68, 85-88.

6 The gravamen of Cohen’s claims against Lynch and Westin was that they both breached
7 their fiduciary duties to Cohen by inducing Cohen to sell his Artist Royalties and to set up THLLC
8 for the purposes of an annuity obligation to fund Cohen’s retirement. Through Lynch’s and
9 Westin’s misrepresentations and fraud, and unbeknownst to Cohen who understood that his
10 children were to be the beneficiaries, Lynch obtained 99.5% ownership of that entity and was
11 given control over the corporate assets by Westin, which she proceeded to dissipate until all that
12 remained was \$150,000 to fund Cohen’s retirement. Complaint ¶¶49-68, 84, 88.

13 Thus, Lynch’s argument that Cohen lacked standing to bring suit against Lynch for
14 breaches of her fiduciary duties to him as his personal manager and for wrongful conversion of his
15 assets is wholly without merit. To have standing, “a party must be beneficially interested in the
16 controversy; that is, he or she must have ‘some special interest to be served or some particular
17 right to be preserved or protected over and above the interest held in common with the public at
18 large.” Holmes v. California National Guard, 90 Cal. App. 4th 297, 315 (Cal. Ct. App. 1st 2001).
19 Cohen sued Lynch in his individual capacity alleging personal injuries for fraud, conversion,
20 breach of contract and breaches of fiduciary duties for misappropriating well in excess of the 15%
21 management fee to which she was entitled and obtained a \$7.3 million default judgment, which
22 remains unsatisfied. Lynch’s attempt to recharacterize the claims in the underlying Complaint is
23 an improper collateral attack on a final judgment. Goldman, 160 Cal. App. 4th at 261-262; Molen
24 v. Friedman, 64 Cal. App. 4th 1149, 1156-57 (Cal. Ct. App. 3rd 1998)(collateral attack will not lie
25 for the insufficiency of the complaint.).

26 **2. A Constructive Trust Was the Appropriate Remedy for Lynch’s Wrongful**
27 **Conversion of Cohen’s Assets**

1 On page 14 of her July 2015 Motion, Lynch reprises several arguments previously
2 advanced in her 66-page “Case History” filed as part of her August 2013 Motion. In August 2013
3 Lynch argued “two companies THLLC and Blue Mist Touring, were inserted into the Default
4 Judgment although they were not named as parties” and “the Court did not have jurisdiction over
5 these parties.” Aug. 2013 Motion, p. 4; Case History, p. 71, lines 21-22. In a section of the Case
6 History entitled “The Entities” Lynch argued that “TH was administratively dissolved by the state
7 of Kentucky on November 9, 2004” (p. 25, 27) and that Blue Mist Touring Company, Inc.
8 registered as a foreign entity in California on March 18, 1993 and its status has been forfeited.”
9 Aug. 2013 Motion, Case History, p. 23. Lynch repeats these arguments in her July 2015 Motion.
10 She reasons, however, without citation to authority, that because these entities were not in good
11 standing, and THLLC “was never registered to do business in California and had no contacts with
12 this state” the May 15, 2006 Default Judgment and the July 13, 2015 Renewal of Judgment
13 “should...be modified to specifically exclude them.” July 2015 Motion, p. 14, lines 3-9.

14 Lynch once again demonstrates confusion regarding the constructive trust remedy that the
15 Court properly imposed as an equitable remedy in the May 15, 2006 Default Judgment. Cohen’s
16 complaint alleged claims for conversion and sought the equitable remedies of constructive trust,
17 declaratory and injunctive relief against Lynch. Complaint, Fifth and Sixth Causes of Action.
18 The Complaint alleges: “Lynch had wrongfully converted to her possession Cohen’s money and
19 property from THLLC, Blue Mist and other personal accounts of Cohen” and because of such
20 wrongful conversion “Lynch holds the property of Cohen wrongfully taken and/or transferred as
21 constructive trustee for the benefit of Cohen.” Complaint ¶¶112,115. As a result of Lynch’s
22 wrongful conversion, Cohen “suffered a loss in an amount to be proven at trial, but which will be
23 *in excess* of \$5 million.” Complaint ¶113. (emphasis supplied). Cohen’s Prayer for Relief included
24 a request “for the imposition of a constructive trust over the money, property and legal rights that
25 Lynch contends she rightfully controls.” Complaint, Prayer for Relief, ¶10.

26 A constructive trust is “an involuntary equitable trust created as a remedy to compel the
27 transfer of property from the person wrongfully holding it to the rightful owner.” In Re Real
28 Estate Associates Ltd. Partnership Litig., 223 F. Supp. 2d 1109, 1139 (C.D. Cal. 2002). The

1 imposition of a constructive trust requires: (1) the existence of a res (property or some real interest
2 in property); (2) the right of the complaining party to the res; and (3) some wrongful acquisition or
3 detention of the res by another party who is not entitled to it.” Burlesci v. Petersen, 68 Cal. App.
4 4th 1062, 1069 (Cal. Ct. App. 1st 1998). A constructive trust may be imposed in practically any
5 case where there is a wrongful acquisition or detention of property to which another is entitled.
6 Burlesci, 68 Cal. App. 4th at 1069. “Constructive trusts are creatures of equity; in dealing with
7 them, equity will disregard mere form, and will ascertain and act on the substance of things,
8 regarding that as done which should have been done.” Edwards-Town, Inc. v. Dimin, 9 Cal. App.
9 3d 87, 94 (Cal. Ct. App. 5th 1970).

10 The “res” of the equitable constructive trust imposed by operation of law in the May 15,
11 2006 Default Judgment is the \$5 million in money, the property and the legal rights of Cohen’s
12 that Lynch wrongfully converted. That the corporate entities were not in good standing and that
13 they were not named as parties in the Complaint is wholly irrelevant. A constructive trust was
14 properly imposed as an equitable remedy for Lynch’s conversion. Civil Code §§2223, 2224. In the
15 imposition of the constructive trust, the Court exercised its *equitable* jurisdiction over the
16 wrongfully converted assets. Thus, Lynch’s argument that Cohen should have brought derivative
17 claims and the May 15, 2006 Default Judgment and the July 13, 2015 Renewal of Judgment
18 should be modified to exclude Traditional Holdings, LLC and Blue Mist Touring Company, Inc.
19 because they were not in good standing and not named as parties to the action, has no merit.

20 **VI. CONCLUSION**

21 For all of the foregoing reasons, Plaintiffs pray that the Court deny Lynch’s Motion to Set
22 Aside the July 13, 2015 Renewal of Judgment.

23 **DATED:** September 20, 2015

Respectfully submitted,

24 By: 

25 MICHELLE L. RICE
26 KORY & RICE, LLP

27 **ATTORNEY FOR PLAINTIFFS**

28

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Michelle L. Rice, Esq. (SBN 235189) Kory & Rice, LLP 9300 Wilshire Blvd., Suite 200 Beverly Hills, CA 90212 TELEPHONE NO.: 310-285-1630 FAX NO. (Optional): E-MAIL ADDRESS (Optional): mrice@koryrice.com ATTORNEY FOR (Name): Leonard Norman Cohen; Leonard Cohen Investments LLC	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Los Angeles STREET ADDRESS: 111 N. Hill Street MAILING ADDRESS: CITY AND ZIP CODE: Los Angeles, CA 90012 BRANCH NAME: Central District - Stanley Mosk Courthouse	CASE NUMBER: BC338322
PLAINTIFF/PETITIONER: Leonard Norman Cohen; Leonard Cohen Investments DEFENDANT/RESPONDENT: Kelley Lynch	JUDGE: Hon. Robert L. Hess DEPT.: 24
PROOF OF SERVICE—CIVIL Check method of service (only one): <input type="checkbox"/> By Personal Service <input type="checkbox"/> By Mail <input checked="" type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Messenger Service <input type="checkbox"/> By Fax <input type="checkbox"/> By Electronic Service	

(Do not use this proof of service to show service of a Summons and complaint.)

1. At the time of service I was over 18 years of age and not a party to this action.
2. My residence or business address is:
9300 Wilshire Blvd., Suite 200, Beverly Hills, CA 90212
3. The fax number or electronic service address from which I served the documents is (complete if service was by fax or electronic service):
4. On (date): Sept. 21, 2015 I served the following documents (specify):
PLAINTIFFS' POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE JULY 13, 2015 RENEWAL OF JUDGMENT

The documents are listed in the Attachment to Proof of Service—Civil (Documents Served) (form POS-040(D)).

5. I served the documents on the person or persons below, as follows:
 - a. Name of person served: Kelley Lynch
 - b. (Complete if service was by personal service, mail, overnight delivery, or messenger service.)
Business or residential address where person was served:
1754 N. Van Ness Avenue, Hollywood, CA 90028
 - c. (Complete if service was by fax or electronic service.)
(1) Fax number or electronic service address where person was served:

(2) Time of service:

The names, addresses, and other applicable information about persons served is on the Attachment to Proof of Service—Civil (Persons Served) (form POS-040(P)).

6. The documents were served by the following means (specify):
 - a. **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

CASE NAME: Leonard Norman Cohen; Leonard Cohen Investments v Kelley Lynch	CASE NUMBER: BC338322
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6. b. **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and *(specify one)*:
- (1) deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
 - (2) placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state)*:
- c. **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- d. **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. *(A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)*
- e. **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- f. **By electronic service.** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed in item 5.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: Sept. 21, 2015

Lauren Wilhite

(TYPE OR PRINT NAME OF DECLARANT)

▶ Lauren Wilhite
(SIGNATURE OF DECLARANT)

(If item 6d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

- By personal service.** I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on *(date)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(NAME OF DECLARANT)

▶ _____
(SIGNATURE OF DECLARANT)