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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SHAHIN SHAATH, Plaintiff and Respondent, v. SAMAH OUDEH et al., Defendants and Appellants.	D074692 (Super. Ct. Consolidated No. CIVDS1312530)
SHAATH & OUDEH ENTERPRISES, INC., et al., Plaintiffs and Respondents, v. SAMAH OUDEH et al., Defendants and Appellants.	(Super. Ct. Consolidated No. CIVDS1312531)
IBRAHIM OUDEH et al., Plaintiffs and Appellants, v. IBRAHIM SHAATH, etc., et al., Defendants and Respondents.	(Super. Ct. Consolidated No. CIVDS1406757)

APPEAL from a postjudgment order of the Superior Court of San Bernardino, Donald R. Alvarez, Judge. Appeal dismissed in part and reversed and remanded with directions in part.

Law Offices of John A. Case, Jr. and John A. Case Jr. for Defendants and Appellants.

Gulino Law Office and John J. Gulino for Plaintiff and Respondent.

This is an appeal from a postjudgment order in a matter in which the superior court has consolidated three actions for all purposes. The postjudgment order vacated and set aside a default and a default judgment in one of the three actions.

Since the judgment that preceded the postjudgment order on appeal did not terminate the litigation between all of the parties in all of the actions in the consolidated case, the judgment is not final as to those parties who still maintained claims and defenses that were not fully and finally resolved by the judgment. Because the judgment was not final *as between those parties*, the postjudgment order *as between those parties* is not an appealable order. Thus, as we explain, appellate jurisdiction is lacking, and we will dismiss the appeal *as to them*.

The judgment at issue is a default judgment on a first amended complaint, and the postjudgment order at issue set aside the default judgment and the entry of default that preceded it. Based on its equitable powers, the trial court ruled that, as a matter of law, because the defendants' answer to the original complaint was sufficient to respond to the first amended complaint, the defendants were not in default, and there was no basis for entry of default or a default judgment. This was error. As we explain, the amended

complaint asserted, at a minimum, a new cause of action not alleged in the original complaint. With regard to the defendants who remain as respondents in this appeal, since their original answer did not respond to the *new cause of action*, they were in default at least as to the new matter, and the trial court erred in concluding otherwise. Accordingly, we will reverse the postjudgment order as to the defendants who remain as respondents in the appeal and remand with directions that the court rule on the remaining issues raised in these defendants' motion.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

Seven parties are involved in three San Bernardino County Superior Court actions that have been consolidated for all purposes. All of the claims and defenses are based on the parties' business relationship related to two gas station and mini-mart businesses, one in La Quinta and one in Temecula, California.

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1 Absent a party's accurate record reference (Cal. Rules of Court, rule 8.204(a)(1)(C); further undesignated rule references are to the California Rules of Court) or our independent verification of facts from evidence in the record, we have not considered the party's factual recitation. (*Rybolt v. Riley* (2018) 20 Cal.App.5th 864, 868 [appellate courts may " 'disregard any factual contention not supported by a proper citation to the record' "]; *County of Riverside v. Workers' Compensation Appeals Board* (2017) 10 Cal.App.5th 119, 124 [appellate courts " 'ignore' " factual statements without record references].) We are unable to accept counsel's presentation—either from trial court pleadings or in appellate court briefs—as *evidence of facts*, as opposed to allegations or arguments. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 11 ["the unsworn statements of counsel are not evidence"]; *Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 454 ["unsworn averments in a memorandum of law prepared by counsel do not constitute evidence"].)

A. *The Parties*

On one side of the disputes are appellants Ibrahim Oudeh and Samah Oudeh, who are husband and wife (together, the Oudehs). On the other side of the disputes are respondents Shahin Shaath and Ibrahim Shaath, who are brothers (together, the Shaaths), and the following three business entities (together, the Corporations): Shaath and Oudeh Enterprises, Inc. (Enterprises); Shaath and Oudeh Group, Inc. (Group); and S and O Enterprises, Inc. (S and O).

Enterprises owned and operated an ARCO gas station and AM-PM mini-mart in La Quinta in 2008, and S. Shaath initially owned the real property on which the La Quinta business was located. Group owned and operated an ARCO gas station and AM-PM mini-mart in Temecula beginning in 2009. According to I. Oudeh, S and O owned the real property on which the Temecula business was located; according to S. Shaath, the parties formed S and O to own the real property on which the La Quinta business was located.[2] In purchasing the businesses, the parties contributed various amounts of cash and borrowed significant funds from traditional lenders.

During the 2008 - January 2013 time period, S. Shaath and S. Oudeh were the shareholders of record of the Corporations. The parties disagree as to each shareholder's percentage ownership interest in the Corporations. Shaath and I. Oudeh were actively involved in the management of the Corporations, and I. Oudeh was the general manager of both of the retail businesses.

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2 This disagreement is irrelevant to any issue on appeal.

B. *The Transaction*

Following a number of disputes between the individual parties, S. Oudeh and the Shaaths entered into an agreement dated January 23, 2013 (Buyout Agreement), by which S. Oudeh agreed to sell to the Shaaths a "33% interest" in each of the Corporations in exchange for $1.213 million. Among other terms and conditions, the $1.213 million was to be paid as follows: (1) $700,000 cash from the refinance of the Temecula real property; and (2) $513,000 in monthly installments of $5,000, all due and payable within a year, as evidenced by a promissory note secured by a deed of trust on the La Quinta real property.

Pursuant to the terms of the Buyout Agreement, the Shaaths caused to be paid the $700,000 from the refinance and $25,000 in monthly installments on the note, but then paid nothing more.

C. *The Litigation*

The parties dispute why the Shaaths made no additional payments on the promissory note, but for purposes of the issues in the present appeal, an understanding of the parties' positions and arguments is irrelevant. All that is necessary is the understanding that, as a result of the disputes, litigation ensued.

1. *San Bernardino Superior Court Case No. CIVDS1312530 (Case 1)*

In October 2013, S. Shaath sued S. Oudeh in San Bernardino Superior Court, case No. CIVDS1312530 (Case 1).

S. Shaath asserted causes of action against S. Oudeh for breach of contract (Buyout Agreement), fraud (in the inducement to enter into the Buyout Agreement),

declaratory relief (under the Buyout Agreement), and breach of the implied covenant of good faith and fair dealing (Buyout Agreement). In May 2014, S. Oudeh filed an answer to the complaint in Case 1 in which she generally denied the allegations and asserted 31 affirmative defenses.

2. *San Bernardino Superior Court Case No. CIVDS1312531 (Case 2)*

In October 2013, Enterprises and Group sued the Oudehs in San Bernardino Superior Court, case No. CIVDS1312531 (Case 2).

Enterprises and Group alleged various causes of action, individually and together, against the Oudehs for: conversion (based on the draws and payments they made to themselves from the receipts of the operations of the two businesses); fraud (related to setting up the shareholders' percentage ownership of Enterprises and Group); money had and received; and account stated. In May 2014, the Oudehs filed an answer to the complaint in Case 2 in which they generally denied the allegations and asserted 32 affirmative defenses.

3. *San Bernardino Superior Court Case No. CIVDS1406757 (Case 3)*

In May 2014, in addition to having filed their answers in Cases 1 and 2, the Oudehs filed a lawsuit against I. Shaath, S. Shaath, Enterprises, Group, and S and O in San Bernardino Superior Court, case No. CIVDS1406757 (Case 3).

S. Oudeh named all of the defendants in the following three causes of action: breach of contract (promissory note); judicial foreclosure (real property lien); and judicial foreclosure (personal property lien). Both of the Oudehs named all of the defendants in the following 12 causes of action: breach of contract (handwritten agreement and Buyout

Agreement, alleged to contain similar terms); judicial foreclosure (vendors' lien); breach of the implied covenant of good faith and fair dealing (handwritten agreement and Buyout Agreement); violations of the Uniform Fraudulent Transfer Act (renamed the Uniform Voidable Transactions Act in 2015; Civ. Code, § 3439 et seq.); common law fraudulent transfers; fraudulent inducement (Buyout Agreement, promissory note, other written and oral agreements); fraudulent concealment (Buyout Agreement, promissory note, other written and oral agreements); breach of fiduciary duty; declaratory relief (extinguishing real property lien); declaratory relief (that the Oudehs do not owe defendants anything in Cases 1 and 2, or otherwise); money had and received; and equitable restitution. As relevant to the issues in this appeal, in the nine causes of action for money damages, the applicable plaintiff(s) alleged damages in the amount of the promissory note ($513,000), plus accrued interest ($91,977.81), less payments received ($25,000)—for total of $579,777.81, plus interest.

I. Shaath, S. Shaath, Enterprises, Group, and S and O (Case 3 Defendants) failed to respond to the complaint in Case 3, and in July 2014 the Oudehs requested and the court entered their default in Case 3.

4. *San Bernardino Superior Court* Consolidated *Case No. CIVDS1312530*

In August 2014, pursuant to the stipulation of the parties, the court ordered that Cases 1, 2, and 3 "shall be consolidated for all purposes, including trial, pursuant to Code of Civil Procedure § 1048(a) and Rule . . . 3.350."[3]

The parties further stipulated, and the court further ordered that the defaults entered in Case 3 were set aside and the Case 3 Defendants were given until September 4, 2014, in which to respond to the complaint. Almost 11 months later, in July 2015, the Case 3 Defendants filed an answer to the Case 3 complaint in which they generally denied the allegations and asserted 13 affirmative defenses.

A year later, in July 2016, the court granted an unopposed motion by the Oudehs for leave to file a first amended complaint in Case 3, ordering that the Case 3 Defendants had 20 days in which to answer. The Oudehs included only four changes in their amended complaint. In three of the original causes of action for money damages

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3 Further undesignated statutory references are to the Code of Civil Procedure. Section 1048 provides in relevant part: "(a) When actions involving a common question of law or fact are pending before the court, . . . it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Rule 3.350(a) contains the requirements for a motion to consolidate superior court cases. As applicable here, rule 3.350(b) requires that Case 1 be designated the lead case; rule 3.350(d) requires that, following consolidation, all documents filed in the consolidated case include the caption and case number of Case 1, followed by the case numbers of Cases 2 and 3; and rule 3.350(c) requires that, because consolidation was ordered "for all purposes including trial," all subsequent documents be filed only in Case 1. As evidence of the parties' intent and understanding, following the August 2014 consolidation, all of the parties' documents contained in the record on appeal comply with these requirements.

(fraudulent inducement, fraudulent concealment, and breach of fiduciary duty), the Oudehs asserted as "alternative relief" damages of not less than $3 million from the Case 3 Defendants. As particularly relevant to the issues on appeal, the Oudehs asserted a new, seventeenth, cause of action in which they sought money damages of not less than $3 million from the Case 3 Defendants based on what the Oudehs alleged to be injury resulting from their right to rescind the Buyout Agreement on grounds of fraudulent inducement, mutual mistake, unilateral mistake, and failure of consideration—all under Civil Code section 1689. None of the five Case 3 Defendants responded to the Oudehs' amended complaint by the court-ordered deadline, and more than 20 days after notice of the ruling on the motion, the Oudehs requested and the clerk of the court entered the Case 3 Defendants' default in late August 2016.

Almost eight months later in April 2017, pursuant to section 585, subdivision (d), the Oudehs requested entry of a court judgment against the defaulted Case 3 Defendants—in Case 3 only. In support of their request, consistent with rule 3.1800, the Oudehs submitted a formal application, declarations, exhibits, a memorandum of costs, a declaration of nonmilitary status, a proposed judgment, and a request to dismiss Doe defendants—more than 175 pages of substantive materials in total. On April 28, 2017, the court entered a money judgment in Case 3 only in favor of I. Oudeh and S. Oudeh and against I. Shaath, S. Shaath, Enterprises, Group, and S and O, jointly and severally, in the amount of $3,001,762.62. In addition, the court entered a declaratory relief judgment in favor of the Oudehs and against the Case 3 Defendants, jointly and severally, setting

aside and voiding what the Oudehs alleged to have been the "secret deed of trust" on the La Quinta property for the benefit of I. Shaath.

In June 2017, the Oudehs gave notice of entry of the April 28, 2017 judgment in Case 3 ("Judgment").

The next day, the Case 3 Defendants filed an ex parte application for an order vacating and setting aside the Judgment, or alternatively staying enforcement of the Judgment and shortening time for a hearing on the application. In support, the Case 3 Defendants submitted a memorandum of points and authorities, a declaration from their attorney, and two exhibits. The Case 3 Defendants presented several alternative arguments: The Oudehs fraudulently obtained the Judgment; the Case 3 Defendants did not receive notice of the Oudehs' motion to amend their complaint in Case 3, the granting of their motion, the filing of their amended complaint, or their intent to enter a default judgment; the parties agreed that the Case 3 Defendants' October 2014 answer to the original complaint would serve as their answer to the amended complaint; and, because the Case 3 Defendants' October 2014 general denial to the original complaint served as a general denial to the amended complaint, as a matter of law the Case 3 Defendants were not in default.

The court declined to hear the Case 3 Defendants' request on an ex parte basis and set the matter for briefing and hearing.

The Oudehs filed a memorandum of points and authorities, a declaration of counsel, and 20 exhibits in opposition to the Case 3 Defendants' motion to vacate and set aside the Judgment. The Oudehs' legal arguments included: There was no evidence of

extrinsic fraud; the Oudehs gave the Case 3 Defendants all notice required by law related to the default and default judgment; the Case 3 Defendants did not establish the requisite mistake, inadvertence, surprise, or excusable neglect to obtain the requested relief; and the Judgment was not void—both because the court had subject matter and personal jurisdiction (making the Judgment *voidable* at best), and because the Case 3 Defendants' October 2014 answer to the original complaint was not a sufficient response to the July 2016 amended complaint (leaving the amended complaint in default).

The Case 3 Defendants filed a reply that included responses to the legal arguments and four declarations.

The Oudehs filed a surreply and a supplemental declaration.

The court conducted a hearing at which counsel presented oral argument. At the conclusion of the July 3, 2017 hearing, the court granted the Case 3 Defendants' motion, setting aside the default and Judgment on very specific grounds:

> "The Court will note that it does have powers in equity to grant a motion, . . . and reviewing the motion . . . with regard to the amended complaint, it is clear, at least it appears, the amendment was fairly minor. I think it simply adds an additional cause of action that was related to the other existing causes of action. . . . [¶] So this is—this case appears to be somewhat similar to [*Carrasco v. Craft* (1985) 164 Cal.App.3d 796 (*Carrasco*)]. I'm somewhat familiar with the history here. My intended is to grant the motion to set aside the default and default judgment pursuant to the Court's equitable powers, and I'm going to deem the previous answer sufficiently answers the amended complaint."

The court's minute order is consistent:

> "[Case 3 Defendants'] Motion re: Vacate/Set Aside Default is Granted. [¶] Motion is granted pursuant to the Court's equitable powers; original answer is deemed answer to Amended Complaint.

> [¶] Set aside entire judgment on 1st Amended Complaint (Unlimited) of Oudeh. [¶] Set aside disposition of [Case 3 Defendants]. [¶] Set Aside Request for Default as to [Case 3 Defendants]. [¶] Answer of [Case 3 Defendants] deemed filed." (Some capitalization omitted.)

The Case 3 Defendants gave notice of this ruling and submitted a proposed written order, which the court signed and filed.[4]

By notice filed July 12, 2017, The Oudehs timely appealed from the July 3, 2017 minute order granting the Case 3 Defendants' postjudgment order.[5]

II. DISCUSSION

The Oudehs argue that the trial court erred when it ruled that the Case 3 Defendants' answer to the Oudehs' complaint was a sufficient response—and thus the Case 3 Defendants did not default in responding—to the Oudehs' amended complaint. We agree. As we explain at part II.B.2.a., *post*, because the amended complaint contains substantive amendments not present in the original complaint, the Case 3 Defendants' answer generally denying the allegations in the original complaint did not respond to the amended complaint—at least not to the Oudehs' new cause of action; thus, the Case 3 Defendants were in default by failing to have responded to the amended complaint.

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4 In addition to the rulings reflected in the reporter's transcript of proceedings, the court's minute order, and the Case 3 Defendants' notice of ruling, the written order also directs the Oudehs to "take all necessary actions to withdraw and recall any judgment liens created or the effect of any recordings that may have occurred based upon the now vacated default and default judgment, the recording of any abstract of judgment, or the recording of any other document, record, or notice based upon the now vacated default and default judgment."

5 None of the Case 3 Defendants cross-appealed from the Judgment.

Before we reach the substantive issue on appeal, however, we must first consider jurisdiction. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126 (*Jennings*) [reviewing court must raise issue of appellate jurisdiction "on its own initiative" whenever a doubt exists].) As we explain at part II.A., *post,* because the Judgment does not fully and finally resolve all of the consolidated action's causes of action between all of the adverse parties in the appeal, appellate jurisdiction is lacking for review of the postjudgment order as to these adverse parties.

A. *Appellate Jurisdiction Exists Only as to Those Parties Who, After the Disposition of Case 3, No Longer Had Pending Claims Adverse to the Oudehs in the Consolidated Action*

Appellate courts have jurisdiction over a direct appeal, like the present one, only where there is an appealable order or judgment. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696 (*Griset*); *Jennings*, *supra*, 8 Cal.4th at p. 126 [an appealable order or judgment "is a jurisdictional prerequisite to an appeal"].) "A trial court's order is appealable when it is made so by statute." (*Griset*, at p. 696; see *Dana Point Safe Harbor Collective v. Superior Court* (2010) 51 Cal.4th 1, 5 ["right to appeal is wholly statutory," citing § 904.1].)

Section 904.1 contains a general list of appealable orders and judgments in California. (*American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 556-557.) Subdivision (a)(1), which describes the broadest category of appealability, provides that an appeal may be taken from "a judgment, except an interlocutory judgment[.]" (§ 904.1, subd. (a)(1).)

In California, the right to appeal is generally governed by the "one final judgment rule"— by which an appeal lies only from a *final* judgment that terminates the trial court proceedings by completely disposing of the matter in controversy between adversaries. (*In re Baycol Cases I and II* (2011) 51 Cal.4th 751, 754, 756.) As applied, section 904.1, subdivision (a)(1) codifies the common law one final judgment rule. (*Griset*, *supra*, 25 Cal.4th at p. 697 [§ 904.1, subd. (a)(1) "prohibits review of intermediate rulings by appeal until final resolution of the case"].) In short, the section 904.1, subdivision (a)(1) right to appeal "from a judgment" means a *final* judgment. (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304.) When a judgment "does not dispose of all causes of action between the parties, allowing an appeal from the [judgment] would defeat the purpose of the one final judgment rule by permitting the very piecemeal dispositions and multiple appeals the rule is designed to prevent." (*Griset,* at p. 697.)

Here, the Oudehs have appealed from a *postjudgment* order vacating the Case 3 Defendants' default and related Judgment. They base appellate jurisdiction on section 904.1, subdivision (a)(2), which provides that an appeal may be taken from "an order made after a judgment made appealable by paragraph (1)." Thus, for purposes of section 904.1, the postjudgment order granting the Case 3 Defendants' motion is appealable under subdivision (a)(2) only to the extent the Judgment is appealable under subdivision (a)(1). We must now determine the extent to which the Judgment is appealable.

"A judgment is the final determination of the rights of the parties in an action[.]" (§ 577.) In determining whether an adjudication is final and appealable, our Supreme Court has provided the following guidance:

> " 'It is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but *where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory*.' " (*Griset*, *supra*, 25 Cal.4th at p. 698, italics added.)

As we explain, the Judgment here is final, and thus appealable, only as between certain parties. Thus, as we further explain, the order vacating the Judgment is appealable only as to these certain parties, and we will dismiss the appeal as to the others.

In general, "[a] judgment that disposes of *fewer* than all of the causes of action framed by the pleadings . . . is necessarily 'interlocutory' (Code Civ. Proc., § 904.1, subd. (a)), and not yet final, *as to any parties between whom another cause of action remains pending*." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 741, second italics added.) Thus, even where a judgment does not dispose of all the causes of action in an action, the judgment is nonetheless final and appealable to the extent it "leaves no issue to be determined as to one party." (*Justus v. Atchison* (1977) 19 Cal.3d 564, 568 (*Justus*), overruled on another ground in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171; accord, *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 993, fn. 3 ["an order dismissing fewer than all defendants from an action is a 'final judgment' as to them, and is thus appealable"]; compare *Herrscher v. Herrscher* (1953)

41 Cal.2d 300, 303 [order dismissing cross-complaint against a codefendant or third party is appealable] with *Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 118 [order dismissing cross-complaint against plaintiff is not appealable][6].) This is because "it better serves the interests of justice to afford prompt appellate review" where one party's rights or liabilities have been definitively adjudicated than to require that party and its adversary to await the final outcome of trial proceedings which are of no concern to the party whose rights have been fully and finally determined. (*Justus*, at p. 568.)[7]

In the present case, the parties agreed—and the court ordered—that the three cases be consolidated "*for all purposes*, including trial." (Italics added.) Under such

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6 " 'Insofar as the appealability of an order striking a cross-complaint is concerned, it is the general rule that where the parties to the cross-complaint are identical to the parties to the original action, an order striking a cross-complaint is not appealable because it does not constitute a final judgment, the propriety of such an order being reviewable on the appeal from the final judgment. [Citations.] Where, on the other hand, the cross-complaint names new parties or codefendants the order striking a cross-complaint may constitute a final and appealable judgment, provided it adjudicates rights as between the cross-complainant and the new parties or the codefendant cross-defendants.' " (*Bob Baker Enterprises, Inc. v. Chrysler Corp.* (1994) 30 Cal.App.4th 678, 685.) Although the present appeal is from a judgment on one of three complaints in a *single consolidated action*, not cross-complaints, the parties "stipulated and agreed" that all of the claims and defenses in the three cases easily could have been presented in one complaint and one or more cross-complaints. Thus, the law applicable to the appealability of orders finalizing the dispositions cross-complaints is persuasive, if not compelling.

7 The Oudehs contend that the Judgment is final and appealable as to all parties and claims, arguing that, "[b]ecause [the] judgment is final and appealable as to some parties, it is final and appealable as to all parties *as a matter of judicial economy*." (Italics added.) We disagree; judicial economy, while desirable, is not a substitute for jurisdiction. " '[T]his court has no power to make appealable an order which is nonappealable.' " (*Velicescu v. Pauna* (1991) 231 Cal.App.3d 1521, 1523.)

circumstances, "which may be utilized where the parties are identical and the causes could have been joined,[8] the pleadings are regarded as merged, one set of findings is made, and one judgment is rendered." (*Committee for Responsible Planning v. City of Indian Wells* (1990) 225 Cal.App.3d 191, 196-197 [based on § 1048, appeal dismissed where individual judgments in consolidated action were "merely interlocutory" because of other pending claims].) Thus, the Judgment here was final and appealable judgment only as to the parties for which the Judgment left no additional issues to be determined adverse to the Oudehs *in the consolidated action*. (*Justus*, *supra*, 19 Cal.3d at p. 568.)[9]

The Judgment, which deals only with the claims in the complaint in *Case 3*, resolves I. Oudeh's and S. Oudeh's claims against all five Case 3 Defendants: I. Shaath, S. Shaath, Enterprises, Group, and S and O. However, in *Case 2*, I. Oudeh and S. Oudeh are still defending claims by Enterprises and Group; and in *Case 1*, S. Oudeh is still defending claims by S. Shaath. Accordingly, the Judgment does not fully and finally resolve the claims—i.e., despite the Judgment, there are still additional issues to be determined in the consolidated action—between: I. Oudeh and Enterprises; I. Oudeh and

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8 As we explained at footnote 6, *ante*, in the present case the parties agree that all of the claims and defenses in the three consolidated cases could have been presented in a single action without consolidation.

9 We are aware that, in some circumstances, even where other causes of action remain, an order may still constitute a final judgment if the order "effectively disposes of the entire case" by "resolv[ing] an allegation that is essential to all of the causes of action." (*Canandaigua Wine Co., Inc. v. County of Madera* (2009) 177 Cal.App.4th 298, 303.) However, here, the Case 3 Defendants do not make such an argument, and on the present record we are unable to make that determination in the first instance.

Group; S. Oudeh and S. Shaath; S. Oudeh and Enterprises; and S. Oudeh and Group. Because of the pending claims between each set of parties, the Judgment as to each set of parties is not final and, thus, not appealable. (*Justus*, *supra*, 19 Cal.3d at p. 568.)

Without a final appealable judgment between these respective groups of parties, the *postjudgment* order between these respective groups of parties is not appealable. (§ 904.1, subd. (a)(2).) Without an appealable order, we lack jurisdiction. (*Griset*, *supra*, 25 Cal.4th at p. 696.) Without jurisdiction, we have no choice but to dismiss the appeal. (*Cole v. Rush* (1953) 40 Cal.2d 178; *Katzenstein v. Chabad of Poway* (2015) 237 Cal.App.4th 759, 769 ["appellate court '*must* dismiss an appeal from a nonappealable order' "].)

Accordingly, we will dismiss: I. Oudeh's appeal as to Enterprises and Group; and S. Oudeh's appeal as to S. Shaath, Enterprises, and Group. Together, we will refer to the Case 3 Defendants who remain in the appeal—namely, I. Shaath, S. Shaath (as to I. Oudeh's appeal only), and S and O—as the Case 3 Respondents.

B. *The Trial Court Erred in Ruling, as a Matter of Law, That the Filing of the Case 3 Respondents' Answer to the Original Complaint Precluded Entry of the Case 3 Respondents' Default on the Oudehs' First Amended Complaint*

The trial court ruled that the amendments in the Oudehs' amended complaint in Case 3 were "fairly minor" and "simply add[ed] an additional cause of action that was related to the other existing causes of action." Based on this ruling, the court concluded that the Case 3 Defendants were not in default, since, as a matter of law, their answer to the original complaint sufficiently responded to the amended complaint.

As we explain, because the Oudehs' amended complaint alleged, at a minimum, a new and different cause of action against the Case 3 Respondents, these defendants were not entitled to rely on their answer to the Oudehs' original complaint; and, accordingly, the Case 3 Respondents were in default at the time the clerk of the court entered their default, as requested by the Oudehs, on the amended complaint. Therefore, as we further explain, the trial court erred in setting aside the default and resulting Judgment on the basis stated by the court.

1. *Law*

In addition to the more commonplace statutory grounds for relief from a default under section 473—none of which is at issue in this appeal—the trial court also may vacate a default or default judgment "on equitable grounds." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981 (*Rappleyea*);[10] accord, *Pulte Homes Corp. v. Williams Mechanical, Inc.* (2016) 2 Cal.App.5th 267, 275.) The trial court's equitable power to grant relief from a default is " '*narrower, not wider*,' " than its authority under section 473, subdivision (b).[11] (*Carroll v. Abbott Laboratories, Inc.*, *supra*, 32 Cal.3d at p. 901, fn. 8, quoting *Weitz v. Yankosky* (1966) 63 Cal.2d 849, 857.)

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10 In *Rappleyea*, an appeal from a default judgment, the only issue on appeal was whether the trial court had erred in denying the defendants' motion to set aside their default. (*Rappleyea*, *supra*, 8 Cal.4th at p. 978.) Even though most of the court's statements are in the context of a defendant's attempt to vacate *a default*, they are equally applicable to a defendant's attempt to vacate *a default judgment*.

11 For example, "a party who seeks to have a default judgment set aside under a court's equity power must make a stronger showing of the excusable nature of his neglect

We review the trial court's grant of a motion to set aside a default and default judgment—whether under traditional section 473 or equitable grounds—for an abuse of discretion. (*Rappleyea*, *supra*, 8 Cal.4th at p. 981.) The appropriate test for an abuse of discretion in this context is " 'whether the trial court exceeded the bounds of reason.' " (*Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 929.) As applicable here, a trial court exceeds the bounds of reason—i.e., abuses its discretion—where the court's decision is based on an error of law. (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 590 (*David*).)

We disagree with the Oudehs' suggestion to apply a de novo standard of review to the trial court's decision to vacate the default and the Judgment. Rather, since all alleged errors of law are "scrutinized de novo" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860; accord, *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 826 [appeal from denial of motion to vacate default]; *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496 [de novo review of decision that judgment is void]), we will determine de novo whether the trial court erred in concluding, as a matter of law, that the Case 3 Respondents' answer to the original complaint was a sufficient response to the amended complaint. Based on that determination, we will then consider whether the trial court abused its discretion in setting aside the default and the Judgment.

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than is necessary to obtain relief under section 473." (*Carroll v. Abbott Laboratories, Inc.* (1982) 32 Cal.3d 892, 901, fn. 8.)

2. *Analysis*

a. *The Trial Court Erred in Concluding That the Case 3 Respondents' Answer to the Original Complaint Was a Sufficient Response to the First Amended Complaint*

In granting the Case 3 Defendants' motion based on its "equitable powers," the trial court ruled, as a matter of law, that the Case 3 Respondents' answer to the Oudehs' original complaint was a sufficient response to—and thus the Case 3 Respondents did not default in failing to answer—the Oudehs' amended complaint. In doing so, the court relied on *Carrasco*, *supra*, 164 Cal.App.3d 796, which holds that, where "no new causes of action are stated in the amended complaint . . . , defendants' original answer could stand as an answer to the amended complaint[.]" (*Id.* at p. 811.) *Carrasco* teaches that, before entering a defendant's default on an amended complaint, the trial court must first consider the substance of the amendments to determine whether a new answer is required. (*Ibid*.)

In *Carrasco*, the defendants filed a motion to set aside a default and default judgment, arguing that they "were *void* insofar as the amended complaint made no new substantial allegation against either defendant and, therefore, no new answer was required."[12] (*Carrasco*, *supra*, 164 Cal.App.3d at pp. 799, 801, 807, italics added.) In

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12 The trial court here did not expressly rule that the default or Judgment was *void*. To the extent the court's reliance on *Carrasco* implies such a ruling, we disagree with it. In *People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653 (*American Contractors*), our Supreme Court explained that a judgment is void *only* when the court lacks jurisdiction in a fundamental sense, which " 'means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.' " (*Id.* at p. 660.) In contrast, a court *exceeds* its jurisdiction " '[w]hen a statute authorizes [a] prescribed procedure, and the court acts contrary to the authority thus

answer to the *legal question* "whether the default judgment should be voided" (*id.* at p. 808),[13] the appellate court concluded that the trial court erred in entering the default, because the original answer could stand as an answer to the amended complaint (*id.* at p. 811).

In reaching its conclusion, the *Carrasco* court relied on *Gray v. Hall* (1928) 203 Cal. 306 (*Gray*), which explained that a default judgment may be taken against a defendant who fails to answer an amended complaint, but only where the new complaint " 'change[s] the cause of action, or add[s] a new one.' " (*Carrasco*, *supra*, 164 Cal.App.3d at p. 808, quoting from *Gray*, at p. 311.) A new answer is not required—i.e., a defendant is not in default for failing to respond to an amended complaint—" 'where the amendment is merely as to formal or immaterial matters, and does not change the cause of action' " or " 'where the original . . . answer set[s] forth a sufficient defense to the . . . complaint as amended.' " (*Carrasco*, at pp. 808-809, quoting from *Gray*, at p. 311.) Where, as here, a defendant fails to respond to an amended complaint, " 'his original answer stands as his answer to the amended complaint; and in such case he will not be in default *except as to the additional facts set up in the amended complaint, and not put in issue by the answer*.' " (*Carrasco*, at p. 809, quoting from *Gray*, at p. 313, italics added.)

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conferred[.]' " (*Id.* at p. 661.) Where, as here, "a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable"—*not void*. (*Ibid.*)

13 In *Carrasco*, the court considered the issue one of law, because it was "determinable by examination of the judgment roll." (*Carrasco*, *supra*, 164 Cal.App.3d at p. 808.)

The following is a summary of the differences between the Oudehs' original complaint and their amended complaint:

- In the ninth cause of action for fraud (fraudulent inducement), the tenth cause of action for fraud (fraudulent concealment), and the eleventh cause of action for breach of fiduciary duty of the original complaint, the Oudehs alleged damages of $513,000 (unpaid balance of the promissory note), plus $91,977.81 (accrued interest), less $25,000 (acknowledged credits)—for a grand total of $579,777.81, plus prejudgment interest from the date of the filing of the complaint. In their amended complaint, the Oudehs alleged these same three causes of action and the same $579,777.81 in damages, *plus an additional paragraph seeking, in the alternative, $3 million in damages* caused by the Case 3 Defendants' wrongful conduct, based on "the estimated minimum value of the loss" of the Oudehs' ownership interests in specified businesses, corporations, real property, and personal property.
- The Oudehs' original complaint contained 15 causes of action (described in more detail at pt. I.C.3., *ante*). In their amended complaint, the Oudehs realleged each of the 15 causes of action (with the additional paragraphs asserting, alternatively, $3 million in damages in the ninth, tenth, and eleventh causes of action) and *added a sixteenth cause of action, entitled "RESCISSION," against the Case 3 Defendants*. More specifically, the Oudehs alleged that, pursuant to Civil Code section 1689, they are entitled to rescind the Buyout Agreement on four independent bases: (1) The Case 3 Defendants fraudulently induced S. Oudeh to

enter into the Buyout Agreement; (2) there was a mutual mistake when the Oudehs and the Case 3 Defendants entered into the Buyout Agreement; (3) the Oudehs were unilaterally mistaken in entering into the Buyout Agreement; and (4) as a result of the Case 3 Defendants' failure and refusal to perform their obligations under the Buyout Agreement, there was a complete failure of consideration.[14]

The issue, therefore, is whether any of these amendments materially changes or adds a cause of action (in which event the Case 3 Respondents were in default by failing to respond) or whether all of these amendments are merely as to formal or immaterial matters (in which event, the original answer sets forth a sufficient defense to the amended complaint). (*Gray*, *supra*, 203 Cal. at p. 311; *Carrasco*, *supra*, 164 Cal.App.3d at pp. 808-809.)

The Case 3 Respondents argue that, despite the allegations in the Oudehs' sixteenth cause of action for rescission, "no such cause of action exists; the amended complaint sought *the remedy* of rescission." (Italics added.) We disagree. Civil Code section 1689, subdivision (b) sets forth the statutory bases on which a party may rescind a

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14 Civil Code section 1689 provides, as relevant to the sixteenth cause of action in the Oudehs' amended complaint: "(b) A party to a contract may rescind the contract in the following cases: [¶] (1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through . . . fraud . . . , exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party. [¶] (2) If the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds. [¶] . . . [¶] (4) If the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause. . . ."

contract (see fn. 14, *ante*), and Civil Code section 1692 provides that, upon rescinding a contract, the aggrieved party may *either* bring an action for money damages *or* assert the rescission as a defense or a cross-complaint to contract claim.[15] "[A]lthough a party need not seek relief upon rescission if he does not want any[,]. . . *if he does want relief, . . . he must bring an action to obtain it or assert the rescission by way of* defense or *cross-complaint*." (*Little v. Pullman* (2013) 219 Cal.App.4th 558, 568-569, italics added, citing Civ. Code, § 1692.)

Very simply, although parties like the Oudehs *may* assert rescission as an alternative remedy to a legal claim for damages for breach of contract or fraud,[16] they are not limited to asserting rescission in that manner. They are statutorily authorized to assert rescission affirmatively by "bringing an action" as they did by the sixteenth cause

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15 "When a contract has been rescinded in whole or in part, any party to the contract may seek relief based upon such rescission by (a) *bringing an action to recover any money* or thing owing to him by any other party to the contract as a consequence of such rescission *or for any other relief to which he may be entitled* under the circumstances or (b) asserting such rescission *by way of* defense or *cross-complaint*. [¶] . . . [¶] A claim for damages is not inconsistent with a claim for relief based upon rescission. The aggrieved party shall be awarded complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction *and any consequential damages to which he is entitled*; but such relief shall not include duplicate or inconsistent items of recovery. . . ." (Civ. Code, § 1692, italics added.)

16 The "consequential damages" allowed under Civil Code section 1692 (see fn. 15, *ante*) refers to the damages that would restore the aggrieved party to his original position—i.e., "the very purpose of rescission." (*Akin v. Certain Underwriters at Lloyd's London* (2006) 140 Cal.App.4th 291, 298.) In contrast, contract damages compensate the aggrieved party for the loss of his expectational interest—i.e., " 'the benefit of his bargain which full performance would have brought.' " (*Ibid.*)

of action in their amended complaint in Case 3. (Civ. Code, § 1692; accord, *Little v. Pullman*, *supra*, 219 Cal.App.4th at pp. 568-569.)

Without authority, the Case 3 Respondents next argue that, because the facts in support of the Oudehs' *rescission* cause of action are the same as those in support of their causes of action for *breach of contract* or *fraud*, the Case 3 Respondents' answer to the original complaint already denied those material facts. Even if the factual bases of the two types of claims must be consistent—which we will assume without deciding—the Case 3 Respondents' argument still fails. In their original complaint, the Oudehs do not mention, let alone seek relief, based on *mistake* (mutual or unilateral) or *failure of consideration*—i.e., new and factually different claims asserted in the amended complaint.

In ruling on the Case 3 Defendants' motion, the trial court appreciated that, by their amended complaint, the Oudehs "add[ed] an additional cause of action" that was not in their original complaint. Where the court erred was to then conclude that, despite the new cause of action in the amended complaint, *Carrasco*, *supra*, 164 Cal.App.3d 796, controlled. That is because, in *Carrasco*, the amended complaint contained *fewer* causes of action against the defaulted defendants than the original complaint. (*Carrasco*, *supra*, 164 Cal.App.3d at pp. 810-811 [from eight down to five].) Indeed, this fact was the singular basis of the *Carrasco* court's ultimate ruling:

> "As to [the defaulted defendants], *no new causes of action are stated in the amended complaint*. Thus, as a matter of law, defendants' original answer could stand as an answer to the amended complaint and, therefore, it was error to enter the default and default judgment

> on the basis that the defendants failed to file an answer to the amended complaint." (*Ibid.*, italics added.)

For this reason, *Carrasco* is factually distinguishable—on an outcome-determinative issue—from the present case. In fact, by implication *Carrasco* supports the conclusion that, *because* the Oudehs' amended complaint contains a cause of action not included in their original complaint, the Case 3 Respondents' answer to the original complaint *cannot* stand as an answer to the amended complaint. (*Ibid.*)

In conclusion, based on our review of the legal ruling actually made, the trial court abused its discretion in setting aside the default and the Judgment. (*David*, *supra*, 226 Cal.App.4th at p. 590 [trial court abuses its discretion where its decision is based on an error of law].) Because the Oudehs' amended complaint asserted a cause of action (rescission) based on claims not alleged in the original complaint (mutual mistake, unilateral mistake, and failure of consideration), the Case 3 Respondents' answer to the original complaint did not respond to the amended complaint.[17] For this reason, the Case 3 Respondents were in default at the time the Oudehs requested entry of default, and the trial court erred in concluding, as a matter of law, otherwise.

On appeal, we review the trial court's ruling, not the reasons stated for the ruling; thus, even where trial court's legal reasoning is erroneous, the ruling will be affirmed if it

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17 We need not and do not decide the legal effect, for purposes of requiring a new answer, of the amendments by which the Oudehs increased their alleged damages to $3 million in the ninth, tenth, and eleventh causes of action.

can be supported by any legal theory.[18] (*Rappleyea*, *supra*, 8 Cal.4th at pp. 980-981.) In this regard, *independent of* Carrasco, the Case 3 Respondents argue that the trial court's order should be affirmed based on the following three arguments that they presented to the trial court in opposition to the Oudehs' motion: (1) The Oudehs did not give the Case 3 Respondents notice of their (the Oudehs') August 2016 request for entry of default or April 2017 application for default judgment on declarations; (2) based on their actions in the trial court following the consolidation of the three actions, the Oudehs "waived any claimed right" to seek entry of either the Case 3 Respondents' default or the Judgment; and (3) because the Oudehs did not properly serve their amended complaint, the default and Judgment are void.[19] To the extent the Case 3 Respondents contend that these are legal issues that an appellate court may decide in the first instance, we disagree. Each requires findings of fact (in part based on creditability determinations) and the exercise of discretion *in the first instance*—which have not been made and which are beyond the scope of the present appeal. Absent extraordinary circumstances not present here, appellate courts neither decide factual disputes nor exercise discretion over issues

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18 The rationale is that an appellant is not prejudiced from an error in logic or reasoning if the decision itself is legally sound. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 610.)

19 The Case 3 Respondents' brief is replete with references to the default or the Judgment being "void." However, the Case 3 Respondents do not argue, let alone establish, a lack of either subject matter or personal jurisdiction. Thus, for the reasons explained at footnote 12, *ante*, neither the default nor the Judgment is *void*; at best, either may be *voidable* upon a sufficient showing. (See *American Contractors*, *supra*, 33 Cal.4th at pp. 660-661.)

presented to the trial court; instead, appellate courts are limited to reviewing decisions of the trial court. (*Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 791 [" 'unlike trial, the purpose of an appeal is *not* to determine the case on its merits, but to review for trial court error' "]; *People v. Contreras* (2015) 237 Cal.App.4th 868, 892 ["[a]ppellate courts do not make factual findings"]; *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1160 ["it is the trial court's function in the first instance to assess witness credibility and resolve conflicts in the evidence"].) As we explain at part II.B.2.b., *post*, to the extent the Case 3 Respondents properly raised these arguments in support of their motion to vacate and set aside the Judgment, the trial court should rule on them.[20]

b. *On Remand, the Trial Court Should Rule on the Remaining Arguments Raised in the Case 3 Respondents' Motion to Vacate and Set Aside the Default Judgment*

Based on the trial court's error in ruling that the Case 3 Respondents were entitled to relief, we will reverse the court's order to that effect. Absent further directions on remand, the matter would be placed in the same procedural posture as if the order had

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20 With regard to the first argument, we accept the Case 3 Respondents' concession that "there is no statutory or rule requirement" that the party proceeding to prove up default judgment give notice to (or, according to the Case 3 Respondents, "warn") the defaulted defendant. In addition, our research has not disclosed any case authority that requires such notice or warning. Nonetheless, the Case 3 Respondents suggest that the Oudehs' attorney's failure to give such notice or warning was an ethical violation, which entitled the Case 3 Respondents to the requested relief. Those issues require factual findings and an exercise of discretion, which, as we explained in the text, an appellate court is unable to provide in the first instance in this context.

never been entered (*Weisenburg v. Cragholm* (1971) 5 Cal.3d 892, 896)—namely, with the Judgment in full force and effect as to the Case 3 Respondents.

The trial court vacated and set aside the default and the Judgment on the basis that, *as a matter of law*, because the Case 3 Respondents' answer to the original complaint sufficiently responded to the amended complaint, the Case 3 Respondents were not in default. In so ruling, the court never reached the other arguments raised by the Case 3 Respondents in support of the motion—arguments that required a determination of witness credibility, the resolution of disputed facts, and an exercise of the court's discretion *based on* the factual findings.

Accordingly, on remand, limited to the consideration of the parties' submissions in support of and in opposition to the Case 3 Respondents' July 2017 application for an order vacating and setting aside the Judgment, the trial court is directed to rule on the remaining issues the parties raised—i.e., all issues *other than* those decided in this appeal.[21] All that we have decided here is that, at the time the clerk entered the Case 3 Respondents' defaults, the Case 3 Respondents were in default on the basis that, because the Oudehs' amended complaint asserted a cause of action not alleged in their original complaint, the Case 3 Respondents' answer to the original complaint was not a sufficient response to the amended complaint.

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21 We express no opinion as to the potential outcome of any specific issue on remand.

III. DISPOSITION

I. Oudeh's appeal is dismissed as to Enterprises and Group. S. Oudeh's appeal is dismissed as to S. Shaath, Enterprises, and Group.

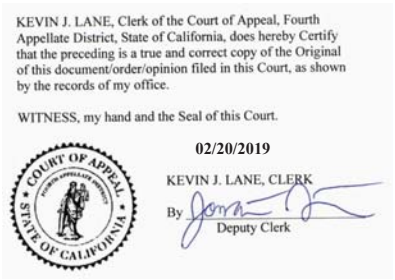
The order vacating and setting aside the default and the Judgment in favor of I. Oudeh and against I. Shaath, S. Shaath, and S and O is reversed, and the matter is remanded to the trial court. The order vacating and setting aside the default and the Judgment in favor of S. Oudeh and against I. Shaath and S and O is reversed and the matter is remanded to the trial court. On remand, the trial court is directed to rule on the issues *not decided in this appeal* and previously raised by the Case 3 Respondents in support of, and by the Oudehs in opposition to, the Case 3 Respondents' June 2017 application to vacate and set aside the Judgment.

In the interests of justice, the parties are to bear their respective costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

IRION, J.

WE CONCUR:

NARES, Acting P. J.


KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

02/20/2019

KEVIN J. LANE, CLERK

By Deputy Clerk

O'ROURKE, J.