SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 10-24-23 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear by video.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today 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 strongly prefers in person appearances. If you must appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. Phone lines are now open for you to call and reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Where to call for your hearing date: 408-882-2430 When you can call: Monday to Friday, 8:30 am to 12:30 pm

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

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.

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LINE #	CASE #	CASE TITLE	RULING
LINE 1	22CV398906 Hearing: Demurrer	Marzieh Abdolyousefi et al vs Mojtaba Taiebat et al	See Tentative Ruling. Court will prepare the final order.
LINE 2	22CV398906 Motion: Compel	Marzieh Abdolyousefi et al vs Mojtaba Taiebat et al	See Tentative Ruling. Defendant will prepare the final order.
LINE 3	22CV398906 Hearing: Motion to Strike	Marzieh Abdolyousefi et al vs Mojtaba Taiebat et al	See Tentative Ruling. Court will prepare the final order.
LINE 4	22CV397779 Hearing: Motion Summary Judgment	Google LLC et al vs John French III et al	See Tentative Ruling. The Court will prepare the final order.
LINE 5	22CV397779 Motion: Summary Judgment/Adjudication	Google LLC et al vs John French III et al	See Tentative Ruling. The Court will prepare the final order.
LINE 6	21CV391846 Hearing: Confirm Arbitration Award	Jinsong Hu vs Bryan Salesky, as CEO of Argo AI, Inc.	There is no amended notice of hearing filed. If Defendant appears, the motion will be continued to allow for proper notice. If Defendant fails to appear the matter will go off calendar.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 7	21CV392046 Motion: Leave to Amend Complaint	James Nelson vs Volvo Car USA LLC et al	Notice appearing proper and good cause appearing, the unopposed motion for leave to amend is GRANTED. Plaintiff shall submit the final order and file the amended complaint within 10 days of the hearing.
LINE 8	22CV398340 Hearing: Confirm Arbitration Award	IPS3 Group Limited et al vs ADMI California, Inc.	Notice does not appear proper as there is no proof of service for the amended notice of hearing. If Petitioner appears for the hearing, the matter will be continued to allow for proper notice. If Petitioner fails to appear the matter will go off calendar.
LINE 9	22CV400083 Motion: Withdraw as attorney	Realty One Group, Infinity, a corporation vs Alexis Orosco et al	There is no amended notice of hearing filed. If moving counsel appears, the motion will be continued to allow for proper notice. If moving counsel fails to appear the matter will go off calendar.
LINE 10	23CV411623 Hearing: Pro Hac Vice Counsel	Lauren Hanson vs Tinatin Gegia et al	Notice appearing proper and good cause appearing, the unopposed motion of Chad Silker is GRANTED. Defendant shall submit the final order.
LINE 11			
LINE 12			

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Calendar Line 1 Calendar Lines 1 & 3
Case Name: *Abdolyousefi, et al. v. Taiebat, et al.*
Case No.: 22CV398906

I. Factual and Procedural Background

Plaintiff Mojtaba Taiebat ("Plaintiff") brings this First Amended Complaint ("FAC") against defendant Marzieh Nabi Abdolyousefi ("Defendant").

According to the allegations of the FAC, the parties moved in together in 2013. (FAC, ¶ 7.) The parties "agreed that they would be in essentially a domestic partnership where they would share expenses equally and acquire property together[.]" (*Ibid*.) The parties share one child together, born in 2017. (*Ibid*.)

During their relationship, the parties acquired multiple properties together, including their shared home in San Jose ("the Property"). (See FAC, ¶¶ 8-12.) The parties agreed that for each of the properties, Plaintiff would contribute the down payment, to be paid back upon sale of the properties. (*Id*. at ¶ 13.) Some of these properties have been sold, but Plaintiff was not paid his down payment. (*Id*. at ¶ 14.)

In 2021, the parties agreed to separate peacefully; however, "Defendant tricked Plaintiff into leaving the joint home by promising [it] would be sold." (FAC, ¶ 15.) The parties entered into a stipulation agreement ("Stipulation Agreement") in 2021. (FAC, Ex. A.) Plaintiff relied on Defendant's promises to sell the home, but eventually Defendant stopped responding to the realtor the parties agreed to use. (*Ibid*.)

On February 17, 2023, Defendant filed a motion for judgment on the pleadings as to Plaintiff's initial complaint. On May 16, 2023, this Court (Hon. Rosen) granted the motion as to the first, second (count two), third, sixth, and eighth causes of action with leave to amend. The Court granted the motion as to the fourth and fifth causes of action without leave to amend. The Court denied the motion as to the second (count one), seventh, ninth, and tenth causes of action.

On June 15, 2023, Plaintiff filed an amended pleading and now asserts the following 10 causes of action against Defendant:

1) Fraud;
2) Breach of Contract;
3) Declaratory Relief – Recission;
4) Declaratory Relief – Contract Terms;
5) Partition and Sale of Real Property;
6) Unjust Enrichment and Restitution;
7) Battery;
8) Assault;
9) Defamation; and
10) Computer Tampering.

On June 30, 2023, Defendant filed a demurrer to the FAC's first, second, third, fourth, and ninth causes of action and a motion to strike portions of the FAC. Plaintiff opposes both motions.

II. Demurrer

Defendant generally demurs to the entire pleading on the ground it seeks recovery of money damages but fails to state any amount of damages. Defendant additionally generally demurs to the first, second, third, fourth, and ninth causes of action on the ground they fail to state facts sufficient to constitute a valid claim. Defendant specially demurs to the first cause of action on the ground it is uncertain and the second cause of action on the ground Plaintiff fails to allege whether the contract is oral, written, or implied.

a. Legal Standard

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 only issue involved in a demurrer is whether the complaint, as it stands, unconnected with extraneous matters, states a cause of action. (*Griffith v. Department of Public Works* (1956) 141 Cal.App.2d 376, 381.)

b. Demurrer to Entire FAC

Defendant argues the entire FAC fails because nowhere does it allege any amount of damages as required by Code of Civil Procedure section 425.10, subdivision (a)(2). (Demurrer, p. 3:25-27.) In opposition, Plaintiff contends that where a pleading alleges personal injury, it is not required to state an amount of damages in the Prayer, as stated in section 425.10, subdivision (b). (Opposition, p. 4:6-8.)

Code of Civil Procedure "Section 425.10 requires that the amount of damages be pleaded in causes of action other than for personal injury or wrongful death" (*Becker v. S.P.V. Construction Co.* (1980) 27 Cal.3d 489, 494). "If no specific amount of damages is demanded, the prayer cannot insure adequate notice of the demands made upon the defendant. . . . Consequently, a prayer for damages according to proof passes muster . . . only if a specific amount of damages is alleged in the body of the complaint." (*Ibid*.)

Here, the FAC seeks damages according to proof and fails to request a specific amount of damages in either the body of the pleading or the prayer as required by Code of Civil Procedure section 425.10, subdivision (a)(2). However, in addition to the causes of action that do not allege personal injury, Plaintiff asserts causes of action for assault and battery, which do not require Plaintiff to request a specific amount of damages. Despite demurring to the FAC in its entirety, Defendant concedes this point in reply. (See Reply, p. 2:5, 17-19 [the Court should "sustain Defendant's general demurrer to the entire [FAC] (at least as to all causes of action other than the assault and battery causes of action"].)

Thus, the Court declines to sustain the demurrer to the entire FAC on the ground that no specific amount of damages are pled. (See *Furia v. Helm* (2003) 111 Cal.App.4th 945, 957 ["The purpose of such a requirement is to ensure that the defendant is sufficiently aware of the

consequences of not answering the complaint. . . . the absence of a specific amount from the complaint is not necessarily fatal as long as the pleaded facts entitle the plaintiff to relief"]; see also *Hoffman v. Pacific Coast Constr. Co.* (1918) 37 Cal.App. 125, 130 ["'if the facts stated in the body of the complaint entitled the plaintiff to any relief, a general demurrer will not lie, no matter what may be the form of the prayer, or, indeed, whether there is any prayer at all"]; *Rollins v. Forbes* (1858) 10 Cal. 299, 300 ["Objections to the prayer of a complaint cannot be taken by demurrer"].)

Accordingly, the demurrer to the entire FAC is OVERRULED.

c. First Cause of Action – Fraud

"The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages." (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 792.) "Fraud must be pleaded with specificity rather than with general and conclusory allegations. The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made[.]" (*Id.* at p. 793 [internal citations and quotations omitted].)

Defendant argues Plaintiff failed to allege a misrepresentation with the requisite specificity as Plaintiff does not specify what verbal communications were made by Defendant. (Demurrer, p. 5:2-4.) Additionally, Defendant contends Plaintiff does not allege how any misrepresentations caused him to sustain any form of damages. (*Id.* at p. 5:4-5.)

Here, the FAC alleges "Defendant represented to Plaintiff through a series of verbal communications as set forth in the Stipulation attached hereto as Exhibit A that she would cooperate in the listing and sale of the family residence" (FAC, ¶ 17) and that Defendant "knowingly and intentionally concealed from Plaintiff her intention to refuse to cooperate to sell the family residence[.]" (FAC, ¶ 18.)

The Exhibit A that Plaintiff references is unhelpful in supporting his allegations of a "series of verbal communications" as it is a legal stipulation whereby the parties agreed to resolve the division of assets, including the family home, with a mediator, and that "if there is no resolution" the parties will subsequently list the home for sale and split the proceeds of the property. (See FAC, Ex. A.) Exhibit A does not reference a series of verbal communications and Plaintiff has not alleged what specific verbal communications were made, or when and where they were made. Moreover, any argument that less specificity is required when defendant possesses full information concerning the facts of the controversy is unavailing here. As the Court stated in its prior order, there is no explanation provided for why Plaintiff is unable to specifically allege such facts as to what, when, and where any verbal representations were made directly to him. As the Court also previously explained, Plaintiff undermines his argument that less specificity is required by noting that the fraud centers on the September 2021 Stipulation Agreement between the parties. Thus, the first cause of action for fraud fails to allege facts with sufficient particularity and the demurrer may be sustained on this basis.

Having sustained the demurrer for the reasons stated above, the Court declines to address the demurrer for uncertainty.

As such, the demurrer to the first cause of action is SUSTAINED without leave to amend. The Court has previously afforded Plaintiff the opportunity to amend for these same reasons and he has failed to do so. Moreover, it is Plaintiff's burden to demonstrate in what ways he can amend his complaint to state a valid cause of action (see *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43 (*Rakestraw*) [pleading party "bears the burden of proving there is a reasonable possibility of amendment"]) and in this instance, Plaintiff has failed to explain how he will amend his fraud cause of action (see *Rakestraw, supra,* 81 Cal.App.4th at pp. 43-44 [party "must clearly and specifically set forth the 'applicable substantive law' and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, [the party] must set forth factual allegations that sufficiently state all required elements of that cause of action. Allegations must be factual and specific, not vague or conclusionary"]).

d. Second Cause of Action, Counts 1 and 2 – Breach of Contract

Plaintiff alleges two separate breach of contract counts: non-marital relationship agreement and the stipulated settlement. Defendant argues both counts fail to state facts sufficient to constitute a cause of action.

"The elements of breach of contract are '(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.'" (*Kumaraperu v. Feldsted* (2015) 237 Cal.App.4th 60, 70.)

1. Count 1 – The Non-Marital Relationship

Defendant specially demurs to Count 1 and argues it does not allege whether the non-marital relationship agreement is verbal, written, or implied pursuant to Code of Civil Procedure section 430.10, subdivision (g).

Under Code of Civil Procedure section 430.10, subdivision (g), a party may specially demur to "an action founded upon a contract, [if] it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct." (Code Civ. Proc., § 430.10, subd. (g).) In opposition, Plaintiff argues Defendant may only object pursuant to Code of Civil Procedure section 430.10, subdivision (g) by answer or demurrer and not by a motion for judgment on the pleadings. (Opposition, p. 5:14-24.) It appears Plaintiff's Counsel has copied and pasted the opposition to count one found into the prior motion for judgment on the pleadings in his opposition to the demurrer. Thus, the argument is not well taken, as this is a demurrer, not a motion for judgment on the pleadings. As such, the Court will treat the demurrer to the second cause of action, count one as unopposed. (See e.g., *D.I. Chadbourne, Inc. v. Superior Ct.* (1964) 60 Cal.2d 723, 728, fn. 4 [where nonmoving party fails to oppose a ground for a motion "it is assumed that [nonmoving party] concedes" that ground]; *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 [treating issue as abandoned and declining to address it on the merits where party fails to present pertinent argument or apply the law to the circumstances of the case].)

Here, the FAC alleges the parties agreed they would split expenses equally. (FAC, ¶ 22.) The FAC is devoid of any facts indicating whether this agreement was written, oral, or implied by conduct. Therefore, the demurrer to the second cause of action, count one may be sustained on this basis.

The Court would not generally be inclined to allow leave to amend, given that the burden to show that "a reasonable possibility exists that amendment can cure the defects" rests with Plaintiff and here Plaintiff "offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action." (See *Rakestraw*, *supra*, 81 Cal.App.4th at pp. 43-44.) But because this cause of action can presumably be easily fixed and because the judgment on the pleadings with regard to this cause of action was denied, the demurrer to this cause of action is SUSTAINED with 10 days leave to amend.

2. Count 2 – The Stipulated Settlement

Defendant argues Count 2 fails to allege any specific breach of any specific provisions of the Stipulated Agreement. (Demurrer, p. 6:3-4.) Defendant further asserts that even though Plaintiff does allege Defendant breached the agreement by refusing to cooperate in the marketing and sale of the property, there is no provision in the Stipulated Agreement that requires Defendant to cooperate in the marketing and sale of the property. (*Id.* at p. 6:6-8.)

The FAC alleges Defendant breached the Stipulated Agreement in "multiple ways" including: agreeing to sell the Property and then refusing to cooperate in the marketing and sale of the Property. (FAC, ¶ 23.)

The Stipulated Agreement states that: Plaintiff intends to buy out Defendant using the appraisals/input from the mediator, subject to the following conditions: 1) within 30 days of the agreement, the parties will exchange appraisals of the property, perform property inspections, and obtain advice from the parties' listing agents; 2) within 60 days of the agreement, if there is no resolution, the parties will follow through on the advice from the inspector and listing agent relating to the sale of the property; and 3) if there is no resolution by the 90th day of the agreement, the home will be listed for sale and the parties will evenly split the sale proceeds. (See FAC, Ex. A, p. 4.)

Here, the Stipulated Agreement indicates that if the parties cannot come to a resolution the home shall be listed for sale and the parties shall split the proceeds evenly. Thus, while not in the exact words, the Stipulated Agreement does require Defendant to cooperate in the marketing and sale of the Property. These allegations are sufficient to survive a demurrer. (See *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 496 ["it is well settled that a general demurrer admits the truth of all material factual allegations in the complaint; that the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court; and that plaintiff need only plead facts showing that he may be entitled to some relief"][internal citations omitted]; see also *Miller v. Ash* (1909) 156 Cal. 544, 562-563 ["allegation under the demurrer must be taken as true"].)

Based on the foregoing, the demurrer to the second cause of action, count two is OVERRULED.

e. Third Cause of Action – Declaratory Relief

Defendant argues the third cause of action for declaratory relief, seeking to rescind the Stipulated Agreement based on Defendant's fraud, is dependent upon Plaintiff's first cause of action for fraud and should fail as well.

As the Court also stated in its prior order, the third cause of action is dependent upon the first cause of action for fraud. As the first cause of action fails to sufficiently allege fraud, the demurrer to the third cause of action is likewise SUSTAINED without leave to amend.

f. Fourth Cause of Action – Declaratory Relief

The Court previously granted Defendant's motion for judgment on the pleadings as to the fourth cause of action for declaratory relief without leave to amend. (See e.g., *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, 942 ["where the nature of plaintiff's claim is clear, but under substantive law no liability exists, leave to amend should be denied, for no amendment could change the result"].) Plaintiff requested the Court issue a decree setting forth the exact contract terms between the parties and the parties' respective rights and duties thereunder. The Court explained that a party may not bring a cause of action related to a purported agreement without knowing the terms of that agreement because if there were no meeting of the minds on the terms or mutuality of assent, there would be no enforceable agreement. (See Court's May 16, 2023 Order, citing *Elyaoudayan v. Hoffman* (2003) 104 Cal.App.4th 1421, 1430 ["California law is clear that there is no contract until there has been a meeting of the minds on all material points"]; see also *Banner Entertainment, Inc. v. Superior Ct. (Alchemy Filmworks, Inc.)* (1998) 62 Cal.App.4th 348, 359 ["the failure to reach a meeting of the minds on all material points prevents the formation of a contract even though the parties have orally agreed upon some of the terms, or have taken some action related to the contract"]; see also *Bustamante v. Intuit, Inc*. (2006) 141 Cal.App.4th 199, 209, 215 [stating also "if a supposed 'contract' does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract"].)

Plaintiff appears to have amended the fourth cause of action to include new allegations while still essentially requesting the Court determine the parties' rights and duties under their agreements, which the Court has already declined to do. Plaintiff did not seek leave of court to add a new cause of action. (See *Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 456 ["'[f]ollowing an order sustaining a demurrer or a motion for judgment on the pleadings with leave to amend, the plaintiff may amend his or her complaint only as authorized by the court's order. The plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend'"].) Furthermore, once a Court grants a motion for judgment on the pleadings without leave to amend, a plaintiff may not later amend the complaint without first filing a motion for reconsideration or an appeal, neither of which have occurred in this case.

The demurrer to the fourth cause of action is SUSTAINED without leave to amend.

g. Ninth Cause of Action – Defamation

"'The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage.'" (*Sanders v. Walsh* (2013) 219 Cal.App.4th 855, 862.)

Defendant contends the FAC fails to allege all the necessary elements of a defamation claim and fails to point to any statement made that is alleged to have been defamatory. (Demurrer, pp. 7:26-8:2.) Defendant further asserts that the statements she made to the police are entirely supported by Plaintiff's own statements to police officers and thus, an admission that Defendant was telling the truth in her statements. (*Id.* at p. 8:13-18.) Plaintiff argues[1] this is an affirmative defense to defamation and should only be sustained where the face of the complaint discloses that the action is necessarily barred by the defense. (See Opposition, p. 7:7-17.)

"When a complaint affirmatively alleges facts amounting to an affirmative defense, it is subject to a demurrer." (*Halvorsen v. Aramark Unif. Servs.* (1998) 65 Cal.App.4th 1383, 1391; see also *McKenney v. Purepac Pharmaceutical Co.* (2008) 167 Cal.App.4th 72, 79 [stating same].) "Truth, of course, is an absolute defense to any libel action." (*Campanelli v. Regents of the Univ. of Cal.* (1996) 44 Cal.App.4th 572, 581-582 [affirming trial court's sustaining of demurrer to libel action].)

Here, the FAC states that "Defendant filed a false, malicious police report . . . that led to Plaintiff's arrest. Defendant knew the report was false and malicious at the time she made the report . . . Plaintiff was arrested in response to the report, which is attached as Exhibit C." (FAC, ¶ 59.) Exhibit C of the FAC contains a statement to the police made by both Defendant and Plaintiff explaining what took place the night that Plaintiff was arrested. Defendant told police that she asked Plaintiff to leave a room, nudged him with her arm to get him to leave and he then "attacked her and hit her on the chest with his elbow" after a fight regarding their daughter and an out of country trip. (FAC, Ex. C, p. 5.) Defendant "tried to defend herself" after he swung his arm backwards and struck her in the chest with his elbow by grabbing onto his arm. (*Ibid*.) Plaintiff told police that the parties were arguing about the out of country trip, Defendant began to push him and hit his right arm, and he then used his upper right arm to push Defendant away from him. (*Id.* at p. 6.) Thus, Exhibit C indicates Plaintiff made substantially similar statements to the police about what took place before Plaintiff's arrest. (See *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505 ["to the extent the factual allegations conflict with the content of the exhibits to the complaint, we rely on and accept as truth the contents of the exhibits"].)

Specifically, both parties agreed they were fighting over an out of country trip with their daughter, Plaintiff pushed Defendant in her chest, and Defendant was grabbing and hitting Plaintiff's arm. (See FAC, Ex. C.) As Plaintiff's allegations concede the accuracy of Defendant's statements to the police, the defamation cause of action necessarily fails. (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 952-953 ["'an essential element of defamation is that the publication in question must contain a false statement of *fact*' . . . Thus,

[1] As this is not an anti-SLAPP motion, the Court declines to address Plaintiff's arguments regarding protected activity. (See Opposition, p. 7:1-3, citing *Lefebvre v. Lefebvre* (2011) 199 Cal.App.4th 696, 703.)

truth is a complete defense to civil liability"][emphasis original].) Accordingly, Plaintiff has failed to plead the second element of a defamation cause of action and the demurrer may be sustained on this basis.

Based on the foregoing, the demurrer to the ninth cause of action is SUSTAINED without leave to amend.

III. Motion to Strike

a. Legal Standard

A court may strike out any irrelevant, false, or improper matter asserted in a pleading or strike out all or part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court. (Code Civ. Proc., § 436, subd. (a).) The grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice. (Code Civ. Proc., § 437, subd. (a).) In ruling on a motion to strike, a court reads the complaint as a whole, all parts in their context, and assumes the truth of all well-pleaded allegations. (*Clauson v. Superior Ct.* (1998) 67 Cal.App.4th 1253, 1255.)

b. Allegations in the FAC

Defendant moves to strike the following allegations of the FAC:

1) Paragraph 1, lines 6-7: "as well as the real properties owned by the now-former couple."
2) Paragraph 1, lines 11-12: "(5) stole Plaintiff's identity and used his credit cards without permission, as well as falsely claiming to be his wife."
3) Paragraph 1, lines 19-22: "Defendant continues to assert fake claims in court via her sister, the latest of which is a civil harassment restraining order apparently filed at Defendant's behest, simply to harass Plaintiff."
4) Paragraphs 9 – 12 in their entirety: containing addresses of the properties the parties owned together.
5) Prayer, p. 11, lines 8-9: "On the first, seventh, eighth, ninth, and tenth causes of action, punitive damages according to proof."
6) Prayer, p. 11, line 21: "Attorney fees and costs to the extent permitted by law."

1. Item Nos. 1 – 4

Defendant moves to strike Item Nos. 1 – 4 as entirely irrelevant to any of the claims alleged in the FAC, pursuant to Code of Civil Procedure section 436, subdivision (a). (MTS, p. 3:11-14.)

Defendant contends that Item Nos. 1 and 4 refer to property that do not relate to any of the causes of action mentioned in the FAC and the only real property mentioned in the FAC relates to the first, second (count two), fifth, and sixth causes of action is their family Property. (MTS, p. 3:17-24.) In opposition, Plaintiff argues the allegations in Nos. 1 and 4 support his breach of contract claims, as well as his claim for declaratory relief found in the fourth cause of

action. (Opposition, p. 3:8-13.) The allegations pertaining to the other properties do not support Plaintiff's second cause of action (count two) for breach of the Stipulated Agreement as the only property referenced in the Stipulated Agreement is the shared family home (referred to as the Property throughout this Order). (See FAC, Ex. A.) Further, the Court has, for the second time, sustained without leave to amend the fourth cause of action. Accordingly, the motion to strike Nos. 1 and 4 is GRANTED without leave to amend.

Defendant asserts Item No. 2 that refers to her stealing Plaintiff's identity is completely irrelevant to any of the causes of action in the FAC and that it supported a cause of action in the previous complaint that is no longer in the FAC. (MTS, pp. 3:25-4:3.) In opposition, Plaintiff appears to allege Item No. 2 is relevant to his fraud cause of action and his prayer for punitive damages. (Opposition, p. 3:20-25.) However, Plaintiff alleges his fraud cause of action is dependent on the Stipulated Agreement and does not address further any claims of stolen identity. (FAC, ¶ 17.) Moreover, the Court has sustained without leave to amend the fraud cause of action. Thus, the Court finds the allegations in No. 2 to be irrelevant. As such, the motion to strike No. 2 is GRANTED without leave to amend.

Defendant argues Item No. 3 is likewise irrelevant to any of the claims in the FAC. (MTS, p. 4:5-8.) Plaintiff fails to address this in opposition. In any event, the Court finds the allegations regarding claims made by Defendant's sister to be irrelevant to any of the causes of action stated. Accordingly, the motion to strike No. 3 is GRANTED without leave to amend.

2. Item No. 5 (Punitive Damages)

Defendant next asserts that Plaintiff's prayer for punitive damages should be stricken as Plaintiff fails to allege Defendant engaged in despicable conduct or any malicious, oppressive, or reprehensible conduct that would support a claim for punitive damages. (MTS, p. 4:10-12.) First, the Court notes that Plaintiff does not address Defendant's detailed, two page argument regarding punitive damages. Instead, in opposition, Plaintiff merely asserts that punitive damages may be awarded when a defendant is guilty of oppression, fraud, or malice, and "[h]ere, the fraud centers on the September 2021 agreement to sell property jointly owned by the parties and the stipulated settlement between the parties." (Opposition, p. 4:4-8.) However, the Court has sustained without leave to amend the first cause of action for fraud, so this argument is not helpful. In any event, Plaintiff's prayer for punitive damages also includes his seventh, eighth, and tenth causes of action for battery, assault, and computer tampering, respectively.

As to the seventh and eighth causes of action, "[a]n award of punitive damages is proper where the assault has been wantonly and maliciously committed, and the question of malice is one for the trier of fact." (*Ayer v. Robinson* (1958) 163 Cal.App.2d 424, 428-429.) Here, Plaintiff alleges Defendant "intended to cause harmful or offensive contact with Plaintiff's person" (FAC, ¶¶ 48, 54). Accordingly, the Court declines to grant the motion to strike punitive damages as to these causes of action. (See *G. D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 29 ["When the plaintiff alleges an intentional wrong, a prayer for exemplary damages may be supported by pleading that the wrong was committed willfully or with a design to injure"].)

As to the tenth cause of action for computer tampering, Plaintiff's allegations are insufficient to support a claim for punitive damages, as he merely claims Defendant deleted

photos from an external hard drive without permission. (See FAC, ¶ 62; see also *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166 ["Not only must there be circumstances of oppression, fraud or malice, but facts must be alleged in the pleading to support such a claim"].)

As to the first and ninth causes of action, the motion to strike is MOOT, as the Court has sustained the demurrer to both without leave to amend. The motion to strike is DENIED as to the seventh and eighth causes of action. The motion to strike is GRANTED with leave to amend as to the tenth cause of action.

3. Item No. 6 (Attorney Fees)

Finally, Defendant argues Plaintiff's requests for attorney fees should be stricken because Plaintiff has not alleged any agreement with Defendant that contains an attorney fees provision or any statute allowing for the recovery of attorney fees as to any of the FAC's causes of action. (MTS, p. 6:11-14, 21-23.) In Opposition, Plaintiff states he is seeking to recover attorney fees "based on breach of contract." (Opposition, p. 4:17.)

However, the FAC asserts two separate counts of breach of contract and Plaintiff does not specify which contract he is referencing. As explained above, the Court has sustained Plaintiff's first count for breach of contract with leave to amend. As for the breach of the Stipulation Agreement, the contract contains no provision for attorney fees. Thus, attorney fees are not recoverable under the Stipulation Agreement.

Accordingly, the motion to strike No. 6 is GRANTED with leave to amend but only to the extent the contract that is the subject of the first count of the breach of contract claim includes a provision for attorney's fees.

IV. Conclusion and Order

The demurrer to the FAC in its entirety is OVERRULED. The demurrer to second cause of action (count two) is OVERRULED. The demurrer to the first, third, fourth, and ninth causes of action is SUSTAINED without leave to amend. The demurrer to the second cause of action (count one) is SUSTAINED with 10 days leave to amend. The motion to strike Item Nos. 1 – 4, is GRANTED without leave to amend. The motion to strike Item No. 5 is MOOT, in part, GRANTED with leave to amend, in part, and DENIED, in part. The motion to strike Item No. 6 is GRANTED with leave to amend if the subject contract allows for attorney's fees. The Court will prepare the final Order.

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Calendar Line 2
Case Name: *Abdolyousefi, et al. v. Taiebat, et al.*
Case No.: 22CV398906

Factual and Procedural Background

On May 24, 2022, Plaintiff (Marzieh Abdolyousefi) filed her initial complaint against Defendant (Mojtabat Taiebat) under case no. 22CV398906. On June 1, 2022, Defendant filed his initial complaint against Plaintiff under case no. 22CV399354. On November 29, 2022, this Court consolidated the two cases, with Plaintiff's as the lead case.

On July 14, 2023, Defendant filed a motion to compel further discovery responses from Plaintiff. Plaintiff opposes the motion.

Discovery Motions

Meet and Confer Efforts

A motion to compel further discovery responses must be accompanied by a meet and confer declaration pursuant to Code of Civil Procedure section 2016.040. (Code Civ. Proc., § 2033.290, subd. (b) [requests for admission]; Code Civ. Proc., § 2030.300, subd. (b)(1) [interrogatories].) Section 2016.040 requires a moving party to make a "reasonable and good faith attempt at an informal resolution of each issue presented by the motion." A determination of whether an attempt at informal resolution was adequate depends upon the particular circumstances and involves the exercise of discretion. (See *Obregon v. Superior Ct.* (1998) 67 Cal.App.4th 424, 431; see also *Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1016 [meet and confer rule is designed to encourage the parties to work out their differences informally so as to avoid the necessity for a formal order].)

Defense counsel indicates in his declaration that the parties attempted to meet and confer but could not come to an agreement. (Watters Decl., ¶ 6.) Further, attached to Defendant's memo of points and authorities in support of the motion, are emails sent between the parties' attorneys. Thus, the Court finds the parties sufficiently met and conferred before the filing of the motion.

Motion to Compel Further Response to SI

Defendant moves to compel further responses to SI Nos. 1 – 9.

Legal Standard

A responding party must provide non-evasive answers to interrogatories that are "as complete and straightforward . . . to the extent possible," and, if after a reasonable and good faith effort to obtain the information they still cannot respond fully to an interrogatory, the responding party must so state in its response. (Code Civ. Proc., § 2030.220.) If the responding party provides incomplete or evasive answers, or objections without merit, the propounding party's remedy is to seek a court order compelling a further response to the interrogatories. (Code Civ. Proc., § 2030.300.) If a timely motion to compel answers is filed, the burden is on the responding party to justify any objection or failure to fully answer the interrogatories. (See *Coy v. Superior Ct.* (1962) 58 Cal.2d 210, 220-221 (*Coy*).)

SI Nos. 1-5

SI No. 1 requests: Please state all steps you took, if any, to comply with section 3.H. of the Stipulation and Order Re: Dismissal of Petitioner's DVRO, filed February 18, 2022, namely: "In 30 days, the parties shall: 1. exchange appraisals," between February 16, 2022 and the date of production.

SI No. 2 requests: Please state all steps you took, if any, to comply with section 3.H. of the Stipulation and Order Re: Dismissal of Petitioner's DVRO, filed February 18, 2022, namely: "In 30 days, the parties shall: 2. inspect the property," between February 16, 2022 and the date of production.

SI No. 3 requests: Please state all steps you took, if any, to comply with section 3.H. of the Stipulation and Order Re: Dismissal of Petitioner's DVRO, filed February 18, 2022, namely: "In 30 days, the parties shall: 3. obtain advice from a listing agent, Mondana [sic] Simai," between February 16, 2022 and the date of production.

SI No. 4 requests: Please state all steps you took, if any, to comply with section 3.H. of the Stipulation and Order Re: Dismissal of Petitioner's DVRO, filed February 18, 2022, namely: "In 60 days, if there is no resolution, the parties shall follow through on advice from the inspectors/listing agent," between February 16, 2022 and the date of production.

SI No. 5 requests: Please state all steps you took, if any, to comply with section 3.H. of the Stipulation and Order Re: Dismissal of Petitioner's DVRO, filed February 18, 2022, namely: "If there is no resolution by the 90th day the house shall be listed on the MLS" between February 16, 2022 and the date of production.

Plaintiff objects to these five requests on the ground the interrogatories are not full and complete in and of themselves in violation of Code of Civil Procedure section 2030.060, subdivision (d), as they require Plaintiff to resort to materials outside the scope of the interrogatory in order to answer them.

In opposition, Plaintiff argues section 2030.060(d) is violated where resort must be made to other materials in order to answer the question. In this case, Plaintiff argues, she would have to provide information based on a stipulation entered in another legal action. Plaintiff further argues that SI Nos. 1-5 are related to allegations and claims made by Plaintiff against Defendant, but Defendant has failed to summarize those pleadings as they relate to SI Nos. 1-5 in violation of California Rules of Court, Rule 3.1345(c)(6) [moving party "must summarize each relevant document" in separate statement when documents outside of discovery requests are also relevant]. Defendant fails to address these specific objections in his separate statement and fails to comply with section 2030.060(d) and Rule 3.1345(c)(6). The Court therefore sustains Plaintiff's objections. Accordingly, the motion to compel further responses to SI Nos. 1-5 is DENIED. (See *Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 893 [court has discretion to deny a motion for failure to provide a code-compliant separate statement].)

SI Nos. 6

SI No. 6 requests: Please state all steps you took, if any, to reduce harm to Defendant as soon as you learned you erroneously filed your 2021 tax return as a "married" person.

Plaintiff objects to this request on the grounds it exceeds the scope of permissible discovery, is irrelevant, vague and ambiguous, particularly with its use of "to reduce harm to

Defendant." In opposition, Plaintiff argues SI No. 6 relates to a cause of action for False Personation that was in Defendant's initial complaint but that was sustained without leave to amend on a motion for judgment on the pleadings and therefore, SI No. 6 is irrelevant to any of Defendant's claims. Additionally, Plaintiff asserts that "to reduce harm to Defendant" is vague and ambiguous and he does not address these objections in his separate statement.

Defendant states in his separate statement that Plaintiff's response is evasive and that she "harmed [Defendant]. She must state what she did to mitigate the harm[.]" (Defendant's Separate Statement, p. 9:17-19.) Defendant again does not address Plaintiff's objections directly. Moreover, in light of the Court's ruling on Defendant's demurrer and motion to strike portions of Defendant's FAC, the Court sustains Plaintiff's relevancy objection, as the request is irrelevant to any of his remaining causes of action. Accordingly, the motion to compel a further response to SI No. 6 is DENIED.

SI Nos. 7-8

SI No. 7 requests: Please state each fact that supports the following contention in section 15 of your May 24, 2022 Complaint: "When they moved in together, Defendant told Marzieh to close her personal bank accounts and own just one joint account with him at Wells Fargo and place all funds there as they were in a 'relationship'."

SI No. 8 requests: Please state each fact that supports the following contention in section 17 of your May 24, 2022 Complaint: "Plaintiff complied and had all of her salary going into the joint Wells Fargo account."

Plaintiff objects to these requests on the ground they are not full and complete in and of themselves in violation of Code of Civil Procedure section 2030.060, subdivision (d), as they require Plaintiff to resort to materials outside the scope of the interrogatory in order to answer them. Plaintiff additionally objects on the ground the requests refer to matters in the complaint filed on May 24, 2022, which is no longer the operative complaint. Defendant contends that Plaintiff put these facts at issue and that the allegation also appears in the same spot in her Second Amended Complaint ("SAC"). California courts hold that where a litigant places a thing at issue, she cannot withhold information relating to that issue. (See *Alch v. Superior Ct.* (2008) 165 Cal. App. 4th 1412, 1428 [requiring production of information that is directly relevant to claims and essential to fair resolution of the lawsuit].) Moreover, the only material Plaintiff will need to resort to is her own pleading. Plaintiff's objections are overruled. As such, the motion to compel further responses to SI Nos. 7-8 is GRANTED.

SI No. 9

SI No. 9 requests: Please state each fact that supports your 2014 contention to Defendant, that your sister Sareh Nabi Abdolyousefi incurred a $1,500 transaction fee from PayPal (allegedly resulting from a transaction where Sareh sent $7,500 to a friend, after you had transferred the $7,500 to Sareh).

Plaintiff objects to this request on the grounds it exceeds the scope of permissible discovery in the current action, it is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence, it is vague and ambiguous, particularly with respect to Defendant's use of the phrase "your 2014 contention to Defendant." Plaintiff argues SI No. 9 requests her to provide information based on a 2014 contention to Defendant but does not state the basis of the contention. Plaintiff further asserts that if the contention relates to a pleading,

Defendant has not explained what pleading he is referring to or summarized the pleading in violation of California Rules of Court, Rule 3.1345(c)(6). Defendant argues the request is relevant to Plaintiff's claims against him in her operative complaint. However, it is not clear from Defendant's request, and his reference to a contention from 2014, exactly what he is referencing. (See *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409 [a court is not obligated to undertake independent examination of record when a party "'has shirked his responsibility in this respect"'].) In any event, the Court finds the request to be vague and ambiguous and further finds no allegations related to Plaintiff's sister or a "2014 contention" in Plaintiff's SAC. Accordingly, the motion to compel a further response to SI No. 9 is DENIED.

Motion to Compel Further Response to FI

Defendant moves to compel further responses to FI Nos. 2.3, 2.7, and 12.1-12.7.

FI No. 2.3

FI No. 2.3 requests: At the time of the INCIDENT, did you have a driver's license? If so state: (a) the state or other issuing entity; (b) the license number and type; (c) the date of issuance; and (d) all restrictions.

Plaintiff objects to this request on the grounds it requests information not relevant to any claims or issues in the action, requests information beyond the scope of permissible discovery, and is not reasonably calculated to lead to discovery of admissible evidence. In opposition, Plaintiff contends Defendant has not adequately explained in his separate statement how information relating to Plaintiff's drivers license is related to any claims or allegations made in his pleading. However, the burden is on the responding party to justify an objection. (See *Fairmont Ins. Co. v. Superior Ct.* (2000) 22 Cal.4th 245, 255 [burden on responding to party justify any objection].) Plaintiff further argues that the request appears to be related to Defendant's false impersonation claim contained in his original pleading but not in his FAC. Defendant argues Plaintiff used her driver's license to open bank accounts in her name and it is therefore discoverable and could also lead to other relevant information. As Plaintiff has not sufficiently justified her objections to the request, the motion to compel further responses to FI No. 2.3 is GRANTED.

FI No. 2.7

FI No. 2.7 requests: State: (a) the name and ADDRESS of each school or other academic or vocational institution you have attended, beginning with high school; (b) the dates you attended; (c) the highest grade level you have completed; and (d) the degrees received.

Plaintiff objects to this request on the grounds it is irrelevant, goes beyond the scope of permissible discovery, and is not reasonably calculated to lead to discovery of admissible evidence. In opposition, Plaintiff argues Defendant has not explained how Plaintiff's educational background is relevant. As explained above, the burden is on Plaintiff to justify her objections. Plaintiff further contends that Defendant's argument that Plaintiff has requested the same information is not a legal justification for compelling a further response. However, as Plaintiff has failed to justify her objections, the motion to compel further responses to FI No. 2.7 is GRANTED.

FI Nos. 12.1-12.7

FI No. 12.1 requests: State the name, ADDRESS, and telephone number of each individual: (a) who witnessed the INCIDENT or the events occurring immediately before or

after the INCIDENT; (b) who made any statement at the scene of the INCIDENT; (c) who heard any statements made about the INCIDENT by any individual at the scene; and (d) who YOU OR ANYONE ACTING ON YOUR BEHALF claim has knowledge of the INCIDENT (except for expert witnesses covered by Code of Civil Procedure section 2034).

FI No. 12.2 requests: Have YOU OR ANYONE ACTING ON YOUR BEHALF interviewed any individual concerning the INCIDENT? If so, for each individual state: (a) the name, ADDRESS, and telephone number of the individual interviewed; (b) the date of the interview; and (c) the name, ADDRESS, and telephone number of the PERSON who conducted the interview.

FI No. 12.3 requests: Have YOU OR ANYONE ACTING ON YOUR BEHALF obtained a written or recorded statement from any individual concerning the INCIDENT? If so, for each statement state: (a) the name, ADDRESS, and telephone number of the individual from whom the statement was obtained; (b) the name, ADDRESS, and telephone number of the individual who obtained the statement; (c) the date the statement was obtained; and (d) the name, ADDRESS, and telephone number of each PERSON who has the original statement or a copy.

FI No. 12.4 requests: Do YOU OR ANYONE ACTING ON YOUR BEHALF know of any photographs, films, or videotapes depicting any place, object, or individual concerning the INCIDENT or plaintiff's injuries? If so, state: (a) the number of photographs or feet of film or videotape; (b) the places, objects, or persons photographed, filmed, or videotaped; (c) the date the photographs, films, or videotapes were taken; (d) the name, ADDRESS, and telephone number of the individual taking the photographs, films, or videotapes; and (e) the name, ADDRESS, and telephone number of each PERSON who has the original or a copy of the photographs, films, or videotapes.

FI No. 12.5 requests: Do YOU OR ANYONE ACTING ON YOUR BEHALF know of any diagram, reproduction, or model of any place or thing (except for items developed by expert witnesses covered by Code of Civil Procedure sections 2034.210– 2034.310) concerning the INCIDENT? If so, for each item state: (a) the type (i.e., diagram, reproduction, or model); (b) the subject matter; and (c) the name, ADDRESS, and telephone number of each PERSON who has it.

FI No. 12.6 requests: Was a report made by any PERSON concerning the INCIDENT? If so, state: (a) the name, title, identification number, and employer of the PERSON who made the report; (b) the date and type of report made; (c) the name, ADDRESS, and telephone number of the PERSON for whom the report was made; and (d) the name, ADDRESS, and telephone number of each PERSON who has the original or a copy of the report.

FI No. 12.7 requests: Have YOU OR ANYONE ACTING ON YOUR BEHALF inspected the scene of the INCIDENT? If so, for each inspection state: (a) the name, ADDRESS, and telephone number of the individual making the inspection (except for expert witnesses covered by Code of Civil Procedure sections 2034.210–2034.310); and (b) the date of the inspection.

As Plaintiff notes, Defendant fails to include Plaintiff’s objections to these seven requests in his separate statement in violation of California Rules of Court, Rule 3.1345(c)(2).

The separate statement must be full and complete so that no person is required to review any other document in order to determine the full request and the full response. Defendant's failure to provide a code-compliant separate statement prevents the Court from reaching the merits of the motion as to FI Nos. 12.1-12.7. Accordingly, the motion to compel further responses to FI Nos. 12.1-12.7 is DENIED.

Motion to Compel Further Response to RFA

Defendant moves to compel a further response to RFA No. 13.

Legal Standard

If a party demanding a response to a request for admission deems that an answer to a particular request is evasive or incomplete, or an objection to a particular request is without merit or too general, that party may move for an order compelling a further response. (Code Civ. Proc., § 2033.290, subd. (a).) If a timely motion to compel a further response to a request for admission has been filed, the burden is on the responding party to justify any objections or failure to fully answer. (*Coy, supra,* 58 Cal.2d at pp. 220-221.)

RFA No. 13

RFA No. 13 requests: Admit that you have used Defendant's credit card, on or in between April 1, 2016 and the date of production.

Plaintiff objects on the grounds the request is vague and ambiguous, it is not clear what Defendant means by "and the date of production," it is beyond the scope of permissible discovery, irrelevant, and appears to relate to Defendant's claim for false personation which appeared in his initial complaint but not in his operative complaint. In opposition, Plaintiff asserts that "and the date of production" is vague and ambiguous because RFA No. 13 is not a request for production of documents, and it is unclear what date of production Defendant is referencing in the request. Plaintiff contends the request is irrelevant because it relates to a cause of action that was sustained without leave to amend and does not appear in Defendant's FAC.

While the request may be somewhat vague or ambiguous, "the nature of the information sought is apparent, [and] the proper solution is to provide an appropriate response." (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 783.) In this case, it is fairly clear that Defendant is referring to dates between April 1, 2016 and the date of the discovery request. With respect to Plaintiff's relevancy objection, relevance to the subject matter is applied liberally with any doubt generally resolved in favor of discovery. (See *Colonial Life & Acc. Ins. Co. v. Superior Ct. (Perry)* (1982) 31 Cal.3d 785, 790.) Moreover, for discovery purposes, information is "relevant to the subject matter" if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement thereof. (See *Gonzalez v. Superior Ct. (City of San Fernando)* (1995) 33 Cal.App.4th 1539, 1546.) The Court finds that the request is relevant, or could reasonably lead to the discovery of admissible evidence, to Defendant's second cause of action, first count, for breach of the non-marital agreement. Accordingly, the motion to compel a further response to RFA No. 13 is GRANTED.

Sanctions

The Court shall impose a monetary sanction against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to an interrogatory or request for admission, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (Code Civ. Proc., § 2030.300, subd. (d); Code Civ. Proc. § 2033.290, subd. (d).)

Defendant has made a request for monetary sanctions against Plaintiff. Defendant's principal attorney bills at $500 per hour. The associate attorney working on Defendant's case bills at $300 per hour. Defendant requests at total of $5,411.65 in sanctions against Plaintiff for 7 hours drafting the motion, and an expected 1 hour reviewing an opposition,1.5 hours drafting a reply, and 1 hour attending the hearing for a total of 9.5 hours. The associate attorney spent two hours assisting the motion for a total of 2 hours. Defense counsel also requests $61.65 (plus 2.75% credit card processing) for filing the motion.

First, the Court does not award anticipated expenses. (See *Tucker v. Pacific Bell Mobile Services* (2010) 186 Cal.App.4th 1548, 1551 [the court awards sanctions only for expenses actually incurred, not for anticipated expenses].) Next, Defendant's separate statement was non-compliant with California Rules of Court and this is a ground to deny the motion to compel. Finally, as Defendant's motion was only partially successful, the Court finds Plaintiff acted with substantial justification in opposing the motion. Accordingly, Defendant's request for monetary sanctions is DENIED.

Conclusion

The motion to compel SIs, FIs, and RFAs is GRANTED, in part and DENIED, in part. The request for monetary sanctions is DENIED.

Defendant shall prepare the final Order.

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Calendar lines 4 and 5
Case Name: *Google LLC, et al. v. French, et al.*
Case No.: 22CV397779

According to the allegations of the first amended complaint ("FAC"), plaintiffs Google LLC ("Google") and City of San Jose ("City") (collectively, "Plaintiffs") seek to quiet title to certain properties known as Park Avenue and South Montgomery Street, South Montgomery Street, Otterson Street, and Barack Obama Boulevard (formerly known as Autumn Street), to proceed with the phased construction of the development project in San Jose known as "Downtown West." (See FAC, ¶¶ 1-2, 42-47.) Defendants Peter Gill Case[2], Matthew Owen Case[3], Warren Titus Weber, Otis Klingbeil, Laurance Rockefeller[4], Barbara Byron, Barbara Robin Tomasi, Theodore David Tomasi, Anne Marie Tomasi, Louisa Robins Hendrix, Leslie Kipp Hendrix, James Davis Robins, David Fuller Learnard, Fric Jan Spruyt, Alan B. Spruyt, Emily Lee[5], Ava Learnard, Otto Learnard, Louise R. Lord, Peter Adams[6], Christopher Adams[7], Scott G. Adams[8], Greggory Adams[9], Carla McCormack, Camille McCormack[10], Tere Krainer, Isabel Perry, Janet Ronnie Montana Krachmalnick, Spencer Jacob Wagner[11], Madison Francis Wagner, Alec Bowman[12], Rebecca Diane Ross, and Timothy K. Ross[13] are descendants of former owners of the parcels comprising the subject property and may claim to have some right, title, estate, interest, lien or cloud on title to the subject properties. (See FAC, ¶¶ 5-41.) Plaintiffs collectively assert fee interest ownership of the subject properties, alleging that Civil Code section 831 and 1112 and Code of Civil Procedure section 2077 create a presumption that Plaintiffs own the fee interest to the center line of the subject properties. (See FAC, ¶¶ 57-66.) In order for Google to proceed with its development plans for the Downtown West project, fee title in the subject properties must be perfected in Google. (See FAC, ¶¶ 67-76.)

On July 12, 2022, Plaintiffs filed the FAC asserting causes of action for:

1) quiet title (by Google against all defendants); and,

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[2] On December 29, 2022, plaintiff Google filed a request for dismissal as to defendant Peter Gill Case. Entry of dismissal was filed on January 6, 2023.
[3] On December 29, 2022, plaintiff Google filed a request for dismissal as to defendant Matthew Owen Case. Entry of dismissal was filed on January 6, 2023.
[4] On December 29, 2022, plaintiff Google filed a request for dismissal as to defendant Laurance Rockefeller. Entry of dismissal was filed on January 6, 2023.
[5] On December 1, 2022, plaintiff Google filed a request for dismissal as to defendant Emily Lee Spruyt. Entry of dismissal was filed on February 10, 2023.
[6] On March 9, 2023, plaintiff Google filed a request for dismissal as to defendant Peter Adams Case. Entry of dismissal was filed on March 15, 2022.
[7] On March 9, 2023, plaintiff Google filed a request for dismissal as to defendant Christopher Adams Case. Entry of dismissal was filed on March 15, 2022.
[8] On March 9, 2023, plaintiff Google filed a request for dismissal as to defendant Scott Adams Case. Entry of dismissal was filed on March 15, 2022.
[9] On March 9, 2023, plaintiff Google filed a request for dismissal as to defendant Greggory Adams Case. Entry of dismissal was filed on March 15, 2022.
[10] On May 10, 2023, plaintiff Google filed a request for dismissal as to defendants Carla and Camille McCormack. On June 20, 2023, Carla and Camille filed a disclaimer of interest as to the property involved in this action.
[11] On August 2, 2022, plaintiff Google filed a request for dismissal as to defendant Spencer Jacob Wagner. Entry of dismissal was filed on October 3, 2022.
[12] On September 30, 2022, plaintiff Google filed a request for dismissal as to defendant Alec Bowman. Entry of dismissal was filed on October 3, 2022.
[13] On December 1, 2022, plaintiff Google filed a request for dismissal as to defendant Timothy Ross. Entry of dismissal was filed on February 10, 2023.

2) quiet title (by City against all defendants).

On June 27, 2022, Carla McCormack and Camille McCormack (collectively, "the McCormacks") filed a cross-complaint against Google and City, asserting causes of action for quiet title and declaratory relief.

On December 5, 2022, Leslie Kipp Hendrix ("LKH") filed a cross-complaint for quiet title, alleging that General Henry M. Naglee owned the subject properties as of 1849; Henry M. Naglee died in 1886 and provided in his will that his two daughters Marie (Naglee Robins) and Antoinette each inherited 50% of his estate; Marie Naglee Robins died in 1969 and provided in her will that her three children (Margaret N. Robins, James H. Robins and Henry N.R. Robins) inherited 1/3 each of her estate; Margaret N. Robins died in 1985 (without having ever married or having any children) and provided in her will that the three children of her brother James H. Robins (James Davis Robins, Barbara Robins Bryon and Helen Louise Hendrix Lord) inherited 30% each of her estate); Henry N.R. Robins died in 1996 (without having ever married or having any children) and provided in his will and trust that the three children of his brother James H. Robins (James Davis Robins, Barbara Robins Bryon and Helen Louise Hendrix Lord) inherited 1/3 each of his estate; James H. Robins died in 1971 and provided in his will that, upon the death of his second wife (which has since occurred), his three children (James Davis Robins, Barbara Robins Bryon and Helen Louise Hendrix Lord) inherited 1/3 each of his estate; and, LKH received a quitclaim deed (Document No. 25318353 recorded on June 10, 2022 by the Santa Clara County Recorder) from her uncle James Davis Robins granting all of his right, title and interest in the subject properties to LKH. (See LKH XC, ¶ 20.) LKH seeks to quiet title to, and confirm her ownership interest in the subject properties. (See LKH XC, ¶ 22.)

On May 3, 2023, the McCormacks dismissed their XC with prejudice.

Defendant LKH moves for summary judgment of the FAC, or, in the alternative, for summary adjudication of the first and second causes of action of the FAC. LKH argues that: the street centerline presumption pursuant to Civil Code section 831 and 1112 and Code of Civil Procedure section 2077 do not apply since those statutes were not enacted by the Legislature until 1872 and the subject transactions occurred 6-12 years prior; and, the allegations of the FAC that the conveyances using metes and bounds descriptions that created cut-off descriptions to the streets are admissions that rebut any application of the street centerline presumption to the subject properties.

Plaintiffs also move for summary judgment, or, in the alternative, for summary adjudication of the first and second causes of action of the FAC, the McCormacks' first and second causes of action of their cross-complaint for quiet title and declaratory relief, respectively, and LKH's cause of action for quiet title in the LKH XC.

I. CROSS-MOTIONS FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION

A. Plaintiffs' motion for summary adjudication of the McCormacks' first and second causes of action of their cross-complaint is MOOT.

Plaintiffs move for summary adjudication of the McCormacks' first and second causes of action of the McCormacks' cross-complaint. However, as previously stated, the McCormacks dismissed their XC with prejudice on May 3, 2023. Accordingly, the motion for summary adjudication of the McCormacks' first and second causes of action of the McCormacks' cross-complaint is MOOT.

Therefore, the lone issues remaining concern Plaintiffs' FAC and LKH's XC.

B. LKH's request for judicial notice

LKH requests judicial notice of the FAC and the declaration of Guy Kerley in support of the motion for summary judgment. The request for judicial notice is not opposed and is GRANTED. (Evid. Code § 452, subd. (d).)

C. The properties at issue

The instant dispute involves portions of land that are below the streets on or adjacent to respective properties. In the 1800s, the original owners Frederick H. Billings, Archibald Peachy, and Henry Morriss Naglee (collectively, "original owners") jointly owned approximately 300 acres in San Jose. (See Kerley amended decl. in support of motion for summary judgment ("Kerley decl."), ¶ 8.) In 1860, a subdivision map was prepared depicting a grid of city blocks and streets, many of which became the streets for the City, including Montgomery Street and Park Avenue and likely Barack Obama Boulevard, formerly Autumn or St. Mary's Street. (See Kerley decl., ¶¶ 16-17, exh. E.) The original owners transferred various parcels along South Montgomery, Park and Barack Obama to third-party grantees; the grant deeds used in those transactions described the parcels using metes and bounds descriptions that ran only to the sideline of the streets, rather than the midline of the streets. (*Id*. at ¶ 15.) Thus, the deeds included the parcels but not the land under the streets adjacent to the parcels, thereby potentially "severing" ownership of the parcels from the street portions. (*Id*.) The fourth street portion, Otterson Street, was conveyed to Agnes Otterson in 1861, who recorded subdivision map depicting Otterson Street and the parcels along it in 1886. (*Id*. at ¶¶ 27-28, exhs. I-J.) The Otterson Street properties came into the ownership of Barbara Schwall who conveyed a parcel along Otterson Street to F. Gomez by grant deed that included a "cut off" description that ran to the sideline of Otterson Street, not its midline, thereby potentially "severing" the portion of Otterson Street. (*Id*. at ¶ 29, exh. K.)

Plaintiffs contend that there is no evidence in the public record that the property under the streets was separately owned from the parcels and California law presumes that Plaintiffs own the street portions as the owners of the property adjacent to the street portions. LKH contends that Plaintiffs may not rely on the statutory presumptions, and moreover, Plaintiffs' own allegations and evidence are judicial admissions that establish that there is no evidence that supports the application of the presumption.

D. The statutes at issue

As stated above, Plaintiffs rely on three statutory presumptions to support their position that there is no triable issue of material fact that they own the street portions: Civil Code section 831 and 1112 and Code of Civil Procedure section 2077.

Civil Code section 831 states:

> An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown.

(Civ. Code § 831.)

Civil Code section 1112 states:

> A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant.

(Civ. Code § 1112.)

Code of Civil Procedure section 2077 states:

> The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:
>
> > … 4. When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title.

(Code Civ. Proc. § 2077.)

E. The parties' intent is determinative in the construction of boundaries.

As Plaintiffs argue, "[i]n the construction of boundaries, the intention of the parties is the controlling consideration." (*Machado v. Title Guarantee & Trust Co.* (1940) 15 Cal.2d 180, 186.) "Whenever possible, a court should place itself in the position of the parties and ascertain their intent, as in the case of any contract." (*Id*.) "[T]hat an owner of land bounded by a road or street is presumed to own to the center thereof is based on the supposed intention of the parties, and the improbability of the grantor desiring or intending to reserve his interest in the street when he had parted with his title to adjoining land." (*Id*.)

F. *Machado*: a description of metes and bounds is not determinative

In *Machado, supra*, in 1875 and 1876, a certain tract of land was allotted by both metes and bounds and acreage to a widow and a son with a strip of land lying between the two tracts of land, laid out and set apart as a road or street by metes and bounds corresponding with the boundaries of the two mentioned and adjacent tracts. (See *Machado, supra*, 15 Cal.2d at p.182.) The son and widow conveyed their parcels by the same metes and bounds and acreage;

however, the widow's deed contained an omnibus clause conveying all of her right, title and interest in and to the original tract—of which both the parcel and the strip of land were at one time a part. (*Id*.) The successors in interest to the son and widow's allotted parcels each claimed title to the half of the street adjacent to the respective parcels, citing to Civil Code sections 831, 1112 and Code of Civil Procedure section 2077, subdivision 4, stating that "[a]n owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown… [and t]hat the presumption is highly favored in the law is made clear by the discussion of this court in *Anderson v. Citizens' S. & T. Co*., 185 Cal. 386." (*Id*. at p.183; see *Anderson, infra*, 185 Cal. at pp.392-393 (stating that "where land is conveyed by a description which bounds it by a street, and the grantor is the owner of the fee in the street, as he is presumed to be, the real boundary line of the property is not the side line of the street but its center line… [i]t is well settled that land described in a deed as bounded by a public highway or street, will be considered as extending to the center of the street or highway, unless it clearly appears that it was intended to make a side line instead of the center line the boundary… the fee in the half of the street upon which the lot abuts is in fact a part of the lot, so that a conveyance of the lot conveys the fee in the street as a part of it").) Ultimately, the *Machado* court concluded "that in the absence of any circumstances showing clearly that it was otherwise intended," the fee to the center line of the street was conveyed as a part of the parcels allotted to the widow and son which fee passed to the grantee defendants. (*Id*. at p.187.) Therefore, even if the conveyance of property is by metes and bounds, and the description of the property to be conveyed does not include reference to the property underlying the road between parcels of land, the presumption that an owner of land bounded by a road is owner of the land under the road to the center of the road.

G. Hixson v. Jones: a metes and bounds description can rebut the statutory presumption that the grantee takes the underlying fee to the center of the street *only* if there is evidence that the metes and bounds description was inserted by the exercise of free choice by the grantor.

Cited by both parties, *Hixson v. Jones* (1967) 253 Cal.App.2d 860 likewise involved the conveyance of property using a metes and bounds description. Here, on August 2, 1954, grantor Laura Thane Whipple sold property to the Hixsons with a metes and bounds description that stated that certain lots had a boundary of the southwestern line of 3rd Street, running along that line northwesternly 110 feet from the intersection with Driscol Road. (*Id*. at p.862.) While the Hixsons believed that the property under 3rd Street was to be a street and did not have interest in acquiring title to it, they used and maintained that property. (*Id*.) On March 26, 1963, Whipple granted the remaining property in the area to the Joneses but did not specifically convey the strip of land underneath 3rd Street. (*Id*.) On November 6, 1963, the Joneses brought an action to quiet title in and to the one-half of 3rd Street adjacent to their property. (*Id*.) Over three months later, Whipple quitclaimed any interest she had in the strip of land underneath 3rd Street to the Joneses. (*Id*. at pp.862-863.)

As with *Machado, supra*, the *Hixson* court cited to Civil Code section 1112, and then to *Anderson, supra*, 185 Cal. at p.396, where the Anderson court stated that "the treatment of the highway as a monument furnishes the means to include the fee to the street center in every case where there is not express language excluding it." (*Hixson, supra*, 253 Cal.App.2d at p.863, quoting Civ. Code § 1112 and *Anderson, supra*, 185 Cal. at p.396.) The *Hixson* court also noted that "[t]he use of a metes and bounds description which does not include one-half of an adjoining street is one of the ways to rebut the statutory presumption that the grantee takes the

underlying fee to the center of the street." (*Hixson, supra*, 253 Cal.App.2d at p.864.) However, citing *Machado, supra*, the *Hixson* court qualified this statement, noting that "[t]he use of a metes and bounds description creates an inference which may rebut the statutory presumption that the parties intended to convey the underlying fee to the center of an abutting street *only* if the metes and bounds descriptions were inserted by the exercise of free choice by the grantor. (*Hixson, supra*, 253 Cal.App.2d at p.864 (emphasis original).)

The *Hixson* court determined that "[i]t would appear to be wholly illogical to presume that Mrs. Whipple intended to retain a narrow sliver of property 25 feet by 110 feet." (*Id*. at p.865.) The court then quoted *Brown v. Bachelder* (1932) 214 Cal. 753: "a strip of land the width of a street can be of little use to the dedicator who has parted with title to all lands on both sides of the street, as was done by the original dedicator in the instant case, and it will not in such circumstances be presumed that he intended to retain the fee as a remnant of his private estate." (*Hixson, supra*, 253 Cal.App.2d at p.865, quoting *Brown, supra*, 214 Cal. at p.756.) It then quoted *Los Angeles City High School Dist. v. Swensen* (1964) 226 Cal.App.2d 574, stating "[t]here is no object in the grantor's retaining a narrow strip of land which is of little or no use or value to him when separated from the adjoining land [citation]; that the value of the land to a purchaser would be greatly affected if the abutting street were not included in the conveyance [citation]; that such a rule will guard against litigation and disputes between owners of land adjacent to public highways [citation]; that retention of such a narrow strip of land would retard the improvement and further alienation of the adjoining property [citation]; and that "if no other reason could be assigned of this rule . . . the general understanding of the people, and the extensive and immemorial practice of claiming and acquiescing in such rights, ought to have great weight." (*Hixson, supra*, 253 Cal.App.2d at pp.865-866, quoting *Los Angeles City High School Dist., supra*, 226 Cal.App.2d at pp.579-580.) The *Hixson* court reversed the trial court's conclusion that the Joneses owned the 25-foot strip of land and determined that the statutory presumptions of Civil Code sections 831, 1112 and Code of Civil Procedure section 2077, subdivision 4 were controlling and instructed the trial court to enter judgment quieting title in the one-half of 3rd St. adjacent to the Hixsons' property in favor of the Hixsons. (*Id*. at p.866.)

Thus, the metes and bounds descriptions may rebut the statutory presumptions of Civil Code sections 831, 1112 and Code of Civil Procedure section 2077, subdivision 4—however, only if there is evidence that the metes and bounds descriptions were inserted by the exercise of free choice by the grantor.

H. LKH's motion for summary judgment

LKH's memorandum of points and authorities in support of her motion for summary judgment ("LKH's memo") makes two primary arguments: 1) that the street centerline presumption does not apply retroactively; and, 2) the street centerline presumption is rebutted by Plaintiffs' own admissions and other evidence.

1. The street centerline presumption predated the codification of the presumption and applies to conveyances as early as 1854.

LKH argues that the street centerline presumption of Civil Code sections 831, 1112 and Code of Civil Procedure section 2077, subdivision 4 do not apply because "[a]ll of the real estate sales transactions to which Plaintiffs are attempting to apply the street centerline

presumption occurred by no later than 1866… [however,] Sections 831 and 1112 of the Civil Code and Section 2077 of the Code of Civil Procedure were not even enacted by the California Legislature until 1872… [and] Section 3 of the Civil Code and Section 3 of the Code of Civil Procedure state that no part of each Code is 'retroactive, unless expressly so declared.'" (LKH's memo, pp.1:21-26, 2:1-16.)

In response, Plaintiffs note that while "California continues to adhere to the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application… [a] new enactment will have retroactive effect, however, if the new enactment is designed merely to codify preexisting law or to render explicit the original legislative intent." (*Rogers v. Edmonds* (1988) 200 Cal.App.3d 1237, 1241, citing *City of Redlands v. Sorensen* (1985) 176 Cal.App.3d 202, 211 (also stating that "[t]he rationale behind this seeming exception is that the new legislation merely states the preexisting rule of law, therefore is not truly retroactive… [t]he rule is not new, just newly articulated").) Plaintiffs then cite to *Moody v. Palmer* (1875) 50 Cal. 31, in which the land in controversy was that which lay in Park avenue, adjacent to land conveyed by Dyer in July 1854. (*Id*. at p.36.) The "conveyances… commenc[ed] in one deed 'at the northwesterly corner of Pine street and Park avenue,' and in the other at the 'northeast corner of Pine street and Park avenue,' and then in each running round to Park avenue, and 'thence at right angles along the Park one hundred and twenty feet to the place of beginning.'" (*Id*. at p.35.) In affirming judgment for the defendants who claimed title in fee to the lands that lay to the middle of Park avenue adjacent to its land, the *Moody* court stated that "[i]t is well settled that land described in a deed as bounded by a public highway or street, will be considered as extending to the centre of the street or highway, unless it clearly appears that it was intended to make a side line instead of the centre line the boundary." (*Id*. at p.36.) The *Moody* court further noted that "[p]ublic policy demands that deeds containing descriptions of this character shall be construed, if practicable, as including the land to the centre of the street…." (*Id*. at p.37.) As Plaintiffs argue, *Moody* demonstrates that the street centerline presumption predated the codification of the presumption and that the presumption applies to transactions at least as early as 1854.

In reply, LKH argues that "*Moody* has nothing to do with any retroactivity challenge and never refers to any of the 1872 presumption statutes." (LKH's reply memorandum in support of motion for summary judgment ("LKH reply"), p.9:3-4.) However, this argument is disingenuous at best. As stated above, it is clear that *Moody* demonstrates that the street centerline presumption predated the codification of the presumption and that the presumption applies to transactions at least as early as 1854. As such, there was no need for the *Moody* court to address any retroactivity issue regarding the street centerline presumption since it concluded that the presumption already applied to transactions as early as 1854.

LKH next argues that "the *Moody* court was simply surveying the law of other states as of 1875 and then determining what the law should be for this issue in California in 1875… [and n]either *Moody* nor Plaintiffs in their Opposition Memo cite to any applicable California decisions which existed as of 1860-61 when the original owners were preparing the operative deeds or even prior to 1875 when *Moody* was decided." (LKH reply, p.9:5-9.) LKH fails to understand that *Moody* involved a conveyance that occurred July 1854—prior to when the original owners here prepared their deeds. This argument lacks merit.

LKH then argues that the California Supreme Court's statement in *Moody* that the street centerline presumption is "well settled" is incorrect because it discusses a public highway and the out of state cases to which *Moody* cites refer to private roadways. (See LKH reply, p.9"10-18.) However, this Court does not disagree with the Supreme Court's statement. Accordingly, LKH fails to offer a convincing argument with respect to whether the street centerline presumption applies retroactively.

2. Plaintiffs' "admissions" do not assist LKH.

LKH next argues that "[i]n Plaintiffs' operative First Amended Complaint, Plaintiffs admit that the mid-1800's grantors of the transactions at issue in this case (Messrs. Naglee, Peachy and Billings) entered into numerous 'conveyances… of their interest in the lots that adjoined the streets [the Subject Properties]… those conveyances created cut-off descriptions to the streets." (LKH's memo, p.7:14-18.) "Plaintiffs then make even more substantial admissions regarding these deed cut-off descriptions in the Declaration of their title expert Guy Kerley… [who] admits: 'The Original Owners [Naglee, Peachy & Billings] conveyed certain parcels in the Rancho [where the Subject Properties are located] to various third parties. Certain of those conveyances were made by grant deeds that described the parcels using the metes and bounds descriptions that ran only to the sideline of the streets, rather than to the midline of the streets. These types of descriptions 'cut off' the parcels from the adjacent street portion and create a 'severed' street portion." (*Id*. at pp.7:22-26, 8:1-6.) "Mr. Kerley's Declaration even more broadly admits: 'I have reviewed dozens of deeds executed by Naglee, Peachy and Billings for this area of the Rancho, and all of them used a cut-off description. I have not found any documents that would support the conclusion that Naglee, Peachy and Billings ever used a deed to convey property for this area of the Rancho that did not include a cut-off description." (*Id*. at p.8:10-16.)

However, as previously discussed, *Hixson*, *supra*, and *Machado*, *supra*, state that a metes and bounds descriptions may rebut the street centerline presumption presumptions of Civil Code sections 831, 1112 and Code of Civil Procedure section 2077, subdivision 4—however, *only* if there is evidence that the metes and bounds descriptions were inserted by the exercise of free choice by the grantor. LKH's cited cases do not support her position. LKH cites to *Berton v. All Persons* (1917) 176 Cal. 610 (see LKH's memo, p.9:15-23); however, in *Berton*, the California Supreme Court noted that the lot was described by metes and bounds. (See *Berton*, *supra*, 176 Cal. at p. 612 (stating that "[t]he first was of a lot described by metes and bounds").) After citing sections 831 and 1112 of the Civil Code, the *Berton* court then determined that, despite the cut off descriptions, Berton owned the land under the cul-de-sac." (*Id*. at p.615) Thus, the fact that there are cut-off descriptions does not rebut the street centerline presumption absent evidence that the cut-off descriptions were inserted by the grantor with the exercise of free choice.

3. LKH's remaining evidence does not rebut the presumption; thus, LKH fails to meet her initial burden.

LKH then indicates that her remaining evidence is: Plaintiffs' responses to requests for admissions that they do not have any extrinsic evidence that admit that they have no evidence of the metes and bounds in any of the pre-1867 conveyances; and, that the original owners

were sophisticated grantors who intended to retain ownership of the subject properties. However, LKH fails to cite any case authority that suggests that the original owners' sophistication level is germane to the determination of whether the street centerline presumption is promoted, or that it is determinative of whether the metes and bounds description was inserted by the grantor with the exercise of free choice.

Further, the admission that a party does not have any extrinsic evidence of the metes and bounds in any of the pre 1867 conveyances likewise does not demonstrate whether the metes and bounds description was inserted by the grantor with the exercise of free choice.

LKH also asserts that certain maps of the Rancho area "reflects that the roads (i.e., the Subject Properties) in this area of the Rancho remained critical for Messrs. Naglee, Peachy and Billings to be able to access and sell most of the remaining Rancho which remained unsold even as of 1867." (LKH's memo, p.12:17-24, citing UMFs 20 and 30.) However, the maps—altered by LKH's counsel, Jeffrey Leon—do not support the assertion that the roads remained critical for the original owners to access and sell the remaining Rancho. This assertion is entirely speculative; there is no statement in the evidence cited by UMFs 20 and 30—the Leon declaration—that makes any statement regarding the roads being critical for the original owners.

LKH also asserts that "[a]nother factor weighing heavily on the need for Messrs. Naglee, Peachy and Billings to retain ownership of the Subject Properties was that the legal rules for road access and maintenance in the early 1860's were still uncertain." (LKH's memo, p.13:1-3.) This assertion is apparently supported by UMF 19—which, in turn, is not supported by any evidence, but rather two cases and a statement from a treatise. LKH does not explain how case law from 1864 and 1865 and a treatise from 2023 demonstrates that the uncertainty for legal rules for road access and maintenance weighed heavily on Messrs. Naglee, Peachy and Billings regarding their need to retained ownership of the subject land under the street. LKH fails to support this assertion.

Accordingly, LKH fails to meet her initial burden to demonstrate that the causes of action of the complaint lack merit, and her motion for summary judgment, and her alternative motion for summary adjudication are DENIED in their entirety.

I. Plaintiffs motion for summary judgment, or, in the alternative, for summary adjudication.

1. Parties' contentions

Plaintiffs argue that: California law presumes that Plaintiffs own the subject street portions; the presumptions control unless LKH and other defendants rebut them; and, even viewing the evidence in the light most favorable to defendants, there is no triable issue of material fact as to the ownership of the street portions. In support of their motion, Plaintiffs identify five material facts: Google owns the parcels identified as Assessor's Parcel Numbers 259-48-012 (2018); 261-35-003, 006, 010 (2018); 259-48-011 (2018); 259-48-053 (2018); 261-35-014 (2018); 259-48-052 (2018); 261-35-027 (2022); 259-38-018 (2020); 259-38-087 (2019); 259-38-088 (2019) (Pls.' separate statement of undisputed material facts, no. ("UMF") 1); the City owns the parcels described in Book 7111 Page 130, Book 8242 Page 92; Book 8409 Page 36; Book 8447 Page 371; and Book 8798 Page 322, all recorded in the Official

Records of Santa Clara County (the 'City Parcels,' and together with the Google Parcels, the 'Parcels') (UMF 2); in various historical transactions, the Parcels were transferred by Frederick Billings, Henry Naglee, Archibald Peachy, and/or Barbara Schwall to third party buyers, using grant deeds (the 'Grant Deeds') that contained "cut off" descriptions (metes and bounds descriptions that did not include the land underneath the streets adjacent to the Parcel) (UMF 3); the portions of the streets immediately adjacent to each of the Parcels, to the midline of the street (the 'Street Portions') are described as set forth in Exhibits A, B, C, and D to the declaration of Tracy Giorgetti (UMF4); and, there is no admissible evidence demonstrating that the cut off descriptions were inserted in the Grant Deeds by the exercise of the free choice of any of the grantors (UMF 5).

LKH opposes Plaintiffs' motion, arguing that: Plaintiffs cannot establish a prima facie case because nothing in the applicable deeds establish that the grantor meant to convey title to the streets at issue here; the statutory presumption on which Plaintiffs rely is not retroactive; and, there is at the very least a triable issue of material fact that the grantors did not convey the land containing the streets at issue in this action given the language of the deeds. Defendants David Fuller Learnard, Louise R. Lord, Alan Spruyt, Eric Spruyt and Barbara Robin Tomasi (collectively, "Tomasi defendants") also oppose Plaintiffs' motion, similarly arguing that: the statutory presumptions are not retroactive; even if the presumptions are retroactive, they are rebutted by the unambiguous language used in the deed; and, even if extrinsic evidence is considered, the evidence establishes an intent to retain the streets.

2. For reasons already stated, the street centerline presumption predated the codification of the presumption and applies to conveyances as early as 1854.

For reasons already stated above, the street centerline presumption deem Plaintiffs to own the street portions unless the defendants can rebut this presumption. Both the Tomasi defendants and LKH argue that the presumption is not retroactive (see LKH's opposition to Pls.' motion for summary judgment ("LKH Opposition"), pp.11:4-25, 12:1-14; see also Tomasi defs.' opposition to Pls.' motion for summary judgment ("Tomasi Opposition"), pp.11:5-28, 12:1-28, 13:1-28, 14:1-28, 15:1); however, as already articulated above, while "California continues to adhere to the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application… [a] new enactment will have retroactive effect, however, if the new enactment is designed merely to codify preexisting law or to render explicit the original legislative intent." (*Rogers v. Edmonds* (1988) 200 Cal.App.3d 1237, 1241, citing *City of Redlands v. Sorensen* (1985) 176 Cal.App.3d 202, 211 (also stating that "[t]he rationale behind this seeming exception is that the new legislation merely states the preexisting rule of law, therefore is not truly retroactive… [t]he rule is not new, just newly articulated").) As already stated, *Moody v. Palmer* (1875) 50 Cal. 31 demonstrates that the street centerline presumption predated the codification of the presumption and that the presumption applies to transactions at least as early as 1854.

3. As stated above, the metes and bounds descriptions may rebut the statutory presumptions of Civil Code sections 831, 1112 and Code of Civil Procedure section 2077, subdivision 4—only if there is evidence that the metes and bounds descriptions were inserted by the exercise of free choice by the grantor.

LKH argues that Plaintiffs cannot establish a prima facie case because the metes and bounds descriptions in the deeds demonstrate that the grantor did not mean to convey title to the street portions. (See LKH Opposition, pp.10:5-28, 11:1-3.) LKH also argues that "the description of the deeds at issue are by themselves sufficient to rebut any presumption, let alone speculation by a purported expert on the grantors' intent in the deeds at issue." (*Id*. at pp.12:24-28, 13:1-22.) The Tomasi defendants likewise argue that the Plaintiffs' admission that the deeds used a cut-off description However, *Hixson*, *supra,* and *Machado*, *supra,* state that a metes and bounds descriptions may rebut the street centerline presumption presumptions of Civil Code sections 831, 1112 and Code of Civil Procedure section 2077, subdivision 4—however, *only* if there is evidence that the metes and bounds descriptions were inserted by the exercise of free choice by the grantor.

LKH argues that *Hixson* is distinguishable because the plaintiff there introduced evidence that the metes and bounds description was added by the title company, and here, Plaintiffs have only presented the Kerley declaration. Here, the Kerley declaration states what the deeds state and a review of all of the records do not demonstrate that any party ever treated any of the street portions as property that was separate from the adjacent parcel. (See Kerley decl., ¶ 30.) LKH objects to this paragraph, asserting lack of foundation, improper expert testimony, contradicting own evidence and improper legal conclusion. The objection is OVERRULED. The Kerley declaration also states that a review of the records do not provide any statement or other evidence that show that any of the original owners prepared or reviewed the descriptions or understood the significance of the metes and bounds descriptions or the fact that they could be understood to sever ownership of the parcel from the street portion. (See Kerley decl., ¶ 31.) LKH objects to the paragraph, asserting lack of foundation, improper expert testimony, and a legal conclusion contrary to governing law. The objection is OVERRULED. LKH cites to a number of cases—*Berton v. All Persons* (1917) 176 Cal. 610, *Warden v. South Pasadena Realty & Improv. Co*. (1918) 178 Cal. 440, *Severy v. Central P. R. Co*. (1875) 51 Cal. 194, *Speer v. Blasker* (1961) 195 Cal.App.2d 155, *Besneatte v. Gourdin* (1993) 16 Cal.App.4th 1277, and *Hixson*, *supra*, 253 Cal.App.2d 860. In opposition, the Tomasi defendants cite to the same cases. (See Tomasi Opposition, pp.15:18-28, 16:1-19, 19:2-28, 20:1-26.) However, as Plaintiffs argue, these cases do not support LKH's and the Tomasi defendants' positions. (See Pls.' memo, pp.12:8-23, 13:1-28, 14:1-26, 15:1-28, 16:1-26.)

Plaintiffs meet their initial burden to demonstrate that the street centerline presumption applies and that there is no evidence that shows the metes and bounds descriptions were inserted by the exercise of free choice by the original owners. Thus, Plaintiffs meet their initial burden to demonstrate ownership of the street portions. (See evidence cited by UMFs 1-5.)

LKH's objections numbers 3-5 to the Yu declaration are OVERRULED. LKH's objection number 6 to the declaration of Tracy Giorgetti is OVERRULED.

4. The Haberstadt declaration

In opposition to Plaintiffs' motion, the Tomasi defendants present the declaration of April Haberstadt, a historian. Haberstadt makes several statements regarding Henry M. Naglee, including statements regarding Naglee's reputation, his close attention to detail, his ability to quickly recognize the impact of events, and personal details. Plaintiffs object to

paragraphs 4-26 of the Haberstadt declaration on the grounds that it contains inadmissible character evidence, inadmissible evidence with respect to the quality of his conduct on a specified occasion, it is inadmissible hearsay, it is speculative and it lacks relevance. The objection is SUSTAINED.

5. The Weller declaration

In opposition to Plaintiffs' motion, both the Tomasi defendants and LKH submit the declaration of James Weller, an expert land title consultant. Mr. Weller first makes certain opinions regarding the inaccuracies or inadequacies of Mr. Kerley's declaration.

Plaintiffs object to paragraphs 8 and 9 of the Weller declaration on the ground that they lack foundation. The objections are SUSTAINED.

Plaintiffs also object to paragraphs 15-17 on the grounds that they lack relevance and are speculative. The objection is SUSTAINED. Mr. Weller even states that the title insurance company's likely refusal to insure title "is ***probably*** the primary reason why the Plaintiffs sued to quiet title in the first place."

Plaintiffs also to paragraphs 11-13 and 18-19 on the ground that questions of intent and motive are not a proper subject for expert testimony. Here, Mr. Weller attempts to state the intent of the original owners over 160 years ago. The objection is SUSTAINED. (See Evid. Code § 801; see also *Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 291.)

The admissible portions of the Weller declaration neither demonstrate that the original owners inserted the metes and bounds descriptions nor that such insertion was through the exercise of free choice. Accordingly, the Weller declaration fails to demonstrate the existence of a triable issue of material fact.

6. The LKH declaration

LKH presents her own declaration in opposition to Plaintiffs' motion for summary judgment. However, her declaration refers to her own non-signing of a quitclaim deed, not as to the insertion of the metes and bounds description by the original owners or the original owners' exercise of free choice with regards to such insertion. Thus, the LKH declaration also fails to demonstrate the existence of a triable issue of material fact.

Therefore, both LKH and the Tomasi defendants fail to demonstrate the existence of a triable issue of material fact as to Plaintiffs' ownership of the subject street portions. Accordingly, Plaintiffs' motion for summary judgment is GRANTED. The Court will prepare the final order.

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