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OF PARTICULAR INTEREST:

Florida Supreme Court and federal court agree vessel owner not liable for negligence of shipboard doctor, 305.

Remarkable concurrence of three courts that agreements to arbitrate seamen's injury claims separate from employment contracts are enforceable, 339, 353, 442.

First Cir. agrees "being used" contrary to policy includes lying in berth, 334.

Fourth Cir. denies Himalaya Clause gives stevedore defenses against its employer, 471.

Alaska Supreme Court holds no dram shop law in admiralty and State law applies, 379.

Possessory lien of marinas, wrongful removal of boat as conversion, and right of recaption reviewed by Cal. court, 553.



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Martin L. Kappert, Business Manager
American Maritime Cases, Inc.
Meadow Mill at Woodberry
3600 Clipper Mill Road, Suite 208
Baltimore, MD 21211
Telephone: (410) 243-2426
Fax: (410) 243-2427
E-Mail: amcrpr@mindspring.com
Website: www.americanmaritimecases.com

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Conclusion

For the foregoing reasons, we affirm the district court's judgment that the plaintiffs were discharged in retaliation for correspondence protected under 46 U.S.C. §2114 and its calculation of the plaintiffs' remedies. We also affirm the district court's judgment that Showboat is not contractually obligated to indemnify Riverboat for its losses. We reverse the judgment of the district court as it relates to the finding of liability against Mr. Heitmeier, holding that there is no evidence substantiating his role in terminating the plaintiffs in retaliation for their correspondence with the Coast Guard. Additionally, we hold that the district court erred in finding that Mr. Doncet and Mr. Horton are not entitled to whistleblower protection under §2114 and remand for further proceedings consistent with this opinion.

Affirmed in part and reversed and remanded in part.

LLOYD VICTOR RAMIREZ

v.

MATT BUTLER, *ET AL.*

California, Superior Court, County of Marin, January 9, 2007.

No. CV040728

PRACTICE — 1601. To Complain

Leave to amend a complaint should be liberally granted when defects can be cured but may be denied if it would not state a cause of action, contradict an admission in a prior complaint or stipulation or be barred by a statute of limitations. Where, as here, the allegations to be made are well known and plaintiff has not pled a cause of action and cannot do so as the events complained of were not wrongful, and he cannot amend adequately without contradicting his verified complaint, amendment should be denied.

CONTRACTS — 15. Performance — 161. Non-Performance by Other Party — CONVERSION — Elements to Be Pled — JURISDICTION — 1121. Applicability of Maritime Law, Common Law and State Statutes — 162. Services — 165. Storage — PRACTICE — 15221. Precision of Pleading — WHARVES, TERMINALS AND MARINAS — 191. Berthing and Storage.

Claims for breach of contract for berthing and storage of a vessel and for conversion of property on the vessel are of admiralty contract and tort jurisdiction, respectively, governed by maritime law, and the elements of the conversion claim will be referred to state law as they usually are. The complaint for breach must allege the plaintiff's performance of his obligations and is inadequate here for failure to do so. The complaint for conversion must plead ownership or right to possession, and the making of a demand if the property was not taken tortiously. As to such property, the complaint is defective for failure to plead ownership or right to possession and failure to plead demand or in the alternative a cause of action for trespass or conversion.

CONVERSION — Removal from Lienor's Possession — MARITIME LIENS — 156. Wharfage — 165. Possessory Lien for Storage and Delivery — 28. State Lien Statutes — PRACTICE — 264. Burden of Proof — VESSEL — 113. Property on Board — 114. Tackle, Apparel and Furniture.

The Cal. statutory lien on which defendants rely to support their possession, recaption and sales of vessels for berthing charges applies to vessels but not personal property on them except that for lifesaving, mooring and operation and thus applies to appurtenances as known in maritime law, inextricably linked to vessels and the question of their conversion. The lienor is entitled to retain the property and to sell it with the lien unsatisfied after proper notice of the charges, and is while holding it special owner of it, so that the general owner taking out of its possession is guilty of the crime and tort of conversion and the lienor has the right of recaption. The lienor's possessory acts were thus not wrongs to the plaintiff, to whom the burden shifts to show his right

by evidence of actual payment of the lienor's charges, which he fails to do. Defendants are entitled to summary judgment.

LACHES AND LIMITATIONS — 13. Excuse — PRACTICE — 152. Complaint.

Plaintiff had originally alleged a single date for the lienor's taking and sales of his vessels and now admits there was no sale on that date. Amendment of the complaint to allow allegation of conversion by lienor's sales of vessels in May 2003, rather than on the earlier date alleged, could not relate back to the original filing because it would assert a different event on a different date for which a complaint is now time-barred by the three-year statute of limitations for conversion. The summary judgment will therefore be without leave to amend.

PRACTICE — 1582. Document Production — 1583. Examination of Person — 1584. Procedure, Default — 31. Appeal.

On the contingency of a remand of the case following appeal, the court finds the repeated failures of plaintiff, in connection with his claims of emotional distress caused by defendants, to comply with discovery requests and orders and to appear for psychological examination, insisting without a right to do so that his lawyer also attend, and to pay sanctions awarded, amount to outright refusal in bad faith justifying the sanction of terminating his claims and his emotional distress claims are therefore terminated.

Paul J. Steiner (Law Offices of Paul J. Steiner) for Ramirez

George W. Nowell and John H. Cigavic III (Law Offices of George W. Nowell) for Butler

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MICHAEL P. DUFFICY, J.:

I. Introduction

A. Overview

This case is about self-help and helplessness on the Marin County waterfront arising from a “dispute” relating to storage and services performed for vessels stored at a local marina. The “dispute” began with a fire at defendants’ marina and culminated in this lawsuit.

B. Procedural Posture

Plaintiff Lloyd Victor Ramirez (“plaintiff”) brought this lawsuit in pro per in this Court on 18 February 2004 and also in the United States District Court for the Northern District of California on 12 February 2004. Appx. at No. 5¹. Plaintiff’s Original Verified Complaint alleges a “dispute”

1. All factual references are to the Appendix to this Statement of Decision and Order in the format “Appx. at No. ____”. [Appendix and references are hereafter omitted. Eds.]

against defendants Matt Butler and San Rafael Yacht Harbor (hereinafter “defendants”)², Pat Lopez, Loch Lomond Marina and Does 1-50. Plaintiff demands against defendants, *inter alia*, title to certain vessels in rem, wrongful taking, trespass and conversion, allegedly arising from the events of 18 February 2003 and for the alleged conversion, loss or destruction of plaintiff’s personal property by defendants or others that was allegedly aboard the vessels. Plaintiff also seeks damages for emotional distress and punitive damages. Plaintiff made various other allegations in proposed (but unfiled) amended complaints including: negligent accounting, breach of bailment contract, breach of contract, harm resulting from an alleged lack of access to showers and bathroom facilities after a fire at defendants’ marina, damage to paint on plaintiff’s vessels allegedly caused by defendants’ delays, and a “cause of action” for “emotional distress”. Pat Lopez and Loch Lomond Marina have settled with the plaintiff.

Plaintiff has never amended the Original Verified Complaint notwithstanding defendants stipulated to a proposed amendment and plaintiff’s promises to amend dating to 2004 made through his counsel (who unexpectedly made a special appearance in the federal action discussed below and who has represented plaintiff since that time). Plaintiff’s counsel in 2004 through the present was and is Paul J. Steiner, Esq. (hereinafter “Mr. Steiner”). Plaintiff was also represented before the Social Security Administration by Ian M. Sammis, Esq. (hereinafter “Mr. Sammis”) at relevant times.

The second trial setting of this action was set for 8 November 2006. This Court issued a “Decision re Submitted Motions” on 10 October 2006 stating: “The Court has reviewed the entire record in this case. Having done so the Court reaches the conclusion that Plaintiff’s causes of action for damages arising from the loss of his vessels as well as his claim for damages for emotional distress, are all fatally flawed. In addition Plaintiff has repeatedly failed to comply with the requirements of pre-trial discovery. To allow this matter to proceed further would be to ignore Plaintiff’s refusal to comply with discovery and the defects in the legal support, if any, for his theories of recovery, and would be an unreasonable use of both the Court and a jury’s time. There is no longer any reasonable dispute as to the underlying facts”. The Court now memorializes the “Decision” in this Statement of Decision and Order.

2. San Rafael Yacht Harbor is a ‘doing business as’ name for Mr. Matt Butler. San Rafael Yacht Harbor is referred to throughout this Statement of Decision as “SRYH” where separately referred to.

II. Issues Presented

A. *The Issues Presented for Decision In this Statement of Decision and Order*

The issues presented for decision in this Statement of Decision and Order are (1) a determination of this Court's jurisdiction over the parties, the claims presented and the requested relief asserted in plaintiff's Original Verified Complaint, (2) whether plaintiff has pled the elements of contracts and properly alleged a cause of action for breach of those contracts, (3) whether plaintiff has stated the elements of a cause of action for trespass upon or conversion of personal property, (4) whether "boat tackle, spare parts and gear, accessories and equipment" are vessel appurtenances, (5) whether the events occurring "on or about February 18, 2003" are actionable, i.e. whether those events amount to trespass or conversion as alleged in the complaint, (6) whether plaintiff can amend his complaint to cure any of the defects identified in this Statement of Decision and (7) whether plaintiff's conduct during discovery is sanctionable and whether this Court should exercise its discretion to award terminating, issue, evidentiary and monetary sanctions against the plaintiff.

B. *Defendants' Motions and the Relief Sought*

1. *The Pending Motions*

This decision addresses six motions brought by defendants, they are (a) "Defendants' Motion for Summary Adjudication" (hereinafter "Summary Motion"); (b) "Motion for Judgment on the Pleadings (1) This Court is Without Jurisdiction to Award Title to the Vessels In Rem and (2) Plaintiff Has Not Stated a Cause of Action for Breach of Contract Under Applicable Law" (hereinafter "MOP#1"), (c) "Motion for Judgment on the Pleadings That Plaintiff Has Failed to State a Cause of Action for Conversion of Personal Property" (hereinafter "MOP#2"), (d) "Motion to Compel Compliance with Plaintiff's Statement of Compliance and for Sanctions Against Plaintiff and Plaintiff's Counsel" (hereinafter "Compel Motion"), (e) "Motion to Compel Further Responses to Matt Butler's Fourth Set of Requests for the Production of Documents and Things and For Sanctions Against Plaintiff and Plaintiff's Counsel" (hereinafter "Production Motion") and (f) "Motion for Terminating, Issue, Evidentiary and Monetary Sanctions for Plaintiff's Misuses of the Discovery Process Relating to His Claims for Alleged Emotional Distress" (hereinafter "Terminal Motion").

2. *The Requested Relief*

In the Summary Motion defendants seek an order limited to plaintiff's allegations regarding trespass upon and conversion of the vessels stating that (1) defendants did not trespass upon, wrongfully take, or convert plaintiff's vessels, (2) plaintiff is not entitled to damages for emotional distress for the alleged conversion of plaintiff's vessels; (3) plaintiff is not entitled to punitive damages for the alleged conversion of plaintiff's vessels; and (4) plaintiff is not permitted to amend his complaint as to the claims and causes of action adjudicated herein.

In MOP#1 defendants seek an order stating that (1) exclusive admiralty jurisdiction applies to plaintiff's claims for title to the vessels so that this Court is without jurisdiction to adjudicate the title to the Vessels *in rem*; (2) plaintiff has alleged maritime contracts subject to admiralty jurisdiction; and (3) plaintiff has not stated a cause of action for breach of contract under applicable law because (a) he has not alleged he performed his obligations under the agreement (or was excused from performing his obligations) and (b) he has not alleged defendants breached the agreement.

In MOP#2 defendants seek an order stating that (1) "boat tackle, spare parts and gear, accessories and equipment" are vessel appurtenances that are part of the vessels named in the complaint (i.e. the res) for purposes of determining rights and interests in the vessels and the scope of liens on vessels and are not separate personal property; and (2) plaintiff has not stated a cause of action for conversion of the remaining personal property because he has alleged neither (a) ownership of the non-vessel appurtenant property nor (b) the right to possess the non-vessel appurtenant property nor (c) the right to immediately possess the non-vessel appurtenant property nor (d) a demand for the property as required by Cal Harb & Nav §509.

In the Production Motion defendants seek an order stating that (1) plaintiff shall give further responses to Matt Butler's Fourth Set of Requests for the Production of Documents and Things Requests Nos. 72, 73, 83, 84, and 85 within 10 days of this Court's Order and produce the materials sought therein; and (2) plaintiff and plaintiff's counsel shall pay monetary sanctions to defendants in the amount of \$3000 within 10 days of this Court's Order.

In the Compel Motion defendants seek an order stating that plaintiff pay monetary sanctions (1) to Dr. Rappaport in the amount of \$2000 as the reasonable value of defendants' expert's time for plaintiff's missed Independent Mental Examination and (2) to defendants in the amount of \$4500 to compensate defendants for the necessity of bringing this motion. Defendants

also requested an order (1) requiring plaintiff to immediately (a) execute a "release" for his Social Security Administration records and (b) direct his attorney Ian M. Sammis, Esq. to comply with defendants' Deposition Subpoena for the Production of Business Records; and (2) finding plaintiff's response to Defendants' Request for Production No. 49 is a statement of compliance and therefore subject to this Court's 11 May 2006 Order; and (3) requiring plaintiff to comply with his statement of compliance to Defendants' Request for Production Request No. 64; and (4) requiring plaintiff to appear at defendants' expert's office for an Independent Mental Examination at a time convenient for defendants' expert.

In the Terminal Motion defendants seek an order stating that (1) plaintiff has not complied with his discovery obligations with regard to his claims for damages for "emotional distress" by, *inter alia*, (a) not attending the Court Ordered Independent Mental Examination scheduled for 7 March 2006 and not making any efforts to attend such an examination (i) since 7 March 2006 and (ii) since defendants filed the Compel Motion on 15 August 2006, and (b) not tendering to defendants (i) his Social Security Administration Records or (ii) a release for his Social Security Administration Records in response to Matt Butler's Requests for Production Nos. 49 and 64 or (iii) making any efforts to produce or release his Social Security Administration Records since defendants filed the Compel Motion on 15 August 2006 and (iv) not responding to Special Interrogatories regarding his claims for emotional distress; (2) plaintiff has misused the discovery process by not complying with his discovery obligations with regard to his claims for damages for "emotional distress" as outlined in (1); (3) defendants are entitled to an "issue sanction" for plaintiff's misuses of the discovery process by not complying with his discovery obligations with regard to his claims for damages for "emotional distress" as outlined in (1) and plaintiff is barred from raising and supporting the allegation of "emotional distress"; (4) defendants are entitled to an "evidentiary sanction" for plaintiff's misuses of the discovery process by not complying with his discovery obligations with regard to his claims for damages for "emotional distress" as outlined in (1) and plaintiff is barred from introducing evidence on the issue of plaintiff's alleged "emotional distress"; and (5) defendants are entitled to a "terminating sanction" for plaintiff's misuses of the discovery process by not complying with his discovery obligations with regard to his claims for damages for "emotional distress" as outlined in (1) and the allegations in plaintiff's complaint alleging "emotional distress" are stricken from the complaint without leave to amend.

C. Right to Amend & Prohibitions Against Amendment

1. Defendants Request Summary Adjudication Without Leave to Amend

Defendants' Summary Motion requests that plaintiff not be permitted to amend his complaint to cure the defects the Court identifies in plaintiff's allegations. The Court will analyze whether plaintiff should be permitted to amend his complaint in view of plaintiff's allegations, admitted and known facts and the law summarized in this Statement of Decision and Order.

2. Standards Applicable to Permitting Amendment to a Complaint

Requests for leave to amend are directed to the sound discretion of the Court and should be granted, after notice to the opposing party, on terms that are "just". See Cal. Code of Civ. Proc. §473 (a) (1).

Leave to amend is not proper, however (1) when the amendment would not state a cause of action, (2) when the amendment would contradict an admission(s) in a prior complaint, or (3) when the amendment would contradict a stipulation. *E.g. Congleton v. National Union Fire Ins. Co.*, 189 Cal. App. 3d 51, 62 (1987); see also *Continental Ins. Co. v. Lexington Ins. Co.*, 55 Cal. App. 4th 637, 646 (1997).

Amendment should be permitted whenever the defect(s) can be cured, but if all allegations are known and do not state a cognizable claim then summary judgment can be granted without leave to amend. See *Tarasoff v. Regents of University of Cal.*, 17 Cal. 3d 425, 432 at fn. 3 (1976); *Hansra v. Superior Court*, 7 Cal. App. 4th 630, 647-648 (1992).

D. Summary of Decision

For the reasons outlined in detail in this Statement of Decision and Order, this Court finds and holds (1) this Court has jurisdiction over the parties and claims asserted in this lawsuit in personam but not in rem, (2) plaintiff has alleged the elements of a maritime contract but has not pled a cause of action for breach of contract, (3) plaintiff has not properly alleged the elements necessary to state a cause of action for trespass upon or conversion of the non-vessel appurtenant personal property in the Original Verified Complaint at ¶12, (4) "boat tackle, spare parts and gear, accessories and equipment" are vessel appurtenances that follow the vessel (i.e. the res) for purposes of analyzing plaintiff's allegations of trespass and conversion, (5) the events of 18 February 2003 are not wrongful and

therefore are not trespass or conversion, (6) plaintiff cannot amend his complaint to cure the above deficiencies because all the material, significant facts are known and admitted by plaintiff and he (a) cannot amend his complaint to state a cause of action and/or (b) any amendment would require plaintiff to contradict his Original Verified Complaint and/or factual admissions so that permitting amendment would be unjust and/or (c) any amendment would potentially be barred by the applicable statute of limitations, and (7) plaintiff has repeatedly misused the discovery process throughout this litigation so that the only just sanctions that can be awarded at this time are terminating, issue, and evidentiary sanctions for plaintiff's claims of "emotional distress"; monetary sanctions will also be awarded to defendants to compensate them for some of the unnecessary costs and fees plaintiff's course of conduct during discovery forced defendants to incur.

III. Statement of Facts

A. Facts Relevant to Plaintiff's Demand for Title to the Vessels In Rem

At all relevant times plaintiff claimed to be the "true and lawful owner of two vessels which are the subject of this action, a 1966 Wayfarer 26' Sailboat, Hull # CF4819 YB and the 1975 Hunter 30' Sailboat, Hull # CP 0938 . . . and their tackle, apparel, equipment, accessories, furniture and personalty" (hereinafter "*Hunter*" and "*Wayfarer*" individually or "vessels" collectively). Plaintiff's "Complaint In Rem to Establish Title to and Right of Possession of Vessel . . ." claims a cause of action for "Title to and Right of Possession of Vessels" in rem. Plaintiff further alleges "nor anyone except Plaintiff has any legal title to said Vessels". Plaintiff demands judgment that he "be declared the true and only lawful owner of said Vessels".

B. Facts Relevant to Understanding the Events of 18 February 2003 Alleged in ¶s 7 and 11

The facts relating to defendants' Summary Motion and MOP#1 and MOP#2 are compiled from plaintiff's allegations in the Original Verified Complaint and from his admissions and representations in papers filed with the Court. Plaintiff has made certain errors in his own story, however, and these errors will be pointed out in the text. The Court finds that these errors are not material and do not affect the conclusions of this decision. Moreover these errors are contradictions in plaintiff's own admissions and he will not benefit from the ambiguity he himself created in the evidence by

destroying his own credibility. See *Rivera v. Southern Pacific Transportation Co.*, 217 Cal. App. 3d 294, 299-300 (1990); *Hoover Community Hotel Development Corp. v. Thomson*, 167 Cal.App.3d 1130, 1141-1142 (1985).

Thus, for purposes of defendants' motions (including the Summary Motion) the Court will look to the Original Verified Complaint for the causes of action alleged. The facts outlined below present the statement of events according to the plaintiff (except as noted in the text).

1. Plaintiff's Allegations of Conversion, Trespass & Sale of the Vessels on 18 February 2003

a. The Relevant Allegations in Plaintiff's Original Verified Complaint

Plaintiff's Original Verified Complaint at ¶7 alleges:

For an undetermined time prior to on or about February 10, 2003, Plaintiff LLOYD VICTOR RAMIREZ was a tenant for a fee at the SAN RAFAEL YACHT HARBOR. A dispute arose between Plaintiff and Defendant MATT BUTLER AND SAN RAFAEL YACHT HARBOR concerning fees and charges for berthing and other services. Said dispute involved approximately \$2,000.00. On or about February 10, 2003, Plaintiff moved his Vessels to LOCH LOMOND MARINA and became a tenant at said marina, for a fee, and was at the relevant times thereafter a tenant at said marina, berthing both Vessels here involved.

Plaintiff's Original Verified Complaint at ¶11 alleges:

Plaintiff believes and based thereon alleges that on or about February 18, 2003, Defendant MATT BUTLER and SAN RAFAEL YACHT HARBOR and certain other persons unknown to Plaintiff, improperly, unlawfully, and without the knowledge and consent and contrary to the desire and instructions of the owner of said Vessels, converted said Vessels, trespassed thereon, and sold, disposed or converted them to their own use, notwithstanding that Plaintiff, the true and lawful owner of said Vessels did not sell the Vessels or part with title thereto, and Plaintiff alleges that neither Defendant MATT BUTLER, SAN RAFAEL YACHT HARBOR, nor anyone except Plaintiff has any legal title to said Vessels, or any right to possession thereof.

b. The Facts As Determined by Plaintiff's Admissions

Plaintiff admits the "dispute" arose after defendants failed to repair or make available showers and bathrooms after a fire at SRYH destroyed the

facilities in September of 2002, or to make reasonable accommodations to replace those facilities.

Plaintiff admits that the Original Verified Complaint does not state a cause of action for breach of contract.

Plaintiff admits that in 2002 he bought the *Wayfarer* from defendants and berthed her at defendants' marina at all relevant times.

Plaintiff admits the *Wayfarer* remained at her berth at defendants' marina at all relevant times except during the period she was hauled-out and stored on land at defendants' marina³.

Plaintiff admits that between November and December of 2002 he brought the vessels to defendants for services including "haul-out" and "dry-storage".

Plaintiff admits that defendants provided "berthing and services" to plaintiff's vessels (i.e. stated to be berthing for the *Wayfarer* and dry storage for the *Hunter*⁴) at relevant times.

Plaintiff admits that in late January 2003 defendants returned the vessels to the water after receiving from plaintiff two checks totaling \$1225 (hereinafter "checks") (one check was in the amount of \$825 and was for "dry-storage" for both vessels as noted on the check and the other check was in the amount of \$400 and was for "berthing").

Plaintiff admits that the checks were returned to defendants unpaid because the account on which they were drawn had been "closed".

Plaintiff admits *he closed* the bank account the checks were drawn on before they were cashed by defendants.

Plaintiff admits he formed the intention of removing the *Hunter* vessel from SRYH before defendants placed the *Hunter* vessel back in the water.

3. This is one instance where plaintiff's story is inaccurate: plaintiff pled all allegations with reference to the "Vessels" collectively but later asserted that it was only the *Hunter* vessel that was removed from defendants' marina by the plaintiff and that the *Wayfarer* at all times remained at her berth at SRYH. The facts, for purposes of this motion, are as set forth in plaintiff's Original Verified Complaint where the allegations consistently refer to the "Vessels" and the Court will look to plaintiff's verified pleading on this point. As noted in the text, however, whether one or both vessels were removed from SRYH by plaintiff will not affect the Court's analysis of plaintiff's allegations (*see infra* at Section VII, C. 2).

4. This is another instance where plaintiff's admissions are self-contradictory insofar as plaintiff attempts to assert that only berthing was provided for the *Wayfarer* but not the *Hunter*, while only dry storage was provided for the *Hunter* but not for the *Wayfarer*. The Court finds that defendants provided berthing and dry-storage for both vessels because the Original Verified Complaint refers to a "dispute" re "berthing and services" for both vessels.

Plaintiff admits that on or about 10 February 2003 he moved the vessels out of defendants' marina and took the vessels to Loch Lomond Marina, grounding them en route and requiring a tow.

On or about 18 February 2003, defendants learned plaintiff moved the vessels to Loch Lomond Marina and towed them back to SRYH.

Plaintiff admits he cannot come forth with evidence showing that he paid the sums reflected in the checks to defendants.

2. Facts Relating to Sale on or after 23 May 2003

Plaintiff defended the Summary Motion by contending that defendants sold plaintiff's vessels without "authorization" from the California Department of Motor Vehicles (hereinafter "DMV"). After the Court's first "Decision" was issued denying defendants' Summary Motion on the ground that an unlawful sale as alleged in the complaint (i.e. on or about 18 February 2003) could constitute conversion, plaintiff stated (through Mr. Steiner) orally, and in writing to defendants' counsel on 5 June 2006: "... we have never suggested that your client [defendants] sold the vessel(s) on or about February 18, 2003, have never alleged such a fact, nor made it a part of our complaint. It is, therefore, a moot issue".

Defendants demonstrated, however, (1) that they obtained an Order from the Small Claims Court of Marin County on 8 April 2003 permitting defendants to sell plaintiff's vessels, and (2) were "authorized" to sell plaintiff's vessels by the DMV in a document dated 18 April 2003.

C. Facts Relevant to Analyzing Plaintiff's Pleadings Alleging Conversion of Personal Property in ¶12 of the Original Verified Complaint

Plaintiff's Original Verified Complaint at ¶12 alleges:

Plaintiff further alleges that Defendants MATT BUTLER AND SAN RAFAEL YACHT HARBOR, and certain other persons unknown to Plaintiff, improperly, unlawfully, and without the knowledge and consent of the Plaintiff, converted, sold or otherwise disposed of the personal property of the Plaintiff, including boat tackle, spare parts and gear, accessories and equipment, and other personal belongings, including, but not limited to clothing, and visual equipment, and numerous other items.

IV. Jurisdiction

A. Introduction - Jurisdiction & Applicable Law

We begin with an analysis of this Court's jurisdiction and the bodies of law that will govern resolution of this dispute. The fact that plaintiff's claims involve vessels, water, and marinas raises the potential that admiralty law will, at least in some way, apply to this case. However, before admiralty law will apply there must be admiralty jurisdiction, and in the absence of admiralty jurisdiction California state law will apply. *See Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 1954 AMC 1, 7 (1953).

However, where there is admiralty jurisdiction then the federal admiralty law, which is comprised of statutes, the general maritime law and the common law, will apply. *See East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864-865, 1986 AMC 2027, 2032 & fn. 2 (1986) ("With admiralty jurisdiction comes the application of substantive admiralty law. . . . Absent a relevant statute, the general maritime law, as developed by the judiciary, applies. . . . Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules. . . .").

When a matter subject to admiralty jurisdiction is pending before a State Court, the State Court *shall* apply the admiralty law to those aspects of the case that are subject to such jurisdiction. *See Fahey v. Gledhill*, 33 Cal. 3d 884, 887 (1983) ("The basis of admiralty jurisdiction of the federal courts is article III, section 2 of the United States Constitution, and under the supremacy clause of article VI, the admiralty rules are applicable in state court litigation"). Also, a State Court cannot deprive a person of any substantive rights enjoyed under the admiralty law. *See Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-410, 1954 AMC 1, 7 (1953) (" . . . a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. . . .").

For example, plaintiff has alleged a "dispute" involving "berthing and services" and "haul-out" and "dry-storage" for plaintiff's "vessels". These allegations aver maritime contracts since berthing agreements, slip agreements and contracts for dry-storage of pleasure vessels are admiralty contracts (*see infra* at V. B.). Thus, *Fahey* requires that the Court apply admiralty law to the contract aspects of plaintiff's complaint. The Court recognizes that *Pope* dictates that the parties cannot be deprived of their rights under admiralty law.

B. This Court Has Jurisdiction Over These Claims Either Directly, Concurrently with the Federal Courts, or Both

With regard to jurisdiction specifically, those maritime claims that are in personam, rather than in rem, may be adjudicated in state courts pursuant to the "saving to suitors" clause in 28 U.S.C. §1333 (1), which provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled*" (emphasis supplied)). This clause "leave[s] state courts 'competent' to adjudicate maritime causes of action in proceedings 'in personam,' that is, where the defendant is a person, not a ship or some other instrument of navigation." *See Madruga v. Superior Court*, 346 U.S. 556, 560-561, 1954 AMC 405, 409 (1954); *see also Madruga v. Superior Court of San Diego County*, 1953 AMC 1059, 40 Cal. 2d 65 (1952).

The State court is limited, however, to the extent that Federal courts have exclusive jurisdiction over claims for title to vessels in rem (*see infra* at IV. D.). Notwithstanding this limitation, State courts have *concurrent jurisdiction* with the Federal courts to adjudicate admiralty related claims, including state-law-based possessory lien claims. *See Sun Harbor Marina, Inc. v. Sellick*, 1967 AMC 2783, 2785, 250 Cal. App. 2d 281, 285 (1967). Hence, the plaintiff and defendants in this case are subject to the jurisdiction of this Court, in personam, exercised directly on matters of California State law and concurrently with the Federal bench on matters of admiralty law.

C. The Federal Decision Will Not Affect the Court's Analysis of Jurisdiction or Applicable Law

The determination of applicable law is complicated somewhat by a Federal court ruling arising from some of the facts in this action (*see Ramirez v. Butler*, 2004 AMC 2203, 319 F. Supp.2d 1034 (N.D. Cal. 2004)) determining, in the context of a FRCivP 12 (b) (1) motion to dismiss, that there is no admiralty jurisdiction over the tort allegations of conversion in plaintiff's complaint. *Id.* This decision will have little or no impact on the applicable law analysis because the admiralty law of conversion looks to the state law where the action is pending for the guiding principles (*see Tyrone Pacific International, Inc. v. M/V Eurychili*, 658 F.2d 664, 666 (9 Cir. 1981)) so that the law applicable to plaintiff's conversion claims will be California State Law whether there is admiralty jurisdiction over plaintiff's conversion claims or not.

D. Analysis of Plaintiff's Claims for Title In Rem

A federal court sitting in admiralty has exclusive jurisdiction over actions prosecuted in rem and a State court cannot entertain such an action. *See Madrugá v. Superior Court*, 346 U.S. 556, 560, 1954 AMC 405, 409 (1954); *United States of Mexico v. Rask*, 1932 AMC 69, 118 Cal. App. 21, 43 (1931) (“A state may not provide a remedy in rem for any cause of action within the admiralty jurisdiction. . .”).

In view of the discussion above, this Court finds that it has jurisdiction over all aspects of plaintiff's complaint in personam but does not have jurisdiction to the extent the complaint seeks an adjudication of rights in the vessels *in rem*. Since in rem actions must be brought exclusively in a federal venue plaintiff cannot obtain relief in rem in this State Court. Therefore, defendants' MOP#1 requesting this Court so order is granted and the portions of the complaint identified in Appx. at Nos. 17-20 (*see supra* at Section III. A.) are stricken from the Original Verified Complaint without leave to amend since plaintiff cannot cure this defect.

V. Analysis of Plaintiff's Claims Sounding in Contract

A. Bases For Deciding Motions for Judgment on the Pleadings

1. Common Law Basis Deciding for Motions for Judgment on the Pleadings

A motion for judgment on the pleadings is long recognized at the common law and can be brought at any time, up to and including during the trial. *See Stoops v. Abbassi*, 100 Cal. App. 4th 644, 650 (2002) (“A motion for judgment on the pleadings may be made at any time either prior to the trial or at the trial itself. . .” (citations omitted)); *see also* Weil & Brown, Cal. Prac. Guide, Civ. Proc. Bef. Trial, §§7:277, 7:285-286 (and cases cited).

Objections that the Court has no jurisdiction over subject matter and/or that the pleadings fail to state a cause of action may be raised at any time and are not waived. *See* Cal Code Civ Proc §430.80 (a).

2. Statutory Basis for Deciding Motions for Judgment on the Pleadings

Any party may move for judgment on the pleadings. *See* Cal Code Civ Proc §438 (b) (1). If the moving party is a defendant then a motion for judgment on the pleadings may be brought on the grounds (1) the court has no jurisdiction of the subject of the cause of action in the complaint

or (2) the complaint does not state a cause of action against the defendants. *See* Cal Code Civ Proc §438 (c) (1) (B) (i) and (ii).

A motion under Cal Code Civ Proc §438 may be made as to either the complaint as a whole or to any of the causes of action stated therein. *Id.* at (c) (2) (A) (“The motion provided for in this section may be made as to either of the following: The entire complaint or cross-complaint or as to any of the causes of action stated therein”).

B. Berthing Contracts, Slip Agreements & Dry-Storage Contracts for Vessels Are Admiralty Contracts Subject to Admiralty Jurisdiction

Admiralty jurisdiction extends to contracts for wharfage/berthing. *See Ex Parte Easton*, 95 U.S. 68, 77 (1877). Marina slip agreements are maritime contracts conferring admiralty jurisdiction. *See Sander v. Yacht Club of St. Louis*, 2003 AMC 1817, 1820, 334 F.3d 712, 715 (8 Cir. 2003). Additionally, admiralty jurisdiction extends to contracts for temporary dry-storage of pleasure vessels. *See American Eastern Development Corp. v. Everglades Marina, Inc.*, 1980 AMC 2011, 2013-14, 608 F.2d 123, 124-125 (5 Cir. 1979); *see also* *Fahey v. Gledhill*, 33 Cal. 3d 884, 890 (1983) (“The United States Supreme Court having refused to exempt pleasure boats from the traditional admiralty law regulating torts where predictability is of less importance, there is not much reason to believe that it would exempt them from the traditional admiralty regulation of maritime contracts, particularly contracts relating to tort liabilities”).

C. Breach of Maritime Contract Pleading Requirements

1. Pleading Performance of Plaintiff's Obligations

A plaintiff claiming a breach of maritime contract must allege performance of their obligations under the contract (or facts excusing their performance) to maintain the action. *See Hasler v. West India S.S. Co.*, 212 F. 862, 866 (2 Cir. 1914) (“A plaintiff in an action upon a contract cannot succeed ordinarily, if he has himself failed to perform at the proper time. . .”).

2. Pleading Defendants' Breach

If the plaintiff does not establish a defendant breached the maritime contract then the plaintiff cannot recover damages for breach of that contract. *See Hasler v. West India S. S. Co.*, 212 F. 862, 867 (2 Cir. 1914)

(“As there was no actual breach of the contract on the part of the respondent, there can be no recovery of damages in this suit. . . .”).

D. Analysis

Defendants’ motion requesting this Court Order plaintiff has failed to state a cause of action for breach of contract is granted. Plaintiff has pled the existence of maritime contracts so that admiralty law applies to the contract aspects of plaintiff’s complaint. Since admiralty law requires plaintiff plead (1) performance of his obligations pursuant to the contract and (2) defendants’ breach of the contract, then plaintiff’s failure to so plead means plaintiff has not stated a cause of action for breach of contract under applicable law. Plaintiff admits that the Original Verified Complaint does not state a cause of action for breach of contract.

Moreover, since no person can be deprived of rights under applicable admiralty law in a state court action and this Court finds that plaintiff has pled the existence of maritime contracts, the parties are entitled to all maritime rights and obligations pursuant to these contracts.

VI. Analysis of Plaintiff’s Claims of Conversion of Personal Property

A. Bases For Motion on the Pleadings

The standards governing Motions for Judgment on the Pleadings are outlined *supra* at V. A. and apply to the analysis contained in this section.

B. Required Allegations to State a Cause of Action for Conversion of Personal Property

1. Plaintiff’s Pleading for Conversion of the Non-vessel Appurtenant Personal Property is Fatally Flawed

a. Overview: The Definition of Conversion

Conversion is the wrongful exercise of dominion over the property of another in a manner inconsistent with the rights of the claimant. *See Itano v. Colonial Yacht Anchorage*, 267 Cal. App. 2d 84, 89 (1968) (“Conversion is defined as ‘any act of dominion wrongfully exerted over another’s personal property in denial of or inconsistent with his rights therein’ . . .”).

b. Standards for Conversion

As noted, *supra* at IV. C, the general maritime law of conversion looks to the state law where the action is pending for the guiding principles of law. *See Tyrone Pacific International, Inc. v. MV Eurychili*, 658 F.2d 664, 666 (9 Cir. 1981) (“The elements of the tort of conversion are well settled in California: (1) plaintiffs’ ownership or right to possession of the property at the time of the conversion; (2) defendants’ conversion by a wrongful act or disposition of plaintiffs’ property rights; and (3) damages. . . . ‘Conversion’ has been defined as ‘any act of dominion wrongfully exerted over another’s personal property in denial of or inconsistent with his rights therein’ ” (citation omitted)); *see also Messerall v. Fulwider*, 199 Cal. App. 3d 1324, 1329 (1988) (citing *Baldwin v. Marina City Properties, Inc.*, 79 Cal. App. 3d 393, 410 (1978)); 5 Witkin, *California Procedure*, (4th Ed. 1997) §§661-662.

A party failing to plead ownership or right to possession of chattels fails to state a cause of action for conversion. *See Baldwin v. Marina City Properties, Inc.*, 79 Cal. App. 3d 393, 410 (1978).

c. Ownership & Right to Possession

A claimant’s right to immediate possession of property allegedly trespassed upon or converted is a separate necessary prerequisite to a conversion action. *See Yukon River S.B. Co. v. Gratto*, 136 Cal. 538, 542 (1902) (“The plaintiff in trover must have possession or right to the immediate possession. . . . ‘It is well settled that a person having neither the possession nor the right to possession of personal chattels cannot maintain trespass or trover for an injury done to the property’ ” (citing *Triscony v. Orr*, 49 Cal. 612, 617 (1875) (emphasis supplied)); *see also Commercial & Sav. Bank v. Foster*, 210 Cal. 76, 79-80 (1930) (in replevin action: “To sustain [conversion] the plaintiff must have the right to the immediate and exclusive possession of the property at the commencement of the action . . . All that need be pled is the ultimate fact of the right to possession”).

d. A Demand for the Property Is Required Pursuant to Cal Harb & Nav §509

Cal Harb & Nav Code §509 provides in pertinent part: “Personal property not subject to lien shall be given to the registered owner or the owner’s authorized agent *upon demand*” (emphasis supplied).

The only conversion cases where pleading a “demand” is *not necessary* is where the property allegedly converted was wrongfully taken in the first instance by a tort. *See Igauye v. Howard*, 114 Cal. App. 2d 122, 127 (1952) (“A demand for return of the property is not a condition precedent to institution of the action *when possession was originally acquired by a tort as it was in this case*”). Thus, if the Court finds that defendants’ possession of the vessels and personal property was *not acquired by a tort*, then a *demand* for the allegedly converted personal property is *necessary* (see *infra* at Section VII).

2. Analysis

a. Plaintiff Has Failed to Plead “Ownership” or the “Right to Possession” and Therefore Has Not Stated a Cause of Action for Trespass and Conversion of Non-Vessel Appurtenant Personal Property

The Original Verified Complaint at ¶12 (quoted in full *supra*) only avers “the personal property of plaintiff” and does not allege plaintiff “owned” or had the “right to possess” the non-vessel appurtenant property identified in ¶12 (see *supra* at this section sub 1.b.). Moreover, ¶12 nowhere contains the language appearing in ¶11 stating “and Plaintiff alleges that neither Defendant . . . nor anyone except Plaintiff has any legal title to said Vessels, or any right to possession thereof” (see *supra* at III, B. 1. and C. 1.). Thus, plaintiff knows how to plead “ownership” and “right to possession” but has not done so in ¶12.

Therefore, the Court finds that the allegations in ¶12 are not sufficient to state a cause of action for conversion of personal property because plaintiff has not pled (1) “ownership” or (2) the “right to possession” of the non-vessel appurtenant personal property such that plaintiff has failed to plead a cause of action for trespass upon and conversion of the non-vessel appurtenant personal property on these grounds.

b. Plaintiff Has Failed to Plead a “Demand” for the Property and Therefore Has Not Stated a Cause of Action for Trespass and Conversion of Non-Vessel Appurtenant Personal Property

Plaintiff’s Original Verified Complaint at ¶12 does not allege that plaintiff demanded defendants return the non-vessel appurtenant personal property allegedly aboard the vessels as required by Cal Harb & Nav §509

(second sentence, *supra* this section). Therefore, plaintiff has not alleged the ultimate facts necessary to sustain a finding that plaintiff had the right to immediately possess the non-vessel appurtenant personal property and plaintiff has failed to state a cause of action for trespass upon or conversion of the non-vessel appurtenant personal property on this ground as well (compare Section VI, B. 1. d. and *infra* at Section VII).

For all these reasons defendants’ MOP#2 requesting this Court Order plaintiff has not stated a cause of action for conversion of the non-vessel appurtenant personal property is granted.

C. “Boat Tackle, Spare Parts and Gear, Accessories and Equipment” Are Vessel Appurtenances That Follow the Vessels for Purposes of Maritime Liens

1. Applicable Statute—Cal Harb & Nav §509

Cal Harb & Nav Code §509 provides in relevant part “No lien shall attach to any personal property in or on the vessel except that which is carried on the vessel for lifesaving, safety, mooring, and operating purposes”.

Cal Harb & Nav Code §509 is unannotated and there is no known caselaw in California giving meaning to this provision. Since this question involves vessels and the scope of liens on vessels, a matter of maritime concern (see *infra* at sub 2, this section), the Court will look to the general admiralty law for guidance on the meaning of this provision.

2. Definition of Appurtenances

Property aboard a vessel that is essential to her navigation or particular voyage is an appurtenance of the vessel. *See Stewart & Stevenson Servs. v. M/V Chris Way MacMillan*, 890 F. Supp. 552, 561, 1995 AMC 2995 [DRO] (N.D. Miss. 1995) (“... components of a vessel, even though readily removable, which are essential either for her general navigation or for the specific voyage upon which she is embarked become a part of the vessel itself and thus constitute appurtenances or apparel of the vessel”); see also *Gowen, Inc. v. F/V Quality One*, 2001 AMC 1478, 1481, 244 F.3d 64, 67 (1 Cir. 2001) (“Traditionally, a maritime lien attaches not only to the bare vessel but also to equipment that is used aboard the vessel and is ‘essential to the vessel’s navigation, operation, or mission’”); *The SS Tropic Breeze*, 1972 AMC 1622, 1627, 456 F.2d 137, 141 (1 Cir. 1972).

3. Appurtenances Become Part of the Res (i.e. Part of the Vessel)

Appurtenances of a vessel become part of the vessel, i.e. part of the res, for purposes of determining rights and interests in the vessel and the scope of liens on vessels. See *Turner v. United States*, 1928 AMC 1089, 1092, 27 F.2d 134, 136 (2 Cir. 1928) (“That the refrigerator, under the circumstances, was a part of the ship admits of little doubt. It, as part of the res, must share the loss”); *The Joseph Warner*, 1940 AMC 217, 219, 32 F. Supp. 532, 534 (D.C. Mass. 1939) (“... whatever is place (*sic*) in a vessel subject to a lien to carry out the purposes for which the vessel was equipped, increasing its value for use although it may be removed without injury to itself or to the vessel, becomes a part of the vessel. . . .”).

4. Examples of Property Found to be Appurtenances

Appurtenances include propellers and shafts⁵, hull, engines, tackle, apparel and furniture, winches and gallowses⁶, fathometer and radar equipment⁷, a diving bell and air pump, ship engine and net, armaments, chronometer and oil tanks⁸, tackle, the sails, and anchors⁹.

5. Analysis

Defendants contended that “lifesaving, safety, mooring” is self-explanatory and that “operating” in Cal Harb & Nav §509 means “appurtenance” as defined in the general admiralty law. The Original Verified Complaint at ¶2 accords defendants’ contention by identifying “their tackle, apparel, equipment, accessories, furniture and personalty” in the description of plaintiff’s “Vessels”. The Court finds this contention has merit and that plaintiff’s reference in ¶12 to “boat tackle, spare parts and gear, accessories and equipment” refers to vessel appurtenances and not separate personal property.

5. *Stewart & Stevenson Servs. v. M/V Chris Way MacMillan*, 890 F. Supp. 552, 562, 1995 AMC 2995 [DRO] (N.D. Miss. 1995).

6. *The Joseph Warner*, 1940 AMC 217, 218, 32 F. Supp. 532, 533 (D.C. Mass. 1939) (“The maritime lien attached to the vessel, which is considered to consist of the hull, engine, tackle, apparel and furniture. All of these become subject to the liabilities of the ship” (and cases cited)).

7. *United States v. F/V Sylvester F. Whalen*, 1963 AMC 2389, 2390, 217 F. Supp. 916, 917 (S.D. Me. 1963).

8. *Turner v. United States*, 1928 AMC 1089, 1092, 27 F.2d 134, 136 (2 Cir. 1928) (citing cases).

9. *1 Benedict on Admiralty*, §167, at Pages 10-15 - 10-17 (citing cases).

Therefore, defendants’ motion requesting this Court find that “boat tackle, spare parts and gear, accessories and equipment” are vessel appurtenances for purposes of determining interests in the vessels and the scope of liens (and not separate personal property), is granted. Cal Harb & Nav Code §509 (first sentence) makes clear that vessel appurtenances are part of the vessel and follow the res for purposes of determining interests in the vessels and the scope of liens on vessels and this Court finds that admiralty law applies to clarify what materials are vessel appurtenances. Since the admiralty law identifies the materials alleged by plaintiff to have been converted by defendants are vessel appurtenant property, then the Court finds that the determination of whether this property was converted by defendants is inextricably linked to the analysis of whether defendants converted the vessels: that is, if defendants converted the vessels under applicable law then defendants converted the appurtenances as well, and vice versa since the appurtenances follow the res.

VII. Defendants Had Liens On & Did Not Trespass Upon or Convert Plaintiff’s Vessels

A. Standard Applicable to Summary Motions

Any party may move the Court for an adjudication that a cause of action or claim for damages in a complaint has no merit, and such motion shall be treated in all procedural regards as a motion for summary judgment. See Cal. Code of Civ. Proc. §437c (f). A motion for summary judgment shall be granted if all of the papers submitted in support thereof show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Id.* at sub (c). All papers submitted shall set forth admissible evidence. *Id.* at sub (d).

The moving party in a motion for summary adjudication bears the burden of proof throughout the motion. See *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 850 (2001). A defendant moving for summary judgment meets his burden of proof to show a cause of action has no merit when it is shown that plaintiff cannot establish an element of that cause of action: upon this showing, the burden shifts to plaintiff to show a triable issue of fact. *Id.* at 849. To have its motion granted a defendant moving for summary judgment must show not only that the plaintiff does not have “needed evidence”, but also that the plaintiff cannot obtain “needed evidence”. *Id.* at 854. Defendant meets this burden if plaintiff admits he does not have “needed evidence”. See *Gaggero v. Yura*, 108 Cal. App. 4th 884, 892 (2003).

B. Introduction

Plaintiff claimed throughout this lawsuit that defendants' "possessory acts" were conversion because defendants did not have liens on plaintiff's vessels, as defendants contended.

Defendants contended that they did have liens on plaintiff's vessels pursuant to the law reflected in the following citations:

Cal. Const., Art. XIV §3 (2005)¹⁰ (Mechanics' liens) provides:

Mechanics, persons furnishing materials, artisans, and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens.

Cal Harb & Nav Code §502 (a) provides:

Except as provided in Article 1.5 (commencing with Section 410) of Chapter 1 of Division 3, every person has a lien dependent upon possession of the vessel for the compensation to which he or she is legally entitled for services rendered to or storage of any vessel subject to registration with the Department of Motor Vehicles¹¹. The lien shall arise at the time a written statement of lien is sent to the registered owner of the vessel which specifies the charges for services or storage rendered and states that the vessel is subject to sale pursuant to the California Boater's Lien Law¹².

Defendants further contended that they had liens pursuant to the common law and in equity. The Court will now turn to these contentions.

C. The California Constitution & the Boaters Lien Law

1. Legislative History of Cal Harb & Nav §502

The history of the first sentence in Cal Harb. & Nav. §502 makes clear that "having a lien" on a vessel should be determined with reference to the California Constitution and that statutory liens for materials and services furnished to a vessel are in pari materia with Cal. Const. Art. XIV §3 (Cal.

10. Previously numbered Cal Const. Art. XX, §15 with present numbering adopted June 8, 1976.

11. Referred to herein as "first sentence".

12. Referred to herein as "second sentence".

Const. Art. XX, §15 at time of the cited case). See *Bennett v. Beadle*, 142 Cal. 239 (1904)¹³.

The lien arises or is created under the California Constitution either at the time of delivery of the property with orders for the work to be performed thereon or immediately upon the furnishing of such labor and materials. *Id.*; see also 13 Witkin, *Summary of California Law*, 10th Ed., Personal Property, §218, P. 233 ("A possessory lien is ordinarily created when the owner or the owner's authorized agent delivers the chattel with instructions to have the work done" (citing cases)). This point is clear under admiralty law, however: *the lien arises automatically upon the furnishing of the materials or services giving rise to the lien. See Riffe Petroleum Co. v. Cibro Sales Corp.*, 1979 AMC 1611, 1615, 601 F.2d 1385, 1389 (10 Cir. 1979) ("The Maritime Lien Act, 46 U.S.C. §971, grants a lien on a vessel for necessities supplied to that vessel . . . The lien arises automatically upon the furnishing of necessities. . .").

The history of the second sentence in Cal Harb. & Nav. §502 makes clear that the provision addresses "enforcing a lien" by sale and not the conditions necessary for "having a lien". See *Adams v. Dep't of Motor Vehicles*, 11 Cal. 3d 146, 157, fn. 18 (1974) ("The Legislature, if it determines that common law remedies are inadequate, or if it feels compelled under the state Constitution, (citing at footnote 18 Article XX, section 15¹⁴, of the California Constitution) may specify remedies in addition to those available" (clarifying that the common law remedy to retain possession of lien property is not affected by the *Adams* holding, (see *infra* this section at sub C. 3.). See generally Attorney General Opinion re Boater's Lien Law - 64 Op. Atty. Gen. Cal. 742, *16 (1981). It appears based on the legislative history available that the second sentence in Cal Harb. &

13. *Id.* at 242-243 ("As is claimed by plaintiff's counsel, the subdivision of section 813 of the Code of Civil Procedure relative to liens on vessels for materials furnished for their construction and the sections of our law relative to mechanics' liens on buildings and other structures derive their being and authority from one common source, — viz., section 15 of article XX of the constitution of this state. . . . The constitution and section 813 of the Code of Civil Procedure give to the materialman a lien upon the vessel "upon which" he has furnished materials, for, as is claimed by plaintiff, the statutes are undoubtedly in pari materia in this respect, and the words 'all . . . vessels . . . are liable for . . . materials furnished . . . for their construction,' in the section relative to liens on vessels, mean the same thing as the words 'materialmen . . . furnishing materials . . . shall have a lien upon the property upon which they have . . . furnished materials,' in the section relating to liens upon buildings. In the one case, it is the furnishing to the vessel that creates the lien; in the other, it is the furnishing to the building or other structure that creates the lien").

14. This provision presently appears at Cal Const. Art XIV, §3.

Nav. §502 was added in 1982 (Added Stats 1982 ch. 941 §2) in the wake of *Adams* and the *Attorney General Opinion* just cited.

Enforcing a lien refers to selling the property subject to the lien, and there is no dispute that California state law based vessel liens shall be enforced (i.e. by sale) pursuant to the Boaters Lien Law. See *Mariners Bay Co. v. Department of Motor Vehicles*, 229 Cal. App. 3d 808, 810 (1991) (holding that marina owner could not sell abandoned vessels pursuant to Cal Civ Code §1988 because: “We conclude plaintiffs may not enforce possessory vessel liens outside the exclusive provisions of the ‘Boaters Lien Law’ ”¹⁵); *Adams v. Dep’t of Motor Vehicles*, 11 Cal. 3d 146, 157, fn. 18 (1974).

2. Defendants Had Liens on Plaintiff’s Vessels

Defendants’ main argument is that defendants had liens (including possessory liens) pursuant to the California Constitution, U.S. and California Supreme Courts, the common law, statutory law and in equity arising from (a) plaintiff’s request for “berthing and services”, (b) defendants’ performance pursuant to plaintiff’s request, and (c) plaintiff’s failure to pay defendants for the requested services. The Court finds these contentions have merit, are supported in the record, are admitted by plaintiff and establish that defendants had liens on plaintiff’s vessels pursuant to the California Constitution, the Boaters Lien Law §502 (a) (first sentence), the common law and in equity immediately upon the performance of “berthing and services” to plaintiff’s vessels.

3. Defendants’ Liens Entitled Them to Retain Possession of the Liened Property (i.e. the Vessels and Appurtenances)

The existence of liens entitles the lienholder to retain possession of the liened property. See *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638, 644 (1900) (“A bailee of property has a remedy for work done . . . by detention of possession. . . .”); *Adams v. Dep’t of Motor Vehicles*, 11 Cal. 3d 146, 157 (1974) (“We do not invalidate the entire statutory scheme. A garage man still may retain possession of a car when the owner, for whatever

15. The Court notes that *Mariners Bay* does not control this case because *Mariners Bay* is solely concerned with the statutory procedure to be followed in order to sell vessels subject to a lien (an issue that is not properly before the Court for the reasons identified in this opinion at Section VII. E.). Additionally, *Mariners Bay* is not a conversion case, does not address conversion in any way, and in fact the word “conversion” appears nowhere in that opinion.

reason, declines to pay for its repair. But the garage man may no longer sell the car to satisfy his claim” (emphasis supplied)); *Attorney General Opinion re Boater’s Lien Law - 64 Op. Atty. Gen. Cal. 742, *16* (1981) (“ . . . as in the *Adams* case, we believe the person to whom the vessel was delivered for repair or improvement may retain possession of the vessel until the labor and materials incorporated into the vessel have been paid for” (emphasis supplied)); *United States of Mexico v. Rask*, 1932 AMC 69, 78, 118 Cal. App. 2d 42 (1931) (confirming the lienors’ right to retain possession of liened vessel).

These common law rights are not affected by the Boaters Lien Law which contains a saving clause recognizing, *inter alia*, the above common law rights. See Cal Harb & Nav Code §502(g) (“Nothing in this section shall impair any rights or remedies which are otherwise available to the lien claimant against the registered owner under any other provisions of law”).

Defendants’ liens therefore entitled them to retain possession of the vessels until such time as the liens were redeemed or the right to redeem was foreclosed. See Cal Civ Code §§2903, 2905; Cal Harb & Nav §506.5.

4. Plaintiff’s Taking Possession of a Vessel Subject to a Lien Is An Act Inconsistent With the Rights of the Lienholder, Is Unlawful, Is Larceny and Is Conversion

Pursuant to California state law, a lienholder is considered a “special owner” of liened property so that if the general owner takes the liened property from the lienholder it is a crime and the tort of conversion; stated another way: taking property from a lienholder is “unlawful”. See *Arques v. The National Superior Co., et al.*, 67 Cal. App.2d 763, 774 (1945) (owner taking vessel subject to lien guilty of civil conversion); *Balestreiri v. Arques*, 49 Cal. App.2d 664, 667 (1942) (owner taking vessel subject to lien guilty of criminal larceny); *People v. Cain*, 7 Cal. App. 163, 166-167 (1907) (general owner taking liened property guilty of criminal larceny); see also *In re Joiner*, 180 Cal. App.2d 250, 254 (1960) (same); *Faneuil Advisors Inc. v. O/S Sea Hawk*, 1995 AMC 1504, 1505, 50 F.3d 88, 90 (1 Cir. 1995) (same). See generally Cal. Civ. Code §3517 (2005) (Clean hands) (“No one can take advantage of his own wrong”).

5. Defendants Had the Right to Repossess the Vessel Unlawfully Taken From Their Possession

A person with a superior right to possess property may repossess or recapture it if it is unlawfully taken from his possession provided there is

no breach of the peace. See *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638, 644 (1900) (“There is also a common law remedy for . . . a right of recaption of goods stolen or *unlawfully taken*” (emphasis supplied)); *Adams v. Dep’t of Motor Vehicles*, 11 Cal.3d 146, 155, fn 15 (1974) (“And the owner of a chattel may generally repossess it from a converter only if he can do so without breach of the peace . . .”); *Silverstin v. Kohler & Chase*, 181 Cal. 51, 54 (1919) (same); see also 5 Witkin, *Summary of California Law*, 10th Ed. Torts, §422.

Furthermore, a party entitled to possession of liened property who is wrongfully dispossessed of the property may recapture it from a *third party* without regard to breaches of the peace. See *Griffith v. Reddick*, 41 Cal. App. 458, 460 (1919) (affirming lienholder’s right to recaption from third parties).

D. *The Defendants Satisfied Their Burden of Proof On Summary Adjudication By Demonstrating Their Liens So That the Burden Shifted to Plaintiff to Show That the Sums Identified in the Dishonored Checks Have Been Satisfied*

1. *Defendants’ Liens Satisfy Their Burden of Proof on Summary Adjudication*

Once defendants demonstrated they had liens on plaintiff’s vessels (and the equipment and appurtenances as outlined, *supra*) then defendants satisfied their burden of proof to sustain summary adjudication because they showed that plaintiff cannot demonstrate a key element of the cause of action for trespass or conversion: *plaintiff cannot show that defendants’ possessory acts were inconsistent with plaintiff’s property rights in the vessels and were therefore not wrongs to the plaintiff*. The burden of proof then shifted to the plaintiff to show a triable issue of material fact.

2. *Plaintiff Was Required to Come Forth With Evidence the Debts Identified In the Checks Were Paid by Plaintiff*

The payment of money by one to another creates an evidentiary presumption that the money was owed to the other. See Cal Evid Code §631 (“Money delivered by one to another is presumed to have been due to the latter”). This presumption affects the burden of producing evidence. See Cal Evid Code §630.

A *prima facie* case of non-payment of money owed is made by producing a note without a notation that payment has been made thereon. See *Light*

v. Stevens, 159 Cal. 288, 292 (1911) (“Admittedly, the burden of proving payment of the note was on defendant [debtor]. It is elementary that the possession of the note by the payee, bearing no indorsement of payment, raises a presumption of non-payment of any portion of the amount thereof”).

Once an unpaid note is shown, then the burden of producing evidence that the note has been subsequently paid is on the debtor and he must introduce evidence that any monies paid were on account of the unpaid debt and not just that monies were paid to the creditor. *Id.* at 293 (“The burden of proving payment resting on defendant [debtor], he must introduce evidence which warrants the conclusion of not only the mere delivery of money to the creditor, *but the conclusion of the delivery of money on account of the particular obligation in suit, for this is involved in the term ‘payment’ when applied to any particular obligation*” (italics in original, other emphasis supplied)).

3. *Plaintiff Did Not Sustain His Burden of Proof on Summary Adjudication*

Plaintiff failed to show any triable issue of material fact because he admits he did not pay defendants the sums identified in the dishonored checks. Therefore, plaintiff has not sustained his burden of proof to demonstrate a triable issue of *material* fact on the cause of action for trespass upon and conversion of the vessels and appurtenances.

E. *The Allegation of a Sale of the Vessels On 18 February 2003 Does Not Assist Plaintiff’s Claims Because Plaintiff Admits No Sale Occurred On That Date*

1. *Sale of the Vessels on 18 February 2003 and 23 May 2003 Are Separate Allegations of Conversion*

Even though a plaintiff claims more than one element of harm from different obligations in a single cause of action, summary adjudication is still proper and the motion may be decided when directed at a separate and distinct wrongful act even though combined with other harm in the complaint. See *Lilienthal & Fowler v. Superior Court*, 12 Cal. App. 4th 1848, 1854-1855 (1993) (“Each obligation creates a separate and distinct claim . . . [¶] [W]e hold that under subdivision (f) of §437c, a party may present a motion for summary adjudication challenging a separate and distinct wrongful act even though combined with other wrongful acts alleged in the same cause of action”).

The law also recognizes successive acts of conversion may occur to the same property at different times. See *Wade v. Markwell & Co.*, 118 Cal. App. 2d 410, 433 (1953).

2. *Allegations of Sale on 23 May 2003 Will Not Relate Back to Plaintiff's Allegations of Sale on 18 February 2003*

For an amended complaint to 'relate back' to the original complaint for purposes of, *inter alia*, the statute of limitations, the proposed amendment must be (1) based upon the same general set of facts and (2) involve the same injury. See *Barrington v. A. H. Robins Co.*, 39 Cal. 3d 146, 151 (1985); Weil & Brown, *Cal. Prac. Guide, Civ. Proc. Bef. Trial*, §§6:717-6:732.

In this case, any amendment attempting to assert defendants converted plaintiff's vessels by unlawful sale on or about 23 May 2003 would introduce a new "set of facts" from that alleged in the Original Verified Complaint. Enforcing a lien requires following various statutory procedures, Cal. Harb & Nav §§500, *et seq.*, and therefore involves significantly different facts than those relevant to the events of 18 February 2003 since a manual taking on one day and a sale months later are clearly different events. Therefore, an amendment attempting to state a cause of action for conversion by sale on 23 May 2003 would not relate back to the filing of the Original Verified Complaint.

The statute of limitations for conversion of personal property is three years from the date of the alleged conversion pursuant to Cal Code of Civ Proc §338 (c). Thus, plaintiff's unpled conversion allegations of conversion by sale on 23 May 2003 were time-barred as of 23 May 2006. Therefore, the statute of limitations has run on claims of conversion by sale of plaintiff's vessels and any amendment attempting to state such a cause of action would now be time-barred and would not relate back to the filing of the Original Verified Complaint. If plaintiff wanted to assert a cause of action for conversion on 23 May 2003 then he should have done so, and done so before the statute of limitations expired on that particular claim.

3. *Plaintiff Concedes There Was No Sale on 18 February 2003*

Plaintiff now admits there was no sale of the vessels on or about 18 February 2003 (notwithstanding a sale was alleged in the complaint and argued in opposition to defendants' Summary Motion), so there is no need to analyze defendants' sale of the vessels at a later time because ¶11 only alleges conversion of the vessels on 18 February 2003. The complaint, as

pled, is therefore limited to the events occurring on 18 February 2003 which this Court has found are not wrongful.

Nevertheless, it is noted that defendants did take plaintiff to Small Claims Court before the 23 May 2003 sale and obtained a ruling in their favor on 8 April 2003. Additionally, defendants did obtain "authorization" from the DMV in a document dated 18 April 2003 to sell plaintiff's vessels. Thus, in any event, plaintiff could not amend his complaint to state a cause of action for conversion of the vessels by sale in view of the above facts.

F. *Conclusion*

Defendants' request for an order that "Defendants did not trespass upon, wrongfully take, or convert Plaintiff's vessels" and that plaintiff not be granted leave to amend the complaint is granted. Plaintiff admits that defendants performed "berthing and services" for plaintiff's vessels and that plaintiff did not pay defendants for those services; therefore, defendants had liens on plaintiff's vessels pursuant to, *inter alia*, the California Constitution, the Boaters Lien Law, the common law and in equity that gave defendants the superior right to possess plaintiff's vessels on or about 18 February 2003 and thereafter. Thus, defendants' possessory acts on or about 18 February 2003 and thereafter were not conversion or trespass under applicable California Supreme Court authority because any possessory acts by defendants were not inconsistent with plaintiff's property rights in the vessels. Plaintiff's possessory act of removing the vessels from defendants' marina, however, was an act inconsistent with defendants' right to possess the vessels and *was larceny and conversion by plaintiff*. In other words, plaintiff's taking of the vessels out of defendants' marina was "unlawful". Since defendants were unlawfully dispossessed of the vessels by plaintiff, defendants had the legal right to recapture the vessel from the third party Loch Lomond Marina. Finally, because plaintiff admits there was no sale of the vessels on 18 February 2003 there is no remaining basis to sustain plaintiff's allegations of conversion in the Original Verified Complaint. For all of these reasons, defendants' Summary Motion is granted without leave for the plaintiff to amend his complaint.

G. *Disposition*

The Court finds in view of the discussion in Sections III through VII, *supra*, and the Court's rulings on defendants Summary Motion and MOP#1 and MOP#2 that all of plaintiff's causes of action are without merit, are fatally flawed, and in view of the admitted facts cannot be amended to

state a cause of action without contradicting previous admissions, allegations and/or violating the statute of limitations.

Plaintiff's Original Verified Complaint is therefore dismissed with prejudice without leave to amend.

VIII. Discussion of Plaintiff's Conduct During Discovery

A. Overview

The Court recognizes that the Decision on defendants' substantive motions, the Summary Motion and MOP #1 and #2, fully resolves all of plaintiff's causes of action and requires a dismissal of plaintiff's claim with prejudice. Nevertheless, there are various discovery issues in this case that would not be moot *in the event this case were reopened or remanded to this Court* after Appellate Review favorable to plaintiff. Therefore, defendants' various discovery related motions are properly before this Court and will be ruled on in this Statement of Decision and Order. *See Hays v. Superior Court of Los Angeles County*, 16 Cal. 2d 260, 264 (1940) ("A trial court has the power to exercise a reasonable control over all proceedings connected with the litigation before it. Such power necessarily exists as one of the inherent powers of the court and such power should be exercised by the courts in order to insure the orderly administration of justice"); *Weiss v. Chevron, U.S.A., Inc.*, 204 Cal. App. 3d 1094, 1098-1099 (1988).

The facts adopted in this section are comprised of the admissions and representations of plaintiff, plaintiff's counsel, and defendants' counsel in the papers filed with the Court.

The Court finds as follows on the discovery motions (1) defendants' Production Motion is granted and the Order stayed until remand, if any, (2) defendants' Compel Motion is granted and the Order stayed until remand, if any, except insofar as the Court grants defendants monetary sanctions in the amounts of \$1,200 to be paid by plaintiff to Dr. Rappaport within 10 days of the entry of the Order and \$2,000 to be paid by plaintiff to defendants within 10 days of the entry of the Order, and (3) defendants' Terminal Motion is granted in full. The Court will now turn to an analysis of the motions that will not be stayed by the Order, i.e. defendants' request for certain monetary sanctions in the Compel Motion and defendants' Terminal Motion.

B. Facts Relevant to Defendants' Terminal Motion

1. Plaintiff's Claims of Emotional Distress

Plaintiff asserts "great physical and emotional distress" as an element of damages for his conversion claims.

Plaintiff's Original Verified Complaint at ¶15 alleges:

As a direct and proximate consequence of the wrongful taking and conversion of Plaintiff's Vessels above described, Plaintiff was injured and damaged by losing his principal place of abode, all to his great physical and emotional distress, and to his economic injury in a sum to be proven at trial, but not less than \$100,000.00.

These allegations are another instance where the plaintiff's story has varied over time. Plaintiff at one point described the basis of his alleged emotional distress as follows:

As a result of the INCIDENT, Plaintiff suffers from the debilitating symptoms of Post-Traumatic Stress Syndrome. The condition has drastically exacerbated previously existing psychological problems. Since the incident and in an attempt to treat the accompanying severe levels of emotional and mental distress, Plaintiff is now required to take several different types of medication at very high dosages and at several different times throughout the day. This severe increase in his medications, though necessary and required by his doctors, negatively affects Plaintiff's capacity to function or to lead a productive life as before.

As a result of his emotional distress caused by the INCIDENT, Plaintiff's Sleeping pattern has been severely affected. Plaintiff suffers from debilitating anxiety and stress, lack of focus and mental acuity, as well as an overall decreased capacity to get things done — paralyzed by the attendant stress and anxiety. Plaintiff's symptoms are continuous and constant in addition to being present and pervasive throughout the day as well as the night. The resulting emotional distress has had a severe impact on Plaintiff's mental well being and may impact his ability to work in the future. Discovery and investigation are continuing. Plaintiff reserves the right to amend or supplement these responses as new information is discovered.

Plaintiff was still contending that his alleged "emotional distress" was continuing as of April 2006.

As a threshold issue, it is clear that plaintiff has put his emotional condition "in controversy" in this action so that defendants are entitled to examine through discovery all potential "alternate sources" of plaintiff's alleged "emotional distress." *See Vinson v. Superior Court*, 43 Cal. 3d 833, 839-840 (1987); *Doyle v. Superior Court*, 50 Cal. App. 4th 1878, 1887 (1996).

2. Plaintiff's Record Regarding Supporting His Claims of Emotional Distress

a. Overview

Throughout the course of this litigation plaintiff has violated at least three discovery *Orders* (1) the parties' Stipulation Re Discovery & Order Thereon (by not timely responding to outstanding discovery and otherwise not adequately responding to that discovery), (2) this Court's 11 May 2006 Order requiring plaintiff provide further responses to certain discovery for materials including, *inter alia*, plaintiff's Social Security Administration "correspondence" and to pay monetary sanctions to defendants, and (3) the Stipulation and Order for Independent Mental Examination of Plaintiff.

Plaintiff's overall conduct of discovery was abusive, causing defendants' extensive discovery related motion practice: defendants brought eight discovery related motions during the pendency of the action to compel plaintiff to produce various materials, respond and further respond to various questions and otherwise comply with his discovery obligations.

Summarizing, during the course of discovery plaintiff (1) did not appear for an Independent Mental Examination (hereinafter "IME") pursuant to the parties' stipulation and this Court's Order, (2) did not agree to a date to attend an IME pursuant to this Court's Order, (3) did not produce his Social Security Administration Records, *inter alia*, reportedly pertaining to the same emotional distress claims raised in this lawsuit, (4) did not execute a release permitting defendants to have access to his Social Security Administration Records, and (5) did not comply with the obligations in (1) through (4) after defendants filed two motions attempting to compel plaintiff to comply with his obligation to provide corroborating evidence of his emotional distress claims, (6) did not pay to defendants \$1550¹⁶ in sanctions awarded to them, (7) did not provide materials responsive to this Court's 11 May 2006 Order on discovery, and (8) did not respond (substantively in one instance or in any way in another instance) to defendants' Special Interrogatories seeking discovery relating to plaintiff's emotional distress claims.

Plaintiff has acted, however, by personally interfering with a valid subpoena served by defendants on plaintiff's Social Security Administration attorney, Mr. Sammis. According to Mr. Sammis, plaintiff specifically

¹⁶ The Court notes that this sum is the total of this Court's award of \$1050 to defendants in the 11 May 2006 Discovery Order and \$500 awarded to defendants by Tentative Ruling in October 2004, which ruling was never reduced to an Order.

directed him not to comply with defendants' subpoena seeking Mr. Sammis' complete file on plaintiff's Social Security Administration Records.

b. Plaintiff's Explanation for His Discovery Failures

Plaintiff defended his conduct on the grounds (1) that he was always willing to attend the IME but that defendants had not provided alternate dates, (2) that he was allegedly unable to attend his IME as stipulated and Ordered by this Court because his counsel, Mr. Steiner, was not available to accompany plaintiff to the IME, (3) that the Social Security Administration records are "not relevant" to this action, (4) that plaintiff had not violated the 11 May 2006 Discovery Order because plaintiff's response to Request No. 49 is not a statement of compliance and therefore not included within the 11 May 2006 Discovery Order, (5) that Request No. 64 (which plaintiff argued is substantially identical to Request No. 49) is a statement of compliance and plaintiff intends to comply, and (6) that plaintiff cannot pay monetary sanctions because he allegedly does not have the resources.

Plaintiff further asserted that defendants have all the information needed to defend against plaintiff's claims because (1) plaintiff sat for deposition and testified to his emotional distress, (2) plaintiff permitted a psychiatrist to be deposed, (3) plaintiff permitted a psychologist to be deposed and (4) plaintiff permitted another doctor to be deposed.

3. The IME Order

On 14 February 2006 plaintiff and defendants stipulated to an Order for Independent Mental Examination of plaintiff (hereinafter "IME Order") and this Court signed and entered the IME Order on 24 February 2006. The IME Order provided for an IME by defendants' expert, Dr. Bernard S. Rappaport, M.D. (hereinafter "Dr. Rappaport"), to be conducted at Dr. Rappaport's offices on 7 March 2006 commencing at noon. After noon on 7 March 2006 plaintiff's counsel advised defendants' counsel that he had forgotten about the IME. Plaintiff did not appear for the IME on 7 March 2006 and has never attended the IME.

4. Dr. Rappaport's Fees

In anticipation of plaintiff's IME, on 1 March 2006 defendants paid Dr. Rappaport \$2,000 for his services with regard to plaintiff's IME. On 9 March 2006, 29 March 2006, and again on 10 August 2006 defendants' counsel sent a letter to plaintiff's counsel requesting plaintiff pay Dr. Rappaport's \$2,000 fee. Between 29 and 31 March 2006, plaintiff's counsel

communicated to defendants' counsel that plaintiff would only pay a fee for the time Dr. Rappaport could demonstrate he was not otherwise occupied notwithstanding plaintiff's missed IME. In response to plaintiff's counsel's request, Dr. Rappaport offered to reduce his request to \$1200 as a courtesy to plaintiff notwithstanding the fact that the late "notice" made it impossible to suddenly schedule another patient at that time. As of the time of this Decision, plaintiff has made no efforts to compensate Dr. Rappaport in any amount whatsoever.

5. Plaintiff's Social Security Administration Records

a. Defendants' Requests for Production

Defendants requested in discovery that plaintiff produce "correspondence" between him and the Social Security Administration on two separate occasions (defendants' Request for Production, Request Nos. 49 and 64). Plaintiff agreed that both requests are substantially identical. On 11 May 2006, this Court Ordered that plaintiff provide "further responses" to Request No. 49. Plaintiff never provided such further responses as Ordered, did not comply with his statement of compliance in Request No. 64 and has never turned over his Social Security Administration "correspondence" to defendants or a "release" therefor.

b. The Subpoena to Mr. Sammis

On 7 July 2006 defendants' counsel served a Deposition Subpoena for the Production of Business Records on Mr. Sammis requesting his file on plaintiff (hereinafter "Subpoena"¹⁷). Plaintiff did not file a Motion to Quash the Subpoena at any time. On 26 July 2006 Mr. Sammis sent a facsimile to defendants' offices (hereinafter "26 July Sammis Letter") advising, *inter alia*, "I consulted with my client and Mr. Steiner and have been given directions not to honor the subpoena . . ." Defendants' counsel

17. The SSA Subpoena seeks: "All non-Attorney Client privileged documents and evidence reflecting the complete records of Lloyd Victor Ramirez relating in any way to his claims before the U.S. Social Security Administration (hereafter "SSA") including any claims that he is "disabled," including but not limited to: your entire file for Lloyd Victor Ramirez, all correspondence, filings, affidavits, physical evidence, physician records, medical evidence, documentation regarding any diagnoses, charts, treatments, prescriptions, all deposition transcripts of all witnesses involved in any hearing(s) before the SSA, all proceeding transcripts before the SSA, all statements of decision of the SSA, and all related evidence or documentation related to Lloyd Victor Ramirez efforts to collect money from the SSA from September 2001 through the present".

sent the 26 July Sammis Letter to plaintiff's counsel on 26 July requesting an explanation from plaintiff's counsel and further inviting plaintiff's counsel to meet and confer on the Subpoena. Plaintiff's counsel never substantively responded to the 26 July invitation to meet and confer, but defendants' counsel did receive a letter from Mr. Steiner's "assistant" Carolyn Kennedy, Esq. on 27 July 2006 (1) advising that Mr. Steiner "does not recall 'directing' Mr. Sammis not to honor the subpoena", (2) stating that defendants' counsel's 26 July letter does not adequately address Mr. Sammis' concerns, and (3) arguing that plaintiff's response to Request No. 49 is not a statement of compliance and therefore "*with regard to the documents of the Social Security Administration, we have nothing further to offer*" (emphasis supplied).

On 2 August 2006, defendants' counsel received a facsimile from Mr. Sammis (hereinafter "2 August Sammis Letter") advising, *inter alia*, that he wished "to clarify the 'directions not to honor the Subpoena . . .' were given by [his] client [Mr. Ramirez], not Mr. Steiner"; otherwise, the 2 August Sammis Letter outlined Mr. Sammis' reasons for refusing to comply with the Subpoena. On 3 August 2006 (and again on 10 August 2006) defendants' counsel sent plaintiff's counsel Mr. Steiner an invitation to meet and confer on the Subpoena. Plaintiff's counsel never substantively responded to the July or August invitations to meet and confer on the Subpoena.

On 2 August 2006 Mr. Sammis sent defendants' counsel certain medical records relating to plaintiff that identified a doctor that had previously not been disclosed. At the time of this Decision, Mr. Sammis has not fully complied with the Subpoena and plaintiff has never provided defendants a "release" for those materials.

6. Plaintiff's Failure to Respond to Special Interrogatories

In the months leading up to defendants' Terminal Motion plaintiff objected to or otherwise did not respond to Special Interrogatories seeking information relating to his emotional distress.

Then, on 23 August 2006 defendants served "Defendant Matt Butler's Fourth Set of Special Interrogatories To Plaintiff With Declaration for Additional Discovery" by personal delivery on plaintiff's counsel ("Discovery Set IV"). Defendants contended that certain Interrogatories in Discovery Set IV are directly relevant to plaintiff's alleged "emotional distress". Plaintiff never responded to Discovery Set IV.

7. Monetary Sanctions

As a direct result of plaintiff's and plaintiff's counsel's position on the Subpoena and plaintiff's failure to timely compensate Dr. Rappaport, as above, defendants contended they necessarily incurred reasonable expenses in excess of \$4500 for preparing the Compel Motion, drafting the documents associated with the Compel Motion, and attempting to informally resolve these disputes. The Court Ordered payment of \$2000 in its 10 October 2006 Decision re Submitted Motions.

C. Plaintiff's Attorney Had No Right to Attend the IME With Plaintiff

Plaintiff's attorney is not authorized under the law to attend an IME with his client. *See Edwards v. Superior Court*, 16 Cal. 3d 905, 907 (1976) ("We conclude that such a psychiatric examination should occur in the presence of the examiner and the examinee alone"); *see also Vinson v. Superior Court*, 43 Cal. 3d 833, 845-846 (1987) (*affirming Edwards*).

That Mr. Steiner was not entitled to attend the IME with plaintiff is a matter Mr. Steiner should have known so that his attempts to make his presence at the IME a condition of plaintiff's performing his discovery obligations was, at the least, inappropriate. Therefore, defendants had no obligation to accommodate Mr. Steiner's schedule with regard to the IME and it is no excuse for the plaintiff that he did not attend the IME because his counsel could not accompany him. Plaintiff should have made all necessary efforts to follow this Court's Orders.

D. Discovery Code Principles

1. General Principles Governing Court Rulings On Discovery Sanctions

The purpose of the discovery statutes is to permit the discovery of evidence to further the economical disposition of a lawsuit. *See Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 793 (1978).

Where an order has already been entered on the materials requested in a subsequent application for discovery relief, the Court should make orders that are just. *See Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 793 (1978) ("Where a motion to compel has been granted, and discovery has been delayed or denied, the court must make orders in regard to the refusal as are just").

When deciding upon an appropriate sanction, including issue, evidence and terminating sanctions, the Court is entitled to consider past conduct

and previously unpaid sanctions when determining what is just. *See Manzetti v. Superior Court*, 21 Cal. App. 4th 373, 379 (1993) ("... we are entitled to consider petitioners' prior conduct with respect to the discovery dispute to decide if sanctions are justified"); Weil & Brown, *Cal. Prac. Guide, Civ. Proc. Bef. Trial*, §8:1227 (noting unpaid sanctions plus violated orders for discovery are relevant when determining whether "doomsday sanctions" are appropriate).

2. Misuses of the Discovery Process Are Sanctionable

The Court has authority to award sanctions against a party that misuses the discovery process. *See Cal Code Civ Proc* §2023.030; Weil & Brown, *Cal. Prac. Guide, Civ. Proc. Bef. Trial*, §§8:1184.

Failure to submit to an authorized method of discovery is a "misuse of the discovery process". *See Cal Code Civ Proc* §2023.010 (d) ("Misuses of the discovery process include, but are not limited to, the following . . . (d) Failing to respond or to submit to an authorized method of discovery").

Disobeying a court order to provide discovery is a "misuse of the discovery process". *See Cal Code Civ Proc* §2023.010 (g) ("Misuses of the discovery process include, but are not limited to, the following: . . . (g) Disobeying a court order to provide discovery").

3. This Court Has Authority to Award Monetary, Issue, Evidentiary & Terminating Sanctions for Misuses of the Discovery Process

a. Monetary Sanctions May Be Imposed for Misuses of the Discovery Process

The Court is authorized to award monetary sanctions, including attorneys' fees, against a party and/or their attorney (or both) for misuses of the discovery process. *See Cal Code Civ Proc* §2023.030 (a); *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 791 (1978) ("The court may award attorneys fees against the disobedient party or the attorney advising such disobedience"). *See generally Weil & Brown, Cal. Prac. Guide*, §8:1188.

b. Issue Sanctions May Be Imposed for Misuses of the Discovery Process

The Court may impose an "issue sanction" and determine a fact or facts and/or an issue or issues in favor of the party negatively affected by another party's misuse of the discovery process and prohibit the misusing party from supporting that claim or claims. *See Cal Code Civ Proc* §2023.030

(b); *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 791 (1978) (“The court may also issue an order that certain designated facts be taken as established for the purposes of the action in accordance with the claim of the party obtaining the order”). See generally Weil & Brown, *Cal. Prac. Guide, Civ. Proc. Bef. Trial*, §§8:862, 8:1187.10, 8:1205.

c. Evidentiary Sanctions May Be Imposed for Misuses of the Discovery Process

The Court may impose an “evidentiary sanction” that prohibits the party misusing the discovery process from introducing into evidence sanctioned matters. See Cal Code Civ Proc §2023.030 (c); *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 791 (1978) (“[The Court] may also issue an order refusing to allow the disobedient party to support or oppose designated claims or defenses or an order prohibiting him from introducing certain documents, things or items of testimony”). See generally Weil & Brown, *Cal. Prac. Guide, Civ. Proc. Bef. Trial*, §§8:863, 8:1187.10, 8:1205.

d. Terminating Sanctions May Be Imposed for Misuses of the Discovery Process

The Court may impose a “terminating sanction” that, *inter alia*, strikes portions of the pleadings of a party who misuses the discovery process. See Cal Code Civ Proc §2023.030 (d) (1); *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 792 (1978) (“Finally, a court may, 1) strike out pleadings or parts thereof. . .”). See generally Weil & Brown, *Cal. Prac. Guide, Civ. Proc. Bef. Trial*, §§8:864, 8:1205.

e. All of the Above Listed Sanctions Are Available for Failure to Attend Court Ordered Independent Mental Examination

Cal Code Civ Proc §2032.410 provides: “If a party is required to submit to a physical or mental examination . . . but fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction. . . . In lieu of or in addition to that sanction, the court may, on motion of the party, impose a monetary sanction under Chapter 7 (commencing with Section 2023.010). See generally Weil & Brown, *Cal. Prac. Guide, Civ. Proc. Before Trial*, §§8:1599, *et seq.*”

4. Factors Supporting Terminating Sanctions

a. Relevant Factors Supporting Terminal Sanctions

Various factors should guide the Court’s discretion when deciding whether sanctions are proper including (1) the time elapsed between the service of the discovery and the sanction request, (2) any extensions of time given, (3) the number of discovery requests propounded, (4) whether the sought after information is difficult to obtain, (5) whether any responses thereto are evasive or incomplete, (6) the number of requests outstanding, (7) the relation of unanswered discovery to a particular claim or defense, (8) whether the responding party has been acting in good faith, (9) the existence of prior orders compelling discovery, (10) the ability of the party to comply with existing orders, (11) whether permitting additional time to answer will enable the answering party to provide the discovery and (12) whether a sanction short of dismissal is more appropriate than dismissal. See *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 796-797 (1978).

Furthermore, although a terminal sanction is a drastic measure and should be employed with caution, *when a litigant persists with an “outright refusal” to comply with discovery obligations the refusal constitutes an admission that the claim is without merit and terminal sanctions are appropriate.* See *Deyo v. Kilbourne*, 84 Cal. App. 3d 771, 793 (1978).

b. Analysis

Plaintiff’s repeated violations of this Court’s Orders for more than one year and his numerous failures to respond to discovery requests, his evasive and incomplete responses to various of defendants’ discovery directly related to plaintiff’s emotional distress claims, his failure to “release” the materials sought notwithstanding his ability to do so, coupled with his active intervention to thwart defendants’ discovery leads to the conclusion that plaintiff is not acting in good faith. This Court finds that plaintiff’s conduct constitutes the sort of “outright refusal” to comply with discovery obligations that the *Deyo* court recognized constitutes a proper basis to terminate plaintiff’s claims. Therefore, the Court finds that plaintiff has admitted that his claims for emotional distress damages are without merit and exercises its discretion to terminate plaintiff’s “emotional distress” claims for damages.

E. Summary of Decision on Discovery Motions

In view of all of plaintiff’s actions during discovery it appears plaintiff is not meeting his discovery obligations and is not acting in good faith

with regard to his claims for “emotional distress” and that the only effective remedy at this stage is for the Court to exercise its sound discretion to terminate plaintiff’s claims for emotional distress and bar the issue and evidence thereon from any trial of this action.

Plaintiff violated at least three Orders from this Court during the course of discovery relating to plaintiff’s emotional distress claims and has actively interfered with a valid subpoena seeking access to relevant materials. Additionally, Plaintiff’s self-serving hearsay declarations of “emotional distress” must be corroborated by other witnesses and evidence: plaintiff cannot rest on his own self-diagnosis, avoid psychological testing and conceal medical records and providers so that he can present unsubstantiated claims of “great . . . emotional distress” to a hopefully sympathetic jury. The integrity of the judicial system, judicial resources and economy and the rights of defendants must be protected against allegations of “great . . . emotional distress” that are not only vague but actively unsupported by the claimant.

Therefore, defendants’ motion for “Terminating, Issue and Evidentiary Sanctions” is granted: plaintiff’s claims of emotional distress damages are stricken from the complaint and he is not permitted to introduce evidence on this subject or raise an issue in any trial of this action relating to his vague and unsubstantiated claims of “great . . . emotional distress”. This Court expressly finds that, in view of plaintiff’s repeated disregard of this Court’s Orders, his alleged inability to pay monetary sanctions (including those already awarded) and his apparently calculated course of conduct designed to conceal relevant materials from defendants relating to his claims for emotional distress, that the Court is well within its discretion to grant terminating sanctions against plaintiff and further finds that a lesser sanction will not correct the prejudice visited upon defendants nor protect the integrity of the judicial system.

CHERYL MARIE PERU

v.

USS MISSOURI MEMORIAL ASSOCIATION, INC.

[LIMITED OPINION — See Editors’ Note]

United States Court of Appeals for the Ninth Circuit, November 20, 2006
No. 05-15421*

Before: Trott, Wardlaw and W. Fletcher, JJ.

JURISDICTION — 243. Traditional Maritime Activity; Effect on Commerce.

There is no admiralty jurisdiction of a fall from a ladder in a battleship moored in navigable waters as a museum because a fall inside could not affect maritime commerce outside the vessel.

Jay Lawrence Friedham and Joshua T. Gillelan, II (Longshore Claimants’ Natl. Law Center) *for Peru*

John R. Lacy (Goodsill, Anderson, Quinn & Stifel) and Randolph L. M. Baldemor *for USS Mo. Mem.*

Appeal from the United States District Court for the District of Hawaii; Samuel P. King, Senior District Judge. Affirmed.

MEMORANDUM**

Cheryl Peru, a tourist photographer injured while ascending a ladder on board the naval-historical museum located inside the USS Missouri, filed this negligence action in federal district court against the USS Missouri Memorial Association and others (MMA) invoking maritime jurisdiction. *See* 28 U.S.C. §1333. The district court granted MMA’s motion to dismiss for lack of jurisdiction, concluding that the activity involved does not have the potential to disrupt maritime commerce. We have jurisdiction to review this decision pursuant to §1291, and we affirm.

A party invoking federal admiralty jurisdiction over a tort claim, under 28 U.S.C. §1333(1), “must satisfy conditions both of location and of connection

*This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

**This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Editors’ Note: This opinion has been limited by the court as to where and for what purposes it may be cited. Counsel who wish to cite it to a court should consult the rules of the issuing court and those of the court in which it is to be cited and any general rules that may apply to the latter. In citing it, counsel are requested to signal its limited status by including [LTD] at the end of the AMC citation, thus: 2005 AMC 3500 [LTD].