

No. \_\_\_\_\_

IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA

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JENNIFER GREEN,  
*Plaintiff/Appellant,*

vs.

PAUL GREEN,  
*Defendant/Respondent.*

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APPEAL FROM THE ORDER GRANTING DEFENDANT'S DEMURRER  
SUPERIOR COURT OF CALIFORNIA, COUNTY OF REDWOOD, CASE No. 12345  
THE HONORABLE JEAN SMITH PRESIDING

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**RESPONDENT'S BRIEF**

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If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email [info@quojure.com](mailto:info@quojure.com).

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Attorney for Respondent

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**  
**California Rules of Court, Rule 14.5**

No other person or entity has a financial or other interest in the outcome of this proceeding.

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

Dated:

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Attorney for Respondent

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## **ARGUMENT**

### **1. Standard of review**

The standard of review in this case is whether the trial court abused its discretion in sustaining respondent's demurrer without leave to amend. *CAMSI IV v. Hunter Tech. Corp.* (1991) 230 Cal.App.3d 1525, 1538. The judgment must be affirmed if any one of the grounds for the demurrer is well taken. *Beck v. American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555, 1566. It is the validity of the trial court's action in sustaining the demurrer that is reviewable, not the court's statement of reasons for its action. *Ibid.* On appeal, the plaintiff has the burden of showing how the trial court abused its discretion in sustaining the demurrer. *Trustees of Capital Wholesale Electric Etc. Fund v. Shearson Lehman Brothers, Inc.* (1990) 221 Cal.App.3d 617, 627.

### **2. Res judicata bars appellant's complaint.**

The doctrine of res judicata is composed of two parts: claim preclusion and issue preclusion. Claim preclusion prohibits a party from relitigating a previously adjudicated cause of action. A new lawsuit on the same cause of action is entirely barred. Issue preclusion, also known as "collateral estoppel," applies to a later suit between the parties on a different cause of action. Collateral estoppel prevents the parties from relitigating any *issue* actually litigated and finally decided in the earlier action. *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn 3; *Flynn v. Gorton* (1989) 207 Cal.App.3d 1550, 1554.

Both aspects of res judicata share the common goals of preventing inconsistent results, and promoting finality and judicial economy by

bringing an end to litigation. *Ibid.* The defense of res judicata is appropriately raised by demurrer if the grounds for asserting the defense appear on the face of the complaint or from matters that can be judicially noticed. *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 324; Code Civ. Proc. § 430.30(a).

Here, appellant/plaintiff Jennifer Green’s complaint is absolutely barred under either or both aspects of res judicata.

**A. The complaint is barred by claim preclusion.**

Claim preclusion bars a second lawsuit between the same parties on the same cause of action. *Flynn v. Gorton, supra; Slater v. Blackwood* (1975) 15 Cal.3d 791, 795. The earlier cause of action merges into the judgment, which prohibits a plaintiff from splitting a cause of action into successive lawsuits. *Craig v. County of Los Angeles* (1990) 221 Cal.App.3d 1294, 1301.

California courts employ the “primary rights” theory in determining what constitutes a cause of action and whether the earlier lawsuit involved the same cause of action as the one in the later suit. *Slater, supra; Craig, supra.* The violation of one primary right gives rise to a single cause of action. *Slater, supra*, at 795. “Under this theory, the underlying right sought to be enforced determines the cause of action. In determining the primary right, the significant factor is the harm suffered.” *Craig, supra*, at 1301.

Under claim preclusion, the prior final judgment on the merits not only settles all the issues actually litigated in the first action *but also every issue that could have been raised and litigated as well.* *Mattson v. City of Costa Mesa* (1980) 106 Cal.App.3d 441, 446. Thus, claim preclusion bars

litigation of the same cause of action on a different legal theory or for different relief. *Ibid.*

For purposes of applying claim preclusion, a stipulated judgment or order is a judgment on the merits and conclusively determines all matters put into the pleadings, unless the parties agree to restrict its scope by expressly withdrawing an issue from the stipulated judgment or order. *California State Auto Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 Cal.3d 658; *In Re Marriage of Buckley* (1982) 133 Cal.App.3d 927.

Applying the primary-rights theory here compels the conclusion that Jennifer's family law notice of motion and her complaint in the later civil action involve the same cause of action, and thus her complaint is barred by claim preclusion. Both actions seek to redress the same harm Jennifer allegedly suffered as a result of respondent Paul Green's sale of the family residence without her knowledge and his later failure to turn over her share of the sale proceeds. No matter how cleverly Jennifer characterizes it, that harm is simply the alleged denial of her right to share in the community property from the parties' marriage.

The stipulated order the parties entered into provides for Paul to make equalization payments of \$27,500 to redress this harm. Jennifer's complaint essentially seeks to recover for the same harm, only under such different legal theories as breach of contract and fraud. But her use of different legal theories and her desire for different remedies in her civil action does not avoid the application of claim preclusion and will not skirt its bar of the later civil action.

In *Rogers v. Austin* (1979) 94 Cal.App.3d 918, husband and wife entered into a stipulated judgment regarding the division of marital property. Husband later attempted to set aside the property division in the

family law court on the grounds of fraud. That court upheld the earlier property division. Husband then sued wife for fraud, again seeking to disturb the earlier property division. The court held that the civil action was barred under claim preclusion. *Id.* at 920.

Here, Jennifer's complaint attempts to re-litigate Paul's alleged denial of her right to a share of the family law property division, but the family law court already addressed and rectified that denial. As in *Rogers*, the family-law stipulated order and judgment in this case cannot be relitigated and disturbed in a civil action.

Jennifer's reliance on *Craig v. County of Los Angeles, supra*, 221 Cal.App.3d 1294, is misplaced. She offers no reasoned analysis why that case supports her position. *Craig* is readily distinguishable. The plaintiff sought to redress two distinct harms in the two actions. In a mandate proceeding, the plaintiff sought only to assert his right to be employed as a harbor police officer. His second action involved his right to past salary and damages, resulting from the defendant's conduct denying his right to employment. Here, in contrast, Jennifer asserted in the family law motion both her right to share in the community property and the amount to which she was entitled by virtue of that right.

Despite Jennifer's long-winded analysis of Pomeroy's theory of primary rights, she never applies the theory here; instead, she relies on the simple formal aspect of her pleadings. Her argument comes down to:

Plaintiff/Appellant argues that the Stipulation and Order authorizing equalization payments . . . involved a different primary right than those asserted in these causes of action. The issue of breach of contract, fraud or conversion was not considered in the dissolution proceeding.

Appellant's Opening Brief, 21:21-26.

This assertion is made in vain because claim preclusion bars litigation of the same cause of action on a different legal theory or for different relief.

*Mattson, supra*, 106 Cal. App.3d at 446.

Jennifer also argues that she could not assert these theories in family law court because of California Rule of Court 1212; thus, she asserts, claim preclusion should not apply. This argument is flawed for two reasons.

First, Rule 1212 does not prohibit a party in a family law proceeding from filing a civil action for relief or on theories not authorized by the Family Code. Jennifer could have filed the instant action simultaneously with the filing of the notice of motion and had the two actions consolidated.

*Marriage of McNeill* (1984) 160 Cal.App.3d 548, 557.

Second, Jennifer chose unilaterally to proceed in the family law court. No one compelled her to do so. She cannot now avoid the bar of claim preclusion by arguing that the family law court was statutorily barred from granting all the relief to which she claims she is entitled. *Mattson, supra*, at 449-450; RESTATEMENT, SECOND, JUDGMENTS § 24, comment g.

This rule applies even if the plaintiff seeks additional consequential damages or punitive damages in the second action, neither of which could have been awarded in the first action. *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1476. Again, the fundamental question is whether those additional consequential damages flow from an infringement of a separate and distinct primary right. *Ibid*. Here the answer is a resounding “No.” Jennifer’s request for additional consequential damages arises out of the invasion of the same primary right.

**B. The complaint is barred by issue preclusion.**

Even if the claim preclusion aspect of res judicata were not a bar to

Jennifer's action, the issue preclusion aspect unequivocally does bar it. The five requirements for issue preclusion are present here: the issues in the two actions are identical, the issues were actually litigated in the prior action, the issues were necessarily decided in the prior action, the decision in the prior action was on the merits and is final, and the party against whom preclusion is sought is the same as, or in privity with, the party in the prior action. *Lucido v. Superior Court, supra*, 51 Cal.3d 335, 341.

**(1) *The issues in the Family Law Motion are identical to the issues raised in Jennifer's complaint.***

“The ‘identical issue’ requirement addresses whether ‘identical factual allegations’ are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same.” *Id.* at 342. To determine whether the same factual allegations are at stake in both proceedings, the trial court can examine the prior suit's entire record. *Frommhagen v. Bd. of Supervisors* (1987) 197 Cal.App.3d 1292, 1301, fn.3.

If Jennifer's Family Law Notice of Motion, including her declaration and request for relief, is juxtaposed with her civil complaint, a careful analysis reveals that they both present the identical factual allegations. Jennifer's complaint indisputably arises out of the same nexus of facts complained of in the Notice of Motion: that Paul breached an agreement to provide her share of the community property through the sale of the family residence; that Paul sold the family residence without her knowledge; and that he then kept the proceeds for himself without providing for Jennifer's community property share. Under *Lucido*, the identical-issue requirement is easily met.

Jennifer attempts to confuse this court by arguing that the Family

Law Notice of Motion did not address the same “cause of action.” AOB, 24:18-20. But this is irrelevant to the issue-preclusion analysis and has no bearing on whether the two cases have identical issues. Jennifer then argues:

The Stipulation and Order on Order To Show Cause . . . addressed the issue of the equalization installment payments . . . . On the other hand, the underlying civil action relates to Defendant/Respondent’s conscious disregard of Plaintiff/Appellant’s property rights by using the escrow proceeds from the sale of the family residence for his own personal gain . . . .

AOB 24:20-27.

Jennifer argues that different legal issues were at stake in the two actions, but this is irrelevant under *Lucido*: the first requirement is met if the *factual* allegations are the same.

**(2) *The issues in the complaint were actually litigated in the Family Law Motion.***

For issue preclusion to apply, the issues sought to be barred must have been actually litigated in the prior action. An issue is “actually litigated” if: (i) it is properly raised by the pleadings; (ii) submitted for determination; and (iii) finally determined. *Barker v. Hull* (1987) 191 Cal.App.3d 221, 225-227. No particular level of litigation activity is necessary to satisfy this requirement. *State Farm Mut. Auto.Ins. Assoc. v. Superior Court* (1989) 211 Cal.App.3d 5, 15, fn.12. The party asserting issue preclusion need not show that any particular evidence was presented at the earlier action. *Ibid.*

It is well settled that an action ending in a stipulated judgment or order satisfies the requirement that the issues be actually litigated.

*Marriage of Buckley, supra*, 133 Cal.App.3d at 935; *Landeros v. Pankey* (1995) 39 Cal.App.4th 1167, 1173. This is true so long as the parties do not expressly reserve or withdraw an issue in the pleadings from the scope of the stipulation. *Buckley, supra*, at 935. Here, the identical factual issues in Jennifer’s complaint were pleaded in the Family Law Notice of Motion and she had an opportunity to pursue her claims in the first action. Further, none of these issues raised by the Family Law pleadings were expressly excluded or reserved by the Family Law Stipulation and Order.

**(3) *The issues raised in the Notice of Motion were necessarily decided in Family Law Action.***

This requirement is met if the issue(s) were not “entirely unnecessary” to the judgment in the prior action. *Lucido*, at 342. “That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.” Code Civ. Proc. § 1911.

Paragraph 10 of the Family Law Stipulation states: “Respondent acknowledges that he owes Petitioner \$27,500. . . .” Clerk’s Transcript, at 37. Thus the issues Jennifer raised in her Notice of Motion—that she was entitled to her community property share, and that Paul wrongfully withheld her share from the sale of the family residence—were resolved and included in the Stipulation. Looked at another way, the parties necessarily determined that Paul owed Jennifer \$27,500 to provide for her community share in the marriage and, therefore, Paul was not entitled to keep the entire amount of the proceeds of the sale of the family home.

Additionally, the stipulation does not expressly exclude or reserve any issues raised by the family law notice of motion.

**(4) *The Stipulated Order was a final judgment on the merits.***

A stipulated judgment or order is a judgment on the merits for purposes of applying issue preclusion. *Marriage of Buckley, supra*, 133 Cal.App.3d at 935.

**(5) *Paul seeks issue preclusion against a party to the Family Law Motion.***

Jennifer concedes that this requirement is met. A.B. 27:23-26. She was obviously a party to both actions.

In sum, the five requirements for the application of issue preclusion are present and bar Jennifer's complaint. She offers no compelling reasons why the application of issue preclusion here would not further the court's underlying policies of judicial economy and finality of actions. *Flynn, supra*.

Jennifer had her day in court in the Family Law Division and had an opportunity to assert her right to share in the marriage's community property. Indeed, Paul ultimately acknowledged her right and stipulated to an order against himself in the amount of \$27,500. That Jennifer may now not be happy with the amount she exacted from Paul in the family law action does not warrant disregarding the principles of res judicata. If her action were successful, it would open the door for disgruntled spouses to file civil actions, alleging fraud and the like, seeking to set aside community property distributions made in the Family Law Court with which they were dissatisfied.

Moreover, California Rule of Court, Rule 1212's prohibition against pleading certain causes of action or claims for relief is of no avail. In *Buckley*, the husband attempted to argue the same thing. The court

responded:

[T]he fact that husband could not have responded to wife's dissolution action with a tort cross-complaint is irrelevant. The doctrine of collateral estoppel is a doctrine of "issue preclusion." [Citation.] The issue of wife's alleged fraud was necessarily determined by the consent judgment, and husband cannot now vex and harass wife by litigating that issue again in a new cause of action.

*Id.* at 936.

Jennifer's attempt to distinguish *Buckley* is unpersuasive. The nature and timing of the fraud the husband complained of was irrelevant to the *Buckley* court's consideration of issue preclusion. Before the court began its discussion of issue preclusion it observed:

[E]ven if husband's action was not barred by Civil Code Section 43.4, or if his complaint can be read as an attempt to state a cause of action for the restoration of money obtained by fraud, the trial court properly granted judgement for wife, as husband was also collaterally estopped by the stipulated judgement of nullity from relitigating the issue of wife's alleged fraud.

*Buckley*, at 934.

Here, Jennifer's complaint is also akin to an action for the restoration of money obtained by fraud, and admittedly not like an action for a broken promise to marry. But such distinction is irrelevant to the court's issue preclusion analysis, since it assumed for the sake of its discussion that Civil Code § 43.4 did not barr the husband's action. Thus Jennifer's argument—that *Marriage of McNeill, supra*, is "controlling" because the nature and timing of the fraud is more like that alleged in her complaint—is pointless.

### **3. The Family Law Court has exclusive jurisdiction over the action.**

The Family Law Court's exclusive jurisdiction over the parties and subject matter supports the trial court's order sustaining the demurrer without leave to amend. After a family law court acquires jurisdiction in a marriage dissolution action to characterize, value, and divide the parties' community property, no other department may entertain proceedings or make an order adversely affecting the family court's property jurisdiction. *Askew v. Askew* (1994) 22 Cal.App.4th 942, 961. This rule obtains even if the family law court has entered judgment in the marital action, so long as the court has reserved jurisdiction. *Marriage of Schenk* (1991) 228 Cal.App.3d 1474, 1483-1484.<sup>1</sup>

Because Jennifer's civil action implicates the issue of the parties' community rights in the family residence, *Askew* controls and prevents the trial court from exercising jurisdiction over Jennifer's action. Any ruling the civil court made on her civil action would affect and interfere with the family law court's original ruling on the appropriate distribution of the proceeds from the sale of the family residence and its continuing jurisdiction over the parties and subject matter. The court in the civil action may not make any such order or judgment. *Askew* at 961.

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<sup>1</sup> *McNeill* stands for nothing more than the proposition that a family law court may consolidate a family law action with an independent civil action raising common issues of law and fact. *McNeill, supra*, 160 Cal.App.3d at 556-557. But this is not helpful to Jennifer, since she failed to file the civil action at the same time she brought the Family Law Notice of Motion and then move for consolidation before the Family Law Motion was resolved. Thus, any civil action brought now is barred by res judicata. *McNeill* does not dictate a contrary result.

## **CONCLUSION**

Jennifer has failed to carry her burden of showing that the trial court's granting the demurrer without leave to amend was an abuse of discretion. The complaint is barred under either or both aspects of res judicata and on the grounds that the Family Law court has exclusive jurisdiction over the property division issues arising out of the marriage.

The trial's court ruling should be upheld.

Dated:

Respectfully submitted,

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Attorneys for Respondent