SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 20, Honorable Socrates Peter Manoukian, Presiding

Courtroom Clerk: Hien-Trang Tran-Thien

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

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

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

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

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

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DATE: Thursday, 09 November 2023
TIME: 9:00 A.M.

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

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

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

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

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

One tap mobile
+16699006833,,961 4442 7712#

APPEARANCES.

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

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

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

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

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

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

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

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

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

CIVILITY.

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

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

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

COURT REPORTERS.

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

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

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

PROTOCOLS DURING THE HEARINGS.

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

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

TROUBLESHOOTING TENTATIVE RULINGS.

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

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

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 1	21CV386176	Thomas Lee vs Chris Martinelli et al	**Demurrer of Defendant Esa Management To Plaintiff's Complaint.** Plaintiff did not file opposition to this demurrer. The demurrer is SUSTAINED with 10 days' leave to amend. NO FORMAL TENTATIVE RULING.
LINE 2	21CV386176	Thomas Lee vs Chris Martinelli et al	**Motion of Defendant Esa Management To Strike Punitive Damages Allegations and Requests for Attorney's Fees and Costs in Plaintiff's Complaint.** Plaintiff did not file opposition to this motion. The demurrer is SUSTAINED with 10 days' leave to amend. NO FORMAL TENTATIVE RULING.
LINE 3	22CV408645	John DZ 20, et al. v. Doe 1, Local Religious Unincorporated Assoc., et al.	**Demurrer of Defendant Doe 3, Family Services Organization, to Plaintiffs' Complaint.** Defendant Family Services' demurrer to Plaintiffs' complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)], i.e., the claims are barred by the applicable statute of limitations, is OVERRULED. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 4	22CV408645	John DZ 20, et al. v. Doe 1, Local Religious Unincorporated Assoc., et al.	**Motion Of Defendants Doe 1 And Doe 2 By Church Of Jesus Christ Of Latter-Day Saints To Quash Service Of Summons and Complaint.** Specially-appearing Church's motion to quash service of summons on behalf of Defendant Ward and Defendant Stake is GRANTED. SEE LINE #3 FOR TENTATIVE RULING.
LINE 5	22CV409378	SPG Center, LLC vs Nigel Pang et al	**Demurrer Of Defendants Nigel Pang, Conliza Pang, Parnell Pang And Derrick Pang To Plaintiff's Complaint.** The Individual Defendants' demurrer to plaintiff SPG's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days' leave to amend. SEE ATTACHED TENTATIVE RULING.
LINE 6	23CV413113	Steven Trinh; MFAS Direct Services, LLC vs. Del Toro Loan Servicing, Inc.; SGLC, Inc.; Calpac Management.	**Demurrer of Del Toro Loan Servicing, Inc. To Plaintiff's First Amended Complaint.** On 26 of October 2023, plaintiffs filed a dismissal of this defendant. OFF CALENDAR WITHOUT PREJUDICE. NO FORMAL TENTATIVE RULING.
LINE 7	23CV413113	Steven Trinh; MFAS Direct Services, LLC vs. Del Toro Loan Servicing, Inc.; SGLC, Inc.; Calpac Management.	**Demurrer of SGLC, Inc. To Plaintiff's First Amended Complaint.** Defendant SGLC's demurrer to the first cause of action [rescission] in plaintiffs Trinh and MFAS's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code of Civil Procedure***, § 430.10, subd. (e)] is OVERRULED. Defendant SGLC demurrer to third of action [violation of California Business and Professions Code §17200 et seq.] in plaintiffs Trinh and MFAS's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [***Code of Civil Procedure***, § 430.10, subd. (e)] is SUSTAINED with 10 days leave to amend. SEE ATTACHED TENTATIVE RULING.
LINE 8	23CV421700	Hassan Abpikar vs Bhullar Harjot et al	**Motion of Defendants Peyman Rad and Sasan Momeni To Strike Plaintiff's Complaint and for Attorney's Fees (*Code of Civil Procedure*, § 425.16)** The Court lacks jurisdiction to hear defendant Rad's special motion to strike and so it is ordered OFF CALENDAR. Defendant Momeni's special motion to strike plaintiff Abpikar's complaint is GRANTED. Defendants Rad and Momeni's request for attorney's fees and costs is GRANTED in the amount of $10,185.00, payable within 20 days of the filing and service of this order. SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 9	23CV409702	Ramón Gómez vs Rafael Martínez	**Case Management Conference.** Pertaining to any matter pertaining to the law firm of Hopkins & Carley, this Court will recuse itself because a person aware of the facts might reasonably entertain a doubt that the Judge would not be able to be impartial. **(*Code of Civil Procedure*, § 170.1, subd. (a)(6)(A)(iii).)** The case is directed to the Calendar Secretary for reassignment and a new hearing date.
LINE 10	23CV409702	Ramón Gómez vs Rafael Martínez	**Motion of Plaintiff to Compel Defendant to Respond to Discovery Requests and to Deem Admitted Requests for Admissions.** Pertaining to any matter pertaining to the law firm of Hopkins & Carley, this Court will recuse itself because a person aware of the facts might reasonably entertain a doubt that the Judge would not be able to be impartial. **(*Code of Civil Procedure*, § 170.1, subd. (a)(6)(A)(iii).)** The case is directed to the Calendar Secretary for reassignment and a new hearing date.
LINE 11	20CV366458	Lei Wang; Chen Zhang vs Nuvera Construction, Inc.; Ronsdale Management, LLC; Yin Chan; Mary Mo.	**Motion of Plaintiffs for Leave to File Second Amended.** It seems to this Court that the complaint does indeed allege new theories of liability against the defendants. While this Court might allow new theories of liability can be alleged on facts previously revealed in discovery, would new discovery be necessary? Did plaintiffs unduly delay in bringing this motion for leave to file the second amended complaint? NO TENTATIVE RULING. The parties are to use the Tentative Ruling Protocol to advise this Court if they wish to submit on the papers or appear to argue the merits of the motion.
LINE 12	21CV376227	American Express National Bank vs John Davis	**Motion Of Plaintiff To Vacate Conditional Dismissal And For Entry Of Judgment.** The parties entered into a written agreement signed by the parties to settle the above-captioned case. On default by the defendant, on proper motion this Court will enter judgment pursuant to the terms of the settlement. (***Code of Civil Procedure***, § 664.6). The Motion is GRANTED and this Court will execute the proposed judgment in the sum of $7,225.27 plus costs of $498.00 for a total judgment of $7,723.27. NO FORMAL TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 13	22CV396629	Susan Abdallah v. SOL Healthcare LLC	**Petition of Defendant to Compel Arbitration and Stay Proceedings**. The supplemental briefs have been reviewed. Plaintiff claims that an agency cannot be created by the conduct of the agent alone; rather, conduct by the principal is essential to create the agency. (***Flores v. Evergreen at San Diego, LLC*** (2007) 148 Cal.App.4th 588, 585.) Defendant claims that Ms. Abdallah's testimony establishes that Ms. Abdallah was her mother's authorized agent long before her mother was admitted into the facility and that Ms. Abdallah has always acted as her mother's authorized agent and has been the only person to make medical decisions on behalf of her mother. NO TENTATIVE RULING. The parties are to use the Tentative Ruling Protocol to advise this Court if they wish to submit on the papers or appear to argue the merits of the motion.
LINE 14	2012-1-CV-230186	GCFS, Inc vs A. Darwish, et al	**Claim of Exemption.** CONTINUED from 05 October 2023. NO TENTATIVE RULING. The parties are to use the Tentative Ruling Protocol if they wish to appear and contest the matter.
LINE 15			SEE ATTACHED TENTATIVE RULING.
LINE 16			SEE ATTACHED TENTATIVE RULING.
LINE 17			SEE ATTACHED TENTATIVE RULING.
LINE 18			SEE ATTACHED TENTATIVE RULING.
LINE 19			SEE ATTACHED TENTATIVE RULING.
LINE 20			SEE ATTACHED TENTATIVE RULING.
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LINE 24			SEE ATTACHED TENTATIVE RULING.
LINE 25			SEE ATTACHED TENTATIVE RULING.
LINE 26			SEE ATTACHED TENTATIVE RULING.
LINE 27			SEE ATTACHED TENTATIVE RULING.
LINE 28			SEE ATTACHED TENTATIVE RULING.

LINE #	CASE #	CASE TITLE	TENTATIVE RULING
LINE 29			SEE ATTACHED TENTATIVE RULING.
LINE 30			SEE ATTACHED TENTATIVE RULING.

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Calendar Line 1

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Calendar Line 2

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Calendar Line 3

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 22CV408645 John DZ 20, et al. v. Doe 1, Local Religious Unincorporated Assoc., et al.
DATE: 9 November 2023 TIME: 9:00 am LINE NUMBER: 03, 04
This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 14 June 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Orders on:
(1) Defendant Doe 3, Family Service Organization's
Demurrer To Plaintiffs' Complaint For Damages; and
(2) Specially Appearing Church Of Jesus Christ Of Latter-Day Saints'
Motion To Quash Service Of Summons On Behalf Of Defendants Doe 1 And Doe 2.

I. Statement of Facts.

Plaintiffs John Roe DZ 20, John Roe DZ 21, and John Roe DZ 22 (collectively, "Plaintiffs") are adult male [brothers] who, in approximately 1977, were members of a local branch of a religious denomination, identified herein as Defendant Doe 1, Local Religious Unincorporated Association ("Defendant Ward"), which in turn was a part of a regional religious grouping, identified herein as Defendant Doe 2, Regional Religious Unincorporated Association ("Defendant Stake"). (Complaint, ¶¶1 – 3.) Both Defendant Ward and Defendant Stake were based out of the Sunnyvale/ Los Altos area. (*Id.*)

Defendant Doe 3, Family Services Organization ("Defendant Family Services") engaged professionals throughout California to assist members of local religious congregations with various domestic, emotional, psychological, and interpersonal matters, including Plaintiffs and their family and the congregation to which they belonged. (Complaint, ¶6.)

Defendant Ward and Defendant Stake employed lay clergy, including William "Bill" Knox ("Knox"), to provide religious and pastoral services to members of their religious community, including Plaintiffs and Plaintiffs' family. (Complaint, ¶¶9 – 10.) Defendant Ward and Defendant Stake tasked Knox with spreading their religious message, serving as a religious leader and role model to the congregation and community, and ensuring participation and compliance from minors involved in defendants' programs and activities in and around defendants' boundaries of operations in the Sunnyvale/ Los Altos area. (*Id.*)

In or around 1977, Knox was serving as Single Adult Leader in defendants' program for single adults and as Senior Home Teaching Companion and religious youth leader within the Sunnyvale congregation. (Complaint, ¶11.) As part of that role, Knox was instructed to befriend single women and their children, if any, to recruit church members and encourage marriage of single individuals within the faith, as well as participate in and encourage visits with youth to other member homes. (*Id.*) In his capacity as Single Adult Leader and Senior Home Teaching Companion, Knox befriended Plaintiffs' mother and Plaintiffs at least in part to fulfill his religious role, recruit plaintiff

John Roe DZ 22 to membership, and secure defendants' future financial interests. (*Id.*) Knox was further a leader in Defendant Ward's spiritual progr the now. In Am for boys, as well as defendant's separately sponsored scouting troop, which plaintiffs John Roe DZ 20 and plaintiff John Roe DZ 21 joined immediately upon being baptized in 1977. (*Id.*) At some point in 1977 or 1978, Knox further became Senior Home Teaching Companion to plaintiff John Roe DZ 20 and plaintiff John Roe DZ 21, a role that required Knox to spend time alone with each of the boys in the course of ministering to other families in Defendant Ward's congregation. (*Id.*)

As Knox was building his relationship with Plaintiffs' mother at the behest of Defendants, he also attempted to build relationships of trust and authority with each of the Plaintiffs, inviting them over separately to his apartment in Sunnyvale for overnight visits in his capacity as Senior Home Teaching Companion and religious leader to plaintiff John Roe DZ 20 and plaintiff John Roe DZ 21, and as religious leader to plaintiff John Roe DZ 22. (Complaint, ¶12.) These individual "sleepovers," typically on Saturday nights, happened on numerous occasions over the course of approximately a year between 1977 and 1978. (*Id.*)

During these "sleepovers," each of the Plaintiffs was sexually molested, assaulted, and abused ("sexual abuse") by Knox. (Complaint, ¶13.) The incidents became increasingly sexually and physically abusive while Knox was sexually aroused, and as Knox sexually gratified himself. (*Id.*) Knox used various methods to groom and entice Plaintiffs into acquiescing to Knox's sexual abuse including, but not limited to, Knox promising to provide each plaintiff with certain meals, candy, and gifts their mother could not afford, or other special attention. (*Id.*)

Pursuant to duties on behalf of defendants, Knox would then transport Plaintiffs to worship services at Defendant Ward on Sunday mornings following these sleepovers. (*Id.*) Were it not for Knox's transport of the Plaintiffs to worship services, Plaintiff's mother would not have been able to get them to services at this period shortly following their conversion to the Mormon faith. (*Id.*) On occasion, Knox abused each of the Plaintiffs at Defendant Ward's facilities before or after services, ceremonies, or other religious activities. (*Id.*)

Knox, using the trust and authority he had over minor Plaintiffs as the result of his religious roles, sexually abused each of the minor Plaintiffs by forcibly fondling and masturbating each of the Plaintiffs (in separate, isolated environments) for anywhere from several minutes up to an hour, while arousing and gratifying himself. (Complaint, ¶14.) Knox frequently persisted in this activity against Plaintiffs' will and protest, and despite the minor Plaintiffs' discomfort, pain, and inability and/or unwillingness to respond sexually, causing each of the minor Plaintiffs severe physical pain, abrasive injury, psychological stress and anxiety, and in some instances long-term structural harm to each Plaintiffs' genitals. (*Id.*)

Knox's sexual abuse of each of the Plaintiffs continued for several years at increasing frequency once Knox established a relationship with Plaintiffs' mother. (Complaint, ¶15.) Knox was able to escalate his abuse to oral copulation and penetration. (*Id.*) These instances of abuse occurred while Knox acted within his religious capacity at the family home, at Defendant's facilities, and before or after religious events, activities and retreats sponsored by Defendants. (*Id.*)

Knox also sexually abused Plaintiffs in the context of Scouting events over the years. (Complaint, ¶16.) The scouting-related portions of Plaintiffs' complaint will be channeled into a bankruptcy settlement program pursuant to the Confirmation Order and associated rulings in *In re Boy Scouts of America, et al.*, Chapter 11 Case No. 20-1043 (LSS) (Bankr. D. Del.). (*Id.*) The non-scouting related claims must be severed and adjudicated independently. (*Id.*)

On 13 December 2022[1], Plaintiffs filed a complaint against Defendant Ward, Defendant Stake, and Defendant Family Services asserting causes of action for:

(1) Negligence/ Failure to Protect (Religious Context)

(2) Negligent Supervision/ Failure to Warn (Religious Context)

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

(3) Negligent Hiring/ Retention (Religious Context)

(4) Sexual Battery (Religious Context)

(5) Negligence/ Failure to Protect (Scouting Context)

(6) Negligent Supervision/ Failure to Warn (Scouting Context)

(7) Negligent Hiring/ Retention (Scouting Context)

(8) Sexual Battery (Scouting Context)

(9) Negligent Failure to Warn, Train, or Educate (Scouting Context)

On 27 July 2023, Defendant Family Services filed one of the two motions now before the court, a demurrer to Plaintiffs' complaint.

On 8 August 2023, Church of Jesus Christ of Latter-Day Saints specially appeared and filed the other motion now before the court, a motion to quash service of summons on behalf of Defendant Ward and Defendant Stake.

II. Analysis.

A. Defendant Family Services' demurrer to the Plaintiffs' complaint is OVERRULED.

Defendant Family Services demurs on the ground that Plaintiffs' complaint is barred by the statute of limitations. A court may sustain a demurrer on the ground of failure to state sufficient facts if "the complaint shows on its face the statute [of limitations] bars the action." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315 (*E-Fab*).) A demurrer is not sustainable on statute of limitations grounds if there is only a possibility that the cause of action is time-barred; the defense must be clearly and affirmatively apparent from the allegations of the pleading. (*E-Fab*, *supra*, 153 Cal.App.4th at pp. 1315-1316.) "In assessing whether plaintiff's claims against defendant are time-barred, two basic questions drive our analysis: (a) What statutes of limitations govern the plaintiff's claims? (b) When did the plaintiff's causes of action accrue?" (*Id.* at p. 1316.)

Defendant Family Services asserts Plaintiffs' claims here are governed by Code of Civil Procedure section 340.1[2] which provides, in relevant part:

> In an action for recovery of damages suffered as a result of childhood sexual assault, the time for commencement of the action shall be within 22 years of the date the plaintiff attains the age of majority or within five years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual assault, whichever period expires later, for any of the following actions:
>
> …
>
> (2) An action for liability against any person or entity who owed a duty of care to the plaintiff, if a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff.
>
> (3) An action for liability against any person or entity if an intentional act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff.

(Code Civ. Proc., §340.1, subd. (a).)

Plaintiffs' complaint alleges, in relevant part, that plaintiff John Roe DZ 20 was born in June 1966; plaintiff John Roe DZ 21 was born in December 1967; and plaintiff John Roe DZ 22 was born in April 1970. (Complaint, ¶¶1 – 3.) There is no dispute that the instant action is one "for recovery of damages suffered as a result of childhood sexual assault" and also no dispute that Plaintiffs did not commence this action against Defendant

[2] All further statutory references are to the Code of Civil Procedure unless expressly noted otherwise.

Family Services within "within 22 years of the date the plaintiff attains the age of majority or within five years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual assault."

Thus, there is no dispute that Plaintiffs' complaint would normally be barred under section 340.1, subdivision (a). The issue presented to this court, however, is whether Plaintiffs' complaint against Defendant Family Services has been revived pursuant to Section 340.1, subdivision (q) which provides:

> Notwithstanding any other law a claim for damages described in paragraphs (1) through (3), inclusive, of subdivision (a) that has not been litigated to finality and that would otherwise be barred as of January 1, 2020, because the applicable statute of limitations, claim presentation deadline, or any other time limit had expired, is revived, and these claims may be commenced within three years of January 1, 2020. A plaintiff shall have the later of the three-year time period under this subdivision or the time period under subdivision (a) as amended by the act that added this subdivision.

Since there is no dispute that Plaintiffs' complaint involves a "claim for damages described in paragraphs (1) through (3), inclusive of subdivision (a) … that would otherwise be barred as of January 1, 2020," the crux of the analysis is whether Plaintiffs' complaint involves a claim for damages "that has not been litigated to finality."

> [S]ection 340.1, subdivision (q) provides that it only revives a claim for damages "that has *not been litigated to finality*." (Italics added.) Similarly, subdivision (r) states that the statute revives any action that has commenced but is "*still pending* on [the date of enactment]." (Italics added.) Thus, the statute only revives claims that have not already reached final adjudication.

(*Doe v. Marysville Joint Unified School Dist.* (2023) 89 Cal.App.5th 910, 916 (*Marysville*).)

"[S]ection 340.1's revival provision means what it says. It exempts from revival all claims that have been litigated to finality, irrespective of the basis for the court's final determination." (*Marysville*, *supra*, 89 Cal.App.5th at p. 920.)

In demurring, Defendant Family Services asserts Plaintiffs previously asserted a claim for damages suffered as a result of childhood sexual assault in 2009 and that previous claim has already been litigated to finality. In support of these assertions, Defendant Family Services requests the court take judicial notice of various court records from the previous claim as well as the complaint in this action. (See Request for Judicial Notice in Support of Defendant Doe 3, Family Services Organization's Demurrer to Plaintiffs' Complaint for Damages; see also Declaration of Scott D. Joiner in Support of Defendant Doe 3, Family Services Organization's Demurrer to Plaintiffs' Complaint for Damages.) Plaintiffs do not object to Defendant Family Services' request for judicial notice.[3] There being no objection, Defendant Family Services' request for judicial notice is GRANTED.

From the judicially-noticed documents, the same Plaintiffs here filed a complaint in San Francisco Superior Court on 2 November 2009 ("Earlier Action"). After being transferred to Santa Clara Superior Court, Plaintiffs filed a second amended complaint. By Defendant Family Services own acknowledgment, the complaint in the Earlier Action "named … Knox, the [Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints (the 'Church'), and Boy Scouts of America ["Boy Scounts"] as defendants, among others."[4]

One of those others named in the Earlier Action was Edna M. Dowell ("Dowell").[5] In the second amended complaint from the Earlier Action, Dowell is allegedly "retained, hired, and/or directed by Mormon Church to provide professional therapy and/or counseling to Bill Knox, Plaintiffs, and Plaintiffs' mother at their home in Sunnyvale, California, at the times herein alleged."[6]

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[3] See page 4, fn. 2 to Plaintiffs' Opposition to Defendants' Demurrer.

[4] See page 6, lines 6 – 7 of the Memorandum of Points and Authorities in Support of Defendant Doe 3, Family Services Organization's Demurrer to Plaintiffs' Complaint for Damages ("Defendant Family Services' MPA").

[5] See page 11, lines 3 – 4 of Defendant Family Services' MPA. See also Defendant Family Services' RJN, Exhibit 2 – 4.

[6] See Defendant Family Services' RJN, Exhibit 2.

On 18 May 2011, the court (Hon. McKenney) issued an order sustaining demurrers by defendants Church and Boy Scouts without leave to amend on all causes of action of the second amended complaint except the fifth cause of action for intentional infliction of emotional distress.[7]

The Boy Scouts filed a petition for writ of mandate claiming the trial court erred in overruling their demurrer to the fifth cause of action.[8] While the petition for writ of mandate was pending, the California Supreme Court issued a ruling in *Quarry v. Doe I* (2012) 53 Cal.4th 945 which prompted the Plaintiffs to file a request for dismissal of their fifth cause of action with prejudice.[9] The dismissal rendered the writ petition moot, but the Sixth District Court of Appeal nevertheless retained jurisdiction and concluded the trial court erred in overruling the Boy Scouts' demurrer to the fifth cause of action for intentional infliction of emotional distress as being timely.[10]

On 16 April 2012, the court clerk entered dismissal, with prejudice, of the sole remaining fifth cause of action.[11] Consequently, Defendant Family Services submits Plaintiffs' claim previously asserted in 2009 has been litigated to finality.

The instant action or claim by Plaintiffs, however, is not directed at the same defendants. By Defendant Family Services' own acknowledgment, the instant action "purports to state claims against organizations that are related to those [previous] defendants."[12] Instead of suing Church, Plaintiffs have now sued Defendant Ward and Defendant Stake which Defendant Family Services explains, in a footnote, "are ecclesiastical parts of the Church. … Plaintiffs previously sued Church in the proper way—by suing its corporate entity. But [Defendant Ward and Defendant Stake] are not unincorporated associations subject to service or capable of being sued."[13] Moving party Defendant Family Services identifies itself as "a Church-affiliated organization that provides services to Church members" and defendant in the Earlier Action, Dowell's, employer.[14]

Despite not being a party to the Earlier Action, moving party Defendant Family Services contends the finality of the Earlier Action is still binding and Plaintiffs cannot revive their claim simply by altering the names of the defendants. Defendant Family Services cites *Marysville* as support, but in this court's reading, *Marysville* does not stand for the proposition that a claim previously litigated to finality is binding upon defendants who were not a party to that previous claim. In *Marysville*, the plaintiffs alleged a school counselor sexually abused them while they were students at an elementary school in the District. In 2002, the plaintiffs sued the District and a District employee (not the perpetrating counselor). The trial court granted the defendants' motion for summary judgment. The appellate court affirmed after plaintiffs appealed and the Supreme Court denied plaintiffs' petition for review. In response to the amendment to Section 340.1, on October 8, 2020, the three original plaintiffs and one new plaintiff filed an action against the District, the same District employee previously sued, and the alleged perpetrator. As against the District, the new complaint "effectively alleged the same claims against the District as were alleged in the 2002 suit." (*Marysville*, *supra*, 89 Cal.App.5th at p. 914.) The trial court sustained the District's demurrer to the new complaint without leave to amend and the plaintiffs appealed. Since the earlier action had been litigated to finality, the *Marysville* court affirmed the trial court ruling in favor of the District. Nowhere in the *Marysville* opinion does the court discuss, let alone hold, that a claim previously litigated to finality is binding upon the defendant (alleged perpetrator) who was not a party to the previous action. "[C]ases are not authority for propositions not considered." (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 374.)[15]

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[7] See Defendant Family Services' RJN, Exhibit 3.

[8] See Defendant Family Services' RJN, Exhibit 5.

[9] *Id.*

[10] *Id.*

[11] See Defendant Family Services' RJN, Exh. 6.

[12] See page 11, lines 4 – 5 of Defendant Family Services' MPA.

[13] See fn. 6 of Defendant Family Services' MPA.

[14] See page 11, lines 10 – 11 and page 11, line 15 – page 12, line 3 of Defendant Family Services' MPA.

[15] Defendant Family Services' reliance on *Perez v. Roe 1* (2006) 146 Cal.App.4th 171, 174, fn. 1 (*Perez*), is equally unavailing. Defendant Family Services contends *Perez* held, "even though the prior lawsuits did not name [the bishop as an individual],

Defendant Family Services also likens Section 340.1's preclusion of claims litigated to finality to the preclusion of claims barred by res judicata insofar as res judicata may be asserted ***against*** a party who was bound by the previous action even though the party asserting res judicata was not.[16] Defendant Family Services cites *Bernhard v. Bank of America Nat'l Trust & Sav. Asso.* (1942) 19 Cal.2d 807, 812-813, where the court wrote:

> No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend. (See 7 Bentham's Works (Bowring's ed.) 171.) Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted. … The courts of most jurisdictions have in effect accomplished the same result by recognizing a broad exception to the requirements of mutuality and privity, namely, that they are not necessary where the liability of the defendant asserting the plea of res judicata is dependent upon or derived from the liability of one who was exonerated in an earlier suit brought by the same plaintiff upon the same facts. (See cases cited in 35 Yale L. J. 607, 610; 9 Va. L. Reg. (N. S.) 241, 245-247; 29 Ill. L. Rev. 93, 94; 18 N. Y. U. L. Q. R. 565, 566-567; 34 C. J. 988-989.) Typical examples of such derivative liability are master and servant, principal and agent, and indemnitor and indemnitee. Thus, if a plaintiff sues a servant for injuries caused by the servant's alleged negligence within the scope of his employment, a judgment against the plaintiff on the grounds that the servant was not negligent can be pleaded by the master as res judicata if he is subsequently sued by the same plaintiff for the same injuries. Conversely, if the plaintiff first sues the master, a judgment against the plaintiff on the grounds that the servant was not negligent can be pleaded by the servant as res judicata if he is subsequently sued by the plaintiff. In each of these situations the party asserting the plea of res judicata was not a party to the previous action nor in privity with such a party under the accepted definition of a privy set forth above. Likewise, the estoppel is not mutual since the party asserting the plea, not having been a party or in privity with a party to the former action, would not have been bound by it had it been decided the other way. The cases justify this exception on the ground that it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries.

(See also *Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, 579—res judicata may be asserted by a defendant not a party to the earlier action if that defendant's liability is ***derivative*** of the defendant in the earlier action. "[I]mposition of derivative liability is not limited to the doctrine of respondeat superior. Liability based on an aiding and abetting or conspiracy theory is also 'derivative.'")

The court is not inclined to adopt the analogy advanced by Defendant Family Services in determining whether a "claim for damages … [has or] has not been litigated to finality." As Defendant Family Services recognizes,

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we deem those judgments operative as to him." This is an incomplete citation taken out of context. The footnote more accurately states, "The Roman Catholic Bishop of Stockton (the Bishop) is a corporate entity. Perez and Howard (collectively, appellants) also sued Stephen E. Blaire, the individual who currently acts as the bishop, in his representative capacity. His name was included in the caption of the master complaint eventually adopted by appellants, but is not included in the allegations of that complaint. The Bishop contends that Blaire is not a proper defendant to this action because his individual culpability is not at issue. Appellants do not contest that point, and even though their prior lawsuits did not name Blaire, we deem those judgments operative as to him." *Perez* is clearly distinguishable. Here, there is no allegation or any judicially-noticed evidentiary showing that Defendant Family Services is being sued in its representative capacity of any of the defendants in the Earlier Action.

[16] Res judicata is an imperfect analogy since Defendant Family Services itself argue elsewhere in its demurrer that section 340.1's language, "litigated to finality," does not require a litigation to finality ***on the merits***, as would be required for res judicata. See page 14, lines 6 – 16 of Defendant Family Services' MPA. "Res judicata precludes the relitigation of a cause of action only if (1) the decision in the prior proceeding is final and ***on the merits***; (2) the present action is on the same cause of action as the prior proceeding; and (3) the parties in the present action or parties in privity with them were parties to the prior proceeding." (*Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82; emphasis added.)

> [Under] well-settled principles of statutory interpretation … "we first look to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction." [Citation.]
>
> Under the first step, we look to the chosen words in the statute as they are the most reliable indicator of the Legislature's intent. "We give the words of the statute 'a plain and commonsense meaning' unless the statute specifically defines the words to give them a special meaning. [Citations.] If the statutory language is clear and unambiguous, our task is at an end, for there is no need for judicial construction." [Citation.]
>
> However, as our high court held, "the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and the provisions relating to the same subject matter must be harmonized to the extent possible." [Citation.] Moreover, the plain meaning of the statute is not to be followed when it would "frustrate[] the manifest purposes of the legislation as a whole or [lead] to absurd results." [Citation.]
>
> If an analysis of the plain meaning of the statute does not resolve the issue, courts then proceed to the second step of the inquiry, which includes looking at the statute's legislative history, among other extrinsic aids, to assist with statutory interpretation. [Citation.]

(*290 Division (EAT), LLC v. City and County of San Francisco* (2022) 86 Cal.App.5th 439, 453.)

Here, Section 340.1, subdivision (q), is silent with regard to whether a "claim for damages … [has or] has not been litigated to finality" is limited to the specifically named defendants of such claim or encompasses, as Defendant Family Services now argues, anyone bearing derivative liability. Under the rules of statutory interpretation, the court should look first to the statutory purpose and legislative history.

> "[T]he Legislature has the power to expressly revive time-barred civil common law causes of action. This holding is consistent with the niche in our civil law occupied by statutes of limitations. 'The principle is … well established that "[s]tatutorily imposed limitations on actions are technical defenses which should be strictly construed to avoid the forfeiture of a plaintiff's rights. …" [Citation.] [T]here is a "strong public policy that litigation be disposed of on the merits wherever possible."'

(*Coats v. New Haven Unified School Dist.* (2020) 46 Cal.App.5th 415, 428 (*Coats*).)

Defendant Family Services has not provided this court with any legal authority concerning the statutory purpose or legislative history behind Section 340.1, subdivision (q). In the absence of legislative purpose and history, the court is not inclined to incorporate res judicata principles to determine whether the Plaintiffs' instant complaint is a claim for damages that has or has not been litigated to finality under the circumstances presented here and, consequently, revived and timely commenced.

Accordingly, Defendant Family Services' demurrer to Plaintiffs' complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)], i.e., the claims are barred by the applicable statute of limitations, is OVERRULED.

B. The motion to quash on behalf of Defendant Ward and Defendant Stake is GRANTED.

"A defendant is under no duty to respond in any way to a defectively served summons. It makes no difference that defendant had actual knowledge of the action. Such knowledge does not dispense with statutory requirements for service of summons." (Weil & Brown, et al., CAL. PRAC. GUIDE: CIV. PROC. BEFORE TRIAL (The Rutter Group 2020) ¶4:414, p. 4-69 citing *Kappel v. Bartlett* (1988) 200 Cal.App.3d 1457, 1466 (*Kappel*) and *Ruttenberg v. Ruttenberg* (1997) 53 Cal.App.4th 801, 808 (*Ruttenberg*).) "[N]otice does not substitute for proper service. Until statutory requirements are satisfied, the court lacks jurisdiction over a defendant." (*Ruttenberg*, *supra*, 53 Cal.App.4th at p. 808.) "[I]n California, '...the original service of process, which confers jurisdiction, must conform to statutory requirements or all that follows is void.'" (*Id.* at p. 809.)

> Appellant was under no duty to act upon a defectively served summons. The requirement of notice 'is not satisfied by actual knowledge without notification conforming to the statutory requirements' [citation]; it is long-settled that methods of service are to be strictly construed and that a court does not acquire jurisdiction where personal service is relied upon but has not in fact taken place.

(*Kappel*, *supra*, 200 Cal.App.3d at pp. 1466 – 1467.)

A "defendant's first line of attack normally is a motion to quash service for lack of personal jurisdiction under Code of Civil Procedure section 418.10, subdivision (a)(1). … The same motion is used to attack defects in the manner in which summons was issued or served." (Weil & Brown, et al., CAL. PRAC. GUIDE: CIV. PROC. BEFORE TRIAL (The Rutter Group 2020) ¶3:376, p. 3-110.) "Without valid service of summons, the court never acquires jurisdiction over defendant. Hence, the statutory ground for the motion to quash is that the court lacks jurisdiction over the defendant." (*Id.* at ¶4:413, p. 4-69 citing Code Civ. Proc. §418.10, subd. (a)(1).) Code of Civil Procedure section 418.10, subdivision (a)(1) states, in pertinent part:

> A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes: (1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her.

"[W]here a defendant properly moves to quash service of summons the burden is on the plaintiff to prove facts requisite to the effective service." (*Sheard v. Superior Court* (1974) 40 Cal.App.3d 207, 211.) "Although the defendant is the moving party, the burden of proof is on the plaintiff." (Weil & Brown, et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶3:384, p. 3-112 citing *Floveyor International, Ltd. v. Superior Court* (1997) 59 Cal.App.4th 789, 793 (*Floveyor*), et al.) "[T]he burden of proof is upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence." (*Evangelize China Fellowship, Inc. v. Evangelize China Fellowship, Hong Kong* (1983) 146 Cal.App.3d 440, 444 (*Evangelize*).) "Where a motion to quash is made, the burden of proof is on the plaintiff to establish the facts of jurisdiction, by declarations, verified complaint or other evidence." (2 Witkin, California Procedure (4th ed. 1996) Jurisdiction, §211, p. 775 – 776.)

Here, Church has specially appeared and filed a motion to quash service of summons on behalf of Defendant Ward and Defendant Stake. Consequently, the burden of proof is upon Plaintiffs to establish the facts of jurisdiction.

Code of Civil Procedure section 416.40 states, in relevant part:

> A summons may be served on an unincorporated association (including a partnership) by delivering a copy of the summons and of the complaint:
>
> …
>
> (b) If the association is not a general or limited partnership, to the person designated as agent for service of process in a statement filed with the Secretary of State or to the president or other head of the association, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the association to receive service of process;
>
> (c) When authorized by Section 18220 of the Corporations Code, as provided by that section.

Code of Civil Procedure section 415.20, subdivision (a), authorizes substitute service on an unincorporated association in lieu of personal service:

> In lieu of personal delivery of a copy of the summons and complaint to the person to be served as specified in Section 416.10, 416.20, 416.30, 416.40, or 416.50, a summons may be served by leaving a copy of the summons and complaint during usual office hours in his or her office or, if no physical address is known, at his or her usual mailing address, other than a United States Postal Service post office box, with the person who is apparently in charge thereof, and

> by thereafter mailing a copy of the summons and complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. When service is effected by leaving a copy of the summons and complaint at a mailing address, it shall be left with a person at least 18 years of age, who shall be informed of the contents thereof. Service of a summons in this manner is deemed complete on the 10th day after the mailing.

On 6 June 2023, Plaintiffs filed a "Proof of Service Re Defendant Doe 1, Local Religious Unincorporated Association" and "Proof of Service Re Defendant Doe 2, Regional Religious Unincorporated Association." With regard to Defendant Ward, in the attached declaration, the registered process server declares that "On May 21, 2023 at 12:35 PM," he served copies of the summons and complaint upon "Defendant Doe 1, Local Religious Unincorporated Association" by substituted service upon "DAVID HAIGHT, BISHOP (WHT/M/65/6FT2/300LB/WHT HR)" at "771 W FREMONT AVENUE SUNNYVALE, CA 94087." The process server further declares that on 23 May 2023, he mailed the summons and complaint to "DEFENDANT DOE 1, LOCAL RELIGIOUS UNINCORPORATED ASSOCIATION 771 W FREMONT AVENUE SUNNYVALE, CA 94087."

With regard to Defendant Stake, in the attached declaration, the registered process server declares that "On May 21, 2023 at 12:13 PM," he served copies of the summons and complaint upon "Defendant Doe 2, Regional Religious Unincorporated Association" by substituted service upon "SAM HEALAY, BISHOP (WHT/M/65/6FT4/300 LB)" at "1300 GRANT ROAD LOS ALTOS, CA 94024." The process server further declares that on 23 May 2023, he mailed the summons and complaint to "DEFENDANT DOE 2, REGIONAL RELIGIOUS UNINCORPORATED ASSOCIATION 1300 GRANT ROAD LOS ALTOS, CA 94024."

Normally, filing a proof of service that complies with statutory standards creates a rebuttable presumption that service was proper. (Weil & Brown, et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2017) ¶4:362, p. 4-63 citing *Floveyor*, *supra*, 59 Cal.App.4th at p. 795.) Evidence Code section 647 creates a presumption in favor of a declaration by a registered process server. Evidence Code section 647 provides, "the return of a process server registered pursuant to Chapter 16 (commencing with Section 22350) of Division 8 of the Business and Professions Code upon process or notice establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return." Evidence Code section 604 states that the effect of a presumption affecting the burden of producing evidence is that the trier of fact is required to assume the existence of the presumed fact "unless and until evidence is introduced which would support a finding of its nonexistence."

"[W]hen the party against whom such a presumption operates produces some quantum of evidence casting doubt on the truth of the presumed fact, the other party is no longer aided by the presumption. The presumption disappears, leaving it to the party in whose favor it initially worked to prove the fact in question." (*Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 882.)

In moving to quash, Church submits a declaration from its Director of Risk Management who explains that the Church is an unincorporated religious body of believers with 17 million members in 170 countries including roughly 730,000 members in California.[17] The Church is hierarchical with its headquarters in Salt Lake City, Utah.[18] The Church is led by 15 apostles with the senior apostle being President of the Church.[19] At the local level, the Church is comprised of ecclesiastical units typically called "wards" and "stakes."[20] A "ward" is a congregation of

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[17] See ¶3 to the Declaration of Branden Wilson in Support of Specially Appearing Church of Jesus Christ Of Latter-Day Saints' Motion to Quash Service of Summons on Behalf of Defendants Doe 1 and Doe 2 ("Declaration Wilson").

[18] See ¶4 to the Declaration Wilson.

[19] *Id*.

[20] See ¶6 to the Declaration Wilson.

200 to 500 members.[21] Multiple wards are groups into "stakes."[22] Most wards and stakes do not own property or have any assets and are not independent legal entities.[23]

The Church, founded in 1830, first formed a corporation to conduct its secular affairs in 1851 but was disincorporated by Congress in the late 1800s.[24] Early in the twentieth century, the Church formed two corporations sole as vehicles for performing the secular functions and affairs of the Church: (1) Corporation of the President of The Church of Jesus Christ of Latter-day Saints ("COP") and (2) Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints ("CPB").[25] CPB was primarily a property holding company while COP received and held donations and funded ecclesiastical affairs of the Church.[26] In nearly all instances, these corporate entities stood in Church's shoes for purposes of suing and being sued.[27]

In 2019, the Church renamed CPB as "The Church of Jesus Christ of Latter-day Saints, a Utah corporation sole," which became the Church Corporation.[28] The Church then merged COP into Church Corporation, creating a single entity to stand in the Church's shoes.[29] The Church Corporation is registered to do business in California and maintains a registered agent for service of process in California.[30] The Church Corporation's registered agent is CSC – Lawyers Incorporating Services with offices at 2710 Gateway Oaks Drive, Sacramento, California.[31]

Defendant Ward and Defendant Stake are sued in this case as unincorporated associations, but are not unincorporated associations.[32] Defendant Ward and Defendant Stake are parts of the Church which exists in the secular world as Church Corporation.[33] Church members are part of the Church, not their local ward or stake.[34] When Church members move, they attend different wards, but their membership in Church does not change.[35] Church members attend services in any ward they choose, often doing so when traveling.[36] Ward and stake boundaries change as Church membership grows or shrinks.[37]

The most salient fact that the court takes from Church's declaration is that Church disputes Plaintiffs' assertion that Defendant Ward and Defendant Stake are each separately constituted unincorporated associations. According to Church, the appropriate legal entity to be sued is Church Corporation. Church's Director of Risk Management further declares Plaintiffs previously named and served COP and CPB as defendants in the Earlier

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[21] *Id.*

[22] See ¶7 to the Declaration Wilson.

[23] See ¶9 to the Declaration Wilson.

[24] See ¶10 to the Declaration Wilson.

[25] See ¶11 and Exh. A – B to the Declaration Wilson.

[26] See ¶12 to the Declaration Wilson.

[27] *Id.*

[28] See ¶15 to the Declaration Wilson.

[29] *Id.*

[30] See ¶16 to the Declaration Wilson.

[31] *Id.*

[32] See ¶19 to the Declaration Wilson.

[33] *Id.*

[34] See ¶20 to the Declaration Wilson.

[35] *Id.*

[36] *Id.*

[37] *Id.*

Action.[38] Plaintiffs' counsel have also previously named and served Church Corporation, COP, and/or CPB in at least 13 other lawsuits.[39] Church contends it was improper for Plaintiffs to perform substituted service on the purported unincorporated associations, Defendant Ward and Defendant Stake, rather than serve Church Corporation through its designated agent for service of process despite doing so in the past.

In opposition, Plaintiffs note that an "unincorporated association" means an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not. (Corp. Code, §18035.) "The criteria applied to determine whether an entity is an unincorporated association are no more complicated than (1) a group whose members share a common purpose, and (2) who function under a common name under circumstances where fairness requires the group be recognized as a legal entity. Fairness includes those situations where persons dealing with the association contend their legal rights have been violated." (*Barr v. United Methodist Church* (1979) 90 Cal.App.3d 259, 266-267.)

Plaintiffs challenge Church's conclusory assertion that Defendant Ward and Defendant Stake are not unincorporated associations by requesting judicial notice of California Secretary of State Records which reflect the existence of other (not Defendant Ward and Defendant Stake in this case) Church wards and stakes which were separately incorporated under California law.[40] However, the court finds this to be consistent with Church's evidence that "[m]ost wards and stakes … are not independent legal entities."

The court, as the trier of fact retains the prerogative to draw reasonable inferences from the evidence. (Evid. Code, §600, subd. (b); *Craig v. Brown & Root, Inc.* (2000) 84 Cal.App.4th 416, 421 (*Craig*).) For instance, the trier of fact may weigh a party's denial of receiving a letter against an inference of receipt (drawn from proof that the letter was mailed). (Evid. Code, §604, Comment; *Craig*, *supra*, 84 Cal.App.4th at p. 422.)

Based on the evidence submitted, whether Defendant Ward and Defendant Stake are or are not unincorporated associations separate and distinct from Church is in material dispute. However, acting as trier of fact and for purposes of this motion to quash only, the court finds on balance that Plaintiffs have not me their burden and there is an insufficient factual basis to establish that Defendant Ward and Defendant Stake are unincorporated associations separate and distinct from Church. Consequently, it was improper for Plaintiffs to serve them as such.

Plaintiffs, in opposition, request an opportunity to conduct discovery in order to establish jurisdiction against Defendant Ward and Defendant Stake. While the court is aware of the right to conduct discovery in order to establish personal jurisdiction (see *Mihlon v. Superior Court* (1985) 169 Cal.App.3d 703, 710), the court is not aware of any authority to conduct discovery to establish valid service of summons. Accordingly, Plaintiffs' request to conduct discovery is DENIED.

For the reasons discussed above, specially-and appearing Church's motion to quash service of summons on behalf of Defendant Ward and Defendant Stake is GRANTED.

III. Order.

Defendant Family Services' demurrer to Plaintiffs' complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)], i.e., the claims are barred by the applicable statute of limitations, is OVERRULED.

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[38] See ¶13 to the Declaration Wilson.

[39] See ¶14 to the Declaration Wilson.

[40] Plaintiffs' Request for Judicial Notice is GRANTED. (See Evid. Code §452, subd. (h) [court may take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy"]; *Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1236 fn.2 [judicial notice of articles of incorporation]; *Cal. Aviation Council v. County of Amador* (1988) 200 Cal.App.3d 337, 344 fn.7 [judicial notice of certificate amending the articles of incorporation]; *Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200 Cal.App.4th 1470, 1484—court takes judicial notice of a certificate of corporate status.)

Specially appearing Church's motion to quash service of summons on behalf of Defendant Ward and Defendant Stake is GRANTED.

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

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Calendar Line 5

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 22CV409378 **SPG Center, LLC v. Yucca De Lac Corp., et al.**
DATE: 9 November 2023 **TIME: 9:00 am** **LINE NUMBER: 5**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 14 June 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Order on Defendants Nigel Pang, Conliza Pang, Parnell Pang, and Derrick Pang's Demurrer To Plaintiff's Complaint.

I. Statement of Facts.

Plaintiff SPG Center, LLC ("SPG") is the owner of those certain premises commonly known as Stanford Shopping Center, 660 Stanford Shopping Center, Room 700A, Palo Alto, California 94304 ("Premises"). (Complaint, ¶2.)

On or about 11 May 2011, plaintiff SPG and defendant Yucca De Lac Corp. ("YDL") entered into a written lease for the Premises with a term commencing 1 March 2012 and continuing until 28 February 2022 ("Lease"). (Complaint, ¶12 and Exh. A.) On or about 5 October 2010, defendant Fung Lum Concessions Corporation ("FLC")[1] signed an absolute and unconditional guaranty to perform all covenants and obligations of the tenant under the Lease, including payment of all amounts due and owing to plaintiff SPG ("Guaranty"). (Complaint, ¶13 and Exh. B.)

On or about 28 March 2012, the Lease was amended ("First Amendment to Lease"). (Complaint, ¶14 and Exh. C.) Pursuant to the terms of the Lease and First Amendment to Lease, defendants agreed to pay estimated rent and fixed rent, operating costs, real estate taxes, and trash removal as additional rent to plaintiff SPG for the Premises. (Complaint, ¶15.)

On or about 1 April 2020, defendants breached the Lease and Guaranty and, since that time, defendants have failed and refused, despite demand by plaintiff SPG, to pay rent and additional rent past due and becoming due under the terms and conditions of the Lease. (Complaint, ¶19.)

On 28 February 2022, defendants' Lease expired. (Complaint, ¶20.)

Defendants entered into possession of the Premises pursuant to the Lease and Guaranty and continued to maintain possession of the Premises until 8 July 2022. (Complaint, ¶21.)

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[1] On or about 2 December 2015, defendant FLC was dissolved. (Complaint, ¶4.) Defendants Nigel Pang, Conliza Pang, Parnell Pang, and Derrick Pang were officers and/or directors of defendant FLC and received the distribution of the assets on dissolution of defendant FLC. (Complaint, ¶4.)

In spite of plaintiff SPG's demands that defendants pay the amounts due and owing under the Lease and Guaranty, defendants have failed and refused to do so, and continue to fail and refuse to do so. (Complaint, ¶¶23 – 27.)

On 30 December 2022[2], plaintiff SPG filed a complaint against defendants YDL, FLC, Nigel Pang, Conliza Pang, Parnell Pang, and Derrick Pang asserting causes of action for:

1. Breach of Contract
2. Breach of Guaranty [against defendants FLC, Nigel Pang, Conliza Pang, Parnell Pang, and Derrick Pang and John Does]
3. Common Counts

On 20 July 2023, defendants Nigel Pang, Conliza Pang, Parnell Pang, and Derrick Pang ("Individual Defendants") filed the motion now before the court, a demurrer to plaintiff SPG's complaint.

II. Analysis.

C. The Individual Defendants' demurrer to plaintiff SPG's complaint is SUSTAINED.

1. Breach of Contract [Lease].

The Individual Defendants demur to plaintiff SPG's first cause of action [breach of Lease] on the ground that they are not parties to the Lease and, consequently, cannot be liable therefor. (*Gold v. Gibbons* (1960) 178 Cal.App.2d 517, 519 ["Breach of contract cannot be made the basis of an action for damages against defendants who did not execute it and who did nothing to assume its obligations."]; see also *Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 452 ["Under California law, only a signatory to a contract may be liable for any breach."].)

The complaint alleges defendant YDL entered into the Lease. (Complaint, ¶12.) The Lease, attached as an exhibit to the complaint (Complaint, Exh. A) also reflects defendant YDL as the party entering into the Lease. Similarly, the First Amendment to Lease, attached as an exhibit to the complaint (Complaint, Exh. C) reflects defendant YDL as the party thereto.

In opposition, plaintiff SPG contends the Individual Defendants are liable for breach of the Lease by virtue of the allegation that the Individual Defendants were officers and/or directors of defendant FLC and received the distribution of the assets on dissolution of defendant FLC and defendant FLC is alleged to have executed the Guaranty.

As support, plaintiff SPG relies upon *Central Building, LLC v. Cooper* (2005) 127 Cal.App.4th 1053, 1058 (*Central Building*) where the court wrote:

> A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." …
>
> When a guaranty agreement incorporates another contract, the two documents are read together and " '[c]onstrued fairly and reasonably as a whole according to the intention of the parties.' [Citations.]" (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 39–40 [86 Cal. Rptr. 2d 855, 980 P.2d 407].) In other words, when a party undertakes to guarantee the faithful performance of another contract, the guarantor is contracting in reference to the other contract; " ' "otherwise it would not know what obligation it was assuming." ' " (*Boys Club of San*

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

Fernando Valley, Inc. v. Fidelity & Deposit Co. (1992) 6 Cal.App.4th 1266, 1271–1272 [8 Cal. Rptr. 2d 587].)

From this citation, plaintiff SPG asserts a lease and accompanying guaranty are "considered as one integrated document." Even so, the court does not agree with plaintiff SPG's assertion that breach of lease necessarily gives rise to liability against the guarantor. In *Central Building*, the court considered whether a guaranty would continue to be enforceable after expiration of the 72-month term of the accompanying lease. The *Central Building* court explained, "Guaranty agreements may be limited or continuing." (*Central Building*, *supra*, 127 Cal.App.4th at p. 1059).) A limited guaranty might set forth a guaranty period which expires at the end of the accompanying lease period in which case, "the obligations of Guarantor under this Guaranty shall automatically terminate." (*Id.* at p. 1060.) However, in *Central Building*, the court found the guaranty to be continuing because, "The language in the guaranty expresses the intent to apply the guaranty to continuations or extensions of the lease, whether by formal agreement or by a course of conduct such as holding over. The plain terms of the documents extended the obligations of the guarantors to future modifications of the lease." (*Id.* at pp. 1062-1063.)

Plaintiff SPG has made no showing and points to no allegations of the complaint to suggest that the liability of the guarantor here [defendant FLC] is co-extensive with the liability of the lessor [defendant YDL]. (See also *Talbott v. Hustwit* (2008) 164 Cal.App.4th 148, 151—"A contract of guaranty gives rise to a separate and independent obligation from that which binds the principal debtor.") Accordingly, the Individual Defendants' demurrer to the first cause of action in plaintiff SPG's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for breach of contract is SUSTAINED with 10 days' leave to amend.

2. Breach of Contract [Guaranty].

The Individual Defendants demur to plaintiff SPG's second cause of action [breach of Guaranty agreement] on the same ground that they demurred to the first cause of action, i.e., that they are not parties to the agreement. As noted above, defendant FLC is the signatory to the Guaranty.

In opposition, plaintiff SPG contends its allegation that that the Individual Defendants were officers and/or directors of defendant FLC and received the distribution of the assets on dissolution of defendant FLC is what supports liability against the Individual Defendants. Plaintiff SPG relies upon Corporations Code section 2011, subdivision (a)(1)(b) which states:

> Causes of action against a dissolved corporation, whether arising before or after the dissolution of the corporation, may be enforced against any of the following: …
>
> (B) If any of the assets of the dissolved corporation have been distributed to shareholders, against shareholders of the dissolved corporation to the extent of their pro rata share of the claim or to the extent of the corporate assets distributed to them upon dissolution of the corporation, whichever is less.
>
> A shareholder's total liability under this section may not exceed the total amount of assets of the dissolved corporation distributed to the shareholder upon dissolution of the corporation.

However, plaintiff SPG's citation to Corporations Code section 2011 exposes a limitation to this basis for liability. Corporations Code section 2011, subdivision (a)(2)(B) states:

> [With one exception inapplicable here], all causes of action against a shareholder of a dissolved corporation arising under this section are extinguished unless the claimant commences a proceeding to enforce the cause of action against that shareholder of a dissolved corporation prior to the earlier of the following:
>
> (A) The expiration of the statute of limitations applicable to the cause of action.
>
> (B) Four years after the effective date of the dissolution of the corporation.

By plaintiff SPG's own allegation, defendant FLC dissolved on or about 2 December 2015. (Complaint, ¶4.) If liability against the Individual Defendants is premised upon Corporations Code section 2011, those causes of action are extinguished unless plaintiff SPG commenced this action against the Individual Defendants before the

fourth anniversary of defendant FLC's dissolution, or in this case, prior to 2 December 2019. Plaintiff SPG did not commence this action until 30 December 2022, more than three years too late.

Plaintiff SPG contends there is no published authority supporting such an interpretation of Corporations Code section 2011, subdivision (a)(2). A plain and commonsense reading of the statute had led the court to this result. "If the statutory language is clear and unambiguous, our task is at an end, for there is no need for judicial construction. [Citations omitted.] In such a case, there is nothing for the court to interpret or construe. [Citation omitted.]" (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083.)

Without identification of/ citation to any statutory purpose or specific public policy, plaintiff SPG contends further that the Individual Defendants would be unjustly enriched if allowed to keep the assets of dissolved guarantor [defendant FLC] and, therefore, argue for application of Corporations Code section 2011, subdivision (a)(2)(A) and a four-year statute of limitations following a breach of the Guaranty instead. However, such an application completely ignores the plain language of the statute which states any causes of action against the shareholders of a dissolved corporation are extinguished unless the action is commenced prior to the "***earlier of***" two possible dates: (1) the expiration of the applicable statute of limitations; or (2) four years after the date of dissolution. Here, the date of dissolution is unequivocally earlier.

Accordingly, the Individual Defendants' demurrer to the second cause of action in plaintiff SPG's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)], i.e., is barred by the applicable statute of limitations, is SUSTAINED with 10 days' leave to amend.

3. Common Counts.

Finally, the Individual Defendants demur to the third cause of action [common counts] on the ground that "a demurrer to a common count is properly sustained where the plaintiff is not entitled to recover under those counts in the complaint wherein all other facts upon which his claim is based are specifically pleaded." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 601; see also *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394—"When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable.")

For the reasons discussed above, the Individual Defendants' demurrer to the third cause of action in plaintiff SPG's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for common counts is SUSTAINED with 10 days' leave to amend.

III. Order.

The Individual Defendants' demurrer to plaintiff SPG's complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days' leave to amend.

_____ _____

DATED:

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

Calendar Line 6

---oooOooo---

Calendar Line 7

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 23CV413113 **Steven Trinh, et al. v. Del Toro Loan Servicing, Inc., et al.**
DATE: 09 November 2023 **TIME: 9:00 am** **LINE NUMBER: 7**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 14 June 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Order On Demurrer Of Defendant SGLC Inc.
to Plaintiffs' First Amended Complaint.

I. Statement of Facts.

On or about 26 June 2012, plaintiff MFAS Direct Services, LLC ("MFAS") purchased the real property located at 2012 Biarritz Place, San Jose ("Subject Property") via grant deed. (First Amended Complaint ("FAC"), ¶14.) Plaintiff Steven Trinh ("Trinh") is the managing member of plaintiff MFAS (collectively, "Plaintiffs"), and the Subject Property is his primary residence. (*Id.* at ¶¶2-3.)

On or about 12 June 2018, plaintiff MFAS obtained a loan secured against the Subject Property in the amount of $2,000,000.00 at an interest rate of 9.00% (FAC, ¶15.) The promissory note ("Note") refers to the beneficiary with the language, "SEE ATTACHED LENDER VESTING ADDENDUM," but no addendums are attached. (*Id.* at ¶16.)

A deed of trust ("Deed of Trust") was concurrently executed as security for the Note and recorded. (FAC, ¶17.) The Deed of Trust lists Stewart Title as the trustee and again identifies the beneficiary with the language, "SEE ATTACHED LENDER VESTING ADDENDUM," but no addendums are attached to the Deed of Trust. (*Ibid.*) The escrow documents executed by Lotus Escrow from May to June 2018 also refer to the Beneficiary with a similar reference to an addendum that is not attached. (*Id.* at ¶17.)

Since the inception of the loan in June 2018, several parties contacted plaintiff Trinh purporting to be the lender on the loan. (FAC, ¶19.) In or around September 2020, Michael Goodman of defendant SGLC first reached out to plaintiff Trinh to tell him his monthly payment was late. (*Id.* at ¶20.) Over the next three years, plaintiff Trinh asked Mr. Goodman and a Mr. Pukini[1] to provide him with the signed copies of the original loan documents, and Plaintiffs did not know who the lender was during this time. (*Id.* at ¶21.)

In 2021, plaintiff Trinh attempted to refinance with Bank of the West and Caliber at lower interest rates, but both entities denied the applications because there was no beneficiary listed on the loan documents. (FAC, ¶22.) On or about 14 January 2021, Mr. Goodman again contacted plaintiff Trinh and, for the first time, said that he

[1] The FAC does not further identify "Mr. Pukini" or clarify his relationship to the allegations.

was the lender on the loan. (*Id.* at ¶23.) Plaintiff Trinh asked Mr. Goodman for the signed loan documents, but Mr. Goodman did not provide them. (*Ibid.*)

In or around October 2022, the federal government forced AB Capital, LLC (defendant Calpac's principal) into involuntary bankruptcy due to fraud. (FAC, ¶24.) Plaintiff Trinh learned that defendant Calpac frequently originated loans and sold ownership of the loans to several different investors while representing to each investor that it owned 100 percent of the loan. (*Ibid*.)

In or around January 2023, Mr. Goodman informed plaintiff Trinh that the loan maturity date was 1 June 2020 and that the maturity date had to be extended to avoid default. (FAC, ¶24.) On or about 14 January 2023, Mr. Goodman provided plaintiff Trinh with what he said were the fully executed loan documents, but the documents were not signed by the lender or broker. (*Id.* at ¶25.) Plaintiff Trinh did not tender the amount to extend the loan's maturity date. (*Id.* at ¶26.) Defendant SGLC transmitted the original signed loan documents in January 2023, and the documents did not identify a lender. (*Id.* at ¶36.)

On 22 February 2023, Plaintiff Trinh requested a payoff demand from the loan servicer, defendant Del Toro. (FAC at ¶27.) The statement plaintiff Trinh received said the total amount to pay off the loan was $2,111,662.00, but Trinh disputes this amount. (*Id.* at ¶28.) On 06 March 2023, counsel for plaintiff Trinh submitted a request to defendant Del Toro asking for a list of beneficiaries on the loan. (*Id.* at ¶29.) None of the entities on the list is defendant SGLC. (*Ibid*.[2])

Plaintiff Trinh's account is more than 90 days past due. (FAC, ¶30.) Plaintiffs received $2,000,000.00 under the contract and have paid approximately $817,629.14 towards the loan. (*Id.* ¶37.) Plaintiffs are willing and able to tender the remaining $1,058.117.10 received as value under the loan. (*Ibid.*)

On 17 March 2023[3], plaintiffs Trinh and MFAS filed a complaint against defendants Del Toro, SGLC, and Calpac.

On 17 May 2023, plaintiffs Trinh and MFAS filed the operative FAC against defendants Del Toro, SGLC and Calpac, asserting causes of action for:

(1) Rescission

(2) Violation of 12 U.S.C. §2605, et seq.

(3) Unfair Competition—Violation of Business & Professions Code §17200, et seq.

On 30 June 2023, defendant Del Toro filed a demurrer to plaintiffs Trinh and MFAS's FAC.[4]

On 30 June 2023, defendant SGLC filed the motion now before the court, a demurrer to plaintiffs Trinh and MFAS's FAC.

II. Demurrers in General

A complaint must contain substantive factual allegations sufficiently apprising the defendant of the issues to be addressed. (See ***Williams v. Beechnut Nutrition Corp.*** (1986) 185 Cal.App.3d 135, 139, fn. 2.)

A demurrer tests the legal sufficiency of a complaint. It is properly sustained where the complaint or an individual cause of action fails to "state facts sufficient to constitute a cause of action." (***Code Civ. Proc.***, §430.10, subd. (e).) "[C]onclusionary allegations . . . without facts to support them" are insufficient on demurrer. (***Ankeny v.***

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[2] The FAC does not directly allege that defendant Del Toro provided the list attached as Exhibit C to the FAC, but this is implied from the allegations stated. (See FAC, ¶ 29.)

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

[4] Court records show that plaintiff Trinh submitted a request for dismissal as to defendant Del Toro on 26 October 2023.

Lockheed Missiles and Space Co. (1979) 88 Cal.App.3d 531, 537.) "It is fundamental that a demurrer is an attack against the complaint on its face, it should not be sustained unless the complaint shows that the action may not be pursued." (***Yolo County Dept. of Social Services v. Municipal Court*** (1980) 107 Cal.App.3d 842, 846-847.)

"It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading." (***Committee on Children's Television, Inc. v. General Foods Corp.*** (1983) 35 Cal.3d 197, 213 (***General Foods***).) "It 'admits the truth of all material factual allegations in the complaint . . .; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' [Citation.]" (***Id.*** at pp. 213-214; see ***Cook v. De La Guerra*** (1864) 24 Cal. 237, 239 ["[I]t is not the office of a demurrer to state facts, but to raise an issue of law upon the facts stated in the pleading demurred to."].)

III. Analysis.

D. Defendant SGLC's demurrer to the first cause of action [rescission] of plaintiffs Trinh and MFAS's FAC is OVERRULED.

"Rescission is not a cause of action; it is a remedy." (***Nakash v. Superior Court*** (1987) 196 Cal.App.3d 59, 70. citing ***Civil Code***, §1689[5].) "The traditional equitable action to have the rescission of a contract adjudged was recognized in former ***Civil Code*** 3406." (***4 Witkin, California Procedure*** (6th ed. 2023) Pleading §549.) "The equitable action was abolished in 1961," and "the current remedy is a legal action for restitution based on a completed unilateral rescission." (*Ibid*.) "The following must be alleged in an action for restitution after completed unilateral rescission: (1) the contract or other contractual instrument; (2) the ground for rescission; (3) if the ground is breach of contract, plaintiff's own performance." (***4 Witkin, California Procedure*** (6th ed. 2023) Pleading §550; see also ***Runyan v. Pacific Air Industries, Inc.*** (1970) 2 Cal.3d 304 (***Runyan***).) "Relief given in rescission cases—restitution and in some cases consequential damages—puts the rescinding party in the status quo ante, returning him to his economic position before he entered the contract." (***Runyan***, *supra*, 2 Cal.3d at p. 316, fn. 15.)

In the first cause of action for rescission, FAC alleges in relevant part:

> 33. The operative Contracts at issue here are the 2018 Note and Deed of Trust. Plaintiffs allege that defendant CalPac obtained their consent in executing these Contracts by fraud, or, in the alternative, by mistake. During the loan origination process, Defendant CalPac led Plaintiffs to believe that they were taking out a $2 million loan at a 9 percent interest rate, and that there was a single, identifiable beneficiary that had authority to collect, make demands such as

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[5] ***Civil Code*, §1689**. **(a)** A contract may be rescinded if all the parties thereto consent. [¶] **(b)** A party to a contract may rescind the contract in the following cases:

(1) If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

(2) If the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds.

(3) If the consideration for the obligation of the rescinding party becomes entirely void from any cause.

(4) If the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect from any cause.

(5) If the contract is unlawful for causes which do not appear in its terms or conditions, and the parties are not equally at fault.

(6) If the public interest will be prejudiced by permitting the contract to stand.

(7) Under the circumstances provided for in Sections 39, 1533, 1566, 1785, 1789, 1930 and 2314 of this code, Section 2470 of the Corporations Code, Sections 331, 338, 359, 447, 1904 and 2030 of the Insurance Code or any other statute providing for rescission.

extending the maturity date, and commence foreclosure actions if appropriate. Instead, Plaintiffs allege they were just a part of many Defendant CalPac fraudulent loan origination schemes. When Plaintiffs discovered that there are supposedly 14 beneficiaries on the loan who likely believe they all possess a 100 percent interest, this further confirmed these allegations. As such, with no valid beneficiary under this Deed of Trust, Plaintiffs dispute its validity and exercise their right to rescind.

36. Plaintiffs discovered facts that entitled them to rescission when Defendant SGLC finally transmitted the original signed loan documents in January 2023. The documents did not identify a Lender on this Loan. Coupled with the discoveries by Plaintiff's counsel and news coverage surrounding fraudulent Loan Origination by Defendant CalPac, Plaintiffs therein discovered that these Contracts are subject to rescission.

37. Plaintiffs received $2 million under this contract. Since its origination in 2018, Plaintiffs have paid approximately $817,629.14 into this Loan. As such, Plaintiffs are willing and able to tender the remaining $1,058,117.10 received as value under this fraudulent contract.

Thus, the FAC alleges the Plaintiffs' consent was obtained by mistake or, alternatively, fraud. In demurring to the first cause of action, defendant SGLC sets forth three arguments: (1) Plaintiffs have not fully offered to restore the benefits received under the contract; (2) Plaintiffs have ratified SGLC's status as beneficiary; and (3) Plaintiff's rescission claim is barred by the statute of limitations. (Mot., pp. 3 -5.)

1. Offer to Restore Benefits

As defendant SGLC observes, ***Civil Code*** section 1691 sets forth requirements that a party must satisfy to obtain a rescission.

Subject to Section 1693, to effect a rescission a party to the contract must, promptly upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence or disability and is aware of his right to rescind:

(a) Give notice of rescission to the party as to whom he rescinds; and

(b) Restore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so.

When notice of rescission has not otherwise been given or an offer to restore the benefits received under the contract has not otherwise been made, the service of a pleading in an action or proceeding that seeks relief based on rescission shall be deemed to be such notice or offer or both.

(***Civ. Code***, §1691.)

Defendant SGLC contends the offer to restore benefits is insufficient because it states Plaintiffs' willingness to return $1,058,117.10, rather than the full $2,000,000.00 that Plaintiffs received under the loan. (FAC, ¶37.) Plaintiff's amount reduces original benefit by the approximate amount that Plaintiffs have paid towards the loan. (FAC, ¶37.) Defendant SGLC insists that a claimant must return "everything of value" or "offer to restore the same" to properly effect a rescission. (Mot., p. 3:6-8 [quoting and citing ***Civil Code*** section 1691.)

But defendant SGLC's reliance on the "everything of value" phrasing in ***Civil Code*** section 1691 is inapt, particularly where the very next sentence of the statute explains that "the service of a pleading in an action or proceeding that seeks relief based on rescission shall be deemed to be such notice or offer or both." (***Civil Code*** section 1691.) The court does not read ***Civil Code*** section 1691 to require a pleading for rescission to state a specific amount in order to sufficiently represent an offer to restore benefits received, but rather that the pleading of

the claim itself is deemed to be a sufficient offer. (*Ibid.*) Defendant SGLC does not direct the court to any authority suggesting otherwise.[6]

Further, it is well-settled that while the goal of rescission is to return the parties to where they were before entering into the contract, a "complete status quo" is not always possible or necessary. (***Tampico v. Wood*** (1963) 222 Cal.App.2d 211, 214-215 [affirming trial court's judgment made "to approach the status quo as nearly as possible"].) "Inability to restore the precise status quo is not invariably a bar to rescission. [Citations.]" (***Farina v. Bevilacqua*** (1961) 192 Cal.App.2d 681, 685.) "Where it is possible to bring about substantial justice by adjusting the equities between the parties, the fact that the status quo cannot be exactly reproduced will not preclude the plaintiffs from equitable relief." (***Lobdell v. Miller*** (1952) 114 Cal.App.2d 328, 344.) "It is often impossible to make literal restoration to the status quo in declaring rescission, and the party entitled to rescind is not compelled in his offer to specify in detail what he proposes to do in the way of restoration." (***Smith v. Rickards*** (1957) 149 Cal.App.2d 648, 651.)

Thus, the court declines to sustain the demurrer to the first cause of action because of an insufficient offer to return the benefits received.

2. Ratification

Defendant SGLC further argues that plaintiffs Trinh and MFAS have waived[7] the right to rescind by engaging in conduct manifesting an understanding that SGLC is the beneficiary of the Note and Deed of Trust. (Mot., pp. 3-4.) Defendant SGLC relies on three decisions in support of its ratification theory: ***Houk v. Williams Bros., Ltd.***, (1943) 58 Cal.App.2d 573, 579 ["A contract which is voidable for lack of consent may, however, be ratified for subsequent consent"]; ***Rakestraw v. Rodrigues*** (1972) 8 Cal.3d 67, 73 ["Ratification is the voluntary election by a person to adopt in some manner as his own act which was purportedly done in his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him"]; ***Common Wealth Ins. Systems, Inc. v. Kersten*** (1974) 40 Cal.App.3d 1014, 1026 ["Voluntary retention of benefits with knowledge of the unauthorized nature of the act constitutes ratification. … Acquiescence or silence may also constitute ratification"].)

In opposition, plaintiffs Trinh and MFAS persuasively argue that the authorities cited by defendant SGLC are inapposite here, at the demurrer stage, because those appellate decisions all followed factual findings that the rescinding party had discovered the material facts. When the relevant facts are disputed, waiver is a question for the trier of fact:

> "[The right to rescind], like any other, can be waived. … In general, to constitute a waiver, there must be an existing right, a knowledge of its existence, an actual intention to relinquish it, or conduct that is so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished. … Waiver is ordinarily a question for the trier of fact; however, where there are no disputed facts and only one reasonable inference may be drawn, the issue can be determined as a matter of law."

(***DuBeck v. California Physicians' Service*** (2015) 243 Cal.App.4th 1254, 1265 [internal quotation marks and citations omitted].)

Further, it is defendant SGLC's burden to establish waiver because it is an "affirmative defense." (***Williams v. Marshall*** (1951) 37 Cal.2d 445, 456; see also ***California Academy of Sciences v. County of Fresno*** (1987) 192 Cal.App.3d 1436, 1442 [stating same].) "It has long been held that if the *onus* of proof is thrown

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[6] This Court notes the same argument in the reply papers where in defendant argues that plaintiffs must either return the full $2 million to SGLC or offer to return this amount to SGLC. (Reply Papers, page 2, line 15-page 3, line 7.)

[7] "The loss of the right to rescind has often been expressed by the courts in terms of 'ratification' rather than 'waiver,' although both legal theories and their effects are the same." (***4 Miller & Starr,*** Cal. Real Estate (4th ed. 2018) §40.7, p.40-39 [citing, among others, ***Lobdell v. Miller*** (1952) 114 Cal.App.2d 328, 338-339 ["the making of two payments on a note after notice of rescission did not necessarily constitute a waiver. …**Ratification of a fraudulent transaction can only occur when the person ratifying has full knowledge of the facts**"].)

upon the defendant, the matter to be proved by him is new matter." (***Harris v. City of Santa Monica*** (2013) 56 Cal.4th 203, 239 [emphasis original, internal quotation marks and citations omitted].)

Here, the FAC alleges that Plaintiffs were denied refinancing due to failure to attach the addendums referenced in the Note and Deed of Trust (FAC, ¶22) and that Plaintiffs did not receive the executed loan documents for several years despite repeated requests (*Id.* at ¶21). On such allegations, among others set forth in the FAC, there are clearly disputed facts as to the issue of wavier.

Therefore, the court declines to sustain the demurrer on basis of defendant SGLC's claim of waiver/ratification because it is a question for the trier of fact.

3. Statute of Limitations

Defendant SGLC also argues the first cause of action is barred by the statute of limitations. "In assessing whether plaintiff's claims against defendant are time-barred, two basic questions drive our analysis: (a) What statutes of limitations govern the plaintiff's claims? (b) When did the plaintiff's causes of action accrue?" (***E-Fab, Inc. v. Accountants, Inc. Services*** (2007) 153 Cal.App.4th 1308, 1316.)

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

Defendant SGLC recognizes that plaintiff Trinh and MFAS's claim for rescission is grounded in fraud or mistake but contend the claim accrued when Trinh signed the loan documents in 2018. (Mot., pp. 4-5.) However, this analysis ignores the second sentence of ***Code of Civil Procedure*** section 337, subdivision (c), which explains, "where the ground for rescission is fraud or mistake …, the time shall not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake." Here, the FAC alleges that plaintiffs Trinh and MPAS only discovered there was no lender identified on the loan documents "when defendant SGLC finally transmitted the original signed loan documents in January 2023." (FAC, ¶36.)

As the court understands the FAC's allegations, the failure to identify the lender in the Note and the Deed of Trust was either a mistake or a fraudulent misrepresentation that plaintiffs Trinh and MPAS did not discover until January 2023. (FAC, ¶¶33, 36.) As such, the FAC sufficiently alleges a claim for rescission within the statutory period set forth in ***Code of Civil Procedure*** section 337, subdivision (c). Whether plaintiffs Trinh and MPAS are able to prove these allegations is not before the court on demurrer. (***General Foods***, *supra*, 35 Cal.3d 197, 213-214 –"[on demurrer] the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.")

Accordingly, defendant SGLC's demurrer to the first cause of action [rescission] in plaintiff Trinh and MFAS's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] for rescission is OVERRULED.

E. Defendant SGLC's demurrer to the third cause of action violation of [California Business & Professions Code §17200, et seq.] of plaintiffs Trinh and MFAS FAC is SUSTAINED.

"Business and Professions Code section 17200 et seq. prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL covers a wide range of conduct. It embraces anything that can properly be called a business practice and that at the same time is forbidden by law." (***Korea Supply Co. v. Lockheed Martin Corp.*** (2003) 29 Cal.4th 1134, 1143 (***Korea***).) "Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. In addition, under section 17200, a practice may be deemed unfair even if not specifically proscribed by some other law." (***Id.***) "By proscribing unlawful business practices, the UCL borrows violations of other laws and treats them as independently actionable. In addition, practices may be deemed unfair or deceptive even if not proscribed by some other law. Thus, there are three varieties of unfair competition: practices which are unlawful, or unfair, or fraudulent." (***Blakemore v. Superior Court*** (2005) 129 Cal.App.4th 36, 48.)

The "unfair" standard is intentionally broad, allowing courts maximum discretion to prohibit new schemes to defraud." (See ***Motors, Inc. v. Times Mirror Co.*** (1980) 102 Cal.App.3d 735, 740.) The test to determine if conduct is "unfair" under the UCL is as follows:

> When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.

(***Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co***. (1999) 20 Cal.4th 163, 187.)

However, the ***Cel-Tech*** court expressly limited this application to business competitor cases, leaving the possibility for a different test involving consumer cases. Plaintiffs Trinh and MFAS are not alleging "unfair" business practice as a business competitor of defendant SGLC. Instead, plaintiffs Trinh and MFAS are consumers. Whether the same test applies in consumer cases is not clear. Some appellate courts apply the ***Cel-Tech*** test, while others apply an older test. Under the older tests, "An 'unfair' business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. [T]he court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." (***Cel-Tech***, *supra*, 20 Cal.4th at p. 184.) The Sixth Appellate District appears to endorse the older test. (See ***Linear Technology Corp. v. Applied Materials, Inc.*** (2007) 152 Cal.App.4th 115, 134 – 135.)

Here, plaintiffs Trinh and MFAS are alleging that defendant SGLC's practices are unfair. (FAC, ¶50.) In demurring to the third cause of action, defendant SGLC contends the FAC does not allege facts sufficient to establish that the failure to include the addendums to the Note and Deed of Trust was either unlawful, unfair, or fraudulent, as opposed to inadvertent. (Mot., p. 8.) In support of its demurrer to the third cause of action, Defendant SGLC also contends the allegations of the FAC are contradicted by judicially noticeable documents.[8] Plaintiffs Trinh and MFAS do not address the demurrer to third cause of action in their opposition, effectively conceding defendant SGLC's arguments. But Plaintiffs do request leave to amend when addressing the demurrer as a whole. (Opp., p. 4.)

Accordingly, defendant SGLC's demurrer to the third cause of action [violation of California Business and Professions Code §17200 et seq.] in plaintiffs Trinh and MFAS's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days leave to amend.

F. Sham Pleading

Finally, Defendant SGLC argues that the FAC is a sham pleading that the court must disregard because it removes the cause of action for cancellation instrument contained in the original complaint without explanation. (Mot., pp. 12-13.)

"Under the sham pleading doctrine, plaintiffs are precluded from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers or motions for summary judgment. [Citations and footnote omitted.] A noted commentator has explained, 'Allegations in the original pleading that rendered it vulnerable to demurrer or other attack cannot simply be omitted without explanation in the amended pleading. The policy against sham pleadings requires the pleader to explain satisfactorily any such omission.'" (***Deveny v. Entropin****, Inc.* (2006) 139 Cal.App.4th 408, 425-426.)

In ***Owens v. Kings Supermarket*** (1988) 198 Cal.App.3d 379, 384, the court wrote:

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[8] Defendant SGLC asks the court to take judicial notice of an affidavit and a limited power of attorney document purportedly signed by plaintiff Trinh. The request in GRANTED, insofar as the court takes judicial notice of the existence of the documents, but not necessarily the truth of any matter asserted therein. (***Evid. Code***, §452(h); ***Bockrath v. Alrich Chemical Co.*** (1999) 21 Cal.4th 71, 83-84 [court may take judicial notice of affidavits]; ***People v. Woodell*** (1998) 17 Cal.4th 448, 455 [court "cannot take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact"].)

> It is axiomatic that the function of a demurrer is to test the legal sufficiency of the pleading by raising questions of law. [Citation.] It is also well established that, when reviewing a judgment entered following the sustaining of a demurrer without leave to amend, the appellate court must assume the truth of the factual allegations of the complaint. (*Ibid.*) However, an exception exists where a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citations.] In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint.

Here, plaintiffs Trinh and MPAS asserted a cause of action for cancellation of instrument in their original Complaint. Defendant SGLC demurred to the Complaint, and plaintiffs Trinh and MFAS filed the FAC before there was a hearing on the first demurrer.

In reviewing the Complaint and the FAC, it does not appear to the court that the FAC seeks to avoid any defects of the Complaint by omitting or altering facts previously alleged. (***Owens***, *supra*, 198 Cal.App.3d at p. 384.) Rather, the FAC states a different cause of action based upon facts consistent with those alleged in the Complaint.

Accordingly, the sham pleading doctrine is inapplicable here. (***Hahn v. Mirda*** (2007) 147 Cal.App.4th 740, 751 ["The purpose of the doctrine is to enable the courts to prevent an abuse of process… The doctrine is not intended to prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts"].)

III. Order.

Defendant SGLC's demurrer to the first cause of action [rescission] in plaintiffs Trinh and MFAS's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is OVERRULED.

Defendant SGLC demurrer to third of action [violation of California Business and Professions Code §17200 et seq.] in plaintiffs Trinh and MFAS's FAC on the ground that the pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc., §430.10, subd. (e)] is SUSTAINED with 10 days leave to amend.

_____ _____

DATED:

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

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Calendar Line 8

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
DEPARTMENT 20

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(For Clerk's Use Only)

CASE NO.: 23CV421700 **Hassan Abpikar v. Bhullar Harjot, et al.**
DATE: 09 November 2023 **TIME: 9:00 am** **LINE NUMBER: 08**

This matter will be heard by the Honorable Judge Socrates Peter Manoukian in Department 20 in the Old Courthouse, 2nd Floor, 161 North First Street, San Jose. Any party opposing the tentative ruling must call Department 20 at 408.808.6856 and the opposing party no later than 4:00 PM on 14 June 2023. Please specify the issue to be contested when calling the Court and Counsel.

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Order On Defendants Peyman Rad and Sasan Momeni's Special Motion To Strike (*Code of Civil Procedure*, § §425.16) Plaintiff's Complaint For (1) Defaming (Libeling); (2) Malicious Conduct; (3) Breach Of Fiduciary Duty; (4) Intentional Misrepresentation; (5) Constructive Fraud; (6) Conspiracy; and Motion For Attorney's Fees And Costs In Filing Motion.

I. Statement of Facts.

Defendants Bhullar Harjot ("Harjot") and Bhangu Poonam ("Poonam") live together at 4700 Silver Ranch Place in San Jose. (Complaint, ¶¶2 – 3 and 15.) Defendants Harjot and Poonam have placed many high-resolution cameras on the outside of their home, some of which are directed at plaintiff Hassan Abpikar's ("Abpikar") home to monitor plaintiff Abpikar's activities 24/7. (Complaint, ¶16.)

On or about 17 May 2023, plaintiff Abpikar parked his vehicle on the side of the street opposite of defendants Harjot and Poonam's residence. (Complaint, ¶25.) On 18 May 2023, as plaintiff Abpikar was walking from his home to enter his vehicle, agents of the Department of Motor Vehicles ("DMV") arrested plaintiff Abpikar. (Complaint, ¶26.)

Unknown to plaintiff Abpikar, defendants Harjot and Poonam obtained a video and photos of plaintiff Abpikar's arrest and transmitted the video and photos to defendant Tomonari Yamanaka ("Yamanaka"), plaintiff Abpikar's adjacent neighbor; to Aria Hematian ("Hematian"), plaintiff Abpikar's former roommate; and to defendant Christopher E. Lewis, an attorney who had been representing defendant Yamanaka in an active civil harassment case. (Complaint, ¶¶4, 7, 8, 18, 20, 24, 27, 28, and 29.)

Defendant Hematian transmitted the video and photos to defendant Sasan Momeni ("Momeni"), an acquaintance of plaintiff Abpikar. (Complaint, ¶¶5, 22, and 30.) Defendant Momeni transmitted the video and photos to defendant Peyman Rad ("Rad"), an attorney representing defendant Momeni in three pending civil cases, two of which are related to the instant action. (Complaint, ¶¶6, 23, and 31.)

All defendants misinformed the neighborhood, the Persian community, and social media that plaintiff Abpikar was wanted by the FBI and was arrested by FBI agents, knowing plaintiff Abpikar had been arrested by DMV agents. (Complaint, ¶32.) All defendants participated in libeling plaintiff Abpikar by writing the following statement under plaintiff Abpikar's arrest photo: "Homeland security and fbi your best friend Hasanak" and "Iranian terrorist hasan abpikar wanted by homeland security and fbi just got arrested by fbi agents," with knowledge of the falsity of the statements or with reckless disregard for the truth or falsity of the statements. (Complaint, ¶33.)

Defendant Rad twice made statements about plaintiff Abpikar's arrest which he knew to be false or with reckless disregard for the truth or falsity. (Complaint, ¶34.) Defendant Rad made these statements on 6 April 2023 and 25 July 2023 in open court while on the record. (Complaint, ¶¶35 – 36.)

On 30 August 2023[1], plaintiff Abpikar, a self-represented litigant[2], filed a complaint against defendants Harjot, Poonam, Tomonari, Momeni, Rad, and Lewis asserting causes of action for:

(10) Defaming and Libeling Abpikar's Public Reputation and Credibility

(11) Malicious Conduct

(12) Breach of Fiduciary Duty

(13) Intentional Misrepresentation Fraud

(14) Constructive Fraud

(15) Conspiracy

On 29 September 2023, defendants Harjot and Poonam each filed an answer to plaintiff Abpikar's complaint.

On 3 October 2023, defendants Rad and Momeni jointly filed the motion now before the court, a special (anti-SLAPP) motion to strike plaintiff Abpikar's complaint pursuant to Code of Civil Procedure section 425.16.

On 24 October 2023, the court issued an order, pursuant to an ex-parte application by defendants Rad and Momeni, setting the hearing on defendants Rad and Momeni's special motion to strike for 9 November 2023.

On 3 November 2023, the court clerk dismissed plaintiff Abpikar's complaint against defendant Lewis with prejudice based upon plaintiff Abpikar's filing of a request for dismissal.

II. Analysis. In

G. Defendants Rad's special motion to strike plaintiff Abpikar's complaint is OFF CALENDAR.

On 6 November 2023, the court clerk dismissed plaintiff Abpikar's complaint against defendant Rad with prejudice based upon plaintiff Abpikar's filing of a request for dismissal.

Consequently, the court no longer has jurisdiction to rule on defendant Rad's special motion to strike. (See *Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 881—"dismissal filed by plaintiff was effective upon filing, and the trial court lacked the jurisdiction to rule on defendants' anti-SLAPP motion." But see Weil & Brown, et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2020) ¶7:1124, p. 7(II)-80 citing *White v. Lieberman* (2002) 103 Cal.App.4th 210, 220—"the court may award fees to a prevailing defendant whose anti-SLAPP motion was not heard because the complaint was dismissed on other grounds before the hearing on the motion.")

H. Defendant Momeni's special motion to strike plaintiff Abpikar's complaint is GRANTED.

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

[2] Although a judge should ensure that self-represented litigants are not being misled or unfairly treated (see *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284), self-represented litigants are not entitled to special treatment with regard to the Rules of Court or Code of Civil Procedure. "[W]e cannot disregard the applicable principles of law and accord defendant any special treatment because he instead elected to proceed in propria persona. [Citations.]" (*Stein v. Hassen* (1973) 34 Cal. App. 3d 294, 303.) "A litigant has a right to act as his own attorney [citation] 'but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts.'" (*Lombardi v. Citizens Nat'l Trust & Sav. Bank* (1955) 137 Cal.App.2d 206, 208-209.)

1. The Filing of an Amended Complaint Does Not Moot the Motion.

As a preliminary matter, plaintiff Abpikar filed an objection to defendant's special motion to strike on 7 November 2023, two days prior to the scheduled hearing. Among other things, plaintiff Abpikar contends a first amended complaint ("FAC") which he submitted for filing on 6 November 2023 renders the instant special motion to strike moot.

Plaintiff Abpikar's assessment of the effect of his proposed FAC is incorrect. The filing of an amended pleading while a special motion to strike is pending does not render the special motion to strike moot and cannot be used to circumvent the special motion to strike. (See *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1280—"we consider whether a plaintiff or cross-complainant may avoid a pleadings challenge pursuant to Code of Civil Procedure section 425.16 by amending the challenged complaint or cross-complaint before the motion to strike is heard. We conclude he may not…")

Thus, plaintiff Abpikar's request for leave to file the FAC is DENIED.

2. The Reason for the Request of Plaintiff to Continue the Hearing Is Not Plausible.

Plaintiff Abpikar further or alternatively requests a continuance of the hearing. According to plaintiff Abpikar, he did not receive notice of this court's 24 October 2023 order setting the hearing on this matter for 9 November 2023 until 4 November 2023 and did not have sufficient time to prepare opposition.[3]

However, the court records reflect defendants Rad and Momeni served plaintiff Abpikar with an amended notice of this motion's 9 November 2023 hearing date by overnight delivery on 25 October 2023.

Well before that, the moving defendants served plaintiff Abpikar with the original notice of motion on 21 September 2023 and the moving defendants also served plaintiff Abpikar by mail with the ex-parte application which sought the earlier hearing date on 21 September 2023.

As such, the court does not find credible plaintiff Abpikar's assertion that he was not aware of the 9 November 2023 hearing date in sufficient time to prepare adequate opposition. It appears further from his declaration that plaintiff Abpikar has devoted significant time toward the preparation and filing of the aforementioned FAC.

However, as discussed above, an amended pleading does not render a special motion to strike moot. Plaintiff Abpikar's misguided efforts do not establish good cause for a continuance. The court finds no good cause and, consequently, plaintiff Abpikar's request for a continuance of the hearing is DENIED. The court will proceed with the merits of defendant Momeni's special motion to strike plaintiff Abpikar's complaint.

3. The two-step procedure for anti-SLAPP motions.

Code of Civil Procedure section 425.16 requires a court to engage in a two-step process when determining whether a defendant's anti-SLAPP motion should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken in furtherance of the defendant's right of petition or free speech under the United States or California Constitution in connection with a public issue. If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim. In making these determinations, the trial court considers the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

More recently, the California Supreme Court clarified:

> At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at

[3] See ¶1 to the Declaration of Abpikar in Support of Plaintiff's Objection, etc.

this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.

(*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396 (*Baral*).)

4. Step one – arising from protected activity.

A defendant meets the burden of showing that a plaintiff's action arises from a protected activity by showing that the acts underlying the plaintiff's cause of action fall within one of the four categories of conduct described in section 425.16, subdivision (e). [Citation.] Those four categories are: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

(*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1569 (*Siam*).)

"In applying section 425.16, subdivision (b)(1), the mode of proceeding and the applicable analysis at the often-elusive first step have been worked out in some detail in the case law. '[T]he court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' (§ 425.16, subd. (b)(2).) 'To determine whether a cause of action arises from protected activity, we disregard its label and instead examine its gravamen "by identifying '[t]he allegedly wrongful and injury-producing conduct … that provides the foundation for the claim.'" [Citation], i.e., "'the *acts on which liability is based*,'" …'[citations]; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 [124 Cal. Rptr. 2d 519, 52 P.3d 695] (*City of Cotati*) ['the statutory phrase "cause of action … arising from" means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech'"].)

"'A claim arises from protected activity when that activity underlies or forms the basis for the claim.' (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062 [217 Cal. Rptr. 3d 130, 393 P.3d 905] (*Park*).) 'Critically, "the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech." [Citations.] [T]he focus is on determining what "the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning."' (*Id.* at p. 1063.) 'If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute.' (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272 [99 Cal. Rptr. 3d 805]; see *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 767 [142 Cal. Rptr. 3d 74] (*Singletary*) ['the question is whether the protected activity is merely an incidental part of the cause of action'].)

(*Oakland Bulk & Oversized Terminal, LLC v. City of Oakland* (2020) 54 Cal.App.5th 738, 752-753 (*Oakland*); italics original.)

On its face, the complaint alleges defendant Rad represented Momeni in two related and pending civil matters. (Complaint, ¶23.) In those two civil matters, defendant Rad acting as an attorney on behalf of Momeni,

made purportedly false accusations against Abpikar. (Complaint, ¶¶34 – 36.) Plaintiff Abpikar is now suing defendants Rad and Momeni based on those false statements which, by plaintiff Abpikar's own allegations, were made "in the open Court on the Record." (Complaint, ¶¶34 – 36.) As oral statements made during a judicial proceeding for the basis for plaintiff Abpikar's complaint against defendant Momeni, the complaint on its face arises from protected activity.

5. Step two – probability of prevailing.

"[I]f a court ruling on an anti-SLAPP motion concludes the challenged cause of action arises from protected petitioning, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. To satisfy this prong, the plaintiff must state and substantiate a legally sufficient claim. Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741; internal citations and punctuation omitted.) "The court does not weigh credibility or comparative strength of the evidence. The court considers defendant's evidence only to determine if it defeats plaintiff's showing as a matter of law." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 (*Soukup*).)

The court's task is made simple here by virtue of plaintiff Abpikar's failure to submit any substantive opposition or admissible evidence to support any of the claims asserted in his complaint. As such, defendant Momeni's special motion to strike plaintiff Abpikar's complaint is GRANTED.

I. Request for attorney's fees.

"[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (Code Civ. Proc., §425.16, subd. (c)(1).) In conjunction with their special motion to strike, defendants Rad and Momeni request attorney's fees and costs in the amount of $10,185.00. (See ¶¶4 – 5 to the Declaration of Barzin Barry Sabahat in Support of Special Motion to Strike, etc.) Defendants Rad and Momeni's counsel declares he spent 22.5 hours in preparing the special motion to strike at the billing rate of $450.00 per hour and incurred a filing fee of $60. (*Id.*)

Since defendants Rad[4] and Momeni prevailed on the special motion to strike, defendants Rad and Momeni's request for attorney's fees and costs is GRANTED in the amount of $10,185.00, payable within 20 days of the filing and service of this order.

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[4] See *White v. Lieberman* (2002) 103 Cal.App.4th 210, 220—"the court may award fees to a prevailing defendant whose anti-SLAPP motion was not heard because the complaint was dismissed on other grounds before the hearing on the motion."

III. Order.

The court lacks jurisdiction to hear defendant Rad's special motion to strike and so it is ordered OFF CALENDAR.

Defendant Momeni's special motion to strike plaintiff Abpikar's complaint is GRANTED.

Defendants Rad and Momeni's request for attorney's fees and costs is GRANTED in the amount of $10,185.00, payable within 20 days of the filing and service of this order.

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

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