SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Farris Bryant, Courtroom Clerk (covering for Rachel Tien)
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: September 12, 2023 TIME: 9:00 A.M.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.

The courthouse is open: Department 10 is now fully open for in-person hearings, as of April 18, 2023. The court strongly prefers **in-person** appearances for all contested law-and-motion matters. For all other hearings (*e.g.*, case management conferences), the court strongly prefers either **in-person or video** appearances. Audio-only appearances are permitted but disfavored, as they cause significant disruptions and delays to the proceedings. Please use telephone-only appearances as a last resort.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml.

Recording is prohibited: As a reminder, most hearings are open to the public, but state and local court rules prohibit recording of court proceedings without a court order. This prohibition applies to both in-person and remote appearances.

Court reporters: Unfortunately, the court is no longer able to provide official court reporters for civil proceedings (as of July 24, 2017). If any party wishes to have a court reporter, the appropriate form must be submitted. See https://www.scscourt.org/general_info/court_reporters.shtml.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV411753	Binh Nguyen et al. v. Nhan Chu et al.	Click on LINE 1 or scroll down for ruling.
LINE 2	19CV342114	Chang Long Realty Development LLC v. Xi Hua Sun et al.	Click on LINE 2 or scroll down for ruling in lines 2-4.
LINE 3	19CV342114	Chang Long Realty Development LLC v. Xi Hua Sun et al.	Click on LINE 2 or scroll down for ruling in lines 2-4.
LINE 4	19CV342114	Chang Long Realty Development LLC v. Xi Hua Sun et al.	Click on LINE 2 or scroll down for ruling in lines 2-4.
LINE 5	21CV383135	Kassandra Souza v. Joann Jepson	Click on LINE 5 or scroll down for ruling.
LINE 6	20CV361637	Aaron Davis v. Marcy Morigeau	Motion for order of dismissal: notice is proper and the motion is unopposed. Good cause appearing, the motion is GRANTED. The moving party will prepare the order for the court's signature.
LINE 7	23CV418773	Shirley Getty v. Villa Verde et al.	Click on LINE 7 or scroll down for ruling.
LINE 8	23CV415651	Liberty Mutual Insurance v. Mary Valdez	Motion to compel arbitration: parties to appear. Notice is apparently proper, and the motion is unopposed. The court is puzzled because it has not been presented with a copy of the arbitration agreement (or relevant text), although it appears from the correspondence that was attached to the motion that the parties do not dispute the existence of an applicable arbitration agreement. Assuming that a proper copy of the agreement is presented at the hearing, the court intends to grant the motion.

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LINE 9	22CV395989	Sisi Xu et al. v. Bethany Liou et al.	Order of examination: parties to appear in person, as indicated on the August 29, 2023 minute order.
LINE 10	22CV395989	Sisi Xu et al. v. Bethany Liou et al.	Order of examination: parties to appear in person, as indicated on the August 29, 2023 minute order.
LINE 11	22CV395989	Sisi Xu et al. v. Bethany Liou et al.	Order of examination: parties to appear in person, as indicated on the August 29, 2023 minute order.

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Calendar Line 1
Case Name: *Binh Nguyen et al. v. Nhan Chu et al.*
Case No.: 23CV411753

I. BACKGROUND

This is an action concerning the sale of real property located at 894 Coyote Drive, Milpitas, California ("Property"). Plaintiffs Phuc Le, DuongAnh Chu, Binh Nguyen, and VanAnh Chu Nguyen (collectively, "Plaintiffs") bring this action against defendants Nhan Chu and Hang Doan Chu, individually and as trustees of the Chu Family Living Trust dated March 17, 1999 (collectively, the "Chu Defendants"). Plaintiffs have also named James T. Stroud, the Chu Defendants' attorney of record, as a defendant.

According to the complaint, in 1993, Plaintiffs, the Chu Defendants, Chi Chu, and Lan Chu purchased the Property; the eight of them agreed to share equally in the management costs and ownership of the Property. (Complaint, ¶¶ 9-10.) Only the Chu Defendants were named on the title of the Property, however, because they suggested that it was faster for two owners to receive mortgage approval than all eight. (*Id.* at ¶ 11.) Nonetheless, all eight purchasing parties agreed to an equal ownership share in the Property. (*Ibid.*)

In 1999, the Chu Defendants transferred title of the Property to the Chu Family Living Trust ("Chu Family Trust"). The portion of the Chu Family Trust provided to Plaintiffs is described, in relevant part:

> A. The Trustee (Chu Defendants) shall first distribute or retain fractional interest in the real property located at 894 Coyote Drive, Milpitas, California, APN 022-32-004 as follows:
>
> 1. One-fourth (1/4) shall be retained by Trustee (Chu Defendants) and held as part of the Trust Estate.
>
> 2. One[-]fourth (1/4) shall be distributed <u>outright</u> and free of Trust to VANANH CHU NGUYEN and BINH QUOC NGUYEN, as their community property.
>
> 3. One[-]fourth (1/4) shall be distributed <u>outright</u> and free of Trust to DUONG ANH CHU and PHUC LE, as their community property.
>
> 4. One[-]fourth (1/4) shall be distributed <u>outright</u> and free of Trust to CHI CHU and LAN CHU, as their community property.

(Complaint, ¶ 12 [emphasis and all caps in original].) [1]

For the next thirty years, all eight owners continued to abide by their co-ownership agreement, and the Chu Defendants confirmed the agreements multiple times. (*Id.* at ¶ 13.) Only the Chu Defendants were able to receive the benefits of title to the Property, including

[1] The Chu Family Living Trust divides the Property equally between four married couples as their community property. Nevertheless, the complaint also recognizes individual ownership among the couples, resulting in references to eight owners or 1/8 ownership. (See, e.g., Complaint, ¶¶ 8, 29, 33.)

deduction of mortgage payments, property insurance, and property taxes on their personal income taxes. (*Id*. at ¶ 14.)

In 2022, the Chu Defendants decided to sell the Property, unilaterally, and hired a real estate agent and contractor to prepare the Property for sale. (*Id.* at ¶¶ 16-17.) The real estate agent, Eric B. Chu, was a relative of the Chu Defendants. (*Id.* at ¶ 16.) The Property sold for $1,335,000, escrow closed on January 27, 2023, and Orange Coast Title Company of Northern California ("Orange") held the sale proceeds. (*Id.* at ¶ 18.) Orange disbursed $67,540 to Eric B. Chu as his 2.5% commission, and the contractor received $12,850 for his services. (*Id*. at ¶¶ 16, 21-23.) Plaintiffs did not know about or consent to these payments. (*Id.* at ¶¶ 21-23.)

Plaintiffs demanded disbursement of the sale proceeds, but the Chu Defendants refused, withholding $481,027.45 for alleged taxes and $6,000 for 10 years of financial services. (*Id*. at ¶ 25.) The Chu Defendants allegedly induced Orange to release the remaining proceeds of the sale, $1,202,568.62, to Stroud. (*Id*. at ¶ 26.) Stroud claimed that the proceeds were in a trust account and that he would disburse funds solely on Defendants' calculations and deductions. (*Ibid*.)

The complaint alleges the following causes of action:

1. Declaratory Relief, against all Defendants;
2. Accounting, against the Chu Defendants; and
3. Breach of Fiduciary Duty, against the Chu Defendants.

Currently before the court is defendant Nhan Chu's demurrer to each cause of action. Nhan Chu contends that all three claims fail to state facts sufficient to constitute a cause of action under section 430.10, subdivision (e), of the Code of Civil Procedure.

II. LEGAL STANDARD

In ruling on a demurrer, the court treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688 (*Piccinini*) [citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318].) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (*Committee*).) In liberally construing the allegations within a pleading, the court draws inferences favorable to the pleader. (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1239.)

III. ANALYSIS

A. First Cause of Action: Declaratory Relief

Nhan argues that the complaint fails to allege the existence of an actual controversy because the claim is more appropriately alleged as a breach of contract action. To state a claim for declaratory relief, a plaintiff must allege that there is "an '*actual controversy* relating to the legal rights and duties of the respective parties,' not an abstract or academic dispute." (*Centex Homes v. St. Paul Fire and Marine Insurance Co.* (2015) 237 Cal.App.4th 23, 29 (emphasis in

original) [quoting *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 746-47]; see also *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79 [holding the fundamental basis of declaratory relief is the existence of an actual and present controversy over a proper subject].) A general demurrer is usually not an appropriate method for testing the merits of a declaratory relief action, because the plaintiff is entitled to a declaration of rights even if it is adverse to the plaintiff's interest. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 752.)

The complaint requests a judicial determination of the parties' rights and duties regarding disbursement of the proceeds from the sale of the Property. (Complaint, ¶ 30.) Plaintiffs contend that the Chu Defendants should have divided the money equally among the eight owners, as stipulated in the Chu Family Living Trust, whereas the Chu Defendants claim sole entitlement to disburse the funds as they see fit. (*Id*. at ¶ 29.) This sufficiently alleges a declaratory relief cause of action. (See *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 947 [holding declaratory relief claim was properly pleaded because the complaint alleged "a controversy over the legal rights and duties of plaintiff and defendant under the deed of trust containing a due-on clause," and the parties disputed the enforceability of the clause.])

Nhan contends that declaratory relief is inappropriate because an appropriate legal remedy exists for a breach of contract. This argument is, at best, underdeveloped. Even if there is a basis for a breach of contract claim here, that does not necessarily preclude the assertion of a declaratory relief claim, and Nhan provides no legal authority to the contrary. Nhan's citations to *Travers v. Louden* (1967) 254 Cal.App.2d 926 and *California Ins. Guarantee Ass'n v. Superior Court* (1991) 231 Cal.App.3d 1617 are inapposite.

In *Travers v. Louden*, *supra*, 254 Cal.App.2d at p. 929 the appellate court held that the complaint alleged a breach of contract action and failed to plead facts that would support a declaration with respect to the future conduct of the parties. The *Travers* court went on to note that declaratory relief was improper "when the rights of the complaining party have crystallized into a cause of action for past wrongs, all relationship between the parties has ceased to exist and there is no conduct of the parties subject to regulation by the court." (*Ibid*.) Plaintiffs point out that the claim here, in contrast, arises from a present and ongoing harm (the failure to disburse sale proceeds), and the unresolved disbursement of the Property sale under the Chu Family Trust still connects the parties.

In *California Ins. Guarantee Ass'n v. Superior Court*, *supra*, 231 Cal.App.3d at p. 1617, the appellate court held that it was proper for a trial court to order a *stay* of declaratory judgment proceedings because of a pending trial in the underlying action. The court held that allowing the declaratory judgment could be prejudicial and result in inconsistent verdicts on factual issues common to both cases. (*Id*. at p. 1624.) That has no application to the present situation, where there is no concurrent case or trial. Instead, this case seeks a single determination on the distribution of sale proceeds retained in a single account.

The court therefore OVERRULES Nhan's demurrer to the first cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

B. The Second and Third Causes of Action: the Existence of a Fiduciary Relationship

Nhan's demurrer to the second and third causes of action disputes the existence of a fiduciary relationship between the Chu Defendants and the Plaintiffs. The court concludes that the complaint sufficiently pleads a fiduciary relationship.

A fiduciary relationship may support a claim for accounting, while a fiduciary relationship is necessary to plead a claim for breach of fiduciary relationship. (See, e.g., *Prakashpalan v. Engstrom, Lipscomb and Lack* (2014) 223 Cal.App.4th 1105, 1136-37 (*Prakashpalan*) ["Generally, an underlying fiduciary relationship, such as a partnership, will support an accounting, but the action does not lie merely because the books and records are complex."]; *Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 524 (*Pellegrini*) [stating elements of a breach of fiduciary duty claim].)

"'Technically, a fiduciary relationship is a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client . . . whereas a confidential relationship may be founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship.'" (*Persson v. Smart Inventions, Inc*. (2005) 125 Cal.App.4th 1141, 1161 (*Persson*), quoting *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 271.) "Because confidential relations do not fall into well-defined categories of law and depend heavily on the circumstances, they are more difficult to identify than fiduciary relations. The existence of a confidential relationship is a question of fact." (*Persson*, 125 Cal.App.4th at p. 1161.)

"Before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 632 (*Oakland Raiders*).) A trustee and trust beneficiary relationship is a fiduciary relationship that arises as a matter of law. (*Ibid.*; see also *Penny v. Wilson* (2004) 123 Cal.App.4th 596, 603.) California Probate Code section 16081, subdivision (a), provides that "if a trust instrument confers 'absolute,' 'sole,' or 'uncontrolled' discretion on a trustee, the trustee shall act in accordance with fiduciary principles and shall not act in bad faith or in disregard of the purposes of the trust."

The complaint alleges that the Chu Defendants are trustees of the Chu Family Trust, and that Plaintiffs are beneficiaries of the Chu Family Trust. (Complaint, ¶ 5.) The Chu Family Trust once held the Property and decreed the equal distribution of the Property between the parties. (*Id*. at ¶ 12.) This is more than sufficient to allege that Nhan owed a fiduciary duty to Plaintiffs. (See *Committee, supra,* 35 Cal.3d at p. 213-214 [admitting the truth of all material factual allegations in the complaint on a demurrer].)

1. Second Cause of Action: Accounting

Nhan insists the complaint fails to allege a basis for accounting because "the complaint alleges specific sums due and from which total amounts potentially due can be calculated." (Demurrer, p. 3:24-25.)

"The right to an accounting can arise from the possession by the defendant of money or property which, because of the defendant's relationship with the plaintiff, the defendant is

obliged to surrender." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179-180 (*Teselle*); see also *Prakashpalan, supra*, 223 Cal.App.4th at pp. 1136-37 ["Generally, an underlying fiduciary relationship, such as a partnership, will support an accounting, but the action does not lie merely because the books and records are complex."].)

"An accounting is an equitable proceeding which is proper where there is an unliquidated and unascertained amount owing that cannot be determined without an examination of the debits and credits on the books to determine what is due and owing." (*Prakashpalan, supra,* 223 Cal.App.4th at p. 1136.) Thus, [a]n action for accounting is not available where the plaintiff alleges the right to recover a sum certain or a sum that can be made certain by calculation." (*Teselle, supra,* 173 Cal.App.4th at p. 179.) "Equitable principles govern, and the plaintiff must show the legal remedy is inadequate." (*Id.* at pp. 1136-1137.)

As discussed above, Plaintiffs adequately allege that they had a fiduciary relationship with the Chu Defendants, which supports an accounting. (*Prakashpalan, supra,* 223 Cal.App.4th at pp. 1136-37.) Moreover, the complaint alleges that the Chu Defendants, as trustees of the Chu Family Trust, maintained control over the Property and were "obliged to surrender" the sale proceeds of Property pursuant to terms of the trust. (Complaint, ¶¶ 12, 26; see *Teselle, supra,* 173 Cal.app.4th at p. 179-180.)

Nhan cites *St. James Church of Christ Holiness v. Superior Court of Los Angeles County* (1955) 135 Cal.App.2d 352 (*St. James*) for the proposition that because the complaint alleges a sum due, an accounting claim is improper. The court concludes that this case is distinguishable. The complaint in *St. James* specifically alleged that the plaintiff entered into a one-year lease that required a monthly payment of $40. (*Id*. at pp. 356-57.) The defendant received $240 and continued to collect monthly rent. (*Id*. at p. 357.) The court held that an accounting claim was improper because the complaint "sets forth all the facts necessary for the calculation of an account between the parties." (*Id*. at p. 359 [citing *Faivre* v. *Daley*, 93 Cal. 664, 673].) In this case, by contrast, Plaintiffs complain that Nhan retains full control of and access to the books and records, leaving Plaintiffs unaware of (1) the total costs incurred to prepare the Property for sale; (2) the proceeds from the sale; and (3) the tax deductions and maintenance or management fees Nhan claimed over the past thirty years. (Opposition, p. 7:19-24; see also Complaint, ¶¶ 16-17, 21-23.)

Plaintiffs analogize an action for accounting to "a means of discovery," maintaining that the action is proper because they have repeatedly requested distribution of proceeds and transactional records from Defendants to no avail. (Opposition to Defendant Nhan Chu's Demurrer ["Opposition"], p. 7:5-14; see also Complaint at ¶ 25.) The court agrees. The calculations required in this matter are significantly more complex than the fixed monthly charges that were at issue in *St. James*.

The court OVERRULES Nhan's demurrer to the second cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

2. Third Cause of Action: Breach of Fiduciary Duty

Nhan objects to the third cause of action on the ground that the complaint fails to allege a confidential relationship that would give rise to fiduciary duty.

As noted above, the complaint sufficiently alleges a fiduciary relationship between Nhan and the Plaintiffs. The court therefore OVERRULES Nhan's demurrer to the third cause of action. (Code Civ. Proc., § 430.10, subd. (e).)

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Calendar Lines 2-4
Case Name: *Chang Long Realty Development LLC v. Xi Hua Sun et al.*
Case No.: 19CV342114 (lead case)

I. BACKGROUND

This is a dispute over the ownership and development of real property, 11801 Dorothy Anne Way in Cupertino, California, which is sometimes referred to by the parties as "Seven Springs Ranch." The dispute has given rise to two (formerly three) consolidated cases in this court. Defendants Xi Hua Sun and Shan Zhu (collectively, "Sun and Zhu") have now brought three motions: two motions for summary judgment and a motion to quash a deposition subpoena.

In the lead case, plaintiff Chang Long Realty Development LLC ("CLRD") filed the original and still operative complaint on January 18, 2019. The complaint states seven causes of action against Sun and Zhu: (1) Quiet Title; (2) Partition; (3) Accounting; (4) Breach of Fiduciary Duty; (5) Conversion; (6) Trespass to Chattels; and (7) Imposition of Constructive Trust.

On April 22, 2019 Sun and Zhu filed their verified answer to CLRD's Complaint. As a second affirmative defense, this answer states that the complaint is "barred by the doctrine of estoppel." As a 30th affirmative defense, it states that the "Complaint is barred by the statute of limitations, including but not limited to, Code of Civil Procedure § 339(1)." Code of Civil Procedure section 339(1) is the only statute of limitations identified in the answer. Sun and Zhu also filed a cross-complaint against CLRD and CLRD's alleged owner, Xi Jun Sun (who is also Xi Hua Sun's brother) on April 22, 2019. CLRD filed an answer to this cross-complaint on May 18, 2019, and Xi Jun Sun filed an answer on July 18, 2019.

On November 19, 2019, this court (Judge Pierce) consolidated the lead case (Case No. 19CV342114) with a later-filed case, *Sino Vista LLC v. Xi Hua Sun et al.* (Case No. 19CV347502), for all purposes. The complaint in the later-filed action, dated May 3, 2019, states claims by Sino Vista LLC ("Sino Vista") against Xi Hua Sun, CLRD, and Shan Zhu for: (1) Fraud; (2) Breach of Contract; (3) Intentional Misrepresentation; (4) Negligent Misrepresentation; (5) Conversion; (6) Breach of Fiduciary Duty; (7) Accounting; and (8) Constructive Trust.

Sun and Zhu answered Sino Vista's complaint on July 31, 2019. Notably, this answer does not raise Business and Professions Code section 7031 as an affirmative defense.

Xi Hua Sun filed a cross-complaint in the Sino Vista case against Sino Vista and cross-defendants Wanmei Properties, Inc. ("Wanmei") and Dennis Liu on July 31, 2019.[2] Wanmei filed its answer to this cross-complaint, as well as its own cross-complaint against Xi Hua Sun, CLRD, and Shan Zhu on September 24, 2019, followed by a first amended cross-complaint ("FAXC") on March 18, 2020, after the consolidation of the two cases. Wanmei's FAXC states claims for: (1) Fraud; (2) Breach of Contract; (3) Breach of the Implied Covenant of

[2] This cross-complaint alleges in paragraph 4, on information and belief, that Dennis Liu is an owner of Wanmei and that Wanmei is his alter-ego. It does not specifically allege that any cross-defendant performed work for which a license was required in violation of Business and Professions Code section 7031.

Good Faith and Fair Dealing; (4) Intentional Misrepresentation; (5) Negligent Misrepresentation; (6) Conversion; (7) Breach of Fiduciary Duty; (8) Accounting; (9) Constructive Trust; (10) Declaratory Relief; and (11) Quiet Title. Sun and Zhu filed an answer to Wanmei's original cross-complaint on October 21, 2019 and an answer to Wanmei's FAXC on April 21, 2022. Notably, neither of these answers asserts Business and Professions Code section 7031 as an affirmative defense.

On August 18, 2021, this court (Judge Kirwan) issued an order consolidating these two cases with another later-filed case, *Cabay Development Group, Inc. et al. v. Xi Hua Sun et al.* (Case No. 20CV372586), for all purposes. This third case subsequently settled and was dismissed pursuant to a stipulation and order on November 7, 2022. The remaining consolidated cases have a trial date of December 11, 2023.

Currently before the court are three motions. The first is a motion for summary judgment by Sun and Zhu as to CLRD's complaint in the first case (Case No. 19CV342114). The second is another summary judgment motion by Sun and Zhu as to both the Sino Vista complaint and the Wanmei FAXC in the second case (Case No. 19CV347502). The third is a motion by Sun and Zhu to quash a deposition notice served on non-party Yan Chan, the wife of Xi Jun Sun, by Sino Vista and Wanmei in the second case.

II. SUN AND ZHU'S SUMMARY JUDGMENT MOTION AS TO CLRD'S COMPLAINT (CASE NO. 19CV342114)

A. Requests for Judicial Notice

"Judicial notice may not be taken of any matter unless authorized or required by law." (Evidence Code § 450.) A precondition to judicial notice in either its permissive or mandatory form is that the matter to be noticed be relevant to the material issue before the court. (*Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, citing *People v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2.) It is the court, and not the parties, that determines relevance. Evidence Code section 453(b) requires a party seeking notice to "[furnish] the court with sufficient information to enable it to take judicial notice of the matter." Both sides have submitted requests for judicial notice.

1. Sun and Zhu's Request

With their motion, Defendants Sun and Zhu have requested judicial notice of nine documents, submitted as Exhibits 1-9. The basis for notice of each document is not stated but the request cites Evidence Code sections 452(d) and (h). The court grants in part and denies in part the request.

Judicial notice of Exhibits 1 and 8 (copies of the cross-complaint filed by Sun and Zhu on April 22, 2019 and the verified complaint filed by CLRD on January 18, 2019) is GRANTED pursuant to Evidence Code section 452(d) (court records) only. Notice is only taken of the existence and filing dates of the two pleadings, and not of the truth of their allegations or of the content of any attached exhibits.

Judicial notice of Exhibits 2, 3, 7 and 9 (copies of documents filled out by private parties and filed with state agencies) is DENIED. These documents are not court records, and

cannot be considered official acts of the state agencies. (See *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 607-608 [applications and supporting documents filed by private parties with Department of Insurance were not official acts of department subject to judicial notice]; *People v. Thacker* (1985) 175 Cal.App.3d 594, 598-599 [copies of articles of incorporation, statement by domestic corporation, and notice of issuance of shares were materials prepared by private person, not official acts].)

The contents of Exhibits 2, 3, 7, and 9 also fall outside the intended scope of Evidence Code section 452, subdivision (h). (See *Gould v. Md. Sound Indus*. (1995) 31 Cal.App.4th 1137, 1145 ["Judicial notice under Evidence Code section 452, subdivision (h), is intended to cover facts which are not reasonably subject to dispute and are easily verified. These include, for example, facts which are widely accepted as established by experts and specialists in the natural, physical, and social sciences which can be verified by reference to treatises, encyclopedias, almanacs and the like or by persons learned in the subject matter."].)

Judicial notice of Exhibits 4 and 6 (deposition transcript excerpts) is also DENIED. Deposition transcripts and declarations cannot be noticed as to the truth of their contents. (See *Oh v. Teachers Ins. & Annuity Assn. of America* (2020) 53 Cal.App.5th 71, 79-81 [truth of contents of court records cannot be judicially noticed]; *Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1057 [court may take judicial notice of existence of declaration but not of facts asserted in it]; *Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865 [court may not notice the truth of declarations or affidavits filed in court proceedings]; *Garcia v. Sterling* (1985) 176 Cal App 3d 17, 22 ["Although the existence of statements contained in a deposition transcript filed as part of the court record can be judicially noticed, their truth is not subject to judicial notice."].)[3] While the *fact* that the two depositions occurred could be judicially noticed, that fact has no relevance to the issues before the court.

Judicial notice of Exhibit 5, a copy of a grant deed recorded in Santa Clara County on June 5, 2014, is GRANTED. While deeds are not court records, Evidence Code section 452(h) has been interpreted to allow notice of recorded deeds. "Judicial notice may be taken of 'the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face.'" (*Linda Vista Village San Diego Homeowners Assn., Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 184, citation omitted.)

As the request for judicial notice is the only means by which Sun and Zhu have submitted Exhibits 2, 3, 4, 6, 7 and 9, they will not be considered by the court, and they cannot provide support for any undisputed material facts.

[3] The decision cited by Sun and Zhu, *Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 219, fn. 11, is distinguishable. There, in the specific circumstance of evaluating a demurrer to a class action complaint, the trial court took judicial notice of testimony and of declarations submitted in other proceedings to determine if allegations of commonality were contradicted. On demurrer, a court may in some circumstances take judicial notice of testimony or discovery responses if they contain admissions that contradict allegations in the challenged pleading. That concept does not apply here.

2. CLRD's Request

With the opposition to Sun and Zhu's motion, Plaintiff CLRD has submitted a request for judicial notice of four documents, two of which are attached as Exhibits 1 and 2. The other two documents are Exhibits 7 and 8 to the supporting declaration of CLRD's counsel, Dezhan Li. The request fails to specify the basis for judicial notice of any of the documents, referring only generally to Evidence Code section 452, 452 and 453. (See Request at p. 1:11.)

Judicial notice of Exhibits 1 and 2 (additional copies of CLRD's verified complaint and Sun and Zhu's verified answer to that complaint) is GRANTED pursuant to Evidence Code section 452, subdivision (d). The court takes notice only of the existence and filing dates of the two pleadings, and not of the truth of their allegations or of the content of any attached exhibits.

Judicial notice of the grant deeds included in Exhibits 7 and 8 is GRANTED pursuant to Evidence Code section 452(h). The court takes judicial notice *only* of the two grant deeds themselves, and not of any deposition testimony submitted in Exhibits 7 and 8 relating to the deeds.

B. General Legal Standards for Summary Judgment and Summary Adjudication

The operative pleadings limit the issues presented for summary judgment or adjudication, and a motion for summary judgment or adjudication cannot be granted or denied based on issues not raised by the pleadings. (See *Government Employees Ins. Co. v. Sup. Ct*. (2000) 79 Cal.App.4th 95, 98; *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins*. (2010) 181 Cal.App.4th 60, 73 ["[T]he pleadings determine the scope of relevant issues on a summary judgment motion."].)

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A motion for summary judgment or adjudication shall be granted only if it completely disposes of an entire cause of action, an affirmative defense, a claim for damages, or an "issue of duty." (See Code Civ. Proc., § 437c. subd. (f)(1); *McClasky v. California State Auto. Ass'n* (2010) 189 Cal.App.4th 947, 975 ["If a cause of action is not shown to be barred in its entirety, no order for summary judgment—or adjudication—can be entered."].)

On a motion for summary judgment or adjudication, the moving party's declarations and evidence will be strictly construed in determining whether they negate or disprove an essential element of a plaintiff's claim, "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (or opposing party's) favor." (*Johnson v. American Standard, Inc*. (2008) 43 Cal.4th 56, 64, parentheses added.) While the same standards of admissibility govern both, the opposition declarations are liberally construed while the moving party's evidence is strictly scrutinized. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The evidence must be liberally construed in support of the opposing party, resolving any doubts in favor of that party. (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1037.)

Neither party can rely on its own pleadings (even if verified) as evidence to support or oppose a motion for summary judgment or adjudication. (See *College Hospital, Inc. v. Sup Ct.*

(1994) 8 Cal.4th 704, 720, fn. 7; *Gutierrez v. Girardi* (2011) 194 Cal.App.4th 925, 933; *California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 182.) The moving party may generally not rely on additional evidence submitted with its reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38 ["The general rule of motion practice . . . is that new evidence is not permitted with reply papers. This principle is most prominent in the context of summary judgment motions . . . ."]; see also *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252.) Accordingly, the court has not considered the "supplemental" declaration of Dezhan Li.

> A defendant [or cross-defendant] moving for summary judgment bears the initial burden of showing that a cause of action has no merit by showing that one or more of its elements cannot be established or that there is a complete defense. Once the defendant has met that burden, the burden shifts to the plaintiff "to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof."

(*Madden v. Summit View, Inc*. (2008) 165 Cal.App.4th 1267, 1272, internal citations omitted, brackets added.)

C. The Basis for Sun and Zhu's Motion

Sun and Zhu "move for summary judgment . . . because the undisputed material facts, paired with the precedent case law, conclusively demonstrate that Plaintiff Chang Long Realty Development LLC is precluded, as a matter of law, from asserting any and all claims and/or causes of action against Defendants because it is barred by the applicable statutes of limitation, including Cal. Civ. Code §§ 338 and 343 and is also barred by the doctrine of equitable estoppel." (March 7, 2023 Notice of Motion at p. 2:11-17.)

Even though this motion is styled in the caption as a "motion for summary judgment or summary adjudication," it is a motion for summary judgment *only*. The notice of motion does not indicate that it seeks summary adjudication as to any specific cause of action or issue of duty. The accompanying separate statement of undisputed material facts ("UMFs") also does not address any specific claims or issues in CLRD's complaint, nor does it include any UMFs that specifically address equitable estoppel. The separate statement contains a single sub-heading: "Summary judgment should be granted in favor of Defendants on all causes of action contained in Chang Long's Complaint because the undisputed material facts demonstrate that the Complaint is barred by the statute of limitations."

In addition to the request for judicial notice (which, again, the court has granted only as to Exhibits 1, 5, and 8), the motion is supported by eight declarations. The first declaration is from Defendant Xi Hua Sun. This has two attached (unmarked) exhibits, consisting of documents purportedly related to the property purchase, including a copy of the CLRD operating agreement signed by Xi Jun Sun. The other declarations are from Defendant Zhu, Yan Sun, Coco Tan, PQ Kang, Jiaming Kang, Rebecca Zhang and Eva Wong. These declarations do not have any attached exhibits.

D. Analysis

The court DENIES defendants' motion for summary judgment for failure to meet the initial burden to establish an absence of triable issues of material fact or a complete defense as to all seven causes of action in CLRD's complaint.

Code of Civil Procedure section 431.30, subdivision (b)(2), provides that an answer must contain a statement of any new matter constituting an affirmative defense. A party must raise an issue as an affirmative defense where the matter is not responsive to the essential allegations of the complaint. This would include arguments that a claim or an entire pleading is barred by a specific statute of limitations or by a specific type of estoppel.

As CLRD correctly points out in its opposition to this motion, the only grounds for summary judgment listed in Defendants' Notice of Motion—(1) the statutes of limitations set forth in sections 338 and 343 of the Code of Civil Procedure, and (2) the doctrine of equitable estoppel—are not contained in Sun and Zhu's answer to the complaint. Thus, these grounds have both been waived. (See CLRD's Opposition at pp. 14:6-15:20 and pp. 21:16-22:12.)

1. Statutes of Limitations

Sun and Zhu's answer to CLRD's complaint includes a thirtieth affirmative defense, which states that the "Complaint is barred by the statute of limitations, including but not limited to, Code of Civil Procedure § 339(1)." This is the only place in which the answer mentions any statute of limitations defense. This is insufficient to preserve an affirmative defense based upon Code of Civil Procedure sections 338 or 343 (repeatedly referred to erroneously as "Civil Code" sections in Defendants' Notice of Motion and Memorandum of Points and Authorities).

Code of Civil Procedure section 458 requires the following in any answer that relies upon a statute of limitations defense: "In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section _____ (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure . . . ." The failure to plead the statute of limitations as required by the Code waives the defense. "There are two ways to properly plead a statute of limitations: (1) allege facts showing that the action is barred, and indicating that the lateness of the action is being urged as a defense and (2) plead the specific section and subdivision . . . . The failure to properly plead the statute of limitations *waives the defense*." (*Martin v. Van Bergen* (2012) 209 Cal.App.4th 84, 91, emphasis added, citing *Mysel v. Gross* (1977) 70 Cal.App.3d Supp. 10, 15; see also *Citizens for Beach Rights v. City of San Diego* (2017) 17 Cal.App.5th 230, 238, fn. 10 (quoting *Martin v. Van Bergen*); *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691 ["It is necessary for a defendant who pleads the statute of limitations to specify the applicable section, and, if such section is divided into subdivisions, to specify the particular subdivision or subdivisions thereof. If he fails to do so the plea is insufficient."])

Sun and Zhu's answer to CLRD's complaint does not allege any facts showing that the complaint, or any specific cause of action, is barred by any statute of limitations, and it does not specifically plead any statute of limitations other than section 339(1) of the Code of Civil Procedure, which is not cited anywhere in Sun and Zhu's motion for summary judgment.

Summary judgment cannot be granted based on a claim that the complaint, or any cause of action within it, is time-barred by sections 338 or 343, or by any statute other than section 339(1). Such arguments have been waived. The fact that no pleading challenge was made to the answer is irrelevant. A party is not required to demur to an answer to preserve the objection that the answer fails to comply with section 458. (See *Area 55, LLC v. Nicholas & Tomasevic LLP* (2021) 61 Cal.App.5th 136, 172.)

2. Equitable Estoppel

"Estoppel is an affirmative defense that cannot be proved unless specially pleaded by the defendant." (5 Witkin, *California Procedure* (5th ed. 2019) Pleading § 1163; see also *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 459 [general rule is that equitable estoppel must be specifically pleaded with sufficient accuracy to disclose the facts relied upon].) "A valid claim of equitable estoppel consists of the following elements: (a) a representation or concealment of material facts (b) made with knowledge, actual or virtual, of the facts (c) to a party ignorant, actually and permissibly, of the truth (d) with the intention, actual or virtual, that the ignorant party act on it, and (e) that party was induced to act on it." (*Transport Ins. Co. v. TIG Ins. Co*. (2012) 202 Cal.App.4th 984, 1013.)

The only affirmative defense in the answer to CLRD's complaint that references estoppel is the second, which states that the complaint is "barred by the doctrine of estoppel." This is insufficient to assert an equitable estoppel defense—it does not disclose the facts relied upon for the defense, nor does it even identify the type of estoppel being asserted.

In addition, as CLRD correctly points out in its opposition, the separate statement in support of Sun and Zhu's motion does not list any undisputed material facts that address the elements of equitable estoppel. It is the "golden rule" of summary judgment that all material facts must be set forth in the separate statement. (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337.) If it is not in the separate statement, it does not exist. (*Id*.; see also *North Coast Business Park v Nielsen Construction Co*. (1993) 17 Cal.App.4th 22, 29, fn. 4 [finding that facts not set forth in the moving party's separate statement of facts cannot be considered in ruling on a motion for summary judgment.]; *Roger H. Proulx & Co. v. Crest-Liners, Inc*. (2002) 98 Cal.App.4th 182, 201 ["Without facts set forth in a separate statement to support a ground for summary judgment, summary judgment cannot be granted on that ground"].) "'Both the court and the opposing party are entitled to have all the facts upon which the moving party bases its motion plainly set forth *in the separate statement*.' And if the separate statement does not contain all material facts on which the motion is based, the moving party has failed to meet its initial burden of production and is 'not entitled to summary adjudication as a matter of law.'" (*California-American Water Co. v. Marina Coast Water District* (2022) 86 Cal.App.5th 1272, 1297, emphasis in original, internal citations omitted.) The golden rule of summary judgment requiring courts to disregard material facts not set forth in the separate statement applies to the *absence of the fact* from the separate statement, not the underlying *evidence* supporting the fact. When a fact is not mentioned in the separate statement, it is irrelevant that such fact might be buried in the mound of paperwork filed with the court. (*Id*. at p. 1298.)

As the only two grounds for summary judgment listed in Defendants Sun and Zhu's notice of motion were waived by the failure to assert them in their verified answer, this motion must be denied for failure to meet the initial burden. Given this straightforward outcome, it is

not necessary (or feasible, given the voluminous law and motion calendar) for the court to address the parties' other arguments on this particular motion.

III. SUN AND ZHU'S SUMMARY JUDGMENT MOTION AS TO SINO VISTA'S COMPLAINT AND WANMEI'S FIRST AMENDED CROSS-COMPLAINT (CASE NO. 19CV347502)

A. Requests for Judicial Notice

1. Sun and Zhu's Request

In support of their motion as to Sino Vista's and Wanmei's pleadings, Sun and Zhu have submitted a request for judicial notice of eight documents, submitted as Exhibits 1-8 to the request. The basis for judicial notice of each document is not stated, but the request cites Evidence Code sections 452(d) and (h). The court grants in part and denies in part the request.

The court DENIES judicial notice of Exhibits 1, 3, 7, and 8. These documents are not court records. Moreover, as already noted above, information provided by private parties that is merely on file with state agencies is not judicially noticeable under Evidence Code section 452, subdivisions (d) and (h). Printouts of internet search results performed by unidentified persons on the California State Licensing Board's (CLSB) web site (Exhibits 7 and 8) are not court records and are also not noticeable as to the truth of their contents under subdivisions (d) or (h). (See *Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization* (2008) 160 Cal App 4th 514, 519 [affirming denial of request to take notice of the truth of the contents of web site pages of the American Coal Foundation and the U.S. Dept. of Energy]; *Duronslet v. Kamps* (2012) 203 Cal App 4th 717, 737 [refusing to take judicial notice of information on the Cal. Bd. of Registered Nursing web site]; *Ragland v. U.S. Bank National Assn*. (2012) 209 Cal.App.4th 182, 194 [noting that "[t]he contents of web sites and blogs are 'plainly subject to interpretation and for that reason not subject to judicial notice'"]; *Jolley v. Chase Home Finance LLC* (2013) 213 Cal.App.4th 872, 889 ["[W]e know of no 'official web site' provision for judicial notice in California."])

Judicial notice of Exhibit 2 (excerpts from the transcript of Dennis Liu's December 14, 2022 deposition testimony) is also DENIED. Again, deposition transcripts and declarations cannot be noticed as to the truth of their contents, and their mere existence or filing dates are not relevant to the issues presently before the court. (*Oh v. Teachers Ins. & Annuity Assn. of America*, *supra*, 53 Cal.App.5th at pp. 79-81.)

Judicial notice of Exhibits 4 and 5 (copies of Sino Vista's May 3, 2019 complaint and of Wanmei's March 18, 2020 FAXC) is GRANTED pursuant to Evidence Code 452, subdivision (d) (court records). The court does not take judicial notice of the truth of any allegations in either pleading or the contents of any attached exhibits.

Judicial notice of Exhibit 6 (a certified copy of Dennis Liu's contractor license history provided by the CSLB and dated October 14, 2022) is GRANTED pursuant to subdivision (h). As Dennis Liu is not a party to Sino Vista's complaint or Wanmei's FAXC, and neither pleading alleges any unpaid contracting work performed by Dennis Liu, this history has limited relevance to the material issues before the court.

As the request for judicial notice is the only means by which Sun and Zhu have submitted Exhibits 1, 2, 3, 7, and 8, and notice of those documents has been denied, they have not been considered by the court and cannot provide support for any undisputed material facts.

2. Sino Vista and Wanmei's Request

With their opposition to this motion Sino Vista and Wanmei have submitted a request for judicial notice of three documents, submitted as Exhibits 1-3. They assert that Exhibits 1 and 2 are noticeable under section 452, subdivisions (d) and (h), and that Exhibit 3 is noticeable under subdivisions (c) and (h).

Judicial notice of Exhibits 1 and 2 (copies of Sun and Zhu's answers to Sino Vista's complaint and Wanmei's FAXC) is GRANTED pursuant to subdivision (d) (court records). Subdivision (h) does not apply to these documents. The answers are not noticed as to the truth of their allegations.

Judicial notice of Exhibit 3 (a copy of a notice of a lis pendens recorded in Santa Clara County on July 30, 2020) is GRANTED pursuant to subdivisions (c) and (h).

B. The Basis for Sun and Zhu's Motion

This motion is also one for summary judgment only. There are eight causes of action in Sino Vista's complaint and eleven causes of action in Wanmei's FAXC, but the March 8, 2023 Notice of Motion and Motion raises only a single basis for granting the motion: "the undisputed material facts, paired with the precedent case law, conclusively demonstrate that Plaintiff Sino Vista LLC and Cross [Complainant] Wanmei Properties, Inc. are precluded, as a matter of law, from asserting any and all claims and/or causes of action against Defendants because they failed to comply with the requirements of California Business and Professions Code section 7031." (Notice of Motion at p. 1:17-23.) There is no alternative request for summary adjudication as to any cause of action or affirmative defense.

Similarly, Sun and Zhu's separate statement of undisputed material facts contains a single subheading: "Summary Judgment should be granted in favor of Defendants on all causes of action contained in Sino Vista LLC's complaint [and] Wanmei Properties, Inc.'s cross-complaint because the undisputed material facts demonstrate that neither Sino Vista nor Wanmei Properties can establish that they possessed a valid contractor's license at all times during the performance of their work on the project which bars them from bringing any causes of action against Defendants."

In addition to the request for judicial notice discussed above, Sun and Zhu submit a supporting declaration from Defendant Xi Hua Sun. Attached to that declaration are seven exhibits (Exhibits A-G).

C. Analysis

The court DENIES Sun and Zhu's motion for summary judgment as to both Sino Vista's complaint and Wanmei' s FAXC for failure to meet the initial burden of proof.

As the joint opposition from Sino Vista and Wanmei points out, Sun and Zhu's failure to raise Business and Professions Code section 7031 in their answers to either Sino Vista's complaint or Wanmei's FAXC bars them from relying on this defense as a basis for summary judgment. (See Joint Opp. at pp. 8:1-9:13.) The pleadings determine the issues to be addressed by a summary judgment motion; here, the basis for Sun and Zhu's motion is completely absent from the pleadings. (See *Lona v. Citibank* (2011) 202 Cal.App.4th 89, 100.)

1. Business and Professions Code Section 7031

Business and Professions Code Section 7031, subdivision (a), states:

> (a) Except as provided in subdivision (e), no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that they were a duly licensed contractor at all times during the performance of that act or contract regardless of the merits of the cause of action brought by the person, except that this prohibition shall not apply to contractors who are each individually licensed under this chapter but who fail to comply with Section 7029.

This code section and its surrounding provisions have been thoroughly analyzed in the case law, including in *White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 517, which explains:

> The Contractors' State License Law (CSLL), [Business and Professions Code] section 7000 et seq., is a comprehensive legislative scheme governing the construction business in California. The CSLL provides that contractors [footnote omitted] performing construction work must be licensed unless exempt. (§§ 7026 et seq., 7040 et seq.) "The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. [Citations.]" (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995 [277 Cal. Rptr. 517, 803 P.2d 370].) The licensing requirement and the penalties for violating that requirement are designed to protect the public from incompetent or dishonest providers of building and construction services. (*Ibid*.)

(*Ibid*.) In addition:

> The CSLL shields persons who utilize the services of an unlicensed contractor from lawsuits by that contractor to collect payment for unlicensed work.
>
> * * *
>
> The California Supreme Court has given a broad, literal interpretation to the shield provision in section 7031: "Where applicable, section 7031(a) bars a person from suing to recover compensation for any work he or she did under an agreement for services requiring a contractor's license unless proper licensure

> was in place at all times during such contractual performance." (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 419 [30 Cal. Rptr. 3d 755, 115 P.3d 41].) The Legislature's use of the phrase "in law or equity" and the unqualified terms "any" and "all" mean that section 7031, subdivision (a) applies "[r]egardless of the equities." (*Hydrotech Systems, Ltd. v. Oasis Waterpark, supra*, 52 Cal.3d at p. 997.) The statutory language demonstrates the Legislature's "intent to impose a stiff all-or-nothing penalty for unlicensed work . . . ." (*MW Erectors, Inc*., *supra*, at p. 426.) The statute's harsh results are justified by the importance of deterring violations of the licensing requirements. (*WSS Industrial Construction, Inc. v. Great West Contractors, Inc*., *supra*, 162 Cal.App.4th at p. 596.)

(*Id.* at pp. 518-519.)

The CSLL further defines what a "contractor" is:

> "Contractor," for the purposes of this chapter, is synonymous with "builder" and, within the meaning of this chapter, a contractor is any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building . . . or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith, or the cleaning of grounds or structures in connection therewith . . . and whether or not the performance of work herein described involves the addition to, or fabrication into, any structure, project, development or improvement herein described of any material or article of merchandise. "Contractor" includes subcontractor and specialty contractor.

(Bus. & Prof. Code § 7026.)

Only "those who actually perform or supervise the performance of construction services" are contractors under the statute; "[t]hus, a person or company in the business of supplying equipment or hiring out laborers to be supervised by others is not deemed to act in the capacity of a contractor and is not required to have a license." (*Contractors Labor Pool, Inc. v. Westway Contractors, Inc.* (1997) 53 Cal.App.4th 152, 165.) In addition, a "construction manager" who merely "act[s] as the Owner's agent with respect to the various parties connected with the development of the project" and has "no responsibility or authority to perform any construction work on the project, or to enter into any contract or subcontract for the performance of such work" is not a contractor. (*Fifth Day, LLC v. Bolotin* (2009) 172 Cal.App.4th 939, 948 (*Fifth Day*) [LLC's claims pursuant to a development management agreement were not barred where LLC was not a contractor under section 7026 and LLC did not contract to perform or perform any activities listed in the statutory definition].) "Section 7031 . . . does not prevent a plaintiff from seeking compensation for acts for which no contractor's license was required." (*MKB Management, Inc. v. Melikian* (2010) 184 Cal.App.4th 796, 806.)

2. Application of Business and Professions Code Section 7031 to Sino Vista's Complaint and Wanmei's FAXC

While a party has the burden of proof as to each fact that is essential to the claim for relief or defense asserted (Evid. Code, § 500), the court notes as an initial matter that neither Sino Vista's complaint nor Wanmei's FAXC seeks recovery for "the collection of compensation for the performance of any act or contract where a license is required by" the CSLL.

Sino Vista's complaint alleges that it is a limited liability company that entered into a joint venture with Sun and Zhu to develop Seven Springs Ranch, based on their false statements regarding the value of the property and their control over it, as well as their wrongful omissions of other essential information. The complaint further alleges that Defendants breached the joint venture agreement in various ways. While it makes references to remodeling work and repairs performed at the property, it does not allege that Sino Vista (or Wanmei) directly performed this work for Defendants Sun and Zhu.

The primary support for the nine causes of action in the complaint is Exhibit C, a signed copy of the "Seven Springs Ranch Project Agreement," dated August 16, 2016, between Xi Hua Sun and CLRD ("Party A") and Wanmei ("Party B") "for the joint venture in the Seven Springs Ranch development project." It states that "[t]he project will be held and managed using a Limited Liability Company – Sino Vista LLC. The LLC has one manager – Wanmei Properties, Inc. The manager will manage all aspects of the operation of the project, though major decisions will be made jointly by Party A and B." The agreement further states (under "Major Responsibilities") that Wanmei "is the primary entity to manage the marketing, sales, and the entitlement process of the project, as well as all aspects of property maintenance since an agreement was reached in May 2016."

Sino Vista's complaint cannot reasonably be construed as alleging that Sino Vista was a "contractor" (as defined in Business and Professions Code section 7026) seeking payment from Sun and Zhu for work it performed while unlicensed. Rather, it alleges that Sino Vista (through Wanmei) entered into a joint venture agreement with Xi Hua Sun and CLRD to develop the subject property. It does also seek to recover costs "related to" remodeling and repair work at the property—which presumably could include the costs involved in hiring others to perform contracting work. This does not necessarily make Sino Vista subject to Business and Professions Code section 7031 itself. (See *Fifth Day*; *MKB Management, Inc.*, *supra*.) Fairly read, Sino Vista's complaint does not put section 7031 at issue.

Wanmei's FAXC generally repeats the same material allegations as Sino Vista's earlier-filed complaint and relies upon the same exhibits, including the "Seven Springs Ranch Project Agreement," which is again submitted as Exhibit C. The FAXC alleges that Wanmei is a California corporation and the manager of Sino Vista. While the FAXC refers to workers (such as painters) hired by Wanmei and seeks to recover costs "related to" this work, it cannot be reasonably construed as alleging that Wanmei itself acted as "contractor" rather than a "manager" under the "Seven Springs Ranch Project Agreement." The FAXC also does not put section 7031 at issue.

Moreover, an affirmative defense that Sino Vista or Wanmei violated Business and Professions Code section 7031 is "new matter" that Sun and Zhu were required to raise in their

answers, if they intended to rely on it (e.g., on summary judgment). A general denial is only sufficient to preserve a claim that a party has failed to comply with Business and Professions Code section 7031 *if* the plaintiff or cross-complainant is suing for work performed as a contractor and is required to plead licensure. (See *Advantec Group, Inc v. Edwin's Plumbing Co., Inc*. (2007) 153 Cal.App.4th 621, 626-628.) Here, a claim of noncompliance with section 7031 is not responsive to the essential allegations of Sino Vista's complaint or Wanmei's FAXC, and so it had to be raised as an affirmative defense. (Code of Civ. Proc., § 431.30(b)(2).) On this basis alone, the court must deny the motion for summary judgment for failure to meet the initial burden.

Even if it were assumed for purposes of argument that Business and Professions Code section 7031 was properly raised in Sun and Zhu's answers and that their submitted evidence (essentially the declaration from defendant Xi Hua Sun) was sufficient to meet their initial burden, when the burden shifts to Sino Vista and Wanmei, their evidence in opposition would be sufficient to raise a triable issue as to whether *all 19 causes of action* in both the complaint and FAXC are barred by section 7031. In particular, even if *some* of the causes of action in these pleadings could theoretically fall under the scope of section 7031 (read as broadly as possible), other causes of action—e.g., fraud, intentional misrepresentation, conversion, and quiet title—certainly would not.

The declarations submitted in support of Sino Vista and Wanmei's opposition (from Dennis Liu, Sophia Liu, and Irene Fujii) largely contradict the factual statements in the declaration of defendant Xi Hua Sun. The evidence must be liberally construed in favor of the party or parties opposing summary judgment, resolving any doubts in favor of the opposing party. (See *Yanowitz v. L'Oreal USA, Inc*., *supra*, 36 Cal.4th at 1037.) In ruling on a motion for summary judgment, the court also may not weigh the evidence or assess the credibility of declarants. (See *Reid v. Google, Inc*. (2010) 50 Cal.4th 512, 540.) "Typically in summary judgment litigation, equally conflicting evidence requires a trial to resolve the dispute." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 881.)

For all of these reasons, the court denies the motion for summary judgment.

D. Evidentiary Objections

The court notes that with the joint opposition, Sino Vista and Wanmei have submitted objections to the declaration of Xi Hua Sun. As Sun and Zhu's motion has been denied on the basis that the affirmative defense of Business and Professions Code section 7031 has been waived (among other reasons), it is not necessary for the court to rule on these objections. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., § 437c, subd. (q).)

IV. SUN AND ZHU'S MOTION TO QUASH

Sun and Zhu move to quash a deposition notice and subpoena served by Sino Vista, Wanmei, and Dennis Liu on non-party Yan Chen, the wife of Xi Jun Sun. Sino Vista, Wanmei, and Liu argue that Chen has relevant information about CLRD and her husband's transactions and dealings with Sun and Zhu. Sun and Zhu argue that her knowledge is largely

second-hand to Xi Jun Sun's own knowledge; more critically, they argue that the noticing parties failed to comply with the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and that the subpoena therefore violates rules on international comity.

This motion was originally scheduled to be heard in November 2023, but because this consolidated case is set for trial on December 11, 2023, the court granted Sino Vista, Wanmei, and Liu's ex parte request to advance the hearing date and have the motion to quash heard along with the pending summary judgment motions. In accelerating the time for the hearing, the court also stated in its August 16, 2023 order that the length of any reply brief would be limited "to THREE pages." Notwithstanding this clear order, Sun and Zhu's reply brief extends into "page 8." Because of this failure to follow basic instructions by Sun and Zhu's counsel, the court disregards the last four pages of the reply brief.

Code of Civil Procedure section 2027.010 sets forth the procedure for taking depositions in a foreign nation. In particular, subdivision (c) provides that for non-parties, "a party serving a deposition notice under this section shall use any process and procedures required and available under the laws of the foreign nation where the deposition is to be taken to compel the deponent to attend and to testify . . . ." Significantly, the code focuses solely on the "process and procedures" for *compelling* witnesses in foreign countries to testify, and it does not explicitly address the situation in which a third-party witness is already willing to appear for deposition.

Similarly, the Hague Convention also focuses on the procedure for compelling the deposition of a foreign national and generally does not concern itself with voluntary witnesses. Under rules of international comity, courts should exercise "special vigilance" to ensure that foreign witnesses are protected "from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position" (*Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa* (1987) 482 U.S. 522, 546 (*Aerospatiale*)), but these concerns are diminished when the witness is fully willing to appear. As the United States Supreme Court further noted in *Aerospatiale*, "the Convention was intended as a permissive supplement, not a pre-emptive replacement, for other means of obtaining evidence located abroad." (*Id.* at 536.)

In this case, the court understands that Chen is a willing witness, and that the objecting parties—Sun and Zhu—are not actually objecting in order to protect Chen from any undue burden. Indeed, it is unclear exactly why Sun and Zhu are objecting. While they are undoubtedly correct that Chen does not possess the degree of first-hand knowledge that her husband possesses regarding CLRD and the defendants, Sun and Zhu cannot (and do not) argue that she has *no* relevant information. Moreover, Sino Vista, Wanmei, and Liu make it clear that they have tried to obtain Xi Jun Sun's testimony, but that they have been unable to do so because he is apparently still incarcerated in China.

In view of the foregoing, Sun and Zhu's objections to the deposition are not well taken, and they have no real basis to quash the deposition, so long as Chen remains a willing witness. To the extent that the court is required to conduct the balancing test set forth in *Aerospatiale* and *American Home Assurance Company v. Societe Commerciale Toutelectric* (2002) 104 Cal.App.4th 406, 409—even for a voluntary witness—the court finds that the balance weighs in favor of denying Sun and Zhu's motion to quash.

Of course, under Code of Civil Procedure section 2027.010, subdivision (d), there remains the question of whether the deposition can properly be taken by an officer with sufficient authority. Given that subdivision (d)(3) allows for the deposition officer to be "any person agreed to by all the parties," and given that Chen and all the other parties (with the exception of Sun and Zhu) appear to be willing to submit to the authority of a court reporter who is authorized to administer oaths in the State of California, the court finds that this is sufficient to overcome any concerns, and the objections of California residents Sun and Zhu are insufficient to prevent the deposition from going forward. Again, the purpose of both section 2027.010 and the Hague Convention is to protect the foreign witness from undue intrusion. These procedures were not intended to allow *domestic* parties with no apparent standing to object to prevent relevant discovery from proceeding.

The motion to quash is DENIED.

The court DENIES all three motions brought by Sun and Zhu.

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Calendar Line 5
Case Name: *Kassandra Souza v. Joann Jepson et al.*
Case No.: 21CV383135

Defendant Joann Jepson moves to compel a neuropsychological examination of plaintiff Kassandra Souza, based on Souza's claim that she suffered a traumatic brain injury, psychological injuries, and cognitive impairments (including post-traumatic stress disorder, post-traumatic concussion, anxiety, and depression) from the two-car collision that is the subject of this personal injury case. The court finds that a neuropsychological examination of Souza is directly relevant to her claim of damages and that good cause exists to GRANT the motion under Code of Civil Procedure section 2032.320.

Souza raises a number of arguments in opposition to the motion, none of which alter the court's decision.

First, Souza argues that Jepson did not adequately meet and confer before filing this motion. The court finds otherwise. Although the correspondence and discussions on March 21 and March 24, 2023 ended inconclusively between the parties, and it was certainly possible for the parties to continue discussing the parameters of any potential neuropsychological examination before this motion was filed on May 3, 2023, or even in the months since it was filed, the court finds that the discussions were minimally adequate and sufficiently indicative of an impasse. While Souza could have proposed another compromise in the intervening months since the filing of this motion, the fact that she and her counsel made no effort to do so demonstrates that this motion was necessary.

Second, Souza argues that Jepson "has not candidly disclosed the testing to be performed," disclosing an "overly-broad list of proposed tests that cannot possibly be performed in the time allowed." While it does appear that the list of 20 tests in Jepson's counsel's email of March 24, 2023 appears to be quite broad, and may not all be able to be performed within six hours, Souza has not identified a single, specific test to which she objects, arguing only generically in boilerplate briefing that the list is overbroad. This is unhelpful to the court. In the absence of any issue with any individual test or tests—which Souza has failed to specify—the court will not micromanage the tests that may be appropriate here. Instead, the court will simply limit the duration of testing to six hours, as initially suggested by both sides.

Third, Souza argues that a neuropsychological examination impinges upon her constitutional right to privacy, but instead of specifying any particular issues with the proposed examination, she submits boilerplate arguments that appear to be imported directly from other briefs. (Opp. at pp. 7-9.) Again, this is useless to the court. Because Souza has placed her neuropsychological condition at issue in the case, it is incumbent upon her to identify any potential privacy issues arising from the proposed examination. Her opposition fails to do so.

The court orders Souza to submit to a neuropsychological examination from Jepson's proposed expert witness, Alexis Smith, within 45 days of this order (i.e., by no later than October 27, 2023) for six hours. The tests that may be performed are those listed in counsel's email of March 24, 2023. The examination is not required to be recorded, but the raw test data must be shared with Souza's retained expert.

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Calendar Line 7
Case Name: *Shirley Getty v. Villa Verde et al.*
Case No.: 23CV418773

Plaintiff Shirley Getty moves for a preferential trial setting under Code of Civil Procedure section 36. She argues that she meets the statutory standard because she is 99 years old, has a substantial interest in the litigation as the sole plaintiff, and has numerous health conditions (Stage 4 pressure injury on her coccyx, hypertension, dementia, memory loss, depression, atrial fibrillation, acute kidney failure, and many more) that make a preference necessary to prevent prejudicing her interest in the case. The court finds that Getty has satisfied the statutory requirements for a trial preference and GRANTS the motion.

Defendants Villa Verde, Dominica Oliva, Sequoia Home Health & Hospice, Cornerstone Healthcare, Inc., Pennant Services, Inc. have filed *four* separate oppositions to the motion, raising several overlapping and needlessly repetitive arguments.[4] The court rejects all of these arguments out of hand.

First, the argument that Getty's motion lacks foundation is unpersuasive, given that Code of Civil Procedure section 36.5 explicitly allows the moving party to rely on an attorney affidavit that sets forth the party's "medical diagnosis and prognosis" on information and belief, rather than on direct, personal knowledge. Even while acknowledging the existence of section 36.5, defendants Villa Verde and Domenica Oliva ignore it altogether in making their argument that Getty's attorney's declaration "has no foundation to opine on Plaintiff's health or prognosis." (Villa Verde/Oliva Opp. at p. 4:15-21.) The court is unmoved by this transparent sophistry.

Second, defendants' argument that section 36 "is not applicable where a Plaintiff is already incapacitated at the time of the filing of the Complaint" lacks legal support. Indeed, it is directly contrary to *Fox v. Superior Court* (2018) 21 Cal.App.5th 529, which held that "incapacity" is irrelevant to the application of section 36, given that the statute "says nothing about 'death or incapacity.'" All that section 36, subdivision (a), requires "is a showing that the party's '*health . . . is such* that a preference is necessary *to prevent prejudicing [her] interest in the litigation*.'" (*Id.* at p. 534 (quoting Code Civ. Proc., § 36, subd. (a)), italics in original.) In this case, regardless of the degree to which her dementia and memory loss might affect her ability to participate at trial, Getty's interest in the litigation as its sole plaintiff would indisputably be prejudiced by a later rather than sooner trial setting.

Finally, defendants argue that granting the motion will violate their alleged "due process" rights to obtain wide-ranging discovery. Again, this argument lacks legal support and is based on a total misunderstanding of the law. Having found that the statutory requirements are satisfied, the court has no room for discretion to set a later trial date to accommodate defendants' desire for a specific scope of discovery. The fact that application of section 36 may cause inconvenience to the court or to the other litigants, or may prevent the completion of discovery or other pretrial matters, is completely "irrelevant" in the eyes of the Legislature that enacted the law. *Swaithes v. Superior Court* (1989) 212 Cal.App.3d 1082, 1085. "The trial court has no power to balance the differing interests of opposing litigants in applying the

[4] As a general matter, the court strongly disapproves of this practice, particularly as three of the four opposition briefs are submitted by the same counsel. The arguments are not made more persuasive by being duplicative; rather, they come across as lacking in cogency and careful consideration.

provision. The express legislative mandate for trial preference is a substantive public policy concern which supersedes such considerations." (*Id.* at p. 1085-1086.) Application of section 36 is "mandatory."

Under section 36, subdivision (f), the court sets this matter for trial on **January 8, 2024** at 8:45 a.m. The Mandatory Settlement Conference will be on **December 20, 2023** (exact time to be determined closer to the date).

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