SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 6
Honorable Evette D. Pennypacker, Presiding

David Criswell, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2160

DATE: February 13, 2024 TIME: 9:00 A.M.

RECORDING COURT PROCEEDINGS IS PROHIBITED

FOR ORAL ARGUMENT: **Before 4:00 PM today you must notify the:**

(1) Court by calling (408) 808-6856 and

(2) Other side by phone or email that you plan to appear at the hearing to contest the ruling

(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

FOR APPEARANCES: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the courtroom, click or copy and paste this link into your internet browser and scroll down to Department 6:

https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

FOR COURT REPORTERS: The Court does **not** provide official court reporters. If you want a court reporter to report your hearing, you must submit the appropriate form, which can be found here:

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FOR YOUR NEXT HEARING DATE: Please do NOT file a blank notice of motion to obtain a hearing date. **Phone lines are now open for you to call and reserve a date before you file your motion**.

Where to call:408-882-2430
When to call: Monday through Friday, 8:30 am to 12:30 pm

LINE	CASE NO.	CASE TITLE	TENTATIVE RULING
1	20CV374091	Financial Pacific Leasing, Inc. vs. Michael J. Medina	Parties are ordered to appear for examination.
2	19CV356261	Sherry Chuang, et. al. vs. Shiuh Kai Chuang	Defendants' Demurrer is SUSTAINED AND OVERRULED, IN PART. Please scroll down to line 3 2 for full tentative ruling. Court to prepare formal order.
3	22CV403929	Suemi Gonzalez and Benicio Gonzalez vs. Santa Clara Valley Transportation Authority	Santa Clara Valley Transportation Authority's Demurrer is CONTINUED to February 29, 2024. There was an error in the Opposition e-filing, and it therefore was not located sufficiently in advance of the hearing to go forward on the noticed February 13, 2024 hearing date. The Court will prepare a formal order regarding the continuance; no further notice is required.
4	22CV403948	SJC Funeral Care, Inc. vs. Claire Owens, et. al.	Defendants' Motion to Compel Third Party Bay Area Employment Development Company to Produce Documents and for Sanctions is DENIED. Third Party submitted a custodian of records declaration and a supplemental production, neither of which is addressed in Defendants' motion. The record demonstrates Third Party has complied with the subpoena. Defendants have failed to identify facts or otherwise show good cause why additional documents exist and/or should be produced. Court to prepare formal order.
5	23CV418299	Rajeev Guliani vs. Milind Dalal, et. al.	Milind P. Dalal's Demurrer to Rajeev Guliani's First Amended Complaint, which Clarity Wealth Advisors, LLC joins, is CONTINUED to March 21, 2024 at 9 a.m. in Department 6 pursuant to the parties' January 3, 2024 stipulation.
6	19CV342660	City of San Jose vs. John J. Falsocchia et. al.	Cross-Defendants' Motion for Summary Judgment is GRANTED. Please scroll down to line 6 for full tentative ruling. Court to prepare formal order.
7	19CV356261	Sherry Chuang, et. al. vs. Shiuh Kai Chuang	Off calendar.
8	22CV400956	Marilyn Rojas vs. Carpigiani North America, et. al.	Plaintiff's Motion to Compel Responses to Form and Special Interrogatories (Sets One) and for $1500 in Sanctions is GRANTED, IN PART. While Defendant unquestionably served its responses several months late, the Court finds Defendant has since served substantially code compliant responses and the lateness of Defendant's responses is due to excusable neglect. Thus, the waiver of objections is set aside. However, sanctions are appropriately assessed in the amount of $1500 for all three motions Plaintiff had to prepare to ensure it would receive some responses. While current Defense counsel may have always intended to remedy prior counsel's failure to respond to this discovery, having already waited several months for responses, Plaintiff was not in a position to know if current counsel would actually respond, justifying the present motions. The parties are further ordered to meet and confer in person or by video conference (phone or email are not sufficient) regarding Defendants' responses to address any remaining discovery issues with Plaintiff's first sets of discovery, prepare and file a joint letter brief for the Court outlining any issues the parties could not agree upon on or before March 22, 2024, and, if necessary appear for a further hearing on this motion to compel on March 28 2024 at 9 a.m. in Department 6. Court to prepare formal order.

9	22CV400956	Marilyn Rojas vs. Carpigiani North America, et. al.	Plaintiff's Motion to Deem the Truth of Matters in Request for Admissions (Set One) Admitted and for $1500 in Sanctions is GRANTED, IN PART. Where a party serves code compliant responses before the hearing on a motion to have matters deemed admitted, the motion must be denied. (Code of Civ. Proc. § 2033.280(c); *St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762, 776, 778.) Here, Defendant served substantially code compliant responses to Plaintiff's requests for admission on January 30, 2024, thus the motion to have matters deemed admitted is DENIED. However, sanctions are appropriately assessed in the amount of $1500 for all three motions Plaintiff had to prepare to ensure it would receive some responses. Thus, Plaintiff's motion for SANCTIONS is GRANTED. The three motions are substantially identical; thus, the Court finds $1500 for all three motions is a reasonable sanction. Court to prepare formal order.
10	22CV400956	Marilyn Rojas vs. Carpigiani North America, et. al.	Plaintiff's Motion to Compel Responses to Requests for Production (Set One) and for $2,500 in Sanctions is GRANTED, IN PART. While Defendant unquestionably served its responses several months late, the Court finds Defendant has since served substantially code compliant responses and the lateness of Defendant's responses is due to excusable neglect. Thus, the waiver of objections is set aside. However, it does not appear that any documents have been produced. Defendants are ordered to produce all documents it has already agreed to produce within 20 days of service of this formal order. Defendants are also ordered to pay $1500 (total) in sanctions for all three motions, for the reasons cited above. Finally, the parties are ordered to meet and confer in person or by video conference (phone or email are not sufficient) regarding Defendants' responses to address any remaining discovery issues with Plaintiff's first sets of discovery, prepare and file a joint letter brief for the Court outlining any issues the parties could not agree upon on or before March 22, 2024, and, if necessary appear for a further hearing on this motion to compel on March 28 2024 at 9 a.m. in Department 6. Court to prepare formal order.
11	23CV416558	Menekshe Law Firm, APC vs. Kenneth A. Freedman, et. al.	The parties are ordered to appear for a discovery conference on March 1, 2024 at 10:00 via the Department 6 Microsoft Teams link. The Court will confer with the parties and issue an order detailing what discovery will be permitted, which discovery will be substantially narrower than what Plaintiff has thus far served.
12	23CV420854	StormQuant, Inc. v. Reuben "Tripp" Purvis	Reuben "Tripp" Purvis's Motion to Compel Arbitration is DENIED. Please scroll down to line 12 for full tentative ruling. Court to prepare formal order.
13	23CV426010	Same Ghezavat vs. Bloom Energy Corporation	The parties stipulated to address their dispute in arbitration and to stay these proceedings, which stipulation the Court approved by order dated January 12, 2024. This matter is therefore off calendar. The parties are ordered to appear in Department 6 on August 29, 2024 at 10 a.m. for a status conference regarding the arbitration. This order to be reflected in the minutes.

14	20CV373187	Austin Erlich vs. Wahid Shah	The Court orders the parties to appear for Plaintiff Austin Erlich's motion for terminating sanctions against Defendant Wahid Shah. The Court is concerned that Defendant did not receive proper notice of this motion: there is an amended notice of motion with this hearing date and time, but no proof of service with that amended notice is in the court file. The Court granted Wahid Shah's counsel, James C. Hann's, motion to withdraw as counsel by order dated January 9, 2024. That order (a) is effective upon the filing of a proof of service of the signed order on Mr. Shah and no proof of service is in the court file; (b) identifies the February 28, 2024 settlement conference, February 29, 2024 trial assignment, and March 4, 2024 trial dates; but (c) does not identify this February 13, 2024 hearing date and time for the motion for terminating sanctions. While there appears to be good cause to grant this motion for terminating sanctions for Defendant's failure to appear for deposition and produce documents as required by the Court's December 12, 2023 order, the Court wants to confirm that both defense counsel and Mr. Shah were served with the amended notice of motion before issuing a final ruling to that effect.
15	22CV408399	Ning Yu vs. iTalk Global Communications, et. al.	Defendants' Motion for Attorneys' Fees are GRANTED. Please scroll down to lines 15-16, 19 for full tentative ruling. Parties are ordered to appear for argument. Court to prepare formal order.
16	22CV408399	Ning Yu vs. iTalk Global Communications, et. al.	Defendants' Motion for Attorneys' Fees are GRANTED. Please scroll down to lines 15-16, 19 for full tentative ruling. Parties are ordered to appear for argument. Court to prepare formal order.

17	23CV410398	Nasir Abbas Deen vs. Purple Lotus	Plaintiff's Motion to Seal is DENIED. First, this motion does not appear to have been served on either defendant. The Code of Civil Procedure, Rules of Court and Civil Local Rules require that the moving party serve a written notice of motion with the hearing date and time. (See Code Civ. Proc. §§1005(a), 1010.) A court lacks jurisdiction to hear a motion that has not been properly served, even if the non-moving party had some type of advanced notice. (See *Diaz v. Professional Community Mgmt.* (2017) 16 Cal.App.5th 1190, 1204-1205; *Five-O-Drill Co. v. Superior Court of Los Angeles County* (1930) 105 Cal. App. 232.) Next, Plaintiff brought this motion by way of ex parte application, which application the Court denied by order dated January 10, 2024. While this motion appears to be more narrowly tailored than the ex parte application, the Court still fails to find good cause to seal these records. The records have already been in the public record for more than a year, and the very nature of Plaintiff's case involves the facts Plaintiff seeks to have sealed. As the Court explained in its order denying Plaintiff's ex parte application: "Unless confidentiality is required by law, court records are presumed to be open." (Cal. Rules of Court, Rule 2.550(c).) "[A] trial court is a public governmental institution. Litigants certainly anticipate, upon submitting their disputes for resolution in a public court, before a state-appointed or publicly elected judge, that the proceedings in their case will be adjudicated in public. As observed in *State v. Cottman Transmission Systems, Inc*., *supra*, 75 Md. App. 647, 542 A.2d 859, 864, '[a]n individual or corporate entity involved as a party to a civil case is entitled to a fair trial, not a private one.'" (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178, 1211.) In keeping with the open door policy of the courts, California Rules of Court, Rule 2.550 provides: The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed scaling is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest. On this record where the Plaintiff filed this case more than a year ago based on mental health claims, the Court does not find facts to support sealing here. Court to prepare formal order.
18	23CV427633	David Arken and Kathleen Arken vs. Tesla Energy Operations, et. al.	David Arken and Kathleen Arken's Petition to Confirm Arbitration Award is GRANTED. Please scroll down to line 18 for full tentative ruling. Court to prepare formal order. Parties ordered to appear for argument
19	22CV408399	Ning Yu vs. iTalk Global Communications, et. al.	Defendants' Motion for Attorneys' Fees are GRANTED. Please scroll down to lines 15-16, 19 for full tentative ruling. Parties are ordered to appear for argument. Court to prepare formal order.

Calendar Line 2
Case Name: *Sherry Chuang v. Shiuh Chuang, et al.*
Case No.: 19CV356261

Before the Court is Defendants Sherry Chuang's and Alexander Liu's demurrer to the Plaintiffs' Mei Haw Chuang, Shiuh Chuang ("Lisa"), and Alessio Lisi Complaint.[1] Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

This is a consolidated matter pertaining to various property disputes, including for property located at 410 Sheridan Avenue in Palo Alto (the "Sheridan Property")[2], property located at 4234 Pomona Avenue in Palo Alto (the "Pomona Property")[3], and property located at 2972 Clara Drive in Palo Alto (the "Clara Property"). The Clara Property is at the center of this Complaint.

In 2002, Sherry and Lisa purchased the Clara Property. (Complaint, ¶ 16.) Mei and her late husband, Ying, put up the $300,000 down payment for the Clara Property as a gift to their daughters, who are each 50% owners. (Complaint, ¶ 16.) It was agreed Lisa, Lisi, and their children would reside on their side of the property and Mei and Ying would reside on Sherry's side of the property. (Complaint, ¶ 16.)

Ying and Mei appointed Sherry as their power of attorney until January 21, 2017, when they learned only $20,000 remained between their Wells Fargo accounts. (Complaint, ¶ 22.) Ying, Mei, and Lisa attempted to trace the transactions and learned that approximately $488,018 had been transferred to Sherry and Liu's bank accounts. (Complaint, ¶ 23.) Plaintiffs were able to recoup $48,000 before Ying's passing, and in May 9, 2017, Defendants agreed to return an additional $133,427. (*Ibid*.)

After they were confronted about the theft, Defendants filed three separate partition actions regarding the properties. (Complaint, ¶ 24.) Subsequently, Mei amended the survivor's trust to remove Sherry as trustee and beneficiary. (Complaint, ¶ 25.) Sherry carried out harassing and intimidating

[1] As multiple individuals share a surname, the Court will refer to them by their first names for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)
[2] *Sherry Chuang v. Mei Haw Chuang, et al.*, Case No. 19CV358358 also involves the Sheridan Property.
[3] *Mei Haw Chuang, et al. v. Sherry Chuang, et al.*, Case No. 20CV371732 involves both the Sheridan and Pomona Properties. *Sherry Chuang v. Mei Haw Chuang, et al.*, Case No. 20CV372732 involves just the Pomona Property. The above matters were consolidated on July 13, 2021. (See July 13, 2021 Order RE: Motion to Consolidate, p. 3.) The parties also have an active probate case, *Ying Cheh Chuang and Mei Haw Chuang Revocable Trust dated 5/10/1998,* Case No. 20PR189253.

behavior toward Mei, including but not limited to, trying to control her daily activities, monitoring her, belittling her, and locking her out of the Clara Property. (Complaint, ¶¶ 26-27.) Sherry also took steps to harass, intimidate, Lisa, Lisi, and their children. (Complaint, ¶ 28.)

In March 2020, Sherry moved into her side of the Clara Property to monitor Plaintiffs. (Complaint, ¶ 31.) Mei disinherited Sherry in December 2019. (Complaint, ¶ 32.) At that time, Sherry began refusing to provide Mei with rent obtained from tenants in the Pomona Property. (*Ibid*.) Liu and Sherry misappropriated money from Mei's bank accounts and her when they withheld rent due to her. (Complaint, ¶ 33.) Sherry also falsified text messages on Mei's phone on two separate occasions. (Complaint, ¶ 34.)

On October 8, 2020, Plaintiffs filed the Complaint for: (1) financial elder abuse; (2) conversion; (3) breach of fiduciary duty; (4) accounting; (5) intentional infliction of emotional distress; (6) negligent infliction of emotional distress; (7) invasion of privacy; (8) private nuisance; and (9) unauthorized computer access and fraud. On March 19, 2021, the Court issued its order denying Defendant's anti-SLAPP motion, which was appealed. On May 23, 2023, the appellate court affirmed the order and on August 10, 2023, it issued the remittitur. On September 20, 2023, Defendants filed the instant motion, which Plaintiffs oppose.

II. Preliminary Matters

First, the tone in Defendants' motion and reply is discourteous to a degree that transgresses the standards lawyers should exhibit towards each other and in front of the Court. The Court reminds Defense counsel that disagreements between the parties, or disagreements with arguments made in the opposing party's papers, does not excuse Defendant and its counsel from presenting arguments in conformity with the Code of Civil Procedure, California Rules of Court, and the Santa Clara County Bar Association's Code of Professionalism.[4]

Next, Plaintiffs contend the Avalon Defendants filed and served an oversized memorandum. California Rules of Court, Rule 3.1113, subdivision (d) states: "Except in a summary judgment or summary adjudication motion, no opening or responding memorandum may exceed 15 pages." (Cal.

[4] Santa Clara County Bar Association's Code of Professionalism, § 9 ["A lawyer should at all times be civil, courteous, and accurate in communicating with adversaries, whether in writing or orally"].

Rules of Court, Rule 3.1113, subd. (d).) "A memorandum that exceeds the page limits of these rules must be filed and considered in the same manner as a late-filed paper." (Cal. Rules of Court, Rule 3.1113, subd. (g).) "[A] trial court has broad discretion to accept or reject late-filed papers." (*Rancho Mirage Country Club Homeowners Assn. v. Hazelbaker* (2016) 2 Cal.App.5th 252, 262.)

Defendants' memorandum in support of their motion is 18 pages long. Thus, it does not comply with Rule 3.1113 (d). Although Plaintiffs object to the oversized memorandum, there appears to be no prejudice. Thus, the Court will exercise its discretion to consider the oversized memorandum. Defendants are reminded to follow the Rules of Court and Code of Civil Procedure, and future failure to comply may result in the Court rejecting or disregarding their papers.

III. Request for Judicial Notice

Defendants request judicial notice of the following 19 items:

(1) Complaint filed in this action on October 8, 2020;

(2) Lisa and Lisi's ex parte application for a continuance of the interlocutory judgment of partition by sale of the Clara Property, heard on October 14, 2020;

(3) Declaration of Plaintiff's attorney Michael Hsueh in support of the ex parte application;

(4) The Order denying the ex parte application (October 15, 2020);

(5) The Order granting the interlocutory judgment (October 22, 2020);

(6) Stipulated order entered on March 4, 2021, approving the sale;

(7) Mei's declaration filed on February 3, 2021 in opposition to the anti-SLAPP motion;

(8) Lisa's declaration filed on February 3, 2021 in opposition to the anti-SLAPP motion;

(9) The Order denying the anti-SLAPP motion (March 19, 2021);

(10) Mei's declaration filed on June 16, 2022, in support of her motion for third-party to manage the Pomona Property;

(11) The Order denying Mei's motion for a third-party to manage the Pomona Property (October 13, 2022);

(12) The Order granting Sherry's motion for summary adjudication as to the Sheridan Property (January 17, 2023);

(13) Deposition transcript of Mei from July 10, 2023;

(14) Exhibit 9 of Mei's deposition transcript;

(15) Exhibit 10 if Mei's deposition transcript;

(16) Mei's response to Form Interrogatories 9.1, on July 25, 2023;

(17) The docket of *The People of the State of California v. Alessio Lisi*, Case No. B2002025;

(18) Mei's opening brief in her appeal (Case No. H050903) of the order granting summary adjudication, filed on August 9, 2023; and

(19) Portions of Mei's excerpts of record in her appeal.

Evidence Code section 452, subd. (d) permits the Court to take judicial notice of court records. Items 1-12, 18-19 are all court records which are proper items for judicial notice, thus the request is GRANTED. However, "the court will not consider the truth of the documents contents unless it is an order, statement of decision, or judgment." (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375.) Therefore, to the extent Defendants rely on the *contents* of any court records, apart from the orders, the Court will not consider the truth of their contents.

The request for judicial notice as to item 17 is GRANTED. (See *First American Title Co. v. Mirzaian* (2003) 108 Cal.App.4th 956, 961 [taking judicial notice of "superior court docket"]; *Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 872, fn. 3 [taking judicial notice of "superior court's public record docket entries"]; *In re Estevez* (2008) 165 Cal.App.4th 1445, 1452, fn.4 [taking judicial notice of "docket (register of actions) entries)"]; *County of Los Angeles v. American Contractors Indemnity Co.* (2011) 198 Cal.App.4th 175, 178, fn 4 [taking judicial notice of "electronic docket"].)

"The court will take judicial notice of records such as admissions, answers interrogatories, affidavits and the like, when considering a demurrer, *only where they contain statements of the plaintiff or his agent which are inconsistent with allegations of the pleading before the court.* The hearing on demurrer *may not be turned into a contested evidentiary hearing* through the guise of having the court take judicial notice of affidavits, declarations, depositions, and other such materials which was filed on behalf of the adverse party and which purports to contradict the allegations and contentions of the plaintiff." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604-605, emphasis added (*Del E. Webb*).)

Defendants' request number 16 pertains to Mei's response to form interrogatory 9.1, which states, "are there any other damages that you attribute to the **INCIDENT**? If so…." However, the exhibit does not define what the "incident" refers to. It is unclear to the Court exactly what that response references and therefore, the Court is unable to determine whether the statements are inconsistent with the allegations of the Complaint. Defendants also rely on Mei's response to Form Interrogatory 17.1, however, Mei's answer is not inconsistent with the allegations of the pleading before the Court. (See *Del E. Webb, supra,* 123 Cal.App.3d at p. 605.) Accordingly, the request for judicial notice of item 16 is DENIED.

Defendants fail to state a basis for judicial notice of the deposition testimony or to provide any authority that would allow the Court to take judicial notice of such testimony. Thus, judicial notice of items 13, 14, and 15 is DENIED. (See *Fremont Indemnity Co. v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 113 (Fremont Indemnity Co*) ["A court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show"].)

IV. Legal Standard for a Demurrer

"The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in [Code of Civil Procedure s]ection 430.30, to the pleading on any one or more of the following grounds: . . . (e) The pleading does not state facts sufficient to constitute a cause of action, (f) The pleading is uncertain." (Code Civ. Proc., § 430.10, subds. (e) & (f).) A demurrer may be utilized by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court in ruling on a demurrer 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.) "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 on Children's Television*).) In ruling on a demurrer, courts may consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.) Evidentiary facts found in exhibits attached to a complaint can be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.)

Defendants demur to each cause of action on the grounds it is time-barred and/or fails to allege sufficient facts to state a claim. (Code Civ. Proc., § 430.10, subd. (e).)

V. Analysis

A. First Cause of Action: Elder Abuse

1. Statute of Limitations

"An action for damages pursuant to Section 15657.5 and 15657.6 for financial elder abuse… shall be commenced within four years after the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered, the facts constituting the financial abuse." (Welf. & Inst. Code, § 15657.7.)

Plaintiffs allege physical and financial elder abuse. (Complaint, ¶¶ 38-39.) Plaintiffs do not allege exactly when the physical abuse took place, although some conduct during the pandemic is alleged. (See Complaint, ¶ 28.) The alleged financial abuse is not limited to Sherry's conduct as power of attorney for Mei. Thus, the demurrer cannot be sustained on this basis. (See *E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315. (*E-Fab*) [A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute of limitations bars the action"].)

2. Sufficiency of the Allegations

"'Elder' means any person residing in this state, 65 years of age or older." (Welf. & Inst. Code, § 15610.27.) "Abuse of an elder… means any of the following: (1) Physical abuse… or other treatment with resulting physical harm or pain or mental suffering…(3) Financial abuse, as defined in Section 15610.30." (Welf. & Inst. Code, § 15610.07, subd. (a).) Mental suffering means "fear, agitation, confusion, severe depression… brought about by forms of intimidating behavior, threats, harassment… made with malicious intent to agitate, confuse, frighten… the elder…" (Welf. & Inst. Code, §

15610.53.) Financial abuse includes, but is not limited to, taking, secreting, obtaining, or retaining the real or personal property of an elder for a wrongful use or with intent to defraud. (Welf. & Inst. Code, § 15610.30.)

Plaintiffs allege Sherry physically abused Mei by belittling her for various things such as her mental capacity; physically preventing Mei from conversing with her attorney; stealing her keys, locking her out, and pushing her out of the Clara Property; installing cameras facing her bathroom to invade her privacy and make her uncomfortable; stealing her personal belongings and moving them to the Pomona Property, without her permission; yelling at her about who she associates with and receives food from. (Complaint, ¶ 27.) Plaintiffs further allege Sherry committed financial abuse when she took Mei's real or personal property such as her money, with the intent to defraud. (Complaint, ¶ 39.) Plaintiffs incorporate prior allegations into this claim, including allegations regarding the misappropriation of rent monies around December 2019. (See Complaint, ¶ 32.) Therefore, Plaintiffs allege sufficient facts to state their claim for elder abuse.

Defendants attempt to use deposition testimony to establish that this claim cannot be stated. However, the Court declined to take judicial notice of the deposition testimony, thus the statements and accompanying exhibits are not before the Court at this time. Defendants cite to *Chacon v. Union Pacific Railroad* (2020) 56 Cal.App.5th, 572-573, which found "the existence and contents of a written agreement may be the proper subject of judicial notice if there is no factual dispute that the document is genuine and accurate." However, Defendants rely on deposition testimony to establish the document is genuine and accurate, and such testimony is not before the Court at this time and will not be considered on demurrer. (See *Del E. Webb, supra,* 123 Cal.App.3d at pp. 605 ["The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of affidavits, declarations, depositions, and other such materials which was filed on behalf of the adverse party and which purports to contradict the allegations and contentions of the plaintiff"].)

Thus, the demurrer to the first cause of action is OVERRULED.

B. Second Cause of Action: Conversion

1. Statute of Limitations

Conversion is subject to a three-year statute of limitations. (See *AmerUS Life Ins. Co. v. Bank of America N.A.* (2006) 143 Cal.App.4th 631, 639 [under Code of Civil Procedure section 338, subdivision (c), which applies to the conversion of personal property, there is a three-year limitations period].) "Code of Civil Procedure section 338, subdivision (c)(1), creates a three-year limitations period for 'actions for the specific recovery of personal property.' In most cases, the act of wrongfully taking the property triggers the statute of limitations." (*Eleanor Licensing LLC v. Classic Recreations LLC* (2018) 21 Cal.App.5th 599, 612, internal citations omitted.)

Plaintiffs allege Defendants withdrew funds from Mei's bank account, thus stealing and denying Mei the right to ownership of her personal property. (Complaint, ¶ 45.) Sherry also allegedly interfered with Mei's ownership of personal property by taking Mei's personal property and moving it to the Pomona Property. (*Ibid*.) This pertains to Sherry's refusal to provide Mei with rent monies from tenants in the Pomona Property in December 2019. (Complaint, ¶ 32.) The Complaint was filed in October 2020. Therefore, the claim is not time-barred. (See *E-Fab, supra,* 153 Cal.App.4th at p. 1315.) Thus, the demurrer to the second cause of action is OVERRULED.

C. Third Cause of Action: Breach of Fiduciary Duty

The applicable limitations period for a breach of fiduciary duty is generally four years (Code Civ. Proc., § 343) *except* where the claim is based on concealment or misrepresentation of facts, i.e., actual fraud on the part of the defendant. (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230.) In such a circumstance, the applicable statute of limitations is the three-year limitations period provided by Code of Civil Procedure section 338, subdivision (d).

Plaintiffs allege Sherry owed Mei a fiduciary duty as her power of attorney. (Complaint, ¶ 50.) Sherry allegedly concealed material facts, including that she was stealing from Mei's bank accounts and using Mei's money to pay her own financial obligations. (Complaint, ¶ 53.) The claim is therefore subject to the three-year limitations period. Sherry's conduct as Mei's power of attorney was discovered on January 21, 2017, thus Mei had until January 21, 2020 to timely file her claim. The Complaint was not filed until October 8, 2020. Plaintiffs do not allege or argue that the statute of limitations should be tolled. The claim is therefore untimely on its face, and the demurrer to the third cause of action is SUSTAINED without leave to amend. (See *E-Fab, supra,* 153 Cal.App.4th at p. 1315.)

D. Fourth Cause of Action: Accounting

The statute of limitations for fraud is three years. (Code Civ. Proc., § 338, subd. (d).) A claim for an accounting does not have a specific limitations period. Therefore, in cases not involving fraud, the four-year limitations period of Code of Civil Procedure section 343 applies.

Here, Plaintiffs allege Defendants misappropriated not only Mei's money from her bank accounts but also rent monies due and owing from the Pomona and Sheridan Properties conduct that allegedly occurred from 2017 and 2019. (Complaint, ¶ 32.) Thus, the claim is not time-barred. (*PH II, Inc. v. Super. Ct.* (1995) 33 Cal.App.4th 1680, 1682 ["A demurrer does not lie to a portion of a cause of action"]; see also *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778 ["[A] defendant cannot demur generally to part of a cause of action"].)

Defendants also contend an accounting is a remedy, not a cause of action. However, an accounting may be pleaded as a cause of action. (*Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1413.) Defendants fail to raise any other argument as to this claim. Thus, the demurrer to the fourth cause of action is OVERRULED.

E. Fifth Cause of Action: Intentional Infliction of Emotional Distress

The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) For the purposes of the tort, "extreme and outrageous" conduct is that which exceeds "all bounds of that usually tolerated in a civilized community." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051.) Generally, the question of whether the conduct at issue is in fact extreme and outrageous is a question of fact to be determined beyond the pleading stage. (*So v. Shin* (2013) 212 Cal.App.4th 652, 672.)

Plaintiffs allege Sherry stole money from Mei and embarked on a campaign of abuse and harassment against them. (Complaint, ¶¶ 59, 26-28.) As a result of Sherry's conduct, Plaintiffs suffered emotional distress, including but not limited to anxiety, worry, embarrassment, and fear. (Complaint, ¶ 61.) However, Plaintiffs fail to allege they suffered *severe or extreme* emotional distress. (*Potter,* 6

Cal.4th at p. 1001.) Thus, the demurrer to the fifth cause of action is SUSTAINED with 20 days leave to amend.

F. Sixth Cause of Action: Negligence Infliction of Emotional Distress

"The law of negligent infliction of emotional distress in California is typically analyzed by reference to two 'theories' of recovery: the 'bystander' theory and the 'direct victim' theory. We have repeatedly recognized that the negligent causing of emotional distress is not an independent theory, but a tort of negligence. The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability." (*Fluharty v. Fluharty* (1997) 59 Cal.App.4th 484, 490 (*Fluharty*).) To recover for negligent infliction of emotional distress, a plaintiff must prove a special relationship with the defendant. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 205.)

Plaintiffs allege Sherry stole money from Mei and embarked on a campaign of abuse and harassment against Plaintiffs. (Complaint, ¶¶ 64, 26-28.) At a minimum, her actions were negligent. (Complaint, ¶ 65.)

Here, Plaintiffs' only allegations regarding duty stem from Sherry's duty as Mei's power of attorney, which ended in 2017. To the extent Plaintiffs rely on this duty to support their claim, it is barred by the statute of limitations, which is two years for an NIED claim. (Code Civ. Proc., § 335.1.) Plaintiffs argue there is a special relationship between the parties as Sherry is Mei's oldest daughter, Lisa's sister, and Lisi's sister-in-law. However, Plaintiffs fail to state any authority in support of the alleged special relationship and the Complaint is devoid of any allegations stating Sherry owed Plaintiffs such a duty. (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 (*Allen*) ["We are not required to examine underdeveloped claims or to supply arguments for the litigants."]; see also *Perry v. City of San Diego* (2021) 65 Cal.App.5th 172, 188, fn. 8 (*Perry*) ["It is not this court's role to connect the dots"].) Moreover, Plaintiffs fail to allege any facts regarding breach of said duty. (See *Fluharty, supra,* 59 Cal.App.4th at p. 490.) Thus, the demurrer to the sixth cause of action is SUSTAINED with 20 days leave to amend.

G. Seventh Cause of Action: Invasion of Privacy

The elements of a common law invasion of privacy claim are intrusion into a private place, conversation, or matter, in a manner highly offensive to a reasonable person. In determining the existence of 'offensiveness,' one must consider: '(1) the degree of intrusion; (2) the context, conduct and circumstances surrounding the intrusion; (3) the intruder's motives and objectives; (4) the setting into which the intrusion occurs; and (5) the expectations of those whose privacy is invaded.'" (*Mezger v. Bick* (2021) 66 Cal.App.5th 76, 86-87 [internal citations omitted].)

"'Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.' The impact on the plaintiff's privacy rights must be more than 'slight or trivial.'" (*Mezger,* 66 Cal.App.5th at p. 87 [internal citations omitted].)

Furthermore, "the plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant. If voluntary consent is present, a defendant's conduct will rarely be deemed 'highly offensive to a reasonable person' so as to justify tort liability." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 26.)

Plaintiffs allege they had a reasonable expectation of privacy in their home. (Complaint, ¶ 68.) Sherry intentionally intruded on their privacy by installing security cameras pointed towards Mei's bathroom, videotaping Plaintiffs while they were inside their home, going through Lisa and Lisi's mail, and walking through their portion of the home and taking pictures and viewing private documents. (Complaint, ¶ 69.) They further allege Sherry's conduct would be highly offensive to a reasonable person. (Complaint, ¶ 70.)

Because Plaintiffs allege Sherry had 50% ownership of the Clara Property and at the time of purchase, the parties agreed Lisa, Lisi, and their children would reside on their side of the property and Mei and Ying would reside on Sherry's side of the property, Defendants argue the claim fails because the parties are tenants in common as Sherry was a co-owner of the Clara Property. (Complaint, ¶ 16.) "Each tenant in common equally is entitled to share in the possession of the entire property and neither may exclude the other from any part of it." (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541.) Plaintiffs fail to

offer any response to this argument, thereby conceding the merits. (*Sehulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"].) Thus, the demurrer is SUSTAINED with 20 days leave to amend.

H. Eighth Cause of Action: Private Nuisance

Civil Code section 3479, defines a nuisance as: "[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." (Civ. Code, § 3479.) "A nuisance may be public nuisance, a private nuisance, or both. 'A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.' Every other nuisance is private." (*Newhall Land & Farming Co. v. Super. Ct.* (1993) 19 Cal.App.4th 334, 341. (*Newhall Land & Farming*).)

To prevail on a claim for private nuisance, a plaintiff must prove (1) an interference with his use and enjoyment of his property; (2) "that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer 'substantial actual damage'"; and (3) that the interference was unreasonable, "i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.'" (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal. 4th 893, 938-939.)

Plaintiffs allege they owned/occupied the Clara Property. (Complaint, ¶ 73.) Sherry, by her actions, created conditions to interfere with Plaintiffs' comfortable enjoyment of life or property and accordingly interfered with Plaintiffs' use and enjoyment of the Clara Property. (Complaint, ¶ 75.) As Plaintiffs incorporate their prior allegations (Complaint, ¶ 72), they further allege Sherry's conduct included: going through Lisa and Lisi's mail; harassing their house guests; following and recording their children when they returned from school and aggressively engaging them when they did not want to speak to her; monitoring and videotaping Lisa, Lisi, and their children from the outside when they were inside; entering their portion of the property and taking pictures of their home and looking at private

paperwork; cutting their security cameras wires; and forcing her way through the sliding glass door and jamming herself in the doorways to harass them. (Complaint, ¶ 28.) Plaintiffs further allege they did not consent to Sherry's conduct and an ordinary person would be reasonably annoyed or disturbed by her conduct. (Complaint, ¶ 75.)

As with the seventh cause of action, Plaintiffs fail to respond to Defendants' argument regarding their right to use the entire property as tenants in common, thus conceding the argument. Moreover, Plaintiffs fail to cite any authority and the Court is aware of none regarding a private nuisance claim against a tenant in common. Thus, the demurrer to the eighth cause of action is SUSTAINED with 20 days leave to amend.

I. Ninth Cause of Action: Unauthorized Computer Access and Fraud

Penal Code section 502, provides,

Any person who commits any of the following acts is guilty of a public offense:

(1) Knowingly accesses and without permission takes, copies, or makes use of any data from a computer system, or computer network, in order to either (A) devise or execute any scheme or artifice to defraud, deceive, or extort; or (B) wrongfully control or obtain money, property, or data.

(2) Knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network…

(4) Knowingly accesses and without permission adds, alters, damages, deletes, or destroys any data, computer software, or computer programs which reside or exist internal or external to a computer, computer system, or computer network.

(Pen. Code, § 502, subd. (c)(1), (2), & (4).)

Penal Code section 502, subdivision (e)(1), provides, in relevant part, "in addition to any other civil remedy available, the owner or lessee of the computer, computer system, computer network, computer program, or data who suffers damage or loss by reason of a violation of any of the provisions

of subdivision (c) may bring a civil action against the violator for compensatory damages and injunctive relief or other equitable relief."

Plaintiffs allege Sherry violated the statue by knowingly accessing and without permission, altering, damaging, data from Mei's computer, computer systems, or computer network, in addition to taking, copying, and making use of Mei's computer, computer systems, or computer networks. (Complaint, ¶ 79.) Plaintiffs incorporate prior allegations into the claim, thus further allege Sherry stole Mei's phone and sent fake text messages to herself, falsely communicating Mei's apology and position that she did not want the rental income from one of the properties, as well as trying to have Mei blame Lisi for bad behavior. (Complaint, ¶ 34.)

Plaintiffs allege a violation of the statute and are entitled to bring a civil action "for compensatory damages…" (See Pen. Code, § 502, subd. (e)(1).) General damages, unlike special damages, need not be pled with particularity. (See *Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 969.) Defendants' remaining arguments go beyond the pleading, as they refer to Plaintiffs' ability to prove the claim, which is not at issue here. Defendants' reliance on Mei's responses to form interrogatories is unavailing, since the Court declined to take judicial notice of those documents. Thus, the demurrer to the ninth cause of action is OVERRULED.

Calendar Line 6
Case Name: *City of San Jose v. John Falcocchia et.al., and related cross-claims*
Case No.: 19CV342660

Before the Court is Cross-Defendants', City of San Jose, Diane Buchanan, Rachel Roberts, William Gerry, motion for summary judgment against John Falcocchia's and Rachel Falcocchia's (collectively "Cross-Complainants") first amended cross-complaint ("FACC") for declaratory relief. Pursuant to California Rule of Court 3.1308, the Court issues its tentative ruling.

I. Background

A. Factual Background

1. Complaint

According to the Complaint, the Falcocchias engaged in unpermitted work on their residential property in violation of the City's municipal code. An administrative hearing was held before the City's Appeals Hearing Board (the "Board"). The Board ordered the Falcocchias to obtain City approval, including permits and inspections, for work done on their property. The Board also assessed administrative costs and penalties, including $750 per day until the date of compliance, up to a maximum of $100,000. To date, the Falcocchias have not paid penalties and costs of at least $114,721.46.

2. First Amended Cross-Complaint

According to the FACC, the Falcocchias' property is in a gated community. (FACC, ¶ 9.) The work the City complains of consisted of grading the hillside in the Falcocchias' backyard and building a retaining wall. None of the work required a permit. (FACC, ¶¶ 8, 10.) Someone in the gated community reported the work to the City's code enforcement office, which led to an investigation by City employee, William Gerry. (FACC, ¶ 11.)

In November 2014, Gerry falsely identified himself as a San Jose Law Enforcement Peace Officer, impermissibly entered the gated community, trespassed on the Falcocchias' property, and made inquiries to their contractor about the work, his immigration status, and his contractor's license. (FACC, ¶¶ 11, 12, 14.) Gerry's illegal trespass and search and seizure of Falcocchias' property was and is authorized by official Municipal policies and practices of the City of San Jose and of the San Jose Code Enforcement office. (FACC, ¶ 19.)

During the Board hearing, several witnesses, including Gerry, falsely testified about the work that had been done on the Falcocchias' property. Gerry intentionally made his false statements because of the animus he harbored against the Falcocchias. As a result, AHB issued an Order to Correct to the Falcocchias. (FACC, ¶ 21.) From 2014 to the present, the Falcocchias' property has been "red flagged," preventing their use and enjoyment of their property. (FACC, ¶ 16.)

Cross-complaints also allege that from June 1, 2016 to April 30, 2019, Gerry continuously parked his car in front of the Falcocchias' property and surveilled them to the point of frightening their daughter. (FACC, ¶ 23.)

B. Procedural Background

The City of San Jose filed its complaint on February 6, 2019. The Falcocchias filed their initial cross-complaint in May 2019 against the City and its employees, Diane Buchanan, Rachel Roberts, and Gerry, asserting: (1) full indemnity; (2) partial indemnity; (3) declaratory relief; (4) violation of Fourth Amendment rights under the U.S. Constitution; (5) violation of right to privacy under the U.S. Constitution; (6) violation of 42 U.S.C. section 1983; (7) invasion of privacy under article I, section of the California Constitution; (8) Bane Act violations; (9) intentional infliction of emotional distress; (10) unfair and deceptive business practices; and (11) slander of title. On October 29, 2019, the City's demurrer to the cross-complaint was sustained without leave to amend as to the fourth, fifth, sixth, seventh, eighth, ninth and tenth causes of action, and sustained with leave to amend as to the first, second and third causes of action.

On November 20, 2019, the Falcocchias filed their operative FACC asserting: (1) full indemnity; (2) partial indemnification; (3) declaratory relief; (4) intentional interference with prospective economic advantage; and (5) private nuisance. The City again demurred, and the Falcocchias' causes of actions for full indemnity, partial indemnity, intentional interference with prospective economic advantage and private nuisance were dismissed on July 10, 2020.

On July 9, 2021, the Court granted summary judgment in favor of the City's complaint. On October 24, 2023, City and its named employees filed their motion for summary judgment on Falcocchias' remaining FACC claim for declaratory relief.

II. Request for Judicial Notice

Pursuant to Evidence Code §452 subsections (d), (c), and (h), the Court GRANTS Cross-Defendants' request and takes judicial notice of the following:

- Resolution 17-05 of the City of San Jose Appeals Hearing Board ("AHB")
- Records of the Santa Clara County Superior Court do not contain a writ of mandate filed pursuant to Code of Civil Procedure § 1094.6, by either or both John J. Falcocchia or Rachel D. Falcocchia pertaining to the Appeals Hearing Board Resolution No 17-05 3
- Order on Cross Defendant's Demurrer to Cross Complaint filed on October 29, 2019
- Order on Cross Defendant's Demurrer to First Amended Cross Complaint filed on July 10, 2020
- Order on the City of San Jose's Motion for Summary Judgment on the City's Complaint
- Cross-Complainants' Memorandum of Points and Authorities dated June 24, 2021, in Opposition to the City's Motion for Summary Judgment
- Cross-Complainant John J. Falcocchia's Declaration dated June 24, 2021, in Opposition to the City's Motion for Summary Judgment
- Cross-Complainants' Case Management Statement filed on July 7, 2023.

Cross-complainants' request for judicial notice is PARTIALLY GRANTED as follows:

- Ex. A- Public Notification of Arrest; the Criminal record in the People of the State of California v. Gerry, William, Case No.: C2012699.

  REQUEST DENIED – One document seems to be a printout from an unidentified website and the other seems to be a printout of an email sent from San Jose Police Department as a public notification of William Gerry's alleged arrest for various crimes. Before acting upon a request for judicial notice, the court must be assured the document or record is a true and correct copy. (*People v. Preslie* (1977) 70 Cal.App.3d 486, 494). "Accordingly, when a party desires the court to take judicial notice of a document or record . . . the parties should furnish the court with a copy of such document or record certified by its custodian. (*Id.* at 495; *see also Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 74.) Cross-Complainants have failed to provide evidence of trustworthiness sufficient to establish the documents are admissible.

- Ex. B - Order of Summary Judgment, Hon. Christopher Rudy dated 7/8/21. GRANTED
- Ex. C - Cross-Complainants specific allegations set forth in their FACC referenced and incorporated in this Opposition. GRANTED
- Ex. D - "[E]vidence that Cross-Complainants, the FALCOCCHIA'S, continue to have their property 'red flagged,' as reported in Official Notices of Noncompliance and in the official San Jose City Code Enforcement System reporting the case is 'Under Investigation,' see Exhibit 'D.' This Notice against the FALCOCCHIA'S property by SAN JOSE affects their property and precludes the FALCOCCHIA'S in the use of their rear backyard property which amounts to an adverse taking and continuous daily denial and loss of the use and enjoyment of their property to the present day."

  REQUEST DENIED. The Court cannot take judicial notice of Cross-complainants' argument nor can it take judicial notice of an unknown sourced printout titled "Code Enforcement Case Info 7342 Glenview Drive.png." Cross-Complainants have failed to provide evidence of trustworthiness sufficient to establish the document is admissible.
- AHB Resolution 17-05. GRANTED

III. Evidentiary Objections

Cross-complainants object to every statement of undisputed material facts Defendants submitted in support of their motion. Objections to each statement are identical and are on the grounds that the statement is argumentative, lacks foundation, calls for speculation, is misleading, lacks relevance and is hearsay.

The Court OVERRULES Cross-complainants' objections.

IV. Legal Standard

The purpose of a motion for summary judgment or summary adjudication "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal. 4th 826, 843.) "Code of Civil Procedure section 437c, subdivision (c), requires the trial judge to grant summary judgment if all the evidence submitted, and 'all inferences reasonably deducible from the

evidence' and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (*Adler v. Manor Healthcare Corp.* (1992) 7 Cal.App.4th 1110, 1119.)

A defendant moving for summary judgment bears two burdens: (1) the burden of production, i.e., presenting admissible evidence, through material facts, sufficient to satisfy a directed verdict standard; and (2) the burden of persuasion, i.e., the material facts presented must persuade the court that the plaintiff cannot establish one or more elements of a cause of action, or a complete defense vitiates the cause of action. (Code Civ. Proc., § 437c(p)(2); *Aguilar,* 25 Cal.4th at p. 850-851; see also, *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1519.) A defendant may satisfy this burden by showing that the claim "cannot be established" because of the lack of evidence on some essential element of the claim. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 574, 590.) Once the defendant meets this 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 defense thereto." (*Id*.)

"On ruling on a motion for summary judgment, the court is to 'liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.'" (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 760.) The court must, therefore, consider what inferences favoring the opposing party a factfinder could reasonably draw from the evidence. "While viewing the evidence in this manner, the court must bear in mind that its primary function is to identify issues rather than to determine issues. [Citation.]" (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.)

Defeating summary judgment requires only a single disputed material fact. (Code Civ. Pro. § 437c(c) [a motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."] [emphasis added].) Thus, any disputed material fact means the court must deny the motion; the court has no discretion to grant summary judgment. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925, fn. 8; *Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1511-1512.)

V. Analysis

Cross-complainants' only remaining cause of action is for declaratory relief. Cross-Defendants seek judgment on this cause of action on the grounds that it is (1) moot, (2) derivative of the previously dismissed claims, (3) for completed past wrongs, and (4) res judicata.

For a party to seek declaratory relief, there must be (1) an actual controversy about justiciable questions regarding the rights or obligations of a party which (2) involves a proper subject of declaratory relief. (Code Civ. Proc. § 1060; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80; *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1722.) The "proper subject" for declaratory relief must be a future issue for the parties; a declaratory judgment acts prospectively, not retroactively to redress past wrongs. (*Gafcon v. Ponsor & Associates* (2002) 98 C.A.4th 1388, 1403; 5 Witkin, Cal.Proc. (6th Ed. 2021, March 2023 Update), Pleading, § 846.)

Cross-Defendants contend the operative FACC was filed to invalidate the Resolution base on inspector Gerry's alleged illegal conduct and false testimony. This Court has affirmed the validity of the Resolution in its summary judgment order in favor of the Cross-Defendants. The issues and evidence Cross-complainants presented against the Complaint are substantially the same as what they present in support of their FACC. As a result of this Court's summary judgment Order, no actual and current controversy exists for further judicial determination.

Cross-Defendants indisputably establish that the Resolution is binding, and Cross-complainants cannot, in this proceeding, challenge the determinations that were previously made at the Board hearing. Determinations were Cross-complainants (1) failed to get the required permits in violation of various provisions of the SJMC, (2) failed to remedy those violations as provided by the Compliance Order issued to them by the City, (3) have incurred penalties as a result, and (4) penalties would continue to accrue until they comply with the Board's Resolution. (July 9, 2021, Order Re: Motion for Summary Judgment)

In their FACC, Cross-Complainants allege:

- inspector Gerry trespassed upon their property.
- imposing as an officer Gerry threatened the people who were grading the hillside on the back of their property and intimidated them into stopping their work,

- Gerry's unlawful search and seizure violated Cross-complainants constitutional rights.
- Gerry's unlawful entry, search, and seizure was and is authorized and is consistent with the City of San Jose's and the San Jose Code Enforcement's policies.
- These illegal enforcement policies have been in place since 2014 and continue to the present.
- From 2014 through 2018, and continuing up to the present date, Gerry has refused to provide any evidence of violation despite Cross-Complainants' repeated requests.
- From December 1, 2014, through June 1, 2016, and up to April 30, 2019, Cross-Complainants repeatedly asked Gerry for additional time to establish compliance since their engineer refused to turnover plans due to financial dispute.
- From June 1, 2016, until April 30, 2019, Gerry intimidated, threatened, and illegally surveilled their property.
- On March 23, 2017, the Appeals Hearing Board held a hearing and based on Gerry's false testimony found Cross-Complainants in violation of various Municipal Codes and ordered them to obtain the necessary permits.
- Cross-Complainants' claims arise out of the same tort, transactions and events that give rise to the Cross-Defendants' claims.

These allegations are all made to challenge the validity of the Resolution, which has been decided in Cross-Defendants' favor. Furthermore, in their cause of action for declaratory relief, Cross-Complainants seek the Court's determination as to (1) the parties' rights and duties with respect to the assessed penalties, (2) Cross-Defendants' comparative liability and damages, and (3) comparative indemnity owed to Cross-Complainants for any sums they are compelled to pay. (FACC, ¶ 46.) In its July 10, 2020 ruling on Cross-Defendants' demurrer to the FACC, this Court dismissed Cross-Complainants' claims for partial indemnification and full indemnification, reasoning that Cross-Complainants "are not tortfeasors and have no claim for indemnity against the City cross-Defendants, as they are allegedly the 'injured party.'" (July 10, 2020, Order.)

Therefore, Cross-Defendants' have satisfied their burden. To defeat summary judgment, Cross-Complainants must now establish that a triable issue of material fact exists with regards to their claim for declaratory relief.

In their opposition, reiterating their FACC's allegations, Cross-Complainants contend an actual controversy exists because (1) their property remains "red flagged" to the present date for noncompliance thus depriving them of its use and enjoyment, and (2) illegal enforcement policies of the City continue to the present and continue to violate Cross-Complainants' rights. Cross-Complainants further argue that invalidity of the Resolution is not fully and finally determined because new evidence shows Gerry's recent conviction for fraud, extortion, bribery, and perjury in 2020. Consequently, the Court must (1) determine Cross-Defendants' comparative liability and responsibility for any sums they are compelled to pay, and (2) enjoin the City's racially motivated illegal implementation of their policies against Cross-Complainants. Cross-Complainants fail to produce any admissible evidence to support their contentions and fail to satisfy their burden of showing a triable issue of fact.

Cross-Complainants request leave to amend their cross-complaint to add a cause of action for inverse condemnation and/or regulatory taking based on the argument that the Resolution was improperly based on perjured testimony of Gerry. First, Cross-Complainants must file a motion for leave to amend their pleading. Second, Cross-Complainants' inability to produce the above referenced evidence will continue to negate their argument about the Resolution.

Accordingly, Cross-Defendants' motion for summary judgment is GRANTED.

Calendar Line 12
Case Name: *StormQuant, Inc. v. Reuben "Tripp" Purvis*
Case No.: 23CV420854

Before the Court is Defendant Rueben "Tripp" Purvis's motion to compel Plaintiff StormQuant, Inc.'s ("StormQuant") Complaint for Declaratory Relief to arbitration. The Court's tentative ruling is set forth below.

I. Background

In or around January 2019, Purvis and other formed StormQuant. (Complaint, ¶ 6.) Purvis became StormQuant's CEO and Chairman of the Board upon StormQuant's formation. (*Id.*) StormQuant alleges Purvis breached his fiduciary duties to StormQuant when "he walked off the job with no notice or effort to protect StormQuant's interests" and engaged in self-dealing to enrich himself and others, including his spouse. (*Id.*)

StormQuant alleges Purvis "developed a scheme" to create employment agreements that would only be offered if StormQuant obtained $5 million in funding from an investor. (Complaint, ¶ 7.) StormQuant alleges Purvis knew these agreements would only become effective if the funding came through. (Complaint, ¶¶ 7-9.) Although the funding had not come through, Purvis instructed StormQuant's Chief Technology Officer to execute Purvis' employment agreement on behalf of StormQuant. (Complaint, ¶ 10.) StormQuant alleges Purvis breached his fiduciary duty by instructing the CTO to sign the agreement, and the CTO had no authority to sign the agreement. (Complaint, ¶ 11.)

The investment never came through, and Purvis continued to operate in the same manner as he had before the CTO signed the agreement—in other words, according to StormQuant—in accordance with that agreement having never been signed and not being effective. (Complaint, ¶ 12.) When another StormQuant employee sought to enforce an identical agreement to obtain payments, Purvis argued the agreement was not enforceable because it was contingent on obtaining funding that never came through and did not seek to move that dispute into arbitration pursuant to the agreement. (Complaint, ¶ 15.)

On March 1, 2023, Purvis filed a demand for arbitration with JAMS asserting employment claims against StormQuant, an investor named Ed Rossi, and against a company Rossi owns, Cal Door

and Cabinet. Purvis did not sue other StormQuant investors, including his family members or family trust. (Complaint, ¶ 18.)

StormQuant concedes, that the agreement contains an arbitration provision requiring disputes regarding the enforceability of the arbitration section of the agreement to be governed by the Federal Arbitration Act. (Complaint, ¶19.) StormQuant further alleges the arbitration clause contains the following language:

> TO THE FULLEST EXTENT PERMITTED BY LAW, I ALSO AGREE TO ARBITRATE ANY AND ALL DISPUTES ARISING OUT OF OR RELATING TO THE INTERPRETATION OR APPLICATION OF THIS AGREEMENT TO ARBITRATE, ***BUT NOT DISPUTES ABOUT THE ENFORCEABILITY, REVOCABILITY, OR VALIDITY OF THIS AGREEMENT TO ARBITRATE.*** . ..

(Complaint, ¶ 20.) The arbitration agreement also contains a severability clause which states: "If a court or other body of competent jurisdiction finds. . .any provision of this Agreement, or portion thereof, to be invalid or unenforceable. . ." confirming, according to StormQuant the court's exclusive jurisdiction to determine enforceability of the arbitration agreement. (*Id.*)

StormQuant thus brought this action for declaratory relief seeking judgment that (1) the agreement is invalid and unenforceable, (2) the arbitration agreement is invalid and unenforceable, (3) the arbitration agreement is unconscionable, and (4) JAMS (and any other arbitrator whether with JAMS or not) does not have jurisdiction to determine any dispute between the parties over the enforceability or validity of the arbitration agreement or other agreements between the parties.

In response, Purvis moved to compel this case to arbitration, arguing an arbitrator must decide the questions StormQuant's complaint poses to the Court.

II. Legal Standard

"The parties agree [the arbitration clause] is governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) (FAA), which provides that a contractual arbitration provision 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' (9 U.S.C. § 2.) The FAA 'declare[s] a national policy favoring arbitration' of claims that parties contract to

settle in that manner.'" (*Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal. App. 5th 1096, 1106-1107, quoting *Preston v. Ferrer* (2008) 552 U.S. 346, 353.) "Arbitration is a matter of contract, and 'parties are generally free to structure their arbitration agreements as they see fit.'" (*Nielsen*, 22 Cal. App. 5th 1096, 1106-1107, quoting *Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 479.) "However, under the FAA's savings clause, an arbitration agreement is not enforceable if a party establishes a state law contract defense, such as fraud, duress, unconscionability, or illegality." (*Nielsen*, 22 Cal. App. 5th 1096, 1106-1107, citing *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339; *Poublon v. C.H. Robinson Co.* (9th Cir. 2017) 846 F.3d 1251, 1259; *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 962.) "Although arbitration agreements cannot be 'invalidated by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue,' the enforceability of the agreement remains subject to defenses applicable to all other contracts." (*Nielsen*, 22 Cal. App. 5th 1096, 1106-1107, quoting *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 962.)

"[P]arties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." (*Rent-A-Center, West, Inc. v. Jackson* (2010) 561 U.S. 63, 68–69.) Similarly, "'[p]arties to an arbitration agreement may agree to delegate to the arbitrator, instead of a court, questions regarding the enforceability of the agreement.'" (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 239.) "Following *Rent-A-Center*, California courts have recognized that a court is the appropriate entity to resolve challenges to a delegation clause nested in an arbitration clause when a specific contract challenge is made to the delegation clause. (See, e.g., *Malone v. Superior Court* (2014) 226 Cal.App.4th 1551, 1559–1560 [173 Cal. Rptr. 3d 241] (*Malone*).) In *Malone*, the plaintiff challenged an employment contract *and* the delegation clause on grounds of unconscionability. (*Id.* at pp. 1556–1557.) The reviewing court held the unconscionability challenge to the delegation clause was for the court to resolve. (*Id.* at pp. 1559–1560.) However, after evaluating that challenge, the court held the unconscionability challenge to the delegation clause was without merit. (*Id.* at pp. 1560–1571.) The court thus held the delegation clause was enforceable and the defendants' motion to compel arbitration should have been granted. (*Id.* at pp. 1570–1571.)" (*Nielsen*, 22 Cal. App. 5th 1096, 1109.)

In a motion to compel arbitration, the Court must determine "(1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of that arbitration agreement." (*Bruni v. Didion* (2008) 160 Cal. App. 4th 1272*,* 1283 (citations omitted).) "The petitioner bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation.] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citation.]" (*Bruni,* 160 Cal. App. 4th at 1282 (citations omitted).)

Even if the Court finds the Parties agreed to arbitrate these claims, the agreement is unenforceable if it is unconscionable. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.) Unconscionability consists of both procedural and substantive elements. The prevailing view is that both procedural and substantive unconscionability must be present, but the two elements of unconscionability need not be present to the same degree. A sliding scale is invoked such that the more substantively oppressive the contract term the less evidence of the procedural unconscionability is required to conclude that the contract provision is unenforceable, and vice versa. (*Armendariz,* 24 Cal.4th at 114.)

The procedural element tests the circumstances of contract negotiation and formation and focuses on "oppression" or "surprise" due to unequal bargaining power. (See *Armendariz,* 24 Cal.4th at 114.) "Oppression" occurs when a contract involves lack of negotiation and meaningful choice, and "surprise" occurs where the alleged unconscionable provision is hidden within a printed form. (*Pinnacle Museum Tower Ass'n v. Pinnacle Mkt.Dev. (US), LLC* (2012) 55 Cal.4th 223, 247, citing *Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1317; *Tiri v. Lucky Chances, Inc.* (2014) 226 Cal.App.4th 231; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 179.)

III. Analysis

First, the Court finds it clear that even assuming the arbitration provision is enforceable, that provision does not clearly and unmistakably delegate the decision regarding the enforcement of the arbitration agreement to the arbitrator. To the contrary, the language plainly reserves that decision for

the court. In his initial argument, Purvis ignores the reservation language entirely, instead focusing on language incorporating the JAMS rules by reference. However, it is axiomatic that the specific contract language governs reserving such decision for the court governs. Purvis seems to concede this point in reply by shifting to a new argument that if a party is essentially challenging the entire agreement in addition to the arbitration clause, then the arbitrator decides that issue. Not only is that argument nonsensical—still ignoring the specific contract language—it ignores the opposite teaching in *Neilson*, where the court affirmed the trial court's decision *denying* a motion to compel arbitration after deciding the arbitration provision was illegal.

Accordingly, it is the Court, not JAMS, that must decide whether the arbitration provision is enforceable. In so deciding, the Court sits as a trier of fact, weighing the evidence to determine whether the preponderance of the evidence is for or against enforceability. Given Purvis's admissions regarding the unenforceability of the employment agreements, his position in the lawsuit involving another employee and the same agreement, his continued course of performance in accepting payments to his LLC after the funding fell through, and his written representations to others—all done before he filed his JAMS petition, the Court finds the preponderance of the evidence favors the conclusion that the arbitration agreement is unenforceable.

Accordingly, Purvis's motion to compel this matter to arbitration is DENIED.

Calendar Lines 15-16, 19
Case Name: *Ning Yu vs 1POINT3ACRES, LLC et al*
Case No.: 22CV408399

Before the Court are Defendants' Motions for Attorney Fees and Costs Pursuant to California Code of Civil Procedure Section 425.16.

I. Background

By Order dated August 15, 2023, the Court granted Defendants' 1pointacres, LLC's ("1point"); Yao Meng, Hongkang Liang, Aegean Lee, Winnie Chen, Xianren Wu, Zhiyong Huang, Ruolin Duan, Wa Goa, Hanxing Shi, Yingzi Du (the "Individual Defendants"); BUPT[5] Alumni Association of America's ("BUPTAAA"); and iTalk Global Communications, Inc.'s ("iTalk") special motion to strike Plaintiff Ning Yu's First Amended Complaint.

California Code of Civil Procedure section 425.16(c) states: "a prevailing defendant on a special motion to strike **shall** be entitled to recover his or her attorneys' fees and costs." (Cal. Code Civ. Pro. §425.16(c) (emphasis added).) Given the mandatory nature of these fees and costs, the only issue before the Court is the proper amount.

The Court initially issued a tentative ruling for these motions on January 17, 2024. The parties, except for iTalk, appeared for argument, and the Court learned that the various motions for attorney fees had been incorrectly set. Given the confusion and to permit iTalk to respond and Plaintiff the appropriate amount of time to oppose, the Court continued the hearing on the incorrectly set motions to February 13, 2024. In the interim, iTalk did submit an opposition, which the Court has considered. It appears Plaintiff did not submit any challenge to the fees sought by the parties, except for those sought by iTalk, for which Plaintiff submitted a supplemental and second supplemental opposition, which the Court has also considered.

II. Legal Standard and Analysis

Anti-SLAPP fee awards should include expenses incurred for all proceedings "directly related" to the special motion to strike and fees "addressing matters with factual or legal issues that are 'inextricably intertwined' with those issues raised in an anti-SLAPP motion." (*Henry v. Bank of Am. Corp.* (N.D.Cal. Aug. 23, 2010) 2010 WL3324890 *4.) To determine the correct award, the Court

[5] This acronym refers to the Beijing University of Posts and Telecommunications.

applies the lodestar method which is calculated by multiplying "the number of hours reasonably expended. . . by the reasonable hourly rate" of counsel. (*PLCM Group, Inc. v. Drexler* (2000) 17 Cal.4th 1084, 1095.) To determine reasonableness, the Court considers "the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure." (*Id.* at 1096.)

A. 1point

1point seeks to recover $21,913.32 in fees and costs. (See Declaration of Bing Zhang Ryan.) 1point spent 32 hours on its opposition to the Anti-SLAPP motion, 8.3 hours on the fee motion, and estimates 7 hours for a reply and hearing on the fee motion.

Plaintiff does not oppose 1point's fee request. Thus, the estimated 7 hours for a reply and hearing on the fee motion is not necessary and should be deducted from the total amount awarded. The Court otherwise finds the number of hours and Mr. Ryan's $450 per hour rate to be reasonable for this type of case and this market. The costs incurred are also reasonable.

1points motion for fees and costs in the amount of $18,763.32 is GRANTED.

B. Individual and BUPTAAA Defendants

The Individual and BUPTAAA Defendants seek $62,822.51 in fees and costs, reflecting 93.1 hours of attorney time at billing rates ranging from $800 to $450 per hour, 39.2 hours of paralegal time at $225 per hour, and $6,197. Plaintiff does not appear to oppose this request.

Given the number of defendants in this group (10 individuals and 1 organization), the number of hours spent and attorneys and paralegals working on the case is reasonable. The range of hourly rates is also reasonable for this case type and the Silicon Valley market.

The Individual and BUPTAAA Defendants' motion for $62,822.51 in fees and costs is accordingly GRANTED.

C. iTalk

iTalk seeks $139,578 in attorney fees. (Declaration of Michael E. Williams ("Williams Decl.") Mr. William's reduced billing rate for this matter is $1,380 per hour (his new client rate is $1,865 per hour), and associate Olivia Diab's rate for this matter is $680 per hour (her new client rate is $990 per hour). (Williams Decl., ¶ 5.) iTalk's team billed 147.10 hours in relation to the anti-SLAPP motion,

with Mr. Williams billing 56.50 hours and Ms. Diab billing 90.60 hours. (*Id.*, ¶¶68.) According to iTalk's motion, "[t]he team spent approximately 36 hours analyzing Plaintiff's opposition, declarations and evidentiary objections and drafting the documents filed in reply to Plaintiff's opposition. . .[t]he remainder of the approximately 40 hours were spent discussing internally the claims and issues for the anti-SLAPP motion as well as case strategy between Mr. Willaims and Ms. Diab, discussing and educating the client on the grounds for the anti-SLAPP motion, communicating with the Plaintiff about the anti-SLAPP motion, and preparing for and attending the hearing on the motion." (Opening Brief, p. 4.) Plaintiff opposes iTalk's motion, arguing the billing rates and amount of time spent are not reasonable, particularly when compared to the other defendants' fee requests. The Court agrees.

In particular, 40 hours spent discussing the case internally and with the client is excessive. The Court will thus reduce the number of hours to 107.10. The rates are also substantially higher than those charged by other firms regularly practicing in Santa Clara Superior Court—even in similarly situated business litigation disputes. Considering this fact, and the fact that iTalk went to its known counsel to assist it with this case, the Court will use a blended rate of $800 per hour for the iTalk team, and grant iTalk's motion for fees in the reduced amount of $85,680. The Court finds this fee award sufficient for both the anti-SLAPP motion and the fees motion, as fees in this context are mandatory and the sole issue was the amount of those fees.

Calendar Line 18
Case Name: *David Arken and Kathleen Arkin vs. Tesla Energy Operations, et. al.*
Case No.: 23CV427633

Before the Court is Petitioners' David Arken and Kathleen Arken Petition to Confirm its Arbitration Award. Below is the Court's tentative ruling. (California Rule of Court 3.1308.)

I. Background

The Arkens had a solar heating system on their roof, which was installed and operated by Respondent Tesla Energy Operations ("Tesla"). The parties had

After a hearing with three witnesses, briefing, and oral argument, the Court essentially found for Petitioners. The arbitrator's interim award states:

> Arbitrator awards Claimants $13,504.00 as damages for breach of the HIA, plus costs in the amount of $748.32, ***plus attorney's fees according to proof. Claimant shall submit to Arbitrator an itemized statement of attorney's fees incurred showing the attorney's hourly rate, the date the work was performed, the work performed, and the amount of time it took to do the work. Claimants were not represented by counsel at the arbitration hearing or at any of the pre-arbitration hearings.***
>
> The damages awarded for breach of the HIA cover the following: Roof inspection and repair for DWV cut off $190; Plumber to repair DWV $1,000; Roof Estimate NR Roofing 2/25/23 $125.00; Roof inspection after panel system removal $540; ***Roof repair of ½ replacement if necessary $10,800; Re-roof permit if required $350*****;** Return of HIA contract fee of $499.
>
> Although Claimants testified that they were owed $186.96 for damages for breach of the PPA, Respondent stipulated to pay $293.25 for damages. Arbitrator awards Claimants $293.25 as damages for breach of the PPA.
>
> Arbitrator awards Claimants their request to terminate the PPA. Tesla shall remove the solar system from Claimants home within 30 days of this award becoming final.

The parties did not receive the interim award until an outstanding balance at JAMS was paid. Consequently, the arbitrator issued a final award, stating, in relevant part:

> THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Agreement to Arbitrate set forth in Paragraph 18 of the Solar City Power Purchase Agreement dated April 10, 2012, and in Paragraph 18 of the Tesla Home Improvement Agreement dated January 2, 2021 and having examined the submissions, proof, and allegations of the parties, issued an Interim Award on August 21, 2023. The Interim Award was not sent to the parties until October 11, 2023, after fees were paid. The Interim Award specified that it would be the Final Award unless within ten days either party specified those principal controverted issues as to which the party was requesting a decision or make proposals not include in the Interim Award. Arbitrator received no requests to rule on specific issues or proposals not included in the Interim Award. The Interim award [sic] is the Final Award and is a full settlement of all claims submitted by the parties in this arbitration. All claims not expressly granted in the award are hereby denied.

Tesla argues the Court should either vacate the award and resubmit the matter to a new arbitrator or not confirm portions of the award because the italicized bold language in the award set forth above are only conditional and therefore cannot be final and binding. Tesla claims, at most, the Court can confirm the award for roof inspection for repair of DWV, repair of DWV, roof inspection after panel system removal, and return of HIA contact [sic] fee for a total of $2,977.32.

II. Legal Standard

"If a petition or response under this chapter is duly served and filed, the court shall confirm the award as made, whether rendered in this state or another state, unless in accordance with this chapter it corrects the award and confirms it as corrected, vacates the award or dismisses the proceeding" (Code Civ. Proc. § 1286). "The sufficiency of the evidence to support the award is not a matter to be reviewed by the court." (*Olivera v. Modiano-Schneider, Inc.* (1962) 205 Cal. App. 2d 9, 14-15, citing

Crofoot v. *Blair Holdings Corp*., 119 Cal.App.2d 156, 185; *Case* v. *Alperson*, 181 Cal.App.2d 757, 761.) "'Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action.'" (*Olivera v. Modiano-Schneider, Inc.* (1962) 205 Cal. App. 2d 9, 14-15, quoting *Sapp* v. *Barenfeld*, 34 Cal.2d 515, 523.)" Every intendment of validity must be given the award." (*Olivera v. Modiano-Schneider, Inc.* (1962) 205 Cal. App. 2d 9, 14-15, citing *Grunwald-Marx, Inc.* v. *Los Angeles Joint Board*, 52 Cal.2d 568, 589.) "[A]n award must be vacated where the arbitrators 'so imperfectly executed' their powers 'that a mutual, final and definite award' was not made. (*Olivera v. Modiano-Schneider, Inc.* (1962) 205 Cal. App. 2d 9, 14-15, quoting Code Civ. Proc. § 1288 -- in effect at the time of arbitration.)

III. Analysis

The above language clearly and unequivocally awards Claimants "$13,504.00 as damages for breach of the HIA, plus costs in the amount of $748.32"; "$293.25 as damages for breach of the PPA"; termination of the PPA; and attorneys' fees according to proof, and the Court must thus confirm this award.

Tesla is incorrect that *Ulene v. Murray Millman of California, Inc.* (1959) 175 Cal. App. 2d 655 supports the Court vacating this award on the basis that it is not definite. First, that case actually confirmed the trial court's ruling confirming the arbitration award; the award in that case was not vacated. Next, that court found that even if part three of the award was not final and definite—an argument that court rejected—it would still be compelled to enforce the rest of the award under California law. Thus, *Ulene* supports Claimants here, not Tesla.

That the arbitrator states that a portion of the award covers certain costs does not mean the costs had to be incurred for Claimants to receive the award. It was not necessary for the arbitrator to lay out the different elements of the damages awarded. And the award can be fairly read to mean that Claimants receive those damages and that the damages would cover certain specified costs if incurred. Put another way, the arbitrator awarded Claimants "$13,504.00 as damages for breach of the HIA, plus costs in the amount of $748.32" that they would have in hand to use to cover certain costs associated with the damages the arbitrator found Tesla was responsible for if they needed it to cover those specified

costs, whether those costs were actually incurred or not. This reading is supported by both the plain language of the award and a reading of the arbitrator's analysis as a whole.

It does not appear, however, that Claimants ever submitted the attorney fee information to the arbitrator for the arbitrator to affix an amount of fees "according to proof." Accordingly, there is no fixed amount of fees for this Court to confirm. Nor is Tesla's counsel a party to the arbitration agreement or the arbitration. Thus, Tesla's counsel is dismissed as a party to this action.

Telsa must, however, pay all other dollar amounts set forth in the arbitrator's award, which award the Court confirms.