SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

191 North First Street, San Jose, CA 95113

Telephone: 408.882.2320

Department20@scscourt.org

"Every case is important" . . . . . "No case is more important than any other."—United States District Judge Edward Weinfeld (https://www.nytimes.com/1988/01/18/obituaries/judge-edward-weinfeld-86-dies-on-us-bench-nearly-4-decades.html)

"The Opposing Counsel on the Second-Biggest Case of Your Life Will Be the Trial Judge on the Biggest Case of Your Life."—Common Wisdom.

As Shakespeare observed, it is not uncommon for legal adversaries to "strive mightily, but eat and drink as friends." (Shakespeare, The Taming of the Shrew, act I, scene ii.)" (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 309.)

Counsel is duty-bound to know the rules of civil procedure. (See *Ten Eyck v. Industrial Forklifts Co.* (1989) 216 Cal.App.3d 540, 545.) The rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. (*McClain v. Kissler* (2019) 39 Cal.App.5th 399.)

By Standing Order of this Court, all parties appearing in this Court are expected to comply with the Code of Professionalism adopted by the Santa Clara County Bar Association: https://www.sccba.com/code-of-professional-conduct/

---oooOooo---

DATE: Thursday, 05 October 2023
TIME: 9:00 A.M.

Please note that for the indefinite future, all hearings will be conducted remotely as the Old Courthouse will be closed. This Department prefers that litigants use Zoom for Law and Motion and for Case Management Calendars. Please use the Zoom link below.

"A person's name is to him or her the sweetest and most important sound in any language."—Dale Carnegie. All Courts of California celebrate the diversity of the attorneys and the litigants who appear in our Courts. Do not hesitate to correct the Court or Court Staff concerning the pronunciation of any name or how anyone prefers to be addressed. As this Court is fond of saying, "with a name like mine, I try to be careful how I pronounce the names of others." Please inform the Court how you, or if your client is with you, you and your client prefer to be introduced. The Court encourages the use of diacritical marks, multiple surnames and the like for the names of attorneys, litigants and in court papers. You might also try www.pronouncenames.com but that site mispronounces my name.

You may use these links for Case Management Conferences and Trial Setting Conferences without Court permission. Informal Discovery Conferences and appearances on Ex Parte applications will be set on Order by the Court.

Join Zoom Meeting
https://scu.zoom.us/j/96144427712?pwd=cW1JYmg5dTdsc3NKNFBpSjlEam5xUT09
Meeting ID: 961 4442 7712
Password: 017350

Join by phone:
+1 (669) 900-6833
Meeting ID: 961 4442 7712

One tap mobile
+16699006833,,961 4442 7712#

APPEARANCES.

Appearances are usually held on the Zoom virtual platform. However, we are currently allowing in court appearances as well. If you do intend to appear in person, please advise us when you call to contest the tentative ruling so we can give you current instructions as to how to enter the building.

Whether appearing in person or on a virtual platform, the usual custom and practices of decorum and attire apply. (See ***Jensen v. Superior Court (San Diego)*** (1984) 154 Cal.App.3d 533.). Counsel should use good quality equipment and with sufficient bandwith. Cellphones are very low quality in using a virtual platform. Please use the video function when accessing the Zoom platform. The Court expects to see the faces of the parties appearing on a virtual platform as opposed to listening to a disembodied voice.

For new Rules of Court concerning remote hearings and appearances, please review California ***Rules of Court***, rule 3.672.

This Court expects all counsel and litigants to comply with the Tentative Rulings Procedures that are outlined in Local Civil Rule 8(E) and ***California Rules of Court***, rule 3.1308. If the Court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the Court at (408) 808-6856 before 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. A failure to timely notify this Court and/or the opposing parties may result in the tentative ruling being the final order in the matter.

Please notify this Court immediately if the matter will not be heard on the scheduled date. ***California Rules of Court***, rule 3.1304(b). If a party fails to appear at a law and motion hearing without having given notice, this Court may take the matter off calendar, to be reset only upon motion, or may rule on the matter. ***California Rules of Court***, rule 3.1304(d). A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless this Court orders otherwise. This Court will rule on the motion as if the party had appeared. California Rules of Court, rule 3.1304(c). Any uncontested matter or matters to which stipulations have been reached can be processed through the Clerk in the usual manner. Please include a proposed order.

All proposed orders and papers should be submitted to this Department's e-filing queue. Do not send documents to the Department email unless directed to do so.

While the Court will still allow physical appearances, all litigants are encouraged to use the Zoom platform for Law & Motion appearances and Case Management Conferences. Use of other virtual platform devices will make it difficult for all parties fully to participate in the hearings. Please note the requirement of entering a password (highlighted above.) As for personal appearances, protocols concerning social distancing and facial coverings in compliance with the directives of the Public Health Officer will be enforced. Currently, facemasks are not required in all courthouses. If you appear in person and do wear a mask, it will be helpful if you wear a disposable paper mask while using the courtroom microphones so that your voice will not be muffled.

Individuals who wish to access the Courthouse are advised to bring a plastic bag within which to place any personal items that are to go through the metal detector located at the doorway to the courthouse.

Sign-ins will begin at about 8:30 AM. Court staff will assist you when you sign in. If you are using the Zoom virtual platform, it will helpful if you "rename" yourself as follows: in the upper right corner of the screen with your name you will see a blue box with three horizontal dots. Click on that and then click on the "rename" feature. You may type your name as: Line #/name/party. If you are a member of the public who wishes to view the Zoom session and remain anonymous, you may simply sign in as "Public."

CIVILITY.

In the 48 years that this Judge has been involved with the legal profession, the discussion of the decline in civility in the legal profession has always been one of the top topics of continuing education classes.

This Court is aware of a study being undertaken led by Justice Brian Currey and involving various lawyer groups to redefine rules of civility. This Judge has told Justice Currey that the lack of civility is due more to the inability or unwillingness of judicial officers to enforce the existing rules.

The parties are forewarned that this Court may consider the imposition of sanctions against the party or attorney who engages in disruptive and discourteous behavior during the pendency of this litigation.

COURT REPORTERS.

This session will not be recorded. No electronic recordings, video, still photography or audio capture of this live stream is allowed without the expressed, written permission of the Superior Court of California, County of Santa Clara. State and Local Court rules prohibit photographing or recording of court proceedings whether in the courtroom or while listening on the Public Access Line or other virtual platform, without a Court Order. See Local General Rule 2(A) and 2(B); ***California Rules of Court***, rule 1.150.

This Court no longer provides for Court Reporters in civil actions except in limited circumstances. If you wish to arrange for a court reporter, please use Local Form #CV-5100. All reporters are encouraged to work from a remote location. Please inform this Court if

any reporter wishes to work in the courtroom. This Court will approve all requests to bring a court reporter. Counsel should meet and confer on the use of a court reporter so that only one reporter appears and serves as the official reporter for that hearing.

PROTOCOLS DURING THE HEARINGS.

During the calling of any hearing, this Court has found that the Zoom video platform works very well. But whether using Zoom or any telephone, it is preferable to use a landline if possible. IT IS ABSOLUTELY NECESSARY FOR ALL INDIVIDUALS TO SPEAK SLOWLY. Plaintiff should speak first, followed by any other person. All persons should spell their names for the benefit of Court Staff. Please do not use any hands-free mode if at all possible. Headsets or earbuds of good quality will be of great assistance to minimize feedback and distortion.

The Court will prepare the Final Order unless stated otherwise below or at the hearing. Counsel are to comply with ***California Rules of Court***, rule 3.1312.

TROUBLESHOOTING TENTATIVE RULINGS.

To access a tentative ruling, move your cursor over the line number, hold down the "Control" key and click. If you see last week's tentative rulings, you have checked prior to the posting of the current week's tentative rulings. You will need to either "REFRESH" or "QUIT" your browser and reopen it. Another suggestion is to "clean the cache" of your browser. Finally, you may have to switch browsers. If you fail to do any of these, your browser may pull up old information from old cookies even after the tentative rulings have been posted.

This Court's tentative ruling is just that—tentative. Trial courts are not bound by their tentative rulings, which are superseded by the final order. (See *Faulkinbury v. Boyd & Associates, Inc.* (2010) 185 Cal.App.4th 1363, 1374-1375.) The tentative ruling allows a party to focus his or her arguments at a subsequent hearing and to attempt to convince the Court the tentative should or should not become the Court's final order. (*Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 917.) If you wish to challenge a tentative ruling, please refer to a specific portion of the tentative ruling to which you disagree.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	22CV403402	Jesse Sanchez et al vs The City Of Gilroy et al	**The Demurrer Of Defendant City Of Gilroy To Plaintiffs' First Amended Complaint.** No opposition has been filed to this demurrer. The demurrer is in good form and is GRANTED with 10 days leave to amend NO FORMAL TENTATIVE RULING.
LINE 2	22CV403402	Jesse Sanchez et al vs The City Of Gilroy et al	**The Motion Of Defendant City Of Gilroy To Strike Portions of Plaintiffs' First Amended Complaint.** No opposition has been filed to this motion. The motion to strike is in good form and is GRANTED. NO FORMAL TENTATIVE RULING.
LINE 3	22CV397119	Sutter's Place, Inc. vs S.J. Bayshore Development, LLC	**Motion of Plaintiff/Cross-Defendant Sutter's Place for Summary Judgment/Adjudication on the Claims for Reformation in the Cross-Complaint of Defendant/Cross-Complainant S.J. Bayshore.** This motion will be heard at 3:00 PM this afternoon on this same virtual platform. SEE ATTACHED TENTATIVE RULING.
LINE 4	22CV397119	Sutter's Place, Inc. vs S.J. Bayshore Development, LLC	**Motion of Plaintiff/Cross-Defendants Sutter's Place and Timothy Bumb for Summary Judgment/Adjudication on the Cross-Complaint of Defendant/Cross-Complainant S.J. Bayshore.** This motion will be heard at 3:00 PM this afternoon on this same virtual platform. SEE LINE #3 FOR TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 5	20CV370287	Angelina Mojica vs LL GP, L.L.C. et al	**Motion of Plaintiff to Compel Defendant Hersha Hospitality Management, L.P. to Provide Further Responses to Special Interrogatories, Set Two, and Request for Monetary Sanctions.** OFF CALENDAR per moving party.
LINE 6	23CV418841	Vernon Newman, by and through His Attorney-in-Fact, Tamara K. Goyette, as Trustee of the Vernon Newman Revocable Trust vs. Covenant Care Morgan Hill, LLC d.b.a. Pacific Hills Manor, et al.	**Petition of Plaintiff's Wife, Trustee, and his Attorney-in-Fact, Tamara K. Goyette Preferential Trial Setting.** The current motion was filed on 23 August 2023 and set for 21 December 2023. By ex parte application to this Court the matter was advanced to this date. Plaintiff is seeking preferential trial setting because of grave illness following surgical replacement of a broken hip and developing decubitus ulcers over the sacrum. According to the moving papers, despite several remedial surgeries, the ulcer has now spread from hip to hip. This Court notes that on 05 September 2023, defendant Pacific Hills Manor filed its motion to compel arbitration. In a further application, this defendant requested shortening time for the hearing of this motion to 26 September 2023. In denying the request, this Court indicated that it would hear the matter following the hearing on the motion for preference. This Court would like to hear discussions as to which forum-trial or arbitration-would provide a speedier date for resolution. NO TENTATIVE RULING.
LINE 7	2012-1-CV-230186	GCFS, Inc vs A. Darwish, et al	**Claim of Exemption By Judgment Debtor Ashraf M. Darwish.** NO TENTATIVE RULING.
LINE 8	22CV393277	Second Osborne LLC vs. Le Garden HB, LLC	**Order of Examination Regarding Third-Party Person Most Knowledgeable at Bank of Stockton.** Unless the parties agree otherwise, both parties are to appear in Department 20 at 9:00 AM via the Zoom virtual platform. The appropriate oath will be administered by the Court and the parties may conduct the examination off-line and report back to the Court. The parties may meet and confer on how to conduct the examination remotely. NO FORMAL TENTATIVE RULING.
LINE 9			SEE ATTACHED TENTATIVE RULING.
LINE 10			SEE ATTACHED TENTATIVE RULING.
LINE 11			SEE ATTACHED TENTATIVE RULING.
LINE 12			SEE ATTACHED TENTATIVE RULING.
LINE 13			SEE ATTACHED TENTATIVE RULING.
LINE 14			SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 15			SEE ATTACHED TENTATIVE RULING.
LINE 16			SEE ATTACHED TENTATIVE RULING.
LINE 17			SEE ATTACHED TENTATIVE RULING.
LINE 18			SEE ATTACHED TENTATIVE RULING.
LINE 19			SEE ATTACHED TENTATIVE RULING.
LINE 20			SEE ATTACHED TENTATIVE RULING.
LINE 21			SEE ATTACHED TENTATIVE RULING.
LINE 22			SEE ATTACHED TENTATIVE RULING.
LINE 23			SEE ATTACHED TENTATIVE RULING.
LINE 24			SEE ATTACHED TENTATIVE RULING.
LINE 25			SEE ATTACHED TENTATIVE RULING.
LINE 26			SEE ATTACHED TENTATIVE RULING.
LINE 27			SEE ATTACHED TENTATIVE RULING.
LINE 28			SEE ATTACHED TENTATIVE RULING.
LINE 29			SEE ATTACHED TENTATIVE RULING.
LINE 30			SEE ATTACHED TENTATIVE RULING.

---oooOooo---

Calendar Line 1

---oooOooo---

Calendar Line 2

---oooOooo---

Calendar Line 3

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DEPARTMENT 20

161 North First Street, San Jose, CA 95113
408.882.2320 · 408.882.2296 (fax)
smanoukian@scscourt.org
http://www.scscourt.org

(For Clerk's Use Only)

CASE NO.: 22CV397119 Sutter's Place, Inc. dba Bay 101 v. S.J. Bayshore Development, LLC, et al.
DATE: 5 October 2023 TIME: 3:00 pm LINE NUMBER: 03, 04
This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 04 October 2023. Please specify the issue to be contested when calling the Court and Counsel.

---oooOooo---

Orders on Motions of:
1. Plaintiff And Cross-Defendant Sutter's Place, Inc.
For Summary Adjudication Of Its Claims For Reformation
and Declaratory Relief Issues; and
2. Plaintiff And Cross-Defendant Sutter's Place, Inc. and
Cross-Defendant Timothy Bumb For Summary Adjudication Of Claims
By Defendant And Cross-Complainant S.J. Bayshore Development LLC For
Rescission, Fraud And Breach Of Fiduciary Duty.

I. Statement of Facts.

Complaint

On 1 November 1992, plaintiff Sutter's Place, Inc. dba Bay 101 ("Bay 101"), as tenant, entered into a ground lease ("Ground Lease") for approximately 10 acres of raw land located on Bering Drive in San Jose ("Original Premises"). (Complaint, ¶4.) Pursuant to the Ground Lease, the lessor provided plaintiff Bay 101 with an option to purchase the Original Premises for $15,246,000. ("Original Option Agreement"). (Complaint, ¶¶4 – 5.)

On or about 15 November 1993, plaintiff Bay 101, as tenant, and Bumb & Associates, as landlord, entered into a lease ("Building Lease") whereby Bumb & Associates agreed to lease to plaintiff Bay 101 a to-be-constructed two-story, 75,000 square foot building at 1801 Bering Drive in San Jose and plaintiff Bay 101 agreed to assign the Original Option Agreement to Bumb & Associates. (Complaint, ¶8.) Bumb & Associates did not exercise the option to purchase [the Original Premises] during the option exercise period. (*Id.*)

The original term of the Ground Lease and Building Lease expired on 14 November 2017 and the ground lessor did not agree to extend or renew the Ground Lease. (Complaint, ¶9.) Consequently, plaintiff Bay 101 and Bumb & Associates were required to demolish the building at the Original Premises and relocate to a new location. (*Id.*)

Plaintiff Bay 101 and Bumb & Associates began searching for a new location. (Complaint, ¶10.) Bumb & Associates and The Flea Market, Inc. each acquired undivided interests as tenants in common in what became known as Bay 101 Technology Place located at 1788 North First Street in San Jose. (*Id.*) Bumb & Associates and

The Flea Market, Inc. began the process to subdivide Bay 101 Technology Place into eight (8) parcels as part of a mixed-use commercial/ office/ hotel project. (*Id.*) The subdivision process was completed with the formation of Bay 101 Technology Place and the filing for a planned development permit. (*Id.*)

As part of a reorganization of Bumb & Associates from a general partnership to a limited liability company (LLC), additional LLC entities were formed to hold and develop investment properties, with defendant S.J. Bayshore Development, LLC ("SJBD") being formed as the entity to own Parcel No. 4 on that certain Parcel Map entitled, "Parcel Map Bay 101 Mixed Use Project," and all improvements thereon ("Premises"). (Complaint, ¶¶1 and 10.) For this new location, plaintiff Bay 101 and defendant SJBD began negotiating and drafting the terms of a new lease, new option agreement, and new purchase and sale agreement using, among others, the original Ground Lease and Original Option Agreement as templates. (Complaint, ¶10.)

The parties agreed plaintiff Bay 101 would again receive an option to purchase the Premises but the price would be determined by an appraisal. (Complaint, ¶11.) The parties agreed the option to purchase would begin on 1 September 2022 and terminate on 1 September 2024. (Complaint, ¶12.) The parties agreed the appraisal would be completed at least 90 days before plaintiff Bay 101 was entitled to exercise the option to purchase. (Complaint, ¶13.) The parties also agreed on a 180-day closing, but inadvertently neglected to modify this term (from a 30-day closing) when redrafting the purchase and sale agreement. (Complaint, ¶¶14 – 15.)

On 12 July 2017, defendant SJBD, as landlord, and plaintiff Bay 101, as tenant, entered into a lease for the Premises ("Lease"). (Complaint, ¶¶1 and 16.) Timothy Bumb executed the Lease on behalf of plaintiff Bay 101 in his capacity as its President. (Complaint, ¶16.) Timothy Bumb and his brother, Brian Bumb, executed the Lease on behalf of defendant SJBD in their capacities as co-managers of T&B Management Group LLC, the manager of defendant SJBD. (*Id.*) Pursuant to the Lease, defendant SJBD granted plaintiff Bay 101 an option to purchase the Premises ("Option Agreement"). (Complaint, ¶17.) Under the Option Agreement, "In the event [plaintiff Bay 101] exercises its option to purchase the Option Property, [plaintiff Bay 101] shall concurrently execute and return with [plaintiff Bay 101's] notice to [defendant SJBD] of its unconditional exercise of option to purchase said Option Property, the purchase and sale agreement … attached hereto as ATTACHMENT C ("Purchase and Sale Agreement")… respectively." (Complaint, ¶18.)

On 26 January 2022 and again on 9 February 2022, plaintiff Bay 101 informed defendant SJBD about the [closing date] error and requested defendant SJBD agree in writing to reform the Lease and Option Agreement so that closing could occur 180 days after exercise of the option to purchase. (Complaint, ¶19.) On 9 February 2022, plaintiff Bay 101 also demanded defendant SJBD move forward with the selection of an appraiser. (*Id.*)

In a 14 February 2022 email, defendant SJBD conceded a scrivener's error in an exhibit to the Lease and the inconsistency between the Option Agreement and the Purchase and Sale Agreement, but asserted the error was with the Option Agreement [calling for a 180 day closing], not the [30 day closing in the] Purchase and Sale Agreement, and therefore refused to amend as plaintiff Bay 101 requested. (Complaint, ¶20.) Furthermore, defendant SJBD did not select an appraiser or indicate when it would do so. (*Id.*)

Between 8 March 2022 and 18 March 2022, counsel for plaintiff Bay 101 and defendant SJBD exchanged communications but defendant SJBD continues to refuse to agree to correct the scrivener's error in the Option Agreement or to select an appraiser, frustrating plaintiff Bay 101's ability to determine the purchase price for the Premises and exercise the option to purchase the Premises. (Complaint, ¶¶21 – 25.)

Plaintiff Bay 101 contends the Lease requires the following steps to occur prior to 1 September 2022 (the date plaintiff Bay 101 is entitled to exercise the option to purchase the Premises): (1) the parties select an appraiser; (2) the appraiser completes the appraisal; and (3) based on the appraisal price, plaintiff Bay 101 determines whether it wishes to exercise the option to purchase and whether it can obtain the financing necessary to obtain the Premises. (Complaint, ¶26.) Plaintiff Bay 101 also contends that should it exercise the option to purchase, plaintiff Bay 101 then has 180 days to obtain financing and otherwise complete all necessary steps for closing. (Complaint, ¶27.)

Defendant SJBD contends selection of an appraiser and completion of an appraisal does not occur until after plaintiff Bay 101 exercises the option to purchase; and in the 30 day period after exercise of the option, the parties must select an appraiser, the appraiser must complete the appraisal, plaintiff Bay 101 must obtain the

necessary financing, and the parties must complete the closing. (Complaint, ¶28.) Defendant SJBD knows this sequence and timing is impossible. (*Id.*) Defendant SJBD knows the financing necessary to purchase the Premises, likely to be in excess of $70 million, cannot be obtained on such short notice or in such a short time period. (*Id.*)

On 15 April 2022[1], plaintiff Bay 101 commenced this action by filing a complaint against defendant SJBD asserting causes of action for:

(1) Reformation of Contract

(2) Declaratory Relief

(3) Declaratory Relief

(4) Breach of Lease

(5) Breach of the Implied Covenant of Good Faith and Fair Dealing

On 23 May 2022, defendant SJBD filed an answer to plaintiff Bay 101's complaint and also filed a cross-complaint against plaintiff Bay 101, Timothy Bumb, Ronald Werner ("Werner"), and Loren Vaccarezza ("Vaccarezza") asserting causes of action for:

(1) Rescission [against plaintiff/ cross-defendant Bay 101]

(2) Breach of Fiduciary Duty [against cross-defendant Timothy Bumb]

(3) Breach of Fiduciary Duty [against cross-defendants Werner and Vaccarezza]

(4) Professional Negligence [against cross-defendants Werner and Vaccarezza]

(5) Fraud (Concealment) [against cross-defendant Timothy Bumb]

(6) Fraud (Concealment) [against cross-defendants Werner and Vaccarezza]

(7) Constructive Fraud [against cross-defendant Timothy Bumb]

(8) Constructive Fraud [against cross-defendants Werner and Vaccarezza]

(9) Aiding and Abetting [against cross-defendants Timothy Bumb, Werner, and Vaccarezza]

(10) Reformation [against plaintiff/ cross-defendant Bay 101]

(11) Breach of Express Duty of Good Faith [against cross-defendant Timothy Bumb]

(12) Breach of the Implied Duty of Good Faith and Fair Dealing [against cross-defendant Timothy Bumb]

On 21 July 2022, cross-defendants Bay 101 and Timothy Bumb filed a demurrer and motion to strike SJBD's cross-complaint.

On 23 August 2022, cross-defendant Werner filed a demurrer to SJBD's cross-complaint.

On 31 August 2022, cross-defendant Vaccarezza filed a demurrer to SJBD's cross-complaint.

On 17 November 2022, the court (Hon. Kirwan) issued an order sustaining cross-defendants Bay 101 and Timothy Bumb's demurrer to SJBD's cross-complaint and deeming the motion to strike moot. The court (Hon. Kirwan) also issued a separate order sustaining, in part, and overruling, in part, cross-defendant Werner's demurrer to SJBD's cross-complaint. On 5 December 2022, the court (Hon. Kirwan) issued an order sustaining, in part, and overruling, in part, cross-defendant Vaccarezza's demurrer to SJBD's cross-complaint.

---

[1] This Department intends to comply with the time requirements of the Trial Court Delay Reduction Act (**Government Code**, §§ 68600–68620). The California Rules of Court state that the goal of each trial court should be to manage limited and unlimited civil cases from filing so that 100 percent are disposed of within 24 months. (Ca. St. Civil **Rules of Court**, Rule 3.714(b)(1)(C) and (b)(2)(C).)

On 30 November 2022, defendant/ cross-complainant SJBD filed the operative first amended cross-complaint ("FAXC").

First Amended Cross-Complaint

The FAXC alleges the Bumb family has operated multiple successful businesses in the San Jose area for over six decades beginning with the San Jose Flea Market founded in 1960 by George Bumb, Sr., the patriarch of the Bumb family. (FAXC, ¶8.)

Richard Patch ("Patch") of the law firm of Coblentz Patch Duffy & Bass LLP ("Coblentz Firm") had long been acting as outside attorneys for defendant SJBD and the Bumb family businesses. (FAXC, ¶9.) Bumb & Associates, a California general partnership founded in 1981, converted to a Delaware LLC as part of a broader corporate reorganization in 2015 devised and implemented by attorney Patch. (*Id.*) As part of that same reorganization, a collection of LLCs, including SJBD, were formed to hold and develop various Bumb family assets under the Bumb & Associates umbrella. (*Id.*) The Bumb family then created T&B Management Group LLC ("T&B") to manage the various family entities ("Bumb Family Businesses"). (*Id.*) T&B is co-managed by Brian Bumb ("Brian")[2] and cross-defendant Timothy Bumb ("Timothy"), both sons of George Bumb, Sr. (FAXC, ¶10.)

Timothy is 92.1% owner and President of plaintiff Bay 101. (FAXC, ¶11.) When plaintiff Bay 101 had to find a new location in 2015, the Bumb family decided the parcel owned by SJBD would become plaintiff Bay 101's new location. (*Id.*) Unknown to the rest of the Bumb family, cross-defendant Timothy would take negotiation of plaintiff Bay 101's lease as an opportunity to put his own interests above those of the Bumb Family Businesses to which he owed duties as a co-manager of T&B. (*Id.*) To obtain the best possible lease for plaintiff Bay 101, cross-defendant Timothy enlisted the help of his son-in-law, cross-defendant Vaccarezza and long time friend and Bumb family lawyer, cross-defendant Werner. (*Id.*) Cross-defendant Vaccarezza, positioned as SJBD's General Counsel, had an insider's advantage in negotiation of the lease and used the opportunity to benefit himself and his father-in-law, cross-defendant Timothy. (*Id.*) Cross-defendant Werner, having the trust of the Bumb family as its lawyer dating back to the 1980s, used this as an opportunity to benefit himself as 1.32% owner of plaintiff Bay 101. (*Id.*) With the help of cross-defendants Vaccarezza and Werner, cross-defendant Timothy was able to secure a lease beneficial to plaintiff Bay 101 and detrimental to SJBD knowing all along that SJBD would never be able to perform under the terms of the lease that cross-defendants conspired to draft. (*Id.*)

On 13 June 2016, the Bay 101 Technology Place Declarations of Covenants, Restrictions and Common Easement Areas ("CC&Rs") were recorded. (FAXC, ¶16.) The CC&Rs were negotiated by cross-defendant Timothy, on behalf of the original owner of Bay 101 Technology Place, and cross-defendants Werner and Vaccarezza, as counsel for the original owner. (*Id.*) The CC&Rs were executed by cross-defendant Timothy on behalf of the original owner and as co-manager of T&B. (*Id.*)

On 12 July 2017, SJBD entered into a lease with plaintiff Bay 101 for a parcel within Bay 101 Technology Place. (FAXC, ¶17.) The lease states, "Tenant [plaintiff Bay 101] shall have a minimum of 725 parking spaces on the Leased Premises or on a combination of the Leased Premises and other adjacent property either owned or controlled by Landlord [SJBD] for a term of the Lease." (*Id.*) Werner and Vaccarezza each participated in the drafting and negotiation of the lease.

Having executed the CC&Rs on behalf of T&B, Timothy knew at the time the lease was executed that SJBD did not have enough physical space to provide 725 parking spaces to plaintiff Bay 101. (FAXC, ¶24.) Werner and Vaccarezza also knew the CC&Rs did not grant plaintiff Bay 101 725 exclusive parking spaces nor did SJBD have enough physical space to provide 725 parking spaces to plaintiff Bay 101. (*Id.*) Cross-defendants further knew that parcel no. 7 at Bay 101 Technology Place would be condemned by the City of San Jose, further reducing the land owned by SJBD, giving SJBD even fewer parking spaces available to offer to plaintiff Bay 101. (*Id.*)

---

[2] "For the sake of clarity, we refer to the [parties] by their first names. We mean no disrespect in doing so." (*In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 551, fn. 2.)

Cross-defendants knew the proposed lease would create a conflict of interest between SJBD and plaintiff Bay 101. (FAXC, ¶25.) Plaintiff Bay 101 has since attempted to commence the process of exercising an option in the lease to purchase the leased property from SJBD. (FAXC, ¶27.) In doing so, plaintiff Bay 101 claims SJBD must now provide it with 725 parking spaces that cross-defendants Timothy, Werner, and Vaccarezza knew SJBD was not able to provide. Brian believed Werner and Vaccarezza represented SJBD when they negotiated and drafted the lease with plaintiff Bay 101. (FAXC, ¶18.) Werner and Vaccarezza were obligated to disclose any conflicts of interest to SJBD and obtain SJBD's written informed consent but failed to do so. (FAXC, ¶¶19 – 22.)

Assuming arguendo that the lease is valid, SJBD contends the lease contains an error due to mutual mistake and should be reformed. (FAXC, ¶35.) According to SJBD, a thirty-day close of escrow period correctly memorializes the intention of the parties with regard to plaintiff Bay 101's option to purchase the leased property. (*Id.*)

SJBD's FAXC continues to assert the same twelve causes of action asserted in its original cross-complaint.

On 23 January 2023, cross-defendant Vaccarezza filed an answer to SJBD's FAXC.

Also on 23 January 2023, cross-defendant Werner filed an answer to SJBD's FAXC.

On 21 February 2023, cross-defendants Bay 101 and Timothy jointly filed an answer to SJBD's FAXC.

On 17 April 2023, cross-defendants Bay 101 and Timothy filed the two motions now presently before the court: (1) a motion for summary adjudication of claims by defendant and cross-complainant SJBD for rescission, fraud and breach of fiduciary duty; and (2) a motion for summary adjudication of plaintiff Bay 101's claims for reformation and declaratory relief issues.

II. Analysis.

A. Cross-defendants Bay 101 and Timothy's motion for summary adjudication.

1. Plaintiff/ cross-defendant Bay 101's motion for summary adjudication.

a. Plaintiff/ cross-defendant Bay 101's motion for summary adjudication of the first cause of action of cross-complainant SJBD's FAXC and sixth affirmative defense of defendant SJBD's answer on the ground that they are barred by the statute of limitations and/or laches is DENIED.

The first cause of action asserted in SJBD's cross-complaint is for rescission of the 12 July 2017 lease it entered into with cross-defendant Bay 101 for the lease of parcel no. 4 within Bay 101 Technology Place. (FAXC, ¶¶15, 17, 41, and Exh. A.) Defendant SJBD's sixth affirmative defense to plaintiff Bay 101's complaint is entitled rescission and alleges, in relevant part, "the Complaint is barred … in that the contract [Lease], if any, upon which the Complaint is based has been rescinded."

In moving for summary adjudication, cross-defendant Bay 101 argues the first cause of action and sixth affirmative defense by cross-complainant SJBD is barred by the statute of limitations. "In assessing whether plaintiff's claims against defendant are time-barred, two basic questions drive our analysis: (a) What statutes of limitations govern the plaintiff's claims? (b) When did the plaintiff's causes of action accrue?" (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316.)

Cross-defendant Bay 101 contends the answer to the first question is Code of Civil Procedure section 337, subdivision (c) which states that the statute of limitations is four years for "[a]n action based upon the rescission of a contract in writing." Code of Civil Procedure section 337, subdivision (c), itself provides the answer to the second question. "The time begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred. Where the ground for rescission is fraud or mistake, the time shall not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

Despite recognition that cross-complainant SJBD's claim for rescission is grounded in fraud, cross-defendant Bay 101 focuses only on the first sentence of this statute regarding accrual, i.e., that the cause of action

accrues "from the date upon which the facts that entitle the aggrieved party to rescind occurred." According to cross-defendant Bay 101, the cause of action for rescission accrued when cross-complainant SJBD signed the lease on 12 July 2017 because that is when the fraudulent conspiracy resulting in unfavorable terms had "occurred." Thus, cross-complainant SJBD had until 12 July 2021 to commence this action for rescission but did not do so until 23 May 2022.

Cross-defendant Bay 101's reliance on the first sentence regarding accrual is inapt particularly where the very next sentence explains, "where the ground for rescission is fraud …, the time shall not begin to run until the discovery by the aggrieved party of the facts constituting the fraud." (See FAXC, ¶41—"Cross-Complainant entered into the lease due to the Cross-Defendants' fraud … Cross-Complainant would not have entered into the lease but for Cross-Defendants' fraud….")

As the court understands the FAXC, the alleged fraud is (at least) two-fold. More significantly, the lease provision includes a provision that cross-defendant Bay 101 shall have a minimum of 725 parking spaces which cross-defendants Timothy, Werner, and Vaccarezza knew cross-complainant SJBD could not comply with. (See FAXC, ¶¶17, 24 – 25.)

In moving for summary adjudication, cross-defendant Bay 101 begins by discrediting cross-complainant SJBD's allegation that it did not discover the fraud until April 2021. (FAXC, ¶28.) Even if the court discredited cross-complainant SJBD's allegation concerning discovery of the fraud, it is still cross-defendant Bay 101's burden on summary adjudication to establish its affirmative defense.[3] In order to do so, cross-defendant Bay 101 would have to show that the cause of action began to accrue prior to 23 May 2018.[4]

> Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. [Footnote.] … the limitations period begins once the plaintiff ""has notice or information of circumstances to put a reasonable person *on inquiry* . . . ."" (*Gutierrez*, *supra*, 39 Cal.3d at pp. 896-897, quoting *Sanchez*, *supra*, 18 Cal.3d at p. 101 (italics added by the *Gutierrez* court).) A plaintiff need not be aware of the specific "facts" necessary to establish the claim; that is a process contemplated by pretrial discovery. 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, 1110-1111.)

Cross-defendant Bay 101 contends cross-complainant SJBD was on inquiry notice in July 2017 because, at that time, cross-complainant SJBD (Brian Bumb) knew the lease called for 725 parking spaces and cross-complainant SJBD (Brian Bumb) had the opportunity to review the lease terms at the time it signed and any time thereafter, but did not. In this court's opinion, having access to the lease and even knowing that the lease requires 725 parking spaces does not put cross-complainant SJBD on inquiry/ create a suspicion that the lease term is impossible to comply with. The undisputed backdrop for this case is essentially a landlord entity controlled by two brothers leasing family property to a tenant entity controlled by one of the brothers. Even though legal representation was involved, it is difficult for the court to view this as an arms-length transaction. Under such

---

[3] "A defendant seeking summary judgment must show that at least one element of the plaintiff's cause of action cannot be established, or that there is a complete defense to the cause of action. (§ 437c, subd. (o)(2).)" (*Alex R. Thomas & Co. v. Mut. Serv. Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72.)

[4] Actually, cross-defendant Bay 101 would have to show that the cause of action began to accrue prior to 26 November 2017 if Judicial Council's Emergency Rule No. 9 is applied. The relevant text of Emergency Rule No. 9 is as follows:

Emergency Rule 9. Tolling statutes of limitations for civil causes of action

(a) Tolling statutes of limitations over 180 days. Notwithstanding any other law, the statutes of limitations and repose for civil causes of action that exceed 180 days are tolled from April 6, 2020, until October 1, 2020.

(Emergency Rule 9 amended effective May 29, 2020.)

circumstances, more facts are necessary for this court to reach the conclusion that cross-complainant SJBD had some reasonable suspicion of fraud in July 2017 such that the limitations period began to accrue.

Moreover, cross-complainant SJBD proffers some evidence in opposition which would at least create a triable issue of material fact with regard to whether cross-complainant SJBD should have suspected fraud in July 2017. Primarily, cross-complainant SJBD (via Brian Bumb) is not an attorney and relied on the legal advice of Werner and Vaccarezza and understood Werner and Vaccarezza were acting as counsel for cross-complainant SJBD.[5]

> When a plaintiff reasonably should have discovered facts for purposes of the accrual of a cause of action or application of the delayed discovery rule is generally a question of fact, properly decided as a matter of law only if the evidence (or, in this case, the allegations in the complaint and facts properly subject to judicial notice) can support only one reasonable conclusion.

(*Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 193.)

On the evidence before the court, cross-defendant Bay 101 does not meet its initial burden of establishing that cross-complainant SJBD's first cause of action and sixth affirmative defense for rescission is barred by the statute of limitations. Even if cross-defendant Bay 101 had met its initial burden, the court finds a triable issue of material fact exists with regard to whether cross-complainant SJBD reasonably should have discovered facts for purposes of accrual.

Alternatively, cross-defendant Bay 101 argues cross-complainant SJBD's first cause of action and sixth affirmative defense for rescission is barred under the doctrine of laches. "The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." (*Farahani v. San Diego Community College Dist.* (2009) 175 Cal.App.4th 1486, 1494.) "When relief based upon rescission is claimed in an action or proceeding, such relief shall not be denied because of delay in giving notice of rescission unless such delay has been substantially prejudicial to the other party." (Civ. Code, §1693.)

Cross-defendant Bay 101 suggests here that even if cross-complainant SJBD, as alleged, did not discover the fraud until April 2021, cross-complainant delayed more than one year before filing this claim for rescission on 23 May 2022. Without consideration of any other fact or circumstance, cross-defendant Bay 101 contends the more than one year passage of time is not prompt.

> While it is the rule that one seeking a rescission must act promptly and will not be permitted to speculate upon the fraud, yet laches is always a question of fact. To accurately and fairly determine the diligence of the party rescinding, every fact and circumstance illustrating his actions should be considered…

(*Miller v. Eisenberg* (1949) 90 Cal.App.2d 479, 482.)

Whether a party has rescinded promptly depends on the circumstances of the particular case. [Citation. … There is no hard or fixed rule as to the lapse of time or circumstances that will justify the application of the doctrine of laches. [Citation.]" (*Mayer v. Northwood Textile Mills, Inc.* (1951) 105 Cal.App.2d 406, 409.) Pointing out the mere passage of time is not sufficient, in this court's opinion, for cross-defendant Bay 101 to establish that cross-complainant SJBD did not promptly rescind and, consequently, that cross-complainant SJBD's first cause of action and sixth affirmative defense for rescission is barred by the doctrine of laches.

b. Plaintiff/ cross-defendant Bay 101's motion for summary adjudication of the first cause of action of cross-complainant SJBD's FAXC and sixth affirmative defense of defendant SJBD's answer on the ground that they are barred by waiver is GRANTED.

---

[5] See cross-complainant SJBD's Additional Undisputed Material Facts ("SJBD's AUMF"), Fact Nos. 1, 3, 9, 10, 13, 15, 16.

Cross-defendant Bay 101 argues separately that defendant/ cross-complainant SJBD's first cause of action and sixth affirmative defense for rescission are subject to summary adjudication on the ground that defendant/ cross-complainant SJBD has waived the right to rescind. "That right [to rescind], like any other, can be waived. … In general, to constitute a waiver, there must be an existing right, a knowledge of its existence, an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished." (*DuBeck v. California Physicians' Service* (2015) 234 Cal.App.4th 1254, 1265 (*DuBeck*).) As cross-defendant Bay 101 itself recognizes, "Waiver is ordinarily a question for the trier of fact; '[h]owever, where there are no disputed facts and only one reasonable inference may be drawn, the issue can be determined as a matter of law.' [Citation.]" (*DuBeck*, *supra*, 234 Cal.App.4th at p. 1265.)

> The rule is too familiar to require the citation of authority that if a person entitled to rescind goes on, after he discovers the facts which give him the right and knows that he has the right, to deal with the property involved as if the contract or transaction were still in effect, he affirms the contract or transaction and his right to rescind it is gone. That is exactly what the defendant here did. We need not go back to the time at which he should have known of his right to rescind but did not. It is necessary to consider only what he did after he filed his cross-complaint when he was fully aware of his rights and was affirmatively seeking rescission. After this time he continued through the medium of his wife to collect the rents of the property…

(*Bancroft v. Woodward* (1920) 183 Cal. 99, 111 (*Bancroft*).)

Cross-defendant Bay 101 proffers evidence that since cross-complainant SJBD filed its cross-claim seeking rescission on 23 May 2022, SJBD has sent bills to cross-defendant Bay 101 for rent, accepted over twenty rent checks over eleven months (for rent from June 2022 to April 2023), and deposited nearly $7.5 million in rent and other charges.[6] As in *Bancroft*, cross-defendant Bay 101 contends such conduct by defendant/ cross-complainant SJBD amounts to waiver of the right to rescind.

In opposition, defendant/ cross-complainant SJBD relies upon a statement in *Soderling v. Tomlin* (1959) 170 Cal.App.2d 169 (*Soderling*) to defeat summary adjudication. Specifically, cross-complainant SJBD quotes from *Soderling*: "The acceptance of benefits consistent with the payment of a reasonable rental would not necessarily be inconsistent with a rescission of the option. Under such circumstances it cannot be said as a matter of law that plaintiffs waived their right to rescind." (*Soderling*, *supra*, 170 Cal.App.2d at p. 173.) This statement is cited without any context. A careful review of the facts in *Soderling* make clear why this statement is entirely inapposite to the facts presented here which are distinguishable. In *Soderling*, the defendant Tomlins owned ranch property in Mendocino County. Defendant Tomlins entered into an option agreement with plaintiff Soderlings which "provided that in consideration of the sum of $10,000 the plaintiffs were to have physical possession of the ranch, farm equipment and furnishings during the period of the option beginning July 15, 1956, and continuing for a period of one year; and that at any time during said period, plaintiffs had the option of purchasing said property for the sum of $95,000." (*Id.* at p. 171.) Before executing the option agreement, plaintiff Soderling went on an inspection of the property with defendant Tomlin who made various misrepresentations concerning the property. Defendant Tomlins appealed the judgment which canceled and rescinded the option agreement. Among other things, defendant Tomlins argued plaintiff Soderlings waived their right to rescind by accepting benefits under the option agreement and subsequent to the notice of rescission.

> …it appears that plaintiffs accepted a payment of $ 250 for hunting privileges in October of 1957 and that the notice of rescission was served in May of that same year. However plaintiff Harold Soderling testified that upon taking possession on July 15, 1956, defendants represented that payment for hunting rights was due immediately. It thereafter developed that payment was not due until the following October, and hence plaintiffs were denied hunting rentals for three months. Thus the payment which was accepted was for the four months commencing October 22, 1957, would have encompassed a period of time including the time of trial of the action.

---

[6] See Separate Statement of Undisputed Facts in Support of Plaintiff and Cross-Defendant Sutter Place, Inc.'s and Cross-Defendant Timothy Bumb's Motion for Summary Adjudication of Claims by Defendant and Cross-Complainant S.J. Bayshore Development LLC for Rescission, Fraud and Breach of Fiduciary Duty ("Bay 101's SSUF"), Issue No. 2, Fact Nos. 36 – 45.

> ***However plaintiffs were entitled to retain possession of the ranch following the notice of rescission for so long as defendants refused to return the consideration paid for the option agreement. Of course the right was conditioned upon payment of a reasonable rental by plaintiffs.*** The acceptance of benefits consistent with the payment of a reasonable rental would not necessarily be inconsistent with a rescission of the option. Under such circumstances it cannot be said as a matter of law that plaintiffs waived their right to rescind.

(*Id.* at p. 173; emphasis added.)

The highlighted provision above is the crucial part missing from cross-complainant SJBD's opposition. The *Soderling* court explained, "a defrauded vendee is entitled to retain possession of property following rescission." (*Id.* at p. 174.) Since the plaintiff Soderlings were defrauded purchasers of property, they were entitled to remain in possession of that property while seeking rescission and could accept benefits (hunting rental income) incident to their possession subject to their repayment [to the sellers] of reasonable rental value while in possession.

Here, the circumstances are entirely distinguishable. Cross-complainant SJBD is not a defrauded ***purchaser*** of property and not even a defrauded ***lessee***. Cross-complainant SJBD claims to be a defrauded ***lessor***. *Soderling* might be helpful to cross-complainant SJBD had it been the lessee seeking rescission who remained in possession of the leased property and continued to make rental payments, but that is not the situation presented.

On the facts presented here, the court finds the following discussion in *Neet v. Holmes* (1944) 25 Cal.2d 447, 458 – 459 (*Neet*) to be apropos:

> By the acceptance of royalty payments subsequent to the notice of rescission, the plaintiffs treated the lease as in existence and thereby waived their attempted rescission. Even if it be assumed that an offer to restore prior receipts of royalties was excusable, the subsequent acceptance "without prejudice" to their rights, in the absence of assent by the defendants, does not excuse their conduct as a waiver and permit them to claim retention of the royalties as payment on account of restoration of their alleged losses in an action to enforce rescission. The rule is stated in *Brennan v. National Equitable Inv. Co.*, 247 N.Y. 486 [160 N.E. 924], an action to enforce rescission of a stock purchase, where the court said: "The rule is thoroughly established that an assertion of a rescission is nullified by the subsequent acceptance of benefits growing out of a contract claimed to have been rescinded. . . . When, with knowledge of the facts, the purchaser accepts dividends, he will be held to have waived the fraud and to have ratified his purchase. (Black on Rescission (1st ed.), § 347.) He cannot by words cancel his contract and then continue to assert rights and benefits under it. . . . Declarations of rescission followed by acts which negative them must be regarded in such a light as to require the inference of an abandonment of the declared act. Generally the issue is one of fact, whether the commission of certain acts shows an intent to waive a rescission. . . . ***Waiver is rarely established as a matter of law, but an intent contrary to apparent acts must be disclosed. . . . When moneys are paid as dividends, a shareholder is not at liberty to avoid the effect of his acceptance by a notice not assented to by the company that he will take them as something else. His retention of the dividends paid to him subsequent to his discovery of the alleged fraud and subsequent to the institution of his action on rescission must be held, as matter of law, to constitute an abandonment of rescission and a reaffirmation of the contract."***
>
> ***So, too, in the present case, the alleged provisional acceptance of royalties subsequent to notice of rescission, inferring retention thereof as "something else," does not harmonize the plaintiffs' inconsistent conduct. On the contrary it compels the conclusion that the plaintiffs subsequently treated the lease as in existence and that their conduct amounted to a waiver of the rescission as matter of law.***

(Emphasis added.)

Neet applies with even greater force here because cross-complainant SJBD's acceptance of rent from cross-defendant Bay 101 is not even accompanied by a disclosure of contrary intent.[7] Even if cross-complainant SJBD had disclosed some contrary intent (e.g., notice to cross-defendant Bay 101 that the checks were accepted subject to a right to rescission), there is no assent from cross-defendant Bay 101.

Cross-complainant SJBD contends its intentions are made known because it specifically alleged in its cross-complaint and FAXC that it "offers to restore to [Bay 101] everything of value which it has received from [Bay 101]." (Cross-Complaint, ¶22; FAXC, ¶41.) However, as the court in *Neet* explained, even a proper notice of rescission does not "harmonize" inconsistent conduct. Cross-complainant SJBD has not presented any admissible evidence which would create a triable issue of material fact with regard to waiver.

Accordingly, plaintiff/ cross-defendant Bay 101's motion for summary adjudication of the first cause of action [rescission] of cross-complainant SJBD's FAXC and sixth affirmative defense [rescission] of defendant SJBD's answer is GRANTED.

c. Plaintiff Bay 101's motion for summary adjudication of the seventh affirmative defense [undue influence, fraud, intentional or negligent misrepresentation in the execution] in defendant SJBD's answer to plaintiff Bay 101's complaint is GRANTED.

Without much, if any, discussion, plaintiff Bay 101 lumps defendant SJBD's seventh affirmative defense into the above argument/ analysis concerning rescission. In relevant part, defendant SJBD's seventh affirmative defense alleges, "the Complaint is barred in that the execution of the contract, if any, was procured by unlawful and illegal acts including fraud, undue influence, intentional and/or negligent misrepresentation."

Initially, the court has excised this seventh affirmative defense from the above discussion regarding rescission because, as the court understands, the seventh affirmative defense does not involve rescission. "California law distinguishes between fraud in the 'execution' or 'inception' of a contract and fraud in the 'inducement' of a contract. In brief, in the former case 'the fraud goes to the inception or execution of the agreement, so that the promisor is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all, mutual assent is lacking, and [the contract] is void. ***In such a case it may be disregarded without the necessity of rescission.***'" (*Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 415 (emphasis added); see also *Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754, 763.) As such, the rescission-specific arguments discussed above do not apply to defendant SJBD's seventh affirmative defense.

Yet, in opposition, defendant SJBD does not identify this distinction between fraud in the execution and fraud in the inducement and seemingly concedes its seventh affirmative defense is related to its cross-claim and sixth affirmative defense for rescission.[8] In the FAXC, cross-complainant SJBD again uses the phrase, "fraud in the execution,"[9] but makes no allegation that it did not know what it was signing or that it did not intend to enter into a contract at all. To the contrary, the FAXC includes an allegation that, "At the time of its execution, SJBD believed the lease would be beneficial to both SJBD and [Bay 101], and in turn to the whole Bumb family."[10] From this, the court can reasonably infer SJBD knew that it was entering into a lease with Bay 101 and that it intended to do so. Moreover, defendant SJBD's reference to "undue influence" also suggests defendant SJBD's seventh affirmative defense is, in reality, an assertion of rescission rather than fraud or undue influence in the execution since "undue influence" is another recognized ground for rescission.[11]

---

[7] See Bay 101's SSUF, Issue No. 2, Fact No. 46.

[8] See page 13, lines 18 – 21 of Defendant and Cross-Complainant S.J. Bayshore Development, LLC's Opposition to Plaintiff and Cross-Defendant's Motion for Summary Adjudication No. 1—"Bay 101's request for summary adjudication of [SJBD's] rescission claim ***and related affirmative defenses of*** rescission and ***fraud*** should be denied."

[9] See FAXC, page 4, line 13.

[10] See FAXC, ¶19.

[11] Civil Code section 1689, subdivision (b)(1) allows a party to a contract to rescind, "[i]f the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or ***undue***

While the court initially had reason to pause and treat plaintiff Bay 101's motion for summary adjudication of defendant SJBD's seventh affirmative defense differently, upon further examination, the court will group defendant SJBD's seventh affirmative defense together with SJBD's cross-claim and sixth affirmative defense for rescission. For the reasons discussed above, plaintiff/ cross-defendant Bay 101's motion for summary adjudication of the seventh affirmative defense of defendant SJBD's answer is also GRANTED.

2. Cross-defendant Timothy's motion for summary adjudication of cross-complainant SJBD's FAXC.

a. Statute of limitations.

Cross-complainant SJBD's FAXC asserts six causes of action against cross-defendant Timothy individually. Cross-defendant Timothy characterizes the fifth cause of action [fraud], seventh cause of action [constructive fraud] and ninth cause of action [aiding and abetting] as fraud-based causes of action which are governed by a three-year statute of limitations pursuant to Code of Civil Procedure section 338, subdivision (d).[12] Cross-defendant Timothy characterizes the second cause of action [breach of fiduciary duty], eleventh cause of action [breach of express duty of good faith], and twelfth cause of action [breach of the implied duty of good faith and fair dealing] as contract-based causes of action which are governed by a four-year statute of limitations pursuant to Code of Civil Procedure section 337, subdivision (a).[13] In opposition, cross-complainant SJBD does not take any issue with cross-defendant Timothy's assertion that these are the applicable statutes of limitation.

As cross-defendant Bay 101 argued earlier, cross-defendant Timothy similarly argues "all of these claims ran from [began accruing] the date the parties signed the Lease [12 July 2017], and therefore expired in July 2020 for the fraud claims and in July 2021 for the contract claims."[14] Since cross-complainant SJBD did not assert these claims until the filing of its cross-complaint on 23 May 2022, cross-defendant Timothy contends the claims are all barred.

Insofar as the fraud-based causes of action are concerned, cross-defendant Timothy incorrectly states the claims accrued on the date the parties signed the Lease. Code of Civil Procedure section 338, subdivision (d), expressly states, in relevant part, "The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Cross-defendant Timothy also fails to provide any legal authority to support his assertion that the contract-based causes of action accrue on the date the parties signed the lease agreement.[15] Nevertheless, cross-defendant Timothy implicitly recognizes that both the fraud-based and contract-based causes of action are subject to the discovery rule or delayed discovery rule because he attempts to discredit cross-complainant SJBD's allegation that it did not discover misconduct or have reason to suspect misconduct until April 2021.[16]

---

influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."

[12] Code of Civil Procedure section 338, subdivision (d), provides a three-year statute of limitations on "[a]n action for relief on the ground of fraud or mistake."

[13] Code of Civil Procedure section 337, subdivision (a), provides a four-year statute of limitations on "[a]n action upon any contract, obligation or liability founded upon an instrument in writing."

[14] See page 20, lines 10 – 11 of the Memorandum of Points and Authorities in Support of Cross-Defendants' Motion for Summary Adjudication of S.J. Bayshore's Rescission Claim and Defense (Motion 1).

[15] "Ordinarily, a cause of action for breach of contract accrues on the failure of the promisor to do the thing contracted for at the time and in the manner contracted." (*Waxman v. Citizens Nat. Trust & Savings Bank of Los Angeles* (1954) 123 Cal.App.2d 145, 149.)

[16] The delayed discovery rule is also applied to breach of contract claims. In *April Enterprises v. KTTV* (1983) 147 Cal.App.3d 805, 832, the court held, "the discovery rule may be applied to breaches [of contract] which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time."

However, as the court noted earlier, even if cross-defendant Timothy successfully discredited cross-complainant SJBD's allegation of delayed discovery, it is cross-defendant Timothy's initial burden in moving for summary adjudication to establish the affirmative defense of statute of limitations. In order to do so, cross-defendant Timothy would have to affirmatively establish that the claims accrued no later than 26 November 2017 (for the contract-based claims) and 26 November 2018 (for the fraud-based claims). Cross-defendant Timothy has not made such a showing and, consequently, has not met his initial burden.

b. Absence of fraud.

Cross-defendant Timothy argues next that all six causes of action directed against him individually fail because they are premised upon a finding of fraud or conspiracy to defraud and there is no evidence that cross-defendant Timothy engaged in either a conspiracy or fraud.

Preliminarily, the court is skeptical of the assertion that each of the six causes of action directed against cross-defendant Timothy necessarily depend upon a showing of fraud or conspiracy to defraud. Even if the court is willing to make this logical leap, the court is not persuaded by cross-defendant Timothy's showing that he has not engaged in fraud.

Cross-defendant Timothy introduces evidence in the form of Brian Bumb's testimony in order to identify and isolate the fraud he is charged with committing.

> Q: So with respect to Timothy Bumb, can you tell me what S.J. Bayshore believes was any fraud committed by Timothy Bumb that induced S.J. Bayshore to enter into the 2017 lease?
>
> A: The subjects of the 700 – knowing that the 725 spaces were not possible to give. The 30 versus 180 days. The below-market rent and below-market increase. And then, as I mentioned before, the Article 17.1 that deprived the family from its $7 million investment.

(Declaration of Richard R. Patch in Support of (1) Plaintiff and Cross-Defendant Sutter Place, Inc.'s and Cross-Defendant Timothy Bumb's Motion for Summary Adjudication, etc., ¶13, Exhibit 6 (page 206:24 – 207:8).)

As pointed out above, one of the bases for fraudulent concealment alleged by cross-complainant SJBD is the lease provision includes a provision that cross-defendant Bay 101 shall have a minimum of 725 parking spaces which cross-defendants Timothy, Werner, and Vaccarezza knew cross-complainant SJBD could not comply with. (See FAXC, ¶¶17, 24 – 25.) According to cross-complainant SJBD, cross-defendants' failure to disclose their advance knowledge that cross-complainant SJBD would not comply with this provision amounts to fraudulent concealment.

Cross-defendant Timothy moves for summary adjudication by arguing the failure to disclose SJBD's inability to comply with the parking provision is not a fraudulent concealment because cross-complainant SJBD (Brian Bumb) knew from the outset that it would not be able to comply.[17] Cross-defendant Timothy contends this is so because there is evidence Brian Bumb was privy to meetings concerning the potential condemnation of one of the parcels within Bay 101 Technology Place. However, the evidence does not unequivocally establish cross-defendant SJBD was aware from the outset that it would not be able to comply with the parking provision over the term of the lease. Even cross-defendant Timothy's own evidence suggests a triable issue of material fact with

---

[17] [T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) ***the plaintiff must have been unaware of the fact*** and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.

(*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248; emphasis added.)

regard to whether SJBD (Brian Bumb) was unequivocally aware that SJBD could not provide Bay 101 with 725 parking spaces over the term of the lease.[18]

It is this court's opinion that cross-defendant Timothy has not conclusively established an absence of fraud or cross-defendant Timothy's own evidence raises at least a triable issue of material fact exists with regard to the existence of fraud.

c. Cross-defendant Timothy's motion for summary adjudication of the second cause of action [breach of fiduciary duty] and seventh cause of action [constructive fraud] of cross-complainant SJBD's FAXC is GRANTED.

"The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432; see also CACI, No. 4100.)

Constructive fraud is defined by Civil Code section 1573 to consist of, "any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or, any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." (See also CACI, No. 4111.) "In addition to the traditional liability for intentional or actual fraud, a fiduciary is liable to his principal for constructive fraud even though his conduct is not actually fraudulent. Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship." (*Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 562.) "[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud even though there is no fraudulent intent." (*Ibid.*)

As both breach of fiduciary duty and constructive fraud require the existence of a fiduciary relationship, cross-defendant Timothy moves for summary adjudication of cross-complainant SJBD's second and seventh causes of action on the ground that he did not owe cross-complainant SJBD a fiduciary duty. "Whether a fiduciary duty exists is generally a question of law." (*Marzec v. Public Employees' Retirement System* (2015) 236 Cal.App.4th 889, 915.)

Cross-defendant Timothy contends he does not owe cross-complainant SJBD a fiduciary duty because the SJBD operating agreement eliminates any fiduciary duty by the manager, T&B (who, in turn, is managed by Timothy and Brian Bumb).[19] Section 5.5 of SJBD's Second Amended and Restated Operating Agreement states, in relevant part, "The Manager shall owe no fiduciary duties to the Company or its Members other than as expressly

---

[18] See Declaration of Richard R. Patch in Support of (1) Plaintiff and Cross-Defendant Sutter Place, Inc.'s and Cross-Defendant Timothy Bumb's Motion for Summary Adjudication, etc., ¶13, Exhibit 6 (page 208:22 – 209:8) [Deposition of Brian Bumb]:

> Q: In 2017, were there 725 parking spaces available at the technology park development to allocate to Bay 101?
>
> A: I think so.
>
> Q: So you – S.J. Bayshore did have the ability to give 725 spaces? … In 2017?
>
> A: ***In 2017, before I found out about the entirety of the condemnation, if you – if you take the condemnation out of the equation, there was 725 to give.***

[19] See Declaration of Timothy Bumb in Support of (1) Plaintiff and Cross-Defendant Sutter Place, Inc.'s and Cross-Defendant Timothy Bumb's Motion for Summary Adjudication, etc., ¶22, Exhibit 4.

Presumably, cross-defendant Timothy's position is that if the entity manager (T&B) of SJDB owes no fiduciary duty to SJDB, then one of the individual managers (Timothy) of the entity manager (T&B) would certainly owe no duty to SJDB either.

required by applicable law." Cross-defendant Timothy asserts Delaware law is the applicable law because section 1.1, read in conjunction with section 11.1, of SJBD's operating agreement states, in relevant part, "The rights and obligations of the parties and the administration and termination of the Company shall be governed by this Agreement, the Certificate of Formation, and [Delaware's Limited Liability Company Act]." "The Delaware Limited Liability Company Act (the "LLC Act") [6 Del. C. § 18-1101(c)] provides that 'the fiduciary duties of a member, manager, or other person that is a party to or bound by a limited liability company agreement may be expanded or restricted or eliminated by provisions in the limited liability company agreement."'" (*Smith v. Scott* (Ch. Apr. 23, 2021, No. 2020-0263-JRS) 2021 Del. Ch. LEXIS 76, at *23.)

Cross-defendant Timothy anticipates an argument by cross-complainant SJDB that Delaware law is not the applicable law and, instead, California law is the applicable law. At section 12.5 of SJDB's operating agreement, it states, "Except as otherwise set forth herein, this Agreement shall be governed by and construed under the internal laws of the State of California without any regard to any conflict of law principles." Cross-defendant Timothy highlights the prefatory exception, "Except as otherwise set forth herein," comes into operation and sections 1.1 and 11.1 preclude application of section 12.5.

In opposition, cross-complainant SJDB does not address the prefatory exception language of section 12.5 and instead focuses on section 1.1's statement that "this Agreement" governs and section 12.5 unambiguously calls for application of California law. SJDB's failure to address the prefatory exception of section 12.5 leads this court to reject SJDB's argument.

SJDB argues that even if Delaware law applies, section 5.5 of its operating agreement nevertheless imposes a duty upon T&B (and, in turn, cross-defendant Timothy) to act in good faith. Specifically, section 5.5 of the SJDB operating agreement states, "The Manager shall act in good faith within the scope of authority granted to the Manager to exercise such degree of care and skill in a manner such Manager believes to be in the best interests of the Company." Cross-complainant SJDB cites *Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1338, where the court wrote, "a fiduciary relationship is any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party." (Punctuation omitted.) However, while good faith may be a characteristic of a fiduciary relationship, the court does not agree with cross-complainant SJDB's suggestion that a duty to act in good faith is tantamount to a fiduciary duty.

Nor is the court persuaded by cross-complainant SJDB's continued reliance and citation to California law to argue for imposition of a fiduciary duty here in light of the SJDB operating agreement's express disclaimer of fiduciary duty for its manager. Such argument fails to confront and overcome the express written contract language.

Next, cross-complainant SJDB suggests a triable issue of material fact exists with regard to whether cross-defendant Timothy owed a fiduciary duty to cross-complainant SJDB because cross-defendant Timothy admitted he owed a fiduciary duty to the "shareholders or the members" of T&B. It is not entirely clear, but presumably SJDB offers this acknowledgement from cross-defendant Timothy in one context should be implied against him in the present context to acknowledge that he owes a fiduciary duty to the shareholders or members of SJDB. However, even if the court were to make this application, it is not an equivalent comparison. Timothy's acknowledgement is that a manager of an LLC owes the LLC members a fiduciary duty. If the same applied here, then it would mean the entity T&B owes a fiduciary duty to the members of SJDB (First Street Holdings LLC and T&B Management Group LLC). It does not mean cross-defendant Timothy, individually, owes a fiduciary duty.

Finally, as the court understands, cross-complainant SJDB contends a fiduciary duty may nevertheless arise out of a confidential relationship even though not a legally recognized fiduciary relationship.

> A fiduciary duty under common law may arise "when one person enters into a confidential relationship with another." (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.*, *supra*, 83 Cal.App.4th at p. 417, 99 Cal.Rptr.2d 665.) It is a question of fact whether one is … a party to a confidential relationship that gives rise to a fiduciary duty under common law (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.*, *supra*, 83 Cal.App.4th at p. 417, 99 Cal.Rptr.2d 665; see *Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 960–962 [85 Cal.Rptr.3d 817])

(*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 140.)

> We review first the basic principles of fiduciary and confidential relations. The two terms are often said to be synonymous, but there are "significant differences." [Citation.] Both relationships give rise to a fiduciary duty, that is, a duty "to act with the utmost good faith for the benefit of the other party." [Citation.] " 'Technically, a fiduciary relationship is a recognized legal relationship such as guardian and ward, trustee and beneficiary, principal and agent, or attorney and client ... whereas a "confidential relationship" may be founded on a moral, social, domestic, or merely personal relationship as well as on a legal relationship.' " [Citation.] A confidential relation may exist where there is no fiduciary relation. [Citation. Footnote.] "Because confidential relations do not fall into well-defined categories of law and depend heavily on the circumstances, they are more difficult to identify than fiduciary relations." [Citation.] The existence of a confidential relationship is a question of fact, and " 'the question is only whether the plaintiff actually reposed such trust and confidence in the other, and whether the other "accepted the relationship." ' " [Citation.]

(*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1160-1161 (*Persson*).)

> …because of "[t]he vagueness of the common law definition of the confidential relation that gives rise to a fiduciary duty, and the range of the relationships that can potentially be characterized as fiduciary," the "essential elements" have been distilled as follows:
>
> > " '1) The vulnerability of one party to the other which 2) results in the empowerment of the stronger party by the weaker which 3) empowerment has been solicited or accepted by the stronger party and 4) prevents the weaker party from effectively protecting itself.' " [Citation.]

(*Persson*, *supra*, 125 Cal.App.4th at p. 1161.)

Cross-complainant SJDB's argument in this regard is underdeveloped at best. Cross-complainant SJDB points to cross-defendant Timothy's testimony agreeing SJBD and Bay 101 could be analogized as children and stating, "I had a duty of fairness and the ability to keep the businesses running." Cross-complainant SJDB also points to cross-defendant Timothy's own declaration wherein he states, in relevant part, "Brian and I discussed that the goal for Bay 101 and [SJDB] to enter into a lease that would work for, and be beneficial to, both parties." The court does not find these evidentiary references sufficiently address the "essential elements" for a confidential relationship to arise.

For the reasons discussed above, cross-defendant Timothy's motion for summary adjudication of the second cause of action [breach of fiduciary duty] and seventh cause of action [constructive fraud] of cross-complainant SJBD's FAXC is GRANTED.

d. Cross-defendant Timothy's motion for summary adjudication of the eleventh cause of action [breach of the express duty of good faith] of cross-complainant SJBD's FAXC is GRANTED.

Cross-complainant SJDB's eleventh cause of action alleges that its "operating agreement requires that the manager act in good faith and to act in the best interests of the company." (FAXC, ¶79.) "Cross-defendant Timothy Bumb violated this standard by knowingly acting against the interests of SJBD." (FAXC, ¶80.)

As noted earlier, section 5.5 of SJBD's operating agreement states, in relevant part, "The Manager shall act in good faith within the scope of authority granted to the Manager to exercise such degree of care and skill in a manner such Manager believes to be in the best interests of the Company."

Since this obligation is an express written term of the operating agreement, this eleventh cause of action is essentially a breach of contract cause of action. "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186; see also CACI, No. 303.)

Here, cross-complainant SJBD has chosen to direct this cause of action at cross-defendant Timothy in his individual capacity. One of the arguments advanced by cross-defendant Timothy in moving for summary adjudication of this eleventh cause of action is that cross-defendant Timothy did not owe to cross-complainant SJBD this duty to act in good faith. Although not expressly cited, the court understands cross-defendant Timothy to rely on the legal principle enunciated in *Gold v. Gibbons* (1960) 178 Cal.App.2d 517, 519, where the court held, "Breach of contract cannot be made the basis of an action for damages against defendants who did not execute it and who did nothing to assume its obligations." (See also *Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 452—"Under California law, only a signatory to a contract may be liable for any breach.")

The contractual basis for this obligation explicitly states that, "The ***Manager*** shall act in good faith…." Cross-defendant Timothy is not the Manager identified in the SJBD operating agreement; T&B is identified as the Manager. In the opposition, cross-complainant implicitly recognizes the disconnect but argues nevertheless, "As Manager of [SJBD] ***(through T&B)***, Tim owed this fiduciary duty to [SJBD]."[20] While cross-defendant Timothy's signature appears on the SJBD operating agreement (and on the Lease), it is in his capacity at co-manager of T&B; not in his individual capacity. Since cross-defendant Timothy, in his individual capacity, is not a signatory, he owes no duty and is not personally liable.

Accordingly, cross-defendant Timothy's motion for summary adjudication of the eleventh cause of action [breach of the express duty of good faith] of cross-complainant SJBD's FAXC is GRANTED.

e. Cross-defendant Timothy's motion for summary adjudication of the twelfth cause of action [breach of the implied duty of good faith and fair dealing] of cross-complainant SJBD's FAXC is GRANTED.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (Rest.2d Contracts, §205.) "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658; see also CACI, No. 325.)

In moving for summary adjudication of the twelfth cause of action, cross-defendant Timothy contends there can be no implied covenant of good faith since the contract already includes an express covenant of good faith as noted above.

> "The law will imply a term only for omitted covenants. There can be no implied covenant as to any matter specifically covered by the written contract between the parties." *Reading Terminal Merchants Ass'n v. Samuel Rappaport Assocs.*, 310 Pa. Super. 165, 456 A.2d 552, 557 (Pa. Super. Ct. 1983) (rejecting tenants' claim of an implied covenant to pay only level utility charges, rather than individual metered charges (citing *Greek v. Wylie*, 266 Pa. 18, 109 A. 529 (Pa. 1920))). Thus, it is only "in the *absence of an express provision*, [that] the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract." *Daniel B. Van Campen Corp. v. Building & Constr. Trades Council*, 202 Pa. Super. 118, 195 A.2d 134, 136-37 (Pa. Super. Ct. 1963) (emphasis added) (finding that city had no implied duty to commence arbitration for contractor allegedly harmed by picketing in attempt to organize subcontractor's employees).

(*USX Corp. v. Prime Leasing, Inc.* (3d Cir. 1993) 988 F.2d 433, 439.)

The same principle exists under California authorities.

> …where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability. . . ." *Wal-Noon Corp. v. Hill* (1975) 45 Cal. App. 3d 605, 613 [119 Cal. Rptr. 646]. See also

---

[20] See page 23, lines 16 – 17 of Defendant and Cross-Complainant S.J. Bayshore Development, LLC's Opposition to Plaintiff and Cross-Defendant's Motion for Summary Adjudication No. 1. (See also page 23, fn. 12.)

> *Wagner v. Glendale Adventist Medical Center* (1989) 216 Cal. App. 3d 1379, 1393 [265 Cal. Rptr. 412] (there can be no implied contractual term completely at variance with an express term of a contract); *Wilkerson v. Wells Fargo Bank* (1989) 212 Cal. App. 3d 1217, 1227 [261 Cal. Rptr. 185] (citing *Wal-Noon*, inequitable to imply obligation different from those in parties' bargain); *Hillsman v. Sutter Community Hospitals* (1984) 153 Cal. App. 3d 743, 754 [200 Cal. Rptr. 605] (well settled that a covenant will not be implied against express terms of contract); and *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal. App. 3d 467, 482 [199 Cal. Rptr. 613], disapproved on other grounds in *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 688, 700, footnote 42 [254 Cal. Rptr. 211, 765 P.2d 373] (there cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results).

(*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419-1420.)

With regard specifically to the implied covenant of good faith and fair dealing, "The covenant [of good faith and fair dealing] thus cannot 'be endowed with an existence independent of its contractual underpinnings.' [Citations.] It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349 – 350.)

Cross-complainant offers no argument in opposition to this point. Accordingly, cross-defendant Timothy's motion for summary adjudication of the twelfth cause of action [breach of the express duty of good faith] of cross-complainant SJBD's FAXC is GRANTED.

f. Cross-defendant Timothy's motion for summary adjudication of the ninth cause of action [aiding and abetting] of cross-complainant SJBD's FAXC is DENIED.

Both sides here agree with the statement in *George v. eBay, Inc.* (2021) 71 Cal.App.5th 620, 641, that:

> the four elements of a claim for aiding and abetting, … in a claim involving an alleged breach of fiduciary duty: "(1) a third party's breach of fiduciary duties owed to plaintiff; (2) defendant's actual knowledge of that breach of fiduciary duties; (3) substantial assistance or encouragement by defendant to the third party's breach; and (4) defendant's conduct was a substantial factor in causing harm to plaintiff.

In moving for summary adjudication of this ninth cause of action, cross-defendant Timothy asserts he did not know cross-defendants Werner or Vaccarezza were violating their fiduciary duties to SJBD. To support this assertion, cross-defendant Timothy proffers his own declaration wherein he states, in relevant part, "At no point during the lease negotiations or during the drafting and preparation of the lease did I believe that Loren Vaccarezza was acting on behalf of Bay 101 nor did I ever ask or instruct him to do so. At no point during the lease negotiations or during the drafting and preparation of the lease did I ever instruct Mr. Vaccarezza to insert any specific provisions into the Lease to benefit Bay 101 at [SJBD's] expense. At all times during the lease negotiations and during the drafting and preparation of the Lease, I believed that Werner was acting on behalf of Bay 101 and Vaccarezza on behalf of [SJBD]."[21]

As previously noted, the alleged breach of fiduciary duty against cross-defendants Werner and Vaccarezza is multi-faceted and includes an allegation that they "intentionally fail[ed] to disclose certain facts to [SJBD], such as that the lease contained terms that … SJBD could not fulfill." (FAXC, ¶¶24, 25, 47, 49, 59.) Cross-defendant Timothy's declaration does not speak directly to his knowledge concerning the alleged concealment of information. As such, the court finds cross-defendant Timothy has not met his initial burden.

Alternatively, cross-defendant Timothy asserts he did not provide substantial assistance or encouragement to Werner or Vaccarezza's alleged breach of fiduciary duty. Cross-defendant Timothy relies on the same declaration above for support. Again, cross-defendant Timothy's cited testimony does not speak directly to

---

[21] See Declaration of Timothy Bumb in Support of (1) Plaintiff and Cross-Defendant Sutter Place, Inc.'s and Cross-Defendant Timothy Bumb's Motion for Summary Adjudication, etc., ¶25.

the issue of Werner or Vaccarezza's concealment of information. Nor does cross-defendant Timothy's additional citation to Brian Bumb's testimony.

Accordingly, cross-defendant Timothy's motion for summary adjudication of the ninth cause of action [aiding and abetting] of cross-complainant SJBD's FAXC is DENIED.

3. Plaintiff/ cross-defendants Bay 101 and Timothy's objections to evidence.

In reply, plaintiff/ cross-defendants Bay 101 and Timothy filed objections to evidence cited by defendant/ cross-complainant SJDB. Objection number 7 is hereby OVERRULED. The court declines to rule on objection numbers 1 – 6 as the court did not deem the evidence material to its disposition. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., §437c, subd. (q).)

B. Plaintiff/ cross-defendant Bay 101's motion for summary adjudication of its claims for reformation and declaratory relief issues.

1. Plaintiff/ cross-defendant Bay 101's motion for summary adjudication of the first cause of action [reformation] of its complaint; second cause of action [declaratory relief] of its complaint; and tenth cause of action [reformation] of cross-complainant SJBD's FAXC is DENIED.

> When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value.

(Civ. Code, §3399)

> The purpose of reformation is to correct a written instrument ***in order to effectuate a common intention of both parties*** which was incorrectly reduced to writing. (*Bailard v. Marden*, 36 Cal.2d 703, 708 [227 P.2d 10].) In order for plaintiff to obtain this relief there must have been an understanding between the parties on all essential terms, otherwise there would be no standard to which the writing could be reformed. (*Bailard v. Marden*, 36 Cal.2d 703, 708 [227 P.2d 10]; *McConnell v. Pickering Lbr. Corp.*, 217 F.2d 44, 48-49; see 5 Williston on Contracts (rev. ed. 1937), § 1548, p. 4339; Rest., Contracts, § 504, com. b; 45 Am.Jur. 586-587, 609-610.)

(*Lemoge Electric v. County of San Mateo* (1956) 46 Cal.2d 659, 663 (emphasis added); see also *Shupe v. Nelson* (1967) 254 Cal.App.2d 693, 699.)

As plaintiff Bay 101 itself recognizes, "The key issue … is what closing period the parties intend."[22] As set forth in the first and second causes of action of plaintiff Bay 101's complaint and the tenth cause of action of cross-complainant SJBD's FAXC, plaintiff Bay 101 contends the escrow closing period should be 180 days whereas cross-complainant SJBD contends the escrow closing period should be 30 days.

The evidence presented to the court on this issue is, without question, in conflict. Plaintiff/ cross-defendant Bay 101 submits a declaration from Timothy Bumb who states, in relevant part, "After the reorganization was complete, Brian and I began to discuss in earnest the material terms of a new lease between Bay 101 and [SJBD]. I met with Brian several times to discuss the material terms of the lease. … Brian and I eventually agreed on a twenty-five year lease term and that Bay 101 would receive an option to purchase that could be exercised between years five and seven of the lease term. … Brian and I also discussed the mechanics of exercising the option. I requested that Bay 101 have 180 days to complete its purchase should it choose to exercise the option. We agreed that this amount of time was necessary in order to (1) get the necessary approvals from the San Jose

[22] See page 14, line 24 of the Memorandum of Points and Authorities in Support of Plaintiff and Cross-Defendant Sutter's Place, Inc.'s Motion for Summary Adjudication … (Motion 2).

Police Department, Division of Gambling Control, the California Department of Justice, Bureau of Gambling Control and from the California Gambling Control Commission and (2) obtain financing for the transaction."[23]

In direct conflict, defendant/ cross-complainant SJBD proffers the declaration of Brian Bumb who states, in relevant part, "I never had any meetings with Tim Bumb where we specifically negotiated terms of the Lease. In particular, I never met with Tim to discuss, much less reach an agreement on, the base amount of monthly rent that Bay 101 would pay to [SJBD]; the number of parking spaces to which Bay 101 would be entitled under the Lease; or the length of the escrow close period in the event Bay 101 exercised its option to purchase the property under the Lease. To be more specific, I did not agree to a 180-day escrow closing period with Tim or anyone."[24]

Defendant/ cross-complainant SJBD also points to some inconsistency between Timothy's declaration and the declaration of Werner. In relevant part, Werner states, "My role was to draft the Lease to include the terms that Timothy and Brian agreed upon. ***I did not negotiate or advocate for any particular Lease term***."[25] Yet, Werner then goes on to state, "In June 2016, I began drafting the Lease and the Option Agreement. Both when I initially created the first draft of the Lease and subsequently when I revised drafts of the Lease, I did so to include terms that Timothy and Brian agreed to during meetings at which I was present, that Timothy Bumb told me to include, or that were consistent with the Original Lease and my understanding of the agreement reached between Timothy and Brian."[26] More significantly, "In June 2016, I circulated a draft of the Lease … During the drafting of the Lease, Mr. Vaccarezza and I agreed that the parties needed to build in time for governmental entities to review the Option. After those discussions, I added a new Section 28.18 of the Lease, which provided that the Option to Purchase may be subject to [governmental entity review] … I modified the closing provision to provide for a 180-day closing period to build in time for potential review of the Option by the three governmental authorities. The modification that I made to increase the closing period … to one hundred eighty (180) days was made following, and is consistent with, my conversation with Vaccarezza on this topic."[27] In one breath, Werner states he is merely writing out the terms that Timothy and Brian intended, but then in the next breath, indicates he is using his own independent judgment and setting forth his own agreement/ intent, not the agreement between Timothy and Brian, or otherwise supplying missing terms. In reply, plaintiff/ cross-defendant suggests Werner and Vaccarezza's agreement is *in addition* to Timothy and Brian's agreement on the issue of the closing period, but a plain reading of Werner's declaration does not support this assertion or is at least vague.

In the court's opinion, the evidence cited is enough to present a triable issue of material fact with regard to the intention of the parties. The parties cite to additional evidence in their respective favor, but any additional evidence would merely go to the relative weight. On a motion for summary adjudication, "The trial court may not weigh the evidence in the manner of a fact finder to determine whose version is more likely true." (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840.)

Accordingly, plaintiff/ cross-defendant Bay 101's motion for summary adjudication of the first cause of action [reformation] of its complaint; second cause of action [declaratory relief] of its complaint; and tenth cause of action [reformation] of cross-complainant SJBD's FAXC is DENIED.

2. Plaintiff Bay 101's motion for summary adjudication of the third cause of action [declaratory relief] of its complaint is DENIED.

---

[23] See Declaration of Timothy Bumb in Support of (1) Plaintiff and Cross-Defendant Sutter Place, Inc.'s and Cross-Defendant Timothy Bumb's Motion for Summary Adjudication, etc., ¶¶23, 27, and 28.

[24] See Declaration of Brian Bumb in Support of Defendant and Cross-Complainant S.J. Bayshore's Opposition to … Plaintiff and Cross-Defendant Sutter's Place, Inc.'s Motion for Summary Adjudication and Declaratory Relief Issues (Motion 2), ¶5.

[25] See Declaration of Ronald Werner in Support of Plaintiff and Cross-Defendant Sutter's Place, Inc.'s Motion for Summary Adjudication of its Claims for Reformation and Declaratory Relief Issues (Motion 2), ¶27.

[26] See Declaration of Ronald Werner in Support of Plaintiff and Cross-Defendant Sutter's Place, Inc.'s Motion for Summary Adjudication of its Claims for Reformation and Declaratory Relief Issues (Motion 2), ¶32.

[27] See Declaration of Ronald Werner in Support of Plaintiff and Cross-Defendant Sutter's Place, Inc.'s Motion for Summary Adjudication of its Claims for Reformation and Declaratory Relief Issues (Motion 2), ¶34.

Plaintiff Bay 101 argues next that it is entitled to summary adjudication of its third cause of action for declaratory relief concerning the timing of the selection of an appraiser and the completion of an appraisal to be performed in connection with its option to purchase under the Lease.[28] More specifically, section 1.1 of the Purchase and Sale Agreement provides the purchase price "shall be at Fair Market Value as determined by appraisal by an MAI appraiser on a date not more than 90 days prior to the date of the signing of this Purchase Agreement by both Buyer and Seller."[29]

By its own allegation, plaintiff Bay 101 and defendant SJDB dispute the interpretation of this contract provision.[30] Plaintiff Bay 101 contends that since it could exercise the option to purchase as early as 1 September 2022, defendant SJDB was obligated by the contract language cited above to select and complete an appraisal 90 days before, or by 3 June 2022. Plaintiff Bay 101 contends further that since defendant SJDB failed to do so, defendant SJDB was in default of the Lease entitling plaintiff Bay 101 to unilaterally select and complete its own appraisal which plaintiff Bay 101 did. By plaintiff Bay 101's own allegation, defendant SJDB disputes plaintiff Bay 101's interpretation and asserts any appraisal will be done after plaintiff Bay 101 first exercises the option which could not occur until after 1 September 2022.

Civil Code section 1636 states, "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Civil Code section 1638 states, "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Civil Code section 1639 states, in pertinent part, "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible." Civil Code section 1644 states, "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. Such intent is to be inferred, if possible, solely from the written provisions of the contract. The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage', controls judicial interpretation. Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608; internal citations omitted.)

> "Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39–40 [69 Cal. Rptr. 561, 442 P.2d 641]; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal. App. 3d 1113, 1140–1141 [234 Cal. Rptr. 630].) Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face. Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at p. 40 & fn. 8; *Pacific Gas & Electric Co. v. Zuckerman*, *supra*, 189 Cal. App. 3d at pp. 1140–1141.)" [Footnote omitted.]
>
> The interpretation of a contract involves "a two-step process: 'First the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid

---

[28] See Complaint, ¶41.

[29] See Complaint, ¶41; see also Separate Statement of Undisputed Facts in Support of Plaintiff and Cross-Defendant Sutter's Place, Inc.'s Motion for Summary Adjudication … (Motion 2) ("Bay 101 SSUF Motion 2"), Issue No. 3, Fact No. 115.

[30] See Complaint, ¶41.

in the second step—interpreting the contract. [Citation.]' (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165 [6 Cal. Rptr. 2d 554].) The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. (*Ibid.*) ***The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence.*** (*Id.* at p. 1166.) ***Furthermore, '[w]hen two equally plausible interpretations of the language of a contract may be made … parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.'*** (*Walter E. Heller Western, Inc. v. Tecrim Corp.* (1987) 196 Cal. App. 3d 149, 158 [241 Cal. Rptr. 677].)" [Footnote omitted.]

…

The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." [Footnote omitted.] "The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. (Civ. Code, §§ 1635–1656; Code Civ. Proc., §§ 1859–1861, 1864; *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1814 [34 Cal. Rptr. 2d 732]; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, §§ 688–689, pp. 621–623.)" [Footnote omitted.]

(*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1350-1351 and 1356-1357; emphasis added.)

Plaintiff Bay 101 itself cites extrinsic evidence from defendant SJBD conflicting with its own interpretation. (See page 19, lines 5 – 14 of the Memorandum of Points and Authorities in Support of Plaintiff and Cross-Defendant Sutter's Place, Inc.'s Motion for Summary Adjudication … (Motion 2) citing "Defendant and Cross-Complainant S.J. Bayshore Development LLC's Second Amended Responses to Plaintiff and Cross-Defendant Sutter's Place, Inc.'s Form Interrogatories – General Set One, pp. 12:16 – 25 (Nov. 16, 2022) – "Parties are not required to select a joint appraiser before Bay 101 exercises its option;" appraisal "could be" conducted after Bay 101 exercised the Option; "[t]he price would be placed in the purchase and sale agreement after it was determined.") Plaintiff Bay 101 also proffers the following: In the Spring of 2021, Vaccarezza raised with Brian [Bumb] the issue of determining which appraiser [SJBD] would use, and Brian did not propose any appraisers at that time.[31] On August 26, 2021, Brian [Bumb] said in an email that: "It is my understanding that BAY 101 is going to exercise the option to purchase next September."[32] Plaintiff Bay 101's own evidence of conflicting parol evidence creates a triable issue of material fact.

Accordingly, plaintiff Bay 101's motion for summary adjudication of the third cause of action [declaratory relief] of its complaint is DENIED.

3. Plaintiff Bay 101's motion for summary adjudication of the fourth cause of action [breach of lease] and fifth cause of action [breach of implied covenant of good faith and fair dealing] of its complaint is DENIED.

In its motion for summary adjudication, Plaintiff Bay 101 writes, "Bay 101's [fourth cause of action] for breach of the Lease and [fifth cause of action for] breach of the implied covenant of good faith and fair dealing are all based on [SJBD's] duties to select an appraisal, participate in the appraisal process, and now [as a result of

[31] See Bay 101 SSUF Motion 2, Issue No. 3, Fact No. 117.

[32] See Bay 101 SSUF Motion 2, Issue No. 3, Fact No. 118.

default] be bound by the Appraisal – in other words, the same duties underpinning its declaratory relief claims. … Bay 101 seeks summary adjudication on *all* issues of duty under its fourth and fifth causes of action."[33]

In light of the court's rulings above, plaintiff Bay 101's motion for summary adjudication of the fourth cause of action [breach of lease] and fifth cause of action [breach of implied covenant of good faith and fair dealing] of its complaint is DENIED.

4. Defendant/ cross-complainant SJBD's objections to evidence.

In opposition, defendant/ cross-complainant SJDB filed objections to evidence submitted by plaintiff/ cross-defendant Bay 101 in support of motion for summary adjudication (motion 2). As the court did not deem the evidence material to its disposition, the court declines to rule on defendant/ cross-complainant SJDB filed objections to evidence submitted by plaintiff/ cross-defendant Bay 101 in support of motion for summary adjudication (motion 2). "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., §437c, subd. (q).)

5. Plaintiff/ cross-defendant Bay 101's objections to evidence.

In reply, plaintiff/ cross-defendant Bay 101 filed objections to evidence cited by defendant/ cross-complainant SJDB. Objection numbers 2 and 3 are hereby OVERRULED. The court declines to rule on objection number 1 as the court did not deem the evidence material to its disposition. "In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., §437c, subd. (q).)

III. Order.

Plaintiff/ cross-defendant Bay 101's motion for summary adjudication of the first cause of action [rescission] of cross-complainant SJBD's FAXC and sixth affirmative defense [rescission] of defendant SJBD's answer is GRANTED. Plaintiff/ cross-defendant Bay 101's motion for summary adjudication of the seventh affirmative defense of defendant SJBD's answer is also GRANTED.

Cross-defendant Timothy's motion for summary adjudication of the second cause of action [breach of fiduciary duty] and seventh cause of action [constructive fraud] of cross-complainant SJBD's FAXC is GRANTED.

Cross-defendant Timothy's motion for summary adjudication of the eleventh cause of action [breach of the express duty of good faith] of cross-complainant SJBD's FAXC is GRANTED.

Cross-defendant Timothy's motion for summary adjudication of the twelfth cause of action [breach of the express duty of good faith] of cross-complainant SJBD's FAXC is GRANTED.

Cross-defendant Timothy's motion for summary adjudication of the ninth cause of action [aiding and abetting] of cross-complainant SJBD's FAXC is DENIED.

-----oOo-----

Plaintiff/ cross-defendant Bay 101's motion for summary adjudication of the first cause of action [reformation] of its complaint; second cause of action [declaratory relief] of its complaint; and tenth cause of action [reformation] of cross-complainant SJBD's FAXC is DENIED.

Plaintiff Bay 101's motion for summary adjudication of the third cause of action [declaratory relief] of its complaint is DENIED.

---

[33] See page 21, lines 16 – 21 of the Memorandum of Points and Authorities in Support of Plaintiff and Cross-Defendant Sutter's Place, Inc.'s Motion for Summary Adjudication … (Motion 2).

Plaintiff Bay 101's motion for summary adjudication of the fourth cause of action [breach of lease] and fifth cause of action [breach of implied covenant of good faith and fair dealing] of its complaint is DENIED.

_____ _____

DATED: **HON. SOCRATES PETER MANOUKIAN**
Judge of the Superior Court
County of Santa Clara

---oooOooo---

Calendar Line 4

---oooOooo---

Calendar Line 5

---oooOooo---

Calendar Line 6

---oooOooo---

Calendar Line 7

---oooOooo---

Calendar Line 8

---oooOooo---

Calendar Line 9

---oooOooo---

Calendar Line 10

---oooOooo---

Calendar Line 11

---oooOooo---

Calendar Line 12

---oooOooo---

Calendar Line 13

---oooOooo---

Calendar Line 14

---oooOooo---

Calendar Line 15

---oooOooo---

Calendar Line 16

---oooOoooo---

Calendar Line 17

---oooOooo---

Calendar Line 18

---oooOooo---

Calendar Line 19

---oooOooo---

Calendar Line 20

---oooOooo---

Calendar Line 21

---oooOooo---

Calendar Line 22

---oooOooo---

Calendar Line 23

---oooOooo---

Calendar Line 24

---oooOooo---

Calendar Line 25

---oooOooo---

Calendar Line 26

---oooOoooo---

Calendar Line 27

---oooOooo---

Calendar Line 28

---oooOoooo---

Calendar Line 29

---oooOoooo---

Calendar Line 30

---oooOoooo---