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: 10/1/2024 TIME: 9:00 A.M.

TO CONTEST THE RULING: Before 4:00 p.m. today (9/30/2024) 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 appearances or by Teams. If you must appear virtually, please use video.

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.

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	24CV434966	Vivienne Vlaskovits vs Regional Medical Center	Hearing: Demurrer to Plaintiff's Complaint by Defendant Regional Medical Center Tentative Ruling for Lines 1 and 7: Demurrer is UNOPPOSED and SUSTAINED WITH 15 DAYS LEAVE TO AMEND. Motion to Strike is MOOT Moving Party shall prepare order for signature by court.
LINE 2	24CV441418	Alejandra Vergara vs Gabriela Vergara	Hearing: Demurrer to Plaintiff's Complaint based on Res Judicata by Defendant Gabriela Vergara, Doe Child #1, Doe Child #2 and Doe Child #3 Ctrl Click (or scroll down) on Line 2 for tentative ruling. The court will prepare the order.

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LINE 3	24CV441486	Waterscape Solutions Inc. et al vs Haoyu Zhai et al	Hearing: Demurrer to Plaintiff's. complaint by Defendant YuJia Real Estate Management LLC Ctrl Click (or scroll down) on Line 3 for tentative ruling. The court will prepare the order.
LINE 4	23CV420588	Michelle Ferkel et al vs Syed Farhan et al	Motion: Compel Further Responses to Request for Production of Documents No. 4 and Privilege Log by Plaintiffs Ctrl Click (or scroll down) on Line 4 for tentative ruling. The court will prepare the order.
LINE 5	24CV430148	Wells Fargo Bank, N.A. vs Jason Zaballero	Motion: Admissions Deemed Admitted against Defendant Jason Zaballero for Plaintiff's Requests for Admissions, Set One to Defendant Jason Zaballero filed by Plaintiff Wells Fargo Bank, N.A. Unopposed and GRANTED. Moving Party to submit order for signature by court.
LINE 6	21CV384601	MARK RUBIN et al vs DOUGLAS HOHBACH et al	Hearing: Motion hearings to Strike, or in the Alternative, Tax Costs by Plaintiffs/Cross Defendants SARAH WEAVER and MARK RUBIN Ctrl Click (or scroll down) on Line 6 for tentative ruling. The court will prepare the order.
LINE 7	24CV441418	Alejandra Vergara vs Gabriela Vergara	Hearing: Motion to Strike Plaintiff's Complaint by Defendant Regional Medical Center Tentative Ruling for Lines 1 and 7: Demurrer is UNOPPOSED and SUSTAINED WITH 15 DAYS LEAVE TO AMEND. Motion to Strike is MOOT Moving Party shall prepare order for signature by court.
LINE 8			
LINE 9			
LINE 10			
LINE 11			
LINE 12			

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Calendar Line 1

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Calendar Line 2
Case Name: *Alejandra Vergara v. Gabriela Vergara, et al.*
Case No.: 24-CV-441418

Demurrer to the Complaint by Defendants Gabriela Vergara, Doe Child #1, Doe Child #2 and Doe Child #3

Factual and Procedural Background

This is an action for breach of an agreement by plaintiff Alejandra Vergara ("Plaintiff") against defendants Gabriela Vergara[1] ("Gabriela"), Doe Child #1, Doe Child #2, and Doe Child #3 (collectively, "Defendants").

According to the complaint, Plaintiff and defendant Gabriela are sisters and the Doe defendants are Gabriela's three unnamed children. (Complaint at ¶¶ 4, 8.)

The real property that is the subject of this action is located at 2932 Vanport Drive in San Jose, California ("Property"). (Complaint at ¶ 1.)

On December 26, 2021, Juan F. Vergara ("Juan"), the father of Plaintiff, Gabriela, and their brother, Raphael,[2] executed the Juan F. Vergara 2012 Living Trust (the "Trust"). (Complaint at ¶ 8.) Shortly thereafter, Juan executed a deed of trust placing the Property into the Trust. (Ibid.)

Section Three of the Trust provided that, upon the death of Juan, the Property was to be distributed to his three children as tenants-in-common, or all to the survivor of them, subject to all liens and encumbrances thereon, with Raphael's share to be held in a special-needs trust. (Complaint at ¶ 9.)

Juan died in August 2020, and, in accordance with the terms of Section Thirteen of the Trust, Plaintiff was appointed as successor Trustee. (Complaint at ¶ 10.)

On December 1, 2020, after the three siblings discussed the distribution among themselves as well as with attorney Sally R. Cooperrider ("Cooperrider") (acting as probate counsel) , they, along with their stepmother, Nancy Frederick ("Nancy"), entered into the Trust Allocation Agreement ("Agreement"). (Complaint at ¶ 11, Ex. A.)

Under the Agreement, the Property would initially be distributed 1/3 each to the three siblings; that Plaintiff and Raphael would then convey their 1/3 interests to Nancy; and that Nancy would then distribute those interests to Gabriela, so that Gabriela would end up as the sole owner of the Property. (Complaint at ¶ 12.)

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[1] At times, the court refers to some of the parties and individuals in the complaint by their first name for purposes of clarity. No disrespect is intended. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

[2] Both "Raphael" and "Rafael" are used interchangeably throughout the complaint. The court assumes both names refer to the brother of Plaintiff and defendant Gabriela. Nevertheless, the court adopts "Raphael" as the proper spelling of the name for purposes of this order.

The Agreement further provided that, in exchange for receiving her siblings' collective 2/3 interest, Gabriela was to execute a promissory note and deed of trust in favor of Raphael in the amount of $280,000; Gabriela was further to execute a promissory note and a deed of trust in favor of Plaintiff in the amount of $205,000; both amounts were to be paid within six months of the date of the Agreement (i.e., by June 1, 2021). (Complaint at ¶ 13.)

Shortly after their father's death, Plaintiff and defendant Gabriela also entered into an agreement, oral and/or by conduct, by the terms of which they would share equally in the entirety of their father's legacy irrespective of whether any particular aspect of it was legally or technically part of his estate. (Complaint at ¶ 14.)

On December 1, 2020, defendant Gabriela executed a Promissory Note stating she promised to pay Plaintiff the sum of $205,000 within six months; in exchange, Plaintiff executed a grant deed conveying her 1/3 interest in the Property. (Complaint at ¶ 22.)

Before his passing, Juan set up a retirement account at Merrill Lynch ("Retirement Account") naming Nancy as the designated beneficiary. (Complaint at ¶ 25.) Upon Juan's death, Merrill Lynch transferred the Retirement Account into Nancy's name. (Ibid.)

Attorney Cooperrider learned of the existence of the Retirement Account while investigating the assets of Juan's estate, and advised Plaintiff and Gabriela of the account. (Complaint at ¶ 26.) Plaintiff declined to look into the account as she believed it was only worth about $50,000. (Id. at ¶ 27.) But, Gabriela and her husband, Andres, told Nancy the money in the account belonged to the children (i.e. Plaintiff, Gabriela, and Raphael) and that Nancy needed to turn over the account. (Id. at ¶ 28.) After a series of phone calls among Nancy, Gabriela, Andres, and a representative of Merrill Lynch, Nancy signed over the proceeds of the Retirement Account to Gabriela, and the proceeds of the account were transferred to her. (Id. at ¶ 29.)

Later, Nancy told Plaintiff she had turned over the account to Gabriela and that Gabriela should have used some of it to pay Plaintiff back. (Complaint at ¶ 30.) When asked about this, Gabriela told Plaintiff that it had been Nancy's wish to give her (Gabriela) the proceeds of the Retirement Account. (Ibid.) Nancy denies this. (Ibid.)

As of March 31, 2022, Plaintiff discovered the Retirement Account was valued at $205,076.56, not $50,000. (Complaint at ¶ 31.) Plaintiff reminded Gabriela that, if Nancy had gifted Gabriela the proceeds of the account, which is part of Juan's legacy, then Gabriela was obligated to share it equally with Plaintiff pursuant to their oral agreement. (Ibid.)

In January 2024, Plaintiff learned that Nancy had been misled by Gabriela and Andres to believe that the Retirement Account belonged to Gabriela alone and that Nancy had to turn it over to Gabriela so Gabriela could pay off the loan to Plaintiff. (Complaint at ¶ 32.) Thus, Plaintiff believes Gabriela acted improperly with respect to their father's assets. (Id. at ¶ 33.)

On June 13, 2024, Plaintiff filed the operative complaint against Defendants: (1) breach of contract; (2) revocation of gift to Gabriela; and (3) revocation of gift to Doe ##1-3.

On July 30, 2024, Defendants filed the motion presently before the court, a demurrer to the complaint. Both sides filed requests for judicial notice in conjunction with the motion. Plaintiff filed written opposition. Defendants filed reply papers.

A case management conference is scheduled for December 10, 2024.

Demurrer to the Complaint

Defendants argue the complaint is subject to demurrer based on the defense of res judicata.

Defendants' Request for Judicial Notice

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

Here, Defendants request judicial notice of the following:

(1) Complaint in case number 22-CV-408447 (Ex. A);
(2) Declaration of Alejandra Vergara in support of her Opposition to Gabriela Vergara's Motion for Summary Judgment in case number 22-CV-408447 (Ex. B);
(3) Order Granting Summary Judgment in case number 22-CV-408447 (Ex. C);
(4) Complaint in case number 24-CV-441418 (Ex. D).

The court may take judicial notice of these exhibits as records of the superior court under Evidence Code section 452, subdivision (d). Furthermore, courts are permitted to take judicial notice of their own files. (See *Stepan v. Garcia* (1974) 43 Cal.App.3d 497, 500 [the court may take judicial notice of its own file].) There is no opposition to the request. The request also appears relevant to arguments raised in support of the res judicata argument in the moving papers. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 [judicial notice is confined to those matters which are relevant to the issue at hand].)

Accordingly, the request for judicial notice is GRANTED.

Plaintiff's Request for Judicial Notice

In opposition, Plaintiff requests judicial notice of the following:

(1) Court Order denying Ex Parte Application for an Order Shortening Time to file and hear Motion for Leave to File Amended Complaint in case number 22-CV-408447 (Ex. 1);
(2) Notice of Motion for Leave to File Amended Complaint in case number 22-CV-408447 (Ex. 2);
(3) Proposed First Amended Complaint in case number 22-CV-408447 (Ex. 3);

(4) Court "Order Denying Motion to Amend" dated April 17, 2024 in case number 22-CV-408447 (Ex. 4);
(5) Court "Order Denying Motion to Amend" dated May 21, 204 in case number 22-CV-408447 (order title is incorrect as it is actually an order granting motion for summary judgment) (Ex. 5).

These exhibits constitute records of the superior court subject to judicial notice under Evidence Code section 452, subdivision (d). The exhibits are also relevant to points raised in support of the opposition.

Therefore, the request for judicial notice is GRANTED.

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.)

Res Judicata

" 'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) Res judicata also bars claims that could have been brought in the prior action. (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 226 (*Planning & Conservation League*).) The purpose of res judicata is to "preserve the integrity of the judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation." (*Vandenberg v. Super. Ct.* (1999) 21 Cal.4th 815, 829.) In essence, it precludes the piecemeal litigation of claims. (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245.)

The elements for res judicata are: (1) a claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted

was a party or in privity with a party to the prior proceeding. (*Ronald F. v. State Dept. of Developmental Services* (2017) 8 Cal.App.5th 84, 93.)

The burden of proving the requirements for the application of res judicata is upon the party seeking to assert it as a bar or estoppel. (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 257.)

"If all of the facts necessary to show that an action is barred by res judicata are within the complaint or subject to judicial notice, a trial court may properly sustain a general demurrer. [Citation.] In ruling on a demurrer based on res judicata, a court may take judicial notice of the official acts or records of any court in this state. [Citations.]" (*Frommhagen v. Bd. of Supervisors* (1987) 197 Cal.App.3d 1292, 1299 (*Frommhagen*).) "[A] demurrer based on res judicata is properly sustained only if the pleadings and judicially noticed facts conclusively establish the elements of the doctrine." (*Planning & Conservation League, supra*, 180 Cal.App.4th at p. 231.)

The court now examines whether the doctrine of res judicata applies to this action based on the operative complaint and the judicially noticed materials.

Same Parties

Res Judicata bars a subsequent action on the same claim between not only parties to the first action, but also their privies. (*Rice v. Crow* (2000) 81 Cal.App.4th 725, 735.)

"Under the requirement of privity, only parties to the former judgment or their privies may take advantage of or be bound by it. [Citation.] A party in this connection is one who is 'directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment.' [Citations.] A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase. [Citations.]" (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 811 (*Bernhard*).)

Here, both Plaintiff and defendant Gabriela were parties to the prior action in case number 22-CV-408447 ("First Action"). (See Defendants' RJN at Ex. A.) And, even though the Doe defendants were not named as parties in the First Action, case authority suggests that privity exists between Gabriela and her children for purposes of res judicata. (See *Garcia v. Rehrig Internat., Inc.* (2002) 99 Cal.App.4th 869, 878 ["We conclude the parents adequately represented the minor's interests in the prior action and the trial court erred in determining privity was absent."]; see also *Aguilar v. Los Angeles County* (9th Cir. 1985) 751 F.2d 1089, 1093 ["The concept of privity 'has been expanded…to a relationship between the party to be estopped and the unsuccessful party in the prior litigation which is "sufficiently close" so as to justify the application of the doctrine of collateral estoppel.' "].) Nor does Plaintiff dispute this factor in opposition. Thus, this element satisfies the res judicata doctrine.

Final Judgment on the Merits

For purposes of res judicata, a judgment is on the merits if the substance of the claim is tried and determined. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 77.) "This may include a judgment of dismissal following a general demurrer or a dismissal motion if the

disposition was plainly reached 'on a ground of substance.' [Citations.]" (*Association of Irritated Residents v. Department of Conservation* (2017) 11 Cal.App.5th 1202, 1220 (*Association of Irritated Residents*).) "[I]t is the nature of the action and the character of the judgment that determines whether it is *res judicata*." (*Goddard v. Security Title Ins. v. Guar. Co.* (1939) 14 Cal.2d 47, 54.)

"The rationale for applying res judicata where a judgment was on the merits has been explained as follows: 'This requirement is derived from the fundamental policy of the doctrine, which gives stability to judgments after the parties have had a fair opportunity to litigate their claims and defenses.' [Citations.] 'The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue [or cause of action] from again drawing it into controversy.' [Citation.]" (*Association of Irritated Residents, supra,* 11 Cal.App.5th at p. 1219.)

"If the prior judgment was not on the merits, then res judicata is not applicable and it does not have the effect of barring the subsequent action. [Citation.]" (*Association of Irritated Residents, supra,* 11 Cal.App.5th at p. 1219.)

As a preliminary matter, Defendants did not submit any "final judgment" to the court in support of their res judicata argument. Rather, they provided only the trial court's order in the First Action granting the motion for summary judgment. (See Defendants' RJN at Ex. C.) But, such an order does not constitute a final judgment. (See *People ex rel. Feuer v. Super. Ct. (Cahuenga's the Spot)* (2015) 234 Cal.App.4th 1360, 1374 [grant of a motion for summary judgment is an important step, but not the only step, in the course of litigation that will conclude later with entry of final judgment]; *Doudell v. Shoo* (1911) 159 Cal. 448, 453 ["A judgment is final 'when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.' "]; see also *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 628-629 [order granting summary judgment is not itself appealable, but appeal lies from judgment entered on such order].)

Even if final judgment had been entered, it would not be a "judgment on the merits" of claims asserted in the present action. The First Action arose from breach of the *written* Agreement and related promissory note, alleging causes of action for: (1) breach of contract, (2) fraud and misrepresentation, (3) rescission, and (4) declaratory relief. (See Plaintiff's RJN at Ex. 5; Defendants' RJN at Ex. A.) By contrast, the current lawsuit alleges claims for breach of an *oral* contract and revocation of gifts to Defendants which were omitted from the court's order granting summary judgment. (See Plaintiff's RJN at Ex. 5; Defendants' RJN at Ex. D.) In fact, Plaintiff attempted to raise these new legal theories in a motion for leave to file an amended pleading during the First Action that were rejected by the court prior to the ruling on the motion for summary judgment. (See Plaintiff's RJN at Exs. 2-4.) Consequently, there can be no final judgment on the merits to support the defense of res judicata.

Same Issues

"California has consistently applied the 'primary rights' theory in defining a cause of action. Under this theory, the invasion of one 'primary right' gives rise to a single cause of action, even though several remedies may be available to protect the primary right.

[Citations.]" (*Frommhagen, supra,* 197 Cal.App.3d at pp. 1299-1300.) "In particular, the primary right theory provides that a cause of action consists of (1) a primary right possessed by the plaintiff, (2) a corresponding duty devolving upon the defendant, and (3) a delict or wrong done by the defendant which consists of a breach of the primary right." (*Amin v. Khazindar* (2003) 112 Cal.App.4th 582, 589.)

"[T]he 'cause of action' is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. 'Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal ground* for relief.' [Citations.]" (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.)

"Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involves the same primary right." (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798.)

As stated above, the causes of action in the First Action differ from those raised in the present lawsuit. Even so, Defendants contend both actions constitute a dispute by the parties to the estate and "legacy" of Juan, their father. (See Demurrer at p. 8:9-12.) Thus, Defendants suggest res judicata applies as Plaintiff could have brought these claims in the First Action and failed to do so. (See Demurrer at p. 8:13-23; see *Zevnik v. Super. Ct.* (2008) 159 Cal.App.4th 76, 82 ["Res judicata bars the litigation not only of issues that were actually litigated in the prior proceeding, but also issues that could have been litigated in that proceeding."].) This contention however is not persuasive as the trial court prevented Plaintiff from asserting these legal theories in the First Action. In the order denying leave to amend, Judge Pennypacker explained that the proposed amendment stated a different theory of recovery that radically changed the existing theories in the First Action. (See Plaintiff's RJN Ex. 4.) And, as pointed out in opposition, res judicata must "conform to the mandate of due process of law that no person be deprived of personal or property rights by a judgment without notice and an opportunity to be heard." (*Bernhard, supra,* 19 Cal.2d at p. 811; OPP at p. 10:18-26.) Here, Plaintiff has yet to be heard on her claims for breach of oral contract and revocation of gifts that were not considered in the First Action. It remains to be seen if Plaintiff will prevail on such claims. But, for purposes of this demurrer, it appears that such causes of action are not barred by the defense of res judicata.

Accordingly, the demurrer to the complaint based on res judicata is OVERRULED.

Disposition

The demurrer to the complaint on the ground of res judicata is OVERRULED.

The court will prepare the Order.

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Calendar Line 3
Case Name: *Waterscape Solutions Inc. v. Haoyu Zhai et al.*
Case No.: 24CV441486

I. Factual and Procedural Background

Plaintiff Waterscape Solutions Inc. ("Plaintiff") brings this breach of contract action against defendants Haoyu Zhai ("Zhai") and YuJia Real Estate Management LLC ("YuJia") (collectively, "Defendants").

According to the allegations of the Judicial Form Complaint, on or around June 1, 2020, Plaintiff and Zhai entered into an oral agreement for pool cleaning services. (Compl., p. 3, BC-1.) Zhai was to pay Plaintiff for monthly, regular cleaning and for an annual chemical treatment for two separate properties. (*Ibid*.)

On or around February 23, 2024, Plaintiff invoiced Zhai, but no payment was issued. (Compl., p. 3, BC-2.) On May 14, 2024, a demand was sent to Zhai. (*Ibid*.) Zhai promised to pay the invoice but never did. (*Ibid*.) A second demand was sent on May 28, 2024, but Zhai failed to respond entirely. (*Ibid*.) There are now two outstanding invoices for the two properties in the amount of $3,370 and $1,655. (Compl., p. 3, BC-4.)

On June 20, 2024, Plaintiff filed its complaint, asserting a cause of action for (1) breach of contract against Zhai and (2) common count for an open book account of money due against Defendants.

On July 31, 2024, Defendants filed a demurrer to the complaint. Plaintiff opposes the motion and Defendants filed a reply.

II. Procedural Matter

Untimely Demurrer

Pursuant to Code of Civil Procedure section 430.40, subdivision (a), a demurrer may be filed and served within 30 days after service of the complaint. (Code Civ. Proc., § 430.40, subd. (a); *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 280 (*McAllister*).) Additionally, California Rules of Court, Rule 3.110, provides that parties may stipulate without leave of court to one 15-day extension beyond the 30-day time period prescribed for response after service of the initial complaint. (Cal. Rules of Court, Rule 3.110.)

Plaintiff argues that Defendants' demurrer is untimely and that they did not enter into a stipulation to extend the time period to file a demurrer. (Opposition, p. 5, subd. D.) Plaintiff contends it served Defendants with the complaint on June 28, 2024 and that any demurrer needed to by filed by July 29, 2024. Here, the demurrer was filed on July 31, 2024, two days late. Plaintiff urges the Court to overrule the demurrer on this basis. The Court declines to do so. First, Code of Civil Procedure section 430.40, subd. (a), "uses the permissive expression 'may,' not the mandatory term 'must.'" (*McAllister*, *supra*, 147 Cal.App.4th at p. 280.) Further, "there is no absolute right to have a [demurrer] stricken for lack of timeliness in filing where no question of jurisdiction is involved, and where, as here, the late filing was a mere irregularity; the granting or denial of the motion is a matter which lies within the discretion of the court. The trial court may exercise this discretion so long as its action does not affect the

substantial rights of the parties." (*Jackson v. Doe* (2011) 192 Cal.App.4th 742, 750 [internal citations and quotations omitted].)

Here, Defendants demurrer was filed only two days after the thirty-day time period. Moreover, Plaintiff has filed a substantive opposition to the demurrer and therefore, no prejudice will result in considering the merits of the demurrer. Finally, courts have a strong policy of favoring disposition of cases on the merits rather than on procedural grounds. (See *Kapitanski v. Von's Grocery Co.* (1983) 146 Cal.App.3d 29, 32-33 ["Cognizant of the strong policy favoring the disposition of cases on their merits…judges frequently consider documents which have been untimely filed."].) Accordingly, the Court declines to overrule the demurrer on the ground it is untimely.

III. Demurrer

a. Legal Standard

In ruling on a demurrer, the court 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.)

b. Request for Judicial Notice

In support of their demurrer, Defendants request the Court take judicial notice of the following:

1) Fictitious Business Name Statement, filed on February 22, 2021;
2) Fictitious Business Name Statement, filed on May 6, 2010;
3) Articles of Incorporation recorded on March 26, 2013; and
4) Certificate of Dissolution recorded on December 22, 2023.

The request is DENIED. Materials prepared by private parties that are merely on file with governmental agencies, such as the Secretary of State, are not official records of which judicial notice may be taken. (See *Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 608.)

c. Discussion

Defendants demur to both causes of action, asserting two arguments: (1) Plaintiff has not registered the fictitious business name under which it allegedly issued invoices to Zhai; (2) there are no allegations regarding YuJia; and (3) monies due under an express contract cannot be recovered in an action on an open book account.

i. Fictitious Business Name

Defendants contend that Plaintiff has not registered its fictitious business name "MiPool and Spa" under which Plaintiff allegedly entered into a contract as and issued invoices to Zhai under. Defendants assert that this is in violation of Business & Professions Code, section 17918. Section 17918 states, in relevant part:

> No person transacting business under a fictitious business name contrary to the provisions of this chapter, or his assignee, may maintain any action upon or on account of any contract made, or transaction had, in the fictitious business name in any court of this state until the fictitious business name statement has been executed, filed, and published as required by this chapter.

(Bus. & Prof. Code, § 17918.)

California courts have recognized that the "object of section 17918 is simply to ensure that those who do business with persons operating under a fictitious name will know the true identities of the individuals with whom they are dealing or to whom they are giving credit or becoming bound." (*Villareal v. LAD-T, LLC* (2022) 84 Cal.App.5th 446, 457; see also *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 1001, fn. 8, citing *Asdourian v. Araj* (1985) 38 Cal.3d 276, 289, fn. 8 [superseded by statute on other grounds].)

Defendants argue that Plaintiff alleges it has registered the fictitious business name "miPool and Spa" but that a thorough review of public records shows that Plaintiff is actually registered under the name "MI POOL and SPA." (Demurrer, p. 2:18-22, citing Complaint, p. 1, 3.b.1.) Defendants entire argument is dependent upon their request for judicial notice, which has been denied.

Here, Plaintiff alleges that Waterscape Solutions Inc. has complied with the fictitious business name laws and is doing business under the fictitious name of miPool and Spa. (Complaint, p. 1, 3.b.1.) Plaintiff further alleges that miPool and Spa entered into an agreement with Zhai and thereafter sent invoices under miPool and Spa. (See e.g. Complaint, Ex. B.) As Plaintiff notes in its opposition, all the facts alleged in a complaint are deemed true on demurrer. (Opposition, p. 2:27, citing *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) In this instance, Defendants argument falls outside of the facts alleged in the pleading and are not the proper subject of judicial notice. (*Cook v. De La Guerra* (1864) 24 Cal. 237, 239 ["It does not appear upon the face of the complaint that there is a defect . . . but the defendants, in order to make the defect apparent, allege [separate] facts . . . . This mode of pleading is inadmissible under any system, for it is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to."]; see also *Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 834 ["Because a demurrer challenges defects on the face of the complaint, it can refer to matters outside the pleading only if those matters are subject to judicial notice"].)

Accordingly, the Court declines to sustain the demurrer to the first and second causes of action on the ground Plaintiff has not registered its fictitious business name.

ii. Allegations Against YuJia

Defendants next argue that the second cause of action states no claim against the LLC defendant, YuJia. They argue YuJia is made a party to the case only by the common count cause of action, which is based on the invoices attached to the Complaint, but the invoices only show that they were issue to Zhai, not YuJia. (Demurrer, p. 4:6-9, 10, 14-16.)

In opposition, Plaintiff argues that YuJia is owned by Zhai and his family and Zhai is an agent of YuJia, which owns the title of the subject properties. (Opposition, p. 4, subd. B,

citing Exhibit I.) Plaintiff's argument depends on improper extrinsic evidence. Plaintiff has not filed a request for judicial notice and Exhibit I is not attached to the pleading. Thus, the Court declines to consider Exhibit I. Furthermore, the pleading is devoid of allegations that Zhai is YuJia's agent[3] or that YuJia owns the title of the subject properties. Thus, Plaintiff's argument is not well taken. Accordingly, the demurrer to the second cause of action can be sustained as to YuJia.

iii. Open Book Account

Finally, Defendants contend the common count also fails against Zhai because monies due under an express contract cannot be reovered in an action on an open book account in the absence of a contrary agreement between the parties. (Demurrer, p. 4:19-24, citing *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1343 (*Tsemetzin*).)

In *Tsemetzin*, the Court of Appeal held that because the plaintiff did not allege a cause of action claiming that an open book account existed between him and defendant, the plaintiff was precluded from relying on an open book account theory to defeat a summary judgment motion. (*Tsemetzin, supra*, at p. 1343.) The Court further explained that "the only evidence that such an account ever existed was plaintiff's own declaration. . ." (*Ibid.*) *Tsemetzin* is inapposite here, where the Court is not concerned with evidence to defeat a summary judgment motion.

.The elements of a cause of action for common counts – open book account are: (1) the plaintiff and the defendant had a financial transaction; (2) the plaintiff kept an account of the debits and credits involved in the transaction; (3) the defendant owes the plaintiff money on the account; and (4) the amount of money that defendant owes the plaintiff is a sum certain. (*Interstate Group Adm'rs v. Cravens* (1985) 174 Cal.App.3d 700, 708.)

Here, on a court-provided judicial pleading form tailored to common counts on an open book account for money due, Plaintiff's complaint states that Defendants became indebted to Plaintiff on an "open book account for money due" for "work, labor, services and materials rendered at the special instance and request of defendant and for which defendant promised to pay plaintiff" in the sum of $5,025.00. This is sufficient to support a cause of action for open book account. Thus, the demurrer to the second cause of action is overruled as to Zhai.

Based on the foregoing, the demurrer to the first cause of action is OVERRULED. The demurrer to the second cause of action is OVERRULED as to Zhai and SUSTAINED with 15 days leave to amend as to YuJia.

IV. Plaintiff's Request for Sanctions

In its opposition, Plaintiff seeks monetary sanctions against Defendants pursuant to Code of Civil Procedure section 128.5.

Section 128.5 provides: "A trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." (Code Civ. Proc., § 128.5, subd. (a).) As Defendants correctly point out in

[3] The only agency allegation appears on page 2 of the Form Complaint, indicating that Doe 1 is an agent or employee of the named defendants. (Complaint, p. 2, 4.b.1.)

reply, however, such a request must be made by means of a *separately noticed motion*. (See Code Civ. Proc., § 128.5, subd. (f)(1)(A) ["A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific alleged action or tactic, made in bad faith, that is frivolous or solely intended to cause unnecessary delay."].) Here, there is no separately noticed motion. Thus, the request is DENIED.

V. Conclusion and Order

The demurrer to the first cause of action is OVERRULED. The demurrer to the second cause of action is SUSTAINED with 15 days leave to amend as to YuJia and OVERRULED as to Zhai.

The Court shall prepare the final order.

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Calendar line 4
Case Name: *Michelle Ferkel, et al. vs Santa Clara Valley Transportation Authority, et al.*
Case No.: 23CV240588

Plaintiff Michelle Ferkel, by and through her successors in interest, Danielle Ferkel and Joseph Ferkel (collectively "Ferkel")'s motion pursuant to Code of Civil Procedure ("CCP") section 2031.240 for an order compelling defendant Santa Clara Valley Transportation Authority ("VTA") to produce a full and complete privilege log in response to request for production of documents, set two, ("RPD") No. 4 is GRANTED.

Within 20 days of this order, VTA shall provide a further privilege log to its supplemental response to RPD No. 4 with "the identity and capacity of all individuals who authored, sent, or received each allegedly privileged document, the document's date, a brief description of the document and its contents or subject matter sufficient to determine whether the privilege applies, and the precise privilege or protection asserted." (See *Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1130 (*Catalina*).)

Ferkel's request for monetary sanctions in the amount of $4,560 (or any other amount) pursuant to CCP section 2023.010 and 2031.310 is DENIED. The one subject to the sanctions acted with substantial justification or other circumstances make the imposition of sanctions unjust.

Discussion

CCP section 2031.240(c) provides:

> **(1)** If an objection is based on a claim of privilege or a claim that the information sought is protected work product, the response shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log.
>
> **(2)** It is the intent of the Legislature to codify the concept of a privilege log as that term is used in California case law. Nothing in this subdivision shall be construed to constitute a substantive change in case law.

When a responding party asserts a claim of privilege or attorney work product protection, the responding party must provide sufficient factual information to enable the parties and the court to evaluate the merits of a claim, including, if necessary, a privilege log. (Code Civ. Proc., § 2031.240(c)(1); *Riddell, Inc. v. Superior Court* (2017) 14 Cal.App.5th 755, 772.) "A privilege log must identify with particularity each document the responding party claims is protected from disclosure by a privilege and provide sufficient factual information for the propounding party and court to evaluate whether the claim has merit. [Citations]" (*Catalina, supra,* 242 Cal.App.4th 1116, 1130.) "The precise information required for an adequate privilege log will vary from case to case based on the privileges asserted and the underlying circumstances." (*Ibid.*) In general, however, a privilege log typically should provide the identity and capacity of all individuals who authored, sent, or received each allegedly privileged document, the document's date, a brief description of the document and its contents or subject matter sufficient to determine whether the privilege applies, and the precise privilege or protection asserted. (*Ibid.*)

VTA's counsel sent a letter on June 11, 2024, stating that they would produce a privilege log. (See Decl. of Marisella T. Prada, Esq. ¶ 5; Ex. 5.) On July 10, 2024, VTA's counsel advised Plaintiff's counsel that IT has not given her the necessary information due to staff turnover and expected it would take a month for her to hear from IT and complete the privilege log. (Dec. of Paige Yeh filed 9/17/2024, Ex. A.) On August 6, 2024, VTA's counsel stated that she is still awaiting a supplemental response from IT. (Decl. of Marisella T. Prada, Esq., ¶ 9; Ex. 8.)

Ferkel filed this motion to compel on August 27, 2024.

On September 6, 2024, VTA served its Third Amended/Additional Response to Plaintiff's RPD No. 4 which contained an updated response/privilege log. (Dec. of Paige Yeh filed 9/17/2024, ¶8, Ex. C.)

Ferkel's counsel is still dissatisfied, contending that "Each email being withheld must be separately listed with supporting information including authors, recipients, the date, and description of each email." (Dec. of Paige Yeh filed 9/17/2024, Ex. A.) Ferkel's counsel cited language in *Catalina, supra, 242 Cal.App.4th at p. 1130* that: "a privilege log typically should provide the identity and capacity of all individuals who authored, sent, or received each allegedly privileged document, the document's date, a brief description of the document and its contents or subject matter sufficient to determine whether the privilege applies, and the precise privilege or protection asserted." (*Ibid.*)

VTA relies on the language in *Catalina, supra*, 242 Cal.App.4th at p. 1130 that "The precise information required for an adequate privilege log will vary from case to case based on the privileges asserted and the underlying circumstances." (*Ibid.*) VTA also cites cases from *other* jurisdictions regarding whether a privilege log is required for documents created after the litigation commenced.

This is a wrongful death accident that arises out of a single event, a light rail accident that resulted in the tragic death of Decedent. As this is neither an insurance coverage or malpractice action and there is no allegation of the crime-fraud exception, VTA argues that any communications regarding Decedent or the subject matter incident made in anticipation of or for litigation between VTA and its general counsel, risk department or its claims administrator, are clearly privileged communications that should be safeguarded "to promote full and open discussion of the facts and tactics surrounding individual legal matters." (*Catalina, supra,* 242 Cal.App.4th at p. 1126.)

Although VTA's supplemental response regarding withheld emails does not include dates or the sender/recipient names, it does state they were "regarding the subject incident" between VTA employees and either (1) VTA's third party administrator (Carl Warren); (2) VTA's Office of General Counsel; or (3) VTA's Enterprise Risk Management—Claims Management Department. It also indicated they were made on or after April 11, 2024, the date on which VTA received the government claim presented on Plaintiffs' behalf by their counsel. VTA argues that this is sufficient information "to permit the court to determine whether the asserted privilege protects specific documents from disclosure." (*Catalina, supra*, 242 Cal.App.4th at 1127.) VTA also argues that the addition of the specific dates on which the emails were sent and/or the names of the senders/recipients would have no impact on the analysis.

However, the court agrees with Ferkel's reply that VTA's failure to provide detail in the privilege log to support the objections leaves Ferkel (and the court) with insufficient information to evaluate the privilege for the communications being withheld. (CCP § 2031.240, subds. (b) & (c); *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 130.) "The party claiming privilege carries the burden of showing that the evidence which it seeks to suppress is within the terms of the statute." (*D. I. Chadbourne, Inc. v. Superior Court of San Francisco* (1964) 60 Cal.2d 723, 729.) When asserting claims of privilege or attorney work product, the objecting party must provide "sufficient factual information" to enable other parties to evaluate the merits of the claim. (CCP § 2031.240(c).) Without any detail surrounding who made, received and was copied with the withheld email communications Ferkel (and the court) is unable to determine the validity of VTA's objections.

Accordingly, Ferkel's motion for an order compelling VTA to produce a full and complete privilege log in response to request for production of documents, set two, ("RPD") No. 4 is GRANTED.

Within 20 days of this order, VTA shall provide a further privilege log to its supplemental response to RPD No. 4 with "the identity and capacity of all individuals who authored, sent, or received each allegedly privileged document, the document's date, a brief description of the document and its contents or subject matter sufficient to determine whether the privilege applies, and the precise privilege or protection asserted." (See *Catalina, supra,* 242 Cal.App.4th at p. 1130.)

Ferkel's request for monetary sanctions in the amount of $4,560 (or any other amount) pursuant to CCP section 2023.010 and 2031.310 is DENIED. The one subject to the sanctions acted with substantial justification or other circumstances make the imposition of sanctions unjust.

The court will prepare the order.

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Calendar Line 5

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Calendar Line 6
Case Name: Mark Rubin, et al. vs The Mayfield Building Company, et al.
Case No.: 21CV384601

Plaintiffs Mark Rubin and Sarah (collectively "Plaintiffs")' motion to strike or in the alternative tax costs requested by defendant Hohbach Realty Company Limited Partnership ("Defendant") is untimely and DENIED.

On May 24, 2024, Judgment was entered in favor of Defendant against Plaintiffs.

On May 28, 2024, the Notice of Entry of Judgment was served on Plaintiffs through their counsel of record Ari Rief, of Tenant Law Group ("Plaintiff's counsel").

On June 12, 2024, Defendant filed its Memorandum of Costs for $18.943.78. The attached proof of service shows it was *mailed* to and *electronically* served on Plaintiffs' counsel on the same date.

Code of Civil Procedure ("CCP") section 1034(a) provides:

> Prejudgment costs allowable under this chapter shall be claimed and contested in accordance with rules adopted by the Judicial Council.

Pursuant to California Rules of Court ("CRC") Rule 3.1700(b)(1), any notice of motion to strike or to tax costs must be served within 15 days after service of the cost memorandum. If the memorandum of costs is served electronically, the period is extended by two court days. (See CRC Rule 3.1700(b)(1); 1010.6.) [17 days from 6/12/2024 is Saturday 6/29/2024 (on a weekend), so the deadline was extended to Monday 7/1/2024). If the memorandum of costs is served by mail, the period is extended by five calendar days. (See CRC Rule 3.1700(b)(1); CCP § 1013.) [20 days from 6/12/2024 is Tuesday, 7/2/2024). Plaintiffs' deadline to serve and file a notice of motion to strike or to tax costs was July 1 or 2, 2024.

Pursuant to CRC Rule 3.1700(b)(4), after the time has passed for a motion to strike or tax costs, the clerk must immediately enter the costs on the judgment.

Plaintiffs motion to tax strike or in the alternative to tax costs was not filed until **8/14/2024**. It is untimely and DENIED. A party's failure to timely file a motion to tax costs constitutes a waiver of the right to object to the memorandum of costs. (See *Santos v. Civil Service Bd*. (1987) 193 Cal.App.3d 1442, 1447 ["Santos's failure to file a motion to tax costs constitutes a waiver of the right to object"]; *Jimenez* v. *City of Oxnard* (1982) 134 Cal.App.3d 856, 859 ["By not filing said motion within the period specified in [former version of CCP section 1033], plaintiffs waived the right to object to the costs claimed by the city"]; Cal. Prac. Guide: Civil Trials and Evidence (The Rutter Group 2023) ¶ 17:725, p. 17-96 ["Delay in challenging (or failure to challenge) a costs bill waives any objection to the costs claimed therein"] citing *Douglas v Willis* (1994) 27 Cal.App.4th 287, 290 (citing text.)

THEREFORE, IT IS ORDERED:

Plaintiffs' motion to strike or in the alternative to tax costs is untimely and DENIED.

Defendant Hobach Realty Company Limited Partnership is awarded costs in the amount of $18,943.78 against Plaintiffs Mark Rubin and Sarah Weaver, jointly and severally. The clerk shall enter the amount of costs upon the judgment immediately, pursuant to CRC Rule 3.1700(b)(4).

The court will prepare the order.

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