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LOS ANGELES
SUPERIOR COURT
NORTHEAST DISTRICT

Attorneys for Respondent Lupe Esparza

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES**

10 In the Matter of)
11 THE ESTATE OF AMELIA V. LOPEZ,)
12)
13 Deceased.)

CASE NO. GP 011294

Respondent and Cross-Petitioner Lupe Esparza's Trial Brief

14 _____)
15 BEATRICE ROSALES, Administrator with)
16 Will Annexed of the Estate of Amelia Lopez,)
17 Petitioner)

Date: July 9, 2007
Time: 8:30 a.m.
Department: A

18 Vs.)
19 LUPE ESPARZA, Respondent)
20 _____)
21 and related cross-petitions)

22 **I. INTRODUCTION**

23 Respondent and Cross-Petitioner Lupe Esparza is the daughter of Decedent Amelia V.
24 Lopez. Ms. Esparza did not finish high school and has worked in factories, as a truck driver
25 and as a caretaker for the elderly.

26 As a middle-aged woman, Ms. Esparza spent over a decade living with and caring for
27 first her elderly father and then her mother (Decedent Lopez) while her grown siblings had little
28 to do with them. Ms. Esparza's parents appreciated her care and company. They promised and

1 intended to reward her.

2 In 1999, Ms. Lopez deeded two pieces of real property in Los Angeles to Ms. Esparza
3 after her son Richard Esparza (Lupe's brother) and sister Beatrice Rosales filed a
4 conservatorship lawsuit to wrest control of their mother's money.

5 This lawsuit pertains to the efforts of the Estate (controlled by Ms. Lopez's siblings,
6 none of whom were caretakers for their mother) to reclaim the subject real property. It also
7 pertains to Ms. Esparza's efforts to be compensated for (1) the years of service she provided
8 caring for her mother Decedent Lopez, and (2) the repairs and maintenance that Ms. Esparza
9 caused to be provided for the subject real property since Ms. Lopez died.

10 The lawsuit also seeks to rescind a 2005 transaction in which Las Vegas con artist Jack
11 Whitehorn – who has admitted under oath to engaging in the unlicensed practice of law –
12 tricked Ms. Esparza into deeding to him a 50% interest in the two subject properties.

13
14 **II. STATEMENT OF FACTS**

15 **A. Lupe Esparza**

16 Lupe Esparza is 71 years old and the daughter of Decedent Amelia Lopez. Ms. Esparza
17 attended high school and later took classes at a community college. During her life, she worked
18 in a variety of aircraft or electronics factories, as a truck driver, as a cashier, and as a live-in
19 caretaker for the elderly. She has no education or training in the law or real estate.

20 **B. Pete Lozano**

21 Pete Lozano is the adult son of Ms. Esparza. He was a truck driver before becoming
22 disabled. Since 2005 he has helped his mother with doing repairs and maintenance at the
23 subject real properties.

24 **C. Beatrice Rosales**

25 Beatrice Rosales is the sister of Lupe Esparza. She is the current executor of the Estate
26 but admitted to the Court on the record (through her lawyer on June 19, 2007) that she does not
27 want to serve as the Executor.

28 Ms. Rosales either lives or spends most of her time in Washington state. For over a

1 decade, she has spent much of her time driving around the nation in an expensive motor home
2 that she bought with money that her mother lent her (and which has yet to be repaid).

3 D. Richard Esparza

4 Richard Esparza is the brother of Lupe Esparza. He is a retired police officer.

5 E. Jack Whitehorn

6 Respondent Jack Whitehorn attended two years of law school at the University of
7 Tennessee in the 1950. Whitehorn did not graduate, and he never sat for the bar anywhere. In
8 1960, Whitehorn bought a small radio station (WFDR) in Manchester, Georgia, which he ran
9 from there for 21 years. During this time, Whitehorn himself handled all legal matters
10 involving the FCC.

11 In 1979, Whitehorn moved to Las Vegas. After about seven years, he started working
12 there as a “legal consultant” who charges \$395/hour. By Whitehorn’s own admission at
13 deposition (before he asserted the 5th Amendment) his “consulting work” includes charging
14 laymen \$395/hour to prepare wills and trusts that are “good to go.” He also had a fraud
15 judgment entered against him in Tennessee involving real estate.

16 F. Lupe Esparza’s Return to Los Angeles To Care For Her Parents

17 In 1988, Lupe Esparza was working in Reno, NV. At the request of her parents, Ms.
18 Esparza returned to Los Angeles to help care for her father. After caring for him for years, Ms.
19 Esparza assumed responsibility of caring for her elderly mother Decedent Amelia Lopez.

20 In appreciation for her efforts, Lupe’s parents told her that they would care and provide
21 for her. In 1993, as a partial action on this promise, her mother Ms. Lopez amended the codicil
22 to her will to provide that Lupe would receive a home that Decedent Lopez owned 1444
23 Playground Street (“Playground”) in Los Angeles.

24 Throughout this period, Ms. Esparza provided daily care and daily companionship to her
25 mother. Ms. Esparza would take Ms. Lopez shopping, to doctor’s appointments, out for meals
26 (Ms. Lopez enjoyed eating in modest restaurants and regularly talked about how she had
27 “cooked enough” in her life), on excursions and out for meals. Although Ms. Lopez had
28 remarried, her new husband often took trips to Mexico, at which times she particularly valued

1 Lupe's care and companionship.

2 At her mother's direction, Lupe Esparza also helped her mother collect rental income
3 generated by a (combination) residential and commercial property that Ms. Lopez owned at
4 2427, 2429 and 2429 ½ Caesar Chavez Boulevard ("the Caesar Chavez property" or "Caesar
5 Chavez"). They used this money to support Ms. Lopez and pay for the foregoing expenses.

6 G. Putting Lupe's Son Larry Lozano in Charge Of The Property

7 By the summer of 1999, Amelia Lopez had given Lupe Esparza a power of attorney so
8 that Lupe could easily help manage her affairs. Lupe was receiving no compensation for the
9 care and companionship she was giving her mother, or for the "managerial" duties she was
10 providing.

11 In the summer of 1999, Lupe Esparza arranged for her adult son Larry Lozano to
12 assume responsibility for managing Caesar Chavez. Concerned that tenants or vendors would
13 not respect Larry's authority to act, on August 3, 1999 Ms. Esparza signed a deed conveying
14 title in the property to her son Larry Lozano. Ms. Esparza had no intention of actually giving
15 the property to her son Larry (no money was exchanged, no lawyer was consulted, and in fact
16 Ms. Esparza did not execute the deed in a form so that it would be legally valid), and Larry
17 Lozano later purported to convey title back to his mother in October 2000 after he stopped
18 being in charge of the property.

19 H. Richard Esparza's Initiation of Litigation Without First Talking to His Sister Lupe.

20 At some point, Richard Esparza learned about Ms. Esparza's efforts to confer
21 "managerial authority" on her son Larry. Rather than talk about it with Ms. Esparza, Richard
22 collaborated with his sister Christina Fitzgerald and filed a lawsuit seeking to have a
23 conservatorship appointed for his mother. He filed the action on October 6, 1999.

24 I. Amelia Lopez's Giving The Playground Property To Lupe Esparza

25 Amelia Lopez did not like that two children who had little or no time to visit or care for
26 her were now suing to get control of her money. She decided to do something about it.

27 On October 19, 1999 Ms. Lopez deeded title to the Playground property – which she
28 already had devised to Lupe pursuant to the will's codicil – to Lupe.

1 J. The TRO

2 On October 28, 1999 Richard Esparza sought and obtained a TRO providing that the *status*
3 *quo* be maintained and enjoining any transfers of Amelia Lopez's property.

4 Amelia Lopez and Lupe Esparza attended the hearing. Ms. Esparza was cut off when she
5 tried to speak, and she and her mother did not understand much of the proceedings.

6 At one point, Richard Esparza's lawyer raised the issue of \$52,000 in matured bond
7 proceeds. Ms. Esparza told the Court that Ms. Lopez had directed her to withdraw the money and
8 keep it so that her other children could not get control of it. The Court instructed that the money
9 not be spent pursuant to the TRO.

10 On November 3, 1999 the Court extended the TRO to December 1, 1999.

11 H. Neurologist Richard Graham's November 12 Examination of Amelia Lopez

12 Ms. Lopez did not appreciate what she perceived as an attempt by her non-caring children
13 to wrest control of her money. On November 12, 1999 she visited neurologist Richard Graham,
14 who examined her. Dr. Graham issued an informal opinion stating that Ms. Lopez was competent
15 to dispose of her affairs.¹

16 H. The Attempted Transfer of Caesar Chavez

17 On November 18, 1999 Ms. Lopez became further upset about Richard Esparza's efforts
18 to seize control of her money. Ms. Lopez then instructed her daughter Lupe Esparza to take Ms.
19 Lopez to a notary public. Ms. Esparza, dutiful to a fault, honored her mother's request. Ms. Lopez
20 then executed a deed by which she transferred title in the Caesar Chavez property to Lupe Esparza.

21 I. The Examination By Psychologist Bonnie Wolkenstein

22 Meanwhile, Ms. Lopez was examined by psychologist Bonnie Wolkenstein on
23 November 22, 1999 in conjunction with the conservatorship lawsuit.

24 During her examination, Dr. Wolkenstein failed to consider many points, did not test in
25 an accepted manner, failed to test in a way that would have allowed for Ms. Lopez's hearing
26 problems (i.e., using written questions as a substitute for oral ones), apparently accepted at face
27

28 ¹ Neither Ms. Lopez nor anyone else submitted Dr. Graham's findings to the Court in the
conservatorship proceeding (due apparently to a misunderstanding of how or when to use it).

1 value false accusations from Richard Esparza and Beatrice Rosales about Lupe physically
2 mistreating their mother, otherwise failed to “test” the legitimacy of the information she was
3 receiving from the children seeking the conservatorship, and appeared to have been
4 subconsciously biased against finding that Ms. Lopez was competent.

5 Dr. Wolkenstein later issued a report on November 30, 1999 that was filed in the
6 conservatorship lawsuit on December 2, 1999.

7 J. Imposition of Conservator

8 On December 18, 1999 the Court ordered the appointment of a conservatorship for Ms.
9 Lopez – thereby making Richard Esparza the conservator of his mother.

10 K. Richard Esparza’s Failure To Take Responsibility For His Mother’s Affairs.

11 After being appointed conservator, Richard Esparza did nothing. He did not try to
12 collect the rent on the Caesar Chavez property, did not ask talk to his mother and Lupe Esparza
13 about the Caesar Chavez property, and did nothing to change the arrangement by which Lupe
14 Esparza lived with and cared for Ms. Lopez. Nor did Richard Esparza seek to recover any of
15 the \$52,000 in cash that was in Ms. Lopez’s possession and which had been the subject of the
16 now expired TRO.

17 As a result, Lupe Esparza continued – without compensation but in reliance on her
18 mother’s assurances that she was going to be provided for – to care for Ms. Lopez for years.
19 [And the Estate continued to reap the benefit of having someone care for Ms. Lopez without the
20 expense of a full-time caretaker, which can cost more than \$36,000 per year and which would
21 have substantially depleted Ms. Lopez’s assets.] Ms. Esparza continued to help her mother
22 collect the monthly rent that Caesar Chavez generated and continued to use the money to pay
23 for Ms. Lopez’s living expenses.

24 L. The Disappearance of \$52,000 in Cash from Amelia Lopez’s Home

25 At some point at the instruction of her mother, Lupe Esparza put most of the \$52,000 in
26 a bag. She then concealed the bag by suspending it in a hole in the floor of a closet in the front
27 bedroom of her mother’s home on Elevado Terrace in Los Angeles. [Photographs on this hiding
28 place will be presented as exhibits at trial.] The bag lay suspended under the home and could

1 have been seen only if (1) someone looked in the hole (which had a piece of furniture on top of
2 it) or (2) looked under the house.

3 From time to time, Ms. Esparza and Ms. Lopez would use some of the money for Ms.
4 Lopez's living expenses.

5 At some point *well after the TRO had expired*, Ms. Lopez and Ms. Esparza discovered
6 that the bag was missing from the hole in the bedroom closet. The person who had access to
7 this hole was Ms. Lopez's "new" husband Ramon Lopez. Mr. Lopez later denied taking the
8 money, but his denials are suspect as far as Ms. Esparza is concerned. [At one point years
9 earlier, Ramon Lopez made sexual advances to Ms. Esparza and tried to fondle her while her
10 mother was sitting outside by the front door of their home. Ms. Esparza was horrified and
11 rebuffed him.]

12 M. Ms. Esparza's Move to Las Vegas

13 In June 2002 Richard Esparza filed a petition in the conservatorship lawsuit to regain
14 title to Caesar Chavez.

15 At some point (Ms. Esparza does not remember when but estimates it to have been after
16 the filing of the 2002 petition), she went to a courthouse in conjunction with some legal
17 proceeding and was told by a lawyer representing Richard Esparza (she does not remember his
18 name) that she would be arrested if she were to continue collecting the rent that Caesar Chavez
19 generated.

20 This threat scared Ms. Esparza, who lacked the foresight or presence of mind to consult
21 with a lawyer for independent advice. Because Ms. Esparza had no job and no way of
22 supporting herself, she got her son Larry to drive her to Las Vegas that same day to "start over."
23 Ms. Esparza left with literally only the clothes on her back. In Las Vegas she found work as a
24 caretaker for the elderly.

25 N. Ms. Lopez's Death

26 Amelia Lopez died in March 2005. Lupe's siblings did not warn her when the end was
27 near so that she could say goodbye to her mother.

28 O. An Opportunity for Ms. Esparza to Sell Her Interests in Caesar Chavez and Playground

1 Shortly after Ms. Lopez died, Ms. Esparza was contacted by a lawyer named Caesar
2 Reinoso. Mr. Reinoso had grown up in the real estate business and later turned to the law. He
3 was looking for real estate that he could improve or “flip” at a profit and had come across Ms.
4 Esparza’s properties.

5 After some discussion, Ms. Esparza agreed to sell to Mr. Reinoso the two properties that
6 she believed she had been given by her mother: Casear Chavez and Playground. The deal was
7 that Mr. Reinoso would pay \$15,000, assume responsibility for prosecuting a lawsuit to quiet
8 title, and then pay a total of \$450, 000 once he had clear title.²

9 On or about March 12, 2005, Ms. Esparza, her son Pete and Mr. Reinoso met in
10 Barstow (where Pete lived) at a bank and executed a contract for Mr. Reinoso to buy this real
11 estate. Ms. Esparza also opened a bank account and deposited the \$15,000 that she received
12 from Mr. Reinoso.

13 P. Getting Tricked By Jack Whitehorn

14 Ms. Esparza did the deal because she needed the money (she had little and was helping
15 to support a grown son and his children) but she also worried whether she was getting a fair
16 deal with a fair price. While mentioning her situation at the facility where she was caring for
17 someone, a visitor named Mary Whitehorn told Ms. Esparza that her husband Jack Whitehorn
18 might be able to help because he was a law school graduate and just as good as a lawyer even
19 though he was not one himself. Ms. Esparza later talked with Mr. Whitehorn, who reiterated
20 that he was “just as good as a lawyer” and might be able to “help” Ms. Esparza.

21 Ms. Esparza then arranged for Mr. Reinoso to meet with her and Mr. Whitehorn while
22 Mr. Reinoso was in town to have grant deeds notarized. They met in Mr. Whitehorn’s home.
23 Mr. Whitehorn started telling Ms. Esparza that the deal was not fair and essentially talked Ms.
24 Esparza out of consummating it. As this happened, it was apparent to Mr. Reinoso that Mr.
25 Whitehorn was doing this so that he could try to insert himself into the transaction. And that is
26

27 _____
28 ² Richard Esparza effectively had abandoned the petition in the conservatorship lawsuit and
never prosecuted it, and Ms. Esparza (who had no lawyer) had no idea about her rights or the status
of title to the properties.

1 precisely what happened.

2 Mr. Whitehorn told Ms. Esparza that he could help her figure out whether she really had
3 title to the two pieces of property but that to do so he would need to have his name on title so
4 that people would “listen” to him. Turning on his Southern charm, Mr. Whitehorn duped Ms.
5 Esparza – who previously had had the same false notion that an agent would not be heeded if
6 his name were not on title (hence her purported transfer to son Larry Lozano while he was
7 acting as caretaker) into believing this.

8 As a result, on March 25, 2005 Mr. Whitehorn caused Ms. Esparza not only to deed to
9 him a 50% interest in each of the properties but also to sign an agreement providing that he
10 would be paid 18% of their sale price (and be reimbursed for all legal fees) in return for his
11 services of clearing up title to the subject real property. Mr. Whitehorn also caused Ms.
12 Esparza to grant him a power of attorney. At all times, Ms. Esparza believed that the
13 documents she had signed were a formality to help Mr. Whitehorn investigate her situation and
14 that he would “undo” the transaction when he finished.

15 In return for these interests, Mr. Whitehorn paid \$15,000 to Mr. Reinoso, who was
16 willing to walk away (he wanted an investment, not a lawsuit) if he received a refund of his
17 deposit money. Mr. Whitehorn also apparently agreed to help Ms. Esparza pay enough of the
18 overdue taxes on the properties to keep them from being sold.

19 Q. Collecting the Rent and Catching Up on Repairs at Caesar Chavez

20 After undertaking (in her mind) to have Mr. Whitehorn help clear things up, Ms. Esparza made
21 arrangements to start collecting the rent from Caesar Chavez’s residential and commercial
22 tenants. She also assumed responsibility for maintaining the property.³

23 Caesar Chavez was in bad shape. Little had been done to maintain it between the time
24 that Ms. Esparza had moved to Las Vegas and the death of Ms. Lopez in 2005.

25 Because Ms. Esparza was usually “tied” to Las Vegas with her job giving “24-7” in-
26 home care for an elderly woman (the recently deceased Florence Kaiser, mother of recently
27 _____

28 ³ There was no rent to collect for the Playground property for most of this period. Relatives
who were struggling financially were allowed to live there rent-free.

1 deceased Mike Kaiser), Ms. Esparza arranged for her son Pete Lozano to take on these tasks.
2 Mr. Lozano, a disabled truck driver who has mechanical skills, took on the challenge pursuant
3 to an understanding that his mother would pay (or otherwise reward) him for his troubles at the
4 end of the day.

5 Since he assumed these duties in 2005, Pete Lozano has, on behalf of Lupe Esparza,
6 responded to tenant requests for repairs at Caesar Chavez, repaired and maintained the
7 premises, paid property taxes and required governmental fees, collected the rent, and otherwise
8 managed the property.

9 Mr. Lozano's actions included spending at least \$24,923 for items that included
10 supplies, fixtures, and materials. These items in turn were used on maintenance and repair
11 projects that included plumbing, painting, repairing and welding the fence, installing a new
12 fence, patching holes in walls, tile for four rooms and the lobby, replacing latches with door
13 handles, removing carpet that had been glued to the floor, replacing 10 windows and 2 window
14 frames (plus windows), making a frame for one window, repairing walls, buying smoke
15 detectors, and replacing items pursuant to directives from the County of Los Angeles.

16
17 **III. NO GROUNDS EXIST TO SET ASIDE MS. LOPEZ'S TRANSFER OF TITLE**
18 **TO THE "PLAYGROUND" PROPERTY BECAUSE THERE WAS NO UNDUE**
19 **INFLUENCE AND IT WOULD BE AN IDLE ACT GIVEN THAT MS.**
20 **ESPARZA WAS SUPPOSED TO INHERIT IT.**

21 A. Undue Influence

22 The amended petition (§ 24) seeks to set aside Ms. Lopez's transfer of the Playground
23 home on the grounds that it was effected by undue influence arising from Ms. Lopez's
24 "physical and mental weakness and distress". The evidence will show that no such thing
25 occurred.

26 The presumption of undue influence arises if three elements are shown:

27 (1) a confidential relationship,

28 (2) active participation in the preparation of the document transferring property, and

1 (3) undue profit accruing to the beneficiary.

2 If those elements are shown, a presumption of undue influence arises and the litigant seeking to
3 preserve the status quo has the burden of proving no undue influence. However, “[i]t is for the
4 trier of fact to determine whether the presumption will apply and whether the burden of
5 rebutting it has been satisfied.” *Estate of Sarabia*, 221 Cal. App.3d 599, 605 (1990). *See also*
6 *Estate of Clegg*, 87 Cal. App. 3d 594, 602 (1978) (When a will contestant has shown by a
7 preponderance of evidence that the above elements are present, the burden then shifts to the
8 proponent to prove that the will was not induced by his undue influence).

9 First, no presumption of undue influence should arise because at least two of the
10 necessary elements will not be established. First, the evidence will not establish that Ms.
11 Esparza “actively” participated in the preparation of the subject grant deed (Ms. Lopez went to
12 a notary’s office and had it done there). Second, there is no “undue profit” because the will’s
13 codicil already devised the Playground home to Ms. Esparza – not to mention the fact that Ms.
14 Esparza had relocated to Los Angeles and spent years of her life caring for her parents.

15 Moreover, neurologist Richard Graham and psychologist David Fox will testify about
16 Ms. Lopez’s condition in the fall of 1999 and the flaws in the report and conclusions of
17 psychologist Bonnie Wolkenstein. Their testimony will establish that Ms. Lopez knew precisely
18 what she was doing: trying to keep her greedy children from taking control of her money and
19 protecting her ability to reward the one child (Lupe Esparza) who regularly cared for her.

20 B. Courts Do Not Promote Idle Acts

21 No grounds exist for the Court to hear or grant the petition as to the Playground property
22 because doing so would waste judicial resources in violation of the Civil Code. It is undisputed
23 that the codicil to the subject will bequeathed “Playground” to Ms. Esparza. Because Ms.
24 Esparza was to receive this property in any event, no benefit would arise from a finding that
25 Ms. Lopez was subjected to undue influence when she gave her daughter the same property she
26 had already bequeathed to her in her will.

27 Civil Code § 3532 states that “The law neither does nor requires idle acts.” Because the
28 result would be the same even if the amended petition’s allegations were true regarding the

1 “Playground” property, it would be “idle” to have the property returned to the estate and then
2 re-transferred to Ms. Esparza through probate. For this reason, no basis exists to allow the
3 prosecution of this claim.

4
5 **IV. MS. ESPARZA’S CROSS-PETITION’S CLAIMS AGAINST THE ESTATE.**

6 Ms. Esparza has asserted cross-claims against the Estate involving (1) the money and
7 labor spent repairing and maintaining Caesar Chavez, and (2) the years she spent caring for
8 Decedent Lopez. [The facts forming the basis for these cross-claims also are the basis for the
9 Offset defense asserted in the answer to the amended petition.]

10 A. Quantum Meruit

11 Quantum meruit refers to the established principle that "the law implies a promise to pay
12 for services performed under circumstances disclosing that they were not gratuitously
13 rendered." *Long v. Rumsey*, 12 Cal.2d 334, 342 (1938). Its underlying idea is “the law’s distaste
14 for unjust enrichment. If one has received a benefit which one may not justly retain, one should
15 “restore the aggrieved party to his [orher] former position by return of the *thing* or its *equivalent*
16 in money.” *Maglica v. Maglica*, 66 Cal. App. 4th 442, 449 (1998) (emphasis in original).

17 A plaintiff must establish both that he or she was acting pursuant to either an express or
18 implied request for services from the defendant and that the services rendered were intended to
19 and did benefit the defendant. *Ochs v. PacifiCare of California*, 115 Cal .App.4th 782, 794
20 (2004).

21 Here, the Estate filed no answer to the petition, thereby waiving the opportunity to assert
22 any defenses. Because Ms. Esparza will testify how she expected to receive *some* sort of
23 reward for the sacrifices she made caring for her mother, she is entitled to the full restitution
24 sought in her amended cross-petition.⁴

25
26 ⁴ The Court need not reach this issue because the Estate has no grounds to defend this claim
27 due to its failure to answer the amended petition, but there is precedent for allowing a quantum
28 meruit recovery in this kind of situation. Although Ms. Esparza has not found any California case
authority on point, many courts in foreign jurisdictions have held that a child or relative may recover
in quantum meruit for care provided, especially when sacrifices are made. *See e.g., Palriwala v.*

1 Likewise, common sense dictates finding an implied request by the Estate for Ms.
2 Esparza via Mr. Lozano to do maintenance and repairs on Caesar Chavez while it was the
3 subject of litigation. Otherwise, its value would diminish and someone would suffer. Equally
4 important, the Estate (and the other siblings) never objected to the performance of these tasks
5 despite having full knowledge (this is a family; relatives talk) of how Mr. Lozano was caring for
6 and improving the premises.

7 B. Common Counts

8 The common count for services provided is akin to *quantum meruit*. See, e.g., *Junho*
9 *Hyon v. Selten*, -- Cal.Rptr.3d ----, 2007 WL 1793153) (2nd District, issued June 22, 2007);

11 V. THE ANSWER'S WAIVER DEFENSE AS TO THE ESTATE'S CLAIMS
12 REGARDING CERTAIN RENTAL INCOME

13 The Estate purports to seek to recover the Caesar Chavez rental income that Ms. Esparza
14 and her mother collected after the conservatorship was granted in December 1999 and Ms.
15 Esparza's move to Las Vegas a few years later.

16 The answer to the amended petition asserts a waiver defense. It alleges that the rental
17 income claims for this period have been waived because during this time conservator Richard
18 Esparza knowingly allowed Ms. Esparza to continue living with and caring for their mother, to
19 continue collecting the Caesar Chavez rental income, and to continue using that money to pay
20 for their mother's living expenses.

21 Waiver arises from the intentional relinquishment of a known right with awareness of
22 the relevant facts. The waiver may be express, based on the party's words, or implied from
23 conduct indicating an intent to relinquish the right. *Stewart v. Seward*, 148 Cal. App. 4th 1513,
24 1523 (2007).

25 Here, the only possible finding is that such a waiver occurred. All of the subject money
26

27 *Palriwala Corp.*, 834 N.E.2d 1241 (MA 2005); *Ragusa v. Barrett*, Not Reported in N.E.2d, 2004
28 WL 1490233 (2004); *Brankline v. Capuano*, 656 So.2d 1 (1995); *In re Estate of Beecham*, 378
N.W.2d 800 (Minn.,1985).

1 was used to support Decedent Lopez, so Conservator Esparza had no reason to challenge it (or
2 the arrangement by which his mother received free care and companionship from Ms. Esparza –
3 as opposed to having to pay for a caretaker).

4
5 **VI. MS. ESPARZA’S LACHES DEFENSE**

6 The Court previously denied without prejudice the assertion of the laches defense.

7 During the trial, Ms. Esparza anticipates that the Court will receive testimony from
8 many witnesses where details and dates cannot be provided because people have forgotten them
9 over the eight years that have passed since the events that form the basis for this dispute.

10 The doctrine of laches is designed to prevent unwarranted injustice. *See Brewster v.*
11 *Simpson*, 53 Cal. 2d 567, 594 (1960).

12 **A. The Elements of Laches**

13 The elements of laches are unreasonable delay and resulting prejudice to the defendant.
14 *Johnson v. City of Loma Linda*, 24 Cal. 4th 61, 68 (2000). Unless a petitioner can show that she
15 acted with reasonable diligence, in prosecuting a claim a court will turn a deaf ear. *Williams v.*
16 *Stillwell*, 217 Cal. 487, 490 (1933).

17 When adjudicating a laches defense, the Court is to consider how much prejudice was
18 suffered and the reasonableness of the plaintiff. *See In re Marriage of Modnick*, 33 Cal. 3d 897,
19 909 (1983). These factors are interrelated; the more resulting prejudice, the sooner the plaintiff
20 should have sought relief. *Id.*

21 **B. Prejudice And Unreasonable Delay Exist Here**

22 There can be little credible argument that Petitioner Rosales’ six year delay in bringing
23 this action has prejudiced Ms. Esparza. The memories of all witnesses are gone or severely
24 faded, and their mother Ms. Lopez – the most important witness regarding the Estate’s claims–
25 is dead (but was alive through March 2005). It would be hard to imagine greater prejudice.

26 Importantly, the California Supreme Court has held that the loss of witnesses is a factor
27 showing prejudice, and a defendant is not required to show that their testimony would have
28 been favorable. *See Gerhard v. Stephens*, 68 Cal. 2d 864, 904 n. 44 (1968). *See also*

1 *Zakaessian v. Zakaessian*, 70 Cal. App.2d 721, 727 (1945) (death of a material witness is to be
2 considered when adjudicating laches defense).

3 In addition, prejudice can be presumed because Ms. Rosales filed her petition after the
4 normal five year statute of limitations. *See Fountain Valley Regional Hospital & Medical*
5 *Center v. Bonta*, 75 Cal. App. 4th 316, 323-324 (1999); C.C.P. §§ 318 and 328.

6 Because each of these circumstances exists here, laches bars the subject claims.
7

8 **VII. MS. ESPARZA'S FRAUD & RESCISSION CLAIM AGAINST WHITEHORN.**

9 California Civil Code § 1709 defines fraud as follows: "One who willfully deceives another
10 with intent to induce him to alter his position to his injury or risk, is liable for any damage which
11 he thereby suffers." The species of fraud relevant to this action is as follows:

- 12 1) Intentional misrepresentation ("The suggestion, as a fact, of that which is not true,
13 by one who does not believe it to be true");

14 The elements of fraud (whether through a misrepresentation or concealment) are:
15 (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, *i.e.*, to induce reliance; (4)
16 justifiable reliance; and (5) resulting damage. Civil Code § 1709; California's Book of
17 Approved Jury Instructions (BAJI) 12.30 et seq.; *Harazim v. Lynam*, 267 Cal. App. 2d 127,
18 130, 72 Cal. Rptr. 670 (1968), quoting, 5 Witkin, Summary of California Law, Section 676.

19 Civil Code § 1689(b)(1) provides that a party may rescind a contract where in was
20 procured by fraud. *See, e.g., Miller v. Busby*, 101 Cal. App.2d 83 (1950) (Evidence warranted
21 rescission of sale of motel for vendor's false representation as to net income received from
22 motel during previous season).

23 In addition to rescission, Ms. Esparza is entitled to recover punitive damages against
24 Whitehorn due to his use of fraud to induce her to sign the subject deeds and agreement. *See*
25 C.C. § 3294(a); *Horn v. Guaranty Chevrolet Motors*, 270 Cal. App. 2d 477, 484 (1969).
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1 **VIII. THE DOCTRINE OF UNCLEAN HANDS BARS WHITEHORN'S CROSS-**
2 **PETITION**

3 The doctrine of unclean hands requires that a plaintiff have acted "fairly" in the matter
4 for which he seeks relief. Misconduct that soils a party's hands includes not only an actionable
5 tort but also "any conduct that violates conscience, or good faith, or other equitable standards
6 of conduct." Kendall-Jackson v. Superior Court, 76 Cal. App. 4th 970, 978 (1999), *rehearing*
7 *denied, review denied*. Such an act bars legal and equitable claims if it relates directly to the
8 conduct at issue in the lawsuit. Id at 978-979.

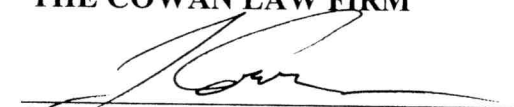
9 Here, the evidence will show that Whitehorn used lies to induce Ms. Esparza to deed
10 him interests in the subject property and sign the subject consulting agreement. Because these
11 acts soiled Whitehorn with unclean hands, he is not entitled to any relief from the Court. *See*
12 *Burton v. Sosinsky*, 203 Cal. App. 3d 562, 574 (1988) (plaintiff's conspiracy to commit fraud
13 supported unclean hands defense); *Samuelson v. Ingraham*, 272 Cal. App. 2d 804 (1969)
14 (unclean hands applies to attempts to defraud as well as accomplished fraud).

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19 DATED: July 6, 2007

Respectfully submitted,

THE COWAN LAW FIRM

20 By:


21 Jeffrey W. Cowan
22 Attorneys for Respondent Lupe Esparza

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PROOF OF SERVICE

I am over the age of eighteen years and not a party to this action; my business address is 1541 Ocean Avenue, Suite 200, Santa Monica, California 90401.

On July 6, 2007 I served **Respondent and Cross-Petitioner Lupe Esparza's Trial Brief** the interested parties in said action as indicated below:

Michael I. Schiller, Esq.
3838 Carson Street, Suite 106
Torrance, CA 90503
[(310) 792-7798; fax (310) 792-2529] *[counsel for Jack Whitehorn]*

[BY MAIL] by placing a copy of said document for collection and mailing on the date indicated above, in a sealed envelope(s), addressed as set forth above, pursuant to ordinary business practices. I am "readily familiar" with this firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service at Santa Monica, California on that same day in the ordinary course of business.

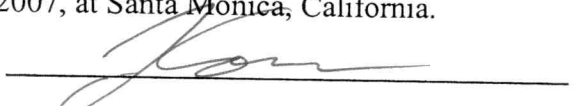
[BY PERSONAL SERVICE] by placing the original _____ a copy _____ of said document (s) for collection and mailing on the date indicated above, in a sealed envelope(s), addressed as set forth on the attached service list, and delivered to each addressee by a messenger employed by Magnum Courier Service.

[BY EMAIL] by transmitting a true copy by email to each of the above counsel.

[BY OVERNIGHT COURIER] I caused to be delivered to and served by an *Overnight Courier* on all interested parties in said action, the above named document(s) by placing true copies thereof in enclosed sealed envelopes, delivery fees paid or provided for, and addressed as set forth above.

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 6, 2007, at Santa Monica, California.



Jeffrey W. Cowan

PROOF OF SERVICE

I am over the age of eighteen years and not a party to this action; my business address is 1541 Ocean Avenue, Suite 200, Santa Monica, California 90401.

On July 6, 2007 I served **Respondent and Cross-Petitioner Lupe Esparza's Trial Brief** the interested parties in said action as indicated below:

Cory C. Brendel, Esq.
301 E. Colorado Boulevard, Suite 204
Pasadena, CA 91101
[Tel: (626) 793-8000 Fax: (626) 793-9600]; *Attorneys for Petitioner*

[BY MAIL] by placing a copy of said document for collection and mailing on the date indicated above, in a sealed envelope(s), addressed as set forth above, pursuant to ordinary business practices. I am "readily familiar" with this firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service at Santa Monica, California on that same day in the ordinary course of business.

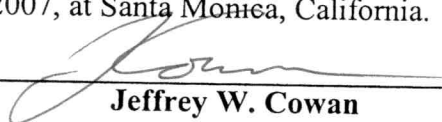
[BY PERSONAL SERVICE] by delivering a copy of this document to the office of Cory Brendel.

[BY EMAIL] by transmitting a true copy by email to each of the above counsel.

[BY OVERNIGHT COURIER] I caused to be delivered to and served by an *Overnight Courier* on all interested parties in said action, the above named document(s) by placing true copies thereof in enclosed sealed envelopes, delivery fees paid or provided for, and addressed as set forth above.

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

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