SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

Rachel Tien, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408-882-2210

DATE: December 19, 2023 TIME: 9:00 A.M.

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

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

***New information* (please read)**: To set future motion hearings, you no longer need to file your motion before receiving a hearing date. Phone lines are now open for you to call and reserve a hearing date *before filing and serving* your motion. Please call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve your date. This will obviate the need to file and serve a separate amended notice at a later time. Please note: if your motion papers are not filed within five business days of reserving the hearing date, the date will be released to other cases.

CourtCall is no longer available: Department 10 uses Microsoft Teams for remote hearings. Please click on this link if you need to appear remotely, and then scroll down to click the link for Department 10: https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. Again, the court strongly prefers in-person or video appearances. Telephonic appearances are a sub-optimal relic of a bygone era.

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV403330	Mark Hacker v. Encore Industries et al.	Click on LINE 1 or scroll down for ruling.
LINE 2	23CV415923	Sanmina Corporation v. Cue Health Inc.	Click on LINE 2 or scroll down for ruling.
LINE 3	19CV352403	Deanna Lacy et al. v. San Joaquin Regional Rail Commission et al.	Motion for summary judgment: the court originally prepared a tentative ruling granting the motion, given the absence of an opposition and given that the Santa Clara Valley Water District had met its initial burden of showing that there are no triable issues of material fact regarding the causes of action asserted against it. Two hours before posting this tentative ruling, the court received an ex parte stipulation from the parties to continue the hearing. The court will GRANT the request to continue the hearing, even though this 11th-hour filing is exceedingly discourteous.
LINE 4	22CV404231	Diana Rodriguez v. Michelle L. Rodriguez	Click on LINE 4 or scroll down for ruling.
LINE 5	21CV386912	Yeo Bai Lee v. Christy Jihee Ryoo et al.	Click on LINE 5 or scroll down for ruling in lines 5-9.
LINE 6	21CV386912	Yeo Bai Lee v. Christy Jihee Ryoo et al.	Click on LINE 5 or scroll down for ruling in lines 5-9.
LINE 7	21CV386912	Yeo Bai Lee v. Christy Jihee Ryoo et al.	Click on LINE 5 or scroll down for ruling in lines 5-9.
LINE 8	21CV386912	Yeo Bai Lee v. Christy Jihee Ryoo et al.	Click on LINE 5 or scroll down for ruling in lines 5-9.
LINE 9	21CV386912	Yeo Bai Lee v. Christy Jihee Ryoo et al.	Click on LINE 5 or scroll down for ruling in lines 5-9.

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LINE 10	23CV415418	McManis Faulkner, APC v. Melvin Cooper	Click on LINE 10 or scroll down for ruling.
LINE 11	23CV414159	Spring Oaks Capital SPV, LLC v. Theresa Tran	Motion for requests for admissions to be deemed admitted: it appears that notice is proper, based on a proof of service filed on November 27, 2023. The court has not received any opposition to the motion. In view of the absence of timely responses to the RFAs, the court GRANTS the motion. Moving party to prepare final order.
LINE 12	20CV361931	HD Supply Construction Supply, Ltd. v. Saul Robert Flores et al.	Click on LINE 12 or scroll down for ruling.
LINE 13	20CV373696	Jerry Ivy, Jr. v. Jerry Ivy, Sr. et al.	OFF CALENDAR
LINE 14	23CV419667	Center for Advanced Public Awareness v. Bymm Corporation	Motion to approve Proposition 65 settlement: parties to appear. Notice is not proper, as the motion was filed without the correct hearing date, and there is no amended notice of hearing on file. The court has not received any response to the motion.

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Calendar Line 1
Case Name: *Mark Hacker v. Encore Industries et al.*
Case No.: 22CV403330

I. BACKGROUND

This action arises from the alleged involuntary dissolution of Encore Industries, a California corporation ("Encore"). Plaintiff Mark Hacker ("Hacker") filed suit against defendants Encore, Gary N. Vogel ("Vogel"), and Does 1 through 50, asserting causes of action for involuntary dissolution, breach of fiduciary duty, and declaratory relief on August 18, 2022. He filed the operative second amended complaint on October 3, 2023, after the court overruled in part and sustained in part a demurrer to the first amended complaint.

The present demurrer concerns Encore's cross-complaint, filed on June 9, 2023, which states causes of action against Hacker for: (1) Breach of Fiduciary Duty; (2) Conversion; (3) Common Counts; and (4) Imposition of Constructive Trust. The cross-complaint alleges that Hacker was the Chief Executive Officer of Encore from 2010 to 2016 and controlled the company's operations and finances in that capacity. (Cross-Complaint, ¶ 1.) As CEO, Hacker allegedly misappropriated funds from Encore, using them to pay for his own personal expenses. (*Id*. at ¶ 2.) Hacker now demurs to all four causes of action.

II. DEMURRER TO THE ENCORE CROSS-COMPLAINT

A. General Standards

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.)

The court considers only the pleading under attack, any attached exhibits (which are part of the "face of the pleading"), and any facts or documents for which judicial notice is properly requested. The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. The court has only considered the declaration of Hacker's counsel, Gordon Finwall, to the extent it describes the required meet-and-confer efforts. The court has not considered the various exhibits attached to Finwall's declaration or any arguments relying on those exhibits. For similar reasons, the court has not considered the declaration submitted by Encore's counsel, Mark Fredkin. While Code of Civil Procedure section 430.41, subdivision (a)(3), requires a declaration from the demurring party to demonstrate meet-and-confer efforts, it does not call for the filing of a responsive declaration from the opposing party.

Hacker demurs to all four causes of action on the ground that they all fail to state sufficient facts. (See August 2, 2023 Notice of Demurrer and Demurrer.) In his supporting memorandum, Hacker relies on the applicable statutes of limitations to make this argument.

B. Analysis

As an initial matter, the court notes that Code of Civil Procedure section 430.41 requires the demurring party to meet and confer "in person or by telephone" with the party who filed the pleading that is the subject of the demurrer. The mere sending of letters, as described in the declaration of Hacker's counsel, does not fully comply with the plain terms of the statute and would not by itself constitute a "good faith attempt" allowing for an automatic 30-day extension under section 430.41(a)(2). Nevertheless, as Code of Civil Procedure section 430.41(a)(4) makes it clear that any insufficiency of the meet-and-confer process "shall not" be grounds for overruling a demurrer, the court will still determine the merits.

For similar reasons, Encore's objection in its opposition that Hacker did not raise the statute of limitations in the meet-and-confer correspondence is ultimately immaterial. Again, even if the court were to find that the meet-and-confer process was insufficient, that would "not be grounds to overrule or sustain a demurrer." (Code Civ. Proc., § 430.41, subd. (a)(4).) Moreover, a "failure to state sufficient facts" is broad enough to encompass an argument that a claim is time-barred.

As noted above, Hacker asserts that all four causes of action are either time-barred or completely dependent upon causes of action that are time-barred. "A complaint showing on its face the cause of action is barred by the statute of limitations is subject to general demurrer." (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995.) The running of the statute must appear clearly and affirmatively from the dates alleged—it is not enough that the complaint *might* be barred. (*Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 42.) "Generally, the limitations period starts running when the last element of a cause of action is complete." (*NBCUniversal Media, LLC v. Super. Ct.* (2014) 225 Cal.App.4th 1222, 1231.)

1. First Cause of Action (Breach of Fiduciary Duty)

"The statute of limitations for breach of fiduciary duty is three years or four years, depending on whether the breach is fraudulent or nonfraudulent. (See *Fuller v. First Franklin Financial Corp*. (2013) 216 Cal.App.4th 955, 963 ["limitations period is three years . . . for a cause of action for breach of fiduciary duty where the gravamen of the claim is deceit, rather than the catchall four-year limitations period that would otherwise apply . . . ."]; *William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312 ["[b]reach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year 'catch-all statute' of Code of Civil Procedure section 343"]; *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 606-607 [same]; *City of Vista v. Robert Thomas Securities, Inc*. (2000) 84 Cal.App.4th 882, 889 [four-year statute of limitations applies to breach of fiduciary duty, unless the gravamen of the claim is actual or constructive fraud, in which case the statute of limitations is three years].)

"It is well-settled that the [delayed] discovery rule applies to causes of action involving the breach of a fiduciary relationship," which means that such an action does not begin to accrue until the plaintiff discovers or should have discovered the facts giving rise to the action. (*April Enters. v. KTTV* (1983) 147 Cal.App.3d 805, 826-827; see also *Krieger v. Nick Alexander Imports, Inc*. (1991) 234 Cal.App.3d 205, 221 ["California courts have applied the 'discovery rule' to both contract and tort causes of action in situations involving fiduciary

relationships such as professional malpractice."]; *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1397.)

Here, the first cause of action alleges that Hacker breached his fiduciary duty "by engaging in self-dealing transactions, including, but not limited to, misappropriating funds that were paid to Encore by third parties and by distributing Encore funds to his family member without any actual benefit or consideration being received by the corporation." (Cross-Complaint at ¶¶ 4-7.) While Hacker's alleged actions are described as "fraudulent" in paragraph 7, nothing else alleged in the first cause of action, or in the general allegations incorporated by reference, is sufficient to establish that the gravamen of the breach of fiduciary claim is deceit or fraud.

There are also no allegations in the first cause of action or the cross-complaint as a whole that would support a delayed discovery theory. "In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must *specifically plead facts* to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; '*conclusory allegations will not withstand demurrer*.'" (*Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal.4th 797, 808 (*Fox*), internal citations omitted, emphasis added.)

Accordingly, the statute of limitations applicable to the first cause of action is the four year "catch all" statute in Code of Civil Procedure section 343. Hacker argues that because the cross-complaint alleges that Mr. Hacker was CEO of Encore Industries from 2010 through 2016 and that his alleged wrongdoing occurred "[d]uring that time" (see ¶¶ 1-2), the first cause of action became time barred by no later than the end of 2020, four years after the end of 2016 and more than a year and a half before the original complaint in this action was filed on August 18, 2022.

In its opposition, Encore claims that because the cross-complaint does not allege *when* Encore learned of Hacker's alleged breach of fiduciary duty, the running of the applicable statute of limitations (which it concedes is Code of Civil Procedure section 343) does not clearly and affirmatively appear from the face of the pleading. Encore also claims that its cause of action is based on a theory of a "continuing breach" of duty. Neither of these arguments is persuasive. First, the cross-complaint alleges that Hacker ceased being CEO at the end of 2016. This clearly renders the cause of action time-barred on its face without the benefit of the discovery rule. There are no specific allegations in the first cause of action or the incorporated general allegations that would support a claim of delayed discovery under *Fox, supra*. Similarly, there are also no allegations that would support a claim of an ongoing or continuing breach of duty. The cross-complaint alleges that the fiduciary duty owed by Hacker arose from his position as CEO (see ¶ 4), which the cross-complaint admits he no longer held by the end of 2016. Any breach therefore had to occur by the end of 2016. Indeed, Encore's apparent contention that Hacker's fiduciary duties extended indefinitely—even to this very day—because of his continuing position as a "corporate officer and director" finds no support in the pleading. The court therefore concludes that the cross-complaint shows *on its face* that the first cause of action became time-barred by the end of 2020. The court SUSTAINS Encore's demurrer to the first cause of action.

A plaintiff or cross-complainant bears the burden of proving an amendment would cure the defect identified by a demurrer. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The opposition does not meet this burden, as it fails even to ask for leave to amend in the event that the demurrer is sustained. "The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case.'" (*Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145, internal citation omitted.)

Nevertheless, given that this is the first pleading challenge to Encore's cross-complaint, the court grants 20 DAYS' LEAVE TO AMEND.

When a demurrer is sustained with leave to amend, the leave must be construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, not to add entirely new causes of action. (*Patrick v. Alacer Corp*. (2008) 167 Cal.App.4th 995, 1015.) To raise claims entirely unrelated to those originally alleged requires either a new lawsuit or a noticed motion for leave to amend. Absent prior leave of court, an amended complaint raising entirely new and different causes of action may be subject to a motion to strike. "Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend." (*Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456, citing *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.)

2. Second Cause of Action (Conversion)

Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. (See *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240.) The applicable statute of limitations is Code of Civil Procedure section 338, subdivision (c)(1), which provides a three-year limitations period for "[a]n action for taking, detaining, or injuring any goods or chattels."

The second cause of action depends upon the first cause of action and the incorporated general allegation that Hacker ceased being CEO at the end of 2016. Any conversion had to take place by the end of 2016, as well. As with the first cause of action, Hacker argues that the claim became time-barred well before the original complaint in this action was filed. The opposition very briefly argues that the demurrer should be overruled as to the second cause of action for the same reasons the demurrer to the first cause of action should be overruled. (Opp. at p. 4:19-24.) This is unpersuasive.

Hacker's demurrer to the second cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

3. Third Cause of Action (Common Count)

"The common count is a general pleading which seeks recovery of money without specifying the nature of the claim." (*Title Ins. Co. v State Board of Equalization* (1992) 4

Cal.4th 715, 731.) "A common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." (*Utility Audit Co v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958.) "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.' [Citation.]" (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460.) "A common count is not a specific cause of action, however; rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394.)

Where a demurrer is sustained as to a specifically pleaded cause of action, a demurrer to a corresponding common count for the same recovery is likewise proper. "A demurrer to a common count is properly sustained where the plaintiff is not entitled to recover under those counts in the complaint wherein all the facts upon which his claim is based are specifically pleaded. The validity of the [common counts] is, therefore, dependent upon whether basis of recovery is adequately set forth in the other causes of action." (*Del E. Webb. Corp. v. Structural Materials Co*. (1981) 123 Cal.App.3d 593, 601.)

As pled, the third cause of action depends upon the first and second causes of action and the incorporated general allegation that Mr. Hacker was CEO until the end of 2016. Based on this and the fact that there are no allegations to support a delayed discovery theory, Hacker argues that the demurrer to the third cause of action should be also sustained. The opposition briefly defends the claim (grouping it with the fourth cause of action) by referring to Hacker's "continuing" duty, but there are currently no allegations in the cross-complaint to support this theory. Accordingly, the demurrer to the third cause of action is SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

4. Fourth Cause of Action (Constructive Trust)

A request for the imposition of a constructive trust is not a cause of action but a remedy. (See *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 76 [a constructive trust is a remedy not a cause of action]; *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1332 ["A constructive trust is an equitable remedy to compel the transfer of property by one who is not justly entitled to it to one who is."].) Courts have permitted parties to plead a cause of action entitled "constructive trust" where the complaint had "plead[ed] facts constituting the cause of action, such as fraud, breach of fiduciary duty, etc., and specifically identifiable property." (*Ehret v. Ichioka* (1967) 247 Cal.App.2d 637, 642; see also *Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1114.)

"A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from the person wrongfully holding it to the rightful owner. [Citations.] 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. [Citations.]" (*Communist Party v. 522 Valencia, Inc*. (1995) 35 Cal.App.4th 980, 990.) "The principal circumstances where constructive trusts are imposed are set forth in Civil Code sections 2223 and 2224." (*Ibid.*) "One who wrongfully detains a thing is an involuntary

trustee thereof, for the benefit of the owner." (Civ. Code, § 2223.) Additionally, "[o]ne who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." (Civ. Code, § 2224.) "[A] constructive trust may only be imposed where the following three conditions are satisfied: (1) the existence of a res (property or some interest in property); (2) the right of a complaining party to that res; and (3) some wrongful acquisition or detention of the res by another party who is not entitled to it." (*Communist Party v. 522 Valencia, Inc*., *supra*, 35 Cal.App.4th at p. 990.)

Hacker argues that the remedy the fourth cause of action seeks is entirely dependent upon the three causes of action that precede it, all of which are time-barred or otherwise fail to state sufficient facts as presently alleged. Encore's opposition once again argues that it is relying on a continuing duty theory, but there are no allegations to support such a theory, or to support any delayed discovery theory. Therefore, Hacker's demurrer to the fourth cause of action is also SUSTAINED WITH 20 DAYS' LEAVE TO AMEND.

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Calendar Line 2
Case Name: *Sanmina Corporation v. Cue Health, Inc.*
Case No.: 23CV415923

I. BACKGROUND

This is a contract dispute between two Delaware corporations, plaintiff Sanmina Corporation ("Sanmina"), whose principal place of business is in San Jose, and defendant Cue Health, Inc. ("Cue"), whose principal place of business is in San Diego.

Sanmina filed the original and still-operative complaint in this matter on May 5, 2023. It describes, but does not attach, a written contract between the parties, a Letter of Agreement ("LOA") that was allegedly entered into on April 21, 2020. (See Complaint at ¶¶ 6-8.) The complaint states three causes of action: (1) Breach of Contract (alleging a failure to pay for materials and finished goods in breach of the LOA); (2) Breach of the Implied Covenant of Good Faith and Fair Dealing (again alleging a failure to pay for materials ordered under the LOA); and (3) Promissory Estoppel (alleging reasonable reliance on the LOA and requests from Cue in incurring costs).

Currently before the court is Cue's demurrer to the complaint, filed on July 25, 2023. Sanmina filed its opposition on December 6, 2023.

II. DEMURRER TO THE COMPLAINT

A. General Standards

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.)

The court considers only the pleading under attack, any attached exhibits (which are part of the "face of the pleading"), and any facts or documents for which judicial notice is properly requested. The court cannot consider extrinsic evidence in ruling on a demurrer or motion to strike. The court has considered the declaration of counsel Alexander Moore only to the extent that it describes the required meet and confer efforts. The court has not considered Cue's cross-complaint or any arguments in the demurrer based on the cross-complaint.

Cue demurs to the complaint's second and third causes of action on the ground that they fail to state sufficient facts. (See Cue's Notice of Demurrer and Demurrer at pp. 2:8-3:13.)

B. Analysis

1. Second Cause of Action

"The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. The covenant thus cannot 'be endowed with an existence independent of its contractual underpinnings.' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 349-350.) "[W]here breach of an actual term is alleged, a separate implied covenant claim, based on the same breach, is superfluous." (*Id*. at p. 327.)

The court finds persuasive Cue's argument that the second cause of action fails to state sufficient facts, because it simply repeats the breach of contract terms alleged in the first cause of action. (Compare Complaint at ¶¶ 1-23 & 24-29 with Complaint at ¶¶ 30-36.) The second cause of action, as currently framed, alleges nothing more than the breach of an express contract—a failure to pay for items and/or materials—which is the same thing as the first cause of action.

Sanmina's argument that a breach of the implied covenant can be alleged as an alternative to a breach of contract cause of action, based on the same conduct, is incorrect. An implied covenant claim is not a common count. There can be no implied covenant of good faith and fair dealing without a valid, enforceable underlying contract being alleged to exist. "The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. [Citation.] 'The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.' [Citation] . . . 'In essence, the covenant is implied *as a supplement to the express contractual covenants,* to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract.'" (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032, emphasis added.) Even where there is no separate cause of action for breach of contract, an alleged breach of an express contract term cannot be the basis for a breach of the implied covenant.

The court therefore SUSTAINS Cue's demurrer to the second cause of action on the ground that it fails to state sufficient facts.

A plaintiff bears the burden of proving an amendment would cure the defect identified by a demurrer. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) The opposition does not meet this burden, as it simply makes a generic request for leave to amend if any part of the demurrer is sustained. Indeed, by arguing that the second cause of action is being pled as an "alternative" to the first cause of action, Sanmina effectively concedes that the second cause has nothing additional to offer. Despite this failure, the court grants 20 DAYS' LEAVE TO AMEND the second cause of action, given that this is the first pleading challenge in the case.

When a demurrer is sustained with leave to amend, the leave must be construed as permission to the pleader to amend the causes of action to which the demurrer has been sustained, not to add entirely new causes of action. (*Patrick v. Alacer Corp*. (2008) 167 Cal.App.4th 995, 1015.) To raise claims entirely unrelated to those originally alleged requires either a new lawsuit or a noticed motion for leave to amend. "Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend." (*Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456, citing *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.)

2. Third Cause of Action

The elements of a promissory estoppel cause of action are: "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) the reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (*Flintco Pacific, Inc. v. TEC Management Consultants, Inc.* (2016) 1 Cal.App.5th 727, 734.) The party claiming promissory estoppel must specifically plead all facts relied on to establish its elements.

The third cause of action is sparsely alleged (Complaint at ¶¶ 37-42), but that is not the basis for Cue's challenge to it. Cue asserts that the third cause fails to state sufficient facts because the "sole alleged acts in reliance upon alleged misrepresentations by Cue were governed by the parties' contract, rendering promissory estoppel an inapplicable legal theory." (Demurrer at p. 3:11-13.) In its supporting memorandum, Cue likewise argues that "promissory estoppel is not an applicable cause of action where, as here, a contract governs the parties' at-issue conduct." (*Id.* at p. 7:5-6.)

This is not a basis upon which a demurrer can be sustained. Unlike the second cause of action for breach of the implied covenant, promissory estoppel can be pleaded in the alternative, along with a breach of contract cause of action. While it is true that "a cause of action for promissory estoppel is inconsistent with a cause of action for breach of contract based on the same facts, '[w]hen a pleader is in doubt about what actually occurred or what can be established by the evidence, the modern practice allows that party to plead in the alternative and make inconsistent allegations.'" (*Fleet v. Bank of America, N.A.* (2014) 229 Cal .App.4th 1403, 1413; see also *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, 1224-1225; 4 Witkin, *Cal. Procedure* (5th ed., 2019) Pleading §§ 416, 419.)

Accordingly, the court OVERRULES Cue's demurrer to the third cause of action on the ground that it fails to state sufficient facts.

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Calendar Line 4
Case Name: *Diana Rodriguez v. Michelle Rodriguez*
Case No.: 22CV404231

I. BACKGROUND

This is an action for partition of real property brought by plaintiff Diana Rodriguez ("Diana") against defendant Michelle Rodriguez ("Michelle").[1] The original, verified, and still-operative complaint was filed on September 14, 2022 and states a single cause of action for partition of property at 3038 Everdale Drive in San Jose, California. The property is allegedly co-owned by the parties. Diana is Michelle's mother.

Currently before the court is a motion for "summary interlocutory judgment," filed by Diana on November 1, 2023.

II. ACTIONS FOR PARTITION

"A co-owner of real or personal property may bring an action for partition." (Code Civ. Proc., § 872.210.) As a general matter, "partition" is "the procedure for segregating and terminating common interests in the same parcel of property." (*14859 Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1404-1405.) It is a remedy very much favored by the law, as it "permits cotenants to avoid the inconvenience and dissension arising from sharing joint possession of land" and "facilit[ates] transmission of title, thereby avoiding unreasonable restraints on the use and enjoyment of property." (*Cummings v. Dessel* (2017) 13 Cal.App.5th 589, 596.) A co-owner has an absolute right to partition unless barred by a valid waiver. (Code Civ. Proc., § 872.710, subd. (b).)

The governing statute for partition is Code of Civil Procedure section 872.720, which provides, in pertinent part: "If the court finds that the plaintiff is entitled to partition, it shall make an interlocutory judgment that determines the interests of the parties in the property and orders the partition of the property and, unless it is to be determined later, the manner of partition." (Code Civ. Proc., § 872.720, subd. (a).) The manner of partition may be "in kind"—*i.e.*, physical division—or if the parties agree or the court concludes it "would be more equitable," the court may order the property sold and the proceeds divided among the parties. (Code Civ. Proc., §§ 872.820 and 873.510 *et seq*.).

Based on the foregoing provisions, it is clear that an interlocutory judgment in a partition action is to include the following two elements: a determination of the parties' interests in the property and an order granting the partition. (See *Summers v. Superior Court* (2018) 24 Cal.App.5th 138, 143; Code Civ. Proc., § 872.720, subd. (a).) In a partition action, any interest of a party in the property may be put in issue, tried, and determined. (Code Civ. Proc., § 872.610.) If there are any other issues affecting this determination, the court must resolve them. (Code Civ. Proc., § 872.620.)

[1] The court refers to the parties 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.)

III. THE PRESENT MOTION

Diana's motion is expressly brought under the summary judgment statute: Code of Civil Procedure section 437c. She has also styled it a "motion for summary interlocutory judgment." (See November 1, 2023 Notice of Motion and Motion.)

As Michelle points out in opposition to the motion, the motion does not comply with the mandatory notice requirements for a summary judgment motion under section 437c. Specifically, section 437c, subdivision (a)(2), states: "Notice of the motion and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing. If the notice is served by mail, the required 75-day period of notice shall be increased by 5 days if the place of address is within the State of California, 10 days if the place of address is outside the State of California but within the United States, and 20 days if the place of address is outside the United States. If the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the required 75-day period of notice shall be increased by two court days."

Diana filed her motion on November 1, 2023, only 48 days before the December 19, 2023 hearing date for this motion. According to a proof of service filed by Diana on October 24, 2023 (apparently in conjunction with a prior unsuccessful attempt to file the present motion), Michelle was served with the motion "by U.S. Mail and email" on October 24. This is still only 56 days before the hearing date, which is clearly insufficient under section 437c.

At the same time, the court is unaware of any requirement that a motion for interlocutory judgment in a partition action be filed as a motion for summary judgment. Indeed, an "interlocutory" judgment is one that, by definition, *does not conclude* a case, whereas a summary judgment is ordinarily a judgment that *does* conclude a case. Accordingly, it is the court's (admittedly limited) understanding of the statutory scheme (Code Civ. Proc., §§ 872.010 *et seq.*) that the request may be brought as a regular noticed motion, as long as the undisputed evidence establishes ownership of the property. Indeed, the court would be inclined to treat this as a regular motion rather than a summary judgment motion, but for the fact that Diana expressly noticed it under section 437c and Michelle responded to it accordingly. Notably, Michelle's opposition does not present any basis for denying the motion other than the procedural one of insufficient notice under section 437c.

Thus, as a matter of fundamental fairness, the court concludes that this motion must be continued to a time that provides sufficient notice under Code of Civil Procedure section 1005, subdivision (b), for an opposition on the merits. The court continues the hearing on this motion to **January 25, 2024**. Michelle may file an opposition brief by no later than **January 11, 2024**. Diana's reply, if any, shall be filed by **January 18, 2024**.

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Calendar Lines 5-9
Case Name: *Yeo Bai Lee v. Christy Jihee Ryoo et al.*
Case No.: 21CV386912

This is an action for elder abuse, breach of contract, fraud, and related causes of action by plaintiff Yeo Bai Lee ("Lee") against defendants Christy Jihee Ryoo ("Ryoo"), K&L Supply Co., Inc., YBL Holdings, Inc, Skylars LLC, K&L Supply Korea, Co., Ltd., and DOES 1-25 (collectively, "Defendants"). As the court has previously noted, the "core contention" in the case is that "Ryoo coerced and manipulated [Lee] so as to take control of his assets and companies." (July 20, 2022 Order at p. 1:19-22.)

At the most recent hearing, on June 20, 2023, the court heard three motions from the parties. Now before the court are five more motions: (1) Defendants' motion to file under seal documents related to Adult Protective Services ("APS") records; (2) the State Bar of California's motion for a protective order (and request for sanctions); (3) Defendants' motion to compel Lee to produce documents in response to the fourth set of requests for production (and request for sanctions); (4) Defendants' motion to compel Lee to return or destroy inadvertently transmitted documents (and request for sanctions); and (5) Defendants' motion to seal certain portions of Defendants' motion to compel Lee to return or destroy inadvertently transmitted documents. The discovery referee in this case, Judge Kleinberg, has heard additional motions by the parties in the last several months, but these five motions are before the court today because the State Bar of California is a third party who claims that it is not subject to the court's prior order appointing Judge Kleinberg as the discovery referee. At least one of the other discovery motions presently before the court is directly related to the State Bar's motion. The parties submitted a stipulation for the court to hear all of these motions together, and the court granted it on October 27, 2023.

I. MOTION TO FILE APS-RELATED RECORDS UNDER SEAL

The first motion is the simplest one. It was originally scheduled to be heard on October 12, 2023, but because notice was not proper and the court had not received any response to the motion, the court continued the hearing to December 19, 2023. Notice is now proper, and the court still has not received any response to the motion. Good cause appearing, the court GRANTS the motion.

As the court previously noted in its June 20, 2023 Order denying Lee's motion to redesignate documents under the parties' protective order, there is no basis to change Judge Pegg's previous determination that the APS records should remain "Highly Confidential." The court finds that: (1) there continues to exist an overriding privacy interest in the APS records cited in the unredacted versions of Defendants' papers (the Declaration of Sarah G. Hartman, Exhibit 5 to that Declaration, and the Opposition to Plaintiff's Motion to Re-Designate Documents) that outweighs the right of public access to the records; (2) the overriding interest supports sealing the records; (3) a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) the proposed sealing is narrowly tailored; and (5) no less restrictive means exist to achieve the overriding interest.

The court clerk is directed to maintain the unredacted versions of Defendants' Opposition to Plaintiff's Motion to Re-Designate Documents, the Declaration of Sarah G. Hartman, and Exhibit 5 to the Declaration of Sarah G. Hartman (all filed together as a single

77-page document on June 6, 2023) under seal. Public access to the unredacted documents will remain restricted absent a further order from the court.

II. STATE BAR OF CALIFORNIA'S MOTION FOR PROTECTIVE ORDER

Non-party State Bar of California moves for a protective order against the production of a transcript and video of Lee's July 20, 2023 deposition (plus exhibits), taken as part of a State Bar investigation of Lee's former attorney, Jeffrey Filon Ryan. The State Bar raises a number of arguments in support of its motion, but the court is ultimately persuaded by just one of them: the requested materials are protected from disclosure by Business and Professions Code section 6086.1, subdivision (b). The court therefore GRANTS the motion.

Section 6086.1, subdivision (b), states, in relevant part: "All disciplinary investigations are confidential until the time that formal charges are filed . . . . These investigations shall not be disclosed pursuant to any state law . . . ." Subdivision (b) goes on to state that this confidentiality may be waived by "[t]he licensee whose conduct is being investigated," the "Chief Trial Counsel or Chair of the State Bar," or the "Chief Trial Counsel's designee." (Bus. & Prof. Code, § 6086.1, subd. (b).) In its briefs, the State Bar sets forth the public policy underlying the rule against disclosure before formal charges are filed: "Disclosure of records relating to complaints against attorneys that have not resulted in charges filed would both discourage complainants from making complaints and do harm to the attorneys at issue, by making public allegations and investigations that were not meritorious enough to lead to public charges." (Memorandum of Points and Authorities at p. 8:19-22.) This echoes the same rationale recognized in *Chronicle Publishing Co. v. Superior Court of San Francisco* (1960) 54 Cal.2d 548, 568-572 (*Chronicle*) (["[A citizen] will hesitate a long while before [bringing a complaint] if he knows his complaint is to be made public," and "[t]he fact that a charge has been made against an attorney, no matter how guiltless the attorney might be, if generally known, would do the attorney irreparable harm even though he be cleared by the State Bar."].) In *Chronicle*, the Supreme Court upheld the denial of discovery of any complaints to the State Bar about an attorney where no discipline was actually imposed, but it carved out an exception for discovery relating to any "private reproval" of that attorney, to the extent that any existed.

Defendants argue that section 6086.1 does not prohibit disclosure here, because the State Bar did in fact file formal charges against Ryan; therefore, according to Defendants, the investigation was "no longer confidential." (Opposition at p. 4:15-5:7.) The problem with this argument is that ignores the entire sequence of events. Although the State Bar did file formal charges against Ryan and make his investigation public in December 2022, it later dismissed those charges in April 2023. (Declaration of Lisa Jacobs, Exhibit D.) In its motion to dismiss, the State Bar states that it anticipates re-filing disciplinary charges against Ryan "with additional charges," but that was its last public statement on the matter. (Declaration of Reuben C. Cahn, Exhibit 2 at p. 2:16-20.) No charges have been filed since then, and no other information has been made public, including the deposition of Lee, which occurred on July 20, 2023, three months *after* the dismissal.

It is unclear to the court whether there is still an active investigation, but that is in fact the point. Until formal charges are re-filed—if they are ever re-filed—outside parties should not be privy to the details of the State Bar's confidential investigations. The court disagrees with Defendants' interpretation of section 6086.1 that once charges are filed, then that opens the State Bar's investigation to the public *in all perpetuity*, even if charges are later dropped

and a new or different investigation is commenced. First, that runs directly counter to the public policy underlying section 6086.1. Second, Defendants cite no authority for this illogical reading of the statutory language. The court concludes that section 6086.1 does apply to prohibit disclosure of the materials requested here. At best, Defendants' subpoena document requests are premature.

Finally, the court notes that the statute and the case law do not appear to provide for any balancing of the competing interests—*i.e.*, between the *confidentiality* of the requested discovery and its *importance* or *relevance* to the case at hand. Even if they did, the court would find that the former outweighs the latter. Although Lee's deposition in the State Bar investigation is almost certainly relevant to the present case, with overlapping subject matter, it appears that Defendants' primary motivation for obtaining this deposition is to uncover potential impeachment material—to find ways in which Lee's State Bar testimony may be inconsistent with his deposition testimony (or ultimately, his trial testimony) in this case. The court finds the probative value of such discovery to be low. Defendants have not been prevented from taking Lee's deposition in this case—indeed, it appears that they may be attempting to take his deposition at least twice in this litigation—and they have not identified any information that could uniquely have come only from his testimony with the State Bar. For this reason, the court finds Defendants' contention that denying this discovery implicates "due process"—or that it is somehow "unfair" to them for Lee to have a copy of his own State Bar deposition transcript (which he cannot use in this case, in any event)—to be plainly absurd.

As for each sides' requests for monetary sanctions, the court finds that Defendants did not act with substantial justification in aggressively seeking this discovery of limited probative value and advancing an illogical interpretation of Business and Professions Code section 6086.1. At the same time, the court notes that the State Bar has also advanced specious arguments in its motion—the notion that the discovery is protected from disclosure by Business and Professions Code section 6094 (that is not how the court reads section 6094), as well as the baseless claim that the discovery is protected by the attorney work product doctrine. Accordingly, the court GRANTS IN PART the State Bar's request for monetary sanctions, reducing the amount awarded from $6,000 to **$2,500**, representing five hours of attorney time at $500/hour. The purpose of discovery sanctions is compensatory, not punitive. Defendants shall pay this amount to the State Bar within 30 days of notice of entry of this order.

III. MOTION TO COMPEL RESPONSES TO FOURTH SET OF REQUESTS FOR PRODUCTION

After the State Bar filed its motion on September 14, 2023, Defendants filed a motion to compel Lee to produce the same information on October 5, 2023. Defendants argue that even if the statute protects the State Bar or the court reporter who transcribed the deposition from disclosing the information pursuant to a subpoena, it does not excuse Lee from his discovery obligations as a party to this case. The court disagrees. Section 6086.1, subdivision (b), states that this information is "confidential" and "shall not be disclosed pursuant to any state law." That edict applies to Lee, as well, and Defendants provide no authority to support their claim that Lee is "bound by no obligation of confidentiality." (Notice of Motion and Motion at p. 6:11-14.)

Indeed, as noted above, section 6086.1, subdivision (b), allows only "[t]he licensee whose conduct is being investigated," the "Chief Trial Counsel or Chair of the State Bar," or

the "Chief Trial Counsel's designee" to waive the confidentiality established by the statute. Lee himself is not authorized to waive this confidentiality and must continue to abide by it.

The court finds this motion to be an improper attempt to perform an end run around the State Bar's motion, as well as around section 6086.1.

The motion is DENIED. In addition, the court finds that Defendants did not act with substantial justification in seeking this discovery of low probative value from two sources at the same time, causing duplicative motion practice. Either motion would have been sufficient. Further, by bringing this motion against Lee after Lee had already indicated that he would wait to see the outcome of the State Bar's motion, Defendants placed Lee in the untenable position of having to choose between violating section 6086.1 or facing a motion to compel and request for sanctions. The court GRANTS IN PART Lee's request for monetary sanctions in the amount of **$6,500**, representing five hours at $750/hour (Andrew August) and 5.5 hours at $500/hour (Jessica Stemple). Defendants shall pay this amount to Lee's counsel within 30 days of notice of entry of this order.

IV. MOTION TO COMPEL THE RETURN OR DESTRUCTION OF INADVERTENTLY TRANSMITTED DOCUMENTS

On July 28, 2023, Defendants' former counsel, Jeffer Mangels Butler & Mitchell LLP ("JMBM") sent Lee, at his home address, a letter attaching an outstanding invoice for fees, as well as a Notice of Client's Right to Fee Arbitration. The latter notice is a typical prelude to the commencement of a fee dispute between a client and counsel. (See Bus. & Prof. Code, §§ 6200 et seq.) In this instance, however, the client was not Lee but rather YBL Holdings, Inc., the company that bears Lee's initials but that he has sued as a defendant in this case. The letter itself was apparently addressed to defendant YBL "c/o" defendant Ryoo.[2] Defendants now argue that this was an inadvertent transmission of attorney-client privileged information by JMBM—especially as it is undisputed that JMBM never represented Lee and was always adverse to Lee—and must be returned or destroyed. Lee has refused to do so and opposes the motion.

Both sides rely almost entirely on their divergent readings of the California Supreme Court's decision in *Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282 (*LA County Board*) to support their positions. Defendants argue that the Supreme Court unambiguously held that attorney's fee invoices for "pending and active legal matters" are privileged communications. (Notice of Motion and Motion at p. 5:9-11.) Lee responds that fee invoices are "not categorically covered by the attorney-client privilege," and that "the touchstone of the Court's opinion is that the privilege turns on both the content and purpose of the communication, not form." (Opposition at p. 10:8-13, italics omitted.) Having now closely reviewed *LA County Board*, the court agrees with Defendants that the fee invoice at issue is privileged, and all copies in Lee's (or Lee's counsel's) possession must be returned or destroyed.

In *LA County Board*, the Court drew a clear distinction between litigation that has already concluded and litigation that is "pending" or "continuing." The court also noted that

[2] The court does not have a copy of these documents (they were not lodged under seal, even though Defendants claim that they were—see Declaration of Reuben C. Cahn in Support of Motion to Seal, ¶ 5.b), and so the only information the court has about them is the parties' descriptions of them.

even if the invoices themselves do not contain much substantive information about an ongoing representation, they are "close enough" to the "heartland" of the attorney-client privilege that they should be protected, even if they are not "categorically" privileged: "And even if the information is more general, such as aggregate figures describing the total amount spent on continuing litigation during a given quarter or year, it may come close enough to this heartland to threaten the confidentiality of information directly relevant to the attorney's distinctive professional role. The attorney-client privilege protects the confidentiality of information in both those categories, even if the information happens to be transmitted in a document that is not itself categorically privileged." (*LA County Board, supra,* 2 Cal.5th at p. 297.) In this case, it is the court's understanding that the JMBM invoice is "more general" and merely contains "aggregate figures" owed by YBL/Ryoo—again, the court has not seen a copy of the invoice—but even then, it is protected by the privilege according to the Supreme Court's analysis in *LA County Board*.

Lee argues that he is entitled to these documents in any event by virtue of his constructive trust claim as to YBL and the other entity defendants. This argument is unpersuasive. Regardless of the merits of Lee's claims against YBL, the fact remains that he is adverse to YBL in this litigation, and the proper way to obtain documents from an adverse party is through discovery, not through an inadvertent mailing by that party's former counsel. The court does find that JMBM's transmittal was inadvertent, as there is no apparent reason why JMBM would deliberately have sent its fee dispute correspondence to an opposing party.

The court understands that the parties are currently engaged in a discovery dispute over documents evidencing payments by defendants to counsel—not the attorney's fee invoices themselves, but other documents such as "checks, wire transfers, company ledgers, corporate consents" that show payment amounts—and that this has already been addressed by the discovery referee, Judge Kleinberg. The court makes no findings or conclusions regarding the outcome of this dispute, as the matter is not presently before the court. The court urges the parties to try to resolve this dispute without resorting to further motions or ex parte applications. But if the parties are unable to do so, the court notes that it will be guided by this additional language from the Supreme Court:

> When a legal matter remains pending and active, the privilege encompasses everything in an invoice, including the amount of aggregate fees. This is because, even though the amount of money paid for legal services is generally not privileged, an invoice that shows a sudden uptick in spending 'might very well reveal much of [a government agency]'s investigative efforts and trial strategy.' [Quoting *Mitchell v, Superior Court* (1984) 37 Cal.3d 591, 610.] Midlitigation swings in spending, for example, could reveal an impending filing or outsized concern about a recent event.

(*LA County Board, supra*, 2 Cal.5th at 297.)

The court GRANTS IN PART and DENIES IN PART Defendants' motion to compel the return or destruction of inadvertently transmitted documents. Pursuant to *LA County Board*, the court orders Lee and Lee's counsel to return or destroy all copies of the JMBM invoice that was transmitted on July 28, 2023. The court does *not* order Lee to return or destroy the Notice of Client's Right to Fee Arbitration, as the court has not been made aware of any basis for finding that this document—or the fact of transmittal of this document by

JMBM—implicates the attorney-client privilege. Finally, the court is unaware of the contents of the "cover letter," and so Defendants have not met their burden of showing that this letter contains any information that might be privileged under *LA County Board*. It is unclear whether the letter makes any reference to the "aggregate figures" allegedly owed by Defendants to JMBM.

The court finds that Lee did not act with substantial justification in refusing to return or destroy the fee invoice; additionally, the interpretation of *LA County Board* that he presents in his opposition contorts and obfuscates the clear language of the majority opinion. Nevertheless, the court finds that the $13,990 in monetary sanctions requested by Defendants is excessive. At bottom, this is a simple motion that turns on the interpretation of a single published decision. Accordingly, the court orders Lee to pay Defendants **$5,250** in sanctions within 30 days of notice of entry of this order. This represents six hours of attorney time at $875/hour. Again, the purpose of discovery sanctions is compensatory, not punitive.

V. MOTION TO SEAL PORTIONS OF MOTION TO COMPEL RETURN OR DESTRUCTION OF INADVERTENTLY TRANSMITTED DOCUMENTS

As noted above, the court has not seen a copy of the documents that JMBM inadvertently transmitted to Lee on July 28, 2023. Nevertheless, based on the parties' descriptions of these documents and the court's reading of *LA County Board*, the court concludes that very little needs to be sealed. The court finds nothing in Exhibits 4, 6, and 7 to the Cahn Declaration in Support of the Motion to Compel that needs to be sealed. The court finds nothing in Defendants' Notice of Motion and Motion to Compel Plaintiff and His Counsel to Return or Destroy Confidential and Privileged Materials (and supporting memorandum) that needs to be sealed—all of the current redactions are unnecessary and improper.

The only information that is potentially confidential and privileged under *LA County Board* is the "aggregate figure" of the amount of outstanding fees for three or four months of work performed by JMBM in 2023. This information is contained in the second paragraph of the first numbered section of the email that is Exhibit 5 to the Cahn Declaration (the paragraph that begins with "These requests seek" and ends with "financial elder abuse"). That *paragraph* should be redacted. The only other place where this information comes up—of which the court is aware—is in Lee's opposition to the motion to compel plaintiff to return or destroy, on page 4, line 8. This *single* line should be redacted. The court finds that with these narrowly tailored redactions, the attorney-client privilege is preserved.

Accordingly, the court GRANTS IN PART and DENIES IN PART the motion to seal. Defendants shall resubmit unredacted versions of Exhibits 4, 6, and 7 for the public file, as well as a redacted version of Exhibit 5 that redacts only the paragraph identified above. In addition, Defendants shall resubmit an unredacted version of their opening brief. Plaintiff Lee shall resubmit a redacted version of his opposition brief that redacts the line identified above.

If the court has missed any other information that is truly confidential and privileged in the foregoing recitation, the court invites the parties to identify it at oral argument.

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Calendar Line 10
Case Name: *McManis Faulkner, APC v. Melvin Cooper*
Case No.: 23CV415418

This is an action for allegedly unpaid attorney's fees. Plaintiff McManis Faulkner, APC ("Plaintiff") represented defendant Melvin Cooper ("Cooper") in a family court case in Santa Cruz County Superior Court. Plaintiff alleges that Cooper owes over $200,000 for legal services, and it alleges that Cooper concealed an award of attorney's fees that he ultimately obtained in the family court case, after he replaced Plaintiff with other counsel. Plaintiff now brings this motion to compel compliance with a document subpoena to Morgan Tidalgo Sukhodrev & Azzolino LLP ("MTSA"), the law firm that represented Cooper's opponent in the family court case, Carrie Click ("Click"), who is also the mother of Cooper's child. Plaintiff seeks documents relating to any "payments of an award, settlement, or any other recovery" to Cooper in the earlier case.

Neither MTSA nor Click has responded to this motion, although it appears that they received notice of it. Cooper has filed a response, but he merely repeats the same arguments that he made in his motion to quash this very same subpoena. The court rejected those arguments in an order dated November 14, 2023.[3] Indeed, Cooper's opposition does not even acknowledge the court's prior conclusions; it merely rehashes the same arguments as if the court's prior order did not exist. Rather than restate the conclusions in the prior order, the court incorporates it by reference.

As the court previously noted, Family Code section 7643 applies only to records that were actually introduced into the record in family court; it does not apply to any documents—such as documents evidencing payments of attorney's fees by Click to Cooper—that were never filed.

Moreover, to the extent that documents from the family court record are in fact necessary in order to show "payments of an award, settlement, or any other recovery" to Cooper in that case, the court finds good cause for their production here under section 7643, subdivision (a).

The motion is GRANTED.

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[3] Cooper's counsel now claims that he "was in attendance at that hearing but was unable to un-mute in order to be heard." (Opposition at p. 2:23-24, fn. 1.) The court finds this statement to be problematic. First, Cooper's counsel did not provide notice on the eve of the hearing of an intent to appear "in order to be heard," as required by local rule and Rule 3.1308(a)(1) of the California Rules of Court. This rule and requirement is posted at the very top of the court's tentative ruling template, and the court expects counsel who appear in this court to abide by these rules. Second, if counsel still has difficulty with remote hearing technology after more than three and a half years of remote hearings in the California courts, then counsel should consider appearing in person. The undersigned did not hear or see Cooper's counsel at the November 14, 2023 hearing, and the minute order for that hearing reflects no such appearance.

Calendar Line 12
Case Name: *HD Supply Construction Supply, Ltd. v. Saul Robert Flores et al.*
Case No.: 20CV361931

1. INTRODUCTION

This is a motion to set aside a default, originally filed by defendant 95 Hamilton LLC ("95 Hamilton") on August 8, 2023. On November 14, 2023, defendants' counsel attempted to file an "amended motion" on behalf of both 95 Hamilton and defendant Saul Robert Flores ("Flores"), but that filing was rejected by the court clerk's office because a first appearance fee was not submitted on behalf of Flores. Even if Flores or his counsel had submitted such a fee, however, the "amended motion" would still be unauthorized, as there is no legal basis for amending a motion after it has been filed and a hearing has already been set.

Nevertheless, the opposition brief of plaintiff HD Supply Construction Supply, Ltd. ("HD Supply"), which was filed on November 30, 2023, addresses the amended motion on the merits, and the court has also received a courtesy copy of the amended motion. Therefore, the court will consider both the original motion and amended motion. The court ultimately DENIES both.

2. ADDITIONAL PROCEDURAL IRREGULARITIES

The foregoing procedural irregularities are only the beginning. It appears that the clerk's office originally entered a default as to the defendants (95 Hamilton, Flores, and Eagle Home Loans ("Eagle")) on September 22, 2020. The clerk's office entered another default as to Flores on January 6, 2022, but there has still been no default judgment in the *nearly four years* that this case has been pending.

As for this motion, 95 Hamilton (and Flores) purport to bring it under Code of Civil Procedure sections "472, 473, and 473.5" (see August 8, 2023 Notice of Motion at p. 1:23) and/or Code of Civil Procedure sections "438, 472, 473, 473 [sic]" (see November 14, 2023 Amended Notice of Motion at p. 1:22). But most of these code sections have no application here. Section 438 governs motions for judgment on the pleadings, and section 472 governs amendments of pleadings—neither of these procedures have anything to do with the present motion. Similarly, although section 473, subdivision (b), governs motions for relief from default based on "mistake, inadvertence, surprise, or excusable neglect," defendants make no argument based on mistake, inadvertence, surprise, or neglect in this motion. Rather, their motion is based solely on the argument that service of the summons and complaint were improper. As a result, the court will construe this motion as one brought under Code of Civil Procedure section 473.5—*i.e.* "Relief from judgment where summons does not result in actual notice."

Finally, the court notes that in lieu of a reply brief, defendants have filed a "Notice of Intent to Request to Continue Motion for Relief from Default." The basis for the continuance request is the fact that the clerk's office disallowed the filing of the amended motion. But because both HD Supply and the court have received and considered the amended motion (and because defendants never had a right to file such an amendment to begin with), there is no need for or basis for a continuance. The court DENIES the request.

3. DISCUSSION

The court finds that defendants have failed to establish that they are entitled to relief under section 473.5. First, the court is not persuaded that defendants lacked "actual notice" of the summons and complaint. According to HD Supply, after 26 unsuccessful attempts to serve Flores at his home address at 7076 Kindra Hill Dr., San Jose, CA 95120,[4] HD Supply mailed copies of the summons and complaint to that address.[5] In addition, HD Supply also sent copies to Flores's other addresses at 101 S. Santa Cruz Avenue #33192, Los Gatos, CA 95030 (which was a post office box) and 1190 Park Avenue, San Jose, CA 95126, which were the addresses listed with the California Secretary of State for his businesses (Flores Construction and Development, defendant 95 Hamilton, and defendant Eagle). The court therefore finds Flores's vague claim that he "do[es] not recall ever receiving any papers by mail regarding the lawsuit" to be devoid of credibility. (Declaration of Saul Flores, ¶ 4.)

Second, even if defendants could establish an absence of "actual notice," the court would find that that absence was the result of defendants' deliberate "avoidance of service." (Code Civ. Proc., § 473.5, subd. (c).) The first clear indication of defendants' avoidance is the fact that defendant 95 Hamilton's address with the California Secretary of State, including the address for its agent for service of process (Flores) and its alleged principal place of business, is the post office box at "101 S. Santa Cruz Avenue, #33192, Los Gatos, CA 95030."[6] This is improper. The Secretary of State does not allow post office boxes to be used as addresses for registered agents or for principal places of business. Moreover, the fact that this address does not expressly state "P.O. Box" indicates to the court that it was written as "101 S. Santa Cruz Avenue, #33192" in a deliberate effort to disguise its true nature. The second clear indication of defendants' avoidance is the fact that HD Supply made 26 attempts to serve Flores personally, with the process server noting activity within the home on multiple occasions but no answer at the door. (Exhibit 1 to HD Supply's Opposition.)

The motion to set aside default is DENIED.

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[4] Both sides misspell this address in their briefs as "7076 *Kendra* Hill," but it is consistently spelled "7076 *Kindra* Hill Dr." in the process server's affidavits. (Exhibit 1.)

[5] Indeed, this court (Judge Kirwan) ordered that a copy be mailed to that address as part of the order for publication of summons, dated September 29, 2021.

[6] The court takes judicial notice of the Secretary of State filings, submitted as Exhibits A-D to HD Supply's Request for Judicial Notice.