SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 3
Honorable William J. Monahan, Presiding

Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 11/19/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (11/18/2024)you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling.
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court prefers in-person appearances or by Teams. If you must appear virtually, please use video.

FOR YOUR NEXT HEARING DATE: Please reserve your next hearing date using Court Schedule—an online scheduling tool that can be found on the Santa Clara County court website.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.) **Please Note:** Any proposed orders must be submitted with the Judicial Council Form EFS-020 Proposed Order (Cover Sheet). Please include the date, time, dept., and line number.

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	24CV430327	Maureen Cronin vs Daniel Cronin et al	Hearing: Demurrer to Plaintiff's First Amended Complaint by Defendant Erica Cronin Ctrl Click (or scroll down) on Line 1 for tentative ruling. The court will prepare the order.
LINE 2	24CV439524	Tara Dang vs Nguyen Nam et al	Hearing: Motion to Strike **CONT TO 2/19/25** Plaintiff's First Amended Complaint and Under Special Motion to Strike for ANTI-SLAPP (CCP 425.16) by Defendant Hien Nguyen OFF CALENDAR. [This motion was already continued to 2/19/2025 at 9am in Dept. 20. (See Stip. and Order filed 11/7/2024.)]
LINE 3	22CV393632	Sabrina Alfaro vs Varian Medical Systems, Inc. et al	Motion: Summary Judgment/Adjudication by Defendant Varian Medical Systems, Inc. OFF CALENDAR. [Notice of Settlement filed 11/12/2024.]

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DATE: 11/19/2024 TIME: 9:00 A.M.

LINE 4	24CV435415	ALONDRA GONZALEZ vs VOLKSWAGEN GROUP OF AMERICA, INC. et al	Motion: Compel Defendant VOLKSWAGEN GROUP OF AMERICA, INC. S RESPONSES TO FIRST SET OF SPECIAL INTERROGATORIES AND REQUEST FOR MONETARY SANCTIONS by Plaintiff ALONDRA GONZALEZ ("Plaintiff") OFF CALENDAR. [Notice of withdrawal filed 11/14/2024.by Plaintiff.]
LINE 5	24CV435415	ALONDRA GONZALEZ vs VOLKSWAGEN GROUP OF AMERICA, INC. et al	Motion: Compel VOLKSWAGEN GROUP OF AMERICA, INC. S RESPONSES TO FIRST SET OF FORM INTERROGATORIES AND REQUEST FOR MONETARY SANCTIONS by Plaintiff ALONDRA GONZALEZ ("Plaintiff") OFF CALENDAR. [Notice of withdrawal filed 11/14/2024.by Plaintiff.]
LINE 6	23CV417837	ERICK GONZALES vs Securitas Security Services USA et al	Motion: Vacate Arbitration and Lift Stay Pursuant to the EFAA by Plaintiff ERICK GONZALES **This hearing is continued to 12/12/2024 at 9am in Dept. 3.** The court requests additional briefing *limited to* the following issues: (1) Does Code of Civil Procedure (CCP) section 1008 apply to this motion? (2) If so, is it a basis for denial? (3) Does it matter that Plaintiff did *not* amend his complaint (to include these 2 new causes of action) *before* it was ordered to binding arbitration and the stay was entered? (4) Does it matter that these 2 new causes of action are only in the amended complaint in arbitration (and are *not* contained in the complaint filed before this court)? Both sides: Please e-file and electronically serve a brief (10 pages max.) addressing these issues by 12/2/2024 and any reply (5 pages max.) to the other side's brief by 12/6/2024. The court will prepare the order.

SUPERIOR COURT, STATE OF CALIFORNIA
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DATE: 11/19/2024 TIME: 9:00 A.M.

LINE 7	23CV420831	Gail Bennett vs Tracy Tram, PhD	Motion: Set Aside judgment by plaintiff Gail Bennett (pro per) Good cause appearing, plaintiff Gail Bennett (pro per) ("Plaintiff")'s motion pursuant to Code of Civil Procedure ("CCP") section 473(b) to set aside (and vacate) the ex-parte judgment dismissing the action with prejudice (as to defendant Tracy Tram, M.D. ("Dr. TRAM") on 3/26/2024 is GRANTED. Plaintiff has established by a preponderance of the evidence that the ex parte judgment dismissing the action on 3/26/2024 was entered through her "mistake, inadvertence, surprise or excusable neglect." (CCP §473(b); *Marcotte v Municipal Court* (1976) 64 Cal.App.3d 235, 239; *Goodson v. The Bogerts, Inc.* (1967) 252 Cal.App.2d 32, 38; *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233 (*Easton*) ["because the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default."]) Plaintiff has also shown by a preponderance of the evidence that her application for relief was "made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. (CCP §473(b); *Easton, supra,* 38 Cal.3d. 227, 234; *Ludka v Magnetics Int'l* (1972) 25 Cal.App.3d 316, 321-322.) Plaintiff's declaration also shows that she acted diligently and that the reason for the delay was her substantial health/medical issues that justified or excused the delay. (*Staffford v. Mach* (1998) 64 Cal.App.4th 1174, 1181 [the moving party "must also show diligence in filing its application under section 473 after learning of the default. If there is a delay in filing for relief under section 473, the reason for the delay must be substantial and must justify or excuse the delay.') The exparte judgment dismissing the action with prejudice (as to defendant Dr. TRAM) on 3/26/2024 is hereby set aside (and vacated) pursuant to CCP section 473(b). Defendant Dr. TRAM has 30 days leave (from the date of this order) to file a response to Plaintiff's First Amended Complaint (filed 3/25/2024). The court will prepare the order.

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DATE: 11/19/2024 TIME: 9:00 A.M.

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Calendar Line 1
Case Name: *Cronin v. Cronin et al.*
Case No.: 24CV430327

I. Factual and Procedural Background

Plaintiff Maureen Cronin ("Plaintiff") brings this action against her son, Daniel Cronin ("Daniel") and his former wife,[1] Erica Cronin ("Erica") (collectively, "Defendants").[2]

According to the allegations of the first amended complaint ("FAC"), in or around 2008, Daniel introduced Plaintiff to Erica and in 2014, Defendants married. (FAC, ¶¶ 8-9.) From around 2014 to 2017, Defendants rented a home located next-door to Plaintiff's house in Los Altos, California, (FAC, ¶ 11.) In or around 2016, Defendants decided to purchase a home and Plaintiff accompanied Erica to tour homes for sale in Los Altos. (FAC, ¶¶ 12-13.)

In or around February 2017, Defendants made an offer to purchase a property in Sunnyvale, California ("the Property"). (FAC, ¶ 14.) The seller required an all-cash closing within seven days; however, Defendants were unable to meet this requirement and sought assistance from Plaintiff. (*Ibid*.) Defendants assured Plaintiff that she would remain an integral part of Defendants' daily lives and based on these assurances and their close relationship, Plaintiff agreed to provide financial assistance to Defendants. (FAC, ¶¶ 15-16.) Thereafter, Plaintiff obtained a margin loan secured against her personal investment and retirement accounts and used those funds to pay approximately $1,801,951 in cash to purchase the Property. (FAC, ¶ 16.)

Despite the fact that nearly all of the funds for the Property came from Plaintiff, she agreed with Defendants' request that they each hold an equal interest in title to the Property. (FAC, ¶ 17.) Accordingly, Defendants received an undivided two-thirds interest in the Property as community property with right of survivorship, and Plaintiff, in her capacity as Trustee of the Cronin Family Survivor's Trust, received an undivided one-third interest in the Property. (*Ibid*.)

After close of escrow, the parties sought to refinance the Property in order to repay Plaintiff's margin loan. (FAC, ¶ 19.) Defendants were approved for a new $1,000,000 loan, with Plaintiff as a co-signer. (*Ibid*.) To cover the difference between the $1,801,951 margin loan balance and the $1,000,000 refinance loan, Defendants paid approximately $210,000 and requested Plaintiff pay the remaining $600,000 out of her personal funds. (*Ibid*.)

Plaintiff offered the $600,000 loan ("the Loan") based on her discussions with Defendants and their understanding that by accepting the Loan, as long as Defendants remained at the Property, Plaintiff would refrain from collecting on the Loan until Defendants were financially able to repay Plaintiff. (FAC, ¶ 20.) Additionally, it was Plaintiff's intent at

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[1] As of December 2020, Daniel and Erica are currently separated with a petition for dissolution of their marriage pending before this Court. (FAC, ¶¶ 2, 10.)

[2] The individuals involved in this case share the same last name, so the Court will refer to them by their first names. No disrespect is intended. (See *In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 551, fn. 2; see also *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

the time of the formation of the Loan, that any outstanding balance would be deducted from Daniel's share of his inheritance from Plaintiff's estate, should the Loan remain unpaid at the time of her death. (FAC, ¶ 22.) Plaintiff continued to provide financial assistance to Defendants by paying one-third of the Property's mortgage each month from around April 2017 through August 2020. (FAC, ¶ 25.) In or around 2020, Erica expressed to Plaintiff that if the Property could be refinanced again with a lower interest rate, Defendants could manage monthly payments on their own and then take full title ownership of the Property. (FAC, ¶ 26.)

Thereafter, Defendants were approved for a lower-interest loan to refinance the Property, but they advised Plaintiff that they needed an additional $150,000 to complete the refinance transaction. (FAC, ¶ 27.) Plaintiff provided Defendants with the $150,000, but designated this amount as a gift. (FAC, ¶ 28; Ex. B.) Plaintiff also agreed to remove herself from title to the Property since she would no longer be paying part of the mortgage. (FAC, ¶¶ 29, 30; Ex. C.) Despite no longer being on the title to the Property, Plaintiff did not relinquish her right to seek repayment from Defendants of the $600,000 loan. (FAC, ¶ 31.)

In or around December 2020, Defendants separated with the intent to sell the Property in order to split their marital estate. (FAC, ¶ 32.) As such, Defendants will no longer be living near Plaintiff as was intended when she loaned Defendants the $600,000. (*Ibid*.) Daniel continues to live at the Property with Plaintiff's grandchildren and Erica lives elsewhere. (*Ibid*.) In July 2023, Erica disavowed responsibility for the $600,000 loan and instead asserted that it had been a gift from Plaintiff. (FAC, ¶ 33.)

On June 24, 2024, Plaintiff filed her FAC against Defendants, asserting the following causes of action:

1) Breach of Contract;
2) Imposition of Constructive Trust;
3) Common Count – Money Had and Received;
4) Common Count – Money Lent; and
5) Financial Elder Abuse.

On August 5, 2024, Erica filed a demurrer to each cause of action in the FAC. Plaintiff opposes the motion and Erica filed a reply.

II. Meet and Confer Efforts

Code of Civil Procedure section 430.41, subdivision (a) states, in relevant part that, "[b]efore filing a demurrer pursuant to this chapter, the demurring party shall meet and confer in person or by telephone with the party who filed the pleading that is subject to demurrer for the purpose of determining whether an agreement can be reached that would resolve the objections to be raised in the demurrer."

Plaintiff argues the demurrer should be overruled given that Erica's counsel failed to sufficiently meet and confer before filing the subject demurrer, in violation of Code of Civil Procedure section 430.41, subdivision (a). (Opposition, p. 8, IV.A.) In reply, Erica's counsel states that meet and confer efforts occurred via email but concedes that the parties did not meet and confer through phone or in person, as required. (Reply, p. 3:3-4.)

Despite the failure to comply with the requirements of the code, the Court will consider Erica's demurrer on the merits. (See e.g., *Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502, 515 ["Indeed, subdivision (a)(4) [of Code of Civil Procedure section 430.41] provides that 'any determination by the court that the meet and confer process was insufficient shall not be grounds to overrule or sustain a demurrer."]; *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 [courts have a policy favoring disposition of cases on the merits rather than on procedural grounds].) The Court reminds the parties not to treat Code of Civil Procedure section 430.41 as a procedural hurdle, and, instead, the parties should undertake the obligations set forth therein with sincerity and good faith.

III. Legal Standard on Demurrer

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, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).) "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.)

IV. First Cause of Action – Breach of Contract

Erica demurs to the first cause of action on the grounds the oral contract is unenforceable; fails to comply with the statute of frauds; and is barred by the statute of limitations.

a. Oral Contract

Erica first argues that Plaintiff failed to attach a written contract or document memorializing an agreement and instead, the FAC alleges that the parties entered into the loan agreement through their conduct. (Demurrer, p. 7:9-11.) In opposition, Plaintiff argues she is not required to attach a written document because she is not alleging the existence of a written agreement. (Opposition, pp. 8:27-9:1.) This is persuasive.

"[A] complaint must indicate on its face whether the contract is written, oral, or implied by conduct." (*Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 458-459; see also *Unilab Corp. v. Angeles-IPA* (2016) 244 Cal.App.4th 622, 636 (*Unilab*).) "Whether an implied contract exists is usually a question of fact[.]" (*Unilab, supra*, at p. 636.)

Here, Plaintiff alleges the contract was implied through the parties' conduct. (FAC, ¶ 36.) Thus, the first cause of action sufficiently alleges the type of contract at issue and the Court declines to sustain the demurrer on this basis.

b. Statute of Frauds

Erica next asserts that the Loan agreement was required to be in writing pursuant to Civil Code section 1624, subdivisions (a)(1), (a)(3), and (a)(5). (Demurrer, p. 7:20-23.)

Section 1624 states, in relevant part:

> **(a)** The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:
>
> **(1)** An agreement that by its terms is not to be performed within a year from the making thereof.
>
> [. . .]
>
> **(3)** An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged.
>
> [. . .]
>
> **(5)** An agreement that by its terms is not to be performed during the lifetime of the promisor.

Aside from quoting the language of the statute of frauds and restating the facts alleged in the FAC, Erica does not explain how the agreement between the parties is subject to the statute of frauds in subdivisions (a)(1) or (a)(3). (See e.g., *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 [court is not required to examine undeveloped claims, nor to make arguments for the parties].) As to subdivision (a)(5), Erica contends that the Loan included a stipulation that the funds would be deducted from Daniel's inheritance after Plaintiff's death. (Demurrer, p 8:6-16, citing FAC, ¶¶ 22, 24.)

In opposition, Plaintiff asserts that: (1) subdivision (a)(1) does not apply because the agreement regarding the Loan could have occurred within one year; (2) subdivision (a)(3) does not apply because the Loan was not an agreement made by an agent of either party and was not for an interest in real property; and (3) subdivision (a)(5) does not apply because the intent to deduct the balance from Daniel's inheritance does not make the agreement impossible to be performed within Plaintiff's lifetime. Again, Plaintiff's arguments are persuasive.

As for subdivision (a)(1), nothing in the FAC indicates that the agreement between the parties could not be completed within one year. (See *Columbia Pictures Corp. v. De Toth* (1948) 87 Cal.App.2d 620, 634 ["If the agreement *can* be performed within one year it is valid. It is only when it *cannot* be fully performed within one year that it is invalid."][emphasis original].)

Subdivision (a)(3) is likewise inapplicable. Here, the FAC is devoid of allegations that anyone other Plaintiff and Defendants made the agreement between the parties. The plain language of the subdivision indicates it applies where an agent of the party sought to be charged enters into the agreement. (See Civ. Code, § 1624, subd. (a)(3).)

Finally, as to subdivision (a)(5), there is again nothing in the FAC that states or implies that the agreement is not to be performed during Plaintiff's lifetime. Instead, the agreement was that ***if*** any remaining debt was owed after Plaintiff's death, the remainder would be taken from Daniel's inheritance. (See FAC, ¶ 22.)

Based on the foregoing, the Court declines to sustain the demurrer on the grounds it fails to comply with the statute of frauds.

c. Statute of Limitations

A court may sustain a demurrer for failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315 (*E-Fab*).) A demurrer is not sustainable on statute of limitations grounds if there is only a possibility that the cause of action is time-barred; the defense must be clearly and affirmatively apparent from the allegations of the pleading and matters of which a court may properly take judicial notice. (*Id.* at pp. 1315-1316.) When evaluating whether a claim is time-barred, the court must determine: (1) which statute of limitations applies, and (2) when the claim accrued. (*Ibid.*) The statute of limitations for the enforcement of an implied contract is two years. (Code Civ. Proc., § 339, subd. (1); *Citizens Cas. Co. v. Otis Clark & Co.* (1971) 19 Cal.App.3d 294, 299.)

Erica contends that the first cause of action falls outside of the statute of limitations. She asserts that, pursuant to Code of Civil Procedure section 339, a two-year statute of limitations applies to the first cause of action, and where no time is specified for repayment of a loan, the statute of limitations begins to run at the time the loan is made. (Demurrer, p. 9:2-5, citing *Dorland v. Dorland* (1884) 66 Cal. 189, 190 (*Dorland*).) The Court is not persuaded that the statute of limitations began to run at the time the parties made the agreement regarding the Loan. In *Davis v. Hosford* (1937) 18 Cal.App.2d 664, 665-666 (*Davis*), the Court of Appeal distinguished *Dorland*. The *Davis* Court noted that in *Dorland,* the decision specifically pointed out that no time was given or fixed in the written instruments at issue, raising a presumption of law that the obligation was to be repaid on demand and that the statute of limitations began to run from the time of the loan. (*Id.* at p. 665.) The Court continued, however, that in the case before it, the complaint alleged the loan was to be repaid when the debtors were able to repay it or found it convenient to do so, and that the trial court, based on the evidence, determined when the reasonable deadline was. (*Id.* at pp. 665-666.) Therefore, the Court concluded, the statute of limitations commenced on that reasonable date. (*Id.* at p. 666.)

Here, similarly, the FAC alleges that Defendants were to begin paying when they could afford to or at the time they moved away from the Property. (FAC, ¶ 20 [based on discussions, "defendants understood that by accepting the $600,000 loan, so long as Defendants remained at the Property, Plaintiff would refrain from collecting on the loan until Defendants were financially able to repay Plaintiff."].) As Plaintiff notes in opposition, the FAC does not specify a date when Erica moved away from the Property. Moreover, the FAC indicates that Daniel continues to live at the Property and that Erica disavowed the loan in 2023, but Daniel has not. (FAC, ¶¶ 32-33.) Thus, it is not clear from the face of the pleading that the two-year statute of limitations bars the claim. Accordingly, the Court declines to sustain the demurrer on this basis as well.

Based on the foregoing, the demurrer to the first cause of action is OVERRULED.

V. Second Cause of Action – Imposition of Constructive Trust

Erica asserts the following two arguments in support of her demurrer to the second cause of action: (1) constructive trust is a remedy not a substantive claim for relief; and (2) that because the breach of contract claim fails, there is no harm to be remedied through imposition of a constructive trust.

"An action to impose a constructive trust is a suit in equity to compel a person holding property wrongfully to transfer the property interest to the person to whom it rightfully belongs." (*Higgins v. Higgins* (2017) 11 Cal.App.5th 648, 658-659 (*Higgins*); see also *Meister*

v. Mensinger (2014) 230 Cal.App.4th 381, 399.) "Three conditions must be shown to impose a constructive trust: (1) a specific, identifiable property interest, (2) the plaintiff's right to the property interest, and (3) the defendant's acquisition or detention of the property interest by some wrongful act." (*Higgins, supra,* 11 Cal.App.5th at p. 659.)

As to Erica's first argument, in opposition, Plaintiff argues that California law is "directly contrary" to the assertion that a constructive trust is not a cause of action. (Opposition, p. 17:17-18.) However, several cases hold that a constructive trust is an equitable remedy rather than a cause of action and Plaintiff cites no cases to support her particular argument. (See e.g., *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1332 [a constructive trust is an equitable remedy]; see also *Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1023, fn. 3 [a constructive trust is not an independent cause of action but merely a type of remedy].)

In any event, courts "are more concerned with the substance of the underlying allegations than how the plaintiff labels the cause of action" and here, it appears Plaintiff is asserting a claim for unjust enrichment/restitution.[3] (*O'Grady v. Merchant Exchange Productions, Inc.* (2019) 41 Cal.App.5th 771, 792; see also *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908; *Parnham v. Parnham* (1939) 32 Cal.App.2d 93, 96.) "The essence of the theory of constructive trust is to prevent unjust enrichment and to prevent a person from taking advantage of his or her own wrongdoing. . . . [A] constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled." (*Weiss v. Marcus* (1975) 51 Cal. App. 3d 590, 600.) "The elements of an unjust enrichment claim are the 'receipt of a benefit and the unjust retention of the benefit at the expense of another.'" (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1593.) Here, the FAC alleges that Defendants received $600,000 from Plaintiff and that there was an agreement that Defendants would repay this money, but have refused to do so. (FAC, ¶¶ 43-45.) Accordingly, the Court declines to sustain the demurrer to the second cause of action on the ground it is a remedy.

Given that the Court has overruled the demurrer to the first cause of action, Erica's second argument regarding the second cause of action fails. As such, the demurrer to the second cause of action is OVERRULED.

VI. Third Cause of Action – Common Count, Money Had and Received

"In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.'" (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 (*Zerin*) [internal citations omitted].)

Erica argues the third cause of action for a common count is subject to demurrer because it is based on the same facts as a specific cause of action that is demurrable. (Demurrer, p. 11:21-22, citing *Zerin, supra*, 53 Cal.App.4th at pp. 459-460.) In particular,

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[3] Unjust enrichment is not a cause of action, however it is synonymous with restitution, and California courts are instructed to overlook labels and determine if the plaintiff has pleaded a basis for restitution. (See, *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387-388.)

Erica appears to argue that the common count should fail based on the demurrer to the breach of contract claim. (Demurrer, p. 12:5 ["Plaintiff has failed to present a valid and enforceable contract"].) As explained above, the breach of contract cause of action survives demurrer. Thus, Erica's argument is not well taken. Accordingly, the demurrer to the third cause of action is OVERRULED.

VII. Fourth Cause of Action – Common Count, Money Lent

As to the common count for money lent, Erica argues that, like Plaintiff's breach of contract claim, the claim for money lent is barred by the applicable statute of limitations because there was no specific time given for repayment. (Demurrer, p. 12:25-26.) As explained above, the Court did not find this argument to be meritorious and declines to sustain the demurrer to the fourth cause of action for the same reason. Thus, the demurrer to the fourth cause of action is OVERRULED.

VIII. Fifth Cause of Action – Financial Elder Abuse

"'Financial abuse' of an elder or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secrets, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

(3) Takes, secrets, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70. (Welf. & Inst. Code, § 15610.30, subd. (a).)

"A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." (Welf. & Inst. Code, § 15610.30, subd. (b).)

"For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult." (Welf. & Inst. Code, § 15610.30, subd. (c).)

Erica demurs to the fifth cause of action on the ground Plaintiff was not sixty-five years old at the time the alleged agreement was entered into. (Demurrer, p. 13:24-25.) Specifically, Erica contends that, as discovered through interrogatory responses, Plaintiff did not turn 65 until March 2018, a full year after Plaintiff advanced monetary support for the purchase of the Property. (Demurrer, p. 13:23-25.)

First, in ruling on a demurrer, the facts in the pleading are deemed true, however improbable they may be. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) Moreover, the

Court is not concerned with Plaintiff's ability to prove the allegations of the pleading or the possible difficulty in making such proof. (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496.) Here, the FAC alleges that Plaintiff is considered an elder pursuant to Welfare and Institutions Code section 15610.27. (FAC, ¶ 56.) The Court treats this as true on demurrer. Furthermore, the Court declines to consider any of Erica's arguments regarding discovery responses given that those responses are not properly before this Court, either as an exhibit attached to the pleading or on a proper request for judicial notice. (See e.g., *SKF Farms v. Superior Court* (1984) 153 Cal.App.3d 902, 905 ["A demurrer tests the pleadings alone and not the evidence or other extrinsic matters"]; *Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 834 ["Because a demurrer challenges defects on the face of the complaint, it can refer to matters outside the pleading only if those matters are subject to judicial notice"].)

Accordingly, the demurrer to the fifth cause of action is OVERRULED.

IX. Conclusion and Order

The demurrer is OVERRULED in its entirety.

The Court shall prepare the final order.

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