

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

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

**DATE: 7/30/2024 TIME: 9:00 A.M.**

**TO CONTEST THE RULING:** Before 4:00 p.m. today 97/29/2024) you must notify the:

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

**TO APPEAR AT THE HEARING:** The Court prefers in-person appearances or by Teams. If you must appear virtually, please use video.

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

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

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

LINE #	CASE #	CASE TITLE	RULING
<a href="#">LINE 1</a>	21CV381415	CREDITORS ADJUSTMENT BUREAU, INC. vs CAMPBELL DRY INC.	Hearing: Order of Examination (OEX) of Jose Cahue, CEO of Campbell Dry Inc. aka Campbell Dry, Inc dba Pegasus Refinishing by plaintiff Creditors Adjustment Bureau, Inc.  <b>Appear.</b>  <b>Note:</b> The clerk will administer the oath for the examination at the hearing. If there is no appearance by counsel for the moving party, it will be ordered off calendar at the hearing.  POS personal service filed 4/24/2024

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 3**

**Honorable William J. Monahan, Presiding**

Courtroom Clerk

191 North First Street, San Jose, CA 95113

Telephone: (408) 882-2130

**DATE: 7/30/2024 TIME: 9:00 A.M.**

<a href="#">LINE 2</a>	21CV383107	Gluliani Construction and Restoration, Inc. vs Rancho Homeowners Association	Hearing: Motion to Strike portions of Albert Yeong's second amended cross-complaint  Continued to 8/13/2024 at 9am in Dept. 3 to be heard together with demurrer.
<a href="#">LINE 3</a>	23CV423278	William Fales vs Select Portfolio Servicing, Inc. et al.	Hearing: Motion to Strike portions of Plaintiff's second amended complaint by defendant Select Portfolio Servicing, Inc.  Ctrl Click (or scroll down) one Lines 3-4 for tentative ruling. The court will prepare the order.
<a href="#">LINE 4</a>	23CV423278	William Fales vs Select Portfolio Servicing, Inc. et al.	Hearing Demurrer to Plaintiff's second amended complaint by defendant Select Portfolio Servicing, Inc.  Ctrl Click (or scroll down) one Lines 3-4 for tentative ruling. The court will prepare the order.
<a href="#">LINE 5</a>	23CV427861	LegalForce FAPC Worldwide P.C. vs Google LLC	Hearing: Demurrer to Plaintiff's complaint by defendant Google LLC  <b>The demurrer is continued to 9/26/2024 at 9am in Dept. 3.</b> If the pending motion to compel arbitration is GRANTED, the demurrer will become MOOT.
<a href="#">LINE 6</a>	23CV427861	LegalForce FAPC Worldwide P.C. vs Google LLC	Hearing: Pro Hac Vice Counsel by Katelyn Kang to appear by defendant Google, LC  Unopposed and GRANTED. Moving party to submit order for signature by the court.
<a href="#">LINE 7</a>	23CV427861	LegalForce FAPC Worldwide P.C. vs Google LLC	Hearing: Petition Compel Arbitration by defendant Google, LLC  Ctrl Click (or scroll down) on Line 7 for tentative ruling. The court will prepare the order.

**SUPERIOR COURT, STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA**

**Department 3**

**Honorable William J. Monahan, Presiding**

Courtroom Clerk

191 North First Street, San Jose, CA 95113

Telephone: (408) 882-2130

**DATE: 7/30/2024 TIME: 9:00 A.M.**

<a href="#">LINE 8</a>	24CV425386	Emilian Elefratos et al vs CityCheers Media Corporation	Motion: compel a further response to the first set of request to produce documents (RPD) No. 8 from defendant CityCheers Media Corporation and for monetary sanctions against CityCheers Media Corporation in the amount of \$1,960 by plaintiff Emilian Elefratos and WYO Group, LLC.  Unopposed and GRANTED. Moving party to submit order for signature by court.
<a href="#">LINE 9</a>	23CV426673	Wells Fargo Bank, N.A. vs Jose Perez	Motion: Admissions Deemed Admitted  Unopposed and GRANTED. Moving party to submit order for signature.
<a href="#">LINE 10</a>	24CV436275	Ernesto Guerra vs Gilroy IM Automotive, LLC et al.	Hearing: Petition Compel Arbitration and to stay or dismiss judicial proceeding s by defendant Gilroy IM Automotive LLC dba Gilroy Buick GMC  Ctrl Click (or scroll down) on Line 10 for tentative ruling. The court will prepare the order.
<a href="#">LINE 11</a>			
<a href="#">LINE 12</a>			

- oo0oo -

**Calendar Line 1**

**- oo0oo -**

**Calendar Line 2**

**- oo0oo -**

### **Calendar Lines 3-4**

**Case Name:** *William N. Fales v. Select Portfolio Servicing, Inc., et al.*

**Case No.:** 23-CV-423278

Demurrer and Motion to Strike to the Second Amended Complaint by Defendants U.S. Bank National Association, as Trustee, on Behalf of the Colt 2021-HX1 Mortgage Loan Trust, a New York Common Law Trust and Select Portfolio Servicing, Inc.

### **Factual and Procedural Background**

This is a wrongful foreclosure action brought by plaintiff William N. Fales (“Plaintiff”) against defendants U.S. Bank National Association, as Trustee, on Behalf of the Colt 2021-HX1 Mortgage Loan Trust, a New York Common Law Trust (“U.S. Bank”) and Select Portfolio Servicing, Inc. (“SPS”) (collectively, “Defendants”).

Plaintiff is the owner of real properties located at 1128 Dean Avenue, San Jose, CA 95125 (“Dean Property”) and 236 Bean Avenue, Los Gatos, CA 95030 (“Bean Property”) (collectively, “Properties”). (Second Amended Complaint [“SAC”] at ¶ 12.)

On June 7, 2021, Plaintiff secured two loans. (SAC at ¶ 13.) The first loan was for \$600,000, pursuant to a note and deed of trust recorded on the Dean Property with Homeexpress Mortgage Corp. (“HMC”) being the original beneficiary of the loan (“Dean Loan”). (Ibid.)

The second loan was for \$975,000 pursuant to a note and deed of trust recorded on the Bean Property with HMC being the original beneficiary of the loan. (SAC at ¶ 14.)

On August 10, 2022, the Dean Loan was assigned to U.S. Bank. (SAC at ¶ 15.) There was also an alleged substitution of the Trustee of the loans to Clear Recon, a non-party to this action. (Id. at ¶¶ 8, 16.)

In September 2021, SPS began servicing the loans. (SAC at ¶¶ 17, 21.) Thereafter, SPS misapplied Plaintiff’s payments on the two loans. (Id. at ¶ 21.) For example, on the first payment in September 2021, Plaintiff made out two checks for each loan, clearly stating which check applies to each loan. (Ibid.) SPS however erroneously misapplied both checks to the loans. (Id. at ¶ 22.) Plaintiff notified SPS of the misapplication of his checks to both loans upon receipt of his next statement received in October 2021. (Ibid.) Ultimately, the misapplication of payments caused the Dean Property to be in default starting in May 2022. (Id. at ¶ 23.)

In 2022, Plaintiff hired Titan Credit to represent him to put a stop to the misapplication of his loan. (SAC at ¶ 24.) Despite these efforts, SPS continued to erroneously apply Plaintiff’s payments to the wrong loan account. (Id. at ¶ 26.)

Plaintiff then proceeded to hire Ms. Pamela Simmons (“Ms. Simmons”), a lawyer, to assist him in putting an end to the erroneous accounting of his loan payment by defendant SPS.

(SAC at ¶¶ 27-28.) Ms. Simmons was able to get SPS to acknowledge that all payments were made timely and that there was an error in the application of the payments. (Id. at ¶ 28.)

Plaintiff alleges the endless erroneous application of his payments by defendant SPS caused the Dean Loan to be falsely in default. (SAC at ¶ 29.) By contrast, SPS contends that, because Plaintiff missed a mortgage payment in May 2022, the Dean Property is in default status and facing foreclosure. (Id. at ¶¶ 30, 32.) Nevertheless, Plaintiff continued to diligently make payments knowing he never defaulted on the loans. (Id. at ¶ 33.) SPS would either cash his checks and reissue another check to Plaintiff or reject and return his payments requesting Plaintiff to pay the falsely accumulated default amount, false default rate interest and miscellaneous charges. (Ibid.)

On May 10, 2023, SPS caused Clear Recon to record a notice of default on the Dean Property. (SAC at ¶ 34, Ex. F.)

On September 14, 2023, Defendants recorded a notice of trustee's sale scheduled to be held on November 1, 2023. (SAC at ¶ 35, Ex. G.)

Because of Defendants' misconduct, Plaintiff has suffered and continues to suffer various damages and injuries including but not limited to, the imminent foreclosure of his Properties, late fees and additional charges on the loan account, and damage to his credit. (SAC at ¶¶ 37-38.)

On September 20, 2023, Plaintiff filed a complaint against Defendants alleging causes of action for:

- (1) Violation of Civil Code Section 2924.17;
- (2) Violation of Civil Code Section 2924(a)(1)(B);
- (3) Violation of Business and Professions Code Section 17200 et seq.;
- (4) Negligence;
- (5) Cancellation of Instruments.

On January 3, 2024, Plaintiff filed a motion for preliminary injunction. The court (Hon. Arand) granted the motion as to the Dean Property to preserve the status quo. The court denied the motion as to the Bean Property.

On January 18, 2024, Plaintiff filed a first amended complaint ("FAC") against Defendants setting forth causes of action for:

- (1) Violation of Civil Code Section 2924.17;
- (2) Violation of Civil Code Section 2924(a)(1)(B);
- (3) Intentional Misrepresentation;
- (4) Negligent Misrepresentation;
- (5) Defamation;
- (6) Breach of Fiduciary Duty;
- (7) Negligence;
- (8) Violation of Business and Professions Code Section 17200 et seq.;
- (9) Cancellation of Instruments;
- (10) Declaratory Relief.

On January 19, 2024, Defendants filed a demurrer and motion to strike to the FAC. The hearing on the motions was scheduled for April 2, 2024. Following oral argument, this court (Hon. Monahan) overruled the demurrer to the FAC based on preemption. The court however sustained the demurrer to each cause of action for failure to state a valid claim with leave to amend. The motion to strike was rendered moot by the court's ruling on demurrer.

On April 22, 2024, Plaintiff filed the operative SAC against Defendants asserting causes of action for:

- (1) Violation of Civil Code Section 2924.17;
- (2) Violation of Civil Code Section 2924(a)(1)(B);
- (3) Violation of Business and Professions Code Section 17200 et seq.;
- (4) Negligence;
- (5) Cancellation of Instruments;
- (6) Declaratory Relief.

Currently before the court are Defendants' demurrer and motion to strike portions of the SAC. Defendants filed a request for judicial notice in conjunction with the motions. Plaintiff filed written oppositions. Defendants filed reply papers.

### **Demurrer to the SAC**

Defendants argue each cause of action in the SAC is subject to demurrer for failure to state a valid claim. (Code Civ. Proc., § 430.10, subd. (e).)

### **Request for Judicial Notice**

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

Here, Defendants request judicial notice of the following:

- (1) Deed of Trust recorded on June 14, 2021 in the Santa Clara County Recorder's Office as Document Number 24994290 (Ex. 1);
- (2) Corporate Assignment of Deed of Trust recorded on August 10, 2022 in the Santa Clara County Recorder's Office as Document Number 25355819 (Ex. 2);
- (3) Substitution of Trustee recorded on May 10, 2023 in the Santa Clara County Recorder's Office as Document Number 25473280 (Ex. 3).

Exhibits 1-3 are subject to judicial notice as real property documents recorded in Santa Clara County. (See Evid. Code, § 452, subd. (h); see also *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-265, disapproved on other grounds in *Yvanova v. New Century Morg. Corp.* (2016) 62 Cal.4th 919 [court may take judicial notice of the existence and recordation of real property records]; *West v. JPMorgan Chase Bank, N.A.* (2013) 214



Cal.App.4th 780, 803 (*West*) [“A court may take judicial notice of a recorded deed.”].) Plaintiff does not oppose the request and the exhibits are relevant to arguments raised in support of the demurrer. (See *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301 [judicial notice is confined to those matters which are relevant to the issue at hand].)

Accordingly, the request for judicial notice is GRANTED.

## **Legal Standard**

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

“The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. ... [I]t is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.” (*Gregory v. Albertson’s, Inc.* (2002) 104 Cal.App.4th 845, 850.)

## **General Demurrer**

“ ‘The absence of any allegation essential to a cause of action renders it vulnerable to a general demurrer. A ruling on a general demurrer is thus a method of deciding the merits of the cause of action on assumed facts without a trial.’ [Citation.] ‘Conversely, a general demurrer will be overruled if the complaint contains allegations of every fact essential to the statement of a cause of action, regardless of mistaken theory or imperfections of form that make it subject to special demurrer.’ [Citation.]” (*Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 291-292 (*Morris*).)

“A complaint, with certain exceptions, need only contain a ‘statement of the facts constituting the cause of action, in ordinary and concise language’ [citation] and will be upheld ‘ “so long as [it] gives notice of the issues sufficient to enable preparation of a defense.” ’ [Citation.] ‘[T]o withstand a demurrer, a complaint must allege ultimate facts, not evidentiary facts or conclusions of law.’ [Citation.]” (*Morris, supra*, 78 Cal.App.5th at p. 292.)

## **First Cause of Action: Violation of Civil Code Section 2924.17**

The first cause of action is a claim for violation of Civil Code section 2924.17 which provides in pertinent part:

- (a) A declaration recorded pursuant to Section 2923.5 or pursuant to Section 2923.55, a notice of default, notice of sale, assignment of a deed of trust, or substitution of trustee recorded by or behalf of a mortgage servicer in connection with a foreclosure subject to the requirements of Section 2924, or a declaration or affidavit filed in any court relative to a foreclosure proceeding shall be accurate and complete and supported by competent and reliable evidence.
- (b) Before recording or filing any of the documents described in subdivision (a), a mortgage servicer shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information. (Civ. Code, 2924.17, subds. (a)-(b).)

In summary, "section 2924.17, requires that certain documents recorded in connection with a foreclosure 'be accurate and complete and supported by competent and reliable evidence' and that a mortgage servicer review 'competent and reliable evidence' to substantiate the default and right to foreclose before recording such documents." (*Adams v. Bank of America, N.A.* (2020) 51 Cal.App.5th 666, 674.)

As a general matter, the SAC must plead facts supporting the statutory elements of a statutory violation, with reasonable particularity. (*Covenant Care, Inc. v. Super. Ct.* (2004) 32 Cal.4th 771, 790; *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.) And, while section 2924.17 does not state the level of specificity with which a plaintiff must identify the inaccuracies contained in the notice of default, a plaintiff must plead sufficient facts "to raise a right to relief above the speculative level" in order for his or her claim to survive a defendant's motion to dismiss. (*Davis v. U.S. Bank N.A.* (C.D. Cal. 2015) 2015 U.S. Dist. LEXIS 62606, at pp. \*16-17; see *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 64, fn. 4 ["We may cite and rely on unpublished federal district court decisions as persuasive authority."].)

The allegations in support of the first cause of action are incorporated in paragraphs 39-61 of the SAC. First, Defendants argue Plaintiff fails to allege facts with reasonable particularity supporting the statutory elements to establish a violation under section 2924.17. As stated above, the statute requires allegations that Defendants reviewed competent and reliable evidence to substantiate a borrower's default and the right to foreclose. Here, Plaintiff alleges Defendants do not have accurate documentation to foreclose on his Properties and failed to accurately review his loan account to substantiate his default. (See SAC at ¶¶ 41, 59.) But, these factual allegations appear to fall short of establishing the statutory elements of a violation. Nor does Plaintiff specifically address the argument for reasonable particularity in support of his opposition. (See *Schulster Tunnels/Pre-Con v. Traylor Brothers, Inc.* (2003) 111 Cal.App.4th 1328, 1345, fn. 16 [failure to address point is "equivalent to a concession"]; see also *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal. App. 4th 507, 529 [failure to challenge a contention in a brief results in the concession of that argument].)

Even if the first cause of action had been pled with reasonable particularity, Defendants contend there are no facts demonstrating any claimed violation was "material."

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

“Pursuant to [Civil Code] § 2924.12, borrowers can sue for violations of § 2924.17, but only if those violations are ‘material.’ ” (*Cardenas v. Caliber Home Loans, Inc.* (N.D. Cal. 2017) 281 F.Supp.3d 862, 869.) Again, Plaintiff appears to concede this argument as he fails to address it in his opposition.

As a final point, Plaintiff appears to argue in opposition that the court should overrule the demurrer given this court’s prior ruling granting the motion for preliminary injunction. (See OPP at pp. 5:12-6:14.) But, motions for preliminary injunction and demurrer are separate proceedings with different factual elements. (See *Ryland Mews Homeowners Assn. v. Munoz* (2015) 234 Cal.App.4th 705, 711 [“In deciding whether to issue a preliminary injunction, a court must weigh two ‘interrelated’ factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction.”].) Nor does Plaintiff cite any legal authority for the proposition that the granting of a motion for preliminary injunction results in the overruling of a general demurrer. (See *Public Employment Relations Bd. v. Bellflower Unified School Dist.* (2018) 29 Cal.App.5th 927, 939 [“The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.”]; *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153 [court may disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he or she wants us to adopt].) And, as pointed out in the reply papers, this court previously sustained the demurrer in this action despite the court’s earlier ruling granting the motion for preliminary injunction.

Consequently, the demurrer to the first cause of action is SUSTAINED for failure to state a claim.

### **Second Cause of Action: Violation of Civil Code Section 2924(a)(1)(B)**

The second cause of action seeks relief in connection with Civil Code section 2924, subdivision (a)(1)(B) which provides that a notice of default shall include, among other things, “[a] statement that a breach of the obligation for which the mortgage or transfer in trust is security has occurred.”

The allegations in support of the second cause of action are contained in paragraphs 62-84 of the SAC. Defendants argue the second cause of action also fails to allege facts with reasonable particularity supporting the statutory elements to establish a violation under section 2924(a)(1)(B). The second cause of action alleges in relevant part:

¶ 65: Defendants abusive servicing of Plaintiff’s loans by the excessive and constant misapplication of Plaintiff’s loan payments resulted in a falsified default.

¶ 66: There is no breach of obligation securing the mortgage because Plaintiff is current on his payments but for Defendants abusive misapplication of his loan payments. (SAC at ¶¶ 65-66.)

The allegation in paragraph 66 correctly corresponds to section 2924(a)(1)(B). Plaintiff however does not allege that the notice of default in this case failed to include the language cited in paragraph 66 and thus fails to state a valid cause of action. And, like the first cause of action, Plaintiff's opposition does not directly respond to the argument for reasonable particularity.

Even if the second cause of action had been pled with reasonable particularity, Defendants contend Plaintiff does not allege prejudice from any claimed irregularity in the foreclosure process:

“A nonjudicial foreclosure sale is accompanied by a common law presumption that it ‘was conducted regularly and fairly.’ [Citations.] This presumption may only be rebutted by substantial evidence of prejudicial procedural irregularity. [Citation.] The ‘mere inadequacy of price, absent some procedural irregularity that contributed to the inadequacy of price of otherwise injured the trustor, is insufficient to set aside a nonjudicial foreclosure sale. [Citations.] [Citations.] It is the burden of the party challenging the trustee’s sale to prove such irregularity and thereby overcome the presumption of the sale’s regularity. [Citation.]” (*Melendrez v. D& I Investment, Inc.* (2005) 127 Cal.App.4th 1238, 1258.)

Plaintiff does not offer any argument in opposition addressing prejudice and thus the demurrer is also sustainable on this ground.

Therefore, the demurrer to the second cause of action is SUSTAINED for failure to state a claim.

### **Third Cause of Action: Violation of Business and Professions Code Section 17200 et seq.**

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

Here, Plaintiff’s unfair business practices claim is based on violations of Civil Code sections 2923.17 and 2924(a)(1)(B). (See SAC at ¶ 87.) But, as stated above, the court sustained the demurrer to the first and second causes of action. Thus, there is no unlawful, unfair, or fraudulent conduct to support a claim under the UCL. (See *Becerra v. McClatchy Co.* (2021) 69 Cal.App.5th 913, 951 [where an unfair business practices claim “is derivative of an underlying violation of law, it must stand or fall with the underlying claim”].)

Accordingly, the demurrer to the third cause of action is SUSTAINED for failure to state a claim. Having sustained the demurrer on this ground, the court declines to consider Defendants' remaining arguments to the UCL cause of action.

#### **Fourth Cause of Action: Negligence**

"To state a cause of action for negligence, a plaintiff must allege (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's damages or injuries." (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 62 (*Lueras*).)

Defendants contend there is no duty, as a matter of law, to support negligence as no such duty exists between a loan servicer and a borrower.

"Lenders and borrowers operate at arm's length. [Citations.] '[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.' [Citation.]" (*Lueras, supra*, 221 Cal.App.4th at p. 63.)

But, as is the case here, statutory duties may be used to support negligence. (SAC at ¶¶ 94-95.) Statutes may be borrowed to support negligence for one of two purposes: (1) to establish a duty of care; or (2) to establish a standard of care. (*Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 535 (*Turner*).) For example, in *Turner*, the Third Appellate District concluded a negligence claim could be supported by a statutory duty under the nonjudicial foreclosure statutes. (*Ibid.* ["Accordingly, to the extent a negligence cause of action arises from a statutory duty under the nonjudicial foreclosure statutes (Civ. Code, § 2924 et seq.), we believe the duty is sufficient to support a negligence cause of action."].)

Here, Plaintiff relies on statutory duties set forth in Civil Code sections 2923.17 and 2924(a)(1)(B). But, as stated above, the court sustained the demurrer to the first and second causes of action based on these sections. Thus, if there is no claim stated for a violation of these sections, there can be no corresponding duty violated to support negligence. (See *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316 ["[A] demurrer to a negligence claim will properly lie only where the allegations of the complaint fail to disclose the existence of any legal duty owed by the defendant to the plaintiff."].)

Consequently, the demurrer to the fourth cause of action is SUSTAINED for failure to state a claim. Having sustained the demurrer on this ground, the court declines to address Defendants' remaining arguments to the negligence cause of action.

#### **Fifth Cause of Action: Cancellation of Instruments**

Under Civil Code section 3412, "[a] written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled."

“To prevail on a claim to cancel an instrument, a plaintiff must prove (1) the instrument is void or voidable due to, for example, fraud, and (2) there is a reasonable apprehension of serious injury including pecuniary loss or prejudicial alteration of one’s position.” (*U.S. Bank National Association v. Naifeh* (2016) 1 Cal.App.5th 767, 778.)

“To obtain cancellation under this section, a plaintiff must allege the instrument is ‘void or voidable’ and would cause ‘serious injury’ if not canceled. [Citation.] Cancellation of an instrument is essentially a request for rescission of the instrument. [Citation.] The effect of a decree cancelling an instrument is to place the parties where they were before the instrument was made, as if it had never been made. [Citation.]” (*Deutsche Bank National Trust Co. v. Pyle* (2017) 13 Cal.App.5th 513, 523.)

Here, Plaintiff seeks to cancel the notice of default and notice of trustee’s sale in connection with the Properties for violations under Civil Code sections 2923.17 and 2924(a)(1)(B). (See SAC at ¶¶ 122-123.) But, as stated above, the court sustained the demurrer to the first and second causes of action. Thus, there is no factual basis to support a claim for cancellation of instruments.

Therefore, the demurrer to the fifth cause of action is SUSTAINED for failure to state a claim.

### **Sixth Cause of Action: Declaratory Relief**

Code of Civil Procedure section 1060 provides in relevant part:

“Any person interested under a written instrument ... or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. ...”

To qualify for declaratory relief under section 1060, a plaintiff’s action must present two essential elements: (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to the rights or obligations of a party. (*Lee v. Silveira* (2016) 6 Cal.App.5th 527, 546.) “ ‘The “actual controversy” language in ... section 1060 encompasses a probable future controversy relating to the legal rights and duties of the parties.’ [Citation.] It does not embrace controversies that are ‘conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court.’ [Citation.]” (*Ibid.*)

To support declaratory relief, Plaintiff alleges the following in relevant part:

¶ 125: An actual controversy has arisen between the parties concerning the ownership of the Property. Defendants claim to have the authority to have effectuate a sale of the Property.

¶ 126: Plaintiff contends that the notice of default and notice of trustee's sale were illegally recorded on his Property and Defendants do not have the power or authority to effectuate a sale. (SAC at ¶¶ 125-126.)

Here, Plaintiff's declaratory relief allegations are a restatement of his prior claims which did not survive demurrer for reasons stated above. As there is no valid underlying claim to support declaratory relief, the sixth cause of action also fails. (See *Faunce v. Cate* (2013) 222 Cal.App.4th 166, 173 [trial court properly sustained the demurrer as to these claims because they were "wholly derivative of" other nonviable causes of action]; see also *Ball v. FleetBoston Financial Corp.* (2008) 164 Cal.App.4th 794, 800 ["[W]here a trial court has concluded the plaintiff did not state sufficient facts to support a statutory claim and therefore sustained a demurrer as to that claim, a demurrer is also properly sustained as to a claim for declaratory relief which is 'wholly derivative' of the statutory claim."].)

Accordingly, the demurrer to the sixth cause of action is SUSTAINED for failure to state a claim.

### **Leave to Amend**

Should the court sustain the demurrer, Plaintiff requests further leave to amend. (See OPP at p. 10:9-18.)

"The plaintiff bears the burden of proving there is a reasonable possibility of amendment." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*).) To satisfy this burden, a plaintiff "must show in what manner he (or she) can amend his (or her) complaint and how that amendment will change the legal effect of his pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) "Plaintiff must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. [Citations.] Allegations must be factual and specific, not vague or conclusionary." (*Rakestraw, supra*, 81 Cal.App.4th at pp. 43-44.)

Here, the court has already afforded Plaintiff an opportunity to amend and he has been unable to state a valid cause of action to overcome a pleading challenge on demurrer. Nor does Plaintiff explain how any such amendment will change the legal effect of his pleading. Thus, Plaintiff fails to satisfy his burden for any further amendment.

As a consequence, leave to amend is DENIED. (See *Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1145 ["The onus is on the *plaintiff* to articulate the 'specifi[c] ways' to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend 'only if a potentially effective amendment [is] both apparent and consistent with the plaintiff's theory of the case. [Citation.]' "].)

### **Motion to Strike Portions of the SAC**

Defendants also move to strike portions of the SAC regarding allegations of emotional distress, attorney's fees, damages, and credit impairment damages. As explained above, the court sustained the demurrer to the SAC without leave to amend. Therefore, the motion to strike portions of the SAC is MOOT.

**Disposition**

The demurrer to the SAC is SUSTAINED WITHOUT LEAVE TO AMEND for failure to state a claim.

The motion to strike portions of the SAC is MOOT.

The court will prepare the Order.

- oo0oo -

- oo0oo -



**Calendar Line 5**

**- oo0oo -**

**Calendar Line 6**

**- 00000 -**

## **Calendar Line 7**

**Case Name:** *LegalForce PAPC Woldwide P.C vs Google LLC*

**Case No.:** 23CV427861

Defendant Google LLC (“Defendant” or “Google”)’s motion to compel final and binding arbitration of the claims submitted by Plaintiff LegalForce DAPC Worldwide P.C. (“Plaintiff” or “LegalForce”) in this matter pursuant to Code of Civil Procedure (CCP) section 1280, *et seq.*, and for an order staying this matter pending the outcome of the arbitration is GRANTED.

### **General Favorability of Arbitration**

California case and statutory law strongly favors the resolution of disputes by arbitration. (*OTO, L.L.C. v. Kho* (2019) 8 Cal. 5th 111, 125.) The state legislature has expressed a strong policy interest in arbitration as a quicker and less costly alternative to judicial resolution. (*Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 9.) When presented with a dispute which calls for resolution by arbitration, presiding courts are to consider the presumption in favor of arbitration. (*Id.*)

A party to an arbitration agreement may seek a court order compelling the parties to arbitrate a dispute covered by the agreement (CCP § 1281.2.) A party moving to compel arbitration must prove by a preponderance of the evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (*Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 [*“the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate”*]; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 [the moving party’s burden of proof is by a preponderance of evidence].) The burden then shifts to the resisting party to prove a ground for the denial [by a preponderance of the evidence]. (*Id.*)

The court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for rescission of the agreement....

(CCP § 1281.2.)

If the court orders arbitration “of a controversy which is an issue involved in [the] action or proceeding pending before [it], the court ... shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies. (CCP § 1281.4.) “If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only.” (*Id.*)

Here, Google has met its burden of proof by a preponderance of the evidence that there is an arbitration agreement between Google and LegalForce that covers the claims in the Plaintiff’s complaint in this matter. Google established with the evidence it submitted that Jolly Mathews, LegalForce’s Chief Financial Officer (CFO), accepted the Terms and Arbitration Provision for LegalForce in March 2022. LegalForce did *not* dispute this. (See Opp. at 11-12.)

LegalForce incorrectly claims that the March 2022 Terms do not require arbitration of this dispute because the agreement “does not stipulate that it applies retroactively to encompass disputes arising prior to its execution.” (Opp at 12.) This is flatly wrong. Section 13(A)(2) of the Terms state that arbitration is required for “claims that arose before Customer or Advertiser first accepted any version of these Terms containing an arbitration provision.” (Shadd Decl. Ex. F § 13(a)(2).) Consistent with this language, California courts have established that “an arbitration agreement may be applied retroactively to transactions which occurred prior to execution of the arbitration agreement.” (*Salgado v. Carrows Restaurants, Inc.* (2019) 33 Cal.App.5th 356, 361; see also *Desert Outdoor Advertising v. Superior Court* (2011) 196 Cal.App.4th 866, 877 [holding that the broad language of the arbitration agreement applied to a dispute occurring before the signing of the arbitration agreement].)

LegalForce admits the Arbitration Provision’s scope is “expansive” and requires arbitration of “any conceivable issue, regardless of its connection to the contract’s core services[.]” (Opp. at 13.) However, LegalForce contradicts itself when arguing elsewhere in the same Opposition that its claims are not arbitrable because they have “nothing to do with the advertising contract between Plaintiff and Google,” and only a breach of contract claim would be subject to arbitration. (Opp. at 9-10 [unpersuasively arguing, without citation, that “[t]he intended scope of an arbitration agreement, typically, is to provide a mechanism for resolving disputes that are contractual and intrinsic to the services described in the agreement”]. This

second interpretation is both factually and legally incorrect as it ignores the plain language of the Arbitration Provision and California courts' interpretation of similar language.

The Arbitration Provision requires the parties to arbitrate “all disputes and claim” that **“arise out of or relate in any way** to the Program or these Terms. (Shadd Decl. Exs. A, E [emphasis added].) “[T]he decision as to whether a contractual arbitration clause covers a particular dispute rests substantially on whether the clause in question is “broad” or “narrow.”” (*Ramos v. Superior Court* (2018) 28 Cal.App.5th 1042, 1051-1052 [239 Cal.Rptr.3d 679].) In *Ramos*, the arbitration clause covered claims “arising out of or relating to this Agreement ... or the Partnership,” and plaintiff argued ---as LegalForce does here---that her statutory and tort claims were not arbitrable because they did not involve any alleged violation of the underlying agreement. (*Id.*) The court rejected that argument, explaining that arbitration clauses covering disputes “relating to” the agreement have been construed broadly to encompass tort, statutory, and contractual disputes that “have their roots in the relationship between the parties which was created by the contract.” (*Id.*; [internal citations omitted]; see also *Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell* (1999) 76 Cal.App.4th 227, 230 [arbitration clause covering “[a]ny controversy or claim arising out of or relating to any provision of this [partnership] [a]greement or the breach thereof . . . .” covered complaint for partnership dissolution and an accounting]; *Khalatian v. Prime Time Shuttle, Inc.* (2015) 237 Cal.App.4th 651, 659 [The language “arising out of or relating to” as used in the parties' arbitration provision is generally considered a broad provision that “are consistently interpreted as applying to extracontractual disputes between the contracting parties.”])

Google has met its burden to show that the arbitration agreement between Google and LegalForce require arbitration of all the claims in this action.

Under the “arise out of or relate in any way” language of the Arbitration Provision (Shadd Decl. Exs. A,D) LegalForce’s “factual allegations of the complaint need only touch matters covered by the contract containing the arbitration clause. (*Ramos, supra*, 8 Cal.App.5th at p. 1052 [internal quotations omitted.]) Legalforce alleges that Google increases prices LegalForce pays for advertising on Goggle Ads by failing to prevent the display of fraudulent ads by LegalForce’s competitors. (See e.g., Compl. At 10-11, ¶¶ 11-12.) These allegations do far more than merely “touch” the Terms; rather they relate directly to Google’s

charges to Plaintiff pursuant to them. And the Terms require arbitration of all disputes that “relate in any way to the Program” LegalForce uses to buy advertisements.

**The Arbitration Agreement is Not Unconscionable.**

LegalForce has *not* met its burden of proof by a preponderance of the evidence to establish that the Arbitration Provision is *either* procedurally and substantively unconscionable, and LegalForce must establish both to prevail. (See Pet. At 19-21; Opp at 13; *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.) Moreover, as a sophisticated, commercial and legal entity with experience in the law and in the legal profession, Legalforce’s unconscionability arguments ring especially hollow here. (See *Dean Witter Reynolds v. Superior Court* (1989) 211 Cal.App.3d 758, 768 [noting party’s “sophistication” relevant to determining unconscionability].)

Contrary to LegalForce’s contention (Opp. at 1), unnegotiated click wrap agreements with arbitration requirements that also permit users to opt out of arbitration, such as Google’s Terms, are not procedurally unconscionable under settled law. (*Circuit City Stores, Inc. v Ahmed* (9th Cir. 1999) 195 F.3d 1131, 1132 [applying California law and concluding opt out right defeated procedural unconscionability]; *Mohamed v. Uber Techs., Inc.* (9th Cir. 2016) 848 F.3d 1201, 1211 [arbitration agreements were not procedurally unconscionable “if there is an opportunity to optout of it”]; *Trudeau v. Google LLC* (N.D.Cal. 2018) 349 F. Supp. 3d 869, 872, 877, 881 [no unconscionability in Google’s Arbitration Provision where opportunity to opt out of the arbitration agreement existed; *Houtchens v. Google LLC* (N.D.Cal. 2023) 649 F. Supp. 3d 933, 944 [no unconscionability where opportunity to opt out of the arbitration agreement existed].)

The Arbitration Provision covers “all disputes and claims ... under any legal theory” that “arise out of or relate in any way to the Programs or these Terms” is enforceable and not unconscionable.

LegalForce’s arguments –which center primarily around vague and unsupported assertions regarding “:public policy” are meritless and cannot, in any event overcome the plain language of the Terms or the Arbitration Provision which LegalForce has accepted.

Legal Force has *not* met its burden of proving *any* defense to the Arbitration Agreement by a preponderance of the evidence.

Google's petition/motion to compel binding arbitration with LegalForce is GRANTED.

### **Google's Request for Stay**

When a trial court "has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before" the court, it "shall, upon motion of a party ... stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate ... ." ([CCP] § 1281.4.)

*(Heritage Provider Network, Inc. v. Superior Court (2008) 158 Cal.App.4th 1146, 1152.)*

Google's request for a stay of this action pending the outcome of the binding arbitration is GRANTED.

### **Conclusion**

Google's petition/motion to compel binding arbitration with LegalForce is GRANTED.

Google's request for a stay of this action pending the outcome of the binding arbitration is GRANTED.

The court will prepare the order.

- oo0oo -

**Calendar Line 8**

**- oo0oo -**



**Calendar line 9**

**- oo0oo -**

## **Calendar line 10**

**Case Name:** *Ernesto Guerra vs Gilroy IM Automotive, LLC, et al.*

**Case No.:** 24CV436275

Defendant Gilroy IM Automotive, LLC dba Gilroy Buick GMC (“Defendant”)’s motion to compel arbitration of this controversy pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. section 1, et seq., and the California Arbitration Act (“CAA”), California Code of Civil Procedure (“CCP”) section 1280 et seq. and the arbitration notice and procedures in the Retail Installment Sale Contract (“RISC”) agreed to and signed by plaintiff Ernesto Guerra (“Plaintiff”) is GRANTED.

Defendant’s motion to stay this matter pursuant to 9 U.S.C. section 3 and CCP section 1281.4 pending the outcome of the arbitration is GRANTED.

### **General Favorability of Arbitration**

California case and statutory law strongly favors the resolution of disputes by arbitration. (*OTO, L.L.C. v. Kho* (2019) 8 Cal. 5th 111, 125.) The state legislature has expressed a strong policy interest in arbitration as a quicker and less costly alternative to judicial resolution. (*Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 9.) When presented with a dispute which calls for resolution by arbitration, presiding courts are to consider the presumption in favor of arbitration. (*Id.*)

A party to an arbitration agreement may seek a court order compelling the parties to arbitrate a dispute covered by the agreement (CCP § 1281.2.) A party moving to compel arbitration must prove by a preponderance of the evidence the existence of the arbitration agreement and that the dispute is covered by the agreement. (*Cruise v. Kroger Co.* (2015) 233 Cal.App.4th 390, 396 [*“the threshold question presented by a petition to compel arbitration is whether there is an agreement to arbitrate”*]; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 [the moving party’s burden of proof is by a preponderance of evidence].) The burden then shifts to the resisting party to prove a ground for the denial [by a preponderance of the evidence]. (*Id.*)

The court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or  
(b) Grounds exist for rescission of the agreement....  
(CCP § 1281.2.)

If the court orders arbitration “of a controversy which is an issue involved in [the] action or proceeding pending before [it], the court ... shall, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies. (CCP § 1281.4.) “If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only.” (*Id.*)

Plaintiff’s complaint alleges six causes of action against Defendant (1) violation of the Consumers Legal Remedies Act, Civil Code section 1750, et seq. (2) violation of Civil Code section 1632; (3) Civil Theft—violation of Penal Code section 496; (4) Fraud and Deceit; (5) Negligent Misrepresentation and (6) violation of the unfair competition Law, Business and Professions Code section 17200, et seq.

The allegations of the complaint arise out of Plaintiff’s Oct. 10, 2021, purchase of the 2017 Chevrolet Tahoe, VIN 1GNSCKKC0HR210640 (“2017 Chevrolet Tahoe”) from Defendant under a written RISC that included a binding arbitration provision. (See Complaint ¶ 8; Decl. Michael Winding ¶¶ 1-5, Ex. A.)

Here, Defendant has met its burden of proof by a preponderance of the evidence that there is an arbitration agreement between Defendant and Plaintiff that covers the claims in the Plaintiff’s complaint in this matter.

Plaintiff does not dispute that he signed an arbitration agreement in connection with the vehicle purchase. Indeed, plaintiff states he agreed to Defendant's request to arbitrate and selected JAMS as the arbitration provider, but Defendant insisted AAA serve as the arbitration provider.

The arbitration agreement states: "You may choose the American Arbitration Association [‘AAA’] ... (www.adr.org), or any other organization subject to our approval." Plaintiff argues Defendant's insistence on AAA as the arbitration provider and refusal to agree to JAMS demonstrate the arbitration agreement is both procedurally and substantively unconscionable and should not be enforced.

A court can refuse to enforce an unconscionable provision in a contract. (Civ. Code § 1670.5.) "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." (Civ. Code § 1670.5(a); *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 122.) "If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Id.* at 124.)

Unconscionability has both a procedural element and a substantive element. (*Armendariz*, supra, 24 Cal.4th at 114.) The procedural elements focuses on "oppression" or "surprise" due to unequal bargaining power; the substantive elements focuses on "overly harsh" or "one-sided" results. (*Id.*) Procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability, but they need not be present in the same degree. (*Id.*) "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." (*Id.*) "In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Id.*)

"The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power." (*Carmona v. Lincoln Millennium Car Wash, Inc.* (2014) 226 Cal.App.4th 74, 83.) "Oppression arises from an inequality of bargaining power, when one party has no real power to negotiate or a meaningful choice. Surprise occurs when the allegedly unconscionable provision is hidden." (*Id.* at 84.)

"Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided. [Citations.] A contract term is not substantively unconscionable when it merely gives one side a greater benefit; rather, the term must be "so one-sided as to 'shock the conscience.'"" (*Carmona*, 226 Cal.App.4th at 85.) The paramount consideration in assessing substantive conscionability is mutuality. (*Id.*)

Plaintiff does *not* have to choose AAA under the arbitration agreement. Plaintiff clearly gets to choose the arbitration provider “subject to [Defendant’s] approval. Defendant's refusal to agree to JAMS does *not* render the arbitration unconscionable. Plaintiff may choose another arbitration organization “subject to [Defendant’s] approval.”

Plaintiff argues that the arbitration agreement is unconscionable because it is a contract of adhesion. The adhesive nature of a contract is sufficient to establish some degree of procedural unconscionability. (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 915.) However, there was no substantive unconscionability. The arbitration agreement clearly allows Defendant the choice of AAA “or any other organization to conduct the arbitration *subject to [Defendant’s] approval.*” (See Dec. of Michael Winding, Ex. A [emphasis added].) The fact that any other organization is subject to Defendant’s approval is clearly stated in the arbitration agreement. It is *not* hidden.

Here, the parties are ordered to meet and confer to reach agreement on an arbitration provider (other than AAA or JAMS) in accordance with their binding arbitration agreement.

Defendant’s motion to stay this matter pursuant to 9 U.S.C. section 3 and CCP section 1281.4 pending the outcome of the arbitration is GRANTED.

When a trial court “has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before” the court, it “shall, upon motion of a party ... stay the action or proceeding until an arbitration is had in accordance with the order to arbitrate ... .” ([CCP] § 1281.4.)

(*Heritage Provider Network, Inc. v. Superior Court* (2008) 158 Cal.App.4th 1146, 1152.)

This action is stayed pending the outcome of the arbitration,

### **Conclusion**

Defendant’s motion to compel binding arbitration with Plaintiff pursuant to the terms of the arbitration agreement in the RISC is GRANTED. Plaintiff may choose the arbitration provider subject to Defendant’s approval. The parties are ordered to promptly meet and confer in good faith to reach agreement on an arbitration provider (other than AAA or JAMS) in accordance with their binding arbitration agreement.

Defendant’s motion for stay of this action pending the outcome of the arbitration is GRANTED.

The court will prepare the order.

- 00000 –

Calendar line 11

- 00000 -

**Calendar line 12**

**- oo0oo -**

Calendar line 13

- oo0oo -