SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 3
Honorable William J. Monahan, Presiding
Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: (408) 882-2130

DATE: 6/13/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (6/12/2024) you must notify the:

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

TO APPEAR AT THE HEARING: The Court prefers in-person or Teams 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 3**.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

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

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

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

LINE #	CASE #	CASE TITLE	RULING
LINE 1	23CV426813	ALLEN MOYER vs SELECT PORTFOLIO SERVICING, INC.	Hearing: Demurrer to Plaintiff's First Amended Complaint by Defendant Select Portfolio Servicing, Inc. Ctrl Click (or scroll down) on Lines 1-2 for tentative ruling. The court will prepare the order.
LINE 2	23CV426813	ALLEN MOYER vs SELECT PORTFOLIO SERVICING, INC.	Motion: Strike Portions of Plaintiff's First Amended Complaint by Defendant Select Portfolio Servicing, Inc Ctrl Click (or scroll down) on Lines 1-2 for tentative ruling. The court will prepare the order.

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LINE 3	24CV433109	In RE: Quality Loan Service Corp. vs 282 Bangor Avenue, San Jose, CA 95123	Motion: Strike verified Claim to Surplus funds and accompanying documents filed by Claimant Larry Fernandez **APPEAR.** **[Note: There is another motion in this case on Line 9.]**
LINE 4	22CV405977	Sun Communications, Inc. vs PMG Builders, Inc. et al	Motion: Withdraw as attorney as attorney Shea & McIntyre, APC c/o Marc L. Shea to Plaintiff/Cross Defendant Sun Communications, Inc. Unopposed and GRANTED. Moving attorney to submit order.
LINE 5	23CV418527	POLYXENE G. KOKINOS, M.D., A.P.C. vs Bradley Hill, MD et al	Motion: Reconsider April 12, 2024, Order and Judgment by Petitioner Polyxene Kokinos, MD, A.P.C. On June 11, 2024, Petitioner Polyxene G. Kokinos, M.D., A.P.C. ("Appellant") filed an appeal from the Judgment entered April 12, 2024. (See Notice of Filing Notice of Appeal filed 6/12/2024.) This court lacks subject matter jurisdiction to continue to entertain the Appellant's reconsideration motion, as of the time that the Appellant filed this appeal, because the motion sought to vacate and modify the April 12, 2024, judgment or order being appealed. (See Code. Civ. Proc. § 916(a): *Jack v. Ring LLC* (2023) 91 Cal.App.5th 1186, 1211.) The court will prepare the order.
LINE 6	23CV427937	Juan Cabrera vs FORD MOTOR COMPANY, a Delaware Corporation et al	Hearing: Other: motion for relief from Waiver of Objections by Defendant Ford Motor Company, a Delaware Corporation **OFF CALENDAR**. Notice of Withdrawal filed by moving party.
LINE 7	23CV427937	Juan Cabrera vs FORD MOTOR COMPANY, a Delaware Corporation et al	Hearing: Other CTSCH Id: 1887. Confirmation: 1ECNTYFZ. Scheduled online for Defendant FORD MOTOR COMPANY, a Delaware Corporation **OFF CALENDAR**. Notice of Withdrawal filed by moving party.

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DATE: 6/13/2024 TIME: 9:00 A.M.

LINE 8	24CV431483	Julie Hilty vs OAKMONT SENIOR LIVING OF SILVER CREEK OPCO LLC et al	Hearing: Other and to Civil Court Proceeding by Defendant Oakmont Senior Living of Silver Creek OPCP LLC and Oakmont Management Group, LLC **APPEAR.**
LINE 9	24CV433109	In RE: Quality Loan Service Corp. vs 282 Bangor Avenue, San Jose, CA 95123	Motion: Order Motion to release deposit funds to the claimant by Claimant Larry Fernandez **APPEAR.** **[Note: There is another motion in this case on Line 3.]**
LINE 10	ADD ON 21CV391490	Gregory Steshenko vs Patrick Ahrens et al	Motion: Other Vexatious Litigant Ctrl Click (or scroll down) on Line 10 for tentative ruling. The court will prepare the order.
LINE 11	ADD ON 23CV425157	Patrick Nugent vs Ksai Liang, et al.	Motion: Other. Amended motion for specific performance by plaintiff Patrick Nugent (in pro per) [Continued from 5/30/2023. (See 5/30/2024 minute order.)] Ctrl Click or scroll down on Line 11 for tentative ruling. The court will prepare the order.
LINE 12			

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Calendar Lines 1-2
Case Name: *Allen D. Moyer v. Select Portfolio Servicing, Inc.*
Case No.: 23-CV-426813

Demurrer and Motion to Strike to the First Amended Complaint by Defendant Select Portfolio, Inc.

Factual and Procedural Background

This is a wrongful foreclosure action brought by plaintiff Allen D. Moyer ("Plaintiff") against defendant Select Portfolio Servicing, Inc. ("SPS").

According to the first amended complaint ("FAC"), Plaintiff is the owner of real property located at 12300 Highland Estates in San Martin, California ("San Martin Property"). (FAC at ¶ 12.) To purchase the property, Plaintiff obtained a first position mortgage against the property and concurrently executed a Deed of Trust as security for the note. (Id. at ¶ 13.) Defendant SPS is the current servicer of the first lien mortgage and mortgage servicer of the loan. (Ibid.)

In December 2021, Plaintiff purchased a second home located at 4535 Alta Tupelo Drive in Calabasas, California ("Calabasas Property"). (FAC at ¶ 14.) Plaintiff splits his time evenly between the two properties. (Ibid.)

Due to the Covid-19 pandemic, Plaintiff experienced a decrease in his personal income and thus, by late 2022, he was unable to sustain the mortgage payment on the property while also keeping up with his other financial obligations. (FAC at ¶¶ 17-18.) As a result, Plaintiff fell behind on his mortgage payments. (Id. at ¶ 18.)

In late 2022 or early 2023, Plaintiff informed SPS of his financial hardship and requested a foreclosure prevention alternative, such as deferment, Covid forbearance, or loan modification. (FAC at ¶ 19.) Thereafter, Plaintiff's loan was assigned to Yvonne and he told her he wanted to apply for a foreclosure prevention alternative and asked her about the application process. (Id. at ¶¶ 20-21.)

Plaintiff did apply for a foreclosure prevention alternative, but in April 2023, Plaintiff was denied for a workout option based on his income and the delinquency of the account. (FAC at ¶ 22.) Pursuant to the denial letter, SPS calculated Plaintiff's gross income to be $52,390.54. (Ibid.) The denial letter did not indicate whether Plaintiff was considered for a Covid forbearance plan. (Id. at ¶ 23.)

By October 2023, Plaintiff's income had significantly increased to approximately $70,000 per month. (FAC at ¶ 24.) In addition, Plaintiff's company settled a lawsuit and thus he would see the proceeds of that settlement in the coming months. (Ibid.) Therefore, Plaintiff experienced a material change in his financial circumstances. (Id. at ¶ 25.)

On November 29, 2023, Plaintiff contacted SPS to apply for a foreclosure prevention alternative and spoke with his assigned customer service manager, Yvonne. (FAC at ¶ 26.) Yvonne however told Plaintiff that SPS would not review him for any foreclosure prevention alternative and that his property was going into foreclosure. (Id. at ¶ 27.) Plaintiff specifically asked about applying for a foreclosure prevention alternative, such as forbearance or loan

modification, but Yvonne told Plaintiff he could not do so; his only option was to pay the past due balance or lose his property to foreclosure. (Ibid.) The foreclosure sale was scheduled for January 17, 2024. (Id. at ¶ 28.)

On December 1, 2023, Plaintiff filed a complaint against defendant SPS alleging causes of action for: (1) Violation of Civil Code, § 2923.7; (2) Violation of Civil Code, § 3273.10; and (3) Unfair Business Practices.

On January 2, 2024, defendant SPS filed a demurrer and motion to strike to the complaint. The hearing was scheduled for February 29, 2024. Plaintiff did not file opposition to the motions. Following the hearing, this court (Hon. Monahan) issued an order sustaining the demurrer with 20 days leave to amend while the motion to strike was rendered moot.

On March 20, 2024, Plaintiff filed the operative FAC against defendant SPS setting forth causes of action for: (1) Violation of Civil Code, § 2923.7; (2) Violation of Civil Code, § 2924.9; and (3) Unfair Business Practices.

Currently before the court is a demurrer and motion to strike portions of the FAC by defendant SPS. Plaintiff filed written oppositions. Both sides filed requests for judicial notice.

Demurrer to the FAC

Defendant SPS argues each cause of action in the FAC is subject to demurrer for failure to state a valid claim. (Code Civ. Proc., § 430.10, subd. (e).)

Request for Judicial Notice - SPS

"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.)

Here, defendant SPS requests judicial notice of the following:

(1) Deed of Trust recorded on June 15, 2021 in the Santa Clara County Recorder's Office as Document Number 24996864 (Ex. 1);
(2) Notice of Default recorded on October 12, 2023 in the Santa Clara County Recorder's Office as Document Number 25544216 (Ex. 2);
(3) Complaint filed on November 28, 2023 in *Allen Dwight Moyer v. Select Portfolio Servicing, Inc.* in Los Angeles County (case no. 23SMCV05558) (Ex. 3).

Exhibits 1-2 are subject to judicial notice as real property documents recorded in Santa Clara County. (See Evid. Code, § 452, subd. (h); see also *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-265, disapproved on other grounds in *Yvanova v. New Century Morg. Corp.* (2016) 62 Cal.4th 919 [court may take judicial notice of the existence and recordation of real property records]; *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 803 ["A court may take judicial notice of a recorded deed."].)

In opposition, Plaintiff objects to the court taking judicial notice of the *truth of allegations* contained in the complaint filed in Los Angeles County. (See OPP at pp. 5:21-6:9; see also *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564 ["A court may only take judicial notice of the *existence* of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments."].) The court finds the objection to be well-taken and thus declines to take judicial notice of Exhibit 3.

Accordingly, the request for judicial notice is GRANTED as to Exhibits 1-2 and DENIED as to Exhibit 3.

Request for Judicial Notice - Plaintiff

In opposition, Plaintiff requests judicial notice of a trial court order ruling on a demurrer and motion to strike from Los Angeles County. (See Request for Judicial Notice at Ex. 1.) The court however declines the request as the trial court order is not a proper subject for judicial notice. (See *Crab Addison, Inc. v. Super. Ct.* (2008) 169 Cal.App.4th 958, 963, fn. 3 [appellate court declined to take judicial notice of trial court order which had no precedential value and judicial notice could not be used to impart value it did not have]; see also *City of Bakersfield v. West Park Home Owners Assn. & Friends* (2016) 4 Cal.App.5th 1199, 1210 ["However, trial court orders hold no precedential value. [Citation.] Accordingly, we will neither rely upon, nor take judicial of, these orders."].)

Therefore, the request for judicial notice is DENIED.

Legal Standard

"In reviewing the sufficiency of a complaint against a general demurer, we are guided by long settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213–214.)

"The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. … [I]t is error for a trial

court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Gregory v. Albertson's, Inc.* (2002) 104 Cal.App.4th 845, 850.)

First Cause of Action – Violation of Civil Code, § 2923.7

The first cause of action is a claim for violations under Civil Code section 2923.7 which provides in relevant part:

> (a) When a borrower requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide the borrower one or more direct means of communication with the single point of contact.
>
> (b) The single point of contact shall be responsible for doing all of the following:
>
> (1) Communicating the process by which a borrower may apply for an available foreclosure prevention alternative and the deadline for any required submissions to be considered for these options.
> (2) Coordinating receipt of all documents associated with available foreclosure prevention alternatives and notifying the borrower of any missing documents necessary to complete the application.
> (3) Having access to current information and personnel sufficient to timely, accurately, and adequately inform the borrower of the current status of the foreclosure prevention alternative.
> (4) Ensuring that a borrower is considered for all foreclosure prevention alternatives offered by, or through, the mortgage servicer, if any.
> (5) Having access to individuals with the ability and authority to stop foreclosure proceedings when necessary. (Civ. Code, § 2923.7, subds. (a) – (b).)

Defendant SPS contends the first cause of action fails because: (1) Plaintiff has not pled facts satisfying the criteria under Civil Code section 2924.15; and (2) the claim has not been pled with specificity.

Section 2924.15

Civil Code section 2923.7 applies to mortgages or deeds of trusts described in section 2924.15. (Civ. Code, § 2923.7, subd. (f).) That section states in pertinent part:

> "(a) Unless otherwise provided, paragraph (5) of subdivision (a) of Section 2924 and Sections 2923.5, 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, and 2924.18 shall apply only to a first lien mortgage or deed of trust that meets either of the following conditions:
>
> (1)

(A) The first lien mortgage or deed of trust is secured by owner-occupied residential real property containing no more than four dwelling units.

(B) For purposes of this paragraph, 'owner-occupied' means that the property is the principal residence of the borrower and is security for a loan made for personal, family, or household purposes.

(2) The first lien mortgage or deed of trust is secured by residential real property that is occupied by a tenant and that contains no more than four dwelling units and meets all of the conditions described in subparagraph (B) and one of the conditions described in subparagraph (C)." (Civ. Code, § 2924.15, subd. (a)(1)(2).)

Defendant SPS argues Plaintiff cannot satisfy the criteria of section 2924.15 as he purchased a second home, the Calabasas Property, where he "also resides." (See Demurrer at p. 10:14-15.) SPS contends this allegation contradicts allegations made in a prior pleading in Los Angeles County where Plaintiff stated his primary residence was the Calabasas Property. (See SPS' Request for Judicial Notice at Ex. 3.) SPS asserts this prior allegation constitutes a judicial admission that binds Plaintiff in this action. (See Demurrer at pp. 10:15-11:2.) SPS also claims Plaintiff does not plead facts showing he has any tenant living at the property. (Id. at p. 11:2-3.)

"Judicial admissions may be made in a pleading, by stipulation during trial, or by response to request for admission. [Citations.] Facts established by pleadings as judicial admissions ' "are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her." ' [Citations.]" (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746.)

As a preliminary matter, the court rejects this argument as it is based on exhibit 3 to SPS' request for judicial notice which was denied for reasons stated above. Even if the court were to consider the argument, it also fails as a judicial admission is effective (i.e. conclusive) only in the particular case. (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 456; see *Betts v. City National Bank* (2007) 156 Cal.App.4th 222, 235 [admission in proposed probate pleading not binding because pleading was not filed in current case].) Furthermore, the subject property in this action is the San Martin Property which Plaintiff alleges he has ownership of to satisfy the criteria for section 2924.15. (See FAC at ¶¶ 2, 8, 12-13, 29, 33-34.) Thus, the demurrer is not sustainable on this ground.

Specificity

Defendant SPS also argues the claim has not been pled with specificity as: (1) SPS provided a single point of contact ("SPOC") to Plaintiff; and (2) Plaintiff's allegations amount to mere conclusions and do not state a valid cause of action. (See Demurrer at pp. 11:25-27, 13:10-17.) While the FAC alleges a SPOC (Yvonne) to Plaintiff, the focus of the claim is the failure on the part of that SPOC to uphold their duties under the statute. As stated above, such duties include ensuring that a borrower is considered for all foreclosure prevention alternatives offered by, or through, the mortgage servicer. (See Civ. Code, § 2923.7, subd. (b)(4).) Plaintiff alleges SPS violated this duty in paragraph 36 of the FAC which provides:

> "In the case at hand, in November 2023, Defendant refused to allow Plaintiff to apply for a foreclosure prevention alternative, claiming, instead, that Plaintiff's only option to avoid foreclosure was to pay the total past due payments owed on the loan. This was in spite of a demonstrable change in financial circumstances which would warrant a new review and would impact the outcome of that review." (FAC at ¶ 36; see also FAC at ¶¶ 24-28.)

Such allegations must be accepted as true on demurrer and are sufficient to state a valid claim under section 2923.7. (See *Hild v. Bank of Am., N.A.* (C.D. Cal. 2015) 2015 U.S. Dist. LEXIS 13419, *20-21 ["Although they were denied a HAMP modification, they appear to allege that they were not considered for an in-house 12 to 24 month modification until April 2014, (FAC ¶ 31); thus they at least facially allege a claim for Nationstar's initial failure to '[e]nsur[e] that a borrower is considered for all foreclosure prevention alternatives offered by, or through, the mortgage servicer, if any."]; see also *Aleman v. Airtouch Cellular* (2012) 209 Cal.App.4th 556, 576, fn. 8 ["Although not binding, unpublished federal district court cases are citable as persuasive authority."].)

Consequently, the demurrer to the first cause of action on the ground that it fails to state a claim is OVERRULED.[1]

Second Cause of Action - Violation of Civil Code Section 2924.9

The section cause of action is a claim for violation of Civil Code section 2924.9 which states in relevant part:

> "(a) Unless a borrower has previously exhausted the first lien modification process offered by, or through, his or her mortgage servicer described in Section 2923.6, within five business days after recording a notice of default pursuant to Section 2924, a mortgage servicer that offers one or more foreclosure prevention alternatives shall send a written communication to the borrower that includes all of the following information:
>
> (1) That the borrower may be evaluated for a foreclosure prevention alternative or, if applicable, foreclosure prevention alternatives.
> (2) Whether an application is required to be submitted by the borrower in order to be considered for a foreclosure prevention alternative.
> (3) The means and process by which a borrower may obtain an application for a foreclosure prevention alternative." (Civ. Code, § 2924.9, subd. (a).)

Defendant SPS argues the second cause of action fails because: (1) Plaintiff has not pled facts satisfying the criteria under Civil Code section 2924.15; (2) the claim has not been pled with reasonable particularity; and (3) Plaintiff does not allege a material violation under the statute.

Section 2924.15

[1] As Plaintiff has stated a valid claim under section 2923.7, the court declines to consider the argument raised in the moving papers with respect to section 2923.6, subdivision (g). (See Demurrer at pp. 12:1-13:9.)

Civil Code section 2924.9 also applies to mortgages or deeds of trusts described in section 2924.15. (Civ. Code, § 2924.9, subd. (c).) Defendant SPS thus repeats the same argument made in connection with the demurrer to section 2923.7. The court however has rejected that argument for reasons stated above and does so again here with respect to section 2924.9. (See FAC at ¶ 44.)

Reasonable Particularity

Defendant SPS also contends Plaintiff has not pled the second cause of action with reasonable particularity as he fails to allege that he has not previously exhausted the first lien modification process. (Demurrer at p. 13:18-26.) This contention lacks merit as the subject allegation can be found in paragraph 45 of the FAC which provides: "In the case at hand, Plaintiff has not previously exhausted the first lien modification process offered by, or through, his mortgage servicer." (FAC at ¶ 45.) The demurrer is therefore not sustainable on this ground.

Material Violation

Finally, defendant SPS asserts Plaintiff fails to allege any claimed violation was "material" to support a cause of action under section 2924.9. (Demurrer at pp. 14:1-15:17.)

"[T]he HBOR creates liability only for material violations that have not been remedied before the foreclosure sale is recorded. A material violation is one that affected the borrower's loan obligations, disrupted the borrower's loan modification process, or otherwise harmed the borrower." (*Billesbach v. Specialized Loan Servicing LLC* (2021) 63 Cal.App.5th 830, 837.) Thus, "a temporary disruption of the normal foreclosure process that is corrected and causes no lasting harm to the borrower's rights will give rise to no liability." (*Id.* at p. 845.) Absent any meaningful harm to the plaintiff, a defendant's uncured violations are not deemed material. (*Id.* at p. 846.)

Here, Plaintiff has pled allegations in support of the statute that include the following:

> ¶ 47: Defendant SPS caused a Notice of Default to be recorded with the Santa Clara County Recorder's Office.
>
> ¶ 48: Following the recording of the Notice of Default, Plaintiff did not receive correspondence which provided the following information: (1) that the borrower may be evaluated for a foreclosure prevention alternative or, if applicable, foreclosure prevention alternatives, (2) whether an application is required to be submitted by the borrower in order to be considered for a foreclosure prevention alternative, and (3) the means and process by which a borrower may obtain an application for a foreclosure prevention alternative. (FAC at ¶¶ 47-48.)

The second cause of action also incorporates prior allegations of the FAC where Plaintiff claims SPS refused to review him for any foreclosure prevention alternative and thus his only option was to pay the past due balance or lose his property to foreclosure. (See FAC at ¶¶ 27-28, 41.) Such allegations demonstrate a material violation as the actions by SPS disrupted Plaintiff's loan modification process and exposed him to further harm by way of an imminent foreclosure of his property. Nor are there any allegations that SPS attempted to

remedy the violations before the pending foreclosure sale. Thus, the demurrer is not sustainable on this ground.

Accordingly, the demurrer to the second cause of action on the ground that it fails to state a claim is OVERRULED.

Third Cause of Action – Unfair Business Practices

The third cause of action is a claim for unfair business practices under Business and Professions Code section 17200 (or "UCL"). Defendant SPS contends the third cause of action fails because: (1) Plaintiff does not allege an unfair or unlawful business practice by SPS; and (2) Plaintiff lacks standing to sue under the UCL.

Unfair or Unlawful Business Practice

"The UCL defines 'unfair competition' to 'mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising' and any act prohibited by [Business and Professions Code] section 17500. [Citation.]" (*Searle v. Wyndham Int'l* (2002) 102 Cal.App.4th 1327, 1332-1333 (*Searle*).) "Section 17200 'is not confined to anticompetitive business practices, but is also directed toward the public's right to protection from fraud, deceit, and unlawful conduct. [Citation.] Thus, California courts have consistently interpreted the language of section 17200 broadly.' [Citation.]" (*South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 877-878.) "The statute prohibits 'wrongful business conduct in whatever context such activity might occur.' [Citation.]" (*Searle, supra,* at 102 Cal.App.4th at p. 1333.)

Defendant SPS argues Plaintiff fails to plead any unfair, deceptive, or unlawful practice to support his claim under the UCL. (Demurrer at p. 16:9-23.) Here, Plaintiff's UCL cause of action is based on unlawful practices in connection with violations by SPS under Civil Code sections 2923.7 and 2924.9. (FAC at ¶ 53.) These claims survived the pleading challenge on general demurrer for reasons stated above and thus support a valid cause of action under the UCL.

Standing

"A private person now has standing to assert a UCL claim only if he or she (1) 'has suffered injury in fact,' and (2) 'has lost money or property as a result of the unfair competition.' " (*Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 852 (*Hall*).)

A plaintiff suffers an injury in fact for purposes of standing under the UCL when he or she has: (1) expended money due to the defendant's acts of unfair competition; (2) lost money or property; or (3) been denied money to which he or she has a cognizable claim. (*Hall, supra,* 158 Cal.App.4th at pp. 854-855.)

In addition, a plaintiff must show he or she lost money or property as a result of the alleged unfair competition. (*Hall, supra,* 158 Cal.App.4th at p. 855.) This causation element requires a showing of a causal connection or reliance on the unlawful, unfair, or fraudulent act. (*Ibid*.)

Here, defendant SPS asserts that Plaintiff fails to allege facts to demonstrate standing in pursuit of a claim under the UCL. (Demurrer at pp. 16:24-17:20.) This assertion however is not persuasive as paragraphs 59 and 60 of the FAC allege sufficient facts to establish standing under the UCL for pleading purposes. Thus, the demurrer is not sustainable on this ground.

Therefore, the demurrer to the third cause of action on the ground that it fails to state a claim is OVERRULED.

Motion to Strike Portions of the FAC

Defendant SPS separately moves to strike the second cause of action and Plaintiff's allegations for attorneys' fees, punitive damages, emotional distress and other damages claims.

Legal Standard

A court may strike out any irrelevant, false, or improper matter asserted in a pleading. (Code Civ. Proc., § 436, subd. (a).) A court may also strike out all or any part of a pleading not filed in conformity with the laws of the State of California. (Code Civ. Proc., § 436, subd. (b).) The grounds for a motion to strike shall 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).)

Irrelevant matter includes "immaterial allegations." (Code Civ. Proc., § 431.10, subd. (c).) "An immaterial allegation in a pleading is any of the following: (1) An allegation that is not essential to the statement of a claim or defense; (2) An allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense; (3) A demand for judgment requesting relief not supported by the allegations of the complaint or cross-complaint." (Code Civ. Proc., § 431.10, subd. (b).)

"As with demurrers, the grounds for a motion to strike must appear on the face of the pleading under attack, or from matter which the court may judicially notice." (Weil & Brown, et al., *California Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2023) ¶ 7:168, p. 7(l)-77 citing Code Civ. Proc., § 437.) "Thus, for example, defendant cannot base a motion to strike the complaint on affidavits or declarations containing extrinsic evidence showing that the allegations are 'false' or 'sham.' Such challenges lie only if these defects appear on the face of the complaint, or from matters judicially noticeable." (Id. at ¶ 7:169, p. 7(l)-78.)

"In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to the motion to strike as a whole, all parts in their context, and assume their truth." (*Clauson v. Super. Ct.* (1998) 67 Cal.App.4th 1253, 1255.) "In ruling on a motion to strike, courts do not read allegations in isolation." (*Ibid.*)

Second Cause of Action

Defendant SPS moves to strike the second cause of action as the court's order sustaining the demurrer to the complaint did not give permission for Plaintiff to allege a claim for violations under Civil Code section 2924.9.

Following an order sustaining a demurrer with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. (*Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.) "The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend." (*Ibid*.; see *Patrick v. Alacer Corp.* (2008) 167 Cal.App.4th 995, 1015 [acknowledging rule but finding it inapplicable where new cause of action "directly responds" to trial court's reason for sustaining the demurrer].)

Here, this court filed an order sustaining the demurrer to the complaint with leave to amend on February 29, 2024. As SPS correctly points out, the order does not allow Plaintiff to amend to add a cause of action under Civil Code section 2924.9. Nor has Plaintiff filed a separate motion for leave to amend seeking permission to do so.

In opposition, Plaintiff's counsel contends opposition was not filed as her office never received email notification of the demurrer. (See Galletta Decl. at ¶ 4.) She states that any FAC filed prior to the first hearing on demurrer would have included a claim under Civil Code section 2924.9 and apologizes to the court for this error. (Id. at ¶¶ 5-6.)

Although SPS is correct on the law, the court finds that striking the second cause of action would not be in the interests of judicial economy. Taking such action would only result in further delay of the case, force Plaintiff to file a motion for leave to amend, which would likely be granted by the court given the liberality in accepting amendments to pleadings. (See *Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1428 ["[T]he court's discretion will usually be exercised liberally to permit amendment of the pleadings. [Citations.] The policy favoring amendment is so strong that it is a rare case in which denial of leave to amend can be justified."].) Furthermore, SPS has taken the additional step of substantively addressing the second cause of action by general demurrer which the court overruled for reasons explained above. And this court has a policy of addressing cases on the merits whenever possible. (See *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 [courts have a policy favoring disposition of cases on the merits rather than on procedural grounds].) Thus, the court declines to strike the second cause of action. The court reminds Plaintiff's counsel to properly comply with court rules and procedures with respect to future motions.

Consequently, the motion to strike the second cause of action is DENIED.

Attorneys' Fees

Defendant SPS also moves to strike the following allegations regarding attorneys' fees:

- The words "attorneys' fees," appearing at page 6, paragraph 40;
- The words "and attorneys' fees," appearing at page 7, paragraph 50;
- The words "reasonable attorney's fees, appearing at page 10, paragraph 63; and
- The words "attorneys' fees," appearing at page 10, paragraph 5 of the Prayer.

"In the absence of some special agreement, statutory provision, or exceptional circumstances, attorney's fees are to be paid by the party employing the attorney." (*Howard v. Schaniel* (1981) 113 Cal.App.3d 256, 266; Code Civ. Proc., § 1021.)

Here, defendant SPS argues Plaintiff fails to state any statutory or contractual basis to support an award for attorneys' fees. (See Motion at p. 10:6-11.) But, as stated above, Plaintiff alleges valid claims under Civil Code sections 2923.7 and 2924.9 which allow a party to recover attorneys' fees. (See Civ. Code, § 2924.12, subd. (h) ["A court may award a prevailing borrower reasonable attorney's fees and costs in an action brought pursuant to this section."].) Plaintiff however does not allege any statutory or contractual basis to support attorneys' fees under the UCL. Nor does California permit the recovery of attorneys' fees under the UCL as a matter of law. (See *Zhang v. Super. Ct.* (2013) 57 Cal.4th 364, 371 (*Zhang*) [a prevailing plaintiff under the UCL is generally limited to injunctive relief and restitution and may not receive damages or attorney fees]; see also *Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390, 399 ["Private plaintiffs suing under the UCL may seek only injunctive and restitutionary relief, and the UCL does not authorize attorney fees."].)

Accordingly, the motion to strike the attorneys' fees allegations appearing at page 10, paragraph 63 of the FAC is GRANTED WITHOUT LEAVE TO AMEND. (See *Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436 ["Leave to amend should be denied where the facts are not in dispute and the nature of the claim is clear, but no liability exists under substantive law."].) The motion to strike the remaining attorneys' fees allegations is DENIED.

Punitive Damages

Defendant SPS moves to strike the following allegation regarding punitive damages:

- The words "For exemplary damages in an amount sufficient to punish Defendants' wrongful conduct and deter future misconduct," appearing at page 10, paragraph 6 of the Prayer.

"In order to 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. These statutory elements include allegations that the defendant has been guilty of oppression, fraud, or malice. 'Malice' is defined in the statute as conduct 'intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. 'Fraud' is 'an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.' " (*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63, internal citations omitted.)

Also, "[u]nder Civil Code section 3294, subdivision (b), punitive damages can properly be awarded against a corporate entity as a principal, because of an act by its agents, if the corporate employer authorized or ratified wrongful conduct. Ratification is shown if an

officer, director, or managing agent of the corporation has advance knowledge of, but consciously disregards, authorizes, or ratifies an act of oppression, fraud, or malice." (*Pulte Home Corp. v. American Safety Indemnity Co.* (2017) 14 Cal.App.5th 1086, 1124.)

"In determining whether a complaint states facts sufficient to sustain punitive damages, the challenged allegations must be read in context with the other facts alleged in the complaint. Further, even though certain language pleads ultimate facts or conclusions of law, such language when read in context with the facts alleged as to defendants' conduct may adequately plead the evil motive requisite to recovery of punitive damages." (*Monge v. Super. Ct.* (1986) 176 Cal.App.3d 503, 510.)

Here, defendant SPS asserts Plaintiff fails to allege facts of malice, oppression or fraud to support a prayer for punitive damages. (See Motion at pp. 6:18-8:19.) Plaintiff concedes this argument in opposition with respect to his claims under Civil Code sections 2923.7 and 2924.9. (See OPP at p. 3:23-27.) Furthermore, punitive damages are not available in connection with claims under the UCL:

> "In fact, the language of section 17203 is clear that the equitable powers of a court are to be used to 'prevent' practices that constitute unfair competition and to 'restore to any person in interest' any money or property acquired through unfair practices. (§ 17203.) While the 'prevent' prong of section 17203 suggests that the Legislature considered deterrence of unfair practices to be an important goal, **the fact that attorney fees and damages, including punitive damages, are not available under the UCL** is clear evidence that deterrence by means of monetary penalties is not the act's sole objective." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1147-1148 (*Korea Supply*), emphasis added.)

Therefore, the motion to strike the punitive damages allegations is GRANTED WITHOUT LEAVE TO AMEND.

Emotional Distress Allegations

Defendant SPS moves to strike the following allegations regarding emotional distress:

- The words "severe emotional distress, loss of appetite, frustration, fear, anger, helplessness, nervousness, anxiety, sleeplessness, sadness, and depression," appearing at page 9, paragraph 60;
- The words "damages for emotional distress," appearing at page 10, paragraph 5 of the Prayer.

As this a pre-trustee's sale action, defendant SPS contends only injunctive relief is available with respect to Plaintiff's claims under Civil Code sections 2923.7 and 2924.9. (See Motion at p. 10:12-26; see also Civil Code, § 2924.12, subd. (a)(1) ["If a trustee's deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin a material violation of Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17."].) Plaintiff concedes this argument in opposition to the motion. (See OPP at p. 3:23-27.) Nor are emotional distress damages available under the UCL as California Supreme Court cases like *Zhang* and *Korea Supply* make clear as stated above.

Consequently, the motion to strike the emotional distress allegations is GRANTED WITHOUT LEAVE TO AMEND.

Other Damages Allegations

Defendant SPS moves to strike the following additional allegations regarding damages:

- The words "Damages and" appearing on the Caption at page 1;
- The words "Likewise, Plaintiff was injured and suffered actual damages including but not limited to, loss of money and property, loss of reputation and goodwill, and severe emotional distress, according to proof at trial but within the jurisdiction of this Court," appearing at page 9, paragraph 60;
- The word "for damages," appearing at page 10, line 1 of the Prayer;
- The word "damages," appearing at page 10, paragraph 4 of the Prayer; and
- The words "For compensatory damages, special damages, damages for emotional distress," appearing at page 10, paragraph 5 of the Prayer.

As explained above, Plaintiff has no right to recover damages with his statutory claims under the HBOR or the UCL. The court however declines to strike the language relating to "loss of money and property" as this allegation is relevant to Plaintiff's standing in support of the UCL.

Accordingly, the motion to strike is GRANTED IN PART WITHOUT LEAVE TO AMEND AND DENIED IN PART as to the damages allegations. The motion is denied only as to the phrase "loss of money and property." The motion to strike is granted as to the remaining allegations.

Disposition

The demurrer to the first, second, and third causes of action is OVERRULED in its entirety.

The motion to strike the second cause of action is DENIED.

The motion to strike the attorneys' fees allegations appearing at page 10, paragraph 63 of the FAC is GRANTED WITHOUT LEAVE TO AMEND. The motion to strike the remaining attorneys' fees allegations is DENIED.

The motion to strike the punitive damages allegations is GRANTED WITHOUT LEAVE TO AMEND.

The motion to strike the emotional distress allegations is GRANTED WITHOUT LEAVE TO AMEND.

The motion to strike the damages allegations is GRANTED IN PART WITHOUT LEAVE TO AMEND AND DENIED IN PART. The motion is denied only as to the phrase

"loss of money and property" appearing at page 9, paragraph 60 of the FAC. The motion to strike is granted as to the remaining damages allegations.

The court will prepare the Order.

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Case Name: *Steshenko v. Board of Trustees of Foothill-De Anza Community College District et al.*
Case No.: 21CV391490

I. Background

On November 15, 2021, plaintiff Gregory Steshenko ("Plaintiff"), a self-represented litigant, filed his 296-page complaint against defendants Board of Trustees of Foothill-De Anza Community College District, Foothill-De Anza Community College District (collectively, "Foothill"); Patrick Ahrens, Laura Casas, Pearl Cheng, Peter Landsberger, Gilbert Wong, Shinny Duong (Duong")(collectively, "Individual Defendants"), and Does 1 through 10.

Plaintiff asserts his first cause of action for violations of his First Amendment to the U.S. Constitution and Section 3(a) of the California Constitution and his second cause of action for retaliation for filing an age discrimination complaint. On May 2, 2022, Plaintiff filed his 105-page First Amended Complaint adding additional causes of action.

On February 4, 2022, Foothill and Duong ("collectively, "Defendants") filed their motion for prefiling order for vexatious litigant and to require security. On April 19, 2024, Defendants filed their amended motion for prefiling order for vexatious litigant and to require security. On May 14, 2024, Plaintiff filed his opposition to the motion.

On May 28, 2024, this Court (Hon. Monahan) continued the hearing on this motion to June 13, 2024, to allow for the parties to address the amount of security. The parties have since submitted additional papers for the Court's review.

II. Foothill's Request for Judicial Notice

In support of its motion, Defendants request the Court take judicial notice of 20 documents, including records on file with the Court and other Court documents. The request is GRANTED. (See Evid. Code, § 452, subds. (a), (d), (h).)

III. Plaintiff's Request for Judicial Notice

In support of his opposition, Plaintiff requests the Court take judicial notice of 21 documents, including court documents and filings. The request is GRANTED as to all documents except Exhibit R (an article found in the Economist). (See Evid. Code, § 452, subd. (d).)

IV. Vexatious Litigant Generally

The vexatious litigant statutes, Code of Civil Procedure section 391 et seq., provide that a defendant may move for an order requiring the plaintiff to furnish security on the ground the plaintiff is a vexatious litigant. A party may also move to enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in pro per without first obtaining leave of the presiding judge.

"As relevant here, a vexatious litigant is one who, while self-represented, repeatedly relitigates or attempts to relitigate matters already finally determined against them or repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary

discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." (*In re Marriage of Deal* (2022) 80 Cal.App.5th 71, 77 [internal quotations omitted].)

Under Code of Civil Procedure section 391, subdivision (b), a vexatious litigant means a person who does any of the following:

> **(1)** In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.
> [. . .]
> **(3)** In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

"While there is no bright-line rule as to what constitutes 'repeatedly,' most cases affirming the vexatious litigant designation involve situations where litigants have filed dozens of motions either during the pendency of an action or relating to the same judgment." (*Morton v. Wagner* (2007) 156 Cal.App.4th 963, 972.) Ultimately, "[w]hat constitutes 'repeatedly' and 'unmeritorious' under subdivision (b)(3), in any given case, is left to the sound discretion of the trial court." (*Id.* at p. 971.)

V. Analysis

Defendants first argue that this Court (Hon. Kulkarni) determined that Plaintiff was a vexatious litigant, this was affirmed by the Sixth District Court of Appeal, and the Supreme Court denied review. While the case was pending review at the Sixth District, Plaintiff initiated the underlying action in the present case.

a. Court's Prior Order

On January 21, 2021, Judge Kulkarni granted a motion for prefiling order against Plaintiff. (See Defendants' RJN, Exs. B, C.) Thereafter, Plaintiff appealed, and on August 1, 2023, the Sixth District affirmed the order but struck the requirement of a $10,000 security as to Foothill. (See Defendants' RJN, Ex. D.) Plaintiff sought review by the California Supreme Court and on November 1, 2023, the petition was denied. (See Defendants' RJN, Ex. E.)

Once a court has deemed a party to be a vexatious litigant, the court can "on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed." (Code Civ. Proc., § 391.7, subd. (a).)

b. Plaintiff's Appeal

The Court will first address Plaintiff's contention that upon the filing of an appeal of Judge Kulkarni's order declaring him a vexatious litigant, he did not need to seek the presiding

judge's approval before filing the instant action because the appeal stayed that order. The Court does not find this argument persuasive.

On May 3, 2022, the Court (Hon. Takaichi) issued an order in this case. He explained that Plaintiff had not obtained an order of leave to file the instant action from the presiding judge of the court. However, the Court stayed the action until either of the following: 1) application is made to the presiding judge; 2) the stay is lifted, and opinion of the Court of Appeal is issued; or 3) pending order of dismissal of this action. As noted above, on August 1, 2023, the Court of Appeal issued a decision affirming the January 21, 2021 order. Plaintiff now appears to argue that he did not need leave of court to file the pleading in the instant action because the appeal was pending, staying the January 21, 2021 order such that it was void until the Court of Appeal issued its order.

The Court finds the language of the order to be prohibitory and therefore, the vexatious litigant order was not stayed by Plaintiff's appeal, and Plaintiff was required to request leave of court before filing the instant action. (See *Metropolitan Laundry Co. v. Greenfield* (1936) 17 Cal.App.2d 174, 176 ["If mandatory, the appeal suspends the operation of the injunction. If prohibitory merely, the appeal does not suspend it."].) "To determine whether an injunction is mandatory or prohibitory, we 'examine the terms and effect of the injunction in order to discover its character.' 'The purpose of mandatory relief is to compel the performance of a substantive act or a change in the relative positions of the parties. By contrast, the prohibitive order seeks to restrain a party from a course of conduct or to halt a particular condition. The character of prohibitory injunctive relief, however, is not changed to mandatory in nature merely because it incidentally requires performance of an affirmative act.'" (*People ex rel. Brown v. iMergent, Inc.* (2009) 170 Cal.App.4th 333, 342 [internal citations omitted].)

Here, the purpose of the Court's order was to prevent Plaintiff from filing repeated and unmeritorious papers and actions. Judge Takaichi explained that the "effect of the [January 21, 2021] order ***prohibits*** plaintiff . . . from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding . . . judge of the court where the litigation is proposed to be filed." (See Court's May 3, 2022 Order, p. 2 [emphasis added].) Accordingly, the order was prohibitory in nature.

In Case No 19-CV-360940, the Superior Court has found Plaintiff to be a vexatious litigant and the Sixth District affirmed the Court's order. Moreover, the Court is not persuaded by any argument that the vexatious litigant order was stayed pending the appeal. Based on this, Plaintiff should not have filed the underlying action, as he did not receive approval from the presiding judge before doing so.[2] Thus, this case will be dismissed as to all named defendants within 15 days of service of this order.

With that said, the Court will address the remaining arguments in Defendants' motion, brought under Code of Civil Procedure section 391, subdivisions (b)(1) and (b)(3).

c. Section 391(b)(1)

[2] The Court also notes that on January 16, 2024, Presiding Judge McGowen signed an order denying Plaintiff's filing of new litigation.

Defendants argue that Plaintiff's litigation record in the seven years preceding the filing of Defendants' motion permits this Court to determine Plaintiff is a vexatious litigant. Defendants contend Plaintiff has personally litigated over five cases that have been finally determined adversely to him. (See Memo, pp. 5-6.)

In opposition, Plaintiff appears to argue that the fifth case that Judge Kulkarni relied on to reach the "five-case threshold" was an interlocutory appeal and not a final determination. However, the Court of Appeal affirmed that Plaintiff had commenced or maintained at least five litigations that resulted in adverse final determinations and specifically addressed the same interlocutory argument that Plaintiff now raises again. (See Foothill RJN, Ex. D [*Steshenko v. De Anza* (Aug. 1, 2023, No. H048838) Cal.App.5th [2023 Cal.App.Unpub. LEXIS 4496, at *9-12]].)

Based on Defendants' evidence, the Court finds Plaintiff has maintained over five cases that have been finally determined adversely to him and he may be declared a vexatious litigant under section 391, subdivision (b)(1).

d. Section 391(b)(3)

Foothill argues that the Court may also declare Plaintiff to be a vexatious litigant under section 391, subdivision (b)(3) because Plaintiff engages in frivolous and abusive litigation tactics. In opposition, Plaintiff merely asserts that Foothill's argument is meritless. (See Opposition, p. 13, subd. (B).)

To support its contention, Defendants' Counsel, Roy Combs ("Combs"), submits his declaration stating that Plaintiff has filed numerous cases and in some cases, has filed over 600 documents. (See e.g., Combs Decl., ¶ 7.) Additionally, Combs indicates that the Ninth Circuit stated that Plaintiff presented the court with frivolous and factually unsupported issues and mounted groundless attacks against the pro bono counsel. (*Id.* at ¶ 9.) Thus, the Court finds that Plaintiff may be declared a vexatious litigant under section 391, subdivision (b)(3).

a. No Reasonable Probability of Success

"When considering a motion to declare a litigant vexatious under section 391.1, the trial court performs an evaluative function. The court must weigh the evidence to decide both whether the party is vexatious based on the statutory criteria and whether he or she has a reasonable probability of prevailing. Accordingly, the court does not assume the truth of a litigant's factual allegations and it may receive and weigh evidence before deciding whether the litigant has a reasonable chance of prevailing." (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 635 (*Golin*) [internal citations omitted].)

After a review of the record, the Court does not find that Plaintiff has a reasonable probability of succeeding on his claims against Defendants. The Court does not believe that Plaintiff will be able to prove his claims. Plaintiff submits no evidence in opposition to this motion to support his substantive claims. (See *Golin, supra*, 190 Cal.App.4th at p. 642.) Moreover, the Court finds the legal arguments made by Defendants in their previous demurrer to be persuasive.

Based on the foregoing, the Court GRANTS Defendants' motion.

b. Security

When the requirements for an order to furnish security are met as to a moving defendant, "the court shall order . . . security in such amount and within such time as the court shall fix." (Code Civ. Proc., § 391.3, subd (a).) The purpose of the security is "to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant." (*Id.* at subd. (c).) The trial court may rely on its own experience and expertise to determine the appropriate amount to set the security. (See e.g., *Reynolds v. Ford Motor Co.* (2020) 47 Cal.App.5th 1105, 1113.)

This Court gave the parties the opportunity to file additional papers to support an amount of requested security. Defendants timely filed and served the declaration of Roy A. Combs on 5/20/2024 seeking that Plaintiff post a security of $90,000. Defendants assert that 1) Plaintiff's indigent status is not a factor to be considered in determining if Plaintiff is a vexatious litigant; 2) Plaintiff owns a single-family home that has an estimated fair market value between $1,400,000 and $1,700,000 and Plaintiff does not explain why his home is not adequate collateral to post security. (See Defendants' reply filed and served 6/6/2024.)

Plaintiff's Objections to Contemplated Dismissal filed 5/28/2024 and Plaintiff's Objection to the Presumed Combs May 29, 2024, Court Filing Regarding the Amount of Security filed 6/3/2024 are OVERRULLED.

As noted above, the security is intended to cover the Defendants' reasonable expenses, including attorney's fees incurred in connection with the litigation caused to be maintained by Plaintiff. The request for security in the present action is supported by the declaration of Roy A. Combs filed 5/29/2024 that Defendants seek security of $90,000. The Court nevertheless finds $90,000 to be excessive. Accordingly, the Court sets security for each moving defendant at $10,000, which means the total amount of security is $20,000.[3] This case will be dismissed unless Plaintiff posts $20,000 security within 15 days of service of this order.

VI. Prefiling Order

Once a court has deemed a party to be a vexatious litigant, the court can on its own motion or the motion of any party, enter a prefiling order prohibiting a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge. (Code Civ. Proc., § 391.7, subd. (a).)

Here, the Court finds that Plaintiff is a vexatious litigant and Defendants seek a prefiling order. The Court GRANTS the request and will fill out the appropriate Judicial Council form for this order.

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[3] $10,000 for Foothill plus $10,000 for Duong equals $20,000.

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Case Name: *Patrick Nugent vs Ksai Liang, et al.*
Case No.: 23CV425157

Plaintiff Partick Nugent, in pro per ("Plaintiff")'s amended motion for specific performance is DENIED. Plaintiff's moving papers failed to provide any declaration or evidence in support of this motion. Defendants Ksai Liang and K&J Property Management Group ("Defendants")' opposition correctly notes that Plaintiff's moving papers were unsupported contentions and that Defendants retain their right to jury trial.

All evidence that will be presented to the court [by the moving party] at a motion hearing must be served along with the notice of motion and points and authorities. (Code Civ. Proc. ("CCP") §1005(b); *David S. Karton, a Law Corp. v. Musick, Peeler & Garrett LLP* (2022) 83 Cal.App.5th 1027, 1048; Weil & Brown, Civil Practice Guide: Civil Procedure Before Trial (The Rutter Group 2023), ¶9:44.) Plaintiff failed to file any declaration (with supporting evidence) with his moving papers.

"The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers. . . . '[T]he inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case . . .' and if permitted, the other party should be given the opportunity to respond. [Citations.]" (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1537.)

Self-represented litigants are entitled to the same, but no greater, consideration than other litigants and attorneys. (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1444.) Self-represented litigants "are held to the same standards as attorneys" and must comply with the rules of civil procedure. (*Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543; see also *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985 ["A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation."].)

Plaintiff's declaration with his reply papers (erroneously entitled "Defendant's Declaration in Support of Motion for Specific Performance" filed on 5/22/2024) is untimely. That evidence needed to be filed under CCP section 1005(b) with his moving papers to be considered, not his reply papers. No justification is provided for the withholding of evidence until the reply. The evidence was available to Plaintiff at the time he filed his moving papers. For the reasons stated, this is not an exceptional case. In any event Plaintiff's [reply] declaration is insufficient to show that Plaintiff is entitled to specific performance.

Plaintiff's amended motion for specific performance is DENIED.

The court will prepare the order.

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