PARTIES/ATTORNEYS

Plaintiff	Jose Apolinar	Frank P. Cuykendall
Defendant	E Cortez Corporation dba Central Coast Produce	Vaughn Taus
Alter Ego/ Successor	United Foods Inc.	Spiegel & Utrera P.C. Mary Herlihy

TENTATIVE RULING

The court has considered the subsequently filed Motion to Affirm Judgment Adding Name of Continuing Enterprise despite its untimeliness, as well as the response filed by United Foods.

The court's ruling has not changed. Absent service of process or service of a noticed motion to add United Foods, Inc., the judgment entered on June 13, 2024 is void for lack of jurisdiction and must be vacated as to United Foods Inc. under Code of Civil Procedure section 473 subdivision (d) ("The court may, ... on motion of either party after notice to the other party, set aside any void judgment or order.")

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote Appearance (Zoom) Information | Superior Court of California | County of Santa Barbara.)

Plaintiff Jose Appolinar filed his initial complaint on June 13, 2014, against defendant E Cortez Corporation dba Central Coast Produce alleging wage and hour violations. Trial was initially set for June 15, 2015. That date was vacated after it was reported that defendant intended to file for bankruptcy. Notice of Stay of Proceedings pursuant to the automatic stay in bankruptcy was filed on February 5, 2016. On February 7, 2023, the court was advised that the automatic stay had been lifted. A court trial was held on June 3, 2024. Defendant did not appear. The court found in favor of the plaintiff and against defendant E. Cortez Corporation for total Judgment of $278,721.73. The Judgment filed on July 13, 2024 specified it was against E Cortez Corporation *and* against United Foods Inc. "as Alter Ego."

On August 8, 2024, United Foods Inc. filed a Motion to Set Aside the Judgment as it pertains to United Foods, arguing that it had no notice of the

proceeding. Opposition was filed on August 16, 2024. The Court published a tentative ruling in which it concluded that absent service of a noticed motion or service of process on United Foods, the judgment must be vacated, relying on *Milrot v. Stamper Medical Corp*. (1996) 44 Cal.App.4th 182.

At the December 17, 2024 hearing, the court continued the matter and allowed further briefing. On January 15, 2025, plaintiff filed a Motion to Affirm the Amended Judgment. On January 17, 2025, United Foods filed a response that seems to function as both a reply to plaintiff's opposition to the Motion to Set Aside the Judgment and as opposition to the Motion to Affirm Amended Judgment.[1]

To be clear, the court is focused on how the amended judgment was presented procedurally. Consequently, argument whether United Foods should be added to the judgment based on substantive factors have not been addressed.

1. Successor Liability

Plaintiff argues that under the doctrine of successor liability, a company may step into the shoes of a predecessor company and become liable for the predecessor's actions, citing *CenterPoint Energy, Inc. v. Superior Ct.* (2007) 157 Cal.App.4th 1101, 1120. In that case, plaintiffs contended that numerous energy-related defendants engaged in a conspiracy from 1999–2002 to manipulate prices in the California retail natural gas market. Plaintiffs sued, among others, CenterPoint Energy, Inc. (CenterPoint), a Texas public utility holding company, on a successor liability theory, based on its formation during 2000–2002 out of a former parent, Reliant Energy, Inc. (Former Reliant or Former REI), a Texas utility holding company. CenterPoint filed a motion to quash service of summons for lack of personal jurisdiction. The motion was denied and CenterPoint filed a petition for writ of mandate. It is against this background that the appellate court stated:

> "The main question presented in CenterPoint's petition is whether a recognized basis for successor liability applies on this record. *Successor liability is a well settled concept in the area of personal jurisdiction determinations.* In a case raising liability issues, a California court will have personal jurisdiction over a successor company if (1) the court would have had personal jurisdiction over the predecessor, and (2) the successor company effectively assumed the subject liabilities of the predecessor."
>
> (*CenterPoint Energy, Inc. v. Superior Court* (2007) 157 Cal.App.4th 1101, 1120 [emphasis added].)

[1] The motion to affirm amended judgment was not timely served or filed. (Code Civ. Proc., § 1005, subd. (b)—"Unless otherwise ordered or specifically provided by law, all moving and supporting papers shall be served and filed at least *16 court days* before the hearing." [Emphasis added].) To be timely, the motion must have been served and filed by January 10, 2025. Nevertheless, United Foods does not raise untimeliness as an issue and the court will thus consider the motion.

The italicized sentence is prominently featured in plaintiff's brief. The court has no issue with the concept that in appropriate cases, successor liability may confer jurisdiction over a defendant. But the court can't ignore that in the *CenterPoint* case, *the successor company was served with notice of process in the action for which liability was sought.* Plaintiff does not address this point at all. In this case, United Foods was not served with notice of process (nor had it even been served with a notice of motion prior to being added to the judgment). *CenterPoint* is not dispositive, for it is axiomatic that a case does not stand for a proposition not considered. (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.)

Plaintiff argues that it has satisfied the substantive requirements of successor liability. A successor company has liability for a predecessor's actions if: (1) the successor expressly or impliedly agrees to assume the subject liabilities (which has never been argued here respecting the unregulated businesses), (2) the transaction amounts to a consolidation or merger of the successor and the predecessor, (3) the successor is a mere continuation of the predecessor, or (4) the transfer of assets to the successor is for the fraudulent purpose of escaping liability for the predecessor's debts. (*CenterPoint, supra,* 157 Cal.App.4th at p. 1120; *Ray v. Alad Corp.* (1977) 19 Cal.3d 22, 28.) Plaintiff argues: "Here, at trial of the predecessor, E Cortez, all four of the above alternative requirements were proven to the satisfaction of the Court." (Motion to Affirm Amended Judgment, p. 2, ll. 24-25.) However, *CenterPoint* does not stand for the proposition that service of process need not be accomplished so long as the substantive requirements for successor liability are satisfied. The court is not convinced that any finding of successor liability is sufficient to satisfy procedural due process and statutory concerns of notice, which in turn implicate jurisdiction. Plaintiff has failed to supply let alone identify any authority to the effect that a court can impose liability without any notice to the party against which liability is imposed. Notions of fundamental fairness are seemingly at play.

2. Amendment Pursuant to Civil Code Section 187

Plaintiff also renews the argument that a California court may use "all the means necessary" to carry its jurisdiction into effect pursuant to Code of Civil Procedure section 187.[2] He asserts that "[t]his includes amending a judgment against a corporation to add a nonparty alter ego as a judgment debtor." (Motion, p. 3, ll. 16-18.) But in each case cited by plaintiff, a motion to amend was brought. (*Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 506—"On August 28, 2009, Greenspan filed a motion to amend the judgment to add [ ] judgment debtors . . ."; *Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd.* (1996) 41

[2] Section 187 states: "When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most comformable to the spirit of this code."

Cal.App.4th 1551, 1554—"In December 1994 appellant renewed its motion to amend the judgment to add MCCOC as respondent's alter ego."; *Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1074–1075—"The trial court also appears to have denied the motion to amend the judgment, in part, because Misik did not allege the alter ego doctrine in the underlying lawsuit. Code of Civil Procedure section 187, however, does not require that the ground for such a motion be alleged and proved before entry of judgment."; *Highland Springs Conference & Training Center v. City of Banning* (2016) 244 Cal.App.4th 267, 275—"In October 2012, Highland Springs, Banning Bench, and the two Cherry Valley entities moved to add SCCA to the judgments as an additional judgment debtor and render SCCA liable for paying their attorney fees and costs awards."; *Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership* (2013) 222 Cal.App.4th 811, 813—"Relentless moved to amend the judgment to add Wayne and Linda Fulton, Airborne Turbine, Inc. (ATI), and Paradise Aero, Inc. (Paradise), as judgment debtors.") In the end, section 187 contemplates amending a judgment *by noticed motion*. (*Highland Springs Conference & Training supra,* 244 Cal.App.4th at p. 280; *Wells Fargo Bank, Nat'l Ass'n v. Weinberg* (2014) 227 Cal.App.4th 1, 9.) Here, no such motion appears in the record. Thus, the amended judgment is void for lack of due process.

3. Jurisdiction by Appearance

Plaintiff argues that United Foods was fully represented in this proceeding by attorney Vaughn Taus, Esq., asserting that "Mr. Taus represented both E. Cortrez and the continuing enterprise, United Foods. Mr. Taus had indicated that he was the attorney representing both entities and, in court, stated that counsel for Plaintiff, could not contact either one of his clients. He also sent an email stating same." (Motion to Affirm Amended Judgment, p. 6, ll. 23-26.)

Milrot v. Stamper Medical Corp. (1996) 44 Cal.App.4th 182 (the case cited in the court's first order) is again instructive. In *Milrot*, the plaintiffs sued their employer, Stamper Medical Corporation, and obtained a judgment that identified the judgment debtor as "Stamper Medical Corporation 'et al.' " Plaintiffs moved to "clarify" the judgment to specifically identify two judgment debtors—Stamper Medical Corporation and Dr. Stamper. The trial court declined the plaintiffs' request to add Dr. Stamper as a judgment debtor, but it nonetheless amended the judgment to add Lindora Medical Clinic, Inc. (Lindora). (*Milrot, supra,* 44 Cal.App.4th at p. 184-185.) Lindora filed a motion to set aside the judgment against it, asserting (among other grounds) that the court never had personal jurisdiction over it and that the judgment against it was therefore void. The trial court denied the motion. The appellate court concluded the judgment against Lindora was void and reversed the order amending the judgment. (*Milrot, supra,* 44 Cal.App.4th at p. 188.) It reasoned that "[i]n order for the judgment against [Lindora] to be valid, the [trial] court must have had jurisdiction over [Lindora]. Normally jurisdiction is acquired by service." (*Milrot, supra,* 44 Cal.App.4th at p. 186; see also Ahart, Cal.

Practice Guide: Enforcing Judgments & Debts (The Rutter Group 2024) ¶ 6:1575.1 ["The court must have jurisdiction over the judgment debtor's alter ego in order to enter a valid judgment against the alter ego. This is normally accomplished by service of process."].)

The *Milrot* court continued: "The only other potential source of jurisdiction on this record is the appearance of attorney Sanders [nominally representing only Stamper and Dr. Stamper] at the motion to amend the judgment." The court held that "[t]he validity of the judgment against [Lindora] thus depends on whether attorney Sanders was authorized to appear on behalf of [Lindora] at the motion to amend the judgment." (*Milrot, supra,* 44 Cal.App.4th at p. 186.) The court then examined whether there was evidence of actual or ostensible authority to conclude whether the attorney had authority to appear on behalf of the Lindora and found there was none. It reasoned:

> "Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the third party to believe that the agency exists." (2 Witkin, Summary of Cal. Law, supra, Agency and Employment, § 40, p. 53, italics in original.) (1d) Thus the actions of Attorney Sanders alone cannot create jurisdiction over LMC, Inc.; action by LMC, Inc., itself is needed. The record here is devoid of evidence of any action by LMC, Inc., of any kind. Nor can it be said that the record contains relevant evidence of inaction on the part of LMC, Inc. LMC, Inc., simply was not a party, was never served, was not a target of the postjudgment motion, was not served with the postjudgment motion, and was not even incorporated at the time of the motion."

The appellate court "reversed with directions to vacate the judgment against [Lindora] as void for lack of jurisdiction." (*Milrot, supra,* 44 Cal.App.4th at p. 188.)

Plaintiff asserts in briefing that Mr. Taus had indicated that he was the attorney representing both entities and, in court, stated that counsel for Plaintiff, could not contact either one of his clients. But plaintiff has not cited nor provided any convincing *evidence*. Plaintiff also asserts that Attorney Taus sent an email stating the same. The email exchange shows that Attorney Cuykendall inquired of Attorney Taus: "Vaughn: Are you still representing E Cortex, United Foods, etc. Did you file a Motion to Withdraw re E Cortez? If not please provide a notice of written consent that I may directly contact your clients." Attorney Taus responded: "There is nothing to withdraw from. The lawsuit is against a bankrupt entity. My clients settled with the Chapter 7 trustee and received a comprehensive release. The claim or claims, if any, were owned by the chapter 7 estate, controlled by the chapter 7 trustee and have been concluded. You may not communicate with any of my clients, directly or indirectly." (Cuykendall Decl., Exh. C.) But even assuming the email contained an affirmative confirmation of representation (which it does not),

pursuant to *Milrot*, ostensible agency cannot be established by the representations or conduct of Attorney Taus, the purported agent. It must be established by the party. There is no evidence that United Foods took any action to suggest that Attorney Taus was representing it.

Even if attorney Taus were found to represent United Foods Inc., *absent service of a noticed motion or service of process*, the judgment must be vacated. The judgment entered on June 13, 2024 is void for lack of jurisdiction and must be vacated as to United Foods Inc. under Code of Civil Procedure section 473 subdivision (d) ("The court may, ... on motion of either party after notice to the other party, set aside any void judgment or order.")

4. Defective Motion

Plaintiff argues that the procedural device relied upon by United Foods to request an order vacating the judgment is inapplicable. United Foods' motion to vacate is based in part on Code of Civil Procedure section 473.5. Section 473.5 subdivision (a) provides: "When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action." Here, as plaintiff points out, a default judgment was not entered. This code section thus seems inapplicable.

However, United Food's motion is also grounded on Code of Civil Procedure section 473, subdivision (d), which provides: "The court may, . . . on motion of either party after notice to the other party, set aside any void judgment or order." The court does not find the motion to be fatally defective.

5. Ruling

The court grants the Motion to Set Aside the Amended Judgment on the basis that it was procedurally defective and did not provide due process to United Foods. The court commensurately denies the Motion to Affirm the Amended Judgment.