SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

(Dept 16 is now hearing cases that were formerly in Dept 2)

Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 12-21-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

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 prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. 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 and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to 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. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV410259 Motion: Reconsider Special Mtn to Strike	John Doe vs Gelareh Homayounfar et al	Off Calendar
LINE 2	20CV368334 Motion: Strike	Anthony Canciamilla et al vs Rumit Kotak	Withdrawn
LINE 3	22CV404490 Motion: Reconsider	Qian Yang vs Robert Lee	See Tentative Ruling. The Court will prepare the final order.
LINE 4	23CV417103 Motion: Strike	Juan Medina et al vs Sreekanth Thirthala et al	See Tentative Ruling. Plaintiff shall submit the final order.
LINE 5	21CV386240 Motion: Summary Judgment/Adjudication	RAO CHERUKURI vs BALAJI PARIMI et al	See Tentative Ruling. The Court will prepare the final order.
LINE 6	21CV386240 Motion: Seal Records	RAO CHERUKURI vs BALAJI PARIMI et al	See Tentative Ruling. The Court will prepare the final order.
LINE 7	23CV414010 Motion: Summary Judgment/Adjudication	Wells Fargo Bank, N.A vs CHARISSA DURAN	See Tentative Ruling. The Court will prepare the final order.
LINE 8	19CV358724 Motion: Withdraw as attorney	Angela Duran et al vs Rajan Khanna et al	Attorney Chris Roberts shall appear at the hearing with an update for the Court. If Mr. Roberts fails to appear, the motion will be taken off calendar.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 9	19CV358724 Motion: Withdraw as attorney	Angela Duran et al vs Rajan Khanna et al	Attorney Chris Roberts shall appear at the hearing with an update for the Court. If Mr. Roberts fails to appear, the motion will be taken off calendar.
LINE 10	22CV394800 Motion: Withdraw as attorney	Nancy Rosado vs City of San Jose	Attorney Kevin Cowan is ordered to appear. Notice of hearing does not appear proper. If Mr. Cowan fails to appear, the motion will be taken off calendar.
LINE 11	23CV410259 Hearing: Motion Prevailing party's fee	John Doe vs Gelareh Homayounfar et al	Off Calendar.
LINE 12			

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Calendar Line 3
Case Name: *Qian Yang v. Robert Lee*
Case No.: 23-CV-397831

Factual and Procedural Background

This is an underlying action for defamation brought by plaintiff and cross-defendant Qian Yang ("Yang") against defendant and cross-complainant Robert Lee ("Lee").

In 2019, Yang and Lee entered into an extramarital relationship. (First Amended Complaint ["FAC"] at ¶ 1.) Lee met Yang while she was employed as an investment advisor at Shenzhen Dangdai Junsheng Investment Co., Ltd. (Id. at ¶ 4.) Yang's boss had assigned her to obtain travel documentation related to Lee's brother and his mistress. (Ibid.)

Following their meeting, Lee "lured YANG to the United States with the promise of lucrative opportunities at Stanford and in the Silicon Valley investment world." (FAC at ¶ 4.) Lee holds himself out as the senior advisor of the former CEO of Stanford Health and as an investor working at Stanford University. (Id. at ¶¶ 3, 7.)

Throughout their relationship, Lee "habitually sexually abused YANG and used his professional power, wealth, and influence to intimidate her" and eventually began a "public defamation campaign against YANG" after she reported Lee's brother for tax evasion and went public about Lee's misdeeds as a married man. (Id. at ¶¶ 1, 4.)

In February 2022, Lee created a group chat with several of Yang's Stanford associated colleagues. (See FAC at ¶ 5, Ex. B.) In the group chat, Lee stated, among other things, Yang had schizophrenia and committed the crime of extortion. (Id. at ¶¶ 5, 11.) Yang asserts the statements are false and injured her reputation in her profession and community. (Id. at ¶ 11.)

Yang's initial complaint was filed *pro per* on October 13, 2022 and contained three causes of action for fraud, intentional infliction of emotional distress, and defamation.

Thereafter, Yang retained counsel and the FAC was filed on December 6, 2022 alleging a single cause of action for libel per se.

On January 9, 2023, Lee filed a demurrer and motion to strike to the FAC. The hearing on the motions were set for March 14, 2023. Following oral argument, the court filed an order overruling the demurrer in its entirety. The motion to strike was granted and denied in part with 10 days leave to amend. Yang did not file any amended pleading.

On April 3, 2023, Lee filed a judicial council form answer generally denying allegations of the FAC and setting forth a single affirmative defense for failure to state a claim.

At the same time, Lee filed a cross-complaint against Yang alleging causes of action for: (1) extortion; and (2) procuring or offering a false instrument to be filed with this superior court.

On May 1, 2023, Yang filed an anti-SLAPP motion to the cross-complaint. The motion was heard on August 29, 2023. Following oral argument, the court granted the anti-SLAPP motion.

On September 8, 2023, Lee filed the motion presently before the court, a motion for reconsideration of the order granting the anti-SLAPP motion. Lee filed a request for judicial notice in conjunction with the motion. Yang filed written opposition. Lee filed reply papers.

A motion for attorney's fees in connection with the anti-SLAPP motion is scheduled for February 6, 2024.

Trial is set for May 28, 2024.

Motion for Reconsideration

Lee moves for reconsideration of the court's order granting the anti-SLAPP motion to the cross-complaint on the ground of excusable neglect.

Request for Judicial Notice

"Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.)

In support of the motion, Lee requests judicial notice ("RJN") of the following: (1) Restraining Order After Hearing, filed September 22, 2022 in *Lee v. Yang* (22DV000054) by Hon. Charles Adams (Ex. 1); and (2) Ex. 3 from Yang's Request for DVRO filed April 22, 2022 in *Lee v. Yang* (22DV0000054) (Ex. 2).

These exhibits are subject to judicial notice as records of the superior court under Evidence Code section 452, subdivision (d). (See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) There is no opposition to the request. Furthermore, the request is relevant to issues raised in support of the motion for reconsideration. (*Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 [information subject to judicial notice must be relevant to the issue at hand].)

Therefore, the request for judicial notice is GRANTED.

Legal Standard

Typically, motions for reconsideration are considered under Code of Civil Procedure section 1008.[1] But, as is the case here, such motions have also been addressed under section 473, subdivision (b) based on excusable neglect.[2] (*Austin v. Los Angeles Unified School Dist.* (2016) 244 Cal.App.4th 918, 929-930 (*Austin*) [motion for reconsideration treated as motion for relief under section 473, subd. (b)]; see *Sole Energy Co. v. Petrominerals Corp.* (2005) 128

[1] All further statutory references are to the Code of Civil Procedure unless otherwise stated.
[2] Both the moving papers and reply brief refer to section 1008. (See Motion at p. 2:4; Reply at p. 1.) Lee however specifically seeks relief under section 473 for excusable neglect. Thus, the court declines to consider the motion under section 1008.

Cal.App.4th 187, 193 [upholding authority of trial court to construe a motion for reconsideration as a motion for a new trial]; see also *City & County of San Francisco v. Muller* (1960) 177 Cal.App.2d 600, 603 ["The nature of a motion is determined by the nature of the relief sought, not by the label attached to it. The law is not a mere game of words."].)

"The trial court has discretion under section 473(b) on a showing of 'mistake, inadvertence, surprise or excusable neglect' to grant relief from a judgment, dismissal or other order based on its evaluation of the nature of the mistake or error alleged and the justification proffered for the conduct that occurred. 'The general underlying purpose of section 473(b) is to promote the determination of actions on their merits.' [Citations.]" (*Austin, supra,* 244 Cal.App.4th at p. 928.)

"A party seeking relief under section 473(b) must file the motion within a reasonable time but not longer than six months after the judgment or dismissal has been entered. This six-month time limitation is jurisdictional; the court has no power to grant relief under section 473 once the time has lapsed. [Citations.] In addition, the moving party bears the burden of establishing a right to relief. [Citations.] Within the context of section 473(b) neglect is excusable if a reasonably prudent person under similar circumstances might have made the same error. [Citations.]" (*Austin, supra,* 244 Cal.App.4th at pp. 928-929.)

Analysis

"In deciding whether counsel's error is excusable, this court looks to: (1) the nature of the mistake or neglect; and (2) whether counsel was otherwise diligent in investigating and pursuing the claim. [Citations.] In examining the mistake or neglect, the court inquires whether 'a reasonably prudent person under the same or similar circumstances' might have made the same error. [Citations.]" (*Bettencourt v. Los Rios Community College Dist.* (1986) 42 Cal.3d 270, 276.)

"[A]ny neglect of the attorney is imputed to the client, who has the burden on the motion of showing this neglect was excusable." (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 682.) "Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice." (*Ibid*.)

To establish excusable neglect, Lee submits a declaration from his counsel, Charles J. Smith ("Smith"), which states in part:

> "My excusable neglect is based on a personal tragedy that I suffered on Easter Sunday, April 9, 2023, when my 37-year old son died by suicide. Attached as Exhibit A is a true and correct copy of the death certificate. I worked very little in the month of April. In early May, when I was served with this anti-SLAPP motion, I had no one to help with my client's Opposition. I am a sole practitioner. I have no full or part-time associate."
>
> (Smith Decl. at ¶ 7.)

Attorney Smith further states that he dealt with his grief by trying to immerse himself in his work. (Smith Decl. at ¶ 8.) He contends he was overwhelmed with work, seven days a week, during the period of May through August 2023. (Ibid.) Also, due to his involvement in two criminal trials and assigned Public Defender cases, Smith did not devote adequate time to prepare Lee's opposition to the anti-SLAPP motion. (Id. at ¶ 9.) Specifically, he asserts he did not provide adequate work to prepare the simple declarations that would have permitted the court to consider the dispositive WeChat and emails sent by Plaintiff/Cross-Defendant threatening his client and his family. (Ibid.)

In support, Lee cites *Shapiro v. Clark* (2008) 164 Cal.App.4th 1128 (*Shapiro*) where the Sixth Appellate District determined the failure to file a timely response to a complaint was excusable because of a death in the family. The appellate court stated in pertinent part:

> "In such a case scarcely any excuse is needed to justify the lifting of a default. Yet here appellant had a compelling excuse in a personal and family tragedy of the highest order—the sudden death of her son."
>
> (*Id.* at p. 1141.)

And, while not binding on this court, Lee relies also on *Farmers Ins. Group v. District Court* (1973) 507 P.2d 865 where the Colorado Supreme Court declared:

> "Excusable neglect involves a situation where the failure to act results from circumstances which would cause a reasonably careful person to neglect a duty. **It is impossible to describe the myriad situations showing excusable neglect, but in general, most situations involve unforeseen occurrences such as personal tragedy, illness, family death, destruction of files, and other similar situations which would cause a reasonably prudent person to overlook a required deadline date in the performance of some responsibility**. Failure to act due to carelessness and negligence is not excusable neglect. [Citation.] On the other hand, 'excusable neglect' occurs when there has been a failure to take proper steps at the proper time, not in consequence of carelessness, but as the result of some unavoidable hindrance or accident. [Citation.]"
>
> (*Id*. at p. 867, emphasis added.)

As a preliminary matter, this court, like counsel for Yang, expresses its deepest sympathies to attorney Smith and the tragedy involving the death of his son. Given the Smith declaration, there would appear to be some grounds for excusable neglect based on a death in the family and the subsequent attempt by counsel to bury his grief in his law practice.

Nevertheless, for purposes of reconsideration, the court examines the following two issues: (1) whether the mandatory provision of section 473, subdivision (b) is applicable here; and (2) whether the new evidence submitted in the moving papers changes the outcome of this court's ruling on the anti-SLAPP motion.

Mandatory Relief

"Section 473(b) provides for both discretionary and mandatory relief. [Citation.] The mandatory provision provides: '[T]he court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default, or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect.' [Citation] ' "The range of attorney conduct for which relief can be granted in the mandatory provision is broader than that in the discretionary provision, and includes inexcusable neglect." [Citation.] The purposes of the mandatory relief provision is to promote the determination of actions on their merits, to relieve innocent clients of the burden of the attorneys' fault, to impose the burden on the erring attorney, and to avoid the precipitation of additional litigation in the form of malpractice suits.' [Citation.] ' "[I]f the prerequisites for the application of the mandatory provision of [Section 473(b)] exist, the trial court does not have discretion to refuse relief." ' [Citations.]" (*Pagnini v. Union Bank, N.A.* (2018) 28 Cal.App.5th 298, 302-303.)

In contrast to the mandatory portion of section 473, subdivision (b), discretionary relief under the statute is not limited to defaults, default judgments, and dismissals. (*Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419 (*Huh*).) Instead, the discretionary relief provision applies to any judgment, dismissal, order or other proceeding. (*Ibid*.)

" 'In order to qualify for [discretionary] relief under section 473, the moving party must act diligently in seeking relief and must submit affidavits or testimony demonstrating a reasonable cause for the default.' [Citation.] In other words, the court's 'discretion may be exercised only after the party seeking relief has shown that there is a proper ground for relief, and that the party has raised that ground in a procedurally proper manner, within any applicable time limits.' [Citation.]" (*Huh, supra,* 158 Cal.App.4th at p. 1419.)

"A party seeking discretionary relief on the ground of attorney error must demonstrate that the error was excusable, since the attorney's negligence is imputed to the client. [Citation.]" (*Huh, supra,* 158 Cal.App.4th at p. 1419.)

Here, Lee seeks relief based on the mandatory provision of section 473, subdivision (b). (See Motion at p. 2:7-9.) But, as stated above, the mandatory provision applies *only to* defaults, default judgments, and dismissals. (See *Vandermoon v. Sanwong* (2006) 142 Cal.App.4th 315, 320 [as expressly worded, the mandatory provision of section 473, subdivision (b) applies only to relief sought in response to defaults, default judgments or dismissals]; see also *English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 138 ["[T]he mandatory provision of section 473(b) simply does not apply to summary judgments because a summary judgment is neither a 'default,' nor a 'default judgment,' nor a 'dismissal' within the meaning of section 473(b)."].) For example, in *Shapiro*, cited by Lee, the Sixth District applied section 473, subdivision (b) in the context of a motion for relief from default and default judgment. (See *Shapiro, supra,* 164 Cal.App.4th at p. 1136 ["Appellant seeks on this appeal to challenge both the trial court's conditional order on her motion for relief from default, and the underlying default judgment."].) That is not the case here as the challenged order is the granting of an anti-SLAPP motion. While such an order may arguably be subject

to the discretionary portion of section 473, subdivision (b), Lee has not made any alternative request under this provision. Thus, the motion fails on this basis alone.

New Evidence

Even if the court applied the discretionary provision, there is still the issue of whether the new evidence presented in the moving papers would change the court's ruling on the anti-SLAPP motion. (See *Stratton v. First Nat. Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1080 [the purpose of a motion for reconsideration is to persuade the trial court to make a different order or judgment, one not adverse to the party so moving].)

In granting the anti-SLAPP motion, this court determined the cross-complaint arose from protected activity based on Yang's efforts to settle her claims against Lee. (See Order at pp. 5:20-6:4.) Lee argued there was no protected activity as Yang had been charged with criminal conduct, including extortion. (Id. at p. 6:6-8.) Thus, Lee urged the court to adopt the illegality exception to section 425.16 explained in *Flatley v. Mauro* (2006) 39 Cal.4th 299 (*Flatley*). (Id. at p. 6:8-10.)

In *Flatley*, the Supreme Court held that when it is uncontested or otherwise conclusively established that a person acted *illegally* in exercising his or her First Amendment rights, that activity is not a *valid* exercise of rights, and is accordingly not protected under the anti-SLAPP statute. (*Flatley, supra,* 39 Cal.4th at p. 320.) In particular, *Flatley* held that "where a defendant brings a motion to strike under section 425.16 based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of the defendant's exercise of protected speech or petition rights, but either the defendant *concedes*, or the evidence *conclusively establishes*, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." (*Ibid.*, italics added.) "The rationale is that the defendant cannot make a threshold showing that the illegal conduct falls within the purview of the statute and promotes section 425.16's purpose to prevent and deter lawsuits [referred to as SLAPP's] brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (*Id.* at p. 316, internal quotation marks and citations omitted.)

But, the illegality exception to section 425.16 articulated in *Flatley* is narrow. **The party opposing the anti-SLAPP motion must either show that the other party concedes to the illegal activity, or that the alleged illegality is conclusively established by uncontroverted evidence**. (*Flatley, supra,* 39 Cal.4th at p. 320, emphasis added.) Lee had previously failed to satisfy the illegality exception as he did not show that Yang conceded to the illegal activity or proffered uncontroverted evidence establishing Yang engaged in extortion. (See Order at pp. 7:24-8:2.)

In support, Lee submits new evidence attempting to show Yang committed extortion to satisfy the *Flatley* exception and thus demonstrate the cross-complaint does not arise from protected activity. (See Lee Decl; Ben Rose Decl; Mary Ma Decl; RJN.[3]) But, the *Flatley* exception applies when the alleged illegality is conclusively established by *uncontroverted*

[3] Although Yang disputes the evidentiary value of these declarations in opposition, she did not submit any formal objections for ruling by the court.

evidence. That is not the case here as Yang disputes this evidence claiming the cross-complaint arises from alleged settlement negotiations. (See Order at pp. 5:20-6:4.) And, in a case where a factual dispute concerning the illegality of the statements are at issue, the *Flatley* exception is inapplicable. (See *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 965 ["The burden is on the party opposing a section 425.16 motion to strike to show that no factual dispute exists."]; see also *Flatley, supra,* 39 Cal.4th at p. 316 ["If, however, a factual dispute exists about the legitimacy of the defendant's conduct, it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits."].)

Finally, assuming the first prong was satisfied, Lee asserts his newly submitted evidence establishes a probability of success on the merits of his claims in the second prong. (See Motion at p. 8:17-20.) But, as addressed in opposition, Lee fails to offer any legal argument or supporting evidence to overcome the litigation privilege which this court determined to be an absolute defense against claims in the cross-complaint. (See Order at p. 10:8-28; OPP at p. 4:3-15; *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1263, fn. 7 [if alleged conduct is subject to litigation privilege, plaintiff cannot establish probability of prevailing to defeat an anti-SLAPP motion]; see also *Bonni v. St. Joseph Health System* (2022) 83 Cal.App.5th 288, 304 [numerous courts have held that statements relating to settlements also fall within the litigation privilege, including those made during settlement negotiations].)

Therefore, even if the court were to consider any of the newly submitted evidence, it would not alter this court's prior ruling in granting the anti-SLAPP motion.

Court's Inherent Authority

" 'If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order.' [Citation.] Even without a change of law, a trial court may exercise its inherent jurisdiction to reconsider an interim ruling." (*Pinela v. Neiman Marcus Group, Inc.* (2015) 238 Cal.App.4th 227, 237; see *Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156 [procedural requirements for reconsideration does not limit trial court's inherent authority to change its interim rulings any time before judgment].) For example, in *Le Francois v. Goel* (2005) 35 Cal.4th 1094, the California Supreme Court stated:

> "We cannot prevent a party from communicating the view to a court that it should reconsider a prior ruling (although any such communication should never be ex parte). We agree that it should not matter whether the 'judge has an unprovoked flash of understanding in the middle of the night' [citation] or acts in response to a party's suggestion. If a court believes one of its prior interim orders was erroneous, it should able to correct that error no matter how it came to acquire that belief." (*Id*. at p. 1108.)

In ruling on the anti-SLAPP motion, this court determined Lee's cross-complaint arose from protected activity, that the *Flatley* exception was not applicable, and the litigation privilege precluded Lee from establishing success on the merits of his claims. The court does not believe this ruling to be in error and is not inclined to exercise its inherent authority to reconsider its prior ruling.

Consequently, the motion for reconsideration is DENIED. The court will prepare the Order.

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Calendar line 4
Case Name: *Medina et al. v. Thirthala et al.*
Case No.: 23CV417103

Factual Background

Plaintiffs Juan Medina ("Mr. Medina")and Thrudy Medina (collectively, "Plaintiffs") filed their First Amended Complaint ("FAC") against defendants Sreekanth Thirthala ("Thirthala"), Padma Sireesha Garlapati ("Garalapati"),[4] and BT Properties, Inc. ("Defendant" or "BAP").[5][6]

In or around November 2020, Plaintiffs became tenants at 1855 S. Springer Rd., Unit #B, Mountain View, CA ("the Property"). (FAC, ¶ 10.) Mr. Medina is over the age of 80. (*Id.* at ¶ 11.)

On April 8, 2022, Mr. Medina received notice from the senior regional manager of BAP, which stated that the owners of the building intended to relocate to the area and move into Plaintiffs' unit. (FAC, ¶ 12.) The Property owner, and manager, had knowledge that the owner would not actually move into the Plaintiffs' unit and the owners had no legal basis for evicting Plaintiffs. (*Id.* at ¶¶ 13, 14.)

Upon eviction, Plaintiffs did not receive any relocation assistance or a rent waiver, as mandated by Civil Code section 1946.2, subdivision (d). (FAC, ¶ 15.) Plaintiffs resided at the Property for over two years and experienced profound stress and anxiety as a direct result of the mandated relocation, which was further exacerbated by Mr. Medina's age and challenging financial circumstances. (*Id.* at ¶ 16.)

On June 1, 2022, instead of returning Mr. Medina's security deposit, he was presented with a statement indicating an outstanding balance owed to the landlord, accompanied by a threat to report the debt negatively to a credit agency if not paid. (FAC, ¶ 17.)

On August 9, 2023, Plaintiffs filed their FAC, asserting the following causes of action against defendants:

1) Wrongful Eviction;
2) Fraud;
3) Intentional Infliction of Severe Emotional Distress ("IIED");
4) Negligent Infliction of Emotional Distress;
5) Financial Elder Abuse;
6) Negligence; and
7) Security Deposit.

On September 6, 2023, Defendant BAP filed the motion to strike, currently before the Court. Plaintiffs oppose the motion.

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[4] Thirthala and Garlapati are the owners of the Property. (FAC, ¶ 6.)
[5] Moving defendant indicates it was erroneously sued as BT Properties, but is Bay Area Property Management Inc. ("BAP").
[6] BAP managed the Property on behalf of the owners. (FAC, ¶ 7.)

Motion to Strike

Legal Standard

A court may strike out any irrelevant, false, or improper matter asserted in a pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436, subd. (a).) The grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).) In ruling on a motion to strike, a court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (*Clauson v. Superior Ct.* (1998) 67 Cal.App.4th 1253, 1255.) Motions to strike are disfavored and courts considering such motions must presume the allegations contained therein are true and must consider those allegations in context. (*Ibid*.)

Motion to Strike Punitive Damages Allegations

"[T]o state a prima facie claim for punitive damages, a complaint must set forth the elements as stated in the general punitive damage statute, Civil Code section 3294." (*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63.) The statutory elements include allegations defendant has been guilty of oppression, fraud, or malice. (*Ibid*.) Malice is conduct intended by defendant to cause injury to plaintiff or despicable conduct which is carried on by defendant with a willful and conscious disregard of the rights or safety of others. (*Ibid*.; Cal. Civ. Code, § 3294, subd. (c).) Oppression is despicable conduct that subjects plaintiff to cruel and unjust hardship in conscious disregard of plaintiff's rights. (Cal. Civ. Code, § 3294, subd. (c)(2).) Fraud is an intentional misrepresentation, deceit, or concealment of a material fact known to defendant with the intention of depriving plaintiff of property or legal rights or otherwise causing injury." (*Id.* at subd. (c)(3).) Simply pleading the terms malice, oppression or fraud by themselves is insufficient to support a claim for punitive damages; a plaintiff must allege sufficient facts supporting that existence of malice, oppression, or fraud. (*Blegen v. Superior Ct.* (1981) 125 Cal.App.3d 959, 963.)

Defendant moves to strike the following paragraphs from the FAC:

1) **Fraud Cause of Action, Page 6, Paragraph 35:** "The acts of DEFENDANTS, and each of them, were willful, wanton, deliberate, malicious, oppressive and designed to cause PLAINTIFFS economic and personal injury, and therefore justify the awarding of substantial punitive damages."
2) **IIED Cause of Action, Page 7, Paragraph 42:** "The acts of DEFENDANTS, and each of them, were willful, wanton, deliberate, malicious, oppressive and designed to cause PLAINTIFFS economic and personal injury, and therefore justify the awarding of substantial punitive damages."

Fraud

Defendant first argues that Paragraph 35 of Plaintiffs' fraud cause of action should be stricken because Plaintiffs fail to sufficiently allege fraud. (See Motion to Strike, p. 5:6-8, 26-28.)

Any argument regarding a failure to allege sufficient facts is properly raised on demurrer, not by a motion to strike. (See e.g., *Behnke v. State Farm General Ins. Co.* (2011) 196 Cal.App.4th 1443, 1452 ["general demurrer challenges the legal sufficiency of the complaint on the ground it fails to state facts sufficient to constitute a cause of action"]; *Allerton v. King* (1929) 96 Cal.App. 230, 233-234 ["'[a] motion to strike out is not the proper method of attacking a pleading which is merely insufficient to state a cause of action, or defense, or which is defective in form, where the objection may be reached upon demurrer'"]; Code Civ. Proc., § 430.10, subd. (e).) If Defendant contends that punitive damages allegations should be stricken because fraud is insufficiently pled, it must file a demurrer.

Accordingly, the Court declines to strike Paragraph 35.

IIED

As for Defendant's argument regarding Paragraph 42 of the IIED cause of action,[7] Defendant merely recites several paragraphs from the FAC and conclusively states that the "FAC does not offer sufficient facts that would establish an evil motive on Defendant's part." (Motion to Strike, p. 7:8-27.)[8] This argument, without more, is insufficient. (See *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153 [court may disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he or she wants us to adopt]; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 546 [it is not the court's function to serve as backup counsel "and furnish a legal argument" for the party].)

As such, the Court declines to strike Paragraph 42.

Motion to Strike Request for Treble Damages

Plaintiffs seek treble damages under Civil Code section 3345 in connection with their elder abuse claim (pursuant to Welfare & Institutions Code sections 15610.30 and 15657.5).

"Civil Code section 3345, applies 'in actions brought by, on behalf of, or for the benefit of senior citizens . . . to redress unfair or deceptive acts or practices or unfair methods of competition.'" (*Clark v. Superior Ct.* (2010) 50 Cal.4th 605, 610 (*Clark*), quoting Civ. Code, § 3345, subd. (a).) It "allows for a recovery of up to three times the amount of a monetary award whenever 'a trier of fact is authorized by a statute to impose either a fine, or a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter,' if the trier of fact finds any of the factors identified in the statute to exist." (*Clark, supra,* 50 Cal.4th at p. 610, quoting Civ. Code, § 3345, subd. (b).)

Defendant moves to strike the following from the FAC:

> **Prayer for Relief, Page 9, Paragraph F:** "Treble damages under Elder Abuse and Dependent Adult Civil Protection Act."

[7] Defendant refers to both the second and fifth causes of action; however, IIED is Plaintiffs' third cause of action.

[8] Defendant's Reply likewise quotes numerous allegations from the FAC and assertions that they are insufficiently pled.

Defendant argues that a prayer for treble damages cannot be based on Plaintiffs' fifth cause of action for financial elder abuse because the FAC "does not specifically allege the taking of any real or personal property, which is required under [Welfare & Institutions Code] Section 15610.30, nor that they were parties to a lease." (Motion to Strike, p. 8:16-19.) As explained above, the failure to state sufficient facts for financial elder abuse is not sufficient grounds to strike a request for treble damages. (See e.g., *Bezaire v. Fidelity & Deposit Co.* (1970) 12 Cal.App.3d 888, 891 ["general demurrer, not a motion to strike, is the appropriate method of attacking the sufficiency of a pleading"].) Accordingly, the Court declines to strike Prayer for Relief, Paragraph F.

For the foregoing reasons, the motion to strike is DENIED.

Conclusion and Order

The motion to strike is DENIED in its entirety.

The prevailing party shall prepare the final Order in accordance with California Rules of Court, Rule 3.1312.

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Calendar Lines 5-6
Case Name: *Rao Cherukuri v. CloudKnox Security, Inc., et al.*
Case No.: 21CV386240

Factual and Procedural Background

This is an action for fraud and breach of fiduciary duty.

According to the first amended complaint ("FAC"), in January 2015, plaintiff Rao Cherukuri ("Plaintiff") invented a new cloud security technology (the "Technology") to address weaknesses and configuration issues in identity and access management layers across different Cloud platforms. (FAC at ¶ 9.) Continued reliance on the Cloud to store data made the Technology potentially lucrative. (Ibid.)

In April 2015, Plaintiff validated the commercial feasibility of the Technology and began working full time to develop a prototype. (FAC at ¶ 10.) In that regard, Plaintiff desired to create a team to help develop the prototype. (Ibid.)

Plaintiff had previously met defendant Balaji Parimi ("Parimi") in 2000 and the two had prior work experience in the technology sector and startup companies. (FAC at ¶ 11.) By 2015, the two had become close personal friends, and their families socialized together. (Ibid.) Plaintiff approached Parimi with the opportunity to work for him to develop the prototype. (Id. at ¶ 13.) Parimi accepted the opportunity, and in September 2015, he began working part time to assist in creating the prototype for the Technology. (Ibid.) In January 2016, Plaintiff, with the assistance of others, finished the prototype for the Technology. (Id. at ¶ 14.)

In February 2016, Plaintiff formed and registered defendant CloudKnox Security, Inc. ("CloudKnox" or the "Company"). (FAC at ¶ 15.) The parties agreed that Plaintiff would serve as the Chief Executive Officer ("CEO") and own 55% of the Company, defendant Parimi would serve as the Chief Technology Officer ("CTO") and own 45% of the Company. (Id. at ¶ 19.) On June 6, 2016, Plaintiff and Parimi executed a Founders Stock Purchase Agreement ("FSPA"), which allocated 4,950,000 shares to Plaintiff and 4,050,000 shares to Parimi. (Id. at ¶ 20.) The parties allocated 1,000,000 shares for anticipated employee stock options. (Ibid.)

In September 2016, defendant Parimi informed Plaintiff that, through his efforts, the renowned venture capital firm KPCB[9] wanted to invest in the Company. (FAC at ¶ 22.) But, in order to invest in the Company, Parimi told Plaintiff he would need to step down as CEO of the Company, resign from the board of directors, and dilute his majority shareholder interest in the Company. (Id. at ¶ 24.) Parimi told Plaintiff that KPCB would only invest in the Company if Plaintiff agreed to those terms and would only deal with Parimi because KPCB did not see Plaintiff's value, or continued value, to the Company. (Ibid.)

Once defendant Parimi convinced Plaintiff to believe him, he presented Plaintiff with a written agreement whereby Plaintiff resigned his positions as an employee, officer, and director of the Company, and diluted his shareholder interest from 4,950,000 to 500,000, while also requiring Plaintiff to forego other vested and contractual rights in the FSPA. (FAC at ¶ 26.) Pursuant to the "Confidential Separation Agreement and General Release of All Claims"

[9] Also referred to by the parties as "Kleiner" or "Kleiner Perkins."

(the "Separation Agreement"), Parimi told Plaintiff he would get back a significant portion of the shares he relinquished—9.5% of the shares issued to the domain experts (the "Anti-Dilution Protections"). (Id. at ¶ 27.) Parimi also told Plaintiff he was protected through his board observer rights. (Ibid.) The parties executed the Separation Agreement on November 17, 2016. (Id. at ¶ 28.) As a result, Parimi became the CEO and majority shareholder for the Company. (Id. at ¶ 29.)

Even though the Separation Agreement named Plaintiff as a board observer, the Company did not hold any board meetings and/or shareholder meetings between the signing of the Separation Agreement and May 2017. (FAC at ¶ 30.) During that time, defendant Parimi verbally told Plaintiff that everything was going well with KPCB's investment in the Company. (Ibid.) Plaintiff had received no information to suspect any wrongdoing and had no access to information to suspect any wrongdoing. (Ibid.)

In May 2017, defendant Parimi contacted Plaintiff stating that, while the KPCB investment was going well, the Company needed to obtain additional and interim seed funding to carry the Company until KPCB's investment was finalized. (FAC at ¶ 31.) In that regard, Parimi verbally told Plaintiff that, for the Company to get the interim financing, the interested investors insisted Plaintiff relinquish his position as a board observer. (Ibid.) Parimi further stated the interim seed investors were concerned about Plaintiff's Anti-Dilution Protections in the Separation Agreement, and thus Plaintiff needed to relinquish his board observer rights and Anti-Dilution Protections. (Ibid.)

Given his personal and professional relationship with defendant Parimi, Plaintiff reasonably believed his representations concerning the interim seed investor, and that such actions were necessary and in the best interests of the Company. (FAC at ¶ 32.) Thus, Plaintiff relinquished his board observer rights and Anti-Dilution Protections via a June 9, 2017 Letter Agreement ("Letter Agreement"). (Ibid.) As a result of the Letter Agreement, Parimi's shareholder interest in the Company swelled to approximately 89%, as he now held approximately 4,050,000 shares and Plaintiff held only 500,000 shares. (Id. at ¶ 33.)

On January 28, 2020, Plaintiff read an article in which defendant Parimi stated the Company "secure[d] another round of funding." (FAC at ¶ 36.) According to the article, the venture capital firm, Sorenson Ventures, had recently invested in the Company. (Ibid.) The article listed its previous investors but did not mention KPCB, the venture capital firm that Parimi said had agreed to invest in the Company upon Plaintiff's resignation and share dilution. (Ibid.) Also absent from the list was any mention of the alleged interim seed investor that supposedly demanded Plaintiff relinquish his board observer rights and further dilute his share interests. (Ibid.)

On July 21, 2021, Microsoft announced it was acquiring the Company. (FAC at ¶ 37.) Shortly thereafter, Plaintiff, as a minority shareholder, received some information about the proposed sale to Microsoft. (Ibid.) At that time, Plaintiff discovered defendant Parimi's statement about the Company hiring domain experts never occurred. (Ibid.)

After reading the article, Plaintiff made futile demands to the Company, defendant Parimi, Microsoft and KPCB to obtain information regarding the alleged fraudulent statements. (FAC at ¶ 38.) The Company and Parimi (collectively, "Defendants") however stonewalled Plaintiff's access for such information. (Ibid.)

On July 29, 2021, Plaintiff filed a complaint against Defendants alleging causes of action for:

(1) Fraud – Intentional Misrepresentation;
(2) Negligent Misrepresentation;
(3) Breach of Fiduciary Duty;
(4) Breach of Duty of Loyalty;
(5) Unfair Competition;
(6) Unjust Enrichment; and
(7) Declaratory Relief.

On February 17, 2022, Plaintiff filed the operative FAC against Defendants setting forth causes of action for:

(1) Fraud – Intentional Misrepresentation;
(2) Negligent Misrepresentation;
(3) Breach of Fiduciary Duty; and
(4) Breach of Duty of Loyalty.

On March 21, 2022, Defendants separately filed demurrers and motions to strike to the FAC. The court (Hon. Takaichi) overruled the demurrers and denied the motions to strike in their entirety.

On September 1, 2022, Defendants separately filed answers to the FAC asserting a general denial and affirmative defenses.

On August 18, 2023, Defendants filed the motion presently before the court, a motion for summary judgment, or in the alternative, summary adjudication to the FAC. Plaintiff filed written opposition. Defendants filed reply papers and evidentiary objections. Defendant Parimi and Plaintiff filed motions to seal.

Trial is set for June 3, 2024.

Motion for Summary Judgment, or in the Alternative, Summary Adjudication to the FAC

Defendants move for summary judgment, or in the alternative, summary adjudication to each cause of action in the FAC on the following grounds: (1) the undisputed facts establish that Plaintiff did not justifiably rely upon defendant Parimi's statements with respect to the fraud and negligent misrepresentation claims; and (2) all causes of action are barred by the statute of limitations.

Defective Separate Statement

In opposition, Plaintiff contends Defendants did not submit a code-compliant separate statement in support of the motion for summary judgment, or in the alternative, summary adjudication.

The separate statement in support of the motion must separately identify each cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion and state in numerical sequence the undisputed material facts in the first column. (See Cal. Rules of Court, rule 3.1350(d)(1)(A), (B)(3).)

"The requirement of a separate statement from the moving party and a responding statement from the party opposing summary judgment serves two functions: to give the parties notice of the material facts at issue in the motion and to permit the trial court to focus on whether those facts are truly undisputed." (*Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1210.) As one court explained:

> "Separate statements are required not to satisfy a sadistic urge to torment lawyers, but rather to afford due process to opposing parties and to permit trial courts to expeditiously review complex motions for SAI and summary judgment to determine quickly and efficiently whether material facts are disputed."

(*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335.)

Here, as explained in opposition, Defendants' separate statement does not comply with the rules of court as it fails to organize each undisputed material fact in numerical sequence. A failure to comply with the separate statement requirement may, in the court's discretion, constitute a sufficient ground for denying the motion. (See Code Civ. Proc., § 437c, subd. (b)(1).) Despite this deficiency, Defendants have set forth various material facts and evidence in their separate statement in support of points raised in the motion.[10] Plaintiff does not appear to be severely prejudiced as he was able to file an opposing separate statement disputing the material facts and incorporating additional facts. (See *Truong v. Glasser* (2009) 181 Cal.App.4th 102, 118 ["The facts critical to the ruling were adequately identified, and Plaintiffs have not explained how any alleged deficiency in Glasser's separate statement of material facts impaired Plaintiffs' ability to marshal evidence to show that material facts were in dispute as to the proper application of the statute of limitations."].) And, this court has a policy of considering cases on the merits whenever possible. (See *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (*Fox*) [courts have a policy favoring disposition of cases on the merits rather than on procedural grounds]; see also *Slusher v. Durrer* (1977) 69 Cal.App.3d 747, 753 ["The policy of the law favors, whenever possible, a hearing on the merits"].) Thus, the court will not exercise its discretion to deny the motion but instead will overlook this procedural defect and consider the separate statement on the merits.

Plaintiff's Evidentiary Objections

In opposition, Plaintiff asserts various objections challenging the motion in his separate statement.

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[10] In reply, Defendants submitted a corrected separate statement providing numbers to the material facts contained therein. Defendants also submitted a corrected memorandum of points and authorities citing to material facts by number from the separate statement with their reply papers.

Written evidentiary objections must be made in a separate document and must not be re-stated or re-argued in the separate statement. (Cal. Rules of Court, rule 3.1354(b).) Objections must identify the specific item of evidence that is objectionable. (Ibid.) Here, Plaintiff improperly asserts objections in his opposing separate statement that he did not include in a separate document containing his evidentiary objections. Therefore, Plaintiff's evidentiary objections do not comply with California Rules of Court, rule 3.1354(b).

In addition, evidentiary objections must be accompanied by a proposed order that complies with the requirements set forth in California Rules of Court, rule 3.1354(c). The rule requires an objecting party to file two separate documents, objections and a separate proposed order, both in one of the approved formats set forth in the rule. (See Cal. Rules of Court, rule 3.1354(b) and (c).) Here, Plaintiff fails to comply with the rule as he did not submit a separate document setting forth his evidentiary objections or a proposed order as provided in the rules of court.

Accordingly, the court declines to rule on the objections based on the above-described defects. (*Vineyard Spring Estates v. Super. Ct.* (2004) 120 Cal.App.4th 633, 642 [trial courts only have duty to rule on evidentiary objections presented in proper format].)

Defendants' Evidentiary Objections

In reply, Defendants raise objections to evidence included in Plaintiff's opposition to the motion. Defendants object to Plaintiff's declaration in its entirety on the ground that the declaration is self-serving. This objection is not well-taken and thus the objection is OVERRULED. The court declines to consider the remaining objections as they are not material to the outcome of the motion for reasons explained below. (Code Civ. Proc., § 437c, subd. (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review."].)

Legal Standard

Any party may move for summary judgment. (Code Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "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." (Code Civ. Proc., § 437c, subd. (c); *Aguilar, supra,* 25 Cal.4th at p. 843.) The object of the summary judgment procedure is "to cut through the parties' pleadings" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra,* 25 Cal.4th at p. 843.)

The "party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact…" (*Aguilar, supra,* 25 Cal.4th at p. 850; see Evid. Code, § 110.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar, supra,* 25 Cal.4th at p. 851.)

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); see *Aguilar, supra,* 25 Cal.4th at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra,* 25 Cal.4th at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id.* at p. 856.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra,* 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id.* at p. 843.)

Similarly, "[a] party may seek summary adjudication on whether a cause of action, affirmative defense, or punitive damages claim has merit or whether a defendant owed a duty to a plaintiff. A motion for summary adjudication…shall proceed in all procedural respects as a motion for summary judgment." (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 630, internal citations and quotation marks omitted.)

"[S]ummary judgment (or summary adjudication) is a drastic remedy and should be used with caution. [Citation.] Because summary judgment is a drastic procedure all doubts as to the propriety of granting a motion for summary judgment should be resolved in favor of the party opposing the motion. [Citations.]" (*Tully v. World Savings & Loan Assn.* (1997) 56 Cal.App.4th 654, 660; see *Kernan v. Regents of University of California* (2022) 83 Cal.App.5th 675, 684 ["The drastic remedy of summary judgment may not be granted unless reasonable minds can draw only one conclusion from the evidence."].)

Lack of Justifiable Reliance – First and Second Causes of Action [Fraud – Intentional Misrepresentation and Negligent Misrepresentation]

Defendants argue there is no justifiable reliance by Plaintiff on statements made by defendant Parimi to support his claims for intentional and negligent misrepresentation.

Law

"To establish a claim for deceit based on intentional misrepresentation, the plaintiff must prove seven essential elements: (1) the defendant represented to the plaintiff that an important fact was true; (2) that representation was false; (3) the defendant knew that the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff *reasonably relied on the representation*; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in causing that harm to the plaintiff." (*Manderville v. PCG&S Group, Inc.* (2007) 146 Cal.App.4th 1486, 1498.)

Similarly, "[t]he elements of negligent misrepresentation are (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.)

" 'Besides actual reliance, [a] plaintiff must also show "justifiable" reliance, i.e., circumstances were such to make it reasonable for [the] plaintiff to accept [the] defendant's statements without an independent inquiry or investigation.' [Citation.] The reasonableness of the plaintiff's reliance is judged by reference to the plaintiff's knowledge and experience. [Citation.] ' "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact." [Citations.]' [Citations.]" (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864-865.)

That said, California appellate courts have determined the issue of justifiable reliance in connection with motions for summary judgment.

For example, in *Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289 (*Hinesley*), a case cited by Defendants, the appellate court decided the issue of justifiable reliance on a motion for summary judgment. That case involved a fraud claim by a commercial tenant of a shopping center. There, the plaintiff tenant alleged that the landlord's agent made representations to the effect that three chain businesses would be occupying the shopping center by the end of 1998; the plaintiff alleged that he was induced by these representations to enter into the lease in July 1998. (*Id*. at p. 292.) Two of the tenants never leased space in the center; the third did, but not until December 2000. (*Id*. at p. 292, fn. 1.) However, the plaintiff's lease included a provision (paragraph 25.33) that the landlord had made no representations, and the tenant had not relied upon any representations, regarding the identities of any specific tenants that would occupy the shopping center. (*Id*. at p. 297.) The plaintiff, who was represented by counsel in the lease negotiations, testified that he was certain he had read that provision of the lease. (*Id*. at pp. 297-298.) And it was undisputed that the plaintiff never asked the landlord about the contractual status of the three proposed tenants or indicated that his decision to enter into the lease was based upon the proposed tenants' occupancy of the center. (*Id*. at p. 298.)

On appeal, the Third Appellate District concluded that summary judgment of the fraud claim was properly granted because the plaintiff as a matter of law had not justifiably relied on the landlord's alleged representations. (*Hinesley, supra,* 135 Cal.App.4th at pp. 300-303.) The court reasoned: "In the complete absence of any actions taken to question, clarify, or confirm the contractual status of the three cotenants, to notify his attorney of the representations or to modify paragraph 25.33, Hinesley could not justifiably rely on his understanding of the representations and gestures made by [the landlord's agent]." (*Id*. at p. 303.)

Also, in *Guido v. Koopman* (1991) 1 Cal.App.4th 837 (*Guido*), cited by Defendants, the plaintiffs/appellants (the injured party and her spouse), filed a complaint against a horseback riding academy for personal injuries resulting from a horseback riding accident. Before taking lessons at the academy, the plaintiff signed a waiver releasing defendant from liability for any injury to her after the instructor had advised her the waiver was meaningless. (*Id*. at p. 840.)

While taking lessons at the academy, the plaintiff was injured after being thrown from one of the horses. (*Ibid*.) The trial court awarded summary judgment in favor of the horseback riding academy in part because the waiver precluded her from pursuing any claims against the academy. (*Ibid*.)

On appeal, the appellants argued that the release was unenforceable because it was executed in reliance on the academy's misrepresentation that it was unenforceable. (*Guido, supra,* 1 Cal.App.4th at p. 841.) Affirming the trial court decision, the appellate court held that, as a matter of law, the appellant injured party could not have reasonably relied on the statement by the academy that the release was meaningless. (*Id*. at pp. 843-844.) The decision was primarily based on the injured party's deposition testimony where she revealed that she was a practicing attorney that uses releases as part of her practice. (*Id*. at p. 843.) Given the injured party's knowledge and experience as a lawyer working with releases, the appellate court concluded that there was no finding of justifiable reliance.

Pleadings

On summary judgment, "the pleadings frame the issues to be resolved. ' "The purpose of a summary judgment [adjudication] proceeding is to permit a party to show that material factual claims arising from the pleadings need not be tried because they are not in dispute." [Citation.] "The function of the pleadings in a motion for summary judgment [adjudication] is to delimit the scope of the issues: the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings." [Citations.]' [Citations.]" (*Snatchko v. Westfiled LLC* (2010) 187 Cal.App.4th 469, 477 (*Snatchko*).)

Thus, "[t]he burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint*; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493; see *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 182 ["We do not require [defendant] to negate elements of causes of action plaintiffs never pleaded."].)

In addition, "[a] plaintiff may not avoid summary judgment by producing evidence to support claims outside the issues framed by the pleadings." (*Snatchko, supra,* 187 Cal.App.4th at p. 477.) Rather, "[a] plaintiff wishing 'to rely upon unpleaded theories to defeat summary judgment' must move to amend the complaint before the hearing." (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 90.)

Here, Plaintiff's fraud claim alleges in relevant part:

> ¶ 41: In or around September 2016, Defendant misrepresented to Plaintiff: (1) KPCB's interest and intention to invest in the Company; (2) KPCB's alleged condition precedent that it would only invest if Plaintiff exited the Company; and (3) KPCB's alleged requirement that Plaintiff reduce his equity interest in the Company because of the Company's alleged need to hire domain experts who were to receive the shares relinquished by Plaintiff.

¶ 42: Further, in or around May 2017, Defendant defrauded Plaintiff again by stating that the KPCB investment process was going well, but the Company needed to obtain interim seed funding while waiting for KPCB to finalize its investment. Defendant misrepresented to Plaintiff that these interim seed investors required Plaintiff to forfeit his board observer rights and Anti-Dilution Protections.

¶ 45: Plaintiff justifiably relied on Defendant's misrepresentations. For example, given his 15-year close personal friendship with Defendant and their families, coupled with Defendant's position as a Company officer, director and shareholder/majority shareholder, Plaintiff reasonably believed that Defendant had the Company's best interests at heart and was being truthful when he said that the Company needed investment from a renowned from like KPCB to reach its full potential. Further, based on Defendant's statements, Plaintiff reasonably believed that KPCB's investment would be so advantageous to the Company that the increased value in the Company would flow to him as the value of his shares would increase. (FAC at ¶¶ 41-42, 45.)

Plaintiff's second cause of action for negligent misrepresentation provides nearly identical allegations as the fraud claim. (See FAC at ¶¶ 54-55, 58.)

Analysis

"In determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered." (*Guido, supra,* 1 Cal.App.4th at p. 843.) "Only '[if] the conduct of the plaintiff [in relying upon a misrepresentation] in the light of his own intelligence and information was manifestly unreasonable' will he be denied recovery. [Citation.]" (*Winn v. McCulloch Corp.* (1976) 60 Cal.App.3d 663, 671.)

Defendants argue Plaintiff's professional experience and failure to investigate the validity of the alleged misrepresentations demonstrates a lack of justifiable reliance to support his claims for fraud or negligent misrepresentation. In support, Defendants refer to Plaintiff's deposition testimony and material facts in the separate statement which include the following:

MF No. 1: Prior to forming CloudKnox, Plaintiff co-founded at least four technology companies and was CEO of three such companies.

MF No. 2: Prior to forming CloudKnox, Plaintiff's experience included:

- Responsibility for and obtained venture capital funding for three businesses;
- Served as a strategy and/or fundraising advisor for several other companies; and
- Leadership positions (such as CTO) for other companies.

MF No. 3: Prior to forming CloudKnox, Plaintiff had experience with founder separations.

MF No. 16: From November 2016 to May 2017, Plaintiff did not ask Mr. Parimi about the status of an investment by Kleiner Perkins or the hiring of domain experts.

(See Defendants' Separate Statement at Nos. 1-3, 16 at pp. 1, 3.)

But, as alleged by the pleadings, Plaintiff's claim of justifiable reliance is not based simply on his professional experience but also on his 15-year close personal relationship with defendant Parimi. (See FAC at ¶¶ 45, 58.) On this point, Plaintiff submits his declaration in opposition which provides in relevant part:

> I was friends with Balaji Parimi since the early 2000s as part of a group in the Indian diaspora that played volleyball on the weekends and met in person regularly for special events, dinners, and other gatherings. Our families also became close and met regularly and have taken vacations together. Our families remained close after my departure from CloudKnox in 2016, and Balaji was one of my closest friends during this period of approximately fifteen years.

(See Plaintiff's Decl. at ¶ 2; Plaintiff's Additional Facts at Nos. 1-6.)

Such evidence, if credited by the trier of fact, might show that Plaintiff was justified in relying on statements made by defendant Parimi based on their long-term personal friendship. Furthermore, the existence of a confidential relationship between them, would, as suggested in opposition, negate any duty on the part of Plaintiff to investigate the truth of misrepresentations made by Parimi. (See OPP at p. 11; *Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 921 [" 'If the plaintiff and defendant are in a confidential relationship there is no duty of inquiry until the relationship is repudiated. The nature of the relationship is such as to cause the plaintiff to rely on the fiduciary, and awareness of facts which would ordinarily call for investigation does not excite suspicion under these special circumstances.' "]; see also *Huy Fong Foods, Inc. v. Underwood Ranches, LP* (2021) 66 Cal.App.5th 1112, 1122 ["A confidential relationship may be founded on moral, social, domestic, or merely a personal relationship."].) Therefore, the scope of any confidential or personal relationship between Plaintiff and Parimi and whether reliance was justified is better resolved in this instance by the trier of fact, not on this motion for summary judgment and adjudication. (See *Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 383 ["Generally, the existence of a confidential relationship is a question of fact for the jury or the trial court."].)

Statute of Limitations – All Causes of Action

Defendants also contend each cause of action is time-barred by the applicable statute of limitations.

Law

" 'Statute of limitations' is the collective term applied to acts or parts of acts that prescribe periods beyond which a plaintiff may not bring a cause of action. [Citations.]" (*Fox, supra,* 35 Cal.4th at p. 806.) It "strikes a balance among conflicting interests. If it is unfair to bar a plaintiff from recovering on a meritorious claim, it is also unfair to require a defendant to defend against possibly false allegations concerning long-forgotten events, when important evidence may no longer be available." (*Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 797 (*Pooshs*).)

"Critical to applying a statute of limitations is determining the point when the limitations period begins to run. Generally, a plaintiff must file suit within a designated period after the cause of action *accrues*. [Citation.] A cause of action accrues 'when [it] is complete with all of its elements' – those elements being wrongdoing, harm, and causation. [Citation.]" (*Pooshs, supra*, 51 Cal.4th at p. 797.)

"Summary judgment is the appropriate disposition of an action which on its face is barred by a statute of limitations [citation]. However, summary procedure is drastic and should be used with caution and not become a substitute for trial [citation]." (*Sevilla v. Stearns-Roger, Inc.* (1980) 101 Cal.App.3d 608, 610.)

Also, "[w]hile resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112.)

When evaluating whether a claim is time-barred, a court must determine (1) which statute of limitations applies and (2) when the claim accrued. (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316 (*E-Fab*).)

Applicable Limitations

"To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action." (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22.) " '[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code.' [Citation.]" (*Id*. at p. 23.) "What is significant for statute of limitations purposes is the primary interest invaded by defendant's wrongful conduct." (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1207.)

Here, the statute of limitations for the intentional misrepresentation claim is three years. (Code Civ. Proc., § 338, subd. (d); see *Britton v. Girardi* (2015) 235 Cal.App.4th 721, 733 [statute of limitations for fraud is three years].) The negligent misrepresentation cause of action is subject to a two-year statute of limitations. (Code Civ. Proc., § 339; see *E-Fab, supra*, 153 Cal.App.4th at p. 1316 ["a cause of action for negligent misrepresentation typically is subject to a two-year limitations period"].) Finally, as to the breach of fiduciary duty and breach of loyalty causes of action, the statute of limitations is three years as the gravamen of those claims is fraud.[11] (See FAC at ¶¶ 68-69, 80; see also *Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 963 [limitations period for breach of fiduciary duty is three years where the gravamen of the claim is deceit, rather than the catchall four-year limitations period that would otherwise apply].)

[11] Defendants, in a footnote, suggest the claims for breach of fiduciary duty and breach of loyalty are subject to Delaware law but otherwise indicate the three-year limitations period is applicable under California or Delaware law. (See Motion at p. 18, fn. 14.)

In opposition, Plaintiff does not dispute the applicable statute of limitations raised in the moving papers. Thus, the court will address accrual of Plaintiff's claims in connection with these limitations periods.

Accrual

"The general rule for defining the accrual of a cause of action sets the date as the time 'when, under substantive law, the wrongful act is done,' or the wrongful result occurs, and the consequent 'liability arises.' [Citation.] In other words, it sets the date as the time when the cause of action is complete with all of its elements [citations] – the elements being generically referred to by sets of terms such as 'wrongdoing' or 'wrongful conduct,' 'cause' or 'causation,' and 'harm' or 'inquiry' [citations]." (*Nogart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.)

As to accrual, Defendants, relying on the FAC, argue Plaintiff's harm occurred:

(1) On November 17, 2016, when following alleged misstatements by Mr. Parimi, Plaintiff entered into the Separation Agreement, stepping down as CloudKnox CEO and relinquishing a portion of his company equity; and

(2) On June 9, 2017, when following Mr. Parimi's alleged May 2017 statement that a Kleiner investment was "going well" or "underway," Plaintiff entered into the Letter Agreement, relinquishing his board observer and anti-dilution rights.

(See Motion at pp. 12:4-15, 18:2-6; FAC at ¶¶ 26-29, 31-32, 41-42, 46-47, 54-55, 59, 68-71, 80-81.)

As the initial complaint was not filed until July 29, 2021, Defendants assert the action is untimely.

In the case of fraud, " '[t]he cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.' [Citation.] This discovery element has been interpreted to mean 'the discovery by the aggrieved party of the fraud or facts that would lead a reasonably prudent person to suspect fraud. [Citation.]' [Citation.]" (*Doe v. Roman Catholic Bishop of Sacramento* (2010) 189 Cal.App.4th 1423, 1430.)

In opposition, Plaintiff submits his declaration stating he did not make discovery of the fraud until January 2020:

> In or about January of 2020, I came across an article titled "CloudKnox secures 12M in funding." While I was excited about the headline, I noticed the names of the investors did not include Kleiner Perkins. I knew that Dell Technologies and Foundation Capital were seed investors in 2017 but did not see Kleiner Perkins listed as an investor. I did note that the article did not list all previous investors in CloudKnox, so I was not one hundred percent sure that Kleiner Perkins had not invested. **But reading this article is the first time that I had any suspicion that Kleiner Perkins had not invested in CloudKnox, and that it was possible Balaji had not been truthful with me concerning his conversations with Kleiner Perkins**.

(See Plaintiff's Decl. at ¶ 41, emphasis added; Plaintiff's Additional Fact at No. 81; FAC at ¶¶ 35-39.)

Such evidence, if credited by the trier of fact, might show that Plaintiff did not make discovery of the fraud until January 2020 and thus his subsequent filing of this action in July 2021 would be considered timely. Defendants take issue with this argument claiming Plaintiff could have made discovery sooner and simply failed to exercise any diligence. (See Motion at pp. 19-20; Reply at pp. 9-10.) Even so, Defendants do not dispute the allegation in paragraph 35 of the FAC which provides:

> From approximately November 17, 2016 to January 2020, the Company held no board or shareholder meetings, sent no financial records to Plaintiff, **and provided Plaintiff with no information that would reasonably lead him to suspect that his trusted friend and the Company's CEO, Chairman of the Board and majority shareholder had lied to and deceived him**. In fact, during that time, Defendant [Parimi] repeatedly told Plaintiff that all was well with the business, and the investors were pleased with the Technology. (FAC at ¶ 35, emphasis added.)

This allegation, un-challenged by the motion, would suggest Plaintiff had no reason to suspect to any fraud by defendant Parimi until January 2020. Finally, as pointed out in opposition, courts have recognized delayed accrual in situations involving confidential and fiduciary relationships as is the case here. (See OPP at p. 16:17-28; *Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1424 ["Delayed accrual of a cause of action is viewed as particularly appropriate where the relationship between the parties is one of special trust such as that involving a fiduciary, confidential or privileged relationship."]; *Prudential Home Mortgage Co. v. Super. Ct.* (1998) 66 Cal.App.4th 1236, 1246 [rule of delayed discovery generally applicable to confidential or fiduciary relationships]; see also *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 855 ["In effect, the same degree of diligence is not required where a fiduciary relationship exists between the parties at the time the alleged acts of negligence occur."].)

Based on the foregoing, the court cannot resolve the statute of limitations issue, as a matter of law, on this motion for summary judgment and summary adjudication.

Therefore, the motion for summary judgment, and in the alternative, summary adjudication to the FAC is DENIED. As the motion is denied, the court declines to consider Plaintiff's request to continue the motion to conduct discovery.

Defendant Parimi's Motion to Seal

Defendant Parimi moves to seal certain non-public confidential and private financial information included in Plaintiff's opposition to the motion for summary judgment, or in the alternative, summary adjudication.

Legal Standard

A court has the authority to 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 sealing is narrowly tailored; and
(5) No less restrictive means exist to achieve the overriding interest.

(Cal. Rules of Court, Rule 2.550(d).)

The California Rules of Court do not define what constitutes an "overriding interest." Instead, this has been left to case law. Different "[c]ourts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute overriding interests." (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 298, fn.3 (*In re Providian Credit Card Cases*) (quoting Judicial Council advisory committee comment to [former] Rule 243.1) [affirming lower court order unsealing certain records over defendants' objection that the materials contained proprietary trade secrets]; see also *NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct.* (1999) 20 Cal.4th 1178, 1222, fn.46 [overriding interests found in various cases include: protection of minor victims of sex crimes from further trauma and embarrassment, privacy interests of a prospective juror during individual voir dire, protection of witnesses from embarrassment or intimidation so extreme that it would traumatize them or render them unable to testify, protection of trade secrets, protection of information within the attorney-client privilege, and enforcement of binding contractual obligations not to disclose, safeguarding national security, ensuring the anonymity of juvenile offenders in juvenile court, ensuring the fair administration of justice, and preservation of confidential investigative information].)

A declaration supporting a motion to seal should be specific, not conclusory, as to the facts supporting the overriding interest. If the court finds that the supporting declarations are conclusory or otherwise unpersuasive, it may conclude that the moving party has failed to demonstrate an overriding interest that overcomes the right of public access. (*In re Providian Credit Card Cases*, *supra*, 96 Cal.App.4th at pp. 301, 305.)

Further, where some material within a document warrants sealing but other material does not, the document should be edited or redacted if possible, to accommodate the moving party's overriding interest and the strong presumption in favor of public access. (Cal. Rules of Court, Rule 2.550(e)(1)(B); see *In re Providian Credit Card Cases*, *supra*, 96 Cal.App.4th at p. 309.) In such a case, the moving party should take a line-by-line approach to the information in the document, rather than framing the issue to the court on an all-or-nothing basis. (*In re Providian Credit Card Cases*, *supra*, 96 Cal.App.4th at p. 309.)

Analysis

Defendant Parimi moves to seal the following portions of Plaintiff's opposition to the motion for summary judgment, or in the alternative, summary adjudication:

- Plaintiff's opposition memorandum at page 6:28 (amount of proceeds);
- Plaintiff's opposing separate statement at pages 146:21-22, 178:21-22, 210:21-22, 242:21-22, 274:21-22, 306:21-22 (amount of proceeds);

- Compendium of Evidence in support of Plaintiff's opposition: Estrin Declaration at Exhibit 30 (entirety).

Defendant Parimi also moves to seal Defendants' response to Plaintiff's separate statement of facts at pages 149:17, 184:27, 220:17, 255:27, 291:17, and 326:27 (amount of proceeds).

Defendant Parimi seeks to keep this information under seal as it contains confidential and non-public financial information relating to the specific amount of the proceeds that he and his family trust received as a result of Microsoft's 2021 acquisition of CloudKnox. (See *Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 506 [trial court should have ordered financial information sealed because it was irrelevant to plaintiffs' summary judgment opposition].) The motion is supported by Parimi's Declaration which establishes the confidential nature of the materials at issue and the harm that would result from their disclosure.[12] The court finds the factors established by California Rules of Court, rule 2.550(d) are satisfied as to these materials. Furthermore, no opposition has been filed.

Accordingly, Parimi's motion to seal is GRANTED.

Plaintiff's Motion to Seal

Plaintiff moves to seal pages 44-46 of his deposition transcript filed in Defendants' motion for summary judgment, or in the alternative, summary adjudication and attached as Exhibit A to the Declaration of Jaime Bartlett. Plaintiff contends those pages mention by name two individuals who departed from the company, Perspica, Inc., as well as circumstances surrounding their departures. Plaintiff asserts that sealing of these pages is necessary to protect sensitive and potentially embarrassing information concerning the private employment information of two non-party individuals. (See *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1024 ["While commercial harm or embarrassment of a party does not alone justify sealing the entire record of a case (citation), it is appropriate to seal certain records when those particular records contain highly sensitive and potentially embarrassing personal information about individuals."].)

As a preliminary matter, the court notes no opposition has been filed. Regardless, the court examines the motion to seal to determine whether the application is in compliance with the rules of court. Here, Plaintiff submits his declaration in support of the motion to seal. The declaration however is conclusory and fails to allege facts in support of an overriding interest. The court has also reviewed pages 44-46 of the deposition transcript and finds the testimony does not appear to be highly sensitive or potentially embarrassing. And, even if it were so, the request is not narrowly tailored as the latter portion of page 46 (beginning at line 17) is not related to the employment status of the two non-party individuals. Thus, Plaintiff's motion to seal does not satisfy the requirements set forth in California Rules of Court, rule 2.550(d).

Consequently, Plaintiff's motion to seal is DENIED.

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[12] Parimi filed two separate declarations which appear to be identical on December 11 and 14, 2023.

Disposition

The motion for summary judgment, or in the alternative, summary adjudication to the FAC is DENIED.

Defendant Parimi's motion to seal is GRANTED.

Plaintiff's motion to seal is DENIED.

The court will prepare the Order.

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Calendar Line 7
Case Name: *Wells Fargo Bank, N.A. v. Duran*
Case No.: 23CV414010

This is a collection action for credit card debt. According to the allegations of the complaint, defendant Charissa D. Duran ("Defendant") entered into a credit card agreement with plaintiff Wells Fargo Bank, N.A. ("Plaintiff") on April 19, 2009, and Defendant breached the contract by not paying $10,031.21 owed on the credit card. (See complaint, ¶¶ BC-1-4.)

On April 3, 2023, Plaintiff filed a complaint against Defendant, asserting causes of action for breach of contract and common counts.

Plaintiff moves for summary judgment.

I. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff's burden on summary adjudication

The moving party bears the initial burden of production to make a prima facie showing that there are no triable issues of material fact—one sufficient to support the position of the party in question that no more is called for. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.) Plaintiffs moving for summary judgment bear the burden of persuasion that each element of the cause of action in question has been proved, entitling the party to judgment. (Code Civ. Proc. § 437c, subd.(p)(1).) Plaintiffs, who bear the burden of proof at trial by preponderance of evidence, therefore "must present evidence that would require a reasonable trier of fact to find the underlying material fact more likely than not—otherwise he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Aguilar*, *supra*, 25 Cal.4th at p.851.) "'Once the plaintiff... has met that burden, the burden shifts to the defendant... to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto.'" (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1195 (Sixth District case), quoting Code Civ. Proc. § 437c, subd. (p)(1).)

Plaintiff Wells Fargo meets its initial burden

"A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 228 (Sixth District case).) "A common count… is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness." (*Professional Collection Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 690.) "A 'book account' is 'a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith." (*Id*. at pp.690-691.) "A book account is 'open' where a balance remains due on the account." (*Id*. at p.691.) "An account stated is 'an agreement, based on prior transactions between the parties, that the items of an account are true and that the balance struck is due and owing.'" (*Id*., citing *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 968.)

In support of its motion, Wells Fargo presents the declaration of Sierra S. Hickman, Loan Workout Specialist, responsible for monitoring the legal process for credit card accounts, investigation and resolution of customer disputes, research and review of Wells Fargo's business records, including researching specific account issues such as an account being opened, disputes with respects to the account, charges made and payments received and account delinquencies. (See Hickman decl. in support of Pl.'s motion for summary judgment ("Hickman decl."), ¶¶ 1-4.) Plaintiff presents documents prepared in the ordinary course of Wells Fargo's business[13] that demonstrates that Defendant applied for and was issued a Wells Fargo credit card account with the customer agreement for the credit card ("Customer Agreement"), which provided that:

> 1) Agreement. This contract for your credit card account ("Account") includes the Credit Card Agreement ("Agreement"), and the Important Terms of Your Credit Card Account and future amendments to this Agreement. This Agreement is a contract between Wells Fargo Bank, N.A. and each Account holder. You and any joint Account holder accept the terms of this Agreement by using or confirming your Account….

(Hickman decl., ¶¶ 5-11, exh. 1, § 1.)

Defendant used the credit card, thereby accepting the terms of the Customer Agreement and the account was opened with Wells Fargo on April 19, 2009. (*Id*. at ¶¶ 12-13.) Defendant charged goods and services to the account with Wells Fargo, or authorized others to charge goods and services to the account, was issued monthly billing statements for those charges/purchases, and Defendant made payments of the principal and interest pursuant to the agreement through August 16, 2022. (*Id*. at ¶¶ 14-17, 21, exh. 2.) No further payments were made on the account after August 16, 2022, leaving a balance of $10,031.21 on the subject account. (*Id*. at ¶ 22.) Pursuant to the Fair Credit Billing Act, California's Song-Beverly Credit Card Act of 1971 and the Billing Rights Summary included with every monthly statement provided to Defendant, Defendant had 60 days to notify Wells Fargo of any disputes on the activity of the account, and there is no record of any unresolved disputes on the account. (*Id*. at ¶¶ 18-20.) As a result, pursuant to the terms of the Customer Agreement, Defendant owes Wells Fargo the balance of $10,031.21. (*Id*. at ¶ 23.) Wells Fargo also presents Defendant's responses to requests for admissions, in which Defendant admits that she, or those authorized by her, were the only people who used the Wells Fargo credit card, and never disputed the accuracy of any of the monthly billing statements. (See Mulhorn decl. in support of Pl.'s motion for summary judgment, exhs. 1-2, numbers ("RFAs") 3, 5.)

Wells Fargo meets its initial burden to demonstrate that it is entitled to judgment on its complaint. Accordingly, the burden shifts to Defendant to show that a triable issue of one or more material facts exists. (See Code Civ. Proc. § 437c, subd. (p)(1).)

In opposition, Defendant fails to demonstrate the existence of a triable issue of material fact.

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[13] Defendant's claim that Wells Fargo failed to establish the records are admissible as business records is not well taken. See Hickman decl., ¶¶ 5-6, 15-17.

In opposition, Defendant fails to provide any opposing separate statement and thus does not indicate any dispute to any particular material fact. Defendant presents her own declaration, which states that she: does not currently possess, and believes that at no time did she ever execute or receive a copy of the alleged agreement in the matter, and does not believe that she received any Federal Truth in Lending (TILA) disclosures setting forth the finance charges, interest rates, annual percentage of interest, for either the initial alleged agreement period for the subject credit card or any subsequent modifications. (See Def.'s decl., in opposition to Pl.'s motion for summary judgment, ¶¶ 3-4.)

As stated above, Defendant did not dispute in a separate statement in UMF 2 that Wells Fargo sent the Customer Agreement along with the credit card. This alone is an independent basis for granting the motion. (See Code Civ. Proc. § 437c, subd. (b)(3) (stating that "[t]he opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating if the opposing party agrees or disagrees that those facts are undisputed… [e]ach material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence… [f]ailure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion"); see also *Buehler v. Alpha Beta Co.* (1990) 224 Cal.App.3d 729, 734-735 (affirming granting summary judgment where party failed to file opposing separate statement); see also *Kaplan v. LaBarbera* (1997) 58 Cal.App.4th 175, 179 (stating that "[t]he failure of the opposing party to comply with this requirement may in the court's discretion constitute sufficient grounds for granting the motion… the record does not disclose a separate statement submitted by Kaplan… [t]hat alone is a sufficient ground to uphold the trial court's grant of the motion").)

Further, the fact that Defendant does not *currently possess* a copy of the alleged agreement fails to demonstrate a triable issue of material fact as to the *existence* of an agreement or an account. As to Defendant's belief that she did not execute a copy of the agreement, this is contradicted by her admission that she used the credit card; the agreement expressly states that Defendant's use constitutes acceptance of the terms of the agreement. (See *Professional Collection Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 693 (stating that the defendant's argument that the terms of the cardmember agreement are unenforceable because Lujan did not sign the cardmember agreement is without merit because "it is the *use* of the credit card, and not the issuance, that creates an enforceable contract"); see also *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21 (stating that where the party provides an admission, statement in a counter affidavit to the contrary does not demonstrate "substantial evidence of the existence of a triable issue of fact").) Moreover, "subjective beliefs… do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations." (*King v. United Parcel Service, Inc*. (2007) 152 Cal.App.4th 426, 433; see also *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1159 (stating same); see also *Talley v. County of Fresno* (2020) 51 Cal.App.5th 1060, 1090 (stating that "Plaintiff's declaration regarding his subjective belief… is not sufficient to raise a triable issue of fact… [t]his is so regardless that declarations opposing summary judgment are to be liberally construed"); see also *Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1124 (stating that "[d]eclarations based on information and belief are insufficient to satisfy the burden of either the moving or opposing party on a motion for summary judgment or adjudication"); see also *Star Motor Imports, Inc. v. Super. Ct. (Shake)* (1979) 88 Cal.App.3d 201, 204 (stating that "an affidavit based on 'information and belief' is hearsay and must be disregarded… and it is

'unavailing for any purpose' whatsoever"); see also *Baustert v. Super. Ct. (People)* (2005) 129 Cal.App.4th 1269, 1275, fn. 5 (stating that "[t]he declaration was made on information and belief and therefore did not provide competent evidence of the facts stated therein").) Thus, Defendant's statement in paragraph 3 of her declaration does not demonstrate the existence of a triable issue of material fact.

Defendant lastly states in paragraph 4 that she does not have and believes she never received any Federal Truth in Lending disclosures setting forth the finance charges, interest rates, or annual percentage of interest. (See Def.'s decl., ¶ 4.) However, this plainly ignores the monthly statements presented by Wells Fargo in support of its motion, which statements Defendant admitted to receiving. These monthly statements set forth the finance charges, interest rates and the annual percentage of interest. (See Hickman decl., exh. 2; see also Mulhorn decl., exh. 1, exh. 1 (monthly statement).) 12 CFR Part 226 Appendix E states that "[c]reditors may comply by placing the required disclosures on the invoice or statement sent to the consumer for each transaction." (12 C.F.R. Part 226, Appen. E, ¶ 4.) Neither Defendant's declaration nor her opposition indicates how these disclosures in the monthly statements do not comply with the Truth in Lending Act. (See *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162 (stating that the party "opposing a motion for summary judgment … must file opposition to the motion, with affidavits setting forth specific facts demonstrating that a triable issue of material fact exists as to the cause of action").) Defendant's statement is therefore without any supporting evidentiary facts and is merely a bald conclusion that is insufficient to demonstrate the existence of a triable issue of material fact. (See *Fuller v. Goodyear Tire & Rubber Co*. (1970) 7 Cal.App.3d 690, 693 (stating that "affidavits or declarations which set forth only conclusions, opinions or ultimate facts are insufficient"); see also *Taylor v. Financial Casualty & Surety, Inc*. (2021) 67 Cal.App.5th 966, 994 (stating that "[a]ffidavits must cite evidentiary facts, not legal conclusions or ultimate facts"); see also *Zuckerman v. Pac. Sav. Bank* (1986) 187 Cal.App.3d 1394, 1400 (stating that "[t]he affidavits must cite evidentiary facts, not legal conclusions or 'ultimate' facts"); see also *Ahrens v. Super. Ct. (Pacific Gas & Electric Co.)* (1988) 197 Cal.App.3d 1134, 1141 (stating that "[m]ere conclusions of law or fact are insufficient to satisfy the evidentiary requirements of the summary judgment statute").)

As Defendant fails to meet her burden to demonstrate the existence of a triable issue of material fact, Wells Fargo's motion for summary judgment is GRANTED.

The Court shall prepare the Order.

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