SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 10
Honorable Frederick S. Chung

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

DATE: July 9, 2024 TIME: 9:00 A.M.

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

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

Scheduling motion hearings: Please go to https://reservations.scscourt.org or call 408-882-2430 between 8:30 a.m. and 12:30 p.m. (Mon.-Fri.) to reserve a hearing date for your motion *before* you file and serve it. You must then file your motion papers no more than five court days after reserving the hearing date, or else the date will be released to other cases.

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

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

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

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV403647	Kateryna Pomogaibo v. Weeklys, Inc.	Click on LINE 1 or scroll down for ruling.
LINE 2	23CV421587	Weiting Zhan v. Rui Tang	Click on LINE 2 or scroll down for ruling.
LINE 3	23CV422278	Joe Sparacino v. Terri Fijak et al.	Click on LINE 3 or scroll down for ruling in lines 3-4.
LINE 4	23CV422278	Joe Sparacino v. Terri Fijak et al.	Click on LINE 3 or scroll down for ruling in lines 3-4.
LINE 5	24CV428565	Truist Bank v. Francisco Anciano	Motion for judgment on the pleadings: notice is proper, and the court has not received a timely response to the motion. The court denies plaintiff's request for judicial notice "of the content of [the court's] file," as this plainly fails to comply with Evidence Code section 453, subdivision (b). Nevertheless, the court takes judicial notice of defendant's answer and observes that it admits the truth of all of the material allegations of plaintiff's complaint. Accordingly, the motion is GRANTED. Plaintiff shall submit the proposed order.
LINE 6	21CV390666	Eric F. Hartman v. Koshy P. George et al.	Click on LINE 6 or scroll down for ruling.
LINE 7	23CV420932	Brian Claire v. Xin Huang et al.	Motion for requests for admissions to defendant Kim Thuy Ho to be deemed admitted: notice is proper, and it appears that Ho has not responded to either the RFAs or this motion. Good cause appearing, the court GRANTS the motion. Moving party to submit the proposed order.
LINE 8	18CV321965	Olivia Rodriguez v. Luis Alberto Caro Zuniga	Click on LINE 8 or scroll down for ruling.

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LINE #	CASE #	CASE TITLE	RULING
LINE 9	20CV367997	Francisco Carrascal et al. v. AAA Insurance et al.	Motion for leave to amend complaint: even after multiple settings of this hearing, it is still unclear to the court whether any defendant has ever been served with the moving papers. Nevertheless, given that the amended pleading merely adds CSAA Insurance Exchange as a named defendant, and it appears that CSAA Insurance Exchange has not yet been served with any summons and complaint in this case, the court will GRANT the motion and direct plaintiffs as follows: (1) plaintiffs may file a complaint that conforms to the pleading attached to their February 14, 2024 motion for leave, adding CSAA Insurance Exchange as a defendant, except that they must properly label it a THIRD Amended Complaint, given that the operative pleading is apparently a second amended complaint; (2) plaintiffs must file their pleading by no later than July 19, 2024; (3) plaintiffs must properly serve the summons and complaint on CSAA Insurance Exchange without further delay; and (4) the hearing on the order to show cause why this case should not be dismissed for a failure to serve REMAINS AS SET on September 19, 2024 at 10:00 a.m. in Dept. 10.
LINE 10	21CV378088	American Express National Bank v. Coreen Jones	Motion to vacate dismissal and enter judgment: notice is proper, and the court has received no opposition to the motion. Good cause appearing, the court GRANTS the motion. Plaintiff must re-file the proposed order and judgment for the court's signature, given the clerk's office's rejection of the proposed judgment on May 9, 2024.
LINE 11	22CV395293	Yuping Lin v. Cohesity, Inc.	Click on LINE 11 or scroll down for ruling.

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LINE #	CASE #	CASE TITLE	RULING
LINE 12	23CV421811	Robert Rome v. Cupertino Healthcare & Wellness Center, LLC et al.	Motion for trial preference: parties to appear. Click on LINE 12 or scroll down for the court's questions to the parties.
LINE 13	23CV426086	Zeus Lopez, Sr. v. Universal Site Services, Inc.	Click on LINE 13 or scroll down for ruling.
LINE 14	23CV428277	Stratim Capital Growth Fund, LLC et al. v. Altierre Corporation	Click on LINE 14 or scroll down for ruling.

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Calendar Line 1
Case Name: *Kateryna Pomogaibo v. Weeklys, Inc.*
Case No.: 22CV403647

I. BACKGROUND

This is a limited civil action for breach of contract brought by plaintiff Kateryna Pomogaibo ("Pomogaibo") against defendant Weeklys, Inc. ("Weeklys"). The original form complaint, dated September 30, 2022, stated a single cause of action for breach of contract—specifically, an oral contract that was allegedly formed on September 5, 2022. The complaint sought $10,000 in damages and attorneys' fees according to proof. The narrative portion of the breach of oral contract attachment alleged: "Pomogaibo has to sent [sic] order for publication, summons, and credit card details to newspaper. Newspaper has to publish summons 4 weeks and charge $400 for it. Newspaper refused to comply with court order based on conversation with attorney Ekaterina Berman, who said to newspaper three false datums – she represented his client Yevgeniy Babichev, [I]'m [vexatious] litigant, [I] have not received permission from presiding judge to serve defendant. Elizabeth Alber, is legal representative who is responsible for violation of court order." The attachment alleged that Weeklys was the owner of the East Bay Express newspaper, and that Weeklys caused damages in the form of "strong emotional distress and expenses for therapist."

While no exhibits were mentioned in the complaint, there were four documents attached. Exhibit A was a copy of a September 2, 2022 order by this court (Judge Kirwan) in Case No. 20CV372317, permitting service of summons by publication in the East Bay Express on a defendant in that case, Yevgeniy Babichev. (Notably, the order does not direct the East Bay Express to publish the summons—it simply permits Pomogaibo to serve Babichev by publication in that newspaper.) Exhibit B was a copy of an unsigned letter from Pomogaibo to Weeklys, dated September 29, 2022, demanding payment of $10,000 for the "intentional sabotage and intentional infliction of emotional distress" caused by Weeklys' alleged refusal to publish the summons. Exhibit C was a copy of a September 2022 emails from Pomogaibo to email addresses at East Bay Express. Exhibit D was a copy of the fees charged by the East Bay Express for the publication of legal notices.

Weeklys filed a demurrer to the original complaint, as well as a motion to strike, which the court heard on March 19, 2024. The court sustained the demurrer on the ground that it failed to state sufficient facts and granted 10 days' leave to amend the breach of oral contract cause of action. The court denied the motion to strike. The court did not grant, and Pomogaibo did not seek, leave to add new claims or parties.

The court takes judicial notice of the March 19, 2024 order on its own motion, under Evidence Code section 452, subdivision (d). The court also takes judicial notice of the Judicial Council of California's Vexatious Litigant List (www.courts.ca.gov/documents/vexlit.pdf), which lists Pomogaibo as a vexatious litigant as of February 28, 2023, under Evidence Code section 452, subdivisions (c), (d), and (h),

Pomogaibo filed the operative first amended complaint ("FAC") on April 17, 2024. The FAC is also a form complaint. It attaches a signed verification form, as well as breach of contract attachment that now alleges a breach of a written contract and of an implied contract, in addition to a breach of oral contract. The attachment checks all three boxes ("written,"

"oral," and "other"), whereas the attachment in the original complaint checked only the box for "oral."

The narrative portions of the FAC's breach of contract attachment now allege: "Plaintiff found newspaper EastBayExpress [sic] and accepted public offer from web-site. Plaintiff and Defendant's legal person Liz Alber orally confirmed all elements of contract by phone. On 09/02/2022 Plaintiff filed Order to Yevgeniy Babichev in case 20CV372317 to publish in newspaper. Plaintiff sent email to Defendant: what's to publish, when and her credit card. Defendant orally agreed to charge card & start next week." The attachment further alleges that the following acts breached the contract: "Yevgeniy Babichev's step-daughter and attorney Ekaterina Berman called to Defendant, and asked Defendant to violate contract, because she is his attorney, Plaintiff is vexatious litigant and Plaintiff has not asked permission from presiding judge to make publication. Defendant accepted her arguments and orally confirmed Plaintiff to refuse in executing contract based on conversation with Ekaterina Berman."

The FAC does not mention any exhibits, but four documents labeled as Exhibits A through D are attached to the FAC. These exhibits are slightly different from Exhibits A – D of the original complaint and in a slightly different order: Exhibit A consists of a copy of the fees charged by the East Bay Express for the publication of legal notices (this was previously Exhibit D to the original complaint) plus a copy of what appears to be a printout of a page from the East Bay Express website. Exhibit B is Judge Kirwan's September 2, 2022 order granting Pomagaibo's request to serve the summons on Babichev by publication in Case No. 20CV372317 (previously attached as Exhibit A to the original complaint). Exhibit C is the same as the previous Exhibit C—September 2022 emails from Pomogaibo to editor@eastbayexpress.com and legals@eastbayexpress.com). Exhibit D is a letter from Pomogaibo to Weeklys, dated September 29, 2022, demanding payment of $10,000 for the "intentional sabotage and intentional infliction of emotional distress" caused by Weeklys' alleged refusal to publish the summons (previously, Exhibit B to the original complaint).

Currently before the court is a demurrer to the FAC, filed by Weeklys on April 17, 2024. Pomogaibo filed her opposition on June 14, 2024.

II. DEMURRER TO THE FAC

A. General Standards

The court, in ruling on a demurrer to a pleading, treats it "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. It admits the truth of all material factual allegations in the complaint; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court." (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 213-214.) The court considers only the pleading under attack, any attached exhibits (which are part of the "face of the pleading'), and any facts or documents for which judicial notice is properly requested.

Facts appearing in exhibits control over inconsistent allegations in the pleading. (See *Barnett v. Fireman's Fund Ins. Co*. (2001) 90 Cal.App.4th 500, 505 ["[T]o the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits."])

Where, as here, a demurrer is to an amended complaint, the court "may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making contradictory averments, in a superseding, amended pleading." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034, internal quotations omitted; see also *Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336, 343 [noting "well-established precedent" allowing "courts to consider omitted and inconsistent allegations from earlier pleadings when ruling on a demurrer."]; *Doe v. United States Youth Soccer Assoc.* (2017) 8 Cal.App.5th 1118, 1122 [citing *Berg & Berg*].) "While inconsistent theories of recovery are permitted, a pleader cannot blow hot and cold as to the facts positively stated." (*Manti v. Gunari* (1970) 5 Cal.App.3d 442, 449, internal citation omitted.)

The court cannot consider extrinsic evidence in ruling on a demurrer. The court has therefore considered the declaration of counsel Harpaul Nahal only to the extent that it discusses the meet-and-confer efforts required by statute.

B. Discussion

As an initial matter, to the extent that the FAC attempts to allege causes of action for breach of a written contract or breach of an implied contract, the court strikes those allegations on its own motion under Code of Civil Procedure section 436, subdivision (b). These new allegations are inconsistent with the original complaint, and they are also not in conformity with the court's March 19, 2024 order. Absent prior leave of court, an amended complaint raising new and different causes of action is subject to a motion to strike: "Following an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend." (*Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456, citing *Harris v. Wachovia Mortgage, FSB* (2010) 185 Cal.App.4th 1018, 1023.) The court's prior order did not grant Pomogaibo leave to amend add new causes of action beyond the existing cause of action for breach of oral contract. Indeed, this was expressly noted in the court's March 19, 2024 minute order, which stated, "Plaintiff is not authorized to add new causes of action at this time."[1] The only cause of action alleged by Pomogaibo remains one for breach of oral contract.[2]

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[1] The court takes judicial notice of the March 19, 2024 minute order on its own motion pursuant to Evidence Code section 452, subdivision (d).

[2] The court notes that a contract cannot simultaneously be oral, written, and implied. An implied contract is by definition not based on oral or written statements. (See *California Emergency Physicians Medical Group v. PacifiCare of California* (2003) 111 Cal.App.4th 1127, 1134 [an implied contract ". . . consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have *not been expressed in words*. In order to plead a cause of action for implied contract, the facts from which the promise is implied must be alleged."] [Emphasis added.].)

Weeklys also points out that Pomogaibo's new allegations regarding a written or implied contract violates the sham pleading doctrine. (See Notice of Demurrer and Demurrer, p. 2:4-15.) Under the sham pleading doctrine, "admissions in an original complaint . . . remain within the court's cognizance and the alteration of such statements by amendment designed to conceal fundamental vulnerabilities in a plaintiff's case will not be accepted.'" (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1061.) The purpose of the doctrine is to "enable the courts to prevent an abuse of process. [Citation.]" (*Hanh v. Mirda* (2007) 147 Cal.App.4th 740, 751.) "[W]here a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings," the court may examine the prior complaint to ascertain whether the amended pleading is merely a sham. (*Owen v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384.)

The court agrees with Weeklys that Pomogaibo's new allegations are inconsistent with the allegations of the original complaint and violate the sham pleading doctrine. Although the court has stricken the new allegations on the basis of its violation of the court's prior order, the doctrine constitutes an additional basis for disallowing these allegations.

The court sustains Weeklys' demurrer to FAC's cause of action for breach of contract on the ground that it fails to state sufficient facts, the same basis upon which the court sustained the demurrer to the original complaint's cause of action.

To state a breach of contact cause of action, a plaintiff must allege: 1) the existence of a (valid) contract; 2) Plaintiff's performance or excuse for nonperformance; 3) Defendant's breach; and 4) damage to Plaintiff resulting from that breach. (See *Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 228, citing *Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1388.)

As noted above, bare legal conclusions are not accepted as true on a demurrer, and the contents of exhibits attached to the pleading control over any inconsistent allegations. Contrary to Pomogaibo's allegations, Exhibit A to the FAC is not a "public offer" to enter a contract by Weeklys, and the conclusory allegation that Weeklys orally confirmed unidentified "elements of contract" by phone is not adequate to allege the formation of an oral contract. The emails attached as Exhibit C to the FAC also do not support the formation of an oral contract. As Weeklys points out, these emails constitute an inquiry about payment options. Finally, as previously noted in the court's March 19, 2024 order, Judge Kirwan's September 2, 2022 order did not order East Bay Express or Weeklys to do anything and does not support the allegation of an oral contract, or any other contract. A court order is not a contract.

It is a plaintiff's responsibility to demonstrate how a defect identified by a demurrer can be cured through amendment. (See *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the plaintiff to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]'"].) Pomogaibo's one-page opposition fails to meet this burden, as it simply asserts that "Oral contract is valid in California, so nothing to change or amend."

Because no potentially effective amendment is apparent to the court, and because the court already gave Pomogaibo an opportunity to amend her complaint to cure the pleading defects that still remain, the court denies further leave to amend.

The demurrer is SUSTAINED WITHOUT LEAVE TO AMEND.

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Calendar Line 2
Case Name: *Weiting Zhan v. Rui Tang*
Case No.: 23CV421587

I. BACKGROUND

Plaintiff Weiting Zhan filed this action for defamation against defendant Rui Tang in August 2023, based on Tang's alleged conduct during a civil harassment restraining order proceeding against Zhan in Santa Cruz County (the "CHRO case"). Tang is an attorney who represents a party adverse to Zhan in the CHRO case, and Zhan alleges that Tang defamed her by intentionally and maliciously mistranslating Zhan's emails from Chinese to English as part of evidence submitted in that case. (Second Amended Complaint ("SAC"), pp. 4-7.)[3] Zhan alleges that Tang inserted the word "hell" nine times into her translations, when none of the original emails in Chinese contained any word that translates as "hell." (*Id*. at p. 2:11-12.) Tang also translated "go away" or "get lost" as "fuck off," the phrase "expose you" as "I'm going to publish your information to the public," and the word "disturbing" as "ruining" and "destroying." (*Id*. at p. 2:13-18.)

Zhan filed the original complaint in this case on August 21, 2023 and a first amended complaint ("FAC") on August 29, 2023. Tang demurred to the FAC, and on March 19, 2024, this court sustained the demurrer. The court determined that the FAC failed to state a cause of action, as all of the alleged conduct was protected by the litigation privilege. In addition, although the court was "unable to envision any" amendment that would cure the defamation cause of action, it granted leave to amend that cause of action, given that this was the first pleading challenge in the case. (March 19, 2024 Order, p. 8:6-9.) On March 28, 2024, in apparent response to the court's order, Zhan filed a "first amended complaint; memorandum of points and authorities; exhibit and proof of service." Tang interprets this document as the SAC, and the court does, as well. This March 28, 2024 filing is the operative complaint in the case.[4]

Tang now demurs to all causes of action in the SAC. Because the court concludes that Zhan has not cured the deficiencies in the FAC, the court SUSTAINS the demurrer without leave to amend.

II. LEGAL STANDARDS

A demurrer may be used by "[t]he party against whom a complaint [ ] has been filed" to object to the legal sufficiency of the pleading as a whole, or to any "cause of action" stated therein, on one or more of the grounds enumerated by statute. (Code Civ. Proc., §§ 430.10, 430.50, subd. (a).)

The court, in ruling on a demurrer, treats it "as admitting all properly pleaded material facts, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. California*

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[3] Because the paragraphs in the SAC are inconsistently numbered, the court cites page numbers and, where possible, line numbers.
[4] Zhan also filed a motion for leave to file a "second" amended complaint on March 11, 2024 and a motion for leave to file a third amended complaint on March 18, 2024. The court denied these motions in an order dated May 21, 2024.

Emergency Management Agency (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. [Citation.] 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.' [Citation.]" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214, superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.) Evidentiary facts found in exhibits attached to a complaint may be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) In ruling on a demurrer, courts may also consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

III. DISCUSSION

A. Zhan's Malicious Prosecution and Civil Conspiracy Causes of Action

As an initial matter, the court takes judicial notice of its prior orders in this case, dated March 19, 2024 and May 21, 2024, under Evidence Code section 452, subdivision (d).

The SAC is extremely unclear and confusing—not least because it includes a "memorandum of points and authorities" with an "argument" section—but it could be interpreted as advancing causes of action for malicious prosecution and civil conspiracy. It alleges:

- The "pending evidence could potentially reveal elements of civil conspiracy and malicious prosecution in [the CHRO case]."

- "The forthcoming evidence, which includes testimony from the psychiatrist and the potential for witnesses to mislead the plaintiff, may reveal the defendant's potential role in orchestrating malicious prosecution. Such findings could imply the defendant's involvement in both malicious prosecution and civil conspiracy, thereby undermining any protection afforded by the litigation privilege."

(SAC, pp. 3:6-7 & 5:9-12.) Tang argues that these allegations are an attempt to assert causes of action for malicious prosecution and civil conspiracy. To the extent that they are, the court strikes them on its own motion as being directly inconsistent with the court's March 19, 2024 order sustaining the demurrer to the FAC. (Code Civ. Proc., § 436, subd. (b).) As noted in the court's prior order, leave to amend the FAC did not extend to adding new causes of action. (March 19, 2024 Order, p. 8:15-16 ["The leave to amend that the court is granting today with the present demurrer does *not* extend to adding *new causes of action* unrelated to those raised in the FAC."] [emphasis in original].) (See *Water Coalition v. Santa Cruz County Local Agency Formation Commission* (2011) 200 Cal.App.4th 1317, 1329 [affirming trial court's ruling striking unauthorized new causes of action under Code of Civil Procedure section 436, subdivision (b)].)

Because the court STRIKES any newly added malicious prosecution or civil conspiracy cause of action, the court OVERRULES Tang's demurrer to these causes of action as moot.

B. Zhan's Defamation Cause of Action

Tang contends that Zhan continues to fail to state a cause of action for defamation because California's litigation privilege applies to the complained of conduct. As noted by Tang, the SAC's allegations and exhibits establish that "Tang was a participant (and an associate attorney for a firm that was 'counsel of record') in the [CHRO] litigation and prepared the 'filing' – the certified translation – that Zhan targets in this case." (Memorandum of Points and Authorities, p. 7:10-17.) Thus, all of the alleged wrongful conduct was performed in the course of pursuing the CHRO case against Zhan.

"The litigation privilege 'derives from common law principles establishing a defense to the tort of defamation.' [Citation.] . . . '[T]he section was primarily designed to limit an individual's potential liability for defamation.' [Citation.]" (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241.) "The litigation privilege, codified at Civil Code section 47, subdivision (b), provides that a 'publication or broadcast' made as part of a 'judicial proceeding' is privileged. This privilege is absolute in nature, applying 'to all publications, irrespective of their maliciousness.' [Citation]." (*Ibid*., emphasis in original.) "The usual formulation is that the [litigation] privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*).)

The court reaches the same conclusion that it did in its March 19, 2024 order, which is that all of Zhan's allegations are encompassed by the privilege. In this case, the SAC alleges that Tang submitted the allegedly "malicious" translations as part of the CHRO case—*i.e.*, directly in the course of conducting litigation. (See *Silberg*, *supra*, 50 Cal.3d at 212 [the litigation privilege applies "even though the publication is made outside the courtroom"].) Zhan's newly submitted facts and exhibits in the SAC do not change the court's evaluation of the allegations. These new facts and exhibits all consist of communications, filings, and discovery in either the CHRO case or in the present case. (See SAC, Exs. 1-10.) In other words, they are exactly the types of facts and exhibits that the litigation privilege was designed to protect.

Zhan makes a number of arguments in opposition to the demurrer, two of which the court already addressed in its March 19, 2024 order. First, Zhan argues that the litigation privilege does not apply to perjury, and Tang's conduct amounts to perjury.[5] (SAC, p. 6:4-16.) Second, Zhan argues that under Civil Code section 47, subdivision (b)(2), the litigation privilege does not apply to any "communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence." (*Id.* at p. 5:14-20.) The court previously addressed these arguments and will not repeat its discussion here. (See March 19, 2024 Order, pp. 5:19-23 & 7:21-24.)

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[5] Tang appears to believe that the SAC asserts a cause of action for perjury. Although the SAC is undoubtedly unclear on this score, the court interprets the allegation of perjury in the SAC as an argument against the application of the litigation privilege, rather than a freestanding cause of action. (If it were a separate cause of action, it, too, would be subject to being stricken under Code of Civil Procedure section 436.)

Citing *Silberg, supra,* Zhan now also argues that the litigation privilege does not apply to "representations . . . made to achieve personal objectives or to gain an advantage for [a] client through artifice or deceit, reasoning that in that case they could not have been made to promote the 'interest of justice.'" (SAC, p. 4:21-25.) Zhan relies on the following passage in *Silberg*:

> The Court of Appeal affirmed the judgment of dismissal as to all other causes of action but reversed as to the fifth cause of action, denominated "intentional tort," and remanded to the trial court with directions to issue a new order sustaining the demurrer with leave to amend as to that cause of action. The Court of Appeal concluded defendant's representations were not privileged under section 47(2) if they were made to achieve personal objectives or to gain an advantage for her client through artifice or deceit, reasoning that in that case they could not have been made to promote the "interest of justice." The court further reasoned that whether the statements were made for such purposes was a question of fact not subject to resolution on demurrer. Accordingly, the Court of Appeal determined that husband should be allowed to amend his "intentional tort" cause of action to allege an "improper objective in the procurement of Dr. Adler's services," which, under its reasoning, would preclude application of section 47(2) and allow husband to proceed on that cause of action.

(*Silberg, supra*, 50 Cal.3d at p. 211.) But this portion of *Silberg* merely describes the Court of Appeal's opinion, which was reversed by the California Supreme Court; it does not set forth the holding of the Supreme Court itself. (*Id*. at p. 220.) In fact, the Supreme Court expressed concern over the "interest of justice" language, stating: "We conclude that the well-intentioned addition of the 'interest of justice' test must be rejected." (*Id*. at p. 218.) "A rule that an otherwise privileged communication is not privileged under section 47(2) unless made for the purpose of promoting the 'interest of justice' is wholly inconsistent with the numerous cases in which fraudulent communications or perjured testimony have nevertheless been held privileged." (*Ibid*.) For this reason, this court concludes that Zhan has not established a valid exception to the application of the litigation privilege here.

Finally, Zhan claims that Tang "is a stranger (neither a litigant, attorney, nor witness) to [the CHRO case]; therefore, she should not have any legitimate privilege." (SAC, p. 4:13-14.) This factual allegation is inconsistent with the other factual allegations of the SAC, which make it clear that Tang participated directly in the CHRO case, translating emails and text messages to be submitted as evidence in a judicial proceeding. Indeed, Zhan must concede that Tang is not a stranger by the very nature of her defamation allegations. Tang's law firm, serving as lead counsel in the CHRO case, attempted to use the translations to obtain a restraining order on behalf of its client.

The court SUSTAINS the demurrer as to the defamation cause of action without leave to amend.[6] A "[p]laintiff must show in what manner [she] can amend [her] complaint and how that amendment will change the legal effect of his pleading. [Citations.]" (*Goodman v.*

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[6] Plaintiff appears to request a stay but cites no corresponding authority for the stay. (See *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [points asserted without supporting authority are waived].) Accordingly, any request for a stay is denied.

Kennedy (1976) 18 Cal.3d 335, 349.) Zhan has not done so here, despite already having been given an opportunity to amend, and the court cannot envision a way that Zhan can cure the defects outlined above.

IV. CONCLUSION

The court STRIKES any newly added causes of action in the SAC and SUSTAINS the demurrer to the defamation cause of action in the SAC without further leave to amend.

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Calendar Lines 3-4
Case Name: *Joe Sparacino v. Terri Fijak et al.*
Case No.: 23CV422278

The present action arises out of a reverse mortgage loan taken out by Linda Lovell in 2010. Plaintiff Joe Sparacino, Lovell's son, filed the present action on behalf of his mother against defendants Financial Freedom Acquisition LLC, Mortgage Electronic Registration Systems, Inc., Terri Fijak, and John Fijak. Terri Fijak is also a daughter of Lovell (and apparently, Sparacino's half sister), and she and John Fijak are referred to herein collectively as the "Fijaks." First Citizens Bank ("First Citizens")—which is the successor in interest to Financial Freedom Acquisition, LLC—and Mortgage Electronic Registration Systems, Inc. ("MERS") are referred to herein as the "Lender Defendants."

I. BACKGROUND

Sparacino filed the original complaint against the defendants on September 6, 2023. On March 14, 2024, Sparacino filed a first amended complaint ("FAC"), alleging causes of action for: (1) fraud (against the Fijaks); (2) breach of fiduciary duty (against First Citizens and MERS); (3) accounting (against all defendants); and (4) financial elder abuse (against Terri Fijak).

Sparacino alleges that he holds a power of attorney for Lovell, which allows him to bring these causes of action on her behalf. (FAC, ¶ 1.) According to the FAC, the property that is the subject of the reverse mortgage is located at 1311 Kipling Court, San Jose, CA 95118, which is held by Lovell through a revocable trust (the "Trust"). (*Ibid*.) Lovell served as trustee of the Trust until her doctor determined her "incompetent due to a diagnosis of dementia as of October 2023." (*Ibid*.) Sparacino became the sole active trustee upon Lovell's incapacity. (*Id*. at ¶ 2.)

On February 19, 2010, Lovell and her husband, Chester Lovell, Jr. (now deceased), entered a closed-end fixed rate reverse mortgage deed of trust engagement ("Reverse Mortgage") with First Citizens and MERS. (FAC, ¶¶ 22-23.) The original loan amount on the Reverse Mortgage was $780,000.00. (*Id*. at ¶ 25.) As of April 2, 2023, the balance stood at $734,149.03. (*Ibid*.)

Sparacino alleges that the Fijaks, a married couple, induced Chester Lovell into removing Linda Lovell from the joint checking account that the Lovells shared. (FAC, ¶ 27.) Terri Fijak replaced Linda Lovell on the checking account, ostensibly to assist the Lovells in paying bills while Chester Lovell was ill, but the Fijaks allegedly withdrew funds from this checking account for their own benefit. (*Ibid*.) Terri Fijak also allegedly took from Linda Lovell's home a copy of the Trust and fraudulently altered the Trust to change distributions of Trust property upon Linda's death. (*Id*. at ¶ 28.) Shortly before his death, Chester Lovell went to live in a hospice facility, and Terri Fijak informed the hospice facility that Chester had no spouse and that Linda was deceased. (*Id*. at ¶ 29.) Terri Fijak told a hospital treating Linda Lovell that the latter had dementia, even though Linda allegedly "had full use of her faculties." (*Id*. at ¶ 30.) Terri Fijak possessed credit cards opened with Bank of America and Wells Fargo Bank in Chester Lovell's name. (*Id*. at ¶ 31.) Terri Fijak reported to law enforcement that Chester Lovell experienced elder abuse, and social services workers investigated Linda Lovell regarding that report. (*Id*. at ¶ 32.)

Currently before the court is a demurrer to the entire FAC by the Fijaks.[7] In addition, the Lender Defendants have filed a separate demurrer to the second and third causes of action.[8]

II. GENERAL LEGAL STANDARDS

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

The court, in ruling on a demurrer, treats it "as admitting all properly pleaded material facts, but not contentions, deductions or conclusions of fact or law." (*Piccinini v. Cal. Emergency Management Agency* (2014) 226 Cal.App.4th 685, 688, citing *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "A demurrer tests only the legal sufficiency of the pleading. [Citation.] 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.' [Citation.]" (*Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214, superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.) Evidentiary facts found in exhibits attached to a complaint may be considered on demurrer. (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94.) In ruling on a demurrer, courts may also consider matters subject to judicial notice. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 751.)

III. THE FIJAKS' DEMURRER

A demurrer can be directed to the entirety of a pleading or to any cause of action therein. (Code Civ. Proc., § 430.50, subd. (a).) The distinction can be significant because a demurrer to an entire pleading can be sustained only if no cause of action states facts sufficient to entitle plaintiff to any relief. (See *Warren v. Atchison, Topeka & Santa Fe Ry.* (1971) 19 Cal.App.3d, 24, 29 [trial court's sustaining of demurrer to entire pleading reversed on ground that a cause of action was stated]; 5 Witkin, Cal. Procedure (5th ed., 2019) Pleading, § 953 ["A demurrer that merely refers to the complaint as a whole will be sustained only when all counts are defective; if one count is good, the demurrer will be overruled."].)

Code of Civil Procedure section 430.60 states: "A demurrer shall distinctly specify the grounds upon which any of the objections to the complaint, cross-complaint, or answer are

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[7] In their supporting memorandum, the Fijaks purport to demur specifically to the first, third, and fourth causes of action on multiple grounds, but as noted below, this is inconsistent with their notice of demurrer.

[8] The Lender Defendants state in their notice of demurrer that they demur to the second and fourth causes of action. (Notice of Demurrer, p. 1:27-28.) But in their memorandum of points and authorities, they make it clear that they are focused on the second and third causes of action. Because the only causes of action asserted against the Lender Defendants are the second and third, the court construes their notice of demurrer as referring to the second and third causes of action. This is also the focus of Sparacino's opposition.

taken. Unless it does so, it may be disregarded." The California Rules of Court also require that that the demurrer itself (as opposed to a supporting memorandum) specify the target of any objection and the grounds. (See Cal. Rules of Court, rules 3.1103(c), 3.1112(a), 3.1320(a) ["Each ground of demurrer must be in a separate paragraph and must state whether it applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."]; see also 5 Witkin, Cal. Procedure (5th ed., 2019) Pleading, § 953 ["Each ground of demurrer must be in a separate paragraph and must state whether the demurrer applies to the entire complaint, cross-complaint, or answer, or to specified causes of action or defenses."].)

As the Fijaks identify only the FAC as a whole in their notice of demurrer and demurrer, the demurrer can only be considered a demurrer to the entirety of the FAC under section 430.60. (See Notice of Demurrer and Demurrer.) The court must overrule the demurrer if any one cause of action is properly stated. The court finds that the third cause of action for an accounting is properly stated.

The Fijaks demur to Sparacino's third cause of action on the ground that the "entire Cause of Action belongs in the PRAYER FOR RELIEF section." (Memorandum of Points and Authorities in Support of John and Terri Fijak's Demurrer to Plaintiff's Verified First Amended Complaint, p. 11:3.) Sparacino's cause of action also purportedly constitutes an "admission that Plaintiff's has no facts to plead – not even a dollar ($) range, e.g., Linda Lovell was taken for 6-figures ($) or somewhere in the low-3s ($)." (*Id.* at p. 11:1-2.)

"A cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179 (*Teselle*).) "An accounting is an equitable proceeding which is proper where there is an unliquidated and unascertained amount owing that cannot be determined without an examination of the debits and credits on the books to determine what is due and owing. [Citations.] Equitable principles govern, and the plaintiff must show the legal remedy is inadequate . . . some underlying misconduct on the part of the defendant must be showing to invoke the right to this equitable remedy." (*Prakashpalan v. Engstrome, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1136-1137.)

A cause of action for an accounting is a cognizable cause of action. (See *Teselle*, *supra*, 173 Cal.App.4th at p. 179 ["A cause of action for an accounting . . ."].) The court does not find persuasive the Fijaks' argument that this cause of action "belongs in the PRAYER FOR RELIEF section" or is limited to a basis for discovery. The Fijaks provide no legal support for this argument. (See *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [points asserted without supporting authority are waived].)

Sparacino has otherwise pled sufficient facts to support a cause of action for accounting. He alleges a clear relationship between the Fijaks and the Lovells. The Fijaks allegedly received sums of money belonging to Linda Lovell and Chester Lovell Jr. through various means, including proceeds from the Reverse Mortgage, funds from a bank account originally held in the Lovells' names, and proceeds from credit card accounts that were purportedly opened fraudulently under Chester Lovell Jr.'s name. (FAC, ¶ 45.) Sparacino's accounting cause of action seeks to establish the precise amounts received by the Fijaks, "trace the flow of funds, and compel Defendants to provide a detailed account of their transactions"

involving Linda Lovell and her former husband's assets. (Plaintiff's Opposition to Defendants John and Terri Fijak's Demurrer to First Amended Complaint at p. 9:8-10.)

Because Sparacino has properly pled the third cause of action for an accounting, the Fijaks' demurrer to the entire FAC is OVERRULED.

IV. FIRST CITIZENS AND MERS'S DEMURRER

As mentioned above, the Lender Defendants demur to the second and third causes of action.

A. Second Cause of Action – Breach of Fiduciary Duty

1. Statute of Limitations

First Citizens and MERS contend that a four-year statute of limitations bars Sparacino's breach of fiduciary duty cause of action because the alleged breach occurred in 2010 and Sparacino filed the present action in 2023. (Notice of Demurrer and Demurrer, p. 5:7-15.)

A statute of limitations defense may be raised by demurrer, when the grounds for the defense are disclosed on the face of the complaint or from matters judicially noticed. (See *Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 746; *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 995.) "'A demurrer on the ground of the bar of the statute of limitations will not lie where the action may be, but is not necessarily barred.' [Citations.] It must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred. [Citations.] This will not be the case unless the complaint alleges every fact which the defendant would be required to prove if he were to plead the bar of the applicable statute of limitation as an affirmative defense. [Citation.]" (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 881.) "It is not sufficient that the complaint might be barred. [Citation.] If the dates establishing the running of the statute of limitations do not clearly appear in the complaint, there is no ground for general demurrer. The proper remedy 'is to ascertain the factual basis of the contention through discovery and, if necessary, file a motion for summary judgment . . . .' [Citation.]" (*Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325.)

"An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citation.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807 (*Fox*).) "Under the discovery rule, suspicion of one or more of the elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period. [Citations.]" (*Ibid.*) "Rather than examining whether the plaintiffs suspect facts supporting each specific legal element of a particular cause of action, we look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them." (*Ibid*.) "Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1111.) "In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of

the information that would have been revealed by such an investigation." (*Fox, supra*, 35 Cal.4th at p. 808.)

"In order to rely on the discovery rule for delayed accrual of a cause of action, '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' [Citation.] In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer. [Citation.] [¶] Simply put, in order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light. In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period." (*Fox, supra*, 35 Cal.4th at pp. 808-809.)

Sparacino does not dispute that the that a four-year statute of limitations applies to a cause of action for breach of fiduciary duty. (See *William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312 ["[b]reach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year 'catch-all statute' of Code of Civil Procedure section 343"].) Nor does he dispute that this case was filed approximately 13 years after the 2010 Reverse Mortgage. Instead, he claims that he "has sufficiently pleaded facts indicating that [Lovell] discovered the breach of fiduciary duty within the appropriate time frame and exercised reasonable diligence in discovering the fraud." (Opposition to Lender Defendants' Demurrer, p. 7:5-7.) Yet Sparacino points to no date, in either the FAC or his opposition to the Lender Defendants' demurrer, on which either he or Lovell discovered the alleged breach. Furthermore, despite his protestations to the contrary, the FAC does not plead any specific facts regarding the alleged discovery of information supporting a claim for breach of fiduciary duty against the Lender Defendants. The FAC vaguely states that plaintiff "eventually discovered" that the Fijaks were engaged in various financial transactions involving the Lovells (FAC, ¶¶ 17-33); but it does not say anything about when Sparacino or Lovell learned about the Lender Defendants' role in these transactions (if any) or even what specifically that role was. Accordingly, the court finds that the demurrer on statute of limitations grounds is well taken.

2. The Existence of a Fiduciary Duty

The Lender Defendants also argue they did not owe a fiduciary duty to Linda Lovell. (Memorandum, p. 5:25.) They contend that the FAC "is bereft of any facts to suggest that First Citizens' relationship with Plaintiff was anything other than a conventional—and arm's length—relationship between lender and borrower." (*Id*. at p. 5:25-27.) Nor "does Plaintiff allege any facts to show a fiduciary relationship between Plaintiff and MERS." (*Id*. at p. 5:28-6:2.)

The Lender Defendants are correct that no fiduciary duty ordinarily arises out of a borrower-lender relationship in an arm's length transaction. (See *Ragland v. U.S. Bank*

National Assn. (2012) 209 Cal.App.4th 182, 206 (*Ragland*).) A court can find that a borrower and a lender have a relationship giving rise to a fiduciary duty when the lender exceeds the scope of its role as a lender in advising a borrower. (*Barrett v. Bank of Am.* (1986) 183 Cal.App.3d 1362, 1369 [plaintiff "perceived his relationship with [defendant] as very close and he relied on [defendant's] financial advice implicitly. Because of the feeling of trust and reliability [plaintiff] shared confidential financial information concerning unfavorable developments in the C.B. industry. [Plaintiff] also relied on [defendant's] advice on mergers."].) But when a party acts in its conventional role as a lender of money, no such relationship exists. (*Ragland, supra,* 209 Cal.App.4th at p. 207 [holding the trial court did not err in finding no relationship between plaintiff, a borrower, and lender, a financial institution, because "[i]n contrast with the extensive financial and legal advice given by the loan officer in *Barrett*," defendant's advice to plaintiff regarding a loan payment fell within the scope of defendant's "conventional role as a lender of money."].)

The FAC includes no facts suggesting that the Lender Defendants acted beyond the scope of their roles as lenders when engaging with Linda Lovell; nor does it allege any other facts that would establish a relationship beyond that of a lender and borrower. Instead, Sparacino alleges that First Citizens and MERS disbursed money from the Reverse Mortgage – an activity well within the normal scope of a lender's activities – and then failed to investigate misrepresentations related to these disbursements. But again, this latter point merely begs the question because it presupposes the existence of a duty to so investigate.

Sparacino's opposition to the Lender Defendants' demurrer alleges, for the first time, that First Citizens "exceeded its scope as a conventional lender when it conspired with Terri and John Fijak to disburse the loan funds under borrower's name to an unauthorized bank account." (Opposition to MERS Demurrer, p. 7:10-11.) This allegation is not present anywhere in the FAC, and so it cannot be a basis for overruling the demurrer. (See *Childs v. Cal*. (1983) 144 Cal.App.3d 155, 159 ["It is well settled that in testing the validity of a complaint against a demurrer, courts must look exclusively to facts alleged in the complaint, ignoring contrary allegations."]; *United B. & T. Co. v. Fidelity & Deposit Co.* (1928) 204 Cal. 460, 461 ["The facts herein considered are taken from the complaint, it being the only record by which the question of the sufficiency of the facts as stating a cause of action may be judged."].) In any event, even if this conclusory statement from the opposition brief were contained in the pleading, it would still arguably be insufficient, as there are no factual allegations to support this supposed conspiracy between the Lender Defendants and the Fijaks.

3. Failure to Attach Underlying Document

The Lender Defendants contend that the failure to attach the terms of the Reverse Mortgage is fatal to the FAC. (Memorandum, pp. 6:21-7:3.) The court is not persuaded. The Lender Defendants rely on *Otworth v. Southern Pacific Transportation Co*. (1985) 166 Cal.App.3d 452, 459 (*Otworth*). But *Otworth* involved a breach of contract action, which requires that the terms of the contract be pled. (See *Otworth, supra,* 166 Cal.App.3d at p. 459.) Here, there is no breach of contract cause of action, and the Lender Defendants provide no other support for this argument. Accordingly, the court rejects it.

4. Failure to Plead Sufficient Facts

The Lender Defendants argue that Sparacino offers "mere conclusions" and fails to allege sufficient facts to support a claim for breach of fiduciary duty. (Memorandum, p. 6:3-20.) According to them, the FAC "effectively concedes Defendants did not engage in the conduct which underlies Plaintiff's claim against Defendants." (*Id*. at p. 6:7-8.) The FAC alleges that Linda Lovell—not the Fijaks—"entered into a closed-end fixed rate reverse mortgage deed of trust agreement" with First Citizens and MERS. (FAC, ¶ 23.) Therefore, according to the Lender Defendants, the Fijaks could not "have misrepresented their authority to enter" into a reverse mortgage on Lovell's behalf, and the Lender Defendants could not have breached any alleged duty to investigate any purported misrepresentation. (Memorandum, p. 6:14-18.)

Sparacino responds that "the existence of a fiduciary duty is determined by the specific facts and nature of the relationship between the parties." (Opposition, p. 7:14-15, [citing *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29].) Sparacino contends that he "has provided detailed allegations demonstrating how Defendants breached their fiduciary duty by disbursing borrower's loan funds to an account [Lovell] had no access to and was not authorized [sic]." (*Id*. at p. 7:15-17.)

The court finds the Lender Defendants' argument to be convincing. Sparacino does not present any facts supporting his contention that the Fijaks misrepresented their authority to enter into the Reverse Mortgage; he merely states that they did so. He does not present any facts supporting his contention that the Fijaks actually entered into the Reverse Mortgage, rather than Lovell herself. Further, the FAC does not, in fact, make any mention of either First Citizens or MERS disbursing unauthorized funds to an account Lovell could not access. In fact, the FAC does not make clear that the Lender Defendants actually distributed proceeds from the Reverse Mortgage to the Fijaks directly. Instead, it states that Terri Fijak received sums of money properly belonging to Lovell "in the form of proceeds obtained from the Reverse Mortgage, proceeds which were disbursed by co-defendants FREEDOM and MERS." (FAC, ¶ 45.) As a result, the court finds that the FAC fails to plead sufficient facts to allege a breach of fiduciary duty.

5. Conclusion

The court SUSTAINS the demurrer as to the second cause of action with 20 days' leave to amend, based on the apparent time bar, based on the absence of sufficient allegations to support the existence of a fiduciary duty, and based on the absence of sufficient allegations to show a breach of fiduciary duty. Even though Sparacino has not even attempted to show that there is any reasonable possibility that the foregoing defects can be cured by amendment, the court will grant leave, given that this is the first pleading challenge, and it is not obvious to the court that leave to amend would be completely futile.

B. Third Cause of Action – Accounting

The Lender Defendants demur to the third cause of action for an accounting on the grounds that they: (1) owe no fiduciary duty to Linda Lovell; and (2) owe no balance to Lovell. (See, e.g., Memorandum, pp. 7-8.)

As noted above, "[a] cause of action for an accounting requires a showing that a relationship exists between the plaintiff and defendant that requires an accounting, and that some balance is due the plaintiff that can only be ascertained by an accounting." (*Teselle, supra,* 173 Cal.App.4th at 179.) "An accounting is an equitable proceeding which is proper where there is an unliquidated and unascertained amount owing that cannot be determined without an examination of the debits and credits on the books to determine what is due and owing. [Citations.] Equitable principles govern, and the plaintiff must show the legal remedy is inadequate . . . [s]ome underlying misconduct on the part of the defendant must be showing to invoke the right to this equitable remedy. [Citation.]" (*Prakashpalan v. Engstrome, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1136-1137.)

Sparacino argues that a party need not have a fiduciary relationship to allege an accounting cause of action, and the Lender Defendants appear to concede this point in their reply. (Reply, p. 5:13-16.) For this reason, the court rejects the Lender Defendants' contention that the third cause of action "rises and falls" with the fiduciary duty cause of action.

The Lender Defendants also argue that they have no existing relationship with Lovell—fiduciary or otherwise—because they assigned the Reverse Mortgage to the Secretary of Housing and Urban Development in Washington D.C. (Reply, p. 5:17-21.) Accordingly, they claim that they divested themselves of any interest in the Reverse Mortgage "several years ago" and have no present relationship with Lovell that would justify an accounting. (*Id*. at p. 5:21-23.) This argument is being raised for the first time on reply, with the Lender Defendants submitting a request for judicial notice of an "Assignment of Deed of Trust," dated October 5, 2017, with their reply brief. The court finds this argument (and evidence) to be improper. As a general matter, "points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before." (*Proctor v. Vishay Intertechnology, Inc*. (2013) 213 Cal.App.4th 1258, 1273; See also *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 ["This court will not consider points raised for the first time in a reply brief for the obvious reason that opposing counsel has not been given the opportunity to address those points."].) The Lender Defendants have not shown any good reason for failing to make this argument in their opening papers.

At the same time, the court agrees with the Lender Defendants that the FAC fails to set forth sufficient facts to allege that they owe a "balance" to Lovell (or Sparacino). The FAC does not explain how the actions of First Citizens or MERS resulted in any missing, misappropriated, or converted sums on the Reverse Mortgage, given that it merely alleges that the Lender Defendants failed to investigate "whether the Reverse Mortgage was being entered into under fraudulent circumstances." (FAC, ¶ 40.) Whether MERS or First Citizens "failed to investigate" the circumstances under which the Reverse Mortgage was entered into does not necessarily give rise to a duty to provide an accounting to Sparacino regarding any subsequent "balance" that may exist on the mortgage, particularly if there is no showing that anything is owed by the Lender Defendants on that reverse mortgage. Indeed, a reverse mortgage normally means that the *borrower owes money to the lender*, not the other way around. Further, as the Lender Defendants point out, "the Defendants that are alleged to have received the proceeds in question are the Fijaks, not First Citizen or MERS." (Reply, p. 6:10-12.) Even if Sparacino may or may not have a cause of action against the Fijaks, that does not necessarily mean that he also has a cause of action against the Lender Defendants. The basis for an accounting cause of action against the lenders here is completely unexplained.

The court SUSTAINS the demurrer to the third cause of action with 20 days' leave to amend. The court grants leave to amend solely on the basis that this is the first pleading challenge, and not because any possible cure is apparent to the court.

V. CONCLUSION

The court OVERRULES the Fijaks' demurrer to the FAC.

The court SUSTAINS the Lender Defendants' demurrer as to the second cause of action with 20 days' leave to amend. The court SUSTAINS the Lender Defendants' demurrer to the third cause of action with 20 days' leave to amend.

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Calendar Line 6
Case Name: *Eric F. Hartman v. Koshy P. George et al.*
Case No.: 21CV390666

Defendants Lynn Kuehn and The Carpet Butler (the "Kuehn Defendants") move to compel compliance with document requests propounded to plaintiff Eric Hartman. (Code Civ. Proc., § 2031.320.) Specifically, the Kuehn Defendants seek the production of any videos that Hartman allegedly took of the Kuehn Defendants or that are referred to in the complaint. (See Complaint, ¶ 30; see Requests for Production Nos. 4 & 5.) Relatedly, the Kuehn Defendants also move to compel further responses to these same document requests under Code of Civil Procedure section 2031.310, given that the current responses do not include a clear statement of compliance. Rather, they make production conditional on "advis[ing] as soon as possible as to the electronic procedure for producing your requested video(s), documents and photos."

The court concludes that the motion should be granted. As the Kuehn Defendants note, these document requests were the subject of the court's prior order on January 25, 2024, which directed Hartman to provide substantive responses without any new objections by February 15, 2024. Although Hartman provided tardy written responses on February 19, 2024 and then stated that the requested videos would be "ready" by April 5, 2024, it appears that these videos still have not been produced.

In his opposition to the motion, Hartman justifies his repeated delays by claiming that the Kuehn Defendants failed to serve code-compliant requests for production and "failed to specify the form in which each type of ESI (videos) are to be produced." (Opposition, p. 2:13-16 [citing Code Civ. Proc., §§ 2031.010 and 2031.030].) The court rejects these claims. First, the court already decided that Hartman was required to provide responses to these discovery requests, and so his newfound contention that these requests are "non-code compliant" is in direct contravention of the court's January 25, 2024 order. Second, Hartman fails to specify exactly what he means by "non-code complaint" – if he means that the Kuehn Defendants were required to "specify the form" of his ESI production *before* he would be required to produce it, that is incorrect. Section 2031.030 merely states that a demanding party "*may* specify the form or forms in which each type of electronically stored information is to be produced." (Code Civ. Proc., § 2031.030, subd. (a) [emphasis added].) It does not require it. Moreover, given that Hartman represented in his March 22, 2024 meet-and-confer letter that the videos at issue would be ready in "14 days – April 5, 2024," and it is now July 2024, there is no excuse for this excessive delay.

Hartman must produce the videos at issue within **10 days** of notice of entry of this order.

The Kuehn Defendants also seek $11,250 in monetary sanctions, representing 30 hours of work in preparing this discovery motion. The court finds that this amount is excessive for such a simple motion with such a simple, single issue. The purpose of discovery sanctions is compensatory, not punitive. The court grants the Kuehn Defendants' request only in part, finding that the appropriate amount to be imposed is **$1,875** (five hours of attorney time at $375/hour). The court orders Hartman to pay this amount to the Kuehn Defendants within **30 days** of notice of entry of this order.

The Kuehn Defendants have also requested an evidentiary sanction and terminating sanctions. The court finds that these non-monetary sanctions are excessive, too—indeed, they are premature at best. The court denies the request for non-monetary sanctions but will keep an open mind regarding an evidentiary sanction in the event that another discovery motion needs to be brought as a result of a further failure to comply with an order of the court. It is certainly the court's hope that such a motion will not be necessary.

The motion to compel is GRANTED. The request for sanctions is GRANTED IN PART and DENIED IN PART.

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Calendar Line 8
Case Name: *Olivia Rodriguez v. Luis Alberto Caro Zuniga*
Case No.: 18CV321965

This is a motion for leave to amend a complaint in a case that was apparently dismissed in 2019, more than five years ago. With his opposition to the motion, defendant Luis Alberto Caro Zuniga ("Caro") submits a request for judicial notice of three prior minute orders in this case, as well as the register of actions from the court's docket in this case. The court grants judicial notice of these documents under Evidence Code section 452, subdivision (d), and it finds that the January 31, 2019 minute order expressly states that the case was dismissed at the request of plaintiff's counsel: "Med held, settled. Case Dism at atty's request." Plaintiff Olivia Rodriguez argues in reply that this minute order was insufficient to dismiss the case because it "was not signed by a Judge" and does not indicate which side's "atty" dismissed the case. (Reply, pp. 3:20-6:5.) The court finds this unsupported argument to be meritless. Code of Civil Procedure section 581, subdivision (b)(1), clearly states that a case may be dismissed "by oral or written request to the court at any time before the actual commencement of trial." Although the undersigned was not the judge at the January 31, 2019 hearing, this court must infer that the prior judge followed the law and that the minute order would not have said what it says if the "atty" who requested the dismissal was the *defendant's* attorney instead of the *plaintiff's* attorney. Rodriguez's supposition to the contrary is entirely baseless.

Caro apparently made the same evidentiary showing that he makes here when Rodriguez attempted to file a motion to enforce the parties' settlement in June 2021, *more than two years* after the 2019 dismissal. Caro cited the January 31, 2019 minute order in an effort to argue that the case was already dismissed; in addition, Caro pointed out that there was no retention of jurisdiction under Code of Civil Procedure section 664.6 when the case was dismissed, and so the court did not have jurisdiction to enforce the settlement. Although the undersigned does not understand why there is no ruling in the court file on Rodriguez's 2021 motion to enforce the settlement, the undersigned finds that the question is moot in any event. This case is over, and so the court does not have jurisdiction to do anything further, whether that is enforce the settlement or grant leave to amend a pleading.

Because this case is dismissed, the motion is DENIED.

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Calendar Line 11
Case Name: *Yuping Lin v. Cohesity, Inc.*
Case No.: 22CV395293

This is a motion to dismiss the case for a failure to prosecute under Code of Civil Procedure section 583.410, subdivision (a) (incorrectly cited as section "538.410(a)" *repeatedly* in both the notice of motion and the supporting memorandum of points and authorities), filed by defendant Cohesity, Inc. ("Cohesity"). As an apparent illustration of the manner in which his attorney has prosecuted the case, plaintiff Yuping Lin has filed an opposing memorandum and declaration *three* days late. In reply, Cohesity urges the court to disregard Lin's tardy opposition.

The court denies the motion, notwithstanding the lateness of the opposition. A discretionary dismissal under sections 583.410 and 583.420 is a drastic remedy and runs counter to the general policy in California of favoring decisions on the merits. Although Cohesity has certainly shown dilatory conduct on the part of Lin and/or his counsel, the court finds that it does not quite rise to the level of a required dismissal. Under rule 3.1342(e) of the California Rules of Court, the court finds that while some factors weigh in favor of dismissal of the case, factors (e)(3) and (e)(9) weigh against a dismissal. In particular, it appears that plaintiff has made substantial efforts at ADR, and it also appears that the primary reasons for the delays in this case are attributable to counsel rather than Lin himself, making a dismissal contrary to the interests of justice.

The motion is DENIED. This matter is currently on for an ADR status review on August 29, 2024 at 10:30 a.m. in Department 10, but the court will consider a proposal from the parties to set a trial date that is approximately nine or ten months out from that August 29 date. The parties are ordered to meet and confer regarding trial dates.

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Calendar Line 12
Case Name: *Robert Rome v. Cupertino Healthcare & Wellness Center, LLC et al.*
Case No.: 23CV421811

This is a motion for a preferential trial setting under Code of Civil Procedure section 36, filed by plaintiff Robert Rome against defendants Cupertino Healthcare & Wellness Center, LLC d/b/a Cupertino Healthcare & Wellness Center and Sol Healthcare, LLC (collectively, "Defendants").

Under section 36, a party may file and serve a motion for a preferential trial setting upon "a declaration of the moving party that all essential parties have been served with process or have answered." (Code Civ. Proc., § 36, subd. (c).) Here, Rome's supporting declaration states that "Defendant" was served with process and that "Defendants filed an Answer on March 1, 2024." (Declaration of Janine A. Mitchell, ¶ 5.) But the court sees that there are two defendants named in the complaint as to whom there is no proof of service in the file and who are not included in the answer that was filed on March 1, 2024: Ensemble Healthcare, LLC and Rechnitz Core, GP. Neither side's papers adequately explain who these entities are, and their roles are not apparent from the complaint, which repeatedly lumps all of the "Defendants" together. Unless Rome appears at the hearing and explains why Ensemble Healthcare, LLC and Rechnitz Core, GP are not "essential parties," the court will deny the motion.

If Rome does provide an adequate explanation as to Ensemble Healthcare, LLC and Rechnitz Core, GP, then the court will grant the motion under the mandatory provisions of section 36, subdivision (a). The moving papers demonstrate that Rome is over 70 years of age, has a substantial interest in this action as the plaintiff, and has a health condition such that "a preference is necessary to prevent prejudicing the party's interest in the litigation." (Code Civ. Proc., § 36, subd. (a)(1)-(a)(2).) Defendants argue that under the discretionary provisions of section 36, subdivision (d), Rome has not shown "clear and convincing medical documentation" to support his motion. The court does not need to rely on the discretionary provisions of subdivision (d), given that Rome clearly satisfies the mandatory provisions of subdivision (a). For the same reason, Defendants' arguments against, and objections to, the supporting declaration of Rome's counsel are without merit, given that they fail to take account of Code of Civil Procedure section 36.5, which allows a declaration of counsel to support a showing under section 36, subdivision (a).

Again, the parties are ordered to appear to clarify the situation regarding the (apparently) unserved defendants, Ensemble Healthcare, LLC and Rechnitz Core, GP.

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Calendar Line 13
Case Name: *Zeus Lopez, Sr. v. Universal Site Services, Inc.*
Case No.: 23CV426086

This is an employment case in which the employer, defendant Universal Site Services, Inc. ("USS"), moves to compel arbitration, based on an arbitration agreement that it allegedly entered into with its former employee, plaintiff Zeus Lopez, Sr. ("Lopez"). Because the court concludes that there is insufficient evidence to establish that Lopez knowingly assented to the agreement, the court DENIES the motion.

USS hired Lopez on September 21, 2021 "to drive a dump truck around the Bay [A]rea and pick up items and trash." (Complaint, ¶ 9.) About a month and a half later, on November 11, 2021, he electronically signed a "Task Acknowledgement" that stated: "I hereby acknowledge that I have read and understand Review Arbitration Agreement." (Declaration of Maria Lobato in Support of Motion to Compel, ¶ 3, Exhibit 1.) The three-page "Arbitration Agreement" itself is attached as Exhibit 1 to the Lobato Declaration, but the third page, the signature page, is undated and unsigned. USS argues that Lopez nevertheless signed the Agreement by signing the separate Task Acknowledgement. Lopez disagrees and also argues that USS has not properly authenticated his signature on either the Task Acknowledgement or the Arbitration Agreement. (Opposition, pp. 5:11-22, 8:25-10:25.)

The court ultimately finds that USS has properly authenticated Lopez's signature on the Task Acknowledgement. In addition, the court rejects Lopez's arguments: (1) that the Task Acknowledgement is not related to the Arbitration Agreement, (2) that USS admitted in discovery responses that the Task Acknowledgement is not related to the Arbitration Agreement, and (3) that the Arbitration Agreement is unclear in its definition of "Employee." Nevertheless, the court also finds that the Task Acknowledgement contains an insufficient statement of assent on its face. Instead of signing the Arbitration Agreement itself or signing a separate document that says he *agrees to* the Arbitration Agreement (or that he *concurs* in it, *consents* to it, *assents* to it, *accedes* to it, *acquiesces* in it, or otherwise *accepts* it), Lopez signed a separate document that merely says he "read" the Arbitration Agreement and "understand[s]" it. That is not enough. From the perspective of USS, this may sound like splitting hairs: why make Lopez sign a statement saying that he has read and understood an agreement if he is not being asked to assent to it? From Lopez's perspective, however, it is a material distinction, because it needs to have been made clear *to him* that he was agreeing to be bound by something, not just understanding it.

This distinction is particularly important, given that USS has argued, rather strenuously, that signing the Arbitration Agreement was not a condition of Lopez's employment and that any signature on it was purely "voluntary" on his part. (Reply, p. 9:3-14.) This cuts against a finding that Lopez implicitly agreed to be bound by the Arbitration Agreement. (See *Diaz v. Sohnen Enterprises* (2019) 34 Cal.App.5th 126, 131 [after being told that an arbitration agreement is a condition of employment, an employee who continues to work may be deemed to have impliedly consented to it].) It also cuts against the notion that he knew he was agreeing to be bound by the Agreement by signing a statement that says he "understand[s]" it. In addition, USS contends that in addition to the Task Acknowledgement for the Arbitration Agreement, Lopez also "executed additional documents that very day [November 11, 2021] and within mere seconds of one another." (Reply, p. 5:15-16.) This, too, heightens the importance of making sure that an employee who is asked to "click through" various

acknowledgements and agreements via an electronic signature "within mere seconds of one another" is clearly told that they are signing a binding agreement, not just that they "understand" that agreement.

The court therefore denies the motion. Because the court concludes that there is insufficient evidence of a meeting of the minds regarding arbitration, the court declines to address Lopez's additional argument that the Arbitration Agreement is unconscionable.

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Calendar Line 14
Case Name: *Stratim Capital Growth Fund, LLC et al. v. Altierre Corporation*
Case No.: 23CV428277

On April 11, 2024, proposed intervenor Kline Hill Partners Fund II LP ("Kline Hill") filed an ex parte application to intervene in this case. Plaintiffs Stratim Capital Growth Fund, LLC, Stratim Cloud Fund, LP, and Stratim Capital, LLC (collectively, "Stratim") opposed the application. On April 12, 2024, this court denied the application without prejudice and set the matter on the law-and-motion calendar for July 9, 2024, with additional briefing from the parties. Having now considered all of the parties' submissions, including the proposed complaint in intervention, the court grants the motion.[9]

A third party seeking intervention may demonstrate either a "right" to intervene or a basis for "permissive" intervention. (Code Civ. Proc., § 387, subd. (d).) The former applies if the "person seeking intervention claims an interest relating to the property or transaction that is the subject of the action and that person is so situated that the disposition of the action may impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by one or more of the existing parties." (Code Civ. Proc., § 387, subd. (d)(1)(B).) The latter applies "if the person has an interest in the subject matter in litigation, or in the success of either of the parties, or an interest against both." (Code Civ. Proc., § 387, subd. (d)(2).) Under subdivision (d)(2), the court has the discretion to permit intervention if: "(1) the intervener has a direct and immediate interest in the litigation, (2) the intervention will not enlarge the issues in the case, and (3) the reasons for intervention outweigh opposition by the existing parties." (*Hinton v. Beck* (2009) 176 Cal.App.4th 1378, 1382-1383.)

The court finds that Kline Hill is entitled to intervene as of right. First, it has demonstrated that its proposed complaint in intervention is related to "the property or transaction that is the subject" of this case—*i.e.*, Stratim's loan(s) to defendant Altierre Corporation ("Altierre"). Stratim devotes a great deal of its opposition to emphasizing that Kline Hill may no longer have direct causes of action against Stratim in the pending San Francisco case (Case No. CGC-21-594124) because the San Francisco court sustained Stratim's demurrer to the direct causes of action, leaving only derivative causes of action. Even if this is true, Stratim presents no authority for the proposition that derivative claims cannot "support intervention in this action." (Opposition, p. 7:10.) The requirement that an intervenor's interest in the subject of the litigation be "direct" rather than "consequential" only applies to permissive intervention, not intervention as of right; by contrast, subdivision (d)(1)(B) requires only an interest "*relating to*" the property or transaction that is the subject of the litigation. There is no dispute that Kline Hill's pending derivative causes of action in the

[9] Stratim has filed a request for judicial notice. The court takes judicial notice of Exhibits C, D, E, F, G, and J, which are court orders and court filings, but not as to the truth of any disputed facts contained therein. (Evid. Code, § 452, subd. (d).) The court denies judicial notice as to Exhibits A & B, which do not fall under any identified subdivision of Evidence Code section 452. Contrary to Stratim's contentions, these are not "[o]fficial acts of the legislative, executive, [or] judicial departments of the United States [or] of any state." (Evid. Code, § 452, subd. (c).) Nevertheless, the court has considered these documents as attached to the declaration of J. Craig Crawford. The court generally agrees with Kline Hill that on a motion to intervene, the court does not focus on "evidence"—rather, the focus is on allegations, particularly the allegations set forth in the proposed complaint in intervention.

San Francisco case "relate to" the assets of Altierre and the loan(s) provided to Altierre by Stratim.

Second, Kline Hill has shown that without intervention, its ability to protect its alleged interests may be impaired or impeded, given that Altierre is insolvent and has failed to defend itself in the present action. Stratim argues that even without intervention, Kline Hill can still pursue its San Francisco case unimpeded, but the court agrees with Kline Hill that this is the wrong legal standard: "the issue is whether an existing party is adequately representing the potential intervenor's interests in the filed lawsuit, without consideration of whether those interests may be protected by pursuing separate litigation in another court." (Reply, p. 12:1-3 [quoting *King v. Pacific Gas & Electric Co.* (2022) 82 Cal.App.5th 440, 454].)

Based on a straightforward application of Code of Civil Procedure section 387, subdivision (d)(1), the court determines that Kline Hill is allowed to intervene as of right. Having so determined, the court declines to address the parties' arguments regarding permissive intervention, which is a slightly closer call, given that there is apparently no case law directly on point that establishes whether derivative shareholder causes of action constitute "direct and immediate" interests or "consequential" interests. Each side has cited extremely old case law—Kline Hill cites *Shively v. Eureka Tellurium Gold Mining Co.* (1900) 129 Cal. 293, 294-295 (*Shively*) and Stratim cites *Difani v. Riverside County Oil Co.* (1927) 201 Cal. 210, 216 (*Difani*)—but it is unclear whether the Supreme Court in *Shively* addressed permissive intervention or intervention as of right (the opinion does not appear to say), and *Difani* was not even an intervention case. In any event, *Difani* is distinguishable, because in contrast to that case, the proposed complaint in intervention here alleges that the Altierre board was compromised by the bad faith of defendant Zachary Abrams, who allegedly "controlled the board and had himself installed as CEO to ensure his control over the Company." (Complaint in Intervention, ¶ 5; see also *id.*, ¶¶ 4, 25-29 [loan terms "were not approved by the Altierre board or its shareholders, and the board did not review any other alternatives"].) In *Difani*, the Court relied on the fact the third-party shareholder "made no charge in her affidavit . . . that the governing board of directors or trustees of the defendant corporation had fraudulently permitted the recovery of the judgment complained of." (*Difani*, 201 Cal. at p. 215-216.) Here, the complaint in intervention clearly alleges otherwise. Moreover, unlike here, there was no indication that the defendant corporation in *Difani* had failed to litigate the case because it was insolvent and defunct.

The motion is GRANTED, and Kline Hill shall separately file its complaint in intervention within 10 days of this order.

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