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FILED
Superior Court of California
County of Los Angeles
AUG 24 2015
Sherri R. Carter, Executive Officer/Clerk
By Kinisha Scott, Deputy

**Superior Court of California
County of Los Angeles**

In re the Marriage/Matter of: : Case No.: BD 538 616
: RULING ON SUBMITTED MATTER
: AND ORDER THEREON
PETITIONER: :
: MICHELLE HOWARD, :
: and :
: **RESPONDENT:** :
: **TERRENCE HOWARD** :
:

Introduction

Respondent moves to set aside the marital settlement agreement of the parties and the judgment. The motion is granted. By stipulation, the judgment terminating marital status remains in effect. The matter is returned to the home court for further proceedings. The Petitioner's request to determine arrearages under the agreement is moot; and it is discharged. This Memorandum of Intended Decision shall become the court's Statement of Decision under *California Rule of Court 3.1590(c)*.

Discussion

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1 Petitioner, Michelle Howard (Michelle) and Respondent, Terrence Howard
2 (Terrence)¹ entered into an agreement (the Agreement) months after a single mediation
3 session before the Honorable Kenneth A. Black, Judge, retired (Judge Black). Michelle
4 moved the court for entry of judgment based on the Agreement. Terrence opposed entry
5 judgment. A Judgment was entered on May 6, 2013 (the Judgment).

6 On May 5, 2015, Terrence filed the pending request for order seeking to set aside
7 the Judgment on the grounds that Michelle engaged in conduct amounting to criminal
8 extortion or blackmail [Penal Code §§518, 519] justifying an order to set aside the
9 Judgment under Family Code §2122(c).²

10 The court limited Michelle from putting on any direct evidence through her own
11 testimony in defense to the request to set aside because she failed to timely serve a
12 narrative declaration in response to Terrence's request for order; she also unjustifiably
13 refused to answer relevant questions at her deposition on the grounds that the agreement
14 precluded her from discussing the agreement because of a nondisclosure clause and
15 mediation confidentiality.

16 Michelle takes the strained and untenable position that all communications
17 between the parties from May 1, 2012 (and even before) are protected by mediation
18 confidentiality. This sweeping and overbroad application of the confidentiality
19 provisions is inconsistent with the law and facts. The key facts are these:

- 20 • May 1, 2012 the parties participated in a mediation with retired Judge
21 Kenneth A. Black (Judge Black). Michelle and counsel appeared in person.
22 Terrence participated by telephone. His counsel was present at the single
23 session of the mediation.
- 24 • There was no signed agreement or recitation of an agreement on the record
25 at the end of this single mediation session at about 11:00 p.m.

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27 ¹ First names are used for ease of reference with no disrespect to either party

28 ² Further unspecified statutory references are made to the Family Code.

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- After May 1, 2012, there were no further mediation sessions involving Judge Black. There is no evidence that either party or his/her attorney participated in further communications with Judge Black related to this proceeding.
 - September 19, 2012, Michelle's counsel was the last person to execute the Agreement.

7

When does mediation end?

8 Evidence Code Section 1125 provides:

9 “(a) For purposes of confidentiality under this chapter, a mediation ends
10 when any one of the following conditions is satisfied:

11 (1) The parties execute a written settlement agreement that fully resolves
12 the dispute.

13 (2) An oral agreement that fully resolves the dispute is reached in
14 accordance with Section 1118.³

15 (3) The mediator provides the mediation participants with a writing signed
16 by the mediator that states that the mediation is terminated, or words to that
17 effect, which shall be consistent with Section 1121.

18 (4) A party provides the mediator and the other mediation participants with
19 a writing stating that the mediation is terminated, or words to that effect,
20 which shall be consistent with Section 1121. In a mediation involving more
21 than two parties, the mediation may continue as to the remaining parties or
22 be terminated in accordance with this section.

23 (5) **For 10 calendar days, there is no communication between the**
24 **mediator and any of the parties to the mediation relating to the**

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27 ³ Under the terms of section 1118, this section does not apply because none of the things
28 described in the section occurred.

1 **dispute. The mediator and the parties may shorten or extend this time**
2 **by agreement.** [Emphasis Added].

3 The Law Revision Commission Comments notes the following:

4 “By specifying when a mediation ends, Section 1125 provides guidance on
5 which communications are protected by Section 1119 (mediation
6 confidentiality). Under subdivision (a)(1), if mediation participants reach
7 an oral compromise and reduce it to a written settlement fully resolving
8 their dispute, confidentiality extends until the agreement is signed by all the
9 parties. For guidance on binding a disputant to a settlement agreement, see
10 Williams v. Saunders, 55 Cal.App.4th 1158, 64 Cal.Rptr.2d 571 (1997)
11 (“The litigants’ direct participation tends to ensure that the settlement is the
12 result of their mature reflection and deliberate assent.”). Subdivision (a)(2)
13 applies where mediation participants fully resolve their dispute by an oral
14 agreement that is recorded and memorialized in writing in accordance with
15 Section 1118. The mediation is over upon completion of that procedure,
16 and the confidentiality protections of this chapter do not apply to any later
17 proceedings, such as attempts to further refine the content of the agreement.
18 See Section 1124 (oral agreements reached through mediation).
19 Subdivisions (a)(3) and (a)(4) are drawn from Rule 14 of the American
20 Arbitration Association's Commercial Mediation Rules (as amended, Jan. 1,
21 1992). **Subdivision (a)(5) applies where an affirmative act terminating a**
22 **mediation for purposes of this chapter does not occur.** Subdivision (b)
23 applies where mediation partially resolves a dispute, such as when the
24 disputants resolve only some of the issues (e.g., contract, but not tort,
25 liability) or when only some of the disputants settle. Subdivision (c) limits
26 the effect of Section 1125.” [Emphasis Added].

27 While no case specifically construes section Evidence Code section 1125(a)(5)
28 several cases discuss its effect. *Wimsatt v. Superior Court* (2007) 152 Cal. App. 4th 137

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1 (*Wimsatt*) clarifies that a party claiming mediation confidentiality has the burden of
2 proof.⁴ Here, the parties participated in a mediation with retired Judge Black on May 1,
3 2012. After the mediation was completed, the parties engaged in further negotiations and
4 the last signature was affixed on the Agreement by Attorney Donahue on September 19,
5 2012. Michelle has the burden of proof on the following issues:

6 • *There was communication between the mediator and any of the parties*
7 *to the mediation relating to the dispute that occurred 10 days after May 1,*
8 *2012.* Michelle fails to carry her burden of proof as no credible evidence
9 exists on this issue. The court rejects Michelle's counsel's hypothesis that
10 simply because Judge Black indicated he would be available that this
11 somehow extended the mediation. Potential availability alone is not an
12 extension of the mediation.

13 • *The mediator and the parties extended the 10 day window.* Michelle fails
14 to carry her burden of proof. Simply put, she has no evidence on this issue.

15 *Not every form of communication between parties is protected*
16 *simply because they mediated at one time*

17 In *Eisendrath v. Superior Court* (2003) 109 Cal. App. 4th 351 (*Eisendrath*)⁵ there
18 was an attempt to show communication between the mediation participants before the
19 end of the mediation that occurred outside the mediator's presence. The *Eisendrath* court
20 held that any such communications were protected under mediation confidentiality.

21 Here there is no attempt to present evidence regarding what took place during the
22 mediation.⁶ As demonstrated above, at the very outside, the mediation ended on May 12,
23

24 ⁴ Here, that party is Michelle.

25 ⁵ On remand *Eisendrath* was assigned to the undersigned bench officer. Nothing in this
26 discussion of the holding in *Eisendrath* relates to the post-remand proceedings in that case.

27 ⁶ Under Michelle's theory of the case, because the Agreement references that the parties
28 participated in mediation, this means no communications between the parties can be presented in

1 2012. Some of the relevant communications in this motion to set aside occurred outside
2 the mediation framework between the parties alone including a series of threats and
3 repeated threats both before the mediation and after the mediation was completed through
4 the signature on the Agreement made by Michelle or on her behalf by Yvonne.
5 Michelle's threats before mediation cannot be insulated; and her extortion after the
6 mediation is not a protected form of communication.

7 *In re Marriage of Kieturakis* (2006) 138 Cal. App. 4th 56 (*Kieturakis*) addressed
8 the question of the availability of the mediator to testify about communications and
9 presentations that clearly took place during the mediation. *Kieturakis* clarifies that
10 Terrence shoulders the burden of proof to demonstrate the requisite duress under section
11 2122. The *Kieturakis* panel observed that Anna, the moving party, would be unable to
12 demonstrate the requisite duress at the time of the hearing. In *Kieturakis*, the moving
13 party was attempting to show duress based on events that occurred during the mediation.

14 Here, Terrence asserts coercion that predated the mediation and continued after the
15 session was completed. *Kieturakis* differs markedly from the facts presented here.
16 Michelle and Terrence conducted a one day mediation with Judge Black where Terrence
17 did not appear in person. Michelle fails to carry the burden of proof that the mediation
18 was extended by the parties and the mediator beyond May 12, 2012. Based on the
19 legislative comments cited above, the mediation was long over at the time the Agreement
20 was signed. The language of the Agreement referencing the fact of a prior mediation
21 does not constitute the requisite extension as provided by Evidence Code section
22 1125(a)(5).

23 Communication between Terrence's counsel and Michelle's counsel may be
24 subject to confidentiality based on settlement discussion between the attorneys. Neither
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26 this request for order. As defined by *Eisendrath* there was no attempt to present evidence
27 concerning communications protected by mediation confidentiality; nor was there an attempt to
28 explain the agreement (as in *Eisendrath*) based on what the parties or the mediator said.

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1 party presented evidence of settlement discussions between the attorneys. Thus, direct
2 communications between Michelle and Terrence before the mediation and during the
3 relevant period (May 12, 2012 and after) are admissible, including any communications
4 by Yvonne on behalf of Michelle.

5 This case presents several important issues:

- 6 • Is the Agreement subject to mediation confidentiality? Yes, but subject to the
7 limitations described.
- 8 • Is the Non-disclosure provision enforceable? Yes if the Agreement is enforceable.⁷

9 Michelle filed no substantive responsive declaration signed by her under penalty
10 of perjury denying Terrence's claim that she blackmailed him into signing the
11 Agreement.⁸ Testimony was presented by Terrence's former sister in law Yvonne
12 Howard (Yvonne) who confirmed that Michelle was threatening Terrence with revealing
13 information about his past sexual escapades and his sexual health. Michelle presents no
14 evidence denying the threats. The nondisclosure clause of the agreement is designed to
15 create a remedy for improper disclosure. Stated differently, the nondisclosure clause
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18 ⁷ Michelle tried the case on the theory that the nondisclosure clause prohibited her from
19 responding to the allegations made by Terrence; or in the alternative that any communication
20 between them was protected by mediation confidentiality.

21 ⁸ Nothing in the Agreement prohibits Michelle from denying Terrence's claims about her. It
22 defies logic and common sense for her to assert- "I could defend these claims, but I'm sworn to
23 silence." First, if there is no Agreement, then there is no enforceable non-disclosure clause.
24 Second, Terrence was the first to "violate" the nondisclosure clause. It strains credulity to think
25 that Michelle could not enter even a flat denial. And she didn't. Because of this, Michelle was
26 precluded from presenting testimony on direct in her case in chief. She would have been
27 permitted to present testimony on redirect if Terrence conducted an examination of her under
28 *Evidence Code §776*. However, Terrence never called her as a witness.

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1 creates a remedy for improper disclosures; it is not a bar to making statements. It is
2 certainly not a prior restraint that would have kept Michelle from defending herself.

3 *Michelle's request to present an alternative theory*
4 *at the end of the hearing*

5 Nearing the end of Terrence's case in chief, Michelle moved the court for an order
6 permitting her to testify in response to Terrence's testimony. In his Reply declaration
7 filed June 17, 2015, Terrence observed that Michelle had not filed a denial to Terrence's
8 allegations. When Michelle filed an unsolicited supplemental responsive declaration on
9 July 29, 2015, she still never filed a direct denial of Terrence's allegations.

10 On the last day of the four day hearing, Michelle belatedly asked for leave of court
11 so she could present a narrative declaration and testify. The court denied the request
12 finding that there was no excusable neglect in Michelle's strategic decision that she
13 would not file a responsive declaration that included her declaration.⁹

14 *A strategic determination is a deliberate act*
15 *not a form of excusable neglect*

16 The provisions of law permitting courts to relieve a party of a mistake or
17 excusable neglect are not a safe-harbor for a calculated, even if unjustified, or
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19 _____
20 ⁹Michelle's attorney filed a narrative declaration and signed the relevant FL-320 Responsive
21 Declaration. Michelle was permitted to make an offer of proof concerning her proposed
22 testimony so that she could protect her record. For the reasons stated, the court did not consider
23 her offer of proof. Michelle had no meaningful explanation for this belated request for filing.
24 Heretofore she took the position that the Non-Disclosure Agreement (NDA) and Mediation
25 Confidentiality precluded her from testifying. She tried the case on the theory that mediation
26 confidentiality precluded Terrence from making an attack on the agreement. For the reasons
27 stated, it did not. As to the NDA, Michelle was trying to ride two horses at the same time- if the
28 agreement was not set aside, she had a claim against Terrence under the NDA provision. It is
axiomatic that if there is no enforceable agreement there is no enforceable NDA provision.

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1 unwarranted, even if poor, litigation strategy. In *Zamora v. Clayborn Contracting Group,*
2 *Inc.* (2002) 28 Cal. 4th 249 (*Zamora*) a party sought relief under Code of Civil Procedure
3 473 on the basis of mistake or inadvertence of counsel. In determining whether the
4 attorney's mistake or inadvertence was excusable, "the court inquires whether 'a
5 reasonably prudent person under the same or similar circumstances' might have made the
6 same error.'" [Citations Omitted].

7 The *Zamora* court stated that: "the discretionary relief provision of section 473
8 only permits relief from attorney error "fairly imputable to the client, i.e., mistakes
9 anyone could have made." (*Garcia, supra*, 58 Cal.App.4th at p. 682, 68 Cal.Rptr.2d 228.)
10 **"Conduct falling below the professional standard of care, such as failure to timely**
11 **object or to properly advance an argument, is not therefore excusable.** To hold
12 otherwise would be to eliminate the express statutory requirement of excusability and
13 effectively eviscerate the concept of attorney malpractice." (Ibid.)" (*Zamora* at 258)
14 *Zamora* follows the line of reasoning that relief should not be granted where the actions
15 were intentional and strategic. [Emphasis Added].

16 In *Roemer v. Retail Credit Co.* (1975) 44 Cal. App. 3d 926 (*Roemer*) plaintiff filed
17 an action for libel. The trial court did not allow defendant's request for leave to amend its
18 answer to plead partial truth in mitigation of the damages. The *Romer* court observed:
19 "Furthermore, we agree with plaintiff that defendant's attempt at the end of the second
20 trial to inject the issue of partial truth via an amendment to its answer and a jury
21 instruction was **merely an attempt 'to submit its case to the jury on one theory after**
22 **having tried it on another. . . .'** We conclude that the trial judge did not err in
23 **denying defendant's request for leave to amend nor in refusing its proposed jury**
24 **instruction."** [Emphasis Added] (*Roemer* at 940-941).

25 Amendments of pleadings to conform to the proofs should not be allowed when
26 they raise new issues which were not included in original pleadings and upon which
27 adverse party had no opportunity to defend. See: *Trafton v. Youngblood* (1968) 69 Cal.2d
28 17; *Lavelly v. Nonemaker* (1931) 212 Cal. 380.

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1 Michelle is not seeking to amend an earlier filed declaration. She is attempting to
2 change theories in the middle of the case by filing a new declaration tacking toward an
3 entirely different course and presenting an alternative approach leaving no opportunity
4 for Terrence to rebut or prepare for her newly presented theory. Moreover, Michelle
5 makes no meaningful offer to compensate Terrence for the cost of further delay,
6 including:

- 7 • Retaking her deposition
- 8 • Refiling the response
- 9 • All the costs associated with the preparation and prosecution of this lengthy
10 proceeding.

11 For these reasons, and as described on the record in this proceeding, the court denied
12 Michelle's late conceived attempt to reframe her defense to the agreement. Michelle
13 filed no substantive responsive declaration signed by her under penalty of perjury
14 denying Terrence's claim that she blackmailed him into signing the Agreement which
15 was served by her at the time of her response or even her belated supplemental
16 response.¹⁰

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18 ¹⁰ Nothing in the Agreement prohibited Michelle from denying Terrence's claims about her. It
19 defies logic and common sense for her to assert- "I could defend these claims, but I'm sworn to
20 silence." First, if there is no Agreement, then there is no enforceable non-disclosure clause.
21 Second, Terrence was the first to "violate" the nondisclosure clause. It strains credulity to think
22 that Michelle could not enter even a flat denial. And she didn't. The court infers that Michelle
23 did not want to answer for her conduct and she tried to hide behind an unsupported claim of
24 mediation confidentiality and presented an unctuous claim that she was silenced by a
25 nondisclosure clause. Because of this, Michelle was precluded from presenting testimony on
26 direct in her case in chief. She would have been permitted to present testimony on redirect if
27 Terrence conducted an examination of her under *Evidence Code* §776. However, Terrence never
28 called her as a witness.

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1 Testimony was presented by Terrence's former sister in law Yvonne who
2 confirmed that Michelle was threatening Terrence with revealing information about his
3 past sexual escapades and his sexual health. Michelle presents no evidence denying that
4 she made these threats or that she attempted to dissuade Yvonne from participating in the
5 litigation. While Yvonne's testimony was presented by the reading of her deposition she
6 was credible; and when necessary she clarified statements in the declaration that she
7 signed.

8 Charles McBride (Mr. McBride) was Terrence's business manager and
9 accountant; he testified that Michelle diverted several hundred thousand dollars in the
10 Fall of 2010 into an account in her name only. Mr. McBride planned to use it as a credit
11 in any divorce proceedings which were later filed in January 2011.

12 In May 2011 and June 2011, Mr. McBride put some money into a joint account.
13 According to Mr. McBride, Michelle wrongfully wired out 150,000 from a joint
14 account.¹¹ In June 2011 Mr. McBride confronted Michelle and she began cussing him
15 out. In September 2011, he spoke with Michelle who wanted the divorce to be over. Mr.
16 McBride told Michelle not to expect any more money. Late in September 2011, there was
17 discussion about how much Terrence could afford to pay Michelle; and Mr. McBride
18 handled a wire transfer of \$40,000 (Exhibit 9) paid as "hush money" which was all that
19 Terrence had available to him.¹² That said, Mr. McBride classified it as alimony in an
20 earlier declaration. Ex. 40 shows how he characterized payments for Michelle.

21 In response, Michelle called her forensic accountant Steve Wasserman
22 (Accountant Wasserman) who testified concerning the use of certain funds by Terrence
23 and Michelle during the marriage. Accountant Wasserman is a well-respected forensic
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26 ¹¹ The Agreement recites a July 25, 2011 date of separation (Date of Separation). Many of the
27 transactions that Mr. McBride testified about, all occurred before this Date of Separation.

28 ¹² The evidence (Ex. 40) shows that Terrence had income in excess of one million dollars during
several of the months before and after the Date of Separation in 2011.

1 accountant; but his testimony added nothing to the core question of whether or not
2 Michelle was pressuring Terrence into signing the agreement.

3 Terrence called Ian Tausig- (Mr. Tausig) who has 8 ½ years law enforcement
4 experience with Santa Paula and Guadalupe Police Department. He has expertise as a
5 Social Media Intelligence Analysis- McAfee Institute- Mid 2014. Mr. Tausig reviewed
6 exhibits 6, 7, and 8. He reviewed Michelle's deposition; and he reviewed various
7 Instagram™ postings and Twitter™ messages. Mr. Tausig concluded that Michelle was
8 the only follower of certain Instagram™ accounts.

9 Mr. Tausig testified that he looked for certain indicia that *Michie_Ghent* had only
10 one follower for *Jchang768* who is Michelle. He looked for specific indicia which
11 displayed across all of the accounts LOL- improper use of *they're* for *their* and the profile
12 photo. *JWildCard* and *Jchang768*. Mr. Tausig concludes that Michelle was the person
13 making the postings on social media accounts including private information about
14 Terrence. Michelle's deposition testimony is contradicted by the search warrant data (Ex.
15 8) supporting Mr. Tausig's opinion that Michelle was the author and poster of these
16 messages. Mr. Tausig concedes that LOL is commonly used in social media postings,
17 emails, Twitter™ tweets, and text messages.¹³

18 Under the pressure of a well-presented cross examination, it appears that many of
19 Mr. Tausig's conclusions were not supported by the evidence including whether other
20 persons had actually posted similar pictures of Terrence while he was in Atlanta,
21 Georgia. Mr. Tausig did credibly testify that Michelle was making Instagram™ and
22 Twitter™ postings about Terrence.

23 Andre Polk (Mr. Polk) testified on behalf of Michelle as her technical expert
24 regarding the social media postings. Like Mr. Tausig's testimony, Mr. Polk's testimony
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28 ¹³ LOL is commonly known as an internet slang acronym meaning "laughing out loud."

1 did not further clarify who was posting various messages or information about
2 Terrence.¹⁴

3 Terrence testified that he was fearful of Michelle. The court heard the tape (Ex. 3)
4 recording where Michelle was absolutely threatening Terrence that if he did not accede to
5 her financial demands, she would engage in an unrelenting campaign to destroy his
6 career. While in closing argument Michelle's counsel tried to underplay the effect of this
7 tape recording, the facts simply belied the hollow and unsupported attempts to show that
8 Michelle just needed to get some money.¹⁵ The court concludes from the statements
9 made by Michelle in the tape recording that she was absolutely livid with Terrence. She
10 had every intention of belittling him and pressuring him to give her money; and she
11 coerced him into accepting the terms of the agreement by threatening to sell embarrassing
12 information to the tabloid media.¹⁶

13 Michelle exerted coercive control over Terrence because she had copied many of
14 his tapes and recordings, including from his now deceased mother, and tapes and videos
15 of a private, sexual, intimate nature.¹⁷ He professed a love for Michelle and a desire to
16 regain the recordings and photographs. His motives were conflicted. He claims he did
17 not give Michelle a sexually transmitted disease. According to Terrence, there was
18 violence between the parties, but he testified he only responded in self-defense. The
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21 ¹⁴ The evidence demonstrated that someone styling herself as "napacook" was posting pictures of
22 Terrence on Instagram.

23 ¹⁵ The court rejects Michelle's counsel's attempt to call her conduct defensively "fighting fire
24 with fire." Moreover, there is no admissible evidence to support this statement. In sum,
25 Michelle presented no evidence explaining her conduct. The court gave great weight to the
26 rantings contained in her overtly hostile tone on the tape.

27 ¹⁶ As noted, Michelle never presented a timely and meaningful explanation for her conduct.

28 ¹⁷ Nowhere in the record is there evidence from Michelle explaining or denying her conduct.

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1 court finds that Terrence was not credible concerning the sexually transmitted disease;
2 and he was not credible concerning his claimed self-defense.¹⁸

3 Terrence is a bully, but that doesn't mean he can't be bullied. Terrence has an
4 unrelenting pattern of styling himself as the victim of rampant racism and unfair
5 allegations about him.¹⁹ A very accomplished actor, Terrence tried to minimize his
6 conduct in past events including an incident on a Continental airline flight. However
7 poorly Terrence may have acted in other settings, he was the only witness to testify
8 concerning the telephone call between Terrence and Michelle.²⁰

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13 ¹⁸ Michelle's counsel postulated that since she was the victim of domestic violence so that she
14 was not capable of acts of extortion or making threats because she was afraid of Terrence. Not
15 so. The evidence and her own words do not support this conclusion.

16 ¹⁹ Whether actually persecuted or only styling himself as a victim, the following things are true
17 about Terrence based on the evidence presented and his conduct in court: (a) he lacks impulse
18 control (b) he is convinced he is the most important person in the room (c) he has a lengthy
19 admitted history of substance abuse (d) he has abused Michelle (e) he uses bravado to cover up
20 insecurity (f) he self describes as "crazy" (g) he never got over his attachment to Michelle even
21 after remarrying. However, against this back drop of inner turmoil and conflict, as troubling as
22 it may be, he was victimized by Michelle who from the tenor and tone of her recordings can be
23 plenty tough. This time, Terrence met his match.

24 ²⁰ Michelle's counsel tried to turn this case into a trial about Terrence's character. Whatever
25 strengths or weaknesses are present in Terrence's character, this case was about whether he was
26 being extorted by Michelle by direct threats to sell material to the tabloid press in exchange for
27 money or a favorable settlement from Terrence. Many of the other efforts brought by Michelle
28 about Terrence were simply artful distractions diverting attention from her conduct, her threats,
her demands, and the consequences that naturally flow therefrom.

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1 As to the claim that he felt threatened by her; and that he felt forced into signing
2 the agreement, Terrence was credible. There was no testimony from any credible witness
3 that explained Michelle's actions in her threatening telephone call about the Agreement.

4 To establish grounds for setting aside a family law judgment, the Legislature has
5 created a framework for grounds for set aside that differ from the grounds under the
6 Family Code that developed independently from the older architecture of Code of Civil
7 Procedure 473.

8 Section 2122(c) allows the court to set aside a judgment obtained through duress
9 so long as the application is properly substantiated and timely presented. There is a three
10 prong analysis:

- 11 • Timely application
- 12 • Substantiated Grounds
- 13 • Material Benefit

14 Terrence acted (albeit barely) within the statutory time frames. So, the question is
15 whether he has established a prima facie case of duress under the Family Code.

16 Terrence's un rebutted testimony asserts that he agreed to several years of alimony for a
17 one year marriage subjecting himself to in excess of one million dollars of alimony for a
18 very short term marriage so he has demonstrated the potential for material benefit from
19 the setting aside of the judgment.

20 The case turns on the question of whether Terrence established a prima facie case
21 of duress. Citing the Family Law Practice Guide, he observes:

22 "[16:117] Duress: [Fam.C. § 2122(c)]. The statute offers no definition of
23 cognizable "duress." Presumably, therefore, courts should be guided by prior case
24 law on the subject: "Duress, which includes whatever destroys one's free agency
25 and constrains him or her to do what is against his or her will, may be exercised by
26 threats, importunity or any species of mental coercion ... **It is shown where a
27 party intentionally used threats or pressure to induce action or nonaction to
28 the other party's detriment ... The coercion must induce the assent of the**

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1 **coerced party, who has no reasonable alternative to succumbing.**” [Marriage
2 of Balcof (2006) 141 CA4th 1509, 1523, 47 CR3d 183, 193 (brackets, internal
3 quotes and citations omitted); Marriage of Baltins (1989) 212 CA3d 66, 87, 260
4 CR 403, 415-416—H induced W's consent to inequitable property settlement
5 through acts of psychological coercion, threats, misrepresentations and financial
6 control]

7 [16:117.1] Under this standard, there is no cognizable “duress” where the record
8 shows the complaining spouse's consent to a stipulated property division and
9 support judgment was “freely, knowingly and voluntarily given”; and especially
10 where he or she was thoroughly probed by the judge about his or her
11 understanding and had ample opportunity to reflect on the proposed judgment and
12 obtain independent advice before signing the stipulated judgment. [Marriage of
13 Rosevear (1998) 65 CA4th 673, 685-686, 76 CR2d 691, 699—fact W did not sign
14 stipulated judgment until 3 months after underlying settlement conference “is
15 strong evidence what she was experiencing was not duress, but ‘buyer's
16 remorse’”].²¹

17 Terrence is the only witness who testified on the question of cognizable duress
18 because he was afraid that Michelle, who was angry, frantic, and menacing. The court
19

20
21 ²¹ Michelle urges that Terrence must show three things to establish duress: (a) a wrongful act or
22 wrongful threat to pressure a party (b) a reasonable person in Terrence's position would have
23 believed that he or she had no reasonable alternative except to consent to the contract (b) that
24 Terrence would not have consented to the contract without the wrongful act or wrongful threat.
25 By playing the tape, Terrence established that Michelle was extorting him into signing the
26 contract by threatening to release the tapes. Terrence testified credibly that he would not have
27 signed the agreement but for the threat because he believed if he did not sign, then Michelle
28 would release information that would be very damaging to Terrence's career. Finally, Terrence
was believable when he said he would not have otherwise consented to the Agreement.

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1 finds a credible threat that she would in fact make good on her threats to sell
2 embarrassing information to the tabloid media. It is true that Terrence was drawn back to
3 Michelle even after his subsequent remarriage. The court gave little weight to this
4 evidence. First, only Terrence credibly testified that he was drawn back to Michelle
5 based on a complex combination of fear and a morbid fatal attraction. Terrence was
6 mesmerized by Michelle and his past attraction apparently continued long after the
7 marriage was over. Michelle for her part seemed sympathetic as she kindly questioned
8 him during a recorded conversation that took place after the agreement was signed and
9 Terrence had remarried.

10 Absent further requirements imposed by law (not present here), Evidence Code
11 Section 411 provides that the testimony of a single witness is sufficient to carry the
12 burden of proof.²² For strategic reasons known only to herself, Michelle elected to leave
13 the court (until it was too late) with no evidence of her side of the story.²³

14 Both sides presented extensive evidence on largely collateral matters- such as the
15 Instagram™ postings and Twitter™ tweeting and the finances of the parties. Michelle
16 had very sensitive photographs and recordings of Terrence that if revealed would cause a
17 person of ordinary sensibilities to be deeply embarrassed. Terrence engaged in acts of
18 domestic violence toward Michelle. Simply because Michelle was the victim of domestic
19

20 ²² The nature of the threats was confirmed by Yvonne Howard in both her declaration and
21 deposition. Michelle did attempt to dissuade Yvonne from participating in the litigation by
22 intimating that she didn't have to get involved. The communications between Michelle and
23 Yvonne show that Michelle is at least manipulative if not cunning.

24 ²³ Michelle successfully demonstrated that Terrence is a relentless narcissist whose strength of
25 personality includes such self-congratulatory designations as "I'm the smartest person in the
26 world" followed by mercurial self-depreciating lows where he wants to kill himself. But this
27 evidence proved nothing in defense to the underlying claim of coercive behavior resulting in
28 Terrence signing the Agreement under duress.

RULING ON SUBMITTED MATTER AND ORDER THEREON

1 violence does not mean that she is incapable of extorting money from Terrence.²⁴ And
2 she did.

3 The case turned on the evidence presented by Terrence through the tape recording
4 of Michelle threatening him; and his unrebutted testimony that he felt he had no choice
5 but to sign the agreement whereby he obligated himself to five years and potentially in
6 excess of a million dollars of alimony for a one year marriage.

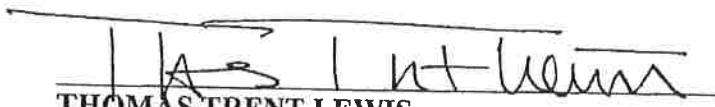
7 **Order**

8 The Court orders that:

- 9 1. The Agreement and the Judgment are set aside except with respect to marital
10 status.
- 11 2. The parties remain unmarried persons.
- 12 3. The Petitioner's request to establish arrearages is moot because of the court order
13 setting aside the agreement. It is discharged and placed off calendar.
- 14 4. The matter is returned to Judge Tamzarian's court for all further proceedings.
- 15 5. This order is effective when signed. No further order shall be necessary.
- 16 6. This Ruling on Submitted Matter shall become the court's statement of decision
17 under California Rule of Court 3.1590(c) absent a timely filed and served request
18 in compliance with the rule filed directly in Department 309.

19 IT IS SO ORDERED.

20 Date: August 24, 2015

21
22 
23 **THOMAS TRENT LEWIS**
24 **JUDGE OF THE SUPERIOR COURT**
25
26
27
28

²⁴ The court rejects Terrence's explanation for how Michelle was injured when he was cross
examined on this issue.